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New Jersey Court of Errors and Appeals

EDWARD V. GOODMAN, EXR., ETC. OF JAMES E. GOODMAN,
Plaintiff and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant and Plaintiff in Error.

No. 1.
In Tort.
On Writ of Error.

EDWARD V. GOODMAN,
Plaintiff and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant and Plaintiff in Error.

No. 2.
In Tort.
On Writ of Error.

EDMUND MAYS,
Plaintiff and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant and Plaintiff in Error.

No. 3.
In Tort.
On Writ of Error.

Reply Brief for Defendant and Plaintiff in Error.

McCARTER & ENGLISH,
Attorneys for and of Counsel with Plaintiff in Error.

Inasmuch as we were not served with a copy of the brief submitted by the counsel of the defendants in error, until after the argument of this cause, we take the liberty of filing a short reply thereto, three copies of which have been served upon the attorney of the defendants in error. We are spurred to this action because of serious mistatements of fact contained in the brief of opposing counsel, upon an important phase of the case.

In our main brief (pp. 71-77) we took exception to the action of the trial court, at an earlier trial of this cause, in permitting the plaintiff, James E. Goodman, to testify from a list, which was admittedly the composite production of four people, as to the articles destroyed, and as to their value.

Counsel for the defendant in error argues (pp. 44-45 of his brief), that the use of such a list was proper, because all of the parties to it testified to the part each took in preparing it and attested to its truth. Both law and reason argue against this position, however, as do likewise the facts in the case. If such a course is proper, a dozen people may get together after any event and agree upon a statement of the true facts of the case, and with the statement before them at the trial, testify unanimously to the story therein contained. Every case would then be tried in the shack upon the farm, instead of before a court and jury. If the statement were false, which of the authors would be responsible for the perjury? Each could safely deny the authorship of the false part of the statement, and what jury would convict?

The facility with which such irresponsible testimony can be injected into a case, under the rule contended for, is well illustrated by the case at bar. It will be remembered that this list was divided into two parts—one relating to the "outside things" and the other to the "inside things." In the early part of his testimony, James E. Goodman undertook to testify

from this list in relation to the "inside things" and their value (pp. 360 to 365). Referring to page 362 he testified as follows:

"Q What were the two black cashmere shawls worth? A $25.

Q Camel hair shawl? A $250.

Q What was the small silk and wool shawl? A $250.

Q Where did it come from? A That was left to my aunt—to my mother. My mother's sister willed it to her when she died and then from my mother to my wife when she died.

Q Have you any knowledge as to the reason for its being worth $250? A Nothing more than I was told that that was the value of it.

Q What kind of a shawl was it? Does your wife know about this? A Yes, sir.

Q Well, we will let her describe that?"

But when Mrs. Goodwin took the stand she refused to place any valuation upon any of these articles, and stated that she did not know their value (p. 302). Now, which of the four compositors is the author of the fancy valuation of $250 placed upon the silk shawl, and the similar valuation upon the camel's hair shawl? None of them have taken the responsibility for it, yet it was before the jury, to the extreme prejudice of the defendant herein. Nor is this the only testimony injected into the case by the use of the list. With the list before him and the valuations attached thereto James E. Goodman gave the following valuations:

1st Room, 3rd Story.

(p. 360-1)

Feather bed $25.00

2nd Room, 3rd Story.

(p. 362)

Feather bed and mattress $30.00
Lace spread and pillow shams..... 25.00

3rd Room, 3rd Story.

Bureau $30.00
2 rush bottomed chairs 16.00

(p. 363)

Large box books 25.00

Store Room, 3rd Story.

(p. 364)

Books $200.00
Box patches 5.00
1 bbl. carpet rags 10.00
2 flags 25.00

Mrs. Goodman did not know the value of any of these articles (pp. 295-309), so the only testimony on that point was the voice of the list. Thus the attempt of counsel to avoid the force of our objection upon the theory of harmless error should fail, as it can be seen from this short analysis of the evidence that it is not true as stated by counsel at p. 45 of his brief that ALL the articles testified to by James E. Goodman from the list were also testified to by his wife and son. In fact the testimony of the wife and son does not begin to cover the valuations of ALL the articles testified to by James E. Goodman from the list; and the testimony of Lucretia Wilcox, the daughter, does not cover any of them. Her testimony only undertakes to put the stamp of her approval upon the list, of which she was one of the compositors. (Printed book, pp. 401-405).

The situation is the same in relation to the valuations placed upon the outside things. James E. Goodman, speaking from the list gave these valuations:

Horse brushes	$1.00
Curry combs	.75
Clipping machine	20.00
Kit carpenter's tools	15.00
Leather belting	10.00
Wood	32.00
2 seated carriage	50.00
Runabout	50.00
1 spring wagon	25.00
1 brass nettle	5.00
Ice tongs	.75
3 canvas sheets	6.50
1 open bridle	2.00
1 rocking chair	5.00
Paint brushes	1.50
12 panel fence	12.00
Grindstone	5.00
Wringers	5.00
Boy's kit tools	2.50
Whiffletrees	5.00
Wood racks	10.00
1 binder	110.00
Lubricator	18.00
Steam gauge	2.50

All of these articles are mentioned by Edward V. Goodman in his testimony (pp. 198-236), but he does not undertake to place a valuation upon any of them. The above valuations read by James E. Goodman from the list was the only evidence that went to the jury in reference thereto.

In addition to this there was a Portland cutter at $75, a business sleigh at $25, and numerous small outdoor articles testified to by James E. Goodman, from the list, that were not mentioned at all by Edward V. Goodman. Thus by the improper use of the

list the plaintiff was enabled to place before the jury, the result of a conference of his witnesses upon the value of the articles destroyed, which valuations amount to hundreds of dollars, and must have influenced the verdict.

Counsel further undertakes to urge upon the court that it is immaterial whether or not the evidence taken at the former trial was legal or not, as the statute serves to perpetuate the evidence irrespective of its character (p. 59, brief for defendant in error). Can it be possible that the statute was designed to perpetuate an error? Even if the legislature has power to declare hearsay evidence admissable, such a statute being in derogation of the common law, must be clear and explicit. The statute under consideration provides that "the testimony of such deceased party on the former trial of said action may also be proved and admitted on the new trial thereof." The statute does not refer to hearsay testimony admitted over objection at a former trial, and it is to be presumed that the legislature intended only legal and proper testimony to be perpetuated.

McCARTER & ENGLISH,

Attorneys of Defendant and Plaintiff in Error.

June Term, 1911.

New Jersey Court of Errors and Appeals

EDWARD V. GOODMAN, Executor, etc. of JAMES E. GOODMAN, *Pltff. & Deft. in Error,* *vs.* LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, *Deft. & Pltff. in Error.*	*No. 1.* *In Tort.* *On Writ of Error.*
EDWARD V. GOODMAN, *Pltff. & Deft. in Error,* *vs.* LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, *Deft. & Pltff. in Error.*	*No. 2.* *In Tort.* *On Writ of Error.*
EDMUND MAYS, *Pltff. & Deft. in Error,* *vs.* LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, *Deft. & Pltff. in Error.*	*No. 3.* *In Tort.* *On Writ of Error.*

Brief for Defendant and Plaintiff in Error.

These three cases come up on writ of error to the Supreme Court. Rules to show cause with exceptions reserved were argued before that court at the November Term, 1910, and discharged without opinion.

The cases were tried before Judge Speer and a jury in the Union Circuit, and were consolidated for the purposes of trial.

The ground of liability on which the defendant is sought to be held in all three of the cases, is that fire was communicated from its locomotive engine, resulting in destroying the property of the respective plaintiffs.

Suit No. 1 was originally brought in the lifetime of James E. Goodman, he having been the owner of the property destroyed. Mr. Goodman died during the pendency of the suit, and the suit was revived in the name of his executor, Edward V. Goodman. The declaration in this case consisted of five counts (pages 1-12). The first and fourth counts were designed to recover for the destruction by fire of a quantity of manure. The third and fifth counts were designed to recover for the destruction of a standing crop of clover.

The defendant had no knowledge as to the destruction of either the manure or the clover. It was accordingly agreed between counsel that the value of the manure was $29, and the value of the clover $15 (p. 38, lines 25-40; p. 715, line 30), and the defendant conceded that the plaintiff in this suit, if entitled to a verdict at all, was entitled to a verdict for the amount of $44.

The second count of the declaration (pages 3-5) seeks to recover damages for the destruction of the plaintiff's dwelling house, barns, stables and other outbuildings on his farm, as well as for certain personal property used in and around his farm, and also for household furniture, utensils and implements, and also for certain fruit trees, etc. All the evidence in the case, so far as the question of damages was concerned, was directed toward establishing the damages recoverable, if at all, under this second count.

The declaration in the suit of Edward V. Goodman (No. 2) consisted of but one count (pages 18-20) and sought to recover damages for certain personal property only, consisting of clothing, furniture, jewelry, books, pictures, etc.

Edward V. Goodman was a son of James E. Goodman, and lived with him. The question of liability therefore is identical in the two Goodman suits.

The declaration in the Mays case (Suit No. 3) consisted of one count (pages 25-28) and sought to recover damages for the destruction of a horse barn, a cow barn, a red barn, a workshop, a tool house, an ice house, a corn crib, a chicken house, and a barrack, beside other personal property, such as grain, hay, straw and farm implements.

There is no pretence that the fire which destroyed Mays' property was communicated directly from the defendant's engine. The claim is that the defendant caused the fire which destroyed the Goodman property, and that the wind blew the sparks from the Goodman property to the Mays' property, causing it to be set on fire and to be destroyed. The barn of Mr. Goodman which became ignited was distant from Mr. Mays' barn 1,180 feet (p. 536, lines 30-40) by actual survey. It is obvious, therefore, that an additional question arises as to the liability of the defendant in the Mays case, for not only did this plaintiff have to establish the liability for the Goodman fire, but that that fire was communicated from the Goodman property to his property.

The case of Edward V. Goodman, executor (No. 1), has been tried before, and has been before the Supreme Court on rule to show cause, and also before this court on writ of error. At the first trial of that case the jury rendered a verdict which was subsequently set aside by the Supreme Court as contrary not only to the weight of, but to the totality of the evidence. (See *Goodman* vs. *L. V. R. R. Co.*, 46 Vr., 277.)

Following that decision a second trial was had, and by stipulation of the parties the case was submitted upon the same testimony that was taken at the first trial, with the objections made thereto by counsel, and the exceptions taken with the same effect as if such testimony, objections and exceptions had been produced anew by both parties to the suit. The justice who heard that case, conceiving himself bound by the opinion of the Supreme Court, directed a verdict for the defendant on the second count of the declaration. The sum of $44 was conceded then, as now, to be due on the first, third, fourth and fifth counts, and accordingly a verdict for $44 was entered. The plaintiff thereupon took a writ of error to this court with the result that this court, in an opinion by Chancellor Pitney, held that the case should have been submitted to the jury.

See *Goodman, Executor,* vs. *L. V. R. R. Co. of N. J.,* 49 Vr., 317.

A third trial was ordered as the result of that decision, and the case, now consolidated with the cases of Edward V. Goodman and Mays comes before this court for review, on the exceptions taken at the trial.

The first question to determine is that of the liability of the defendant in the suit of Edward V. Goodman, executor of James E. Goodman (No. 1), and of Edward V. Goodman (No. 2).

Liability for the other fires mentioned in the declaration, and which occurred on other dates, having been conceded, the sole question now is as to the liability of the defendant for the fire mentioned in the second count of the declaration in the Goodman executor suit, and in the declaration of Edward V. Goodman, which fire occurred on July 19th, 1905.

I.

There is no sufficient evidence from which liability can be fastened on the defendant for the fire of July 19th, 1905, to the Goodman property; and the Trial Judge erred in refusing to grant the defendant's Motion for a Non-Suit and Direction of Verdict.

This is a statutory action. The defendant is a railroad company, duly chartered and authorized to run locomotive engines operated by steam (p. 497, line 20). Whatever right of recovery, therefore, the plaintiff has, must arise by virtue of the statute, and particularly of sections 56 and 57 of the General Railroad Law (P. L. 1903, p. 673).

Section 56 provides as follows:

> "Every company or person operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them in passing along or being upon such railroad to the property, of whatever description, of any owner or occupant of any land adjacent or near to said railroad, and shall provide such engine with a screen or cover in the smokestack, so as to arrest and prevent, as much as practicable, the escape of fire."

And Section 57 provides:

> "When injury is done to property by fire communicated from an engine of any company or person, in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act, proof that the injury was communicated from the engine shall be *prima facie* evidence of such violation, subject

nevertheless to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire, as by said section required."

To establish a cause of action for an alleged damage by fire, it is a prerequisite to the plaintiff's case that he prove that the fire was communicated from an engine. If he succeeds in establishing that fact, then the defendant may successfully rebut his *prima facie* case by proof that it had taken and used all practicable means to prevent such communication of fire; the "practicable means," as defined in the statute, being to provide its engine with a screen or cover in the smokestack.

The defendant's contention, therefore, is that the jury should have been given binding instruction by the trial judge, because:

(1). That there is not sufficient evidence to justify the jury in finding that the fire which destroyed the plaintiff's property was "communicated from an engine" of the defendant; and

(2). That the defendant took and used all practicable means to prevent the communication of fire from its engine, and to that end provided its engine with a screen or cover in the smokestack, so as to arrest and prevent, as much as practicable, the escape of fire, and that these screens or covers were in good and perfect condition at the time of the fire.

We discuss these two points in their order.

(1). THERE IS NO SUFFICIENT EVIDENCE TO JUSTIFY THE JURY IN FINDING THAT THE FIRE WHICH DESTROYED THE PLAINTIFF'S PROPERTY WAS "COMMUNICATED FROM AN ENGINE" OF THE DEFENDANT.

There was but one engine involved in this case, and that was No. 2454, which drew an eastbound passen-

ger train designated as No. 8, and familiarly known as the "Mail train."

It was conceded by all the plaintiff's witnesses that the fire occurred shortly before four o'clock in the afternoon, and that it was discovered shortly after this mail train had passed.

The interrogatories which the plaintiff put in evidence (pages 325-328), show that five trains passed the Goodman property on the afternoon of the day in question, two going west and three going east. Of these trains, it was conceded that engines Nos. 2676 and 1119, going west, passed after the fire was in progress, and so had nothing to do with it (page 525, lines 24-33). This left the three engines going east as the only possible ones which could have been concerned with the fire. These engines were Nos. 2454, 1458 and 1355 (page 328, line 30).

Of these, No. 1355 must be counted out. At the time it passed the Goodman property, the barn was "completely blazing," as the testimony of the engineman, Frank Carlin shows (p. 525, line 11). The evidence of the plaintiff's witnesses John Polimbo (p. 75, line 1) and Charles Koerber (p. 100, line 15) was that their attention was drawn to the fire by the whistle of an engine of a passing freight train, and this engine which thus whistled was engine 1355.

The only remaining engines, therefore, to be considered are 2454 and 1458.

The defendant's counsel moved the court to eliminate from the case, or to require the plaintiff to eliminate from the case, engine 1458, inasmuch as by the schedule it passed about thirty minutes before the fire occurred (p. 528, lines 20-40) and under the evidence could have had no connection with the fire. The result of that motion was that the trial judge said (p. 529, line 30):

> "I think I shall charge the jury in this case, when it comes time to charge them, that they

> may disregard that matter. I don't think that, in the state of the proof that there had been a drought for a long while before that, and everything was in a state of absolute dryness, and that the wind was blowing in the doorway, the doors were open, and this highly inflammable hay and everything in the immediate vicinity, this notion of a smoldering fire for twenty minutes or half an hour before anybody saw any evidence of it, I do not think is sustained by any kind of proof, much less a burden of any evidence, and therefore I shall charge the jury that the railroad company will not be obliged to meet the case with respect to that engine" (p. 529, lines 31 to 530, line 12).

The engine to which the court thus referred was No. 1458 (page 530, line 21). In his charge to the jury the court mentioned specifically engine No. 2454, and no other (page 699, line 22). Because of this ruling the defendants directed no evidence to engine No. 1458, and the case resolves itself into a determination of the question of whether the fire was communicated by sparks from engine No. 2454.

There is no contention that the fire was communicated in any other way than by a spark thrown from the smokestack. In the second count of the declaration in the Goodman, executor case (p. 4) the duty of the defendant is alleged to be to take and use all practicable means to prevent the communication of fire, by providing its engine with a screen or cover in the smokestack (p. 4, line 18), and the breach of duty, as alleged in that count, is that the defendant did not provide its engine with a screen or cover in the smokestack, so as to arrest and prevent, as much as practicable, the escape of fire therefrom "whereby sparks and ignitious matter were emitted or thrown from the smokestack of the steam locomotives and engines of the said defendant, and fell over and upon the property of the plaintiff, and thereby communicated fire to said barn," etc.

The plaintiff's case was presented on this theory alone, and no evidence was offered by the plaintiff to show that the fire was communicated in any other way than by a spark from the smokestack of engine No. 2454. James E. Goodman, who testified at a former trial, and whose evidence was read at this trial, positively disclaimed any claim that some evidence of fire which he had seen between the railroad and the lane north of his barn, had set fire to the barns (p. 391, ll. 1-40).

The case therefore is narrowed down to this single question: Was the fire which destroyed the plaintiff's property communicated by a spark thrown from the smokestack of engine No. 2454 on the afternoon of July 19th, 1905?

The map offered in evidence by the plaintiff—a reduced replica of which appears in the back of the printed book—shows that the Goodman barns were located on the southerly or easterly side of the track, and parallel with the track, and at a distance of 115 feet in a straight line from the nearest rail of the eastbound track. The testimony of all the witnesses was that there was a strong wind blowing that day. Their testimony varies as to what direction the wind came from. Edmund Mays says that the wind was southeast (p. 87, l. 24). If the wind was southeast, and blowing with the strength which the plaintiff's witnesses say, then the fire could not have been communicated to the barn from the passing engine, as any spark would have been blown in a direction away from the barn. The other witnesses who testified as to the direction of the wind, say that it was due west. Andrew Polimbo (p. 55, l. 38) indicated a direction almost due west. John Polimbo said that the wind was blowing hard "right across the tracks" (p. 74, l. 9), and Charles Koerber testified to the same effect (p. 102, l. 13), and when asked to take the pointer and indicate on the map the direction the wind was

blowing, indicated that it was blowing due west (p. 102, l. 17). So did James E. Goodman (p. 388, ll. 18-24).

If, then, the wind was due west, as the great weight of the evidence indicates it was, a spark from the engine, to reach the barn, must have had to travel the distance from that point on the track which was due west of the barn, to the barn, which the plaintiffs' surveyor, Mr. Ham, after a careful triangulation and computation, found to be 168.4 feet (p. 71, ll. 35-40).

What evidence is there from which the jury could conclude that the fire was communicated from an engine of the defendant company?

The only engine involved, as we have seen, was No. 2454, which drew the mail train. This train as the schedule shows, left South Plainfield, on the west of the Goodman property, at 3.37 P. M., and arrived at Cranford on the east of the Goodman property, at 3.50 P. M. The evidence indicates that it passed the Goodman property at about a quarter to four o'clock.

There was no direct evidence whatever that a spark from this engine caused the fire. No one was around the barn when the fire began, no one saw a spark from the engine fall upon and ignite the hay in the barn, and the origin of the fire remains to this day a complete mystery.

The only evidence which the plaintiff could produce that the fire was communicated from the engine was purely circumstantial.

The person who seems first to have discovered the fire was a boy named Andrew Polimbo, who at the time of the fire, was about twelve years old (p. 61, l. 15). He had been working across the track and to the north and west of the barns that afternoon and had crossed the track to where his brother John, and Charles Koerber (referred to in the evidence as Fred) were working in the potato field. Andrew

says they were 590 feet from the barn (p. 51, l. 37) and about 75 feet away from the railroad track (p. 52, l. 13). After talking to them a short time Andrew started for the house to get some water (p. 52, ll. 17-20). He says that he started for the house just as the mail train passed (p. 52, l. 23; p. 59, l. 15). He made no haste, and did not run. He says "I didn't run, I walked along the road. It was a pretty hot day" (p. 53, l. 17).

From this point on Andrew's testimony is confused and not reliable.

He first says that he walked 150 feet and then looked up "and I saw the fire by the barns, and I ran up to it, and it was burning the hay, and I ran in the house and told Mr. Goodman" (p. 53, l. 25). On cross examination (p. 59, l. 33), he said that he was 150 feet from the stable before he saw the fire and that he first observed it as he was passing an apple tree (p. 59, l. 37). His first story of the fire was the impossible one that, when he was by the apple tree 150 feet away he saw the fire *in* the barn (p. 63, ll. 30-36). He afterwards retreated from that position, and said that when he was by the apple tree he couldn't see what was inside of the barn burning and that he didn't exactly know whether there was any fire in the barn (p. 66, ll. 12-20). Having taken this position he said that he saw the fire outside "about two feet away" from the barn door (p. 68, l. 14), and that what he saw burning outside was "dry grass and hay all scattered around" (p. 65, l. 36). He immediately contradicted this statement, however, by saying that there was no hay either inside or outside the barn at that point which could have caught fire. His testimony on re-direct examination was (p. 65, l. 38):

> "Q When you left the barn after putting in the hay did you leave everything perfectly clean?
>
> A Yes, sir, we raked it up pretty clean.

Q Was there any hay left around on the floor at all?

A We raked it up pretty clean, there might have been some.

Q Was there anything left lying on the outside of the barn?

A No, sir."

This left him as his only refuge to say "I seen this grass burning outside the barn, that is all I seen" (p. 66, l. 10).

The presence of any grass at that point which could have caught fire and burned is contradicted by the testimony of James E. Goodman, the original plaintiff. His testimony is that the ground between the railroad track and his barn was of three different kinds. There was "just a sod next to the railroad." Another portion of the ground was "plowed ground" (p. 389, l. 10), and next to the barns and between the barn and the sod and plowed ground was a roadway, "a beaten track" (p. 389, l. 20). Mr. Goodman noticed evidences of fire between the railroad track and this roadway, but too far away to have ignited the barn. There was no evidence, he said, of fire between the roadway and the barn (p. 389, l. 21):

"Q Then this fire had extended from the railway toward your buildings as far as the roadway?

A Yes, sir.

Q And was there evidence of fire extending toward your buildings from the roadway?

A From the road?

Q Yes.

A No, sir."

Again he testified (p. 390, l. 22):

"Q On whose land was this fire which you saw?

A The trace of it, sir?

Q Yes.

A My land.

Q And it was between your buildings and the railroad, was it?

A Yes, sir.

Q You saw it what day, the day after the fire?

A Yes; I think it was the day after the fire I saw that had been burned there.

Q Was that the fire that burned the grape-vines?

A Well, I presume it was.

Q Was that the fire which burned your buildings?

A That fire?

Q Yes.

A I don't think it was, sir.

Q Why do you not think that was the fire which burned your buildings?

A Why, there was no fire out there when I started out to try to release my horse out of the barn; the fire was all in the barn, in the driveway of the barn."

Not only is Andrew's present testimony that the fire first started in the grass outside of and about two feet away from the barn in contradiction of his other testimony, and in contradiction of the testimony of the original plaintiff, but it is also in contradiction of his testimony given in the first trial of the case. At the first trial Andrew had been asked to point out where the fire originated and he had indicated the horse stable which was on the opposite side of the barn from the railroad (p. 60, ll. 10-40). At that trial he had taken the pointer and indicated the horse stable as the place where the fire first occurred (p. 60, l. 40). At this trial he sought to escape from that position by saying that he did not understand the map, but that he did understand the map this time. His testimony was (p. 69, l. 21):

"Q You understand the map pretty well today?

A Yes, sir.

Q When did you see the map between that time and now?

A I seen it last Saturday.

Q Last Saturday?

A Yes, sir.

Q In Judge Whittemore's office?

A Yes, sir.

Q And you went over the map in Judge Whittemore's office then, did you?

A Yes, sir.

Q And he intimated to you that you pointed out at the last trial, namely, that the horse stable was not the place you saw it first?

A Yes, sir.

Q That is right?

A Yes, sir.

Q And told you you were mistaken about it?

A Yes, sir.

Q And then you made up your mind you were mistaken?

A Yes, sir."

Andrew's evidence is not worthy of credence. The only corroboration of it is that the barn was in fact on fire. His testimony of when the fire first began, and where it first began is utterly confused, and as to the origin of the fire he leaves us utterly in the dark. The only connection between the railroad engine and the fire so far as his testimony goes is found in the simple fact that just as he started to leave the potato field some 600 feet away, the mail train went by. After walking slowly the intervening distance he discovered that the barn was on fire, and the simple fact that the barn was on fire is all that his testimony amounts to.

John Polimbo and Charles Koerber, who were working together in the potato field, gave no evidence whatever which would enable a jury or anyone else to say that the fire in the barn was communicated from the engine of the mail train. John Polimbo says they were working in the field 600 or 700 feet from the barn (p. 73, l. 13), that the mail train passed about a quarter to four (p. 73, l. 31), and that Andrew started for the house about the same time (p. 74, l. 35). He knew nothing of the fire until a freight train went past a little later and "she blew, and we looked towards the barn and we seen the flames and the smoke" (p. 74, l. 40). This freight train was going toward New York. "It might be four or five minutes, I cannot say how long it was after" (p. 75, l. 8), but he was not paying any particular attention to the time (p. 83, l. 13). When the freight train went by they saw the fire "in full swing" (p. 82, l. 38).

The engineman of this train, Frank Carlin, says that when he noticed the barn burning "it was completely ablaze" (p. 25, l. 10).

Charles Koerber, who was John's companion in the field, had no knowledge of the fire either until the freight engine blew its whistle (p. 100, l. 15). He left John to take care of the horses (p. 100, l. 27), and ran to the barn. He first came to the side of the barn where the fire had started towards the track (p. 100, l. 36) and when he got there the whole top of the barn was gone. "The whole top was ablaze." He did not see the fire start (p. 106, ll. 1-15).

Any causal connection between the engine and the fire, so far as these two witnesses were concerned, is entirely wanting. All their testimony amounts to is that some time after the mail train passed and Andrew had left, their attention was directed by the whistle of the freight train, and they looked up and saw that the whole barn was a mass of flames.

The other witnesses to the fire were even farther removed in their testimony from the engine as the cause of the fire than the Polimbo boys and Koerber.

Edmund Mays smelled hay burning, looked over and saw the blaze and ran to the fire. He did not in any way connect the fire with the train. He said that about twenty minutes before he discovered the fire he heard the noise of a passing train (p. 88, ll. 30-40). What train or in what direction or on whose railroad tracks did not appear.

Dr. Sinclair, who was at the Goodman house at the time attending Edward V. Goodman, who was then sick, remembered the fact of a fire, but in his testimony made no mention of a train whatever (p. 118 to p. 120).

John H. Stewart, the doctor's chauffeur, was sitting outside in the automobile waiting for the doctor. He said a train passed while he was there, going towards New York, and that he did not notice a fire for "perhaps fifteen or twenty minutes after that" (p. 123, l. 3). This train, he says, was a freight train (p. 123, l. 26), and that he did not notice any other train passing (p. 123, l. 30). Inasmuch as the engine of the mail train is alleged to have caused the fire, if any engine did, his evidence is utterly worthless to the plaintiff.

James E. Goodman, the original plaintiff, was in the house with his son and Dr. Sinclair when the mail train passed (p. 354, ll. 30-40). Shortly after the train went by Andrew Polimbo rushed into the house and told him the barn was on fire (p. 353, l. 38 to p. 354, l. 10). He rushed out and found the middle barn with the doors all in flames (p. 354, ll. 10 to 30).

Edward V. Goodman corroborated this evidence to the extent that he heard the mail train go through (p. 175, l. 19), and a few minutes after the mail train passed Andrew came running into the house and announced the fire (p. 175, l. 38).

Neither of them had any knowledge at all as to the cause of the fire. The passing of the train followed by the alarm of fire, was, so far as their testimony goes a mere coincidence.

These witnesses above named were the only ones who testified as having any knowledge either direct or indirect of the fire; and they had no real knowledge at all as to its origin.

To further aid his *prima facie* case the plaintiff called as witnesses two brothers, Charles and George Cordes. These men lived about a mile east of Goodman's. On the afternoon of the fire they were standing in their barn, which was located about 300 feet from the railroad track, and claim to have seen the mail train pass by, and that immediately after the train passed a fire was started in the grass in their field (p. 114, l. 16; p. 125, l. 18). The wind was blowing strong from the track toward their barn. Charles Cordes says the fire began about 125 feet from the railroad fence (p. 114, l. 40), and that the fire was about 5 feet nearer the railroad than a cherry tree standing there (p. 115, l. 25). George Cordes gives practically the same distances (p. 126, ll. 1-17).

The measurements given by Mr. Ham, the surveyor, show that the distance from the nearest rail of the railroad track to the fence was 43 feet and from the fence to the cherry tree was 140 feet. Taking the testimony of Charles Cordes that the fire was first seen 5 feet nearer to the railroad than the cherry tree would indicate that the fire had started about 178 feet from the railroad track.

There is no proof that sparks from the engine caused this fire in the field of the Cordes brothers. Whatever connection there was between the engine and the fire is purely a matter of conjecture. If it is to be regarded as circumstantial evidence of the fact that the engine was at that time throwing sparks of sufficient size to cause a fire at a distance of 178 feet from the track,

then the circumstances from which such a conclusion can be reached are very weak indeed.

Both the brothers agreed that the train was going at high speed. Amos D. Clark, the engineman of the mail train, says it is a level stretch of track for a mile both east and west of Goodman's (p. 531, l. 20), and that he was running at about 40 miles an hour (p. 531, l. 20). Both of the Cordes brothers are insistent that the train consisted of four cars only (p. 117, l. 25; p. 127, l. 34), and that before the last car had passed the field was afire (p. 117, l. 23; p. 127, l. 36).

The testimony of the Cordes brothers is not such testimony as should be allowed to weigh in favor of the plaintiff.

In the first place they evidently were testifying about some other train than the train in question. To be sure they say it was the mail train; but they both say they had a clear view of it only 300 feet away and they both insist it consisted of only four cars. As a matter of fact the train drawn by engine 2454 consisted of six cars, according to the testimony of the locomotive engineer, who certainly knew (p. 531, lines 26-30). The Cordes brothers must, therefore, have seen and been testifying about a different engine than the one in question here.

In the second place assuming that the train which they saw was the mail train, then to give credence to this testimony of the Cordes brothers requires us virtually to believe a physical impossibility. This the court will not do; even in the face of sworn testimony.

> See *Hummer* vs. *L. V. R. R. Co.*, 46 Vr., 703, p. 714.

The evidence shows that the sparks which come from the smoke stack of a locomotive engine are drawn through the flues from the fire box into the front of the engine which is called the smoke box. The exhaust steam which comes from the cylinders is emptied into the smoke box from the nozzles which are located

there and this exhaust steam which is thus sent out when the engine runs, creates a vacuum in the smoke box which in turn creates the suction which draws the sparks from the fire box and forces them up through the smoke stack. Consequently the sparks are first shot up into the air to a considerable height and then are blown in whatever direction the wind may be. Before the sparks in question could have set fire to the Cordes field, they must have been forced up from the smoke stack of the engine high into the air and then blown by the wind a distance of at least 178 feet. The train was going 40 miles an hour. It had, in fact, six cars. Assume as a fair average length that the cars were 50 feet long. That would make the train 300 feet long, besides the engine would necessitate the train having gone 300 feet by the time the sparks alighted in the field and ignited the dry grass. A train going 40 miles an hour runs at the rate of 3,653 feet a minute, or 60.8 feet a second. The time consumed by the train in going this 300 feet, therefore, was between four and five seconds. To bear out the plaintiff's contention that the spark travelled 178 feet in a straight line from the railroad, it must necessarily have gone into the air as high as 50 feet or more above the engine, and in travelling to the point of the fire the spark must have travelled a distance upward and then horizontally of between 200 and 300 feet in order to have reached the point described. In order to have set the grass on fire by the time the last car passed, the spark must have travelled practically as fast as the train, or at the rate of 40 miles an hour. There is no pretense that the wind, although strong, was blowing at a rate of 40 miles an hour, and without the aid of the wind the spark could not go a distance of 178 feet at right-angles from the railroad track; even assuming for the moment that a spark could be thrown that far from an engine and retain enough vitality to cause a fire. The evidence of the Cordes brothers so far as furnishing a

basis for an inference that the fire was caused by a spark from the mail train must be discredited as beyond the realm of ordinary possibility. If it was in fact the mail train which they saw, and there was a fire as they say, it must have been due to some other cause. The passing of the mail train at the time was a mere coincidence.

Moreover the case is utterly wanting in any evidence to indicate that a spark from an engine sufficient to have ignited the Goodman barn could retain its vitality for so great a distance. The evidence showed that when sparks pass up through the smoke box of an engine they are immersed in a steam bath which has a consequent dampening effect upon them (p. 507, ll. 1-4).

There is not a scintilla of evidence by anybody that sparks from a locomotive ever have or could retain sufficient vitality to ignite combustible material at a distance of 178 feet from the engine.

The plantiff also sought to show by Thomas McDonald that this same engine had thrown sparks which caused a fire in a field about a half mile from Goodman's. His evidence, however, entirely failed to make out any such situation. He worked for a Mrs. Robinson, and was engaged in mowing the lawn when the mail train went by (p. 150, l. 9). It was his custom when the mail train went by to stop whatever he was doing and start to do up his "night work" (p. 150, l. 17). Accordingly after the train passed he went a distance of some 10 yards to the carriage house, put up his mowing machine, and then went down to the horse stable. On his way to the horse stable he noticed some smoke in the grass, and that, he said, was all that he know about the fire (p. 150, ll. 20-40).

Some little time must necessarily have passed from the time the train went through until the fire was discovered in the field. He had to walk the necessary distance from where he was to the carriage house, put

away his lawn mower, come out and walk toward the stable. Moreover the distance from where this fire was to the railroad track was about 90 feet (p. 149, l. 4). His evidence, therefore, is of no value for two reasons; in the first place, the time of the passing of the train and the discovery of the fire was too far removed in time, and in the second place, the fire was located but 90 feet from the railroad track. Even assuming that the engine did throw the spark which started this fire at a distance of 90 feet, that fact is of no value in connecting the Goodman fire with this same engine for the reason that by the direction the wind was blowing, a spark to have ignited the Goodman barn, would have had to have travelled a distance of 168 feet (p. 71, l. 39). Even the very shortest distance from the track to the Goodman barn was 115 feet.

It is perfectly obvious as the chancellor pointed out in his opinion in the Court of Errors and Appeals (49 Vr., 317), that a spark which continues to burn and thereby consume itself while driven through the air by the exhaust steam and carried along by the prevailing wind, cannot retain sufficient heat to ignite combustible materials at an unlimited distance; and it does not follow from the fact that a spark, by retaining its vitality for a distance of 90 feet, would also retain its vitality and cause a fire at a distance of 168 feet.

In considering all this testimony in an effort to determine whether it tends to show that the engine in question did communicate fire to the plaintiff's barn by a spark thrown from the smokestack, the evidence as to the way in which the engine was running, and the condition of the throttle at the time it passed Goodman's, as well as the places where the Cordes Bros. and McDonald were, is very important. The engineman, Amos D. Clack, says that his engine burned anthracite coal, that he was not running under a forced draft, but running along easily, and that

there was no occasion to run otherwise (p. 531, ll. 25-35). He said further that his reverse lever was "hooked up pretty well," that he had it hooked up not quite to the center (p. 532, ll. 35-40). The effect of hooking up the reverse lever to the center is that it cuts the steam valves off closer; it cuts the steam off that goes into the cylinders, and makes the exhaust from the cylinders sharp and short (p. 533, ll. 1-20). The result of this is to throw a minimum of sparks, and the situation is exactly the contrary from what it is when the reverse lever is down in the corner. Then the ports are all open, and the exhaust is as great as can be made and pulls the fire hard, and throws more sparks (p. 533, ll. 24-34). When the train passed Goodman's however, the reverse lever was not down in the corner, but was hooked up to the center, and the plaintiff's own expert, Amandas Rehrig, corroborated Mr. Clack by saying, in answer to the question: "What effect does the cutting of the exhaust have on the quantity of sparks thrown?": "It throws less sparks the higher you hook her up" (p. 649, l. 7).

In considering the evidence of the Cordes Bros. and McDonald, therefore, as well as the other evidence in the case—all of which was circumstantial—this condition of the reverse lever, and the fact that it was in a position to throw the least possible quantity of sparks, is of great importance in its bearing upon the question of the likelihood of the fire having been caused by sparks from the engine.

The evidence of the plaintiff's witness, Miles M. Rouch, was of no value whatever. He had been at the Goodman farm in April preceding the fire and had tied his newly clipped horse between the carriage house and the wagon house (the wagon house adjoins and was a part of the main barn, see map). While standing there, he says, "I noticed a spark or cinder or whatever you call it, strike on the ground at that corner of the building (indicating the north-

erly corner of the wagon house) somewhere about there, and I judge about twenty feet from it" (p. 281, l. 30).

That was all his testimony amounted to. It did not appear that any train was then passing or had been passing for some time previous, and this spark, wherever it came from, was in no way connected with an engine of the defendant at all. It did appear in the evidence of James E. Goodman, that the plaintiff owned a steam engine with which he was accustomed to saw wood and fill silos for the neighboring farmers (p. 375, ll. 31-36), and it is just as fair an inference that the spark which Mr. Rouch saw came from that steam engine as from an engine of the defendant. In any event there is no evidence to connect it with the defendant.

This completes the review of the testimony of the plaintiff's witnesses, and shows that the case which he made was purely a circumstantial one, so far as fastening negligence on the defendant was concerned, or connecting the defendant in any way with the fire. The plaintiff's case, however, did contain direct and positive proof that the defendant had complied with the requirements of the statute.

The plaintiff offered in evidence as a part of his case, certain interrogatories and answers thereto, which had been propounded to the defendant (pp. 325-328). Among these answers and interrogatories was the following (p. 327, l. 28):

> "Seventh interrogatory.
>
> "What precaution or means did the defendant take or use at the time of the fires specified in the plaintiff's declaration, to prevent the communication of fire from the locomotives of the defendant to the property of any owner or occupant of land adjoining or near said railroad.
>
> Answer to seventh interrogatory.

> The defendant, the L. V. R. R. Co. of New Jersey, took and used all practicable means at the time of the fire specified in the plaintiff's declaration, to prevent the communication of fire from any engine used by it when passing along the property of the plaintiff stated in the declaration, and for this purpose equipped and provided its engines with screens and covers to their smoke stacks, so as to arrest and prevent, as much as practicable, the escape of fire."

A more complete answer to the plaintiff's own case could not be made. The first part of the answer to the effect that the defendant took and used all practicable means to prevent the communication of fire from its engines, may be in the nature of a conclusion, but necessarily so. Whether or not the defendant railroad company has taken and used all practicable means is necessarily a conclusion from the facts upon which an expert could express an opinion.

The closing part of the answer, however, is not a conclusion, but states as a matter of fact that the defendant equipped and provided its engines with screens and covers in the smokestack, so as to arrest and prevent, as much as practicable, the escape of fire. The answer states the fact in the language of the statute. There was nothing more which the defendant was required to, or could do. The fact of this complete compliance with the statute thus appears on the plaintiff's own case. If the evidence of the plaintiff's witnesses can be said to raise a *prima facie* case that Engine 2454 caused the fire, then this part of the plaintiff's case rebuts that presumption. The defendant on its part could not do more than establish this fact, which the plaintiff by this evidence had established for it, namely, that it equipped its engine with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire.

There is no escape for the plaintiff from the effect of this interrogatory and its answer. By section 140 of the Practice Act written interrogatories and their written answers are given probative force when offered by the parties proposing the interrogatories, as was the case here. When so offered they are made evidence by virtue of the statute, but even without the statute such interrogatories and their answers are evidence on well settled principles.

In *Campbell* vs. *Hough,* 3 Buch., 601, *V. C.* Walker said p. 605, in discussing this general question:

> "A party to a suit can always go into the papers of his adversary and use them or such parts of them as he is advised will help his cause. It is true that the Practice Act (P. L. 1903, p. 575, § 140) provides that if an action is at issue in a common law court either party may serve on the adverse party written interrogatories on any matter material to the issue and require written answers to the same under oath, and that the answers shall be evidence in the action if offered by the party proposing the interrogatories, but not otherwise. Section 144 of the Practice Act (P. L. 1903, p. 577) provides that any party to an action may by order of the court or a judge be examined as a witness at the instance of the adverse party, or of anyone of the several adverse parties after issue joined and before trial; and (P. L. 1903, p. 577, § 146) provides that the examination and cross examination shall be reduced to writing and signed by the party so examined, and filed, and may be used by either party at the trial. I apprehend that without the direction that the examination may be used by either party, that that right would exist, and, likewise, I am of opinion that interrogatories answered under oath by a party to a common law suit would be evidence on the trial for the party

> answering the interrogatories, if the party propounding them did not offer them, save for the fact that the statute, in that case, expressly provides that the answers shall be evidence only if offered by the party proposing the interrogatories, but not otherwise."

Nor can the plaintiff escape the effect of this interrogatory and its answer on the theory that he was required to introduce in evidence all of the interrogatories and their answers thereto in order to secure the benefit of others of the interrogatories and answers which he desired to put in evidence. Some discussion arose during the trial as to the practice in this regard (p. 433, ll. 25, &c.), but there need be no confusion on that subject in view of the decision of this court in *Cetofonte* vs. *Camden Coke Co.*, 49 Vr., 662. In that case the plaintiff offered in evidence one of several interrogatories and its answer, and objection was made that all of the interrogatories and answers should have been submitted. This objection was overruled, and in overruling it the court would seem to have settled the practice in such matters. Justice Trenchard said, p. 667:

> "The fourth assignment of error argued is that the court wrongfully permitted the answer to one of several interrogatories to be put in evidence.
>
> It appears that, before trial, the plaintiff served upon both defendants several written interrogatories in pursuance of section 140 of the Practice Act. Pamph. L. 1903, p. 575. That section provides that after an action is at issue either party may serve on the adverse party written interrogatories upon any matter material to the issue, and the answer shall be evidence in an action if offered by the party proposing the interrogatories, but not otherwise.
>
> Both defendants answered in writing.

> At the trial the plaintiff offered in evidence and read one of the several answers made by the Camden Coke Company. The defendant objected to the admission of that answer unless the answers to all of the interrogatories submitted and answered were put in. There was no showing nor offer to show, either in the court below or here, that the remaining answers were material to the issue or that they tended to explain, qualify or limit the answer admitted. Clearly, in the absence of such showing, the action of the trial judge cannot be said to be erroneous. What the result might have been in a different situation we are not called upon to determine. Our conclusion is not inconsistent with the rule laid down in Lanahan *vs.* Lawton, 5 Dick. Ch. Rep., 276; affirmed in this court, 5 *Id.*, 796, in which certain extracts from an alleged deposition not before the court were excluded."

Not only is the plaintiff's case devoid of proof to connect the fire with the engine of the defendant, but there was reasonable ground for the conclusion that some other cause than a spark from an engine had caused the fire.

It seems that Mr. Goodman forbade his employees from smoking around the barn, but the fact nevertheless remains that they did smoke around the place and carried matches while working in the barn. Andrew Polimbo said that his brother John, Charles Koerber and James E. Goodman all smoked (p. 62, ll. 8-12). John Polimbo frankly admitted that he and Koerber smoked out in the field that afternoon as they were cultivating potatoes, and that they got the matches out of their pockets with which to light their pipes (p. 89, ll. 1-6). Koerber told the absurd story that although he was an habitual smoker and had smoked right along up to the time of the fire, and had smoked right along after the day of the fire, he did not have

any tobacco and did not smoke on the day of the fire (p. 108, l. 17, etc.). Ordinarily he was accustomed to smoke around the place (p. 107, l. 33). The evidence was that these two boys had been helping unload hay in the barn that afternoon and had gone direct from the barn to the potato field (p. 107, l. 20), so they must necessarily have had these matches with which they lighted their pipes in the field in their pockets as they were working around the barn. It is by no means unreasonable to conclude that some of these matches might have fallen from their pockets and either by spontaneous combustion (the evidence is that it was an unusually hot day and had been dry for a long time), or otherwise, became ignited and caused the blaze in the barn.

Nor is the case devoid of proof from which an inference can be drawn that the fire was of an incendiary origin. It appears from the evidence that certain Jews, and particularly one Axel, suddenly appeared about the time of the fire. John Polimbo says that shortly after he got there the Jews came running from across the tracks (p. 76, l. 30, to p. 77, l. 10). Mr. Mays says that Axel was there before he got there (p. 87, l. 1), and James E. Goodman says, "There was three Jews there, one was named Axel, but the others I didn't know their names" (p. 355, l. 4).

Where these Jews came from, or why they were there, or what they were doing, does not clearly appear, except that they assisted in rescuing furniture from the burning house. Their presence and actions at the fire seem to be shrouded in mystery, and it is significant that none of them were called as witnesses by the plaintiff. The fact that they assisted in helping to rescue furniture from the burning house would be a most natural way for them to act in order to cover their tracks, if they had in fact caused the fire.

The record now before the court is very different from that when this case was under review before.

The plaintiffs' present case is much weaker than it was at the earlier trial, if indeed he has left any case at all.

Chancellor Pitney thus summarized the plaintiffs' case, as it appeared in the earlier record, 49 Vr., 317, p. 319:

> "There was evidence tending to show that a strong wind was blowing from the railroad toward the barn; that the day was quite warm, and that the weather for some time had been unusually dry; that there was no person in or about the barn at the time the fire broke out, or within one and a half hours prior to that time; that no fire or any lighted lamp was kept in the barn; that the conflagration commenced in the hay, near a door that stood open leading into the mow, some distance above the ground and facing the railroad; and that at the beginning there was no fire upon the ground or in the lower part of the barn. One witness (Axel) testified that being at a point 25 to 50 feet distant from the railroad, on the opposite side from the Goodman barn, and where he had a clear and unobstructed view, he saw the mail train going by, and as the last car of the train passed he observed the hay smoking and immediately gave the alarm. Andrew Polimbo testified that when at a distance of 150 feet from the barn he saw the smoke, and on running to the barn saw the hay was afire within two feet from the door. In addition, Charles Cordes testified that on the same day while at work in his barn about 300 feet from the railroad, at a distance of about a mile eastwardly from Goodman's property, he observed the mail train in question passing, and before the last car had passed fire started in the grass about 125 feet from the railroad; that there was no smoke in the field before the engine reached it,

> and nobody visible to have set the fire. And Thomas MacDonald testified that on the same day, at a place some distance west from the Goodman property, and adjoining the railroad, fire was started in the grass about 30 feet from the track shortly after the mail train passed by."

The plaintiffs' case now is quite different. The witness Axel, whom the Chancellor refers to as having given evidence of great materiality to the plaintiffs' case, was not called and did not testify at this trial. The testimony of Andrew Polimbo is now shown to be thoroughly unreliable. The Chancellor found that the fire started in the hay in the mow some distance above the ground. Under the evidence now at bar no one knows where the fire first started. Charles Cordes now puts the place where he saw the fire in his field at 178 feet from the railroad track, whereas in his testimony at the earlier trial, as the Chancellor points out, he put it at 125 feet from the railroad. Thomas McDonald's testimony at the last trial evidently was that the fire which he saw in the grass occurred shortly after the train went by, whereas it now appears a considerable time elapsed and that he really knows nothing about the origin of that fire.

Moreover the evidence of the practice which the men had of smoking around the place and carrying matches in their clothes when working in the barn, seems not to have entered into the earlier trial at all. Assuming that circumstantial evidence is sufficient to make out a *prima facie* case in suits of this character, there must be sufficient evidence, nevertheless, from which a jury would be entitled to draw a reasonable inference. The burden is on the plaintiff to prove that the fire was communicated from an engine of the defendant.

At this point the answer to the seventh interrogatory becomes most pertinent. The plaintiffs' own evidence rebuts completely his *prima facie* case. The

very thing the defendant must prove appears on the plaintiff's case. The facts which the statute makes a complete defense appears on the plaintiff's case in the very language of the statute.

It is quite apparent from a reading of the Chancellor's opinion that the testimony of Axel, that just as the last car of the train passed he saw the hay smoking in the mow, influenced him very greatly in reaching a conclusion that a *prima facie* case had been made out. And properly so. But in this case Axel did not testify. His evidence is not before this court.

Not only is the plaintiff's case greatly weakened, over what it previously was, by the absence of Axel's testimony, but the entire body of the plaintiff's evidence is unsatisfactory and weak. It consists of nothing but inferences, and fails to set forth facts from which it can be said, as was the situation at the former trial, that it fairly tended to show that the fire that consumed the Goodman property was communicated by sparks escaping from an engine operated by defendant company. Moreover, the fact of the defendant's complete compliance with the requirements of the statute fully appears in the plaintiff's own case.

The learned trial judge felt and conceded the weakness of the plaintiff's case, and frankly said, that but for the Chancellor's opinion he "would have non-suited it, and instantly have non-suited it" (p. 425, line 24, &c.). However that may have been, the Chancellor's opinion does not in any way change the law on this subject as long known and understood. It simply applied to the particular facts *then* before the court. The facts *now* before the court are quite different, and we respectfully, and with great confidence insist, that they do not make out a *prima facie* case for the plaintiff, and they fail to show even circumstantially that the fire was communicated from an engine of the defendant, namely engine No. 2454.

In our judgment the plaintiff failed to meet the burden of proof cast upon him by the law, and the learned trial judge erred in refusing to non-suit.

But assuming for the sake of argument that the nonsuit was properly refused, the case does not end there. This is a statutory action, and even though the plaintiff does make out a prima facie case, if it is successfully rebutted as provided for in the statute, no cause of action will lie. The next question therefore, is,—assuming a *prima facie* has been made out—has the defendant met the burden which the statute casts upon it?

This burden was to show that it complied with the requirements of the statute, and particularly sections 56 and 57 of the General Railroad Law.

(2). THE DEFENDANT TOOK AND USED ALL PRACTICABLE MEANS TO PREVENT THE COMMUNICATION OF FIRE BY ITS ENGINE, AND TO THAT END PROVIDED ITS ENGINE WITH A SCREEN OR COVER IN THE SMOKE-STACK SO AS TO PREVENT AND ARREST AS MUCH AS PRACTICABLE THE ESCAPE OF FIRE. THIS SCREEN OR COVER WAS IN GOOD AND PERFECT CONDITION AT THE TIME OF THE FIRE.

Pursuant to the obligation imposed upon it by the statute the defendant had provided its engine with a screen or cover in the smokestack for the purpose of preventing and arresting as much as practicable the escape of fire.

It is recognized by the courts, and the plaintiff does not contend otherwise, that it is necessary and unavoidable in the operation of a locomotive engine to throw sparks. The legislature has recognized this necessity by requiring not that the railroad company should prevent the escape of fire, but that it should prevent *as much as practicable,* the escape of fire.

The evidence is conclusive that the defendant had installed in its engine No. 2454 a screen or cover which did prevent as much as practicable the escape of fire, and which was as efficient as any screen or cover used by the standard railroads of the country for the same purpose.

The spark arrester which was installed in engine No. 2454 on the day of the fire was of the type known as the cone screen. Reproductions of the blue print maps showing the front and side views of the interior of the locomotive where the screen is located, appear in the back of the printed book as Exhibits D. 1 and D. 2. The sparks from the fire box are drawn through the flues or tubes by the action of the exhaust steam, into the smoke box, as the front of the engine where the screen is installed is called. The screen is fastened at the top by clamps and bolts to the bottom of the smoke stack, and is similarly fastened at the bottom of the screen around the exhaust pipe which contains the nozzles; and when the screen is in good condition it is impossible for any sparks to escape out of the smoke box through the smoke stack except by passing through the meshes of the screen (p. 500; p. 521, l. 15, to p. 522, l. 10).

The material out of which the screen is made is steel (p. 515, l. 1), and the size of openings of the mesh is a little less than one-quarter of an inch. The wire is .095 or 3-32 of an inch in thickness, and there are three openings to the square inch (p. 601, ll. 20-25).

It appeared from the evidence that the screen used by the defendant has a small or a smaller mesh than that used by any other of the standard railroads. None uses a smaller mesh.

It is a smaller mesh than that used by the Pennsylvania Railroad Company (p. 603, l. 20; p. 628, l. 38).

It is smaller than the mesh used by the Central Railroad Company of New Jersey (p. 619, l. 14).

It is smaller than the mesh used by the Chicago, Burlington and Quincy Railroad Company (p. 621, ll. 1-10).

It is smaller than the mesh used by the Delaware, Lackawanna and Western Railroad Company (p. 633, l. 25).

It is smaller than the mesh used by the Illinois Central Railroad Company (p. 633, l. 26).

It is practically the same size as that used by the Philadelphia & Reading Railroad Company (p. 620, l. 13).

Furthermore it appeared that the use of any smaller mesh would not be practicable as it would be impossible to secure sufficient draft to enable the engine to make steam.

Amos Turner, master mechanic of the defendant at Easton, testified that he had personally made tests to see if a smaller mesh was practicable and found that it was not practicable (p. 604, l. 20 to p. 605, l. 15).

Mr. Chambers, superintendent of motive power of the Central Railroad Company of New Jersey, testified that it would not be practicable to use any smaller screen than that used by the defendant (p. 622, l. 28).

Mr. Maxfield, master mechanic of the Pennsylvania Railroad Company at Trenton, testified to the same effect (p. 629, l. 3), and so did Mr. Barton, master mechanic of the Delaware, Lackawanna & Western Railroad Company at Kingsland (p. 633, l. 37).

It appeared from the evidence that the shape and style of spark arresters vary, some being of the type used by the defendant known as the cone screen, and some being of a square shape type known as the master mechanic's screen. It was conceded by all the witnesses that the efficiency of the spark arrester depends on the screen. The arrester is the screen (p. 614, l. 36), and the particular form of screen used is a mere matter of detail as to the installation of the apparatus in the engine.

For example the Pennsylvania Railroad Company use the square or basket screen (p. 629, l. 35), while the Chicago, Burlington & Quincy Railroad Company use both the cone screen such as the defendant uses, and also the square or box screen (p. 623, l. 10).

The Philadelphia & Reading Railroad Company also use cone shaped screens (p. 623, l. 17).

The shape of the screen however is unimportant. The size and character of the mesh are the things that count.

The opinion of the witnesses at the trial best qualified to judge, was that the character of screen used by the defendant for the prevention of the escape of fire was as efficient as any other form of spark arrester which could be devised as practicable.

Mr. Charles E. Chambers, the present superintendent of motive power of the Central Railroad of New Jersey, had been general road foreman of engines, and general master mechanic of that company before becoming superintendent of motive power. He had been road foreman of engines for the Reading Railroad and had been machinist, fireman and locomotive engineer for the Chicago, Burlington & Quincy Railroad (p. 618, ll. 10-30). He was not and never had been employed by the defendant and was thoroughly qualified to express an impartial opinion as to the efficiency of the screens used by the defendant. He had, for the purpose of testifying, examined the engine of the mail train (which at that time was numbered 2460), with particular reference to the character and method of installation of its spark arrester (p. 618, l. 34 to p. 619, l. 8). His testimony as to the efficiency of the screen used by the defendant was as follows (p. 622, l. 6):

> "Q I will ask you, as a result of your experience, and knowledge, whether or not it is practicable to use any smaller screen than that, in the front of the locomotive, to arrest the communica-

tion of fire by sparks? A It would not be practicable to use any smaller screen than that.

Q From your examination of the screen used by the Lehigh Valley Railroad, what have you to say as to the efficiency of that screen for the prevention of the communication of fire from their engines? A I should say it was an efficient screen.

Q What have you to say as to the efficiency of the screen used by the Lehigh Valley Railroad as compared with the screen used by other railroad companies, with which you are familiar? A I should say it was as efficient as any."

Howard H. Maxfield, is the master mechanic of the Pennsylvania Railroad Company located at Trenton, and had held that position for five years. Previous to becoming master mechanic he had been assistant superintendent of motive power for five years, assistant master mechanic, and assistant road foreman of engines. Prior to that he had served as an inspector or superintendent of motive power for a year, and had served an apprenticeship at the machine shops. In addition to that he is a graduate of Stevens Institute (p. 627, ll. 13-28). He was not and never had been employed by the Lehigh Valley Railroad Company and was thoroughly competent to express an impartial opinion as to the character of its spark arrester. In company with Mr. Chambers he had examined the screen in the engine in question at Easton (p. 627, l. 38 to p. 628, l. 5). His testimony as to the efficiency of the defendant's screen was as follows (p. 629, l. 10):

"Q From your examination of the screen used by the Lehigh Valley Railroad Co., what have you to say as to its efficiency for the prevention of the communication of fire by sparks from their engine? A I consider it an efficient screen, and quite practicable.

Q What have you to say as to the efficiency of the screen used by the Lehigh Valley Railroad Co., as compared with other railroads, with which you are familiar, for the prevention of the communication of fire by sparks from their engines?

A I think it is fully as efficient."

Thomas F. Barton was master mechanic of the Delaware, Lackawanna & Western Railroad Company located at Kingsland, New Jersey, and a part of his duties was the charge of the installation and repairing of screens of locomotives. He had held the position of machinist, general foreman, and master mechanic of the Illinois Central Railroad Company, and of apprentice locomotive foreman and machinist of the Grand Trunk Railroad (p. 632). He was not and never had been employed by the defendant. He had examined the life size screen which was produced in court and his testimony was that it was equally efficient with the screens used by the other railroads with which he was familiar (p. 634, l. 20).

The strength of the testimony of these three disinterested witnesses cannot be ignored. They were each of them experts in their line of work. They were thoroughly familiar with the construction and running of locomotive engines, and their life work had required them to study, observe and deal with the question of prevention of fire from locomotive engines by the escape of sparks. Their testimony summed up is to the effect that the screen used by the defendant is as efficient as that used by the following standard railroads of the country:

The Chicago, Burlington & Quincy Railroad Company, Central Railroad Company of New Jersey, and Philadelphia & Reading Railroad Company (Mr. Chambers).

The Pennsylvania Railroad Company (Mr. Maxfield.)

The Illinois Central Railroad Company, Grand Trunk Railroad Company and Delaware, Lackawanna & Western Railroad Company (Mr. Barton).

In addition to these three outside witnesses the defendant called Amos Turner, who had been employed by the defendant for forty years, having served as machinist, general foreman, and master mechanic at the Easton shops (p. 600, ll. 30-40). It was his duty as master mechanic to look after the repairs of locomotives (p. 601, l. 4), and he had made special tests at various times for the purpose of trying out and arriving at the best practicable kind of screen (p. 604 and p. 605).

He gave as his judgment from his experience that the defendant had taken and used all practicable means to prevent the communication of fire from its engines and particularly engine No. 2454 on the day in question (p. 614, ll. 1-20).

He further testified (p. 605, l. 16):

"Q What do you say as to a smaller screen, is it practicable? A No sir.

Q When this screen is installed and in proper running order, it is possible for sparks to escape through the smoke stack except by passing through the screen? A No, sir, it is not.

Q What is your judgment on the screens used on the Lehigh Valley Railroad, for the practical prevention of the communication of fire from locomotive engines used by it? A In my judgment, it is the best that can be put in service.

Q What have you to say as to the efficiency of screens used by the Lehigh Valley Railroad in their engines for the prevention of communication of fire, in 1905? A It is the best we know of."

Moreover the answer to the seventh interrogatory, which the plaintiff put in as part of his own case, says:

> "The defendant, the L. V. R. R. Co., of New Jersey, took and used all practicable means at the time of the fire specified in the plaintiff's declaration, to prevent the communication of fire from any engine used by it when passing along the property of the plaintiff stated in the declaration, and for this purpose equipped and provided its engines with screens and covers to their smoke stacks, so as to arrest and prevent, as much as practicable, the escape of fire."

This admission, remember, comes from the plaintiff himself.

In view of the testimony as to the installation, character and efficiency of the screen used by the defendant, how can it be said that the defendant did not take and use such means as the statute required, so as to arrest and prevent as much as practicable the escape of fire from its locomotive engine. What more could it have done? What did it leave undone?

If then the character of the defendant's spark arrester was, as it indubitably was, fully within the requirements of the statute, the only question left is as to whether it was in good and perfect condition on the day of the fire.

It appears from the evidence that the life of a screen is about one year (p. 521, l. 12; p. 617, l. 30).

The screen in engine No. 2454 had been installed new a few months before the fire. This was established conclusively by the testimony of John Deninger, a man whose sole business is to make and install screens at the Easton shops (p. 634, l. 35 to p. 635, l. 10). Deninger kept a record of the screens which he installed showing the time when and the number of the engine, which record he kept himself and made "right after I did the job" (p. 635, ll. 10-30).

It seems that the numbers of the engine of the mail train had been changed from time to time. In February of 1905, she was known as No. 677. At the time of the fire she was known as No. 2454, and just previous to the trial when she had been examined by Messrs. Chambers and Maxfield, she was known as No. 2460. It further appeared that at the time she was known by a given number there was no other engine of the same number in the service (p. 639, l. 38 to p. 640, l. 16; p. 636, l. 34 to p. 637, l. 35).

These screens are in two sections, front and back, the line where they are joined being on the side (see Exhibit D. 2 in the back of the book). Deninger put a new back screen in this engine on February 10th, 1905 (p. 635, l. 40)—about five months before the fire; and he had previously put a new front screen in on December 19th, 1904 (p. 646, ll. 30-40), about seven months before the fire.

The screen which he put in on those dates remained in the engine and in operation until March 23rd, 1906 (p. 636, l. 18), and this fact in itself is conclusive evidence of the good condition in which the screen was on July 19th, 1905, the date of the fire. This very important fact did not appear in the earlier record when the case first came before this court. It is inconceivable that the defendant would have deliberately continued this same screen in use for a period of six or seven months after the fire if it were in fact a defective or improper screen; especially when by the filing of this suit in November, 1905, they had notice of the alleged defectiveness of the screen.

The screen in engine No. 2454 was examined and inspected at three different times and in three different places, and by three different inspectors all within thirty hours before the fire, and it was also examined by these same three inspectors at three different times and places within twenty-four hours after the fire.

At each and all of these six examinations the condition of the screen in the smoke stack was found to be in good and perfect condition.

The examinations before the fire were as follows:

1. George Burkhardt examined the screen at Easton on the night of July 18th to 19th, 1905, between 10:50 P. M. and 12:30 A. M. (Mr. Burkhardt was dead at the time of the trial and his testimony given at the previous trial was read in evidence.) He examined the engine with the aid of his torch and his description of his examination is as follows (p. 589, l. 23):

> "Q What was the nature of the examination you made of the screen on the 18th? A Well, I opened this door in the front here and jumped up on the ring here and hold my torch. I am the night inspector; I must hold my torch all around there and examine it.
>
> Q And did you do this with 2454 this night? A Yes, sir.
>
> Q And you found the condition of the screen as set forth in that record? A Yes, sir; according to my record here.
>
> Q This examination of the screen includes what with reference to what is above and below it? A How do you mean?
>
> Q The bottom and top of the screen? A The screen complete is attached to the stack above and below it fits around the nozzle.
>
> Q Where it is attached to those places can sparks escape through? A No, sir; that is solid sheet iron at the top and below, it fits around a solid plate."

The record to which he referred and from which he refreshed his recollection when he testified (p. 591, l. 20) was "Engine 2454, No. 1 stack, stack in good condition. Good screen."

The screen was a cone screen. He made his record within fifteen or twenty minutes after the examination (p. 589, ll. 14-18). The testimony of Burkhardt was not impeached in any way.

2. Lawrence Slagel, engine foreman at Jersey City, examined the spark arrester of the same engine at 6:45 in the morning of July 19th, 1905. (He also was dead at the time of the trial and his previous testimony was read in evidence.) His business was to inspect the passenger engines of the defendant which came in at night at Jersey City (p. 598, ll. 20-27). He, too, kept a record and made his entry "a few minutes after I examined it" (p. 596, l. 36). His record was as follows: "July 19 at 6:45 A. M. Engine 2454, spark arrester good and screen is good" (p. 596, l. 23).

His inspection did not pretend to be as thorough as that of Burkhardt for he did not go inside the engine. The character of his examination was in his own word, "On each side of the spark box there is a cap that we use for to knock sparks out of the front end. That is about five inches and a half or six inches square. I take that cap off and look in and I can see the whole screen, that is, from each side" (p. 597, l. 10).

It is apparent from his testimony that he can in this way discover holes if they exist, for he speaks of making reports of screens which he thus discovers to be defective (p. 599, ll. 20-30). This engine, however, never had a hole in its screen when he examined it (p. 600, ll. 1-20).

Whatever the character of the inspection which Slagel made may have been, the engine was inspected just before her run for New York on the day of the fire by Thomas Shannon at South Easton.

3. Thomas Shannon, the inspector at South Easton, examined engine No. 2454 at about 11:30

A. M. on July 19th, 1905. He kept a record from which he refreshed his recollection in testifying. It seems that his method was to examine several engines at a time and write down the results on a slip of paper, and then from this slip of paper to make the entries in his book. These entries would be made direct from the memorandum within a half hour or an hour from the time the examination was made (p. 541, ll. 10-36). He did not wait until the end of the day before making any entries in the record book (p. 541, l. 38 to p. 542, l. 8; p. 556, l. 20; and p. 558, ll. 20-30). His invariable custom was to make an entry in his book after having examined some three or four or half a dozen engines. The record and character of his examination he described as follows (p. 544, l. 14, etc.):

"Q Now, refreshing your recollection from your memorandum here, what time did you make the inspection on July 19th, 1905, of number 2454? A 11:30.

Q 11:30 A. M.? A Yes, sir.

Q Did you make an entry as to the kind of stack there was in that engine? A Yes, sir.

Q What did you enter? What kind of a stack was it? A A number 1.

Q What does that mean? A Well, I don't know. It has always been that way, that is a good stack.

Q That means a number one stack? A That means a number one stack.

Q Did you make any entry as to the condition in which you found the stack? Well, I see a heading here, 'Condition in which stack was found.' Did you make an entry under that? A Well, there is the marks.

Q What did you enter as to the condition of the stack? A Good.

Q I see another heading of a column, 'Condition which spark arrester was found.' What entry did you make under that? A Well, it is good.

Q I see another entry, 'Of what did the spark arrester consist?' What did it consist of? A Screen.

Q Was there anything the matter with that screen at that time? A No, sir.

Q Now, what sort of an inspection did you make? How did you go at it, and what did you do? A Well, I opened the door on the front of the engine.

Q That is this sort of a round door on the front of an engine? A Yes, sir.

Q How did you get it open? A By opening the latches.

Q Did you unscrew some bolts with a wrench? A Yes, sir.

Q And then you opened up the front of the engine so that it was as you look here on the blue print D. number 1? A Yes, sir.

Q You opened up that front end and then what did you do? A Well, I looked in and saw the front screen was all right, and got inside and felt the back of the screen.

Q You felt the back of the screen here (indicating on model)? A Yes, sir.

Q On the back of this model? A Yes, sir.

Q Is that the way to make an inspection of the back by feeling the back of the screen? A Yes, sir; that is the only way you can make it.

Q Where did you feel, around the bottom of the exhaust?

Mr. Whittemore. Don't lead him.

Q Where did you feel? A Bottom of the screen.

Q Where else? A Around the back of the screen.

Q As the result of this inspection, of the character which you made, you found and made an entry in your book that the screen was in good condition? A Yes, sir.

Q Can you tell from that kind of an inspection whether there is anything the matter with the screen? A Yes, sir.

Q Did you ever find anything the matter with screens when you inspected them? A Yes, sir.

Q And when do you find something the matter, what do you do in your book? A Well, I mark it down, broken screen.

Q Or whatever the fact is, I suppose? A Yes.

Q Where was this engine inspected, out on the ash track? A Yes, sir.

Q There is no roof over that, is there? A No, sir.

Q Right out in the daylight? A Yes.

Q And it was 11:30 in the morning, I think you said? A Yes, sir."

His examination of the spark arrester as his evidence shows, was a thorough one, he having opened the front of the engine, gotten inside and felt with his hands the back of the screen. The evidence is that the engine had been in from her run for sometime and that the screen was cool (p. 547, ll. 1-20).

Shannon's inspection was made but a few hours before the engine passed Goodman's on the day of the fire, and the plaintiffs counsel realizing the importance to his case of overthrowing the testimony of Shannon, subjected him to a most rigid cross examination both as to the character of the inspection and the time and way in which he made the entries in his record book. In fact the plaintiff's counsel admitted

that he was trying to confuse the witness (p. 550, ll. 11-16).

Although counsel endeavored to confuse him and subjected him to a most severe and skillful cross examination his testimony is not shaken or impeached in the slightest. His record was made in the ordinary course of his employment as a spark arrester inspector and his cross examination shows that the record, which he then made and was accustomed to make, was a truthful one (pp. 572 to 582). (The printed book has at the top "Thomas Shannon, Direct." It should be "Thomas Shannon, Cross.") He testified that when he discovered a hole in a screen he so indicated on the record and marked it "Broken screen" (p. 551, l. 24). Upon reporting this the engine was taken away to be repaired in the round house (p. 551, ll. 25-35). He was then asked this question on cross examination, "Now isn't it a fact Mr. Shannon, that some of these entries here that you have marked good, are instances of inspections where patches were put on the screens, over holes, and then the record, after that was done, was marked good?" (p. 551, l. 38), and his answer was "Yes, sir" (p. 552, l. 8). Counsel for the plaintiff did not, however, give the witness a chance to explain this statement, but it was perfectly explained on re-direct as follows (p. 584, l. 22):

> "Q When you found a screen in the engine which has a hole in it, what would you do in your book, what report would you make? A I would report a broken screen.
>
> Q After that was reported what would be done with the engine, or the screen, if you know? A It would be sent to the round house for repair, it would be taken to the shop and sent to the round house for repair.
>
> Q If it was a small hole, what kind of repair would they make to the screen? A They would put a patch on.

Q When next would you see the engine after it had been reported by you with the hole in the screen? A The next day or the day after the next—next time she came to the ash pit.

Q And you would inspect her again? A Yes, sir.

Q If you inspected an engine which had been repaired, after the break in the screen, but was otherwise in good condition, except for this patch, how would you report it? A In good condition, if we found no holes, we would report the screen as in good condition.

Q When you said last Friday, if you found an engine patched you would report it 'good,' you meant an engine repaired as you say, with a patch over the hole, and if the patch was in good repair, and everything else was in good repair, you would report it 'good'? A Yes, sir."

This evidence makes plain and straightforward what had seemed obscure and questionable on the cross examination. It was customary when a screen was found to be broken, to send the engine to the round house and there to put a patch of the same material over the small holes, and whenever that had been done and the engine had again been put in commission and had come back to the ash pit for inspection, the inspectors considered the screen as repaired a good screen, and marked it accordingly. This was a very different matter from putting a patch over a hole in the screen on the ash pit, and then reporting the screen good when it had in fact been found to be broken. This was the impression which the plaintiff's counsel in his effort to "confuse" the witness tried to create. The evidence, however, is quite otherwise.

It is impossible not to conclude that the spark arrester or screen in engine No. 2454 was in good and perfect condition immediately before the fire of July 19th, 1905. Three witnesses who examined it at dif-

ferent times and places and without collusion, or with opportunity for conference, and who in the course of their employment made records of what they found, unite in saying that the screen was in good order and free from holes.

The examinations made after the fire of the screen of engine No. 2454 were made by the same inspectors at different times, and were as follows:

(1). Lawrence Slagel examined the engine at Jersey City at 4.50 P. M. on July 19th, 1905, just about an hour after the fire started (page 597, line 36). He testified that he made the same kind of an examination as he did in the morning, and found the screen and smoke stack to be in good condition (p. 597, line 38, to 598, line 10). He made an entry to that effect in his record book.

(2). George Burkhardt examined the engine at Easton on the night of the fire, his examination having been made between the hours of 10.30 and 12.30 on the night of July 19th, 1905 (p. 590, line 12). He made a thorough examination just as he did the night previous, getting inside the engine, and using his torch (p. 590, line 15). He found that the spark arrester was in good condition, and he so noted in his record (p. 590, line 17).

(3). Thomas Shannon examined the engine at Easton on the day following the fire, between 12.18 and 1.18 P. M. (p. 585, lines 20-33). He made the same kind of an examination as the day before, namely, by getting inside the engine and feeling the spark arrester with his hands (p. 586, lines 14-22). He found the screen in good condition and so noted in his record book (p. 586, line 25).

If these witnesses are to be believed, the proof is abundant that the screen or spark arrester in engine No. 2454 was in good condition at the time of the fire. The three inspectors were veterans in this kind of

work. They testified how defects were found in other screens which they inspected. They did not, so far as known, have any knowledge of this fire. They acted entirely independent of each other. They each claim to have made a thorough inspection, and their testimony is unimpeached. They all unite in saying that at the time their respective investigations were made the spark arrester was in good and perfect condition.

It is possible and conceivable that one of these inspectors might have been mistaken, but it is not at all probable, or likely, that all of them could have been mistaken; nor is it at all within the range of ordinary probability that if a hole or defect existed in this screen, it would not have been discovered in one of the six inspections made. Moreover, the very significant fact must not be overlooked that the defendant continued to use this self-same screen till March in the following year; a thing which the company, for its own protection, would never have done had the screen not been a good and perfect screen.

The plaintiff called certain witnesses in rebuttal of the defendant's case, but they presented a rather sorry spectacle. They were as follows:

(1). Amandas Rehrig had been an engineer for eight or nine years prior to May, 1908, with the defendant company (p. 647, lines 30-36). In one respect his testimony directly benefited the defendant, for he testified that when an engine travels at forty miles an hour, the reverse lever "is hooked up as close to the center as you can" (p. 649, line 1).

Amos D. Clack, the engineman of engine 2454, had previously testified that he had his reverse lever "hooked up pretty well" but "not quite" up to the center (p. 532, lines 30-40).

Rehrig testified that "it throws less sparks the higher you hook her up" (p. 649, line 9), which was in exact corroboration of Mr. Clack (p. 533, line 37, to 534, line 12).

The real reason why Mr. Rehrig was called in rebuttal, however, was to answer this question: "In your opinion, would a spark from an engine with a screen of that size and character go to a distance of 115 feet and retain vitality or fire enough to set fire to anything?" to which he answered "to the best of my judgment, no." Aside from the fact that this rebuts nothing, the testimony of Rehrig is plainly prejudiced testimony. He was a discharged employee, having been twice suspended, and finally dismissed, as a locomotive engineer (pp. 653 and 654), by the defendant.

(2). Dennis J. Donovan had had some experience as engineer of a freight and drilling yard engine, but he admitted that he could not tell how far a spark would go from an engine running forty miles an hour, and keep alive (p. 657, line 30). His testimony therefore amounts to nothing.

(3). William B. Munn was another prejudiced witness. He had been an engineer for ten years on the Central Railroad of New Jersey from 1888 to 1898 (p. 663, line 35), from which he was discharged. He testified that an engine could not be inspected after coming in from a run inside of an hour or an hour and a half (p. 665, line 29), and that you could not tell by looking into the smoke box through the caps at the side, the condition of the screen (p. 667, line 20).

So far as his testimony that you could not inspect the engine within an hour or an hour and a half is concerned, it rebuts nothing, for it does not appear at what hour the various inspectors made their inspection of the engine in question.

As to his testimony that you cannot make a proper inspection by looking through the caps, that testimony affected no one but Slagel, who made the inspection in that way, and no reason appears why Slagel's word is not quite as worthy of belief as Munn's, if not more

so. But the defendant does not have to rely on the inspection of Slagel alone. The engine was inspected four other and different times by two other inspectors, in addition to the fact that the same screen was kept in use for six months after the fire. Moreover, Munn never made an inspection of a screen as such (p. 668, line 25), and admitted that after he had run his engine in on the ash pit and looked it over, he had nothing further to do with it. The hostlers, and not he, cleaned out the front end (p. 670, lines 10-20). In addition to this, he worked for the New Jersey Central, not the defendant company. He says the Jersey Central did not inspect their screens (p. 670, line 21), and last, but not least, he was a discharged employee of the Central Railroad (p. 669, lines 20-28).

(4). John F. Donelan failed to qualify entirely, and did not testify.

(5). Joseph S. Taylor was a former Lehigh Valley engineer, who had been with the road some sixteen years (p. 672, l. 28), but whose career, like Rehrig's and Munn's, had come to an end after various suspensions, by his having been dismissed from the service (p. 681, ll. 10-26). Consequently he too was a prejudiced witness.

He testified that he had never seen an inspection made of an engine at Jersey City, except on the report of the engineer that the engine did not steam (p. 673, l. 27, etc.) and that no inspection was made of the front ends of the spark arresters at Jersey City (p. 674). He had no knowledge of what occurred at Easton (p. 674, l. 35), and it turned out that he had no regular run to Easton: "never ran up at Easton, only I have taken broken trains up, and such as that. I went up there last summer all summer." This was long after the fire (p. 679, ll. 26-30). He admitted, however, as did Munn, that after his run was over he had nothing to do with the engine after it got on the ash pit; that he was not an inspector of screens, and had

nothing to do with the ashes (p. 678, ll. 3-38). There was a lounging room in the shanty at Jersey City, where he and his fellow engineers used to go and sit (p. 680, l. 26).

Taylor also testified on direct examination as follows:

"Q Did you find your engine when you came back to take them out, with any sparks in the front end?

A There were, yes, sir.

Q Did that happen more than once?

A Oh, yes."

(p. 676, l. 25, etc.). This would seem to argue that the engine had not been inspected, inasmuch as the defendant's inspectors all testified that they cleaned out the front end. The unreliability of Taylor's evidence, however, appeared on cross examination, when he said, in reference to this matter (p. 681, l. 36):

"Q You said you had seen ashes or sparks in the front of the engine before you started on that run. Where was that?

A Where was that?

Q Yes.

A At Easton.

Q And what train was that you were talking about, or what engine, or what run was that?

A That was an engine that what they call a helper, from Easton to the tunnel.

Q Easton to the tunnel?

A Yes."

He said further that he had discovered that fact, because the engine did not steam "good," and that "he looked in the hand-hole on the side of the engine" and saw accumulated sparks there.

It is perfectly obvious that no comparison can be made either between the engines or the system of in-

spection, as applied to the regular engines on the defendant's line, on the one hand, and the dummy engine, or helper or pusher, used around the shops and tunnels at Easton, on the other. There *is* no comparison between the two, and the fact that the tunnel or pusher engine was not cleaned out in front, and possibly not inspected, is not material on this case. Moreover it must not be forgotten that Taylor had been discharged by the defendant.

(6). The last witness called by the defendant was Henry A. Pease, who was formerly a steam-fitter for the Central Railroad of New Jersey (p. 683, l. 39, to 684, l. 10). His testimony applied entirely to the Central Railroad, and it was admitted by the trial judge, although he had "grave doubts about it" (p. 686, l. 3). It was certainly immaterial, as applied to the defendant. He had never worked for the defendant, and knew nothing about their engines (p. 688, l. 27). His testimony was that he sometimes found holes punched in the front of the spark arresters of the Central Railroad, when they came in for repairs.

Of the six witnesses called in rebuttal by the plaintiff, three gave no testimony of any materiality at all; and three were discharged former railroad employees.

If the facts were other than as the defendant proved, it would not have been necessary to have brought into court discharged and disgruntled ex-employees to have shown it. If the facts were other than as given by the defendant, the plaintiff could readily have shown it by reputable and disinterested witnesses. The evidence of these witnesses, when read carefully and analized, rebuts nothing.

With whom, then, does the evidence lie, if not with the defendant? How can it be said that *this* case presented a jury question?

As at the conclusion of the plaintiff's case, so now at the conclusion of the whole case, this record is

essentially different from that before the Court of Errors and Appeals.

The chancellor in his opinion in this Court (49 Vr., 317), summed up the defendant's evidence then before the court, and then said (p. 323):

> "We may assume—indeed, it is in effect conceded by counsel for plaintiff in error—that, if this evidence must be fully credited, and constituted the only evidence that bore upon the care exercised by the defendant, it demonstrated that the defendant had used 'all practicable means to prevent the communication of fire,' and had fulfilled its statutory duty. But, in our judgment, the testimony introduced by the plaintiff to the effect that engine No. 2454 actually threw a spark that retained its vitality for a distance of more than 115 feet, so as to set fire to the hay in Goodman's mow, together with the testimony of Cordes and MacDonald about the throwing of sparks by the same engine on the same trip, had a legitimate tendency to prove not only that this engine started the Goodman fire, but that its screen was not in good order at the time. Moreover, one of defendant's own witnesses, an expert, testified that in his judgment a spark that had passed through the meshes of such a screen as No. 2454 carried (the screen being intact) would not retain sufficient vitality or fire to ignite combustible material at a distance of 116 feet from the railroad track. Indeed, it may easily be inferred, from what we all know, that a piece of live coal so small that it will pass through a quarter-inch mesh, and which, of course, continues to burn, and thereby to consume itself while driven into the air by the exhaust steam and while carried along through the air by the prevailing wind, cannot retain sufficient heat to ignite other combustible materials at an unlimited distance.

Whether it can carry its heat for 50, or 100, or 150 feet, or more or less, cannot be solved by the application of any rule of law, and is left unsolved by the evidence.

It is clear enough that the evidence introduced by the defendant, tending to show that it had properly maintained the screens so as to prevent the communication of fire, at the same time tended to show that in fact the fire was not communicated to plaintiff's property from defendant's locomotives; and for the same reason the evidence introduced on the part of the plaintiff that tended to show that the fire was communicated from the locomotives, also tended to show that the locomotive screens were not in good order at the time, and thus to contradict the evidence of defendant's witnesses who testified that they were in good order. In short, if the testimony of plaintiff's witnesses as to the origin of the fire was believed and if the jury inferred therefrom (as they reasonably might infer) that the fire was caused by a spark from a locomotive engine, and also concluded that the spark could not travel so far and retain its fire unless when it left the engine it was too large to have passed through a quarter-inch mesh, it results that the jury might fairly conclude that defendant's witnesses who testified to the effect that the engines in question were fitted with screens of quarter-inch mesh, that the screens had been inspected with proper care and were in good order and perfect condition at the time, and that there was no way in which sparks could come out of the smoke stack without first passing through the screen, must have been in some way mistaken. The evidence upon the disputed points being thus in conflict, the question could be legitimately solved only by the intervention of the jury."

The chancellor, as previously observed, was passing on the particular facts then before him; but just as the plaintiff's *prima facie* case is weaker now than it was then, so the defendant's case is stronger.

The chancellor, as appears from that portion of his opinion just quoted, was considering together the evidence of both the plaintiff and defendant, and it is significant that he should comment upon "the testimony introduced by the plaintiff to the effect that engine No. 2454 actually threw a spark that retained its vitality for a distance of more than 115 feet so as to set fire to the hay in Goodman's mow." Here doubtless the chancellor was referring to the testimony of Axel, as given in the former trial, that he had seen the fire start in the mow immediately as the last car of the train passed. This testimony is wanting in this record.

The chancellor also comments on the testimony of Cordes and MacDonald, but the analysis of the evidence of these two witnesses (*supra*), shows that their testimony cannot now be taken as of much, if any, value against the defendant.

Again the chancellor comments upon "one of the defendant's own witnesses, an expert" who "testified that in his judgment a spark that had passed through the mesh of such a screen as No. 2454 carried (the screen being intact) would not retain sufficient vitality or fire to ignite combustible material at a distance of 116 feet from the railroad track."

There is no such evidence now before the court.

Three witnesses in the case were asked if they thought a spark could escape through a screen of the size and character used by the defendant and go a distance of 115 feet and retain sufficient vitality to cause a fire.

Mr. Turner said that he had never seen a spark that had set fire to anything at that distance (p. 610, l. 25; p. 611, l. 9); Mr. Maxfield said he doubted it (p.

630, l. 32), and Mr. Rehrig, the discharged employee of the defendant whom the plaintiff called in rebuttal, said that to the best of his judgment it would not (p. 652, ll. 1-5). Whichever way this question was answered was of little real value in this present case.

The evidence now before the court shows that the wind which came from across the track to the plaintiff's barn was due west. This required a spark thrown from an engine, if borne by the wind, as the theory of the plaintiff's case presupposes, to travel a distance of 168.4 feet. Even if, therefore, there were evidence before the court as to the vitality of a spark travelling at a distance of 115 feet that evidence would be of no value now in view of the fact that for the spark to have set fire to the plaintiff's barn it would have had to travel a distance of over 168 feet.

The evidence in the earlier record before this court, which, judging from the opinion of the chancellor, conclusively influenced the court in reaching the conclusion which it did, was much stronger against the defendant than the record now before the court, in that the earlier record contained the evidence of Axel, which is wanting now; the testimony of Cordes and MacDonald was not discredited as it now is, and one of the defendant's own experts had in the earlier trial conceded that a spark communicating fire at a distance of 116 feet presupposed a defective screen. Evidence to this effect was deemed material in the case then, as the chancellor's opinion indicates. But the fact that the spark would have to travel over 168 feet to reach the barn seems either not to have been before the court or not considered, for the distance the chancellor speaks of is the 115 feet which is the nearest distance northwest from the barn to the track.

The chancellor's opinion is simply to the effect that on the record before him the case was one for the jury. It cannot mean that every case of this character is one for the jury, for that would resolve the decision of

this court into a piece of judicial legislation, pure and simple, which is at variance with the statute. At the second trial which was then up for review on writ of error, the trial judge had directed a verdict for the defendant. At the first trial the case had gone to the jury and the verdict for the plaintiff had subsequently been set aside by the Supreme Court as contrary to the totality of the evidence, 46 Vr., 277.

The judgment which the Court of Errors reversed was the judgment which had been directed by the trial judge at the second trial.

All that it decided was that that case was one for the jury.

The opinion of the chancellor, therefore, is not a precedent for the plaintiff as against the defendant on anything except the record then before the court. We have endeavored to point out the differences between the evidence then before that court, and that now before this court so as to emphasize the more the present weakness of the plaintiff's case.

The learned trial judge deeming himself bound by the chancellor's opinion, let the case go to the jury, but in so doing he erred. If this case was one for the jury, then every case of this character must go to the jury, if in fact there was a fire, regardless of evidence to prove anything beyond a mere suspicion that the fire was communicated from an engine, and regardless of evidence under the statute that the defendant used all practicable means to prevent the communication of fire. We do not understand that the decision of this court is to that effect. The case now at bar lacks nearly all the salient features which induced this court to decide that the earlier case was one which could not be decided by the trial court, but required the intervention of a jury. We say, therefore, that the learned trial judge erred in refusing to non-suit or direct a verdict.

II.

There is no evidence to sustain the verdict for the plaintiff in the Mays case.

All that has been said in the previous point on the question of the responsibility of the defendant for the fire to the Goodman property applies with full force to the Mays case.

If our previous point is well taken then the Judgment in the Mays case necessarily falls. But if not, then, the plaintiff in order to recover in the Mays case, had to go still further and show that the fire which destroyed his property was not only communicated to the Goodman property in such a way as to make the defendant responsible therefor, but also that the fire which destroyed his property was the natural and proximate effect of the negligence which caused the Goodman fire.

It is not enough for Mays to have established that the defendant negligently caused the Goodman fire. Even assuming that that fire was negligently communicated by the defendant, there can be no recovery for Mays unless the fire to his property was the natural and proximate result of the Goodman fire.

Justice Dixon, in the case of *Wiley* vs. *West Jersey R. R. Co.*, 44 N. J. L., 247, in speaking of this question, said, p. 251:

> "The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

So far as the evidence in the Mays case indicates, there was no other culpable or efficient agency intervening between the Goodman fire and the destruction of the Mays buildings. The question, therefore, is whether the Mays fire was the "natural" result of the Goodman fire; assuming for the purposes of the argument that the Goodman fire was caused by the defendant's dereliction.

Having in mind that Justice Dixon in the Wiley case says that the term "natural" imports what might reasonably have been foreseen, Justice Depue in the Salmon case throws this light on the term "natural." He said (10 Vr., p. 308):

> "Many results of an act are perfectly natural, and yet, as consequences, are so remote from the act done, as not to involve legal responsibility. For instance, the natural tendency of fire, when kindled, is to spread, and to destroy all combustible matter in its progress. The destruction of a building, however far distant from the place where the fire was kindled, is a natural consequence of the fire, and yet its destruction may be so disconnected from the wrongful or negligent act of building the fire, that the wrong-doer is not legally responsible for the loss.
>
> "The difficulty is to determine, in such cases, when the casual connection is so broken that the legal liability of the wrongdoer ceases."

Our contention is that the destruction of the Mays buildings was so disconnected with the Goodman fire (assuming that that fire was due to the negligence of the defendant), that the defendant is not legally responsible for the loss.

The Mays property was distant from the Goodman property in a straight line by actual survey 1180 feet (p. 536, l. 36). It was situated on the opposite side of the road from the Goodman property and eastwardly from it.

There is no direct evidence whatever that the Goodman fire was the cause of the Mays fire. There is evidence that a volume of smoke rolled eastwardly from the Goodman property toward the Mays property, but that is all the evidence shows, as an analysis of it demonstrates.

Mr. Mays, the plaintiff, on discovering the fire at Goodman's, had run to that place where he stayed for some time and did not know of the fire at his place until he was informed by Mrs. Ulbricht (p. 440, l. 15). He then ran home and found the shingles of his ice house on fire. What caused them to be on fire he did not know.

Joseph Orr, who worked for the plaintiff, Mays, had also gone to Goodman's at the time of that fire, and remained there until he was informed of the fire at Mays (p. 460, ll. 1-8). When he got back to the Mays property he found the side of the roof of the ice house which was towards the railroad on fire. He had no knowledge as to the cause of the fire (p. 460, l. 19).

Stella Mays, a daughter of the plaintiff Mays, had with the others gone to the Goodman fire, and after remaining there a few minutes had returned with a satchel of papers (p. 464, ll. 10-40). She started to return to the Goodman fire when her attention was called by Elsie Ulbricht at the foot of the hill. She immediately returned and found the ice house on fire (p. 465, ll. 1-18). She was specifically asked as to whether or not there were any burning sparks or shingles which could have caused the fire, but her testimony negatives any such idea (p. 465, ll. 19-30):

"Q Did you see anything in the air, or passing through the air, before your ice house got on fire? A Well, of course, the blaze was going very high.

Q Did you see anything going through the air? A It was a very hot, high wind.

Q In which direction was the wind blowing?

A Towards our home.

Q Was there anything going along with the wind? A Well, I suppose shingles, but—

Q Did you see anything? A No, sir, I didn't see them."

Isaac Walker, who lived on the same side of the road as Goodman (p. 468, l. 10), and southeast from Mr. Mays (p. 41, l. 12), was loading hay in the field when he heard the alarm of fire and discovered that Mr. Mays' place was on fire as well as Goodman's. He went immediately to Mays' place to assist in saving what he could, and returned to his own home about an hour and a half after (p. 468, ll. 14-32). When he got back to his own place he found the grass burning behind the barn (p. 468, l. 35), and found "little bits of shingles from off the roof all over there" (p. 469, l. 10). He was specifically asked if he noticed anything in the air, and said, "I didn't notice nothing. I was in too big a hurry" (p. 469, l. 26). He reiterated on cross examination that he was so excited that he didn't notice anything in the air at all (p. 471, l. 38). He says, however, that there were sparks, "but I never looked after them, I was in too big a hurry" (p. 470, l. 17). Whatever sparks there were which he saw, however, he specifically says came from Mr. Mays' own place. On direct examination he said (p. 470, l. 29):

"Q Now, the sparks that you saw in the air, in what direction were they going? A They were coming towards me.

Q From where? A From Mr. Mays'."

He said on cross examination (p. 472, l. 16):

"Q When you got down to Mr. Mays' place, to help save what you could, the whole place was on fire, and there were sparks running around? A Oh, yes, sir.

Q Where these sparks came from, I don't suppose you knew, or did they come from Mr. Mays' place? A They could not come from anywheres else."

This witness's statement that the sparks which were at Mays' place could not have come from anywhere else than Mays, is most significant in view of the fact that at the time he was there the Goodman buildings were also burning.

Frank Englehardt was helping Mr. Mays load hay when the Goodman fire started and like the others he ran to Goodman's and stayed there until the roof got on fire in the Goodman house (p. 472, l. 30 to p. 473, l. 10). He says, that while he was at Mr. Goodman's he saw sparks flying over towards Mr. Mays. The sparks which he saw, if they were starting in the direction of Mays, had just begun their long journey of 1180 feet, and the fact that he saw them starting off in that direction is of no very great significance. When he heard of the fire at Mays, he ran back (p. 474, l. 25), which took him about five minutes (p. 474, l. 19). When he got there he found the ice house roof on fire (p. 473, l. 20; p. 474, l. 30). He had no knowledge as to the cause of the fire.

Elsie Ulbricht was a little girl about ten years old at the time of the fire (p. 456, l. 30). She was sitting out in the yard with her mother. She lived on the same side of the road as Mr. Mays and nearer to the Goodman property than he did (p. 455, ll. 10-20). She saw the Goodman fire. She was called to the stand twice, the second time for further cross examination, and her evidence must be taken together in giving it its due value. Her direct evidence was that she saw sparks passing through the air while the Goodman property was burning, and that they were going toward Mr. Mays', and that she saw the ice house on fire on the roof (p. 455, l. 28 to p. 456, l. 14). On her first cross examination she said that she was watching the fire at Goodman's, that she saw the sparks come from Goodman's, and watched one of them light on the ice house (p. 457, l. 33 to p. 458, l. 2). She thus claims to have done what this court

has held cannot be done, namely, to have seen burning sparks in the daytime (49 Vr., p. 320).

This story seemed so extraordinary that Elsie was subsequently called for further cross examination with the result that it then appeared that she did not see the spark light on the ice house at all, and had no real knowledge of the cause of the fire.

It appeared in this further cross examination that when she first saw the smoke at Mr. Goodman's she went and told her brother, who was in the back of the barn, and they both then ran down toward Mr. Goodman's (p. 480, ll. 30-40). Her mother went also, and they went all the way to Goodman's (p. 481, ll. 1-6). Her mother remained there, but she returned to her own yard and watched the fire from there. When she first returned from Mr. Goodman's the Mays ice house was not then on fire (p. 481, ll. 20-22). A few minutes after her return her mother also returned, and it seems that at the same time some one drove a burned horse from Mr. Goodman's toward her place, and she ran to the barn to get a rope to tie him with (p. 482, ll. 14-20). As she ran to the stable to get this rope she noticed that the Mays ice house was on fire, and that was all she knew about it. She had no knowledge of the cause of the fire nor did she see any spark light on the ice house. Her testimony was as follows (p. 483, l. 2, etc.):

"Q Was this horse much burned?

A Yes, sir.

Q Was he cutting up any or standing perfectly still?

A He was going around.

Q And you wanted to catch him and aid him?

A Yes, sir.

Q As you ran down to the stable, to get a rope, you found that the ice house was on fire?

A Yes, sir.

Q That is right, is it?

A Yes, sir.

Q And that is all you know about it, is it not?

A Yes, sir.

Q You did not see the spark light on the ice house?

A No, sir.

Q It was afire the first you saw of it?

A Yes, sir."

Bertha Ulbricht, Elsie's mother, corroborated Elsie's story to the effect that she was sitting out under the trees at the time the Goodman fire began. She was asked if she saw anything in the air, and her testimony on that was as follows (p. 461, l. 27):

"Q Did you see anything going on at Mr. Goodman's place?

A Yes, sir.

Q What was happening over there?

A I saw a great black smoke, and then I look over the other side of my house, and then I thought it start a fire.

Q What start a fire?

A The barn.

Q What barn?

A Mr. Goodman's barn.

Q Did you see it burn?

A Yes, sir.

Q Did you see anything in the air?

A Yes, sir.

Q What was there in the air?

A Black smoke.

Q Anything else?

A Well, nothing else.

Q Nothing else in the air?

A No, sir.

Q Which direction was the smoke going?

A Right over in front of my place."

Her first information that the ice house was on fire came from Elsie (p. 462, l. 16), and then she looked over and saw a roof burning (p. 462, l. 23; p. 463, l. 10). She had no knowledge whatever as to the cause of the ice house fire.

The fire which began in the Mays ice house was communicated to other buildings on his premises and they were all burned down with the exception of his dwelling house and carriage house.

This was all the evidence which the plaintiff Mays submitted for the purpose of fastening liability on the defendant for his fire. He endeavored to prove, as the questions asked by his counsel show, that a burning spark from the Goodman fire lighted upon the roof of his ice house and ignited it. In this he failed. There is no direct evidence whatever in his case that a spark from the Goodman fire caused the fire to his ice house. On the other hand, some of the evidence in his case is directly to the contrary, notably that of Mr. Walker, who says that the sparks around there could have come nowhere but from the Mays fire itself. No one claims to have seen sparks from Goodman's flying around the Mays property. Englehardt saw sparks at Goodman's starting off in the direction of Mays', but he did not see them at Mays', and even Elsie Ulbricht, as she finally gave her testimony, did not pretend that she knew what caused the ice house fire, or that she had seen any spark light on the ice house roof.

While there is no evidence of any "culpable or efficient agency" intervening between the Goodman fire and the Mays fire so as to show positively that the Mays fire was not the proximate result of the Goodman fire, yet the evidence in the Mays case is such that it cannot possibly be said that the Mays fire was the "natural" result of the Goodman fire within the purview of the Wiley and Salmon cases.

We, therefore, respectfully submit that whatever conclusion may be reached as to the responsibility of the defendant for the Goodman fire, there is no evidence whatever to justify a verdict for the plaintiff in the Mays case, and that the motions for a nonsuit and direction of verdict as applied to this case should have been granted.

III.

The learned Trial Judge erred in admitting the evidence of the plaintiff's witness Pease as to the condition of the screens in engines of other railroad companies than the defendant.

The plaintiff called in rebuttal one Pease who had formerly been employed as a steam fitter for the Central Railroad Company of New Jersey—a railroad company other than the defendant. This witness claimed to be familiar with the screens in engines of that company about the year 1905 or 1906 (p. 684, lines 1 to 20). He was then asked and permitted to answer over the objection of the defendant the following questions (p. 685):

> "Q What condition of wear did you find those screens in when you have worked on the front end?"

Objection was made to this and the trial judge said to the plaintiff's attorney (p. 686, line 1):

> "If you want to take a chance on that question I will admit it. Now go ahead with it. I have my grave doubts about it."

It does not appear from the record that this particular question was answered, but the following ques-

tions were asked and objected to and answered as follows (p. 686, line 11):

"Q Now, Mr. Pease, have you noticed the condition in which those screens will wear?

A Yes, sir, I have."

"Q Do you know how long those screens which you have noticed, how long they have been in the engines?

Mr. McCarter. I object.

The Court. I will admit it.

Mr. McCarter. Prays exception.

Exception allowed; sealed accordingly.

WM. H. SPEER,

(SEAL) *Judge.*

By the Court.

Q Do you know?

A Yes, sir.

The Court. All right, go ahead.

By Mr. Whittemore.

Q Have you ever noticed a screen which has been in an engine in operation and use—passenger engine, for a period of four months, have you ever noticed such a screen?

A Yes, sir.

Q Well, now, how does such a screen wear? How have you found such a screen to wear, and in what condition do you find it at the expiration of four months?

Mr. McCarter. I object, as directly irrelevant. The evidence is that the screen in the Jersey Central has a different mesh, and it don't appear that they use the same kind of coal. The conditions might be as variant as possible. Those two conditions appear right away to me to make it directly immaterial. They may be careless. We are not responsible for the Jersey Central.

The Court. I have grave doubts about it, but I am going to let it in.

Mr. McCarter. Prays exception.

Exception allowed; sealed accordingly.

WM. H. SPEER,

(SEAL) *Judge.*

Q What size wire do they use on those screens, do you know?

A I don't know the scale of the wire, but I know some of them had one-quarter inch mesh and some of them three-eighths inch mesh. It was a heavy wire, just similar to this.

Q Well, now, state what was the extent of wear at the end of four months?

Objected to.

The Court. I will admit it.

Mr. McCarter. Prays exception.

Exception allowed; sealed accordingly.

WM. H. SPEER,

(SEAL) *Judge.*

A The reason I can explain that is this: About every three or four months the extensions from the blower pipe, and also the exhaust from the air pump coming in, have to be renewed in the stack, and that is the reason I can tell you the condition of the screens through noticing when getting in to make those repairs. I have seen them, getting in there, all coated up and big holes in them, were probably they would not draw good for the engineer and he would take his pick and drive a few holes in it.

Mr. Whittemore. I move to strike that out.

Mr. McCarter. I don't.

Mr. Whittemore. That was not responsive.

The Court. That will come out.

A The wear generally strikes it back of the penal blade, or diaphragm, where the sparks coming through the flues strike against and hit against the back of the screen; down at the foot where the ashes lay, and probably the moisture from the exhaust, or something getting in those ashes and acting on the gases coming from the coal. Of course, I cannot say, but that is my idea of it.

Q What is the condition of repair?

A It will rot away at the bottom.

By the Court. Q How long will it take it to rot away?

A Oh, probably about four or five months.

Q Four or five months?

A Yes, sir.

Cross examination by Mr. McCarter.

Q Mr. Pease, I don't think you ever worked on the Lehigh Valley?

A No, sir."

There can be no rational ground on which this evidence was admitted. The witness did not work for the defendant and knew nothing about their methods of procedure. The fact that holes were found in screens of the Central Railroad Company—another company—or that their screens were rotten at the bottom had nothing whatever to do with this case. Such evidence could have no other effect than to prejudice and poison the minds of the jury. By admitting this evidence the defendant was condemned by the actions of another railroad with which it had nothing to do and over which it had no control. The Trial Judge himself frankly conceded his grave doubt as to the materiality of the evidence and only consented to admit it at the urgent request of the plaintiff's attorney. It requires no citation of authorities to show that such evidence was improperly admitted.

Its effect upon the minds of the jury must have been most harmful to the defendant. It was clearly irrelavant and improper. The judgments should be reversed for this very harmful error.

IV.

The witness James E. Goodman, was improperly permitted to testify from a memorandum to which was appended values of the articles mentioned therein.

At the time of the trial James E. Goodman, the original plaintiff, was dead. His testimony which had been given at an earlier trial of the case was read at this trial pursuant to section 10 of the Evidence Act (P. L., 1900, p. 364), which reads as follows:

> "10. In case of a new trial of any civil action wherein the parties have been examined as witnesses, if either party shall have died since the former trial, and the action shall have been duly revived and proceeded with at the suit of or against the legal representatives of such deceased party, the surviving party and also such legal representative shall be competent witnesses on such new trial, and the testimony of such deceased party on the former trial of said action may also be proved and admitted on the new trial thereof."

Considerable discussion took place at the trial as to the propriety of admitting in evidence certain questions and answers which had been objected to at the time Mr. Goodman originally gave his testimony (pp. 331 to 334). The result finally was that the learned Trial Judge concluded that he could not exclude testimony which had been given at the earlier

trial (p. 334, l. 1, &c.). Accordingly the objections which had been made at the earlier trial were made at this trial and exceptions were allowed and sealed by Judge Speer (p. 558, ll. 1-20).

It appeared in the evidence of James E. Goodman that two months after the fire his wife, his son, his daughter and himself got together for the purpose of making out a list of articles which had been burned and affixing values thereto. The list which resulted was the composite production of the four (p. 349). He did not pretend to have accurate personal knowledge of all of the articles mentioned or of the values affixed thereto. The list as prepared was the joint result of the several recollections of the four. Mr. Goodman was permitted by the learned Justice who tried the original case—Justice Swayze—to hold this list in his hand and to testify from it. The list was not formally offered in evidence and marked as an exhibit, but to all intents and purposes it was in evidence and the effect was precisely the same as though it had been so admitted. The witness used it and testified from it not only as to the articles burned, but also as to their value. At the original trial this procedure was objected to (p. 350, l. 10; p. 351, l. 20), the objection being:

> "That in using that list having appended to it a value, that he ought not at the time fix the value of those goods, but that the value fixed ought to be fixed without reference to the memorandum that he has there" (p. 351, l. 20).

Justice Swayze, in answer to that objection, ruled:

> "Well, I think differently. I will allow him to use the whole of this memorandum" (p. 351, l. 26).

An exception was prayed at the time and allowed and sealed. When this evidence was sought to be intro-

duced in this trial the same objection was again urged and an exception signed and sealed by Judge Speer.

In thus admitting this evidence of James E. Goodman which had been given at the former trial, Judge Speer ruled diametrically opposite to the rulings which he made in passing upon offers of evidence of a similar character from the witness who were called and testified in the trial over which he presided.

In seeking to introduce evidence as to the character of the loss and the values of the property destroyed counsel for the plaintiff called Theodore A. Pope and Ernest Wilcox, two carpenters who, after the fire, had gone over the ruins and made a joint estimate as to the value of the buildings and the extent of the loss. When Mr. Pope sought to testify or refresh his recollection from the memorandum which had thus been prepared, Judge Speer refused to permit him (p. 164, ll. 1 to 25; p. 173, ll. 10 to 20).

Mr. Wilcox in testifying as to the way the paper had been prepared by him and Mr. Pope said, in answer to questions by the court (p. 276, ll. 5, &c.):

> "*By the Court.* Q How much did you get from Pope, Mr. Wilcox?
>
> A Why, we would take these plans and we would both sit—
>
> Q I am asking you how much information you got from him? For instance, when you wanted to know anything, would you ask Pope?
>
> A Sure.
>
> Q And he told you what he knew and that went down?
>
> A Yes, sir.
>
> Q But you didn't know what you asked him until he told you, did you?
>
> A No, sir.
>
> Q So that that is the product of your knowledge, and Pope's knowledge, taken together, isn't it?

A Exactly.

Q And some of it he knew and you didn't know, and some of it you knew and he didn't, isn't that it?

A Yes, sir; that is right.

The Court. I am prepared to rule.

Mr. English. I am prepared to object.

The Court. I will sustain the objection."

The result was that the memorandum offered was overruled; nor was the witness allowed to refer to it in giving his testimony.

The same ruling was made when it came to the testimony of Mrs. Sarah E. Goodman, the widow of James E. Goodman. She was one of those who had participated in the making of the memorandum which James E. Goodman was permitted to testify from. She testified of the making of the list by the joint efforts of herself, her husband and her daughter (p. 292, l. 16), but was not permitted to testify from this list. In fact because of the previous ruling of Judge Speer in connection with the memorandum prepared by Messrs. Pope and Wilcox, counsel for the plaintiff did not attempt to have Mrs. Goodman testify from the memorandum as James E. Goodmna at the earlier trial had been permitted to do (p. 293).

Mrs. Goodman gave her testimony independent of the memorandum.

In ruling as he did—although it was contrary to the ruling of the learned Justice who had presided at the earlier trial, Judge Speer was undoubtedly right. The paper was not the memorandum of any of the witnesses called upon to use it. It did not represent their own independent recollection or their own independent personal knowledge. It was the composite result of a number of minds and a large part of it, as far as any individual witness was concerned, was purely hearsay matter.

That such a paper cannot be offered in evidence is well settled.

Field vs. *Thompson,* 119 Mass., 151.
Bentley vs. *Ward,* 116 Mass., 333-337.
Lindenthal vs. *Hatch,* 32 Vr., 29.
Diament vs. *Colloty,* 37 Vr., 295.
North Hudson Railway Co. vs. *May,* 19 Vr., 401.

In the last case above cited the Court said, a memorandum made at the time of the accident might have been used by the conductor to refresh his recollection, but it was only because it was made contemporaneously with the accident.

This is very different from using a memorandum with values affixed, made more than two months after the fire.

In *More-Jonas Glass Co.* vs. *West Jersey, &c. R. Co.,* 47 Vr., 708, the witness, who was general manager of the plaintiff's factory, was allowed to use a memorandum made by himself shortly after the fire, to refresh his memory as to what tools and instruments were destroyed by the fire. In sustaining this, this court said (p. 709):

> "In permitting the witness to use the schedule thus prepared for the purpose of stimulating his present and existing recollection, the trial judge was clearly within the rule that a witness may, while under examination, refresh his memory by referring to any writing *made by himself at the time of the transaction, concerning which he is questioned,* or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory." (Citing cases.)

In the case at bar, the memorandum was not made by the witness himself, but was the composite result

of himself and three others, and moreover, it was not made at the time of the fire, or immediately thereafter, but two months after the fire had occurred.

When it came to the reading of the testimony of James E. Goodman, Judge Speer held that the testimony should be admitted exactly as given at the earlier trial. In doing this he seems to have followed the ruling of this court in *Brown* vs. *Honiss,* 45 Vr., 501. In that case the testimony of the deceased witness Brown was read at the trial. It appears from the opinion (p. 505) that objection was made to the admission of the evidence of Brown as bearing upon certain matters. It does not appear whether this same objection had been made at the trial at which Brown testified was whether they were made at the trial for the first time at which his testimony was read, so that there is nothing in that case which furnished a precedent for the guidance of the court in this case.

The memorandum sought to be introduced in connection with the testimony of Messrs. Pope and Wilcox, and the memorandum used in connection with the testimony of the late Mr. James E. Goodman, were identical so far as the legal principle involved is concerned.

The learned Judge who presided at this trial held, in connection with the evidence of Messrs. Pope and Wilcox and also of Sarah E. Goodman, that such a memorandum could not be used.

But he allowed the testimony of the deceased witness, James E. Goodman, who used the same memorandum, to be read in evidene. It cannot be that the testimony given from this memorandum was competent evidence, and the action of the learned Justice who presided over the earlier trial in permitting the use of it was undoubtedly erroneous.

This being so one of two things must follow.

(a) Either Judge Speer was wrong in permitting the testimony of James E. Goodman containing this improper evidence to be read; or

(b) If he correctly permitted it to be read, that part of the testimony which was thus admitted over objection was improper and should not have been originally introduced into the case.

On either view of the dilemma a very serious error resulted for which there should be a new trial.

V.

The learned Trial Judge committed error, both in admitting evidence, and refusing to charge as requested, in reference to the use of diaphragms.

The plaintiff's witness in rebuttal, William B. Munn, was asked this question (p. 664, l. 9):

> "Q Did the Central Railroad have any diaphragms in their engines"?

Objection was made to this question to which an exception was signed and sealed and the witness was allowed to testify that the said engines did "all have diaphragms pretty much."

When it came to the charge the Trial Judge was requested, among other things, to charge as follows (p. 725, l. 27):

> "15. Whatever evidence there is in this case in reference to the installation and use of diaphragms is immaterial to this issue, and must be disregarded by the jury."

There was evidence in the case as to the effect upon the sparks as they came from the engine, striking

against the diaphragms in those engines in which diaphragms were installed (p. 623, l. 20 to 624, l. 20; p. 630, l. 35). The testimony was that the diaphragm had nothing whatever to do with the screen but was simply to regulate the draft. As a physical fact, however, the sparks in coming from the engine did strike against the diaphragm.

The position of the Trial Judge on this question seems to have been uncertain. The plaintiff's witness Donovan on rebuttal was asked:

> "What effect has the diaphragm on the sparks"?

(p. 655, l. 40), to which objection was made and sustained (p. 656, l. 25). Again the witness Munn was asked:

> "What is the effect upon a spark from striking the diaphragm of an engine"?

to which again objection was made and sustained. In passing on the objection to this question the Trial Judge said (p. 664, l. 40):

> "So far as its (diaphragm) effect is concerned I am going to charge the jury that the railroad company is under no obligation whatever to place a diaphragm on an engine which is provided with a proper screen."

When it came to the charge he did at the defendant's request, charge as follows (p. 709, l. 33):

> "14. The defendant was not required to install diaphragms in its engines. The fact that no diaphragm was installed in engine No. 2454, does not cast any liability on the defendant in this case."

It would seem that if the fourteenth request was proper to charge, the fifteenth was also, for if the fact that no diaphragm was installed in the engine

cast no liability on the defendant, then surely whatever evidence there was in the case in reference to the installation and use of diaphragms was immaterial to the issue, and the jury should have been instructed to disregard it.

A reference to the statute demonstrates this. Section 56 of the Railroad act (P. L. 1903, p. 673) lays down specifically what a railroad company shall do in order to free itself from liability for the communication of fire from its engines. The railroad by this section is required to take and use all practical means to prevent the communication of fire; and the "practical means" are defined in the section to be "to provide such engine with a screen or cover in the smoke stack so as to arrest and prevent as much as practicable the escape of fire." The thing for the railroad company to do, therefore, to save itself harmless is to provide its engine with a screen or cover in the smoke stack. The section further provides that any company refusing or neglecting to "make such provision," *i. e.*, to provide a screen or cover in the smoke stack, shall forfeit for such refusal or neglect one hundred dollars to be recovered in an action on contract, &c.

The liability of a railroad company for fire is purely a statutory one, and the statute lays down those rules which the company must observe in order to be freed from the liability which the statute imposes. When, therefore, the railroad company obeys the statute to the letter there is nothing further for it to do. The engine in question, 2454, was proved to have had a screen in its smoke stack as efficient as any in use by railroads. This complied fully with the law. Whether or not it had diaphragms or other internal arrangements had nothing to do with the case. The learned trial judge seems to have had this view (p. 655, lines 1 to 25). If this view was correct, as it undoubtedly was, there seems no theory on

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which evidence relating to the use of diaphragms could have been material to this issue. In refusing to charge the fifteenth request therefore the learned trial judge erred.

VI.

The learned Trial Judge erred in refusing to charge certain requests as requested.

The fourth request to charge was as follows (p. 723, l. 25, &c.):

> "4. The plaintiffs are bound to look out for, and take every precaution against, fire caused by sparks from a locomotive, which has been properly supplied with every practicable means to prevent the escape of sparks, and if the jury believe that the fire in question was due to a spark escaping from such a locomotive which nevertheless, owing to the high wind and the dry weather, and the exposure of a highly inflammable substance like hay, set fire to the plaintiff's property, then there can be no recovery in the case."

This the court refused to charge (p. 704, l. 29), and an exception was duly signed and sealed (p. 719, l. 38, to p. 720, l. 3).

The judge was also requested to charge as follows (p. 723, l. 38):

> "5. The owner of property adjacent to a railroad should use proper care in the use thereof, so as to guard against fire originating from the locomotives, without the fault of the company, and if the fire in question arose under those circumstances, then there can be no recovery."

Instead of charging this fifth request as requested, he qualified it as follows (p. 704, l. 36):

> "The law in this state says, that reasonable care is the duty of everyone, and reasonable care

in this case, was the duty of this plaintiff—but the rule in regard to that is laid down as follows:

'The owner of lands—and I charge you that this is the law, in qualification of that request—the owner of lands adjacent to a railroad, is not obliged to keep his lands contiguous to the track free from leaves or other combustible matter, coming or being thereon. He may cultivate, build upon and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself no other risks than such as are incident to the operation of the road, with proper care, by the company, and will, nevertheless, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain'—that is the law in this state on that subject."

To this qualification an exception was signed and sealed (p. 720, l. 10).

In refusing to charge the fourth request, and in qualifying the fifth request, the learned trial judge failed to distinguish the language of the requests from the law which he quoted in justifying the qualification which he gave to the fifth request. The case which the judge read from in qualifying the fifth request was *D., L. & W. R. R. Co.* v. *Salmon,* 10 Vr., 299, p. 312. It is apparent from the language of Justice Depue in that case that the pronouncement of law which he there made was predicated upon the idea of a fire arising from the negligence of the company. The requests which were refused or qualified, were predicated on no such idea. They presumed a fire from an engine which had strictly complied with the requirements of the law. The fourth request referred to an engine "which had been properly supplied with every practicable means to prevent the es-

cape of sparks" and the fire assumed in that request was one due to a spark "escaping from *such* a locomotive," *i. e.,* one which had perfectly complied with the law.

So in the fifth request the charge related to a fire "originating from a locomotive without the fault of the company." In the Salmon case, Justice Depue, in speaking of the dtuy of a land owner, said that he was entitled to remedy "for injuries by fire arising from the *negligence* of the company in the construction or management of its locomotives."

The two sets of circumstances—those in the Salmon case, on which the trial judge relied, and those in the two requests—are so different, that the Salmon case is not applicable. We think that the defendant was entitled to the requests as made and that the trial judge erred in refusing to so charge.

(b) The trial judge erred in the qualification which he gave to the seventh request to charge.

The seventh request reads as follows (p. 724, l. 15):

> "7. The railroad is not bound to insure that its inspection will disclose defects in the screen. It is only required to use due care in such inspection, and if, notwithstanding such care was exercised, a defect nevertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire from the locomotive, to plaintiff's property, the company is not responsible therefor."

Instead of charging this request, the trial judge qualified it as follows (p. 706, l. 1, etc.):

> "The railroad is not bound to insure that its inspection will disclose defects in the screen, it is only required to use due care in such inspection—and I charge you now, as I did before, that in cases of this kind, due care means a high de-

> gree of care, and if, notwithstanding such care was exercised, a defect nevertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire to the plaintiff's property, then the company is not responsible therefor, and I charge you with this qualification, that a reasonably careful inspector must, in making his inspection, have and use a high degree of care in his inspection, and if after using such high degree of care, the defect escapes his attention, then the company would not be liable—that I charge you, gentlemen."

In this language he defines "due care" as a "high degree of care," and by so doing necessarily gave the jury the impression that some extraordinary degree of care was necessary.

We find no such definition of "due care" in the books in this connection, nor do we find any authority for qualifying the expression "due care" in the manner which the trial judge did.

In *Wiley* v. *West Jersey R. C. Co.*, 15 Vr., 247, Judge Dixon said (p. 250):

> "The design must have been to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed, by those operating it, against such a disaster, and so place upon them the burden of proving the exercise of due care."

So this court in the opinion of the chancellor in this same case (49 Vr., 317), followed the rule laid down in the Wiley case, and said, in commenting on it (p. 321):

> "In that case the plaintiff claimed that by evidence tending to show that the fire was commu-

nicated by an engine of the defendant company, the burden of proof was cast upon the defendant. The latter, on the other hand, denied that the law became applicable until the plaintiff should further show that the fire was communicated in violation of the preceding sections of the act, that is, for want of the use of screens or some other practicable means. The court rejected the latter contention on the ground that to accept it would render the section utterly futile, and held that the legislative design was to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed by the company to prevent the communication of fire, and so placed upon the company the burden of proving the exercise of *due care.*"

In both of these cases the court used the words "due care." The request employs the same language. If the railroad was required to use only due care in the installation of the apparatus to prevent the communication of fire by sparks, it was likewise required to use only due care in the inspection of this apparatus. In qualifying the request to charge in the way he did, the trial judge imposed a higher duty on the defendant than the law imposes and hence committed error.

(c) The defendant's eighth request was as follows (p. 724, l. 23):

> "8. If the jury believe that the locomotive was provided with a srceen so as to arrest and prevent, as much as practicable, the escape of fire, then no recovery can be had in this case."

This the trial judge refused to charge (p. 706, l. 21), and exception was duly signed and sealed (p. 720, l. 20).

This request to charge was expressed in the language of the statute and would seem to be a proper

request. No reason was assigned to the trial judge for refusing to charge it, and no reason seems assignable. The question which the jury were to ascertain was whether the defendant's locomotive was in fact provided with a screen so as to arrest and prevent as much as practicable the escape of fire; and if the jury so found, the verdict must of necessity have been for the defendant. It would seem that the defendant was clearly entitled to the instruction requested, and that the refusal to charge the same was error.

(d) The defendant's eighteenth request was as follows (p. 726, l. 4):

> "18. The undisputed evidence here is, that the screen in use by the defendant is as efficient as any in use by the railroad companies generally, the fact that the defendant did not use the basket screen or some other form of screen is immaterial."

This was also refused (p. 710, l. 29), and exception taken (p. 720, l. 38).

There was evidence in the case that there are several kinds of screens used to prevent the escape of fire from locomotives. One is the cone screen, such as is used by the defendant, and the other is the basket screen, otherwise known as the master mechanic's screen (p. 629, l. 35). It is a matter of opinion with railroad men as to which is the better, but the testimony of all the witnesses was that the cone screen used by the defendant was as efficient as any to prevent the communication of fire by sparks.

The statute nowhere requires that one kind of screen must be used in preference to another. All that it provides is that the defendant must prevent the escape of fire as much as practicable by installing a screen or cover in its smoke stack. The defendant did install a screen which was concededly as efficient

as any. There was no requirement on it to use the basket screen or any other particular form of screen. The fact that there was evidence showing that the basket or some other form of screen is sometimes used by railroads may have given the jury the impression that the defendant had not done its full duty in that it had not used such screens. If such an impression existed, as is possible, the defendant was entitled to have that corrected by the charging of the eighteenth request. The trial judge refused this, and, as we think, improperly.

VII.

The learned Trial Judge erred in the admission of evidence in the following particulars:

(a) The trial judge permitted the plaintiff's counsel to ask the witness Thomas McDonald the following question: "How did that field get on fire?" (p. 147, l. 27).

This question was highly improper. Mr. McDonald claimed to have discovered a fire in the field near where he was working, shortly after the train went by. He had no real knowledge as to how it got on fire. His evidence showed (p. 150, l. 39), that when he came out of the carriage house he saw the smoke in the field, and that, he said, was all he knew about it (p. 151, l. 1). In order to have properly answered the question objected to, he should have seen the spark fly from the locomotive, light in the field, and set the field afire. This he did not pretend to have seen. It was daylight, and he could not have seen the spark if he had been looking. As a matter of fact he was not looking, and only discovered the fire after the train had gone by. It was, therefore, improper to have permitted him to say that the field got on fire from the locomotive. There is nothing in his evidence

to warrant his saying that, or to warrant him in expressing any opinion as to how the field did get on fire. Such evidence must necessarily have prejudiced the jury.

(b) Of the same character was the question put to and permitted to be answered by James E. Goodman: "Who would have any occasion to go into the barn on the afternoon of that day?" (p. 358, l. 8). The design of this question was, doubtless, to show that the employes on the farm had not gone into the barn and set fire to it on the afternoon of the fire. It is manifestly absurd, however, for Mr. Goodman to have undertaken to say that no one would have any occasion to go into the barn after the last load of hay had been unloaded. It is entirely conceivable that after the men had quit working in the barn, that one or more of them might have had occasion to go back to get something which had been forgotten, or to give attention to the horses, or to have attended to any one of a hundred things which has to be done around a farm barn. In any event, it was highly improper to have permitted the witness to answer the question in the form in which it was put.

(c) The trial judge permitted the plaintiff's counsel on cross examination of the defendant's witness, Amos Turner, to ask him the following question: "Do you think that a spark would escape through a mesh of one-fourth inch in size, in good order, and extend over a distance of 115 feet and have life enough left in it to set fire at that distance?" (p. 610, l. 25). This witness had qualified as an expert on the character of screens used in locomotive engines to prevent the communication of fire. He undoubtedly was a thorough expert on screens. He was not, and did not pretend to be, an expert on the life of sparks. He had given no testimony which would qualify him or enable him to testify in answer to the question

put, and the question was not a cross-examination of anything which had gone before in his testimony.

To the same effect was the question put the defendant's witness, Howard H. Maxfield (p. 630, l. 20): "And in your opinion would a spark, coming through a screen of this character, as is shown here, in good order, go to a distance of 115 feet and retain sufficient vitality to set fire at that point?" Here, again, no foundation was laid in the direct examination for the asking of such a question, nor did the witness pretend to be an expert on the life of sparks, but on screens in locomotives.

The same improper question was put to the plaintiff's witness in rebuttal, Rehrig (p. 649, l. 16; p. 652, l. 1). Mr. Rehrig had formerly been a locomotive engineer. He disclosed no qualification whatever to enable him to answer such a question.

These questions, we submit, were all improper and tended to prejudice the jury.

(d) The learned Trial Judge improperly permitted the plaintiff's counsel to cross examine the defendant's witness Shannon upon the contents of a memorandum book which the witness had used to refresh his recollection although said book was not offered in evidence by either side.

The book which the witness produced was his book of original entry (pp. 538 and 539).

The defendant did not offer it in evidence (p. 552). The plaintiff's counsel endeavored to force the defendants to put it in evidence and failing that, endeavored to treat it as in evidence for the purpose of cross examination. (See the long discussion on this; pp. 563 to 572).

The up-shot of it was that the court permitted counsel to cross examine on the book as though it were in evidence and a long cross examination accordingly followed (pp. 573 to 578). This was subject to objection to which an exception was sealed (p. 572,

l. 20). In permitting this use of the book on cross examination, it seems to us that the learned Trial Judge violated the rule and permitted cross examination on a record not in evidence, which must have resulted harmfully to the defendant.

(e) The plaintiff's witness, Taylor, on rebuttal was permitted to answer the following question:

> "Was any inspection made otherwise of the engine?" (p. 674, l. 3, &c.).

This witness had formerly been employed by the defendant to run a freight engine between Bound Brook and Jersey City. He undertook to testify as to the practice of inspecting engines at Jersey City. He failed entirely to show that he had any knowledge of the practice, or that he had any knowledge of any matters relating to the inspection of engines at all. His testimony showed that as soon as he got to the round house and put his engine on the ashpit he left it (p. 678). In, therefore, attempting to testify as to what the practice was at Jersey City, he was called upon to testify about a matter which he knew nothing about. In permitting this the Trial Judge clearly erred.

VIII.

The learned Trial Judge erred in admitting evidence as to the cost of individual buildings on the Goodman farm.

At the trial the court, over the objection of the defendant's counsel, permitted Edward V. Goodman to testify as to the cost of certain buildings which were affixed to, and a part of, the realty. In particular he was allowed to testify as to the cost of a water closet (p. 231, l. 20; p. 232, l. 20), and to the cost of a carriage house (p. 232, l. 33). James E. Goodman

was allowed to testify as to the cost of a carriage house (p. 336, ll. 1-20), and also to the cost of certain papering and painting to the house (p. 336, ll. 36, &c.).

The case contains a great deal of evidence tending to show the cost of various articles of personal property with a view of aiding the jury in arriving at the damages. When it came to the question of damages to the realty, however, the rule invoked by both sides as to the true measure of damages, was the difference in market value of the real estate before and after the fire. This was taken as the true rule under the authorities.

In *D. L. & W. R. R. Co.* vs. *Salmon*, 10 Vr., 299, 316, the judge charged the jury that the measure of damages was the difference in the market value of the lands burned over before and after injury. This charge was sustained by this court, except that it should have included compensation for the value of wood that had been cut and was lying on the plaintiff's land.

The same measure of damages in cases of destruction to the inheritance by fire has been established in New York, in *Argotsinger* vs. *Vines*, 82 New York, 309, 313.

To the same effect see *Dwight* vs. *Elmira, etc.*, 132 New York, 199, 200.

In *Van Deusen* vs. *Young*, 29 New York, 9, it was held that where timber had been cut from land, thus depreciating the value of the inheritance, the measure of damages was the difference between what the land was worth before the timber was cut and what it was worth afterwards.

In *Amer. and English Ency. of Law*, second edition, volume III, page 538, it is said:

> "Where the injury by fire is to real property, the rule most frequently stated is that the meas-

ure of damages is the difference in the value of the realty immediately before and immediately after the conflagration."

On this theory both sides produced experts to testify as to the value of the farm both before and after the fire.

The evidence in question, however, was of a different character. The buildings, the cost of which or the cost of repairs to which, before the fire, were all covered in the testimony offered and admitted, showing the value of the farm before and the value after the fire. There is no precedent, that we know of, permitting the supplementing of this kind of evidence with detailed evidence as to the cost of individual buildings—which buildings are a part of the realty, as was the case here. We say, therefore, that the learned trial judge erred in admitting this evidence. The harmful character of it and its effect upon the mind of the jury appears from certain questions asked by one of the jurors bearing upon the value of these individual buildings as such, apart from the value of the lands burned over, as such (pages 169 to 172, and especially page 171).

On all the grounds urged the judgments should be reversed in all three cases.

Respectfully submitted,

McCARTER & ENGLISH,
Attorneys of Defendant.

June Term, 1911.

New Jersey Court of Errors and Appeals

EDWARD V. GOODMAN,
EXECUTOR, ETC., OF JAMES E. GOODMAN, DECEASED,
Plaintiff and Defendant in Error,
vs.
THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.
Defendant and Plaintiff in Error.
} IN TORT.

EDWARD V. GOODMAN,
Plaintiff and Defendant in Error,
vs.
THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.
Defendant and Plaintiff in Error.
} IN TORT.

EDMUND MAYS,
Plaintiff and Defendant in Error,
vs.
THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.
Defendant and Plaintiff in Error.
} IN TORT.

Brief for Plaintiffs Below and Defendants in Error.

The above three suits are actions for negligently setting fire to the properties of the respective plaintiffs by sparks from a locomotive of the defendant. The suits were consolidated for the purpose of trial.

Briefly stated, the facts are as follows: The farm of James E. Goodman is adjacent to defendant's right of way and on the farm were located the various buildings shown on the map at the end of the state of the case. On July 19th, 1905, about 3:45 P. M., a train passed, going toward New York. It was a very hot day, with a strong breeze blowing from the railroad toward Goodman's barn, located one hundred and fifteen feet from

the track. That morning and noon, Goodman had been putting hay into the barn and it was full. The barn doors were open toward the railroad. There was no one about the barns and no fire in the barns. A few minutes after the train had passed, a boy employed by Goodman discovered, while on his way from the field to the barn, that the barn was on fire, and saw the fire just inside the barn doors in the hay, and gave the alarm. Under the impetus of the strong wind, the fire spread with great rapidity and burned down all of the buildings on the farm and their contents.

James E. Goodman has died pending the action, and his executor has been substituted since the first trial, which resulted in a judgment that was set aside by this court on rule to show causes. 75 N. J. L. 277, 68 Atl. 63. A re-trial was had and on the same evidence taken on the first trial the opinion of the Supreme Court was followed, and it resulted in a direction of a verdict; and the plaintiff took a writ of error to the Court of Errors and Appeals. That Court set aside the judgment. The opinion is reported in 78 N. J. L. 317, 74 Atl. 519. A new trial having again resulted in a judgment, for plaintiff, a rule was taken by defendant, which was discharged by the Supreme Court, and then this writ of error was sued out.

The plaintiff in the second suit, Edward V. Goodman, owned certain personal property contained in his father's house, and sues for its value, and was given a judgment by the jury.

The plaintiff in the third suit, Edmund Mays, had a farm near Goodman's. On this eventful day, the wind was blowing directly from Goodman's buildings toward those of Mays, carrying with it large volumes of smoke, sparks, burning shingles, etc. The roof of the ice-house belonging to Mays caught fire, while he was at Goodman's place endeavoring to be of assistance. The ice-house, barns, and all other buildings on May's farm except his residence, were burned down, and the contents of all of them were destroyed. He sues for the damages sustained, and the jury has given him a verdict.

Very numerous errors have been assigned by the defendant, but in this brief it will only be necessary to discuss those urged by the counsel of the defendant in his brief. For the sake of convenience, this brief will follow the order of argument adopted by my adversary.

I.

THERE WAS EVIDENCE TENDING TO PROVE THAT THE FIRE OF JULY 19th WAS CAUSED BY A SPARK FROM DEFENDANT'S LOCOMOTIVE, AND IT WAS SUFFICIENT AT LEAST TO JUSTIFY REASONABLE MEN TO REACH A CONCLUSION THAT THE FIRE WAS SO CAUSED, AND THERE WAS NO ERROR IN THE REFUSAL TO NON-SUIT.

With Regard to All Three Suits.

The Supreme Court has refused, on rule to show cause, to set aside these verdicts as contrary to the evidence and the weight of evidence. Although there is no direct appeal from this decision allowed by law, the defendant now, by virtue of the exceptions reserved, practically secures a review of the correctness of the decision of the Supreme Court, as to the motions for non-suit and direction of verdict. If the Supreme Court had decided the other way, the plaintiffs would have been without remedy by appeal.

The evidence produced as to the probability of the fire being caused by sparks, is sufficient to satisfy any reasonable man that the fire was so caused. It is true that the evidence is circumstantial, but nevertheless, strong and convincing; it might almost be said to be as strong as it could possibly be under the circumstances. Direct evidence is not possible, as sparks cannot be seen in the day time (p. 535, ll. 33-40; p. 681, l. 30).

No cause for the fire appears in evidence other than sparks from locomotives. The conditions proved were

favorable to the setting of a fire by sparks,—a hot, dry day, with a strong wind blowing from the railroad to the barn. The fire broke out immediately after an engine passed. The possibility that the fire could be caused by a spark blown from the railroad, for the distance required, has been amply demonstrated. The existing facts proved are not controverted.

The setting of the fire by sparks is perfectly consistent with existing conditions. There hardly seems to be ground for a reasonable doubt that the fire was so caused. Men have been hanged on no stronger evidence.

This case has been before the court so many times that we have the benefit of both the judicial and laymen's opinions on the sufficiency of the evidence. At the first trial on evidence almost entirely corresponding, Mr. Justice Swayze deemed the case to be a proper one for the jury; that jury was satisfied that the fire was caused by sparks; while the Supreme Court held the evidence as to the screen in the engine to be a complete defense, this Court afterward declared all the evidence to have been sufficient to be passed on by the jury; the learned trial Judge at the last trial, considered the question at issue should be decided by the jury; that jury also found in favor of the plaintiff; the Supreme Court has refused to disturb the verdict; and now it will be necessary for this Court to say whether all of this legal and lay judgment favorable to the plaintiff is without a sufficient foundation as a matter of law.

The evidence in this case surely furnishes ground for a finding that it was reasonable that a fire did originate from sparks.

Minard vs. W. Jersey R. R. 64 Atl. 1054.

The court's attention will be directed to various portions of the evidence.

(a) The conditions were favorable to the setting of the fire by a spark.

The barn was 72 feet from the railroad fence and 115 feet from the east bound track. (See Map).

The barn doors were open facing the railroad, and the mows were filled with hay on both sides of the gang-

way, with wisps of hay lying around as usual after unloading.

The day was a very hot one, and the weather had been dry for a long time before.

The wind was blowing *very strongly* from the railroad to the barn. The claim that the evidence in part was to the effect that the wind was blowing in the other direction, is not correct. It is true that some of the witnesses used the expression that the wind was west, or was a west wind, but their testimony clearly shows that they meant the wind was blowing *from* the west, and when one said the wind was southeast he meant the wind was blowing *toward* the southeast. That is evident by his apprehending that something was burning (p. 85, l. 38) when he was at his home 1,180 feet away in a southeasterly direction and the odor could not have been carried in that direction, if the wind was blowing strongly the other way. This witness, Mays, says it was "blowing very hard and it was very dry" and the weather was "fair, warm and windy" (p. 87, ll. 25-28). An offer was made to prove by this witness the force and direction of the wind (p. 88, l. 12) and overruled. On his own case he shows beyond question that he meant the wind was blowing *toward* the southeast. He says the wind took the sparks "direct to his place" (p. 441, l. 4) which would be in a southeasterly direction.

Again it is represented that Andrew Polimbo testified the wind to be blowing *toward* the west. This is his testimony: p. 55, lines 29 to 39,

Q. You say this was a windy day?
A. Yes, sir.
Q. In which direction was the wind blowing?
A. I should say it was blowing northwest.
Q. Will you show us on the map the way the wind was blowing?
A. In this direction (indicating southeast).
Q. Do you mean it was blowing from the northwest?
A. Yes, sir.
Q. Indicate that direction again, show us how the wind was blowing.

A. This way, here (witness indicates a direction almost due west).

The stenographer in stating the witness indicated "a direction almost due west" meant as the witness did, that it was blowing *from* the west. There is no more reason for claiming the witness testified the wind was from the west, than that he said the wind was from the southeast, as appears above. p. 56, l. 26. It was blowing pretty hard.

John Polimbo testified, p. 74, ll. 3-12:

Q. What kind of a day was it?
A. Windy.
Q. How was the weather?
A. Clear.
Q. When you say it was windy, what do you mean by that?
A. The wind was blowing hard.
Q. In which direction was the wind blowing?
A. Right across the tracks.
Q. In which way across?
A. *Towards the barns.*

Charles Koerber testified, p. 102, ll. 10-18:

Q. How was the wind that afternoon?
A. A good stiff wind.
Q. In which direction was it blowing?
A. *From the tracks, across the barns, and across the house.*
Q. Take the pointer and lay it on the map in the direction you remember the wind was blowing.
A. It was like that (pointing due west).

Again I insist the expression of the stenographer's "due west means *from* the west. The pointer was laid by the witness flat on the map, and of course the two points of it were in opposite directions but the course of it indicated the direction of the wind and there could be absolutely no doubt by anyone present that the witness meant the wind was blowing from the west to the east. I would not otherwise have been content to let the evidence stand without further questions to clear up

the contradictions between what he said and what it is claimed he indicated.

James E. Goodman testified, p. 338, ll. 18-25:

Q. Mr. Goodman, will you please take the pointer and lay it on the map indicating thereby the direction in which the wind blew on the day on which your buildings were burned?
A. (Witness indicates on map.)
Q. Indicating a westerly direction, *from the west?*
A. Yes, sir.

It is difficult to understand how counsel can consistently urge upon this court that James E. Goodman or any other witness actually testified that the wind was blowing toward the west.

Charles Cordes testified to seeing a spark setting fire within ten minutes after the Goodman fire, in dry grass on the *easterly side* of the railroad and 125 feet from it, thus indicating the wind must have been blowing in an easterly direction (pp. 111 to 117). He says it was blowing hard (p. 115, l. 5). "It was blowing from the track down towards our barn, that is pretty near southwest, I think." He has his compass direction wrong, that would be correctly southeast, as he says there is no bend in the track between his place and Goodman's, (p. 114, ll. 24-28).

George Cordes says, p. 125, ll. 10-16:

Q. How was the wind that day?
A. It was a pretty high wind, it was an awful high wind.
Q. Which way was it blowing?
A. It was blowing from the railroad right on down across.
Q. Across where?
A. From the railroad down towards the barn.

Thomas McDonald tells of a fire being set in dry grass on the easterly side of the railroad, by the same engine on the same trip within a short distance of Goodman's place, thus indicating the spark must necessarily have been carried by a wind blowing toward the east (p. 147).

It is true he said it was blowing "kind of a west wind" (p. 149), but it is evident he meant it was blowing from the west, otherwise there is no sense in his testimony of the fire. He also says, "It was a good dry wind and it blew on a nice gale, it was a nice steady breeze all through with no stop to it" (p. 149, lines 27-30).

Edward V. Goodman says (p. 176, line 40, p. 177 top):

Q. How was the wind?
A. Very strong.
Q. In which direction?
A. It was blowing *from* the west, practically.

From the foregoing it must appear clearly that the wind was blowing from the railroad to the barn, probably in a slightly diagonal course toward the west, the direction from which a spark would naturally be aided by the forward motion of the train and the strong breeze so that it would be likely to drift directly through the barn doors. The statement of the witnesses that the wind was from the west, means generally from a westerly direction. It does not appear that any of them made any note that it was exactly west according to the compass. A wind blowing directly at right angles with the track might well be termed a westerly wind and the defendant is not justified in concluding that the spark in question was emitted at a point so far to the west according to the compass, that it necessarily had to travel the full diagonal distance of 168 feet to reach the barn, even though that would be quite credible under the evidence of Charles and George Cordes. It might even be true and the jury could well conclude under the evidence that the spark was emitted directly opposite the barn and only had to travel 115 feet or a little more.

It may be urged that it would be incredible to believe a spark which could be emitted from an engine with screens of one-fourth inch mesh, could retain life for a distance of 115 feet. That is conceded. The plaintiff's case does not proceed upon such a theory. The insistence is that the screen had larger holes in it and that sparks were emitted large enough in size to retain vital-

ity for a distance of 167 feet as is positively proved by the Cordes brothers.

(b) The coincidence of time, the breaking out of the fire immediately after the passing of the train, coupled with the direction of the wind and the facts testified to by the Cordes brothers and McDonald, connected with the same engine on the same trip, is of surpassing significance, and establishes a very close connection.

Andrew Polimbo (who was 12 years old at the time of the fire, and 17 years at the time of the last trial) saw the mail train pass when he was 590 feet from the barn (p. 51, l. 37), and he started at once to go to the barn along a lane extending parallel with the railroad. It was a passenger train, a regular train passing at a quarter to four and was on time (p. 52, ll. 20-38; p. 58, ll. 22-30; p. 59, l. 15). He walked 150 feet and then saw "fire by the barns and I ran up to it, and it was burning the hay and I ran in the house and told Mr. Goodman" (p. 53, lines 24-28; also p. 59, l. 30-33). He saw the fire inside the barn on the right hand side, right close to the door (p. 54, ll. 4-6). On pp. 63 and 64 he testified, on cross-examination, in answer to leading questions:

Q. Did you see the hay actually on fire?
A. Yes, sir.
Q. At this apple tree?
A. What do you mean by the apple tree?
Q. At the apple tree, on this place, 150 feet away that you speak of?
A. Yes, sir. When I was by that apple tree, I seen the fire at the barn.
Q. When you were at the apple tree you saw the fire in the barn?
A. Yes, sir.
Q. Now Andrew, I want to know what was on fire at that time?
A. I ran to the barn and there was hay inside it, on fire, too.
Q. Was the barn on fire as well as the hay when you first saw it?
A. Yes, sir.
Q. You did not see the hay on fire, but did you see the barn on fire first?

