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I

OPINION OF SUPREME COURT

Filed Jan. 20, 1926

NEW JERSEY SUPREME COURT

No. 47, May Term, 1924

JOSEPH SYMONSKI,
Plaintiff-Respondent,
v.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Appellant.

On an appeal from the Hudson County Court of Common Pleas before Gummere, Chief Justice, and Justices Kalisch and Campbell. For the appellant, DeVoe Tomlinson, George Holmes and Edwin F. Smith. For the respondent, Edward A. Markley and William George. The opinion of the Court was delivered by Kalisch, J. The plaintiff recovered a verdict in the Hudson County Court of Common Pleas, against the defendant company, for the sum of twenty-nine thousand dollars, in an action brought by him under the Federal Employers' Liability Act, to recover damages sustained by him, through the negligence of the defendant's servants, on the 8th day of March, 1924, while he and the defendant company were engaged in interstate commerce. From the judgment entered upon the verdict the defendant takes this appeal.

The amended complaint contains two counts. The first count alleged, "That this action is brought under and by virtue of an Act of Congress of the

United States, entitled 'An Act relating to the liability of Common Carriers by railroads to their employees in certain cases.' " This paragraph is repeated in the second count except that it is not expressly alleged that the defendant company was engaged or the plaintiff employed in interstate commerce. The trial judge in his instructions to the jury after stating that the action was brought under "An Act of Congress of the United States" first read that provision of the statute which relates to and governs actions brought against common carriers engaged in interstate commerce by employees, who have suffered injury while engaged in interstate employment, "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc.," and then further charged that if at the time of the accident the plaintiff was engaged in work which was a part of the interstate commerce in which the defendant was engaged, or work that was so closely connected with interstate commerce as practically to be a part of it, or work which had for its immediate purpose the furthering of the conduct of interstate commerce then both the defendant and plaintiff would be engaged in interstate commerce, and the provisions of the Federal Employment Act would apply to this case.

We have no fault to find with this statement of the law, but only as to the application made of it by the trial judge to the facts of the case. There are thirty-five grounds of appeal presented for reversal of the judgment but as we are met at the threshold of the case with the fundamental question, raised by the defendant's motion (denied by the Court) for a direction of a verdict in defendant's favor, upon the ground that at the time of

the plaintiff's mishap he was not engaged in interstate commerce we need go no farther than to determine from a consideration of the facts of the case whether there was any testimony which warranted the trial judge to leave to the decision of the jury, the question whether or not the plaintiff at the time of the accident was engaged in interstate commerce, for if he was not so engaged, he was not entitled to succeed under the Federal Employers' Liability Act.

The solution of this inquiry necessitates a statement of the facts, which, briefly, are these: The accident happened on March 8th, 1924, while the plaintiff, an employee of the defendant company, was walking upon its railroad tracks on his way to its railroad station, at Bayonne, for the purpose of taking one of its passenger trains to convey him to the defendant's round-house, at Elizabethport, at which place his employment was to clean fires from and to build fires in engines engaged in interstate commerce. His hours were from three o'clock P. M. until eleven o'clock P. M. His pay did not begin until he reached the shop and actually punched the time card. He resided on Prospect Street between 23rd and 24th Streets, in Bayonne, about a block and a half from the defendant's railroad station on 22nd Street and about four miles from its round-house at Elizabethport. The company maintains a passenger station on either side of the tracks, one for eastbound and the other for westbound passengers. These stations are reached by flights of stairs leading from 22nd Street. On the day of the accident the plaintiff left his home about 2:15 o'clock in the afternoon to go to his place of employment, but instead of going by way of the stairs, provided by the defendant company, to reach

its passenger station, he, according to his own story, followed his usual course to reach the station by cutting across lots and thus got upon the railroad tracks and then walked along the tracks, and when within about two hundred feet of the station he was struck by the engine of an interstate freight train, of the approach of which he had no warning and was so seriously injured that his right foot, at the ankle and his left leg at the knee had to be amputated. There was proof that the plaintiff and other employees had taken the route he took to reach the station, and that this was a common practice covering a period of three or four years. The plaintiff was entitled to take any one of the defendants' passenger trains from Bayonne, stopping at Elizabethport, without payment of fare. There was no proof or intimation that the defendant company ever exercised any control over its employees as to their place of residence. In the absence of proof to the contrary it will be presumed that the choice of residence was left to them. While it is true that the defendant company permitted its employees to be conveyed to and from its shops, at Elizabethport, by its trains, without payment of fare, we think this circumstance is of no vital importance, since it does not appear that the defendant exercised any control over the plaintiff's choice of place of residence or that the defendant undertook to control or direct the plaintiff as to the means he should use to reach his place of employment. The circumstance that he was allowed to ride, without payment of fare to and from Elizabethport is of no more significance than if he had been furnished by his employer with the money to pay for his daily trips to and from his work.

In support of the plaintiff's right to maintain

his action under the Federal Employer's Liability Act it is argued that notwithstanding the fact that he was not injured while he was on the defendant's premises in the immediate vicinity of the place where he was employed, nevertheless, since he was on the defendant's premises when he received his injury, and was walking along the defendant's right of way with the purpose to take a train, upon its arrival, at the company's station to be conveyed to his place of employment, he was in legal theory engaged in interstate commerce. We are unable to find sanction of any such theory either in the Federal or State decisions, to which reference has been made in the brief of counsel of plaintiff. The failure to find judicial confirmation of any such proposition is no cause for wonderment, if we pause to consider what an expansive territory would become embraced as a part of the premises of the plaintiff's employment.

To illustrate the plaintiff's counsel's theory, let us take the case of an employee of the defendant company, residing in Bound Brook or Trenton, who, in going to his work, selects the company's right of way to reach the station to board one of the company's trains, or upon reaching the station in safety he waits for the arrival of the train, and while doing either of those things he is injured by one of the company's interstate trains; thus, we have a situation of an employee being upon his employer's premises, on his way to his fixed place of employment, a distance of forty or fifty miles away, to perform, upon his arrival there interstate commerce work, nevertheless, according to the plaintiff's counsel's theory, the employee so soon as he sets his foot upon his employer's premises, for the purpose of going to his work, he is to be considered to

have entered upon the duties of his employment, regardless of the remoteness of the place where he received his injury from the place of his employment, and irrespective of whether or not the accident occurred on the employer's premises within the vicinity of the plaintiff's place of employment, or whether or not he was directed by the master either expressly or impliedly to take the route that he took at the time of his injury.

The Federal cases lend no support to such a theory, in *North Carolina R. Co., v. Zachary,* 232, U. S., 249, the plaintiff's decedent a locomotive fireman, after having prepared his engine for starting on a trip, left his engine to go to his house across certain tracks that intervened between the engine and his boarding house a short distance away when he was struck by another engine, the view of which was obstructed, the Court said:

> "Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that the deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck."

In *Erie Railroad Company v. Winfield,* 244 U. S., 170, which was a case where the employee while leaving the railroad premises at the end of his day's work but had not entirely cleared the premises was struck by a switch engine, inflicting a fatal injury. The Supreme Court said:

> "In leaving the carrier's yard at the close of his day's work, the deceased was but dis-

charging a duty of his employment. See *North Carolina Railroad Company v. Zachary,* 232, U. S., 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain and that his employment also extended to intrastate commerce is for present purposes of no importance."

By parity of reasoning the same rule would apply to a workman who was injured while on his way to commence his daily work. It is to be observed that in the cases cited the right of a recovery was sustained upon the express ground that the injury to the workman occurred while he was within the ambit of his employment and what he was doing was a necessary incident of his day's work. It is undisputed that the general work of the plaintiff's decedent in the instant case was that of interstate commerce, and the legal problem presented is whether at the time of his injury he was doing an act which was a necessary incident of his day's work, namely, in walking along the defendant's right of way, four miles from the place where his work actually began. In the absence of any testimony that the plaintiff was directed by the defendant to take the route that he did to reach the defendant's station, or that the defendant exercised any control

over his movements, and in view of the further fact that the company had provided a safe means of access to its stations for the general use of its intending passengers, of which the plaintiff was one, it cannot be logically maintained that his election to walk along the defendant's right of way was a necessary incident of his day's work and partook of its character as a whole. To adopt a contrary view would subject the defendant to liability, in case of accident, as a result of the capricious act of its servant in selecting the most perilous route to the place of his employment, without regard to its remoteness from the starting point, so long as he maintained a foothold upon the defendant's premises, at the time of his injury. The manifest vicious tendency of such a doctrine is self-condemnatory.

It is strenuously urged by the plaintiff's counsel that the facts of the instant case cannot be distinguished in application of the legal principle from those facts which were present in the *Lampher v. Oregon Railroad and Navigation Company,* 196, Fed. Rep., 336, where it was held that the plaintiff's decedent was entitled to recover under the following circumstances. The plaintiff's decedent was directed and ordered by the defendant to go from the town where he resided to the railroad station and procure transportation there by a certain train, due at 7:45 P. M., to be conveyed by it to Tekoa, Oregon. His orders were to relieve an engine crew which had been working over-time, and to move the train then engaged in interstate commerce. He went to the station as directed and upon reaching the crossing in the yards of the company where two cars were cut, he continued his course across between the two cars, which were suddenly closed, and by reason of which he was fatally injured. The Court said:

> "The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a certain train then engaged in interstate commerce. He was on the premises in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce and belonged to the same railroad company."

Assuming that this case was correctly decided, and that the essential facts are accurately stated, the dissimilarity between the facts upon which the excerpt from the opinion was predicated from the facts of the case *sub judice* is too conspicuously apparent to need comment. This being the case, it leads, however to the pertinent observation that while it is true that in the cited case the decedent met his injury upon his employer's premises, far away from the place where he was to take charge of the interstate train, he was there at the direction and peremptory command of his employer, and hence, his interstate employment began when he reached his employer's premises and started in obedience of its explicit direction and command to fulfil the duty of the employment imposed upon him, by going to the train which he was directed by his employer to take. But it is to be observed that the fact that the employee met his injury upon his employer's premises, far distant from the place of his general interstate employment is not of itself determinative one way or the other, on the question whether the employee at the time of his injury was en-

gaged in interstate commerce, but is simply a factor to be considered with other facts and circumstances in the case, as is aptly illustrated by the facts and decision in the Oregon case above cited.

Upon this branch of the case, the facts being without dispute, a Court question was presented, whether the plaintiff at the time of his injury was engaged in interstate commerce, we think he was not so engaged and that, therefore, the motion for a direction of a verdict for the defendant made by its counsel which motion was denied, should have prevailed. For this error judgment must be reversed.

Judgment is reversed.

JUDGMENT OF REVERSAL

Filed Jan. 28, 1926

This matter having been duly argued at the May Term, 1925, of this Court, by DeVoe Tomlinson, George Holmes and Edwin F. Smith, of counsel for the appellant, and Edward A. Markley and William George, of counsel for the respondent, and the Court having inspected the record and judgment below and considered the causes assigned for appeal,

It is thereupon ORDERED that the judgment of the said Hudson County Court of Common Pleas be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to said Hudson County Court of Common Pleas, to be proceeded with in accordance with this judgment and the practice of said Court.

Entered January 28, 1926.

On motion of:

WM. A. BARKALOW,

Attorney for Defendant-Appellant.

PETITION FOR RE-ARGUMENT

Filed Feb. 6, 1926

NEW JERSEY SUPREME COURT

No. 47, May Term, 1925

JOSEPH SYMONSKI, Plaintiff-Respondent, v. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Court of Common Pleas.

To the Honorable Justices of the Supreme Court, Part I, May Term, 1925.

The humble petition of Joseph Symonski, the plaintiff-respondent in the above-stated cause, respectfully represents:

He recovered a verdict against the defendant for $29,000.00 for the loss of both of his legs and the defendant appealed from the judgment on that verdict in the Hudson County Court of Common Pleas to this Court. This Court, in an opinion by Justice Kalisch, filed on January 20, 1926, reversed the judgment of the Court below on the ground that a verdict should have been directed in favor of the defendant because at the time of his injury the plaintiff was not engaged in interstate commerce. The plaintiff respectfully asks a reconsideration of the conclusion stated in said opinion that the judgment should be reversed because the holding of the Court that he was not engaged in interstate commerce is not dispositive of the motion for a direction of verdict against him.

Petition for Re-argument

The opinion of this Court recites that the other members of the Court who considered the appeal were Chief Justice Gummere and Justice Campbell.

The Supreme Court reversed the judgment of the Common Pleas Court on the ground that the trial Court should have granted defendant's motion for a direction of verdict, because, in the opinion of the Supreme Court, the evidence did not establish the fact that the plaintiff at the time of the accident was engaged in interstate commerce.

The motion of the defendant which the Court says should have been granted is on the ground "that there was no proof in the case that the plaintiff was engaged in interstate commerce or in any work for the defendant at the time of the accident" (See p. 228, Case).

The refusal of the Court to grant the motion for a direction of verdict on the ground stated is the only ground upon which the Supreme Court has reversed the judgment below.

There are two causes of action alleged in the complaint; first, that the accident happened while the plaintiff and the defendant were engaged in interstate commerce; and second, that the accident was due to a wilful act of the defendant's servants. The first count of the complaint was based on the Federal Employers' Liability Act. The second count does not state that either the plaintiff or the defendant were engaged in interstate commerce at the time of the accident and is not based on that act because it could not be without that statement or some statement tantamount thereto. The mere fact that through inadvertence one sentence of the first count is reiterated to the effect that the suit is based on the Federal Employers' Liability Act is mere surplusage. The second count is sustainable

even though the plaintiff was a trespasser on the defendant's railroad, which in fact he was not. As stated, a reading of the second count of the complaint will show that it is based on a wilful or wanton injury. The proof demonstrated that there was such a wilful or wanton injury. For convenience, we are filing with this petition a copy of our original brief and in Point I, subdivision (c), beginning at page 40 of the original brief, we argued the point which we now raise and which apparently was not considered by this Court, namely, that assuming that the plaintiff was a trespasser or a mere licensee, the defendant owed him the duty to refrain from wilful or wanton injury, and the testimony shows that it violated that duty. Without reiterating the argument advanced at page 40 of our original brief, we wish to state that the evidence was complete, certainly sufficient for the jury to find that the plaintiff's injury was caused by the wilful or wanton or gross negligence of the defendant's servants. The train at the time it struck the plaintiff was going only five to six miles an hour and could have been stopped in twenty feet or less. The engineer had the plaintiff in plain sight for at least one hundred feet. The proof showed that he neither blew a whistle nor rung a bell nor attempted even to stop the train, but permitted it to continue after striking the plaintiff, for a distance of over a hundred and fifty feet, and the engine tender and one and a half cars, having a length of a hundred and sixty-five feet, passed over the plaintiff. This evidence was uncontradicted.

The question whether the defendant was liable by reason of the gross negligence of its servants was not one that could be decided on a motion for a direction of verdict, and even if the trial court

had concluded that the plaintiff and the defendant were not engaged in interstate commerce at the time of the accident, still, the motion for a direction of verdict in favor of the defendant had to be denied because the second count was based on gross negligence or wilful or wanton acts. Defendant's motion for a direction of verdict clearly did not reach or cover the entire case presented and the trial court could not, therefore, direct a verdict for the defendant. The question as to whether the plaintiff was a licensee or invitee or trespasser was not before the Court on defendant's motion for a direction of verdict and the sole question raised by defendant's motion was whether plaintiff at the time of the accident was engaged in interstate commerce, and this Court has reversed the judgment on the sole ground that the trial court should have granted defendant's motion for direction of verdict on the ground that the plaintiff at the time of the accident was not engaged in interstate commerce.

It is respectfully submitted that the trial court could not have granted the motion on the ground stated with the evidence in the case fully establishing the fact that the injury was due to a wilful or wanton act, or in other words, gross negligence.

Under Section 161 of the Practice Act (P. L. 1903, p. 581) it is provided: "If there are in a declaration several counts, some of which are faulty or bad and others not, and entire damages are given, the verdict shall be good but the defendant may apply to the court to instruct the jury to disregard such faulty or bad counts."

In *Hansen v. De Vita,* 76 N. J. L. 97, this Court said: "As the record stands, there is a general verdict and one admittedly good count. Section 161

of the Practice Act (P. L. 1903, p. 581) provides that if there are in the declaration several counts, some of which are faulty or bad and others not, and general damages are given, the verdict shall be good."

Counsel for the plaintiff-respondent therefore respectfully pray that a re-argument of this question may be ordered, especially in view of the fact that the plaintiff is without funds of any kind and cannot afford to print the record, which is very large, and brief in the Court of Errors and Appeals, which would be necessary in the event that an appeal were taken to that Court from the judgment of this Court.

Dated, February 3, 1926.

Very respectfully submitted,

EDWARD A. MARKLEY,
WILLIAM GEORGE,

Of Counsel with the Plaintiff-Respondent.

FRANK M. HARDENBROOK,
Attorney of Plaintiff-Respondent.

XVI

ORDER DENYING PETITION FOR RE-HEARING

Filed, April 11, 1925

SUPREME COURT OF NEW JERSEY

TRENTON

April 11th, 1926.

Edward A. Markley, Esq.,
Counsellor etc.,

My dear Mr. Markley:

Your application for a re-argument in the case of Symonski v. Central R. R. Co. of N. J. has been given consideration by Justices Kalisch, Campbell and myself (in conference) today; and the conclusion reached by us is that the application should be denied.

Yours very truly,

WM. S. GUMMERE,
C. J.

NOTICE AND GROUNDS OF APPEAL

Filed, April 24, 1926

NEW JERSEY SUPREME COURT

JOSEPH SYMONSKI, Plaintiff-Appellant, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Respondent.	Action at Law. On Appeal. Notice and Grounds of Appeal.

To William A. Barkalow, Esq., Attorney for Defendant-Respondent,

SIR:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court on the following grounds:

1. The Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

2. The Supreme Court erred when it refused to affirm the judgment of the Hudson County Court of Common Pleas for one or more of the reasons advanced before the said Supreme Court for such affirmance.

3. The Supreme Court erred in concluding that the motion of the defendant for a direction of verdict on the trial should have been granted because

the trial court properly denied said motion for one or more of the reasons urged before the said Supreme Court.

Dated, April 19, 1926.

FRANK M. HARDENBROOK,
Attorney for Plaintiff-Appellant.

Service acknowledged April 22, 1926.
William A. Barkalow,
Attorney of Defendant-Respondent.

NEW JERSEY

Court of Errors and Appeals

NOTICE OF APPEAL

Filed February 11, 1925.

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law

To: FRANK M. HARDENBROOK, ESQ., Attorney of Plaintiff.

Sir:

PLEASE TAKE NOTICE that the defendant, The Central Railroad Company of New Jersey, hereby appeals to the New Jersey Supreme Court from the whole and every part of the judgment of the Hudson County Court of Common Pleas, rendered in the above stated cause.

WM. A. BARKALOW,
Attorney of Defendant.

Dated, February 6th, 1925.

SUMMONS

Served October 8, 1924.

The State of New Jersey to The Central Railroad Company of New Jersey:

You are summoned to answer the annexed complaint of Joe Symonski, in an action at law in the Hudson County Court of Common Pleas, (L. S.) and take notice that unless you file your Answer to said Complaint with the Clerk of said Court, in Jersey City, New Jersey, within twenty days after service upon you of this Writ and the Annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness: Hyman Lazarus, Judge of our Hudson County Court of Common Pleas, at Jersey City, New Jersey, this twenty-sixth day of September, 1924.

JOHN J. MCGOVERN,
Clerk.

FRANK M. HARDENBROOK,
Attorney.

COMPLAINT

Served October 8, 1924.

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant.

The plaintiff, residing in the City of Bayonne, in the County of Hudson and State of New Jersey, says:

1st—That at all the times hereinafter mentioned the plaintiff was and now is a citizen and resident of the City of Bayonne, Hudson County, New Jersey.

2nd—That at all of said times the defendant was and now is a corporation organized and existing under the laws of this State.

3rd—That at said times the defendant was a common carrier of freight and passengers and engaged in interstate commerce between the State of New Jersey and other states of the United States.

4th—That this action is brought under and by virtue of an act of the Congress of the United States, entitled "An Act relating to the liability

of Common Carriers, by railroad, to their employees, in certain cases."

5th—That on March 8, 1924, the plaintiff was in the employ of the defendant in such interstate commerce.

6th—That on at or about two o'clock and fifteen minutes on the afternoon of said day, the plaintiff, while in such employment, was on his way to Elizabeth, New Jersey, to work for the defendant, in cleaning the fire from its engines at Elizabeth.

7th—That in going to work, as aforesaid, the plaintiff was crossing the tracks of the defendant, at or near Twenty-second Street, to go to a depot or station of the defendant at Twenty-second Street, to take a train of the defendant, at said depot or station, to be transported by it to his place of work, at Elizabeth, as aforesaid.

8th—That it became and was the duty of the defendant to operate its engines and train at or about Twenty-second Street, in said City of Bayonne, in a reasonably careful manner, so as to avoid injury to its employees, on its said tracks and who were going to their respective work at said place.

9th—That it became and was the duty of the defendant to give a reasonable notice and warning of the approach of its said engine and trains to such of its employees so upon the tracks of the defendant, as aforesaid.

10th—That it became and was the duty of the defendant to give a usual and customary notice and

warning of the approach of its engines and trains to such of its employees so upon the tracks of the defendant, as aforesaid.

11th—That the defendant negligently omitted its aforesaid duty in that it operated one of its engines and trains at said time and place in a dangerous and reckless manner and at a high and excessive rate of speed and without giving the customary and usual notice or any signal or notice, whatever, of its approach, at or about Twenty-second Street, as aforesaid.

12th—That at said time and place the said engine and train of the defendant, due to the negligence of the defendant, as aforesaid, struck the plaintiff.

13th—That by reason thereof the plaintiff sustained injuries necessitating the amputation of his right foot at the ankle and his left leg at the knee.

14th—That by reason thereof the plaintiff has been subjected to great pain and suffering and has been put to great expense and been and will be permanently unable from carrying on his usual or any occupation, whatever, and has been permanently injured and crippled, to his damage, $50,000.-00.

15th—That the said matters and things occurred while the said defendant was engaged in such interstate commerce and while the plaintiff was employed by said defendant in such commerce.

16th—That this action is commenced within two years from the day the cause of action accrued.

17th—That the cause of action herein set forth is one which is not governed by the provisions of the Act of the State as to compensation for injuries received by an employee in the course of employment.

Plaintiff demands $50,000.00, damages.

FRANK M. HARDENBROOK,
Plaintiff's Attorney.

ANSWER

Filed October 28, 1924.

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant.

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

I. It has no knowledge or information sufficient to form a belief as to the allegations contained in the 1st paragraph of the complaint.

II. It admits the 2nd paragraph of the complaint.

III. It admits the 3rd paragraph of the complaint, except that it also specifically avers that at all of the times therein mentioned, it was engaged not only in interstate commerce, but also in intrastate commerce, wholly within the State of New Jersey.

IV. It denies the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th paragraphs of the complaint.

V. In answer to the 17th paragraph of the complaint it denies that the complaint sets forth a cause of action.

AS A SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was wholly the result of contributory negligence upon the part of the plaintiff.

AS A SECOND SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint plaintiff was a trespasser upon the private property of the defendant.

AS A THIRD SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, the plaintiff was a mere licensee upon the private property of the defendant.

WM. A. BARKALOW,
Attorney for Defendant.

REPLY

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant.

The above named plaintiff for a reply to the defendant's Answer says he denies the matters and things alleged in the first, second and third separate defenses in defendant's Answer and alleges that the place where the plaintiff was injured as described in the complaint was then and for a long period of time prior thereto, continuously and notoriously used by the plaintiff and many other employees of the defendant, without objection, in going to their respective places of employment and to and from the station of the defendant at Twenty-second Street in the City of Bayonne.

FRANK M. HARDENBROOK,
Plaintiff's Attorney.

ANSWER TO REPLY

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law

By way of answer to the reply filed by the plaintiff herein, the defendant says that:

I. It denies each and every allegation contained in said reply.

WM. A. BARKALOW,
Attorney for Defendant.

AMENDED COMPLAINT

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant.

The plaintiff, residing in the City of Bayonne, in the County of Hudson and State of New Jersey, says:

FIRST COUNT

1st—That at all the times hereinafter mentioned the plaintiff was and now is a citizen and resident of the City of Bayonne, Hudson County, New Jersey.

2nd—That at all of said times the defendant was and now is a corporation organized and existing under the laws of this State.

3rd—That at said times the defendant was a common carrier of freight and passengers and engaged in interstate commerce between the State of New Jersey and other states of the United States.

4th—That this action is brought under and by virtue of an act of the Congress of the United States, entitled, "An Act relating to the liability of

Common Carriers, by railroad, to their employees, in certain cases."

5th—That on March 8, 1924, the plaintiff was in the employ of the defendant, in such interstate commerce.

6th—That at or about two o'clock and fifteen minutes on the afternoon of said day, the plaintiff, while in such employment, was on his way to Elizabethport, New Jersey, to work for the defendant, in cleaning the fire from its engines at Elizabeth.

7th—That in going to work, as aforesaid, the plaintiff was lawfully walking along the tracks of the defendant, at or near Twenty-second Street to go to a depot or station of the defendant at Twenty-second Street, to take a train of the defendant, at said depot or station, to be transported by it to his place of work, at Elizabethport, as aforesaid.

8th—Plaintiff alleges that the place where he was injured as described herein was then and for a long period of time prior thereto, continuously and notoriously used by the plaintiff and many other employees of the defendant, without objection, in going to their respective places of employment and to and from the station of the defendant at Twenty-second Street, in the said City of Bayonne.

9th—That it became and was the duty of the defendant to operate its engines and train at or about Twenty-second Sreet, in said City of Bayonne, in a reasonably careful manner, so as to avoid injury to its employees, on its said tracks and who were going to their respective work at said place.

10th—That it became and was the duty of the defendant to give a reasonable notice and warning of the approach of its said engine and trains to such of its employees so upon the tracks of the defendant, as aforesaid.

11th—That it became and was the duty of the defendant to give a usual and customary notice and warning of the approach of its engines and trains to such of its employees so upon the tracks of the defendant, as aforesaid.

12th—That the defendant negligently omitted its aforesaid duties in that it operated one of its engines and trains at said time and place in a wilful, wanton, malicious, dangerous and reckless manner, and at a high and excessive rate of speed, and without giving the customary and usual notice or any signal or notice, whatever, of its approach at or about Twenty-second Street, as aforesaid. The defendant was also negligent in this: That the servants and agents of said defendant in charge of said engine and train after discovering the position of the plaintiff in time to avoid injuring him, nevertheless wilfully, wantonly and maliciously failed to exercise ordinary care to do so.

13th—That at said time and place the said engine and train of the defendant, due to the negligence of the defendant, as aforesaid, struck the plaintiff.

14th—That by reason thereof the plaintiff sustained injuries necessitating the amputation of his right foot at the ankle and his left leg at the knee.

15th—That by reason thereof the plaintiff has been subjected to great pain and suffering and has been put to great expense and been and will be permanently unable to carry on his usual or any occupation, whatever, and has been permanently injured and crippled, to his damage, $100,000.

16th—That the said matters and things occurred while the said defendant was engaged in such interstate commerce and while the plaintiff was employed by said defendant in such commerce.

17th—That this action is commenced within two years from the day the cause of action accrued.

18th—That the cause of action herein set forth is one which is not governed by the provisions of the Act of the State as to compensation for injuries received by an employee in the course of employment.

SECOND COUNT

1st—Plaintiff repeats paragraphs 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, of the amended complaint herein.

2nd—Plaintiff repeats paragraphs 3 and 4 of the amendments of this complaint.

3rd—That at all the times herein mentioned the defendant was and now is a common carrier of freight and passengers.

4th—On March 8, 1924, and prior thereto, the plaintiff was in the employ of the defendant.

5th—On said day and prior thereto the work of the plaintiff for the defendant was cleaning fires from the locomotive engines of the defendant at the shop of the defendant at Elizabethport, N. J.

6th—On said day in going to his work, aforesaid, the plaintiff was lawfully walking along the railroad tracks of the defendant, on the railroad of the defendant, at or near Twenty-second Street, in the City of Bayonne, County of Hudson and State of New Jersey, and was about to go to the depot or station of the defendant at said Twenty-second Street, to board a train of the defendant to be transported to his work at Elizabethport, aforesaid.

Plaintiff demands One hundred thousand ($100,000) Dollars, damages.

FRANK M. HARDENBROOK,
Plaintiff's Attorney.

STIPULATION

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI, Plaintiff, *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law

It is hereby stipulated and agreed that on the trial of this action plaintiff may amend the first paragraph of the Second Count of the Amended Complaint by inserting the figure "7" after the figure "2" and the figure 11 after the figure "10" and the figure ♯15 after the figure "14" and that the second paragraph of said Count may be stricken out.

Dated:

FRANK M. HARDENBROOK,
Plaintiff's Attorney.
WM. A. BARKALOW,
Defendant's Attorney.

ANSWER TO AMENDED COMPLAINT

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law

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

FIRST COUNT

I. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1st.

II. It admits paragraph 2nd.

III. It admits paragraph 3rd, except that it also specifically avers that at all such times it was engaged not only in interstate commerce between the State of New Jersey and other states of the United States, but it was also engaged in intrastate commerce wholly within the State of New Jersey.

IV. It denies paragraphs 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th.

V. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 17th except that it specifically denies that any cause of action has accrued to the plaintiff as against the defendant.

AS A SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was wholly the result of contributory negligence upon the part of the plaintiff.

AS A SECOND SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, plaintiff was a trespasser upon the private property of the defendant.

AS A THIRD SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, the plaintiff was a mere licensee upon the private property of the defendant.

AS A FOURTH SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, the plaintiff was walking or standing upon the defendant's railroad.

SECOND COUNT

I. It repeats its answers to paragraphs 1st, 2nd, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th of the First Count.

II. It repeats its answer to paragraph 3rd of the First Count.

III. It admits paragraph 3rd.

IV. It denies paragraphs 4th, 5th and 6th.

AS A SEPARATE DEFENSE, it alleges that the accident mentioned in the complaint was wholly the re-

sult of contributory negligence upon the part of the plaintiff.

AS A SECOND SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, plaintiff was a trespasser upon the private property of the defendant.

AS A THIRD SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, the plaintiff was a mere licensee upon the private property of the defendant.

AS A FOURTH SEPARATE DEFENSE, it alleges that at the time of the accident mentioned in the complaint, the plaintiff was walking or standing upon the defendant's railroad.

WM. A. BARKALOW,
Attorney for Defendant.

REPLY TO ANSWER TO AMENDED COMPLAINT

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant.

The above named plaintiff for a reply to the first, second, third and fourth separate defenses to plaintiff's amended complaint and also as a reply to the first, second, third and fourth separate defenses to the Second Count of defendant's answer to plaintiff's amended complaint, says that he denies the matters and things therein alleged.

FRANK M. HARDENBROOK,
Plaintiff's Attorney.

RULE FOR JUDGMENT

HUDSON COUNTY COURT OF COMMON PLEAS

JOE SYMONSKI, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law

This action was tried before Hon. Adam O. Robbins, with a jury, in the presence of the counsel of the respective parties, at the Hudson Circuit on January 27, 28 and 29, 1925; and the cause having been heard and submitted to the jury, they returned their verdict as follows:

We find a general verdict in favor of the plaintiff and against the defendant in the sum of $29,000.00.

Whereupon it is adjudged that the plaintiff, Joe Symonski, recover of the defendant, Central Railroad Company of New Jersey, the sum of $29,000.00 and his costs to be taxed.

Rule actually entered this
2nd day of February, 1925,
on motion of

FRANK M. HARDENBROOK,
Attorney of Plaintiff.

GROUNDS OF APPEAL

Filed March 20, 1925.

NEW JERSEY SUPREME COURT

JOE SYMONSKI, Plaintiff-Respondent, *vs.* THE CENTRAL RAILROAD COMPANY, OF NEW JERSEY, Defendant-Appellant.	On Appeal from Hudson County Court of Common Pleas.

To: FRANK M. HARDENBROOK, Esq.,
Attorney for Plaintiff-Respondent.

Sir:

PLEASE TAKE NOTICE that the following are the grounds upon which the defendant, The Central Railroad Company of New Jersey, appeals from the judgment heretofore entered in this cause against it:

1. The said judgment was given for the plaintiff, Joseph Symonski, against the defendant, The Central Railroad Company of New Jersey, whereas by the law of the land judgment should have been given for the said The Central Railroad Company of New Jersey and against the said Joseph Symonski.

2. The said judge erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

3. The said judge erroneously permitted the witness Marcella Wortzik to answer over the defendant's objection the following question:

"Q. During the years that you lived there in that house at 102 Prospect Street, what was the practice with respect to railroad employees going through the adjoining lot to the railroad and walking to the station?"

4. The said judge erroneously permitted the witnes George L. DeMott to answer over the defendant's objection the following question:

"Q. Now then, assuming you were operating an ordinary freight engine with seventy empty freight cars behind it, all equipped with automatic air brakes, operated by the engineer, weather clear and track dry, almost level grade, and that your engine was going five or six miles an hour, and you had applied your emergency brake, in approximately what space or what length would you stop?"

5. The said judge erroneously permitted the witness George L. DeMott to answer over the defendant's objection the following question:

"Q. And suppose you were going fifteen miles an hour under the same circumstances?"

6. The said judge erroneously permitted the witness Arthur S. Copcutt to answer over the defendant's objection the following question:

"Q. Now, then, suppose there was a train of seventy empty freight cars, all equipped

with automatic air brakes, operated by the engineer from the engine, on a level track approximately level, a clear day, dry track, going approximately five or six miles an hour, and assume that the engineer applied the emergency air brake, the valve on his engine, to stop the train, in approximately how many feet would the train stop?"

7. The said judge erroneously permitted the witness Arthur S. Copcutt to answer over the defendant's objection the following question:

"Q. Assuming the same engine, the same equipment, pulling the same number of cars, all equipped with air brakes, on approximately a level track, straight track, going at ten or twelve miles an hour, and the air brakes were applied in emergency by the engineer, within how many feet would the train then stop?"

8. The said judge erroneously permitted the witness Arthur S. Copcutt to answer over the defendant's objection the following question:

"Q. Let's assume fifteen miles an hour, under the same conditions, in how many feet would your train stop?"

9. The said judge erroneously permitted the witness John T. Donnelly to answer over the defendant's objection the following question:

"Q. Now then, Mr. Donnelly, take a train of seventy empty freight cars, pulled by an engine on a straight track, on a clear day, track almost level, going five or six miles an

hour, all freight cars equipped with automatic air brakes operated from the engine, in your opinion within how many feet would that train stop?"

10. The said judge erroneously permitted the plaintiff Joseph Symonski to answer over the defendant's objection the following question, and refused to strike out the following answer thereto:

"Q. Did you always go through the lots? A. Yes, sir."

11. The said judge erroneously permitted the plaintiff Joseph Symonski to answer over the defendant's objection the following question:

"Q. How long did you work for them at that time?"

12. The said judge erroneously permitted the plaintiff Joseph Symonski to answer over the defendant's objection the following question:

"Q. Do you know what the practice was during the years that you worked on the railroad for employees to come through the lot opposite 100 Prospect Avenue where you lived, across the railroad tracks and down the tracks to the station?"

13. The said judge erroneously charged the jury as follows:

"In order to establish that here, it must be proved by the greater weight of the evidence, and the burden rests upon the plaintiff to prove that he and the company were,

at the time, engaged in such commerce; and if that has been proved by the greater weight of the evidence then this Federal Act becomes applicable."

14. The said judge erroneously charged the jury as follows:

"It has been testified by the plaintiff that the work which he was on his way to do at the time of the accident, was to clean the fires from engines, and the answer of the defendant to the plaintiff's interrogatories, states that its engines were of every kind and character, indiscriminately engaged in both interstate and intrastate commerce.

If you are satisfied from the evidence as to this fact, and that certain of the engines from which the plaintiff was to clean the fires were used in interstate commerce, then the plaintiff while on his way to clean the fires from these engines was engaged in interstate commerce at the time of the accident to him. That the plaintiff had not actually reached the place where he was to do this work at the time of the accident to him, is immaterial, if you are satisfied from the evidence that he was on his way to perform work in interstate commerce."

15. The said judge erroneously charged the jury as follows:

"It is claimed by the defendant that the plaintiff at the time of the accident, was a trespasser upon its tracks, and that it owed him no duty except to refrain from wilfully

injuring him. On this issue the first fact for you to determine is whether at the time of the accident the plaintiff was a trespasser, and this fact, our courts have held, is essentially one, the solution of which is for you to determine from the conflicting evidence and the reasonable inferences to be drawn therefrom."

16. The said judge erroneously charged the jury as follows:

"Should you find from the evidence that he was a trespasser, that does not, of itself, relieve the defendant from the charge of negligence."

17. The said judge erroneously charged the jury as follows:

"You will recall, gentlemen of the jury, that what is known as the Tucker case has been referred to and argued by both sides. That case was decided by the Court of the District of Columbia and affirmed by the Supreme Court, and because that case has been referred to by both sides I have prepared certain extracts from that case which is the law of the highest court in these United States covering cases of that character.

'When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume to their mutual interest and advantage. The relation of master and servant in so far as the obligation of the master to protect his serv-

ant is concerned, commences when the servant, in pursuance of his contract with the master, is upon the premises of the master. The servant in such a situation is not a mere trespasser or a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. The present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was travelling over that way, and its obligation to him after he had entered the annex which was only another agency provided by the master for the accommodation of its servants.

'In this connection it is argued that Tucker voluntarily selected the more dangerous way when he might have proceeded down Virginia Avenue to South Capitol Street, where he could have gone under the track, then back to the annex. Had he chosen that way it would have required him to go one thousand one hundred feet further, and moreover, the testimony shows beyond dispute, that the way he did choose was the customary and usual way for employees living in his locality. Moreover, the act ordains that "All questions of negligence and contributory negligence shall be for the jury." '

What I have just read to you is the language the court used in the Tucker case, and it may be applied to the facts in this case in

so far as the same may be applied under the different set of circumstances in the two cases."

18. The said judge erroneously charged the jury as follows:

"Further, as to the duty which a railroad company owes to trespassers, it is the duty of the railroad company to exercise reasonable care to avoid injuring a trespasser after discovering his peril."

19. The said judge erroneously charged the jury as follows:

"It has been testified by the plaintiff that for some six months before the accident, he had every day, and at the same hour, in going to the 22nd Street station, to be transported to his place of work, at Elizabethport, walked on the defendant's tracks at the place where he was injured, and that he had done this for this length of time without any protest or objection by any of the agents, servants or employees of the defendant, and that other employees of the defendant also used the defendant's tracks at that place for the same purpose.

It appears from the answers of the defendant to the interrogatories of the plaintiff, that the engineer of the defendant's train which struck the plaintiff saw the plaintiff when he was outside of the railroad track and east of the 22nd Street bridge, and that the engineer then first blew the whistle when the plaintiff was 75 to 100 feet

distant from the engine. It therefore appears that the position of the plaintiff was known to and discovered by the engineer when the train was from 75 to 100 feet distant from the plaintiff."

20. The said judge erroneously charged the jury as follows:

"It is one of the contentions of the defendant that the plaintiff selected the more dangerous way to get to the 22nd Street station when he might have proceeded down Prospect Avenue to 22nd Street when he could have gone under the tracks and then up a stairway to get to the 22nd Street station. Had he chosen that way it would have required him to go a little further. The testimony is that the way he did choose was the customary and usual way for him and other employees of the defendant."

21. The said judge erroneously charged the jury as follows:

"Of course, gentlemen, unless the defendant and the plaintiff were engaged in interstate commerce, the plaintiff could not recover, and that is a question for the jury. It is claimed that both he and the defendant were engaged in interstate commerce at the time of the accident, he being an assistant in the firing of the engines used in interstate commerce."

22. The said judge erroneously charged the jury as follows:

"If you find that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident, and that the plaintiff has sustained injuries which resulted in full or in part through the negligence of any of the agents, officers or employees of said defendant, by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment, then the defendant would be answerable to the plaintiff for such injuries which he may have sustained from the accident."

23. The said judge erroneously charged the jury as follows:

"If you find that at the time of the accident the plaintiff was engaged in work which was a part of interstate commerce in which the defendant was engaged, or work that was so closely connected with interstate commerce as practically to be a part of it, or work which had for its immediate purpose the furthering of the conduct of interstate commerce, then both the defendant and plaintiff would be engaged in interstate commerce, and the provisions of the Federal Employers' Liability Act would apply to this case."

24. The said judge erroneously charged the jury as follows:

"In all actions brought against a common

carrier by virtue of the provisions of this act to recover damages for injury or death, the fact that the employee may have been guilty of contributory uegligence should not bar a recovery, but the damages should be diminished by the jury in proportion to the amount of the negligence attributable to such employee."

25. The said judge erroneously charged the jury as follows:

"Now, gentlemen after applying the law which the court has given you to the facts which have been produced in evidence, you come to the point where you consider damages, the court will instruct you what to take into consideration as the measure of damages. The elements which you would consider and which should be considered for which damages may be awarded, in case you find damages should be awarded after considering all of the facts that have been produced before you, are the bodily injuries which he sustained, the pain and suffering undergone, the effect on the health by the suffering undergone, the effect on the health by the suffering according to its degree and probable duration, the permanency of the injury, the pecuniary loss sustained through his inability to attend to business, which again may be of a temporary character or may be such as to incapacitate the plaintiff for the remainder of his life. These elements should be taken into consideration in arriving at your verdict as to the amount of damages that may be awarded the plaintiff in

case that you find that he can recover under the law as the court has instructed you, and after applying the law to the facts as produced in this court room from the witness stand."

26. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"As a general rule an accident occurring to an employee going to or returning from work does not arise out of or in the course of his employment."

27. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"An exception to the above general rule exists in cases where the employee has reached the premises of the master wherein is the place of work of the master and is injured therein while proceeding to, or from his place of work."

28. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"A further exception exists in cases where the master has provided exclusive transportation facilities for the employee to and from his work as part of the contract of employment, which facilities the employee must avail himself of."

29. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

> "In this case the work of plaintiff began when he reported for work at the shops of defendant at Elizabethport."

30. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

> "At the time of the happening of the accident plaintiff was not on the premises of the employer at or near the place of his work. In fact he was injured in one city and his place of work was in another city in a different county some miles away."

31. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

> "At the time of his accident, plaintiff was not engaged in interstate commerce."

32. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

> "At the time of his accident, plaintiff was a trespasser, or at best, a licensee upon the premises, or right of way, of defendant, and defendant owed him no duty save to refrain from wilful and wanton injury."

33. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"At the time of the accident plaintiff was not an employee of defendant."

34. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"If the jury should find that at the time of the accident the plaintiff was not employed or engaged in interstate commerce there can be no recovery in this action."

35. The said judge erroneously refused when thereunto duly requested by the defendant, to charge the jury as follows:

"If the jury should find that at the time of the accident, the plaintiff was at the point of the accident in any other capacity than as an employee whose work required him to be there, there can be no recovery in this action."

Dated, March 13th, 1925.

Yours respectfully,

WM A. BARKALOW,
Attorney for Defendant-Appellant.

STENOGRAPHER'S MINUTES

HUDSON COUNTY COURT OF COMMON PLEAS.

JOSEPH SYMONSKI
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Before Hon. ADAM O. ROBBINS, J.

Jersey City, N. J., Jan. 26, 1925.

Appearances:

FRANK H. HARDENBROOK,
WILLIAM GEORGE, and
EDWARD MARKLEY, for plaintiff.
EDWARDS & SMITH, by Mr. Smith, and
DEVOE TOMLINSON, for the defendant.

Mr. Hardenbrook: We desire to amend the complaint under stipulation with defendant's counsel, the first paragraph of the second count by inserting the figure 7 after the figure 2; again the figure 11 after the figure 10; and the figure 15 after the figure 14.

The Court: That amendment will be allowed.

Mr. Hardenbrook: I wish to read a stipulation given us by the defendant to this effect:

"That the plaintiff worked in the shop of the defendant at Elizabethport, cleaning fires in engines and building fires in engines, which had

theretofore been engaged in interstate and intrastate commerce, and which would thereafter be used in interstate and intrastate commerce."

Mr. Hardenbrook: I offer in evidence, if the court please, interrogatories served upon the defendant, together with the answers of the defendant thereto.

(Mr. Hardenbrook thereupon read the interrogatories and answers to the jury.)

Interrogatory No. 1. Where, on the defendant's tracks, was plaintiff, when struck by defendant's engine?

Answer to Interrogatory No. 1: On bridge over 22nd Street, Bayonne, New Jersey.

Interrogatory No. 2. How far was the plaintiff from the station at Twenty-second Street when he was struck by the engine?

Answer to Interrogatory No. 2: Approximately 225 feet.

Interrogatory No. 3. At what speed was engine going at the time it struck plaintiff?

Answer to Interrogatory No. 3: About five or six miles per hour.

Interrogatory No. 4. What distance did the engine go after striking plaintiff, before it came to a stop?

Answer to Interrogatory No. 4: Approximately 150 feet.

Interrogatory No. 5. When the train came to a stop, where was the plaintiff?

Answer to Interrogatory No. 5: On the bridge over 22nd Street.

Interrogatory No. 6. Give the number of the engine which struck plaintiff?

Answer to Interrogatory No. 6: No. 853.

Interrogatory No. 10. State what signal if any was given by the engineer of the engine before striking plaintiff?

Answer to Interrogatory No. 10: Blew engine whistle several times.

Interrogatory No. 11. Where was the plaintiff at that time?

Answer to Interrogatory No. 11: When the whistle was first blown the plaintiff was outside of the railroad tracks and east of the 22nd Street bridge.

Interrogatory No. 12. How far distant was he from the engine at that time?

Answer to Interrogatory No. 12: Between 75 and 100 feet.

Interrogatory No. 13. State the amount of wages paid to plaintiff weekly for a period of two months prior to March 8, 1924?

Answer to Interrogatory No. 13; Plaintiff was paid semi-monthly.

For the first half of January, 1924, he received $56.71.

For the second half of January, 1924, he received $73.58.

For the first half of February, 1924, he received $43.50.

For the second half of February, 1924, he received $39.00.

For the period during which he worked in March, 1924, he received $27.13.

Interrogatory No. 14. State the length of the engine and tender, which struck plaintiff, and also the length of the cars immediately following it.

Answer to Interrogatory No. 14: The length of the engine was 47 ft. 10¼ inches. The length

of the tender was 33 ft. 5⅞ inches. The cars were approximately 34 feet long.

Interrogatory No. 17. State the kind and character of engines at Elizabethport, N. J., which plaintiff was required to work at?

Answer to Interrogatory No. 17: He was required to work on engines of every kind and character indiscriminately.

Interrogatory No. 18. State, in detail, the kind of work which plaintiff was required to do, at Elizabethport, New Jersey.

Answer to Interrogatory No. 18: Cleaning and drawing fires of engines.

Interrogatory No. 19. State what engines of defendant were at Elizabethport, N. J., on the afternoon and evening of March 8th, 1924, and whether they had theretofore been used indiscriminately in interstate and intrastate commerce.

Answer to Interrogatory No. 19: Engines numbers 866, 30, 283, 45, 40, 89, 12, 25, 33, 11, 439, 39, 285, 32, 13, 106, 9, 48, 36, 38, 43, 46, 99, 395, 411, 102, 681, 94, 289, 37, 69, 352, 44, 35, 173, 566 and 540. Some of the foregoing engines were undergoing repairs and were out of service. Defendant refuses to answer the balance of the interrogatory upon the ground that it calls for a conclusion of law.

Interrogatory No. 20. State whether said engines or any of them were to be prepared by plaintiff on the afternoon and evening of March 8th, 1924, for work, indiscriminately, in interstate and intrastate commerce.

Answer to Interrogatory No. 20: Defendant is unable to state on what engine or engines the plaintiff would have worked had he reported for duty on the date in question.

Stenographer's Minutes.

Interrogatory No. 21. State where plaintiff's body was in reference to the cars constituting the train which struck him at the time the train came to a stop. Which car of the train was he under and what part of that car was he under.

Answer to Interrogatory No. 21: At about the center of the second car from the engine.

Interrogatory No. 22. State how many freight cars were being hauled by engine No. 853, at the time of the accident to the plaintiff?

Answer to Interrogatory No. 22: Seventy.

Interrogatory No. 23: State how many of the said cars were equipped with air brakes?

Answer to Interrogatory No. 23: All.

Interrogatory No. 24. State who controlled the operation of the air brakes at the time of the accident to the plaintiff?

Answer to Interrogatory No. 24: Engineer.

Interrogatory No. 25. State whether or not the engines at Elizabethport referred to in answers to interrogatories 18 and 19 or any of said engines other than engines undergoing repairs or engines out of service were used on said March 8, 1924, in the movement of a car or cars destined to a point or points without the State of New Jersey?

Answer to Interrogatory No. 25: Some.

Interrogatory No. 26. State whether or not the engines at Elizabethport referred to in answers to interrogatories 18 and 19 or any of said engines other than engines undergoing repairs or engines out of service were having their fires cleaned in preparation for their use in the movement of a car or cars from the State of New Jersey.

Answer to Interrogatory No. 26: These engines

were having their fires cleaned in preparation for whatever work, service or use they might or should thereafter be assigned to. At the time they were having their fires cleaned they had not yet been assigned to any particular trip or class of service.

Interrogatory No. 27. If the answer to Interrogatory 25 is "Yes" state the engine number of such engines.

Answer to Interrogatory No. 27: See answer to Interrogatory No. 26.

Interrogatory No. 28. If the answer to Interrogatory 26 is "Yes" state the engine numbers of such engines.

Answer to Interrogatory No. 28: 866, 30, 283, 45, 40, 89, 12, 25, 33, 11, 439, 39, 285, 32, 13, 106, 9, 48, 36, 38, 43, 46, 99, 395, 102, 94, 37, 287, 411.

FREDERICK D. PANGBORN, sworn.

Direct examination by Mr. Markley.

Q. Mr. Pangborn, are you a photographer? A. Yes, sir.

Q. How long have you been a photographer? A. A little over twenty-two years.

Q. Where do you live? A. 45 Lexington Avenue, Jersey City.

Q. Did you at my request take some pictures of the bridge over 22nd Street, Bayonne, near the Bayonne Station of the defendant company, the New Jersey Central Railroad? A. Yes, sir.

Q. Did you also make a sketch of the physical layout at that point? A. I did.

Q. I show you these photographs and ask you

if those are the photographs that were taken by you? A. Yes, sir, those are the views.

Q. How many views have you altogether? A. There are seven photographs altogether.

Q. When were they taken? A. December 21, last year.

Q. What kind of a day was it? A. May I look at my notes? I think it was a clear, bright day, but I would not be sure. (Referring to paper.) Yes, it was a clear, bright day.

Q. Did you take some pictures yourself? A. Yes, sir.

Q. What was the elevation of your camera from the ground? A. Five feet three inches from the center of the lens to the ground.

Q. Now then, taking photograph marked No. 1, and looking at that photograph, will you be able to tell me of tracks shown in the center of the picture—

Mr. Smith: Have you offered them yet, Mr. Markley?

Mr. Markley: I will offer these photographs in evidence.

Mr. Smith: No. objection.

Mr. Markley: I will offer them in the order in which they are marked.

Photographs marked in evidence P-1, 2, 3. 4, 5, and 6.

Mr. Markley: The photographs are now marked in evidence in the same order in which the photographer marked them.

Photographs numbers 6 and 7 make one panoramic view, and that has been marked in evidence P-6.

Q. Looking at Exhibit P-1, does that show the 22nd Street bridge over the New Jersey Central Railroad, passing over 22nd Street, Bayonne? A. Yes, that is the overhead bridge.

Q. And the track in the center of the picture is what track, do you know? A. I call it the southbound track, it runs in a southerly direction.

Q. Going toward the station at 22nd Street, that is the furthest track on the right? A. The furthest track on the right, on the west.

Q. Now then, taking Exhibit P-2, what is the view there? A. This photograph, Exhibit P-2, was taken twenty feet north of the north end of the bridge, and twelve feet west of the near rail of the southbound track.

Q. Looking in which direction? A. Looking southeast, diagonally toward the bridge.

Q. Southeast, away from Jersey City? A. Yes, sir.

Q. And is that the 22nd Street station up there? A. Yes, sir, up on the right-hand side, on the west side of 22nd Street.

Q. Was the elevation of the camera the same on all these pictures? A. The same unless it is noted especially.

Q. Now, then, taking Exhibit P-3, in which direction is this picture looking? A. That photograph is looking in a northerly direction.

Q. Toward Jersey City, so to speak? A. Yes, sir.

Q. And is that the same track that appears on the left of the second photograph? A. Yes, sir.

Q. Where is that second track? A. That was taken between the main southbound track and the track next easterly of it and ten feet south of the south end of the bridge looking northwest.

Q. How is the track, looking toward Jersey City at that point, straight or curved? A. It is straight for a considerable distance.

Q. Is there any grade at that point? A. Well, it is barely perceptible. The picture does not show it very clearly. I think I have another one. You can hardly see it though.

Q. And what is the view along that track towards Jersey City from the bridge at that point, approximately? A. It is over three thousand feet; at least three thousand feet; that is my estimate of it.

Q. Taking Exhibit P-4, does that also show the bridge over 22nd Street? A. Yes, sir.

Q. Looking towards Jersey City? A. Yes, sir, in the same direction as the last one.

Q. Looking toward Jersey City would be away from the 22nd Street station? A. Yes.

Q. Now then, where was that picture taken, Exhibit P-4? A. That was taken fifty feet south of the south end of the bridge, and about two feet west of the west rail of the main southbound track looking northerly.

Q. Northerly would be toward Communipaw, Jersey City? A. Yes, sir.

Q. And what is the view at that point? A. About the same as it was in number 3.

Q. The track is straight? A. Yes, sir.

Q. Now then, Exhibit P-5, does that show the same bridge over 22nd Street? A. Yes, sir.

Q. And that track appearing there about the center of the picture, is that the same track as appears in the first two pictures? A. Yes, the southbound track.

Q. How far from the bridge was your camera placed when you took that picture? A. One hun-

dred and ten feet northerly of the north end of the bridge, and about twenty-six inches or two feet west of the west rail of the main track.

Q. One hundred and ten feet did you say northerly? A. North, yes.

Q. That is, your camera would be one hundred and ten feet nearer Jersey City? A. Yes.

Q. Facing southerly toward the station here? A. Yes.

Q. And is the track straight looking in that direction? A. Yes.

Q. Did you approximate the distance that way? A. I guess it is over two thousand feet in that direction.

Mr. Smith: That is, the track is straight for two thousand feet?

The Witness: About that.

Q. Now then, taking the last picture, the two views which have been marked P-6, where was your camera placed, how far from the 22nd Street bridge was your camera placed when you took those? A. The position of the camera was six hundred and thirty-six feet four inches northerly from the north end of the bridge.

Q. That means nearer Jersey City? A. Yes, sir.

Q. Looking toward the station? A. Yes, looking southerly.

Q. Over six hundred feet away? A. Yes. You can see the station here. It is quite close to the rail, I have not got the measurements, but it is about two feet from the near rail.

Q. Now, the picture at the left, how did you take that? A. The photograph at the left was

in exactly the same position as the other one, except the camera was swung more to the east.

Q. Toward the houses that appear? A. Toward those houses in the background.

Q. But taken at the same point from the 22nd Street bridge? A. Yes, sir.

Q. So as to give a sweeping view around? A. Just what you would see from the station.

Q. And how far is that from the station? A. The same point, six hundred and thirty-six feet and four inches north.

Q. Did you for the purpose of showing where your camera was each time you took one of these photographs, make a sketch of the layout there? A. Yes, I made a sketch and later on made a tracing and got a blueprint.

Q. Have you on this blueprint put the same number as appears on each of those photographs for the purpose of showing where your camera was when you took it? A. I had the arrows to indicate the position of the camera, and they are numbered.

Q. That is, you have an arrow numbered? A. Yes, sir.

Q. And the numbered arrow shows where the camera was when you took the picture? A. Yes, sir.

Q. Is this sketch made to scale? A. Yes, right around the bridge.

Q. And what is the scale at that point? A. It is twenty feet to the inch.

Q. Does it show the 22nd Street station? A. Yes.

Q. And shows the point of the compass? A. It does.

Mr. Tomlinson: May I cross examine as to this map?

Mr. Markley: Certainly.

Cross examination by Mr. Tomlinson:

Q. Did I understand you to say that this map was drawn to scale only as to the part of it as shows the 22nd Street bridge? A. Except as to where my camera was placed. I mean the buildings and so forth were not scaled in, simply indicated.

Q. Have you drawn to scale the tracks which you show? A. Yes, they are to scale, four feet eight and one-half inches.

Q. Well, then, what is there on this map which is not drawn to scale? A. Why, the coal shed is simply indicated.

Q. You have not attempted to drawn to scale the distance between the 22nd Street bridge and the coal sheds, have you? A. I think so. (Referring to paper.) No, I do not have that. It is about fourteen feet or something like that.

Q. I didn't ask you what the distance was. A. Pardon me.

Q. I asked you what you have shown to scale on this map and what you have not shown. A. None of the buildings are shown to scale.

Q. You have not shown to scale the distance between any of the buildings, fences, or other construction on this property at the 22nd Street bridge? A. Only right at the bridge. That was the point of the accident.

Mr. Tomlinson: We will not interpose any objection.

Mr. Markley: I offer the sketch in evidence. (Marked Exhibit P-7.)

For Plaintiff—Frederick D. Pangborn—Redirect.

Redirect examination by Mr. Markley.

Q. The scale, you say, is 20 feet to the inch? A. Yes, sir.

Q. In other words, every inch on this sketch, as far as the tracks are concerned, and your measurements around the bridge, would be 20 feet to the inch? A. Yes, sir.

Q. Now, then, looking at the map, does it show the 22nd Street station? A. Yes.

Q. That is it right here? A. Yes, sir.

Q. And the tracks, are they shown at that point—how many tracks are there? A. I have five.

Q. Were there five there? A. There were.

Q. Now then, those tracks that appear in the picture in the center—which track is this? A. That is the westerly track.

Q. The lowest one? A. The one at the bottom of the map.

Q. Now, where is the one which indicates where photograph number 1 was taken, is that shown on the map? A. Yes.

Q. Where is that? A. That was taken right in here.

Q. Where was the pitcure taken? A. That was a diagonal view, here.

Q. And number 3, where was that taken? A. South from the bridge between the two westerly tracks.

Q. Now then, Exhibit P-4, where was your camera when you took that? A. P-4 was taken between the bridge and the station.

Q. Nearer to the station? A. I don't know, I didn't scale the station.

Q. Right about where your arrow is? A. Yes.

Q. Looking toward Jersey City? A. Yes.

Q. Now then, Exhibit P-5, where was that taken? A. Exhibit P-5 was taken 110 feet back.

Q. You have noted the distance every one hundred feet here? A. Yes.

Q. Exhibit P-5 was taken about where your 5 is there? A. Yes.

Q. Looking toward the station? A. Yes.

Q. Looking toward the Bayonne station. Now, the panoramic view, where was that taken from? A. Down here, 636 feet.

Q. Where it says 6 and 7? A. Yes.

Q. Looking up toward the station here at 22nd Street? A. Yes.

Q. The picture to the right of this double picture is looking, as I understand it, along the track up to the station? A. Yes.

Q. The other one? A. To the left of the embankment.

Q. Looking out towards those buildings? A. Yes, sir.

Q. Now then, the bridge itself—you call this the southbound track? A. Yes.

Q. The track nearer to the station, what is the clearance between the outside rail of that track and the nearest obstruction on the bridge? A. Clearance between the girder?

Q. Yes. A. The clearance between the west rail of the southbound track is 3 feet 6 inches.

Q. Now, looking at this picture, Exhibit P-1, what do you mean by the girder? A. That would be the outside—you see the girder here.

Q. How about these uprights, how near are they to the track?

Mr. Tomlinson: They call those the braces.

Q. All right, the braces. How near are they to the track, near to the westbound track? A. Two feet one inch; the stringers I would call them.

Q. I see there is planking raised up here? A. Those are the stringer pieces.

Q. Are those what you refer to? A. No, these are the girders over here. Those are the stringer pieces.

Q. How near are the stringer pieces to the rail? A. Between the stringers and the west rail of the southbound track is 12 feet 3½ inches from outside to outside.

Q. Now, taking the stringer pieces that run along the other rail, the westerly rail of the southbound track, how near is that stringer piece? A. I didn't measure that. It is practically the same as the other.

Q. What would you call this iron thing between the two tracks? A. That is the main girder.

Q. Between the two tracks? A. Yes, sir.

Q. How near is that to the southbound track, the east rail? A. That is practically the same as the one on the west. Those distances are practically the same.

Q. Taking Exhibit P-1, is that a mile post right at that bridge? A. Mile post.

Q. That upright, is that the mile post shown in Exhibit P-2? A. No, there is a second post there which says "580." I imagine that is 5.80 miles. I neglected to put that in the sketch.

Q. But it is in the picture? A. Yes.

Q. To come back to the point where you took this panoramic picture, 6 and 7, looking down toward the station, is the track straight all the way? A. It is.

Q. And how about being the same grade all the way? A. It is practically the same grade.

Q. Now then, the track to the west of this southbound track, the lowest track appearing on your sketch, the track nearest the station, isn't there an open space there? A. There is.

