

NEW JERSEY  
Court of Errors and Appeals.

---

HELEN G. FERGUSON,  
*Plaintiff,*  
*Defendant in Error.*  
*vs.*  
THE CENTRAL RAILROAD  
COMPANY ET AL.,  
*Defendants,*  
*Plaintiffs in Error.*

} On Error.

---

**Brief for Plaintiffs in Error.**

This cause has been twice tried. When first tried the learned trial justice granted a non-suit upon the ground that the evidence did not disclose the cause of the accident, and this Court, on error, in *71 N. J. Law 647*, held that there was a jury question and reversed the judgment of non-suit. The motion for the non-suit included among the reasons the failure on the part of the plaintiff to show that the defendant, Philadelphia and Reading Railway Company, had been guilty of any negligence toward the plaintiff's intestate in not anticipating and providing against the conditions which existed at the time of the accident. The trial justice did not consider this reason, nor, do we understand, it was passed upon in this court.

From the standpoint of the plaintiffs in error, the substantial facts are as follows. Plaintiff's intestate was a fireman in the employ of the Central Railroad Company, and while its engine, hauling the cars and passengers of the Philadelphia and Reading Railway Company over the tracks and roadbed actually owned by said railway company at Jenkintown station, in the State of Pennsylvania, the locomotive ran through and over water and debris at the highway crossing and was upset, killing said fireman. The water on the tracks was caused by an extraordinary rainfall, which brought to the tracks sand and dirt from a tract of land that had been recently opened by a syndicate. At the time of the accident it had been raining not less than ten minutes, and the presence of water and debris was known to the ticket agent at the station and to the flagman at the crossing, whose duty by the undisputed proof was to notify approaching trains of danger at said crossing. It was raining so hard when the locomotive approached the crossing that, according to the testimony of the engineer, he could not see the crossing, or know of its condition, yet he did not slacken the speed of his train. This brief statement of facts is sufficient for a discussion of the assignments of error.

#### I.

#### THERE SHOULD HAVE BEEN A DIRECTION FOR THE DEFENDANTS.

Plaintiff's claim is that there was negligence on the part of the Philadelphia and Reading Railway Company in not providing at the crossing where the accident occurred a system of drainage of sufficient capacity to have carried under the tracks the water and debris which were present, and which, it is claimed, was the cause of the derailment of the locomotive. Evidence was introduced on the part of the plaintiff tending to show that the system existing at the time of the

accident was inadequate to take care of a certain amount of rainfall, which, it was said, was the ordinary and average rate of rainfall. The testimony is without dispute that if the amount of rainfall on the day of the happening was in excess of the ordinary or average rainfall, that the system which plaintiff claims should have been in vogue would not have taken care of the water and debris, and that its presence would have been found on the tracks of the company notwithstanding. The position of the defendants is that the storm was of an extraordinary character, and that the sand and gravel which was found on the tracks came from the disturbance of earth on a tract of land nearby which was in process of development by a syndicate, and that they were not called upon, in the exercise of reasonable care toward plaintiff's intestate, to provide a system of drainage which would carry off the rainfall of that day, as well as the sand and gravel.

On principle and by authority the defendants were required to anticipate and provide for ordinary happenings, and they discharged their full duty, if any they owed, to plaintiff's intestate when this was done. In *Stoher vs. St. Louis, etc.*, 105 Mo. 192, the Court says: "Defendant was only required in discharging its obligation to deceased in the matter of protecting its roadbed from damage by water, to provide against such storms and floods as could have been reasonably anticipated." The same principle is enunciated in *Central Railroad Company* against *Kent*, 87 Georgia 402. It is said: "When a railroad company has performed its duty of inspecting and keeping in safe condition its tracks and roadbed with that degree of diligence which the law requires of it, it is not liable in damages to one of its employes for an injury occasioned by running his engine into a washout caused by a sudden, most violent and unusual rainfall, such as the oldest inhabitant of the neighborhood had never before witnessed."

The witnesses, in speaking of the rainfall, testify as follows:

*Martell*, at page 81:

"Q. There was an unusual storm that day?

A. There was."

*Clapp*, at page 117:

"Q. Was this rainstorm on May 18th a usual or an unusually heavy storm?

A. It was an unusually heavy storm."

*Dolbar*, at page 130:

"Well, on leaving Twenty-fourth street it was raining a little bit, but it looked very threatening; seemed to be a heavy shower in the north. When we arrived at Wayne Junction it was raining some there. Now it's Elkins Park, then it was Melrose. Near there it commenced to rain very hard; in fact, it rained so hard I could hardly see out of the window. I don't think I ever saw it rain so hard."

At page 137 he says:

"Q. During the years that you ran on that road did you ever witness such a storm as that at or about Jenkintown?

A. I don't think I did; not quite as much rain."

*Cushing*, at page 146:

"Q. When you saw this train go by what was the condition of the weather?

A. It was raining very heavily at the time.

Q. Very heavy?

A. Very heavy."

This, we believe, includes all the testimony upon the subject of the character and quantity of rainfall. We come now to the question of the provision made by the Railway Company to carry off the water under its tracks.

*John W. Hunter* was sworn on behalf of the plaintiff, and on direct examination, at page 216, he says:

"The culvert that was there was practically large enough to carry the water from an ordinary rainfall, but when we come to have an extra heavy rain, which some of these were, it was not large enough."

At page 228 he testified:

"Q. I ask you whether that storm to which you refer when that creek was up and the bridge was carried away you speak of in 1892, whether that was not an unusual storm; the bridge was carried away, I understood you to say?"

A. Yes.

Q. That was unusual?

A. Yes, sir.

Q. And in building the culvert under a railroad, you would not undertake as an engineer to provide for any storm of that kind, would you?

A. It would hardly be taken into consideration."

At pages 252 and 253 plaintiff's expert, *Abraham Swan*, admits that his proposed system does not contemplate extraordinary storms, and he further admits that in large cities provision is not made for extraordinary or unusually heavy rainstorms, and that because such provision is not made, it frequently happens that great damage results by reason of floods, but that the damage accruing is better to be borne by the municipality and property-owners than to have to bear the expense of constructing and maintaining a system that would provide for such extraordinary or unusually heavy rainstorms.

Witness *Nelson*, at page 275, admits that a system which provides for the carrying off of water in an ordinary rainfall, which is a maximum of three inches per hour, would not take off a rainfall if it fell at a greater rate than three times per hour.

We think that it was possible for the plaintiff to have shown the actual amount of rainfall per hour, and to have shown that that amount was not in excess of the ordinary rainfall, which we will assume the Railway Company was obliged to provide for. This she did not do in the face of the fact that all the witnesses who speak of the question of the amount of rainfall described it as unusual. We maintain that the jury was, under the undisputed evidence, bound to find that

the rainfall was unusual, and that a system of drainage which provided for an ordinary condition would not have prevented the water and debris from going over the tracks on the day in question, and that in consequence the accident would have happened, notwithstanding the Railway Company had exercised the law's care in providing for ordinary conditions. Moreover, the plaintiff's claim is that it was the sand and gravel on the tracks which caused the derailment. All the evidence tends to show that the sand and gravel on the tracks were washed from private property down the highway to the tracks. The development of the land was of recent origin prior to the accident. There is nothing in the case to show that the Railway Company had knowledge prior to the accident of the development of this property, nor do we think the law called upon it to anticipate the possibility of such an unusual storm that would wash the sand and gravel from the property to its tracks. In the face of these facts the learned trial justice should have directed a verdict for the Philadelphia and Reading Railroad Company upon one of the grounds assigned, to wit: "That there is no evidence to go to the jury under the pleadings to show the Philadelphia and Reading Railway Company failed in discharging any duty that it owed to Ferguson; the point being that there is nothing in this case to show that the company failed, under the conditions that existed at the time of this accident, to exercise reasonable care to protect Ferguson from danger, assuming that they were under any obligation to do that."

Witness *Nelson* further testified that in the exercise of a proper degree of care the defendant should have provided a system that would have taken care of a rainfall at the rate of three inches per hour, and that in fixing the maximum at three inches per hour he fixed it with relation to the condition and the rain that is supposed to fall in the vicinity of Jenkintown, and that his information concerning the amount of rainfall in the vicinity of Jenkintown was received from the Weather

Department, where the record is kept. His testimony is at the bottom of page 269 and on page 270. The Court permitted this testimony to stand, notwithstanding defendant's objection. The point we urge is that since the maximum amount of rainfall in the vicinity of Jenkintown is at the rate of three inches per hour, under ordinary conditions, and since by the undisputed proof a system which provided for an ordinary rainfall would not take care of a rainfall in excess of three inches per hour, and since by all the testimony the rainfall was unusual and extraordinary, no negligence can be ascribed to the defendant in this case.

## II.

THERE WAS ERROR IN THE COURT'S REFUSAL TO CHARGE "IF THE JURY SHOULD BELIEVE THAT THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE FAILURE OF THE FLAGMAN AT THE CROSSING TO WARN THE APPROACHING TRAIN TO STOP PLAINTIFF CANNOT RECOVER.

*Patrick Lee* was sworn as a witness for the plaintiff. He was section foreman of the Jenkintown section of the Reading Railway Company at the time of the accident, and he had charge of the drains at the highway crossing in question. He testified, on cross-examination, concerning the duties of the flagman at the crossing, and his testimony is as follows:

"Q. Do you know what his duties were as flagman?

A. Yes, sir.

Q. What were they?

A. The duty of a flagman is to keep his watch-box clean and neat; also to sweep it and everything around and surroundings and keep it neat and clean. That is my instructions from all corporations.

Q. What are his duties on the crossing for the trains?

A. To display the flag on each and every approaching train, north and south.

Q. Is it his duty to notify the trains of danger at the crossing? Is it the duty of the flagman to notify the approaching trains of danger at the crossing?

A. Yes, or to flag them himself, if he sees danger, without instructions."

By the testimony of *Martell*, at page 83, the flagman was on the crossing at the time the train passed, and it had been raining, according to his testimony at page 82, "unusually hard about—between fifteen and twenty minutes, at the time the train struck the crossing." It also appears by his testimony that the water was on the tracks for several minutes before the train reached the crossing. There is no allegation in the declaration of the plaintiff that the cause of the accident was the negligence of the flagman in not attempting to flag the train and notify it of the danger at the crossing. The plaintiff was entitled to recover only in event that the negligence of the company was the proximate cause of the accident. The Court left the case to the jury and permitted it to find against the defendant if they found that they were negligent in not providing an adequate system to carry off the water. The jury may have been content to find negligence against the company on this ground, and yet may have found that the proximate cause of the accident was the failure of the flagman to notify of danger. By the proof it was his duty so to do, and the accident in question might have been, and doubtless would have been, averted had the flagman discharged that duty, for there was sufficient before him before the approach of the train to warn him in the exercise of reasonable care, that an accident might happen if the train was permitted to pass over the crossing under the conditions which existed. At all events, the jury so found, because they had to find that the presence of

the water and debris on the tracks was the cause of the accident. Defendants were, therefore, entitled to the request that if the proximate cause of the accident was the negligence of the flagman there could be no recovery. The refusal to so charge was plain error. There would be no doubt, we think, that had the declaration charged negligence in the failure of the flagman to notify the approaching train of danger, and the jury had found that such failure was the proximate cause of the accident, that the defendant company would be liable, unless it could escape liability under the Pennsylvania Act of 1868, to which allusion will be made later. But the declaration makes no such allegation and plaintiff's counsel was content to rest upon his declaration as laid.

### III.

#### IT WAS ERROR TO ADMIT IN EVIDENCE THE DEPOSITION OF JAMES F. MARTELL.

The deposition of James F. Martell was taken in Pennsylvania, on notice to the attorney for the Central Railroad Company and attorneys for the Philadelphia and Reading Railway Company. No one appeared at the taking of the deposition to represent the Philadelphia and Reading Railway Company. The notice of the taking of the deposition of the witness did not state that he was a material witness, or that he resided out of the State of New Jersey. Counsel for the Reading Railway Company objected to the reading of the deposition of the witness for these reasons, and the Court allowed it over objection and sealed an exception thereto, on page 64.

Section 36 of the Revised Evidence Act (*Pamphlet Laws of 1900, page 373*), provides that the testimony of a material witness residing out of the State may be taken *de bene esse*. Section 45 provides for the taking of testimony of a material non-resident witness other-

wise than by commission. It is under this latter section that the deposition in question was taken. The right to take such deposition is dependent upon two things. First, that the witness whose deposition is to be taken is a material witness, and second, that such witness resides out of the State of New Jersey. The notice in question, as appears by statement of counsel to the Court at page 60, when the offer was made, "does not show that Martell is an important witness, or that he resides out of the State." So far, then, as the notice is an element, it did not appear that Martell was a witness within the statute. The question is, Is not the defendant entitled to know by the notice served upon him under the statute that the witness whose deposition is to be taken is a witness within the statute, and that if such facts are not disclosed by the notice may the notice not be ignored? Must a party receiving a notice attend upon the taking of the deposition in order to ascertain the jurisdictional facts required by statute before a deposition can be read? It will be borne in mind that the proceeding outlined by the statute is in derogation of the common law. It is giving to parties to a litigation exceptional and unusual rights. Under such circumstances a party who is noticed to appear in another State upon the taking of a deposition of a witness is entitled to know by the notice served upon him that he is expected to meet the testimony of a material witness, resident out of the State. Unless he has such facts disclosed to him by the notice, he has the right to ignore the notice and assume that the proceeding is not under and by virtue of the statute. If we are correct in this position the next inquiry is, Was the testimony of the witness injurious and non-cumulative? We shall not quote his testimony at length. We shall ask the Court to read it, as it appears, beginning with page 65. It is sufficient to say that no witness testified to the same occurrences as does Martell. His testimony was important as bearing upon the cause of the accident and in bringing to the attention of the defendant the dangerous character of the crossing.

## IV.

THE STATUTE OF PENNSYLVANIA OF 1868, AT PAGE 58,  
IS CONTROLLING.

The accident happened in the State of Pennsylvania and the plaintiff relies upon a Pennsylvania statute for her right to sue in her individual capacity. Defendants offered in evidence the public laws of that State of 1868, at page 58. Section 1 of that act reads:

“That when any person shall sustain personal injury, or loss of life, while lawfully engaged or employed about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, or trains, of which company such person is not an employe, the right of action in all such cases against the company shall be such only as would exist if such person were ~~not~~ an employe; provided, that this action shall not apply to passengers.”

Plaintiff's intestate was an employe of the Central Railroad Company and was on its locomotive. The cars and passengers, as stated, were the cars and passengers of the Philadelphia and Reading Railway Company, and it was that company's tracks in fact upon which the accident occurred. The agreement between the defendant companies is in evidence in the case, and it shows a traffic arrangement. From the standpoint of the Philadelphia and Reading Railway Company it is important to determine upon which company's tracks in theory of law the accident happened. If the tracks were the tracks of the Central Railroad Company then the Reading Railway Company owed the deceased no duty. If they were the tracks of the Philadelphia and Reading Railway Company, then the act of 1868 is applicable to decedent's situation and may bar a recovery. The train which was carrying Ferguson when he was killed was not at the time engaged in the ser-

vice of the Central Railroad Company. The traffic it was carrying was not the Central's traffic. It was either engaged in doing service for the Reading Railway Company, or in the joint service of the Reading and Central under the agreement for the operation of the New York line. If the plaintiff contends that the service and traffic was that of the Central Company exclusively, then the tracks were in law the tracks of that company, and it alone was bound to the deceased. If Ferguson was, as we contend, upon the premises of his own employer, the Central, then the duties due to him were from his own employer, and not from the Reading. If the flagman was, at the time of the accident in theory of law, using the road as that of the Central, he must be considered as an employe of the Central with Ferguson, and in that case a co-employe.

Under the testimony, the duties of the flagman were to see to the safe passage of trains, and he must be considered a fellow-servant with the fireman. The flagman's negligence, therefore, was the negligence of the fireman, which would defeat recovery. The position taken by the plaintiff at the trial was that Ferguson was an employe of the Central Company, that the flagman was an employe of the Reading Company, and that the tracks were the tracks of the latter company. If this position be correct, then the Pennsylvania statute applies, and limits the right of action to the plaintiff against the Philadelphia and Reading Company to that of an employe of that company. On the theory of the plaintiff, Ferguson lost his life while lawfully engaged in the service of the Central Railroad Company, about the premises of the Reading Company, and in such a case the Pennsylvania statute says "the right of action in all such cases against the company shall be such only as would exist if such person were ~~not~~ an employe; provided, that this action shall not apply to passengers."

Ferguson was, then, a co-employe with the flagman, whose duty it was to give warning to an approaching train of danger. They were clearly fellow-servants.

This being so, the defendants were entitled to the fourth request to charge that if the proximate cause of the accident was the negligence of the flagman in failing to warn the approaching train to stop plaintiff could not recover.

The Pennsylvania statute has been construed a number of times, and the last exposition is in *Keck v. Philadelphia and Reading Railway Company*, 56 *Atlantic Reporter*, page 47. That case cites a number of cases which preceded it, and deduces four rules from those cases. It may be urged that the cited case is against the position here taken, but our submission is that a careful study of that case shows that this case may be differentiated, and that properly analyzed it favors the contention here made. The fourth rule deduced in that case is: "In such case the employes of each road accept the risks of their employment in regard to their own road, but not to those incident to the operation of the other road, unless at the time engaged in some work for the other, or for both roads." If it be contended that the road, at the time of the accident, was not the road of the Central, but the road of the Reading, then Ferguson was within the fourth rule, deduced from the case if at the time he was engaged in some work for the other (or Reading Company), or for both roads jointly. Under the agreement which the plaintiff offered in evidence Ferguson certainly was engaged in hauling the cars and passengers of the Reading Company, if not engaged in hauling cars and passengers for both roads jointly. The Keck case is to be distinguished in this, that in that case the Central Company was engaged wholly in carrying its own traffic, in which no one else had any interest, and the employes of the train were engaged wholly in the Central's services, or, as in the case in hand, the service was either for the Reading Company in carrying its passengers, etc., from Philadelphia to New York, or the joint service of the Central and Reading in carrying passengers, etc., under the agreement between the points named.

Again, in the Keck case the negligence complained of was not committed upon the same tracks as it was in the Kelly case (the latter case being cited in the opinion in the Keck case), but it was as if two roads ran parallel and the negligence of the road that was parallel to the Central caused an injury to the Central's employe. Viewed in any aspect, the judgment against the Reading Company should be reversed.

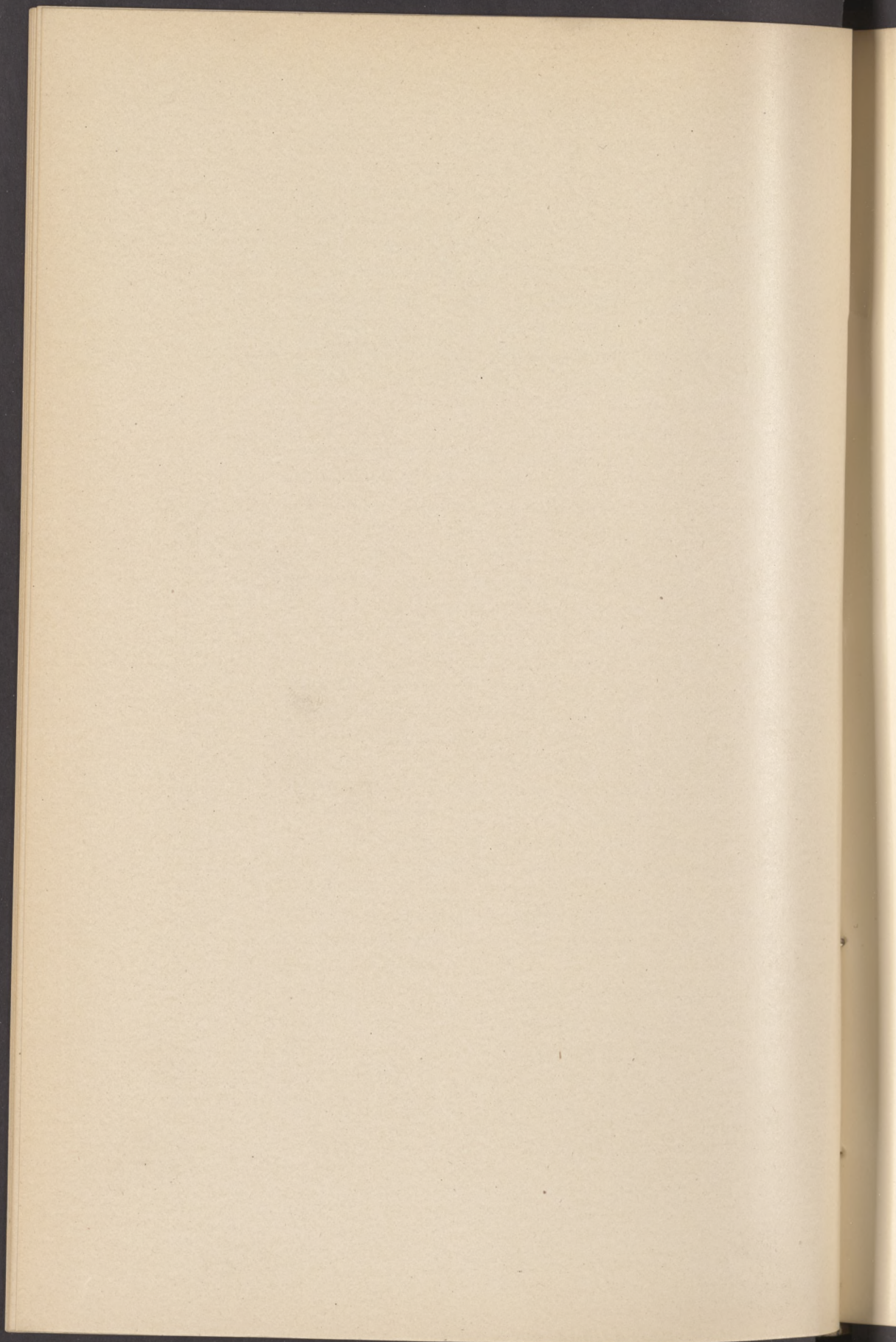
Summarized, if, in law, the tracks were those of the Central Company it alone owed a duty to Ferguson. If they were the tracks of the Reading Company and the flagman was an employe of the Reading Company, then Ferguson was lawfully employed by another company while about the premises of the Reading Company, which accident may have been caused proximately by the failure of the flagman to warn the approaching train, and he, under the act of 1868, being a co-employe with Ferguson, his, the flagman's, negligence was Ferguson's negligence. If the first position be legally correct there should have been a direction for the Reading Railway Company, but if it be not the correct position, then the second position must be correct, and it was error, either in refusing to direct a verdict because the accident was due to the negligence of a fellow-servant, of Ferguson, or in refusing to permit the jury to say whether the proximate cause was the negligence of such fellow-servant. If the judgment be erroneous as to either defendant it must be set aside as to both, because the Judge charged the jury that the verdict must be joint.

For these reasons we submit legal error is manifest, and that the judgment should be set aside and a *venire de novo* awarded.

GEORGE HOLMES,  
*Attorney for Central R. R. Co.*

THOMPSON & COLE,  
*Attorneys for Philadelphia and  
Reading Railway Company.*





NEW JERSEY  
*Court of Errors and Appeals*

---

HELEN GRAY FERGUSON,

*Defendant in Error.*

VS.

THE CENTRAL RAILROAD COMPANY OF  
NEW JERSEY,

THE PHILADELPHIA AND READING RAIL-  
WAY COMPANY,

*Plaintiffs in Error.*

} In Error.

**Argument of Defendant in Error.**

Charles Ferguson, deceased, was employed by the Central Railroad Company of New Jersey as a fireman upon one of its engines attached to an express train running upon the tracks of the Philadelphia and Reading Railway Company from Philadelphia to Jersey City. On the eighteenth day of May, 1900, while engaged in the regular line of his employment, the engine upon which he was riding was derailed and upset at the Greenwood avenue crossing, at Jenkintown, Pennsylvania, by reason of which he was killed.

The action was brought by the defendant in error, the widow, under the laws of the State of Pennsylvania (*P. L.* 1851, page 674, section 19, and *P. L.* 1855, page 309), against both companies, the gravamen being that the derailment was caused by a large deposit of stone, earth and gravel

washed upon the road-bed at the crossing by the waters of a heavy storm, due to the insufficient and negligent construction and maintenance of the drainage system of the railroad at the crossing.

The course of the railroad is north and south, and is situated nearly at the foot of Greenwood avenue, which crosses it at right angles and extends eastwardly through a ravine upon an up-grade, to the summit, an elevation of 117 feet above the grade of and 3,245 feet from the railroad. Greenwood avenue between these points was built upon its natural grade, and forms a canal for the surface water from the watershed on either side, embracing an area of land about 1,000 feet wide and about 3,200 feet long, including about seventy-five acres, about equally divided by the avenue. The place of interception of the waters falling upon this shed was at the crossing. To provide for the venting of it across and under its tracks, the Reading had, on the day of the accident, on the north side of Greenwood avenue, a pipe eighteen inches in diameter, direct intercepting, terminating in a ditch alongside of the north-bound track (page 185). On the south side of the avenue there was a catch-basin, or inlet, with an opening in the street, flush with the gutter, three feet square; this was covered by a grating (page 193). Connected with this and extending eastwardly along the south side of Greenwood avenue, and forming a part of the sidewalk, was a wooden trunk. Its purpose was to carry the waters of a small stream supplied by two springs into the catch-basin; the springs were located near Updown street, and the stream ran down a depression on the south side of Greenwood avenue. From the catch-basin on the south side the waters flowed into a culvert which ran under the railroad tracks and into Wyncote creek. Greenwood avenue was bevelled from side to side, each inlet being intended to intercept the waters flowing from the shed on the side upon which it was located (page 239). The venting capacity of the inlet on the north side was at the rate of fifteen cubic feet per second (page 247); that on the south side was seventy-two cubic feet per second under the most favorable conditions (page 217).

Careful engineering demanded a venting capacity based upon a calculation of rainfall at the rate of two and one-half inches per hour. At this rate water would accumulate at the points of interception mentioned at the rate of 180 cubic feet per second. Direct intercepting sewers on either side of the street of a venting capacity of 90 cubic feet per second were necessary (Swan, pages 191-193).

Alfred B. Nelson, a railroad engineer, says that a direct intercepting sewer of twenty square feet area, with an opening on each side of the street, and a venting capacity of 227 cubic feet per second, would be required in good engineering to care for the water flow; that it was practical of construction, and, when properly built, would carry the wash of earth and stone (page 264).

The plaintiff's engineers condemned the method of construction and the capacity of the drainage system as unsuitable and insufficient for the purpose.

That its capacity was inadequate was demonstrated upon numerous occasions, viz.:

Martell, the station agent, says he saw very frequently, eight or nine times, or twice a year, water flow across the track during heavy rainfalls (pages 73, 83).

Joseph W. Hunter said that it happened frequently (page 225).

Charles Clapp, the engineer, says he was held up the year before the accident because of wash on the track after a rain storm (pages 112-113).

That the derailment was due to the debris on the track seems to be beyond dispute.

Clapp, the engineer, says that his engine seemed to raise up about the time he struck the crossing, as though she had gone over something (page 104), and then derailed. He further testified that after extricating himself from the derailed engine he went back to the crossing, and saw sand and gravel which had been cleaned from the crossing, and piled at either end; he says it may have been a wagon load piled up on either side of the crossing (page 107).

Martell, the ticket agent at Jenkintown, testified that he noticed a large body of water crossing the railroad at Greenwood avenue; that he was watching the approaching train to

see it come through the water; that he saw it strike the water; that he saw the smoke-stack waiver, and then he ran (pages 67, 68).

Edward Cushing testified that immediately after the accident he saw a lot of wash on the track at Greenwood avenue (page 144); that the wash consisted of stones, from the size of an egg and larger, down to fine sand, and that it came from the macadamized road on Greenwood avenue (page 147); that he supposed there was two or three cart loads of it, and that it was washed onto the center rail; that the whole mass was on the left hand or most westerly rail of the east-bound track, and piled up in cone shape.

The evidence tending to show the cause of the accident, viz., the wash of sand and rocks upon the track, due to insufficient drainage, was practically the same as that produced in the former trial, and which this court held was of such a character as required it to be submitted to the jury, upon the question of the defendants' negligence.

*Ferguson vs. Railroad Companies*, 42 Vr. page 647.

The jury having found against the defendants, they now seek to reverse and assign the following error:

1. THE TRIAL JUDGE SHOULD HAVE NON-SUITED OR DIRECTED A VERDICT IN FAVOR OF THE DEFENDANTS, because

(a)

The action should have been brought by the personal representative, and not by the widow of the decedent.

In *Lower vs. Segal*, 30 Vr. page 66, the Supreme Court held that the right of action under the Pennsylvania statute is vested in the widow.

In the recent case of *Haughey vs. Pitts. Ry. Co.*, 210 Pa. St. page 367, the Supreme Court held that the action rests in the widow alone.

(b)

That the death was occasioned by the negligence of a fellow servant; a risk which the deceased assumed.

The flagman at the Greenwood avenue crossing was an

employee of the Philadelphia and Reading Railway Company. Whether he flagged the train upon which the misfortune happened, and was not seen by the engineer, nor the deceased, or whether he altogether failed to flag it, was not shown with any certainty at the trial. The only testimony is that of Clapp (pages 120 and 121). The flagman was not produced as a witness. Even though they had been fellow servants, the defendants cannot avail themselves of his negligence, because they likewise were remiss in the discharge of their duty to the deceased. They neglected to properly drain their roadbed, which occasioned the wash thereon, resulting in the derailment.

Where the negligence of the master concurs with that of the fellow servant, the master is liable.

*Campbell vs. Gillespie Co.*, 40 Vr. page 279.

*Paulmier vs. Erie R. R. Co.*, 5 Vr. page 151.

*Belleville Stone Co. vs. Mooney*, 31 Vr. page 323.

*Flanigan vs. Guggenheim Smelt. Co.*, 34 Vr. page 647

*Cole vs. Warren Mfg. Co.*, 34 Vr. page 626.

*Collyer vs. Pennsylvania R. R. Co.*, 20 Vr. page 59.

The defendant, The Philadelphia and Reading Railway Company, pleaded, and, at the trial, offered in evidence, the Act of the Legislature of the State of Pennsylvania, of April 4, 1868 (*P. L.* 1868, page 58), which reads:

“That when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, or trains, of which company such person is not an employee, the right of action in all such cases against the company shall be such only as would exist if such person were an employee; *provided*, that this action shall not apply to passengers.”

The effect of this legislation is to relieve railroad companies from liability occasioned by *the negligence of their servants* to persons who may be employed about their roadbed or works. It enables railroad companies to set up the doctrine of assumed risk of the carelessness of fellow servants as a defense, but it does not apply where the negli-

gence is that of the railroad company itself, or where the injury is the product of the concurring act of a master and a fellow servant.

The construction given to this act by the Supreme Court of Pennsylvania in *Keck vs. Phila. and Reading Railway Co.*, 206 Pa. St. page 501, excludes the case under review from its operation. It is there held that for the purposes of that act, and that alone, the use of the roadbed, and not the title to it, is controlling, upon the question of ownership of the railroad, and to apply the construction there given to this case, it means that the tracks upon which the deceased was operating his train were for the time being the tracks of his employer, the Central Railroad Company of New Jersey, and that there was no relation between the deceased and the flagman of the Philadelphia and Reading Railway Company. They were not fellow servants within the purview of the act. The liability of the Philadelphia and Reading Railway Company for its neglect, as laid in the declaration, and proven at the trial, is in nowise affected.

(c)

That the deceased was guilty of contributory negligence.

It was contended that by the exercise of reasonable care the deceased could have discovered the wash upon the crossing in time to notify his engineer, and thus avert the accident.

The testimony of the engineer is, that his duty, as well as that of his fireman, was to look for the overhead signals; that they were each so engaged; that he, the engineer, was not looking for, nor did he notice the crossing, nor the water running over it (pages 102-104).

The question was properly left to the jury.

*Mahnken vs. Frecholders*, 33 Vr. page 404.

(d)

The Reading Company did not fail in the discharge of its duty to the deceased.

The second and third requests of the Central Railroad Company (page 298) assumes that its duty to the deceased was legally imposed upon the former company.

It has already been pointed out that the drainage system was grossly inadequate. This was established at the trial by the testimony of the two engineers, Swan and Nelson. It was also demonstrated by the conditions that prevailed for years at the place of the accident. The witnesses, Cushing, Evans, Hunter, Lee and Martell, gave testimony that upon many occasions before the accident water and debris washed upon the railroad tracks at the crossing, which gave fullsome warning to this defendant of a likelihood of a re-occurrence and consequent dangers. The negligence of the defendant in this respect was likewise a jury question, and properly submitted to them under the ruling in this case.

*Ferguson vs. Railroad Companies, supra.*

#### DEPOSITION OF JAMES F. MARTELL.

It was taken in Philadelphia, before a Master in Chancery of this State, upon notice pursuant to the forty-fifth section of the Evidence Act (*Laws 1900, page 375*); the notices, as well as the Master's oath, were offered—they are not printed.

(a)

It was objected that the Master's certificate showed that the testimony was taken stenographically, and that it did not appear that the stenographer first took an oath to "carefully, faithfully and impartially take said evidence, and to make a true and correct transcript thereof," as required by the forty-eighth section of the act (*P. L. 1900, page 377*). The Master was his own stenographer. The amendment of this section in 1903 makes it unnecessary for the Master, under these circumstances, to qualify in this respect (*P. L. 1903, page 219*).

(b)

It was further objected that it did not appear that the officer before whom the Master took the oath of office was authorized to administer oaths in Pennsylvania. The oath was taken in Pennsylvania, before a Notary Public of that State, who in the jurat certified that he was such Notary, and added his official designation to his signature and attested

the same under his official seal. This is sufficient proof (*G. S.* page 2334).

(c)

It was also objected that the notice of taking of the deposition was defective, because it did not set forth that the witness was non-resident and material. The section under which the proceedings were had does not require either qualification to be averred in the notice. It provides that the notice shall be in writing, specifying the time and place of such examination, and the names of the witnesses to be examined—nothing more. (*P. L.* 1900, page 375, sec. 45).

The non-residence and materiality must in fact exist in order to make evidence in this form competent, but these cannot be established by a mere recital of them in the notice. Proof necessarily must rest in the depositions themselves, or supplied *aliunde* at the time the evidence is offered; as was done at the trial of this cause.

The provisions of the forty-fifth section differ materially from those of the thirty-sixth section of the Evidence Act (*P. L.* 1900, page 373). In the latter a commission issues only after proof to the satisfaction of the judge issuing the same of the essentials now sought to be read into the former section. This section leaves them to be established in any legal manner, before the trial court at the time the depositions are tendered as evidence.

#### REQUESTS TO CHARGE.

That neither of the defendant companies owed a duty to the deceased. That the master-defendant shifted its duty to its exculpation.

This embraces the ninth request of each defendant, and the eleventh and twelfth of the Central Railroad Company, and also the second and third ground of that company for the direction of a verdict.

(a)

## CENTRAL RAILROAD COMPANY OF NEW JERSEY.

The duty of the master is to exercise a reasonable care to furnish a safe place in which the servant may labor—a duty which it cannot delegate.

*Smith vs. Erie R. R. Co.*, 38 Vr. page 636.

This rule applies where a railroad company uses the road-bed of another for the purposes of its operations, and if its care is left to the owner company, the master is responsible in damages for the derelictions of the latter.

*Wood's Master and Servant* (2d Ed.), page 735.

*Dunn vs. Penna. R. R. Co.*, 42 Vr. page 21.

*Story vs. Concord & M. R. R. Co.*, 70 N. H. page 364.

(b)

## PHILADELPHIA AND READING RAILWAY COMPANY.

Its duty arose out of a state of facts created by contract—it is imposed by law, based upon public policy.

*Wood's Master and Servant*, *supra*.

*Durand vs. N. Y. & L. B. R. R. Co.*, 36 Vr. page 656.

*Story vs. Concord & M. R. R. Co.*, *supra*.

*Styles vs. F. R. Long Co.*, 41 Vr. page 301.

(c)

The action was properly brought against both defendants—they were joint tort feasons.

*Wood's Master and Servant*, *supra*.

*Story vs. Concord & M. R. R. Co.*, *supra*.

## FOURTH AND TENTH REQUESTS.

“If the jury should believe that the proximate cause of the accident was the failure of the flagman at the crossing to warn the approaching train to stop, plaintiff cannot recover.”

“The only duty that The Philadelphia and Reading Railway Company owed to Charles Ferguson was to remove the deposits and debris within a reasonable time after it had knowledge of their existence upon the tracks, or to warn the approaching train in time to prevent its crossing the avenue, provided it knew, or in the exercise of reasonable care, ought to have known, within time to warn, that the presence of water and debris, or either, upon the tracks, might have derailed the engine.”

These requests were properly refused because they do not embrace all of the pertinent facts upon which the defendants' liability or non-liability were predicated.

The first ignores the concurrent duty of the master of the flagman to have a care, the omission of which necessarily was the proximate cause of the accident, and assumes that the flagman's carelessness, which was ancillary only, may have been the sole cause of the mishap.

The other request is likewise vicious, because it limits the duty of the defendants to a removal of the debris from the tracks or to warn the approaching train of the danger, within a reasonable time after notice of its deposit, and excludes the greater and dominant duty of taking precaution, by proper drainage, to prevent accumulations upon the tracks likely to occasion derailment. Culling from the case partial sets of facts, and asking deductions therefrom, has been denounced by this court.

*Durand vs. Long Branch R. R. Co., supra.*

#### EIGHTH REQUEST.

If the jury should find as a fact that the accident was caused by two separate contributing acts of negligence, one on the part of the defendant, Philadelphia and Reading Railway Company, and the other by the defendant, Central Railroad Company of New Jersey, plaintiff cannot recover.

The proposition advanced has been definitely settled—adversely—by numerous authorities.

*Mathews vs. D., L. & W. R. R. Co., 27 Vr. page 34.*

THE VERDICT FOR THE PLAINTIFF MUST BE  
JOINT.

The defendants, being joint tort feasons, the plaintiff had her election to sue one or both—a suit, recovery and satisfaction against one would be a bar against the other.

*Mathews vs. D., L. & W. R. R. Co., supra.*

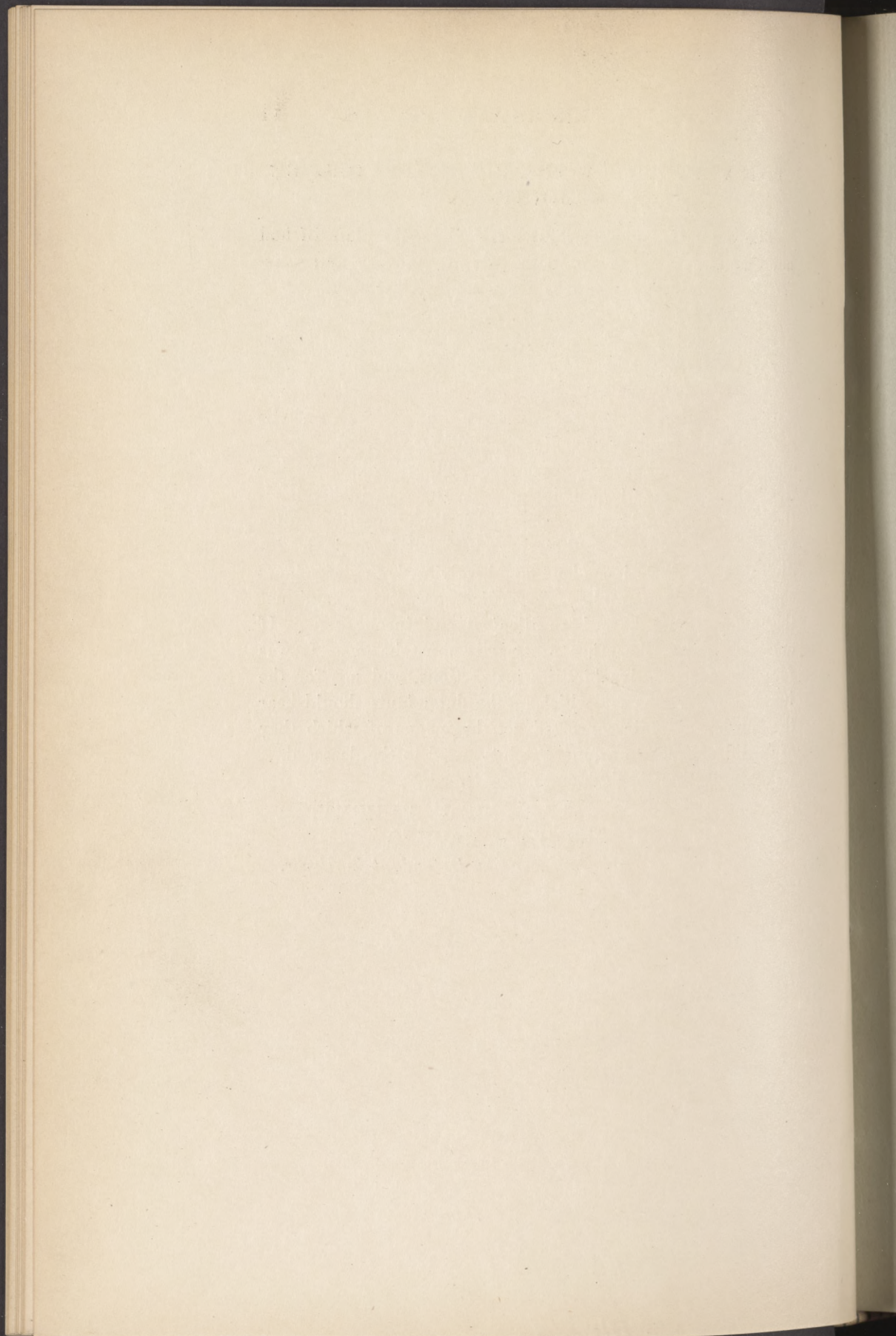
In the case of *Mathews vs. D., L. & W. R. R. Co., supra*, the Supreme Court held that in an action against joint tort feasons a verdict against one of them was not objectionable. An examination of that case discloses that the duties of the defendants were separate, diverse and disconnected, the neglect of which, however, concurred and united in causing the injury; hence the conclusion. In the case in hand, although the circumstances from which the respective duties arose were distinct, yet their breach rested in a single, indivisible and interdependent act, involving both defendants equally and inseparably. A verdict against one, and not the other, would have been illogical and incongruous. If one was guilty, the other necessarily must be too. It was for the court to give binding instructions, and not for the jury to arbitrarily say which of the defendants should bear the burden of their concerted act, by means of which they each did violence to a separate duty owed to the deceased.

We pray that the judgment be affirmed.

CLARENCE H. MURPHY,

JOHN H. BACKES,

*Of Counsel with Defendant in Error.*



---

---

**N. J. Court of Errors & Appeals**

---

HELEN G. FERGUSON,

Defendant in Error,

vs.

THE CENTRAL RAILROAD COMPANY, ET AL.,

Plaintiffs in Error.

---

ON ERROR.

---

CASE.

---

JOHN H. BACKES,  
Counsel for Defendant in Error.

GEORGE HOLMES,  
Counsel for Central Railroad Co.

THOMPSON & COLE,  
For Philadelphia and Reading Railway Co.

---

---

# INDEX.

	PAGE.
Assignments of Error .....	325
Charge of the Court .....	300
Defendants' Exceptions .....	315
Exhibit No. 1 .....	327
"    "    2 .....	328
"    "    3 .....	329
"    "    4 .....	331
"    "    5 .....	331
"    "    6 .....	331
"    "    7 .....	331
Motion to direct verdict .....	297
Postea .....	2
Writ .....	1

## PLAINTIFF'S WITNESSES.

Backes, John H. ....	62
Clapp, Charles A. ....	98
Cross-ex. ....	114
Re-direct .....	125
Cushing, Edward .....	141
Cross-ex. ....	159
Dolbear, John G. ....	129
Cross-ex. ....	135
Evans, Charles .....	171
Cross-ex. ....	179
Ferguson, Mrs. Helen .....	46
Cross-ex. ....	51
Recalled .....	95
Re-cross .....	97
Ferguson, Mrs. Frances .....	98
Hunter, Joseph W. ....	207
Cross-ex. ....	227
Re-direct .....	234
Re-cross .....	237
Lee, Patrick .....	181
Cross-ex. ....	199
Re-direct .....	201
Martell, James F. ....	65
Cross-ex. ....	79
Nelson, Alfred B. ....	257
Cross-ex. ....	269
Re-direct .....	275
Re-cross .....	279
Swan, Abram .....	18
Recalled .....	239
Cross-ex. ....	251

## DEFENDANTS' WITNESSES.

Lee, Patrick .....	283
Cross-ex. ....	288
Snowden, Lewellyn .....	138

## NEW JERSEY COURT OF ERRORS AND APPEALS.

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our Supreme Court before you, between Helen Gray Ferguson against Central Railroad Company of New Jersey and Philadelphia and Reading Railway Company, defendants, in an action of tort, manifest error hath intervened to the great damage of the said defendants, as it is said, we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the seventeenth day of April, nineteen hundred and six, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of said Court of Errors and Appeals, at Trenton, this the 30th day of March, nineteen hundred and six.