A. Yes, sir, there was hay inside, too.
Q. The thing you saw on fire first was what?
A. Hay.
Q. The hay it was that you saw first on fire?
A. Yes, sir.
Q. And that was inside the barn?
A. Yes, sir.
Q. How far from the door was that?
A. About two feet back from the door.
Q. And that was the thing you saw first?
A. Yes, sir.
Q. And then you were down by the apple tree?
A. Yes, sir.
Q. And that you saw was 150 feet from the barn and was on the part of that lane that don't appear on that map?
A. Yes, sir.
Q. That is right, is it?
A. Yes, sir.

On p. 65 and 66 he says, on re-direct:

Q. When you were at the apple tree, Andrew, can you tell us just what you saw up there at the barn, what did you see when you were at the apple tree, 150 feet away?
A. I seen flame and fire.
Q. Did the flame produce anything besides the flame itself?
A. What do you mean by that?
Q. Well, was there anything in the air besides flame?
A. No, sir.
Q. When you were down here in the lane and looking towards the barn, where was the fire?
A. *Well, there was some outside too, just close to the barn and there was some inside.*
Q. What was burning outside?
A. Dry grass and hay, all scattered around.
Q. When you left the barn after putting in the hay did you leave everything perfectly clean?
A. Yes, sir, we raked it up pretty clean.
Q. Was there any hay left around on the floor at all?
A. *We raked it up pretty clean, there might have been some.*

Q. Was there anything left lying on the outside of the barn?

A. No, sir.

Q. When you were down at the apple tree how could you see what was going on in the barn?

A. *I seen this grass burning outside the barn, that is all I seen.*

Q. Could you see anything down at the apple tree, that was going on inside the barn?

A. *No, sir, I couldn't see when I was down at the apple tree, what was inside the barn burning.*

Q. How did you know there was any fire in the barn?

A. *I didn't exactly know, but when I come to it, I seen it was inside the barn, too.*

Q. When you were at the apple tree, what was it you saw that occasioned you to run?

A. I see some fire there.

Q. You saw some fire there?

A. Yes, sir.

This witness, when he testified at the first trial, and was then twelve years of age, did not understand the map, and pointed out a place inside of the back part of the barn, near the horse stable, as the place where he first saw the fire. The defendant's brief quotes from page 60, with reference to a consultation in the office of the attorney of the plaintiffs with this witness, when he examined the map just before the last trial, being then seventeen years of age; but the defendant fails to quote the evidence with relation to this consultation as it appears, beginning at the bottom of page 67.

Mr. Whittemore:

Q. What did I ask you—do you remember what I asked you about the fire when you were in my office?

A. What did you ask me?

Q. Yes.

A. You asked me about the fire—if I knowed it.

Q. Did I ask you anything about where the fire was with relation to the doors?

A. Yes, sir.

Q. What did you tell me?

A. What do you mean?

Q. What did you answer when I asked you where

the fire was, with relation to the doors, do you remember what you told me?

A. Inside the barn.

Q. Did I ask you how near the door the fire was?

A. Yes, sir.

Q. What did you tell me?

A. About two feet away.

Q. Do you remember my telling you that you had said it was in the back part of the stable at the last trial?

A. Yes, sir.

Q. What did you tell me then?

A. I told you that I must have made a mistake, that I did not understand the map.

Q. Do you remember saying at the last trial, in answer to the question "How near the door was there any fire?" and answering "About a foot and a half to two feet from the door," do you remember saying that?

Mr. McCartner: I object to the question on the ground that it is not re-direct examination.

Question allowed.

A. Yes, sir, I think I do.

Court:

Q. Do you know whether you did or not?

A. Yes, sir, I said a foot and a half or two feet.

Mr. Whittemore:

Q. Had you seen that map before the last trial, before the day of the last trial?

A. Yes, sir.

Q. Where had you seen it?

A. In here.

Q. No, before that day, you saw it here, had you seen it anywhere before you came to court here that day, had you ever seen that map anywhere?

A. No, sir.

The following questions and objections, on page 69, 70, and 71, indicate the lack of understanding of the map by the witness at the time of the first trial, as the evidence was brought out at that trial.

John Polimbo says that Andrew started from the place

where they were all in the fields, about 590 feet from the barns, about the same time that the train passed, or maybe a few minutes before (p. 74, l. 35). That a freight train passed four or five minutes afterward, and by the whistling of the engine their attention was directed to the fire in the barns (p. 74, bottom; p. 75, top).

Edmund Mays was at his home 1,180 feet away, when his attention was called to the fire, about twenty minutes after he heard the train pass (p. 88, lines 25-40).

Charles Koerber also says that Andrew started from the field to the barn just as the train passed (p. 100, lines 3-7). And his attention was also directed to the fire by the whistling of the freight engine that came along afterwards (p. 100). And on page 105, he says (lines 15-20) that Andrew started right away after the passenger train went by, or probably a minute or so afterwards.

Edward V. Goodman testifies that he heard and saw the mail train go by when he was at the house, and a few minutes afterwards Andrew came in the house and gave the alarm of fire (p. 175, lines 19-40), and after they got him out of the house (he was sick), his wife rushed back and got his watch and her watch, and when the witness got down to the end of the lane, the watch indicated four o'clock, or around four o'clock (p. 177, lines 27-35).

The amended answer to Interrogatory No. 4 indicates that passenger train No. 8, Engine 2454, passed through South Plainfield at 3.37 and Cranford at 3.50 (p. 328). The plaintiff's home was about half way between the two places, and therefore the train must have passed the plaintiff's farm about 3.44.

James E. Goodman testified that he saw the train pass a few minutes before four o'clock, called the mail train No. 8 (p. 353, line 21), and not two minutes afterward Andrew Polimbo gave the alarm of fire (p. 313, bottom).

(c) The probability that this fire was caused by a spark from the engine of the mail train is illustrated by the fact that it did cause other fires on the same trip, one at a greater distance from the track than it would be nec-

essary for a spark to travel to ignite the Goodman barn.

Charles Cordes and his brother were putting in hay this afternoon, and they noticed the mail train pass at four o'clock, and just as it passed, a fire started in the field between where they were standing and the railroad, there being no one in the field, and no cause for the fire other than a spark from the engine (p. 114, lines 15-20). And afterwards they measured it, and found it was 125 feet from the railroad fence to the place where the fire started (p. 114, lines 30-40).

Afterwards Charles Cordes placed the fire at a certain distance from a cherry tree, but it is obvious that his actual measurement from the railroad fence would be more accurate than his recollection of the distance of the fire from the tree.

The surveyor gives the distance between the railroad fence and the east bound track as 43 feet (p. 45, l. 9).

George Cordes also testifies as to this occurrence (p. 125, lines 15-40), and gives the same distance (p. 126, lines 1-5), and says there was no cause for the fire other than sparks from the engine (p. 126, lines 18-22).

On the other side of the Goodman place, the same engine, on the same trip, set fire in a field at least ninety feet from the track, being the width of a strip of land owned by the railroad company along side of the track (p. 147, 148, 149).

(d) The possibility of a spark being emitted from the engine and being carried by the wind to a point alongside the barn, and retaining vitality for all of that distance, is also proved.

Miles Rouch says that in April, 1905, he had occasion to go to Goodman's farm about business, and sheltered his horse from a strong wind behind the barn in question. And while standing there he noticed a spark fall in the driveway between the carriage house and the wagon house, and saw it smoke for a minute or two, and he took it up and found it hot, and tossed it up and down in his hand, and threw it down, and put it out with his foot. That other cinders fell, but that was the only one he could see smoke. That it was about the size of a hazel-

nut, only in a rough condition (pp. 278, 279, 281, 282).

The argument is made that this witness failed to prove that a train passed at this time. By sheer inadvertence this proof was not made, but it hardly seems sensible for anybody to doubt that this spark and the other cinders must have come from a passing engine. The wind was blowing directly from the railroad (p. 279, line 10). And there does not appear to have been anything around there to cause the spark to fall. It is a matter of common knowledge that sparks do not generate in the air; that they will be carried by the wind, and that the direction of the wind in this case was such as to bring this spark from the railroad.

It follows from the fact that this spark did fall at this point that a similar spark could have fallen into the litter of hay around the barn doors on July 19, and caused the fire in question. And it was valuable testimony to assist the jury in reaching a conclusion.

The evidence of this witness, Rouch, and also of the two Cordes brothers, and of McDonald, has not been impeached or discredited in any way, unless all of the testimony shall be considered incredible and all of the witnesses guilty of rank perjury. Evidently the jury believed their statements, and did not consider them as incredible; not only that, but considered the fact that these things happened showed the screens in the locomotives in question to have been out of order.

(e) There is no other known cause for the fire than that it was set by sparks from the railroad.

James E. Goodman, his sick son Edward V. Goodman, the son's wife, Harriet Goodman, and Dr. Sinclair, were in the house at the time the mail train passed. The Doctor's chauffeur was in back of the house and back of the barns. Andrew Polimbo, John Polimbo, and Charles Koerber, the only three hired men on the place, were down in the fields. There was no fire in the barn, and no lamp, and there had been no smoking in the barn. Nor has any violation of the rule against smoking *in the barn* been shown, as stated by counsel at the argument. There was no rule against smoking in the fields.

No person had been seen around the barn at the time the fire occurred. After the fire was discovered, quite a number of persons came to the fire to assist, and among them were Edmund Mays, a man named Axel, and two Jews who came from the other side of the railroad and the other side of the track, and were seen coming there when the fire was in full swing (p. 177, lines 10-20; p. 288, lines 10-20; p. 359, line 28).

It clearly appears by the evidence of Andrew Polimbo that he saw no one about the barns at the time he discovered the fire (p. 61, l. 38). If this fire was not caused by a spark what did cause it? The answer that it was caused by a spark is the only answer that can be made, based upon any of the facts produced in evidence.

It is difficult to understand why Andrew Polimbo's testimony should be considered as unreliable. It must be remembered that he was a boy; that he was skilfully led on cross-examination by a series of questions calling for yes and no, and the cross-examiner was practically the one who was testifying. Upon being asked questions which left him free to give his own answers, it will be observed that there is no inconsistency in his testimony, and that he tells the facts in a very plain, frank manner. What little wisps of hay there might have been lying around the barn doors, which Andrew said he saw burning, would naturally all be consumed by the time Mr. Goodman came on the scene, and he would not be paying particular attention to them in any event, at that exciting moment.

The evidence of John Polimbo and Charles Koerber, who were in the potato field, amply corroborates the passing of the passenger train and the fact that Andrew left at the same time; also that they, being engaged for a couple of hours in the field, had had nothing to do with starting the fire. Being occupied with their work, they did not notice the fire until their attention was called to it by the whistling of the freight engine four or five minutes afterwards.

John H. Stewart, the doctor's chauffeur, evidently did not notice the passenger train pass, or else he mistook

it for a freight train, inasmuch as there was nothing particular at the time to call his attention to it. It appears conclusively that the passenger train did pass, whether Stewart saw it or not. If he did not notice it, or did not mistake it for the freight train, then the freight train that he must have seen was the one attached to Engine No. 1458, as appears by the answer to the interrogatory. Indeed, it seems probable that this freight train was the train that he noticed, as he says it passed fifteen or twenty minutes before the fire (p. 123, line 3); and according to the schedule, the freight engine 1458 passed probably about half an hour before the fire (p. 328). Indeed, the freight train may have passed fifteen or twenty minutes before the fire, as it might have made slow time between South Plainfield and Goodman's place, and faster time between Goodman's and Cranford, depending upon the number of stops necessary.

The argument in defendant's brief, on page 19, that the spark which set the fire at the Cordes farm had to travel between 200 and 300 feet, does not appear to be logical. We all know that witnesses are apt, in speaking of time or distance, to be guilty of slight inaccuracies, and it might very well be that when the witnesses say the fire broke out just as the last car passed, they were speaking generally, and meant about that time. If the train went 300 feet in five seconds, it might not be incredible, even taking the witnesses' words in their strictest sense, that a spark should travel 168 feet in a very strong wind in five seconds. But if the testimony is to be allowed any common-sense construction, a second or two difference as to the time the last car passed and the time the fire was first noticed, would easily account for the spark travelling this distance. While there is some forward motion to a spark on being emitted from the stack of a moving engine, that forward motion is in all probability quickly arrested by the stillness of the air or the direction in which the wind is blowing, so that this spark could very well have been emitted at a point very nearly opposite where the fire started. There is no such state of facts in this case that would justify

the court in adjudging the occurrence testified to, to have been a physical impossibility; as was the case in Hummer vs. Lehigh Valley R. R., 46 Vroom, p. 703. The testimony of the Cordes brothers is all the more credible in view of the fact that it leads to the conclusion that the screen in the engine was out of order and a large spark was emitted. The Cordes brothers must have seen the mail train pass, and the defendant's answer to the interrogatory discloses that no other passenger train passed at this time.

The passing of the train at the time the fire broke out may be said to be a coincidence, but it is such a coincidence as prevents any other reasonable conclusion than that a spark from this engine must have set this fire. The Cordes brothers, Miles Rouch, and McDonald, furnish the testimony necessary to prove that a spark can retain vitality to ignite combustible material at a very considerable distance from the engine.

It does not seem to be necessary to argue further that there was sufficient evidence to justify the jury in reaching the conclusion that the fire was set by a spark from the engine. The case that has been made out on this last trial is substantially the same as that which has been heretofore reviewed by this court. It is true that the witness Axel was not called at this trial. The plaintiff had very good reasons for not calling him, as the defendant well knows. As Axel and his companions came running to the fire after it was started, from across the railroad and from the other side of the railroad, and as they were not seen about the place at the time the fire started, it is obvious that they could have had nothing to do with the starting of the fire. There is no mystery whatever about their coming to the fire to assist in removing goods. That would be a most natural thing for any neighbor or other person within a reasonable distance to do, under the circumstances. While Axel's testimony possibly might have strengthened the plaintiff's case, it does not follow that the plaintiff's case is not amply strong enough to go to the jury without his testimony. A reading of the opinion of the Chancellor

indicates clearly that if he had not been produced as a witness, still it would have been held that the question was one of fact for the jury.

Charles Cordes now places the fire in his field at 168 feet from the east bound track, and this is the same as his testimony at the earlier trial. He says now, as he did then, that the fire was 125 feet from the railroad fence; and there was testimony in the earlier trial, as there is now, that the distance from the railroad fence to the track was 43 feet more. The Chancellor in his opinion speaks of the Cortes fire being 125 feet from the railroad, but he does not say whether he meant the railroad fence or the railroad track, and presumably he meant what the evidence showed.

The defendant most unconscionably seeks to set up the answer to the seventh interrogatory as being fatal to the plaintiff's case. It would be a sorry commentary on our judicial practice if justice should be administered upon such a technicality. The discussion between counsel and the court with regard to this interrogatory, on the motion to non-suit and direction of a verdict, shows the reason why this interrogatory was read. It was believed by counsel for the plaintiff to be necessary to read this answer, because it was his understanding of the existing practice that all of the interrogatories should be read together; and the trial judge believed that to be the proper practice. The case of Cetofonte vs. the Camden Coke Co. 49 Vr. 662, was decided February 28th, 1910. This case was tried March 28th, 1910; and neither counsel nor the court seemed to be familiar with this decision, and probably it had not been published at the time of the trial.

While this case settles the practice, it clearly appears that previously there had been a diversity of practice upon this subject.

There are a number of reasons why the answer to this interrogatory is in any event not fatal to the plaintiff's case.

1. It is not responsive.
2. It is clearly a conclusion.

3. The witness has not been shown to have qualified.

4. The plaintiff, in any event, is not precluded from showing the truth and from contradicting this interrogatory or any of his witnesses. The greatest disability that the plaintiff can be under in connection with this testimony is that he may not impeach the witness; and there is no evidence of impeachment of the witness who subscribed the interrogatory. The evidence hereinbefore referred to clearly is sufficient to go to the jury as to whether or not the defendant did take and use all practicable means to prevent the communication of fire, etc., and that evidence warrants a conclusion that they did not take and use all practicable means, etc., because the fact that sparks from this engine on the same trip did set fire to Goodman's barn, and did set fire to the field at Cordes' farm, at an equal or greater distance from the track, indicates that the screen in this engine must have been out of order, if the jury believed such evidence. This is in accordance with the Chancellor's opinion in this case.

II.

THE DEFENDANT'S PROOF THAT IT TOOK ALL PRACTICABLE MEANS TO PREVENT COMMUNICATION OF FIRE FROM ITS ENGINES, AND PROVIDED A SCREEN OR COVER IN THE SMOKE STACK SO AS TO PREVENT AND ARREST AS MUCH AS PRACTICABLE THE ESCAPE OF FIRE, AND THAT THE SCREEN OR COVER WAS IN GOOD OR PERFECT CONDITION AT THE TIME OF THE FIRE, WAS DISCREDITED, IMPEACHED AND CONTROVERTED TO SUCH AN EXTENT AS TO REQUIRE THE JURY TO DETERMINE THE FACT OF ITS SUFFICIENCY UNDER THE STATUTE, AND THERE WAS NO ERROR IN THE REFUSAL TO DIRECT A VERDICT.

The two strongest reasons to conclude that the screen was not in order are, first, because it is proved that this engine, on the same day and on the same trip, did emit sparks large enough to set two other fires, one being 167 feet from the track; and second, because a spark was emitted large enough to set fire to the Goodman barn, 115 feet from the track, as the jury has concluded; and if the evidence is sufficient to justify such a conclusion, the jury's decision must be considered final as to the fact.

These are strong reasons, because by common knowledge we know that with the screen in good order, no larger spark could be emitted than one-quarter inch in diameter, and we know that such a spark would not possess vitality enough to carry fire to a distance of 115 feet, and certainly not 168 feet; and besides the defendant's expert witnesses doubt that it would be possible (p. 520, line 31; p. 611, line 9; p. 630, line 32); and the plaintiff's also (p. 652, lines 1-8). And steam and air have a tendency to kill a small spark (p. 507, lines 1-5; p. 517, lines 30-40, and p. 630, line 18).

It therefore follows, from this alone, that the screen must have been out of order, and a large spark emitted in violation of defendant's duty.

In addition to the above, the proof of the perfect condition of the screen was further impeached, discredited and controverted by the following facts:

The inspections and the record of inspections was not made under oath.

The witnesses have no recollection of the particular inspections, but testify from the record only (p. 539, line 30; p. 546, lines 30-40; p. 586, line 33; p. 591, lines 15-20).

It is not probable that a witness would admit any failure of a duty performed years before, or that he would even recall that he had shirked a tiresome routine task so long before. He had made a record, and would stick to his record.

The defendant's witnesses as to inspections would be

affected by a fear of dismissal or reprimand, as they are still in defendant's employ.

The witnesses made hundreds of inspections and could not at this time identify one from another.

A proper inspection required the inspector to get in the front of the engine, and Slagel did not get in the front of the engine.

Slagel only looked through small caps on the side of the front end of the engine. Such an inspection would be wholly unreliable (p. 597, lines 10-15; p. 663, line 15; p. 667, lines 20-25).

One of the inspectors claims that he felt the back of the screen with his hand (p. 545, lines 20-40, p. 547), which is incredible, because the screen would be too hot, and in order to do it, he would practically have to embrace this hot screen.

The entries were not made until some time after the inspections, and then a number were entered at one time. (p. 541, lines 10-20; p. 542, line 28; p. 578, lines 10-15; p. 587, line 10; p. 592, lines 1-15).

Many entries were made consecutively in such a similar manner and handwriting as to indicate that a day's work was customarily entered at one time and with the same pencil, contrary to the testimony (p. 587, lines 25-40).

Inspections were claimed to have been made shortly after the engine came in from its run; whereas it would then be too hot to be inspected (p. 665, lines 25-40; p. 666, lines 30-40).

A hole might have been found in the screen and a patch put on it and the record marked "good." (p. 549, lines 38-40; p. 552, lines 1-10; p. 599, lines 20-35).

Screens have a tendency to corrode around the bottom where the water runs down, and the cinders settle, and large sparks are found in the bottom of the box, and would be likely to be drawn through these holes, if any are there. (p. 519, line 28; p. 520, line 12; p. 581, lines 1-10; p. 612, lines 30-40; p. 613, line 7; page 661, lines 15-40).

The back of the screen of this engine was in use from

February 10, 1905, to March 23, 1906 (pp. 635, 636). The front was used from Dec. 19, 1904 to March 23, 1906 (p. 646).

The witness Shannon was obviously confused, and was discredited by his contradiction, hesitancy, and inability or unwillingness to understand questions. The jury had an opportunity of observing his demeanor, and the demeanor of the other witnesses who were produced, and this Court can only take the printed testimony. Reference to the inspection book would be necessary to appreciate thoroughly Shannon's contradictions (pp. 573-578).

The plaintiff produced a former engineer of the defendant, who was employed before and after the fire in question, and he testified that no inspections of spark arresters were made at the points testified to by defendant's inspectors (pp. 673 to 677, 683).

The New Jersey spark cases are:

Wiley vs. West Jersey R. R., 15 Vr. 247.
Hoff vs. West Jersey R. R., 16 Vr. 201.
West Jersey R. R. vs. Abbott, 31 Vr. 150.
Vallaster vs. Atlantic City R. R., 43 Vr. 334.
Minard vs. West Jersey R. R., 64 Atl. 1054.
Goodman vs. L. V. R. R., 68 Atl. 63, 75 N. J. L. 277.
Goodman vs. L. V. R. R., 74 Atl. 519, 78 N. J. L. 317.

In a case of fire set by a spark at a point so close to the railroad, where it would be possible for a spark passing through a screen of one-fourth inch mesh in good order, to set a fire and in which the evidence of the condition of the screen was not in any respect open to criticism, it might very well be that in New Jersey there would be no controverted issue to be passed upon by the jury, although in some other jurisdictions even such a case would be held to be one for the jury. However, the case at bar is not such an one, the difference being that the fire in question, and also one or two other fires, were set by the same engine at such a great distance from the track that it would not be possible, ac-

cording to common knowledge, for a spark small enough to pass through a one-fourth inch mesh to retain vitality for such distance: *ergo,* there must have been a hole in the screen larger than one-fourth inch. If it cannot be considered to be common knowledge that a one-fourth inch spark will not carry fire for a distance of 115 feet, in any event it is a question for the jury to determine, as it would have a very strong tendency to induce a belief in the minds of most, if not all people, that if the fire were set at this distance, the screen could not have been in good order. Proof by the defendant that the screen was in good order therefore has a tendency to meet two issues: first, whether the fire was set by the spark from the engine; and secondly, whether the screen was in good order.

Conversely, the setting of the fire to the plaintiff's property, and the two other fires testified to by the Cordes brothers and McDonald, has a tendency to prove that the screens could not have been in good order, that the inspections must have been perfunctorily or carelessly made, or that the records of the inspections were falsely made.

The evidence of Miles S. Rouch to the effect that a spark fell as far away from the railroad as the plaintiff's barn, also tends to prove that the system of inspections testified to by the defendant's witnesses must have been inefficient with regard to at least one other engine, because he says the spark he picked up at that distance was as large as a hazelnut.

The Chancellor in his opinion says:

"But, in our judgment, the testimony introduced by the Plaintiff to the effect that engine No. 2454 actually threw a spark that retained its vitality a distance of more than 115 feet, so as to set fire to the hay in Goodman's mow, together with the testimony of Cordes and McDonald about the throwing of sparks by the same engine on the same trip, had a legitimate tendency to prove not only that this engine started the Goodman fire, but that its screen was not in good order at the time. Moreover, one of the defendant's own witnesses

—an expert—testified that in his judgment a spark that had passed through the meshes of such a screen as No. 2454 carried (the screen being intact) would not retain sufficient vitality or fire to ignite combustible material at a distance of 116 feet from the railroad track. Indeed, it may be inferred, from what we all know, that a piece of live coal so small that it will pass through a quarter-inch mesh, and which of course continued to burn and thereby to consume itself while driven into the air by the exhaust steam and while carried along through the air by the prevailing wind, cannot retain sufficient heat to ignite other combustible materials at an unlimited distance. Whether it can carry its heat for 50, or 100, or 150 feet, or more or less, cannot be solved by the application of any rule of law, and is left unsolved by the evidence.

"It is clear enough that the evidence introduced by the defendant tending to show that it had properly maintained the screens so as to prevent the communication of fire, at the same time tended to show that in fact the fire was not communicated to plaintiff's property from defendant's locomotives. And for the same reason the evidence introduced on the part of the plaintiff that tended to show that the fire was communicated from the locomotives also tended to show that the locomotive screens were not in good order at the time, and thus to contradict the evidence of defendant's witnesses who testified that they were in good order. In short, if the testimony of plaintiff's witnesses as to the origin of the fire was believed, and if the jury inferred therefrom (as they reasonably might infer) that the fire was caused by a spark from a locomotive engine, and also concluded that the spark could not travel so far and retain its fire unless when it left the engine it was too large to have passed through a quarter-inch mesh, it results that the jury might fairly conclude that defendant's witnesses who testified to the effect that the engines in question were fitted with screens of quarter-inch mesh, that the screens had been inspected with proper care and were in good order and perfect condition at the time, and that there was no way in which sparks could come out of the smokestack without first passing through the screen, must have been in some way mistaken. The evidence upon the disputed points being thus in conflict, the question could be ligitimately solved only by the intervention of the jury. It is un-

necessary to lay stress upon the circumstances that some or all of defendant's witnesses who spoke upon these topics were still in the company's employ; that the screen inspectors were further interested because if the screens were out of order, they themselves were responsible; that they testified without any special recollection of the particular engine on the particular occasion, and relied wholly upon records said to have been made by them, shortly after the several inspections, in books kept for the purpose, in which numerous other inspections of other engines were kept. These circumstances affect merely the reliability of the witnesses, and were for the jury's consideration.

"It seems to us, therefore, that the question whether defendant was legally responsible for the fire of July 19th ought to have been submitted to the jury."

Upon the question of the admission of certain evidence, the Chancellor also says:

* * * "Upon the faithfulness with which that system (inspection) was carried out, the reliability of the evidence as to the inspection of engines 1458 and 2454 materially depended. In fact, as already pointed out, the inspectors (whose duties required them day after day and month after month, to inspect numerous engines distinguished only by numbers) did not, and in the nature of things could not, have any dependable recollection of what they did about inspecting these two particular engines, and what they ascertained about their condition, upon a particular date in the past; and it was a fair construction of their testimony that what they meant to swear to was substantially this: that they knew, for instance, that engine No. 2454 was inspected thus and so at Jersey City on the morning of July 19, 1905, that such and such steps were taken to render the inspection efficient, and that the screen was either found in good order or if not was immediately repaired, because it was their invariable practice to make inspections and repairs in that fashion and to make a short minute in the record, including the entry "screen good", or the like, and because such an entry is in the record respecting inspection of engine 2454 at the time and place in question."

It appears on this trial, but did not appear on the first trial, that the screen in engine No. 2454 was put

in in two sections, on two different dates; the back of the screen on Feb. 10th, 1905, and the front of the screen on Dec. 19th, 1904. Therefore the front of the screen had been in use for seven months when the fire occurred. To what extent it had been patched previous to July 19th, 1905, cannot be ascertained, because of the custom of patching and then marking the record as "Good." While the screen was continued in operation, as testified to, until March 23rd, 1906, no one can know what its condition was or to what extent it had been patched. Although the company knew of this claim and suit long before the screen was taken out, it did not even take the trouble to preserve the screen for exhibition at the trial.

The defendant's counsel makes much ado over the fact that the evidence produced by the plaintiffs in rebuttal was principally from discharged railroad engineers. As if, forsooth, they must necessarily be untruthful for that reason. It goes without saying that the plaintiff could not produce any engineers to testify in his behalf who were at the time employed by the defendant or any other railroad company. There is probably not an engineer in existence actually employed by a railroad company, who would be willing to testify favorably to the plaintiff, even though he had knowledge which would enable him to do so.

Comments upon this subject are more properly addressed to the jury at the trial than to a court of review. The credibility of the plaintiff's witnesses produced in rebuttal is just as much a question for the jury to settle, owing to any bias that may be claimed to exist because of a discharge from the railroad, as the credibility of the defendant's witnesses as to inspections because of their interest in the employ of the railroad. There is no reason to consider one to be prejudiced on one side any more than the other is prejudiced on the other side.

Mr. Taylor testified that although he had been an engineer on the railroad for sixteen years, he had never seen an inspection made of an engine at Jersey City or at Easton. No matter whether he was accustomed to leave his engine very shortly after coming in from a run,

still it is hardly possible that in the length of time he was with the railroad, he would not on some occasion have his attention directed to the inspection of spark arresters. The effect of his testimony is that the defendant's inspections were a matter of form only, and little short of an absolute false record. Mr. Taylor is not without corroboration that these inspections were not diligently made. The manner in which the inspection books were made up bears evidence on the face of them that the entries are made consecutively and at the same time. The handwriting shows it to be so. The way in which some of the inspections are testified to have been made shows it to be so. And it is not incredible that the company's employees have been keeping a formal record and saving themselves a lot of time and trouble, having been lulled into a sense of security through the fact that seldom, if ever, any trouble happened through breaks in the spark arresters, and through the fact that whatever breaks did happen would probably be discovered through other operations and inspections of the engines from time to time, without the necessity of making those inspections daily. In fact the great and apparently unnecessary diligence shown with reference to these inspections three times in one day, as a constant thing, with regard to each engine, is in itself a suspicious circumstance. The company has made a system with the determination that it cannot be beaten, and I do not doubt if that system were conscientiously and faithfully observed, there never would be any trouble with the screens in the engines, and there would be very many fewer fires than there are caused by locomotive sparks; and this suit would probably never have had any occasion for prosecution as the plaintiff's buildings would be standing to this day.

The opinion of the Chancellor in this case, when before this court last, apparently settles this question, and no further authorities or argument need be made. It is said that that decision depends upon the testimony of the defendant's witness that in his judgment a spark passing through a screen in good order would not retain sufficient vitality to ignite combustible material at a dis-

tance of 116 feet from the railroad track, and that no such evidence is now before the court. But the Chancellor goes on to say:

"Indeed, it may easily be inferred, *from what we all know*, that a piece of live coal so small cannot retain sufficient heat to ignite other combustible materials at an unlimited distance."

But it is not quite correct to contend that there is no expert testimony that a spark passing through a screen in good order would not retain vitality sufficient to set a fire 116 feet away. In the case previously before the court, the witness said that "in his judgment such a spark would not retain vitality," etc. In the last trial, Mr. Maxfield said, he doubted it (p. 630, line 32). What is the difference between the witness saying that he doubted it, and another one saying that in his judgment it would not carry fire that distance. Again, Mr. Rehrig said that to the best of his judgment, it would not carry that far; which is just the same expression used by the witness in the first trial (p. 652, lines 1-5). Also Mr. Turner said that he had never seen a spark that had set fire to anything at that distance. (Page 610, line 25; p. 611, line 9.)

Therefore this last trial, upon this question presents just as strong evidence as it did in the case in which the opinion was written by the Chancellor.

It is not contended by the plaintiff that because this is a case properly submitted to a jury, every spark case must be submitted to a jury. In many such cases, the evidence which is found in this case may be lacking.

The attention of the court will be directed to portions of the testimony concerning which the argument above made will have direct application.

William H. Vaughn says that the wire netting will corrode (p. 517, line 18); that the steam has a tendency to put out the sparks (p. 507, line 50; p. 517, lines 31-38). The friction and corrosion have something to do with the deterioration of the wire, and the leaks in and around the front end corrode the wire, and the gases,

sparks and small ashy substances help. That they often find the screens broken where the ashes lodge on the flanges of the exhaust pipe, and seldom elsewhere, and that patches are put on wherever the screen breaks (p. 519). That as a general rule the holes patched were right behind the exhaust pipe, in the rear where the screen gets the most wear; that a spark that would come out of the engine would be dampened by the steam, and *should not go very far* (p. 520, lines 10-32).

Engine No. 2454 used anthracite coal (p. 531, line 26).

Sparks cannot be seen in the daytime (p. 535, lines 30-40).

Shannon says that he inspected the engines sometimes in fifteen or twenty minutes after they came in from a run (p. 547, line 10). Also p. 549, line 35.

Q. Don't you know that sometimes patches are put on screens where holes are found, and then the record is marked good?
A. Yes, sir.
Q. Don't you know that?
A. Yes, sir.

And on page 551, line 38, he says:

Q. Now, isn't it a fact, Mr. Shannon, that some of these entries here that you have marked good, are instances of inspections where patches were put on the screens over holes, and then the record, after that was done, was marked good, isn't that so?

Apparently the witness hesitated, or failed to answer.

Mr. McCarter:

Do you understand that question, Shannon?

A. Yes, sir.
Q. Well, isn't that so?
A. Yes, sir.

And pages 573-578 show that Mr. Shannon was very much confused as to the order of time in which he set down his inspections, and the time which he indicated in his inspection book as representing either the time of

the inspecton or the time when he made the record, and if the latter, then what time previously he had made the inspection. The inspection book would show how much mixed up the witness was, and how he contradicted himself frequently; thus making a question for the jury as to his credibility or the correctness of his testimony.

He says that sparks are sometimes found in the front end as large as walnuts, and that the front end is filled up with sparks up to the nozzles (p. 581, lines 1-10). That he did not go in the front end after he took the sparks out (p. 581, line 36). This would be necessary in order properly to inspect the bottom of the screens, which would have been previously covered by the sparks.

The witness acknowledges the inspection records to be in similar handwriting and with the same pencil (p. 587, lines 28-38).

It appears that the examination of the stack is a matter of form; that there is nothing to get out of order (p. 592, line 30).

Slagel examined only eight engines a day at Jersey City (p. 598, line 16).

He is the man that looked through the caps. It does not appear what other work he had to do. Surely eight inspections a day would not be a day's work. He also puts patches on screens and marks the records good (p. 599, lines 20-35).

He says he never did this to engine No. 2454; but considering the length of time this engine was running, and the number of inspections this man made, that statement could be taken by the jury with a grain of salt.

Turner says that in a single trip from Jersey City to Easton, 500 pounds of anthracite sparks would be collected in the front end of the engine (p. 608, lines 28-30). He did not know how much went out of the stack.

On p. 610 he is asked the question:

Q. Do you think that a spark would escape through a mesh of one-quarter inch size, in good order, and extend over a distance of one hundred and fifteen feet and have life enough left in it to set fire at that distance?

Mr. McCarter objected on the ground that this involved the knowledge of a great many things other than the screens themselves. The court said:

Still he says he was competent to express an opinion, and has ridden on the engines with the object of noticing the effect of such screens (See page 604, lines 25-40; and page 605, lines 1-14), and I think that was some of the knowledge that would perfect it, that is with respect to how large a spark and how long it would retain its life,—I think that is competent and I will admit the question.

The witness then answers:

A. I have never seen a spark that set fire to anything at that distance.

The front end of an engine is quite a troublesome thing to open. The door is fastened on with twelve clamps (p. 612, line 20). The screen is three feet two inches from the door (p. 612, line 2), and 5 feet 2 inches or 6 feet from the tubes to the door (line 35). The cinders accumulate to the height of the blow pipes, practically a foot and a half in the center of the box, banking up two feet high in front (p. 612, bottom, 613, top).

Howard H. Maxfield has ridden on engines (p. 627, line 35). He says in answer to the question (p. 630, line 20):

Q. In your opinion, would a spark coming through a screen of this character, as is shown here, in good order, go to a distance of 115 feet and retain sufficient vitality to set fire at that point?

Objected to. Allowed.

A. Why, I doubt it. My experience would not warrant me saying it would.

The plaintiff's witness Rehrig, says, to the best of his judgment a spark would not retain vitality enough to set fire 115 feet away (p. 652, lines 1-5).

And Dennis J. Donovan, with regard to the distance a spark might go, testified as follows (p. 657):

Q. Did you ever watch or measure the distance a spark went from any of your locomotives?
A. Sometimes I did; yes, sir.
Q. In feet?
A. Well, not in feet. According to the stack; according to when I was on the engine sometimes I would see it going. May come down alongside of me. I wouldn't notice how far up in the air it would go; no sir.

And on page 658:

Q. I say, you don't know from experience, how far a spark will go that escapes from a screen, you can't tell?
A. Well, not exactly, but I know it won't go 100 feet.
Q. How do you know that?
A. Because the engines don't give exhaust enough for it, providing the screen is all right; it won't let it out and fire won't be alive that far. Providing the coal you burn. If you burn anthracite coal there is a different thing.
Q. How do you know how far sparks have gone?
A. I rode behind the engine before I run an engine, and I was on the freight train as a brakeman.
Q. Did you burn anthracite coal on a freight?
A. Burn it?
Q. Did you burn anthracite coal on a freight?
A. Yes, sir.
Q. Now you have measured the distance a spark went?
A. When I was braking, it wouldn't come back cars thirty or thirty-four feet long. It wouldn't come back the third car, and I on a brake. It might—probably it wouldn't hurt my hand if it fell on me.
Q. It depends somewhat on the strength of the wind, too?
A. Well, it does at certain times.
Q. Doesn't the spark go further back than it does sideways?
A. That is according to the weather and the wind.

* * * * *

Q. Did you ever notice how far they go—they will travel sideways from the track, when the wind is blowing across the track?

A. It is according to the speed of the engine. If the engine is traveling fast of course she will throw one off further, and the wind will take it further away.

Q. Sparks do go sideways when the wind is blowing across the track, don't they?

A. Yes, sir.

Q. And when they have gone sideways, have you noticed how they go?

A. Oh, they don't go far.

This witness also says that a screen gets corroded from the oil and the ashes around the bottom of the netting. "It picks it up from the front of the engine and around the exhaust pipe" (p. 661, lines 15-20).

Q. What comes out of the blower pipe?

A. Well, the blower pipe, that ain't quite a ways in on the end of it when you put it on first off it still throws some of the water off the stack, and the rest of it runs down on the netting and so forth.

Q. What effect does that have on the netting?

A. Well, there is oil on the netting, and it takes the ashes on there and stops the netting up.

He says that the condition of the screen could not be ascertained by looking through the caps on the side of smoke box as Slagel did (p. 663, line 18).

William B. Munn testified that an engine could not be inspected inside of an hour and a half or two hours, because it is too hot (p. 665, line 30). (See also page 666, lines 30-40; 667, lines 1-7).

This witness also says that an inspection of the whole of the screen could not be made through the caps on the side of the smoke box (p. 667, lines 20-25).

Taylor says he never saw inspections made in Jersey City except when there was complaint of something being wrong (p. 673, lines 25-30; p. 674, lines 23-25).

Nor did he see inspections made at Easton (p. 674, lines 32-40; p. 675, lines 1-12; p. 677, lines 1-10).

He says he has waited around for eleven hours in

Jersey City (p. 680, line 21; p. 683, lines 8-13 and lines 25-28).

Henry A. Pease testifies that the screens have a tendency to wear out, as follows:

A. The wear generally strikes it back of the penal blade or diaphram, where the sparks coming through the flues strike against it and hit against the back of the screen; down at the foot where the ashes lay, and probably the moisture from the exhaust, or something getting in those ashes and acting on the gases, coming from the coal. Of course, I can not say, but that is my idea of it.

Q. What is the condition of repair?

A. It will rot away at the bottom.

By the Court:

Q. How long will it take it to rot away?

A. Oh, probably about four or five months.

Q. Four or five months?

A. Yes, sir.

All of the foregoing evidence clearly shows that the question of the sufficiency of the defendant's inspections was one for the jury.

III.

THE EVIDENCE IN THE MAYS CASE WAS SUFFICIENT TO REQUIRE THE JURY TO DETERMINE WHETHER THE DESTRUCTION OF MR. MAYS' PROPERTY WAS A NATURAL AND PROXIMATE RESULT OF THE DEFENDANT'S NEGLIGENCE WHICH CAUSED THE GOODMAN FIRE; AND THERE WAS NO ERROR IN THE REFUSAL TO NON-SUIT OR DIRECT A VERDICT IN THE MAYS CASE.

It is apparently conceded that there was no culpable and efficient agency intervening between the Goodman

fire and the Mays fire, which would prevent the Goodman fire, and the negligence which caused that fire, from being the proximate cause of the Mays fire. But it is argued that the Mays fire was not the natural result of the Goodman fire. It is difficult to see the distinction desired to be drawn, unless it is that the evidence in this case does not warrant the conclusion that the Mays fire was ignited from the Goodman fire. The defendant's discussion of evidence seems to be as to this question of fact.

The evidence in the case of Mays is also circumstantrial, but it is even stronger evidence that he fire was set from the Goodman fire, than that the Goodman fire was set by a locomotive spark.

Similar arguments can be made for the conclusion that the Mays fire was set from the Goodman fire, viz.:

1. No other cause for the fire appears in evidence.
2. The conditions proved were favorable to the setting of the fire by a spark from the Goodman fire.
3. The fire broke out on Mays' place shortly after the sparks began blowing from the Goodman fire over toward the Mays place.
4. The distance that burning sparks were carried by the wind has been proven.
5. The direction of the wind was directly toward the Mays property.
6. Sparks were seen falling over toward the Mays property.

The fact that the fire started on the roof of the ice house, a building filled with non-combustible material, so far above the ground that it could not be reached to be put out; and all the people about the Mays place being accounted for, indicates that the fire must have come from a spark from the Goodman fire.

Mr. Mays says (p. 440 bottom, 441 top):

Q. Had you noticed anything in the air, when you were over at Mr. Goodman's?

A. Well, it was full of charred shingles and leaves flying through the air.

Q. In which direction were they flying through the air?

A. The wind took them just direct to my place.

Q. Was there any fire in the ice-house when you left your place that afternoon?

A. No, sir, there was nothing there to have a fire in.

Q. What was in the ice-house?

A. Ice.

Elsie Ulbrich testified (p. 455, lines 35-40):

Q. Did you see anything passing through the air while Mr. Goodman's property was burning?

A. Sparks.

Q. Which direction were they going?

A. Towards Mr. Mays'.

And on page 456, top:

Q. Did you see anything happen over to Mr. Mays' place?

A. I seen the ice-house on fire.

Q. Now where was it on fire when you first saw it?

A. In the middle.

Q. In the middle of what?

A. The middle of the ice-house.

Q. On the side of it?

A. On the top.

And on page 457, lines 19-26; 35-38.

Q. Do you remember the ice-house?

A. Yes, sir.

Q. That is where the sparks struck, as you recall it?

A. Yes, sir.

Q. That is the sparks, you say?

A. Yes, sir.

Q. And while you were there you saw some sparks come over from where?

A. From Mr. Goodman's.

And on page 458, top:

Q. And you watched these sparks, you say, and one of them lit on where?

A. On the ice-house.

Joseph Orr says there was nothing wrong when he went down to Mr. Goodman's place (p. 459, line 39).

Bertha Ulbrich says (p. 461, lines 35-40; 462, lines 1-25):

Q. Which direction was the smoke going?
A. Right over in front of my place.
Q. How was the wind blowing that day?
A. Well, he go over from Mr. Goodman's and drove it over to my place.
Q. The wind drove it over from Mr. Goodman's?
A. Yes, sir.
Q. Did you see anything happen over to Mr. Mays' place that afternoon?
A. Yes, sir.
Q. What called your attention to anything happening there, how did you happen to notice it?
A. I was on my front, and I see that the ice-house was started on fire.
Q. How did you happen to look at the ice-house?
A. Well, I keep my eyes all over, you know.
Q. Was there anything said by anybody—did anybody say anything to you before you saw Mr. Mays' ice-house on fire?
A. Yes, sir, my Elsie told me.
Q. And then you looked where?
A. I looked over, and I see it start.
Q. Where?
A. Over on the ice-house.
Q. What part?
A. In the middle, in the roof, on the ice-house.
Q. What was burning there?
A. The roof.
Q. How much of it was burning?
A. Well, maybe two feet, it started, yes sir, it started—

Stella Mays went over to the Goodman fire and brought some valuables back to her own house, and found everything just as she left it, all right (p. 464, lines 30-40), and went back again to Goodman's. She says there was a very hot high wind blowing towards her home (p. 465, lines 25-28).

Isaac Walker, who lived on the same road a quarter

of a mile from Goodman's found little bits of burning shingles at his place, blown there from the Goodman house or the Mays fire (p. 469, lines 10-20; p. 470, lines 15-22). He says the sparks came from the west, and were going east and that his house was in that direction (p. 471, lines 1-10).

Frank Engelhart says that he saw the sparks flying from Goodman's place over toward Mr. Mays', and he went over to Mr. Mays' place and found the roof of the ice-house on fire (p. 473, lines 12-20).

Elsie Ulbrich was recalled and said she did not see a spark light on the ice-house; that it was afire when she first saw it, to the extent of two or three feet (p. 483, lines 10-25).

It must be obvious from the foregoing testimony that there could not be any other occasion for setting fire to Mr. Mays' property than by means of sparks blown to his place from the Goodman fire. The Goodman fire would therefore be both the natural and proximate cause of the Mays fire, and there is no difference between the responsibility occasioned, because the fire happened to be communicated for a long distance through the air than there would be in the case of a fire communicated to the personal property of Edward V. Goodman in his father's house, and a fire that might creep along the ground from foot to foot, from field to field, or from mile to mile. The negligence which occasioned the first outburst of flame is responsible for its spread without limit, until some other agency comes in and interferes, arrests or diverts the spread or aggravates its force in some way.

This principle appears to be settled in the fire case Salmon vs, D. L. & W. R. R. Co.

The question is clearly one for the jury, and the jury has properly resolved that question in favor of the plaintiff.

IV.

THERE WAS NO ERROR IN THE ADMISSION OF THE EVIDENCE OF PLAINTIFF'S WITNESS,

HENRY A. PEASE, AS TO THE CONDITION OF WEAR OF SCREENS IN THE ENGINES OF A RAILROAD COMPANY OTHER THAN THE DEFENDANT.

It will be conceded that locomotives generally are built upon the same principles. Their general build is a matter of common knowledge. We all know that the fire box is on the back end and the coal is put in there, and that the fire and heat and sparks pass through some passages to the front end, where the smoke stack is located, and where the smoke and sparks and exhaust steam are emitted.

The competency of the defendant's witnesses as to the efficiency and practicability of the screens used in all locomotives proceeds upon the theory that, generally speaking, they are all constructed and operated in a similar way, with but minor differences in the different railroads and in the different makes of engines. It appears from numerous witnesses produced by the defendant that all of the leading railroads of the United States have what is known as "front ends" in which there are nozzles projecting from the bottom from which the steam is exhausted under great pressure, causing a vacuum to be formed in the front end, which operates as a suction to draw the fire through the tubes and up out of the stack, and thus keep a fierce fire in the fire box.

It also appears that there is a blower connected at about the point where the nozzles are located, which blower is used for producing a draft when the engine is not running.

All of these witnesses, Barton, Chambers, Maxfield, Turner and Vaughn, describe the engines with regard to these features and with regard to the matter of the screen, and it appears that these features are of a similar character in the engines of all the different railroads of the country; and spark arresting apparatus in the form of a screen having approximately a one-quarter inch mesh, is universally used, including the Central Rail-

road, with reference to the engines of which Pease has testified.

It also appears that it is the common practice in all engines for sparks to collect on the front end, being those sparks which cannot go through the screen and necessarily cannot get out; that they collect up around the nozzles in the bottom of the screen; that steam and water are emitted from the nozzles and blower, and run down on the screen, with oil and soot and sparks; and that the screens are all made out of iron wire.

It is also well known that engines are operated by means of coal, forming gases that pass through the screen.

Now if the defendant may properly call witnesses to prove how screens in the engines of other railroads operate, and what is the best practicable means for the prevention of sparks, in such other locomotives, and compare the screens in such other locomotives with the screens in the engines of the defendant, it is pretty difficult to understand why the complainant in turn may not call a witness to tell how these screens in these other locomotives wear. "What is sauce for the goose is sauce for the gander." It will readily be appreciated that the plaintiff is under great difficulty in getting any witnesses who were employed by the defendant company to prove the particular experience of that company. There is nothing to show that there is any reason why the wear of the screens in an engine of similar character with regard to the front end, etc., of the Central Railroad, should be any different from screens in an engine of the defendant. The evidence shows that the conditions are practically the same. Pease says that the size of wires in the screens with regard to which he testifies, is just the same as the wire in the screen produced in court (p. 687, line 20). He speaks generally of five or six different patterns of engine (p. 684, line 35), evdently all with front ends and screens the same as on the Lehigh Valley engines. His evidence has nothing to do with the inspections, nor has his evidence anything to do with the negligence or lack of negligence on the part of the Central

Railroad Company. For all that we know, the repairs which he was called upon to make showed a diligence on the part of the Central Railroad Company in making the necessary repairs. The sole object of his testimony is to prove that the iron wire, which is the material of which the screens are made, in the use of it, with regard to the lower portion where it is clamped around the nozzles, and where the sparks pile up and the water runs down and settles, corrodes and wears out in a much shorter period of time than that testified to by the defendant's witnesses. They said the life of a screen was one year. Mr. Pease testifies that the lower part of the screen corrodes through use in about four months. (p. 688).

It does not appear that the witness repaired the screens, but merely renewed the extensions of the blower pipe, and the exhaust from the air pump, and he saw that that was the accustomed wear of the screens when doing the work. And it may be that the railroad company at the same time had the screens repaired. But we are not trying in this case the question of whether the Central Railroad Company made such repairs or not, nor has the plaintiff offered any proof that they did not make proper repairs.

This evidence is hardly any more harmful to the defendant than some of the evidence given by the defendant's own witnesses, in which they say, as above set forth, that corrosion generally took place, as Pease testified, at the bottom of the screen, where the sparks filled up around it, and where the vapor, soot, and water and oil collected. See p. 519, ll. 12, 28; p. 520, ll. 12-20. See also plaintiff's witness, p. 661, ll. 12-35.

It must be noted that the front of the screens in engine No. 2454 had been in use seven months, and the back of the screen five months, at the time of the fire. If Mr. Pease is right in stating that a screen will corrode around the bottom in four months, it would account for there being holes in the bottom of this screen, either front or back, through which a large spark which had come into the front end could be drawn and thrown

out of the stack, and be carried to a long distance. It is not correct to say that this evidence of Pease condemned the defendant by the actions of another railroad. That does not follow at all, as the question of whether the other railroad made the proper repairs or not has not been shown, and no favorable or unfavorable inference can be drawn; and certainly whether it is favorable or unfavorable to the Central Railroad,—that there should happen to be holes in the bottom of the screens of their engines has no bearing on this case. All that this evidence rebuts is the testimony that the life of a screen is one year. We now prove on our part that holes appear in a screen in natural wear in four months. There is no difference between the iron or steel in the Lehigh Valley engines than in the Central Railroad engine, and no difference, according to the evidence, in the operation of the engines; no difference in the actions of gases, sparks, oil and water in an engine of one company from an engine of the other. And the matter of inspections has nothing to do with this question.

Donovan, an engineer of the Central Railroad, says that company made use of anthracite coal (p. 658, l. 23).

Chambers, the Central Railroad Superintendent, says the wire of the screens is the same in the engines of the defendant and the Central Railroad (p. 620, lines 1-25).

V.

THERE WAS NO ERROR IN PERMITTING JAMES E. GOODMAN TO TESTIFY FROM A MEMORANDUM LIST HAVING VALUES OF THE LISTED ARTICLES APPENDED.

The use of the memorandum list in question was for the purpose of refreshing the recollection of the witness. It was not offered in evidence.

The great number of articles destroyed, probably a thousand or more, indicates the necessity of refresh-

ment of the recollection of the witness both as to each articles and as to its value.

There seems to be no good reason why a witness should not refresh his recollection as to value, as well as to other matters, where it appears likely that at the time he noted the value he would be in a better position, both as to the character of the article and the market value as it was then, to fix its value, than at the time he testifies.

The objection appears to be based more on the idea that the list was a composite production of James E. Goodman, his wife, Sarah E. Goodman, his son, Edward V. Goodman, and his daughter, Lucretia Wilcox, and therefore no one of these parties could testify from the list, when it was possible some of the articles or their values might have been the result of the recollection or opinion of some other one, and in that way make the evidence partake of a hearsay character.

I will first discuss this question as if James E. Goodman had been a living witness at the last trial. Even in such case I insist his evidence would have been competent.

All of the parties who participated in making the list, testified with reference to the part each took in preparing it. The correctness of the list is verified by the oath of each of the witnesses, and it would have been a waste of time for each witness to have gone over all the items in the list, as obviously he or she could not pick out the articles or their values which were the exclusive result of his or her own recollection, and the only way would have been for the entire list to have been gone over in detail by each. The cross-examiner had his opportunity to find out about any item. All of the witnesses say that after being prepared, they all went over the list and agreed that the items were correct. Each witness testified by items with reference to the class of articles with which each was most familiar,—James E. Goodman and his son Edward, with reference to the "out-door things" (that is, in the barn,

etc.), and Mrs. Goodman concerning the "in-door things" (household articles, etc.). The list was divided into two parts, "indoor" and "outdoor" articles.

All of the articles testified to by James E. Goodman were also testified to in detail by his son, Edward V. Goodman, and some by his wife, Sarah E. Goodman, and therefore there was evidence before the jury with regard to these articles, independent of the testimony of James E. Goodman.

It appears that the list is in the handwriting, in part of the daughter and in part of the son, that is, the daughter wrote the list of "in-door" articles, and the son wrote the "out-door" articles, and after being written these lists were examined by all and they all agreed that they were correct, both as to the articles and their values. There is no particular magic in the handwriting of a witness. There does not appear to be any good reason why a witness may not make a memorandum prepared by others, his own, if he has examined the memorandum at the time of its preparation or at the time when his recollection was fresh and finds it to be correct according to his recollection at that time. The brain of one may act and the hand of another may execute, and the result be the production of the brain of the one rather than the brain of the other.

It seems that the list in question was re-written from other pencil memorandum which was destroyed and after being re-written was examined and gone over by all of the parties and found to be correct, except that by inadvertance a few articles from the parlor were put in the list and stricken out. This correction is some proof of the accuracy of the list.

If any of the parties who assisted in preparing the list had not been produced and sworn with regard to the accuracy of the list, there would possibly have been some slight error, in that one of the witnesses might have supplied the recollection of some one article and its value, and thereby to a slight extent hearsay evidence would appear in the testimony of the witness who testi-

fied from the list. That is not the case in this cause. It would be advisable to refer to the testimony of the witnesses to see how each of them verified the list in question.

Edward V. Goodman testified as follows:—page 195, and 196.

Q. Did you make any list of the personal property on the place?
A. Yes, sir.
Q. When did you do that?
A. Why, if I recollect, it was just as soon as we came back from Maine, as soon as I came back from Maine.
Q. How long after the fire was that?
A. About three weeks or possibly four weeks.
Q. Who was with you at the time the list was made out?
A. My father, mother, and sister, and my wife was there.
Q. What did you put down on that list?
A. Well, we put down what was burned up.
Q. Was your recollection good at that time?
A. It certainly was sufficient—yes, sir, it was good.
Q. Did you put any values down at that time?
A. Yes, sir.
Q. Did you put anything down on the list that was not destroyed?
A. No, sir, I did not, because the fact is—
Q. I show you a paper, and I ask you whose handwriting that is in?
A. That is mine.
Q. What is this paper?
A. That is an inventory of the things that were consumed.
Q. Where are those things that are shown on this list?
A. Where those buildings were.
Q. Were they in the buildings?
A. Yes, sir, in the buildings and some possibly around the buildings.
Q. In what buildings?
A. In the outer buildings.
Q. What do you mean by "outer" buildings?
A. The carriage house, the wood shed and the wagon shed.

Q. Was there another list made of the things in the house?

A. Yes, sir.

Q. What did you call those?

A. The indoor things.

Q. Now, would you be able to enumerate all the things in the house, one after the other, without referring to this list?

A. No, I don't think so.

Q. Would this list refresh your recollection as to what articles were in the house and the barns?

A. The outdoor things I think I can give them very near without any list, but the indoor things I can't.

Q. Well, if you can give them without any list I am willing to go on.

A. I can't start at the top and enumerate them right down.

Edward V. Goodman went on and testified with regard to the articles on the list by the aid of suggestions from time to time, without objection. These articles testified to by him are the same which were testified to by his father from the list, and an examination of the list will show, I think, that none of the articles were omitted from the testimony of Edward V. Goodman.

He also testified as follows:—page 400-401.

Q. Now, Mr. Goodman, the list that you prepared and which your father used in testifying from, was, I believe you said, in your handwriting?

A. Yes, sir.

Q. Did you have personal knowledge of all the facts put on that list?

A. Yes, sir.

Q. What did you put down on the list, as to those facts?

A. Well, we put down what we thought was the market value price at that time.

Q. Did you set that down truthfully?

A. Yes, sir, as near as we could come to it.

Q. Were any of the things that you put down in the list based upon any information furnished by anybody else, that wasn't your own information?

A. Yes, sir.

Q. The list to which you have referred is the list of the outdoor things, so-called?

A. Yes, sir.

Cross-examination by Mr. McCarter.

Q. Who were present when this list was made up?
A. My father and myself.
Q. And your father took no part in making it up?
A. Yes, sir.
Q. What?
A. Yes, sir.
Q. His information as to the number of articles and the value given on the list was used, was it not?
A. I don't understand what you mean, Mr. McCarter.
(Question repeated.)
A. Certainly.
Q. And after you and he had agreed upon the different items, both as to the quantity and as to value, you then wrote down what you jointly agreed upon?
A. Well, yes, practically.

Lucretia Wilcox, the daughter testified as follows:—page 401, all of page 402, and part of page 403, and also page 404.

Q. Did you take part in the preparation of any of list of the personal property on the farm?
A. I did.
Q. What did you know about what there was there?
A. I had been in the habit of going home.
Q. How often did you go home?
A. Why, an average of once in two weeks.
Q. Before the fire?
A. Yes.
Q. And when were you married?
A. September 16th, 1903.
Q. Where had you lived before you were married?
A. At home.
Q. And had ever since you were born, lived home?
A. Yes.
Q. Did you take part in the preparation of the list?
A. Yes.
Q. In whose handwriting is the list made up?
A. I think it is mine, if I see it.
Q. I show you eight pages and ask you to identify the handwriting.
A. That is my handwriting.
Q. Where was the list prepared?

A. Part of it was prepared at my house and part of it was prepared in the shack where they lived after the fire.

Q. How did you know what to put down here?

A. From what my mother told me and father.

Q. Did you know anything about it yourself?

A. Yes, sir.

Q. Did you know of all of these things on this list yourself?

A. Yes.

Q. What does this list state with reference to the truth of the fact of the property being there?

A. Why, it is the truth, as far as I know it.

Q. Did you consult with your father and mother about the list?

A. Yes.

Q. Did your father and mother see the list after you had written it?

A. Yes.

Q. What did they do with it after you wrote it?

A. Took it to your office.

Q. Well, before they took it to my office, did they do anything with it, look at it?

A. Well, they looked over it to see that everything was written correctly.

Q. And in September sometime, you and your mother and your father got together, for the purpose of trying to make up a schedule of the articles inside the house that had been destroyed, is that right?

A. No. We started to make out that list in July.

Q. Well, did you keep it up until September?

A. Why, I think the final writing was in September; it was about a month or six weeks after the fire.

Q. Was there a list made out prior to this list?

A. Why, I think there was. First we made out in pencil.

Q. In pencil?

A. Yes.

Q. Then it wasn't made out at one sitting, then?

A. No.

Q. You had several sittings between July and September?

A. Yes.

Q. And the final sitting occurred in September?

A. I think perhaps it did. I am not certain about the date.

Q. Well, now, your mother contributed to the information as to what the articles in the house were, didn't she?

A. Some, yes.

Q. You could not remember, not having lived home for two years, and only visiting home occasionally, what every bedroom had in it, could you?

A. Why yes, I could.

Q. You could?

A. Yes.

Q. And every trunk had in it?

A. No, I won't be positive about the trunks, because I didn't open the trunks when I went there.

Q. And your father contributed some information as well, didn't he?

A. Yes.

Q. And did you yourself, or some of the others prepare the original lead pencil rough memorandum?

A. Well, I couldn't say.

Q. At any rate, there was an original rough memorandum that was the product of this kind of an investigation, and that memorandum you took home and you purported to copy in the sheets of paper that I have in my hand, is that right?

A. I won't be certain about that.

Q. Well, I understood you to say that some of this at least, was written at your home?

A. Yes.

Q. And it all looks to me as if it were with one ink, I may be wrong, you know. Look at it and see if it was not all written at home?

A. It looks very much as if it was, yes.

Q. So that, isn't it, your best judgment now, after looking at the paper, that that particular document, or those particular sheets of paper that you hold in your hand, is a copy of this other rough lead pencil memorandum?

A. Yes.

Q. That you yourself, made out?

A. I didn't make it out wholly myself, no.

Q. Well, I mean that you, yourself, copied this particularly?

A. Yes, I copied that.

Q. At your house?

A. I can't say. It is very likely that I did. I won't be certain about it.

Q. And who else was present when you were making up the original memorandum, beside your mother and your father? Was Elmer there?

A. I couldn't tell you. It isn't at all likely that he was, for he wouldn't know anything about anything.

Q. Was Edward there?

A. I couldn't say that either.

Q. Couldn't say that?

A. No.

Re-direct examination by Mr. Whittemore.

Q. Do you know where this original pencil memorandum is?

A. I think it has been destroyed. I haven't seen it since.

Q. After you had written this list, was it examined by anybody?

A. Yes.

Q. In the family?

A. Yes.

Q. Who?

A. Mamma and papa.

By the Court:

Q. Why?

A. To see that it was correct.

Q. I thought you said you made it up and agreed it was correct before any examination was made?

A. Well, to see that this ink copy was correct.

Q. Oh, you mean that the rest of them examined the ink copy, after you had made it, to see that that was correct?

A. Yes.

Q. Well, you knew it was correct, didn't you?

A. Well, I knew it was correct, but there are lots of times when a person makes a mistake in copying something.

Q. Well, if there had been a mistake in copying, you could have corrected it if you knew what the facts were, couldn't you?

A. Well, I suppose I could, but things were overlooked sometimes, and we wanted to be sure it was correct.

Q. Then you were not quite sure it was correct?

and you wanted to have your recollection verified by that of your father and your mother, is that right?

A. Yes.

Mrs. Sarah E. Goodman, testified as follows:—page 292 and 293.

Q. Are you familiar with what was contained in the house?

A. Yes, sir.

Q. After the fire, did you prepare any list?

A. Yes, sir.

Q. When was that list prepared?

A. About six weeks or two months after the fire.

Q. Where was it prepared?

A. Partly in the building that we staid in after the fire, and part over at my daughter's house in Westfield.

Q. Who was present when the list was prepared?

A. My husband and daughter and myself.

Q. At that time did you remember what was in the house?

A. Yes, sir, I did.

Q. What was put on that list, with reference to things contained in that house?

A. Do you want me to itemize them?

Q. No, but tell what you did put down?

A. The household furniture and things.

Q. What household furniture had you?

A. Such as bedroom suits and carpets.

Q. Where was the furniture?

A. In the house.

Q. Did you put anything down on the list that was not in the house?

A. No, sir.

Q. Did you look over this list after it had been prepared?

A. I did.

Q. What was your recollection at the time you looked it over as to the correctness of it?

A. It was all right.

Q. You had been keeping house a good many years at that time, hadn't you?

A. Yes, sir.

Q. And you bought things for the household I suppose?

A. Yes, sir.
Q. And you knew what they cost?
A. Yes, sir.
Q. And the household furniture?
A. Yes, sir.
Q. Did you put anything on that list, as to the value of the articles?
A. Yes, sir.
Q. What did you put down with reference to the value?
A. From what we thought they were worth from the time we bought them to the time of the fire.
Q. What was your recollection as to the value when you looked over the list?
A. That they were correct.
Q. Now, I show you eight sheets of paper and ask you what they are (handing papers to witness)?
A. Itemized things of what we had in the house, furniture and things destroyed.
Q. Can you, without referring to this list, state all of the things in that house?
A. I think I can.
Q. Without referring to the list?
A. Yes, sir, I don't want the list.

Mrs. Goodman testified without referring to the list. I think that all of the articles testified to by her were not testified to by James E. Goodman, as they were indoor articles.

On page 294 she says:

Q. And that list had on it the value or cost that was put on the things at the time you made the list up?
A. Yes, sir.
Q. Now, in making up that list, you and your daughter and your husband all took part?
A. Yes, sir, we were all together.

And on page 295 she says:

Q. And do I understand that you claimed that you personally attended to the purchase of every article in that house?

A. No, sir, not everything, you could not understand that.

James E. Goodman in his testimony says as follows:— page 347 and page 348; also page 349 and 350, 351 and 352.

Q. Have you prepared a list of the household furniture and other personal property you had on your premises at the time of the fire?
A. Yes, sir, as near as we could.
Q. How soon after the fire did you prepare a memorandum of what you had there?
A. To the best of my knowledge it was about two months.

The Court:

Just show him that memorandum. (Paper handed witness.)

By the Court:

Q. Did you prepare that?
A. Yes, sir, with my suggestions.
Q. With what?
A. With my suggestions. I didn't write it, no.
Q. Whose writing is it?
A. Part is my son's. I couldn't say that. Part is my daughter's and the other I don't recognize.

By Mr. Whittemore:

Q. Were you present when it was prepared?
A. Yes, sir.
Q. The items were put in there by whose direction?
A. My direction, sir.
Q. Do you know whether you had those articles, all that are mentioned in that list ?
A. Yes, sir.
Q. At the time the fire occurred or before?
A. Yes, sir, Judge, I might state this, that this was written by my son, sir. I said I didn't know but it was. I was unfit at the time to do any writing.
Q. Did you take any part in the preparation of that paper?
A. Yes, sir, I did.
Q. What part did you take?
A. Why, we helped naming over the things and the prices of them.

Q. Now, did you ever look at the paper after he had written it?
A. Yes, sir.
Q. So as to know whether it was correct?
A. Yes, sir, I have.

The Court:

I will allow that paper to be used to refresh the witness' recollection. It is not admissible in evidence.

Q. Why was not the paper prepared by yourself?
A. Because I was so nervous, sir, that I couldn't write. My hand was very shaky.
Q. By whom was the paper prepared?
A. By my son there and my married daughter from Westfield.
Q. Who mentioned the articles which are in that list?
A. My wife and myself, sir.
Q. You all assisted, did you not, in making suggestions as to that list?
A. Yes, sir.
Q. Your wife, yourself and your son and your daughter?
A. Yes, sir.
Q. And that list contains the articles which were suggested by all four of you, does it not?
A. Yes, sir.
Q. And the values which I see here placed are the values which were suggested by all four of you, are they not?
A. Yes, sir.
Q. You say the list was not prepared until about two months after the fire?
A. Yes, sir; about that time.
Q. Now in what month was it prepared, if you remember?
A. It seems to me it was the last of September, sir.
Q. Last September?
A. Yes, 1905.
Q. And after the list had been prepared what was done with it?
A. Why, we sent it down to Mr. Whittemore, our lawyer.

Q. Immediately after its preparation?
A. Yes, sir.
Q. Have you seen it since?
A. Yes, sir.
Q. The original list?
A. No, sir.
Q. And after its preparation by your son and daughter did you see it before it was sent to Mr. Whittemore?
A. Yes, sir.
Q. Where?

A. To where I was living in the storehouse, right by the farm.
Mr. English:

We object to the introduction of this paper, as it seems to be a composite production of the son and daughter and wife and himself.

By the Court:

Q. Well, were you all present while this paper was being prepared?
A. Yes, sir.
Q. And after it was done you say you looked it over? Can you state whether or not you then found it was correct according to your recollection?
A. We had put in the parlor furniture through mistake and that we took out again, but otherwise it was all correct.
Q. Well, the parlor furniture and dining room furniture were not burned, then?
A. No, sir.
Q. They were saved?
A. Yes, sir.
Q. With that exception you say the list when you looked it over was or was it not correct?
A. As far as my belief, why, it was all correct.

By Mr. English:

Q. Some of those goods placed in the list were the result of the recollection of your wife and daughter and son, were they not?
A. Yes, sir.

Q. And as to values that also was their recollection, was it not?

A. Well, we took that from the bills we had paid on them, money we had paid.

Q. So that the values there stated are the values in the bills that you paid for these things?

A. Yes, sir, with the usual wear and tear, understand, sir.

Q. And all those goods were purchased by yourself and your wife and son and daughter, some of them?

A. By my wife and myself, sir.

Q. By your wife and yourself?

A. Yes, sir.

Q. And when you say by your wife and yourself you mean some of them were purchased by your wife and some by yourself?

A. No, sir, we went together and purchased them.

The Court:

I will allow the witness to see the paper itself only to refresh his recollection. The paper itself is not admissible in evidence.

* * * * *

Mr. English:

It would seem to me, if the Court please, that in using that list having appended to it a value, that he ought not at the time fix the value of those goods, but that the value fixed ought to be fixed without reference to the memorandum that he has there.

The Court:

Well, I think differently. I will allow him to use the whole of this memorandum.

Q. Will you refer to the list of the furniture in your house, Mr. Goodman?

By the Court:

Q. That is not the paper he has been testifying to?

A. Yes, sir.

Q. Some of it is your son and part your daughter?

A. That is outside goods, sir.

Q. These two papers are the papers you have been referring to in the testimony?
A. Yes, sir.
Q. Both of them?
A. Yes, sir.
Q. Both prepared in the same way?
A. Yes, sir.

By Mr. Whittemore:

Q. What is the difference between the two papers?
A. Why, one was the furniture throughout the house and the other was the outside things on the farm, the wagon and such.

The Court will bear in mind that James E. Goodman was the head of the family and would control the necessary expenditures and would naturally know most, if not all, of the articles in and about his property.

The objection is made to his testimony, but he says in his testimony that he knew the list to be correct, and if he is prepared to say that this is so, the jury has a right to decide whether or not he can be correct in his statement. It may conclude that although the list was made up by four people, James E. Goodman was one who knew, as he says, that all of the items of the list were correct, or at any rate all those out-door articles that he testified to. As suggested by the Court at the first trial, he was not familiar to any extent to the in-door articles, those were testified to by Sarah E. Goodman, she being familiar with these articles.

It is urged that because the Court excluded the testimony of Pope and Ernest Wilcox, the builders who jointly estimated on the cost of construction of the buildings on the place, that therefore the use of the list by James E. Goodman was also incompetent. It is insisted that the Trial Judge was in error in excluding the evidence of Pope and Wilcox. They were both sworn as witnesses, and whatever was the recollection of either one of them, was verified by the oath of that one when he went over the list, even though the

other one through inability to separate the items, which were the result of his own recollections, from the others might have testified to that extent in a hearsay manner.

If the testimony of Mrs. Goodman, her son and her daughter is to be interjected into James E. Goodman's testimony, so as to give to his evidence the effect (notwithstanding his independent assertions of personal knowledge of his own) of hearsay testimony, then the rule of law is nullified, which allows a party to show the truth, by the testimony of any witness even though that witness may contradict some other witness produced by the same party, providing there is no impeachment of such other witness.

I will now consider the effect of this testimony as produced from a deceased witness who testified at the first trial under the provisions of the Evidence Act.

The objection now urged is not sustained by the evidence at the first trial, that is, it was not then proved that any of the articles or their values was the result of the recollections of one witness which was not also shared by each of the other witnesses.

Evidence to this effect being brought out at the second trial does not necessarily invalidate the evidence taken at the first trial, because the Statute has, in any event, substituted the evidence of the dead witness as legal evidence whether or not it would have been legal evidence, if the witness were living, and produced at the second trial. It cannot be doubted that the Legislature has the power to define the evidence which may be produced at the trial and to permit the introduction of secondary evidence or even hearsay evidence. If there is any force in the argument made by the Counsel for the defendant, that argument is nullified by the mandatory language of the Statute.

Objection was made at the first trial to the use of the list with reference to the values appended. At that trial this objection was not well taken, inasmuch as it did not appear at that trial in any way that these values appended could have been the result of the recollection

of another witness in which recollection James E. Goodman did not concur.

The objection must be considered with reference to the values only, as no objection was made with reference to the articles listed on the ground that some of them might have been the result of the exclusive recollection of another person therefore the matter must be considered with reference to values. Whatever force there can possibly be to the objection as stated at the first trial, is only to be found in the evidence of other witnesses than James E. Goodman, produced at the second trial.

Now if any merit, as I say, is to be found in the objection made at the first trial and given force by the evidence at the second trial, that force or effectiveness is destroyed by the Statute, which says:

"The testimony of such deceased person on the former trial of said action may also be proved and admitted on the new trial thereof." Laws 1900, page 354, Section 10.

* * * * *

If it is considered that possibly some error might have crept in with reference to these lists, still it is not prejudicial to the defendant. The verdict rendered in favor of the plaintiff is for a much smaller amount than would be warranted by the testimony of James E. Goodman or of the other witnesses. The list of outdoor articles shows a valuation of $3,601.10 (per James E. Goodman, pp. 342, 346, 365 to 369), and the indoor articles of $725.20 to $743.14 (pp. 295 to 323). The amount of damages to the real estate according to the estimates of the defendant, was $3,500 (p. 645), $4,900 to $5,400 (p. 691), plaintiff's, $6,000 (pp. 131 and 258). The verdict was only Eight Thousand Three Hundred and Thirty-three Dollars and Thirty-three Cents, which could include under the charge of the jury interest for five years, (page 718). It will thus be seen that any evidence of values from the list by James E. Goodman was disregarded and the

jury went according to their own ideas, on the testimony of the other witnesses.

It also seems that the articles referred to would prove to a large extent to their own values, most of them being articles concerning which we all have a common knowledge even considering the customary wear and use.

The use of the list in any event was not prejudicial to the defendant because we must all agree that it would be impossible for the jury to carry in their recollection the one thousand or so articles and their values referred to in this list. The jury came into Court, as the record shows, asking to be given the list; the list was not given to them, but instead Counsel for the plaintiff and defendant agreed to submit their own calculations as to the value of the various articles destroyed.

This appears on page 715-718 of the case. The defendants gave a valuation of the outdoor articles at Three Thousand One Hundred and Forty-four Dollars and Fifty Cents ($3,144.50), and the indoor articles at Six Hundred and Fifty-seven Dollars ($657), and claimed a reduction of two-thirds in value.

The plaintiff gave a valuation of the outdoor articles of Three Thousand Four Hundred and Twenty-six Dollars and Sixty Cents ($3,426.60), and the indoor articles of Seven Hundred and Forty-three Dollars and Fourteen Cents ($743,14), and claimed that articles not subject to any depreciation, amounted to Eighteen Hundred Dollars ($1,800).

It will be observed that the valuations given by the plaintiff in this statement to the jury of the outdoor articles is the value as testified to by Edward V. Goodman, (p. 716 C. 39), and not James E. Goodman, and a reference to the evidence of Edward V. Goodman will show the correctness of the statement of the Counsel.

It can then be seen that the only figures which the jury had in mind when they considered of their verdict, were the figures testified to by Edward V. Goodman, and not James E. Goodman.

Therefore the defendant cannot possibly be prejudiced by any error that might have been made.

The error, if any, involved in the use of the list by James E. Goodman, would not affect the whole verdict. At the most it would only result in a reduction in the amount of the verdict to the extent of the values testified to by him in excess of the values testified to by the other witnesses.

If there be any error on this point, it does not affect the validity of the judgments recovered by Edward V. Goodman individually, and by Edmund Mays.

VI.

THERE WAS NO ERROR IN ADMITTING EVIDENCE NOR IN REFUSING TO CHARGE AS REQUESTED, WITH REFERENCE TO THE USE OF DIAPHRAGMS.

The question on page 664 objected to, was properly admitted because at that time it did not appear, on the plaintiff's rebuttal, what, if any, relation a diaphragm had to the screen. The defendant's witnesses claimed it had nothing to do with the spark arresting apparatus, although they admitted a diaphragm intercepted sparks, protected the screen from their impact, broke the sparks up into smaller pieces, tended to knock the fire out of them and to divert them into the bottom of the smoke box where they could come to rest. What the plaintiff's proof upon this subject was going to be, remained to be seen, and the judge properly gave the plaintiff an opportunity to make such proof as he could. The plaintiff's witnesses tended to prove that a diaphragm was efficacious to prevent the escape of sparks, but after considering testimony and hearing arguments the learned Trial Judge decided and stated that he would charge the jury that there was no obligation to place a diaphragm on an engine (p. 664), and he did so charge (p. 709, and 710 in three different ways in the 13th, 14th and

16th requests). The fifteenth request to charge is obviously redundant. The jury is presumed to have observed the directions of the judge, that there was no liability on account of failure to install a diaphragm in engine 2454.

There is much that might be said in support of the evidence concerning diaphragms. It shows that diaphragms are valuable in preventing sparks although their principal use is said to be to regulate the draft.

When the statute was originally adopted, locomotives did not have extension fronts or smoke ends. The spark arresting apparatus was contained in the smoke stack proper in an enlarged top with which we are familiar by illustrations. In this enlarged stack there was an arrangement of plates or diaphragms to intercept and "baffle" the sparks and then a netting was stretched across the top or outlet. The statute was worded with reference to this arrangement. The plates in the stack were the statutory "cover" as I understand it; in the most primitive early form of locomotive, there was probably some plate or cover held over the top of the stack. In the modern locomotive these plates and screens have been taken out of the stack and moved to a point below in the new extension front. In the statutory sense therefore the front end is still a part of the smoke stack and the diaphragm might still be considered as the impenetrable screen or cover referred to in the statute. A screen does not necessarily have meshes, it may be a solid screen.

It may be the special charters of some of the companies organized when railroads were in their infancy, contain provisions with regard to the prevention of fire, but it would be a large undertaking to examine all of these numerous charters to find such a provision. Apparently the first general law on this subject was passed in New Jersey in 1865, and was entitled "An Act to prevent injuries by fire from locomotive engines on railroads, and to provide compensation therefor." This act made it the duty of the company "to take and use

all practicable means to prevent the communication of fire" etc., and provided that the company should be responsible in damages for all fires caused, and might effect insurance against its liability. P. L. 1865, p. 901.

In 1873 a supplement to this act required every company to provide its "engine or engines with a screen or screens, or cover or covers, on the smoke stack or smoke pipe of such engine or engines, so as to prevent as much as practicable the escape of fire, either from wood, soft coal, or hard coal, from the smoke stack or smoke stacks, smoke pipe or smoke pipes of said engine or engines." Sec. 2 made proof of the fire, prima facie proof of violation, subject to be rebutted, etc. Sec. 3 imposed a penalty. P. L. 1873, p. 155.

It is not known whether these provisions were borrowed from another state, or whether they were original with us.

All the sections of the original act of 1865 and the supplement of 1873 were incorporated verbatim into the Railroad Act of 1874 as Sections 13, 14, 15, 16, and 17. Gen. Stat., p. 2670.

These provisions, in slightly modified language, are contained in the Act of 1903, as Sections 56 and 57. P. L. 1903, p. 673.

In 1865 and 1873 extension fronts were not used on locomotives, and all of the spark arresting apparatus, the screens and covers, were contained in the enlargement of the smoke stack itself.

The defendant certainly is not prejudiced by any action of the Trial Judge concerning diaphragms. If there was any prejudice it was to the plaintiff.

A great mass of evidence as to diaphragms was admitted without any objection (see pp. 623, 624, 629, 630, 631, 655, 515, 516, 605, 606, 607). The first and only objection to this evidence appears on p. 664, and the Trial Judge immediately thereafter ruled out further evidence as to diaphragms (p. 665).

VII.

THERE WAS NO ERROR IN THE REFUSALS TO CHARGE AS REQUESTED BY THE DEFENDANT.

As to the fourth request (p. 704, l. 29).

There was no error in refusing this because the law was correctly charged (p. 704, l. 36), because, even if there was negligence by the defendant the plaintiff owed no duty to the railroad to preserve his own property; if he wished to do so he could expose it to danger and take no precautions and sustain himself whatever loss might result. That was his own affair, as long as he did not injure some one else. The request therefore was an improper one.

In addition to this the Trial Judge clearly and fully explained to the jury the necessity of finding that there was negligence with a reference to the screen in the engine before they could find a verdict for the plaintiff. It clearly appears from his charge that if the fire did occur from a spark without any negligence by the defendant, there could be no recovery (p. 697, lines 16-20, and p. 7, lines 1-10). The request therefore was redundant.

With regard to the seventh request (p. 724).

The objection to the qualification of this request is that the defendant was required to use a "high degree of care" in its inspections. This is what the statute requires. It says "shall take and use *all* practicable means to prevent the communications of fire, etc." (Sec. 56), and also "subject, nevertheless, to be rebutted by evidence of the taking and using *all* practicable means, etc." (Sec. 57).

"*All* practicable means" certainly is equivalent to the "highest degree of care" where care is a means of prevention. If there is degree of care practicable not taken, however high, then all practicable means are not taken and there has not been a compliance with the

statute. A "high degree of care" as specified by the Trial Judge is a more limited expression than the plaintiff was entitled to have used. It should have been, the "highest degree of care practicable." The only limitation on the degree of care is its practicability.

The expression "due care" in the Wiley case, was not used significantly in this connection. There was no occasion for the court to decide whether or not a high degree of care was necessary. It seems reasonable to believe that the court would have regarded "due care" in a spark case to be as high a degree of care as practicable.

The defendant has nothing to complain of on this score.

With regard to the eighth request (p. 724).

This request is more comprehensive than it should be; it does not in any way provide for the duty of keeping the screen in order. If this request had been charged, the jury might have considered that the placing of a new screen in the engine five months before the fire, in itself exonerated the defendant from liability, even though holes afterward came in it. The court covered the law fully (p. 702, 703, 705, lines 20-28, p. 710, lines 12-28).

With regard to the eighteenth request (p. 726).

The plaintiff has not offered any evidence to rebut the fact that the cone screen in engine 2454 was not as effective as any screen in use. Under the judge's charge eliminating any consideration of diaphragms, the sole issues were with regard to inspections and the condition of the screen. All the evidence concerning basket screens or any other form, comes from the defendant's witnesses.

The 18th request is practically covered by the 17th, which was charged (p. 710), and which is couched in general terms, the only difference between that and No. 18 being that the latter uses more specific language and refers to the certain styles of screens, particularly. This

point would be of more significance if the evidence raised any issue that one form of screen was any better than another. Taking the case as a whole, it clearly appears there was no controversy over the style of screen used, and the jury was not misled in any way on the subject. There is no prejudice to the defendant through the failure to charge this request.

VIII.

THERE WAS NO ERROR IN THE ADMISSION OF THE EVIDENCE.

(a) The question "How did that field get on fire?" (p. 147, line 25), is of itself unobjectionable; the answer to the question might be objectionable if it involves a conclusion of the witness, and the defendant could move to strike it out. The remainder of the evidence clearly shows the extent of McDonald's knowledge as to how the field got on fire, and all of his knowledge was laid bare to the jury on direct and cross-examination. I say the question is unobjectionable because the witness might know exactly how the fire was caused, such as that it was set by a match in his presence, etc., and the answer would have to be heard before it could be said to be objectionable; and even then the answer as given, is open to explanation, as it actually was explained in this case, and there would have been no prejudice with the jury.

But the objection that the answer involved a conclusion was not presented to the trial court. The record shows:—

Mr. McCarter:

I object to this evidence for *the same reasons heretofore stated.*
Same ruling.

What reasons were heretofore stated?

The objection is the one which appears on p. 113, line 28-40, to evidence of Charles Cordes of a similar character to McDonald's, that it was irrelevant and immaterial to show other fires at the same or greater distance from the track. The point having been considered and decided adversely (and properly under the Chancellor's opinion) to the defendant, its counsel contented himself with simply objecting to McDonald's testimony as to other fires on the same ground, in order to preserve his rights and to be consistent. I feel assured that nothing was further from the thoughts of my learned adversary and the court than that the question involved a conclusion, as now urged. The objection not having been presented to the trial court cannot be urged on appeal. (See also the same objection similarly stated on p. 125, line 20, as to the evidence of George Cordes.)

(b) The question, "Who would have any occasion to go into the barn on the afternoon of that day?" (p. 358, l. 8), must also be taken with common sense consideration. Everybody knows that an answer to such a question must be limited by the extent of his knowledge. Being the proprietor of the place, the witness would naturally know if there was any person who would in the course of his duties, have occasion to go to the barn to feed or water the stock, get tools and supplies, etc. The answer might have been in the affirmative. While it was in the negative, the answer must manifestly be taken and understood by the jury with the limitation of the knowledge of the witness, which was fully disclosed by the evidence.

(c) The questions asked of the witness Turner (p. 610, line 25), Maxfield (p. 630, l. 20), and Rehrig (p. 649, l. 16, p. 652, l. 1), with regard to the distance that the spark would travel if emitted from a screen in good order, involved the expert knowledge of the witnesses in some measure. The witnesses Turner and Maxfield were produced to prove that the screens were efficient means of prevention of the escape of sparks,

and the test of such efficiency would be in the operation of the screens, and the distance to which sparks might go from such a screen, shows how the screens operate. These were qualified as practical mechanics, and if they could know anything about the operation, they ought to know to what extent such a screen would throw fire. It is not known that there is such a person as an expert on the life of sparks, and strictly speaking, probably no expert testimony, as such, could be produced on that subject. A locomotive engineer or constructor or mechanic, who much know how an engine is built and operated, and who actually operated one, or rode on one with a view of watching its operation, would have more than common knowledge on the subject, and the jury is entitled to have the benefit of such further knowledge.

The plaintiff had a right to inquire of these witnesses as to the effect of the operation of the screens. It is conceded that some fire must escape, and it is a pertinent query,—to what distance? If the answer was that a one-quarter inch spark could go 168 feet and set fire, it would have been fatal to the plaintiff's case, or else the conclusion would be proper that a spark arresting apparatus which emitted sparks to that distance, was a farce and a sham. If the plaintiff took the risk of the question, and the answer happens to show not only that the screen was effective in limiting the area to which sparks could go, but also that, in connection with another branch of the case, if sparks could go an extraordinary distance, a screen which emitted them must have been out of order, the plaintiff is entitled to the benefit of such evidence.

(d) The defendant objects to the plaintiff's cross-examination on Shannon's inspection book, used by him to refresh recollection (See arguments, p. 569, lines 28-40; pp. 570, 571 and 572). The defendant refuses to offer the book in evidence, although a motion is made that he shall do so (See pp. 563 to 568), and then tries to force the plaintiff to offer his record or else

forego a cross examination on it. It is needless to call attention to the fact that defendant cites no authorities to sustain his contention. If this is the rule, the plaintiff is out of court before the trial begins.

There is direct authority for such cross examination.

Stephen's Digest of Evidence, Art. 137.

See also Elliot v. Moreland, 69 N. J. L. 216, 54 Alt. 224.

(e) "Q. Was any inspection made otherwise of the engine?" (p. 674, l. 3). The same comments as to the questions under subdivisions (a), (b), this point, apply with equal force to this question. The question is not objectionable; the answer depends on the extent of the knowledge of the witness. It happened the answer showed the witness had knowledge of certain inspections, but not of front ends. The extent of his knowledge was thoroughly shown to the jury, and the jury, if they believed his testimony, at the end of his evidence, could say as well as he whether any inspections were made. They learned how long he was there and what he knew during that time, and certainly had to understand his answer as referring to the scope of his knowledge. At the time the question was asked, it had not appeared that there was any limitation of the knowledge of the witness.

No objection was made on the ground that the answer involved a conclusion, nor could it be said that the question called for an answer involving a conclusion.

IX.

THE COST OF NEWLY CONSTRUCTED ORDINARY BUILDINGS MAY BE SHOWN, AS SOME EVIDENCE OF THE EXTENT TO WHICH THE REAL ESTATE WOULD BE DEPRECIATED BY THE DESTRUCTION OF THE BUILDINGS.

The questions involved under this point are found on page 231, line 20; p. 232, l. 33; p. 336, ll. 1-20, and l. 36. They involve altogether buildings costing originally $721. All of such new construction work was done within from 1½ years before the fire to a month and a half before. Surely this would be some guide to the jury as to the depreciation of the real estate through the destruction of the buildings. It was admitted on that ground (p. 232), and also as to James E. Goodman's testimony, because the Trial Judge felt bound to admit the evidence of this deceased witness just as it was originally taken and ruled upon. The Judge correctly charged the jury that the measure of damages was the depreciation in the value of the real estate (p. 706, 707). The plaintiff contended for no different rule. The cost of these new buildings tended to establish the value before the fire. The defendant's witness, Marsh, did not know any change had been made in the house (p. 643, l. 35; p. 644, l. 32-40; p. 645, l. 1-10). He says they were *old* buildings (p. 645, line 11; p. 643, l. 20). The defendant's witness, French, did not know how many buildings there were (p. 690, l. 23). It therefore appears that the valuations given by defendant's witnesses were not based on a proper state of facts, and it was competent for plaintiff to supply evidence of those facts. The plaintiff also produced expert witnesses as to the depreciation in value of the real estate,—Scudder (pp. 128-145), and Hewitt (pp. 255-258). The evidence of cost of the new buildings tended to corroborate these witnesses as to their valuations, as distinguished from the much lower calculations of the defendant's witnesses.

The question of the juror (p. 171), with regard to 20% depreciation in the value of the new buildings, related to the evidence of the witness, Pope, who was finally not allowed (p. 173) to give estimates of the value of the buildings, because his memorandum was in part prepared by his partner.

X.

THE CREDIBILITY AND SUFFICIENCY OF DEFENDANT'S PROOFS UNDER ALL THE CIRCUMSTANCES, ARE QUESTIONS EXCLUSIVELY FOR THE JURY.

Many of the considerations suggested under Point II (omitting those which tend *directly* to impeach or controvert the defendant's evidence), show that the credibility of the witnesses, and of their records, under all the circumstances of the case, should not be deemed conclusive by the court, but should properly be passed upon by the jury, to see if twelve reasonable men are satisfied with the truth and correctness of their statements and their records, or whether they do not think they are untruthful or mistaken or their records false or carelessly and perfunctorily made.

8 A & E. Ency. 19.

2 Thompson on Negligence, Sec. 2234, 2287 to 2290.

Burlington R. R. v. Westover, 4 Neb. 268.

St. Louis Rwy. v. Coombs, 88 S. W. 595.

XI.

THE JUDGMENTS IN ALL THREE SUITS SHOULD BE AFFIRMED.

It should be noted that if any error is found with regard to Point III, this brief, it does not affect the validity of the judgments of Edward V. Goodman, Executor, or Edward V. Goodman individually.

If there was error with regard to Point V, this brief, it may only affect the judgment of Edward V. Goodman, Executor by reducing the amount, and would not affect at all the judgments of Edward V. Goodman individually, and of Edmund Mays.

If there was error with regard to Point IX, this brief, it would only occasion a reduction in the verdict not exceeding $721 in the case of Edward V. Goodman, Executor, and would not affect the other two judgments at all.

June Term, 1911.

C. McK. WHITTEMORE,

Attorney for Plaintiffs.

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Writ of Error.

Filed Jan. 16, 1911.

NEW JERSEY, *ss.*:

The State of New Jersey to the Chief Justice, and other Justices of our Supreme Court of Judicature,

[SEAL] GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you, between Edward V. Goodman, executor of the last will and testament of James E. Goodman, deceased, plaintiff, and Lehigh Valley Railroad Company of New Jersey, a corporation, defendant, in an action in tort, manifest error hath intervened to the great damage of the said Lehigh Valley Railroad Company of New Jersey, as is said; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that the record and proceedings, with all things touching the same, to our Judges of our Court, of Errors and Appeals in the last resort in all causes at Trenton, on the second day of February next, together with this writ, you distinctly and openly send, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the thirteenth day of January, in the year of our Lord one thousand nine hundred and eleven.

S. D. DICKINSON,
Clerk.

McCARTER & ENGLISH,
Attorneys.

The answer of the Justices of the Supreme Court of the State of New Jersey within named.

The record and proceedings whereof mention is within made with all things touching and concerning the same we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed as within we are commanded.

(L. S.) WILLIAM S. GUMMERE,
Chief Justice.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Elizabeth in and for the County of Union, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and ten, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the seventh day of June, A. D., nineteen hundred and ten, before our said Supreme Court at Trenton comes the said plaintiff by his attorney aforesaid, and the Judge before whom, etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred and ten, at a Circuit Court, held at

Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court, to whom the issue joined as aforesaid, was referred by his Honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, comes as well as the within named Edward V. Goodman, executor of the last will and testament of James E. Goodman, deceased, plaintiff, as the within named Lehigh Valley Railroad Company of New Jersey, defendant, by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who, to try the truth of the matters within contained, being chosen, tried and sworn, on their oaths say, that the said Lehigh Valley Railroad Company of New Jersey, is guilty of the trespass and grievances above laid to its charge, in manner and form as the said Edward V. Goodman, executor of the last will and testament of James E. Goodman, deceased, hath complained against it, and they assess the damages of the said Edward V. Goodman, executor of the last will and testament of James E. Goodman, deceased, over and above his costs and charges, to the sum of eight thousand three hundred and thirty-three dollars and thirty-three cents, and for those costs and charges, to the sum of

But because our said Court now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to wit, until the fifth day of January, A. D., nineteen hundred and eleven, to hear the judgment of the said Court thereupon.

At which day, before our said Court at Trenton, come the parties aforesaid, by their attorneys aforesaid. Thereupon all and singular the premises being seen and by the Court now here fully understood and mature deliberation thereupon had;—

It is considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid found to eight thousand three hundred and thirty-three ollars and thirty-three cents, and also for his costs and charges aforesaid, by the court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to judgment signed this fifth day of January, A. D., nineteen hundred and eleven, as of June seventh, A. D., nineteen hundred and ten, *nunc pro tunc.*

WM. S. GUMMERE, *C. J.*

Writ of Error.

Filed Jan. 16, 1911.

NEW JERSEY, *ss.*:

The State of New Jersey, to the Chief Justice, and other Justices of our Supreme Court of Judicature, GREETING:—

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Chief Justice.

Therefore let a jury thereupon come before our Chief Justice or some other justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Elizabeth, in and for the County of Union, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and ten, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the seventh day of June, A. D., nineteen hundred and ten, before our said Supreme Court at Trenton, comes the said plaintiff, by his attorney aforesaid, and the Judge before whom, etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred and ten, at a Circuit Court, held at Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court, to whom the issue joined as aforesaid was referred by his honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Edward V. Goodman, plaintiff, as the within named Lehigh Valley Railroad Company, of New

Jersey, defendant, by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also, come, who, to try the truth of the matters within contained being chosen, tried and sworn on their oaths say that the said Lehigh Valley Railroad Company of New Jersey is guilty of the trespass and grievances above laid to its charge, in manner and form as the said Edward V. Goodman hath complained against it, and they assess the damages of the said Edward V. Goodman over and above his costs and charges, to the sum of two hundred dollars, and for those costs and charges to the sum of

But because our said court now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to wit, until the fifth day of January, A. D., nineteen hundred and eleven, to hear the judgment of the said court thereupon.

At which day before our said court at Trenton, come the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises being seen and by the court now here fully understood, and mature deliberation thereupon had—

It is considered that the said plaintiff do recover against the said defendant, his said damages by the jury in form aforesaid, found to two hundred dollars, and also for his costs and charges aforesaid, by the court now here adjudged to the said plaintiff, and with his assent, which said damages, costs and charges in the whole amount to

Judgment signed this fifth day of January, A. D., nineteen hundred and eleven, as of June seventh, A. D., nineteen hundred and ten, *nunc pro tunc.*

WM. S. GUMMERE, *C. J.*

Writ of Error.

Filed Jan. 16, 1911.

NEW JERSEY, *ss.*:

The State of New Jersey to the Chief Justice, and other Justices of our Supreme Court of Judicature, GREETING:—

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you, between Edmund Mays, plaintiff, and Lehigh Valley Railroad Company of New Jersey, a corporation, defendant, in an action in tort, manifest error hath intervened to the great damage of the said Lehigh Valley Railroad Company of New Jersey as is said; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that the record and proceedings, with all things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes at Trenton, on the second day of February next, together with this writ, you distinctly and openly send, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the thirteenth day of January, in the year of our Lord one thousand nine hundred and eleven.

S. D. DICKINSON,
Clerk.

McCARTER & ENGLISH,
Attorneys.

The answer of the Justices of the Supreme Court Court of the State of New Jersey within named.

The record and proceedings whereof mention is within made with all things touching and concerning the same we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed as within we are commanded.

(L. S.) WILLIAM S. GUMMERE,
Chief Justice.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Elizabeth, in and for the County of Union, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and ten, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the seventh day of June, A. D., nineteen hundred and ten, before our said Supreme Court at Trenton, comes the said plaintiff, by his attorney aforesaid, and the judge before whom, etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred and ten, at a Circuit Court held at Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court to whom the issue joined as aforesaid, was referred by his Honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Edmund Mays, plaintiff, as the within named Lehigh Valley Railroad Company of New Jersey, defendant, by their

respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who ,to try the truth of the matters within contained, being chosen, tried and sworn on their oaths say, that the said Lehigh Valley Railroad Company of New Jersey is guilty of the trespass and grievances above laid to its charge in manner and form as the said Edmund Mays hath complained against it, and they assess the damages of the said Edmund Mays, over and above his costs and charges to the sum of three thousand one hundred dollars, and for those costs and charges, to the sum of

But because our said court now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to wit, until the fifth day of January, A. D., nineteen hundred and eleven, to hear the judgment of the said court thereupon.

At which day before our said court at Trenton, come the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises being seen and by the court now here fully understood, and mature deliberation thereupon had:—

It is considered that the said plaintiff do recover against the said defendant his said damages, by the jury in form aforesaid found to three thousand one hundred dollars, and also for his costs and charges aforesaid, by the court now here adjudged to the said plaintiff, and with his assent, which said damages, costs and charges in the whole amount to

Judgment signed this fifth day of January, A. D., nineteen hundred and eleven, as of June seventh, A. D., nineteen hundred and ten, *nunc pro tunc.*

WM. S. GUMMERE,
C. J.

Assignments of Error.

Filed Jan. 25, 1911.

New Jersey Court of Errors and Appeals

EDWARD V. GOODMAN, Executor, etc., of JAMES E. GOODMAN, Deceased,
Plaintiff below and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant below and Plaintiff in Error.

In Tort. On Writ of Error.

EDWARD V. GOODMAN,
Plaintiff below and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant below and Plaintiff in Error.

In Tort. On Writ of Error.

EDMUND MAYS,
Plaintiff below and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant below and Plaintiff in Error.

In Tort. On Writ of Error.

Afterwards, that is to say, the twenty-fourth day of January, nineteen hundred and eleven, in the New Jersey Court of Errors and Appeals in the last resort in all causes, comes the Lehigh Valley Railroad Company of New Jersey, by McCarter & English, its attorneys, and says that in the record and proceedings in each of the cases aforesaid, and also in the matters recited and contained in the bill of exceptions in each of the cases aforesaid, and also in giving the judgment in each of the cases aforesaid, there is manifest error in this, to wit:

First. Because the trial judge refused, on motion of the defendant's counsel, to nonsuit the plaintiff, Edward V. Goodman, Executor of James E. Goodman, deceased.

Second. Because the trial judge refused, on motion of the defendant's counsel, to nonsuit the plaintiff, Edward V. Goodman.

Third. Because the trial judge refused, on motion of the defendant's counsel, to nonsuit the plaintiff Edmund Mays.

Fourth. Because the trial judge refused, on motion of the defendant's counsel, to direct a verdict for the defendant in each of said cases.

Fifth. Because the trial judge refused the request of the defendant's counsel to direct a verdict for the defendant in each of said cases.

Sixth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness Andrew Polimbo, to answer the following question: "I recall to your recollection, do you remember indicating a point in the horse stable, at the back door of the house, when asked to point out the back door of the house?"

Seventh. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness Charles Cordes, to answer the follow-

ing question: "What did you see happen in the field at the time the train passed, or after the train passed?"

Eighth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness, George Cordes, to answer the following question: "When the train passed, or after it passed, did you see anything happen?"

Ninth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness Thomas McDonald, to answer the following question: "How did that field get on fire?"

Tenth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness Theodore A. Pope, to answer the following question: "Can you tell us how much you estimated as the cost of rebuilding the house?"

Eleventh. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness Edward V. Goodman, to answer the following question: "During the time that your father lived on the property, between 1886 and 1889, do you know whether he paid any rent to Mrs. Van Velsor or not?"

Twelfth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness, Edward V. Goodman, to answer the following questions: "You were present and saw the horse bought and sold?" "Now, Mr. Goodman, what have you to say as to the value of these horses at the time of the fire?"

Thirteenth. Because the trial judge permitted the plaintiffs' counsel, over the objection of the defendant's counsel, to ask the witness Edward V. Goodman, questions to prove what the value of the reproduction of the buildings was, and also to permit him to show the depreciation, as bearing upon the question of the value of the building at the time of the fire.

Fourteenth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness, Edward V. Goodman, to answer the following question, referring to the carriage house: "What did that building cost?"; and also the following question, referring to the wagon house: "What did that cost?"; and also the following question, referring to barn No. 2: "Do you know how much it cost?"

Fifteenth. "Because the trial judge refused to permit the defendant's counsel, on cross examination of the plaintiffs' witness, Edward V. Goodman, to ask the following questions: "Do you know how much insurance you and your father collected?" "You know, do you not, Mr. Goodman, that your father had his property insured?" "Did your father carry insurance upon both personal property and the buildings?"

Sixteenth. Because the trial judge refused to permit the defendant's counsel, on cross examination of the plaintiffs' witness, Edward V. Goodman, to ask the following questions: "Is it not a fact that after this fire, your father recovered from the Insurance Company the full amount for which the property had been insured?" "Did you not rebuild from the proceeds of the insurance that you had upon the property that was destroyed?" "Is it not a fact that your father carried insurance to what he deemed the full value of the property on that farm?"

Seventeenth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' witness, Miles M. Rouch, to answer the following question: "While there, did you see anything happen?"

Eighteenth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' counsel, on reading the testimony of James E. Goodman given at a former trial, to read the answer

to the following question, referring to the carriage house: "I will ask what that building cost?"

Nineteenth. Because the trial judge, over the objection of the defendant's counsel, permitted the plaintiffs' counsel, on reading the testimony of James E. Goodman, given at a former trial, to read the answer to the following question, referring to the house: "Can you say how much that papering and painting cost you?"

Twentieth. Because the trial judge permitted the memorandum referred to by the witness, James E. Goodman, whose testimony taken at a former trial was read, to be used to refresh the witness's recollection.

Twenty-first. Because the trial judge permitted the witness, James E. Goodman, whose testimony taken at a former trial was read, to use a memorandum to which was appended values of the articles mentioned therein, in giving his testimony.

Twenty-second. Because the trial judge permitted the plaintiffs' counsel, on reading the testimony of James E. Goodman taken at a former trial, to read the answer to the question: "Who would have any occasion to go into the barn in the afternoon of that day?"

Twenty-third. Because the trial judge refused to permit the answer of the witness, James E. Goodman, whose testimony taken at a former trial was read, to be read in answer to the question of the defendant's counsel on cross examination: "At the time of the fire, was your property insured?"

Twenty-fourth. Because the trial judge refused to permit the defendant's witness, William H. Vaughn, to answer the following question asked by the defendant's counsel: "Can you say whether the size of mesh used by the Lehigh Valley Railroad Company is

smaller or larger than that used by other railroads with which you are familiar?"

Twenty-fifth. Because the trial judge refused to permit the defendant's witness, William H. Vaughn, to express his opinion as a railroad man on the efficiency of the screen used by the defendant, a duplicate of which was in court, for the prevention of the throwing of sparks by an engine.

Twenty-sixth. Because the trial judge permitted the plaintiff's counsel to cross-examine upon the contents of the memorandum book produced by the defendant's witness, Thomas Shannon, and used by him to refresh his recollection, although said memorandum book was not offered in evidence by either side.

Twenty-seventh. Because the trial judge refused to entertain any new objections to testimony of witnesses deceased at the time of the trial, which testimony had been given at a previous trial, although urged to do so by the defendant's counsel.

Twenty-eighth. Because the trial judge permitted the plaintiffs' counsel, on cross examination of the defendant's witness, Amos Turner, to ask him, over the objection of the defendant's counsel, the following question: "Do you think that a spark would escape through a mesh of one-fourth inch in size in good order, and extend over a distance of 115 ft. and have life enough left in it to set fire at that distance?"

Twenty-ninth. Because the trial judge permitted the plaintiffs' counsel, on cross examination of the defendant's witness, Howard H. Maxfield, to ask him, over the objection of the defendant's counsel, the following question: "And in your opinion, would a spark coming through a screen of this character as is shown here in good order, go to a distance of 115 feet and retain vitality to set fire at that point?"

Thirtieth. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness in re-

buttal, Amandas Rehrig, the following question: "And in your opinion would a spark from an engine with a screen of that size and character, go to a distance of 115 feet, and retain vitality or fire enough to set fire to anything?"

Thirty-first. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, Amandas Rehrig, called in rebuttal, the following question: "Have you any feeling against the railroad now?"

Thirty-second. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, William B. Munn, in rebuttal, the following question: "Did the Central Railroad have any diaphragms on their engines?"

Thirty-third. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, William B. Munn, in rebuttal, the following question: "Why can't it be inspected right after it comes in?"

Thirty-fourth. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, Joseph S. Taylor, in rebuttal, the following question: "Was any inspection made otherwise of the engines?"

Thirty-fifth. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, Henry A. Pease, called in rebuttal, referring to engines of other railroad companies than the defendant, the following questions: "What condition of wear did you find those screens in when you have worked on the front end?" "Now, Mr. Pease, have you noticed the condition in which those screens will wear?" "Do you know how long those screens which you have noticed, how long they have been in the engines?"

Thirty-sixth. Because the trial judge permitted the plaintiffs' counsel to ask the plaintiffs' witness, Henry A. Pease, called in rebuttal, the following questions referring to the screens in engines of other rail-

road companies than the defendant: "Well, now, how does such screen wear?" "How have you found such a screen to wear, and in what condition do you find it at the expiration of four months?" "Well, now, just state what was the extent of wear at the end of four months?"

Thirty-seventh. Because the trial judge in his charge to the jury, charged the jury as follows:

"Now in that case the contention is, that an engine of the defendant company numbered 2454, I think it is, passed this farm, now owned by Edward V. Goodman, the son, and then owned by James E. Goodman, the elder—and you will find on the map the situation delineated fully—a barn was on that property, which, according to the testimony of the witnesses was seventy-two feet from the property of the railroad company, and 115 feet from the nearest rails of the defendant company—and a young man by the name of Polimbo who said that he had been working in a potato patch on the other side of the railroad tracks, away from the barns, that he came over to get a drink of water, to where his brother and another young man were cultivating and hilling potatoes in a field on the side of the tracks on which the barn was situated, but not finding water there, he started to go to the house to get some, and that when he arrived at an appletree some little distance—one hundred and fifty feet I think he said—from the barn, the mail train as he called it, drawn by engine No. 2454, had just passed, and he observed that there was a fire in the barn. I think he said the fire was about two feet in the barn, in the hay—I think that is his testimony—but whatever his testimony is, it is for you entirely to settle, and if I mistake the testimony, then you must disregard what I say, and settle it for yourselves. I am simply directing your minds to this evidence, to make clear what I wish to say, with respect to the law. He says he saw this fire about two

feet in the barn, in the hay, and that it spread rapidly and so on. .

Other witnesses say that the wind was blowing from the railroad towards the barns; that it was a dry hot day, and in that period of the year, and prior to the time of the fire, there had been a drought in that neighborhood, and other witnesses have been brought to show that a fire was communicated from the same engine, some little further distance along the road from the Goodman farm—or whether it was the same engine or not, it is for you to settle—but they gave evidence tending to show that a fire was communicated in the grass and from the same engine.

Another witness says that he was sheltering his clipped horse one day, at a time slightly distant from the time of this fire, and that a piece of coal dropped right near him where he was standing, and about six feet from the edge of the barn, and that it smoldered there for a little while, and that he then went and picked it up, and saw that it was a coal—I said he said "it dropped," maybe he did not say it dropped, but he said that he found this piece of coal smoldering there, and he said he picked this piece of coal up, still hot, and he danced it up in his hand and then put it under his foot—he put it out. Now, these and other facts which you will remember, you are to pass your judgment upon, and they are facts which in the first case the plaintiff says are evidence from which the jury should conclude that he has established by a preponderance of the evidence that the fire which was discovered by young Polimbo in this barn was a fire which was communicated from the engine of the defendant company as it passed on the railroad tracks the property of the plaintiff."

Thirty-eighth. Because the trial judge in his charge to the jury, charged the jury as follows:

"Now the defendant has introduced evidence here tending to show that it has a regular system of in-

spection of its engines, at Easton, Pa., and at Jersey City. It has produced books here in which the persons who made the inspection—either by having the testimony of those who were deceased read, or by witnesses who have testified from the stand—say that they made entries either at or shortly after the time the inspections were made, and that this record correctly and accurately represented what the inspection disclosed at the time it was made.

Now, of course, these records are not conclusive. It is for you to say whether these records, taken in connection with the supplementary evidence of the witnesses, established to your satisfaction, by a preponderance of the evidence, that the defendant used all practicable means to inspect these screens when they had once been installed. If the screens when first installed, were such as you would say, in the exercise of a high degree of care, on the part of the defendant company, and a high degree of skill in exercising its judgment to select those which were practicable, for the prevention of the communication of fire from its smokestack, to the adjacent property, then the defendant has done all that the law requires of it, provided afterwards it used reasonable care—which the law says is a high degree of care—to inspect these things, at proper intervals, to see that they were kept in a proper state of repair. After the defendant has done these things then the defendant has done the duty which the law has cast upon it, and it is not liable, and the verdict under those circumstances would have to be for the defendant, if there were nothing more in the case.

Then the plaintiff introduces evidence further in rebuttal, tending to show that the inspection which the defendant company alleges was made, was not a regular system of inspection, and that it was not made with the regularity and thoroughness which was testified to and which the defendant contends for.

Now, it is for you to take all this evidence, and say, whether upon all that evidence with respect to the installation and the inspection of these screens, in these locomotives, the defendant has discharged the burden which was cast upon it, of showing that it used all practicable means to prevent the escape of fire. If the defendant has done that, then the defendant is entitled to your verdict. If the defendant has not done that, and the plaintiff has established that the fire was communicated from the engine of the defendant company, to its property, then the plaintiff is entitled to your verdict, and then you would come to the question of the assessment of damages."

Thirty-ninth. Because the trial judge, in charging the defendant's first request, qualified said request as follows:

"First. The defendant requests me to charge—

I. 'The mere fact that the fire complained of in this case occurred, of itself creates no liability upon the railroad company. The jury, in order to give the plaintiff a cause of action, must conclude:

(a) That the fire was communicated from the locomotive of the defendant, whose number was 2454, and

(b) That the defendant had not used all practicable means to prevent the communication of fire by sparks from said locomotive.'

I do charge you that, except that I make this qualification of it—that in respect to the second portion of that request, that you are obliged to conclude that the defendant has not used all practicable means to prevent the communication of fire by sparks from said locomotive—that is not quite correctly expressed. For the burden rests upon the defendant to show you, that it has used all practicable means to prevent the escape of sparks from the locomotive, and if the defendant

has not done that and you are satisfied that the fire was communicated from the locomotive of the defendant, and you are satisfied of that by a fair preponderance of evidence, then the plaintiff would be entitled to your verdict."

Fortieth. Because the trial judge, in charging the defendant's third request, qualified said request as follows:

"Next I am requested to charge as follows:

'(3) The burden of proof is upon the plaintiff to show by the preponderance of evidence, that the circumstances creating liability upon the railroad company, existed in this case.'

I charge you this, with this qualification, that, as I told you before, the burden of proof is upon the plaintiff only to the extent of showing that the fire was communicated from the engine of the defendant company to the plaintiff's property, and that after that the burden of proof shifts over to the defendant company, and it must show that it used all practicable means to prevent the communication of fire from its locomotive engine to the property of the plaintiff."

Forty-first. Because the trial judge refused to charge the defendant's fourth request, as follows:

"4. The plaintiffs are bound to look out for, and take every precaution against, fire caused by sparks from a locomotive, which has been properly supplied with every practicable means to prevent the escape of sparks, and if the jury believe that the fire in question was due to a spark escaping from such a locomotive which nevertheless, owing to the high wind and the dry weather, and the exposure of a highly inflammable substance like hay, set fire to the plaintiffs' property, then there can be no recovery in the case."

Forty-second. Because the trial judge, in charging the defendant's fifth request, qualified said request as follows:

'(5) The owner of property adjacent to a railroad should use proper care in the use thereof, so as to guard against fire originating from the locomotive, without the fault of the company, and if the fire in question arose under those circumstances, then there can be no recovery.'

The law in this state says, that reasonable care is to be the duty of everyone, and reasonable care in this case, was the duty of this plaintiff—but the rule in regard to that is laid down as follows:

'The owner of lands—and I charge you that this is the law, in qualification of that request—the owner of lands adjacent to a railroad, is not obliged to keep his lands contiguous to the track, free from leaves or other combustible matter, coming or being thereon. He may cultivate, build upon and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself no other risks than such as are incident to the operation of the road, with proper care, by the company, and will, nevertheless, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain'—that is the law in this state on that subject."

Forty-third. Because the trial judge, in charging the defendant's seventh request, qualified said request as follows:

"I am next requested to charge as follows:

'(7) The railroad is not bound to insure that its inspection will disclose defects in the screen. It is only required to use due care in such inspection, and if, notwithstanding such care was exercised, a defect evertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire from the locomotive to plaintiffs' property, the company is not responsible therefor.'

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STATE OF NEW JERSEY.

Supreme Court

Amended Declaration.

(Filed March 8, 1906.)

NEW JERSEY SUPREME COURT.

Of the twenty-eighth day of November, Nineteen hunded and five.

UNION COUNTY, SS:

The Lehigh Valley Railroad Company of New Jersey, a corporation, the defendant of this suit, was summoned to answer unto James E. Goodman, the plaintiff therein, in an action in tort, and thereupon the plaintiff by Clark McK. Whittemore, his attorney, complains:

1. For that whereas the defendant before and at the time of the grievances hereinafter mentioned was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railway of the said defendant from the City of Newark, in the County of Essex and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood, in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said State of New Jersey, and did operate and propel over and along the said railroad certain trains, cars and

New Jersey State Library

steam locomotives and engines; and whereas the said plaintiff, at the time aforesaid, was the owner of certain lands and real estate adjoining the said railway of the said defendant at or near Goodman's Station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain personal property thereon situated, a large quantity of manure, to wit, twenty-five tons, of great value, to wit of the value of one hundred and fifty dollars; and whereas the said defendant was then and there bound by law to take and use all practicable means to prevent the communication of fire from any engine used by the said defendant in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjoining or near to said railroad, and to provide such engines with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire, yet the said defendant, not regarding its said duty in that behalf and notwithstanding numerous complaints previously made, did not take and use all practicable means to prevent the communication of fire from the engines used by them in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjacent or near to said railroad, and in particular to the property, hereinbefore mentioned, of the plaintiff, lying adjacent or near the said railroad and did not provide the engine or engines of the said defendant with a screen or a cover in the smokestack so as to arrest and prevent as much as practicable, the escape of fire therefrom, to wit on the first day of April, nineteen hundred and five, at or near Goodman's Station, in the Township of Fanwood, in the

County of Union aforesaid, whereby sparks and igneous matter were emitted or thrown from the smokestacks of the steam locomotives and engines of the said defendant, and fell over and upon the property of the said plaintiff, and thereby communicated fire to said manure and caused the complete destruction thereof, wherefore the said plaintiff says that he is injured and has sustained damages to the amount of twenty-five thousand dollars ($25,000), and therefore he brings his suit, etc.

2. For that whereas the defendant before and at the time of the grievances hereinafter mentioned was a railroad corporation and as such a common carrier of goods and passengers upon and along a certain railway of the said defendant from the City of Newark, in the County of Essex, and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood, in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said State of New Jersey, and did operate and propel over and along the said railroad certain trains, cars and steam locomotives and engines; and whereas the said plaintiff, at the time aforesaid, was the owner of certain lands and real estate adjoining the said railway of the said defendant at or near Goodman's Station, aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain buildings and improvements upon the said real estate erected, in which the plaintiff and members of his family and employees resided, to wit: A dwelling house, a barn or stable, a wagon house, a corn crib, a smoke house, a boiler house, of great value, to wit, of the value of seven thousand five hundred dollars, and was also the owner of

certain personal property contained in said buildings and upon said premises, to wit: Seventy tons of hay, two horses, one coal wagon, two bob sleds, one runabout, one spring wagon, one two-seated carriage, one reaper and binder, 3,000 feet of white oak plank, two sets of -double harness, one set of single harness, and household furniture, utensils and implements, wearing apparel, jewelry, and other personal property, goods and chattels, of great value, to wit, of the value of five thousand dollars. And the said plaintiff was also the owner of certain fencing, and of certain fruit and shade trees and grape vines upon said premises of great value, to wit, of the value of on thousand dollars; and whereas it was the duty of the said defendant then and there to take and use all practicable means to prevent the communication of fire from any engine used by the said defendant in passing along or being upon such railroad, to the property of whatsoever description of any owner or occupant of any land adjoining or near to said railroad, and to provide such engines with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire; yet the said defendant, not regarding its said duty in that behalf and notwithstanding numerous complaints previously made, did not take and use all practicable means to prevent the communication of fire from the engines used by them in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjacent or near to said railroad, and in particular to the property hereinbefore mentioned, of the plaintiff lying adjacent or near the said railroad, and did not provide the engine or engines of the said defendant with a screen or a

cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire therefrom, to wit, on the nineteenth day of July, nineteen hundred and five, at or near Goodman's Station, in the Township of Fanwood, in the County of Union aforesaid, whereby sparks and igneous matter were emitted or thrown from the smokestack of the steam locomotives and engines of the said defendant, and fell over and upon the property of the said plaintiff, and thereby communicated fire to said barn, wagon house, wood shed, corn crib, smokehouse, boiler house and dwelling house, and all of the aforesaid contents and property therein contained, and to the fencing, fruit trees, shade trees, grape vines and other property hereinbefore enumerated, and did thereby cause the complete destruction of the said buildings and other property above mentioned, whereby the said plaintiff sustained great loss and damage, and the said plaintiff was obliged to lay out and expend large sums of money, to wit: The sum of one thousand dollars in finding and providing a place of residence for himself and his family and employees, and stabling, storage and accommodations for his horses, stock, and cattle, and his wagons, vehicles and implements, and suffered loss and damage to his trade and business as a farmer and coal merchant, and lost large profits by reason of the destruction of his said property as aforesaid, and was obliged to suffer and undergo great hardships and inconveniences by reason thereof. Wherefore the plaintiff says that he is injured and has sustained damages to the amount of twenty-five thousand dollars, and therefore he brings his suit, etc.

3. For that whereas the defendant before and at the time of the grievances hereinafter men-

tioned was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railway of the said defendant from the City of Newark, in the County of Essex and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood, in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said State of New Jersey, and did operate and propel over and along the said railroad certain trains, cars and steam locomotives and engines; and whereas the said plaintiff, at the time aforesaid, was the owner of certain lands and real estate adjoining the said railway of the said defendant at or near Goodman's Station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain standing crops of hay, grain, clover and other farm products and trees growing upon said premises, of great value, to wit, of the value of one thousand dollars; and whereas the said defendant was then and there bound by law to take and use all practicable means to prevent the communication of fire from any engine used by the said defendant in passing along or being upon said railroad, to the property of whatever description of any owner or occupant of any land adjoining or near to said railroad, and to provide such engines with a screen or cover in the smokestack so as to arrest and prevent as much as practicable, the escape of fire, yet the said defendant, not regarding its said duty in that behalf and notwithstanding the numerous complaints previously made, did not take and use all practicable means to prevent the communication of fire from the engines used by them in passing along or being upon such railroad, to the property of whatever

description of any owner or occupant of any land adjacent or near to said railroad and in particular to the property hereinbefore mentioned, of the plaintiff, lying adjacent or near the said railroad, and did not provide the engine or engines of the said defendant with a screen or a cover in the smokestack so as to arrest and prevent as much as practicable, the escape of fire therefrom, to wit, on the twenty-second day of July, nineteen hundred and five, or near Goodman's Station, in the Township of Fanwood, in the County of Union aforesaid, whereby sparks and igneous matter were emitted or thrown from the smokestacks of the steam locomotives and engines of the said defendant, and fell over upon the property of the said plaintiff and thereby communicated fire to said standing crops of hay, clover, grain and other farm products and trees growing upon the said premises of the plaintiff, and did thereby cause the complete destruction of the same, wherefore the plaintiff says that he is injured and has sustained damages to the amount of twenty-five thousand dollars.

4. For that whereas the defendant before and at the time of the grievances hereinafter mentioned was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railroad of the said defendant from the City of Newark, in the County of Essex and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood, in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said State of New Jersey, and did operate and propel over and along the said railroad certain trains, cars and steam locomotives and engines; and whereas the said plaintiff, at the

time aforesaid, was the owner of certain lands and real estate adjoining the said railway of the said defendant at or near Goodman's Station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain personal property thereon situated, a large quantity of manure, to wit, twenty-five tons of great value, to wit, of the value of one hundred and fifty dollars; and whereas it was the duty of the said defendant to use and exercise reasonable and proper care and diligence to keep its railroad tracks and right of way and banks adjoining the same, being the property of the said defendant, free from dry grass, rubbish, paper, weeds and combustible material which might or could become ignited by sparks or igneous matter thrown or dropped from the locomotives or engines of the said company, or in any other manner, so that the fire so caused could or might spread from the said property of the defendant to the lands and property of the plaintiff and other persons adjoining the said defendant's railway, and thereby cause the damage or destruction of the property of the plaintiff or such other persons, and it was the duty of the said defendant to use and exercise reasonable care and diligence to prevent any fire originating upon the lands of the said defendant from the sparks or igneous matter emitted or thrown from the locomotives and engines of the defendant or caused by the action of the agents or employees of the said defendant, from spreading from said lands of the defendant over and upon the lands and property of the said plaintiff and other persons whose property adjoin the said defendant's railway, so as to cause the damage or destruction by fire of the property of the plaintiff or such other persons, yet the said

defendant, not regarding its said duty in that behalf and frequent complaints previously made, did not exercise reasonable care and diligence to prevent the accumulation of dry grass, rubbish, paper, weeds and combustible material upon its railroad tracks and right of way and banks adjoining the same, the property of the said defendant, which might or could become ignited from sparks or igneous matter thrown or emitted from the said defendant's locomotives or engines, or in any other manner whatsoever, but, on the contrary, negligently and carelessly permitted and allowed its said railroad tracks and right of way to become encumbered with a large quantity of dry grass, rubbish, paper, weeds and combustible material, so that the same became and were ignited by sparks and igneous matter emitted or thrown from the defendant's locomotives and engine, or in some other manner and did negligently and carelessly permit the fire so caused or which was caused by the actions of the agents or employees of the said defendant to spread over from the lands of the said defendant to and upon the lands of the said plaintiff, and communicated fire to the manure of the said plaintiff, thereby causing the complete destruction thereof, to wit, on the first day of April, nineteen hundred and five, at or near Goodman's Station, in the Township of Fanwood, in the County of Union aforesaid, wherefore plaintiff says he is injured and has sustained damages to the amount of twenty-five thousand dollars.

5. For that whereas the defendant before and at the time of the grievances hereinafter mentioned was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railway of the said defend-

ant from the City of Newark in the County of Essex and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood, in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said State of New Jersey, and did operate and propel over and along the said railroad certain trains, cars and steam locomotives and engines; and whereas the said plaintiff at the time aforesaid, was the owner of certain lands and real estate adjoining the said railway of the said defendant at or near Goodman's Station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain standing crops of hay, grain, clover and other farm products and trees growing upon said premises of great value, to wit, of the value of one thousand dollars; and whereas it was the duty of the said defendant to use and exercise reasonable and proper care and diligence to keep its railroad tracks and right of way and banks adjoining the same being the property of the said defendant, free from dry grass, rubbish, paper, weeds and combustible material which might or could become ignited by sparks or igneous matter thrown or dropped from the locomotives or engines of the said Company or in any other manner, so that the fire so caused could or might spread from the said property of the defendant to the lands and property of the plaintiff and other persons adjoining the said defendant's railway, and thereby cause the damage or destruction of the property of the plaintiff or such other persons, and it was the duty of the said defendant to use and exercise reasonable care and diligence to prevent any fire originating upon the lands of the said defendant from the sparks or igneous matter emitted or thrown from the locomotives and engines of the

defendants or caused by the action of the agents or employees of the said defendant, from spreading from said lands of the defendant over and upon the lands and property of the said plaintiff and other persons whose property adjoin the said defendant's railroad, so as to cause the damage or destruction by fire of the property of the plaintiff or such other persons, yet the said defendant, not regarding its said duty in that behalf and frequent complaints previously made did exercise reasonable care and diligence to prevent the accumulation of dry grass, rubbish, paper, weeds and combustible material upon its railroad tracks and right of way and banks adjoining the same, the property of the said defendant, which might or could become ignited from sparks or igneous matter thrown or emitted from the said defendant's locomotives or engines, or in any manner whatsoever, but, on the contrary, negligently and carelessly permitted and allowed its said railroad tracks and right or way to become encumbered with a large quantity of dry grass, rubbish, paper, weeds and combustible material, so that the same became and were ignited by sparks and igneous matter emitted or thrown from the defendant's locomotives and engine, or in some other manner and did negligently and carelessly permit the fire so caused or which was caused by the actions of the agents or employees of the said defendant to spread over from the lands of the said defendant to and upon the lands of the said plaintiff, and communicated fire to said standing crops of hay, grain and clover and other farm products and trees growing upon said premises, the property of the plaintiff, and thereby caused the complete destruction of the same, to wit, on the twenty-second day of July, nineteen hundred

and five, at or near Goodman's Station, in the Township of Fanwood, in the County of Union aforesaid, wherefore plaintiff says he is injured and has sustained damage to the amount of twenty-five thousand dollars, and therefore he brings his suit, etc.

C. McK WHITTEMORE,
Attorney for Plaintiff.

Plea—General Issue.

(Filed March 16, 1906)

NEW JERSEY SUPREME COURT.

JAMES E. GOODMAN, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	In Tort. Plea to Amended Declaration.

And the said defendant, the Leigh Valley Railroad Company of New Jersey, a corporation, by N. C. J. English, its attorney, comes and defends the wrong and injury, when, etc., and says, that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, etc., and the said plaintiff doth the like, etc.

N. C. J. ENGLISH,
Attorney of Defendant.

State of Pennsylvania, } ss:
County of Philadelphia. }

E. A. Albright, of full age, being duly sworn, saith that he, this deponent is the Ass't Secretary and for this purpose the agent of the Lehigh Valley Railroad Company of New Jersey, a corporation the defendant in the above entitled cause, that the plea is not intended for the purpose of delay, but that he, this deponent, verily belives that the said defendant hath a just and legal defence to the above entitled action of the plaintiff on the merits of the case.

A. E. ALBRIGHT.

Sworn and subscribed at Philadelphia, Pa.,
this 14th day of March, A. D., 1906.

L. S. J. Wm. Robbins.
A foreign Commissioner of Deeds
for New Jersey in Pennsylvania.

Order of Revivor.

(Filed Dec. 21, 1907.)

NEW JERSEY SUPREME COURT.

James E. Goodman, vs. Lehigh Valley Railroad Company of New Jersey.	In tort.

It appearing to the court that James E. Goodman, the plaintiff in the above cause, has died after filing the declaration and before final judgment in this suit, and that said James E. Goodman

left a last will and testament wherein and whereby he appointed Edward V. Goodman the executor thereof which will has been duly admitted to probate by the Surrogate of Union County, and said Edward V. Goodman has duly qualified as such executor and has taken upon himself the burden of the administration of said estate agreeably to said will, and the said surrogate has issued letters testamentary thereon to said Edward V. Goodman;

And it also appearing that the cause of action upon which this suit is founded, might have been originally prosecuted by the executor or administrator of the plaintiff if he had not been living at the time of the commencement of this suit, and that said suit should not abate by reason of the death of the plaintiff as aforesaid:

It is, on this twenty-first day of December, nineteen hundred and seven, ordered that this suit be and the same is hereby revived and the action shall proceed to final judgment at the suit of said Edward V. Goodman, executor of the last will and testament of James E. Goodman, deceased against said Lehigh Valley Railroad Company of New Jersey, defendant.

Entered December 21, 1907.

On motion of

C. McK. Whittemore,
Attorney of plaintiff.

Let the above rule be entered in the minutes.

F. J. SWAYZE,
J. S. C.

Consent is hereby given to the above order.

N. C. J. ENGLISH,
Atty. of Defendant.

A true copy.

M. Ricker, Jr.,
Clerk.

Order to Show Cause.

(Filed April 8, 1910.)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN, Executor of James E. Goodman, deceased, v. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	In Tort.

A verdict having been rendered for the plaintiff in the above entitled cause and application for a rule to show cause why the said verdict should not be set aside with the defendant's exceptions reserved having been made in due time,

It is ordered on this sixth day of April, Nineteen hundred and ten, on motion of McCarter & English, attorneys of the defendant, that the said plaintiff do show cause before this court at the state house in the City of Trenton, on Tuesday, the seventh day of June, next at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard why the said verdict should not be set aside and a new trial granted.

And it is further ordered that the exceptions granted to the said defendant at the said trial be and they hereby are expressly reserved.

WM. H. SPEER,
Judge.

Reasons.

(Filed May 11, 1910.)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN, Ex'r., of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	In Tort. On rule to show Cause.

And the said defendant by McCarter & English, its attorneys, comes and assigns the following reasons why the verdict entered in the above entitled cause should not be set aside and a new trial granted, viz:

First: Because the said verdict is contrary to the evidence.

Second: Because the said verdict is contrary to the weight of the evidence.

Third: Because the said verdict is excessive.

Fourth: Because the said verdict is in divers other respects illegal and improper.

McCARTER & ENGLISH,
Attorneys of Defendant.

Dated, May 5th, 1910.

Postea.

(Filed .)

NEW JERSEY SUPREME COURT.

James E. Goodman, Plaintiff, vs. The Lehigh Valley Railroad Company of New Jersey, a corporation, Defendant.	In Tort.

Afterward, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred ten, at a Circuit Court, held at Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court, to whom the issue joined as aforesaid, was referred by his Honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Edward V. Goodman, plaintiff, as the within named Lehigh Valley Company of New Jersey, defendant, by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who, to try the truth of the matters within contained, being chosen, tried and sworn on their oaths say: that the said Lehigh Valley Railroad Company of New Jersey is guilty of the trespass and grievances above laid to its charge, in manner and form as the sid Edward V.

Goodman hath complained against it, and they assess the damages of the said Edward V. Goodman over and above his costs and charges, to the sum of two hundred dollars, and for those costs and charges, to the sum of

WILLIAM H. SPEER,
Circuit Court Judge.

Declaration.

(Filed Aug. 24, 1906.)

NEW JERSEY SUPREME COURT.

Of the first day of August, Nineteen hundred and six.

Union County, ss:

The Lehigh Valley Railroad Company of New Jersey, a corporation, the defendant in this suit was summoned to answer unto Edward V. Goodman, the plaintiff therein, in an action in tort and thereupon the plaintiff, by C. McK. Whittemore, his attorney, complains:

For that whereas the defendant before and at the time of the grievances hereinafter mentioned, was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railway of the said defendant from the City of Newark, in the County of Essex and State of New Jersey, through a place known as Goodman's station, in the township of Fanwood, in the County of Union, in said state, to and beyond the Town of Bound Brook, in said state, and did operate and propel over and along the said railroad certain trains, cars, and steam locomotives and engines and whereas the said plaintiff at

the time aforesaid, was the owner of certain personal property consisting of clothing, furniture, jewelry, silver and gold plate and plated ware, china and glassware, crockery, furs, lamps, books and pictures, and house furnishings and supplies and other property, all of great value to wit, fifteen hundred dollars, which said property was situate and contained in the dwelling-house and other buildings of James E. Goodman, with whom the said plaintiff resided, situate upon the real estate of said James E. Goodman near the railway of the said defendant at or near Goodman's station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey; and whereas the said defendant was then and there bound by law to take and use all practicable means to prevent the communication of fire from any engine used by the said defendant in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjoining or near to said railroad and to provide such engines with a screen or cover in the smoke-stack so as to arrest and prevent, as much as practicable, the escape of fire; yet the said defendant, not regarding its said duty in that behalf, did not take and use all practicable means to prevent the communication of fire from the engines used by them in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjacent or near to said railroad, and in particular to the property hereinbefore mentioned of the plaintiff and to said property of said James E. Goodman, lying adjacent or near the said railroad, and did not provide the engine or engines of the said defendant with a screen or a cover in the smoke-stacks thereof, so as to arrest and prevent as

much as practicable, the escape of fire therefrom, to wit, on the nineteenth day of July, nineteen hundred and five, at or near Goodman's Station in the Township of Fanwood, in the County of Union aforesaid, whereby sparks and igneous matter were emitted or thrown from the smoke-stacks of the steam locomotives and engines of the said defendant, and fell over and upon the property of said James E. Goodman, being certain barns, and dwelling house situate upon lands of said Goodman adjacent to the said railroad of the defendant, in which buildings the aforesaid property of the plaintiff was located, and thereby communicated fire to said barns, dwelling house and other property of said James E. Goodman, and to the property of the plaintiff therein contained, as aforesaid, whereby all of the aforesaid property of the plaintiff was completely destroyed, and by reason thereof the said plaintiff sustained great loss and damage, and said plaintiff was obliged to lay out and expend large sums of money to wit, the sum of three hundred dollars, in finding and providing a residence and place of abode for himself and his family, and storage for his goods and chattels, and suffered and underwent great hardships and inconveniences by reason of the destruction of his said property as aforesaid.

Wherefore, the plaintiff says that he is injured and has sustained damage to the amount of fifteen hundred dollars, and therefore he brings his suit, etc.

C. McK. WHITTEMORE,
Attorney of Plaintiff.

Plea.

(Filed Sept. 10, 1906.)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN,. Plaintiff, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	In Tort.

And the said defendant, The Lehigh Valley Railroad Company of New Jersey, by N. C. J. English, its attorney, comes and defends the wrong and injury, when, etc., and says, that it is not guilty of the said proposed grievances above laid to its charge, or any or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against it.

And of this the said defendant puts himself upon the country, etc., and the said plaintiff doth the like, etc.

N. C. J. ENGLISH,
Attorney of Defendant.

State of
County of , } ss:

, of full age, being duly sworn, saith, that he, this deponent, is the and for this reason the agent of The Lehigh Valley Railroad Company of New Jersey, the defendant in the above entitled cause, that the above plea is not intended for the purpose of delay,

but that he, this deponent, verily believes that the said defendant hath a just and legal defence to the above entitled action of the plaintiff on the merits of the case.

Sworn and subscribed at Philadelphia, Pa., this 5th day of September, A. D. 1906 before me,

J. Wm. Robbins,

A foreign Commissioner of Deeds for New Jersey, in Pennsylvania.

(Seal).

Order to Show Cause.

(Filed April 8, 1910.)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN, v. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	In Tort.

A verdict having been rendered for the plaintiff in the above entitled cause and application for a rule to show cause why the said verdict should not be set aside with the defendant's exceptions reserved having been made in due time;

It is ordered on this sixth day of April, Nineteen hundred and ten, on motion of McCarter & English, attorneys of the defendant, that the said plaintiff do show cause before this court at the state house in the City of Trenton, on Tuesday the seventh day of June next at eleven o'clock in the forenoon or as soon thereafter as counsel can

be heard why the said verdict should not be set aside and a new trial granted.

And it is further ordered that the exceptions granted to the said defendant at the said trial be and they hereby are expressly reserved.

WM. H. SPEER,
Judge.

Reasons.

(Filed May 11, 1910.)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	In Tort.

On rule to show cause.

And the said defendant by McCarter & English, its attorneys, comes and assigns the following reasons why the verdict entered in the above entitled cause should not be set aside and a new trial granted, viz:

First: Because the said verdict is contrary to the evidence.

Second: Because the said verdict is contrary to the weight of evidence.

Third: Because the said verdict is excessive.

Fourth: Because the said verdict is in divers other respects illegal and improper.

McCARTER & ENGLISH,
Attorneys of Defendant.

Dated May 5th, 1910.

Postea.

(*Filed* .)

NEW JERSEY SUPREME COURT.

EDWARD V. GOODMAN, Executor &c., of James E. Goodman, deceased, Plaintiff, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	In Tort.

Afterwards, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred and ten, at a Circuit Court, held at Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court, to whom the issue joined as aforesaid, was referred by his Honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Edward V. Goodman, Executor of the last will and testament of James E. Goodman, deceased, plaintiff, as the within named Lehigh Valley Railroad Company of New Jersey, defendant, by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who, to try the truth of the matters within contained, being chosen, tried and sworn on their oaths, say: that the said Lehigh Valley Railroad Company of New Jersey is guilty of the trespass and grievances above laid to its charge, in manner and form as the said Edward V. Goodman, Executor of the last will and testament of James E. Goodman, deceased, hath

complained against it, and they assess the damages of the said Edward V. Goodman, Executor of the last will and testament of James E. Goodman, deceased, over and above his costs and charges, to the sum of eight thousand three hundred and thirty-three dollars and thirty-three cents, and for those costs and charges, to the sum of

WILLIAM H. SPEER,
Circuit Court Judge.

Declaration.

(Filed Aug. 24, 1906.)

NEW JERSEY SUPREME COURT.

Of the first day of August, nineteen hundred and six.

Union County, ss:

The Lehigh Valley Railroad Company of New Jersey, a corporation, the defendant in this suit, was summoned to answer unto Edmund Mays, the plaintiff therein, in an action in tort, and thereupon the plaintiff, by C. McK. Whittemore, his attorney complains:

For that whereas the defendant before and at the time of the grievances hereinafter mentioned, was a railroad corporation and as such a common carrier of passengers and goods upon and along a certain railway of the said defendant from the City of Newark, in the County of Essex, and State of New Jersey, through a place known as Goodman's Station, in the Township of Fanwood,

in the County of Union, in said State of New Jersey, to and beyond the Town of Bound Brook, in said state, and did operate and propel over and along the said railroad certain trains, cars and steam locomotives and engines and whereas the said plaintiff at the time aforesaid, was the owner of certain lands and real estate near the said railway of the said defendant at or near Goodman's Station aforesaid, in the Township of Fanwood, County of Union and State of New Jersey, and of certain buildings thereon situated, to wit a horse barn, a cow barn, a red barn, a work shop and toolhouse, an icehouse, a corn crib, a chicken house, and a barrack of great value, to wit, of the value of five thousand dollars; and the said plaintiff was also the owner of certain fruit trees, to wit, cherry, plum, apple and peach trees, and of certain fencing situate upon said premises, of great value, to wit, of the value of five hundred dollars; and the said plaintiff was also the owner of a large amount of personal property contained in said buildings and upon said premises, consisting of corn, oats, bran, hay, rye, straw, wheat and other grain, produce, and feed, ice, cord wood, cedar lumber, canvas, wagons, plows, harrows, roller, sleighs, farm appliances and machinery, milk and milk cans, frames, rope, block and falls, tools, box, and farming utensils, appliances and supplies, and other personal property, all of great value, to wit, three thousand five hundred dollars; and whereas the said defendant was then and there bound by law to take and use all practicable means to prevent the communication of fire from any engine used by the said defendant in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjoining or near to said railroad and to provide such engines with

a screen or cover in the smoke stack so as to arrest and prevent, as much as practicable, the escape of fire; yet the said defendant, not regarding its said duty in that behalf did not take and use all practicable means to prevent the communication of fire from the engines used by them in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjacent or near to said railroad, and in particular to the property hereinbefore mentioned, of the plaintiff, and to the property of James E. Goodman, hereinafter mentioned, lying adjacent or near the said railroad, and did not provide the engine or engines of the said defendant with a screen or a cover in the smokestacks thereof, so as to arrest and prevent as much as practicable, the escape of fire therefrom, to wit, on the nineteenth day of July, nineteen hundred and five, at or near Goodman's station, in the Township of Fanwood, in the County of Union aforesaid, whereby sparks and igneous matter were emitted or thrown from the smokestack of the steam locomotives and engines of the said defendant, and fell over and upon the property of said James E. Goodman, being certain barns, and dwelling house, situate upon lands of said Goodman adjacent to the said railroad of the defendant, and thereby communicated fire to said barns, dwelling house and other property of said Goodman, and the personal property contained in said buildings, and the fire thereby caused was communicated from the said buildings and property of said Goodman to the aforesaid buildings, and fruit trees and other property of the said plaintiff hereinbefore mentioned, whereby all of the aforesaid property of the said plaintiff was completely destroyed, and by reason thereof the said plaintiff sustained great loss and damage,

and the said plaintiff was obliged to lay out and expend large sums of money, to wit, the sum of one thousand dollars in finding and providing stabling, storage and accommodations for his horses, stock and cattle and his wagons, vehicles, goods and chattels, and suffered great loss and damage to his business as a farmer, and lost large profits, to wit, the sum of one thousand dollars by reason of the destruction of his said property as aforesaid, and was obliged to suffer and undergo great hardships and inconveniences by reason thereof.