Q. And is that shown in this picture, Exhibit P-5? A. Yes, sir.

Q. Is that the way it looked when you were there, shown on the right of Exhibit P-5? A. Yes.

Q. Have you any idea what distance there is from the near rail of the track to the building? A. Have you got a ruler?

Q. Approximately? A. It is 14 or 17 feet, I could scale it off if I had a ruler.

Q. That is the approximate distance from the outside rail of the southbound track nearest the station back to the covered coal trestle at the bottom of the picture? A. Yes.

Q. And taking the other side of the track between the two tracks, the two southbound tracks, what is in there? A. Two sets of tracks.

Q. The two southbound tracks? A. There is broken stone fill, ballast.

Q. Does that appear in Exhibit P-1, that ballast, broken stone ballast between the two tracks? A. It does.

Q. About the center of the picture? A. Yes, sir.

Q. And was this a clear day when you took these pictures? A. Yes, sir.

Q. And do the pictures fairly represent the view at that point at that time? A. They do.

Mr. Markley: Cross examine.

For Plaintiff—Frederick D. Pangborn—Recross.

Cross examination by Mr. Tomlinson:

Q. Are you a civil engineer? A. No, sir, I am not.

Q. You never have been a civil engineer, have you? A. No, sir.

Q. When you speak about north you mean toward Jersey City, don't you? A. In that general direction, yes, sir.

Q. And when you speak of south you mean toward Elizabeth and Elizabethport? A. I don't know where Elizabethport is, I suppose it is south of Elizabeth.

Q. Do you know where Elizabeth is? A. Yes, it is southerly from that point.

Q. It is generally south, isn't it? A. Yes, generally south.

Q. When was it that you took these pictures? A. December 21st, 1924.

Q. And how many pictures did you take in all on that day? A. Seven.

Q. They are all the pictures you took, are they? A. Yes, sir.

Q. Now, east of the track and north of 22nd Street there are some vacant lots, aren't there? A. There is vacant land there, yes.

Q. And at this point you say there are six tracks there? A. I am pretty sure I counted six.

Q. You say that this sketch which you brought here accurately portrays the situation, don't you? A. I said it was not scaled, it was simply sketched in.

Q. What are these lines on the sketch? A. They are the lines of the track.

Q. Every two lines are intended to represent one railroad track, aren't they? A. Yes, sir.

Q. And just west of what you call vacant land you have six tracks, haven't you? A. Yes.

Q. And you say, don't you, that those six tracks were there on the day that you took the photograph? A. I am pretty sure there were six tracks there.

Q. Is there any doubt in your mind about it? A. Well, I glanced across and I figured there were six tracks there.

Q. In other words, you guessed there were six tracks? A. No, I think I counted them.

Q. But you are not sure about it? A. I am not positive about the six tracks. I think there is a siding there.

Q. Is there anything else on that blueprint that you are not positive about? A. No, I am pretty sure there were buildings around this compass mark, on this side there was a shed, I believe.

Q. Who was with you when you made these photographs? A. Mr. Markley.

Q. Who made the measurements? A. I did.

Q. Did you have anybody helping you? A. Why, he held one end of the tape for me when I made my measurements.

Q. Mr. Markley? A. Yes, sir.

Q. Now, I understood you to say that north of the 22nd Street bridge, that is, towards Jersey City, the tracks were straight for about three thousand feet? A. That is my estimate, yes.

Q. You did not measure them for that purpose? A. No.

Q. So that your statement in that regard is simply an estimate on that particular point? A. Yes.

Q. And you say that south of the 22nd Street bridge, in that general direction, the tracks are

straight for about two thousand feet? A. Yes, I estimated that.

Q. That is also just an estimate, isn't it? A. Yes, sir.

Q. Now, you have known that the 22nd Street station has six tracks? You say that there were six tracks at that point? A. No, I just carried that across the whole lot on the sketch.

Q. You showed six tracks there, didn't you? A. I am pretty sure of that, but I won't say positively.

Q. So that you are not sure about this point on your map? A. Not about that track, no, sir.

Q. You are not sure as to whether there were six tracks over that bridge? A. I have said so several times, I am not positive.

Q. Now then, 22nd Street runs under the railroad bridge, doesn't it? A. Yes, it is an overhead bridge.

Q. And you have indicated the station here, the west station platform? A. Yes.

Q. These little lines on the west of the map and toward the right-hand side indicate the station coming up to the station platform? A. They do.

Q. You come up from 22nd Street to the southbound station platform? A. Yes, they come up from the sidewalk.

Q. Now, on the other side of the tracks are there steps coming up? A. I didn't go over to see; I presume there are, but I didn't go over there.

Q. But you don't intend your map to indicate that there were no steps over there, do you? A. No. That section was not involved, and I didn't go over there at all.

Q. How do you know it is not involved? A. I didn't believe it was from what I was told.

Q. Over on the north side of 22nd Street there are no steps leading from the street up to the top on either side, are there, on the west side or the east side? A. There is not on this side, I know.

Q. When you say this side you mean the north side of the street? A. Yes, sir, the north side of the track.

Q. Now, north of 22nd Street these tracks have their rails up above the surface of the ground, haven't they? A. Oh, yes, a regular roadbed.

Q. And the ties are above the surface, too, aren't they? A. They might be in places.

Q. And between the tracks there is ballast, isn't there? A. Yes, sir.

Q. You did not take any measurements to ascertain the grade of the tracks here, did you? A. No, they are practically level.

Q. Prospect Street runs parallel with the tracks, doesn't it? A. It does.

Q. On the east side of the track? A. Yes, sir.

Q. And Prospect Street is lower than the railroad track, isn't it? A. I think there is a little dip there.

Q. When you get to 22nd Street bridge Prospect Street is much lower there than the railroad track? A. I think it is graded down to 22nd Street.

Mr. Tomlinson: That is all.

Redirect examination by Mr. Markley:

Q. This house you show on your map, that is on Prospect Street, isn't it, that is 100 Prospect Street? A. I don't remember the number.

Q. Wasn't it pointed out to you as No. 100 Prospect Street? A. It was pointed out as the house in

which this man lived. I simply sketched it in to indicate its position.

Recross examination by Mr. Tomlinson:

Q. You have shown on the west side of the map, the west side of the track, a covered coal trestle and yard? A. Yes, sir.

Q. That is the Consumers' Ice and Coal Company? A. I believe it is.

Q. Now, did you measure the distance between that trestle and the nearest rail? A. My recollection is that I did, but my recollection is it was around 14 or 15 feet. I could scale it with a rule.

Q. Are you sure about that? A. Not without scaling it.

Q. About how high from the ground is this coal trestle? A. That would be hard to say; I imagine 35 or 40 feet.

Q. It is a pretty high building, isn't it? A. Yes, sir.

Mr. Tomlinson: That is all.

(Witness excused.)

Mr. Markley: May we call Dr. Rector out of turn?

Mr. Tomlinson: We have no objection.

JOSEPH M. RECTOR, sworn.

Direct examination by Mr. Markley:

Q. What is your profession? A. I am a physician and surgeon.

Q. Have you any degree? A. Yes.

Q. What is your degree? A. Master of Arts and Doctor of Medicine.

Mr. Tomlinson: We admit the doctor's qualifications.

Q. What institution are you a graduate of? A. Columbia University.

Q. You got your degree there? A. From Columbia University, yes.

Q. Please state your experience, Doctor?

Mr. Smith: We admit the doctor's qualifications.

A. I am surgeon at the Jersey City Hospital, the North Hudson Hospital, surgeon to the American Expeditionary Force in France, I was examining surgeon for the United States Government, Department of the Interior, Bureau of Pensions.

Q. How long have you been practicing as a doctor and surgeon? A. Thirty-one years.

Q. Now then, Doctor, did you at our request examine the plaintiff in this case, Joseph Symonski? A. I did.

Q. And where did you examine him, Doctor? A. At the Bayonne Hospital.

Q. When did you examine him? A. December 8, 1924.

Q. Will you please state what you found as a result of your examination? A. I found that the right leg had been amputated at the foot. The left leg had been amputated at the junction of the upper and middle third of the leg.

Q. About where is that? A. About three or four inches below the knee joint. The amputa-

tion of the right foot had healed, there was a flap which had been drawn from the back up to the front, which had made a good stump. On the left side there had been evidently a suppurating condition, and there was a painful stump with contraction of the scar, due to the contraction of the soft tissues. Part of the stump had healed and part was in a granulated condition.

Q. What do you mean by that last statement as to its condition? A. The entire skin was not entirely over the stump of the leg, that is, over the part that had been amputated. As a result of suppuration the skin had not entirely healed, and a raw surface was visible on the stump and outer side, at the extremity of the stump, and the contraction of the soft tissues over the ends of the bones caught the nerve structures resulting in a painful stump, that is, a stump which gives him pain.

Q. Then, so far as the amputation of the right leg is concerned, you think that that might in time stand an artificial leg? A. The right foot has been taken off and an artificial foot can be put there as soon as the stump becomes hardened. It is a little tender now, but it is simply a question of time when it will be ready for an artificial foot. It is a good stump, with a good, well formed flap which has healed perfectly.

Q. The left leg, you say, is not that way? A. The left leg has a painful stump, which will require re-amputation.

Q. That means he will have to undergo another operation?

Mr. Smith: Suppose, Mr. Markley, you let the doctor testify.

Q. You say that the left leg will require another amputation, what do you mean? A. Why, with the painful stump where there is not enough tissue left to form a flap, where it is so near a joint, you do not get good results unless we disarticulate the joint or above the joint. It requires a disarticulation or a reamputation in order to get skin to cover the flap, and to get rid of the painful condition due to the contraction of the scar tissue.

Q. You think that will be necessary? A. In my opinion that will cure it.

Mr. Markley: We would like to show the plaintiff's left leg to the jury, so that the doctor can explain.

Q. Will you please point out to the jury what you mean by the condition which necessitates another operation? A. This has healed since I examined it. When I examined it in December the portion which you see here was granulated. It has now healed over with just a small soft scar at this point. The portion which you see here was granulated. This skin had not covered it. Since December this has covered up. This part here is tender because the tissue is tied to the bone, and there are nerve filaments caught in that scar, which gives pain. As soon as pressure is put on this it causes pain. That is due to the contraction of the tissue, with the nerve filaments caught in the scar tissues, so we have a painful stump.

Q. With the nerves caught in the tissue, can he wear an artificial leg on this stump in its present condition? A. There would be no weight on

the end of the stump with an artificial leg. An artificial leg is made to support at the side and back of the leg; there is no pressure put on the end of the stump; it is simply a question of the movement of the skin pulling on this scar tissue which is adherent to the bone. That is the way in which an artificial leg would cause pain to a stump of this kind. As far as pressure on the end of the stump is concerned, and artificial limb would not be designed to put pressure there, but the pull of the tissues caused by movement of the leg would cause pain. The soft tissue is contracted and adherent to the bone, and any movement of that tissue would give him pain.

Q. What would have to be done to eliminate that? A. The trouble is that the amputation has been made—there may have been one or more amputations—but the last amputation has been made about three or four inches below the joint.

Q. The knee joint? A. The knee joint. Where we get up within three inches of the knee joint we do not get a sufficient amount of stump left for the proper fitting and wearing of an artificial limb. We have to have a longer stump to give proper support and obtain movement of the joint.

Q. What would be the reasonable cost of such an amputation or operation? A. That depends upon the man who does it.

Q. Suppose it was done by an ordinary physician in Hudson County? A. Five hundred dollars.

Q. Now, Doctor, assuming that this operation is not performed, what will be the effect upon the leg if anything, of putting an artificial leg on the limb as it now is? A. The probability is that he will have pain when he uses it by the

pulling of the skin which is adherent to the bone; that is going to give him pain.

Q. That would be painful, would it? A. Yes, sir.

Mr. Markley: Cross examine.

Mr. Smith: No cross examination.

Mr. Hardenbrook: Is counsel for the defendant willing to admit on the record that the injury which the plaintiff received at the time of this accident was of such a nature that amputation was justified?

Mr. Tomlinson: Yes.

JOHN J. CARROLL, sworn.

Direct examination by Mr. Markley:

Q. Where do you live? A. Bayonne, 17½ East 24th Street.

Q. And how long have you lived in Bayonne? A. Twenty-one years.

Q. On March 8, 1924, were you in the vicinity of the 22nd Street station of the Central Railroad, Bayonne? A. Yes, sir.

Q. Where were you? A. I was at Avenue E about half a block from the scene of this accident.

Q. Could you from the position where you were on Avenue E see the bridge of the Central Railroad going over 22nd Street, right near the station? A. Yes, sir.

Q. Did you see it? A. Yes, sir.

Q. And about how far away do you say you were from that bridge? A. About a half a block, I should say.

Q. Now, as you stood there, did you see anything unusual happen on the bridge? A. Well, no, nothing unusual happened on the bridge, no, sir.

Q. Well, what did you see? A. I seen the train come to a stop, but it was about—well, in the neighborhood—the engine and two cars almost over this man. That drew my attention and I looked and I ran to the scene and I seen this man laying there between the rail and the channel iron and another man holding him while they cut the car off to take him out.

Q. All right. Now then, did you ever work on the railroad? A. Yes, sir.

Q. For what companies did you work? A. I worked for the Philadelphia and Reading.

Q. How long a time were you employed on the railroad? A. Five or six years.

Q. And in what capacity? A. Brakeman.

Q. Now then, as you looked at this train going over the bridge and saw part of it go over the bridge, did you at any time hear the emergency brake applied? A. No, not until it was over—passed over the bridge about the length of the engine and almost two cars, it might have been two cars for that matter, that was what drew my attention to the scene.

Q. What did you hear? A. I heard the clicking, the tying up of the engine.

Q. Could you tell from the distance you were, half a block away, that it was the emergency brakes, could you hear them? A. Yes, sir.

Q. Did you have any trouble hearing them? A. No, they clicked, they rumble.

Q. Well, you know the kind of a noise it makes when they go on? A. Yes, sir.

Mr. Tomlinson: Objected to as leading.

Mr. Markley: I withdraw it.

Mr. Tomlinson: And I move to strike the answer out.

The Court: The question is withdrawn, therefore the answer would mean nothing.

Q. Could you from your experience as a railroad man tell the kind of noise made by the application of the emergency brake? A. Yes.

Q. Did you hear that kind of a noise? A. I heard that kind of a noise, yes, sir. I could tell when he applied it. You could hear him applying it and the train coming like to a sudden stop.

Q. All right, where was the train when he applied it and you heard it? A. Very near 22nd Street station.

Q. That is the engine? A. Yes, sir.

Mr. Tomlinson: I object to that as leading.

The Witness: Very near 22nd Street station.

Q. How much of the train was over the bridge when you heard the emergency brake applied? A. The engine and very nearly two cars, as near as I could judge.

Q. Did you hear any whistle given by that engine? A. None at all.

Q. Did you hear any bell given by that engine? A. None at all.

Q. Was it a clear day?

Mr. Tomlinson: Objected to as leading.

A. Yes, I think it was a clear day. I figure it was a clear day.

The Court: It is leading.

Mr. Markley: I withdraw the question.

Mr. Tomlinson: And I move that the answer be stricken out.

Q. What kind of a day was it? A. It was a clear day, that I remember now.

Mr. Markley: Cross examine.

Cross examination by Mr. Tomlinson:

Q. Avenue E runs parallel with the railroad track, doesn't it? A. Yes, sir.

Q. And it is on the other side of the railroad tracks from Prospect Avenue? A. This side of Prospect Avenue, yes. I was on Avenue E when I seen it.

Q. I didn't ask you that. You have lived how long in Bayonne? A. Twenty-one years.

Q. You know where Prospect Avenue is, don't you? A. Yes, I know where Prospect Avenue is.

Q. And Prospect Avenue runs parallel with the railroad tracks, doesn't it? A. Yes, sir.

Q. And Avenue E runs parallel with the railroad tracks? A. Yes, sir.

Q. And the railroad tracks are between Prospect Avenue and Avenue E, aren't they? A. Yes, sir.

Q. The 22nd Street bridge where the railroad tracks are is much higher than Avenue E, isn't it? A. Yes, sir.

Q. Now, where were you standing on Avenue E? A. I was standing on the south—where the jitney starts, going to Elizabeth, if you would call that north, on Avenue E.

Q. How close to 22nd Street were you? A.

About ten feet, where the jitney starts for the Hook.

Q. How far is Avenue E from the railroad tracks? A. I judge about a half a block.

Q. Well, how far would you say half a block is? A. Well, a couple of hundred feet.

Q. So that you were at least a couple of hundred feet away from the railroad track, weren't you? A. About that.

Q. And which direction were you from 22nd Street, were you on the side toward Jersey City or on the side away from Jersey City? A. On the side away from Jersey City.

Q. What were you doing there? A. Going on a jitney to work, on the middle shift, three to eleven.

Q. You were waiting for a jitney? A. Yes, sir.

Q. Anybody else there with you? A. Quite a few.

Q. Who was there with you? A. Well, I just cannot remember now.

Q. Where do you work? A. The Standard Oil Company.

Q. Down at the Hook? A. Yes, sir.

Q. A lot of these other men who were standing were men who were also going to the Hook? A. Yes, sir.

Q. You knew them? A. I do, but I just cannot remember them.

Q. Can you remember any of their names? A. Well, hardly. Since that time I got hurt myself, and I have been under the doctor's care for the the last four months, and it just has not come to me.

Q. Are any of those men in the court room? A. No, sir, not that I know of.

Q. Did you see any of them here in the court room? A. Not that I know of.

Q. And how long have you been working down at the Hook? A. About twelve years.

Q. And a lot of these men have been working down there for a number of years, too? A. Yes, sir. I know quite a few of their faces.

Q. How many men would you say there are there altogether? A. Quite a few—

Q. How many men would you say there were there altogether waiting for the jitney? A. There might have been at least half a dozen, as far as I can now remember.

Q. And you cannot give us the name of any one of them, can you? A. No; I don't think I can. I didn't take that much interest in it.

Q. You say you have been hurt. Where did you get hurt? A. I got hurt right there, at that very spot, a jitney hit me.

Q. After this accident? A. After this happened, yes, sir.

Q. Now, what time of day was this, about? A. It was a little after two, two or very shortly after two, that is where I generally go to get the jitney for work.

Q. How long was it that you worked for the P. & R.? A. Oh, about twenty-two years ago.

Q. About twenty-two years ago? A. Something like that, twenty-one or twenty-two years ago.

Q. And by the P. and R., you mean the Reading? A. The Philadelphia and Reading Railroad.

Q. Where was it that you worked for the Reading? A. Between Philadelphia and Bethlehem.

Q. A freight train or a passenger train? A. Freight train.

Q. How long did you work for them? A. Five or six years.

Q. How did you happen to quit? A. I got tired of it; I bettered myself.

Q. You bettered yourself. What did you do after you left the railroad? A. I went to work for the Standard Oil Company.

Q. When you first saw the engine on this train how fast was it going? A. I should judge it would not be going over four or five miles an hour in my estimation. He was going slow.

The Court: We will adjourn now for one hour.

AFTER RECESS.

Mr. Hardenbrook: Before recess I told Mr. Carroll that we would not need him, and I understand now that counsel for the other side have not finished their cross examination. I will send a taxicab for him. In the meantime, if it is satisfactory to the defendant, we can put on another witness.

3 P. M.

JOHN J. CARROLL, resumed.

Cross examination by Mr. Tomlinson:

Q. I think you said this morning you worked for the Standard Oil Company, is that true? A. Yes, sir.

Q. What was your job with the Standard Oil Company at that time? A. Working in the receiving houses.

Q. And you say you were on your way to work at the time this accident happened? A. Yes, sir.

Q. What time was that? A. About two or a little past two.

Q. And how long were you going to work, what were your hours? A. From three to eleven.

Q. At the Standard Oil Company? A. Yes, sir.

Q. This was a Saturday afternoon? A. I don't know exactly whether it was or not, I cannot remember that.

Q. You do not remember whether it was a Saturday afternoon? A. I cannot tell you that, no.

Q. The Standard Oil Company is shut down on Saturday afternoons, you know that, don't you? A. I am a process man.

Q. And you work every Saturday afternoon at the Standard Oil Company? A. Not all the time, some weeks we change shifts. There is three shifts.

Q. You do not work on Saturday afternoons at the Standard Oil, do you? A. Not exactly every Saturday afternoon. If I work one Saturday afternoon from three to eleven, the following Saturday afternoon I work from eleven to seven in the morning.

Q. Are you still working for the Standard Oil Company? A. Yes, sir.

Q. In the same job that you had on the day of this accident, is that so? A. Yes.

Q. You were waiting on Avenue E near 22nd Street, is that right? A. Yes.

Q. Which way were you facing? A. Facing toward the Central Railroad.

Q. All the time? A. Yes, sir. I was sitting in the jitney, facing the Central Railroad. All

at once my attention was attracted by the engine approaching—

Q. Which way was the jitney headed? A. Headed toward Jersey City.

Q. Which side of the jitney were you on? A. On the Central Railroad side.

Q. You were on the right-hand side? A. Yes, sir.

Q. The seats in that jitney run length wise, don't they? A. They did on that one, yes.

Q. So you had to turn your head around? A. I was looking out towards the Central Railroad.

Q. Well, did you have to twist your head around? A. I was looking out and I was sitting this way, looking out.

Q. How long had you been sitting in that jitney bus? A. A couple of minutes.

Q. And as soon as you got on that jitney you turned your head around and looked toward the railroad tracks, is that right? A. I did at that time.

Q. You expected something was going to happen, that is the reason you looked at the tracks? A. I didn't know anything was going to happen, but I was looking at the Central Railroad tracks.

Q. You were particularly interested in those tracks? A. I was looking that way.

Q. Were you particularly interested in the tracks? A Not interested at all, just looking that way.

Q. Could you see all the bridge from where you were? A. I could see where the engine was—

Q. Could you see all the bridge or not? A. Yes, I could see where the engine was.

Q. Now, where was the engine when you first saw it? A. I seen it before it came to the bridge.

Q. Well, where was it when you first saw it? A. Just about entering the bridge, maybe about three or four feet from entering the bridge.

Q. And where was it when it stopped? A. Very near the depot, 22nd Street.

Q. Did you see them make the cut? A. I seen them make the cut, yes, sir.

Q. Where was the engine after they made the cut? A. Very near the 22nd Street station.

Q. Where was the engine after it stopped and before they made the cut? A. What drew my attention to it—

Q. Where was the engine after it stopped and before they made the cut? A. Very near the 22nd Street station.

Q. Didn't they move the engine to make the cut? A. I suppose they came back a little bit, yes.

Q. Where was the engine when you say the engineer applied his brakes? A. Very near the 22nd Street station, where he applied his air.

Q. Did you see this man get hit? A. No, sir, I did not.

Q. Did you go up to the station afterwards? A. I went up before they cut the cars. I seen them carrying him away.

Q. When was the first you saw of them there? A. After he stopped, shortly before they cut the cars.

Q. You saw him up there while they were cutting the cars? A. I seen him laying between the rail and the channel.

Q. He was between the train and Avenue E, wasn't he? A. (No answer.)

Q. He was on this side of the train when they cut the cars? A. Exactly.

Q. Now, from the time you went into the jitney up to the time you saw the train go over the bridge, you were watching the train all the time? A. I had been looking that way, yes, sir.

Q. You had been looking that way all the time? A. Yes, sir.

Q. Then why is it you could not see the man when he got struck? A. I just didn't happen to see him. That channel is about this high. He might have been in behind it. My eyesight is not so good either.

Q. You saw the train after it stopped and when they made the cut, yet you did not see the man? A. No, sir, I did not see it hit him.

Q. What day of the month was this? A. I just could not tell you what day of the month it was. It was in March.

Q. Do you remember what kind of a day it was? A. It was a bright, cool kind of a day.

Q. It was a cool day, was it? A. Yes, a cool kind of a day, I was doing some outside work, and that is how I recall it.

Q. Now, you were in the jitney and the windows were closed, weren't they? A. Yes, sir.

Q. You saw this train come over the bridge? A. Yes, sir.

Q. You could not see this man, and you did not know there was going to be any accident, did you? A. Nothing drew my attention to it until after he applied the air, then I ran to see what was wrong; I got out of the jitney.

Q. You did not see this man as the train came along? A. No, sir.

Q. You say there was nothing particularly to draw your attention to this spot? A. No, sir.

Q. You have testified quite frequently in accident cases, haven't you? A. Oh, no.

Q. You have testified, haven't you, in accident cases? A. Well, I have been in one, yes, in my life.

Q. One before? A. Yes, sir.

Q. More than one? A. No, sir.

Q. Only one? A. That is all, one.

Q. Where was that?

Mr. Markley: I object as immaterial—I withdraw the objection.

Q. Where was that? A. Do I have to answer that?

Mr. Markley: Go ahead, answer it.

The Witness: Right here before Judge—

Mr. Markley: Before Judge Egan?

Mr. Tomlinson: I object to counsel interrupting.

The Court: He said in this court house.

Q. What case was it? A. A case of a jitney accident or an automobile accident, a jitney ran into him, I happened to see that on my way to work, right at that same point, too.

Q. Who did you speak to first about this accident? A. I really don't know who I spoke to first.

Q. You spoke to somebody, didn't you? A. I spoke to all of my working men, when I arrived at work that day, but I don't know just who in particular I did speak to about it.

Q. You talked to all the workmen about it, did you? A. The men I work with, yes.

Q. And there were some of the men you work with down in the jitney, too, weren't there? A. I don't

think they were in that jitney; I don't remember who were there.

Q. Somewhere in the jitney, weren't they? A. I don't remember who were in the jitney.

Q. You cannot tell me the name of one man who was in that jitney? A. I don't think I could. I didn't think it was necessary.

Q. You say you worked for the Reading Railroad how long ago? A. About twenty-one years ago.

Q. Have you ever been on an engine? A. Yes, sir.

Q. Wait until I finish the question. Have you ever been on an engine since the time when you worked for the Reading twenty-two years ago; A. Yes, sir.

Q. Have you ever worked on an engine since that time? A. Yes, sir.

Q. Where? A. I was hostler for the Tidewater Oil Company.

Q. They are shifting engines, aren't they? A. Yes, sir, switching engines with air.

Q. Have you ever been on a road engine since you worked for the Reading, twenty-two years ago? A. No.

Q. Have you ever been on any part of a freight train since you worked for the Reading twenty-two years ago, when the emergency brakes were applied? A. No, not as I remember.

Q. Now, you say, you can tell when the engineer puts the emergency brake on. Don't you know that the whole system of air braking has been changed and revolutionized since twenty-two years ago when you worked for the Philadelphia & Reading? A. Yes, but I can tell he put the air on, and it drew my attention to it.

Q. Could you see it? A. No, but I seen where the air was applied, the cars came together like a—they came to an almost sudden stop.

Q. Did you see the engineer put the air on? A. No, sir, I could not see him put the air on, but I heard it.

Q. I didn't ask you whether you heard it, just answer the question that you are asked. You have no interest in this case, have you? A. No.

Q. You are here simply to tell the truth? A. Yes, sir.

Q. Then won't you please answer the question? Did you see the brake go on? A. Did I see the shoes applied?

Q. Did you see the engineer put the brakes on? A. No, but I heard the air shsss.

Mr. Tomlinson: I move to strike that out.

The Court: That may stand; he cannot give a fairer answer than that to the question.

Q. What indicated to you, besides hearing something, that the brakes had gone on? A. Because I know when a shoe hits the wheel; I learned that much.

Q. And you saw these cars quivering, did you? A. I seen the cars after this shsss was put on them, the cars bumped together.

Q. And when you saw these cars bump together, that was what you took to be the application of the brakes? A. I heard that and ran up to see what was wrong, and I seen the shoes applied to the wheels and releasing the air to cut the cars.

Mr. Tomlinson: I move to strike that out.

The Court: I think that is a fair answer to your question, Mr. Tomlinson.

Mr. Tomlinson: Will the stenographer repeat the question, please.

(Question repeated by the stenographer.)

A. Yes, sir, those cars bumped together, and you could hear the shsss.

Mr. Tomlinson: That is all.

Redirect examination by Mr. Markley:

Q. What did you hear when they bumped together? A. Shsss.

Q. What did that indicate to you? A. The air; which it always does.

Q. What was happening to the air? A. He was applying the air to stop his train.

(Witness excused.)

AFTER RECESS.

Mr. Markley: At this time I want to have appear on the record a stipulation which counsel for the defendant have agreed to, namely, that Robert Nixon, who swore to the answers in the interrogatories, numbers 1, 2, 3, 4, 6, 10, 11 and 12 inclusive, is the engineer of the engine which was in the collision with the plaintiff in this case, and that his affidavits verifying those answers is as follows:

State of New Jersey County of Hudson: Robert Nixon, of full age, being duly sworn, upon his oath deposes and says he is an engineer of the Central Railroad Company of

New Jersey; he has read the foregoing answers to the interrogatories, and that the answers to the first, second, third, fourth, sixth, tenth, eleventh and twelfth interrogatories are true to the best of his knowledge and belief.

EDWARD BLACK, sworn.

Direct examination by Mr. Markley.

Q. Where do you live? A. 387 Broadway, Bayonne.

Q. And how long have you lived in Bayonne? A. 42 years.

Q. How old are you? A. Going on 43.

Q. Now then do you know where the 22nd Street station of the Central Railroad of New Jersey is in Bayonne? A. Yes, sir.

Q. Now, on March 8th, 1924, were you in the vicinity of that station? A. I was on Avenue E and 22nd Street.

Q. Avenue E and 22nd Street? A. Yes, sir.

Q. Is that near the jitney stand? A. Yes.

Q. And about how far is that from the railroad of the Central Railroad of New Jersey? A. About 300 feet, I guess.

Q. Is Avenue E on the same side of the railroad as Prospect Street? A. No, sir.

Q. Prospect Street is on the other side? A. The far side.

Q. Now then, what did you see of this accident if anything to Joe Symonski? A. The only thing I see is an engine and two cars go off the bridge, two iron cars and the engine, then they

took this man and carried him down, that is all I seen.

Q. Where were you when the engine and two cars were pulled off the bridge? A. Down at the bottom, right at the foot.

Q. And what were you doing there? A. I was standing there waiting for my brother.

Q. How long had you been standing there? A. I was there I guess about 20 minutes.

Q. Now then before this engine pulled over the bridge and as it pulled over the bridge, did you hear it give any signal by bell or whistle? A. No, sir.

Q. What kind of a day was it? A. Well, it was a bright day.

Q. Did you go up to the station after the accident? A. No, sir, I did not. I walked up the bank to the top.

Q. What did you see? A. I seen them carrying this man down, some officer, I don't know who it was now. He said—

Mr. Tomlinson: I object to what anybody said.

Q. What did you see about the officer, what did he do? A. I seen the officer carry one of his legs down.

Q. Did you go up on the railroad yourself? A. No, sir.

Q. Did you go up on the steps that lead— A. No, sir, I went up the bank.

Q. Of 22nd Street? A. Up on Avenue E; I was off Avenue E on to the bank; I didn't go near the tracks.

Q. You didn't go near the tracks? A. No. sir.

Q. You are not a railroad man? A. No, sir.

Q. During the 20 minutes you stood there before you saw the engine and the two cars go over the bridge, did you hear any whistle or bell? A. No, sir, I did not.

Mr. Markley: Cross examine.

Cross examination by Mr. Tomlinson.

Q. Mr. Black, where do you work? A. I work for the city.

Q. City of Bayonne? A. Yes, sir.

Q. And you were standing at the corner of Avenue E and 22nd Street, is that right? A. Yes, sir.

Q. And those steps that you talk about, are they the steps that lead to the railroad company embankment up by 22nd Street and Avenue E? A. Yes, sir, right off 22nd Street and Avenue E.

Q. You were not down near the steps that lead up to the station were you? A. I was about five or ten feet from them.

Q. Weren't you over by the steps that are located over near Avenue E and 22nd Street? A. Yes, sir.

Q. Where were the steps you were near to? A. On the Avenue E side, more on the 22nd Street.

Q. On the Avenue E side? A. Yes, and on the 22nd Street side.

Q. You were nowhere near the 22nd Street station, were you? A. No.

Q. You were over by the Avenue E steps? A. Yes, sir.

Q. And you said that you thought that is about 300 feet from the railroad tracks. A. I think it is.

Q. You were standing there waiting for somebody? A. Yes, sir.

Q. That place is no strange place to you, is it? A. No, sir.

Q. You go around there very frequently? A. Sometimes ten or twelve times a day, passing there.

Q. And hundreds of trains come over those tracks, don't they? A. Yes, sir.

Q. You do not watch to see whether each train, that goes over there rings its bell or blows its whistle, do you? A. No, sir, I do not.

Q. You did not know on this day that this train was coming along there? A. No, sir, I was not near the railroad to see it.

Q. And you were not watching for the train? A. No, sir.

Q. Nor listening for the train? A. No, sir.

Q. You were not interested in the train, were you? A. No, sir, I was not.

Q. And it didn't make any difference to you whether it blew its whistle or whether it didn't blow its whistle? A. I know it didn't blow any whistle or I could have heard it.

Mr. Tomlinson: I move to strike that out as not responsive.

Mr. Markley: It is responsive to the question.

Q. Now answer the question one way or another, please. (And it didn't make any difference to you whether it blew its whistle or whether it didn't blow its whistle?) A. It didn't blow.

The Court: That may be stricken out.

(Question repeated.)

A. No, sir, it did not.

Q. And it did not make any difference to you whether the engine rang its bell or not, did it? A. No, sir, it didn't.

Q. When you noticed the engine and the cars they had stopped, hadn't they? A. The engine and the cars, I paid no attention to them only when he pulled the cars apart his airline let loose and he went up to the waiting station, the engine and two iron cars.

Q. That is when they were cut loose? A. Yes, sir.

Q. That is after they had cut the car to get Mr. Symonski out? A. Yes.

Q. Before that you had not noticed the engine and the cars? A. I didn't notice them, no, sir.

Mr. Tomlinson: That is all.

Redirect examination by Mr. Markley.

Q. If the engine had blown its whistle would you have heard it?

Mr. Tomlinson: I object to that.

A. I would have heard it if he blew.

Mr. Tomlinson: And now I move to have the answer stricken out.

The Court: The answer may be stricken out.

Q. Have you been there before in that position you were at the time of this accident and the whistle blew, and did you hear it?

Mr. Tomlinson: Objected to as incompetent, irrelevant and immaterial.

The Court: I think he may answer the question.

Mr. Tomlinson: Exception.

Mr. Markley: I withdraw the question.

(Witness excused.)

MARCELLA WORTZIK, sworn.

Direct examination by Mr. Markley.

Q. Where do you live, Mrs. Wortzik? A. 24th Street, No. 11, West.

Q. 11 West 24th Street? A. Yes, sir.

Q. Did you live on 24th Street— A. We just moved Saturday.

Q. How long have you lived in Bayonne? A. Fifteen years.

Q. Now then, did you live on Prospect Street? A. Yes, sir.

Q. What number? A. 102.

Q. And when you lived on Prospect Street did you know where Joe Symonski here lived? A. Yes, he lived next door, next to my house where I was living.

Q. No. 100 Prospect Street? A. Yes, sir.

Q. Now then, how long did you live on Prospect Street? A. Two years.

Q. At No. 102, did you say? A. Yes, sir.

Q. And is that right near the lot that leads to the railroad? A. Right across.

Q. I show you picture P-6 which is a photograph—does that show you where you lived? A. Yes, sir.

Q. Will you just point to the house with a pencil? A. Well, this is the house.

Q. Put a W there. A. Right here.

Q. We will put 102 above that. Now, which was Joe's house where Joe lived? A. Right next door.

Q. Now then, how long did you say you lived there? A. Two years.

Q. Are you married? A. Yes, sir.

Q. And your husband is a railroad man? A. Yes, sir, and my son, too.

Q. Now, you were right across the street from the railroad at this point? A. Yes, sir.

Q. Now, when your husband and son went to work how did they get down to the station? A. They always crossed the tracks.

Mr. Smith: I object to the question that it is incompetent, irrelevant and immaterial.

The Court: How is this material, Mr. Markley?

Mr. Markley: Well, we want to show that it was the custom during a number of years prior to this accident for these railroad men who lived in Bayonne right in that immediate vicinity, in going to their work, to go through that lot and over the track and down to the railroad station, for the purpose of implying knowledge on the part of the railroad company of that practice with respect to their employees. It seems to me that for that purpose it is material. Its weight, of course, is for the jury.

Mr. Tomlinson: If the Court please, the custom of any men, even though they be employees of the railroad company, to walk over the railroad property, cannot impose any ad-

ditional duty upon the railroad company because it has been well settled that a mere acquiescence to the use of one's land does not constitute any invitation and imposes no duty on the land owner.

The Court: The objection is sustained.

Mr. Markley: Exception.

Q. During the years that you lived there in that house at 102 Prospect Street, what was the practice with respect to railroad employees going through the adjoining lot to the railroad and walking to the station?

Mr. Tomlinson: Objected to for the reason already assigned in my objection to the last question, that it is incompetent, irrelevant and immaterial.

The Court: It seems to me there is an entirely different aspect to this question. This question is as to the general custom of the employees. The other question was applying merely to her son and husband.

Mr. Tomlinson: I submit that if it was a general custom, even if all the employees made it a practice to go over those tracks and we knew it, yet under the law that imposes no additional obligation upon us because it is well settled by any of the authorities that simply because people go on your property does not increase your obligation or duty towards them. It does not constitute an invitation. You have to take some active steps to recognize them as having a right on your property to raise an additional duty on your part and constitute them an invitee.

The Court: If he were not an employee the situation would be different, but they permitted not only him but others of their employees to use this passageway or particular part of the track. It is a question whether the jury is not entitled to know that, and that is a question for the jury to decide as to whether they were invitees over that particular portion of the railroad company's property.

Mr. Tomlinson: My point is that under the law even if those facts are so, that does not carry any extra obligation or any additional duty upon the part of the railroad company, because that would constitute merely acquiescence, on the part of the railroad company to the use of these tracks by these men, and mere acquiescence to the use of your property by somebody else, whether it be your employees or not, does not raise any additional duty on your part, and does not raise the relation or make the relation one of invitee and invitor.

The Court: I think I will let her answer the question.

Mr. Tomlinson: Exception.

(Question repeated by stenographer as follows: "During the years that you lived there in that house at 102 Prospect Street, what was the practice with respect to railroad employees going through the adjoining lot to the railroad and walking to the station?") A. I would not answer that without the interpreter.

(At this point the interpreter was called and the examination was thereafter conducted through him.)

A. In the morning I seen working men coming from the railroad passing the track and going that way. Working men going to work were going the same way.

Q. Now then, when Joe Symonski, the plaintiff, was hurt on the bridge at 22d Street where were you? A. I was by this bridge going on my way home.

Q. You were going under the bridge? A. Under the bridge.

Q. And where were you going? A. I was coming home from Broadway.

Q. Where had you been before you got to the bridge? A. I was on Broadway about my business; I was going from Broadway home.

Q. As you were going under the bridge, and as you approached the bridge did you hear any whistle or bell from any engine? A. No, I didn't hear anything.

Q. Did you go up on the bridge when the accident happened? A. I didn't go up because I was standing there looking up and I seen the man was holding Joe Symonski, and after that the people started running, so I still stayed there and looked up. After that another man came to help him, and afterwards they pulled the car and I saw that they took Joe Symonski and carried him to the ambulance.

Q. When you say they pulled the car, what did you mean? A. Opened the car and pulled this engine and two cars away and took Joe away.

Q. You saw them open the cars up? A. Yes.

Q. And what did you do, did you go up on the bridge? A. No, I didn't have the nerve to go look at it, but I asked the man who it was and they told me it was Joe.

Q. You cannot tell us what was said. You did not go up? A. No.

Q. Because you did not have the nerve? A. Yes.

Q. Did you hear any whistle on this engine? A. No whistle.

Q. Did you hear any bell? A. No bell.

Q. What kind of a day was it? A. It was a very nice day.

Mr. Markley: Cross examine.

Cross examination by Mr. Tomlinson.

Q. Mrs. Wortzik, you say your husband is a railroad man? A. Yes, sir.

Q. Is he working for the railroad now? A. He does not work now because he is sick.

Q. He is suing the railroad company, too, isn't he? A. Well, I don't know.

Q. You do not know? A. No.

Q. Don't you know that your husband now has a suit against the Central Railroad Company, and Mr. Hardenbrook here is his lawyer? A. That is not my case, that is my husband. I don't know what he is doing.

Q. Now, wait a minute, just listen to me, and if you do not understand me say so. Don't you know that your husband is now bringing a suit—do you know what a suit is? A. Yes, I know, but he didn't tell me.

Q. Don't you know that he is suing the railroad company and that Mr. Hardenbrook is his law-

yer? A. I don't know. Maybe. He didn't tell me anything about it.

Q. Don't you know that he is suing the railroad company and that Mr. Hardenbrook is his lawyer? A. No.

Q. You are living with your husband? A. Why of course, yes.

Q. And you have been living with your husband right along, haven't you? A. Yes.

Q. Now, you used to live at 102 Prospect Street, didn't you? A. Yes.

Q. You say you have seen men come home across those tracks on their way from their work? A. Yes, and to their work.

Q. (In English.) You understand my question in English, don't you? A. Yes. If I do not then I will ask the interpreter.

Q. You do not have any trouble in understanding me now, what I am talking about? A. No, I understand that all right.

Q. And you say that you saw men go over that lot on their way to work? A. Yes.

Q. Who were those men? A. Well, I don't know all those men.

Q. Well, where were they going to work? A. On the railroad.

Q. And where on the railroad? A. Well, where they work—they go to the 22d Street station.

Q. Who were the men you saw? A. I know my husband was going and my son was going to work.

Q. Your husband and your son? A. Yes, and a lot of men.

Q. Who else? A. I don't know the men's names.

Q. Who besides your husband; can you tell us the name of any one man besides your husband

and your son? A. I don't know the name; I didn't ask the men their names.

Q. How many men did you see? A. Well, they always was going, about six or seven men, and at night—

Q. How many at night? A. The same thing.

Q. And you cannot tell us the name of one of those men? A. I don't know.

Q. On this day you had come from Broadway, had you? A. Yes, I was coming from Broadway.

Q. And Broadway runs parallel or rather the same direction as Avenue E, doesn't it? A. Yes, sir, Avenue E, and I was going down home through 22d Street.

Q. I say, Broadway runs the same way as Avenue E? A. Yes.

Q. And Avenue E is near Broadway and the station, isn't it? A. Yes.

Q. Now, how do you come from Broadway? A. Well, I was going to buy something, and after that I was coming home.

Q. And you came from Broadway down 22d Street, didn't you? A. Yes.

Q. And then you were going to Prospect Street, were you? A. Yes.

Q. Then you were going to walk up Prospect Street home? A. Yes.

Q. From where Joe lived you could walk down Prospect Street to 22d Street, then through 22d Street and up the bridge to the station, couldn't you? A. Yes.

Q. Now, when was the first time that you saw the train, was it after Joe got hurt? A. After that.

Q. You did not see the train until after Joe got

hurt, did you? A. The train was stopped already when I came to the bridge.

Q. The train was stopped when you first saw it? A. Yes, sir.

Q. And that was the first time you knew a train had been there? A. Yes, sir.

Mr. Tomlinson: That is all.

GEORGE L. DEMOTT, sworn.

Direct examination by Mr. Markley.

Q. Where do you live? A. 9 Palisade Avenue, Jersey City.

Q. How old are you? A. Thirty-eight.

Q. Where are you employed at the present time? A. United States Government clerk.

Q. Have you had any experience railroading? A. Seventeen years.

Q. Where? A. Engineer, fireman and shopman. For eleven years I was fireman, five or six years as engineer.

Q. How many years as a shopman? A. A little over a year.

Q. And what railroad company? A. Pennsylvania Railroad.

Q. When did you cease your employment with the Pennsylvania Railroad? A. 1920, I believe.

Q. That was the time of the outlaw strike, was it not? A. Yes.

Q. And were you one of the men that went out that time? A. I was.

Q. And never went back? A. No, sir.

Q. How many years' experience did you say you had as engineer? A. Between five and six years.

Q. What service, what railroad? A. All classes, freight, passenger and drill service.

Q. Are you thoroughly familiar with the operation of locomotive engines? A. I am.

Q. Freight engines? A. All classes.

Q. A freight engine hauling say seventy empty freight cars? A. Yes.

Q. Equipped with automatic air brakes operated from the engine, on each car? A. Yes.

Q. Have you operated such engines and such trains? A. I have.

Q. Now then, assuming you were operating an ordinary freight engine with seventy empty freight cars behind it, all equipped with automatic air brakes, operated by the engineer, weather clear and track dry, almost level grade, and that your engine was going five or six miles an hour, and you had applied your emergency brake, in approximately what space or what length would you stop?

Mr. Tomlinson: I object to that on the ground first, it is incompetent, irrelevant and immaterial, second on the ground that it assumes a fact not in the evidence, and that at the time he applied his brakes he was going five or six miles an hour. There is no evidence to that effect. The evidence is that at the time the engine struck the plaintiff it was going five or six miles an hour, and there is no evidence in this case as to the speed at which the engine was going when he started to apply his brakes.

Mr. Markley: There is evidence here that at the time the engine struck the plaintiff it was going five or six miles an hour. That was specified to by the engineer, Nixon, in answer to the interrogatories. It has also been testified to here that the train when it was on the bridge was going about four or five miles an hour. Carroll testified to that. It is also apparent that I have the right to put a hypothetical question based on various speeds; I am not going to stop at five or six miles an hour, I am going to go into ten miles an hour or twelve miles an hour and get the opinion of this expert whom I have qualified as such, as to what distance such a train with automatic air brakes on each car, going at those various speeds, would be able to stop.

That is good evidence in this case because there is another interrogatory which this engineer answered in which he says that when he first saw this plaintiff the plaintiff was seventy-five to one hundred feet in front of the engine. Now I have a right to show that he could have stopped within that distance when he first saw the plaintiff and thus have avoided the accident.

Mr. Tomlinson: The answer to the interrogatories does not state the speed at which the engine was going when the engineer first observed this man. The answers to the interrogatories do not state, and I contend again there is no evidence to show, the speed at which the engine was going when the engineer applied his brakes or started to apply his brakes, therefore I say the question is

improper. And I further contend and urge to your Honor that it is not permissible to propound a hypothetical question unless that hypothetical question is based upon facts in evidence.

Mr. Markley: Here is another point that Mr. George calls my attention to. Interrogatory number 4 was "What distance did the engine go after striking the plaintiff before it came to a stop?" and the answer by the engineer to that was, "Approximately 150 feet." Now, Mr. Tomlinson in his opening said to the jury in effect that he saw the plaintiff and saw he was not going to get off the track, so he applied his brake. Therefore if he went 150 feet and could stop in considerably less distance than that, it is important to show that. Therefore it seems to me to be a perfectly proper question.

The Court: I will permit him to answer the question.

Mr. Tomlinson: Exception.

(Question repeated by the stenographer as follows: "Now then, assuming you were operating an ordinary freight engine with seventy empty freight cars behind it, all equipped with automatic air brakes, operated by the engineer, weather clear and track dry, almost level grade, and that your engine was going five or six miles an hour, and you had applied your emergency brake, in approximately what space or what length would you stop?")

A. About twenty feet.

Q. And taking the same conditions and assume the engine was going ten miles an hour instead of five or six miles an hour, say ten or twelve miles an hour, within what distance could you stop? A. Less than fifty feet.

Q. And suppose you were going fifteen miles an hour under the same circumstances?

Mr. Tomlinson: I would like to make an objection to that on the grounds I have already assigned.

The Court: The objection is overruled, and you may have an exception.

A. Between seventy and eighty feet.

Q. In applying your emergency brakes, what do you have to do? Is it a difficult operation? A. Very simple, just pull the brake valve.

Q. Then what happens? A. One movement of the hand puts the brake on all seventy cars and the locomotive.

Mr. Markley: Cross examine.

Cross examination by Mr. Smith.

Q. What size engine was contemplated by Mr. Markley? A. What sized engine?

Q. What size engine? A. I figure it was a big freight engine.

Q. You figured it was a big freight engine? A. Yes, to haul seventy cars.

Q. Did the question contain any size of engine or weight of engine? A. No, sir.

Q. What kind of cars did you figure, iron, steel or wood? A. I heard the testimony here—

Q. I didn't ask you that. You understand English, please answer the question. A. I figured they were steel and wood mixed.

Q. Steel and wood, mixed? A. Yes, sir.

Q. How many steel cars did you contemplate? A. I figured a little over half of them anyhow.

Q. From the question? A. Not from the question, no, sir; there were seventy cars mixed.

Q. So that you just figured something outside of the question, didn't you? A. Not exactly, no, sir.

Q. Well, what do you mean then? Did anything in his question state to you how many cars were steel cars and how many cars were wooden cars? A. I have been used to the handling of freight trains—

Q. I didn't ask you that, I asked you that question. A. There was nothing in the question about that, no.

Q. Nothing in the question about it? A. No.

Q. So that you were using something outside of the question? A. As a general run of trains, yes, sir.

Q. What kind of air brakes were you contemplating? A. Westinghouse.

Q. Do you know what kind were on the engine in this case? A. I do not, no, sir.

Q. You do not know? A. No, sir. Either New York or Westinghouse will act the same.

Q. Either New York or Westinghouse will act the same, but you were figuring on Westinghouse, were you? A. The Central Railroad uses Westinghouse.

Q. How do you know? A. I have run—

Q. Just a moment, please. How do you know that all the cars had air brakes on them? A. All the cars had air brakes on.

Q. How do you know that all the cars in this train had air brakes on them? A. That was in the question.

Q. Was it? A. Yes.

Q. So you think the question contemplated that all the cars had air brakes on? A. I did.

Q. Did you contemplate that the air should go from the engine through the pipes through all the cars toward the end? A. In charging them?

Q. In stopping the train? A. Any reduction in the train line will start the brakes working.

Q. Any reduction at all? A. Yes.

Q. Well, that is, assuming the air all the way through to the last car. A. That is not the way the question was put to me.

Q. How was the question put to you? A. It was that it had air on the train.

Q. So that you were assuming—A. I am assuming that I had a train of air.

Q. What is the momentum of seventy cars attached to an engine, a big freight engine, as you call it, at the speed of five miles an hour? A. I really could not tell you that.

Q. You do not know that? A. No.

Q. Nor at ten miles an hour? A. No, sir.

Q. Nor at fifteen miles an hour? A. No.

Q. Nor at any other miles per hour? A. No.

Q. What is the weight of a single freight car contemplated by you? A. The weight of a single freight car?

Q. Yes. A. Some of them go from one hundred and forty thousand pounds capacity.

Q. And what is the weight, I asked you? A. I do not know exactly the weight of them.

Q. You say you figured in this case half steel

and half wood. What is the weight of a steel freight car? A. A steel freight car?

Q. Yes? A. About thirty-seven thousand pounds.

Q. Thirty-seven thousand pounds? A. Yes, sir.

Q. They run different weights, don't they? A. They run different weights, yes.

Q. What was the weight that you ascribed to each of these cars? A. Mixed weight.

Q. Just mix some of the weight for us and tell us what you get? A. Well, in a mixed train you have all kinds of cars from various railroads.

Q. Have you contemplated what cars were in this train at all? A. No, sir, I have not. I took seventy cars or air.

Q. And don't you have to have the weight behind the car and the speed it is going at in order to determine how soon it can be stopped? A. The weight? No, sir.

Q. You say you do not figure the weight at all? A. Loaded or empty, I do.

Q. Loaded or empty? A. Yes, sir.

Q. And you do not give it any other consideration as to whether it is a heavy car, whether it weighs 37,000 pounds or 50,000 pounds, do you? A. Oh, yes.

Q. Then tell us? A. There is a difference if you are handling a loaded train or an empty train.

Q. And what was the weight you ascribed to the wooden cars? A. I was not figuring any particular weight for any individual car in the train.

Q. Then your answer was not based upon the

testimony, was it? A. The question was not put to me in that way, no, sir.

Q. You just made up your mind, didn't you, that you were going to give these answers, 20 feet for 5 miles an hour, 50 feet for less, or ten miles an hour, and 70 or 80 feet for 15 miles an hour? A. No, sir, I have handled trains to know how soon I could stop them.

Q. Didn't you figure that out before you came on the witness stand? A. No, sir.

Q. You did not? A. No, sir.

Q. And at the present time you cannot give any estimate of the weight of that train of cars, with the speed it was going at, the momentum it had acquired, in order to ascertain within what distance you could stop it? A. No, sir. I know nothing of the cars or of their weight.

Mr. Smith: That is all.

Redirect examination by Mr. Markley.

Q. You have handled trains of this size in your experience? A. Thousands of them, yes, sir.

Q. And empty trains and loaded trains? A. I have, yes, sir.

Q. Is it easier to stop an empty train than a loaded train? A. It is.

Q. And in order to determine whether or not you could stop in twenty feet with a train of seventy cars, going at five or six miles an hour, does it make any difference as to the particular weight of any one car, from your experience? A. No, sir.

Q. The same with respect to ten or twelve miles an hour and fifteen miles an hour? A. Exactly.

Q. You keep in mind the general proposition that you have seventy cars and the speed, and you can tell in about what distance you can stop? A. Yes, sir.

Q. You were never employed by the Central Railroad of New Jersey? A. No, sir.

Q. And you live here in Jersey City? A. I do.

Q. How long? A. All my life, thirty-eight years.

Recross examination by Mr. Smith.

Q. Why is it easier to stop a train of empty cars than a train of loaded cars? A. Because you have not got the weight to hold back, and you have the same braking power.

Q. Then you do consider weight, don't you? A. Only as regarding whether it is loaded or empty.

Q. That is the way you figure it? A. But not the weight of a car; we do not figure the weight of the cars.

Mr. Smith: That is all.

Redirect examination by Mr. Markley.

Q. One other question I have forgotten. Mr. Smith said to you, "Doesn't the air have to go from the engine to each one of these seventy-two cars before the air brakes are applied?" Is that so? A. It goes from the engine to the hind end of the train in recharging. When you are applying the brakes it all goes through the engineer's valve.

Q. From the time you turn the valve until the time the brakes work, how much time elapses? A. A second.

Mr. Markley: That is all.

Recross examination by Mr. Smith.

Q. Did I say to you that the air had to go all the way through from the engine to the rear? A. You did.

Q. Did I say that? A. You asked me whether the air came from the hind end up to the front, the engine, or went to the hind end.

Q. Does the air go from the engine to the hind end when you release it? A. When you are releasing it, yes.

Q. Or does it come from the hind end to the engine? A. It comes from the hind end as you are applying it.

Q. What do you mean by applying it? A. Putting the brakes on.

Q. When you are putting the brakes on the air comes from the rear end toward the engine, does it? A. Yes.

Q. That is a fact, isn't it? A. Yes, sir.

Q. And you mean that when you are charging, in order to get the reservoir supplied with air, then it goes from the engine toward the rear, that is the fact, isn't it? A. Yes.

Mr. Smith: That is all.

Redirect examination by Mr. Markley.

Q. When you apply your brakes by turning the valve in an emergency, do all of the brakes apply at the same time? A. They are supposed to apply automatically, each one at the same time.

Mr. Markley: That is all.

(Witness excused.)

For Plaintiff—Arthur S. Copcutt—Direct

ARTHUR S. COPCUTT, sworn.

Direct examination by Mr. Markley.

Q. Where do you live? A. 139 Wilkinson Avenue, Jersey City.

Q. How long have you lived in Jersey City? A. All my life.

Q. How old are you? A. Thirty-three.

Q. Where are you employed at the present time? A. The Keystone Dairy Company.

Q. Jersey City? A. Jersey City.

Q. In what capacity? A. Salesman.

Q. Now, then, have you had any railroad experience? A. Yes, sir.

Q. What experience have you had as a railroader? A. Why, seven and one-half years—I should say I started in as telegraph messenger—I have had eighteen years altogether.

Q. Have you had any experience as a freight engineer? A. Yes, sir.

Q. How long? A. Three years.

Q. Fireman? A. Fireman, seven and one-half years.

Q. What other capacity? A. I worked in the offices and throughout the terminal in Jersey City for the rest of the time.

Q. What company were you employed by? A. The Central Railroad of New Jersey.

Q. Are you familiar with the engines of that company? A. Yes, sir.

Q. Are you familiar with the roadbed at 22d Street, Bayonne? A. Yes, sir.

Q. When did you cease your employ with that company? A. 1920.

Q. In April, 1920, when they had the outlaw strike? A. Yes, sir.

Q. You were one of the men that went out on that strike and never went back? A. Yes, sir.

Q. Now, then, suppose there was a train of seventy empty freight cars, all equipped with automatic air brakes, operated by the engineer from the engine, on a level track, approximately level, a clear day, dry track, going approximately five or six miles an hour, and assume that the engineer applied the emergency air brakes, the valve on his engine, to stop the train, in approximately how many feet would the train stop?

Mr. Smith: Objected to; incompetent, irrelevant and immaterial, and assuming a fact not in the evidence.

The Court: Objection overruled; you may have an exception.

Mr. Smith: Exception.

A. Going about five miles an hour, I should judge, from my experience in handling engines, I should judge it would stop in ten or fifteen feet, probably twenty feet at the most.

Q. Assuming the same engine, the same equipment, pulling the same number of cars, all equipped with air brakes, on approximately a level track, straight track, going at ten or twelve miles an hour, and the air brakes were applied in emergency by the engineer, within how many feet would the train then stop?

Mr. Smith: Objected to on the same ground.

The Court: Objection overruled.

Mr. Smith: Exception.

A. About forty or fifty feet.

Q. Let's assume fifteen miles an hour, under the same conditions, in how many feet would your train stop?

Mr. Smith: Objected to on the same ground.
The Court: Objection overruled.
Mr. Smith: Exception.

A. About seventy-five feet, I should judge.

Q. Is that your experience as a railroad engineer? A. Yes, sir.

Q. Did you operate engines pulling that many cars, approximately? A. I won't say seventy, but somewheres around that.

Q. Not exactly seventy? A. No.

Q. Would it make any difference in your opinion whether those cars are of different weights, to any extent? A. No, sir, not as long as they are empty.

Q. Empty or loaded? A. If they were loaded, it would.

Q. Does it make any difference if they are steel or wood? A. Not materially.

Q. If you have the facts as to their being equipped with air brakes, on a straight track, on a clear day, and the speed of the engine, can you tell approximately in what distance you would stop? A. Why, your experience as an engineer would more or less give you that instinct to know about where you need to apply your brakes, or how far it would take you to stop.

Q. And these distances you gave us in which you could stop are based upon your experience as an engineer on the Central Railroad of New Jersey? A. Yes, sir.

Q. Are you familiar with the engine 853? A. I don't think they had those engines there at the time; I think they are a 1923 product.

Q. You do not know that particular engine? A. No, sir, I do not.

Mr. Markley: That is all.

Cross examination by Mr. Tomlinson.

Q. Where was your run when you were engineer for the Jersey Central? A. At what time?

Q. The last time you worked for the Jersey Central. A. I ran from Claremont to the West Shore Railroad.

Q. You used a drill engine on that, didn't you? A. We used the large engines, we did not always use the drill, in fact I don't believe I had a drill the whole time I was on it.

Q. You never used an engine of the 853 type on that road, did you? A. I just remarked to Mr. Markley—

Q. I don't care what you remarked to Mr. Markley, I am asking you? A. —that the 853 type was not there, I don't believe, in my time, if they were, they were on the upper end.

Q. Don't you know that the 853 type was adopted by the Central Railroad in 1918? A. 1918? Then they were up on the Scranton Division, around Mauch Chunk, at the time, or around Petersburg.

Q. Don't you know they were adopted in 1918 and used on the same line in 1918 and 1919? A. I do not believe so.

Q. You do not think so? A. No.

Q. Don't you know that it was not until some time after that that they were used up on the L. &

S. Division, running into Scranton? A. I just stated they were used on the upper division. They were not used around Jersey City.

Q. I am asking you if they were not first used on the main line running out of Jersey City, before they were used up on the Scranton Section? A. They might have been used on excursion trains.

Q. Do you swear now that an engine of the 853 type was not used down at this end, at Jersey City, and on the Central Railroad in 1920? A. I would not say that, I could not be positive of it.

Q. You never took a train of seventy cars, with an engine of the 853 type, or any engine of that type, and made any test to see how quickly you could stop, did you? A. No, I did not.

Q. Do you know Mr. DeMott, the gentleman who was last on the witness stand? A. Yes, I do.

Q. And before you testified you discussed this case with Mr. DeMott, did you? A. Not any more than just casual talk; that was all.

Q. Casual talk about the distance within which you could stop a train, isn't that so? A. Why, I don't recollect that I did; I might have mentioned something about it.

Q. You do not remember what you discussed with him? A. No, I just met him and talked to him a couple of minutes, I was talking to a friend of mine.

Q. Weren't you talking to him this morning here in the court house? A. Where?

Q. In the court house here? A. I don't know as I was talking to him in the court house.

Q. Where was it? A. It might have been outside, I remember having a conversation with him, that is all.

Q. And although you talked with him this morn-

ing and although you are on the witness stand now on your oath, you cannot recollect whether you talked to him in the court house or outside the court house? A. I didn't talk to him in the court room, no.

