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Notice and Grounds of Appeal.

(Filed Feb. 5, 1918.)

To ALEX. SIMPSON, ESQ.,
Attorney for Plaintiff:

TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The following questions were admitted:

To the witness Bert Scott:

(a) "But you have frequently seen planks put on, haven't you, by laborers; wood taken home?"

(b) "You had taken wood home before this day, hadn't you?"

(c) "Yes, long before the accident happened. I don't mean on the day; I don't mean you took this board. I mean before the accident?"

(d) "You have taken wood home?"

(e) "How did you take it home, put it on the cars and ride?"

(f) "You carried it home?"

(g) "You mean to say that you found it in Weehawken and carried it home?"

(h) "You had it on cars, too, didn't you?"

(i) "Hadn't you had it put on cars for you, and ridden with it, had it on cars?"

(j) "Wasn't this very board put on for you?"

(k) "You say you had never taken wood home?"

(l) "Where did you take it from?"

(m) "And during all the time you worked there you took it home?"

(n) "Anybody forbid you to take it home?"

(o) "And for how long a period of time had you been taking it home?"

(p) "That you worked there?"

(q) "That was about sixteen months?"

(r) "And what kind of wood was it that you would take home?"

(s) "What would you use it for?"

(t) "I see. Now, other people besides you took it home, didn't they?"

(u) "You never saw anybody do this outside of you? You never saw anybody besides yourself?"

(v) "You never saw any wood being taken except what you took?"

(w) "Although you worked there sixteen months and took it home once a week yourself?"

2. The following questions were admitted:

To the witness Philip Stickel:

(a) "Wasn't it the custom for the men to take home loose wood on the train?"

(b) "I mean, didn't they take it on the train for their own use, take it home?"

(c) "Well, you knew it was the custom. You have seen them take wood home?"

(d) "And you have seen other men take it?"

(e) "You don't know that, but you know it was the custom?"

3. The following questions were admitted:

To the witness Frederick W. Schneider:

(a) "And did he or did he not manifest any evidence of pain in the way of groans or anything of that kind?"

(b) "And how did he seem? Did he seem to be suffering or not?"

(c) "And how long did you stay with him that day?"

(d) "So then you came away?"

(e) "Now, the next day, did you go to see him?"

(f) "What time did you go the next day?"
(g) "What time?"
(h) "That would be about the 30th of August?"
(i) "You went first on the 29th, second on the 30th, and the third time at night you went on the 31st?"
(j) "Was he in bed?"
(k) "Strapped to the bed?"
(l) "And how was he acting?"
(m) "Did he seem to be delirious or not?"
(n) "Was he out of his mind or not?"
(o) "He seemed to be out of his mind?"
(p) "And he was groaning and hollering?"
(q) "Did he recognize you?"
(r) "How was he strapped down to the bed?"
(s) "His hands?"
(t) "What?"
(u) "Was he trying to get up?"
(v) "What would he do to try to get up?"
(w) "And how did his face look?"
(x) "Well, how did it look?"
(y) "Was he pale?"
(z) "Did he seem to be weak?"
(aa) "And how long did they let you stay with him on the night of the 31st?"

4. Defendant's motion for a direction of verdict in its favor should have been granted for one or more of the following reasons:

(a) There has been no negligence proven;

(b) The negligence alleged in the complaint has not been proven;

(c) Decedent assumed the risk of the injury from the plank that caused the accident;

(d) The evidence shows that the defendant and its servants exercised all the duty of reasonable care which they were required to exercise in the way of inspecting and examining the train;

(e) There was no negligence on the part of the company or any of its employes to use reasonable care either to furnish a safe place in which to work or to keep objects from the train that might cause injury during the progress of the train.

5. The court charged the jury:

"Upon that point the plaintiff is insisting in three directions; it says, first, that the defendant company did not exercise that care with respect to the place where it employed or caused the decedent to work, as the law called upon it to do.

* * * * * *

"Now, going back to the first: the rule of care which is placed upon a company such as this defendant company with respect to the providing of a safe place for its servants to work is that it must use reasonable care to provide for the servant a reasonably safe place in which to perform his work. Now, pay attention to that rule—it must use reasonable care to provide a reasonably safe place in which its servants are to work. That does not mean, as you can see, gentlemen, by the very plain language—it does not mean that the company is put to all extremities and to all efforts possible to make the place so safe that one cannot meet with a casualty; that is not the rule; but it is quite the other side, and that is, it must use that care which is reasonable care, that care which a reasonably prudent person would exercise, not to keep it perfectly safe—no, by no means, but to keep the place in which its employes are to labor and work in a reasonably safe condition.

"So the first question before you is, taking into consideration all the evidence in the case, has the plaintiff established by a fair preponderance of

the evidence that this defendant company did not use reasonable care to keep these cars upon this train in a reasonably safe condition? If the plaintiff has established that by a fair preponderance of the evidence then she has made out an allegation of negligence chargeable or attributable to the defendant company. And then the remaining question will be whether that negligence was the proximate, natural cause of this happening. As to that again, the plaintiff must make it out by a fair preponderance of the evidence, and if he has, then, save for what I shall say upon other matters which are pertinent to that particular issue, plaintiff has so far made out her case in the direction of being entitled to have a verdict—in the direction of being entitled to have a verdict."

6. The court charged the jury:

"It says, secondly, that one of the employes of the company, a Mr. Scott, I believe, was negligent in the manner in which he attempted to alight from this tank car, and that his negligence brought about the happening which resulted in the injury to Mr. Schneider and his death.

* * * * * *

"If it has been made out upon that score to which I have just directed your attention, then you may direct your attention to the second point, and that is with respect to the conduct of Mr. Scott. As I have indicated to you, plaintiff insists and urges that Mr. Scott was negligent in the manner in which he attempted to alight from this car. Mr. Scott was only under the obligation, however, gentlemen, likewise to use reasonable care, to use that care, conduct himself in that manner which a reasonably prudent person would, considering time, place and

circumstances. Your inquiry in that direction is, has the plaintiff established to your satisfaction by a fair preponderance of the evidence that Mr. Scott was negligent in and about the things which he did? If so, then, was that negligence of his the proximate and actual cause of this happening? If the plaintiff has not made that out, why, then, of course, she has not made out that allegation of negligence and is not entitled to a verdict upon that allegation.

"If she has, then, save for what I will further say to you upon subjects allied with that, she has made out something in the direction of being entitled to a verdict."

7. The court charged the jury:

"Thirdly, they contend for this: that there has been shown a custom upon the part of employes of the company to carry on the cars of this train planks, boards, wood, and so forth; that this custom was known to the company or had existed for such a length of time as to charge the company with knowledge thereof, and that the doing thereof, and the permitting of the doing thereof were so dangerous as to amount to negligence.

* * * * * *

"If she has not made out that allegation, then we come to the third one, which is raised and urged and insisted upon, and that is that there was a custom existing by which and under which the employees of the defendant company carried and transported waste wood, planks, and like things, upon the cars of trains of the company. As to that, gentlemen, the first thing for your consideration is, has such a custom been established? And keep in mind that the burden of establishing it is upon the

plaintiff, and the plaintiff must do so by a fair preponderance of the evidence.

"Now, custom does not mean, gentlemen, the casual doing of a thing, and interrupted doing of a thing, a doing of a thing once or twice; but it means, if anything, a continued doing of a thing over such a space of time, and so continuous and so notorious as to be open to all who are qualified to see and know that it is being done, and not done by stealth or secretly, but done so continuously, openly and notoriously as to be open to the observation and knowledge of reasonably observant persons.

"Again, even if they have established—and the first point before you is, is there in this case that evidence, that preponderance of evidence which warrants you in finding that a custom of that character has at all been established? If not, why, then you need not go any further with that particular branch of the case, because there is then nothing at all to consider further upon that point.

"If the custom has been established the next thing before you for consideration is, has it been so established, and was it so notorious and open that this defendant company would be chargeable with the knowledge of it, and that it was being done? Because, in order to charge the company with an act or action of that character for the purposes of an action of this character it must be shown either that they had actual knowledge of it, or actually permitted or authorized the things to be done, or that it must have been so continuous and of such long standing, and so openly done and notoriously done, that in the exercise of reasonable care on their part, or on the part of their agents, would have given them knowledge of it.

Has it been established that that is the situation? If not, then you need not go any further with that matter. If both of those things have been established, then the next question is, was the doing of this thing, carrying of wood, planks, and so forth, in this manner, such a dangerous thing that it can be said to be included under that rule of reasonable care which I have already given you? Was it so dangerous, so openly dangerous a thing to do, or to be permitted to be done, that a person exercising reasonable care would not permit it to be done? The burden is also there again upon the plaintiff to satisfy you upon that score, because even if it were the custom, even if it were known to the company, or had been conducted and carried on so long that the company in law would be charged with it, yet, if it was not the doing of a thing that was so dangerous as to charge a person with negligence under the rule of reasonable care, then, of course, there cannot be a recovery in this case for it: because the only care that is required of the defendant company at all times and under all the circumstances is to use reasonable care to keep the trains and the cars of the trains upon which this man was working in reasonably safe condition. Keep that always in mind."

8. The court charged the jury:

"It is contended for in this action that there should be a verdict covering two grounds: the first, compensation or payment for pain and suffering, if any, which Mr. Schneider endured and suffered from the time of the happening to the time of his death, during such time, if any there were, between those two periods that he was conscious. In other words, they are seeking to recover first compensation for conscious pain and suffering. Of course,

the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence that Mr. Schneider's condition of consciousness was such that he was conscious and was able to realize and feel and know of any pain which he may have had; and it is only in the event that that has been shown that she can be entitled to have a recovery for it. Of course, the two things must be shown: first, that there was pain and suffering; secondly, that at some time, or more particularly for what period of time, if any, his condition was that of being conscious so that he realized that pain and suffering; and, thirdly, what the degree and intensity of that pain and suffering were. Now, there is no mathematical rule which I can give you gentlemen for the admeasurement of such damages and for such a purpose. The only thing that I can say to you is this: you are, as your best judgment will permit and guide you, to determine what sum of money will compensate —reasonably compensate for such pain and suffering as may have been shown during such a period or time, if any there have been, that the deceased Mr. Schneider was conscious between the time of the happening of the accident and the time of his death. For that the plaintiff is entitled to be compensated as nearly as you can—for that pain and suffering.

* * * * * *

"If you find that your verdict is to be for the plaintiff, that there is to be a recovery upon both items contended for, then you will say that you find for the plaintiff and against the defendant for the pain and suffering so much; for pecuniary loss because of death, so much. That keeps the two items, you will see, of recovery separate and distinct."

COLLINS & CORBIN,
Attorneys for Appellant.

Complaint.

(Filed July 6, 1916.)

The plaintiff, who resides at No. 17 Floyd Street, in the City of Jersey City, in the County of Hudson, says that:

1. That she is the Executrix of the Last Will and Testament of Adolph Schneider, deceased, and that Letters Testamentary have been granted to her by the Surrogate of the County of Hudson.

2. The defendant is now and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the State of New York and is a common carrier by railroad, engaged in interstate commerce, transporting goods and passengers for hire from the State of New Jersey to other States and Territories without the State of New Jersey.

3. The intestate of the plaintiff, at Hoboken, in the County of Hudson, on the *27th day of August,* 1915, was an employee of the defendant and was working as a brakeman on a train of cars, which said train consisted of freight cars which had come from without the State of New Jersey into the State of New Jersey, and thereby the defendant and the intestate of the plaintiff were engaged in interstate commerce.

4. While the intestate of the plaintiff, at Hoboken aforesaid, was so engaged as the employee of the defendant and while the defendant was so engaged in interstate commerce, the intestate of the plaintiff was injured by reason of the negligence of the defendant, its servants and agents, and from which injuries he died.

5. The negligence of the defendant consisted in this:

That while the intestate of the plaintiff was so employed as a brakeman *on top of a train of moving freight cars,* carrying freight consigned without the State of New Jersey and freight which had been consigned from the State of New York into the State of New Jersey and from other States into the State of New Jersey, and while engaged in the performance of his duties for the defendant, he was injured by reason of the negligence of the defendant to use reasonable care to furnish him with a safe place in which to work; and by reason of the failure to use reasonable care on the part of an employee of the defendant, in the use of a certain plank, whereby the intestate of the plaintiff was struck by the said plank, while he, the intestate of the plaintiff was engaged in interstate commerce and so injured that he died.

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

7. The intestate of the plaintiff left him surviving next of kin who have suffered pecuniary injury by reason of his death.

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

The plaintiff demands $50,000 damages.

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer.

(Filed July 19, 1916.)

Defendant, ERIE RAILROAD COMPANY, a corporation of the State of New York, having its principal office in the State of New Jersey, at the foot of Pavonia Avenue, Jersey City, New Jersey, answering says:

First Defense.

1. It has not any knowledge or information thereof sufficient to form a belief.

2. It admits the allegations of paragraph two, but says that it was not exclusively engaged in interstate commerce as therein set forth, but was at times engaged solely in intrastate commerce within the limits of the State of New Jersey.

3. It admits the allegations of paragraph three except that it denies that the train of cars had come from without the State of New Jersey into the State of New Jersey.

4. It denies the allegations of paragraph four.

5. It denies the allegations of paragraph five except that the defendant is informed that on the 30th day of August, 1915, the plaintiff's intestate died.

6. It denies the allegations of paragraph six.

7. It has no knowledge of the allegations of paragraph seven, except that it admits that the action was commenced within two years from the time of the said accident.

Answer

Second Defense.

The accident set forth in the complaint was due to the obvious risks of employment which were assumed by the plaintiff's intestate.

Third Defense.

The accident set forth in the complaint was due to contributory negligence on the part of the said Adolph Schneider, deceased; and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the said Adolph Schneider, deceased.

Fourth Defense.

Before the happening of the accident set forth in the complaint, said Adolph Schneider, deceased, made an agreement with the defendant whereby he surrendered his right to any method, form or amount of compensation or determination thereon, other than as provided in Section II of Chapter 95, Laws of 1911, of the State of New Jersey; under paragraph 8 of said act, said agreement binds his personal representatives, his widow and next of kin, and is a bar to the present action.

COLLINS & CORBIN,
Attorneys of Defendant.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

MARTHA LENNON, Executrix,

vs.

ERIE RAILROAD COMPANY.

ALEXANDER SIMPSON, Esq., for the plaintiff.

COLLINS & CORBIN, Esqs. (Mr. Hobart) for the defendant.

The above entitled case was tried October 17, 1917, before Honorable LUTHER A. CAMPBELL, *Judge*, and a jury.

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

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

Mr. Simpson: I offer first the evidence of Robert J. Clark, Sr., taken in the presence of the defendant by consent of the defendant. (Reads as follows:)

"ROBERT J. CLARK, Sr., sworn, testified as follows:

Direct examination by Mr. Simpson:

Q. Where do you live? A. 131 Lake Street, Jersey City Heights.

Q. Where are you employed? A. Douglass Lumber yard at present.

Testimony of Robert J. Clark—For Plaintiff
Direct—Offered and Read as Evidence

Q. Where is it? A. 317 West Street.

Q. New York City? A. Yes.

Q. On the 28th of August, 1915, where were you? A. I was watchman on Pier B, Erie Railroad.

Q. And on the 28th of August, 1915, were you in the vicinity of the place where this man Schneider met his accident? A. Yes, sir, I was on a car.

Q. And where was that? A. Right at the Ravine Road.

Q. And what was your employment then? A. I was night watchman on Pier B, Erie.

Q. Erie Railroad? A. Yes, Erie Railroad.

Q. How long had you been employed as that? A. Sixteen months.

Q. And where had you been taken during the sixteen months, over what portion of the road? A. On Pier B.

Q. And had you seen the operation of trains in that vicinity? A. Yes, sir.

Q. And had you ridden home frequently? A. Frequently, yes.

Q. And how had you gotten home? How had you ridden? A. Well, get on the freight car and ride around to Croxton yard. I lived right up from the Croxton yard.

Q. From this pier? A. From this pier.

Q. What did you see about the condition of this man there after the time of the accident? A. Well, I went over. I was on top of the box car and he was on the tank, sitting on the side of the tank. There was a couple of old boards laying there on the tank, and when we got to the crossing I went towards the back of the baggage car—the box car. In the mean time he had fallen off. I looked around again. Him and Schneider, Starbuck and Scott was picking him up, and I stood up on the car at

that time and waved my hand at this fellow Stickles. He was about seven or eight cars behind.

Q. Who was Stickles? A. He was another brakeman on the car.

Q. What did Stickles do? A. He signalled to the engineer.

Q. Did the train stop? A. Well, he didn't get the engineer until he was going to the mouth of the tunnel. Then the train stopped and backed up again as far as Monmouth Street.

Q. And did you get off the train? A. No, I did not.

Q. Well, did you see the engine man? A. I seen Stickles.

Q. Where was he? A. He was in his cab—the engineer?

Q. I mean the injured man. A. He was laying on the ground. Scott and Stickles had picked him up in the meantime.

Q. Was there any board or plank near him? A. There was a board fell off the car with him.

Q. How near was the board to him? A. It was within a couple of feet of him.

Q. What was his condition? A. He was laying on the ground, and Scott and Starbuck picked him up.

Q. What condition was he in with regard to blood or evidence of injury? A. I could not tell you that, because I kept on flagging the train. The train didn't stop until we got about half a mile away from him.

Q. What did you do after that, anything? A. I didn't do anything after.

Q. You stayed on the train? A. I stayed on the train.

Testimony of Robert J. Clark—For Plaintiff
Cross—Offered and Read as Evidence

Q. Did you see what became of him? A. No sir, I did not.

Q. Now, during the sixteen months that you worked there, what did you see, if anything, about employees putting wood on the train and taking it home for their own purposes? A. If the man would take a bundle of wood, a couple of sticks of wood, they would throw it on the train, and throw it off wherever their place was.

Q. Was that geenral—was that done during the entire sixteen months you worked there? A. Whenever I rode; I didn't ride all the time.

Q. You saw that done any time you rode over? A. Yes.

Cross examination by Mr. Hobart:

Q. How many times did you see that done? A. Oh, I guess at least fifteen or sixteen.

Q. That would be about once a month during the sixteen months that you worked? A. About twice a month.

Q. Where were the boards put? A. Well, on any car they would get room on, an open car or oil tank.

Q. Or box car? A. Well, if the doors are open they would throw them in sometimes, but they generally had the doors closed.

Q. Would they put them on one of the open cars? A. Either one of the open cars or oil tanks.

Q. By open car do you mean flat car, do you mean a coal car? A. Well, not the iron coal car; one with wooden sides, or flat car, whichever was easiest to get on.

Q. And the men who did that were whom? A. Laborers on the road.

Q. Some of the laborers? A. Some of the laborers on the road, yes.

Q. You never did that, I suppose? A. No, sir.

Q. You never saw any of the crew do that? A. None of the crew, no sir.

Q. You never saw any of the watchmen do it? A. Well, no, I could not say I did.

Q. Just the laborers, the men who worked along the line? A. Yes.

Q. Now, at the time of the accident you were on the ground, I suppose? A. No; I was on the top of the car.

Q. Oh, you were on the train then? A. Yes.

Q. Which car were you on? A. The last car.

Q. Was that a box car? A. Yes.

Q. And which car was Schneider on? A. On the tank ahead.

Q. Right next to the box car? A. Right next to the box car.

Q. And you were on your way home, were you? A. Yes sir.

Q. Was there anybody else on the top of the box car with you? A. No sir.

Q. How long had you been on the box car? A. All the way from Weehawken.

Q. Did you get on that car at the time the train started? A. Yes sir.

Q. And you remained on it until after the accident? A. Remained on until Croxton station.

Q. Do you know where Schneider got on the train? A. Yes sir. Schneider got on at the Weehawken yard.

Q. Same place you did? A. Same place I did.

Q. When did you first notice this board that you have mentioned? A. I seen it laying on the running board at the side—there were two boards there.

Testimony of Robert J. Clark—For Plaintiff
Cross—Offered and Read as Evidence

Q. One on each side? A. No, both on the one side.

Q. Both on the one side of this tank car? A. Yes sir.

Q. And which side were they on? A. The right hand side towards the hill.

Q. Now, how long after the train started from Weehawken was it that the accident happened? A. Well, now, I don't know how long it takes to go as far as the Ravine Road; it didn't make no stop.

Q. Was it a matter or five or ten minutes? A. Well, I guess ten minutes or five minutes.

Q. What was the first that you notice anything happened to Schneider? A. When he was on the ground.

Q. You didn't see him fall off? A. No sir, I didn't.

Q. You don't know what made him fall off? A. No sir, I do not.

Q. Did you notice whether either of these two boards fell off at the same time? A. Yes sir; there was a board laying aside of him.

Q. Do you know whether it was the same board or one of the same boards that had been on the car? A. No sir.

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

Q. After he had fallen off did you notice whether these boards were on the tank car? A. I didn't take any great notice to the boards.

Q. You don't know whether either of them fell? A. No sir.

Q. Was that the first time that you noticed the boards after you saw him fall off? A. No sir. I noticed the boards when I was riding over. Starbuck had one in his hand.

Q. Who was Starbuck? A. He was a detective on the road.

Mr. Simpson: You mean Scott?

The Witness: Him and Scott were detectives on the road. But he was making out he was a submarine, making out that he was shooting over one of the oil tanks, and that was one of the pieces of wood he picked off the running board. He said, "Here is a submarine, we are shooting at the Kaiser."

Q. And this was before the train left or after you started? A. No, this was between Weehawken and where the accident happened.

Q. That was after the train had started? A. Oh, yes, all the way over, he was just mimicing and showing where submarines get under the ships and one thing and another.

Q. Was Starbuck riding on the same tank car? A. Yes, and Scott, too.

Q. All three were on the same car? A. All three were on the same car.

Q. And were they riding on the same part of the car? A. On the same side, only Adam was sitting up more towards the front—Schneider.

Q And Starbuck and Schneider were both behind him? A. Yes, they were more towards the tail end of the car.

Q. And you were sitting or standing—— A. I was sitting on top of the box car.

Q. Right next to the tank? A. Yes.

Q. So you could see what Starbuck was doing and hear what he was saying? A. Yes sir; I was sitting.

Testimony of Robert J. Clark—For Plaintiff
Cross—Offered and Read as Evidence

Q. Tell us again just what Starbuck did? A. Well, he had this board up using it for a gun.

Q. What was he pointing it at? A. Putting it up at the air—at the hill.

Q. And did Schneider see what he was doing or hear what he was saying? A. No, Schneider wasn't interested. He was sitting on the side of the run-board.

Q. Did he turn around to look? A. Yes, he turned around to look.

Q. Apparently he saw what Starbuck was doing and heard what he was saying? A. Yes, he did.

Q. How many shots did Starbuck take at the Kaiser? A. I don't know; he kept carrying on that way all the way along towards the meadows.

Q. And he did that shortly after the train started? A. Yes sir.

Q. And kept it up until the time of the accident? A. Well, we got off where the accident was; they both got off there.

Q. That is both Starbuck and Scott? A. Yes.

Q. And both of them got off before the accident? A. I don't know whether they both got off before the accident, but Scott always got off there; he got off to go home; and Starbuck got off there to go to Hoboken. And I was surprised to see Adam laying on the ground and I jumped to my seat and flagged the train.

Q. The first you knew or heard of any boards being on the tank was when Starbuck began playing with one of the boards, pretending he was shooting? A. Yes sir.

Q. That was the first time you noticed anything about the board? A. Yes sir.

Q. You don't know who put them on? A. No sir, I do not.

Testimony of Robert J. Clark—For Plaintiff
Cross—Offered and Read as Evidence

Q. You didn't see anybody put them on? A. No, because they were on the tank when I got on the car. I had to hurry to get on the car.

Q. You had to hurry to get on the car before the train started? A. Yes. If I didn't get that train I would have to pay my carfare, see? And that saved me carfare over, and made better time.

Q. Had the train started before you got on? A. Just started when I ran and caught on the tail car.

Q. Starbuck was one of the detectives at that time? A. Yes.

Q. Did Scott play with any of the boards? A. No sir; Scott didn't play with any of the boards.

Q. Starbuck was the lively one? A. He was lifting it up.

Q. Schneider was taking part in the fun, too, wasn't he? He was looking at it? A. He was looking at it. He wasn't really interested in it; he didn't pay much attention, I guess he was tired after his night's work.

Q. He was not as playful as the others? A. No sir.

Mr. Hobart: I think that is all.

Mr. Simpson: That is all.

You will waive the signature? I waive it.

Mr. Hobart: All right.

(Witness excused.)

Bert Scott—For Plaintiff—Direct

BERT SCOTT, sworn,

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Scott? A. 419 Lake Street, West Hoboken.

Q. How old are you? A. Forty-one.

Q. What is your business? A. Watchman on the Erie Railroad.

Q. On the 27th of August, 1915, were you watchman on the Erie Railroad? A. Yes sir.

Q. What time did you go to work on that day? A. What time? I worked from six to six.

Q. Six in the morning to six at night? A. Yes sir.

Q. Where do you live? A. I live on Montrose Avenue, Manhattan.

Q. Where were you working? A. On the Weehawken branch.

Q. Did you get on a train at the Weehawken branch to go home? A. Yes sir.

Q. Where did you go on that train? A. On the oil tank.

Q. And was Schneider there on the oil tank? A. Yes sir.

Q. Did you put any board on the train? A. No sir.

Q. There was a board there, wasn't there, laying on the car. A. No sir.

Q. There wasn't any board there? A. No sir.

Q. Didn't you kick a board off as you got off the car? A. No sir.

Q. Haven't you made a statement in this case about a board on the car? A. (No answer.)

Q. Was there a plank on the car? A. There was an oil plank.

Q. An oil plank? A. An oil plank.

Q. Did you put it on the car? A. No sir.

Q. When did you first see it there? A. When I was stepping off the train.

Q. Where was the plank? A. In right between the two oil tanks.

Q. You mean lying where the couplers are? A. No; there is a running board across where the tank is.

Q. What do you mean by between the two tanks? There aren't two tanks on one car? A. There are two tanks, see? And just as I was walking to go off, to go home, I stepped on this plank.

Q. What happened? A. My weight balanced it and it ran along like that.

Q. Along the car? A. Yes.

Q. What did it do to Schneider? A. Catched him here on the left side.

Q. And knocked him off? A. Yes sir.

Q. Now, was this plank lying on the run board or where was it? A. Yes sir; right on the run board.

Q. Was no part of the car at all? A. No sir.

Q. Has no business on the car? A. No sir.

Q. And as you walked along your foot happened to strike it and that carried it against the car. A. My weight, you know, balanced it.

Q. Balanced—you explain it to me, will you? I cannot quite understand it. A. We will say that this is the running board of the oil tank, see?

Q. Yes. A. And I was in the middle here, about here, looking down the track, as I generally do, in case any fellow comes alongside the rail, want to rob the car. Well, when my point come at the place to get off, I accidentally stepped on the end of it. It was so dirty I couldn't see it. It looked

like the running board of the car, naturally in the way.

Q. But it was the plank? A. It was the plank.

Q. And you stepped on it. When you stepped on it what happened? A. It went up in the air and came down and stuck in the railroad tie.

Q. Stood up straight? A. Yes, and dragged along like that and hit Mr. Schneider.

Q. And knocked him off. A. And knocked him off, yes sir.

Q What car did you get on when you got on this train? A. I was on the same side as Mr. Schneider. I had to pass Mr. Schneider.

Q. You had to pass him? A. Yes.

Q. And did you ride on that car all the way? A. All the way down; yes sir.

Q. And what was he doing? What were his duties on the car? A. He was supposed to be flagman.

Q. Of that train? A. Yes sir.

Q. And his duties called him in the position he was in, didn't they, when he was struck by the plank? He was sitting on the side? A. Oh, yes; he was sitting down; yes sir.

Q. On the oil tank. Now, when this thing stuck in the ground and then caught him and knocked him off, what did you do? A. I jumped off and hollered for Starback.

Q. Hollered for whom? A. For Starback, or Starbuck, whatever it is.

Q. And then what happened? A. He ran and tried to stop the train.

Q. And then what happened after that? A. I went over to Schneider and tried to pick him up, which I did.

Q. What condition was he in? A. He started to groan a little bit, you know. His head was a little

bit scratched from the cinders. I picked him up and kind of brought him to the sidewalk, and asked him to try to get up and walk, see if he couldn't walk to the hill. When we got to the hill I was going to run down to the tower and tell them he got hurted.

Q. You say. I understand, that you never saw this plank before you stepped on it? You didn't see this plank before you stepped on it? A. No, I didn't.

Q. You heard the testimony I read. Didn't you see one of these men with this plank playing submarine? A. No sir.

Q. Wasn't anything like that going on? A. No sir.

Q. Starback was on the other side of the tank. Was Starback—— A. Starback was on the other side of the tank; that is the reason I didn't see.

Q. Was he on the same car? A. Yes; he was on the same car.

Q. You didn't see any such performance as testified to by Mr. Clark, did you? A. Mr. Clark was on the box car on the hind end, on the roof.

Q. Did you see Clark? A. Yes sir.

Q. And Starback was a detective on the road, wasn't he? A. He was, sir.

Q. Was he a detective? A. Oh, yes.

Q. Well, you were on the same side as Schneider? A. Yes; I was.

Q. You didn't see Schneider turn to look at Starback—— A. No, sir.

Q. ——who was playing with this plank and making believe it was gun? A. No, sir.

Q. And you didn't see Starback put it down after he got through playing with it? A. No, sir; not at all.

Q. Was it any part of your business to inspect these cars and see that they were safe for the men on them? A. No, sir.

Q. See that there were no obstacles around of any kind? A. No, sir.

Q. That was not any part of your business? A. No, sir.

Q. But you have frequently seen planks put on, haven't you, by laborers; wood taken home?

Mr. Hobart: I object to that as immaterial.