Wherefore the plaintiff says that he is injured and has sustained damage to the amount of nine thousand dollars and therefore he brings his suit, etc.

C. McK. WHITTEMORE,
Attorney of Plaintiff.

Plea.

(Filed Sept. 10, 1906.)

NEW JERSEY SUPREME COURT.

Edmund Mays, Plaintiff, vs. The Lehigh Valley Railroad Company of New Jersey, Defendant.	In Tort.

And the said defendant, the Lehigh Valley Railroad Company of New Jersey, by N. C. J. Eng-

Plea.

lish, its attorney, comes and defends the wrong and injury, when, etc., and says, that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it.

And of this the said defendant puts itself upon the country, etc. And the said plaintiff doth the like, etc.

N. C. J. ENGLISH,
Attorney of Defendant.

State of Pennsylvania, }
County of Philadelphia. } ss:

D. G. Baird, of full age, being duly sworn, saith that he, this deponent is the secretary and for this purpose the agent of the Lehigh Valley Railroad Company of New Jersey, the defendant in the above entitled cause, that the above plea is not intended for the purpose of delay, but that he, this deponent verily believes that the said defendant hath a just and legal defence to the above entitled action of the plaintiff on the merits of the case.

D. G. BAIRD.

Sworn and subscribed at
Philadelphia, Pa., this
5th day of September,
A. D. 1906, before me,
J. W. M. Robbins.
A foreign Commissioners of Deeds for New Jersey in Pennsylvania.
(Seal.)

Order to Show Cause.

(Filed April 8, 1910.)

NEW JERSEY SUPREME COURT.

EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY.	In Tort.

A verdict having been rendered for the plaintiff in the above entitled cause and application for a rule to show cause why the said verdict should not be set aside with the defendant's exceptions reserved having been made in due time,

It is ordered on this sixth day of April, Nineteen Hundred and Ten, on motion of McCarter & English, attorneys of the defendant, that the said plaintiff do show cause before this court at the State House in the City of Trenton, on Tuesday the seventh day of June next at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard why the said verdict should not be set aside and a new trial granted.

And it is further ordered that the exceptions granted to the said defendant at the said trial be and they hereby are expressly reserved.

Wm. H. SPEER,
Judge.

Reasons.

(Filed May 11, 1910.)

NEW JERSEY SUPREME COURT.

EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	In Tort. On Rule to Show Cause.

And the said defendant by McCarter & English, its attorneys, comes and assigns the following reasons why the verdict entered in the above entiled cause should not be set aside and a new trial granted, viz:

First: Because the said verdict is contrary to the evidence.

Second: Because the said verdict is contrary to the weight of evidence.

Third: Because the said verdict is excessive.

Fourth: Because the said verdict is in divers other respects illegal and improper.

McCARTER & ENGLISH,
Attorneys of Defendant.

Dated, May 5th, 1910.

Postea.

(*Filed* .)

NEW JERSEY SUPREME COURT.

EDMUND MAYS, Plaintiff, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	In Tort.

Afterwards, that is to say, on the twenty-eighth, twenty-ninth and thirtieth days of March, and the first, fourth and fifth days of April, in the year nineteen hundred and ten, at a Circuit Court, held at Elizabeth, in and for the County of Union, before his Honor, William H. Speer, a Judge of the Circuit Court, to whom the issue joined, as aforesaid, was referred by his Honor, James J. Bergen, the Justice of the Supreme Court holding the Union County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Edmund Mays, plaintiff, as the within-named Lehigh Valley Railroad Company of New Jersey, defendant, by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who, to try the truth of the matters within contained, being chosen, tried and sworn on their oaths, say: that the said Lehigh Valley Railroad Company of New Jersey is guilty of the trespass and grievances above laid to its charge, in manner and form as the said Edmund Mays hath complained against it, and they assess the damages of the said Edmund Mays, over and above his costs and charges, to the sum of three thousand one hundred dollars, and for those costs and charges, to the sum of

WILLIAM H. SPEER,
Circuit Court Judge.

Testimony.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT, JANUARY TERM, 1910.

EDWARD V. GOODMAN, Executor &c. of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 1 In Tort.
EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 2 In Tort.
EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 3 In Tort.

Transcript of stenographer's notes of evidence, taken in the above entitled cases, before Hon. William H. Speer, judge of the Circuit Court, and a jury, at the Court House, in the City of Elizabeth, N. J., on the 28th day of March, A. D. 1910.

Appearances:

Mr. C. McK. Whittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

The Lehigh Valley Railroad Co., of N. J.

Testimony.

It is agreed between counsel that the case of Edward V. Goodman vs. the Lehigh Valley Railroad Company and the case of Edmund Mays vs. The Lehigh Valley Railroad Co., be consolidated and tried with the case of Edward V. Goodman, executor etc., of James E. Goodman deceased, vs the Lehigh Valley Railroad Co., of New Jersey, and that the evidence taken shall be equally applicable to all three cases with the exception of the particular proof of damage which is applicable to each particular plaintiff. The consolidation being for the purpose of trial only, not for the purpose of merging the suits into one suit.

Mr. Whittemore: Before we proceed with the evidence, I would like to make the motion to have the jury view the premises, the scene of the fire. The cause of action arose in the year, 1905, and it involved the destruction of buildings and personal property by the commmunication of fire. The place of the fire is located some five miles away from here, and on it there were about five barns, two or three out buildings, and a house, and they were located some seventy-two feet away from the railroad fence, and about one hundred and fifteen feet from the nearest track of the railroad tracks,—there was a crossing here, (indicating on map produced), and the railroad is about straight at that point, and on the level, and there is a cut just opposite the house; I speak of these things, because I want to draw to the Court's attention, or to show to the Court, how desirable it is that the jury should see the whole situation, how it exists today, and what the probable cause was or is of this fire which was communicated by sparks from the smoke stack of a passing locomotive on the railroad of the Lehigh Valley Railroad, and the object of the jury viewing the premises is, that the jury will see for them-

selves the lay of the land, and in that way they will not mistake what the witnesses are describing, and I think if your Honor please, that it would be an aid to the jury, as well as to the Court, to see what it is that the witnesses are undertaking to describe, and I think it is proper that the jury should have an opportunity to see the premises—I do not say today, but sometime, any time during the course of the trial, as it may be ordered by the Court.

Mr. McCarter: I understand that it is very likely the case will consume some time, and we have set aside these two or three days for the trial of the case, and the delay would thus ensue by the jury visiting or viewing the premises, that of itself would be sufficient objection, it seems to me, without anything else. It is a case of alleged imperfection of the screen in the smoke-stack of the locomotive, the allegation being that fire was communicated to these premises—now that fire occurred five years ago. The property was totally destroyed and the presumption is that since then there has taken place an entire change in the surroundings there, an entire change in the property, new barns, new house, and everything, the personal property has all been destroyed and removed, and as Judge Whittemore remarked, the situation is a very simple one, the railroad company's tracks run by this property, some little distance off, as is shown on the map. There was no view by the jury before. The time of the fire was in mid-day, in July, 1905, and to send a jury out there, with all these changed conditions and with the new buildings, and the new location of the building and everything would be apt, I think, to create confusion, and would not assist them any. There is nothing whatever at all complicated about the situation. The track is some

seventy or eighty feet—the property line of the railroad, the right of way of the line is some seventy or eighty feet from the nearest building that was first ignited—I think the proof shows that at the former trial, the engine that caused the fire as they allege would be on the track which really was some 160 feet from the side of the stable nearest to the railroad—there is therefore nothing complicated about the situation, and I do not know that anything exists here that would not exist in any case where any kind of an affair takes place involving damages. Assuming that the situation of things had remained exactly as they were at the time of the fire, there would be no necessity then for the jury to view the premises. The question is, was the screen sufficient or was it in such a condition as to cause this fire?

I think it is unfair to take a jury there, when the buildings have been removed, and new buildings erected in different positions these of the old buildings, and then try to differentiate with what they see with their eyes, and the past condition as it is shown on the map, and for those reasons I say I think it is not a proper thing to do under the circumstances, as they exist today.

Court: The decision of this thing rests in my discretion, and where the object of the view is to point the application of the evidence to the situation in which the cause of action is said to have arisen, I will later decide as to the necessity for it, and therefore I will hold this motion without deciding it until such time as the necessity for it appears, and then if you should renew your motion, and you may do so, I will deal with it then.

If you will point me to the section of the act under which you make the motion, I will see first whether it is discretionary or not,—if it is dis-

cretionary in the Court, I will allow you an exception, if it is not, I will not allow the exception.

Mr. Whittemore: I will withdraw the application if your Honor please, as I see it is within your Honor's discretion.

Mr. Whittemore: In the preparation of this case, if your Honor please, I observe at the close of the printed case, there is a motion made at the trial three and a half years ago, to amend the declaration in the specification of the amount of damages for the personal property, from $5,000 to $7,000, which amendment was allowed as the record will show. Afterwards that amendment was not put in any form except upon the stenographer's notes, and when the transcript of the evidence was handed down, it does not appear.

I therefore desire to make the record as it should be, and I therefore ask the Court to amend the declaration, thus making the amount claimed, as $7,000, as to personal property.

Court: Is there any objection to that in behalf of the defendant?

Mr. McCarter: We have come here prepared to meet the case made by the declaration. Neither Mr. English or myself tried this case before. If Judge Whittemore says that the amendment was permitted or allowed by Judge Swayze, I have no doubt what he says is true. It was then objected to, at that time, and I think we have good reason to suppose that the amendment then asked to be made, had not been pursued, and we supposed that the plaintiff had abandoned his increase of damages, and there we are opposed to any amendment being made now.

Court: What would be the surprise in respect to this amendment?

Mr. McCarter: We have our views of course as to the extent of the damages. In one sense

there would be a surprise, and in another sense there would not. I don't know what they expect to show, for any increase. We are prepared to meet what their claim is, as made up there in their declaration, but I deprecate most earnestly the practice of reserving until the time of the trial the adding to the extent of the value of the goods. You see the amendment proposed is to the abdamnum clause. It is not like the damage claimed for the buildings. This thing may go on and grow and grow.

Court: It can only grow on facts. The property did exist and witnesses have seen it, and you have come prepared to meet whatever was set up at the last trial. The only reason I hesitate to allow the amendment is, that you were or might be surprised but you evidently are not.

Mr. McCarter: We had supposed that they had abandoned the amendment, whatever their plan was at the last trial, and that they had determined to stick to original abdamnum clause.

Mr. Whittemore: Opening in behalf of the plaintiff.

Mr. English: We ask that there should be put on the record an admission, as to the forty-four dollars claimed for the destruction of the pile of manure, and for the crop of clover. The defendant has no information as to the destruction of the pile of manure by fire on or about April 1, 1905, declared on in the first and fourth counts of the declaration, the value of which is agreed to be twenty-nine dollars and for that reason we offer no proof and have no objection to the direction of a verdict for that amount.

The defendant has no information as to the destruction of the crop of clover by fire on July 22nd declared on in the third and the fifth count of the declaration, at the agreed value of fifteen dollars, and for that reason we offer no evidence

and have no objection to the direction of a verdict for that amount.

Mr. Whittemore: I desire to offer in evidence the following document:

I offer in evidence the will of Thomas T. Littell, recorded in Book E, of Wills, at page 86, and dated July 23rd, 1872, and the codicil thereto, dated the 2nd day of July, 1874, duly proved and admitted to probate October 8, 1877, by the Surrogate of the County of Union, and recorded in Book E, of Wills, page 86, etc., which will contains a power of sale in words following: "I hereby authorize and empower my executors thereinafter named and the survivor of them, to sell and convey, for such prices as they shall deem proper, all the real estate of which I may die seized, wheresoever situated, and to give good conveyances in the law for the same."

And the will further provides, "that after the payment of debts and charges—I dispose of my estate as follows: 'I direct my executors to invest on bond and mortgage the proceeds of one-half of my estate, and keep the same securely invested and pay the interest accruing therefrom to my wife Mary H., in semi-annual payments during her life, or so long as she shall remain a widow, and after her decease, to divide the principal sum in the manner hereinafter directed for the distribution of the remaining half of my estate, which distribution shall be as follows:

'I direct my executors to divide the remaining one-half of my estate, into seventeen equal parts, etc.' "

I also offer in evidence letters of administration with the will annexed of Thomas T. Littell, granted to John Ganswyck, January 17, 1882, by the Surrogate of the county of Union, recorded in Book A of administrators at page 530.

I also offer in evidence a deed made by John Ganswick, administrator with the will annexed, of Thomas T. Littell, deceased to Elizabeth T. Van Velsor, dated June 15, 1885, duly acknowledged and recorded June 17, 1885, in Book 170 of deeds for Union County, page 368, etc. Conveying property in the township of Fanwood, containing 94 65/100 acres.

Marked Exhibit P-2.

I next offer in evidence a deed made by Elizabeth T. Van Velson, widow, dated January 31, 1899, to James A. Goodman, conveying premises in the township of Fanwood, containing 94 65/100 aces—excepting so much as had been conveyed to the Roselle and South Plainfield Railroad Co. duly acknowledged and recorded February 9, 1899 in Book 346 of deeds for Union County, page 549, etc.

Marked Exhibit P-4.

Next I offer in evidence the probated copy of the will of James A. Goodman, dated April 11, 1901, admitted to probate January 21, 1907, by the Surrogate of the county of Union, and letters testamentary granted to Edward Van Velsor Goodman, dated January 21, 1907.

Marked Exhibit P-5.

Next I offer in evidence by agreement with counsel, the map of the premises in question, made by Frank B. Ham and dated April 29, 1906.

Marked Exhibit P-6.

FRANK B. HAM, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. You are a surveyor and civil engineer? A. Yes, sir.

Q. And have been for how many years? A. About seventeen or eighteen.

Q. Did you make this map which has been offered and marked Exhibit P-6? A. Yes, sir.

Q. Do you remember the time you made it? A. I think the date is on it. My recollection would be that it was about four or five years ago.

Q. There is a date on it of April 29, 1906, does that signify anything with relation to the time you made the map? A. I presume my observations were made on April 29th, 1906, the date on the map.

Q. From what did you make it? A. I surveyed the ground and there was a personal examination of the premises made by me.

Q. What did you get the dimensions from that are marked on the map? A. Some of them from things that were existing at the time that I was there.

Q. What things? A. Fences and trees and foundation stones, and other things of that character.

Q. From what did you get the sizes of the barn? A. I got the sizes of the barn partly from observations that could be made on the ground, as the evidence of fire, and partly from foundation stones still standing, and partly from the information given to me by Mr. Goodman himself.

Q. Which Mr. Goodman? A. The Mr. Goodman that sits here.

Q. This young man (indicating the plaintiff Edmund B. Goodman)? A. Yes, sir.

Q. What did you get the location and size of the house from? A. The foundation of the house. A new house had been built about or at the site of the old house, and the foundation walls of the old house, were discernible, within the cellar of the new one.

Q. You have on the map marked the word "lane," where did you get that, or how did you come to mark "lane" there? A. It was clearly marked on the ground at the time I was there, I think the fences were standing at the time.

Q. Directly between the barn and the railroad track, was there any evidence of anything between the barn and the railroad track? A. Not that there had been any building, no, sir.

Q. I don't mean that—right in front of or running along by the barns in a continuation of that lane, was there anything there? A. I do not recollect anything there at the present time, except that there was—why there were traces of fire about there—they were more prominent in some locations than in others.

Q. Where did that lane end? A. As I recollect it, it came to an end where I indicate on the map, and then spreads out as the farmers would drive out of their farm buildings.

Q. Was there any evidence of driving further than the end of that lane? A. The evidences were that persons driving in would drive from the road and up to the carriage house, and to the house, and in various ways indicate how they got from the building to the lane.

Q. Was there any evidence of a driveway between the carriagehouse and the wagonhouse? A. There was, as I recollect it now, there was some evidence of a sort of hollow through there, as though it were made by wagons driving through, but when I was up there, the buildings were all down, and the people could drive anywhere around there.

Q. If you got beyond this, what becomes of this evidence, did they continue on, or did they turn? A. Well, so far as I recollect now, there was not

very much of any evidence there, of any particular way of driving, they simply went around the buildings, as they would go around the buildings on any farm, around any of the farm buildings.

Q. Was there any difference in the elevation of the land on the southeasterly side of the railroad fence, and the land where the railroad tracks were located? A. The railroad went through quite a cut there.

Q. About how much difference was there in the elevation? A. I did not take the exact figure, but as I stood there, it was above my head considerably, and I should think it was about ten feet.

Q. What is the slope of the land on either side of these barns? A. As I recollect now, the land was a little higher at the railroad line than it was where the barns were standing, not very much, but there was quite a rise from the road to the building.

Q. The slope is upward from the road towards the buildings? A. Yes, sir, the slope is upward from the road to the building, there was quite a rise from the road to the building.

Q. What was the elevation of the road as compared with the railroad tracks where they cross there? A. The road went down southeasterly from the railroad tracks, it was lower than the railroad on the southeasterly side of the railroad.

Q. To the southwest of the barns, what was the slope there? A. It went down.

Q. How far down? A. I did not investigate how far, but I suppose some three or four hundred feet.

Q. In relation to the track? A. Did it go below the grade of the railroad?

Q. Yes, that is what I mean. A. It might, I am not sure, but I think it did.

Q. You have marked some trees on the map, where did you get your information from as to those trees? A. Those trees were, some of them standing at the time I made my observations, complete, some of them.

Q. How many? A. Well, they were mostly dead, I think there was a little life in a few of them, but mostly they were burned, so that they would die anyhow, and some of them were simply stumps.

Q. You have marked them as of different varieties, where did you get that information from? A. I think Mr. Goodman told me that, but there were same of them still alive, so that I could tell the variety.

Q. You have marked here, "stack" what does that represent? A. I think they were hay stacks, there was a place where the ground had been burned over, but there was no particular evidence of buildings.

Q. What made you think there were hay stacks there? A. Mr. Goodman told me.

Q. What is the scale of this map? A. Ten feet to one inch.

Q. Is the compass correctly shown upon that map? A. That is approximately true north.

Q. As marked on the map? A. Yes, sir, as marked on the map.

Q. You have marked here "coalyard," what does that represent? A. Mr. Goodman has the coalyard over on the other side of the road, alongside the railroad, extending beyond the points of this map.

Q. Have you met or do you know Mr. Cordes? A. I know his place.

Q. Have you been to his place recently? A. Yes, sir.

Q. For what purpose? A. For the purpose of measuring the distance of certain buildings and trees and other objects from the railroad.

Q. What distance did you measure? A. The distance from the railroad track to the fence, and then from the fence to the cherry-tree, and then from the cherry tree to the ash tree, the other side of the road, and from that ash tree to the barn.

Q. What was the distance from the railroad track to the railroad fence? A. Forty-three feet, that is from the nearest rail of the railroad track.

Q. What is the distance from the railroad fence to the cherry tree? A. One hundred and forty and a half feet about, to the centre of the cherry tree.

Q. What was the distance from the cherry tree to the ash tree? A. About thirty-five and a half feet between centres of trees.

Q. What is the distance from the cherry tree to the barn? A. From the cherry tree it would be 121 1/2 feet and from the ash tree 86 feet.

Q. To what? A. To the barn.

Q. What is the total distance from the barn to the railroad fence? A. 262 feet about, as it runs along the road.

Q. And to the track it would be what? A. 305 feet, that is measuring along the road, it is not quite a right angle.

Q. At what angle is the road to the track? A. It is about eighty degrees, eighty and a half degrees, I think.

Q. What distance is the barn from the road? A. It is about nine feet from the road, the road line is not marked distinctly there.

Q. Where are the trees with relation to the road?

Mr. McCarter: It is just down on the map, that this is some other property, not the property of this plaintiff, and I object to this evidence on the ground that it is irrelevant, the distances and the other figures, given by this witness, refer entirely

to a different property, and I move to strike out this evidence, or so much of it as refers to a different property than the property in question here.

Court: I gathered from the opening that some fire had blown from the locomotive and ignited something at some distance from the railroad, and I assume that counsel is laying a foundation to show the distance that actually existed between the place where the spark was that set fire to the place, and the place where this fire took place. I suppose that is the object of it and I suppose he has the right to show how far a spark has actually been seen to carry from the locomotive on that road to a place, and to ignite property at that place, in order to lend some degree of credibility to the proposition, that the spark from the locomotive in this case actually ignited the contents of the barns on this place; I will overrule the objection, and permit the testimony to be given, or to stand.

A. The cherry tree was about five feet on Cordes property, away from the road. The ash tree was about four feet from the property in the road out on the sidewalk.

Q. Where was the house upon the premises with relation to the barn? A. It was beyond the barn from the railroad.

Q. What do you mean by beyond the barn? A. It was about 100 feet—

Q. What do you mean by beyond the barn—in which direction in relation to the railroad? A. It was away from the railroad, the other side of the barns from the railroad.

CROSS-EXAMINATION by Mr. McCarter:

Q. Have you indicated the railroad tracks on the map? A. Yes, sir.

Q. Point them out to the jury so that there may be no mistake about it? A. This is the east-bound, and these two lines the west-bound track.

Q. I understood you to say these tracks are in a depression or cut, which you estimate to be in the neighborhood of ten feet deep? A. Yes, sir.

Q. Is there a fence between the railroad right-of-way and Mr. Goodman's property? A. I think there was when I made the survey.

Q. Have you indicated it there? A. I have.

Q. Point it out please? (Witness indicates fence.)

Q. That is a fence running parallel with the railroad track? A. Yes, sir.

Q. A wooden fence? A. I think a wire fence, but I am not certain. It is some four years ago since I made the survey.

Q. About how high is it? A. I suppose about four feet.

Q. Now, have you the distance from the stable to the property line, and to the track, indicated on the map—are they indicated on the map? A. They are.

Q. Please lay your pointer in a westerly direction from the barn door, to the east-bound track, and scale the distance and give us what that is please? A. It is about 150 feet.

Q. Can not you get it right or nearly the fact—you say "about,"—I would like to have it as near as you can get it? A. Well, if it was absolutely west, I would have to take some triangle, and make some calculations with my parallel lines, to make the exact distance, but it is pretty close to it.

Q. You are within a few inches you say? A. Within a few feet.

Q. Within a few feet? A. Yes, sir.

Q. Had the new buildings been erected when you went there in April, 1906? A. There was a new house standing over the foundation of the old house, and there was a new barn, on the location of the old barn.

Q. I call your attention to your evidence as printed on page 11 of the printed book, in which you were reported to have said, in answer to the following question: "Q. Now, Mr. Ham, just measure, just look at that barn where the doors are, and tell us how far west, in a westerly direction, the direct westerly direction it would be to the east-bound railroad track? Lay your pointer there first. Take it right where the barn doors are, and go in a direct westerly direction, and tell us how far it would be to the east-bound railroad track"—and you are reported to have answered—"about one hundred and sixty feet"—do you wish to change your evidence in that respect? A. No, sir, it may be.

Q. Can not you tell within ten feet? A. I could if I had the triangles and the parallels—I could parallel it off, but I haven't the appliances here, so as to tell what is exactly the westerly direction. It would make quite a difference, if the railroad should be hit in that way (indicating), or so (indicating), but the west is pretty nearly that.

Q. Can you bring your triangles and things? A. It is about 160 feet I should judge, but I can not tell exactly.

Q. It is somewhere in the neighborhood of 160 feet? A. Yes, sir, or 150, and it might be 140 or 170, I can not say exactly.

Q. Can you bring your triangles and make that correct for us? A. Yes, sir.

Q. Is your office here in Elizabeth? A. No, sir.

Mr. Whittemore: Q. You can get your instruments and measure it, and send us word what it is? A. Yes, sir.

Mr. McCarter: Q. So that we may have it plain before us, what is the direction of the tracks? A. The direction of the track is northeasterly and southwesterly.

Q. What is the kind of property on the west side of the track—fields? A. I think they are.

Q. The tracks are about level at this locality? A. Kindly undulating, and the tracks opposite the barn, and in the cut there, are about level with the land at the road.

Q. The tracks there, themselves—is there any grade? A. I suppose there is, but I did not take any levels, to know whether there is a grade or not—it is not perceptible.

Q. It is not perceptible? A. No, sir.

Q. And it is perfectly straight for some distance on either side? A. Yes, sir.

Q. Where is this Cordes place that you measured with regard to the Goodman place? A. It is about northeasterly.

Q. And about how far beyond the road that intercepts the Goodman place? A. I think about a mile and a half.

Q. Nearer which place? A. Nearer Picton.

Q. Where is Picton with regard to Cranford? A. Picton is about a mile and a half west of Cranford station, I think.

Q. That is between Goodman's and Cranford? A. Yes, sir, Picton is the only station beween Goodman's and Cranford.

RE-DIRECT by Mr. Whittemore:

Q. You say the tracks are about level where it passes Goodman's farm, did you notice whether

they are straight or crooked or bending? A. They are straight as they pass Mr. Goodman's property, they bend west, to the west, I don't know just how far.

Q. You know to some extent how far, don't you? A. It is pretty hazy, it might be a mile west or only half a mile, I did not make any observations.

Q. And east, how are they? A. They run straight to the Aldene bridge.

Q. How far is that? A. Four or five miles, I don't know just how far.

ANDREW POLIMBO, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. How old are you? A. Seventeen years old.

Q. Where do you live? A. Where I live?

Q. Yes, where do you live now? A. At Maurer's, N. J.

Q. How long have you been there? A. Two months.

Q. Where were you before you went to Maurers? A. At J. E. Goodman & Son.

Q. Where was their place? A. Ashbrook, or Goodman's, N. J.

Q. How long had you been there? A. I have been there two years.

Q. What were you doing? A. Working.

Q. What kind of work? A. Farm work.

Q. Before that what did you do? A. I done farm work just the same.

Q. Where? A. Out in the field.

Q. Whose place? A. Goodman's place.

Q. Where did you live then? A. Home, I lived then.

Q. Where was your home then? A. Just the other side of the track from Mr. Goodman.

Q. How near the road? A. Oh, I should say it sets over twenty feet.

Q. You lived with your father and mother there? A. Yes.

Q. Where is your mother now? A. In Europe.

Q. Do you remember anything happening on Goodman's place? A. Yes, sir.

Q. What happened there? A. Fire.

Q. How much of a fire—what was burned? A. The barn, and the house and—

Q. Where were you that day? A. Working in the field.

Q. Who for? A. Mr. Goodman.

Q. What field were you working in? A. The potato field.

Q. Where was that in relation to the house? A. On the other side of the track, away down there by the "big bridge" as they call it.

Q. Did you stay there all afternoon? A. No, sir.

Q. Where did you go to? A. I went to see my brother, and a fellow by the name of Fred, that was working on this side of the track where the barns was, I went to see if he had any water.

Q. What part of the year was this in? A. The 19th of July.

Q. What kind of day was it, how was the weather? A. Clear weather, a windy day.

Q. Where did you find your brother and Fred? A. On the other side of the track.

Q. Where were they with reference to the barn? A. What do you mean?

Q. How far were they from the barn? A. To where they were working?

Q. Yes. A. It was 590 feet.

Q. How did you make out that distance? A. I measured it.

Q. How? A. By the posts of the railroad fence.

Q. How did you measure it by the posts of the railroad fence? A. Between every post is ten feet.

Q. Did you count up the number of the posts? A. Yes, sir.

Q. How far from the railroad fence were they? A. What do you mean?

Q. How far were they away from the railroad fence, where they were working? A. My brother and Fred?

Q. Yes. A. About 75 feet.

Q. Could you see the railroad? A. Yes, sir.

Q. Did you speak to your brother and Fred there? A. Yes, sir.

Q. How long did you talk with them? A. Not very long.

Q. Where did you go from there? A. I went up to the house to get some water.

Q. Did you see anything pass on the railroad? A. Yes, sir, I seen the mail train go past then, just as I started for the house.

Q. Why do you call it the mail train? A. It was a passenger train.

Q. Have you ever noticed that train before? A. Yes, sir.

Q. Do you know what time that passed that day? A. It used to go up at a quarter to four.

Q. Have you ever seen that train pass on other days? A. Yes, sir.

Q. It was a regular train then? A. Yes, sir.

Q. Do you know what time it was due? A. Yes, sir.

Q. What time was it due? A. A quarter to four, and sometimes it was late.

Q. Was it on time this day? A. I am pretty sure it was.

Q. Did you hear any noise from the train? A. A. Yes, sir.

Q. What noise did you hear? A. I didn't hear no noise, only it went past, that is all.

Q. Did you notice any other noise? A. No, sir.

Q. When the train passed how fast was it going? A. It was going fast.

Q. What do you mean by fast?

Mr. McCarter: I object to the question on the ground that this witness is not qualified to give an opinion on the speed of a passing train.

Question withdrawn.

Mr. Whittemore: Q. What did you do after the train passed? A. I started up to the house to get some water.

Q. How did you go? A. I didn't run—I walked along the road, it was a pretty hot day.

Q. What road? A. The lane there.

Q. And did you notice anything up at the barns? A. No, sir, not until I got up pretty near to the barns.

Q. Did you notice anything at any time as you were going towards the barn? A. No, sir, I walked 150 feet, and didn't see nothing, and then I looked up, and I see the fire by the barns, and I ran up to it, and it was burning the hay, and I ran in the house, and told Mr. Goodman.

Q. When you got to the barns, what part of the barn did you look in? A. I was going towards the barn, and I was looking in the right-hand side, or the left-hand side—no, the right-hand side—

Q. Did you look in the barn? A. Yes, sir.

Q. Through what? A. Through the barn door.

Q. How were the doors, open or closed? A. Open.

Q. Now what did you see, Andrew? A. I didn't see nothing there, but the fire.

Q. Where was the fire with reference to the doors? A. Inside the barn on the right-hand side.

Q. With reference to the doors, where was the fire, how near to the doors, was the fire? A. Right close to the barn door, and inside there too.

Q. How near to the doors was the fire? A. Right by the doors.

Q. Had you been at the barns before that day? A. Yes, sir.

Q. When were you there before? A. I had been there just about two o'clock to the barns.

Q. What doing there? A. Putting in hay.

Q. Who was with you? A. My brother John and Fred and old Mr. Goodman and Mr. Goodman's son.

Q. How much hay did you get in the barn? A. That day?

Q. Yes, how much hay was in the barn when you left there? A. Oh say three or four loads were put in that day.

Q. How much was in the barn? A. The barn was all full, pretty near.

Q. When did you go away from the barn? A. Say about two o'clock.

Q. Where did you go to? A. To the potato field.

Q. That is on the other side of the track? A. Yes, sir.

Q. When you came up to the barns this time, and saw the fire, did you see anyone around? A. No, sir.

Q. Can you tell us which way you went around to the house, how did you go to the house? A. I came up through here, and went around here, and —(indicating between the wagon house and the carriage house) and along here to the house (indicating back of the house).

Q. Was there any door in the back of the house? A. Yes, sir.

Q. Did you go in? A. Yes, sir.

Q. Who was in there? A. Mr. Goodman.

Q. Did he say something? A. Yes, sir.

Q. What did you do then? A. I was nervous, and I went home, my mother called me home.

Q. In which direction did you go home, show us on the map? A. I went between these barns, and here and over the road (indicating).

Q. Show us where your home is, continue on,—do you understand the map? A. Yes, sir.

Q. Where is the railroad track? A. Here (indicating).

Q. Where is the railroad fence? A. Here (indicating).

Q. Which side is that fence on? A. On the other side.

Q. Where is the other fence? A. Here (indicating).

Q. Where is your home? A. It is about here.

Q. Where is that house with reference to the railroad property? A. It is about here (indicating).

Q. Which side of the fence? A. This side (indicating the northerly side).

Q. It was on the railroad property? A. Yes, sir.

Q. What did your father do, what did your father work at? A. He worked on the railroad.

Q. You say this was a windy day? A. Yes, sir.

Q. In which direction was the wind blowing? A. I should say it was blowing northwest.

Q. Will you show us on the map the way the wind was blowing? A. In this direction (indicating southeast).

Q. Do you mean it was blowing from the northwest? A. Yes, sir.

Q. Indicate that direction again, show us how the wind was blowing? A. This way, here, (witness indicates a direction almost due west).

Q. When you came up to the house, did you see anyone there? A. No, sir.

Q. Was there anybody outside the house, or in back of the house? A. Right by the house was Dr. Sinclair's man, with his automobile.

Q. Where was his automobile, and Dr. Sinclair's man? A. Right around here (indicating a position directly south of the walnut tree, and adjacent to the walnut tree, marked "eighteen in. Walnut tree").

Q. What was he doing? A. He was just standing by the automobile.

Q. How was the wind blowing—I do not mean the direction, but what was the force of the wind?

Mr. English: I object to the question on the ground that the witness is not qualified to testify to that.

Court: He can say whether the wind was blowing mildly, or whether it was blowing stronger.

Mr. Whittemore: I am trying to avoid leading the witness otherwise I could make it plain to him.

Q. You say it was a windy day? A. Yes, sir.

Q. What do you mean by a windy day? A. It was blowing pretty hard.

Q. When you came around in between the barns and the railroad, was there anything to prevent your seeing all around there? A. No, sir, but I didn't see nobody.

Q. Was there anything to prevent you seeing all around there? A. What do you mean by "prevent you"?

Q. Was there anything in your way? A. No, sir.

Q. Who was working on Mr. Goodman's place at that time? A. My brother and me, and a fellow by the name of Fred.

Q. Who lived at the house? A. Mr. Goodman

and Mrs. Goodman, and young Mr. Goodman and his wife, Mr. Goodman's son.

Q. Do you mean this Mr. Goodman, (indicating the plaintiff)? A. Yes, sir.

Q. Any other son of Mr. Goodman's, besides this one? A. Yes, sir, the little one about twelve or thirteen years old.

Q. When you went into the house, who was there? A. All I seen was Mr. Goodman the old gentleman.

Q. Did you see young Mr. Goodman? A. No, sir.

Q. You did not see him? A. No, sir.

Q. What did Mr. Goodman do when you spoke to him? A. He ran outside, and ran to the horse stable, but he could not do nothing, it was too big a fire, he was trying to save out some horses.

CROSS-EXAMINATION by Mr. McCarter:

Q. This was a pretty warm day? A. Yes, sir.

Q. And you were thirsty and wanted a drink of water? A. Yes, sir.

Q. That is the reason you left where you were working to go to the house? A. Yes, sir.

Q. You had nothing to drink in the potato field? A. No, sir.

Q. What were you doing in the potato field? A. Just pulling out the big weeds out of the potatoes.

Q. You had been weeding the potato patch two hours? A. Yes, sir.

Q. And you had left the barn at two o'clock and went over to this potato field to weed? A. Yes, sir.

Q. As I understand it, the potato field was on the other side of the railroad to the house? A. Yes, sir.

Q. It does not show on the map? A. No, sir, I do not think so.

Q. It is down here further off towards his Honor, Judge Speer? A. Yes, sir.

Q. And while you were working, you heard the mail go through? A. What do you mean—the mail train?

Q. The mail train you speak of? A. When I walked over to cross the tracks to my brother, and this fellow Fred, I talked with them, and I went to see if they had some water, I thought they had some water, and I could get a drink, and they said—

Q. I didn't ask you that, I was asking you where you were when you heard the passenger train go through? A. I was just talking with this fellow, and had just started towards the house.

Q. You had crossed the railroad track, before the train went through? A. Yes, sir.

Q. How did you get across—over that big bridge? A. No, sir, I went across the track, I didn't go across the big bridge.

Q. Were you actually with your brother talking to them when the mail went through? A. I was with them I was talking to them for awhile before the mail went through, and I just started away from them to go to the house, when the mail went through.

Q. Did you see the train or only heard it? A. I seen it, and I heard it.

Q. Both? A. Yes, sir.

Q. Where were your brother and Fred at work at that time when you talked to them? A. On this side of the track.

Q. On this side? A. Yes, sir.

Q. Down below, here somewhere? A. Yes, sir.

Q. About opposite where you were? A. I was a little further down.

Q. But they were not on any part of that shown on this map at all? A. No, sir.

Q. And what were they doing? A. One was hilling up and one was cultivating.

Q. Potatoes? A. Yes, sir.

Q. Did they have potatoes on both sides of the track? A. Yes, sir.

Q. And you found they hadn't any water though? A. Yes, sir.

Q. So then you started to walk down to the house to get a drink? A. Yes, sir.

Q. Did they go with you or did you go alone? A. I went alone.

Q. Did you continue your talk with them a little after the train went through? A. No, sir, I just started up to the house, as the train passed.

Q. You just started up to the house, for the water as the train passed? A. Yes, sir.

Q. Did you go down this lane (indicating)? A. Yes, sir.

Q. How far does this lane go, in a southerly direction—in other words, is that quite a long lane, one end of which appears on the map? A. It starts just about where they was working.

Q. And you walked down this lane? A. Yes, sir.

Q. Now at that time, you did not know there was any fire at all? A. No, sir.

Q. And when you got you said I think a distance of 150 feet— A. One hundred forty feet.

Q. Well 140 feet from the stable, you saw the fire—how far were you from the stable when you saw the fire? A. One hundred fifty feet.

Q. Did you mark the place? A. Yes, sir.

Q. How did you mark the place—how did you mark where you were, when you first observed the fire? A. By an apple-tree there.

Q. You saw an apple-tree there? A. Yes, sir.

Q. Did you notice that apple-tree just at the time you saw the fire? A. Yes, sir.

Q. Where did you see the fire first—point out on the map first where you saw the fire? A. In the front door of the building here.

Q. That apple-tree does not show on this map, does it? A. No, sir.

Q. It must have been off the map somewhere further down? A. Yes, sir.

Q. Do you remember the horse stable that was there? A. Yes, sir.

Q. You remember testifying at the other trial, do you not? A. Yes, sir.

Q. And don't you remember that you pointed to the door nearest to the horse stable as where the fire was before? A. I don't remember, I might have made a mistake, I didn't understand the map just exactly.

Q. You didn't understand the map then? A. Yes, sir.

Q. You understand the map pretty well today? A. Yes, sir.

Q. When did you see the map between that time and now? A. I seen it last Saturday.

Q. Last Saturday? A. Yes, sir.

Q. In Judge Whittemore's office? A. Yes, sir.

Q. And you went over the map in Judge Whittemore's office then, did you? A. Yes, sir.

Q. And he, intimated to you that you pointed out at the last trial, namely, that the horse stable was not the place you saw it first? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. And told you you were mistaken about it? A. Yes, sir.

Q And then you made up your mind you were mistaken? A. Yes, sir.

Q. You remember at the last trial when Judge Swayze sat here, you took the pointer, and pointed to about where I now point, as where you saw the fire first, about there? A. Yes, sir.

Mr. McCarter: I mark the place with the letter "H".

Q. You say you are seventeen years old now? A. Yes, sir.

Q. And this fire was five years ago, 1905, I think, was it not? A. I don't really think it is five years ago.

Q. It was 1905? A. Yes, sir.

Q. You have told us it was on the 19th of July —did Judge Whittemore tell you that on last Saturday when you were in his office? A. No, sir.

Q. You must have been about twelve years old then? A. Yes, sir.

Q. A pretty young lad to do your work? A. Yes.

Q. And I understand you to say that as soon as you came out of the house, you got home as quickly as you could get? A. Yes, sir.

Q. You didn't wait for anything? A. No, sir.

Q. When you went to the house and told Mr. Goodman the barn was on fire, you scooted right over and went to your own house? A. Yes, sir.

Q. Which way did you go? A. Through by the carriage house to the barn and across the railroad.

Q. And to your father's house across the tracks? A. Yes, sir.

Q. Does your father's house come pretty near to the railroad line? A. Yes, sir.

Q. Now who was in the barn with you the last time you were there at two o'clock, Fred and your brother you say? A. Yes, sir.

Q. Did you go in with the load of hay? A. Yes, sir.

Q. Was anybody else working around the farm that day? A. No, sir.

Q. Were there not some Jews around that place that day? A. No, sir, I didn't see no Jews around.

Q. You didn't hear about them? A. No, sir.

Q. Does your brother smoke? A. Yes, he used to smoke.

Q. I suppose you were too young to smoke those days? A. Yes, sir.

Q. You didn't acquire that habit so early? A. No, sir.

Q. Did Fred smoke too? A. Yes, sir, he smoked.

Q. And Mr. Goodman, did he smoke? A. Not very often.

Q. Once in a great while? A. Yes, sir.

Q. How about his son? A. He didn't smoke.

Q. Now did you see your brother, or Fred at all after you left them to go and get your drink of water? A. What do you mean?

Q. Before you went home? A. No, sir.

Q. You left them and they attended to their business, and you went off and got a drink of water? A. Yes, sir.

Q. And you left them and you did not see them before you got home? A. No, sir.

Q. Did you measure the distance between the place where Fred and your brother were, and this apple tree that you spoke of? A. Yes, sir, 440 feet.

Q. From where Fred and your brother were at work to the apple tree was 440 feet? A. Yes, sir.

Q. Right straight down that lane? A. Yes, sir.

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

Q. When? A. A month ago, after the fire.

Q. Are the apple trees still standing there? A. Yes, sir.

Q. How did you conclude about where Fred and your brother stood—it was just an ordinary potato patch, was it not? A. Yes, sir.

Q. You could not tell exactly where they stood a month after the fire, could you? A. No, sir.

Q. Well, assuming you got the right place, you

found it was 440 feet about, to the apple tree? A. Yes, sir.

Q. How did you measure that 440 feet, did you have a tape? A. No, sir, I only measured it by the railroad posts.

Q. I don't understand what you mean? A. Between the railroad posts.

Q. The posts on what? A. The railroad.

Q. You mean the fence posts? A. Yes, sir.

Q. And there were fences along the road? A. Yes, sir.

Q. You counted the railroad fence posts? A. Yes, sir.

Q. And how far apart were they? A. They averaged about ten feet apart.

Q. And how did you measure from the apple tree to the barn? A. In the same way.

Q. By rail posts again? A. Yes, sir.

Q. Did you do that at the same time? A. Yes, sir.

Q. Who asked you to do that? A. Mr. Goodman told me to do that.

Q. Was there anyone with you at the time? A. No, sir.

Q. Did you see the hay actually on fire? A. Yes, sir.

Q. At this apple tree? A. What do you mean by the apple tree?

Q. At the apple tree, on this place, 150 feet away that you speak of? A. Yes, sir. When I was by that apple tree, I seen the fire at the barn.

Q. When you were at the apple tree you saw the fire in the barn? A. Yes, sir.

Q. Now Andrew, I want to know what was on fire at that time? A. I ran to the barn and there was hay inside it, on fire too.

Q. Was the barn on fire as well as the hay when you first saw it? A. Yes, sir.

Q. You did not see the hay on fire, but did you

see the barn on fire first? A. Yes, sir, there was hay inside too.

Q. The thing you saw on fire first was what? A. Hay.

Q. The hay it was that you saw first on fire? A. Yes, sir.

Q. And that was inside the barn? A. Yes, sir.

Q. How far from the door was that? A. About two feet back from the door.

Q. And that was the thing you saw first? A. Yes, sir.

Q. And then you were down by the apple tree? A. Yes, sir.

Q. And that you saw was 150 feet from the barn and was on the part of that lane that don't appear on that map? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. Now did your brother and Fred leave the barn after you put in the hay, about two o'clock, with you or after you? A. They left at the same time.

Q. Which way did they go? A. They went down to the potato field.

Q. Did they go down the lane with you? A. Yes, sir.

Q. And what became of Mr. Goodman? A. He went in the house.

Q. Where were the horses that drew in this load of hay, who took care of them? A. They took them down to the potato field, to cultivate with.

Q. They took them down to the potato field to cultivate with? A. Yes, sir.

Q. They unhitched them and put them in the cultivator? A. Yes, sir.

Q. Were there any horses in the barn? A. Yes, sir.

Q. Did you wait until they were unhooked, and go down with them? A. Yes, sir, I helped unhook them.

Q. And young Mr. Goodman was there, with the hay at two o'clock was he not? A. I think he was not there, he was sick at that time.

Q. And only Fred and your brother and you and Mr. Goodman senior, were there? A. Yes, sir.

Q. How wide is that lane, about? A. Oh, it ain't a very wide lane.

Q. Is there a fence on either side? A. No, sir.

Q. Just a kind of a roadway? A. Yes, sir, just between a row of trees.

Q. Which side of the lane were you on—the right-hand side? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. When you were at the apple tree Andrew, can you tell us just what you saw up there at the barn, what did you see when you were at the apple tree, 150 feet away? A. I seen flame and fire.

Q. Did the flame produce anything besides the flame itself? A. What do you mean by that?

Q. Well, was there anything in the air besides flame? A. No, sir.

Q. When you were down here in the lane and looking towards the barn, where was the fire? A. Well, there was some outside too, just close to the barn and there was some inside.

Q. What was burning outside? A. Dry grass and hay, all scattered around.

Q. When you left the barn after putting in the hay did you leave everything perfectly clean? A. Yes, sir, we raked it up pretty clean.

Q. Was there any hay left around on the floor at all? A. We raked it up pretty clean, there might have been some.

Q. Was there anything left lying on the outside of the barn? A. No, sir.

Q. When you were down at the apple tree how could you see what was going on in the barn? A. I seen this grass burning outside the barn, that is all I seen.

Q. Could you see anything down at the apple tree, that was going on inside the barn? A. No, sir, I couldn't see when I was down at the apple tree, what was inside the barn burning.

Q. How did you know there was any fire in the barn? A. I didn't exactly know, but when I come to it, I seen it was inside the barn too.

Q. When you were at the apple tree, what was it you saw that occasioned you to run? A. I see some fire there.

Q. You saw some fire there? A. Yes, sir.

Q. From where you were over in the potato field, over on the other side of the track, could you see your brother and Fred? A. Yes, sir, I could see them.

Q. Well, did you see them? A. Yes, sir.

Q. What time did you go down to the potato field—did you look over to them? A. Yes, sir, I did.

Q. When you were over on the other side of the track, did you look to this side where John and Fred were? A. Yes, sir.

Q. Who did you see over there? A. I seen my brother and Fred.

Q. What doing? A. One cultivating, and one hilling up.

Q. What time did you go over to the potato field where your brother was—do you know what time it was that you went down to your potato

field? A. When I went down to the potato field, do I know what time it was?

Q. Answer yes or no—do you know? A. Oh, I would say about two o'clock.

Q. How do you know it was two o'clock? A. I only guess about it, that is all.

Q. Had you had any dinner that day? A. Yes, sir.

Q. Do you know when you had dinner that day? A. Yes, sir.

Q. When? A. I had it at twelve o'clock.

Q. What did you do after dinner? A. We had a load of hay to get off yet, and then we went down to the field.

Q. How much time did you spend getting off the load of hay? A. Well, by taking it off by hand, it takes a long while.

Q. How long? A. About an hour and a half.

Q. What time did you go to work again after dinner? A. About half past twelve.

Q. Was anyone with you over in your potato field, where you were working? A. No, sir.

Q. How often did you look over to see the field where John and Fred were working? A. Oh not often—maybe—I think it was twice.

Q. As you were coming over to them could you see them as you were on your way to them? A. Yes, sir.

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

Q. When you came to my office Andrew, did I ask you where the fire was—interrupted—

Mr. McCarter: I object to the conversations.

Court: He has the right to find out what he did tell him.

Mr. Whittemore: Q. What did I ask you—do you remember what I asked you about the fire when you were in my office? A. What did you ask me?

Q. Yes. A. You asked me about the fire—if I knowed it.

Q. Did I ask you anything about where the fire was with relation to the doors? A. Yes, sir.

Q. What did you tell me? A. What do you mean?

Q. What did you answer when I asked you where the fire was, with relation to the doors, do you remember what you told me? A. Inside the barn.

Q. Did I ask you how near the door the fire was? A. Yes, sir.

Q. What did you tell me? A. About two feet away.

Q. Do you remember my telling you that you had said it was in the back part of the stable at the last trial? A. Yes, sir.

Q. What did you tell me then? A. I told you that I must have made a mistake, that I did not understand the map.

Q. Do you remember saying at the last trial, in answer to the question "how near the door was there any fire," and answering "about a foot and a half to two feet from the door" do you remember saying that?

Mr. McCarter: I object to the question on the ground that it is not re-direct-examination.

Question allowed.

A. Yes, sir, I think I did.

Court: Q. Do you know whether you did or not? A. Yes, sir, I said a foot and a half or two feet.

Mr. Whittemore: Q. Had you seen that map before the last trial, before the day of the last trial? A. Yes, sir.

Q. Where had you seen it? A. In here.

Q. No before that day, you saw it here, had you seen it anywhere before you came to court

here that day, had you ever seen that map anywhere? A. No, sir.

Q. Do you remember saying when asked "do you know anything about maps," and you said "no?"

Mr. McCarter: I object to the question as irrelevant.

Question sustained.

Mr. Whittemore: Q. Do you remember being asked to point out the back door of the house?

Mr. McCarter: I object to the question, as irrelevant.

Court: I can see some relevancy to that, as it tends to show some acquaintance or lack of acquaintance with the map at the last trial, I will allow that question.

A. No, sir, I don't think so.

Mr. Whittemore: Q. I recall to your recollection—do you remember indicating a point in the horse stable, as the back door of the house when asked to point out the back door of the house?

Mr. McCarter: I object to the question—the witness has admitted that he at the last trial placed the fire as at the rear of what is called the horse stable. He now says he is mistaken, and that on Saturday in looking at the map, he makes up his mind that it was in here, in the front of the barn. Now whether he mistakes other parts of the house or not, we might have brought that out, but he says that he was confused, and he now corrects his testimony in that respect.

Court: I think it can not be quite material to show when he was first confronted by that map, that he did not know one part of the map from the other, and when he pointed to a point on the map, it was just a haphazard mistake. If you could show

that he had some acquaintanceship with the map, and then he with that knowledge, had pointed to the back end of the barn when he testified, or testifies now, that the fire occurred in the front, it would seem to me to be almost destructive of his testimony, and it seems to me also that it is relevant to show now that the mistake arose on account of the lack of acquaintanceship with the map when he gave his previous testimony, I think that is material testimony, and I will therefore permit the question.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WILLIAM H. SPEER,
Judge.

(Seal.)

A. What do you mean by that?

Mr. Whittemore: Q. Well, do you remember—do you know where the horse stable is now? A. Yes, sir.

Q. Did you know where the horse stable was at the last trial? A. Yes, sir.

Q. Did you know it on the map? A. Yes, sir.

Q. Do you remember pointing out anything in the horse stable at last trial? A. No, sir, I don't think so.

Q. Do you remember pointing out the barn doors to me on the map at the last trial?

Mr. McCarter: I object to the question as irrelevant and immaterial.

Same ruling as before.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WILLIAM H. SPEER,
Judge.

(Seal.)

A. Yes, sir.

Court: Q. Do you remember what you pointed out on the map at all on the last trial? A. I think I pointed out the back of the horse stable.

Q. Do you remember what it was you pointed out on the map the last time, and if you did point anything out, what it was you pointed out—have you any recollection of it at all? A. No, sir.

Q. You have not? A. No, sir.

Mr. Whittemore: Q. I would like to recall to your recollection whether you pointed out to me the barn doors as being the horse stable?

Mr. McCarter: I object to the question as leading.

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Q. When you were putting in the hay, was your brother and Fred or either of them smoking in the barn? A. No, sir, not then.

Q. Was James E. Goodman smoking there? A. No, sir.

Q. Was there any fire in the barn when you put in the hay? A. No, sir.

Q. Was there any lamp burning? A. No, sir.

Q. Was there any rule about smoking about the barns, made by Mr. Goodman that you knew of? A. Yes, sir, Mr. Goodman said "not to smoke around the barns."

FRANK B. HAM, being re-called for further cross-examination:

Cross-examined by Mr. McCarter:

Q. Have you made that calculation that you promised to make? A. I have.

Q. How far did you find the barn door in a westerly direction from the east-bound track? A. By true west, it was 168 4–10 feet, that is to the nearest rail.

RE-DIRECT by Mr. Whittemore:

Q. You have said on a former examination, that you have given the distance along the road at the Cordes property, and you say that that was at the angle of practically eighty and a half degrees, what variance would there be between the distance you testified to along the road, and a course measured directly at right angles, or ninety degrees from the railroad? A. Not very much, maybe one or two per cent difference.

Q. Greater or less? A. It would be a little less.

JOHN POLIMBO, a witness produced in behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. Rahway now.

Q. What do you do there? A. Work for the Ice Co.

Q. Did you ever do work for James E. Goodman? A. Yes, sir.

Q. How long ago? A. Well, when I quit three weeks ago, when I quit.

Q. Three weeks ago? A. Yes, sir.

Q. How long were you with Mr. Goodman? A. Nine years.

Q. What work did you do for Mr. Goodman? A. Well, I drove the coal wagon, and I drove the truck to Newark for him.

Q. Anything else? A. Well, all kinds of work on the farm.

Q. Where did you live when you worked for him? A. I was boarding with him.

Q. At the house? A. Yes, sir.

Q. Do you remember anything happening down at his place in July, 1905? A. Yes, sir.

Q. What happened then? A. Fire.

Q. What was burned? A. Well, the barn and the house and everything—everything that was on the place was burned.

Q. Where were you when the fire occurred? A. I was working out in the field.

Q. What field? A. On the same side the barn was on.

Q. How far away from the barn? A. Six hundred or seven hundred feet from the barn (indicating).

Q. How far from the railroad were you? A. Not over a hundred feet.

Q. Who was with you? A. Fred Koerber.

Q. Anyone else? A. No, sir, not then.

Q. Where was your brother? A. Across the railroad track.

Q. Anyone with him? A. No, sir.

Q. Could you see the railroad from where you were? A. Yes, sir.

Q. Did you see anything pass on the railroad? A. Yes, sir.

Q. What did you see? A. A train.

Q. What train? A. A mail train.

Q. Do you know that mail train? A. Yes, sir.

Q. Have you seen it on other days? A. Yes, sir.

Q. Do you know what time that passes? A. Well, it was supposed to go past at quarter to four.

Q. Do you know whether it was on time that day or not? A. I can not tell whether it was on time that day or not, I can not tell that, because I didn't look at my watch.

Q. How was it going? A. It was going fast.

Q. In which direction? A. Towards New York.

Q. What kind of a day was it? A. Windy.

Q. How was the weather? A. Clear.

Q. When you say it was windy, what do you mean by that? A. The wind was blowing hard.

Q. In which direction was the wind blowing? A. Right across the tracks.

Q. In which way across? A. Towards the barns.

Q. What were you doing down in the field? A. I was hilling up potatoes.

Q. What was Fred doing? A. Cultivating.

Q. Did you have some utensils with you, did you have a cultivator with you? A. Yes, sir.

Q. What were you hilling with? A. A hiller.

Q. Did you have any horses down there? A. Yes, sir.

Q. When the train passed, who was with you? A. Well, there was three of us when the train passed.

Q. Who was the other one? A. Fred Koerber, and my brother Andrew.

Q. Where did Andrew come from? A. From across the railroad tracks.

Q. Did he say anything to you? A. He came and asked us if we had some water.

Q. Did he come close to you? A. Yes, sir.

Q. What became of Andrew? A. He went up towards the house, to get some water.

Q. When did he start towards the house, in relation to the passenger train passing on the tracks? A. He started about the same time that the train did, or maybe a few minutes before the train passed.

Q. What next did you hear or see—was your attention called to anything a little later? A. Yes, sir, when a freight train went past, and she

blowed, and we looked towards the barn, and we seen the flames and the smoke.

Q. Which way was the freight train going? A. Towards New York.

Q. How long after the passenger train did the freight train come along? A. It might be four or five minutes, I can not say how long it was, shortly after.

Q. What did you and Fred do? A. When we seen the flames and the smoke, we tied the horses to the fence, and ran to the barns and the house.

Q. What did you do up there? A. We went to the house to see if we could save anything.

Q. Did you do anything? A. Yes, sir.

Q. What did you do? A. We carried some furniture out, a little bit, what we could.

Q. Who did you find up there when you got there? A. The only thing I seen was Fred Koerber, and I was there, and Dr. Sinclair's man was there.

Q. Did you see your brother there? A. No, sir.

Q. Was there anyone else there with Dr. Sinclair's man, and Fred Koerber, and yourself? A. That was all, when I got there.

Q. Saw no one else? A. Not just then.

Q. Where were you when you say you did not see anyone but those you were speaking of? A. At the house.

Q. Was there anyone in the house? A. No, sir, not just then, only Dr. Sinclair's man.

Q. Where was Dr. Sinclair's man? A. In the house, telephoning.

Q. Did you see Mr. Goodman that afternoon? A. Yes, sir.

Q. Where was he? A. I seen him up there, as I went down the field.

Q. After you saw the fire, where did you see Mr. Goodman? A. I seen him down the road.

Q. What road? A. Right by the house there.

Q. In front of the house? A. Yes, sir, in front of the house.

Q. The road that crosses the railroad track? A. Yes, sir.

Q. Did you see him before that time? A. No, sir.

Q. You don't know what he was doing when you came up? A. No, sir.

Q. Did you see young Mr. Goodman? A. Yes, sir, he came out in the yard afterwards.

Q. Did you see him before you saw him on the road? A. No, sir.

Q. Did you see Mrs. Goodman? A. No, sir.

Q. Did you see the younger Mrs. Goodman? A. No, sir.

Q. Did you see Mr. Goodman that afternoon in the lane? A. Not as I know of.

Q. Did you see anybody else around the place? A. Not when I came up, no, sir.

Q. Did you see anyone come afterwards? A. Yes, sir.

Q. Who? A. They all came, but I can not recollect all the names, out there.

Q. Give the names of some of those that you can recollect? A. Well, Mr. Mays.

Q. How soon did he get there, after you got to the house? A. He got there when I did, or two or three minutes after.

Q. Who else came? A. Some people, some Jews there, the names was Axel.

Q. Where had they came from? A. From their home.

Q. Where is their home? A. Across the railroad tracks.

Q. Who got there first, you or the Jews? A. I got there first.

Q. Were they there when you came there? A. No, sir.

Q. Did you see them come? A. Yes, sir.

Q. In what direction did they come? A. From across the railroad tracks.

Q. All at once, or separate? A. They came separate.

Q. Who came first? A. Do you mean the Jews?

Q. Yes, who was the first one to come? A. Mr. Axel I think it was.

Q. Was he there when you came? A. No, sir, not yet.

Q. What was burned up that afternoon? A. Well, there was the barns, and the house, and the wagons, and the carriages, and everything on the place.

Q. Everything there was on the place was burned up? A. Yes, sir.

Q. And you had been at the barn earlier that afternoon? A. No, sir.

Q. Before the fire had you been to the barns that afternoon? A. Not since two o'clock.

Q. Were you there at two o'clock? A. Just a little before two o'clock, yes, sir.

Q. What were you doing there? A. Unloading hay.

Q. Who was with you? A. My brother, and Fred Koerber, and Mr. Goodman was there, too.

Q. Anyone else? A. No, sir, there was no one else.

Q. What did you do there? A. I was unloading hay.

Q. How much did you unload? A. One load that afternoon.

Q. What did you do after you unloaded the hay? A. Unhooked the horses, and went down to the potato field.

Q. Who went down to the potato field? A. Me and Fred Koerber, and my brother went down in the other field.

Q. Anyone else go with you? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir.

Q. What became of Mr. Goodman? A. He went in the house.

Q. Are you sure Mr. Goodman didn't go down to the field with you? A. No, sir; he did not.

Q. How long did you stay down in the field? A. Two hours.

Q. Did you come up to the barn? A. Yes, sir.

Q. During that two hours, did you come to the barn? A. Yes, sir, I came to the barn when we seen the flames and the smoke.

Q. Before you saw the flames and the smoke, did you come up to the barn? A. No, sir.

Q. Did Fred Koerber go to the barn? A. No, sir.

Q. Did you see Fred Koerber alongside you all the time? A. Yes, sir, he was alongside me all the time.

Q. Did Andrew go to the barn? A. Yes, sir, for a drink of water.

Q. Before that, after finishing up the hay in the barn, did he go to the barn, between that time and the time he went for the drink of water? A. No, sir.

Q. How do you know? A. Because I could see him all the time.

Q. Did you see him all the time? A. Yes, sir, I seen him all the time.

Q. Had you been smoking in the barn? A. No, sir.

Q. Was there any fire in the barn when you left there at two o'clock? A. No, sir.

Q. Any lamp in there? A. No, sir.

Q. Was Fred Koerber smoking? A. He used to smoke, yes, sir.

Q. What did he smoke? A. He smoked a pipe.

Q. In the barn? A. No, sir, not in the barn.

Q. Did he smoke that afternoon? A. On the field, yes, sir.

Q. Did he smoke up at the barn? A. No, sir.

Q. Why didn't you smoke in the barn? A. We was not allowed to.

Q. Who would not allow you? A. Mr. Goodman.

CROSS-EXAMINATION by Mr. McCarter:

Q. You were down in the potato field, down at the end of the lane, were you not? A. Yes, sir.

Q. You never measured the distance up? A. No, sir, I did not.

Q. How long a time had Andrew been over on your side of the railroad before that passenger train went to New York? A. Well, it might have been two minutes, not longer than two or three minutes.

Q. Two or three minutes? A. Two or three minutes.

Q. He was thirsty, and he asked you for a drink of water? A. Yes, sir.

Q. Did he continue a conversation, or as soon as he found out you hadn't any water, he went right on, which? A. He went right off, as soon as he found out we had not any water.

Q. That didn't take two or three minutes, did it? A. No, sir, I don't think so.

Q. Did he cross the tracks before the train came? A. He crossed the tracks before the train came.

Q. Now, you are sure Mr. Goodman didn't come down with you to the potato field? A. No, sir, he did not.

Q. He was accustomed to working all day around the farm, was he not? A. He was accustomed to working all day around the farm, yes, but he didn't go on the field that day.

Q. He was accustomed to working on the field, in the day, was he? A. Yes, sir, he would work all day.

Q. He would work all day? A. Yes, sir.

Q. And what he did, after you got down to the potato field, you don't know? A. No, sir.

Q. Did you see him actually go in the house? A. Yes, sir.

Q. What did he go in the house for—to get a drink of water? A. I don't know what he went in for, I can not tell you that.

Q. Before you left the barn, or afterwards, was it? A. Before we left the barn, he went into the house.

Q. You don't mean to say you never had smoked in that barn? A. No, sir, I never had smoked in that barn.

Q. You had never smoked in that barn? A. No, sir, I had never smoked in that barn.

Q. Mr. Goodman told you that you must not? A. Mr. Goodman told me right off, when I first went there, that I was not to smoke in the barn, or around the barn even.

Q. Or around the barn even? A. Yes, sir.

Q. You used to smoke around the place, didn't you? A. Why, we used to smoke around the place, but never around the barn.

Q. You never disobeyed any of the rules, under any circumstances, did you? A. No. sir.

Q. You carried your pipe, and tobacco, and matches with you, did you not? A. Yes.

Q. And Fred did the same thing, didn't he? A. Yes, sir.

John Polimbo—Cross.

Q. And Fred was smoking down at the potato patch? A. Yes, sir.

Q. Were you smoking, too? A. Yes, sir.

Q. Did you get the matches out of your pocket and light up your pipe that day? A. Yes, sir.

Q. I do not suppose your brother Andrew smoked, he was too young? A. Yes, sir, he was too young.

Q. How old were you in those days? A. Fifteen.

Q. At that time you were fifteen years of age? A. Yes, sir.

Q. How old was Fred? A. He must have been about twenty-five, I guess.

Q. Is Fred here? A. I don't know, sir

Q. You haven't seen him? A. No, sir.

Q. Where had that load of hay been carted? A. On the fields, I suppose.

Q. Do you know—did you see it carted—did you see it carted? A. Yes, sir.

Q. Where was it cut? A. Across the railroad track.

Q. And had you helped put it on the hay wagon? A. Yes, sir.

Q. And brought it to the hay loft? A. Yes, sir.

Q. Did you leave any hay on the floor? A. On the floor?

Q. Yes. A. I can not say that now.

Q. The idea was to put it all up in the loft? A. Yes, sir, the idea was to put it all up in the barn, certainly.

Q. And Andrew testified that it was all cleaned up—is that your recollection or not? A. I think it was all cleaned up, after we got through unloading it, I can not say now whether it was or not, sometimes some drops on a load of hay, some drops on the floor.

Q. The lofts for the hay were on either side? A. Yes, sir.

Q. And up above? A. Yes, sir.

Q. And the wagon would drive in the centre and you would stand in the wagon and fork the hay up on either side? A. Yes, sir.

Q. And that is what you did that day, is it not? A. Yes, sir.

Q. The door was as high as the loft? A. Yes, sir.

Q. For instance, suppose that was the top of the door over there, now the floor of the loft was above that top of the door? A. No, sir, the door was a little higher than the loft was.

Q. The door was a little higher than the loft was? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir.

Q. How much higher? A. It might be three feet.

Q. How much? A. Three feet, about.

Q. So that if you looked in with the door open, you could see the loft? A. Yes, sir.

Q. On each side? A. Yes, sir.

Q. Were you pretty well blown when you got down to the fire that day? A. Yes, sir.

Q. It was quite a run, wasn't it? A. Yes, sir, it was.

Q. You had been doing some work I suppose, after Andrew left, before you heard the shout of the fire? A. Yes, sir.

Q. And you didn't know how long a time it was, did you? A. I guess it was about four or five minutes.

Q. Well when the freight train went through you say you saw the fire in full swing, didn't you? A. Yes, sir.

Q. Now, it was not until the freight train went

through that you saw the fire, was it? A. No, sir.

Q. And that freight train followed the other train? A. Yes, sir.

Q. Going to New York? A. Yes, sir.

Q. On the same track? A. Yes, sir.

Q. And you say that was four or five minutes after Andrew left you? A. Yes, sir.

Q. It might have been a little longer? A. No, sir, I don't think it was any longer than that.

Q. You didn't pay any particular attention to the time? A. No, sir, I didn't pay any particular attention to the time, but that is about what I think it was, four or five minutes after Andrew left.

Q. Where was that freight train when you heard the whistle, and saw the blaze in the barn? A. It was right there by us.

Q. Right by you? A. Yes, sir, close to us.

RE-DIRECT by Mr. Whittemore:

Q. You say there was lofts on both sides of that barn? A. Yes, sir.

Q. On the right-hand side, as you went in, what was there on the level with the floor? A. There was hay there.

Q. You mean there was hay there put in under the loft? A. Yes, sir, there was hay put in the loft and there was hay left there, but we took it down and put the hay down from the bottom up.

Q. Where did the hay begin? A. From the bottom of the floor just then, and went up.

Q. And extended up how high? A. I can not say how high it was just exactly.

Q. Did it go up that high? A. The hay?

Q. Yes, how high did you pile it up on that side? A. It must have been about fifteen feet, I guess.

Q. How near the roof did you get? A. I don't

know how high the barn was, I know it went up to the roof.

Q. Up to the roof? A. Yes, sir.

Q. On the other side of the barn was there a loft there? A. No, sir, there was hay from the bottom up.

Q. The bottom of what? A. The barn floor.

Q. How did that extend, how high? A. The same height.

Q. Did you put in any hay that morning? A. No, sir, not that morning.

Q. Did you put any hay in the other barns? A. Yes, sir.

Q. How much did you put in that afternoon? A. We only put in one load that afternoon, in that barn, but in the morning we made five loads of the neighbors and put hay in there.

FURTHER CROSS-EXAMINATION by Mr. McCarter:

Q. Which side was the flame on the right or the left side when you saw it? A. It was right in the middle of the barn, when I saw it, first.

Q. Over the door? A. Yes, sir, over the door.

Q. Over the door to the right or left of the door? A. When I saw it from the fields, it was right from the roof of the barn.

Q. It had been afire some time? A. Yes, sir, it was all ablaze when I seen it.

EDMUND MAYS, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. I live in Linden.

Q. How long have you lived in Linden? A. About two years.

Q. Where before that did you live? A. Clark Township.

Q. Whereabouts? A. Pretty close to the Lehigh Valley Railroad.

Q. Where, with reference to the Goodman place? A. Well, about 700 or 800 feet from the Goodman place.

Q. On the same side of the road, or the other side? A. On the other side.

Q. And nearer the railroad track or further away? A. Further away.

Q. How long did you live there? A. About seven years, in that place.

Q. Did you know Mr. Goodman in his lifetime? A. Yes, sir.

Q. Did you know his property? A. Yes, sir.

Q. Had you ever been on it? A. Yes, sir.

Q. Had you ever been on the place? A. Yes, sir.

Q. How many times? A. Oh, I can not tell you, a great many times, a hundred, off and on.

Q. Do you remember a fire occurring on the Goodman place? A. Yes, sir.

Q. About how long ago? A. Well, I think it was in 1905.

Q. Where were you when that fire occurred, or commenced? A. I was home in the house.

Q. Where had you been early that afternoon? A. Twenty minutes before that time, I came across the track from Westfield.

Q. How was your attention first called to the fire? A. Well, I looked out—first I laid down, I was kind of tired, and I said to my daughter, there is something burning—

Q. You can not say what your daughter said—something was said to your daughter? A. Yes, sir.

Q. Now, anything else? A. I smelled hay burning, and I jumped up, and I looked over, and I see the blaze.

Q. What did you do then? A. I went over as quick as I could get there.

Q. What did you do when you got there? A. Well, I seen we could not do anything, with the buildings, and I got into the house and tried to save something out of that.

Q. Who did you see when you went over there? A. The two Mr. Goodmans, that is Mr. Goodman, Sr., and young Mr. Goodman.

Q. Did you see Mrs. Goodman? A. Mrs. Goodman, Jr.

Q. You saw Mrs. Goodman? A. No, sir, she was not at home.

Q. Who else did you see besides Mr. Goodman and his son? A. I saw Johnnie and his brother.

Q. John and Andrew Polimbo? A. Yes, sir.

Q. Where was Andrew? A. They were at the house, when I got there.

Q. Do you remember Andrew being at the house? A. He was at the steps, I think, but it is so long ago, I won't be positive of that, Mr. Lozier and his son came over when I got there.

Q. Who was there when you got there, when you arrived there? A. I don't think there was anybody around the house then, when I first went, only Mr. Goodman, they were both coming from the house.

Q. Who came after you got there? A. Johnnie, and Mr. Lozier, Mr. Englehardt and Mr. Ulbrech.

Q. Anyone else with you that you can remember? A. No, sir, I don't remember anyone else, at present.

Q. Did you know of anyone by the name of Axel? A. Yes, sir, Mr. Axel was there.

Q. Who got there first, you or Mr. Axel? A. Well, I think Mr. Axel was there before I was, he may have been in the house.

Q. What was the condition of the fire when you got there? A. When I got there, the back of the buildings was all ablaze, along the railroad, from one end to the other.

Q. Was the house on fire? A. No, sir.

Q. What happened after you got there, what was the progress of the fire? A. We tried to save the building next to the house, and found we could not do that, so we went to work to save what we could, from the house.

Q. And what happened? A. It got so hot, we were drove out.

Q. And what became of the house? A. It got burned down clean.

Q. After the fire was over, what buildings were there on the place? A. I don't think there was any, not a thing left.

Q. What was the directin of the wind that day? A. I think the wind was southeast.

Q. How was it blowing? A. It was blowing, very hard, and it was very dry.

Q. What kind of weather was it? A. Fair, warm and windy.

Q. Did anything happen over to your place that day? A. Yes, sir.

Q. What happened? A. I got burned out too.

Q. How did you happen to get burned out?

Mr. English: I object to that as immaterial.

Court: If he shows that the fire originated from a locomotive of this company's, and that the sparks were carried a like distance from that locomotive to his place, or if he shows that just prior to this time, the same locomotive or one of the two testi-

fied to, passed there and immediately thereafter the fire originated—

Mr. Whittemore: That is not the object of it, if your Honor please.

Court: What is the object of it?

Mr. Whittemore: To show that the sparks went from this place, Mr. Goodman's place, over to Mr. May's place.

Mr. English: That is the point of my objection.

Mr. Whittemore: The object being to show the force and direction of the wind.

Court: I think it is too remote, it is relevant, but I think it is very remote.

Mr. Whittemore: Q. Have you a suit against the Lehigh Valley Railroad? A. Yes, sir.

Q. Did you hear any train pass? A. I did, yes, sir.

Q. What did you hear? A. Well, I have been home about two minutes, I guess, and I watch that train pretty nearly every day, or listen for it.

Q. What did you hear? A. I heard a noise, just same as any train would make, that is all I hear.

Q. Anything except the noise of the train running? A. That is all, the noise of the train.

Q. When trains approach that crossing, do they make any additional noise? A. Yes, sir, you can feel the vibration in the house, very often.

Q. Any other noise? A. No more than the whistle.

Q. Did you hear any whistle? A. No, sir, I did not.

Q. You heard the train? A. Yes, sir.

Q. How long after you heard the train was your attention called to the fire in any way? A. I should judge in about twenty minutes.

Q. What was your business at that time? A. I was a general farmer.

Q. How long have you been a farmer? A. Twenty-five years, about.

Q. Did you cut and sell hay? A. Yes, sir.

Q. Do you know the value of hay? A. I sell a great deal of it.

Q. Did you see any hay on Mr. Goodman's place that year? A. Yes, sir.

Q. Did you have anything to do with the harvesting of that hay? A. I was over there one day helping them to put hay in.

Q. Did you see the hay in the barns? A. Yes, sir.

Q. What kind of hay was it? A. Very good hay, "A No. 1 timothy."

Q. What is the value of that hay in the barns at that time? A. Well, it is a long while ago, I disremember, twenty, twenty-two, or sometimes twenty-five dollars.

Q. In the barns? A. In the barns—and sometimes less.

Q. That year in the barns? A. I think it was about twenty-two dollars.

Q. Do you remember giving a value at the last trial? A. No, sir, I do not.

Q. How long have you known Goodman's property? A. About thirty years.

Q. When you first knew it, who owned it? A. Mr. Littell.

Q. Where did Mr. Littell live? A. He lived then in the same house that was burned down.

Q. Who used the barn, who was in possession of the farm when he was living there? A. Mr. Littell.

Q. Do you remember when he died? A. I do not remember when he died.

Q. Do you know of his death? A. I knew of his death, yes. sir.

Q. After his death who had possession of the farm? A. Mr. Goodman.

Q. How long after his death? A. Well, I could not tell, two or three years, it might be, and it might have been right away.

Q. After Mr. Goodman lived there, who was there? A. After Mr. Littell died?

Q. Yes—you say Mr. Goodman was on the farm after Mr. Littell did, for two or three years, is that correct? A. I could not tell exactly how long.

Q. After he left, who was in possession of the farm? A. After Mr. Littell?

Q. After Mr. Goodman left? A. Mr. Goodman is in possession of it yet, I think.

Q. Did Mr. Littell have any family? A. I think he did have one daughter, that I know of.

Q. Where did she live? A. I don't know where she lived after that.

Q. Did he have any wife, Mr. Littell that is? A. Yes, sir.

Q. Where did she live? A. She lived there with him.

Q. And after his death, where did she live? A. After his death, I don't know where they went, I don't know where they went after he died.

Q. Do you know how long it was after Mr. Littell died that Mr. Goodman came on the place? A. No, sir, not exactly, I do not.

Q. What is the best of your recollection? A. Well, I was not there for a few years, then it might have been right way, and it might not.

Q. You can not say. A. I can not say

Q. What was the condition of Mr. Goodman's place as to repair just before the fire? A. Well,

it was almost a new house, I considered it as good as new.

Q. How did it happen to be as good as new? A. He remodeled it.

Q. What kind of a house was it? A. It was what we call a French roof house, that is it was square two stories, and garret, I presume.

Q. What was the condition of the barns with regard to repair? A. Some was good, and some was not very good, but they were all in pretty good condition, I think two of them was pretty nearly new.

Q. Do you understand that map? A. I don't know as I do, I could not see it from here anyhow.

Q. Look at it closely. A. I understand the location of the buildings.

Q. What have you to say as to whether that map indicates the buildings correctly? A. I should say it does, that it is correct.

Q. Do you know the horses Mr. Goodman had at the time of the fire? A. Yes, sir.

Q. Do you know the two that were burned? A. Well no, I don't know the two, I knew one of them.

Q. Do you know one of them that was burned? A. I know he lost two, but one of them I did not know much about.

Q. Have you bought and sold horses? A. Yes, sir.

Q. Do you know the value of the horses at that time, in July, 1905? A. Yes, sir.

Q. What do you say is the value of the horse that you were acquainted with, and which was destroyed in the fire at that time, what was its value at that time? A. Well, a horse of that size, I should judge, about $200—as to its age, I could not tell anything about that, I never examined

the horse, but from his outside appearance, he was young—

Q. You said you knew him, what do you mean by that? A. I saw the horse, then he was a fine looking horse, but I never examined him closely enough to tell his age.

CROSS-EXAMINATION by Mr. McCarter:

Q. Your house was about how far from Mr. Goodman's house? A. Well, about 700 or 800 feet on a guess.

Q. And you were in your house, when you first heard of the fire, were you not? A. Yes, sir, at least I could smell it, I smelled the burning hay.

Q. You smelled hay burning? A. Yes, sir

Q. You were then in your house some 600, 700 or 800 feet away? A. Yes, sir.

Q. And you went right over there? A. Yes, sir.

Q. There was a man named Axel there, around there, working on the farm at that time, was there not? A. Yes, sir.

Q. You saw him there the day of the fire? A. I saw him there the day of the fire, yes, sir.

Q. You have not seen him today, have you? A. No, sir.

Q. You spoke of some Jews being there, was he one of those Jews whom you spoke of? A. I don't know that he was, there was some Jews lived there.

Q. Near the Goodman's? A. Just before he came there.

Q. Where did they live? A. They lived on the place over the railroad.

Q. Just across the railroad? A. Yes, sir.

Q. And you say they used to come over to Goodman's now and then, these Jews? A. No,

sir, I don't know as I ever made any such remark, I don't know as they ever went to Goodman's.

Q. You claim, don't you, that the fire that burned up Goodman's property blew over and burned up your place? A. Yes, sir.

Q. And you have a claim against the company for some hay, haven't you? A. Yes, sir.

Q. Did you see Mr. Goodman's hay near by that was destroyed? A. Yes, sir.

Q. How soon before the fire was that? A. Oh, about a week.

Q. Which hay are you talking about? A. The hay Mr. Goodman had in his barn.

Q. Then he had some of the hay in his barn a week before the fire, did he? A. Oh yes, sir, considerable.

Q. Now, these barns had never been painted, towards the railroad, had they? A. Well, some of them had, yes, sir, two of them had.

Q. And the rest of them had not? A. The rest of them I do not think had.

Q. And these barns needed weather-boarding, didn't they? A. Well, the weather-boards was good yet, what was on them.

Q. Well, they needed some weather-boards? A. I don't think they needed any for the barn purposes, as long as they were used for hay.

Q. Did they have any weather-boards on? A. Yes, sir.

Q. And off, too? A. No, sir, I didn't see any off.

Q. They didn't? A. No, sir.

Q. Do you remember testifying at the last trial? A. Yes, sir, I remember testifying at the last trial.

Q. Do you remember testifying as follows, in answer to the question, "What was the condition

of the barn?''—your answer being as given here, ''the barns was very good, so far as some of them were concerned. I have not examined them; of course I have not seen them from the outside of the barns, next to the railroad, some of them wanted a few weather-boards, but the frame was good, all I could see''—did you testify that way? A. I can not tell you, but it is likely that I did, I think it is more than likely I did.

Q. Then further on, at page 232, in reply to this question, ''Q. These barns also needed roofing, didn't they?'' and did you answer as follows: ''A. Well, they look of course, a little rough, but they were those long shingles, and I would put hay in them, and I could not see why they could leak any.'' Did you testify that way? A. Yes, sir.

Q. Now, you were asked at page 233, as follows: ''Q. These barns were not painted towards the railroad''—and did you answer: ''A. No, sir, there were two of them painted, and two of them were not.''

Q. So two of the barns had never been painted towards the railroad? A. Not to my knowledge, no, sir.

Q. Who were at the fire when you got there? A. I think Mr. Axel was there.

Q. Mr. Axel was there? A. Yes, sir.

Q. Go on? A. And I think that is all that I remember seeing of them, there might have been someone in the house—until a few minutes later—and then Mr. Lozier came, I think; he might have been there before I got there, but it was an exciting time, and I saw him there a very few minutes after I got there.

Q. Where does he live? A. I think his house is on this side of Goodman's.

Q. You saw Andrew Polimbo there? A. Yes, sir.

Q. And his brother John later? A. Yes, sir.

Q. Did you get to the fire before John got there? A. I don't remember.

Q. The only person you saw when you got there was Mr. Axel? A. Mr. Axel and the two Goodmans.

Q. How old was this horse, to your knowledge —did you ever examine him? A. No, sir, I didn't examine him, but from the looks of him I should judge he was not over ten.

Q. Do you mean to say that seeing a man driving along the road with a horse, you could tell whether the horse was ten, eleven, or fourteein years old? A. You can tell pretty near by his actions, although you can not be positive.

Q. You don't have to look at a horse's teeth to see how old he was? A. I have looked at several horses' teeth, to see how old they were.

Q. What kind of a horse was this? A. This was a big heavy truck horse.

Q. How much did he weigh? A. Oh, about 1,300 or 1,400 pounds.

Q. And you say you think he was worth $200? A. I think so.

Q. That is assuming how old he was? A. That would be twelve years.

Q. Twelve years old? A. Yes, sir.

Q. Does the price of hay vary year by year? A. Yes, sir.

Q. Well, the hay you are talking about, was the hay you saw in the barns, a week before the fire, is that right? A. Some of it, yes, sir.

Q. That is the only hay you know about, is it not? A. No, sir, we had put the hay up for two or three different mows there.

Q. A week before the fire? A. Yes, sir.

Q. That is the hay you have been talking about? A. Yes, sir, the hay was in the barn.

Q. And that had been there for a week? A. Yes, sir.

Q. You had not seen that hay inside of a week? A. No, sir, I don't think I had.

Q. Well, had it been a week or more than a week? A. No, sir, I don't think it was over a week.

Q. What kind of hay did you call it? A. "Timothy" hay, I call it.

Q. What was the price of "timothy hay" that year, in the barn? A. Well, I paid $19 after I was burned out, that is all I know about it.

Q. You paid $19? A. Yes, sir.

Q. And why did you say this is worth $22? A. Because I think it is worth that profit on the place.

Q. Three dollars a ton? A. Yes, sir.

Q. How long does it take to cart a load of hay? A. It depends how far you have to come, but I had to go three or four miles.

Q. Where? A. To buy hay.

Q. How far did Mr. Goodman have to go? A. Oh well, some of it we had only to go a little distance for.

Q. That would not be worth $3.00 a ton when you had to go only a distance for it? A. Well, some of them I think you had to buy then you would have to go a long distance.

Q. Your valuation is at the barn? A. Yes, sir.

Q. $22.00? A. Yes, sir.

Q. And you paid $19 for the same kind of hay? A. No, sir, I didn't get the same kind of hay by a long shot.

Q. What kind of hay did you get? A. I got fine cow hay.

Q. Better hay? A. No, sir, not as good.

Q. What kind of hay did you call it? A. Well,

"red top" and "Dutch daisies," was what we called them.

Q. And you paid $19 a ton? A. Yes, sir.

Q. Where? A. Over to Lambert's for it.

Q. That same year? A. Yes, sir.

Q. Did you have any experience in "timothy" hay that summer? A. No, sir, I don't think I bought any timothy.

Q. So you don't know what the price of timothy was? A. No, sir, I may have gone to town to get a bale, but I don't remember.

RE-DIRECT by Mr. Whittemore:

Q. What kind of hay was that you bought? A. Well, "red top," and some that had been mowed I supposed off a potato patch, I think.

Q. "Timothy" hay is not called "red top" hay, is it? A. No, sir.

Q. Which is better, timothy hay or red top? A. Timothy hay fetches a great deal more than red top.

Q. Do you know how much hay there was in Mr. Goodman's barn? A. Well, no, sir, I should not be able to come within three or four tons of it, because I did not put much of it in.

Q. Did you understand Mr. McCarter to ask you if Mr. Axel was working on the farm? A. No, sir, I did not.

Q. Well, was he working on the farm? A. No, sir, not to my knowledge—I thought he asked me if he was on the farm.

Q. Did you know of Mr. Axel's ever working over to Mr. Goodman's place? A. No, sir, I don't know of his working there.

Q. When you got there, do you recall whether or not Mr. Axel was there? A. No, sir, I could not, but I think he must have been there, or he might have come just after I got there.

Q. What was he doing there? A. They were trying to get something out of the house.

CHARLES KOERBER, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. 339 Waverly avenue, Newark, N. J.

Q. How long have you lived there? A. I have lived there about nineteen years.

Q. Do you know Mr. Goodman? A. Yes, sir.

Q. Were you ever employed down on his farm on Fanwood township? A. Yes, sir.

Q. How long were you employed by him on his farm? A. I can not say just exactly, probably four or five months.

Q. Did anything particular happen while you were there? A. Well, we had aburn-out.

Q. Where were you that afternoon? A. Why, I was down in the potato field, at the lower end of the farm.

Q. Who was with you? A. One of the boys named "John."

Q. Anybody else? A. There was only two of us, the other boy was on the other side of the field.

Q. What other boy do you mean? A. Andrew.

Q. On the other side of what field? A. The other side of the railroad track, on the other field.

Q. Do you remember what you and John were doing that afternoon? A. I was cultivating potatoes.

Q. What was John doing? A. John was hilling them.

Q. Did you have a horse in the cultivator and a hiller down there? A. We both had a horse.

Q. Did you have any talk with Andrew that afternoon? A. Yes, sir, I believe I did.

Q. How did you happen to have a talk with him? A. He came over and asked me if I had—

Q. Never mind what he asked you—did you have a talk with him? A. Yes, sir.

Q. How long did Andrew stay with you? A. Oh, probably about two minutes.

Q. What then did he do? A. I sent him up to the house, to get some water.

Q. How far were you from the barn, about, as nearly as you can estimate? A. Well, about 500 or 600 feet.

Q. And how far from the railroad were you? A. Just inside the fence.

Q. In cultivating, did you move about and go backwards and forwards, from the railroad, or was it the other way? A. No, sir, the opposite way, the way the tracks ran.

Q. You went back and forward, away from the railroad tracks? A. Yes, sir.

Q. Did you see any train pass that afternoon? A. Yes, sir.

Q. What train? A. A quarter to four train.

Q. When you say "quarter to four" what do you mean by that? A. It was a regular train—that is the way we used to calculate our time on, I never carry a watch.

Q. How was it going? A. Towards New York, east.

Q. At what speed? A. I guess she was going—

Mr. McCarter: I object to the question on the ground that this man is not qualified to testify as to the speed at which a train is travelling.

Question withdrawn.

Mr. Whittemore: Q. Was it going fast or slow? A. It was going at a good speed.

Q. Well, when did Andrew start towards the barn, in relation to the time the train passed? A. Why the train I believe just passed, when Andrew started for the house.

Q. Was your attention afterwards directed to anything that was happening up towards the barn? A. No, sir, it was a freight train that passed that drew my attention.

Q. To what? A. Towards the barn.

Q. How was your attention drawn towards the barn by a freight train? A. When I came to the head of the row, facing the tracks, the freight train passed, and the engineer blew the whistle, and I saw the fireman on the engineer's side, and I thought there was something wrong, and I saw the fireman point towards the barns, and as I turned, I see the barns all rolling up in smoke.

Q. What did you do then? A. I tied the two horses, to the fence, and ran to the barns.

Q. Who did you see? A. There was no one around the barn when I got there.

Q. Did anyone go to the barn with you? A. No, sir, I left John to take care of the horses.

Q. Did John come afterwards? A. As soon as he had his horse tied.

Q. What did you do after you got to the barns? A. I tried to go and get the horses out, but the heat was quite great, and I could not get near it.

Q. Which side of the barn did you stay on, which side of the barn did you come to first? A. I tried to get in where the fire had started, towards the track.

Q. The large barn doors? A. Yes, sir, the large barn doors, towards the track.

Q. Then what did you do? A. I seen I could not get in that way, and I went around the barn.

Q. Where did you go then? A. I tried to go to the other entrance of the stable to get the horses out.

Q. What did you do then? A. I could not get the horses out, the heat was so great. Then I went and tried to get a coal wagon out from a shed there was there, and I could not pull the wagon out by myself, it was too heavy. Then I ran to the house, to see if I could get help there.

Q. What did you see then? A. I saw an automobile standing in the road.

Q. Where? A. At the back door to the kitchen.

Q. Anyone else there? A. The man that drove the machine was there.

Q. Did you know his name? A. I did not know his name, he was a colored man.

Q. Was anyone else there except that man? A. Not at the time.

Q. Who did you see next? A. Why I seen Mr. Goodman.

Q. When you speak of Mr. Goodman, which do you mean? A. Mr. Goodman, Sr.—

Q. Where was he? A. He was in the back part of the house.

Q. Who else did you see there afterwards? A. Well, John came up by that time.

Q. Who else did you see, give the name of anyone you saw there? A. Mr. Lozier was there, the next farmer down the road.

Q. How soon did he come? A. He got there probably five or six minutes after I got there.

Q. Who else came there? A. Dr. Sinclair was there. Mr. Mays came there—that is all I noticed.

Q. Did you notice anyone by the name of Axel? A. He came there later on.

Q. Was he there when you came up first? A. No, sir.

Q. Did you see him come? A. I saw him come.

Q. What did you do the rest of the time that afternoon? A. Tried to get some furniture out of the house.

Q. Did you get much out? A. No, sir.

Q. How did the fire progress? A. Well, it didn't take long to clean the whole thing down.

Q. How was the wind that afternoon? A. A good stiff wind.

Q. In which direction was it blowing? A. From the tracks, across the barns, and across the house.

Q. Take the pointer and lay it on the map in the direction you remember the wind was blowing. A. It was like that (pointing due west).

Q. How was the weather? A. It was a mild day.

Q. Rainy? A. No, clear.

Q. Where did you live when you worked on that farm? A. In the house.

Q. How long did you stay with Mr. Goodman after the fire? A. Three or four months.

Q. Had you been in the barn earlier that afternoon? A. Well, I unloaded a load of hay after dinner, it was about two o'clock I guess, when we left the barn.

Q. Where did you go then? A. Down in the potato field.

Q. Who went with you? A. John.

Q. Were you back to the barn again before the fire? A. No, sir.

Q. Was John back to the barn again before the fire? A. No, sir.

Q. Had you been smoking in the barn? A. No, sir.

Q. Had John been smoking in the barn? A. Nobody smoked that day, we had no tobacco.

Q. Do you remember that? A. Yes, sir.

Q. Who was with you unloading the hay? A. John and Andrew.

Q. No one else? A. None that I remember.

Q. Did you see Mr. Goodman before the fire occurred that afternoon? A. I saw him at dinner time.

Q. Did you see him after that? A. Not as I remember.

Q. Do you know how much hay there was in this barn? A. The amount in tonnage—the barns were pretty well filled.

Q. When you say the barns were pretty well filled, what barns do you mean? A. The main barn.

Q. Any other? A. The other two was filled.

Q. Which other two do you mean—indicate on the map which two barns you mean? A. These here (indicating) were all filled.

Q. Numbers 2 and 3? A. Nos. 2, and 3 and 4, were all filled.

Q. Was there any other hay on the place, except what was in the barn, cut hay, I mean? A. Not as I remember.

Q. Was there any swamp hay there? A. There was some swamp hay I believe outside.

Q. Where was that? A. I believe it was outside between "three" and "four" barns.

Q. Point it out on the map? A. Right about here (indicating the angle between barns "three and four").

Q. Was there any hay that was stacked up on the place, any swamp hay? A. That is the only swamp hay that I remember.

Q. When you went down to the field at two o'clock you said John was with you, did anyone else go along with you? A. Andrew went half way down, and then went on the other side of the tracks.

Q. From where you were working, could you see Andrew working on the other side of the tracks? A. I don't know as I could.

Q. Did you see him between that and the time he came over, concerning which you have just testified? A. No, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Koerber, one of you was cultivating, and the other was hilling, as I understand it, is that right? A. That is right.

Q. You did not work side by side? A. Side by side, yes, sir.

Q So that you came up in this direction and go towards the railroad, and backwards and forwards, together? A. Yes, sir, exactly.

Q. You and John? A. Yes, sir.

Q. So that where you were he was, and where he was, you were, side by side? A. Yes, sir.

Q. How far from the tracks did you happen to be when Andrew came across, and said he was thirsty, and wanted some water? A. How far from the tracks?

Q. Yes. A. We were just at the fence.

Q. You were near the fence line? A. About two or three feet away.

Q. You had gotten down to that end, of the end of the row? A. Yes, sir.

Q. Did he come right up to you? A. Yes, sir, he came right up to us.

Q. Now, you said he stayed two or three minutes with you, was it longer or shorter than that, or about that time? A. It could not have been more than two minutes.

Q. Did he do anything more than ask for a drink of water? A. No, sir.

Q. And then went away? A. And then went away.

Q. That would not take two or three minutes—at any rate he stayed with you long enough to ask for the water? A. Yes, sir.

Q. And you said you had none? A. Yes, sir.

Q. And then he said he was thirsty, and he was going over to the house to get some? A. I told him to go to the house, and get a jug full.

Q. And bring some for you too? A. Yes, sir.

Q. And he started off? A. Yes, sir.

Q. Had he gotten out of your sight, when the freight train came along, with the firemen on the engineer's side—could you see him down the lane, when the freight train came along? A. I could not see him.

Q. You say he started to go just after the passenger train had gone by? A. Yes, sir.

Q. Right away, or a minute or so afterwards? A. Well, probably a minute or so afterwards.

Q. And then you lost sight of him, and the next thing you knew, was the freight train whistle? A. Yes, sir.

Q. Could you see him at all after you heard the freight train whistle—could you see Andrew at all? A. I had not looked in that direction.

Q. Do you know where that apple tree was that he testified he stood by? A. I don't remember whether it was burned down or where it was.

Q. You haven't that in your mind? A. No, sir, I don't have that recollection.

Q. And it was the fireman of the freight train pointing towards the barn, that called your attention to the fire in the barn? A. Yes, sir.

Q. And you tied your horse and ran over there? A. Yes, sir.

Q. It was quite a run? A. Yes, sir.

Q. You were pretty well blown when you got there? A. Yes, sir, I certain was.

Q. It was 600, 700 or 800 feet? A. Something like that.

Q. And when you got there the whole barn was on fire? A. Well, the whole top of it was gone.

Q. The whole top of it was gone? A. Yes, sir.

Q. Had the top tumbled in before you got there? A. I never noticed, whether it fell in, the smoke was so great.

Q. The whole top was ablaze? A. Yes, sir, the whole top was ablaze.

Q. You don't know where the fire started—you did not see it start? A. No, sir, I was not there to see it start.

Q. Where did this man Axel live—right across the railroad? A. Up aways from the railroad.

Q. About how far? A. Oh, a thousand feet away.

Q. Further than you were away from the barns, do you think? A. Oh, yes, sir.

Q. How near to the barn was this automobile? A. It was not near the barn, it was nearer the house.

Q. Near the house? A. Yes, sir.

Q. You did not carry a watch, did you? A. I did not carry one.

Q. You didn't carry a watch when you were working there on the farm? A. I carried a watch the first of the week, I worked there, but after that we kept the time by the trains, as they passed by.

Q. How do you fix that it was two o'clock when you put the last load of hay in the barn? A. I believe a passenger train went through.

Q. Was there a passenger train due to go through there about two o'clock? A. Somewheres about that.

Q. Whatever time that went through, that is the time you stopped there? A. Yes, sir.

Q. Which way did it go? A. I don't remember.

Q. You say you place that time as being the time the passenger train would go by there—now which way was that passenger train going? A. I could not say.

Q. Well, do you remember that there was a passenger train went through? A. Sure there was a passenger train went through.

Q. Did you see it? A. Yes, sir—I believe it was a passenger trian.

Q. If you saw it, and it was a passenger train, which way was it going, do you remember that? A. No, sir, I do not.

Q. Where were you working at that time? A. We were just starting out from the barn.

Q. And you and Andrew and John all went down to the potato field? A. Yes, sir.

Q. And that was about two o'clock to the best of your recollection? A. Somewheres near there.

Q. You had been in and out of the barn all the morning, hadn't you? A. We had put in a couple of loads of hay in the morning.

Q. Where had you collected that hay? A. The other side of the railroad track.

Q. Just along the road? A. Yes, sir, just along the road.

Q. Now, I understand you to say that on this particular day, you did not do any smoking—is that right? A. I didn't have any tobacco.

Q. You were accustomed to smoking around there? A. Oh yes, sir.

Q. And I understand you to say that you are quite sure you had no tobacco that day? A. I know we didn't have any that day.

Q. You know? A. I know we didn't have any that day.

Q. You and John and— A. None of us.

Q. Don't you remember John smoking out on the potato patch? A. I do not remember.

Q. You say he had no tobacco? A. I didn't see him smoke.

Q. He was with you all the time? A. Sometimes he was at the head of the row, and I was at the bottom.

Q. Didn't you tell me just a little while ago, that you and he were together, that you went to the top of the row, and then went back again, together? A. That was the time I saw the train go through.

Q. Was he working with you all the time? A. Yes, sir.

Q. You had tobacco the day before, hadn't you? A. Yes, sir, I believe we did.

Q. And the day after, didn't you? A. I think so.

Q. You ordered some that night, didn't you? A. No, sir, we didn't buy any that night.

Q. You had some the next day to smoke, didn't you? A. I don't remember.

Q. You didn't go two whole days without smoking, did you? A. Oh, we go many days, without smoking, we didn't have to smoke, you know.

Q. Didn't you smoke the next day—of course we understand now that there was neither of you smoking that day—in fact I don't believe there was a cigar within a mile of that barn that day—but the day after, don't you remember that you smoked the day after? A. I don't think we did.

Q. Are you sure? A. I am pretty sure.

Q. Will you say that John Polimbo did not smoke the next day? A. I did not see him.

Q. You must have been pretty anxious for a smoke about this time? A. I was anxious enough.

and if I had had the tobacco, I would have smoked.

Q. You smoke a pipe? A. I smoke a little.

Q. Where did you get your tobacco, when you did have any? A. I bought it at Westfield.

Q. The next day after this fire, there was not much doing around there in the way of farming, was there? A. No, sir.

Q. Didn't you smoke that next day at all? A. No, sir.

Q. Nothing at all doing in the way of smoking that next day? A. No, sir.

Q. Did you ever hear Mr. Goodman forbid you smoking in the barn? A. Yes, sir.

Q. That was because he saw you smoking there, was it not? A. No, sir.

Q. When did he forbid you smoking in the barn? A. When he hired me.

Q. How long ago was that? A. When I first went there.

Q. So he told you smoking around the barn was dangerous? A. Yes, sir.

Q. And you never did smoke around the barn? A. No, sir, I never did smoke around the barn.

Q. You had smoked otherwise, but not near the barns—is that right? A. Yes, sir.

Q. You smoked when you were working, if you were not working near the barns? A. Yes, sir.

Q. You did it upon every occasion, every day, but you didn't smoke this day? A. We didn't have any tobacco.

Q. Did you hear John testify this morning, that he was smoking while out in the potato field that afternoon? A. No, sir, I did not.

Q. You didn't hear that? A. No, sir.

Q. And did you hear John testify that you smoked that day, while out in the potato field? A. Not as I remember.

Q. Not as you remember? A. No, sir.

Q. Now, how did you light your pipe—with matches? A. Yes, sir.

Q. You carried matches, didn't you, in your pocket? A. I had a few.

Q. And John carried matches in his pocket? A. Yes, sir.

Q. And sometimes he would give you a light and sometimes you would give him a light? A. Yes, sir.

Q. What kind of matchbox did you carry? A. I had one made out of tin, I think it was, it was silver plated one time.

Q. And that kind of silver had worn off? A. Yes, sir.

Q. What kind of a box did John carry? A. I don't remember whether he had one or not.

Q. Did young Mr. Goodman smoke? A. Not very often.

Q. Once in a while? A. Once in a while.

Q. Old Mr. Goodman did not smoke, did he? A. I never saw him smoke.

Q. He had no vices of that character? A. I never saw him smoke.

Q. Was there any schedule that you know of, on which the freight trains ran—did they go by at regular times, too? A. No, sir, I don't believe they have, I think it was an extra, I think it only had a couple of cars to it.

Q. Do you remember whether there was a schedule for freight trains? A. I don't remember, it might be in regard to certain train.

Q. But you don't know about that, in this particular train, whether this was a schedule train or an extra? A. No, sir.

RE-DIRECT by Mr. Whittemore:

Q. How do you remember what days you smoked—what was there to enable you to determine what days you smoked? A. Why we had no money to purchase tobacco with.

Q. Did you get any down there at Mr. Goodman's place? A. No, sir, I believe he was out too.

Q. Did you go to Westfield the next day? A. No, sir.

Q. Where did you get any tobacco from to smoke the next day? A. We didn't have any the next day.

Q. And that is the reason why you say you did not smoke the next day, is it? A. Yes, sir.

CHARLES CORDES, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Whittemore:

Q. Where do you live? A. I live about a mile, or a little over a mile from Mr. Goodman's.

Q. In which direction? A. East.

Q. How long have you lived there? A. I have lived there thirty-nine or forty years.

Q. Do you know of anything happening down on Mr. Goodman's property about five years ago? A. We saw the smoke, and one of our neighbors came and told us—

Q. Never mind what anyone told you—were you afterwards at Mr. Goodman's place? A. Not that same day.

Q. Soon after? A. Within a couple of days?

Q. What did you find when you got there? A. We see all the buildings burned.

Q. You spoke of seeing smoke—where were you when you saw it? A. We were—I was in the back of our barn.

Q. And in which direction did you see the smoke? A. Coming from a little bit southeast.

Q. Southeast? A. No, sir, southwest.

Q. Could you tell where it came from? A. We thought it was from there.

Q. What were you doing in your barn? A. Helping, carting in hay.

Q. How far is your barn from the railroad? A. In the neighborhood of 300 feet.

Q. Could you see the trains—could you see the railroad from where you were standing? A. Yes, sir.

Q. Who was with you? A. My brother.

Q. Did you see anything pass on the railroad? A. I saw what we afterwards called—

Mr. English: Won't you please fix the time?

Mr. Whittemore: Q. What time of day was that, you were in the barn and had finished putting in some hay—what time of day was it? A. It was close to four o'clock.

Q. At that time did you see any train pass? A. Yes, sir.

Q. What train? A. It was what we call "always around four o'clock."

Q. Did you know that train? A. Yes, sir.

Q. From seeing it on other days? A. Yes, sir.

Q. Which way was it going? A. East.

Q. How was it going, as to its speed?

Mr. McCarter: I object to the question on the ground that the witness is not qualified to testify as to that.

Question withdrawn.

Mr. Whittemore: Q. Was it going fast or slow?

Mr. McCarter: I make the same objection.

Court: It has been decided that an ordinary witness may state matters of distance, and time, or space, or anything of that sort, even though it may have been merely the opinion of the witness, and I therefore think that he may answer the question, in general terms.

A. It was going pretty fast, I could not—

Mr. Whittemore: Q. Was there anything between you and the railroad that would obscure your view? A. No, sir.

Q. What was the character of the ground between the place, where you were standing, and the railroad? A. Well, the railroad might have been about four feet higher than where our barn stands.

Q. What was the character of the ground? A. It had been a pasture field, and later we mowed it over.

Q. Did you see anything happen in that field? A. Yes, sir.

Q. What did you see happen in that field, at the time the train passed, or after the train passed?

Mr. McCarter: I object to the question as irrelevant and immaterial.

Court: I think the testimony is admissible, on the ground that there is evidence, from which the jury may conclude, that this train passing around or about four o'clock, was the train about which the other witnesses have spoken, and the evidence further shows, that that train was going very fast and in going that distance, it would only take such a short period of time, that it is not at all likely, that the

condition of the wind or the condition of the weather, or day, would change between the time this train passed Cordes place, and the time that it reached the place where the ignition is charged to have taken place on Mr. Goodman's property—so under the circumstances, I think it is relevant, and I will permit the question.

Mr. McCarter: Prays exception.

Exception allowed, sealed accordingly.

WILLIAM H. SPEER.

Judge (Seal).

A. Before the last car had got past, there was a fire started in our field there—before the last car in the train had went past, the last car.

Q. Was there anyone in the field? A. No, sir.

Q. Was there anything to cause a fire there? A. No, sir.

Q. What did you do when you saw the fire? A. I drew my brother's attention to it, and we went out and started to put it out.

Q. Which way was the wind blowing that day? A. It was blowing from the track down towards our barn; that is pretty near southwest, I think.

Q. Is there any bend in the track, between your place and Mr. Goodman's? A. No, sir.

Q. Do you know how far the point where the fire started was, from the railroad fence—do you know? A. Yes, sir.

Q. How do you know? A. I measured it.

Q. What did you do that for? A. Because it went further than I had ever took notice of sparks going before.

Q. How did you measure it? A. I measured it with a ten-foot pole first.

Q. What distance did you find? A. One hundred and between twenty-five and twenty-six feet, from the railroad fence, towards our barn.

Q. Do you know how far the east-bound railroad track is from the railroad fence? A. No, sir.

Q. Can you estimate it? A. No, sir.

Q. How was the wind blowing? A. It was blowing hard.

Q. What did your brother and you do when you saw the fire? A. We went out, and started to put it out.

Q. About how far from the road did this fire start? A. From the public road?

Q. The road that passes your barn? A. About 100 feet.

Q. Your barn is close to the road, is it not? A. Yes, sir.

Q. Any trees along the road between you and the railroad? A. Yes, sir.

Q. What kind of trees? A. An ash tree and a cherry tree.

Q. Which tree is nearer the railroad? A. The cherry tree.

Q. Could you see whether the fire started at a point nearer to the railroad than the cherry tree, or further away? A. Well, it might have been—the fire might have been five feet towards the railroad, closer than the cherry tree—the fire was the nearest to the railroad.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Cordes, were you carting hay that day to your barn, you and your brother, from the very field that the fire occurred in? A. No, sir.

Q. Had there been hay in the field? A. We had pastured it.

Q. Was the stuff that got afire loose or fast grass? A. It was grass.

Q. Fast? A. Fast—yes.

Q. It was a very dry day? A. Yes, sir.

Q. And very hot? A. Yes, sir.

Q. And the 19th of July? A. Yes, sir.

Q. Had there been a drought? A. Yes, sir.

Q. You didn't see any sparks come out of the locomotive? A. No, sir.

Q. How many cars were there on this train? A. Four.

Q. Four passenger coaches? A. Yes, sir.

Q. And you were actually unloading hay at the time? A. There was some fell off the back of the wagon, and I was throwing it on to the wagon, to put it up in the mow again.

Q. Did you have your face to the track or away from the track? A. My face? I stood between the wagon and the railroad.

Q. With your face to the railroad? A. Yes, sir.

Q. What were you doing? A. I was picking the hay up from off the floor, and putting it back on the wagon, to put it up in the mow again, it was the hay that fell down in unloading.

Q. You first put it in the wagon, and then from the wagon you put it up in the mow? A. Yes, sir.

Q. Was your brother in the wagon? A. No, sir, he was alongside the wagon.

Q. After you get it in to the wagon, you get on to the wagon, and put it up in the mow? A. This was after we got it unloaded—when we were unloading it part of it fell off the wagon—off the back of the wagon.

Q. Now what attracted your attention to the train from the hay—the whistle? A. No, sir, as I was throwing the hay up from the floor on the wagon, my face was towards the train.

Q. And you had the pitch-fork in your hand? A. Yes, sir.

Q. And picking up the hay from the floor to put it in the wagon? A. Yes, sir.

Q. And you watched your work when you were fooling with that pitch-fork, didn't you? A. I set the fork down, when I got—I didn't hold the fork in my hand for a minute.

Q. Well, did you put the fork down, or didn't you? A. I held it in my hands, and the tines resting on the ground.

Q. What struck you? A. Well, I generally look at the trains, as they go by.

Q. What attracted your attention that day—the whistle, or the bell or what? A. I always do it when the trains go by.

Q. And at that time, there was no fire. A. No, sir.

Q. Are you sure? A. Yes, sir.

Q. And this train was going at a pretty good lick? A. Yes, sir.

Q. And before the train got by, the meadows were afire? A. Yes, sir.

Q. Before the last car got by, the field was ablaze? A. Yes, sir.

Q. And there was only four cars on the train? A. Yes, sir.

Q. And had you looked through the grass, before the train went by? A. I had not—I woke up though.

Q. You had been intent upon unloading this hay, hadn't you? A. Well, that sort of work don't attract your attention, so that you have to keep your eyes right on it all the time, you know.

Q. You looked all over—you looked all around and through the hay, and threw the pitch-fork around at the same time, didn't you? A. Yes, sir.

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ROBERT R. SINCLAIR, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Doctor, you live in Rahway? A. No, Westfield.

Q. You are a practicing physician? A. Yes, sir.

Q. About five years ago, had you occasion to attend Mr. Edward V. Goodman? A. Yes, sir.

Q. Did anything happen at Goodman's place that day? A. Yes, sir, the day—I presume you refer to a specific day.

Q. Do you remember anything happening at Goodman's place, at the farm? A. Yes, sir.

Q. What happened? A. I don't recall the exact date, but I presume the day you refer to, was the day of the fire.

Q. What were you doing there? A. I was attending Mr. Goodman professionally.

Q. Where were you? A. Well, it was an improvised bedroom we will call it, a downstairs room.

Q. Where was Mr. Edward V. Goodman? A. He was in this room downstairs, which was temporarily a bedroom.

Q. What part of the room was he in? A. On the side away from the railroad track, I do not recall which direction, or what position that would be, but away from the railroad track, probably the eastern side of the room or of the house.

Q. Was he sitting in a chair, or what was he doing? A. He was lying down.

Q. On what? A. I think on a couch.

Q. Do you remember what he was suffering from?

Mr. McCarter: I object to that as immaterial.

Question withdrawn.

Mr. Whittemore: Q. Do you know how long he had been confined to the house? A. I think about three or four weeks, then, or longer.

Q. What were you doing with him that afternoon? A. I had given him a hypodermic injection as a remedy for his disease.

Q. Who was there? A. His father and I think his mother was there, his wife, and I do not recall whether anyone else was there or not—I don't recall if there was anyone else there.

Q. Do you remember his mother being there? A. No, sir, I would not insist that she was there, but I think she was, although I could not say that emphatically.

Q. Was your attention called to anything while you were there? A. Yes, sir.

Q. What? A. A call of fire.

Q. Where did that come from? A. I think from my man.

Q. Do you remember that boy (counsel having called upon Andrew Polimbo to stand up)? A. Well, I remember a boy around the place, seeing him from time to time, having him there every day, but I do not recall his face just now.

Q. Do you not remember whether or not you had seen that boy? A. I remember what I would call a "chore-boy" around the place, but I could not be sure that I recognize him now, as being the same boy.

Q. When you heard the alarm of fire, what did you do? A. I went out of the door towards the barn, and entered the barn, or made an effort to enter the barn, and I made an effort to help get the horses out.

Q. How did you get to the house? A. I drove the automobile when I went there—when I went to make my call, you mean?

Q. Yes. A. I drove into the yard alongside the

house, away from the railroad track, and stopped at the back door.

Q. When you got out there, after the alarm of fire, where was your automobile? A. Within about, possibly fifteen or twenty feet from this back door.

Q. Did anyone go there with you? A. Yes, sir, my chauffeur.

Q. Is he here? A. Yes, sir, he is here.

Q. Where was he when you went out? A. He was not in the automobile at that moment, I think he came to arouse us, regarding the fire, if I remember correctly, or else he was going towards the barn, I don't recall just which, but he was in that very immediate neighborhood of the barn or the auto.

Q. Did you see anyone else there that day? A. No sir, I did not see anyone outside at that time.

Q. Well, later on? A. Later on, there was. The farmers and their helpers of all kinds, later but not at this particular time.

Q. Did anyone come out of the house when you went out on the alarm of fire? A. I think Mr. Goodman did, that is Mr. Goodman Sr.

Q. How long before the alarm of fire had you arrived at the house? A. Possibly fifteen minutes, but that is a mere estimate, that is very uncertain.

Q. How long did you stay after the alarm of fire? A. I stayed for quite a long time, probably an hour or more, until the fire was completely over.

Q. What was done with Mr. Edward V. Goodman? A. I helped to take him out of the house, and I put him in my auto, and took him to Westfield, to a relative's home.

Q. But you did not go to Westfield, until the

buildings were all burned down? A. No, sir, I did not go at once.

Q. What was done with him in the meantime? A. I think we took him out, and put him on the ground in the shade, on a blanket or mattress, or something, to protect him.

No cross-examination.

JOHN H. STEWART, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. You are employed by Dr. Sinclair? A. Yes, sir.

Q. As chauffeur to drive his automobile? A. Yes, sir.

Q. And have been for more than five years past? A. Yes, sir.

Q. Do you know Mr. Goodman's place? A. Yes, sir.

Q. At Fanwood? A. Yes, sir.

Q. Or at Goodman's station? A. I know Mr. Goodman.

Q. You know his farm? A. Yes, sir.

Q. You have been on it? A. I have been there.

Q. Were you on that farm any time or at the time when the fire occurred? A. Yes, sir, I was.

Q. Do you remember the day that all these buildings were burned down? A. I do not say I can remember the day.

Q. Well you remember being there that day? A. I remember being there that day, yes, sir.

Q. You went there with Dr. Sinclair? A. Yes, sir.

Q. Where did you go—into the house—where did you stop your automobile? A. Well, we stopped it in the back, near the kitchen door there.

Q. Where did Dr. Sinclair go? A. Into the house.

Q. What did you do? A. I was still sitting in the auto.

Q. How long were you sitting there before anything particular happened? A. Oh maybe fifteen minutes.

Q. And then, what happened? A. Well, after that?

Q. Yes—to call your attention or what was your attention directed to then, after you had been there fifteen minutes—did you hear anybody or see anybody? A. I did not see anybody at the time.

Q. Well, tell what happened? A. Well, after that time, the fire broke out there on the farm.

Q. How did you happen to notice the fire? A. I noticed the smoke from the barn.

Q. What attracted your attention to the smoke from the barn? A. I happened to be sitting out there, and I noticed the smoke rolling up at the time.

Q. Do you know Andrew Polimbo (counsel calling upon Andrew Polimbo to stand up, which he did)—do you know that young man? A. Yes, sir, I have seen him.

Q. Did you see him that afternoon? A. I did not.

Q. Did you see any train that afternoon?

Mr. McCarter: I object to that.

Question withdrawn.

Mr. Whittemore: Q. Did you see anything on the railroad? A. As to the train—a train passed at the time I was there.

Q. Which way was it going? A. Towards New York.

Q. How soon after the train went by, did you notice anything? A. Oh, perhaps fifteen or twenty minutes maybe, I can not say exactly.

Q. Do you remember testifying at the first trial four years ago? A. Yes, sir, I was here.

Q. Do you remember saying anything about the boy, in that trial?

Mr. McCarter: I object to that.

Objection sustained.

Mr. Whittemore: Q. Where was the smoke coming from that you saw? A. Well, it was from the barn, the side of the barn next to the railroad.

Q. Did you have anything to assist you in bringing the fire to your attention? A. Anything to assist me?

Q. Did anyone assist you in bringing the fire to your attention? A. No, sir, no one at that time—no, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. That was a freight train that went by when you were there? A. A freight train—yes, sir.

Q. Going to New York? A. Yes, sir.

RE-DIRECT by Mr. Whittemore:

Q. Did you see any other train going by except a freight train? A. No, sir, I did not.

Q. Is your recollection clear about what happened here five years that day, as to the kind of train? A. At the time I was there?

Q. Yes? A. Why yes, sir, it was a freight train.

Q. Is your recollection clear as to whether there was more than one train pass or not? A. Well, that is the only train to remember passing at that time.

GEORGE CORDES, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. You are a brother of the witness who testified before? A. Yes, sir.

Q. A short while ago? A. Yes, sir.

Q. Where are you living? A. Clark township, near Picton.

Q. Which direction is Goodman's place, from you? A. Goodman's is west of us.

Q. Do you know the place? A. Do you remember anything—or do you remember the day that something happened down at Goodman's place? A. Yes, sir.

Q. Do you know what happened down there? A. A fire, that is all I remember.

Q. Do you know what you were doing that afternoon, when the fire occurred? A. Yes, sir, we were getting in hay.

Q. Where were you? A. I was standing in the barn alongside my brother, that is right behind him.

Q. Where is your barn with relation to the railroad? A. It faces right up to the railroad.

Q. Did you see anything on the railroad that afternoon—did you see anything pass there? A. Nothing but a train, what we called the mail train.

Q. What time did that pass? A. It passes generally close to four o'clock, or around four o'clock, somewheres there.

Q. What time did it pass this day? A. I can not tell you exactly what time it passed this day, but I know it generally passes close to four o'clock—sometimes a little earlier, and sometimes a little later.

Q. Do you know whether it was early or late that day? A. No, sir, I can not tell you whether it was early or late that day, but it generally passes as I said before, close to four o'clock.

Q. Did you see the train pass? A. Yes, sir.

Q. Was there anything between you and the railroad to obscure your view? A. No, sir, nothing whatever.

Q. How was the wind that day? A. It was a pretty high wind, it was an awful high wind.

Q. Which way was it blowing? A. It was blowing from the railroad right on down across.

Q. Across where? A. From the railroad down towards the barn.

Q. When the train passed or after it passed, did you see anything happen? A. I seen fire right in the lot.

Mr. McCarter: I make the same objection, to this evidence, by this witness, as I made to the evidence, when his brother was on the stand.

Question allowed.

Mr. McCarter: Prays exception.

Exception allowed—seal accordingly.

WILLIAM H. SPEER,
Judge (Seal).

Mr. Whittemore: Q. What did you do? A. I seen before the last car passed there that there was smoke and the fire had started.

Q. Where? A. Right between the railroad and the barn where we were standing.

Q. What was burning? A. The grass there.

Q. What did you do? A. We ran and got the shovels, and worked on it, and put it out, beat it out, the best way we could.

Q. Do you know how far that fire started from the railroad fence? A. Yes, sir.

Q. How do you know? A. We measured it.

Q. How far was it? A. Between 125 and 126 feet, from the railroad fence, right from the post.

Q. Do you know how far the railroad fence is from the east-bound track? A. No, sir.

Q. Do you know of any trees that were on the road, between you and the railroad? A. Yes, sir.

Q. What trees were there? A. A cherry and an ash tree.

Q. How far was this set fire from the road? A. I should judge about a hundred feet, just about.

Q. Which was the nearer to the railroad, the cherry tree or the fire? A. The fire was a little nearest, that was the nearest.

Q. Was there anybody out in the field, when you saw the fire start? A. No, sir.

Q. Was there anything to cause the fire there? A. No, sir, nothing whatever.

Q. Was there any sparks coming from the engine—did you see any? A. No, sir.

Q. Can you see sparks in the daytime?

Mr. McCarter: I object to the question on the ground that this is not an expert on that line.

Question withdrawn.

CROSS-EXAMINATION by Mr. McCarter:

Q. Did you go over to Goodman's that day? A. No, sir, we could not.

Q. You were about a mile away? A. Yes, sir.

Q. So that how soon was it after that day that you were over to Goodman's? A. It was two days after that I was over.

Q. All that you know then is, that on a day you saw some smoke down towards Goodman's and this thing took place, at your place, the same day, is that it? A. The same day, yes, sir.

Q. Now, you were behind your brother? A. Right almost alongside him.

Q. You testified on your direct-examination, that you were behind him—was that right or wrong? A. I may have been behind him, but I was right by him, and right next to him.

Q. Did you have a pitch-fork in your hand? A. No, sir, I haven't had a pitch-fork in my hand that day.

Q. And what were you doing? A. I was standing there looking at him.

Q. Looking at him? A. Yes, sir.

Q. And what was he doing? A. He was gathering up the hay that had spilled down off of the wagon when he unloaded it.

Q. What was he going to do with it? A. He was throwing it up in the mow.

Q. Were there any horses in the wagon? A. No, sir.

Q. And the railroad was how far away? A. It is 300 feet from the barn.

Q. What directed your attention to this train? A. It is a common thing, we always look at trains when they go by, if it happens that we have the doors open, and we are there.

Q. Did you hear the whistle? A. Yes, sir, we heard the whistle, they generally blow at the crossing above us.

Q. And you saw the train go by? A. Yes, sir.

Q. Going at a pretty good lick? A. Yes, sir, it was going at a pretty high speed.

Q. And how many cars? A. Four.

Q. And you say that before the last car got by you noticed this fire? A. Yes, sir.

Q. Did you call your brother's attention to it? A. No, sir, he called me to it.

Q. He called your attention to it? A. Yes, sir.

Q. If he had not, you would not have seen him? A. I would have seen it, I was right there at the time, at the back part of the door.

Q. You would have seen it? A. Yes, sir.

Q. Was this a very bright day? A. Yes, sir.

Q. Very warm? A. It was warm, yes, sir.

Q. Had it been dry and hot for some time before? A. Yes, sir.

Q. How long? A. I could not tell you, it had been a good dry summer, at that, it was long before that dry.

Q. Did you have anyone on your place, besides you and your brother? A. No, sir, I and my brother—

Q. You live on the place? A. Yes, sir.

Q. Have you a family? A. Yes, sir.

MULFORD M. SCUDDER, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. Westfield.

Q. How long have you lived there? A. Well, I was born there.

Q. How far is Westfield from Goodman's station? A. Well, I say Westfield, we live in the town of Westfield, it has the station called Picton.

Q. You know Mr. Goodman's place, at Goodman's station? A. Yes, sir.

Q. How far is that from your place? A. About a mile and three-quarters.

Q. How long have you known Mr. Goodman's farm? A. I have known it for a good many years, a great many years.

Q. Did you know Thomas T. Littell? A. Littell? That is the—I know the Goodmans.

Q. Do you know the people who owned the farm before the Goodmans got it? A. Yes, sir, I knew them.

Q. Did you know Thomas T. Littell? A. Yes, sir.

Q. Did he own or possess this farm? A. I think he did, before the Goodmans did.

Q. Did you know it at the time? A. Oh yes, sir, I knew the farm at the time.

Q. At the time he lived on it? A. Yes, sir, I think I did.

Q. After he died, who lived there on the farm? A. I think the Goodmans bought it after that.

Q. Have you ever been on the Goodman farm? A. Yes, sir.

Q. Have you seen the buildings? A. Yes, sir.

Q. Had you seen them before the fire? A. Yes, sir.

Q. How long before the fire, so far as you can recall? A. Oh well I saw them off and on, every little while.

Q. How often does that mean, how often do you mean by that? A. Well, I would be driving along the road, or in that section of the country—

Q. How often? A. Oh, I would be over there probably once a month, or once in three or six months, or something like that.

Q. Had you been on the place and up to the buildings? A. Oh, I have been, yes, sir.

Q. And do you know about how long that was before the fire, you saw the buildings? A. Oh, I should judge a month, or maybe two or three months, of course the fire occurred some time ago.

Q. What is your recollection of the condition of the buildings? A. Well, they were fair farm buildings.

Q. What do you recall if anything about the

house? A. Well, the house was or had been remodeled—it was a French roof house before that, and then it was a double pitch house.

Q. What was its condition at the time of the fire? A. It was in good condition.

Q. Will you look at the map here and tell us whether or not, it correctly shows the farm buildings on the farm? A. Yes, sir, I should judge it did, pretty correctly, they were all built together in that way, and the house stood off on one side.

Q. What is your business? A. Real estate.

Q. How long have you been in that business? A. Oh I suppose I have been in it probably twenty years.

Q. Do you have anything to do with real estate in the vicinity of Fanwood township? A. Yes. sir.

Q. In what way? A. We have customers who buy and sell—we deal in it.

Q. Do you hold any official position in this county? A. Yes, sir.

Q. What is that? A. I am one of the Commissioners of Taxation of Union County.

Q. In the County Board of Taxation? A. Yes, sir.

Q. How long have you been such Commissioner? A. Ever since the Board was created.

Q. When was that? A. I think this was the fourth or fifth year, I know the first appointments came under Gov. Stokes—I think it is the four year.

Q. In your official work have you had anything to do with the valuation of property? A. Yes, sir, quite considerable.

Q. Farming property? A. Yes, sir, all kinds of property.

Q. Are you familiar with Goodman's farm? A. Yes, sir, I am pretty familiar with it.

Q. Before July, 1905, I mean? A. Well, that was five years ago—oh, I should say that property at that time was worth about $12,000. Of course there is quite a difference between five years ago and the present time.

Q. We are talking about that time. A. Yes.

Q. Did you know of Goodman's fire? A. Yes, I was not there but I heard of it. I had been to New York, and when I came home they told me that the barns had all burned down.

Q. Did you see the place afterwards? A. Yes, sir.

Q. Were there any buildings there afterwards? A. There was nothing left, it was pretty well stripped.

Q. After the buildings were burned down, what was the value of the farm without buildings? A. Well, that property was absolutely a farm at that time—of course there was nothing but a farm. I should think to take the buildings off that farm, the farm at that time would not be worth over—well, I don't know—$6,000 or $6,500.

Q. How much? A. $6,000. Because I know at that time for farms it was a very dull market, and they were not selling for anything hardly. Farms I have sold then, have trebled since that time.

CROSS-EXAMINATION by Mr. McCarter:

Q. Do you know how much acreage he had? A. I think there were somewhere between eighty and ninety acres.

Q. And the buildings, a number of them were quite old? A. Well, if they were new buildings they would have been worth more.

Q. Some of the barns had not been painted? A. Probably not, but they were fair farm buildings.

Q. And the weather boards, I believe, some of the weather-boards on some of the barns, were decrepid and in bad condition—was your attention called to that? A. Of course I looked at it.

Q. But you never made an appraisal of the farm? A. No, sir.

Q. You never went and examined the buildings specifically? A. No, sir.

Q. You are judging from the general survey of the place that you made as you were going by on the road? A. Yes, sir—well, I have been on the property—they were only a short distance from us, they were on the next from us.

Q. Do you know what Mr. Goodman paid for the farm? A. No, sir.

Q. Do you know what new buildings he put on there, if any? A. Well, he kept the buildings in pretty good shape.

Q. Do you know what new buildings he put there if any? A. Since then?

Q. After he bought and before the fire, I mean? A. He remodeled the house.

Q. And that is all he did? A. I don't know, he might have repaired some of the buildings.

Q. Are you aware that the only paid $4,000 for the farm?

Mr. Whittemore: I object to the question.

Adjourned to March 29, 1910, at 10 a. m.

Testimony.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT—JANUARY TERM, 1910.

EDWARD V. GOODMAN, Executor, &c., of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 1. In Tort.
EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 2. In Tort.
EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	No. 3. In Tort.

Transcript of stenographer's notes of evidence, taken in the above entitled cases, before Hon. William H. Speer, Judge of the Circuit Court, and a jury, at the court house, in the City of Elizabeth, N. J., on the 29th day of March, A. D., 1910.

Appearances:

Mr. C. McK. Wittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

MULFORD M. SCUDDER, being re-called for further cross-examination saith:

Cross-examined by Mr. McCarter:

Q. Have you made a specialty of farming land in your real estate business? A. Of course we take in all classes of business.

Q. I suppose you have not however sold as many farms as you have sold land for the purpose of dividing them into lots, or suburban lands and plots? A. Well, I think we have sold about 1,000 acres of ground within the last year or two.

Q. I am speaking now in 1905 and prior thereto? A. Well, there was not many farms sold then, there was no demand for them.

Q. Farms as such to be used as farms, in 1905, and prior thereto, were not looked upon as valuable lands in Union County, were they? A. The value principally lay in their availability for building sites, to supply the demand for suburban homes. Of course farms at that time were not in such demand at that time.

Q. Do you know how many acres Mr. Goodman had in his farm? A. I think it was about ninety acres.

Q. Ninety-four acres, was it about? A. About that.

Q. Judge Whittemore has called my attention to the fact that ninety-four and some tenths acres was the quantity of land previous to the railroad going through there—so you are about right when you say that there was about ninety acres in 1905—now in 1905, before this fire, how many acres were plowed and under cultivation? A. That I could not say positively.

Q. I suppose that makes a great deal of difference in the value of a farm? A. If it was all low ground of course that would make a difference but I think this farm lay very nicely.

Q. You don't know how much was plowed, how much was cultivated at all, do you? A. No, sir, I can not say as to that.

Q. Now what value per acre did you put upon that in 1905—upon that farm? A. Farms at that time were very low, like they are now you might say in Hunterdon County, you could go and buy a farm for almost less than the buildings are worth, that are on the farm, also in Somerset County—of course now farms are coming up, there is more demand for them, and farms at that time though, were certainly very low.

Q. Now what value per acre do you put now in view of the value at that time? A. For farming purposes?

Q. Yes, for farming purposes? A. Of course, my experience is—I was brought up on a farm you know— and for farming purposes it is hard to get a living out of a farm, and the man that makes a living out of a farm if he gets $50 an acre, and makes his living out of it, and his expenses out of it, he is coming pretty near—

Q. You never examined these buildings? A. Well, nothing more than I would others that I know nearby.

Q. Without looking at the map, can you recall how many buildings he had on the place? A. Well, I don't know as I could, of course there was a carriage house, and stables and barns—

Q. I understood you to say yesterday that you had never gone there and formally appraised the property? A. No, sir, I never had any occasion to go there to formally appraise the property.

Q. For instance if the Mutual Life Insurance Co. or some other large insurance company ask you to put a value on the property for the purpose of making a loan, the observations you have

made of this place, were not such as to enable you to make such an appraisement? A. Why, certainly I should have wanted to go there and looked everything over—but for farming purposes, if you had taken those buildings off there, it would have been—

Q. With the buildings I am speaking? A. I think it was worth that on the farm, I only think so, for farming purposes, but if you had taken those buildings off that farm in 1905, it would have been very hard to make a sale at any price, but since then things have changed—

Q. For how long a time previous to 1905, had farms been of such poor value in Union County? A. Right straight along.

Q. Right straight along? A. Yes, sir.

Q. And there had not been any improvement up to that time, as I understand it? A. No, sir, there had been no improvement up to that time.

Q. Are you aware that in 1899 that whole farm of ninety-four acres—according to the deed that has been put in evidence, including the acreage taken by the railroad company of four or five acres, making a total acreage of ninety-four and some tenths acres—that whole farm sold to Mr. Goodman for $4,000?

Mr. Whittemore: I object to the question, because it presupposes a fact that is not proven. There is in evidence a deed containing a certain express consideration —where there is a bargain and sale deed, where the inducement for making that deed, whether in the nature of a bona fide open sale in the market, or whether it is of a different character, does not appear, I think any answer founded upon such a question as has been propounded, would

lead to an erroneous statement of fact. Unless the witness can say that he is familiar with this sale in question, and knows that it was a bona fide sale, between a person who did not have to sell, and a person who did not have to buy. Now, I know all the facts about this, and the objection is made in good faith, for good and sufficient reasons, as can be shown later on, and I say that the question is founded upon a false basis of fact.

Mr. McCarter: The question your Honor is based upon the fact that the deed recites a consideration of $4,000. I am well aware of the fact that it is not always customary to insert in deeds a true consideration. But on the other hand my understanding is that when something more than a nominal consideration is expressed, and when a substantial sum like four thousand dollars, is expressed as the consideration in a deed, prima facie at least that is the price and what may be shown to be different, the parties have put themselves on record as indicating that that was the price, paid for the property, and to that extent they are bound by it; subject of course to showing that they paid something else.

Now, this consideration is decided in this deed as $4,000 in hand paid—there is no other consideration stated, and that sum is stated by these parties as having been the price for this land, and while they may show some circumstances which Judge Whittemore says he knows all about, yet at the same time, it seems to me, the proof in its present state I submit your Honor,

we have a right to assume that that was the consideration and that that was the sum that was paid for this property in 1899, and we ask your Honor to pass on this question, as to whether this is not a proper question to ask this witness based upon that hypothesis.

Court: I think your view of that is correct—I think both the date and the consideration and the other matters contained in a deed are always open to variance by parole evidence, but with the date and the amount in it, that is the consideration prima facie for the conveyance, and it is up to Mr. Goodman to show what the true consideration is.

Mr. Whittemore: This is not a case where a question has arisen as to the right to refer to the consideration expressed in the deed, in the argument or anything of that kind, or in the examination of witnesses or parties to that date. This is submitting to a third party, another party altogether, a statement of facts,—"do you know that that property sold for so much money, according to a certain deed,"—this witness will assume that that is a fact, and if he assumes anything of that kind, then he assumes something that is wrong, and his testimony based upon that as a statement of fact, would be to bring matters before this jury, that it is not proper to bring before them.

Court: If later you can show and you do so that that was not the true consideration, then you would have the right to ask the court to instruct the jury that that evidence must be disregarded. But the mere

fact that it may be erroneous when prima facie, it is a statement of a thing which was in a deed, that your client accepted. I do not see how it can make it irrelevant in the testimony, it becomes material and relevant when you offer the deed. Everything in that deed is evidence, and if it is evidence the attorney-general has the right to use that as the basis for a question. Subsequently, if you show that that is not a fact, then you will have the right to ask the Court to charge the jury that they must disregard the evidence of the witness based upon that which was subsequently shown now to have been a fact. I do not know of any case or any text book, that asserts anything to the contrary of that proposition, and it seems to me, it would be just as reasonable for you to say, if Mr. McCarter said to you "do you know that that property only contains ninety acres, and that that appears by the deed," for you to say, "no, there is something back of that, and I can show that it only contains fourteen acres, or a hundred and sixty acres," and it is very unfair for you to ask this witness about that, because the real facts are not as the deed says they are, but they are as I now say they are. It therefore seems to me that we must take the proof in the condition that we find it is in, when the question is asked, and then if it should subsequently develope that that which appears to be the fact is in reality not the fact, then you can get such remedy as would be proper under the circumstances. I shall admit the question.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Mr. McCarter: Q. Are you aware of that fact? A. No, sir, I was not.

Q. And were you aware also of the fact that in June, 1885, the administrator of Thomas T. Littell, sold the same property with the large acreage ninety-four and a fraction acres, to Mrs. Van Velsor, for a consideration expressed in the deed of $4700? A. No, sir.

Q. Now, do you know of your own knowledge, whether or not it is not true that when Mr. Goodman bought, all of the buildings were on that farm that existed at the time of the fire, in a practically unchanged condition, except that the house had, perhaps, been remolded—that is true, is it not? A. Yes, sir.

Q. You knew when the remodeling took place, of the Mansion house, didn't you? A. I could not say exactly the time.

Q. Now you won't say as a real estate man that farms—I understand you have already said that farms in Union County, as farms, have not increased in value materially between 1899 and 1905? A. Well, not a great deal. Of course they were beginning to make some inquiries too, about that time.

Q. Is the acreage valuation that you have given, $50 or $60.00, as the farm stood, buildings and all? A. No, sir, I would say with the buildings off, that is what I was talking about, with the buildings off.

Q. So that, taking that farm as you knew it, without regard to the number of acres under cultivation, or the number of acres untillable, and assuming that it was bereft of buildings, you would say that its value in 1905 per acre, was $50 or $60, an acre? A. Well I would say it was somewhere in the neighborhood of $50 or $70, somewhere along there. If you take the build-

ings off at that time, it would be nothing but vacant land, and you could not find a buyer for it.

Q. Could you find a buyer at $50 or $60 an acre? A. I might.

Q. Don't you think you have put a large value on it, without any buildings on it at all, farming land of which you don't know how much is tillable, or how much is not tillable? A. I guess it is worth that.

Q. In 1905? A. Yes, sir.

Q. How much—$50 or $60 an acre? A. Yes, sir, I should say it was.

Q. It was worth what? A. Sixty dollars or seventy dollars an acre.

Q. You are gradually going up.—Why don't you make it eighty or ninety dollars, you have been jumping up ten dollars a time? A. We were trying to sell some farms then, and we sold some, but at very low prices. I can tell you what they are selling for now—

Q. What farms do you have in mind that in 1905, without any buildings on them, sold? A. Oh, I didn't sell any.

Q. What valuation have you on farms without buildings—any worth fifty or sixty dollars an acre? A. Well, I don't think there were, that is my opinion, as I said before, you can go up to Hunterdon County, and you could buy a farm there which was not much better than this, for less than this—you could go and buy farms for considerably less than you could put the buildings up for—you could go into Somerset County some few years ago, and things were not much better, there, at that time, than they were here—

Q. Do you think they are worth much more with the buildings off than on? A. About the same. It costs of course considerable to put the buildings on a place, and it is worth more with the

buildings on a farm than with the buildings off, but I consider that farm worth $12,000. I considered it worth that then with the buildings on it, and today it is—

Q. I did not ask you that question—it is an entirely different thing what the farm is worth today—now you said you think that this place is worth fifty or sixty dollars an acre as land, is that on the assumption that all of it is tillable? A. No, sir, I should take the farm just as it lies.

Q. How much of it is pasture land? A. That I can not say, I can say this, that I think it is a pretty fair farm all through.

Q. How much is woodland? A. That I can not say.

Q. Would that have anything to do with it? A. Good woodland is worth something.

Q. I suppose it is—I suppose some of it is swamp meadow? A. If it is there ain't enough of it to count.

Q. Do you know how much is swamp meadow? A. No, sir.

Q. Have you never been over the farm? A. No, sir, but I know it is a pretty good farm.

Q. In order to make a farm valuable, you have to be able to cultivate it, haven't you? A. Yes, sir.

Q. How many acres of this farm were under the plough at the time of this fire? A. That I could not say.

Q. Would you be surprised to learn that not more than half was? A. I don't know that I would.

Q. Would that modify your opinion any? A. No, sir, I think the farm is worth that.

Q. Whether there is fifty acres under plough or only twenty-five? A. I should say that it is

worth that, and I am judging the farm from what I know about it.

Q. You have to have some foundation, some basis for your judgment—do you wish it to go on the record here before this jury, some of whom I imagine are farmers—that a farm of ninety acres is worth $12,000, whether ten acres of it can be tilled, or the whole farm is tillable? A. If there were only ten acres, and it was all swamp land, that would make a difference but that is not so.

Q. Suppose only fifty acres could be tilled, and the rest of it could not, what would you say then? A. If the rest of it were pasture land, it would be worth the money yet.

Q. Suppose you found that fifty acres of it could be plowed, and some of it pasture lands, and the balance salt meadow and woodland, what would you say then? A. Salt meadow—that is too far away to be salt meadow.

Q. Swamp meadow, I mis-spoke. A. Fifty acres of it?

Q. Fifty acres of it under plow, and the balance, some of it pasture, and swamp meadow—what would you say then—would you consider it worth sixty or seventy dollars an acre then? A. Yes, sir, but I don't know of any such ground as that in that section of the country.

Q. I suppose Mr. Goodman knew what his ground consisted of, better than you did? A. I suppose so.

Q. I will ask you this question—suppose you learned that of this ninety acres, only fifty acres were tillable, and the balance consisted of salt meadow, wood and pasture, would your valuation still be the same? A. Yes, sir, if it was good pasture and good wood land, and I suppose it was.

Q. Can you give me a single farm in that neighborhood, where it sold for anything like that figure, consisting relatively of that kind of property,—for any such sum as you have mentioned? A. No, sir, I don't know as I can,—I don't know of any being sold around there. If you want to go up further, I can tell you of a farm—

Q. Then your basis or theory in regard to the value of the farm, is based upon what the prices of farms sold not here, but in other localities? A. Yes, sir, the general price of farms about that time. I know of several farms that you could have bought for that price. People could not sell them at the price then, then they would go to work and after a little bit, they were forced to sell, for what they could get. I know of farms where they asked $12,000 for it, and it was afterwards sold for $8,000, but now they want $30,000 for that same farm.

Q. When did it sell for $8,000? A. About two years ago.

Q. How many acres were there in it? A. I think there were between forty and fifty, or in that neighborhood.

Q. And any buildings on it? A. Farm buildings.

Q. And that sold for $8,000? A. Yes, sir, but they wanted $12,000 for it.

Q. And they got $8,000? A. Yes, sir, they got $8,000.

Q. How far is that farm from this one? A. That is in another direction.

Q. How far is it from this farm? A. A little over two miles.

Q. What else have you in mind, and when was that sold? A. Oh, some two or three years ago, I think three years ago.

Q. Go on back to 1905, and tell us of some sales that formed the basis of this estimate of yours, farm land sold in 1905? A. I can not tell you because there was very few sales. But since then I can tell you of lots of them sold since then.

Q. Farms at that time were a glut in the market, were they not? A. Yes, sir, they were a drug in the market, that is about the price they were getting, when they were sold.

RE-DIRECT by Mr. Whittemore:

Q. Do you know the general character of the land in this Goodman farm? A. It is all good land.

Q. How much is tillable and how much is swamp? A. I consider it a good farm, as farms run. Take any farm, there is always some waste ground, there is always some pasture ground, some lowland or woodland in a farm, of one hundred acres.