S. D. DICKINSON,  
Clerk.

GEO. HOLMES,

Attorney of Central Railroad Company of New Jersey.

THOMPSON & COLE,

Attorneys of Philadelphia and Reading Railway Company.

## NEW JERSEY SUPREME COURT.

HELEN GRAY FERGUSON,

vs.

THE CENTRAL RAILROAD COM-  
**10** PANY OF NEW JERSEY, THE  
 PHILADELPHIA & READING  
 RAILWAY COMPANY.

IN TORT.  
 ON POSTEA.

CLARENCE H. MURPHY, Attorney.

As yet of the eighteenth day of March, A. D. one  
 thousand nine hundred and one.

**20** Witness, DAVID A. DEPUE, Chief Justice.  
 WILLIAM RIKER, JR., Clerk.

OCEAN COUNTY, SS.:

The Central Railroad Company of New Jersey and The Philadelphia and Reading Railway Company, defendants in this suit, were summoned to answer unto Helen Gray Ferguson, the plaintiff herein, in an action of tort, and thereupon the said plaintiff, by Clarence H. Murphy, her attorney, complains.

**30** For that whereas, heretofore, to wit, on the eighteenth day of May, in the year nineteen hundred, and for a long space of time, to wit, the space of three months prior thereto, the said defendant, The Philadelphia and Reading Railway Company, was the owner and in possession and had the management and control of a certain railroad with its tracks, roadbed and appurtenances located in the State of Pennsylvania, and extending from the city of

Philadelphia to and beyond a place known as Jenkintown, in the county of Montgomery, in said State, which tracks and roadbed, at the place last named, crossed a public highway known as Greenwood avenue, and which tracks and roadbed at the crossing of the said public highway were located in a natural depression and at the foot of land sloping towards and to the said tracks and roadbed. That during and at the time aforesaid, the locomotive engines and cars of the said defendant, The Central Railroad Company of New Jersey, were operated, transported and carried over the said tracks and roadbed of the said The Philadelphia and Reading Railway Company, by and under certain contracts and agreements then and there existing between the said defendants, whereby and for the consideration therein mentioned and expressed the said defendant, The Philadelphia and Reading Railway Company, promised and agreed to safely carry the locomotive engines and cars of the said defendant, The Central Railroad Company of New Jersey, over the said tracks and roadbed, to wit, at Jenkintown aforesaid, and to keep, provide and maintain the said tracks and roadbed in good, safe and sufficient condition and repair, in all respects fit and proper for use, for the purpose of running and operating the said locomotive engines and cars as aforesaid in safety. That Charles Ferguson, deceased, late husband of the plaintiff, in his lifetime, and on the day and year last aforesaid, was a servant in the employ of the said defendant, The Central Railroad Company of New Jersey, as locomotive fireman, and as such was engaged at the instance and request of the said last named defendant in running, managing and operating, in the line of his duty as such locomotive fireman, a certain locomotive engine belonging to the said last named defendant, to which was attached a train of cars, which said locomotive engine and train of cars, on the day and year last aforesaid, started from the city of Philadelphia aforesaid to pass over the said railroad to Jersey City, in the State of New Jersey.

10

20

30

That it then and there became and was the duty of the said defendant, The Central Railroad Company of New Jersey, and also of the said defendant, The Philadelphia and Reading Railway Company, to exercise a reasonable care to have, keep and maintain the said tracks and roadbed, to wit, at the public highway at Jenkintown aforesaid, safely, sufficiently and adequately drained, or otherwise guarded and protected so as to prevent water, earth, stones and rocks in such large and obstructing quantities as hereinafter set forth, from being washed and deposited from the adjacent slope of the said tracks and roadbed, and to have, keep and maintain the said tracks and roadbed in good, safe and sufficient condition and repair, and in all respects fit and proper for use for the purpose of running said locomotive engines and train of cars thereon in safety.

Yet the said defendants, The Central Railroad Company of New Jersey and The Philadelphia and Reading Railway Company, not regarding their said duty in that behalf, did then and there, to wit, at Jenkintown, in the county of Montgomery aforesaid, to wit, at Toms River, in the county of Ocean aforesaid, wholly disregard their said duty, and carelessly and negligently caused and permitted the said tracks and roadbed, to wit, at the said public highway at Jenkintown aforesaid, to be, exist and remain so unsafely, insufficiently, inadequately and defectively drained, guarded and protected, that by reason thereof, on the day and year last aforesaid, large quantities of water, earth, stones and rocks from the adjacent slope washed and were deposited upon, and filled, clogged and obstructed the said tracks and roadbed, whereby and in consequence of the carelessness and negligence of the said defendant in that behalf, the said locomotive engine, whereon the said Charles Ferguson was performing his duty as fireman as aforesaid, without any carelessness or negligence on the part of the said Charles Ferguson, ran into, over and upon the said large quantities of water,

earth, stones and rocks, washed and deposited upon, which filled, clogged and obstructed the said tracks and roadbed at the said public highway, at Jenkintown aforesaid, and was thereby derailed, and fell upon the said Charles Ferguson, whereby he was instantly killed, to wit, at Jenkintown, in the county of Montgomery aforesaid, to wit, at Toms River, in the county of Ocean aforesaid.

By means whereof the plaintiff, who is the widow of Charles Ferguson, deceased, sustained great loss and damage, to wit, twenty-five thousand dollars (\$25,000) 10  
whereby and by force of a certain statute of the State of Pennsylvania, to wit, Section 19 of Act No. 358, approved April 15th, 1851, Pamphlet Laws of that year, page 674, which reads as follows:

"That whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representative may maintain an action for and recover damages for the death thus occasioned."

And an act of the said State of Pennsylvania, entitled 20  
"An Act relating to damages for injuries producing death," No. 323, approved April 26, 1855, Pamphlet Laws of that year, page 309, which reads as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by authority of the same, that the person entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in 30  
the proportion they would take his other personal estate in case of intestacy and without liability to creditors.

"Section 2. That the declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death and not thereafter."

An action hath accrued to the plaintiff, as widow of the said Charles Ferguson, for the benefit of the said

plaintiff as such widow, and of Eleanor Ferguson, Frances Ferguson, Thomas Ferguson and John Ferguson, who are infant children of the said Charles Ferguson, deceased, who are all parties entitled to such action.

- 10 And for that whereas, heretofore, to wit, on the eighteenth day of May, in the year nineteen hundred, and for a long space of time, to wit, the space of three months prior thereto, the said defendant, The Philadelphia and Reading Railway Company, was the owner and in possession and had the management and control of a certain railroad with its tracks, roadbed and appurtenances located in the State of Pennsylvania, and extending from the city of Philadelphia to and beyond a place known as Jenkintown, in the county of Montgomery, in said State, which tracks and roadbed, at the place last named, crossed a public highway known as Greenwood avenue, and which tracks and roadbed, at the crossing of the said public highway, were located in a natural depression and at the foot of land sloping towards and to the said tracks and roadbed.
- 20 That during and at the time aforesaid the locomotive engines and cars of the said defendant, The Central Railroad Company of New Jersey, were operated, transported and carried over the said tracks and roadbed of the said The Philadelphia and Reading Railway Company by and under certain contracts and agreements then and there existing between the said defendants, whereby and for the consideration therein mentioned and expressed the said defendant, The Philadelphia and Reading Railway Company, promised and agreed to safely carry the
- 30 locomotive engines and cars of the said defendant, The Central Railroad Company of New Jersey, over the said tracks and roadbed, to wit, at Jenkintown aforesaid, and to keep, provide and maintain the said tracks and roadbed in good, safe and sufficient condition and repair, in all respects fit and proper for use, for the purpose of running and operating the said locomotive en-

gines and cars as aforesaid in safety. That Charles Ferguson, deceased, late husband of the plaintiff, in his lifetime, and on the day and year last aforesaid, was a servant in the employ of the said defendant, The Central Railroad Company of New Jersey, as locomotive fireman, and as such was engaged, at the instance and request of the said last named defendant, in running, managing and operating, in the line of his duty as such locomotive fireman, a certain locomotive engine belonging to the said last named defendant, to which was attached a train of cars, which said locomotive engine and train of cars, on the day and year last aforesaid, started from the city of Philadelphia aforesaid to pass over the said railroad to Jersey City, in the State of New Jersey. **10**

That it then and there became and was the duty of the said defendant, The Central Railroad Company of New Jersey, and also of the said defendant, The Philadelphia and Reading Railway Company, to exercise a reasonable care to have, keep and maintain the said tracks and roadbed, to wit, at the public highway at Jenkintown aforesaid, free and clear from large and obstructing quantities of water, earth, stones and rocks, and to have, keep and maintain the said tracks and roadbed in good, safe and sufficient condition and repair, and in all respects fit and proper for use for the purpose of running said locomotive engine and train of cars thereon with safety. **20**

Yet the said defendant, The Central Railroad Company of New Jersey, and The Philadelphia and Reading Railway Company, not regarding their said duty in that behalf, did then and there, to wit, at Jenkintown, in the county of Montgomery aforesaid, to wit, at Toms River, in the county of Ocean aforesaid, wholly disregard their said duty and carelessly and negligently permitted the said tracks and roadbed, to wit, at the public highway at Jenkintown aforesaid, to become, be and **30**

10 remain filled, clogged and obstructed by slides to and upon the same of large quantities of water, earth, stones and rocks from the adjacent slope, and to become and be wholly out of repair and unsafe for the passage of locomotive engines and cars over the same; whereby and in consequence of the carelessness and negligence of the said defendant in that behalf the said locomotive engine whereon the said Charles Ferguson was performing his duty as fireman as aforesaid, without any carelessness or negligence on the part of the said Charles Ferguson, ran into, over and upon the said large quantities of water, earth, stones and rocks washed and deposited upon, which filled, clogged and obstructed the said tracks and roadbed at the said public highway, at Jenkintown aforesaid, and was thereby derailed and fell upon the said Charles Ferguson, whereby he was instantly killed, to wit, at Jenkintown, in the county of Montgomery aforesaid, to wit, at Toms River, in the county of Ocean aforesaid.

20 By means whereof the plaintiff, who is the widow of Charles Ferguson, deceased, sustained great loss and damage, to wit, twenty-five thousand dollars (\$25,000), whereby and by force of a certain statute of the State of Pennsylvania, to wit, Section 19 of Act No. 358, approved April 15th, 1851, Pamphlet Laws of that year, page 674, which reads as follows:

30 "That whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or if there be no widow the personal representatives may maintain an action for and recover damages for the death thus occasioned."

And an act of the said State of Pennsylvania, entitled "An act relating to damages for injuries producing death," No. 323, approved April 26, 1855, Pamphlet Laws of that year, page 309, which reads as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsyl-

vania, in general assembly met, and it is hereby enacted by authority of the same, that the person entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relatives, and the sum recovered shall go to them in the proportion they would take his other personal estate in case of intestacy and without liability to creditors.

"Section 2. That the declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death and not thereafter." 10

An action hath accrued to the plaintiff, as widow of the said Charles Ferguson, for the benefit of the said plaintiff as such widow, and of Eleanor Ferguson, Frances Ferguson, Thomas Ferguson and John Ferguson, who are the infant children of the said Charles Ferguson, deceased, who are all the parties entitled to such action.

And therefore she brings her suit, &c. 20

And the said Philadelphia and Reading Railway Company, by Thompson & Cole, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, and of this it puts itself upon the country.

And for a further plea in this behalf, by leave of the Court here for this purpose first had and obtained, this defendant, answering, says that at the time of the injury to the said Charles Ferguson, in the plaintiff's declaration mentioned, this defendant was, and from thence hitherto hath continued to be a body corporate, as a railroad company, under and by virtue of the laws of the Commonwealth of Pennsylvania, and as such company had, on the eighteenth day of May, one thousand nine 30

hundred, the possession, management and control of the said railroad, with its tracks, switches and appurtenances in the plaintiff's declaration mentioned, within the said Commonwealth; that on that day the said Charles Ferguson, not being in the employ of this defendant, or a passenger on its road, was lawfully engaged and employed by the Central Railroad Company of New Jersey, on and about the railroad, works, depots, and premises of this defendant, on the line of its railroad within the Commonwealth of Pennsylvania aforesaid, and while so employed within the Commonwealth of Pennsylvania and without any carelessness, negligence or want of due care on the part of this defendant, he sustained a personal injury, by means whereof he lost his life as in the plaintiff's declaration in that behalf set out. And this defendant avers that at the time the said Charles Ferguson was so injured and lost his life, there were then and there engaged and employed by this defendant divers persons acting for the defendant in the same line of employment as that in which the said Charles Ferguson was engaged and employed, whose duty it was to inspect the aforesaid roadbed of this defendant, its tracks, switches and sidings, and to remove all obstructions therefrom, and if for any reason such obstruction could not be removed in time to allow the safe passage of the train upon which the said Charles Ferguson was so as aforesaid engaged and employed, then to notify the said Charles Ferguson thereof in due time, by proper signals, which had been provided and furnished by this defendant.

And the defendant further saith, that in the selection and employment of the aforesaid divers persons to perform the duty aforesaid, this defendant used due and reasonable care and caution, and that the said employes were competent and prudent persons in their respective employment, who were each properly and fully instructed by the defendants as to the manner in which each of said duties should be performed, and that the supposed negli-

gence and carelessness in the plaintiff's declaration in that behalf set out, by means whereof the said accident and injury and loss of life happened to the said Charles Ferguson, was that of the divers persons, employes of this defendant, or some of them, engaged in the same line of employment as the said Charles Ferguson, and not of this defendant, while the said Charles Ferguson was lawfully engaged as the servant of The Central Railway Company of New Jersey, on the roads, works, depots and premises of this defendant, by means whereof any right of action and recovery accruing to the plaintiff herein is subject to and governed by a public statute of the Commonwealth of Pennsylvania, entitled "An act relating to railroad companies and common carriers, defining their liabilities and authorizing them to provide means of indemnity against loss of life and personal injury," approved the fourth day of April, A. D. one thousand eight hundred and sixty-eight, wherein it was enacted among other things as follows :

10

"Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that when any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe; provided this section shall not apply to passengers." And this the defendant is ready to verify.

20

30

And for a further plea in this behalf, by like leave of the Court here for this purpose first had and obtained, this defendant answering says, that at the said time, when, &c., it was the owner in the occupation of the said railroad, tracks, switches, signals and switch signals thereon,

in the plaintiff's declaration mentioned, to wit, at Jenkintown, in the Commonwealth of Pennsylvania, and as such owner and occupier on the said eighteenth day of May, in the year of our Lord one thousand nine hundred, and during the whole of said day had provided and maintained proper tracks, switches, signals and switch signals thereon, and during the day last aforesaid had exercised due and proper care and caution in maintaining and preserving the said tracks and switches in a good and safe condition and repair, free from water, rocks, stones, sticks, gravel and other dirt, and in all respects fit and proper for use for the running in safety the said trains in the plaintiff's declaration mentioned.

10

And the defendant further saith, that its said tracks and railroad, in running from Philadelphia to and beyond Jenkintown aforesaid, passes over and crosses at grade, at Jenkintown aforesaid, a certain public highway; that as the said locomotive engine on which the said Charles Ferguson was at work as a fireman, as in the plaintiff's declaration-set out, was on the said eighteenth day of May last aforesaid approaching said public highway, as it was being run over and along the aforesaid tracks of this defendant's railroad, and when about fifty feet distant therefrom, certain water, rocks, stones, sticks, gravel and other dirt, being the water, rocks, stones, gravel and other dirt in the plaintiff's declaration mentioned, were accidentally carried over and deposited upon the aforesaid railroad tracks of this defendant, at the point where it crosses the aforesaid public highway, by water falling from the clouds during an extraordinary storm and shower, which caused a great flood and an unusual quantity of water to fall and flow upon the aforesaid tracks of this defendant, whereby the said tracks and roadbed, to the knowledge of the said Charles Ferguson, suddenly, but without the knowledge of the said Charles Ferguson, became filled, clogged and obstructed, being the obstruction in the plaintiff's declaration mentioned, which

20

30

the locomotive engine upon which the said Charles Ferguson was at work ran into, over and upon, by means whereof, and from no other cause, and without any carelessness, negligence, improper conduct or want of due care on the part of this defendant, the said locomotive engine upon which the said Charles Ferguson was at work, as in the plaintiff's declaration mentioned, was derailed, and thrown from said track and fell upon the said Charles Ferguson, whereby he was instantly killed, and this the defendant is ready to verify.

And the said defendant, The Central Railroad Company of New Jersey, by George Holmes, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the wrongs and grievances above laid to its charge in manner and form as the plaintiff hath above complained against it, and of this it puts itself upon the country. 10

And the said plaintiff, as to the said plea of the said defendant, The Central Railroad Company of New Jersey, by it above pleaded, and of which it hath put itself upon the country, doth the like. 20

And the said plaintiff, as to the said plea of the said defendant, The Philadelphia and Reading Railway Company by it firstly above pleaded, and of which it hath put itself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant, The Philadelphia and Reading Railway Company, by it secondly above pleaded, as to the wrongs and injuries in the introductory part of that plea mentioned, saith that she, by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining her aforesaid action thereof against the said defendant, The Philadelphia and Reading Railway Company, because she saith that the negligence and carelessness in the said plea mentioned, by means whereof the said accident and injury and loss of life happened 30

to the said Charles Ferguson, was not that of the divers persons, employes of the said defendant, The Philadelphia and Reading Railway Company, or some of them engaged in the same line of employment as the said Charles Ferguson, as the said defendant hath in and by its said plea alleged, but that the same was the negligence and carelessness of the said defendant, The Philadelphia and Reading Railway Company, in manner and form as the said plaintiff hath above thereof complained against it,

10 the said The Philadelphia and Reading Railway Company, to wit, at Toms River, in the county of Ocean aforesaid, and this the said plaintiff prays may be inquired of by the country, &c.

And the said plaintiff, as to the said plea of the said defendant, The Philadelphia and Reading Railway Company, by it thirdly above pleaded, as to the wrongs and injuries in the introductory part of that plea mentioned, saith that she, by reason of anything by the said defendant in that plea above pleaded, ought not to be barred from

20 having and maintaining her aforesaid action thereof against the said defendant, The Philadelphia and Reading Railway Company, because she saith that the said defendant, The Philadelphia and Reading Railway Company, at the same time when, &c., and of its own wrong, and without the cause by it in its third plea alleged, committed the said wrongs and injuries in the introductory part of that plea mentioned, in manner and form as the said plaintiff hath in her said declaration complained against it, the said The Philadelphia and Reading Railway Company. And this the said plaintiff prays may be

30 inquired of by the country, &c.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Toms River, in and for the county of Ocean, on the second Tuesday of December, in the year of our Lord one

thousand nine hundred and five, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the twentieth day of February, A. D. nineteen hundred and six, before our said Supreme Court at Trenton, comes the said plaintiff, by her attorney aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the fifteenth day of December, nineteen hundred and five, at a Circuit Court held at Toms River, in and for the county of Ocean, by his Honor Charles E. Hendrickson, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the within named plaintiff, as the within named defendants, by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say, that the defendants are guilty in manner and form as the plaintiff hath within complained against them, and they assess the damages of the said plaintiff, on occasion thereof, over and above her costs and charges by her about her suit in this behalf expended, to the sum of six thousand dollars, and for those costs and charges the sum of six cents.

Therefore it is considered that the said plaintiff do recover against the said defendants her said damages by the jury in form aforesaid found to six thousand dollars, and also ninety-five dollars and eighty-one cents for her costs and charges aforesaid, by the court now here adjudged to the said plaintiff, and with her assent, which said damages, costs and charges in the whole amount to six thousand and ninety-five dollars and eighty-one cents.

Judgment signed this twentieth day of February, A. D. one thousand nine hundred and six.

WILLIAM S. GUMMERE,  
C. J.

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

In testimony whereof, I have set my hand and the seal of said Court, at Trenton, this sixth day of September, A. D. nineteen hundred and six.

[SEAL.]

WM. RIKER, JR.,  
Clerk.

10

The answer of Wm. S. Gummere, Chief Justice within named. The record and proceedings of the plea whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all cases within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

WM. S. GUMMERE,  
Chief Justice.

20

30

NEW JERSEY SUPREME COURT.  
OCEAN CIRCUIT.

HELEN GRAY FERGUSON,	}	
Plaintiff,		
vs.		
THE CENTRAL RAILROAD COM-	}	10
PANY OF NEW JERSEY AND THE		IN TORT.
PHILADELPHIA AND READING		
RAILWAY COMPANY,		
Defendants.		

---

TOMS RIVER, N. J., December 13, 1905.

---

20

TESTIMONY

Before HON. CHARLES E. HENDRICKSON, Judge, and a jury.

Appearances :

For Plaintiff—C. H. MURPHY and JOHN H. BACKES, Esqs. 30

For Defendant, C. R. R. Co.—WILLIAM A. BARKALOW and E. W. ARROWSMITH, Esqs.

For Defendant, P. & R. R. Co.—CLARENCE L. COLE and NELSON Y. DUNGAN, Esqs.

TOMS RIVER, N. J., December 13, 1905.

ABRAM SWAN, sworn for plaintiff.

Direct examination.

By Mr. Backes :

- 10** Ques. You live where, Mr. Swan?  
 Ans. Trenton, New Jersey.  
 Ques. And your business or profession is what?  
 Ans. Civil engineer.  
 Ques. Are you carrying on your profession?  
 Ans. I have an office in Trenton.  
 Ques. And how long have you been practicing your profession?  
 Ans. I have been practicing the profession for about sixteen or seventeen years.
- 20** Ques. Did you occupy any official capacity towards the city of Trenton where you carried it on?  
 Ans. I was employed in the City Engineer's office at Trenton for about fifteen years, during which time I was about nine years of it assistant city engineer.  
 Ques. And during your incumbency did the city of Trenton adopt a sewer system and put it into effect?  
 Ans. Sewers and drains; yes, sir.  
 Ques. Did you have anything to do with it?  
 Ans. I had full charge of its construction.
- 30** Ques. And for how long a time?  
 Ans. For about nine years.  
 Ques. And during that time did they install this sewer system?  
 Ans. Building it all the time; that is, for the last fifteen years.  
 Ques. Now there are two maps before the jury here. Did you make those maps?

Ans. I did.

Ques. What were they made from?

Ans. Actual surveys made at Jenkintown.

Ques. And you may now describe those maps to the jury.

Ans. The larger map on the yellow paper shows the location of the stations, tracks, platforms, several buildings, streets and water courses in the vicinity of Greenwood avenue, in Jenkintown. In addition to that, it shows in a red line here the outside of the watershed in that particular location east of the railroad. The map is drawn to a scale of one inch equals twenty feet. In other words, every inch on this map represents twenty feet as it actually exists on the ground. This arrow shown here denotes the points of the compass, north, south, east and west; this, being the head of the arrow, points to the north; the other points are east, west and south, but not designated. The yellow scored objects as shown here are the various stations and various offices, a covered trestle and section house, and they are all designated as such. The blue lines, as I have shown them here, are the several watercourses; this being Wyncote creek, which is on the most north-westerly portion of the map. This double parallel line, as shown on the map here, is a ditch which extends from a point midway or about midway between the tracks, which are shown here by these parallel lines, entering Wyncote creek. This ditch has a sewer or drain emptying into it which vents water coming from Jenkintown down through Greenwood avenue, and is intercepted by inlets which are marked here, one on the northerly side of Greenwood avenue and the other on the southerly side, at the intersection of Beechwood avenue, which is shown here. The several lines of the streets, the outside boundaries, are shown by these several parallel lines here in black, and there are some curb lines and some house lines. Those which are curb lines are designated as curb. I have not shown here on Greenwood avenue and here on

10

20

30

Beechwood avenue. The most easterly line of Beechwood avenue is a wall which has several openings that is not shown on this plan. This wall encloses lands occupied by a hotel, which is known as the Beechwood Inn, and as are shown, the most westerly and southerly side of it, by this yellow scored line which is shown here and marked "Beechwood Inn." As I said before, these several lines here, parallel lines, are the tracks of The Philadelphia and Reading Railroad.

16 Ques. How far are the tracks apart?

Ars. That is, with reference—

Ques. The east and west bound track; how far is it apart?

Ans. It is 6.7 feet; that is, from the nearest rail of one track to the nearest rail of the other track—what is known as a dummy strip between. This dark yellow scored object shown on the end of Greenwood avenue, or at the intersection of Greenwood avenue and the railroad tracks, is a planking. This planking is a planking the same as used commonly at the intersection of railroads where streets cross. The plank is put there to stop the jolt of wagons crossing the tracks. These planks are put on a level with the head of the rail—

20

Mr. Cole: I object to the witness commenting about why things are put there.

Ans. It is a matter of explanation is all.

30 The Court: Just omit that.

Ans. Very well. The planking are flush with the rail. I was going to explain that there.

The Court: State the condition of things as you found them, without explaining why.

Ans. This planking is on a level with the rail and is a solid plank platform, with the exception of on the inside of the rail of each track, or inside of each track, there is a groove cut along the track. I believe that explains these several dotted lines.

Ques. Was that crossing there at grade, on a level?

Ans. It is on a level with the street, Greenwood avenue. I think that explains all. These several red figures as shown here are elevations.

Ques. Now just explain the elevations.

10

Ans. These elevations are put on here for the purpose of showing the contour, or the respective elevation of one portion of this map or this ground with another portion of it. For instance, at the bottom of the map there is a red O. That denotes nothing. The bottom of drain, 1.8, showing that the bottom of that drain is 1.8 feet, or one foot and ten inches above the water that stands in that creek that day as I measured it. This other measurement here above the planking of the railroad, 13.8, is 13 feet and 10 inches above the waters of this Wyncote creek. The one immediately in Greenwood avenue, at the intersection of the center line of Beechwood avenue, is 14.1, showing 14.1 feet above this O, or subtracting 13.8 from it will give you .3, or a little more than 4 inches. This one here at Greenwood avenue, at the intersection of Beechwood, is 15.7. This one at the top of the map is 25.7, which is in the center of Greenwood avenue. This one at the most northerly portion of the map at Beechwood Inn is 70.9.

20

Ques. Higher than here? (Indicating O.)

Ans. Higher than O. This over here at Summit avenue and this other right here is 39.9 and 48.9. Now you will have to go to the smaller map.

30

Ques. Is there any more to this map?

Ans. There is a portion of it on the big map which is shown also on this smaller map. The smaller map is the Borough of Jenkintown, Pennsylvania, showing the

watershed of Greenwood avenue and so designated. This map is drawn to a scale of one inch equals one hundred feet.

Ques. In other words, one inch on the map equals one hundred feet on the ground?

10 Ans. One hundred feet on the ground. This arrow represents the north point, and points in the same direction as this one, and showing approximately the same direction. This small map does not show anything west of the railroad, this being the railroad line, this dot and dash line, which is this line shown here, and all of this map shows what actually exists east of the railroad. Beechwood avenue is shown here, Beechwood avenue; Greenwood avenue here; and Summit avenue around here, as is shown here.

Ques. Now indicate the rainsheds.

20 Ans. This map has red lines shown, as exist on this other map, but extends further on up; it extends up into Jenkintown. These red lines show the outside boundary of all the lands that shed their waters, their rain waters, into Greenwood avenue, and have the same elevations, or has elevations on which are referred to the same datum as this, this O being used in connection with this map. As an illustration, 13.8 feet here at the railroad is shown here 13.8; Beechwood avenue, 70.9, here is 70.9. These several elevations shown through here, this one is 68.5, at the intersection of Summit avenue and Wyncote; Spaeder avenue, at the intersection of Greenwood, 59.7, the next elevation going up Greenwood avenue. The next elevation is part way between Spaeder and Walnut, 68.9  
30 feet. At the intersection of Walnut street and Greenwood avenue, 84.84. Part way between Walnut and Cedar on Greenwood is 100.44, going still up Greenwood avenue. At the intersection of Cedar and Greenwood is 114.32. The intersection of Leedom and Greenwood is 128.74; and about 100 feet beyond Leedom, which is the crown or summit, is 13.34.

Ques. What, feet?

Ans. Feet, above the waters in Wyncote creek.

Ques. And how much higher is it on the crown than what it is here on the railroad crossing?

Ans. Taking 13.8 from 130.34, 116¼ feet fall through that point to Greenwood avenue down to the top of the railroad track.

Ques. Now, is Greenwood avenue improved, the avenue itself?

Ans. It is paved. The gutters are paved with bricks, the street itself with a macadam pavement. **10**

Ques. And could you tell whether it was laid on a natural grade or not?

Ans. It follows in general, in fact, all the way through the natural surface of the ground.

Ques. From the railroad to the summit?

Ans. From the railroad to the summit, practically the whole thing, all the way through.

Ques. And what is the grade of the street itself between the curbs?

Ans. The grade of the street? **20**

Ques. Yes; how is it formed?

Ans. It is concave. It has gutters about six or seven—or convex, rather—it has six or seven gutters, and then rounded over.

Ques. And how many acres of land did this watershed that you have denoted within the red lines cover?

Mr. Cole: We object to that as being irrelevant and incompetent at this time. Our position will be that it must be shown that the precise conditions prevailed at the time of this accident as prevailed when this surveyor was on the ground. And we shall also maintain that these companies are not responsible for any conditions that were created that were beyond their control after their road went through Greenwood avenue. Now, this present testimony is quite general as applying to **30**

the condition that existed when the surveyor was there. And we warn counsel that he is expected to connect all that up; otherwise we take the benefit of our objection.

Mr. Backes: Much obliged for the warning.

10 Mr. Cole: Of course we make the other claim, may it please your Honor, and say to counsel that we are not responsible. We shall object to any evidence that undertakes to hold us responsible to carry off under our tracks the water which it is claimed comes from that water-shed.

Ques. How many acres of land are included within the area bounded by the red lines on this map?

The Court: I think I will allow that.

20 (Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ans. About seventy-five acres.

Ques. And with reference to Greenwood avenue, how is it divided?

Ans. About equal, as the plan shows, or the map shows; that is, about as much on one side as the other.

Ques. And what is the nature of the soil as you observed it?

30 Ans. Very impervious nature.

Ques. Impervious to what?

Ans. That is, not absorbing any water.

Ques. Well, what was the nature of the soil?

Ans. Clayey. You mean the contours?

Ques. All over this watershed.

Mr. Cole: That is objected to as being irrelevant and incompetent.

Ques. The question is, what is the nature of the soil included within this watershed?

Ans. It is clayey and rocky.

Mr. Barkalow: There was an objection made to that prior to the time the witness answered the question.

The Court: Well, it was not ruled on at all. Do you insist on your objection?

Mr. Cole: Well, on our theory of this case, may it please your Honor, we must insist on the objection. Of course, at the very outset it is apparent that the counsel for the railway company maintain a different legal position from what they think ought to be maintained, so in order to raise an issue here, and possibly for the future, we have to insist on our objection.

10

The Court: I will allow that answer to stand as to the soil.

20

Mr. Arrowsmith: We ask an exception to both defendants in each case.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ques. Now, what were the conditions as to the surface within this watershed?

30

The Court: Mr. Bakes, what was the date you are speaking of when he was there? Is that fixed? How soon after the accident?

Mr. Backes: I don't know that I asked that. I was under the impression that I had.

Mr. Cole: No; it has not been shown yet.

Ques. When was it that you made this map, the larger map?

Ans. The larger map was made in April, 1902.

Ques. And when was the smaller map made?

Ans. One year later.

Ques. And what was the smaller map made from?

Ans. Actual surveys.

**10** Ques. And what were the conditions as to the soil at the time that you made the survey, natural or improved?

Ans. Natural soil; it had been disturbed on the easterly side with some apparent improvements, not amounting to very much—

Mr. Cole: I object to the witness' comment, expressing an opinion about this thing.

Mr. Backes: That is not expressing an opinion.

**20** The Court: Strike out that part of it where it expresses a view—not much improvement—giving his opinion about it. Just give the conditions.

Ans. Well, it was original; that is, in other words, there was some of it very well grown with vegetation.

Ques. All over the—

Ans. Not all over it; no, sir.

Ques. Well, describe it more in detail then, will you?

**30** Ans. In the way of grass, and the surface was very irregular and of a natural nature.

Ques. All over the—

Ans. Excepting, as I said before, on the easterly side.

Ques. Easterly side of what?

Ans. Or the southeasterly side of Greenwood avenue there were some improvements.

Ques. Of what nature?

Ans. In the way of grading.

Ques. Now, where was the point of interception of the waters that fell upon this watershed or watershed?

Ans. At the intersection of Beechwood avenue and Greenwood avenue, on Greenwood avenue, just east of the railroad tracks.

Ques. Will you indicate it on the map here, or may I do it?

Ans. As shown here. (Indicating on map.) It is marked "Inlet" on the north and south side with the red figures 14.3. 10

Ques. By that do you mean that all the waters falling upon the watershed came to that point?

Ans. They were brought down to that point.

Ques. Was there any other point of escape, as you observed it?

Mr. Cole: I want to interpose at this time an objection to this testimony on the ground that it does not show so far that the conditions as the witness saw them at the time about which he is speaking were the same as the conditions at the time of the accident. 20

The Court: Well, of course, I will have to sustain that, Mr. Backes, I think, unless you show that they were the same. You will have to show that the conditions were the same that he is speaking of.

Mr. Backes: Counsel who is trying the case was not here before, and of course not conversant with the testimony that we had before. We have other witnesses to testify that the conditions at the time this witness made his survey were the same conditions as they were at the time of the accident. 30

The Court: I think you had better prove that before you go any further in examining such a witness, because

counsel will raise objections, and if they can be obviated by other proof I would like it to be put in that way as far as may be practicable.

Mr. Backes: Well, it is not practicable, because we cannot put two witnesses on at one time. You may cross-examine.

The Court: Now, I suppose we will agree to that.  
 10 Of course, while counsel must be allowed a reasonable opportunity to apply such evidence, I don't mean to rule in such a way as to allow that, but if it is not connected I will rule it out and instruct the jury not to consider it. With that understanding you may proceed with your testimony. Mr. Cole takes an objection. Of course, he can have the benefit of it if he desires.

(Question repeated.)

The Court: I will allow that, subject to its being connected by proof that the conditions were the same at  
 20 the time of the accident.

Mr. Cole: We may take the benefit of an exception at this time, and of course if he removes the objection later, all right?

The Court: Yes; of course.

(Whereupon the defendants, by their counsel, pray  
 30 a bill of exceptions, which is hereby allowed and sealed accordingly.)

No cross-examination.

Mr. Backes: I offer for your Honor's inspection and then in evidence the laws of the State of Pennsylvania, Pamphlet Laws of 1851, especially Section 19, of page 674. I offer it in evidence. I have permission to read it?

(Reads.) "That whenever death shall be occasioned by unlawful violence or negligence and no suit for damages shall be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." 10

I offer for your Honor's inspection an act of the Assembly of the State of Pennsylvania of the year 1855. I may say to your Honor that all the books I have here are from our State Library, and I presume they are genuine. It is page 309, Act No. 323, an act passed the 26th day of April, 1855. I ask your Honor's permission to read it. (Reads.)

"Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by authority of the same, that the persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." 20

"Section 2. That the declaration shall state who are the parties entitled in such action. The action shall be brought within one year after the death and not thereafter." 30

I offer it in evidence.

The Court: I admit it.

Mr. Backes: I offer the Constitution of the State of Pennsylvania as printed in the laws of that State for the year 1874.

Mr. Cole: What is the purpose of that offer, Mr. Backes?

10 Mr. Backes: The purpose of it is to show that the Constitution of the State of Pennsylvania—and here we are enforcing a right, a right that the Legislature has given, one that did not exist at common law—a prohibition by the Constitution and a limitation by that instrument upon the powers of the Legislature, that they shall not be permitted to limit recoveries in actions of this kind.

Mr. Cole: Well, we object to it as being irrelevant, and that it has not been pleaded.

Mr. Backes: The offer is withdrawn. We offer the Constitution, Section 1 and Article 17, which provides that all railroads—

Mr. Barkalow: Where is it found?

20 Mr. Backes: 1874. These are the laws of Pennsylvania, and the Constitution is printed in the first part of the laws.

The Court: You are reading now from the Constitution?

Mr. Backes: I am reading from the Constitution.

Mr. Cole: Isn't that the same point over again?

30 Mr. Backes: No, it is not.

Mr. Cole: What is the distinction—I don't see it—between what you offered before and offer now?

Mr. Backes: It is this: that as to the Philadelphia and Reading Railway Company there were contractual rela-

tions existing between the decedent and that company. Their duty to the decedent arose first from a state of facts created by a contract, but not the contract itself. Then we also claim that their duty to the decedent was a public duty, and I purpose offering the Constitution of the State to show that railroads of the State of Pennsylvania are public highways. The question upon the argument of this case—and Mr. Cole was there—upon the argument of the writ of error to remove the non-suit that had been granted in this Court two years ago, so far as the liability of The Philadelphia and Reading Railway, Judge Dixon 10 said, “Does it appear in any part of the case that the railroads of the State of Pennsylvania, like those of New Jersey, are public highways?” And I want to show by the Constitution that they have been declared public highways, and it is a public duty that they owe not to be careless.

Mr. Cole: We object to that upon two grounds: first, that it is necessary for him to plead that Constitution to get its benefit; and secondly, that he has not rested his case upon that ground, but has rested his case by the pleadings upon the ground that by reason of the contractual relation between The Philadelphia and Reading Railway and The Central Railroad of New Jersey, that thereby a duty was imposed upon The Philadelphia and Reading Railway. 20

(Mr. Backes replies.)

Mr. Cole: We make the further point that from the statement made by Mr. Backes as to the purpose of the introduction of the Constitution, it would appear that we would have a case where there might be a recovery, or at least where the claim would be of negligence on the part of one company by reason of one thing, or failure to do a thing, and negligence on the part of the other company 30

for doing or failing to do a thing; so that in the face of a joint allegation or a joint trespass you would have separate trespasses. And it seems to me, as I see the case, sitting here, that is not a possible condition under these pleadings.

(Mr. Backes replies.)

10 The Court: The offer is of a portion of the Constitution, isn't it?

Mr. Arrowsmith: Yes, sir; not referred to in the pleadings.

The Court: I think I should admit this so it will be in the case. I don't know what effect it will have yet, or what further construction I may have to give to it, but I will allow it subject to your objection, gentlemen.

20 (Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Backes: (Reads.) "Railroads and canals.

30 Section 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State and to connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination."

Mr. Cole: Do I understand that you are offering the laws of 1874 of Pennsylvania to prove this constitution?

Mr. Backes: Yes.

Mr. Cole: I make the further objection that that is not the way to prove it. By the statutes of our State you cannot prove the constitution by introducing the pamphlet laws. You can introduce pamphlet laws as such, but I don't understand that that carries with it the proof that that is the constitution because it is there in the pamphlet laws.

The Court: I want to understand, Mr. Backes, about your view, whether there is any statute authorizing the constitution to be put in evidence that way. Our own laws allow the statutes of another State to be put in that way, and Mr. Cole makes that distinct objection now to this offer, and it seems to me there is something in that objection. I want to hear from you if you have any answer to it. If I recollect right, we are limited by our statutes that way to offering the statutes of another State in the ordinary public form, to attempt to show that they are statutes; but I am not clear that you can prove the constitution of the State in that way.

10

20

Mr. Backes: I will pass that for the present, and go on to my other exhibits.

The Court: That is passed for the present.

Mr. Backes: The pamphlet laws of the State of Pennsylvania of the year 1777, page 722.

30

Mr. Cole: May I ask Mr. Backes the purpose of that offer?

Mr. Backes: The purpose is to show that the State of Pennsylvania adopted the common law of England.

Mr. Cole: Well, did you plead that, Mr. Backes?

Mr. Backes: No, sir; I didn't; I didn't have to plead it.

Mr. Cole: Do you think you don't have to plead that?

10 Mr. Backes: No. Why do I have to plead a right, except to plead the effect, to show that the law of Pennsylvania is as the English law was? It is offered in evidence.

Mr. Arrowsmith: That is objected to, upon the ground that it was not pleaded, and also because it is irrelevant and immaterial.

20 The Court: Well, Mr. Backes, I don't clearly see why you should introduce statutes of another State unless you rely upon them in your case; and usually, of course, they have to be pleaded, any right claimed under a foreign statute.

Mr. Backes: We don't claim any right under a foreign statute. We claim a right under the law, whether it be foreign or otherwise, to wit, the law of right that prevails in New Jersey, the old English law itself.

30 The Court: We have got New Jersey laws; that is one thing—

Mr. Backes: My action is not based upon this.

The Court: But you are now offering a certain act, and it appears it has not been in any way referred to in your pleadings in your case. What is the general

rule about that? I think it is that you must plead it if you rely upon it—that is the usual rule—either in complaint or defence.

Mr. Backes: Yes; if my cause of action is dependent on the right, immediately dependent, if my cause of action arose upon it. But to show the Court what the law of another State is I am not obliged to plead it. In other words, the laws of Pennsylvania are as the laws of New Jersey at the time we adopted them, at the time we adopted the constitution and the time of the adoption of the common law. **10**

The Court: I understand the force of counsel's argument, but as far as I see now I think counsel should be allowed to offer in evidence such statutes, if he chooses to, to refer to in the conduct of the case; what effect they may have, of course, I will hear further about that. I will permit counsel to do that and allow the other side an exception. **20**

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Backes: I repeat my offer of the constitution of the State of Pennsylvania, by virtue of the authority of our evidence act, section 1, article 7, which I have already read, which provides—

Mr. Cole: Permit us to renew our objection for the same reason that has already been given. **30**

The Court: Certainly.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Backes: Which provides that all railroads and canals shall be public highways.

The Court: You want to offer the constitution as contained in the session laws?

Mr. Backes: Yes, sir. Your Honor is satisfied that the book is genuine and contains the pamphlet laws?

10 The Court: Yes; I will admit it.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

20 Mr. Backes: I offer the laws of 1852 of the State of Pennsylvania, Act No. 382, approved April 8, 1852, organizing, or rather incorporating the Philadelphia, Easton & Water Gap Railroad Company, which is the predecessor in title of the Philadelphia & Reading Railroad Company.

I offer the act of 1853 of the State of Pennsylvania, Act No. 353, section 11, on page 630. (Reads.)

30 "Section 11. That the name, style and title of the Philadelphia, Easton & Water Gap Railroad Company be and the same is hereby changed to and said corporation shall hereafter be known by the name of "The North Pennsylvania Railroad Company," with all the rights, privileges and immunities, and subject to all the provisions and penalties provided for and enjoined by the act incorporating said company, and the several supplements thereto."

The Court: It is admitted.

Mr. Backes: I offer the laws of the State of Pennsylvania for the year 1870, Act No. 8, to be found on

page 31. It authorizes railroad companies to lease or become lessees and make contracts with other railroad companies, incorporations and parties.

I offer the act of 1861 of the State of Pennsylvania, Act No. 262, to be found on page 259, entitled "An act concerning the sale of railroads, turnpikes, bridges and plank roads." These are offered for the purpose of qualifying some documentary testimony which I have from the Courts of the State of Pennsylvania.

I offer the act of 1878, Laws of Pennsylvania for the year 1878, Act No. 184, page 145, entitled "A supplement to an act entitled 'An act concerning the sale of railroads, canals, turnpikes and plank roads,' approved the 8th day of April, A. D. 1861, extending the provisions of said act to coal, iron, steel, lumber or oil, or mining, manufacturing, transportation and telegraph companies in this commonwealth." 10

I offer the act in the Pamphlet Laws of the State of Pennsylvania for the year 1887, Act 164, to be found on page 278, entitled "An act to amend the first section of an act entitled 'A supplement to an act entitled 'An act concerning the sale of railroads, canals, turnpikes and plank roads,' approved the 8th day of April, A. D. 1861, extending the provisions of said act to coal, iron, steel, lumber or oil, or mining, manufacturing, transportation and telegraph companies in this Commonwealth, extending such act so as to embrace all sales made under and by virtue of power of sale contained in any mortgage or deed of trust, without any process or decree of a court in the premises.'" 20

I offer the laws of the State of Pennsylvania for the year 1715, page 78. Our conveyance act provides that exemplified copies of the records of other States may be admitted in evidence in this State, provided they are admitted in evidence in the State from which they come; and this is for the purpose of showing that such an exemplified copy or certified copy is admissible in their own 30

Court. (Reads.) "Cap. 9.—An act entitled 'An act for the acknowledgement and recording of deeds.'"

I offer the Assembly Laws of the State of Pennsylvania for the year 1834, Act No. 49, on page 68, entitled "An act to make records and exemplifications of records evidence."

10 I offer the laws of the State of Pennsylvania for the year 1846, Act No. 100, to be found on page 124, entitled "Supplement to existing laws in relation to recording deeds, approved the 14th of March, 1846."

I offer the laws of 1870 of the State of Pennsylvania, Act No. 2, to be found on page 13, entitled "An act to aid in perfecting titles to land," which provides that where a deed for property is recorded in separate counties—and one of these deeds, a railroad deed, is recorded in five counties in Pennsylvania—that the record of it from one of the counties in which it is recorded, exemplified, may be admitted in evidence in the State of Pennsylvania.

20 I offer the Carlisle rule of mortality—the Carlisle Mortality Table.

Mr. Cole: We object.

Mr. Backes: I offer the Carlisle Mortality Table, as found on pages 143, 144 and 145 in Wolf's Inheritance Tax Calculations; also tables of annuities, dower, curtesy, mortality, expectation of life, vested and contingent remainders, etc., by the consent of the other side, without further proof.