Mr. Simpson: My contention is that it is very material in this case, not essential to a recovery, but it is very material because in this last edition of Ritchie's on the Federal Employers' Liability Act, in a Kentucky case the contention was that employees who after the completion of the day's work was carrying home unused timber on a hand car were not in the scope of their employment, so that the company would be liable, but in case in 162 Kentucky, 172 Southwestern report, it is said: "and it cannot be contended that the very act of negligence complained of must have been in the service or employment." In other words, in order to hold the defendant liable, it is necessary that it should have had the servant to perform the negligent act; in other words, anything that the servant does, if he is hired to do it or not in the employment, would render the master liable. Now, I do not go so far as that in this case, but I do say that it is relevant to show under these cases that it was the custom of the Erie Railroad to let men carry unused timber home, just to show that

the Erie Railroad Company accepted the responsibility for the presence of this timber on its cars. If it was a custom, and they knew it, and it had been done, as one of the witnesses testified, for sixteen months, then it is for the jury to say if they were in the exercise of due care in allowing this thing to be done under these cases, and especially under this case of the Kentucky Court of Appeals, so as to charge them with liability for it. In other words, if they permit a practice to grow up of men carrying wood on the trains, then this jury has the right to say if it was negligence, and that it was that negligence which produced this board on the train, and produced this very accident. In other words, we are not limited to the negligence—that is, the act within the scope of the employment.

Mr. Hobart: I do not think you can charge neglect to the company if some men without any authority, subordinate employees, throw planks, whether usable or non-usable, on board of a freight train that is running along. They are not hired for that purpose. Certainly there is no proof that any of these men were. In addition to that, this question is entirely immaterial because there is no such charge in the complaint at all. We are not told in this complaint that we permitted men to do that, and that because we permitted them to do so, therefore, we were negligent. The charge is we did not furnish a safe place to work, and that we did not use reasonable care in the use of a certain plank, whereby the said tes-

tator was struck by the said plank. There is not the slightest suggestion there that they were going to try to hold us on the theory that is now put forward as justification for this evidence.

Mr. Simpson: It is not necessary, I have heard, to plead evidence. I thought you pleaded your cause of action, and my cause of action is that they did not furnish him with a safe place in which to work.

The Court: Mr. Simpson, your contention is, by that allegation, that they did not provide plaintiff's intestate with a reasonably safe place in which to work?

Mr. Simpson: Yes, sir.

The Court: That you shall endeavor to show that there was—I will use the word custom, probably improperly—practice, rather, of permitting employees of the company to carry boards, planks, and timber on these trains, a practice which the company had knowledge of, and with knowledge permitted it to continue; and I suppose you expect to show, if you can, that this plank which was the cause or alleged to be the cause of this particular happening was such a plank. Is that your idea?

Mr. Simpson: Yes; that is my purpose. I simply say my action is because you didn't furnish me with a safe place in which to work. Then I try to prove how they didn't. They say immediately: "all you have is a plank on the train. We are not responsible for the plank on the train." Then, of course, I have to show something which charges them with knowledge of the presence of the

plank. If somebody came two minutes before this accident and laid the plank on the train and they didn't know anything about it, some stranger, they certainly would not be responsible. But if I can show that for six months they have been allowing strangers to put planks on the train, then they are chargeable with knowledge of the situation they created by the fact that they permitted it. I simply say: "My case is that you didn't give us a safe place in which to work." Of course, I don't plead the evidence.

Mr. Hobart: He refers particularly to a certain plank.

Mr. Simpson: In addition——

Mr. Hobart: The plank that the plaintiff was struck by.

Mr. Simpson: Yes, in addition to the failure to give us a safe place. That is another thing; that is another allegation.

Mr. Hobart: I submit that there is not anything in that allegation or any of the allegation, even if it were competent.

Mr. Simpson: All that I have got to do, as I understand the new practice, is to allege my negligence, and my negligence allegation is that you didn't give us a safe place in which to work.

The Court: For the present I am inclined to sustain the objection, Mr. Simpson. Will you refer me to those cases?

Mr. Simpson: Yes. It is page 149, Ritchie's, on the Federal Law, Section 61.

The Court: Page 149, Section what?

Mr. Simpson: 61. I ask for an objection to your Honor's ruling excluding this testimony.

The Court: You may take it. I may change my mind after I have read those cases.

Q. When you got off this train—what color was this box car that you were on, this oil car? A. It was black, black tank.

Q. Black tank car? A. Yes.

Q. And was this a wooden plank? A. A wooden plank that fell off?

Q. Yes. A. Yes, an oily plank.

Q. Was it a wooden plank? Leave the oil out. Mr. Hobart will give you all the time you want to testify about that. A. Yes, it was wood.

Q. It was not a steel plank, was it? A. Oh, no.

Q. How long was it? A. About six feet.

Q. How wide was it? A. About seven inches.

Q. How thick was it? A. About an inch and a half or two inches.

Q. Was it painted or unpainted? A. No sir.

Q. Did it look like a plank that was used around the yards at all? A. Well, I couldn't say that.

Q. You have seen planks around the yard, haven't you? A. Oh, yes; I have seen plank around the yard.

Q. Planks like this around the yard? A. Oh, no.

Q. What was the matter with that plank that made it different? A. Looked like it was picked up along the road.

Q. Well, you have seen along the track—— A. Yes.

Q. —planks of this kind? A. Yes sir.

Q. Was this your regular way of getting home? A. That was my special every night—or every morning.

Q. I mean during the time you would you were

carried on this kind of a train; you would get on a train. A. Oh, yes, on train.

Q. And that was your custom as to getting home, to go that way, wasn't it? A. Yes.

Q. Well, how did you do that, on a pass, or do it without a pass? A. No; when six o'clock came I was through. I got off at Ravine Road. Then I would walk up Ravine Road to Manhattan Avenue. See?

Q. Yes. Well, why didn't they put you off the train? Did you have a pass? Did they know you to be a watchman? A. I had a badge.

Q. Have you got that badge? A. No.

Q. What did it say on it? A. Erie watchman.

Q. And that would carry you on any train, would it? A. Yes.

Q. How long have you been riding in this way of these trains? A. How many years?

Q. Yes. A. I should judge four and a half years.

Q. Was the train in motion when you tried to get off? A. Yes sir.

Q. They would not stop for you to get off while it was in motion? A. No. As soon as they would get in the lock they would go right straight ahead.

Q. This night when you kicked the plank the train was still in motion? A. Yes.

Q. It was not stopped? A. No sir.

Q. And that was regular way for you to get off while it was in motion? A. Yes sir.

Q. Now, while you were doing that you had to take care of yourself; I mean to protect yourself from injury, getting off the moving train? A. Certainly.

Q. You had certainly to devote some of your attention to yourself, didn't you? A. Yes sir.

Q. And in doing that you struck this plank which

you didn't see and knocked it off; is that right? A. Yes sir.

Q. Was there any way that you could get them to stop for you so as to let you get off while the train was not moving, or would you have to take your alighting while it was moving? A. Well, the trains always move. You had to get on them while they were moving.

Q. And get off while they were moving? A. Yes sir.

Q. And you always got off at the same place, did you? A. Yes sir.

Mr. Simpson: That is all.

Cross examination by Mr. Hobart:

Q. This train was what is called a Weehawken branch train, wasn't it, Mr. Scott? A. Yes sir.

Q. And where did that train run? A. It run from Weehawken to Croxton.

Q. Weehawken is in the northern end of Hudson County? A. Yes sir.

Q. And Croxton is part of the terminal yard here in Jersey City, isn't it. A. Yes.

Q. Just west of the police station? A. Yes sir.

Q. How long a run is it? A. Well, I judge it is —let me see—about two mile.

Q. Now, what time did this accident happen? That is, what time of day? A. It happened six o'clock in the morning.

Q. And you were on your way home, were you? A. Yes sir.

Q. You had been on duty all night? A. Yes sir.

Q. And the car on which Schneider was riding you have called a tank car? A. Yes sir.

Q. Will you describe that a little further? A. It is an oil tank.

Q. And it is used to carry or transport oil? A. This is empty cars, these were, what you carry oil in.

Q. There was no oil in it at the time? A. No.

Q. It is a large round tank, something like a pipe, isn't it? A. Yes sir.

Q. That rests right on the car? A. Yes, sir.

Q. With a board walk or steel walk, rather, on each side? A. Well, yes; there is a walk all the way around the car, see?

Q. So that the brakemen who wanted to go from one end of the car to another would walk along this walk on one side or the other? They don't have to walk on top of the tank, do they? A. No; there is some tanks that some walk on top, too.

Q. You don't remember whether this one had or not, do you? A. No, sir; it had not.

Q. And this one had the path for the brakeman to walk on, one on each side of the car? A. Yes, sir.

Q. And about how high was the tank above the walk? A. Well, I couldn't—well, it was higher than me.

Q. Higher than a man's head? A. Oh, yes.

Q. So that if a man is on one side of the tank he cannot see what is going on on the other side, can he? A. No, sir.

Q. Now, you were riding on this tank car, I believe? A. Yes, sir.

Q. And do you remember which side your were riding on? Was it the right hand or the left hand side, in the direction the train was going? A. The left hand side.

Q. Left hand side? A. Yes, sir.

Q. And what part of the car, towards the front

or towards the rear? A. I was standing in the centre.

Q. And as you stood there you couldn't see what was going on on the other side, could you? A. No, sir.

Q. Did you know that Mr. Starback was on that train? A. Yes, sir; he was on the other side.

Q. He was on the same car with you, but on the other side of the tank. A, Yes, sir.

Q. You couldn't see him from where you were? A. No, sir.

Q. Which part of the car was Schneider riding on? A. On the same side with me, but on the hind end of the tank, sitting down.

Q. Was he sitting down. A. Yes, sir.

Q. With his feet hanging over the side? A. Yes, sir.

Q. And was he sitting at the centre on the rear of the car, or to one side or the other side? A. Just on the end.

Q. Right on the end of the walk? A. Yes, sir.

Q. And that was the same walk on which you were standing? A. Yes, sir.

Q. It was part of your job, I suppose, to keep an eye out for anybody that might attempt to jump that train and steal things from it? A. Yes, sir; that is my duty.

Q. That is what you were doing that morning? A. Yes, sir.

Q. You hadn't noticed this plank at any time up to the moment you happened to step on it? A. No, sir; I didn't see no plank.

Q. Do you know how it got there at all? A. No, I do not.

Q. And where did you get on the train? A. Weehawken.

Q. Did you get on the train at the front end on the same car that you were at the time of the accident? A. I got on the same train where Mr. Schneider was. I had to pass Mr. Schneider.

Q. Had to walk by him? A. Yes, sir.

Q. And you stayed on that side of the tank car all the time up to the time of the accident, did you? A. Yes, sir.

Q. And how long was that all together? A. What? How long the car was?

Q. No, I mean how long did it take the train to get from the point where it started up to the time the accident happened? A. Oh, I should judge about twenty minutes.

Q. And how long was it in distance, just a mile or half a mile, or what? A. Why, it would be a mile from Weehawken.

Q. You had not got to the tunnel, had you? A. No, sir.

Q. And how fast was the train going? A. About ten miles an hour.

Q. That is the usual rate for that branch train, isn't it? A. Yes, sir.

Q. You were going towards the front end of the train when the accident happened? A. Yes, sir.

Q. What were you going to do that for? A. To get off.

Q. Well, why did you want to go to the front to get off? A. Because I didn't want to go back again to pass Schneider, because I couldn't climb down over the man to get down to the step. You see, there is the step right there.

Q. He was sitting right near the step on that side? A. Yes, sir.

Q. And you couldn't very well climb over the tank, could you? A. No, sir.

Q. When was the first time that you had seen this plank at all? A. Well, when I seen the plank, after I stepped on it; that was the only time I seen it.

Q. Was that the same color as the— A. Same color as the running board.

Q. —— as the walk or running board. A. Yes, sir.

Q. Well, what attracted your attention to the fact that this plank that you stepped on had struck Schneider? A. I said to Mr. Schneider: "Look out, Mr. Schneider," like that.

Q. That is when you stepped on it and you saw it fly up, or whatever it did, you called to him, did you? A. Yes, sir.

Q. Did you turn around to see— A. It hit him; yes sir.

Q. And you actually saw it strike against him? A. It was too late for him to jump. He could have jumped if he got up quick enough.

Q. But you saw the plank strike him? A. Yes, sir.

Q. Did the train stop shortly after that? A. Had to run after it outside the train; that is the only way it stopped.

Q. Well, what brought the train to stop, anybody give it a signal, or did it stop, anyhow? A. Watchman had to run over the top of the car and tell them what the accident was.

Q. Did you go with Schneider to the hospital? A. No, sir.

Q. Do you know who did go with him? A. I think it was one of the brotherhoods went with him, I think.

Q. Now, the other man around there at the time was this Mr. Clark, I believe. Where was he riding? A. He was riding on the box car.

Q. And was that at the rear of the tank ? A. That was the last car on the train.

Q. Last car on the train? A. Yes, sir.

Q. And next to the tank car? A. Yes, sir.

Q. He was also a watchman, I believe, wasn't he? A. Yes, sir.

Q. Was it any part of his job to watch that particular train, or was he a watchman in the yard? A. He was a watchman on the dock.

Q. Have you had any talk with Schneider as the train was moving in these twenty minutes? A. Not at all; no, sir.

Q. Did you know him? A. Oh, yes.

Q. You had seen him work around there before, had you? A. Oh, yes; I knew him for years.

Q. You say this accident happened about twenty minutes after the train had started. Do you remember where the train started? Didn't it start in the Weehawken yards? A. Weehawken yards; yes, sir.

Q. So you boarded the train before it started? A. No, sir; when it moved I got on.

Q. That was after it had started? A. Yes, sir.

Q. How far had it gone when you got on? A. Oh, about ten feet, I presume.

Q. Well, it was just starting? A. Yes, sir.

Q. And did you get on this same tank car where you remained? A. Yes, sir.

Q. Schneider was the rear brakeman, I believe, wasn't he? A. Yes, sir.

Mr. Hobart: That is all.

Re Direct Examination by Mr. Simpson:

Q. Isn't it a fact, Mr. Scott, that this wood was

put on the train for you and that you knew it was on the train? A. This wood put on for me?

Q. Yes; that you were in the habit of taking it home, and you knew this night that this board was put on for you? A. There was no wood put on for me; not as I know.

Q. You are sure about that? A. No, sir; there was no wood put on for me.

Q. Who was the conductor of that train, do you know? A. George Petnaud.

Q. Petnaud? A. Yes, sir.

(Recess to ten o'clock the following day.)

October 18, 1917.—Trial continued.

SAMUEL BARASHAW, sworn

Direct Examination by Mr. Simpson:

Q. Doctor, you are a physician? A. Yes, sir.

Q. And you are the interne now of Christ Hospital, are you? A. Yes, sir.

Q. And have charge of the records of the hospital; those you produced here, the records of Christ Hospital? A. Yes, sir.

Q. Now, what are these papers; that is, what is the system of doing business at the Hospital? How do they keep the records? A. Well, the records are kept by the nurses under the order of the doctors.

Q. Now, Dr. Gray, who attended this case, is dead now, isn't he? A. Yes, so far as I know.

Mr. Simpson: Well, I guess it is admitted. If it is not I can prove it.

Mr. Hobart: Who is that?

Mr. Simpson: Dr. Gray, committed suicide.

Mr. Hobart: Oh, yes; that is admitted.

The Court: The attending physician is dead?

Mr. Hobart: Yes.

Q. Have you here the records of that hospital concerning the case of one Adolph Schneider, residence 17 Floyd Street, Jersey City, on the date of August 28, 1915, showing his admission to the hospital and showing the complete records of the hospital as kept by the hospital concerning this case? A. Yes, sir.

Q. Are these the records? A. Yes, sir.

Mr. Simpson: I offer those in evidence.

Mr. Hobart: I would like to cross examine before we proceed.

The Court: You may.

Cross Examination of the Offer by Mr. Hobart:

Q. Did you keep these yourself, Doctor? A. No, sir.

Q. Who did keep them? A. Why, the nurse kept them under the orders of the doctor.

Q. What is the nurse's name? Does the nurse's name appear here? A. No, sir; only a pupil nurse.

Q. Well, you know who it was, don't you? A. No, sir, I do not.

Q. But you know that it was one of the nurses in the hospital? A. Yes, sir.

Q. Doesn't her name appear anywhere? A. No; the nurses' names are not on the chart at all.

Q. This record, then, was not kept by Dr. Gray, of course? A. It was under his supervision.

Q. What do you mean by that? A. I mean that all orders at the hospital are kept under the attending surgeon who attends the case.

Q. True, but the doctor did not tell the nurse what to put down, did he; that is not the custom in the hospital, is it? A. Well, it is practically understood that way.

Q. Well, isn't it a fact that the nurse writes down the treatment and the medicine, and any comments on it, and then submits the records to the doctor when he calls to attend the patient? A. Well, she writes the drugs, and so on, under the supervision of the doctor. The doctor tells her to write this particular thing for that patient, and then she writes it down and, of course, she may judge sometimes of the condition of the patient, and she may not at other times.

Q. Well, suppose there is a record here, for example, that the patient's pulse is so and so, or that it is weaker, or that it is stronger. Does the doctor tell her to write that down, or does she write it down according to her observation while the doctor is away? A. She writes it down and reports it immediately to the doctor.

Q. So the doctor does not tell her at all what to write down, but he looks at it when he calls on the patient? A. She writes it down, yes, and then reports it.

Q. Reports it in the form of this written record? A. Yes, sir.

Q. The doctor presumably knows nothing about it until he sees the nurse's report? A. Well, he does not even have to look at it. He is told right away, either over the phone, or he is called in and then he looks at the chart.

Q. So this is a record of the nurse's observation

written down for the information and guidance of the attending physician? A. Yes, sir.

Mr. Hobart: I submit, your Honor, that it is incompetent. I do not know whether it is competent at all as a record. It might possibly be used by whoever kept the record to refresh his or her memory as to the details of the case, but this physician does not say that he had anything to do with this case. He is simply custodian of the records, as I understand it.

Mr. Simpson: All right; I will withdraw the offer. That is all, Doctor.

By Mr. Simpson:

Q. You don't know who was there? A. Dr. Entry was there. He was house surgeon at the time.

Q. Is he there now? A. No; he is down at Fort Oglethorpe, Georgia, with the United States Army.

(Witness excused.)

Mr. Simpson: Now, your Honor suggested something about taking care of this—

The Court: Yes, the principal point that was before me yesterday, gentlemen, was the question of some testimony on a question which it was alleged would go to the question of negligence. That was the question that was prominently before me, and there is another question which I had in mind, which was raised upon your opening, Mr. Simpson, and also upon Mr. Hobart's opening, and that was as to the question of the direction in which damages might be as-

sessed. To be more plain with you, you are asserting that you are entitled to have, if you are entitled to a verdict, damages for constant pain and suffering of the deceased as well as compensation for deprivation of contributions by him, and I would like to discuss both matters with you at this time because I think it will be to the advantage of all to have them discussed and settled, because, as I said before, you will reach them continuously throughout the trial. The first one, however, is the one that is constantly before us.

Mr. Simpson: That is as to the proof.

The Court: Yes.

Mr. Simpson: Now, I say that under the form of these pleadings I have pleaded the following as my cause of action.

The Court: As to that negligence?

Mr. Simpson: Yes. That the relationship, the interstate commerce—

The Court: You may drop right down into paragraph five, Mr. Simpson.

Mr. Simpson: That while the interstate—

The Court: He was injured by reason of the negligence of the defendant. This is the specific allegation: by reason of the negligence of the defendant to use reasonable care to furnish him with a safe—

Mr. Simpson: —— place to work; and by reason of the failure to use reasonable care on the part of a certain employee in the use of a plank.

The Court: Now, let me see if I understand you. You are making an attempt to show that a practice existed and had for

some time on the part of employees of the railroad company to carry upon such trains as this boards, planks, and matters of that sort; that that practice was known to the railroad company.

Mr. Simpson: Or should have been known.

The Court: Or should have been, because of the length of time which it had continued; and I presume you also have in mind an attempt not only to show that, but to show that the particular thing or plank which brought about, as you allege, this happening, was a plank that had so been brought upon this train by one of the employees of the company. Is that, generally speaking, what you are purporting to show?

Mr. Simpson: Yes, sir.

The Court: Well, let me ask you, Mr. Hobart, aside from the question whether that is properly treated or not, do you contend that such a showing would not—if a proper given state of facts—be such negligence as, being the proximate cause of an injury, would be the basis of a recovery?

Mr. Hobart: Assuming it to be the proximate cause—and there is probably sufficient evidence to make it unnecessary to consider that question further—my position is that such an act upon the part of an employee or a considerable number of employees covering a considerable period of time was clearly outside of the scope of their employment; and, therefore, no negligence can be charged against the company by reason of these men doing that sort of thing. Now,

there happens to be quite a recent case in the United States Circuit Court of Appeals (that was one of my own cases) where the question was raised in a somewhat different aspect, but the point was raised whether under the circumstances of that case the decedent was engaged in the scope of his employment, and the court rules squarely that he was not thus engaged; that the federal statute did not apply. I referred to the Van Buskirk case, 228 federal, 489. Have you it here?

Mr. Simpson: No; I have it over in my office. You can send over and get it.

Mr. Hobart: Now, while we are on that point we will refer to the case Mr. Simpson spoke of yesterday in Ritchie. I have the report here. The one case which he spoke of was the Walker case, and in that case the report shows that one of the company's foremen authorized the employees to carry some pieces of wood home with them on a hand car. They said that was sufficient to charge the duty because it was authorized by one who had the authority to do so, the foreman being the man above the laborers who were engaged in that enterprise. Another case which is also cited in Ritchie, I think on the same page—

The Court: The Reeve Case?

Mr. Hobart: The Reeve case, yes, sir. I have that here also. That was a case where some employees were engaged in some playful enterprise and got into a wrestling match on one of the cars, and an injury followed, and it was held that because that was

not within the scope of their employment that the company was not liable even though the employees who were thus wrestling were negligent. In this Reeve case it was said that the statute was not intended to cover a negligent act of an employee in no way connected with the business in the progress of which he was employed to aid. This was an act under the federal statute.

Now, under the Walker case I think it is quite possible if they show some authority of something expressed or implied—possibly it might be said that under that case it was within the scope of employment.

The Court: I do not see how it can be said to be within the scope of employment, as a logical reason why there might be a recovery for it; because, as I see it, and as I think you place it before me, these employees of the Railroad Company using this hand car for their own purpose were not in the course of their employment, but they were doing the thing for their own individual personal benefit with the permission of some person having the authority to give such permission. Now, that seems to be the situation. I do not see how it can be adduced logically that that was in the course of their employment.

Mr. Hobart: It is just as your Honor suggests. These men were going home on a hand car which had been provided by the company and they were permitted to take the pieces of timber home for the purpose of taking them home as kindling wood, having been permitted by an assistant foreman to have possession of the boards and for the

purpose of carrying home wood that another foreman had told them they might take. I do not say that I quite agree with that Walker case, but even taking that as authority, I do not see that it applies to this case. There is another case I cannot recall the name of —I sent for it—but it occurs under the Workman Compensation Act of this State, where the Supreme Court held that an employee who was injured by a playful act, the Supreme Court held that that arose out of the employment. The Court of Appeals said no, it did not; it was not any part of their job.

The Court: There is another case. I cannot give you the name of it now. I think it goes to a somewhat similar purpose. Walters, I think it is, against the Paper Company. It was certified as not being a matter growing out of his employment—an injury growing out of the employment.

Mr. Hobart: That is all I have to say on that point. Shall I discuss the other now? Or shall we take it up after you dispose of this?

The Court: I am asking you these questions because I understand already Mr. Simpson asserts he has the right to show it not only as a matter of fact, and as a matter of law, but also because his pleadings are sufficiently specific and broad to include such a showing. Let me ask you this, then: assume for the moment that such facts can be shown as would charge the company with knowledge and therefore with liability, that the facts are shown, which are sufficient, I

believe, to go to the jury; that through a circumstance growing out of this knowledge and from this particular occurrence took place as the proximate result of it. If I understand you correctly, you say that the present pleadings do not sufficiently assert it.

Mr. Hobart: Yes, sir.

The Court: I am only wondering, of course, the allegation is very broad, Mr. Hobart, this particular one, "he was injured by reason of the negligence of the defendant to use reasonable care to furnish him with a safe place with which to work." I suppose anything might be shown under that, might it not—which can legally be shown, I mean, now; which would show negligence on your part or on the part of the defendant company in not using reasonable care to keep the place in reasonably safe condition?

Mr. Hobart: Oh, yes; it is very broad; I could see that; but I do not think it is sufficiently specific to cover a claim that by a long course of custom we permitted somebody to put planks with our authority, on a train which our employees were engaged in running. Now, of course, you do not have to plead evidence, but you have to plead facts.

The Court: No; I suppose a subsequent affidavit would put you on notice that you must defend yourself against what is ordinarily raised by such an allegation; that is, proper and reasonable inspection and so on.

Mr. Hobart: Yes, sir.

The Court: And it might be said by a de-

fendant company that such an allegation in that form and in that language is not sufficiently specific to put you to your defense on that.

Mr. Hobart: That is the point exactly.

The Court: Now, Mr. Simpson, I have taken up the question with your opponent because I wanted to get his idea.

Mr. Simpson: He should have moved to strike out this complaint. He didn't move to strike it out. He joined issue.

The Court.—He could not have stricken it out.

Mr. Simpson: I think he could, on the ground that it was not specific under that late case, that where you plead non-safe place, that in a proper pleading you ought to go out and set out the fact. Now, if that were so he had a right to move to strike it out. He didn't do that.

Mr. Hobart: The rest of it is good.

Mr. Simpson: He didn't do that. He joined issue on it. That is, he denied that he had failed to use reasonable care to provide a safe place. We come in to try that issue. I say: "you didn't give up a safe place in which to work, and you didn't do it because you had a plank on the car." He said, "Why, we were not responsible for the plank on the car. You have to show that we are responsible." I go on to show them why they were responsible. He says: "Oh, no; you have not pleaded anything in your complaint about any custom. I am going to object to that because you should have pleaded in your complaint this long course of custom before you

can put it in. But it has been the law in this State ever since the case of Potts against Clark—(Read from the case).

Now, couldn't they move to strike out that allegation on the ground that it was not sufficiently specific? He didn't need to. Now, anything that grew out of that litigation could be litigated. Of course, I do not say that having pleaded "you didn't give us a safe place" I could then go on and prove that they supplied us with a defective tool. I couldn't do that. That would be irrelevant. But I can prove anything which goes to show that they didn't give us a safe place in which to work. I have made a very general averment of negligence. It appears to let in this negligence. He has not moved to make it more direct. He has not even in his answer said: "At the trial of this cause I will move to strike out the complaint or any parts thereof, or any count thereof, on the ground that it contained no cause of action;" but he has put in a plea of general issue. Now, I say under the authority of this case, which is a very late case, and has been cited many times in our report that if I have pleaded anything which will allow me to get this evidence in, whether it was specific or definite or not, then your Honor cannot rule it out because by his pleadings he has made it the issue. It cannot be said that I can be limited to proving the presence of the plank. I will go on and prove that, and then your Honor will say, "Why, that is not enough; somebody may have put that plank there a second before this acci-

dent happened. You have got to show me and you have got to show facts from which the jury can say that the defendant was responsible for the condition of the place." Now, how do I do that? I prove the condition and instrumentality. Then I prove the long course of conduct charging the defendant with knowledge of it, and then I say that I have shown that the defendant failed in his duty to use reasonable care. In other words, the argument of Mr. Hobart is that under my allegation of negligence I cannot prove that the defendant did not supply us with a safe place in which to work. I say I can.

Now, as to the other, why isn't that tied by the United States Supreme Court case which I handed up to your Honor, which is the same as this case exactly—Fletcher against the railroad, where the men were throwing off pieces of firewood, and the Supreme Court there ruled that the railroad company was responsible for it; that you could prove the custom of doing it, and having proved the custom that the railroad company was responsible. They even went so far in this case—that was before the statute was passed—and the lower court directed a verdict on the ground that it was the action of a fellow-servant in throwing lumber off the train; but the United States Supreme Court said no, that is not the action of a fellow-servant. The man who was killed was not working for the company at the time he was killed, and therefore the railroad company was responsible for the negligence of its servants. Now, that being the

law, the statute being passed, they are responsible for the action of their employees. I do not rely on this Kentucky case. I do not rely on any of these cases. I rely on the United States Court case, which is exactly this case—men throwing off firewood and men throwing it off after a long course of conduct, charging the railroad with responsibility. I do not know whether Mr. Hobart has seen that case. If he has I should like to know how he distinguishes this case from it, because it is this case on all fours; it is the case of men taking firewood, taking it for a long time and throwing it off the train and hitting a man and killing him. It disposes at once the question of scope of employment. We are not concerned now with the scope of employment. We are concerned with the failure of the defendant to provide a safe place for the man to work.

The Court: That particular case you are speaking of now was the case as you have very well said it, I think, where the recovery was not had because of the relationship of master and servant as between the company and the party who was killed, but that party who was killed stood at the time of the happening in the relationship of a member of the general public.