Q. I said "in the court house." A. Not that I am aware of, I might have, but I would not swear to it.

Q. You are not sure where you talked to him? A. No.

Q. And that conversation was this morning? A. I won't say it was; maybe.

Q. Maybe. You think it was this morning? A. I am only just judging—you asked me if I had a conversation with him and I said, "Yes." I expect I did because I met him and I know him.

Q. And you left the Jersey Central at the time of the outlaw strike? A. Yes.

Q. You went out as one of the strikers, didn't you? A. I did.

Q. And you never came back? A. No.

Mr. Tomlinson: That is all.

JOHN T. DONNELLY, sworn.

Direct examination by Mr. Markley.

Q. How old are you? A. 57.

Q. Have you had any railroad experience? A. Oh, yes.

Q. How many years? A. Well, I have been running engines thirty-four years.

Q. On what railroad? A. The Erie.

Q. Are you one of the outlaws, too? A. Well, I am still working for the railroad.

Q. You are working for the railroad? A. Yes, sir.

Q. What are you doing now? A. Engineer.

Q. Still an engineer? A. Yes, sir.

Q. You are not actively engaged now? A. No, I got hurt two years ago and I have not worked since, but I am still on the payroll.

Q. Hurt two years ago on your engine? A. Yes, the driving rod broke and went through the cab and hit me.

Q. And that is how you sustained the injury to your foot? A. Yes.

Q. Now, over your thirty years' experience as engineer, have you had experience on freight trains? A. All kinds.

Q. Now, then, Mr. Donnelly, take a train of seventy empty freight cars, pulled by an engine on a straight track, on a clear day, track almost level, going five or six miles an hour, all freight cars equipped with automatic air brakes operated from the engine, in your opinion within how many feet would that train stop?

Mr. Tomlinson: Objected to as incompetent, irrelevant and immaterial, based upon facts not in the evidence.

The Court: The objection is overruled; you may have an exception.

A. Why, it would not go hardly anywhere with the emergency brake, it might go ten feet or so.

Q. Now, then, suppose you apply the emergency brake under the same conditions with the train going at ten or twelve miles an hour? A. It would go a little further, but not far.

Q. How far, with the emergency brake applied? A. Twenty-five feet or so.

Q. And suppose the train, under the same circumstances, was going about fifteen miles an hour, within what distance would it stop? A. A little further. The slower you go, the quicker you stop.

Q. Well, within what distance? A. 75 feet or so.

Q. Do you know Mr. DeMott? A. No.

Q. Do you know Mr. Copcutt? A. I don't know a man in the room.

Q. Have you been introduced to him by me or anybody else? A. No.

Q. Have you talked to Mr. DeMott or Mr. Copcutt? A. I don't know a man in the room.

Q. Except me? A. Only you, and I only met you the other day.

Mr. Markley: That is all.

Cross examination by Mr. Tomlinson.

Q. Who asked you to come here today, Donnelly; Mr. Markley? A. Yes.

Q. You are still on the payroll of the Erie Railroad? A. Yes, sir, very much so.

Q. And you are not working? A. I have not worked in two years last June.

Q. You did go out on strike in 1920? A. I did.

Q. And you returned after that time? A. After the strike was over we all went to work again; these other railroads laid their men off, but the Erie did not do that.

Q. You never worked on the Central Railroad, did you? A. Never worked for anybody, only the Erie, and I am working for them since 1880.

Q. Did you ever take a train of seventy cars with an engine of the type of 853? A. I do not

know what class that is; I don't know what she looks like.

Q. Did you ever take any train of seventy cars with an engine of any class and make tests to see within what distance you could stop, going at various rates of speed? A. No, sir.

Mr. Tomlinson: That is all.

JOSEPH SYMONSKI, sworn.

Direct examination by Mr. Markley.

Q. How old are you? A. 34.

Q. Where did you live before you were hurt? A. 100 Prospect Avenue.

Q. Down in Bayonne? A. Yes, sir.

Q. I show you Exhibit P-6, is that your house over there? A. Yes, sir.

Q. Number 100? A. That is the house.

Q. How long did you live there? A. About three years in that house.

Q. Where were you working when you met with your accident? A. Elizabethport, Central Railroad.

Q. On the New Jersey Central? A. Yes, sir.

Q. And what was your work at Elizabethport? A. I cleaned the engines.

Q. You cleaned the fires in the engine? A. Cleaned the fires in the engine.

Q. Locomotives? A. Yes, sir.

Q. Build the fires? A. Build the fires.

Q. At Elizabethport? A. Elizabethport.

Q. What were your hours of work? A. From three to eleven.

Q. Three in the afternoon to eleven at night? A. Yes, sir.

Q. And how did you go to Elizabethport from your home at number 100 Prospect Street, Bayonne? A. I go through that lot and across the tracks and go on the station and get the train and go to Elizabethport.

Q. At the 22nd Street station? A. Yes, sir.

Q. And you would get a train there and go to Elizabethport? A. Yes, sir.

Q. When you got off the train at Elizabethport where did you go? A. I go on the job.

Q. You work in the round house? A. No, in the ash pit.

Q. Did you always go through the lots? A. Yes, sir.

Mr. Tomlinson: Objected to as incompetent, irrelevant and immaterial. I didn't get a chance to make my objection before the witness answered and I now move to have the answer stricken out.

The Court: The objection is overruled.

Mr. Tomlinson: Exception.

Q. Now then, looking at Exhibit P-6, you would come from your house you say through the lot? A. Through the lot.

Q. And over on the track? A. Over on the track.

Q. And what track would you walk along? A. I walked on this track.

Q. Wait until I mark that. About how far from the bridge over 22nd Street did you get on this track? A. About 500 feet.

Mr. Markley: I have marked with an X the track the witness referred to on Exhibit P-6.

Q. Now, then, you got on that track, you say about 500 feet from the station at West 22nd Street? A. Yes, sir.

Q. Where did you walk?

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

Mr. Markley: That is a physical fact in the case.

Mr. Tomlinson: You are asking him what his custom was. If you ask him what he did on that day I won't object.

Q. Where did you walk on that day? A. I walk on this track to the station.

Q. Did you walk inside the rails or outside the rails? A. Inside the rails.

Q. Inside the rails on that track? A. Inside the rails on that track and I get hurt on the bridge.

Q. Now then, what did you walk on between the rails? Did you walk on the gravel or on the ties? A. On the ties.

Q. You say you got on there about 500 feet from the station, is that right? A. Yes, sir.

Q. Now then, on this day, on March 8th, about what time did you start to your work from your house? A. From my house? I leave my home at two-ten.

Q. And what time did the train go that you were to catch? A. Well, the train goes at half-past two, it leaves at half-past two.

Q. About what time were you hurt? A. I got hurt about quarter after two, between twelve minutes after and quarter after, something like that,

Q. Before the train struck you did you see it at all? A. Yes, sir, I see that train.

Q. Where was it? A. About between 28th and 29th Street, something like that.

Q. Down between 28th and 29th Street? A. Yes, sir.

Q. Do you know whether it was moving then or not? A. I don't know, I see just smoke.

Q. And when was it that you saw it there—I withdraw that. Where were you when you saw this smoke down at 28th or 29th Street? A. Well, across the tracks that time.

Q. When you were crossing the tracks? A. Yes, sir.

Q. Did you see it afterwards? A. No, sir.

Q. Now then, when you walked along the track this distance up to the station, 500 feet, did you hear any whistle? A. No, I didn't hear any whistle.

Q. Did you hear any bell? A. No, sir.

Q. What kind of a day was it? A. The day was nice.

Q. The sun was shining? A. Yes, sir.

Q. The ground dry? A. Yes, the ground was dry.

Q. And you are sure you didn't hear any whistle? A. No, sir, I didn't hear any whistle.

Mr. Tomlinson: I object as a repetition.

Mr. Markley: I want to be sure about it.

The Court: The witness testified he didn't hear any whistle.

Q. Now then, where were you on the railroad when the train struck you? A. Oh, about five or six feet from the bridge.

Q. Five or six feet from the bridge? A. Yes, sir.

Q. That is the bridge over 22nd Street? A. Yes, sir.

Q. Referring to Exhibit P-1, there is the bridge over 22nd Street, you were five or six feet from the end of the bridge? A. Yes, sir.

Q. You had walked to five or six feet from the bridge? A. Yes, sir.

Q. Between the rails? A. Between the rails.

Q. Will you just put a mark where you were when you were struck? Put an X on the bridge.

(Witness complies.)

Q. Were you between the rails or outside of the rails? A. I was lying on the side.

Q. No, before that, when you were first struck. A. He struck me right here on this bridge.

Q. That is where the X is? A. Yes, sir.

Q. Now then, when you fell, which way did your body go? A. My body goes across the rail there.

Q. Where was your head? A. Right here.

Q. Put an H there. A. Yes, sir.

(Witness complies.)

Q. And you laid here on the track? A. Yes, the train hit me on the shoulder here.

Q. Before you were struck you were at the point where the X is on the bridge? A. Yes, sir.

Q. And after you were struck your head was where the H is? A. Yes, sir. I have three stitches in my head where I was struck.

Q. Did you lose your senses, were you unconscious? A. I don't know anything about it afterward for three or four days I don't know nothing.

Q. Was your head hit? A. My head was hit right here (indicating).

Q. Is there any mark there? A. Yes, I have two or three stitches there.

Q. Two or three stitches in your head? A. Yes, sir.

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

Q. And you say you did not know anything for two or three days? A. Nothing.

Q. Then when you were awakened and came to out of your sleep, where were you? A. When I came out of this thing?

Q. Where were you? A. I am in the hospital.

Q. What hospital? A. Bayonne Hospital.

Q. Are you still in the Bayonne Hospital? A. Yes, sir.

Q. Still there? A. Yes, sir.

Q. Did you have any pain? A. Oh, I have—not now steadily, but sometimes I still have it.

Q. You still have pain? A. Yes, sir.

Q. After the accident did you have any pain? A. I didn't feel anything after the accident.

Q. I mean after you woke up, when you came to. A. I feel that time, I feel pain, but for two or three days I didn't feel any pain.

Q. You didn't feel anything at all? A. No.

Q. But after you came to? A. Yes, then I have pain.

Q. Where? A. In my legs, and my shoulder too.

Q. How about your head? A. It feels sore from that scratch.

Q. Do you have any pain in your legs now? A. Sometimes; when the weather changes I have pain.

Q. What do you mean by that? A. I have nerves here.

Q. They jump? A. Yes, on a clear day it is not so bad, but in some weather I have pain.

Q. Did you get these bills from the hospital for expenses there? A. Yes, sir.

Q. One bill for $468? A. Yes, sir.

Q. And another one for $60? A. Yes, sir.

Q. And that is up to January 2nd, 1925? A. Yes, sir.

Mr. Markley: I offer these bills in evidence. (Marked Exhibit P-8 and P-9.)

Q. Who was your boss in Elizabethport? A. Gus.

Q. He was your foreman? A. He is the boss.

Q. How long had you been working at Elizabethport before the accident? A. I started in November, 1923.

Q. Were you working steadily every day? A. Yes, sir.

Q. Sundays too? A. Yes, Sundays too.

Q. Seven days a week? A. Yes, sir.

Q. Did you ever work on the railroad before November, 1923? A. Yes, sir, I have been working on the Central Railroad, 22nd Street, Bayonne.

Q. You worked there too? A. Yes, about three or four years ago.

Q. How long did you work for them at that time?

Mr. Tomlinson: Objected to as irrelevant, incompetent and immaterial.

Mr. Markley: The purpose is to lead up

to the point to show that it was customary for these men to walk through the lot to the railroad, down to the station; I wish to lay the foundation for the testimony that he knows this because he was there and saw them, that he worked there at the station for several years prior to the time that he went to Elizabethport.

The Court: If that is the purpose I think it may be admitted.

Mr. Tomlinson: Exception.

Q. What did you do at the 22nd Street station, what kind of work? A. Coal passer and fire cleaner.

Q. At 22nd Street, Bayonne? A. Yes, sir.

Q. How long did you work at 22nd Street, Bayonne, for the New Jersey Central? A. About a year and a half.

Q. Did you work for them any other time down there? A. No.

Q. Just twice? A. Twice.

Q. Now, do you know what the practice was as to men coming through the lot opposite your house at 100 Prospect Avenue to the railroad during those years?

Mr. Tomlinson: Objected to as irrelevant, incompetent and immaterial.

The Court: I think I ruled on that—

Mr. Markley: I will withdraw it and reframe it.

Q. Do you know what the practice was during the years that you worked on the railroad for employees to come through the lot opposite 100

Prospect Avenue where you lived, across the railroad tracks and down the tracks to the station?

Mr. Tomlinson: Same objection.
The Court: The objection is overruled.
Mr. Tomlinson: Exception.

Q. Do you know what the practice was? A. Yes, sir.

Q. What was it? What did they do? Did they go across the lots?

Mr. Tomlinson: I object to that as leading.
Mr. Markley: I withdraw it.

Q. What did the men do? A. They go through the lots, go on the station to get the train and go to the place where they work. Not only the railroad people go, but other ones go, working for the Standard Oil, Singer—lots of people go through there.

Q. I am talking about the railroad employees, the people that work for the railroad company, the New Jersey Central, did they come through the lots? A. Yes, sir.

Q. How about coming home at night? A. Well, daytime they go the same way, but we cannot go through at night, the train stops at West 8th Street, then we get off at 8th Street station and we walk through Avenue E home.

Q. Didn't the train stop at night at 22nd Street? A. No, sir, not that train.

Q. You had to get off at West 8th Street? A. Yes, sir.

Q. How long have you lived in Bayonne? A. 11 years.

Mr. Markley: Cross examine.

Cross examination by Mr. Tomlinson.

Q. Joe, you started to go to work at three o'clock, didn't you? A. Three o'clock, yes, sir.

Q. You got paid by the hour, is that right forty-five cents an hour, didn't you? A. Fifty cents an hour.

Q. It was $3.65 a day, wasn't it? A. No, four dollars a day.

Q. But you got paid by the hour, didn't you? You got paid fifty cents an hour and if you were an hour late you did not get paid for that hour, did you? A. We did not get paid when we were late.

Q. In other words, your pay did not begin until you got to your job? A. Yes, sir.

Q. When you punched the time card then your pay began? A. Yes, sir.

Q. You had a pass, didn't you? A. Yes.

Q. That pass was between 22nd Street and Elizabethport, wasn't it? A. Yes, sir.

Q. Have you got that pass with you, Joe? A. Yes, I have that pass.

Q. You say at night time you would get off at West 8th Street? A. Yes, sir.

Q. Then you would walk up Avenue E to 22nd Street? A. Yes, sir.

Q. You would walk to 22nd Street and Prospect Avenue? A. Yes, sir.

Q. And walk up Prospect Avenue home? A. Yes, sir.

Q. You could go from your home to the 22nd Street station in the morning by walking down Prospect Avenue to 22nd Street, couldn't you? You could do that? A. Well, everybody goes

through that way, it is a short cut. Everybody goes through that lot.

Mr. Tomlinson: I move to strike that out.

Q. You could, if you wanted to, walk down from your house, down Prospect Avenue, through 22nd Street and up the steps to the station, couldn't you, Joe? A. Well, but everybody goes through the lots.

Q. Could you do that or couldn't you?

The Court: The question is could you do that or couldn't you do that, yes or no?

A. Oh, yes.

Q. Was there anything to stop you from doing that? A. No.

Q. Then, if you would go down Prospect Avenue to 22nd Street, then through 22nd Street to the station, up the steps to the station, you would not have to go anywheres near the railroad tracks, would you? A. No.

Q. Now, these men you say you have seen go over the tracks, they were not all railroad men, were they, Joe? A. Well, I know a lot of people but I don't know now.

Q. Some of them were Standard Oil people, weren't they? A. Yes, some from the Standard Oil and some from the Singer, factory men go there too.

Q. Men from the Singer Company and men from the Standard Oil as well as Central Railroad men? A. Yes, sir.

Q. And some other men besides those too? A. Yes, there are different people go through those lots.

For Plaintiff—Joseph Symonski—Cross.

Q. Now, the reason you went to the station by going down the tracks instead of by going along Prospect Avenue and through 22nd Street was because it was a short cut down the railroad tracks, isn't that true? A. Yes, sir.

Q. What sort of a day did you say this was, Joe, was it a clear day or rainy? A. It was a nice day.

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

(At this point the examination of this witness was interrupted for the purpose of continuing with the examination of John J. Carroll.)

Cross examination (resumed) by Mr. Tomlinson.

Q. Have you ever gone to the station by going down Prospect Avenue to 22nd Street and then through 22nd Street to the steps leading up to the station? A. Yes, sir.

Q. You had gone that way? A. Yes, but I did not go that way.

Q. I say you had at some time gone to the station that way, hadn't you? A. Well, I don't think I go once. I am always the short cut.

Q. Hadn't you ever gone down Prospect Avenue? A. Oh, yes.

Q. To 22nd Street and then through 22nd Street? A. Another time I walk the long way, but I don't go again all the way on the street.

Q. Of course you knew you could go to the station and get your train by going along the street instead of taking the short cut along the track; you knew that, didn't you, Joe? A. Yes.

Q. You say that was a clear day, Joe? A. Yes, was a clear day.

Q. Now when you would walk along the tracks you would usually walk on the outside of the track, wouldn't you? A. No, I walked between the rails.

Q. You always walked between the rails, did you? A. Yes, sir.

Q. You are sure about that, are you? A. Yes, sir.

Q. Now, when you got into the tracks you saw this train down by what street did you say? A. Between 28th and 29th Street, something like that.

Q. And you saw the smoke from that train, didn't you? A. I saw the smoke.

Q. And that train was on the same track that you were on, wasn't it? A. Yes, sir.

Q. Now, isn't it the truth, Joe, that instead of going down between the rails of the track you walked on the side of it, didn't you? A. No.

Q. Didn't you walk on the side? A. No. I didn't walk on the side, I walked between the rails.

Q. And you were between the rails when you got hit on the bridge, were you? A. When I got hit, then I am on this way, on Avenue E.

Q. When you got hit you were on the bridge? A. Yes, sir.

Q. And you were between the rails of this track on the bridge? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. You had your lunch with you? A. Yes, sir.

Q. You had your lunch under your left arm or your right arm? A. Under my left arm.

Q. Now, after you saw this train, you didn't look back again, did you? A. No.

Q. Joe, do you remember talking to Mr. Wyman?

Mr. Markley: Come down here, please, Mr. Wyman.

Q. Do you remember talking to this gentleman in the hospital? A. Yes, sir.

Q. On June 10th, 1924? A. Yes, sir; yes; I talked to that man.

Q. And he asked you certain questions, didn't he? A. Yes.

Q. And you answered them? A. Yes, I answered them, but I just was five days after the operation, and they had taken the skin from my leg here to where my stump is, they drew the skin from my leg here and put it on that stump, then I was only five days after the ether, after the operation. Maybe I didn't say right. I don't remember that.

Q. How old are you, Joe? A. 34.

Q. Now, the day Mr. Wyman was talking to you didn't he say to you, "How old are you?" and didn't you say to him "44"? A. No, I am 34 now. I was born in 1889.

Q. Do you remember that there was a man there in the hospital taking down what Mr. Wyman said and what you said? Do you remember a man sitting there and taking this down? A. Yes, sir.

Q. And didn't Mr. Wyman say to you, "Which side of the track were you on, Joe, the eastbound side or the westbound side?" and didn't you say "West"? A. Westbound.

Q. Westbound is toward Elizabethport, isn't it? A. Yes, sir.

Q. And eastbound is toward Jersey City? A. Yes, sir.

Q. And didn't Mr. Wyman say to you, "What did you do, walk on the tracks, Joe?" And didn't you say to him, "No, I walked on the side"? Didn't you say that to him? A. I don't remember. I could not say that. I don't remember. I tell him the truth that time.

Q. You told him the truth that time? A. Yes, but I walked between the rails.

Q. And didn't Mr. Wyman say to you, "Was it a clear day or a rainy day?" and didn't you say to him, "A rainy day was that time, rainy and windy," didn't you say that to him? A. Yes, sir, was a little windy, but it was clear.

Q. Didn't you tell Mr. Wyman, "Rainy day was that time, rainy and windy?" didn't you say that to him? A. I don't remember.

Q. Then didn't he say to you, "Did you have an umbrella, Joe?" and you said, "No, I have poor clothes, I didn't have an umbrella because it is not far from the house."

Q. Didn't you say that to him? A. I don't remember, maybe I say, I don't know.

Q. And didn't Mr. Wyman say to you, "Where were you walking, on the outside of the tracks?" and you said, "Yes," didn't you say that? A. I walked between the rails.

Q. Didn't you say that to Mr. Wyman? A. I don't remember.

Q. And didn't he say, "Towards Avenue E" and you said, "Yes," didn't you say that to him? A. I don't remember.

Q. And didn't he say to you, "Were you far off from the ties?" and didn't you say to him, "About five or six feet, something like that," didn't you say that to him? A. I don't remember.

Q. And didn't he say, "Away from the ties, not the rails," and you said, "No." A. I walk on the ties.

Q. I am asking you what you said to Mr. Wyman; didn't you say that to him? A. I remember him, but I don't remember what I say. I was five days after the ether, I was in awful pain at that time.

Q. This train that you saw down by 28th Street, wherever you said it was, what sort of a train was it, a passenger train or a freight train? A. I could not tell you what kind of a train it was, just I see the smoke from the engine.

Q. You told this man the truth, didn't you? A. (No answer.)

Q. You did not lie to this man when he came to talk to you, did you, Joe? A. Well, I was supposed to tell the truth, but I don't remember now.

Q. And you did see a man there writing down what was said, what you said and what he said, didn't you? A. I don't remember who was there that time.

Mr. Tomlinson: That is all.

Redirect examination by Mr. Markley.

Q. You were in bed at the time when these men came there? A. Yes, sir, I was five days after the ether, after the operation.

Q. And you say they had taken some skin from your leg? A. Yes, from my leg they take the skin off.

Q. Where did they get the skin from? A. Up here.

Q. They took a whole slip off? A. Not one piece, but pieces like that (indicating).

Q. And what did they do, put it on the stump? A. Yes, sir.

Q. And were you suffering pain? A. Oh, gee; oh, Jesus.

Q. Did you pay much attention to what Mr. Wyman was saying to you? A. I don't remember now, I don't remember anything.

Q. Were you between the rails of the track when you were walking along the track? A. Yes, sir, when I walk on the track I was between the rails.

Q. And while you were walking? A. Then I get hit, struck with the engine on my shoulder, then I fall and after I do not know anything.

Q. What were you walking on as you walked between the rails?

Mr. Tomlinson: I object to that as simply a repetition.

Mr. Markley: All right, it is all in.

Recross examination by Mr. Tomlinson.

Q. Joe, this pass that you had was good on any trains between East 22nd Street and Elizabethport, wasn't it? A. Well, I do not take so many trains—

Q. I say you could use that pass on any train that you wanted to take between 22nd Street and Elizabethport, couldn't you? A. I don't know, I

didn't try it. I didn't try it on any other train, I always go on the same train.

Q. Is the pass here? A. Yes, sir, I have the pass here; my lawyer has it.

The Court: Is that material? Do you admit that he had a pass there?

Mr. Tomlinson: I want to show that the pass was not limited to any particular train, if the Court please.

Mr. Markley: We will admit that.

Mr. Tomlinson: My purpose is to prove that by virtue of this pass this gentleman could have taken any train that he desired between 22nd Street and Elizabethport; he didn't have to take the 2:30 train.

Mr. Markley: We will admit that, surely.

Mr. Tomlinson: All right that eliminates it.

The Court: At this time we will recess until ten A. M. tomorrow morning.

TRIAL RESUMED

Cross examination by Mr. Tomlinson.

Q. Mr. Symonski, you said yesterday that you used to work at 22d Street, Bayonne? A. Yes.

Q. You worked at the 22d Street roundhouse, didn't you? A. Yes.

Q. You never worked at the station, did you, at 22d Street? A. No.

Q. Now, you also said yesterday that you had seen railroad men, as well as other men, go down along the tracks? A. Yes, sir.

Q. Can you give us the names of any of the men that you saw go down there? A. Yes, I know a few men's names.

Q. Who were they? A. One was Stanley Rapowsky.

Q. Where does he work? A. He worked in the Central Railroad, I don't know where, but I knew he worked on the Central Railroad.

Q. Whereabouts on the Central Railroad? A. Elizabethport, too.

Q. Who else? A. A fellow by the name of Orosky, who works in the Standard Oil, he used the same road.

Q. Who else? A. I don't know anybody else's name.

Q. Where does Stanley Rapowsky live, Joe? A. I don't know where he lives.

Q. And where does this man live who worked for the Standard Oil Company? A. He works there.

Q. Where does he live? A. He lives on Prospect Avenue, someplace, but I don't know his number.

Q. Rapowsky lived in Bayonne, did he? A. Yes, he lived in the same house I lived in, but he moved from that house and I don't know where he lives now.

Mr. Tomlinson: That is all.

Redirect Examination by Mr. Markley.

Q. Do you know a man named Worchzky—do you know Mr. and Mrs. Worchzky—Mrs. Worchzky who was on the witness stand yesterday? A. Yes.

New Jersey State Library

Q. Did he use that path? A. Yes, he used that same lot and his son.

Q. His son too? A. Yes.

Q. Did they work for the Central Railroad Company? A. For the Central Railroad Company.

Mr. Tomlinson: That is leading.

Q. Where did they work? A. In the roundhouse somewhere. I don't know what he does there, but I know he works for the Central Railroad.

Q. Did he live next door to you on Prospect Avenue? A. Yes, sir.

Q. Did he use that path, this road? A. Yes.

Mr. Tomlinson: I object to that, there is no testimony that there was any path there. There is testimony that men walked over the lot, but there is no testimony of any path.

The Court: I don't know that there is any testimony, Mr. Markley, that there was a path.

Q. Well did they go through this lot where you walked? A. Yes, sir, they went through this lot.

Q. They went to work in the morning? A. Yes.

Q. And they used the same route in the nighttime? A. I did not see in the nighttime, because I am on the job.

Q. Were there other men besides yourself and these men you have named that went through this lot? A. Yes, sir.

Mr. Tomlinson: Objected to as leading.
The Court: Objection overruled.
Mr. Tomlinson: Exception.

Q. Did you see them? A. Yes, sir, I see them.

Q. During the time you lived there? A. Yes, sir.

Q. I think you said Mr. Worchzky's son went through the lot too? A. Yes, sir.

Q. Did he work for the Central Railroad? A. Yes, sir.

Mr. Markley: That is all.

Recross Examination by Mr. Tomlinson.

Q. Where does Mr. Worchzky live now, in Bayonne? A. He lives in Bayonne, but I don't know what his number is; he moved from that house to the other house.

Q. Did Mr. Worchzky and Mrs. Worchzky and the son all live in the same house? A. Yes.

Q. All lived together? A. Yes, sir.

Mr. Tomlinson: That is all.

(Witness excused)

Mr. Markley: That is the plaintiff's case.

DEFENSE

STEWART L. PACH, SWORN.

Direct examination by Mr. Tomlinson.

Q. You live where? A. Plainfield, New Jersey.

Q. And you are in the employ of the Central Railroad? A. Yes, sir.

Q. In what capacity? A. Civil Engineer.

Q. How long have you been a Civil Engineer? A. Fifteen years.

Q. And in whose office are you? A. In the office of Chief Engineer.

Q. Are you familiar with the situation surrounding the East 22d Street station of the Central Railroad in Bayonne? A. Yes.

Q. Did you make a survey of that situation there? A. Yes, sir.

Q. And from that survey prepared a map? A. Yes, sir.

Q. Will you produce the map, please?

(Witness complies.)

Mr. Tomlinson: I offer the map in evidence.

Mr. Markley: This is not a stock map of the Company?

The Witness: No.

Mr. Markley: You made it especially for this case?

The Witness: Yes.

Mr. Markley: What is the scale of it?

The Witness: One inch on the map equals ten feet on the ground.

Mr. Markley: No objection to it.

(Marked in evidence Exhibit D-1.)

Q. To the right of the map is which direction? A. The right of the map is toward Jersey City.

Q. And the left of the map is what direction? A. Towards the City of Elizabeth, across Newark Bay.

Q. Have you shown the 22d Street station on the map? A. Yes, the 22d Street station is marked "Westbound station" at the top side of the track, and on the bottom of the tracks it is marked "Eastbound station."

Q. I notice some dotted lines in almost the middle of the map between tracks 2 and 1; what do they represent? A. Those lines represent the fence in between the tracks.

Q. And are the various tracks numbered as you have shown on the map? A. Yes.

Q. Which are the tracks leading away from Jersey City? A. Tracks 2 and 4 lead away from Jersey City.

Q. They are commonly called the westbound tracks, are they not? A. Yes, sir.

Q. And the tracks leading to Jersey City are 1, 3, and 5? A. Yes, only 5 is not built all the way into Jersey.

Q. They are what are called the eastbound tracks? A. Yes, sir.

Q. Are there any other tracks there than the five which you have indicated on the map? A. This spur going into the Levy Coal Yard.

Q. Have you indicated the 22d Street bridge? A. Yes, that runs at right angles to the track. The bridge is five over eighty.

Q. You say it runs at right angles to the track at 22d Street? A. 22d Street runs at right angles to the road.

Q. On the crossing over this bridge, are there any

other tracks than the five tracks which you have indicated? A. No, sir.

Q. Now, have you indicated on this map Prospect Avenue? A. Yes, Prospect Avenue runs parallel to the railroad and is shown on the bottom of the map.

Q. It is shown along here, is it? A. Yes, sir.

Q. Does Prospect Avenue connect with 22d Street? A. Yes, sir.

Q. I notice you have indicated, you have shown on your map a certain object of some sort at the intersection, apparently, of 22d Street with some part of the station premises, near track No. 5; I ask you what that object is intended to represent? A. That represents a flight of stairs leading from 22d Street to the eastbound station platform.

Q. On the other side of the track, is there a flight of stairs leading to the westbound station? A. Yes, sir.

Q. That is indicated over here? A. Yes.

Q. Do you know where Avenue E is? A. Yes, Avenue E is the next street toward the top of the map, beyond the tracks.

Q. Do you know where Broadway is? A. Broadway is the next block over.

Q. Broadway and Avenue E both run parallel to the railroad tracks, do they not? A. Yes, sir.

Q. And does Prospect Avenue? A. Yes.

Q. Do you know whether or not the tracks are on the same level with Prospect Avenue or not? A. The tracks are a little higher than the level of Prospect Avenue.

Q. And when the tracks get to the bridge at 22d Street, are they higher or lower than Prospect

Avenue? A. They are considerably higher than Prospect Avenue.

Q. I show you a space which is intersected by two tracks, apparently, and ask you whether or not that is an open lot? A. Opposite 23d Street there is an open lot.

Q. On the westbound side of the track, I show you a long, black line with the words "Consumer's Coal Trestle," and ask you what that line represents? A. That is a coal trestle.

Q. How high is that trestle? A. I didn't measure it, but it is about twenty feet over the top of the rails, at least twenty feet.

Q. And how near to the nearest rail of track 4 is that trestle at a point close to the bridge? A. 18.98 feet, the nearest rail of track 4 to the trestle.

Mr. Tomlinson: Cross-examine.

Cross examination by Mr. Markley.

Q. I see you have the first street coming from 22nd Street northerly is Mechanic Street? A. Yes, sir.

Q. The distance from Mechanic Street to East 23rd Street is still another block? A. Yes, sir.

Q. In other words, there are two blocks from 22nd Street to 23rd Street? A. Yes, sir.

Q. Would you mind telling me the distance that is, according to scale, from 22nd Street along Prospect Avenue? A. About 550 feet from 23rd Street to 22nd Street.

Q. And how far is it to 24th Street, approximately? A. That is a full 200-foot block from 24th to 23rd Street.

Q. So that it is 750 feet from 22nd Street to 24th Street? A. Yes, sir.

Q. Now, when you gave us the measurement of 18 feet to the coal trestle from the near rail of track 4 of your map, you gave us the widest distance, didn't you? A. Yes.

Q. It gets narrower there as you come towards 24th Street? A. Yes.

Q. And what is the distance at the most narrow point? A. The narrowest point is here between 23rd and 24th Street, where there is only five feet to the nearest rail.

Q. There is a bulge in the trestle right above the T. & P. track No. 4—what is the distance there? A. Eight feet.

Q. When did you make this map? A. The map was made on December 3rd, 1924.

Q. And were the tracks then practically the same during the year preceding? A. Yes.

Q. No change in the physical layout? A. No.

Q. The tracks were the same? A. Yes.

Q. This siding does run out there paralleling a short distance track No. 5? A. Yes, both these side tracks run into the coal yard.

Q. The Harry Levy Coal Yard? A. Yes, sir.

Q. So that at this point at least there are six tracks, are there not? A. Of course.

Q. One is a siding? A. Yes, sir.

Q. And tracks 1, 3 and 5 eastbound? A. Yes.

Q. And tracks 2 and 4 westbound? A. Yes.

Q. Westbound is toward Elizabeth or Elizabethport? A. Yes.

Q. And eastbound toward Jersey City A. Yes, sir.

Q. And you do not mean to say that when you cut the siding at the entrance of the Levy Coal

Yard, that that is where it ends? A. No, it runs all the way through the coal yard.

Q. I show you photograph, Exhibit P-1; does that show the bridge which you show on your map at 22d Street? A. Yes, sir.

Q. I show you another photograph, Exhibit P-2, does that show it as you saw it? A. Yes.

Q. I show you Exhibit P-3, and I call your attention to this track, that is track No. 4, isn't it? A. Yes.

Q. The track on which I have my pencil? A. Yes.

Q. The one to the left in the picture? A. Yes.

Q. And that Consumer's Coal trestle is the building you see at the top of the picture? A. Yes.

Q. It is a building, isn't it? A. Yes, sir.

Q. You call it a trestle? A. It is a trestle closed in.

Q. There is a building there? A. Yes.

Q. And it shows in the picture here? A. Yes, sir.

Q. Now, looking at Exhibit P-5, here is track 4 again? A. Yes.

Q. There is a coal trestle up there, or the coal trestle building, we will call it? A. Yes.

Q. And this is the space in between where you say it measures 18 feet and at the narrowest point 5 feet? A. Yes.

Q. It is level, isn't it? A. Possibly, yes.

Q. Ordinary ground, dirt? A. Cinders chiefly, I understand.

Q. With a few railroad cars lying there? A. Yes, sir.

Q. You see them in the picture, Plaintiff's 5? A. Yes.

Q. Now, what is the grade there, any grade? A. On the railroad track?

Q. Yes. A. There is only an upgrade in the westerly direction.

Q. Going toward Elizabeth there is a slight upgrade? A. Yes.

Q. How much of an upgrade? A. Why, it is about .25 of 1 per cent.

Q. By 1 per cent, you mean 1 foot in every 100 feet? A. Yes, sir.

Q. In other words, every 100 feet there is an upgrade of 1 foot when there is a 1 per cent grade? A. Yes.

Q. In this case there is not that much? A. No, sir.

Q. One-fourth of that? A. Yes.

Q. Three inches upward in every 100 feet of track? A. Yes.

Q. So that, from a point, let's say, 600 feet from the trestle at 22nd Street, going along track No. 4, for 600 feet up the track there would be how much of a rise? A. 18 inches.

Q. A foot and a half of a grade in that 600 feet, is that right? A. Yes.

Q. The track is straight? A. Yes.

Q. Did you make any measurement to see how far it was straight from 22nd Street toward Jersey City? A. I did not make a measurement, but I know.

Q. Approximately? A. Two miles.

Q. Two miles of straight track? A. Yes.

Q. That is, approaching 22nd Street from Jersey City on track No. 4, it is straight for two miles? A. Yes.

Q. And how about going past 22nd Street towards Elizabethport? A. At 22nd Street there is straight track of approximately two thousand feet.

Q. Now, then, tell me what the clearance is as depicted on your map from the outside rail to the nearest obstruction on the bridge? A. From the northerly rail of track 4 to the edge of the girder, the distance is 3 feet 8 inches.

Q. From the northerly rail, that is the outside rail of the outside track? A. Yes, sir.

Q. On the top of the map? A. Yes.

Q. Track No. 4? A. Yes.

Q. It is how much? A. 3 feet 8 inches.

Q. To where? A. From the outside rail to the nearest edge of the girder.

Q. When you say girder, do you mean the flat surface? A. The flat surface.

Q. What is the distance to the extended part of the upright part? A. 3 feet 3 inches measured at the top of the rail.

Q. To the outside of the steel upright? A. Yes, sir.

Q. And how far is this planking raised above the floor of the bridge? A. I didn't measure it.

Q. Can you give me any idea? A. It is about a foot from the rail to the edge of the planking.

Q. Does the planking run along parallel to the rail? A. Yes.

Q. And you say the distance is about the same? A. I didn't measure it, about the same.

Q. Now, can you tell me how far it is from the side of the bridge nearest to the station, to the station building? A. Yes.

Q. To the near side of the station building, we

will say, to the side of the bridge, to the near side of the station building? A. 162 feet.

Q. Now what is the width of the bridge? A. 56 feet, that is, parallel with the tracks.

Q. Yes, so that 56 feet plus the 162 feet will give us the distance from the side of the station building to the other side of the bridge? A. Yes.

Q. Do you know how wide the right of way of the company is at that point? A. No, sir, I do not.

Q. Measure the width as it is shown on your map. A. I have not shown the right of way.

Q. You do not show the right of way? A. No, sir.

Q. Do you know if it includes this space, up to the Consumer's Coal Company building on the top of the map? A. I think it does, but I am not certain about it.

Q. Now then, suppose you measure the width of the bridge for me, the whole width of the bridge? A. 68 feet.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. Are there some other steps leading to the westbound station than these steps which you have indicated here? A. Yes, there is a flight down to Avenue E near 22nd Street, and there is also a flight down to 21st Street, which I have indicated over here, west of the Station building.

Q. What is the distance from the end of the bridge to the nearest end of the westbound station, that is, between this point here, the westbound side of the bridge to the nearest point of

the station? A. The nearest point of the station building is 162 feet. The canopy is a little less than that, 23 feet less.

Mr. Tomlinson: That is all.

Recross examination by Mr. Markley.

Q. One question, to make it clear in my own mind. You show Prospect Avenue here on the east side of the railroad? A. Yes, sir.

Q. And one block over is Avenue E, is it? A. Yes, sir.

Q. So that the railroad at this point is Avenue E on the west and Prospect Avenue on the east? A. Yes.

Q. That is, taking the general direction? A. Yes.

Q. And then on the other side of Avenue E, which is on the west side, is Broadway? A. Yes.

Q. So that coming to the railroad you would strike Broadway first, then Avenue E and then railroad, then Prospect Avenue going south? A. Yes.

Mr. Markley: That is all.

Redirect Examination by Mr. Tomlinson.

Q. One further question: This trestle leading to the Levy Coal Yard, you said did not terminate at this point where you have indicated it on the map? A. No.

Q. Now, I ask you whether or not this trestle crosses East 22nd Street? A. No, sir, the trestle ends at a point about 25 feet from 22nd Street.

Q. And this track itself does not cross 22nd Street, does it? A. No, sir.

Q. Have you indicated on your map No. 98 Prospect Avenue? A. I have not indicated it on the map, but I can tell about where it is.

Mr. Markley: No. 98 or No. 100?

Mr. Tomlinson: There is some testimony that it is 98 and some testimony that it is 100.

Q. How about 100 Prospect Avenue? A. Right opposite this point I marked 297, between 23rd and 24th Street, about the middle of the block. I mark it with a red line on the easterly side of Prospect Avenue.

Q. Would you mind marking there 100; you might mark 98 and 100.

(Witness indicates.)

Q. Now, will you give us the distance from 100 Prospect Avenue to East 22nd Street? A. Yes, 630 feet.

Q. And the distance from 22nd Street, taking the same side of 22nd Street as 98 and 100 Prospect Avenue are on, the distance from that side of 22nd Street over to the steps leading up to the westbound station? A. 260 feet.

Q. That distance you gave was the intersection of Prospect Avenue and 22nd Street A. Yes, the southwesterly corner.

Q. Now, what is the distance from 98 Prospect Avenue to 22nd Street, how much less is that? A. 25 feet less than the distance from 100.

Q. Now, will you give the distance from 100 Prospect Avenue across the tracks to the Consumer's Coal trestle? A. 236 feet.

Q. Give us the distance from 100 Prospect Avenue across the track to the furthest rail of track 4? A. 5½ feet less.

Q. Now, then, what further measurements. You measured across the tracks from 100 Prospect Avenue over to the Consumer's trestle? A. Yes.

Q. Now, will you give us the distance from that point, that is, the point across the tracks opposite 100 Prospect Avenue down to the bridge? A. Well that is the same distance as it is along Prospect Avenue, it parallels it.

Q. 630 feet? A. Yes.

Q. Now, give us the distance from that point to the station.

Mr. Markley: Which point?

Q. From the point across the tracks and opposite 100 Prospect Avenue? A. That is 792 feet.

Mr. Tomlinson: That is all.

(Witness excused.)

Mr. Tomlinson: I offer in evidence these twelve photographs. (Marked in evidence Exhibits D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13). Exhibit D-2 is taken from a point on the bridge looking towards Jersey City; D-3 is taken from a point on the Jersey City side of the bridge looking towards the direction of Elizabethport; D-4 is taken from a point

nearer Jersey City than the preceding photograph, looking toward Elizabeth and showing on the right the Consumer's Coal trestle; D-5 is taken looking towards Jersey City and showing the Consumer's Coal trestle on the left of the picture; D-6 is looking away from Jersey City and toward Elizabeth, showing the Consumer's Coal trestle on the right of the picture and the Levy Coal trestle on the left of the picture; D-7 is looking toward Jersey City, showing on the right of the picture the vacant lot and the siding leading into the Levy Coal Yard; D-8 is looking from the west side of the tracks and showing the lot and the coal tracks; D-9 is taken from a point on the west side of the tracks, looking straight across the tracks and showing the vacant lot; D-10 is taken from the west side of the track looking across the track, showing the end of the coal building; D-11 is taken from the east side of Prospect Avenue, at the corner of 23rd Street, looking directly across the tracks; D-12 is taken from approximately the corner of 24th Street, looking down along Prospect Avenue; D-13 is taken from the corner of East 22nd Street and Prospect Avenue, looking through 22nd Street and showing the railroad bridge.

For Defendant—Stewart L. Pach—Recalled—Redirect

STEWART L. PACH, recalled.

Redirect examination by Mr. Tomlinson.

Q. Are you familiar with the location of the Elizabethport car shops of the Central Railroad Company at Elizabethport? A. Yes, sir.

Q. Do you know the approximate distance between the East 22nd Street station at Bayonne and the shops at Elizabethport? A. Yes, sir, I can figure it. 19,700 feet—it is approximately four miles.

Q. In what county is Elizabethport? A. Union County.

Q. And Bayonne is in Hudson County? A. Hudson County.

Q. Between Elizabethport and 22nd Street, Bayonne, there is the Newark Bay, isn't there? A. Yes, sir.

Q. So that to get from Bayonne to Elizabethport you have to cross Newark Bay? A. Yes, sir.

Q. In what manner does the railroad belonging to the Central Railroad cross Newark Bay? A. On a trestle.

Q. About what is the length of that trestle? A. It is one mile and one-tenth.

Q. Is there any bridge for pedestrians over that trestle? A. No, sir.

Mr. Markley: Objected to—I withdraw the objection.

Mr. Tomlinson: That is all.

For Defendant—Stewart L. Pach—Recross
For Defendant—Robert Nixon—Direct

Recross examination by Mr. Markley.

Q. You say the distance is approximately four miles? A. 19,700 feet.

Mr. Markley: That is all.

(Witness excused.)

ROBERT NIXON, sworn.

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 67 Monitor Street, Jersey City.

Q. How long have you lived there? A. Two years.

Q. Have you been ill recently? A. Yes, sir.

Q. For how long? A. From the 18th of October to the 8th of December.

Q. You are employed by the Central Railroad Company as an engineer? A. Yes, sir.

Q. How long have you been an engineer? A. Seven years and a half.

Q. Were you the engineer of the train that was involved in this accident? A. Yes, sir.

Q. Where did you start out from? A. Jersey City freight yard.

Q. That is at Claremont Street? A. Yes, sir.

Q. And where were you going? A. Allentown.

Q. What sort of an engine did you have? A. 853, stoker.

Q. And what sort of an engine is that, Mr. Nixon? A. It is a Pacific type.

Q. On that engine does the engineer sit up in the middle of the boiler or does he sit back at

the end of the boiler? A. Well, he sits back at the end of the boiler.

Q. And where is the fireman located? A. On the back of the boiler opposite the engineer.

Q. Is that engine the kind that is commonly called the Mikado engine? A. Yes, sir.

Q. Have you any idea how long it is? A. About 81 feet.

Q. How often had you run through Bayonne? A. Running through there off and on for seven years and a half; I was promoted.

Q. Who was riding on your engine with you this day? A. The fireman, the traveling fireman and the head brakeman.

Q. As you approached 22nd Street, Bayonne, at what speed were you traveling? A. About 20 or 25 miles an hour.

Q. When was it that you first noticed the plaintiff, Mr. Symonski? A. Well, when I was about 100 feet away from him.

Q. And where was he when you first noticed him? A. Walking about 10 feet on the inside of the rail toward Brady's, the consumers coal chute.

Q. Was he on the track at all? A. No, sir, off the track.

Q. Then what happened? A. Well, he walked up outside as far as 22nd Street, and he stepped in on the bridge.

Q. What did you do? A. I blew the whistle and put the brake on emergency.

Q. How many times did you blow your whistle? A. Three or four times.

Q. And how long after you blew your whistle did you start to apply your emergency brake? A. About the same time.

Q. What did he do after you blew your whistle? A. He never looked around, he kept on going.

Q. Did you stop your engine as quickly as you could? A. Yes, sir.

Q. During the time that you had gone through Bayonne before, had you ever seen any men walking along in this same space where this man was walking? A. No, sir.

Q. Have you ever noticed any men walking along that track walking on the track itself? A. No, sir.

Q. Which window were you looking out of? A. Out of the side cab window.

Q. And how long a time had you been looking out of that cab window? A. Continuously from Jersey City.

Q. Now, would you state whether or not that trestle along the right hand side of the track throws any shadow or not? A. Yes, sir, it does.

Q. What part of the engine struck this man? A. The right breast beam, the front part of the engine.

Mr. Markley: The right?

The Witness: Yes, sir.

Q. The breast beam? A. The front part of the engine that the pilot is on.

Q. Does that stick out over the side of the engine or not? A. Yes, sir.

Q. Did this man have anything underneath his arm? A. Yes, sir, he had a bundle.

Q. When you actually struck him, about what was your speed then? A. About six miles an hour.

Q. Did you have a bell on this engine? A. Yes, sir.

Q. And how was that bell operated? A. By air.

Q. As you approached 22nd Street was that bell ringing or not? A. Yes, sir.

Q. And for how long a time had it been ringing? A. At the time we left Van Nostrand Place.

Q. Who turned it on? A. I did.

Q. After you once turned it on does it keep on ringing until you turn it off? A. Yes, sir.

Q. When you stopped what did you do? A. I went over to the station and asked them to call for an ambulance.

Q. When this man stepped on the bridge as you say and you started to blow your whistle, how far ahead of you was he at the time? A. About ten feet.

Q. And when you struck him where was he? A. About five feet in on the bridge.

Q. Nearest to which side of the bridge? A. He was walking along between the girder and Track 4 on this side of the rail.

Q. Which end of the bridge was he nearest to? A. Jersey City.

Mr. Tomlinson: Cross examine.

Cross examination by Mr. Markley.

Q. You say the engine was 81 feet long? A. Yes, sir.

Q. And how long was the tender? A. That includes all.

Q. That includes the tender of the engine then? A. Yes, sir.

Q. How long is the engine itself? A. I could not tell you.

Q. Can't you approximate it? A. No, sir.

Q. Why not? A. (No answer.)

Q. How long is the tender? A. I could not tell you.

Q. If you do not know the length of the tender or of the engine, how can you tell the length of the whole business? A. Certain things I have been taught to know; the length of the engine I know.

Q. Don't you think you have been taught how long either is? A. No, sir.

Q. Well, haven't you the faintest idea how long that tender was? A. About thirty feet.

Q. Well, from thirty to thirty-five feet would not be out of the way, would it? A. No, sir.

Q. Then, have you any idea how long that engine was? A. About 50 feet.

Q. You would not be surprised if it was 47 feet long, would you? A. I am not positive.

Q. Now, you were on the engine? A. Yes, sir.

Q. You were not on the tender? A. I was on the engine.

Q. On which side of the engine were you? A. On the right hand side.

Q. And about what part of the engine? A. On the back part of the engine.

Q. Now, how many cabs are there on the right hand side of that engine? A. One.

Q. And how many cabs on the left hand side of the engine? A. The one cab takes up all of it, one cab for all.

Q. How far is that from the front of the engine? A. About 45 feet.

Q. The engine is only 47 feet long? A. That is all, the cab is on the back of the boiler.

Q. All right, you have more than two feet behind you on the engine, haven't you? A. No, sir.

Q. You mean to say you are two feet from the rear end of your engine? A. Yes, sir.

Q. Were you standing up or seated? A. Seated.

Q. And only two feet from the rear of the engine, seated in the engineer's cab? A. Yes, sir.

Q. Is that where you were? A. Yes, sir.

Q. From Van Nostrand Avenue, Jersey City, all the way up to the scene of the accident? A. Yes, sir.

Q. That is several miles, isn't it? A. Yes, sir.

Q. Three or four miles? A. Yes, sir.

Q. You were sick, you say? A. Yes, sir.

Q. What was the trouble? A. I had influenza.

Q. Nothing the matter with your mind? A. No, sir.

Q. Now you say you blew your whistle? A. Yes, sir.

Q. When you were ten feet from the man, is that right? A. Yes, sir.

Q. Sure about that? A. Yes, sir.

Q. Is that the first time you blew your whistle? A. Pardon me?

Q. Is that the first time you blew your whistle? A. Yes, sir.

Q. And you saw him when you were 100 feet from him? A. Yes, sir.

Q. When your engine was 100 feet from him? A. Yes, sir.

Q. That was the first time you saw him, was it? A. Yes, sir.

Q. Well, the track is straight there for at least two miles and you were looking out of the window all the time? A. Yes, sir.

Q. If anything there is a little upgrade there? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. Now, then, why didn't you see him before the engine was only 100 feet from him? A. He could have been in alongside the coal chute and I could not have seen him.

Q. I am not asking you that; I am asking you—

Mr. Tomlinson: He has been asked why he could not see him and I think that is an answer.

Mr. Markley: I won't press it.

Q. At any rate you did not see him? A. No, sir.

Q. Where he was you did not see? A. No, sir.

Q. Of your own personal knowledge? A. Of my own personal knowledge, no, sir.

Q. How many men were on this engine as you approached the scene of the accident? A. Four men.

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

Q. Did you have a caboose on that train? A. Yes, sir.

Q. At the rear end? A. Yes, sir.

Q. And the caboose is the car in which the crew usually remain while the train is in motion? You had a long journey ahead, didn't you? A. A long journey?

Q. You were going to Pennsylvania? A. Yes, sir.

Q. From Jersey City to Allentown, Pennsylvania? A. Yes, sir.

Q. Do you know how many miles that is? A. Yes, sir.

Q. How many? A. 88 miles.

Q. And yet you had four men in your cab? A. Yes, sir.

Q. Did you make any stops between Van Nostrand Avenue and the scene of this accident? A. No, sir.

Q. You continued all the way? A. Yes, sir.

Q. Did you have the air up at Van Nostrand Avenue before you started? A. Yes, sir.

Q. You had full air pressure? A. Yes, sir.

Q. How much? A. 70 pounds on the train line and 90 pounds in the main reservoir.

Q. Maximum pressure? A. Yes, sir.

Q. Nothing the matter with it? A. No, sir.

Q. You had not exhausted it in any way? A. No, sir.

Q. And that was 100% then? A. Yes, sir.

Q. On every car? A. Yes, sir.

Q. And you had 70 cars? A. Yes, sir.

Q. And they were all empty weren't they? A. Yes, sir.

Q. Now, you had an automatic bell on your engine? A. Yes, sir.

Q. All you had to do to start that bell was to turn a little valve? A. Yes, sir.

Q. And then it goes? A. Yes, sir.

Q. Who was on the engine? A. The traveling fireman, the head brakeman, and the fireman.

Q. Where was the head brakeman? A. Standing alongside of the fireman.

Q. Where was the traveling fireman? A. Standing in the middle of the boiler—the middle of the cab.

Q. They were with you though? A. No, sir.

Q. Were they talking with you? A. No, sir.

Q. You were not carrying on any conversation with them? A. No, sir.

Q. Your attention was not distracted from your road? A. No, sir.

Q. You were looking ahead? A. Yes, sir.

Q. That was part of your duty, wasn't it? A. Yes, sir.

Q. To look ahead along the tracks. A. Yes, sir.

Q. And if there was any obstruction along the track in the way of a human being, to blow your whistle? A. If they were on the track, yes, sir.

Q. Or if you thought he was going on the track you would blow your whistle, wouldn't you? A. Yes, sir.

Q. Now, as a matter of fact, instead of blowing your whistle when you were only ten feet from the man you blew it when you were 100 feet from the man, didn't you? A. No, sir.

Q. Didn't you swear to that in the interrogatories? A. No, sir.

Q. I call your attention to interrogatory number 11; that is your signature, isn't it? A. Yes, sir.

Q. Just look at this, is that your signature? A. Yes, sir.

Q. And you swore to the answers to the first, second, third, fourth, sixth, tenth, eleventh and twelfth interrogatories, that they were true? A. Yes, sir.

For Defendant—Robert Nixon—Cross.

Q. Now, then, the 11th interrogatory—I will start at the 10th to give you the context. 10th: State what signals, if any were given by the engineer on the engine before striking the plaintiff. The answer is: Blew engine whistle several times. You swore to that, didn't you? A. Yes, sir.

Q. The 11th interrogatory is: Where was the plaintiff at that time when the whistle was first blown? The answer is: The plaintiff was outside the railroad tracks and east of the 22nd Street bridge. That is right? A. Yes, sir.

Q. The 12th interrogatory is: How far distant was he from the engine at that time? And your answer was: Between 75 and 100 feet? A. Yes, sir.

Q. So that when you first blew your whistle the plaintiff was 75 to 100 feet from your engine, was he? A. Yes, sir.

Q. Well, now, which is it, ten or fifteen feet from your engine when you first blew your whistle or was he 75 or 100 feet from your engine when when you first blew the whistle? A. About 75 or 100 feet.

Q. So that your answer here this morning was not the correct answer? A. No, sir.

Q. You think now on reflection and on calling your attention to the interrogatories which you signed and swore to, you think the real fact is that he was 75 or 100 feet from your engine when you first blew the whistle? A. Yes, sir.

Q. So that you were mixed, were you, before? A. Yes.

Q. Now, then, you said here this morning that the plaintiff was 10 feet inside—he was walking 10 feet inside of the rail? A. Yes, sir, toward the bank, toward Brady's coal chute.

Q. Was he walking toward the bridge? A. Yes, sir, walking towards the bridge.

Q. And was he on the inside of the track? A. Yes, inside toward the Consumer's Coal and Ice Co.

Q. That would be the outside. He was on your right at the time? A. On my right at the time.

Q. When you first saw him? A. Yes, sir.

Q. He was on the outside of Track 4, between Track 4 of the Consumer's Coal Company? A. Yes, sir.

Q. And he was 10 feet from the outside rail? A. Yes, sir.

Q. Well, what did you blow your whistle for? A. I didn't blow the whistle until he started to step in on the tracks.

Q. You say you blew your whistle just now after reflection and after considering your answers made to these interrogatories back on November 13th—you were sick at that time, were you? A. November 13th?

Q. Yes. A. Yes.

Q. Were you in bed on November 13th? A. No, sir.

Q. I understood from your direct-examination that you were laid up from October 13th to December 8th. A. Yes, sir.

Q. Yet you swore to your answers on November 13, 1924? A. Yes, sir.

Q. Where did you swear to them? A. In my house.

Q. They came up to your house? A. Yes, sir.

Q. But you were not sick? A. No, sir, I was up around.

Q. How long have you been working? A.

Since the 8th of December; I worked five days, then I was off fourteen days, then I went back to work again.

Q. And you have been working since? A. Yes, sir.

Q. Now, then, when you struck this man you were only going five or six miles an hour, were you? A. Yes, sir.

Q. Quite clear about that? A. Yes, sir.

Q. And with an up-grade and 100% air pressure ready to operate by merely turning the valve? A. By just pulling the handle around.

Q. Just pulling the handle around and in a second your brakes are on? A. Yes, sir.

Q. Now, then, going up that speed, going up a grade such as there is there—there is a grade there, isn't there? A. Yes, sir.

Q. With the track clear? A. Yes, sir.

Q. You could stop very quickly, couldn't you? A. Yes, sir.

Q. Stop in 10 or 20 feet, couldn't you? A. Not going 15 miles an hour.

Q. I am talking about five or six miles an hour. A. Five or six miles an hour you can stop it in about 25 feet.

Q. Now, then, going at ten miles an hour you can stop in 40 feet, under those conditions? A. No, sir, 100 feet.

Q. Under those circumstances I am talking about. A. I am talking about under those conditions, 100 feet.

Q. What? A. 100 feet.

Q. Now, then, you were only going five or six miles an hour when you struck him; how fast were you going 100 feet away from him? A. About 20 miles an hour.

Q. Then you mean to say you reduced your speed from 20 miles an hour to five or six miles an hour in 100 feet? Is that what you mean to say? A. Yes, sir.

Q. Yet you went 150 feet after you hit him? A. I went an engine and car length and a half after I hit him.

Q. You went 150 feet, didn't you, approximately? A. Yes, sir.

Q. But you stopped, as I understand you now, as you were going 20 miles an hour in 100 feet you brought your speed down from 20 miles an hour to five or six miles an hour; you cut your speed three quarters, didn't you? A. Yes, sir.

Q. In 100 feet? A. Yes, sir.

Q. Yet, after your engine was down to five or six miles an hour you continued to go on 150 feet before you actually came to a stop? A. Yes, sir.

Q. As a matter of fact, you did not apply your emergency brake until after you hit him? A. I applied my emergency brake before I hit him.

Q. Full pressure? A. I didn't get that.

Q. Full pressure? A. Yes.

Q. In emergency? A. In emergency.

Q. You did not make any service application at that time? A. No, sir, I did not.

Q. So that your brakes must have been on full force 100 feet on all cars before you hit him? A. Yes, sir.

Q. Well, how did you come to go 150 feet then after you hit him? A. That is something I do not know.

Q. You must be mistaken somewhere. A. The train will push you that far.

Q. Why didn't it push you further than five or six miles an hour at the time you struck him? A. (No answer.)

Q. Can you answer that? A. No, sir, I cannot.

Q. Now, then, you applied your brake as soon as you blew your whistle, as I understand it? A. Yes, sir.

Q. In emergency immediately? Is that right? A. Yes, sir.

Q. And that was when you first blew your whistle? A. Yes, sir.

Q. And that was 75 or 100 feet from the man? A. Yes, sir.

Q. And you were only going 20 miles an hour? A. Yes, sir.

Q. Well, how do you account for the fact that you went 100 feet to the man, plus 150 feet or 250 altogether before you stopped? A. Going at 20 miles an hour you will go about 500 feet before stopping.

Q. Well, a moment ago you said 100 feet. A. You cannot tell anything about the trains—

Mr. Tomlinson: He didn't say that, I object to that.

Mr. Markley: Will the stenographer repeat his last answer, I didn't hear it.

(Repeated by stenographer as follows: You cannot tell anything about the trains—.)

Q. Didn't you say here before on cross-examination that going at 20 miles an hour you could stop in 100 feet? A. No, sir.

Q. What did you say? A. I said going at ten miles an hour.

Q. You could stop? A. In 100 feet.

Q. In 100 feet? A. Yes, sir.

Q. All right, now, then, you say you were going about 20 miles an hour? A. Yes, sir.

Q. In how many feet could you stop? A. About 400 feet.

Q. Did you ever try it? A. No, sir.

Q. Then that is a mere guess? A. No, sir, that is the way we are instructed.

Q. Who instructed you that way? A. Our air man, when we go through the examination.

Q. On a dry rail? A. Yes, sir.

Q. A clear day? A. Yes, sir.

Q. An upgrade? A. Yes, sir.

Q. Going only 20 miles an hour you would take 400 feet to stop? A. Yes, sir.

Q. Then, how did you come to stop at 250 feet then? A. That is something I cannot say.

Q. If it takes you 400 feet to stop at 20 miles an hour under those conditions, you stopped 150 feet too soon than under your instructions, didn't you? A. It is the variation of the train.

Q. You stopped 150 feet before this train should have stopped under your instructions, is that right? A. Yes, sir.

Q. Is that what you mean to tell this jury? A. Yes, sir.

Q. You do not mean that, do you? A. I do, sir.

Q. That although it takes 400 feet to stop a train going at 20 miles an hour under those conditions that prevailed there that day, with a clear track, dry rails, an up-grade, 70 empty cars with 100% air pressure, it takes 400 feet to stop as you are instructed, yet you made a stop in 250 feet? A. 250 feet.