30 Your Honor will remember that the name of the corporation, The Easton and Water Gap Railroad Company, was changed to The Northern Pennsylvania Railroad Company. I am now offering an agreement between The Northern Pennsylvania Railroad Company and The Delaware and Bound Brook Railroad Company and The Central Railroad Company of New Jersey, the latter company the defendant in this case, dated March 31, 1876.

Mr. Cole: Is this the agreement referred to in the declaration?

Mr. Backes: Yes.

Mr. Cole: We object to the introduction of this agreement upon two general grounds: First, that it is not sufficiently set out and pleaded in the declaration to notice the defendants; and it is irrelevant, immaterial and incompetent, for the reason that its existence in no way casts upon the defendant, The Philadelphia and Reading Railway Company, any duty toward the plaintiff's decedent. **10**

Mr. Arrowsmith: The defendant, The Central Railroad Company of New Jersey, objects upon the ground that it is irrelevant and immaterial, and also because it is not properly set out in the pleadings.

The Court: I will admit the offer in evidence at this time, so it may be in the case. **20**

Mr. Backes: Let me disavow any notion that may exist in the mind of counsel on the other side that I am basing my right of action upon this agreement. This agreement between these parties sets out circumstances and conditions from which our action arose.

I am also offering it for the purpose of showing that when the decedent was in the engine of The Central Railroad Company of New Jersey, upon the property of The Philadelphia and Reading Railway Company, he was there of right, he was there by invitation, there under contract, and not as a mere licensee or trespasser to whom The Philadelphia and Reading Railway Company owed nothing further than to refrain from wilful neglect or wilful violence. **30**

The Court: It is admitted.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Backes: The agreement was made the 30th day of March, 1876, and it reads, after stating who the parties are. (Reads.)

(Agreement marked Exhibit P1.)

10 Mr. Barkalow: Subject to the objection already made.

Mr. Backes: You don't object to the proof?

Mr. Barkalow: Oh, no. In other words, the agreement goes this far: that he need not bring here the original agreement; that these are copies.

20 Mr. Backes: Now I offer in evidence an exemplified copy of the record of the Recorder of Deeds of the county of Philadelphia and State of Pennsylvania, certified by the Recorder of Deeds, exemplified by Meyer Sulzberger, Presiding Judge of Court of Common Pleas No. 2, of Philadelphia, and then in turn by R. M. Thayer, Prothonotary of the county. It is a deed of lease made by The North Pennsylvania Railroad Company, the same railroad company mentioned in the agreement I just read, to The Philadelphia and Reading Railroad Company, not the defendant in this case, but its predecessor. One of the defendants in this case is called the railway company.

30 That is the distinction. It afterwards went into the hands of a receiver and was sold out by the trustees and a conveyance made to The Philadelphia and Reading Railway Company, the defendant in this case. It bears date the 14th of May, 1879, and is recorded in the office of the Recorder of Deeds of the county of Philadelphia, in Book L. W. No. 39, page 481, &c. It conveys or

leases—that is, The Northern Pennsylvania Railroad Company leases to The Philadelphia and Reading Railroad Company, for nine hundred and ninety-nine years, apparently all of its real and personal property, but especially the property of The Northern Pennsylvania Railroad Company at Jenkintown, running from Berks street through Jenkintown, and from Jenkintown up to the Delaware River, part of The Northern Pennsylvania Railroad Company's property.

(Lease marked Exhibit P2.)

10

The Court: Does that lease follow the agreement or the agreement follow the lease, the agreement between The North Pennsylvania, The Bound Brook and The Central Railroad Company of New Jersey?

Mr. Backes: The lease from The Northern Pennsylvania Railroad Company to The Philadelphia and Reading Railroad Company is on May 14, 1879, three years after; and this lease for nine hundred and ninety-nine years makes it subject to, and the lessee in that lease assumes the obligations of The Northern Pennsylvania Railroad Company as contained in that contract.

20

I offer in evidence further, your Honor, an exemplified copy of a record of the Recorder of Deeds of the county of Montgomery, in the State of Pennsylvania—that is the same county in which Jenkintown is situated, and so alleged in the pleadings and not disputed—exemplified by Aaron S. Schwartz, Presiding Judge of the Court of Common Pleas of the 38th Judicial District of the State of Pennsylvania, and in turn by J. Milton Brooke, Prothonotary; of a deed made by the Philadelphia Company for Insurance on Lives and Granting Annuities, as trustees, to Charles H. Coster, et als. The purpose of offering these various laws of the State of Pennsylvania was to show

30

that a railroad company could be sold out by trustees under a mortgage, and that it could be purchased by individuals, and that they may reorganize into a company—and that is exactly what was done—as showing the title as it was continued from the old Easton and Water Gap Railroad Company. It was made to Charles H. Coster and Francis Lynde Stetson, dated October 23, 1896, and conveys to them all of the property that belonged to The Philadelphia and Reading Railroad Company; and in and

**10** by the description that this deed contains is described the railroad property which was formerly The Northern Pennsylvania Railroad, running from Berks street, in Philadelphia, to Jenkintown, and from Jenkintown to the middle of the Delaware River at or near Trenton.

The Court: The Northern Pennsylvania Railroad, wasn't it?

**20** Mr. Backes: The Northern Pennsylvania Railroad Company, which afterwards leased to The Philadelphia and Reading Railroad Company, and The Philadelphia and Reading Railroad Company, under a trustee mortgage made to the Pennsylvania Company for Insurance on Lives and Granting Annuities, as trustees; the latter sold it to Charles H. Coster and Stetson at public auction. The deed recites the confirmation of sale by the court and so on.

(Deed marked Exhibit P3.)

**30** I offer a deed made by The Philadelphia and Reading Railroad Company, under a decree of foreclosure, and in a proceeding where Chief Justice Paxson was appointed one of the Receivers of The Philadelphia and Reading Railroad Company. The court by the decree in that cause directed that not only shall the trustee, The Pennsylvania Company for Insurance on Lives and Granting Annuities,

make the deed to make the sale after confirmation by the court, but furthermore, that The Philadelphia and Reading Railroad Company, as a corporate body, shall make a conveyance to Charles H. Coster and Francis Lynde Stetson. This is an exemplified copy from the office of the Recorder of Deeds of the county of Montgomery, in the State of Pennsylvania, exemplified by Aaron S. Schwartz, President Judge of the Court of Common Pleas, and J. Milton Brooke, Prothonotary.

10

The Court: And this conveys what?

Mr. Backes: This conveys all the property that was sold under the mortgage, and includes the railroad tracks upon which this accident happened. That is dated the 23d day of October, 1896, recorded in the office of the Recorder of Deeds of the county of Montgomery, in Book 418 of Deeds, page 25.

(Deed marked Exhibit P4.)

20

I offer an exemplified copy of the certificate of organization of The Philadelphia and Reading Railway Company, the defendant in this case, exemplified by Samuel W. Pennypacker, Governor of the State, and by Frank M. Fuller, Secretary of the Commonwealth—the certificate of organization authorized by these various acts that I offered in evidence. It is duly acknowledged and filed in the office of the Secretary of State on the 17th day of November, 1896.

30

(Certificate marked Exhibit P5.)

Now we offer a deed by Charles H. Coster and Stetson, the organizers, and to whom the property was sold, to The Philadelphia and Reading Railway Company, made the 16th day of November, 1896. The copy is certified

by the Recorder of Deeds of the county of Montgomery, in the State of Pennsylvania, and certified to be recorded in Deed Book 418, page 402, and that being exemplified by Aaron S. Schwartz, President Judge of the Court of Common Pleas of the 38th Judicial District of the Commonwealth of Pennsylvania, and in turn by J. Milton Brooke. By that deed is conveyed to The Philadelphia and Reading Railway Company, the defendant in this suit, the railroad property upon which the accident happened as part and parcel. It is dated November 16, 1896.

10

(Deed marked Exhibit P6.)

Now I offer a further agreement made on the 13th day of June, 1898, by The Baltimore and Ohio Railroad Company, The Philadelphia and Reading Railway Company,—they are now, your Honor will observe, the owners of this property; it is after they are reorganized,—The Philadelphia and Reading Railway Company, The Central Railroad Company of New Jersey, and The Staten Island Transit Railroad Company. It is entitled for the establishment and operation of the new line, with a recital as to the names of the parties and how it shall be hereafter styled.

20

Mr. Cole: This offer is objected to, of course, for the same reasons as we interposed to the offer of the other agreement.

30 The Court: As irrelevant and immaterial to this issue?

Mr. Cole: Yes.

Mr. Barkalow: And on the part of The Central Railroad Company of New Jersey objection is made the same as before.

The Court: It is admitted, subject to objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Backes: (Reads agreement.) It is a traffic arrangement between these four companies that the railroad—and which includes that part of the railroad on which this accident happened—shall be used by them for the purpose of carrying on their respective business, each company supplying its own particular track and its rolling stock, and that is arranged for. 10

The Court: According to the agreement, the rolling stock and engines of each company, are they authorized and privileged to run on the other roads, according to the agreement?

Mr. Backes: I wouldn't want to say that, your Honor. I think it is, but whether that is so or not, it is already provided for. I don't care to make a positive declaration. 20

The Court: I thought I would like to have some part of this agreement or some reference that I can understand.

Mr. Backes: So far as The Philadelphia and Reading and Central Railroad Companies are concerned, they are already bound up to that by the agreement of 1876. The Northern Pennsylvania Railroad Company, to whose property The Philadelphia and Reading Railway Company succeeded, and whose liabilities it assumed at that time, entered into an agreement with The Central Railroad Company of New Jersey, and really this is in the nature of an ancillary agreement, wherein The Philadelphia and Reading Railroad Company and The Central 30

Railroad Company of New Jersey could have been put in as one party; but they are already joined and combined in interest with The Baltimore and Ohio and Staten Island Railroad Company.

(Agreement marked Exhibit P7.)

10 The main object of all of these offers is to show that The Philadelphia and Reading Railway Company owned this track at the place of this accident. If I had not produced all this evidence, other counsel not so gracious as these counsel that are here might say, "You have not proved the title." That is the only aim of it. Counsel would have saved me all of this trouble.

---

MRS. HELEN FERGUSON, sworn for Plaintiff.

20 Direct examination.

By Mr. Backes:

Ques. You are the plaintiff in this case, Mrs. Ferguson?

Ans. Yes, sir.

Ques. You live where?

Ans. Point Pleasant.

Ques. And how long have you lived at Point Pleasant?

30 Ans. About twenty-two years, I guess.

Ques. You are the widow of Charles Ferguson?

Ans. Yes, sir.

Ques. When were you married to him?

Ans. Twenty-two years ago.

Ques. And after that lived at Point Pleasant all the time?

Ans. Yes, sir.

Ques. Did you have any children by your husband?

Ans. Yes, sir.

Ques. How many?

Ans. Seven.

Ques. On the 18th day of May, 1900, how many of those children were living?

Ans. Four.

Ques. And their names?

Ans. Eleanor and Frances and Thomas and John.

Ques. How old was Eleanor?

10

Ans. Sixteen.

Ques. I mean on the 18th day of May, 1900; how old was she then?

Ans. Sixteen.

Ques. On that day how old was Frances?

Ans. Fourteen.

Ques. Thomas?

Ans. Twelve.

Ques. And John?

Ans. Nine.

Ques. Your husband died on the 18th day of May, 1900, did he? **20**

Ans. Yes, sir.

Ques. When did you see him before that? When did you see him alive last?

Ans. Thursday night.

Ques. And what day was it that he died?

Ans. Friday.

Ques. Did you see his body after his death?

Ans. Yes, sir.

Ques. Where? **30**

Ans. When they brought him home.

Ques. Now where was your husband employed at the time of his death?

Ans. On the railroad; worked for the railroad.

Ques. Which railroad?

Ans. The Central.

Ques. Central what? The Central Railroad of New Jersey?

Ans. Yes, sir.

Ques. And where was he working at the time of his death?

Ans. Jersey City.

Ques. On what line?

Ans. The main line.

Ques. Between where?

10 Ans. Jersey City and Philadelphia, I think he said.

Ques. How long had he been working on the main line?

Ans. I don't know whether it was a month or over a month.

Ques. In what capacity was he serving the Central Railroad Company of New Jersey, while working on the main line?

Ans. Fireman.

20 Ques. Where did he work before he went on the main line between New York and Philadelphia?

Ans. From Point Pleasant to Jersey City.

Ques. How long had he worked there on that line between Point Pleasant and Jersey City?

Ans. Oh, a good while.

Ques. In what capacity? What did he do?

Ans. Fireman.

Ques. Well, you say a good while. Can't you tell us about how long?

Ans. I don't know; it was nine or ten years; maybe it is more. I kind of forget.

30 Ques. Do you know—you may answer this yes or no—why it was that he was transferred from the Long Branch Division—that is, between Point Pleasant and Jersey City—to the main line?

Mr. Cole: That is objected to as irrelevant.

Ques. Do you know—yes or no—do you know of your own knowledge?

Mr. Cole: I think it is irrelevant. I don't see what it has to do with the case. I object to counsel stating the purpose; I think it appears in the question. He has asked her why her husband was transferred from one department to another. I say that is irrelevant, and I don't think counsel ought to examine upon it. It seems to me it is a plain question, that is either competent or not.

10

Mr. Backes: I didn't ask her why; I asked her whether she knew why.

Mr. Cole: I understand, but then the next question must be, if it has any relevancy at all, why he was.

Mr. Backes: Then I submit that because the second question is going to be irrelevant, a preceding question which is relevant is not a proper subject of objection.

The Court: I don't see how she could know by any legal channel why he was transferred. What he would say certainly would not be evidence. I merely suggest that.

20

Mr. Backes: Yes; if I regard her evidence as coming from that source alone I would not ask her the question, for that would not be binding on the defendant. The subject matter itself might be relevant but the nature of the testimony would not be admissible.

The Court: Do you press that question, as to whether she knows or not? You ought to have some knowledge of the basis of her information in examining her.

30

Mr. Backes: I will withdraw it. She may know. I understood she did, but I didn't know it from this witness. I will establish it, however, by other witnesses.

Ques. How old was your husband?

Ans. Forty.

Ques. On the 18th day of May, 1900?

Ans. Forty.

Ques. How old were you?

Ans. Thirty-nine.

Ques. And what was the condition of your husband's health up to the time of his death?

Ans. Good.

10 Ques. What?

Ans. All right; it was good.

Ques. Was he a heavy man? Can you describe your husband?

Ans. Well, he was tall and pretty stout.

Ques. You say his health was good?

Ans. Yes, sir.

Ques. Do you know what wages your husband earned?

Ans. Yes, sir.

20 Ques. How much did he earn from the Central Railroad Company of New Jersey as its fireman?

Ans. About \$80 to \$85 a month.

Ques. Did your husband work every day?

Ans. Yes, sir.

Ques. Work extra?

Ans. Sometimes.

Ques. Do you know whether they are paid by the day's work or month's work, or the distance they travel?

Ans. They are paid every month.

30 Ques. That is the time of payment, yes. Now, how do you know that he got \$80 to \$85 a month? How do you know that?

Ans. He gave me the money?

Ques. Who conducted the household?

Ans. Myself.

Ques. And from what source, from what revenues? Where did you get the money to do it?

Ans. My husband's money.

Ques. And you are living at Point Pleasant now with your children?

Ans. Yes, sir.

Cross-examination.

By Mr. Cole :

Ques. Mrs. Ferguson, do you know in what year and what month your husband was born? **10**

Ans. No; I couldn't tell that now.

Ques. You haven't any record of it?

Ans. Home I have.

Ques. Do you know what the record says as to the time of his birth?

Ans. Well, I couldn't tell you.

Ques. You don't remember?

Ans. No, sir; I have looked it up.

Ques. But you have seen the date of his birth?

Ans. Yes, sir. **20**

Ques. And the year and the month in the record at home?

Ans. Yes, sir.

Ques. Did you keep any record of the money that your husband turned over to you?

Ans. What do you mean?

Ques. Why, when he would come to you each month and turn the money over to you that he earned, did you keep any record, put it down in a book?

Ans. No, sir.

Ques. You never put it down in any book anywhere, **30**  
the money that your husband turned over to you?

Ans. No, sir.

Ques. Now you say he worked every day?

Ans. Yes, sir.

Ques. Sure about that?

Ans. Yes; every day that he was able to work.

Ques. Every day that he was able to work?

Ans. Yes, sir.

Ques. Were there some days that he was not able to work?

Ans. Once in a while when he was sick so he couldn't work.

Ques. When he was sick what was the matter with him?

Ans. Well, bad colds.

10 Ques. Well, how often was he sick so that he couldn't work?

Ans. Well, sometimes it was a day, and I don't know whether it was any longer than that or not.

Ques. Don't you know, Mrs. Ferguson, that it is a fact that the engineers and firemen on the Central Railroad do not work every day, that they have to lie off a day or two in every week?

Ans. No; I didn't know it.

Ques. And you say your husband did not lie off?

Ans. No, sir.

20 Ques. And he worked every day except those days that he was sick; is that true?

Ans. Yes, sir.

Ques. Is that true?

Ans. As far as I know.

Ques. Now, can you tell the jury when—that is, I mean what month—he began to work on the line between Jersey City and Philadelphia?

Ans. No; I couldn't tell on what date, for I don't know.

30 Ques. You don't know how long it was then that he had been working on that line at the time of his death?

Ans. No; I couldn't tell you.

Ques. You don't know that?

Ans. I don't know whether it was four weeks or six weeks. It was not very long.

Ques. Mrs. Ferguson, can you tell the jury how much money your husband turned over to you in the month of May, 1899?

Ans. No.

Ques. Can you tell the jury how much money he turned over to you in June, 1899?

Ans. No, sir; I couldn't tell.

Ques. Can you tell how much money he turned over to you in July, 1899?

Ans. No.

10

Ques. In August, 1899?

Ans. No.

Ques. In September, 1899?

Ans. No; I couldn't tell you.

Ques. In October, 1899?

Ans. No, sir.

Ques. In November, 1899?

Ans. No, sir.

Ques. In December, 1899?

Ans. No, sir.

20

Ques. In January, 1900?

Ans. No, sir.

Ques. In February, 1900?

Ans. No, sir.

Ques. In March, 1900?

Ans. No; I couldn't tell you.

Ques. In April, 1900?

Ans. No.

Ques. In May, 1900?

Ans. No.

Ques. You don't remember how much he turned over in those months? 30

Ans. I don't remember; no.

Ques. What time of the month did he turn the money over to you?

Ans. Well, I don't know. He mostly got his wages on the 11th or 12th.

Ques. Well, it was about the 11th or 12th that he turned it over to you?

Ans. Yes, sir.

Ques. Now, Mrs. Ferguson, will you please say in what month from May, 1899, to May, 1900, that your husband ever turned over to you as much as \$80?

Ans. From when?

Ques. From May, 1899, to May, 1900. What month of those months did he turn over to you \$80?

10 Ans. Well, I couldn't remember.

Ques. You don't remember?

Ans. No, sir.

Ques. Now, Mrs. Ferguson, I call your attention to these figures and ask you if you remember that these are about the amounts that your husband earned during those months: In May, 1899, \$73.62; June, \$73.24; July, \$66.36; August, \$73.20; September, \$75.34; October, \$61.62; November, \$69.48; December, \$72.22; January, 1900, \$62.18; February, 68.66; March, \$80.30; April, \$74.10; You don't recognize any of those amounts, do you?

20 Ans. No; I don't remember. I know he didn't draw as much just before he went to Jersey City on that day run that he had, but on the night freight he drew about \$80 a month, and sometimes \$89.

Ques. He hadn't worked the night freight, had he, for over a year prior to this time?

Ans. No; they took him from that and put him on the fast train.

Ques. I say it was a year before his death that he had been working there?

30 Ans. I didn't know it was a year he was working there.

Ques. Do you remember when he quit the night freight?

Ans. No, I don't.

Ques. You don't know much about anything that he did except what he told you, do you?

Ans. No; I don't know.

Ques. You depended on what he told you about those things, didn't you?

Ans. Yes, sir.

Ques: Now you are guessing, aren't you—

Mr. Backes: I don't think that is fair. She testified that he handed her the money.

Mr. Cole: Of course she testified to that, but I am asking a question about his work and the trains he worked on. **10**

Ques. Do you profess to have a very clear recollection, that you can tell this jury just how much Mr. Ferguson was getting each month?

Ans. No; I don't know as I can.

Ques. When you state those figures as \$80 or \$85 a month you are stating that that is as much as he ever handed over to you, are you not?

Ans. No; I know two months he made \$88 and \$89. **20**

Ques. When did he ever make \$88.

Ans. I remember when he was on the night freight—

Ques. And that was how long?

Mr. Backes: I object to counsel interrupting.

Ans. When he worked he worked overtime, you know; he didn't get in sometimes till eleven or twelve o'clock in the day.

Ques. That was when he worked on the freight? **30**

Ans. Yes, sir.

Ques. So he was working more than a day at a time; he was putting in more than one day in each day, wasn't he, in twenty-four hours?

Ans. I don't know. He worked that night.

Ques. He worked extra in order to make this eighty some dollars, didn't he?

Ans. Yes, sir.

Ques. Did you know that he got paid by the miles that he ran?

Ans. I don't know anything about that.

Ques. You didn't know anything about that?

Ans. No, sir.

Ques. Did you keep any record of the money that you turned over to him or that he kept out of his wages?

10     Ans. Oh, well, sometimes he used to keep two or three dollars out. I never asked him what he kept out. He gave me enough to do with and I suppose he--and he used to sometimes take two or three dollars, I don't know exactly which.

Ques. Of the money that he turned over to you, did you ever give any of it back to him?

Ans. Well, sometimes he would want a couple dollars, two or three dollars.

Ques. Who bought his clothes?

Ans. I mostly done that.

Ques. Who bought his tobacco?

20     Ans. He bought that himself.

Ques. Bought that himself?

Ans. Yes, sir.

Ques. Mrs. Ferguson, how long had Mr. Ferguson been a fireman on the Central Railroad of New Jersey prior to his death?

Ans. I don't know; ten or twelve years, I guess.

Ques. Well, now, you were the one that had the money, were you, that he received, outside of the little that you say he kept?

30     Ans. Yes, sir.

Ques. Now how much had you saved, accumulated, as savings of the money he had turned over to you during those years?

Mr. Backes: That is objected to as irrelevant and not cross-examination. It cannot certainly give us any light

upon the loss that the wife and children sustained by reason of the death of her husband.

Mr. Cole: It may do this: The witness comes here, I submit it now appears, and she is guessing to some extent as to the amount of money he earned. She kept no books and is depending on her memory; and it seems to me the question of how much money had been saved would aid the jury to some extent in determining how much he earned. If she came here with the figures put down definite and certain, it would be different. 10

The Court: I think that is a little too remote, to try to prove in that way what she may have saved. I think it is too indefinite, Mr. Cole.

Mr. Cole: Does your Honor exclude it?

The Court: Yes.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.) 20

Mr. Backes: Is this examination to be continued by the counsel of the other company?

The Court: I cannot tell.

Mr. Backes: I say if it is, then I object to the counsel for the other company praying an exception. I have no objection to both defendants conducting the cross-examination. 30

The Court: I don't know either. I had supposed that Mr. Cole, as far as the cross-examination was concerned, was acting as the cross-examiner.

Mr. Cole: I am cross-examining for the Philadelphia & Reading Railroad Company. I am not responsible for anything more than that.

Mr. Backes: Then I object on the other side getting an exception.

The Court: Well, I presume that the other side will not insist upon an exception if they were not represented  
**10** by Mr. Cole.

Mr. Cole: There is nothing before your Honor. I am cross-examining the witness and your Honor overruled my question and I took an exception. There is nothing more before the Court.

The Court: Well, it is generally allowable for counsel and the Court to agree whether there is anything allowed or not.

**20** Mr. Arrowsmith: I will say for the benefit of counsel on the other side that I do not intend to ask any questions except those asked by Mr. Cole unless you force me to do it by not allowing us the benefit of an exception.

Mr. Backes: You don't expect to repeat?

Mr. Arrowsmith: No, sir.

**30** Mr. Backes: Then I have no objection.

Ques. Do you know that during the year just before Mr. Ferguson's death that he worked extra time?

Ans. I don't know; I couldn't tell you; it has been too long ago.

Ques. Now, how many days do you think he lost from May, 1899, to May, 1900, that he did not work?

Ans. I don't know.

Ques. You don't know?

Ans. No, sir.

Ques. You kept no account of it?

Ans. No.

Ques. Now what was ever the matter with him except those colds that kept him from work?

Ans. Nothing that I know of. He would take a heavy cold and have colds, the only thing he would have.

Ques. How long would those heavy colds prevent him from working, how many days? **10**

Mr. Backes: I object to that as asked and answered. She said sometimes one day and sometimes two days.

Mr. Cole: Well, if it is I don't want another answer. My memory is not quite so good as Mr. Backes' about that, perhaps.

Ques. How old was Mr. Ferguson when you married, if you know? **20**

Ans. Well, I can't remember.

Ques. You don't know how old he was at the time you were married?

Ans. I think he was twenty-four.

Ques. You don't remember that?

Ans. No, sir; I don't know how old he was when we were married. I know how long I have been married. Twenty-four, I guess. I can't tell you. If I can't tell you the truth I won't tell you at all.

Ques. You think he was about twenty-four when you were married? **30**

Ans. I think so. I can't tell you. You will have to reckon it up yourself. You can tell how long I have been married.

Mr. Backes: There were witnesses that we were unable by the process of our courts to produce in New Jersey on this trial. It was, therefore, necessary for me to take depositions *de bene esse*, and I now am going to read to the jury the testimony of James F. Martell, taken upon notice to the counsel of the defendant company.

10 Mr. Cole: We have in behalf of the Philadelphia & Reading Railroad Company objections to the offer of these depositions as a whole, and then we have specific objections. We make a general objection, first, that it appears by the certificate of the Master that the testimony was taken stenographically. There is nothing in the record to show that in taking it stenographically there was a compliance with the statute which permits it to be taken stenographically. It does not appear that the person before whom the Master took the affidavit was authorized by the law of the State where it was taken, to wit, Pennsylvania, to take affidavits. The notice of the taking of the testimony does not comply with the statute, in that  
20 it does not show that the witness whose testimony was to be taken was either a material witness or a witness who resided out of the State, which the statute requires before such deposition can be taken. It is also a fact that a commission issued in this case by your Honor to take the testimony of this witness before the testimony was taken by way of a deposition, and interrogatories attached; our insistence being that as that commission issued, until it was in some way gotten rid of, that they were bound to take their testimony under the interrogatories, and were  
30 not permitted to take it under a notice by depositions.

The Court: Does other counsel for the New Jersey Central wish to object?

Mr. Barkalow: I think the only objection we can make appears right in the deposition itself.

The Court: Then generally you don't make any objection? It will come in on the reading of the deposition.

(Mr. Backes replies.)

Adjourned till December 13, 1905, 10 A. M.

---

TOMS RIVER, N. J., December 13, 1905. 10

Trial of the cause resumed at 10 A. M.

Mr. Backes: I observe that the commissioner failed to make return as to the manner in which he returned the deposition to the clerk, failed to certify that he personally delivered that to the clerk. Counsel for both defendants say they make no point of that and waive that. I offered to send for Mr. Gnichtel and have him come down here, or have the Supreme Court Clerk come, but they said there was no need of that. I offer to go on the stand and prove that Mr. Martell is a resident of the State of Pennsylvania. 20

Mr. Cole: We admit that.

The Court: I think the materiality ought to appear before the deposition is admitted, and I think Mr. Backes can swear to that.

Mr. Cole: I think we are willing to say that Mr. Backes will swear that this testimony is material, but our thought is that that is not the way to prove it. We don't want to waive that point. 30

Mr. Backes: I cannot correct the paper if the paper is faulty, but I can establish the fact. I don't want it to

go upon record simply that they believe that I will swear to it; I want it to go further; that it appears that he is in fact a material witness.

The Court: Well, you be sworn then and testify to these facts. It is quite usual in these matters.

---

**10** JOHN H. BACKES, sworn for plaintiff.

The Witness: I am the counsel with Clarence H. Murphy, the attorney of record in this case, for the plaintiff. I know James F. Martell. He was the ticket agent of the Reading Railroad Company at Jenkintown station. In the preparation of the case I met Mr. Martell, and from what he told me of the case as it had been developed so far, I concluded—

**20** Mr. Cole: At this point counsel for the Philadelphia & Reading Railway Company interposes the objection that if the purpose is to show by the witness that Mr. Martell was and is a material witness within the meaning of the evidence act, which permits the taking of depositions, that this is not the method of proof.

**30** The Court: I will allow your objection to that. I have not directed the witness in any particular line of answer. It is for the witness to simply confine himself to his knowledge as counsel in the case of Mr. Martell, whether he resides in Pennsylvania and is a material witness in his judgment as counsel in this case.

The Witness: I say I examined Mr. Martell also about his testimony in the trial of this cause two years ago, and Mr. Martell is a material witness for the plaintiff in this cause. The cause is one—

The Court: Well, you need not give any reason for it. You have testified to that.

The Witness: Well, I simply demonstrate how he is.

The Court: Well, I know; but you must be careful to proceed on legal grounds, not as a witness to give facts.

The Witness: It is only this: that when we apply to your Honor for the postponement of a case because of the absence of a material witness, while the strict form requires counsel to make affidavit that the evidence is material, yet the practice is to require the facts to be stated. 10

The Court: Any facts that you want to testify to, now is the time to testify to them.

The Witness: Mr. Martell lives in Germantown, Pennsylvania. He lives with his mother. He was formerly the ticket agent of the Philadelphia & Reading Railroad Company at Jenkintown. His mother has a hotel known as Martell's saloon, where Mr. Martell is now employed. He lives with his mother. That is all. 20

Mr. Cole: I have no questions. I objected to the method of proving that this witness is a material witness. Now your Honor permits the witness to testify that he is material, and I want an exception to the testimony.

The Court: You may have that. 30

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL]  
J. S. C.

Mr. Backes: Shall I read the testimony?

The Court: I want to know whether they have anything to add in reply to you.

Mr. Cole: No, sir; I have nothing more to say. Now I understand the Court permits the depositions to be offered?

10 The Court: Yes.

Mr. Cole: And we take an exception to your Honor's ruling.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL]  
J. S. C.

20

(Mr. Backes proceeds to read the deposition of James Martell as follows:)

30 Taking of testimony, etc., in the above case, on Saturday, the second day of December, 1905, at the hour of 10.30 in the forenoon, at the office of Albert E. Peterson, No. 14 South Broad Street, in the city of Philadelphia, in the State of Pennsylvania, before the subscriber, a Master in Chancery of the State of New Jersey, of James F. Martell, which testimony was taken on the part of the plaintiff, in the presence of John H. Backes, Esq., as representing the attorney of the plaintiff, and William A. Barkalow, Esq., of counsel representing the Central Railroad Company of New Jersey.

Mr. Backes, on the part of the plaintiff, offered in evidence the notice to take this testimony acknowledged by Thompson & Cole, also a notice acknowledged by George Holmes, the attorney for the Central Railroad Company of New Jersey; also offered the oath of the Master before whom the testimony is to be taken, which is annexed to one of the copies of the notice.

---

JAMES F. MARTELL, being duly sworn on the part of the plaintiff, testified as follows: 10

Direct examination.

By Mr. Backes:

Mr. Barkalow: I desire to enter an objection on the part of the Central Railroad Company of New Jersey to the taking of the testimony *de bene esse*, because of the fact that a commission has been issued under the order of the Court, or a Judge, attached to which are certain interrogatories, and our insistent is that the depositions should be taken pursuant to the commission and interrogatories served. 20

Ques. You live where?

Ans. 5528 Lloyd Street, Germantown, Pennsylvania.

Ques. Were you employed by the Philadelphia & Reading Railway Company, May 18, 1900?

Ans. Yes, sir. 30

Ques. In what capacity?

Ans. As ticket clerk.

Ques. Where?

Ans. At Jenkintown station.

Ques. Of what road?

Ans. Of the Philadelphia & Reading Railway Company.

Ques. How long had you served the company in that capacity prior to that time?

Ans. I guess it was upward of eleven years.

Ques. Do you remember on the 18th day of May, 1900, an accident happening at that station?

Ans. Yes, sir.

Ques. Wherein an engine attached to a train was derailed?

Ans. Yes, sir.

**10** Ques. What time in the day did that happen?

Ans. I guess it was around between half past three and four o'clock.

Ques. In which direction was the train going?

Ans. It was going east.

Ques. From Philadelphia to New York?

Ans. Yes.

Ques. What was the train known as?

Ans. 508.

Ques. Did it have any other name more familiar?

**20** Ans. They called it the Royal Blue Line.

Ques. A train of which company as you understood it?

Ans. It was operated by the P. & R. at that time.

Ques. The Royal Blue Line operated by the P. & R.?

Ans. Of course I won't swear positively to that, only from hearsay.

Ques. How was the train made up, do you know?

Ans. I think there was an engine, two parlor cars, a baggage and passenger coach; of course I could not swear positively.

**30** Ques. What happened to the train as you saw it on the day and time that you stated?

Ans. It ran off the track.

Ques. Where?

Ans. At the crossing on Greenwood avenue.

Ques. Where is the crossing at Greenwood avenue with reference to the station?

Ans. It is south of the station.

Ques. Toward Philadelphia?

Ans. Yes.

Ques. What is the nature of that crossing? Crossing of what?

Ans. It was a street crossing at that time?

Ques. Crossing over the railroad?

Ans. Yes.

Ques. Won't you just tell us what you saw; tell us everything, where you were standing, what you were doing and what you saw?

Ans. I was looking out of the window at the time, and I saw the train approaching, run through the water; what attracted my attention most was the wavering of the smokestack, and that was all I waited to see; I ran then.

Ques. You say you were looking out of the window; where were you?

Ans. In the ticket office.

Ques. Where was the train when you first saw it?

Ans. It was below the station.

Ques. Where with reference to the crossing was it?

Ans. Below the crossing.

Ques. Toward Philadelphia?

Ans. Yes.

Ques. And you say you saw it strike the water?

Ans. Yes.

Ques. Where was that water?

Ans. On the crossing at Greenwood avenue.

Ques. Where was the water coming from?

Ans. From Jenkintown.

Ques. Is that east or west of the track?

Ans. East of the track.

Ques. In what way was it running?

Ans. West.

Ques. Do you know how deep it was?

Ans. I could not say positively how deep it was.

Ques. Give us your best judgment.

Ans. I thought at the time that it was anyway from three to six inches.

10

20

30

Ques. Running in any great quantity?

Ans. Yes; quite a lot coming down.

Ques. Now, with reference to the crossing, was the crossing covered?

Ans. Yes.

Ques. The entire crossing?

Ans. Yes.

Ques. How long was the water running across at the crossing before the engine of this train struck it?

10 Ans. I do not know; I guess it was not going over there very long, possibly ten minutes; somewhere about that time.

Ques. And of about the same depth all the time?

Ans. I guess it was.

Ques. Which way were you looking out of the window?

Ans. South.

Ques. What were you looking south for?

Ans. I was looking to see the train come through.

Ques. Through what?

Ans. Through the water.

20 Ques. Did you see the train come through the water?

Ans. I saw it strike the water.

Ques. When you saw it strike the water what did you see?

Ans. I saw the smoke-stack waver and then I ran.

Ques. In what way did the smoke-stack waver?

Ans. (Illustrating.) It shook toward the east and west.

Ques. What then?

Ans. I ran.

Ques. Why did you run?

30 Ans. I thought from the way it was acting that it was off the track and I wanted to get out of harm's way.

Ques. Where did you run to?

Ans. Out of the station.

Ques. Where to?

Ans. Well, by the time I got outside the thing had settled down so I didn't go any further out on the platform.

Ques. What had settled down?

Ans. The engine.

Ques. What did you hear after you ran?

Ans. All I could hear was the whistling of the engine.

Ques. Did you hear anything of the train after you ran—things that you didn't see?

Ans. I heard the coal spill on the platform out of the tender.

Ques. Did you hear anything else? You say the thing had settled down; I ask you whether you heard anything else after you started to run? **10**

Ans. No; that is all I know; all I remember hearing was the coal spilling on the platform.

Ques. Did you hear any noise?

Ans. There was whistling, there was a rumbling noise, I guess, and then the whistling of the engine when it settled down; it knocked the cap off the whistle and started to blow.

Ques. Did you return to your post?

Ans. Yes, I came back. **20**

Ques. What did you see then?

Ans. Well, I came in the office; there was no one in there when I got in. I went and looked around for the rest of them.

Ques. What did you see with reference to this train and engine?

Ans. I saw the train was laid over on its side. The tender was on the south bound track and the engine was lying on the north bound track.

Ques. Which way was the engine bound? **30**

Ans. South at that time.

Ques. Toward Philadelphia?

Ans. Yes.

Ques. When you saw it at the time the smoke-stack was wavering, was it going in that direction, south bound or north bound?

Ans. No; it was going north at that time?

Ques. What else did you see? Make that a little more plain. You say you saw the tender on the south bound track and the engine on the north bound track?

Ans. Yes.

Ques. What else did you see there then?

Ans. The cars were standing there then.

Ques. Anything else that you saw afterwards with reference to the engine; was there anyone killed that day?

Ans. Oh, yes; the fireman.

**10** Ques. Did you see him?

Ans. I saw him after they got some of the wreckage away.

Ques. Who took the wreckage away?

Ans. The roadway crew and the wrecking crew.

Ques. Where did you see the fireman?

Ans. Under the engine.

Ques. Was he dead or alive?

Ans. He was dead at that time.

Ques. Did you know him?

Ans. Not personally.

**20** Ques. Had you seen him before?

Ans. Not to my knowledge before.

Ques. Was there any platform crossing Greenwood avenue at the railroad, carrying the street across the railroad?

Ans. Yes; there was a wooden platform there.

Ques. How far did that extend?

Ans. That extended all the way across except in the middle. There were planks on either side of the rail, and then it was filled in with macadamizing in the middle.

**30** Ques. How many tracks are located there at the crossing?

Ans. Two tracks; north and south bound.

Ques. From the most westerly rail to the most easterly rail, was there any planking in between?

Ans. Yes; there were planks.

Ques. Solid?

Ans. Solid planking.

Ques. Was the entire distance solid planking?

Ans. Between both rails.

Ques. Between the most easterly and the most westerly rails of the two tracks?

Ans. There were planks on either side of the rail and then in the middle of that it was filled in with macadam.

Ques. Do you know about the width of the plank?

Ans. The planks are about a foot wide.

Ques. Won't you describe the planking between the rails, say the rails of the east bound track; more than one, was there? **10**

Ans. There was a foot path on either side that was solid, that is pavement like, and then in the middle, in the roadway, I think there was planking on each side of the rails and then in the middle of this here was filled in with macadam. I won't swear now, but this is my impression. I think it was that way.

Ques. Were these planks between the tracks of the east bound rails?

Ans. These planks were on either side of the track. **20**

Ques. On the inside or the outside?

Ans. Both sides.

Ques. Do you know what the planks were made of, what material?

Ans. No; I could not say that.

Ques. What kind of wood?

Ans. It was wood.

Ques. What kind of wood?

Ans. I could not say what kind of wood.

Ques. Were these planks close up to the rail? **30**

Ans. Yes; I guess they are all on the level with the rail.

Ques. I understand you that they extended across the entire width of the avenue along the rail?

Ans. Yes; all the way across.

Ques. What was the condition of the weather on this day, just prior to the derailing of the train?

Ans. It was raining at the time.

Ques. How long had it been raining?

Ans. I judge about fifteen or twenty minutes.

Ques. Have you a telegraph operator in the place?

Ans. Yes; there is a telegraph operator in the station.

Ques. Was there any effort made to stop this train, to signal it?

10 Mr. Cole: I object to that question, on the ground that there is nothing in the pleadings to indicate any negligence on the part of the company in failing to notify this train or any one on it of the existence of any condition that was dangerous. The declaration lays the cause of action purely on the ground of the existence of the water and material on the track, which caused the derailment of the engine. In other words, there is no allegation of negligence of the company by reason of failure to notify this train that there was danger at that crossing.

20 Mr. Backes: There was no objection presented at the time of taking the depositions.

The Court: It doesn't have to be, as I understand it. If you take a deposition that way *de bene esse* it may be objected to without any previous objection when it is offered in the court.

30 Mr. Backes: There are two counts in the narr: one is that by reason of the negligence of the defendant companies in failing to properly provide a sufficient drainage system, that the tracks of the railroad of these two companies at Jenkintown became clogged and filled with dirt and gravel and stone from the slides on the adjoining hill, on the adjoining tract. That is the first count. And the other count is that they carelessly and negligently permitted their tracks to become clogged with material that washed down from the adjoining hills.

The Court: That does not touch the point of the objection, which is that in your declaration you do not allege any negligence for want of signaling the train before it reached the station.

Mr. Backes: I am basing and predicating my case upon the charge of gross negligence of this company in failing to provide a drainage system.

The Court: I say that is the point now.

100

Mr. Backes: I think the matter of warning is inherent to the second count in my declaration, in which it is charged that they carelessly and negligently permitted these slides to remain on their track. However, the matter is immaterial, and I don't object to its not being read.

The Court: I sustain the objection to this question.

(Mr. Backes continues the reading of the deposition as follows:)

200

Ques. During the time that you were stationed at Jenkintown as ticket agent had you seen any similar occurrences as the water running across the Greenwood avenue crossing during rain storms?

Ans. Yes, sir.

Ques. How often during your time?

Ans. Well, now, I could not state the number of times at all. I never kept any account of it.

Ques. Approximately?

300

Ans. About eight or nine times.

Ques. Had you seen it frequently?

Ans. No; it came over very often; of course how many times I could not say; I did not keep any account of it.

Ques. And that was a very heavy rain storm?

Ans. Yes, sir.

Ques. When was the first with reference to the first time you went there, about how long ago?

Ans. That I could not say.

Ques. Over what period of time did this happen?

Ans. I suppose those heavy rains came generally once or twice a year there. I know in winter when the ground was hard and the rain did not soak through, and it used to run across there.

Ques. Did that happen each year while you were there?

10 Ans. That I could not say, whether it was each year or not.

Ques. How near the time that you first went there did you observe the water rushing across the track during heavy rain storms?

Ans. That I could not say.

Ques. About how long prior to this accident did you first see it?

Ans. I guess a couple of years that I noticed it.

20 Ques. Do you mean then that within two years prior to the date of this derailing that you saw it run over eight or nine times?

Ans. The rain did not go over there so heavy until they started to put that new land company—

Ques. I asked you about the time.

Ans. I suppose about two years before that accident that they started to make their improvements there—

Ques. When did you see it before then?

Ans. It was before the land company came there, I know, I noticed the water going over, but it did not go over with as much force as it did then.

30 Ques. Now during the first year that you were there did you notice that condition, of water running across?

Ans. That I cannot say; I don't know whether I noticed it or not; I might possibly have noticed it and not recalled it.

Ques. Do you recall the drainage system that existed at the railroad crossing to carry the rain water across the tracks?

Ans. I know there was a drainage system there, but I am not familiar with it at all.

Ques. You don't recall it?

Ans. I know there was a drain system there.

Ques. Did that drain system carry the water over or not?

Ans. If it didn't come too fast it carried it under and if it came too fast why it would not receive it.

Ques. Do you recall the street opening on the Jenkintown side of the track for the receiving of the water to carry it under the tracks? **10**

Ans. Yes; there was an opening there.

Ques. Do you know how that was constructed?

Ans. By a sort of an archway and then a grating over the top.

Ques. So that when the water ran down the street it dropped into it?

Ans. Yes, sir.

Ques. The grating, how was that compared with the surface of the road? **20**

Ans. It was on the grade of the road.

Ques. Where was it with reference to the sidewalk, to the sides of the street?

Ans. It was north of the south sidewalk.

Ques. On Greenwood avenue?

Ans. Yes.

Ques. How near the tracks?

Ans. I judge it was about six feet away from the tracks.

Ques. Toward Jenkintown?

Ans. Yes; toward Jenkintown.

Ques. That is on the south side; now on the north side was there any receiver there that you recall? **30**

Ans. No; that is on the north side we are speaking of. There was only that one inlet there and we would call it the east side there.

Ques. Was it on the Philadelphia side of Greenwood avenue, or the New York side?

Ans. On the Philadelphia side of Greenwood avenue.

Ques. Was there any north or the New York side that you recall?

Ans. Yes; I believe there was a sort of an inlet on the north side but it stood some distance from the track like on the corner of the street.

Ques. About what distance toward Jenkintown from the track was it?

Ans. Was what?

10 Ques. Was the inlet.

Ans. I don't know. I judge about twenty-five or thirty feet.

Ques. How was that inlet constructed as you recall?

Ans. That I cannot just tell you.

Ques. Can't you recall?

Ans. No; I know there was an inlet there, but what it looked like I cannot recall.

Ques. Do you know what the opening of the inlet was on the south side, or the Philadelphia side of Greenwood avenue?

20 Ans. There was a grating there.

Ques. Do you know the dimensions of it?