Mr. Simpson: Yes, but the court in that opinion said if they permit this negligence —that this is negligence, and if they permit it they are responsible to everybody who is hurt. Now, the court did not make up master and servant. They said: "This is negli

gence, and if you allow this thing to be done everybody who is hurt has a cause of action against you." And I say now that we have an action against them because we were hurt by this negligence. Of course, since the passage—at that time they could have bowled out the plaintiff on the ground that it was the act of the fellow servant and he was working on the premises. Now, assuming that state of facts, along comes this statute, and if he is working on the premises and is hurt, fellow-servant is no longer a defense, because the act specifically provides that the doctrine of fellow-servant is abolished. So I say that is on all fours with this case.

Now, as to the third point, whether under this complaint I can recover under the Act of 1910—

The Court: There is no doubt about your right to recover, Mr. Simpson, under proper facts.

Mr. Simpson: That is what I am talking about now. I say that I have alleged in the complaint sufficient—

The Court: Let us see for a moment what you have alleged. The intestate of the plaintiff left him surviving next of kin who had suffered pecuniary injury by reason of his death.

Mr. Simpson: Yes, but that is only one branch of the case. In paragraph five above that I say "the intestate of the plaintiff was engaged in interstate commerce and was so injured that he died." Now, if that is the fact, it is not necessary for me—no case can be pointed out to me that I must there-

upon plead the statute. If it is a fact that he was so injured that he died by reason of his injuries, under these circumstances, he had a cause of action. That cause of action survived to his personal representative, and there is no necessity to plead that. That is a matter of law which your Honor is bound to know.

The Court: I do, but just wait a minute. There are two causes of action. There is one for the pain and suffering—conscious pain and suffering—which, had he survived long enough to have brought the action, but not concluded it before he died, that action so started would have survived to his personal representative, and his death would have brought to the hand of his personal representative the other right of recovery; and the personal representative could have proceeded with the action. The case where it is—the only case where I think it was passed on is the case of St. Louis, Iron Mountain and Southern Railroad Company against Kraft, 35 Reporter, at page 704. Now, it seems to me, reading that case, Mr. Simpson, of course, the position you are in is that you must at this time in this one action satisfy all of your claims; that is, both of those claims; but it does seem that you must so affirm your pleadings as to show that you are claiming for both.

Mr. Simpson: I do not think so. The claim comes in the damage clause. The claim does not come in the statement of the cause of action. The statement comes in the damage clause.

The Court: What is your damage clause?

Mr. Simpson: I demand $50,000—

The Court: That you have suffered pecuniary injury by reason of his death.

Mr. Simpson: No; I demand $50,000 damages; that is, general damages. These are not special damages; these are general damages, and if your Honor will look at the Digest you will find under the old practice and the present practice no one ever had to plead general damages. They plead special damages and must plead them specially; but you do not plead general damages. General damages are assumed as a matter of law. These are general damages. Now, then, I am acting under the Act of Congress which says that any right of action given by this Act to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and so forth, in such cases there shall be only one recovery for one injury. Now, that is the law. I have alleged that he suffered injury by reason of the negligence of his employer while engaged in interstate commerce. Now, I do not think that you have got to set out this statute in your complaint—

The Court—I don't mean that—

Mr. Simpson: In the McAdoo case it says the declaration need not invoke the Federal Employers' Liability Act of 1903.

The Court: You need not spend any time on that, Mr. Simpson. I do not insist on that at all. My whole insistment would be that you should so set out in your complaint

by such language that would show that you are attempting at this time to recover for both lines of damage; that is, for the pain and suffering which he consciously suffered, and for the pecuniary loss to the next of kin.

Now, let me read—in the first case, this is from the Kraft Case. In that particular case it is rather significant that at the statement of the fact in the beginning of it the court says the action was for the benefit of the father, there being no surviving widow or child, and the damages were for (a) pecuniary loss to the father by reason of the death; that is, such loss as you would have under the ordinary death act; and (b) conscious pain and suffering of the decedent before the injury proved fatal. Apparently we can only guess at it, but I think it is a fair guess that there were either two counts in the complaint or there were two separate, distinct allegations or averment as to right of recovery. Now, you know, you go on further where the court is speaking as to the question of the right, and so on, of his survivor—although originating in the same act of wrong or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, the decedent, and it is confined to his personal loss and suffering before he died; while the other is for the wrong to the beneficiary and is confined to their pecuniary loss through his death. One begins where the other ends, and the recovery for both in the same action is not a double recovery for the same wrong, but a

single recovery for a double wrong. And then it goes on and speaks of the case of the Northern Pacific Railroad Company against *Koerner,* as to which it says an injured employee brought an action under the statute to recover for his injuries, and shortly thereafter died by reason of them. The action was revived in the name of his personal representative, and by an amended and supplemental petition damages were sought for the deceased while he lived, and also for pecuniary loss to his widow and children by his death, again showing quite clearly, to my mind, that the practice has been to, as it were, alleged for both rights, contend for both rights of recovery. I am not saying now that you cannot have both under proper showing of facts. I am not saying that you must specifically plead the statute in the sense which you suggest; but the serious question in my mind is whether or not the situation is not that you must specifically show in your complaint that your endeavor is to recover for both; that if you do not it will be assumed that your recovery is for pecuniary loss to the next of kin by the death, not for the right which was the right of the injured person for his personal pain and suffering.

Mr. Simpson: I do not think that—

The Court: And in some of these cases it seems they have even gone so far as when the damages were assessed by the jury to assess them separately, so much for conscious pain and suffering, and so much for pecuniary loss.

Mr. Hobart: And the court reduced them separately.

The Court: And the court reduced them separately, showing quite conclusively to me that the court had in his mind, as the defendant said, that they are two separate and distinct causes of action, the one initially being in the representative and next of kin; that is, the pecuniary loss for deprivation; and the other coming to them—extending to them, as it were, by being continued by the Act of Congress because he had suffered pain and suffering, and died before he could bring or conclude his action. That is the only thing I have in mind. I am only confining myself to the one thing; that is as to whether or not it is incumbent upon you to have your purpose so set forth in your complaint as to specifically show that you are at this time pursuing both of those rights.

Mr. Simpson: Why, I know of no rule of pleading where a man has to point his finger at a defendant and say: "I am entitled under the law, under the fact which I have stated here, to recover so many things, and I am going to ask for that, and this, and some other things." Certainly something is left to the law.

The Court: I agree with you, Mr. Simpson. For instance, if there was no question here as to these two different things you are asked to recover for, but your recovery was for deprivation because of the death of the decedent, assuredly you would not have to go into a statement into your complaint that he was the age of so many years, and that

his probable duration of life was so many more, and that his wages and earnings were at the time so much, and it is probable that his earnings in the future would be so much—no, that would not be so, any more than in the ordinary case for negligence you would have to specifically set out pain and suffering and physical disability, earnings and all that sort of thing. I think it is quite true that you would not. But the question in my mind—and it is quite firmly in my mind—is that to have the recovery you should specifically set out your purposes and contentions in your complaint.

Mr. Simpson: I think it is the very thing which is not necessary. I do not have to set out any purposes or intent. I have to set out facts, and then the law draws certain conclusions from those facts. For instance, I am now asking for damages. I am asking this jury for damages for the death of the man; that is, pecuniary damages which I have set out. I am asking for damages for his injuries which he would have been entitled to sue for if he had lived. Now, then, in 13 Cyc.——

The Court: Now, Mr. Simpson, we can end this very quickly. I am going to end it very quickly. You may amend if you like.

Mr. Simpson: I will do that if you won't put the case over; that is the trouble. I want to finish this case.

The Court: I am going to give you the benefit of the doubt in both instances.

Mr. Simpson: Well, I would like your Honor to look at this late case in the Su-

preme Court on this very question, page 481, *Great Northern Railroad* v. *Capital Trust.* That is after the Kraft case. Page 481 of the loose leaf sheets. I would like to amend, of course. I have every faith in your Honor's judgment, but I do not want to amend if I am going to put this case over.

The Court: Which is the greater loss, if you amend and the case goes off for the term, or you do not amend and you spend several years to finally find out you are wrong?

Mr. Simpson: I think the Appellate Courts are dealing with the Federal Employers' Liability Cases on very liberal ground, and if I get a verdict it will hold on the ground that the pleading—general issue.

The Court: You see, in that case you just cited to me, Mr. Simpson, again we are left absolutely in the dark as to what the pleadings were. It might reasonably be said from that opinion, possibly because of the fault I had in my mind ever since hearing the matter yesterday, that it would require a definite statement in the complaint that they sought to recover on those branches. I say that may have been the situation, because none of these cases clearly say to us what the pleadings were, and it may be that because I have that thought in my mind it would lead me to think that that language means that the complaint did specifically and definitely demand damages for both causes.

Mr. Simpson: Well, does not this settle the difficulty? I think under the head of damages in Cyc. they lay down this funda-

mental rule, which is bolstered up by many cases, whereby reason of certain wrong or breach of a contract the law would impute certain damages as the natural, necessary and logical consequence of the act of the defendant, such damages need not be specifically set forth in the complaint, but are by a proper averment of such breach or wrong recoverable under a claim for damages generally. Now, that I say is my situation. I have alleged the employment in interstate commerce, and relation of master and servant, the injury of the man. Now, under that allegation, by operation of law he had an action, and under the Act of 1910 that action survived, and I have claimed general damages. So I contend under this complaint I can recover on both causes of action. I necessarily can make only one recovery.

Mr. Hobart: Just a word or two further, if your Honor please: in these Supreme Court cases—there is another on the same line—they say that they are entirely and practically distinct separate causes of action. This Kraft case provides for two distinct causes of action: one for personal loss, the other for his personal representative.

The Court: It has been my impression that it might with very great reasonableness be said that a perfect complaint would be one of two counts—a perfectly perfect complaint would be one with two counts——

Mr. Simpson: Having joined issue on it I think he is here to meet it.

The Court: ——where it puts him in that position that it can be said that he has been

properly brought here to defend on the question of damages for that survived action which the decedent had, if he had any right to recover, for conscious pain and suffering. I have indicated my best thought on it, and it is that I think the complaint does not specifically go. Had your complaint gone a little further I would not have had the slightest difficulty. For instance, in your fourth paragraph you allege that while the plaintiff and the defendant were so engaged in interstate commerce the plaintiff was injured by reason of the negligence of the defendant, its servant and agent, and from which injury he died. And you might have had there "from which he suffered conscious pain and suffering," and from which injury he died. If both of those things had been there I would have felt rather safer.

Mr. Simpson: That may have been a better way to plead it, but I say it is sufficiently pleaded; that is, having pleaded facts which would indicate that he had an action if he had not died, which these facts would show was with him if he did die, I would have my action under Section 9 of the Employers' Liability Act, which would be a right of action given to him because he suffered injury. It does not say anything, as the Supreme Court does, about conscious pain and suffering, but it says the right of action under this Act given to a person suffering injury shall survive. Now, I have proved his right of action; I have proved his death, and, therefore, by operation of law I say that the action surived.

The Court: If I am right and they are

two distinct causes of action, as I am perfectly sure myself they are, an amendment which would allege a right to recover for the conscious pain and suffering is now barred by statute, and it would be presenting a new cause of action by amendment. It could not stand.

Mr. Simpson: The Practice Act says that is no longer a bar—the new Practice Act; that you can amend.

The Court: I do not know of any such rule, Mr. Simpson. Your right to amend is a very wide open one, but I have always followed the rules laid down by our court here that you cannot amend to institute a new cause of action against which the statute of limitation has already run. If so, you could continue indefinitely.

Mr. Simpson: There was a section passed which was passed to meet that very case of Mr. Hobart—the Doran case, and it was held by the Supreme Court that it was improper. Judge Haight ruled that in the Smith case, and you (directing Mr. Hobart) took that up before the Circuit Court of Appeals and they didn't reverse on that theory.

Mr. Hobart: True. They invited consideration of the Federal Law permitting amendment.

Mr. Simpson: Yes; you said the New Jersey Act did not apply. (Refers to section 23 of the Practice Act.) No civil suit or proceedings at common law shall fail or be dismissed on the ground that any party therein has mistaken the course of procedure, etc.

The Court: Of course, that does not mean

that I have the right to wipe off the slate the statute of limitation. It simply means that you have the right to start another action when you discover that you have mistaken your cause of action; I am not to make you go all the way back and start all over, but I may give you such amendment as will permit you even to plead a new cause and go on, but not when the statute of limitation has closed the door.

Mr. Simpson: The thought that is running in my mind is that Mr. Hartshorne in his book about this Act has put a note in and says this was passed to meet the situation in the Doran Case, where they allowed an amendment after it passed the statute of limitation.

The Court: Mr. Hartshorne may have had that in his mind——

Mr. Hobart: They refused to close the door on the ground your Honor states.

Mr. Simpson: I won't ask to amend. I think my complaint is sufficiently broad to embrace any recovery under the fact; that is, any recovery which is warranted by the fact alleged in this complaint I am entitled to.

The Court: Well, I am going to take this position, Mr. Simpson, although it is against my judgment, against my idea of what the correct situation is: I am not going to debar you from your right to show. You are doing it now with your eyes wide open.

Mr. Simpson: Yes.

The Court: Under the Death Act you would be barred by the statute of limitation and have to start *de novo*. Upon the first

question which is raised I am also inclined to hear the evidence which I would not allow to take yesterday. Whether or not it is going to reach the point so that you can have the benefit of it, I cannot now say, because I do not know what your evidence is going to be. So, if you wish to put your witness back that you had on the stand yesterday you may do so.

Mr. Simpson: Yes sir.

The Court: It is over Mr. Hobart's objection.

Mr. Hobart: I ask an objection.

The Court: I expect Mr. Hobart to keep it in mind if it does not reach the point that is being shot at.

BERT SCOTT, recalled.

Direct examination by Mr. Simpson: (continued).

Q. Whom did you say the conductor of this train was? A. Peorge Petnaud.

Q. He is in court today? A Yes.

Q. You had taken wood home before this day, hadn't you? (b)

Mr. Hobart: I object to that as irrelevant, immaterial and incompetent, and ask an exception to your Honor's ruling in permitting it.

The Court: For the same reasons.

Mr. Hobart: On the same reasons that were considered in the discussion.

The Court: You may have your objection.

Mr. Hobart: May I have the benefit of the objection to this line of testimony without repeating it to each question? It will save time?

The Court: You may.

Q. (Repeated by the stenographer) You had taken wood home before this day, hadn't you? A. Why, before this accident happened?

Q. Yes, long before the accident happened. I don't mean on the day; I don't mean you took this board. I mean before the accident? A Oh, yes, often took——

Q. You have taken wood home? A. Took it off the ground, certainly; took it home.

Q. How did you take it home, put it on the cars and ride? A. No, sir.

Q. You carried it home? A. Yes, sir.

Q. You mean to say that you found it in Weehawken and carried it home? A. Oh, no sir; I found it in Jersey City.

Q. You had it on cars, too, didn't you? A. No, sir.

Q. Hadn't you had it put on cars for you, and ridden with it, had it on cars? A. No, sir.

Q. Wasn't this very board put on for you? A. No, sir.

Q. You say you had never taken wood home? A. I have taken wood home; yes.

Q. Where did you take it from? A. Sometimes it would be lying alongside of the car.

Q. And during the all the time you worked there you took it home? A. No, sir.

Q. Anybody forbid you to take it home? A. No, sir.

Q. And for how long a period of time had you been taking it home? A. Oh, maybe about once a week; from time to time.

Q. That you worked there? As. Yes, sir.

Q. That was about sixteen months? A. Yes, sir.

Q. Now, what was your duty? What did you have to do? You were watching cars weren't you? A. Yes, sir; I was a watchman.

Q. And these cars came in from all over, didn't they? A. Yes, sir.

Q. New York and all over. And you watched these cars? Did you have the powers of police? A. Yes, sir.

Q. And what kind of wood was it that you would take home? A. Oh, any old piece of wood; it would not matter what it was as long as it would burn.

Q. What would you use it for? A. Firewood; saw it up when I got home, chopped it up and put it in the shed.

Q. I see. Now, other people besides you took it home, didn't they? A. Not on the Erie that I know.

Q. You never saw anybody do this outside of you? You never saw anybody besides yourself? A. Not that I saw.

Q. You never saw any wood being taken except what you took? A. That is all.

Q. Although you worked there sixteen months and took it home once a week yourself? A. Yes, sir.

Q. Anybody else watchman there besides you? A. At present, now?

Q. No, at that time.

The Court: That time was August 27th and before August 27th.

Mr. Hobart: 1915.

The Court: 1915; yes, sir.

A. Yes sir, a party by the name of William Starback.

Q. Starback? A. Yes, sir.

Q. Did you see him take wood home? A. No, sir; he never took wood home.

Q. He was riding on this car this day? A. Yes, sir; at the time of the accident.

Q. Was this board on the car when you got on? A. No, sir.

Q. Did you see it? A. No.

Q. When was the first you saw it? A. When I stepped off the train.

Q. And what part of the car was it lying on?

A. Towards the tunnel.

Q. Which end of the car would that be? A. That would be towards the east end.

Q. Did you know Mr. Philip Stickel? A. Yes, sir.

Q. And how long have you known Stickel? A. Oh, well, I should say about twenty years.

Q. And did he work for the Erie during all the time that you worked for the Erie? A. Yes, sir.

Mr. Simpson: That is all.

Cross-examination by Mr. Hobart:

Q. The wood that you took home from time to time was wood that was burned or was otherwise damaged? A. It is old wood, you know, that would be left in the car, like, blocking up machinery and stuff like that.

Q. Oh, yes. You live in Jersey City, do you? A. I did; yes, sir.

Q. When you took that home you carried it home yourself, did you? A. For my own home use.

Q. For your use at home? A. Yes, sir.

Q. Had you carried it on your shoulder, or basket, or something of that sort? A. Yes, on my shoulder.

Q. You never put any wood on the train running from Weehawken to Jersey City? A. No, sir.

Q. Never saw anybody else do that, either, did you? A. No, sir.

Q. During the time you were there? A. No, sir.

Q. And did you travel on that train almost every day, or on other trains from Weehaken to Croxton every day or every night, whenever it was you were on duty? A. Night.

Q. You travelled every night during the sixteen months back and forth between Weehawken and Croxton? A. Yes, sir.

Q. Sometimes in one direction and sometimes in the other? A. Yes, sir.

Q. Say "yes" or "no," whatever the fact is, so that the stenographer can get it. A. Yes, sir.

Q. And during that time you never saw anybody put wood on this Weehawken train, did you? A. Not while I was riding the train; no, sir.

Q. And you never saw wood—that is, I mean loose planks such as this was—— A. No, sir.

Q. ——on any of those trains during the sixteen months you worked there? A. (no answer).

Q. You have told Mr. Simpson that the first you noticed this piece of wood was when you were getting off the train? A. Yes, sir.

Q. The train, of course, was moving at that time? A. Yes, sir.

Q. Why were you getting off just at that moment? A. That is my spot. I generally used to get off at Ravine Road.

Q. That was the nearest point to where you lived at that time? A. Yes, sir.

Q. And in order to do that—that is, to get off the train—you were intending to get up nearer the head of the train; is that it? A. Yes; to get off.

Q. Well, would you have to walk from this tank car to the next car ahead to do that? A. No, just walk along the running board, as I call it, and there is a step right there to get down on, get down on the ground.

Q. You were intending to get off from that very same car, then? A. Yes, sir.

Mr. Hobart: That is all.

Redirect examination by Mr. Simpson:

Q. Do you know where Starback is now? A. I do not.

Mr. Simpson: That is all.

(Witness excused.)

GEORG PETNAUD, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. No. 1 Underwood Place.

Q. You are the conductor of this train? A. Yes, sir.

Q. On which Mr. Schneider was at the time he was hurt? A. Sitting on the second hind car.

Q. Were you the conductor? A. Yes; I was the conductor.

Q. Now, what was the conductor's business? What would he have to do on that train? A. Well,

he was supposed to look after the train and see that his train was in the right position.

Q. What? A. See that his men were in the right place and everything, doing the work on that end.

Q. Anything else? A. Yes, for the safety of the train.

Q. Were you the man who was in charge of that train? A. Yes, sir; I was in charge of it.

Q. And where were you working? Were you supposed to keep in touch with the train and see what its condition was and what was going on? A. I certainly was; yes, sir.

Q. And this man and the brakemen was under you, weren't they? A. Yes, sir.

Q. And where did you leave with that train, from what point? A. From Weehawken.

Q. And what kind of a train was it? A. Train mixed; a consignment of box cars, dumps, and all kinds; twenty or twenty-one cars all together.

Q. Were they all empty or all loaded? A. A few loads in it.

Q. Where were you going with that train? A. Croxton.

Q. And what was to be done there with this train? A. Drop the train in D yard, in the receiving yard.

Q. And at D it would be broken up? A. Yes, sir.

Q. Put in different trains, switched and classified wherever the freight went. Where were these cars going? That is, where were the loaded ones going? A. Some Croxton, some Croxton Transfer; some D's.

Q. From Croxton where were they going? A. Well, Paterson, Croxton Transfer, P. R. R., D. L's.

Q. What do you mean, Pennsylvania Railroad?

A. Pennsylvania Railroad and D. L. & W. Railroad.

Q. Where were they going on your own road, some of these cars? A. Why, Paterson and Passaic, Rutherford.

Q. Not out of the State of New Jersey, of course. Have you got the records of this train with you? A. No; I ain't got the record here.

Q. Don't you know that the cars were going to be taken all over the road, those twenty-one that you had were going to be taken and divided, and taken up all over the road? A. I think there was no one went over any further than to Port Jervis, not after New York division.

Q. There was nothing further than Port Jervis? A. Not consigned in that train, no.

Q. What is Port Jervis, what is that? A. That is the end of the New York Division.

Q. And you had nothing that would go any further than Port Jervis? A. *Yes,* sir.

Q. How do you know that? A. By the billing.

Q. Well, how many were billed to Port Jervise? A. I don't think there were any billed to Port Jervis. They were all side lines and branch cars.

Q. Well, there were empties there, too, weren't there? A. Yes, sir.

Q. Where were the empties goin? A. Why, they were going to Bergen. They get classified there, and they use them for the transfer; they use them for wherever they want.

Q. Take them wherever they want, don't they? A. Yes, sir.

Q. And you cannot tell now how many you had going to Port Jervis? A. No, sir.

Q. What was the name of this train? A. It is a strong-haul engine.

The Court: Speak louder.

The Witness: It is a strong-haul engine.

Q. Now, tell me where—you say you know where these loaded trains were going. How many loaded cars did you have? A. I ain't got the record; I ain't got the slip with me.

Q. Who has got the slip?

The Witness: Have you got it, John?

(A slip is produced.)

Q. Look at this and tell use where you were going, these cars? A. Well, the head car was a Bergen transfer; the second car was Little Falls, that is, on Greenwood Lake; the third car was a transfer; fourth car was East Orange; that is, on the Orange branch; fifth car is to *Plymouth,* that is on Greenwood Lake; then there was three empty box cars, Erie empty box cars, for Bergen for classification wherever they wanted to send them. The next car was a tank. 1630—a car of asphalt for Westwood; that is on the Hackensack.

Q. Where does that come from? A. That comes from the Central Railroad.

Q. A tank of asphalt? A. Yes.

Q. Now, you don't know where it had come from on the Central Railroad? A. No; I don't know where it came from.

Q. The record would show that? A. (Referring to paper). Why, from Weehawken.

Q. You got it from Weehawken? A. From the billing, yes. Next car was Rutherford; then comes P. R. R. Sozodont car, empty box car, going back to the Pennsylvania.

Q. Going back to the State of Pennsylvania? A. No, going back to the Pennsylvania Railroad.

Q. Where would it be delivered to the Pennsylvania Railroad? A. Right at the junction at Bergen.

Q. You don't know what it had in it when it came? A. No; it was an empty. Next car was a car of empty barrels for Endcliff; that is on the Susquehanna.

Q. What is the name of that State? A. Endcliff.

Q. Where is that? A. That is on the Susquehanna.

Q. That is in Bergen County, isn't it? A. Where?

Q. Bergen County? A. Well, it is on the Susquehanna road, as I remember. I don't know whether it is in Bergen County or where it is. The next car was two cars of brick for Dundee.

The Court: Dundee?

The Witness: Dundee; yes, sir.

The Court: That is in Bergen County?

The Witness: The next car was an Erie empty car, the next was an M. D.—an oil tank, or two oil tanks, for Edgewater. Next——

The Court: That is on the Susquehanna?

The Witness: That is on the Susquehanna. Next comes an oil tank for Paterson, and the last car was a P. R. R. car of oil for Pine Bush.

Q. New Jersey? A. Pine Bush, New Jersey; yes, sir.

Q. Where were these empties going? A. Why, they were going to Croxton, to get classified there, to send them wherever they felt like it.

Q. Where did the oil cars come in that you had? Where did they come from? A. Why, they come off the Central Railroad float.

Q. What? A. Off the Central Railroad from the float at Weehawken.

Q. That is, they were brought around to the Hudson River to get them off? A. To get them off the float.

Q. That is the oil car? A. That is the tank. The load——

Q. I don't mean asphalt; I mean the oil. A. That is where the load comes from, too.

Q. Now, was there any record of these empties that you in the train? A. Yes.

Q. Where was that record taken? A. Right to the office.

Q. At the office? A. Yes.

Q. And that record would show what was done with the empties, when you delivered them up at the Croxton yard? A. Yes, exactly.

Q. Now, you make up the trains in Croxton for west bound freight, don't you? A. Yes.

Q. That is, freight going west into New York and other States, that is where the freight is made up? A. Make them up there; yes, sir.

Q. Now, when you took this train in, you hauled it into the Croxton yard and there it was broken up and separated?. A. There it was humped, yes.

Q. When you left Weehawken what was your position on this train? A. I was riding about five or six cars from the engine.

Q. Did you stay there all the time? A. Sometimes I felt like riding the hind end; I ride on the hind end. Wherever I was it is my position.

Q. On this day did you walk down the train to see whether there were any planks, any obstacles

of any kind? A. I did that in Weehawken, yes; before I left.

Q. (By the Court): Did you do so that day?

Q. Did you? A. Yes, sir.

Q. And did you do it after you left? A. Not until after we got the signal to stop.

Q. You didn't look at the condition of the train, then, after it had left Weehawken? A. No, after it left Weehawken we didn't make no stop.

Q. And was Scotty on the train, on this car, when you passed to inspect the car? A. I inspected the train when I coupled it up in Weehawken.

Q. Was Scotty on it? A. Scotty wasn't around there then.

Q. And the only time you looked at it then was before the train moved out? A. Before we left Weehawken, yes.

Q. Did you see men riding on the train—I don't mean your train—other trains with wood, taking wood home? A. No, sir.

Q. You have never seen that? A. No, sir.

Q. How long have you worked there? A. Well I am working with the company since 1896; twenty-one years.

Q. And you never saw men take a piece of wood home? A. Not off the train.

Q. I didn't say off the train? A. No, sir.

Q. Did you see men get a piece of wood and take it off? A. I seen men when they got to their destination there in Bergen yard take them sticks off the flat cars.

Q. Off what? A. Off the side of the flat cars, take them from machinery.

Q. I mean unused wood. I don't mean wood that was any use. A. Well, that is unused wood, too.

Q. What is it? A. It is sticks that is put on the part of the flat cars to stop lumber from rolling off.

Q. When the car is empty—— A. When the car is empty, why, they take them off.

Q. You have seen them take them off? A. That is, when they got to the destination in Bergen yard the car inspector lets them take it off.

Q. Was that stuff in the car riding with them, or do you mean they got off one train and went to another and took the stuff off it? A. Why, the train was at the destination. I didn't stay there to see whether they——

Q. Well, you had seen them taking the wood off the cars, had you—these unused sticks? A. That is on the branch?

Q. Oh, anywhere at all. A. I seen them in Bergen, yes, when the train reached the destination.

Q. When the train stopped you would see the men on the train take the sticks off and go home? A. Not on the train.

Q. Well, how would they take them off? A. The car inspector would go over and if they seen a stick on the car they would take it off.

Q. They would take the stick off? A. Yes.

Q. Had you seen Scott ride with boards before this thing? A. I never rode with Scott on a branch.

Q. You never saw him? A. I have seen him, yes.

Q. Now, was this your branch that you rode on? A. That was the only engine running there in them days—that night—yes.

Q. What did you do after the train left Weehawken to be sure there were not any obstacles on the car that would hurt the brakemen or throw

them off, or anything of that kind? Did you do anything at all? Did you look for loose boards or planks? A. It is not my business to do that.

Q. I don't care whose business it was. You didn't do it, did you? A. No, I didn't.

Q. You are in charge of the train, aren't you? A. Yes.

Q. And you are responsible for the safety of the men under you, aren't you? A. I had a train—I had the train coupled and the put in——

Q. Were you responsible for the safety of the men under you? A. Yes, to a certain extent.

Q. Did you know that Scott was riding on your train? A. He was riding every night.

Q. Did you know that he was riding on your train this night? A. I didn't know it, no.

Q. You didn't know that he was riding on your train? A. I knew that my two brakemen was on.

Q. Did you know that anybody was on that was not a brakeman? A. Yes.

Q. Well, who was he that was not a brakeman? A. Clark.

Q. Who? A. Watchman from Weehawken.

Q. What is his name? A. Clark.

Q. Anybody else? A. That is all I know.

Q. You say he was on every night. Do you mean by that you carried him home every night on your train? A. Not Clark. I say Scotty.

Q. Scott. You carried him on your train every night? A. I didn't carry him; that was his business to ride them trains from Croxton—from the tunnel to Weehawken and back to the tunnel.