Q. Do you know whether swamp or meadow is of any value in a farm? A. Yes, sir, woodland is particularly valuable.

Q. Why is the swamp valuable to a farm? A. You get pasture, and you can pasture your stock in it.

Q. Is swamp hay good for farming purposes? A. Yes, for bedding and such like.

Q. What have you to say as to whether swamp meadow is good to have on a farm? A. It does not hurt it any.

Q. Do you say it is desirable to have woodland on a farm? A. Very much so. A farm sold with several acres of wood on it, it is considered of value to the farm, instead of otherwise, because you can get your fencing out of it, and things of that kind that you would otherwise have to go off the farm to buy.

Q. I believe you said in answer to Mr. McCarter that there had been no change in the buildings from the time Mr. Goodman bought the place, is that your recollection? A. The house had been remodeled.

Q. Except the house? A. There had been some repairs made, but to what extent, I could not say, I do not know.

Q. Do you know that there had been a carriage house built? A. Yes, sir, I knew there was a carriage house built, and some repairs to the buildings, too.

Q. There had been some additions to the house made? A. Yes, sir.

Q. Did you know that there was a corn-crib or a corn-house, a boiler-room, and a horse-stable, added—you knew that, I presume, since Mr. Goodman bought it? A. It didn't occur to me then, but thinking it over I remember now there had been.

Q. Did you know the woodshed had been remodeled as well as the house? A. Yes, sir.

THOMAS McDONALD, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. You live where? A. At Mrs. Robinson, Ashbrook.

Q. How far is that from Mr. Goodman's place? A. About half a mile down the track, or a little over.

Q. In which direction? A. North. Mr. Goodman's place is north from Mrs. Robinson's.

Q. Goodman's is north? A. Yes, sir.

Q. Which side of the track is Mrs. Robinson's place? A. On the east side.

Q. Do you remember the day when they had the fire down at Mr. Goodman's place? A. Oh, yes, sir.

Q. How did you see or know of that fire? A. I seen the field on fire.

Q. How did you know of Mr. Goodman's farm being on fire? A. Oh, I did not know of Mr. Goodman's fire, until about five o'clock or after, I was too busy working on the fire by Mrs. Robinson's ground.

Q. How did you learn of it? A. I seen the smoke down to Mr. Goodman's and Mr. Mays, there was a screen of trees between us, and I could not see the buildings, and I hollered to the man in the depot—

Q. Did you learn from someone where the smoke was? A. I asked this man where it was.

Q. What happened up on your place that afternoon? A. Nothing, only the field got on fire.

Q. Where was that field? A. It goes right along the east side of the track.

Q. How did that field get on fire? A. That field got on fire from the locomotive.

Mr. McCarter: I object to this evidence for the same reasons heretofore stated.

Same ruling.

Mr. McCarter: Prays exception.

Exception allowed; sealed accordingly.

WILLIAM H. SPEER, (Seal),
Judge.

Mr. Whittemore: Q. What locomotive? A. The mail train, twenty minutes to four.

Q. Did you see any mail train that day? A. Yes, sir, I always look out for it.

Q. And where was it going? A. It was going off to New York.

Q. How was it going? A. It was going east.

Q. Well, slow or fast? A. Oh, it was going pretty fast, it doesn't go very slow through there.

Q. Now, what happened when that mail train passed, that you saw? A. All I seen was the fire down the field, and I went down and I worked there until five o'clock or after, putting it out.

Q. Where did it start? A. It started about the fence, adjoining the Lehigh Valley Railroad and Mrs. Robinson's ground.

Q. How far was that fence from the railroad track? A. I could not say exactly how far it is—it is what is called a "running acre" there and the fence of the railroad track takes it in.

Q. What is this "running acre" you speak of? A. It was an acre they got there, besides the depot to build three or four cottages on, that they never built.

Q. Who got it? A. The company got it from Mrs. Robinson.

Q. What company? A. The Lehigh Valley Railroad Co.

Q. They own some land in addition to the right of way? A. Yes, sir.

Q. An acre of land? A. Yes, sir.

Q. Where does this acre of land lay, in relation to Mrs. Robinson's property? A. It lays right on the west of the depot, along by the track.

Q. Is it between the track and Mrs. Robinson's place? A. Yes, sir.

Q. And how far beyond the acre of land is the railroad track? A. Right along beside it.

Q. Is the track along the edge of the acre? A. Yes, sir, just along by the edge of it.

Q. How wide is this acre at this point? A. Well, I measured the acre this morning when I knew I was coming down, and it measured from the fence to the edge of the railroad, it measures thirty paces of mine.

Q. About how many feet would be included in one of your paces, do you know? A. I judge about three—I made sure to measure it this morning.

Q. You think it was about ninety feet? A. Yes, sir, I said before that I thought it was about a hundred feet, so I measured it this morning, so as to make no mistake.

Q. Where did the fire start? A. It started inside the fence, it didn't go in the railroad property at all, it was just on the fence line inside the acre tract.

Q. What did you do when you saw the fire there? A. I went down and began to work on it, until I got it out.

Q. How was the wind blowing that day? A. Well, I should say it was blowing kind of a west wind.

Q. What was the strength of the wind so far as you are able to estimate it? A. Oh, I could not tell you that.

Q. How would you describe the wind as blowing that day, what have you to say as to the way the wind was blowing that day? A. How fast it was blowing?

Q. Was it a soft wind or what? A. It was a good dry wind, and it blew on a nice gale, it was a nice steady breeze all through, with no stop to it.

CROSS-EXAMINATION by Mr. McCarter:

Q. Where were you when the train went by? A. I was at the house, cutting the lawn.

Q. Cutting the lawn? A. Yes, sir.

Q. What part of the lawn? A. Upon the south, by the side of the house.

Q. The stable side of the house? A. The south side.

Q. Anywhere near the carriagehouse? A. When

I was through cutting the lawn, I went with the lawn mower to put it in the carriagehouse, to put it up, to put it away, when that mail train comes through, I generally puts my things away, it is the end of my doing work, when the mail train comes through.

Q. Where were you when the mail train went through? A. Cutting the lawn, I told you.

Q. Had you got to the carriagehouse? A. I didn't see the smoke until I got to the carriagehouse, and I was putting up the lawnmower.

Q. You were cutting the lawn then? A. Yes, sir.

Q. When the train went by? A. Yes, sir.

Q. And how long did you continue cutting that lawn? A. As soon as it goes through, no matter what I am doing, I stop, and I goes to do up my night work.

Q. How far were you from the carriagehouse? A. Well, I might be about ten yards, about the breadth of two wagons—there is two little driveways comes in, and meets together at the carriagehouse door.

Q. Did you have a hand mower machine? A. Yes, sir, I was the pusher, and I was a horse then.

Q. And you took that mowing machine into the carriagehouse? A. Yes, sir.

Q. Where did you leave it? A. Just inside the door, under the stairs.

Q. And then you came out of the carriagehouse again? A. Yes, sir, and I went down into the horse stable.

Q. And on your way to the carriage house or to the horse stable you noticed the grass was on fire? A. Yes, sir, when I came out of the carriagehouse, I seen the smoke coming up.

Q. And that is all you know about the fire? A. Yes, sir, I went then and put it out.

RE-DIRECT by Mr. Whittemore:

Q. How much was burning when you saw the fire? A. Oh, I could not tell, before I got it out—I could not tell—before I got it out it burned over two acres of it, the ground was very dry, and it run fast, it run very quick, sometimes quicker than I could.

Q. How long were you working at it? A. I guess I was working at it for half an hour.

Q. Was there anybody down there in the field? A. No, sir.

Q. Was there anything to cause the fire there? A. No, sir.

FURTHER CROSS-EXAMINATION by Mr. McCarter:

Q. Were you the only person on the farm that day? A. I am the only one on it at any time.

Q. How about Mrs. Robinson, doesn't she live there? A. Certainly she lives there, but they don't work the farm.

Q. They were on the place? A. Yes, sir.

Q. How many is there in her family? A. Well, there was only two of them home that day, one of the ladies was in Europe that summer, and there was only two of them home.

Q. Did you have any servants in the house? A. Yes, sir.

Q. So there was someone else on the place besides you? A. Yes, sir, but they didn't mind what was going on outdoors, and I didn't mind what was going on inside.

Q. It was a pretty hot day? A. Oh, yes, sir.

Q. How much of a lawn is it you keep? A. About half an acre.

Q. Right in front of the house? A. All around, both back and front, and each end of it.

Q. On the railroad side of the house, or the other side? A. Both sides.

Q. Where had you been cutting before you stopped? A. I was in the south side in front of the house.

Q. That is not towards the railroad? A. The railroad is towards the north side of the house, in fact you can not tell when a stranger comes there, you can not tell just which is the back or the front of the house, it looks as good one way as it does the other, you might say, it has two fronts, and there is a driveway that comes in on both sides.

ALTHEA PAUL, a witness produced in behalf of the plaintiff, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. I live in Rahway.

Q. Were you related to Thomas T. Littell? A. Yes, sir.

Q. What relation was he to you? A. He was my father.

Q. Did your father have anything to do with this farm of Mr. Goodman's? A. No, sir.

Q. Well, at any time? A. Well, he sold it.

Q. Did your father own this farm at one time? A. Yes, sir.

Q. Did he live on it? A. Yes, sir.

Q. Did he have possession of it? A. Yes, sir.

Q. Where did you live at the time? A. I lived with him.

Q. And any others in your family at home? A. Yes, sir, my mother and two sisters.

Q. When did your father die? A. In 1877.

Q. When your father lived on the farm, with yourself, your mother and two sisters, who farmed it? A. He had different hands by the day or the month, in that way he farmed it.

Q. Did they work for him? A. Yes, sir.

Q. Had he been doing that for some years? A. Yes, sir.

Q. Now, do you remember when your father died? A. In 1877.

Q. After he died who lived on the place? A. Well, different ones, different people, sometimes we farmed it ourselves, and sometimes we had help.

Q. Who do you mean when you say "we"? A. my mother and my sisters.

Q. And how about yourself? A. I lived there too, sometimes.

Q. How long did you live there? A. Well, we staid there from the time father died until 1885 then the place was sold and we moved.

Q. Between 1877 and 1885, who lived on the premises there?

Mr. McCarter: I object to the question as immaterial.

Mr. Whittemore: I want to show that Mr. Littell's estate was not in possession of the farm in 1885, the time that the deed was dated.

Court: If you think it is material, and you want to prove it, I will let you do so.

Mr. Whittemore: Q. Previous to 1885, when the property was sold to Mrs. Van Velsor, who lived on the property? A. A party by the name of—

Q. Where did you and your mother live up until 1885? A. We lived on the place.

Q. Was there some other family living there with you? A. Yes.

Q. How did they come to live there with you? A. We wanted help—we wanted help to farm the place.

Q. To help you farm the place? A. Yes, sir, his name was Terry.

No cross-examination.

THEODORE A. POPE, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. What is your business, and where do you live? A. Builder—Westfield, N. J.

Q. How long have you been in the business of builder? A. About nine years.

Q. In business for yourself or with someone else? A. In business with Mr. Wilcox.

Q. How long have you been in business with him? A. Nine years.

Q. What is your firm name? A. Wilcox & Pope.

Q. Is Mr. Wilcox related to the Goodman family in any way? A. Yes, sir.

Q. How? A. By marriage—son-in-law.

Q. Do you know Goodman's place down at Goodman station on the Lehigh Valley railroad? A. Yes, sir.

Q. How long have you known it? A. Possibly twelve years.

Q. Do you know of the fire that occurred there in 1905? A. Yes, sir.

Q. Had you seen the buildings previous to the fire? A. Yes, sir.

Q. How often had you seen the buildings before

the fire, as nearly as you can recall? A. Oh, a number of times, I did work there.

Q. What do you mean by doing work there? A. Remdoeling the house, building a carriagehouse, a horsebarn and some other work.

Q. What was done to the house in remodeling it? A. The house was raised from the second or third story, and made a French roof house of it.

Q. Are you familiar with the buildings there, the way they are laid out, or were laid out before the fire? A. Yes, sir.

Q. Look at the map that is here, and tell us whether or not you think that indicates the buildings correctly? A. Yes, sir, I think it does.

Q. Did you do any work on any of these buildings, other than the house? A. Yes, sir.

Q. Indicate which buildings you did work on, and what work you did? A. The carriagehouse built new.

Q. How long before the fire? A. I think about a year.

Q. Proceed? A. The horsebarn, the horse stable—built new.

Q. How long before the fire? A. Well, possibly a year and a half, I think that was all rebuilt new.

Q. What work did you do on any of the other buildings? A. Well, I can not remember now—jobbing and little repairs.

Q. Do you remember anything about a toilet built there? A. Yes, sir.

Q. What did you do about that? A. We built it new.

Q. How long before the fire? A. I can not say how long.

Q. Ten years? A. No, sir, possibly a year and a half or two years.

Q. Give the best of your recollection—did you

do any work on the greenhouse? A. I don't remember.

Q. The corncrib? A. I don't remember.

Q. The boiler-room? A. I don't remember.

Q. You testified at the last trial? A. Yes, sir.

Q. Did you make an estimate of the cost of building these buildings, at the time you testified at the last trial? A. Yes, sir.

Q. Can you give us an estimate from recollection? A. No, sir.

Q. Did you prepare any written calculations or estimates at that time? A. Yes, sir.

Q. I show you a paper, and ask you what it it (handing witness a number of sheets of paper)?

Mr. McCarter: I presume that paper that the witness is about to be shown is the estimate to which he referred, and on that assumption we object to any inquiry of this kind, because it appears to be an estimate made by the witness, not at the time of the fire from his knowledge of what buildings were there at that time, but made a year or so ago, and several years after the fire.

Court: I think it is inadmissible if he made an estimate at the time of the last trial, which would be entirely irrelevant and immaterial.

Mr. Whittemore: I intend to show that it would be relevant.

Mr. Whittemore: Q. The estimate that you made at the time of the last trial, was an estimate of what cost, the cost at that time, or the cost at the time of the fire? A. The cost at the time we made the estimate.

Q. Did you at that time make any allowance

for the difference in cost between the time of the fire and the time you made your estimate? A. Not when the estimate was made, no, sir.

Q. Did you in connection with that estimate, allow for the difference in cost? A. Yes, sir.

Q. Was there a difference in cost between the the time of the fire, and the time you made your estimate? A. A slight difference.

Q. Are you able to say, or to give an estimate of what that difference was? A. Between two and three per cent.

Q. In making your estimate did you take into consideration the fact that the buildings were not entirely new, and make an allowance on that account for depreciation? A. We made an allowance for depreciation, yes, sir.

Q. Were you familiar enough with the buildings to form an idea, or form an opinion, as to what would be a proper amount to allow for depreciation? A. Yes, sir.

Q. What amount in your opinion did you think should be allowed for depreciation, to these buildings on account of the fact that they were not new buildings, from the figures which you estimated as the cost of replacing? A. As I remember it, about twenty per cent.

Q. Now Mr. Pope, I show you nine sheets of paper, and I ask you to tell us what those papers are (handing witness papers)? A. The first is the house—

Q. What are the papers, what do they show? A. It is an estimate on the buildings.

Q. An estimate of what? A. The buildings at Goodman's farm.

Q. What about them, what they look like, or what? A. The cost of the buildings.

Q. Who prepared that paper? A. Mr. Wilcox and myself.

Q. When was that prepared? A. October 3rd, 1906.

Q. You were both present together, at the same time? A. Yes, sir.

Q. And it is the result of your joint labors? A. Yes, sir.

Q. Mr. Wilcox is your partner? A. Yes, sir.

Q. Whose writing is that in? A. Mr. Wilcox.

Q. Did you see him write it? A. Yes, sir.

Q. Did you agree with what he put down there? A. Yes, sir.

Q. What do these papers show with reference to the details? A. Well, it shows an itemized estimate of the house.

Q. What do you itemize in it? A. Everything the timbers, the flooring, and everything that went into the construction of that building.

Q. Anything for labor? A. Yes, sir.

Q. And other material besides timbers? A. Yes, sir, mason's material.

Q. Have you made a separate estimate for each building? A. Yes, sir.

Q. Can you tell us how much you estimated as the cost of rebuilding the house?

Mr. McCarter: We object to this line of evidence, in the first place for the reasons stated before, that the cost of rebuilding does not seem to us to be relevant, or even helpful in getting at the value of the buildings, at the time of the fire. And in the next place, I do not consider this witness has the right to use a paper made up by and certainly the partial product of the mind of another man. This seems to have been a joint work, of these two men, the witness and this son-in-law, Mr. Wilcox. Now, suppose these gentlemen went around and looked at these buildings from time to time, when they were there on the farm,

and afterwards in 1906 this fire having occurred in July, 1905, Mr. Wilcox, the son-in-law of Mr. Goodman who has not been produced, makes up a paper, and in the making up of this paper, this witness takes some part, and now he proposes to use this same paper as a memorandum in this case —I do not think this is the kind of memoranda that a witness can use.

Court: I think first of all that it is a matter of supreme inconsequence who makes the memorandum, provided the party who attempts to use it, verifies it, at the time it was made, and was sufficiently satisfied of the accuracy and truth of the things recorded in it.

With respect to the second of the points taken by counsel, and which you place first, it seems to me that the value or the cost of the reproduction of the buildings at the time of the fire, is an essential element in the case. It is not like a piece of personal property which you get the value of at the time it is purchased, and then take the other elements necessary in such a calculation, and arrive at its fair value, or at its cost of reproduction. I therefore will premit the witness to testify from this memoranda.

Mr. McCarter prays exception.

Exception allowed—sealed accordingly.

WILLIAM H. SPEER (Seal.)

Judge.

Mr. McCarter: If your Honor please, I will ask permission to cross-examine this witness on this memorandum before counsel examines him upon it.

Court: You may do so.

CROSS-EXAMINATION by Mr. McCarter:

Q. I suppose you nor Mr. Wilcox, neither one of you, knew the dimensions of the sills, the girders, the studs, the posts, the beams, the ceilings, the partitions, the sheathing, the roofs, and the floors, of this old building, without some information given you, did you Mr. Pope? A. Yes, sir, I remember the buildings, as being high frame buildings of heavy timbers.

Court: Q. That is not the question—the question is whether you remember the dimensions and the sizes of the timbers and such like? A. Yes, sir.

Mr. McCarter: Q. The sills? A. Yes, sir.

Q. Why in October, 1906, after this building had been destroyed more than a year, you were able to carry in your mind the sizes, 4x6, 2x6, or 2x4, or 7/8 by 3 1/2 of each one of the component parts of these destroyed buildings—were you? A. No, sir.

Q. Where did you get that information? A. We could not get that, it would be impossible.

Q. You made that up then? A. We knew about what they were.

Q. For instance, had you ever done any work on this building "barns" consisting of main, two, three and four, and the wagon-house? A. I don't remember that I have.

Q. Had you ever done any work on the greenhouse, and the boilerroom? A. No, sir, I don't remember that I had.

Q. Had you ever done any work on the woodshed? A. I don't remember whether I did or not.

Q. I see another building over here called the "pigpen," have you ever done any work on that? A. No, sir.

Q. It is a matter of great moment, in estimating the cost of buildings, to know the character of the

wood, in the first place, that enter into the structure, is it not? A. Yes, sir.

Q. As to whether it is North Carolina pine or this and that or the other? A. Yes, sir.

Q. Also the size? A. Yes, sir.

Q. And not knowing them you can not make an analysis of the cost a correct estimate of the cost? A. I knew enough to make an estimate.

Q. If you had not worked on the barn how could you? A. I had been in the barn many times.

Q. Do you know the character and the size of the different component parts of that barn? A. Possibly not each piece.

Q. Who refreshed your recollection, or that of Mr. Wilcox in your presence, with regard to the number of posts and the number of feet of pine boards, for instance, that go into some of these estimates? A. We had the size of the buildings on the ground and calculated from that.

Q. And who refreshed your recollection as to the character of the material? A. I knew pretty well from memory.

Q. Could you tell definitely? A. Yes, I think I could, most of it.

Q. All of it—I am not talking about most of it—all of it, I am talking about—could you remember without assistance from Mr. Goodman or Mr. Goodman's family, the details of these buildings? A. Yes, sir, generally—the general details, yes, sir.

Q. In other words, do you want to go on record as saying that all these detaiils are exactly as they were in the original buildings? A. It would be necessary to replace these buildings, to do that.

Q. I didn't ask you that—I asked you if you want to go on record as saying that all these details are exactly as they were in the original buildings, in these eight and a half sheets of paper,

whether those details are exactly as they were in the old building? A. As near as I remember.

Q. You don't answer my question? A. I can not answer it any better, I don't know of any other way that I can answer it. Of course I didn't have any memoranda of every piece of timber on that place. That estimate was made as near as we could make it.

Q. Did you have any assistance from Mr. Goodman as to what the character of the material was? A. No, sir.

Q. How did Mr. Wilcox happen to write that out rather than you? A. There could be but one of us writing at the time on the paper.

Q. Did you write it out in your place, or at the place of business? A. At the place of business.

Q. What memorandum did you have? A. We had a map of the buildings.

Q. This map on the easel now? A. No, sir, I think not.

Q. Some other map? A. Yes, sir.

Q. Who gave you that map? A. Mr. Whittemore.

Q. Just before you made the estimate? A. Yes, sir.

Q. And on the assumption that the map correctly gave you the dimensions, you made up an estimate of the cost of putting up new buildings on this place, of that type, is that right? A. Yes, sir.

Q. And that is the way this was made up? A. Yes, sir.

Court: Q. You did not know whether the map was correct or not, did you? A. No, sir, I could not say as to that.

Q. Did you go, before making the estimate, either one of you, to look at the property? A. Yes, sir.

Q. When, with regard to making the estimate? A. Well, I can not say, just a short time before, I can not say the exact length of time.

Q. You or Mr. Wilcox? A. We both went there.

Q. For the purpose of making the estimate? A. No, sir.

Q. What did you go for? A. We had been over there at the time of the fire, and before that and afterwards.

Q. You were friendly with the Goodmans? A. Yes, sir.

Q. And Mr. Wilcox was a son-in-law of Mr. Goodman's? A. Yes, sir.

Q. And you did not go there for the purpose of getting assistance in making the estimate? A. No, sir.

Q. The estimate was really made from this map? A. Yes, sir, the estimate was made from the map.

Q. For instance, what kind of shingles are "K-C" shingles? A. Red Cedar.

Q. Do you know what kind of shingle the barns had on? A. No, sir.

Q. How did you know then what to estimate on—there is a difference in the cost of shingles, is there not? A. Not a great deal, not in the line of shingles that would be used in that class of building.

Q. I ask you if there is not a great difference in the cost of shingles? A. Yes, sir, there is a great difference in the cost of shingles.

Q. What kind had you estimated on for the barns? A. "Red Cedar."

Q. Without knowing whether they had had "Red Cedar" or not before? A. Yes, sir.

Q. Is it not, as a matter of fact, usual for old buildings to have Cyprus shingles? A. Yes, sir.

Q. And are they not more expensive? A. They cost very much more.

Q. And whether these had Cyprus or Red Cedar you did not know? A. I did not know.

Court: I don't think you need go any further. I am satisfied that at the present showing, that that memoranda can not be used by the witness.

Mr. Whittemore: May I continue the examination?

Court: You may examine him further but it is perfectly manifest that he made the estimate from a document, he does not know now the authenticity of—he does not know who made it—the estimate of the amount, and the prices, and the expense of the material, and the work done, was almost entirely conjectural, and so far as I can see, there is not a single element of accuracy about it. Unless you can make something very much stronger, I do not see how he can use that as a means of refreshing his memory.

FURTHER DIRECT by Mr. Whittemore:

Q. Before the fire, had you been in these buildings? A. Yes, sir.

Q. How many times? A. I could not say.

Q. Once? A. A great many times.

Q. One hundred times?

McCarter: I object to the question as leading.

A. Possibly one hundred times, but I can not say.

Mr. Whittemore: Q. Your partner was a son-in-law of Mr. Goodman's, was he not? A. Yes, sir.

Q. Did you ever have any occasion to go down

this way, in the direction of Mr. Goodman's place? A. Yes, sir.

Q. When you did, did you stop in there? A. Yes, sir.

Q. You worked on the house, did you not? A. Yes, sir.

Q. And when you altered the house, did you have occasion to see the timbers that were in it? A. Yes, sir.

Q. Do you know what they were made of? A. Yes, sir.

Q. Do you know what the sizes were? A. Some of them, yes, sir.

Q. The main timbers—do you know the size of the main timbers? A. Yes, sir.

Q. The figures you have put in this estimate, for the main timbers, do they correspond with the size of the timbers you knew of, in the house? A. Yes, sir.

Q. Have you been in these barns? A. Yes, sir.

Q. Do you know what kind of frames they had? A. Yes, sir.

Court: Q. Did Mr. Wilcox live there? A. No, sir.

Q. How much did you depend on him in making up this estimate? A. Well, not in particular, we made the estimate together, as partners in business.

Q. Did you ask him questions about it? A. Undoubtedly, yes, sir.

Q. And the result of some of the things he said, appear in this estimate, do they not? A. Yes, sir.

Q. And these were things that you wanted to know about? A. Yes, sir.

Mr. Whittemore: Q. Is Mr. Wilcox here? A. Yes, sir.

Q. You know, as a builder, what size of timbers are necessary to put into a house to build it? A. Yes, sir.

Q. Have you in your estimate calculated on any other than a proper size of timbers to build that house and build the buildings that you estimated on?

Mr. McCarter: I object.

Objection sustained.

Mr. Whittemore: Q. What does this estimate show with regard to the character of timbers that you have figured upon, what does it show as to their character, with relation to the character of the buildings in question? A. It shows the timbers, as they were in the building, as near as I could remember it, or that would be necessary to build a building of that description.

Q. How near were you able to remember the sizes of the timbers in the building—were you? A. Yes, sir, I think I could remember most of them.

Q. Had you estimated on any material of a more expensive character than that which was in the old buildings?

Mr. McCarter: I object to the question—

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Q. Have you estimated on any material of a more expensive character than that which was in the house?

Mr. McCarter: Same objection.

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed----sealed accordingly.

Mr. Whittemore: Q. Are there any figures on

this paper in your writing—look it over and see? A. Yes, sir.

Q. You take out pages four, five and seven—in whose handwriting are those pages? A. They are in my handwriting.

Q. And the other pages, in whose handwriting are they? A. Mr. Wilcox.

Q. Now I show you a map—can you say whether you saw that before or not? A. I think I did.

Q. When did you see it? A. At the trial before, and a map similar, at the time we made the figures.

Q. Do you know whether this is the map you had when you made the figures? A. Oh, I could not tell you that.

Q. Do you remember whether it was a blueprint or not? A. It was a blueprint, as I remember.

Q. Did it look like this? A. Yes, sir.

Q. Have you on this estimate marked the sizes of the buildings? A. Yes, sir.

Q. Each one of them? A. Yes, sir.

Q. Where did you get the sizes from? A. From the map.

Q. Will you look at the map in evidence in this case, and tell me whether the sizes as shown on that map are the same or different, from those which you have on your estimate?

Mr. McCarter: I object. He can not get his memorandum in in that way.

Court: I shall sustain the objection, you can not use that memorandum for the purpose of evidence, before it is in evidence. I don't think you can use it for any purpose, until you make it evidence. Unless the proof is strict I do not propose to

let it go in, and I do not intend to have this jury speculating on the speculations of others, that is the situation, as it presents itself to me, and I present it to you now.

Mr. Whittemore: Q. Have you any recollection of the size of these buildings, of your own, independent of the memoranda? A. Yes, sir, I have.

Q. How are you able to recollect the sizes of these buildings? A. I could not give it to you in exact figures.

Q. Let me have that memorandum—let us see what you can give us—can you give us the dimensions of the house? A. No.

Q. Can you give me the dimensions of any of the barns there, that you recollect? A. I don't think I can.

Q. You saw the map that was here at the last trial, didn't you? A. I did.

Q. Did you have occasion to look at that map at that trial? A. I did.

Q. And frequently, didn't you, during the course of your giving your evidence? A. Yes, sir.

Q. And in giving your evidence you referred to the map on frequent occasions, didn't you? A. Yes, sir.

Q. The only map which you had, and from which you drew this estimate was before you, for some hours, was it not? A. Yes, sir.

Q. Have you any recollection concerning the map which you had in our possession, corresponding or differing from the map which was in evidence in the case?

Mr. English: I object to the question.

Court: I won't let that map in on that testimony, but I will permit him to ask the question.

A. No, sir, they did not differ.

Mr. Whittemore: Q. They did not differ. you say? A. Yes, I have some recollection of the map, it did not differ to my recollection.

Q. Did you get anything from that map, except the sizes of the building? A. No, sir, I think not.

Q. From what did you get the height of the buildings? A. As I remember the buildings?

Q. How well did you remember the heights? A. I think I had them right, that construction—I knew the construction very well.

Mr. Whittemore: I think, if your Honor please that shows that the map he examined, corresponded with the one which was here, and which was in use at the last trial. I can say that this is the map used at the last trial—perhaps counsel will admit that it was—otherwise I can show that it was.

Mr. McCarter: I do not think it is necessary to prove it—there is no point about that—we admit that the map on the easel was the map you had at the last trial.

Mr. Whittemore: That being admitted, the testimony of the witness that the map which he had and which he says was a blueprint, showed the same figures that were on the map on the easel, and that he had frequent occasion to refer to that map at the time of the trial, and that he knows it gives the same dimensions—and the only things he got from that map were the dimensions of the buildings—that is as far as I can go—I am in the hands of the Court.

Court: I do not think that makes out the whole proposition by any means. The

mere fact that he had a map that might correctly show the sizes of the buildings—there is no contention that that map shows the height, and the various other things that enter into the construction of a building. The maps of course will not show its height, they only show what everyone else knows, that is, the dimensions of the buildings on the ground. Now, a man can not, by going up to a building and looking at it, tell, its height, or its dimensions accurately—his attention must be specificially directed to the essential parts of the building, to the component parts of the building, their sizes, what they are, their composition, and everything of that description, before he can make any estimate that is worth anything. Now this man says that he, and his friends or his partner, by consulting together, could reproduce the construction. I think that is the veriest speculation, and I think we ought to have more proof on that point. You have got the value of the property before the fire, and you have got the value of the property after the fire—

Mr. Whittemore: I want to support that by the evidence of a man who is able to give us more in detail, as to the value of the building. I think I ought to be permitted to show the value of the buildings by the dimensions, but the value of the timbers that went into the construction of the building, and all those other various matters entering into the construction and value of these buildings.

Court: I think you could prove that,

but you can not prove it by the evidence you are attempting to produce now.

Juror No. 11: Q. I would like to know what the witness did—he said he took twenty per cent from the value of the entire building, that is from the new building that he erected? Now, as to the old buildings, how about them? Did he make any deduction from the value of those—or what percentage did he take from the new building—did you take a twenty per cent depreciation from the entire building? A. Yes, sir, the entire building.

Q. Irrespective of the ages of any of the buildings? A. Yes, sir.

Q. Did you know the age of the old barn that you did not erect? A. Yes, sir, somewhere about—

Q. What was the ages? A. In the neighborhood of thirty years.

Q. What is the usual percentage that a builder takes off in a year? A. It depends on the condition of the building at the time, the condition of the roof, and the enclosure, the frame.

Q. Do you know the sill of the big barn, where the fire was said to have started—the height of the roof, where the peak starts at the roof, do you know how high that was? A. Yes, sir, about sixteen feet.

Court: Q. To follow up the juror's question—how much percentage did you take off the barns for each year? A. We took into consideration the condition of the roof, and the enclosure, and the buildings in general.

Q. How much percentage each year—what do you say is the depreciation for each year, one per cent, two per cent, ten per cent, or twenty per cent, or what? A. We didn't figure it that way, we figured on the condition of the building.

Q. If you figured on the condition of the building, why did you take twenty per cent off the new buildings? A. That is what it amounted to.

Q. You said you took it off the whole of the buildings? A. Yes, sir.

Q. Now, you lumped all of the buildings together, and then you said "we will take twenty per cent off all of the buildings new, and old and that would be for the depreciation of the whole"—that is the depreciation, as you then did it, is it? A. No, sir.

Q. Then what did you do? A. We took into consideration the condition of the buildings, and what it would cost to put them in repair, and the house, and the barns, what it would cost to put them into repair, and it amounted to in the whole amount, twenty per cent.

Q. Then practically you took the depreciation on each building, and then struck an average, by dividing by the number of buildings? A. Yes, sir, that is what we did.

Juror No. 11: Can I have the value of each building, so that if he could not figure it, we might.

Court: That is what counsel is fighting about. That is has not the proper data in his figures so that you could figure out properly on it, and I have held, so far as that is concerned, from the evidence thus far given, that it would be impossible for the jury to arrive at any correct and accurate valuation from this witness's speculations on the value—that is where the case now stands.

Mr. Whittemore: Q. How long before the fire, had the house been remodled? A. I think about five years.

Q. What was the condition of the repair of the house? A. Very good.

Q. What was the condition of the paint on it? A. Good.

Q. Do you know anything about its having been painted that spring—do you know that? A. Yes, sir.

Q. You did know it? A. Yes, sir.

Q. What was the condition of the repair of the barns? A. Fair.

Mr. Whittemore: Now, I desire to have the witness permitted to use the memoranda and testify as to the values.

Mr. McCarter: Then we object to it.

Court: Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed. Sealed accordingly.

Mr. Whittemore: I will withdraw this witness now—do you wish to cross-examine the witness?

No cross-examination.

EDWARD V. GOODMAN, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. How old are you? A. Thirty-one and a half years old.

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. I live at Goodman's station.

Q. On the property we have been talking about? A. Yes, sir.

Q. Who lives with you? A. My wife and my mother.

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Q. And brother? A. Yes, sir.

Q. Are you the executor of your father's estate? A. Yes, sir.

Q. And the person named in the letters of administration, which have been offered in evidence? A. Yes, sir.

Q. Were you home at the time of the fire on your property? A. Yes, sir.

Q. Where were you? A. I was lying on a couch in the east side of the dining room.

Q. What was the occasion of your lying on the couch there? A. I was sick.

Q. Where is the dining room in the house—point it out on the map? A. Right there (indicating a point on the southerly end of the main building).

Mr. English: Q. On the south side? A. Well, I call it the east side.

Q. Furthest away from the railroad? A. Yes, sir, furthest away from the railroad.

Q. How large a room is it? A. Well, it went from one side of the house to the other, from the east to the west. It extended from this side, to this side (indicating), right half way through the house—the dining room runs through there—there had been two rooms originally, and the partition had been taken out, and an arch made, and you could see through from one end to the other.

Q. What was there on the side nearest the railroad, in the wall? A. There was a window right there (indicating) and there was a paneled door, with a glass half way down (indicating), and right on this side of the room, there was another window (indicating).

Q. Indicate on the map the position you occupied? A. I lay right here—there is a window there, and I lay by this window here, exactly opposite that one there (indicating).

Q. Who was in the room with you? A. Dr. Sinclair, father, and my wife, and our little baby—wife had the baby in her arms.

Q. How long had you been ill? A. I had been unable to work for about three or four weeks.

Q. How long had you been confined to the house? A. Well, I don't recollect just exactly now, but I judge in the neighborhood of a week, possibly ten days.

Q. What time was it the doctor was there, about? A. About between a quarter to four, and four o'clock, possibly twenty minutes to four.

Q. What was he doing? A. He was injecting a preparation in my legs for typhoid malaria.

Q. Did you notice anything or hear anything on the railroad? A. Yes, sir.

Q. What did you hear A. I heard the mail train going by.

Q. Did you see anything on the railroad? A. Yes, sir.

Q. What did you see? A. I saw the mail train going by.

Q. How could you see it? A. By looking.

Q. Through what? A. Through the door or the window, either one, I was right opposite, and it attracted my attention, for about a couple of years before, there had been a man struck by that same train, and she gave out two long and two short blows, which is usually the whistle for that crossing, and she never blowed until she got right opposite to our house, and she should have blowed lower down—

Q. I want to know what you heard? A. I heard the train blow.

Q. What happened next after you heard the train? A. A few minutes after the train passed by, Andrew came running to the house, and hollered—

Q. Never mind what he said—he said something? A. Yes, sir.

Q. What did they do then? A. Father ran out, and Dr. Sinclair ran out of the house, and my wife went through this dining room across and came out on the back porch, the porch ran all the way around the house.

Q. And what did you do? A. I lay still, or sat on the couch, I don't recollect which I done.

Q. What happened afterwards, what became of you? A. Someone helped me down to the end of the lane.

Q. What lane? A. Right down there (indicating on the map), right there is a willow tree, and they placed me on the grass, under this willow tree.

Q. At the junction of the lane and the road? A. Yes, sir.

Q. Do you remember who took you there? A. I don't just recollect, but it runs in my mind it was Mr. Mays was one of them and Dr. Sinclair.

Q. How long did you stay there? A. We staid there until the building was pretty well consumed.

Q. Anyone with you? A. My wife was with me, she was there practically all the time.

Q. Did you see the fire from where you were? A. Yes, sir, because immediately at the end of the couch where I lay was a door, and through that door you passed into the kitchen, and at the kitchen there, there was a window, and when I was informed of the fire, I rose up this way (indicating), and I saw the smoke, and the flames—well, I could not see the flames, but I could see the smoke rolling out of the barn.

Q. How was the wind? A. Very strong.

Q. In which direction? A. It was blowing from the west, practically.

Q. What kind of a day was it? A. A very warm day.

Q. Clear? A. Yes, sir—well possibly a little hazy with the heat.

Q. Who did you see come over to the fire? A. Well, Mr. Mays in my recollection was the first one there with the exception of the ones that was on the ground, that is my father and Dr. Sinclair, and the colored man. And while I was lying down at the end of the lane, after they got me down there, a man by the name of Axel and his two partners came running across the tracks, and over the potato field.

Q. Can you show us which way they came? A. Yes, sir, they came right across the crossing here, and ran directly—possibly this way—and across the potato field. We had potatoes in here, and also potatoes in here in front of the house here (indicating a southerly direction from the roadway).

Q. What time do you think it was, that the alarm of fire was given? A. I should judge it was from ten to a quarter to four, or about that.

Q. How do you fix the time? A. After they got me out of the house, and while they were taking me down the lane, my wife rushed back into the house to get my watch and her watch, and some rings, and when I got down to the end of the lane, my watch said four o'clock or some few minutes after, or around four o'clock.

Q. Do you remember the time when Mr. Ham came to the property? A. Yes, sir.

Q. To make this map? A. Yes, sir.

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

Q. Who showed him the location of the buildings? A. I did.

Q. Something has been said here about some stacks of hay—where were they? A. On the map there.

Q. Are they correctly located on the map? A. Yes, sir.

Q. It is said there was some hay in the angle formed between barns Nos. "2, 3 and 4" what have you to say about that? A. No, sir, there was not.

Q. Who is Elizabeth Van Velsor? A. That is my father's aunt, my grand-aunt.

Q. How long had you lived on the property before the fire? A. Since 1886.

Q. Your father lived with you and your mother there? A. Yes, sir.

Q. Since that time? A. Yes, sir.

Q. Where did Mrs. Van Velsor live? A. She lived with us a little while, but her place of residence was in Hoboken, until she abandoned housekeeping, and then she moved with us.

Q. Do you know when you first came there, who was the owner of the property? A. Yes, sir.

Q. Who? A. Mrs. Van Velsor.

Q. And how did your father happen to be on the property? A. My aunt bought—

Q. No, not that—just tell us how it was your father happened to be on the property? A. I can not tell you unless you will let me explain—

Q. Without telling any conversations you may explain? A. He went there with the understanding that that was to be—

Q. Never mind that—tell us without telling what the understanding was or any conversations? A. Well I can not tell you then. I can tell you if you will let me explain the circumstances, if you don't, I can't.

Q. Do you know whether Mrs. Van Velsor knew of your occupying the premises? A. Certainly, it was with her consent.

Q. How did your father become the owner of the property—do you know? A. Yes, sir.

Q. Was Mrs. VanVelsor married? A. Yes, sir.

Q. Was her husband living? A. No, sir.

Q. Did she have any children? A. She had one living, she lived with us too.

Q. Were you present at any time or at the time of the transfer of the title to this property? A. Yes, sir.

Q. What did Mrs. Van Velsor do at that time with regard to the transfer of the title?

Mr. McCarter: What do you mean? Do you mean whether she signed the deed or not?

Mr. Whittemore: I want to know if this sale—

Mr. McCarter: What she said or what his father said would not be competent, and I object to the question.

Question withdrawn.

Mr. Whittemore: Q. Was there anything paid at the time the deed was signed? A. No, sir, there was not.

Q. Do you know whether anything had been paid for the property by your father? A. No, sir.

Q. You don't know at all? A. I know there was not, no, sir.

Q. You know there was not? A. I know there was not.

Q. During the time that your father lived on the property between 1886 and 1889, do you know whether he paid any rent to Mrs. Van Velsor or not?

Mr. McCarter: I object to the question as immaterial.

Court: I will allow the question.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WILLIAM H. SPEER,
Judge.
(Seal.)

A. He did not.

Mr. Whittemore: Q. Do you know whether Mrs. Van Velsor required him to pay any rent?

Mr. McCarter: I object on the ground that the question is immaterial and on the further ground that that is not the way to prove it.

Objection sustained.

Mr. Whittemore: Q. Do you remember Mr. Fink being on your property at any time before the fire? A. Yes, sir.

Q. For what purpose? A. Well, we had some oak timber or lumber there, some planking.

Q. Where was that lumber at the time Mr. Fink came there? A. It lay out at the angle, where you asked me about the hay, between the barns Nos. "3 and 4."

Q. Did Mr. Fink look at the lumber? A. Yes, sir.

Q. How long before the fire was that? A. That was the spring before the fire.

Q. What did you do with the lumber? A. We bracketed it—it is what we called rough edged plank, and we bracketed it, piled it under barn No. 4.

Q. What became of that lumber at the time of the fire? A. It went up in smoke.

Q. It was burned up? A. Yes, sir.

Q. Do you know how much lumber there was in

that pile at that time? A. There was around 5,000 feet if I remember rightly.

Q. After the fire, where did you go, that is after the day of the fire? A. The same day, do you mean?

Q. Yes—well, where did you go—where were you after the day of the fire? A. At my sister's in Westfield.

Q. How long did you stay there? A. I staid there until I was able to go out, I cannot say exactly how long it was now.

Q. Then where did you go? A. Then I went up in Maine.

Q. How long did you remain there? A. Two weeks.

Q. When you come back, where did you go? A. We were hanging up in a little shanty across the way from the house.

Q. Show me where it is? A. Right about there (indicating somewhere, about the north-easterly side of the road, and near the railroad track).

Q. You say there was a store house there? A. Yes, sir.

Q. After the fire, when you came back from Maine, who lived there? A. Father and mother, my brother and myself, my wife staid there part of the time, and part of the time in Westfield.

Q. How long did you live there?

Mr. McCarter: I object to that question as immaterial.

Question withdrawn.

Mr. Whittemore: Q. Do you know, or were you around the property at the time the house was remodeled? A. Yes, sir.

Q. Before the fire? A. Yes, sir.

Q. Did you see the timbers in the house? A. Yes, sir, I did.

Q. You are familiar with the barns, I suppose? A. Yes, sir, I am.

Q. By the way—I had better ask you now—were you out of the house the day of the fire, before the fire? A. No, sir.

Q. Had you been at the barns that day? A. No, sir.

Q. Do you know anything about the dimensions and the sizes of the barns? A. Yes, sir.

Q. Do you know the dimension and size of the house? A. Yes, sir.

Q. What was the size of the house? A. Twenty-eight by thirty-four, I think.

Q. Any extension on it? A. Yes, sir, it had a kitchen, back of it, that was thirteen by twenty-six.

Q. The dimensions you give— A. That should have been twenty-six by thirty-four.

Q. Did that include the extension? A. No, sir.

Q. Do you know the size of the wood-shed? A. That was eighteen foot plate, I think, it was fourteen feet wide by twenty feet long.

Q. Do you know the size of the carriage house? A. That was eighteen by twenty, sixteen foot plate.

Q. Was the wood-shed higher than the carriage house? A. No, sir.

Q. You said that was an eighteen foot plate? A. No, sir, an eight foot plate, I said.

Q. Now, go to the wagon shed, do you know how big that was? A. That was twenty-eight feet long, sixteen foot plate, and I think it was twenty feet wide.

Q. Now, the main barn, do you know the size of that? A. That was the same width, and I think that was twenty-eight feet, possibly it might have been thirty—that was all sixteen feet plate.

Q. The barn adjoining it, known as No. 2 on the west, what was the size of that? A. I think that that was practically the same width, twenty-two feet long I should judge.

Q. And the barn adjoining that known as No. 3? A. That was not quite as wide as the other, by a foot, it was sixteen foot plate, all of them—I could not say whether that was eighteen or twenty feet long, that was practically square, that was.

Q. No. 4, do you know the size of that? A. Twenty-two by twenty-eight I think.

Q. And the size of the pig-pen adjoining? A. That was the same width as the barn, it is twelve feet boards on the side of it, and twelve feet on the floor, running lengthwise up to the barn, and with a pitched roof.

Q. Twelve by twelve that was? A. Yes, sir.

Q. The horse stable, what is the size of that? A. That was thirty-five by fifteen. That was built in that shape, against the main barn, right under the eaves of the main barn, sloping down.

Q. What kind of a frame did they have in this barn? A. All oak frames, except the wagon-house, and that was chestnut.

Q. What was the condition of the repairs of these buildings? A. They were all good.

Q. Are you able to specify the dimensions of the timbers contained in the barns? A. I can come very close to it, I have been into them enough.

Q. Do you know how large the sills were in the main barn? A. The sill of the main barn, right where the fire orignated, that big sill is ten by twelve chestnut, I helped father put it there.

Q. Do you know what the size of the plates were? A. The plates was six by eight.

Q. Do you know what the size of the beams were? A. What do you mean by "beams"—there are so many beams in the place—

Q. Do you know what the size of the rafters are? A. The rafters were square on two sides—they were oak lumber, taken right out of the woods and squared and flattened on two sides, I should judge they were about seven inches on the butt, by about four to five at the top.

Q. Were you familiar with what you had on the farm? A. Yes, sir there wasn't a thing there that I did not know of.

Q. You worked on the place, did you? A. Yes, sir.

Q. How many horses did you have? A. We had six.

Q. How many were burned in the fire? A. Two, and one burned very badly.

Mr. English: Q. Another one besides the two? A. Two were burned up and one was burned very badly.

Mr. Whittemore: Q. What became of that one that was burned badly? A. We saved her, by treating her, but she has no hair on one side of her.

Q. Have you got her yet? A. Yes, sir, and the fire blinded her in both eyes.

Q. Did you ever have occasion to buy or sell horses? A. Yes, sir.

Q. Do you know the value of this horse that you have, or these horses that you had, that were burned up? A. Yes, sir.

Q. What was the value of these horses?

Mr. McCarter: I would like to cross-examine this witness a little on that before we testify if I may be permitted.

Court: You may do so.

CROSS-EXAMINATION by Mr. McCarter:

Q. How old were you at the time of the fire? A. Well, that makes me about twenty-six.

Q. And do you know what your father paid for those two horses? A. Yes, sir, I do.

Q. Were you present at the time he bought them? A. Yes, sir.

Q. Did you see him pay for them? A. Yes, sir.

Q. You were Johnny-on-the-spot? A. Yes, sir, right on the job.

Q. When was that? A. That gray horse I think was bought the summer preceding the fire, possibly it might have been the second summer.

Q. Who was it bought of? A. George Ball in Rahway.

Q. Now, the other one? A. The other one was bought from a man named Shann.

Q. Where did he live? A. Rahway.

Q. When was that bought? A. That I could not tell you.

Q. You happened to be there all the same? A. Well, I wish to correct that, I made a mistake—that horse I was not present when it was bought.

Q. What color was that horse? A. That was a bay, I thought you meant the black mare.

Q. What horses prior to the fire had you bought or sold? A. We didn't sell any, we had no occasion to sell them.

Q. What horses had you been familiar with the purchase of? A. The gray horse,—the gray horse was burned completely up. The black mare, that was burned pretty badly, and another bay horse by the name of "Harry," and another one by the name of "Charlie,"—I was present and helped father buy all of them.

Q. In other words, your familiarity with the prices of horses at that time enables you, you think, to act as an expert now, arising from the fact that when your father bought three or four of these horses, you were present? A. I was.

Q. When was the black mare bought? A. I think it was 1901.

Q. Now when did you buy Harry? A. That was some time before 1899, but I cannot tell you the exact time.

Q. And Charlie? A. He was bought the next year after Harry.

Q. Now, do you remember the prices given for each? A. Yes, sir practically, I can come pretty close to it.

Mr. McCarter: If the evidence is to be given at all, it ought to be actually what the price was. I do not think the prices paid by his father for these horses, that were bought by his father, that can not make this witness an expert on the value of horses.

Court: Q. Have you had any more dealings about horses than those that you have mentioned? A. Not at that time, I have been since.

Q. But prior to that time? A. Well, I have been to the sales in Newark, where we bought horses, and where I saw horses sold, and saw them bought—we bought horses down in Newark prior to that time.

Q. I am talking about your presence in Newark—have you seen other sales conducted? A. Yes, sir.

Q. By horse dealers and owners? A. By horse dealers.

Q. You were present and saw the horses bought and sold? A. Yes, sir.

Court: I will permit the examination.
Mr. McCarter: Prays exception.
Exception allowed—sealed accordingly.
WILLIAM H. SPEER,
Judge.

(Seal.)

RE-DIRECT by Mr. Whittemore.

Q. Will you tell us first what those two horses that were destroyed cost—that is the horses that were destroyed? A. The gray and the little bay.

Q. What did the gray horse cost? A. We paid $150 for him.

Q. What did the bay horse cost? A. $100.00.

Q. Now, Mr. Goodman what have you to say as to the value of these horses at the time of the fire?

Mr. McCarter: I object for the reasons already stated.
Question allowed.
Mr. McCarter: Prays exception.
Exception allowed—sealed accordingly.
WILLIAM H. SPEER,
Judge.

(Seal.)

A. They were not worth any less than was given for them, because horses are increasing in value.

Q. Were they worth any more? A. Yes, sir, the little horse was worth more than we gave for her.

Q. Why? A. Because she was perfectly gentle, my mother or my wife could drive her, and horses at that time were worth more than when we bought them, they were worth more than we paid for them.

Q. How much was she worth at that time? A. She was worth $150.00.

Q. That is the bay mare? A. Yes, sir—Major and the gray horse are identically the same, the bay mare was the other horse that was burned.

Q. What was the bay horse's name? A. Jennie.

Q. Now did you have any hay on the place at the time of the fire? A. Well, we had—oh yes, we had all that we had cut, in the barns.

Q. Do you know how much that was?

Mr. McCarter: How can he tell, he was sick and had been for two weeks before the fire.

Question withdrawn.

Mr. Whittemore: Q. Was there any hay in the barns before you went in the house—were taken sick? A. Oh, yes, sir.

Q. How much was in the barns at that time? A. Some of them were getting pretty well filled, some of them were filled before I went and was laid up in the house.

Q. How much was in before you were laid up and was sick? A. It was practically all in with the exception of about five acres.

Q. How much do you say was in the barns before you became ill? A. It was in the neighborhood of sixty tons.

Court: Q. What do you mean by "in the neighborhood?" A. Well, it is hard to estimate hay, the only way we can do it is, by—I know pretty near what each mow would hold.

Q. What was the lowest amount you would say was there? A. Well, I would say from fifty-five to sixty tons.

Mr. Whittemore: Q. Did you have any swamp hay on the place? A. Yes, sir.

Q. How much was that? A. There was about four or four and a half tons in the stack.

Q. What was that hay worth?

Mr. McCarter: I object. This man is not qualified.

Question withdrawn.

Mr. Whittemore: Q. Did you ever sell any hay? A. Yes, sir.

Q. How long have you been doing that? A. We always had hay to sell.

Q. Tell us how many years you have been doing that? A. Ever since I was big enough to go around, I can't say how long.

Q. Have you sold much hay? A. Yes, sir.

Q. Every year? A. Yes, sir.

Q. Did you sell any this year? A. No, sir, we had the intention of selling it, but we didn't get the chance.

Q. Do you know what the value of hay was that year? A. Yes, sir.

Q. How do you know what the value of hay was that year? A. Well, by inquiring, and what we had to pay for hay, and haul it back on the place.

Q. When was that? A. Well, that was—fortunately we didn't have to buy any immediately after the fire, because we had four loads over to a neighbor's place across the brook from us, but as soon as that was gone, we had to go into the market and buy in enough for our purposes—that was in November.

Q. Was hay worth more or less in November than it was in July? A. It was worth more, because you couldn't get the price for new hay that you could get for old hay.

Q. What was the kind of hay you had in these barns? A. It was all good hay.

Q. What quality? A. First class "Timothy" hay, with the exception of those two stacks I spoke of.

Q. What was the value of hay in the barns in July, 1905? A. $16.00.

Q. Sixteen dollars a ton? A. Yes, sir.

Q. What was the value of the swamp hay at the time of the fire? A. That was worth about $8.00 a ton.

Q. How many tons were there? A. Between eight and nine tons in the two stacks.

Q. Did you have any wagons destroyed in the fire? A. Yes, sir.

Q. What were they? A. We had a coal wagon, a one-horse spring wagon, and we had a run about and a two-seated carriage.

Q. Do you know anything about the value of wagons? A. Yes, sir.

Q. How do you happen to know anything about the value of wagons? A. I helped buy the ones that was there, and I helped to buy some that replaced them, that was burned, and I bought wagons before, and I have bought wagons since.

Q. Do you know what the coal wagon cost? A. Yes, sir.

Q. How old was it? A. I think that one that was burned up was four years old.

Q. What did it cost? A. I think we paid $75 for the running gear, and father made the body, and had it ironed.

Q. What do you think it was worth at the time of the fire?

Mr. McCarter: I think that was rather remote.

Question withdrawn.

Q. What was the condition of the wagon at the time of the fire? A. The condition was good, because the wagon had been painted that spring, Mr. Fink at Westfield had just painted it.

Q. How old was the spring wagon? A. Why I can not just say now.

Q. Do you know what it was worth at the time of the fire?

Mr. McCarter: I think he had better say what it cost.

Question withdrawn.

Mr. Whittemore: Q. Do you know how much it cost? A. We didn't buy the wagon new, when we got it we paid $25 for it, when we bought it.

Q. Second hand? A. Yes, sir, the wagon was practically—well, it was in good shape.

Q. And you used it right along? A. When we had occasion to use a one-horse wagon, or a spring wagon, it was not used every day by a long shot.

Q. The two seated carriage, do you know how much that cost? A. Yes, sir.

Q. How much? A. $110.

Q. How old was it? A. Well, I should judge that was in the neighborhood of ten years, probably eight or ten years old.

Q. What was the condition of it? A. That was good, we only used that when we had occasion to drive a two seated wagon.

Q. Did you have any other vehicles there? A. Yes, sir, but mother had the buggy out, and Dr. Sinclair—

Q. I mean any that were burned? A. Oh no, sir.

Q. Did you have any sleighs? A. Yes, sir.

Q. What kind? A. One Portland cutter.

Q. Do you know what it cost? A. Yes, sir.

Q. How much? A. It cost $75.00.

Q. How old was it? A. It was bought the winter before the fire, in January.

Q. Did you have any business sleigh? A. Yes, sir.

Q. How much did that cost? A. Andrew

Reilly made that sleigh for us, and we paid him $25 for it.

Q. How long before the fire? A. That was about three years.

Q. Were they both burned in the fire? A. Yes, sir.

Q. Did you have any box sleds? A. Yes, sir.

Q. What did they cost? A. All the way from $15.00 to $25.00, it depends whether they are factory made sleighs or hand made.

Q. What did these cost? A. Well, one of these was bought about two years before the fire, and I think we paid $18 for it, I am not positive of that. But the other one was bought some time before that, and I think father paid $20 for that, but I am not quite clear on it.

Q. Do you know what they were worth, or in what condition they were at the time of the fire? A. They were in good condition.

Q. Did you have any blankets there? A. Yes, sir.

Q. What kind? A. Team blankets.

Q. How many did you have? A. Eight.

Q. Do you know what they cost? A. Yes, sir.

Q. How much? A. $8.00 a piece, $16.00 a pair.

Q. How long had you had them? A. One pair of farm blankets, and one pair of Blue stone, they had just been bought that winter, but the others were a year old.

Q. Did you have any farm machinery? A. Yes, sir.

Q. What did you have? A. We had a binder, that is a reaper and binder combined.

Q. What make? A. Adams, Platt & Co.

Q. How long had you had it? A. I think in the neighborhood of six years.

Q. Do you know what it cost? A. Yes, sir.

Q. How much? A. $140.00.

Q. What was its condition at the time of the fire? A. Practically as good as new.

Q. Had it been used? A. Not continuously.

Q. Was it in good working order? A. Yes, sir, first class.

Q. Did you have any ear corn on the place? A. Yes, sir.

Q. How much? A. About 500 bushels.

Q. Where was it? A. In the corn crib.

Q. Do you know what that was worth? A. Somewheres—I can figure that better by the ton.

Q. Well how many tons did you have? A. I can figure it by the ton, I can tell the price by the ton.

Q. That won't do any good unless you can tell us how many tons you had? A. Well, it runs seventy pounds to the bushel, and a ton is 2,000 pounds.

Q. That would be 260 bushels to a ton about—how much was it a ton? A. We pay—well I think that cost us, some of it, $13.50 a ton, and the last lot we put in cost us $15 per ton delivered on the track.

Q. Then what did you have to do with it? A. We had to move it, and put it in the corn crib.

Q. How many bushels did you say you had? A. We had about 500 bushels. The reason I know that is that the crib filled, held about 1,000 bushels, and it was about half full.

Q. And there was a little less than two tons in the corn crib? A. Oh, there was more than that.

Q. More than that? A. Yes, sir.

Q. You say seventy pounds to a bushel? A. Yes, we considered seventy pounds to a bushel, but we didn't buy it that way, we bought it by the ton.

Q. That would be twenty-eight bushels to the ton, and there were 500 bushels? A. Yes, sir, about that.

Q. It would be somewhere about eighteen tons then? A. That is pretty near right.

Q. And it was worth how much a ton? A. The first lot we bought it, and then sold it, and then we would put in the crib—

Q. Never mind that—how much was it worth a ton? A. The first lot was worth $13.50 a ton, and the balance we paid $15 a ton for.

Q. How much was worth $13.50 a ton? A. There was very little of that, of that first car load we sold nearly all of it, we only put two or three tons in the crib, but if you strike the difference between the two figures, that I think would be about right.

Q. Did you have any cord wood on the place? A. Yes, sir.

Q. How much? A. I think there was eight cord hauled there, if I am not mistaken, from the woods.

Q. What became of it? A. It went up, like the rest.

Q. Burned up? A. Yes, sir.

Q. Do you know what that cord wood was worth? A. Well, it was worth at that time between three and a half to four dollars a cord on the ground.

Q. Did you have a runabout wagon there? A. Yes, sir.

Q. What did that cost? A. $110.

Q. How long did you have it? A. That was bought the fall before the fire.

Q. What was its condition at the time of the fire? A. That was good.

Q. Was there any manure in the barn yard? A. Yes, sir.

Q. Do you know how much there was there? A. Well, there was possibly—I don't believe I could give you an estimate on that.

Q. Now Mr. Goodman, did you make up a list of personal property destroyed on your place? A. I helped make it up.

Q. Was the manure burned? A. Yes, sir.

Q. Where was that located? A. It was scattered all around here (indicating a space south of the barn), it was in the barn too. There was a gate there (indicating), and it was scattered all around in there.

Q. Was that burned up? A. Yes, sir.

Q. Did you make any list of the personal property on the place? A. Yes, sir.

Q. When did you do that? A. Why if I recollect, it was just as soon as we came back from Maine, as soon as I came back from Maine.

Q. How long after the fire was that? A. About three weeks or possibly four weeks.

Q. Who was with you at the time the list was made out? A. My father, mother and my sister, and my wife was there.

Q. What did you put down on that list? A. Well, we put down what was burned up.

Q. Was your recollection good at that time? A. It certainly was sufficient—yes, sir, it was good.

Q. Did you put any values down at that time? A. Yes, sir.

Q. Did you put anything down in the list that was not destroyed? A. No, sir, I did not, because the fact is—

Q. I show you a paper, and I ask you whose handwriting that is in? A. That is mine.

Q. What is this paper? A. That is an inventory of the things that were consumed.

Q. Where are those things that are shown on this list? A. Where those buildings were.

Q. Were they in the buildings? A. Yes, sir, in the buildings and some possibly around the buildings.

Q. In what buildings? A. In the outer buildings.

Q. What do you mean by "outer" buildings? A. The carriage house, the wood shed and the wagon shed.

Q. Was there another list made of the things in the house? A. Yes, sir.

Q. What did you call those? A. The indoor things.

Recess.

Afternoon session, 2:00 p. m.

EDWARD V. GOODMAN, resumes the stand:

Direct-examination (continued) by Mr. Whittemore:

Q. Now, would you be able to enumerate all the things in the house, one after the other, without referring to this list? A. No, I don't think so.

Q. Would this list refresh your recollection as to what the articles were in the house and the barns? A. The outdoor things I think I can give them very near without any list, but the indoor things I can't.

Q. Well, if you can give them without any list I am willing to go on. A. I can't start at the top and enumerate them right down.

Q. You said you could name every article there without the list? A. Well, I could come pretty close to it.

Q. Were there any stoves? A. Yes, sir.

Q. Where? A. Why, there was up in the shop.

Q. What do you call the shop? A. Well, the top of the carriage house.

Q. How many stoves were there A. Two.

Q. Do you know what they were worth A. A pot stove and a cylinder stove.

Q. What were they worth?

Objected to.

Q. Do you know what they cost?

Mr. McCarter: We don't think this man can possibly be an expert on everything.

Mr. Whittemore: No, I don't think he is.

The Court: The question was changed from what they were worth to what they cost. I think that is admissible.

By Mr. McCarter: Q. Did you buy these stoves, Mr. Goodman? A. I bought one of them, and the other one I know what it cost.

Q. How do you know? A. Well, when we buy anything and put it down on our expense book we don't list it more than the amount was. It is customary to put on the expense book what a certain article cost, and I had access to the books.

Q. Your father kept an expense book, did he? A. Why, any business man does, certainly.

Q. I didn't ask you what any business man did.

By the Court: Q. The question is whether your father did? A. Yes.

By Mr. McCarter: Q. Your father kept an expense book? A. Yes.

Q. And if he went away and bought an article,

he came home and put what it cost in the book? A. Yes.

Q. And in regard to one of these stoves you are dependent upon that information, are you? A. Yes.

The Court: He may testify to the cost of the one that he bought himself, and with respect to the one that he got the information from his father's expense book he can not testify.

By Mr. Whittemore: Q. What did the one that you bought yourself cost? A. Sixteen dollars. That was the pot stove.

Q. Did you have any harness? A. Yes, sir.

Q. Where was that? A. In the barn, or in the horse stable, rather.

Q. What different kind of harness did you have? A. Well, we had team harness, and we had single harness, single hames and collars.

Q. Did you have any double harness? A. Yes, sir.

Q. How many sets? A. Two; well, we had three, but there was two burned.

Q. What? A. We had three but there was two burned.

Q. Do you know what the two that were burned cost? A. Yes, sir.

By Mr. McCarter: Q. How do you know that? A. Well, because I was with father when he bought them.

The Court: Go ahead.

By Mr. Whittemore: Q. How much did they cost, do you know? A. One cost $35.00 and the other one cost $48.00.

Q. How old were they? A. I can't state positively on that.

Q. Do you know how much the single harness cost? A. Yes, sir.

Q. How many sets were destroyed? A. Well, there was one good set, what we called the best set, that hung in the carriage house, and there was what we called the hack harness in the barn.

Q. Do you know what they cost? A. The good harness cost $25.00.

Q. What did the other cost? A. The other one I can't say.

By Mr. McCarter: Q. Were you present when that single harness was bought? A. The one I give a price on; yes, sir.

By Mr. Whittemore: Q. Was there any lines there? A. Yes, sir.

Q. Do you know what they cost? A. $4.50.

Q. Any hames? A. Yes, sir.

Q. What did they cost? A. $6.50.

Q. How many pairs of hames? A. Well, there was a pair of single hames, that is the one I am pricing at $6.50, for a heavy wagon.

Q. Were there any horse nets there? A. Yes, sir.

Q. How many? A. There was four; two pair.

Q. Do you know how much they cost? A. $4.50 a pair.

Q. Was there any light net there? A. Yes, sir.

Q. Do you know what that cost? A. $3.25.

Q. Any heavy hames there, and traces? A. Yes, sir.

Q. Do you know what they cost? A. I don't think I could tell you just exactly.

Q. Have any hames without traces? A. Yes, sir.

Q. Do you know what they cost? A. $1.25—if I recollect rightly it was $1.25 a pair.

Q. How many pairs? A. Two pair, I think.

Q. Any horse collars? A. Yes, sir.

Q. How many horse collars? A. I couldn't just tell now.

Q. One or more than one? A. Oh, yes, we had more than one; there was some five or six of them, but just as to the exact amount I would not be positive, I would not state.

Q. Do you know what they cost? A. Well, the average price is about $4.50.

Q. Any horse brushes? A. Yes, sir.

Q. Curry combs? A. Yes, sir.

Q. Any horse stable blankets? A. Yes, sir; ten.

Q. How many? A. Ten.

Q. And what did they cost? A. $2.25 apiece.

Q. How old were they? A. Eight of them had been bought that winter; the other two I can't state the age.

Q. Was there any clipping machine? A. Yes, sir.

Q. Do you know what that cost? A. Yes, sir.

Q. How much did it cost? A. $25.00.

By Mr. McCarter: Q. I am assuming, Mr. Goodman, that you are giving from your personal knowledge, and not from that book, of these costs, is that right? A. What is that?

Q. I am assuming that you are giving your personal knowledge, and not taking it from this book? A. I have seen no book.

By Mr. Whittemore: Q. You testify only to the values of those articles that you know of personally. A. That is all I am testifying to.

Q. Not what you got from your father's expense book? A. Not what I got from the book, or what I got from hearsay. Articles I am testifying to are articles I recollect what they cost.

Q. And when I mention any article that you

know its value from the expense book, you say so? A. I will, or I will say I don't know.

Q. How old was that clipping machine? A. I think we had used it to clip the six horses with that fall before.

Q. Did you have any knives for it? A. Yes, sir; had three sets.

Q. Do you know what they cost? A. $2.50.

Q. For the three sets, or for each? A. No, for each set.

Q. Did you have any bedding there? I suppose that is bedding hay you mean? A. Yes, that was up over the horse stable.

Q. How much did you have there? A. There was some over the horse stable, and there was a half a stack out in the barn yard, near the chicken house.

Q. Was it all destroyed? A. Yes, certainly.

Q. Do you know what that was worth? A. Well, it was worth just the same as that swamp hay is in the stack, $8.00 a ton; that is what we used it for.

Q. Have any berry crates? A. Yes, sir.

Q. How many? A. I think there was twenty-five.

Q. How much would be in half a stack? A. Why, I should judge about two ton, and there was possibly a half a ton up in the barn.

Q. How much were the berry crates worth? A. Either twenty or twenty-five cents apiece.

Q. At the time you prepared the list you recollection was better than it is now? A. Why, certainly it was. My recollection was fresh.

Q. Can you remember distinctly whether you had twenty-five berry crates, or not? A. Well, that is my recollection. No, I can't remember distinctly, but I think there was twenty-five.

Q. Did you have any hot bed sashes? A. Yes, sir.

Q. How many? A. Ten, I think.

Q. What were they worth? A. They were worth $1.85.

Q. Have a harrow? A. Yes, sir.

Q. What was that worth?

Mr. McCarter: Do you mean cost?

Mr. Whittemore: Of course, this man is a farmer, and he has some knowledge of the value.

A. I know what it costs to buy them.

Q. Do you know what they cost? A. Does that mention whether it is an Acme harrow, or what kind of a harrow?

Q. Did you have an Acme harrow? A. Yes, sir.

Q. What did that cost? A. $16.00.

Q. How old was that? A. That was in the neighborhood of three year old, or four year old, possibly.

Q. Did you have any carpenter's tools there? A. Yes, sir.

Q. Many? A. Why, there was a full kit.

Q. Where did they come from? A. My father used to be a carpenter and builder, and he had a full kit of tools, all kinds, planes and saws and all the tools. He used to frame sash and everything, with them sash tools.

Q. Did you know of the purchase of any of these tools? A. No, that I can't state the price of, because they were purchased before I was big enough to recollect.

Q. Were there any feed bags in the barn? A. Yes, sir.

Q. How many? A. In the neighborhood of five hundred.

Q. Do you know what they were worth?

Mr. McCarter: That is not the question.

Q. Do you know what they cost? A. Five cents apiece.

Q. What did you have five hundred feed bags for? A. Well, we were dealing in feed.

Q. What? A. We were handling feed at the time.

Q. You used to put the feed in bags? A. We were buying and selling feed, ear corn and bran and oats and meal.

Q. Have any berry boxes? A. Yes, sir.

Q. How many berry boxes did you have? A. Two thousand.

Q. How did you happen to have two thousand? A. Well, we bought them and never used them. They were in the crates, just as they come from New York, in Warren street.

Q. What did you get them for? A. Put berries in.

By the Court: Q. How long before? A. They were bought the spring before.

Q. Never been used? A. Never been used. We bought them to use that summer and they were burned up.

Q. And the feed bags, did you ever use any of those? A. Some of them we had used.

Q. But you hadn't used any of the five hundred? A. Yes, possibly those had been used.

Q. Well how many? Let the jury know, so that they can tell how many had been used and how many unused? A. That is hard to tell.

Q. Well, as near as you can tell us? A. Well, we will say two hundred had been used and the other three hundred hadn't.

Q. And how much had the two hundred that had

been used, been used? A. Why, not more than once or twice.

By Mr. Whittemore: Q. Do you know what the berry boxes cost? A. Yes, sir.

Q. How much? A. $4.50 a thousand.

Q. Did you have any saw and table? A. Yes, sir.

Q. What did you have that for? A. Saw wood.

Q. Did you have an engine? A. Yes, sir.

Q. Saw and table used in conjunction with the engine? A. Yes, sir.

Q. What did that cost, do you know? A. The whole outfit?

Q. Just the saw and table? A. Saw and table $31.50.

Q. Was there any sugar in the barn? A. Yes, sir.

Q. How much? A. One barrel.

Q. Do you know what that cost? A. Yes, sir.

Q. How much? A. $18.75.

Q. Did you have any soap in the barn? A. Yes, sir.

Q. How much did you have in the barn? A. We had practically what they call a Larkin's order of $10.00.

Q. Any of it been used? A. No, sir.

Q. Did you have any carriage robes? A. Yes, sir.

Q. How many? A. Two.

Q. Do you know what they cost? A. One I don't know what that cost, because that was found on the road, but one that was bought, I know what was paid for it.

Q. How much was paid for that one? A. That was $15.00, if I recollect rightly.

By the Court: Q. What was the condition of the one that was found on the road? A. That was a

good robe, but we could never find the owner, so finding was keeps. That was in good condition; it wasn't tore or mussed in any way at all.

By Mr. Whittemore: Q. Have any lard in the barn? A. Yes, sir.

Q. How much lard did you have? A. Fifty pound can. It wasn't in the barn, judge, it was in the carriage house, upstairs.

Q. Do you know what that cost? A. Twelve cents, I think, a pound, $6.00.

Q. Any of it been used? A. No, sir; not out of that one.

Q. Did you have any block and tackle? A. Yes, sir.

Q. And rope? A Yes, sir.

Q. How many blocks? A. There were two block and tackle and there was around two hundred and fifty feet of rope, one and one-quarter inch.

Q. Do you know what that cost? A. Yes, sir.

Q. What did it cost? Tell us how much all of that cost, if you know. A. I do.

Q. What do you know? A. The two block and tackles cost $5.00, and the rope cost $5.00.

Q. Did you have any one inch rope? A. Yes, sir.

Q How much? A. I couldn't say, but there was a bunch of it, but what it was I couldn't say.

Q. Any cross-cut saws? A. Yes, sir.

Q. How many? A. I think there was two.

Q. And do you know what they cost? A. I couldn't state positively, but I think $75 a piece.

Q. Any mowing machine blades? A. Yes, sir.

Q. How many A. I think there was three.

Q. Do you know how much they cost? A. $2.25 a piece.

Q. Any paint? A. Yes, sir.

Q. How much? A. Possibly there was ten gallon or over; it is hard for me to state just the amount of gallons.

Q. Do you know how much that cost? A. Some of it cost $1.50, and some of it cost $1.00. The barn paint cost $1.00, and the paint that was used on the house cost $1.50.

Q. Any linseed oil? A. Yes, sir.

Q. How much? A. I think there was ten gallon.

Q. Do you know what that cost? A. At that time I couldn't tell you, but I know what it cost immediately after the fire for new oil, but I couldn't tell what that cost; no sir. ,

Q. Well, immediately after the fire was there any change in the—what did it cost you immediately after the fire? A. Well, that fall, that is, when we were building up in September, I built the new chicken house, and I bought oil to paint it with.

Mr. McCarter: We object to that.

Objection sustained.

Q. Any harness oil there? A. Yes, sir.

Q. How much? A. Well, there was pretty close to five gallons. We had bought five, and there was only a little bit used out of it.

Q. Do you know how much that cost? A. That cost fifty cents a gallon.

Q. Any knife grinder for machine blades? A. Yes, sir.

Q. Do you know how much that cost? A. I think it was $4.50.

Q. Any belting? A. Yes, sir.

Q. How much did you have? A. There was forty-four foot of six-inch belting.

Q. Do you know how much it cost? A. Well, no, I can't tell you the cost of that. It cost us more than it was worth.

Q. Did you have any engine tools? A. Yes, sir.

Q. Do you know what they cost? A. I know what they cost, but I can't tell you each item now because I bought them when we bought the boiler.

Q. Have any bushel baskets? A. Yes, sir.

Q. How many did you have? A. It seems to me there was two dozen and a half, that is thirty.

Q. Do you know what they cost? A. They cost fifty cents apiece to buy; split rattan.

Q. Had they been used? A. Oh, yes, they had been used some.

Q. Did you have hoes and shovels and picks? A. Yes, sir.

Q. And a grub hoe? A. Yes, sir; crow bars.

Q. You have had to buy farming utensils, in the nature of hoes and shovels and picks, and things like that, haven't you, about the farm? A. Yes, sir.

Q. From time to time, as needed? A. Yes, sir.

Q. Now, to save detail, what would you say would be the value, considering the use these farming utensils had had that you had in the barn, such as hoes, picks, rakes, and shovels and etc., small utensils? A. You mean lump them as a whole?

Q. Yes, I want to save time? A. Why, $25.00 as a lump.

Q. For all the farming tools? A. Yes, that is a small figure.

Q. Have any car mover? A. Yes, sir; new one.

Q. How much did that cost? A. $4.50.

Q. Any fertilizer? A. Yes, sir.

Mr. McCarter: In view of the fact that Mr. Goodman has said that he could recall quite plainly the contents of what he called the outside buildings, I think the line of ex-

amination conducted by Judge Whittemore is objectionable as leading. I don't mean to say that if my house is burned down tonight, I would be expected to recall distinctly everything that was in it, and I could not; but, inasmuch as the witness has volunteered the information that he does recall, then it does seem to me that it is unnecessary for the counsel to adopt the practice which he has, perhaps naturally of calling his attention to each set of articles. It is certainly leading, and while, perhaps, under certain circumstances, it would not be objectionable for that reason, it does seem to us that under the circumstances it is, because, as I understand it this gentleman seems to have a phenomenal memory —I wish I had half as good—and he says he can remember them all, and he can go right down through the barn and remember every article that was in there, and under those conditions we are impressed with the idea that the method of examination of Judge Whittemore is improper, and, therefore we suggest that going through the rest of this list we let this gentleman tell us just what the articles were, as well as what they were worth.

Mr. Whittemore: Of course, all these things have to be taken reasonably, your Honor. There were five barns out there and he says he can remember them. If your Honor desires I will let him go on and try.

A. I think I can tell you what was there and give you the location of them.

The Court: The witness, apparently, is

disputing what you say. The witness says not only can he tell you what articles were there, but he can give an exact geographical location of them. If he can, let him go on.

Q. Mr. Goodman, suppose you begin with the woodshed and tell us what was in that? A. Well, that is the woodshed (indicating); that contained wood; and there was a washing machine there.

Mr. English: Don't go a mile a minute.

The Court: I don't think that the witness is obliged to accommodate his speed to that of counsel. I think he has a right to give his testimony, and he may give it. You asked for it that way, and now he may go on. Go right on, Mr. Goodman.

A. There was wood piled up here (indicating); right in the corner is where we kept the washing machine.

Q. When you specify an article, Mr. Goodman, will you give its value, or cost, at the same time?

The Court: Wherever that cost or value is in your own personal knowledge, from having purchased it, or been present at the time of its purchase.

A. All right. This wood wasn't bought. That we cut in the woods, so I can't tell you the exact value of that, because I didn't buy it. It was all split and cut up and sawed. That was piled across there (indicating) in this way. In this corner (indicating) there was a coal box with a half a ton of coal. Do you want to know the cost price of that? We deal in coal.

Q. Tell it. A. That was worth $5.30 a ton; that is wholesale, delivered on the track. In this corner (indicating) was a washing machine, and I am not positive of the price, but I think it was

around $4.50 or $5.00. That was a toilet (indicating). Starting in here there was a door here (indicating) going upstairs.

Q. Starting where? A. In the carriage house. We are done with the woodshed.

Q. Don't say here, but tell us what it is. A. All right.

The Court: Name the building as it is named on the map.

A. This is the carriage house (indicating). We are starting that now. Going up the stairs here (indicating) right alongside there is where we kept part of the tools, that is, the picks and hoes and shovels; if you lump those there is a $25.00 sum for the whole amount. Going up the stairs, right over there (indicating) was the pot stove that cost $16.00. Over the middle of the carriage house, which was just about slightly over my head, we had some stringers laid over, and there is where the berry crates were, and the berry baskets. The berry baskets were $4.50 a thousand, and there was two thousand of them. The berry crates, in my recollection—

Q. Don't tell us about them. A. I thought you wanted me to go over the whole list.

The Court: Just what you haven't told.

A. Over here (indicating) was a garden bench, and the tools lay there. In under here, right on the first floor, was the two seated carriage. The runabout stood in the centre, and the buggy stood there (indicating). That wasn't burned, because my mother had it out. Under the stairs there was just odds and ends of tools. Going from the carriage house to the wagon house, on that side, right there (indicating) is where the one wagon stood that was burned. Next to it is a vacant place where the other one wagon should have

stood, but that was out under the apple tree and that was saved. Next to it there was a centre place there and two wagons were in there and two in here (indicating). In there, in the back, was the spring wagon. In front of it was the newest runabout. On this side is where there was five hundred foot of chestnut lumber, valued at five cents per foot; that is board measure. Going from the wagon house in here, here is the horse stable door, right there (indicating); that horse there was out; this horse was out; and that horse was out; there was a vacant spot in there where there was a separate stall and had half door in front of it where we could open to go in the barn. Right here is where the gray horse stood (indicating.) That one Dr. Sinclair got out. The black mare died. This horse was out, and also this horse. This horse was out, mother had that; that wasn't burned. Upstairs was some of the bedding hay that was in dispute, and also about here is where this half a stack stood that we cut off as we wanted to use it.

Q. In the barn yard? A. In the barn yard. Under that wagon shed—I am skipping some—there was some plows, and this Acme harrow stood in the back.

Q. What was the plow worth? A. $12.50. There was two two-horse plows and one one-horse plow. They were all burned. $12.50 is what the plows cost when they were new.

Q. What was the other one? A. They were $12.50 when new.

Q. How old were they? A. The Oliver plow was older than the Syracuse, but we hadn't used that very much. We bought that especially for a man we hired, an Irishman, that wanted to use an Oliver plow.

Q. How old was it? A. That plow possibly might have been seven or eight years old. Possibly not so old.

Q. That will do. A. Outside of this wagon shed —no, it wasn't, it was over here (indicating) was where the two harrows stood. The spike toothed harrow, that was burned.

Q. What was that worth? A. I don't know that. We got as far as the horse stable and the bedding in here. That barn there, from that door over to here (indicating), within four foot of the horses, the horses stalls were there, and from there, from within four foot to here (indicating).

Q. What was there? A. That was solid with hay to the roof. There was no mow overhead at all, but only space to walk in under. The horses were generally in this end, and when we built the stable we piled the hay in there sixteen feet high.

Q. Go to the next barn. A. That barn there was hay to the top of that. That was a sixteen foot barn, and the hay was about half way up.

Q. You are referring to the wagon house? A. Yes.

Mr. McCarter: The witness has no right to say what he did not see. How can he tell us what he thinks about that. That is perfectly incompetent.

A. If the barns hadn't been filled with hay we would not have taken and hauled four loads over to the neighbor's barn to put them in.

The Court: It does not necessarily follow because he was in the house that he could not see, from where he lay as he pointed out, whether any hay had been taken out or not. It does not appear that he does not know what he is talking about. He has pointed out that he lay in the house where

he could look out to the barn. Why should one say that he could not see? I think maybe he could.

Q. Tell what you know and saw yourself, and then we will avoid trouble. You have told about the hay now. Go over to the other barn. A. This barn here was filled with hay—

Q. What was that, number two? A. Number two, but not to the ground. Half way up was cow stables under there, and from there to the peak was filled with hay. This barn was filled.

Q. Did you see that filled with hay yourself? A. Yes, sir; I filled it before I was taken sick.

By the Court: Q. Would anybody take it out without your order? A. No, sir. Number three was filled with hay, this barn over here (indicating).

By Mr. Whittemore: Q. What was that? A. This barn, number four, there was hay put in there after I was confined to the house. That barn was full of hay before—

Q. Tell how much was there before you went in the house? A. The barn was full.

Q. When you went in the house? A. Yes, sir; but hay settles. If you leave hay stand a week you can possibly get another load in the barn, which they put in.

Q. You heard that? A. I didn't hear it, because I could see it. The horses' heads, when they were standing putting hay in this barn, the horses' heads come out past the pig pen, and I could see them from where I lay. That was filled with hay half way up. In under here was where the oak lumber was, in question.

Q. Have you described all the contents of all the buildings? A. I think I have.

Q. Did you have any oats in there? A. Yes, sir.

Q. Where were they? A. Well, that I didn't see.

Q. Did you have any meal? A. Yes, sir.

Q. Where was that? A. That was in the feed bin.

Q. Did you see it? A. No, sir; I did not.

Q. Have any rye? A. Yes, sir.

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

Q. Where was that? A. That was up in the shop.

Q. What do you call the shop? A. Up here (indicating).

Q. In the wagon house? A. In the wagon house.

Q. How much rye was there there? A. I couldn't tell you now exactly.

Q. Have any shelled corn? A. Yes, sir.

Q. Where was that? A. In the corn crib.

Q. How much was there? A. Well, I wouldn't attempt to say exactly.

Q. Any mixed feed? A. Yes, sir.

Q. How much did you have? A. Half a ton.

Q. Do you know how much that was worth? A. $11.00.

By Mr. English: Q. Ton, or half ton? A. $11.00 for the half ton.

By Mr. Whittemore: Q. Did you have any movable feed bin? A. That was in the barn, right along in front of the horses.

Q. Was that fastened to the building? A. No, sir.

Q. Do you know what that was worth? A. Well, no, because we built that ourselves. I couldn't tell you.

Q. Did you have any small feed bins? A. Yes, sir.

Q. Do you know what they were worth? A. No, we built them ourselves.

Q. Did you have any corn sheller? A. Yes, sir.

Q. Where was that? A. That was in the corn crib.

Q. What did that cost? A. I couldn't tell you that.

Q. Any cutting machine? A. Yes, sir; that stood, when I went in the house it stood right alongside of this feed bin, in the main barn in the driveway. Whether it was moved out after that I can't say. Used it for hay cutting.

Q. Do you know what that cost? A. I think we paid $12.00 for that.

Q. Any small sashes? A. Yes, sir; those were up in the carriage house, right there where the berry crates were.

Q. How many of those did you have? A. When we had the house remodeled there was—I think that the house had thirty-three windows into it, and we put in full pane sash, and those were up there. We sold Mr. Mays, I think, two of them, to put in his stable, and the balance were up there.

Q. Then there were thirty-six? A. Originally.

Q. How much did you sell Mr. Mays? A. I think we sold him two windows. What I call two windows is four sashes.

Q. So that you had about sixty-two sash? A. Yes, sir.

Q. What were they worth, do you know? A. Well, for the four I sold Mr. Mays we got seventy-five cents apiece for them.

Q. Any large sash there? A. Yes, sir.

Q. Where were they? A. Right over the work bench here.

Q. Do you know how much they were worth? A. No, I wouldn't attempt to say.

Q. Any axes and hatchets and hammers? A. Those I bunched in with the small tools.

Q. Any cow hide leather? A. Yes, sir; a half a cow hide.

Q. Do you know how much that was worth? A. That cost, I think, $4.50—$4.25 or $4.50.

Q. Any asphaltum? A. Yes, sir.

Q. Where was that? A. That was right under the two seated carriage. In a barrel rolled under the two seated carriage there.

Q. Do you know how much that cost? A. Yes, sir.

Q. How much? A. $2.50.

Q. Any wire netting? A. Yes, sir.

Q. Where was that? A. One roll of it was on the corn crib, tacked on to keep the rats out from there. The other roll had never been put on. It was bought to put on, but hadn't been put on yet. That was up in the top of the carriage house.

Q. Do you know how much that roll cost? A. I wouldn't be positive of it. No, I will not state any price.

Q. Any rollers there? A. I don't know what rollers you mean.

Q. Any paris green? A. Yes, sir.

Q. How much? A. We bought twenty-five pound and had never used any, because we intended to use it on this potato patch we were hilling up the day of the fire.

Q. Do you know what that was worth? A. No, I couldn't say, but I think around twenty-two cents a pound at that time.

Q. Any brass kettle? A. Yes, sir.

Q. Where was that? A. That was up in the shop.

Q. Do you know what that cost? A. No, sir; I do not. That had been in the family a long while.

Q. Any large chains? A. Yes, sir.

Q. Where were they? A. They hung right here (indicating). Right over the door there was a rack we hang chains on.

Q. How many did you have? A. Well, we had some eight or ten.

Q. Do you know how much they cost? A. We bought some that winter to haul this lumber down, and we paid around an average of $1.00 apiece for them, for the heavy ones.

By Mr. McCarter: Q. Did the chains burn? A. No, they didn't burn, but they were no good when they come out of the fire. They were like punk.

By Mr. Whittemore: Q. Did you have any fertilizer? A. Yes, sir.

Q. How much did you have? A. I think there was only a couple of bags of that. That laid back of this wagon house here.

Q. Do you know how much that cost? A. I think that was potato fertilizer and that cost $1.50 a hundred, and these bags were two hundred pound bags, if I recollect rightly. That is four hundred pounds.

Q. About one-fifth of a ton? A. Well, it is $1.50 for one hundred.

Q. Did you have any iron horse mangers? A. Yes, sir.

Q. Were they fastened to the barn? A. No, sir; they were not. We bought them to put in and they weren't put in yet. The horses were eating out of boxes. They lay on top of these feed boxes. There was six mangers and six hay racks.

Q. Do you know how much they cost? A. $1.50 for the six hay racks and $1.50 for the six horse mangers.

Q. You spoke of chestnut lumber. Do you know what that was worth? A. Yes, sir.

Q. How do you know what it was worth? A. Well, by inquiries at the time. I bought the lumber, not the oak, but this chestnut was the balance we had out of ten thousand foot that I had bought in the lump. I paid the man so much a thousand foot for it.

Q. How much did you pay for it? A. We paid him $12.50 a thousand foot, taking it as a whole, but there was a lot of scrap lumber there that wasn't worth near as much as this was. This was the best out of the ten thousand foot that we had culled out of the lot to sell at a better price.

Q. Did you do any work on the lumber? Did you do any sawing on it? A. No, that was all sawed when we bought it. I can give you the man's name we bought it from.

Q. Have any ice tongs? A. Yes, sir.

Q. Any rubber sheet? A. Yes, sir; I think it laid in the carriage. There is where it was generally kept.

Q. Do you know what that cost? A. No, I couldn't state postively.

Q. Did you have any canvas sheets? A. These wagon covers what we used to cover the wagons up.

Q. How many? A. Three.

Q. Do you know what they cost? A. Well, we bought a lot of muslin and made them out of the muslin I couldn't just exactly state now.

Q. Any carriage covers? What you have just mentioned was carriage covers? A. Carriage covers.

Q. Well, did you have any canvas sheets? A. Well, unless that means the big canvas we had to put over loads of hay. That is all I can recollect. We had a big canvas to put over hay if we wanted to leave it out doors over night.

Q. Do you know how much that cost? A. That was second-hand when I bought it. I went in West street and bought it and I paid five dollars for it.

Q. Have any keg of nails A. Yes, sir.

Q. How much was there in the keg? A. Well, I think the keg was one hundred pound originally, and I don't think there had been much used out of it. I am pretty positive it hadn't.

Q. Do you know how much that cost? A. Well, if it was 6d nails it cost $3.25. If it was 12d nails it cost $2.00 even.

Q. What was this? A. I couldn't tell this, but it runs in my mind it was 8d nails.

Q. Did you have a binder? A. Yes, sir; that stood out under the end of this barn right there (indicating).

Q. Have any binding cord? A. Yes, sir; that was up in the top of the shop.

Q. How much did you have? A. There was a fifty pound pail and I don't think there was never any used out of it.

Q. Do you know what it cost? A. Twelve cents a pound.

Q. Any poles for sleigh or carriage? A. Yes, sir.

Q. Does that go in with the price that you have got on these carriages? A. No, sir; that is a separate article altogether. Those were up in the top of the shop.

Q. How many poles did you have? A. Two.

Q. What did they cost, do you know? Did you buy them? A. One of them.

Q. Well, the one that you bought, how much did that cost? A. I think I paid $2.50 for it at a sale.

By the Court: Q. What kind of a one was the other one? A. The other one was just as good.

Q. Was it the same kind? A. Same kind, yes. Iron poles for light horses.

By Mr. Whittemore: Q. Any spring seat? A. Yes, sir.

Q. Did that belong to one of these carriages? A. No, that was a separate spring seat altogether.

Q. What did that cost, do you know? A. $2.25.

Q. Any ladders? A. Yes, sir.

Q. How many ladders? A. Three.

Q. Do you know what they cost

Mr. McCarter: They might have been made on the farm.

Q. Were they? A. Yes, sir.

Q. Any truck shafts? A. Yes, sir; one pair. Those were out under this end barn here (indicating).

Q. What did they cost? A. I don't know.

Q. Any ice cream freezer? A. Yes, sir.

Q. Where was that? A. Well, that was in this wood shed here somewheres around the washing machine.

Q. Do you know what that cost? A. I think we paid $3.50 for that when we bought it.

Q. How old was it? A. Oh, possibly three or four years old, or five year old. I wouldn't state positive.

Q. Breast pads for horses? A. Yes, sir.

Q. How many did you have? A. There were two pair.

Q. What did they cost, do you know? A. Seventy-five cents apiece; $1.50 a pair.

Q. Open bridle? A. Yes, sir; there was one open bridle.

Q. Do you know what that cost? A. No, sir.

Q. Any oil cans? A. Well, you mean—does it

say five gallon oil cans? We had some five gallon oil cans.

Q. Well, how many? A. Five.

Q. Was there any oil in them? A. Yes, sir.

Q. How much? A. Well, there was five gallon cans—there was five five-gallon cans; one of them had harness oil in; two of them—

Mr. English: He has testified to the oil.

Q. Do you know what the cans themselves were worth? A. Yes, sir; they were worth seventy-five cents apiece.

Q. Did you buy them? A. That is the deposit on to them. When I bought the oil there was that deposit on them, and we hadn't got the deposit returned yet.

Q. Did you have any cylinder oil? A. Yes, sir.

Mr. English: He testified about the oil, Judge.

Mr. Whittemore: Not cylinder oil.

A. I mentioned machine oil and paint oil, but we did have five gallons of cylinder oil.

Q. How much did that cost? A. That cost seventy-five cents a gallon. That was worth more than the machine oil.

Q. Did you have any machine oil? A. Yes, sir.

Q. How much? A. Well, there was practically five gallons of it. Possibly might have used say two quarts out of that last five-gallon can.

Q. How much did that cost? A. That cost fifty cents a gallon.

Q. Any rocking chair in the barn? A. Not in the barn.

Q. Well, any rocking chair burned up that wasn't in the house? A. Right up in the carriage house where the men's beds were, where they slept, right there.

Q. What kind of a rocking chair was it? A. Well, it was a porch rocker.

Q. Any other chair there? A. Yes, there was a couple, or two or three odd chairs.

Q. Any paint brushes? A. Yes, sir.

Q. How many, do you know? A. I couldn't say.

Q. Any coal screen? A. Yes, sir.

Q. Where was that? A. That stood in the wood shed.

Q. Do you know what that cost? A. The wire for it, without any labor putting it on, cost $3.25.

Q. Any sand screen? A. Yes, sir.

Q. Do you know how much that cost? A. That stood out in the carriage house right, in the corner.

Q. Do you know what that cost? A. No, sir.

Q. Was there any fence paneling? A. Yes, sir; down here there was twelve panel of fence, down here alongside of the hen house, and over to here, and there there was a gate (indicating).

Q. Any grind stone? A. Yes, sir.

Q. Where was that? A. That was in the wood shed.

Mr. English: I think he testified to that.

A. That is a different kind of stone. A grind stone is one thing, and a knife grinder is another thing.

Q. Do you know what this grind stone cost? A. No, sir.

Q. Do you know what the washing machine cost? A. I mentioned that before. I think it was $4.50.

Q. Were there any wringers? A. Yes, sir.

Q. What are the wringers? A. What they wring clothes with.

Q. What did they cost, do you know?

By Mr. English: Q. Did you buy them? A. No, I will have to plead—I didn't buy them.

By Mr. Whittemore: Q. Any express wagon there? A. Yes, sir.

Q. Where was that? A. That I expect was piled up around the wood pile, or under the shed, where the boy generally leaves it. I couldn't state where that was, because he was using it.

Q. Do you know how much that cost? A. That cost $2.25.

By Mr. English: Q. Did you buy it? A. Yes.

By Mr. Whittemore: Q. Any boy's kit of tools? A. Why, yes there was.

Q. Whose was that? A. That belonged to my brother.

By Mr. English: Q. Who owned this boy's express wagon, your father? A. Well, it belonged to my younger brother; I presume he was a minor and I suppose it belonged to my father.

Mr. Whittemore: Strike out the boy's express wagon.

By Mr. Whittemore: Q. Any hoop iron for barrels? A. Yes, sir.

Q. How much did you have of that? A. Well, I couldn't say now.

Q. Any cider barrels? A. Yes, sir.

Q. How many? A. Those were down in the house cellar.

Q. How many? A. Well, I couldn't tell you now. There was some five or six of them, at least, or four or five.

Q. Do you know what they were worth? A. From seventy-five cents to $1.00.

By Mr. McCarter: Q. Any cider in them? A. No, we drank the cider all up.

By Mr. Whittemore: Q. Did you have an iron vice? A. Yes, sir.

Q. Where was that? A. That was right upstairs on the edge of the work bench, here (indicating).

Q. Do you know how much that cost? A. No, sir; I do not.

Q. Any wagon body in the place? A. Yes, sir.

Q. Where was that? A. That stood out right along here behind the wagon house, or carriage house.

Q. Was that burned? A. Yes, sir.

Q. Do you know how much that cost? Where did you get that wagon body from? A. Same as we got the other one, we made it.

Q. You say your father was a carpenter? A. Yes, sir.

Q. Do you know what the value of the lumber was that went into the wagon body? A. Yes, sir.

Q. How do you know? A. Well, I know by buying it.

Q. What did you say was the value of the lumber?

Mr. McCarter: He ought to tell the exact amount that went in.

A. I can tell you in a couple of minutes, if you will let me use a paper. 10′ 6″, 3′ 6″ outside, and 22″ high; that will tell you how many square feet of 1-1/8″ stuff.

Q. Can you estimate the value of that wagon body? A. Well, if a wagon body is built of 7-8″ stuff it will cost you $20.00 to buy it.

Q. You say a lighter wagon body would cost $20.00? A. Yes, sir; this one, with the labor and the wood—

Q. That will do. Any whiffletrees there? A. Yes, sir.

Q. Where were they? A. They were in this corner of the carriage shop. Possibly some of them have been laying in by the wagons.

Q. Do you know how much they cost? A. No, I do not, because those were hand made.

Q. Any curtains for the buggy? A. Yes, sir.

Q. Do you know how much they cost, or did they come with the buggy? A. They come with the buggy, but we had to buy a pair to put on again when those were burned up, right immediately after the fire.

Q. What did it cost you for a new one? A. $3.50.

Q. String sleigh bells? A. Those hung under the stairs where the harness was.

Q. Do you know how much they cost? A. $2.25.

By Mr. English: Q. Did you buy those? A. I was along when they was bought.

By Mr. Whittemore: Q. Did you go about with your father generally? A. Yes, sir.

Q. How was your father's condition of health? A. My father wasn't very well, and hadn't been for some years, and if he went anywheres to buy anything I am more than positive I went with him.

Q. Who was the most active man on the place, in the management of the farm, in attending to things you or your father? A. Me.

Q. Did you have any oiled canvas clothes? A. Yes, sir; two at least.

Q. Do you know how much they cost? A. $3.50 apiece, if I recollect rightly.

Q. Any wood racks? A. Yes, sir. two.

Q. Do you know how much they cost? A. Those were hand made again.

Q. At your place? A. Yes, sir.

Q. Any corn fodder twine? A. Yes, sir.

Q. How much was it? A. Why, I should judge it was in the neighborhood of forty to fifty pounds.

Q. Do you know how much it cost a pound? A. I think that year it cost seven and one-half cents,

or eight the fall before. I got one hundred pounds and we didn't use it, and I should judge there was about forty or fifty left.

Q. Any potato barrels? A. Yes, sir.

Q. How many? A. I couldn't say now. There was quite a number.

Q. Five? A. Oh, yes, there was more than five.

Mr. McCarter: Don't lead him.

A. There was a number of them; more than five or six or like that. There was possibly twenty-five at the least.

Q. Do you know what they were worth? A. They were worth six cents to ten cents apiece. The flour barrels was worth ten cents.

Q. You are talking about potato barrels? A. I called them potato barrels when I wrote out the list.

Q. You are testifying from memory? A. You must be looking at the list when you ask me.

Q. You say they are five, six and ten cents apiece? A. Yes, sir; they are five to ten cents apiece, according to the quality of the barrels.

Q. Any hose out there? A. Rubber hose?

Q. Yes. A. Fifty foot.

Q. Do you know what that cost? A. Around ten cents a foot, somewheres in that neighborhood; I wouldn't be positive. I bought it but I wouldn't be positive.

Q. Any force pump? A. Yes, sir.

Q. Where was that? A. That stood right here (indicating). There was a cistern under there.

Q. What place is that? A. That is by the house. There was a cistern there, and this force pump stood there.

Q. Do you know how much that cost? A. I think it was seven—it was over $7.00, but I

wouldn't say what. It was $7.00 and odd money.

Q. Have any chicken wire? A. Yes, sir.

Q. Where was that? A. Why, it was around the chicken fence here (indicating), part of it.

Q. Around where? A. Around the chicken fence.

Q. How much did you have?

By Mr. McCarter: Q. Was this fence loose or fastened up? A. Some of it was fast and some of it was loose.

By Mr. Whittemore: Q. How much did you have altogether? A. We bought four rolls altogether, and we had used about two and a piece off them.

Q. Do you know how much that cost a roll? A. $4.50 a roll, I think it was.

Q. Did you have any wire for flower beds? A. Yes, sir.

Q. How much? A. Why, there was about a roll of one-inch wire.

Q. How much did it cost? A. That is 1¼ cents a square foot. There is one hundred feet in a roll.

Q. About $11 then, a roll? A. It would be $1.10.

Q. Did you ever have any governor for your engine? A. Yes, sir.

Q. Where was that? A. The engine and boiler stood right by that button ball tree. The saw stood right alongside of that button ball tree. The engine and boiler stood right out there (indicating). There was a walk up here and the engine and boiler stood right there (indicating).

Q. Had that engine been used that day? A. No, sir. It had never been used since it was moved there.

Q. What happened to the governor on the en-

gine? A. It was broke by the house falling on it. The beams fell out.

Q. Do you know how much that cost? A. I think that is $12.

Q. Any lubricator on the engine? A. Yes, sir.

Q. What happened to that? A. That was melted up.

Q. How much did that cost? I suppose you bought the lubricator with the engine? A. That come with the engine, but I priced them at the time.

Q. Did you get one after the fire? A. No, the engine was no good. The engine was all warped up.

Q. Did you get any steam gauge? A. No, sir.

Q. You say the engine was no good after the fire? A. No, sir.

Q. How long had you had that engine? A. Why, I think we had it four years.

Q. What became of it after the fire? A. Sold for old junk. Crown sheet was all warped.

Q. How much did it cost you? A. We paid $225 for it.

Q. How much did you get for it when you sold it? A. I don't know. We sold it by weight. I couldn't tell you now. With a lot of other junk. Probably might have turned four or five dollars.

Q. Have any fence wire? A. Yes, sir.

Q. How much did that cost? A. Well, I can't tell you what it cost. It cost $2.25 a roll, but I don't know how much there was. I don't recollect now. There was some there in the shed.

Q. Have any chickens on the place? A. Yes, sir.

Q. Any of them destroyed through the fire? A. Yes, sir.

Q. Do you know how many? A. I couldn't tell, no. Not exactly, I wouldn't attempt to.

Q. Now, Mr. Goodman, do you know of the alteration and remodeling of your house? A. Yes, sir.

Q. Do you know how much was spent on it in remodeling? A. Yes, sir.

Q. How much?

Mr. McCarter: It does not seem to me that the cost of the alteration of the house is of any value to measure the value of the old house. It may be that one may very extravagantly or foolishly fit up a house and may put up a lot of foolish things that the idiosyncrasy of the owner may desire. I think the witness could properly show what was the original condition of the house before the remodeling, and then show what remodeling was done, but to undertake to say that they spent one thousand, or two thousand, is not competent.

The Court: There is no foundation laid yet for showing the pertinency of this testimony.

Mr. McCarter: No, sir.

The Court: I think that is correct. If you show what the original condition of the house was, and then what the repair was, that will be all right.

A. I can.

Q. How long before the fire was this alteration made? A. Why, it was somewheres around six or seven years.

Q. And what kind of a house was it before the alteration was made? A. Why, it was what they call a story and a half house, and the upstairs bedrooms come part this way before they begin to go across. There was no attic to it whatever.

Q. What was done to the house in the alteration? A. Well, there was a new upright upstairs put in that corner.

Q. The south corner? A. The south corner. And it was raised up and made a three-story French roof house, with a tin roof. The second story was new ceilings and new side walls on the outside. They was raised up and made full size rooms, so that they come up this way and three rooms finished up in the attic, and the room in this corner of the house was what they call the store room.

Q. The west side? A. On the third floor; yes, sir.

Q. Any extension built on the house at that time? A. Yes, new kitchen altogether. The old kitchen was practically a wreck, and it was just tore right off, and a new kitchen, the same width of the house by thirteen feet high was put on, with a partition through right about there.

Q. Had the house been painted after the alteration? A. It was painted right immediately after the alteration, and the spring before the fire we just put one hundred and twenty—

Q. Don't say that. Had you had any painting done just before the fire? A. Yes, sir.

Q. How long before the fire? A. I think that Mr.—the painter from Westfield had finished it up some time in June.

Q. What work had he done? A. Give it two coats from top to bottom.

Q. Outside? A. Outside.

Q. Any work done inside? A. We had papering done inside, but not by Mr. Hunt.

Q. What papering did you have done inside, and when? A. It was practically papered from top to bottom, because they were all new walls.

and after they were all dried that spring we had Hodge Brothers paper it.

Q. That was that spring? A. Yes, sir.

Q. I want to ask you what those alterations cost that were made at the time the house was remodeled?

Objected to. Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed. Sealed accordingly.

Q. Had there been any new buildings built on that farm, Mr. Goodman? A. Yes, sir.

Q. What? A. That was remodeled. This was built (indicating).

Q. What is that? A. That is the wood shed.

The Court: Say, the building marked on the map in evidence wood shed was remodeled. A. The building marked on the map "water closet" was new.

Q. Do you know what the water closet cost? A. $35.00.

Mr. Whittemore: Any objection to that?

Mr. McCarter: Yes.

Q. How long before the fire? A. That spring before the fire, somewheres along in April or May.

Mr. Whittemore: I think it may be shown safely, the cost of it.

The Court: What is your objection?

Mr. English: That is no addition to the land, which is right within your Honor's ruling. It is a building attached to the land, and he is giving the cost of it. I don't understand that under your Honor's ruling that is admissible. My objection is that it is part of the real estate.

The Court: It is part of the real estate.

Mr. English: I don't understand that he can show the individual cost of these

buildings, to go into the value of the measure of damages.

The Court: I have not yet ruled that.

Mr. English: May I ask your Honor's ruling?

The Court: I have not yet ruled that. I said this morning that I would permit Judge Whittemore to prove what the value of the reproduction of the building was, and then I would permit him to show depreciation, as bearing upon the question of value of the building at the time of the fire. I understand that is what he is trying to do, and that is what, in this particular, I am going to permit him to do, and you may have an exception to the ruling.

Mr. English: Prays exception.

Exception allowed. Sealed accordingly.

WM. H. SPEER (Seal)
Judge.

Q. What was the cost of that water closet? A. $35.00.

Q. Proceed and tell us what else there was new. A. Building marked "carriage house" on the map was new a year before the fire.

Q. Was there any change in the condition of that building up to the time of the fire? A. After it was put there it was painted.

Q. Had it deteriorated any, or become out of order in any way? A. No, sir.

Q. What did that building cost? A. $326.00—

Mr. McCarter: We make the same objection.

The Court: Same ruling.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly

WM. H. SPEER (Seal)
Judge.

A. That was $325.00 or $326.00.

Q. Tell us what else there was? A. At what time do you refer?

Q. Before the fire, what else was there new on the place? A. From what time?

Q. What buildings were built on the place by your father, after he went to live on it? A. This wagon house marked "wagon house" on the map was new.

Q. When was that built? A. That was built, I should judge, about four or five years before the fire.

Q. Was that painted? A. Yes, sir.

Q. What was the condition of that wagon house, as to repair, at the time of the fire? A. It was just as good as the day it was built, practically, because it had been painted that spring again.

Q. And what did that cost?

Mr. English: Prays exception.

The Court: Same ruling.

Mr. English: Same objection.

Exception allowed. Sealed accordingly.

WM. H. SPEER (Seal)

Judge.

A. I can't tell you, because father and I built that ourselves, with a hired man's help, and I couldn't tell you.

Q. Anything else that was built on that place by your father? A. Corn crib.

Q. How was that built? A. That was built the same way.

Q. Anything else new? A. This green house. That was built the same way.

Q. Anything else? A. The hen house had been remodeled. It used to stand over here (indicating), and we had remodelel it about a year or

two years before, and put it over there close to the buildings.

Q. Anything else? A. This pig pen here (indicating).

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

Q. Any thing else? A. We new sided this barn here (indicating).

Q. Number what? A. Barn number two, from this mark to that mark (indicating).

Q. On the side towards the railroad track? A. On the side towards the railroad track. The main barn, from this mark to that mark (indicating), had new barn doors from top to bottom on the railroad side.

Q. How long before the fire? A. Well, I couldn't state that exactly, but some four or five years, or somewheres around there, and we put new flooring in the main barn, out of some of this chestnut lumber that I say we bought, from one side to the other, two inch flooring. This horse stable (indicating) was brand new.

Q. Who built that? A. Mr. Wilcox and Pope.

Q. Do you know how much that cost?

Mr. English: Same objection.

Q. How long before the fire? A. If I am not mistaken that was just a year before the fire, but I won't be positive. It was in the middle of the summer. It might possibly have been two years, but I won't be positive of that, but that is the last new building built later than the carriage house, but I think that was a year and this was a year and a half.

Q. How was that as to its condition of repair at the time of the fire? A. Why, it was new, practically new.

Q. Had it deteriorated any? A. No, sir.

Q. Do you know how much it cost?

Mr. English: We object.
The Court: Same ruling.
Mr. English: Prays exception.
Exception allowed. Sealed accordingly.
WILLIAM H. SPEER, (Seal)
Judge.

A. No, we furnished the lumber, and that was built by days' work, and what it cost I couldn't tell you now.

Q. Do you know how much the lumber cost? A. I can tell you what the siding cost per foot.

Q. Do you know how much siding went into it? A. No, sir; I couldn't tell you.

Q. Now were there any trees on your place that were injured? A. Yes, sir.

Q. Point them out and tell what kind of trees they were? A. Right here (indicating) there was two pear trees that were burned.

Q. Indicating near the big barn? A. Near the stacks of hay.

Q. Go ahead. A. This one was burned on one side. These three are cherry, and two quince bushes, near the lane going west from the barns, were killed from the fire running across, and the hot blaze, that same day. Right here (indicating) there was four apple trees.

Q. Between the— A. Railroad fence and the carriage house and the wagon shed. They were right behind there, I should judge (indicating). There was one right here and one there (indicating). These two first ones next to the shed were completely dead.

Q. Which were they? A. The two nearest the carriage house was completely dead. The two nearest the railroad was scorched so on one side that they will possibly live another year and then they are gone.

Q. Go on. A. Right here there was a button ball tree.

Q. Where? A. Between the wood shed and the house was a bean tree. That bean tree is alive. walnut tree, right immediately back of the house was burned.

Q. Go ahead. A. Right there was a pear tree in front of the house that was burned. Right here there was a sweet bow apple tree that was burned.

Q. In front of the house? A. In front of the house, practically this was the front of the house. That would be the end of the house.

Q. The south side was the front of the house? A. Yes, sir. Here there was a maple, and a maple here (indicating). Just off in front of the house was a bean tree. That bean tree is alive. We trimmed that back and it sprouted out, but it does not look very nice. That is a cherry tree here (indicating), and that is dead. A mulberry tree there (indicating), and that is dead.

Q. Any grape vines? A. Two grape vines back of the house. They were small vines, trimmed back.

Q. What happened to them? A. Well, they are dead. Down here in the chicken yard there was two peach trees, and they are dead. There was a locust tree right by the smoke house, that is dead. There was a pear tree at the corner of the house, that is dead. There was a locust tree off here to the south of the greenhouse, that is dead. There was an apple tree right by the corner of the greenhouse, that is dead. And that is the well (indicating). The boards were burned off of the well.

CROSS-EXAMINATION by Mr. McCarter:

Q. Boards burned off the well? A. Yes, sir.

Q. Bucket hurt? A. Didn't have no bucket.

Q. When did you quit going to school, Edward? A. When I was about sixteen.

Q. And as I understand it, after that you became the man of the house, and your father kind of took second place? A. No, you didn't hear me say so.

Q. How old were you when you moved on the place? A. We moved there the spring that I was born.

Q. And with the exception of the new buildings that you have testified to, and the remodeling of the house, the other buildings were there at the time you moved? A. Well, there had been repairs on them.

Q. I didn't ask you that. I ask you if the other buildings, other than the new ones you spoke of, and the remodeling of the house were there at the time you moved there, when you were born? A. Yes, sir.

Q. How many acres were under cultivation on this farm? A. Why, about fifty-five.

Q. About fifty-five under cultivation, and of that how much was hay?

Mr. Whittemore: I suppose that means that year?

Mr. McCarter: Yes, that year.

A. I am trying to count up what we had in other crops and I will tell you in a moment. We had about seven acres under the plow.

Q. Seven under the plow? A. Yes, sir.

Q. Go on. A. We had about five acres on pasture, near, I should judge, and that would make fifty.

Q. Five on pasture? A. Yes.

Q. The balance of the fifty-five was hay? A. Yes, sir.

Q. Did you have any wheat or oats? A. No, sir.

Q. All you had were under plow, and the pasture, and hay? A. Yes, sir.

Q. How much of the ninety acres was swamp meadow? A. There was about fifteen acres in swamp meadow. That cut us two crops a year.

Q. How much wood land? A. About between twenty and twenty-five acres.

Q. What did you raise under the plow that year? What did you have under the plow that year? A. Potatoes, and just a garden crop is all. We had no potatoes at all.

Q. How many cows did you keep? A. Well, we generally keep in the neighborhood of—

Q. I ask you how many cows you kept that year? A. I can't tell you now.

Q. Do you mean to say that is one thing you don't know, how many cows you had? A. Well, we had in the neighborhood of four or five.

Q. Don't you know? A. That is as near as I will say.

Q. What was the trouble with you, typhoid, you say? A. I had typhoid malaria.

Q. And when were you taken sick? A. I was ailing for about three or four weeks before I was confined to the house.

Q. During that ailing did you attend to all your chores? A. Yes, sir.

Q. When did you take to the house? A. I think it was about a week or ten days before the fire, I won't be positive, but it was somewheres around there.

Q. It was an unusual thing for you to be sick, wasn't it? A. That is the only sickness I have ever had.

Q. And you can't remember when it was that you took to the house? A. Not at the present time I can not.

Q. How early did you begin to crop your timothy hay that year? A. Why, we began our

clover and timothy—we had some with a little clover with it—we began the first of June.

Q. First of June? A. Yes, sir.

Q. Timothy hay the first of June? A. Yes, sir.

Q. And did you see any of the hay that was taken in the day of the fire? A. Only at a distance, through the window.

Q. Was that timothy? A. Yes, sir.

Q. So that you were cropping timothy hay from June 1st to July 19th? A. Yes, sir.

Q. Did you sell your hay? A. We did sell hay; yes, sir.

Q. Well, did you make a practice of selling it, or did you use your hay yourself? A. Yes, sir. we couldn't feed the whole amount of hay we grew and we had to sell, certainly.

Q. Had you been confined to the bed at all during your illness? A. No, I hadn't been confined right to the bed; no, sir.

Q. Had you been compelled to stick to your bedroom? A. No.

Q. The worst that happened, you lay on the lounge? A. Yes, I couldn't walk around.

Q. And I understood you to say that on the day in question, when the fire occurred, you were so ill that you had to be carried down to the button ball tree near the road? A. Not the button ball; the willow tree.

Q. As I understood you, as you lay on the sofa, your head was towards the road, or your feet towards the road? A. My head was towards the road.

Q. And looking out of the window you lay looking right toward the railroad? A. Yes.

Q. And you testified that you saw the express go by? A. Yes, sir.

Q. Don't you know that the railroad is sunk

ten feet or more below the grade of your property at that point? A. No, sir; it is not.

Q. Well, could you see the cars? A. Yes, sir.

Q. As well as the top of the engine? A. Yes, sir.

Q. You distinctly remember that express going by that day? A. Yes, sir.

Q. You heard the whistle? A. Yes, sir.

Q. Where was it when it whistled? A. Right in front of me. Right in front of those two apple trees that I pointed out was dead, right across like that.

Q. The first you knew that there was a fire was when Edward came in? A. Yes, sir.

Q. Who was Mr. Axel's two partners of whom you spoke? A. I don't know whether I can tell the name or no.

Q. Do I understand you to testify that Mrs. Van Velsor gave this farm to your father? A. No, sir.

Q. You said that nothing was paid at the time the deed was signed? A. Well, neither there was.

Q. Well, when was whatever was paid passed over, before or after the deed was signed? A. Well, I can't tell you how long afterward; it was all taken on a mortgage.

Q. Why did you say nothing was paid at the time the deed was signed? Did you wish to give this jury the impression that nothing was paid for the deed? A. No, sir; there was no money paid at the time the deed was signed, and I answered correctly there was not.

Q. How much mortgage did your father give back? A. Mrs. Van Venselor—

Q. (Repeated) How much mortgage did your father give back? A. She took a second mortgage of a thousand dollars, and the Savings Bank

in Rahway took a mortgage of three thousand dollars.

Q. Who arranged the loan with the Savings Bank at Rahway, your father or you? A. I couldn't say.

Q. What? A. I couldn't say that; I don't know.

Q. You were not there at that time? A. No.

Q. You didn't see that thing transacted, did you? How long ago was that? A. That was the year the place was bought.

Q. In '99? A. Yes.

Q. Well, don't you know that your father was only able to borrow three thousand dollars on the place, and that the other amount that made up the total consideration of four thousand dollars was taken by Mrs. Van Velsor's second mortgage, that is a fact, isn't it? A. No, it is not.

Q. Why didn't your father borrow four thousand dollars off the Savings Bank? A. Because she said, I will let the thousand go, Jim; you can just raise three thousand dollars and I will let the one thousand dollars go and take a second mortgage for it.

Q. Did you know Mr. Gans, the administrator with the will annexed of old Mr. Van Velsor? A. I knew him slightly, because I was a boy then.

Q. At the time your father bought this place for four thousand dollars, all of it on bond and mortgage, one thousand being on second mortgage, was the main barn there? A. Yes, sir.

Q. Was barn number two there? A. Yes, sir.

Q. Was barn number three there? A. Yes, sir.

Q. Was barn number four there? A. Yes, sir.

Q. I think the pig pen wasn't? A. That wasn't there.

Q. Was the house there, the old house? A. The lower part of it was; not the top part.

Q. The story and a half house you spoke of? A. Yes, sir.

Q. And with the exception of the kitchen wing, it was the same size on the first floor as before? A. With the exception of the porch. The porch was all new. Ninety-nine feet of porch, I think, was new.

Q. The main portion of your house, are these figures correct, 26x42? A. I think they are.

Q. Do you know where those figures came from? A. The foundation.

Q. Had your father been a farmer before he took this place and commenced to farm it? A. Yes, sir.

Q. When had he worked at his trade as carpenter? A. Well, that was before he went to farming.

Q. Well, when had he been a farmer before he bought and farmed this place? A. Well, he was a farmer from sixteen years old until he went to farming the year I was born, 1878.

Q. I suppose you remember that too? A. No, that I can't remember.

Q. 1878, when you were born, down to the time he died, he continued farming? A. Well, I made a mistake there. In between that time, from '72 for about seven or eight years, he was working at the carpenter's trade, six or seven years, or something like that.

Q. Who ran the farm then? A. We didn't have any farm. I am only telling what my father said, I don't know.

Q. As long as you knew— A. As long as I knew he was a farmer; yes, sir.

Q. What help did you have on this farm? Take the five years before the fire, on the average how many hired men did you have? A. Well, on the average we had about three—three to four.

Q. Of the matured age of Andrew and John? A. We had older men.

Q. Well, at this time, the time of the fire, how many hired men had you? A. Three.

Q. Andrew—A. Andrew, John and Fred.

Q. Andrew was twelve? A. Yes.

Q. And John was about fifteen? A. Yes, sir.

Q. And Fred was about how old? A. I couldn't tell you. I didn't inquire his age. I hired him but I didn't inquire his age.

Q. How old was your father at the time of his death? A. I think he was fifty-six.

Q. And he died a year or two ago? A. 1907.

Q. Do you remember when the railroad went through there? A. Yes, sir.

Q. That left how many acres on the west side? A. I can't tell you that; I don't know.

Q. Well, the best of your judgment now? A. I won't figure it.

Q. Well, you have done a good deal of figuring; don't you think you could figure that? A. There was eighty-nine acres as a whole. I can't give you the figures on either side.

Q. Have you no idea to give to this jury of the size of your farm west of the railroad? A. No, sir; I can't.

Q. You have been a farmer now for how long, since you were sixteen? A. Yes, sir.

Q. And did you farm the other side, as well as this side? A. Yes.

Q. And you can't give any idea to this jury how much of your farm was on the west of the railroad? A. I will give you the figures, but I won't guarantee them right, if you want them.

Q. How did you know how much you had in hay, and how much under plow, if you had no idea how much you had on the other side of the

railroad? A. Well, the hay wasn't all on the other side of the railroad.

Q. I don't suppose it was, but I ask you again if you have no idea how much of your land—A. I just figured up field for field.

Q. What? A. I took what I thought we had in potato, and what we had in our garden stuff.

Q. That was a mere guess, was it? A. No, sir.

Q. Well, if you could estimate how much you had in potatoes by acres, why can't you estimate how much you had on the west of the railroad? A. Because it takes four barrels of potatoes to plant an acre, on an average, and we planted so many barrels and that made five acres of potatoes.

Q. How much hay did you cut off an acre? A. Well, we cut two ton—one and three-quarters to two ton. We didn't weigh it right in the field there, but we figured that much.

Q. Is that an estimate, or is that a calculation based on experience? A. Well, I can tell very near what an acre of hay will cut, a good stand of hay, per acre.

Q. I am not asking you what you ought to cut, I ask you how much in fact you did cut off of your acreage of hay, per acre? A. Well, take on an average that would be about right.

Q. What? A. What I said.

Q. Acre and three-quarters? A. I didn't say that.

Q. I mean a ton and three-quarters? A. Yes.

Q. Did you ever go over on the west side of the farm, west of the railroad? A. Was I ever there?

Q. Yes. A. Why, certainly.

Q. Been over it all? A. Yes.

Q. Familiar with it? A. Yes, sir.

Q. Was there any hay over there? A. Yes, sir.

Q. Any swamp meadow over there? A. Yes, sir.

Q. Any woodland over there? A. Yes, sir.

Q. Where were your potatoes, both sides, weren't they? A. Both sides.

Q. Now, I don't suppose these articles that you bought, which you have detailed with such particularity, had all been bought at once? A. Certainly not.

Q. They had been bought as occasion required, from your earliest recollection, hadn't they? A. Well, no, they hadn't all been bought from earliest recollection. There was lots of articles there that I don't know the price of, and I don't know what they cost, because what they bought when I was a boy they used up.

Q. Answer my question, please. I didn't ask you anything about the price at all, I ask you if the articles of which you have spoken and described and given the cost, had been bought from time to time as occasion required, or if they had all been bought at once, just before the fire? A. As the occasion required.

Q. A great many of them, practically all of them, were second-hand articles, were they not? A. No, sir; when they were bought they were not.

Q. I mean at the time of the fire? A. Why, of course they were.

Q. Have you ever attended a vendue of farmers' materials? A. Yes, sir.

Q. This engine and boiler that you spoke of, was that right out in the weather? A. Yes.

Q. Wasn't covered by any kind of a shed? A. We had canvas around it, but no shed, because we moved it from place to place.

Q. How long had that stood in the place where it was at the time of the fire? A. Why, possibly a couple to three months—couple of months.

Q. What did you use it for, sawing wood? A. Used it for sawing wood.

Q. And was it a movable engine, on wheels? A. Yes. Well, it wasn't on wheels at that time. We had wheels to put on it, but we took the wheels off when we went to saw, and set it down.

Q. You hadn't used it since when? A. In the spring we moved it down to Mr. Darby's.

Q. Had you loaned it out to Mr. Darby? A. No, sir; we brought the wood up from the place where I got that chestnut lumber I am speaking about.

Q. Where was Darby's? A. I can't show you on the map there, because it isn't there.

Q. I didn't ask you that; I ask you where Darby's was? A. Towards Fanwood.

Q. How far? A. About a mile and a half.

Q. And where did you say this engine stood at the time of the fire? A. Right there (indicating).

Q. Between the house and the button ball tree? A. In here (indicating).

Q. How long had you had that engine and boiler? A. Around five years—four or five years.

Q. Now, won't you tell me how it is that you could remember on the stand the price of, I should think, four or five hundred different articles, making a rough guess, and can't give me any estimate of the acreage of your farm across the railroad? A. Well, I hadn't figured the farm out in feet and inches, and I bought those things, or helped buy them, and I know what they cost. I never paced the farm off each side of the railroad to tell what it is.

Q. Whenever anything was bought, you went along? A. Yes, sir.

Q. Always? A. Yes.

Q. Where did you and your father generally buy things? A. Some of them we bought in Plainfield. Some in Rahway. Some in Westfield, and a great many of them in New York.

Q. And that had been true from the time that you were sixteen, that you always went along and participated in the—A. Not quite as young as sixteen, no.

Q. Well, when did you commence on this? A. Well, when I was about eighteen or nineteen, when I was big enough to help take charge.

Q. Were you a partner of your father's? A. Well, in the coal business. Not in the farm.

Q. I am talking about the farm? A. No, sir.

Q. Were you paid a salary by your father on the farm? A. No, sir.

Q. You were just living there? A. I got my living out of it.

Q. Did you devote your time to the coal business? A. Not all of it, no.

Q. Well, some of it? A. Some of it. The majority of it.

Q. Where was the coal business? A. Well, it is marked on the map "coal yard."

Q. Well, I hadn't heard that. That is your coal yard? A. I presume so.

Q. Well, don't you know? A. Well, it wasn't mine.

Q. Well, whose was it, your father's? A. Yes.

Q. And you had an interest in it? A. Practically, yes.

Q. What? A. Practically, yes.

Q. And did you have an office over there? A. No.

Q. Did you keep coal there at that place called "coal yard?" A. No.

Q. Suppose I lived in the neighborhood and wanted to buy a ton of coal, how would I get it,

come to you? A. My father, or anybody around would take an order from you, or by mail or telephone.

Q. And you devoted the bulk of your time to the coal business, did you not? A. Well, yes, practically. I was on the farm. No, I can't say I did. I was on any job that I happened to have occasion to go at, from one to the other.

Q. Who bought the coal, you? A. Well, sometimes I did, and sometimes father ordered by letter, and more times I would go to New York and order it from New York.

Q. Who did you buy it off, Lehigh Valley? A. Lehigh Valley Coal Company.

Q. Would you go to New York and buy it yourself? A. Certainly; order it; whatever you call it. We would not carry it out with us.

Q. Wouldn't carry a dozen tons out in your pocket? A. No.

Q. You are quite facetious this afternoon? A. You will have to get another word. I don't understand that word.

Q. Whenever you wanted to buy some coal, you and your father would always go to New York together? A. No, not always. I didn't say so.

Q. When you went to New York to buy coal, would you go together, or would you go alone? A. Sometimes he would order it, and sometimes I would order it, and sometimes he would write for it, and sometimes he would telephone for it.

Q. Did you get a salary in the coal business? A. No, sir; I did not.

Q. How long since you were twenty-one? A. How long?

Q. Yes. A. Well, since I was twenty-one.

Q. How long ago was that? A. Well, it was about eleven years ago, or ten or twelve.

Q. And I judge you have been married several years? A. I think I was twenty-two when I was married, if I recollect rightly.

Q. And you and your wife live home there? A. Yes.

Q. And you were neither interested in the farm, except as you got your living out of it, nor did you get any salary from the coal yard, is that right? A. No, sir. If I wanted five dollars I would go and ask papa for five dollars. If I wanted a dollar he would give me a dollar, or whatever I wanted. I never had any salary, nor any stated sum.

Q. Do you know how much insurance you and your father collected?

Objected to.

The Court: What is the relevancy of that?

Mr. McCarter: I think it is relevant for two reasons. In the first place it would be evidential of their estimate of the value of this property, some evidence of that, that they had seen fit to insure it for so much. Secondly, that I don't understand that it has ever been excluded from cases of this character, although, perhaps, the courts have held that the jury should be instructed that notwithstanding the fact that the plaintiff did have insurance, nevertheless this suit might be for the insurance company, or something or the other of that kind, and therefore the fact that he did recover does not mimimize the amount that he can recover, but I never knew of a single case where it had been, in fact, excluded. I think it has always been permitted, perhaps for the reason I first suggested, that it is some evidence of

the value put by the owner upon his property that was destroyed. Also, as a material fact in the case, and I urge it on both grounds.

The Court: What do you say about it, Judge Whittemore?

Mr. Whittemore: I think it is clear, of course, that it is no measure of the damages. I don't think I need to say anything about that. There was a case of Weber vs. somebody that decided that point in this State. I don't think it is admissible as evidence of the value of the property, because there are a great many elements that enter into the making of a contract for insurance. There is, of course, the rate you have to pay. Of course, this is farm property and the amount of insurance that a person might carry might be no evidence of the value of the property there; no evidence of the property or furniture that I have in my house, or that a man has out in a farm house, where he has to pay high rates, as long as he desired to carry some insurance. It may be also affected by the question of whether or not he considers it a good business principle for him to carry full insurance, or only part insurance. Now, I think that is a matter of some common knowledge that some people do not think it wise to spend money on a large amount of insurance, as long as they have some to protect them against partial loss. It is common experience for people to have property destroyed by fire and to find when it is destroyed that they only have a fraction of the value of that property in insurance, and it by no means indicates, when

that is discovered, that they are falsifying the value of their property. That can be shown beyond question. The fact that I might carry a small line of insurance on my business could not be considered any criterion of the value of what I might have in my business. I could speak of a matter of personal experience on that question. Now, I think if we prove that there is one thousand, or two thousand, or ten thousand insurance on this place, it does not signify anything at all. It only signifies the amount of indemnity that that man desired to have and the amount of indemnity that he was able to get, or the amount of money that he wishes to expend in insurance, and nothing more than that. He might have property ten times or one hundred times for what he carries insurance. Now, we are, to some extent, familiar with the condition of affairs with regard to farm property, where there is no protection at all, and I think it is pretty well known that the insurance rates on farm property are very high, and a person might wish to carry along a nominal amount of insurance at the time, without its having any bearing upon what he considered his property to be worth. I do feel that there can be no question upon that point. I don't know that I have any decisions on that point, but I can, of course, on the other point, give your Honor an abundance of authority on that, that it is no evidence—it is not the measure of damage, nor it does not bar recovery.

The Court: I think I will overrule your question, Attorney General. I do not

know of any case that has permitted it, or that has sanctioned its admission, and, of course, the general rule is that if you can show reason for its exclusion that you can not possibly admit it, but this is one of the class of questions that I do not think is permissible, because I do not think it is a fair basis from which the jury could infer value and, therefore, I overrule it, and give you an exception.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly.

WILLIAM H. SPEER,
Judge. (Seal)

The Court: I overruled your question on another ground, which was, you asked him how much insurance he collected. I think the question is entirely bad on that ground.

Mr. McCarter: I think so too. I was going to modify it for that reason.

Q. You know, do you not, Mr. Goodman, that your father had his property insured?

Mr. Whittemore: I object to that. It is irrelevant, as I take it, whether he had it insured, or didn't have it insured.

The Court: I don't see its relevancy. Question overruled.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly.

WILLIAM H. SPEER,
Judge. (Seal)

Q. Did your father carry insurance upon both the personal property and the buildings?

Objected to. Objection sustained.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly.

WILLIAM H. SPEER,
Judge. (Seal)

Q. Is it not a fact that after this fire your father recovered from the insurance company the full amount for which the property destroyed had been insured?

Objected to. Objection sustained.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly.

Q. How much was this insurance?

Objected to. Objection sustained.

Mr. McCarter: Prays exception.

Exception allowed. Sealed accordingly.

WILLIAM H. SPEER,
Judge. (Seal)

Q. You don't pretend, do you, Mr. Goodman, that the cost prices that you have put upon all these thousand and one articles, about which so much time was spent this afternoon, are the value of those articles, as between a person that wanted to buy them and a fellow that wanted to sell them, at the time of the fire, do you? A. Oh, no.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. Do you know of any consideration for the transfer of this property from Mrs. Van Velsor to your father, other than the money consideration concerning which you have testified? A. Yes.

Q. What other consideration was there for it?

By Mr. McCarter: Q. How do you know that? A. I was there.

By Mr. Whittemore: Q. What was there?

Mr. English: Where was it and when was it? What were the circumstances?

Q. What other consideration was there than the money consideration? What was the occasion? A. Friendship.

Mr. English: I object to that. That is not a valid consideration.

Q. What do you mean by friendship? How was Mrs. Van Velsor related to your father?

Mr. English: Apparently this is not going to be a legal consideration this witness is going to testify to.

The Court: He is going now, apparently, to draw some conclusions and state some inferences on his part with respect to the relationship that existed between his father and Mrs. Van Velsor, and I do not think that is good evidence.

Mr. Whittemore: It is a matter of pedigree.

The Court: Oh, yes, if you want to prove relationship by those in the family, you can show the relationship, but that is altogether a different thing from saying that a woman was moved to perform an act because of relationship.

Q. Did you know anything that Mrs. Van Velsor said? A. Yes, sir; I was present at the time she said it.

Q. From what she said did you know the reasons or inducements for making the transfer of this title?

Mr. English: I think that is this witness's conclusion from what he heard at that time. I object to this question on the ground that it naturally calls for a conclusion.

Objection sustained.

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

Direct-examination by Mr. Whittemore:

Q. Where do you live, Mr. Huett? A. Rahway.

Q. What is your business? A. Real estate.

Q. How long have you been in that business? A. Eighteen or twenty years.

Q. Do you know Mr. Goodman's farm? A. Yes, sir; I think so.

Q. How long have you know Mr. Goodman's farm? A. Well, how long have I known it? I have known it seventy-five years.

Q. Who owned it before Mr. Goodman? A. Terry Little, when I first knew it.

Q. Is that the Thomas T. Little that has been mentioned? A. Terry.

Q. Is his first name Thomas? A. They call him Terry Little. All I ever heard was Terry Little; now they call it Little, but it was Little once.

Q. What has been your experience in real estate? What character of property have you sold? A. Oh, I have sold a good many farms.

Q. In what neighborhood? A. How?

Q. In what neighborhood? A. Around Rahway and up New Dover, and I sold some farms there near Mr. Goodman.

Q. You have sold farms near Goodman's? A. Yes.

Q. Have you been on Goodman's place? A. Yes, sir.

Q. Do you know the buildings that were on it previous to the fire? A. Yes, I did know.

Q. How familiar were you with those buildings? How well did you know them? A. Well, I know them, after Mr. Goodman got there he

fixed them all up in good order and kept them in good order while he lived there.

Q. Did you see them during the time he lived there? A. Oh, yes, I seen them a few days before they were burnt, I think.

Q. How many? A. A few days before they were burnt.

Q. How did you happen to see them there? A. Well, I went up to Mr. Mays' place, that next farm this way, about selling that, and I had to go there sometimes about two or three times a week, the way I come to see them.

Q. How did you happen to see Mr. Goodman's place that day? A. I have been up to his place several times.

Q. Did you go up to his place that day? A. Not on particular seeing his farm.

Q. Did you go up there that day that you were at Mays', before the fire? A. No, I went up after the fire. I went up before the fire and went up after the fire.

Q. How long before the fire were you at the place? A. I guess I was there a week or ten days before the fire.

Q. Did you see the buildings then? A. I don't mean to Mr. Goodman's; I mean to Mr. Mays'.

Q. When were you at Mr. Goodman's place before the fire? A. I suppose three or four months, or four or five months.

Q. Did you see the buildings then? A. Yes.

Q. What was the condition of the house? A. Well, the house was—the time I first seen it the house was all repaired up and didn't look like the place at all. Had it all in nice order.

Q. How were the barns? A. Barns and everything was in good order, the buildings. There was quite a good many buildings, and everything

was in order and he always kept them in order.

Q. Do you know the values of farms down in that neighborhood? A. Some thinks I do; I don't know whether I am any expert on it, but they call on me to value farms often; I don't know why it is.

Q. Do you know the value of this farm down here? A. Mr. Goodman's?

Q. Yes. Did you know it, and what its value was in 1905? A. Yes, I thought I did. Well, I should say—

Q. Wait a minute. Did you know its value in 1905? A. Before the fire?

Q. Yes. A. Yes.

Q. With the buildings on it? A. Buildings on it, yes, before the fire, I knew it then.

Q. How long did you say you were in business? A. Eighteen or twenty years.

Q. Real estate business? A. Yes, sir.

The Court: He has already qualified. He said he was in business for a long time, and he bought and sold farms in that neighborhood.

Q. What was the value of this farm, Mr. Huett, before the fire, with all the buildings on it? A. Well, I think the farm was worth about $12,000.

Q. Now, did you see the farm after the fire? A. I seen it after the fire, yes.

Q. Any buildings on it then? A. Looked like a wilderness to me; to see so many buildings on it, and then swept them off clean; it done very clean work.

Q. Can you form any opinion as to what the value of the farm was in 1905, after the fire, without the buildings? A. Well, I think it was $12,000. I would not have those buildings burnt for me—

Q. Not that. What was it worth without the buildings? A. I think it would have knocked half that off the farm; $6,000.

Q. Do you know how many acres there were in the farm? A. Not exactly, but I heard; I think it was something like eighty or ninety acres.

Q. Had you seen the farm?

The Court: He said he had been on it.

A. Oh, I have been on it years and years ago.

Q. Do you know the character of the land? A. Mr. Goodman's?

Q. Mr. Goodman's. A. Oh, yes, I know the character of the land.

Q. What it was good for? A. Yes.

Q. And woodland there? A. Well, I didn't think the wood was of very much value.

Q. Was there any swamp land? A. I think there was about—oh, I couldn't tell to an acre, but I think, when I knew it altogether, I don't know whether they sold any off since, I think there was somewhere near forty acres, if I am not mistaken.

Q. Forty acres of what? A. Of this low land. This miry land, I call it.

Q. Forty acres of low land? A. You can't go on it no season of the year good. Forty acres of it, about.

Q. How about the woodland? A. Well, the wodland, this woods is scattered all through the soft land.

Q. All through the low land? A. Yes. It is what they call a swamp, and it has got the proper name.

CROSS-EXAMINATION by Mr. English:

Q. You say you have known this for seventy-five years. How old a man are you, Mr. Huett? A. Well, I am very close to eighty-six years old, if I live about a month and three or four days.

Q. I hope you do. A. I know that farm seventy-five years, and I have known it more than that a little, because I used to go there when I was young.

Q. Are you giving your estimate of the value of the farm as you knew it seventy-five years ago, or as you knew it in 1905? A. Seventy-five years ago I didn't know much of the value of farms. I used to go along with my father as a shaver, but I will guarantee that I recollect it eighty years ago.

Q. Are you active in business at the present time? A. I am active in business at the present time.

Q. And you were in 1905? A. I have been in business, yes.

Q. How many farms have you sold in the vicinity of the Goodman farm? A. Well, I sold the Mays' farm, and I sold the farm this side of Mays', in that vicinity. Mays' farm is this side, east of it.

Q. I mean before July, 1905. Are you speaking of that time? A. I have sold Mays' farm, that farm, I sold Mays' farm since the fire.

Q. Well, I don't want that. I want to know what farms you sold before the fire? A. Well, I sold that farm this side of Mays' farm.

Q. Before the fire? A. Before the fire, yes; and that farm I sold twice before the fire. I don't know what the man's name was.

Q. I don't care about the name. A. Yes.

Q. Any others in that vicinity, before the fire? A. Not exactly in that neighborhood. I have got a string of farms that I sold, and if you want to know I can get them for you.

Q. You don't like this woodland very much, as I understand your testimony? A. Some part of it. Some part of that farm is good.

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Q. The woodland, I am talking about. A. I don't think the woodland is very valuable.

Q. How much did you put that in at an acre? A. I don't put it in more than $25.

Q. About $25 for the woodland? A. I think that would be all right.

Q. And the swamp meadow, how much do you put that in for an acre? A. The meadow land?

Q. Yes. A. Well, I never thought meadow land was worth much more than $100 an acre. I thought that was pretty good.

Q. Do you think it is worth as much as that? A. $100 an acre? No, not without buildings; with buildings on it.

Q. Leave out the buildings now. How much is that swamp meadow land worth on that farm? A. That swamp land is worth about $25, the swamp part of it, and the other, I suppose is worth about $60.

Q. Then you put in the swamp meadow at about— A. Maybe it would bring $100 now these times.

Q. I don't care about now, Mr. Huett. You put in the swamp land at about $25 an acre? A. Yes.

Q. About the same as you rate the woodland? A. That is the woodland, mostly woods, when you can go on it. Have to be clear kind of weather to go on it, though.

Q. In making up your estimate, how much did you value the tillable part of the farm per acre, with the buildings on? A. There was a good many buildings there, and very good. I should think that farm, with the buildings on, that tillable land, was worth about $120 an acre.

Q. This is the time of the fire I am speaking of now, in 1905. A. You mean with the buildings on?

Q. I want you to understand my question. I want you to consider the Goodman farm in 1905, before the fire, and tell me how much, with the buildings on the farm, you value the acreage of the tillable part of the land, how much an acre? A. Well, I value it at about $65 an acre, the tillable part.

Q. The tillable part at $65 an acre? A. Yes. You mean without the buildings?

Q. I want first with the buildings. How much with the buildings? A. Well, I can't tell what it was, but I say I don't think it was worth over $12,000.

Q. I am not asking you that now. I want to know how much you value the tillable part of the land per acre, with the buildings on the farm? A. With the buildings on the farm?

Q. Yes, in 1905? A. That is, when the buildings were on there?

Q. Yes, when the buildings were on there. A. I should think it was worth $100 an acre—about $120 an acre.

Q. $120 an acre, the tillable part, with the buildings? A. Yes.

Q. How much do you value the tillable part of it per acre, with the buildings off? A. I just told you a while ago, about $65.

Q. Well, now, isn't $120 per acre a good price for a farm for farming purposes? A. Well, it used to be a pretty good price, but I don't think it is nowadays.