Q. So that you broke the record by 150 feet then, is that right? A. Yes, sir.

Q. How many times did you blow your whistle? A. Three or four times.

Q. Before you hit him? A. Yes, sir.

Q. Then what kind of a warning, Mr. Nixon? A. Short blasts of the whistle, a warning whistle.

Q. Very loud? A. Yes, sir.

Q. Real loud? A. Yes, sir.

Q. Sure about that? A. Yes, sir.

Q. That man's back was to you, wasn't it? A. Yes, sir.

Q. And I think you said on your direct examination he never turned? A. He never turned.

Q. Made no indication that he heard your whistle, did he? A. No, sir.

Q. Why did you blow your whistle at all when he was ten feet away from your track? A. He started to walk in.

Q. When you first saw him, as I understand you from your direct examination, he was outside of the rail ten feet? A. Yes, sir.

Q. Walking towards the bridge? A. Yes, sir.

Q. He was not walking toward the track then, according to your story? A. No.

Q. Then why did you blow your whistle for this fellow? A. To draw his attention.

Q. To draw his attention? A. Yes, sir.

Q. Ten feet away from the rail? A. No, sir, he was not ten feet away from the rail when I blew the whistle.

Q. You said when you first saw him 75 or 100 feet away you blew your whistle? A. Yes, sir.

Q. And that when you first saw him he was 10 feet from the outside of your track? A. He was.

Q. Then why did you blow your whistle then? A. I blew the whistle when he started to walk in toward the track.

Q. Then he must have started to walk in when you were 75 or 100 feet away from him, is that right? A. No, sir.

Q. It is not so? A. Well, I could not give just the distance, but I got pretty close to him and he started to walk in.

Q. I understood when you first saw him you blew your whistle? A. Yes, sir.

Q. Did you do that or didn't you? A. When I first saw him?

Q. Yes. A. No, not when I first saw him I didn't blow the whistle.

Q. Well, you blew your whistle when you were 75 or 100 feet from him, didn't you? A. Yes.

Q. How far were you away from him when you first saw him, 200 feet? A. No, sir, about the same distance.

Q. Then you must have blown your whistle when you first saw him then? A. Yes, sir.

Q. Then he must have turned in when you first saw him? A. No, not right after I first saw him.

Q. You just said now that you blew your whistle when he first turned in, is that right? A. Yes, when he first turned in I blew the whistle.

Q. When he was 75 or 100 feet away from you, that is the time wasn't it? A. Yes, sir.

Q. That was 75 or 100 feet from the bridge, wasn't it? A. No, sir.

Q. Well, you struck him right on the bridge; wasn't he entering the bridge when you hit

him? A. He was about five feet in on the bridge.

Q. Then he must have been 70 to 95 feet from the bridge when you first saw him? A. No, sir, he was not that far away.

Q. Well, I am not trying to confuse you, Mr. Nixon. I want to get the facts. After you struck him he was only five feet in on the bridge, that is a fact? A. Yes, sir.

Q. Then you hit him? A. Yes, sir.

Q. Then he was between the rails, wasn't he? A. No, sir.

Q. Where was he? A. On the side of the rail.

Q. Which side? A. On the outside, the girder.

Q. You could plainly see him then? A. Yes, sir.

Q. Now, then, if he was only five feet in when you first struck him and you first saw him when he was 75 or 100 feet from your engine, he must have been some distance outside of the bridge, isn't that so? A. Yes, about ten or fifteen feet this side of the bridge.

Q. Ten or fifteen feet from the bridge? A. Yes, sir.

Q. Then he must have turned in right then? A. He turned in when he got up to the bridge.

Q. Then he must have walked ten feet before he turned in? A. He did.

Q. That is when you first blew your whistle? A. I seen him start to turn in.

Q. Then you didn't blow it when he was walking those ten feet, did you? A. No, sir.

Q. Sure about that? A. Yes, sir.

Q. You did not blow your whistle while he was walking the ten feet in to the bridge? A. No, sir.

Q. Why didn't you? A. Because he was out of danger.

Q. How was he out of danger? A. He was off the tracks at that time.

Q. How far? A. About ten feet.

Q. So that you did not blow any whistle for him? A. Not at that time.

Q. He could not walk anywhere but towards the bridge then, could he? A. That is where he was going.

Q. He could not continue outside the tracks and walk over 22nd Street, could he? A. No, sir.

Q. Because there is an embankment there? A. Yes, sir.

Q. He would have had a fall of about 25 feet? A. Yes, sir.

Q. So that if he was going toward the bridge on the outside of the tracks, the only way he could get over would be on the tracks, wouldn't it? A. Yes, sir.

Q. Then why didn't you blow your whistle for him? A. I didn't know he was going to step in.

Q. You did not think he would step in? A. No, sir.

Q. He did not make any indication, did he? A. He didn't make any indication that he would step in.

Q. But he was walking toward the bridge, wasn't he? A. Yes, sir.

Q. Now, then, you did not see him come across the track then down here five hundred feet from the bridge, did you? A. No, sir.

Q. You did not see him walking along the track for that distance, 500 feet, did you? A. No, sir.

For Defendant—Robert Nixon—Cross.

Q. You did not see him between the rails? A. No, sir.

Q. You were not on any other track than Track 4 were you? A. Track 4.

Q. All the time? A. Yes, sir.

Q. That was a clear day? A. Yes, sir.

Q. The sun was shining? A. Yes, sir.

Q. No obstructions there? A. There is Brady's coal chute.

Q. Nothing on the track? A. Nothing on the track.

Q. But you think there was some shadow from the coal trestle? A. Yes, sir.

Q. Then why is it that you did not see the man at all? A. When I got up close to him I seen him.

Q. I show you a photograph that was taken of this place leading to the bridge, Exhibit P-5; do you see any shadow there? A. No, sir.

Q. It is perfectly plain, isn't it? A. Yes, sir.

Q. You can see very well? A. Yes, sir.

Q. That is the coal trestle curving to the right of the picture? A. Yes, sir.

Q. And you have not any difficulty looking along those tracks have you? A. No, sir.

Q. Nor alongside the tracks? A. No, sir.

Q. This other picture shows Brady's coal trestle and the buildings; no difficulty about seeing there? A. No difficulty.

Q. Here is a picture of your own company's Exhibit D-2; that is the same location, isn't it? A. Yes, sir.

Q. You do not see any shadows there, do you? A. No, sir.

Q. Here is one that does appear to show a shadow, Exhibit D-4, is that the shadow you refer to? A. Yes, sir.

Q. Well, that is about ten feet from the rail, isn't it? A. That is further up than I mean, the place is further up than where the shadow was.

Q. That is where the coal trestle comes out? A. Yes, sir.

Q. Up near the bridge there is 18 feet of clearance? A. Yes, sir.

Q. Here there is only five feet in Exhibit D-4? A. Yes, sir.

Q. Yet there is a very narrow shadow isn't there? A. Yes, sir, on that picture.

Q. That was a clear day? A. Yes, sir.

Q. Who were these other men on your engine? A. The traveling fireman.

Q. Can you give us their names? A. Yes.

Q. Who were they? A. Harry Freund, traveling fireman, Arthur Gunther, the fireman and the brakeman's last name was Rose; I don't know his first name.

Q. Are they in Court? A. Yes, sir.

Q. You know them? A. Yes, sir.

Q. Did you know them at that time? A. Yes, sir.

Q. How long had you known them? A. I have known Mr. Freund about 13 years.

Q. Who was Mr. Freund? A. The traveling fireman.

Q. How about the other men? A. Gunther, I know him about five years.

Q. And the other man? A. I know him about a year or a year and a half.

Q. As a matter of fact, you were talking to

those men, were you? A. After the accident happened, yes, sir.

Q. I mean before the accident happened. A. I never saw the brakeman from that time until I came to court.

Q. I am not talking since that time, I am talking about the time of the accident. They were friends of yours, weren't they? A. Not necessarily friends, no, sir. Only working—

Q. You had known them for years and years? A. Yes, sir.

Q. And they were right on the engine there with you? A. Yes, sir.

Q. All in one cab? A. Yes, sir.

Q. You and the fireman? A. Yes, sir.

Q. And the brakeman and the traveling fireman? A. Yes, sir.

Q. You were all in this one big cab? A. Yes, sir.

Q. Weren't you talking together to these other men? A. No, sir.

Q. Hadn't you been talking to them from Van Nostrand Avenue? A. No, sir.

Q. You mean to tell the jury you had not said a single word to these three other men in the same cab? A. No, sir, I did not.

Q. Were they talking? A. I could not say.

Q. You didn't hear them? A. I could not hear them.

Q. Will you say although they were four men in the cab not a word was spoken? A. I could not swear to that.

Q. You were in the same cab? A. Yes, I know that.

Q. Did you hear them talking? A. No, sir.

Q. You didn't hear a word? A. No, sir.

Q. When they are talking in that cab can you hear them? A. Not always.

Q. Well, nearly always. A. Not necessarily always.

Q. Well, how did you know they were there? A. They were there when we started out.

Q. Were they there at the time of the accident? A. Yes, sir.

Q. How do you know that? A. Well, they didn't get off.

Q. You were not looking at them, were you? A. I looked at them after we stopped there.

Q. I mean before you stopped? A. No, sir, I didn't look at them before we stopped.

Q. You were looking out of the window all the time? A. Yes, sir.

Q. You were not looking at these men? A. No, sir.

Q. All the time from Van Nostrand Avenue, continuously, every moment, you were looking out of your window? A. Yes, sir.

Q. And never turned your head? A. I turned my head to look at the steam gauge and the air gauge once in a while.

Q. But not at these men who were in the same cab with you? A. No, sir.

Q. The steam gauge was right in front of you? A. Yes, sir.

Q. You did not have to turn your head, just your eyes? A. Just my eyes.

Q. So that you did not turn your head at all, did you? A. No, sir.

Q. When you looked at the steam gauge you could not see them? A. No, sir.

Q. Now, where were these men at the time of the accident? A. Well, I don't know. The

fireman was on the left hand side and the brakeman was next to him.

Q. Well, how do you know that if you were not looking at them? A. I seen them after we stopped.

Q. I mean before you stopped. A. I could not say where they were then.

Q. They were not near you anyway, were they? A. No, sir.

Q. And they were not on your side? A. No, sir.

Q. You are positive about that? A. I am positive about that.

Q. If they were there you would have seen them? A. I would have felt them alongside of me, yes, sir.

Mr. Markley: That is all.

(Witness excused.)

ALFRED GUNTHER, sworn.

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 11 Wade Street, Jersey City.

Q. How long have you lived in Jersey City? A. About eighteen or nineteen years.

Q. Were you the fireman on the train? A. Yes, sir.

Q. The engine that Mr. Nixon was running? A. Yes, sir.

Q. How long have you been a fireman? A. Five years.

Q. Now, in what part of the engine were you riding? A. On the left side of the cab.

Q. And what were you doing on the left side of of the cab? A. Attending to the stoker valve.

Q. What were you doing with that? A. Putting coal into the fire.

Q. What is that, an automatic stoker? A. An automatic stoker.

Q. And where was that valve located? A. Right on the side of the boiler, between the cab and the boiler.

Q. Did you notice the traveling fireman and Mr. Rose, the head brakeman? A. I did, yes, sir.

Q. Where were they standing? A. The head brakeman was standing alongside of me, and the traveling fireman was standing by the fire door, that is, in the center of the boiler.

Q. What was the first thing you knew of there having been an accident? A. Why, the first thing I knew, was when the engineer blew several blasts of the whistle and put the emergency brake on.

Q. And what did you do after that? A. Why, after we stopped I got off and walked back, then I lost my nerve and the traveling fireman told me to go up and look at the—

Mr. Markley: I object.

Q. You cannot tell us what anybody told you. Do you know about where your engine was when you heard these whistles that you have described and the brakes going on? A. No, sir.

Q. Do you know whether it had reached the 22nd Street bridge or not? A. No, sir, I do not.

Q. Did you see this man before he got struck? A. No, sir.

Q. Do you know whether the bell was ringing or whether it was not ringing? A. Yes, it was was ringing.

Q. And how long had the bell been ringing? A. Ever since we left Van Nostrand Place.

Q. Did you see anybody on the track as you approached 22nd Street? A. Why, I had been watching a bunch of children there running across, that is all.

Q. And what were they doing? A. I don't know if they were chasing a ball, that I could not say.

Q. Which direction were they going, along the track or across it? A. They ran over from the station over to the fence.

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Markley.

Q. This lot was right before you got to the 22nd Street bridge? A. No, sir, after the 22nd Street station.

Q. Oh, at the station you saw that? A. Yes, sir.

Q. When? A. Why, I was watching them right along there.

Q. As the train came along? A. What do you mean? Our train?

Q. Yes. A. Yes, I seen a bunch of kids run out.

Q. Before the accident, that is? A. Yes.

Q. How long before the accident? A. That I do not know.

Q. Was it three or four minutes before the accident happened? A. I could not judge what time, I don't know.

Q. Haven't you any idea? A. No, I have not.

Q. How long before the accident was it? A. I don't know.

Q. It was before the accident? A. Yes, sir.

Q. And which side did they come from? A. They were playing in the open space toward Avenue E.

Q. This is East 22nd Street here? A. Yes, sir.

Q. And this is East 23rd Street here, and here is the bridge down here. Now, where were these children playing? A. I said up at the station there.

Q. Here is the station up here? A. This side of the station, going up toward that section there.

Q. This section here? A. No, sir.

Q. Then to the side? A. Right here between the two tracks, between 2 and 4.

Q. Up here? A. Yes, sir.

Q. Playing ball? A. I don't know what they were playing, that I could not say.

Q. So that while the train was moving— A. Yes, our train was moving.

Q. That is the time you saw this? A. Yes, sir.

Q. You saw the accident? A. Yes, sir.

Q. And where were you when you saw this? A. I just turned to look out of the window.

Q. How long before the accident? A. I could not say, I don't know.

Q. You were in the left of the cab then? A. Yes, sir.

Q. You were not putting any coal on the fire at the time? A. That is what I was looking at the stack for, to see how the smoke was.

Q. As I understood, on your direct examination, you said just as this accident happened and prior thereto, you were putting coal on the fire? A. Putting coal on the fire with the valve, the stoker valve, and watching the smoke stack at the same time.

Q. You did not mean using a shovel then? A. No, sir.

Q. How do you do that? A. Why, it is an automatic stoker.

Q. And you just turn the valve and the coal falls on the fire? A. Just turn the valve and the coal goes into the fire.

Q. Is it part of your duty as a fireman to assist the engineer in looking out of the engine on the track ahead? A. Yes, sir, when the engineer cannot see.

Q. What are your duties? A. Just watching the fire.

Q. After your fires are attended to aren't you supposed to look out with the engineer? A. Not always.

Q. Well, sometimes? A. When everything is running smooth.

Q. Everything was running smooth here, wasn't it? A. No, sir.

Q. What was the matter? A. We were just starting out from Van Nostrand Place and I didn't have time to get a real good fire.

Q. Van Nostrand Place is quite a distance away, isn't it? A. It takes ten miles sometimes before you are fixed right.

Q. You were turning the valve? A. Yes, sir.

Q. And you do that sitting in your seat? A. Yes, sir.

Q. On the fireman's side of the engine? A. Yes, sir.

Q. The left side? A. Yes.

Q. And sitting in your seat, by just turning a little valve, you could put coal on the fire? A. Yes, sir.

Q. You didn't have to go to the firebox and take a shovel and shovel the coal in? A. No, sir.

Q. You could see out ahead while doing that? A. Yes, sir.

Q. And while sitting in your seat you are supposed to keep a lookout? A. You look ahead, yes, sir.

Q. You are supposed to do it, aren't you? A. You are supposed to do it, yes.

Q. That is a part of your duty, isn't it? A. Yes, sir.

Q. Now, then, you did not see anything ahead, did you? You did not see this accident? A. Not this accident, no, sir.

Q. You did not see the man on the track? A. No, sir.

Q. You didn't see the train strike the man? A. No, sir.

Q. You saw absolutely nothing? A. Nothing.

Q. Were you talking to these men? A. I was talking to the head brakeman.

Q. What is his name? A. Rose is what I knew him by.

Q. He was standing alongside of you? A. Yes.

Q. And you were talking to him? A. Yes, sir.

Q. You were not paying any attention to what was ahead of you? A. I was looking out, I didn't

have to turn around to speak to the men.

Q. Were you looking out or looking ahead? A. I was at the time when I seen the kids.

Q. At the time of the accident were you looking out? A. Yes, I was looking out.

Q. And you did not see it? A. No, sir.

Q. You didn't see a man 75 or 100 feet ahead of you? A. No, sir.

Q. And yet you say you were looking out? A. Yes, I was watching the kids up there.

Q. The kids were away over up here? A. Yes, sir.

Q. I am talking about when you were down here, you were coming along a straight track for miles, weren't you looking ahead? A. Yes, sir.

Q. And you saw something? A. Not the man, no, sir, I did not.

Q. I show you Exhibit Plaintiff's 5. There is the station up there, isn't it? A. Yes, sir.

Q. You see that all right? A. Yes, sir.

Q. And that is the bridge in the picture? A. Yes, sir.

Q. And that is the track as you come to the bridge? A. Yes, sir.

Q. And you see the coal trestle? A. Yes, sir.

Q. Now if you were looking ahead and you saw these children playing, how is it you could not see a man right on the bridge? A. If he had been on the bridge I would have seen him.

Q. He must have been on the bridge if he was struck by your train? A. If he had been on the bridge, the length of the boiler would not allow me to see this man on the bridge.

Q. Before you came there? 100 or 75 feet away? A. I didn't see him at all.

Q. You were talking to the head brakeman, weren't you? A. Yes, sir.

Q. And talking to the traveling fireman? A. No, sir, I was not at the time.

Q. Where was he? A. Standing alongside of the brakeman.

Q. Listening to your conversation? A. That I could not say.

Q. Was it a personal conversation? A. Not a personal conversation, no, sir.

Q. You don't remember what it was now, I suppose? A. No, sir.

Q. You have forgotten what it was all about? A. Yes, sir.

Q. But you and the head brakeman were talking and the traveling fireman was standing alongside of you? A. Yes, sir.

Q. And that would be at your right side as you sat in the cab? A. Yes, on my right.

Q. And the head of the train would be then at your left side as you sat in the cab, is that right? A. Yes, sir.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. Where is this valve that runs the automatic stoker? A. Right between the cab and the side of the boiler.

Q. And you work that with your right hand? A. You could work it with your right hand or your left hand.

Q. And during the time that you were working this valve, were you looking out the win-

dow all the time or watching this valve? A. I was working it with my right hand and watching the smoke.

Q. Why were you watching the smoke? A. At that rate of speed we were going I would have made too much smoke going through Bayonne.

Q. When you sat on the left side of that engine, who sat over on the right hand side of the engine? A. What do you mean?

Q. Could you see the right side of the track which you were running on? A. No, sir.

Q. Why not? What would prevent you from seeing it? A. The length of the boiler, if that is what you mean.

Mr. Tomlinson: That is all.

Cross examination by Mr. Markley.

Q. Sitting in the fireman's cab, looking out ahead, you can see to the other side of the track, can't you? A. What side do you mean, the right side?

Q. The engineer's side? A. No, sir.

Q. You cannot see at all? A. Not at a near distance; a long distance, you may.

Q. You can see an object on the right hand side 50 feet ahead of the engine? A. Not that I know of; I never measured it to tell the distance.

Q. You have never measured it? A. I don't know.

Q. Can you see an object on the right rail in the direction in which you are going sitting in the cab to the left, 75 feet ahead of the engine? A. I might if I leaned way out.

Q. In your ordinary position? A. I don't think so.

Q. Don't you know? A. No.

Q. Can you see an object 100 feet ahead on the rail, sitting in your cab in your ordinary position and looking ahead? A. That I could not say, what distance.

Q. Do you know how long your engine is? A. No, sir, I have never been told and I have never asked.

Q. Do you know what position your cab occupies on the engine, as to length? A. No, sir.

Q. And how far your cab is from the rear end of your engine? A. No, sir, I never measured it and have never been told.

Q. Do you know how far it is from the front end of your engine? A. No, sir.

Q. Then you do not know much about it, do you, how far you could see over on the right rail? A. I know it has to be quite a distance away from the engine to see it.

Q. What do you mean by quite a distance? A. So that I can see it.

Q. How many feet ahead? A. I don't know.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. When this happened had you yet gotten your fire working to suit you? A. No, sir, I had not.

Mr. Tomlinson: That is all.

Mr. Markley: Are you still employed by the company?

The Witness: Yes, sir, I am.

(Witness excused.)

For Defendant—Harry Freund—Direct

HARRY FREUND, sworn.

Direct examination by Mr. Tomlinson.

Q. Mr. Freund, where do you live? A. 189 Randolph Avenue, Jersey City.

Q. How long have you lived in Jersey City? A. Why, about 20 years.

Q. You are employed by the Central Railroad Company? A. Yes, sir.

Q. In what capacity? A. Traveling fireman.

Q. Were you a traveling fireman on the day this accident happened? A. Yes, sir.

Q. What is a traveling fireman, Mr. Freund? A. Why, it is his duty to break in new fireman in case they have any, or watch the mechanical stokers and in case an engine does not steam up, you have to see what the trouble is.

Q. What was the purpose or the reason of your riding on this engine on the day of the accident? A. Why, to watch the mechanical stoker.

Q. What is a mechanical stoker, Mr. Freund? A. Why, an engine operated by steam to supply coal to the fire.

Q. And how is that mechanical stoker operated? A. Why, by operating the fireman's valve on the left side of the boiler; it puts steam into the cylinders of the stoker engine.

Q. Where were you riding on this day, what part of the engine? A. Why, about the center of the cab.

Q. Where did you get on the engine? A. At the Communipaw Round house.

Q. Now, then, at the time of the accident did you notice whether or not the engine bell was ringing? A. Yes, sir.

Q. Do you mean by that that you noticed it or did it ring? A. Yes, sir, I heard it ring when we started leaving Van Nostrand Place.

Q. Was it stopped at any time after that? A. No, it rang continuously.

Q. Did you tell me in what part of the engine you were riding? A. In the center of the cab.

Q. Standing or sitting? A. Standing.

Q. Could you see out of the cab from where you were? A. No, sir.

Q. Were you closer to the fireman or closer to the engineer? A. I was just about the same distance, right in the center of the cab.

Q. What was the first word you got of there having been an accident? A. The engineer said, "I ran over a man."

Mr. Markley: I object.

Q. How did you first find out? By reason of something the engineer said? A. Yes, the engineer blew his whistle several times.

Q. How many times did he blow his whistle? A. Three or four times.

Q. What else did you notice him do, if anything? A. Applying the emergency brakes at the same time.

Q. Are you sure that was the emergency brake? A. Yes, sir.

Q. Then what did you do? A. I asked him what had happened.

Q. And the engine stopped after that? A. Yes, sir.

Q. And what did you do after that? A. I do not understand the question.

For Defendant—Harry Freund—Cross

Q. What did you do after the engine came to a stop? A. I asked him what had happened.

Q. All right, then what did you do, never mind any conversation you had with anybody. A. Why I went back to see who was struck.

Q. And you found this man? A. Yes, sir.

Q. What part of the bridge? A. In the center.

Q. What was done then? A. I climbed over him and got him by the overcoat and pulled him into an upright position.

Q. And then did you have the cars cut so as to get him out? A. Well, not right away.

Q. Well, eventually did you cut the cars so as to get this man out? A. Yes, I believe the head brakeman did.

Q. Now, at the time you noticed the engineer blow the whistle and apply the brakes did you see him do anything else, did you see him change his position or not? A. No, sir, he was looking out the cab window at the time and at all times in fact.

Q. And did you notice what the fireman was doing? A. He was sitting on his seat operating the stoker.

Q. And that was what you were watching on this engine, was it? A. Yes, sir.

Mr. Tomlinson: Cross examine.

(Recess until two p. m.)

Cross examination by Mr. Markley.

Q. You were a traveling fireman? A. Yes, sir.

Q. How long had you been a traveling fireman? A. Seven years.

Q. And before that what were you? A. A locomotive fireman.

Q. And how long were you a locomotive fireman? A. Why, about 15 years.

Q. And before that what were you? A. Well, sailor before then.

Q. Altogether you were a fireman for how many years? A. About 15 years.

Q. And that does not include your time as traveling fireman? A. No, sir, I was promoted and made traveling fireman.

Q. And you have been a traveling fireman about six years you say? A. Seven.

Q. That would make 22 years? A. Yes, sir.

Q. And you were still employed by the company all that time, for 22 years? A. No, sir.

Q. What company? A. Lehigh Valley.

Q. Before you were a fireman on the Jersey Central? A. Yes, sir.

Q. This engine, do you know the number of that engine? A. Yes, sir.

Q. What was it? A. 853.

Q. And what kind of an engine was it? A. A Mikado engine.

Q. Freight engine? A. Yes, sir.

Q. A big freight engine? A. Yes, sir.

Q. One of the biggest the Central has, isn't it? A. Yes, sir.

Q. It was not any small dinky affair? A. Oh, no.

Q. Now, then, do you say this bell was ringing from Van Nostrand Avenue, Jersey City? A. Yes, sir.

Q. There was no occasion to keep the bell ringing all that time, was there? A. Well, on

account of the section men working on the tracks at Van Nostrand Place.

Q. That was miles before, wasn't it? A. Yes, sir.

Q. How many miles away is Van Nostrand Avenue from 22nd Street, Bayonne? A. Why, about three or four miles.

Q. Well, now, after you got past there there was no occasion to keep that bell ringing, was there? A. Well, it is the hablit of the majority of engineers to put it on and leave it on.

Q. Don't you know the unnecessary use of the bell is prohibited by the company?

Mr. Tomlinson: I object to that, that has not been shown.

Q. Don't you know that the company provided that the bell was not to be unnecessarily rung? A. Why, there is some crossings between Bayonne and—

Mr. Tomlinson: I object to the question, there is no proof that the company did prohibit it.

Mr. Markley: I will reframe it.

Q. Isn't it a fact that your company provided by its rules that the unnecessary use of the bell was prohibited? A. Well, it was not unnecessary.

Q. I am asking you isn't that the rule of the company? A. Yes.

Q. Now, then, where was there a grade crossing that required the ringing of a bell in the vicinity of this accident? A. Why, there are several, 58th Street, Bayonne is the first one.

Q. One at 58th Street? A. Yes, sir.

Q. Where is the next one? A. 45th Street.

Q. And the next? A. Well, I don't know just where the next one is.

Q. And there is not any in between there, is there? A. Well, there is a path across there where men walk across.

Q. Where is that path? A. Well, up around there I should judge 40th Street.

Q. A private path, a grade crossing? A. No grade crossing.

Q. I am talking about grade crossings. The nearest one is down below 40th Street, isn't it? A. Yes, sir.

Q. Now, what other thing would require the ringing of the engine bell after you got past that place down at 40 some street? A. Well, we kept it ringing—

Q. I am asking you what occasion there would be for ringing the bell beyond that crossing? A. Oftentimes there are people picking coal.

Q. Picking coal? A. Yes, sir.

Q. Well, outside of picking coal, what reason was there for ringing the engine bell beyond 40th Street? A. Why, we were traveling along.

Q. What was there on the track or in front of the engine, to your knowledge that required the ringing of the bell beyond 40th Street? A. Why, probably some section men working around there.

Q. If there were some? A. Yes; that I don't know; I didn't see them.

Q. Well, then, the only thing you know that might require the continuous ringing of the automatic bell on the engine would be somebody picking coal on the track or some section men

that might be working there? A. Yes, also several stations through there.

Q. Several stations? A. Yes, sir.

Q. Would you ring the bell for the stations? A. Yes, sir.

Q. Keep it ringing? A. Yes, sir.

Q. Would you blow your whistle? A. No, sir.

Q. Just the bell? A. Yes, sir.

Q. Now then, you did not see anything of the accident, did you? A. Not until after it was over.

Q. And you were standing in the center of the cab? A. Yes.

Q. Facing the boiler? A. No, facing the tender—well, the tank and the boiler, watching the coal as it was going down into the stoker.

Q. So that you were facing the tender part way and part to the boiler? A. Yes, sir.

Q. So that you were not in a position to see anything, were you? A. No, sir.

Q. And the first you know of anything unusual happening was, you say, when you heard the whistle? A. Yes, sir.

Q. And when you heard the whistle you thought that that was unusual? A. Yes, sir.

Q. Then, that was the only thing that attracted your attention to something unusual, was it? A. Yes, sir.

Q. Now then, you also know, being a traveling fireman and having experience as a fireman yourself, that the duty of the fireman is to keep a lookout, don't you?

Mr. Tomlinson: I object as improper cross-examination.

Mr. Markley: It is cross-examination going to the witness's credibility.

Mr. Tomlinson: I didn't examine him upon the duties of a fireman at all. Now he is being interrogated on cross examination as to the duties of a fireman and I object as improper cross examination.

Mr. Markley: I won't press it.

Q. Were you talking to either of the other men on your side of the cab? A. No, sir.

Q. Were you listening to their conversation? A. No, sir.

Q. You do not know what they were talking about? A. No, sir.

Q. Do you know whether the fireman was keeping a lookout? A. Why, he had been instructed to watch the track on account of the smoke.

Q. That is what he was doing? A. Yes, sir.

Q. He had to look out to do that, didn't he? A. Occasionally, yes.

Q. Do you know whether the fireman looked out for any purpose as you were approaching the 22nd Street station? A. Only to watch the smoke.

Q. Do you know of your own knowledge? A. No, sir, I do not.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. Did the smoke from the stack go up in the air or did it go toward the ground? A. Why, it went up in the air.

Q. You said you were attracted by the whistle? A. Yes, sir.

Q. What if anything was there about the char-

acter of the whistle or the kind of whistle that attracted your attention? A. Why, three or four loud blasts.

Q. And what sort of a blast do you call that in railroad parlance? A. Well, a blast like that would be danger.

Q. Now, who had charge of this engine? A. Why, Mr. Nixon, the engineer.

Q. What was the last station that you had passed through before you got to the 22nd Street bridge? A. 33rd Street.

Q. Have you been an engineer? A. Yes, sir.

Q. How long were you an engineer? A. Since October 19, 1917.

Mr. Tomlinson: That is all.

(Witness excused.)

EDWARD THOMAS ROSE, sworn.

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 215 Pearsall Avenue, Jersey City.

Q. How long have you lived in Jersey City? A. 42 years.

Q. You were the head brakeman on this train, were you not? A. Yes, sir.

Q. How long have you been a brakeman? A. About seven years.

Q. How did you come to be riding in the cab of this engine? A. Well, that is the place where I should be, the head end of the train.

Q. That is the place for the head brakeman, is it? A. Yes, sir.

Q. And whereabouts in the cab were you riding? A. Alongside of the fireman between the engine and the tank.

Q. Could you see out of the cab at all from where you were? A. No, sir.

Q. What attracted your attention to the fact of the accident? A. Why, the whistle.

Q. What sort of a whistle was it? A. Why, loud whistles.

Q. How many times? A. I should judge three or four.

Q. Did you feel the brakes go on? A. Yes, sir.

Q. And then what did you do as soon as you heard the whistle and felt the brakes go on? A. I looked out alongside of the train.

Q. Which side, the right side or the left? A. The left side.

Q. Did you see this man then? A. No, sir.

Q. Then what did you do? A. I got off the left side.

Q. You got off the left side? A. Yes, sir.

Q. And went back? A. Yes, sir.

Q. And what did you do after you got back? A. I found Mr. Freund there holding a man up toward the side of the bridge.

Q. Then what did you do after that? A. I closed the ankle cock on the rear end of the two cars and made a cut.

Q. And why did you make the cut? A. To release the cars.

Q. Are you able to state about where your engine was when you heard the blast of the whistle and felt the brakes go on? A. Just the other side of the bridge.

Q. Which side of the bridge do you mean, to-

wards Jersey City or towards 22nd Street station? A. Towards 22nd Street.

Q. Do you mean that you had gotten over the bridge? A. No, the engine was partly on the bridge, not quite to the center.

Q. Did you see the engineer when he put the brakes on? A. No, sir.

Q. Then the first that you knew about the brakes being on was when you felt them? A. I heard him make the application.

Q. Well, just how do you know that the brakes had gone on? Did you feel them or what? A. Why, I felt them go on.

Q. Did you notice whether the engine bell was ringing or not? A. Yes, sir.

Q. Was it ringing or was it not ringing? A. Ringing.

Mr. Tomlinson: Cross-examine.

Cross examination by Mr. Markley.

Q. You heard the bell ringing, did you? A. Yes, sir.

Q. Where? A. Why, from the time we left Van Nostrand Place.

Q. All the way down? A. Yes, sir.

Q. You are sure about that? A. Positive.

Q. You have not talked that over with anybody, have you? A. No, sir.

Q. Now, you were a fireman, weren't you? A. Yes, sir.

Q. For how long? A. I guess about eight years.

Q. What? A. About eight or nine years.

Q. A fireman eight or nine years? A. Yes, sir.

Q. And you were an engineer too? A. No, sir.

Q. Just a fireman? A. Yes, sir.

Q. How long have you been a brakeman? A. Avout seven years.

Q. And how long have you worked for the Central all together? A. About eight years.

Q. As a brakeman? A. Yes, sir.

Q. Where did you work as a fireman? A. On the Pennsylvania.

Q. And how long have you been in the railroad business? A. I guess about twenty-five or thirty years.

Q. Now, then, you said you felt the brakes applied when the engine was on the other side of 22nd Street bridge; is that right? A. I felt them applied on the bridge, on the east end of the bridge.

Q. Well, is the east end the end nearest the station? A. No, sir, that is the west end.

Q. Now, how far on the bridge was the engine when you felt the brakes applied? A. Well, not quite half way on the bridge.

Q. Do you know how wide that bridge is? A. No, sir.

Q. The bridge is fifty-six feet wide; it was half-way on the bridge, was it? A. Half-way on the bridge.

Q. That is the bridge over 22nd Street, is it? A. Yes, sir.

Q. The engine was half-way on the bridge, half-way of those fifty-six feet when you felt the brakes applied? A. Yes, sir.

Q. Now, you can feel the brakes applied, can you? A. Yes, sir.

Q. You do not have to see it done, do you? A. No. sir.

Q. Until you were half-way on the bridge, or the engine was half-way on the bridge, you did not feel the brakes applied, did you? A. No; well, I might not have been half-way on the bridge.

Q. Well, to the best of your judgment. A. I could not see out, you know.

Q. You looked out first when you heard the whistle? A. Yes, sir.

Q. And you heard them on the bridge? A. Yes, sir.

Q. Half-way over the bridge? A. Not half-way, I don't think I was.

Q. You have just said half-way.

Mr. Tomlinson: I think he should have a right to finish his answer.

Q. Well, what is your answer? A. Well, I don't think I was half-way on the bridge.

Q. Weren't you half-way over the bridge when you felt the brakes applied? A. No, I don't think I was.

Q. You just said a moment ago that you were. Well, where were you on the bridge? A. Just about on the bridge, I should judge.

Q. Now, you have changed that? A. Yes.

Q. You were mixed before when you said you were half-way over the bridge? A. Yes, sir.

Q. Well, now, are you quite sure you were only just on the bridge when you felt the brakes applied? A. No, that is probably where he stopped.

Q. Where who stopped? A. The train, the engine.

Q. Stopped where? A. After the brakes were applied.

Q. Where? A. On the bridge.

Q. The train stopped on the bridge? A. Yes, sir.

Q. You are sure about that? A. Positive.

Q. Positive, do you say? A. Yes, the engine.

Q. Don't you know the engine went 150 feet over the bridge before it stopped? A. (No answer.)

Q. Do you understand the question? A. Yes.

Q. What is your answer? A. I say it stopped about half-way on the bridge.

Q. What did? A. The engine.

Q. So that the engine was only half-way over the bridge when it stopped, according to your best judgment? A. Half-way on the bridge.

Q. So that as this train came along it was only half-way on this bridge when it came to a stop, do I understand you correctly now? A. Yes, sir.

Q. I just want to get it right so that there won't be any misunderstanding? A. Yes.

Q. So that if this bridge was fifty-six feet, the engine had traveled only half of this fifty-six feet over the bridge when it stopped? A. Yes.

Q. And you felt the brakes applied when? A. Just before—just about when we hit the bridge.

Q. As you hit the bridge, you could feel these brakes going on in emergency? A. Yes, sir.

Q. You had no trouble in feeling that? A. No.

Q. And you are quite positive now on reflection, that the brakes were not applied when the engine was half way on the bridge, but just as it got to the bridge, the brakes were applied? A. As it got on the bridge.

Q. So that the train went half of the width of the bridge before it came to a stop after

the application of the brakes just as you entered on the bridge, is that right? A. Yes, sir.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. Were you looking out of the engine when you felt the brakes go on? A. No, sir.

Q. And when was the first time that you did look outside of the engine? A. After the brakes went on.

Q. And when you looked out of the engine, had the train yet come to a stop or was it still going? A. Just moving.

Q. Which side of the engine did you get off on? A. Left side.

Q. And when you got off on the left side, did you get off onto the bridge or beyond the bridge? A. Just beyond the bridge.

Q. Now, when you say beyond the bridge, do you mean towards Twenty-second Street or towards Jersey City? A. Twenty-second Street depot.

Q. You got off there? A. Yes, sir.

Q. Then you went back? A. Yes, sir.

Mr. Tomlinson: That is all.

(Witness excused.)

For Defendant—William H. Leary—Direct

WILLIAM H. LEARY, sworn.

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 224 Center Street, Elizabeth, N. J.

Q. You were the conductor on this train, were you? A. Yes, sir.

Q. How long have you been a conductor? A. I was promoted in 1917 and I lost out in the trouble, and then I came back and was promoted in 1921 again, in July.

Q. You lost out in what trouble, the outlaw strike? A. Yes, sir.

Q. In 1920? A. Yes, sir.

Q. You were riding on this train? A. I was in the caboose.

Q. How many cars did you have on that train? A. Seventy.

Q. And where was your caboose? A. On the rear end.

Q. So that your caboose was the seventy-first car away from the engine? A. Yes.

Q. What was the first thing that attracted your attention to the fact that anything unusual had happened? A. Why, a sudden stop.

Q. Then what did you do? A. Why, the stop upset us, I just finished my writing and as I was getting up the stop knocked me down on the bunk again, and, so I came out with an air hose and ring and went forward looking for trouble.

Q. What were you taking the air hose and ring for? A. Because of the sudden application of the brakes.

Q. Well, what—A. It might have been a broken

air hose or some defect, or something, I could not say.

Q. Well, where did you go, which side of the train did you come up on? A. I went up on the left side.

Q. Then what did you do? A. Well, I went all the way up on the left side and looked the train over and didn't see anything wrong, and when I came up to the engine, the engine was cut off with two cars and pulled up west of the East Twenty-second Street station, and I believe it was my brakeman told me—

Q. Never mind what anybody told you. A. They told me that.

Q. No, you cannot tell what anybody said to you. Had the man been taken away when you got there? A. Yes, sir.

Mr. Tomlinson: That is all.

Cross examination by Mr. Markley.

Q. You were in the caboose, were you? A. Yes, sir.

Q. On the rear of the train? A. Yes, sir.

Q. And there were seventy cars between you and the engine? A. Yes, sir.

Q. You were writing, were you? A. I just finished writing.

Q. Writing up your report on the run, I suppose? A. Yes.

Q. Now, then, you had finished your writing, had you? A. Just finished it.

Q. Well, you stood up, did you? A. I just about got up when the sudden stop knocked me down again.

Q. The stop was very sudden, was it? A. Yes, sir.

Q. Could you tell the brakes were being applied? A. Yes, sir.

Q. By the sudden stop? A. Yes, sir.

Q. You could feel the brakes being applied to the cars? A. Well, yes, you could feel it.

Q. From your experience as a railroad man you could tell they were being applied in emergency? A. Yes, something was wrong.

Q. If an air hose broke would that apply the emergency? A. Yes.

Q. Or if the engineer pulled the emergency valve that would apply the brakes in emergency? A. Yes, sir.

Q. Just as you stood up, you say the emergency was applied? A. Yes, sir.

Q. And applied very suddenly so that it knocked you down again? A. It kind of knocked me down on the bunk.

Q. And the train stopped? A. Yes, sir.

Q. It didn't go very far from the time the emergency was applied until it stopped? A. I could not say.

Q. You do not know how far it went? A. I could not say.

Q. Did it go one car length? A. I could not tell you.

Q. Did it go two car lengths? A. I could not say.

Q. You do not know? A. No.

Q. You got right off? A. As soon as I could I got together a ring and a hose and went off.

Q. And that was only a matter of a second or so? A. It might have been a little longer than that.

Q. From the time that the brakes were applied

until the train stopped was only a matter of a second or so, wasn't it? A. Yes, sir.

Mr. Markley: That is all.

(The witness is excused.)

GEORGE L. PRATT sworn.

Direct examination by Mr. Markley.

Q. You were a member of the crew of this train? A. Yes, sir.

Q. What was your job? A. Brakeman.

Q. Where do you live? A. 141 Thomas Street, Newark.

Q. How long have you been a brakeman? A. I have been a brakeman for the last five years.

Q. And whereabouts on this train were you riding? A. I was riding in the caboose.

Q. What called your attention to the fact that there had been an accident? A. Why, I was sitting there with the conductor and all of a sudden I noticed the train make a sudden stop, and it made a suspicious noise, with the empty coal gondolas.

Q. Empty what? A. Coal cars.

Q. Were they steel or wooden cars? A. Steel. We have an air gauge in the caboose; I looked up at the air gauge and I seen all the air had gone from the air gauge.

Q. You say you can see that all the air was gone? A. Yes, sir, and when he made the sudden stop I got up and looked around. We have a water cooler there, a milk-can which is generally filled with

water for washing and drinking. The water cooler had fallen off the rack and the milk can laid up there about the middle of the caboose with the water running down and the conductor picked the milk can up. With that I grabbed my flag and got out onto the ground on account there might have been something going west on track two.

Q. Now, when you railroad men speak of east and west, do you mean by east towards Jersey City? A. Yes, sir.

Q. And west, the opposite direction? A. Yes, sir.

Q. And your job was to go back to the rear of your train after it stopped? A. Yes, sir.

Mr. Tomlinson: Cross-examine.

Cross examination by Mr. Markley.

Q. You were what, the flagman? A. Yes, sir.

Q. And a member of the crew of the train? A. Yes, sir.

Q. How long have you been a railroad man? A. About five years.

Q. As flagman? A. Brakeman and flagman.

Q. A flagman's duties are almost the same as those of a brakeman? A. Yes, sir.

Q. Excepting that he has the additional job of getting out to the rear of the train? A. Yes, sir.

Q. Now, then, you were in the caboose? A. Yes, sir.

Q. You call that the cab? A. Yes, sir.

Q. Were you seated in the caboose? A. Yes, sir.

Q. And you and the conductor were there? A. Yes, sir.

Q. Anybody else? A. No, sir.

Q. Just you two? A. Yes, that is all.

Q. Were you seated there at the time that the emergency went on? A. Yes, sir.

Q. Can you tell from your experience in railroading, when the emergency application was made on the brakes? A. Yes, sir.

Q. You can tell the difference between that and the service application, can't you? A. Yes, sir.

Q. This was not a service application, was it? A. No, it was an emergency application.

Q. And the train stopped very quickly, didn't it? A. Yes, sir.

Q. Did it go as much as a car length after the brakes went on? A. That I could not say, I was inside.

Q. It was a matter of a second or two between the application of the air and the time the train stopped? A. I could not say that, I was not interested.

Q. Well, you got up? A. But I was interested in getting outside; I didn't want to be killed.

Q. You did not want to get killed? A. No, sir.

Q. None of us do, but what I am talking about is that as soon as the emergency went on, you immediately grabbed your flag and got off the train in order to flag anything that might be going west on track two? A. Yes, sir.

Q. How fast was the train going when the brakes were applied? A. The train was going anywhere from twenty to twenty-five miles an hour, I should judge.

Q. How far did it go from the time the emergency

brakes were applied? A. That I could not say.

Q. Did it go a car length? A. That I could not say.

Q. You have not the faintest idea about that? A. No, I was inside.

Q. But it was a matter of seconds between the application of the brakes and the stopping of the train? A. I could not say that, I was not outside to see any object that was moving.

Q. You did not look out at all? A. No.

Q. Have you got a window in the cab? A. Yes.

Q. You did not look out the window? A. No, sir, I was not sitting at the window.

Mr. Markley: That is all.

(The witness is excused.)

HENRY L. SANDHAS, *sworn.*

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. Allentown, Pennsylvania.

Q. You are connected with the Central Railroad Company? A. Yes, sir.

Q. In what capacity? A. General inspector.

Q. And in your duties as general inspector, or in your capacity of general inspector, what are your duties generally? A. To supervise the air brakes and to supervise the air brake instruction as well as repairs on the entire system.

Q. Including New Jersey? A. Yes, sir.

Q. Have you charge of instructing the engineers in the use of air brakes? A. Yes, sir.

Q. And by air brakes I assume you include emergency air brakes? A. Emergency includes the air brakes.

Q. Have you been an engineer? A. Yes, sir.

Q. Operated locomotives? A. Yes, sir.

Q. Have you ever been a fireman? A. Yes, sir.

Q. Have you ever been a traveling firemen? A. No, sir.

Q. How long were you an engineer? A. Five years.

Q. Have you operated freight trains? A. Yes, sir.

Q. Operated them through Twenty-second Street, Bayonne? A. From Mauch Chunk to East Twenty-second Street, Bayonne.

Q. Coal trains? A. Coal trains.

Q. And were those locomotives that you ran equipped with air brakes? A. Yes, sir.

Q. Are you familiar with engine 853? A. Yes, sir.

Q. What sort of an engine is that, Mr. Sandhas? A. That is what we call the Mikado type engine, U. S. Railroad Administration Standard Mikado engine.

Q. Do you know when it was that the Central Railroad got the engines of this type? A. The spring of 1918, I believe.

Q. When the railroad was under Governmental control? A. Under the United States Administration.

Q. Have you ever operated an engine of that sort? A. Not as an engineer, but I have operated them in my capacity as instructing engineer.

Q. Now, Mr. Sandhas, from your experience, basing your answer upon the experience you have had as an engineer, if an engine of the type of 853, drawing 70 empty cars, most of them steel gondolas, traveling at the rate of 20 miles, and the brakes were applied in emergency by the engineer, within what distance do you think the train could be stopped? A. Brakes applied in emergency?

Q. Yes, the train going at 20 miles an hour, 70 cars. A. From my experience in stopping and assisting in stopping trains with recording devices and another, to get the proper distance, proper speed, I would just approximately 450 feet at 20 miles an hour.

Q. Now, assume that the train was going at 25 miles an hour, within what distance do you think that train could be stopped? A. At 25 miles an hour?

Q. Yes. A. About 150 feet further.

Q. That would make 600 feet? A. Yes, sir.

Q. Now, assume that the train was going at 15 miles an hour and all other conditions being the same, within what distance could it be stopped? A. About 300 feet.

Q. Supposing that the train was going 10 miles an hour? A. About 100 feet.

Q. And five miles an hour? A. I will judge between 25 and 35 feet.

Q. Suppose that you were operating an engine of the type of 853, drawing 70 cars and going at 5 miles, and you attempted to apply your emergency brakes, what if anything would be liable to happen to the train. A. In the first place, it would require emergency conditions to apply the brakes in emergency, because you are liable to cause some damage

to the train at that low speed.

Q. What sort of damage? A. Well, different damage, a rear-end crash, causing injury to the men in the caboose, and you would cause a buckle in the center of your train.

Q. What do you mean by buckling the center of the train? A. Why, the train would buckle in the center.

Q. Would that be liable to cause a derailment in a train of 70 cars? A. Yes, sir.

Q. Will you state whether or not it would affect your answers to the questions I just asked you if I said that this train was being operated past 22nd Street, Bayonne? A. No, it would not affect it. It would be the same statement.

Mr. Tomlinson: That is all.

Cross examination by Mr. Markley.

Q. How long have you worked for the Central Railroad of New Jersey? A. 41 years.

Q. You are still employed by them? A. Still employed by them.

Q. At Allentown, Pennsylvania? A. Over the entire system. That is my headquarters.

Q. Where do you live? A. Allentown.

Q. Allentown, Pennsylvania? A. Yes, sir.

Q. Do you come to Jersey City every day? A. No.

Q. Where do you usually—A. At some hotel, but at the present time I am putting up in a private car on account of my duties.

Q. How many wooden cars have you included in your estimate of a 70-car train? A. I don't care.

Q. How many steel cars? A. I don't care if they are steel or wooden cars; those cars were mixed.

Q. Those cars were nearly all steel cars. But you do not say in your estimate? A. No.

Q. It does not make any difference? A. No.

Q. It does not make any difference if they were all steel or all wood? A. No, sir.

Q. It would make a difference if they were empty or loaded? A. Yes, sir.

Q. And the weight of each individual car does not make any difference? A. Yes, it does.

Q. What is the weight of the cars as you estimated them? A. The weight of the car would average 35,000 or 40,000 pounds.

Q. And you take the average car? A. Yes, sir.

Q. You did not take the weight of each individual car in arriving at your estimate? A. No.

Q. It has been testified to in this case that this bridge was 56 feet wide and that the emergency brakes were applied when the engine entered on the bridge, and the engine came to a stop in the middle of the bridge after it had traveled 28 feet from the time of the application of the emergency brake until it stopped. Can you tell me from those facts which I have given you just now how fast the engine was going before the emergency was applied? A. Let me have that question again, please.

Q. The engine, it has been testified, had its emergency brakes applied when it was just about entering on the bridge? A. Yes.

Q. And it came to a stop in the middle of the bridge? A. In the middle of the bridge?

Q. Yes. Now, the bridge was 56 feet wide, so that half of the bridge would be 26 feet. Assume

it stopped within 26 feet, how fast was it going before the emergency brakes were applied? A. Before?

Q. Yes? A. At the time the emergency was applied?

Q. Yes. A. If that was true, I would say five miles an hour.

Q. Now, suppose it was applied 50 feet before it stopped, how fast would you say it was going at the time the brakes were applied? A. If you want the answer to that, we will have to do some figuring.

Q. I am asking you if the emergency brakes were applied to this train of 70 empty cars, and it stopped within 50 feet, how fast was it going? A. The distance has an effect upon the speed.

Q. That is what I am asking you: What speed was this train going at when the brakes were first applied, if it went 50 feet after the application of the emergency brake? A. If you double the speed you increase the distance within which you can stop by four times.

Q. You said before it was going at five miles an hour if it made a stop within 26 feet? A. Yes.

Q. Now, then, double up on that and make it fifty feet that it traveled from the time the emergency brakes were applied on this same train, Mr. Tomlinson asked you about, at the same place, 22nd Street? A. Yes.

Q. Suppose from the time the emergency brakes were applied until the time the train stopped it traveled 50 feet—A. Yes.

Q. How fast was it going when the brakes were applied? A. Seven or eight miles an hour.

Q. That is all it could have been going? A. Yes.

Q. Now, then, does it make any difference in your calculation as to whether the grade is up or down? A. Oh, yes.

Q. Does it make any difference in your calculation as to whether the track was dry or wet? A. Very little.

Q. It does not make any difference? A. At that speed, very little.

Q. Does it make any difference at 15 or 20 miles an hour? A. Yes, at higher speed it does make a difference.

Q. Does it make any difference at 20 miles an hour whether the rails are wet or not? A. I am not able to state just the exact place where it runs out, but there is more difference at high speed than at low speed.

Q. You have actually made tests, have you? A. Yes.

Q. Have you made tests with dry rails and wet rails? A. Both.

Q. Does it make any difference at ten miles an hour? A. I can recall a test we made at ten miles an hour on what difference there was.

Q. Is there any difference? A. There is some difference, but I cannot say what it was.

Q. In these calculations that Mr. Tomlinson gave you, did you assume a wet rail or a dry rail? A. I would say the average rail, and there is very little difference.

Q. I am asking you whether your answers given to Mr. Tomlinson were based on the assumption that the rail was wet or dry? A. In the estimates I made, I would consider both.

For Defendant—Henry L. Sandhas—Cross

Q. In other words, it would stop in the same distance whether the rail was wet or dry? A. Approximately.

Q. And how much difference would it make? A. I should say at ten miles an hour not any.

Q. Well, at fifteen miles an hour, did you assume a wet rail in your answer to Mr. Tomlinson? A. I assumed both.

Q. That is, it would not make any difference? A. Very little difference; the approximate answers would take in both.

Q. Well, then, it cannot be the same for each? A. There is a very little difference.

Q. What is the difference? A. It is a very little difference, the exact amount I am not able to say, but my experience tells me that the difference would not be noticed at ten miles an hour.

Q. I am talking about fifteen miles an hour. A. Fifteen miles an hour there would be very little difference.

Q. At twenty miles an hour? A. There would be very little difference, there might be ten feet.

Q. Only ten feet difference between wet and dry rails? A. Yes, sir. Understand, every other condition being the same.

Q. Suppose we have a grade of 1½ feet in 600, would that make any difference? A. A couple of feet.

Q. What do you mean, two feet? A. I could not tell you; that is too fine a question for me to answer. I can state there is some difference in it.

Q. The fact is, you can stop a train on an up-grade quicker than you can stop it on a down-grade?

A. Yes, but on that grade there would be very little difference.

Q. I am asking you whether you will stop quicker on an up-grade than you will on a down-grade? A. Yes, but there is very little difference.

Q. And you will stop quicker on an up-grade than you will on a level track? A. Yes.

Q. Now, then, you said that if the emergency brakes were applied at five miles an hour, the train would buckle up in the middle? A. I didn't say it would; I said there is a tendency for it to.

Q. You do not mean to say it always would, do you? A. No.

Q. Ordinarily it would not, would it? A. It has happened a number of times, to my knowledge.

Q. According to your estimate, going at five miles an hour, the train would only travel 25 feet? A. That is the reason it buckles up.

Q. It has a tendency to, but it may not? A. It may not, no.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. You have gone over 22nd Street, haven't you? A. Yes, sir.

Q. Now, have you operated engines through there? A. Yes, sir.

Q. Your answers to my questions, were they based on the assumption that the train was being operated on the same grade as is through 22nd Street, or not? A. That is the place I had in mind at the time.

Mr. Tomlinson: That is all.

For Defendant—Henry L. Sandhas—Recross

Recross examination by Mr. Markley.

Q. You assumed this particular track in your answers? A. Yes, sir.

Q. Why did you assume that particular track? A. Because the case applies to this train.

Q. You came here from Allentown to testify? A. No, I came from Jersey City.

Q. Didn't you come here prepared to testify? A. I came from Jersey City here, not Allentown.

Q. You came here prepared to testify on these conditions? A. Oh, yes.

Q. Now, then, let's assume that this train traveled 250 feet from the time that the emergency brakes were applied, and that this 70-car train was being run on a dry track—A. I did, yes.

Q. Slightly up grade— A. Yes.

Q. Let's assume that it traveled 250 feet from the moment the emergency brakes were applied until it came to an absolute stop, how fast was the train going when the brakes were applied? A. Approximately fifteen miles an hour.

Q. Fifteen miles an hour? A. Approximately.

Q. Everything is approximate? A. Certainly, I cannot tell the miles per hour exactly; you cannot do that.

Q. When you say fifteen miles an hour, you mean approximately fifteen miles an hour? A. Yes, sir.

Q. So that in order for a train to travel 250 feet on this track, on a dry day, with a slight upgrade after the emergency brakes were applied, the train must have been going approximately 15 miles an hour, is that right? A. Yes, sir.

(Witness excused.)

WALTER SHEETS, *sworn.*

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 846 Livingston Street, Elizabeth, New Jersey.

Q. You are connected with the Central Railroad Company? A. Yes, sir.

Q. In what capacity? A. Sergeant of Police.

Q. Of the Central Railroad police force? A. Yes, sir.

Q. Where is your territory? A. Bayonne.

Q. And how long a time has that been your territory? A. Sixteen years.

Q. Did you formerly live in Bayonne? A. No, sir.

Q. What part of Bayonne is included in your territory? A. From 51st Street to the drawbridge.

Q. You mean the bridge over Newark Bay? A. Yes, sir.

Q. And does or does not that include the 22nd Street station and adjoining territory? A. Yes, sir.

Q. What are your duties? A. Why, to keep order, eject trespassers from the tracks, and get thieves of any kind.

Q. And in the pursuance of your duties, do you go over the railroad tracks? A. Yes, sir.

Q. And in the vicinity of 22nd Street, as well as other points? A. Yes, sir.

Q. And has that been your job all through the sixteen years? A. Yes, sir.

Q. What has been your custom and practice if you saw anybody walking along the tracks or near the tracks on the side of the 22nd Street bridge near to Jersey City? A. Eject them.

For Defendant—Walter Sheets—Cross

Q. Have you ever seen any railroad workmen either walking on the tracks or walking along the tracks on their way to the 22nd Street station? A. No, sir.

Q. How often do you get up to the territory which is east of the bridge, and by east I mean the Jersey City side? A. Probably two times a day.

Mr. Tomlinson: Cross examine.

Cross examination by Mr. Markley.

Q. When would those two times be, Mr. Sheets? A. That is hard to say, whenever I feel like going.

Q. That is, you would go up to the 22nd Street whenever you felt like it? A. Yes, sir.

Q. Every time you felt like it you would go up there? A. Not without I seen something.

Q. How far is the drawbridge from 22nd Street? A. Well, I judge a mile, probably a mile and a quarter.

Q. You had a pretty big territory? A. I guess it is.

Q. Do you ride or walk? A. Very often I ride, sometimes I walk.

Q. You ride on the cars? A. Ride on the cars.

Q. And you walk along the tracks, is that right? A. Yes.

Q. What were your hours of employment? A. From 7 A. M. until 3 P. M.

Q. All the time? A. No, sir; sometimes I worked different hours.

Q. Did you ever work there in the morning when

the Central Railroad men go to work in the morning? A. Yes.

Q. Did you ever see them come through this lot and walk along the tracks to the station? A. No, sir.

Q. Never saw that? A. No, sir.

Q. Never saw a single employee walk through this lot, along the track, and down to the station. A. No, sir.

Q. Then you never had occasion to eject any of them? A. Not from there, no.

Q. Did you see any of the Standard Oil men go to work there in the morning? A. No, sir.

Q. Did you ever see any Singer men going to work there along the tracks to the station? A. No, sir.

Q. Then you never ejected any of them? A. No, sir.

Q. During all of the sixteen years? A. No, sir.

Q. At night when they were coming home, did you ever see any of them walk along the tracks up to the lot on Prospect Avenue? A. No, sir.

Q. Never during those sixteen years? A. No, sir.

Q. And you had no occasion, therefore, to eject anybody there, did you? A. No, sir.

Q. Did ever see any children picking coal along the tracks there? A. Yes.

Q. At that particular place? A. Yes, sir.

Q. You did see them, didn't you? A. Yes.

Q. So that in your sixteen years' experience, while you have ejected persons from the tracks in that section, you have never had occasion to eject

any employee of the company, have you? A. I never seen any to eject.

Q. Then you never ejected any, did you? A. No.

Q. Never told any to get off the tracks? A. No, not at that place.

Q. Were you working in Bayonne all through the sixteen years, or did you work any place else? A. I worked there during sixteen years..

Q. Working eight hours a day? A. At all times.

Q. Sometimes you worked a little longer than that? A. Sometimes I have worked twelve hours.

Q. And some days you did not work there at all, did you? A. Well, if I had anything to draw my attention—maybe there were some days I would not be there.

Mr. Markley: That is all.

Redirect examination by Mr. Tomlinson.

Q. You have spoken about Singer's; where is Singers' located? A. Elizabethport.

Q. That is close to Newark Bay, isn't it? A. Yes.

Q. Where is the Standard Oil plant? A. The Standard Oil plant is on the east side of the tracks.

Q. How far away? A. Well, about a half mile from 22nd Street.

Q. You have been asked whether or not you have ever seen any Standard Oil men walking along the tracks between this lot here and 22nd Street; did you ever see any of them walking along the tracks? A. In the vicinity of the 22nd Street station, yes.

Q. What did you do with them? A. Ejected them.

Q. Did you ever see any men walking along the tracks west of the 22nd Street station? A. Yes, sir.

Q. What did you do with them? A. Ejected them from the company's property.

Mr. Tomlinson: That is all.

STEVEN GOSCZINSKY, sworn.

Direct examination by Mr. Tomlinson.

Q. How old are you? A. Fifteen.

Q. Where do you live? A. 73 Prospect Avenue.

Q. Bayonne? A. Yes.

Q. Do you know where the 22nd Street station is on the Central Railroad? A. Yes, sir.

Q. Do you know where Avenue E is? A. Yes, sir.

Q. Are there railroad tracks between Prospect Avenue and Avenue E? A. Yes, sir.

Q. And do you know where Broadway is? A. Yes, sir.

Q. Where is Broadway? A. Between Avenue C and Avenue E.

Q. Broadway is further away from Avenue E, isn't it? A. Yes, sir.

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

Q. Where do you go to school? A. School No. 9.

Q. Where is that? A. Between 25th and 26th Street.

Q. Do you remember the day this accident happened? A. Yes, sir.

Q. Where were you? A. I was over to the other side of the bridge.

Q. The other side of the bridge? A. Yes, sir.

Q. The station side or the other side? A. The station side.

Q. And whereabouts were you, on the station platform, or where? A. On the station platform, I was by the stairway.

Q. And were you on the side of the station toward Prospect Avenue or toward Avenue E? A. Right near Prospect Avenue.

Q. Did you see this man come along? A. Yes.

Q. And did you see the train come along? A. Yes.

Q. Do you know where the Consumer's Coal trestle is? A. Yes, sir.

Q. Which part of the track is that on? A. On the east side.

Q. Toward Avenue E? A. Yes, sir.

Q. Now, where was the man when you saw him, Steven? A. Over to the other side of Harry Lee's place.

Q. And what did he do; what did you see him do, which way did he go? A. He went across the tracks over to the other side of the Consumer's Coal trestle.