Q. Well, that was not his business when he was going home? A. No; he was working nights on the branch.

Q. No. When he was going home, did you carry

him? A. He was riding the train to see that they didn't do no stealing.

Q. You saw him on the train, did you? A. I didn't see him that particular morning, but he was doing it all the time.

Q. What system did you have to stop it, to let him off to go home? A. We never stopped.

Q. He got off while it was in motion? A. Yes.

Q. And he got off the best way he could? A. And he got on the same way.

Q. While it was in motion? A. Yes.

Q. And that was the usual practice? A. And that was the usual practice.

Q. Now, what do you know about the accident to this man Schneider? A. Well, when we got around Seventeenth Street I saw a signal from the brakeman Stickles to stop. I ran back and asked Stickles what was the matter, and he told me Schneider fell off.

Q. Who told you that? A. Brakeman Stickles.

Q. What did you do? A. I ran back there, and they had Schneider sitting against the Mountain Ice Company fence.

Q. What was his condition? A. Sitting down there, three or four parties around.

Q. Well, what was his condition? Was he bleeding? A. No; he was not bleeding, or anything.

Q. How were his clothes? A. His clothes wasn't torn or anything.

Q. He didn't look as if he had been hit in the side with a plank, either, did he? A. No. I asked——

Q. And you heard Scott's testimony yesterday about how the plank hit him in the side? A. Yes.

Q. He didn't look that way at all, did he? A. Well, he wasn't bleeding that morning. His clothes weren't torn that morning.

Q. Did you help to take him home? A. No, sir; I asked him what was the matter and he told me he got knocked off by a piece of board. I asked him where and he showed me the spot and everything, and I asked the division man around there if they sent for the ambulance or telephoned for anybody; they said no. So I went across to telephone and I telephoned for the ambulance.

Q. Why did you telephone for the ambulance? A. Because the man—I asked him—because he told me he was hurt.

Q. And did he bear evidence that he was hurt? Did he show that he was hurt? A. He looked pale, but that was all.

Q. Did you wait there until the ambulance came? A. No, sir; I left him in charge of the people that was there.

Q. Then you went away, did you? A. Then Brakeman Stickles and I walked around to see whether there was any obstruction where he got knocked off, and there was no board or anything around there, nor there was no wood, and when I got to the rear of the train we looked the tank over, and the tank was in good order, and there was no damage to the place—to the tank.

Q. Did you find the plank that was on the tank? A. No, sir; it could not be found if there was a plank.

Q. Well, you didn't find it? A. No, I didn't see it, only I was told by him that he got knocked off by a piece of board.

Q. Was Scott there when you were helping this man? A. Scott was around there where he was sitting, yes.

Q. Now, where do you say the list is kept for this train that you were working on? A. Penn Horn.

Q. I mean of these cars, the numbers, and where these cars came from that you had in this train. Where would be the record to show that? A. In the Penn Horn office.

Q. Who is the man who has charge of that? A. Chief clerk.

Q. What is his name? A. Harrigan. I don't know his first name.

Q. Harrigan at the Penn Horn office? A. Yes.

Q. Don't know his first name? A. No.

Q. And what do you say the number of the train was? A. Why, it was a haul engine.

Q. I know, but had it any number or name or designation? A. Extra 115.

Q. Extra 115?

The Court: Extra 115.

Q. And was it made up when you got it? A. Why, in Weehawken.

Q. Yes. A. No, sir.

Q. What? A. No, sir; I made it up myself.

Q. Where did you get these cars from that you made it up from? A. Off No. 1 receiving track.

Q. Where did the cars come from that were on No. 1 receiving track? A. They come from the docks and off the floats.

Q. Come from New York? A. Yes, from off the Long Island and off the Central Railroad float, or else empties from the dock.

Q. That is what No. 1 Receiving Track is used for? A. One and two receiving track is used to put those cars up, and they put them in there.

Q. They come from all over, don't they? A. They can't, only from those docks and from Long Island.

Q. From Long Island and the dock? A. And the Central.

Q. And the Jersey Central dock, or boat? A. Yes.

Mr. Simpson: That is all.

The Court: Cross examine.

Cross examination—By Mr. Hobart:

Q. You spoke of Pine Bush, Mr. Petnard, as being in New Jersey. Weren't you mistaken about that? A. Well, that is what it says there.

Q. Isn't it New York? A. Pine Bush, New York; yes.

Q. Pine Bush. It is in New York? A. That is in the New York division, this side of Port——

Q. Near Middletown? A. Yes, it is on the Middletown branch.

Mr. Hobart: Does that satisfy you?

Mr. Simpson: Yes. Thank you.

Q. Do you remember what time this train started from Weehawken? A. About five minutes to six.

Q. Did the train have any schedule time—running time, or do you start as soon as you get it made up? A. As soon as we got it made up and ready we started.

Q. Now, before it started did you look over the train? A. I was around the train and coupled it up, yes sir.

Q. And how many men did you have in your crew? A. Two men.

Q. Two brakemen? A. The head brakeman and the flagman.

Q. And Schneider was the flagman? A. Flagman.

Q. And, of course, you had the engineer and fireman? A. Running the engine.

Q. And did these two brakemen also look over the train before it started? A. No, sir; it was a man—the head man stayed around near the engine to give the signals and the flagman walked over the cars and took the brakes off.

Q. Well, in walking over the cars to take the brakes off he would, of course, see if there was anything on the cars that should not be there? A. Yes.

Mr. Simpson: I object, on the ground that that is for the jury to say. He can describe the situation.

Q. Well, it was part of his job to do that? A. That is the only thing he had to do, was to let the brakes off.

Q. And in doing that he walked over the top of the cars, didn't he? A. Yes, sir.

Q. And this brakeman who did that was Schneider himself? A. Schneider himself.

Q. And did you see him walk over the train before he started? A. Why, we was making up the train when he walked over it.

Q. Well, you saw him walk over it before the train started? A. Yes, when I was coupling it. If I happened to be around the curve he would be on top to give me a signal. He walked around with me. When I was on the ground he was on the roof.

Q. Did you cover the entire length of the train before it started? A. Covered the entire length, yes sir.

Q. And did Schneider cover the entire length of the train in connection with looking after the brakes? A. He had to, because he rode the hind end coming out.

Q. Well, did he start at the head end of the engine? A. Yes, he started at the head end of the engine.

Q. And go to the hind end? A. He did every night.

Q. Well, did he this night? A. Yes, sir.

Q. And how long did it take him to do that, to go from the head to the rear of the train? A. Why, from about between eight and ten minutes.

Q. And did he walk over the top of the cars or walk along the ground, or what? A. He walked over the top of the car. When he would come to a coal dump or tank he would get down and walk around.

Q. And go up again? A. No; he would go on the ground until he came to another string of box cars.

Q. How about these tank cars? Do you remember how many tanks you had that night? A. I don't just remember, no.

Q. Well, there was one, anyhow, near the rear? A. There was three or four tanks.

Q. Three or four tanks. Well, it was not necessary to go on the ground when it came to the tank cars; that is, there was a running board on the tank cars? A. There was a running board on the tank cars, yes.

Q. Right on the side of the tank? A. On the side of the tank.

Q. Did you walk over the train or alongside of the train before the train started? A. I walked alongside of it on both sides. I generally walk down one side when I couple it, and then I walk up the other to look the train over.

Q. Did you do that this night? A. I did.

Q. And how long did it take you to do that? A. Why, around fifteen minutes.

Q. Well, now, when you walked on one side of the train and up the other side, did you see any plank or board on any of the cars? A. No, sir.

Q. Was it daylight at the time? A. Yes, sir.

Q. Weather clear? A. Clear weather.

Q. Now, your other brakeman was the man who had been mentioned here as Stickle? A. Philip Stickle.

Q. He had charge of the front of the train, the head part of the train? A. Head part of the train.

Q. Did he look over any part of the train before it started? A. Well, he walked five or six cars.

Q. Which cars did he cover? A. Five or six head cars, and then when he got the engine all coupled up and the air in he walked up with the *bills* and waited for a sign from the hind end.

Q. Well, the cars that he covered were the cars next to the engine? A. Next to the engine.

Q. What did he do in the way of looking over those cars? A. Why, just looking out for signals.

Q. Well, was he on top of the cars or on the ground? A. On top of the cars watching signals.

Q. How fast was the train moving at the time you first heard of the accident? A. Between five and six miles an hour.

Q. What time did Schneider come to work that morning, do you remember? Was this the first train that your crew was to handle? A. No, that was the last train.

Q. Oh, you had been working all night, had you? A. We were on our last trip down.

Q. Schneider had been working all night, had he? A. Yes, sir.

Mr. Simpson: This time you gave of starting from Weehawken was five minutes to six in the morning.

The Witness: Five minutes to six in the morning; yes, sir.

Mr. Hobart: That is all.

Redirect examination by Mr. Simpson:

Q. Five minutes to six in the morning. What time did the accident happen? A. About six—about six ten, when I took the signal on Seventeenth Street to stop.

Q. And you made a careful examination of this train before it started to look for planks and boards, did you? You did that, or you didn't do it? A. I did; I coupled the train up myself and looked it over.

Q. Well, did you look on these cars for planks or boards, as you testified, or not? A. Well, the running board of the tank is only four feet high, and if you can't see there is a plank there in broad daylight——

Q. You could not see it unless you looked at the place where it would be, would you? A. Well, if there was a plank there it would certainly project, yes.

Q. If it didn't project, if it was parallel with the running board, or on the running board—did you look on the running board to see if there was a plank or anything of that kind there? A. I looked on the running board, there, yes. If there was a plank there I certainly would see it.

Q. Did you look on this occasion before the train started? A. I look the train up before I make it up.

Q. Did you look on this occasion before the train started? A. I did.

Q. Did you see any plank on the running board? A. I did not.

Q. You looked for it to see if there was any? A. I looked the train over.

Q. What would you have done if there had been a plank on the running board? A. I would throw it off.

Q. Why? A. Because it is likely to fall off and get under the wheels and throw us off the track.

Q. Dangerous for people on the car, too? A. Any brakeman who is walking along.

Q. It might tilt up and throw him off? A. Yes.

Q. So, before you went off you made an investigation to see if there was anything like this on the car? A. When I coupled up the train, yes.

Q. And you didn't see anything, did you? A. No, sir.

Q. And that was the only inspection you made before your train started, wasn't it? A. That is all.

Q. The other time you stayed in the back of the train, did you? A. No, I was riding in the middle, about five or six cars from the engine, that morning; it was summer time.

Q. Where was this tank car when you made this inspection that you have told Mr. Hobart about? A. The second rear car.

Q. Where was it, in Weehawken? A. In Weehawken.

Q. And what kind of a car was it? A. Why, it was an oil tank.

Q. Well, what was its construction? Was it a tank with a foot-way on each side of it? A. With a running board on each side.

Q. And a rail along the running board? A. Rail along the running board.

Q. Where was the railing? A. Railing on the outside of the running board.

Q. And how would this man get off the car, then? Would he have to get under the rail? A. No, by walking to the end there; there is a step.

Q. And does the rail run all along the side of the running board? A. From one end to the other.

Q. What? A. From one end to the other.

The Court: From one end to the other.

The Witness: From one end to the other on each side.

Q. So there is no way for a man to get off except at either end of the foot-way; is that right? A. Yes.

Q. Unless he goes under the rail? A. Yes, and jumps off.

Q. Did you see Schneider sitting on this runway? A. I seen Schneider at First Street sitting on there; yes.

Q. Who was sitting on with him, did you see? A. Well, I could see there was somebody else there, but I couldn't——

Q. Did you see anybody skylarking on your train with a board, pretending it was a submarine, and taking shots at a tank car? A. No, sir.

Q. You know a man named Starback, or name of that kind? A. I don't know the man's name; I might know him by sight.

Q. Well, did you see Starback—a man named Starback, another detective, with Scott. A. No.

Q. Did you see anybody with Scott? A. I didn't see Scott that morning, I told you.

Q. Did you see Schneider? A. I did.

Q. Did you see anybody but Schneider? A. I could see somebody on the side of the tank, but I couldn't tell who they were.

Q. Couldn't tell who was on your train? A. I couldn't tell from where I was, no.

Q. Did you see those men, or one of them, making out that he was a submarine? A. No.

Q. Making out that he was shooting over one of the oil tanks and that one of the pieces of wood he picked off the running board—did you hear him say: "Here is a submarine and we are shooting at the Kaiser?" A. No, sir.

Q. You didn't see anything of that kind on the tank? A. No.

Q. Didn't know that anything of that kind was going on? A. I did not.

Q. Did you see that car all the way over from Weehawken to the point of the accident? A. No, sir.

Q. Or anything like that? A. No, sir.

Q. And what did you do all the way over from Weehawken to the point of the accident? A. Sitting down there, looking once in awhile to see at the hind end, to see if there was any brake dragging.

Q. You stayed on the hind end all the time? A. No, sir.

Q. Where? A. I was riding five or six cars from the engine that morning.

Q. Anything between you and this tank car that would prevent you from seeing what was going on? A. No; I couldn't see, only when we got around the curve.

Q. Now, this man Scott, as I understand you, was really working on this train, was he? A. He was riding the trains, yes.

Q. Working on it? Was he fulfilling his employment? Was he a watchman working on it? A. He was watching the train.

Q. Then he was working on your train, wasn't he, watching your train? A. He was watching the train, yes.

Q. And when he got through watching it, he got off at a certain point, didn't he? A. Yes.

Q. Now, you didn't see the accident, did you? A. No, sir.

Q. You didn't see whether Scott in getting off the train had knocked the board against Schneider and thrown him off, did you? A. No sir.

Mr. Simpson: That is all.

Recross-examination by Mr. Hobart:

Q. How long after you had walked around the train, up one side and down the other, or vise versa, as you have told us—how long after that was it that the train started? A. Why, I should judge around five minutes.

Q. And how long after the train started was it that the accident happened? A. Why, about twelve minutes.

Q. And how far had the train gone from the time it started out to the time the accident happened? A. Well, about two blocks.

Q. Well, would it take the train twelve minutes to go two blocks? A. No. From Weehawken to Ravine Road it took twelve minutes—it took ten minutes.

Q. Well, the accident happened about ten minutes after the train started? A. After the train started from Weehawken.

Q. Were there box cars between you and this tank car where Schneider was riding? A. There was.

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. So you couldn't see from where you were after the train started—you couldn't see this tank car or anybody on it? A. Only around the curve.

Q. Now, as you walked along the train, before the train started, you have told us this tank car was about—or at least the running board of the tank car, was about four feet above the ground? A. About four feet high.

Q. And you are a man of the average height, about five feet seven? A. Five feet eight. (Witness stands up.)

Q. So that as you walked along by this tank car, you, of course, could see the running board as you went by? A. Could see right on top of the running board.

Q. And you didn't see any planks there when you walked by it? A. No sir.

Mr. Hobart: That is all.
Mr. Simpson: That is all.

(Witness excused.)

Mr. Simpson: I want to offer the evidence taken by Mr. Hobart of Mr. Philip Stickle. I offer the testimony of Mr. Stickle taken before trial.

(Reads as follows:)

"PHILIP STICKLE, sworn, testified as follows:

Direct examination by Mr. Broadhurst:

Q. Mr. Stickel, where do you reside? A. Portville, Cataraugus County, New York.

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. Did you ever work for the Erie Railroad? A. Twenty-nine years.

Q. Did you work for the Erie Railroad on August 28th, 1915? A. (After referring himself to a book which he produces from his inside pocket) I don't know—I worked the night that that accident occurred, anyway.

Q. Do you know A. Schneider? A. I knowed him personally.

Q. And you worked for the Erie Railroad Company the night of the accident? A. Yes sir.

Q. The morning of the accident, I mean? A. The morning of the accident.

Q. Do you remember what date that was? A. I don't remember; I have it in my time book.

Mr. Simpson: I will stipulate the date.

Mr. Broadhurst: August 28, 1915.

Mr. Simpson: All right; August 28, 1915, is the date.

Q. And what was your position at that time? A. Head brakeman.

Q. Were you head brakeman on the same train? A. Yes sir.

Q. What time did that accident occur? A. Around six o'clock or five-thirty; something like that; in the morning.

Q. In the morning? A. As near as I can tell you at the time—it is so long ago.

Q. Did you see the accident? A. No sir.

Q. What was the first that you knew that the accident happened? A. Man on the hind end called back to me and signalled to stop, and I didn't know what it was, and he hollered to me, 'the hind man fell off.'

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. What was the weather condition at that time, what was it? A. Clear.

Q. Was it daylight or dark at that time. A. It was daylight.

Q. What position on the train were you at the time the brakeman called to you to stop? A. What position was I in?

Q. What part of the train were you at the time the brakeman—— A. I should judge about ten cars from the end.

Q. Was that near the center of the train or near the front of the train? A. About ten cars from the engine; it wouldn't be more than that, you know; about eight or ten cars; something like that. I could see the hind man where I was sitting.

Q. It was near the middle of the train? A. Yes; we had a short train.

Q. And whereabouts on the road was the train? A. Right by there—some call it Ferry Street, by the D. L. & W. bridge, on the northern bank.

Q. And who was the man that gave you the signal to stop? A. It was a new—one of the Erie Detectives, a new man; I don't know his name, I seen him quite frequently.

Q. All right. How long have you been a brakeman? A. I have been a brakeman for the Erie Company twenty-nine years all but eight days.

Q. What was the speed of that train? A. To the best of my knowledge I think we were running six miles an hour. We could not have been going fast. We had to slow down about a block.

Q. At the time you were given the signal to stop the train was the train moving along smoothly without jerks?

A. It was, yes: no jerks whatever—it was August 28, 1916, is it?

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. 1915. How long have you known Schneider? A. I have known Schneider since the year 1888, the early part of 1888.

Q. And was he a railroad man—I withdraw that question. How long have you known Schneider as a railroad man? A. Since 1888, when I first got acquainted with him.

Q. Was he familiar with the yard and roadway at the place of the accident? A. He was, yes sir.

Q. Now, had you been over the rear end of that train any time before the accident happened? A. No, I am not positive whether I went around it or not, but I most generally went around the train to see if there were any doors hanging down, to help the conductor out; but I could not say whether I went around that morning or not.

Q. Well, in the first place, how many cars were on the train? A. I should judge there could not have been over twenty-one or twenty-two cars.

Q. And what was the last car? A. It was a box car.

Q. And what was the next to the last car? A. An oil tank.

Q. And the rest of the train was made up of what? A. Of different styles of cars—mixed.

Q. Now, do you remember having gone to the rear of that train any time prior to this accident? A. No, I don't remember whether I went around that train, but as a general thing I always went around to look at the doors, to help the conductor with his train; but I could not swear whether I went around this train or not. They were in a hurry to get us out of there.

Q. You would not say you did, would you? A. I would not say I did because I might be mistaken.

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. Did you see Schneider on this train on the morning of the accident? A. I certainly did.

Q. What time did you see him? A. I saw him—I could take an oath—two minutes before the accident occurred.

Q. And where were you at that time when you saw him? A. As I told you, I was about eight or ten cars from the engine.

Q. And you saw him from your position? A. Yes sir; I could see him on the train.

Q. And where was he at that time? A. He was sitting on the hind end of the second rear car, the oil tank.

Q. What part of the car was he sitting on, the platform? A. The platform. His feet was hanging down the same as I am sitting down, plenty of room to sit there.

Q. Was he holding on to the car? A. As far as I could see he seemed to have his hand on one of the stanchions, holding fast and sitting there.

Q. What was his position on that train? A. He was a rear man, flagman, as they call him.

Q. And what was his duty? A. His duty was to protect the rear end and in case we stop at a branch to see that nothing ran into us, or if he saw anything out of place to stop us.

Q. Did you see Schneider get struck? A. No sir.

Q. After you received the signal to stop you stopped the train—had the train stopped? A. As quick as I possibly could get the man.

Q. Then what did you do? A. Then we backed the train down to Monmouth Street.

Q. Well, you backed the train down? A. Yes.

Testimony of Philip Stickle—Direct—Offered and Read as Evidence

Q. Did you get off the train then? A. Yes, and ran back.

Q. And you ran back, you say? A. Yes sir.

Q. And you saw Schneider? A. Yes, and the conductor he come back there and he got there before I did.

Q. Now, did you examine the train at that tim A. We examined that car the best we could. Of course, you know we are not car inspectors, and we could not see anything on the car that would cause the man to fall off, only what he told us.

Q. Did you inspect the ground at that time around where the accident happened? A. We looked, but we didn't see anything of any account, you know.

Q. Did you see any planks? A. We didn't see any planks or anything.

Q. Did you examine the car, the oil car? A. We did that to the best of our ability.

Q. Did you find anything the matter with it? A. The car appeared to us to be in proper running order.

Q. Did you look at the running board? A. Yes sir.

Q. ——where Schneider was sitting? A. Yes sir; we looked, both the conductor and I, on both sides.

Q. Did you see anything the matter with that platform? A. There was nothing as we could see the matter with it.

Q. Were there any pieces of plank missing from that platform? A. There was none missing.

Q. Were there any plankings on that platform? A. Yes sir, there was planks.

Q. And was that plank fastened? A. It seemed to be in proper condition.

Testimony of Philip Stickle—Cross—Offered and Read as Evidence

Q. It was part of the running board, was it, or was it not? A. What he was sitting on was the running—what you walk on.

Q. Was there any loose plank? A. I didn't no-tice

Q. Did you notice any loose plank anywhere on the ground—— A. No sir.

Q. ——near where Schneider had fallen off or was knocked off? A. No sir.

Q. Who else were on that train, working on that train? A. George Petnaud.

Q. George Petnaud. Don't remember any others? A. No.

Q. Who was Petnaud? A. That was the conductor—oh, yes, I know the fireman and the engineer.

Q. Do you know their names? A. Yes, Duffy; I don't know his first name; and Ben McLaury.

Q. Are you now in the employ of the Erie Railroad? A. No sir.

Q. When did you leave the employ of the Erie Railroad? A. Some time in June I sent in my resignation.

Q. I want to ask you—repeat one question: Was there any jerking of the cars at the time, either a few minutes before or at the time when you saw Schneider sitting on the train—was there any jerking, clearing up slack, as they call it? A. There was no unusual motion in the train whatever.

Q. At what speed was the train moving? A. Well, I should judge about six miles.

Cross-examination by Mr. Simpson:

Q. What kind of a train was this? A. A mixed train.

Q. What did it consist of? A. Well, oil tanks and coal cars and box cars.

Q. Where had it been made up? A. Weehawken.

Q. And where was it going? A. To Bergen Junction—Croxton, as we call it.

Q. What would happen to it there? A. Then we would put it in the yard and the engine would get behind it and put it where it belonged.

Q. Well, were there loaded cars in it? A. I could not say. You would have to consult the conductor. He had the bills.

Q. Were these tank cars full or empty? A. That is something I could not say, for I did not have the way bills, you know.

Q. How many cars were in it? A. In the train? A. Well, I should judge there were about twenty-one; maybe twenty-two.

Q. It was a regular movement, was it, from Weehawken to Croxton? A. Regular movement.

Q. And Croxton was where they made up the trains to go all over, was it? A. Yes sir.

Q. And when you got the train there it would be broken up and put in different trains wherever it was to go. A. When it got to Croxton.

Q. Now, when you saw the man, Schneider, on the tank was there anybody with him there? A. I didn't see. When I saw him there was nobody with him.

Q. Did you see Scott there? A. I didn't see Scott there. Scott must have been on the train some other place.

Q. How long did you see him before the accident? A. I saw the man—on every curve going over the branch on that side I could see him sitting there

Q. How long was it before you saw him on the

ground that you saw him? What was the last time? A. I saw him not two minutes, as I said, before he was supopsed to be knocked off the train or fell off the train, or whatever it was.

Q. Did you see any wood on the car that he was on, any loose wood? A. I didn't take any notice.

Q. Wasn't it the custom for the men to take home loose wood on the train?

Mr. Hobart: I make the same objection as it was made to the line of evidence by the other witness—same ruling and same exception, I suppose.

The Court: Yes.

A. Well, sometimes they threw a piece of wood off if they saw it, and other times they leave it stay there.

Q. I mean didn't they take it on the train for their own use, take it home? A. Probably they did sometimes. Of course, I could not swear they did.

Q. Well, you knew it was the custom. You have seen them take wood home? A. I have taken wood home myself.

Q. And you have seen other men take it? A. I have, but I could not say whether there was any there for that purpose.

Q. You don't know that, but you know it was the custom? A. It was the custom.

Q. Now, you don't remember any unusual jerk, you say, at all, of the train? A. No sir.

Q. And this dead man was working on the train then: he had some duty to perform on that train? A. Well, yes.

Q. Well, what car was he on? Was he on the last car? A. On the second last.

Q. Second to the last? A. Yes.

Q. And acting, as you say, as rear brakeman? A. Yes.

Q. That would be to protect the rear end of that train? A. Yes sir.

Q. When you saw him on the ground what was his condition? A. Well, his clothes were all tore and he was bleeding.

Q. Where was he bleeding? A. He was bleeding across here (indicating).

Q. Across the forehead? A. Yes.

Q. Was he conscious? A. Yes, he was conscious.

Q. Did he say anything? A. I asked him how bad he thought he was hurt; and he said his back was hurt; that is all.

Q. Did he say how he was thrown off? A. He said a piece of wood knocked him off. That is what he told me. Of course, we looked, and did not see anything.

Q. He said a piece of wood had knocked him off? A. Yes.

Q. And you didn't see any piece of wood around? A. There was no piece of wood around.

Q. That you could see? A. If it had been it would have been picked up by some one.

Q. Well, you didn't see any? A. No.

Q. How long was it before you got to the place where he was lying after he was knocked off? A. I should judge five minutes.

Q. Did you see this Bert Scott around there, the detective? A. I saw Bert Scott there.

Q. Did you hear the man who was around there say anything to Bert Scott about the plaintiff? A. No, I didn't hear him say anything.

Mr. Simpson: I think that is all.

The Witness: I believe you are right about that accident, on the 28th—it happened on the night of the 27th, but——

Mr. Broadhurst: It is agreed it was the 28th day of August, 1915.

By Mr. Simpson:

Q. One more question? Who was the conductor of that train? A. George Petnaud.

Q. Was he here this morning? A. I was talking to him.

(Witness excused.)

GEORGE D. DUFFY, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Duffy? A. Jersey City.

Q. And on the 28th of August, 1915, what was your business? A. Locomotive engineer.

Q. Were you the engineer on this train that Petnaud was the conductor of? A. Yes sir.

Q. And where did you take the train? A. Croxton.

Q. Where were you going with it? A. Croxton.

The Court: He misunderstood your first question.

Q. Where did you take the train from? A. Weehawken.

Q. And where were you going? A. Croxton, Croxton.

Q. What time did you leave Weehawken? A. 5.56—55.

Q. Do you know anything of the accident to Schneider? A. No sir.

Q. What did you know? What was the first you knew that there had been accident on your train? A. When I was told by a man on the ground—Scott —that Schneider had fallen off.

Q. Did you stop the train? A. No sir.

Q. And get off? A. No sir.

Q. You stayed on the train? A. Yes, sir.

Q. Now, in the operation of this train how fast did you go? A. Why, at the time of the accident not over five or six miles per hour.

Q. You didn't jerk the train? A. No sir.

Q. You didn't do anything to the train so that a man getting off the train would be caused to stumble or anything of that kind, did you? A. No sir.

Q. That is, you moved it in the ordinary way? A. Ordinary movement.

Mr. Simpson: Cross examine.

Mr. Hobart: No question.

By Mr. Simpson:

Q. Who was on that train besides you, do you know? A. Fireman McGlory, and Conductor Pet-naud.

Q. Fireman McGlory.

Mr. Simpson: I will call Fireman McGlory.

(Witness excused)

Benjamin F. McGlory—For Plaintiff—Direct

BENJAMIN F. MCGLORY, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. McGlory? 38 Floyd Street, Jersey City.

Q. What is your business? A. Locomotive fireman.

Q. How long have you been a locomotive fireman? A. Ten years.

Q. And whom are you working for? A. Erie Railroad.

Q. Were you working for the Erie Railroad, on the 28th of August, 1915? A. Yes, sir.

Q. Were you the fireman on this train which Schneider was? A. Yes, sir.

Q. What time did you get on the train? A. I had been on all night.

Q. All night? Had the train been made up all night? A. Well, I had been on the engine all night.

Q. This engine was backed up to this train, was it? A. Yes, sir.

Q. What time? A. Why, I believe we hooked on the train between five and six in the morning.

Q. Were you on the same side that Schneider was on on the train, or on the opposite side? A. I was on the opposite side.

Q. Did you see Scott on the train? A. No, sir.

Q. Or Schneider? A. Why—no sir; I could not say I seen Schneider; I seen a man on the hind car coming around the curve out of Weehawken; that is all.

Q. What was the first you knew of the accident? A. When we got to Thirteenth Street viaduct I heard somebody holler at the top of the car and giving a signal to stop.

Q. And did you get off? A. No, sir.

Q. Well, on the way over from Weehawken, how did the train move, move smoothly? A. We made no stops; yes sir.

Q. What speed was it runing at at the time of the accident? A. Why, about six or eight miles an hour.

Q. And did anything occur just before the time of the accident, any unusual movement of the train which would cause a man who was getting off to stumble or anything of that kind? A. No, sir; we just came right along steady; hadn't stopped at all.

Mr. Simpson: That is all.

Mr. Hobart: No questions.

(Witness excused.)

Mr. Simpson: I want to go a little bit out of order with the witness, your Honor.

FREDERIC W. SCHNEIDER, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. Passaic.