Mr. Cole: We object to that. Our objection is that so far in this case there is nothing to show that this inlet or grating about which the witness is about to testify was on the property of or in any way under the control of the Philadelphia & Reading Railway Company, that it had anything at all to do with this grating. So far as appears, it may have been entirely off the property of this company; 30 it may have been put there by public authorities; the company may have had nothing to do with it; they may have had no right to interfere with it, may have had nothing to do with putting it there. But there is another point, may it please the Court, that it seems to me that sooner or later in this case we will have to meet, and I suppose an objection at this time will raise it. Now the allegation

here is that this company—well, in fact, both companies—are charged with the failure to provide an adequate system to carry off the water under its tracks. Now it seems to me that until it appears in this case as to the full character and extent of this storm, the quantity of rainfall on this occasion, that the question of the size of these culverts, the dimensions, the amount of water that they could have taken off under the track, becomes utterly irrelevant.

(Mr. Cole argues and Mr. Backes replies.)

10

The Court: It is so difficult to regulate the order of testimony that I will allow this reading to continue over the point suggested here, and will hear later a motion to strike out, or may on my own volition, if it is not connected properly to overcome counsel's objections. I will allow you to go on and will allow you an opportunity to connect it if you see fit. Of course if you do not see fit to do it, it will be a phase of the matter for me to consider later.

Mr. Cole: We would ask an exception. Of course, if counsel removes the objection, the exception fails. If he does not, we don't want to be put in that position if we fail to ask to strike it out.

20

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Cole: I make further objection, may it please the Court, that the answer of this witness appears to be a guess; and I submit that the matter is one that is susceptible of a certain and definite proof, and that if the matter is at all material to the plaintiff in this case, he should have reduced this to a certainty.

30

The Court: I overrule the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

(Mr. Backes proceeds to read the deposition as follows:)

Ans. I judge it was about a foot and a half one way and three the other.

10 Ques. How far were the gratings apart?

Ans. About one inch apart.

Ques. How wide were the gratings?

Ans. The grating on top?

Ques. Yes.

Ans. I judge that was about an inch, too.

Ques. After the accident and when the rain stopped did you see any one cleaning off the crossing at Greenwood avenue?

Ans. Yes, sir.

20 Ques. Who did that?

Ans. The section foreman and his gang?

Ques. Who was the section foreman?

Ans. Patrick Lee.

Ques. Did you see what they took off?

Ans. Yes, sir.

Ques. What?

Ans. Sand and small gravel and a little mud.

Ques. Anything else?

Ans. That is all I noticed.

30 Ques. How many men were at work there at that time?

Ans. They had the roadway gang, I don't know how many men were in that, and the section gang.

Ques. How was it taken off?

Ans. By shovel and broom, swept into a pile and then shoveled off.

Ques. How often had you, before the date of this derauling, watched trains coming through the water rushing down Greenwood avenue and across that crossing?

Mr. Cole: I object. That question assumes too much. That assumes that the train came rushing through Greenwood avenue. It is not proved in the case that that is so.

Mr. Backes: He said he saw it coming through on eight or nine occasions.

Mr. Cole: Yes, but he didn't say he saw trains come rushing through the water. That is quite a different proposition. **10**

(Objection sustained. Exception noted for plaintiff.)

Ans. Oh, I could not tell you how often; I know whenever the water was across there as a general thing if we were not busy we watched it.

Ques. For what?

Ans. To see the water fly.

Ques. Was that what you were watching for this day? **20**

Ans. That is what we were watching for.

Cross-examination.

By Mr. Barkalow.

(Read by Mr. Barkalow.)

Ques. You say you saw the train approach that afternoon?

Ans. Yes, sir.

Ques. You were watching for it? **30**

Ans. Yes, sir.

Ques. And as it approached the crossing I understood you to say the smokestack wavered?

Ans. Yes, sir.

Ques. Where did the train first strike the water with reference to the crossing? Was it on the Philadelphia side of the crossing?

Ans. On the Philadelphia side.

Ques. And that is the point where the smokestack wavered?

Ans. Yes, sir.

Ques. The water you say was from three to six inches in depth?

Ans. That is to the best of my knowledge.

Ques. That is a matter of guess?

Ans. Yes.

10. Ques. You have also stated in your examination that the water had been passing over the crossing for about ten minutes; is that a guess too?

Ans. No, I know that it was ten minutes at least.

Ques. You were sworn as a witness in this case at Toms River two years ago, were you not?

Ans. Yes, sir.

Ques. Your testimony in that case shows that you said at that time that it had been going for five minutes; now what, since giving that testimony at that time, leads you to change your statement now?

20. Ans. From what I was able to see during the ten minutes I know I was out on the platform when the water was coming across that; that was before the train due there at 3.35 arrived there, and I know I stood on the platform at least three minutes. I had gone into the station and was in the station and sold a ticket to a young girl that went out and took that 3.35, and it was her I saw cross through the water.

30. Ques. Now you think it was at least ten minutes that the water was going over prior to the time of the coming of the train?

Ans. I would not say any more.

Ques. You stated a moment ago in answer to my question that the water was not confined to the crossing, but that there was water on the Philadelphia side of the crossing as well; that is true, is it not?

Ans. It was all over the crossing.

Ques. And south of the crossing?

Ans. South of it—no, you mean off the crossing?

Ques. Yes.

Ans. Well, it run out into the gutter and down.

Ques. Was there any water on the tracks covering the tracks south of the Greenwood avenue crossing?

Ans. Just for about two or three feet, until it strikes down into the ties and then there is a gutter. That was a little beyond that, right on the other side of the flag-man's box; I guess it was five feet.

Ques. That is the point where you saw the smoke-stack waver? **10**

Ans. No, it was about on the crossing where I saw it.

Ques. Where you saw it waver?

Ans. Yes, because the train would not strike that water until it did get on the crossing.

Ques. You remember that this case was tried at Toms River?

Ans. Yes.

Ques. Do you remember some evidence of the witnesses there, I think it was you, that there was a train pulled up behind and the people there got out in the water; this train that stopped prior to reaching the crossing? Do you remember testimony of that kind? **20**

Ans. Yes, I think I do.

Ques. That water covered the track south of the crossing, didn't it?

Ans. No.

Ques. It was simply between the tracks?

Ans. Between the tracks and the gully.

Ques. There was an unusual storm that day? **30**

Ans. There was.

Ques. And just prior to the coming of the train over the crossing?

Ans. That is right.

Ques. How long had it been raining unusually hard before the train struck the crossing, for how many minutes?

Ans. About between fifteen and twenty minutes.

Ques. Unusually hard?

Ans. Unusually hard.

Ques. Was it raining unusually hard at the time the train struck the crossing?

Ans. Yes, it was raining just as hard.

Ques. And it was raining when you went out of the station when the thing happened?

Ans. Yes.

**10** Ques. And unusually hard?

Ans. Yes.

Ques. That was an unusual rain for that section, was it not?

Ans. Yes, sir.

Ques. I understood you to say, in answering Mr. Backes' question, that the platform run across the street; is that so—the station platform?

Ans. Oh, no; not the station platform.

**20** Ques. Where did the station platform begin with reference to Greenwood avenue and the street?

Ans. It just started at the street?

Ques. Which side of Greenwood avenue?

Ans. There were two platforms on either side of the track, but they started from the end of the street.

Ques. No, I am speaking of which side of Greenwood avenue.

Ans. The New York side, on the north side.

Ques. And run northerly in front of the station?

Ans. Yes, sir; that is right.

**30** Ques. Both sides of the track?

Ans. Yes, sir; both sides of the track.

Ques. You made no effort to have this train stopped, did you?

Ans. No, sir.

Ques. And no one at the station made any effort to have this train stopped?

Ans. No, sir.

Ques. Did you ever know of any train having any difficulty about getting through the Greenwood avenue crossing before?

Ans. Not to my knowledge, no.

Ques. So there was no occasion for any alarm?

Ans. No.

Ques. And it didn't occur to you or to any other railroad employee, as far as you know

Ans. That is right.

Ques. Was there a flagman on the crossing?

10

Ans. Yes, sir.

Ques. Was he there at the time this train came through?

Ans. Yes, sir.

Ques. Were his gates down?

Ans. His gates were down.

Ques. You stated to the best of your recollection that you have seen water go over this crossing eight or nine times?

Ans. Yes, sir.

20

Ques. That is a matter of guess?

Ans. Well, that is the best of my recollection, yes.

Ques. You have no definite knowledge of that fact?

Ans. No.

Ques. You never made any record?

Ans. No.

Ques. The times before that you have seen water run over there, you say it might have been once or twice a year, was the water as deep at those times as it was this day?

Ans. I judge it was, yes.

30

Ques. And once or twice a year?

Ans. I won't say, once or twice a year. I know it went over there, but how many times or how often I can't say.

Ques. The answer that you have just made to my question, does that relate to within a year or two pre-

vious, after the land company began operations up on the hill?

Ans. Yes, I know it went over before they began the operations.

Ques. But in regard to the depth was there any difference?

Ans. Oh, yes.

Ques. In other words, was there more water after that than there was before?

10 Ans. Yes, sir; there was more water after that than there was before.

Ques. What sort of operation was it that the land company was performing? What were they doing?

Ans. Building operations; they were grading and putting in new streets and one thing and another like that, and building houses at the same time.

Ques. Tearing up the soil?

Ans. Yes, the soil was torn up.

Ques. You spoke about the train due there at 3.35 that day.

20 Ans. Yes, sir.

Ques. Was that train due there prior to the time that the train in the question was?

Ans. Yes, sir; before.

Ques. Did it come that day?

Ans. Yes, sir.

Ques. Did it pass through that station?

Ans. Yes, sir.

Ques. And upon what track?

Ans. The same track.

30 Ques. The same track that the accident occurred on?

Ans. Yes, sir.

Ques. How was the depth of the water when that train went through?

Ans. Well, that is what draws my knowledge of the depth of it, because I saw the young girl go through there.

Ques. How was it with reference to the depth when the following train came through?

Ans. It seemed about the same.

Ques. Did the first train have any difficulty?

Ans. No.

Ques. Did that train stop at that station?

Ans. Yes.

Ques. You spoke about selling a ticket to a young lady.  
Did she take that train?

Ans. Yes, sir.

Ques. How did she get over on the other side?

Ans. Went across the crossing.

10

Ques. Through the water?

Ans. Through the water.

Ques. Did you watch her?

Ans. Yes, I was going to open the gate and let her go through. There is an iron fence, and I knew the train was coming that she was to go on, and I was going to open the gate so that she would not have to walk through the water, but she got ahead of me.

Ques. And you saw her walk across?

Ans. Yes, sir.

Ques. How far did the water come up on her shoes?

20

Ans. About to her ankle.

Ques. After this thing occurred did you go outside then?

Ans. Yes, sir.

Ques. And you saw the section foreman Lee and his gang there?

Ans. No, I didn't see them there right away.

Ques. You did see them there?

Ans. Afterward, yes.

Ques. You also spoke of the roadway gang.

30

Ans. Yes.

Ques. That was the wrecking crew?

Ans. No, the roadway gang was working above the station on the Bound Brook side and they happened to be right there at that time, so of course they came down and they were assisting.

Ques. To what?

Ans. To the wreck, and then the wrecking train came there after that.

Ques. You do not mean to say they were assisting Lee's gang on this crossing, sweeping up?

Ans. Yes, after they moved the train back and got things cleared, the roadway gang, the gang came there to their assistance.

10 Ques. I mean particularly with reference to cleaning up the crossing, did the roadway gang help Lee's gang do that?

Ans. Yes.

Ques. Or were they attending to the wreck?

Ans. They were attending to the wreck and of course attending to the cleaning up of the platform; not all the gang but some of the gang; but there was more than Lee's gang on the crossing.

Ques. I think you have stated there was a deposit of sand, small gravel and a little mud.

20 Ans. Yes.

Ques. Which they gathered up?

Ans. Yes, sir.

Ques. It didn't take them very long to do it?

Ans. Well, no; I don't think it did.

Ques. After the wreck, what was the position of the train, the wrecked train? You have spoken about the engine; the engine was doubled over and turned around facing Philadelphia?

Ans. Yes.

30 Ques. What became of the cars behind it?

Ans. There was one car off the track and of course the others that were back of that, they were moved down on the siding.

Ques. Before that, as the engine lay there facing toward Philadelphia, where were the cars in the train?

Ans. Some of them were on the crossing, some below.

Ques. And some of them with their trucks on the crossing?

Ans. Yes, sir.

Ques. What was done with the car or cars that were on the crossing after that?

Ans. They were removed down on what we call the east passenger track.

Ques. Which side of the station is that on?

Ans. South side of the station.

Ques. Toward Philadelphia?

Ans. Yes, sir.

Ques. On the north bound side?

**10**

Ans. Yes, sir.

Ques. How long had that car remained on the crossing before it was moved?

Ans. That I could not say. I know it remained there for some time.

Ques. Had the water receded?

Ans. Oh, yes; the rain had slackened up and the water had gotten away.

Ques. This small gravel and sand and the little mud that you spoke about, where was that on the crossing?

Ans. It was all over the crossing.

**20**

Ques. Was it level or in heaps?

Ans. It was leveled off. The rain would run it all over the platform. There were no heaps there.

Ques. I am not speaking of the platform, I am speaking of the crossing.

Ans. That is the crossing, of course.

Ques. I will make that clear. When you speak of the platform you mean the crossing planks in the street?

Ans. Yes, sir, the crossing planks.

Ques. Were there any heaps formed by the trucks of the cars?

**30**

Ans. That I could not say. I did not see it when he moved the train away.

Ques. You were not there then?

Ans. No, I was not standing out then.

Ques. The way train preceded the express that was wrecked?

Ans. Yes.

Ques. How many minutes before?

Ans. About three.

Ques. And this woman went across before the local came?

Ans. Yes, sir.

Ques. And she took that train?

Ans. Yes, sir.

10 Ques. How far is the platform on the Jenkintown side from the nearest rail?

Ans. The platform from the nearest rail?

Ques. Yes.

Ans. You mean the distance down

Ques. The distance between the platform and the nearest rail.

Ans. I judge from one foot and a half to two feet.

Ques. That is so constructed that passengers can step from the steps of the car immediately on the platform?

Ans. Yes, that is right.

20 Ques. Did you notice this platform after the wreck?

Ans. Yes, sir.

Ques. Did it show any indications of having been run into or through?

Ans. Yes, sir.

Ques. About how far from the crossing was that indication?

Ans. Well, I guess twenty to thirty feet; somewhere in that neighborhood, I think.

Ques. At that point was the platform ripped?

Ans. Yes.

30 Ques. What did it look like, as if what had happened to it?

Ans. It looked as if the train had gone over it. It was all ripped up.

Ques. How did the section men remove this small gravel and sand and mud?

Ans. They swept it up with their brooms and then shoveled it off.

Ques. How much of it was there, a wheelbarrow load?

Ans. I guess there was more than a wheelbarrow load.

Ques. Two wheelbarrow loads?

Ans. Yes.

Ques. You cannot tell us about how long the cars were standing on the crossing?

Ans. No, I cannot. I think to the best of my recollection they stood there until the next train. I think I had better leave that alone. I am not positive about it. I know they were pulled away by an engine. Whether it was the engine from the passenger train that followed them up or the roadway engine I am not certain. 10

Ques. But they were not pulled away until the water had receded?

Ans. No, I do not think they were.

Ques. How long did it take the water to recede from the time the wreck occurred?

Ans. After the heavy downpour stopped then it started to recede right away.

Ques. Was it ten minutes?

Ans. That I cannot say. I hardly think—I guess it was longer than ten minutes. 20

Ques. That is all.

Re-direct. (Read by Mr. Backes.)

Ques. Where were you when the men were taking this gravel and mud off the crossing?

Ans. I was back and forth from the train into the office.

Ques. How near were you at any time to the crossing itself while they were doing this work? 30

Ans. A few times I was down on the crossing.

Ques. While they were working?

Ans. Yes, sir; most of my time I was up close to the office.

Ques. And the office is about how far from the crossing?

Ans. I guess it is pretty near one hundred yards from the crossing.

Ques. How many men were engaged in doing this?

Ans. I could not say.

Ques. 50 or 100?

Ans. Not over eight in all.

Ques. As to the quantity that they removed, you say that it was two wheelbarrow loads. Do you mean that?

Ans. Yes, I guess there were two wheelbarrow loads.

10 Ques. Was there more than that?

Ans. That I do not know.

Ques. You say you never observed any trouble with any other train during the heavy storms while the water rushed across at that crossing?

Ans. No, sir.

Ques. Do you know of any trains being stopped there because of the water rushing across there?

Ans. Not until afterwards.

20 Ques. I asked you whether you ever knew of any trains prior to this accident having been stopped before it reached the crossing because of the water running across the crossing during the heavy storms.

Ans. Not to my knowledge.

Ques. Did you when you observed the water rushing across there during the heavy storms, did you ever call the attention to that of any of your superiors?

Mr. Cole: I object to that on the ground that it is not redirect, that it assumes a fact not proven, and that it is not relevant.

30 (Objection sustained. Exception noted for plaintiff.)

Ques. No, but after these heavy storms, when you saw the water rushing across, did you ever call the attention of any of your superiors to it?

Mr. Cole: That is the same question. I make the same objection, for the same reason.

The Court: I will sustain the objection on that ground, that it is not redirect, nothing new brought out by the cross-examination.

(Exception noted for plaintiff.)

Ques. After any of these occurrences did you ever call the attention of your superiors that water did rush across there?

(Objected to for the same reason. Objection sustained. Exception noted for plaintiff.)

10

Ques. Did you ever make any complaint to anybody about the condition of the crossing during storms?

(Objected to for the same reason. Objection sustained. Exception noted for plaintiff.)

Ques. It was not your business, you mean?

20

(Objected to. Objection sustained. Exception noted for plaintiff.)

Ques. You say this was an unusual storm; you have had such unusual storms before in that neighborhood?

Ans. We have had heavy rains.

Ques. Heavy rains when water rushed across the crossing?

Ans. Yes.

Ques. After these heavy rains that occurred prior to the accident would this crossing show any deposit on it?

30

Ans. Yes, sir.

Ques. How often did you see that?

Ans. That I can't say; I could not tell you.

Ques. How often with reference to each heavy storm?

Ans. Well, the storms never drew our attention until

that time. I know the storms were there and I know the platforms were cleaned before that.

Ques. Cleaned after the storm?

Ans. Yes, sir.

Ques. Now the Royal Blue Line train to which this accident happened, that was a through train?

Ans. Yes, sir.

Ques. Not due to stop at Jenkintown?

Ans. No, it did not stop there.

10 Ques. This one did, but it was not due to stop there?

Ans. That is right.

Ques. The 3.35 which preceded the derailed train was a way train, was it not?

Ans. Yes.

Ques. And as it approached Greenwood avenue did it necessarily slow down to stop?

Ans. It had to slow down to stop at the station.

Ques. Did you see that train go through the water?

Ans. Yes, sir.

20 Ques. What was the effect on the water, whatever may have been done by that train that you saw? What did you see it do?

Ans. I saw it splash the water on either side.

Ques. It was coming in slowly?

Ans. Yes, sir.

Ques. The Royal Blue Line train which was derailed as it was approaching the crossing, was that coming slowly or fast?

Ans. It was coming, I think, under control.

30 Ques. Was it coming at high speed or low speed?

Ans. It was coming a little faster, I know.

Ques. Faster than the 3.35?

Ans. Oh, yes.

Ques. Did you see any other ripping up either of the ties or of the rails, in addition to the ripping of the platform you spoke of at or about the crossing?

Ans. At or about the crossing, on the crossing?

Ques. Yes.

Ans. Part of one of the planks was ripped up.

Ques. From the street crossing to the place in the platform where it was ripped did you notice any marks on the railroad ties?

Ans. Yes.

Ques. What did you notice there?

Ans. Where the engine run across.

Ques. Where did that begin with reference to the beginning of the platform at the street crossing?

10

Ans. You could notice it across the platform and then on the ties.

Ques. Where at the street crossing could you first notice it?

Ans. About the middle of the street crossing.

Ques. And from there on what could you notice up to the place where the platform was ripped?

Ans. You could notice the marks of the flanges of the wheels on the ties.

Ques. In what way?

20

Ans. They were ripped in; the ties were cut.

Ques. From about the center of the street crossing all the way up to the place where the platform was ripped?

Ans. Yes, sir.

Ques. That is all

Further Cross-Examination. (Read by Mr. Barkalow.

Ques. Didn't the marks start at the south side of the crossing rather than in the middle of the crossing?

30

Ans. That I could not say. I think it was toward the middle, to the best of my knowledge.

Ques. You are not quite sure about that?

Ans. No.

Ques. You don't know whether they started south of the crossing?

Ans. I know they were in the middle; I am satisfied of that.

Ques. You know there were marks in the middle of the crossing, but whether they started at the south side or before the train reached the south side of the crossing you do not know, do you?

Ans. No, sir.

10 Ques. In your examination two years ago at Toms River you were asked this question: "Did you see any quantity of dirt left there at any of those times when the water ran over?" and you answered, "Yes, I have seen some sand and a little mud." Is that true?

Ans. Yes, sir.

Ques. Question, "Any quantity, I ask you?" and you answer, "No, there was no quantity; not more than just covering the platform; that's about all." Is that true?

Ans. That's about it.

20 Ques. You were asked, "Was there ever enough to interfere with the running of trains?" and you answered "Not to my knowledge." Is that true?

Ans. That is right.

Ques. You were asked, "Did you ever see any there?" and you answered "No."

Ans. Any what?

Ques. Any quantity of material.

Ans. No, that is right.

Ques. That is true?

Ans. That is true.

30 Ques. "I want to know what you saw, that's all; did you ever see enough sand there to interfere at all with the running of the trains?" and you answered "No, sir." Is that right?

Ans. That is right.

Ques. You were asked, "Was not the dirt and stuff that you saw there at this crossing just about the quantity that would collect on any crossing after a shower?" and you answered "Yes, sir." Is that true?

Ans. That is right.

Ques. You were asked, "Partly washed there and beaten there; it is that kind of a collection that you refer to, is it not?" and you answered "Yes, sir." Is that true?

Ans. That is right.

Ques. That is all.

Mr. Barkalow: As far as I am concerned I agree that the signature of the witness to his deposition be waived.

Mr. Cole, representing the Philadelphia and Reading Railway Company, upon being communicated with, wrote to the Master and stated that he would waive the signature of the witness. **10**

I do hereby certify that the foregoing deposition was taken before me, at the time and place stated in the caption: that the witness, James F. Martell, appeared before me and was first duly sworn before his evidence was taken; that the evidence was taken by me stenographically and the foregoing is a true transcript of the said testimony; that the counsel for the Central Railroad Company of New Jersey was present and waived the signing of the deposition; that the counsel for the Philadelphia and Reading Railway Company afterward wrote to me stating that he would waive the signature of the witness to the deposition. **20**

F. W. GNICHTEL,  
Master in Chancery.

---

HELEN GRAY FERGUSON, recalled for plaintiff. **30**

Direct examination.

By Mr. Backes:

Ques. Since last evening when you were on the witness stand have you refreshed your memory as to your husband's income during the last year of his life?

Ans. Yes, sir.

Ques. Have you been thinking over it, Mrs. Ferguson?

Ans. Yes.

Ques. Now, during that last year, in what capacity was your husband employed, as you now recall it? What was he working at during that year?

Ans. Fireman.

Ques. On the night or day shift?

Ans. Oh, in the daytime.

Ques. And prior to that time what did he work at?

**10** On what shift did he work before that?

Ans. On the night freight.

Ques. During this last year where did he work during the day, on what division?

Ans. On a passenger train.

Ques. During the last year he worked as fireman on a passenger train?

Ans. Yes, they took him off the night freight and put him on a passenger train, till they took him off that and put him on the main line. I thought it over last night, and he didn't draw the same wages. His wages was smaller during that time.

**20**

Ques. During which time?

Ans. That he was on this day run.

Ques. When he was on the night run what were his wages?

Ans. \$80 and \$85 and—well, sometimes \$88 and \$89 and \$90.

**30** Ques. Now there were figures read to you yesterday on cross-examination by Mr. Cole of your husband's monthly receipts. Have you thought that over? Do you understand me, Mrs. Ferguson?

Ans. No, sir.

Ques. I say this gentleman, Mr. Cole, spoke to you in his examination about the amount of money that your husband received during the last year of his life. Have you thought that over?

Ans. Oh, when he was on the day run that time?

Ques. Yes.

Ans. Yes, it was as he said.

Ques. As he said?

Ans. As this gentleman told me yesterday. It came to me it was sixty some and seventy some, just as he read it, but I couldn't tell you how many months. It might have been eight or ten; I couldn't tell you.

Cross-examination.

10

By Mr. Cole:

Ques. You think, do you, that the figures I read to you yesterday as to his income during those months was correct?

Ans. Yes. I think they were. When you read them I studied on it last night to myself and I remembered. I thought that they took him off the night freight and put him right on the main line, but it came to me afterwards that they didn't.

20

Ques. In other words, he worked as a passenger fireman between Point Pleasant and Jersey City before he was put on the line between Jersey City and Philadelphia?

Ans. Yes, sir.

Ques. I asked you yesterday as to the number of days in the week that your husband did not work during this year from May, 1899, to May 1900. Do you recall now, after having thought it over, that he did lose days during the weeks?

Ans. No, when he went on the main line he was home one day and would go away that night. That is all I know. He was not on there very long and I can't remember. He would be home Monday and he would go to work, leave our place sometime during the night, and he would work on Tuesday.

30

Ques. So that he did lose a day or two, did he not, during each week while he was a passenger fireman?

Ans. That is on the main line. All I know is when he went away, that he would be home Monday all day. He would come home Monday morning. Sometimes he had to work Sunday, and he came home Monday morning on the first train, and then he would go away Monday night, and all day Tuesday he would be away, and he would come home Tuesday night on the last train.

---

10

MRS. FRANCES FERGUSON, sworn for plaintiff.

Direct examination.

By Mr. Backes :

Ques. Mrs. Ferguson, are you the mother of Charles Ferguson?

Ans. Yes, sir.

20 Ques. He was the husband of this witness who was just on the stand?

Ans. Yes, sir.

Ques. When was Charles Ferguson born?

Ans. The 14th of July.

Ques. Which year?

Ans. 1859.

No cross-examination.

---

30

CHARLES A. CLAPP, sworn for plaintiff.

Direct examination.

By Mr. Backes :

Ques. You live where, Mr. Clapp?

Ans. Newark.

Ques. And your business is what?

Ans. Engineer.

Ques. And you work for whom?

Ans. The Central Railroad of New Jersey.

Ques. And how long have you worked for that company?

Ans. About thirty-three years.

Ques. In what capacity during all of that time?

Ans. Five of it brakeman—about four or five years; **10**  
then I fired four, and I have been running about twenty-five.

Ques. Running what kind of engines, passenger or freight?

Ans. Well, I have run freight, shifting engines and passenger engines.

Ques. On the 18th day of May, 1900, were you in the employ of the Central Railroad Company of New Jersey?

Ans. Yes, sir.

Ques. As engineer? **20**

Ans. Yes, sir.

Ques. Did you know Charles Ferguson?

Ans. I did.

Ques. Where did he work?

Ans. He was firing the engine for me.

Ques. And for whom did he work?

Ans. The Central Railroad Company of New Jersey.

Ques. And what was your run on that day?

Ans. The number of the train?

Ques. No, what was your run? **30**

Ans. Passenger run.

Ques. From where to where?

Ans. Between New York and Jersey City and Philadelphia and return.

Ques. Whereabouts in Philadelphia?

Ans. 24th & Chestnut.

Ques. And who was your fireman on that day and on that run?

Ans. Charles Ferguson.

Ques. Did you make the run that day?

Ans. Yes, sir.

Ques. Starting from New York?

Ans. Made the run over and part way back.

Ques. You mean you made the run over from where?

Ans. Made the run from Jersey City to 24th and Chestnut and back as far as Jenkintown.

Ques. On that run who was your fireman?

Ans. Charles Ferguson.

**10** Ques. How long had Charles Ferguson been fireman with you?

Ans. I couldn't say exactly, but I should think about two months, maybe not as long.

Ques. And what course did you take going from New York to Philadelphia and back to Jenkintown? Describe the route you went over.

Ans. Jersey City to Bound Brook.

Ques. Over whose railroad then?

Ans. The Central Railroad of New Jersey.

**20** Ques. From where?

Ans. Bound Brook to Park Junction.

Ques. Whose railroad there?

Ans. The Philadelphia & Reading.

Ques. The Philadelphia & Reading what?

Ans. Railway Company. And from Park Junction to 24th Street the Baltimore & Ohio Company.

Ques. Do you know where Jenkintown station is?

Ans. Yes, sir.

**30** Ques. Is that between Bound Brook and Park Junction? Is that what you call it?

Ans. Yes, sir; between Bound Brook and Park Junction—Girard avenue station.

Ques. At Jenkintown Station, is that the tracks of the Philadelphia & Reading Railway Company?

Ans. Yes, sir.

Ques. What time did you leave New York for Philadelphia?

Ans. In the morning?

Ques. Well, on that day.

Ans. 8.11 in the morning going over, I think.

Ques. And what time did you arrive at Twenty-Fourth and Chestnut?

Ans. I think we are due there at 10.26 or 28, somewhere along there.

Ques. What is the distance?

Ans. Ninety-three miles, we get by time card.

Ques. And what is your time allowance?

Ans. Ninety-two miles, I would say, the time card.

Ques. What is your running time?

Ans. The run going over was about two hours and fifteen or sixteen minutes.

Ques. And the running time going back?

Ans. Running back, we left there at 3.13 and was due in Jersey City at 5.33.

Ques. In whose engine were you at the time you were running back toward Jenkintown?

Ans. The Central Railroad of New Jersey's.

Ques. How much of a lay-over did you take in Philadelphia?

Ans. Half past ten to 3.13.

Ques. Now before you left Philadelphia did you examine your engine?

Ans. Yes, sir.

Ques. What did you do by way of examination?

Ans. The same as I always do, look the engine all over, all parts that was apt to become loose.

Ques. And what did you find?

Ans. Nothing.

Ques. What condition did you find it in?

Ans. All right.

Ques. What time did you leave Philadelphia?

Ans. 3.13.

Ques. Was this an express train or a local train?

Ans. Well, it was an express train.

10

20

30

Ques. Where did you stop?

Ans. Trenton. Well, we stopped first at Wayne Junction and then Trenton and Bound Brook; and Plainfield and Elizabeth were signal stops, to let off passengers.

Ques. Did you start on time this day?

Ans. Yes, sir; I think we did.

Ques. And on your way did anything happen to your engine?

Ans. No, sir.

10 Ques. I mean on the 18th day of May, 1900, on your return trip from Philadelphia to New York, did anything happen to your engine?

Ans. We were derailed at Jenkintown.

Ques. Now tell us about that. Tell us what happened.

20 Ans. Well, it was raining very hard when we left Melrose—in fact, when we left Twenty-fourth and Chestnut it was raining, but not hard—just ordinary rain, and at Wayne it was raining about the same; didn't strike the hard rain until we were within I guess about four miles of Jenkintown, or between Oak Lane and Merion—along there; then it was very hard. As we approached Jenkintown I shut the engine off going down the straight line to Jenkintown. There is a straight piece of track as we come down the track there.

Ques. Shut her off what way?

Ans. Shut the steam off of her cylinders and let her roll.

Ques. Did that reduce the speed?

30 Ans. Well, it doesn't increase it any. She might roll right along. It is a little up hill there so it reduced it ascending there. We were I think looking out the window, I on one side and Charlie on the other, for signals on the bridge at Jenkintown, which indicates the New York Division and Bethlehem Branch. When I got close enough to see the signals I got down on the seat and pulled out and as I struck the crossing the engine seemed to raise up, and after that there was a mix up, and I couldn't tell you any more of what happened.

Ques. Where did you find yourself after that?

Ans. Laying on the boiler on my back, over the gauges of the engine.

Ques. Where was Ferguson when you last saw him?

Ans. Standing the other side looking out the window on the other side of the engine.

Ques. How near did you get to the Greenwood avenue crossing? You know where that is located, don't you?

Ans. Yes, sir.

Ques. When you observed the signals?

10

Ans. I couldn't say; maybe within a couple hundred feet of it. It was raining so hard and the steam flying on the windows that you couldn't see a great ways.

Ques. Where were these signals?

Ans. On the bridge at the east end of the station.

Ques. Do you understand this map, Mr. Clapp?

Ans. Not very well, I don't think.

Ques. Well, this is said to be the Jenkintown station, this the Wyncote station; they are opposite each other. You know where they are, do you?

20

Ans. Yes, sir.

Ques. Where was this bridge with reference to the Jenkintown station?

Ans. At the east end, goes up over the track, built of iron.

Ques. How high was it from the track?

Ans. Well, I would say the top signal was thirty-five, maybe forty feet above the track.

Ques. What was the nature of the signal?

Ans. Three arms there, governing the trains moving in an easterly and westerly direction.

30

Ques. What was your attention called to at that time? What were you doing with reference to the signals?

Ans. I was looking to see whether I had the top signal or not, which was my signal for the New York Division.

Ques. That meant what?

Ans. Clear track.

Ques. You say when you saw that you pulled out?

Ans. Yes, sir.

Ques. What do you mean by that?

Ans. Commenced to make steam again.

Ques. What had that to do with your speed?

Ans. Increased it.

Ques. Had you noticed any water on the track at Greenwood avenue?

No, sir.

10 Ques. Had you looked for any?

Ans. No, sir.

Ques. Do you remember crossing Greenwood avenue or striking it?

Ans. I remember it was about on a spot where I struck an obstruction, or whatever it was.

Ques. Can you give us a better explanation as to your sensations, as to what it was that you felt?

Ans. Well, the engine seemed to raise right up in the air, the front of her, and pretty hard riding, it seemed to me.

20 Ques. What do you mean by pretty hard riding?

Ans. Well, rough; the engine shaking around, rolling around. I couldn't keep my feet. I was down in the cab.

Ques. Did you feel the engine strike anything?

Ans. No, sir; I felt nothing of that sort.

Mr. Cole: The witness ought to tell what he felt and saw.

30 Ans. Well, the engine seemed to rise up about the time I struck this crossing, as though she had gone over something.

Ques. How long was it after you experienced this sensation that you came to, do you know?

Ans. It seemed a good long while, but I guess it wasn't over a few seconds, maybe half a minute.

Ques. Were you able to leave your engine yourself?

Ans. I did, yes, sir; I got out myself.

Ques. How was the engine? Where was the engine at that time?

Ans. She was turned completely around, laying on her left side, headed towards Philadelphia.

Ques. Lying on her left side? Where was the cab, that part of the cab in which Ferguson had been?

Ans. Down.

Ques. And where were you?

Ans. I was on the right side, laying up.

10

Ques. Did you see Ferguson after that?

Ans. I seen him once after that; yes, sir.

Ques. What did you do after you got out? Tell us that.

Ans. Well, I went to look for Charlie.

Ques. What did you hear or see?

Ans. Well, I didn't hear anything only the steam. The steam was escaping from the engine and it knocked off the safety valve from the engine and the steam was so you couldn't see anything. I heard some one halloo and I supposed it was Charlie. I afterwards found out it was the baggagemaster at the station.

20

Ques. What was done after that? What did you hear and what did you see after that?

Ans. Well, I waited till the steam cleared away and we looked around, and the section men or wrecking crew I think found Mr. Ferguson.

Ques. Well, what then?

Ans. Well, as far as I was concerned, I waited for a chance to be taken home. There was nothing more for me to do.

30

Ques. Just state what you said.

Ans. Well, I said that the section men looked around and found Mr. Ferguson's body, and I didn't do anything. I sat there at the station and waited for a train to take back to Jersey City.

Ques. You say you saw Ferguson after that?

Ans. Yes, sir; I saw him once.

Ques. Where?

Ans. Under the engine.

Ques. Was he living or dead then?

Ans. He was dead.

Ques. At that time was it raining?

Ans. Yes, sir; rained for an hour, I guess, after that.

Ques. Hard or light?

10 Ans. Well, it didn't rain as hard as it did at the time of the wreck, but still it was raining quite hard.

Ques. Where was your train at that time?

Ans. Standing on the track; all but the first car, I think, and the tank, was derailed.

Ques. Did you go back and make any examination?

Ans. I went back, yes, sir, after I got out from the engine.

Ques. Where did you go to and what did you do?

20 Ans. I went back as far as the crossing and tried to get up between the cars. I was on the left of the train, or right of the train, and tried to get on the other side; and the porter I think opened the door.

Ques. The right of the train, was that on your side?

Ans. That is on my side, the Jenkintown side.

Ques. You tried to get over to the Wyncote side?

Ans. Yes, sir.

Ques. What did you see down there?

Ans. Plenty of water; that was all you could see. The water was running very deep over the crossing right there.

Ques. Where did you go then?

30 Ans. The colored porter he opened the door and I passed through and went and found the conductor.

Ques. Where did you go then?

Ans. Went up to the front car to see if any one was hurt.

Ques. On your train?

Ans. Yes, sir.

Ques. Where did you go then?

Ans. I couldn't say. I stepped out on the platform of the station and around on the other side and commenced to look and see if we could find anything of Charlie.

Ques. Well, what then?

Ans. Well, I couldn't say what then. I stayed there quite some time.

Ques. Did you stay there until they moved the train away?

Ans. Yes, sir; I think they did pull the train back, the cars, before I left. 10

Ques. Did you notice anything about the crossing after that?

Ans. After they pulled the train back, yes, sir; I seen there was sand.

Ques. What did you see?

Ans. I seen there was sand and gravel on the crossing where they cleaned it up.

Ques. Where was it?

Ans. Piled up at each end of the crossing.

Ques. How much was it?

Ans. I couldn't say; maybe a wagon load; quite a pile of it on each end. 20

Ques. Would you say a wagon load at each end?

Ans. No, I should say maybe a wagon load from both ends, or there might have been a wagon load on both ends. There was quite a pile of it.

Ques. Did you notice at that time the condition of the platform of the Jenkintown station, notice anything about that?

Ans. I knew it was all ripped up along there, and the station partially knocked down. 30

Ques. Which station partly knocked down?

Ans. The one on the right, towards Jenkintown.

Ques. Knocked down by what?

Ans. By the engine, I suppose.

Ques. Well, do you remember anything after you felt your engine go up, apparently over something?

Ans. Do I remember?

Ques. Yes.

Ans. I remember trying to get out and I couldn't.

Ques. I know, but did you remember anything between the time your engine went up at the crossing and when she came to a stop?

Ans. Well, I remember in a way.

Ques. Well, what was going on?

10 Ans. I know she was going over the ties, or down in the dirt, or wherever she was going, but I couldn't see. I was down and couldn't get up. I couldn't tell where she was going or see where she was going.

Ques. Was she off the track?

Ans. Yes, sir.

Ques. Do you know where she left the track?

Ans. No, I couldn't say positive. I didn't make any examination of it. I should think, though, along about thirty or forty from the crossing, probably not so far.

Ques. North or south of the crossing?

20 Ans. East of the crossing.

Ques. That is towards New York?

Ans. Yes, sir.

Ques. That is beyond the Greenwood avenue station?

Ans. Yes, sir.

Ques. Did you after that go down to that crossing and make any observations there as to whether you could see where the engine went off the track?

Ans. No, sir; not that day.

Ques. When did you go?

30 Ans. I was there the next day. I was called there on the coroner's inquest.

Ques. Was it the next day, do you say?

Ans. Yes, sir.

Ques. Did you go to Greenwood avenue crossing?

Ans. Had to go over the crossing to get to Jenkintown, on the hill, to the inquest.

Ques. What did you see there?

Ans. If I remember, I could see the marks of the flanges of the wheels, marks on the crossing planks.

Ques. Where was it?

Ans. I should say about the center of the crossing.

Ques. Mark on what?

Ans. On the planking of the crossing.

Ques. Was there any indentation on the rails?

Ans. No, I didn't notice any on that. I don't know as I noticed it as close as that. They were looking at it, I think, the superintendent and supervisor of the road. **10**

Ques. Made sort of tracks on it?

Ans. Made one mark through there where one of the power wheels went across there.

Ques. Did you follow those marks across the track?

Ans. Followed them across the other rail, and from there on to the ends of the ties.

Ques. Could you indicate here about the course that the marks took?

Ans. To the right side of the track, or the rail nearest to the platform. **20**

Ques. Do you mean about the center of Greenwood avenue?

Ans. I should say about the center of the crossing; went over the rail about the end of the crossing, the east end.

Ques. And where did those marks end?

Ans. At the end of the crossing, the east end of the crossing; commenced at the center, and diagonally across the crossing to the east end of it; there it came over on to the ends of the ties.

Ques. When you went back, on the day of this derailment, how soon was it after you got out of your cab? **30**

Ans. Oh, I think maybe a couple minutes.

Ques. And did you notice the water at that time?

Ans. Yes, sir.

Ques. Did you see any water at Greenwood avenue?

Ans. That is where I saw it.

Ques. What did you see there?

Ans. Plenty of it running over the track.

Ques. How deep was it?

Ans. I couldn't say; maybe four or five or six inches, maybe more.

The Court: When was that?

10 Mr. Backes: Two or three minutes after the derailment.

Ques. Now did you ever have any trouble on this crossing before the date of this accident?

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

The Court: The objection is sustained, unless you have something, some view you want to express to me.

20 (Mr. Blackes replies.)

Ques. Did you ever see any water running across this Greenwood avenue station prior to the date of this derailment while you were employed in running your engine?

Ans. No, sir.

Ques. Were you ever held up or even stopped before you reached this avenue prior to the day of this derailment?

30 Mr. Cole: That is objected to, on the ground that it is incompetent, immaterial and irrelevant; and the witness has said that he never saw himself anything on the track before.

Mr. Backes: No, he didn't say that; water on the track.

Mr. Cole: Well, whatever you asked him, he said he never saw it before. Now I assume that if this engineer

had ever had orders before with respect to this crossing, it seems to me we are entitled to have the orders and see what they said about it, and not the witness' recollection. We have no means, on a question like this answered, to properly cross-examine him. The question is too general, I think, besides the other points made.

(Question withdrawn.)

Ques. Were you ever stopped before reaching this crossing by reason of the employes of the road being then engaged in removing debris from the crossing after a storm? **10**

(Objected to.)

Mr. Backes: Counsel objected before because the question was too general. I put it more specifically.

Mr. Cole: That I submit is incompetent, irrelevant and immaterial, and calls for a conclusion. **20**

(Objection sustained. Exception noted for plaintiff.)

Ques. Did you ever notice any debris, dirt, mud, upon this crossing at Greenwood avenue after a rain storm, prior to the time of this derailment?

Ans. Yes, sir.

Ques. When?

Mr. Cole: Now just a moment. I interpose an objection now, and it is substantially the one that was made some time ago: that until there is some relation shown as to the conditions at the different times, the testimony is irrelevant. **30**

The Court: The question is admitted.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Cole: This is subject, of course, to correction being made.

Ques. When and under what circumstances?

Ans. About a year, I think, before that, maybe a little longer.

10 Ques. What was it? What occurred?

Ans. Sand and gravel. (Remainder of answer ordered stricken out.)

Ques. What did you see at that time?

Mr. Cole: Now I object, may it please the Court. The first question was whether he had ever seen debris on the track after a rain storm.

The Court: On the crossing.

20 Mr. Cole: On the crossing.

The Court: I don't think he said after a rain storm in the question before.

Mr. Cole: Yes, and then the witness says he supposes there had been a rain storm; he didn't know that. Now unless the debris was on this track in consequence of a rain storm, it is incompetent; because in this case it is the connection between the debris and the rain storm.

30 If we omit the rain storm it is improper.

The Court: Let him describe the conditions he saw. If he states that it may be proper.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ques. Where were you?

Ans. I was flagged east of the station, or held back by the signals at the station.

Ques. Going west?

Ans. Yes, sir; I was held back by the signals east of the station.

Ques. That is, you were going to Philadelphia?

Ans. Yes, sir.

Ques. At that time do you remember the condition of the weather?

Ans. It had been fair where I was, but the ground looked wet after we passed Bethayre, maybe Pilmont—I don't know—a short distance from Jenkintown—showed there had been a shower.

10

Ques. Where is Bethayre?

Ans. About three miles east of Jenkintown.

Ques. Where?

Ans. Towards New York.

Ques. What was the appearance of the ground at Jenkintown?

Ans. Looked as though they had had a heavy storm—a rain.

20

Ques. What did you see being done on the crossing?

Ans. From where I stood I could see the roadway department gang of men and section men, I suppose; they were digging there.

Mr. Cole: Don't state what you suppose.

Ques. What did you see?

Ans. I saw men working on the track gathering up gravel.

30

Ques. Where were they?

Ans. Right below Jenkintown station, towards Philadelphia.

Ques. And where, with reference to Greenwood avenue crossing? Where were the men with reference to Greenwood avenue crossing?

Ans. They were working right on the crossing and below the crossing.

Ques. How long were you held up there?

Ans. Perhaps twenty minutes, maybe half an hour.

Ques. Will you state the speed that you were going just before you approached the crossing and after you—

The Court: You mean at the time of the accident?

10 Ques. No; I don't mean at the time of the accident; I mean just before you saw the signals of a clear track and left your engine out; can you tell us what speed you were going?

Ans. I should think about thirty miles an hour, the speed limit through the yard.

Cross-examination.

By Mr. Cole:

20 Ques. How far were you from the Greenwood avenue crossing on the occasion when you say you were stopped coming from New York to Philadelphia?