Q. He went over to the other side by the Consumer's Coal trestle? A. Yes, sir.

Q. Then what did he do? A. Then he started walking on the cinders, then he turned in on the bridge.

Q. Now, when you say he walked along the cinders, Steven, what do you mean, was he on the tracks or not? A. No, he was off the tracks.

Q. And how far off the tracks? A. About two or three feet away.

Q. Which side of the tracks was he? A. By the Consumer's Coal trestle.

Q. And how near was he to the Consumer's Coal trestle, how near to the fence there by the Consumer's Coal trestle? A. About three or four feet.

Q. Where was he when you say he turned onto the track? A. He was right by the end of the bridge, then he turned in and he started walking toward the station.

Q. Right by the end of the bridge, you say? A. Yes, sir.

Q. Now, what did you see the train do? A. The train started and gave three or four loud blasts.

Q. Three or four loud blasts? A. Yes.

Q. Then what did it do? A. Then it kept on going.

Q. Was the train running fast or slow? A. Slow.

Q. And after it gave these three or four blasts, did it keep on going at the same speed or did it slow up? A. It slowed up.

Q. Did you notice the bell on the engine, as to whether or not that was ringing? A. I didn't notice the bell.

Q. Who was with you? A. Two boys.

Q. What are their names? A. Magowski.

Q. And where are these boys now? A. They have gone to Poland.

Mr. Tomlinson: That is all.

Cross examination by Mr. Markley.

Q. Have you talked to anybody about this, Steven? A. No, sir.

Q. You are sure? A. No, sir.

Q. You have not talked to anybody? A. No, sir.

Q. Did you give your name and address to anybody? A. No.

Q. How old are you? A. Fifteen.

Q. Is this the first time you have told your story? A. Yes, sir.

Q. When you were on the witness stand? A. Yes, sir.

Mr. Markley: Is Mr. Raimer in the court room?

Q. Did you ever see this gentleman before? A. He was in my house.

Q. Where? A. In Bayonne.

Q. Did you ever know him before he came to your house in Bayonne? A. No, sir, that was the first time.

Q. And you did not tell him your story, did you? A. Yes, he was asking me questions.

Q. Did he speak to you in Polish? A. No, English.

Q. He didn't have to speak Polish to you, did he? A. No.

Q. He took a statement from you, didn't he? A. Yes, sir.

Q. And you signed the statement? A. Yes, sir.

Q. And he asked you questions about this thing, didn't he? A. Yes, sir.

Q. And that is the first time you told anybody you knew anything about this accident, wasn't it? A. Yes, sir.

Q. Then you read that statement over here in court, didn't you? A. Yes.

Q. You did not hear any bell, did you? A. No, sir.

Q. And you were playing with these boys? A. Yes, sir.

Q. What were you playing? A. Pinochle.

Q. With cards? A. Yes, sir.

Q. And how many boys were playing pinochle? A. Me and two other boys.

Q. Won't you come down here and show these men where you were playing pinochle? This is the station building there, the westbound station, there is Twenty-second Street and there is the bridge over Twenty-second Street, this is the station going toward Elizabeth? A. Yes.

Q. And this is the station going to Jersey City? A. Yes, sir.

Q. And here is Prospect Avenue down here? A. Yes, sir.

Q. Now, just point out to the jury where you were playing pinochle? A. Right there.

Q. Right near the stairway? A. Yes, sir.

Q. Sitting on the steps? A. No, I was right here, about two feet from the stairs.

Q. Sitting down or standing? A. Standing up.

Q. Weren't you sitting down when you were playing pinochle? A. No, sir.

Q. Where were the cards? A. On the ground.

Q. But you stood with the cards in your hand? A. Yes, sir.

Q. Why didn't you sit down on the ground? A. (No answer.)

Q. Weren't you sitting on the ground? A. No, sir.

Q. In which way were these other boys facing? A. Facing Elizabeth.

Q. Which way were you facing? A. Towards Jersey City.

Q. And you were right up near these stairs? A. Yes, sir.

Q. And these stairs are right in back of the Consumer's Coal trestle? A. Yes, sir.

Mr. Markley: That is all.

(The witness is excused.)

WALTER KRONICZ, sworn.

Direct examination by Mr. Tomlinson.

Q. How old are you? A. Eleven.

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

Q. Where do you go to school? A. No. 9 school.

Q. Whereabouts is that? A. Between Twenty-fifth and Twenty-sixth Street.

Q. Bayonne? A. Yes, sir.

Q. Where do you live? A. 490 Broadway.

Q. Do you know where Prospect Avenue is? A. Yes, sir.

Q. How many streets away is Broadway from Prospect Avenue? A. I think three.

Q. What is the next street to Broadway? A. Avenue C.

Q. I mean going toward the railroad station? A. Avenue E.

Q. And what is the next street after that—then do you come to the railroad tracks? A. Yes, sir.

Q. Then what is the next street, Prospect Avenue? A. Yes.

Q. Do you know where the Twenty-second Street station is on the Central Railroad? A. Yes, sir.

Q. Do you remember the day that Joe here got hurt? A. Yes, sir.

Q. Where were you? A. I was on the hill near the station.

Q. What side of the station? A. The side toward Avenue E.

Q. And did you see Joe before he got hurt? A. I seen him while he was crossing the bridge.

Q. Did you see him before he crossed the bridge? A. No.

Q. Did you see the train coming? A. Yes, sir.

Q. Did you hear the train do anything at all? A. Blew a whistle.

Q. How many times did it blow its whistle? A. Three or four times.

Mr. Tomlinson: Cross examine.

Mr. Markley: No questions.

(Witness excused.)

Mr. Tomlinson: By stipulation of counsel it is agreed that Mr. Harry Schirmer, a stenographer—and I think Mr. Markley will agree that he is not connected with the Central Railroad Company—if produced would testify that the minutes which I have here correctly represents a statement as given to him and taken by him stenographically at the Bayonne Hospital in Bayonne on June 10th, 1924, by the plaintiff Mr. Symonski, the questions being propounded by Mr. Wyman who was identified here yesterday, the claim agent of the Central Railroad Company, and the answers made by Mr. Symonski.

Mr. Markley: That is substantially so. We

agreed that if Harry Schirmer were called he would testify that this is a correct transcript of his stenographic notes.

Mr. Tomlinson: That he would testify that his notes showed these answers as having been given by the plaintiff, and do in fact correctly represent the answers as given by the plaintiff.

Mr. Markley: Yes, Harry Schirmer would so testify if he were called.

Mr. Tomlinson: "Statement of Joseph Symonski taken at the Bayonne Hospital, Bayonne, New Jersey, the tenth day of June, 1924, at one-thirty o'clock in the afternoon, in the presence of H. Wyman and Harry Schirmer, in answer to questions asked by Mr. Wyman.

Q. Where do you live, Joe? A. 98 Prospect Avenue, Bayonne.

Q. How old are you? A. Forty-four.

Q. Married? A. Yes, sir.

Q. Where is your wife living? A. My wife died, but I have just two kids.

Q. How old are they, Joe? A. One five, one seven.

Q. They live with you? A. No; they live with my brother.

Q. You worked where, at the Elizabethport roundhouse? A. Elizabethport, yes.

Q. What did you do there, Joe? A. Fire cleaner.

Q. With us; for the Ceneral Railroad Company? A. Yes, sir.

Q. How long have you worked for us? A. I work now, I don't know, six and a half or seven

months, something like that; but before I worked 22nd Street, I worked over two years.

Q. At 22nd Street roundhouse? A. Yes, sir.

Q. Who was your boss out there in Elizabethport? A. Elizabethport, I forgot his name; the night boss is Jimmy, I don't know the last name.

Q. When did you work, days or nights? A. I worked middle shift, from three to eleven.

Q. Do you remember what date it was that you got hurt, Joe? A. The 7th of March.

Q. Where were you going that day? A. I was going to work.

Q. What train were you going to take? A. I don't know what train; just the next day I seen in the papers it was express, the next day I seen in the paper.

Q. Do you know what train you were going to take? What time did you leave the house that day? A. But that train go about half past two or quarter to three, something like that.

Q. About half past two or quarter to three? A. Yes.

Q. At what station; 22nd Street? A. 22nd Street, yes.

Q. Is that the same train you take every day? A. Yes.

Q. What kind of pass did you have; what does your pass say? A. (Produces pass).

Q. Is that it? Between Elizabethport and East 22nd Street? A. East 22nd Street; yes.

Q. You had this with you at the time, did you? A. Yes.

Q. Is that your name on the back of it? A. Yes, sir. (Signed Symonski).

Q. What is the number of that pass, Joe? A. (Number noted as 10629.)

Q. Now, just tell us what happened when you got down there? A. I go to work, they change the car, which was a car of tanks, Standard tanks, one engine, they bump, I didn't hear that.

Q. What did you say about a car of tanks bumping? A. They switch; I am passing the other side, the other side of the track; that express was behind me and I don't know how he took me, and he took me under, I was far from the track, I was about five feet when he found me, passed me; I don't know about it.

Q. When you came out of your house, Joe, which way did you come; did you come out of the back way, or down Prospect Street; which way did you come when you came out of your house? A. I came out of Prospect Street.

Q. Came down Prospect Street how far down? A. And through that empty lots there.

Q. You didn't come all the way down 22nd Street, did you? A. No.

Q. Came through the empty lot, then came down the track? A. Yes.

Q. Which side of the track were you on, Joe, the eastbound side or westbound side? A. West.

Q. What did you do, walk on the track, Joe? A. No; I walk on the side.

Q. On the side? A. On the side.

Q. Did you say there were some tank cars drilling there? A. But I was by the depot by that time when he hurt me, I was on 22nd Street.

Q. You were by the station, you mean? A. Yes.

Q. Then how near the station, Joe, were you, over the bridge? A. Yes.

Q. Do you know where the 22nd Street bridge is? A. Yes.

Q. Had you crossed that bridge? A. No; he followed me on that bridge there, he rolled me, I don't know.

Q. Do you remember walking over the bridge? Don't you remember walking over the bridge? A. No; I don't think.

Q. You don't think you did? A. No.

Q. What way was the train coming that hit you, Joe? A. I don't know the train, but the next day I seen in the paper it was express.

Q. You didn't see it; you didn't hear it? A. No.

Q. No hear; no see? A. No.

Q. What track was the train on, do you know, Joe? The train that hit you; what track? A. I think on that side, the last track.

Q. The last track? A. The first track from Avenue E.

Q. The first track from Avenue E? A. Yes.

Q. Was there any other train right by there at that time; did you see any other train? A. No.

Q. How near to the bridge were you when you were struck, Joe? A. I don't know; I couldn't remember. They pick me up, then I talk, but I don't remember; somebody was there and say I am talking right.

Q. But you don't remember at all what happened? A. I don't remember; how he put me in the ambulance; how he picked me up, I don't remember; but the next day I am here; I don't feel pain, neither.

Q. This lot when you come through there, how far is that from the bridge? A. Oh, about one block.

Q. You came from your house, and you came through the vacant lot? A. Yes.

Q. Then you walk down the track, on the side of the track? A. Yes.

Q. Then you have to cross the 22nd Street bridge? A. Yes, I have to cross 22nd Street.

Q. Do you remember whether you had crossed that or not when the accident happened? A. No; I don't remember; I don't think; no; I don't remember.

Q. Was it a clear day or rainy day? A. Rainy day was that time, rainy and windy.

Q. Did you have an umbrella, Joe? A. No; I have poor clothes; I don't have an umbrella, because it is not far from the house.

Q. Do you remember seeing the train after you got hurt? A. No.

Q. Do you know whether it was a freight train or passenger train? A. No; just I seen it in the paper next day it was passenger and express.

Q. But you don't know? A. No. I got my leg off; then nobody stop the blood; all blood go down; after that, fifteen minutes, come some driver he take a rope and tie up my legs; I am hurt enough.

Q. Did you see anybody around there, Joe, before you got hurt? A. There was men in the station, see, going to work, one or two, but it was rainy day, he was inside; but any time we come we go in the station.

Q. Who were they, do you know? A. I don't know; there was a lot of men was there, we go in the one bunch, about 15 or 16 on that shift.

Q. They work at the shops? A. They work all over, on the engine, ash, and—

Q. You don't know their names? A. There is a lot of fellows, I know their names, but I don't see, before when I got hurt a lot of men come down and see me, but not now, sometimes they come.

Q. You didn't see any train at all? A. No.

Q. No hear no train? A. No.

Q. Is that the way you come every day when you go to work? A. It is everybody go from the other side, everybody.

Q. Anybody ever tell you not to go that way? A. No. Nobody say nothing; all the time people go through that.

Q. You walk along the track for maybe about a block? A. About a block.

Q. What kind of work do you do, clean the fire of the engine? A. Yes, clean fires.

Q. Passenger engines, or freight engines? A. Any kind of an engine that comes in there.

Q. Do you remember the day before what the last engine was you cleaned, Joe? A. The day before?

Q. The day that you worked before you got hurt, do you remember what engine you cleaned? A. I don't remember.

Q. You don't remember what engine? A. We clean that time is it some small bob-tail.

Q. You think they were the last ones you cleaned, the bob-tails? A. Yes, I think was the last.

Q. Who worked with you, Joe? A. His name, I forget his name, he live in Bayonne, too, that man, his first name John, I forget his name, some funny name.

Q. A Polish fellow? A. A Polish fellow, yes.

Q. How long have you been in this country, Joe? A. I come in 1907.

Q. Are you a citizen of this country? A. Yes, sir.

Q. What country were you born in? A. I am born in Poland.

Q. You walked which way, west, Joe? A. West.

Q. And the train that hit you, that was going what way? A. Train go on the west.

Q. The same way that you were going? A. Yes.

Q. Where were you walking, on the outside of the tracks? A. Yes.

Q. Towards Avenue E, is that right? A. Yes.

Q. Were you far off from the ties? A. About five or six feet, something like that.

Q. Away from the ties; not the rails? A. No.

Q. How did the engine hit you, Joe? A. I don't know; I couldn't understand that, how he take me; I am laying in the bed; I feel pain and everything, I think about that, how he can take me.

Q. Are you sure whether you walked in on the bridge or not; had you crossed over the bridge yet? A. No, not crossed.

Q. You hadn't crossed the bridge when it happened? A. No.

Q. How far were you from the bridge, do you know? A. I don't remember that.

Q. When you cross the bridge, then you got to walk up on the track, haven't you, Joe? A. No; I don't used to walk on the track, but there is some couple of boards like on the side.

Q. Is there room to walk over the bridge without walking on the track? A. Yes.

Q. Do you know if there were any cars on the eastbound track, Joe? A. No.

Q. You don't know, or weren't there any other trains around there, Joe? A. No; just one between 21 and 22, on the switch tank, Standard tank.

Q. Where; down by the yard, you mean? A. Yes; away down by the yard.

Q. No train passed right there? A. No.

Q. You left the house about what time, Joe? A. I leave about five after two or ten after two we leave, something like that, because the train go half past two, we got enough time to walk, ten minutes.

Q. Was there anybody with you at the time? A. No; there was some fellows was go before.

Q. But you were all alone when you got hurt? A. Yes, I go after them.

Q. Had you looked back at all, Joe, to see if any train was coming? A. Yes, I looked back, but the train was far away, that was at 33rd Street that time, away down there.

Q. Where were you when you looked back, Joe? A. When I go on the track.

Q. Yes; is that when you first go on the track, then you looked back? A. Sure, any time I go.

Q. Did you look back again after you first went on the track? A. No. Of course I am always on the side there, too far away.

Q. When you first went on the track, then you saw the train away down by 33rd Street? A. Yes.

Q. Then you didn't look back again? A. Then I was past the railroad, when I walked on the side, I didn't know he is going to catch me, we go all the time that way.

Q. But you know the train was going to come, did you? A. No; I just see the train; I don't know if he go there.

Q. What track did you see the train on, do you know, Joe? A. Well, he was on the same track, that same train catch me.

Q. Was that train moving, Joe, or was it standing at the station? A. I see the smoke then, I don't know whether he was moving.

Q. That is when you first came on the track? A. Yes.

Q. Then you didn't look back again after that? A. I didn't look after, when I go to that bridge, then I don't look.

Q. You didn't look again? A. But of course I don't think he catch me.

Q. You thought you would have time to get down there, did you? A. Oh, yes, I have enough time.

Q. You thought you had enough time? A. I had enough time; it was about ten or twelve minutes after two, and I have enough time.

Q. I mean, you thought you had enough time to get down to the station before that train would get up to you? A. Yes.

Q. Is that the reason you didn't look back again? A. When I pass the track I look, then he was on 33rd Street, that is all.

Q. When you looked and saw it at 33rd Street, then you thought you had time to get down to the station? A. Yes.

Q. Is there anything else you want to tell us, Joe? A. Well, I don't know what I can tell.

Q. Were you thinking of getting to the station ahead of the train, or were you just thinking that you were safe? A. No, I am on the side.

Q. Did you think that was the train that you were going to take to Elizabethport? A. No; I know that was the other train.

Q. Now, Joe, when you came down there along the track, don't you have to step on the track to get over the bridge? A. I don't remember that.

Q. Don't you have to do that; you can't go over the bridge without walking up on the track, can you? A. No; no use to step on the track.

Q. You have to step on the rail? A. No; there is enough room on the side so a man can pass there; I don't remember how far is it from the rails; there is enough room.

Q. You think there is room enough to walk between the rail and the plank without getting hit by the train? A. Oh, well, if I see the train, I can't trust that.

Q. Do you remember, Joe, was there any station platform where you were? You hadn't reached the station platform yet, had you? What I mean, where it was all leveled off even for the station, where the people get on the train, you hadn't reached that yet, had you? A. No.

Q. Do you know what I mean? A. No.

Q. Where the people get on the train, you see, it is all off smooth? A. Yes.

Q. You hadn't reached that part yet, had you? A. No.

Q. You hadn't come to that place? A. No."

For Defendant—August Lorcheim—Direct

AUGUST LORCHEIM, sworn.

Direct examination by Mr. Tomlinson.

Q. Where do you live? A. 118 William Street, Roselle Park.

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

Q. In what capacity? A. General foreman of the Elizabethport roundhouse.

Q. And was that the place where Joe Symonski worked? A. Yes, sir.

Q. Were you the general foreman there when he was employed there? A. Yes, sir.

Q. And did you know him? A. Yes, sir.

Q. Did you know the train that he would ordinarily take out from 22nd Street to Elizabethport? A. He the train he ordinarily took out?

Q. Yes, what time did that reach Elizabethport? A. Somewheres around three o'clock, between 2:50 and 3, I think, I am not quite sure.

Q. And what time did he go on his work, what time did he begin work? A. He was supposed to be at his post of duty at 3:30 P. M.

Q. Now, this train that he would ordinarily take out, was that a regular passenger train or a special? A. A regular passenger train, probably made up at Jersey City.

Q. Carrying passengers from where? A. From Jersey City to points west.

Q. A regular train, was it? A. Yes, sir.

Q. It would take on any passenger that wanted to take it? A. Yes, a regular train.

Q. It was not limited to anybody? A. Oh, no.

Mr. Tomlinson: Cross examine.

Mr. Markley: No questions.

Mr. Tomlinson: We rest.

Mr. Markley: We rest.

MOTION FOR DIRECTION OF VERDICT

Mr. Smith: My understanding of this case is that it is based upon two theories, both contemplating that the plaintiff was an employee of the defendant at the time of the accident. One count seems to be based upon an action brought under the Federal Employers' Liability Act, and the other seems to be a count based upon the mere employment of this man, as an employee. Under such circumstances, therefore, I move for a direction of a verdict on the ground that there is no proof in this case that the plaintiff at the time of the accident, in which he claims to have been injured, was engaged in interstate commerce, nor is there any proof that the plaintiff was at the time he was injured engaged in any work for the defendant.

Next, that there is no proof of any negligent act on the part of the company;

Next, that there is proof that the plaintiff received his injury by reason of his own negligence in walking on a railroad track between the rails;

Next, that the plaintiff being a railroad man, was familiar with the risk of walking on a railroad track in the same direction as a train was approaching, and therefore assumed the risk in so doing;

Next, that if plaintiff was not engaged in interstate commerce at the time, he was simply an employee, if it be assumed that he was an employee at the time of his injury, and his rights under such circumstances would be governed by the Workmen's Compensation Statute;

Next, if the plaintiff is not considered as an employee, either in interstate commerce or as an ordinary employee, at the time he received his injury, he is then precluded from recovering under the 55th Section of the Railroad Act, which provides that under such circumstances there can be no recovery.

The Court: This is an action brought to recover for injuries under the Federal Act which provides that the plaintiff must have been engaged in interstate commerce and that the defendant as well must have been engaged in interstate commerce at the time of the happening of the accident. The accident occurred while the plaintiff was on his way from his dwelling to his place of employment, and there is testimony that he was traveling the usual course traveled by himself and other employees of the company across or along the property of the defendant. It seems to the Court there are sufficient disputed matters of fact to submit to the jury, therefore the motion to direct a verdict will be denied.

Mr. Smith: Exception.

COURT'S CHARGE TO THE JURY

The Court thereupon charged the jury as follows:

Gentlemen of the Jury: The case which you as part of this court of justice are required to decide is a very important case. The plaintiff brings suit and asks damages in the sum of one

hundred thousand dollars. Of course whatever the facts may be that sum could not be exceeded in your verdict because that is the limit of damages as asked for in the case, merely making that a preliminary.

This case, as in all cases in courts of law, must be decided upon the facts deduced before you in this court room from evidence properly admitted in the court room. The court will lay down rules of law which you as jurors must apply to those facts, and your verdict is to be reached by applying the rules of law as laid down by the court to the facts which have been produced before you on the witness stand and the legal evidence that has been admitted in the case. The verdict of the jury is not to be based upon any sympathy or prejudice. The plaintiff and the defendant stand in the same position, whether the one be a poor working-man and the other a railroad company, or not. Each have their rights and each have their liabilities. You, as members of this jury, have sworn to decide this case according to the evidence, and neither prejudice nor sympathy is to enter into your verdict.

This action is brought under an Act of Congress of the United States, which among other things provides: "That every common carrier by railroad while engaged in commerce between any of the several states or territories, shall be liable in damages to anyone suffering injury while he is employed by such carrier in such commerce, for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its

cars, engines, appliances, machinery, tracks, roadbed, boats, wharves, or other equipment."

That, gentlemen, is the statute. I am further continuing from the statute:

"A right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce."

In order to establish that here, it must be proved by the greater weight of the evidence, and the burden rests upon the plaintiff to prove that he and the company were, at the time, engaged in such commerce; and if that has been proved by the greater weight of the evidence then this Federal Act becomes applicable.

It has been testified by the plaintiff that the work which he was on his way to do at the time of the accident, was to clean the fires from engines, and the answer of the defendant to the plaintiff's interrogatories, states that its engines were of every kind and character, indiscriminately engaged in both interstate and intrastate commerce.

If you are satisfied from the evidence as to this fact, and that certain of the engines from which the plaintiff was to clean the fires were used in interstate commerce, then the plaintiff while on his way to clean the fires from these engines was engaged in interstate commerce at the time of the accident to him. That the plaintiff had not actually reached the place where he was to do this work at the time of the accident to him, is immaterial, if you are satisfied from the

evidence that he was on his way to perform work in interstate commerce.

The question would next arise, gentlemen, as to whether or not the plaintiff has proved, as he must prove to recover a verdict, by the greater weight of the evidence, that there was negligence on the part of the defendant company, and that such negligence proximately caused the injury of which he complains, and for which this suit to recover damages is brought.

The defendant company owes a duty to its employees. What was that duty? The law says that it is the duty of all employers to exercise reasonable care that the place in which its servants or employees are set to work shall be reasonably safe for that servant or employee in the service for which he is employed.

It is claimed by the defendant that the plaintiff at the time of the accident, was a trespasser upon its tracks, and that it owed him no duty except to refrain from wilfully injuring him. On this issue the first fact for you to determine is whether at the time of the accident the plaintiff was a trespasser, and this fact, our courts have held, is essentially one, the solution of which is for you to determine from the conflicting evidence and the reasonable inferences to be drawn therefrom. Should you find from the evidence that he was a trespasser, that does not, of itself, relieve the defendant from the charge of negligence.

You will recall, gentlemen of the jury, that what is known as the Tucker case has been referred to and argued by both sides. That case was decided by the Court of the District of

Columbia and affirmed by the Supreme Court and because that case has been referred to by both sides I have prepared certain extracts from that case which is the law of the highest court in these United States covering cases of that character.

"When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume to their mutual interest and advantage. The relation of master and servant in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is upon the premises of the master. The servant in such a situation is not a mere trespasser or a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. The present case, assuming for the moment the existenec of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the annex, which was only another agency provided by the master for the accommodation of its servants.

In this connection it is argued that Tucker voluntarily selected the more dangerous way when he might have proceeded down Virginia Avenue to South Capitol Street, where he could have

gone under the track, then back to the annex. Had he chosen that way it would have required him to go one thousand one hundred feet further, and moreover, the testimony shows beyond dispute, that the way he did choose was the customary and usual way for employees living in his locality. Moreover, the act ordains that 'All questions of negligence and contributory negligence shall be for the jury.' "

What I have just read to you is the language the court used in the Tucker case, and it may be applied to the facts in this case in so far as the same may be applied under the different set of circumstances in the two cases.

Further, as to the duty which a railroad company owes to trespassers, it is the duty of the railroad company to exercise reasonable care to avoid injuring a trespasser after discovering his peril.

It has been testified by the plaintiff that for six months before the accident, he had every day, and at the same hour, in going to the 22nd Street station, to be transported to his place of work, at Elizabethport, walked on the defendant's tracks at the place where he was injured, and that he had done this for this length of time without any protest or objection by any of the agents, servants or employees of the defendant, and that other employees of the defendant also used the defendant's tracks at that place for the same purpose.

It appears from the answers of the defendant to the interrogatories of the plaintiff, that the engineer of the defendant's train which struck the plaintiff saw the plaintiff when he was out-

side of the railroad track and east of the 22nd Street bridge, and that the engineer then first blew the whistle when the plaintiff was 75 to 100 feet distant from the engine. It therefore appears that the position of the plaintiff was known to and discovered by the engineer when the train was from 75 to 100 feet distant from the plaintiff.

It is one of the contentions of the defendant that the plaintiff selected the more dangerous way to get to the 22nd Street station when he might have proceeded down Prospect Avenue to 22nd Street when he could have gone under the tracks and then up a stairway to get to the 22nd Street station. Had he chosen that way it would have required him to go a little further. The testimony is that the way he did choose was the customary and usual way for him and other employees of the defendant.

Of course, gentlemen, unless the defendant and the plaintiff were engaged in interstate commerce, the plaintiff could not recover, and that is a question for the jury. It is claimed that both he and the defendant were engaged in interstate commerce at the time of the accident, he being an assistant in the firing of the engines used in interstate commerce.

It is not in every case where an accident happens to an employee that he can recover, but there must have been negligence on the part of the defendant, and that negligence must have been the proximate cause of the accident to the plaintiff. If there were no negligence, or if that was not the proximate cause of the accident, the plaintiff could not recover.

Negligence is defined as the failure to observe for the protection of the interests of another person, that degree of care and precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. Contributory negligence means that the person injured, the plaintiff, did not use such care as a reasonable and prudent person would use under the circumstances, and in cases of this character that may be considered in mitigation of damages.

It is incumbent upon the plaintiff to prove by a preponderance of evidence in this case, that is to say, the greater weight of evidence must be produced in favor of the plaintiff than of the defendant, so that the scale of justice, weighing the evidence on both sides, will balance in favor of the plaintiff.

If you find that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident, and that the plaintiff has sustained injuries which resulted in full or in part through the negligence of any of the agents, officers or employees of said defendant, by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment, then the defendant would be answerable to the plaintiff for such injuries which he may have sustained from the accident. If you find that at the time of the accident the plaintiff was engaged in work which was a part of interstate commerce in which the defendant was engaged or work that was so closely connected with interstate commerce as practically to be a part of it, or work which had for its immediate purpose the furthering of the conduct of interstate commerce, then both the defendant and

plaintiff would be engaged in interstate commerce, and the provisions of the Federal Employers' Liability Act would apply to this case.

In all actions brought against a common carrier by virtue of the provisions of this act to recover damages for injury or death, the fact that the employee may have been guilty of contributory negligence should not bar a recovery, but the damages should be diminished by the jury in proportion to the amount of the negligence attributable to such employee.

Now, gentlemen, after applying the law which the court has given you to the facts which have been produced in evidence, you come to the point where you consider damages, the court will instruct you what to take into consideration as the measure of damages. The elements which you would consider and which should be considered for which damages may be awarded, in case you find damages should be awarded after considering all the facts that have been produced before you, are the bodily injuries which he sustained, the pain and suffering undergone, the effect on the health by the suffering according to its degree and probable duration, the permenancy of the injury, the pecuniary loss sustained through his inability to attend to business, which again may be of a temporary character or may be such as to incapacitate the plaintiff for the remainder of his life.

These elements should be taken into consideration in arriving at your verdict as to the amount of damages that may be awarded the plaintiff in case that you find that he can recover under the law as the court has instructed you, and after applying

the law to the facts as produced in this court room from the witness stand.

I am requested to charge by counsel for the defendant:

"First: As a general rule an accident occurring to an employee going to or returning from work does not arise out of or in the course of his employment."

That I decline to charge.

"Second: An exception to the above general rule exists in cases where the employee has reached the premises of the master wherein is the place of work of the master, and is injured therein while proceeding to or from his place of work."

That I decline to charge.

"Three: A further exception exists where the master has provided exclusive transportation facilities for the employee to and from his work as part of the contract of employment, which facilities the employee must avail himself of."

That I decline to charge.

"Fourth: In this case the work of the plaintiff began when he reported for work at the shop of defendant at Elizabethport."

That I decline to charge.

"Fifth: At the time of the happening of the accident plaintiff was not on the premises of the employer at or near his place of work. In fact he was injured in one city and his place of work was in another city, in a different county, some miles away."

That I decline to charge in that form.

"Sixth: At the time of his accident, plaintiff was not engaged in interstate commerce."

That I decline to charge.

"Seventh: At the time of his accident plaintiff was a trespasser, or at best, a licensee upon the premises, or right of way of the defendant, and defendant owed him no duty save to refrain from wilful and wanton injury."

That I decline to charge.

"Eighth: At the time of the accident was not an employee of the defendant."

That I decline to charge.

"Ninth: If the jury should find that at the time of the accident the plaintiff was not employed or engaged in interstate commerce there can be no recovery in this accident."

That I decline to charge, excepting so far as I have already charged in that respect.

"Tenth: If the jury should find that at the time of the accident the plaintiff was at the point of the accident in any other capacity than as an employee whose work required him to be there, there can be no recovery in this action."

That I decline to charge except in so far as I have charged in that respect.

Mr. Smith: Exception to that part of the Court's charge, where the Court said that the plaintiff testified that he was on his way to work at interstate commerce.

2. Exception to that portion of the Court's charge where the Court said if the jury is satisfied from the evidence of the fact that the plaintiff

was on his way to clean fires in engines in use in interstate commerce, then the plaintiff was engaged in interstate commerce.

3. To that part of the charge where the Court said that the plaintiff had not reached the point where he was to do his work is immaterial if the jury were satisfied that he was on his way to work in interstate commerce.

4. Exception to that portion of the Court's charge wherein the Court said it was for the jury to determine whether the plaintiff was a trespasser or not.

5. To that portion of the Court's charge where the Court said if the jury found that the plaintiff was a trespasser this does not relieve the defendant of the charge of negligence.

6. Exception to the reading by your Honor of the extracts from the Tucker case, especially in the manner in which they were read, as to their inapplicability to the case in hand.

7. Exception to the further statement to the jury by your Honor that the law as laid down in the Tucker may be applied by them to this case.

The Court: In so far as it applies.

8. Exception to that part of your Honor's charge where you say that the duty of the railroad company was to use reasonable care after the discovery of the plaintiff on its tracks.

9. Exception to that part of the charge where you say that because for some months the plaintiff had walked the tracks without objection, in conjunction with the answer by the engineer in the interroga-

tories that he saw him some 75 to 100 feet away, showed that he was in a position to have discovered the presence of the man on the track, and therefore was obliged to use reasonable care.

10. Exception to that portion of your Honor's charge where you say that the negligence of the plaintiff in placing himself in a dangerous position cannot excuse negligence of the defendant company.

11. Exception to that part of your Honor's charge where you say if the engineer could have seen the plaintiff in time to stop the train before injuring him, his failure to so stop was negligence.

12. Exception to that part of your Honor's charge where you say that the selection of the more dangerous way when there was another safe way does not show negligence on the part of the plaintiff, inasmuch as there was testimony to show that the way he came was the usual way for him and other employees of the company.

13. Exception to that part of your Honor's charge where your Honor leaves to the jury the question of whether or not the plaintiff was engaged in interstate commerce under the evidence in this case.

14. To that part of the charge where you say that contributory negligence in this case can only be used in mitigation of damages.

15. Exception to that part of your Honor's charge where you leave the question as to the plaintiff being engaged in interstate commerce to the jury.

New Jersey State Library

Defendant's Exceptions

16. Exception to that part of your Honor's charge where you say that if the plaintiff was engaged in whole or in part in interstate commerce, the company was liable.

17. Exception to that part of your Honor's charge where you say his contributory negligence in this case would not bar a recovery.

18. Exception to the whole charge as not stating the law on the subject in this case.

The Court: A general exception to the charge will be denied. Your exceptions will be allowed.

Mr. Smith: Exception to the refusal to give me the exception.

Mr. Tomlinson: The defendant notes an objection to your Honor's refusal to charge the defendant's requests 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

2. The defendant further notes an objection to your Honor's charge which was substantially as follows:

"If you find that the plaintiff and the defendant were engaged in interstate commerce and that the accident resulted as the result of the defendant's negligence in certain respects, then your Honor said from negligence of any of the officers or employees or from insufficiency in cars, equipment and so forth."

3. We would like an exception to so much of your Honor's charge where your Honor charged substantially as follows:

"If you should come to the question of damages, the damages which should be awarded after considering all of the facts that have been produced

before you are the bodily injuries which he sustained, and so forth."

4. Exception to the first part of your Honor's charge where you said that it must be proved that the plaintiff and defendant were engaged in such commerce, referring to interstate commerce, and if that has been proved, then this Federal Act becomes applicable.

Mr. Markley: Exception to that part of your Honor's charge where your Honor in effect said with respect to this suit being under the Federal Employers' Liability Act, that there could only be a recovery in this suit in the event that the plaintiff was employed in and the defendant engaged in interstate commerce at the time of the accident.

DEFENDANT'S REQUESTS

1. As a general rule, an accident occurring to an employee going to or returning from work does not arise out of or in the course of his employment.

2. An exception to the above general rule exists in cases where the employee has reached the premises of the master wherein is the place of work of the master and is injured therein while proceeding to, or from, his place of work.

3. A further exception exists in cases where the master has provided exclusive transportation facilities for the employee to and from his work as part of the contract of employment, which facilities the employee must avail himself of.

Defendant's Requests

4. In this case the work of plaintiff began when he reported for work at the shops of defendant at Elizabethport.

5. At the time of the happening of the accident plaintiff was not on the premises of the employer at or near the place of his work. In fact he was injured in one city and his place of work was in another city in a different county some miles away.

6. At the time of his accident plaintiff was not engaged in interstate commerce.

7. At the time of his accident, plaintiff was a trespasser, or at best, a licensee upon the premises, or right of way, of defendant, and defendant owed him no duty save to refrain from wilful and wanton injury.

8. At the time of the accident plaintiff was not an employee of defendant.

9. If the jury should find that at the time of the accident the plaintiff was not employed or engaged in interstate commerce there can be no recovery in this action.

10. If the jury should find that at the time of the accident the plaintiff was at the point of the accident in any other capacity than as an employee whose work required him to be there, there can be no recovery in this action.



PLAINTIFF'S EXHIBIT P-1



PLAINTIFF'S EXHIBIT P-2



PLAINTIFF'S EXHIBIT P-3



PLAINTIFF'S EXHIBIT P-4

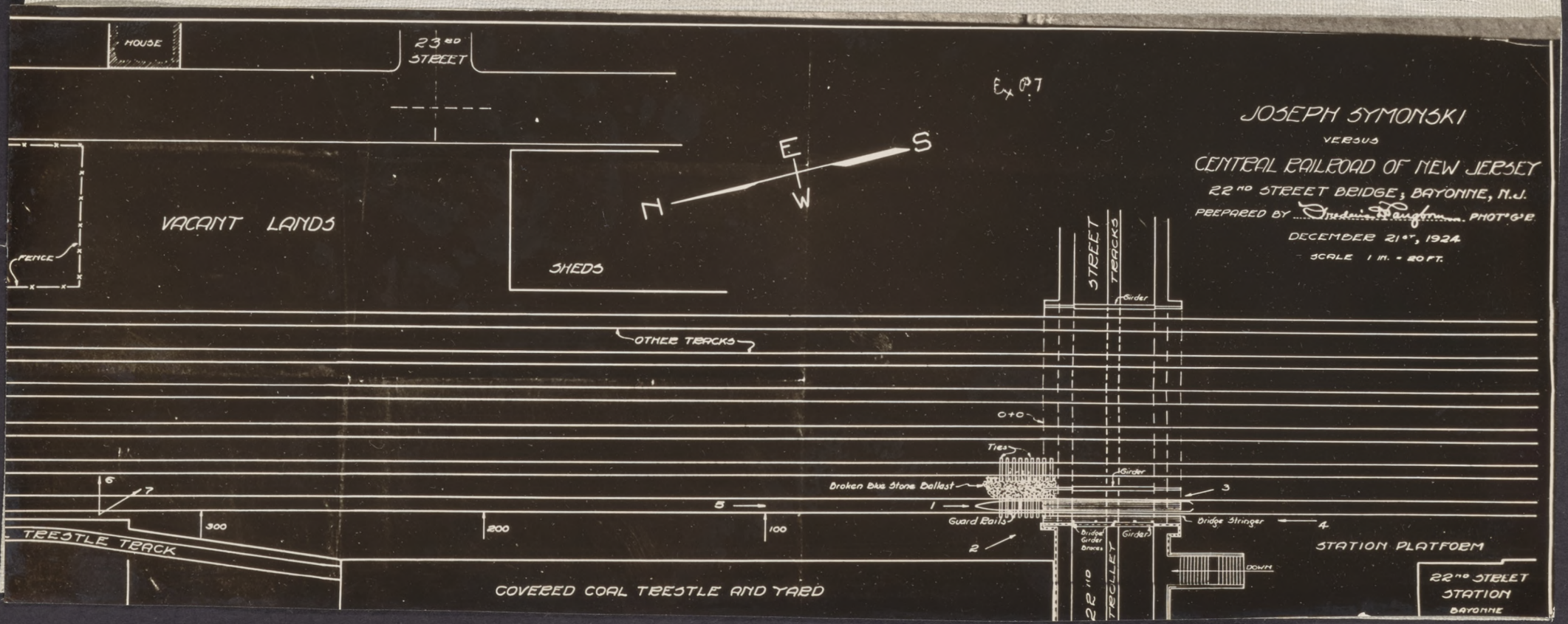


PLAINTIFF'S EXHIBIT P-5


102
4
S
100

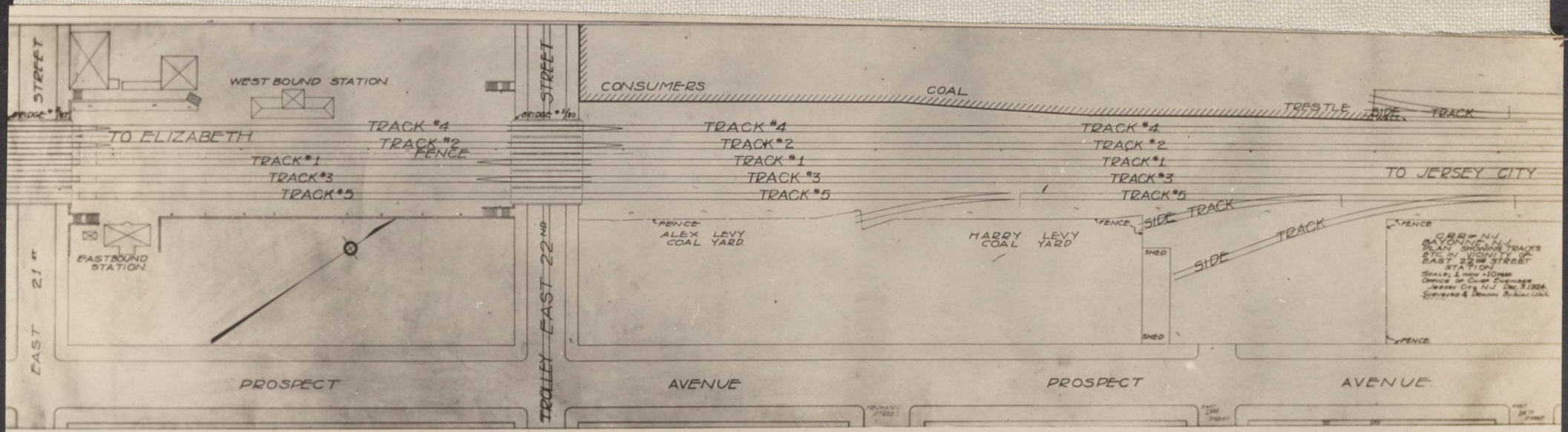

HARRY LEVY
COAL AND FEED

PLAINTIFF'S EXHIBIT P-6



JOSEPH SYMONSKI
VERSUS
CENTRAL RAILROAD OF NEW JERSEY
22ND STREET BRIDGE; BAYONNE, N.J.
PREPARED BY Frederic Langbein PHOT'G'R.
DECEMBER 21ST, 1924
SCALE 1 IN. = 20 FT.
Ex P.7
HOUSE
23RD STREET
VACANT LANDS
FENCE
SHEDS
N
E
W
S
OTHER TRACKS
STREET TRACKS
Girder
0+0
Ties
Broken Blue Stone Ballast
Guard Rails
Bridge Girder Braces
Girder
Bridge Stringer
22ND TROLLEY
DOWN
STATION PLATFORM
22ND STREET STATION BAYONNE
TRESTLE TRACK
300
200
100
COVERED COAL TRESTLE AND YARD
1
2
3
4
5
6
7

PLAINTIFF'S EXHIBIT P-7



STREET
WEST BOUND STATION
BRIDGE #5/87
TO ELIZABETH
TRACK #4
TRACK #2
FENCE
TRACK #1
TRACK #3
TRACK #5
EASTBOUND STATION
EAST 21ST
STREET
BRIDGE #5/80
TROLLEY EAST 22ND
CONSUMERS
COAL
TRESTLE
SIDE TRACK
TRACK #4
TRACK #2
TRACK #1
TRACK #3
TRACK #5
TRACK #4
TRACK #2
TRACK #1
TRACK #3
TRACK #5
TO JERSEY CITY
FENCE
ALEX LEVY COAL YARD
HARRY LEVY COAL YARD
FENCE
SIDE TRACK
SIDE TRACK
SHED
SHED
FENCE
FENCE
C.R.R. OF N.J.
BAYONNE, N.J.
PLAN SHOWING TRACKS
ETC. IN VICINITY OF
EAST 22ND STREET
STATION
SCALE, 1 INCH = 10 FEET
OFFICE OF CHIEF ENGINEER
JERSEY CITY, N.J. DEC. 3 1924.
SURVEYED & DRAWN BY
PROSPECT
AVENUE
PROSPECT
AVENUE
MECHANIC STREET

D-1

DEFENDANT'S EXHIBIT D-1


5
80
HARRY LEVY
COAL AND FEED

DEFENDANT'S EXHIBIT D-2


FURNITURE

DEFENDANT'S EXHIBIT D-3



DEFENDANT'S EXHIBIT D-4


SIMONS
SIMONIZ

DEFENDANT'S EXHIBIT D-5



DEFENDANT'S EXHIBIT D-6



DEFENDANT'S EXHIBIT D-7



DEFENDANT'S EXHIBIT D-8



DEFENDANT'S EXHIBIT D-9


ALL PERSONS ARE FORBIDDEN
TO PASS AROUND THIS FENCE

DEFENDANT'S EXHIBIT D-10



DEFENDANT'S EXHIBIT D-11



DEFENDANT'S EXHIBIT D-12


REVELATION
TARNISH
REVELATION
TARNISH
PROSPECT
LUNCH
STE

DEFENDANT'S EXHIBIT D-13

NEW JERSEY

Court of Errors and Appeals

JOSEPH SYMONSKI, Plaintiff-Appellant, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF IN FAVOR OF APPELLANT.

(1)

Statement of the Case.

This appeal of the plaintiff brings before this Court for review a judgment of the Supreme Court reversing a judgment in favor of the plaintiff in an action wherein Joseph Symonski brought suit to recover damages for personal injuries to himself (loss of two legs and other injuries), which he alleged were due first, to the negligence of his employer, the defendant, The Central Railroad Company of New Jersey, while both were engaged in interstate commerce, and second, irrespective of whether he was engaged in interstate commerce at the time of the accident, and assuming that he was a trespasser or a mere licensee, as the result of the wilful or wanton acts of the defendant's employee, the engineer of the engine which struck the plaintiff, who saw the plaintiff walking along the track in

New Jersey State Library

ample time to stop the engine before striking him but nevertheless failed to do so and failed to give any audible signal by bell or whistle or otherwise of the approach of the engine, although he had ample opportunity to do that also after discovering the plaintiff before striking him.

The accident happened on March 8, 1924. The plaintiff lived in Bayonne and was employed at the roundhouse of the defendant at Elizabethport in cleaning fires from and building fires in engines engaged in interstate commerce (p. 35, l. 40 *et seq.*). His home in Bayonne was across the street from the railroad of the defendant and a block and a half from its passenger station at Twenty-second Street, Bayonne. It had been the practice and custom of the plaintiff and other employees of the defendant, working at Elizabethport, for a period of three or four years prior to the accident, to use the way adjoining the plaintiff's house for the purpose of reaching the railroad and then walking along the railroad for the distance of a block and a half to the railroad station at Twenty-second Street where the defendant provided transportation for the employees free of charge to take them to their work at Elizabethport. On the day of the accident, which was clear and bright, at about 2:15 p. m., the plaintiff took the customary way and was walking along the tracks of the defendant and was within a short distance of the station (approximately two hundred feet) when, without warning of any kind by bell or whistle or otherwise, he was run down by an engine coming from behind him with the result that he suffered the loss of both legs and other injuries. It was proven not only that the plaintiff received no warning of any kind of the approach of the engine, which was moving very slowly (five or six miles an hour at the time it struck the plaintiff), but that the engineer actually saw the plaintiff walk-

ing along the track for some time before the accident and that he had ample time after discovering the plaintiff in which to stop the engine before striking him. The track was straight in the direction from which the engine approached for over two miles and the plaintiff had been walking along the track for approximately five hundred feet before he was run down.

At the close of the whole case counsel for the defendant moved for a direction of verdict in its favor on various grounds, which motion was denied (p. 228, *et seq.*). The case was submitted to the jury and they brought in a verdict in favor of the plaintiff for $29,000.00 (p. 20). The defendant appealed and the Supreme Court reversed the Trial Court. A petition for reargument was filed with the Supreme Court and denied (p. xiii, l. 25).

(2)

Grounds of Appeal

1. The Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

2. The Supreme Court should have affirmed the judgment of the Hudson County Court of Common Pleas.

3. The Supreme Court erred in holding that the Trial Court erred in refusing to direct a verdict in favor of the defendant.

(3)

Brief of the Argument.

I.

Decisions of Federal Courts construing act, control.

"In construing the Federal Employees Liability Act, the decisions of the National Courts control over those of the State Courts."

See:

Rounsville v. P. R. R. Co., 101 Atlantic, 182;

Farrell v. P. R. R. Co., 87 N. J. L., 78.

"As the action is under the Federal Employees Liability Act, rights and obligations depend upon it and applicable principles of Common Law *as interpreted and applied in Federal Courts.*"

Southern R. Co. v. Gray, 241 U. S., 333, 60 Law Ed., 1030.

"The federal decisions must be looked to, to determine whether enough facts have been introduced for the jury to infer negligence as that question involves matters of substantive law and not procedure."

Southern R. Co. v. Prescott, 240 U. S., 632, 60 Law Ed., 836 and cases cited Roberts Sec., 542, page 950.

See also long line of federal decisions cited.

6 Negligence and Comp. Cases, page 75.

The question as to whether plaintiff was engaged in interstate commerce, is a question for the jury.

In Penn. Co. v. Donat, 239 U. S., 50, the U. S. Supreme Court held:

"The trial court submitted to the jury the question whether plaintiff at the time of his injury was engaged in interstate commerce. The court held that this was proper (*N. Y. Central R. R. v. Carr*, 238 U. S., 260, 59 Law Ed., 1298)."

10 Neg. & Comp. Cases, page 161.

"*Defendant requested the trial judge to instruct the jury that plaintiff had not brought himself within the protection of the Federal Employers' Liability Act, which was refused.* In affirming a judgment for plaintiff the court held that the refusal to instruct the jury as requested was proper; that if the board in question was a 'running board' then plaintiff was within the act; and that *the trial judge properly left this question to the determination of the jury. Bramlett v. Southern R. Co.*, 98 S. C., 319 (1914)."

9 Neg. & Comp. Cases, page 23.

"That he was at the time preparing his engine to take out one of these trains; and that the Black Hills division included that part of the defendant's road west of Long Pine, Neb. The Court held that it would take judicial notice of the fact that the Black Hills are in South Dakota, that the western terminus of the defendant line was in the Black Hills, and that with *these facts the plaintiff's evidence made a*

sufficient showing to warrant submission to the jury of the question whether or not the defendant and the plaintiff were engaged in interstate commerce at the time of the plaintiff's injury, and to support the jury's verdict on that point. Bower v. Chicago & N. W. R. Co., 96 Neb., 419 (1914), aff'd 241 U. S., 470 (1916)."

11 Neg. & Comp. Cases, page 863.

"The general rule is that where an issue of fact is raised in the trial of a case as to *whether defendant and plaintiff were engaged in interstate or intrastate commerce at the time of the injury complained of, the Trial Court should charge the law as to both and permit the jury to decide which law applies according as they find the facts. Camp v. Atlantia & C. Air Line Ry. Co.*, S. C., 84 S. E., 825 (1915).

"In an action by a section foreman to recover damages for personal injuries sustained, *the Court held that whether he was employed in interstate commerce within the meaning of the Federal Employers' Liability Act, such question being a disputed one, was at least a question for the jury, and was properly submitted as such. Cherpeski v. Great Northern R. Co.*, 128 Minn., 360 (1915)."

9 Neg. & Comp. Cases, pages 545 and 546.

"If upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the Trial Court deprived plaintiff in error of the opportunity to go to the jury upon the question. North Carolina R. Co. v. Zachary, 232 U. S., 248, 58 L. Ed., 591."

9 Neg. & Comp. Cases, page 550.

"The Trial Court submitted to the jury the question whether the plaintiff was engaged in interstate commerce and rendered a judgment upon a verdict in favor of the plaintiff. *Palermo v. Erie Ry. Co.*, 185 N. Y., 637."

19 Neg. & Comp. Cases, page 24.

"WHEN QUESTIONS OF EMPLOYMENT IN INTERSTATE SHOULD BE SUBMITED TO JURY:

"*Where, under all the evidence in the case, any essential matter bearing on the question of whether the employe was at the time of the injury engaged in interstate commerce, is in doubt, the question should be submitted to the jury under proper instructions.* In an action for damages under the Federal Act the plaintiff may state a cause of action under one count under the state law and in another count under the Federal Act and if the evidence is such at the close of the introduction of the testimony, *that it is doubtful in which commerce he was engaged, it becomes a mixed question of law and fact to be submitted to the jury under proper instructions.*

"If it appears at the close of the evidence as a matter of law which statute applies, no doubt it would be error to submit the question to the jury as the Court should pass on all questions of law; but *if the evidence is such that reasonable men could draw different conclusions as to whether the defendant and the injured employe were engaged in intrastate commerce or interstate commerce, then it would be error for the Court to decide that issue as all ques-*

tions of facts should be submitted to the jury under proper charges declaring the law applicable. Sec. 461 *Roberts Fed. Lia. of Carriers,* page 798."

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro.* It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson v. Del. Lack. & Western R. Co.,* 229 U. S., 146, 151 (57 L. Ed., 1125, 3 N. C. C. A., 779); *St. Louis & San Francisco Ry. Co. v. Seale,* 229 U. S., 156, 161."

"With respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. North Carolina R. R. v. Zachary, 232 U. S., 248-58 Law Ed., 591."

9 Neg. & Comp. Cases, pages 117-118.

See also:

Carolina C. & O. R. Co. v. Stroup, 152 C. C. A., 125, 239 Fed., 75;

Erie R. Co. v. Krysienski, 151 C. C. A., 218, 238 Fed., 142;

Roberts Fed. Liability of Carriers, p. 799, note.

The single question presented by this record is whether Symonski, at the time of injury received,

was engaged in interstate commerce as to be practically a part of it.

Shanks v. D. L. & W. R. R. Co., 239 U. S., 556, 60 Law Ed., 436;
Chicago, etc., R. Co. v. Harrington, 241 U. S., 177, Law Ed., 941.

"The question the trial judge put to the jury."

Hud. & Man. R. Co. v. Iorio, U. S. Cir. Ct. of Ap., 239 Fed. Rep., 855.

"On the trial, the court below, submitted to the jury the question whether the deceased was employed in interstate commerce."

Erie R. Co. v. Van Buskirk, U. S. Cir. Ct. Ap., 3d Cir., 228 Fed., 439.

"The jury, in this case, had a right to find as it did, that at the time of his death, Morford was employed in interstate commerce."

Pillsbury & Hd. Ry, Co. v. Glinn, U. S., Cir. Ct. of Ap., Sixth Cir., 219 Fed. Rep., 148.

"To the same effect is *Graber v. Duluth, S. & A. R. Co.*, 159 Wis., 414, 150 N. W., 489, where it was held that an employee, while actually performing a service essential, to or so closely connected with, interstate commerce as to be substantially a part of it, though not necessarily exclusive of all intrastate features, is in the performance of interstate service within the meaning of the Federal Employers' Liability Act.

"In *Calahan v. Boston & M. R. Co.*, 79 N. H., 173, 106 Atl., 37, it was held that if the act the servant was performing at the time of the

accident was incident to interstate work, or if it was incident to a whole day's work, which was partly interstate and partly intrastate, he was within the Federal Employers' Liability Act.

"In *Gruszewsky v. Director Gen.*, 96 Conn., 119, 113 Atl., 160, we are of the opinion, after reviewing the foregoing cases, and others which might be cited in this opinion, that petitioner was, at the time of his injury, engaged in interstate commerce. It is true that, at the moment of the accident which resulted in his injury, he was loading into said interstate car an intrastate shipment; still, this act was so directly and immediately connected with interstate commerce as to substantially form a part or a necessary incident thereof. In other words, we think petitioner's employment falls within the test announced in *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S., 556, 60 L. Ed., 436, L. R. A. 1916 C, 797, 36 Sup. Ct. Rep., 188."

29 *A. L. R.*, pp. 1206-1207.

"In *Erie R. Co. v. Winfield*, 244 U. S., 170, 61 L. Ed., 1057, the Court, in determining whether said employee was, at the time he was killed, engaged in intrastate commerce or interstate commerce, said: '*In leaving the carrier's yard at the close of the day's work the deceased was but discharging a duty of his employment.* Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole. *His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is*

therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance.'"

29 *A. L. R.*, 1205.

The Trial Court did not err in refusing to direct a verdict in favor of the defendant.

On the trial six grounds were urged in support of the motion of the defendant for a direction of verdict (p. 228, *et seq.*). Only two of these grounds are urged in the brief of the defendant, namely, (a) the plaintiff was not engaged or employed in interstate commerce at the time of the accident (p. 10 of the brief), and (b) since he was not engaged in interstate commerce, then he was either engaged in intrastate commerce or else was a trespasser and is barred by Section 55 of the General Railroad Act (p. 22 of the brief). The other grounds in support of the motion for a direction may therefore be disregarded.

Public Service Electric Co. v. Board, 88 N. J. L. 603; affirmed 87 N. J. L. 128;
Manda v. U. S. Express Co., 85 N. J. L. 720.

Upon the fundamental point as to whether or not the defendant was negligent, no argument is made in the brief of the defendant except that in passing the defendant refers to the testimony of the engineer and fireman to the effect that the engine bell was ringing and the whistle blowing, although the testimony of a number of witnesses called by the plaintiff to the effect that no audible signal of any kind was given is not referred to. Also, under the second ground urged in support of the motion for direction, the defendant says (p. 25 of brief): "We insist that in the instant case there was no evidence

from which the jury might have found such a wilful or wanton act upon the part of the engineer." However, the testimony of the various witnesses is not referred to and we contend and shall herein discuss the point that there was evidence from which the jury had the right to draw the conclusion that the plaintiff was injured as the result of the wilful or wanton conduct of the defendant's engineer who, seeing the plaintiff in ample time to give him warning of the approach of the engine failed to do so, and also having discovered him in ample time to stop the engine without striking the plaintiff, nevertheless wilfully or wantonly continued to operate the engine so that it ran into the plaintiff.

In view of the fact that the complaint was amended several times, we shall briefly outline the issues made at the trial. The original complaint (p. 3) contained but one count which alleged a cause of action under the Federal Employers' Liability Act. An amended complaint (p. 10) was filed which set up two counts. The first count alleges a cause of action under the Federal Employers' Liability Act and the negligence charged in that count is as follows (p. 12, ll. 20-30):

> "That the defendant negligently omitted its aforesaid duties in that it operated one of its engines and trains at said time and place in a wilful, wanton, malicious, dangerous and reckless manner, and at a high and excessive rate of speed, and without giving the customary and usual notice or any signal or notice, whatever, of its approach at or about Twenty-second Street, as aforesaid. The defendant was also negligent in this: That the servants and agents of said defendant in charge of said engine and train after discovering the position of the plaintiff in time to avoid injuring him, nevertheless wilfully, wantonly and maliciously failed to exercise ordinary care to do so."

The second count of the amended complaint does not allege that the plaintiff was an employee of the defendant at the time of the accident or that he was engaged in interstate commerce at that time, but merely alleges that he was in the general employment of the defendant on the day of the accident and that he was injured as the result of the wilful or wanton acts of the defendant's agents or servants. The allegation of negligence is the same as that contained in the first count quoted *supra*. The second paragraph of the second count of the amended complaint by a later stipulation was stricken out and in its place certain paragraphs of the first count were reiterated (p. 15).

It therefore appears that there are two counts; the first alleges a cause of action under the Federal Employers' Liability Act; and the second alleges a cause of action at common law for a wilful or wanton injury to the plaintiff, assuming, but not admitting, that at the time of the accident he had the status of a trespasser or a mere licensee.

Under Section 161 of the Practice Act (P. L. 1903, p. 581) it is provided: "If there are in a declaration several counts, some of which are faulty or bad and others not, and entire damages are given, the verdict shall be good but the defendant may apply to the court to instruct the jury to disregard such faulty or bad counts."

In Hansen v. De Vita, 76 N. J. L. 97, this Court said: "As the record stands, there is a general verdict and one admittedly good count. Section 161 of the Practice Act (P. L. 1903, p. 581) provides that if there are in the declaration several counts, some of which are faulty or bad and others not, and general damages are given, the verdict shall be good."

The Supreme Court in its opinion (top of p. 11) says that there is repeated in the second count of the complaint the allegation "that this action is brought under and by virtue of an Act of Congress of the United States, etc." This is an inadvertent misstatement by the court because an examination of the pleadings shows that there was a stipulation filed striking out the second paragraph to the second count in the amended complaint wherein the alleged reiteration appeared (p. 15 for stipulation; p. 13 for paragraph 2 of second count of amended complaint; p. 10, paragraph 4th, where allegation was originally made).

The second count of the amended complaint does not allege that the plaintiff was an employee of the defendant at the time of the accident or that he was engaged in interstate commerce at that time, but merely alleges that he was in the general employment of the defendant on the day of the accident and that he was injured as the result of the wilful or wanton acts of the defendant's agents or servants. The allegation of negligence is the same as that contained in the first count quoted *supra*. The second paragraph of the second count of the amended complaint by a later stipulation was stricken out and in its place certain paragraphs of the first count were reiterated (p. 15).