Q. You are talking about nowadays? A. Yes.

Q. I am talking about 1905, five years ago? A. You are talking now before the fire?

Q. Before the fire, yes. You think that was a reasonable figure before the fire? A. Yes, I do so.

Q. Have you sold any other farm around there at the rate of $120 an acre, at an average of $120 an acre, with buildings on? A. No, I don't know as I have. Yes, I sold Mays' since the fire.

Q. Not since the fire. Before the fire. A. Well, I sold Mays'.

Q. Before the fire? A. Since the fire.

Q. I am talking about before the fire. A. Well, I offered Mays—

Q. No, no, not what you offered for it. I want to know if you know of a single sale, before the fire, of any farm around there, at the rate of $120 an acre, with the buildings on? A. That I sold?

Q. That you sold? A. Well, if I had my list here I could very soon tell.

Q. You can't tell now, as you are on the stand now? A. No, I can't tell now, because I have so many that I don't recollect. I don't recollect hardly what I sold Mays' for since.

Q. The woodland and the swamp land were not affected very much one way or the other by the destruction of the buildings, were they? A. They was what?

Q. The swamp land, and the woodland on the Goodman farm, were not affected much one way or the other by the destruction of the buildings, were they? A. Well, I should think it wasn't worth as much as when the buildings were on. It was worth more than when they were off, wasn't it?

Q. I am not asking you that. I am asking you about the swamp land and the woodland. A. The swamp land, I say, is worth about $25 an acre, and you can figure it up to suit yourself, and the other was $65 without the buildings. I think it was worth $12,000. I don't know as I could get $12,000. I didn't sell it for $12,000, but I put the

value on it as $12,000, because some places ain't but a half a mile off and you will get as much again for the place.

Q. Suppose, just before the fire, this farm had been put up for sale at public auction, do you think it would have brought $12,000?

Objected to.

The Court: I think the objection is well taken.

Q. Is this valuation of $12,000 based on the idea of a person who is willing to buy, and of Mr. Goodman, who is willing to sell his farm, or is that valuation what you think it ought to bring? A. Before the buildings burned?

Q. Before the buildings were destroyed? A. Yes, I think, before the buildings was burnt, I could have got probably in the neighborhood of $12,000 for it.

Q. You don't know? A. Well, I think I could. You have got to think something about it.

Q. And you think you could only have got $6,000 after the fire? A. I think the farm is damaged $6,000, with the buildings burned off.

Q. I didn't ask you that. I ask you if you think that you could have only sold the farm for $6,000 after the fire? A. After the fire?

Q. Yes. A. Well, I might have sold the farm for less, and I am doubtful at that.

Q. You might have sold it for more? A. Might. I couldn't tell. I always ask enough, if I don't get it.

Q. Well, now, I want to know if the existence, or the nonexistence of the buildings on that farm had any particular bearing on the value of the swamp land and the woodland, leaving out the tillable acreage entirely? A. I know the woodland is sprinkled with wood on to it in the swamp,

and as far as I suppose the value of that, I value it at $25 an acre, and if I wanted it myself, it is more than I would give for it any time.

Q. That is more than you would give for it? A. But it might bring it. I should certainly ask that for it, and probably more.

Q. You would not expect to get it, although you asked it? A. I don't know. Sometimes people don't think alike. It always takes two to make a bargain.

Q. I am still trying to get an answer to the question whether the existence of the buildings made any difference in the value of the woodland? A. The buildings being on it?

Q. You take the farm with the buildings on. Now, segregate from the farm the woodland and the swamp land, about forty acres. Did the destruction of the buildings make any particular difference in the value of that swamp land one way or the other? A. Not much.

THEODORE A. POPE, re-called:

Direct-examination by Mr. Whittemore:

Q. Did you do the work there of remodeling the house? A. I worked on the house for Mr. Wilcox.

Q. Do you know what the cost of remodeling the house was? A. No.

Q. Did you build any buildings on there new? A. Yes.

Q. What buildings did you build new? A. The carriage house, horse stable, water closet; I think that is all the buildings we built new entirely.

Q. Do you know what the carriage house cost to build?

Mr. English: I object. Just answer yes or no whether you know, Mr. Pope.

Q. Do you know? A. About; I couldn't say positive.

Q. You can't say positively? A. No.

Q. Do you know how much the horse stable cost to build?

Mr. English: Just say yes or no whether you know.

Q. Do you know that? A. No.

Q. Are you familiar enough with these buildings to be able to say about what they—or to form an estimate of the cost to build them? A. Yes, I could form an estimate.

Q. Now, I will ask you, can you give me an estimate of what the cost of rebuilding the house would be?

Mr. English: I object to that for two reasons; one, because I don't think he is qualified to do it from what he has said; and the other, because I don't think that is proper evidence.

The Court: On the first ground I overrule the question I don't think he has shown qualification yet.

Mr. Whittemore: He has testified before.

The Court: Yes, I remember his testimony before.

Q. You are a builder and carpenter? A. Yes, sir.

Q. Do you take contracts for the erection—

The Court: I do not mean that he is not qualified as a carpenter. I do not think he is qualified as to the facts.

Mr. English: That is my objection.

Q. Are you familiar with these buildings? A. Yes.

Q. Is there any rule by which you can estimate the values of buildings? A. Yes.

Q. Without going into the details? A. Yes.

Q. What is that rule? A. So much per foot area you can get it pretty close.

The Court: What is the rule?

Mr. English: So much per foot area.

Q. Do you know enough about the character of the house on Mr. Goodman's place to give us the value, according to the square foot area? A. Yes, sir.

Q. What would you say would be that value?

Objected to.

The Court: I suppose that whether he does know enough to give such an opinion is a question the jury has got to pass on and I suppose, therefore, it becomes necessary for him to show what he knows to the jury, by testimony, before he expresses his opinion on whether or not he can say how much it would cost per square foot area to reproduce a building. It is easy enough for anybody to get up and say, I know what it would cost, or I know enough about the building, but it may very well be, when the facts are manifested to the jury, that he does not know enough to express any such opinion at all.

Q. Do you know what kind of a porch there was around that house? A. Yes.

Q. Do you know what kind of timbers went into it? A. Yes.

Q. Do you know what kind of siding there was in the house? A. Yes.

Q. How do you happen to know all this? A. I worked on the house and helped repair it.

Q. Do you know what kind of beams there were in it? A. Yes.

Q. Do you know the flooring—

Mr. English: I think the witness ought to tell what he knows, and not be led along like this by the plaintiff's counsel.

The Court: This is simply asking him to say in detail that he possesses knowledge on what he previously said he possessed knowledge on in general. He said, I know it. What does he know? What was the siding and what was the flooring and what was the shingling, what were the rafters, and all those things. If he can tell us what he knows about it that is a different thing.

Q. Describe what kind of a porch there was? A. Porch six feet; 2x8 beams; 2x8 sill.

Q. What kind of posts? A. Turned posts six inches.

Q. What kind of flooring? A. Seven-eighths pine flooring.

Q. What kind of a roof? A. Tin roof.

Q. How large of a porch was there there? A. Porch was about six feet wide, and in the neighborhood of ninety feet around.

Q. What kind of siding did they have in the house? A. 2x4.

Q. Do you know what size beams there were? A. Yes, 2x8.

Q. And what kind of flooring there was? A. Seven-eighths flooring.

Q. What kind of trim did you have? A. Beaded trim; trimmed with a bead at the edge.

By Mr. English: Q. What kind of wood? A. Pine.

By Mr. Whittemore: Q. What kind of a roof did it have on? A. Shingle roof with a tin top.

Q. What were the doors, stock doors? A. Stock doors, that is, four panel doors.

Q. What kind were the window frames? A. Double hung sash.

Q. Stock windows? A. Yes.

Q. How were the walls covered? A. Plaster.

Q. What kind of stairs did it have in? A. Straight staircase with a baluster at the side.

Q. New or old stairs? A. Practically new.

Q. Do you know what material the stairs were made of? A. Pine.

By the Court: Q. Do you do tin work? A. No, sir.

Q. You don't? A. No, sir.

Mr. Whittemore: What is that?

The Court: He does not do tin work, he says.

By Mr. Whittemore: Q. Do you, as a builder, estimate on tin work? A. Yes, sir; we get estimates on tin work.

Q. Do you know the value of tin work, as a builder? A. Yes, sir.

Q. Without your estimates? A. Yes, sir.

Q. Was there any plumbing in the house? A. Very little.

The Court: What was there?

Q. What was in the house? A. As I remember there was a sink.

Q. Anything else? A. I don't remember.

Mr. Whittemore: Now, I think I have shown familiarity with the general character of the house. I should not think it would be necessary to go into further details, before he estimates the value, outside of to show a general familiarity, that what he said was truthful, that he knew in regard to the character of the house.

The Court: I am going to permit you to ask the question.

Mr. English: May I cross-examine first?

The Court: You may cross-examine.

CROSS-EXAMINATION by Mr. English:

Q. You are undertaking to give an estimate on the replacing of this house, at the time of the fire? A. Yes.

Q. How old was the old part of the house? A. Couldn't say.

Q. Go back a good many years, did it? A. Well, I presume it did; yes, quite old.

Q. Before the Civil War? A. Oh, I don't know.

Q That you don't know? A. I don't know.

Q. Of course, you had nothing to do with the construction of the original house? A. No.

Q. Was it filled in with brick was it that kind of a house? A. As I remember a part of it was.

Q. Part of it was filled in? A. It had been filled in, yes.

Q. Do you think now that you can estimate what it would cost to restore the old part of the house, as well as the cost of construction of the new part? A. Yes.

Q. Have you had any experience in building in houses that are filled in with brick? A. Yes.

Q. How many houses have you ever built, filled in with brick? A. I have worked on them in alterations.

Q. I don't mean that, I mean build brand new a house on the old style order, filled in with brick? A. No.

Q. You never did anything like that? A. No.

Q. Have you got definitely in your mind the size of the beams and the uprights and the flooring in the lower part of the house, which was not touched by your alterations? A. Yes.

Q. Did you take off the wall downstairs? A. No.

Q. Did you take off the clapboards, or what-

ever there was on the outside downstairs? A. Some of them.

Q. Do you know what was inside, between the outside and the inside of that house downstairs? A. Yes.

Q. The character of the material is there? A. Yes.

Q. What was it? A. It was oak timbers, as I remember, it was filled in, partly filled in.

Q. You haven't had any experience to qualify you to say what it would cost to reproduce oak timbers in a house of that character, filled in with that sort of thing, have you? A. Oh, yes. I can estimate on them.

Q. You think you can do that? A. Yes, sir.

Q. How would you go to work and figure on it? A. I would get the number of feet that was in them.

Q. I suppose you would put in the cost of the brick at the time you figured? A. Put in the cost of the brick?

Q. When you figured, you would estimate on the cost of the material at the time you made your calculation, wouldn't you? A. Yes.

Q. You would not know what it cost originally when it was put in? A. No.

Mr. English: I renew the objection.

The Court: I will admit the question.

Mr. English: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge (Seal)

DIRECT-EXAMINATION (continued) by Mr. Whittemore:

Q. From your knowledge of this building, were you able to prepare an estimate of the cost of rebuilding it?

Mr. English: Just whether you know.

A. Yes.

Q. Did you do it? A. I helped to do it.

Mr. English: That is a different thing.

Q. Who with? A. Mr. Wilcox.

Q. Where were you when Mr. Wilcox did it? A. I was with him in Westfield.

Q. I ask you what this paper is? A. That is an itemized estimate of the cost of the house.

Q. Who wrote it? A. That is Mr. Wilcox's writing.

Q. Did you see him write it? A. Yes, sir.

Q. The items and figures that are put down there represent what? A. Represent quantities and labor.

The Court: He has testified they represent what he contributed and what Mr. Wilcox contributed.

Mr. English: Your Honor ruled on it.

The Court: He already testified that sometimes when he didn't know a thing he would ask Mr. Wilcox about it, and that that would go down and that that is their conjoint and co-operative performance. That is what he said.

Q. I will ask you to give me the estimate, from this memorandum, of the cost of rebuilding this house?

Objected to.

The Court: Objection sustained. The memorandum can not be used by this witness, when he testifies it is a conjoint memorandum, made up by him, with the assistance of some one else, whose knowledge supplied a part of its contents.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

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

Direct-examination by Mr. Whittemore:

Q. You are a partner of the last witness? A. I am.

Q. Do you know Mr. Goodman's farm? A. Very well; yes, sir.

Q. How do you happen to know it? A. Well, from being there from time to time.

Q. How often have you been there before the fire? A. I suppose I averaged probably once every ten days.

Q. Ever been in the house? A. Very often.

Q. Your wife was a daughter of Mr. Goodman's, wasn't she? A. Yes, sir.

Q And you were married when? A. September 16, 1901.

Q. At the house? A. At the house; yes, sir.

Q. Have you ever been in the barns? A. Yes, sir.

Q And carriage house and wood shed on the premises? A. Yes, sir.

Q. More than once? A. Oh, yes. I have put my horse up there a number of times.

Q. Do you know the character of those buildings? A. Yes, sir.

Q. Had you ever done any work on any of the buildings? A. I think I have done work on most of the buildings.

Q. Ever do any work on the house? A. Yes, sir.

Q. What work did you do there? A. I worked for my father at the time he remodeled the house, and then I have done some few alterations after I got better acquainted with the Goodman family.

Q. Do you know the timbers and material with which that house was made? A. Yes, sir.

Q. Do you know anything about the frames and material contained in the barns? A. Yes, sir.

Q. What do you know about them? A. I know most of the old barns were oak frames and sheathed up, the regular tongued and grooved barn boards.

Q. What was their condition of repair? A. They were in good shape as a rule.

Q. Did you and Mr. Pope prepare any estimate, at any time, of the value of these buildings? A. Yes, sir.

Q When was that? A. That was after the fire sometime, I don't know just how many weeks it was, or how long.

Q. What did you do in preparing that estimate, how did you figure? A. Well, we figured the same as we always do, the number of square feet of timber it would take to erect the building and then figured—in the case of the barns I think we figured the labor and material in a lump sum, so much a foot, or so much a thousand feet.

Q. And the house, how did you figure the house? A. The same way.

Q. Well, did you figure the house in any detail? A. Yes, we go right into every detail when we figure it. We start from the girder and take the sills and the beams and the siding, and everything, and figure so much a thousand for the timber and so much a thousand for the labor.

Q. I ask you what these papers are? A. That is the estimate which was prepared after the fire.

Q. These nine sheets represent the estimate prepared after the fire? A. Yes, sir.

Q. Whose writing is this in? A. It is partly both of our writings. I will show you. That is mine.

Q. Pick out yours. A. Those are mine.

Q. Sheets one, two, three, six, eight, and one marked eight and one-half are your writing. Whose writing are these? A. They are Mr. Pope's.

Q. Who was with you when you wrote your sheets? A. Well, we were both together, the same as we always are.

Q. Did you see Mr. Pope write the other sheets in his writing? A. I am not sure about that now.

Q. Did Mr. Pope see you write the sheets in your writing? A. Yes, sir; I am quite sure that he did, because when we were together figuring I most always done the writing and he did the measuring.

Q. What figures did you put down here? Where did you get them from? A. Figures of material and labor to erect the house.

farm.

Q. Erect what? A. Buildings on the Goodman

Q. Where did you get the figures that you used from? A. Partly from the plans and partly from the foundations that were there.

Q. Did you know anything about the size of the buildings yourself, the height? A. Well, only from working there.

Q. Well, did you know from working there? A. Yes, sir.

Q. Did you make use of what you knew in preparing these figures? A. Yes, sir.

Q. Did you look over the sheets made by Mr. Pope? A. Yes, sir.

Q. Did you agree, or disagree with him as to what he put down here? A. We always go over them before they go in, and see that they agree, and see that we both agree.

Q. Well, did you agree? A. Yes, sir.

Q. The figures that you put down on your sheets, did Mr. Pope go over them? A. He did.

Q. Did he agree or disagree with them? A. He agreed.

Q Will you give us, from the memorandum, the cost of the construction of the house? A. I will.

The Court: Do you want to cross-examine?

Mr. English: Yes.

CROSS-EXAMINATION by Mr. English:

Q. You can't give an estimate without referring to these papers, can you? A. Not out of my head, no.

Q. Now, the information set forth here is partly information which you had, and partly which you got from other people, isn't it? A. Certainly.

Q. You don't pretend that you knew, of your own knowledge, everything that is stated in here? A. Yes, I know everything as stated in there, that that is what it would require to construct the buildings that we were told to figure on.

Q. Well, for example, did you know the exact number of feet of sills? A. Certainly.

Q. Where did you get that information from? A. From the plans that were there.

Q. Sills of what? A. Sills of the house and barns and three sides of a wood shed.

Q. You measured up the foundation, is that how you found it out? A. Yes, sir.

Q. Did you know the exact size of the old sills which had been there? A. Exact size?

Q. Yes. A. No.

Q. Didn't know that? A No.

Q. So you had to get that from somebody else, I suppose? A. Why, I got it from the knowledge

that I had from working around there; I suppose they were about 8x10 sills.

Q. Yes, but you didn't know accurately, you just supposed that? A. Yes, that is right.

By the Court: Q. How much did you get from Pope, Mr. Wilcox? A. Why, we would take these plans and we would both sit—

Q. I am asking you how much information you got from him? For instance, when you wanted to know anything, would you ask Pope? A. Sure.

Q. And he told you what he knew and that went down? A. Yes, sir.

Q. But you didn't know what you asked him until he told you, did you? A. No, sir.

Q. So that that is the product of your knowledge, and Pope's knowledge, taken together, isn't it? A. Exactly.

Q. And some of it he knew and you didn't know, and some of it you knew and he didn't, isn't that it? A. Yes, sir; that is right.

The Court: I am prepared to rule.

Mr. English: I am prepared to object.

The Court: I will sustain the objection.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

DIRECT-EXAMINATION (continued) by Mr. Whitemore:

Q. Is there anything on there that is not in your knowledge?

The Court: He says some were his and some were Mr. Pope's. He does not deny that.

(Witness withdrawn.)

Adjourned until tomorrow morning.

March 30, 1910, at 10 a. m.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

JANUARY TERM 1910.

EDWARD V. GOODMAN, Executor of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 1. In tort.
EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 2. In tort.
EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 3. In tort.

Transcript of stenographer's notes of evidence, taken in the above entitled cases, before Hon. William H. Speer, Judge of the Circuit Court, and a jury, at the Court House, in the City of Elizabeth, N. J., on the thirtieth day of March, A. D., 1910, at 10 a. m.

Appearances:

Mr. C. McK Whittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

MILES M. ROUCH, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr Whittemore:

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

Q. Near Goodman's place? A. Probably three miles away.

Q. Do you know Mr. Goodman? A. Yes, sir.

Q. Had you ever been down there before the fire? A. Yes, sir.

Q. Do you remember being at Mr. Goodman's place on an occasion before the fire, when you had business with Mr. Goodman? A. Yes, sir.

Q. What was the business? A. Buying some twenty-five hot-bed sash.

Q. When did you go there? A. In the month of April, 1905.

Q. What time of day? A. I should judge about eight or nine o'clock in the morning.

Q. How did you get there? A. I drove there.

Q. What did you do with your horse when you got there? A. Stood him out by the barn.

Q. Will you look at the map here, and look it over and see if you are able to identify the buildings there—do you understand that map? A. Shall I point out where I stood my horse.

Q. Do you understand the map—point out the place where you stood with your horse? A. My horse stood at this corner (indicating).

Q. And where were you? A. Right by his head, in the driveway between these buildings—

between this building and that (indicating the driveway between the carriagehouse and the wagonhouse). I had him newly clipped, and the wind was blowing quite brisk and cool—

Q. What did you go near that point for? A. To keep him out of the wind.

Q. How was the wind blowing, in which direction? A. I think west from behind these buildings, this way (illustrating) that is the reason I stood him there, and I stood him between the buildings.

Q. While there did you see anything happen?

Mr. McCarter: I object to the question on the ground that it is too remote. I understood him to say—possibly you may make this evidence later admissible, as to what occurred at other times, and other places, it might be admissible to indicate that the system of inspection, which in the meantime had been proven to have been in vogue indicating perfection of the screen or that their condition might be good—I say it might later be admissible for that purpose—but there is not a word to indicate in the opinion of the chancellor, that the fact that a fire occurred in April from the railroad, without its being proven to be the same engine or the same train or anything else, is germane or in any way relevant to the plaintiffs proof of his case that is on his direct case, and therefore we object to it.

Court: I think this evidence is admissible, for these reasons:

First, And taking a last point first. It is true that in the opinion of the chancellor he says that the evidence was admissible

in rebuttal, but he does not say that it was not admissible on the main case, and it seems to me that the reason why it was admissible on rebuttal was, as tending to show, that there had not been a proper inspection. While it may be true that under the statute the plaintiff is not obliged to show as part of his case, that there had been no proper inspection, nevertheless he may do so, he can go beyond the extent required by the statute, and show a prima facie case of the communication of fire to the property, that is, from the engine of the defendant company, to the property plus the fact of an improper inspection. And it seems to me that we are quibbling at what stage of the case that evidence is admissible—because it was admissible in rebuttal therefore you say it was not admissible on the main case—and I think it is.

On the next phase of the case, this seems to be a complete answer to that objection. This plaintiff is obliged to show that there actually was—either by special evidence or otherwise a communication of fire from the locomotive engine of this defendant company to the property which was burned. Now then, anything that goes to show the physical possibility of the transference of an ignited spark from an engine of the defendant company to a distance at which a fire was communicated it seems to me, that that is perfectly relevant testimony, and for these reasons I think the question is admissible, and I will accept it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge (Seal).

Mr. McCarter: We object to it further, if your Honor please, on the ground that it is irrelevant and immaterial.

Court: The fact that you are willing to admit that a fire occurred on that day does not preclude the plaintiff from trying to prove the fact that, as I understand it, you are willing to admit—he may not be satisfied with the extent of the proof, he might want to fortify it by evidence that would make it relevant and material. I therefore overrule your objection.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

A. Yes, sir.

WM. H. SPEER,
Judge (Seal).

Q. What did you see happen?

Mr. McCarter: I object to this question. The objection goes to the proof of the fire, in respect to this particular fire on this day—we object to this line of testimony.

Court: Yes, your objection will be noted.

A. Well, as my horse stood at this corner, I stood a little to the left of it, and I noticed a spark or a cinder or whatever you call it strike on the ground at that corner of the building (indicating the northerly corner of the wagonhouse), somewhere about there, and I judge about twenty feet from me.

Q How far from the building? A. Well, I would not say exactly—something like that (indi-

cating), probably or maybe six or eight feet from that corner (indicating a point about half way between the carriagehouse and about even with the front of the wagonhouse).

Q. You saw a spark? A. Yes, sir.

Q. How did you notice it? A. I noticed it by the smoke rising from it.

Q. What did you do? A. I went by it, it smoked I should judge for about a minute or two or something like that, and then I walked up to it and took it up in my hand, and the coal was hot, and I tossed it up and down in my hand, and then through it down, and put my foot on it, and rubbed it up with my foot until it was out. Other cinders fell, but this is the only one that I could see smoke.

Q. How big was it? A. I should judge it was about the size of a hazel-nut, only in a rough condition.

CROSS-EXAMINATION by Mr. McCarter:

Q. What time of day was this? A. About eight or nine o'clock in the morning, or in the neighborhood of that, about eight or nine o'clock in the morning.

Q. And I understood you to say that the wind was so strong you got your horse under shelter? A. Well, it was not under shelter exactly, the horse stood at the corner of the building, protected from the wnid.

Q. That is what I wanted to say—protected from the wind? A. Yes, sir, I said the wind was blowing rather swift and cold, and I had him newly clipped, and that is one of the reasons I had put him there, to protect him from the wind.

HIRAM L. FINK, a witness produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr Whittemore:

Q. What is your business? A. I am in the carriage busines and automobile business.

Q. What do you mean by that? A. I manufacture carriages and wagons.

Q. Do you use lumber in their construction? A. Yes, sir.

Q. Have you been down to Mr. Goodman's place before the fire? A. Yes, sir.

Q. Did you see any lumber there that day? A. Yes, sir.

Q. What lumber did you see? A. Well, there was a lot of white oak.

Q. Where was it when you saw it? A. It was under a shed there.

Q. How much did you see, do you know? A. Well, I don't know how much there was—there was quite a large pile of lumber.

Q. Were you able to estimate the quantity? A. No, sir, I hardly think I could.

Q. Now, do you know what the value of that white oak lumber is? A. Yes, sir.

Q. Or was at that time? A. Yes, sir, from seven to eight cents per foot.

Q. How do you know what that lumber was worth? A. That is what I was paying for it.

Q. You use it in your business of building carriages? A. Yes, sir, I expected to purchase this lumber.

CROSS-EXAMINATION by Mr. McCarter:

Q. You did not purchase it? A. No, sir.

Q. Did you take any of it out from under the barn? A. No, sir, I looked at it, as it was racked up in the rack there.

Q. Under the barn? A. Under the shed.

Q. Is there any difference in the value of lumber as to whether it is knotted or other defects in it? A. Oh, yes, sir.

Q. You did not know anything about that, you could not tell? A. We uncovered some of it, it was very clear.

Q. Could you get in under the shed? A. Yes, sir.

Q. Did you go in under the shed? A. Yes, sir.

Q. What shed was this? A. It was a shed built out alongside the barn there, as I recollect, it was a place where we could get under, and they had some boards laid over it to protect the lumber, which were uncovered, so that you could see the lumber.

Q. How large a pile was there, do you think? A. It was quite a large pile.

EDWARD V. GOODMAN, re-called in behalf of the plaintiff, saith:

Examined by Mr. Whittemore:

Q You testified that there was a runabout there that cost $110? A. Yes, sir.

Q. Do you wish to make any correction with regard to that? A. Yes, sir.

Q. What do you wish to say about that? A. That runabout was saved.

Q. Did you have any other runabout? A. Yes, sir.

Q What happened to that other one? A. The other one was burned.

Q. What did that one cost that was burned? A. That cost $50.

CROSS-EXAMINATION by Mr. McCarter:

Q. How long had you had it? A. I could not tell exactly.

Q. How do you remember that it cost $50 if you can not tell how long you have had it? A. We bought it from the man who has just been on the stand, and that was what was paid for it.

Q. Well, how long did you have it? A. I should judge four or five years, that spring we had new rubber tires put on it, which cost $24.

Mr. McCarter: I didn't ask the witness that and I move that the portion of the answer that was not responsive, be stricken out.

Court: Yes, it may be stricken out.

Mr. McCarter: I will ask permission at this time to ask this witness some questions which I forgot to ask him yesterday.

Court: You may do so.

Mr. McCarter: Q. Did you raise any rye straw on your place for straw bedding? A. No, sir.

Q. What kind of straw was this you had on the place? A. It was swamp hay.

Q. Used for bedding? A. Yes, sir.

Q. You have rebuilt out there, Mr. Goodman, have you not?

Mr. Whittemore: I object to the question as irrelevant.

Question allowed.

A. Yes, sir.

Mr. McCarter: Q. Did you not rebuild from the proceeds of the insurance that you had upon the property that was destroyed?

Mr. Whittemore: I object to the question as irrelevant and immaterial.

Court: I sustain the objection. I think

the insurance contract is entirely separate and distinct from the question here.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge (Seal).

Mr. McCarter: Q. Is it not a fact that your father carried insurance to what he deem the full value of the property on that farm?

Mr. Whittemore: I object to the question on the ground that it is immaterial and irrelevant.

Court: I overrule that question as being bad both in form and substance.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge (Seal).

HARRIET GOODMAN, a witness produced in behalf of the plaintiff, being duly sworn according to law or her oath saith:

Examined by Mr. Whittemore:

Q. You are the wife of Edward V. Goodman? A. I am.

Q. Where were you at the time the fire broke out? A. In the dining room.

Q. And what did you first know about the fire? A. Why the first I knew was Andrew coming in and telling us.

Q. Andrew came in? A. Yes, sir.

Q. What did you do after Andrew came in? A. I went out on the back of the porch and looked towards the barn.

Q. How long did you stay there? A. A couple of minutes.

Q. Where did Mr. Goodman go? A. He was lying on the couch.

Q. Your husband was lying on the couch? A. Yes, sir.

Q. Where did old Mr. Goodman go? A. He went out on to the farm.

Q. Where did Dr. Sinclair go? A. He went out the same way.

Q. Did you leave anyone else in the room? A. My little boy was there.

Q. How old was he? A. Two years.

Q. Anyone else in the room? A. Mr. Goodman was on the couch.

Q. Anyone else beside him? A. No, sir.

Q. Anyone else in the house? A. No, sir.

Q. Where was Mr. Goodman's little brother? A. Why he hadn't returned from school yet.

Q. After you went out on the porch and looked at the fire, where did you go? A. I went back in the dining-room and went down through the roadway with Mr. Goodman.

Q. You went down the roadway with Mr. Goodman? A. Well, not with him, but behind him and the little boy.

Q. Where did you go? A. Right down in front of the house.

Q. How long did you stay there? A. Probably two or three minutes, and I then left Mr. Goodman with the doctor, and went back to the house, and upstairs and gathered up a few valuables, up there, and went back again.

Q. How long did you stay there? A. I staid there until the fire was almost finished.

Q. Did you see anyone else around the place when you came out on the porch? A. The first I saw was Mr. Mays.

Q. Where did he come from? A. He was coming from his house.

Q. Where were you when you saw him coming? A. I was just coming out of the house.

Q. Which time, the first or the second time. A. The first time.

Q. Did you see anyone else coming? A. I saw three other men, after I had gotten down at the roadway.

Q. Who were they? A. One of them was Mr. Axel and his two partners.

Q. Where did they come from? A. They were coming across the tracks.

Q. Where did they go? A. They came across the potato field, and went towards the barn.

Q. Where was the potato field? A. Right at the side of the house, between the track and the house.

Q. Where did they cross the track? A. At the crossing.

Q. Previous to the alarm of fire that Andrew gave, how long had you been in the house? A. Why probably about fifteen or twenty minutes, just before the doctor came.

Q. Where before that had you been? A. Out back of the house.

Q. What were you doing? A. I had my little boy out there, I was not doing anything particular.

Q. Why did you go back of the house? A. I was between the barn and the house, in the back.

Q. Had you been between the barn and the house? A. No, sir.

Q. Had you been to the barn that day? A. No, sir.

Q. When you were out there, did you see any one around there? A. No, sir, I did not.

CROSS-EXAMINATION by Mr. McCarter:

Q. I understand that after the fire, your husband was taken down to a willow tree, over here near the road somewhere (indicating)—is that right? A. Yes, sir.

Q. And I also judged from your evidence, that you concluded it would be best to have him moved, and the first time you went out from the porch, you followed with the little boy? A. Not the first time, I did not say so.

Q. Did you leave the porch? A. No, sir.

Q. The first time, did you leave the porch? A. No, sir, I did not, not the first time, the first time I went out on the porch.

Q. Wait until I finish my question—I understand from your evidence, the first time you left the porch, after the fire was discovered, you followed the doctor and the other men who was carrying your husband, down to the willow tree—is that right? A. Yes, sir.

Q. Did you go all the way down to the willow tree? A. Yes, sir.

Q. How far is that from the porch? A. Well down at the end of the drive, right there by the road, (indicating).

Q. How far is that about? A. I never measured it, I could not tell you.

Q. Haven't you any idea at all? A. No, sir.

Q. Not the slightest? A. No, sir.

Q. Then after you got down there you went back to the house again? A. Yes, sir.

Q. And went upstairs? A. Yes, sir.

Q. Was there anyone in the house then? A. No, sir.

Q. Not a soul? A. No, sir.

Q. Where did you go? A. In my room.

Q. You got some trinkets, including your husband's watch? A. Yes, sir.

Q. And then came back and went down to the willow tree again? A. Yes, sir.

Q. Did you run or walk, that second trip? A. I ran.

Q. You ran both ways? A. Yes, sir.

Q. When you were on the porch before you left at all, you saw Mr. Mays there? A. Yes, sir, I did.

Q. Where did you see him? A. I saw him going towards the barn.

Q. From the lane? A. No, sir, it was back of the house—no, sir, it was not the lane.

Q. Here is the house, and the porch surrounds the house (indicating)—will you point where it was you said you saw him?—where it was when you saw Mr. Mays? A. Right there (indicating on the northwest corner of the porch.)

Q. And Mr. Mays is standing where? A. He was going towards the back of the house towards the barn.

Q. Do I understand that all there between the railroad and the house was a potato field? A. Yes, sir.

Q. This whole lawn here was in potatoes? A. No, sir, not the whole lawn.

Q. Well, how much of it? A. Well from the apple trees and the woodshed towards the road.

Q. The apple trees indicated somewhere near the fence here? A. Yes, sir.

Q. Are these the apple trees you refer to (indicating)? A. Yes, sir.

Q. From there to the woodshed and the road was all in potatoes? A. Not all the way down to the road.

Q. How much is it then you said to the road? A. I don't know just how far from the road.

Q. Well practically to the road? A. Very near to the road.

Q. And was that true with regard to all of the land it was planted with potatoes from the apple tree down to the woodshed and practically down to the road, is that right? A. From this side of the house, on the opposite side (indicating).

Q. And between the house and the road, the same way? A. I don't remember just what was in front of the house.

Q. You mean by the side of the house? A. By the side of the house?—the front of the house facing the driveway.

Q. Where the pear and the apple trees were? A. I don't remember just what was there.

Q. Have you any idea of the size of that potato patch? A. No, sir.

SARAH E. GOODMAN, a witnesss produced in behalf of the plaintiff, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. You are the widow of James E. Goodman? A. Yes, sir.

Q. Who owned this property? A. Yes, sir.

Q. Where were you in the afternoon of the day of this fire? A. At Westfield.

Q. What time did you return from Westfield? A. Between four and five o'clock.

Q. How far had the fire progressed at that time? A. Everything was destroyed mostly, nothing but just the posts that was till burning, and the hay and things.

Q. Did anyone come with you when you came back? A. My neighbor Mrs. Mays, the one that went with me.

Q. You of course had been living with your

husband in this house, for a good many years befor the fire? A. Yes, sir.

Q. Are you familiar with what was contained in the house? A. Yes, sir.

Q. After the fire, did you prepare any list? A. Yes, sir.

Q. When was that list prepared? A. About six weeks or two months after the fire.

Q. Where was it prepared? A. Partly in the building that we staid in after the fire, and part over at my daughter's house in Westfield.

Q. Who was present when the list was prepared? A. My husband and daughter and myself.

Q. At that time did you remember what was in the house? A. Yes, sir, I did.

Q. What was put on that list, with reference to things contained in that house? A. Do you want me to itemize them?

Q. No, but tell what you did put down? A. The household furniture and things.

Q. What household furniture had you? A. Such as bedroom suits and carpets.

Q. Where was the furniture? A. In the house.

Q. Did you put anything down on the list that was not in the house? A. No, sir.

Q. Did you look over this list after it had been prepared? A. I did.

Q. What was your recollection at the time you looked it over as to the correctness of it? A. It was all right.

Q. You had been keeping house a good many years at that time, hadn't you? A. Yes, sir.

Q. And you bought things for the household, I suppose? A. Yes, sir.

Q. And you knew what they cost? A. Yes, sir.

Q. And the household furniture? A. Yes, sir.

Q. Did you put anything on that list, as to the value of the articles? A. Yes, sir.

Q. What did you put down with reference to the value? A. From what we thought they were worth, from the time we bought them to the time of the fire.

Q. What was your recollection as to the value when you looked over the list? A. That they were correct.

Q. Now, I show you eight sheets of paper and ask you what they are (handling papers to witness)? A. Itemized things of what we had in the house, furniture and things destroyed.

Q. Can you, without referring to this list state all of the things in that house? A. I think I can.

Q. Without referring to the list? A. Yes, sir, I don't want the list.

Q. Well Mrs. Goodman, can you tell us what there was in the first room on the third story? A. Yes, sir, there was a bedroom suit, oak, a feather bed, mattress, springs, bolster and pillows, washstand and bureau.

Q. Now do you know what the value of that bedroom suit was?

Mr. McCarter: I object to the question on the ground that I do not think this woman can give the value of the bedroom suit.

Court: She can answer this question. She is only asked if she knows.

A. Yes, sir, I know, for I helped to buy it—yes, sir.

Mr. Whittemore: Q. Do you know the age of the furniture in your house? A. No, sir, that I don't know, some was entirely new, and others had been used, and we put it down according as we thought.

Q. Do you know the age of this furniture? A. Yes, sir, I know that pretty much.

Q. In fixing the value, what did you allow for it? A. We allowed for the wear and the usage of it from the time we bought it until the fire.

Q. Will you state—

Court: She may state the age and the time and character of usage, and she must state also what was paid for it, but she can not draw the inference as to what the value is, that is for the jury to draw.

Mr. McCarter: I would like to test her memory as to whether or not she has over night refreshed her memory from the list of articles here.

Court: You may do so.

CROSS-EXAMINATION by Mr. McCarter:

Q. In the testimony you propose to give with regard to the cost of the furniture, are you relying upon the list that you made out at your daughter's house, or in the shop where you were then living, for two or three months after the fire, or are you relying on your own recollection of the purchase? A. I am relying upon my own recollection of the purchase.

Q. Have you looked at that list from the time it was made until the present time? A. Yes, sir.

Q. When did you look at it last or a copy of it? A. Oh, I guess a month ago.

Q. And went over it all carefully? A. No, sir.

Q. And that list had on it the value or cost that was put on the things at the time you made the list up? A. Yes, sir.

Q. Now, in making up that list, you and your daughter and your husband all took part? A. Yes, sir, we were altogether.

Q. And do I understand that you claimed that you personally attended to the purchase of every article in that house? A. No, sir, not everything, you could not understand that.

DIRECT by Mr. Whittemore (continued):

Q. Do you know what that bedroom suite cost? A. $35 when it was bought.

Q. What wear had it had? A. From the looks of it you could not tell it had had any, it was not marred, or anything of that kind, it was as good as new.

Q. Who used that room? A. It was used mostly as a spare room, it was used very little.

Q. The feather bed there, you have spoken of, do you know how much that cost? A. No, sir.

Q. Do you know how long ago that bedroom suite was purchased how long before the fire? A. No, sir, I don't think I know what year it was purchased in, but I think about twelve years before the fire.

Q. Do you know anything about the value of goose feathers? A. Yes, sir.

Q. How do you know? A. From buying them after the fire.

Q. How soon after the fire? A. Right away, or about a month after, when we went to live in that store room, we hadn't any pillows, and I had to buy them.

Q. Do you know how many pounds of feathers went in the feather bed? A. Yes, sir, by buying one for my father, I had bought one just before the fire for him, just before the fire, and that I think was about the same as ours.

Q. Were you familiar with the size of the feather bed? A. Yes, sir.

Q. Do you know how many pounds of feathers there were in that feather bed? A. Twenty.

Q. What was the value of goose feathers at that time?

Mr. McCarter: I object.

Question withdrawn.

Mr. Whittemore: Q. How old was this feather bed of your own knowledge? A. About fifteen years old.

Q. Do you know whether a feather bed deteriorates with age to any extent? A. Yes, sir, I do.

Court: Q. Did you buy it? A. No, sir.

Q. Were you present at the time it was bought? A. My husband and I together bought it.

Q. What did it cost? A. Seventy-five cents a pound for the feathers.

Mr. Whittemore: Q. Was there any mattress in the room? A. Yes, sir.

Q. Do you know how much that cost or how long ago it was you had bought it? A. It cost five dollars and we bought it two years before the fire.

Q. Were there any pillows and bolsters? A. Yes, sir.

Q. What was in the pillows and the bolsters? A. Live goose feathers.

Q. How many pounds were in it? A. I don't know how many pounds there were in the pillows, but we paid five dollars for the pillow and the bolsters.

Q. Was there any toilet set in the room? A. Yes, sir.

Q. What did you pay for that? A. $5.00.

Q. Were there any bureau furnishings? A. Bureau necessities.

Q. Do you know what they cost? A. $6.00.

Q. How old were they? A. Practically new.

Q. Was there anything on the floor? A. Matting.

Q. How old was it? A. That was new.

Q. What do you mean by "new"? A. Well, after we rebuilt, we furnished these rooms all pretty much new, and it had never been used much.

Q. How long before the fire had you rebuilt? A. I don't know whether it was four or five years.

Q. You mean this was four years old? A. Yes, sir, the matting was four years old.

Q. Do you know what it costs? A. Forty cents a yard.

Q. How many yards were there? A. Twenty-five yards.

Q. Now the second room on the third story—do you know what was contained in that room? A. Yes, sir.

Q. Specify them? A. A bedroom black walnut; bureau black walnut; rocking chair, two chairs, towel rack, feather-bed, mattress, springs, pillows, bolster, bureau and necessities and toilet set.

Q. Do you know how old the bedroom suite was? A. I guess that must have been about twenty years old.

Q. What was its conditions? A. Good.

Q. Do you know what it cost, the bedroom suite? A. Thirty-five dollars.

Q. What was there on the floor? A. Ingrain carpet.

Q. How much was on the floor? How many yards? A. Twenty yards at eighty-five cents a yard.

Q. Did you know of the purchase of that? A. Yes, sir.

Q. How old was that? A. That was four years old.

Q. The pillows and bolster, what did they cost? A. $5.00.

Q. Was that the cost, do you mean? A. Yes, sir.

Q. The toilet set how much? A. $6.00.

Q. Were there any bureau furnishings there? A. Yes, sir, necessities for the bureau.

Q. What were they worth, do you know? A. $6.00.

Q. Any feather bed? A. Yes, sir.

Q. How old was that? A. I think that was about fifteen years old.

Q. Do you know how many pounds of feathers were in that bed? A. About twenty pounds.

Q. Was there any loose spread and pillow shams there? A. Yes, sir.

Q. Where did they come from? A. My husband.

Q. Where did he get them? A. They were left to him by his aunt that died there.

Q. What kind were they? A. Renaissance, over linen.

Q. Do you know anything about what that lace spread was worth? A. Yes, sir.

Q. How do you know what the value of that lace spread was? A. Why from the buying of the material and making it.

Q. Who made it? A. My aunt.

Q. And did you buy the material? A. I did not buy it.

Q. Have you bought such material? A. I have bought a lot of the goods, and stuff.

Q. What kind of material was it as compared with this? A. The same thing—it is long piece of lace sewed together, and made into a spread, or whatever you want to make out of renaissance, there is a great deal of work on it, embroidered or put together in that way.

Q. Do you know what the value of renaissance work is? A. Yes, sir.

Q. How do you know? A. From buying it, and working on it.

Q. Before the fire, had you bought any renaissance? A. Yes, sir.

Q. Will you tell us what the value of this is?

Mr. McCarter: I object to the question and to the witness giving a value, that is for the jury to ascertain.

Court: It is not necessarily for the jury, if she knows what the value is, she can state it, but she must first be qualified.

Mr. Whittemore: Q. How long before the fire did you buy any renaissance? A. Oh I guess a year or two years perhaps, and I made it while my aunt was there with me.

Q. Had you bought any previous to that, a year or two years? A. Yes, sir.

Q. Was there any variation in the value of renaissance? A. Not that I can recall now.

Q. Did you buy any after the fire? A. No, sir, I never bought any after the fire.

Q. Mrs. Boylan is dead? A. Yes, sir.

Q. What was this room used for—the second room in the third story? A. We did not use it in common, we only used it when we had company.

Q. A spare room? A. Yes, sir, a spare room.

Q. What is the value of this lace spread and pillow shams?

Mr. McCarter: I object to the question on the ground that the witness has not been qualified as an expert.

Court: I shall sustain the objection on the ground that this lady has not been qualified as an expert to testify with respect to the value of such material at the time of the fire.

Mr. Whittemore: Q. Now proceed to the third room in the third story, what was there in that room? A. There was an old fashioned bureau, old mahogany, rush bottomed chairs, two of them,

Q. What else? A. A back-walnut bedstead, mattress and pillows.

Q. Now do you know what the value of the mahogany bureau was?

Mr. McCarter: I object to the question on the ground that it has not been shown that this witness is qualified to testify as to the value of these articles.

Court: I shall sustain the objection on the ground that no foundation has been laid for showing that she knows even what the mahogany bedstead is worth.

Mr. Whittemore: Q. Have you even seen any, old mahogany bureau sold? A. No, sir.

Q. Did you ever buy any? A. No, sir.

Q. Well, as a bureau, in respect of its being old, do you know anything about the cost of bureau and furniture of that kind—have you ever bought any? A. Yes, sir, I have bought some, I know—

Mr. McCarter: I object to this evidence —it is quite obvious that there must be reason exhibited in trying a case of this kind in a bill for damages,—it is quite evident that the plaintiff is endeavoring to get things in and we are trying to try the case within proper legal principles and limits, and we all know as a matter of fact that because a lady has bought, during her life probably certain modern walnut or oakwood or some cottage bedroom furniture, that that does not qualify her to say what an old piece of mahogany is worth—I

therefore do not think that the question whether she has bought or sold bureaus or bedsteads gives her or has any relevancy or bearing in the ascertainment of the price of this particular bureau.

Question withdrawn.

Mr. Whittemore: Q. Do you know what the walnut bed cost? A. $5.00.

Q. When did you buy it, how old was it? A. Five years.

Q. What condition was it in? A. Good.

Q. Do you know anything about the value of rush-bottomed chairs? A. I do.

Q. How? A. Why from pricing them after the fire, and knowing what value they were, and what they are.

Q. How soon after the fire? A. Two months.

Q. The rush bottomed chairs that you priced, how did they compare with the chairs you had before the fire? A. The chairs that was burned, they were as good as new—

Q. How did they compare with the chairs you saw, as to their character and style and make-up? A. Well, these were the styles of chairs that I saw, they were square backed, and square fronts.

Q. Which chairs? A. The rush bottomed chairs.

Q. That you lost? A. Yes, sir.

Q. And the style you saw and priced, how did they differ? A. They were round front and round back.

Q. Can you tell me the value of those chairs?

Mr. McCarter: I object.

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Mr. Whittemore: Q. Was there any shawls in that room? A. Yes, sir.

Q. Where were they? A. In the old bureau.

Q. What kind of shawls were they? A. Camels' hair, and two black shawls, two large black shawls.

Q. What were the black shawls made out of? A. I don't know as I know the material, they were nice black shawls.

Mr. McCarter: Q. Did these shawls belong to you or your daughter, or both of you? A. They belonged to my husband, they did not belong to either one of us.

Mr. Whittemore: Q. Where did he get them from? A. His mother left them to him when she died.

Q. Do you know anything about the value of these shawls? A. Not particularly, no, sir.

Q. Do you know anything about the value of camels' hair shawls? A. Camels' hair is very expensive.

Q. Do you know the value? A. No, sir, not from buying.

Q. Do you know in any way what they are worth? A. Only from hearsay, that is all.

Q. Were there any other kind of shawls there? A. A silk and wool shawl.

Q. Where did they come from? A. My husband's mother's, also.

Q. What kind of shawl was that, an ordinary shawl? A. No, sir, it was a very expensive shawl.

Q. How do you know that? A. Well, from judging what any things of the kind cost, or what I know what other things are worth, I suppose, or things that were good, I have had experience in buying things, that is good.

Q. Do you know anything about the value of that shawl? A. No, sir, I would not state any value.

Q. Any carriage robes? A. Yes, sir.

Q. Do you know what they are worth? A. No, sir.

Q. Were there any books there? A. A large box of books.

Q. How many of them? A. I could not tell you, they were my husband's, and I do not know the value of them.

Q. Were there ten books there? A. Oh, there was a hundred.

Q. Mattress and pillows—what kind of a mattress was that? A. Just an ordinary mattress.

Q. What was in it? A. I guess there was nothing but a husk mattress, it was the man's room.

Q. What kind of pillows? A. Duck feather pillows in that room.

Q. Do you know how many pounds there were in the pillow? A. I guess five pounds for the two pillows.

Q. Do you know what duck pillows are worth? A. Fifty cents a pound.

Q. Now in the store room on the third story, what was there there? A. Trunks, filled trunks, three stoves, a dining room, parlor and bedroom stove, and forty yards of ingrain carpet.

Q. Just state the articles—anything else? A. Six rush bottomed chairs.

Q. Anything else? A. Twenty-five quilts, four large comfortables.

Q. These quilts, were they in the trunks? A. Part of them were in the trunks, and part in boxes.

Q. Twenty-five you say? A. Yes, sir.

Q. And the sealskin cape? A. Mine.

Q. Was that all that was in that trunk? A. I think it was.

Q. Was there any other trunk there? A. There was some patch work, and different things, I don't remember, it was too numerous, just pass them by.

Q. No large articles that you remember? A. Only renaissance work and shams and things like that, but I can not recollect now all of them—pass them on please.

Q. Was there any silk quilts? A. Yes, sir, five.

Q. You mentioned those before? A. Yes, sir.

Q. How long had you had those? A. Three or four years.

Q. Who did they belong to? A. To me.

Q. Was there any lace curtains? A. Yes, sir, two pairs.

Q. Who did they belong to? A. They were mine.

Q. Let me see what you mean by "they were mine"—where did you use these things? A. In the windows when necessary.

Q. Where did you get them? A. They were my husband's.

Q. Where did you get them? A. They were left to him, and he gave them to me to put up.

Q. He gave them to you to put up? A. Yes, sir, to the windows.

Q. Did he give them to you? A. We hung them same as the rest of our furniture that we bought together, he said "these are ours" and he gave them to me to put up.

Q. He gave them to you as your property? A. Yes, sir, he gave them to me.

Q. Were there any blankets there? A. Yes, sir.

Q. Where did you get them? A. We bought them.

Q. Who bought them? A. We bought them together.

Q. Whose money paid for them? A. His.

Q. What do you mean by saying "that we bought them together"? A. When we wanted to buy anything, he generally carried the money, and he bought them and gave them to me, and we used them together.

Q. You used them in the house? A. Yes, sir, on the beds.

Q. Do you know what they cost? A. Some four dollars, and some five dollars, different prices.

Q. How many pairs were there? A. Eight pairs.

Q. Did any of them cost less than four dollars? A. No, sir.

Q. How old were they? A. Some must have been eight years old, and some was new.

Q. Were there any comfortables there? A. Yes, sir.

Q. How old were they? A. About the same.

Q. How many were there? A. Four.

Q. Do you know what they cost? A. No, sir, I don't know what they cost.

Q. Any bed quilts? A. Yes, sir.

Q. How many? A. Twenty-five.

Q. Do you know what they cost? A. $2.50 and $3.00.

Q. How old were they? A. Some new and some had been used.

Q. How old—how long had they been used? A. Eight years.

Q. Any books up there? A. Yes, sir.

Q. How many books? A. There might have

Q. And the sealskin cape? A. Mine.

Q. Was that all that was in that trunk? A. I think it was.

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Q. How old—how long had they been used? A. Eight years.

Q. Any books up there? A. Yes, sir.

Q. How many books? A. There might have

been fifty or more, I could not tell exactly, the number.

Q. What kind of books? A. There were a series of books and things, nice books that was my husband's.

Q. Can you state the authors? A. No, sir, I can not.

Q. Do you know what the dining room stove cost? A. Yes, sir.

Q. How much? A. $22.00.

Q. How long had you had it? A. We bought it the winter before the fire.

Q. One winter's use? A. Yes, sir.

Q. Did you have a parlor stove? A. One parlor stove.

Q. How old was it? A. That was two years old.

Q. Do you know how much it cost? A. Yes, sir.

Q. How much? A. $18.00.

Q. A small cylinder stove? A. $5.00.

Q. That was the cost? A. Yes, sir.

Q. How old was that? A. That was three years old.

Q. You spoke of carpet, how much carpet was there? A. Forty yards.

Q. And how old was it? A. That was new that winter, and we took it up to put the summer carpet down, that is the reason it was in the store room.

Q. Do you know what it cost? A. Eighty-five cents a yard.

Q. Were there any dining room or parlor ornaments? A. Yes, sir.

Q. Whose were they? A. My husband's and mine together. They were each of us.

Q. When you say "mine" what do you mean by that—do you mean literally that they were

yours, and not your husband's at all? A. No, sir, I do not, I mean that they were left to him and he says "these is ours," that is all I know.

Q. Did you use them in the house? A. Yes, sir.

Q. Do you know what these ornaments were worth? A. No, sir, I do not.

Q. Were there any patches? A. A box full.

Q. What did you use them for? A. For another silk quilt.

Q. Any carpet rags up there? A. A barrel.

Q. What was that for? A. Making carpet.

Q. Any flags up there? A. Yes, sir, two.

Q. What kind? A. Silk and linen.

Q. How large? A. Three by four I think they were.

Q. Three by four what? A. Feet.

Q. Did you ever see them flying? A. Yes, sir.

Q. Do you think they were only three by four? A. Oh I guess they were larger.

Q. Do you know when these were bought? A. One of them I did, the other I did not.

Q. Do you know how much it cost, the one that you know was bought? A. No, sir.

Q. Now, pass on to the second floor, the first room, whose room was that? A. That was my son Elmer's room.

Court: I have found the case which has reference to the matter referred to by counsel, with respect to the recovery for the value of the wearing apparel, coat etc., which this lady said were her own property, that she had received them from her husband. The case I had reference to was "Farrell vs. Farrell, 65 Mad., 702, and the rule there laid down is, that wearing apparel etc., which came to him during coverture, remained his property, during his life, and he may sell and dispose of them

during his life, and secondly, he could bring suit to recover for them etc.

Mr. McCarter: Then the recovery, if it should be sued on to recover, could only be recoverable by his estate, not by her, that is she could not recover.

Mr. Whittemore: I would like to have the matter presented, so as to preserve my rights in the matter.

Court: Of course you may do so.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly

Q. Do you know anything about the value of the sealskin coat? A. No, sir.

Q. What was in Elmer's room? A. A cherry bedroom suite.

Q. Consisting of what? A. Bedstead, bureau, toilet, rocker, two chairs, and double springs. feather bed, mattress, pillows and bolster, carpet and a toilet set.

Q. Do you know when the bedroom suite was bought? A. Yes, sir.

Q. How long ago? A. Ten years before the fire.

Q. What was its condition? A. It was in good condition.

Q. Do you know what it cost? A. No, sir, I don't think I do.

Q. The toilet set, what did that cost? A. $6.00.

Q. Brussels carpet—how many yards? A. Eighteen yards.

Q. Do you know what that cost? A. $1.10.

Q. How old was it? A. Six years old.

Q. Feather bed—do you know how many pounds of feathers there were in that? A. No, sir, but they were about like what the rest were, about twenty pounds to a bed.

Q. The mattress—what kind of mattress was it? A. Cotton and hair.

Q. Do you know what it cost? A. $12.00.

Q. How old was it? A. Two years old.

Q. Pillows and bolster, what was in them? A. Live goose feathers.

Q. Do you know how many pounds? A. No, sir.

Q. How did that pillow and bolster compare with the others? A. Just about the same, they were all about the same, feather beds and pillow and bolster, about the same thing.

Q. Any pictures in the room? A. Yes, sir.

Q. How many? A. I don't know whether five or six.

Q. Do you know of the purchase of any of them? A. No, sir.

Q. Now, the second room on the second story, whose room is that? A. Our room.

Q. What was in that room? A. A quartered oak bedroom suite.

Q. What did it consist of? A. Bedstead, bureau, washstand, chairs, rocking chair, toilet set, pictures, moquet carpet.

Q. Any mirror in your room? A. Yes, sir, a large mirror.

Q. How many pictures? A. Four large ones.

Q. Anything on the bureau? A. Bureau necessities.

Q. Do you know how much the bedroom suite cost? A. $35.00.

Q. How old was it? A. Five years old.

Q. Do you know how much the toilet set cost? A. Six dollars.

Q. The bureau necessities, how much did they cost? A. $6.00.

Q. How old was the toilet set? A. That was three years old.

Q. Do you know what the bureau necessities were worth or cost? A. Six dollars.

Q. Did you have anything else on your bureau besides the furnishing? A. A renaissance cover.

Q. How long have you had that? A. About a year.

Q. Where did you get it? A. I made it.

Q. Were there any shoes destroyed? A. Two or three pair.

Q. Do you know anything about the cost of the oak bureau? A. No, sir, I don't know as I do.

Q. Do you know anything about the cost of any of the pictures? A. No, sir.

Q. Do you know anything about the cost of the carpet? A. Yes, sir.

Q. How much did it cost? A. We gave $12 for it.

Q. How long before the fire? A. About two years before the fire.

Q. Any rugs in the room? A. Yes, sir, two.

Q. Do you know what they cost? A. $1.50 apiece.

Q. How old were they? A. They were practically new.

Q. What do you mean my "practically new"? A. Well, a year old.

Q. Any ornaments on the mantel? A. Different vases.

Q. Do you know what they cost? A. No, sir.

Q. Any lambrequins? A. Yes, sir.

Q. Where did you get it? A. I made it.

Q. Now, the third and fourth room on the second floor, who occupied them? A. My son Edward.

Q. And his wife? A. Yes, sir.

Q. Who did the things belong to in that room? A. All the things belonged to them but the carpets, they were ours.

Q. What carpets? A. One ingrain and one brussels.

Q. How many yards of brussels? A. Same as on the other floor, just the same, the other two rooms opposite.

Q. Do you mean the rooms were under one another? A. No, the hall went between them, they had the two rooms on one side, and we had the two rooms on the other side.

Q. How many yards of brussels carpet were there? A. I don't know whether twenty or twenty-five.

Q. Do you know what it cost? A. $1.10.

Q. And the brussels carpet? A. $1.10.

Q. How old was it? A. Four years old.

Q. Now, the other one, how much did that cost? A. Eighty-five cents.

Q. What kind of carpet was it? A. Ingrain.

Q. How may yards? A. Twenty yards.

Q. How old was it? A. Five years old.

Q. Now, were these all the time on the second floor? A. Yes, sir.

Q. What was there in the parlor? A. A parlor suite, piano, rocking chair, and carpet.

Q. Did anything happen to the piano? A. They got it out, but it was ruined, the leg was broken and the pedals were off, and burned up.

Q. Did you have anything done to that afterwards? A. No, sir.

Q. Never had it fixed? A. No, sir.

Q. How old was that piano? A. I could not tell you.

Q. What were the articles of furniture in the room? A. A parlor suite, four chairs—

Q. What was destroyed—you got some of it out? A. Yes, sir, we got the parlor suite out.

Q. What was destroyed? A. That was all that was got out.

Q. What was destroyed, that was in that room? A. Three rocking chairs, and the carpet, the lambrequin, on the mantel, and the vases and pictures.

Q. How many pictures? A. I don't know now, but six, I think, I guess that is all.

Q. Any piano cover? A. Yes, sir, the piano cover was destroyed.

Q. Anything else besides the two rockers? A. No, sir, I think not.

Q. Any jardineres? A. Two.

Q. Any palms or plants there? A. Yes, sir, palms—two palms.

Q. Any bric-a-brac on the mantel? A. Yes, sir.

Q. What kind was it? A. Bisque, some of the images was Bisque, and different things.

Q. Do you know what the largest cost—the three rocking chairs? A. $2.50 or $3.00 each.

Q. How long have you had them? A. Two years.

Q. And the jardineres—do you know how much they cost? A. No, sir, I do not.

Q. Do you know how much any of the bric-a-brac cost? A. No, sir.

Q. Do you know how much the lambrequin cost? A. $25.00.

Q. How long have you had that? A. Two years.

Q. Where did it come from? A. It was my husband's.

Q. Where did he get it? A. His cousin gave it to him.

Q. How do you know what it cost? A. I only know by hearsay, that is what she said.

Mr. English: I object to that, and move to strike it out.

Court: It may be stricken out.

Q. How many yards of carpet was there? A. Seventy.

Q. How long had you had it? A. Four years.

Q. Do you know how much it cost? A. $1.35 a yard.

Q. Do you know how much any of the pictures cost? A. No, sir.

Q. What kind of pictures were they? A. Some oil paintings, and some different sketches.

Q. Where did you get the piano cover? A. I guess we bought it with the piano.

Q. As part of the cost of the piano? A. Yes, sir, as part of the cost of the piano.

Q. Was any oak buffet there? A. In the dining room that was.

Q. What was in the dining room? A. The oak buffet.

Q. What was burned? A. That was ruined, it was worth nothing, but we got it out.

Q. What did you do to it afterwards? A. We had new doors made to it.

Q. Do you know how much it cost? A. No, sir.

Q. What else in the dining room? A. The Crex matting on the floor, forty yards was burned.

Q. How long had you had that? A. That was just new, put down in June.

Q. How much did it cost? A. Fifty cents a yard.

Q. Any china closet in the dining room? A. Yes, sir.

Q. What became of it? A. It was destroyed, burned up.

Q. How long did you have it? A. Two years.

Q. Who made it? A. Mr. Wilcox.

Q. Do you know how much it cost? A. No, sir.

Q. Were there any pictures? A. Yes, sir.

Q. How many? A. I don't know.

Q. Any dishes? A. Yes, sir.

Q. What became of them? A. Some were destroyed, and some saved.

Q. How much was destroyed? A. I don't think I can remember now—very few of the best of our dishes were saved, we sent to Europe and got again some that were destroyed, but I think they cost us $17.00.

Q. Do you know how many pieces of china were destroyed? A. No, sir, I could not tell you.

Q. Were there ten? A. Oh, yes, sir, there were twenty or more.

Q. Twenty pieces of china destroyed? A. Yes, sir.

Q. What was in the kitchen? A. There was a black walnut desk, a table, stove, kitchen closet, two chairs, carpet and linoleum on the floor, and the kitchen utensils, in the closet.

Q. Now how much did the kitchen closet cost, do you know? A. No, sir.

Q. Do you know how much the carpet cost? A. No, sir.

Q. Do you know how much was the cost of the linoleum? A. $5.00.

Q. How long did you have it? A. It was new.

Q. Bought just before the fire? A. No, sir, in June, before the fire.

Q. Did you have a mirror in the kitchen? A. Yes, sir.

Q. What did that cost? A. $2.00.

Q. How old was it? A. A year old.

Q. You had a stove? A. Yes, sir.

Q. How old was that? A. Five years old.

Q. Do you know how much it cost? A. $22.00.

Q. Do you know of any cooking table? A. Yes, sir.

Q. How much did that cost? A. $2.50.

Q. And chairs? A. Yes, sir, one.

Q. How old were they? A. Two years old.

Q. Any rocker in the kitchen? A. Yes, sir.

Q. Do you know where that came from? A. We bought it.

Q. How long before the fire? A. Two years.

Q. How much did it cost? A. $1.50.

Q. Where did the desk come from? A. I think it was my aunt left it to my husband.

Q. Do you know what the value or the cost of the kitchen utensils in the kitchen closet was, that were destroyed? A. Yes, sir, by buying them.

Q. You had to buy those articles from time to time? A. Yes, sir.

Q. And what was the cost of them? A. Ten dollars.

Q. You think all the kitchen articles in the closet would cost $10? A. Yes, sir, I do.

Q. What was there in the outer kitchen? A. There was a barrel of flour, and sugar.

Q. How much flour? A. A barrel.

Q. Was any taken out of it? A. Just a little, and a half a barrel of sugar.

Q. How much did the flour cost? A. About $6.00 a barrel.

Q. And how much did the sugar cost? A. Not quite half a barrel.

Q. Do you know how much that cost per barrel? A. No, sir.

Q. Was there anything else there? A. A refrigerator.

Q. Where did you get that? A. Bought it over to Plainfield.

Q. How long before the fire? A. Two years, or two or three years.

Q. What did it cost you? A. $18.00.

Q. Was there anything in the cellar? A. Yes, sir.

Q. What was there? A. A case of corn, and a

case of peas, lobster, and salmon, and can of lard.

Q. This salmon, what did that cost—do you know? A. No, sir, I do not.

Q. Who bought them? A. Mr. Goodman.

Q. How did you happen to have cases of these articles around? A. Well, because we had a friend, who let us have them at wholesale prices, and who let us have them cheaper by buying wholesale, and we always had bought them wholesale.

Q. Had any of the fish been used? A. I think we used some of the salmon, but not any of the lobster.

Q. Anything else in the cellar that you recall? A. The lard, and hams.

Q. How much lard? A. Almost a can.

Q. How much was a can? A. Fifty pound can.

Q. How much did it cost? A. Twelve cents a pound.

Q. How much did you use out of the can? A. We used some of it, maybe seven or eight pounds, or something like that.

Q. Anything else that you can think of? A. Canned fruit.

Q. Fruit you had put up yourself? A. Yes, sir.

Q. How much did you have? A. I could not estimate it now, there were different kinds, cherries, strawberries and pineapple.

Q. How many jars did you have? A. Oh, there must have been seventy-five cans of fruit.

Q. Do you know anything about the value of that canned fruit, just answer yes or no? A. Yes, sir, I know.

Q. How do you know? A. By putting it up, canning it, and buying it.

Q. Have you ever bought any that had been preserved? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. What does it cost to buy? A. Why, you can get it at all prices, from all the way, ranging from fifty cents to twenty-five cents a can of fruit, twenty-five cents a can—different kinds of fruit.

Q. Was this as good as what you buy? A. Mine was better than you can buy, it was always considered so.

Q. Did you have any vinegar in the cellar? A. Yes, sir.

Q. How much? A. I don't know whether there was a barrel or over, I don't know how much more.

Q. Do you know how much that cost? A. No, sir.

Q. Did you have any meat on the place? A. Yes, sir.

Q. Did you have any salt pork? A. Yes, sir.

Q. How much? A. Half a barrel of pork.

Q. Do you know how much that cost? A. No, sir.

Q. Did you have any stone pots for the milk? A. Yes, sir.

Q. How many of them? A. Oh, they were too numerous to mention, I don't know how many.

Q. Have any wash tubs? A. Yes, sir, two.

Q. What did they cost? A. $2.50.

Q. Each? A. Yes, sir.

Q. How old were they? A. They were new, a year old.

Q. Have a clothes wringer there? A. Yes, sir.

Q. How much did it cost? A. $2.50.

Q. How old was it? A. That was about four years old, four or five years old.

Q. On the third story, hall, did you have any floor covering? A. Matting.

Q. How many yards? A. There was ten yards on the upper floor.

Q. Any on the stairs? A. Yes, sir.

Q. How much? A. I could not tell you.

Q. How long had you had it? A. Put down new two years before.

Q. How much did it cost? A. Forty cents a yard.

Q. Had you any bureau in the hall? A. Yes, sir.

Q. What kind of bureau? A. I guess it was mahogany.

Q. Had you any articles of household use in it? A. Sheets, and pillow cases, table cloths, and napkins.

Q. How many sheets did it contain? A. Twenty.

Q. Do you know how much the sheets cost? A. All the way from $1.00 to $1.50.

Q. How old were they? A. Some of them had not been used, and some had been used quite a while, and there was some new.

Q. Any pillow cases there? A. Yes, sir.

Q. How many? A. Fifteen or twenty pair.

Q. Do you know how much they cost? A. Oh, all the way from eighteen cents to twenty-two cents.

Q. How old were they? A. Some had been used and some were new.

Q. Any towels? A. Yes, sir.

Q. How many? A. Twenty-five.

Q. What did they cost? A. All the way from twelve and a half cents, to seventy-five cents.

Q. How old were they? A. Well, the same, some were old and some were new.

Q. You bought as you needed them? A. Yes, sir.

Q. Any counterpanes? A. Yes, sir, two.

Q. Do you know how much they cost? A. Two or three dollars, I don't know which, two dollars a piece, I should say.

Q. How old were they? A. One was about five years old, and the other a year old.

Q. Any closet room in the third story? A. Yes, sir.

Q. Were there any of your things in there? A. No, sir.

Q. Any floor covering in the hall of the second story? A. Yes, sir.

Q. What was there? A. A brussels carpet.

Q. How many yards? A. Ten yards.

Q. What did that cost A. $1.10 a yard.

Q. How old was it? A. Four years.

Q. Twelve yards of stair carpet, was there any covering on the stairs? A. Yes, sir.

Q. What kind of carpet? A. Brussels to match the hall carpet.

Q. Any rugs? A. Yes, sir.

Q. How many? A. Two.

Q. Do you know what they cost? A. No, sir.

Q. Anything at the front door? A. There was a renaissance front piece, in green silk.

Q. Did you make it? A. No, sir.

Q. Did you buy it? A. I bought the material, and my daughter made it.

Q. Any curtain on the front door? A. Yes, sir.

Q. Do you know how much that cost? A. No, sir, I guess she knows though.

Q. Any shades in the house? A. Yes, sir.

Q. How many shades? A. I don't think I can tell, unless I count them up, from the windows.

Q. Do you know what the shades were worth, or what they cost? A. Eighty-five cents a piece.

Q. How old were they? A. Four years old.

Q. Any screens? A. Yes, sir, for all the windows.

Q. Do you know how much they cost? A. No, sir.

Q. Any screen doors? A. Yes, sir.

Q. How many? A. Three.

Q. Do you know how much they cost? A. No, sir.

Q. What kind of netting did you have on these screen doors? A. Wire mosquito netting.

Q. Iron? A. No, sir, not iron, I guess it was like any other netting, I don't know what you call it.

Q. As you mention these things, you say some of them are three or four years old? A. Yes, sir.

Q. And they were bought new? A. Yes, sir.

Q. How did it happen you bought things new for that house, when living on that place for so many years? A. They were got when the place was fixed over new, we didn't have the things in it that we wanted, and when we got so that we could buy the things, we refurnished, when we remodeled the house.

Q. Where did you live when the house was being remodeled? A. We lived in the extra rooms.

Q. How many extra rooms did you have built when you had the house remodeled? A. Four.

Q. Were there any chickens on the place? A. Yes, sir.

Q. Who looked after the chickens? A. I did.

Q. Were any of them injured in the fire? A. Yes, sir, some of them were burned.

Q. How many of them were burned? A. I can only tell from what was left, we had 150, and we counted ninety odd after the fire, and we judged about fifty of them were burned.

Q. Did you sell any of those after the fire? A. No, sir.

Q. Did you sell any before the fire? A. Yes, sir, we had sold chickens.

Q. How much did you get for them?

Mr. McCarter: We ought to know the age of these chickens, and all that.

Mr. Whittemore: Q. Were these little chickens or large chickens? A. Well, what I mentioned was the large chickens, that was burned, and the little chickens in the coop and nests, I don't know how many there were that were burned, we didn't count them.

Q. The large chickens, what did you sell those for before the fire? A. Seventy-five cents.

CROSS-EXAMINATION by Mr. McCarter:

Q. Won't you be kind enough to tell us of whom your family consisted—your husband and yourself, that is two, then your son Edward and his wife, that was four, and they had a two-year-old child, that would make five, and you had a son Elmer—was he living at home? A. Yes, sir.

Q. How old was he, about? A. Eight years old.

Q. Now, did any of your farm hands live in the house? A. In the winter time they staid in the house, yes, sir, they all lived in the house.

Q. And they had to go upstairs to go to their rooms? A. Yes, sir.

Q. And they slept on the third floor? A. Yes, sir.

Q. How many hands did you have sleeping in the house? A. We never had but one at a time, well sometimes we had two.

Q. Did you keep a hired girl? A. No, sir.

Q. Now, I suppose your carpets and furniture and matting, and rugs, and china, and all the household goods were subject to the wear and tear of an ordinary family living there? A. Yes, sir, surely.

Q. Did you buy new furniture at the time the remodeling was completed? A. Some we did, yes, sir.

Q. And that is, some of the furniture that you had at the time of the fire? A. That was four years old.

Q. Don't you know that the remodeling was done about the time you bought the farm? A. Why, no, sir.

Q. When was the remodeling done? A. Why, four or five years previous to the fire.

Q. You bought, I think you said in 1899? A. I don't remember the year.

Q. And the new furniture that was bought, if you said you had had it four years, you meant you had bought it at the time when the house was enlarged, and you had it fixed up? A. Yes, sir.

Q. You don't claim that these carpets and pieces of matting, and sheets, and toilets and what not, that had been used some of them, four or five or six years, were worth at the time of the fire, what they cost you? A. Why certainly not, no, sir.

Mr. Whittemore: I want to read the interrogatories and the answers thereto in this case and then offer them in evidence.

(Mr. Whittemore reading the interrogatories and Mr. English reading the answers.)

Interrogatories.

"NEW JERSEY SUPREME COURT.

James E. Goodman, vs. Lehigh Valley Railroad Company of New Jersey.	In Tort. Interrogatories.

"First interrogatory.

"What communications have you had from James E. Goodman or any member of his family, representative, agent, or attorney, with reference to fires that occurred on his property during the last five years? Specify the dates of all such communications, from whom received, and to what fire the same referred. Name the person in whose custody said communications are at the present time and give his address?

"Answer to first interrogatory.

"James E. Goodman *and son* on or about April 23, 1904, complained of a fire which they alleged had been caused by the defendant. If he has made other complaints the same have been mislaid or do not recur to memory.

"Second interrogatory.

"Did the Lehigh Valley Railroad Company of New Jersey own the railroad right of way adjoining the farm of the plaintiff at Goodman's Station, in the Township of Fanwood, Union County, New Jersey, and did said defendant own said property about January 1, 1905, until August 1, 1905? If said company did not own said lands, please specify the owner of the same during said period."

New Jersey State Library

"Answer to second interrogatory.

"The right of way mentioned in said interrogatory was owned by the Lehigh Valley Railroad Company of New Jersey from about January 1, 1905, to August 1, 1905."

"Third interrogatory.

"Did the defendant operate the railroad upon and over said right of way adjoining the plaintiff's farm in said Township of Fanwood, between said dates last mentioned? If not, specify what company did own and operate such railroad during that period."

"Answer to third interrogatory.

"Yes."

"Fourth interrogatory.

"What trains passed over the said railroad adjoining the farm of the plaintiff between three and five o'clock in the afternoon of the nineteenth day of July, nineteen hundred and five? Give the train numbers of all such trains, either freight or passenger trains, or single locomotives, the time when each of said trains or locomotives actually passed the farm of the said plaintiff, or that portion of it nearest to his building, and the numbers of all of the engines that passed during that period."

"Answer to fourth interrogatory.

East.

Train	Kind	Eng.	So.P.	Cran.
8	Pass.	2454	3:37	3:50
Ex.	Grab.	1353	2:58	3:40
"	Frt.	1458	2:50	3:30
"	Frt.	1355	3:29	4:00

Interrogatories.

Train	Kind	Eng.	Cran.	So. P.
29	Pass.	2676	4:57	5:08
Ex.	Local	1119	5:01	5:28"

Mr. English: I want to call Mr. Whittemore's attention to the fact that the train going east, viz: "Ex. Grab. 1353-2.58-3.40" has been corrected.

Mr. Whittemore: Yes, I will attend to that.

"Fifth interrogatory.

"What are the nearest points to the plaintiff's farm along the railroad of the defendant, where a record is taken of all engines and trains that are passing along said railroad, with the time that they passed such points?"

"Answer to fifth interrogatory.

"Cranford, N. J."

"Sixth interrogatory.

"In whose custody are such records, at the present time, which give the record of trains passing such points on July 19th, 1905, and what is his present address?"

"Answer to sixth interrogatory.

"R. G. Kenly, Train master, Easton, Pa."

"Seventh interrogatory.

"What precaution or means did the defendant take or use at the times of the fires specified in the plaintiff's declaration, to prevent the communication of fire from the locomotives of the defendant to the property of any owner or occupant of land adjoining or near said railroad.

Answer to Seventh Interrogatory.

The defendant, the L. V. R. R. Co., of New Jersey, took and used all practicable means at the time of the fire specified in the plaintiff's declaration, to prevent the communication of fire from any engine used by it when passing along the property of the plaintiff stated in the declaration, and for this purpose equipped and provided its engines with screens and covers to their smoke stacks, so as to arrest and prevent, as much as practicable, the escape of fire.

Interrogatories.

Interrogatories Marked

'Exhibit P-7', answers thereto marked 'Exhibit P-8.' "

Mr. Whittemore: I will read the Interrogatory and Amended Answer correcting the Fourth Interrogatory, referring to "Ex Grab:"

New Jersey Supreme Court.

James E. Goodman, vs. Lehigh Valley Railroad Company of New Jersey.	In tort.

"Train	Kind	Eng.	So. P.	Cran.
Ex.	Grab.	1353	2:58	3:40"

Marked "Exhibit P-9."

Mr. Whittemore: The Amended Answer reads as follows:

"East.

"Train	Kind	Eng.	SoP.	Cran.
8	Pass.	2454	3:37	3:50
Ex.	Frt.	1458	2:50	3:30
"	"	1355	3:29	4:00"

"West.

"Train	Kind	Eng.	Cran.	So. P.
29	Pass.	2676	4:57	5:08
Ex.	Local	1119	5:01	5:28"

Offered and marked "Exhibit P-10."

Mr. Whittemore: I would like to read the testimony of Mr. James E. Goodman, the original plaintiff, who is deceased.

Mr. McCarter: At the reading of these depositions in the last trial before Judge Swayze, some objections were made and I will ask counsel to read this testimony slowly so that we may make objections, and your Honor, of course, would not be bound by the rulings of Justice Swayze, and therefore we would like to offer our views in regard to the matter. The list referred to in that testimony has been ruled out of these proceedings and it is troublesome to find out how far this evidence would be legal, and I only want to get the benefit of the legal objections as they arise.

"JAMES E. GOODMAN, sworn:

"Direct-examinations by Mr. Whittemore:

"Q. You are the plaintiff in this case, Mr. Goodman? A. Yes, sir.

"Q. You lived at Goodman's Station, in Fanwood Township? A. Yes, sir.

"Q. Have lived there how many years? A. Since 1883.

"Q. What is your business? A. Farmer and coal merchant.

"Q. How long have you been in that business? A. In the coal business?

"Q. Farmer? A. Since 1883 there.

"Q. How long have you been in the coal business? A. Ten years.

"Q. Were you in the farming business before you came to Fanwood? A. Yes, sir.

"Q. Where was that ? A. Why, I rented a farm from Mr. Shann in Raritan Township.

"Q. Did you farm before you came there? A. Well, I first went to farming in 1878.

"Q. Where did you conduct your coal business? A. At Goodman's siding.

"Q. What did you have there in connection with your coal business? A. Well, I have wood.

"Q. Did you have a yard there? A. Yes, sir.

"Q. And a siding from the railroad? A. Yes, sir.

"Q. Is that coal business carried on on your farm at all? A. No, sir.

"Q. It is the other side of the road, isn't it? Is it on the northerly side of the road? A. Yes, sir.

"Mr. English: Is it the west side?

"Mr. Whittemore: Northeast side of the road.

"Q. How large a farm have you there? A. Ninety-one acres and some hundredths.

"Q. What kind of products did you have on your farm, any particular kind or just general farming?

"The Court: Just ask him what he had on this day in July.

"Q. On the 19th of July last what did you have on your farm in the way of improvements? What buildings are on your farm? A. Well, I had a dwelling house, carriage house.

"Q. Now will you point out each building as you mention it, on the map? A. There stood a house (indicating).

"Q. Did you live there? A. Yes, sir.

"Q. In the house? A. Yes, sir. There was a wood shed, carriage house. This was a wagon

shed with a mow attached. These are three barns, and this is a barn, a big bin, and this was a horse stable. This was our hen house. This is our crib. This is our smoke house. This was a boiler room and green houses. That constituted our buildings on the farm (indicating).

"Q. What do these stacks indicate? A. They are two stacks of hay.

"Q. What does this little building up here indicate? A. That was a pig pen.

"Q. What was that? A. That was a toilet.

"Q. Now, Mr. Goodman, what was the size of your house? Do you know whether those dimensions are correctly marked on the map? A. Yes, sir.

"Q. What was the style of the house? A. French roof, two-story.

"Q. How many rooms were in it? A. Twelve, I believe, sir.

"Q. Were there any additions or piazzas on it? A. Yes, sir; here was the extension of the piazza all around on three sides of the house

"Q. What kind of a roof did it have? A. A tin roof, sir, with shingles on the side to make that a French roof.

"Q. Had you made any improvements to the house? A. Yes, sir.

"Q. When? A. Two years before I had raised the house one story and put on this French roof, and squared up the lower rooms there. They slanted off here from the roof.

"Q. How much did you expend in the improvements at that time?"

Mr. English: That is objected to, and we make the same objection now.

The Court: The statute says: The evidence act of 1900. "In case of a new trial

of any civil action wherein the parties have been examined as witnesses, if either party shall have died since the former trial, and the action shall have been duly revived and proceeded with at the suit of or against the legal representatives of such deceased party, the surviving party and also such representative shall be competent witnesses on such trial, and the testimony of such deceased party on the former trial of said action may also be proved and admitted on the new trial thereof."

I take the word "may" there as "must" what right have I to say what part of it may be read or what may not.

Mr. Whittemore: I am willing to allow this question and answer to be stricken out. That settles it. (Therefore on page 20, all that it contains down to the question "Q. Who did your work?" shall be stricken out.)

The Court: But I read the act and the word "may" means "must"; I can not keep it out when the statute says it shall go in.

Mr. McCarter: It seems to me that counsel can not select. He has got to put the whole in, not half the case. It must all go in just as it is read. Either read it or don't read it. I don't think counsel ought to be allowed to select such parts as he thinks objectionable and read them—interrupted—

The Court: If you object, and you have read the objection, and counsel agrees that that objection is well taken, then it becomes testimony by consent of the parties; for

instance, if you say you do not want that in and he says, then, let it go out, I don't want it to go in, that obviates your objection, and you have nothing to complain of.

Mr. McCarter: Before your Honor has made that admission, your Honor has already convinced me that there was nothing to my objection, and I earnestly state now, that I think counsel has no right to garble Mr. Goodman's testimony; he must read it all or nothing.

Mr. Whittemore: I think that would be so if the defendant did not in any way preserve the objections that were made then, that he should object now. If it was presented in such a way that the objection made at the former trial, that objection could not be availed of now. But, in the case where an objection was made and the testimony was admitted, and I should concede that it might be, that there might be value in the objection, and in a desire to not prejudice my case by risking a determination at that point—interrupted—

The Court: Do you think I have the right under that word "may"; do you think I have the right to strike it out?

Mr. Whittemore: I think your Honor has a right to deal with the question as presented on the new trial. I think any other ruling would perhaps infringe on some constitutional right, because what was evidence on the second trial must have been evidence on the first trial and I would like your Honor to deal with the matter, if your Honor can do so.

The Court: If that evidence on the former trial shall be admitted, I would have no difficulty, but it says "testimony."

Mr. Whittemore: Can't that be given the same meaning as evidence?

The Court: I will rule on this testimony as it comes up, as these questions are raised, and then let the Court of Errors say whether I had a right to or not.

Mr. McCarter: Well, in order to have the matter plain, we will object to that procedure.

The Court: I am very glad to have you do that, and we will go on reading the evidence.

Mr. McCarter: I pray an exception.

The Court: First, you object to my ruling at all on this question and then you object to the question, and then you ask me to rule. If that is the way you do it I won't rule on the first objection.

Mr. McCarter: Of course I do not want to appear disrespectful to the Court, but at the same time we have the right to insist under the statute that the evidence must be read entirely.

The Court: You claim that to be your right, and I say to you that that is not your right; then you say to me, you are wrong, and I want an exception, and I say, I may be wrong and you can have an exception. Now, if I am right about that, then you say, you have a right to preserve whatever rights you may have on the specific question.

Mr. McCarter: Yes, sir, that is our position.

The Court: Then I will have to reverse myself.

Mr. Whittemore: I will have that stricken out from lines 1 to 16.

The Court: Very well.

"Q. Who did your work? A. J. N. Wilcox of Westfield.

Q. Now what was the character of the wood shed; what was it built of? A. Wood, pine.

"Q. What kind of roof? A. It was a wood roof, sir.

"Q. How high did it stand, about? A. Ten feet at the eaves and sloped off here to seven feet at the eave.

"The Court: Q. Well, ten feet at the peak I suppose, and seven feet at the eave? A. Yes, sir.

"Q. How old was that wood shed? A. I think about ten years old, sir.

"Q. Did you build it? A. Yes, sir.

"Q. Do you know what it cost?

"The Court: That is too remote, the cost of the building ten years before.

"Q. What is the next building to that? A. Carriage house, sir.

"Q. How high did that building extend? A. Sixteen feet posts.

"Q. What kind of roof? A. Shingle roof.

"Q. Do you know how old that building was? A. A year and a half before the fire. Practically new.

"Q. Of what material was that building constructed? A. Pine, the sheathing was of pine and the frame hemlock.

"Q. Did you build that building yourself? A. I had it built, sir.

"Q. That is a year and a half ago. I will ask what that building cost?"

Mr. English: We object to that.

Mr. Whittemore: Your Honor may be all right about the theory of it, but I object to any exception being allowed to the defendants where he has also objected and excepted to the reading of the testimony with any items stricken out. It seems to me his action in so doing would be inconsistent.

The Court: I will let you have such an exception as you may wish. I rule that is admissible.

Mr. English prays an exception.

WM. H. SPEER,
Judge.
(Seal.)

"Q. That is the wagon house—what did it cost? A. Two hundred and fifty dollars I paid to have that put up.

"Q. What was the condition of your house at the time of the fire as regards repairs? A. Why, it was in very good repairs; just had it newly painted about, not over a month and a half, papered throughout the house from top to bottom and newly painted outside and inside too.

"Q. Who did your work? A. Mr. Hunt of Westfield and Welsh brothers did the papering from Westfield.

"Q. That was a month and a half before the fire, you say? A. Why, I think so, yes, sir.

"Q. Can you say how much that papering and painting cost you?

"Objected to. Question allowed.

"Whereupon the defendant, by its coun-

sel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

WM. H. SPEER,
Judge.
(Seal.)

Mr. English: We object to that.

Mr. Whittemore: That was admitted at the last trial.

The Court: I will admit it.

Mr. English prays an exception.

WM. H. SPEER,
Judge."
(Seal.)

"A. The painting cost $110. That was done by contract.

"Q. What did the rest of it cost? A. The papering cost $25. We bought the paper and Mr. Welsh put it on. $19, excuse me.

"Q. That was inclusive of the value of the paper? A. Yes, sir; we bought the paper, but I forgot how much the paper cost.

"Q. The wagon house, you say, was built a year and a half ago. What condition was it in with regard to repairs at the time of the fire? A. Practically new. We kept the building in good paint so it would last longer.

"Q. Take the nearest barn to your house, what was that used for? A. That is there. Wagon shed and a mow there on top of the wagon shed.

"Q. How high did it stand? A. That was fourteen-feet posts.

"Q. What kind of roof? A. That was twenty-eight by thirty-eight feet, I think.

"Q. What material was it built of? A. Why, sheathing.

"Q. Well, what kind of sheating? A. Pine sheathing and hemlock shingles—I should say spruce shingles.

"Q. What kind of frame? A. Frame was chestnut, sir.

"Q. Take the next building to that, the main barn, how big was that as to height? A. That was of the same height.

Objected to that the map shows it as if it was all one building.

"Q. What did you say in answer to the last question? A. Fourteen feet. These are the same height.

"Q. The same height as the one you have just spoken about before? A. Yes, sir.

"Q. What kind of roof? A. Shingle roof, pine shingles.

"Q. What was it used for? A. A hay barn.

"Q. These barns that we are now talking about are all connected, are they? A. They were, but they were put up separately.

"Q. Is there any communication from one to another? A. No, sir; only by a mow window, but nothing no other way, just to pass hay through.

"Q. They have to be entered from the outside of each one? A. Yes, sir.

"Q. Now all the buildings that you pointed out a little while ago, are they standing now? A. No, sir.

"Q. What became of them? A. Why, they were destroyed by fire.

"Q. At what time? A. 19th of July, 1905.

"Q. Now this barn we were speaking about last is entered from what point? A. The middle barn.

"Q. Yes, sir? A. From the railroad side, sir.

"Q. By what means? A. By means of a drive-way. By the two big doors there.

"Q. Are the doors shown on the map correctly? A. Yes, sir.

"Q. What did you use that barn for? A. For hay.

"Q. On the 19th of July, before the fire, what was in that barn? A. Why, it was practically full of hay. We couldn't get any more into it, sir.

"Q. What work were you engaged in doing at the time the fire occurred? A. Why, I was at the bedside—

"Q. No; I don't mean you personally, but what was being done on your farm? A. Oh, there was two men there cultivating potatoes at the lower end of the field.

"Q. Had you been doing any haying? A. Yes, sir.

"Q. Had you had any haying done on that farm before that? A. Yes, sir.

"Q. How full was that barn of hay? A. Full, sir.

"Q. Now the next barn, what was it used for? A. That was a hay barn, but narrower than the others.

"Q. How much narrower? A. Oh, I should judge it was five, six feet narrower than the others.

"Q. What was the height to the peak? A. The height was the same, fourteen feet, sir.

"Q. Same height to the peak? A. Yes, sir.

"Q. What was the next barn used for? A. That was a hay barn. Cows in under, sir.

"Q. What was the height of that barn? A. That was the same as the other barn, as I told you there.

"Q. What was the width of it in relation to

the last barn? A. That was on the same lines, sir.

"Q. The next barn there marked only touching the corner of the last one you testified about, what was that? A. That was a hay barn.

"Q. What was in it at the time of the fire? A. There was hay. Come down there and left a space for a storage for lumber, seven feet, and there we had 5,000 feet of oak lumber stored, sir.

"Q. Was that barn filled with hay with the exception of that space? A. Yes, sir.

"Q. What was the height of that barn? A. Fourteen feet posts.

"Q. What is next to that? A. That is a pig pen, sir; just a leanto, as they call it. A pig pen.

"Q. There is a building marked here "hen house.' What was the height of that? A. That was seven feet posts. Seven by eighteen, I believe, as near as I can judge now, sir.

"Q. Did you build that hen house? A. Yes, sir.

"Q. When did you build it? A. When I first went there in 1884.

"Q. What was its condition at the time of the fire? A. Well, it was in good condition.

"Q. What is the next building to that? A. Corn crib.

"Q. Did you build that? A. Yes, sir.

"Q. How long ago? A. That was about three years before the fire.

"Q. What was its condition at the time of the fire? A. Good, sir.

"Q. I will ask you what that cost three years ago?"

Mr. English: I object.

The Court: I am going to rule in strict accordance with what Justice Swayze ruled

on the other trial, because, I think, upon reflection, when you come to think this matter over, it is the testimony that was actually given on that trial, and the objections preserved there virtually resulted in the present trial, and, therefore, when the matter gets before the Court again in review, the testimony will stand before them exactly as they were preserved in the record originally, and then the testimony will not be mutilated and everything will stand, as I think it should stand, and for that reason you need not make any more objections, except to say now that you object whether you objected before, and let that matter stand on the record in that way.

Mr. English: That is all right but suppose we want to object to some other phase of the testimony, some other objection to it.

The Court: I will rule upon it as it was originally ruled upon and wherever you ask for an exception I will then say whether I will grant it or not, when the occasion arises.

"A. Well, I really don't know what it did cost, because I had a good deal of frame on the farm, or oak frame, and made it.

"Q. Never mind? A. I built it myself, sir.

"Q. What is the little building next to the corn crib? A. That is a smoke house.

"Q. How high did that stand? A. That was seven feet at the post.

"Q. How old is that; do you know? A. No; I don't know how old that is. That was on the farm when I bought the farm.

"Q. The building marked 'Boiler house,' what was it? A. That I had for raising plants.

"Q. How high did it stand? A. Four feet, sir; six inches at the side and running up to a peak, and then I had the alleyway through the centre.

"Q. Then you are talking about the green house now? A. Yes, sir. That was all connected.

"Q. All the same general shape? A. Yes, sir.

"Q. What was the condition of the green house at that time? A. It was all right.

"Q. All these buildings that we have mentioned have been destroyed by fire? A. Yes, sir.

"Q. The two stacks marked here on the map, were they destroyed by fire? A. Yes, sir.

"Q. When? A. On the 19th of July, 1905.

"Q. What was in those stacks? A. It was what we call swamp hay.

"Q. Do you know how much? A. Why, I should think four tons in each stack.

"Q. What is it worth per ton? A. At that time it was worth $8 a ton, that quality of hay.

"Q. The pig pen marked here by the lane, is that destroyed?

The Court: Is that a second pig pen?

Mr. Whittemore: Yes, sir.

"A. No, sir.

"Q. Did you have any trees on your place previous to the 19th of July? A. Yes, sir.

"Q. Can you point out on these maps what trees were there that were affected by the fire? A. There was four apple trees here; one of them is dead. There is really two of them dead, sir, and two are alive.

"Q. How old are those trees? A. Well, I couldn't tell you sir, but I should judge about

thirty to thirty-five years old, as near as I could judge.

"Q. How did those trees bear? A. Very good, sir.

"Q. Can you say how much the apples were worth you got off of those trees on an average?

Objected to. Question overruled.

"Q. Do you know anything about the value of trees, Mr. Goodman, fruit trees? A. Well, I don't know as I have only young ones.

"Q. Only what? A. Young trees.

"Q. What kind of apples are those? A. They were the early harvest apple.

"Q. When did you get the last crop from them? A. 1904.

"Q. What kind of crop did you get in 1904? A. Why, they was all burned up.

"Q. 1904 I am asking you? A. Oh, in 1904, them trees brought us in ten dollars apiece, sir, the apples that we sold off of them.

"Q. Did you sell apples from those trees? A. Yes, sir.

"Q. Now will you indicate any other trees there? Pass on to the other trees that were destroyed in the fire? A. There were shade trees there. There was a pear tree.

"Q. How old was that pear tree near the corner of your house? A. Why, I should judge that was fifteen years old.

"Q. What kind of crop did you get last year from that tree? A. Nothing, sir. Burned down.

"Q. Well, the year before the fire? A. Oh, there wasn't only about a bushel, I think, the year before the fire.

"Q. What? A. One bushel.

"Q. What kind of pears? A. They were a pear that ripens only about the first of September.

"By the Court: Q. What did you get for the crop? A. That I didn't sell, sir.

"By Mr. Whittemore: Q. Do you know what they would be worth? A. No, sir.

Objected to.

"Q. What is the next tree at the most easterly corner of your house? A. There was two maples there. They was so burned I sawed them down.

"Q. About how old were they? A. There was an apple tree here. That apple tree?

"Q. Yes? A. Oh, I don't know, sir. They were there when I bought the farm.

"Q. Did you get any apples from it the year before the fire? A. Yes, sir; but they were only used for cider apples; nothing to eat out of hand or to sell.

"Q. Now next there? A. There was two maples here that I had set out.

"Q. How old were those trees? A. Them I set out in 1884.

"Q. What is the tree that is between the wood shed and your house? A. That was a cotton ball.

"Q. How old was that? A. That I couldn't tell you. That was about two feet in diameter; it must have been pretty old.

"Q. What was the condition of the tree before the fire? A. Why, it was an excellent shade tree, sir.

"Q. Go on to the other trees? A. That was a black walnut there.

"Q. Directly in rear of your house? A. Yes, sir. That is dead.

"Q. How was it before the fire? A. Why, so it bore walnuts.

"Q. Well what was its condition before the fire? A. Why, it was a healthy tree, the same as the other trees.

"Q. How old is that? A. Well, I couldn't tell. The butt is there and it is twenty inches in diameter, so it must be pretty old—older than I am I guess.

"Q. Now we can pass on to the other trees as rapidly as possible. Give us the ages of them and their condition before the fire? A. That was a cherry tree. That was all ruined. That was about twelve inches in diameter, but I don't know the age of it. That was a common cherry, just a natural cherry.

"Q. What kind of a crop did you get the year before? A. Well we used them for our house, for domestic use, and I didn't sell any of those.

"Q. Now pass on to the next tree? A. This was the bean tree. That is half burned. That was an old tree. This is an old mulberry. It scorched the top out of that. That was twenty-four inches in diameter—the butt is now.

"Q. Destroyed? A. Yes, sir.

"Q. Now go right around to these other trees? A. There was a pear tree here at the boiler house where it is ruined and the stump is there yet, twelve inches in diameter. There was a locust; that is all ruined; that is about ten years old, possibly twelve. Here was an apple tree here by the well; that has one side scorched.

"Q. Partly alive now? A. Yes, sir.

"Q. Did you have any fences on your place? A. Yes, sir.

"Q. Where were they? A. The barnyard here was all fenced in.

"Q. What happened to it in the fire? A. Why, it got burned down.

"Q. How many panels? A. Ten or fifteen, as near as I can judge. The old stumps is here yet, the old bottom or posts.

"Q. What does that lane indicate, shown on the map? A. That lane there?

"Q. Where does that run to? A. To the lower end of our farm.

"Q. Now what trees are those? A. Your Honor, could I have a drink, please?

"Q. What did you have in your house, Mr. Goodman, previous to the 19th of July?

The Court: Before you go into that, you have not ascertained the quantity of hay. That seems to be a matter of some consequence.

"Q. How much hay did you have stored in the barns? A. I put it at seventy tons of hay at the time.

"Q. What is that hay worth a ton? At that time? A. That would have brought me $15 a ton right there in the barn.

"Objected to.

"The Court: That is hardly the way for you to get an estimate of the value. If Mr. English insists upon it, you will have to show that the witness knows what the market value was at the time.

"Q. Do you know anything about what hay was worth at that time? A. That was the price, sir, $15 a ton.

"Q. What did it sell for in the market anywhere at that time around in this vicinity? A. Well, I did hear of some getting $20 for hay.

"Q. At that time?

"Objected to and asked to be stricken out.

"The Court: Yes. You see it might depend on the quality of hay. What kind of hay was this Mr. Goodman?

"The Witness: That was A-No. 1 hay, sir.

"The Court: Q. Timothy hay?

"The Witness: Timothy hay, yes, sir. Two stacks was swamp hay of an inferior quality.

"Q. What was the value of A-No. 1 Timothy hay on the 19th of July, at Fanwood Township?

"Mr. English: Delivered, or in the barn?

"Q. In the barn; to be carted by the purchaser? A. In the barn, sir $15 a ton.

"Q. You reside in the house? A. Yes, sir.

"Q. What did you have in the house by way of furniture? A. We had all our rooms furnished; dining room and parlor and four bedrooms—seven bedrooms and one was a store room. One bedroom was a store room.

"Q. Did you have a piano? A. Yes, sir.

"Q. What kind of a piano? A. That was a Steinway, I think it was, square.

"Q. Have you prepared a list of the household furniture and other personal property you had on your premises at the time of the fire? A. Yes, sir; as near as we could.

"Q. How soon after the fire did you prepare a memorandum of what you had there? A. To the best of my knowledge it was about two months.

"The Court: Just show him that memorandum. (Paper handed witness.)

"By the Court: Q. Did you prepare that? A. Yes, sir; with my suggestions.

"Q. With what? A. With my suggestions. I didn't write it, no.

"Q. Whose writing is it? A. Part is my son's. I couldn't say that. Part is my daughter's and the other I don't recognize.

"By Mr. Whittemore: Q. Were you present when it was prepared?. A. Yes, sir.

"Q. The items were put in there by whose direction A. My direction, sir.

"Q. Do you know whether you had those articles, all that are mentioned in that list? A. Yes, sir.

"Q. At the time the fire occurred or before? A. Yes, sir. Judge, I might state this, that this was written by my son, sir. I said I didn't know, but it was. I was unfit at the time to do any writing.

"Q. Did you take any part in the preparation of that paper? A. Yes, sir, I did.

"Q. What part did you take? A. Why, we helped naming over the things and the prices of them.

"Q. Now did you ever look at the paper after he had written it? A. Yes, sir.

"Q. So as to know whether it was correct? A. Yes, sir; I have.

"The Court: I will allow that paper to be used to refresh the witness' recollection. It is not admissible in evidence.

"Mr. English: We object to that ruling.

"The Court: Yes, you may take your exception to that ruling. Of course, if you desire to cross-examine upon the witness' recollection of the paper and the manner it was prepared you do so now.

"Which exception is hereby allowed and sealed accordingly.

WM. H. SPEER,
Judge."

(Seal.)

Mr. English: While we objected to that at the time and we object to it now and I suppose it will be the same ruling.

The Court: Yes.

"CROSS-EXAMINATION by Mr. English:

"Q. Where were you at the time the paper was prepared? A. Why, I was living in a shanty right on our property. Store house I should say.

"Q. You can write, of course? A. Yes, sir.

"Q. Why was not the paper prepared by yourself? A. Because I was so nervous, sir, that I couldn't write. My hand was very shaky.

"Q. By whom was the paper prepared? A. By my son there and my married daughter from Westfield.

"Q. Who mentioned the articles which are in that list? A. My wife and myself, sir.

"Q. You all assisted, did you not, in making suggestions as to that list? A. Yes, sir.

"Q. Your wife, yourself and your son and your daughter? A. Yes, sir.

"Q. And that list contains the articles which were suggested by all four of you, does it not? A. Yes, sir.

"Q. And the values which I see here placed are the values which were suggested by all four of you, are they not? A. Yes, sir.

"Q. You say the list was not prepared until about two months after the fire? A. Yes, sir; about that time.

"Q. Now in what month was it prepared, if you remember? A. It seems to me it was the last of September, sir.

"Q. Last September? A. Yes, 1905.

"Q. And after the list had been prepared what was done with it? A. Why, we sent it down to Mr. Whittemore, our lawyer.

"Q. Immediately after its preparation? A. Yes, sir.

"Q. Have you seen it since? A. Yes, sir.

"Q. The original list? A. No, sir.

"Q. And after its preparation by your son and daughter did you see it before it was sent to Mr. Whittemore? A. Yes, sir.

Q. Where? A. To where I was living in the storehouse, right there by the farm.

"Mr. English: We object to the introduction of this paper, as it seems to be a composite production of the son and daughter and wife and himself."

"By the Court: Q. Well, were you all present while this paper was being prepared? A. Yes, sir.

"Q. And after it was done you say you looked it over. Can you state whether or not you then found it was correct according to your recollection? A. We had put in the parlor furniture through mistake and that we took out again, but otherwise it was all correct.

"Q. Well, the parlor furniture and dining room furniture were not burned, then? A. No, sir.

"Q. They were saved? A. Yes, sir.

"Q. With that exception you say the list when you looked it over was or was it not correct? A. As far as my belief, why, it was all correct.

"By Mr. English: Q. Some of those goods placed in the list were the result of the recollection of your wife and daughter and son, were they not? A. Yes, sir.

"Q. And as to values that also was their recollection, was it not? A. Well, we took that from the bills we had paid on them, money we had paid.

"Q. So that the values there stated are the values in the bills that you paid for these things? A. Yes, sir; with the usual wear and tear, understand, sir.

"Q. And all those goods were purchased by

yourself and your wife and son and daughter, some of them? A. By my wife and myself, sir.

"Q. By your wife and yourself? A. Yes, sir.

"Q. And when you say by your wife and yourself you mean some of them were purchased by your wife and some by yourself? A. No, sir; we went together and purchased them.

"The Court: I will allow the witness to see the paper only to refresh his recollection. The paper itself is not admissible in evidence. Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

WM. H. SPEER,
(Seal.) Judge.

"Mr. English: It would seem to me, if the Court please, that in using that list having appended to it a value, that he ought not at the time fix the value of those goods, but that the value fixed ought to be fixed without reference to the memorandum that he has there.

"The Court: Well, I think differently. I will alow him to use the whole of this memorandum. (Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

WM. H. SPEER,
(Seal.) Judge."

Mr. English: Well, we objeted to that at the time and we object to it now, and I suppose it will be the same ruling?

The Court: Yes.

"RE-DIRECT-EXAMINATION by Mr. Whittemore:

"Q. Will you refer to the list of the furniture in your house, Mr. Goodman?

"By the Court: Q. That is not the paper he has been testifying to? A. Yes, sir.

"Q. Some of it is your son and part your daughter? A. That is outside goods, sir.

"Q. These two papers are the papers you have been referring to in the testimony? A. Yes, sir.

"Q. Both of them? A. Yes, sir.

"Q. Both prepared in the same way? A. Yes, sir.

"By Mr. Whittemore: Q. What is the difference between the two papers? A. Why, one was the furniture throughout the house and the other was the outside things on the farm, the wagon and such.

"Q. Will you refer to the articles mentioned in there and state what room they were in and what they were?

"Mr. Whittemore: This will take a long time and I would be very glad to agree upon any thing that will save time.

"The Court: If there is no agreement you will have to proceed.

"Mr. Whittemore: If the Court will allow I would like to excuse Mr. Goodman.

"Q. Where were you, Mr. Goodman, on the afternoon of July 19, 1905, between the hours of three and four o'clock? A. At the bedside of my son.

"Q. In what room of that house? A. The dining room.

"Q. Was your son in the dining room? A. Yes, sir; lying on the couch.

"Q. Who was with you? A. Doctor.

"Q. What is his name? A. Dr. Sinclair from Westfield, my wife and my son's wife.

"Q. What side of the house is the dining room on? A. Why, the dining room runs through from the east to the west, right through the whole part.

"Q. As regards the railroad, which side of the house was it on? A. Well, it was so I could see the railroad.

"Q. It was on the side toward the railroad? A. Yes, sir.

"Q. Were there any windows in that dining room? A. Yes, sir.

"Q. Looking toward the railroad? A. Yes, sir.

"Q. Through which you could see trains? A. Yes, sir; there was two and the door had a window in it.

"Q. Now did you see any train pass along the railroad? A. Yes, sir.

"Q. About what time? A. A few minutes before 4 o'clock I noticed a passenger train or the express went through there. It is called the mail train, No. 8.

"Q. Which way was it going? A. East, sir.

"Q. What was its speed? A. Well, it was running pretty swiftly.

"Q. How did you fix the time? A. Well, that train is generally through on time, so I just—there was no stated time; I didn't look at the clock at all, but it generally come through on time every day.

"Q. Is that a regular train that passes through? A. Yes, sir.

"Q. And did you identify it as the regular train passing about that time? A. Yes, sir.

"Q. What did you hear after the train had passed? What happened? A. Why, it hadn't been not two minutes after the train had went by

when a boy I had there on the farm called for me.

"Q. What was his name? A. Andrew Polimbo. Rushed in the house to me and said: "Mr. Goodman your barn's on fire."

"Q. Never mind what he said? What did you do when the boy came in and told you something? A. Why, I rushed out there to try and save my three horses in the barn.

"Q. What did you find when you got out there? A. I found the barn all in flames—or the driveway through the barn all in flames.

"Q. Which? What barn do you refer to? A. This barn here with the doors.

"Q. The middle barn with the doors? A. Yes, sir.

"Q. The driveway was in flames? A. Yes, sir; I rushed in here to get out the three horses, but the flames drove me back every time. I went to the head of a gray horse three times and the flames drove me back, so they had to die.

"Q. Did you make any other efforts to save your property? A. No, sir. I was so overcome by the flames that I was prostrated at the time. From that time on I was no good at all. No more good than a newborn babe, I was so overcome by flames.

"Objected to.

"Mr. English: Will your Honor rule upon this at all?

"The Court: I am going to take the testimony just exactly as it stands there with the exceptions on the record, I do not think I have the right to bother with it at all.

"Q. Who was at the fire if you can recall? A. Why, there was Mr. Mays; there were Dr. Sinclair and Dr. Sinclair's colored driver; then there

was several of our neighbors. Mr. George Lozier was there. Then there was several of our neighbors there. Mr. Mays, the hired help was there, Joseph Awl; then there was three Jews there, one was named Axel, but the other I didn't know their names.

"Q. Any of your employees there? A. Yes, sir. There was two men, when they saw the barn in flames, they come up out of the field—tied the horses in the field there and came up.

"Q. What were their names? A. One was Charles Curber and John Polimbo and this one that saw the fire, Andrew Polimbo was there—that was our help at the time.

"Q. How did the fire spread? A. Spread rapidly, sir. There was a wind blowing directly—directly from the northwest right directly to the barn from the railroad.

"Q. What was the strength of that wind? A. That wind was so strong that it took some of the shingles from the barn a good half mile, which we will produce in evidence.

"By Mr. English: Q. Do you know about that? A. Yes, sir.

"By Mr. Whittemore: Q. You know it was a strong wind or weak wind? A. A very strong wind that whole day and at the time of the fire.

"Q. What was the condition of the weather on the 19th and previously as regards dryness or moisture? A. Very dry, sir.

"Q. And for how long? A. Why, it had been dry for over a month as near as I can recollect now.

"Q. What was the temperature that day? A. Very hot.

Recess.

Afternoon session, 2:00 p. m.

"Q. In what order did the buildings burn? A. Why, it got in this barn door first on the right-hand side entrance and then it spread both ways, of course, being all full of hay, and then spread, followed the buildings.

"Q. What was the direction of the wind at the time the fire commenced? A. It went off this way.

"The Court: Northwest?

"Q. In an almost directly east direction? A. No, sir; northwest, as near as I can make it.

"Q. It was blowing from the northwest, wasn't it? A. Yes, sir.

"Q. Toward the east? A. Yes, sir.

"Q. In what direction as regards Mr. May's property?

"Objected to. Question excluded.

"Q. Did you make any efforts to save your property in the house? A. No, sir, because I was so prostrated with the flames.

"Q. Did you know of any efforts being made by anybody? A. Yes, sir.

"Q. What efforts were made by others that you know of? A. Why, by Mr. Mays and Mr. Lozier and these three Jews and Doctor Sinclair and his driver.

"Q. Did they get much out? A. They saved the parlor furniture and the dining room furniture and one bureau that they saved was damaged so it was useless; nothing else was saved that was any account, only them two lots.

"Q. How long did the fire last? A. Just about two hours. At six o'clock we hadn't anything standing on the farm but the chimney and the foundation of the house.

"By Mr. English: Q. It burned up every building there? A. Yes, in two hours.

"By Mr. Whittemore: Q. What did you do after the fire with regards to finding a home?

"Objected to as immaterial. Question excluded.

"Exception noted for plaintiff. ,

"Where did you live after the fire?

"Objected to. Question excluded.

"Q. Did you notice any trains passing on the railroad before this No. 8 passenger train that you speak of? A. Yes, sir. I was out in the hay field in the morning.

"Q. That afternoon? A. I can't tell.

"Q. Did you notice any train passing after that No. 8? A. There was a freight train, I believe. passed after that, while I was lying on the couch at the end of the lane, of my lane.

"Q. What, if anything, attracted your attention to that train? A. Why, it was running on that—

"Objected to as immaterial. Objection sustained.

"Mr. Whittemore: Now I would like to withdraw Mr. Goodman at this time.

"The Court: There seems to be reason for it. He may step aside. If he is not produced for cross-examination I will strike out all of his testimony.

"(Witness steps aside.)

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"JAMES E. GOODMAN, resumed:

"Further direct-examination by Mr. Whittemore:

"Q. Who did you have in your employ on July 19th, Mr. Goodman? A. These two boys, John and Andrew Polimbo and Frederick Curber—I said Charles this morning, but Frederick Curber instead of Charles.

"Q. Who would have any occasion to go into the barn the afternoon of that day? A. Nobody, sir.

"Objected to. Question allowed.

"Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

WM. H. SPEER,
Judge.

(Seal.)

"A. Nobody, sir; not after I put in the last load of hay.

"Q. How long before you knew of the fire had you been in the barn? A. We left the barn at half past two o'clock, backed the team out after putting off our last load of hay of the season.

"Q. When you went out of the barn was there anybody in it? A. No, sir.

"Q. Who was with you when you went out of the barn? A. Why, the three boys or three men backed the horses out.

"Q. Where did they go? A. They put the hay wagon in under the trees, put the team—put one horse to the cultivator and the other to the hiller to hill up some potatoes at the lower end of the farm.

"Q. Where did they go after they did that? A. Why, they hadn't got through that before the fire occurred.

"Q. Where did they go after they put the horses to this cultivator A. Went down to the potato field.

"Q. Did you see them go down there? A. Did I see them?

"Q. Yes. A. Yes, sir; because I ordered them there.

"Q. Did they have any occasion to come back to the barn for anything? A. No, sir.

"Q. Was there anybody in your employ or household who had occasion to go into the barn after that? A. No, sir.

"Q. When you left the barn was there any fire in it of any kind? A. No, sir.

"Q. Did you ever have any fire in your barn? A. No, sir.

"Q. Was there any smoking in that barn? A. No, sir.

"Q. That day? A. No, sir.

"Q. While you were there? A. No, sir; for I prohibited smoking around my barn.

"Q. When the men went down into the potato field where did you go A. I went in the house to my sick son.

"Q. How long was that before the fire broke out? A. Why, I should judge it was probably about an hour and a half or two hours—one hour and a half, I should say.

"Q. Did you see any stranger around the premises? A. No, sir.

"Q. Did you have any lighted lamp in the barn? A. No, sir."

Mr. Whittemore: From line 20 on page 77, it is agreed that the evidence may be excluded.

Mr. English: State the reason why.

Mr. Whittemore: On account of its relating to the burning of manure in the spring of 1905. Down to page 79, line 8.

Mr. English: Hold on, now, it goes on further than that, judge.

Mr. Whittemore: Also the testimony continuing on page 79.

Mr. English: You start at the top of page 82, in your present case.

Mr. Whittemore: Down to page 81, line 35, and there is a question.

"Q. Previous to the 19th of July had you made complaints to the railroad as to fires on your farm?

Objected to. Question excluded. Exception to plaintiff.

"Q. Mr. Goodman have you a grape vine on your place? Did you have one? A. Yes.

"Q. Was that burned in the fire of July 19th? A. Yes, sir.

"Q. Where was it located? Indicate on the map, please? A. (Witness indicates). Right there, sir.

"Q. Is that grape vine of any value now? A. Now?

"Q. Yes? A. Why, it is dead, sir.

"Q. Fire caused it A. Yes, sir; there was an old stump burned all out too.

"Q. Was the heat from this fire very great that happened there

"The Court: Is it worth while to ask that?

"Q. The first room that you have down there is in the third story, mentioned as the first room. Referring to the memorandum which you prepared, state what property you had in that room?

"The Court: Don't tell us any prices or values, but just what the stuff was there.

"A. Bedroom suit consisting of bed, bureau and washstand and small table, two chairs, rocker

and two towel racks, feather bed, mattress, pillows and bolsters, toilet set, bureau and necessities; floor covered with matting twenty-five yards.

"Q. Now do you know what the bedroom suit would be worth, the first item you have mentioned? A. We value it at $30, sir.

"Q. Do you know what it was worth? Never mind what you valued it at at that time. What do you say now that bedroom suit was worth from your recollection of it? A. Why, the same figure, sir, $30.

"Q. What was the feather bed that you had there worth? A. Twenty-five dollars. That was all geese feathers, seventy-five pounds—seventy-five cents a pound, I beg pardon.

"Q. Do you know what the value of goose feathers is? A. Yes; we have bought some.

"Q. Do you know what you had to pay for them? A. Some as high as eighty-five cents a pound.

"The Court: I make this suggestion, that without going into details if that is not questioned on cross-examination you need not go into them; if it is, I will give you a chance on rebuttal. You can go into the value generally and then they can cross-examine if they desire.

"Q. Now will you state the value of the pillows and bolsters? A. $5.

"Q. Toilet set? A. $5.

"Q. The floor covering of matting? A. $6.50.

"Q. Now in the next room, state what there was in that, the third story second room? A. That was a bedroom suit of black walnut, consisting of bed, washstand, bureau, two chairs, one rocker.

"Q. The next item? A. A floor covering with ingrain carpet.

"Q. Next? A. Pillows and bolsters, toilet set, bureau and necessities, feather bed and mattress, one lace bedspread and pillow shams.

"Q. What was the value of the bedroom suit in that room? A. $35.

"Q. Carpet? A. $12.

"Q. Pillows and bolster? A. $5.

"Q. Toilet set? A. $6.

"Q. Bureau and necessities? A. $8.

"Q. Feather bed and mattress? A. $30.

"Q. Lace bedspread and pillow shams? A. $25.

"Q. The next room, third room third story, what property did you have in that? A. Bedroom suit consisting of bureau over one hundred years old of black walnut, two chairs, rush bottom. Contents of bureau in room are as follows: Two black cashmere shawls, one camelhair shawl, one small silk and wool shawl, two carriage parasols one drawer full of books.

"Q. What is the value of that property item for item? A. The bedroom?

"Q Bedroom suit? A. Well, there was really no whole suit here; it was a bureau.

"Q. Well, the walnut bed and mahogany bureau? A. The bureau was valued at $30.

"Q. How much for the chairs? A. Two rush bottom chairs something over a hundred years old $8 apiece. In very good order.

"Q. $8 apiece? A. $8, sir.

"Q. $8 for the two? A. Yes, sir.

"Q. What were the two black cashmere shawls worth? A. $25.

"Q. Camel's hair shawl? A. $250.

"Q. What was the small silk and wool shawl? A. $250.

"Q. Where did it come from? A. That was

left to my aunt—to my mother. My mother's sister willed it to her when she died and then from my mother to my wife when she died.

"Q. Have you any knowledge as to the reason for its being worth $250? A. Nothing more than I was told that that was the value of it.

"Q. What kind of a shawl was it? Does your wife know about this? A. Yes, sir.

"Q. Well, we will let her describe that? A. Carriage parasols, what are they worth? A. $10.

"Q. The books that you had there? A. $25.

"Q. Did that include the family Bible? A. Yes, sir.

"Q. The next room contained what property, the store room? A. One trunk containing the following: one sealskin coat, three-quarter length, two Alaska sable neck scarf, 90 inches, one Persian lamb collarette, one fur-lined circular, broad cloth, 8 yards of narrow sable fur for trimming, one sealskin muff, one trunk containing 5 silk quilts, crazy patch work, 2 pairs of lace curains, Irish point, 7 pairs of bed blanets, 12 comfortables, 30 bed quilts.

"Q. Now give the value of what you have already stated.

The Court: Some of these things I imagine he doesn't know much about the value of. You had better depend upon his wife for them.

"Q. Omit the furs and sealskin.

"The Court: Well, omit all of these things. The ladies will know more about them than a man.

"Q. What else was there in the store room? A. There is another trunk full belonging to Mrs. E. V. Goodman.

"Q. That is not in this suit. What is next to

that? A. One parlor stove, one small cylinder stove.

"Q. Isn't there some books there?

"The Court: All of those belonged to Mrs. Goodman, didn't they?

"A. There was a large box containing kitchen utensils from a wedding shower and then there was two trunks of books.

"Q. Was that yours or your wife's? A. That belonged to me, sir.

"Q. Two trunks of books. What is next? A. One large dining room stove, one parlor stove, one small cylinder stove, 40 yards of ingrain carpet for winter use in dining room, 6 ancient rushbottom chairs, one box of fancy parlor ornaments, one basket of patchwork which can not be replaced, one barrel of carpet rags, 2 empty trunks, 2 large American flags, 12x15 feet.

"Q. Now will you state the value of those articles? Begin with the two trunks of books.

"The Court: Kitchen utensils.

"A. That was my son's wife's.

"Q. Didn't belong to you? A. No, sir. $200 for the two trunks of books—sets; $22 for the dining room stove; one parlor stove, $18; one small cylinder stove, $5; 40 yards of ingrain carpet, $34; six rush bottom chairs—they were something over a hundred years old—$18; one box of fancy parlor ornaments, $15; basket of patch work, $5; one barrel of carpet rags, all sewed and cut ready to weave, $10; 2 empty trunks, $5; 2 large flags, $25.

"Q. Now, Mr. Goodman, take the next room and give the list as rapidly as you can.

"The Court: Perhaps it will save time if he gives us the estimate of the value as he goes along. There seems to be no objection.

"Mr. Whittemore: I am willing to suggest that Mrs. Goodman can go over this list a little faster. Mr. Goodman has a little impediment in his speech.

"The Court: You may call her on that subject.

"Mr. Whittemore: I think Mr. Goodman had better go on with the things outside.

"Q. Now will you refer to the list of property outside of your house and state what there was? A. One Portland cutter, $75; business sleigh, $25; 2 pair of bobs, $50; 2-seated carriage, $50; 2 coal stoves, one pot and one cylinder, $15; coal wagon, $75; spring wagon, $25; set of double harness, $50.

"The Court: One set or two?

"Two sets double harness; 2 sets of single harness, $35; one pair of double lines. $3; 4 heavy hames without traces, $6; 2 pair of heavy horse nets, $16; one light horse net, $2.50; one pair of heavy hames and traces, $6.50; 4 horse brushes, new, $1; 8 curry combs, new, 75 cents; 5 heavy fawn team blankets, $40; 10 horse stable blankets $25; one clipping machine for horses, $20; 3 sets of clipping knives for machine, $5.

"Q. The hay you have already testified to.

"The Court: Now the belting. You have not testified a thing about that stack of bedding, or is that the same as the swamp hay?

"A. That is the same.

"Q. You haven't said anything about the value of the timber. What was that worth? A. 5,000 feet of $400; 50 berry crates, $25; 10 hot bed sash, $22.50; one harrow $8; one Adriance, Platt & Co's. binder, $110;

one set of carpenter's tools, $15: 500 feed bags, $50; 2,000 berry boxes, quarts, $9; one saw and table for power, $25; one barrel of sugar, $18.75; 10 dollars worth of soap, $10; 2 robes for carriages, $10; 50 pound of lard, $6; 2 sets of block and tackle and 260 feet of 1-inch rope, $10; 75 feet of inch rope, $1.75; two cross cut saws, $4.50; 3 mowing machine blades, $6.75; 15 gallons of paint, $10; 5 gallon of linseed oil, $2.50; 5 gallon of harness oil, $2.50; one knife grinder for mowing machine blades, $5; 40 feet of 5-inch leather belting—

"The Court: 40 or 140?

"A. I guess that is meant for 140, $10.

"The Court: Do you recall which was right?

"A. It was 140, I remember now. Box of engine too is $10; 14 bushel baskets, $4.50; 6 hoes, $2.40; 4 shovels and 3 scoops, $6.50; 2 picks, $2, one grub hoe, $1; one car mover never been used, $4.50; 2 bags fertilizer, $6; 6 iron horse mangers, $9; 6 iron hay racks for hay, $9; 500 feet of chestnut lumber, $20; one 18-inch wrench, $1.50; 4 12-inch wrenches, $2; 6 bushel baskets, $3.60; 100 bushels of oats, $51.00; 100 pounds of oil meal, $1.70; 10 bushels of rye, $8; 500 bushel of ear corn, at 40 cents, $200; 25 bushel of shelled corn, $15; one-half ton of mixed feed, $11; one large feed bin, $10; 2 small feed bins, $5; one corn sheller, $5; one cutting box, $8; 50 small sash, $25; 2 large sash, $5; 4 axes and 2 hatchets, $4.50; 3 hammers, 75 cents; one-half of cowhide leather, $4.50.

"Q. What do you mean by that? A. Why, it was leather to mend harness with, sir. One-half barrel of asphaltum, $2.40; one roll of wire netting, $4, new; 2 dozen snaps and eyelets, $1; 6 6-inch snaps for traces, 60 cents; one cant hook,

$1.50; 2 bars, $2.50; 2 rollers, $1; 8 pounds of paris green, $1.60; 8 cans for applying same on potatoes, $1.20; one brass kettle, $5; 8 large chains, $8; 4 small chains, $2; one pair of ice tongs, 75 cents; one potato hook, 75 cents; one potato fork, 85 cents; 8 hay forks, $4; 4 heavy manure forks, $1.50; one rubber sheet, $2.50; 2 common sheets, $4;— ,

"The Court: What do you mean by 'common sheets'?

"A. That was sheets we had to cover over the horses in the rain, sir, made out of duck. 2 carriage covers, $6; one-half keg of nails, 50 pounds, $1.40; wagon jack, $1; 50 pounds of binding twine, 12 cents a pound, $6, one broad axe, $2; one plow, $10; 8 cord of wood, $32; one hay knife, 75 cents; 2 light poles for sleigh or carriage, $20; spring seat, $1.50; 5 corn knives, $3; 2 scythes, $1.

"The Court: Let me ask you. You say the spring seat—what do you say the value of the spring seat was?

"A. $1.50.

"The Court: What do you say the value of the corn knives was?

"A. Oh, the spring seat was $2.50, sir, and the corn knives were $1.50.

"The Court: And the scythes were how much?

"A. $3; one brush scythe, $1; 2 bill hooks, $1.50; bolts, screws and copper rivets, $1.50; 3 ladders, $10; 1 pair of heavy truck shafts, $5; 2 cold chisels, $1; 1 ice cream freezer, $3.50; 6 breast pads for horses, $4.50; one open bridle, $2; one runabout wagon, $50; 5 gallon oil can, $3.50. That was supposed to be filled with oil, sir.

"Q. How many of those cans? A. One.

"Q. Is that one? A. Seven it says here.

"The Court: It says there, but which was it as a matter of fact? Do you remember?

"A. Yes, sir. Seven. Five gallons of cylinder oil, $2.50; five gallons of machine oil, $2.50; one rocking chair, $5; one straight chair, $5; one half dozen paint brushes, $1.50; one coal screen, $2.50; twelve panel of fence, $12; one grindstone, $5; one wash bench, $2; one washing machine, $5; two wringers, $5; one boy's express wagon, $2; one boy's kit of tools, $2.50; one coal box, half ton of coal, $4; one spade, 75 cents; one hack saw and one-half dozen blades, 75 cents; forty feet of iron for barrels, $1.60; five cider barrels, $3,-75; one iron vise, $7; one wagon body, $10; one pair of heavy whiffletrees, $5; one set of curtains for buggy, $4; one string of sleigh bells, $2.50; two pair of oilskins, coat, pants and hat, $7; two wood racks, $10; fifty pounds of corn fodder string twine, $5—that means tarred rope; fifty potato barrels, $5; seventy-five feet of one-inch hose, $7.50; one force pump, $5; two rolls of 200 feet square chicken wire, six feet high, $10; two rolls one-half inch mesh to cover corn crib, $10; 100 feet of twelve-inch wire for flower beds, $2; one governor on engine, $15; one lubricator, all brass, $18; one steam gauge, $2.50; fifty ton of manure. This manure was in the barn yard.

"Q. That is not the manure that was burned in May? A. No, sir. At $1.45 a ton, $72.50; one-half roll of wire for fence, $2; one hose nozzle, fifty cents; gate $5. Shall I put in the live stock there too, the horses?

"The Court: Counsel must guide you. The last item is gate, $5.

"Q. Did you have any horses that were burned in the fire? A. Two horses, yes, sir.

"Q. What kind of horses were they? A. Draught horses.

"Q. For work on the farm? A. Yes, sir.

"Q. What would you say would be the value of those horses that you have? A. $300 to replace them.

"Q. Were they both of equal value? A. Yes, sir.

"Objected to.

"The Court: Yes, the question was what were the horses worth as they stood.

"Q. What are those horses worth? What were they worth when they were killed? A. They was worth $300 to me, sir.

"Q. What would they sell for? What are they worth? A. That I couldn't tell, what they would sell for. They did my work.

"By the Court: Q. What would be a fair value of those two horses as between man and man? A. Well, I wouldn't take less—

"Q. Not what you would take? A. One hundred and fifty dollars apiece, sir.

"By Mr. Dungan: Q. Is that the market value of them? A. Yes, sir.

"By Mr. Whittemore: Q. Did you have any chickens in the place? A. Yes, sir.

"Q. Were they burned? A. Yes, sir. There was a few burned. There was fifty chickens burned.

"Q. What were those fifty chickens worth? A. $35.

"Q. Seventy cents apiece? A. Yes, sir.

"CROSS-EXAMINATION by Mr. English:

"Q. Mr. Goodman, how long have you lived on that farm? A. Since 1883, sir.

"Q. When did you become the owner of it? A. Right at the present moment I couldn't give you the date, but my deed will tell you. There is the deed, sir.

"Q. Did you become the owner of it at the date of the deed? A. Yes, sir.

"Q. Under what conditions did you occupy the farm before you purchased it? A. Why, my aunt bought the farm for me then for to be mine for my lifetime, sir.

"Q. When did that take place? A. I think it was the spring of 1883.

"Q. Did you afterward purchase the farm? A. Yes, sir.

"Q. Is that the deed for it? A. Yes, sir.

"Q. Where is the deed that your aunt received for it?

"Objected to as not cross-examination. Question excluded.

"Q. After your aunt bought the property where did she live? A. She lived in Jersey City or Hoboken, sir.

"Q. Was your aunt the person of whom you bought the land? A. Yes, sir.

"Q. Did she ever occupy the land? A. No, sir.

"Q. Have you occupied the land continuously since 1883? A. Yes, sir.

"Q. Is your aunt now living? A. No, sir.

"Q. Have you any other title to the land except by that deed? A. No, sir.

"Q. Is that property which you now occupy, your farm there, mortgaged? A. Yes, sir.

"Objected to. Question allowed.

"Q. How many acres are there in your farm? A. Ninety-one and some hundredths now.

"Q. How much of this land can you cultivate, that is, how much of it is upland? A. Why, I have fifty acres under the plow, sir.

"Q. What is the balance of it? A. The balance consists of wood and pasture field, and the swamp meadow that we never plow, but we mow year after year.

"Q. Then there is fifty acres that you cultivate and the rest is pasture or swamp or wood? A. Yes, sir.

"Q. How many buildings has there been erected, that is, prior to the fire how many buildings have been erected on the farm, since you have been on it? A. Four buildings.

"Q. What are they? A. This wagon house for my big wagons and then the next to it was the wagon house—the carriage house, I mean.

"Q. This is the carriage house and the wagon house. Are they different? A. Yes, sir; they are separate.

"Q. Different buildings? A. Yes, sir.

"Q. Now then, start again and tell me what buildings have been placed on that farm since you have occupied it? A. There was this wagon shed, carriage house, the woodshed, the corn crib, new hen house and the boiler house and the hot house combined.

"Q. Now tell me what buildings have been placed on that farm from the date of your deed? This deed is dated January 31, 1899. What buildings have been placed on that farm since the date of that deed? A. Well, shall I say the new horse barn I built there too? New horse barn and the carriage house and the corn crib I built all new and the boiler house.

"Q. The boiler house, the corn crib, the carriage barn, and what other one? A. The horse stable, new horse stable.

"Q. Just point them out on the map? A. There is the new horse stable I built, and that is prior to my ownership of it.

"Q. I want to know what you put on there since you got the deed? A. I am telling you, sir. The horse stable, carriage house, the corn crib and this boiler house and hot house combined.

"Q. What buildings were on the farm when you first went there in 1883? A. This barn here and that one and that one, that one there and the old smokehouse; the rest I built all myself, except the house. The house was there too.

"Q. Were these outbuildings painted at the time of the fire? A. No, the barn was not.

"Q. Just show us what buildings were painted at the time of the fire? A. The woodshed, the carriage house and the wagon shed and the horse stable and the hen house.

"Q. The rest unpainted? A. Unpainted, sir.

"Q. Who owned the farm when the railroad went through there? A. My aunt, Mrs. Van Velsor.

"Q. You did not own the farm? A. No, sir.

"Q. At the time of the fire was your property insured? A. Yes, sir.

"Objected to as immaterial. Question excluded.

"Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

WM. H. SPEER,
(Seal.) Judge.

"Q. Now you said that you had about seventy tons of hay in the barn. From how many acres did that quantity of hay come? A. From about forty acres.

"Q. Was that upland or low meadows? A. That was all upland, sir.

"Q. Upland that you had cultivated? A. Yes, sir.

"Q. And was it all cut this year, in the year 1905? A. Yes, sir.

"Q. New hay? A. New hay.

"Q. How do you get at the seventy tons? How did you arrive at that? A. Well, I thought I was a little judge of hay, putting in so much hay in my lifetime, and that I was a little competent to judge what amount of tons I had there.

"Q. It is mere guesswork on your part then? A. I don't think it is.

"Q. Have you measured it? A. No, sir.

"Q. Had you weighed any of it when it was brought in? A. No, sir.

"Q. Do you know how many loads you brought in? A. That I don't know, because I wasn't home all the time.

"Q. Then how did you arrive at the estimate of seventy tons of hay? A. Why, there was a barn here that I had sold eight tons of hay out of—ten tons of hay I mean.

"Q. When? A. Several times in my lifetime on the farm.

"Q. Well, what other means have you of arriving at the seventy tons of hay? A. Well, I know what I mean by my own judgment.

"Q. Then it is mere estimate on your part, sort of guesswork? A. I should judge it was estimate, yes, sir.

"Q. Had you sold any hay that year, 1905? A. No, sir.

"Q. How did you fix the value of hay per ton at that time? A. Why, that was the price of old hay at that time. Old hay at that time was worth $18, I should say.

"Q. Old hay was $18? A. Yes, sir.

"Q. You hadn't any price of new hay? A. No. prices, but that is what I put it worth to me, sir.

"Q. Now, what was the size of your hay barn? A. Well, I don't know as I can tell you without I look on the map, sir.

"Q. Now then, in the main barn, was there hay in that where the doors were? A. Yes, sir.

"Q. Did the hay come down to the floor or was it only up in the mows? A. Yes, sir; there was one side of the mow came down to the floor and the other side there half of the mow came down to the floor.

"Q. Did they measure these mows to ascertain how much hay was in it? A. No, sir.

"Q. Had you ever sold about as large a quantity of hay in the main barn as was in it at that time? A. No, sir.

"Q. Then you have no fixed idea except mere guesswork as to how much hay was in the barn? A. Well, I think I come pretty near guessing the straight, sir.

Mr. Whittemore: Page 97, beginning line 14, and the rest of that page, and page 98 down to line 28, comes out.

Mr. English: That is right.

"Q. What business did you carry on on the farm? A. Why, general farming business.

"Q. Any other business? A. Coal business.

"Q. Where did you conduct the coal business? A. On Lehigh Valley's ground.

"Q. How far from your house? A. Oh, I should say it was 300 feet.

"Q. Did you do any other business except your ordinary farming and the coal business? A. Well, we had fertilizer business.

"Q. Where did you carry that on? A. Right in our storehouse.

"Q. Where was the storehouse? A. On a neighbor's lot right down along the road.

"Q. That wasn't up there by your farm buildings then? A. No, sir.

"Q. Any other business that you carried on there on the farm? A. No, sir.

"Q. Except ordinary farming I mean? A. Yes, sir.

"Q. Now referring to this list of articles which you say was in the house, how many horses did you have? A. Six horses.

"Q. What did you find use for six horses for? A. Why, I had one driving horse, five heavy horses.

"Q. What did you use them for? A. For carting coal and attending to my farm.

"Q. Now what kind of business did you carry on there that required two thousand berry boxes? A. Why, at one time I had quite a big berry patch.

"Q. How long before the fire was that? A. That has been three or four years before the fire.

"Q. How long? A. Three or four years before the fire.

"Q. Had you retained those berry boxes from that time? A. Yes, sir.

"Q. Where were they? A. They were up in the new wagon house, stored up there overhead.

"Q. How long had they been used? A. Never was uncrated, sir.

"Q. Never been used? A. No, sir.

"Q. What business did you carry on that required 140 feet of five-inch leather belting? A. Why, we sawed wood with a steam engine. I forgot that. And then my son filled silos around for farmers with a steam engine.

"Q. Did you have more than one belt? A. Yes, had several of them.

"Q. What were those several belts used for? A. Around the engines.

"Q. All the same size? A. No, sir; different lengths.

"Q. All the same width? A. No, sir; there was one six-inch, I think, and the others was—well, I stated that.

"Q. What size were they? A. They was strips of belting to be cut to run the governor, from the main shaft up to the governor.

"Q. How many different sizes were they? A. There was only one size. That, I think, was an inch belt.

"Q. What other sizes did you have? A. Six-inch broad belting from the engine to the saw or to whatever machinery we had it attached to.

"Q. What other size did you have? A. That is all, sir.

"Q. Then you had belting one inch wide and belting six inches wide? A. Yes, sir.

"Q. That is all you had? A. Yes, sir.

"Q. How long was the one-inch piece of belting? A. Well, we would cut off of this piece of belting so as to make a short belt for a run the governor from the main. That, I should judge, was say a belt about fifteen feet.

"Q. That is, take and stretch it out and you had about fifteen feet of the one-inch belting? A. Yes, sir.

"Q. How many feet of inch belting did you have? A. The rest was in a coil so we could cut off a piece when this inch belting wore out. That wore out every little while.

"Q. So you had a coil of six-inch belting—A. A coil of one-inch belting, seventy-five feet.

"Q. I understood you fifteen feet? A. Fifteen feet it took to run the governor down to the main shaft, so as to run the governor, and we cut this fifteen feet off of the coil of belting.

"Q. That is the coil of inch belting? A. Yes, sir.

"Q. How many feet did you have altogether of one-inch belting? A. Well, there was seventy-five feet altogether with the belting that was on the machine.

"Q. Then you had altogether seventy-five feet of one-inch belting. Now you then spoke of six-inch belting. How many feet of six-inch belting did you have? A. That was twenty-two feet, I think, of belt. That was doubled.

"Q. What? A. Forty-four feet altogether. That was meant to double, you know—twenty-two feet.

"Q. Then you had forty-four feet altogether of six-inch belting. Did you have any other size belting except inch belting and the six-inch belting? A. No, sir.

"Q. Did you have any more belting than the seventy-five feet of one-inch belting and the forty-four feet of six-inch belting? A. No, sir.

"Q. Then why did you charge here in this statement 140 feet of five-inch belting? You have testified before that you had 140 feet of five-inch belting. A. If I testified to that, sir, I testified wrongly.

"Q. Testified wrong then? A. Yes, sir.

"Q. Well, let us get the value of the inch belting. How much was that inch belting worth? Never mind looking at your paper. A. I want to find out the value of it.

"Q. How much was the inch belting worth, seventy-five feet?

"Objected to as not proper cross-examination.

"Question allowed.

"Q. How much was that inch belting worth?

Do you know? A. I can't say that I do, sir, not that.

"Q. Well, can you tell then how much the six-inch belting was worth? A. That I don't know really, the price of it, because I had to take that as a debt. That cost me about $75.

"Q. Never mind. What was it worth? A. That I don't know.

"Q. Then what have you charged us for, 140 feet of five-inch belting, $10, you can't give any value for the belting that you had at all? A. Not without that I can't.

"Q. Did you have any soap in stock? A. Yes, sir.

"Q. Where was it? A. That was in the carriagehouse.

"Q. What kind of soap was it? A. Larkin's soap.

"Q. How much did you have? A. We had a ten-dollar box full.

"Q. Was it full? A. Just purchased and set up on the bins to dry.

"Q. Just purchased it? A. Yes, sir.

"Q. Did you have a saw and table for power? A. Yes, sir.

"Q. Where was that? A. That was by the woodshed when the fire occurred ready to use to saw up some wood.

"Q. How long had you had it? A. Why, I think it was not over five years, four or five years.

"Q. What kind of saw was it? A. Crosscut saw with a table—slide-up table.

"Q. How did the saw move, up and down or circular saw? A. Circular saw, thirty-inch saw.

"Q. How long had you had that saw? A. Four or five years.

"Q. How long had you had the table? A. The

same amount of time; I bought it at the same time.

"Q. What was that saw and table worth? (No answer.)

"Q. Can you remember what you paid for the saw? A. The saw cost me $35 as new.

"Q. How long before? About five or six years, you say? A. Four or five years.

"Q. How much was that saw and table worth? Well? (No answer.) A. This is a good many items to carry in one's brain, all of those items there.

"The Court: Regardless of the paper or the estimate which you and your family put upon it, what do you say that saw and table was worth as you recollect it? A. The table at the time of the fire you mean?

"Q. Certainly. A. Twenty dollars.

"Q. The saw and table is worth twenty dollars at the time of the fire? A. Yes, sir.

"Q. You have charged on this last $25. Did you have any corn in the ear on hand at that time? A. Yes, sir.

"Q. Where was it? A. In the corn crib.

"Q. How long had it been there? A. Been there since the following March before the fire.

"Q. How much was in the corn crib? A. 500 baskets.

"Q. How do you know? A. Why, because I had measured it in there. We had measured in 900 in there. We had taken out 400 bushel to go to the mill at different times. That is how I know.

"Q. Do you remember taking out 400 bushels? A. Yes, sir.

"Q. Now, then, when you shell corn how much will a bushel of ears return? A. Well, sometimes corn will return a little bit over a bushel—

"Q. Never mind. A. One bushel of ears? Half a bushel of shell corn.

"Q. Then if a bushel of corn on the ear is worth forty cents, how much would that corn when it is shelled be worth?

"The Court: Do you mean how much would the shell corn be worth a bushel?

"Q. I want to get at how much a bushel of corn in the ear is worth when it is shelled. A. At forty cents a bushel of ears?

"Q. Well, I don't know. That is for you to say.

"The Court: I understand the question to be; how much a bushel of corn ears would be worth after it had been shelled? Then you have the cobs and the shelled corn and the labor.

"A. That would only be the price of the shelled corn and that would be a half bushel.

"Q. How much would it be worth? A. Not over forty cents. Yes, sir; forty cents.

"Q. Then the bushel of corn when it is shelled would be worth forty cents? A. The bushel of corn?

"The Court: A bushel of corn ears would make a half bushel of corn, and he says that would be worth forty cents.

"Q. I don't understand you. The bushel of corn before it is shelled is worth how much? A. That is different prices.

"Q. What it was worth at that time, a bushel of corn before it was shelled? A. Forty cents.

"Q. How much was it worth after it had been shelled? A. It would only shell out a half bushel of corn.

"Q. If it is worth before it is shelled forty cents, after it is shelled it is worth forty cents "again? A. Yes, sir; to sell it by weight.

"Q. Then a half bushel of shelled corn is worth forty cents? A. Yes, sir.

"Q. Then why did you charge here twenty-five bushel of shelled corn, 60 cents a bushel? A. Well, that is a full bushel.