Ans. Well, right from the junrtion there. I couldn't say exactly how far it is.

Ques. About, in yards?

Ans. Maybe a thousand feet.

Ques. And you stayed by your engine all the time?

Ans. No, sir; I didn't.

Ques. Where did you go?

Ans. I walked down as far as the station.

30 Ques. Did you go to the crossing?

Ans. No; I didn't go down.

Ques. Didn't go to the crossing?

Ans. I was about by the telegraph office by the station.

Ques. Did you actually yourself see any foreign matter on the Greenwood avenue crossing—that is, I mean on the tracks at Greenwood avenue crossing—on that day? Did you actually see it?

Ans. No, sir.

Ques. So that you don't know, of your own knowledge, that there was any foreign matter on the tracks at Greenwood avenue crossing on that day?

Ans. No; it was cleared up when I got there, scraped up in piles on each side of the crossing, and the men were putting it in the cars.

Ques. Do you know that they gathered anything from off the tracks on that day?

Ans. Well, they were gathering it around the tracks. 10

Ques. I know, but I want to know whether you know it.

Ans. I didn't see them shoveling it off the tracks. They had it all heaped up between the tracks.

Ques. What you saw was material, foreign matter, off of the tracks?

Ans. Yes, sir.

Ques. And you simply supposed that that had been taken off the tracks?

Ans. Yes, sir. 20

Ques. That is correct, isn't it?

Ans. Yes, sir.

Ques. And if there was any foreign matter on the tracks that was taken off by these men, you don't know where it was taken from or how it got there, do you?

Ans. No, sir.

Mr. Cole: At this point, may it please the Court, I ask that all the testimony of this witness concerning that be stricken out.

The Court: I will deny the motion. 30

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Barkalow: We ask an exception for both companies. This is all the cross-examination there will be.

Ques. Now, coming to the day of the accident, the signals about which you have spoken, these cross-arms on the bridge, were signals to show you that the track was clear for your train north of the junction, were they not?

Ans. Well, it is the route you take; not indicating at that time—there were no Hall signals on the Reading road.

10 Ques. But this is what I want to get at: Did the signal which you received on that day, which is in that tower beyond the crossing, have anything to do with the Greenwood avenue crossing?

Ans. No, sir.

Ques. There was no relation whatever between Greenwood avenue crossing and the signal you got?

Ans. No, sir.

Ques. Just tell the jury, please, so there may be no misunderstanding, what that signal was, what it meant to you.

Ans. It meant the route that I was to take.

20 Ques. Now, Mr. Clapp, what is there just beyond this crossing in the way of tracks?

Ans. Yard.

Ques. Well, but are there not tracks that go one way and tracks that go another way?

Ans. Yes.

Ques. Where do those tracks go?

Ans. Two tracks go to Bethlehem and two to New York, and one to the yard from there—a switch leading from the main track to the yard.

30 Ques. How far is it from the Greenwood avenue crossing where the accident happened to the point where the tracks diverge to go to New York and Bethlehem?

Ans. Well, I am a poor judge of distances, but I should say maybe three or four hundred feet.

Ques. Aren't those signals of which you speak signals which turn with these tracks as they diverge from that point?

Ans. Right over the top of it; yes, sir.

Ques. I know, but don't they control the tracks?

Ans. Yes, sir.

Ques. That is what they are put there for?

Ans. Yes, sir.

Ques. To control the trains that go over those respective tracks?

Ans. Yes, sir.

Ques. And those signals are with respect to the various tracks; one signal means for one track and the other is for the other track, and the one particular signal that was given to you indicated that the track was clear for the New York train? **10**

Ans. Yes, sir.

The Court: Does this refer to a year ago?

Mr. Cole: On the day of the accident, bringing it right to the accident.

Ques. Now, of course, running on this road, you have been through rain storms lots of times before the day of the accident? **20**

Ans. Yes, sir.

Ques. Was this rain storm on May 18th a usual or an unusually heavy storm?

Ans. It was an unusually heavy storm.

Ques. What effect had that storm upon your ability to see the Greenwood avenue crossing?

Ans. Well, perhaps if I had been looking for it I might have been able to see the water over there, but I was not thinking of any water. **30**

Ques. You were not looking for any water on that crossing?

Ans. Not that day, no sir; for I didn't think the storm had been there long enough. I didn't know. I had run into it in three or four minutes.

Ques. In other words, the time between the beginning of the storm and the time you reached Greenwood avenue crossing was so short that you didn't think there would be anything on the track?

Ans. No, sir.

Ques. And therefore were paying no attention to the crossing?

Ans. No, sir.

10 Ques. Did the rain have any effect on your ability to see this signal?

Ans. Yes, sir.

Ques. How did it affect you?

Ans. By steaming up the windows, one way, and another way, it was very dark.

Ques. So that on this day you could not see as far as you could if there had not been a rain storm?

Ans. No, sir.

Ques. How far would you have been able to see this signal if the day was clear?

20 Ans. As soon as I came around the curve.

Ques. How far is that from the signal?

Ans. A couple or three thousand feet.

Ques. And this day you could see—how far could you see?

Ans. I couldn't say exactly; maybe within three or four hundred feet of it before I could see it.

Ques. And when you approached this crossing you were looking for your safety signal on the bridge?

Ans. Yes, sir.

30 Ques. And when you got that you pulled your engine out?

Ans. Yes, sir.

Ques. Where was Ferguson?

Ans. He was on the left hand side of the engine.

Ques. In the cab?

Ans. In the cab.

Ques. Had you talked with him before this accident?

Ans. He spoke to me just before the accident.

Ques. What was said?

Ans. He said he wouldn't go out to put any coal on the engine because it was raining so hard.

Ques. How far were you from the crossing when that happened?

Ans. Well, I couldn't exactly tell, but I was between the curve and the crossing.

Ques. That is what I mean; it was after you got on the straight track?

Ans. When I shut off steam there he always put in coal going down there. **10**

Ques. Was it any part of Mr. Ferguson's duty as fireman to be on the lookout for signals?

Ans. It is at any bad point; yes, sir.

Ques. Well, isn't he required, when he is in the cab, to exercise care in observing signals and observing things ahead of him the same as you are?

Ans. Yes, sir.

Ques. It is his duty to notify you, isn't it, if he notices anything that you don't?

Ans. Yes, sir. **20**

Ques. And he was in the cab on this day looking for signals, wasn't he?

Ans. The same as I was; yes, sir.

Ques. As I understand it, on this day in question, after the cars had been moved off the track, you saw some foreign matter that you supposed had been taken off the crossing?

Ans. No; I seen them clearing the crossing.

Ques. Did you see them take it off?

Ans. Yes, sir. **30**

Ques. Actually saw them taking it off?

Ans. Yes, sir.

Ques. Who did you see doing that?

Ans. Men that belonged to the roadway department.

Ques. But the water had not entirely removed from the tracks when you got back and saw them taking it away?

Ans. Yes; it might have been a little running water.

Ques. Just a little water?

Ans. Just a little water.

Ques. Have you any idea as to how much rain fell that day?

Ans. No, sir.

Ques. That is, as to how many inches in a certain time?

Ans. No, sir; I have not.

10 Ques. I think you testified as to where it was when it began to rain the hardest. Can you recall whenever before on that run you had seen it rain as hard as that?

Ans. No, sir; I don't think I ever did.

Ques. You don't remember any such rain as that before?

Ans. Not at that point; no, sir.

Ques. Do you know where—I am asking of your own knowledge Mr. Clapp—do you know where any of the stuff came from that was on the track?

Ans. No, sir.

20 Ques. You have no idea where it came from?

Ans. I have an idea where it came from.

Ques. But you don't know?

Ans. No; I wouldn't say positive.

Ques. Was there a flagman at that crossing?

Ans. Yes, sir.

Ques. Do you know his name?

Ans. I do not.

Ques. Do you know how the gates were that day when you passed?

30 Ans. No, sir; I couldn't say. They were down when I went back.

Ques. Down when you went back?

Ans. Yes, sir.

Ques. You don't know whether the flagman signaled your train or not that day?

Ans. I couldn't say. I didn't see him.

Ques. You saw no signal from the flagman at all?

Ans. No, sir.

Ques. Was it part of the duty of the flagman to notify you if there was danger on the crossing?

Ans. Why, it would be his duty.

Ques. If he had information of a danger on that crossing it would have been his duty to notify you as the engineer of that train?

Ans. He should have flagged me; yes, sir.

Ques. Now on this day you say you were on a Central Railroad engine? **10**

Ans. Yes, sir.

Ques. Do you know what cars were back of you?

Ans. We had the Blue Line cars. They are owned jointly, I believe, by the three companies.

Ques. That is your understanding?

Ans. Yes, sir.

Ques. By the B. & O., the Central and the Philadelphia & Reading?

Ans. Yes, sir. **20**

Ques. And I suppose you don't know, except by mere hearsay and reputation, that the tracks that you were on, between Philadelphia and Bound Brook, were the tracks of the Philadelphia & Reading Railway Company?

Ans. No, sir.

Ques. That is the only way you know it?

Ans. That is the only way I know it?

Ques. Do you know whose passengers you were hauling that day?

Ans. I couldn't say; no, sir. **30**

Ques. Weren't you hauling the Philadelphia & Reading Railway passengers between Philadelphia and Bound Brook?

Ans. Why, between them points, and then the Central passengers after Bound Brook, I suppose.

Ques. On that day the passengers between Philadelphia and Bound Brook that you were taking over to Bound Brook were passengers of the Philadelphia & Reading Railway Company, weren't they?

Ans. They collected fare from them, I suppose.

Ques. Did you undertake, Mr. Clapp, to fix the point where you noticed a disturbance in your engine?

Ans. Well, as near as I can judge, it was on the crossing.

10 Ques. Where were you when you first struck water?

Ans. I couldn't tell you exactly where I was.

Ques. Did you strike water before you got to the crossing?

Ans. I couldn't say, sir.

Ques. You don't know that?

Ans. No, sir; I don't. I wasn't looking for water, as I said before; I was looking for a signal.

Ques. You don't know where you first struck water?

Ans. No, sir.

20 Ques. But you felt the sensation of your engine somewhere along that crossing?

Ans. Well, I seen after I went back it was the crossing, but I couldn't tell you then whether it was the crossing or the depot.

Ques. Then do I understand that you now conclude it was on the crossing where you felt the sensation because you afterwards went back and saw the mark?

Ans. Yes, sir.

30 Ques. Mr. Clapp, as engineer, did you ever before run through water on the track as deep as you saw it on this occasion without the engine being thrown off?

Ans. I did; yes, sir.

Ques. You have done that before?

Ans. Went through it once before; yes, sir.

Ques. The engine didn't go off the track?

Ans. Nothing but water there. The engine stayed on the track.

Ques. Do you think if there had been nothing on that track but water that it could possibly have thrown the engine off?

Ans. No, sir.

Ques. How heavy was your engine?

Ans. I think about ninety tons.

Ques. What did you have back of your engine?

Ans. I had two parlor cars, two coaches and a baggage car.

Ques. Have you any idea about their weight?

10

Ans. I think the parlor cars were about thirty-two tons; ordinary passenger cars from sixteen to eighteen tons, maybe.

Ques. Now, when you were running your engine over the tracks of The Philadelphia & Reading Railway Company between Bound Brook and Philadelphia and Philadelphia to Bound Brook, from whom did you get your orders?

Ans. The Philadelphia & Reading Railroad.

Ques. Are you under the control and domination of The Philadelphia & Reading Railway Company after you get upon those tracks?

20

Ans. Yes, sir.

Ques. The orders for the running of trains or a train upon The Philadelphia & Reading Railway tracks you get from The Philadelphia & Reading Railway Company?

Ans. Yes, sir.

Ques. And those orders you observe?

Ans. Yes, sir.

Ques. Now under the rules of which company do you work when you are on The Philadelphia & Reading Railway tracks?

30

Ans. Under the Reading—The Philadelphia & Reading Railway.

Ques. Do you have to learn the rules of The Philadelphia & Reading Railway Company?

Ans. I do; yes, sir.

Ques. Is that true with respect to the fireman?

Ans. Well, they have never bothered the firemen—well, until they are promoted.

Ans. I mean, for instance, when you get orders to run your train on The Philadelphia & Reading Railway tracks, does the fireman know of those orders?

Ans. Yes, sir.

Ques. Does he have a copy of them?

10 Ans. He does not; he uses mine.

Ques. But you hand him yours, do you?

Ans. Yes, sir.

Ques. So that he knows that he is running by the rules and instructions of The Philadelphia & Reading Railway Company?

Ans. Yes, sir; the same as I do.

Ques. Why do you give him a copy of the orders and rules?

Ans. That is the orders of the company.

20 Ques. Do you get orders from The Central Railroad Company of New Jersey to observe the rules and orders and regulations of The Philadelphia & Reading Railway Company when you are on their tracks?

Ans. No, sir. When we go through the rules of the road they instruct us that when we are on their track we are under their orders.

Ques. What I wanted to know was whether your employ by The Central Railroad Company of New Jersey instructs you to observe the orders of The Philadelphia & Reading Railway Company when you are on

30 their tracks.

Ans. They never did instruct me; no, sir.

Ques. Why did you do it?

Ans. I was instructed by The Philadelphia & Reading Railway Company when I went through the book of rules of their road.

Ques. So that you take all your orders from The Philadelphia & Reading Railway people when you are on their tracks?

Ans. Yes, sir.

Re-direct examination.

By Mr. Backes:

Ques. As you approached the signals at the Jenkintown station, where, under and according to the rules of the company, were you obliged to look? 10

Ans. For the signals.

Ques. No; as you approached, going towards Jenkintown station on your train, where, according to the rules, were you obliged to look?

Ans. For the boards on the bridge, the arms governing the movements of the trains.

Ques. You say that your examination of the books of The Philadelphia & Reading Railway Company taught you that when on their division you had to obey signals given by their employes? 20

Ans. Yes, sir.

Ques. This line that you ran on, is that known as the new line?

Ans. Well, it was years ago.

Ques. Well, when you first went upon that line did you have to pass an examination by The Philadelphia & Reading Railway Company?

Ans. Yes, sir.

Ques. And what was that for? 30

Ans. Well, I suppose to make us familiar with their book of rules, which at that time were different.

Ques. When was it? About when was it?

Ans. What year?

Ques. Yes.

Ans. 1891 I went there, I think; or 1892.

Ques. What did you take up then?

Ans. Why, the signals.

Ques. No; I mean what particular work did you take up at that time?

Ans. I was an engineer, the same as I am now.

Ques. On which line?

Ans. On the Philadelphia & Reading.

Ques. This new line?

Ans. Yes, sir; between New York and Philadelphia.

10 Ques. Carrying a train on the combined roads?

Ans. Yes, sir.

Ques. Prior to that time with whom had you been an engineer?

Ans. For The Central Railroad Company of New Jersey.

Ques. Where?

Ans. Running between Jersey City and Somerville, one trip, and one trip between Jersey City and Bound Brook.

20 Ques. But when you went on this new line operating an engine and train of cars that you did on May 18, 1900, you say you had to pass an examination by The Philadelphia & Reading Railway Company?

Ans. Yes, sir.

Ques. You say that you never saw it rain as hard at this particular place, at Jenkintown?

Ans. Yes, sir.

Ques. Did you see it rain as hard in that vicinity?

30 Mr. Cole: I object. That is not re-direct and it is not relevant.

Mr. Backes: The question that was put to the witness was whether at this particular point, at Greenwood avenue, he ever saw it rain as hard at that point. I am asking whether he ever saw it in that vicinity.

The Court: It is admitted.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ans. Well, no; I can't say that I did, right around there. I have along maybe different parts of the road.

Ques. Different parts of the road between New York and Philadelphia, you mean?

Ans. Yes, sir; perhaps between New York and Bound Brook. I wouldn't say. I have seen it rain very hard. **10**

Mr. Cole: That is objected to, of course, as being irrelevant and not re-direct. I directed the witness' attention to that point.

Ques. Any other points that you recall?

Mr. Cole: That is objected to on the ground that it is not re-direct and not relevant.

Mr. Backes: Counsel on his cross-examination asked a pointed question: "Did you ever see it rain as hard as you saw it rain on May 18, 1900, at this place?" **20**

The Court: Well, of course that may be so. I didn't understand him that the question was exactly at this place, at this point; still, it may be. And now you have asked him in the vicinity?

Mr. Backes: Yes, sir. **30**

The Court: And he has answered all about that.

(Question repeated.)

Ques. In the neighborhood of Jenkintown, through that country?

Mr. Cole: The objection is repeated, for the same reasons.

The Court: That has been answered. He said in the vicinity. Neighborhood is the same thing. The objection is sustained.

(Exception noted for plaintiff.)

10 Ques. You say you went through water before that accident, but there was nothing but water there. Were you in an engine as heavy as this one?

Ans. Well, not quite as heavy; no, sir.

Ques. And when was that?

Ans. Well, some time before that. I couldn't give you the date.

Ques. Where?

Ans. Between Somerton and Fairmount.

Ques. Where is that?

Ans. That is east of Jenkintown.

20 Ques. How far east?

Ans. I guess about four miles, five miles.

Ques. Had it been raining, do you know?

Ans. Must have been. The ground showed indications that they had had a very heavy shower there.

Ques. You went through rain just as deep as this?

Ans. Went through water that was washing over the top of the track.

Ques. And you say there was nothing there then but water?

Ans. That is all.

30 Ques. Did you ever go through water as deep as this where there was some other obstruction on the track without accident?

Mr. Cole: That is objected to, on the ground that it is not re-direct and it is not relevant, unless it is directed to this point and unless it be shown that the conditions are all the same.

Mr. Backes: You brought that out.

Mr. Cole: I beg your pardon. I asked a single question about water, and you may examine on that; but when you add another element to the case—I don't object to your cross-examination or re-direct examination upon any question of the existence of water to show whether his recollection is correct or whether he is telling the truth; but when you add a new element—

Mr. Backes: That is an element the witness added himself, without my asking it. **10**

The Court: The objection is sustained.

(Exception noted for plaintiff.)

Ques. You said that if there had been nothing on this crossing but water you think you would have gone through without trouble?

Ans. Yes, sir.

Ques. What else was there there but water? **20**

Mr. Cole: I object. That has all been gone over.

The Court: I think that has all been gone over. The objection is sustained.

(Exception noted for plaintiff.)

---

JOHN G. DOLBEAR, sworn for plaintiff. **30**

Direct examination.

By Mr. Backes:

Ques. What is your business?

Ans. Conductor.

Ques. And conductor where?

Ans. Central Railroad of New Jersey.

Ques. And how long have you been conductor for The Central Railroad of New Jersey?

Ans. About twenty-eight years.

Ques. On the 18th day of May, 1900, were you at work as conductor for The Central Railroad Company of New Jersey?

Ans. I was.

Ques. Where?

**10** Ans. On train 502, running between Twenty-fourth and Chestnut streets, Philadelphia, and Jersey City.

Ques. On that day did you make a round trip on your train?

Ans. Yes, sir.

Ques. And left Philadelphia at what time?

Ans. 3.13.

Ques. Did anything happen to your train on your return trip to New York that day?

Ans. Yes, sir.

**20** Ques. What?

Ans. Had a wreck at Jenkintown.

Ques. What did you see and what did you hear at Jenkintown?

**30** Ans. Well, on leaving Twenty-fourth street it was raining a little bit, but it looked very threatening, seemed to be a heavy shower in the north. When we arrived at Wayne Junction it was raining some there. When about—now it is Elkins Park; then it was Melrose—near there, it commenced to rain very hard; in fact, it rained so hard you could hardly see out of the window. I don't think I ever saw it rain so hard. It was about five minutes before the accident, I should say. I felt the engineer shut off, reduce the speed, approaching the signals at Jenkintown, and just before we got to Jenkintown I felt him increase it again. So I supposed the signals were all right.

Ques. Well, don't suppose; just what you saw.

Ans. Well, I had to in the train, for I couldn't see.

Ques. What?

Ans. I had to in the train; I couldn't see. When about on the crossing I felt the train come to a sudden stop. The car that I was in—when I left Wayne Junction I started to go through the train to collect my tickets, starting on the forward car, and I had got back when we reached Jenkintown about the middle of the first coach, which was the smoking coach, the smoking car. And when we approached this crossing I felt the train give a sudden lurch; and as I have been in two or three wrecks, I knew pretty near what was coming, and I grabbed hold of the arm of the seat, and I hadn't run, I don't think, over twenty feet and the train came to a sudden stop, like that. Well, of course, in the car I was in there was nobody hurt. There were some of them thrown over on the seats, the forward seats, but no one was hurt. I started right ahead to see if any one was hurt ahead. I knew it was a wreck. I found the passengers in the parlor cars, they were all right but they were up running around. Then I started to the forward end of the parlor car to see that end, and there I found that end tipped over, and when I attempted to get out I found the sleeper that was ahead of that, the doors were crossways, and I had to crawl in under to get into the sleeper; that was the head car. I finally crawled through and got in. I heard some people and children crying out and found there was one hurt. So I got them all to crawl back into the parlor car, crawl back into the next car, and told them not to get out of the train, stay in the train until I found out what was the trouble. Then I jumped out between the sleeper and the parlor car, and as I worked my way out the east side of the car I noticed the forward end of our engine right by the step. The sleeper had gone clear past the engine to the left, on the left hand or south side, and that left the door that I stepped out of facing the engine. My first thought was—

10

20

30

Ques. Never mind what your thought was; tell us what you did, Mr. Dolbear.

Ans. I started to look for my engineer, knowing my passengers were all right. I halloood. The steam was escaping, flying in every direction, you couldn't see anything, and raining yet quite hard. I slipped and went down near where the platform was torn up, fell down and got in the water up to my waist, and halloood, and got out of that again, and finally the engineer answered from the south side of the station.

10

Ques. Where were you, on the north side?

Ans. I was on the north side. I asked him if he was all right and he said he was. I said, "Come over," and he must have come around through the coaches, for he came up to me, and we heard some one hallooding. In the meantime I had asked him if he knew where the fireman was, and he said no. "Well," I says, "there is some one hallooding up above here in amongst the debris of the station and platform," and I says, "I think that is the fireman." The operator came up in the meantime and says, "Let's go and take that man out," wherever he was.

20

He was down about five feet. Over at the east end of the station there was a raised platform where they loaded baggage into the baggage cars, which was raised, and the big platform was what we struck, the end of the building. When the engine turned she knocked the whole side out of the building, knocked the side out, so that the baggageman went down through the floor in amongst the debris. We got there and pulled away a lot of stones and planking and so forth, and finally came to

30

this man and found he was the baggage agent at the station, but couldn't find the fireman. Then I went over and reported the accident. I knew that the operator would report immediately, as soon as it happened, but I went over and made out a written report. We have to do that; that is our instructions. I made out a written report. I suppose that took me altogether about—well,

maybe about eight minutes—eight or ten minutes. By that time there was an engine had come up from the rear with the superintendent; and in looking around his first proposition was to pull the cars that were on the track—

Mr. Cole: I don't want to object, but it seems to me this doesn't help us very much. There is a great deal of detail.

Mr. Backes: Well, your Honor was listening so attentively that I didn't care to object. 10

Recess to 2 P. M.

Trial of the cause resumed at 2 P. M.

JOHN G. DOLBEAR, resumed.

By Mr. Backes: 20

Ques. When did you first go upon the main line between Twenty-fourth and Chestnut, in Philadelphia and Jersey City?

Ans. About sixteen years ago.

Ques. And at that time did you have to pass an examination?

Ans. Yes, sir.

Ques. By the Reading authorities?

Ans. By both roads; yes, sir. 30

Ques. Both roads? What other road?

Ans. The New Jersey Central and Philadelphia and Reading Railroad.

Ques. And what is the line known as upon which you ran?

Ans. The new line.

Ques. What is the new line composed of, as you understand it?

Ans. The Central Railroad of New Jersey.

Ques. From where to where?

Ans. From Jersey City to Bound Brook, from Bound Brook to Park Junction, Philadelphia, the Reading Railway.

Ques. Railway Company?

10 Ans. Railway Company, yes, sir; from Park Junction to Twenty-fourth and Chestnut streets, the Baltimore & Ohio.

Ques. Does Jenkintown, at Greenwood avenue, intersect the points between Bound Brook and Park Station?

Ans. Park Junction?

Ques. Park Junction.

Ans. Yes, sir; it does.

Ques. Now, where was it that it began to rain hard while you were on the train?

20 Ans. About where the present Elkins Park station stands now.

Ques. And how far is that south of Jenkintown station?

Ans. About two miles.

Ques. What were you doing about that time?

Ans. I was making my collections, train collections.

Ques. Were there many to be made?

Ans. I had about one hundred and twenty people, I think.

Ques. And devoting all your time to that, were you?

Ans. Yes, sir.

30 Ques. Were the windows down?

Ans. Windows down.

Ques. And what you observed was while the windows were down and doing that work, was it?

Ans. Yes, sir.

Ques. Did you pay any particular attention to the rain?

Ans. Well, I looked out; I saw it was raining very hard.

Ques. Did you notice whether the windows were steamed or not?

Ans. Yes; they seemed to be covered.

Ques. Steamed?

Ans. Yes, sir.

Ques. Could you see the rain?

Ans. Yes, sir.

Ques. Through the steamed windows?

Ans. A little. You couldn't see very far, it was raining so hard.

Ques. But you could see through the steamed window? **10**

Ans. Yes; not very plain, but you could see through.

Ques. See that it was raining?

Ans. Yes, sir.

Cross-examination.

By Mr. Cole:

Ques. Could you hear the rain?

Ans. Yes; hear it on the roof of the car plainly. **20**

Ques. You passed between the cars, of course? You passed from one car to another in collecting the fares?

Ans. Yes, sir.

Ques. The windows in the cars were closed as they met one another?

Ans. Vestibule; yes, sir.

Ques. Could you see out of those?

Ans. Yes, sir.

Ques. Did you once speak of this rain as a cloudburst? **30**

Mr. Backes: I object to that, what he spoke of once.

Mr. Cole: Why not?

Mr. Backes: It is not cross-examination.

Mr. Cole: I think so.

The Court: If he has said anything inconsistent with what you have drawn out of him I think it is proper.

Mr. Backes: The question is now on cross-examination whether he ever spoke of a cloudburst. That is of no evidential value or evidential force in the case, not competent material for cross-examination, what he may have spoken about.

10

The Court: You mean it does not tend to contradict anything that he has sworn to now?

Mr. Backes: I mean to say it is not cross-examination.

The Court: Does it tend to contradict or modify in any way what he has already testified to about the rain to you?

20

Mr. Backes: I submit it does not.

The Court: That is what I wanted to know; it does not effect any part of his previous testimony? I will allow the question, subject to exception.

(Exception noted for plaintiff.)

(Question repeated.)

30

Mr. Backes: I object to it on another ground, that even on cross-examination the attention of the witness must be drawn to the time and place.

The Court: Yes; I think that is undoubtedly the rule. I suppose counsel will do that.

Mr. Cole: I don't know, may it please your honor. He is under-cross-examination. I am trying to show on cross-examination, if I can, that he may have sometime differently described this. It seems to me I am permitted to do that on cross-examination.

The Court: Unless you wish to contradict him I don't think the question is allowable. Your question asks him whether he didn't say something some other time about it different. 10

Mr. Cole: If I want to lay a foundation to contradict him by somebody else, that may be one thing; but if I simply want to cross-examine him without any idea of contradicting him, and am content with his cross-examination, it seems to me I have a right to ask this question. It may be a different situation if I call somebody else on the stand.

The Court: I haven't that view. 20

Mr. Cole: I don't know. That is my notion about it.

The Court: I sustain the objection to that.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ques. Would you describe this rain that you witnessed between this Elkins station and Jenkintown as a usual or unusual rain storm? 30

Ans. It was an unusual.

Ques. During the years that you ran on that road did you ever witness such a storm as that at or about Jenkintown?

Ans. I don't think I did, not quite as much rain.

Ques. On that occasion did you take up any Philadelphia & Reading tickets?

Ans. Yes, sir.

Ques. Did you have Philadelphia- & Reading passengers on your train?

Ans. Yes, sir.

Re-direct examination.

By Mr. Backes:

**10**

Ques. Were these vestibule cars?

Ans. All vestibule cars.

Ques. And between the cars—

Ans. Curtains.

Ques. And you were enclosed as you passed from one car to the other.

Ans. Yes, sir.

**20**

Mr. Cole: May it please the Court, I have a witness here from the auditing department of The Philadelphia & Reading Railway Company, and he is quite an important man in Philadelphia, and I asked Mr. Backes if he was willing that I put his testimony in,—it is quite brief,—if your Honor will consent.

The Court: Yes; I consent.

**30**

LEWELLYN SNOWDEN, sworn for defendant.

Direct examination.

By Mr. Cole:

Ques. Mr. Snowden, you are in the employ of The Philadelphia & Reading Railway Company?

Ans. I am.

Ques. Stationed where, Philadelphia?

Ans. Yes, sir; Reading Terminal.

Ques. What department?

Ans. Auditor of Passenger Traffic Department.

Ques. Does your position require you to know concerning the revenues of the company from the sale of tickets for passenger traffic and also for the freight traffic between Philadelphia and Bound Brook?

Ans. No, sir; only passenger traffic.

Ques. But you do know that by reason of your position? **10**

Ans. I do; yes, sir.

Ques. Do you know to whom—that is, to which company or what companies—the revenue goes for the sale of tickets over the lines of The Philadelphia & Reading Railway Company between Philadelphia and Bound Brook?

Ans. I do; yes, sir.

Ques. How does it go?

Mr. Backes: I object, as irrelevant and immaterial to the issue. **20**

Mr. Cole: Of course, may it please the Court, the objection would be good, standing now with nothing more in the case, and all I ask is that counsel may have the benefit of the objection and an exception; then if we do not make it relevant by the defence, I have no objection to it being stricken out.

The Court: I will allow it to come in that way, conditionally, that it may be stricken out if it is not connected so as to make it satisfactory. **30**

Mr. Cole: I cannot make it relevant now.

Mr. Backes: I don't see the force of it.

The Court: It is admitted.

(Question repeated.)

Ans. Between Philadelphia and Bound Brook?

Ques. Yes.

Ans. Goes to The P. & R. Railway Company.

- 10** Ques. Suppose a ticket is sold from Baltimore to New York; in what way is the revenue from the sale of that ticket divided, assuming, of course, that the passenger arrives over the B. & O. from Baltimore to Philadelphia, the Philadelphia & Reading from Philadelphia to Bound Brook, and over the Central from Bound Brook to Jersey City.

(Objected to. Objection overruled. Exception noted for plaintiff.)

Ans. How is the revenue divided?

Ques. Yes.

- 20** Ans. The revenue accruing between Baltimore and Philadelphia is given to the B. & O.; Philadelphia to Bound Brook, to The Philadelphia & Reading Railway Company; and Bound Brook Junction to New York to The Central Railroad of New Jersey.

Ques. And is that true without regard to what rolling stock may be used in carrying the passengers between Baltimore and New York?

Ans. Absolutely; yes, sir.

- 30** (Objected to. Objection overruled. Exception noted for plaintiff.)

Ques. And that holds true if the ticket is sold from New York to Baltimore?

(Objected to. Objection overruled. Exception noted for plaintiff.)

Ans. Yes, sir.

No cross-examination.

Mr. Backes: I move to strike out the testimony as irrelevant and immaterial, *nunc pro tunc*.

Mr. Cole: Of course I ask your Honor not to strike it out now, but that counsel waive any right to have it struck out when the defence is in, if it is not relevant. Of course I expect to make it relevant if it comes to the defence. I simply offer it out of time. **10**

The Court: I overrule the motion to strike it out now, but will consider it later.

(Exception noted for plaintiff.)

**20**

EDWARD CUSHING, sworn for plaintiff.

Direct examination.

By Mr. Backes:

Ques. Where do you live, Mr. Cushing?

Ans. I live in Cheltenham Township, Ogontz, Pennsylvania.

Ques. How near is that to Jenkintown? **30**

Ans. Within about a mile of it, a little better.

Ques. How near is it to the station of The Philadelphia & Reading Railway Company at Jenkintown?

Ans. About half a mile.

Ques. How long have you lived in that neighborhood?

Ans. Over forty years.

Ques. And your business is what?

Ans. Fence making.

Ques. Do you remember the 18th day of May, 1900?

Ans. Yes, sir.

Ques. And do you remember an accident happening on The Philadelphia & Reading Railway Company's tracks at Jenkintown station, in Pennsylvania?

Ans. Yes, sir.

Ques. Do you remember what time of day it was?

**10** Ans. In the afternoon, about the middle of the afternoon.

Ques. And where were you at or about that time?

Ans. I was occupied in Nicholson & Company's yard hewing posts that afternoon.

Ques. And where is Nicholson's yard with reference to the Philadelphia & Reading Railway station, at Jenkintown?

Ans. Right on the railroad south of the station.

Ques. Towards Philadelphia?

**20** Ans. Towards Philadelphia.

Ques. About what distance?

Ans. Well, I guess it is about three or four or five hundred feet, maybe.

Ques. And where you were, was it on the Wyncote side or the Jenkintown side of the railroad?

Ans. It was on the Wyncote side, the west side of the railroad. The yard is situated west of the railroad.

Ques. Nicholson's yard?

Ans. Yes, sir.

**30** Ques. Nicholson is engaged in what? What is his business?

Ans. Coal and lumber.

Ques. Has he got an office on Greenwood avenue?

Ans. Yes, sir.

Ques. And immediately in the rear of his office his yard?

Ans. His yard; yes, sir.

Ques. You were there?

Ans. I was there.

Ques. How near were you to the tracks of the Philadelphia & Reading Railway Company at that time?

Ans. Within about seventy-five or a hundred feet—about seventy-five feet, I guess.

Ques. Did you see this train that was derailed come along?

Ans. Yes, sir.

Ques. Just tell us what you saw from the time you saw the train until the accident. **10**

Ans. The first thing that took my attention was the speed of the train. It was the fastest train I ever saw moving on that section at that place. That is what took my attention. And then the fact of it stopping so short was the next thing took my attention. I asked myself was it possible, a train going at that speed, to stop inside of that space. And I heard a noise, a kind of a "Sh" (illustrating) shutting off steam, and that was all there was to it, and I moved on up.

Ques. What did you do? You say you moved on up. What did you do? **20**

Ans. Moved on towards where it happened, out of the yard.

Ques. Where did you go?

Ans. To the station, where this thing occurred.

Ques. From where you were could you see anything up above?

Ans. No; I could see the smokestack of the engine, that was all. There is a big shed there that shut my view off. **30**

Ques. Go on.

Ans. I couldn't actually see it.

Ques. What did you do?

Ans. I went out; and the first thing that came up was the local.

Ques. Came up where?

Ans. Right after this.

Ques. From Philadelphia.

Ans. From Philadelphia, yes, sir; and I got a few plank and other articles to help them, and helped to get the passengers off.

Ques. Did that train stop?

Ans. The train stopped.

Ques. Where with reference to Greenwood avenue?

Ans. South of it.

10 Ques. How near to it?

Ans. Well, it didn't get quite to the crossing. The engine was pretty close to the crossing. The train was back of it.

Ques. You helped get the passengers off?

Ans. I helped get the passengers off; yes, sir.

Ques. When you did that what did you see?

Ans. Went up and viewed the wreck.

Ques. Could you see the wreck from where you were getting the passengers off?

20 Ans. Oh, my, yes, easy. There was no obstructions at all from that point.

Ques. Which side did you go up?

Ans. Crossed the track and went up on the east side.

Ques. That is, the Jenkintown side?

Ans. Yes, sir.

Ques. As you went up what did you see?

30 Ans. Well, the first thing took my attention was a lot of stone that was washed down on the track from Greenwood avenue, right on the track. There was quite a quantity of them. That was the first thing took my attention. The next thing took my attention was the tearing up of the platform.

Ques. Platform of what?

Ans. Platform of the station, on the east side, and the tearing down of the wall and the turning around of the locomotive, all took my attention.

Ques. Won't you just tell us what you saw and not what attracted your attention? Tell us; did you see all of this?

Ans. I saw all of that. The first thing took my attention, the cause of it I thought was this stone on the track.

The Court: Don't repeat that. We have had all that. Counsel don't want it repeated; he only wanted to get a new story. Just direct his attention to what you want. He has told you generally what he saw there. Now, if there is anything special you want to elicit just indicate to the witness.

10

Ques. What did you do next?

The Court: He might have done a hundred things, you know, Mr. Backes. You have got to avoid, if possible, to start the witness telling forty or fifty different things that might have attracted his attention.

Mr. Backes: I fully appreciate this, but I think this will bring it up quicker than the other way.

The Court: Well, I don't think it will. You may think it will.

20

Ques. Where did you go next?

Ans. Up to the engine.

Ques. When you got to the engine, where did you go then?

Ans. Stood there and looked around.

Ques. Afterwards did you go back to the crossing?

Ans. I certainly did, sir.

Ques. How long were you engaged in getting these passengers off?

30

Ans. Probably about a quarter of an hour, ten minutes—something like that.

Ques. How long was it from the time that you saw this train go by to when you arrived at Greenwood avenue, after you let the passengers off?

Ans. It wasn't more than about five minutes, I guess; maybe more.

Ques. I mean from the time that you left the sheds until you got to Greenwood avenue how long was it?

Ans. Only a few moments.

Ques. That was up to the time that you got to the cars and took the passengers off?

Ans. That was afterwards.

Ques. What say?

10 Ans. That was afterwards.

Ques. What was afterwards?

Ans. Took the passengers off first, or helped to.

Ques. That took you ten minutes?

Ans. About ten minutes.

Ques. And then it was five minutes after that—

Ans. I went toward the wreck.

Ques. About fifteen minutes in all?

Ans. About fifteen minutes in all.

20 Ques. When you saw this train go by what was the condition of the weather?

Ans. It was raining very heavily at the time.

Ques. Very heavy?

Ans. Very heavy.

Ques. And when you were taking the passengers off how was it?

Ans. It had moderated some.

Ques. Moderated some?

Ans. Yes, sir.

30 Ques. And when you got to Greenwood avenue crossing, after you got the passengers off, how was the weather as to rain?

Ans. Kind of drizzling.

Ques. When you got to Greenwood avenue was there any water running across the railroad track on the avenue?

Ans. Why, there was. It continued to flow for quite a while afterwards.

Ques. And where was it that you saw this what you saw, the stuff that you saw on the track?

Ans. Right at the crossing on Greenwood avenue; right at the crossing directly.

Ques. Where on the crossing, side or center?

Ans. Right in the center of the track, that is where it was; right in the center of the thoroughfare.

Ques. Now what was it that you saw there?

Ans. There was stone that size (indicating), and from that down to sand. As it washed from Greenwood avenue it was the size of eggs, some of them, and some of them larger; from that down to very fine sand. They washed off of the road, the macademized road. 10

Ques. Do you know what Greenwood avenue was composed of?

Ans. It was made with stone.

Ques. Well, was it macadamized?

Ans. Macadamized.

Ques. What was the nature of the stone and stuff that you saw on the tracks? 20

Ans. It was the same material that was used in macadamizing of Greenwood avenue.

Ques. Did you see any of that stuff removed?

Ans. I did, sir.

Ques. Afterwards?

Ans. Yes, sir.

Ques. Who removed it?

Ans. The company's men removed it.

Ques. Do you know who was in charge of the men?

Ans. Patrick Lee was in charge of that section. 30

Ques. Do you know what position he holds in the company?

Ans. I did then; I don't know now.

Ques. Do you know what position he held then?

Ans. He was section boss then.

Ques. Of which section?

Ans. Of that particular section.

Ques. Did you see the manner in which the men took it off?

Ans. Well, I couldn't exactly answer that. They took it off, I think, in wheelbarrows, wheeled it off.

Ques. How long was that after you went up to Greenwood avenue?

Ans. Oh, that I don't know, whether they removed it immediately or whether it took them a day or a week; I couldn't tell you. That I can't answer.

10 Ques. I mean off of the track; I don't mean the location.

Ans. I know what you mean, but I couldn't tell you that. I don't know when they removed it, how soon, when, or where, or how.

Ques. I ask you whether you saw the men move it?

Ans. I did, but how long it took them I don't know. They generally use wheelbarrows for that kind of work.

Ques. I didn't ask you what they generally do. What had become of the train at the time that they were doing this, do you know?

20 Ans. It was standing there. Now, I couldn't say whether they removed that stuff that afternoon or not. All I remember is to see the stuff there. How it was moved, when it was moved, I couldn't tell you. I remember on other occasions—

(Objected to.)

Ques. I haven't asked you about other occasions. Did you see Pat Lee there that day?

Ans. I saw him there that afternoon.

30 Ques. Did you see him there with his gang of men?

Ans. I seen them there, but I don't know what they were doing. I didn't take any notice.

Ques. I ask you whether you saw these men remove this material from between the tracks that afternoon?

Ans. Now, I can't answer that. I don't remember that I did, really.

Ques. You saw material on the tracks?

Ans. I saw material on the track, but the removal of it I can't vouch for at all.

Ques. Now, at the time you saw it on the track, where was the train, the engine of which had been derailed?

Ans. It was north of it, as I understand, and past. It was beyond it; they had passed over it.

Ques. Over what?

Ans. Over the stuff on the track. It was beyond it.

Ques. Had the train been shifted?

10

Ans. Oh, no; only just where the wreck occurred, you know.

Ques. What quantity of material did you see there; how much?

Ans. I suppose two or three cartloads there.

Ques. How was it with reference to the rails? How was it distributed there?

Ans. As it washed it washed into the center rail; that is the left hand rail as the train moves north. That was the inside rail. Most of it was on that rail, the left hand rail, as I understand it, as the train goes. The whole mass was on the left hand rail.

20

Ques. Left hand rail of the track going to New York?

Ans. Going to New York, on the left hand rail going to New York. The mass of it was on that left hand rail.

Ques. Will you describe how it was there, in what way?

Ans. Rolled up that way.

Ques. Rolled up what way?

Ans. As it was washed down in the pile, in a kind of a cone that way. (Illustrating.)

30

Ques. And that cone you saw?

Ans. I saw it; yes, sir.

Ques. Did you see that cone afterwards, that material afterwards anywhere else?

(Objected to.)

Ques. I mean that day or the day after, did you see where it had been removed?

Mr. Cole: I object to it as irrelevant. I don't see that it makes any difference where it was removed.

Ans. I didn't see it afterwards.

Ques. How far is Greenwood avenue from the railroad toward Jenkintown macadamized?

10 Ans. From the station to Jenkintown?

Ques. Yes.

Ans. All the way through.

Ques. Are any of the adjoining streets macadamized?

Ans. All of them.

Ques. You know Beechwood avenue here, do you?

Ans. Yes, sir.

Ques. And do you know generally the condition of the rainfall there, which way the rain falls?

20 Ans. All goes into Greenwood avenue at the point of the station, at the crossing; and Greenwood avenue takes all the water, pretty much, from off the borough.

Ques. Off the borough of what?

Ans. Of Jenkintown.

Ques. And where does it all deposit?

Ans. Deposits into what they call Tacony creek.

Ques. What point does it come to east of the railroad?

Ans. It comes to the point of Greenwood avenue right at the crossing.

30 Ques. Do you know how the rain waters that deposited on Greenwood avenue were taken across the tracks of the railroad? Do you know what means were employed at that time?

Ans. Previous to that time?

Ques. At that time and previous, too.

Ans. I have a kind of idea; yes, sir.

Ques. Were you there and know?

Ans. I was there and know.

Ques. You have seen it, have you?

Ans. Yes, sir.

Ques. Will you describe it to the jury?

Mr. Cole: That is objected to on the same general ground that was indicated before; that there must be some relation—at least it ought to be shown what the conditions were on this day in question, and what the character of the storm was that the railroad company was supposed to have been obliged to provide for.

10

The Court: I understand your objection. I will allow the testimony, as I think I did the other, subject to your exception.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ans. Well, as I understand it, there is—what I seen coming down on the north side, west of Beechwood avenue, there was a grate and a pipe laid—

20

Mr. Cole: I object to any testimony from this witness concerning any condition off of the property of the railroad company.

The Court: You were not asked anything off the railroad company's property; you were only asked how it passed to the railroad, as I understand it.

30

Mr. Backes: The witness is not directing his testimony as to whether it is or is not on the railroad company; and I say to your Honor, as far as this case is concerned, it doesn't make any difference whether it was or was not on the railroad company, for this reason: it was the duty of The Central Railroad Company of New Jer-

sey and The Philadelphia & Reading Railway Company to of themselves provide a proper drainage system. If the city or municipality had provided something that was insufficient or deficient, it was still the duty of the railroad companies to see that their tracks were safely guarded; and the question now is, what means were provided.

10 Mr. Cole: If you have the witness tell what it was that existed that took the waters over the track, I don't object.

Mr. Backes: He said west of Beechwood avenue. That is right here. (Indicating on map.)

20 The Court: Won't you ask him about that end up there then, and not have so many things in one question? I understood the main purport was as to how that surface water from that basin was carried over the railroad underneath. That is mentioned twice in the question.

Mr. Backes: I beg your Honor's pardon. There are three questions, and it is only mentioned once.

(Question repeated.)

30 Ans. There was one pipe on the north side of Greenwood avenue, west of Beechwood avenue. There was a grate there, and then a cross-pipe went across, and the drain was on the south side; and this pipe is about a foot in diameter, and probably the main drain wasn't over two feet that took away this surface water.