It therefore appears that there are two counts; the first alleges a cause of action under the Federal Employers' Liability Act; and the second alleges a cause of action at common law for a wilful or wanton injury to the plaintiff, assuming, but not admitting, that at the time of the accident he had the status of a trespasser or a mere licensee.

(a)

The plaintiff, while going to work, was engaged in interstate commerce.

See:

Winfield v. Erie, ibid.

In *Lamphere v. Oregan Ry.*, 196 Fed., 363 (C. C. A., 9th Circuit), the Court held:

> "A locomotive fireman was ordered to report for duty on an interstate train. While passing through the defendant's yard, on the way to his destination, he was struck and killed by cars of the defendant other than those to which

he was assigned. The Court reversed the judgment below, and held that that case fell within the statute. In support of its decision, the Court cited the Zikos case and the Colasurdo case, *supra*, and criticised the decision in the case at bar as counter to those cases, and to the decision of this Court, in the cases, and to the decision of this Court, in the *Second Employers' Liability* cases, 223 U. S., 1."

"Again it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. *It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine.* See *Missouri, K. & T. R. Co. v. United States*, 231 U. S., 112, 119, *ante*, 26; 34 Sup. Ct. Rep., 26.

"We conclude that, with respect to the facts necessary to bring the case within the Federal Act, there was evidence that, at least, was sufficient to go to the jury."

North Carolina R. R. v. Zachary, 232 U. S., 248, 58 Law Ed., 59;
9 *Neg. & Comp. Cases*, 117-118.

"A railroad section hand who had been engaged in interstate commerce during the day, was still so engaged while riding on a hand car furnished by the railroad company at the conclusion of his day's labor, by direction of his foreman, for the purpose of not only of returning from his place of work to the camp maintained by the company, but also for the purpose of taking the hand car to a point where it was to be removed from the track, so as to leave the road open for the passage of trains.

"Railroad employees while being carried as part of their daily service to and from their place of work, are fellow servants, even if there is no agreement that they shall be so carried, if such be the implied agreement or regular custom of the railroad company, assented to by the employees.

"In an action by a railroad section hand for injuries sustained while he and other employees were returning to their camp on a number of hand cars, where there was evidence tending to show that the employees upon the car immediately preceding plaintiff's car negligently slackened their speed without warning, thus causing a collision between such car, plaintiff's car, and the other following plaintiff's car, *defendant's negligence was properly submitted to the jury.*"

San Pedro, L. A. & S. L. R. Co., v. Davide, Circuit Court of Appeals, Ninth Circuit, 210 Fed. Rep., 870.

"One of the specifications of error was that *the Court refused to hold 'that the plaintiff's intestate at the time of the accident was not on duty, was not in the actual service of the defendant, and was not an employee within the*

contemplation of the Employers' Liability Act of 1906, and that said act was inapplicable to the case at bar.'

"It is contended, however, that, until Tucker did reach the Annex, he was not a servant of the company within the contemplation of the act. When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that *the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master.* THE SERVANT IN SUCH A SITUATION IS NOT A MERE TRESPASSER NOR A MERE LICENSEE. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the mo-

ment he enters upon the actual performance of his task."

Phil. B. & W. R. Co. v. Tucker, 35 App. Cas. (D. C.), 123, L. R. A. 1915 C. 39 (1910), aff'd 220 U. S., 608, 55 L. Ed., 607 (1911);

11 *Negligence & Comp. Cases*, (NOTES), pp. 117-118.

A case recently decided, which is directly in point Pallocco vs. L. V. R. R. Co., 236 N. Y. 110, 140 N. E. 1, reversing 195 App. Div. 683, 190 N. Y. Supp. 867. ree pages of the defendant's brief below were devoted the decision of this case in the Supreme Court of York. On appeal to the Court of Appeals the Supreme rt was reversed, the court of last resort holding t a section hand who had quit work, put his tools away d started for his home, and had walked a distance of re than a mile to a point outside the yards on the de- ndant's railroad on his usual route, was still engaged interstate commerce. The opinion of the Court of Ap- ls was rendered by Judge Cardozo and that court held t the employee's employment in interstate commerce s not changed as a matter of law because he walked through e yard in leaving work or because he walked on the track stead of between the tracks or was unwise in his choice of route. The Court of Appeals also held that assuming that e plaintiff leaving the yard might have gone by highway stead of walking through the yard, the question whether rilege of going through the yard was reasonably incident the employment must be determined as inference of fact the light of circumstances including physical surroundings d practice of the business.

upon which the plaintiff would have worked if he had not been injured on March 8, 1924 (the day of the accident) in the movement of a car or cars destined to a point or points without the State of New Jersey (p. 39, ll. 20-30); and in answer to interrogatories Nos. 27 and 28, the numbers

ment he enters upon the actual performance of his task."

Phil. B. & W. R. Co. v. Tucker, 35 App. Cas. (D. C.), 123, L. R. A. 1915 C. 39 (1910), aff'd 220 U. S., 608, 55 L. Ed., 607 (1911);

11 *Negligence & Comp. Cases*, (NOTES), pp. 117-118.

Plaintiff was employed by the defendant in Interstate Commerce at the time of the accident.

It is our contention that this question was clearly one of fact for the jury to pass upon. There was no dispute that the plaintiff was in the employ of the defendant at its roundhouse at Elizabethport and that this employment consisted of cleaning fires from and building fires in engines engaged in interstate commerce, for on the trial of the case the defendant stipulated (p. 35, l. 40) "that the plaintiff worked in the shop of the defendant at Elizabethport cleaning fires in engines and building fires in engines which had theretofore been engaged in interstate and intrastate commerce and which would thereafter be used in interstate and intrastate commerce." Also, the defendant answered certain interrogatories to the same effect prior to the trial which were read in evidence on the trial. For instance, the defendant, answering interrogatory No. 25, said that some of the engines at Elizabethport upon which the plaintiff would have worked if he had not been injured were used on March 8, 1924 (the day of the accident) in the movement of a car or cars destined to a point or points without the State of New Jersey (p. 39, ll. 20-30); and in answer to interrogatories Nos. 27 and 28, the numbers

of the engines that would have been thus engaged are given (p. 40, ll. 10-20.).

The law is well settled that had the plaintiff actually reached the roundhouse at Elizabethport he would have been engaged in interstate commerce.

Erie R. R. Co. v. Collins, 253 U. S., 77;
Erie R. R. Co. v. Szary, 253 U. S., 86.

The question presented is whether such an employee while on his way to that kind of work and while on the master's premises in the usual and customary maner (the practice or custom having existed for years) is also engaged in interstate commerce. That he is engaged in interstate commerce under such circumstances has been repeatedly held.

Erie R. R. v. Winfield, 244 U. S., 170;
North Carolina R. R. Co. v. Zachary, 232 U. S., 248, 260;
Philadelphia B. & W. R. Co. v. Tucker, 35 App. Cas. (D. C.) 123; L. R. A. 1915C, 39; affirmed without opinion 220 U. S., 608;
Dennison v. Payne, 293 Fed. 333;
Atlantic Coast R. Co. v. Williams, 284 Fed. 262;
Director General v. Bennett, 268 Fed. 767;
Director General v. Ronald, 265 Fed. 138;
San Pedro, etc., R. Co. v. Davide, 210 Fed. 870;
Lamphere v. Oregon R. & N. Co., 196 Fed. 336.

In the leading case of *Erie R. R. Co. v. Winfield*, 244 U. S., 170, *supra*, wherein the United States Supreme Court reversed the Court of Errors and Appeals of this State, the former court held that

an employee in leaving the yard after his day's work was done, namely, switching interstate and intrastate commerce, was engaged in interstate commerce. The employee was in charge of a switch engine and during the course of his day's work was switching freight cars about in a freight yard to and from a transfer station. In quitting his work for the day the employee took his engine to the place where it was to remain for the night and then proceeded to walk through the extensive freight yard of the company on his way to his home. At page 172, the United States Supreme Court said:

> "The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. See *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance."

In *North Carolina R. R. Co. v. Zachary*, 232 U. S., 248, *supra*, the deceased had left his engine and was on his way to his boarding-house; he was engaged upon a personal errand and not upon the carrier's business. The Supreme Court, at page 260, said:

"There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

In *Philadelphia, etc., R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123; L. R. A., 1915C, 39; affirmed without opinion 220 U. S., 608, *supra*, the employee was an extra locomotive fireman and while his work appears to have been regular and constant he was nevertheless paid by the trip. Except on one occasion when he was summoned by telephone for passenger train service, he had always been called for service and had served on freight trains. He boarded at a house known as 230 First Street which was northeast of an opening to a tunnel which led to the defendant's railroad where he was employed. During the progress of elevating and depressing the tracks the defendant built along the north side of Virginia Avenue a stone wall. This wall extended from the west portal of the tunnel beyond another street. About 840 feet west of the tunnel an opening of about 80 feet wide was left in the wall, primarily to admit a side track leading out into Garfield Park, which track was used in connection with construction work. Immediately adjacent to this wall were the two main tracks of the defendant company, the nearer to the wall leading westwardly from the tunnel and the second track leading in the opposite direction. Beyond these two tracks there was a spur track which accommodated the annex or work train which carried the freight crews to and from work. The evidence showed that this train usually

stopped about opposite the opening in the wall for the purpose of receiving the train crews and other workmen. North of the opening was a way leading directly to the opening and this way and opening had been customarily used, not only by the men riding on the annex but by the other employees of the defendant in going to and returning from their work in the yards and round-house. On the morning of the accident a machinist's helper was sent to Tucker's boarding house to call him to duty. Tucker left the boarding house and proceeded to the opening and in order to reach the opening he walked along the way usually used by the employees for two years. In attempting to pass the main tracks to get to the spur track which accommodated the annex, he was killed. It will be remembered that the annex was the work train which would take the deceased to the freight yard where he would actually go to work. The Court held:

> "It is conceded by defendant that, had Tucker reached the Annex, assuming that he had been called for freight train service, he would have been in the employ of the defendant company within the meaning of Section 1 of said Act of 1906, notwithstanding that technically his term of service would not have commenced until he reached the freight yards to which the Annex was to carry him. This concession is made upon the theory that he would then have been upon a conveyance provided by the master, and hence under the master's control. There are numerous cases sustaining this view. It is contended, however, that, until Tucker did reach the Annex, he was not a servant of the company within the contemplation of the act. When Tucker was killed, he was upon the premises of the defendant in response to its call to assume the duties he had been engaged

by the defendant to assume and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded on reason and supported by authority, is that the relation of master and servant, insofar as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants. * * *

"This opening was upon the premises of the defendant, and, of course, under its control. Had the defendant desired to prevent the use of this opening and the tracks adjacent thereto as a means of access to and exit from its Annex, yard, and roundhouse, it might easily have done so; but no precautions whatever were taken to prevent such use. The long-continued practice fully justified the inference that this was with the knowledge and consent of the defendant."

In *Dennison v. Payne,* 293 Fed., 333, *supra,* the Circuit Court of Appeals for the Second Circuit held that an employee after completing his day's work in interstate commerce and while on his way home was engaged in interstate commerce. The employee had finished his day's work and was on his way out of the yards; the evidence showed that he had completed his eight hours of service. The Court, in deciding that the plaintiff was engaged in interstate commerce, said that the case was on all fours with *Director General of Railroads v. Bennett,* 268 Fed. 767, *supra,* and quoting from that case held:

"On both reason and authority we are of opinion that, when Bennett was injured while leaving his job at the end of the day, notwithstanding the movement might have been, but actually was not, interrupted by an order to proceed elsewhere on overtime, he was but discharging a duty of his employment in a manner necessarily incident to the interstate movement he had just completed."

It was not negligence for the plaintiff in going to the Twenty-second Street Station to go by the nearest way.

The plaintiff after leaving his home in Prospect Avenue, crossed over a vacant lot adjoining the railroad tracks and walked on to the tracks on his way to the Twenty-second Street Station, while it is true that he could have walked down Prospect Avenue to Twenty-second Street and then along Twenty-second Street to the stairs leading up to the station, yet, he used the shorter way to the station.

In *Norfolk & W. Ry. Co. v. Short,* 171 Kentucky, 647, cited in Volume 14, Negligence Cases, page 1000. it appears that plaintiff, a car repairer, found that a car which he was to repair, lacked a knuckle pin, which it was his duty to replace.

> "One could be obtained by going to the general supply shop for that section of the yard or by going to the stock kept for use in the other part of the yard. *The latter way was the nearer,* but required crossing tracks that the decedent would otherwise not have had to cross in the regular course of his employment. *The decedent elected to go the nearer way.*
>
> *"It was not necessarily negligence for him to go to the nearest place; and that if the decedent was, in the opinion of the jury, negligent in going between the cars under the circumstances, such contributory negligence would not defeat the right of recovery, but only, as stated by the Trial Court, operate to diminish damages."*

See also:

Katherine Boehn v. Director Genl. R. R. (C. R. R. of N. J.).

Phila., Balt. & Wash. R. R. Co. v. Tucker.

"In this connection it is argued that Tucker voluntarily selected the more dangerous way when he might have proceeded down Virginia Avenue to South Capitol Street, where he could have gone under the tracks, and thence back to the Annex. Had he chosen that way, it would have required him to go 1,100 feet further, and moreover, the testimony shows beyond dispute that the way he did choose was the customary and usual way for employees living in his locality. Moreover, the act ordains that ('all questions of negligence and contributory negligence shall be for the jury.').

"Affirmed by the Supreme Court of the United States, May 29, 1911, 220 U. S., 608, 55 L. Ed., 607, 34 Sup. Ct. Rep., 725."

L. R. A., 1915, pp. 39 and 45 and 47.

In *Matthison v. Payne*, 98 N. J. Law, 87, the Court held: that on the night in question the train stopped a mile away from the place where the plaintiff worked, and as a result he was left in a position either to take a perilous route over tracks and switches to reach his place of employment or to remain where he was for an indefinite time, and thus, by his absence from the performance of his duties cause probable loss and mischief to his employer. For we may safely assume that the oiling of engines, keeping the fires up and water in the boilers, &c., are important duties, a neglect to perform which might lead to disastrous consequences. The plaintiff was under no legal obligation to risk his life or limb to reach his place of work by attempting to walk. It was, however, his duty to make a reasonably safe effort to get to his work so that the

engines coming in or going out might be properly cared for.

But it is further contended that the hour of eleven o'clock P. M., the time fixed for Hanafin and the conductor to start in on their work had not yet arrived, and therefore, Hanafin was purely a volunteer, for whose negligent act the defendant cannot be held liable. Our attention has not been directed to any well-considered case which espouses any such strange theory.

Lastly, it is argued that the judgment should be reversed because there was no proof that the plaintiff at the time he was injured was engaged in interstate commerce.

The proof tended to show that the plaintiff was employed at the round-house to take care of all engines without regard to their use, and therefore, we think that he was employed both in interstate and intrastate commerce and that when he went to his work and was returning from it he was engaged in both kinds of commerce.

Erie Railroad v. Szary, 253 U. S., 85;
Erie Railroad v. Collins, Id., 78;
Philadelphia and Reading Railroad Co. v. Donato, 65 U. S., Law, Ed., 955.

In *Atlantic Coast Line v. Williams,* 284 Fed., 333, *supra,* the United States Circuit Court of Appeals for the Fifth Circuit held that an employee who was employed in shifting cars on interstate trains who was injured in going to his work while attempting to board the defendant's shuttle train, used to carry its employees to and from their work *six miles distant,* was engaged in interstate commerce at the time.

In *Director General v. Bennett,* 268 Fed., 767, *supra,* the United States Circuit Court of Appeals for the Third Circuit held that a locomotive engin-

eer who, after completing his day's work, was injured while taking his engine to the roundhouse to put it up for the night was engaged in interstate commerce.

In *Director General of RRs. v. Roland,* 265 Fed., 138, *supra,* the United States Circuit Court of Appeals for the Second Circuit held that the employee was engaged in interstate commerce although he had finished his work at the suspension bridge at 5:20 P. M., and was not injured until 7:20 P. M.

In *San Pedro v. Davide,* 210 Fed., 870, *supra,* a railroad section hand who had finished his day's work and was being carried on a hand car at the conclusion of his day's labor from his place of work to the camp maintained by the company was held to be then engaged in interstate commerce.

In *Lamphere v. Oregon &c. Co.,* 196 Fed., 336, *supra,* the United States Circuit Court of Appeals for the Ninth Circuit held that the employee was engaged in interstate commerce and at p. 338 said:

> "The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the Railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the Railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company."

The facts were that the employee was ordered by the company to proceed from his home in a certain town to the depot in that town to secure transporta-

tion there and go on board a certain train which was due at the depot at 7:45 P. M. and to proceed to a certain other town in the state and there relieve an engine crew which had been continuously employed for more than sixteen hours. After receiving the order, he proceeded from his home to the depot of the company in the town where he lived, and upon reaching the crossing in the yards of the company where two cars were cut, he proceeded to cross when, without warning, the cars were suddenly closed by reason of other cars being carelessly and negligently kicked against them and thereby he sustained injuries which resulted in his death.

To summarize the rule set forth in the above cases, an employee whose work is of an interstate nature is actually engaged in interstate commerce so as to come within the Federal Employers' Liability Act when he is on the premises of the company in the usual or customary manner on his way to his work along the path or route or way usually followed by other employees; and this is so even though he may be in a different town or miles away from the actual place of employment. For instance, in the *Lamphere* case, the employee was in another town in the same state miles away when he was injured going over a crossing into the railroad's yard and towards the depot where he was to board a train to take him to his place of employment; and in the *Williams* case, *supra*, the employee was actually six miles from his place of employment, and about to board a train which was to take him to his place of employment. In the *Tucker* case the employee was going over a way customarily used toward a tunnel which was hundreds of feet long and which ultimately led across the main tracks to a side track upon which the employee train would be boarded by the employee. That path had

been used for approximately six months by employees similarly situated.

In the present case the plaintiff lived in Bayonne, a short distance from the railroad station of the defendant at Twenty-second Street, Bayonne. His home at the time of the accident was known as 100 Prospect Avenue, where he lived for three years prior thereto, which was between Twenty-third Street and Twenty-fourth Street, or approximately a block and a half from the station. He had been provided with a pass which entitled him to board any train of the defendant for the purpose of reaching his place of employment, namely, the roundhouse at Elizabethport. The railroad of the defendant adjoined the home of the plaintiff and it was his custom, as well as that of many other employees of the defendant, to use a way leading from Prospect Avenue, Bayonne, to the railroad and then to walk along the railroad for a block and a half to the railroad station where they would board the train and be transported to their employment at Elizabethport. Exhibit P-6, a photograph which was offered in evidence by the plaintiff, shows the plaintiff's house which is marked "100 S." By looking at that photograph the path which the plaintiff took to the station can be readily ascertained. He would leave his home, walk toward and on the railroad to the point marked "X," which was on the same grade with his home and Prospect Avenue and then down the railroad tracks toward the station, a distance of approximately six hundred feet (p. 108, l. 20 to p. 109, l. 30; p. 44, l. 25 to p. 45, l. 20).

The plaintiff testified that he had during his entire employment on the railroad always taken that course in going to his work (p. 108, ll. 20-40). He had worked for the company at Twenty-second Street, Bayonne, three or four years prior to the

accident as a coal passer and fire cleaner. At that time he was so employed for about a year and a half (p. 114, ll. 10-30). Immediately prior to the accident he had been working at Elizabethport roundhouse for approximately five months (p. 113, ll. 20-30).

It was the practice of the railroad men to take the way through the lot opposite his home at 100 Prospect Avenue to the railroad during all the time he had worked on the railroad (p. 114, l. 30 to p. 115, l. 20). He said, "They go through the lots, go on to the station to get the train and go to the place where they worked (p. 115, ll. 20-30). On cross-examination he was asked whether he could not have walked down Prospect Avenue to Twenty-second Street and up the steps to the station, and he replied, "Well, everybody goes through the lots" (p. 117, ll. 10-20). He did not remember a single occasion in which he did not take the path through the lots to the railroad. He said, "Well, I don't think I go once (down Prospect Avenue) I am always (going) by the short cut." He had a pass from the defendant which entitled him to ride between Twenty-second Street and Elizabethport (p. 123, ll. 30-40). He named other employees working at Elizabethport who lived in Bayonne, who customarily went to work in the same way (p. 124, l. 30 to p. 125, l. 40). On redirect his testimony was as follows (p. 125, l. 40 to p. 127, l. 20):

> "Q. Do you know a man named Worchzky—do you know Mr. and Mrs. Worchzky—Mrs. Worchzky who was on the witness stand yesterday? A. Yes.
>
> "Q. Did he use that path? A. Yes, he used that same lot and his son.
>
> "Q. His son too? A. Yes.
>
> "Q. Did they work for the Central Railroad Company? A. For the Central Railroad Company.

"Q. Where did they work? A. In the roundhouse somewhere. I don't know what he does there, but I know he works for the Central Railroad.

"Q. Did he live next door to you on Prospect Avenue? A. Yes, sir.

"Q. Did he use that path, this road? A. Yes.

"Q. Well, did they go through this lot where you walked? A. Yes, sir, they went through this lot.

"Q. They went to work in the morning? A. Yes.

"Q. And they used the same route in the nighttime? A. I did not see in the nighttime, because I am on the job.

"Q. Were there other men besides yourself and these men you have named that went through this lot? A. Yes, sir.

"Q. Did you see them? A. Yes, sir, I see them.

"Q. During the time you lived there? A. Yes, sir.

"Q. I think you said Mr. Worchzky's son went through the lot too? A. Yes, sir.

"Q. Did he work for the Central Railroad? A. Yes, sir."

It therefore appears from the plaintiff's testimony that for three or four years it was the customary and the usual practice for railroad employees to take the way that the plaintiff took at the time of the accident in going from his home to the railroad station at Twenty-second Street, Bayonne, for the purpose of boarding a train provided by the defendant to take him to his work at Elizabethport. The fact that the distance from the plaintiff's home in Bayonne to Elizabethport was approximately four miles is immaterial in the solution of this question,

for, as shown in the cases, supra, the distance might be six miles and the time two hours before actually starting the work of firing engines, and still if the employee was on his master's premises in the usual and customary manner while on his way to work, he comes within the protection of the Federal statute.

Another witness, Marcella Wortzik, lived opposite the railroad right of way, which was on the same level with Prospect Avenue and which ran parallel to it, and the house in which she lived is shown in the photograph Exhibit P-6, the same being 102 Prospect Avenue, marked "102 W" on the photograph. It is right next to the plaintiff's house (p. 81, ll. 1-10). She had lived there for two years, prior to the accident, with her husband and son, both of whom were employees of the defendant at Elizabethport. Her testimony was that all of the railroad employees who lived in Bayonne used the way through the lot adjoining the railroad in order to reach the railroad station at Twenty-second Street during the entire time she lived there for the purpose of going to their work and returning from it. Her testimony was as follows (p. 82, l. 10 to p. 84, l. 10; p. 86, l. 15, to p. 87, l. 10):

"Q. During the years that you lived there in that house at 102 Prospect Street, what was the practice with respect to railroad employees going through the adjoining lot to the railroad and walking to the station? A. In the morning I seen workingmen coming from the railroad passing the track and going that way. Workingmen going to work were going the same way.

"Q. You say you have seen men come home across those tracks on their way from their work? A. Yes, and to their work.

"Q. (In English) You understand my ques-

tion in English, don't you? A. Yes. If I do not then I will ask the interpreter.

"Q. You do not have any trouble in understanding me now, what I am talking about? A. No, I understand that all right.

"Q. And you say that you saw men go over that lot on their way to work? A. Yes.

"Q. Who were those men? A. Well, I don't know all those men.

"Q. Well, where were they going to work? A. On the railroad.

"Q. And where on the railroad? A. Well, where they work—they go on the 22d St. station.

"Q. Who were the men you saw? A. I know my husband was going and my son was going to work.

"Q. Your husband and your son? A. Yes, and a lot of men.

"Q. Who else? A. I don't know the men's names.

"Q. Who besides your husband; can you tell us the name of any one man besides your husband and your son? A. I don't know the name; I didn't ask the men their names.

"Q. How many men did you see? A. Well, they always was going, about six or seven men, and at night—

"Q. How many at night? A. The same thing.

"Q. And you cannot tell us the name of one of those men? A. I don't know."

The defendant made no effort to contradict the foregoing testimony of the plaintiff and his witness as to the practice of the railroad employees for three or four years to pass along the way in question to the railroad and thence down the railroad five

hundred feet to the railroad station in going to and from their work at Elizabethport.

On the contrary, a member of the defendant's police force who did duty at the place in question continuously for a period of sixteen years, from the railroad at that point because such employee walked along the track to his work, testified that he had never ejected any employee. His testimony was as follows (p. 208, ll. 20-30):

> "Q. Then you never ejected any of them? A. No, sir.
>
> "Q. During all of the sixteen years? A. No, sir.
>
> "Q. At night when they were coming home, did you ever see any of them walk along the tracks up to the lot on Prospect Avenue? A. No, sir.
>
> "Q. Never during those sixteen years? A. No, sir.
>
> "Q. And you had no occasion, therefore, to eject anybody there, did you? A. No, sir."

It therefore appears from the testimony of the plaintiff and the other witnesses that the plaintiff and other employees of the defendant continuously, twice a day, morning and night, for a period of three or four years immediately prior to the accident, without any protest, objection or molestation by the defendant or its police officers and without any warning or trespass sign against the practice, customarily and usually went to their work at Elizabethport in the manner in which the plaintiff did on the morning he was injured, namely, they walked along the way adjoining the defendant's railroad at a point distant about five hundred feet from the station and then walked along the track to the station where they boarded the train provided by the defendant for the purpose of transporting them to

their employment at Elizabethport. The business of these employees was with the railroad company. They were on their way to work and when they reached the premises of the company in the customary and usual manner along the route that had been used for years by them and their predecessors, they were entitled to the protection of the Federal Employers' Liability Act as shown in the cases discussed, supra. The fact that the place where the employee entered upon the premises was four miles from the place where he would actually go to work is immaterial. If the plaintiff had actually reached the station at Twenty-second Street, only five hundred feet away, there would be no doubt that he would be entitled to the protection of the Federal statute. The fact that he was five hundred feet from the station, taking the course usually followed by railroad employees in going to and from their work, does not *as a matter of law* deprive him of the benefit of the statute. The most that can be said is that the question is one of fact for the jury to pass upon. The principle of law is well settled, namely, that while he was on the premises of the master and on his way to work or returning from it in the usual and customary manner, he was entitled to the protection of the Federal statute.

The defendant contended that it was not the usual or customary way for employees to go to work. However, it produced no evidence to support that contention. It produced a police officer who admitted that he had never ejected any employee from the railroad at the point in question although he had worked there for sixteen years as such police officer and was supposed to eject trespassers from the railroad right of way (p. 206, ll. 35-40).

In construing the Federal Employers' Liability Act, the decisions of the national courts control.

The rights and obligations under it depend upon applicable principles of common law as interpreted and applied in Federal courts. *Southern R. Co. v. Gray,* 241 U. S., 333; *Farrell v. P. R. Co.,* 87 N. J. L., 78.

We respectfully submit that the Trial Court properly refused to direct a verdict on this ground. The trial judge is only justified in directing a verdict upon a Court question arising from the admitted or uncontroverted facts of a case. *Dickinson v. Erie R. R. Co.,* 85 N. J. L., 586.

Finally, in passing on a motion for direction of verdict, all the evidence against the party moving for the direction must be taken as true and the adverse party must be given the benefit of all legitimate inferences reasonably deducible therefrom. *Andre v. Mertens,* 88 N. J. L., 626.

Keeping in mind that the plaintiff was an ignorant Polish man who had only worked at the roundhouse at Elizabethport for approximately five or six months prior to the accident and who had worked at the Twenty-second Street station for a year and a half three or four years before the accident, and during all that time, with other employees, had continued twice daily, to use the route taken by him at the time of the accident without objection, molestation or warning of any kind from the defendant, his employer, can it be said, in the light of the cases cited supra, that he was nothing but a trespasser to whom the company owned no duty under the circumstances? We respectfully submit that fair-minded men must of necessity differ in arriving at a conclusion on that vital question which is dispositive of the case. As stated in the Tucker case, supra, affirmed without opinion by the United States Supreme Court:

> "This opening was upon the premises of the defendant, and, of course, under its control.

> Had the defendant desired to prevent the use of this opening and the tracks adjacent thereto as a means of access to and exit from its Annex, yard, and roundhouse, it might easily have done so; but no precautions whatever were taken to prevent such use. The long-continued practice fully justified the inference that this was with the knowledge and consent of the defendant."

Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue must go to the jury. *Nolan v. Bridgetown &c. Traction Co.*, 74 N. J. L., 196.

The cases referred to by the defendant, beginning at p. 12 of its brief, are the cases upon which the plaintiff relied in support of his contention at the trial of this case. The Winfield and Zachary cases have already been referred to. The case of *Van Buskirk v. Erie R. R. Co.*, 279 Fed., 622, supports the contention of the plaintiff, for in that case the deceased employee was an engine hostler and had left his engine to go on an errand, the nature of which was unknown. At p. 624, the Court says: "He left the engine and went toward the shanty, but whether he was going to the shanty or some other place nearby, the record does not disclose." At p. 625, the Court refers to the Zachary case and says: "If going to the boarding house was not inconsistent with his duty to his employer (Zachary case) and he continued to be employed in interstate commerce, going from the engine toward the shanty, where he had a right to go, while the engine was being prepared for further work (Van Buskirk case) was also consistent with duty to his employer and did not terminate his employment in interstate commerce."

In the case of *B. & O. R. C. v. Kast*, 299 Fed., 419, the plaintiff was employed as a machinist's helper at a roundhouse. When the supper gong was sounded, he was looking for a piece of pipe. The Court said: "According to his testimony, he was still in pursuit of the pipe at the time he was injured. According to another view of the testimony, he had suspended his errand and was going from the roundhouse across an open place of defendant's premises to another building where its employees kept their lunch baskets and had their lunches. In crossing an open areaway between the roundhouse and another building customarily used by employees, he stepped upon a socket wrench, fell and was injured." He was passing over a part of defendant's premises ordinarily used by employees. *It was not a paved or defined path.* The Court held as a matter of law that the plaintiff was engaged in interstate commerce.

In *Anderson v. Director General*, 94 N. J. L., 421, the employee was a conductor upon a freight train. When the train reached the freight yard his control over it ceased. Thereafter, he delivered certain train records to the yard-master. He was killed while riding on another engine on his way to the yard-master's office. It was held that he was still engaged in interstate commerce. It could hardly be said that a freight engine was provided as a passenger train to carry the conductor. He voluntarily boarded the engine for the purpose of going to the yard-master's office. It was held that he was still engaged in interstate commerce.

In *Cicalese v. L. V. R. R. Co.*, 75 N. J. L., 897, a hand car was used by a trackman to be transported from the place where he had been working to a point convenient to his home and the journey was commenced after the usual day's work had ceased. It was held that the employee was still in the employ of the company.

In *Zabriske v. Erie R. R. Co.*, 86 N. J. L., 266, the employee was a carpenter in a building known as the Morris Building some distance from the Paterson station of the employer and the employee in order to reach the station had to cross a public highway known as Market Street, the principal artery of traffic in Paterson. It appeared that there was no toilet in the Morris Beef Building, where he was working, and he had to go somewhere to satisfy the calls of nature. The most convenient place happened to be the men's toilet room in the defendant's railroad station across Market Street. At the time of the accident the deceased was on his way from the beef building across Market Street and bound for the station when he was struck by an eastbound automobile on Market Street. It was held that he was still in the employ of the master although on a public street at the time and on a personal errand.

In *Fisher v. Tide Water Building Co.*, 96 N. J. L., 103, affirmed on the opinion below in 116 Atl., 924, a workman was killed some distance from the place of his employment while boarding a train on which the employer furnished free transportation from the place of employment to the workman's home. It was held that he was still in the employ of the master at the time.

In the case of *Matthison v. Payne*, 98 N. J. L., 87, affirmed without opinion 122 Atl., 926, the employee had left the train known as the "modoc" provided for the purpose of transporting employees from Jersey City to the roundhouse at East Oak Island, which was near Newark, and was walking through the yard when he boarded a light engine going in his direction toward the roundhouse where he was employed. This Court said he was warranted in relying upon the common practice open to his observation of firemen operating the engines in the absence of the engineers for the purpose of convey-

ing employees to their work. He was entitled to rely on the practice. This Court also said: "It is further contended that the hours of 11 o'clock P. M., the time fixed for Hanafin and the conductor to start in on their work, had not yet arrived and therefore Hanafin was purely a volunteer for whose negligent act the defendant cannot be held liable. Our attention has been directed to no well considered case which espouses any such strange theory."

In *Depue v. Salmon Co.*, 92 N. J. L., 550, it was held that the relation of master and servant continues during the carriage of the servant to and from his work when done by the master or with his consent.

It therefore appears that whether the plaintiff in the case at bar was walking along the way usually and customarily followed for years by other employees or whether he was being carried by a hand car, freight engine or an automobile from his work to his home by his master or with its consent, express or implied, so long as he is on the master's premises in the usual and customary way or in the vehicle in the usual and customary way, he is still in the employ of the master. If that employment is in its nature what is known as interstate commerce, then the employee is still engaged in interstate commerce and entitled to the protection of the Federal Employers' Liability Act.

We therefore respectfully submit that the trial Court properly refused to direct a verdict in favor of the defendant on this ground because the question was one of fact for the jury to pass upon as to whether at the time of the accident, under all the circumstances of the case, the plaintiff was still in the employ of the defendant in interstate commerce.

In passing, with respect to the rather brief argument in the defendant's brief that the plaintiff ceased to be engaged in interstate commerce and

was engaged in intrastate commerce at the time of the accident and therefore comes under the Workmen's Compensation Act of New Jersey, we desire to call attention to the cases of *Erie R. R. Co. v. Szary,* 253 U. S., 86, and *Erie R. R. Co. v. Collins,* 253 U. S., 77, in addition to the cases already cited. The cases just cited are on the point that it is immaterial that the plaintiff was engaged in working on intrastate engines at the roundhouse provided his work also was on interstate engines. The mere fact that he was engaged in cleaning the fires from or building fires in an intrastate engine at one time and at another time had the same work with respect to an interstate engine does not affect in the slightest the applicability of the Federal statute, for his work was indiscriminately in both and therefore the Federal Act exclusively applies. In the Szary case the employee's duty was to dry sand with stoves in a small structure near the tracks and supply it to the locomotives, whether operated in one kind of commerce or the other, and he was injured while returning from the ash pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives. The Supreme Court, after holding that he was engaged in interstate commerce, said (p. 89):

> "We think these facts bring the case within the *Collins* case and the test there deduced from prior decisions. There were attempts there, and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. Indeed something is attempted to be made of an omission, or an asserted omission, in the evidence, of the kind of commerce in which the last engine served was engaged. The distinctions are too artificial for acceptance. The

acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character."

It was the duty of defendant to give plaintiff warning of approach of train and from the nature of the accident, there is a presumption that no such warning was given.

In *Albanese v. R. R.*, 41 Vroom, 241, Mr. Justice Dixon speaking for a unanimous Court of Errors and Appeals of the circumstances under which one may reasonably expect, in the absence of custom, a warning by audible signal, said: *"But no such custom is necessary when the person controlling the cause of danger perceives the peril and has reason to believe that it cannot be escaped unless he gives warning."* The case *sub judice* fell clearly within this rule, if plaintiff's statement of the circumstances in which he was set to work was believed by the jury. *It is further held in that case that a right to a warning may arise from* (1) *custom,* (2) *usual condition and* (3) *exceptional conditions.*

Whether the accident happened as the plaintiff says it happened seems to us to have been a question for the jury, and we think the question of negligence of the defendant was properly for the jury.

Santomassimo, Adm. v. N. Y. S. and W. R. R. Co., N. J. L., 92, pages 10-11-12.

"Where an employee of a railroad company, while at work upon the tracks, in endeavoring to get out of the way of a passenger train, stepped in front of a freight train upon an adjacent track and was killed, and there was evidence from which the jury was justified in find-

ing that the signal of the approach of the passenger train was not given until it was so close to the employe that he was compelled to act without having time to consider or observe whether it would be dangerous to step over on to the freight track.

"Under the Federal Employers' Liability Act, an employee does not assume the risk which arises out of the negligence of a fellow employee.

"The proofs showed that while the decedent was walking upon the eastbound passenger track of the defendant company, inspecting the rails, a passenger train approached him from the rear, and, as it approached, blew a warning whistle; that almost immediately after the whistle was blown the decedent stepped off the passenger track over on to the eastbound freight track, just in time to be struck by the engine of a freight train traveling thereon.

"We think that the jury was justified from the proofs submitted in finding the following facts:

'1. That it was the custom in the operation of the defendant company's trains, to give a warning signal, consisting of several short blasts of the whistle, whenever anybody whether an employee or stranger, was seen walking on the track in apparent unconsciousness of the approach of a train.'

"*If the jury found these facts it was then for them to determine whether the engineer of the passenger train was not guilty of negligence in failing to give the warning signal to Di-Pierro soon enough to enable him to discover whether it would be dangerous to step over on to the freight track.* The presumption is that the jury resolved all of these factors against the defendant company, and we cannot say that

they were not justified in doing so under the evidence submitted to them."

In *D. L. & W. R. R. Co. v. Hughes,* Circuit Court of Appeals, 2nd Circuit, 240 Fed. Rep., 941, it was held:

"In an action under Employers' Liability Act, April 22, 1908, c. 149, 35, Stat. 65 (Comp. St., 1913, 8657-8665), for the death of a railroad switchman, evidence held to warrant the jury in finding that the defendant was negligent *in failing to give sufficient warning to the switchman of the approach of the car which killed him.*

"The fact that a switchman, who had been employed in the same railroad yard for 25 years and who must have been thoroughly familiar with the movement of trains therein, and with all the customs of the yard, was run down and killed in the yards, by a car, raises the presumption that some abnormal and unexpected condition prevailed, since it is contrary to ordinary intelligence that such a man would have remained on the track if adequate warning had been given.

"It is the duty of the railroad company to give adequate warning to a switchman on the track in its yards of the approach of a car.

"There was a clear question of fact to be decided and that there was sufficient testimony to sustain the verdict for the plaintiff.

"We are convinced that there was a question of fact for the jury and their verdict is sufficiently supported by the testimony. Thomas Hughes was employed as switchman by the defendant in its Syracuse yard for 25 years. *He must have been thoroughly familiar with the situation and familiar with the location of the*

tracks, the movement of the trains and all the customs of the yard. That such a man should be run down and killed at a place where he knew every detail of the premises and of the methods employed raises a presumption that some abnormal condition prevailed which was not to be expected, which he could not have foreseen and which he was not required to guard against by taking extraordinary precautions. That such a man would have remained on the track if an adequate warning had been given is contrary to all the impulses which govern the conduct of men of ordinary intelligence.

"It was the duty of the defendant to give adequate warning of the approach of the car.

"While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty independent of statute or rule, on the part of those in charge of such moving engines to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case."

(b)

The plaintiff was not a trespasser.

It appears from the testimony that plaintiff had continuously each day at the same hour, for a period of several months, without any protest or objection by the defendant, walked along the defendant's tracks at the place where he was injured, while on his way to take a train of the defendant at the 22d Street Station, to be transported to his place of

work, and that this was the general custom not only for the plaintiff but for many other employees of the defendant to walk along the tracks at that point in going to the 22d Street Station, and that this was done without any protest or objection and without any signs or notice being posted forbidding the employees to use the tracks for that purpose.

"A person entering premises of right or by invitation, expressed or implied, and using a path which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner, across the path, solely on the ground that the owner has provided another way that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use (*Phillips v. Library Co.*, 55 N. J. L., 307, 308, 318-319)."

"An implied invitation creating the obligation to use reasonable care arises from the conduct of the parties, and *its essence is that the owner knew or ought to have known that something he was doing or permitting to be done might give rise to a natural belief that he intended that to be done which his conduct had led plaintiff to believe he had intended. Furey v. N. Y. C. etc., R. Co.*, 67 N. J. L., 270; *York v. Canada Atl. S. Co.*, 22 Can. Sup. Ct., 167. 29 *Cyc.*, 454."

"Where there has been a custom for persons to enter on premises for certain purposes with the acquiescence of the owner, an invitation will be implied. 29 Cyc., 457."

In *Coyne v. P. R. R. Co.*, 55 N. J. Law, 318, the Court held:

"The defendant insisted that the plaintiff occupied the status of a trespasser, or at most that of a mere licensee, with duties upon the part of the plaintiff and obligations upon the part of the defendant correspondingly co-extensive. But if the plaintiff's legal status be viewed in the light of the peculiar circumstances which on the night in question occasioned his visit to the premises, *it may well be that the jury might ascribe to him the status of a licensee or an invitee.* They might fairly infer that the long continued course of conduct which he pursued was not only known to both railroads using the station, and to the Long Branch Railroad, but was acquiesced in by them as a usual and necessary incident of the railroad business, from which an implied invitation to so use the premises might be said to exist. 29 Cyc., 457 cases cited. *Christopher v. Russell,* 28 Am. & Eng. An., cas. & Notes 564.

"So it has been that one who goes upon the vehicles or premises of a carrier to transact business with it, or its agents, or to transact business in the operation of the road, or who is there by invitation of the carrier, express or implied, is lawfully there, and *the carrier owes him the duty at least of using reasonable or ordinary care for his safety.* 4 R. C. L., 502 and cases cited.

"If we accord to the deceased, the status of a licensee the duty upon the part of the owner of the premises extends no further than to refrain from acts wilfully injurious. *Phillips v. Library Co.,* 26 Vr., 307.

"This situation makes it manifest that the issue presented was essentially one of fact.

"*The solution of an inquiry of that nature has repeatedly been determined by this Court to be the office of the jury and not of the Court* 55 N. J. L., 318.

"When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. At the time of the injury, the servant is properly and necessarily upon the premises, of the master for the sole purpose of his employment. The relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. *The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task.* In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants. The Court reviewed other assignments, and finding no error in the record, affirmed the judgment. *Philadelphia B. & W. R. Co., v. Tucker,* 55 App. Cas. (D. C.) 123, L.

R. A., 1915, C. 39 (1910), aff'd 220 U. S., 608, 55 L. Ed., 607 (1911)."

11 Negligence & Comp. Cases, pp. 116-117-118.

Duty to Trespassers.

If the plaintiff was a trespasser at the time and place when injured, the defendant was not justified in causing injury to him.

It appears from the evidence that the plaintiff was injured when he was about five feet on to the bridge crossing 22d Street. This bridge is about twenty feet in length and on the outside of it there is an iron fence or railing and there is a distance of but three feet between the track on which the train was running and this fence. He was struck at 2:15 P. M. in broad daylight and his position on the tracks was one which was plainly to be seen by the engineer of the train which struck him, running along upon a straight and unobstructed track and with an unobstructed view of plaintiff and his place of danger.

See 8 Negligence & Comp. cases, page 46, Note 1.

"A judgment for plaintiff was affirmed on writ of error, the Court holding that while decedent was a trespasser upon the track, defendant's employees upon discovering his peril, owed him the duty not to wantonly injure him, and that defendant was liable for the injury which naturally and proximately flowed from the engineer's wrongful act. *Chesapeake & O. R. Co. v. Hawkins*, 109 C. C. A., 258, 187, Fed., 568 (1911)."

8 *Neg. & Comp. Cases*, page 159, Notes. See also, page 46, Note 1, above referred to.

"To the trespasser no duty is owing except to exercise ordinary care to avoid injury to him after his peril is discovered; while to the licensee, that is, a person having the right to use the track, there is due the duty of lookout, warning and reasonable speed. *Louisville, H. & St. L. R. Co. v. Lyons*, 146 Ky., 603, 143, S. W., 31."

41 *L. R. A. (NS)*, page 265.

The answer of the defendant alleges plaintiff was a licensee.

"That while the right of way is private property with all the rights and incidents of ownership and control in the company, nevertheless, it must be used and enjoyed with due regard for the safety of others, who with full knowledge and without objection, are permitted to use the right of way for passage."

41 *L. R. A. (NS)*, page 266.

"*Generally, whenever railroad train operatives are approaching places where they have reasonable grounds to anticipate the presence of trespassers in places of danger on or near the track, there is imposed the duty upon them to keep a careful lookout and to be on the alert to anticipate their presence.*"

41 *L. R. A. (NS)*, page 267.

In this case the engineer of the train could see the plaintiff on the track before he struck him.

"*In case of employees of independent contractors doing work upon a railroad and walking upon it to and from their work, they are reasonably to be expected upon the track, and*

are not trespassers, but licensees, and the company is under a duty to take reasonable care to discover them. Norfolk & W. R. C. v. Denny, 106 Va., 383, 56 S. E., 321."

41 *L. R. A. (NS),* page 270.

"But where an accident happened on the main track of a railroad upon a trestle within yard limits, and the evidence showed that a plank walk had been permitted to remain across this trestle for five years and had been used generally by the public, *it was held sufficient to go to the jury on the question of the duty of the company to anticipate the presence of persons thereon. Williams v. Southern R. Co.,*—Ga. App., 75 S. E., 572."

41 *L. R. A. (NS),* page 271.

In *Chunn v. City & S. Ry. Co.,* 207 U. S., 302, 52 Law Edition, page 219, the U. S. Supreme Court held:

"The negligence of one who carelessly places himself in a position exposed to danger cannot as a matter of law, be said to be the proximate cause of an injury, if his negligence was discovered in time to avoid the injury by the use of reasonable care and such care was not exercised, that failure might be found to be the sole cause of the resulting injury."

(*Inland v. Tolson,* 139 U. S., 551, 35 Law Ed., 270; *Grand Trunk R. Co. v. Ives,* 144 U. S., 408-429, 36 Law Ed., 485-493; *Washington & G. Ry. Co. v. Harmon,* 147 U. S., 571-583, 37 Law Ed., 284.)

"KNOWLEDGE OF PRESENCE OF TRESPASSER. *A person cannot escape liability for negligence*

merely because the person injured was a trespasser, where before the commission of the negligent act the presence of the trespasser was known to him or ought to have been known, and by use of ordinary care defendant might have avoided the injury."

Norwood v. Raleigh R. Co., 111 N. C., 236;
29 *Cyc.*, 443.

In *Coyne v. P. R. R. Co.*, 55 N. J. Law, 318, the Court held:

"Upon that theory the defendant insisted that the plaintiff occupied the status of a trespasser, or at most that of a mere licensee, with duties upon the part of the plaintiff and obligations upon the part of the defendant correspondingly co-extensive. But if the plaintiff's legal status be viewed in the light of the peculiar circumstances which on the night in question occasioned his visit to the premises, it may well be that the jury might *ascribe to him the status of a licensee or an invitee. They might fairly infer that the long continued course of conduct which he pursued was not only known to both railroads using the station, and to the Long Branch Railroad, but was acquiesced in by them as a usual and necessary incident of the railroad business, from which an implied invitation to so use the premises might be said to exist."*

29 *Cyc.*, 457, and cases cited;
Christopher v. Russell, 28 Am. & Eng., An. cas. and notes, 564.

"One who is there by invitation of the carrier, express or implied, is lawfully there, and

the carrier owes him the duty at least of using reasonable or ordinary care for his safety."

4 *R. C. L.*, 502, and cases cited.
Jansen v. Jersey City, 61 L., 243;
Travisano v. Stefanelli, 84 L., 764.

"This situation makes it *manifest that the issue presented was essentially one of fact.*

"The solution of an inquiry of that nature has repeatedly been determined by this Court to be the office of the jury and not of the Court."

Guinn v. Del. & Atl. Tel. Co., ubi supra;
Munroe v. P. R. R. Co., 90 Atl., 254.

In *Albanese v. Central R. R. Co.*, 70 N. J. L., 242, the Court of Errors and Appeals held:

"In the present case the fact that there was no custom to give signals and that no instructions were issued to workmen about the approach of trains may have resulted from a belief that, ordinarily, the workmen were exposed to no danger which, with reasonable care they could not avoid, that, ordinarily, they could 'look out for themselves' but it surely would not induce a workman to expect that, *if he were actually working on the track in such a position as prevented his seeing an approaching train,* the engineer of the train, having the workman in sight, would fail to sound a warning and so run him down. *Such exceptional conditions required and therefore justified the expectation of an audible signal, whether signals were customarily given or not.*

"It thus becomes evident that, when Agostino, in the discharge of his duty, placed himself in a position of danger which would be apparent to the engineers of approaching trains,

he had a right to expect a warning from those engineers. If there be a right to expect a warning, it makes no difference in principle whether the right springs from custom, as in Harmer's case, or from usual conditions, as in Hardy's case, or from exceptional conditions, as in the present case, and under such circumstances questions concerning the assumption of risk and contributory negligence cannot be decided by the Court against the party injured. They are for the jury.

"The question of the duty of a train operated, approaching places where they have reasonable ground to anticipate the persons trespasses their duty to keep a careful lookout, is fully set forth in the notes of *Martin v. Hughes Creek Coal Co.*, 41 L. R. A., new series, page 267, and which note a large number of cases in various states, recited, among others, as follows:

"One walking alongside the track on a well-beaten path, where the general public have been accustomed to walk for many years without objection from the company, is a licensee, and the question whether those operating a train backwards at such a place should anticipate the presence of people upon the tracks is for the jury whether in a switch yard or elsewhere. *Sanders v. Southern R. Co.*, 90 S. C., 331, 73 S. E., 356.

"If a workman who, in the discharge of his duty, has placed himself in a position of probable danger, *where he has the right to expect a warning before the danger becomes actual.* is injured because of the warning not being given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided against him by the Court."

"Duty of railroad company to use care not to injure trespasser, and liability for failure to discover presence of person in place of danger, see *Myers v. Boston & M. R. R. (N. H.)* 15 Am. Neg. Rep., 119. For further authorities on this question, see *Am. Neg. Cas. Digest*, page 365, and *Am. Neg. Rep. Digest*, pages 675-680, 1059.

"The plaintiff was injured negligently as he claimed, by one of defendant's trains striking him as he was trespassing along the track. The negligence complained of was the failure to give the plaintiff warning and failure to stop the train in time to avoid the injury. The jury returned a verdict for the plaintiff. *The Court said, in effect, that the fact that the plaintiff negligently placed himself in a place of peril will not defeat recovery, if defendant's servants discovered his negligence for such a length of time before injury that they could have avoided injuring him by exercising reasonable care. Clemens v. Chicago, R. I. & P. R. Co.*, 163 Iowa, 499 (1913).

"The defendant owed him no duty other than to use ordinary care in the exercise of all reasonable means at its command, consistent with the safety of the train, to avoid injuring him after his peril was discovered. But the Court ruled that the defendant's motion for a peremptory instruction was properly denied as there was evidence tending to show that the engineer did not sound a warning whistle and hence did not use the means at his command to prevent the injury. The judgment was affirmed. *Cincinnati, N. O. & T. P. R. Co. v. Jones' Adm'r.*, 166 Ky., 817 (1915).

"In this case the only question involved was whether those in charge of the train used ordi-

nary care to prevent injuring the decedent after his peril was actually discovered. The judgment was affirmed. *Millers' Adm. v. Illinois Cent. R. Co., (Ky)*, 118 S. W., 348 (1909)."

11 *Neg. & Comp. Cases*, pages 464-465-466-467.

The plaintiff was not a trespasser at the time and place of the accident but on the contrary was impliedly invited by the defendant to use the way where he was injured.

We shall not reiterate the argument made in Point I which, if sustained, disposes of this question. At page 23 of the Defendant's Brief, it is argued that Section 55 of the General Railroad Act is applicable. We submit that by the very terms of that section it has no application, for it specifically says (3 Comp. Stat.):

> "It shall not be lawful for any person *other than those connected with or employed upon the railroad* to walk along the tracks, etc."

Section 55 of the Railroad Act specifically exempts from the provision of the Act *all persons employed upon or connected with the railroad.* The Act making a distinction between the man *employed upon* a railroad and one *not employed* upon a railroad, *but connected* with it.

That section precludes a recovery by "any person other than those *connected with or employed upon the railroad* walking along the track of any railroad."

If the Court determines that at the time of the accident the plaintiff was not *employed* upon the railroad yet it specifically appears that *he was* connected with the railroad. He was on his way to a

depot or station of the railroad at 22nd Street, to be from there transported by an employee's annual pass on one of the trains from the 22nd Street depot to his place of work at Elizabethport. He had been for months in the employ of the company at that place and when injured was about 225 feet from the depot where he was to take the train of the defendant to his work (see Ans. Int. 2, p. 36 case). His work was that of cleaning fires from engines at Elizabethport (see Ans. Int. 18, p. 38 case), when he reached there. His hours of work were from three to eleven o'clock at night (p. 40 case) and he was injured at 2:15 o'clock while on his way to the depot to take the train (p. 109 case). If the plaintiff was not employed upon the railroad at that time, he most certainly *was connected with the railroad* at that time, and furnished with an employee's annual pass, and if *connected with* the railroad he is exempt from the provision of the Railroad Act. The plaintiff had been in the employ of the defendant for three to four years (p. 113 case), before the accident.

The question as to plaintiff being a trespasser at the time of the accident could not have been decided by the Court on a motion for a direction of a verdict as it was a question of fact for the jury.

Valenti v. Blessington, 98 N. J. Law, 499.

This statute is penal in its nature and, therefore, must be strictly construed. The phraseology "connected with or employed upon" the railroad is very comprehensive. It does not say that the employee or person connected with the railroad must actually at the moment when the accident happens be employed in the specific work assigned to him. If the person is in any way connected with, or employed upon the railroad, Section 55 does not apply

to him. Counsel for the defendant seem to think that the exception in the statute applies only to such employees as track walkers, track repairmen and railroad workers of a similar nature. It is our contention that it has a broader signification, and that, as its very language says, it applies "to any person connected with or employed upon the railroad" and any such person is not forbidden to walk along the railroad during the course of his work or while going to or returning from work in the usual and customary way.

The Statute says that it shall not be lawful for any person other than those excepted to walk along the railroad, therefore, it impliedly says that it is lawful for any person connected with or employed upon the railroad to walk along the tracks.

It is well settled that the owner or occupier of lands who, by invitation expressed or implied, induces persons to come upon the premises is under duty to exercise ordinary care to render the premises reasonably safe for such purposes, or to at least abstain from any act that will make the entry upon, or use of the premises, more dangerous. The gist of the liability in such cases consists in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared *or* allowed to be used.

Phillips v. Library Co., 55 N. J. L., 307;
Nolan v. Bridgeton & M. T. Co., 74 N. J. L., 559;

Selfer v. Vanderbeek & Sons, 88 N. J. L., 636;
MacDonough v. Woolworth Co., 91 N. J. L., 677;
Fineberg v. Public Service Ry. Co., 94 N. J. L., 55.

In *Phillips v. Library Co.*, 55 N. J. L., 307, *supra*, the Court of Errors and Appeals held:

"A person entering premises of right or by invitation, expressed or implied, and using a path which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner across the path, solely on the ground that the owner has provided another way that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were *invited* to use."

At page 314, the Court said:

"In *Holmes v. N. E. Ry. Co.*, L. R., 4 Exch. 254, a workman going into the private grounds of a railroad company to assist in unloading coal was allowed to recover damage for an injury sustained by the insecurity of a flagged path in the yard. Channel, B., in expressing his judgment, said: 'The real difficulty is not in ascertaining what the law is, but in applying it to the facts in the case. I quite concur in the rule laid down by the cases, that where a person is a mere licensee, he has no cause of action on account of dangers existing in the

place he is permitted to enter. Now, in one sense, the plaintiff was a *mere* licensee, and the word *mere* has a very qualifying operation.' The learned judge then held that the fact that the plaintiff was upon the premises for the *transaction of business* 'prevents the case from being one of mere licensee.' Cleasby, B., Said: 'The question of mere license does not arise; for, as soon as you introduce the element of business, *which has its exigencies and its necessities, all idea of mere voluntariness vanishes.*' This case was affirmed in the Court of Appeals, L. R., 6 Exch. 123.

"In some of the cases the phrase 'accustomed use' is employed or dwelt upon as indicative of the circumstances under which such a liability is imposed. This expression in its broad sense is apt to be misleading, for it would apply to the case of an owner who suffers his land to lie waste over which the public, by his passive acquiescence, is permitted to pass and repass at pleasure; a condition under which it is well settled that no liability is imposed on the owner for the safety of the premises. Indeed, it is impracticable to lay down any precise rule, in set terms, which shall embrace all the cases within and exclude all the cases without the range of an owners' liability for such injuries. The utmost that can be done is to state in general terms the controlling principle that the liability of an owner or occupier for the condition of his premises arises where the plaintiff was induced to make the use of the premises, in the course of which he sustained the injury sued for, by express invitation, or by invitation to be implied from acts and conduct of the defendants. The gist of the liability consists in the fact that the

person injured *did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used. Sweeny v. Old Colony R. R. Co.,* 10 Allen 368, 374. The proof necessary to sustain an action of this aspect must be found in the circumstances of the particular case. In such cases, if there be evidence tending to show inducement or invitation, it becomes a question of fact for the jury whether the conditions exist under which a legal duty is imposed upon the owner of the premises to exercise care for the plaintiff's safety."

In *Nolan v. Bridgeton & M. T. Co.,* 74 N. J. L., 559, *supra,* the same court held:

"A person entering premises by invitation, express or implied, and using a road which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner in the road, solely on the ground that the owner had provided another way that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the road taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which, by its use and appearance, indicated a way that persons so using the premises were invited to use.

"Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue should go to the jury."

In that case, the plaintiff for another person had delivered certain ladders to the defendant. After making delivery, he started to leave the premises by an old road which extended across the defendant's premises and which he and others had frequently used before, presumably with the knowledge of the company. In this old road there happened to be a hole which the plaintiff did not observe, with the result that he was injured. The Court held that he was not a trespasser but, on the contrary , was entitled to the exercise of reasonable care on the part of the defendant.

In *Selfer v. Vanderbeek & Sons*, 88 N. J. L., 636, *supra*, the same court held:

"In passing upon a motion for a directed verdict, the Court cannot weight the evidence, but is bound to concede to be true all evidence which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.

"An owner or occupier of premises who by invitation, express or implied, induces a person to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation, and this includes the duty to use ordinary care to have the railing of a balcony on the premises in a reasonably safe condition for the purpose for which it was used and intended to be used.

"Plaintiff's intestate was on defendant's premises on business in which both the deced-

ent and defendant had an interest and he was there by the express invitation of defendant's servants, who referred him to defendant's superintendent in a matter relating to defendant's business."

In *MacDonough v. Woolworth Co.*, 91 N. J. L., 677, *supra*, the Court of Errors and Appeals held:

"The implied invitation of the storekeeper is broad enough to include one who enters a general store with a vague purpose of buying if she sees anything that strikes her fancy.

"The question of invitation to a customer to enter the space in a store back of the counters, obviously reserved for the sales-employees to work, is for the Court, because in the absence of other circumstances there is no evidence of invitation.

"Where, however, there was through the counter an opening or passageway leading to a small book-rack against the wall filled with books with the titles displayed for selection and so dimly lighted that it was necessary to enter the passageway to read the titles and make selections—HELD, that such circumstances constituted some evidence of implied invitation, and that a jury question consequently arose, although the testimony showing the circumstances was undisputed."

In *Fineberg v. Public Service Ry. Co.*, 94 N. J. L., 55, *supra*, the plaintiff was not even an employee, but seeking employment, and the Court of Errors and Appeals held:

"Under the terms of the agreement under which the plaintiff was working at the time of the accident, he was not an employee of the defendant, nor was he a mere licensee. The po-

sition he accepted was akin to the relationship created and defined at common law in the law of bailments, to which the civil law applied the term of *mandatum,* in which the relationship is created by agreement, but is substantially gratuitous, and in this situation the defendant was under the legal obligation to exercise due care under the circumstances surrounding the accident."

At page 57, this Court said:

"That the situation here presented involves more than the possession of a mere license, which usually inures only to the benefit of the licensee, without any reciprocal benefit to the licensor, must be obvious from the fact that a tentative or conditional agreement existed between the parties, which was expected by its terms to ripen into a contract of service, mutually beneficial to both, and from which would be finally evolved, the legal status of master and servant.

"Such a situation manifestly presents a case of mutual express invitation, where benefit from the relationship created and defined at common law in the law of bailments by Lord Holt in *Coggs v. Bernard,* 2 *Id.* Raym. 909, and subsequently emphasized by Judge Story in his work on *Bailments,* and to which the civil law applied the term *mandatum,* in which the relationship is created by agreement, but is substantially gratuitous or without consideration. 2 *Street Leg.* L., 278.

"Chancellor Kent, in treating of the care required in such a situation, quotes Sir William Jones as authority for the rule, that, the mandatory is 'bound to use a degree of diligence and attention adequately to the performance of his undertakings.' 2 *Kent Com.,* 570.

"This statement manifestly is but an elaboration of our modern definition of due care under the circumstances; and thus Chancellor Kent further elaborating the doctrine, says, 'It is conceded in the English as well as by the Roman Law, that if a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance.'" *Ibid.*

It is undisputed that for years the plaintiff twice daily, together with other employees, had continuously throughout his employment customarily used the way, which he was using at the time of the accident, over the defendant's premises, in order to reach his work and home, and that there had been no protest or objection to the practice on the part of the employer and no warning by sign or otherwise against the practice. The plaintiff did not merely act on motives of his own, to which no act or sign of the owner or occupier, namely the defendant, contributed, but on the contrary he was led by the acts and conduct of the other employees which were permitted by the defendant, to believe that the premises were to be used in the manner in which he used them and such use was not only acquiesced in by the defendant, but the defendant allowed the premises to be used in that way without objections of any kind.