Q. And was Mr. Schneider, the deceased, your father? A. Yes, sir.

Q. What was his first name? A. Adolph.

Q. And how old was he? A. He was fifty years old at the time—

Q. And was he married at the time of his death? A. Yes, sir.

Q. What was his wife's name? A. Elizabeth.

Q. And did she die after him? A. She died after the accident through the shock.

Q. How long afterwards? A. About a little over a month.

Q. And how many children did Mr. Schneider leave? A. Six.

Q. What were the names? A. There was Eliza Huber—

Q. Give me names and ages. A. Eliza Huber, she was about thirty-two; George P. Schneider, he was thirty; and there was Martha Lennon, and she is twenty-two or twenty-four; I don't know which now; and then I come, twenty-one; then my sister Flossie, she is nineteen; and Mamie is seventeen.

Q. Now, what was the first you knew of any accident to your father? A. The morning after the accident happened.

Q. And then did you go to see him at the hospital? A. We went over to the hospital.

Q. And where was he? A. He was in bed.

Q. And what was his condition? Was he— A. We asked him how he felt——

Q. What was his condition? You could see, couldn't you? He laid there—— A. He was laying there.

Q. —— in bed. How did he look? A. He looked as if he was suffering.

Q. And when he talked to you was he able to hold a long conversation or short? A. No, sir; short.

Q. Short. That was the morning after the accident? A. Yes, sir.

Q. How did he seem as to being weak or strong? A. Weak.

Q. And how long did you stay with him that day? A. We stayed with him about a half an hour.

Q. Did he seem to be in pain? A. He was always in pain.

Q. Well, what do you mean by he was always in pain? A. He was groaning.

Q. What? A. He was groaning while he was laying there.

Q. He was groaning? A. Yes.

Q. Who was the doctor that attended him? A. I could not say.

Q. Was it Dr. Gray? A. I could not say.

Q. Did you see any doctor there? A. No, sir.

Q. How long did you stay with him that day? A. I stayed with him about a half an hour.

Q. Did you go to see him the next day? A. Yes, sir.

Q. What time did you get there the next day? A. We got there in the afternoon.

Q. Who went with you? A. Married sister.

Q. She is here? A. Yes, sir.

Q. And how did he seem to be the next day? Was he stronger or weaker than he was? A. He was weaker.

Q. Were you able to talk with him much. A. No, sir.

Q. And did he or did he not manifest any evidence of pain in the way of groans or anything of that kind?

Mr. Hobart: I do not think it is necessary under your Honor's ruling, but to be on the safe side I will make the same objection to this line on the ground that it is not within the pleadings and ask an objection to it.

The Court: I will overrule the objection for the reason I have already stated, and you may have an objection, on the ground that you concede it would go to the recovery for conscious pain and suffering.

Mr. Hobart: That is for the purpose, and may I make the objection once for all to the entire line of testimony?

The Court: Yes. You will be perfectly safe.

Q. (Repeated by the stenographer) And did he or did he not manifest any evidence of pain in the way of groans or anything of that kind? A. He just told us his back and his head hurt, and his right—left shoulder.

Q. And how did he seem? Did he seem to be suffering or not? A. Yes, sir.

Q. And how long did you stay with him that day? A. We didn't stay long. The nurse up there told us we would have to leave him alone; didn't dare to talk with him.

Q. So then you came away? A. Yes, sir.

Q. Now, the next day did you go to see him? A. Yes, sir.

Q. What time did you go the next day? A. We went in the night of the next day.

Q. What time? A. Well, it was about seven or eight, I judge.

Q. That would be about the 30th of August? A. Yes, sir.

Q. You went first on the 29th, second on the 30th, and the third time at night you went on the 31st? A. Yes.

Q. Was he in bed? A. He was in bed strapped down.

Q. Strapped to the bed? A. Yes.

Q. And how was he acting? A. He was groaning and hollering. They told us not to speak to him.

Q. Did he seem to be delirious or not? A. No, sir.

Q. Was he out of his mind or not? A. Well, a little bit, I should judge.

Q. He seemed to be out of his mind? A. Yes.

Q. And he was groaning and hollering? A. And he was groaning and hollering.

Q. Did he recognize you? A. No, sir.

Q. How was he strapped down to the bed? A. His hands.

Q. His hands? A. Across the bed.

Q. What? A. Across the bed that way (indicating). He was strapped down so he couldn't get up.

Q. Was he trying to get up? A. Yes, sir.

Q. What would he do to try to get up? A. He raised his body.

Q. And how did his face look? A. It didn't look the way he used to look.

Q. Well, how did it look? A. He looked in bad condition.

Q. Was he pale? A. Pale.

Q. Did he seem to be weak? A. Yes, sir.

Q. And how long did they let you stay with him on the night of the 31st? A. Just a short while.

Q. And then what was the next you saw him? Was he dead the next time? A. The next time we saw him we got a notice he was dead.

Q. And you went up and got the body at the hospital? A. No, sir; the undertaker went up.

Q. Well, what undertaker was it? A. John Houten, Summit Avenue.

Q. And he brought the body to your house, did he? A. Yes, sir.

Q. And it was buried. What did your father earn when he lived?

Mr. Hobart: If your Honor please, the question is what money did your father earn? And I object to it because I think it must appear that this witness has personal knowledge of the fact.

Mr. Simpson: That is a matter for cross examination.

The Court: No, no, no. The first question is does he know what money his father earned, and if says yes to that, then what his knowledge is.

Q. Did you live with your father? A. Yes, sir.

Q. At the time he was hurt? A. Yes, sir.

Q. Did you know where he was employed? A. Yes, sir.

Q. Where? A. Erie Railroad.

Q. Do you know what his employment was? A. As a brakeman.

Q. And do you know how long he had been employed there to your knowledge? A. I guess over thirty years.

Q. Did he bring his money home when he came home? A. Yes, sir; brought his check home.

Q. You have seen his check, haven't you? A. Yes, sir.

Q. How much did he earth a month? A. Well, over fifty dollars every two weeks; fifty and sixty dollars.

Q. Every two weeks? A. Yes, sir.

Q. And he was paid with checks? A. Yes, sir.

Q. Now who comprised the household; who lived there?

A. There was the father, the mother, and us three younger ones, and an aunt.

Q. Well, what are the names of the three younger ones? A. There is I, Flossie, and Mamie, and my aunt.

Q. You got your living from him? A. Yes, sir.

Q. At that household? A. Yes, sir.

Q. Did he buy your clothes? A. Yes, sir.

Q. And you got your food and lodging there? A. Yes, sir.

Q. Were you working at the time? A. Yes, sir.

Q. What were you doing? A. I was a machinist's apprentice.

Q. You were learning the trade of a machinist? A. Yes, sir.

Q. And what were you paid as an apprentice to a machinist? A. Well, the first year we get eight cents——

Q. At the time he died? A. Twelve cents an hour.

Q. And after he died did you continue to work as an apprentice or did you have to leave that and go to some other employment? A. I left there and went as a handy man.

Q. Why was that? A. Didn't have enough money to support the sisters.

Q. How much did you earn as a handy man? A. Twenty-two cents an hour.

Q. Had you been able to pursue the trade of machinist, to learn it? A. No, not now.

Q. And do you know how much of the money your father earned was used to keep up the house and pay for your clothes and your sisters' clothes, and the mother's clothes—the upkeep; about how much of his money, if you know? A. I guess all of it.

Q. He owned the house where he lived, didn't he? A. Yes, sir.

Q. That is, he didn't pay any rent? A. No, sir.

Q. You personally know nothing of the accident, do you? A. Only what he told us.

Q. You tried to find this Mr. Starback, haven't you, that was on the train? A. Yes, sir.

Q. What effort did you make to find him? A.

I went over to Hoboken where he lived to find out information, and I couldn't get him.

Q. You couldn't find him? A. No, sir.

Q. Well, what do you say your sister's name is, the youngest one? A. Mamie.

Mr. Simpson: Cross examine.

Cross-examination by Mr. Hobart:

Q. Where did you look to get Mr. Starback? A. In Hoboken.

Q. Did you look for him in this court room? A. No, sir.

Q. Do you know him when you see him? A. Yes, sir.

Q. Well, look around and see if you don't see him? A. No, sir; he ain't in here.

Mr. Hobart: Mr. Starback, stand up.

Q. Is that the gentleman? A. That ain't the fellow I looked for.

Q. That is not the fellow you looked for? A. No, sir.

Q. You must have been looking for the wrong man? A. An older man.

Q. What is that? A. I was looking for an older man.

Q. Your father had worked for the company a good many years, hadn't he? A. Yes, sir.

Q. And was he a brakeman all that time? A. No, sir; yard master and conductor.

Q. He used to be yard master? A. Yes, sir.

Q. And before that he was a conductor? A Yes, sir.

Q. That was before he became a brakeman? A. Yes, sir.

Q. At the time of his death he was a brakeman? A. Yes, sir.

Q. And at the time of his death, of course, he learned less than he did as a conductor? A. Yes, sir.

Q. And less than he did as a yard master? A. Well, that I could not say.

Q. Well, at any rate, a conductor is a lower position in the railroad world than a yard master, isn't he? A. Yes, sir.

Q. Your mother was about the same age as your father was, was she not? A. Yes, sir.

Q. And she died about a month after this accident? A. Yes, sir, a little over a month.

Q. Your oldest sister's name is what? A. Eliza Huber.

Q. She is married? A. Yes, sir.

Q. How long has she been married? A. I guess about eight or ten years.

Q. And she lives at her own home with her own family? A. Yes, sir.

Q. And her husband takes care of her, supports her? A. Yes, sir.

Q. And has been doing it ever since they were married, eight or ten years ago? A. No, sir.

Q. Pardon me? A. No, sir.

Q. You say that her husband has been taking care of her? A. No, sir.

Q. Well, who did take care of her? A. My father after her first husband died.

Q. Well, was she married again? A. Yes, sir.

Q. Well, when did she marry her second husband? A. I guess about four years ago.

Q. But ever since she married the second husband he took care of her? A. He took care of her.

Q. And supported her family? A. Yes, sir.

Q. And they lived in their own home? A. Yes, sir.

Q. Now, the next was George P. Schneider; that is your oldest brother? A. The older brother.

Q. Where did he work? A. He worked up in Haskell.

Q. At Haskell? A. Yes, sir.

Q. Was he living at home at the time of this accident? A. No, sir.

Q. How long had he been away from home? A. He has been married, living with his wife.

Q. Been married about how long? A. I should judge about six years; five or six years.

Q. And, of course, he takes care of his family? A. Yes, sir.

Q. Your father didn't have to help him any? A. No, sir.

Q. He earned his own living. Then there is another sister, I think by the name of Julia, isn't there? A. She is dead.

Q. When did she die? A. She died about seven or eight years ago, I guess.

Q. Some time before this accident? A. Yes, sir.

Q. Then comes your sister Martha. Was she living at home at the time of the accident? A. No, sir.

Q. She is married, too, isn't she? A. Yes, sir.

Q. When did she get married? A. She is married about three years, I guess.

Q. Well, some time before the accident? A. Yes, sir.

Q. And she lives in her own home and was living there at the time of the accident? A. Yes, sir.

Q. And her husband was taking care of her? A. Yes, sir.

Q. Then the next in order is yourself? A. Yes, sir.

Q. Now, at the time of the accident you were learning a trade as a machinist? A. Yes, sir.

Q. Where? A. Erie Railroad.

Q. How long had you been working there? A. A little over two years.

Q. And you started in there eight cents an hour and then you were promoted to twelve cents? A. Yes, sir.

Q. And how much longer would you have to work there before you became a machinist? A. I would have to serve four years.

Q. Did you get twelve cents an hour all that time, or is it gradually increased? A. I got raised from eight to twelve.

Q. And did you expect to be raised again? A. Yes, sir, after I got done with that year.

Q. How much would they pay after that? A I guess it was fourteen or sixteen cents.

Q. Then you started in to work, as you claim, as a handy man? A. Handy man.

Q. In the Erie shop? A. In the machine shop.

Q. Are you working there now? A. No, sir.

Q. How long did you work there after your father's death? A. I guess about a year or a little over a year.

Q. And during that time you earned twenty-two cents an hour? A. Twenty-two, and I got raised.

Q. What did you get after you got raised? A. From twenty-two to twenty-eight.

Q. And where are you working now? A. Antone's machine shop, Passaic.

Q. As a handy man or machinist? A. Running a torque lathe.

Q. What do you receive there? A. Receive a salary of four seventy-five a day.

Q. For how many hours? A. For ten hours.

Q. That is forty-seven and a half cents an hour? A. Yes.

Q. Do you know what the pay is of a machinist? A. Well, there is all different prices according to what kind of machinist he is.

Q. Not many of them get forty-seven and a half cents an hour—not on the Erie Railroad. A. Not on the Erie, no.

Q. Are you still living at home with your younger sisters? A. No, sir.

Q. Where do you live? A. Out in Passaic.

Q. You are taking care of yourself? A. Wife and two children.

Q. Oh, you are married, too? A. Yes, sir.

Q. When were you married? A. Right after the father's death; about a year after it.

Q. Were you engaged at the time? A. Yes, sir.

Q. And, of course, at the time of your father's death you were expecting to get married as soon as you could see your way financially, I suppose? A. Sure.

Q. Now, when you were earning these twelve cents an hour learning the trade of a machinist, how many hours a day did you work? A. Ten.

Q. That would be a dollar and twenty cents a day? A. Yes, sir.

Q. Six dollars a week? A. Worked every day in the week, Sundays and holidays.

Q. That would be eight forty-seven a week? A. Yes.

Q. What did you do with that money? A. I had to bring it home.

Q. And turned it over to whom? A. My mother.

Q. Your mother ran the household, I suppose, at that time? A. Yes, sir.

Q. You turned everything over to her? A. Yes, sir.

Q. Now, at the time of your father's death besides you and your father and mother, your sister—your two younger sisters were also living at home, weren't they? A. Yes, sir.

Q. Florence or Flossie, as you have called her? A. Flossie.

Q. And Mamie or Mary? A. Mamie.

Q. Now, at that time—I mean at the time of your father's death—was your sister Florence working? A. I couldn't just say whether she was or not.

Q. Wasn't she working in Nehl's place, factory— A. I don't remember.

Q. On Webster and Fulton Streets, Jersey City? A. I couldn't say.

Q. Don't you know that she was working somewhere? A. I don't know whether she was working or not; I don't remember.

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

Q. Don't you know that she was working and earning about five dollars a week? A. I couldn't exactly say

Q. Do you mean to say that you cannot remember whether your sister was home or whether she was working at that time? A. No, sir.

Q. Well, didn't she work shortly after your father's death? A. I know she was working after the father's death.

Q. How long after? A. Well, I couldn't say.

Q. Well, a month or a year or two years? A. Well, I guess right after the father's death. She had to go to work to give us a hand, I guess.

Q. Where did she go to work? A. Nehl's or Lorillard's; I don't know which.

Q. This Nehl's is the place I mentioned, isn't it? A. Yes.

Q. The same place I called your attention to? A. Yes.

Q. What did she earn? A. About four dollars a week, I think; three or four.

Q. You are not sure of the amount? A. No. sir.

Q. And that was turned in to your mother to help pay the household expenses, I suppose. A. Yes, sir.

Q. Now, how about your sister Mary or Mamie? Did she live at home at the time of your father's death? A. Yes, sir.

Q. What is she doing now? A. She only went to work a short while.

Q. She began work a short while ago. A. Yes, sir.

Q. Where? A. In Nehl's.

Q. Same place your other sister is working? A. Yes, sir.

Q. And what does she get? A. I guess it is four dollars a week for a start; three or four; I don't know which.

Q. Yes. Now, your sister Martha lived in the same house with your father and mother and yourself, didn't she. A. Yes, sir.

Q. She lived upstairs in the same house? A. Yes.

Q. And did you live on the first floor? A. Yes, sir.

Q. And your sister Martha paid rent, I suppose, or paid something to your father and mother? A. Yes.

Q. How much did she pay? A. Ten dollars a month rent.

Q. But she had her own separate household? A. Yes, sir.

Q. Kept house separately from you and the other members of the family? A. (No answer.)

Q. Your father got paid by check, I suppose? A. Yes, sir.

Q. Did he keep a bank account? A. No, sir.

Q. Did he turn the checks over to your mother or did he cash the checks and turn the money over? A. He cashed—the check went to the mother and she cashed it.

Q. And how much did she give him for his own expenses? A. I don't think she ever give him anything, unless he asked for it. He never went out.

Q. Well, he would have to have something, some money, wouldn't he, for ordinary living expenses? A. Just for cigars; that is all.

Q. How about his clothes? Didn't he wear any clothes? A. He would buy them himself. The mother and him would go out.

Q. Well, what did he buy them out of if he gave your mother all the money? A. Bought them out of the household money.

Q. What, the household money? A. The money he gave to the mother.

Q. That is the same money he gave to your mother, she would give it back to him—enough for his clothes; is that it? A. Yes, sir.

Q. How about his other personal expenses, car fare? A. He never had carfare.

Q. He walked to his work? A. Just lived on top of the hill off it.

Q. How about his lunches? A. He would take his dinner pail.

Q. Did your father sometimes drink? A. No, sir; not as we know of.

Q. What is that? A. No. sir.

Q. Sure of that? A. Positively.

Q. Now, coming down to the time when you saw him in the hospital and on the last night that you saw him there, he was in a straight jacket, wasn't he? A. Sir?

Q. He was in a straight jacket, wasn't he, at the hospital? A. The last night we saw him?

Q. Yes. A. Not exactly in a straight jacket, we just seen his wrist tied down to the bed; that is all.

Q. Well, he was strapped down? A. Yes, sir.

Q. And the nurse or doctor told you not to talk with him. A. Yes, sir.

Q. Which was it, the nurse or doctor? A. The nurse. There was no doctor in all the time he was there.

Q. Who was the nurse, do you remember? A. I don't know; I couldn't exactly say.

Q. Do you remember the name at all? A. No, sir.

Q. Would you remember it if I told you what it was? A. No, sir; I only saw her once.

Q. And didn't the nurse tell you the reason why you should not talk to him? A. No, sir.

Q. What is that? A. She just told us not to say too much.

Q. Didn't she say he was out of his mind? A. No, sir; she didn't tell us.

Q. Didn't she say your father was suffering from delirium tremens? A. No, sir.

Mr. Simpson: I object to that—wait a minute——

The Court: He says no.

Mr. Hobart: That is all.

Redirect examination by Mr. Simpson:

Q. She didn't tell you that he was hit with a plank and got delirium tremens or anything of that kind? A. No.

Mr. Simpson: That is all.
(Witness excused.)

MAMIE SCHNEIDER, sworn.

Direct examination by Mr. Simpson:

Q. How old are you, Mamie? A. Seventeen.

Q. When were you seventeen? A. In May.

Q. In March? A. May.

Q. May. And you are a daughter of Adolph Schneider who died about September 1, 1915, aren't you? A. Yes, sir.

Q. You were then about fifteen? A. Yes, sir.

Q. And you were living with your father when he died? A. Yes, sir.

Q. And where did you live with him. A. 17 Floyd Street.

Q. What? A. Floyd.

And did you get your whole living from him? A. Yes, sir.

Q. He bought your clothes? A. Yes, sir.

Q. And you lived home; you didn't have to work, did you? A. No, sir.

Q. Now, do you know how much your clothes cost a year? A. I couldn't say that.

Q. Who bought them? A. My father.

Q. And how many dresses did you get a year? How many suits? A. I could not say.

Q. Two? A. I could not say.

Q. You don't know? Well, did he keep you pretty well clothed? A. Yes, sir.

Q. And you didn't have to work, did you? A. No, sir.

Q. And who lived there home—who was the family? A. My father and mother, brother and sister.

Q. Your father? A. Mother.

Q. Mother, and your brother, and your other sister and yourself? A. Yes, sir.

Q. And he brought home his money and your mother ran the house on it? A. Yes, sir.

Q. No, did your mother die after he was killed or after he died? A. She died of the shock when my father died.

Q. How long after? A. About a month—a month or more.

Q. Then what happened to you? Where did you go to get your living? A. Well, I stayed with my brother until after he got married.

Q. Did he keep you? A. Yes, sir,

Q. And then after he got married what happened to you? Did you have to go to work or what? A Yes, sir; I had to go to work.

Q. And where do you live now? A. I live with my married sister now.

Q. And where do you work? A. Nehl's pocketbook factory.

Q. And what do you get? A. Six dollars.

Q. What did you get when you first went to work? A. Three to four dollars.

Q. How long had you been working there? A. Almost a year.

Q. And up to the time your father died you didn't have to go to work? A. No, sir.

Q. Was he preparing you for anything? I mean, were you going to go to take any trade or profession or anything of that kind? A. No, sir.

Q. You were just living home with him? A. Yes, sir.

Q. And since he died you had to live with your brother or help to get your own living? A. Well, I lived with my brother until after he got married, and when he got married—

Q. You had to go to your sister? A. Yes, sir.

Q. Did you go to work—did you go to see your father up at the hospital at all? A. Yes, sir.

Q. How many times did you go up? A. I went up Sunday—that Sunday.

Q. Was Sunday the day before he died? A. No, that Sunday—Saturday—I was there Sunday.

Q. Did you talk to him on Sunday? A. Yes, sir.

Q. Was he in bed? A. Yes, sir.

Q. How did he look? Did he look like—did he look sick— A. Yes, sir.

Q. —— or did he look well? He looked bad, did he? A. Yes, sir.

Q. How did he seem? Did he seem weak or strong? A. He seemed weak.

Q. Weak. Did he make any groans or noises as if he was in pain? A. Yes, sir.

Q. Was he cut anywhere? Could you see any marks on him? A. Yes, on his forehead.

Q. There was a mark on his forehead? A. Yes, sir.

Q. And how long did you stay there? A. I stayed there about twenty minutes.

Q. And did you see him the next day? A. No, sir.

Q. You didn't see him again, did you, until his— A. No, sir.

Q. ——body was brought home? A. No, sir.

Mr. Simpson: Cross examine.

Cross examination by Mr. Hobart:

Q. How old are you? A. Seventeen.

Q. When were you seventeen? A. In May.

Q. And how long have you been working at this factory? A. Almost a year.

Q. Is that the same factory where your sister Florence works? A. Yes, sir.

Q. How long has she worked there? A. I could not say.

Q. Well, when did she start? Was it before or after your father's death? A. After, I think.

Q. And how long after? A. Well, right after my father died she had to help along with the house.

Q. And she started to work in this factory? A. Yes, sir.

Q. And how much does she get there? A. I could not say.

Q. She gets more than you, I suppose; she has been there longer? A. What do you mean, now?

Q. Yes, what does she get now? A. She is married now.

Q. Well, then, she is not working any more? A. No.

Q. When did she get married? A. About a year ago.

Q. You don't know what she got when she worked at the factory—— A. No, sir.

Q. ——before she was married? Of course, she has her own home, though, now? A. Yes, sir.

Q. Her husband is supporting her? A. Yes, sir.

Q. And you are living with her? A. No, I am living with my married sister—my other married sister.

Q. Which one? A. Mrs. Lennon.

Mr. Hobart: That is all.

Mr. Simpson: That is all.

(Witness excused.)

WILLIAM STARBACK, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Starback? A. 637½ Palisade Avenue.

Q. What is the number? A. 637½ Palisade.

Q. And how long have you lived there? A. A year and a half.

Q. Where did you live before that? A. 119 Sherman Avenue.

Q. Where? A. 119 Sherman Avenue.

The Court: Talk louder.

Q. Where did you live before that? A. 701 First Street, Hoboken.

Q. Hoboken? A. Hoboken.

Q. Is that the only place—did you ever live 360 Newark Street, Hoboken? A. No.

Q. Never lived there? A. No.

Q. Did you ever give that address? A. Why, I guess I did, my sister—I lived there a couple of weeks.

Q. What? A. I lived there a couple of weeks

Q. Then you did give that address to somebody? A. Why, yes.

Q. Now, you were working for the Erie Railroad on the 27th or 28th of August, weren't you, 1915? A. Yes, sir.

Q. 1915? A. Yes, sir.

Q. Where are you working now? A. New York Central.

Q. How long is it since you worked for the Erie? A. Two years ago.

Q. And what do you do for the New York Central? A. Special officer.

Q. Were you on the train that Schneider was on on the 28th of August? A. Yes, sir.

Q. Where did you get on the train? A. Weehawken.

Q. And while you were on the train did you see Mr. Stickle—— A. No, sir.

Q. ——or Mr. Clark—— A. No, sir.

Q. ——on the train? You know Mr. Robert J. Clark, don't you? A. No, sir.

Q. You don't know him at all? A. No, sir; never saw him.

Q. Did you have a board on that train pointing in at the tank saying you were a submarine? A. No, sir.

Q. You would show what they did to the Kaiser? A. No, sir.

Q. You didn't have any board in your hand at all? A. No, sir.

Q. Well, what do you know about this accident? A. Well, the only thing I know about the accident was coming down the branch, I got off on one side and Scott got off on the other; and when I got off I saw Schneider lying on the ground. So I didn't go to pick him up. I ran to flag the train, stop the

train. And the way I understand, Scott was getting off and stepped on this board that was on the train.

Mr. Hobart: Did you see that—pardon me. Go on.

Q. When did you first see the board on the train? A. Why, coming down the branch.

Q. Was it on when you got on the train? A. I didn't take notice, because I didn't get on that car.

Q. You didn't get on that car? A. No.

Q. But didn't you see somebody put the plank on, which was about seven feet long and two feet wide and three inches thick, on the running board—A. No.

Q. ——for Scotty? A. No, sir.

Q. You didn't see anybody put it on? A. No.

Q. And you were on the opposite side, were you? A. Well, I was on the same side with Scott coming down till the time of getting off, and I got on the opposite side.

Q. Oh, you and he were riding together? A. Yes, sir.

Q. When was the first you saw the plank? A. Well, around First Street, Hoboken.

Q. And how far was that from the scene of the accident? A. Well, about a block.

Q. Yes. Do you know what it was doing there? A. No, sir.

Q. Was not any part of the car, was it? A. No, sir.

Q. Well, do you know why it was there or what its purpose was or anything? A. No, sir.

Q. You were a special officer of the road? A. Yes, sir.

Q. Why didn't you throw it off? A. I haven't anything to do with those boards.

Q. Nothing to do as a watchman? A. No, sir.

Q. What were your duties? A. All I had to do was to look there and watch the cars.

Q. For thieves—— A. Wouldn't get into them.

Q. Now, immediately after the accident what did you do? A. Why, I went—I ran, I judge, about two blocks beside the train.

Q. And did you see this plank lying alongside of the road? A. Well, not when I came back, because——

Q. Well, when did you see it? Did you see it at all? A. Why, yes, I saw it around First Street, Hoboken.

Q. I mean after it came off the train, did you see it on the ground? A. I never saw it.

Q. What kind of a looking plank was it? A. Well, I should judge thirty feet—no, twenty feet long.

Q. Twenty feet long? A. Yes.

Q. And how thick was it? A. Well, about three inches.

Q. And what color was it? A. White.

Q. White. You had no trouble in seeing it, did you? A. Well, no: couldn't help seeing it.

Q. And how near was it lying to the end of the car? A. Well, I didn't take notice.

Mr. Simpson: Cross-examine.

Cross-examination by Mr. Hobart:

Q. How long had you been riding the Weehawken branch trains? A. About five months.

Q. Five months. And your duty was to watch the cars, keep people from jumping on the cars or from stealing things, I suppose? A. Yes, sir.

Q. Do you remember which part of the train it was which you got on? A. Yes, sir.

Q. What part was it? A. Pretty near the middle of the train, and I walked over the top of the cars.

Q. Did you get on before the train started or just as it was starting? A. Just as it was starting.

Q. Did Scott get on at the same time with you? A. Well, he got on at different place than I got on. See?

Q. Whereabouts did he get on? A. He got on towards the hind end.

Q. Did you both get on after the train had started? A. Certainly.

Q. How long after the train had started was it that the accident happened? A. Well, about fifteen or twenty minutes.

Q. And the train during that time was in motion all the time? A. Yes, sir.

Q. Traveling through Weehawken and Hoboken and south part of Jersey City? A. Yes, sir.

Q. Traveling through Weehawken, Hoboken, and through part of Jersey City? A. Yes, sir.

Q. Didn't have occasion to go through the meadows at any time—— A. No, sir.

Q. ——while this train was moving? A. No, sir.

Q. After you got on about the center of the train then you walked to the rear, did you? A. To the rear.

Q. What was your purpose in going to the rear? A. Well, I just thought I would get in the back, at the hind end; because if they did throw anything off I would be able to see it.

Q. By throwing anything off you mean throwing things out of the cars? A. Out of the cars; I would be able to see it on the ground.

Q. That also gave you a better view of the entire train, I suppose? A. Yes, sir.

Q. Did you see Mr. Schneider before the accident occurred? A. Yes, sir.

Q. Where was he sitting or standing? A. He was sitting next to the hind end car, Weehawken.

Q. On this tank car? A. On this tank car.

Q. What part of the car was he on? A. Well, right near the steps of the car.

Q. Did you see anybody put this plank on, or piece of board on the tank car? A. No, sir.

Q. Did you ever see anybody put boards or planks on those cars? A. No, sir.

Q. And you were there about five months? A. About five months.

Q. Riding trains back and forth all day, day or night, as the case might be? A. All night.

Q. All night. What color was this plank, if you noticed it? A. Well, it looked to me to be white.

Q. Did you see it when it fell off? A. Why, no; I didn't see it when it fell off.

Q. Well, when did you first notice it? A. When Scott told me about it. He said: "There is a board fell off and knocked this Schneider off."