Ques. Now was there any inlet on the north side of Greenwood avenue, an inlet where the water ran in, west of Beechwood avenue and east of the railroad?

Ans. A gutter on the south side of Greenwood.

Ques. I am speaking about the north side.

Ans. Run right into this pipe—a two-foot pipe, or something like that; and then on the north side of Greenwood avenue it ran west of Beechwood avenue and entered the grating and run across the street kind of diagonal like, about a foot pipe, and that went off the—this main drain was on the south side of Greenwood avenue; that took the bulk of the water away. That was the main sewer—what I called it—call it what you like.

Ques. Please answer my question. I am now directing your attention to the north side of Greenwood avenue. 10

The Court: You are making so many questions. Can't it be read by the stenographer, or do you want to ask a new one?

Mr. Backes: I want to ask a new one.

The Court: Go on.

Ques. I am directing your attention to the north side of Greenwood avenue, and ask you to describe the inlet as it appeared on the street. 20

Ans. There was a grate there about fifteen inches long and about a foot wide, that entered into this pipe that took this water, and that ran across the street.

Ques. Where was that grate laid?

Ans. It was laid west of Beechwood, right at the point of Greenwood avenue.

Ques. And where in the street in Greenwood avenue? 30

Ans. Along the curb.

Ques. In the gutter?

Ans. Yes, sir; in the gutter.

Ques. And how was it laid with reference to the grade of the street?

Ans. Well, it was laid with the grade, I guess, as near as it could be, as far as I know.

Ques. How wide were the openings between the gratings?

Ans. Probably an inch or so.

Ques. And to that you say was connected a pipe?

Ans. Connected a pipe that ran across the street diagonally.

Ques. How do you know that? Did you see the pipe?

10 Ans. Seen it put in. Seen it tore up. They tore it up after every rain. I seen it torn up half a dozen times.

Ques. Where did that pipe end at across the street?

Ans. It entered into and connected with the sewer, what they call the main sewer on the south side of Greenwood avenue.

Ques. Was there any other inlet on the north side of Greenwood avenue, between Beechwood avenue and the railroad?

Ans. Not that I know of.

Ques. Did you ever see any?

20 Ans. No, sir.

Ques. Now on the south side of Greenwood avenue what was there to receive the water that ran down?

Ans. There was a pipe there probably two feet in diameter.

Ques. On the south side?

Ans. On the south side. That was the main entrance, the main pipe.

Ques. Well, you say it was a pipe?

Ans. Yes, sir.

30 Ques. What kind of a pipe?

Ans. I think it was an iron pipe; looked that way to me.

Ques. What was there on the south side of Greenwood avenue to receive the water?

Ans. That is what I say, this iron pipe, about two feet, probably.

Ques. Was there an inlet there?

Ans. There was an inlet, an open inlet.

Ques. How was that constructed?

Ans. It was constructed with this pipe that runs across the street from the north side of Greenwood avenue.

Ques. And where was the inlet built with reference to the gutter on the south side of Greenwood avenue?

Ans. It was built very close, almost immediately to the railroad.

Ques. And was there any grating on that?

Ans. Not that I know of; it was an open pipe. 10

Ques. What do you say?

Ans. I never saw none, to my recollection. I think it was an open pipe.

Ques. You think it was an open pipe?

Ans. It was open; yes, sir.

Ques. And you say that was within five feet of the railroad?

Ans. Well, I guess it was within ten or twelve feet of the track, anyhow, to my recollection, at that time.

Ques. Of what time are you speaking? 20

Ans. Previous to this—

Ques. Well, how long previous?

Ans. At the time of the wreck and previous to it.

Ques. Now, can you, with any greater detail, describe the inlet on the south side, besides saying it was a pipe?

Ans. I don't know that I could add anything to it, only just what I said.

Ques. Well, was the pipe above or below the ground?

Ans. Under the ground.

Ques. How did the water get in it? 30

Ans. Got into it through the gutter on the south side, and then took the water of this cross-pipe from the north side.

Ques. But when the water left the gutter on the south side, how did it get into the pipe?

Ans. It flowed into it, of course.

The Court: An open place in it, he says.

Ques. Was it a catch basin?

Ans. No; just the open end of the pipe; the end of the pipe, all I could see.

Ques. Well, was all the pipe under ground?

Ans. It was, covered.

Ques. Well, was the end exposed?

Ans. The end was exposed, open.

Ques. Nothing over it, eh?

Ans. It was under the ground, covered over.

**10** Ques. Now, on what grade was that laid compared with the grade of the street?

Ans. Now, I couldn't answer that question.

Ques. Do you know the dimensions of this pipe or opening?

Ans. About two feet, maybe. It wasn't any more, I know; maybe not that much.

Ques. At the time and previous to the day of this accident, did you see Patrick Lee ever take charge of these inlets or pipes?

Ans. Yes, sir.

**20** Ques. When?

Ans. Pretty much after every heavy rain they had to tear this pipe up. They got choked up.

Ques. What?

Ans. After every heavy rain they had to take them up and open them and replace them—open them up.

Ques. How often did you see that done?

Ans. I have seen it half a dozen times, I guess.

Ques. And did Patrick Lee do it himself?

Ans. Superintend it. He was section boss there.

**30** Ques. With the men?

Ans. With the men; yes, sir.

Ques. How was this rain on the day of this accident? What kind of a rainfall was it?

Ans. It was very heavy while it lasted.

Ques. Did you ever see any rainfalls of the same kind in that vicinity?

Ans. Several.

Ques. Several what?

Ans. I have seen as heavy rains as that previous to that and since that.

Ques. What?

Ans. And since that I seen the same.

Ques. How about before that?

Ans. I have seen as heavy rains as that many times before it.

Ques. Did you observe, after these rains, anything being done by the railroad company's employes at the Greenwood avenue crossing? I mean after these rains, these heavy rains, did you see any work being done by the employes of the railroad at this crossing? 10

Ans. Always. They always had to tear up this old pipe and relay it again.

Ques. Now, at the crossing—

Ans. But I was going to say I have seen heavier rains, and seen rains that washed away bridges there, and it didn't do it that time. I have seen heavier rains in that vicinity. 20

Ques. How long before this accident?

Ans. That I saw heavier rains?

Ques. Yes.

Ans. I saw I think it is twenty years ago, the bridges swept away there.

The Court: That is pretty remote.

Mr. Backes: Not as remote as the railroad construction. 30

Ans. I saw bridges all swept away. You couldn't make any connection at all with Jenkintown station—had to go around.

Ques. How about between that and the day of this accident, heavy rains?

Ans. Well, I couldn't as regards destruction.

Ques. I am not asking you about destruction. I mean the precipitation of rainfall.

Ans. I seen as heavy rain as that many times.

Ques. After these heavy rains did you see the employes, under Patrick Lee, do anything at the crossing here at Greenwood avenue and the railroad?

Ans. After every heavy rain they had to tear up this pipe and replace it.

10 Ques. That is, the pipe?

Mr. Barkalow: That is about the fifth time he has said that, in answer to the very same question. It seems to me there ought to be some end to this.

Mr. Backes: Your Honor will remember that I have some difficulty with this witness, and my last question directed his attention to the tracks. I have not asked him anything about the pipes; and this sudden outburst of impatience on the other side is somewhat unbecom-

20 ing.

Ques. Do you understand my question, Mr. Cushing? I want to know after these rains, whether you saw the employes of the railroad company do anything on the tracks of the company?

Ans. Well, I don't know that I noticed any particular thing, excepting that you specified.

Ques. After these rains did you see any wash on the tracks?

30 Ans. Always more or less. I seen never as much as I did that time, but I seen some before that.

Ques. And how often before that did you see it?

Ans. Maybe two or three different times there was washes on it, if I recollect right. That was not the first time; I seen it other times.

Ques. During these heavy rains, or after them, did you notice any water on the track?

Ans. The track was covered with water frequently; covered with water that time, so much so—

Ques. I say prior to the day of this accident.

Ans. Oh, I seen water on the tracks on several occasions.

Ques. Of what depth?

Ans. I have seen it cover the rail, and I have seen it sometimes not quite that high. Sometimes it would cover the rail and sometimes not.

Ques. Well, when you saw it cover the rails how much higher was it than the rails? **10**

Ans. Well, I couldn't tell that.

Cross-examination.

By Mr. Cole:

Ques. Mr. Cushing, do you remember testifying in this case before in this court room?

Ans. I do, sir.

Ques. You have a very clear and distinct recollection of the answers that you gave to the questions that were asked you before? **20**

Ans. Probably.

Ques. When you were looking up Greenwood avenue did the water that came down Greenwood avenue cover the whole avenue? Did it cover the whole street between curb and curb?

Ans. It covered it at the point of the railroad.

Ques. Now you notice my question, Mr. Cushing. I want to know whether you saw the water covering the street, the whole street from curb to curb, down Greenwood avenue. **30**

Ans. I seen it cover the street immediately at the railroad, but how far up that went is only a very small distance.

Ques. How do you know that?

Ans. I seen it.

Ques. You were looking for it, were you?

Ans. I was looking at it; I wasn't looking for it.

Ques. How far from the railroad track did you see the water cover the whole street?

Ans. Now I would like to know what you mean by the whole street. Do you mean a half a mile of the road or what? I want to understand you.

10 The Court: I think that is plain. He means the whole width of the street, I suppose, along the railroad.

Ans. Well, it covered it for a short space right immediately at the crossing; it covered the whole street. How far up the street I don't know.

Ques. Now I want to know how far from the crossing did the water cover the whole street.

Ans. Well, maybe twenty or thirty feet.

Ques. Twenty or thirty feet?

20 Ans. Probably; yes, sir.

Ques. Now do you want the jury here to understand that you saw the water washing this stone off the street down on the railroad?

Mr. Backes: I object to the form of the question. The objection goes to this: that what the witness wants the jury to understand is an improper question. It is not what the witness desires the jury to understand, it is what the witness saw and heard.

30 Ques. Did you see the water that came down Greenwood avenue that day wash the stones off of the avenue?

Ans. I seen the result of the wash, but I didn't watch what the water was doing.

Ques. Now, Mr. Cushing, you notice my question. If you don't understand it, you will ask me, and I will try to make it plain.

Ans. I seen the stone on the track that was washed by the water.

Ques. Please wait a moment and answer my question. My question is whether you saw the water that came down Greenwood avenue wash the stone from off the avenue on to the track of the railroad company. Now did you see it or didn't you?

Ans. I seen the result of it.

Mr. Cole: I ask the Court to ask the witness to answer my question. 10

Ans. I seen the result of it is all I can answer.

Mr. Backes: I object to the request of counsel for the Court to direct the witness how to answer.

The Court: Mr. Cushing, let the question be read to you, and I want you to try and answer it directly, not by an inference, and say the result of it. You are asked what you saw. You can answer that, and then you may have a chance to explain later. Wait till it is read to you. 20

(Question repeated.)

Ans. I didn't see it.

Ques. Now, do you know that on the day of this accident there was a deposit somewhere up on either side of Greenwood avenue; that is, on the Jenkintown side, a lot of macadam that was either being used or to be used in paving certain new streets that had been opened on the land of a syndicate? 30

Ans. No; I don't know that.

Ques. You didn't know that?

Ans. I didn't know that.

Ques. Did you undertake or did you examine Greenwood avenue to see if any of it had been torn up by the storm?

Ans. Why, certainly.

Ques. What part of Greenwood avenue did you see torn up on this day in question?

Ans. Right in the immediate vicinity of the crossing.

Ques. How far from the crossing?

Ans. Right at the crossing, and the whole extent of Beechwood avenue and further up; the whole thing was washed out and torn up to the railroad.

Ques. Beechwood avenue was washed, too, was it?

**10** Ans. Probably; but Greenwood avenue is the one that was washed.

Ques. Well, I want to know which it is.

Ans. Well, Greenwood avenue was washed.

Ques. How much of Greenwood avenue and what part of Greenwood avenue was washed out?

Ans. It was washed out on the north side, and probably a hundred feet of it.

Ques. Well, what do you mean by one hundred feet; one hundred feet away from the track?

**20** Ans. A hundred feet in length right along the gutter, on the north side of Greenwood avenue.

Ques. And that, you say, was a part of the macadam street?

Ans. That was the portion, I presume, that was taken by the flow and taken on to the railroad.

Ques. You saw it washed out one hundred feet from the track, didn't you?

Ans. I seen where the stone had left there.

Ques. One hundred feet away from the track?

**30** Ans. One hundred feet from the track up Greenwood avenue, not one hundred feet away from the track.

Ques. Well, I mean this tearing up continued one hundred feet away from the track?

Ans. Yes, sir; continued one hundred feet from the track.

Ques. Did you stay there that day until the water had entirely left the tracks?

Ans. I did.

Ques. And it was after the water had left the tracks that you saw this macadam, wasn't it?

Ans. I saw it before the water had left the tracks.

Ques. While the cars were there?

Ans. I saw it immediately.

Ques. Were the cars there?

Ans. After the wreck.

Ques. Were the cars there then?

Ans. They were there then; yes, sir.

10

Ques. Had the cars been removed off of the crossing before you left?

Ans. They were not on the crossing. They had the wreck moved to the north end of the crossing. That is where it made its destination. It was not on the crossing at all. They had got beyond the crossing.

Ques. You mean all the cars had been taken off the crossing when you got there?

Ans. Yes, sir; I think so.

Ques. Weren't the cars on the crossing when the train came up out of which you helped passengers to get off?

20

Ans. No, sir.

Ques. You are positive about that?

Ans. I wouldn't say positive about that.

Ques. You are not so sure about it?

Ans. I am not so sure about it, but I think they were on the north of the crossing, beyond it.

Ques. You don't think there was any car that was attached to this train that was standing on the crossing when you arrived?

Ans. I don't remember that part.

30

Ques. Don't remember that?

Ans. No.

Ques. And, as I understand, you don't remember seeing anybody move anything off the track?

Ans. Not at that time.

Ques. I mean that day.

Ans. No; not at that time. I didn't pay any attention to that. I didn't pay any attention to that part of it.

Ques. Mr. Cushing, do you remember being asked these questions, to which you gave the following answers, when you were a witness before: "What was the condition of the weather at that time?" to which you answered, "I couldn't tell you that, because I was away below the gutter about five hundred or six hundred feet. Q. I didn't catch what you said. A. I could not tell you anything about the gutter. Q. The weather. A. Oh, the weather; about as heavy a rain as I experienced; as heavy a shower; I never saw it rain any heavier in my life." Do you remember giving that testimony in this case before?

10

Ans. Probably I did.

Ques. Well, if you gave that testimony before it was the truth, wasn't it?

Ans. If I gave it, it was the truth; yes, sir. It rained pretty heavily; I admitted that before.

20

Ques. But you said before, didn't you, that you never saw it rain any heavier in your life? Was that true then?

Ans. If it was true then it is true yet.

Ques. Didn't you say just a moment ago, in answer to Mr. Backes' question, that you had seen it rain heavier?

Ans. I did not, sir. I said I seen it rain quite as heavy.

Ques. Oh, quite as heavy?

30

Ans. Yes, sir; I don't remember saying I seen it rain any heavier. I said I often seen it rain as heavy, and I did.

Ques. Then you didn't say a moment ago, in answer to Mr. Backes' question, that you had seen it rain harder?

Ans. I seen it rain as heavy; I admit that now and then and any time. That is my answer.

Ques. And you say now, do you, that you probably did say before when you were on the witness stand that

you never saw it rain any heavier in your life; is that correct?

Ans. Maybe I didn't; I might have answered that. If I did I meant it. That is five years ago now, pretty near, and it is a long time.

Ques. Do you remember saying also that it came like a torrent?

Ans. I may have said so. It did come that way.

Ques. That was true, wasn't it? It did come like a torrent?

10

Ans. Yes; so it did.

Ques. Now do you remember being asked this question, to which you gave this answer: "During these storms within two years prior to this accident did you see the water—the rain water—wash across the track?"

Ans. Never."

Ans. I guess that was correct.

Ques. What was correct?

Ans. I will answer that yet.

Ques. You never saw the water wash across before?

20

Ans. I did, but—

Ques. Now wait a moment.

Ans. But not previous.

Ques. Now in order, Mr. Cushing, that there may be no misunderstanding, now to be fair with you, I ask whether you remember this question being asked you before: "During these storms within two years prior to this accident did you see the water—the rain water—wash across the track?" Do you remember being asked that question?

30

Ans. I don't remember it.

Ques. Do you remember that you answered to that question, "Never."

Ans. I don't remember that.

Ques. Now I ask you this question: whether on the occasion before when you were a witness you were asked this question and whether you gave this answer: "I ask

you—you have already spoken of two years within which rain fell—how long prior to the two years did you know of Patrick Lee and the men of the railroad company under him attending to these sewers after each heavy rain. Ans. Never until—I never knew of any trouble there until this land association opened avenues and led all their surface water into what they call Greenwood avenue; they had trouble all the time after that.” That is correct, isn’t it?

10 Ans. That is correct. I answered it, yes; I said that before.

Ques. Did you ever measure the size of the pipes, from the inlets on the tracks of the railroad company?

Ans. No, sir.

Ques. So that your testimony concerning the size of them is a mere guess?

Ans. That is all.

20 Ques. Now do you remember being asked this question on the previous trial: “Do you know what the openings were on the south side of Greenwood avenue, east of the railroad, on the Jenkintown side of the railroad, where the water got into the sewer? A. I don’t know anything about that; I never bothered about that at all.”

The Court: Mr. Cushing, please answer.

Ques. Do you remember that question and that you gave that answer?

30 Ans. Well, I give the same answer yet.

The Court: It is not a question whether you do yet. They want to know whether you were asked and answered that way. You must answer the question.

Ques. That was true what you said before?

Ans. Yes, sir; that was true.

Mr. Arrowsmith: That is in regard to the size of the pipe.

Ques. Do you remember giving that answer?

Ans. I may have. I don't exactly remember all about it.

Ques. Well, if you did give that answer it was true at that time, wasn't it?

Ans. I presume so.

Ques. And it is true yet, isn't it?

10

Ans. I presume it is.

Ques. This rain on that day was a terrible downpour, wasn't it?

Ans. While it lasted.

Ques. While it lasted?

Ans. It fell pretty heavy; yes, sir.

Ques. How long did the terrible downpour last?

Ans. Maybe half an hour.

Ques. About a half an hour?

Ans. Yes, sir.

20

Ques. How long had this terrible downpour been going on before this train came along?

Ans. I think the train came along in the midst of it?

Ques. Right in the midst of it?

Ans. Yes, sir.

Ques. How long had it been going on, I mean?

Ans. Five or ten or fifteen minutes.

Ques. Well, there is a lot of difference between five and ten and fifteen minutes.

Ans. Well, I don't know exactly.

Ques. You don't know?

30

Ans. I don't know; I wasn't keeping account of it.

Ques. It wasn't very long?

Ans. It couldn't have been very long.

Ques. And you saw this engine come along shooting through this terrible downpour of rain?

Ans. Yes, sir.

Ques. Running very fast?

Ans. Yes, sir?

Ques. Running so fast in this terrible downpour that you were surprised, weren't you?

Ans. I was for a fact.

Ques. You are willing to admit, I suppose, that this was an unusual rainfall, are you not?

Mr. Backes: I object. That is not the way.

10

(Question withdrawn.)

Ques. Was it an unusual rainfall?

Ans. Not for that time of year.

Ques. Do you remember being asked this question before, to which you gave this answer: "Ques. Unusual? Ans. Unusual."

Ans. Well, I don't remember to have said that.

Ques. You don't remember to have said that?

20

Ans. I may have said so.

Ques. You may have said so?

Ans. It was unusual for the time.

Ques. And if you did say so it was a fact, wasn't it?

Ans. I guess so.

Ques. Do you remember being asked this question, to which you gave the following answer: "I understood you to say that you never saw such a downfall since you lived there in that neighborhood?" To which you answered, "I never saw any heavier in any country, or any place." Did you answer that before?

30

Ans. I don't remember that.

Ques. You don't remember that, eh?

Ans. No, sir.

Ques. Do you remember being asked right after that: "How old are you?" and you answering "Fifty-seven?"

Ans. I do.

Ques. You remember that, do you?

Ans. I do.

Ques. It is not a question whether it is correct or not, but whether you remember being asked the question.

Ans. Well, I don't remember even that.

Ques. Well, is it or not a fact that you never saw any heavier rain in any country or any place than the rain you saw the 18th of May, 1900?

Ans. I won't admit that.

Ques. You won't admit that? You think it is a little **10** bit too much to admit, eh?

Ans. I won't admit that; not at this time.

Ques. Well, when will you admit it?

Ans. I don't think I will ever admit it.

Ques. You know about this land syndicate that changed the face of the country up there about Greenwood avenue, don't you?

Ans. I have an idea of the lay of the country there; yes, sir.

Ques. Do you remember that the improvement that went on there resulted in throwing more water into Greenwood avenue than had ever been thrown there before? **20**

Mr. Backes: I object to that as cross-examination and ask that the answer be stricken out.

Mr. Cole: This witness has been testifying to conditions of rain during a period of years; now, I have a right to test his accuracy and knowledge, and all that sort of thing.

The Court: My impression is that that is all right to have answered, about the improvements, that there never was so much water until the syndicate opened those streets. That has been testified by him. **30**

Mr. Backes: No; not spoken of by him. I don't think it is a fact in the case anyhow, your Honor.

The Court: I will admit the question.

(Question withdrawn.)

10 Ques. Mr. Cushing, do you remember in the previous trial being asked this question, and to which you gave the answer which follows: "You say that, although the wash came down towards the railroad, yet there was never any trouble on the track—what do you mean by trouble on the track, an accident? A. No; the sense I took out of that was there was no gravel or stones washed on the track." Do you remember to have given that testimony?

Ans. Not in that sense.

Ques. Well, do you remember being asked that question and that you gave that answer?

20 Ans. If I answered that question it was not in the sense you put it. If I answered that question at all it was there was never an accident at that crossing of that kind previous to that accident.

The Court: Do you remember it or not? If you didn't, say so. You can't go on and guess what you said, and if you said so and so you meant so and so. Do you remember giving that testimony counsel has just asked you?

Ans. Yes, sir.

30 The Court: You do remember it?

Ans. I do, but it seems to me it is not in that sense I put it.

The Court: Never mind the sense. You have got to get at what the question and answer is on the record as far as you can.

CHARLES EVANS, sworn for plaintiff.

Direct examination.

By Mr. Backes :

Ques. Mr. Evans, you live where?

Ans. Wyncote, Montgomery county.

Ques. That is near Jenkintown, is it?

Ans. Near Jenkintown station.

10

Ques. And how far from the station?

Ans. Well, I suppose it is about four hundred yards between Jenkintown station and my place of residence.

Ques. How long have you lived there?

Ans. Well, I have lived in that neighborhood about thirty-seven or forty years—somewhere along there.

Ques. Did you ever occupy any official position?

Ans. I was supervisor.

Ques. Supervisor of what?

Ans. Of the roads.

20

Ques. When?

Ans. Well, from away on in—let's see—1887, I think, or 1888—somewheres along there.

Ques. Until when?

Ans. Until 1899.

Ques. And do you know where Greenwood avenue is at the railroad crossing?

Ans. Yes, sir.

Ques. And was that within your jurisdiction?

Ans. On the other side of it; yes, sir.

30

Ques. On Greenwood avenue to the station on the Wyncote side?

Ans. Greenwood avenue, yes, sir; on the Wyncote side.

Ques. Do you remember the 8th of May, 1900, when the accident happened?

Ans. I remember the date; yes, sir.

Ques. Where were you on that day?

Ans. I was home.

Ques. Did you have occasion afterwards to go over to the station, after the accident?

Ans. After the accident; yes, sir.

Ques. On that day?

Ans. Not till after it was all cleared away. I didn't get there until after the engine had been removed and the cars taken away.

Ques. Did you see any debris there?

10 Ans. Oh, yes; the platform.

Ques. Did you see any wash there?

Mr. Cole: I object, unless it refers to the crossing.

Ques. At the crossing, at or near the crossing, did you see any wash?

Ans. There was wash there, yes. It hadn't been all removed yet.

Ques. Where did you see that?

20 Ans. Right on the crossing, on each side, on the Greenwood railroad crossing.

Ques. During the time that you were supervisor, did you ever see any of the waters in a storm go across the railroad crossing at Greenwood avenue?

Ans. Many a time.

Ques. Do you know what system, if any, prevailed prior to May 18, 1900, for the carrying of the waters from one side of Greenwood avenue to the other, or across the tracks of the railroad company?

Ans. Why, the township—

30 Ques. Do you know what there was there?

Ans. Well, I was going to explain.

The Court: He didn't ask you what the township did; he asked you what physical objects there were there to carry the water.

Ans. The reason I had to answer that was—

The Court: We don't want any reason about it. You just answer the physical objects.

Ans. I wanted to get the water off of my side of the road. Well, there was pipes under the railroad.

Ques. You say you saw this many times going across it?

Ans. Yes, sir.

Ques. What quantity did you see?

Ans. Well, we couldn't cross over it sometimes.

10

Ques. How deep was it?

Ans. Well, I have seen it up near the top of gum boots, if you had gum boots on.

Ques. How often did you see it that way?

Ans. Every heavy downpour of rain of any time.

Ques. Up toward the end of your administration, in 1899, how often did you see it?

Ans. Oh, I couldn't tell you. I suppose every summer, nearly, whenever there was a heavy downpour of rain.

20

Ques. Did anything accompany the water?

Ans. Yes.

Ques. What?

Ans. Bricks and stone, sand, gravel, macadam and everything else of the kind.

Ques. Did you see where they lodged?

Ans. Well, some of it came across the railroad and some of it stayed on the other side.

Ques. Did you see where it lodged?

Ans. I couldn't say anything about on the track, but it was each side of the railroad, each side of the track.

30

Ques. From what direction did the water come?

Ans. Came from the Jenkintown direction, from the borough.

Ques. Well, now, you might describe, if you know, what the appliances were for carrying the water across the track—all the conditions.

Ans. Well, I just told you the pipe underneath.

Ques. Well, what openings were there on the east or Jenkintown side for the water to get into the pipe?

Ans. Well, there was only two, one on each side; one on the south and one on the north side.

Ques. Will you describe the north side as you recall it five years ago?

Ans. Well, there was an inlet and a pipe laid to carry the water across into the sewer.

**10** Ques. Was that pipe connected with this inlet?

Ans. Connected with that inlet; yes, sir.

Ques. And the inlet, how was that laid with reference to the grade of the street?

Ans. On the grade with the street.

Ques. In the gutter or in the street?

Ans. In the gutter.

Ques. You have had occasion to go up Greenwood avenue, haven't you?

Ans. Oh, yes.

**20** Ques. What is the grade of Greenwood avenue?

Ans. Well, I couldn't tell you. It is a pretty steep grade.

Ques. I don't mean longitudinally, but cross-section.

Ans. Oh, across the street?

Ques. Yes; is there a gutter to it?

Ans. Yes; a gutter on each side of Greenwood avenue.

Ques. How did the elevation of the center of the street compare with the gutter?

**30** Ans. Well, about eight inches, I suppose; eight inches above the gutter.

Ques. Is it beveled, round?

Ans. Yes; round surface.

Ques. Is Greenwood avenue improved?

Ans. Yes; it has been improved.

Ques. I mean is the avenue itself improved?

Ans. Yes, sir.

Ques. Is it the main street?

Ans. Main; yes, sir.

Ques. Is it paved?

Ans. One part is macadam, Belgian block and brick.

Ques. The whole length?

Ans. Different sections, you know.

Ques. Where is the macadam?

Ans. The macadam is next to the Jenkintown station.

Ques. And the gutter, what is that?

Ans. Brick gutters,—or cement gutter, down below **10**  
where they put in the Belgian blocks, down towards  
the station.

Ques. Now this inlet on the north side that connected  
with the pipe running to the south side, had that any  
grating on it? Had that any grating to it?

Ans. Now do you mean, or at that time?

Ques. At that time.

Ans. No; there was no grating to it at that time.

Ques. What say?

Ans. There was no grating over it at that time. **20**

Ques. I mean for the inlet on the north side.

Ans. No; none at that time.

Ques. How wide was that? What were the dimen-  
sions of that inlet?

Ans. Well, I suppose at that time the inlet that was  
in there I suppose was about—

Mr. Cole: I object to this testimony, the witness hav-  
ing to guess or exercise judgment in a matter that is  
susceptible of positive and definite proof by measurement. **30**

Ques. Give us your best recollection.

Ans. I didn't measure it, only with my eye.

The Court: I will admit it.

(Whereupon the defendants, by their counsel, pray  
a bill of exceptions, which is hereby allowed and sealed  
accordingly.)

Ques. Give us your best recollection.

Ans. I judge it was about two feet or two and a half; from two to two and a half feet long and about twelve inches high—that is, the depth down—as near as I can recollect.

Ques. That is the basin you are speaking of, the catch basin?

Ans. The catch basin; yes, sir.

Ques. Are you taking the north side?

**10** Ans. I am talking of both sides. There is one on each side.

Ques. I want to direct your attention first to the north side.

Ans. The north side was about the same thing.

Ques. And the bottom of that was about how far beneath the grade of the gutter?

Ans. About twelve inches.

Ques. What was there over that?

Ans. What?

**20** Ques. Was there anything over it?

Ans. Nothing over it that I know of at that time, where it was set.

Ques. What time?

Ans. Why, before they made the improvements there.

Ques. What improvements?

Ans. Putting in a sewer to carry the water.

Ques. When was that made?

Mr. Cole: I object to that.

**30** The Court: Hasn't this witness been examined about these things at the time of the accident? I thought so. I thought he answered at the time of the accident. I may be mistaken.

The Witness: Before the accident is what I am now.

The Court: You have been speaking of the conditions at the time and before the accident?

The Witness: Yes, sir.

Mr. Barkalow: And on the day of the accident?

The Witness: No, sir.

The Court: Well, at the time of the accident I should think was the same as the date. What do you mean, Mr. Evans?

The Witness: Well, he asked me the condition prior to the day of the accident and I explained that to him. 10

Ques. How were these openings on the day of the accident?

Ans. All changed.

Ques. New inlets put in?

Ans. Improved inlet.

By Mr. Cole: 20

Ques. You mean at the time of the accident?

Ans. Yes, sir.

Mr. Cole: Then all that testimony should be stricken out. As I understand, a different condition prevailed at the time of the accident than before.

The Court: I think that should all be stricken out then. He has been speaking of a condition some other time. Do you want that in? 30

Mr. Backes: If that were the fact I should want it stricken out.

The Court: Well, then, try to get the witness to bring us out of the fog. We are all mixed up.

Mr. Backes: I am not mixed up about it.

The Court: If you see through it clearly I don't.

By Mr. Backes:

10 Ques. I am speaking now of the time of the accident, May 18, 1900. What was the drainage system then prevailing and up to that time to carry the waters from the east side of Greenwood avenue to the west side at the railroad.

Ans. Inlets on each side of the street, Greenwood avenue, on the west side or north side of the station, of the crossing—on the east side.

Ques. Well, I want you to describe what they were.

Ans. Inlets.

Ques. Well, how large were the inlets?

Ans. About two feet and a half long by about twelve or fifteen inches deep—along there.

20 Ques. And how with reference to the grade of the street?

Ans. Level with the grade of the street.

Ques. Now, how on the south side?

Ans. What?

Ques. How was it on the south side?

Ans. The same way.

Ques. Was there any grating on the south side?

Ans. On both sides.

Ques. Grating?

Ans. Yes, sir.

30 Ques. How wide was the one on the south side?

Ans. The same width. They were all put in alike.

Ques. Were there any other provisions that you know of for carrying the water off?

Ans. What, to get it there so it wouldn't run over the track?

Ques. Yes.

Ans. Well, they put in—

Ques. Well, I mean at that time were there any others?

Ans. No; not at that time; no others, no.

The Court: Do you know what time that was, Mr. Backes?

Mr. Backes: I am speaking of the day of the accident and prior to that time.

10

The Court: The witness has confused me some about this matter.

Mr. Backes: He didn't confuse me until the objection was put in by the other side. He spoke and has been directing his attention entirely to matters as they existed prior to the accident. Then he began to speak of something that occurred afterwards, and then the objection was interposed, and that seems to have led to this confusion.

20

Cross-examination.

By Mr. Cole:

Ques. Mr. Evans, I think we are all interested in having the fact made clear to the jury as to what the situation was. Now, you testified to a condition regarding these inlets and the methods used to carry the water under the tracks; then you spoke of a change made before the accident.

30

Ans. Yes; there was a change made.

Ques. How long was it before the accident that the change had been made in the methods of carrying the water off?

Ans. Well, I couldn't tell that.

Ques. About how long?

Ans. Well, I couldn't tell.

Ques. Well, was it a month, six months?

Ans. Oh, well, it was longer than that, I suppose.

Ques. Was it a year?

Ans. Somewheres along there. I couldn't tell.

Ques. But there was a change made before the accident?

Ans. Before the accident; yes.

Ques. Do you think it was about a year?

10 Ans. I judge it was about a year.

Ques. Did that change enlarge the capacity?

Ans. Yes.

Ques. It made better provision for taking the water under the tracks than had existed before, did it?

Ans. Yes, sir.

Ques. Now, did the railroad company, do you know, make this change, enlarging the capacity of the inlets and the pipes to take the water off?

Ans. Yes; that is what I was going to explain.

20 Ques. Were you in Jenkintown on the day of this rain?

Ans. No, sir.

Ques. Didn't know anything at all about that?

Ans. Well, I know it rained.

Ques. Well, I mean you didn't know anything at all about the condition of Jenkintown?

Ans. No.

Ques. Nor of this track?

Ans. No; only afterwards, you know, after the storm, seeing them gathering up the rubbish.

30 Ques. As I understood you to say, you never saw any debris actually on the track at this crossing?

Ans. No; never examined on the track.

Ques. What you saw was stuff on either side of the track?

Ans. Yes; on either side. Some washed over, some lodged on one side, some washed over on the other. As I had charge of the road I had to clean that up.

PATRICK LEE, sworn for plaintiff.

Direct examination.

By Mr. Backes :

Ques. Where do you work?

Ans. On the Reading Railroad.

Ques. Philadelphia & Reading Railway Company?

Ans. Yes, sir.

10

Ques. And upon which division are you now?

Ans. Now I am on the Atlantic and Philadelphia Railway.

Ques. Where were you employed on the 18th day of May, 1900?

Ans. At Jenkintown.

Ques. By whom?

Ans. Yes, sir.

Ques. By whom?

Ans. By the Reading Railway.

20

Ques. The Philadelphia & Reading Railway Company?

Ans. Yes, sir.

Ques. In what capacity?

Ans. Section foreman.

Ques. Of which section?

Ans. What they called the Jenkintown section.

Ques. Did that include Greenwood avenue?

Ans. Yes, sir; right on Greenwood avenue.

Ques. How long had you been section foreman prior to that time? 30

Ans. About ten years.

Ques. How long after that time?

Ans. Well, about ten years altogether, on that side. After that happened—

Ques. Do you know when the accident happened on the railroad?

Ans. Yes, sir.

Ques. You recall the incident, do you?

Ans. Yes, sir.

Ques. How long after that time were you employed as section foreman?

Ans. On the same section?

Ques. On that section; yes.

Ans. Well, till the following December, 1900. I was on that section when the accident occurred.

10 Ques. And you lived at Wyncote, didn't you, at that time?

Ans. Yes, sir.

Ques. On the 18th of May, 1900, were you at the place of this accident?

Ans. No, sir; not at that time.

Ques. Well, did you go there afterwards?

Ans. Yes, sir.

Ques. Who did you go with?

Ans. With my section gang.

20 Ques. How many were in your section gang?

Ans. Well, about nine.

Ques. At that time did you do anything there?

Ans. Why, no; I didn't have anything to do. There was a section man got there before me.

Ques. Did your men have anything to do?

Ans. No; not much when they got there.

Ques. I mean after your men got there did they have anything to do?

Ans. Not much.

30 Ques. Sir?

Ans. They had nothing to do after they got there.

Ques. About what time of day was it you got there?

Ans. It was an hour after the accident happened.

Ques. What time did the accident happen?

Ans. Well, I judge about 3.40, or near about, as near as I can judge.

Ques. Where were you at 3.40?

Ans. I was just about two miles and a half from where the accident occurred.

Ques. On your section?

Ans. On my section.

Ques. Were you there with these nine men?

Ans. We had to walk.

Ques. Were you there with your nine men?

Ans. I was.

Ques. With your gang?

Ans. With my gang.

Ques. As part of your duty did you have charge of Greenwood avenue? **10**

Ans. Yes, sir.

Ques. Taking care of that?

Ans. Yes, sir.

Ques. On that day of the accident did you know of any drains that were on Greenwood avenue, at or near the crossing, that carried the waters under the railroad?

Ans. Yes, sir.

Ques. Did you have charge of those? **20**

Ans. Yes, sir.

Ques. For whom?

Ans. Had charge of them drains.

Ques. For whom?

The Court: What company?

Ques. Did you have charge of the drains in your capacity as section foreman?

Ans. Yes, sir.

Ques. How many drains were there? **30**

Ans. There was two.

Ques. Where were they?

Ans. There was one on the south side.

Ques. Of what?

Ans. One on the south side—

Ques. South side of what?

Ans. Greenwood avenue.

Ques. And where was the other one?

Ans. The other one was coming from the north side of Greenwood avenue, just crossing Greenwood avenue.

Ques. Was there an inlet on each side of Greenwood avenue?

Ans. Yes, sir; both exposed.

Ques. I beg pardon?

Ans. About eighteen inches.

10 Ques. Was there an inlet on the north side of Greenwood avenue?

Ans. Yes, sir; an inlet.

Ques. How far was that from the railroad?

Ans. That was about thirty feet or over.

Ques. East of the railroad?

Ans. Yes, sir; east of the railroad.

Ques. And that you had charge of on that day and for years past?

Ans. Yes, sir.

20 Ques. And where did the waters that went into that inlet at that place empty to?

Ans. That water emptied right through that pipe out on facing the railroad on the northbound side.

Ques. Well, did it cross Greenwood avenue?

Ans. No, sir.

Ques. I say, did it go across Greenwood avenue?

Ans. No, sir; not that pipe didn't. It crossed Greenwood avenue at a point, but where the water was discharged went out on the outside of the northbound track in a ditch—surface water.

30 Ques. Do you understand this map?

Ans. Yes, sir; I see it.

Ques. Now, whereabouts, with reference to the pavement on Beechwood avenue on the north side of Greenwood avenue, was that inlet?

Ans. It was right on the line with the curbstone or footwalk.

Ques. And then you say it crossed Greenwood avenue, the pipe did?

Ans. Yes, sir.

Ques. The pipe ran across Greenwood avenue and emptied on the northbound track?

Ans. Crossed Greenwood avenue, crossed by the watch-box that was there, into a ditch on the northbound side of the track.

Ques. Is the ground on the east side of Greenwood avenue lower than the railroad?

10

Ans. Yes, sir.

Ques. There was a gutter there?

Ans. Yes, sir.

Ques. What was the opening of that inlet, the size of it?

Ans. Eighteen inches.

Ques. And how was that inlet constructed?

Ans. Why, it was just an open pipe at that end, on grade with the ditch to carry water.

Ques. Just an open pipe, eh?

20

Ans. An open pipe, sir.

Ques. There was a grating over the front of the pipe?

Ans. No grating, sir, whatever.

Ques. Which way did the opening of that pipe point?

Ans. It pointed just north; well, say north and south; from the north side to the west side—or I will say the south side—went diagonally across Greenwood avenue.

Ques. And how far south of Greenwood avenue was the place of deposit where the pipe emptied?

Ans. Well, I judge about from Greenwood avenue, I judge about ten feet.

30

Ques. And how near the railroad on the south line of Greenwood avenue did this pipe cross?

Ans. The inlet of that pipe was seven feet from the rail.

Ques. The outlet of it?

Ans. Yes, sir; the inlet of the pipe was seven feet from the rail.

Ques. I mean the pipe that ran from the north side of Greenwood avenue across; I say where did it cross the south line of Greenwood avenue, how far from the railroad?

Ans. Well, about thirty feet.

Ques. That is where it began, wasn't it?

Ans. Yes, sir.

Ques. I mean the other end of it.

10 Ans. The other end started on the north side of Greenwood avenue, this curb that I spoke of. It is kind of diagonal, just like this (illustrating), and towards the railroad.

Ques. Well, the opening of the pipe, did that point up Greenwood avenue or Beechwood avenue?

Ans. It was just on the line of Greenwood avenue and opening off Beechwood avenue. Beechwood and Greenwood are cat-a-cornered like.

Ques. And opened right on the corner?

20 Ans. Right on the corner. Here was a footwalk on Beechwood going this way, and here was Greenwood, going north and south. (Indicating.)

Ques. Was there any other inlet on the north side of Greenwood at the very time of this accident?

Ans. Not to my knowledge; I never seen one.

Ques. You took care of it, didn't you?

Ans. I didn't only these two.

Ques. Well, I say you took care of those two, did you?

Ans. Yes, sir.

30 Ques. Did you take care of any others there on Greenwood avenue?

Ans. Only two.

Ques. One on the north and one on the south?

Ans. Yes, sir; one that was put in by myself and the other one.

Ques. You put that in, did you?

Ans. Yes, sir.

Ques. What was there before that?

Mr. Cole: I object. He is testifying to the condition on the date of the accident.

Mr. Backes: There may be a confusion as to whether there was one or two pipes there.

Ques. Let me ask you, when did you put that pipe in?

10

Ans. I put that pipe in, it was either April or March, I couldn't exactly tell you.

Ques. Of the same year?

Ans. Of the same year.

Ques. At the time you put that in there, was there any other inlet there?

Ans. There was the old inlet there on the south side.

Ques. But I mean on the north side.

Ans. No; there was never none there.

Ques. Never any on the north side?

20

Ans. No, sir.

Ques. On the south side what inlet was there? Won't you describe that?

Ans. Yes, sir.

Ques. What the opening was that the water got in; how it was built.

Ans. The opening was about two feet six inches in width and three feet depth.

Ques. Two feet six inches in width?

Ans. This way; yes, sir. (Indicating.)

30

Ques. How long?

Ans. Well, that was the long distance.

Ques. Now you say the inlet was two feet six inches wide?

Ans. Yes, sir.

Ques. And how long? You have given me the depth.

Ans. Well, do you mean the whole thing was wide?

Ques. Yes; what was the width of it?

Ans. The width of the whole thing. There was nothing but the inlet there. It was the old inlet.

Ques. What was it, oblong or square?

Ans. Square, stone built.

Ques. You say it was two feet—

Ans. Two feet six by three feet. I am speaking of the catch basin. Are you speaking of the catch basin?

10 Ques. I am speaking of the inlet, the opening where the water went in.

Ans. That was square, with the opening that I explained.

Ques. That was two feet six inches wide and how long?

Ans. The opening of this was two feet six by three feet deep, and run a long distance.

By Mr. Cole:

20 Ques. Under the tracks?

Ans. Under the tracks, direct under the tracks. It is not direct under the tracks.

Ques. Continued the same width under the tracks?

Ans. Continued the same width.

By Mr. Backes:

Ques. There was a culvert under the track, was there?

30 Ans. That is the very one that I speak of now, that culvert on the south side.

Ques. It was a culvert that was under the track?

Ans. Exactly.

Ques. How far below the surface of the street was that?

Ans. Below the surface, that—

Ques. That culvert.

Ans. Between eighteen and twenty-four inches, the dirt on it.

Ques. How did the water—what was the manner in which the water got in the inlet?

Ans. It was the old open inlet, nothing in front of that stone culvert. It was a stone culvert all the way towards the creek.

Ques. That is, from—

Ans. That is, on the south side. 10

Ques. How far was that inlet from the track on the south side?

Ans. The approach of that inlet was at least about forty-five feet or seventy-five from the railroad tracks, we will say, up Greenwood avenue, along the south side of Greenwood avenue.

Ques. That was the culvert?

Ans. That was the culvert, the one I spoke of, now have reference to.

Ques. Was that a wooden culvert? 20

Ans. No; it was a stone culvert, covered over.

Ques. Did this in any manner connect with this one under the track?

Ans. There wasn't any more culverts but that one and the pipe that was put in under the track.

Ques. You are speaking of the culvert of which you have given me the dimensions and extended up the street here; is that right?

Ans. That is the old culvert that runs under the track. I am only giving you the approach, how wide it was. 30

Ques. On the 18th day of May, 1900, how far up Greenwood avenue did that extend?

Ans. It extended just as far from the time it had been built. It is an old culvert.

Ques. Answer my question. How far up Greenwood avenue from the railroad track did this culvert extend on the 18th day of May, 1900?

Ans. The same as I said before. I judge between forty-five and seventy-five feet.

Ques. And from the end of that culvert what extended up Greenwood avenue, if anything, at this time?

Ans. Right opposite that culvert that was extended there upwards, around north of that on Greenwood avenue, was an open ditch.

Ques. Was that on the 18th day of May?

10 Ans. No; not on the 18th. It was all filled in then by the association that was improving the land.

Ques. I am now directing your attention to the day of this accident. Was this culvert of which you have given me the description in existence at that time?

Ans. Yes, sir; it was open at that time.

Ques. Was open?

Ans. Yes, sir.