We respectfully submit that under the cases cited in this point, as well as the *Tucker* and other cases cited in Point I (keeping in mind that the plaintiff was an ignorant foreigner, merely doing what other employees were doing and had been doing for years under the same circumstances), the plaintiff was not a trespasser but was at the place where he was injured as a matter of right or, to say the least, it

was a question of fact for the jury to determine. His position on the railroad at the time when he was injured was but an incident of the business he had with the company. In such a case it was a question of fact whether the way taken by the plaintiff had, by its accustomed use with the knowledge of the defendant, which could be inferred from the circumstances, become a way which by its use indicated that the persons so using it were impliedly invited to use it; and, as stated in the *Nolan* case, *supra,* where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue must go to the jury.

As stated in *Phillips v. Library Co., supra:*

> "In such a case it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use."

Also as stated in the *Tucker* case in Point II:

> "This opening was upon the premises of the defendant, and, of course, under its control. Had the defendant desired to prevent the use of this opening and the tracks adjacent thereto as a means of access to and exit from its Annex, yard, and roundhouse, it might easily have done so; but no precautions whatever were taken to prevent such use. The long-continued practice fully justified the inference that this was with the knolwedge and consent of the defendant."

(c)

Assuming that the plaintiff was a trespasser or a mere licensee, the defendant owed him the duty to refrain from wilful or wanton injury and the testimony shows that it violated that duty

The complaint in both counts alleges a wilful or wanton injury as follows (p. 12, ll. 20-30):

> "12th. That the defendant negligently omitted its aforesaid duties in that it operated one of its engines and trains at said time and place in a wilful, wanton, malicious, dangerous and reckless manner, and at a high and excessive rate of speed, and, without giving the customary and usual notice, or any signal or notice whatever, of its approach at or about Twenty-second Street, as aforesaid. The defendant was also negligent in this: That the servants and agents of said defendant in charge of said engine and train after discovering the position of the plaintiff in time to avoid injuring him, nevertheless wilfully, wantonly and maliciously failed to exercise ordinary care to do so."

The testimony in the case at bar, which will be referred to in a moment, was that the defendant's engineer saw the plaintiff when he was 100 feet ahead of the engine, that at that time the engine was moving very slowly; that plaintiff was walking along the track in the same direction in which the engine was going, with his back to the engine, that no audible signal by bell or whistle of any kind was given by the engineer; that there were seventy cars in the train behind the engine, all of which were equipped 100% with airbrakes; that there was an up-grade in the direction in which the en-

gine was going and that it could have been stopped by merely throwing a lever within ten or twenty feet and the time consumed would be but a second or two.

We submit that, if these facts were proven at the trial, the injury to the plaintiff was the result of the wilful or wanton conduct of the engineer in operating his engine in a reckless manner. If the engineer discovered the position of the plaintiff in time to avoid injuring him and nevertheless failed to give him any warning by bell or whistle of the approach of the engine and failed to stop the train when he had ample time to do so after discovering the position of the plaintiff, the case clearly comes within the rule making the defendant liable even to a trespasser or mere licensee, because of the violation of the duty to refrain from a wilful or wanton injury.

WILFUL INJURY.

It is a question of fact for the jury if the accident was due to a wilful injury. *Rafferty v. Erie R. R. Co.*, 66 N. J. Law, 444, 448, 449. *Lerner v. Public Service Rwy. Co.*, 83 N. J. Law, 64 and cases cited. If the engineer saw or by reasonable diligence could have seen the plaintiff in time to stop the train before striking him, the jury were justified in finding that the accident was due to a wilful act of the engineer. If he could have stopped the train and did not do to, the striking of the plaintiff was a wilful act of the engineer.

> "The case of *Albaness Adm. v. R. R. Co.*, 41 Vroom, 241, holds that 'if a workman who, in the discharge of his duty, has placed himself in a position of probable danger, where he has the right to expect a warning before

the danger becomes actual, is injured because the warning is not given, the question whether he assumed the risk or was guilty of contributory negligence can not be decided against him by the Court.' And, in that case Mr. Justice Dixson, speaking for a unanimous Court of Errors and Appeals of the circumstances under which one may reasonably expect, in the absence of custom, a warning by audible signal, said: *'But no such custom is necessary when the person controlling the cause of danger perceives the peril and has reason to believe that it cannot be escaped unless he gives warning.'* The case *sub judice* falls clearly within this rule, if plaintiff's statement of the circumstances in which he was set to work was believed by the jury. It is further held in that case that a right to a warning may arise from (1) custom, (2) usual condition and (3) exceptional conditions. This case may well be classified under the third division. Nothing has been said in my statement of reasons about this case having arisen under the Federal Employers' Liability Act, and it being consequently controlled by the Federal decisions and not by those of this state."

In *Rafferty v. Erie R. R. Co.*, 66 N. J. Law, 444, 448, 449, the Supreme Court held that it was a question to be left to the jury, the Court saying:

"The question of the fireman's negligence, as a proximate cause of the collision, was fairly raised by the testimony, *and was properly submitted* to the jury. He charged it to be the duty of the engineer and fireman, if they see that there is possible danger of collision, to exercise reasonable diligence and reasonable care to avoid it. That such a duty devolves,

under the law, upon the company's servants there can be no question.

"Each must make reasonable and proper efforts, in view of the circumstances to foresee and avoid collisions, and each may, to a limited extent, rely upon the other to exercise such ordinary care. 3 *Ell. R. R.*, 1153, and cases.

"Every precaution should be used by both the driver of the train and persons traveling in their own conveyances to guard against coming in contact. *Runyon v. Central R. R. Co.*, 1 Dutcher, 556."

In *Vandegart v. Redeker*, 22 N. J. Law, 189, the Court held:

"Nothing but wilfulness on the part of the engineer, or such negligence as would amount to wilfulness would make him liable. * * * It was properly admitted by counsel, that had the injury been wilful, the defendant would have been liable and undoubtedly such is the rule."

In *Taylor v. L. V. R. R. Co.*, 87 N. J. L., 673, the Court held that the duty of the driver of the automobile and of the engineer of the approaching train, in the exercise of reasonable care, was to use every reasonable precaution to guard against coming in contact; also that it was the duty of the engineer, if he saw that there was a possible danger of collision, to exercise reasonable care and diligence to avoid it by stopping his engine. In that case it was held that all questions were for the jury.

See also:

Brien v. D. U. Ry. Co., 247 Fed., 693, and
Smith v. B. & O. R. Co., 210 Fed., 414.

In the latter case it was held that the engineer of a train is under no duty to keep a lookout for

trespassers unless he has reason to expect them on the track, but *he is under the duty to use due care to avoid injury to a trespasser whom he sees on a track* in a condition or situation indicating his inability to take care of himself. The Court held that a finding that the engineer of a train saw a child five years old on the track running ahead of the train in time to stop authorized a finding of negligence if he failed to at once use every effort to stop the train. It was also held sufficient to require the submission to the jury of the question whether the engineer of a train saw a child on the track and was negligent in failing to apply the brakes at once.

In *Woodruff v. N. P. R. Co.*, 47 Fed., 689, it was held that a complaint which alleged that a child, while trespassing on a track of a railroad, was intentionally or wantonly injured, states a cause of action.

It appears by the answers of the defendant to the interrogatories of the plaintiff that the engineer of the defendant's train which struck the plaintiff saw the plaintiff when he was outside of the railroad tracks and east of the Twenty-second Street bridge and that the engineer first blew the whistle when plaintiff was seventy-five to one hundred feet distant from the engine. From this it appears by defendant's answer that the position of the plaintiff was known and discovered by the engineer when the train was from seventy-five to one hundred feet distant from him.

In *Chunn v. City & S. Ry. Co.*, 207 U. S., 302, 52 Law Edition, page 219, the U. S. Supreme Court held:

> "The negligence of one who carelessly places himself in a position exposed to danger cannot as a matter of law, be said to be the proximate cause of an injury, if his negligence was dis-

covered in time to avoid the injury by the use of reasonable care and such care was not exercised, that failure might be found to be the sole cause of the resulting injury."

Citing:

Inland v. Tolson, 139 U. S., 551, 35 Law Ed., 270;

Grand Trunk R. Co. v. Ives, 144 U. S., 408-429, 36 Law Ed., 485-493;

Washington & G. Ry. Co. v. Harmon, 147 U. S., 571-583, 37 Law Ed., 284.

"Contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequence of the injured party's negligence. *Inland v. S. C. Ry. Co. v. Tolson*, 139 U. S., 551 558, 35 Law Ed., 270-272."

"KNOWLEDGE OF PRESENCE OF TRESPASSER. A person cannot escape liability for negligence merely because the person injured was a trespasser, where before the commission of the negligent act the presence of the trespasser was known to him or ought to have been known, and by use of ordinary care defendant might have avoided the injury."

Norwood v. Raleigh R. Co., 111 N. C. 236;

29 *Cyc.*, p. 443.

And in still another case:

"The plaintiff was injured negligently as he claimed, by one of defendant's trains, striking him as he was trespassing along the track. The negligence complained of was the failure to give the plaintiff warning and failure to stop

the train in time to avoid the injury. The jury returned a verdict for the plaintiff. The Court said, in effect, that the *plaintiff having negligently placed himself in a place of peril will not defeat recovery, if defendant's servants discovered his negligence for such a length of time before injury that they could have avoided injuring him by exercising reasonable care.* *Clemens v. C. R. Co.*, 163 Iowa, 499 (1913)."

And other Courts, in different states, have held:

"Actual discovery and realization by defendant of the plaintiff's danger in time to have averted the accident will sustain the doctrine of last clear chance and permit a recovery even though the gravamen of the action is negligence merely, and not wantonness or wilfulness, and plaintiff's own negligence must be deemed to have continued until the very instant of the accident, so that it was concurrent with that of the defendant. *Dyerson v. U. P. R. Co.*, 7 L. R. A. (N. S.) 132; *Neary v. N. P. R. Co.*, 19 L. R. A. (N. S.) 446; *S. R. Co. v. Bailey*, 27 L. R. A. (N. S.) 379; and the opinion in *Wilson v. Ill. C. R. Co.*, 34 L. R. A. (N. S.) 687."

36 *L. R. A., (N. S.)* 957-958;
Neary v. N. P. R. Co., 37 Mont., 461, 97 Pac. 944.

It is one of the contentions of the defendant that the plaintiff selected the more dangerous way to get to the Twenty-second Street Station when he might have proceeded down Prospect Avenue to Twenty-second Street, where he could have gone under the tracks and then up the stairway to the Twenty-second Street Station. Had he chosen this way, it would have required him to go a little further, but

the testimony is that the way he did choose was the customary and usual way for him and other employees of the defendant.

In passing upon a very similar state of facts it has been held:

> "It was not necessarily negligence for him to go to the nearest place; and that if the defendant was, in the opinion of the jury, negligent in going between the cars under the circumstances, such contributory negligence would not defeat the right of recovery, but only, as stated by the Trial Court, operate to diminish damages."

And the U. S. Supreme Court affirmed a judgment of a Court which held:

> "The act ordains that ('all questions of negligence and contributory negligence shall be for the jury').
>
> "Affirmed by the Supreme Court of the United States May 29, 1911, 220 U. S. 608, 55 L. Ed., 607, 34 Sup. Ct. Rep., 725."

In *Hopkins v. Southern R. Co.*, 11 Negligence & Comp. Cases, p. 404, the Court held:

> "It is not very material, as was said in Arrowood's case, whether the deceased was a trespasser or a licensee. The jury found the third issue as follows:
>
> " 'Notwithstanding such negligence on the part of the plaintiff's intestate, could the defendants by the exercise of due care and prudence have prevented the killing?'
>
> "To which the jury responded, 'Yes.' "
>
> "After full consideration of the whole case and the exceptions, we find no error."

In this case the Court instructed the jury:

"You are instructed that if from the evidence you find that the defendant's servants in charge of the engine either discovered, or by exercising ordinary care might have discovered, that the plaintiff was walking upon or alongside of the track and that the defendant's servants in charge of the engine could, by the exercise of ordinary care, have stopped the train and avoided the accident after seeing the plaintiff, or after they should have seen him, it was the duty of the engineer, in charge of said train to cause the train to come to a stop before injury to plaintiff, if you are satisfied from the evidence that the engineer of said train did see the position of the plaintiff before striking him and that could have brought the train to a stop before doing so."

Hopkins v. Southern Ry. Co., 11 Neg. & Comp. Cases, p. 404:

"It was the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution, and that his failure so to do was the proximate cause of the accident, then, the accident to the plaintiff was due to the negligence of the defendant. *Norfolk v. W. R. Co. v. Earnest* 229 U. S., 114 57 L. Ed., 1096, Ann. Cas., 1914 C. 172n (1913)."

7 Neg. & Comp. Cases, pp. 525-526.

In *Krysiak vs. P. R. R. Co.*, 270 Fed., 758 (Circuit Court of Appeals for the Third Circuit), the Court says, "Its duty is to exercise reasonable care to avoid injuring him after discovering his peril."

Texas &c. R. Co. vs. Modawell, 151 Fed., 421; 9 L. R. A. (N. S.) 646;
Tutt v. Illinois Central R. Co., 104 Fed., 741.

In *Staub v. Public Service Ry. Co.*, 97 N. J. L., 297, 300, the Court of Errors and Appeals defined a wilful or wanton injury as follows:

> "To establish a wilful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. 29 Cyc., 509. There is no evidence in this case that the motorman of the car could see the truck upon the track and after such discovery with ample opportunity to stop his car before a collision would occur, deliberately failed to do so. There was therefore no evidence of wilful or wanton injury which entitled the plaintiff to a submission of this question to the jury."

We respectfully submit that the case *sub judice* clearly comes within the definition of wilful or wanton injury just given. In 29 Cyc., 509 referred to in the *Staub* case, the rule is given as follows:

> "Wilful or Wanton Negligence (A) *In General.* The doctrine that contributory negligence will defeat recovery has no application

where the injury is the result of the wilful, wanton, reckless conduct of the defendant. In no case will the wilful neglect of a party be excused by the contributory negligence of the party injured unless his contributing fault is more than gross neglect and amounts to an intention of causing his own injury, which could not have been avoided by the exercise of proper care.

"(B) *What Constitutes.* To constitute a wilful injury the act must have been intentional, or the act or omission which produced it must have been committed under such circumstances as evinced reckless disregard of the safety of others, as by failure after discovering the danger to exercise ordinary care to prevent impending injury. In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. In order to establish wantonness it is not necessary to show an entire want of care."

It will also be noticed that the doctrine that contributory negligence will defeat recovery has no application where the injury is the result of the wilful or wanton or reckless conduct of the defendant. Therefore, Section 55 of the General Railroad Law referred to in Point II of this brief would have no application, and it was so held in the U. S. Supreme Court in *Erie R. R. Co. v. Hilt,* 247 U. S., 97, as follows:

"The statute (Section 55) seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some other states, that while a landowner cannot *intentionally* injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

Counsel for the defendant in their brief at page 26 attempt to distinguish a wilful injury from a wanton or reckless one, but such distinction is one without a difference, for a wanton or grossly reckless act is tantamount to wilfulness.

In 40 Cyc., 947, the term "wilful neglect" or "wanton injury" is defined as follows:

"Wilfulness and negligence are, it has been said, the opposite of each other; the one signifying presence of purpose, the other its absence. Nevertheless the term 'wilful negligence' or 'neglect' has come to have a settled signification in the law, and has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest. To constitute a wilful injury, the act which produced it must have been done under such circumstances as to evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

The rules of law applicable having been definitely ascertained, we shall now proceed to give the testi-

mony which we contend established a wilful or wan ton injury in this case, compelling a submission of the case to the jury on that theory.

The plaintiff testified that he walked from his home opposite the railroad directly to the railroad, and that from that point he walked between the rails of the outside track to the point where he was struck by the engine. By referring to photograph Exhibit P-6, his house can be identified because it has above it in ink 100 S, meaning 100 Prospect Avenue, the S standing for his name. He walked across the street and upon the railroad and across the tracks to the point marked "X," to the track at the extreme right of the photograph, and that point was about 500 to 600 feet from the bridge over Twenty-second Street, within a few feet of which he was struck by the engine (p. 108, ll 1-40). He was positive that he walked between the rails of the outside track, and on the ties (p. 109, ll. 10-30). He left his home at 2:10 P. M. and he was to get the 2:30 train from Twenty-second Street (p. 209, ll. 20-40). The accident happened at about 2:15 (p. 109, l. 40). His home was between Twenty-third and Twenty-fourth Streets, so that he was a block and a half from the station. When he went on the railroad, there was no train in the immediate vicinity, although he saw smoke coming from an engine at Twenty-eighth or Twenty-ninth Street, whether or not the engine was moving, he could not tell (p. 110, ll. 10-20). As he walked up the track for a distance of 500 feet, he heard no whistle or bell signal of any kind; the day was clear; the sun was shining and the ground was dry (p. 110, ll. 10-30). He was struck after he had walked five or six feet of the length of the bridge over Twenty-second Street, and he put a cross on Exhibit P-1 to show his position when struck by the engine (p. 111, ll. 10-30). The cross was put between the rails of the

track about five or six feet from easterly end thereof (See Exhibit P-1).

Carrol was on Avenue E, about half a block from the scene of the accident (p. 60, l. 30). He was a former railroad man, having worked as a brakeman for the Philadelphia & Reading for five or six years (p. 61, l. 20). He was waiting for a jitney bus with a number of other intending passengers (p. 64, l. 20). He was on his way to work at the Standard Oil Co. in Bayonne (p. 64, ll. 34-35). He left the railroad to better himself (p. 66, l. 10). When he first saw the engine it was going four or five miles an hour (p. 66, ll. 10-15). At that time he was sitting in the jitney bus, facing the railroad, waiting for the bus to start (p. 67, ll. 30-40). He saw the engine before it came to the bridge—just about as it was entering the bridge—was three or four feet from the bridge (p. 68, l. 4, p. 69, l. 10). When the engine stopped it was very near the Twenty-second Street Depot, so that it traveled a distance of approximately 225 feet (p. 36, ll. 20-25). He said that the brakes were not applied until the engine was almost at the Twenty-second Street Station (p. 69, ll. 20-25). He said he did not see the engineer put on the brakes, but heard them applied in emergency, and saw the cars in the train quiver and heard the usual noise made by the air as the brakes were applied (p. 73, l. 10 to p. 74, l. 20). He said that no audible signal by whistle or bell was given by the engine at any time during his observation of it (p. 62, ll. 30-40); and the day was clear (p. 63, l. 10).

Black was on Avenue E and Twenty-second Street, near the jitney stand (p. 75, ll. 20-30). He had been standing there about twenty minutes; he heard no audible signal by bell or whistle given by the engine; bright day (p. 76, ll. 10-20 to p. 77, ll. 1-10). He was employed by the City of Bayonne

(p. 77, ll. 1-20). On cross-examination, he was asked, "It didn't make any difference to you whether it blew its whistle or whether it didn't blow its whistle?" "I know it didn't blow any whistle or I could have heard it." Asked for a positive answer, he said, "It didn't blow. No, sir, it did not" (p. 78, l. 20 to p. 79, l. 10).

Wortzik was about to go under the bridge at Twenty-second Street at the time of the accident (p. 84, ll. 10-20). As she was going under the bridge she heard no whistle or bell from the engine at any time (p. 84, ll. 20-30). She said it was a very nice day (p. 85, ll. 10-20).

Pangborn, who took the photographs for the plaintiff and made the measurements, testified that the photograph, Exhibit P-6 was taken at a point 636 feet from the station, and at a point about opposite the plaintiff's home (p. 45, ll. 1-20).

Pach, civil engineer, testified that there was a slight up-grade along the track in question, namely, 3 in. every hundred feet of track, so that, starting from the point opposite the plaintiff's home, and going from that point to the bridge where the plaintiff was struck, there was up-grade all told of 18 in. or 1½ ft. (p. 134, ll. 20-30). The track is straight for two miles in the direction from which the engine approached (p. 134, ll. 30-40). In the other direction towards Elizabethport the track is straight for 2,000 feet (p. 135, ll. 1-10). The clearance between the outside rails of the track on which the plaintiff was struck and the side of the bridge over Twenty-second Street is 3 ft. 8 in. (p. 135, ll. 30-40). The distance from the near side of the bridge to the near side of the station was 162 feet and the width of the bridge 56 feet, so that from the far side of the bridge to the near side of the station, the distance was 218 feet (p. 136, ll. 1-10).

Nixon, the engineer, testified that he saw the

plaintiff when the engine was 100 feet behind the latter (p. 147, l. 40). That was the first time he saw the plaintiff, although the track was straight for at least two miles in the direction from which he approached, and he was looking ahead all of the time (p. 148, ll. 1-10). There was a slight up-grade in the track in the direction in which he was going but that did not interfere with his view up the track; he could not account for not seeing the plaintiff prior to the time when the plaintiff was only 100 feet ahead (p. 148, ll. 10-20). There were four men on the engine (p. 148, ll. 30-35). The train was going from Jersey City, New Jersey, to Allentown, Pennsylvania (p. 149, ll. 1-10). There were seventy empty freight cars in the train and each car was equipped with automatic air brakes, and there was a maximum pressure for that purpose on the entire train line, namely, 70 lbs. on the train line and 90 lbs. in the main reservoir. This air pressure was 100% for stopping the train and it had not been exhausted in any way (p. 149, ll. 20-30).

He was not talking with any of the other men; his attention was not distracted from the road and during the entire time from the start of the train at Jersey City until the moment of the collision he was continuously looking ahead along the tracks. That was his duty (p. 150, ll. 1-15). If there was a human being along the track, it was his duty to blow his whistle (p. 150, ll. 20-25). On direct-examination he testified that he started to blow the engine whistle when the plaintiff was 10 feet from the engine (p. 145, l. 40); at the same time he applied the emergency brakes (p. 143, l. 40). On cross-examination he testified that, when he first blew the whistle, the plaintiff was 75 to 100 feet from the engine, and that he was mistaken when he said on direct-examination that the plaintiff was

only 10 feet from the engine (p. 151, ll. 20-40). The engine was only going five or six miles when he struck the plaintiff (p. 153, l. 10). The air brakes in emergency can be applied in a moment by merely turning the valve or pulling the handle around (p. 153, ll. 10-20). Going at five or six miles an hour, and applying the emergency brakes, which he said he did when he first blew the whistle, he could stop in 25 feet (p. 153, ll. 20-30). Going at 10 miles an hour, he could stop in 100 feet (p. 153, l. 30). However, after striking the plaintiff the engine proceeded to go 150 feet before he brought it to a stop (p. 154, ll. 20-25). He admitted that when the brakes were applied they were applied in emergency and not in the manner of a service application (p. 154, ll. 30-35). He could not explain why the engine went 150 feet when it should not have gone more than 25 feet (p. 154, ll. 30-40).

Although he testified that when he blew his whistle 100 feet from the plaintiff, he also applied the brakes in emergency, nevertheless the train covered 100 feet to the plaintiff and then proceeded another 150 feet, in all 250 feet, before it came to a stop (p. 155, ll. 10-30).

Finally, in desperation, the engineer said that he could not stop in less than 400 feet, going at 20 miles an hour, that the tests made by the company indicated that the train could not be stopped in less than 400 feet going at 20 miles an hour (p. 156, ll. 1-15); and that this applied to a dry rail on a clear day, with a slight up-grade. He was then asked if all the data and tests of the railroad company and his own experience indicated that he could not stop in less than 400 feet going at 20 miles an hour, how he actually stopped the train in 250 feet, and he said, "That is something I cannot say." In short, although it takes 400 feet to stop a train going 20 miles an hour, under the conditions existing at the

time of the accident, yet he actually stopped the train in 250 feet, or he broke the record established by all the tests of the company under similar circumstances by 150 feet (p. 157, ll. 1-10). He said that when he first saw the plaintiff 150 feet ahead, he blew three or four loud short blasts of the whistle; that the plaintiff's back was to him, and the plaintiff never turned or made any indication that he heard the warning (p. 157, ll. 10-20). He first saw the plaintiff when the latter was ten or fifteen feet from the bridge and he struck the plaintiff after the latter had walked that distance and five feet farther on the bridge. In short, the plaintiff walked approximately 20 feet from the time when the engineer first saw him to the time when he was struck (p. 159, ll. 10-30), and, of course, during that time the engine went approximately 120 feet (p. 159, ll. 1-20). Asked why he did not see the plaintiff while the latter was walking for 500 feet along the track, he said that there was some shadow from the coal trestle, although he admitted the day was clear, the sun shining and there were no obstacles to his view (p. 160, l. 40 to p. 161, l. 20). He was then shown the various photographs which were taken showing the coal trestle, and admitted that there was no shadow thrown by the coal trestle on the track (See Exhibit P-5, which has the coal trestle at the right of the picture). He admitted that there were no shadows appearing in the picture (p. 161, l. 40). At the point near the bridge at Twenty-second Street, there is an 18 in. clearance from the coal trestle to the near rail of the track (p. 162, ll. 10-20). He was positive that during the entire time from Van Nostrand Avenue to the scene of the accident at Twenty-second Street, Bayonne, a distance of several miles, he was continuously, every moment, looking out of his window at the track ahead (p. 164, ll. 20-40).

Rose, head brakeman of the train, was in the cab of the engine (p. 183, ll. 30-40). He also had been a fireman for eight or nine years (p. 185, ll. 30-40). He said the emergency brakes were not applied until the engine was half way over the Twenty-second Street bridge (p. 186, ll. 20-25). According to the defendant's civil engineer, the bridge was 56 feet long (p. 136, l. 10), so that the engineer had not applied his emergency brakes until 28 feet of the bridge had been covered and that, added to the distance of 115 feet, the point where the engine was when the engineer first saw the plaintiff (plaintiff was 15 feet from the bridge and the engine was 100 feet from the plaintiff), shows that the engineer permitted the engine to go 143 feet after he saw the plaintiff on the track before he applied the emergency brakes. The witness said he could feel the brakes applied (p. 186, ll. 30-40). Finally, he said that the engine stopped when it was half way on the bridge, but that the brakes were applied just as the engine entered on the bridge, so that, after the application of the brakes, the engine only went half the width of the bridge, or 28 feet (p. 188, l. 30 to p. 189, l. 10). If this testimony is credible then, had the brakes been applied when the engineer first saw the plaintiff, the engine would have stopped long before it actually struck the plaintiff.

The plaintiff called three expert witnesses of many years' experience as railroad engineers and their testimony practically agreed with that given by the experts called by the defendant. Their testimony was that the engineer after discovering the plaintiff on the track had ample time to stop his train before striking the plaintiff.

Donnelly, a railroad engineer for thirty-four years, still employed by the Erie Railroad Company (p. 104, ll. 30-40), testified that a train of seventy empty freight cars pulled by an engine on a straight

track on a clear day, track almost level, going five or six miles an hour, having all the freight cars equipped with automatic air brakes operated from the engine, could stop in ten feet on the application of the emergency lever (p. 105, ll. 20-35). Assuming that the same train under the same conditions was going at ten to twelve miles an hour, it could be stopped in twenty-five feet, and assuming that the train was going fifteen miles an hour, it could be stopped in seventy-five feet (p. 105, l. 35 to p. 106, l. 10). He did not know either of the other expert witnesses called by the plaintiff and did not know counsel for the plaintiff until a few days before the trial (p. 106, ll. 10-20).

DeMott testified that the same kind of a train under the same conditions, with the same equipment, going at a speed of from five to six miles an hour, could be stopped in twenty feet (p. 89, l. 20 to p. 91, l. 40). Going at a speed of from ten to twelve miles, it could be stopped in fifty feet and at a speed of fifteen miles, it could be stopped in from seventy to eighty feet. All that is necessary in order to apply the brakes in emergency is to pull the brake valve. One movement of the hand puts the brake on all seventy cars and the locomotive (p. 92, ll. 20-25). This witness had seventeen years' experience as engineer, fireman and shopman. He was a fireman eleven years and an engineer five or six years on the Pennsylvania Railroad (p. 88, l. 25, to p. 89, l. 20).

Copcutt had three years' experience as an engineer and seven and a half years' experience as a fireman on the defendant's railroad and was entirely familiar with the engines of that company and with the roadbed of the company at Twenty-second Street, Bayonne (p. 99, ll. 20-40). He testified that a seventy car freight train, all equipped with automatic air brakes, operated from the engine

on an almost level track on a clear day, going at five or six miles an hour, could be stopped in ten or fifteen feet by applying the air brakes in emergency, which is done by merely applying the valve on the engine (p. 100, ll. 10-25). The same train under the same conditions going at ten to twelve miles an hour could be stopped in forty to fifty feet; going at fifteen miles an hour in seventy-five feet (p. 100, l. 25 to p. 101, l. 20).

These expert witnesses of the defendant were to a marked degree corroborated by the defendant's witnesses. Nixon, the engineer who was operating the engine, testified that going at five or six miles an hour he could stop in twenty-five feet; at ten miles an hour in one hundred feet (p. 153, ll. 20-35).

Rose, the head brakeman, riding on the engine, said the brakes were not applied until the engine was just about entering on the Twenty-second Street bridge and that the engine actually stopped when it was over half the length of the bridge. The bridge was fifty-six feet wide so that the engine actually stopped, according to this witness, twenty-eight feet from the point where the brakes were applied (p. 188, l. 25, to p. 189, l. 10). As shown in the testimony of the engineer, Nixon, supra, his engine actually traveled two hundred and fifty feet after he applied the emergency brakes, which he applied when he first saw the plaintiff. The answer to one of the defendant's interrogatories made by the engineer unequivocally stated that the engine traveled one hundred and fifty feet after striking the plaintiff (p. 36, ll. 30-40). If the engine only traveled twenty-eight feet after the application of the emergency brake, as testified to by Rose in positive terms, it is clear that if the brakes had been applied when the engineer first saw the plaintiff on the track, the engine would have stopped fifty to seventy-five feet before it reached the plaintiff. So

that there was ample time to avoid the accident after discovering the plaintiff's position.

Sandhas, general inspector of the defendant, whose duties involved the supervising of the air brakes and instructions to employees with respect to air brakes as well as repairs thereto for the entire state of New Jersey, said that an engine going five miles an hour with seventy freight cars, etc., could stop in twenty-five to thirty-five feet (p. 198, ll. 30-40), and his answer would be the same whether the freight cars were wooden or steel, whether they were loaded or empty, and the individual weight of each car would make little difference (p. 200, ll. 1-20). He said that if the engine actually stopped in twenty-six feet after the application of the emergency brakes, it was not going more than five miles an hour (p. 200, l. 30 to p. 201, l. 10). If the train traveled fifty feet from the time of the application of the emergency brakes, it would be going at a speed of seven or eight miles an hour when the brakes were applied (p. 201, ll. 30-40). He said that an up-grade would make a difference in the ability to stop the train; that he had made tests and the tests were made with both dry and wet rails (p. 202, ll. 10-30; p. 203, ll. 1-10). On an up-grade, the train could be stopped more quickly than on a level or down grade (p. 203, l. 30 to p. 204, l. 10).

It therefore appears that the engine could have been stopped in ample time to avoid striking the plaintiff after his position on the track was discovered. At least, that question was one of fact for the jury. Likewise, with respect to his position on the track and whether any audible signal by bell or whistle was given of the approach of the engine and train after the plaintiff's position on the track was discovered by the engineer. The testimony in this case was clearly for the jury. All the

facts testified to by the plaintiff's witnesses had to be taken as true on the decision of the motion for direction of verdict and also the plaintiff was entitled to all legitimate inferences of fact to be drawn from the facts testified to. If the engineer actually saw the plaintiff, as he said he did, one hundred feet ahead of the engine, and if at that time he had in fact blown his whistle and put on his emergency brakes, the plaintiff would undoubtedly not have been injured. If the engine was going only five or six miles an hour when it struck the plaintiff, why was it that it did not stop within ten to twenty-five feet, as testified to by all the witnesses for both sides? Why was it that the engine in fact traveled one hundred and fifty feet after striking the plaintiff? If the emergency brakes were applied when the engineer first saw the plaintiff one hundred feet ahead of the engine, how was it that the speed of the engine was reduced from twenty miles an hour to five miles an hour within one hundred feet, the distance traveled before it struck the plaintiff, and yet why was it that the engine traveled one hundred and fifty feet thereafter although its speed was only five miles an hour at the time of the accident? It was for the jury to say whether the speed of the engine at the time when the plaintiff was first discovered on the track was five, six or ten miles an hour or fifteen miles, and if the speed of the engine at the time when the engineer first saw the plaintiff was any one of those speeds, then, according to the testimony in the case given by three disinterested experts, the engine could have been stopped before it actually struck the plaintiff merely by the turning of a valve or the pulling of a lever.

We therefore respectfully submit that the Trial Court properly refused to direct a verdict in favor of the defendant on this ground because there was

evidence, assuming that the plaintiff was a trespasser or a mere licensee, that the defendant had violated its duty to refrain from a wilful or wanton injury. As stated in the case of *Staub v. Public Service Ry. Co.*, 97 N. J. L., 297, 300, supra, to establish a wilful or wanton injury it is necessary to show that one with knowledge of existing conditions and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty and produces the injurious result. In that case the Court of Errors and Appeals held that there was no evidence that the motorman of the car could see the truck upon the track in ample time to stop his car before collision would occur and deliberately failed to do so. In the case at bar there is evidence that the engineer did see the plaintiff upon the track and after discovery of the plaintiff's position had ample opportunity to stop his engine before a collision occurred, and nevertheless deliberately or with reckless indifference to the consequences, failed to do so; also failed to give any warning.

II.

The Trial Court did not err in admitting testimony to show that the plaintiff was using the usual and customary way that employees used for the purpose of going to their work.

At page 28 of their brief, counsel for the defendant urged that there was error in the admission of testimony showing that the plaintiff was using the usual and customary way used by employees for the purpose of reaching their work. That such testimony was competent, material and relevant appears from the argument made in point 1, subdivisions (a) and (b). If the employees of the defendant had been using this way for three or four years prior to the accident, then the very fact of its use with the acquiescence of the defendant during that period of time by the defendant's employees was some evidence that such use was not wrongful but as a matter of right. The situation presented is different from that of the persons, having no connection with the railroad, walking along the way. Under the *Tucker* case and under the case of *Phillips v. Library Co.* and other cases cited, which have been discussed at great length hereinbefore, this testimony was proper.

III.

The charge of the Court is not erroneous in any of the particulars alleged.

We shall discuss the alleged errors in the Trial Court's charges in the same order in which they are discussed in the defendant's brief. In each instance a small part of the charge has been separated from its context and thereby distorted. The rule is that the charge must be considered as a whole, and when so read no substantial error will be found therein. Indeed, it was more favorable to the defendant than it deserved. For instance, the plaintiff would have been entitled to recovery, irrespective of whether he was engaged in interstate commerce, assuming that his injury resulted from the failure of the defendant to refrain from a wilful or wanton injury assuming that he was a trespasser or mere licensee. The Trial Court did not so charge the jury, but on the contrary, instructed them that, unless the plaintiff was engaged in interstate commerce, he could not recover; however, the defendant cannot object to a charge that is more favorable than it deserves.

Counsel for defendant noted an exception to each and every part of the Trial Court's charge, and, in addition, noted ten exceptions to the refusal of the Trial Court to charge requests of the defendant. Altogether there are thirty exceptions to the charge, including the ten requests which were refused; twenty-three of these exceptions are contained in the grounds of appeal and practically all of these grounds are argued in the brief. As has been well said, the urging of so many grounds of appeal, which on their face are clearly without merit, leads to the conclusion that counsel have very little confi-

dence in any one of them, and that it is hoped that the unusual number of objections will make up for the lack of substance of each individual objection.

(a)

The first alleged error in the charge deals with the instructions to the jury on the application of the Federal Statute. Only a part of the charge on that subject is given. The Trial Court first read to the jury the statute, saying:

> "This action is brought under an Act of Congress of the United States, which among other things provides * * *"

and then he read the statute including that part which says that the carrier, while engaged in commerce between any of the several states, "shall be liable in damages to anyone suffering injury while he is employed by such carrier in such commerce." This was a strictly accurate instruction (p. 230, ll. 30-40). Then he reiterated that instruction by saying:

> "A right to recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." (p. 231, l. 10.)

Finally, he said:

> "In order to establish that here, it must be proved by the greater weight of the evidence, and the burden rests upon the plaintiff to prove that he and the company were at the time engaged in such commerce; and, if that has been proved by the greater weight of the evidence, then this Federal Act becomes applicable." (p. 231, ll. 15-20.)

Then comes the part of the charge quoted at page 31 of the defendant's brief, which later is followed by a further instruction, taken partially from the *Tucker* case, part of which is as follows (p. 233, l. 15 to p. 234, l. 20) :

"The relation of master and servant in so far as the obligation of the master to protect his servants is concerned, commences when the servant, in pursuance of his contract with the master, is upon the premises of the master. The servant in such a situation is not a mere trespasser or a mere licensee. He is there, because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. The present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the annex, which was only another agency provided by the master for the accommodation of its servants.

"In this connection it is argued that Tucker voluntarily selected the more dangerous way when he might have proceeded down Virginia Avenue to South Capitol Street, where he could have gone under the track, then back to the annex. Had he chosen that way it would have required him to go one thousand one hundred feet further, and moreover, the testimony shows beyond dispute, that the way he did choose was the customary and usual way for employees living in his locality."

At the conclusion of the charge, the Court again said to the jury:

> "If you find that the plaintiff and defendant were engaged in interstate commerce at the time of the accident, etc." (p. 236, ll. 20-30);

and in still another place:

> "Of course, gentlemen, unless the plaintiff and defendant were engaged in interstate commerce, the plaintiff could not recover, and that is a question for the jury." (p. 235, ll. 25-30).

It is clear then that, when the entire charge on the question of employment of the plaintiff is read as it was given to the jury, it is not erroneous. The Practice Act of 1912 specifically provides in Paragraph 27:

> "No judgment shall be reversed, or new trial granted on the ground of misdirection, or the proper admissions or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the *substantial* rights of a party,"

(b)

The part of the Court's charge referred to at page 33 of the defendant's brief is objected to because it was misleading, because, as counsel for defendant says, it gave the jury the impression that the engineer of the defendant said that the plaintiff was walking between the rails of the track when he did not, in fact, so testify; however, in the very part of the instructions quoted at page 33 of the brief, the Court says:

"It appears from the answers of the defendant to the interrogatories of the plaintiff that the engineer of the defendant's train which struck the plaintiff saw the plaintiff when he was outside of the railroad track and east of the Twenty-second Street Bridge."

What the Trial Court did was to quote *verbatim* the answers to the interrogatories (p. 37, ll. 10-20). If the reference to this part of the testimony was misleading, it was because the answers of the defendant to the interrogatories were misleading.

(c)

This instruction is unobjectionable. The defendant did make the contention which the Trial Court said it did. Had he chosen the way along Prospect Avenue, he would have been required to go a little further, as the Trial Court stated. Plaintiff's testimony was to that effect and the measurements of the defendant's engineer likewise. Furthermore, the photographs indicate that this is so. If the plaintiff had gone down Prospect Avenue to Twenty-second Street, and then along Twenty-second Street under the bridge to the stairs leading to the station, and then up the stairs, he would have traveled two sides of a triangle, the third side being the diagonal course which he took that being the usual and customary way that employees went to work, as hereinbefore shown. Furthermore, the testimony did show that he did use the customary and usual way used by him and other employees, and no witness was called by the defendant except a railroad policeman who testified that, during sixteen years of continuous service, he had never ejected any employee of the railroad from the scene of the accident.

(d)

This portion of the charge referred to at page 36 of defendant's brief is really a further consideration of the instructions on the interstate commerce feature of the case. Also it is nothing but a re-argument of the point that the defendant was entitled to a ruling as a matter of law that the plaintiff was not engaged in interstate commerce. That has already been argued under Point I.

(e)

The part of the charge objected to at page 37 under subdivision (e) was merely the concluding summation of the instructions, and the Trial Court did nothing more than merely reiterate the wording of the Federal Statute. The wording of the statute on its face showed that no possible harm could come to the defendant from its reiteration. Certainly the substantial rights of the defendant were not imperiled if the instructions as a whole are considered.

IV.

The Trial Court did not err in refusing to charge the defendant's requests.

Counsel for defendant seemed to think that they were entitled to have their requests charged in the identical language thereof. In this they are mistaken, because the rule is well settled that, when request to charge the jury is made, all the trial judge is required to do in dealing with such request, when the legal principles involved therein are sound and are applicable to the matter under discussion, is to charge the substance thereof.

Gluckman v. Darling, 85 N. J. L., 457; affirmed 87 N. J. L., 320.

Grybowski v. Erie R. R. Co., 88 N. J. L., 1.

Indeed, the Court of Errors and Appeals in the case of *Armstrong v. Lehigh, etc., R. R. Co.*, 82 N. J. L., 704, held that a charge would be unassailable if the trial judge merely charged the local principle involved. Finally the refusal of the trial judge to charge certain requests is not an error when all the propositions contained therein, which were sound and relevant to the case, were charged.

Miller v. Thomas & Sons Co., 89 N. J. L., 364.

The first request states that, as a general rule, an accident occurring to an employee going to or returning from work does not arise out of, or in the course of his employment. Why it was necessary to tell the jury there was such a general rule does not appear. As a matter of fact, that is not the general rule, as the cases cited in Point 1 very quickly demonstrate. The applicability of the request to the case at hand is doubtful. As a matter of fact, the legal principle involved is substantially charged. It is necessary for counsel for the defendant to go to Minnesota to find an authority for the supposed rule he desires the Trial Court to charge.

The second request states that the general rule in the first request has an exception, namely, that when the employee has reached the premises of the master wherein is the place of work of the master, and is injured while proceeding to and from his place of work, the accident does arise out of and in the course of his employment. Whether the second rule is an exception to the first rule or another general rule is a fairly debatable question. As a matter of fact, the Trial Court did instruct the jury as to the rule itself, without saying that it was an ex-

ception to any other rule. If it had so stated, it would have been more confusing than helpful to the jury.

The third request pretends to set forth another exception to the general rule in the first request, with respect to providing transportation facilities for the employee. It is fairly doubtful whether the request was applicable, for the plaintiff was not being transported at the time of the accident. Here again we submit that the rule in question is not an exception to a general rule, but is in itself a general rule well settled by the cases in this court and in the courts of the United States, namely, it is a general rule that, where the employer provides transportation facilities for the employee to and from his work, the employee is still in the course of his employment while on such transportation facilities.

The fourth request required the Trial Court to instruct the jury that:

> "The work of the plaintiff began when he reported for work at the shops of the defendant at Elizabethport."

It is clearly illegal under all cases, including the *Winfield*, *Zachary* and *Tucker* cases.

The fifth request reiterated facts which were not material to the issue made. The Trial Court was required to separate a few facts from the remaining facts of the case and give them unnecessary prominence and importance by specifically charging with respect to them. The fact that the accident happened some distance from where he actually worked, or in another city, did not affect his right to come under the Federal Act if he was on the defendant's premises in the usual and customary way. The request does not truly state the facts because it says at the time of the happening of the accident the plaintiff was not on the premises of the employ-

er at or near the place of his work. If he had reached the station, only a few hundred feet away, he would have been, for, as a matter of law, he would then be at work within the meaning of the cases and that place was only a short distance from where he was. Indeed, at the very moment of the accident, he was at work so as to come within the Federal Statute, if what he was doing was usually customary under the circumstances.

The sixth request was nothing more than a reiteration of the motion for the direction of verdict.

The seventh request is not argued and is clearly improper. In any event, it is covered by the motion for the direction of verdict.

Likewise the eighth request.

The ninth request was also covered by the motion for the direction of verdict. It was also improper, because, even if the plaintiff was not engaged in interstate commerce and was a trespasser or a mere licensee nevertheless he was entitled to have submitted to the jury the question whether or not the defendant had refrained from wilfully or wantonly injuring him. Finally it was actually charged in substance (p. 235, ll. 25-35).

The tenth request was improper for the same reasons.

V.

Section 55 of the General Railroad Law, "An Act Concerning Railroads," is unconstitutional.

This section of the Act provides:

> "If any person shall be injured by an engine or car while walking * * * on any railroad—such person shall be deemed to have contributed to the injury and shall not recover any damages from the company operating said railroad."

The Act says that such person "shall be deemed" to have contributed to the injury. The word "deemed" is defined by Webster to mean "to be adjudged." The section of the Act is to the effect that a party while walking on any railroad is *adjudged* to have contributed to the injury and cannot recover.

* * * * *

The fact that a party is injured while walking on any railroad may or may not constitute contributory negligence.

> "As used in a statute relative to customs duties which declared that 'a person who shall offer or expose for sale any of the articles named shall be deemed the manufacturer thereof. See *Cardinal v. Smith,* 5 Fed. Cas. No. 2, 395; Deady 197, where it is said: 'And when it is enacted that the vendor of an article shall for any purpose be deemed the manufacturer thereof, for such purpose, he is to be absolutely considered such manufacturer.' "

"When by statute certain acts are 'deemed' to be a crime of a particular nature, they are such crime and not a semblance of it, nor a mere fanciful approximation to or designation of the offense." *Com. v. Pratt,* 132 Mass., 246, 247. *Leonard v. Grant,* 5 Fed., 11, 16, 6 Sawy. 603, where it is said: 'And, therefore, whatever an Act of Congress requires to be "deemed" or "taken" as true of any person or thing, must, in law, be considered as having been duly adjudged, or established concerning such person or thing and have force and effect accordingly.'" (13 *Cyc.*, p. 757.)

The Legislature has no power to disarm the courts by direct or indirect legislation from trying and determining a question of fact as to whether a certain act constitutes contributory negligence, which act in itself, may or may not amount to contributory negligence.

"And while the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the legislature cannot do" (39 Fed. Rep., 895).

The Act of the Legislature goes to the extent of adjudging that this act constitutes contributory negligence and thereby invades the province of the jury to determine the question as to whether the party was guilty of contributory negligence. The Act deprives the party of a right to show the Court the facts which may or may not have amounted to contributory negligence, and is an attempt by the Legislature to usurp the power of the Court. This

the Legislature cannot do, and consequently the Act is unconstitutional and void, and a direct violation of the Fourteenth Amendment to the Federal Constitution which provides that no State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law.

"A right of action to recover damages for an injury is property and the Legislature has no power to destroy such property."

Angle v. C. & St. P. R. R. Co., 151 U. S., 1.

"The theory on which all these cases proceed is that an Act of the Legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The Legislature may regulate the form and the manner of use of the instruments of evidence, the *media* of proof, but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld, there is then little use for course, and small room indeed for the exercise of their functions."

M. K. & T. R. Co., 57, L. R. A., 767.

"The burden of proof to establish contributory negligence is upon the defendant."

Winona v. Bolzet, 23 L. R. A., (N. S.), 204; 169 Fed., 321-94, C. C. A., 563.

Section 55 of the Railroad Act not only relieves the defendant of the burden of proof to establish contributory negligence, but of all proof on the subject, and arbitrarily says that a certain act is contributory negligence and it thereby deprives the plaintiff of the opportunity to show in Court that his act did not contribute to the accident, but also deprives him of the due process of law accorded him by the Federal Constitution, and the courts of the right to judicially determine the matter.

"The Legislature cannot prescribe what shall be conclusive evidence, as that would be an invasion of the province of the judiciary."

15 *U. S. v. Klein*, 13 Wall (U. S.), 128
cited 8 *Cyc.*, pp. 820 and 821.

The Legislature has no right to make evidence conclusive which is not so necessarily, and thus deprive the opposite party of an opportunity of showing the truth (8 *Cyc.*, 926), citing:

Little Rock, etc., R. Co. v. Payne, 33 Ark. 816;
Howard v. Moot, 64 N. Y., 262.

"We think it clear that the Legislature has the power to prescribe rules of evidence and methods of proof. A law which would, in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof

of guilt would be unconstitutional." (See cases cited.)

State v. Beach, Indiana Supreme Court, 36 L. R. A., p. 182.

"As a general rule, however, the Legislature may not provide that certain evidence shall be conclusive, for this would be to usurp the power of the judiciary and to determine the matter at issue without judicial inquiry and therefore without due process of law. It is equally incompetent for the legislature to give an existing state of facts a judicial construction which shall be binding on the parties or on the courts, or to determine disputed questions of fact affecting the rights of persons or property. Thus, an act making the finding of appraisers conclusive evidence of value, and an Act of Congress making a recruit's oath of enlistment conclusive evidence of his age have been declared void." (See cases cited.)

12 *Corpus Juris,* pp. 823, 824.

"For the Legislature to declare what shall be conclusive proof in any case is not due course of law."

Little Rock & Ft. S. R. Co. v. Payne, 33 Ark., 816, 34 Am. Rep., 55;
Cooley, Const. Lim., p. 368;
Dartmouth College v. Woodward, 4 Wheat, 519, 4 L. Ed., 629;
Groesbeck v. Seeley, 13 Mich., 329;
Case v. Dean, 16 Mich., 12;
Wright v. Cradlebaugh, 3 Nev., 341;
Wantlan v. White, 19 Ind., 470;
McCreadu v. Sexton, 291 Iowa, 356, 4 Am. Rep., 214.

"Recitals of Facts in a Statute cannot prejudically conclude private citizens and statutes which declare certain facts presumptively true are ineffectual." (See cases cited; Note 40-41.)

12 *Corpus Juris*, pp. 824, 825.

"The legislature has power to formulate, prescribe, enlarge, modify and alter remedies, provided, however, that it does not, under the guise of a statute relating to procedure, attempt to deprive any person of a right secured by the constitution." (See 12 *Corpus Juris*, p. 825, and cases cited, notes 44 to 47.)

"*Cooley's Const. Lim.* 7th Ed., p. 526, says: 'Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principals of natural justice or of constitutional law.'" (citing *Blackwell, Tax Titles*, pp. 100, *et seq.*).

"The legislature usurped the judicial power of the courts by the enactment of this statute.

It adjudicates an act unlawful and presumptively injurious and dangerous, which is not and cannot be made to be so without a violation of the constitutional rights of the defendant, and imperatively commands the Court to enjoin it without proof that any injury or danger has been or will be caused by it.."

City of Janesville v. Carpenter, Wisconsin, 8 L. R. A., pp. 813-814.

"In *Cooley Const. Lim.*, 5th Ed., 453, it is said: 'But there are fixed bounds to the power of the Legislature over this subject which cannot be exceeded. As to what shall be evidence and which party shall assume the burden of proof, in civil cases, its authority is practically unrestricted so long as its regulations are impartial and uniform; but it has no power to establish rules which, under the pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there cannot be trial if only one party is suffered to produce his proofs, the most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify falsely; and records may be collusively manufactured for dishonest purposes; and that legislature which would pre-

clude the fraud or wrong being shown and deprive the party wronged of all remedy, has no justification in the principles of the natural justice or of constitutional law."

M. K. & T. R. Co. v. Simonson, 57 L. R. A., pp. 766-767.

"The theory on which all these cases proceed is that an Act of the Legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The Legislature may regulate the form and the manner of use of the instruments of evidence, the *media* of proof, but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one, which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions.

"It will be observed that the statute in question, by its terms, shuts out all proof as to the occurrence of fraud or mistake in the making of the bill of lading. Admitting, however, that of necessity there must be read into the act an exception in favor of mistake as well, for, if the bill of lading was executed by the mutual mistake of both parties, it does not evidence the contract of either one."

M. K. & T. R. Co. v. Simonson, 57 L. R. A., p. 767.

"We think it clear that the Legislature has the power to prescribe rules of evidence and methods of proof. A law which would, in effect, exclude the evidence to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional, as also would one which makes an act *prima facie* evidence of crime which has no relation of a criminal act, and no tendency whatever to establish a criminal act. If, however, the legislature in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense and give in evidence to the Court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional. It has repeatedly been held that the legislature has the right to declare what shall be presumptive or *prima facie* evidence of any fact." (See cases cited.)

State v. Beach, Indiana Supreme Court, 36 L. R. A., p. 182.

See also:

Meadowcraft v. People, 163 Ill., 56; 35 L. R. A., p. 182.

Janesville v. Carpenter, 77 Wis., 288; 8 L. R. A., 802, and

12 *Corpus Juris,* p. 825, and 32 L. R. A., (N. S.), 228; 1 L. R. A., p. 819.

Kelly v. Herrell, 20 Fed. Rep., 367 and 78 Fed. Rep., 237 to 262.

VI.

For these reasons the judgment below should be affirmed with costs.

May Term, 1926.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JOSEPH SYMONSKI, Plaintiff-Appellant, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

On March 8th, 1924, the plaintiff, Joseph Symonski, while walking on and along the main line tracks of the defendant, The Central Railroad Company of New Jersey, at a point where such tracks are carried over 22nd Street, in the City of Bayonne, Hudson County, by means of an overhead railroad bridge, was struck by a train of the defendant.

For the recovery of damages on account of the injuries sustained by him as a result of this accident, the plaintiff instituted this suit in the Court of Common Pleas of Hudson County. The action was tried in the Hudson Pleas and the jury returned a verdict of $29,000.00 in favor of the plaintiff.

From the judgment entered thereon the defendant ~~applied~~ appealed to the Supreme Court, which reversed the judgment of the Hudson Pleas (Rec. p. 1). The plaintiff then filed with the Supreme Court a petition for a reargument of the cause, which petition was denied (Rec. XI, XII, XIII,

XIV, XV, XVI). The plaintiff now takes the present appeal from the judgment of the Supreme Court.

Statement of the Case.

The accident occurred at about two o'clock in the afternoon (Rec. 67, 109).

The plaintiff was employed by the defendant as a fire cleaner in the latter's shops at Elizabethport, New Jersey. The hours of the plaintiff at such shops were from three P. M. until eleven P. M. (Rec. 107, 116, 227). The plaintiff's pay, however. did not begin until he had reached the Elizabethport shops and actually punched the time card; that is to say, if he were late in arriving and punching such time card, he received no pay for the time that he was late (Rec. 116).

The plaintiff resided at number 100 Prospect Avenue in the City of Bayonne (Rec. 107).

The scene of the accident is shown on the map, of which a photographic reproduction to a reduced size is attached to the State of the Case, being marked "D-1" (Rec. 259). As will be perceived by reference thereto, the tracks of the defendant company run generally in a northerly and southerly direction, that is to say north in the direction of Jersey City, and south in the direction of Elizabethport and Elizabeth. Insofar as the operation of trains over these tracks is concerned, however, they are generally referred to as eastbound and westbound tracks, i.e., eastbound towards Jersey City and westbound towards Elizabethport and Elizabeth.

In the vicinity of the scene of the accident, these tracks are five in number. Running from the west or north to the east or south, these tracks are numbered as follows: 4, 2, 1, 3 and 5. Tracks 4 and 2 are the westbound tracks while 1, 3 and 5 are the eastbound tracks (Rec. 129).

East 22nd Street in the City of Bayonne runs at right angles to the railroad tracks (Rec. 129).

The defendant's tracks are carried through a greater part of Bayonne on an elevation, and are carried over East 22nd Street by means of a railroad bridge. As will be readily disclosed by reference to photographs P-1, P-3, P-4, P-5, D-2 and D-3, copies of which are attached to the State of the Case (Rec. 245, 249, 251, 253, 261, 263, there is no foot path or foot walk whatsoever over this bridge (Rec. 129, 130, 131).

South or west of this bridge is the East 22nd Street station of the defendant. At this point this is a station building on either side of the tracks, i.e., a westbound station and an eastbound station. There are steps or stairs leading from 22nd Street to the westbound station. There are also steps or stairs leading from 22nd Street to the eastbound station. There are no steps or stairs leading from 22nd Street to the railroad bridge aforementioned (Rec. 130, 136).

Running parallel to the railroad tracks and on the south or east side of said tracks is Prospect Avenue. On the north or west side of the tracks, and running parallel thereto, is Avenue E (Rec. 130).

As aforementioned, the plaintiff resided at 100 Prospect Avenue. This is between East 23rd Street and East 24th Street. At the time of the accident the plaintiff was on his way from his home to the defendant's westbound station at East 22nd Street, for the purpose of taking a train to Elizabethport, at which point he purposed alighting and then going to work. This train was not a workmen's train or a special train in any sense. It was simply a regular and ordinary passenger train. Under the terms of

his employment, the plaintiff was not required to take any particular train to go to work, but could take any train that he desired, or could proceed to Elizabethport by any other route or in any other manner, provided he arrived at Elizabethport in time to report for work at three o'clock (Rec. 108, 124, 227).

There was no proof or intimation that the defendant company ever exercised any control over the plaintiff or any other of its employees as to their place of residence, and, so far as the evidence showed, the choice of residence was left entirely to them, including the plaintiff.

It was entirely possible and practicable for the plaintiff to get to the westbound station at 22nd Street by walking down Prospect Avenue to the intersection of Prospect Avenue with East 22nd Street, then proceeding north or west along East 22nd Street under the railroad bridge, and then proceeding up the flight of steps to the station in question. By taking this route he would at all times be on the public highways up until the time that he actually reached the westbound station premises, and he would not be required or necessitated to go at any time on or near the tracks of the defendant, and, as a matter of fact, it appeared from the testimony that plaintiff had on at least one prior occasion used this route to the station (Rec. 87, 117, 118).

Instead of taking this route, however, the plaintiff crossed Prospect Avenue and proceeded through a vacant lot which is shown on the map, D-1, north or east of the "Alex Levy Coal Yard." He then proceeded through said vacant lot north or west across the two sidetracks, which pass through said lot as shown on said map, and then after having crossed these two tracks, proceeded across four more tracks, i.e., track 5, track 3,

track 1, and track 2 until he reached track 4, at which juncture, according to his testimony, he started to walk in a southerly or westerly direction between the rails and on the ties of said track No. 4, toward the westbound station at East 22nd Street. Plaintiff's testimony was to the effect that he continued walking between the rails of said track up to and including the time he reached the railroad bridge at East 22nd Street, and while between such rails on said bridge was struck by a freight train of the defendant running west or south on track No. 4. The point at which the plaintiff claims, as aforesaid, to have come on to the tracks after passing through the vacant lot in question is, according to the plaintiff's testimony, approximately 500 feet north or east of the railroad bridge (Rec. 108, 109, 110, 111).

The testimony produced upon the part of the defendant was to the effect that the plaintiff, when first observed by the engineer of the freight train, was walking about ten feet on the outside of track No. 4, that is to say, on the west or north side of said track, and, of course, on the right-hand side of the train in the direction that it was proceeding; that he continued walking outside of such track until he got to the East 22nd Street bridge, at which time he suddenly stepped in on the bridge; that the engineer, upon perceiving this, sounded his whistle, applied his brakes, and stopped his train as quickly as possible, but was unable to prevent striking the plaintiff, who at the time he was struck was five or six feet in on the bridge (Rec. 143, 144, 145, 166, 176, 184).

The bell on the engine was ringing at the time of the accident, and had been ringing ever since the train left Van Nostrand Place at Jersey City (Rec. 145, 167, 175, 185).

There was some testimony produced upon the part of the plaintiff that it was and had been customary for him and some other persons residing in his neighborhood to go through the vacant lot and walk down the tracks in the manner described, rather than to use the street route. There was no testimony, however, to show how long this alleged practice had been in existence, and it furthermore affirmatively appeared that this alleged practice or user was not confined to employees of the defendant, but extended to workmen employed by the Standard Oil Company and other concerns. Furthermore, there was no testimony to indicate between what tracks or on what tracks it had been the custom for these persons to walk, and no attempt whatsoever was made at the trial to show the existence of a beaten way alongside of the defendant's track or between the rails of any track whatsoever. All of the testimony in this regard was simply with reference to these persons going through the lot "to the railroad and walking to the station" (Rec. 82, 83, 84, 114, 115, 117, 125, 126).

The testimony on behalf of the defendant was to the effect that the engineer of this train had never before this day seen anyone walking on or along the tracks in this vicinity (Rec. 144). This was not contradicted or attempted to be contradicted by the plaintiff. The testimony on behalf of the defendant was further to the effect that if anyone was seen walking or trespassing upon the tracks or property of the defendant, either at the point of the accident or anywhere in the vicinity, such person would be ejected from the premises (Rec. 206, 207, 209, 210).

The plaintiff testified that when he went through the lot as aforesaid and reached track

No. 4 in the manner heretofore mentioned, he looked toward the east or the north and observed a train on track No. 4, i.e., the same track on which he was walking at the time he was hurt; that this train at the time he observed it was in the vicinity of 36th Street, Bayonne; that after having made this one observation he started to walk toward the station and made no other observations to see whether or not the train was approaching him or endangering him (Rec. 110, 119).

As already stated, the city of Bayonne, wherein this accident occurred, is located in Hudson County. Elizabethport, where plaintiff was employed, is located in Union County. The distance from 22nd Street, Bayonne, to the Elizabethport Shops is approximately four miles. Intervening between Bayonne and Elizabethport is the Newark Bay, over which the defendant's tracks are carried by means of a trestle, which trestle is about one and one-tenth miles long. On this bridge there is and was no foot walk or path for pedestrians (Rec. 141).