Q. That was the first time you knew anything about any plank? A. Yes, because I saw him lying on the ground, and I didn't wait to see anything, because I went to flag the train.

Q. Well, did you see the plank afterwards? A. No, I didn't see it before.

Q. Then you didn't see it at any time, either before or after? A. The only time I seen it was when I came on the train from Weehawken.

Q. Where was it then? A. On the running board.

Q. Resting on the board? A. Resting on the board.

Redirect examination by Mr. Simpson:

Q. You said to Mr. Hobart—I didn't ask you about it, but you said to Mr. Hobart that you had never seen anybody taking wood home; that it was not the custom of anybody to take wood home. You understand that, do you? A. Yes, sir.

Q. I show you a paper. Is this your signature? A. Yes, sir.

Q. You signed that paper and read it before you signed it? A. I certainly did.

Q. Yes. And did you say in this paper: "When this train left Weehawken an employee of the company put a plank which was about seven feet long and two feet wide and about three inches thick on the run board for Scotty, as it was his custom to take the wood home?" Did you say that? A. Well, I must have said it.

Q. Yes, you signed that paper. Is that true? A. That is true; yes.

Q. Well, was it Scotty's custom to take wood home? A. Well, he took wood home some mornings but not every morning.

Q. And did you see an employee put the plank on the car for Scotty? A. No, I did not.

Q. Well, why did you sign that statement and say that if you didn't? A. Well, I don't know.

Q. You don't know why you signed something that was not true? Are you in the habit of doing that? A. No, not at all: the only thing is they put wood on for him to take home, but I don't know who did it.

Q. You saw that done? A. Well, I didn't see it that morning done.

Q. Had you seen it done before? A. Yes, other mornings, but they generally threw it in an empty box car.

Q. For how long a time had you seen that done for Scotty? A. Well, about a week or so.

Q. About a week or so before that they had been doing it? A. Yes.

Q. Throwing wood on for Scotty? A. Yes.

Q. Why do you say a week? Did you think you would like to make it as short as you could? A. Well, no, because the winter was coming on, and he would get supply of wood in for the winter.

Q. Yes; you say it was his custom to take wood home. How long have you known Scotty? How long have you worked with him? A. Four or five months.

Q. What do you mean when you said it was his custom to take wood home? A. Well, they started to take wood home for him.

Q. That is, they start to take wood home a week before they needed it, that is what you mean by custom? A. Yes.

Q. When a man takes wood home a week ahead of time before he needs it, that is what you mean by custom? A. Yes.

Q. Do you know what custom means? A. That is what he did.

Q. Well, what do you mean by custom? What do you think custom means? A. I mean that is his custom to take wood home.

Q. Leave the wood out of it. What do you mean by custom? A. Well, he just likes to take wood home.

Q. Suppose it is ice cream. Would you still say he took wood home when you use the word "custom"? What do you mean by custom? That is what I want to know. What do you understand by custom? Leave the wood out of the train. What do you mean by custom? A. Why, to take anything home that he wants; makes just a habit of it.

Q. That is what you mean by custom? A. Yes.

Q. Then Scotty did make a habit of taking wood home? A. No, only this week he was making a habit of it.

Q. Only this week? A. Yes.

Q. You worked with him every day that week? A. No; he wasn't supposed to ride the train.

Q. Oh, he wasn't, eh? A. No.

Q. What was he doing on this train then? A. He just took a ride.

Q. Well, he had no business on the train? A. Well, yes, he did. If he didn't have any journals to take care of he just took a ride; that was his orders.

Q. You just said a minute ago that he had no business on this train. A. No, he didn't. If he had journals on this train to watch.

Q. Well, did he have any journals to watch? A. No.

Q. What was he doing, going home? A. No, just went to Weehawken and came back on it.

Q. He wasn't going home? A. Our time was up at six o'clock.

Q. Was he going home on the trip that this accident happened on? A. Yes; he was going home because our time was up.

Q. You didn't see him throw this board off, did you? A. Why, no.

Q. What did you see him do to it, if anything? A. Why, I saw him step on it.

Q. You saw him step on it. And when he stepped on it what effect did that have on it? A. I don't know; I got off on the opposite side, and I was——

Q. Which end did he step on? A. I didn't take notice.

Q. What did it do to the board, didn't you see,

when he stepped on it? A. No doubt the board fell off.

Q. When he stepped on it? A. Yes.

Q. And when it fell off the car what happened to it? Did it stick up in the air? A. I don't know.

Q. You just saw it going off the car? A. Yes.

Q. When he stepped on it? A. Yes.

Q. How near the edge of the car was it when he stepped on it? A. I don't know how near the edge; I didn't pay any attention to it.

Q. Were you sitting in the proper place, you and Scotty? A. Why, I wasn't sitting down; I was standing up.

Q. Didn't you say in this statement: "I was sitting on the run board of the box car"? A. Yes, the box car.

Q. Were you sitting there—of the tank car, rather—"I was sitting on the run board of the tank car. Schneider and Scotty were sitting on the run board, but on the opposite side?" A. Yes, but I was not sitting down.

Q. You were standing up, eh? A. I was standing up.

Q. Did you say "this was the only place we could sit, and the proper place"? A. Yes; it was the only place you could sit.

Q. Did you say: "this was the only place 'we' could sit and the proper place"? A. Yes.

Q. But you weren't sitting, you were standing? A. I was sitting down——

Q. You said a minute ago you were standing up. A. Yes, I was standing up.

Q. Do you know whether you were on the car? A. Yes, I certainly was on the car. You can't get off a car sitting down.

Q. You flagged the train to stop, didn't you? A. I certainly did.

Q. What did you do then? A. Then I told the conductor, or whoever it was come up—the brakeman—I told him Schneider was lying on the ground and he must have got hurt.

Q. Where were you standing when you saw this man Scott step on this plank? A. I was just going to cross over to get off on the opposite side.

Q. Were you on the same side he was on? A. Yes, and I got off on the left hand side.

Q. Was he in front of you when he stepped on this plank? A. Not in front of me; on the side of me.

Q. On the side of you. How far away from you? A. Well, about two feet.

Q. And what was he doing when he stepped on the plank? Was he getting off? A. He was getting off on one side and I was getting off on the other.

Q. And when he was getting off he stepped on this plank? A. Yes.

Q. And that knocked it off? A. That knocked it off.

Q. And the car was moving fast or slow? A. Slow.

Q. Were you getting off at the same place he was? A. I was getting off at the same place he was, yes; I was getting off at the Ravine Road.

Q. Why were you getting off there? A. That is the way I go home.

Q. The way you go home? A. Yes.

Q. Now, didn't—you didn't knock any plank off going off the car yourself, did you? A. No, sir; no.

Q. How wide was the runway that the plank was on? A. Well, I should judge about a foot.

Q. And how wide was the plank? A. About half a foot.

Q. So there was half a foot space for anybody to walk along? A. Yes.

Q. And where was the plank, on the outside of the runway or on the inside of the runway? A. I didn't take notice.

Q. You don't remember that? A. I don't remember.

Mr. Simpson: All right; that is all.

Recross-examination by Mr. Hobart:

Q. How many times during the week before the accident did you and Scott ride on the same train? A. About twice.

Q. And were these the times you saw somebody put wood on for Scott? A. Yes, sir.

Q. So there were two occasions, and only two, when somebody put wood on the train for Scott; is that right? A. Yes, sir.

Q. And did they put it in the box cars? A. In box cars and gondolas.

Q. Gondolas, flat cars—do you mean? A. Box cars; you know, open box cars, and gondolas and flat cars.

Q. There were not any put on these tank cars? A. Well, they never put it because they know it is a bad place to put wood.

Q. And the only time you saw anybody put wood on at all were those two times. And do you remember whether it was put in the box cars then or on the gondolas? A. It was put in gondolas.

Q. Gondola cars? A. Yes, sir.

Mr. Hobart: That is all.

By Mr. Simpson:

Q. You said to me that you saw this man step on the plank and the plank go over? A. Yes, sir.

Q. In this statement you say: "I didn't see the accident, but was told that Scotty threw the plank off when he was about to get off." Is that true? A. No, he didn't throw it off.

Q. Did you sign that statement? A. I certainly did.

Q. Well, was that true when you signed it? A. I don't know; I don't remember two years.

Q. Well, was this true when you signed this and said that somebody told you that Scotty threw the plank off? Was that true? A. Well, nobody told me Scotty threw it off.

Q. Well, why did you say it in writing? A. There is nobody there to say it.

Q. Well, you signed this paper, you say? A. I certainly did.

Q. You say you read it before you signed it? A. Yes.

Q. Well, why did you sign this statement that somebody told you that Scotty threw it off? A. Nobody told me that Scotty threw it off.

Q. Well, did you sign a lie? A. No, I didn't sign a lie.

Q. Well, is this paper true? A. Well, I might have signed it when I was riding on.

Q. Oh, you might have signed it? A. Because when I signed that paper I was busy with work.

Q. You didn't sign the other part? A. What other part.

Q. About saying an employee put wood on the car because it was Scotty's custom to take it home? A. No, I didn't sign it. At the time I signed this statement I was pretty busy.

By Mr. Hobart:

Q. Who was this employee, one of the laborers? A. I don't know who he was; I never paid any attention to him.

Q. Where were you when you signed this paper that Mr. Simpson inquired about? A. Lackawanna.

Q. What? A. Lackawanna Railroad; D. L. & W.

Q. Who asked you to sign it? A. I was busy working at the time he asked me to sign it.

Q. Who asked you to sign it? A. I don't know who; some man said he was from Simpson's office.

Mr. Simpson: Mr. A. C. Wachler.

Mr. Hobart: That is all.

(Witness excused.)

MARTHA H. LENNON, sworn.

Direct examination by Mr. Simpson:

Q. You are the daughter of Mr. Schneider? A. Yes, sir.

Q. And you are the executrix——

Mr. Simpson: There is no dispute about that, is there, about the letters? I suppose you have them there.

Q. You got letters of executrixship of the will, didn't you? A. Yes, sir.

Q. Did you give those to me or have you got them——

Mr. Simpson: Oh, I will call up the Surrogate if there is any doubt about it.

Mr. Hobart: If you say it is all right——

Q. You took out letters under the will—your father left a will? A. Yes, sir.

Q. When did your father die? A. He died September 1st.

Q. What year? A. 1915.

Q. Were you living with him when he died? A. No, sir; I lived upstairs.

Q. You were married when he died? A. Yes, sir.

Q. And who else lived with him besides your other sister and brother? A. My other sister that is married, and there is a brother and two sisters, and my married sister's two children.

Q. Well, your married sister and her two children? A. No, only the two children.

Q. Where does she live, the married sister? A. She lived in Hoboken.

Q. But the two children were there at the house, the grandchildren? A. Yes, sir.

Q. And what was the name of the other sister, the one who was not on the stand, who lived with him? A. Florence. Her married name?

Q. No, when she lived with him, what was her name, before she was married, at the time your father was alive? A. Schneider.

Q. What was her first name? A. Florence.

Q. How old was she? A. She was seventeen.

Q. She got her living with your father? A. Yes, sir.

Q. And how soon after did she marry, after his death? A. About a year.

Q. And your mother died about a month after— A. A month or a month and a half after.

Q. ——his death? You didn't live in the house yourself, as I understand you? A. No; I lived upstairs.

Q. Well, did he help you at all with money in his life time? A. No, sir.

Q. Did he help you? A. No, sir.

Q. Well, who supported you? A. My husband.

Q. And your father didn't help you at all? A. No, sir.

Q. Did you go up to the hospital to see him? A. Yes, sir.

Q. When did you go up to the hospital? A. The morning he was hurted.

Q. The morning that he was hurt? A. Yes, sir.

Q. What was his condition when you got to the hospital? A. Well, we asked him how he felt and he laid there and we could see that he was in terrible pain.

Q. And how could you see that he was in terrible pain? A. Because he was moaning and moving around in the bed.

Q. Did he seem weak, or what condition did he seem to be in? A. He didn't seem weak, because he said the doctor didn't see him yet.

Q. Did you talk to him? A. Yes, sir; we talked to him.

Q. Was there a nurse on duty? A. Yes, sir.

Q. And did you know the name of the nurse? A. No, sir.

Q. Who was his physician, do you know—Dr. Gray, was it, that was his physician? A. I couldn't tell.

Q. Were you present when he died? A. No, sir.

Q. When was the next time you saw him after the first time? A. I seen him the next night, I believe, Sunday night.

Q. Now, the first time you saw him was there any mark on him? A. On his forehead.

Q. And were there any other places that he complained of pain? A. Well, I asked him; he said that it was his head, his left shoulder and his side.

Q. Which side? Did he point to his side? A. Left side.

Q. On his left side. And he was conscious then and could talk to you then? A. Yes, sir.

Q. Well, was there some suggestion thrown out to your brother about his being under the influence of liquor? Was he sober that first day you talked to him? A. Yes, sir.

Q. Did he show any signs of liquor at all? A. No, sir.

Q. The second day you saw him, what was his condition? A. The second day we seen him his hands were strapped down in bed.

Q. What was his condition? Was he raving, or was he unconscious, or what was the condition? A. Well, the nurse told us not to bother with him.

Q. I didn't ask you what the nurse told you. I asked you did you see how your father acted? Was he in pain? Was he conscious of what was going on around him, or what was his condition? A. Well, he wanted to get up on the bed, but he couldn't on account of his hands were tied.

Q. Well, wasn't he conscious? Could he talk? A. No, he couldn't talk.

Q. When did you next see him? A. Well, we didn't see him until we heard about him dying.

Q. And then his body was brought home—— A. By the undertaker.

Q. ——by the undertaker, Mr. Houten? Do you know how much he earned during his lifetime? A.

Well, he earned fifty or sixty dollars every two weeks.

Q. Fifty to sixty every two weeks at the time of his death? A. Yes, sir.

Q. He had earned more than that, hadn't he, in his lifetime? A. Well, when he worked.

Q. How old was your father? A. He was fifty years old.

Q. At the time of his death? A. Yes.

Q. And the ages have you given of the others—I think that is all.

Cross-examination by Mr. Hobart:

Q. Were there times when your father did not work? A. Well, when his legs hurted him, before when he was hurted?

Q. When his legs hurt him? A. Yes.

Q. What was the matter with his legs? A. Well, he met with an accident on the railroad before that.

Q. How long before? A. I guess about—about two or three years; I could not just say.

Q. Two or three years before this one. And what kind of an accident was it? That is, how did it hurt him? A. Well, he had, I think—a fractured leg and a compound fracture.

Q. And did that keep him from working regularly? A. Well, it bothered him in his legs when he walked.

Q. So that he didn't work regularly. Well, how much of the time after that accident—how much of the time did he lay off? A. Well, he would only lay off just when his legs would hurt him. See?

Q. Well, how often was that? A. Well, maybe three or four days; maybe a week.

Q. How often did that come about when he had to lay off for three or four days a week? A. Well, that would be according to the weather.

Q. Well, say in the winter time, would he lay off for several weeks at a time? A. Well, a couple of weeks at a time he would be off with his legs.

Q. Of course, he didn't get any money when he was not working? A. No, sir.

Q. Now, you have referred to the time when you saw him in the hospital. You you know whether there was an operation there? A. Yes, sir; there was an operation performed, but we never knew anything about it; they never notified us

Q. You mean they didn't inform you that they were going to perform the operation, but you heard of it afterwards, didn't you? That was the operation by Dr. Gray, wasn't it? A. I could not say what doctor operated on him.

Q. Now, do you know the names of the nurses? A. No, sir.

Q. Was one of them Miss Coombs? A. I couldn't tell.

Q. Did you meet a nurse there by the name of Miss Benedict? A. I couldn't tell you; I never heard the name.

Q. You don't know the name; all right. Now, at the time of your father's death, at the time of this accident, there were several of the children living with your father and your mother, and was there also an aunt that lived there? A. Yes, sir.

Q. What was her name? A. Miss Young.

Q. What? A. Miss Young.

Q. And was she supported also out of your father's earnings? A. Yes, sir.

Q. She lived at home and helped your mother take care of the house, did she? A. Yes, sir.

Q. And do you know whether she was paid anything by your father or your mother, or did she just get her living? A. She just got her living with father.

Q. She just got her living? A. Yes.

Q. And what was that worth? A. Well, she stayed home and helped mamma, and mamma bought everything she needed.

Q. And, of course, gave her her board and lodging? A. Yes, sir.

Q. And how much was the board and lodging—you have kept house—how much was it worth? A. Oh, well, she didn't get paid like that; whatever she needed papa bought. See?

Q. I know, but you keep house and have kept house for some time. How much was the board and lodging worth of a lady in those days? A. Of the aunt?

Q. How much a week would it be worth, living as your father and mother were? Would it be six or seven dollars a week, something like that? A. You mean now?

Q. No, at that time. I suppose it is more now. A. I could not say.

Q. What? A. I could not say.

Q. How old was this aunt? A. She is seventy-one.

Q. Your father bought all her clothes? A. Yes, sir.

Q. And took care of her with the rest of the family? A. Yes, sir.

Q. Is she still living? A. Yes, sir.

Mr. Hobart: That is all.

Redirect examination by Mr. Simpson:

Q. Where is the aunt living now, the old lady? A. She is living with me.

Q. How old is she? A. Seventy-one.

Q. You took care of her since your father passed away? A. Yes, sir.

Mr. Simpson: That is all.

(Witness excused.)

RECESS TO 2 O'CLOCK P. M.

AFTER RECESS.

Mr. Simpson: I would like to offer transcript of vital statistics under Section 28 of the Evidence Act.

The Court: What is the purpose of the showing?

Mr. Simpson: Cause of death.

The Court: What section is it?

Mr. Simpson: Section 28 of the Evidence Act, I think it is, if your Honor will look at it.

The Court: Any objection? (Referring himself to the statute.)

Mr. Simpson: There is another section. (Refers the Court to Section 29.)

(Paper marked P-1 in evidence.)

Mr. Simpson: I want to read this to the jury: Board of Health and Vital Statistics of the County of Hudson; Trenton, October

18, 1917. A transcript from the record of death in the County of Hudson, Volume 17, page 157; number 7814 of local burials. Date of death September 1st, 1915, Adolph Schneider; 49 years and blank days; color, white; occupation, brakeman; birthplace, Germany; father's name, Fred; mother's name, Ernestine Fischer; place of death, Christ Hospital, Jersey City; cause of death, accidental railroad injury, fall from moving train; place of burial, Jersey City Cemetery; medical attendance, George W. King, C. P. and certified according to law.

MARTHA LENNON, recalled in rebuttal.

Direct examination by Mr. Simpson:

Q. Mr. Hobart asked you if you heard of an operation, and you said yes, after it was performed. What was it you heard, or what was it you referred to in your answer to Mr. Hobart? A. Well, we heard about eleven o'clock Saturday morning after we came to the hospital that they had operated on papa for his kidneys, where he was hurted.

Q. Did you hear anything else about the operation, whether it was a success or whether he died during it, or after it? A. They said he got worse after it.

Q. And then died? A. Yes, sir.

Q. Did you hear what time the operation was? A. They said eleven o'clock?

Q. At night? A. No, in the morning.

Q. Do you know what time he died? A. I couldn't say what time he died.

Mr. Simpson: That is all.
Mr. Hobart: No question.
(Witness excused.)
Mr. Simpson: That is my case.

FREDERICK C. WEBBER, sworn.

Direct examination by Mr. Hobart:

Q. Mr. Webber, you are employed by the Erie Railroad? A. Yes, sir.

Q. And were you working at Weehawken on the 28th of August, 1915? A. Yes, sir.

Q. What were your duties there? A. I was air-brake repairer and car inspector at the time, assisting Mr. Wink.

Q. And was part of your duty as car inspector —did you have occasion to examine this? You left Weehawken shortly before six o'clock in the morning? A. Yes, sir; it was my duty to inspect it.

Q. Had you been on duty all that night? A. Yes, sir.

Q. Will you say what your inspection consisted of? A. My inspection consisted of seeing whether there were any defects or anything the matter with the car on both sides, and after that I used to help Mr. Wink test the air part.

Q. When you say to examine the car on both sides, what car do you mean? A. The train that has been made up.

Q. Where do you make your examination, from

the ground or from some part of the car? A. From some part of the car.

Q. How did you do it? What did you do? A. Why, I done it by looking at the car; I could see if there was any defect. If there was any defect I would mark them up.

Q. How long did it take you to make that inspection? A. Sometimes five minutes; sometimes ten minutes; according to the train.

Q. Well, if the train had twenty or twenty-one cars? A. Five minutes.

Q. And how many times did you look at the train? A. I generally looked at the train when it was getting made up and after it was made up before she left I used to inspect it to see if there was anything wrong which we could prevent or fix before she left.

Q. Did you find anything wrong on this train? A. No; everything was O.K.

Q. Was there any planks or any pieces of timber on any of the cars? A. No, sir; the cars that were there that morning came off the float, the Central Railroad float, and I inspected that before it came up on the westbound track the same night and found everything O.K.

Q. And about how long before the train pulled out did you and Wink make your inspection? A. About three minutes; she left there about five-fifty-five.

Q. And after you had made your inspection, as you have described, what did you do? A. Then I went over to the shanty.

Q. And that was all you had to do with that train? A. That was all I had to do.

Mr. Hobart: Cross-examine.

Cross-examination by Mr. Simpson:

Q. You took only five minutes to inspect twenty-one cars? A. Yes, sir; me and Mr. Wink.

Q. Did you inspect one side and Wink the other? A. Yes, sir.

Q. Now, which side did you inspect? A. I inspected the right hand side.

Q. Was that the right hand side as you looked toward the engine? A. The right hand side looking toward the engine.

Q. Did you make any written memorandum of your inspection and file it? A. Yes, sir.

Q. Where is it? A. I have got a book here in court.

Q. Will you let me see it? Show me in your book what you said about your inspection of this train. A. There is all the cars that came off the float; if there is any defect there it would be shown on the side, the same as here (indicating).

Q. That is, defects in the sense of air brakes out of order and brakes out of order? A. No; anything that is the matter with the car would be in the book here.

Q. That is out of repair with the car? If there was an apple on the side of the car you wouldn't write down in your book "one apple on car No. 2," would you? A. No.

Q. What you are doing is looking after the condition of the car, whether it is movable and all that kind of thing? A. Yes, and if there was anything there that would harm anybody.

Q. Well, what do you mean by "that would harm anybody"? A. Well, if a lock or step be broke, a lock be broke, mark it up and try to fix it.

Q. Anything of that kind? A. Yes, sir.

Q. Suppose a man was carrying a plank on the car, you would not mark that up—— A. Wouldn't allow him——

Q. No, but you wouldn't mark it up that he was carrying a plank on the car, would you? A. No.

Q. Did you inspect this oil tank car? A. Yes, sir.

Q. Have you any number for that on your book? A. Yes: X—571—K.T.X—571.

Q. You haven't anything the matter with it? A. No.

Q. Running board and steel step all right? A. Running board, steel step, couplers.

Q. Your inspection is directed more to the construction of the car, that is, to see that the construction of the car is all right? A. Yes.

Q. That is what you are there for? A. To see that the grab irons are all right, and the sills are all right, and the car steps are in good condition; yes.

Q. When you looked at this car it only took you five minutes to look down the twenty-one cars? A. Yes, sir.

Q. And do you think in that five minutes you could tell whether or not there was anything on these cars? A. Yes, sir.

Q. You could? A. Yes, sir.

Q. And you looked at this car? A. Yes, sir; the tank car is just high enough so you can see over the running board—as you call it, the platform.

Q. Anybody on it when you inspected it? Was Scotty on it? A. No, sir; there was nobody on it at all.

Q. Was the conductor on it? A. Just the hind man; that is all.

Q. Who is he? A. Schneider.

Q. And you were there when it went out, were you? A. Yes; I was there when it went out.

Q. What time did it leave? A. Left at 5.55.

Q. And what time did you make your inspection? A. Well, it was about three minutes before she left.

Q. Did you see Scott get on the car? A. No, sir; didn't see him get on.

Q. Didn't see Scott at all? A. No, sir; unless he got on the crossing, but it ain't my business to be up on the crossing.

Q. You said that you would take anything off that you saw on the car. Don't you know, as a matter of fact, that the workmen frequently carry home unused timber to use it? A. No, sir; never seen anybody carrying it.

Q. You never carried any home? A. No, sir; I live right in the town; I don't have to put it on the train; I live right in the town here.

Q. You don't have to use the train? A. No, sir.

Mr. Simpson: That is all.

By Mr. Hobart:

Q. Your car was called K. T. X-571; that was the tank car, was it? A. Yes, sir.

Q. With a running board how high? A. I should judge four or five feet from the ground; that is the standard size. If there was any plank on you could see it.

Q. If there was any plank on you could see it when you went by? A. Yes, sir; certainly could.

Q. You didn't see any such thing? A. No, sir.

By Mr. Simpson:

Q. You didn't expect to see any plank? A. I was looking for anything according to defects.

Q. Weren't you looking at the condition of the car? A. Yes, and if there was anything lying on the car.

Q. Sills and steps. Did you tap these wheels as you went by? A. Yes, sir; I have a gauge.

Q. And you did that, too? A. Yes.

Q. And twenty-one cars in five minutes would give you less than a quarter of a minute for each car? A. Yes, sir.

Q. Yet you were able to take care of the cars in that time? A. Yes, sir.

Q. And during that time you had to write the number of the car, didn't you? A. That is right; yes, write each number. After I get through with all the inspection I write the number.

Q. To the length of the train? A. No, coming back again.

Q. That is, look at the numbers as you went back? A. That is, look at the numbers as I went back.

By Mr. Hobart:

Q. Then you went up one side and down one side—— A. And Wink up on the other, yes.

Q. You were up and down the train? A. Yes; up and down the train.

By Mr. Simpson:

Q. Did you do these two motions in five minutes? A. On one side; I would be on one side and Mr. Wink would be on the other.

Q. How long would it take you to get all around the train? A. About ten minutes, if I had to do it myself.

Q. If you didn't have to do it yourself—as I understand, you are telling Mr. Hobart you went up one side and down the other of this train; in other words, you went up the left side and around the engine and down the right side? A. No, sir; I went down one side and came up on the same side again.

(Witness excused.)

GEORGE WINK, sworn.

Direct examination by Mr. Hobart:

Q. You are the partner in making inspections of the man who just testified, Mr. Webber? A. I am.

Q. And were working with him on the morning of August 28, 1915? A. I was.

Q. And what did you do in the way of inspecting this train? A. I went up the left side of the train and made the inspection of the left side of the train.

Q. What did you do in the way of inspecting, in the way of looking at the train? A. Well, I looked if there was any kind of a defect regarding to anything on the cars, the brakes, and so on.

Q. Did you walk on the ground or on the car? A. I walked on the car; yes, sir.

Q. How long did it take you to make your inspection? A. Well, we both met at the hind about the same time.

Q. And there was a tank car there, do you re-

member? He gave its name as K.T.X—571. A. I know there was a few tank cars.

Q. You do not recall the number particularly? A. I do not recall the number; no, sir.

Q. Now, was there any plank or any board on any of the tank cars or anywhere else on the train when you inspected it? A. None on this; no, sir.

Q. You didn't see any? A. I didn't see any; no, sir.

Cross-examination by Mr. Simpson:

Q. You still work for the Erie Railroad? A. I am; yes.

Q. Are your inspections governed by written rule, as to what you should do, what the inspectors' duties are? A. Yes; there are rules.

Q. Have you got it with you—the written regulation? A. No, sir; I ain't got the written rules.

Q. What does it tell you to do? A. It tells us to watch for the brakes, and so on, and regarding anything laying loose around cars, to repair any defects; which cannot be fixed, to have the car thrown out and replaced on repair track.

Q. That is, you are to look at the condition of the car, whether it is in need of repair or whether there are any obstacles on the cars, where, if a man walked on them, they might throw him off—you are supposed to look after that? A. I am, certainly; yes, sir.

Q. You inspected twenty-one cars this day? A. I inspected twenty-one cars on the left side.

Q. And it only took you five minutes? A. Well, it might have taken me eight minutes.

Q. Now, in those eight minutes did you tap all the axles as you went by? A. I didn't tap all the axles as I went by; no, sir.

Q. What did you do? A. I first inspected them and looked over them because they were supposed to be inspected, too, down at the floats.

Q. Well, you just inspected as you walked along? A. Looked underneath and on the run board, and so forth.

Q. How many tank cars were there? A. I don't know; there were a few tanks.

Q. A few of them? A. Yes.

Q. As you walked by you looked at the running board? A. At the running boards and underneath the cars.

Q. How near were you to the cars when you were making that inspection? A. I was about six inches away from the side; that is all.

Q. You walked close to the car? A. I walked close to the car; yes, sir

Q. Did you ever see a plank on the car? A. No, sir; not as I know; no, sir.

Q. Not in all your time that you worked there? How long did you work for—— A. Only on flat cars.

Q. What is that? A. Only on flat cars; that is about all.

Q. What is a flat car? A. Them are open cars without sides or tops.

Q. Gondolas? A. No, they are—a flat car is a car without any sides or a roof to them.

Q. And what would these planks be doing on those cars? A. That is where they were blocking cars—blocking loading.

Q. Where they what? A. Where they block loading.

Q. Where they block loading. What does that mean? A. Well, if they have any machinery, and so forth, on the car, why, they lock the cars with that stuff there the—machinery.

The Court: So that the load does not shift?
The Witness: Yes.