Ques. At which end?

Ans. At the end towards Jenkintown.

Ques. Fifty or seventy-five feet from the track?

20 Ans. Yes, sir; that is the approach to it.

Ques. Was there anything connected with that leading on towards Greenwood avenue, any other pipe, at that time?

Ans. I couldn't exactly tell you about that.

Ques. Well, you said something about it all being covered up.

Ans. Why, the land improvement had covered that ditch up. Whether they put in pipes in connection with the sewer—but I had instructed them to do so.

30 Ques. You had instructed them?

Ans. I had, indeed, in order to let the water down.

Ques. You had instructed them to do what?

Ans. Put pipe in and put in connection with that sewer that was going under the tracks on Greenwood avenue.

Ques. Prior to the land association doing anything, there was an open gully running up the south side of Greenwood avenue?

Ans. Yes, sir.

Ques. And that connected with this culvert?

Ans. Yes, sir; under ground, that was.

Ques. Under ground?

Ans. Under ground.

Ques. And then on the 18th of May, 1900, the land where this culvert ended, and somewhere up Greenwood avenue, had all been filled in?

Ans. Yes, sir.

Ques. You mean that that culvert had been filled in? **10**

Ans. All closed in; because that made an opening on the avenue, that was coming out on Greenwood avenue, on the west side.

Ques. Left an opening?

Ans. Yes, sir; in the top, for this surface water to get in to the sewer under our tracks.

Ques. Between this point, fifty or seventy-five feet east of the track and the track, was there any way for this water to get into the culvert, any opening there?

Ans. Yes, sir.

Ques. What was it? **20**

Ans. An open top, an open grate, as I said before, coming up this avenue from the west side, where the improvements were by the land association, just coming in on this avenue and on the line of the culvert, there was an open grate on the ground there, and the water would run into our sewer that run under the track.

Ques. How far was that opening from the south side of Greenwood avenue?

Ans. That was at the end of the track that I described. **30**

Ques. Fifty or seventy-five feet?

Ans. Yes, sir.

Ques. But I am asking you whether there was an opening right up close to the track, some place that the water got in.

Ans. Yes, sir; on the north side.

Ques. On the south side. You have described the north side.

Ans. It was a new inlet that was there.

Ques. Was that before or after the accident, the new inlet?

Mr. Cole: I object to any testimony concerning the condition after the accident.

10 Mr. Backes: I know what he testified to before. I don't know whether I am getting from him a fair description of this inlet or not.

Ques. Will you give me the size of the inlet opening on the south side, between the openings, the grating?

Ans. Well, I give you; it is just two feet six by three feet deep. That is the inlet on the south, on the south-bound side.

Ques. Now you told me that two or three times, two feet six by three feet deep. How wide was it?

Ans. It was two feet six wide.

20 Ques. How long was it then? Was it two feet six each way?

Ans. It was under the tracks.

Ques. That is the culvert?

Ans. The culvert; that is what I was speaking of.

Ques. I am speaking of the inlet. Can't you distinguish between an inlet and a culvert?

Ans. The inlet of the pipe, you mean?

30 Ques. No, the inlet of the culvert; the hole where the water ran in it that came down Greenwood avenue on the south side.

Ans. No; I don't understand.

(Question repeated.)

Ans. Why, there was an open drain, an open culvert.

Ques. Well, you said something that you put a grating in on the south side.

Ans. Well, that is at the end of this culvert.

Ques. Well, that is what I want. How wide was the opening of that?

Ans. Oh, I judge about three feet square; that is, the grating on top.

Ques. Where was that with reference to the grade of the gutter?

Ans. That was on the grade of the gutter, on the surface.

Ques. Flat?

10

Ans. Yes, sir; on the surface of the gutter.

Ques. On the surface of the gutter?

Ans. Yes, sir.

Ques. And the rain water that came down on the south side of Greenwood avenue entered into the culvert through this grating, didn't it?

Ans. From Greenwood avenue and whatever came from this street. (Indicating.)

Ques. You mean Summit street here?

Ans. I don't know the name of the street. It was the first street on this side. 20

Ques. Then the water that came down Greenwood avenue on the south side as you look toward Jenkintown came down and deposited into this culvert through this grating, didn't it?

Ans. Yes, sir.

Ques. Was there any other opening for the water to get in except this grating?

Ans. No, sir; on this side.

Ques. What was that grating made of? The grating, what was it made of? 30

Ans. Made of cast iron.

Ques. And how far were the gratings apart?

Ans. Well, I should judge about an inch and a half or something; just about that wide. (Indicating.)

Ques. How wide were the gratings?

Ans. A half inch anyway. I didn't measure it.

Ques. Do you know the flagman who worked on the Greenwood avenue crossing on the 10th of May, 1900?

Ans. Yes, sir.

Ques. How long had he worked there, that flagman?

Ans. Oh, he was employed about seven or eight months.

Ques. How long was he employed there as flagman?

Ans. Seven or eight months.

Ques. What was his name?

10     Ans. His name was Patrick Cavanaugh.

Ques. Do you know where he is now?

Ans. I do not, sir.

Ques. Did you have any appliances, any tools, to keep these drains and gratings open during a rain storm?

Ans. Yes, sir; he had a shovel, broom and so forth—the customary thing for a watchman to have.

Ques. Did he have any instructions from you as to what to do during a heavy rain storm?

20     Ans. Yes, sir; he had instructions from me.

Ques. What instructions did you give him?

Ans. I instructed him in case—

Ques. I mean as to these drains.

Ans. I told him to look out for these drains and keep the mouth of them open, except on the south side. He had nothing to do only on the north side.

Ques. The north side?

Ans. That is all.

Ques. What instructions did you give him about keeping that open?

30     Ans. Keep rubbish and everything of that kind from them.

Ques. What instructions did you give to him about keeping them open during heavy storms?

Ans. Just the same thing; I instructed him to keep them open, keep the rubbish away from the inlets of them.

Ques. Did you ever have any occasion to clean them out yourself?

Ans. Well, no, as long as they had men to do it.

Ques. Well, when I speak of you I mean your men. Of course you are the boss. I mean your men, your section.

Ans. Yes, sir.

Ques. Did you, prior to May 18, 1900, or this accident there, have occasion to clean out these sewers and these inlets and those gratings?

Ans. Yes, sir; in 1899. That was my first experience. 10

Ques. In 1899?

Ans. Yes, sir.

Ques. What was it, then?

Ans. That was our first experience on the crossing.

Ques. What was it, then?

Ans. A heavy rain, and so forth.

Ques. Well, what was the experience?

Ans. Because after this rain made the open gratings—

Ques. I didn't ask you that. What was your experience? 20

Ans. Well, cleaning the crossing off after a big rain storm.

Ques. What did you clean off the crossing?

Ans. Well, what sand come down on the railroad track there at Jenkintown.

Ques. Was there much sand?

Ans. Not quite very much —

Ques. When was that?

Ans. In 1899.

Ques. When in 1899? 30

Ans. I couldn't tell you exactly.

Ques. Well, you can't tell us what time of the year it was?

Ans. No; I couldn't tell you now.

Ques. You say it was about a year before this accident?

Ans. 1899 was my first experience; and that caused by the people been grading—

Ques. Never mind that.

Ans. That is my experience of it.

Ques. I am asking you directly as to what occurred on the railroad track.

Ans. All right.

Ques. How many times were you called upon in 1899 to remove it?

10 Ans. Every time a heavy rain storm came.

Ques. They had heavy rain storms in 1899, didn't they?

Ans. Yes, sir.

Ques. Very heavy rain storms, didn't they?

Ans. I can't tell how many.

Ques. I say very heavy rain storms in 1899?

Ans. Sure.

Ques. And during these heavy rain storms did you notice or see any water cross the tracks of the railroad at Greenwood avenue?

20 Ans. Yes, sir.

Ques. How deep?

Ans. I couldn't exactly tell you how deep.

Ques. Give us your best judgment.

Ans. Between four and five inches.

Ques. And after the water left did you find any material there on the track?

Ans. No, sir; excepting gravel, and so forth.

Ques. Now you say that occurred after each heavy rain?

30 Ans. Yes, sir.

Ques. How many heavy rains did you have during 1899 when you were called upon to go to this Greenwood avenue crossing and do what you have told us you did?

Ans. I didn't keep no record of it?

Ques. Well, half a dozen times?

Ans. Well, it may. I couldn't exactly say that even.

Ques. How often during 1899—I am speaking about the rubbish and stuff—did you see water across that track wash over during rain storms, to the extent of four or five inches?

Ans. Every time a heavy rain came. I couldn't tell you how many times; might be two or three.

Ques. How many times did you see rain water rushing across the tracks of The Philadelphia & Reading Railway Company prior to the year 1899, at the Greenwood avenue crossing? **10**

Mr. Cole: I object to this question, when counsel assumes that this water was rushing across the track. There is nothing by this witness to show that.

The Court: Confine the witness to what he saw himself, what he saw of the water, and let your question relate to what he saw.

Ques. Prior to 1899 did you see any waters on the track? **20**

Ans. Yes, sir.

Ques. And where were those waters coming from?

Ans. Those were coming from Jenkintown, east and west of Jenkintown, and up from the hilltops, probably ten or thirteen hundred.

Ques. What?

Ans. Probably it came ten or thirteen hundred feet across. **30**

Ques. Did you finish?

Ans. I finished; yes, sir.

Ques. Down Greenwood avenue?

Ans. Toward the railroad crossing.

Ques. Down Greenwood avenue and across the railroad crossing?

Ans. Across the railroad crossing.

Ques. How long before 1899 did you do so, how often?

Ans. That was the only time, 1899, my first experience of that.

Ques. I am not asking about your experience. I don't know what you mean by your experience. I may not know what you may. But prior to 1899—before. You understood what I meant by before?

Ans. Never had any trouble before.

10 Ques. What might be trouble for you may not be for me. I haven't asked you about trouble. I ask you before 1899 did you see water during rain storms running across the tracks of the railroad company at Greenwood avenue?

Ans. Yes; in 1899 I seen it.

Ques. Before?

Ans. Not before.

Ques. When before?

Ans. I haven't seen it before.

20 Ques. You say you had not seen it before?

Ans. That is what I said; had no trouble before.

Ques. I am not asking whether you had any trouble before. I ask you whether you saw it before.

Ans. No, sir.

Mr. Backes: This question may be objected to, but I think it is proper. I ask to be heard on it.

30 Ques. After this accident was there any change made in the drainage system at Greenwood avenue?

Ans. No, sir; not in my time.

Ques. The same condition that you have described continued; the same inlets that you have described here remained there during the time up until December, when you left; is that right?

Ans. That is right.

Cross-examination.

By Mr. Cole :

Ques. Mr. Lee, what other instructions did you give this flagman Cavanaugh about this crossing except to keep the sewer or pipes on the north side of the crossing clear?

Ans. I instructed this man Cavanaugh, and the reason I instructed him—

10

Ques. Not the reason. What did you instruct him?

Ans. I instructed him if he saw anything in the way of trains to flag them.

Ques. That is, if he saw danger, you mean?

Ans. Yes, sir.

Ques. On the crossing, to flag the trains?

Ans. Yes, sir.

Mr. Backes: I move that the answer be stricken out. The question was limited to the drains.

20

Mr. Barkalow: It was in addition to the drains.

(Objection withdrawn.)

Ques. When did you give him those instructions?

Ans. Just about the time when I employed him.

Ques. You employed him, did you?

Ans. Yes, sir; I did, and placed him there; and as soon as I placed him there I gave him that instruction.

30

Ques. Well, you employed him and gave him those instructions?

Ans. Yes, sir.

Ques. Do you know what his duties were as flagman?

Ans. Yes, sir.

Ques. What were they?

Ans. The duty of a flagman is to keep his watchbox clean and neat, also to sweep it and everything around, and surroundings, and keep it neat and clean. That is my instructions from all corporations.

Ques. What are his duties on the crossing for the trains?

Ans. To display the flag for each and every approaching train, north and south.

10 Ques. Is it his duty to notify the trains of danger at the crossing? Is it the duty of the flagman to notify the approaching trains of danger at the crossing?

Ans. Yes; or to flag them himself if he sees danger without instructions.

Ques. Now you started to say something about your experience in 1899, and then there was a change. What was the change?

Ans. The change was the land association had been grading.

Ques. Where was the land of this land association?

20 Ans. The land of this land association was on the west side of Greenwood avenue.

Ques. How far up from the tracks?

Ans. Well, I judge about from the track—well, it went on the land, the track, from where they were grading.

Ques. What did they do?

30 Ans. Well, these people—there was an open ditch before they started to do this grading or these improvements, from the railroad crossing on to Walnut lane, a distance of 500 feet, that was always open; and whatever flowed in from Jenkintown or other places, it flowed into this water and didn't reach our crossing.

Ques. Into the ditch?

Ans. Into the ditch. And when the land association began to make this grade they covered this ditch and leveled it all up, and had no place for the water from the hilltops there east and west from Jenkintown.

Ques. So that after the ditch was filled up more of it came down than ever before?

Ans. Yes, sir; everything was graded up.

Ques. That is when you had your trouble?

Ans. Yes, sir; brought this dirt then off the grading they were doing right down on to our tracks.

Re-direct examination.

By Mr. Backes:

10

Ques. You say that the land association land was on the west side?

Ans. Yes, sir.

Ques. You mean the east side of Greenwood avenue, don't you?

Ans. Well, I call the south side the west side.

Ques. Is that the Philadelphia side of Greenwood avenue?

Ans. Yes, sir; it is the Philadelphia side of Greenwood avenue. 20

Ques. And extended all the way from the railroad up to—

Ans. Up to Walnut lane.

Ques. Up to Walnut lane?

Ans. Yes, sir; that is their line, from the railroad to Walnut lane.

Ques. This open ditch that you speak of, where was that with reference to the south side of Greenwood avenue?

Ans. On the same side that the land association was grading, on the south side. 30

Ques. What I meant was, in the street.

Ans. It was on the land inside of the street.

Ques. What part of the land?

Ans. Well, on the inside of the walk. It was on the street.

Ques. And that was filled up?

Ans. It was graded up.

Ques. And after that do I understand that instead of the water going into the ditch it went over into Greenwood avenue?

Ans. Yes, sir.

Ques. Well, wherever it came, you knew that a year before the time that this accident happened, didn't you?

Ans. A year before?

10 Ques. That happened a year before, that you knew of?

Ans. What happened a year before?

Ques. Why, this filling in of the ditch.

Ans. Oh, the ditch.

Ques. And the rain waters coming from the south side of Greenwood avenue over into Greenwood avenue and washing down the south side of Greenwood avenue into this grating of yours; I say that happened a year before the time of this derailment?

20 Ans. Yes, sir.

Ques. And you were fully acquainted with it a year before this derailment, weren't you, of that situation?

Ans. Yes, sir.

(Witness excused.)

Mr. Backes: I omitted a matter with this witness on my direct examination that I would like to recall him for.

30 (Witness recalled.)

Ques. The grade of Greenwood avenue from Jenkintown towards the railroad and up to the railroad, was it descending or ascending? Does it go down or up?

Ans. It goes down.

Ques. From Jenkintown towards the railroad, eh?

Ans. No; from this here avenue that comes down the west side.

Ques. Well, what is the grade from Jenkintown to the railroad?

Ans. I guess a pretty steep grade; I judge between thirty-five and forty to the mile.

Ques. I didn't ask you that. Is it descending all the way down to the railroad?

Ans. Yes, sir; descending.

Ques. And was it descending on the 18th day of May, 1900? **10**

Ans. Yes, sir; it was descending.

Ques. All the way, eh?

Ans. All the way.

Ques. I don't recall whether I asked you—and if I did I hope the Court will excuse me—how long did I understand you that you lived in the neighborhood of Wyncote, in the neighborhood of Jenkintown station, prior to 1900?

Ans. Ten years. **20**

Ques. And were you acquainted with the land lying between the railroad and Jenkintown on the east and west side of Greenwood avenue?

Ans. Well, yes; I am acquainted, slightly acquainted.

Ques. Now you walked through there many times, did you?

Ans. I did, sir.

Ques. Do you know where Summit avenue is, Summit street?

Ans. Yes, sir.

Ques. You know all along through that locality, do you? **30**

Ans. Yes, sir.

Ques. You know where Beechwood avenue is?

Ans. Yes, sir.

Ques. Running parallel with the railroad?

Ans. Yes, sir.

Ques. Been over that a good deal?

Ans. Yes, sir.

Ques. Then you know where Beechwood avenue is running from Jenkintown towards the railroad?

Ans. Yes, sir.

Ques. Do you know where Florence avenue is?

Ans. Yes, sir.

Ques. And Spaeder avenue?

Ans. Yes, sir.

10 Ques. Uptown road?

Ans. Yes, sir.

Ques. And Walnut?

Ans. Yes, sir.

Ques. And Division?

Ans. Yes, sir.

Ques. And Leedom and Willow street and West street; you know all of those?

Ans. Yes, sir.

20 Ques. They are all embraced within this red line as shown on this map? What was the nature of the land all through that district in May, 1900,—I mean the way the land laid—was it natural?

Ans. Well, the land laid natural; them cedars are there yet.

Ques. Yes; the cedars are there yet.

Ans. Cedar yet past Greenwood avenue.

Ques. On either side?

Ans. On either side.

Ques. How long had they been in that condition?

Ans. That high?

30 Ques. Yes.

Ans. They were always that high.

Ques. As long as you remember it, eh?

Ans. Yes, sir.

Ques. How long had the land been—I ask you whether it was natural, whether the topography, the top of the land, was in a natural condition in May, 1900,—

you may not understand it. Now as far back as you remember, how long was the land as high, in the way it was in May, 1900?

Ans. Well, on the west side where they were grading—

Ques. On the south side, you mean?

Ans. I mean on the south side, where those gutters were, it wasn't very good; it was good soil, though, all the same; but on the other it was pretty high places. Walnut street is a pretty high hill.

10

Ques. How long were the tops of the hills as they were in May, 1900? How long were they that way, on the north side? Don't you understand me?

Ans. I don't quite understand you.

Ques. Well, Greenwood avenue goes right up a steep grade?

Ans. Yes, exactly.

Ques. And those streets that run off Greenwood avenue they go up also, don't they?

Ans. That is on that side.

20

Ques. On the New York side, or Philadelphia?

Ans. On the New York side.

Ques. They go up pretty steep hills, don't they?

Ans. Yes, sir.

Ques. How long have those hills been there?

Ans. Ever since the streets were formed.

Ques. How long have those hills been there?

Ans. I couldn't tell you how long.

Ques. Were they there before you came there?

Ans. They were there when I came there; I can't tell how long before.

30

Ques. Are they that way yet?

Ans. Yes, sir; I went through them last Sunday.

Ques. There last Sunday, eh?

Ans. I was there last Sunday.

Ques. And the grade of Greenwood avenue, is that the same way yet?

Ans. That has been changed since I was there.

Ques. Whereabouts?

Ans. Down approaching the railroad; down at the lower end approaching the railroad.

Ques. Well, east of Beechwood avenue had they been changed any?

Ans. I didn't see any change in Beechwood avenue since 1900.

10 Ques. Now, what change is there now between Beechwood avenue and what it was in May, 1900?

Ans. Oh, they have got it changed there altogether.

Ques. I mean only in the grading, if any.

Mr. Cole: I object to it as being immaterial and irrelevant.

20 Mr. Backes: Counsel has again forgotten that he questions the legality of the introduction of this map in evidence unless we first show that the condition in May, 1900, and 1902, when the map was made, was not changed, and I am trying to establish it by this witness.

Mr. Dungan: You say now; you did not fix 1902.

Mr. Backes: Well, if there is no change now the lesser includes the greater.

30 Ques. Now, between the railroad and Beechwood avenue, was there any change made there in the grade between May, 1900, and April, 1902?

Ans. No; not to my knowledge they haven't.

---

Mr. Backes: I offer to read the deposition of Joseph W. Hunter. It was read at the last trial. The papers have been through the printer's hands. I might read from the book.

Mr. Cole: I don't know anything about that.

Mr. Backes: May I read from the book?

Mr. Cole: Yes, you may, as far as I am concerned.

(Mr. Backes reads the deposition of Joseph W. Hunter as follows):

---

**10**

JOSEPH W. HUNTER, sworn for the plaintiff.

Direct examination.

By Mr. Backes:

Ques. You live where?

Ans. Jenkintown.

**20**

Ques. How long have you lived there?

Ans. Twenty-seven years this fall.

Ques. Are you in business in Jenkintown?

Ans. Yes, sir.

Ques. What business?

Ans. Surveyor and conveyancing.

Ques. Do you hold any official position?

Ans. Been Borough Surveyor.

Ques. How long have you been Borough Surveyor?

Ans. Oh, well, during the whole time, I suppose, for  
twenty years. **30**

Ques. For the past twenty years?

Ans. Well, there was, I think, two years that I was not;  
two or three years.

Ques. Do you know where Greenwood avenue, in Jenkintown, is?

Ans. Yes, sir.

Ques. Do you know of a railroad that crosses Greenwood avenue, in Jenkintown?

Ans. Yes, sir.

Ques. What is the course of Greenwood avenue?

Ans. Very nearly east and west.

Ques. And the railroad that you have spoken about?

Ans. North and south.

Ques. Is there not a station of that railroad at or near Jenkintown?

**10** Ans. Jenkintown station is where Greenwood avenue crosses the railroad.

Ques. On which side of Greenwood avenue is the railroad station?

Ans. The station proper is on the west side.

Ques. Of Greenwood avenue?

Ans. On the north side of Greenwood avenue.

Ques. On which side of the railroad is the station?

Ans. The station proper is on the west side.

Ques. What is, if anything, on the east side?

**20** Ans. The office for the baggage and express business and a shed for passengers. I think there is a small portion enclosed also for passengers there, besides the shed.

Ques. How many tracks are there on that railroad that cross Greenwood avenue?

Ans. Two and a switch; the switch is just above Greenwood, and the tracks of that switch cross Greenwood avenue.

Ques. By whom is that railroad operated?

**30** Mr. Bergen: Objected to, unless he knows of his own knowledge.

Ques. What name has the railroad—this is for the purpose of identifying it.

Ans. Philadelphia and Reading Railway.

Ques. You know it as that?

Ans. Yes, sir; I know it as that.

Ques. Have you occasion to use that railroad?

Ans. Yes; I use it.

Ques. In traveling from where?

Ans. Jenkintown to Philadelphia.

Ques. Jenkintown, going in any other direction?

Ans. To Bethlehem.

Ques. Any other direction?

Ans. Bound Brook.

Ques. To New York?

Ans. New York.

Ques. And at this railroad station do they sell railroad tickets? **10**

Ans. They do; yes.

Ques. Do your answers in this respect apply to the present time, or prior to the present time?

Ans. To the present time.

Ques. How far back in point of time has the condition prevailed that you have spoken of?

Ans. Ever since I have been in Jenkintown.

Ques. At or about May 19, 1900, and prior to that time, had you occasion to use this railroad for the purpose of travel? **20**

Ans. I had.

Ques. In going from where to where?

Ans. In going from Jenkintown to Philadelphia, or Jenkintown to New York and several places up along the line of the North Penn.

Ques. And at or about May 18, 1900, and prior to that time, did you purchase any railroad tickets at Jenkintown for your destination?

Ans. Yes. **30**

Ques. Where did you purchase them, and from whom?

Ans. I purchased from the agent at Jenkintown station; that is, I purchased a 50-trip book. I didn't purchase a ticket every time I went, because I had a trip book.

Ques. Who issues those tickets?

Ans. The agent at the station.

Ques. In whose name, by which railroad were they issued?

Ans. They were issued by either the Philadelphia and Reading R. R., or the Philadelphia and Reading Railway Company. I don't know just at what time the present company took possession or got their new charter. At first it was the Philadelphia and Reading Railroad Co., and afterwards, after their reorganization, it went under the name of the Philadelphia and Reading Railway Co. **10** The Philadelphia and Reading operated it.

Ques. What do you mean by operated it?

Ans. The Philadelphia and Reading leased the road from the North Penn Railroad.

By Mr. Bergen:

Ques. Do you know that?

Ans. I know it by—yes, I know it.

**20**

Further direct.

Ques. Until when did the Philadelphia and Reading Railroad Co. operate this line of railroad crossing Greenwood avenue? Tell about what time.

Ans. I don't know just when the change was made in the name of the corporation.

Ques. Approximately?

Ans. I can't remember whether it was two years ago or not; somewheres about that time.

**30**

Ques. But since the change to the Philadelphia and Reading Railway Co., when they got their new charter, as you have spoken of, who has operated the line of railway to your knowledge that crosses Greenwood avenue, at or near Jenkintown?

Ans. The Philadelphia and Reading Railway Co.

Ques. Is there any name on the station at Jenkintown indicating the railroad?

Ans. I don't remember that there is any particular name. There is the name Jenkintown on the sign at the station.

Ques. Have you a book with you now of tickets?

Ans. Yes; I have.

Ques. Will you produce it?

Ans. (Witness produced a book of railroad tickets.)

That is it.

Ques. When was this book issued to you?

Ans. I think it is stamped.

10

Ques. March 15, 1900?

Ans. Yes.

Ques. The first leaf reads, "Philadelphia and Reading Railway Company, 50-trips commutation book, good between Philadelphia (Reading Terminal) and Jenkintown."

Mr. Bergen: I object to reading it in evidence.

Ques. Was this book issued to you by the station agent at Jenkintown?

20

Ans. It was.

Ques. And that station agent was at the time of the issuing of it in the office of the railroad company at the station, in Jenkintown?

Ans. He was.

(Book offered in evidence and marked Exhibit P3.)

Ques. State whether or not books that were issued to you of trip tickets were of the same kind and by the same company as you have just shown me, Exhibit P3, since the time of the new charter?

30

Ans. Yes; this is one of the books that was issued since the new charter.

Ques. How many have you had since the new charter was taken out by the Philadelphia and Reading Railway Company?

Ans. I can't tell you.

Ques. The first one that you obtained, was it the same kind issued by the same company; I mean after the new charter?

Ans. The Philadelphia and Reading Railroad Company issued the same kind of a book previous to their reorganization.

Ques. And then after their reorganization what?

10 Ans. Just the same thing, with the exception that the name was changed.

Ques. And ever since the reorganization you have been obtaining books of fifty-trip tickets of the Philadelphia and Reading Railway Company?

Ans. Yes, sir.

Ques. And purchased them at the Jenkintown station?

Ans. Mostly at the Jenkintown station; sometimes I purchased them at the Terminal.

20 Ques. Do you recall the date of May 18, 1900, when there was an accident at or near the Jenkintown station, on that railroad; do you recall that there was such a thing?

Ans. Yes; I know there was such a thing happened at the Jenkintown station.

Ques. And how long ago, if you can fix it?

Ans. About two years ago, I think.

Ques. Did you see it, or any part of it?

Ans. I didn't see it; didn't see anything of the locomotive, or anything, until the day after.

Ques. What did you see the day after?

30 Ans. Nothing, except some tearing up of the platform and some track being torn up; there was no track torn up at that time.

Ques. How do you know at that time that it was the day after the occurrence?

Ans. I went down to take a look at it.

Ques. You read of it in the newspapers?

Ans. No; I heard of it as soon as I came home; I didn't read of it in the papers.

Ques. You did not?

Ans. No; when I came home; I was at Norristown that day; I went down on the train in the morning and went to Norristown and came home on the trolley, and when I got home I heard of the accident at the station.

Ques. What time in the day was it when you heard of it?

Ans. Somewhere in the neighborhood of 6 o'clock; between 5 and 6.

Ques. It was the next morning that you went to the place of the accident? 10

Ans. Yes.

Ques. What did you see there?

Ans. I don't recollect what all I did see; I saw a portion of the platform torn, but I was not there a great while; I went there to take the train to the city again.

Ques. Which portion of the platform was torn up—on which side of the railroad?

Ans. On the east side of the railroad.

Ques. What else did you see torn up, if anything, besides the platform? 20

Ans. I didn't see anything torn up.

Ques. Anything about the station—about the waiting-room?

Ans. I saw a portion of the shed, or the wall of the shed; something had been knocked out or down; the corner of the roof had been torn off a little.

Ques. Do you know where the flagman's house is at the crossing of Greenwood avenue?

Ans. I do; yes, sir.

Ques. At or about the time of this accident at the station do you know whether it was about the same location then as it is now? 30

Ans. Just about the same.

Ques. Are there gates at the Greenwood avenue crossing?

Ans. Yes.

Ques. Were there then?

Ans. I am not positive about that at all; I can't say whether they were there that long or not.

Ques. How long has Greenwood avenue crossed the railroad at or near this station to your knowledge—at or about the same place where it now is?

Ans. I think since 1867.

By Mr. Bergen:

**10**

Ques. You are speaking of your own knowledge?

Ans. Well, all my knowledge is gained by looking at the records of the court when the street was laid out.

Mr. Bergen: That is not knowledge; we object to that answer; the records must be produced.

Further direct.

**20**

Ques. To your knowledge, how long has Greenwood avenue crossed the railroad at or about its present location?

Ans. Since 1875.

Ques. What records do you speak of when you say that Greenwood avenue was laid out at its present point?

Ans. The records of the court and the jury of view; it was presented to a jury of view and the return of that jury.

**30**

Ques. These papers you have examined?

Ans. Yes.

Ques. At that time was the railroad there?

Ans. Yes, sir.

Ques. Whose railroad was it then?

Ans. It was designated then as the Northern Pennsylvania Railroad Company.

Ques. Do you know of a creek called Wyncote Creek?

Ans. Not by that name?

Ques. Is there a creek to the west of the railroad which crosses Greenwood avenue at Jenkintown station?

Ans. There is a creek west of Jenkintown station, and where Greenwood avenue crosses that creek is about 300 feet west of the railroad; that is called Tacony creek.

Ques. Are you acquainted generally with the topography of the land in the neighborhood of Greenwood avenue on the west of the railroad and the east of the railroad extending toward Jenkintown and south and north of Greenwood avenue, between the creek and Jenkintown? **10**

Ans. I am; I have made topographical surveys of all that section.

Ques. Will you describe it?

Ans. Well, as I just said, the main creek, or Tacony creek, is west—

Ques. I am not speaking of the creek.

Ans. That is part of the topography.

Ques. I am speaking of the land; well, go on. **20**

Ans. Greenwood avenue follows a ravine from Jenkintown on the east crossing the railroad into another ravine; on the west of the railroad, along the south side of Greenwood avenue, there is a small creek that is carried underneath the bed of the railroad and emptied into Tacony creek west of the railroad, where Greenwood avenue crosses the creek; and the ground on either side of Greenwood avenue, east of the railroad, slopes up quite abruptly, particularly so on the north side. West of the railroad, so far as Tacony creek, it is flat, or practically so. **30**

Ques. And downward, depressed all the way?

Ans. There is very little depression from the railroad to the creek; there is some depression, but not very much. On the north side of Greenwood avenue from the railroad—in other words, Greenwood avenue is elevated above the ground, both on the north side and also

on the south side of Greenwood avenue, west of the railroad, although on the south side it has been filled up more within the past two or three years. I would just say immediately south of Greenwood avenue is the line of a little creek that ran west and parallel to Greenwood avenue.

Ques. Extending eastwardly from the railroad, how far does Greenwood avenue run?

Ans. Easterwardly?

10 Ques. Yes.

Ans. It extends from the railroad to the York road, the main street of Jenkintown.

Ques. All the way throughout that entire distance is it in a ravine?

Ans. The ravine proper, or valley, started at what is called Walnut street.

Ques. How far east is that of the railroad on Greenwood?

Ans. That is about 2,000 feet or 2,300 feet; something like that.

20 Ques. The slope that you have spoken of is the natural slope of the land?

Ans. Yes; absolutely so on the north side of Greenwood avenue; on the south side, west of Walnut street, the topography has been changed within the past year by work done on what is known as the Syndicate ground.

Ques. Changed in what way?

30 Ans. They have filled up the ravine somewhat between the foot of the natural slope and the side of Greenwood avenue, covering the bed of the little stream which parallels Greenwood avenue.

Ques. Has the steep slope on the south side of Greenwood been cut down some, or filled in?

Ans. Filled in, except right immediately adjoining the railroad property; that bluff is the same as has been for several years. The building that stood fronting on

Greenwood avenue, just east of the railroad—that is, on the south side of Greenwood, east of the railroad, has been torn down within a year.

Ques. That adjoins the flagman's house?

Ans. Yes; may possibly be a little longer than a year, but just about that time.

Ques. Has Greenwood avenue been, topographically speaking, in the same condition ever since you have known it, as it now is, and as it was on or about May 18, 1900?

10

Ans. Yes; the line of the street and the grades of the street are just about the same as they have been, practically speaking; of course, when the curbs were set there was some little change from the irregular line of the surface of the old road.

Ques. I am speaking of the grade; it is not changed?

Ans. No; practically speaking, it is the same as it was when I first came to Jenkintown.

Ques. Between the York road and the railroad at Jenkintown do any streets intersect or run into Greenwood avenue?

20

Ans. Yes.

Ques. How many?

Ans. There are three streets intersect and cross Greenwood avenue and there is one street—practically four streets that now intersect and cross Greenwood, and there is one street that runs to Greenwood avenue, and does not cross it.

Ques. These streets that intersect and run into—state whether they are all on grade with Greenwood?

Ans. Yes; the grade of the streets meet.

30

Ques. But on either side of these intersecting streets, on either side of Greenwood avenue, are they on a grade with Greenwood avenue?

Ans. No; from Walnut street down the grade on Walnut street rises from Greenwood both to the south and to the north, and the grade on Florence avenue—

Spader street it is on one side and Updown street—that is a continuation of Spader street—on the other. Florence avenue, which is the street open nearest to the railroad, rises with considerable grade toward Greenwood avenue to the north.

Ques. State whether or not it is not a fact that all of these intersecting streets rise in grade from the point of intersection with Greenwood avenue?

Ans. They all do.

- 10** Ques. And the waterflow, in case of rain, on these streets—state which way it goes, with reference to Greenwood avenue?

Ans. Well, the water on the streets centering in Greenwood avenue and Greenwood avenue is the conduit which carries the water to the west.

Ques. State whether it is a fact that Greenwood avenue is really a basin for this water?

Ans. Greenwood avenue is really the conduit that takes the drainage from the slopes on either side.

- 20** Ques. You mean a surface conduit?

Ans. Yes, or probably you might say a canal; it is really a canal.

Ques. Immediately east of the railroad and north of Greenwood avenue, what is the condition of the land there?

Ans. Well, the land there rises abruptly to the north; Beechwood avenue starts at the grade of Greenwood and rises all the way up into Jenkintown.

Ques. Is that the first intersecting street after you pass the railroad going west?

- 30** Ans. Yes, sir.

Ques. What is the name of the next street?

Ans. Florence avenue.

Ques. How far is that from the railroad?

Ans. 800 to 1,000 feet.

Ques. Does that extend east and west from Greenwood avenue?

Ans. It extends north.

Ques. North and south?

Ans. Don't extend to the south; only to the north.

Ques. And Beechwood avenue extends north from Greenwood avenue?

Ans. Yes, sir.

Ques. And the next street is what?

Ans. Florence avenue.

Ques. How far is that from the avenue?

Ans. I had mentioned that as being 800 feet, and the **10**  
next as Spader, or Updown.

Ques. How far is Spader and Updown street from Florence avenue?

Ans. 400 feet.

Ques. What is the next street?

Ans. The next street east of Spader street is Walnut street.

Ques. Is that the summit of the grade?

Ans. No; it is not the summit.

Ques. What is the next street?

Ans. The next street is Cedar street, and that—I can  
give you exactly the height of that point above the rail-  
road. **20**

Ques. How far is Cedar street above Walnut street?

Ans. Cedar street is seven hundred feet east of Walnut.

Ques. How far is Cedar street on Greenwood avenue east of the railroad?

Ans. About two thousand feet, I think; I can't tell exactly.

Ques. Can you give the elevations on Greenwood avenue, between the railroad and each of these intersecting streets? **30**

Ans. I can't from memory; the only one I can remember is a point at Cedar street and Greenwood avenue, and that point is one hundred feet above the railroad.

Ques. From that point to the railroad is the grade downward at all points on Greenwood avenue?

Ans. It is.

Ques. And all those streets that you have mentioned intersecting Greenwood avenue, state whether or not water deposited from those streets runs into Greenwood at their point of intersection?

Ans. The water from the intersecting streets that I have named empties into Greenwood avenue.

10 Ques. Do you know what provision was made prior to May 18, 1900, at the time of this accident, for the carrying of water across the railroad that crosses Greenwood avenue near Jenkintown, and which you have designated as the Philadelphia and Reading Railway Company?

Ans. The water was carried under the railroad, as far as my recollection carries me, by a stone culvert; I don't just remember the dimensions of that culvert, but it was something like two feet, or two and one-half feet square.

Ques. It was immediately under the railroad?

Ans. Yes.

20 Ques. Where did it begin—where was the point of opening of the culvert, with reference to the railroad and Greenwood?

Ans. The point of opening was just a little above where the watchman's box stands.

Ques. On which side of the railroad?

Ans. On the east side of the railroad; on the south side of Greenwood avenue.

Ques. Was there a pavement on Greenwood, or a sidewalk?

30 Ans. There was a wooden pavement there on the south side, in front of the house, which used to stand there and which came down close to the watchman's box.

Mr. Faulks: You mean on the sidewalk?

Ans. Yes, sir; on the sidewalk.

Ques. This culvert, was it in the gutter, or on the sidewalk of Greenwood avenue?

Ans. Immediately in front of the property; I think it was out beyond the building line of the street somewhat, and was covered over with planking from the watchman's box up to a point—well, sixty feet away from the railroad.

Ques. East of the railroad?

Ans. East of the railroad.

Ques. Was that the point of opening of this culvert?

Ans. There was an opening into the culvert right by the watchman's box. 10

Ques. I want to know where the culvert began on the east side of the railroad and the south side of Greenwood. About how far from the railroad?

Ans. Well, it commenced right about the railroad company's line; right near the watchman's box.

Ques. Can you describe its construction at that point—the means that were employed for the water to get into the culvert?

Ans. Not very accurately.

Ques. Describe it as well as you can from your knowledge and recollection of it. 20

Ans. There was an opening; it may have been a foot and may have been more than a foot; it was covered by a flagstone and may have been five feet in length, four feet in length, possibly five in length, and it was raised above the gutter, maybe, a foot, or a little more than a foot, maybe fifteen inches, to allow the water to run from Greenwood into the culvert.

Ques. How did the water get into the culvert if it was covered with stone—a flagstone?

Ans. There was an opening, just the same as a city inlet, on the side. 30

Ques. Won't you describe the opening?

Ans. Well, I thought I had just described it, as near as I can.

Ques. This flagstone, was that part of the pavement, or sidewalk, covering the opening?

Ans. The cover of the inlet was used as part of the sidewalk.

Ques. And where was the inlet proper, with reference to Greenwood avenue and this flagstone?

Ans. The inlet was on the south side of Greenwood, east of the railroad and near this watchman's box.

Ques. Did the opening of the inlet form a part of the gutter on Greenwood avenue?

10 Ans. I, possibly, could best describe that by saying that the water on the south side of Greenwood avenue entered through that inlet, but the drainage from the ground on the south side of Greenwood avenue emptied into an open ditch, or little creek, that was alongside of Greenwood avenue, and entered the culvert some sixty or seventy feet away from the railroad.

Ques. That is, the drainage from the land on the south side of Greenwood avenue?

Ans. Yes.

Ques. Where did the culvert extend to from this point?

20 Ans. It extended underneath the bed of the railroad and, I think, about half way, 100, or 125, or 150 feet, west of the railroad, when it opened into the ditch, or small creek.

Ques. Do you know where John McFern has a shoe-maker shop on the south side of Greenwood avenue?

Ans. Yes; I know where it is.

Ques. Where is this ditch which the culvert empties into, with reference to that shop?

30 Ans. Well, at the present time that is covered up all the way to the creek, but the culvert empties somewhere just about where McFern's shop is, as near as I can recollect. It empties just about west of the line of the Nicholson property, the Nicholson coal yard property.

Ques. Until when did that condition prevail—until when was the culvert constructed in the manner in which you state?

Ans. My recollection is that it was covered up for a little further than that at the time of the accident; a little

further than where McFern's shop is, on account of the railroad company having constructed a roadway into their yard, and it was covered up sufficiently to allow them to get into their yard.

Ques. And the point of outlet at the time of the accident was into what?

Ans. It ran into an open ditch.

Ques. And where did that ditch extend to?

Ans. Into Tacony creek.

Ques. How do you know the size of this culvert; did you ever see it? **10**

Ans. I have seen it; yes.

Ques. When did you see it?

Ans. Well, I saw it frequently during my residence here in Jenkintown.

Ques. Was it in the condition that you have described it at or about the time of the accident; was it built in the manner in which you have described it at or about that time?

Ans. My recollection is that it was, and that there was also, at the time of the accident, an additional outlet for the water, or rather an inlet for the water, on the north side of Greenwood avenue. **20**

Ques. Where did the conduit of that inlet extend to on the north side of Greenwood avenue?

Ans. It extended across Greenwood avenue to the south side into this culvert.

Ques. The same culvert?

Ans. Yes, sir.

Ques. Was any other provision made for the carrying of the water on Greenwood across or under the track of the railroad at or about the time of the accident; was there any other way for the water to get across? **30**

Ans. There was not; the only other outlet for the surface water was down along the east side of the track.

Ques. Extending down which way?

Ans. Extending south.

Ques. Toward Philadelphia?

Ans. Yes, sir.

Ques. Have you ever been in the neighborhood of the railroad during the time of rains and observed the conditions as they existed there prior to the accident?

Ans. Yes; I have been down to the station when the water was over the tracks.

Ques. When, with reference to the accident?

10 Ans. Well, that was—let's see, the water was there, I think it was in 1892; I remember the water being over the tracks.

Ques. After that?

Ans. I don't remember just exactly what time it was; it was one time after that that the water was up high enough to remove the bridge—a wooden bridge that carried Greenwood avenue over Tacony creek.

Ques. During the time of heavy rains, at or immediately before the accident, say within a period of two or three years, did you observe the condition of Greenwood avenue at or near these tracks?

20 Ans. I don't recollect of seeing water up over the tracks within that time, but I do recollect seeing some workmen shoveling the mud and dirt off the tracks after rains had been over.

Ques. When was that, with reference to the date of this accident?

Ans. I am not positive, but I think it was the year before the accident happened; we had a very heavy rain.

Ques. Where were they shoveling the dirt from?

30 Ans. From the Greenwood avenue crossing on the railroad.

Ques. On the railroad?

Ans. Off the tracks; yes.

Ques. In what quantities was it on the tracks?

Ans. I can't say how much was on there.

Ques. Large quantity?

Ans. There was an inch or two of stuff that had been gathered on the tracks that they were cleaning off.

Ques. What were the men doing?

Ans. Carrying it off the tracks with their shovels.

Ques. How many?

Ans. I really don't know.

Ques. Who was in charge of the men at the time?

Ans. I don't know whether the road foreman was there or not; it seems to me that he was.

Ques. Who was he?

Ans. Mr. Lee.

Ques. Patrick Lee?

10

Ans. I think his first name was Patrick.

Ques. How did the sand and stuff that they were shoveling off get there?

Mr. Cole: I object. The answer is a presumption.

Mr. Backes: All right; I won't read that. I will read the next one.

Ques. Was there anything to indicate there that it was?

Ans. Yes; Greenwood avenue had been washed out quite considerable all the way down, particularly from the first angle above, east of the railroad. 20

Ques. Did you ever see that conditon prior to that time, or at any other time?

Ans. I have seen it quite often, but I can't give the date.

Ques. What have you seen quite often?

Ans. I have seen dirt that has been washed on the tracks after heavy rains.

Ques. How many times did you see that condition for a period, we will say, two years prior to May, 1900? 30

Ans. I don't recollect positively; I may have seen it two or three times.

Ques. Are you familiar with the construction of culverts—is that part of your business?

Ans. Yes; I have had some of that sort of work to do.

Ques. And are you familiar with the construction of culverts such as was done at this crossing prior to the accident?

Ans. Yes, I have known those kind; I have built some of those, or had charge of the work of constructing some of those kind of culverts.

10 Ques. From your knowledge of the topography of Greenwood avenue and the intersecting streets and the land surrounding it, can you state whether or not the culvert that was used to carry the water under the railroad toward the creek was sufficient or not to carry the water during heavy rains?

Mr. Cole: That is objected to. I submit that is not a proper question to call for an opinion from this gentleman; and it is not definite or certain enough; it is too general.

(Mr. Backes replies.)

20 Mr. Cole: We base our objection on the ground that the question is too general and the witness is not qualified to express an opinion.

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

30 (Mr. Backes continues the reading of the testimony as follows:)

Ans. The culvert that was there was practically large enough to carry the water from an ordinary rainfall, but when we came to have an extra heavy rain, which some of these were, it was not large enough.

Ques. Upon these occasions when you saw Greenwood avenue submerged, or the tracks submerged, or upon the occasion when they were shoveling sand from the tracks, had there been extraordinary rains?

Ans. Yes, there had been; more water had fallen within a given period than what is generally allowed for an ordinary storm, or a fall of rain. Of course, it is a matter of observation and of calculation as to what constitutes an ordinary rainfall.

Ques. It is a matter of calculation by whom?