"Q. That is what? A. That is a full bushel; that is not a half bushel of corn.

" Q. A what kind of bushel? A. Full bushel of shelled corn. The other what you were getting at is a half bushel of shelled corn.

"Q. Then why didn't you make the bushel the same in each case? One time you make it worth eighty cents and another time you make it sixty cents. A. This corn that was shelled, sir, was corn that we had swept up out of the bottom of the car and was not as valuable as good corn. We had bought two or three carloads of corn that year and this was all dirty and mixed in with the corn and I valued it at sixty cents a bushel.

"Q. Did you have any sashes? A. Yes; from the old house.

"Q. How many did you have? A. There was fifty of them.

"Q. What kind of sashes were they? A. There was six-pane sashes, small sashes.

"Q. Six-pane sashes? A. Yes, sir.

"Q. When you speak of a sash what do you mean, a frame with six lights in it? A. Yes, sir.

"Q. How many did you have altogether? A. I think it was fifty up there in the barn.

"Q. How much were they worth at the time of the fire? A. I think I valued them at fifty cents apiece.

"Q. How much were they worth? A. That is what I valued them.

"Q. Do you say they were worth fifty cents at the time of the fire? A. I think I valued them at that.

"Q. How much were they worth at the time of the fire? Fifty cents apiece? What were they available for? What could you use them for? A. Why, I had sold several of them to neighbors for seventy-five cents apiece to put in hen houses.

"Q. Did you have any oil there on the premises? A. Yes, sir.

"Q. How much did you have? A. Well, there was some paint oil; there was machine oil; there was cylinder oil.

"Q. How much cylinder oil did you have? A. I think it was five gallons.

"Q. What were you doing with that? A. To run our lubricator with.

"Q. How much machine oil did you have? A. Five gallons, I think.

"Q. Were the cans full? A. Yes, sir; never had been opened.

"Q. Did you have an iron vise? A. Yes, sir.

"Q. Where was that? A. That was in the carriagehouse loft.

"Q. How much was that worth? A. That was worth seven dollars.

"Q. Did you have any wood racks? A. Yes, sir.

"Q. What were wood racks? A. They are what we cart the wood on from out of the woods.

"Q. How much were they worth? A. Five dollars apiece.

"Q. Did you have any chicken wire? A. Yes, sir.

"Q. How much wire did you have? A. It seems to me it was 200 square feet of six feet high.

"Q. How long had you had that? A. One year, sir, never been used.

"Q. Did you never use it? A. No, sir; never been uncoiled.

"Q. Did you have a governor for your engine? A. Yes, sir.

"Q. Where was that? A. That was fastened on the engine.

"Q. Was the engine destroyed? A. Partially so.

"Q. Was the governor destroyed? A. Yes; so I will have to get a new one.

"Q. What was the governor worth? A. Ten dollars.

Q. How do you know it was worth ten dollars? A. We ascertained the price from the man that we got the machine of.

"Q. Was it worth ten dollars when it was new or when it was old? A. Well, it took ten dollars to get a new one.

"Q. The governor on the engine was worth ten dollars when it was new or when it was old? A. It was worth ten dollars to me.

"Q. What was it worth, the market value of it? A. I couldn't tell that without taking it all apart.

"Q. How long had it been used? A. Four years.

"Q. Had it been used four years? A. Not steady all the time.

"Q. And a new one would cost ten dollars? A. Yes, sir.

Q. Why did you charge here in this estimate fifteen dollars for the governor on the engine, then? A. Well, I don't know. As I told you, it is pretty hard to remember all them items there that we sat down.

"Q. Was there a lubricator on the engine? A. Yes, sir.

"Q. What is a lubricator? A. That is a machine that the oil has to go through to grease the cylinders.

"Q. Is it attached to the engine? A. No, sir; that we took off every time we stopped the engine.

"Q. How long had you had that? A. The same that we had the engine.

"Q. Was it destroyed? A. Yes, sir.

"Q. What was that worth at the time of the fire? A. Eighteen dollars.

"Q. How do you know? A. A new one would cost me eighteen dollars to get it there.

"Q. And this had been used for how long? A. About four years.

"Q. And this had been used four years and a new one would only cost eighteen dollars? A. To the best of my knowledge.

"Q. Now then you said you had a lot of chickens destroyed; is that so? A. As near as we could tell, we had fifty, yes, sir.

"Q. How old were those chickens? A. They was chiefly all old hens, a year old or two year old.

"Q. Any young chickens destroyed? A. Young chickens, that I don't know. They were outside, roosting outside from fire.

"Q. How many young chickens did you have before the fire? A. I don't know, sir. My wife attended to the chickens.

"Q. You had some? A. Yes, sir.

"Q. Were any left after the fire? A. Yes, sir.

"Q. Now, then, can you tell of these fifty chickens destroyed how many were young and how many old ones? A. They were all old fowl.

"Q. Sure, all of them? A. Yes, sir; we missed that many.

"Q. How much were they worth apiece? A. Thirty-five cents apiece.

"Q. And you think there were fifty of them? A. That is what we missed, sir.

"Q. How many chickens did you have before the fire, old ones? A. We had something over a hundred, but I couldn't exactly tell or remember now, sir.

"Q. Do you know how many you had after the fire? A. Why, I think we counted fifty-five if I am not mistaken after the fire, old hens.

"Q. And that is the way you get at fifty chickens worth thirty-five cents apiece? A. Yes, sir.

"Q. Then why in this bill of items did you charge for fifty chickens at seventy cents apiece? Please explain that. A. Seventy cents apiece?

"Q. Yes. A. The only explanation I can make, sir, that there are too many items in there for me to retain in my state of weak health. I thought I had retained them all, but I find I have made mistakes.

"Q. Then the charge that you have made here of seventy cents a piece or $35 for the fifty chickens is too much? A. The way I stated it is too much.

"Q. Did you have any bob sleds? A. Yes, sir.

"Q. How many? A. Two pair.

"Q. How long had you had them? A. About six years. One pair I only had three years and the other I had six years.

"Q. In what condition were they? A. They were in good repair, sir.

"Q. Been in use for six years, one pair had? A. Yes, sir.

"Q. What did you use them for? A. Carting coal and wood or whatever I need them in the winter time when the snow is on the ground.

"Q. What were they worth, the two? A. Twenty-five dollars.

"Q. Was one better than the other? A. A. I think not, sir.

"Q. Worth twelve dollars and a half apiece, then? A. Yes, sir.

"Q. They are charged here fifty dollars instead of twenty-five. A. Fifty dollars?

"Q. Did you have a two seated carriage? A. Yes, sir.

"Q. How long had you had that? A. I had that six years.

"Q. Is that all? A. Used it very little to my knowledge.

"Q. You hadn't had it but six years? A. If I remember rightly, sir.

"Q. You know what you paid for it? A. What I paid for it?

"Q. Yes. A. I paid one hundred and ten dollars for it.

"Q. You have got it on this statement it is ten years old. What was it worth at the time of the fire? A. Fifty dollars.

"Mr. Whittemore: I will ask the Court to excuse Mr. Goodman for today on the advice of his physician. He thinks it inadvisable that he should proceed any further.

"Mr. English: It is a very unusual course and this is a time when excusing him from this—I don't know that he would avail himself of—

"The Court: I think I will not excuse him from this cross-examination.

"Mr. Whittemore: You think you can go on Mr. Goodman?

"The Witness: I think so.

"Q. Did you have a coal wagon? A. Yes, I had one that was burned up.

"Q. How long did you have that? How long had you had it? A. Gentlemen, my head is getting

in such a state that I can not answer the questions, from nervous prostration.

"Q. Can you remember that, Mr. Goodman, how long you have had the coal wagon?

"The Court: Well, he can not answer the question. I am inclined not to have you press that question, unless you are insistent upon it.

"Mr. English: I am in the hands of the Court. I desire to favor Mr. Goodman's ill health as much as possible, and I do not want to take any extreme measures toward him, but, as your Honor will see, it is an important part of the cross-examination. We are in the hands of the Court in the matter.

"The Court: Well, I think you better not press that question further. He says he can't answer and gives his reason.

"Mr. English: All right.

"A. Two days ago I wouldn't have been able to have been here in court. I was so with my nerves that I wasn't—

"Mr. English: I move that that be stricken from the record.

"The Court: That better be stricken out.

"Q. Do you remember whether you had any fly nets or not? A. Yes, I remember that, fly nets.

"Q. How many pair did you have?

"Mr. Whittemore: Do you feel that you can not go on? If you do you can state so to the Court, what your condition is.

"A. I know I had four nets. But I certainly do feel that I am going to collapse.

"(At this time, owing to the condition of the witness, and upon the assurance of his counsel that he will not seek to refresh

his memory in any manner during his retirement from the stand, the witness was excused for the day.)

Mr. Whittemore: It is continued later on on page 187.

"JAMES E. GOODMAN, resumed:

"Further cross-examination by Mr. English:

"Q. Mr. Goodman, are you ready to proceed? A. Yes, sir.

"Mr. Whittemore: I would like to ask Mr. Goodman if he has seen the schedule.

"Mr. English: We will take your word for it.

"Q. Mr. Goodman, will you please take the pointer and lay it on the map indicating thereby the direction in which the wind blew on the day on which your buildings were burned? A. (Witness indicates on map.)

"Q. Indicating a westerly direction, from the west? A. Yes, sir.

"Q. After the fire occurred on that day, Mr. Goodman, did you notice whether there was any fire which extended from the railroad track towards your buildings? A. Yes, sir.

"Q. What did you notice? A. I noticed—I will have to point on the map, sir, to tell you.

"Q. Certainly. A. (Witness indicates) From here to this apple tree stump.

"Q. What's that? A. From the railroad to the apple tree stump where the grape vine was, that was all burned along this.

"Q. But too far from the barns to ignite there? A. From the barn to the stump.

"Q. Too far, I said, to ignite to the barn? A.

That shows signs of being burned, coming off of the right of way.

"Q. Then I understand you to say there was evidence of fire extending from the railroad track southeasterly toward your buildings? A. Yes, sir.

"Q. Over how much ground was there evidence of the fire? A. Over not very much, because one portion was plowed ground and the other was just a sod next to the railroad.

"Q. Where was the sod, next to the railroad? A. Running from the railroad, yes, sir.

"Q. What is that? A. Next to the railroad.

"Q. Did the evidence of fire which came from the railroad extend beyond the side toward the buildings? A. No, sir; there was a roadway back there (indicating). There was a beaten track right there and it hadn't passed over that roadway.

"Q. Then this fire had extended from the railway toward your buildings as far as the roadway? A. Yes, sir.

"Q. And was there evidence of fire extending toward your buildings from the roadway? A. From the road.

"Q. Yes. A. No, sir.

"Q. Then if any fire extended from the railroad toward your buildings was it stopped at the roadway? A. Yes, sir.

"Q. And you had not reached your buildings? A. No, sir, they were burned down.

"Q. What is that? A. They were burned down.

"Q. Now then, when did you first see the evidence of fire extending from the railroad toward your buildings? A. Why, I think it was the next day, but I couldn't tell what time it was.

"Q. Had you ever noticed it before the fire occurred? A. Yes, sir; along that bank I had put it out repeatedly.

"Q. No; I mean this fire that you say you saw the day after the fire which had run from the railroad toward your buildings, had you ever noticed that before the fire which burned your buildings? A. No, sir.

"Q. Do you know when that fire occurred of which you saw evidences on the ground between the railroad and the roadway? A. No, sir, that I couldn't tell you. It must have been some time during the night.

"Q. Sometime when? A. Sometime during the night.

"Q. During the night? A. Yes, sir.

"Q. Had it occurred before your buildings were burned? A. No, sir; not that stamp hadn't burned before, I don't think.

"Q. On whose land was this fire which you saw? A. The trace of it, sir?

"Q. Yes. A. My land.

"Q. And it was between your buildings and the railroad, was it? A. Yes, sir.

"Q. You saw it what day, the day after the fire? A. Yes; I think it was the day after the fire I saw that had been burned there.

"Q. Was that the fire that burned the grape vines? A. Well, I presume it was.

"Q. Was that the fire which burned your buildings? A. That fire?

"Q. Yes. A. I don't think it was, sir.

"Q. Why do you not think that was the fire which burned your buildings A. Why, there was no fire out there when I started out to try to release my horse out of the barn; the fire was all in the barn, in the driveway of the barn.

"Q. Then you do not claim that the fire of which you saw evidences between the driveway and the railroad was the fire which burned your barn? A. No, sir; that is not my claim.

"Q. And yet you don't know when that fire occurred? A. Not hourly, no, sir, or minutely.

"Q. Now then, was there any evidence of fire between this roadway where the grape vine was and the barn? A. Why, there was evidence pretty near up to the roadway from the barn, because I supposed it was so hot it scorched the grass from the buildings and burned it.

"Q. Then the fire which was between the roadway and the barn was the fire which came from the burning of the barn? A. Between the roadway and the—

"Q. And the barn? A. I presume so, yes, sir.

"Q. Just let me point out here (indicating map). The fire here which you saw evidence of, I understand you, extended from the railroad bank toward the lane and came as far as the grape vine there? A. Yes, sir.

"Q. But you did not see evidences of the fire extending any further toward the buildings? A. No, sir.

"Q. And you did see some evidence of fire afterward around close to the barn and towards the railroad? A. Certainly I did.

"Q. And that fire you think came from the burning of the barn? A. Yes, sir. There was no evidence of any fire over the road out here towards the railroad at all.

"Q. So that I understand you to say you did not claim that this fire which left its evidence between the lane and the railroad was the fire which burned the barns? A. No, sir.

"Q. You told me that you conducted a general farming business? A. Yes, sir.

"Q. What did you raise on your farm in the year 1905? A. Potatos.

"Q. How much did you have in potatoes, how many acres?

"Objected to. Question admitted. Exception noted for plaintiff.

"Q. How many acres in potatoes? A. Well, I don't know the number of acres.

"Q. Well, as near as you can tell? A. Well, we planted, I think, twenty-five barrels, sir.

"Q. Give us the acreage as nearly as you can tell? A. I couldn't do it.

"Q. Were there five acres? A. I don't know, sir, now.

"Q. Do you know whether there was one acre or not? A. I presume there was one acre or more.

"Q. Was there two acres? A. I couldn't tell you, sir.

"Q. Can you tell whether there was as many as five? A. No, sir.

"Q. How many potatoes did you plant? A. Twenty-five barrels, I think it was, that year.

"Q. Are you able to state how many potatoes it takes to plant an acre, how many barrels or how many bushels? A. I have planted a good many barrels of potatoes; I don't know that I ever have measured them.

"Q. Do you know whether there was as many as five acres of potatoes growing? A. That I couldn't tell you, sir, now.

"Q. Do you know whether there was as many as four? A. I couldn't tell you.

"Q. Was there as many as three? You said there was four acres in clover growing; how did you get that? A. Well, that I knew of the field, I had paced it off and had had corn in it and I

had cut it, and I had had rye in it and measured it off.

"Q. Was the patch you had in potatoes as large as this four-acre clover field? A. That I couldn't tell you, because the patch was in two different fields, and I don't know.

"Q. Do you think it was as much as the clover field, the quantity that you had in potatoes? A. I couldn't remember now, sir.

"Q. What else did you have growing besides potatoes? A. We had chiefly hay in that year.

"Q. What else besides potatoes? A. Oh, just a few truck for our own use.

"Q. Did you have any corn growing? A. Sweet corn, yes; no field corn that year.

"Q. Any oats growing? A. No, sir.

"Q. Any other crop growing except hay? A. Nothing. Potatoes and hay.

"Q. Then you had the four acre field of clover hay? A. Yes.

"Q. The potato patch? A. Yes, sir.

"Q. Probably four acres? A. Yes, sir.

"Q. Your truck patch, and what else? Was the rest all hay? A. Yes, sir.

"Q. How many acres did you have in hay? A. I think altogether there was forty or forty-five acres, if I ain't mistaken, in hay that year.

"Q. How many acres did you have in timothy hay growing? A. Why, it was all put down in timothy hay, sir.

"Q. How long had it been down in timothy hay? A. Some the fall before we had quite a big piece I had sowed down, and not over two years the rest of it.

"Q. Some of it was first year and some of it was the second? A. Yes, sir.

"Q. And you think you got seventy tons of

timothy hay? A. That is what I judge, yes, sir.

"Q. But it is merely guesswork? A. Yes, the same as—

"Q. Had you sold any hay that year? A. No, sir.

"Q. Had you bought any? A. Bought any?

"Q. Had you bought any? A. Yes, sir; we bought some after the fire to feed our horses with.

"Q. No; I mean before the fire? A. No, sir.

"Q. This stock of cow hay, how much was there in that? A. There was two stacks.

"Q. Well, you have on the list here one stack of cow hay. How much was there in that? A. Well, I can't recall the number of tons there now in the two stacks.

"Q. Do you remember the stack? A. I remember the stacks.

"Q. Where was the stack? A. Right here (indicating on the map).

"Q. Have you any idea how much was in it? A. No; not now I don't know, sir.

"Q. How much was it worth a ton? A. That hay sold for eight dollars a ton when we sold it, but we very seldom sold any, because we used it up on the farm as bedding and cow hay. We never sold any.

"Q. Was there two tons in the stack? A. Well, I wouldn't like to say now, sir. I couldn't say. That has been over a year ago since I made out that list and I have been very sick ever since.

"Q. Well, we know all that. A. I can't retain all these figures in my head, sir.

"Q. You can remember about the size of that stack, can't you? A. I can remember about it, but I couldn't tell the number of tons in it, not now I couldn't, not if my life depended upon it.

"Q. This schedule says four tons. A. Well, When I made out that schedule, sir, we thought

we were making out a fair valuation, and that is all I can submit to.

"Q. And you think it was worth eight dollars a ton, do you? A. If we had wanted to sell it that is what we would have sold it for.

"Q. Well, now, if you would sell it for eight dollars a ton why did you charge in this schedule ten dollars a ton for it? Your schedule calls for four tons, forty dollars; that is ten dollars a ton. A. Well, I might have made an error in my judgment from that time until this, sir; that is all I can tell you.

"Q. Is that the only explanation you can give? A. That is all I can explain, sir.

"Q. One hundred bushels of oats you have got marked here. Did you raise that oats? A. No, sir.

"Q. Where did you get it? A. We bought it from Mr. Benedict at Elizabeth.

"Q. Do you know what you paid for it a bushel? A. Not now I do not, sir, no, sir; that I couldn't tell.

"Q. When you made this list out did you put in this list the price per bushel the same as you paid for it? A. Why, I think I must have, because it would be foolish for me to do otherwise.

"Q. Do you remember whether you did or not? A. No, sir.

"Q. Do you know what oats were worth a bushel then at that time? A. Not now I do not, sir, no, sir.

"Q. And you can't tell now why you marked here fifty-one cents a bushel? A. No, sir, I can not; not at this time I can not, because I have not refreshed my memory with that schedule.

"Q. Do you know whether oats then were worth a dollar and twenty cents a bag then? A. I do not, sir.

"Q. Do you know how you arrived at the valuation of these oats which you marked down here in the schedule? A. Well, as near as I can judge now, I presume it was what we had paid for the oats.

"Q. But you don't know? A. No, sir; I am not sure.

'Q. These five hundred bushels of ears of corn, did you buy that? A. Yes, sir, except there was some in the bottom.

"Q. Well, the ears of corn, you bought that? A. Yes.

"Q. How much did you pay per bushel for that? A. We bought it by the carload lot, sir, by the ton.

"Q. Well, how much was that per bushel that you bought it for? A. Fifteen dollars and seventy-five cents a ton, I think.

"Q. Well, now, when you put down here four hundred bushel of ears of corn at forty cents a bushell, was that forty cents per bushel what you paid for it or what you expected to sell it for? A. That we never expected to sell, sir.

"Q. How did you arrive at forty cents a bushel? A. Why, I suppose at that same time I thought that that was a fair valuation for it.

"Q. Do you remember anything about it? A. The price of it? The price of corn by the bushel?

"Q. What is that? A. Do you mean the price of corn by the bushel to buy?

"Q. I want to know if you remember anything about the circumstances by which you put this at forty cents a bushel? A. I thought it was of that value to me.

"Q. Why did you put forty cents a bushel? A. Because I thought that that was that much value to me.

"Q. And irrespective of what you paid for it? A. Yes, sir.

"Objected to. Objection overruled.

"Q. The large feed bin that was mentioned here, where was that? A. That was at the head of the horses into the middle barn.

"Q. Does it stand by itself? A. It stands against the mow of hay.

"Q. Was it fastened to the building? A. No, sir.

"Q. Could you move it about? A. Yes, sir.

"Q. What? You said yes to what? A. Move the feed box and I said yes, sir; it was movable.

"Q. It was movable? A. Yes, sir.

"Q. You have charged here for a number of chains—eight large chains and four small chains What became of them after the fire? A. They were so burned we sold them for old junk.

"Q. They were burned up so you couldn't use them? A. Yes, sir.

"Q. Did you have any pads, breast pads for your horses? A. Yes, sir.

Q. How many did you have? A. Well, I don't remember now how many I had, sir.

"Q. How long had you had them? A. Well, I only think we bought them from Mr. Fink a short time before the fire.

"Q. All of them? A. Yes, sir.

"Q. Do you know what you paid for them? A. No, sir; not now I can't tell you.

"Q. You have them marked here four dollars and a half. Do you know how you arrived at that amount? A. Why, I suppose at that time my memory was very fresh of the price of them.

"Q. But you don't recollect anything about it now? A. No, sir, not the price of them.

"Q. The coal box, where was that? A. That was in the woodshed, sir.

'Q. What was that made of? A. Made of hemlock boards.

"Q. Was that fastened to the building? A. No, sir.

"Q. Movable? A. Yes, sir.

"Q. How much coal was there in it, if any; do you remember? A. No; at this time I do not, sir, no, sir.

"Q. Do you know whether there was any coal in it? A. Yes, I know there was coal in it, because after the fire that coal was all burning.

"Q. What was the coal box worth? Do you know? A. As near as I can recollect now I had built it two years before.

"Q. Well, what was it worth? A. I don't think I could state the price of it right now, sir.

"Q. You don't know? A. No, sir.

"Q. Well, you have got the coal box and half a ton of coal four dollars here.

"Mr. Whittemore It has come out that Mr. Goodman's testimony is based on something that his father knew. I would like to ask him about that.

"The Court: Substantially then it is not re-direct but you recall the witness?

"Mr. Whittemore: Yes, sir.

"The Court: That is all right.

"FURTHER DIRECT-EXAMINATION by Mr. Whittemore:

"Q. Do you know whether you had bought any oats before the fire?

"Objected to as repetition. Question permitted.

"A. Yes, sir.

"Q. Do you know how much you bought? A. Twenty-five bags.

"Q. What was done with the twenty-five bags? A. Part was dumped into the bin as far as it would hold and the rest was set on the floor.

"Q. Do you know how much you had in the bin before you put that new purchase in? A. No, sir. The bin filled up held fifty-five bushel, filled up.

"Q. Did you fill it up? A. Yes, but there was some in the bin.

"Q. Now after you had filled up the bins how many bags were there on the floor left? A. That I couldn't tell you now, sir.

"Q. Couldn't tell anywhere near? Upon what basis did you say that there was a hundred bushels of oats there? A. Why, with what we had in the bin and what was on the floor I supposed at that time—

"Q. Well, I will pass that. Now the mixed feed. Did you have any mixed feed just purchased before the fire? A. The same day that I had the oats, yes, sir.

"Q. How much did you purchase? A. One-half ton.

"Q. Where was that put, that half ton? A. In the bin next to the oats. This was a large double bin.

"Q. Was there anything in it when you put it in? A. No, sir.

Mr. Whittemore: I think it was put on the record the agreement under which this testimony was read from the book and I will state it and see if I am correct about it. It is agreed by both sides that the evidence of James E. Goodman, and the other deceased witnesses, may be read from the printed book of testimony used on the trial of the writ of error, or on the nearing of

the writ of error in the Court of Errors and Appeals, in lieu and instead of the original stenographic notes and the verification of them by the stenographer who took the testimony and transcribed it and with the same force and effect as if this testimony had been read from stenographic notes transcribed and verified by the official stenographer who transcribed the notes.

EDWARD V. GOODMAN, re-called:

Direct-examination by Mr. Whittemore:

Q. Do you know anybody by the name of Joseph All? A. No, sir; not Joseph All; I know a man—

Q. In your father's testimony to whom did he refer when he spoke of Joseph All? A. Joseph Orr.

Q. Who was he? A. Man worked for Mr. Mays.

Q. Was he on the farm at the time of the fire? A. He came over that afternoon, yes.

Q. Was he there at the time the fire commenced? A. No, sir.

Q. Now, Mr. Goodman, the list that you prepared and which your father used in testifying from, was, I believe you said, in your handwriting? A. Yes, sir.

Q. Did you have personal knowledge of all of the facts put on that list? A. Yes, sir.

Q. What did you put down on the list, as to those facts? A. Well, we put down what we thought was the market value price at that time.

Q. Did you set that down truthfully? A. Yes, sir; as near as we could come to it.

Q. Were any of the things that you put down

in the list based upon any information furnished by anybody else, that wasn't your own information? A. No, sir.

Q. The list to which you have referred is the list of the outdoor things, so-called? A. Yes, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Who were present when this list was made up? A. My father and myself.

Q. And your father took no part in making it up? A. Yes, sir.

Q. What? A. Yes, sir.

Q. His information as to the number of articles and the value given on the list was used, was it not? A. I don't understand what you mean, Mr. McCarter.

(Question repeated.)

A. Certainly.

Q. And after you and he had agreed upon the different items, both as to quantity and as to value, you then wrote down what you jointly agreed upon? A. Well, yes, practically.

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

Direct-examinatin by Mr. Whittemore:

Q. What relation were you to Mr. James E. Goodman? A. Daughter.

Q. Did you take part in the preparation of any list of the personal property on the farm? A. I did.

Q. What did you know about what there was there? A. I had been in the habit of going home.

Q. How often did you go home? A. Why, an average of once in two weeks.

Q. Before the fire? A. Yes.

Q. And when were you married? A. September 16th, 1903.

Q. Where had you lived before you were married? A. At home.

Q. And had ever since you were born, lived home? A. Yes.

Q. Did you take part in the preparation of the list? A. Yes.

Q. In whose handwriting is the list made up? A. I think it is mine, if I see it.

Q. I show you eight pages and ask you to identify the handwriting? A. That is my handwriting.

Q. Where was the list prepared? A. Part of it was prepared at my house and part of it was prepared in the shack where they lived after the fire.

Q. How did you know what to put down here? A. From what my mother told me, and father.

Q. Did you know anything about it yourself? A. Yes, sir.

Q. Did you know of all of these things on this list yourself? A. Yes.

Q. What does this list state with reference to the truth of the fact of the property being there? A. Why, it is the truth, as far as I know it.

Q. Did you consult with your father and mother about the list? A. Yes.

Q. Did your father and mother see the list after you had written it? A. Yes.

Q. What did they do with it after you wrote it? A. Took it to your office.

Q. Well, before they took it to my office, did they do anything with it, look at it? A. Well, they looked over it to see that everything was written correctly.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mrs. Wilcox, you hadn't been living at home for how long before the fire in July, 1905? A. A little bit less than two years.

Q. And I understand that in that intermediate period of about two years, or less, you used to visit the home about once every fortnight? A. Yes.

Q. Now, after the fire, the family that remained at home were living for a while in what you call the shack, over here on the other side of the road (indicating on map) is that right? A. Yes.

Q. And in September sometime, you and your mother and your father got together, for the purpose of trying to make up a schedule of the articles inside of the house that had been destroyed, is that right? A. No. We started to make out that list in July.

Q. Well, did you keep it up until September? A. Why, I think the final writing was in September. It was about a month or six weeks after the fire.

Q. Was there a list made out prior to this list? A. Why, I think there was. First we made out in pencil.

Q. In pencil? A. Yes.

Q. Then it wasn't made out at one sitting, then? A. No.

Q. You had several sittings between July and September? A. Yes.

Q. And the final sitting occurred in September? A. I think perhaps it did. I am not certain about the date.

Q. Well, now, your mother contributed to the information as to what the articles in the house were, didn't she? A. Some, yes.

Q. You could not remember, not having lived home for two years, and only visiting home occas-

ionally, what every bedroom had in it, could you? A. Why, yes, I could.

Q. You could? A. Yes.

Q. And every trunk had in it? A. No, I won't be positive about the trunks, because I didn't open the trunks when I went there.

Q. And your father contributed some information as well, didn't he? A. Yes.

Q. And did you, yourself, or some of the others prepare the original lead pencil rough memorandum? A. Well, I couldn't say.

Q. At any rate, there was an original rough memorandum that was the product of this kind of an investigation, and that memorandum you took home and you purported to copy in the sheets of paper that I have in my hand, is that right? A. I won't be certain about that.

Q. Well, I understood you to say that some of this, at least, was written at your home? A. Yes.

Q. And it all looks to me as if it were with one ink. I may be wrong, you know. Look at it and see if it was not all written at home? A. It looks very much as if it was, yes.

Q. So that isn't it your best judgment now, after looking at the paper, that that particular document, or those particular sheets of paper that you hold in your hand, is a copy of this other rough lead pencil memorandum? A. Yes.

Q. That you yourself, made out? A. I didn't make it out wholly myself, no.

Q. Well, I mean that you, yourself, copied this particularly? A. Yes, I copied that.

Q. At your house? A. I can't say. It is very likely that I did. I won't be certain about it.

Q. And who else was present when you were making up the original memorandum, beside your mother and your father? Was Elmer there? A. I couldn't tell you. It isn't at all likely that he

was, for he wouldn't know anything about anything.

Q. Was Edward there? A. I couldn't say that either.

Q. Couldn't say that? A. No.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. Do you know where this original pencil memorandum is? A. I think it has been destroyed. I haven't seen it since.

Q. After you had written this list, was it examined by anybody? A. Yes.

Q. In the family? Yes.

Q. Who? A. Mamma and papa.

By the Court: Q. Why? A. To see that it was correct.

Q. I thought you said you made it up and agreed it was correct before any examination was made? A. Well, to see that this ink copy was correct.

Q. Oh, you mean that the rest of them examined the ink copy, after you had made it, to see that that was correct? A. Yes.

Q. Well, you knew it was correct, didn't you? A. Well, I knew it was correct, but there are lots of times that a person makes a mistake in copying something.

Q. Well, if there had been a mistake in copying, you could have corrected it if you knew what the facts were, couldn't you? A. Well, I suppose I could, but things were overlooked sometimes, and we wanted to be sure it was correct.

Q. Then you were not quite sure it was correct? and you wanted to have your recollection verified by that of your father and your mother, is that right? A. Yes.

Plaintiff rests.

DEFENDANT'S MOTION TO NONSUIT.

Mr. McCarter: I would like, your Honor, to move for a nonsuit. I may say that, of course, I am not unaware of Chancellor Pitney's decision; I have read it and studied it and I think I am familiar with it, and I assume your Honor is also familiar with it and, therefore, will not take time to do anything more than to simply say that, as I understand it, this action may be said to be wholly a statutory one. That the railroad company is chartered and has a right to run engines and must necessarily have a fire in so doing, to create steam and all that, and if a fire occurred from the engine, even under certain circumstances, the company is not responsible. In other words, at the end of a plaintiff's case, for instance, it does not necessarily follow that a railroad is responsible; or at the end of a defendant's case it does not necessarily follow that the railroad is responsible, by merely proving that sparks came from a locomotive and caused a fire or conflagration in question. The statute provides, as we know, that—

The Court: You don't mean—I simply ask to get your meaning—you don't mean that even if the company negligently permitted these to escape that it would be a statutory—

Mr. McCarter: No, not at all. The *res ipso loquiter* part is statutory. In a case of this kind, as I understand it, the normal duty of a plaintiff is to prove, either directly or by circumstances, the fact that

the conflagration was due to a spark from a locomotive, in which event, if the defendant satisfactorily established the fact that it has used the most practicable means to prevent the escape of sparks, it relieves itself from liability and the accident or conflagration, even if still due to the railroad company, is one of the results of the invention of steam locomotives and the use of them by chartered rights, across the land; I suppose it is one of those indefinite things that a land owner gets when he gets damage for a railroad taking his land. Now, in this case, with those principles before our mind, and bearing in mind, of course, Chancellor Pitney's decision, let us see where we are standing.

There is, of course, no difference in law, as I understand it, occasioned by the variance in the atmosphere; the fact that the wind is blowing strongly or lightly; the fact that it is a warm or cold day; the burden does not increase; the duty of the railroad company does not change or fluctuate with fluctuations or changes in temperature or other natural conditions, any more than on a foggy day it is the duty of a railroad company, at a grade crossing, to do anything more than as in the Lehman case. Now, we insist in this case that there is, in the first place, no proof directly tracing the spark that ignited this fire to the engine; that there is no direct proof; nobody saw any spark go here. If there is any evidence at all upon that point it must be inference from circumstances, circumstantial evidence such as is perfect-

ly well settled is sufficient to enable that matter to go to the jury. Now, let us turn to the evidence for a moment and see what those circumstances are and how materially they differ from what appeared at the other case. I think a fair and impartial review of the evidence must make us admit that the following are the facts: A warm day, a hot day, a dry day; a wind blowing from the railroad; a train going through there about a few minutes before four o'clock, which train, as I look at it, is the only possible train that can have caused this conflagration; the only possible train about which any circumstances have been proven to point a connection between the fire and the train, or the locomotive. That locomotive, with a train, going rather rapidly to the east, passed on the track.

The Court: There is some evidence in the case, to which I might direct your attention while you are on that point, from the young man Polimbo, that after he had asked his brother and the other man working with his brother for water, at which time the mail train, as he calls it, went through, and while he was going toward the house and before he had reached there, as I understand it, the freight went through. That, I think, is his evidence. He is the only one who says that, but as I recall it, that is what he says, so that there might possibly—

Mr. McCarter: If he did say that it is plainly wrong, as the schedule shows.

The Court: I think probably that is so, but that is what he says.

Defendant's Motion to Nonsuit.

Mr. McCarter: We have not this train, to which I will confine my attention, at least for the moment, the mail train, the engine of which is numbered and on the schedule which the plaintiff has put in. A half mile down, Cordes, two brothers, said that they noticed sparks from that train. Nearer still, McDonald noticed some sparks and the fire after that train. We come down to Andrew Polimbo, who was across the track, and became thirsty and crossed over to where his brother and Gerber were and asked them for a glass of water and found they had none, and he either went voluntarily or was sent from there to the house for the purpose of getting water. He was four or five hundred feet away, he says, from the house at that time, and about a minute or so, probably not as long as that, but that is the way they put it, before he started, this mail train went through while he was still there. He then started to walk, I believe he says rather slowly, down the lane, and when he got to an apple tree which was, he says, one hundred and fifty feet from the barn, the main barn, he noticed some smoke and he ran over there and discovered that the barn was on fire. Now, his brother and Gerber, or Curber, whatever his name is, were out here four or five hundred feet away engaged in the potato patch and their attention was not directed to the fact that there was any fire, or what not, until a freight train came through, and your Honor will recall that they testified there was a sharp blow from the

whistle of the freight train, which attracted their attention, and the fireman, who was on the engineer's side, pointed to the barn, whereupon they looked over there and saw smoke. They say, both of them, that that was four or five minutes, they should estimate, after Andrew left them. The schedule which the plaintiff has put in evidence shows that that freight train that followed after, was ten minutes behind the other.

The Court: Ten minutes behind the other at Cranford.

Mr. McCarter: At Cranford; yes, sir.

The Court: It does not at all follow that it was ten minutes behind it at Goodman's station. They gave two points, as I understand it, where the train was, and the time at one point and the time at another point, and this point where the fire took place was intermediate of those two points.

Mr. McCarter: At South Plainfield it was eight minutes behind. Now, there is no circumstance of any kind or character referable to the freight train. I have not heard a word suggested by a soul in this case from beginning to end, indicating that it is claimed that the freight train caused the fire. The circumstances that Chancellor Pitney referred to as indicative of giving a question that should go to the jury upon that point are all, so many of them as are here—and they are mighty different, as I shall show you in a minute—are all applicable to the mail train. Cordes, the two brothers, McDonald, and Andrew himself, who says he saw the mail go by, and went up there, and he walked say three

hundred feet or so, and he then saw the smoke and he got over there, and then it was that the time, whether it was five or six minutes, or eight minutes, or ten minutes, that elapsed, as the evidence all agrees, between the time that the passenger or mail train went through and the freight train went through, did elapse. Now, what are the circumstances, therefore, that point to the mail train as indicating that there is a ground for the jury to infer that the fire was started by a spark from this locomotive? That is, if we are to confine ourselves to the evidence of the two Cordes brothers, McDonald and Andrew.

Now, in the other case, where the Chancellor held that there was sufficient to make a circumstantial case, the situation was very different. A man by the name of Axel had testified, to whose evidence the Chancellor time and again refers. He stood right across from the head of the arrow on the other side of the track, so he testified and so the opinion shows. He saw the mail go by and just after it went by he saw the smoke coming right out of that stable, and the two important things that Chancellor Pitney specifically referred to were, in the first place, the fact that there was no evidence that the fire started on the ground in front of the stable or barn, but up high, where the wind would have taken the spark; and, secondly, the fact that one hundred and fifteen feet from the track this man saw that thing. Now, if you will look at the evidence of Andrew, we have it here, you will find that he says that the

first fire he discovered was outside of the stable, and not inside the barn. He was forced to that position because, standing one hundred and fifty feet away, and almost parallel with the stable, he could not have seen inside, and so his evidence on page 19 is, "When I was at the apple tree I seen this grass burning outside the barn, that is all I seen. I couldn't see from the apple tree what was going on inside the barn. I couldn't see what was inside the barn burning. Q. How did you know there was any fire in the barn? A. I did not exactly know but when I came to it I seen it was inside the barn too."

Now, Chancellor Pitney, in the opinion, where he finds circumstances sufficient, adverts to two things, he adverts to the fact that "The fire broke out about four o'clock in the afternoon in the hayloft of a barn situate about seventy-two feet from the property of the company, and about 115 feet from its nearest railroad track. A fast mail or passenger train, drawn by engine No. 2454, had passed by upon this track a few minutes before, and a freight train, drawn by engine No. 1458, had passed within about forty minutes. There was no evidence tending to show: That a strong wind was blowing from the railroad toward the barn; that the day was quite warm, and the weather for some time had been unusually dry; that there was no person in or about the barn at the time the fire broke out, or within 1½ hours prior to that time; that no fire or any lighted lamp was kept in the barn; that the conflagration commenced in the hay, near

a door that stood open leading into the mow, some distance above the ground and facing the railroad; and that at the beginning there was no fire upon the ground or in the lower part of the barn. One witness (Axel) testified that being at a point twenty-five to fifty feet distant from the railroad, on the opposite side from the Goodman barn, and where he had a clear and unobstructed view, he saw the mail train going by, and as the last car of the train passed he observed the hay smoking, and immediately gave the alarm." Now, all of that, between the conditions of the atmosphere, which themselves prove nothing, and the next sentence, which commences "Andrew Polimbo," all of that is lacking, and all of that is the part that, by its position and by the accent given to it by the Chancellor, not only there, but later in the opinion, indicates were in his mind the two strong points with regard to the circumstantial connection between this train with engine No. 2454, and this fire, and there is not a word in this opinion that will justify the claim, without those two points, namely, the testimony of Axel, and the testimony as to the place where that fire first broke out. Andrew Polimbo now in this case puts it on the ground in front of the stable or barn, whereas the Chancellor is careful to call attention to the fact that it was not on the ground, but was up in the hayloft.

The Court: What do you attribute any significance to that for? It seems to me that if this railroad ran through a depression at that point, which was ten feet be-

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low the adjoining ground, and if we keep in mind the law of gravity that a thing that is heavier than air tends to go towards the ground, drawn thither by the attraction of gravity, that it would not make an awful lot of difference whether it carried a spark into a hay mow or loft, or whether it carried it right to the ground in front of the stable, and about two feet in, as Andrew Polimbo says it did.

Mr. McCarter: The significance I attach to it is the fact, as proven yesterday by Mr. Edward Goodman, it is not true that it is at a depth of ten feet all the way. He says it is on the level.

The Court: The testimony was quite clear that as you get near the road the railroad emerges from the cut and comes out nearer the level, and the testimony with respect to how the wind was blowing from over there this way toward the barn door and, therefore, if a spark were carried, it must have been carried from this side and, therefore, from the point where the locomotive was running in the cut.

Mr. McCarter: Where the grade of ten feet changes to the level I don't know. It certainly is level at a point opposite this window, because Edward said he lay on the sofa there and could see the whole thing right there, and it is not followed, I do not think there is any proof to indicate that the ten feet grade is even where it is marked here; it is somewhere down a cut ten feet, and it comes gradually to a level.

The Court: Yes, but nearly every wit-

ness testified to how the wind blew that day; it blew out this way (indicating on map); they pointed it out.

Mr. McCarter: Yes, sir; that is correct.

The Court: Now, here, you see, the engineer has marked right here ten feet above the track. If that is correctly marked, then that railroad there is ten feet depressed from the grade of the ground above.

Mr. McCarter: I only called your Honor's attention to the fact that the Chancellor made a great point, in two places there, of the fact that the fire originated, not on the ground, but above and in the barn.

The Court: I was only asking to see what your idea was with respect to why he attached significance to that?

Mr. McCarter: I always supposed what he meant by that was, with a strong wind blowing like that and a smoke stack then that is half way between the ten feet and the level, it could not have been a sharp drop, there certainly was not a hump of ten feet, and Edward said yesterday that opposite the house, which is just below, it is on a level, so there must be some slope, there must be some increase in the height and, therefore, the smoke stack would be elevated some. Now, this wind was blowing so strongly that it would prevent gravity from working as quickly as it would have to in order to bring that spark, if it came from there, down to the ground so quickly. That is the point exactly.

The Court: I can not forget the testimony of the witness who testified this

morning that he had the clipped horse there, and that a piece of coal about as big as a hazel nut was blown from the passing train and fell within six feet of the northerly end of the barn, which is practically the same distance, and the wind was blowing rather swiftly, and that would seem to indicate that gravity would do just such a stunt as you think it might not.

Mr. McCarter: The answer to that, if I may be permitted to suggest, was that there was no train passing while he was there. There was no engine from which the spark could have come.

The Court: He said it was a piece of coal and he picked it up in his hand and that he tossed it in there and that it smoked.

Mr. McCarter: He didn't say any train was passing by. It may have been floating around in the air for a long while, and suddenly dropped there near him.

Without spending any more time, I urge that the circumstances, the absence of Axel, the most important witness who was here before, and the difference in the location of the first appearance of the fire, are sufficiently important to draw out from this case—draw this case out of the position that the Chancellor put it in, on the other evidence, and to say that there was sufficient circumstantial evidence to leave it for the jury to infer that this spark came from that locomotive. Now, that is the first point.

Now, suppose I am wrong about that. I respectfully urge that even assuming

that your Honor would say that there was enough, under the law, to go to the jury upon that point, then it seems to me that the plaintiff has, by the interrogatories and the answers that he has put into this case, and voluntarily offered and read, prevented his recovery. He, your Honor will recall, asked in his seventh interrogatory, "What precautions or means did the defendant take or use at the times of the fires specified in the plaintiff's declaration, to prevent the communication of fire from the locomotives of the defendant to the property of any owner or occupant of land adjoining or near said railroad?" And the answer, which he also read, was, "The defendant, the Lehigh Valley Railroad Company of New Jersey, took and used all practicable means at the time of the fire specified in the plaintiff's declaration, to prevent the communication of fire from any engine used by it when passing along the property of the plaintiff stated in the declaration, and for this purpose equipped and provided its engines with screens and covers to their smoke stacks, so as to arrest and prevent, as much as practicable, the escape of fire."

The Court: Have you any authority that makes the answers to interrogatories any more binding than the testimony of a witness would have been, to that effect?

Mr. McCarter: No. I think it is tantamount to the witness having testified to it.

The Court: I think so too.

Mr. McCarter: And tantamount, to that extent, to an admission by the plaintiff,

through the mouth of one of his witnesses, that the railroad company had used every practicable means on its part. Now, mind you, your Honor, this is testimony adduced by the plaintiff, not cross-examined, not weakened, not minimized in any respect. There was no necessity of putting that in. If it was an answer that he didn't like, or was not legally an answer in any way, he could have had that answer stricken out, but he voluntarily calls the superintendent of this railroad company, on making his case—

The Court: He was either obliged—if that answer was a legitimate answer, he was either obliged, as I understand the rule—this is undecided also in this State—he was either obliged to put in all the answers, all the questions and all the answers, or else he could put in none. I do not understand that this State has yet permitted a man to select which answers he will use, and use them and leave the others out.

Mr. McCarter: I do not know what the practice is in your Honor's court, or in Hudson county, but I can say that it was constant practice with us, under Judge Depew, and has been since followed by the Circuit Judges and by the Chief Justice that an interrogatory that has no relation to a previous interrogatory, may be admitted. If they are germane, or if they are connected, why, they must not be read in part. You can not garble them, but time and again Judge Depew has ruled, in cases in which I was concerned, that if you ask twenty interrogatories, and eighteen of

them are entirely irrelevant to one another, but still germane to the case, you can select one, three, seven and ten and read them, and the plaintiff can not compel you to read them all. Now, that is the practice.

The Court: That is the rule in the Federal Court, and that is due to a rule there especially adopted, and I dare say that is, as you say, the rule in Essex county, but our rule has been quite the reverse, and Judge Dixon has uniformly ruled that you must put all of them in, or none, without regard to their being germane, so it is a question. I do not know.

Mr. McCarter: I can only give you my own experience in our own county. I have had no experience in Hudson county. I have always supposed that the rule in regard to an interrogatory was that it was a searching expedition to a certain line, within which you can frame them, and you may want to cover a vast number of questions, both as to damage which you have got to prove, and liability which you have got to prove. Now, because you wanted to exclude some of the damage, and still wanted to include those that bore upon liability, you would not be compelled, I should think, logically or any other way, to use those that bore out the one and didn't bear upon the other.

Well, at any rate, he did read them, and there was no effort to say that that answer was not responsive, or was not germane, or was not proper. There was no protest against reading; there was no effort to shrink from its presentation. There was

no question of our not operating that railroad company. We have admitted that we were operating it. There has never been any contention about that, and I thought at the time that probably time would have been saved by the simple question as to whether or not we did admit that we were running that engine. There has never been the slightest dispute about that. So that there was no situation in which the plaintiff was compelled, your Honor, except as he thought fit, from his own best judgment, to read that answer and that question.

Now, look at the liability; even assuming, and I think it is certainly questionable, it is very much narrower, plainly, with Axel away, leaving out the other point, very much narrower, because it appears that so far as the two other young men are concerned, that is John Polimbo and Curber, they did not know anything about the fire until this engine, that was eight or ten minutes behind, went by, and called their attention to it. So they have no knowledge of the situation except that eight or ten minutes after the train in question went by, the thing was on fire, and they knew it, and certainly the locomotive that was on that train could not have done it, for there the fire was and the fireman was calling their attention to the fire. There hadn't been time to have it ignite it. Now, the circumstances being so slight with regard to the connection between the fire and the locomotive, and the liability of the defendant, not being a thing that speaks for it-

self, or being a thing that there is doubt arising from the question as to whether we used the practicable means, where is there any doubt left in the case? Who questions the answer to that interrogatory? Who shakes it? Has the man who says every means was used been cross-examined and found out that it is not so?

The Court: Who shook it in the Chancellor's opinion? If you will read the Chancellor's opinion you will find that the facts he collates and recites are very many of them the facts that are at present in evidence in the case, and which he says may be considered by the jury to enable them to say whether they countervail the testimony of the defendant's witnesses that all practicable means were used.

Mr. McCarter: Why, the two significant points that the Chancellor refers to again as standing side by side with the evidence—and he says the evidence of all those men who testified with regard to screens, their evidence is there, and is their memory right or wrong, and all that kind of business, that is a question, however, gone into detail there, but the most important part about that is the fact that the Chancellor calls attention to two things again that appear that do not appear here at all. Again he refers to the Axel testimony and speaks of the fact that Axel saw this fire immediately after that train, 115 feet from the stable, had passed it, and then with more importance yet he refers to this particular thing, "But, in our judgment, the testimony introduced by the plaintiff to the effect that engine No. 2454

actually threw a spark that retained its vitality for a distance of more than 115 feet, so as to set fire to the hay in Goodman's mow, together with the testimony of Cordes and McDonald about the throwing of sparks by the same engine on the same trip, have a legitimate tendency to prove not only that this engine started the Goodman fire, but that its screen was not in good order at the time. Moreover, one of defendant's own witnesses, an expert, testified that in his judgment a spark that had passed through the meshes of such a screen at No. 2454 carried (the screen being intact) would not retain sufficient vitality or fire to ignite combustible material at a distance of 116 feet from the railroad track. Indeed, it may easily be inferred from what we all know, that a piece of live coal so small that it will pass through a quarter-inch mesh, and which, of course, continues to burn, and thereby to consume itself while driven into the air by the exhaust steam and while carried along through the air by the prevailing wind, can not retain sufficient heat to ignite other combustible materials at an unlimited distance. Whether it can carry its heat for 50, or 100, or 150 feet, or more or less, can not be solved by the application of any rule of law, and is left unsolved by the evidence." Now, there is absolutely no such evidence as to what this expert testified, to the effect that if a spark did go and ignite at 160 feet, that was evidence of the insufficiency of the screen. We have no such evidence in this case at all, and it was that that said to the Chancellor, those

sets of circumstances, laid side by side with these sets of circumstances, raises a jury question.

Now, your Honor, I do not understand that the effect of this decision in this case is to overrule the whole body of the law bearing upon the subject of the liability of railroads with fire screens. If so, it is the most revolutionary decision that has been promulgated by our court of last resort for many years. Your Honor is quite familiar with the rule as laid down in the Abbot case, and other previous cases, and followed by the Chief Justice in this case originally, to the effect that the defendant has done its duty when it has used all practicable means, and if the fire occurs under those circumstances it does not follow that it is responsible at all, nor is it always a jury question, whether it has used all practicable means. There must be sometimes when the Court can say, the evidence is fair, is plain, is undisputed, there is no contradiction, and if there be no circumstances such as stated before to show that, notwithstanding the fact that this man said the fire screen was all right, nevertheless, an expert came and said that if a spark went 160 feet, that showed it was wrong, then right away the question arises whether these men have been accurate, but we have no such evidence here. We have absolutely uncontradicted the statement of a man called by the plaintiff to the effect that every practicable means had been used by this company to take care of these screens, and there is not a person who denies that.

The Court: Are we obliged to accept that evidence to the exclusion of everything else? I have understood the rule always to be this: That the best possible phases that could be put upon the evidence of the plaintiff should be put upon it by the Court in considering a nonsuit. That is to say, that all the evidence which makes for the plaintiff's case may be segregated and that which makes the other way may be disregarded, because the jury may see fit to disregard it, in the light of the testimony in the case. If this man's oath, the oath of the superintendent, is simply tantamount to the evidence of a witness, the jury might set off Andrew Polimbo's evidence, and that of the others who say that they were close by at the time of the fire, against the evidence of this superintendent, who says that he used all practicable means, and they will say that he did not use all practicable means, or a spark of sufficient size, on such a day and under such circumstances, to maintain the vitality to start this fire, could not have gone through there, had all practicable means been used. I do not think it is up to the plaintiff to show what all practicable means are. I think that what all practicable means are is something the defendant is obliged to establish. In other words, the defendant would probably be excused if the plaintiff showed that it had adopted such devices as were in ordinary and common use and had been approved by experience and probably that had been made by manufacturers of approved standing, and that those were the things they had on their

trains. I suppose that would excuse them, but I do not understand that merely because a man makes a statement in his answer to an interrogatory that he has used all practicable means, which is a great broad general question, which, had it been asked of him on the stand, probably would have been objectionable, because it called for a conclusion, I do not understand that that requires the Court to nonsuit the plaintiff when there is other evidence, which tends to show that the locomotive did let this spark go from it, and that that spark did go to this mow and set this hay on fire. I do not understand that to be the rule. I am perfectly familiar with the Wiley case, and these other cases, and I confess, before I had read the Chancellor's opinion, that if I had been called upon to decide this case, would have nonsuited it, and instantly have nonsuited it, without any hesitation, but with that opinion before me, I do not see it just that way now.

Mr. McCarter: Well, the point I make is this, your Honor: Unless the Chancellor has departed from the rule that has been laid down ever since the statute of '57 was passed, to the effect that liability can only exist, in the first place, when it, of course, is shown either circumstantially or directly, that the fire came from the locomotive. That your Honor seems to think has been shown here, and I will not take any more time on it, although I, with deference, question that. When that appears, it is then up to the railroad company to show that they have, in the language of the statute, used all practicable means. If

they have shown that, then there is a balance, then there is still no liability.

The Court: Suppose that all that happened was this: That the witness, the superintendent, had been put on the stand, and you had said to him, what did you do to prevent the escape of the sparks from this locomotive; and he had said, we used all practicable means to prevent the escape of sparks; and you had said, that is all; and Judge Whittemore said, I have no cross-examination; you contend then, that that mere statement of a conclusion by the witness, would have required the Court to direct a verdict for the defendant?

Mr. McCarter: I should think so.

The Court: It may be, but I do not see it.

Mr. McCarter: Of course, I can not make your Honor see, I can only answer the question you put to me. I am perfectly frank to say, your Honor, if the superintendent had been cross-examined and a doubt had been created as to whether he had done what the statute requires him to do, and whether or not the things were the best practicable things, that would be a different thing, but the trouble is the plaintiff introduced this naked answer, without comment, or change, or variation, and the language of the answer is in the language of the statute, practically. Now, after all, when you pursue the usual course, and prove your fire, and rest, which is, of course, all Judge Whittemore had to do, then it would be up to us to show that we had used all practicable means, and somebody has got to say that the things that

were used—for instance, your Honor and I are not railroad men, we are lawyers, we don't know whether a screen with a mesh of this size or that size is practicable, and the best practicable; we don't know whether this kind of a top or that kind of a top is the best practicable, and there are two things, therefore, that have got to enter into it, after a searching analysis, in order to reach the conclusion as to whether the railroad has performed its statutory duty, and that necessarily involves a conclusion. Now, I take it that it is not incompetent testimony at all because it is a conclusion that a man says we used the best practicable means. He is subject to cross-examination.

The Court: I do not say it is incompetent testimony; I simply say it is a conclusion.

Mr. McCarter: It seems to me it has got to be a conclusion. If Mr. Harleman, the man who made the answer to that interrogatory, the superintendent, went on the stand and said, we had a thirteen-mesh screen and it was so and so, and so and so, and that was in fine condition, and then stopped, why, that would not prove anything. You would have to, I think, hold the railroad responsible, and direct the verdict against them, because there would be no proof that we used the best practicable means. Now, there may be a dozen different kinds of apparatus that are in use by different railroad companies, to endeavor to prevent the escape of sparks. Sparks will get out. You have got to have steam and you have got to have a fire, and

there may be a dozen different things used, but the thing that the statute requires is set forth in the language, and when a man comes and says, without equivocation, or suggestion of doubt, or suggestion that he is not telling the exact truth, when he is vouched for by giving the answer on that basis, because, if, in the language of the statute, we used the very best practicable means that were in invention at that time, it seems to me the railroad company has freed itself from liability. If his testimony was shown to be untrue, if his testimony was necessarily not relevant or germane, if it did not answer the very question that was put to him, and if it did not answer it in the way the statute says it shall be answered, why, it would be a different thing. Now, the point I make is that it does not necessarily follow, from the opinion of the Chancellor, that because A, B, C and D testify, in connection with a lot of other circumstances, many of which are missing here, that it is necessarily a question of liability. But the case in 43 Vroom of Vallaster vs. Atlantic City Railroad Company was reversed upon the ground that when the evidence was that the two kinds of spark arresters had been used and that they were the best practicable, the Court left it to the jury to say whether they were, rather than nonsuit or direct a verdict, upon the theory that it was a liability question. Now, I understand that the opinion of the Chancellor has not overruled all those cases, and that he said that it is hereafter always a question for the jury whether the best practicable

means have been used. All that the Chancellor said was that under the curious and peculiar circumstances which the evidence disclosed, which was the testimony of that expert with regard to the necessity of its being true, that if a spark had gone 160 feet and retained vitality enough to set fire, that implies that the screen was out of order. With that evidence before him, he says, I necessarily have got to say, that this is a jury question, and that these gentlemen who have said that screen was the best practicable, were therefore, perhaps perfectly honest, but they were mistaken, it was for the jury to say whether, in view of that contradiction, what the true fact was, but there is no question here at all, your Honor. There is a little evidence, very narrow indeed, with regard to the connection between this locomotive and this fire. Enough, perhaps, under your Honor's ruling certainly it has to be, and I bow to it, to conclude that that was a circumstance to go to the jury to determine first, what? Not anything about the screen, nothing at all. Simply with regard to the fact that that engine caused that fire, rather than something else, some pipe, or some man, or some other originator, spontaneous combustion, or something else. Now, that bridge being crossed, the plaintiff, in his own case, unnecessarily brings forth from the mouth of the defendant the admission, or the statement uncontradicted, that the very best practicable thing had been used, in the very language

of the statute, and rests his case. Now, what is the defendant called upon to prove? To prove that his own man told the truth, that the plaintiff has vouched for by offering him? What more can we prove? Now, therefore, it seems to me that the very curious shifting around of the liability, or the presumption of liability that is created by this purely statutory action, which, in the first place, is based entirely upon the idea that the railroad company caused the fire. All right. Your Honor says, in contradiction to my first point, there is enough to go to the jury upon that point. I think so. Very good. Now, that being so, then, in the second place, that the railroad company had not used the best practicable means. Now, the evidence is, however, and there is no contradiction to it, there is nobody says no to it, no other expert has come along and offered, by the plaintiff, in connection with this testimony, to show that Mr. Harleman was mistaken, or wrong—

The Court: Read that interrogatory, will you, and the answer?

Mr. McCarter: Yes, sir. The sixth interrogatory was about the custody of the records, and nothing to do whatever with this question. This is brand new now, directly not germane and not related to anything that has gone before: "What precautions or means did the defendant take or use at the times of the fires specified in the plaintiff's declaration, to prevent the communication of fire from the locomotives of the defendant to the prop-

erty of any owner or occupant of land adjoining or near said railroad?" Answer, "The defendant, the Lehigh Valley Railroad Company of New Jersey, took and used all practicable means at the time of the fire specified in the plaintiff's declaration, to prevent the communication of fire from any engine used by it when passing along the property of the plaintiff stated in the declaration, and for this purpose equipped and provided its engines with screens and covers to their smokestacks, so as to arrest and prevent, as much as practicable, the escape of fire."

Now, I understand that if that is a fact, if that is true, then there is no liability here. That is my understanding of the law applicable to these cases. Now, the only reason why the Chancellor, in the previous matter, let this case go to the jury, and said the case should have gone to the jury was, because he said that there was doubt cast upon that fact, and that doubt arose, first, from Axel's testimony, and second, from the expert who said that a spark could not have escaped and carried 160 feet, from the best practicable screen. Now, without being too persistent, therefore, or too loquacious, the thought that occurs to me is that the plaintiff—he need not have proved that, or, if he had proved it, he could have shown that perhaps it was a mistake, or cast some doubt upon it in some way, so that it would still be open to the defendant to prove the only thing we can prove, your Honor. We did not see that spark. There is only one

person, and that is the great Creator, that does know absolutely where that spark came from. Juries may infer it, and we many infer it, but it is like inferring that somebody drowned, or killed, or stabbed a man who is dead. We did not see it done, and nobody knows actually, and while there may be a strong inference that that engine did this thing, yet there is not any direct, causal relation between the two, and that has got to be a matter of inference. Now, that inference, your Honor says, is enough to go to the jury. But then what can we do under the circumstances? We are chartered to run a railroad, and we must have steam; in order to have steam we have got to have a fire; in order to have fire you will have smoke, and some of the sparks will go out. Now, the law says, all right, railroad company, now you are a great, practical convenience, you are a modern invention, and you help along civilization, and if you do use all practicable means in your screens and in your locomotives to prevent the escape of sparks, and they nevertheless do escape, then you are not responsbile, but if you don't do that, then you are; and the question arises, that now being the issue, did we, or didn't we do that thing? What reason is there for the defendant being permitted, or required, rather, to do anything more than he has done? He has stated, by the mouth of his superintendent, under oath, that the very thing that the law requires of him was done. Your Honor says, possibly, that is a conclusion.

Yes, it is bound to be a conclusion; it can not help but be. You might talk about all the jimcracks in creation, that would not mean a thing to the Court or to me. He has got to say, in the language of the statute, that they have used the best practicable means, or whatever the language is, and that is the very thing he says, that they have screens and covers and what not on that thing, so as to prevent, so far as practicable, the escape of sparks. I do not see what more I could say.

The Court: I think, in this case, Attorney General, I shall refuse the motion. In the first place, I think there is enough in the case, on the first point, to take—

Mr. Whittemore: May I say something, your Honor?

The Court: If you wish to change my mind all right.

Mr. Whittemore: No, I do not wish to change your mind. It has been stated here that the practice has obtained in some places permitting the reading of part of the interrogatories, and not the whole. I want to say that in this county, so far, the practice has been the same as in your Honor's county, which requires the reading of the whole. I have never known of the right of the plaintiff to select interrogatories to suit him, and reject others, and in pursuance of that practice, as I understood it, and of the law, as I studied it, I felt bound to submit these interrogatories and answers, and they contain in other questions matters essential to my case. Now, inasmuch as it has been sug-

gested here that there is a contrary practice, I would desire to avail myself of the benefit of that practice, it may be that I am entitled to it, and to move that the seventh interrogatory and the answer thereto be stricken from the record. In the first place, the answer, if I had the right to question it, the answer is not responsive. The screen and cover is not the whole thing, that is not all. It is a conclusion, in the second place, and I think on that ground it should be stricken out, if upon no other, but in any event, assuming that I have the right to select and to reject the seventh interrogatory and answer, for which there may be some reason, but which I had never thought was so before, I desire to have it stricken out upon all three grounds.

The Court: I shall refuse to strike it out. I am going to give the Attorney General the benefit of that advantage, it it is an advantage, which he thinks he has, by that evidence having been put in. I do not imagine for an instant that he will rest his case there, and I do not think you need fear that he will.

Mr. Whittemore: Prays exception.

The Court: You may not have an exception to that, because it is entirely a matter of discretion, and exceptions do not lie in matters of discretion.

I deny the motion to nonsuit as to this question, on the ground, first, that I think there is in it sufficient to go to the jury with respect to the communication of the fire from a locomotive of the defendant

company to the property of the plaintiff, for recovery of damages for the destruction of which he brings this suit, and for the reasons that I have stated in the small discussion I had with the Attorney General.

With respect to the second point, I think, in the first place, that the answer is a mere conclusion of a witness, who has not in any way shown to have been fitted by training, or experience, or otherwise, to have expressed such a conclusion. He is not shown to have been an expert in the matter concerning which he assumed to speak.

With respect to the second ground upon which I look at that it is this: And that is that the answer of the witness is that he used all practicable means, and then he proceeds to specify what practicable means, he used, by saying, to that end, that is, to the end of using all practical means, they equip and provide the engines with screens, but there is not anything in his answer to show that after the original equipment and provision of those screens, a proper inspection was made by the company to render it impossible that they should have been out of order at the time the sparks escaped from it, if any did escape from it, and I think, furthermore, that the jury would have a right to conclude, from the testimony of the Cordes brothers and of MacDonald, and of the man with the shorn horse, that where sparks should fly such a tremendous distance, and of such a size as to cause ignition, that the means used by the company from whose

engine such sparks had flown, were not the best practicable means that could have been employed, and I think the jury would have a right to conclude that as a matter practically of common knowledge, for, if a defendant company can throw sparks 150 feet away from its railroad, of sufficient size to ignite barns, and buildings, and fields of growing corn, and trees, and things of that sort, why, it would seem that the provision of the statute might rather have been that there should be no interest upon a railroad company to provide anything, because when you get much besides that, unless a whole lump of coal had gone out, it is very unlikely that anything would have ignited and, therefore, I think that in this case there is some evidence, to say the least of it, it may not be much, but there is some evidence to show that the means provided were not the best practicable means, and that that evidence is sufficient to call upon the defendant to make a defense in the case and I, therefore, deny the motion.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.

(Seal.)

Adjourned until Friday morning, April 1st, 1910, at 10:00 a. m.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January term, 1910.

EDWARD V. GOODMAN, Executor of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 1. In Tort.
EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 2. In Tort.
EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 3. In Tort.

Transcript of stenographer's notes of evidence, taken in the above entitled cases, before Hon. William H. Speer, Judge of the Circuit Court, and a jury, at the Court House, in the City of Elizabeth, N. J., on the first day of April A. D., 1910, at 10 a. m.

Appearances:

Mr. C. Mck. Whittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

At this point Mr. Whittemore announced that counsel had come to an agreement, whereby all three suits should be tried together as follows:

"It is agreed that the cases of Edward V. Goodman vs. the Lehigh Valley Railroad Company of New Jersey, and Edmund Mays vs. The Lehigh Valley Railroad Company of New Jersey, be consolidated and tried with the case of Edward V. Goodman Exr. of the estate of James E. Goodman deceased, vs. The Lehigh Valley Railroad Company of New Jersey, and that the evidence taken shall be equally applicable to all three cases with the exception of the particular proof of damage, which is applicable to each particular plaintiff. The consolidation being for the purpose of trial only, not for the purpose of merging the suits into one suit."

(Jury sworn in cases No. 2 and No. 3.)

(Opening by Mr. Whittemore, in behalf of the plaintiffs, in said suits, Nos. 2 and 3.)

EDMUND MAYS, being duly sworn according to law, on his oath saith, in his own behalf, (suit No. 3):

Examined by Mr. Whittemore:

Q. Do you live in the vicinity of Mr. Goodman's place at Rahway? A. Yes, sir.

Q. Do you remember Mr. Goodman's fire? A. Yes, sir.

Q. You have testified where you were—you were over at Mr. Goodman's fire, were you not? A. Yes, sir.

Q. Had you been on your property before you went to Mr. Goodman's fire? A. Yes, sir.

Q. Where had you been? A. I had been to Westfield.

Q. Where were you on your property? A. When the fire started I was in the house.

Q. How long had you been there? A. About twenty minutes.

Q. Who were the members of your family? A. My daughter, Miss Stella Mays,, and Mary A. Mays, my wife, and Florence Mays.

Q. Who else lived on the place? A. My man, my workman.

Q. What is his name, A. Joseph Orr.

Q. Anyone else? A. That is all.

Q. When you were over to your house, before Mr. Goodman's fire, who did you see there? A. My daughter and my man, that is all that was there.

Q. Where was your daughter? A. One was in New York.

Q. The daughter that you saw, where was she? A. In the house.

Q. Where was your man? A. He was in the yard.

Q. What was he doing, do you know? A. Greasing a wagon.

Q. Where were the other members of your family? A. My wife was to Westfield, and my other daughter was to New York.

Q. Anybody else on the place at that time? A. No, sir.

Q. Now, will you tell us what buildings you had on your property then? A. Yes, sir, I had a horse and hay barn, a cow barn, and a red barn we called it, and an ice house, and tool house, and corn crib, and hay barrack, and a chicken house—I think that is all.

Q. Had you any dwelling house? A. A dwelling house, oh yes, sir.

Q. Any other barns? A. No other barns.

Q. Any other wagon shed or carriage house? A. Yes, sir a carriage house.

Q. Did anything happen on your place that afternoon? A. Yes, sir.

Q. What happened over there? A. Sparks from the fire came—

Q. What happened to any of your buildings that afternoon? A. Well, they were all burned down, all but the wagon shed.

Q. Was the dwelling house burned? A. Oh, no, sir.

Q. All but the wagon shed and the dwelling house were burned down? A. Yes, sir.

Q. Where were you when the fire started? A. Over to Goodman's.

Q. What was the first notice you had of it? A. Mrs. Ulbrech came over and said—

Q. Well from something that Mrs. Ulbrech told you? A. Yes, sir.

Q. What did you do then? A. I went home as fast as I could run.

Q. What did you find? A. I found the shingles on the ice house afire.

Q. How was it burning, how much afire? A. Well, about four or five feet on the roof.

Q. What did you do? A. I went in the barn to get a ladder, and before I could get it out, and get it up, one side of the roof was ablaze.

Q. What did you do? A. I had to give it up, I could do no more, all we had to do then was to try and save the house.

Q. Did you take anything out of the barn? A. No, sir, I could not get a thing out.

Q. While your buildings were burning, what was going on over at Goodman's? A. When I left there, it was pretty well down, everything was pretty near consumed.

Q. Had you noticed anything in the air, when you were over at Mr. Goodman's? A. Well, it

was full of charred shingles and leaves flying through the air.

Q. In which direction were they flying through the air? A. The wind took them just direct to my place.

Q. Was there any fire in the ice house, when you left your place that afternoon? A. No, sir, there was nothing there to have a fire in.

Q. What was in the ice house? A. Ice.

Q. How much? A. About twenty-five tons.

Q. Now, Mr. Mays, how long had you owned the place? A. About seven years.

Q. How long had you lived on it? A. Seven years.

Q. What use did you make of the place? A. General farmer.

Q. Can you tell me the size of your barn, the horse barn? A. Forty by twenty-five feet.

Q. The cow barn? A. Forty-three by twenty-four.

Q. The red barn? A. About twenty by fourteen.

Q. The work shop or tool house? A. About twenty by fifteen.

Q. The ice house? A. The ice house by fourteen by twelve, I think.

Q. The corn crib? A. Twenty by eight.

Q. The chicken house? A. Fifteen feet about, and six feet high.

Q. How wide? A. About eight feet.

Q. The hay barrack? A. Twenty-two feet, it was a five-pole barrack.

Q. Five poles to the roof? A. Yes, sir.

Q. Twenty-two feet one way, what was it the other? A. I could not tell you, it was twenty-two feet across from pole to pole—twenty-two feet.

Q. The same way in each direction? A. Yes, sir, the same in each direction.

Q. Had you done any work on any of these buildings before the fire? A. Yes, sir.

Q. What buildings had you worked on? A. I had worked on them all.

Q. In what condition of repair were they at the time of the fire? A. They were good.

Q. What had you done to the large barn, the horse barn? A. Put in new sills, and new floor, new plates and new roof, and new weather boards.

Q. How long before the fire? A. About six years.

Q. Did you work on the other barns too? A. Yes, sir.

Q. Who did you buy the place from? A. Thomas Martin.

Q. Are you the person named in these two deeds I show you (handing witness papers)? A. Yes, sir.

Q. I show you two other deeds, are you the person named in them? A. Yes, sir.

Q. For what property were these deeds? A. For the farm.

Q. The farm to which you have referred? A. Yes, sir.

Mr. Whittemore: I offer in evidence a deed made by Thomas M. Martin, executor of Mary Vail deceased, to Edmund Mays, dated February 18, 1899, recorded in Book 347 of deeds for Union County, page 57.

Marked Exhibit A.

Next I offer in evidence a deed made by Thomas M. Martin, executor of Harriet Vail, to Edmund Mays, dated February 18, 1899, recorded in Book 347 of Deeds for Union County, page 60.

Marked Exhibit B.

Next I offer in evidence deed made by

Thomas M. Martin executor, to Edmund Mays, dated January 31, 1900, recorded in Book 479 of Deeds for Union County, page 62.

Marked Exhibit C.

Next I offer in evidence a deed made by Thomas M. Martin executor, to Edmund Mays, dated January 31, 1900, recorded in Book 479 of Deeds for Union County, page 64.

Marked Exhibit D.

Mr. Whittemore: Q. Did you know Mary and Harriet Vail? A. Yes, sir.

Q. When you knew them where did they live? A. On the same farm I live on.

Q. How long to your knowledge did they live there? A. About thirty years.

Q. What did they do with the farm? A. They just farmed it.

Q. Did you have anything in your barns? A. Yes, sir.

Q. Can you tell us what you had? A. Well, pretty near—there was about twenty tons of hay.

Q. Which barn was that in? A. That was in the horse barn, one side was a mow, and over the horses was another mow.

Q. What was the value of that hay? A. The hay was worth twenty dollars a ton.

Q. What kind of hay was it? A. Some of it was "A No. 1." and some was fine cow hay.

Q. How much of each? A. I suppose I had about eight tons of "Timothy" hay and about twelve tons of fine hay.

Q. What was the value of the Timothy hay at that time? A. I think it was worth about twenty-two dollars.

Q. What was the value of the other hay? A. It would be worth about sixteen dollars.

Q. What kind of hay was the other hay? A. It is what we call cow hay, fine hay.

Mr. Whittemore: I offer in evidence the record of the will of Harriet Vail, dated August 23, 1892, and admitted to probate January 22, 1894, recorded in Book M of Wills for Union County, at page 332 containing a power of sale to the executor, and appointing Thomas M. Martin, executor.

Next I offer in evidence the record of the will of Mary Vail, dated August 23, 1892, and a codicil to the will dated July 29, 1896,—the will and codicil duly admitted to probate March 29, 1897, and recorded in Book O of Wills page 396, coning a power of sale to the executor, and appointing Thomas M. Martin, executor.

Mr. Whittemore: Q. Now what else did you have in your barn that was destroyed by fire? A. In the barn?

Q. Yes? A. About a bag of oats, two bags of bran—

Q. How much did the oats cost? A. About $1.10.

Q. How much did the bran cost? A. About $1.10.

Q. What else did you have? A. In the barrack I had about eighty bushel of rye, and about six bushel of wheat.

Q. What was the rye worth? A. The rye was worth about seventy or eighty cents a bushel, and the straw was worth about sixteen dollars.

Q. What was the wheat worth? A. The wheat was worth one dollar then.

Q. One dollar for how much? A. A bushel.

Q. You spoke of straw, where was that straw? A. This was in the barrack, it had not been thrashed, just as it was gathered.

Q. How much was that? A. To the best of my knowledge, it was about sixty bushel.

Q. In the straw—do you measure straw by the bushel? A. No, sir, it was in the straw, it had never been thrashed.

Q. How much straw was there there, according to the ordinary method of measuring such things? A. After it was thrashed, there would be about a ton and a half of wheat straw.

Mr. McCarter: He is trying to get the straw after it was thrashed, and the wheat as thrashed—yet he says it had never been thrashed yet.

Court: He is entitled to show how much the wheat would be worth, and the rye, and the straw would be worth, and you would then be entitled to show how much it would cost to thrash it, and then strike the amount of the labor from the product, and thus you would have the amount it would be worth.

Mr. Whittemore: Q. Can you tell us how much was there according to the ordinary method of measuring it? A. I presume about two tons of rye straw, as near as I can guess at it.

Q. Do you know whether that rye straw unthrashed, had any value, as it was, in the market—the market value—answer yes or no? A. Yes, sir.

Q. You know it had a market value? A. Yes, sir.

Q. Unthrashed? A. Yes, sir.

Q. What was its value unthrashed, a ton, as it was? A. Unthrashed?

Q. Yes—as it was, just as it was—just state what that was worth per ton? A. With the rye in, you mean?

Q. Yes, just as it was? A. Well, I can not tell you that.

Q. Do you know how much grain was contained in that quantity of unthrashed straw? A. I should judge about eighty bushel of rye.

Q. And how much would it cost to thrash it? A. I think it is eight cents a bushel.

CROSS-EXAMINATION by Mr. English:

Q. That is what you paid to thrash it? A. Yes, sir.

Q. That does not include labor of the other hired hands? A. No, sir.

Q. Was there any other labor? A. Only myself and the man, we had to do that; and the other men thrashed it and measured it, and put it in the bags.

Q. And what do you do? A. Just cart it away.

Q. How much is the carting worth? A. Well to put it in the barn it would not take more than half an hour to put it all in.

DIRECT by Mr. Whittemore:

Q. Now did you have anything else on the buildings, that were destroyed? A. Farming utensils.

Q. Do you know what the value or the cost of those farming utensils would be? A. Yes, sir.

Q. What kind of farming utensils were they? A. A roller and four ploughs.

Q. Do you know what the roller cost? A. $25.00.

It is agreed that the farming utensils amounted to $125.00 in the case of Edmund Mays vs. the Lehigh Valley Railroad.

Mr. Whittemore: Q. Did you have any ice—you said twenty-five tons? A. Yes, sir.

Q. Do you know anything about the value of that ice? A. About $3.00 a ton.

Q. Do you know—I asked you whether you knew or not? A. That is what I paid for it, after I got burned out.

Q. How soon after? A. Within a week.

Q. Where did you get the ice from that you had in the ice-house? A. Cut it off the brook.

Q. And put it in yourselves? A. Yes, sir.

Q. Did you have any wood on the place? A. About five or six cord of hickory wood.

Q. Do you know what that wood was worth? A. It was worth about six dollars a cord, it was all split.

Q. Did you have any cedar boards? A. About 1,000 feet.

Q. Where did you get them? A. I bought them from some man who had a car-load, at Ashbrook, he was going to build, and didn't build, and I bought them.

Q. How long had you had them? A. I had them about a year I guess.

Q. What did they cost you? A. They cost me about thirty-five dollars.

Q. Did you have any hay canvas? A. Yes, sir, one.

Q. Do you know what that cost? A. It cost me fifteen dollars.

Q. Did you have any wagons on the place that were destroyed? A. Two wagons.

Q. What kind? A. One was a two-seated platform spring wagon, the other was a market wagon.

Q. How long had you had the two-seated platform spring wagon? A. About seven years.

Q. Do you know what it cost? A. It cost about $125.00.

Q. And what was its condition at the time of the fire? A. It was considerably worse for wear, although it was a good wagon yet, it had been used for seven or eight years.

Q. Now the market wagon, how long have you had that? A. About six years.

Q. And do you know what that cost? A. I paid $25.00 for it.

Q. What was its condition? A. Very good.

Q. Did you have any sleighs? A. Three.

Q. Tell about one of them—when did you get it? A. About four years.

Q. And paid how much for it? A. I paid $40. for it.

Q. And the other sleigh? A. $10 and the bobs, $25.00.

Q. How long did you have the $10 sleigh? A. It was a cutter.

Q. How long did you have it? A. About nine years.

Q. What kind of sled was the other one? A. A bob-sled.

Q. How long had you had that? A. Five years.

Q. How much did you pay for it? A. $25.00.

Q. Did you have any milk on the place? A. Two cans.

Q. How much was in the cans? A. They were full.

Q. How much a can, or how much in the can? A. Forty quarts.

Q. What was that milk worth? A. About $2.50.

Q. Were there any trees on your place that were damaged? A. About ten or twelve.

Q. What kind of trees were they? A. There were six Japanese plum, to big cherry trees, and four apple trees, and four peach trees.

Q. Did you get any fruit from these trees? A. The cherries and apples was good, the berries and the plums, had been set out three years, and they were just coming in to bearing.

CROSS-EXAMINATION by Mr. McCarter:

Q. You bought this farm in 1899 didn't you? A. Yes, sir.

Q. And you paid how much for it? A. $5,000.

Q. Were all the buildings that you describe, on the farm when you bought it? A. All but the corn-crib.

Q. How many acres were there in the farm? A. About fifty-four.

Q. How far roughly speaking, are your buildings from Mr. Goodman's buildings? A. About 700 feet I should judge,—700 to 800, not over it.

Q. And your claim is, that the sparks from Mr. Goodman's fire, went over to your barn? A. Yes, sir.

Q. You don't claim that your fire was set directly by sparks from the engine? A. No, sir.

Q. Now you said that the horse barn had new sills built, roof and floor? A. Yes sir.

Q. Well, they had been in ever since you owned the farm, hadn't they? A. A year after I bought the farm.

Q. You bought the farm in 1899, and about a year afterwards you repaired the barn? A. Yes, sir.

Q. And put in some new sills, plates and roof? A. Yes, sir.

Q. And you called that "new"? A. Well, there was not much of the old left.

Q. That was new, I suppose, compared with the other buildings? A. No, sir, I over-hauled the others right after that, I went all through them.

Q. How many of your fifty-four acres were under cultivation? A. Well, there was about ten acres of wood, the balance was all under cultivation.

Q. Ten acres of wood and about forty-four acres under cultivation? A. Yes, sir.

Q. How much of the forty-four acres was in hay? A. About eight acres of it.

Q. And the balance was in what? A. Corn and rye and wheat.

Q. Now how much hay on an acre would you get? A. I would get about a ton and a half or two tons.

Q. Well do you ever remember an occasion when you got two tons of Timothy hay on an acre? A. Yes, sir, and three tons.

Q. On this property? A. Adjoining this property.

Q. On this property, I say? A. No, sir, not on this property.

Q. How many acres did you have in rye, and how many acres in wheat? A. In wheat about four acres, and about six acres of rye.

Q. Did all the hay that you have on hand come from your own place? A. No, sir.

Q. Where did it come from? A. I cut thirty-four acres of Mrs. Robeson's of Ashbrook.

Q. And carted it down here? A. I carted it on my place.

Q. That year? A. Yes, sir, that year.

Q. Now you say that you think that A. No. 1 Timothy was worth $22 a ton—did you get $22 a ton for any hay No. 1 Timothy that year, at your stable? A. I didn't have any to sell.

Q. What sale of Timothy hay, "A No. 1," in the year 1905, do you know of, in that vicinity, that reached the figure of $22? A. I don't remember any.

Q. I call your attention to the testimony of Mr. Goodman, the deceased witness in the other case, to the effect that No. 1 Timothy was worth $15, does that influence your judgment any—at the barn I am talking about now, not carting to Newark or New York—does that influence your judgment any? A. No, sir.

Q. Mr. Goodman was a pretty good farmer, was he not? A. He was.

Q. If you don't know of any sales of A No. 1. Timothy for $22, a ton at the barn, what is your testimony based on, Mr. Mays? A. Well, I saw hay sold, at an auction that same year for $18, that I didn't think was—I paid $18 for what I called not as good Timothy.

Q. Perhaps the gentlemen was like me, a gentlemen farmer, and didn't know much about hay, and got stuck? A. He got it to take to the market.

Q. What was this other hay you talked about? A. Hay I cut off Mrs. Robeson's place.

Q. And the timothy hay was hay you had from your own place? A. Yes, sir.

Q. How long had you known this farm before you bought it? A. Thirty years.

Q. How many of the buildings that were on this farm when you bought it, had been put there during that thirty years? A. Not any of them.

Q. So that all the buildings that were on the farm, were on the farm when you bought it, and had been there to your own knowledge, for about thirty years? A. Yes, sir.

Q. Were the barns and out houses painted? A. Yes, sir.

Q. All of them? A. All of them.

Q. What did you pay Mrs. Robeson for this fine hay? A. We cut it down in shares.

Q. You cut it down in shares? A. Yes, sir.

Q. At so much a ton or so much an acre or what? A. No, sir, I took half and gave her half.

Q. How much did you give her to the twelve tons of hay that you got from her place and took over to yours? A. Just same as I took, she took a load and I took a load myself.

Q. How did you pay her? A. I paid her with that hay I gave her.

Q. Oh, she took half and you took half? A. Yes.

Q. What have you as a basis of the sales of hay that year, have—? A. No, sir.

Q. Where do you get your basis for $16 a ton for what you call "fine hay" not No. 1 Timothy? A. Well, I never knew it sold for much less around there, and I can always get $16 for it.

Q. At the barn? A. At the barn— in the field.

Q. In the field? A. Yes, sir.

Q. Had you cut this hay before from your place? A. Not that, I have cut it for several years.

Q. This fine hay? A. Yes, sir.

Q. This same style hay? A. Yes, sir.

Q. Was this fine hay from the swamp meadow? A. No, sir.

Q. What was it from? A. Upland.

Q. Did you say the ice house held twenty-five tons? A. It held fifty tons.

Q. Was it full that year? A. Yes, sir.

Q. How thick was the ice? A. Well, about eight or ten inches.

Q. These measurements that you have given of your different buildings, did you measure them from the foundation, or how did you get those figures? A. No, sir, I had some—but I had worked on them remodeling them so that I had

them all torn down and I knew what these buildings were, I hadn't one that I didn't new-weatherboard, or new-roof and I could—

Q. It is your estimate then? A. Yes, sir.

Q. And the best estimate you can give? A. Yes, sir.

Q. And they were about that size? A. Yes, sir.

RE-DIRECT by Mr. Whittemore:

Q. Did you buy any hay that year after the fire? A. Yes, sir.

Q. How soon after the fire? A. Oh, right away.

Q. What did you pay for it? A. I paid $19.00.

Q. Where was it when you bought it? A. I bought it at a sale.

Q. How far away? A. About two miles.

Q. What did you do with it? A. Fed it to the cows and horses.

Q. How did you get it to your place, two miles away? A. I carted it.

Q. Have you seen this map here on the easel? A. Yes, sir.

Q. Can you identify your property on that map? A. That is the house (indicating).

Q. What property are you pointing to now? A. This is the house, and the wagon-shed, what was left after the fire—

Q. I notice there are some other buildings marked on there? A. Yes, sir.

Q. What does that show in relation to the buildings that existed before the fire? A. This is the corn-crib, the hen-house, the ice-house, and the horse and hay-barn and the cow-barn, the barrack, the red barn, and the tool-house (indicating).

Q. Who made that map—do you know? A. Mr. Ham.

Q. Was he on your premises? A. Yes, sir.

Q. How long ago? A. Oh about a month or two ago.

Q. Did you show him anything there? A. Yes, sir.

Q. What did you show him? A. I showed him those old foundation stones here, and where I built.

Q. What do you say as to whether this map shows the location or relative position of your building correctly or not? A. It is correct, as far as I could see, as to the location of them.

It is agreed that this map may go in evidence, without the proof of the surveyor who made it.

Marked Exhibit E.

ELSIE ULBRICH, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. Do you remember the fire that occurred at Mr. Goodman's farm? A. Yes, sir.

Q. Where were you that afternoon? A. Right in our yard.

Q. Where was your yard with reference to Mr. Goodman's house—could you see Mr. Goodman's house from your yard? A. Yes, sir.

Q. Where was your place—look at that map—do you understand that map—do you think you understand it? A. No, sir.

Q. Was there any road by Mr. Goodman's place? A. Yes, sir.

Q. Was your place anywhere near that road? A. In the same road.

Q. How far away from the road was your house? A. Quite a ways back.

Q. What do you mean by "quite a ways"—as far as the length of this room? A. Yes, sir.

Q. Do you know where the track crosses the road near Goodman's? A. Yes, sir.

Q. Were you nearer to the railroad than the road, or further away? A. Further away.

Q. Now how far were you from Mr. Mays place? A. Not far.

Q. Who was the nearest to Mr. Goodman's place, your property or Mr. Mays' property? A. Our property.

Q. Which side of the road was your house on—on Mr. Mays' side or Mr. Goodman's side of the road? A. Mr. Mays' side.

Q. What property was there between your place and Mr. Mays' place? A. Not any.

Q. You were this side of Mr. Mays' place then (indicating)? A. Yes, sir.

Q. And who was the furthest away from the railroad, Mr. Mays' or your place? A. Mr. Mays'.

Q. How far was your house from Mr. Mays' place— can you estimate the distance by looking around you, were you further away than the length of this room? A. Yes, sir.

Q. Now look outside and say if you can tell the distance outside—how far away were you from Mr. Mays' house? A. Further than this room.

Q. Twice as far? A. About half again as far.

Q. Did you see anything passing through the air while Mr. Goodman's property was burning? A. Sparks.

Q. Which direction were they going? A. Towards Mr. Mays.'

Q. Did you see anything happen over to Mr. Mays' place? A. I seen the ice-house on fire.

Q. Now where was it on fire when you first saw it? A. In the middle.

Q. In the middle of what? A. The middle of the ice-house.

Q. On the side of it? A. On the top.

Q. What kind of a top did the ice-house have—do you know what the top was made of? A. No, sir.

Q. How much was burning, what was burning on the top of the ice-house? A. The roof.

Q. How much of the roof was burning when you saw it? A. About two or three feet.

Q. What did you do? A. I went over and told him.

Q. Told who? A. Mr. Mays'.

Q. Did you tell anyone else before you went over? A. I told my mother.

Q. What happened to them—are they there A. Then the barn started.

Q. What happened to them are they there now? A. No, sir.

Q. What became of them? A. They were burned down.

CROSS-EXAMINATION by Mr. McCarter:

Q. Elsie how old are you? A. Fifteen.

Q. So you must have been about ten years old at that time—you don't know very much about it, do you? A. Yes, sir.

Q. Now look at this map, I think we can explain it to you—we want to get at where you were—this seems to be the road (indicating)—do you remember the road that runs by Mr. May's place? A. Yes, sir.

Q. The same road that goes very near Mr.

Goodman's place, and across the railroad—you remember that road I suppose— do you know where Mr. Goodman's place is? A. Yes, sir.

Q. Do you remember the road that runs along from Mr. Goodman's place to Mr. May's place? A. Yes, sir.

Q. Where do you live—further away from Mr. Goodman's or nearer Mr. Goodman's? A. Further away.

Q. You live on this side, further away from the railroad (indicating)? A. Yes, sir.

Q. And in the next place to Mr. May's? A. Yes, sir.

Q. And you were outdoors that afternoon? A. Yes, sir.

Q. This seems to be the corn-house—do you remember Mr. May's corn-house? A. No, sir.

Q. Do you remember his house, the residence itself? A. Yes, sir.

Q. Do you remember the ice-house? A. Yes, sir.

Q. That is where the sparks struck, as you recall it? A. Yes, sir.

Q. That is the sparks you say? A. Yes, sir.

Q. Where were you, if you can tell us—you were over here somewhere, with regard to that ice-house—Mr. May's house is here fronting on the road—you don't remember any corn-house? A. No, sir.

Q. Where were you standing, can you tell? A. I was watching the fire.

Q. You were watching the fire over to Mr. Goodman's? A. Yes, sir.

Q. And while you were there you saw some sparks come over from where? A. From Mr. Goodman's.

Q. Could you see the flames from Mr. Goodman's? A. Yes, sir.

Q. And you watched these sparks you say, and one of them lit on where? A. On the ice-house.

Q. Where were you standind?— This is Mr. Goodman's place (indicating)—this is the wagon-shed, here is the carriage-house, here is the wood-shed, and according to this map the ice-house was over here (indicating)—is that where you recall it? A. Yes, sir.

Q. Can you tell us where you lived, and were you on your place or somebody else's at the time? A. On our place.

Q. Take the pointer and show us where you stood, about? A. I must have been on this side (indicating).

Q. You must have been on the side nearer Mr. Goodman's—were you at home, were you on your father's place that day? A. Yes, sir.

Q. Now does your father live nearer the railroad than Mr. May's or further away? A. He lives nearer the railway.

Q. So he lives between the railway and Mr. May's house? A. Yes, sir.

Q. You have got that right, have you? A. Yes, sir.

Q. Does he live on the same side of the road? A. Yes, sir.

Q. He lives next to Mr. May's? A. Yes, sir.

Q. You live next to Mr. May's towards the railroad? A. Yes, sir.

Q. Are there any buildings on your place? A. Yes, sir.

Q. Wooden buildings? A. Yes, sir.

Q. Who was out there with you that day? A. I was there alone.

Q. Do you remember when your birthday comes, what month? A. January 14th.

Q. Then you were fifteen years old the 14th of last January? A. Yes, sir.

Joseph Orr—Direct.

JOSEPH ORR, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Do you remember Mr. Goodman's fire? A. Yes, sir.

Q. Who did you work for then? A. Mr. Mays'.

Q. Where did you live? A. At Mr. May's.

Q. Where were you in the afternoon of the day of the Goodman fire? A. I was down there a little while.

Q. Before you went down to Mr. Goodman's, where were you? A. I was putting in hay.

Q. Where? A. Near Westfield.

Q. How long did you stay there—where did you go when you put in the hay near Westfield? A. I came home.

Q. How long were you home before the Goodman fire was called to your attention? A. Well, probably or maybe twenty or twenty-five minutes, I can not exactly.

Q. Did you go home with Mr. Mays? A. Yes, sir.

Q. After you got home what did you do? A. Put in the horse in the stable.

Q. And what next? A. The next thing I heard was "Fire" somewheres, I didn't know where until I looked around.

Q. And what did you do? A. I saw the flames and fire at—

Q. Where? A. At Mr. Goodman's.

Q. And what did you do? A. I went down there.

Q. When you went down to Mr. Goodman's, did you notice anything wrong at Mr. May's place? A. No, sir, not when I went down there.

Q. How long were you down at Mr. Good-

man's? A. Well, I can not exactly say, maybe ten minutes or five minutes, I can not say exactly.

Q. Where did you go when you left Mr. Goodman's? A. I came up to the fire of Mr. May's.

Q. What did you find there when you got up there? A. I found the ice-house on fire.

Q. And what did you do? A. I went to the stable and I put the horses out the first thing and I could not do nothing.

Q. How much of the ice-house was afire? A. The back side was all afire.

Q. What do you mean by the back side? A. One side of the roof it was all afire.

Q. Which side do you call the back side, with relation to the railroad? A. That is the side with relation to the railroad.

Q. The side next to the railroad? A. Yes, sir.

Q. And what kind of roof was it? A. Shingle.

Q. A big roof? A. Yes, sir.

Q. How did the big roof run, parallel with the railroad, or away from the railroad? A. Right straight up and down.

Q. Which direction did the big roof run? A. I ain't no carpenter, I don't know which direction they run in.

Q. Which direction did the back run, in the same direction the railroad ran, or cross-wise to the railroad? A. The same direction that the railroad ran.

No cross-examination.

BERTHA ULBRICH, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. Where do you live with reference to Mr.

May's place? A. 200 feet from Mr. May's place.

Q. In which direction, away from the railroad or towards the railroad? A. In the same place as Mr. May's place.

Q. Which is nearest to the railroad? A. I be's near the railroad.

Q. Any property between you and Mr. May's? A. No, sir.

Q. Which side of the road are you on, the same side or the other side? A. The same side.

Q. Do you remember Mr. Goodman's fire? A. Yes, sir.

Q. Where were you that afternoon? A. I were home.

Q. What part of the house were you in? A. I was outside that day, under the tree.

Q. What were you doing there? A. Well, I peel my potatoes for supper.

Q. Did you see anything going on at Mr. Goodman's place? A. Yes, sir.

Q. What was happening over there? A. I saw a great black smoke, and then I look over the other side of my house, and then I thought it start a fire.

Q. What start a fire? A. The barn.

Q. What barn? A. Mr. Goodman's barn.

Q. Did you see it burn? A. Yes, sir.

Q. Did you see anything in the air? A. Yes, sir.

Q. What was there in the air? A. Black smoke.

Q. Anything else? A. Well, nothing else.

Q. Nothing else in the air? A. No, sir.

Q. Which direction was the smoke going? A. Right over in front of my place.

Q. How was the wind blowing that day? A. Well, he go over from Mr. Goodman's and drove it over to my place.

Q. The wind drove it over from Mr. Goodman's? A. Yes, sir.

Q. Did you see anything happen over to Mr. May's place that afternoon? A. Yes, sir.

Q. What called your attention to anything happening there, how did you happen to notice it? A. I was on my front, and I see that the ice-house was started on fire.

Q. How did you happen to look at the ice-house? A. Well, I keep my eyes all over, you know.

Q. Was there anything said by anybody—did anybody say anything to you before you saw Mr. May's ice-house on fire? A. Yes, sir, my Elsie told me.

Q. And then you looked where? A. I looked over, and I see it start.

Q. Where? A. Over on the ice-house.

Q. What part? A. In the middle, in the roof, on the ice-house.

Q. What was there burning there? A. A roof.

Q. How much of it was burning? A. Well, maybe two feet, it started, yes, sir, it started—

Q. What did you do when you saw the ice-house was burning? A. I could not do nothing, I sent for Mr. May, and I told him it was on fire.

Q. How did you send for Mr. Mays? A. I sent my daughter, here.

Q. Did you see him come over? A. Yes, sir, he came over right away.

Q. What happened to the ice-house? A. Well then half the roof was on fire, before he came up.

Q. What became of the ice-house? A. Well, it was from the sparks.

Q. Is it there now, is the ice-house there now? A. The ice-house there now?

Q. Yes. A. No, sir.

Q. What became of it? A. It burned down, and started the barn on fire.

Q. And what became of the barns? A. It started the barns on fire.

CROSS-EXAMINATION by Mr. McCarter:

Q. You didn't see the ice-house on fire until Elsie called your attention to it, did you? A. Yes, sir, I didn't sit very far from Elsie, and she says to me "Mr. May's ice-house is on fire."

Q. As I understand it, you didn't see the fire on the top of the ice-house, until Elsie called your attention to it—is that right? A. Yes, sir.

Q. Elsie called your attention to the fire on the top of the ice-house, and then you looked there, and saw it was on fire? A. Yes, sir.

RE-DIRECT by Mr. Whittemore:

Q. Was there anything done to your property that day?

Mr. McCarter: I object to that as not re-direct-examination, and as immaterial.

Objection sustained.

STELLA MAYS, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. Miss Mays, where did you live at the time of the Goodman fire? A. At my parents' home.

Q. Who is your parent? A. Edmund Mays.

Q. He is your father? A. Yes, sir.

Q. You lived in the same house with him? A. Yes, sir.

Q. Where were you in the afternoon of the Goodman fire? A. I was at home.

Q. Who was at home with you? A. My father, and Mr. Orr.

Q. Where was your mother? A. Out with Mrs. Goodman.

Q. Any one else about the place? A. No, sir.

Q. How long had you been home that day? A. All day.

Q. What called your attention to anything over at Mr. Goodman's place? A. I went out on the porch, and I saw a large volume of black smoke coming up, and I thought it must be the barn on fire.

Q. What did you do? A. I then told my father.

Q. Where did he go? A. He and the man went over immediately.

Q. What man do you mean? A. Mr. Orr.

Q. After they went who were home? A. Only myself.

Q. Where did you stay? A. Well, I thought I would—well I seen to a few things, and locked up the house, and went down.

Q. Down where? A. To Mr. Goodman's place.

Q. How long did you stay there at Mr. Goodman's? A. Only about five minutes.

Q. Where did you go then? A. I went back home.

Q. Why? A. Because I was given a satchel with some papers in—

Mr. McCarter: I object to that.

Mr. Whittemore: Q. Was your attention called to anything over at your place? A. No, sir, it was just as I left it.

Q. When you got back? A. Yes, sir.

Q. Everything was all right? A. Yes, sir.

Q. How long did you stay there? A. Just long enough to put the satchel in the house.

Q. Where did you go then? A. I then went down, back to the fire again, at Mr. Goodman's.

Q. How long did you stay there that time? A. I hardly got down the hill to the foot of the hill, before this Miss Elsie Ulbrich said—

Q. Well, something was said by Elsie? A. Yes, sir.

Q. What did you do then? A. I immediately went back home.

Q. What did you find when you went back home? A. The ice-house was all on fire.

Q. What part of it was on fire? A. The part towards the railroad.

Q. What part? A. Well, I might say when I got back, all the roof was on fire.

Q. Did you see anything in the air, or passing through the air, before your ice-house got on fire? A. Well, of course the blaze was going very high.

Q. Did you see anything going through the air? A. It was a very hot, high wind.

Q. In which direction was the wind blowing? A. Towards our home.

Q. Was there anything going along with the wind? A. Well, I suppose shingles, but—

Q. Did you see anything? A. No, sir, I didn't see them.

CROSS-EXAMINATION by Mr. McCarter:

Q. You saw the smoke over at Mr. Goodman's and then locked up your house, and went down ther? A. I saw the smoke going through the air

Q. You saw the smoke going through the air? A. Yes, sir.

Q. And you locked up your house, and went down to his place? A. Yes, sir.

Q. And you staid there about five minutes, and then walked back? A. Yes, sir.

Q. When you got back you found everything all right, did you? A. Yes, sir.

Q. When you were down to Mr. Goodman's, were the buildings on fire? A. Yes, sir.

Q. What buildings were on fire when you got down to Mr. Goodman's, the first time? A. Why the house had caught fire.

Q. The house? A. Yes, sir.

Q. Anything else? A. Oh, all the out-buildings.

Q. All the out-buildings had been burned up? A. They were burning, and the house had caught fire.

Q. You staid there about five minutes, you think? A. Yes, sir.

Q. And could it have been longer than five minutes? A. No, sir, that was about all.

Q. What was this satchel you took back? A. It contained papers that Mr. Goodman—

Q. That Mr. Goodman gave you? A. Yes, sir.

Q. And did you walk back home? A. Yes, sir.

Q. And everything was all right? A. Yes, sir.

Q. You looked around? A. Yes, sir, everything was all right.

Q. And went into the house again? A. Yes, sir.

Q. Where did you put the bag—upstair? A. Oh, no, sir.

Q. Downstairs? A. Yes, sir.

Q. And locked the house up again? A. No, sir, because I thought—

Q. No, you didn't lock it up again? A. No, sir, I didn't lock it up again.

Q. And you started to go back to Mr. Goodman's again? A. Yes, sir.

Q. Walking or running? A. Well, I don't know, I went back to have Mr. Goodman brought there to our house.

Q. You started to go back to get young Mr. Goodman, or to help with him? A. Yes, sir.

Q. You said Elsie spoke to you? A. Yes, sir.

Q. Where was she standing? A. Elsie was at her home, when I went there.

Q. You said Elsie spoke to you? A. She came running, from her home, down the hill, and when I got at the foot of the hill, at Mr. Goodman's place—

Q. I want you to look at this map, a moment, and see if you can understand it—the railroad is here, and this is the road between Mr. Goodman's property and your father's place, here is Ashbrook, whatever that is—now, how near to Mr. Goodman's place—there is the entrance to the Goodman place—how near to that line, to his house, is the foot of the hill, about? A. Well, we call it—here is the bridge, and here is the foot of the hill.

Q. You were about at the bridge when Elsie spoke to you on your way back, the second time? A. Yes, sir.

Q. How near is Elsie's house to your house? A. I should think she was about here, at the top of the hill, (indicating).

Q. About the turn of the road? A. Yes, sir.

Q. Had you seen Elsie as you went down the second time? A. No, sir.

Q. You hadn't seen her at all, until she spoke to you down here at the bridge? A. She came running out and told me.

Q. How steep is that hill? A. Well, quite steep.

Q. Quite a steep hill? A. Yes, sir.

ISAAC WALKER, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live with relation to Mr. Goodman's place? A. About a quarter of a mile nearer Rahway, in the same road.

Q. Which side of the road do you live on, the same side as Mr. Goodman, or the other side? A. The same side as Mr. Goodman's.

Q. Do you remember the afternoon of Mr. Goodman's fire? A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. How was your attention called to the fire? A. I was loading hay in the field when they hollered "Fire," and I thought it was my own house was on fire, because the house lay between me and the railroad, where I was loading hay, and I drove the horses home, and they said Mr. May's was on fire, and that Mr. Goodman's was all burned up, and I drove up there, me and three men, and then my wife sent after me, saying that the grass was on fire—

Q. Someone sent after you, and spoke to you? A Yes, sir.

Q. What did you do then? A. I didn't go back, I stayed right where I was already, at Mr. May's to save what buildings we could, he had three men then at home—

Q. When did you go back home to your place? A. I came back in about an hour and a half after.

Q. What did you find when you got back? A. I found the grass burning behind the barn, about fifty feet, but they had four barrels of water, and had ladders up against the barn—

Q. Did you find anything lying on the grass there? A. Yes, sir.

Q. At your place? A. Yes, sir.

Q. What did you find lying on the grass?

Mr. McCarter: I object to that as irrelevant and immaterial.

Court: It may be relevant, if it is not, I will strike it out.

Mr. Whittemore: Q. What did you find there? A. I found little bits of shingles from off the roof, all over there, it was not one, it was hundreds of them, you could find them all over the road, right away down.

Q Pieces of shingle that had been cut? A. No, sir, that blew off, blew up by the wind—the wind was blowing fierce that evening, and the shingles that went up from the fire went with the wind.

Q. What evidence did the shingles show that they were from the fire? A. Well, wherever they struck they lit the grass.

Q. Just same as if they were cut? A. No, sir.

Q. How were the shingles? A. Why, they were burning.

Q. When you were going up to Mr. Goodman's place, did you notice anything in the air? A. I didn't notice nothing, I was in too big a hurry.

Q. After you were at Mr. Mays' place, did you notice anything in the air? A. Yes, sir.

Q. What did you notice?

Mr. McCarter: I object to the question as immaterial and irrelevant—the witness' attention was called to the blaze by the smoke down at Mr. Goodman's, and he went down to Mr. May's place, and he says that at that time he did not notice anything in the air, and then Mr. May's place caught on fire, and then he is now asked if he noticed anything in the air, and it seems to me that the things he noticed in the air would not be relevant to the issues

here and we contend that the issue is not as the plaintiff claims it to be.

Court: Has he testified when he noticed anything in the air, where he was?

Mr Whittemore: Yes, he said he was in Mr. May's place.

Q. What was happening at Mr. May's place when you were there? A. The ice-house, and the barns, and like a potato barn was all on fire, when I got there.

Q. Did you go anywhere else? A. No, sir.

Court: I will let him tell what he saw at that time and place, what he saw in the air.

Q. When you were at Mr. May's place, what did you see in the air? A. There was sparks, but I never looked after them, I was in too big a hurry to see if I could be of any assistance there.

Q. Where did the sparks come from? A. On the roof of the buildings.

Q. What buildings? A. Both Mr. May's and Mr. Goodman's—Mr. Goodman's place was almost burned down, when I got there.

Q. How far away from Mr. May's place is your place? A. It was not a quarter of a mile, not so much as that.

Q. Well, was it as much as one-eighth of a mile? A. Yes, sir.

Q. Now, the sparks that you saw in the air, in what direction were they going? A. They were coming towards me.

Q. From where? A. From Mr. May's.

Q. And you were at Mr. May's place? A. Yes, sir.

Q. How could they come towards you at Mr. May's from Mr. May's, if you were there at Mr. May's? A. My wife sent word after me—

Q. I am talking to you about what you saw—

you said you saw sparks in the air, when you were at Mr. May's place? A. Yes, sir.

Q. Now, in which direction were these sparks that you saw, going? A. They were coming from the west like, from the west.

Q. In which direction were they going? A. They were going like east.

Q. And in which direction was your house? A. It was in the same direction.

Court: Q. You say your house is east from Mr. May's? A. Yes, sir, more like southeast, in the same direction.

CROSS-EXAMINATION by Mr. McCarter:

Q. Does the road that passes your house and Mr. Goodman's house, go to Rahway? A. Yes, sir.

Q. And your place is about a quarter of a mile up in this direction, beyond Mr. May's place, is that right? A. Yes, sir.

Q. And the first time you became aware that something was wrong, you were out there between your house and Mr. May's house? A. No, sir, on the other side.

Q. Oh, an eighth of a mile beyond? A. Yes, sir.

Q. And you were about one-half a mile from Mr. May's house? A. Yes, sir, when the fire took place.

Q. Whose fire took place, Mr. May's fire? A. I didn't know exactly at the time, the first I heard was someone calling "Fire."

Q. And then you started down to Mr. May's? A. Yes, sir.

Q. And you were so excited you didn't notice anything in the air at all? A. I did not, no sir.

Q. When you got down to Mr. May's, where

you could see his place, you say the ice house and the other buildings were on fire? A. They were all on fire.

Q. Did you go down to Mr. Goodman's place? A. No, sir, I did not, it was useless.

Q. By the time you got down to Mr. May's place, could you see the smoke down to Mr. Goodman's place? A. Why certainly, yes, sir.

Q. And you say that his place was all burned up? A. Well, I didn't look until about an hour later.

Q. You were more interested in saving Mr. May's place? A. In saving what I could.

Q. When you got down to Mr. May's place, to help save what you could, the whole place was on fire, and there were sparks running around? A. Oh, yes, sir.

Q. Where these sparks came from, I don't suppose you knew, or did they come from Mr. May's place? A. They could not come from anywheres else.

FRANK ENGLEHARDT, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. Where do you live? A. I lived down in Rahway at the time.

Q. At the time of Mr. Goodman's fire? A. Yes, sir.

Q. Where were you? A. Right alongside Mr. May's, helping my son pack in a lot of hay.

Q. What did you see? A. While we were loading hay, we smelled smoke, and we looked around, and saw the smoke coming in the direction of

Goodman's and we sent in our horses, and went up there.

Q. How far away were you from Mr. Goodman's? A. About a quarter of a mile, I should say.

Q. How long did you stay at Mr. Goodman's? A. We staid there until the roof got on fire up in Mr. Goodman's attic.

Q. Where did you go then? A. Then we went over to Mr. May's.

Q. Did you see anything in the air while over to Mr. Goodman's place? A. I seen sparks flying.

Q. Where did they go? A. Over towards Mr. May's.

Q. When you left Mr. Goodman's, you say you went to Mr. May's? A. Yes, sir.

Q. What did you find there? A. We found the roof of the ice house afire.

Q. How much of it was afire, when you got there? A. Oh, two or three feet.

Q. Who was with you when you went over? A. My son and the boy, he had worked for him, we ran down together.

Q. Was Mr. Mays there that afternoon? A. Yes, sir, he was there.

Q. Where was he when you went over? A. To his place, he ran down ahead of us, from Mr. Goodman's.

Q. How far ahead of you? A. Oh, maybe ten or fifteen feet, we followed him right down, we could not do anything at Mr. Goodman's, of course the roof was afire, and we had to get out of the attic.

Q. What happened down to Mr. May's place? A. The ice house burned down, and the barns caught, and we could not do nothing with the barns.

CROSS-EXAMINATION by Mr. McCarter:

Q. How long did you remain at Mr. Goodman's? A. Oh, I guess we were there about fifteen or twenty minutes.

Q. And had the whole place burned up before you left? A. Why yes sir, the roof was on fire, and we had to get out, we could not carry anything down any more.

Q. You were trying to to get things out? A. We were trying to get things out, and while we were in the attic, to carry things out, the roof caught ablaze, and the rest of the building was all down soon.

Q. Did you walk back then? A. Back where?

Q. Towards Mr. May's? A. Yes, sir.

Q. How long did it take you to walk from Mr. Goodman's over to Mr. May's? A. We ran, it took us about five minutes.

Q. Did you walk? A. No, sir, we ran.

Q. That day? A. Yes, sir.

Q. Why you have just said that you walked back? A. Well, we went back, and—well, we ran there, we ran from Mr. Goodman's down to Mr. May's, after we heard that there was a fire there.

Q. And you heard Mr. May's was afire, before you left Mr. Goodman's? A. Yes, we heard that his place was afire before we left Mr. Goodman's, and then we ran over to Mr. May's.

Q. And when you were up to Mr. May's, you only found about two feet of the ice house on fire? A. Two or two and a half feet.

Q. Who told you that Mr. May's was on fire? A. Well, someone ran up there and told them, I don't know who it was.

Q. Are you a pretty good judge of distance? A. No, sir, I am not, I could not tell the distance of any of them.

ELIJAH HEWITT, a witness produced in behalf of the plaintiff, in suit No. 3, being duly sworn according to law on his oath saith:

Examined by Mr. Whittemore:

Q. What is your business? A. Real estate.

Q. How long have you been in the real estate business? A. About twenty years.

Mr. English: We will admit his qualification.

Mr. Whittemore: Q. Do you know Mr. May's farm? A. I do.

Q. How long have you know it? A. I have known it seventy-five years.

Q. Do you know the value of Mr. May's farm as it was in 1905, before the fire? A. Before the fire?

Q. Yes? A. Eight thousand dollars was the value of it, that was before the fire.

Q. Did you know the buildings on it before the fire? A. Yes, sir.

Q. How often had you been on the place? A. Oh my, I could not tell you how often.

Q. More than once? A. Yes, sir, before the fire, you mean—two or three times a week.

Q. What was the occasion of your going there two or three times a week? A. Well, I had an opportunity of selling it, and I went there and I took customers there.

Q. Do you know what buildings there was on it? A. Yes, sir, I do.

Q. Can you mention any of them? A. I mention the barn, and the stables, and another barn called the "red barn," and the big cow house, and the ice house, and the tool house—there was a hennery, and a building called a barrack.

Q. Did you see the farm after the fire? A. Oh, yes, sir.

Q. What buildings were there then? A. Well, there was nothing but the residence, the house, and the little wagon shed, close by the main house, and I don't think there was any other buildings left there.

Q. What do you think was the value of that farm, after those barns and out-buildings had been destroyed? A. I think that farm was not worth more than $5,000.

CROSS-EXAMINATION by Mr. McCarter:

Q. Did you mention the green house? A. I did not.

Q. Was that there before the fire? A. I don't know anything about the fire, only that it was burned up, I knew it before and after the fire, I was not there at the fire.

Q. Was the greenhouse on the premises before the fire? A. I do not recollect about that.

Q. You don't know whether it was there before or after the fire? A. No, sir, I do not, the green house I don't know anything about.

Q. Do you know how many acres there are in that farm? A. I think originally fifty-four acres.

Q. How many were there at the time of the fire? A. I don't know, I think there were two or three or four acres sold off, I don't know, but the lowland was sold to the water company, but I can not tell you exactly.

Q. Was it fifty acres or fifty-four acres at the time of the fire? A. At the time of the fire?

Q. Yes? A. Well that land did not burn up, you know.

Q. I understand the land did not burn up, but I want to know how many acres there were in the farm at the time of the fire? A. Well, I think in the neighborhood of fifty acres.

Q. Did you hear Mr. Mays testify this morning that ten acres of his farm was woodland? A. Yes, sir, I think he said about ten acres.

Q. I do not suppose the value of woodland was affected by the fire one way or the other, was it? A. No, sir, I think not.

Q. How much per acre did you value the woodland on that place? A. He had this ten acres, he did not say he had it before the fire or after the fire—I did not—

Q. No, he did not pretend that it was burned up? A. I don't know anything about that.

Q. I ask you now, how much would you value the ten acres of woodland on that place? A. Well, it would be guess work anyway. There is some good timber and some old timber, and some timber that did not amount to much for timber, or wood.

Q. I want to know what you value that place for woodland? A. I don't know, I can not tell you, I have known it a good while, and—

Q. Yes, some of these trees must have grown up within your recollection, if you have known it for seventy-five years, now, I want to know what you value that woodland at, just as it was at the time of the fire? A. I don't think there was much on it at the time of the fire.

Q. Well, that is the time we are talking about? A. I don't think there was much on it at the time of the fire, only a few scattered trees, not much, there was some old timber about it—

Q. How much do you value the ten acres of woodland on that place at the time of the fire? A. The woodland?

Q. Yes? A. I would not count it any more than as if they had not any wood on it.

Q. How much per acre, that is what I want to

know? A. Well, say thirty dollars or thirty-five dollars an acre, is all that it would be worth, it would take time the way it has been cut to clean it up, to make it clear land.

Q. How much do you value per acre, the tillable land at the time of the fire, before the fire occurred, with the buildings on it? A. Well, I should think that farm with the buildings on it—

Q. Not the farm, the part of the farm that you can till, the remaining forty acres, how much per acre do you value that at? A. $125 an acre, good, $125 or $130 an acre, what you can till.

Q. Do you think that was a more valuable farm than Mr. Goodman's farm? A. I think it is the most valuable farm on that road, the best farm I know.

Q. That is the character of the farm in your judgment? A. Yes, sir, that is a fair farm.

Q. That is your particular favorite? A. Yes, sir, that is my particular favorite, I think it is the best farm on that road, because I know what kind of land it is.

Q. Can you tell me how much you value the forty acres of tillable land, after the fire, with the barns, and the corn crib, burned off? A. Oh I think—well, as I said before, that the buildings was worth about $3,000.

Q. I didn't ask you that? A. Well, that is as near as I can give it, I can not tell how much the farm is worth with all the buildings burned up, it would be merely guess work.

Q. Then you are really giving your testimony as to what you think the buildings were worth? A. No, sir, I am giving the testimony, as to what I think, no sir, I am giving the testimony as to what I think the farm is worth, and what the buildings are worth, I can not tell you exactly how

much the farm is worth after the buildings are off, but I can tell you what the buildings are worth.

Q. I want you to tell the jury, how much you think the forty acres of tillable land were worth, after the buildings were burned or had been burned? A. $5,000.

Q. Five thousand dollars an acre? A. No, sir, not an acre, for the farm.

Q. How much an acre—that is the way you sell farms, so much an acre, is it not? A. Yes, sir, but you have to have some number of acres.

Q. Now, we have forty acres, you keep in your mind, the Mays farm with forty acres of plowable land in it, and those buildings which were burned off of it, and tell me how much it is worth per acre, at the time of the fire, or right after the fire? A. About eighty dollars an acre, some part of it was.

Mr. McCarter: I would like to call Elsie Ulbrich back for further cross-examination.

Mr. Whittemore: I have no objection.

ELSIE ULBRICH, re-called for further cross-examination in suit No. 3 saith:

Cross-examined by Mr. McCarter:

Q. Elsie, what time of day was this that you were out there in the yard? A. About four o'clock.

Q. And had you been playing all the afternoon? A. No, sir, I was sitting under a tree with my mother.

Q. Sitting under a tree with your mother? A. Yes, sir.

Q. Watching her peel potatoes? A. Yes, sir.

Q. Were you peeling potatoes yourself? A. No, sir.

Q. Now, which way were you looking as you sat there, with your back towards Goodman's, or with your back towards Mr. Mays or how were you looking? A. I think I was looking towards the front.

Q. You say "you think"—do you remember? A. No, sir, I do not remember how I was sitting.

Q. Were you playing with anything? A. No, sir, I was watching my mother.

Q. Was your mother between the road and you? A. We were sitting near together.

Q. She was not sitting down too, was she? A. Oh yes, sir.

Q. Were you both sitting on the ground? A. No, sir, on a box.

Q. Were you sitting on the same box? A. No, sir, different boxes.

Q. Different boxes? A. Yes, sir.

Q. Well, did you see the fire down to Mr. Goodman's? A. Yes, sir.

Q. You saw the smoke? A. Yes, sir.

Q. You were intent upon watching that, were you—after you saw the smoke at Mr. Goodman's, did you run down towards Mr. Goodman's? A. No, sir.

Q. You sat still there? A. No, sir, I went back and told my brother.

Q. Where was he? A. He was in back of the barn.

Q. And did he go down to Mr. Goodman's? A. Yes, sir.

Q. Did you watch him go down there? A. I went too.

Q. You went too? A. Yes, sir.

Q. Did you go down to Mr. Goodman's all the way? A. Yes, sir.

Q. Leaving your mother up there? A. She went too.

Q. She went too? A. Yes, sir.

Q. Well, did you wait until Mr. Goodman's fire was over? A. No, sir.

Q. Before you came back home? A. No, sir.

Q. What? A. No, sir.

Q. You and your brother and your mother all went down to Mr. Goodman's, didn't you? A. Yes, sir.

Q. Did you see the Miss Mays down there? A. Yes, sir.

Q. Did you talk to anybody down there? A. No, sir.

Q. Well, after you came back, where did you go after you came back from Mr. Goodman's? A. I was in the yard.

Q. Was the ice house on fire when you got back? A. No, sir.

Q. It was not? A. No, sir.

Q. And what were you doing after you got back? A. I was watching the fire.

Q. Down to Mr. Goodman's? A. Yes, sir.

Q. I think you said you waited down there until the fire was practically out, didn't you? A. No, sir, I came back again.

Q. Did your mother come back with you? A. No, sir, she staid there.

Q. She staid down there? A. Yes, sir.

Q. But you came back? A. I was told to watch the house.

Q. To watch your house? A. Yes, sir.

Q. And you came back to watch your house? A. Yes, sir.

Q. And after you got back there, Mr. May's ice house was not on fire yet? A. No, sir.

Q. Did you look over that way? A. After awhile.

Q. How long were you home before your mother got back? A. Just a few minutes.

Q. And when she got back where were you? A. Still in the yard.

Q. Watching the smoke down to Mr. Goodman's? A. Yes, sir.

Q. Well, now, what is it you say you saw? A. Then I went to get a rope, and I seen Mr. May's ice house on fire.

Q. Where were you going to get a rope? A. In the barn.

Q. What for? A. I wanted to tie a horse.

Q. Had someone driven it up there? A. No, sir, Mr. Goodman's horse that was burned came over there.

Q. And you went to tie Mr. Goodman's horse? A. Yes, sir.

Q. And you went into the stable, to get a rope to tie him with? A. Yes, sir.

Q. Now, the stable is down to the rear of your place, near the ice house, is it not? A. Yes, sir.

Q. Did you see this burned horse run over there towards your place? A. Yes, sir.

Q. And you were watching him—did he stop or did someone stop him at your place? A. They drove him in.

Q. Who drove him in? A. Mr. Englehardt.

Q. And someone stopped the horse and you went to it? A. Yes, sir.

Q. Did he have a halter on? A. No, sir.

Q. When you walked down to the barn to get that rope, you ran down there, didn't you? A. Yes, sir.

Q. How far was the stable or barn from where you were standing? A. Not far.

Q. The length of this room? A. Yes, sir.

Q. Was this horse much burned? A. Yes, sir.

Q. Was he cutting up any or standing perfectly still? A. He was going around.

Q. And you wanted to catch him and aid him? A. Yes, sir.

Q. As you ran down to the stable, to get a rope, you found that the ice house was on fire? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. And that is all you know about it, is it not? A. Yes, sir.

Q. You did not see the spark light on the ice house? A. No, sir.

Q. It was afire the first you saw of it? A. Yes, sir.

Q. How long a time had you supposed you had been watching that horse and all that before you went to get the rope in the barn? A. Not long.

Q. Well, was the roof of the ice house pretty well on fire when you first saw it? A. No, sir, not much at all.

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

Q. Of the roof? A. Yes, sir.

RE-DIRECT by Mr. Whittemore:

Q. You say Frank Englehardt drove the horse down there? A. Yes, sir.

Q. What Englehardt was that that drove the horse down? A. The one that is here.

Q. This gentleman back here (indicating)? A. Yes, sir.

Mr. Whittemore: I rest in the case of Edmund Mays against the Lehigh Valley Railroad Company of New Jersey.

Mr. McCarter: In regard to Edmund May's case, I renew my motion for a non-

suit for the reasons urged the other day, in the Goodman matter, and I assume that your Honor will make the same ruling.

Court: Yes, the same ruling.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Mr. McCarter: I further move in view of the fact that so far as Mr. May's property is concerned, his case on an alleged connection between the sparks eminating from Goodman's and communicating with Mr. May's property, and not directly from the railroad, that there is no evidence whatever directly tracing the sparks or the cause of the fire to the fire at Mr. Goodman's. The witnesses who have testified, other than the little girl Elsie, all speak of sparks, after the May's fire had occurred, and the only person that testifies at all with regard to any sparks coming from Mr. Goodman's to Mr. May's, is the little girl, who at first did give some evidence with regard to sparks, but I think her cross-examination cleared up the situation so as to indicate what did not appear on the direct-examination at all, that after the Goodman fire commenced, she had gone down to the Goodman place, that she had remained there some time, and had then gone back again to her father's house, and had remained there some indefinite time, and without any description of any carrying of sparks that far, she ran down to the stable to get the rope to tie the horse, and

then she found that the ice house or two or three feet of the roof of it was on fire. Now, I fail to see any evidence from which the jury may infer that the building, 700, 800 or 900 feet or more, according to our information, is from the nearest building on the Goodman place, can be said to have been caused by the fire, for which we are said to be responsible, and because of the entire lack of evidence from which the jury could infer such to be the case, I also ask for a nonsuit.

Court: I will deny the nonsuit. I think there is evidence showing that a great volume of smoke reached from the Goodman property, while it was on fire, and during the time the Goodman property was burned, there was no one over at the May's property, and in the opinion of the Chancellor, it does not need any evidence to show whether a spark is lit or not, when going through the air—the smoke was black and thick, and naturally would obscure the sparks, or prevent anyone from seeing whether it was lit. The wind was going in that direction, and there is no other ascribable cause shown here. I will leave it to the jury to say whether the fire originally came from the Goodman fire or not.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Mr. Whittemore: Q. A couch and table? A. proof in the case of Edward V. Goodman, individually vs. the Lehigh Valley Railroad Co. of N. J., being case No. 2 on the list.

EDWARD V. GOODMAN, being duly sworn according to law, in his own behalf on his oath, in case No. 2, saith:

Examined by Mr. Whittemore:

Q. When you were living at your father's house did you have any property belonging to you, in the place? A. Yes, sir.

Q. How many rooms did you occupy, with your wife? A. Two.

Q. In what part of the house? A. In the side towards the road.

Q. First, second or third floor? A. On the second floor.

Q. What property did you have on the second floor, of your house? A. We had a bedroom suite, consisting of bedstead, bureau, washstand, chiffonier, bureau necessities, and toilet articles, couch and table.

Mr. English: Q. All in one room? A. No, sir, that is in two rooms, I am taking them as a whole.

Mr. Whittemore: Q. A couch and table? A. Yes, sir, and chairs, and a rocker.

Q. How many chairs? A. I could not say offhand.

Q. One? A. Oh, yes, sir, more than one.

Q. More than two? A. I think there was, but I would not be positive, I know there was at least two.

Q. Go on? A. And a rocking-chair, and pictures.

Q. How many pictures? A. I could not say that—there were several, quite a number, in fact, I could not say.

Q. Go on. A. Carpets for both rooms.

Q. Did you have any clothes? A. Yes, sir.

Q. What clothes did you have? A. Well, I had my regular wearing apparel, winter clothing and summer clothing, and underwear.

Q. Any of your own? A. Yes, sir, I had a new suit that I did not wear but three times.

Q. What did it cost? A. $27.50.

Q. How long have you had it? A. I bought it some time in February.

Q. Did you have any other clothes there? A. Yes, sir.

Q. What? A. Hats, and a summer suit, and second best suit, gloves, handkerchiefs, neckties, collars.

Q. Can you give the cost of any of these suits? A. I had a new overcoat.

Q. When was that bought? A. It was bought that winter, just after the holidays, along in January—that I paid $18 for.

Q. Do you know what any of the other suits cost? A. I had a blue serge suit that cost $15.

Q. How old was it? A. Three years.

Q. Did you have any house furnishings? A. Yes, sir.

Q. Your wife knows more about those than you do? A. Yes, sir.

Q. Did you have any silver? A. Yes, sir.

Q. Where did you get it? A. They were wedding presents.

Q. What did you have? A. Well, I could not name the articles, now, we had a whole lot of them, I could not tell you.

Q. Any kitchen supplies? A. Yes, sir.

Q. Where did you get those? A. Some were bought and some had been given to us.

Q. How given to you? A. We had a little party, and they gave them to us, as we intended to go to housekeeping, we had what we called a "kitchen shower."

Q. Did you have any trunks? A. Yes, sir.

Q. What was in the trunks? A. One of the

trunks contained the majority of our wedding presents.

Q. Any other? A. We had a trunk with clothes in, sheets, quilts and pillow cases—those were not in these two rooms, those were in the storeroom.

Q. Do you know where you got this table or stand from? A. I think that was from a stamp book, if I am not mistaken.

Q. Where did you get the chiffonier? A. I bought it.

Q. How long before the fire? A. That spring.

Q. Do you know how much you paid for it? A. $22.

Q. Where did you get the bedroom suite? A. That was my own before we were married.

Q. Where did you get it from? A. Father gave it to me.

Q. How old was it—do you know? A. Well not more than three or four years, I would not be positive.

Q. When were you married? A. In June 25, 1902.

Q. Did you have any carpet belonging to you? A. Yes, sir.

Q. In what room? A. In these two rooms in question, our sleeping room, and like a library.

Q. Do you know where that came from? A. Yes, sir.

Q. Where? A. Father gave it to me when we went to live in the rooms.

Q. Did you have any feather-bed? A. Yes, sir.

Q. Where did you get that? A. That came with the bed.

Q. From your father? A. Yes, sir.

Q. Did you have any silk quilt? A. Yes, sir, that was given me by my grandmother.

Q. What hats did you have that were yours?

A. I had one Stetson hat, and a fur cap, or plush cap, and a Derby hat.

Q. How much did the Stetson hat cost you? A. I paid five dollars for it.

Q. How old was that? A. I think that was about a year old.

Q. Where did you get the toilet set? A. I could not say.

Q. The couch, where did you get that—where had it come from? A. I could not say.

Q. What was in the wash stand? A. Why, there was sheets, and baby's clothes, some of them.

Q. Do you know anything about what they were worth?

Mr. McCarter: I object to that on the ground that this man is not qualified to speak as an expert.

Question withdrawn.

Mr. Whittemore: Q. Did you have any lamp there? A. Yes, sir.

Q. What kind of a lamp was there? A. It was a fancy china lamp.

Q. Where did you get it from? A. I could not say.

Q. Did you have any clock? A. Yes, sir.

Q. Where did that come from? A. I think we bought that.

Q. Do you know how much you paid for it? A. No, sir, I do not.

Q. Did you have any books? A. Yes, sir.

Q. What books did you have? A. Well, I had all my books there that I had gathered together, and given me, from a boy up.

Q. How many? A. Oh, I must have had in the neighborhood of a hundred.

Q. Did you have any dress-suit case? A. Yes, sir.

Q. How long did you have that? A. Why, I think about three years, two and half or three years.

Q. Do you know what it cost? A. $4.50.

Q. Did you save many of your clothes? A. No, sir.

Q. The articles that you have mentioned, what became of them? A. They were burned up.

No cross-examination.

HARRIET W. GOODMAN, a witness produced in behalf of the plaintiff, in suit No. 2, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. I would like to have you tell me about the household supplies that you had, that belonged to your husband, that were destroyed in the fire—what was there? A. Well, such as sheeting, pillow cases, towels—

Q. How many sheets did you have? A. I don't know as I can just remember now.

Q. More than one? A. Yes, sir, probably six or eight pair.

Q. Do you know what those cost? A. No, sir, I do not know.

Q. Did you take any part in the housekeeping done at the house? A. Some.

Q. Did you have to buy anything for the household supplies? A. Yes, sir.

Q. At that time, did you? A. I bought them.

Q. Do you remember what they cost? A. I don't just remember, I think they were twenty-two cents a yard, and they took five yards to a pair.

Q. Then the material would be about $1 in each sheet? A. Yes, sir.

Q. And you made them up? A. No, sir, I did not make them, my mother made them.

Q. The pillow cases, did you have any? A. Yes, sir.

Q. How many? A. About the same as the sheets, six or eight pair.

Q. Do you know what they were worth, or what they cost? A. No, sir, I do not know that I do know.

Q. Did you have any towels? A. Yes, sir.

Q. How many pair? A. Well, I had a box of towels, I don't know how many was in the box, somewhere around a dozen or fifteen or two dozen.

Q. Do you know what those towels cost? A. From twenty-five cents to fifty cents apiece.

Q. Did you have any dresses? A. Yes, sir.

Q. And clothes? A. Yes, sir.

Q. What became of them? A. They were all burned up.

Mr. McCarter: Q. Let me ask you this question—whether the clothes, and the sheets, and the pillow cases, and things of that kind, that you had, were they yours, or given to you at the time of your marriage? A. No, sir, they were bought by Mr. Goodman's money.

Q. All these matters you are speaking of? A. Yes, sir.

Mr. Whittemore: Q. There was a wedding dress? A. Yes, sir.

Q. That was given to you before you were married? A. Yes, sir.

Q. Generally speaking, what was the value of the clothes that Mr. Goodman bought for you—just what he bought? A. I don't know as I can itemize them all up, I don't know as I can tell.

Q. You don't know what the cost would be? A. No, sir, not all of them.

Q. Do you know the cost of any of the clothes or dresses that you had? A. I don't know that I can remember now.

Q. Did you have any sealskin muff? A. Yes, sir.

Q. Where did you get that from? A. Mr. Goodman bought it.

Q. Do you know how much was paid for it? A. No, sir, I do not.

Q. Did you have any fur boa? A. Yes, sir.

Q. Where did you get it? A. Mr. Goodman bought it.

Q. Do you know how much was paid for it? A. No, sir.

Q. The feather bed—do you know how many pounds of feathers there was in that? A. No, sir.

Q. Did you have any silk quilt? A. Yes, sir.

Q. Where did you get it? A. Mr. Goodman.

Q. Your husband bought it? A. Yes, sir.

Q. Do you know how much he paid for it? A. No, sir.

Q. Whose was this winter coat? A. Mr. Goodman had one burned, and I had one burned.

Q. How long did you have that? A. Just that winter before the fire.

Q. Do you know how much it cost? A. I think I paid $25, I am not positive.

Q. Did you have any spring jacket? A. Yes, sir.

Q. Do you know how much that cost? A. $15.

Q. Did you have any knitted shawl? A. Yes, sir.

Q. Do you know how much that cost? A. $2.50, for the yarn.

Q. How long have you had it? A. In June, I got it.

Q. Just before the fire? A. No, I beg your pardon, I got that the year I was married, in June.

Q. June 1902? A. Yes, sir.

Q. Do you know where the couch came from? A. Mr. Goodman bought it.

Q. Your husband? A. Yes, sir.

Q. Where did he buy it? A. I think it was bought in Newark.

Q. Did you have any toilet set? A. Yes, sir.

Q. Do you know where that came from? A. Mr. Goodman.

Q. And you know how much he paid for it? A. I think it was $7.25, if I am not mistaken.

Q. Did you have any hats? A. Yes, sir.

Q. How many did you have? A. I think I had two.

Q. And where did you get them from? A. I bought them.

Q. Do you know with whose money? A. Mr. Goodman's money.

Q. How much did they cost? A. Oh, I can not tell you now.

Q. Do you know whether there was any contents to the washstand? A. Yes, sir.

Q. What was in there? A. Some wearing apparel, and some towels.

Q. That you have testified to? A. Yes, sir.

Q. What was there in the contents of the chiffonier? A. Wearing apparel, underclothing, handerchiefs, and such like.

Q. For whom? A. Mr. Goodman.

Q. Have you any children? A. Yes, sir.

Q. How many? A. One then.

Q. How old was that child then? A. Two years old or nearly so.

Q. Did you have any clothing for that child? A. Yes, sir.

Q. In your room? A. Yes, sir.

Q. What became of it? A. It was burned up.

Q. Did you have any lace spread? A. Yes, sir.

Q. Where did you get that from? A. Mr. Goodman.

Q. And what kind of lace spread was it? A. What kind of work—I think it was Irish point.

Q. Do you know where Mr. Goodman got it? A. No, sir, I do not.

Q. Did you have any clothes hamper? A. Yes, sir.

Q. Where did that come from? A. Mr. Goodman bought it.

Q. Do you know how much he paid for it? A. $5 I think.

Q. Any rugs in the room? A. Yes, sir.

Q. How many? A. I think there was four in the two rooms.

Q. And where had they come from? A. Mr. Goodman bought them.

Q. Do you know how much they cost? A. No, sir, I do not.

CROSS-EXAMINATION by Mr. McCarter:

Q. I only want to ask you one or two questions —do you remember any articles in these two rooms of yours that were new, the season of 1905, when the fire took place? A. Well, I don't just remember now of any.

Q. They had accumulated from time to time—that is from the time you and your husband started housekeeping together down to the time of the fire? A. About two years, yes, sir.

SARAH GOODMAN, a witness produced in behalf of the plaintiff, in suit No. 2, being duly sworn according to law on her oath saith:

Examined by Mr. Whittemore:

Q. Did you and your husband give your son any wedding gifts at the time of their marriage? A. Yes, sir, I think we gave them some things, but I don't remember now.

Q. Was there any silver you gave them? A. Yes, sir.

Q. Do you remember what silver pieces you gave them? A. I don't know whether it was tea spoons or tablespoons.

Q. Do you know what it cost? A. $5.50 or $6, I don't know which.

Q. Do you remember any other silver you gave them? A. No, sir—well different things, at different times, I don't remember now.

Q. What became of these table spoons? A. They were burned.

Q. Do you know what pillow cases were worth that your son had, or what they cost—do you know? A. Yes, sir, I do—from twenty-five to thirty-five cents apiece.

Q. The bedroom suite, where had your son got that from? A. His father gave it to him.

Q. Do you know where his father got it? A. Cannon's in Newark.

Q. How long before the fire? A. I guess he had used it four or five years before the fire.

Q. Do you know how much it cost? A. $35.

Q. Do you know anything about this sealskin muff? A. Yes, sir.

Q. Where had that come from? A. My son gave it to her.

Q. Do you know where he got it? A. I guess he bought it.

Q. Were you with him? A. No, sir, I was not with him.

Q. The feather bed—that was in the room? A. That went with the bed, his father gave him that.

Q. Did you buy that at Cannon's too? A. No, sir, we didn't buy that.

Q. How many pounds of feathers were in it? A. Twenty pounds, about the same as the others.

Q. What was the value of the feathers? A. Fifty to seventy-five cents a pound.

Q. Any stove in the room? A. Yes, sir.

Q. Who did that belong to? A. My son.

Q. Do you know where that came from? A. His father gave it to him.

Q. Do you know where it came from? A. He bought it at Marshes' in Rahway.

Q. How old was it? A. About two years old.

Q. Do you know what it cost? A. Yes, sir, I know I was with his father when he bought it.

Q. What was it? A. $16.00.

Q. Do you know anything about this fancy lamp? A. No, sir, but I know they had that.

Q. Or the clock? A. No, sir.

Q. Do you know anything about the pictures they had? A. I know they were there, I can not describe them.

Q. Do you know anything about this lace spread and pillow shams? A. No, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Did they have any renaissance lace in his room? A. Only on the bureau.

Mr. Whittemore: I rest in the case of Edward V. Goodman, individually vs. the Lehigh Valley Railroad Co. of N. J., suit No. 2.

Mr. McCarter: I make the same formal motion for a nonsuit in this case, and I suppose it will take the same course as the other.

Court: Yes, motion denied.

Mr. McCarter prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Mr. McCarter: We will now resume our defense in behalf of the defendant railroad company, in suits Nos. 1, 2 and 3.

Mr. English: Opens in behalf of the defendant.

The evidence is offered as applicable to all three cases.

It is agreed that the defendant company is a duly chartered corporation of the State of New Jersey, for the purpose of running a railroad and has authority under its charter to run locomotive engines operated by steam.

It is also admitted that the blue prints which were produced, may be offered in evidence.

The blue print showing the engine in the front marked Exhibit D-1.

The blue print showing the engine from the side marked Exhibit D-2.

WILLIAM H. VAUGHN, a witness produced in behalf of the defendant, being duly sworn according to law on his oath saith:

Examined by Mr. English:

Q. Are you employed by the Lehigh Valley Railroad Co., the defendant? A. Yes, sir.

Q. Where are you stationed? A. At Easton, Pa.

Q. What is your position out there? A. General foreman of the shops.

Q. Do you know anything about this model or rather this screen and part of the smoke stack here in court? A. Yes, sir.

Q. Was it made out at the shops under your superintendence? A. Yes, sir.

Q. What is the size of that as compared with the regular size of screens used in the locomotives of your company? A. The exact size.

Q. That is the kind of screens you put in the locomotives? A. Yes, sir.

Q. What do you call this down here, this circular pipe? A. We call that a lift pipe.

Q. And that runs down to the smoke stack? A. Yes, sir.

Q. And the next part is the screen? A. Yes, sir.

Q. And that is clamped at the foot to the lower part of the lift pipe? A. Yes, sir, just as shown there, it is clamped to the exit pipe.

Q. And the exit pipe is fixed where? A. To the cylinder.

Q. And the whole, this lift pipe, the screen and the exit pipe, is located in the smoke box, of the engine? A. Yes, sir.

Q. And where is that? A. It is shown in the front of the locomotive, as shown on the blue print here.

Q. Can you indicate whereabouts the exit pipe is in the blue print marked D-2? A. This is it (pointing to the bottom of the screen underneath the screen).

Q. And the steam which goes up there comes from where? A. From this cylinder.

Q. Right near the wheels? A. No, sir, over the track, this is the track.

Q. And that steam, coming out of that exit, goes where? A. It goes up through the screen and through the stack, and out at the top.

Q. Where is the fire box on an engine? A. It is located in this engine sixteen feet five inches from this point (indicating).

Q. Back of the smoke box? A. Yes, sir, back of the smoke box.

Q. And between the fire box and the smoke box, what is there inside the engine, inside the boiler? A. Why, this is the boiler proper containing flues.

Q. Are the flues what I refer to, as tubes in the opening? A. Yes, sir.

Q. Describe the tubes? A. These tubes in this locomotive are two inches, and they are swedged down in each end to an inch and a half, and they are sixteen feet five inches long, and extending back from the smoke box to the fire box.

Recess.

Afternoon session, 2:00 p. m.

WILLIAM H. VAUGHN, resumed:

Direct-examination (continued):

By Mr. English: Q. At the adjournment I remember you explained that the exhaust came up from the steam chest and then the steam went on up through the screen in the smokestack? A. Yes, sir.

Q. Now, where do the sparks come from which strike against the screen? A. From the fire box.

Q. And then pass through those tubes which you have mentioned, the flues? A. Yes, sir; the flues.

Q. Into the smoke box? A. Into the smoke box; yes, sir.

Q. Now, after a spark leaves the fire box and passes through the flues and into the smoke box, how does it get out of the smoke box? A. Only by passing through the screen.

Q. When this screen that is here in court is properly installed in an engine, is it possible for a spark to get out of the smokestack of the engine without first going through the screen? A. No, sir.