Q. When they take those machines off the planks or sticks stay there? A. Yes.

Q. What would you do in that case, go and throw them off or leave them there? A. If I see it I generally throw it off.

Q. Well, do you mean generally, or always? Or what do you mean? A. Whenever I see them I take—I do take them off.

Q. You take them off. That is part of your business to see that there are no planks there? A. That is part of my business; yes, sir.

(Witness excused.)

GEORGE PETNAUD, recalled.

Direct examination by Mr. Hobart:

Q. You referred to your train list this morning when you were being examined by Mr. Simpson. Did you have on that train a tank car known as K.T.X-571? A. Yes sir, according to that slip; yes sir.

Mr. Hobart: That is all.
Mr. Simpson: That is all.
(Witness excused.)

Mr. Hobart: At rest.
Mr. Simpson: No rebuttal.

Motion to Direct Verdict on Behalf of the Defendant.

Mr. Hobart: If your Honor please, I ask for a direction of verdict on the following grounds: first, that there has been no negligence proven; secondly, the negligence alleged in the complaint has not been proven; and thirdly, the evidence shows that this plank had been on the car for a few minutes after the train had started and before the accident happened, and in plain sight of the decedent, and he assumed the risk of the injury that might arise therefrom. It seems to me that we have now shown beyond any controversy that the company and its servants exercised the duty of reasonable care, which was all the duty they were required to exercise, of course, in the way of inspecting and examining this train before it proceeded. The conductor examined it; the brakeman examined some of the cars; two inspectors examined all of the cars. Schneider himself examined the train, or a considerable part of it, according to the conductor's testimony. So I fail to see how there has been any neglect on the part of the company or its employees to use the reasonable care that the law imposed upon them, either to furnish a safe place in which to work or to keep objects from the train that might cause injury during the progress of the train. The mere fact that a plank got there, nobody knows how—there is no proof as to how it got there; it is there, there is no doubt about it—but as to how it got there and who put it there has not been shown. Nobody knows. I re-

spectfully urge under those circumstances that we have not failed in our legal duty.

The Court: (after discussion) I will decline the motion to direct a verdict.

Mr. Hobart: Your Honor will note an objection.

The Court: You may have your objection noted; yes sir.

Mr. Hobart summed up to the jury on behalf of the defendant.

Mr. Simpson summed up to the jury on behalf of the plaintiff.

The Court's Charge.

Gentlemen of the Jury:

This is an action being maintained by Martha Lennon as Executrix of the last Will and testament of Adolph Schneider, deceased, vs. the Erie Railroad Company, by and through which action the plaintiff is seeking to recover damages for an injury to Adolph Schneider which resulted in his death, as well as for the damages caused by his death.

The action is brought under an Act of Congress, as has been well said to you, which provides that every common carrier engaged in interstate commerce—and admittedly this carrier, the defendant company, was at the time of the occurrence, engaged in interstate commerce, and likewise Mr. Schneider was—shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions; or, in case

of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee. I need not read any further at present because the balance of it has no particular reference to this thing to which I am speaking.

The right of recovery, if one exists, must be predicated upon this: that the defendant company was guilty of some act of negligence, which act was the proximate cause of the hapening in question. I may read further from the same section upon that point, and that is there may be a recovery where the injury or death results in whole or in part from 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, and so forth.

It is necessary, you see, therefore, that the plaintiff shall make out and establish—and must do so by a fair preponderance of the evidence—that the defendant company or its agents and servants were guilty of some act of negligence which was the proximate cause of and brought about this injury to the deceased, Mr. Schneider. Upon that point the plaintiff is insisting in three directions: it says, first, that the defendant company did not exercise that care with respect to the place where it employed or caused the decedent to work, as the law called upon it to do. It says, secondly, that one of the employees of the company, a Mr. Scott, I believe, was negligent in the manner in which he attempted to alight from this tank car, and that his negligence brought about the happening which resulted in the injury to Mr. Schneider and his death. Thirdly, they contend for this: that there has been shown a custom upon the part of em-

ployees of the company to carry on the cars of this train planks, boards, wood, and so forth; that this custom was known to the company or had existed for such a length of time as to charge the company with knowledge thereof, and that the doing thereof and the permitting of the doing thereof were so dangerous as to amount to negligence.

Now, going back to the first: the rule of care which is placed upon a company such as this defendant company with respect to the providing of a safe place for its servants to work is that it must use reasonable care to provide for the servant a reasonably safe place in which to perform his work. Now, pay attention to that rule—it must use reasonable care to provide a reasonably safe place in which its servants are to work. That does not mean as you can see gentlemen, by the very plain language — it does not mean that the company is put to all extremities and to all efforts possible to make the place so safe that one cannot meet with a casualty; that is not the rule; but it is quite the other side, and that is, it must use that care which is reasonable care, that care which a reasonably prudent person would exercise, not to keep it perfectly safe—no, by no means, but to keep the place in which its employees are to labor and work in a reasonably safe condition.

So the first question before you is, taking into consideration all the evidence in the case, has the plaintiff established by a fair preponderance of the evidence that this defendant company did not use reasonable care to keep these cars upon this train in a reasonably safe condition? If the plaintiff has established that by a fair preponderance of the evidence then she has made out an allegation of negligence chargeable or attributable to the defendant

company. And then the remaining question will be whether that negligence was the proximate, natural cause of this happening. As to that again, the plaintiff must make it out by a fair preponderance of the evidence, and if he has, then, save for what I shall say upon other matters which are pertinent to that particular issue, plaintiff has so far made out her case in the direction of being entitled to have a verdict—in the direction of being entitled to have a verdict. If it has been made out upon that score to which I have just directed your attention then you may direct your attention to the second point, and that is with respect to the conduct of Mr. Scott. As I have indicated to you, plaintiff insists and urges that Mr. Scott was negligent in the manner in which he attempted to alight from this car. Mr. Scott was only under the obligation, however, gentlemen, likewise to use reasonable care, to use that care, conduct himself in that manner which a reasonably prudent person would, considering time, place and circumstances. Your inquiry in that direction is, has the plaintiff established to your satisfaction by a fair preponderance of the evidence that Mr. Scott was negligent in and about the things which he did? If so, then, was that negligence of his the proximate and actual cause of this happening? If the plaintiff has not made that out, why, then, of course, she has not made out that allegation of negligence and is not entitled to a verdict upon that allegation.

If she has, then, save for what I will further say to you upon subjects allied with that, she has made out something in the direction of being entitled to a verdict.

If she has not made out that allegation, then we come to the third one which is raised and urged

and insisted upon, and that is that there was a custom existing by which and under which the employees of the defendant company carried and transported waste wood, planks, and like things upon the cars of trains of the company. As to that, gentlemen, the first thing for your consideration is, has such a custom been established? And keep in mind that the burden of establishing it is upon the plaintiff, and the plaintiff must do so by a fair preponderance of the evidence.

Now, custom does not mean, gentlemen, the casual doing of a thing, an interrupted doing of a thing, a doing of a thing once or twice; but it means, if anything, a continued doing of a thing over such a space of time, and so continuous and so notorious as to be open to all who are qualified to see and know that it is being done, and not done by stealth or secretly, but done so continuously, openly and notoriously as to be open to the observation and knowledge of reasonably observant persons.

Again, even if they have established—and the first point before you is, is there in this case that evidence, that preponderance of evidence which warrants you in finding that a custom of that character has at all been established? If not, why, then you need not go any further with that particular branch of the case, because there is then nothing at all to consider further upon that point.

If the custom has been established the next thing before you for consideration is, has it been so established, and was it so notorious and open that this defendant company would be chargeable with the knowledge of it, and that it was being done? Because, in order to charge the company with an act or action of that character for the purposes of

an action of this character it must be shown either that they had actual knowledge of it, or actually permitted or authorized the thing to be done, or that it must have been so continuous and of such long standing, and so openly done and notoriously done, that in the exercise of reasonable care on their part, or on the part of their agents would have given them knowledge of it. Has it been established that that is the situation? If not, then you need not go any further with that matter. If both of those things have been established then the next question is, was the doing of this thing, carrying of wood, planks, and so forth in this manner such a dangerous thing that it can be said to be included under that rule of reasonable care which I have already given you? Was it so dangerous, so openly dangerous a thing to do, or to be permitted to be done, that a person exercising reasonable care would not permit it to be done? The burden is also there again upon the plaintiff to satisfy you upon that score, because even if it were the custom, even if it were known to the company, or had been conducted and carried on so long that the company in law would be charged with it, yet if it was not the doing of a thing that was so dangerous as to charge a person with negligence under the rule of reasonable care, then, of course, there cannot be a recovery in this case for it; because the only care that is required of the defendant company at all times and under all the circumstances is to use reasonable care to keep the trains and the cars of the train upon which this man was working in a reasonably safe condition. Keep that always in mind.

Now, gentlemen of the jury, if upon any of those allegations of negligence you have not been satis-

fied by the plaintiff by a fair preponderance of the evidence that the defendant company is chargeable therewith, or if you find it is chargeable therewith but still have not been satisfied that any of them was the proximate cause of the injury, or through any of them the proximate injury occurred, then your verdict must be for the defendant; because then the plaintiff has not made out that sort of a case which entitles her to a recovery at your hands.

Keep in mind, gentlemen, always those points that the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence that the defendant company was negligent in some one or more of the manners which she has alleged and which she is contending for; and, secondly, that such negligence, if shown, must have been the proximate and natural cause of this happening and the resulting death. If she has not shown that, then you need not consider the case any further because your verdict must be for the defendant.

Again, if those things have been established which I have been talking about to you so far, another question still before the plaintiff is entitled to a verdict will be brought before you for your consideration and determination, and that is the question as to whether or not this deceased party, Mr. Schneider, did not meet with the happening in question and his resulting death through what is known as an assumed risk, or whether he is not chargeable with assumption of the risk. Where through the negligence of an employer one meets with an injury, assumption of risk is defined to be this; the general rule is that a master is bound to exercise reasonable care to provide a safe place for his servant to perform his work and to furnish and

adopt such means that he may be assured reasonably safe protection in his work, and to exercise reasonable care to maintain the place and means reasonably safe. The qualification that the workman takes upon himself during the continuance of his employment are the risks and dangers which are obvious to him or can be perceived by him in the exercise of his senses and the use of ordinary care and circumspection. The risk must be obvious and apparent and known to the servant, or such as he should have known and perceived with the exercise of reasonable care on his part. The rule that the servant assumes not only the ordinary risks incident to his employment, but also some special features of danger as are plain and obvious and also such as he would discover by the exercise of ordinary care for his personal safety, is well established in this state. The servant assumes as well those risks which arise or become known to him during the service, as those in contemplation at the original hiring.

Applying that, gentlemen, to the facts in the case, if you find under that rule or those rules I have just read to you that in this case Mr. Schneider assumed the risk, and it was through that he met his death, then, of course, there cannot be a recovery in this action.

If you find that that has not been established, and that the other things I have spoken to you of as necessary to primarily entitle plaintiff to a verdict have been established, then your consideration may go to the question of a verdict.

It is contended for in this action that there should be a verdict covering two grounds: the first, compensation or payment for pain and suffering, if any, which Mr. Schneider endured and

suffered from the time of the happening to the time of his death, during such time, if any there were, between those two periods that he was conscious. In other words, they are seeking to recover first compensation for conscious pain and suffering. Of course, the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence that Mr. Schneider's condition of consciousness was such that he was conscious and was able to realize and feel and know of any pain which he may have had; and it is only in the event that that has been shown that she can be entitled to have a recovery for it. Of course, the two things must be shown; first, that there was pain and suffering; secondly, that at some time, or more particularly for what period of time, if any, his condition was that of being conscious so that he realized that pain and suffering; and, thirdly, what the degree and intensity of that pain and suffering were. Now, there is no mathematical rule which I can give you, gentlemen, for the admeasurement of such damages and for such a purpose. The only thing that I can say to you is this: you are, as your best judgment will permit you and guide you, to determine what sum of money will compensate—reasonably compensate for such pain and suffering as may have been shown during such a period or time, if any there have been, that the deceased, Mr. Schneider, was conscious between the time of the happening of the accident and the time of his death. For that the plaintiff is entitled to be compensated as nearly as you can—for that pain and suffering.

The second ground which they are contending for is a pecuniary loss which it is alleged has come to the widow and children of the deceased, Mr. Schneider, because of his death. You will note,

gentlemen, that I have said a pecuniary loss, because, in fact, that is what it is. There can be no sum allowed or sum assessed by you because of the death of Mr. Schneider for the loss of his society, or loss to the wife and the children of his society because of his death, nor because of their wounded feelings because of his death. The law does not permit that. What the law does permit a verdict for, is the pecuniary loss, if any, which may have been shown, if it has, that the widow and next of kin, who, of course, are the children, or such of them as you may determine, have met with because of the loss of a reasonable probability of his contributing to them had he lived. I will try and make that plain to you if I can: the burden is upon the plaintiff to establish that it is reasonably probable that had the father lived and earned money, and labored and had compensation therefor, he would for some period during the future have contributed some part of those earnings to his wife and children; that he died when he did cut off that expectation of compensation or contribution to them.

Now, as to the wife, of course, the evidence is that she died within a month or two succeeding the death of Mr. Schneider; so that, of course, any recovery as toward her, or for her pecuniary loss, naturally would be limited to that time which she lived afterward. As to the children, you have heard the ages of them, gentlemen; you have heard their conditions, as to the fact that they are married or single, as the case may be. The question is again as to them as to what they may have satisfied you it is reasonable to find they had a reasonable expectation of having in the way of contribution from the father had he lived. Now, there are

a great number of things, gentlemen, which you must take into consideration. You must take into consideration, of course, the age of the father himself, his physical condition, what the reasonable term of his life would have been had he not met with this accident; that is, how long he would have lived but for this; what the reasonable opportunities were for him to labor and to continue his work and earn. Would he earn as much in the future as he had in the past? Would he earn more or would he earn less? What is reasonable under the circumstances? He might have died, of course, by the course of nature a short time following the time when his death actually did occur; and, of course, that happening, his earning capacity was closed and shut off, and his compensation and contribution likewise to his widow and next of kin would have stopped. His next of kin may have died during his life time had he not been taken off in the manner and at the time he was. A very pertinent fact is that his wife only did survive him by a few months. So, likewise, had he lived some or all of his children might have died before he did, and, of course, at their death his contribution to them would have ceased. Again, gentlemen, he might have met with financial reverses or might have been incapacitated in other manners, which would have prevented him from earning, and, of course, being prevented from earning he would have been prevented from contributing.

As to those children who are married, of course, you may take into consideration that they are married and that they are being provided for in other directions. You may take that into consideration as to what would be the reasonable probability under all the circumstances of the father contributing to them had he lived.

So that, gentlemen, after all, what recovery there is upon that point—that is, for the death of Mr. Schneider, is to be measured first in this wise: What has been established by a fair preponderance of the evidence by the plaintiff as to what, if anything, would have been and had been the loss upon the widow and the children of a reasonable probability of contribution by the father had he lived? That sum when you find it, if it is any—that sum you will capitalize or bring to its present-day worth; because, you see, had he lived and contributed, those contributions would have been made in stated periods, going forth in the future, and you are finding for that which would have been made and earned in the future. So, therefore, if his representative, the plaintiff in this action, for the benefit of those who are entitled to it under the statute, is to have a recovery for it, you see she will have it now; and, therefore, she should have not that gross sum which you may find he would have contributed had he lived, but that gross sum reduced to its present-day worth; that is, if you find that he would have lived for ten years and would have contributed reasonably a certain sum of money, it is not that sum that he would have contributed throughout that ten years, but it is that sum, considering the length of time over which it would have been contributed, and the probable rate at which he would have contributed it, reduced to its present worth.

Now, besides that, gentlemen—I meant to say and I will say after you have arrived at what your verdict will be, if the plaintiff is entitled to a verdict under the rules I have just given you and under the evidence in the case, there is still another matter for you to consider and which would have a

bearing, depending upon your determination as to it, upon the quantum of the verdict. There is a provision in this act under which this action is brought that in all actions hereinafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injury to an employee, or where such injury has resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovey; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. That is the only part of that section that has any applicability to this present matter.

Of course, there was a duty resting in law upon Schneider as to his conduct and the manner in which he cared for himself in and about the work which he was employed to do, and that was that he was required to use that reasonable care which a reasonably prudent person would, considering the circumstances, class of work and things of that character, in and about which he was employed. The question is, did he exercise that reasonable care under the circumstances as shown in this case? The burden of satisfying you that he did not is upon the defendant, and it must satisfy you by a fair preponderance of the evidence. If it has, then it is to be treated in this manner, in accordance with the section which I have already read to you: the courts have said as to that section—and that section again, gentlemen, I will read to you—the fact that the employee may have been guilty of contributory negligence shall not bar a recovery. That is, it shall not absolutely prevent a recovery. But the damages shall be diminished

by the jury in proportion to the amount of negligence attributable to such employee. The courts have said that that section means this: It means and can only mean that where the causal negligence (that is, the negligence which caused the injury) is attributable partly to the carrier (that would be the defendant in this case) and partly to the injured employee (that would be Mr. Schneider in this case), he (that is the employee, and in the event of his death, his representative) shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both of them.

So that if it has been established that he was guilty of contributory negligence then upon both items for which plaintiff is contending, if you find or are about finding for both items that provision of the statute should be applied with that interpretation as placed on it by our court.

Aside from that, gentlemen, I do not know of any other matter I can advise you upon. I have tried to cover the entire field as presented in this case as completely as it is possible for me to do so. I will say to you in conclusion that if your verdict is for the defendant you will state it simply in this wise: that you find for the defendant and against the plaintiff. If you find that your verdict is to be for the plaintiff, that there is to be a recovery upon both items contended for, then you will say that you find for the plaintiff and against the defendant for the pain and suffering so much; for pecuniary loss because of death, so much. That keeps the two items, you will see, of recovery separate and distinct.

With that you may take the case.

(Jury retired.)

Mr. Hobart: In behalf of the defendant I ask an exception to the charge as follows: First, to that part of the charge which permitted the jury to consider the question as to whether or not the defendant exercised reasonable care with relation to the place of work, the exception being directed not to the principle of law as stated on that subject, but to leaving that question to the jury at all under the pleadings or under the proof.

Second, to that part of the charge which permitted the jury to find negligence on the part of the defendant by reason of the conduct of Mr. Scott in attempting to alight from the car, that also being directed not to the statement as the principle of law applicable to such a condition, but to leaving that question to the jury under the proof and the pleadings of the case.

Third, I ask exception to that part of your Honor's charge which permitted the jury to base the verdict in favor of the plaintiff upon the claim that there may have been a custom of carrying planks, etc., on trains, which custom may have been chargeable to the company, and that such a custom was so dangerous as to amount to negligence—leaving that question to the jury under the pleadings and proof, there being no pleading to cover such a point, and if there had been any pleadings the proof being insufficient to sustain such an allegation.

And, finally, I ask exception to that part of your Honor's charge which permitted the jury to find any verdict at all for conscious pain and suffering, this being on the ground that the pleading does not make any allegation which would entitle the plaintiff to recover for such conscious pain and suffering, under the amendment of 1910 to the Federal Statute.

Judgment.

(Entered Oct. 19, 1917.)

This action was tried before Hon. LUTHER CAMPBELL, Circuit Judge, and a jury, on the 17th and 18th of October, 1917, and having been submitted to the jury.

The said jury returned two verdicts, one in favor of plaintiff and against the defendant for the pain, injury and suffering of plaintiff's testator for one thousand dollars ($1,000), and one in favor of plaintiff and against the defendant for pecuniary injury arising out of the death of the testator of the plaintiff for six thousand ($6,000) dollars.

Whereupon it is order that judgment final be entered in favor of the plaintiff and against the defendant for ($7,000.00/100) seven thousand dollars, damages, together with her costs of suit to be taxed.

Rule entered in open court
Oct. 18, 1917.

On motion of

ALEXANDER SIMPSON,
Atty.

Rule to Show Cause.

(Filed Nov. 10, 1917.)

On due application on behalf of the defendant, *Ordered* that the plaintiff show cause before this Court on Friday, the Thirtieth day of November, ber, 1917, why the verdict rendered in her favor on October 18, 1917, should not be set aside and a new trial granted.

FURTHER ORDERED, That the following points be and the same are hereby expressly reserved, to wit: all objections and exceptions noted by the defendant to the rulings of the trial court at the trial of the cause.

LUTHER A. CAMPBELL,
Cir. Ct. Judge.

Rule entered this 10th day of
November, 1917, on motion of

COLLINS & CORBIN,
Attorneys of Defendant.

Reasons.

(Filed Nov. 10, 1917.)

The defendant writes down the following reason upon which it rests its motion for a new trial in the above case, to wit: that the damages awarded by the jury were excessive.

COLLINS & CORBIN,
Attorneys of Defendant.

Conclusions.

(Filed Dec. 28, 1917.)

Campbell, J.

In this cause plaintiff had a verdict for one thousand dollars for conscious pain and suffering, and six thousand dollars for pecuniary loss to next of kin.

The rule is directed to the excessiveness of the six thousand dollars recovery only.

I do not find such recovery to be so unconscionable as to warrant my disturbing it, and therefore the rule is dismissed with costs.

Dated Dec. 28, 1917.

LUTHER A. CAMPBELL,
Judge.

Order Discharging Rule to Show Cause.

(Filed Jan. 3, 1918.)

The above cause having been argued on Rule to Show Cause, and the Court being of the opinion that the said rule should be discharged,

It is, on this 3rd day of January, 1918, on motion of Alex. Simpson, attorney for the plaintiff, *Ordered,* that the above rule to show cause be discharged, with costs.

LUTHER A. CAMPBELL,
Judge.

Reply.

(Filed August 9, 1916.)

The plaintiff as and for a reply in the above entitled cause, denies the matter set up in paragraphs entitled "Second Defense," "Third Defense" and "Fourth Defense" in the answer of the defendant.

Dated August 7, 1916.

ALEX. SIMPSON,
Attorney for Plaintiff.

Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit on October 17, 1917.

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

They say they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of seven thousand dollars ($7,000.00).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of seven thousand dollars ($7, 000.00) damages and his costs, which are taxed at sixty-seven dollars and forty-four cents, making in the whole the sum of seven thousand and sixty-seven dollows and forty-four cents ($7,067,-44).

Judgment entered this 18th day of October, 1917.

LUTHER A. CAMPBELL,
Judge.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MARTHA LENNAN, executrix of ADOLPH SCHNEIDER, deceased, *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, *Defendant-Appellant.*	*On Appeal from Hudson Circuit Court.*

Brief in Favor of Defendant-Appellant.

(1)

Statement of the Case.

The defendant's appeal is taken from a judgment entered against it in the Hudson County Circuit Court for the sum of $7,000 in an action brought under the provisions of the Federal Employers' Liability Act for the purpose of recovering damages alleged to have been sustained by the widow and children of the decedent by reason of his death while in the defendant's employ as a brakeman, on August 27, 1915, while he was riding on an interstate train operated by the defendant. The accident did not result in the immediate death of the employee, but there was a conscious period of survival for about four days after the accident. The plaintiff's attorney claimed that the widow and children were entitled to recover damages not only for the pecuniary loss sustained by them, pursuant to the provisions of the Employers' Liability Act of April 22, 1908, but also that they were entitled to a further allowance under the provisions of the amendment of April 5, 1910, providing that any right of action given

by the act to a person suffering injury should survive to his or her personal representatives for the benefit of the surviving widow or husband and children of such employee, and of the other next of kin named in the statute. Under the charge of the trial judge the jury brought in separate verdicts for these two causes of action, allowing the sum of $6,000 for the pecuniary loss and $1,000 for the pain and suffering of the decedent. Rule to show cause was allowed with reservation of all objections noted at the trial. The reason filed by the defendant in support of the rule was limited to the claim that the damages were excessive and on the argument the only point that was urged was that the verdict was excessive with respect to the allowance of $6,000 for the pecuniary loss. The trial Court refused to disturb the verdict (p. 174) and judgment was entered accordingly for the sum of $7,000.

(2)

Grounds of Appeal.

1. Questions were admitted to the witness Scott tending to show that it was the custom of employees of the defendant to place boards or planks on the defendant's trains for the purpose of taking same home for their own use, as particularly set forth in Ground No. 1 (pp. 1 and 2).

2. Questions to the same purport were admitted to the witness Stickel, as particularly set forth in Ground No. 2 (p. 2, ll. 20-30).

3. Questions were admitted to the witness Schneider tending to show conscious pain and suffering on the part of the decedent after the

accident and before his death as particularly set forth in Ground No. 3 (pp. 2 and 3).

4. Defendant's motion for a direction of verdict in its favor should have been granted for one or more of the following reasons:

(a) There has been no negligence proven;

(b) The negligence alleged in the complaint has not been proven;

(c) Decedent assumed the risk of the injury from the plank that caused the accident;

(d) The evidence shows that the defendant and its servants exercised all the duty of reasonable care which they were required to exercise in the way of inspecting and examining the train;

(e) There was no negligence on the part of the company or any of its employees to use reasonable care—either to furnish a safe place in which to work or to keep objects from the train that might cause injury during the progress of the train (p. 3, l. 30, to p. 4, l. 10).

5. There was error in the charge of the trial judge in so far as said charge permitted the jury to find negligence on the part of the defendant with respect to its alleged failure to use reasonable care to provide a reasonably safe place in which its servants should work, as particularly set forth in Ground No. 5 (pp. 4 and 5).

6. There was error in the charge of the trial judge in so far as said charge permitted the jury to find negligence on the part of the decedent's fellow-servant Scott, as particularly set forth in Ground No. 6 (pp. 5 and 6).

7. There was error in the charge of the trial judge in so far as said charge permitted the jury to find negligence on the part of the de-

fendant by reason of the existence of an alleged custom of its employees to carry on its cars planks and boards, as particularly set forth in Ground No. 7 (pp. 6 and 7).

8. There was error in the charge of the trial judge in so far as said charge permitted the jury to find any verdict for conscious pain and suffering, as particularly set forth in Ground No. 8 (pp. 8 and 9).

(3)

Brief of the Argument.

I.

IT WAS ERROR ON THE PART OF THE TRIAL COURT TO PERMIT THE JURY TO FIND ANY NEGLIGENCE ON THE PART OF THE DEFENDANT BY REASON OF AN ALLEGED CUSTOM ON THE PART OF THE DEFENDANT'S EMPLOYEES TO CARRY PLANKS AND BOARDS ON ITS TRAINS.

In the course of the charge to the jury the trial Court said:

> "Thirdly, they contend for this: that there has been shown a custom upon the part of employees of the company to carry on the cars of this train planks, boards, wood, and so forth; that this custom was known to the company or had existed for such a length of time as to charge the company with knowledge thereof, and that the doing thereof and the permitting of the doing thereof were so dangerous as to amount to negligence.
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> * * * * * * * * * * *
>
> "If she has not made out that allegation, then we come to the third one, which is raised and urged and insisted upon, and that is that there was a custom existing

by which and under which the employees of the defendant company carried and transported waste wood, planks, and like things, upon the cars of trains of the company. As to that, gentlemen, the first thing for your consideration is, has such a custom been established? And keep in mind that the burden of establishing it is upon the plaintiff, and the plaintiff must do so by a fair preponderance of the evidence.

"Now, custom does not mean, gentlemen, the casual doing of a thing, and interrupted doing of a thing, a doing of a thing once of twice, but it means, if anything, a continued doing of a thing over such a space of time, and so continuous and so notorious as to be open to all who are qualified to see and know that it is being done, and not done by stealth or secretly, but done so continuously, openly and notoriously as to be open to the observation and knowledge of reasonably observant persons.

"Again, even if they have established—and the first point before you is, is there in this case that evidence, that preponderance of evidence which warrants you in finding that a custom of that character has at all been established? If not, why, then you need not go any further with that particular branch of the case, because there is then nothing at all to consider further upon that point.

"If the custom has been established the next thing before you for consideration is, has it been so established, and was it so notorious and open that this defendant company would be chargeable with the knowledge of it, and that it was being done? Because, in order to charge the company with an act or action of that character for the purposes of an action of this character it must be shown either that they had actual knowledge of it, or actually permitted or authorized the things to be done, or that it must have been so continuous and of such long standing, and so openly done and no-

toriously done, that in the exercise of reasonable care on their part, or on the part of their agents, would have given them knowledge of it.

"Has it been established that that is the situation? If not, then you need not go any further with that matter. If both of those things have been established, then the next question is, was the doing of this thing, carrying of wood, planks, and so forth, in this manner, such a dangerous thing that it can be said to be included under that rule of reasonable care which I have already given you? Was it so dangerous, so openly dangerous a thing to do, or to be permitted to be done, that a person exercising reasonable care would not permit it to be done? The burden is also there again upon the plaintiff to satisfy you upon that score, because even if it were the custom, even if it were known to the company, or had been conducted and carried on so long that the company in law would be charged with it, yet, if it was not the doing of a thing that was so dangerous as to charge a person with negligence under the rule of reasonable care, then, of course, there cannot be a recovery in this case for it; because the only care that is required of the defendant company at all times and under all the circumstances is to use reasonable care to keep the trains and the cars of the trains upon which this man was working in reasonably safe condition. Keep that always in mind." (P. 158, l. 38, to p. 159, l. 10; p. 160, l. 38, to p. 162, l. 38.)