The Pleadings and Issues.

The Complaint as amended (Rec. 10) contains two counts. The First Count is based upon the Federal Employers' Liability Act. It alleges in substance that plaintiff was employed in interstate commerce by the defendant, who was also engaged in such commerce; that plaintiff while in such employment was on his way to Elizabethport to work for the defendant in cleaning fire from its engines at Elizabethport; that in going to work he was lawfully walking along the defendant's tracks to go to the defendant's station at 22nd Street for the purpose of taking a train to his place of work at Elizabethport; that the

place at which he was injured was and had been for a long period of time continuously and notoriously used by plaintiff and many other of defendant's employees in going to their respective places of employment and to and from said 22nd Street station; that it was defendant's duty to operate its engines and trains at or about 22nd Street in a reasonably careful manner, so as to avoid injury to its employees on said tracks; that it was also defendant's duty to give reasonable notice and warning and usual and customary notice and warning of approach of its engines and trains to such of its employees as were so upon its tracks; that at said time and place defendant's engine and train struck plaintiff.

The alleged negligence of the defendant is charged in the following paragraph:

> "12th. That the defendant negligently "omitted its aforesaid duties in that it oper- "ated one of its engines and trains at said "time and place in a wilful, wanton, mali- "cious, dangerous and reckless manner, and "at a high and excessive rate of speed, and "without giving the customary and usual no- "tice or any signal or notice, whatever, of "its approach at or about Twenty-second "Street, as aforesaid. The defendant was "also negligent in this: That the servants "and agents of said defendant in charge of "said engine and train after discovering the "position of the plaintiff in time to avoid "injuring him, nevertheless wilfully, wan- "tonly and maliciously failed to exercise or- "dinary care to do so."

The Second Count is in effect a repetition of the First Count. It alleges that at the time of the accident the defendant was engaged in interstate commerce; that at such time the plaintiff

was in the general employment of the defendant and was lawfully walking along the railroad tracks of the defendant. It moreover alleges and avers that the action is brought under and by virtue of the Federal Employers' Liability Act.

Plaintiff's brief (p. 13) calls attention to a certain stipulation permitting an amendment of the Second Count and contends that the effect of such stipulation was to strike out of the Second Count the aforesaid allegations that the defendant was engaged in interstate commerce and that the action was brought under the Federal Employers' Liability Act. So far as the record discloses, however, this stipulation was never filed, notwithstanding the statement in plaintiff's brief to the contrary, and the record, furthermore, affirmatively shows that at the trial plaintiff's counsel applied to the Court for permission to amend the Second Count in certain particulars, none of which included the elimination of those paragraphs in the Second Count containing the aforesaid allegations. It, therefore, affirmatively appears that notwithstanding any alleged intent of the pleader, the pleadings themselves as presented to the Court at the time of the trial, and on which any verdict must necessarily be predicated, contained the positive allegations both in the First Count and in the Second Count that the defendant was engaged in interstate commerce and that the action was instituted under the Federal Employers' Liability Act.

That this is so and that the case was submitted by the Court to the jury, without any protest upon the part of the plaintiff, solely upon the theory that the action, including both the First and Second Counts, was brought under the Federal Employers' Liability Act, is clearly demon-

strated by the fact that the Court charged the jury, *inter alia,* as follows:

> "This action is brought under an Act of "Congress of the United States" (Rec. p. 230).

and again:

> "Of course, gentlemen, unless the defend- "ant and the plaintiff was engaged in inter- "state commerce, *the plaintiff could not re- "cover*, and that is a question for the jury. "It is claimed that both he and the defend- "ant were engaged in interstate commerce "at the time of the accident, he being an as- "sistant in the firing of the engines used in "interstate commerce" (Rec. p. 235).

It is quite apparent, therefore, that this case was brought, tried and submitted to the jury on the theory that the plaintiff was engaged and employed in interstate commerce, and that the action was, consequently, one which was governed by the Federal Employers' Liability Act. It is likewise clearly apparent that the plaintiff realizes the case as one based entirely upon the Federal Employers' Liability Act because he says on page 8 of his brief:

> "The *single* question presented by this "record is whether Symonski at the time "of the injury received was engaged in in- "terstate commerce as to be practically a "part of it."

The foregoing demonstrates the unsoundness of the attack contained in plaintiff's brief (p. 13) upon that part of the opinion of the Supreme Court wherein it is said:

> "That this action is brought under and by "virtue of an Act of Congress of the United "States" etc.

Plaintiff's brief challenges this as:

"an inadvertent misstatement by the Court."

As has been shown, however, the Supreme Court in using this language was not only justified but bound by the record, for it is in fact a clear statement of the situation and demonstrates the attentativeness of the Supreme Court to the record.

In this connection it is noteworthy that upon the coming down of the opinion of the Supreme Court, the plaintiff filed a petition for reargument of the case upon the ground that the Supreme Court had misconceived the complaint and that there were two separate counts therein, one under the Federal Employers' Liability Act and one not under that Act. This petition was considered by the Supreme Court and the application for reargument denied.

The defendant by its Answer (Rec. 6) denied first, that plaintiff was employed or engaged in interstate commerce at the time of the accident; second, that the defendant owed any duty to the plaintiff; and third, that the defendant was guilty of any negligence with respect to the plainitff. The defendant also set up the following separate defenses: First, that the accident was wholly the result of plaintiff's contributory negligence; secondly, that the plaintiff was a trespasser upon the defendant's private property; third, that the plaintiff was a mere licensee upon the defendant's private property; and fourth, that at the time of the accident the plaintiff was walking or standing upon defendant's railroad.

ARGUMENT.

POINT I.

The Trial Court erred in refusing to direct a verdict in favor of the defendant.

At the close of the entire case the defendant moved for a direction of a verdict in its favor upon the ground, *inter alia,* that at the time of the accident the plaintiff was not engaged or employed in interstate commerce (Rec. pp. 228, 229). This motion was denied by the trial judge and such denial was assigned as error by the defendant on its appeal to the Supreme Court. The Supreme Court upheld this contention of the defendant and reversed the judgment of the Hudson County Court of Common Pleas, deeming it unnecessary to consider any of the other points.

A.

The plaintiff was not engaged or employed in interstate commerce at the time of the accident.

To establish a right of recovery under the Federal Employers' Liability Act, it must appear not only that the carrier was engaged in interstate commerce at the time of the injury, but it must appear also that the person suffering the injury was *at that time* employed by the carrier in such commerce. And the test of employment in such commerce in the sense intended is whether the employee was at the time of the injury engaged in interstate transportation or in work so closely related to it as to be a part of it. *Pederson* v. *D., L. & W. R. R. Co.,* 229 U. S. 146;

Illinois Central R. R. Co. v. *Behrens,* 233 U. S. 473, 478; *Shanks* v. *D., L. & W. R. R. Co.,* 239 U. S. 556, 558; *C. B. & Q. R. R. Co.* v. *Harrington,* 241 U. S. 177, 180; *Erie R. Co.,* v. *Welsh.* 242 U. S. 303; *Industrial Accident Commission* v. *Davis,* 259 U. S. 182, 185; *Herzog* v. *Hines,* 95 N. J. Law 98.

In the case at bar plaintiff at the time of the accident was, as already shown, walking on or along the main line tracks of the defendant at a point *over four miles from his place of work,* and which place of work was in fact in another county. His entire duties and work were confined to the shops at Elizabethport, and there is no pretense that his work required him to go on the tracks where he was walking at the time of his accident, or in fact to go upon any part of the defendant's property at this point. He was, according to his own testimony and the testimony of his own witnesses, simply walking along these tracks as a matter of convenience to get to the defendant's station, at which point he purposed taking an ordinary and regular passenger train, on which he would ride to Elizabethport, where his place of work was located.

We think that no authority can be found which gives such an extremely elastic interpretation to the provisions of the Federal Employers' Liability Act as to justify a finding that a man in such a situation as was the plaintiff at the time of the accident, was at such time engaged in interstate transportation or in work so closely related to it as to be a part of it.

It has, of course, been held in a number of cases that under certain circumstances an employee in coming to or going from his work in which he was immediately to engage or which he had just left was engaged in and discharging a

duty of his employment. We think, however, that a careful examination of the authorities will demonstrate conclusively that the application of this principle is confined to two classes of cases, viz: First, where at the time of the accident the employee was still on the master's premises and in the vicinity of that part of such premises whereon he was required to perform his work. Second, where at the time of the accident the employee was riding in or about to ride in a conveyance provided by the master for the purpose of transporting the servants to his place of work.

The leading case on this general subject is probably that of *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170. In that case the employee was injured while leaving the master's premises at the end of his day's work, and at the time of his accident was still on these premises. The employee in such case was in charge of a switch engine in the defendant's yard at Croxton, New Jersey, which engine was used in switching freight cars about in this yard. On concluding his work for that day the employee took his engine to the place where it was to remain for the night, and started to leave the yard. While so doing and before he had reached the limits of the yard, he was struck by an engine and sustained the injuries which resulted in his death. On this state of facts, the United States Supreme Court held that the employee at the time of his accident was employed and engaged in interstate commerce. The court said, *inter alia*:

> "In leaving the carrier's yard at the close "of his day's work the deceased was but "discharging a duty of his employment. See "*North Carolina R. R. Co.* v. *Zachary,* 232 "U. S. 248, 260. *Like his trip through the*

> "*yard to his engine in the morning,* it was "a necessary incident of his day's work and "partook of the character of that work as a "whole, for it was no more an incident of "one part than of another. His day's work "was in both interstate and intrastate com- "merce, and so when he was leaving the "yard at the time of the injury his employ- "ment was in both. That he was employed "in interstate commerce is therefore plain, "and that his employment also extended to "intrastate commerce is for present pur- "poses of no importance."

So in the case of *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 249, it was held that an employee whose work was in interstate commerce as well as intrastate commerce, and who was injured while leaving temporarily the yard wherein he was employed, was at such time engaged and employed in interstate commerce. In that case also the employee was injured while in that part of his master's premises where he was required to be for the purpose of performing his work. The Supreme Court in such case said, *inter alia*:

> "Assuming (what is not clear) that the "evidence fairly tended to indicate the "boarding-house as his destination, it never- "theless also appears that deceased was "shortly to depart upon his run, having just "prepared his engine for the purpose, *and "that he had not gone beyond the limits of "the railroad yard* when he was struck."

In the case of *Van Buskirk* v. *Erie R. Co.,* 279 Fed. Rep. 622, the decedent was employed as an engine hostler at a terminal yard and under his direction engines used in both interstate and intrastate commerce were cleaned, coaled, watered and sanded preparatory to their runs. He was

killed while going from an engine which was being coaled under his direction to another place in said yard not inconsistent with the duties of his employment. He was held by the Circuit Court of Appeals for the Third Circuit to have been engaged and employed in interstate commerce. In this case the employee was at the time of his accident upon his master's premises where he was required to be to perform the duties of his employment.

In the case of *Baltimore & O. R. Co.* v. *Kast*, 299 Fed. Rep. 419, the plaintiff according to one version of the accident was at the time of such accident going after a piece of pipe which was needed for the purpose of making running repairs to an engine. According to the other version, he was going after his lunch on the premises. According to both versions, however, and under the unconfradicted testimony in the case, he was at the time of the accident still on the master's premises, to wit, its yard.

In *Anderson* v. *Director General of Railroads*, 94 N. J. Law 421, the plaintiff was a freight conductor, and at the time he was killed was on his way *through the yards of the defendant* to the yardmaster's office.

In *Cicalese* v. *Lehigh Valley R. R. Co.*, 75 N. J. Law 897, the defendant company had provided hand cars for the transportation of its employees from the place where they had been working to a point convenient to their homes, and at the time plaintiff met with his accident he was riding on one of such hand cars.

In *Zabriskie* v. *Erie R. R. Co.*, 86 N. J. Law 266, the employer had failed to provide proper and necessary toilet facilities for employees in the building where they were to work, so that they were obliged to, and did, habitually resort for such facilities during the working hours to

another building of the employer, which lay across a public street, and which custom persisted for a considerable time, and, as the court was entitled to find, was known and assented to by the employer.

In *Fisher* v. *Tidewater Building Company,* 96 N. J. Law 103, the employer had provided a shuttle or workmen's train for the transportation of its employees to and from their homes to their places of work, and plaintiff was injured while boarding such train.

The question of when an employee is employed or engaged in interstate commerce while going to or returning from work was very fully and exhaustively discussed by the Supreme Court of New York in the case of *Pallocco* v. *Lehigh Valley R. Co.,* 190 N. Y. 867. In that case decedent was employed as section man, and during the forenoon of the day in question was engaged at work on the tracks which were used in interstate commerce. Shortly before noon, at the direction of his foreman, decedent put his tools away and started for his home, a distance of more than a mile to the east, outside the yards. While traveling toward his home, over what he claimed was the usual route, on the defendant's premises, following what was known as the "return track," and at a point more than 3,000 feet from his work, the decedent was struck by a locomotive backing along such return track. Decedent was held not to have been engaged in interstate commerce. The court stated the question in issue in the following language:

> "The only question properly presented "here is: Was the decedent still in the em- "ploy of the company and engaged in inter- "state commerce while going home to dinner "by an ordinary route on the defendant's "property? The others sought to be pre-

"sented are purely questions of fact where "now all inferences reasonably to be drawn, "as well as the facts proved, are to be viewed "in a light most favorable to the plaintiff.

"It has been held that an employee in com- "ing to or going from his work in which "he was immediately to engage or which he "had just left, particularly if upon the em- "ployer's premises, is still engaged in and "discharging a duty of his employment "(*North Carolina R. R. Co.* v. *Zachary,* "232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. "591, Ann. Cas. 1914C, 159; *Erie R. R. Co.* "v. *Winfield,* 244 U. S. 170, 173, 37 Sup. Ct. "556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; "*Knowles* v. *N. Y. N. H. & H. R. Co.,* 223 "N. Y. 513, 516, 119 N. E. 1023; *Lamphere* "v. *Oregon R. & Nav. Co.,* 196 Fed. 336, "116 C. C. A. 156, 477 L. R. A. (N. S.) 1; "*Di Paolo* v. *Crimmins Contracting Co.,* 219 "N. Y. 580, 114 N. E. 1065); while the em- "ployee is being carried as a part of his "daily service to and from his place of work "(*San Pedro, L. A. & S. L. R. Co.* v. *Davide,* "210 Fed. 870, 127 C. C. A. 454); and a tem- "porary cessation or interruption of the "labor does not terminate the relation of "master and servant (*Jones* v. *Virginia Ry.* "*Co.,* 74 W. Va. 666, 83 S. E. 54, L. R. A. "1915C, 428); where the employee is to eat "his meals upon the premises or where food "is to be obtained in some emergency, or an "employee is leaving his place of work to "seek shelter from a storm or going to an- "swer the calls of nature (*Sztorc* v. *James* "*H. Stansbury, Inc.,* 189 App. Div. 388, "179 N. Y. Supp. 586, and cases cited in "opinion; *Zabriskie* v. *Erie R. Co.,* 86 N. J. "Law, 266, 92 Atl. 385, L. R. A. 1916A, 315); "or where any injury to one employed while "leaving the premises for the purposes of "procuring a luncheon by means of stairs "which afford the only means of going to "or coming from the work room (*Sundine* "*Case,* 218 Mass. 1, 105 N. E. 433, L. R. A.

"1916A, 318), the employee is still engaged "in his employment. See L. R. A. 1916A, "318. In Matter of *McInerney* v. *Buffalo & "S. R. R. Corp.*, 225 N. Y. 130, 121 N. E. "806, a car inspector on the B. & S. Rail- "road was accustomed to go for his dinner "to his home, which was not on the defend- "ant's premises. Week days he went by the "highway, and on Sundays he walked on the "defendant's right of way in order to avoid "exposing himself in his working clothes. On "Sundays he received pay for eleven hours, "which included the one he was permitted to "take for dinner. While going to dinner one "Sunday, he received injuries causing death, "by falling through a trestle which was "within the limits of the railroad yards in "which he performed certain of his duties. "He had traveled more than half a mile from "the yard where he stopped work before "reaching the trestle where he fell. It was "held that the accident did not arise in the "course of or spring out of his employment. "The court says:

> 'It is true that it has been held many 'times that where an employer requests 'or customarily permits his employees to 'eat their meals upon his premises or in 'some place provided for them, the tem- 'porary interruption to their work thus 'caused will not be regarded as termi- 'nating their character as employees or 'as excluded them from the protection of 'such a law as our Compensation Act (cit- 'ing cases). But no case has been cited or 'found where an employee going for such 'purpose to his home or other place selected 'by him a substantial distance away from 'the "ambit" of his employment and from 'the employer's premises has been regarded 'as so engaged in the latter's business that 'an accident then happened to him would be 'held to be one arising out of and in the 'course of his employment.' "

The foregoing case indicates very clearly, we think, what the courts mean by the expression "going to and returning from the employee's *place of work.*" Such expression does not, of course, mean the exact point at which the servant performs his work, but applies to and comprehends the general vicinity in which the servant is employed, such as a yard or enclosure, or perhaps shops. We think this is best described by the expression used in the decision in the *McInerney* case which is quoted in the *Pallocco* case, i.e., "ambit of employment."

Plaintiff's brief lays great stress upon the fact that the judgment of the Supreme Court of New York in the *Pallocco* case was reversed by the Court of Appeals of New York in 236 N. Y., page 110, and says that the Court of Appeals held:

> "that a section hand who had quit work, put
> "his tools away and started for his home, and
> "had walked a distance of more than a mile to
> "a point outside the yard on defendant's rail-
> "road, on his usual route *outside the yards,*
> "was still engaged in interstate commerce."

A reading of the opinion of the Supreme Court, found in 190 N. Y. S., p. 868, discloses that the decedent was killed:

> "while *in the defendant's yards* at Manches-
> "ter."

There is nothing in the opinion of the Court of Appeals which in any way indicates, points out or states that the decedent was killed outside the yards of the defendant company, but it in plain language shows that he was killed at a time when he was *within the yards* of the defendant.

The Court said:

> "Pallocco was not following a right of way
> "of indefinite extension. He was moving
> "across a yard of determinate dimensions,

"marked off by use and boundaries as a unit,
"as something single and entire. We cannot
"say that there was a duty to depart from
"this inclosure by the shortest line to the peri-
"meter. Whether passage through the yard
"from its outermost extremity to its begin-
"ning was a privilege of the employee, at-
"taching as a reasonable incident of his con-
"tract of employment, must be determined as
"an inference of fact in the light of all the
"circumstances. First in importance among
"these are the physical surroundings and the
"practice of the business.

"Our ruling in *Matter of McInerney* v. *Buf-
"falo & Susquehanna R. R. Corp.* (225 N. Y.
"130) is pressed upon as authority for a dif-
"ferent conclusion. We do not so regard it.
"There the injured workman, a claimant un-
"der the Workmen's Compensation Act, was
"walking along a right of way. Close beside
"him was a highway which he could easily
"have reached and which he commonly trav-
"eled. The contour of the yard, the proxim-
"ity of other avenues of access and egress,
"and the reasonable incidents of the serviec
"as indicated by the practice of the servant,
"were the features of that case which deter-
"mined the decision. They separate it ade-
quately from the case at hand."

In the case of *Krysiak* v. *Pennsylvania R. Co. et al.*, 270 Fed. Rep., p. 758, the Circuit Court of Appeals for the Third Circuit discusses this general question and points out the limitations of the rule stated in the *Zachary* and *Winfield* cases.

In that case the decedent was employed as an engine fire-cleaner in an ash-pit in the railroad yards of the defendant. His work consisted of cleaning engines used in both interstate and intrastate commerce. The facts are thus stated in the opinion of the Court:

"Krysiak was at work during the night as
"an engine fire-cleaner in an ash-pit. His

"employment, being upon engines used in "both interstate and intrastate commerce, was "concededly interstate in character. Instead "of ascending a near-by stairway leading to "a street which the defendant had provided "for the safety of its employes on leaving "their work, Krysiak, on leaving his night's "work, pursued a course, for his personal con- "venience, across the yard tracks and main "tracks of the Railway Company. The earth "thereabout was packed down by the feet of "many employes, who were in the habit of "leaving the yard in any direction they chose, "but it was not shown that there was a beaten "pathway across the tracks suggestive of in- "vitation or permissive way.

"It was early in the morning; the day was "dark and foggy. Krysiak stepped between "the rails of one of the main tracks and was "struck by a train coming from behind an "obstruction at a rapid though not unusual "rate of speed without giving warning."

The Trial Court directed a verdict on these facts for the defendant and the Circuit Court of Appeals affirmed such direction, holding that the decedent when killed was a mere volunteer on the defendant's tracks.

The Court in its opinion said, inter alia:

"In the Zachary and Winfield Cases the in- "jured employes were still about their em- "ployer's business when leaving their work "and their departure was necessarily incident "to their work and necessarily partook of its "character. But here, the employe declined "to take the safe way provided for him on "leaving his work—that is, he declined to take "his departure and thereby complete his em- "ployment in the way provided—but de- "parted by another way more convenient to "him in following his own affairs.

"We are particular to note just here that "we are not passing on a case where an em-

> "ployee, leaving employment in interstate "commerce, selects one of several more or "less dangerous means of exit from his place "of employment because his employer had "provided him no safe means; but we are "passing on a case where the employer had "provided a safe way out and the employe, "ignoring it, selected a dangerous way. At "that moment, we think, Krysiak ended his "employment and lost the status of an em- "ploye in interstate commerce. Later, when "he was killed, he was not not engaged in his "employer's work, or in an incident to it, but "was engaged in his own private concerns."

Attention is directed by the plaintiff to the case of *Lamphere* v. *Oregon R. & Navigation Co.,* 196 Fed. Rep. 336. That case, however, is clearly distinguishable from the case at bar. In the *Lamphere* case the injured had been *ordered* and *directed* by the defendant *to do a designated, specific act* in the service of the company, to wit—to move a train then engaged in interstate commerce. He had been directed to proceed from his home to the depot premises in Tekoa, Oregon, and there to take a *designated* train, and was crossing the tracks of defendant at a *crossing* habitually used by him and other employees of defendant *in the performance of their duties.* In the case at bar, plaintiff had received no direction or command from defendant, nor was he engaged in the performance of his duties as employee of the defendant, nor was he at a crossing habitually used by him and other employees *in the performance of their duties.* He was walking along the tracks at the point where he was injured solely for his own convenience.

Great reliance is also placed by the plaintiff upon the case of *Philadelphia, B. & W. R. Co.* v. *Tucker,* 35 App. D. C. 123, L. R. A. 1915C 39, There the decedent was a fireman and was cross-

ing defendant's tracks to assume his duties as fireman in response to a call from the defendant to report for that purpose. A work train known as the "Annex" was provided by the defendant for the purpose of carrying the freight crews to and from work, and decedent was proceeding to this train at the time he was injured. This train was standing on a spur track almost opposite an opening in a wall on defendant's property which existed at that time, and which opening had been left for the purpose of admitting a side track through such wall. This train had stopped and was standing at this point on this spur track for the purpose of letting off and taking on defendant's employees, as it had customarily and invariably done for the past two years. There was a path leading directly to this opening, and this pathway was taken by the decedent. The point where decedent was required to go on the work train was a roundhouse or engine house, which was about 750 feet distant. The afore-described pathway was, it was testified, used constantly not only by men riding on the work train, but by other employees of the defendant in going to and returning from their work in said roundhouse and the yards adjacent thereto. The accident occurred after decedent had passed through said opening and was proceeding across the tracks to the work train.

The Court of Appeals of the District of Columbia held that the decedent was engaged in interstate commerce at the time of his injury. The court said:

> "When Tucker was killed he was *upon the "premises of the defendant in response to its "call to assume the duties he had been en- "gaged by the defendant to assume,* and for "their mutual interest and advantage."

The court then proceeded to distinguish the case under consideration from the case of *Fletcher* v. *Baltimore & P. R. Co.*, 168 U. S. 135, in which case the plaintiff at the time of the accident had left his work for the day "and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have," when he was struck by the rebounding of a stick of timber thrown from a train of the defendant by one of its employees. The District of Columbia Court of Appeals, in distinguishing this case from the *Tucker* case, said that in the *Fletcher* case "the plaintiff *was not on the premises of the defendant,* but upon a public highway, where his relations to the defendant were precisely those of the general public to it. . . . Here, however, the plaintiff was *upon the premises of the defendant, upon its invitation, in the line of his employment, and solely because of such employment.*"

We submit that the distinction between the *Tucker* case and that at bar is obvious. Clearly, in the present case the plaintiff was not upon the main line tracks of the defendant, at a point over four miles away from where he intended to go to work in the defendant's shops "in the line of his employment, and solely because of such employment." In the *Tucker* case the court in effect held that the decedent at the time of his injury was within the "ambit" of his employment, for the reason, as it would appear, that he was at the time of his injury upon the defendant's premises adjacent to the point where he was to begin his actual work and within the same general boundaries or vicinity. In the case at bar, however, no workmen's train was furnished for the plaintiff, nor was he restricted to any particular passenger train. He was at perfect liberty to choose whatever train he so desired, or to get to work in what-

ever fashion commended itself to him. There was absolutely no relationship between the main line tracks which he was traversing at the time of his accident, and the shops at Elizabethport where he performed his duties. If it can be consistently said that at the time of his injuries he was within the ambit of his employment, then it would also necessarily follow that if he had started to walk from Jersey City over the main line tracks of the Central Railroad to take the train at Bayonne, he would still be within the ambit of his employment. It is apparent to what absurd lengths such a holding would lead, and what ridiculous results it would bring about.

This is more aptly set forth by the Supreme Court in its opinion, as follows:

> "To illustrate the plaintiff's counsel's "theory, let us take the case of an employee "of the defendant company, residing in "Bound Brook or Trenton, who, in going to "work, selects the company's right of way to "reach the station to board one of the com- "pany's trains, or upon reaching the station "in safety he waits for the arrival of the "train, and while doing either of those things "he is injured by one of the company's inter- "state trains; thus, we have a situation of an "employee being upon his employer's prem- "ises, on his way to his fixed place of employ- "ment, a distance of forty or fifty miles "away, to perform upon his arrival there in- "terstate commerce work, nevertheless, ac- "cording to the plaintiff's counsel's theory, "the employee so soon as he sets his foot "upon his employer's premises, for the pur- "pose of going to his work, he is to be con- "sidered to have entered upon the duties of "his employment, regardless of the remote- "ness of the place where he received his in- "jury from the place of his employment, and "irrespective of whether or not the accident "occurred on the employer's premises within

"the vicinity of the plaintiff's place of em-
"ployment, or whether or not he was directed
"by the master either expressly or impliedly
"to take the route that he took at the time of
"his injury." (Rec. V, VI).

It is undisputed that the plaintiff had at his disposal a route to the East 22nd Street station entirely over the public highways, and that he chose the route by way of the main line tracks simply on his own convenience and because, as he alleged, it was shorter. There was no evidence in the case, however, to show that this was in fact a shorter route, and the map D-1, will show that if there was in fact any difference in distance between the route via the highways and that via the tracks, it was trivial. His duties in no wise required him to go upon these tracks. There was no evidence that there was any pathway on or along the tracks. While there was testimony that other people walked along these tracks, yet it appeared that this user was not confined to employees of the defendant company, but extended to all other classes of persons, such as for instance the employees of the Standard Oil Company. Furthermore, there was not the slightest proof of user of this way by any other employee than the plaintiff for the purpose of taking a train at 22nd Street station to be carried to the Elizabethport shops.

It is, therefore, most earnestly insisted that at the time plaintiff met with this accident he was not engaged in interstate transportation, or in work so closely related to it as to be a part thereof. This being so, it, of course, follows that he was not engaged or employed in interstate commerce.

B.

Since plaintiff at the time of the accident was not engaged in interstate commerce, then at such time he was either engaged in intrastate commerce, and therefore subject exclusively to the provisions of the Workmen's Compensation Act, or else he was a trespasser upon the private property of the defendant and is barred by Section 55 of the General Railroad Act.

As we have shown under Point I, A, the plaintiff at the time of the accident was not engaged or employed in interstate commerce.

If, therefore, at the time he sustained his injuries he was engaged in any commerce, or occupied the status of an employee in any regard whatever, such employment must necessarily have been in intrastate commerce.

If it should be held that plaintiff was at such time employed in intrastate commerce, or was engaged in any employment for the defendant in any other capacity than in interstate commerce, then, however, it would necessarily follow that the plaintiff's rights and the defendant's liability would be subject to and governed exclusively by the provisions of the Workmen's Compensation Act. If this be true, then it would likewise necessarily follow that the Hudson Pleas would have no jurisdiction, and the plaintiff would be required to establish his rights by appropriate proceedings in the Workmen's Compensation Bureau. See Chapter 149, Laws of 1918, P. L. 1918, p. 429, entitled "A Supplement to an act entitled 'An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule for compensation, and regulating procedure for the determination of

liability and compensation thereunder,' approved April fourth, one thousand nine hundred and eleven."

If, however, plaintiff was not engaged in intrastate commerce, and hence was not subject to the provisions of the Workmen's Compensation Act, then we submit that his status at the time of the accident was that of a trespasser, and any recovery for his injuries was consequently barred by the provisions of Section 55 of the General Railroad Act.

Section 55 reads as follows:

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

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

The argument is advanced that the plaintiff does in fact come within that part of the statute

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which excepts from the provisions thereof persons "employed upon the railroad." We think, however, that any such contention is so entirely fallacious as to fall of its own weight, for such exception clearly is intended to apply only to those whose work or employment *requires* them to be upon that portion of the tracks where they are injured, as for instance trackwalkers, track repairmen and railroad workers of a similar nature. It surely cannot be construed to apply to one who is merely walking upon the tracks not for the purpose of performing any work, but simply for his own convenience and for the purpose of taking a short cut to get to the railroad station, to take a train to transport him to his place of work, over four miles away.

The plaintiff seems to attribute significance to the fact that he was injured while *on his way* to work. This fact obviously would not relieve him from the status of a trespasser, unless *at the time* he was injured he occupied the status of an employee and was engaged in his master's employment *at the very time* he was injured.

An effort is also made to take this case from the operation of Section 55 by attempting to show that even though the plaintiff was a trespasser, yet his injury was due to a willful or wanton act upon the part of the engineer.

The rule as to willful or wanton negligence has been stated by the Court of Errors and Appeals as follows:

> "To establish a willful or wanton injury "it is necessary to show that one with "knowledge of existing conditions, and con- "scious from such knowledge that injury "will likely or probably result from his con- "duct, and with reckless indifference to the "consequences, *consciously and intentionally* "does some wrongful act or omits to dis-

"charge some duty which produces the in-
"jurious result." *Staub* v. *Public Service Railway Co.*, 97 N. J. Law 297.

The same court said in the earlier case of *Hoberg* v. *Collins, Lavery & Co.*, 80 N. J. Law 425, at p. 429:

"That a defendant might reasonably have
"anticipated a possible injury to a tres-
"passer plays no part in determining will-
"fulness. There must be some evidence
"tending to show the maliciousness of the
"offender, that is, his intention to do an
"injury."

The rule was stated by the New Jersey Supreme Court in the case of *Rose* v. *Squires, et al.*, 128 Atl. Rep., p. 80, New Jersey Advance Reports, Vol. III, p. 1024. In that case the Trial Court submitted to the jury the question of whether or not the driver of the automobile in which the plaintiffs were riding was operating such automobile at such an excessive rate of speed as to constitute willful and wanton negligence.

The Court in this connection charged the jury as follows:

"But, finally, in discussing this phase of the
"case, if you find that they were licensees, and
"that he was guilty of the willful negligence
"to which I have referred, and which I may
"supplement with this observation as to will-
"fulness; that a thing is so done recklessly
"with intent and without just cause or ex-
"cuse. In other words, to apply it, if Mr.
"Campbell was driving his car at forty-five
"miles an hour as he was passing the junc-
"tion of Lincoln Avenue, without his car be-
"ing in control such as a reasonable man
"would have it in control, and in spite of the
"fact, if you believe the testimony, that his
"attention was called to the rate of speed by

"one or the other of the occupants of the "car, you will recall that testimony, then "you may conclude that the alleged reckless "driving was the result of an intent, and in- "tent without just cause or excuse.

The Supreme Court held that this instruction was error, saying:

"The necessary effect of this instruction "seems to be that if the jury found Campbell "guilty of gross negligence in driving, as it "was claimed he did, they were at liberty to "charge him with an act of willful injury if "his passengers were hurt as a result of such "negligence. But there is a substantial dis- "tinction between mere negligence, albeit "gross, and willful injury. It was never sug- "gested in the case that Campbell desired or "attempted to hurt his passengers. It would "never be claimed that he courted a collision "hoping that they would be killed or injured. "Familiar instances of willful injury in the "old books are the setting of man traps or "spring guns to prevent trespassing. They "will serve to illustrate the distinction. Will- "ful negligence is common enough; it is often "called 'taking a chance.' But unless there "be a positive intent to do injury to a licensee "or trespasser, no legal duty is violated. "Even in cases where the trespasser or li- "censee is the victim of a technical assault "and battery, there may be no case for the "jury, as in *Hoberg* v. *Collins, Lavery & Co.*, "80 N. J. L. 425, where a truck driver flicked "his whip at a boy hanging on behind; and in "*Flammer* v. *Morelli,* 2 N. J. Adv. R. 1588, "where the helper on an ice wagon tickled "the plaintiff so that, as claimed, he slipped "on a piece of ice on the runboard in trying "to escape the tickling.

"There was nothing in the testimony to "warrant the court in permitting the jury to "infer malicious intent from the alleged reck- "less driving."

We insist that in the instant case there was no evidence from which the jury might have found such a willful or wanton act upon the part of the engineer. We think it needless, however, to further discuss this point, for the reason that Section 55 in sweeping and absolute terms declares that it shall be *unlawful* for any person to trespass upon railroad tracks, and that any such person so trespassing shall be *absolutely barred* from a recovery.

In *Barcolini* v. *Atlantic City & S. R. R. Co.*, 82 N. J. Law 107, the New Jersey Supreme Court, in interpreting and construing Section 55, said:

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

In the case of *Erie Railroad Company* v. *Hilt*, 247 U. S. 97, the Supreme Court of the United States recognized and approved the doctrine of the *Barcolini* case, saying, *inter alia:*

> "The statute" (Section 55) "seemingly "adopts in an unqualified form the policy of "the common law as understood we believe in "New Jersey, Massachusetts, and some other "States, that while a landowner cannot *inten- "tionally* injure or lay traps for a person com- "ing upon his premises without a license, he "is not bound to provide for the trespasser's "safety from other undisclosed dangers, or "to interrupt his own otherwise lawful occu- "pations to provide for the chance that some- "one may be unlawfully there."

It is to be noted that under Section 55 as interpreted by the United States Supreme Court in the

foregoing case a railroad company may be held liable to a trespasser upon its tracks *only* where it *intentionally* injures such trespasser. There is in the case at bar not the slightest pretense or suggestion that the engineer of the train *intentionally* ran down the plaintiff.

A very similar situation was presented in the case of *Hoyer* v. *Central R. R. Co. of N. J.*, 255 Fed. 493. There deceased was a brakeman employed in the switching yard. He had finished his work for the day and started home. In order to get out of the yard in which he had been at work, he had only to walk about a block when he would have reached a public street, where he might have taken a trolley car or proceeded on foot to his home. But instead he walked up through the freight yard along a dead track. When he had reached a point about a mile from where he had been working he was run over and killed by an engine which came up behind him without sounding a whistle or ringing a bell. The Court said:

> "In this case the decedent, it is true, was "a servant of the company. His labors for "the day, however, were concluded, and his "duties did not require him to be on the "track at the time of the accident. He might "have walked a block from where his work "stopped and made his exit from the yards, "instead of walking a mile in the direction "he chose to pursue. He might have walked "between the dead track and the live track "at the right, there being a distance of ten "feet between the two tracks. He might have "walked on the cinder path to the left and "would have been safe if he kept far enough "away from the rails. And he might have "walked on the path along the retaining wall. "But he chose to walk on the track itself. *He "was not there by the express or the implied "invitation of the company.* The evidence "does not show that he was even a licensee.

"*He was a trespasser upon the tracks* and "was not taking ordinary care for his own "protection. It was a dangerous place, and "the danger was enhanced by the character "of the night and of the storm."

Since the plaintiff, according to his own testimony, was at the time of the accident walking directly between the rails of one of the defendant's main tracks, we think further argument is needless to demonstrate conclusively that the plaintiff, at the time of his injury, was walking on these tracks in direct violation of the laws of New Jersey, and hence is barred from a recovery for his injuries sustained as a result of his unlawful act in this connection.

POINT II.

The Trial Court erroneously admitted improper and illegal evidence, as follows:

A.

The said judge erroneously permitting the witness Marcella Wortzik to answer over the defendant's objection the following question:

"Q. During the years that you lived there "in that house at 102 Prospect Street, what "was the practice with respect to railroad "employees going through the adjoining lot "to the railroad and walking to the station?"

B.

The said judge erroneously permitted the plaintiff, Joseph Symonski, to answer over the defendant's objection the following question, and refused to strike out the following answer thereto:

"Q. Did you always go through the lots?
"A. Yes, sir."

C.

The said judge erroneously permitted the plaintiff, Joseph Symonski, to answer over the defendant's objection the following question:

> "Q. Do you know what the practice was "during the years that you worked on the "railroad for employees to come through the "lot opposite 100 Prospect Avenue where you "lived, across the railroad tracks and down "the tracks to the station?"

The action of the trial court in allowing each of the above questions was assigned as a separate Ground of Appeal. Inasmuch, however, as all of these questions, insofar as their propriety or legality is concerned, involve the same principle or question of law, the court's rulings in admitting all three questions will be argued as a single proposition.

The above questions were propounded for the purpose of showing that there had been prior to the accident a practice or custom for railroad employees and others to take a short cut through the vacant lot heretofore mentioned, across to the railroad tracks and down said tracks, either to the railroad station at 22nd Street, or to some of the industrial plants or factories in the vicinity. This evidence was offered for the avowed purpose "of implying knowledge on the part of the railroad company of that practice with respect to their employees" (Rec. 81).

There was not the slightest bit of testimony, nor any offer of any testimony to show: First, the existence of any beaten pathway on or along any of the tracks, or second, the route over which these men pursued their course down the tracks, or third, any act whatsoever done or performed by the railroad company to indicate in the slight-

est degree any approval or ratification of this practice by the railroad company. So far as appears from the testimony, all that these men did was to take a short cut through this vacant lot and then walk down toward 22nd Street along whatever portion of the roadbed suited their fancy, some pursuing one course and others pursuing another course. And in addition to this was the affirmative evidence produced by the defendant and undisputed by the plaintiff, that if anyone was found walking along these tracks or near these tracks by the defendant, such persons were ejected from the railroad premises (Rec. 206, 207).

We think that the court in admitting this testimony committed clear error.

The rule is firmly established in New Jersey that use, even with the knowledge of the owner of the lands, by sufferance, acquiescence or permission involves no liability upon the part of the owner of said lands towards the person so using them. *Phillips* v. *Library Company of Burlington,* 55 N. J. Law 307, *Hammill* v. *Pennsylvania R. R. Co.,* 56 N. J. Law 370, *Fitzpatrick* v. *Cumberland Glass Manufacturing Co.,* 61 N. J. Law 378, *Turess* v. *New York, Susquehanna & Western R. R. Co.,* 61 N. J. Law 314, *DeVoe* v. *New York, Ontario & Western Ry. Co.,* 63 N. J. Law 276, *Dieckman* v. *D., L. & W. R. R. Co.,* 81 N. J. Law 460, *Furey* v. *New York Central & Hudson River R. R. Co.,* 67 N. J. Law 270, *Schmidt* v. *Pennsylvania R. R. Co.,* 181 Fed. Rep. 83.

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

R. R. Co. v. *Trautwein,* 52 N. J. Law 169, *Phillips* v. *Library Company supra.*

In the instant case, as already shown, the defendant company had not performed one single act, or conducted itself in any manner whatsoever as to exhibit an intention on its part that these men or any other members of the public were to cut through this open lot and walk down its main line tracks in the busy city of Bayonne.

If the evidence objected to and admitted over objection, as embodied in these questions, was not sufficient in law to show an invitation under the foregoing authorities by the railroad company to the use of its roadbed and tracks in this manner, then clearly such testimony was illegal and inadmissible.

It has been shown clearly, we insist, that such testimony was insufficient to show any such invitation, and consequently the court plainly committed error in admitting it.

POINT III.

The charge of the Trial Court was erroneous in law.

A.

The Trial Judge charged the jury as follows:

> "It has been testified by the plaintiff that "the work which he was on his way to do "at the time of the accident was to clean the "fires from engines, and the answer of the "defendant to the plaintiff's interrogatories, "states that its engines were of every kind "and character, indiscriminately engaged in "both interstate and intrastate commerce.
>
> "If you are satisfied from the evidence as "to this fact, and that certain of the engines "from which the plaintiff was to clean the

> "fires were used in interstate commerce, then "the plaintiff while on his way to clean the "fires from these engines was engaged in in- "terstate commerce at the time of the acci- "dent to him. That the plaintiff had not "actually reached the place where he was to "do this work at the time of the accident to "him, is immaterial, if you are satisfied from "the evidence that he was on his way to per- "form work in interstate commerce."

Bearing in mind that plaintiff was walking along the main line tracks of the right of way of defendant in a place approximately four miles from the place of his work (Rec., 141) in a different city situate in a different county from the place of his work (Rec., 141), and if he continued along the right of way of defendant toward Elizabethport (where he worked) he would have to cross the trestle of defendant erected across Newark Bay upon which there is no way, or bridge, for pedestrians, it seems to us that to say that plaintiff "was on his way" to work, so as to bring him within the rule of the case of North Carolina R. Co. vs. Zachary, 232 U. S. 248, 260; Erie R. R. Co. vs. Winfield, 244 U. S. 170, and kindred cases is to extend the rule beyond the limits set forth in any adjudicated case.

In all of the cases upon the subject the injured was either directly at his place of work, or within the "ambit" of his employment (Pollocco v. Lehigh Valley R. Co., 190 N. Y. 867), which in some of the cases has been held to be the "yard" of the employer, or a place where his work necessarily called him to be in its performance.

When, therefore, the Trial Court charged the jury that if it was satisfied that the engines, the fires of which he was accustomed to clean, were engaged in interstate commerce, and that plaintiff was "on his way" to do that work, the fact

that he had not actually reached the place where he was to do the work at the time of the accident was immaterial, he was clearly in error.

B.

The Trial Court charged the jury as follows:

> "It has been testified by the plaintiff that "for some six months before the accident, "he had every day, and at the same hour, "in going to the 22nd Street Station, to be "transported to his place of work, at Eliza- "bethport, walked on the defendant's tracks "at the place where he was injured, and that "he had done this for this length of time "without any protest or objection by any of "the agents, servants or employees of the "defendant, and that other employees of the "defendant also used the defendant's tracks "at that place for the same purpose.
>
> "It appears from the answers of the de- "fendant to the interrogatories of the plain- "tiff, that the engineer of the defendant's "train which struck the plaintiff saw the "plaintiff when he was outside of the rail- "road track and east of the 22nd Street "bridge, and that the engineer then first blew "the whistle when the plaintiff was 75 to 100 "feet distant from the engine. It therefore "appears that the position of the plaintiff "was known to and discovered by the engineer "when the train was from 75 to 100 feet "distant from the plaintiff."

It will be noted that in the first paragraph of the above excerpt from the charge, the Court states that plaintiff testified he had "walked on the defendant's tracks" at the place where he was injured, for a length of time without protest or objection from defendant, and that other employees had done likewise, and that the answers to interrogatories made by defendant developed that the engineer "saw plaintiff when he

was outside of the railroad track and east of the 22nd Street bridge, and that the engineer then first blew the whistle when the plaintiff was 75 to 100 feet distant from the engine,'' and further

> ''It therefore appears that the *position* of ''the plaintiff was known to and discovered ''by the engineer when the train was from ''75 to 100 feet distant from the plaintiff.''

The statement of the Court was misleading. It permitted the jury to infer that because plaintiff had testified he was walking *on the tracks,* and the engineer had stated he saw plaintiff 75 to 100 feet distant from the engine, the position of the plaintiff (*on the tracks*) was then known to the engineer, and ignores the fact that when the engineer saw plaintiff 75 to 100 feet distant plaintiff was *walking outside of the railroad tracks entirely.* It is still more misleading when we consider that in the paragraph before that the Court states that ''it is the duty of the railroad company to exercise reasonable care to avoid injuring a trespasser after discovering his peril'' (Rec., 234-235).

C.

The Court erroneously charged the jury as follows:

> ''It is one of the contentions of the defend- ''ant that the plaintiff selected the more dan- ''gerous way to get to the 22nd Street Station ''when he might have proceeded down Pros- ''pect Avenue to 22nd Street when he could ''have gone under the tracks and then up a ''stairway to get to the 22nd Street Station. ''Had he chosen that way it would have re- ''quired him to go a little further. The testi- ''mony is that the way he did choose was the ''customary and usual way for him and other ''employees of the defendant.''

In using the sentence "Had he chosen that way it would have required him to go a little further" —the Court allowed the jury to infer that because the safe way was "a little further" such would afford an excuse for plaintiff to walk along the main line tracks of defendant upon its right of way. And again that because "the testimony is that the way he did choose was the customary and usual way for him and other employees of defendant" that such fact imposed upon defendant a duty toward plaintiff. The only testimony on the subject of persons walking along the track is confined to the statements of plaintiff who testified that he went from his house on the east side of Prospect Avenue, across the street, through some vacant lots to the tracks of defendant and along the tracks (south) about 500 feet to the 22nd Street Station and that he always went "through the lots" and along the westerly track (Track No. 4, Ex. D-1) and walked "inside the rails (Rec. 109) on the ties (Rec. 109); that he had seen other men "go through the lots, go on the station to get the train and go to the place where they work," and not only railroad people, but Standard Oil men, and Singer men and "lots of people go through there;" and the further testimony of a woman Marcella Wortzik, who stated she lived next door to plaintiff and that her husband and son who are railroad men, when they wanted to go to the station, crossed the tracks (Rec. 81) and that in the mornings she has seen working men coming from the railroad "passing the track, working men going to work (Rec. 84), six or seven men in the morning and at night the same thing" (Rec. 87). The testimony showed no act upon the part of the defendant which would indicate a *way* laid out by it or adopted by it, for its employees, nor instructions or directions, express or implied, to them to

walk along its tracks, but only the fact that people (among whom were employees of defendant) trespassed upon its main line tracks and walked along and on the ties, without protest or objection from defendant. Such could not create any duty upon defendant. The fact that plaintiff testified that it was his usual procedure to walk on the tracks between the rails and on the ties from a point opposite his house to the 22nd Street Station because it was the shortest way (Rec. 118) does not make such tracks a "usual and customary *way*" so as to impose any obligation upon defendant relieving plaintiff from the status of a trespasser upon the railroad of the defendant.

D.

The Trial Court erroneously charged the jury as follows:

> "Of course, gentlemen, unless the defend-
> "ant and the plaintiff were engaged in in-
> "terstate commerce, the plaintiff could not
> "recover, and that is a question for the jury.
> "It is claimed that both he and the defendant
> "were engaged in interstate commerce at the
> "time of the accident, he being an assistant
> "in the firing of the engines used in inter-
> "state commerce."
>
> "If you find that at the time of the acci-
> "dent the plaintiff was engaged in work
> "which was a part of interstate commerce
> "in which the defendant was engaged, or
> "work that was so closely connected with
> "interstate commerce as practically to be a
> "part of it, or the furthering of the conduct
> "of interstate commerce, then both the de-
> "fendant and plaintiff would be engaged in
> "interstate commerce, and the provisions of
> "the Federal Employers' Liability Act would
> "apply to this case."

Under the evidence of the case there was no disputed fact as to plaintiff's employment. There

can be no doubt that he was *not* at the time of his injury employed in *interstate commerce*. This is clearly shown under Point I, A. Leaving to the jury the question as to whether the plaintiff was employed, at the time of his injury, in *interstate commerce* was erroneous. There being no disputed question of fact, such was a court question.

E.

The Trial Court erroneously charged the jury as follows:

> "If you find that the plaintiff and the de-
> "fendant were engaged in interstate com-
> "merce at the time of the accident, and that
> "the plaintiff has sustained injuries which
> "resulted in full or in part through the negli-
> "gence of any of the agents, officers or em-
> "ployees of said defendant, by reason of any
> "defect or insufficiency due to its negligence,
> "in its cars, engines, appliances, machinery,
> "tracks, roadbed, works, boats, wharves or
> "other equipment, then the defendant would
> "be answerable to the plaintiff for such in-
> "juries which he may have sustained from
> "the accident."

There was no claim made in the complaint herein that plaintiff received any injury resulting "in full or in part through the negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment" nor was there any evidence to that effect, and, therefore, to leave to the jury the right to find that he had received injuries resulting from the negligence of defendant occasioned by any "defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment" and, consequently, could recover against defendant therefor was erroneous.

POINT IV.

The Trial Court erroneously refused to charge as requested by defendant.

A.

(Request Nos. 1, 2, 3.)

> "As a general rule, an accident occurring "to an employee going to or returning from "work does not arise out of or in the course "of his employment."
>
> "An exception to the above general rule "exists in cases where the employee has "reached the premises of the master where- "in is the place of work of the master and "is injured while proceeding to or from his "place of work."
>
> "A further exception exists in cases where "the master has provided exclusive trans- "portation facilities for the employee to and "from his work as part of the contract of "employment, which facilities the employee "must avail himself of."

That the above requests contain accurate statements of the law is clear.

In the case of Podgorski v. Kerwin, 144 Minn. 133, 175 N. W. 694, cited in Nesbitt v. Twin City Forge & Foundry Co. (Minn.), 177 N. W. 131, it was held:

> "It is a well settled general rule that an "injury suffered by an employee in going "to or returning from the employer's prem- "ises where the work of his employment is "carried on * * * does not arise out of his "employment so as to entitle him to com- "pensation,"

and the last mentioned case proceeds to state,

> "Upon this general rule some courts have "ingrafted the following exception: Where

> "an employee is injured while riding to his "place of work in a conveyance provided by "the employer 'after the real beginning of "the employment, in compliance with one "of the implied or expressed terms of the "contract of employment, for the mere use "of the employees, and is one which the em- "ployees are required, or, as a matter of "right, are permitted, to use by virtue of "that contract,' the injury may be held to "have arisen out of and in the course of the "employment,"

and cites (for the rule in the exception) Donovan's Case, 217 Mass. 76, 104 N. E. 431, and 1 Honnold, Workmen's Comp. Sec. 110, Bradbury, Workmen's Comp., Sec. 480; L. R. A. 1916 A, 61, 235 note; L. R. A. 1918 F 907 and note.

In the case of Harrison vs. Central Const. Corp. (Md.), 108 Atl. 874, cited with approval in Fisher vs. Tidewater Building Co., 96 N. J. L. 103, affirmed in 97 N. J. L. 324, the court said:

> "When the injury occurs before the be- "ginning or after the termination of work, "there are two general rules applicable to "the question as to whether the injury arose "out of and in the course of the employment. "The first is that an employee while on his "way to work is not in the course of his em- "ployment. The second is that, where the "workman is employed to work at a certain "place, and as a part of his contract of em- "ployment there is an agreement that his "employer shall furnish him free transporta- "tion to or from his work, the period of "service continues during the time of trans- "portation, and if an injury occurs during "the course of transportation, it is held to "have arisen out of and in the course of the "employment."

The Court in the Fisher case citing from this excerpt from the Harrison opinion, says:

> "This rule has the support of the English "and American cases."

That the rule includes the first exception contained in the second request to charge is clearly established by the Winfield case, the Zachary case and kindred cases cited, *supra.*

The refusal of the Court, therefore, to charge said First, Second and Third Requests to Charge was erroneous.

B.

(Request No. 4.)

> "In this case the work of plaintiff began "when he reported for work at the shops of "defendant at Elizabethport."

Plaintiff testified that his work was cleaning fires in engines at Elizabethport at the "Pit," and his hours were from 3 P. M. to 11 P. M. (Rec. 107), and his pay began when he got to his place of work (his job) and when he punched the time clock (Rec. 116), and if he was late he did not get paid (Rec. 106).

There was no dispute of this fact. To refuse the request to charge therefore was error.

C.

(Request No. 5.)

> "At the time of the happening of the acci- "dent plaintiff was not on the premises of the "employer at or near the place of his work. "In fact, he was injured in one city and his "place of work was in another city in a differ- "ent county some miles away."

The evidence of plaintiff was as stated under "B" last above that his place of work was at Elizabethport, his hours commenced when he reached

his job, and his pay started when he punched the time clock. Elizabethport is in Union County. The 22nd Street Station at Bayonne, is in Hudson County, and the distance between the two is approximately four miles. The request contained admitted facts. To refuse it was error.

D.

(Request No. 6.)

"At the time of his accident plaintiff was "not engaged in interstate commerce."

If our contention that plaintiff was not at the time of his injury engaged in interstate commerce as set forth under Point I-A of this brief, is correct, then the Court erred in refusing to charge the above request.

E.

(Request No. 8.)

"At the time of the accident plaintiff was "not an employee of defendant."

Plaintiff's hours of employment by defendant were from 3 P. M. to 11 P. M. at Elizabethport, N. J. He was injured prior to 2.30 o'clock P. M. (Rec. 109) at Bayonne, at least four miles from his place of work. His pay did not start until he reported at Elizabethport and punched the time clock. Until he so reported at Elizabethport his time was his own; he could employ it as he pleased; he was not under the direction or control of defendant. It was only upon his reporting at Elizabethport and punching the time clock that he came under its direction and control. He was not, at the time of his injury, an employee of defendant, unless it be said that having once commenced to work for defendant he could be

said to continue in his employment both day and night until he was permanently discharged. Under the evidence, the request contained a true statement of the facts. To refuse such request was error.

F.

(Request No. 9.)

> "If the jury should find that at the time "of the accident the plaintiff was not em- "ployed or engaged in interstate commerce, "there can be no recovery in this action."

As shown under Point II, B, plaintiff at the time of the accident, if not engaged in interstate commerce, was either engaged in intrastate commerce or was a trespasser. As we have further shown under said Point, if he was engaged in intrastate commerce, his rights and the defendant's liabilities would be governed exclusively by the provisions of the Workmen's Compensation Act, and the Workmen's Compensation Bureau would have sole jurisdiction. As still further demonstrated under such Point, if plaintiff was engaged in neither class of commerce and was a trespasser, the action is barred by Section 55 of the Railroad Act. Accordingly, the defendant requested the court to instruct the jury that if plaintiff was not employed or engaged in interstate commerce, he could not recover in this suit. For the reason that the court refused to so charge the jury, and for the reasons set forth above, we think that this refusal was clear error.

G.

(Request No. 10.)

> "If the jury should find that, at the time "of the accident, the plaintiff was at the "point of the accident in any other capacity

"than as an employee whose work required "him to be there, there can be no recovery "in this action."

Plaintiff could have no right upon the main line tracks of defendant, walking between the rails, upon the ties, unless as an employee of defendant, his work required him to be there. Even though he were an employee, unless his work required him to be where he was, he was a trespasser. The argument of counsel for plaintiff at the trial was that because plaintiff was a general employee whose place of work was at Elizabethport, such fact gave him the right to be upon the main line tracks, walking along, at any point on the system of defendant no matter how distant from the scene of the employment. Upon such an hypothesis, if a man employed by defendant at Scranton, Pa., should, being at Jersey City, N. J., acquire the notion to walk along the main line tracks at Communipaw and so do, and there was struck by an engine, he could recover because he was an "employee" irrespective of the fact that at the time of his injury he was many miles away from the scene of his employment. We submit that this is not the law. Even if an employee, if he was at a place where his work did not call him, and where no act of his employer induced him to be, nor where his master's work required him to be, he was a trespasser and barred by Section 55 of the General Railroad Act.

POINT V.

Section 55 of the General Railroad Act of New Jersey is constitutional.

Neither at the trial nor on the appeal to the Supreme Court did the plaintiff raise any question as to the constitutionality of Section 55 of the General Railroad Act.

On the present appeal plaintiff now contends for the first time in the history of the entire case that Section 55 is unconstitutional.

In support of such contention the plaintiff cites numerous decisions, not one of which, however, is applicable or even similar to the case at bar. All of the decisions and cases cited by the plaintiff deal only with the question of rules of evidence, and merely deal with the power of the Legislature to declare a rule of evidence which shall be conclusive.

In enacting Section 55 of the General Railorad Act, however, we submit that the Legislature of the State of New Jersey enacted and declared not a rule of evidence but enacted a substantive rule of law. The clear intent and effect of Section 55 is to make it *an unlawful act* for any person (except those coming within the exemption contained in the Act) to walk along the tracks of a railroad. It is likewise the clear intent and effect of the Act to provide that any person injured while in the performance of such unlawful act shall not recover any damages for injuries occasioned by his commission of such an unlawful act.

That the State Legislature has abundant power to enact such a statute seems almost too clear to require argument.

In 12 Corpus Juris, p. 810, it is said that:

> "Statutes creating offenses or causes of "action by prescribing the elements that "shall constitute such offenses or by declar- "ing what acts shall constitute a right of "action, and giving a civil remedy therefor, "are not regarded as encroachments on the "judcial power and are valid, as far as their "prospective operation is concerned. Thus "statutes declaring what shall constitute "adulteration, what is intoxicating, what is "wasteful, what is a nuisance, who shall be "deemed fellow servants, what decisions "shall not be considered as authority in the "courts, and also statutes giving remedies "for the benefit of the representatives of "persons who have been lynched by mobs, "have been held valid."

In *Erie Railroad Co.* v. *Swiderski,* 197 Fed. Rep., p. 521, in a case which involved the application of Section 55 to an injury sustained by an infant between seven and eight years of age, while walking or playing on a railroad track, the Circuit Court of Appeals for the Third Circuit impliedly upheld the validity of Section 55 in the following language:

> "That Legislatures have power to so en- "act in case of infants may be conceded, and "that they have subjected children to those "consequences is seen, for example in the "statute of Missouri. See *Barney* v. *Hanni- "bal,* 126 Mo., 372, 28 S. W., 1069, 26 L. R. A., "847, where it was made a misdemeanor for "any person, minor or adult, to climb upon "a moving train."

Also in *Hawker* v. *State of New York,* 170 U. S. 189, 195, the United States Supreme Court held that the legislature might prescribe as conclusive evidence of a fact whatever is ordinarily

connected with the fact or indicative of it, and reasonably tends to prove the fact, according to the experience of mankind.

Section 55 finds its origin in an Act passed in 1869 (Pamphlet Laws of 1869, p. 806), entitled "An Act to prevent accidents on railroads" and containing the following language:

> "That if any person shall be injured by a "locomotive engine, car or cars, whilst walk- "ing, standing or playing on any railroad in "this state, or by jumping on or off a car "whilst in motion, such person shall be "deemed to have contributed to the injury "sustained, and shall not recover any dam- "ages therefor from the company owning or "operating the said railroad; *provided, how- "ever,* that this section shall not apply to "any person or persons crossing a railroad "at any lawful public or private crossing."

The purpose and intent of the Act is clear from its title, i.e., to discourage and prevent reckless and carless acts, and the probable injuries resulting therefrom, on trains and tracks of railroad companies.

Section 55 of the General Railroad Law of 1903 is a mere repetition of the Act of 1869, except that it has as an additional provision an express prohibition against any person other than one connected with or employed upon a railroad, to walk along the tracks thereof, except when such tracks are laid upon a public highway.

It is clearly within the police power of the State to prohibit through its Legislature dangerous acts, and prescribe regulations for the public safety. Legislatures have enacted laws requiring railroads to blow whistles and ring engine bells as their trains approach crossings; requiring railroads to install safety devices at crossings,

and requiring them to equip their cars with safety appliances. They have required safeguards, as for example, by way of fire escapes or otherwise, to be adopted in factories and tenements. They have limited the speed at which trains may be run through cities and at which automobiles may be operated on highways. For the failure to do these acts prescribed, or for the doing of these acts prohibited, the Legislature may direct what the consequences of such breach of the statutes shall be, either by the punishment of the breach as a crime, or by liability to persons affected thereby in civil proceedings. They may, and do, provide that such breach of statute law shall be negligence, for the consequences of which the wrongdoer is liable in civil actions.

The railroad companies maintain their tracks on and operate their trains over their own private property or right of way, but, nevertheless, subject to the authority of and the restrictions imposed by the State. It is highly important both to the railroad companies and to the general public that the Legislature impose such regulations and restrictions, not only upon the railroad companies, but also upon the public, as will First: expedite and facilitate as much as possible the operation of trains over the railroads' property, and Secondly: reduce to the greatest extent the danger of injury to persons or property by the operation of such trains.

Section 55 of the General Railroad Act is a police restriction designed to accomplish this result. For such purpose, therefore, Section 55 declares that it shall be an unlawful and illegal act to walk on a railroad track, and prescribes what the consequences or penalty of such an unlawful and illegal act shall be, i.e., that no damages shall be recovered of the railroad by a per-

son injured while committing such an illegal or unlawful act.

Such legislative declaration and enactment is clearly within the police power of the State.

Since this is so, then certainly Section 55 of the General Railroad Act is constitutional.

POINT VI.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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