Q. The only opening out of the smoke box is through the screen? A. Yes, sir.

Q. Now, when sparks or particles of cinder pass from the smoke box on up, is there any steam there at the same time? A. Yes, sir.

Q. So that the steam and the cinders and the sparks all go up together? A. Yes, sir.

Q. Now, this blue print, as I understand, is a reproduction of engine 2454? A. Yes, sir.

Q. That was the number of the engine in 1905, as the record shows? A. Yes, sir.

Q. What is the number of it at the present time? A. 2460.

Q. Same engine but with a different number? A. Yes.

Q. Is this screen such as is here in court identical with the screen that was installed in 2454 at the time of the fire? A. Absolutely.

Q. How long have you been in the employ of the railroad? A. About twenty-three years.

Q. How long have you been foreman of the round house, or the shops at Easton? A. Since 1902.

Q. You were foreman at the time of this fire? A. Yes, sir.

Q. Do you know of your own knowledge that this screen is identical with that in the engine at the time? A. I do; yes, sir.

Q. Previous to being foreman of the shop what was your position? A. Why, I was transferred there from one of the other shops on the division.

Q. What do your duties as foreman devolve upon you in connection with the use of screens in the engines? A. Well, I have general supervision of the repairs of locomotives, which is part of the locomotive.

Q. Including the screens? A. Yes, sir.

Q. Who in the employ of the railroad in 1905, in July, or during that period of time, had, or was employed for the purpose of installing new screens in engines, when they became worn out? A. At South Easton Mr. John Dennington.

Q. Did you have a system of inspecting your screens and locomotives? A. We have.

Q. Take, for example, engine 2454, on the mail train No. 8, where was that engine inspected? A. South Easton shop.

Mr. Whittemore: Wait one moment. I want it to be shown that the witness knows of what he speaks of his own knowledge.

Mr. English: Sure.

Q. Do you know of your own knowledge what the system was for the inspection of engine 2454 during the month of July, let us say?

Mr. Whittemore: I object, because it should be shown that he has knowledge, and not just merely his statement that it is so.

Mr. English: You can cross-examine on his knowledge.

The Court: You may cross-examine and find out. He says he has personal knowledge of it.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Where are you stationed? A. Easton shop.

Q. In the repair shops? A. Yes, sir.

Q. That is not the place where they inspect engines, is it, or the screens? A. Yes, sir.

Q. Do you mean to say that all the engines come to the repair shops after each run? A. No, sir.

Q. What do you mean, then, about their being inspected at the repair shops? A. Well, I mean that the ash track is in connection with the repair shops adjoining it, over which I have supervision.

Q. What has the ash track got to do with the inspection? A. That is where we inspect them.

Q. Where are you employed? A. At the shops, in the shops, and around the shops.

Q. How do you see what goes on out there at the ash track? A. Because I make it my business to go out there sometimes.

Mr. McCarter: We do not propose to show the specific inspection of this engine, just the plan, the scheme.

Mr. Whittemore: All right.

DIRECT-EXAMINATION (continued) by Mr. English:

Q. What system was there for the inspection of engine 2454 on or about the time of the fire? A. Do you mean you want me to answer what the man does?

Q. Oh no, not what he does, but is there a regular— A. We have a regular system; yes, sir.

Q. This mail train No. 8, what time about did that leave Easton? A. About 2:30, I think, at that time.

Q. Is that engine inspected before she leaves? A. Yes, sir.

Q. Then do you know, if you know, whether she is inspected at Jersey City?

Objected to.

Q. If it is a part of the system to have this engine inspected at Jersey City?

Mr. Whittemore: I object to that, because it might be part of the system and might not be done.

The Court: The question is whether he knows whether it is part of the system, not whether it is actually done.

Mr. English: That is the question.

Mr. Whittemore: That gets in an inference which might arise that it was done as part of the system. I can't see the materiality of it if there a system. The materiality is whether or not the inspection was made.

Mr. English: Sure.

Mr. Whittemore: I object, on the ground it is immaterial if there is a system.

The Court: I will admit it and you may have an exception to it.

Q. Was it a part of the system in effect at that time to have the engine which left Easton inspected on its arrival at Jersey City? A. Yes, sir.

Q. What about on the return trip from Jersey City to Easton, was it inspected on its arrival back in Easton? A. Yes, sir.

Mr. Whittemore: My objections will run to all this.

The Court: All of it that has direct reference as to whether it is part of the system.

Mr. Whittemore: Yes, sir.

Q. How long have you been familiar with the use of this screen? A. Fifteen years.

Q. What are the sizes of the mesh to the inch? Is that the way you measure it, so many openings to the inch? A. Yes, three openings to the inch.

Q. Do you know how that size of mesh compares with the size of mesh in screen used by other railroads?

Mr. Whittemore: Yes or no.

Q. If you know. A. I know; yes, sir.

Q. Can you say whether the size of mesh used by the Lehigh Valley Railroad is smaller or larger than that of other railroads with which you are familiar?

Objected to.

The Court: What is the point of that objection.

Mr. Whittemore: They have to show what knowledge he has. Just the bare statement "I know" is not competent.

The Court: You may cross-examine and see whether he has any or not.

CROSS-EXAMINATION by Mr. Whittemore:

Q. What other railroads have you ever had to do with? A. Not any.

Q. How do you know what screens are in use in any other railroad? A. Well, I have examined.

Q. Where? A. At Phillipsburgh, New Jersey.

Q. What was the occasion of your examination? A. Went for my own personal knowledge.

Q. How many times have you examined them? A. Oh, once, I remember.

Q. What other engine was this? A. Sir?

Q. What engine—engine of what road was this? A. Why, the Pennsylvania, D. L. & W., and the Jersey Central.

Q. Did you examine all those at Phillipsburg? A. Yes, sir.

Q. Were they all together at one time at Phillipsburg? A. All the engines at one point?

Q. Yes. A. No.

Q. Where did you go, from one place to another in Phillipsburg? A. Yes, sir.

Q. How many engines did you examine of the Pennsylvania? A. One.

Q. How many engines of the Central? A. Oh, I saw two or three that day that I was there.

Q. That you examined? A. I looked at them; yes, sir.

Q. On the outside, or what? A. They were in the round house.

Q. Well, did you look at the interior? A. Yes, sir.

Q. And saw the spark arrestor? A. Yes, sir.

Q. What other road did you see an engine of? A. D. L. & W.

Q. How long ago was this? A. Why, just previous to the other trial.

Q. Then you examined them for the purpose of testifying at that trial did you? A. I went for my own personal knowledge.

Q. You were preparing for that trial, weren't you? A. Not necessarily. If I was asked a question I would be prepared to know.

Q. Before you examined those engines you had seen no engines on any other roads to examine as to their spark arrestors? A. I hadn't made any personal examination of them; no, sir.

Q. What style of engines did you examine on the Pennsylvania, at that time? A. Their ordinary locomotive.

Q. Their ordinary locomotive? A. Yes.

Q. Passenger or freight locomotive? A. Well, I couldn't tell you from memory now.

Q. What style of engine did you examine on the Central? A. Freight engine.

Q. Freight engine? A. Freight engine.

Q. What style of engine did you examine on the D., L. & W.? A. I think that was a light passenger engine, if I remember corectly.

The Court: I do not think you need go any further on that. I do not think this testimony is admissible. I think the rule as laid down in the cases is that you may show as evidential in a case like this what is commonly used and employed—what devices are commonly used and employed by other locomotives, or what was in general use by other well regulated roads, and so on. I do not think that the inspection of one engine of one road, where the road probably has thousands, brings us within that rule at all, and I think that Judge Whittemore has made out the objection by his cross-examination and I will over rule the question.

Mr. English: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.
(Seal.)

DIRECT-EXAMINATION (continued):

By Mr. English: Q. What effect does this steam from the exhaust, which you spoke of, have upon sparks or cinders passing up through the screen?

A. Why, the sparks are subjected to a steam bath from the exhaust steam from the cylinders.

Q. Has a dampening effect then, I suppose? A. Dampening effect; yes, sir.

Q. Can you give an opinion, as a railroad man, on the efficiency of this screen, a duplicate of which is here in court, for the prevention of the throwing of sparks by an engine?

(Question repeated.)

Q. (Continued)—for the arrest or prevention of the escape of fire from an engine?

Objected to.

The Court: Why?

Mr. Whittemore: Because this gentleman is a constructor. He has not developed any knowledge or experience in the operation of engines.

The Court: He is asked whether he can give an opinion.

Q. Can you give an opinion? A. I can; yes, sir.

Mr. English: I propose to ask him. Do you want to cross-examine on his fitness?

Mr. Whittemore: I think you should qualify him yourself.

Mr. English: I think he is qualified, from fifteen or twenty years' experience as a railroad man and foreman of these shops, where they make these things and where they install them and where it is his duty, among other things, to inspect them.

The Court: You may cross-examine, Judge Whittemore.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Did you ever run an engine? A. No, sir; not as an engineer.

Q. Did you ever see any other screen different from that screen? A. Yes, sir.

Q. What kind of screen have you seen different from this one A. Those that I enumerated to you a few minutes ago.

Q. To me? A. Yes.

Q. Will you name them again? I don't remember your naming any other kind of screen to me. A. I mean the screens of those other railroads; D., L. & W.—

Q. Those are the only other screens you ever saw, in those engines that you have testified to, is that so? A. Well, that is the only ones that I saw lately; yes, sir.

Q. And outside of those that were in those few engines that you saw that day, you have never seen any different kind of screen than this one, have you? A. Oh, yes, I have.

Q. Where? A. Why, we had them ourselves one time.

Q. How long ago? A. Oh, they have them yet on the road. We had them up to the last couple of years. Some of them yet, I suppose.

Q. What kind of screens are they? A. Well, they are called the master mechanic's standard, or very near to it. It is not this shape.

Q. Will you describe what they are A. We used to call it a square shaped screen; it comes down and over and then up in a front end.

Q. Is that what is known as a basket screen? A. No; this is what is known as a basket screen.

Q. What is a cone effect screen? A. That is the same thing.

Q. Don't you know that the other screens are called basket screens, and this is a cone screen? A. Well, we call this basket netting.

Q. When you say basket netting, you mean the

same netting in both screens, is that it? A. In this kind of a shape, yes.

Q. And the other kind of screens to which you have referred on your railroad? A. Is a master mechanic's standard.

Q. Use the same kind of netting? A. Use the ame kind of netting; yes, sir; only different construction.

Q. Did you ever see a screen with a larger netting? A. Yes, sir.

Q. Larger mesh? A. Yes, sir.

Q. Where? A. In other railroads.

Q. What? A. On other railroads?

Q. The day that you have spoken of? A. Yes, sir.

Q. At any other time have you ever seen any larger screens? A. No.

Q. Did you ever see any smaller screen? A. No, sir.

Q. Did you ever try to put in a smaller screen on any other engine? A. I never did; no, sir.

Q. Did you ever test, or were you ever present at the testing of any engine with a smaller screen? A. No, sir.

Q. And yet you say that you can give an opinion as to whether this screen is efficient in the arresting of sparks? A. Yes, sir.

Q. You can give an opinion? A. Yes, sir.

Q. You mean that you can give an opinion the same as anybody could who looks at that screen, is that what you mean? A. I think I can give an opinion on that screen.

Q. Just the same as I might? A. Yes, sure.

Q. And that is all you know about it? A. No, I know more about it perhaps than you do.

Q. You know more about putting it together, don't you? A. Yes, no doubt I do.

Q. Do you say that you know any more about how much fire would go through that screen than I do? A. No.

Mr. Whittemore: I submit he is not qualified to give an opinion on that. It is a matter of common knowledge.

The Court: I do not think he is either, Mr. English.

Mr. English: May I ask your Honor why?

The Court: Why, because he has not shown any special knowledge about the operation of sparks against that screen. He has not shown that he has watched an engine operating and throwing sparks, and showing whether it is sufficient to prevent them from going through, or not. He seems to be throughly familiar with the mechanism of it, but not with the active operation of it on the road.

Mr. English: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.
(Seal.)

CROSS-EXAMINATION by Mr. Whittemore:

Q. You are still using that same kind of screen today, are you? A. Yes. sir.

Q. And the system of inspection of which you have spoken, that is the same system of inspection that is still in existence? A. Yes, sir.

Q. And had been for how long before the fire? A. I can't tell you that. That was there when I came there.

Q. And that is fifteen years ago? A. Not fifteen years ago. Not since I come to Easton.

Q. How long ago is it since you came to Easton? A. 1902.

Q. 1902? A. Yes, sir.

Q. And that system was in existence at that time? A. Yes, sir.

Q. And 2454 is still running, is she? A. Not at this time, but she is still in existence. She is in the shop now.

Q. What are you doing to it?

Objected to.

The Court: I think the objection must be sustained. It is perfectly well settled that repairs made afterward is no evidence of negligence previously.

Q. Did you ever do any work on 2454? A. Personally, you mean?

Q. Yes. A. No, sir.

Q. Were you present when any work was being done on 2454? A. Oh, yes, many times.

Q. Was any work done on the front end of 2454 in your presence? A. When do you mean?

Q. At the time of the fire, or about that time? A. No, sir.

Q. Any done within a year before the fire? A. Yes, sir.

Q. Were you present? A. No, sir.

Q. How do you know whether it was done or not? A. Well, the record shows it.

Q. Have you got the record here? A. We have a man here that has a record.

Q. How long after the fire was any work done on 2454? A. I couldn't tell you that.

Q. You didn't see anything done? A. No, sir.

Q. Or know of it being done? A. I didn't look to see.

Q. If anything had been done to her, would it have come within your knowledge? A. Certainly

would. That is, any reasonable time, at that time. We would have a record of it.

Q. Why at that time particularly? A. We would have a record of it.

Q. Well, wouldn't you have a record of it at any other time? A. Yes, sir; any time.

Q. And you know of nothing being done to 2454 after the fire? A. Not from personal knowledge; no, sir.

Q. Has there been any change in the method used for the arrest of sparks since the fire? A. No, sir.

Q. Still doing the same? A. Yes, sir.

Mr. McCarter: Now, those questions have been answered and they are essentially unfair questions, and I don't suppose anybody knows better than my friend not to ask them. We have permitted the answers. Before any more questions are asked I think we ought to have the protection of the Court to prevent there being improperly put.

Mr. Whittemore: I have my own reasons for asking those questions, and they are not unfair.

The Court: What are those reasons?

Mr. Whittemore: If you insist on knowing the reasons, I will tell your Honor, but I desire—

The Court: If you do not want to state them I will strike the question and answer out, because I am perfectly satisfied that in this state there never has been a question raised by anybody, that has been ruled upon favorably, to the contention that you can prove after an accident that a man made repairs, or renovated, or changed the

situation from what it was at the time of the accident, and the reason for that is perfectly plain, and it is as certain as the rule itself is, and the reason is that the wheels of progress would be entirely stopped, if a man made repairs, renovations, or improvements at the expense of having an inference of negligence thrown in case he made them. He would simply say, I will not make any, that is all I will stay just as I am. If my spark arrestor throws sparks and if the people are going to say, because I find out they throw sparks and I try to use a better one, that I took a better one because I realized that the other one was negligently or imperfectly constructed, I will not take one.

Mr. Whittemore: That was not my object.

The Court: That was not your object, but that is the basis of the rule.

Mr. Whittemore: That I understand. I desire to show that the same condition exists at the present time with relation to engines and spark arrestors, for the purpose of showing later on in the case of their results that come from that, later on, of a similar character to the results which happened at this time. Now, that is my object. I have no time to waste in submitting what may be reasonably deemed unfair questions. I am not trying the case that way. I do it because I can see that there is an object in it and one that is of value to my case, and I make that statement in view of the fact that I have been put in the position of doing something that is un-

fair. I have no desire to do anything of the kind.

The Court: You are offering, then, this testimony as part of your rebuttal, practically?

Mr. Whittemore: I want to lay a foundation from this man's testimony to cover that point. He is produced as an expert.

The Court: I think I will overrule that, because I do not know of any ground that permits that to go in now as a proper cross-examination of this witness.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Q. Mr. Vaughn, this screen here that is shown in court is the only means that is provided, as a part of the mechanism of the locomotive, to prevent the escape of fire, is it? A. That locomotive; yes, sir.

Q. You mean a locomotive of the style of 2454? A. That locomotive on that day, 2454.

Q. How do you know what was in that locomotive that day? A. I know what we had in them all in our division, as a general rule.

Q. You know that was the style of that locomotive? A. Yes.

Q. In any other engine on your railroad, what other means do you provide to prevent the escape of fire in the screen? A. Not anything.

Q. Then what I said in the first place is true, that this screen is the only means you provide for the prevention for the escape of fire from your locomotives, on the Lehigh Valley Railroad? A. Yes, sir.

Q. Where does this wire netting come from that you have got there? A. Couldn't tell you.

Q. It is bought and furnished to you for the purpose of putting in, is it? A. Yes, sir.

Q. What is the material out of which it is made? A. Steel.

Q. What is the size of the wire? A. 95/1000 of an inch.

Q. Did you put any diaphragms on your engines? A. Very few.

Q. Did 2454 have a diaphragm on it? A. No, sir.

Q. Did 1458 have a diaphragm on it? A. I don't think so; no, sir.

Q. What is the object of changing the numbers of these engines? A. Couldn't tell you that.

Q. Was the number of this engine changed before the fire? A. Yes, sir.

Q. What was the number before the fire? A. 677.

Q. How old was this engine? A. I couldn't just exactly tell you. I think she was purchased in 1901, or '02, or somewheres along there.

Q. Do you know what a diaphragm is? A. Yes, sir.

Q. Where does that extend in the front end of an engine? A. Where does it extend?

Q. Yes, where does it sit up? A. Sits back of the netting on our engines.

Q. And in front of what? A. In front of the flues.

Q. And it slopes down obliquely in front of the tubes and behind the netting, doesn't it? A. It does.

Q. Then, in the operation of an engine where there is a diaphragm, the sparks come out of the tubes and strike the diaphragm, don't they?

Mr. McCarter: One moment. You objected to this witness because you said he didn't know anything about the operation.

Mr. Whittemore: He has been permitted

to show how the draft goes through the tubes.

The Court: I think he can answer such questions.

Q. The draft that comes out of the tubes and the sparks with it, where there is a diaphragm, strikes the diaphragm, doesn't it? A. Wherever the diaphragm extends the sparks strike it.

Q. And what becomes of the sparks when they are stopped by the diaphragm? A. Why, they retire backwards.

Q. And what becomes of them? A. Pass through the netting outside.

Q. Do they all pass through the netting? A. They all have to, that get outside.

Q. What does not go outside, where does that stay? A. That stays in the front end of the engine.

Q. Have you seen any engines which have been brought in with the screens needing repair? A. Yes, sir.

Q. What repairs do they need when you have seen them brought in?

Mr. McCarter: I object. We have not examined on that.

The Court: That is not cross-examination.

Q. Mr. Vaughn, I see that the top part of the netting is fastened on the lift pipe with an iron band? A. Yes, sir.

Q. What holds that netting to the lift pipe, the tension of that band against the lift pipe? A. Yes, sir.

Q. There is nothing else there, is there? A. No, sir.

Q. If that lift pipe expanded through heat, it would loosen up on the netting, wouldn't it? A.

No, sir; I don't think it would in that case; no, sir.

Q. Why wouldn't it? A. Couldn't expand enough. It is similar material; the netting will expand too, you know; it is all of the same material, it all goes together.

Q. Don't you know that that round piece of band across here (indicating on model) would expand at a greater rate than the netting would? A. No, sir.

Q. You say that it will not? A. I don't think it will; no, sir; it all goes together.

Q. It is fastened in the same way in the bottom, is it not, by the tension of a band around the bottom? A. Yes, sir.

Q. Can you say whether or not the wire of which this netting is made will corrode? A. It will corrode; yes, sir; it is subject to—

Q. Doesn't the gas that comes from the fire-box, the burning of the coal in there, tend to corrode that netting? A. No, sir; I don't think the gas does.

Q. You say that it does not? A. The gas does not.

Q. You are willing to go on record as saying that the gas from the burning coal in this engine will not corrode the screen? A. The gas itself does not; no, sir.

Q. You say that is so? A. Yes, sir.

Q. You say that the sparks that come out of the smokestack are enveloped in steam? A. Yes, sir.

Q. And that the steam has a dampening influence? A. Yes, sir.

Q. Then that puts out the spark, doesn't it? A. It has a tendency to; yes, sir.

Q. Now, do you know what pressure of steam there is that comes out of those nozzles? A. No, sir; I do not.

Q. Do you know what pressure is carried in the boilers? A. Yes, sir.

Q. How much? A. What boiler are you speaking of?

Q. What? A. What boiler are you speaking of?

Q. Boiler of engine 2454? A. Yes, sir; I know.

Q. What is the pressure? A. 200 pounds boiler pressure to the square inch.

Q. Two hundred pounds to the square inch? A. Yes, sir.

Q. Now, how far back from the front door of this engine is this screen set? A. About three feet.

Q. Then you couldn't examine that screen without getting in the front end, could you?

Mr. McCarter: I object. He has not testified to examining the screens. He is asked now how he would examine the screens.

The Court: He says simply there is a system of inspection.

(Question withdrawn.)

Q. Do you know whether any different size of wire is ever used in these screens? A. Not to my knowledge.

Q. Always the same? A. Yes, sir.

Q. You were in court and testified at the last trial, weren't you? A. Yes, sir.

Q. You saw the screen that was here at the last trial, didn't you? A. Yes, sir.

Q. Was that the same size wire that is in this screen? A. Absolutely.

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

Q. What became of that screen? A. Well, it was used up, I guess. Sent back. I don't know.

Q. This is not the same one, is it? A. No, sir. Couldn't tell you that.

Q. Is there any wear on a screen from the friction of the sparks striking it? A. Very little.

Q. What makes a screen wear out? A. Why, deterioration of the wire.

Q. What causes deterioration of the wire? A. Well, of course, the friction has something to do with it, and corrosion, we generally find something of that nature.

Q. What corrodes it? A. Why, the leaks in and around there.

Q. Anything else? A. No.

Q. You say the gases don't corrode it? A. Well, they help, with the sparks and the small ashy substance that forms in there.

Q. The gases do help to corrode it then? A. Well, quite a little bit. The gas itself does not hurt it.

Q. Then what do you mean that the gases will a little bit, and yet they don't? Which do you mean? A. I mean that the gas from the fire against the screen—

Q. Is there any other gas in there except what comes from the fire? A. No.

Q. Then what do you mean that the gas will corrode it a little bit, and yet it won't corrode it? Now, which is it? A. What I mean is that oftentimes we find them broke where the ashes lodge in on the flanges of the exhaust pipe.

Q. Never find a break anywhere else, do you? A. Very seldom.

Q. You never saw any with any patches on it, did you? A. Yes, sir; I have.

Q. And where are those patches put? A. Wherever the screen breaks.

Q. What part of the screen that you have seen?

Mr. McCarter: I object; immaterial; where patches have been put on other screens. No patches on this screen.

Mr. Whittemore: He has testified as to where—he says that sometimes it wears out around the bottom. Now, I want to find—he has seen screens with patches on them and I want to find out where those patches were. I think it is clearly competent cross-examination.

The Court: You may ask him.

Q. Where were those patches you have seen on the screen? A. I said over the openings where the holes were.

Q. Where were the openings? A. Well, as a general rule, right in behind the exhaust pipe.

Q. Don't you find them all over the whole screen? A. Very seldom.

Q. Don't you find them on the back part of the screen, towards the pipes? A. That is the part I refer to.

Q. It is mostly in the rear? A. Yes, sir.

Q. That is the part of the screen that gets the most wear, isn't it? A. Yes, sir.

Q. Do you know whether that screen gets red hot in the operation of an engine?

Objected to.

The Court: He has not said a word about that. I will overrule the question.

Mr. Whittemore: I will withdraw it.

Q. Now, you think that a spark that would come out of the engine would be dampened by the steam, don't you? A. Yes, sir.

Q. And such a spark would not go very far, would it? A. Should not; no, sir.

Q. Could not go very far? A. No, sir.

Q. You are sure of that?

Mr. McCarter: He has not testified about that.

Mr. Whittemore: Yes, he has.

The Court: He has not said one solitary word about how far the spark would go. He said when a spark comes out of the fire-box it becomes enveloped in a bath of steam. That is the extent of his testimony on that subject.

RE-DIRECT-EXAMINATION by Mr. English:

Q. Mr. Vaughn, I forgot to ask you, how long is the life of a screen? A. Average life is one year.

Q. Can you explain to the jury how this band around the top of the screen is fastened on? A. Why, it is fastened on by bolts.

Q. I see on the back of it here, on the part away from the jury, a screw with a nut on. Is that screwed up tight with a wrench? A. Yes, sir; that is screwed up tight with a wrench.

Q. That makes it fit tight? A. Yes, sir; bolts the band tight. And the band is supported by that little hook on there.

Mr. McCarter: Come around, Mr. Vaughn, and point it out.

The band, you see, is held up in place by this little rod here, you see, right around the bolt (indicating on model).

Q. A rod that extends from the— A. From the lift pipe. Bolted fast up there and holds the screen tight so that it can't slip down, and besides the tension of the band around this conical shaped pipe. Same way in the rear. This bolt in the rear passes through this lift pipe itself and through the band.

Q. Now, I notice there is a similar band down at the bottom? A. Yes, sir.

Q. Is that screwed up tight and clamped up? A. That is screwed up tight and clamped up.

Q. And I see at the back it rests on a little rest?

A. Yes, sir; a little iron knee put on there to keep it in place, to keep it from slipping down, to keep it rigid.

Q. I see on each side of the screen, running up and down— A. Two pieces of iron plate, and that is to stiffen the screen and keep it rigid.

RE-CROSS-EXAMINATION by Mr. Whittemore:

Q. Mr. Vaughn, you say the band is held up so that it can't drop down? A. Yes, sir.

Q. There is nothing to hold the screen up if the band should loosen on it, is there, except its own stiffness? A. That is all. Supports itself.

Q. And if that netting was heated red hot it would tend to bend, wouldn't it? A. Well, if it was hot it would.

Q. If it was hot? A. If it was hot.

Q. After being heated, with a draft on it, it would not bend when it was heated red hot? A. Well, it might if it was heated red hot, white heat, very soft.

By third Juror: Q. May I ask Mr. Vaughn what keeps that band from slipping up? There is a hook to keep it from sliding down, but is there anything to keep it from slipping up? A. There is an eye, and the bolt passes through the eye. In the back the bolt passes right through the eye and the band itself.

By Mr. English: Q. The same thing that keeps it from sliding down, keeps it up? A. Yes.

Q. It is a rigid iron bar? A. Yes. In the back is a solid bolt passing right through this band. and through this sheet, and through the netting.

Q. So that it is bolted in in the back? A. Bolted stiff in the back, so that you can't get it off.

By Mr. Whittemore: Q. The bolt here passes through the netting, but there is no bolt passes through the netting here, is there (indicating)?

Mr. English: In the front?

Mr. Whittemore: In the front.

A. No.

Q. And this bolt passes through the netting about one inch below the top of the screen, doesn't it, in the back? A. Yes, sir.

By Mr. English: Q. What is the thickness of this iron band, both top and bottom? A. One-quarter inch thick.

Q. And about how wide? A. One and one-eighth inches.

By first Juror: Q. Is that constructed entirely from steel? A. Yes, sir; all but the bottom.

First Juror: I examined that during the recess. Is there any objection to asking that question?

The Court: You may ask any question you wish.

Q. That is made entirely of steel? A. The exact construction of that would be castiron bottom, steel netting and steel top.

Q. Entirely castiron bottom? A. Yes; that exhaust pipe—

Q. Made the same way? A. Made the same shape. This part here (indicating) would be of castiron, and those pipes in there (indicating) would be wrought iron pipes.

By Mr. English: Q. Those exhaust pipes? A. No. The exact construction of this, this would be castiron, and this would be steel, and this would be steel (indicating).

By first Juror: Q. Then what you use is not galvanized iron? A. No, castiron. You could not carry that thing in here if it was castiron.

By Mr. Whittemore: Q. Are there any tops that go on the top of those exhaust pipes? A. Yes, sir.

Q. How far up does these tops extend inside of the screen? A. A half an inch above the—

Q. A half inch above the exhaust pipe shown here? A. Yes.

By fourth Juror: Q. That is the blower exhaust through that? A. Yes, sir.

Q. Those inner tubes, are those the blowers? A. Yes, sir; one is a blower and the other is a air pump exhaust.

By Mr. Whittemore: Q. Isn't there any blower in the smokestack? A. That is the blower.

Q. Isn't there a blower besides that up in the smokestack? A. No.

Q. In some style engines there are? A. No.

FRANK CARLIN, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Mr. Carlin, you work for the Lehigh Valley? A. Yes, sir.

Q. How long have you worked for them? A. Twenty years.

Q. What was your position in July of 1905? A. Locomotive engineer.

Q. Did you run between Easton and New York, and Jersey City? A. No, sir; between Jersey City and Lehighton.

Q. What kind of an engine did you run in the afternoon of July 19, 1905? A. Freight engine.

Q. Do you remember the number of it at that time? A. 1355.

Q. Do you remember when your engine passed Goodman's place? A. Yes, sir.

Q. What did you notice on his premises at that time, if anything? A. I noticed the barn burning.

Q. Was it then on fire? A. Had it been on fire?

Q. Was it on fire as you passed? A. Yes, it was, completely blazing, the whole building.

Q. Could you see it blazing as you came down the track and before you got to it? A. Yes, sir; approaching it.

Mr. English: I simply call attention to the evidence already in by the plaintiff's interrogatories, that engine number 1355 left South Plainfield at 3:29 and arrived at Cranford at 4:00 o'clock.

No cross-examination.

Mr. English: Now, it is admitted, I take it, that the trains referred to in the interrogatories offered by the plaintiff, namely, passenger, engine No. 2676, which left Cranford at 4:57 and arrived South Plainfield at 5:08; and also, extra local, engine No. 1119, which left Cranford at 5:01 and arrived South Plainfield at 5:28, passed after the fire was in progress, and have nothing to do with it.

Mr. Whittemore: Yes, sir.

Mr. McCarter: Now, your Honor, with a view of expediting the trial somewhat, it seems to me that we can be saved the necessity of showing anything with regard to engine 1458. That was the engine on the freight train that followed. The wit-

ness that just left the stand was the witness on the freight train whose whistle called the attention of the two young men, you will remember, to the fire. This one has not been mentioned. The schedule, however, shows three engines and three trains. Now, the last time we spent a great deal of time with regard to 1458. It has not been mentioned in this trial at all, up to this moment, except as it appears in the schedule, and the question arises whether we haven't the right to either ask counsel to say, or your Honor to say that you will charge the jury that there has been absolutely nothing fastened on 1458, no liability for this fire. It went some half an hour ahead of engine 2454, and the only question is whether we have got to take the time to explain with regard to the work that was done, and the character of the screen that was on engine 1458. We have the witnesses here and will do it if your Honor believes there is any necessity for our so doing, and I am anxious to bring this case to an end and it does seem to me that all the circumstantial evidence, and all the evidence in the case, has been solely directed to engine 2454 and, therefore, we would be quit safe in confining our evidence to that thing. In other words, that your Honor would have to charge the jury, as far as this engine is concerned, that there is no evidence in regard to her and, therefore, we would not need to take time to exclude an inference, if such a thing should be done in regard to that.

The Court: What do you think about that?

Mr. Whittemore: I am unable to agree to disposing in regard to that engine. I am as desirous, I think, as anybody of expediting this case. I realize it is something that should be done. This engine passed about fifteen minutes before the mail train, I should judge, and during that period of time, that fifteen minutes, there was no one up there around the barn. The distance these barns are from the track, to my mind, is very nearly prima facie, or makes it prima facie that there must have been some negligence to have a fire start as far away from the track, with a screen in good condition. Now, this engine, although it passed fifteen minutes before, if it had set a fire right into this hay, undoubtedly there would have been fire in existence before it was discovered, so that it is probable that it did not set fire right in the hay, but I do not concede that it was not possible for a fire to have been set by this engine 1458, that smouldered right up there close to the barn and broke out fifteen minutes—into a blaze that became noticeable fifteen minutes after it had passed. Now, I would not think so much of that if it were a fire that had been caused right adjacent to the right of way, but being at the distance it is, and not having been caused by any fire spreading from the railroad track up to the barns, I think that if such a fire did occur, if there is anything in the case from which a probability would arise that it did occur in that way, that it becomes the duty of the defendant to show that with regard to that

engine 1458 they did exercise all the reasonable care that the statute required of them. Now, I do not know whether I make myself clear, but I do conceive that that is something that they are called upon to defend. The evidence shows that that train did pass before that and it is not beyond the bounds of possibility that a fire might have been set by it negligently, and in violation of the statute, at least fifteen minutes before, which smouldered and broke out later on, fifteen minutes later, so that I think they should submit on that point.

Mr. McCarter: Now, if counsel's contention is right, then we would have to go back—

The Court: What is the evidence as to the time? He says fifteen minutes and you say a half an hour.

Mr. English: You can make this comparison: The freight train which we are talking about, 1458, left South Plainfield at 2:50 and was in Cranford at 3:30. The mail train, which they have directed their evidence against, left South Plainfield at 3:37 and got to Cranford at 3:50, so that the freight left South Plainfield forty-seven minutes before the passenger train and it got to Cranford twenty minutes before the passenger train. Now, the running time of the other freight, apparently, was about ten minutes from Goodman's down to Cranford, so I should think it would be at least thirty minutes between the time one passed, and the other.

Mr. McCarter: The locomotive has not been mentioned, except as it appears in the schedule. We might as well say, then, it is up to us to prove the screen on every locomotive that passed by that place that day. I think the logic would be the same. Can it be possible that the law has gotten to be now, in New Jersey, that because a locomotive went by there, without a person that saw it, without a person that claimed that it emitted a spark, without a person that claims that after it went by a fire was seen, but, on the contrary, a fire was seen at three places after another one went by, immediately after, which is the prima facie that they have made, that we have got to spend the time hereby showing what the situation was in regard to that first engine? Now, we are ready to do it, your Honor, and we don't want to make any mistake about it, but we think we have a right to have counsel say whether he makes any claim on that, so that we can have your Honor rule whether or not we have got to meet that claim. Of course, he can claim that the railroad somehow or other did this thing. He has got to prove something.

The Court: I think I shall charge the jury in this case, when it comes time to charge them, that they may disregard that matter. I do not think that in the state of the proof that there had been a drought for a long while before that and everything was in a state of absolute dryness, and that the wind was blowing in the doorway, the doors were open, and this highly

inflammable hay and everything in the immediate vicinity, this notion of a smoldering fire for twenty minutes or a half hour before anybody saw any evidence of it, I do not think is sustained by any kind of proof, much less a burden of any evidence and, therefore, I shall charge the jury that the railroad company will not be obliged to meet the case with respect to that engine and I am fortified in that view, I think, very strongly, by the opinion of the chancellor with respect to what he said as to the other freight train and the evidence with respect to that, in the last trial.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Mr. English: The engine to which your Honor referred is 1458. We might as well have that on the record, and it corresponds with the schedule.

AMOS D. CLACK, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Are you deaf, do you want me to talk up? A. Eh?

Q. Are you deaf? A. I am not exactly deaf; no, sir. I am a little hard of hearing.

Q. Do you work for the Lehigh Valley? A. Yes, sir.

Q. What is your job? A. Locomotive engineer.

Q. How long have you been one? A. Twenty-eight years.

Q. Did you run a locomotive engine on July 19th, 1905? A. Yes, sir.

Q. Between what two points? A. Easton and Jersey City.

Q. What was the number of your engine in the afternoon of that day, do you remember? A. 2454.

Q. Did you have mail train No. 8, as she is called? A. Yes, sir.

Q. Of course, going from Easton to Jersey City you had to pass Goodman's? A. Yes, sir.

Q. Did you notice anything unusual as you went by? A. No, sir.

Q. Any fire at that time, that you saw? A. No, sir; I didn't observe any while passing there.

Q. What is the character of the track along there? A. Level.

Q. For about how far each side of Goodman's is it level? A. Maybe a couple of mile each end.

Q. A long level stretch of track, is there? A. Yes, sir.

Q. What kind of coal did you use in your engine, do you know? A. Hard coal.

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

Q. How many cars did you have on the train? A. Six—locomotive and six cars.

Q. Locomotive and six cars? A. Yes, sir.

Q. Passenger cars? A. Yes, sir. One was a mail car. A mail car and five passenger cars.

Q. How was your engine running at that time, easily, or under forced draft, or how? A. No, it run easily along.

Q. Any occasion to run otherwise at that point? A. No, sir.

CROSS-EXAMINATION by Mr. Whittemore:

Q. How did you run your engine along there the next day? A. Well, I run it just about the same, I guess, along.

Q. You don't remember this day particularly, do you? A. Certainly I mind that day.

Q. What? A. I mind that day.

Q. How do you know how you ran your engine at that point that day? A. What, that day of the fire?

Q. Yes; how do you know? A. Well, I know I was on time. I know I ran along easy. Didn't have to run hard that day.

Q. How do you know you were on time that day? A. Well, I know it by my watch.

Q. Did you make any particular note of it? A. I always do. I always look.

Q. Then you have refreshed your recollection by looking at something, have you? A. Well, I always watch the time, along. I daresn't go in ahead of time.

Q. You could not tell me whether you were on time the day before, or the day after, could you? A. Well, no, I don't mind all that.

Q. Why do you remember whether you were on time this day, then? A. Well, I don't know how that is exactly.

Q. Well, you don't know whether you were on time this day, or not, do you? A. I know we were on time that day leaving South Plainfield, on time.

Q. How fast were you going? A. About forty mile an hour, I guess, or something like that.

Q. Have a heavy train? A. No, sir.

Q. Any occasion to work your engine, did you? A. No, sir.

Q. How was your reverse lever that day? A. Well, I had it hooked up pretty well.

Q. Had it hooked up to the center, didn't you? A. No, not quite.

Q. Pretty near? A. I had it hooked up pretty well.

Q. What is the effect of hooking up your reverse lever to the center on the operation of the steam valves in the cylinder? A. Well, it cuts them off closer.

Q. What effect does that have on the quantity of steam that goes into the cylinders? A. Well, it cuts it off.

Q. When an engine is going very fast, Mr. Clack, the quantity of steam—with the reverse lever hooked up to the center, and a light load, the quantity of steam that gets in the cylinders is not very great, is it?

Objected to.

A. It cuts it off. It cuts the steam off.

Q. Did you have it hooked up just as much as you could and keep the engine going at that speed? A. Well, I had it hooked up.

Q. Then the exhaust out of the cylinders was not very great, was it? A. It was pretty sharp, I guess, of course, running forty mile an hour.

Q. It was sharp and short, wasn't it? A. Yes.

Q. What is the effect on the operation of an engine when you throw the reverse lever down in the corner? A. Then the ports is all open.

Q. Just as wide as you can get them? A. Yes.

Q. And the exhaust is just as great as it can be made? A. Yes.

Q. And it pulls the fire just as hard as it can pull it? A. Yes.

Q. And it throws sparks just as hard as you can throw them? A. Yes, it throws sparks when you pull the throttle out.

Q. Now, when you hold it up towards the center you don't throw any sparks? A. It cuts it off shorter.

Q. It will throw the least amount of sparks she will ever throw, when you bring it up to the center, doesn't it? A. It throws sparks.

Q. But you throw the least amount that you can throw when you bring it up towards the center? A. It just depends on how you pull the throttle out.

Q. How did you have your throttle out that day? A. Enough to make the time.

Q. A good deal of steam out? A. No.

Q. Was there any occasion for throwing any great quantity of sparks in passing Goodman's? A. No.

Q. Did you notice any fire started by your engine that day? A. No, sir.

Q. How do you know?

Mr. McCarter: He says he didn't notice any.

Q. Did you ever seen any fire started by the other engines?

Objected to.

A. No.

The Court: I do not think that is relevant.

Mr. Whittemore: It is only for the purpose of testing his recollection. I do not want anything else.

The Court: I do not think you can test his recollection that way, because, the other one would be irrelevant and immaterial, and you could not disprove it by producing testimony to contradict him; and, secondly, you could not prove his recollection was imperfect.

Q. How many times had you used 2454 at that time? A. How many?

Q. Yes. A. How do you mean?

Q. Had you ever run 2454 before that day? A. Yes, I had it on about the 15th, I think it was.

Q. You had that engine from the fifteenth? A.

From the 15th I think I had that engine. Not before.

Q. Then you had run this engine four times? A. No, I say on the 15th had the engine, and then not until the 19th.

Q. You had it on the 15th, and then not again until the 19th? A. I don't get an engine every day.

Q. Do you remember before the 15th when you had it? A. No, I don't mind before that, before the 15th.

Q. What makes you remember that you had it on the 15th? A. Well, I can see in the record as to how that was.

Q. Then you have been refreshing your recollection from the record, have you? A. As far as that, anyhow.

Q. Now, did you run that engine again that day after you went into Jersey City? A. On the 19th?

Q. Yes? A. Yes, sir.

Q. Where did you run it to? A. Back to Easton.

Q. Did you run it the next day? A. I can't tell you that. Get an engine pretty near every other day at that time.

Q. Do you know whether that engine was throwing any sparks that day? A. I couldn't tell you that. You can't see them in the daytime.

Q. You didn't notice? A. You can't see them in the daytime.

Q. Could you tell in the day time whether your engine was throwing sparks, whether you could see them or not? A. (Witness shakes head no.) You can't see the sparks in the daytime.

Q. You didn't see the spark arrestor on your engine, did you? A. No, sir.

Q. You hadn't see it before that, had you? A. No, sir.

Q. Are you running that engine now?

Mr. McCarter: I object. What is the materiality of that?

(Question withdrawn.)

RE-DIRECT-EXAMINATION by Mr. English:

Q. When you run your engine the steam from the exhaust fills the whole pipe, doesn't it? A. Well, I guess pretty near, yes.

Q. It doesn't make any difference whether the engine is running light or heavy does it? A. Well, just depends on how much throttle you give, you see. If you are running along light—

Q. The quantity of steam depends on the throttle, but after the steam comes out of the exhaust, whatever there is expands and fills the whole pipe, doesn't it? A. Yes, sir.

HARRY SPANGLER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. You are employed by the Lehigh Valley? A. Yes, sir.

Q. In what position? A. Civil engineer.

Q. Did you go to the property owned by Mr. Goodman and Mr. Mays and survey the distance from Goodman's old barn to Mays' barn? A. Yes, sir.

Q. How far was it? A. 1,180 feet.

No cross-examination.

THOMAS SHANNON, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Mr. Shannon, are you deaf, or not? A. No, I am not deaf.

Q. Do you work for the Lehigh Valley? A. Yes, sir.

Q. Did you work for them in July, 1905? A. Yes, sir.

Q. How long have you been working for the railroad, do you know? A. Oh, I have been working over forty years, I guess it is.

Q. What was your job in July of 1905? A. Inspecting spark arrestors.

Q. And whereabouts did you inspect them? A. South Easton.

Q. Do you have a record book of the inspections which you make? A. Yes, sir.

Q. I show you a book, which I ask you to look at and tell me if that is the record book which you had of the inspection of engines at Easton, in July of 1905? Well, that is your book, isn't it? A. That is my book.

Q. Now, turn to the record, under date of July 19th, 1905, and tell me if you have a record of inspection of engine 2454?

Mr. Whittemore: I want to cross-examine.

Mr. English: Just let us see if we have the record.

Q. You have it there, 2454? A. Yes, sir.

Q. Under date of July 19th, 1905? A. No.

Mr. English: That is not yours. That is some other fellow's. Here is yours.

Mr. Whittemore: What do you wish to do with this book, before it is used? Do you want to offer it in evidence?

Mr. English: Yes.

Mr. Whittemore: Before you speak of its contents I want to cross-examine on it.

Mr. English: Very well.

Q. We had the wrong page. I now call your attention to a page in your book, under date of July 19th, 1905, and ask if you have a record there of engine number 2454?

Mr. Whittemore: I object. I want to have this record proved before he has told the contents.

The Court: He is not telling the contents. He is simply asking if he has a record of that engine, not what is it.

Q. What do you say, Tom? A. Yes, sir.

Q. Does that book indicate the hour when you inspected the engine?

Objected to.

Mr. English: I have not asked the hour.

Mr. Whittemore: What is the difference between his telling what the book contains, as long as he does not give figures?

The Court: Suppose he says that he has a book there which indicates the hour, and he does not tell the hour, what would the jury know about what hour it was? They could not tell whether it was four o'clock or half-past one. You may ask that.

Q. It does indicate the hour when you inspected it? A. Yes, sir.

Q. Is your name signed to this inspection? A. Yes, sir.

Q. How soon after—

Mr. Whittemore: You are going into the contents.

Mr. English: I will not go into the contents until you have a chance to cross-examine.

Q. How soon after the inspection was made did you make the entries in this book? A. Shortly after. Might be half an hour, or an hour.

Q. Where did you make the entry in the book? A. South Easton.

Q. Well, I know in South Easton, but whereabouts? A. In the ash pit.

Q. Is that where you inspected the engine? A. Yes, sir.

Q. Now, what kind of an inspection did you make the screen of engine 2454—

Mr. Whittemore: If he knows.

Q. (Continued)—at the time which is noted in your book, at the page to which your attention is directed, what kind of an inspection did you make? A. Why, I opened the door on the front of the engine—

Mr. Whittemore: One moment. I would like to ascertain what the witness is testifying from, whether his specific recollection of that day, or some record.

The Court: You may ask him.

SPECIAL CROSS-EXAMINATION by Mr. Whittemore:

Q. How do you know what inspection you made of 2454? A. How do I know?

Q. Yes. A. Why, I have got my book here.

Q. You don't know anything except what is in the book there, do you? A. No.

Q. And that is how you can tell that you inspected 2454? A. Yes, sir.

The Court: Do you want to cross-examine now with respect to the propriety of his using that book, is that the idea?

Mr. Whittemore: Yes, sir.

The Court: You may do that.

Q. Now, Mr. Shannon, let me see this book.

Where was this book kept? A. Kept in the boiler house.

Q. Where was the boiler house with relation to the place where the inspections were made? A. About a block away.

Q. What were your duties? A. My duty?

Q. Yes. A. To inspect the spark arresters.

Q. Anything else? A. Put down in the book the condition of it.

Q. Did you do any other work? A. Took the sparks out of the top of the engine.

Q. Did you do any other work? A. No, sir.

Q. Nothing else but that all day long? A. Yes.

Q. How many engines did you inspect in a day? A. Well, from thirty to thirty-five, or something.

Q. How long did it take you to make an inspection? A. I don't know. I never looked how long it took.

Q. Take you an hour? A. Oh, no.

Q. Ten minutes?

Mr. McCarter: Is that cross-examination upon the book, how long it took to make an inspection of an engine?

Mr. Whittemore: It will lead up to it.

Mr. McCarter: I understand the particular point of inquiry now is, can the witness refer to that record, which is the regular record to refresh his recollection. Now, how long it took him—the point is that it was made at the time.

The Court: I do not see that the length of time he consumed in making the examination can have any bearing at all upon the length of time that expired between the time he completed the examination and the time he made the entry, which is the real point of inquiry here.

Mr. Whittemore: That is just the way I wanted to get at it.

The Court: You can not get at it by asking him how long it took to make the examination. It might have taken him four hours to make the examination, and he might have made the entry one minute after.

Q. How soon after you made the examination did you make the entries in this book? A. Well, sometimes it would be half an hour, or sometimes it would be an hour, maybe.

Q. Well, in the meantime what were you doing? A. Why, I would be examining other engines.

Q. How many engines would you examine before you made the entries? A. Well, sometimes a half a dozen, maybe.

Q. And you would examine a half a dozen engines in that half hour, would you? A. No, not in a half hour.

Q. I want to know what is the fact. Did you examine a half a dozen engines in the half hour before you would make the entry? A. From a half an hour to an hour, sometimes.

Q. Now, where did you make any entry first? A. Why, on a paper I took a memorandum of it. When I would examine an engine I would mark it down.

Q. In a memorandum book you had in your pocket? A. Yes.

Q. And then what did you do after that? A. Well, I put it on the book then.

Q. Half an hour afterwards you would put it on the book? A. Or an hour.

Q. Or an hour afterwards? A. Yes.

Q. You didn't wait until the end of the day? A. No.

Q. Sure? A. Yes, sir.

Q. Isn't it a fact that you entered twenty engines, or so, all at one time? A. During the day.

Q. No, but all at one time, that you didn't enter twenty engines all at one time? A. No, sir.

Q. That is not so, isn't it? A. No, sir.

Q. You say that is not so? A. No.

Q. Where is the memorandum book that you made the first entry in? A. Oh, I don't know. I threw it away when I got through.

Q. Where did you get that memorandum book from? A. Well, merely a paper I fixed up in the shape of a book.

Q. Now, I will ask you to look at this book. Were not all those entered at one time? A. No, sir.

Q. All that are marked Tom Shannon, on page 571—no, there is no page number, that is not a page number—on July 19th, isn't that all written at one time? A. No, sir.

Q. Are you sure of that? A. I didn't mark them all at one time.

Q. How many of those were marked at one time? A. Well, there might be half a dozen, sometimes.

Q. Can you tell how many of these on July 19th were marked at one time? A. There is six there.

Q. You say those six were marked at one time? A. Yes, sir.

Q. And then the following six were marked at different times, you say that is so, the following five? A. Yes, sir.

Q. Is that true with regard to July 21st? A. Yes, sir.

Q. All these in your name were marked at different times? A. Yes, sir.

DIRECT-EXAMINATON by Mr. English:

Q. This big book which you have here is furnished by the company? A. Yes, sir.

Q. And you use this little memorandum book for your own convenience while you are working on the engine? A. Yes, sir.

Q. And then you go to the boiler house and enter it up in here from that little book, is that it? A. Yes, sir.

Q. Now look at the entry which you made of engine 2454, on July—

Mr. Whittemore: I think perhaps I ought to object to the use of this, unless the previous memorandum—the original entry is produced.

Mr. English: It can not be produced. He said he threw it away.

Mr. Whittemore: This is a secondary record. It perhaps is the best in existence, but, if there was an original—

The Court: I do not think this is analogous with respect to books of original entry, where he produces, for instance, a general ledger, and it is shown that there was a day book or a cash book before it. The reason is that the party against whom the books are offered has a right to have the benefit of all records or credits which may be advantageous to him shown through the whole course of the entry, but it has been held since that time that where entries have been made first on slips of paper, and the slips of paper have been destroyed, and afterwards entered in books, that the books themselves are admissible without the slips of paper, and they are also admissible without the slips of paper, even though they be in existence. Consequently I am perfectly satisfied that under that ruling, this book is admissible, even though the little book were in exist-

ence, but the fact is here that the little book is proven not to be in existence at all; therefore, this is the best that there is. And not only that, but it is vouched for by this man as having been made within such time after the work was done as insured his knowledge of the accuracy of the entries made by him. So I can not see anything which could rule this book out and I therefore admit it, and you may have an exception.

Mr. Whittemore: Prays exception.

Exception allowed. Sealed accordingly.

Q. Now, refreshing your recollection from your memorandum here, what time did you make the inspection on July 19th, 1905, of number 2454? A. 11:30.

Q. 11:30 a. m.? A. Yes, sir.

Q. Did you make an entry as to the kind of stack there was in that engine A. Yes, sir.

Q. What did you enter? What kind of a stack was it? A. A number 1.

Q. What does that mean? A. Well, I don't know. It has always been that way, that is a good stack.

Q. That means a number one stack? A. That means a number one stack.

Q. Did you make any entry as to the condition in which you found the stack? Well, I see a heading here, "Condition in which stack was found." Did you make an entry under that? A. Well, there is the marks.

Q. What did you enter as to the condition of the stack? A. Good.

Q. I see another heading of a column, "Condition which spark arrester was found." What entry did you make under that? A. Well, it is good.

Q. I see another entry, "Of what did the spark arrester consist?" What did it consist of? A. Screen.

Q. Was there anything the matter with that screen at that time? A. No, sir.

Q. Now, what sort of an inspection did you make? How did you go at it, and what did you do? A. Well, I opened the door on the front of the engine.

Q. That is this sort of a round door on the front of an engine? A. Yes, sir.

Q. How did you get it open? A. By opening the latches.

Q. Did you unscrew some bolts with a wrench? A. Yes, sir.

Q. And then you opened up the front of the engine so that it was as you look here on the blue print D number 1? A. Yes, sir.

Q. You opened up that front end and then what did you do? A. Well, I looked in and saw the front screen was all right, and got inside and felt the back of the screen.

Q. You felt the back of the screen here (indicating on model)? A. Yes, sir.

Q. On the back of this model? A. Yes, sir.

Q. Is that the way to make an inspection of the back by feeling the back of the screen? A. Yes, sir; that is the only way you can make it.

Q. Where did you feel, around the bottom of the exhaust?

Mr. Whittemore: Don't lead him.

Q. Where did you feel? A. Bottom of the screen.

Q. Where else? A. Around the back of the screen.

Q. As the result of this inspection, of the character which you made, you found and made an

entry in your book that the screen was in good condition? A. Yes, sir.

Q. Can you tell from that kind of an inspection whether there is anything the matter with the screen? A. Yes, sir.

Q. Did you ever find anything the matter with screens when you inspected them? A. Yes, sir.

Q. And when you do find something the matter, what do you do in your book? A. Well, I mark it down, broken screen.

Q. Or whatever the fact is, I suppose? A. Yes.

Q. Where was this engine inspected, out on the ash track? A. Yes, sir.

Q. There is no roof over that, is there? A. No, sir.

Q. Right out in the daylight? A. Yes.

Q. And it was 11:30 in the morning, I think you said? A. Yes, sir.

CROSS-EXAMINATION by Mr. Whittemore:

Q. You have been at that business how many years, Mr. Shannon? A. About eight or nine years, I guess.

Q. Inspected a good many engines in that time, haven't you? A. Yes, sir.

Q. You inspected engines after that too, didn't you? A. Yes, sir.

Q. You can't remember any particular inspection, can you? A. Not any more than I got on the book.

Q. You must have inspected thousands of engines in that time? A. I don't know how many.

Q. Then when you told Mr. English that you got in the engine and felt around in the back of the screen on that day, how do you know you did it? A. Well, I make it my business to do it.

Q. You mean that is what you do every time, and that is the reason why you say you did it this time? A. Yes, sir.

Q. You could not tell where you felt on that day, whether you felt the top or the bottom? A. Felt all over the back of the screen.

Q. What? A. Felt all over back of the screen.

Q. How long had that engine come in from a run? How long had it been since it came in from a run? A. Well, sometimes perhaps it is fifteen or twenty minutes. Sometimes it is an hour before she gets on the ash pit.

Q. Can you go in and inspect a screen fifteen or twenty minutes after an engine comes in from a run? A. Yes, sir.

Q. Is it cool enough for you to do that? A. Yes, sir.

Q. And for you to put your hand around on the back of it and feel the screen, is it? A. Yes, sir.

Q. Do you have anything on your hand? A. Have gloves on.

Q. What kind of gloves? A. Well, regular—

Q. Woolen, leather, or what? A. Leather gloves.

Q. Thick gloves, weren't they? A. Not thick.

Mr. McCarter: If you are going to testify you had better do it.

Mr. Whittemore: I am cross-examining him. He can say whether it is so, or not.

Q. Is it so, that that they were thick leather gloves? A. No, sir; they were not thick. Gloves that you use in summer.

Q. Have fingers in them? A. Yes, sir.

Q. Did you ever repair any screens? A. No, sir.

Q. Never put any patches on any screens?

Mr. McCarter: I object. He is not a repairer. He has not testified to that.

Mr. Whittemore: This is cross-examination, your Honor.

The Court: You say so, but why is it?

Mr. Whittemore: Because I think it may appear that screens are repaired by spark arrester inspectors.

The Court: That may be very well, but the question is whether that is proper cross-examination. The rule of cross-examination is that it must be confined to what has been examined upon in chief, and this man has not been interrogated with respect to anything whatever concerning the repair of spark arresters.

Mr. Whittemore: Suppose he repaired this screen, isn't it proper cross-examination to bring that out?

The Court: Not at all. He has simply been called to tell whether he inspected it. Now, you have a right to find out whether he did or not. That is all you have a right to do on cross-examination. You have a right to make him your witness and ask him that question, and be bound by his answer. The same rule that would permit you to ask him whether he repaired the screen would permit you to ask him, on cross-examination, whether or not this screen would prevent sparks from escaping, and the same rule would permit you to ask him whether or not it set fire to Goodman's farm. You have got to be confined, under the rule governing cross-examination, to that which was examined upon in chief, otherwise you could examine all over the realm of this man's knowledge with respect to anything connected with his business, or anybody else's business.

Mr. Whittemore: I have in mind some things that occurred at the first trial that I think, if brought out here—I don't like

to speak of them here before the witness—

The Court: All I am required to do is to rule on the question as to whether or not this is cross-examination. I say that it is not and I therefore overrule the question.

Q. Is anything ever done to a screen before you mark it good in the book?

Mr. McCarter: I don't believe he understands you, Judge.

Q. Is anything ever done to a screen before you mark it good in the book? A. No, I guess not.

Q. You never knew of a patch being put on a screen, and then mark it good in the book, did you? A. No, I don't think so.

Q. Are you furnished with patches to put on screens?

Objected to.

A. No, sir.

The Court: I do not think that is proper cross-examination. Your other questions were entirely proper, and you have a right to ask him whether or not, from the time he makes an examination, or after the engine arrives and before he makes his examination, from his knowledge, anything is done before he marks it good in the book. I do not think you have a right to ask him whether he repairs it after he makes the examination.

Mr. Whittemore: You speak about after the examination, I would like to ask about if he repairs it before.

Q. Don't you know that sometimes patches are put on screens, where holes are found, and then the record is marked good? A. Yes, sir.

Q. Don't you know that? A. Yes, sir.

Q. Can you remember the times when that is done? A. No. It is in the book. That is all I can recollect about that.

Q. You could not tell? A. It is in the book.

Q. When the patch is put on it is marked good in the book, isn't it?

Mr. McCarter: You are only trying to confuse that witness.

Mr. Whittemore: Surely I am trying to confuse him. I have a right to cross-examine him.

Mr. McCarter: Let that go on the record, that he is trying to confuse the witness.

Mr. Whittemore: I want to cross-examine this witness without interruption.

The Court: You have a right to do that, except such interruptions as come from proper objections.

(Question repeated.)

Q. Is that so, when the patch is put on it is marked good in the book? A. Repaired.

Q. What is marked in the book when the patch is put on? A. It is marked, screen repaired.

Q. Isn't it marked good, too? A. Yes, sir.

Q. Without the word repairs? A. It is marked repaired in the book.

Q. Is it marked good, without the word repairs?

Mr. McCarter: Let the book speak for itself. I object. I think the book should speak for itself. If he is examining about the book, let him show it, I submit.

Mr. Whittemore: The book will speak for itself, but the fact will not speak for itself.

The Court: I think your question is just a little bit misleading, Judge, although I

think you have a right to ask practically what you want to ask. I think you have a right to ask him whether, when he makes a repair, he ever marks it in the book good, without repair, becase he is attempting to refresh his memory from that book, and what he does you have a right to find out, but what other people do I think is irrelevant.

Q. Did you make any repairs of screens? A. No, sir.

Q. Did you know of anybody else making repairs on screens, when engines come in from their runs, which you afterwards inspected and made a record of? A. No.

Mr. McCarter: Do you mean right away?

Mr. Whittemore: That same day.

A. No, I don't.

Q. You never knew of anybody? A. No, sir.

Q. When you find a hole in the screen what do you do? A. Why, I mark it on the book, broken screen.

Q. And what is done with the engine? A. Well, that screen is repaired.

Q. When is it repaired? A. Shortly after I report it.

Q. What do you mean by shortly after? How soon after? A. Couldn't say.

Q. Couple of days? A. Oh, no. Right away.

Q. Right away? A. When it comes in the house.

Q. Who does that work? In the engine house? A. In the round house.

Q. Now, isn't it a fact, Mr. Shannon, that some of these entries here that you have marked good, are instances of inspections where patches were

put on the screens, over holes, and then the record, after that was done, was marked good, isn't that so?

Mr. McCarter: Do you understand that question, Shannon?

Q. Do you understand the question? A. Yes, sir.

Q. Well, isn't that so? A. Yes, sir.

Q. It is so. Now, look here, Mr. Shannon, beginning here at July 19th, and going back—

Mr. McCarter: The book is not offered in evidence. I do not understand that counsel has a right to examine in regard to the whole book. No objection to it, but then he makes it evidence. It has been used to refresh his recollection. It is not in evidence.

The Court: I suppose he has a right to examine with respect to that book, so far as the entries are concerned which were used on your examination.

Mr. McCarter: Yes, sir.

The Court: I suppose he has a right, furthermore, to ask with respect to other entries, so far as such examination will bear upon the question of the accuracy of those made.

Mr. McCarter: Undoubtedly.

The Court: That he has a right to do. But I do not think he has any right to endeavor to make evidence upon this side of the case on any other theory than those which I have suggested.

Mr. Whittemore: I would like to ask this question:

Q. Beginning at the page on July 19th, will you tell me, by looking through the book, how far back the first break in the screen appears?

Mr. McCarter: Objected to as irrelevant and immaterial.

The Court: What is the relevancy of that, Judge?

Mr. Whittemore: It tends to show how many instances there are—how the screens wear, and how often the holes appear in them; what the life, and wear of the screen is.

The Court: He has not been asked anything about that. He has simply been asked with respect to his examination of this particular screen, and with respect to his entry in the book concerning that.

Mr. Whittemore: These records are made, to a certain extent, beyond our control. I endeavored to have an inspection of them made, but I could not get it.

The Court: But that record is not evidence now. That record was simply used to refresh this man's recollection. I have very grave doubt, if it had been offered by the Attorney General whether I would have admitted it. I do not think that that is—

Mr. Whittemore: I think it is surely in evidence—

The Court: Do you want to offer it?

Mr. Whittemore: No, I am not going to offer it on my case. I think the defendant should offer this record.

The Court: He has a right to control his own record. He is not obliged, because you would like to use his book, to put it in evidence.

Mr. Whittemore: I think that the witness should not be allowed to use the book unless it is put in evidence. This is a rec-

ord made by an employe, in the course of his employment. It is not practically just a memorandum made for his own use, but it is part of his duty to make this record, and I think that when it is made a record in that way, that it becomes evidential, and if anything is endeavored to be proved from it, that then it should be offered by the party who attempts to prove the facts from it.

The Court: Can you show any proof, or any case that even hints upon that rule? I never heard of such a thing. My impression is that if you have a book in your possession, you may do either one of two things with it. If the entries were made by the person who is testifying, you may—and they were fresh in his mind at the time he made them, and their accuracy was within his knowledge, you may either refresh his recollection from it, or, if the book is such a book as is permitted to be offered in evidence, you may offer the book. You may do one, or you may do the other, but you are not required by law, because you want to refresh a man's mind or recollection from a book, to offer the book. I never heard of such a rule being in effect.

Mr. Whittemore: That is not so when you use it to refresh his recollection.

The Court: He is asked whether he examined that screen; and he is asked whether he made that entry; and is asked whether he can refresh his recollection from that memorandum, and then he is asked, having refreshed his recollection, what he did with respect to that screen.

That is all legitimate evidence, and it is all within the control of the party offering the witness, and using the book, and the other side has not any right to say, why, you should put the book in now, because I would like to use it. If you would like to use it, I dare say that the other side would permit you to offer it, but he does not have to do it.

Mr. Whittemore: The last question that I asked was what?

(Question repeated.)

The Court: I overrule the question.

Mr. Whittemore: Prays exception.

Exception allowed. Sealed accordingly.

Q. Who else entered in this book besides yourself, Mr. Shannon?

Mr. McCarter: That I object to also as not cross-examination.

Mr. Whittemore: I want to find out about the book, who had charge of it, and who made the entries.

The Court: I think you may ask that question, because it may very well be that he wants to show by Mr. Shannon that there has been an opportunity to change or tamper with, or in some way mutilate the entries made by Mr. Shannon.

Q. Who else made entries in this book beside yourself? A. Why, the night inspector.

Q. What was his name, do you remember? A. George Burkhart.

Q. What were your hours of going on duty? A. From six o'clock in the morning until six o'clock in the evening.

Q. When did Mr. Burkhart come on duty? A. Six o'clock in the evening.

Q. When did he leave? A. Six o'clock in the morning.

Q. Same time that you got there? A. Yes, sir.

Q. Who did you report to? Who was your superior officer? Who was your boss? A. John Bark.

Q. What position did he hold? A. Foreman in the round house.

Q. When you were not entering in this book, where was it kept? In the boiler house, I believe you said? A. Yes, sir.

Q. Who had charge of it there? A. Why, we had charge of it.

Q. What? A. I had charge of it.

Q. When you were not there, who looked after it? A. Wasn't anyone looked after it.

Q. Where did it lay? A. Lay on the window.

Q. On the window sill? A. On the window sill.

Q. Now, isn't it a fact, Mr. Shannon, that you made your entries at the end of the day? A. No, sir.

Q. Now, will you look at this handwriting closely? Is your eyesight good? A. Yes, sir.

Q. You can see, can you? A. Yes, sir; I can see.

Q. Now, look at that.

Mr. McCarter: What are you referring to.

Mr. Whittemore: July 19th, beginning at 6:16 a. m.

Mr. English: This is not the part he used.

Mr. Whittemore: I want to see when this entry was made. This is cross-examination. I object to being interrupted on it.

Mr. McCarter: There is no possible objection, your Honor, to the most thorough

and rigid cross-examination that will bear upon the question of the authenticity of the book as a record, but we do object to any question as to the contents of the book with regard to other screens and other examinations. There may have been a hundred imperfect screens, or there may have been a hundred perfect screens which has got nothing to do with this case. The question is, what was the condition of the screen on this particular engine, and I do not think that any examination concerning the book other than that which is directed to test the authenticity of the record of the entry in question is at all relevant or proper cross-examination.

The Court: I do not either, but I do not know that this is not to do that. I have not heard the question yet.

Q. Look at the handwriting closely here, beginning at 6:16 a. m. on the morning of July 19th, and follow down through there, and your signature here upon the other side of the page, and all the way down that day to the last entry 3:18 p. m., isn't it, and including all those entires. Do you tell me that any of those were written at different times from the others? A. Yes, sir.

Q. You say that this entry at the beginning was written by you at a different time from this entry here at the bottom? A. Yes, sir.

Q. And you always write just exactly in the same similar handwriting as this, do you? A. Yes, sir.

Q. How many engines did you inspect on that day, according to this record? Shall I count them for you? You inspected thirty engines there. Now, on other days, referring to July 18th—

Objected to.

Mr. Whittemore: I want to see whether he made these records that way too.

The Court: I think I will permit that, Attorney General, on this theory: He has testified, in answer to a question asked by you that he always made the entries within a half an hour, or an hour from the time he made the inspection. Now, the object of this question is to find out whether or not he did not, at the conclusion of the whole day, make an entry with respect to the whole batch of engines examined during that day. I think, for that purpose, it is admissible.

Q. On July 18th, look at this. Do you say those were all made at the same time, on that day?

Mr. McCarter: He did not say anything of the kind.

A. They were not made at the same time.

Q. They were not made at the same time? A. No, sir.

Q. Do you say they were all made at different times? A. Yes, sir; different times.

Q. How many different times were those entries made, so far as you can tell, on that day? A. About five times.

Q. As many different times as there are hours and minutes marked here? A. Yes, sir.

Q. Now, can you see any difference in the handwriting between the entries marked under 6:18 a. m. and those in the following entries, 7:30 a. m.

Objected to as immaterial.

A. No, what difference would there be?

Q. Isn't it exactly identical? A. Yes, sir.

Q. And isn't that true with regard to the entires on July 19th, exactly identical? A. Yes, sir.

By Mr. English: Q. It is all in your handwriting, isn't it? A. Yes, sir.

By Mr. Whittemore: Q. Now, you have a good

deal of time in between engines sometimes, don't you? A. Sometimes we do.

Q. The opening of the front end, how much work is that? A. About three minutes.

Q. What do you have to do to get the front end open? A. Why, you have to unscrew some clamps.

Q. Some bolts, don't you? A. Some bolts.

Q. How many bolts do you have to unscrew? A. Well, about a dozen.

Q. A dozen? A. Twelve; yes, sir.

Q. When you have got them unscrewed, what do you have to do? A. Pull the door open.

Q. And what do you next? A. Get in the front, and examine the back screen.

Q. And you step right in the front? A. Yes, sir. I get in the front.

Q. Step right in, do you, get inside the front? A. Yes, sir.

Q. And then what do you do in there? A. Well, examine the back of the screen.

Q. And what do you do at the front of the screen? A. I can see that.

Q. See that without feeling it? A. Yes, sir.

Q. Is there any light in the back part of that screen? A. Well, the daylight.

Q. Where does that come from, in the back part? A. Why, it comes from the door.

Q. Only what comes in the front door? A. In front of the screen; yes, sir.

Q. Now, you do that every time, do you? A. Yes, sir.

Q. What do you do else, besides feel the back of that screen? A. Why, examine the top part there, called the lifting pipe.

Q. What do you examine about that? A. Well, see if there is any holes in it, or anything.

Q. You mean holes in this iron (indicating on model)? A. Yes, sir.

Q. To see if there are any holes in that iron (indicating)? What do you do that for? A. Why, to see if there is any holes in it. To see that it is all right.

Q. Do you do that for the purpose of making any record? A. Yes, sir.

Q. What record do you make with reference to that? A. Well, I mark it down on the book.

Q. What do you mark down? A. Lifting pipe broke, if there is any break, or any thing wrong about it, I mark it down.

Q. What do you mark down if there is anything broken about the lifting pipe? A. Mark it down.

Q. What do you mark in this record with regard to the lifting pipe? A. Well, the stack.

Q. What do you mark here, just number one? A. Number one.

Q. What does number one mean? A. Well, that the stack is all right.

Q. That says kind of stack, doesn't it? A. Well, what condition the stack was found in, it says good.

Q. Well, this is the kind of stack? A. That kind of stack is one.

Q. Is there any other number, number two, is there? A. I don't know.

Q. What kind of a stack is that? A. Number one.

Q. What is number two? A. I don't know. I never saw any number two.

Q. Why do you call that a number one stack? A. Well, the stack was good.

Q. Well, now, isn't it a fact, you just mark it in there because there is a blank for it, and that is all? A. No, sir.

Q. What is the condition of the stack to which you refer, is that the lifting pipe? A. That ain't the stack; that is the lifting pipe.

Q. You don't mean the stack, do you? A. That is stack there. That means the stack, number one stack.

Q. Well, the stack is what sticks out of the top of a locomotive, isn't it? A. Yes, sir.

Q. And these pipes inside are what are called the lifting pipes? A. Yes, sir.

Q. Then what you have marked is that the stack is good. Do you mean the stack on the outside of the locomotive? A. Yes, sir.

Q. Then you don't mark anything down about the lifting pipe? A. If it is broke, I mark it down, broken lifting pipe.

Q. Do you call the lifting pipe a part of the stack? A. Well, it runs up in the stack.

Q. When you are marking a record, do you mark a record in regard to the lifting pipe under the heading with regard to the stack? A. No, sir.

Q. What does the word "good," under "the condition of the stack," refer to, the lifting pipe, or the stack? A. Well, the lifting pipe and the stack both.

Q. Then you do mark it down under that heading, don't you? A. You find it out here. You would mark good.

Q. Of what did any spark arrester consist other than a screen? Did you ever seen any other spark arrester of any different kind? A. I saw different ones from that.

Q. What differnt kind from that? A. Why, square.

Q. What do you mark in here when you see a different kind from that, a square kind? A. Well, according to what condition I find it in.

Q. But under this column, what do you mark?

Adjourned until Monday morning, April 4th, 1910, at 10:00 a. m.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January term 1910.

EDWARD V. GOODMAN, Executor of James E. Goodman, deceased, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 1. In Tort.
EDWARD V. GOODMAN, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 2. In Tort.
EDMUND MAYS, vs. LEHIGH VALLEY RAILROAD COMPANY of New Jersey.	No. 3. In Tort.

Transcript of Stenographer's notes of evidence, taken in the above entitled cases, before Hon. WIlliam H. Speer, judge of the Circuit Court, and a jury, at the court house, in the city of Elizabeth, N. J., on the fourth day of April A. D. 1910, at 10 a. m.

Appearances:

Mr. C. McK. Whittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

Mr. Whittemore: I would like to be heard for one moment on the question as to whether this book should be admitted in evidence or not.

Mr. English: You have made your motion on that already.

Mr. Whittemore: This witness has testified that he has no recollection of the inspection other than the record contained in this book. That shows that he did. The effect of that testimony may be merely that what he put down was true. That is what his whole testimony tends to show.

Now, what shows the condition of that screen, is his testimony given here on the witness stand from matters within his own recollection, or the book record? I hardly think in the face of his own statement that he has no recollection as to that screen at all which is, of course, a reasonably truthful proposition that it must be considered that the book record is the thing that is the evidence of the condition of that screen. Just the same as a book of account or record made by an employee. Of course he can not remember every item, but enters there paying this or that or the other, and the effect of his testimony is merely to show that that which he put down was true at the time he put it down and the book itself is the evidence of the fact that is in issue, and not the oath or the evidence of the witness, because he can not speak as to that fact himself from his recollection. The fact that he speaks too is as to the truthfulness of the record when he made it and nothing further.

Therefore I say that before he should be permitted to read from that book and get before the jury what is in that book, that book should be in evidence because the book speaks for itself, it is evidential of that fact, and it is the only evi-

dence of that fact. It is a very important matter to the plaintiffs' case here. I desire to see that book and to comment upon it—to comment upon the entries and the character of the entries and I think that the plaintiff is entitled to the and I think that the plaintiff is entitled to the benefit of the proof of these facts as set forth in that book, but not unless the book itself is in evidence. I don't desire to put the book in evidence on my case—naturally I don't want to be bound by this record, but I want to have it so that I may criticise it. There is a distinction between these papers shown to the witness to refresh the witness' recollection and the record here produced. This record was made by an employee in the ordinary course of his employment, impartially and imparting verity to the record. When he uses a record to refresh his recollection, the refreshment is to suggest the occurrence that he sees entered there, and then he is able to say that he has some recollection concerning that occurrence. In other words, he has absolutely no recollection—his mind is a blank upon eevrything except that he can identify his own handwriting in the record when he puts it down and he says, that when he put it down, it was true. Then the record is evidential and not the oath of the witness, and he should not be permitted to use it as a prop to enable him to refresh his recollection. I am desirious that these papers should be admitted in evidence so that I may comment upon them and that the jury may see them and conclude whether this record was truly made at the time it was made from the face of the book, so that the jury may be able to examine it and to criticise it, and for that reason, I submit that

the plaintiffs should not be obliged to put the paper in evidence.

The Court: I am clear in my mind what the rule is in regard to this matter—If I am wrong your enrollment upon the record will be sufficient protection. The rule is in the first place, is the record original—is it primary evidence or is it only hearsay? There are several cases in our state bearing on this question, wherein the court comments upon the fact that entries of matters contained in the book are mere hearsay, but yet they are made evidential as primary evidence really by the necessities of the case, but they will not be extended any further than the necessities of the case require, and so far as that goes our court of errors have said that entries of credits in a book of account are not admissible in evidence so as to take the case out of the statute of limitations. It is true that the last pamphlet of the Atlantic Reporter has a decision in it which is at variance with that doctrine. But I am satisfied that this rule of admitting any book, if you please, showing occurrences of this kind, is simply a matter of taking that which is hearsay out of the category of hearsay, not to make it evidence and basing it upon the necessities of the case and binding it by the necessities of the case. Now, in this case, what do you have? We have a man who made entries in the course of his employment—but they were no more in the course of his employment than are the entries of a bookkeeper in a shoe store, in which the entries made there were made for the purpose of refreshing his recollection later on in respect to facts which came under his observation where, he could not refresh his mind unless he had made these memoranda, which he has made, be-

cause of the numerousness of the examinations he makes. It has been long debated in this state whether any such book was admissible in evidence at all or not—whether it was even admitted to refresh the recollection of the witness and it is only recently that it has been held that such a book is admissible where the court said that if the witness' recollection was infirm so that he could not tell whether or not, or recollect the incidents, he was required to depend on the record—not only was his recollection admissible but also the book could be put in. But that case does not hold, and no case which you can find or cite, has ever held that the fact that the book is admissible in evidence, makes it compulsory upon the party to put it in. If you have such a case I would like to see it, but I don't believe there is any such case anywhere and I don't think there ought to be.

Now, the next proposition is that there are two kinds or ways in which such a book could be used. One is as refreshment of the recollection. There is no better repository of cases collected or cases on this subject in this state than the little Digest of Decisions, edited by Bell of Harvard, which I have here on the table, and he goes on and says that, even where the witness has not the slightest recollection of the incident set down, still if he has a recollection that when he set them down they were correct, then that would be sufficient for him to see the book to refresh his memory. The reasons that urge me to make that statement is because you say you want to hand the book to the jury, that you want them to see it. Why? Because you possibly concede that there is something in it that militates against the accuracy of the book, or his recollection of the ac-

curacy of the entries. If there is, then it is your evidence, which is evidence that militates against the other side. And then surely that evidence should come from your camp, not from the other man's camp. The mere fact that he produces a book and says that the necessities of the case makes it proper for him to use it to refresh his recollection, does not give you the right, when he has refreshed his recollection, to say that he should put it in evidence, and then let you get after the jury and show what a miserable man he was in making his entries. But if you find anything in that book that militates against the accuracy of that entry, or for any purpose against which the book was used, then you would say, I offer the book in evidence, and then when you come to summing up before the jury, you have the use of the book, and all there is in the book, and the other side has the offer of the book merely for the purpose of refreshment of the witness, and that is as far as the law has gone, I think.

I think I shall sustain my former ruling; if any further exception is necessary, you may have it.

Mr. Whittemore: I would like to raise a new question in the case and get the benefit of it on the record, that is this—that I object to the introduction of evidence on the part of the defendant tending to show that they put a screen cover in the smokestack of their engine, and used all practicable means to prevent the escape of fire, on the ground that the law which gives that defense makes it a conclusive defence, is unconstitutional. As I understand it a private individual without a charter and unlicensed to run locomotives and scatter fire, is responsible for all damages that may be caused. It is in the nature of a nuisance. Take the case where some private in-

dividual operating locomotives and scattering fire intended to set up this defense. It is no defense at all. They have to be chartered to do that and the charter is limited to this defendant by the railroad law. It seems to me there is good ground to condemn that law that attempts to give a railroad corporation power to scatter fire, and destroy property, because of the necessities of the case in running their locomotive, and so doing they take the property of private owners or private property for public use, is a violation of the constitution. That there may be no distinction between the legislatures authorizing the taking of a property for a right of way of a railroad, away from an owner without compensation, than in the necessity of giving a railroad company power to destroy property with impunity, merely imposing a duty such as the exercise of reasonable care—that is not only taking property for public use without compensation, but it is taking a property without due process of law, and while I find no argument on that subject, as to whether it may be done or not be done, yet I think there is very good grounds—I don't see the line of demarcation between the taking of a right of way and the taking of any other property, a private individual's property—That is not a statutory offence, it is a statutory defence—we have the right by law, through the scattering of fire by reason of travelling locomotives throwing sparks out of their stacks—there is no common law rule in the case of fires in the ordinary method and the running on a track of locomotives which run through the country scattering fire through its stacks by means of sparks, and the rule which applies to the exercise of care by a person building a fire, where, for instance, a person building a fire and not taking

care to see that it does not travel on to another person's property, that is seeking that it does not scatter and thereby destroy the neighboring property. I do not see why that rule does not apply to the railroad just as much as it does to any other party where they use fire they throw the sparks through the stacks throwing their fire around, thereby destroying property along the road through which it travels—I say I do not think the legislature could have the right to take property, nor could it be contemplated when the legislature gave the railroad its charter, that it could serve the public in that way.

The Court: I do not suppose there is anything to rule on here—there is no question before the court. The question broached by counsel I think is well settled by two of our leading cases against the Pennsylvania Railroad Company, reported in 21st and 25th Vroome, respectively. These cases deal with the question I think, and while there is nothing to rule upon, I might intimate that my ruling is entirely against the proposition that the statute is unconstitutional.

Mr. McCarter: My judgment is that the use that has been made of the book, treating it as a memorandum wholly, as it has been treated by us, does not justify us in the absence of a purpose, to use the book as evidence. Now, counsel may cross-examine the witness with regard to it, as I understand the rule, where a witness uses a book to refresh his recollection, it is this the witness says, "I can't remember but I have a record which will help me to recollect," and the record is used merely as a means of refreshment to the man's recollection. Then counsel cross-examines upon it; he takes the memorandum and he says, "Q. What is that?" The answer is, "It is a

New Jersey State Library

memorandum;" "Q. When was it made?" "A. At the time," and then he completes his examination in regard to the paper. Before the meritorious examination with regard to it is put in, and the witness does not make the document the subject of comment or examination, unless it be that the court is satisfied from the fact, that the facts elicited on cross-examination with regard to the accuracy of the memorandum, that it is not a memorandum, that it should be looked at for the purpose of refreshing the recollection of the witness. Then, if counsel for any reason, wants to use the memorandum and get it to the jury, and if they pass upon its accuracy, then he must offer it. But he can not use the paper in that way by cross-examination or by any other way, unless he offers it in evidence. We are quite content to have counsel offer the book; we are not afraid of the book, and if he fails to offer it, it seems to me, your honor, he can not cross-examine upon its contents, but as he has not offered it, and, as he seems ready to proceed with the cross-examination, I shall object to his cross-examination on that line.

The Court: I think where counsel produces a memorandum whether it be a book, document or whatever it is, there instantly arises a preliminary question for the court, with which the jury has nothing to do, as to whether, or not, that document or book—whether it is permissible to use it for a refreshment of the recollection of the witness—.

Now, as I understand the rulings in this state, if the court admits that upon insufficient grounds and an objection is taken, a reversal will follow. That permits him to use it. Now, afterwards comes the question, to what extent should he use it. The witness takes that book, that memoran-

dum or whatever it may be, and he goes on to say that he made the entries at the time that he says he made them, and seeing them, he recalls them, and he says that at the time he made them they were correct. He says that he does not recollect it now, that is the details of the entries. Well, logically that brings us down to this point The real essence of the recollection is—and the vital point is as to the accuracy of the entries, and then the accuracy of his recollection of what is entered in the book. Because if cross-examining counsel can show either of these views to be incorrect, then he can say at once, that what the witness says was correct, or that it was incorrect, that the entry at the time that he made it, was incorrect, and then, of course, the value of the testimony is destroyed, when the book was produced in the first instance, on the ruling upon the preliminary question, that it was admissible to refresh the witness' recollection. And then upon the motion of Judge Whittemore that the mere using it for the purposes of refreshment did not require counsel to offer it in evidence, that he might permit the witness to refresh his recollection from it without offering it all, or he might permit the witness to refresh his recollection and at the same time offer it as supplement and corroboratory of the witness' testimony in the case; under these circumstances and up to that point, and then owing to the fact that Judge Whittemore does not agree with me we come to the proposition, as you say, that having established the preliminary question, and with which the jury has nothing whatever to do, and as the book has been used for refreshment of the recollection only, now he is foreclosed, he can not say anything at all to the witness about that book—that is what you say—I do not think that that is the

rule, and I think the fullest time on an examination with respect to the accuracy of the recollection of the witness and the entries in the book, at the time they were made, ought to be permitted, because that is the crux of the matter, at the time when the witness made the record. He says, he does not recall except that he put the items down in the book—within a day, or an hour or so of the time when they purport to have been made. Now, the cross-examination shows that, and that is not the thing at all—that would manifestly destroy the gist and foundation of the accuracy of the testimony of the witness and that, I think, they have done, and I shall have to rule against you on that proposition.

Mr. McCarter prays an exception.

Exception allowed and sealed accordingly.

WM. H. SPEER,
(Seal) Judge.

THOMAS SHANNON, re-called in behalf of the defendant saith:

Examined by Mr. Whittemore:

Q. Did you make entries of several days inspections all at one time? A. No, sir.

Q. Did you inspect all the engines that came in? A. Yes, sir.

Q. During the time you were on duty? A. Yes, sir.

Q. Were all inspections made at the ash pit you have spoken about? A. Yes, sir.

Q. Was there any other inspector working on the same days you worked, other than George Burkhardt? A. No, sir.

Q. The time, the hour, that you put down here represents what, with reference to the time of inspection? A. Yes, sir.

Q. It represents what—the same time that you made the inspection—or the time you made the entries, which? A. Yes, it is the time I put them down in the book.

Q. It does not represent the time that you made the inspection on the day of the inspection? A. Yes, sir, on the memorandum—

Q. I am asking you the time you marked in the book here, the hour of the day, is that the time you made the inspection, or the time you made the entry in the book, which? A. The time I made the inspection.

Q. Did you inspect six or seven engines all at one time? A. Well, between that time between the two spaces there.

Q. Does 9.35 p. m. of July 20th represent the time that you inspected the engine opposite which that time is marked?

Mr. McCarter: I object to the use of the book and to an entry of July 20th, or any other in fact.

Question withdrawn.

Mr. Whittemore: Q. The hour 11.20 a. m., opposite engine No. 115—does that represent the time you inspected engine No. 115, or the time you entered the inspection of it? A. The time I entered it in the book.

Q. Under engine No. 2454 following that has no time marked opposite—when did you enter that No. 2454—at the time of the entry, too? A. Yes, sir.

Q. Was it entered at 11.30 a. m.? A. Yes, sir.

Q. Is that true with regard to all of the five engines following, until you come to the time 1.30 p. m.? A. Yes, sir.

Q. Then between 11.30 a. m., and 1.30 p. m., you did not inspect any engines? A. No, sir, these here were entered.

Q. All that follow 1.30 were entered at 1.30? A. Yes, sir.

Q. Is that correct? A. Yes, sir, from 1.30 down to 3.18.

Q. You mean those entered 1.30 were inspected previous to 1.30, is that right? A. No, sir, these here, from here to here (indicating), engine No. 115, and engine No. 2454, was next—

Q. You have here marked engine 117 opposite 1.30 and then you have four engines following that, and you say No. 117 was entered at 1.30 p. m., is that correct? A. Yes, sir.

Q. Now, these four engines following 117, were entered at the same time? A. Yes, sir.

Q. When were these five engines inspected with reference to 1.30 p. m.? A. Well, from 1.30 to 3.18.

Q. Between 1.30 and 3.18, those five engines were inspected? A. Yes, sir.

Q. How could you enter at 1.30 these four engines here, when they had not been inspected at that time? A. Well, I had them all inspected at 1.30, and I put them down, I marked them down.

Q. You marked all these five engines down at 1.30? A. Yes, sir.

Q. You could not have inspected them after 1.30, could you? A. No, sir, I inspected them before.

Q. When did you inspect these five engines with respect to 1.30? A. I started here with No. 117 engine, and 1.30, I inspected them others.

Q. After 1.30, or before 1.30? A. These here were taken between the hour 6.16 a. m., and 8.15 a. m.

Q. Now, before you go further—I did not ask you anything about that—didn't you enter all of these six engines here at 6.16 a. m.? A. Well, that is the time I went to work.

Q. The six engines following 6.16 a. m., didn't you enter all these six at 6.16 a. m.? A. That is the time I started in on them.

Q. 6.16 was the time you started in? A. Yes, sir.

Q. At 6.16 a. m., you started in—you could not have inspected— A. Up to 8.15 a. m.

Q. Then they were not in there at 6.16 a. m., were they? A. I entered them all down—

Q. At 6.16 a. m.? A. Yes, sir.

Q. Were they all entered at 6.16 a. m.? A. No, sir, I started in at 6.16, and these here went to 8.15—

Q. You have said that all these engines following a certain specified time in the book were entered at that time—is that correct? A. They were taken between 6.16 and 8.15 a. m.

Q. Then it is not correct that these engines were all entered at the same time, under the time of 6.16 a. m.—is that so—these six engines that follow 6.16 a. m., were not entered at 6.16 a. m., but were entered at 8.15 a. m., is that correct? A. Yes, sir.

Q. Did you enter all these engines following the time 6.16 a. m., at one time, or at different times? A. At one time.

Q. And at what time? A. 8.15 a. m.

Q. 8.15 is the following time—why didn't you enter 8.15 up here then (indicating)? A. I did not start in there.

Q. When did you write 6.16 a. m.—what time of day did you write that? A. At 6.16 a. m.

Q. When did you write the following, engine No. 2401, at what time? A. Right after, I suppose between them times.

Q. Did you write all of these six engines at one time, or at different times? A. All at one time.

Q. What was the time you wrote all these engines, 6.15 or 8.15 a. m.? A. I marked them down at 8.15, and take them off a memorandum at that time that I had.

Q. Why did you mark them down under 6.16? A. I started in at that time.

Q. Why did you mark them as being inspected at 6.16? A. There was inspected at 6.16, and I inspected that one (indicating).

Q. You inspected the first one at 6.16? A. Yes, sir, and then followed right on.

Q. Then you didn't inspect them all at 6.16? A. Oh no, sir.

Q. What follows there—8.15—was that work done at 8.15? A. No, sir.

Q. This engine No. 2230, did you write that down at 6.16 a. m.? A. No, sir, at 8.15 a. m.

Q. That is above 8.15, isn't it? A. Yes, sir.

Q. And you wrote that down at 8.15? A. Yes, sir.

Q. Look at the one before that, No. 2235 when did you write that down? A. They were taken between these (indicating), that is between 6.16 and 8.15.

Q. Now, I want to know when you wrote that in there? A. At 8.15.

Q. Did you write No. 2230 at 8.15? A. Yes, sir.

Q. Did you write the preceding one No. 2235 at 8.15? A. Yes, sir.

Q. Did you write No. 2674 at 8.15? A. I put them down between these—I put them down—

Q. I didn't ask you when you inspected them, but when did you put down No. 2235, 8.15 or 6.16 a. m.? A. At 8.15.

Q. Then you put 8.15 at the three engines following that number 2235, is that right? A. Yes, sir.

Q. Why didn't you put 8.15 down here opposite that engine (indicating)? A. We never put down the time, we inspect the engine, and I took all these off of a memoranda, and then put them down in the book, and I put them down at 8.15.

Q. You put all these engines beginning No. 1454 at 6.16, you put them all down at 8.15. A. Yes, sir.

Q. Well, when you said you put them down at 6.16, then you were wrong? A. I took them, as I started in all them at 6.16.

Q. You started work at 6.16? A. Yes, sir.

Q. That does not signify the time when you put down these entries? A. No, sir, these here—

Q. 8.15 a. m., which is the time following the record of these six engines, indicates the time you put it down, is that correct? A. Yes, sir.

Q. Now, what did you put down under 8.15 a. m.? A. These here (indicating).

Q. The engines following 8.15, you put down at 11.30 a. m., did you? A. Yes, sir.

Q. And the engines opposite 11.30 and following that, you put down at 1.30 p. m., is that right? A. Yes, sir.

Q. When did you inspect engine No. 115, marked "inspected 11.30 a. m."? A. At 11.30 a. m.

Q. You inspected that at 11.30 a. m.? A. Yes, sir.

Q. Just immediately before that? A. 11.30 a. m.

Q. And you did not put it down until 1.30, is that right? A. Yes, sir.

Q. Why didn't you put it down here where you have the 11.30 a. m., why didn't you put down 1.30? A. Why I started in at 11.30, and I have a memorandum book, and I marked it down at 1.30.

Q. Within the hours you marked down here, if

I understand you correctly, you mean the hours you made the entry, that is they are the times between which you make the inspection, is that right? A. Yes, between these times I make the inspection.

Q. They make the time between which you make the inspection, is that right? A. Yes, sir.

Q. You did not put down No. 115, until two hours after you inspected it, did you? A. No, sir, I guess not.

Q. And in that two hours seven engines came in, is that right? A. Yes, sir.

Q. How long before 1.30 did No. 2454 come in? A. It came in right after 11.30, and not right after engine No. 115.

Q. How long after No. 115—two or three minutes, half an hour or how long? A. Ten minutes maybe.

Q. Well, do you know? A. How long?

Q. Do you know how long after No. 115, No. 2454 came in? A. Ten minutes or five minutes, perhaps.

Q. Might it be half an hour? A. Well, sometimes it is, you can not say as to the time. 11.30, she was in, or it might be eleven, or minutes after eleven, or it might be 11.30, I can not say.

Q. You put that down in the memorandum book? A. Yes, sir.

Q. You said you had that memorandum book at South Easton, at the last trial, didn't you—do you remember that? A. Yes, sir.

Q. What have you done with that book? A. I destroy them all when they get full, I throw them away.

Q. The last trial was a year and a half after the time of the inspection, was it not? A. Yes, sir.

Q. Or one year and three months? A. Yes, sir.

Q. Then why did you destroy it after that? A. It was destroyed before that, I guess.

Q. You said at the last trial that you had it at South Easton, didn't you? A. Yes, sir.

Q. You had not destroyed it then, had you? A. I guess I had.

Q. Why did you say you had it at the last trial? A. I said if I had it, it was at South Easton.

Q. You say you had it at South Easton? A. It was there.

Q. That you had it at South Easton, at that time? A. I didn't have it, if I had it I said it was there, I had it last at South Easton.

Q. You didn't say you had it at the last trial, that you had it at South Easton, at that time? A. Yes, sir.

Q. Didn't you say so? A. Yes, sir.

Q. What have you done with it since? A. I haven't had it since.

Q. What have you done with it? A. I destroyed it.

Q. When you said at the last trial, that you had it at South Easton, then you were mistaken? A. I did not say I had it, I said if I had it, it was at South Easton.

Q. It had been at South Easton? A. I told you it was at South Easton.

Q. When you said that it had been at South Easton— A. If it was not destroyed, it was there.

Q. If you did not have it, where was it? A. It was destroyed, and thrown away.

Q. If it was destroyed and thrown away, then it was not at South Easton? A. I used it at South Easton.

Q. Who destroys these books? A. Myself, when I use them, and get them full, I throw them away, I got no more use for it.

Q. Do the company give you these books? A. No, sir, it is merely a piece of paper like that, folded up.

Q. Just a little sheet of paper? A. Yes, sir, just a little sheet of paper, folded up, and sometimes it is the stub of a book.

Q. And you don't keep it any time at all? A. Maybe a week or two.

Q. And you then throw it away? A. Yes, sir, I throw it away when we get through with it.

Q. Have you ever testified in any railroad cases before?

Mr. McCarter: I object to that as immaterial.

Objection sustained.

Mr. Whittemore: Q. You examined the freight engines too? A. Yes, sir.

Q. All freight engines that come in? A. All freight engines.

Q. Do you make the examination in the same way? A. Yes, sir.

Q. Do you take out the sparks out of the front end? A. Yes, sir.

Q. What else do you do to the engines, besides looking at the spark arrestors, and taking out the sparks? A. That is all.

Q. Do you clean the fires at the ash-pit? A. No, sir.

Q. Who does that work? A. The hostlers.

Q. Have you ever noticed the size of the sparks that you found in the front end of the engines? A. Yes, sir.

Q. How big are they? A. Well, some are the size of pea coal.

Q. And some get as large as a hickory nut? A.

Some of it is of the size of hickory nuts, though not often.

Q. How full do you find the front end when you open it, of sparks? A. Well, not very full.

Q. Do you find it full up to the nozzle? A. No, sir.

Q. Don't you find it full up to around about the bottom of the screen? A. Yes, sir it is full about up to the nozzle.

Q. How do you take the sparks out of the front end, how do you do it? A. With a scraper.

Q. Where do they go out, through the door? A. No, sir, down to underneath.

Q. There is a spark box, underneath? A. Yes, sir.

Q. When do you make an inspection, after the sparks are taken out, or before? A. After I take the sparks out.

Q. How long does it take you to make an inspection? A. Well, it don't take long, after I get the sparks out, to make an inspection.

Q. About how long? A. About a minute.

Q. A minute to make the inspection—not any more? A. No, sir, not after I have the door open.

Q. How long does it take to open the door? A. About three minutes.

Q. The door is sealed up with lead, is it not? A. No, sir.

Q. Is there not lead around the bolts and that door, when you have it sealed, so as to have it tight? A. No, sir.

Q. You do not use any lead? A. No, sir.

Q. Do you go in the front end after you take the sparks out of it? A. No, sir.

Q. Do you repair these screens?

Mr. McCarter: I object to that as immaterial.

Court: That question has already been asked and ruled upon.

Mr. Whittemore: We failed to take an exception to the ruling, I find.

Court: You ought to have taken your exception at the time the objection was made and the ruling made, I can not allow you to go back after reading the testimony, and then take an exception.

Mr. Whittemore: Q. Do you use any other kind of screens in the engines you inspect other than this one, a cone screen? A. Yes, sir.

Q. Do you have any basket-cone screens? A. Yes, sir.

Q. Is there anything to that screen except the mere form of the basket?

Mr. McCarter: I object to the question as immaterial—this is the kind of screens they use on these engines.

Mr. Whittemore: I want to show what this inspection consists of, if there are other apparatus that has to be looked at, that has to be looked over it might draw out the evidence that this has something in it that ought to be looked at.

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Mr. Whittemore: Q. Will you write your name for me, please, I would like to see your handwriting (handing witness paper)? (Witness writes his name).

Mr. Whittemore: I want to ask some questions that will compel me to make him my own witness, if I may be permitted at this time to do so.

Mr. McCarter: We have no objection.

Court: You may do so.

DIRECT-EXAMINATION by Mr. Whittemore:

Q. You are still in the position of spark arrestor inspector, are you? A. No, sir.

Q. At South Easton? A. No, sir.

Q. Up to what time were you? A. February 14th.

Q. Of this year? A. Yes, sir.

Q. And between July 1905 and February 14th, 1910, you performed the duty of spark arrestor inspector at South Easton, did you? A. eYs, sir.

Q. During that same period of time, and after July, you made the same kind of inspections?

Mr. McCarter: We object to that as immaterial.

Mr. Whittemore: This is for the purpose of rebuttal, I want to show that they practically continue the same system or a portion of it.

Court: I do not think you have the right to put any rebuttal in before the time for the rebuttal evidence arrives.

Mr. McCarter: Mr. Shannon will not go away, he will be here subject to your call, when you require him.

Question withdrawn.

Mr. Whittemore: Q. I see the name of Charles P. Gain in this book, on July 27th, who is he?

Mr. McCarter: I object to that as immaterial.

Question withdrawn.

Mr. Whittemore: Q. What did he have to do with this book?

Mr. McCarter: I object to that as immaterial, the book is not in evidence.

Mr. Whittemore: I want to find out who had the right to make entries in the book.

Court: Ask him whether Gain had any right to make entries in the book then.

Mr. Whittemore: Q. Did Charles P. Gain have the right to make entries here? A. Yes, sir.

Q. What right had he to make entries in this book? A. If I was laid off, or was not working, he was put in my place.

Q. He was a substitute for you? A. Yes, sir.

Q. He took your place when you were off duty? A. Yes, sir, if I was not there, they would have to have somebody in my place.

CROSS-EXAMINATION by Mr. English:

Q. You were the day man as I understand it? A. Yes, sir.

Q. And Mr. Burhardt was the night man? A. Yes, sir.

Q. You worked from six in the morning, to six at night? A. Yes, sir.

Q. And he worked from six at night to six in the morning? A. Yes, sir.

Q. When you found a screen in the engine which has a hole in it, what would you do in your book, what report would you make? A. I would report a broken screen.

Q. After that was reported what would be done with the engine, or the screen, if you know? A. It would be sent to the roundhouse for repair, it would be taken to the shop and sent to the roundhouse for repair

Q. If it was a small hole, what kind of repair would they make to the screen? A. They would put a patch on.

Q. When next would you see the engine after it had been reported by you with the hole in the screen? A. The next day or the day after the next—next time she came to the ash pit.

Q. And you would inspect her again? A. Yes, sir.

Q. If you inspected an engine which had been repaired, after the break in the screen, but was otherwise in good condition, except for this patch, how would you report it? A. In good condition, if we found no holes, we would report the screen as in good condition.

Q. When you said last Friday, if you found an engine patched you would report it "good," you meant an engine repaired as you say, with a patch over the hole, and if the patch was in good repair, and everything else was in good repair, you would report it "good"? A. Yes, sir.

DIRECT-EXAMINATION by Mr. English:

Q. I forgot to ask this question on the direct-examination—will you look at this book entry which you made, and tell me whether under date of July 20th, 1905, you inspected this engine No. 2454?

Mr. Whittemore: I object to that.

Court: You have the right to cross-examine on this as counsel says he had forgotten to ask this question on direct-examination—I will allow the question.

A. Yes, sir.

Q. Did you make an entry in your book as to the approximate time? A. Yes, sir.

Q. It was between the two hours as appears on your book? A. 12.18 and 1.18.

Q. Do you report the kind of stack? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. What was it? A. "A No. 1" stack.

Q. Did you report the condition of the stack at that time? A. I put it on the book here.

Q. Did you report in your book the condition of the stack at that time? A. Yes, sir.

Q. What condition did you report it in? A. "Good."

Q. Did you report the condition of the spark arrestor at that time? A. Yes. sir.

Q. What report did you make? A. Good condition.

Q. Did you report what the spark arrestor consisted of? A. Yes, sir.

Q. What? A. The screen.

Q. What kind of examination did you make before that—the examination of the day before? A. The same kind of examination as before.

Q. The same kind of examination as you always made before? A. Yes, sir.

Q. You opened up the front of the engine? A. Yes, sir.

Q. And got inside the way you described? A. Yes, sir.

Q. And as the result of that examination, refreshing your recollection from your book, you say that at that time that the screen was good? Yes, sir.

Q. Does any light come down the smoke stack as you inspect it? A. Yes, sir.

Q. To help you to see? A. Yes, sir.

FURTHER CROSS-EXAMINATION by Mr. Whittemore:

Q. You have no more recollection of that inspection than you have of the other ones, have you? A. No, sir, only what is in the book there.

Q. When was No. 2454 entry made on July 20th, what hour of the day? A. Between 12.18 and 1.18.

Q. Can you tell me when it was? A. July 20th.

Q. What hour? A. Between the hours 12.18 and 1.18.

Q. I heard you say that, but can you tell me what hour, what time it was inspected? A. Between that?

Q. I do not mean inspected, at what time was it entered? A. It was entered at 1.18.

Q. How long before it was entered was the engine inspected? A. Well, half an hour or maybe more.

Q. That engine was on the same run it was the day before, was it not, and came in at the same time, didn't it? A. I don't know, sir.

Q. Doesn't that engine go on a regular schedule? A. I don't know sir.

Q. You don't know about that? A. Sometimes it is sent out extra, when it comes in, with a special train.

Q. That engine does not travel on a regular schedule? A. It was then, but if they want to use it here on an extra, they would send her out on a special run.

Q. On July 30th, didn't you enter everything on that day—at the end of the day? A. No, sir.

Q. That writing is all similar, there is no difference everything is just the same—look at it? A. Yes, sir.

Q. The same pencil? A. Yes, sir.

Q. You have a little colored pencil? A. Yes, sir.

Q. And you begin at 6.20 a. m., after George Burkhardt got through, and everything runs along in that colored pencil, down to the end of the day, does it not, down to where you quit? A. Yes, sir.

Q. You are sure that you did not enter those all at the same time, at the end of the day? A. No, sir.

Mr. English: I want to read the evidence of the two inspectors who are now dead. Their evidence will be found commencing on page 381 of the printed book.

The Court: I will not entertain any new objections; I will permit the testimony as given at the previous trial with the objections, if there are any. I will accept that evidence as it was given and taken at the previous trial, that is the evidence will remain subject only to the same ruling as therein contained.

Mr. English prays exception. Exception allowed, sealed accordingly.

WM. H. SPEER (Seal),
Judge.

Questions read by Mr. English and Mr. Whittemore reads the answers.

"GEORGE BURKHARDT, sworn:

"By Mr. Dungan: Q. Mr. Burkhardt, what is your business? A. Spark arrester inspector.

"Q. Where? A. At Easton.

"Q. For what company? A. For the Lehigh Valley Railroad.

"Q. And you were in that business for them on the 18th, 19th, 20th and 21st of July, 1905? A. Yes, sir.

"Q. In examining the engines, after you have made your examination what do you do? A. Make a record of it.

"Q. Have you your record here? A. Yes, sir.

"Q. Refer to your record of July 18th? (Witness complies.)

"Q. Say whether or not you examined Engine No. 2454 on that day, July 18, 1905? A. July 18th, did you say?

"Q. Yes. A. Yes, sir, July 18th.

"Q. What is your record of your examination of 2454 on that day? A. Good condition.

"Q. Read your entire record, please? Begin at the beginning of the page. A. '7-18-05. 10: 50' in between the hours of 10:50 and 12:30 in between that hour—'Engine 2454, No. 1, stack, stack in good condition. Good screen. Signed, Mannion.'

"Q. What kind of a screen had 2454? A. Same as that one there (indicating sample).

"Q. The cone screen? A. Yes, sir.

"Q. And after making the examination of 2454 that day what did you do, after making the examination? A. Make a record of it in my book.

"Q. How soon after? A. Well, it may have been, say, fifteen or twenty minutes.

"Q. What record did you put in your book, I mean as to whether or not the record records truly the condition in which you found it? Does it? A. Yes, sir; that is the condition I found it in the way I put it in the book.

"Q. What was the nature of the examination you made of the screen on the 18th? A. Well, I opened this door in the front here and jump up on the ring here and hold my torch. I am the night inspector; I must hold my torch all around there and examine it.

"Q. And did you do this with 2454 this night? A. Yes, sir.

"Q. And you found the condition of the screen as set forth in that record? A. Yes, sir; according to my record here.

"Q. This examination of the screen includes what with reference to what is above and below it? A. How do you mean?

"Q. The bottom and top of the screen? A. The screen complete is attached to the stack above and below it, fits around the nozzle.

"Q. Where it is attached to those places can sparks escape through? A. No, sir; that is solid sheet iron at the top and below, it fits around a solid plate.

"Q. As to the size of the meshes in the spark arrester, how does that compare with the screen here shown? A. Same as that screen there (indicating sample).

"Q. When did you next examine this engine? A. On the 7-19, day, between 10:30 and 12:30.

"Q. At night? A. Yes, p. m.

"Q. What examination did you then make? A. The same as the night previous.

"Q. What was the condition then? A. Well, my record says good condition.

"Q. When your record says good condition, what was its condition? A. It must have been good or I wouldn't have marked it that way.

"CROSS-EXAMINATION by Mr. Whittemore:

"Q. How do you know that 2454 had a cone screen? A. Well, I examined it so often that I almost tell it in my memory, continually.

"Q. Do you know that particular engine? A. Oh, no, not particularly, I know about how they run in classes. On different classes the screens are different in some.

"Q. Is 1458 and 2454 of the same class? A. No, sir.

"Q. They are different classes? A. Yes, one is freight and the other passenger.

"Q. And they have different kinds of screens? A. No, sir; not those engines.

"Q. Both the same screen? A. I think they have. I am not positive.

Mr. Whittemore: The sample screen that

was at the last trial was not the same sample screen that we have here now nor was it anything like it. It was only a little small model arrangement.

The Court: Well, do you agree that the sample or model that was here at the last trial was not the same model that is now here produced in this trial?

Mr. English: Oh, yes, we will agree to that.

"Q. You are not sure about that? A. I don't know when I examined 1458, but I think it is the same screen.

"Q. Have you any better knowledge as to 2454? A. Only my record here.

"Q. That is all? You do not remember that engine particularly? A. Not any more than any of the rest from my record.

"Q. And you do not remember the examination of that engine in particular? A. What I got by my record.

"Q. When you made that examination did you mark that down in a memorandum book? A. No, sir; marked it in this book.

"Q. Where are you located? A. At South Easton shops.

"Q. Why did the last witness use a memorandum book and not you A. That is a man's notion; I suppose he may mark the number down on a book and put it in his book and copy it.

"Q. Your entries in that book are made in accordance with your recollection of the examination? A. According to what?

"Q. Your recollection of the examination you had made? A. Yes, sir; after I examine them I mark them on the book.

"Q. How many engines do you examine as a

rule before you make the entry? A. Well, I sometimes—just as it happens—if I get to the book I may have only looked at one or I may have looked at two or three.

"Q. Can you tell from your entries there how many engines you had examined before you entered this 2454? A. Before that that I had marked it down, or what do you mean?

"Q. How many examinations did you make at the same time you entered the examination of this one? A. I can't tell by that now.

"Q. Can you tell by the handwriting how much you entered at one time? A. No, sir.

"Q. Is 2454 examined at Jersey City? A. Well, now, it runs to Jersey City, I suppose it does. I should judge it would be.

"The Court: You don't know of your own knowledge?

"The Witness: No, sir; I am not at Jersey City; I am at Easton.

"Q. You examined the stack of the engine? A. Yes, sir.

"Q. What do you examine that for? A. Well, look around the stack and see if it is all right.

"Q. What is there that gets out of order in a stack A. Well, there is nothing in the stack to get out of order that I know of.

"Q. Well, why is it that you make an examination of that stack and make a record of what your examination shows? A. Well, that I don't know as it is any more than a form. It is very seldom a stack gets out of order, that is, the smokestack, you know.

"Q. Have you any spark arresters in your book other than a screen spark arrester? A. No, sir; all screen.

"Q. Where is that 2454? A. That is the day

man's, I guess. I am night inspector. That is Shannon. I am night inspector.

"Q. Where is 2454? A. There (indicating). That is on the 18th. On the 19th is there.

"Q. Do you know what an extension front spark arrester is? A. Well, nothing more than I know the locomotives all have extension front.

"Q. Do you know whether this is a style of spark arrester known as an extension front spark arrester? A. That I don't know, any distinction in regards to that.

"Q. Have you ever worked on any other railroad than the Lehigh Valley? A. Not on any other railroad, no, sir.

"Q. Do you know what style of spark arrester is used on the Pennsylvania? A. No, sir; I never saw one of them.

"Q. Do you know that the Pennsylvania uses a different kind of spark arrester than this? A. That I don't know.

Objected to as he says he doesn't know.

Mr. Whittemore: Was that a different model to the model here. I call the Court's attention to that.

The Court: If you want the evidence to go in as it was given at the last trial, or if there is any dispute as to the size of the machine, or the size of the screens, or anything of that kind, then you will have to call some one to testify as to the facts in regard to that.

Mr. English: Well, if your Honor please, the screen referred to in the testimony is not the identical screen, the model which is now in Court. It was a screen of the same size and character.

The Court: Well, with that understanding you may go on.

"A. I never examined one of them.

"The Court: There is no use of pressing it. He says he doesn't know.

"Q. Does it ever happen that he mesh on these screens get compressed together so as to leave a wider opening? A. Not unless it wears out, you know, and breaks out.

"Q. Isn't it possible sometime that these wires should get closer together than they are here? A. Not to my knowledge during my experience.

"Q. In your judgment, how far would a spark go and keep alive after it went through this screen?

Objected to as not cross-examination.

Question excluded.

"RE-DIRECT-EXAMINATION by Mr. Dungan:

"Q. I want to ask the witness a question in redirect that I neglected. Turn to your record there, please. You have the record now of July 18th and 21st? A. July 18th and 19th.

"Q. Now turn to your record of July 18th and what does it say about the smokestack? A. July 18th, stack in good condition.

"Q. The stack? A. Yes, that in good condition.

"Q. Does it tell you what kind of smokestack? A. Same form as that.

"Q. Does your record show the class of smokestack it was? A. No. 1.

"Q. What does that refer to? A. Well, they are classed in No. 1 class.

"Q. Engines with No. 1 smokestacks have what kind of screens in? A. Well, they have those in and the other kind; both kind have the same stack,

No. 1 stack. That hasn't anything to do with the inside. The stack has nothing to do with the inside part.

"RE-DIRECT-EXAMINATION by Mr. Whittemore:

"Q. What is the other kind of screen? A. Why, differnt shape. That is on the cage style.

"Q. Can you describe it any better than that? What do you mean by the cage style? A. Why, it is made square instead of round.

"Q. Instead of being round it is just square? A. Made in a square box like.

"Q. Does it stand up vertically like this? A. Same as that. Practically the same as that only it is built square instead of round. It is not used as much as this here.

"Q. What is the difference between those as regards the efficiency of the spark arrester? A. None that I know of.

Objected to unless it appears that this witness knows.

"A. None that I know of.

"The Court: Well, it is answered.

"Q. Is there any other kind of spark arrester except the two that you have mentioned? A. Not that I know of.

"Q. Mr. Burkhardt, did you notice any difference in the condition of the screens on engines on a windy day from those that come in on a calm day? A. No, sir; I never noticed any difference."

Mr. English: I have also to read the testimony of LAWRENCE M. SLAGEL, who has since died.

Questions read by Mr. English and the answers read by Mr. Whittemore.

"DIRECT-EXAMINATION by Mr. Dungan:

"Q. Mr. Slagel, on July 19, 1905, where were you employed? A. By the Lehigh Valley Railroad Company.

"Q. At what point? A. At Jersey City, Lehigh route terminal.

"Q. How long had you been employed by the Lehigh Valley Railroad? A. I am at present position about twenty-three years.

"Q. And in what capacity were you employed on July 19, 1905? A. Well, I am engine foreman and I inspect engines too.

"Q. At Jersey City? A. Yes, sir.

"Q. Did you make a record of your inspections? A. I did.

Q. Have you that record here? A. I think it is here, sir.

"Q. Will you refer to the record and say whether or not on July 19, 1905, you examined Lehigh Valley engine No. 2454? A. I did.

"Q. Read, please, the entire record? A. 'July 19th, at 6:45 a. m., engine 2454, spark arrester good and screen is good.

"Mr. Whittemore: Independent of the record and the objections therein contained I object to that question.

"The Court: I shall make the same ruling as to that as I have done before.

"Mr. Whittemore: I pray an exception.

"Exception allowed and sealed accordingly.

"Q. When did you make that record with reference to your examination? A. Well, maybe a few minutes after I examined it.

"Q. What was the record that you made with reference to whether or not it correctly recorded the condition in which you found the engine? A.

Here is the record on July 19th, engine 2454 at 6:45 a. m., stack good, or screen and spark arrester.

"Q. Now, that is your record? A. Yes, sir.

"Q. What was the condition of the spark arrester and stack at that time? A. It was good.

"Q. What was the nature of the examination that you made at that time? A. Well, on each side of the spark box there is a cap that we use for to knock sparks out of the front end. That is about five inches and a half or six inches square. I take that cap off and look in and I can see the whole screen, that is, from each side.

"Q. What kind of screen was there in that engine? A. Something like that sitting there (indicating sample).

"Q. The cone shaped screen? A. Yes, sir.

"Q. That screen, how was it connected at the top and bottom? A. On the bottom it is cut around what we call the exhaust pipe and there is a band around the outside is screwed and that holds it together. That is perfectly tight.

"Q. Can sparks escape from the place where the screen is connected? A. No, sir.

"Q. From your examination of it in the morning of July 19th, was there anything the matter with the meshes in the screen? A. No, sir.

"Q. And could fire escape anywhere except through the meshes of the screen? A. Not to the best of my knowledge.

"Q. Did you examine the screen again that day? A. No, sir.

"Q. Look at your record of 2454. A. Yes, sir; I examined it on the 19th at 4:50 p. m.

"Q. What examination did you then make of it? A. I made the examination as I did in the morning.

"Q. What did you then find the condition of the screen to be? A. Good.

"Q. And the smokestack? A. Same.

"Q. Do you mean good? A. Good; yes sir.

"Q. When you say you find the condition to be good, what do you mean by that? A. Well, I meant that everything is in proper condition.

"Q. Is that in your handwriting? A. Yes, that is my handwriting.

"CROSS-EXAMINATION by Mr. Whittemore:

"Q. You examined a good many engines in the course of a day, didn't you? A. I examined eight.

"Q. Eight engines in a day? A. Yes, sir.

"Q. Do you have others to examine engines? A. No, sir.

"Q. Then you do not examine every engine that comes in? A. Not every engine, because we have some that comes in in the night, but I only examine engines in the passenger service.

"Q. Passenger service? A. Yes, sir.

"Q. Then you have only eight trains that come in there during the day in the passenger service? A. Yes.

"Q. Do you ever find in your examinations any sparks or pieces of coal stuck in the screen? A. Well, I very seldom do.

"Q. Eh? A. Not very often.

"Q. You say that the screens are not sometimes clogged up with sparks? A. Not very much.

"Q. If the screens were clogged up with sparks it would affect the draft, wouldn't it? A. Yes, sir.

"Q. Don't you sometimes find that when the engine is examined that some one has knocked holes into the spark arrester? A. I never did.

"Q. Never did? A. No, sir.

"Q. Don't you know that the screen interferes with the draft somewhat of the engine? A. I do.

"Q. Don't you know that that screen prevents the engineers sometimes from making as good time as they could do if it were not there? A. Well, I suppose the cleaner the engine would be in the front end, why, the better she would work.

Q. And you say you never find any holes knocked in the screens with a bar or pick or anything? A. No, sir .

"Mr. Dungan: I desire to offer this book and also the book that Mr. Burkhardt used in evidence.

"The Court: They will be received."

Mr. Whittemore: Will these books be received in evidence now?

The Court: I can not say. I have no control over that.

"By a juror: Q. When you find a hole in the screen do you take it out immediately and put in a new one? A. No, sir; I don't take it out, but I go to work and cut a small piece of netting off and put it over and wire it fast.

"By another juror: Q. It is just as good as new then? A. Yes, sir.

"By Mr. Whittemore: Q. Where do you get that netting from? A. I have it down there.

"Q. The same mesh as this? A. Yes, sir.

"Q. When you do that your book is entered how? A. Well, the screen is all right and it is good.

"Q. And you mark it in your book as good? A. Yes, sir.

"Q. Then you don't know whether or not you did that to this engine? A. I never did it to this engine.

"Q. How do you know? A. I know I didn't.

"Q. Can you remember whether you ever did it to this engine when you have examined it every day for the last year, or nearly every day? A. I never examined that engine, this engine had a hole in the screen.

"Q. You say this one never had a hole in the screen? A. Not when I examined it.

"Q. And how do you know that this engine never had a hole in the screen? A. I didn't say she never had it in, but not at my place.

"Q. Can you mention any other engines anywheres that did have a hole in the screen? A. I don't know as I can just particularly mention it.

"Q. Why can you say that this engine didn't have a hole in the screen, then? A. Why, I remember this engine.

"Q. You remember this engine? A. Yes, sir.

"Q. And you know it never had a hole in the screen? A. Not to my knowledge.

AMOS TURNER, a witness produced in behalf of the defendant, being duly sworn according to law on his oath saith:

Examined by Mr. English:

Q. What is your business? A. Master mechanic.

Q. With the Lehigh Valley Railroad Company? A. Yes, sir.

Q. Whereabouts are you located? A. Easton, Pa.

Q. How long have you been in the employ of the Lehigh Valley Railroad Co.? A. About forty years.

Q. What positions have you held with the company prior to becoming master mechanic? A. Well, machinist and general foreman.

Q. And always been located at Easton? A. Most of the time, yes, sir.

Q. What do the duties of master mechanic involve, so far as relating to the repairing of the locomotives and the screens, and that sort of thing? A. The duty of master mechanic is to look after repairs of locomotives, and see that everything is kept in proper position and shape.

Q. Are you responsible as the master mechanic for that? A. Yes, sir.

Q. Are these repairs made at the company's shop? A. Yes, sir.

Q. Are you familiar with the use of screens in the locomotive engines of the Lehigh Valley Railroad? A. Yes, sir.

Q. This screen or replica produced here in court, is that the kind used by them? A. Yes, sir.

Q. Is that the kind installed in engine No. 2454 and was it in July, 1905? A. Yes, sir.

Q. What is the size of the mesh of that screen? A. A little less than a quarter of an inch.

Q. What is the thickness of the wire? A. It is .095 or three thirty-seconds of an inch.

Q. How many openings are there to the square inch? A. Three.

Q. Do you know or not, how that compares in size with the screens of other railroads, that is in comparison with other railroads? A. Yes, sir.

Q. With what screens, on other railroads, are you familiar? A. The Pennsylvania Railroad Company, the New Jersey Central Railroad, and the Philadelphia and Reading.

Q. How does the size of the mesh of your company's screen compare with the size of the mesh in the Pennsylvania Railroad?

Mr. Whittemore asks permission to cross-examine at this point, as to the man's qualifications.

Court: You may do so.

CROSS-EXAMINATION by Mr. Whittemore:

Q. From what do you get your knowledge as to the screens on the other railroads? A. Personal observation.

Q. When? A. Within the last year.

Q. And not before that? A. Oh, yes, sir.

Q. How long before? A. Off and on for the last ten years.

Q. How often did you see the engines on the Pennsylvania Railroad? A. Two or three times a year.

Q. Where? A. At the meadows shop.

Q. What did you examine in the engines when you saw them? A. I would make a general inspection of the repair shop.

Q. Did you see the interior of the front end of the engine? A. Yes, sir.

Q. What did you go there for? A. For observation and knowledge, to see what you could learn.

Q .In preparation for this case? A. Oh, no, sir.

Q. Had you seen any screens of the Pennsylvania Railroad company's engines in July, 1905, or about that time? A. Well, I can not recollect whether 1904, 1905 or 1906.

Q. Did you see any in 1904? A. Probably I did.

Q. You do not recall having seen any? A. No, sir, not that date, no sir.

Q. You may not have seen any from 1903 until 1906? A. Well, I never kept any record of the dates, that I made these inspections.

Q. No—you did not?

Mr. English: We have other railroad men here, and to save a lot of time, I will withdraw that question.

Court: This witness should show that the screens in use by the Pennsylvania

Railroad Company in 1905, were the same as are now used, and that the last four or five years have been years in which the Pennsylvania Railroad have used the same thing that this railroad used, or was using in 1905. I think that would be something that would tend to enlighten the jury, whether or not the Lehigh Valley Railroad had used the best practicable means, but as you withdraw the question, you may go on.

DIRECT-EXAMINATION by Mr. English (continued):

Q. Do you know how the size of the mesh used by the Lehigh Valley Railroad compares with that used by the Pennsylvania Railroad? A. Our screen is a little smaller mesh than that of the Pennsylvania Railroad.

Q. Do you know how the screen of the Lehigh Valley Railroad, compares with the screen of the Reading Railroad? A. Ours is a little smaller than the Reading.

Q. And how about the New Jersey Central? A. They are about the same.

Q. Does the installation of new screens, and the repairing of screens, and the replacing of screens in locomotives come under your department? A. Yes, sir.

Q. Have you made a study of that subject? A. Yes, sir.

Q. And is it not possible to run a locomotive, if the smokestack is closed tight? A. No, sir, it is not.

Q. Is there therefore a limitation on the extent of the screen, which you can put in the front of a locomotive? A. Yes, sir, there is.

Q. Why is that so? A. Well, you could get it too small, and then an engine will not make steam enough to do the work required.

Q. You can not get sufficient draught? A. No, sir.

Q. Do you know from your practical experience and investigation, whether a smaller screen than that used by the Lehigh Valley Railroad Company is practicable or not? A. Yes, sir.

Mr. Whittemore: I want to know what he knows about an engine, and I will ask permission to further cross-examine this man.

Court: You may go on and do so.

FURTHER CROSS-EXAMINATION by Mr. Whittemore:

Q. Have you ever run an engine? A. Not as an engine man.

Q. You don't know what the operation of an engine is with regard to screens—you don't know what effect a screen has upon the operation of an engine, do you? A. I think I do.

Q. If you did not run an engine, how do you know, from practical experience, what effect it has upon it? A. A person need not run an engine to know, by riding on and looking after an engine, he will know whether that is a proper screen or not, whether he could work with a smaller screen than that which is in the engine.

Q. Do you ride on an engine when making trips? A. Not lately.

Q. Did you in 1905? A. Very little in 1905.

Q. How can you tell whether you could use a smaller mesh than that, if you did not run an engine to test it? A. How could I tell.

Q. Yes. A. By putting a finer mesh in and riding on the engine with the engine man.

Q. Have you done that? A. Yes, sir.

Q. When? A. Well, probably that is back ten or eleven years ago.

Q. Did they have extension fronts and spark arresters at that time? A. Oh, yes, sir, ten years ago they had extension fronts and spark arresters —they had them then.

Q. When you made these tests? A. Yes, sir.

Q. Did you see that test made yourself? A. Yes, sir.

Q. And was it the same style engine as this one? A. About the same style.

RE-DIRECT by Mr. English:

Q. What do you say as to a smaller screen, is it practicable? A. No, sir.

Q. When this screen is installed, and in proper running order, is it possible for sparks to escape through the smokestack, except by passing through the screen? A. No, sir, it is not.

Q. What is your judgment on the screens used, on the Lehigh Valley Railroad, for the practical prevention of the communication of fire from locomotive engines used by it? A. In my judgment, it is the best that can be put in service.

Q. What have you to say as to the efficiency of screens used by the Lehigh Valley Railroad in their engines for the prevention of communication of fire, in 1905? A. It is the best we know of.

FURTHER CROSS-EXAMINATION by Mr. Whittemore:

Q. On the Pennsylvania Railroad, they have diaphragms on their engines, haven't they? A. Yes, sir.

Q. And the Lehigh Valley Railroad has no diaphrams, not as a rule, in their engines, have they? A. No, sir, not as a rule.

Q. Do you know the engine No. 2454? A. Yes, sir.

Q. That has no diaphragm in it? A. No, sir.

Q. Will you explain what a diaphragm is? A. It is a plate that goes up partly over the flues, sometimes covering two-thirds of the flues, and will probably be about six inches off of the top row of flues, and extend down to the bottom, and stand about a foot from the screen taper—now, that is one. There are others. There are a great many shapes and forms of diaphragms in locomotives, and there is not two corporations has the same shape.

Q. Does the Reading Railroad have diaphragms on its engines? A. Some of them.

Q. Are there any engines on the Reading Railroad that does not use diaphragms on their engines? A. Yes, sir.

Q. Will you look at this diagram of an engine on the blueprint marked Exhibit D-2, a diaphragm is it that projects out in front of the tubes between this screen and the end of the tubes, and extending down in an oblique direction. to about the top of the nozzle? A. Yes, sir, there are some of them in that way.

Q. There are some mesh that are made in two plates, one extending out part way down in front of the screen, and another one beginning right below it, and extending down the rest of the way, in front of the screen? A. Yes, sir.

Q. What comes out of the tubes in the way of sparks strike these diaphragms? A. Yes, sir.

Q. And the effect is when the sparks come out of the tubes and strike these diaphragms, to knock the sparks downwards into the lower part of the spark box is it, not? A. It would have a tendency to throw them down.

Q. And when the diaphragm is not there, the draught will pull through the tubes, and draw the sparks against the screen? A. Well, hardly.

Q. Well, what would become of the rest? A. They are thrown through the side of the screen.

Q. When the screen is in the way, it would get the whole blast, won't it? A. What the tubes raise strikes at that point, yes, sir.

Q. Is not that considered a part of the spark arrester apparatus? A. Oh, no, sir.

Q. You have known it to be so considered, then, have you? A. No, sir.

Q. When the sparks project right out on the screen, without any diaphragm in the way, it produces a great deal of corrosion on the screen? A. No, sir.

Q. Don't it have any effect at all? A. It has not a great deal—it has some effect.

Q. And the portion of the screen in front of the tubes gets more wear than the portion not in a direct line, with the tubes? A. It is hardly perceptible, the difference.

Q. The front end of the spark arrester was devised for the purpose of collecting sparks, was it not formed as a large box in the front of the engine for the purpose of collecting sparks that could not go through the screen, wasn't it? A. That may have been the cause.

Q. As a mechanic, don't you know that that is so? A. That is the opinion of some people only.

Q. What other purpose was the front end of the spark arrestor devised for, if not for that? A. A mechanical department considered that it makes a better working engine by having a larger smoke-box, than a smaller one.

Q. Now, the operation of an engine, if there is a diaphragm, is that the sparks come out and strike

the diaphragm and are knocked down to the bottom of the box, is not that so? A. Yes, sir.

Q. And when they are knocked down to the bottom of the box, you find a collection of sparks there, and they get into a collection of sparks and rest there, do they not? A. No, sir, they do not.

Q. What becomes of them? A. They are picked up and thrown to the exit and danced around that netting—

Q. Don't you ever find any engine comes in, that there is a large collection of sparks in that end of the engine? A. Oh, yes, sir.

Q. Then they do rest there? A. When they come in, they rest there, but that is only a small portion of what goes into that smokebox, that is that rest there.

Q. Do you know the proportion of sparks that go out of the stack, as compared with those that stay in the front end? A. I could make a little explanation, if you want it, on sparks that was collected years ago, to see how many sparks there was in a round trip, in a locomotive.

Q. You may do so. A. There was a time that we had a spark box in front of the engine, that sparks was deposited in, and not in the smokebox, but in a box, and in a trip, from Jersey City to Easton, we would collect about five hundred pounds of anthracite sparks.

Q. My question is, what, if you know, what proportion went out of the stack as compared with what was in the box? A. No, sir, I can not tell you that.

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

Q. Outside of the Pennsylvania Railroad, or the Reading Railroad, and the Central Railroad of New Jersey, have you any knowledge as to screens used elsewhere? A. Well, not very close-

ly. I have been on the New York Central Railroad, and been on the Lake Shore, but I do not remember exactly the mesh— I was a stranger and I did not measure it up—but from appearances they are all using pretty close to the same mesh.

Q. I just want to know if you knew? A. No, sir.

Q. On the Central Railroad of New Jersey, do they use cone screens or basket screens? A. Baskets, you know there are a great many shapes of baskets.

Q. I mean a screen that is in this form (showing witness an illustration in a book)—is that the form of a basket? A. Something on that order.

Q. Now, that is like a basket, is it not—see if I can state this correctly—the diaphragm in the basket screen extends down here to the end of the nozzle, does it not? A. Yes, sir.

Q. And then there is a screen crosses in a horizontal position? A. Yes, sir.

Q. Where the nozzles are? A. Yes, sir.

Q. And then in front of the nozzles, the screen extends up obliquely to the front end, does it not? A. Yes, sir.

Q. And the sparks that come out, strike the diaphragm, and are thrown down and go around under the level of the tube, of the nozzles, and strike this screen, and comes up around on the side of the nozzles, through the screen, don't they? A. Yes, sir.

Q. And that basket screen extends all across from one side of the smoke box to the other, does it not? A. Yes, sir.

Q. Now on that screen there is a great deal more surface than there is on the cone screen, is not that so? A. Very little more—very little more square feet.

Q. You say that as a mechanic? A. Well, there is a difference, there is more, but not such a great deal more.

Q. On the Jersey Central, they use that kind of screen, do they not? A. Yes, sir.

Q. The basket screen? A. Yes, sir.

Q. And the Pennsylvania Railroad you say use that kind of screen? A. Yes, sir, from the master mechanic standard—

Q. And in the Reading? A. No, sir—well partly part are that kind and part a straight up screen, right in front of the flues.

Q. What do you mean by "straight up kind"? A. Four inches back of the flues.

Q. They don't use any cone screen? A. I haven't seen any cone screens, no sir.

Q. Do you know what kind of coal No. 2454 engine used, what was the character of the coal they used in July, 1905? A. We were using anthracite coal in them runs at that time.

Q. Do you know of any other railroad that uses a cone shape screen? A. I do not.

Q. Do you think that a spark would escape through a mesh of one-quarter inch size, in good order, and extend over a distance of one hundred and fifteen feet and have life enough left in it to set fire at that distance?

Mr. McCarter: I object to the question—I do not think this witness can be asked that question. That involves a knowledge of quite a great many things other than a knowledge of the screens themselves.

Court: Still he says he was competent to express an opinion and has ridden on the engines, with the object of noticing the effect of such screens and I think that was some of the knowledge that would perfect it, that is with respect to how large a spark and how long it would retain its life—I

think that is competent, and I will admit the question.

Mr. McCarter prays exception.

Exception allowed; sealed accordingly.

WM. H. SPEER, (Seal),
Judge.

A. I have never seen a spark that set fire to anything at that distance.

RE-DIRECT by Mr. English:

Q. What is a diaphragm put in an engine for? A. Are you asking this of the Lehigh Valley Railroad or generally?

Q. From what Mr. Whittemore cross-examined you about? A. The Lehigh Valley Railroad?

Q. Yes. A. What we put them in for is to regulate the draught of the fire, to have the fire work regularly, and evenly, over the fire box.

Q. And that is the object of the damper, to regulate the draught? A. Yes, sir.

Q. I hold in my hand a little square of netting, is that the same kind and size of netting as is in the screen in the model here? A. Yes, sir, it is the same.

Q. And this was the kind of netting used in 1905? A. Yes, sir.

Q. And installed in this engine? A. Yes, sir.

Juror No. 3: Q. Will you show us on that blueprint, where these spark holes are located? A. They are about, or just a little above the centre of the smoke box, that is the line of the centre of the smoke box, and that is where the hand goes up and the spark box is at the bottom right under the smoke box, that is the spark box here (indicating), that is the front end of the smoke box, and there is the spark box (indicating on Exhibit D-2).

Q. How are the sparks drawn out of the spark box or forced out, during the inspection? A. They are not forced out, they are scraped out with a scraper.

Q. Through where? A. From the spark box.

Q. Through where? A. The smoke box.

Q. Where is the access to the smoke box. A. By opening a front door.

Q. Show us where the front door is? A. This is the front door (indicating on Exhibit D-2) and the smoke box is there (indicating).

Q. Is that the opening or the part of cast iron frame? A. This is the opening in the cast iron ring, there is a ring and a door, and that forms a smoke head front, the ring and the door or frame as you may call it.

Q. How is that door fastened? A. It is fastened with clamps, twelve clamps.

Q. And machine bolts? A. Yes, sir.

Q. What is the size of the bolt? A. Five-eighths of an inch.

Q. And what is the distance from the front of the smokebox to the tubes, in other words, the length of the smoke box? A. Well, the smoke boxes vary in length, this engine has a smoke box of three feet two inches from the centre.

Q. From the screen? A. Yes, sir, from the screen.

Q. But to the tubes, how much? A. They run four feet to four and a half feet or five feet even, and we have some as long as eight feet.

Q. How long was it in that engine? A. This was about five feet two inches or six feet.

Q. And the depth of cinders, that accumulate then, is the height of these blow pipes, practically a foot and a half in the centre of the box? A. Yes, sir.

Q. And five feet long? A. No, sir, there is very few cinders lodged back here (indicating) they go up towards the front, and they would rush down here and bank up in front again.

Q. They would probably bank up two feet high in front? A. Yes, sir, sometimes.

Q. And then the inspector opens up that door? A. Yes, sir.

Q. And scrapes all that soot down through the box? A. Yes, sir.

Q. And then goes inside and makes an inspection? A. Yes, sir.

Q. Is that screen covered with soot when the locomotive stops running? A. No, sir.

Q. Has it blown through? A. Yes, sir.

Q. On that Reading locomotive you spoke of, with a screen four inches away from the water tubes, what becomes of the screen sparks in that locomotive that accumulates, that takes the place of those which pile up in your locomotive, do they clog up the tubes? A. They remove those in the roundhouse, but that is not in all our engines.

Q. What class of locomotive is this? A. An eight wheel connecting engine, with Pony truck.

Q. What is the object of swedging down these tubes at the fire box end, down to an inch and a half? A. In order to get a proper curve on the tubes, in order to make it tight.

Juror No. 1: Q. The door, after it was taken off, was it packed with lead or asbestos, or refitted? A. No, sir.

Q. And I will ask you then if it was put back again, and refinished? A. No, sir, it was smooth.

Juror No. 3: Q. Does the inspector use a poker, or fire hook, to push these sparks down through the smoke box? A. A hand scraper.

Mr. English: Q. From your experience, what would you say as to whether or not the Lehigh Valley Railroad Company has taken and used all practicable means to prevent the communication of fire from its engines, and particularly engine No. 2454, on July 19th, 1905?

Mr. Whittemore: I object to the question —what has been done will speak for itself, and I object to it further on the constitutional grounds that I have already made my motion in regard to.

Court: This is a conclusion you are seeking to get from the witness, that the jury is called upon to find for themselves, but I will allow the question.

A. Yes, sir.

Q. What do you say, it has or has not? A. Yes, sir.

Q. It has? A. It has.

Q. Can you compare the efficiency of the cone screen used on that engine on that day, to the Master Mechanics, for instance the engine referred to by Judge Whittemore? A. The screen is, or the spark arrestor, the shape that that screen has put in there, is more readily looked after and for the inspection, or detection of any bad places, that might be in it, than the Master Mechanics' spark arrestor.

Q. I judge then you consider that better than the Master Mechanics' screen? A. As far as that is concerned, yes sir.

Q. And the thing that does the arresting of the sparks, is the screen, is it not? A. Yes, sir.

Q. And I suppose the efficiency depends on the size of the character of the screen? A. Yes, sir.

FURTHER CROSS-EXAMINATION by Mr. Whittemore:

Q. What is the boiler pressure carried in engine No. 2454, when in operation? A. Two hundred pounds.

Q. Do you know what the pressure is as the nozzle, where the steam exists, in the smoke box? A. Well, that varies, three, four, or five or six pounds, sometimes down to as low as a pound and a half.

Q. Do you know what the pressure is when the engine is running at forty miles an hour? A. In the steam chest?

Q. No, where it goes out of the nozzle? A. Well, tests have put that down as low as a pound pressure, to the inch.

Q. Does it not run up as high as sixty pounds to the inch, where it comes out of the nozzle? A. No, sir, you wont get very far with that engine, if you had sixty pounds pressure at your nozzle, on the locomotive.

Q. You never knew that to be so stated? A. That is all in the handling, and the way an engine works, and the size of the nozzle, and the size of the exit.

Q. When an engine is travelling on short motion, at high speed, with the whole of the two hundred pounds pressure, with the exception of one or two pounds, is it not exhausted in the cylinder? A. You ask me about the pressure in the exhaust.

Q. Well, what becomes of the pressure, if it is not exhausted in the cylinder, does not some of it come out in the nozzle? A. Yes, sir, after it has done its work, in the cylinder, of course it is exhausted at the nozzle.

Q. Is not all the boiler pressure exhausted in

the cylinder, except one or two pounds? A. No, sir.

Q. What becomes of the rest of it? A. Well, that is quite a difficult matter to explain, just how many pounds pressure is in your cylinder, and how many pounds pressure is in your steam chest.

Q. I am not asking you whether it is in the steam chest or how it gets in the cylinder—but it gets in the cylinder after it leaves the steam chest, does it not? A. Yes, sir.

Q. I will get at it in another way—do you know how much vacuum pressure there is in the front end of the engine? A. Vacuum pressure with the exhaust escaping in the front end?

Q. Yes. A. It goes up to five or six inches.

Q. What does that represent in pounds? A. It would not mean a pound.

Q. Atmospheric pressure? A. But the way this is arrived at—it is arrived at by putting water in a glass gauge—you can not measure that in pounds, you have to measure it in inches.

Q. Is there not four or five pounds atmospheric pressure at the front end, induced by the exhaust? A. From the outside?

Q. Yes. A. Probably there is.

Q. Is not that what causes the draught and the pull from the fire? A. Yes, sir, the vacuum you form in the smoke head, yes sir.

Q. Don't you know that that vacuum could not form in the front head, and that pressure, and produce the pull on the fire, if the exhaust at the nozzle was only one or two pounds? A. Yes, sir, sure.

Q. It could? A. Yes, sir.

Q. You could produce a vacuum pressure of four or five pounds, with a one or two pound ex-

haust at the nozzle? A. Oh no, we ain't talking about what is at the vacuum.

Q. You are talking about pounds pressure at the nozzle, and the steam as it comes out of the nozzle? A. Yes, sir.

Q. Now, can you produce four or five pounds vacuum pressure at the front end by one or two pounds pressure of steam at the exhaust at the nozzle? A. Not pounds, but inches.

Q. I understood you to say a moment ago, that there was a vacuum pressure of four or five pounds at the front end? A. No, sir, I did not say so.

Q. How much is there? A. From the nozzle?

Q. At the front end? A. You can not get steam pressure from the nozzle, or smoke head, either.

Q. I am talking about vacuum pressure at the front end that produces the draught? A. Yes, sir.

Q. Don't you know how many pounds that is? A. No, sir, there ain't no pounds in it, it is all inches.

FURTHER CROSS-EXAMINATION by Mr. English:

Q. What is the life of a screen in your engines? A. The average life of a screen in our engines, is a year.

Q. Mr. Shannon testified that engine No. 2454 had the new number 2460 last January, or don't you know when it was changed? A. Last January, it was changed.

Q. And it has had that number how long, approximately? A. It has had that number three or four years now.

CHARLES E. CHAMBER, a witness produced in behalf of the defendant, being duly sworn according to law on his oath saith:

Examined by Mr. English:

Q. What is your business? A. Superintendent of motive power, of the Central Railroad of New Jersey.

Q. Are you employed by the Lehigh Valley Railroad Company? A. No, sir.

Q. Have you ever been? A. No, sir.

Q. Previous to becoming superintendent of motive power of the Central Railroad of New Jersey, what previous positions have you held in the New Jersey Central Railroad? A. General Road Foreman of Engines; General Master Mechanic, and superintendent of motive power.