We submit that this part of the charge was erroneous for several reasons. In the first place there was no allegation in the complaint of any such negligence on the part of the defendant. The only negligence charged therein was the following:

"That while the intestate of the plaintiff was so employed as a brakeman on top of a train of moving freight cars, carrying

> freight consigned without the State of New Jersey and freight which had been consigned from the State of New York into the State of New Jersey and from other states into the State of New Jersey, and while engaged in the performance of his duties for the defendant, he was injured by reason of the negligence of the defendant to use reasonable care to furnish him with a safe place in which to work; and by reason of the failure to use reasonable care on the part of an employee of the defendant, *in the use* of a certain plank, whereby the intestate of the plaintiff was struck by the said plank, while he, the intestate of the plaintiff was engaged in interstate commerce and so injured that he died."

It will be observed that there is nothing whatever in this allegation which suggests to the defendant that there was any claim made against it by reason of any express or implied permission on its part to its employees to use its trains for their personal accommodation in carting around boards or planks; neither is there any allegation that there was some long continued custom on which the employees had a right to rely. The only reference to a "plank" in the complaint is that there was a failure to use reasonable care on the part of an employee of the defendant "in the use of a certain plank," whereby plaintiff's intestate was struck by the plank and so injured that he died. No motion was made to amend the complaint, and even if such motion had been made the trial Court would have been bound to deny it, as the accident happened on August 27, 1915, more than two years before the date of the trial, and hence any amendment in a substantial particular would have been in violation of the Statute of Limitations.

In the second place, this part of the charge was wrong because there was no proof of the custom to which the trial Court referred. The court recognized the necessity of proving something more than an occasional act, in order to make out a custom, saying that the thing must be done continuously, openly and notoriously (p. 161, ll. 20 to 25). We do not quarrel with this statement of the law, but the difficulty as we conceive it is that there was no proof to go to the jury that planks or boards were continuously or openly transported upon the defendant's trains.

The testimony on this point was as follows:

Clark, night watchman in the employ of the defendant: Had been so employed for sixteen months prior to the accident (p. 15, ll. 1-20); was riding on the train at the time of the accident. Had "frequently" ridden home on similar trains.

> "Q Now, during the sixteen months that you worked there, what did you see, if anything, about employees putting wood on the train and taking it home for their own purposes? A If the man would take a bundle of wood, a couple of sticks of wood, they would throw it on the train, and throw it off wherever their place was.
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> "Q Was that general—was that done during the entire sixteen months you worked there? A Whenever I rode; I didn't ride all the time.
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> "Q You saw that done any time you rode over? A Yes" (p. 17, ll. 5-20).

On cross examination he admitted that he only noticed planks or boards placed on the cars about twice a month. The men who did this were laborers. The witness himself never did it

and never saw any of the crew or any of the watchmen do it (p. 17, l. 20, to p. 18, l. 12).

Scott, watchman for defendant: Was riding on the train. There was an "oil plank" on one of the "oil tanks" (p. 23, l. 40, to p. 24, l. 10). He was asked whether he had "frequently" seen the planks put on the trains by laborers. The question was overruled but the trial Court held the matter under advisement and after argument allowed the plaintiff to recall this witness and testify on that subject (p. 27, l. 10; p. 65, l. 30). He said that he had often taken wood home, *but denied that he had placed it on the cars;* that he had taken it about once a week from time to time (p. 66, l. 20, to p. 67, l. 5). He further said that the wood that he took home were old pieces that he chopped up for fire wood and that he never saw anybody else take any wood home (p. 67, ll. 15-30). This was old wood that had been used to block machinery (p. 68, l. 35). He carried the wood home on his shoulder and never put it on the train and never saw anybody else do it (pp. 68, 69).

Petnaud, conductor of freight train: Examined the train at Weehawken before it left; never saw men taking wood home on the train; had worked with the company for twenty-one years. He sometimes saw men take sticks off of the flat cars when they arrive at the destination in the yard (pp. 76, 77).

Stickle, brakeman:

> "Q Did you see any wood on the car that he was on, any loose wood? A I didn't take any notice.
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> "Q Wasn't it the custom for the men to take home loose wood on the train?
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> "*Mr. Hobart.* I make the same objection as it was made to the line of

evidence by the other witness—same ruling and same exception, I suppose.

"*The Court.* Yes.

"A Well, sometimes they threw a piece of wood off if they saw it, and other times they leave it stay there.

"Q I mean, didn't they take it on the train for their own use, take it home? A Probably they did sometimes. Of course, I could not swear they did.

"Q Well, you knew it was the custom. You have seen them take wood home? A I have taken wood home myself.

"Q And you have seen other men take it? A I have, but I could not say whether there was any therefor that purpose.

"Q You don't know that, but you know it was the custom? A It was the custom?" (P. 99, ll. 5-33.)

STARBACK, watchman: Was riding on the train; had worked for the company about five months prior to the accident (p. 127, l. 35). During that time never saw anybody put boards or planks on the cars (p. 128, ll. 10-20). "Scotty" took wood home some mornings, but not every morning. Did not see anybody put the plank on the car for "Scotty." Had seen wood put on the train for "Scotty" in empty box cars for about a week before the accident (p. 130, l. 30, to p. 131, l. 15). He had done that only during that week (p. 132, ll. 1-10). Later he said that there were only two occasions during the week when he saw somebody put wood on the train for "Scotty" and on those occasions the wood was put in box cars or gondolas and that the wood was never placed on tank cars because "they know it is a bad place to put wood" (p. 135, ll. 15-35).

The foregoing testimony is all that was offered on the subject of alleged custom and it was all given by witnesses called in behalf of

the plaintiff. We submit that it comes very far from establishing a custom "so notorious and open" that the defendant would be chargeable with knowledge thereof. The best that could be said for this testimony is that it indicated that some of the laborers at times—not oftener than twice a month—would throw wood on one of the cars and that Scott, the watchman, took some wood home for his own private purposes, usually carrying it, but on two occasions during a period of a week before the accident, placing it on a gondola car. It is true that Stickle said it was the "custom" to take wood home, but his testimony is very indefinite as to whether he meant that the employees placed wood on the train or whether they merely threw off loose pieces if they happened to see them. The best he could say with reference to the use of the train for the transportation of wood by employees was "probably they did sometimes; of course, I could not swear they did" (p. 99, l. 25).

We, therefore, submit that there was no question of fact for the jury to consider as to whether or not there had been an open and notorious custom to carry wood on the cars of the defendant's trains, and consequently it was error to leave to the jury the question of whether such a custom had been established. But even if under this evidence it should be concluded that it was a jury question whether a "custom" had been established, we further urge in the third place that this part of the charge was wrong because even if the jury should find that there was such a custom, still the defendant could not be held liable, because the acts of the employees, in using the defendant's trains for the transportation of

planks and boards for their own private purposes, were not only outside the scope of their employment, but also without the knowledge or consent of the company or of any responsible officer thereof—indeed, neither the company nor its officers could legally give consent to such free transportation even if they did in fact know of it.

On this point counsel for plaintiff may cite the case of *Louisville & N. R. Co.* v. *Walker,* 172 S. W. 517 (Ky.). In that case the question of defendant's liability was left to the jury, it appearing that laborers were permitted to take pieces of timber home after their work was over for the purpose of using them as kindling wood. This was done with the knowledge of one of defendant's foremen. There is a very obvious difference between that case and one like the present where there is an utter absence of proof that any responsible officer of the defendant had either actual knowledge or was in a position where he was chargeable with such knowledge of the fact that employees used the trains to carry wood home.

It is well settled that in actions under the Federal Employers' Liability statute—just as in actions at law—it must appear that the employee at the time of the accident was engaged in duties that were within the scope of his employment; it must also appear, when recovery is sought under the statute by reason of negligence on the part of a fellow-servant, that such fellow-servant was also acting within the scope of his employment. Thus, in the case of *Reeve* v. *Northern Pacific R. Co.,* 144 Pac. 63 (Wash.) it was held that the railroad was not liable to an employee for injuries sustained by being pushed out of a baggage car door by two other fellow-servants who were wrestling in the car.

The Court said:

> "To those acquainted with the history of the law on the subject of actions for personal injuries, it is apparent that the primary purpose of the statute was to permit a recovery in that class of cases where the right would be otherwise defeated under the common-law doctrine of fellow servant. Its purpose was not to render the carrier liable in all instances, and under all circumstances, where one employee of a carrier is injured by the careless and negligent acts of another. It is not enough that the negligent act causing the injury occur during the existence of the employment, nor is it enough that it occur during the hours the employees are required to be on duty. To render the carrier liable the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business.
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> * * * * * * * * * * *
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> "It remains to inquire whether the injury here suffered by the appellant was the result of a negligent act of a fellow employee committed while he was in the prosecution of the employer's business. Clearly it was not, and is not so claimed by the appellant. The liability is rested on the broad wording of the statute, which, as we say, was not intended to cover negligent acts of an employee in no way connected with the business the prosecution of which he was employed to aid."

Other illustrations of this principle are the cases of *Erie R. R. Co.* v. *Van Buskirk,* 228 Fed. 489; *Hobbs* v. *Great Northern R. Co.,* 80 Wash. 678, 142 Pac. 20, L. R. A. 1915-D, 503; *Cincinnati, etc. R. Co.* v. *Wilson,* 161 Ky. 640, 171 S. W. 430; *Byram* v. *Illinois Central R. Co.,* 154 N. W. 1006 (Iowa).

In this connection attention should be called to the error on the part of the trial judge in

admitting evidence of this alleged custom. In the absence of proof that the acts upon which the custom was founded were within the scope of the duties of the employees who were alleged to have performed them, such evidence was clearly immaterial. All questions on that subject should therefore have been overruled. See Grounds Nos. 1 and 2.

II.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE DEFENDANT SO FAR AS RELATES TO ITS DUTY TO USE REASONABLE CARE TO PROVIDE A REASONABLY SAFE PLACE IN WHICH TO WORK.

The trial judge permitted the jury to find a verdict against the defendant on the theory that there was evidence from which they might find that the defendant did not use reasonable care to keep the cars in a reasonably safe condition (p. 159, ll. 20-40; Ground No. 5). Whatever may be said as to the other theories upon which the jury were permitted to base their verdict, we submit that this theory was clearly without justification in the evidence. The proximate cause of this accident was the movement of the plank upon which one of the decedent's fellow-servants stepped. Assuming for the purpose of argument that this plank had no right to be in the position in which it was at the time of the accident, nevertheless the defendant cannot be held responsible therefor if it appears that the defendant exercised reasonable care to see that the car was reasonably safe. Of course, it was not an insurer of the safety of its employees whose duty required them to be on the train. The evidence

shows *without dispute* that this train and every car therein was properly inspected before it started. Conductor Petnaud said that he was in charge of the train and that it started at Weehawken and was on its way to Croxton where the train would be broken up and the cars sent out on other trains. Before the train left Weehawken he walked "down" it to see if everything was all right. He was riding about five or six cars from the engine (p. 75, ll. 30-40). After the accident he examined the car to see if there was any obstruction and found that it was in good order (p. 80, ll. 20-30).

> "Q Before it started did you look over the train? A I was around the train and coupled it up, yes, sir" (p. 82, l. 30).

It was the duty of the crew to walk over the cars to release the brakes. In this instance the member of the crew who did this happened to be the decedent himself (p. 82, ll. 1-30). The conductor went over the entire length of the train, as did also the decedent, starting at the head end going to the rear (p. 83, l. 30, to p. 84, l. 20). In doing this the decedent walked over the tops of the cars except that when he came to a coal dump or a tank he had to get down and walk (p. 84, l. 20). The conductor walked down one side of the train and walked up the other side to look it over, taking about fifteen minutes. When he did this it was daylight, weather was clear; there was no plank or board on any of the cars (p. 84, l. 20 to p. 85, l. 10). The other brakeman was Stickle, who had charge of the head end of the train; he covered the first five or six cars next to the engine (p. 85, ll. 10-30). At the time of the accident the train was moving between five or six miles an hour. It happened about ten minutes after the train had

started (p. 86, l. 10; p. 91, ll. 15-20). After he had walked around the train there was a period of about five minutes before the train started. The accident happened after it had moved about two blocks (p. 90, l. 30).

The two watchmen, Clark and Starback, say they did not observe the plank on the tank car until after they boarded the train and they do not know who put the plank on the car (p. 15, ll. 30-40; p. 126, ll. 10-20; p. 129, l. 15).

The watchman, Scott, says he did not see the plank at all until he went to step off the train (p. 68, l. 15).

Brakeman Stickle was riding near the middle of the train (p. 93, l. 20). There were twenty-one or twenty-two cars (p. 94, l. 25). After the accident examined the car and could not see anything that would cause the accident. There was nothing the matter with the running board (p. 96, ll. 10-40).

Inspector Webber examined the train before it left Weehawken. In making his inspection he looked to see if there were any defects in the cars, examining both sides and then he helped Inspector Wink test the air brakes. He looked at the train when it was being made up and again after it was made up. He found nothing wrong on this train; there were no planks on any of the cars; they had come off a Central R. R. float the night before and he had also inspected them that night (pp. 146-7). A written record was kept of the inspection and by reference thereto the witness swore that there was nothing out of repair, nor anything that would "harm anybody." The tank car in question was known as "K. T. X. 571." He found nothing the matter with that car (pp. 148-9). The running board was about four or five feet from

the ground and if there was any plank on it he could have seen it. There was no such thing there at the time of the inspection (p. 150, ll. 30-40).

Inspector Wink inspected the left side of the train, examining the cars for defects. There was no plank or board on any of the cars at the time of his inspection. If any planks were observed it would be his duty to take them off (pp. 152-5).

There was no contradiction of any of this evidence. It appears therefrom that the train was inspected in the customary manner by two inspectors and was also examined by the conductor and two brakemen, one of them being the decedent himself, before it left the terminal at Weehawken. At the time of this inspection there was no plank found on any of the cars. Surely in making this inspection the company and its servants had fulfilled the duty of exercising reasonable care. The accident happened about ten minutes after this inspection had been made. There was nothing to suggest to any of the employees that some unauthorized employee, after the inspection had been completed, would plame a plank on any of the cars. The company's servants were not bound to keep up a continuous inspection while the train was in motion. Such is the rule with respect to passengers. *Proud* v. *Philadelphia, etc. R. Co.,* 64 N. J. L. 702. Certainly the degree of care is no greater with respect to employees. There being no evidence of negligence on this point, we submit it was error for the trial court to permit the jury to find negligence in this respect.

III.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF ANY OF THE DECEDENT'S FELLOW SERVANTS.

A further theory upon which the jury were permitted to base the verdict was negligence on the part of the decedent's fellow-servant Scott. The claim was that he was negligent in the manner in which he attempted to alight from the tank car. See charge, p. 160; ground No. 6.

The watchmen, Clark and Starback, did not observe how the accident happened. They saw the decedent immediately after he had fallen to the ground (p. 15, ll. 30-40; p. 125, ll. 30-40).

Scott's account of the accident is that as he was about to alight from the train he stepped on the plank and his weight "balanced" it, causing it to run along the car so that it caught Schneider and knocked him off. As he put it, "I accidentally stepped on the end of it. It was so dirty I could not see it" (p. 24, ll. 10-40). He had not seen the plank before that (p. 26, l. 15). He had not observed Watchman Starback playing with one of the planks (p. 26, l. 15; p. 21, ll. 1-20); the reason being that Starback was amusing himself on the other side of the tank car (p. 26, l. 20).

Even if we assume that Scott should have known that there was a plank resting on one side of the tank car, still there is nothing to show that the accident was due to negligence on his part in stepping on the plank. It was only by the merest accident that he happened to step on such board or plank as to over-balance it and push it off the car in such a manner that it slipped along the edge just long enough to

strike against the decedent. This was a contingency that could not have been reasonably foreseen and would not have happened once in a thousand times. A mere accident of this kind is entirely different from an act of negligence.

IV.

THE RISK OF INJURY WAS ASSUMED BY THE DECEDENT.

The decedent was a brakeman of many years' experience, having been in the employ of the defendant either as brakeman, yardmaster or conductor since 1888 (p. 111, ll. 30-40; p. 94, l. 10). If, as claimed by the plaintiff, there was a "notorious" custom on the part of the employees to carry boards or planks on the defendant's trains, the decedent was certainly well aware of that fact; but if, as claimed by the defendant, there was no such custom, still the decedent had ample opportunity to observe the fact that there were one or more planks on the very car on which he was riding. If these planks were on the car *before* the train started, no one was in a better position to observe that fact than the decedent himself, as he walked over the very car in question before the train started (p. 83, ll. 10-30). If, however, the plank was tossed on to the train after the inspection had been completed, or after the train had started, the decedent was again in a position to observe the fact that the plank or planks were on the car. One of the watchmen, who was riding on the car, it was said by Clark, had one of the planks in his hand and was playing "submarine" (p. 20, l. 20). This was on the same car where the decedent was riding and the lat-

ter observed what the watchman was doing (p. 21, ll. 10-20). If the plank that was knocked off was not the plank that the watchman was playing with, still the decedent must have known it was on the car as he was sitting right alongside of it. He was therefore in a better position than anyone else to observe and realize the danger, if there was any danger, by reason of somebody stepping on the plank and over-balancing it.

In actions under the Federal Employers' Liability Act assumption of risk remains as a defense.

Seaboard Air Line v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062; 239 U. S. 595, 60 L. Ed. 458.

Cetola v. *Lehigh Valley R. R. Co.,* 89 N. J. L. 691.

V.

IN THE ABSENCE OF ANY ALLEGATION IN THE COMPLAINT THAT THE DECEDENT SURVIVED THE ACCIDENT AND DURING THE PERIOD OF SURVIVAL UNDERWENT CONSCIOUS PAIN AND SUFFERING, IT WAS ERROR TO ADMIT EVIDENCE OF SUCH PAIN AND SUFFERING AND TO PERMIT THE JURY TO BASE A VERDICT THEREON.

Against the objection of the defendant, the trial Court permitted evidence of conscious pain and suffering of the decedent during the period of survival after the accident. The questions on this subject are assembled under Ground No. 3 (p. 2, l. 30, to p. 3, l. 30). We submit it was error to admit such evidence and to permit the jury to find any verdict for such pain and suf-

fering in the absence of a specific allegation in the complaint on that subject. By reference to the complaint it will be seen that the *only* claim made therein with respect to damages was that the intestate left surviving next of kin who have suffered pecuniary injury (p. 11, l. 30). Under the Federal Employers' Liability Act of April 22, 1908, no claim could be made by the representatives of a decedent for conscious pain and suffering in the event that there was a period of survival after the accident.

Michigan Central R. R. Co. v. *Vreeland,* 227 U. S. 59, 57 L. Ed. 417;

Gulf, etc. R. Co. v. *McGinnis,* 228 U. S. 173, 57 L. Ed. 785;

St. Louis, etc. Ry. Co. v. *Hesterly,* 228 U. S. 702, 57 L. Ed. 1031.

But under the amendment of April 5, 1910, the personal representatives may recover damages for such pain and suffering.

St. Louis, etc. Ry. v. *Craft,* 237 U. S. 648, 59 L. Ed. 1160;

Kansas City S. R. Co. v. *Leslie,* 238 U. S. 599, 59 L. Ed. 1478;

Great Northern Ry. Co. v. *Capital Trust Co.,* 242 U. S. 144, 61 L. Ed. 208.

Under these cases the cause of action for conscious pain and suffering is entirely separate and distinct from the cause of action for the pecuniary loss sustained by the next of kin. We, therefore, submit that it was error for the trail Court to permit the jury to find any verdict for this item in the absence of any specific allegation on that subject in the complaint. There was no motion made to amend the complaint—indeed, counsel for plaintiff, in the face of a warning from the trial Court, expressly refused to ask for an amendment (p. 64, l. 25).

It is perhaps debatable whether such an amendment could legally be allowed after the statute of limitations had run, but it is unnecessary to consider that point as no amendment was in fact made.

The most recent case on the subject is *Washington Ry. Co.* v. *Scala,* 244 U. S. 630, 61 L. Ed. 1360. In that case an amendment, claiming a right to recover damages for conscious pain and suffering, was permitted after the statute of limitations had run, but only because the original complaint had alleged that the injuries caused the decedent "to suffer intense pain." The inference from this opinion is that in the absence of any like allegation in the complaint no recovery can be had for conscious pain and suffering nor could an amendment be permitted alleging such pain and suffering after the statute had run. In this respect, therefore, we submit that the judgment is erroneous and that that part thereof which is based upon an allowance for conscious pain and suffering must be reversed.

VI.

FOR THE FOREGOING REASONS THE ENTIRE JUDGMENT IN FAVOR OF THE PLAINTIFF SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

GEO. S. HOBART,
Of Counsel.

New Jersey Court of Errors and Appeals.

MARTHA LENNAN, Executrix of ADOLPH SCHNEIDER, Deceased, Plaintiff-Respondent, vs. ERIE RAILROAD COMPANY, Defendant-Appellant.	On Appeal from Hudson Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT.

As stated in the brief of defendant-appellant, this is a suit under the Federal Employers' Liability Act. The decedent who was an employee of the defendant company was returning home from work, having been engaged in interstate commerce and while so returning was killed by reason of being struck with a plank which one of his fellow employes was carrying home with the knowledge and consent of the defendant company and by reason of the negligence of the fellow servant in throwing the plank from the car. A verdict of $6,000 was recovered for pecuniary injury and $1,000 for pain and suffering. A rule to show cause was obtained why a new trial should not be granted and the question of damages and weight of evidence considered, but the trial court refused

to disturb the verdict.

POINT I.

There was evidence from which the jury might have said that the carrying of the wood by employees on trains of the defendant was so open and notorious that it was with the knowledge of the defendant company. The appellant only cites such portion of the testimony as would indicate that it was sporatic, but a close reading of all the testimony will show that the custom was open and notorious and it was for the jury to say whether under this open and notorious custom it would be with the knowledge of the defendant. If they so found, there was evidence to justify that finding. If they found that the carrying of the wood was open and notorious, then the defendant was responsible for the negligence of its servants in throwing off the wood. See U. S. Supreme Court case:

The case of FLETCHER vs. BALTIMORE & POTOMAC R. R., 168 U. S. 135, is a case very much like this one, except there the injured person was a third person, though that does not destroy the reasoning of the case as applicable to this. The Court in that case said: "These men were allowed the privilege of bringing back with them, for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, cross ties, etc. It was the constant habit of the men during all these years to throw off pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some members of their family or other person waiting for it."

In that case it was held to before the jury to say whether or not the defendant should have

known of this custom and therefore been responsible for it. There the Court makes the distinction between a single act and acts of like nature having been done before by those on the cars, with the knowledge of the agent or servant of the defendant who permitted their continuance. There the Court held that if this was so, that if as in this case, the agents and servants of the defendant knew that this was being done and did not prevent it, they were responsible. In the case at bar, the conductor of the train and others on the train knew that the wood was being carried and was so openly and notoriously done that the jury had a right to say the defendant and the persons in control knew of it, and if they did, then the jury had a right to say they were responsible. There is no distinction to be made between the case of Louisville and Nashville R. R. vs. Walker, 172 S. W. 517, because the proof in that case was no more than there was in this, and there the court held there was sufficient evidence to go to the jury. The very man whose act killed intestate said he had been carrying wood home for 16 months, p. 67. See also Starbuck, p. 130, et Seq.

POINT II.

If there was evidence of the custom, then the conduct of the fellow servant, whether it was negligence or not, was for the jury. He threw this board off without any care and threw it off in such a way that it struck on the ground and hurt the decedent. Whether this was negligence was purely for the jury. The jury having found that he was carrying this wood with the knowledge of the defendant and was carried under the supervision of the conductor, then his act in throwing it off could have been held negligent and it is not a common law case but a case where

under the Act the railroad company is being held for the act of a fellow servant. The very evidence relied upon by the defendant in Point III of the brief, shows the jury could have found the defendant Scott negligent.

POINT III.

The risk of this injury was not assumed. The intestate assumed no risks except those incident to the employment, of which this was not one, and obvious ones. There was nothing obvious to the intestate except the plank lying on the car. The conduct of Scott, the servant towards the plank could not have been obvious, because he knew nothing of it until it was all over. He did not know that Scott was going to throw the plank off until it was done. Therefore, he did not take the risk of the injury.

See Seaboard Air Line vs. Horton, 233 U. S. 492;

Gila Valley vs. Hall, 223 U. S. p. 94.

POINT IV.

It was not necessary to state in the complaint that the decedent suffered pain and suffering. If he did, this is recoverable and the pleadings demanded $50,000 damages. The purpose of stating pecuniary damages is because this must be established and declared on as it is not implied, but the other is not necessary because they are not special damages but are damages arising out of the statute. As to the pain and suffering experienced by the intestate, there was the evidence of those who called to see him at the hospital, p. 105 and 107, and evidence of an operation upon him. Therefore, there was ground for some

award. The amount was already determined by the trial judge not to have been excessive.

The plaintiff below, the respondent here respectfully urges that if the argument in the brief of the defendant-appellant is true, then it is necessary to plead evidence. The complaint pleaded that the intestate was injured by a fellow servant in the use of the plank. He was in the use of the plank when the intestate was injured. The complaint of course did not set out every fact that it was intended to prove on the evidence; it simply stated under the rules of pleading that the negligence of the defendant consisted in the acts of a fellow servant in the use of a plank and this was sufficient to apprise the defendant of conditions.

The cases collected in the Second Edition of the Federal Employers' Liability Law, by Richey, p. 284 and 285, show the law to be that a simple allegation of negligence is sufficient. It is not necessary to plead evidence, especially under Federal cases collected in discussing complaints and actions of this kind. Only ultimate facts need be pleaded.

As to the question of the complaint being sufficient to support the verdict, Mr. Thompson in his Commentaries on Negligence, dealing with the situation in Section 7447 says: "Ultimate facts only are to be pleaded." Then he goes on: "If the complaint fails to state facts with particularity, and the opposite party takes the necessary steps to extricate himself from the difficulty, there ought to be very little trouble about the matter." And in the notes, are collection of cases.

So, in the supplement to Thompson's Commentaries on the Law of Negligence, in volume 8, 1914, this section is amplified with a statement: "In most jurisdictions the complaint or declaration which alleges the negligence in general terms is sufficient, 'until it fail by motion for more

specific statement,' and there are many cases collected in the note."

So in Boeese vs. Trenton Horse Railroad, a count loosely drawn stating substantially "by careless management of the car, the agents of the defendant ran over the body and arm of the plaintiff" was sustained, it being stated that it need not appear with much particularity how the tort was committed, citing 2 Redfields Railway 602.

In Miller vs. Pathe Freres, 79 Atl. 1063, it is said that where the injury is direct, setting forth the fact it was sufficient to allege the defendant was negligent and it cites the case of Minnuci vs. Phil. & Reading R. R. Co., 68 N. J. L. 432, where in the end of the opinion, citing Central R. R. vs. Van Horn, 9 Vr. 139, it is said that although it is insufficient to charge simply negligence: "Yet all the certainty necessary is the statement must be such that it is intelligible and in a reasonable measure it apprises the defendant of the substantial case to be made against him."

Following this law, this complaint apprised the defendant that it was charged with the carelessness of a fellow servant in handling a plank and that was what was proved. That it was necessary to plead that the defendant's servant had it on the train by custom and with the knowledge of the defendant, etc., was simply to plead evidence. The actual fact was the careless handling of the plank. The responsibility or not of the defendant rested upon other facts to be produced on evidence without which his negligence would not have been established. The remedy, if it is vague, is to strike it out. No attempt was made to do that in this case. The defendant without alleging surprise joined issue and went to trial. The New Practice Act, pamphlet Laws of 1912, Chapter 231, makes it obligatory in a complaint to use "a plain and concise statement of facts on which the

pleader relies, (and no others) but not of the evidence by which they are to be proved''; and if this complaint attempted to set up evidence showing the custom, etc., it would have been bad under this Act. The trend of the day is for simplicity in legal proceedings. The defendant did not object to the complaint but answered it and made a full and complete answer and went to trial and only at the trial objected that the complaint did not contain a statement of the cause of action.

POINT V.

CONSCIOUS PAIN AND SUFFERING.

This was not a new cause of action. It is an element of damage, the damage given by the statute and therefore not special damages, but the damages which would naturally flow from an injury and as the United States Supreme Court says in case of Washington R. R. vs. Scala, 244 U. S. 639, case cited in the brief of defendant, ''The claim that this amendment added a new cause of action to the declaration is too fanciful for discussion. At most it was a slight elaboration of a probably sufficiently claimed element of damage and the allowance of the amendment was well within the authority of the cases therein cited.''

Conscious pain and suffering were something recoverable under the Statute of 1910. That it was a new cause of action is of course denied by this decision, but his recovery was distinct from the other recovery of $6,000. The language of the complaint is that he was so injured that he died. Certainly from an injury a man would have pain and suffering; but the recoveries in the cause are distinct and the entire judgment cannot be reversed if it is held that the complaint should not allege this element. The complaint can be amended even in the appellate court if the case has been

tried and as the United States Supreme Court says in Washington R. R. vs. Scala, the objection is too elusive for application in the practical administration of justice.

INTERSTATE COMMERCE.

There was no contention made at the trial nor will there be any here that the plaintiff was not engaged in interstate commerce, as he was returning home from work and under Winfield vs. Erie R. R. was engaged in interstate commerce under decision of the United States Supreme Court, at the time of his injury.

This complaint complied with the New Practice Act, but if it is held in the Appeals Court that there should have been a distinct statement of intense pain and suffering, although not a cause of action but an element of damage, and it was not contained in the general damages, then the appellee argues that the judgment should be reversed only to that extent and a new trial ordered under Rule 73 as to that part only of the damages which are found to be wrong.

Respectfully submitted,

ALEX. SIMPSON,

Attorney for Plaintiff-Respondent.