Q. Have you ever been employed by any other railroad, outside of the N. J. Central Railroad? A. Yes, sir.

Q. What? A. Philadelphia & Reading Railroad, and the Chicago, Burlington & Quincy.

Q. What positions have you held in the Reading Railroad? A. Road Foreman of Engines.

Q. What positions have you held in the Chicago, Burlington & Quincy? A. Machinist, fireman, and locomotive engineer.

Q. Are you familiar with the operation of screens in engines for the arresting of fire by sparks? A. Yes, sir.

Q. That has been a part of your business? A. Yes, sir.

Q. Did you, at the request of the defendant, examine engine No. 2460? A. Yes, sir.

Q. When did you make that examination, and where? A. On January 15th, I think it was, at Easton, Pa.

Q. What kind of screen did you find installed,

comparing it with the one now in court here? A. As I remember, it was an exact duplicate of that screen there (indicating the model in court).

Q. Did you examine the way it is installed in the engine? A. Yes, sir.

Q. Did you examine the size of the mesh of the wire? A. Yes, sir.

Q. How does the size of the wire used by the Lehigh Valley Railroad compare in size, with that used by the Central Railroad of New Jersey? A. It is a smaller mesh opening in the Central Railroad of N. J.

Q. Do you know how it compares with the wire used in the Reading Railroad—do you know? A. Yes, sir.

Mr. Whittemore asks permission to cross-examine the witness as to his qualifications.

Court: You may do so.

CROSS-EXAMINATION by Mr. Whittemore:

Q. When were you on the Reading Railroad? A. June 1st, 1901, to June 1st, 1902.

Q. You had not had anything to do with the Philadelphia & Reading Railroad since then? A. Only in a general way, at Jersey City, as they run in there.

Q. What do you mean by that? A. Well, we have supervision over the Reading Railroad engines in Jersey City, over our road.

Q. What does that supervision have to do with the actual knowledge or examination of these engines? A. Well, occasionally I look into the front end of these engines.

Q. Have you looked in the front ends of the Philadelphia & Reading Railroad engines in July, 1905? A. I don't know whether I did or not, in

July, 1905, I may have looked at them, I have looked at them in each year since 1901 no year escaping my observation since that date.

RE-DIRECT by Mr. English:

Q. Do you know how it compares with the wire used in the Reading Railroad company's engines? A. Yes, sir.

Q. How does it compare in size with the wire used in the Reading Railroad company's engines? A. It is practically the same size.

Q. Do you know how it compares with the size of the wire used in the Chicago, Burlington & Quincy railroad? A. Yes, sir.

Mr. Whittemore: Asks permission to cross-examine.

Court: You may do so.

CROSS-EXAMINATION by Mr. Whittemore:

Q. How long ago were you on the Chicago, Burlington & Quincy Railroad? A. I left there in June, 1901.

Q. And haven't had anything to do with that road since? A. Not in the way of being connected with it, any more than I have observed things some at different times since then.

Q. How have you had occasion to observe any of the road engines since you left their employ? A. I have noticed a number of them in the Baldwin Locomotive Co., being constructed and since then I have seen them on their lines, in their runs, and I have looked in the front ends.

Q. Did you open the front ends? A. Yes, sir.

Q. And since then up to 1905? A. Yes, sir, and later than that.

Q. Later than that? A. Yes, sir.

RE-DIRECT by Mr. English:

Q. How does it compare with the mesh of the wire used in the Lehigh Valley Railroad Co., or with the model here in court? A. It is a smaller mesh than they use.

Q. Smaller than the Chicago, Burlington & Quincy? A. Yes, sir.

Q. Is any smaller size mesh used than that used by the Pennsylvania Railroad practicable for the use, in a locomotive?

Mr. Whittemore: I object to the question, and ask permission to cross-examine.

Court: You may cross-examine him.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Have you ever tried any smaller mesh than that used here? A. No, sir.

Q. The way that it is determined, as to the size of mesh to be used, is by testing it, is it not? A. Yes, sir.

Q. And that is the only way? A. The information and gain as you come down from one size to another, is the way you get your determination on that point.

Mr. Whittemore: I think it is a conclusion that he is testifying to, and I object to it.

Court: I think that is a direct answer to your question.

Objection overruled.

Mr. Whittemore: Q. Have you used any larger mesh? A. Yes, sir.

Q. In your experience, as an engine man? A. Yes, sir.

Q. And have you used, in your experience, as an engine man, the same size mesh? A. Yes, sir.

Q. And your answer to the question that is

under discussion now bears upon your experience in changing from the larger to the smaller size? A. Yes, sir.

Q. And not on account of any experience in changing from a smaller size to one still smaller? A. No, sir, because we finally reached a point, and we could not go any further.

Q. How could you tell you had reached a point, without trying a smaller one? A. Because, we get a great deal of blocking with that size of screen, and we found that if we want any smaller, we would not get any draught at all.

Q. And no other method is adopted to prevent the blocking of that and they just stop when they had reached that size, and they did not go to any smaller size, and ascertain whether there would be any further difficulty or not? A. You could not adopt any method to prevent blocking—

Q. Doesn't the interposition of the diaphragm prevent it? A. No, sir.

RE-DIRECT by Mr. English:

Q. I will ask you, as a result of your experience, and knowledge, whether or not it is practicable to use any smaller screen than that, in the front of the locomotive, to arrest the communication of fire by sparks? A. It would not be practicable to use any smaller screen than that.

Q. From your examination of the screen used by the Lehigh Valley Railroad, what have you to say as to the efficiency of that screen for the prevention of the communication of fire from their engines? A. I should say it was an efficient screen.

Q. What have you to say as to the efficiency of the screen used by the Lehigh Valley Railroad as compared with the screen used by other railroad

companies, with which you are familiar? A. I should say it was as efficient as any.

CROSS-EXAMINATION by Mr. Whittemore:

Q. The Chicago, Burlington & Quincy railroad uses diaphragms on their engines, do they not? A. Largely.

Q. They do not use a cone shaped screen like the one here in court? A. They use some of them kind, and they use a screen built on a square or box screen, as they call it.

Q. And on those engines, they have diaphragms, haven't they? A. As a rule.

Q. On the Philadelphia and Reading Railroad, do they use a cone shaped screen? A. They use some, yes, sir.

Q. And on those engines they have diaphragms also, haven't they? A. No, sir.

Q. Do you say they do not? A. No, sir, they do not.

Q. On any of them? A. No, sir.

Q. Do not the Philadelphia and Reading use diaphragms, at all? A. Not to my knowledge.

Q. The Central railroad uses diaphragms, do they not? A. Yes, sir.

Q. Now, you said that the position of the diaphragms between the tubes and the screen would not tend to prevent the screen from clogging up with sparks, did I understand you correctly in that respect? A. It would not prevent it from clogging up?

Q. Yes. A. Well, it might prevent a piece of the screen right in front of the flues more or less from blocking up, but you change the position of your screen entirely, so that the horizontal piece which is placed on the top of the nozzle in the other styles of screens block up very badly.

Q. When there is a diaphragm a good many sparks strike the diaphragm, and are thrown down to the bottom of the firebox, are they not? A. A great many of the sparks when they strike the diaphragm, are thrown down to the bottom of the firebox.

Q. And a great many of them as they strike the diaphragm, and are deflected down to the bottom of the firebox, strike other sparks there, and come to rest with these other sparks, do they not? A. Well, the heavier ones would drop down and come to rest, but the lighter ones would go right up and out of the screen.

Q. So that those that strike the diaphragm and thus come to rest at the bottom of the firebox, after striking the diaphragm, are not those the sparks that go to block up the screen? A. Oh, they are too large to block it, they naturally have to thrash around, until they become small enough to pass out, or less wedge in the opening.

Q. They are all kinds of shapes? A. Yes, sir.

Q. And if they are too large, they would stick in that place, wouldn't they? A. Well, after they have got a start in there, of course they would stick there.

Q. When you don't have a diaphragm, these sparks that would have struck the diaphragm, if it was not there, if of a proper shape to get stuck in the screen, would go out at the nozzle, or get stuck in the screen? A. If they are small enough.

Q. If they had an opening, so that they could get into one of these meshes, they would stick there, that is knowledge, is it not? A. Yes, sir.

Q. Now, can you tell me what the pressure is at the nozzle? A. The exhaust pressure?

Q. In the locomotives, where they carry a boiler pressure of 200 pounds, say? A. The exhaust pressure.

Q. Yes. A. That varies from a pound to eight or ten pounds, according to the way the engine might be working.

Q. Does it not run out to sixty pounds pressure? A. Oh, no, sir.

Q. Are you sure of that? A. I don't think the engine would run very far, if it did.

Q. Is not the exhaust of a very powerful nature? A. By raising its speed, but not by back pressure, the velocity seems to make it appear so to you, but it is not in reality.

Q. The exhaust down at the nozzle is more powerful still than it is at the top of the stack, is it not? A. Not necessarily.

Q. It retains all its power all the way up to the top of the stack, does it not? A. I should say it is, by velocity.

Q. That is what pulls the fire, is it not? A. Yes, sir.

Q. And makes the draught? A. The vacuum formed in the front end of the engine, is that which produces the draught.

Q. And that can be done by a ten pound pressure, do you say? A. Yes, sir.

Q. What do you have a blower for then? A. To blow the fire, when the engine is at rest.

Q. And that is the way the blower exhausts, directly from the boiler? A. Steam from the boiler, yes.

Q. And when you set the blower in motion, you get 200 pounds exhaust, in the front end of the engine, don't you? A. Yes, sir, through a quarter inch hole.

Q. What is the size of the opening at the nozzle then? A. They vary.

Q. Are these the openings here (indicating on the model)? A. That looks to be about an inch,

but it comes from a quarter inch connection with the boiler.

Q. I am talking about the openings for the exhaust from the boiler, you have some tubes there? A. Yes, sir.

Q. And the tubes are much smaller than the openings shown in the model, are they not? A. Yes, sir.

Q. oHw large are these tubes across? A. They vary from two and a half to six inches, according to the size of the nozzle and the style of the engine.

Q. On engine No. 2454, how is it? A. I did not measure them.

Q. If that model is correct, it would be smaller than the opening shown there, would it not? A. I don't know as it would, that may be just the size, but I don't know—did you say the tubes ran through?

Q. Yes? A. The tubes are there.

Q. Have you looked at that model? A. No, sir, I have not, but I think the tubes ought to be there.

Q. Look at it, and get that correct for us? A. (Witness examines the model and says) I should say that represented the tubes as they are on the engine.

Mr. Whittemore: Some other witness has said that the tubes were not there.

Q. Have you ever tested the exhaust at the nozzle, by any mechanical means, to ascertain the exhaust pressure there? A. No, sir.

Q. Then your estimate that it is ten pounds to the square inch is just guess work? A. Based on information furnished by other tests.

HOWARD H. MAXFIELD, a witness produced in behalf of the defendant, being duly sworn according to law on his oath saith:

Examined by Mr. English:

Q. What is your business? A. Master Mechanic of the Pennsylvania Railroad.

Q. Whereabouts are you located? A. At Trenton.

Q. Are you employed by the Lehigh Valley Railroad Company? A. No, sir.

Q. Have you ever been? A. No, sir.

Q. How long have you been Master Mechanic of the Pennsylvania Railroad? A. Five years.

Q. Previous to being Master Mechanic of the Pennsylvania Railroad, what position have you held? A. Assistant Engineer of Motive Power, for practically two years, and Assistant Master Mechanic for four months, and Assistant Road Foreman of Engines, for one year and seven months and prior to that I was inspector, or superintendent of motive power for one year, and prior to that I served my apprenticeship at the machine shops.

Q. Are you a graduate mechanic? A. Yes, sir.

Q. Where did you graduate? A. At Stevens Institute.

Q. Are you familiar with screens for the purpose of arresting sparks in locomotives? A. Yes, sir.

Q. I suppose it is your business to look after the installment or repairs of such screens? A. Yes, sir.

Q. And you have ridden on engines? A. Yes, sir.

Q. Did you, in company with Mr. Chambers, go out to Easton, Pa., and examine engine No. 2460? A. Yes, sir.

Q. When did you go? A. January 15th, 1910.

Q. Can you say how the screen you saw in that engine, compares with the screen in court here? A. They are the same.

Q. Was it installed properly? A. Yes, sir.

Mr. Whittemore: I object to the evidence of this witness, he says that he did not examine the engine until January 15th of this year, four years after the time of the fire—I object to his evidence on the ground that it can be of no value to us here.

Objection sustained.

Mr. English: Do you know the size of the openings in the mesh used in the Lehigh Valley Railroad Co's., engines? A. I do.

Q. How do you know? A. I measured it.

Mr. Whittemore: Q. When? A. I measured it on the day I saw this engine, and I took a sample of the screen home with me, and measured it there.

Mr. Whittemore: I object to the further questioning this witness as to the size of the screen used by the Lehigh Valley Railroad, because it relates to a time four years after the fire in question occurred.

Court: It is already tesified in the case that the screens used now are the same used then, and have been used since 1889, or sometime like that, I therefore think the question is admissible, and I will take the evidence.

Mr. English: Q. What is the size of the mesh? A. Three to the inch.

Q. How does that compare in size with the size of the mesh used by the Pennsylvania Railroad? A. It is smaller.

Q. Can you say whether it is practicable in operation for an engine to use a smaller mesh

than that used in the Lehigh Valley Railroad Co's., engines? A. I can.

Q. What is your opinion about it? A. I do not think it is practicable.

Q. You do not think it is practicable? A. No, sir.

Q. To use anything smaller? A. No, sir.

Q. From your examination of the screen used by the Lehigh Valley Railroad Co., what have you to say as to its efficiency for the prevention of the communication of fire by sparks from their engines? A. I consider it an efficient screen, and quite practicable.

Q. What have you to say as to the efficiency of the screen used by the Lehigh Valley Railroad Co., as compared with other railroads, with which you are familiar, for the prevention of the communication of fire by sparks from their engines? A. I think it is fully as efficient.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Did you ever run an engine? A. I have.

Q. As an occupation? A. As assistant road foreman of engines in charge of engine men, and firemen, I have run a good many engines.

Q. Run them yourself? A. Yes, sir.

Q. On the Pennsylvania railroad you have diaphragms on your engines, have you not? A. Yes, sir, we have.

Q. And those diaphragms project between the tubes and the screen? A. Yes, sir.

Q. Do you use a cone shaped screen or not? A. No, sir, we use a Master Mechanic Standard, such as a basket screen, as it is called.

Q. Why do they call that a "Master Mechanic" screen? A. Well, it was recommended by the Master Mechanic of the American Railroad Men's Mechanical Association.

Q. An association of Master Mechanics? A. Yes, sir.

Q. And this is not a Master Mechanic screen, is it? A. It is not the one recommended in practice, it has not the recommended arrangement of the front end.

Q. The effect of sparks going out of the top, and striknng the diaphragm is to kill the spark, is it not? A. Well, to knock the spark down, and it may possibly break it up.

Q. Tend to break it up into smaller pieces? A. It is very apt to.

Q. And it tends to knock the fire out to some extent? A. Well, possibly.

Q. The steam from the exhaust also tends to dampen the fire, if there is any, as they go out, does it not? A. Yes, sir.

Q. And in your opinion, would a spark coming through a screen of this character, as is shown here, in good order, go to a distance of one hundred and fifteen feet, and retain sufficient vitality to set fire at that point?

Mr. McCarter: I object to the question on the ground that it is not cross-examination.

Question allowed.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER, Judge (Seal).

A. Why, I doubt it, my experience would not warrant me in saying it would.

FURTHER RE-DIRECT by Mr. English:

Q. What is the diaphragm installed in the engine for? A. To regulate the draught.

Q. Has it nothing to do with the screen? A. Nothing at all.

FURTHER CROSS-EXAMINATION by Mr. Whittemore:

Q. Nothing to do with the screen at all? A. It is not a part of the screen, no, sir.

Q. And haven't you ever heard it considered as being an adjunct to the screen?

Mr. McCarter: I object to that.

Objection sustained.

Mr. Whittemore: Q. Is it not an adjunct to the screen, as well as performing the office of regulating the draught? A. It performs the office of regulating the draught, and that is what it is for, and the screen is the protection against fire escaping from the stack. There is no spark that will go out of the stack larger than the opening in the screen, it makes no difference whether there is a diaphragm there or not, if the screen is perfect no spark can possibly go through that screen, larger than the opening in the screen.

Q. Is not the diaphragm the protection to the screen? A. Well, it might protect, or extend the life of a screen, if you want it in that way.

Juror No. 12: Q. By whose request were you sent to Easton, Pa., to examine this particular engine? A. I was ordered to go by my surperior.

Q. Is it the usual thing in cases of this kind, to exchange this information, one road to another? A. Yes, sir.

Mr. McCarter: We will admit that we got Mr. Maxfield, an employee of the Pennsylvania Railroad, to go out to Easton, Pa.,—we asked him to go, we wanted someone that knew, and at our request he went out there.

Mr. Whittemore: Q. Have you testified before in any spark cases? A. No, sir.

THOMAS F. BARTON, a witness produced in behalf of the defendant, being duly sworn according to law on his oath saith:

Examined by Mr. English:

Q. What is your business? A. Master Mechanic.

Q. On what railroad? A. The Delaware, Lackawanna & Western.

Q. Where have you been located? A. At Kingsland, N. J.

Q. That is where the D., L. & W. have their car shops? A. Yes, sir.

Q. Are you employed by the Lehigh Valley Railroad Company? A. No, sir.

Q. Have you ever been? A. No, sir.

Q. How long have you been master mechanic of the D., L. & W., at Kingsland, N. J.? A. Since October, 1908.

Q. Have you held any other positions in the D., L. & W., previous to that date? A. No, sir.

Q. Have you ever been employed on any other railroads before? A. Yes, sir.

Q. What? A. Illinois Central, and Grand Trunk Railroad.

Q. What positions have you occupied in the Illinois Central Railroad? A. The position of machinist,, general foreman and master mechanic.

Q. And in the Grand Trunk Railroad? A. Apprentice locomotive foreman, and machinist.

Q. Has part of your duty of master mechanic, been looking over, or have you had charge of the installation and repairing of screens in locomotives? A. Yes, sir.

Q. And you are responsible for that on your road, in your department? A. I am.

Q. Have you examined the screen here in court? A. I have.

Q. Have you measured the size of the mesh of this model? A. I have.

Q. And what did you find it to be? A. Three mesh to the inch.

Q. How does it compare with the mesh used on the D., L. & W.?

Mr. Whittemore: When?

Mr. English: At the present time, or at any time, for that matter—his knowledge we want, his knowledge goes back to 1908.

Court: I will assume that the mesh used by the D., L. & W., in 1908, and now, is not any worse than it was in 1906 or 1905. They certainly are not trying to find out the worst mesh they can find, and put that in, and if they keep abreast of the times, it is a reasonable assumption that they had at least as good a mesh in 1910, as they had in 1905—I will allow the question.

A. It is smaller.

Mr. English: Q. Smaller than that used by the D., L. & W.? A. Yes, sir.

Q. Can you tell me how it compares with the mesh used by the Illinois Central? A. It is smaller.

Q. How does it compare with the mesh used by the Grand Trunk Railroad? A. Well, it is some time ago, that I had anything to do with the road, and I do not remember.

Q. But it is smaller than that used by the Illinois Cenral and by the D., L. & W.? A. Yes, sir.

Q. Can you say whether it is practicable to use a smaller mesh than that used by the Lehigh Valley Railroad, and run your engine? A. No, sir, it is not.

Q. What have you to say as to the efficiency of the screen used by the Lehigh Valley Railroad

Company, in its engines, for the prevention of the communication of fire, by sparks?

Mr. Whittemore: I think it should be limited to this screen. He has not demonstrated any knowledge as to what is in the D., L. & W., engines.

Court: Q. You understand that this is the mesh used by the Lehigh Valley Railroad? A. I have been given to understand so.

Q. And your answer is as to the efficiency of that mesh for the prevention of the communication of fire by sparks from their engines? A. In my opinion, it is an efficient means to prevent the throwing of sparks.

Q. What have you to say as to the efficiency of this screen used by the Lehigh Valley Railroad, as compared with the screens used by the other railroads, with which you are familiar? A. It is equally efficient, I think.

No cross-examination.

Recess.

Afternoon session, 1:45 p. m.

JOHN DENNINGER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Mr. Denninger, you are employed by the Lehigh Valley Railroad? A. Yes, sir.

Q. Whereabouts? A. Easton.

Q. In the shops out there? A. Yes, sir.

Q. What is your job? A. Making those screens.

Q. You are the man who makes those screens? A. Yes, sir.

Q. Who installs them in the locomotives? A. I put them in.

Q. Do you keep a record of the screens which you put in? A. Yes, sir.

Q. Corresponding with the number of the engine? A. Yes, sir.

Q. Have you got any record of installing a screen in 1905, in engine 2454? A. What time?

Q. Well, any time during the year 1905? I think, as a matter of fact, it was in February? A. Engine 2454, that was about the time they were changing these numbers.

Q. Yes. Mr. Vaughn testified that her previous number was 677? A. Yes.

Q. All right. See if you have got a record of 677? A. On the 10th day of February—

Q. Wait a minute. You have a record? A. Yes, sir.

Q. Do you make the records in that book yourself? A. Yes, sir.

Q. When do you do it? A. Right after I do the job.

Q. Is that record which you are now about to refer to one that you made right after you did the job? A. Yes, sir.

Q. And it shows the time, as I understand you when you put a screen in an engine which was then numbered 677? A. Yes, sir.

Q. Now, I ask you what date your record shows that you put a new screen in engine number 677?

Mr. Whittemore: Let me see the book first. Proceed.

Q. Answer the question. The question is the date that your record shows when you put a new screen in engine 677? A. On February 10, 1905, I put a back screen in that engine.

Q. You don't mean that identical screen, you mean one like it? A. Yes, sir.

Q. Do you know when engine 677's number was changed to 2454? A. I do not know when it was changed.

Q. Have you got a subsequent record in your book of putting a screen in 2454? A. No, sir; I have not.

Q. I mean some time after that? A. No, sir; I have not. I have 2460.

Q. Or 2460? A. Yes.

Q. That also appears in evidence as the third additional number. Now, tell us when your record shows that another new screen was put in, following the one which was put in in February 10, 1905? A. 23rd of March, 1906.

Q. In the meantime, the original screen which you put in on February 10, 1905, had been in use, is that right? A. Yes, sir.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Let me see the place in that record. Will you find that? What does the word "back screen" mean? A. Why, that is only half a one. We call them fronts and backs. This here side here is what we call a back screen and the other one is a front screen. Only put a half one in at that time.

Q. So you only put in the rear portion of the screen? A. Yes, sir.

Q. When you had this engine No. 677, did you have another engine numbered 2454 at the same time? A. No, sir.

Q. So that when it was changed from 677 to 2454 it was a new number? A. That was a new number. Then afterwards it was changed from 2454 to 2460.

Q. Now, was there any engine running with the number 2454, when this engine bore the number 677? A. Not to my knowledge; no, sir.

Q. Would you know? A. By looking over the prints, yes.

Q. Have you looked over the prints to see? A. Through this. There was nothing that I know of. The only 600's that I saw here was 601, 622, 625, 628, 630, 639.

Q. That is not what I want to know. Is there any 2454 down there? A. Only that there that was changed—2460 was changed from 2454. It is 677 on here.

Q. What I want to know is: Was there a 2454 running on the road at the time you put in this screen in No. 677? A. Not to the best of my knowledge; no, sir.

Q. Well could there have been any such engine running without your knowing it? A. No, I don't think there was, because they didn't have numbers that high at that time.

Q. Now, when this engine was number 2454, was there a 2460 running? A. No, sir.

Q. How do you kow that? A. Why, this engine was changed to 2460.

Q. Had there been an engine before that with that number 2460? A. Not that I know of.

Q. So that between February, 1905, and March, 1906, the number of this identical engine was changed twice? A. Yes, sir.

Q. Is there anybody else who does any repairing of screens except yourself? A. Not unless I am there.

Q. Were you at the shops from February, 1905, to March, 1906, continuously? A. I am there very near every day.

Q. Well, were you, that is what I ask you? A. That I would not say positive.

Q. If you were not there, someone else would do any work that would have to be done on screens? A. Yes, sir; they would tell me when I come to work again.

Mr. McCarter: And you would put it in your book?

Mr. Whittemore: Wait, Mr. McCarter. I think that is not quite right.

Mr. McCarter: I was trying to get on, Judge. I want to get through today, if we can.

Q. Show me the other place in this book? A. What is that, 2460?

Q. Yes? A. There the whole set was put in at that time.

Q. Thirty by thirty-three is marked here, and does that indicate a whole screen? A. Yes, sir.

Q. What does the dimension thirty inches refer to? A. At one time we used to have pieces alongside of the pipe and they were thirty inches across on the top and thirty-three inches in height, so I just kept on marking them that way.

Q. How can you tell from this entry when you put in a whole new screen, when it only refers to the diameter across and the height? A. That is the way I mark them.

Q. It is your custom to mark them that way, when you put in an entire new screen you say thirty by thirty-three? A. Yes, sir.

Q. When you put in a back screen you don't put any dimensions? A. No, sir; I just mark it back, or front.

Q. When you put in a new screen in March, 1906, the front of that screen had been in use for more than a year preceding, hadn't it? A. Yes, sir.

Q. Is that all your writing? A. That is up to 1908, I think.

Q. That is, after that, all your writing? Is it all your writing? A. Yes, sir; that is mine.

Q. And how soon after you did the work did you put it in here? A. Why, just as soon as I come back from the roundhouse, why I would mark them down.

Q. Did you do other work besides putting in screens? A. No, sir.

Q. What was the occasion of putting in a new screen in the back of this in February, 1905?

Objected to.

A. What was the occasion?

Q. Yes? A. I suppose it was bad.

Mr. McCarter: One minute. What possible purpose can that have?

The Court: I do not see very well what use that can have, because a witness already testified that the life of a screen is a year, and they wear very much quicker in the back than in the front. Now, almost everybody would conclude just what the witness is about to say, that it had become worn out and they put in a new one.

Q. Were there patches on the screen, can you remember? A. Not that I remember.

RE-DIRECT-EXAMINATION by Mr. English:

Q. When this screen left your hands in February, 1905, could any sparks get out of the smokestack except by passing through the screen? A. That is all.

WILLIAM H. VAUGHN, re-called:

Direct-examination by Mr. English:

Q. Mr. Vaughn, why was it that the number of this engine which you have referred to as 2454 in

this case, was changed so often about the time of the fire? A. Well, they were reclassifying the power, I believe.

The Court: He did testify to that and said the same thing.

Q. At the time she was known as No. 677, was there any other engine known as 677 in the service? A. No, sir.

Q. At the time she was known as 2454, was there any other engine known as 2454 in the service? A. No, sir.

Q. At the time she was known as 2460, was there any other engine known as 2460? A. No, sir.

CROSS-EXAMINATION by Mr. Whittemore:

Q. At the time she was known as 677 was there an engine 2454? A. Not to my knowledge.

Q. Are you sure of that? A. Yes, sir; I know there wasn't.

Q. At the time she was 2454 was there any engine 2460? A. No, sir.

Q. How is it you are able to recall about that? A. Why, from memory. Being associated with the engines all the time.

Q. Some five hundred engines come under your observation, don't they? A. No, not on our division.

Q. How do you know but that you had an engine 2460, which was reclassified and put into a different class? A. How is that?

Q. How do you know but that you had an engine 2460 running at the time this engine was known as 2454, which was reclassified and put into another class when this 2454 was changed to 2460? A. Because we had numbers of all the engines.

Q. And do you remember that there was no 2460 at that time? A. Yes, sir.

JOHN M. C. MARSH, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Where do you live, Mr. Marsh? A. Westfield.

Q. What is your business? A. I am one of the assessors of Westfield, and my other business is real estate business.

Q. You are in the real estate business, and you are a Westfield township assessor? A. Westfield Town.

Q. Do you know the farm known as the Goodman farm, which has been referred to in this case? A. Yes, sir.

Q. How long have you known that farm? A. Twenty-five or thirty years.

Q. Have you ever had occasion, as a real estate man, to sell land in that locality? A. I recollect two years ago—three years ago, a farm down there that I had for sale, very close to it, within fifty yards of it, or one hundred yards.

Q. Can you undertake to say what the value of the Goodman farm was, prior to the fire in 1905? A. Well, it was a farm with ordinary farm buildings on it.

Q. About ninety acres? A. Eighty or ninety acres.

Q. How much would you value that farm, with the buildings on, before the fire?

Mr. Whittemore: I object. Mr. Marsh has not shown that he knows.

The Court: You may cross-examine.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Were you on these premises before the fire, Mr. Marsh? A. Yes. Probably three or four

months before the fire, or five months. Been by it several times.

Q. Ever been in the house? A. No, sir.

Q. Ever been in any of the barns? A. No, sir.

Q. Do you know how many barns there were? A. I did not. Ordinary farm buildings, that is all that I saw there.

Q. You were there three or four months before the fir? A. I weren't on the premises three or four months before the fire. I was by there about once a month.

Q. How long before that had you been on the premises? A. I couldn't tell, on the premises. I used to go down there fox hunting, years ago.

Mr. Whittemore: I object, on the ground that he is not familiar with the buildings.

The Court: I think he is familiar enough with the buildings.

Mr. Whittemore: He does not even know how many buildings were there.

The Court: He said he had seen the buildings, and been by there time and time again. I think he may answer.

DIRECT-EXAMINATION continued by Mr. English:

Q. Tell us what value you would put on this farm, with the buildings on it, before the fire? A. $90.00 to $100.00 an acre.

Q. Nearer to $90.00 or nearer to $100.00? A. Probably $90.00 would be high enough.

Q. What value do you put on that farm, after the fire, without the buildings on it? A. $60.00 to $65.00.

CROSS-EXAMINATION by Mr. Whittemore:

Q. You are an auctioneer too, aren't you, Mr. Marsh? A. Yes, sir.

Q. Surveyor also? A. Don't do much of that now.

Q. Spend most of your time as auctioneer, don't you, or selling personal property? A. No. Selling real estate. I have been selling real estate.

Q. Will you look at this map, Mr. Marsh. Notice there there are four barns, wagon house, carriage house, horse stable, green house, hen house, corn crib and dwelling house on there, do you? A. Yes, sir.

Q. And also various apple and fruit and shade trees? A. I see trees on there.

Q. You knew that it was surrounded by trees? A. Yes, I have seen different trees on it.

Q. Now, will you tell me to what extent you think that those buildings on there that I have enumerated, increased the value of that farm? A. My recollection of it is that they were old buildings.

Q. The house was very old? A. I didn't say it was very old, but it was one and one-half story, I think.

Q. At the time of the fire it was one and one-half story and you are giving your valuation on that as a building with one and one-half story? A. Farm and buildings altogether.

Q. Answer my question. The valuation you have given is the farm with the house one and one-half story? A. I say one and one-half story. Maybe one story and the attic; maybe a little over one story. I never was in to it.

Q. That same house was there ten or fifteen years, up to the time of the fire? A. Yes.

Q. Been no change in it? A. No, sir.

Q. You don't know of any change? A. No.

Q. And the value you give is of that old house, without any change? A. As I saw it some time before.

Q. Now, will you answer my former question, with all those buildings there, to what extent do you think the value of that farm was increased by having the buildings on it? A. That is a hard question for me to answer.

By the Court: Q. To what extent was the value of the farm increased by having the buildings up on it? A. Probably $30.00 an acre.

By Mr. Whittemore: Q. Can't you give me the amount in dollars, and not by the acre? A. $3,000.00.

Q. You think that all of those buildings there only increased the value of that farm to the extent of $3,000.00? A. As I understand, they were old buildings. I am talking about farm buildings.

Q. It was only increased to the extent of $3,000.00? A. I think so.

Q. Do you know what it cost to replace all those buildings? A. I do not.

Mr. McCarter: I object. Immaterial as to what it cost to replace them.

The Court: I think that is immaterial.

Q. Then you don't know that that house has been altered, do you, before the fire? A. I understood it was altered before the fire.

Q. And yet you gave a valuation on it without taking into consideration its alteration, didn't you? A. I have given a valuation on it as I saw it, before it was rebuilt.

Q. That is the valuation you give, before it was rebuilt? A. Yes, sir.

Q. Did you see it after it was rebuilt? A. I went by there. I didn't notice particularly, though.

Q. You knew the house was a very much larger house than it was before, after it was rebuilt? A. I don't know that, no.

Q. Don't you know it was extended up so as to make three stories out of it? A. No, I didn't recollect that.

Q. Well, if it were extended up so as to make three stories out of it, French roof house, three stories, your figures would be more than you have given, wouldn't they? A. Not much more either.

Q. Wouldn't account for anything? A. They are old buildings. If you put a new roof on an old building you don't increase the value very much.

Q. I am not talking about putting a new roof on it. I am talking about enlarging that house from one and one-half story to a new three-story, French roof house, and you say that would not increase your figures to any appreciable extent? A. Oh, it would increase the figures, of course.

Q. Now, to what extent would that increase your figures? A. $3,500.00 for the whole buildings on the farm.

Q. You just said $3,000.00? A. I just said $3,500.00 with the whole buildings on the property. That is what I say now.

Q. What do you mean with the buildings as altered? A. The house and the barns.

Q. The house as altered? A. I mean just as it stood before the fire.

Q. Then the alteration of that house only appreciated the value of that farm to the extent of $500.00 is that right? A. I don't believe it did more than that.

Q. You don't believe it did? A. No, sir.

Q. Do you know the Lambert farm? A. Yes, sir.

Q. That you assessed, didn't you? A. Yes.

Q. Is that a better farm than this farm? A. I should think so.

Mr. McCarter: I object. I do not think the other farms—any comparison between this and other farms is material here, your Honor. Nor have we gone into the assessments.

The Court: Unless he has done something which will contradict what he says here on the stand, and then in that event they must show that the farms are similarly situated, similarly circumstanced, similarly built up, and the fact that he assessed it at a different price has uniformly been held not to be evidential, in this state. You could not produce the books of assessment in evidence to show what the value of a place is. Secondly, you can not draw any comparison with that as a basis, but if you can show that he has done anything at any other time, to place a value upon a similar farm, similarly circumstanced and situated, you may do that.

JOHN DENNINGER, re-called:

Direct-examination by Mr. English:

Q. Mr. Denninger, it appears from your testimony that it was in February, 1905, when you put a new back on the screen in number 677? A. Put a new back screen in.

Q. Do you know when you put on a new front? A. I can tell you.

Q. All right, tell us, please? A. December 19, 1904.

Q. December 19th? A. December 19, 1904.

Q. That is when you put in a new front? A. That is when I put in a new front.

Q. And it was February, 1905, that you put in a new back? A. In February, a new back.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Let me see the book on that?

Mr. McCarter: That is all, with the exception of Mr. French.

The Court: The plaintiff may go ahead with rebuttal.

Plaintiff's Testimony in Rebuttal.

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

Direct-examination by Mr. Whittemore:

Q. Mr. Rehrig, where do you live? A. I live in Lehighton, Pennsylvania.

Q. And what are you doing now? A. I am in the grocery business.

Q. Were you in any former business, any business formerly before that? A. No, sir.

Q. Did you have any occupation before you went into the grocery business? A. I was railroading.

Q. What work did you do on the railroad? A. Why, I was braking, firing and running an engine.

Q. Engineer on the railroad? A. Yes, sir.

Q. How long were you engineer? A. Between eight and nine years.

Q. During what years were they? A. I was running up to 1908, May, 1908.

Q. On what railroad were you employed as engineer? A. Lehigh Valley.

Q. Where did you run yor engine, between what points? A. Between Packerton and Jersey

City, Packerton and Ogalt, and Packerton and Amboy.

Q. When an engine is running at forty miles an hour, how is the reverse lever used?

Mr. McCarter: Objected to as immaterial. This was evidently a freight man and as I understand it, the type of engine between freight and passenger is different, and I do not see that if that were not so, his statement with regard to what his experience was would have any effect upon the issue.

The Court: It does not yet appear that he is not acquainted with the type of engine. You may cross-examine about that.

CROSS-EXAMINATION by Mr. McCarter:

Q. Were you a freight man? A. Both freight and passenger.

Q. When did you run a passenger engine on this division? A. Well, I haven't got the date of that. I run excursions. On the Jersey City division?

Q. Yes. A. Never run over the Jersey division with a passenger engine.

Q. You never ran engine 2454, did you? A. No, sir.

Mr. McCarter: That is all.

The Court: I think you may ask the question, Mr. Whittemore.

DIRECT-EXAMINATION (continued) by Mr. Whitemore:

Q. Now, will you tell us in what position the reverse lever is placed when an engine is travel-

ling at forty miles an hour? A. Why, it is hooked up as close to the center as you can.

Q. What effect does that have on the exhaust? A. Well, it cuts the exhaust.

Q. What effect does the cutting of the exhaust have on the quantity of sparks thrown? A. It throws less sparks the higher you hook her up.

Q. Now, Mr. Rehrig, you know the screens that are used on an engine, don't you? A. Yes, sir.

Q. Are you familiar with the style of screen that is in court here? A. Yes, sir.

Q. Have you operated engines with that style of screen? A. Yes, sir.

Q. And in your opinion would a spark from an engine with a screen of that size and character go to a distance of 115 feet and retain vitality or fire enough to set fire to anything?

Mr. McCarter: I object. In the first place, I do not think that he has had any experience to justify any such question being put to him. In the second place, I do not think it is a question, even if he had had the experience, would be permissible to ask of him. I do not think it is a question which his experience would make him an expert on. How far a spark would go is impossible for a man who has simply worked on an engine ten or twelve years, can be now permitted to say in response to an inquiry of that kind how far the sparks will go. He does not watch that. He is watching his engine. There does not appear a word to indicate that he has watched the distance sparks will go, or knows anything about it. Simply because he is running an engine, that he can be able to tell how far a spark, when he is

looking ahead, would go to the right or left.

The Court: You may cross-examine him with respect to his ability to testify how far sparks would go and be likely to ignite anything. I think that it may be that as an engineer he does possess some knowledge with respect to the ignition of sparks, and the distance from a locomotive. He may not be able to see them in the air, but one may not see things in the air, and yet one can very easily see the effects of things that have been in the air, and if there is highly ignible material along the way and it would set fire to it, he would be very likely to see it. He may have followed other engines at other times, just as you, yourself, have produced in evidence the persons who were on the freight engine who saw the fire, so they say, that the plaintiff alleges was ignited in the barn of Goodman.

Mr. McCarter: The point with me is this: It does not seem to me that the proposed answer rebuts any evidence that was put in. If he undertook to say that he had seen, after this particular screen had been installed and in its apparent good condition, sparks from that screen go 115 feet, that might be one thing, but the fact that sparks from other screens, which may have been imperfect, I don't know whether he has seen them, if he did see them go 115 feet, would not seem to rebut any case we have made.

The Court: The difficulty with your argument, it seems to me, is this: That

you assume the nonexistence of the facts which you have proved yourself. You have proved, or you have offered evidence tending to prove, that you had a regular system of inspection during all the while this man was an employe of the Lehigh Valley Railroad Company, and that that system of inspection made it practically impossible for a screen of that character to be out of repair, because when it went into Easton it was examined by a screen inspector, and when it got into Jersey City it was again examined, and that when such a screen was in repair that it could not throw a spark that far, or a spark big enough to go that far and retain an ignible quality. Now, it seems to me that Judge Whittemore has a right to show, if he can, by this witness, that while he was actually working on an engine, and you have shown that every engine of the Lehigh Company was equipped with this kind of a screen, that while he was employed there such a thing actually did occur, and it would seem to me that if he succeeds in proving that, it would be very favorable to your case, because, if this is the most practicable thing that can be used, and if then a spark would go that distance out of this sort of a screen, in perfect repair, then you have used all practicable means and in spite of that the occurrence is an inevitable accident. I think it is admissible, at least.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Q. (Repeated) And in your opinion would a spark from an engine with a screen of that size and character go to a distance of 115 feet and retain vitality or fire enough to set fire to anything? A. To the best of my judgment, no.

CROSS-EXAMINATION by Mr. McCarter:

Q. On the 17th of March, 1890, while you were in the service of the company, you were suspended for a week, weren't you?

Objected to.

Mr. McCarter: I want to show animus.

The Court: I think you have a perfect right to show any animus that this witness has against this company.

A. That is more than I can tell.

Q. On the 1st of January, 1903, you were suspended for ten days, weren't you? A. That is more than I can tell.

Q. On September 21st, 1903, you were suspended for ten days, weren't you? A. Something wrong in that. I never was suspended three times in all my life, with the Lehigh Valley Company.

Q. On the 10th of June, 1904, you were suspended one week? A. I don't know the dates.

Q. On May 12th, 1906, you were suspended again? A. No, sir; I never was suspended that often in the nineteen years. I was employed by the Lehigh Valley Company.

Q. On June 29th, 1906, you were suspended again, weren't you? A. Not the dates.

Q. Do you say you were not suspended in June, 1906? A. Not suspended.

Q. On August 5th, 1906, weren't you suspended again for four weeks? A. No, sir.

Q. On October 1st, 1907, weren't you suspended again? A. No, sir.

Q. On April 2nd, 1908, weren't you suspended again? A. There is where I was suspended.

Q. And do you know what the word suspended means? A. What does it mean?

Q. I ask you if you know? A. No.

Q. On the 12th of May, 1908, you were dismissed, weren't you? A. 12th of May, 1908; no, sir.

Q. Well, what day were you dismissed? A. I wasn't dismissed until up in July, I guess it was.

Q. July, 1908? A. Yes, sir.

Q. Well, now, how many times had you been suspended or laid off, previous to that? A. Once in my life.

Q. Once in your life? A. Yes, sir. I want that understood right, though. Does that mean laid off, do you mean, that you have reference there?

Q. Do you know what suspended means? A. I don't know what you mean by suspension. The system is a record suspension and a laid off suspension. Now, which is which? I never was laid off but one week in my life until I was dismissed. That is, up to the time I had my trouble.

Q. What do you mean by record suspension? A. Well, that is a system that the company has adopted and give you a week record suspension if a little thing happens.

Q. All right, then, on these dates that I have named, you had a record suspension, on January 1st, 1903? A. I wouldn't testify to that, because I don't know the dates, unless I would go home and look them up.

Q. Then you had another record suspension?

A. I had some record suspensions. What dates there were I don't know.

Q. And then you had another record suspension? A. I don't know.

Q. And you had two actual suspensions, if you wish to make that distinction? A. Yes, sir.

Q. And then you were dismissed? A. Yes, sir.

Q. Did you ever test a screen? A. No, sir.

Q. Did you ever measure the distance a live spark travelled? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. What is a record suspension, Mr. Rehrig? A. Well, a record suspension, or book suspension, some call it, they give you—any little thing happens to you, why, they will give you a whole week book suspension. You work right on, but it goes against your record.

Q. They put it in the book, but you continue working just the same, is that so? A. Yes, sir.

Q. Have you any feelng against the raiiroad company now? A. No, sir.

Mr. McCarter: I object to that.

The Court: I think he has a right to ask him that. If you have a right to show that he had been so treated by the company that ordinarily it would engender feeling, I suppose he has a right to say that he has not any. That seems to deny that he had feeling, or bias, if you please. You may ask that.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Q. Is this system of record suspension a common one, applicable to all engineers?

Objected to.

Objection sustained.

Q. Do you know anything about whether other engineers on the railroad had these record suspensions charged against them?

Objected to.

Objection sustained.

DENNIS J. DONOVAN, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Whittemore:

Q. Mr. Donovan, have you been employed on the railroad? A. Yes, sir.

Q. What railroad? A. Central Railroad of New Jersey.

Q. And during what period of time? A. Oh, for the last thirty years, or thirty-five.

Q. Up to what time? A. 1904, July 13th.

Q. In what capacity were you employed on the railroad? A. Freight, and drilling in the yard.

Q. Well, what do you do? A. Engineer.

Q. Are you familiar with the screens in the engines? A. Well; yes, sir. Not exactly with those kind at present. Those are something new, to my estimation.

Q. What kind of screens do they have in the Central Railroad? A. Well, they have a diaphragm to protect first, and they have a screen before that to protect before it comes to the exhaust. The diaphragm is to regulate the draft, and the screen is to stop the sparks.

Q. What effect has the diaphragm on the sparks?

Mr. McCarter: I object. I suppose it would be possible to put lots of iron things in that so-called fire box; I suppose it would be possible to cover the whole thing up, and put a solid iron over the top. As I understand the requirement of our statute it is to put some kind of a screen there that will, so far as practicable, arrest the escape of fire, the assumption being that fire has got to get out, and this thing should be done as far as practicable. The witness has already said the diaphragm was to regulate the draft and that, therefore, it does seem to me that there is no requirement, or no rule or suggestion anywhere that something that has got to do with the draft shall be, or shall not be, inserted in an engine. The question is what prevention has been made for the retention of the sparks and the prevention of their escape, and that is the thing.

Objection sustained.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Q. Now, Mr. Donovan, in your opinion would a spark from an engine with a screen in good condition go to a distance of 115 feet, and have fire enough to set fire to property at that distance from the railroad?

Mr. McCarter: I would like to cross-examine the witness.

The Court: You may.

CROSS-EXAMINATION by Mr. McCarter:

Q. Did you ever run a passenger train? A. Well, very seldom. Once in a while.

Q. Between where? A. Between Elizabeth-

port and Newark; Elizabethport and Jersey City.

Q. Did you ever watch or measure the distance a spark went from any of your locomotives? A. Sometimes I did; yes, sir.

Q. In feet? A. Well, not in feet. According to the stack; according to when I was on the engine sometimes I would see it going. May come down alongside of me. I wouldn't notice how far up in the air it would go; no. sir.

Q. When you are running the engine you can't, as a rule, keep your eyes forward and watch where the sparks go, can you? A. Not exactly; no, sir.

Q. And you couldn't tell whether a spark was alive at 115 feet, because you would be too far on down the railroad, wouldn't you? A. I could tell it providing my engine was all right, and netting was all irght.

Q. No. I ask you if you could tell whether a spark had been alive at the end of 115 feet? A. I should say no, sir; I don't think it would throw a spark that far.

Mr. McCarter: I didn't ask you that, and I move it be stricken out.

The Court: That will be stricken out.

Q. I want to know if you could tell, going along in a passenger train thirty or forty miles an hour, if you were running your engine and going ahead at forty miles an hour, and looking around, whether a spark keeps alive for 115 feet? You could not tell that, could you? How could you? A. It would not be my place to watch it.

Q. It would not? A. No.

Q. The fact is, you don't see the sparks and follow them where they go, do you, when you are running an engine? A. No, sir.

Q. It is your business to watch ahead and see what is going on where you are going, and not what happens with the sparks, isn't that right? A. That is right.

Q. So you don't know, from your experience, how far sparks will go, that escape from screens, do you? A. What, with the engine I run?

Q. I say, you don't know from experience how far a spark will go that escapes from a screen, you can't tell? A. Well, not exactly, but I know it won't go 100 feet.

Q. How do you know that? A. Because the engine don't give exhaust enough for it, providing the screen is all right; it won't let it out and fire won't be alive that far. Providing the coal you burn. If you burn anthracite coal there is a different thing.

Q. How do you know how far sparks have gone? A. I rode behind the engine before I run an engine, and I was on the freight train as a brakeman.

Q. Did you burn anthracite coal on a freight? A. Burn it?

Q. Did you burn anthracite coal on a freight? A. Yes, sir.

Q. Now, you have measured the distance a spark went? A. When I was breaking it wouldn't come back cars thirty or thirty-four foot long. It wouldn't come back the third car, and I on a brake. It might—probably it wouldn't hurt my hand if it fell on me.

Q. I suppose it depends somewhat on the strength of the wind, doesn't it? A. Sir?

Q. Are you deaf? A. A little bit.

Q. It depends somewhat on the strength of the wind too? A. Well, it does at certain times.

Q. Doesn't the spark go further back than it does sideways? A. Sir?

Q. Doesn't the spark go further back than it does sideways? A. That is according to the weather and the wind.

Q. And don't the motion of the train make it go back? A. Sir.

Q. The motion of the train has a tendency to make it go back? A. Well, it drops back. Of course, it can't go ahead of the train.

Mr. McCarter: I submit he has not shown any experience to permit an answer to such an extreme question as that.

The Court: You will have to qualify him further.

DIRECT-EXAMINATION (continued) by Mr. Whittemore:

Q. Have you observed the distance to which sparks will go when the wind is going directly across the track? A. Well, I never seen a spark—

Q. Not how far. Have you observed? A. No, I have not.

Q. Not going sideways from the track? A. No.

Q. Did you ever notice how far they go—they will travel sideways from the track, when the wind is blowing across the track? A. It is according to the speed of the engine. If the engine is travelling fast, of course, she will throw one off further, and the wind will take it further away.

Q. Sparks do go sideways when the wind is blowing across the track, don't they? A. Yes. sir.

Q. And when they have gone sideways, have you noticed how they go? A. Oh, they don't go far.

Q. I didn't ask you that. Have you noticed, that is all? When the wind is blowing across the track, have you noticed how the sparks go sideways? A. They will travel with the wind just the same.

Q. Have you noticed it? A. Yes, sir.

Q. Have you noticed how far they will go if the screen is in good order? A. Oh, they may go fifty or seventy-five feet.

The Court: That will be stricken out.

Q. Have you noticed how far they will go if the screen is in good order?

Mr. McCarter: I object. He has not had any experience with these screens, and he is talking about his experience, as I understand it, as a brakeman, and running a train, a passenger train a few times. It is an entirely adverse situation. I do hope this Court will not permit a most extreme question of this kind to be asked of a witness who had no more experience than he has.

The Court: I will not permit it to be answered unless he shows a further qualification. He seems not to know anything at all about how far it will go. He does not show anything at all about conditions that existed at the time it happened, or about how he knows that the fire was still in the spark, or anything about it. Nothing of the sort.

Q. Do you know anything about the size of sparks that can go through a netting as small as this? A. It is a very small spark will go through a netting like that. I don't know the size of it. Very small spark.

Q. The sparks that will go through a netting

the size of this one here, will they go to a distance of 115 feet and have fire enough in them to set fire to property at that distance?

Objected to.

Question overruled.

Mr. Whittemore: Prays exception.

Exception allowed—sealed accordingly.

Q. Mr. Donovan, have you noticed the condition in which screens get, from the operation of engines? A. Yes, sir.

Q. What is the effect on a screen from the operation of the engine? A. Why, they get corroded up from the oil and the ashes. It consumes around the bottom of the netting, and it gets up that way.

Q. Where does that corrosion come from? A. It picks it up from the front of the engine, and around the exhaust pipe.

Q. What is there around the exhaust pipe to cause corrosion? A. There is nothing down there, only just what you see there.

Q. What comes out of the exhaust pipe? A. Why, steam.

Q. Is there a blower pipe there? A. Yes.

Q. What comes out of the blower pipe? A. Well, the blower pipe, that ain't quite a ways in on the end of it when you put it on first off it still throws some of the water off the stack, and the rest of it runs down on the netting and so forth.

Q. What effect does that have on the netting? A. Well, there is oil on the netting, and it takes the ashes on there and stops the netting up.

Q. Have you noticed how long a screen will last on an engine, in the operation of it?

Mr. McCarter: I do not think he ought to be permitted to answer that question.

unless he is talking about this kind of a screen. I suppose different styles of screens have different lives, and we are only responsible for maintenance of this kind of a screen and the proof is, in this case, without confliction, that the life of a screen is a year.

Q. What do you say, Mr. Donovan? A. I should judge—

By the Court: Q. Do you know? A. Well, from three to six months.

The Court: That will be stricken out.

By Mr. Whittemore: Q. Yes or no. Have you noticed how long they will last? A. Well, no, I have not noticed that.

Q. Have you ever noticed how long the screens on your engines lasted? A. I have not.

Q. Do you know where the caps are on the side of a smoke box? A. Yes, sir.

Q. What is your opinion as to whether a proper inspection can be made of an engine by looking through those caps on the side of the smoke box?

Mr. McCarter: I object. He is not an expert on inspection.

Mr. Whittemore: There isn't any real evidence that we can produce, except to call an engineer to tell about the operation of an engine.

The Court: You have not shown this man knows anything at all about what kind of an inspection can be made in that way. It is either a matter which anybody could testify about, or else it is a matter which requires an expert. If it requires an expert, then you must qualify the expert, and if it does not require an expert, then

it is not necessary for an expert to testify.

Q. Now, Mr. Donovan, have you ever looked through the caps on the side of a smoke box?

Objected to.

The Court: I will permit that question to be answered, if he has ever looked through.

A. Well, yes.

Q. Have you looked through often? A. No, not very often.

Q. Have you looked through often enough to be able to say whether you could tell the condition of the screen by looking through? A. Oh, I couldn't tell the condition of the screen by looking through.

No cross-examination.

WILLIAM B. MUNN, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Whittemore:

Q. Mr. Munn, have you been employed on the railroad? A. Yes, sir.

Q. In what capacity? A. Engineer.

Q. For how long? A. Ten years.

Q. And during what period? A. 1888 and 1898.

Q. On what railroad? A. Central, New Jersey Central.

Q. Did they have front ends during that period? A. Yes, sir.

Q. And screen spark arresters in the front end? A. Yes, sir.

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Q. Of what kind? A. Well, they have what they call—there was a kind of a square spark arrester, that is a screen, and some of them had some a little bit larger than what that is, of the same shape.

Q. Did the Central Railroad have any diaphragms on their engines? A. All of them.

Mr. McCarter: I object; immaterial.

The Court: I can see a way in which that might be material. It might be material to show something with respect to how the sparks that he observed went out of that screen. I think I will permit it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Q. What did you say? A. They all had diaphragms, pretty much.

Q. What is the effect upon a spark from striking the diaphragm of an engine?

Objected to.

The Court: I will permit it. It was asked of one of your witnesses—it may be some rebuttal of something in the case.

Mr. McCarter: We did not ask a word about it, your Honor.

The Court: One of the witnesses testified that the effect on the spark of a diaphragm might be to disintegrate the spark, and also to cause it to fall to the smoke box.

Mr. Whittemore: It is offered for the same purpose, as evidence on my side of the case.

The Court: So far as its effect is concerned I am going to charge the jury that

the railroad company is under no obligation whatever to place a diaphragm on an engine which is provided with a proper screen. In other words this may—it must be, first, rebuttal of some part of the case, and it also may qualify the testimony as tending to show what effect on an engine equipped with a diaphragm, that diaphragm has on the sparks, possibly the distance they may be thrown, or how they go through the screen, or come out of the smokestack, but it is not evidence which is a defense in the case, even though it should appear that they would absolutely prevent a spark from getting out of the smokestack.

Mr. Whittemore: In view of your Honor's opinion on that I will not take up any more time on that subject.

The Court: You have it on the record there, and when I charge it you may take exception to it. I am perfectly satisfied of what the statute means.

Q. Now, Mr. Munn, how soon after an engine gets in from a run, do you think it can be inspected? A. Well, not inside of an hour and a half, or probably two hours.

Q. Why can't it be inspected right after it comes in? A. Because the engine is too hot.

Mr. McCarter: My associate, Mr. English, reminds me that there is absolutely no evidence, your Honor, to indicate the time in which the inspections in question were made, with regard to the time of the arrival of the train, and that is a fact.

The Court: Yes, there is. The old gentleman who testified first for your side of the

case testified that he could make inspections within fifteen minutes after the time the locomotive came in.

Mr. McCarter: He said he could do it, but I think your Honor will bear us out in the contention that there is absolutely nothing in the case that this engine in question had had any run at all, at any given time, previous to the inspection.

The Court: No, but when they were examined with respect to the accuracy of the entries in the book, and all that sort of thing, he testified that he sometimes made these examinations in an hour and a half, and then entered those things in the book. Now, this witness, to rebut that, because it seems to me to be perfectly clear that if he took the twelve bolts out and scraped out the cinders that had gotten down in the smoke box, and you will remember that he says he made that, if that testimony is true, that thing could not be done. I think, therefore, it is rebuttal.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

(Question and answer repeated.)

Q. Do you know how hot, with regard to incandescence—do you know what I mean—how hot with regard to incandescence the screen gets? A. Well, I couldn't say, because you can't see inside of them, whether it is red hot or not, but they are awful hot, and the outside of the spark arrester I have seen red hot, cherry red, and I have seen the sparks inside of the arrester go to a cinder, or clinker itself so it would take an

awful hard bar, or a thick bar to break them so as to get them down through the hole that they come out of, so the consequence is they couldn't get that screen inspected inside of an hour, or an hour and a half; no man living can.

Q. Now, Mr. Munn, have you observed, as an engineer when you are running an engine, how the sparks would go out of an engine, with a screen in good condition, to what distance? Just yes or no, have you observed? A. No.

Q. You have not observed? A. Not in good condition, no.

Q. Have you looked in the smoke box of an engine through the caps on the side? A. After the expiration of a trip?

Q. Yes. A. Yes, sir. Found it red hot.

Q. More than once? A. Oh, yes.

Q. Are you able to tell, in looking in the smoke box that way, the condition of the whole of the screen? A. No, sir. There is only a hole about six or eight inches in diameter that you can see through, unless you take off the whole front door.

Q. Are you able, from your experience as an engineer, to say whether a spark would go through a screen such as this in court, in good condition, and go to a distance of 115 feet, and have sufficient vitality to set fire? Are you able to say?

Objected to.

The Court: Objection sustained. He said he never examined it at all, and never looked into it.

Q. Have you observed the distance to which engines, other than those which you were operating, throw sparks out of a screen in good condition? Just yes or no. A. No.

CROSS-EXAMINATION by Mr. McCarter:

Q. You testified at the other trial, didn't you, Mr. Munn? A. Yes, sir.

Q. And you were asked the following question, to which you gave the following answer, were you not, and did you not: "Q. Have you any knowledge as to when they are inspected? A. I never saw them inspected." A. Only by myself.

Q. What? A. Only by myself.

Q. I ask you if you answered I never saw engines inspected? A. Well, I was asked—

Q. Did you answer that? A. Yes, I answered that, yes.

Q. As an engineman it wasn't your duty to inspect, was it? A. Only in certain conditions of the engine. If she wasn't steaming right I was supposed to inspect it and find out what was the matter with it.

Q. That inspection was for the purpose of seeing if she steamed all right? A. Get more steam.

Q. It wasn't to inspect the screen, was it? A. No.

Q. You worked on the Jersey Central? A. Yes, sir.

Q. And quit working in 1908 or 1898? A. 1898.

Q. What kind of a screen did you have between 1889 and 1898, on the Jersey Central? A. Well, to tell the honest truth I couldn't tell exactly what kind of screens they had. I had all the scrap heaps on the Central to run.

Q. What is that about the scrap heaps? A. I had all the scrap heaps they had to run, but the screens mostly I saw had a shape of that kind, a square screen, from the top of the exhaust underneath the stack.

Q. Did you ever see one of the screens that the Jersey Central had in use from '89 to '98, out of the engine? A. Out of it?

Q. Yes. A. In the roundhouse, yes.

Q. Outside? A. In the roundhouse, yes. Not with the engine out, but in the roundhouse, off the engine.

Q. And you can't tell us what kind of a screen it was? A. Well, it was omething similar to that. Larger than that a good deal.

Q. A good deal larger? A. Yes.

Q. You used to run the scrap heap engines? A. That is what they called them, scrap heaps.

Q. Did you run the first class passenger trains? A. Some of them.

Q. Do you call them scrap heaps? A. Trains weren't scrap heaps, but the engines were scrap heaps.

Q. Were you discharged from the Jersey Central? A. I was dismissed from the Jersey Central.

Q. You make a distinction between dismissed and discharged? A. Yes.

Q. You have not thought much of railroads after that? A. No. I had no desire to railroad at all after that.

Q. Did the Jersey Central have inspectors, when you were there, for the screens? A. No, sir.

Q. They did not? A. No, sir.

Q. Who did do the inspecting? A. The en gineer himself.

Q. For the screens? A. Well, for the engine in general.

Q. Did the Jersey Central inspect their screens, or didn't they? A. I never saw one inspected.

Q. Do you know whether they had inspectors? A. Never saw one. Never saw what they called an inspector of screens.

Q. When you got to your roundhouse you gave your engine up to the hostler, didn't you, and you didn't hostle the engine, did you? A. Yes, sir.

Q. You didn't hostle your engine, did you? A. No, sir.

Q. You had nothing to do, after you got to the roundhouse? A. I always looked over my engine when she was on the ash pit. They cleaned out the front end. Cleaned out the ash pans in the roundhouse, and that was all, and I done the rest.

Q. What happened to the engine after that you didn't know? A. It was put in the roundhouse and that is all I know.

Q. You think that the Jersey Central didn't do any inspecting? A. No, sir; they did not; not for screens.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. You spoke of this screen being similar to those that you saw in the roundhouse. When you speak of its being similar, do you mean that it was a cone screen, of this shape? A. Well, not exactly like that. They were more of what we called a kind of a petticoat shape; upside down.

Q. Did the Jersey Central use a cone screen like this? A. No; P. & R. used all those. Jersey Central didn't use those, not in my time. They had more of a flat screen.

JOHN F. DONELAN, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Whittemore:

Q. Mr. Donelan, have you been employed by the railroad? A. Yes, sir.

Q. What railroad? A. New Jersey Central.

Q. During what period of time? A. Oh, I had been there for several years.

Q. Well, what years? A. Well, up to 1893, running a locomotive. That is the last locomotive running I done on the Central.

Q. Did they have front ends on the engines at that time, 1893? A. Oh, yes, they had them long before that, for over seven years.

Q. What kind of screens did they have in the front end at that time? A. Well, not exactly like that. They had a shape that covered up where they cast out through the smokestack.

Mr. McCarter: Does your Honor think that the character of screens on the Jersey Central in 1893 is material, in view of what they had a few years after and down to the present time?

Mr. Whittemore: I did not know it was as far back as this.

The Court: It is pretty remote. You see that is eighteen years before the fire.

Mr. Whittemore: I think I will withdraw Mr. Donelan. I guess that is too far back.

JOSEPH S. TAYLOR, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Whittemore:

Q. Mr. Taylor, were you ever employed on a railroad? A. Yes, sir.

Q. What railroad? A. Lehigh Valley.

Q. During what period of time? A. About twenty years.

Q. Well, what years, up to what time? A. From what year up to what time?

Q. Yes. A. 1890.

Q. 1890. A. Yes.

Q. Haven't you been on the railroad since 1890? A. Up to last November.

Q. In what capacity were you employed on the railroad? A. When I went on?

Q. Yes? A. I went on firing.

Q. And when you left what were you doing? A. When I left, running.

Q. What do you mean by "running"? A. Running an engine.

Q. Engineer? A. Yes, sir.

Q. How long had you been an engineer at that time? A. About sixteen years.

Q. What kind of engines did you run? A. All kinds.

Q. Passenger engines? A. Yes, sir.

Q. Freight engines? A. Yes, sir.

Q. Between what points did you run your engines? A. Between what?

Q. Between what points did you run your engines? A. What points?

Q. Yes? A. I run a passenger engine from Bound Brook to Jersey City and from Perth Amboy to Jersey City.

Q. During 1905 what engines were you running,

and between what points? A. Between Amboy and Jersey City.

Q. What kind of an engine in 1905? A. Well, I don't know what they call them. We used to call them hogs.

Q. Freight or passenger engine? A. Passenger.

Q. Passenger engine? A. Yes, sir.

Q. Are you familiar with the front ends of engines? A. Yes.

Q. In Jersey City did you ever see any inspection made of your engine? A. No, sir.

Mr. McCarter: I object. The fact that he didn't see it don't—

The Court: I do not suppose the object is to show that the company did not inspect the engine—oh, this is the Lehigh Valley?

Mr. McCarter: Yes, sir. Now, he ran, for a certain number of years, an engine, and the question that is proposed to be put to him is did he ever see an inspection. Now, the proof in the case is that the engineman does not inspect, any more than he hostles. He may or may not have seen it. What does that prove?

The Court: If he did see it, he may tell who made it, and what was made, and all about it. That is an important preliminary statement.

Q. Did you ever see any inspection made in Jersey City? A. Only inspection I ever saw made, if an engineer would come in and report that his engine did not steam, there was something the matter with it, on that point the engine perhaps would be looked at, and the front might be opened, or he would find something else. That

is the only time that the engines I ever saw inspected.

Q. Was any inspection made otherwise of the engines? A. Of the engines?

Q. Yes, in Jersey City?

Mr. McCarter: I object to this.

A. The foreman they had there—

Mr. McCarter: I object; irrelevant and incompetent.

The Court: I will permit him to answer.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal.) Judge.

Q. Was any inspection made on any other occasion than when a man reported that it was in bad order? A. Yes, they had a foreman to look around the engines to see if there was any springs broke, or head pins or bolts were to be put in, or such as that.

Q. I mean inspection of the front ends, or the spark arresters? A. No, sir.

Q. There were not? A. No, sir.

Q. Where is your other terminal point besides Jersey City? A. Perth Amboy and Easton.

Q. Did you ever see any inspections made up at Easton?

Mr. McCarter: Same objection.

The Court: Same ruling.

A. No, I never did see any inspection, that is, to look at the screen; no, sir.

Q. Do you know whether an inspection was made every day at Easton, at the end of the run? A. I do not.

Q. You don't know? A. I don't know as there were.

Q. When you came into Easton, how much of

the time would you be around, after the run? A. We generally looked around the engine and kept there from fifteen to twenty minutes.

Q. Did you ever see any inspection made in that time? A. No, sir.

Q. Did you ever stay any longer than fifteen or twenty minutes, around your engine? A. I have; yes, sir.

Q. How long have you stayed? A. I have stayed a half an hour.

Q. Did you ever see any inspection in that time? A. No, sir.

Q. When you came back to work, where did you find the engines to take out? A. In the round-house.

Q. Did you ever find any sparks in the front end when you took them out? A. Yes, sir.

Q. If there had been an inspection, would there be any sparks in the front end?

Mr. McCarter: I object.

The Court: What is the ground of the objection?

Mr. McCarter: Why, the cleaning out of the sparks from the bottom is not part of the inspection of the screen. A man might inspect and leave the sparks and dead ashes in there.

The Court: I understood, from the testimony of the representative of the company who said he made the inspection at Easton that he did take the sparks out first, and before he got in and made the inspection, and that that was a part of the system. Now, I suppose it is relevant to show, by this witness, that he got there and that the sparks were still there, to permit a possible inference by the jury that at least a full

inspection had not been made, that was provided for by the system.

Mr. McCarter: My point is that the taking out of the dead ashes from the bottom of that place is no essential feature of the inspection of the wire above.

The Court: No, there is no question about that.

Mr. McCarter: Therefore, the presence or absence of that would indicate nothing at all with regard to the inspection.

The Court: I think it probably would indicate something. Suppose the witness had said, when I made my inspection I put a chalk mark on the engine; and suppose this man were asked, when you came back did you find a chalk mark on your engine, and he said, no; would not that be an evidence that the inspection was not made, just the same as the ashes would be? I will permit it.

Q. Did you find your engine, when you came back to take them out, with any sparks in the front end? A. There was; yes, sir.

Q. That happened more than once? A. Oh, yes.

Q. Do you know what a washout is? A. Sir?

Q. Do you know what it is to have a washout on an engine? A. Yes, sir.

Q. What is that Mr. Taylor? A. Well, when the engine gets dirty inside of it, the flues, that is the inside of the engine, inside of the boiler, becomes dirty by using muddy water and such as that, they take out different plugs around the engine and take a hose and wash it out.

Q. How often does that happen? A. Once a month.

Q. Did you ever know of any inspections being made of spark arresters at any time than when you had a washout, except where the engineer had complained of something being out of order? A. No, I didn't.

Q. Did you ever see the book record of spark arrester inspections? A. No, sir.

Q. Did you know there was any such book record kept? A. No, sir.

Q. Do you know the roundhouse that is near the ash pit at Easton? A. Yes, sir.

Q. Ever been in there? A. Yes, sir.

Q. See any book of spark arrester inspections in there? A. No, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. When did you enter into the company's employ? A. Sir?

Q. When did you enter in to the company's employ? A. When did I leave?

Q. When did you enter into the company's employ? A. Why, 1890, or '91, I forget which, on the fifth of February.

Q. You said you ran from Perth Amboy to Jersey City? A. Yes, sir.

Q. On a passenger train? A. Yes, sir.

Q. Same train? A. What? Same train, did you say?

Q. Would you run a passenger train from Perth Amboy to Jersey City? A. Yes, sir.

Q. When was that? A. Well, from '90 to '95—no, I am wrong. 1905, I believe. I commenced running a passenger train at Bound Brook in '97, or '96, I forget which.

Q. Don't the passengers from Perth Amboy to Jersey City change cars at South Plainfield? A. Some of them.

Q. And you say there were trains that ran all the way through? A. Yes, sir; it had to.

Q. When you get to Easton you take your engine where? A. At the ash pit.

Q. At the ash pit? A. Yes, sir.

Q. Then your duty that day is done, isn't it? A. After we look around it and inspect it; yes, sir.

Q. You see whether, as far as it appears, it is all right? A. Yes, sir.

Q. You are not an inspector of screens, are you? A. No, sir.

Q. You have nothing to do with the ashes? A. No, sir.

Q. Now, after the engine gets on the ash pit the ash cleaner goes on and cleans out the ashes, don't he? A. Yes, sir.

Q. What do you call him, what is his title? A. Well, they have a man to clean the ashes from under the engine and they have a fire cleaner to clean the fire, and he rakes the ashes and the man cleans them out.

Q. The engineman has nothing to do with them? A. No, sir.

Q. When the engineman gets in and leaves his engine on the ash pit and he looks around to see if there is anything wrong, and feels the thing to see if it is hot and pours in a little oil here and there, and then his job is done and he goes home? A. Yes, sir.

Q. And he don't have anything to do with that engine— A. After he goes to the roundhouse and reports what he sees on her.

Q. His duty with that engine is done? A. Yes, sir.

Q. And the next morning, or whenever his next run commences, she is all full of coal in her tender,

she has got water in her, and anything that has been done to her, has been done to her, and you jump on her and take her all ready to start, don't you? A. Yes, sir.

Q. You don't follow what is done to her after she leaves your hands, do you? You don't follow what is done to her after she leaves your hands? A. Follow?

Q. You are not there all the time that she is out? A. No, sir.

Q. You are not there while the fireman is shoving the poker in and cleaning out the fire? A. No, sir.

Q. You are not there when the man is down in the ash pit shoveling away the ashes that come out? A. No.

Q. Did you ever know this man Shannon? A. In Jersey City?

Q. No, no. Up at Easton. Never saw him, did you? A. I might see him.

Q. Never recognized him? A. No.

Q. How long a time would you be at Easton on your runs, to stay there? A. At Easton?

Q. Between runs? A. Well, I never ran up at Easton, only I have taken broken trains up, and such as that.

Q. You had no regular run up there? A. I went up there last summer, all summer.

Q. You had no regular run up there? A. No, sir; my run was to Amboy, unless in case of an accident I would have to take a train up.

Q. Now, when your train gets to Jersey City your train runs into the Jersey City terminus of the Pennsylvania station? A. Yes, sir.

Q. And the train is unhooked and you back out? A. Yes, sir.

Q. Where do you take your engine? A. Up to the water culvert, or ash pit.

Q. You have the same duties there, no more or no less, than you have at the other end? A. Yes.

Q. Same thing? A. Yes.

Q. The engine is hostled by somebody else? A. No, not there.

Q. But she is cleaned by somebody else? A. No.

Q. The ashes? A. The ashes is turned out, but the fire is cleaned by the fireman.

Q. You have nothing to do with that? A. No, sir.

Q. What do you do after you end your run there, until your next run commences? A. Well, sit around there, and keep water in the engine, and the fireman stays there—

Q. What do you do? Never mind what the fireman does. What do you do all the time? For instance, that engine may wait there five hours? A. Well, I have waited eleven hours.

Q. What do you do? A. Sit around and wait.

Q. Never go away? A. Why, sometimes.

Q. You are not bound to stay there all the time? Isn't there a lounging room in the shanty there where you go and sit? A. Yes.

Q. Did you know a man by the name of Slagel in Jersey City? A. Yes, sir.

Q. And where was he stationed? A. In the Pennsylvania.

Q. Now, you didn't run around after him all the time, did you? A. No, sir.

Q. So you never ran a regular train out of Easton, did you? A. No.

Q. And how often did you run a train into Jersey City? How long a time? A. About eleven years.

Q. This Perth Amboy business? A. Yes, sir. Perth Amboy and Bound Brook together.

Q. Now, didn't you use to inspect an engine at Lansdowne? A. Inspect an engine?

Q. Yes. A. I run one there.

Q. Didn't you have to do your own inspecting? A. Yes, sir.

Q. When was that? A. That was '96, I think, three or four years.

Q. Is your name Joseph S. Taylor? A. Yes, sir.

Q. You were suspended in '94, weren't you? A. No, sir; never.

Q. You were suspended in October, weren't you, '94? A. No, sir.

Q. Were you suspended in '95? A. No, sir. Suspended in '95?

Q. 1895? A. I don't know as I was.

Q. Well, will you say you were not? A. I don't remember.

Q. You were suspended several times, weren't you, during your service? A. Record suspension.

Q. I am not talking about record suspension, I am talking about suspensions? A. Yes.

Q. And on November 29, 1909, you were dismissed, weren't you? A. Well, yes.

By Fourth Juror: Q. Can an engineer tell when their screens is in bad condition, if it has any holes in it, or anything? A. Well, only at night, you could tell by seeing the sparks come out. You could tell then, if it throwed out large sparks you would know there was something the matter with the screen. You could tell at that time, but otherwise you couldn't, without you looked.

By Mr. McCarter: Q. You said you have seen ashes or sparks in the front of the locomotive before you started on your run. Where was that? A. Where was that?

Q. Yes. A. Easton.

Q. And what train was that you were talking about, or what engine, or what run was that? A. That was an engine that what they call a helper from Easton to the tunnel.

Q. Easton to the tunnel? A. Yes.

Q. And how did you see that stuff in there? A. The engine didn't steam good and I went and looked to see what was the matter, and found that the sparks hadn't been taken out of it.

Q. You could tell right away, from the fact that it didn't steam well? A. Well, I knowed there was something the matter and that was the first thing I looked at.

Q. How did you look in? A. At the hand hole on the side of the engine.

Q. And where were you at that time, down at the tunnel, when you made the examination? A. No, sir.

Q. How far from Easton? A. About a mile.

Q. Did that pusher burn hard or soft coal? A. Both; mixed.

RE-DIRECT-EXAMINATION by Mr. Whittemore:

Q. I understood you to say you never ran a regular train to Easton, was that correct?

The Court: He said he never did.

Q. Did you run any kind ofa train to Easton? A. Yes, sir.

Q. In 1905? A. I don't remember what year, now, I couldn't tell you. I run trains up to Easton. I have taken trains that have broken down, and I have taken trains that engineers got sick there, and take them up.

Q. How recently have you run trains to Easton? A. How what?

The Court: How lately?

A. Oh, that is quite a while ago. It must be seven or eight years ago.

Q. Seven or eight years? A. I don't just remember.

Q. When you were in Jersey city and you took your engine out to the siding, did you ever sit around there until it was time for you to go out again? A. Sit around at Jersey City?

Q. Yes. A. Quite frequently; yes, sir.

Q. And did you ever see any inspection of the spark arrester? A. No, sir; I never did.

Q. While you stayed around? A. No, sir.

Q. During the whole twenty years that you ran on the railroad, the only record they have against you is these suspensions that you spoke of to Mr. McCarter, is that right? A. Yes, sir.

Q. And were you laid off so that you didn't do work? A. No, sir.

Q. What do you mean by a record suspension?

The Court: That has already been gone over. A record suspension is one on the books, and not from the service.

Q. In Jersey City, who took the sparks out of the front end? A. Well, if there was any to be taken out the fireman took them out, but they was never looked at very much there.

HENRY A. PEASE, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Whittemore:

Q. Mr. Pease, before you got to be a constable, what business were you in? A. I am a steam fitter.

Q. Where? A. Central Railroad of New Jersey.

Q. About how long ago? A. Well, I left there between 1905 and '06.

Q. Did you have anything to do with engines? A. Yes, sir.

Q. What did you have to with them? A. Stripping them and re-fitting them up and looking after running repairs in the roundhouse.

Q. Ever have anything to do with the front end? A. Yes, sir.

Q. Ever see the screens in the front end? A. Yes, sir.

Q. Familiar with the characters of screens that were there? A. Yes, sir.

Q. Did you ever notice the condition in which you found those screens when you did work in the front end?

Mr. McCarter: I object; immaterial.

The Court: I do not see the materiality of the condition in which he found the screens of the Central Railroad when he looked at them.

Mr. Whittemore: I want to show how the screens were.

The Court: If you want to show the condition of wear to which they have gone, you should show the similarity of screens and the inspection to which they had been subjected. Otherwise, the evidence would not be of any value.

Q. What kind of engines did they have down there? A. Oh, they had several makes. They had Baldwin, and Cook, Scott, American Locomotive. They had five or six different patterns.

Q. Any passenger engines? A. Oh; yes, sir. Blue Line engines.

Q. Freight engines? A. Freight engines, and bob tails, and all kinds.

Q. What condition of wear did you find those screens in, when you have worked on the front end?

Mr. McCarter: I object. I really do not see how the condition of wear the attention, or the kind of inspection that is given to the Jersey Central screens has anything to do with this case. Certainly we are not responsible for them, and we are not trying that issue.

The Court: The only relevancy I can see in this testimony is that if he can show—he may be permitted to show the extent to which the steam and the cinders and all that sort of thing, acting on a screen, would tend to wear it away. That is about all the value I can see the evidence will have.

Mr. Whittemore: That is the only reason it is offered.

The Court: If you can show that the wire was three-eighths inch wire, that that wire was used in the Central locomotives, and then the length of time to which the wire had been subjected to exposure, it may be that it will be evidence. At any rate, I would be willing to admit it. What is the particular value of that, Judge?

Mr. Whittemore: I want to show how the screens wear. I think it is a material matter in this case how those screens are inclined to wear. It would help to explain how this thing all came about. We can not go in these engines of the Lehigh Valley Railroad Company. We have got to submit to such proof as they bring here, and we have got to rebut it just so far as we can do so.

The Court: If you want to take a chance on that question I will admit it. Now, go ahead with it. I have my grave doubts about it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.

(Seal)

Q. Now, Mr. Pease, have you noticed the condition in which those screens will wear?

Mr. McCarter: Same objection.

The Court: I will permit him to ask it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.

(Seal)

A. Yes, sir; I have.

Q. Do you know how long those screens which you have noticed, how long they have been in the engines?

Mr. McCarter: I object.

The Court: I will admit it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.

(Seal)

Q. By the Court: Q. Do you know? A. Yes, sir.

The Court: All right, go ahead.

By Mr. Whittemore: Q. Have you ever noticed a screen which has been in an engine in operation and use—passenger engine, for a period of four months, have you ever noticed such a screen? A. Yes, sir.

Q. Well, now, how does such a screen wear? How have you found such a screen to wear, and in what condition do you find it at the expiration of four months?

Mr. McCarter: I object, as directly irrelevant. The evidence is that the screen in the Jersey Central has a different mesh, and it don't appear that they use the same kind of coal. The conditions might be as variant as possible. Those two conditions appear right away to me to make it directly immaterial. They may be careless. We are not responsible for the Jersey Central.

The Court: I have grave doubts about it, but I am going to let it in.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal) Judge.

Q. What size wire do they use on those screens, do you know? A. I don't know the scale of the wire, but I know some of them had one-quarter inch mesh and some of them three-eighths inch mesh. It was a heavy wire, just similar to this.

Q. Well, now, just state what was the extent of wear at the end of four months?

Objected to.

The Court: I will admit it.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,

(Seal) Judge.

A. The reason I can explain that is this: About every three or four months the extensions from the blower pipe, and also the exhaust from the air pump coming in, have to be renewed in the stack, and that is the reason I can tell you the condition of the screens through noticing when getting in to make those repairs. I have seen them, getting in there, all coated up and big holes in them, were probably they would not draw good for the en-

gineer and he would take his pick and drive a few holes in it.

Mr. Whittemore: I move to strike that out.

Mr. McCarter: I don't.

Mr. Whittemore: That was not responsive.

The Court: That will come out.

A. The wear generally strikes it back of the penal blade, or diaphragm, where the sparks coming through the flues strike against and hit against the back of the screen; down at the foot where the ashes lay, and probably the moisture from the exhaust, or something getting in those ashes and acting on the gases coming from the coal. Of course, I can not say, but that is my idea of it.

Q. What is the condition of repair? A. It will rot away at the bottom.

By the Court: Q. How long will it take it to rot away? A. Oh, probably about four or five months.

Q. Four or five months? A. Yes, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. Mr. Pease, I don't think you ever worked on the Lehigh Valley? A. No, sir.

Mr. English: This is the witness for the defendant.

The Court: This is the witness for whom the defendant's case was held open, and he may be sworn now.

CHARLES H. FRENCH, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. English:

Q. Are you a little deaf? A. I am; yes, sir.

Q. Where do you live? A. Fanwood Township.

Q. Did you ever have any official connection with the Township? A. Assessor.

Q. For how long, and between what year? A. '97 and 1906.

Q. 1897 and 1906? A. Yes.

Q. Was the Goodman farm in your bailiwick? A. Yes, sir.

Q. Did you assess it? A. I did.

Q. How many times have you been to see that farm? A. Oh, probably twice a year.

Q. During the time that you were assessor? A. Yes.

Q. The testimony shows the farm had about ninety acres of land, and that the house had been remodeled, I think, about 1900. Now, having in mind the condition of the farm—

Mr. Whittemore: I object to this being stated to the witness. I do not think you have a right to tell the witness the house has been remodeled.

Mr. English: I am telling him what the evidence shows.

The Court: I think the rule is as Judge Whittemore has stated, that an expert on real estate can not be asked a hypothetical question about land that he has not seen, and then be required to give an opinion with respect to it. I will sustain the objection.

Q. Do you remember when the fire was? A. 1905.

Q. Do you remember the place before the fire? A. I seen it occasionally.

Q. And you valued it as assessor, I suppose, before the fire? A. Yes, sir; assessed the farm.

Q. Leaving out of your mind whatever you

valued it as assessor, how much do you say that farm was worth before the fire with the buildings on, how much per acre? A. Oh, in the neighborhood of $75.00 an acre.

Q. How much do you say that farm was worth after the wire, without the buildings on? A. Merely land?

Q. The land? A. $40.00.

CROSS-EXAMINATION by Mr. Whittemore:

Q. Mr. French, you never sold any real estate, did you? A. No, sir; not directly.

Q. Your business is a farmer? A. Mason and builder.

Q. Mason and builder? A. And a little farming along with it.

Q. Did you know what buildings were on this place at the time of the fire? A. I presume the buildings that I had seen there for a number of years.

Q. Did you know how many there were? A. Couldn't say as to that. House and barn and wagon house. Outside of that I couldn't enumerate them.

Q. Had you ever been in the house? A. I can't say positive that I ever was in it.

Q. Did you know that it had been remodeled at the time of the fire? A. Remember what?

Q. That the house had been remodeled at the time of the fire—before the fire? A. I know that it had been. The old house had been fixed over, and a new story on it, something like that.

Q. To what extent do you think the buildings on that farm shown on the map here would increase its value? Will you look at the map and answer the question? A. Is that supposed to represent the buildings that were there before the fire?

Q. Yes, sir? A. What was the question?

Q. To what extent do you think those buildings being on the farm would increase its value? A. My recollection of the buildings, I should think four thousand dollars would cover it.

Q. Four-thousand dollars? A. Yes.

Q. Now, do you know what the value of that farm was with the buildings on it, as an entirety? A. Merely a guess that I might have in my mind as to the value of property in those times.

Q. What was its value? A. $8,500.00 to $9,000.00, total value.

Q. Now, after the buildings were burned down, what was its value? A. About $40.00 an acre, in my estimation.

Q. Leave the acres out. What do you say that farm was worth with the buildings burned down, $40.00 an acre? A. That would be my idea of the probable value of it.

Defendant rests.

Plaintiff rests.

Case closed.

Mr. McCarter: There being no proof of the failure on the part of the company to comply with the statute, we respectfully request your Honor to direct a verdict for the defendant.

The Court: I refuse that.

Mr. McCarter: Prays exception.

Exception allowed—sealed accordingly.

WM. H. SPEER,
Judge.
(Seal.)

Mr. McCarter sums up for the defendant.

Mr. Whittemore sums up for the plaintiff.

Adjourned until tomorrow morning, April 5, 1910, at 10:00 a. m.

NEW JERSEY SUPREME COURT.

Union County Circuit.

January term 1910.

Edward V. Goodman, Execcutor of James E. Goodman, Dec'd., vs. Lehigh Valley Railroad Company of New Jersey.	In tort.	No. 1.
Edward V. Goodman, vs. Lehigh Valley Railroad Company of New Jersey.	In tort.	No. 2.
Edmund Mays, vs. Lehigh Valley Railroad Company of New Jersey.	In tort.	No. 3.

Transcript of stenographer's notes, taken in the above entitled cases, before Hon. William H. Speer, Judge of the Circuit Court, and a jury, at the Court House, in the City of Elizabeth, N. J., on the fifth day of April, A. D., 1910, at 10 a. m.

Appearances:

Mr. C. McK. Whittemore, for the respective plaintiffs.

Messrs. McCarter & English, for the defendant.

Charge to the Jury, by Hon. William H. Speer.

Charge.

Gentlemen of the jury:

As you are aware, we have been trying three cases together. The first case is the case of Edward V. Goodman, Exr. &c., of the estate of James E. Goodman deceased, vs. The Lehigh Valley Railroad of New Jersey.

The second suit is the case of Edward V. Goodman, individually, against the same defendant; and

The third case is the case of Edmund Mays against the same defendant.

These cases by the consent of counsel have been consolidated, and have been tried together. But, in rendering verdicts, in respect to these cases, your verdicts must be separate and distinct with respect to each one. Do not forget that. When you return into court, to give your verdicts, after you have deliberated upon these cases, each case must stand upon its own basis, and each case must have its separate verdict.

The cases were permitted to be consolidated, because the plaintiff claims that all the loss which he alleges he sustained, arose out of practically the same cause. The claim of the plaintiff is, in each case, that fire was communicated from a locomotive engine of the defendant company, in such wise as to kindle property which he owned, and to destroy it, either wholly or partially, and the plaintiff is obliged to make out in each of these cases that fact, by a fair preponderance of the evidence; that is to say, he must make the evidence weigh heavier on his side, in respect to that proposition than it does upon the other, before he is entitled to a verdict.

If after you retire to consider these cases, you should, in any one or more, or all of them, arrive

at the conclusion, that the evidence with respect to that fact is in a state of balance, so that you can not say upon which side it weighs the heavier, you would then have but one duty to perform, and that duty would be to resolve that case or those cases in favor of the defendant, because there, the plaintiff would not have borne the burden which the law has cast upon him, of making the evidence weigh heavier on his side than it does upon the other. That is what is meant in the law, by the expression, which I presume you have often heard in the course of your jury duty, that the burden rests upon the plaintiff to establish by a preponderance, or a greater weight, of the evidence, the proposition which he alleges in his pleading.

Now, that I say is the plaintiff's burden. If the plaintiff in any one of these three cases has established to your satisfaction, by a fair preponderance, or greater weight of the evidence, that the fire of which he complains, and which he says destroyed the property for which he seeks to recover damages, was enkindled from a locomotive engine of the defendant company, then in the absence of any further proof, the plaintiff would be entitled to a verdict, and would be entitled to have you assess his damages for the losses—and it is a statutory law with respect to this point—that when the plaintiff has made out that fact, that the fire started from the engine, and enkindled the property of the plaintiff, that is what is called a *prima facie* case, and that is all that, in the first instance, the plaintiff is obliged to establish by a preponderance of the evidence.

Now, I said that was a statutory provision, and I want, in order to clarify these cases for you, to read to you two of the provisions of the railroad

law of 1903, which are the provisions which govern these cases, and these provisions read as follows:

"Section 56 enacts that 'every company or person operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them, in passing along or being upon such railroad, to the property of whatever description of any owner or occupant of any land adjacent or near to said railroad, and shall provide such engine with a screen or cover in the smoke-stack, so as to arrest and prevent as much as practicable the escape of fire.'" That is the provision which gives rise, so far as the statutory law of this state is concerned, to the action in this case.

Section 57 then follows, and is in the words which I will read. "When injury is done to property by fire communication from an engine of any company or person, in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine, in violation of the preceding section of this act, proof that the injury was communicated from an engine, shall be *prima facie* evidence of such violation, subject nevertheless to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required."

Now, you will observe, I have called your attention to the first provision of that second section, which is, that the burden rests on the plaintiff to show *prima facie,* that is in the first instance, that the fire was communicated from the engine to the property of the plaintiff. The law

then says, that the plaintiff having established that, the burden is cast upon the defendant to show that it has used all practicable means to prevent the communication of fire from its engine to such property.

You see, what is done there by the law is, that the burden shifts from the shoulders of the plaintiff, to establish by a fair preponderance of the evidence that the fire was communicated to the property, over to the shoulders of the defendant, when such fact has been established, to show that it used all practicable means to prevent the communication of such fire, to the property of the plaintiff.

Now then, get that clearly in your mind, for that is really the crucial point, with respect to the burden of proof in these cases. The plaintiff comes here and complains that his property was set on fire by sparks from the defendant's locomotive—he must make that out by a preponderance of evidence—he has that burden of proof—that his property was set on fire by sparks from a locomotive of the defendant. Now when he has done that, *prima facie,* he has done all that the statute requires him to do. And then the defendant must come in and show you, that, even though the fire was communicated from its engine, still it used all practicable means to prevent the communication of such fire, and the defendant must establish that fact by a fair preponderance, or greater weight of the evidence.

Now, what practically does that result in? If the plaintiff should come here gentlemen, and should establish the fact of the communication of fire from the engine of the defendant company to the property of the plaintiff, and the defendant did not put any evidence in at all, why then the

plaintiff would be entitled to recover a verdict at your hands. That is the first proposition.

Suppose now, that the plaintiff comes here and establishes the communication of fire from an engine of the defendant company, to his, the plaintiff's property, and the defendant then comes in and shows that it did take and use all practicable means to prevent the escape of fire, and its communication to the property of the plaintiff, from its engines, and it established that fact by a preponderance of evidence, then notwithstanding the fact that the plaintiff's property was destroyed by the defendant's engine, the defendant would be entitled to your verdict. And the reason for that is, that the statute says, that the proof that the fire was communicated from the engine, may be rebutted by evidence of the fact that the defendant company used all practicable means to prevent the communication of such fire. That I think is as clear as I or anyone else using language can make it for you.

The burden first is on the plaintiff—he must show that the fire had been communicated from the engine of the defendant company; and then the burden shifts over to the defendant company, and it must show that it used all practicable means to prevent the communication of such fire from its engines to the property of the plaintiff.

So much for that.

Now then, after the defendant company has offered its evidence, to show that it did take and use all practicable means to prevent the communication of fire from its engines to the property of the plaintiff, then the plaintiff comes in, and the plaintiff has a right to rebut or counteract that proof that was offered by the defendant,

by showing, if he can, that all practicable means were not used to prevent the communication of this fire. Or, that the means used were not such practicable means as should have been used by the defendant, but through the whole of that inquiry on the question of the use and the adoption by the defendant of practicable means, the burden rests upon the defendant of showing that it did use all practicable means to prevent the communication of fire from its engines to the property of the adjacent property owners, or property owners who owned property nearby.

Now in this case, I do not purpose discussing with you, at any great length, the evidence. You have sat very patiently under a summing up by very able counsel, who have discussed the evidence very fully, and as they see it, indubitably, very fairly. They make their various contentions to you, and what they may think about the thing, is not a matter of any great consequence, if their views should run counter to what the facts established are, for you are to find a verdict, which means a truthful saying from the evidence which has been introduced into the case, and you are to find that verdict, even though I may express an opinion on the subject about a fact here, you are to find your verdict, counter to what I may say, if the facts do not sustain my opinion. That is, if you think the fact to be otherwise, than as I have stated it, then you should find your verdict according to your views, even though it may be contrary to anything that I may have stated with respect to the facts.

Under our jurisdiction, the law has cast upon the court one function, and that is to tell the jury what the law in a given case is, and it has cast upon the jury another function, of equal degree,

and that function is, to have the jury say what the facts are, and to determine those facts for themselves, and without being controlled by the Court, and if I may say anything to you, in discussing these cases, or have said anything to you about the facts, which you think is not in accord with the facts, then you must disregard what I say, and settle those facts for yourself. But you are obliged under the law, to take your law as advised by me, but you are obliged under the law to settle the facts for yourselves.

Now, in this case, as I see it. the plaintiff contends in the first case, of Goodman Exr.—in that case you will remember the suit was originally instituted by the elder Mr. Goodman in his lifetime. He died—his death was suggested on the record, and his son was made the executor to pursue the case further, and he is the plaintiff here.

Now in that case the contention is, that an engine of the defendant company numbered 2454, I think it is, passed this farm, now owned by Edward V. Goodman, the son, and then owned by James E. Goodman, the elder—and you will find on the map the situation delineated fully—a barn was on that property, which, according to the testimony of the witnesses was seventy-two feet from the property of the railroad company, and 115 feet from the nearest rails of the defendant company—and a young man by the name of Polimbo who said that he had been working in a potato patch on the other side of the railroad tracks, away from the barns, that he came over to get a drink of water, to where his brother and another young man were cultivating and hilling potatoes in a field on the side of the tracks on which the barn was situated, but not finding water there, he started to go to the house

to get some, and that when he arrived at an apple-tree some little distance—one hundred and fifty feet I think he said—from the barn, the mail train as he called it, drawn by engine No. 2454, had just passed, and that he observed that there was a fire in the barn. I think he said the fire was about two feet in the barn, in the hay—I think that is his testimony—but whatever his testimony is, it is for you entirely to settle, and if I mistake the testimony, then you must disregard what I say, and settle it for yourselves. I am simply directing your minds to this evidence, to make clear what I wish to say, with respect to the law. He says he saw this fire about two feet in the barn, in the hay, and that it spread rapidly and so on.

Other witnesses say that the wind was blowing from the railroad towards the barns; that it was a dry hot day, and in that period of the year, and prior to the time of the fire, there had been a drought in that neighborhood, and other witnesses have been brought to show that a fire was communicated from the same engine, some little further distance along the road from the Goodman farm—or whether it was the same engine or not, it is for you to settle—but they gave evidence tending to show that a fire was communicated in the grass and from the same engine.

Another witness says that he was sheltering his clipped horse one day, at a time slightly distant from the time of this fire, and that a piece of coal dropped right near him where he was standing, and about six feet from the edge of the barn, and that it smoldered there for a little while, and that he then went and picked it up, and saw that it was a coal—I said he said "it dropped," maybe he did not say it dropped, but he said that he found

this piece of coal smoldering there, and he said he picked this piece of coal up, still hot, and he danced it up in his hand and then put it under his foot—he put it out. Now, these and other facts which you will remember, you are to pass your judgment upon, and they are facts which in the first case the plaintiff says are evidence from which the jury should conclude that he has established by a preponderance of the evidence that the fire which was discovered by young Polimbo in this barn was a fire which was communicated from the engine of the defendant company as it passed on the railroad tracks the property of the plaintiff.

Now, as I say, the burden rests upon the plaintiff to establish that fact, by a preponderance of evidence. After he has done that, then *prima facie,* the plaintiff has made out his case, and the burden shifts over on to the defendant company, to show you that it used all practicable means to prevent the communication of fire from its engines, to that property.

Now, the defendant has introduced evidence here tending to show that it has a regular system of inspection of its engines, at Easton, Pa., and at Jersey City. It has produced books here in which the persons who made the inspection—either by having the testimony of those who were deceased read, or by witnesses who have testified from the stand—say that they made entries either at or shortly after the time the inspections were made, and that this record correctly and accurately represented what the inspection disclosed at the time it was made.

Now, of course, these records are not conclusive. It is for you to say whether these records, taken in connection with the supplementary evi-

dence of the witnesses, established to your satisfaction, by a preponderance of the evidence, that the defendant used all practicable means to inspect these screens when they had once been installed. If the screens when first installed, were such as you would say, in the exercise of a high degree of care, on the part of the defendant company, and a high degree of skill in exercising its judgment to select those which were practicable, for the prevention of the communication of fire from its smokestack, to the adjacent property, then the defendant has done all that the law requires of it, provided afterwards it used reasonable care—which the law says is a high degree of care—to inspect these things, at proper intervals, to see that they were kept in a proper state of repair. After the defendant has done these things then the defendant has done the duty which the law has cast upon it, and it is not liable, and the verdict under those circumstances would have to be for the defendant, if there were nothing more in the case.

Then the plaintiff introduces evidence further in rebuttal, tending to show that the inspection which the defendant company alleges was made, was not a regular system of inspection, and that it was not made with the regularity and thoroughness which was testified to and which the defendant contends for.

Now, it is for you to take all this evidence, and say, whether upon all that evidence with respect to the installation and the inspection of these screens, in these locomotives, the defendant has discharged the burden which was cast upon it, of showing that it used all practicable means to prevent the escape of fire. If the defendant has done that, then the defendant is entitled to your ver-

dict. If the defendant has not done that, and the plaintiff has established that the fire was communicated from the engine of the defendant company, to his property, then the plaintiff is entitled to your verdict, and then you would come to the question of the assessment of damages.

Now, the defendant has requested me to make certain charges.

First: The defendant requests me to charge—

I. "The mere fact that the fire complained of in this case occurred, of itself creates no liability upon the railroad company. The jury, in order to give the plaintiff a cause of action, must conclude:

(a) That the fire was communicated from the locomotive of the defendant, whose number was 2454, and

(b) That the defendant had not used all practicable means to prevent the communication of fire by sparks from said locomotive."

I do charge you that, except that I make this qualification of it—that in respect to the second portion of that request, that you are obliged to conclude that the defendant has not used all practicable means to prevent the communication of fire by sparks from said locomotive—that is not quite correctly expressed. For the burden rests upon the defendant to show you, that it has used all practicable means to prevent the escape of sparks from the locomotive, and if the defendant, has not done that and you are satisfied that the fire was communicated from the locomotive of the defendant, and you are satisfied of that by a fair preponderance of evidence, then the plaintiff would be entitled to your verdict.

The second request of the defendant is as follows:

"(2) The defendant is chartered by the state to operate a railroad and has a right, therefore, to run locomotives. If it uses all practicable means to prevent the communication of fire from its locomotives, and a fire nevertheless occurs from an escaping spark, the company is not liable for the damages resulting therefrom."

I have charged you that in equivalent language. I have told you that from as many different ways and many different standpoints as I could, and it is the law and I charge it to you.

Next I am requested to charge as follows:

"(3) The burden of proof is upon the plaintiff to show by the preponderance of the evidence, that the circumstances creating liability upon the railroad company, existed in this case."

I charge you this, with this qualification: that as I told you before, the burden of proof is upon the plaintiff only to the extent of showing that the fire was communicated from the engine of the defendant company to the plaintiff's property, and that after that, the burden of proof shifts over to the defendant company, and it must show that it used all practicable means to prevent the communication of fire from its locomotive engine to the property of the plaintiff.

The fourth request I refuse to charge.

Next, I am requested to charge as follows:

"(5) The owner of property adjacent to a railroad should use proper care in the use thereof, so as to guard against fire originating from the locomotive, without the fault of the company, and if the fire in question arose under those circumstances, then there can be no recovery."

The law in this state says, that reasonable care is the duty of everyone, and reasonable care in this case, was the duty of this plaintiff—but the rule in regard to that is laid down as follows:

Charge.

"The owner of lands—and I charge you that this is the law, in qualification of that request—the owner of lands adjacent to a railroad, is not obliged to keep his lands contiguous to the track, free from leaves or other combustible matter, coming or being thereon. He may cultivate, build upon and use his lands, or leave them in a state of nature, as he may see proper, and will take upon himself no other risks than such as are incident to the operation of the road, with proper care, by the company, and will, nevertheless, be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain"—that is the law in this state on that subject.

I am next requested to charge as follows:

"(6) The measure of duty imposed by the law upon a railroad company in taking and using all practicable means to prevent the communication of fire from an engine is to provide such engine with a screen or cover in the smoke-stack, so as to prevent, as far as practicable, the escape of fire, and reasonable care in the inspection thereof, to see that its good condition continues."

I charge you that that is the law.

I am next requested to charge as follows:

"(7) The railroad is not bound to insure that its inspection will disclose defects in the screen. It is only required to use due care in such inspection, and if, notwithstanding such care was exercised, a defect nevertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire from the locomotive to plaintiff's property, the company is not responsible therefor."

The railroad is not bound to insure that its inspection will disclose defects in the screen, it is only required to use due care in such inspection—and I charge you now, as I did before, that in cases of this kind, due care means a high degree of care, and if, notwithstanding such care was exercised, a defect nevertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire to the plaintiff's property, then the company is not responsible therefor, and I charge you with this qualification, that a reasonably careful inspector, must, in making his inspection, have and use a high degree of care in his inspection, and if after using such high degree of care, the defect escapes his attention, then the company would not be liable—that I charge you, gentlemen.

The next request (No. 8) I refuse to charge.

I am next requested to charge as follows:

"(9) If the jury conclude the defendant is liable, it then comes, to the question of damages. In measuring these, so far as the buildings are destroyed are concerned, the award must be confined to the difference in the market value of the land before and after the fire. They must not award the cost of the old buildings, nor the cost of the new ones, but only ascertain, and award the extent, in dollars and cents, to which the market value of the farm has been affected, by the destruction of the buildings, in their condition at the time of the fire.

That is the law, gentlemen. The law distinctly states, that the measure of damages with respect to the land, and the buildings built upon the land are a part of the land, is the difference in the value of the land and buildings before and after

the fire. And that is the fact that you are to determine, but in the determination of that fact you have a right, and it is your duty, to take into consideration all of the evidence, bearing upon the question of the value of the land and the buildings thereon, both before and after the fire, and after due consideration of all that evidence, then you are to determine what was the value before the fire, and what was the value afterwards, and then to award the difference between those two values.

I am next requested to charge as follows:

"(10) With regard to the personal property that was destroyed, the rule is that compensation should be based upon the fair market value of the destroyed articles—not what they had cost or what it would cost to replace them—but what a purchaser would have been willing to have paid for them in the condition they were in, at the time of the fire."

That is the law, and it is probably very much better expressed, with respect to the cost and how the cost enters into the admeasurement of damages in a case decided by our Court of Errors, from which I will quote as follows:

"The plaintiff was allowed to prove the cost of the articles as tending to show their value. This cost was the price at which a regular dealer in such article has sold it when new, in the ordinary course of trade. A sale so made was evidence of the market value of the thing when new, and the value of such goods, when worn can scarcely be ascertained, except by a reference to the former price, and the extent of depreciation. Of course, the cost alone could not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have."

Now keep that in mind, gentlement. We are talking about personal property, these bedsteads and whatever it was that was testified were in the house and were destroyed. The question is first, what did it cost when new? Secondly, how long was it owned by Mr. Goodman? How much and what kind of use had it undergone? In what condition was it at the time of the fire? And with these elements before you, and considering the nature of the article itself, you can hardly fail to arrive at a correct estimate of the value of the articles at the time of the fire.

Of course, there are some articles, as Judge Whittemore has pointed out to you, in which there probably would be no depreciation, and in which the market value of the articles at the time of the fire would be the market value of them when they were bought. If then it is established in the case that the market value or the market price of these goods had not changed at any time—you have the matter of the corn and the hay and things of that sort, what were they worth, when they were burned—that is what you have already established in respect to these things. Now with respect to the other things. How had they been used? Had they received slight use, or hard usage—you must say what sort of use they have suffered, and what are they worth, and then when you have taken these elements into consideration, and given them all due weight, each one of them, you have then arrived at your estimate, and that established would be the sum incorporated in your verdict with respect to the value of the personal property.

I am next requested to charge as follows:

"(11) No compensation can be awarded, for the burnt trees as such. All the jury can consider

with regard to them is how far, if at all, their injury or destruction has affected the market value of the farm."

I charge you that in this case. That is the law. If these trees had been what a lawyer sometimes, using a barbarous Latin phrase would call "*Fructus industrialus*"—if they had been a part of a nursery where people are raising trees for sale, it is very well to say that you could give the value of the trees, but if they are merely growing trees on the property, then they enter into and are part of the property, just as much as the houses are, and you must allow for them the general depreciation in accordance with the rules I gave you a moment ago.

The twelfth request to charge is refused.

I am next requested to charge as follows:

"(13) The duty imposed by law on the defendant is to provide its engines with a screen or cover in the smoke-stack, to prevent the escape of fire as much as practicable. The existence or non-existence of a diaphragm in the engine, would not give rise to the liability of the defendant."

I charge you that. I charge you that as to the duty of the defendant, if it placed a proper screen in that engine, and maintained it in a proper manner, in accordance with the rules I have given you, the company would have performed its full duty and it was not under any obligation to place a diaphragm there.

I am requested to charge next as follows:

"(14) The defendant was not required to install diaphragms in its engines. The fact that no diaphragm was installed in Engine No. 2454, does not cast any liability on the defendant in this case."

I charge you that.

The next request (No. 15) is refused.

I am next requested to charge as follows:

"(16). The only duty cast upon the defendant here is that imposed by the statute; and this duty does not include the duty to install or maintain a diaphragm in its engine, or in engine No. 2454, on July 19, 1905."

I charge you that—that is what I said a moment ago, and I say it again.

I am next requested to charge you as follows:

"(17) The defendant was not required to install or use the *best* means known or that may be devised to prevent the communication of fire by sparks; but only all practicable means by the use of screen or cover in the smoke-stack."

I charge you that to be the law. You are not here to determine what is the very best possible means that the highest mechanical skill could devise to prevent the escape of sparks—the statute says that it is obliged to use all practicable means, and if it has done that, and if it has established that by a preponderance of the evidence, according to the rules I have already given you, then I charge you that it is free from any liability in this case, and your verdict would have to be for the defendant.

The next request to charge (No. 18) I refuse.

Now, these are the rules gentlemen, that will govern you in the decision of the first case of Edward V. Goodman Exr. &c. vs. the Lehigh Valley Railroad Company.

These are the rules which will govern you also, in every particular, so far as they are applicable to the case of Edward V. Goodman individually vs. The Lehigh Valley Railroad Company.

Now, when we come to the case of Edmund Mays against The Lehigh Valley Railroad Com-

pany, a different element enters into the consideration of that case, concerning which I desire to speak to you just for a moment.

You will remember that the Edmund Mays case is differentiated from the other two cases by these circumstances, that it is not claimed that the sparks, or the fire, was communicated immediately from the locomotive engine to Mr. Mays' property. But the claim is that the spark was communicated mediately, first it went to Mr. Goodman's property, and enkindled that, and then a spark from Mr. Goodman's property went to Mr. Mays' property, and then enkindled that, and Mr. Mays seeks to hold the defendant company responsible for the communication of fire from the locomotive engine to his property in that way. And I charge you in this case, that if Mr. Mays has established by a fair preponderance of evidence the fact that the spark was first communicated from the locomotive engine of the defendant company to Mr. Goodman's property, and was then communicated from Mr. Goodman's property to his property, and thus set it on fire—I say if he has established those two things, by a fair preponderance of evidence, he has made out a *prima facie* case, and he would be entitled to a verdict, unless under the rules I have given you, the defendant company by a greater weight of evidence, has shown you that it used all practicable care and means to prevent the communication of such fire from its locomotive engine. This has been said in better language probably than I have said it, by our Court of Errors and Appeals, and I want to read to you what the Court of Errors has said about that.

"Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises

of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed from his negligent act to involve him in legal liability.

In actions for injuries resulting from fire, originating through the defendant's negligence, and communicated to the plaintiff's property, where distance, intervening objects, or the manner in which the fire was communicated, present the question whether the plaintiff's loss is attributable to the defendant's negligent act, and there be no intervening agency apparent which may stand, in law, as the immediate cause of the injury, the question is one for the jury, whether, under all the conditions under which the loss happened, the destruction of the plaintiff's property was a result that might reasonably have been expected—though not, in fact, anticipated—from the defendant's negligent act."

In other words, was the defendant company answerable for the communication of this fire, from the locomotive engine to Mr. Goodman's property and could it reasonably anticipate that any such enkindlement of the Goodman property would communicate fire to that other property adjacent thereto, or that the other property might be enkindled therefrom—if such could be anticipated then the defendant company would be responsible *prima facie,* if the plaintiff had made out these facts.

Now, so much for these three cases—there are one or two general injunctions gentlemen, which I usually give to juries, and then I am through.

The first is with respect to the nature of some of the evidence bearing on the questions of the value of the personal property. You will remem-

ber that some of the witnesses on the stand, testified with respect to certain things, that they could not say how many of them there were, and they could not say with respect to their cost, how many of them cost twelve and a half cents apiece or how many of them cost fifty-five cents apiece. I am going gentlemen, next, to illustrate my meaning. Now, the burden, as I have already charged you, on the question of damages, is upon the plaintiff—the plaintiff in each case, must show you by a fair preponderance or greater weight of the evidence, the value of the things destroyed, and for which he seeks to recover damages.

If he leaves that value in such doubt that you can not say how much the thing is worth at all, then you can not allow him anything for that thing. And if for instance there were fifty articles of the same general nature, some of them he says cost ten cents apiece, and others cost fifty cents apiece, and he can not say how many cost ten cents, or how many cost fifty cents, of course, it is then left in doubt, and the jury can not arrive at any possible verdict with respect to how many of those articles should be allowed at fifty cents, nor how many can be allowed at ten cents, and therefore I charge you, under such circumtsances, that you would only be justified in allowing the lowest price mentioned by the plaintiff for those articles. Because everything outside of that would be mere speculation on your part, and would not rest upon any evidence as a basis.

You can readily see how that must be so. Suppose you were to say "Well, we will allow you ten cents for twenty-five, and fifty cents for the other twenty-five," what do you rest that upon? Where is there any evidence in the case showing you that there were twenty-five that cost fifty cents, or that

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there were twenty-five that cost only ten cents—there might only be one that cost fifty cents, and therefore if the plaintiff, by his own fault, possibly not due to any carelessness on his part, but due to the difficulty of the inquiry, he leaves the jury in a position of doubt, from which he has given them no means by which they can extricate themselves, the burden does not rest upon you, the burden rests upon him to show how many of these articles there were that cost so much otherwise you can not arrive at any verdict in regard to that.

I do not think I need to call your attention to anything further, and I am sure from the careful attention, which you gentlemen of the jury, have given to these cases, and the splendid carefulness with which counsel have presented the case, and without giving you what is sometimes called "taffy" I may say that I am sure a correct verdict will be arrived at by you, in each of these cases.

The jury later returned into court for information, after having retired to their jury room.

The foreman of the jury says: We came in to see if we could not get a list of the property, that is the personal property that is destroyed, because it is hard to keep in our memory the details, and it would be impossible to be exact unless we can have the list. There was a list used by counsel in the examination of the witnesses, and we thought we might get that list.

Court: There was not any list offered in evidence, and I doubt very much whether the law would permit such a list to be offered and used by the jury, and I am afraid you will have to struggle along with the best recollection you have

of it. If there are any particular points you want to be enlightened on, with respect to any portion of the evidence, if you will indicate what that is, it may be we can get counsel who are still here, to agree upon what the facts are concerning that, and that might help you.

Mr. Foreman: Would it not help the thing along, if counsel agreed to allow the list to go in?

Court: It was very strongly objected to, being permitted to go in evidence, and I doubt very much that it would be allowed in now.

Foreman: Could we have that portion of the evidence read to us—that would refresh our memory, as to the prices and the quantities?

Counsel thereupon agreed that a statement should be made by each side, and dictated to the stenographer, who shall read it to the jury. Said statement shall cover the value of the goods and personal property, and what the depreciation should be, and then it is agreed that the jury may reach a conclusion among themselves, as to the value of these articles, and that said statement shall be read to them, for their convenience.

The following statements were dictated to the stenographer by the respective counsel, and read by him, to the jury.

Mr. English: The defendant admits that the plaintiff is entitled to a verdict, if at all, to the sum of $44,000 being the amount agreed upon for the clover, hay and manure.

The defendant has totalled up the cost prices given by the plaintiff's witnesses, of the value of the outside property in the suit of Edward V. Goodman Exr. vs. The Lehigh Valley Railroad, and finds the total to be $3,144.50

Defendant has also totalled up the value of the inside property as given by the plaintiff's witnesses in the suit of Goodman Exr. and finds the total to be 657.00

Making the toal cost at the price given $3,801.50

Defendant thinks that inasmuch as the greater part of this property at the time of the fire, was second hand, that a fair value of this property, at the time of the fire, is one-third of the cost price, or $1,267.16

In the suit of Edward V. Goodman Ind., against the Lehigh Valley Railroad, the defendant has not made an accurate compilation of the figures given, but thinks a fair value of the property destroyed at the time of the fire was... 100.00

In the suit of Edmund Mays against the Lehigh Valley Railroad, the defendant has totalled up the cost prices for the personal property as given by the plaintiff's witnesses including the sum of $125, agreed on for the price of the farm implements, and finds that it amounts to 969.70

The defendant thinks in this case, as in the case of Goodman Exr., that one-third of the cost value is a fair value to place upon this property at the time of the fire, and at this value would be 323.23

Mr. Whittemore: The plaintiff has made a compilation of the value of the outdoor articles as testified to by Edward V. Goodman, and finds it to be... $3,426.60

Exceptions.

And the indoor articles as testified to by Mrs. Sarah E. Goodman, and finds them to be 743.14

And that the manure and hay being agreed upon at the value of $44.00 between the plaintiff and defendant, for which the plaintiff Edward V. Goodman, is in any event entitled to a verdict.

And that the plaintiff contends that there should be no deduction from the value, of a larger amount of the personal property, inasmuch as it was of a character, not subject to depreciation, to any extent, and that such personal property not subject to deprecaition as enumerated by counsel, amounts to over $1,800.00

And as to the rest of the personal property, there should be no depreciation to an extent of one-third.

In the case of Edward V. Goodman, individually, the plaintiff has totalled up the value of the personal property as testified to by Mr. Goodman, and his wife, and his mother, at 223.75

In the case of Edmund Mays—plaintiff has made a calculation of the personal property as testified to, of..... $991.80

Exclusive of the value of the additional amount as agreed upon for the smaller farm implements, of 125.00

Making a total of the personal property as testified to and agreed upon ... $1,116.80

And the plaintiff contends that a large quantity of these personal articles are of a character not subject to any appreciable depreciation.

Court: I have been requested by the defendant through its counsel, to say, that the giving of these figures is not to be taken by the jury in any way as an admission on its part of any liability whatever. That you must determine to exist before you allow anything at all.

I understand the jury want to ask some further questions.

Juror No. 4: Can we consider the allowance of any interest for the five years if we should find any verdict in behalf of the plaintiff?

Court: It is in the discretion of the Court, to tell you, whether or not you shall consider interest for the five years, and I will say to you that you may consider interest for five years, if you see fit, on any sum that you may find. When I say interest for the five years I am speaking without absolute accuracy, but what I mean is, for the time that he has been deprived of this property, that is since the fire.

I say it is within the discretion of the Court, to tell the jury that they may consider the matter of interest, and I exercise that discretion, and I tell you gentlemen, that you may allow interest.

Mr. English: If your Honor please, I pray an exception to that part of your Honor's charge, in which your Honor commented on the evidence to the effect that as Polimbo arrived at the apple tree, the mail train passed.

Court: Well, whatever I said you have a right to have an exception on that. Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

Mr. English: I also pray exception to that part of your Honor's charge, in which your Honor commented on the piece of coal found by the man who was sheltering his horse, after it had

been clipped—there being no evidence that this piece of coal came from the locomotive engine.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to that part of your Honor's charge, wherein your Honor says that you left it for the jury to say whether the defendant used all practicable means to inspect the screens after they had been installed.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to that part of your Honor's charge, in which your Honor told the jury that it was the duty of the defendant to use all practicable means to install and inspect the screens.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to that part of your Honor's charge, to the qualification in which your Honor charged the defendant's first request to charge.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to that part of your Honor's charge, to the qualification in which your Honor charged the defendant's third request to charge.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to your Honor's refusal to charge the defendant's fourth request to charge.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to your Honor's qualification or correction in your Honor's charge, of the defendant's fifth request to charge.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to the qualified way in which your Honor charged the seventh request to charge of the defendant.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to that portion of your Honor's charge wherein your Honor refused to charge the eighth request to charge of the defendant.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to your Honor's refusal to charge the twelfth request to charge of the defendant, which was the request to direct a verdict for the defendant in each case.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to your Honor's refusal to charge the fifteenth request to charge of the defendant.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

I also pray an exception to your Honor's refusal to charge the eighteenth request to charge of the defendant.

Exception allowed. Sealed accordingly.

WM. H. SPEER,
Judge. (Seal)

Mr. Whittemore: I pray an exception to the Court's charge in reference to establishing the kindling of the fire by a preponderance of evidence, without stating that the preponderance may be shown by circumstantial evidence only.

Exception allowed. Sealed accordingly.

I also pray an exception to that part of your Honor's charge wherein your Honor said that the fire originated from engine 2454 only, or that portion of it which related to that matter, and did not take into consideration the fact that the fire might have originated from engine No. 1458.

Exception allowed. Sealed accordingly.

I also pray an exception to that part of your Honor's charge, wherein your Honor stated that the railroad is chartered and has the right to run locomotives.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge wherein your Honor said that the defendant may show that it has used all practicable means to prevent the escape of fire, and has provided a screen or cover in the engine to prevent the escape of fire, on the ground that that defense authorized by the statute is unconstitutional.

Exception allowed. Sealed accordingly.

I also pray an exception to the charge of your Honor, wherein your Honor said, in connection with the last portion excepted to, that the jury were allowed to conclude that such a defense has been established.

Exception allowed. Sealed accordingly.

I also pray an exception to the charge of your Honor, wherein your Honor said, in connection

with the last portion excepted to, that the jury were allowed to conclude that such a defense has been established.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge, wherein your Honor stated that it was the duty of the defendant company to provide a screen or cover only in the smokestack.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge, wherein your Honor said, that if there was a defect in the screen which escaped observation, that that would be no liability or language to that effect, whatever that language may be.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge, wherein your Honor stated that the existence or non-existence of the diaphragm, would not give liability and that it was not necessary for the company to install a diaphragm.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge, wherein your Honor stated that the company need not use the best means, etc.

Exception allowed. Sealed accordingly.

I also pray an exception to that portion of your Honor's charge, wherein your Honor charged in regard to the fire of Edward V. Goodman, that it is a question for the jury, whether the fire to Mr. Mays' place would be reasonably anticipated.

Exception allowed. Sealed accordingly.

And I also pray an exception to the refusal of your Honor to charge in respect to the testimony of Mr. Goodman concerning the value and the enumeration of the articles in the list which he used.

Exception allowed. Sealed accordingly.

DEFENDANT'S REQUESTS TO CHARGE.

1. That the mere fact that the fire complained of in this case occurred, of itself, creates no liability upon the railroad company. The jury, in order to give the plaintiff a cause of action, must conclude:

(a) That the fire was communicated from the locomotive of the defendant, whose number was 2454, and

(b) That the defendant had not used all practicable means to prevent the communication of fire by sparks from said locomotive.

2. The defendant is chartered by the State to operate a railroad and has a right, therefore, to run locomotives. If it uses all practicable means to prevent the communication of fire from its locomotives, and a fire nevertheless occurs from an escaping spark, the company is not liable for the damages resulting therefrom.

3. The burden of proof is upon the plaintiff to show by the preponderance of the evidence that the circumstances creating liability upon the railroad company existed in this case.

4. The plaintiffs are bound to look out for, and take every precaution against, fire caused by sparks from a locomotive, which has been properly supplied with every practicable means to prevent the escape of sparks, and if the jury believe that the fire in question was due to a spark escaping from such a locomotive which nevertheless, owing to the high wind and the dry weather, and the exposure of a highly inflammable substance like hay, set fire to the plaintiff's property, then there can be no recovery in the case.

5. The owner of property adjacent to a railroad should use proper care in the use thereof, so as to guard against fire originating from the

locomotives, without the fault of the company, and if the fire in question arose under those circumstances, then there can be no recovery.

6. The measure of duty imposed by the law upon a railroad company in taking and using all practicable means to prevent the communication of fire from an engine is to provide such engine with a screen or cover in the smoke stack, so as to prevent, as far as practicable, the escape of fire, and reasonable care in the inspection thereof to see that its good condition continues.

7. The railroad is not bound to insure that its inspection will disclose defects in the screen. It is only required to use due care in such inspection, and if, notwithstanding such care was exercised, a defect nevertheless existed, which escaped the observation of a reasonably careful inspector, resulting in the communication of fire from the locomotive, to plaintiff's property, the company is not responsible therefor.

8. If the jury believe that the locomotive was provided with a screen so as to arrest and prevent, as much as practicable, the escape of fire, then no recovery can be had in this case.

9. If the jury conclude the defendant is liable, it then comes to the question of damages. In measuring these, so far as the buildings destroyed are concerned, the award must be confined to the difference in the market value of the land before and after the fire. They must not award the cost of the old buildings nor the cost of the new ones, but only ascertain and award the extent, in dollars and cents, to which the market value of the farm has been affected by the destruction of the buildings, in their condition at the time of the fire.

10. With regard to the personal property that was destroyed, the rule is that compensation should be based upon the fair market value of the destroyed articles—not what they had cost or what it would cost to replace them—but what a purchaser would have been willing to have paid for them in the condition they were in at the time of the fire.

11. No compensation can be awarded for the burnt trees as such. All the jury can consider with regard to them is how far, if at all, their injury or destruction has affected the market value of the farm.

12. The Court is requested to direct a verdict for the defendant in each case.

13. The duty imposed by law on the defendant is to provide its engines with a screen or cover in the smoke stack to prevent the escape of fire as much as practicable. The existence or non-existence of a diaphragm in the engine would not give rise to the liability of the defendant.

14. The defendant was not required to install diaphragms in its engines. The fact that no diaphram was installed in engine No. 2454 does not cast any liability on the defendant in this case.

15. Whatever evidence there is in this case in reference to the installation and use of diaphragms is immaterial to this issue, and must be disregarded by the jury.

16. The only duty cast upon the defendant here is that imposed by the statute; and this duty does not include the duty to install or maintain a diaphragm in its engines, or in engine No. 2454 on July 19, 1905.

17. The defendant was not required to install or use the *best* means known or that may be de-

vised to prevent the communication of fire by sparks; but only all *practicable* means by the use of screen or cover in the smoke stack.

18. The undisputed evidence here is, that the screen in use by the defendant, is as efficient as any in use by the railroad companies generally, the fact that the defendant did not use the basket screen or some other form of screen is immaterial.

(Edward V. Goodman, Executor of James E. Goodman,
vs.
Lehigh Valley Railroad Company of N. J.)

Exhibit P-1.

Last Will and Testament of Thomas T. Littell, deceased, dated July 23, 1872, duly admitted to probate on the eighth day of October, 1877, by the Surrogate of Union County, and recorded in Book "E" of Wills for Union County, page 86, by which he gave full power of sale to his executors, and appointed Shotwell B. Frazee and Hugh H. Bowne Executors, of whom Hugh H. Bowne only duly qualified, and to whom letters testamentary on said will were duly issued by said Surrogate, as appears by said record offered in evidence.

Codicil dated July 2, 1874, revokes appointment of Shotwell B. Frazee as Executor, and appoints Hugh H. Bowne, sole Executor.

Exhibit P-2.

Letters of administration with the will annexed of Thomas T. Littell, deceased, dated Jany. 17, 1882, issued to John Ganswyk, by the Surrogate of Union County, recorded in Book "A" of Administrations for Union County, page 530, reciting that the Executor of said will, had previously died.

Exhibit P-3.

John Ganswyk, Administrator with the will annexed of Thomas T. Littell, deceased,	DEED.
	Consideration $4,700.
	Date June 15, 1885
To	Ack. " 16, "
Elizabeth T. Van Velsor.	Rec. " 17, "
	Book 173, p. 568, &c.

Recites power of sale in will, and conveys by virtue thereof, in Township of Fanwood, Union County, New Jersey, a tract of 94–65/100 acres, more or less, being the *locus in quo,* including the right of way of defendant's railroad extending through said tract.

Exhibit P-4.

Elizabeth T. Van Velsor, widow,	DEED
	Consideration $4,000.–
	Date Jany. 31, 1899
To	Ack. " " "
	Rec. Feby. 9, "
James E. Goodman.	Book 346, p. 549.
	Union County.

Conveys, in Fanwood Township, Union County, New Jersey tract of 94-65/100 (same description

as in Exhibit P-3) Excepting and reserving out of the aforesaid described lands and premises so much thereof as has been theretofore sold and conveyed by said Elizabeth T. Van Velsor to the Roselle and South Plainfield Railway Company by deed dated Oct. 31, 1887 and recorded in Book 192 of Deeds, pages 391.

Exhibit P-5.

Probate copy of last will and testament of James E. Goodman, deceased, dated April 11, 1901 and admitted to probate January 21, 1907, by the Surrogate of Union County, and letters testamentary issued thereon by said Surrogate, dated January 21, 1907, to Edward Van Velsor Goodman, the Executor named and appointed by said will.

(EDMUND MAYS,
vs.
LEHIGH VALLEY R. R.)

Exhibit.

Last will and testament of Mary Vail, deceased, dated August 23, 1892, probated March 29, 1897, by the Surrogate of Union County, and recorded in Book "O" of Wills for Union County, page 396, and letters testamentary on said will issued by said Surrogate to Thomas M. Martin, the Executor appointed by said will, which gave to said

executor a full power of sale of real estate of the testatrix.

Codicil datel July 29, 1896, which does not affect power of sale or appointment of Executor.

Exhibit.

Last will and testament of Harriet Vail, deceased, dated August 23, 1892, probated Jany. 22, 1894, by the Surrogate of Union County, and recorded in Book "M" of Wills for Union County, page 332 and letters testamentary on said will issued by said Surrogate to Thomas M. Martin, the Executor appointed by said will, which gave a full power of sale of the real estate of the testatrix to said Executor.

Exhibit A.

Thomas M. Martin, Executor of the last will and testament of Mary Vail, deceased,

to

Edmond Mays.

DEED
Consideration $2400.00
Date Feby. 18, 1899.
Ack. " " "
Rec. " 27, "
Book 347, p. 57.

Recites power of sale in will of Mary Vail, and by virtue thereof conveys, in Townships of Clark and Fanwood, Union County, New Jersey, the undivided one-half part of a tract of 52–83/100 acres, being the greater part of the *locus in quo*. Recites being part of the homestead farm of Jacob Vail, deceased, and of which land said Mary Vail and her sister Harriet Vail were seized in their lifetime.

Exhibit B.

Thomas M. Martin, Executor of the Last will and testament of Harriet Vail, deceased,	DEED Consideration $2400.00 Date Feby. 18, 1899. Ack. " " "
To	Rec. " 27, " Book 347, p. 60 Union County.
Edmond Mays.	

Recites power of sale in will of Harriet Vail, and by virtue thereof conveys, in Townships of Clark and Fanwood, Union County, New Jersey, the undivided one-half part of said tract of 52–83/100 acres as described in preceding Exhibit A with the same recitals.

Exhibit C.

Thomas M. Martin, Executor of the last will and testament of Mary Vail, deceased,	DEED Consideration, $60.00 Date Jany. 31, 1900 Ack. " " "
To	Rec. Dec. 13, 1906 Book 479, p. 62 Union County.
Edmond Mays.	

Recites power of sale in will of Mary Vail, and by virtue thereof, conveys in Township of Clark, Union County, New Jersey, an undivided one-half part of a tract of 68/1000 of an acre, and of another tract of 1–35/100 acres, being the remainder of the *locus in quo,* not included in the first two deeds offered in evidence in this case, exhibits

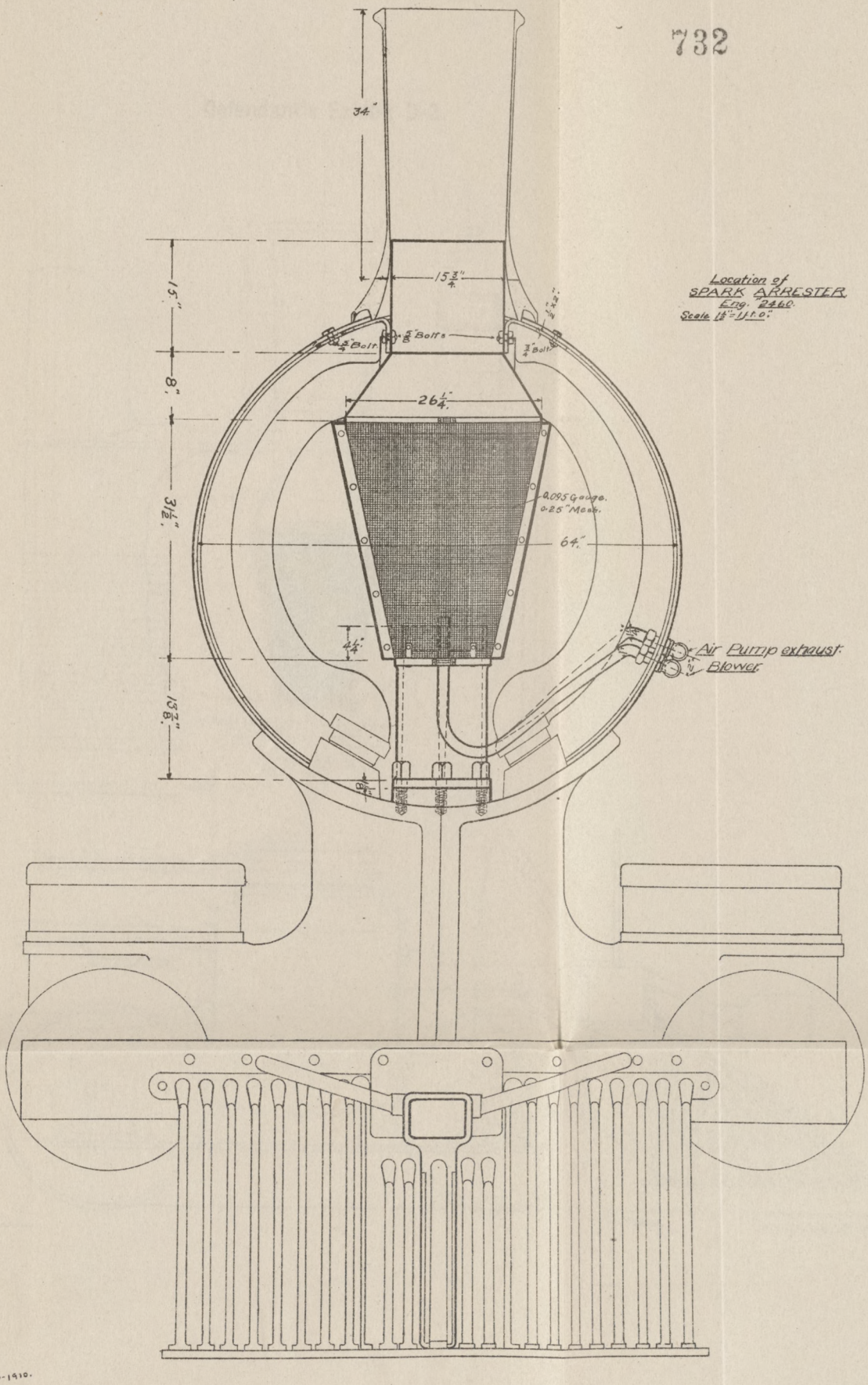
Exhibit D.

Thomas M. Martin, Executor of the last will and testament of Harriet Vail, deceased,	DEED Consideration $60.00 Date Jany. 31, 1900. Ack. " " "
To Edmond Mays.	Rec. Dec. 13, 1906, Book 479 p. 64, Union County.

Recites power of sale in will of Harriet Vail, and by virtue thereof, conveys in Township of Clark, Union County, New Jersey, an undivided one-half part of a tract of 68/1000 of an acre, and of another tract of 1–35/100 acres, being the remainder of the *locus in quo,* not included in Exhibits.

Defendant's Exhibit D-1.

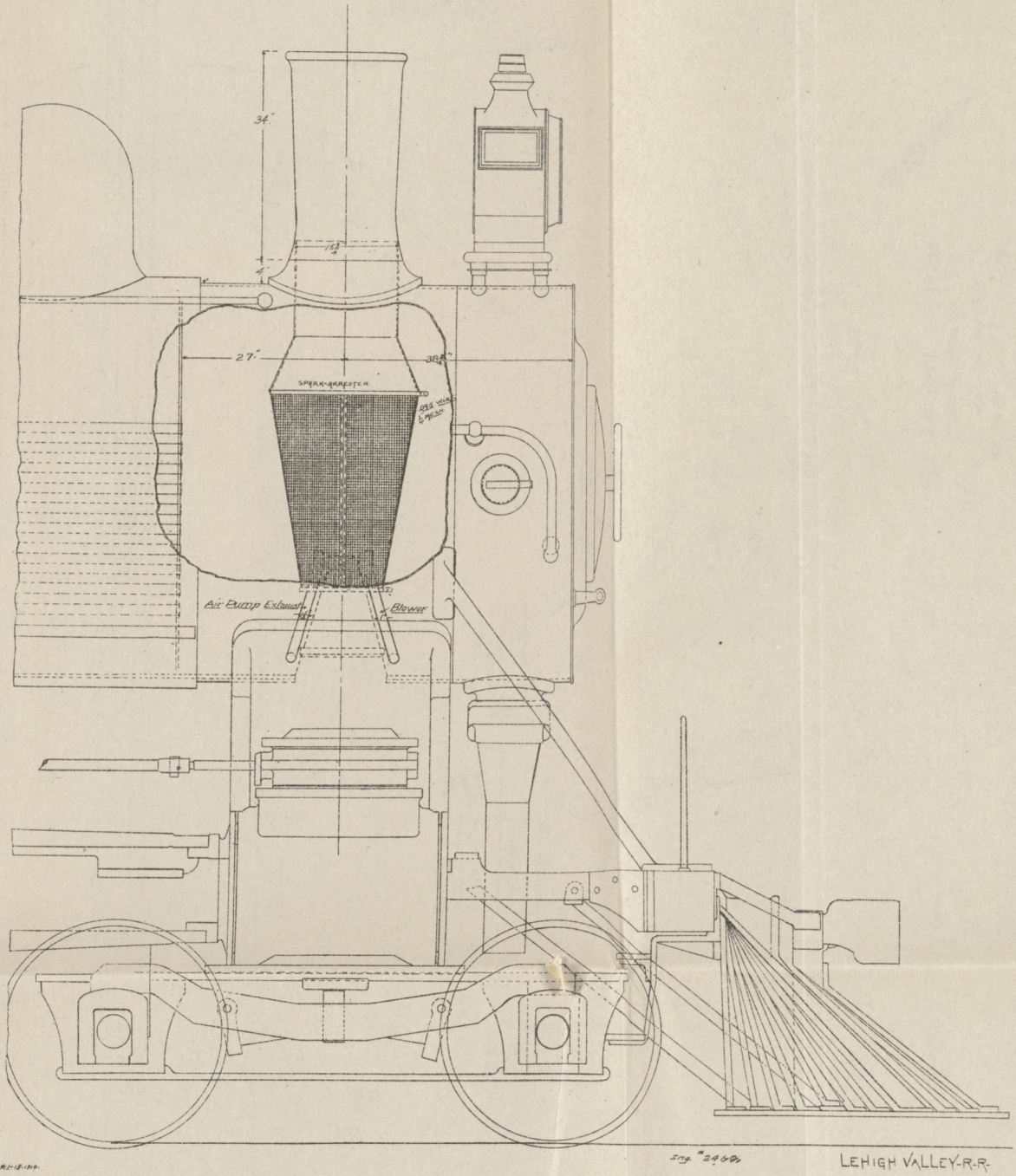
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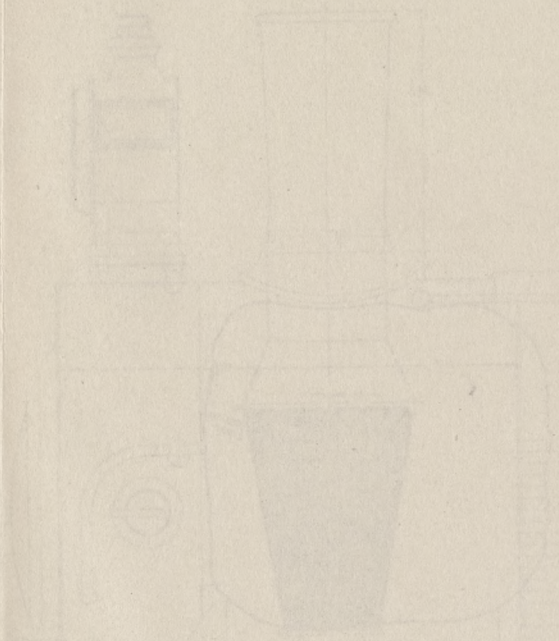


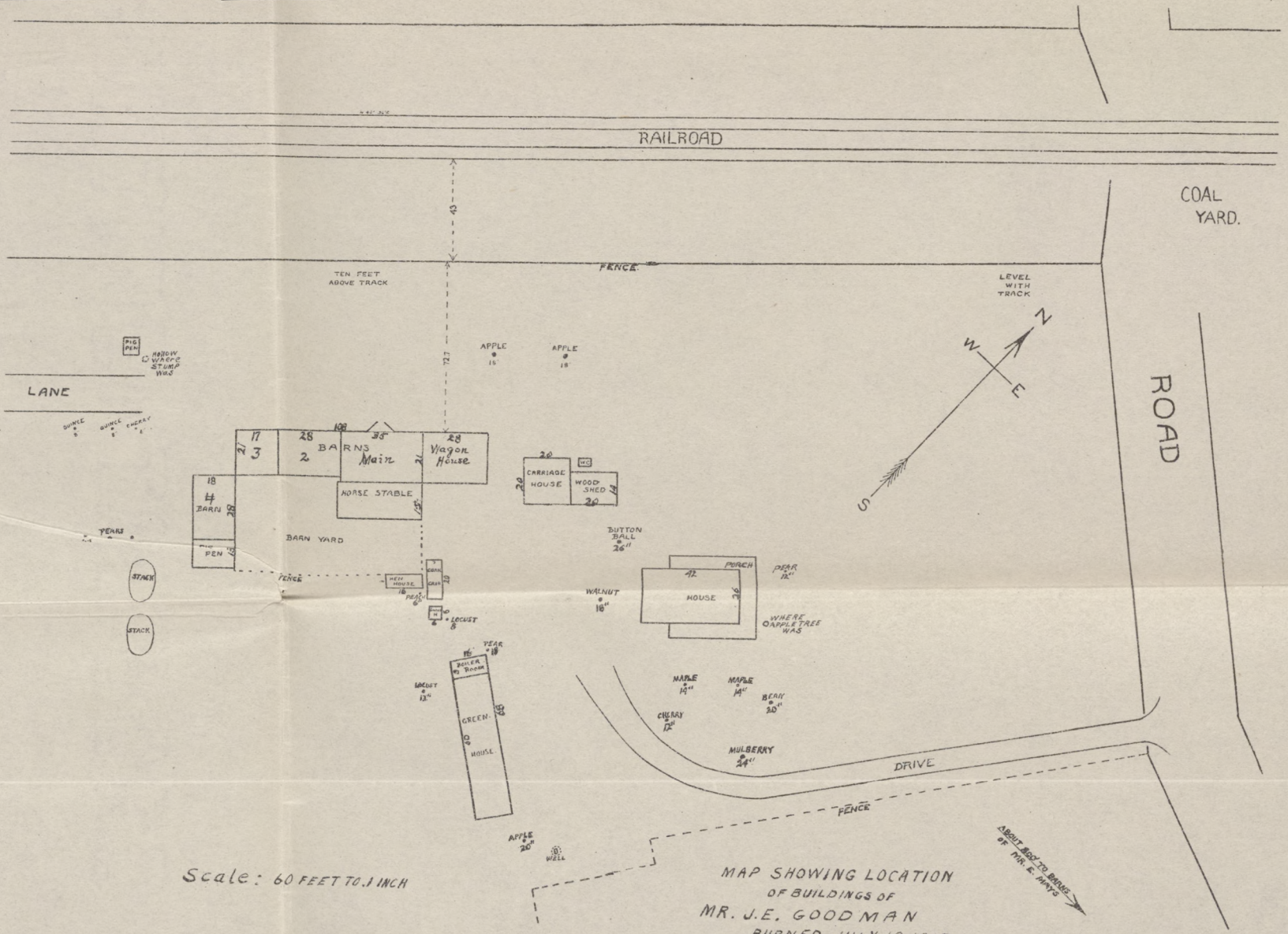
Location of SPARK ARRESTER
Eng. 2460.
Scale 1/8"=1'-0"

F. 1-20-1910.

Defendant's Exhibit D-2.







Plaintiff's Exhibit P-6.

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