10

Ans. Of people who observe those things.

Ques. Are there any fixed rules as to it?

Ans. Well, from observation there has been deducted rules for estimating the proper size of culverts and of pipes necessary to gather the water from certain areas.

Ques. Are you acquainted with these rules?

Ans. Well, in a certain measure; I don't carry them all in my head; I can't.

Ques. Have you ever made a calculation of the size of pipes that would be proper and reasonable to use for the carrying of water across these tracks at Greenwood avenue?

20

Ans. I never made any such calculation for that particular place; no, sir.

Cross-examination.

By Mr. Bergen: (Read by Mr. Dungan.)

Ques. You say you saw the water running over that walk in 1892; was not that at the time when we had the tremendous floods over the country, when Bound Brook was pretty nearly washed away?

30

Ans. I think that is somewhere about that time.

Ques. I know it was, and I am calling your attention to that. Is it not a fact that the storm you refer to, when this creek was so high, was an unusual and extraordinary storm all over the country?

Ans. I think it was. The way I fix that point in my mind was the time—if I am correct, that would be the date of it—at the time Hastings was nominated for Governor. Wasn't he nominated and elected in 1892?

Ques. I don't know about that.

Ans. If that is so, that is the time that general rain came.

10 Ques. I ask you whether that storm to which you referred when that creek was up, and the bridge was carried away, you spoke of in 1892, whether that was not an unusual storm; the bridge was carried away, I understood you to say?

Ans. Yes.

Ques. That was unusual?

Ans. Yes, sir.

Ques. And in building a culvert under a railroad, you would not undertake, as an engineer, to provide for any storm of that kind, would you?

Ans. It would hardly be taken into consideration.

20 (Objected to as not cross-examination.)

Ques. Now, you say there was a creek running alongside of Greenwood avenue—where did that creek rise?

Ans. The principal source was from two springs; one is still open, or they are both open.

Ques. The principal source was two springs, and what else, anything—surface water?

Ans. Yes; but that didn't form the body of the water.

30 Ques. What was there beside the two streams?

Ans. The two springs.

Ques. I mean two springs?

Ans. And there may have been other springs that came in as the stream went out.

Ques. Was it a living stream—water flowing all the time?

Ans. Yes, sir; it was.

Ques. Where did it run, with reference to Greenwood avenue?

Ans. It practically paralleled Greenwood on the south side.

Ques. Beyond the street line?

Ans. Yes, sir.

Ques. South of the street line?

Ans. Yes, sir.

Ques. Running through private property?

Ans. Yes, sir.

Ques. When that reached the neighborhood of the railroad it was there received by and entered into this culvert?

10

Ans. Yes, sir; it was received into the culvert, as I explained. It extended some fifty or sixty feet east of the railroad; it was all planked over.

Ques. It ran into this culvert that went under the track?

Ans. Yes, sir.

Ques. There was not two separate culverts under there?

20

Ans. No, sir; only the one.

Ques. So that the water that came down that stream was received in the upper end of the culvert, and the surface water that ran into Greenwood avenue was received into the inlet on the south side of the street that you have described?

Ans. Yes.

Ques. The stream, or creek, we are speaking of ran at the foot of the elevations to the south of Greenwood avenue?

Ans. Yes.

30

Ques. And in times of showers would receive the water running down from these elevations?

Ans. Yes.

Ques. And carry them into the culvert?

Ans. Yes.

Ques. That, I understand you to say, has been filled up?

Ans. The stream?

Ques. Yes.

Ans. It has been piped—drain-pipes have been put in and it has been covered up.

Ques. Who by?

Ans. By the owners of the ground on the south side of Greenwood avenue.

10 Ques. So that the surface water which now falls on these elevated lands to the south of Greenwood avenue no longer enter into that stream but runs over into the street?

Ans. Yes, sir; runs over into the street.

Ques. That was done how long ago?

Ans. I think the work continued on that about two years.

Ques. Hadn't that been done when this accident happened?

Ans. I think some of it had.

20 Ques. Had the first street above the railroad running up to the summit been opened and graded at that time; was it not in process of being graded?

Ans. No; the first street had been opened some years prior to that time.

Ques. What do you call the first street above the railroad?

Ans. A continuation of Beechwood avenue to the south; Beechwood had been opened some time.

Ques. On the south?

30 Ans. On the south the township road had been open some years before the other street; it ran into the township line.

Ques. Just above the railroad I observed coming up a new street in the shape of a circle that runs up on the height; what is the name of that?

Ans. That is Summit avenue.

Ques. Is there any street between that and the railroad entering into Greenwood avenue?

Ans. No; but—

Ques. Just answer the questions yes or no; is there any street between that street and the railroad entering into Greenwood avenue?

Ans. No, sir.

Ques. That street, you say, was the remodeling of some other street that was formerly there?

Ans. That Summit avenue entered into and became a part of the street that runs straight up; up over the hill.

Ques. But before Summit avenue was graded and put in shape there was a street in there at about that place? **10**

Ans. At exactly the same place.

Ques. Summit avenue, of course, is a wider street than that one was?

Ans. Yes, sir.

Ques. And that was done by the owners of this adjacent land?

Ans. Yes, sir.

Ques. The syndicate you speak of is a party of gentlemen who own the land?

Ans. Yes, sir. **20**

Ques. And who have improved and graded it for the purpose of putting it into the market, I suppose?

Ans. Yes, sir.

Ques. At the time of this accident, how far had Summit street been graded?

Ans. I don't remember; there had been some work done on it.

Ques. It was being graded at the time?

Ans. Yes, sir.

Ques. And the pipes that carried this water, in the **30** place of the creek, ran under this street, didn't they?

Ans. Yes.

Ques. What is the next street above that?

Ans. On the south?

Ques. Yes.

Ans. That is what we call Updown street.

Ques. Was that being graded at the time of this accident?

Ans. I don't know whether the work had been commenced on that one or not; there may have been some work.

Ques. If the work had been commenced this pipe had been continued up across that street, hadn't it?

Ans. That street does not cross that pipe.

Ques. It stops before it gets there?

10 Ans. Yes, sir; coming up, the pipe is run up to the spring.

Ques. And it had been running up to the spring at the time of this accident to gather in the water from this spring?

Ans. I can't say that.

Ques. You have no recollection of that?

Ans. No; I don't know that a pipe was up so far at that time. There was some other work done in that connection—syndicate work—before that was done.

20 Ques. The putting in of this pipe, covering it up, had the tendency to throw more water into the street, I suppose?

Ans. It had.

Ques. How long had that condition existed previous to this accident, as nearly as you can tell—a short time, or very long?

Ans. Only a short time.

30 Ques. Now, at the track; you said there was a ditch at the east of the railroad track running south; that, I understood you to say, received the water that didn't go into this inlet?

Ans. I didn't say there was a ditch; I said the only outlet of the water, beside going over the track in time of flood, was down the east side of the track.

Ques. Then the land to the south of Greenwood avenue, immediately at the track, falls off sufficiently to have the water run there; that gets there?

Ans. Yes.

Ques. The street at the track is on a level with the track, is it not?

Ans. Yes.

Ques. And the sidewalk to the south, or planking—whatever was there at the time—is on the same grade?

Ans. Practically so.

Ques. As near as you can tell?

Ans. As near as I could tell I think there was a step up, and probably four or six inches; there was a little rise, but I don't remember how much. **10**

Ques. What was the size of the opening on the north side of Greenwood avenue?

Ans. My recollection is that it was an opening to take the water into fifteen or eighteen-inch pipes.

Ques. Under the street?

Ans. Under the street.

Ques. And that condition of affairs had existed, according to your recollection, for twenty years?

Ans. Yes. **20**

Ques. Is that correct?

Ans. Yes, sir.

Ques. Now, Greenwood avenue was, at this time, paved with macadam?

Ans. At what time?

Ques. At the time of the accident?

Ans. Yes, sir.

Ques. And the gutters, how were they paved?

Ans. No; the gutters were paved with rubble stone.

Ques. And those new streets that you have spoken of as being opened to the south of Greenwood, were not then paved or macadamed? **30**

Ans. They were not.

Ques. How many of them were then in process of construction?

Ans. Well, work was being done over the whole tract.

Ques. Do you remember this rain that happened that day—the day of the accident?

Ans. Well, in an indistinct way I remember; Norristown got tied up from getting around on account of it.

Ques. Did you notice, within a day or two, what effect this shower had on the work that was being done on the syndicate's land, whether it was washed or not?

Ans. Not very much washing had been done on the roads, but where the earth had been filled in toward Greenwood avenue had been washed out.

Ques. Quite a good deal of it?

10 Ans. Yes; a good bit of it.

Ques. And that washed down into Greenwood avenue?

Ans. Yes.

Ques. Was that scattered along Greenwood avenue?

Ans. There was some scattered along Greenwood avenue, but most of it had been carried away.

Ques. With the flood?

Ans. Yes, sir.

20 Re-direct examination.

(Read by Mr. Backes.)

Ques. What was washed away into Greenwood avenue?

Ans. Some of the earth and the stones that were in the earth where they had been filled in.

Ques. Washed over Greenwood avenue?

Ans. Yes, sir; over the sidewalk into the street.

30 Ques. How far was that from the railroad?

Ans. The most washing was done, I think, from 300 to 700 feet, or 800 feet.

Ques. East of the railroad?

Ans. Yes, sir.

Ques. You spoke of a stream on the south side of Greenwood avenue, and that afterwards pipes were put in at or about the time of the accident, didn't you?

Ans. There had been a pipe put in to carry the water across from the north side of Greenwood avenue to the south.

Ques. The pipes, I think you called them drain-pipes, were put in to take the water from this stream on the south side of Greenwood avenue?

Ans. Yes; they put in pipes; so, instead of having an open stream or ditch, they laid pipes and took this water into them.

Ques. Before these pipes were laid, where did this stream of water empty? **10**

Ans. It emptied into the culvert that passed under the railroad.

Ques. And after the pipes were laid, to intercept this water of the stream, where did the water then empty from the pipes?

Ans. Into the culvert from the railroad.

Ques. Do you mean to say that the pipes were simply put in so as to intercept the water nearer to the head of the stream and to cover up the land and to cover up the open ditch? **20**

Ans. The pipes were put in to cover up the open ditch and to carry the water that naturally came down the stream; they were not put in to carry any of the surface water from a rainfall.

Ques. Then there was no difference in the deposit of water, so far as the culvert was concerned, between the time when the pipes were put in and before?

Ans. Oh, all the water that fell had to center at that one point; that is, the culvert that passes under the railroad. **30**

Ques. The water that fell before putting in the pipes centered at the point of opening the culvert?

Ans. Yes.

Ques. And after the putting in of the pipes the water that fell and the water that was intercepted by the pipes from the stream entered the pipes and went through the pipes into the stream?

Ans. Yes, sir.

Ques. That was the only difference, was it?

Ans. Yes, sir; that was the only difference.

Ques. You said that the putting in of the pipe, or pipes, had a tendency to throw more water into the street; did it have more tendency to throw more water into this culvert; did it make any change in that respect?

10 Ans. No; I think not; the same area on the south side of Greenwood avenue, after the pipes were put in, was drained into the street proper instead of being drained into the open ditch that paralleled Greenwood avenue.

Ques. In opening the streets, was the contour of the land—of the surrounding land—changed in any way?

Ans. Yes; the contour was changed some, because cutting the streets through the contour of the ground would necessitate the concentrating of water more in one channel than if it was brought out over the natural surface of the ground.

20 Ques. But was there any change in the waterflow, or in the course of the waterflow, by the opening of the streets?

Ans. There was no change in the quantity of the water, because that we had no control of.

Ques. Was the earth, or the topography, changed in any manner so as to change the course of the waterflow?

Ans. Yes; the opening of Summit avenue concentrated the water more into a channel that emptied into Greenwood avenue, right near—fifty or sixty feet away from the railroad—than if it had spread out over all the ground and emptied into the ditch.

30 Ques. But the flow of the water prior to the opening was in the same course as the flow was after the opening, was it not, as to course?

Ans. Yes; before the opening of the streets the water all flowed down to Jenkintown, or down Greenwood avenue, and through the culvert, or to the culvert at the station.

Ques. And the making of these streets did not change the course of that flow?

Ans. No.

Re-cross examination.

Read by Mr. Dungan :

Ques. When the old ditch was there before the pipe was put in, where did the ditch empty into the culvert, off the side of the sidewalk—it was not brought into the ditch; didn't run into the street? 10

Ans. The ditch was in the street right near the curb line; nearly along the present curb line, or it might have been just a little back of that, but it came out into Greenwood avenue right by the watchman's box.

Ques. That is, this creek you talk about ran along the south side of Greenwood avenue, came out to Greenwood avenue very near the railroad by the watchman's box?

Ans. Yes, sir.

Ques. And there it emptied into the sewer? 20

Ans. Into the culvert.

Ques. How was the opening protected, or was it unprotected, so far as the ditch was concerned?

Ans. Where?

Ques. Where it emptied into the culvert.

Ans. That was covered up by the planking that was over the creek there.

Ques. The creek fell right into the open culvert under this planking?

Ans. The planking was over the culvert; in fact, it was practically a covered culvert, up to very nearly what is the upper side of that open street at the present time. 30

Ques. That is, the culvert that received the water of this little creek was what you call a covered culvert extending nearly to Summit street?

Ans. Yes, sir.

Ques. How did the water get into that culvert; from which side, the south side or the north side?

Ans. Of Greenwood avenue?

Ques. No; of the culvert.

Ans. It got in; that is, from Greenwood avenue it entered the culvert from the north side.

Ques. I mean the stream; where did the water from this stream enter into the culvert—from the south side, or the north side?

10 Ans. No, it entered from the east side.

Ques. Right at the end?

Ans. Right at the end.

Ques. So that the stream ran into the end of the culvert?

Ans. Yes.

Ques. Was that culvert, as it was continued, of practically the same size as the other?

Ans. I think so.

20 Ques. And then the surface water ran down the street and was taken into this culvert under the track?

Ans. Yes, sir.

Ques. That is right?

Ans. Yes, sir.

Ques. So that practically the old culvert ran about where the sidewalk is now?

Ans. Just about.

Ques. That is all.

Adjourned till December 14, 1905, 10 A. M.

30

TOMS RIVER, N. J., December 14, 1905.

Trial of the cause resumed at 10 A. M.

Mr. Backes: We offer the two maps in evidence.

The Court: They are admitted for the purpose of illustration and argument.

(Maps marked Exhibits P8 and P9.)

ABRAM SWAN, recalled for plaintiff.

Direct examination.

By Mr. Backes:

Ques. You have built how many sewers and drains?

Ans. Oh, I couldn't answer that question. I have built them for years.

Ques. The water that fell on the land on the north side of Greenwood avenue within the red bordered line as indicated on this map, where in its flow did it center? **10**

Ans. Into Greenwood avenue.

Ques. And which side of Greenwood avenue?

Ans. Both sides.

Ques. You mean the water that fell on the north side?

Ans. The water that fell on the north side centered on the north side of the street and carried down Greenwood avenue. **20**

Ques. And the water that fell on the south side of Greenwood avenue within the red line, where in its flow did that center?

Ans. Flowed to the southerly side of Greenwood avenue.

Ques. You were there in 1902, were you?

Ans. Yes, sir.

Ques. And did you at that time make careful observations as to the condition of the soil, the nature of the soil, within the area embraced within the red lines? **30**

Ans. I did.

Ques. And that you may describe.

Ans. The nature of the soil?

Ques. Yes.

Ans. The soil was rocky and of a clayey deposit, with a lot of mica into it, and it was very dense and like clay and greasy; you might say about the same as taking or-

dinary soil—not sand but ordinary soil, loam—and mixing lard with it. It was on the same order; it was slippery; it was like soapstone.

Ques. What was the effect of rain water falling upon that as far as penetrating was concerned?

Ans. There is practically no percolation at all; very little, excepting right on the surface; very little.

Ques. What would be the effect of rain water dropping on there? What would be the course of rain water?

10

Ans. Run off very quickly.

Ques. Did you also at that time make observations as to the manner of the construction of the drainage system or sewerage system under the railroad of The Philadelphia & Reading Railway Company, at the foot of Greenwood avenue?

Ans. I did.

Ques. What is the proper manner, and what was at that time the proper and skillful manner and method for the construction of a drainage system for the carrying off of the water that fell on the rainshed included within the area of the red lines and which centered at the foot of Greenwood avenue east of the railroad?

20

Mr. Cole: That of course is objected to, on the ground already indicated: that there must be shown some relation between the system that existed at the time of the accident and the amount of rainfall at the time of the accident; that unless it is proposed to show that, this evidence is irrelevant and incompetent.

30

The Court: Mr. Backes, suppose you show what you can in that particular by the witness, about the rainfall at that time, as far as you can, to meet this objection.

Mr. Backes: Your Honor, I don't think I have to meet that objection. My charge in my declaration is

that by reason of the failure of the defendant at this place to provide a proper method of draining their railroad and guarding and protecting it against wash, this wash went on and was deposited on the railroad tracks and by reason of that the railroad tracks became unsafe for the use to which they were applied by the defendant company and the decedent met his death.

The Court: I think I will allow this evidence to go in, subject to exception. **10**

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Mr. Cole: It seems to me, may it please your Honor, that we should add the further objection here that that testimony does not bear upon the question in issue as made by the pleadings. If Mr. Backes means by that question a proper system to carry the water under the tracks of the railroad company at the time of this accident, perhaps the last objection would not hold; but it seems to me the question is hardly clear on that as to whether he means a proper system of drainage to carry the water under the tracks of the railroad company. **20**

Mr. Backes: I will strike the question out and begin over again.

Ques. Now, state what was, from an engineer's point of view, a proper method of constructing a drainage system for the carrying of the waters which fell upon a rain-shed included within the area of the red lines upon this map, and which centered at Greenwood avenue immediately east of the railroad, to carry it across the railroad and under the railroad. **30**

Mr. Cole: We make the objection as before, that that is not related to the situation that existed at the time of the accident, either with respect to the method that the company had of carrying the water under the tracks or to the amount of rainfall at and before the time of the accident.

(Objection overruled.)

- 10 (Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

(Question repeated.)

Mr. Backes: I will add: and to take proper care of the water.

- 20 Ans. There should have been direct intercepting inlets into the gutter.

Ques. Describe that more fully.

Ans. Well, for an illustration, the inlets should be opening directly up towards the oncoming water. As a practical demonstration, if I am permitted—

Mr. Cole: No; you are asked for an opinion now.

Ans. Yes, sir.

- 30 Ques. I am asking you to describe it with greater clearness, what you mean by a direct intercepting sewer.

Ans. That is, in other words, a box or culvert in such manner as to leave the end open, so as that the water can run into it direct, especially at this very point, because if you attempt to divert the water—or you cannot at this point on account of the grade—it will have a tendency, if you have inlets or indirect openings, it will rush by them and not get into the inlets, and, therefore, there

should be direct openings, so as to pass the water off freely. They would also collect any wash or anything that would come with it; otherwise they would rush by indirect openings in the street.

Ques. Now, go on. What capacity?

Ans. According to my calculations, I would construct—

Ques. No; pardon me. I probably have not qualified you in that respect. Have you made a study of the drainage system from text-book writers?

Ans. Yes, I have. Besides studying it I have had practical experience, and at present I am building a sewer system along the coast. **10**

Ques. Go on, now.

Ans. From my calculations and observations I have decided that the construction at that particular point should consist of two openings as I have described, direct interceptors, about two feet in height and four feet wide, constructed partly in the gutter and partly underneath the sidewalk, on both sides of Greenwood avenue.

Ques. On each side of Greenwood avenue?

**20**

Ans. Yes, sir; adjoining the railroad.

Ques. What opening would that be in square feet?

Ans. That would give an area in front of each one of eight square feet.

Ques. And then you constructed—you have described the opening; what would that open into?

Ans. Into drains underneath the ground and carried off underneath the railroad and emptied into Wyncote creek.

Ques. And the two openings connected in any manner underneath? Would they be separate? **30**

Mr. Cole: He is asked his opinion as to what was the proper method. Why not let him tell it?

Ans. Well, that is the proper method. Of course, you would have the two. After I have given you a descrip-

tion of what I would take this water in, I would also have to provide something underneath the railroad of sufficient capacity to carry what the two inlets I have described—that is, to take that away, and have to be of sufficient capacity underneath. That would be one culvert or two culverts. This would be carried off through what we call a bell mouth; that is, a funnel shaped arrangement to carry it off, and carry it off across the railroad, if that is what you refer to.

10. Ques. Now, the direct intercepting culvert that you have described of eight square feet, what take-in capacity would that have? How much could that take in per second of waters that concentrated at the foot of the hill?

Ans. According to my opinion and calculations, I come to the conclusion that we would have to take care of about 180 cubic feet of water.

Ques. You didn't get my question.

20. Ans. I understand, but I was leading up to it and explaining it. We would have to take care of 180 cubic feet of water falling on this rain-shed in one second. That is, we must anticipate that much water coming to this point, and that is the only interception there is of this whole drainage area, and, therefore, we must provide for openings, and these openings I have designed to intercept about ninety cubic feet per second, each one of them—ninety cubic feet of water, each one, on each side of the street.

30. Ques. Now would the direct intercepting sewers that you speak of, of the size that you have mentioned here, properly take care—safely take care of that quantity of water?

Ans. It would.

Ques. Now water concentrating at this point or coming to this point on each side at the rate of ninety cubic feet per second, what is that based on as to rainfall?

Ans. That is based on a rainfall at the rate of two and a half inches per hour—a rate that is assumed from

practical experiments and general formulas and rules set down by modern authorities.

Ques. And those authorities?

Ans. Well, I might name several of them.

Ques. Well?

Ans. For instance, Rudolph Hering, one of our most noted engineers of to-day, he sets it at two and a half inches per hour. That is, not to say it must rain two and a half inches in an hour; it may rain fifteen minutes at that rate; but you must provide to take care of that. **10**

Ques. And engineering requires that?

Ans. You must do it; otherwise you can anticipate floods; or if you don't provide for it you must necessarily have floods when these rains would come. And besides that, there is Trautwein's engineer's text-book or pocketbook, used exclusively by engineers and supposed to be one of the best authorities, they put it at three inches per hour. My calculations have been made on the basis of two and a half inches per hour because I never use three inches in my calculations. **20**

Ques. Is that the minimum factor of safety?

Ans. Yes, that is, to take care of extra storms, for careful construction.

Ques. Now rain falling upon this land which washed towards Greenwood avenue at the rate of two and half inches per hour, and flowing to the point of interception, at what rate would it flow to this point per second?

Ans. As I said, you would intercept there at that point about ninety cubic feet per second on each side of the street. You see the construction or the topography of this ground and the conditions in every problem are not the same. Each watershed is a problem of its own. Now this particular shed here is built—it is concave; it is built in the form of a bowl or basin. **30**

Ques. Can you explain that to the jury? Come up here to the map.

Ans. That is, this portion here, the general slope, as I showed on my elevation the day before yesterday, had

a tendency, falling in this way. Of course it is not regular, but it starts and dips down here. You notice there is 114, there is 128, and the distance through there is only about 400 feet.

Ques. That is 14 feet?

10 Ans. It is 14 feet right there in 400 feet. Now here, passing down here, there would be probably some of them at the rate of five feet to the hundred; that is, on the side, would slope off and come up like that, just like a bowl, to the top of these hills. For instance, here, this particular location, 70.9, and here is 28.1, a difference in the elevation of 42 feet fall there. Of course that is up to this point here. Below here, three or four lower—probably 45 feet drop from here to here.

Ques. What is the distance there?

20 Ans. About 400 feet—about 200 feet in. That would probably, from this point down to here, be about two-thirds of that distance. Therefore the waters rushing off of the top of these hills would meet these waters; or, in other words, these waters would not flow off as fast as these waters coming from the top of the hill, and these waters overtaking these would form a volume.

Ques. Come here and just with your pencil show them how the valley is constructed and what you mean. You said it was a bowl shape?

Ans. It is bowl shaped. It is in that shape.

Ques. Now with your pencil.

30 Ans. That is, taking a cross-section, as though you cut right through here and stand and look at a section of it, it is built in this shape, assuming that the top of the hill then comes down that way, and then Greenwood avenue something of that sort. You see these head waters rush down here and overtake these waters here, and the valley forms the volume. This is the same way. That is just an illustration, of course, not drawn accurate.

Ques. Now you said that you would have to provide for ninety cubic feet of water per second at the point of intersection?

Ans. That is on each side.

Ques. On the north side of Greenwood avenue?

Ans. Yes, sir.

Ques. Tell the jury what the venting capacity per second was or is of a pipe constructed and opening cat-cornered on Greenwood avenue and Beechwood avenue and running across the street and deposited in a ditch alongside the railroad, the diameter of the pipe being eighteen inches. 10

Ans. That would depend on the fall, of course, and from my observations of that—I have not measured it exactly—the maximum fall that you could get across there to this 15-inch pipe would be about two feet in a hundred; that is, at the rate—in other words, you would not be able to get a rate of more than two feet fall in a hundred after putting this pipe in the position that you say. It would vent about fifteen cubic feet of water per second. 20

Ques. By venting you mean—

Ans. That there was that amount of water coming through it; and if you put twenty cubic feet of water directly at the mouth of this pipe in volume, that that pipe could only vent three-fourths of that water—fifteen cubic feet. Five cubic feet that would not get in it would have to escape in some other direction.

Ques. At this point, if a pipe were constructed as I have described, with the mouth pointing upward between Greenwood avenue and Beechwood avenue, and properly constructed below grade, with that capacity of fifteen cubic feet per second, and there was a volume of water concentrating at that point at the rate of ninety cubic feet per second, what would become of the other seventy-five cubic feet? 30

Ans. It would pass on beyond.

Ques. Well, as you saw the land there, where would it pass on to?

Ans. It must pass on across the railroad.

Ques. Now, on the south side of Greenwood avenue, this side, there was a catch basin or inlet with an opening three feet square, having over it a grating, the grating and the openings being about equal width and distance apart, the grates across being about of the same width as the openings in the grate, laid flat in the gutter.

10. I ask you what the drainage capacity, the venting capacity of such a drain is per second?

Ans. The venting capacity of that?

Ques. Yes; that is, how much will that take in per second?

Ans. That would have a capacity of seventy-two cubic feet, about seventy-two cubic feet, under the most favorable conditions; in other words, that these must all be open.

Ques. What must all be open?

Ans. All these openings.

20

Ques. The grates?

Ans. The grates; and the water must be delivered direct to it. In this particular location you would probably not be able to get that much water into it, on account of the velocity of this water coming down this hill would have a tendency to run across it. There would not be sufficient attraction to attract the water into it. It would have a tendency to rush across the grates. There is nothing to intercept it; it is an indirect interceptor.

30

Ques. Now, Mr. Swan, any opening of that kind, such as a direct intercepting sewer, which necessarily takes the water that is delivered to it, has it also any attraction for water?

Ans. Oh, yes.

Ques. I say, is water attracted by the opening?

Ans. Certainly.

Ques. By suction?

Ans. Well, I wouldn't say so, not in this case. That depends entirely on the outlet.

Ques. Won't you explain that matter of attraction to the jury?

Ans. Well, that is most generally in the way of flumes and forebays. It is not in particular in this particular case; there would not be any suction. It would depend all entirely—

Ques. I mean attraction, not suction.

Ans. Oh, attraction; yes. There is an attraction there on account of the opening and the volume of the opening. There would be no suction because you could not create a vacuum on account of the water allowing air to escape over the top, and that would break your vacuum; and then your culvert would have to be built air-tight to create a vacuum.

10

Ques. To create a suction?

Ans. Yes.

Ques. I am speaking of attraction. You misunderstood the word there. Now, would these direct intercepting sewers of the capacity that you have mentioned accommodate the passage of wash such as rubble stone and macadam stone and any wash that might come down?

20

Ans. It would, yes, sir; that is, such material as has been testified here and what existed there on Greenwood avenue would have a tendency of keeping to the bottom of this wash; would naturally wash into this.

Ques. Would that be capable of carrying off that wash in case some of the street washed away down Greenwood avenue?

30

Ans. That is, gradually; yes, sir.

Ques. Well, could that be taken care of in that way and by these sewers that you have described?

Ans. That would depend entirely, Mr. Backes, on the amount that was carried there and the volume. Of course, it would just keep rolling over. I couldn't say the quantity it would take care of.

Ques. I haven't asked you that question. I ask you if the sewers you have described are capable of taking care of just such a wash?

Ans. Yes, sir.

Ques. Now, does good engineering at this point demand what you have described here, direct interceptors?

Ans. Yes, sir; in fact, that is the only method I know of intercepting water at that point. I don't know of any other way that you could get it in there.

10 Ques. Now, is that at this point practicable? Could it be promptly done and easily done?

Ans. Yes, sir; it is in practice here. I notice it here in Toms River, the same construction.

Ques. Well, I am speaking of this immediate point at the foot of Greenwood avenue, as you saw it in 1902. Was it practicable at that point there to build these direct openings, direct intercepting sewers, at that place?

Ans. Yes, sir.

20 Ques. You say that part of it would have to be built under the sidewalk?

Ans. Yes, sir.

Ques. Well, won't you describe that to the jury, just what you mean by it?

Ans. I don't know whether I can hardly describe it.

Ques. Let me get you a glass.

30 Ans. I don't think I could show it with a glass; maybe I can. In other words, there is a box culvert. (Illustrating.) I propose to build it square; that is, not square, but about two feet high and about four feet wide. That could be built, assuming this as the south side of Greenwood avenue, that is the top of your sidewalk here; this we will say is about towards Summit avenue from the railroad. Here is the railroad track here, probably fifteen or twenty feet away. This could be excavated down to the bottom of the gutter, to the bottom of this opening, starting at nothing at the top of this incline that I speak of—

Ques. You mean the grade of the street?

Ans. The grade of the street, and allowing that culvert to continue that on the sidewalk, and construct your sidewalk of a material that would act as a covering for that portion of the leader that would have to be open to allow the water to concentrate there and run directly into this opening, to the level of the street, and the other part under the sidewalk, leaving only about two feet exposed in the gutter.

Ques. And you say that is in daily use?

10

Ans. Yes, sir; practically all the time.

Ques. Where?

Ans. I can mention several places where it is.

Ques. Where?

Ans. Why, right here at the Ocean Hotel, where the water rushes, as at the intersection of streets. If it was on the side the water would have a tendency to rush across. In Asbury Park I noticed one in particular there which is much larger than the one I speak of. It is right on Main street, in the center of the town.

20

Cross-examination.

By Mr. Cole:

Ques. Were you personally over all the ground within the red lines on the small map?

Ans. Yes; I made an accurate survey.

Ques. My question is whether you were over all the ground?

Ans. Yes, sir.

30

Ques. Did you dig beneath the surface?

Ans. No, sir; I merely kicked it over with my feet in some places.

Ques. Did you kick over all of the ground that you walked over with your feet?

Ans. No, sir.

Ques. Only in places?

Ans. Only in places.

Ques. Were you on any of this ground during a rain storm?

Ans. No, sir; not—

Ques. That is the question.

Ans. Yes, sir; I was there, but in a drizzling rain. I never have been there but what it has been a dreary, drizzly day, a cold day.

10 Ques. Did you select this kind of days to go there?

Ans. I don't know. We seemed to strike it when we went down.

Ques. Then your statement that the character of this soil was such as would not take in the water is based purely upon an opinion from what you saw of the land by kicking it over with your foot?

Ans. Oh, that is, looking at it; that is—

20 Ques. Well, that is an answer; you have answered it. I know the disposition of experts. Now, it is a fact, is it not, that even in these cases where they provide for these intercepting sewers, such as you say exist in Toms River and other places, that in cases of extraordinary storms they prove insufficient to carry off the water?

Ans. In extraordinary storms?

Ques. Extraordinary storms.

Ans. If they are built by practical engineers, men of experience, they generally fulfill the requirements.

(Question repeated.)

30 Ans. I think I answered that question.

Ques. That is your answer, is it?

Ans. That is my answer.

Ques. Then, what is your explanation for the floods in the streets of large cities, such as Philadelphia, where they do have these intercepting sewers, and Trenton and Elizabeth and other places that you know of, where they

do have extraordinary or unusually heavy rain storms?

Ans. In designing the sort of sewer systems established some time ago, in especially municipal construction, economy was one of the most essential features in the way of construction. If you attempted to provide for some of the storms that come into the cities it would simply bankrupt the cities to try to provide for these storms; that is, in through these districts. Another thing to be taken into consideration, owing to these storms not being very frequent, the damage done at the time of these storms in the way of flooding is not anything compared with what is saved in the construction of the extraordinary large conduits; and in other words, the cellars and basins in the vicinity of these interceptors are flooded and act as a reservoir and generally take off the surplus water that occurs in extraordinary heavy storms. 10

Ques. In other words, the property owners in the city had better bear the expense or the damage that results from the overflowing of the sewers in these extraordinary storms than to be burdened with the expense in the first instance of providing for this extraordinary condition? 20

Ans. And maintaining them.

Ques. Yes, and maintaining them.

Ans. Yes, sir.

Ques. Do some of these floods that occur in these large cities result from bad engineering

Ans. Sometimes.

Ques. And engineers, I suppose, differ sometimes as to what is good and what is bad engineering? 30

Ans. Just the same as lawyers.

Ques. I only wanted to see whether there were others or not. Did you ever measure a rainfall?

Ans. No, sir.

Ques. Did you ever see a rainfall measured?

Ans. No, sir.

Ques. What do you practically know about rainfall?

Ans. In what respect?

Ques. Why, as to measurement, and as to how much of a capacity is required to take it off. Do you know anything more than what you got out of the books?

Ans. I have told you exactly what I—and from practical experience in the way of construction. After my calculations and construction have been in I find that they answer the requirements that I tried to provide for.

10 Ques. Well, this two and a half inch rainfall per hour that you speak of, where did you get that from?

Ans. As I have stated —

Ques. Out of the books?

Ans. Yes, sir; I take that from authority.

Ques. Well, now, suppose instead of this rainfall being at the rate of two and a half inches per hour, the rain actually falls two and half inches in fifteen minutes; would this system that you say ought to have been provided on Greenwood avenue in the exercise of proper engineering have carried off that water?

20 Ans. No, sir; it would not.

Ques. In other words, this system that you propose at the point in question is a system which would only carry off water at the rate of two and a half inches per hour?

Ans. That is the maximum amount of water that these drains would carry off.

Ques. So that if on this day in question the water fell at the rate of—I mean not at the rate of, but I mean fell two and a half inches in half an hour, that would be five inches an hour, and your system would not carry it off?

30 Ans. No; it is only half large enough.

Ques. That is an answer. Now, then, if on this day in question the rain fell two and a half inches in fifteen minutes, what would have become, under your system, of the overflow of water?

Ans. The water itself would have a tendency to rush, as I stated before in my explanation of the 18-inch pipe.

Ques. Over the tracks of the company?

Ans. Over the top of the tracks of the company.

Ques. What would become, under your system as proposed, if the water fell two and a half inches in fifteen minutes or half an hour, what would have become of the debris that came down the streets?

Ans. It would have a tendency of being directed into my inlets.

Ques. But could it have got in?

Ans. Certainly.

Ques. All of it?

Ans. I wouldn't say; it would be the heavier material, and be at the bottom.

Ques. Suppose as a matter of fact that on the day in question the rainfall was so heavy that it covered the street before it got to the point of interception; would your system as proposed have carried that water off?

Ans. It covered the street? What do you mean by covering the street?

Ques. I mean that it covered the whole body of the street from curb to curb.

Ans. At what point?

Ques. All over the street, all the way up it.

Ans. All the way through?

Ques. Greenwood avenue to the Summit.

Ans. That would be 117 feet.

Mr. Backes: If it was all the way up it would have to be 117 feet high.

Ques. I am talking about Greenwood avenue.

Ans. That is what I am talking about. If it was all the way up it would have to be 117 feet above the track.

(Question repeated.)

Ques. When I say covered the street, I mean from curb to curb.

Ans. No; I could not have intercepted, not all of it.

Ques. Now suppose, Mr. Swan, that that street was so constructed, or that the curbing was so constructed, that on the day in question when this rain fell, instead of the water going into the curbs and gutters, in finding its way into the sewer as you proposed it, it covered the center of the street; would your system have taken it off?

10 Ans. It would have a tendency of carrying—no; I will say no; because it would have—

Ques. I don't care anything about the cause. I don't want the reason.

Mr. Backes: I submit he has a right.

Mr. Cole: I submit he has not.

Mr. Backes: I submit the witness is entitled to explain to this jury and to the court.

20 The Court: I will have to let him complete his answer, Mr. Cole; I will have to let him go on. He was interrupted while he was talking.

Ans. That would depend entirely, Mr. Cole, on how the water came down and how this street was constructed. Was it of a concave or convex nature?

Ques. I am talking about this street. You saw it, didn't you?

Ans. Greenwood avenue?

30 Ques. Certainly.

Ans. It was a convex nature. It would take the majority, in fact, very near all of that water; not all of it. It is a convex nature.

Ques. That is, you are talking now of a water fall greater than two and a half inches an hour?

Ans. That is what I am talking about.

Ques. Suppose the fact be that during this last storm and the day in question the water in coming down Greenwood avenue actually tore up the macadam in the street, that is, between the curbs, and carried the macadam down Greenwood avenue to the point of interception of the sewer as you propose it; would your sewer have taken that off?

Ans. I believe it would. From what I take from your question I believe it would.

Ques. That is, the rain falling at the rate of two and a half inches per hour? 10

Ans. Assuming that the rain fell at two and a half inches per hour.

Ques. You think, do you, that if as a matter of fact on this day in question the rain water on Greenwood avenue was coming down that street in such volume and with such force as to actually tear up the macadam in the street and bring it to the point of interception of the sewer, that your sewer would have taken it off?

Ans. I believe it would. 20

---

ALFRED B. NELSON, sworn for plaintiff.

Direct examination.

By Mr. Backes:

Ques. You live where?

Ans. My home is really at Trenton, but I am at present in Lancaster, Pennsylvania. 30

Ques. And you are engaged at Lancaster, Pennsylvania, in doing what?

Ans. Building railroads.

Ques. And what is your profession?

Ans. Civil engineer.

Ques. Are you a schooled man?

Ans. Well, I am a college graduate in engineering.

Ques. And how long ago, Mr. Nelson?

Ans. In 1879—twenty-six years ago.

Ques. And since that time what have you done?

Ans. I have followed railroad building almost exclusively.

Ques. As an engineer?

10 Ans. As an engineer and also as a contractor—in all capacities.

Ques. And where have you followed railroad engineering since you left school?

Ans. Well, throughout Pennsylvania, New York City, New Jersey, down East, in Maine and Maryland—the Eastern States.

Ques. And you are engineer now for what company?

Ans. The Lancaster and Easton.

Ques. At Lancaster?

Ans. At Lancaster, Pennsylvania.

20 Ques. And what other companies did you work for?

Ans. I was ten years engineer in charge of the construction of the Pennsylvania Railroad.

Ques. Where?

Ans. In the vicinity of New York, Philadelphia, Baltimore, and through Pennsylvania and New Jersey.

Ques. On the main line?

Ans. On the main line and branches—Chestnut Hill Road, New York Division, out through New Jersey, United Railroads—all through this part of New Jersey.

30 Ques. You know where Jenkintown is?

Ans. Yes, sir.

Ques. And as the bird flies from Jenkintown, how near did you construct railroads? You said the Chestnut Hill branch?

Ans. Well, I don't know just the distance across. It may be ten miles; it may not be more than six or seven.

Ques. In the neighborhood, in that vicinity of this branch line, in the neighborhood of Jenkintown, did you ever build railroads?

Ans. I did.

Ques. All through there?

Ans. I did, all manner of railroad construction.

Ques. And who else did you work for?

Ans. Who else?

Ques. Yes; besides the Pennsylvania ten years.

Ans. Around Trenton I built the Morrisville and Trenton Road—the Yardley, Morrisville and Trenton; and this last year I built the Trenton, New Hope and Lambertville line. There have been more or less small lines and branches. 10

Ques. Now, in the construction of railroads, or in the taking care of railroads after construction, is the taking care of water a part of your work of engineering?

Ans. That is the greatest problem we have to contend with.

Ques. And the purpose is what? Why is it the greatest problem?

Ans. Well, for the safety of our road.

Mr. Cole: I object to that. I object to this witness giving any testimony as to what the object is. 20

Mr. Backes: He said it was the greatest problem they have.

Mr. Cole: I object to it.

(Question withdrawn.)

Ques. Now, have you studied this problem? Have you been required to study the problem of taking care of water, rain waters, in the construction of railroads? 30

Ans. Yes.

Ques. All the time?

Ans. Yes, sir.

Ques. And have you been to Jenkintown?

Ans. I was.

Ques. Were you there with Mr. Swan?

Ans. Yes, sir.

Ques. I call your attention to the smaller map and also the larger one, and ask you whether you understand that map?

Ans. I do.

Ques. And you understand the locality which it attempts to portray?

10    Ans. Yes.

Ques. Have you been on that?

Ans. I have.

Ques. Have you been over it?

Ans. Yes, sir.

Ques. All of it?

Ans. Yes; I footed it all over. I didn't actually step on all of it, but I walked all over the grounds.

Ques. Now the red line on this map is said to be the crown of watershed. Did you go around that crown?

Ans. Yes.

20    Ques. All the way around?

Ans. Yes, sir.

Ques. And were you also on Greenwood avenue, at or near Beechwood avenue?

Ans. Yes, sir.

Ques. And at the railroad?

Ans. Yes, sir.

Ques. Did you observe the nature of the soil embraced within the area indicated by the red lines?

Ans. Yes.

30    Ques. What was the character of that soil?

Ans. The subsoil is what is termed the schist. It is a greasy, slaty sort of rock—not exactly slate, but micaceous rock. It was covered with a small amount of earth some places, the rock was bare in other places; there might have been a foot or two feet; and in the lower part of the valley the soil or earth was consider-

ably deeper. In a number of places the sides were comparatively bare of soil; in other places a small amount.

Ques. Does the nature of the soil enter into the calculation of taking care of water at points where it accumulates?

Ans. It does.

Ques. Now what have you got to say in that respect concerning this soil, as to the effect of rain water upon it?

Ans. This was an impervious soil. 10

Ques. By impervious you mean what?

Ans. It is close in its nature and compact in its nature; it does not absorb water easily and water runs off quickly from such soils.

Ques. And you agree with Mr. Swan that the waters which fell upon this watershed, or within the area as shown upon this map within the red lines, gathered or came to a point at the foot of Greenwood avenue just east of the railroad of The Philadelphia & Reading Railway Company?

Ans. Yes; that was the collecting point, the gathering point of the water. 20

Ques. And as you then observed it, was that the only gathering point or collecting point for all of that area?

Ans. It is.

Ques. What does careful and good engineering require for the carrying off or properly taking care of water which would fall upon this watershed and gather at the point you have just mentioned, for the purpose of carrying it across the tracks of The Philadelphia & Reading Railway Company? 30

Ans. There must be a culvert or conduit of sufficient capacity to carry off the maximum amount of water that is liable to gather there at any one time.

Ques. The greatest amount of water?

Ans. The greatest amount.

Ques. You say that good engineering requires that?

Ans. It does.

Ques. Good railroad engineering?

Ans. Yes, sir.

Ques. Does that prevail? Is that fundamental in good engineering?

Ans. That is the basis of our work.

10 Ques. Now from your building of railroads in this neighborhood, what do you say was the amount of rain water that good and careful engineering should have provided for to take care of falling upon this watershed and gathering at the point you have indicated?

Ans. Not less than three inches per hour.

Ques. Not less than three inches of what?

Ans. Of rainfall per hour. The records—

(Objected to.)

The Court: Yes; don't volunteer anything beyond your answer, Mr. Nelson.

20 Ques. Not less than three inches per hour, or at the rate of three inches per hour?

Ans. The rate of three inches per hour.

Ques. Now it is said that within the watershed as indicated by the red lines on this map there are seventy-five acres of land. Do you say that is so?

Ans. Yes; that is an approximate calculation.

Ques. Have you calculated it with Mr. Swan?

Ans. I have calculated it roughly.

30 Ques. And did you observe the contour of Greenwood avenue, the shape of Greenwood avenue in the street?

Ans. In the street proper?

Ques. Yes.

Ans. I did; yes, sir.

Ques. What is the contour of it?

Ans. Well, the street proper is rounded up—a convex surface.

Ques. A crown?

Ans. A crown in the center and gutters on the sides; higher in the center than it is on the sides.

Ques. Now the rain which falls on the watershed north of Greenwood avenue, where do you say that gathers?

Ans. That comes down the northerly side of the street.

Ques. And what do you say as to which side of the street that should have been taken care of?

Ans. It should have been intercepted on the northerly side. **10**

Ques. And does that statement apply with the same force to the rain which falls on the south side of Greenwood avenue on this watershed?

Ans. It does.

Ques. Now you say at the rate of three inches per hour of rainfall. From what do you gather that?

Ans. I take that from the reports of the Weather Department. **20**

Mr. Cole: I object. I don't think this witness can testify to that.

Ques. Well, what has been your practice?

Mr. Cole: I object to that, as to what has been his practice.

Ques. Have you made calculations to ascertain the amount of water, falling at the rate of three inches per hour upon this water-shed, would concentrate and come to a point on Greenwood avenue just east of the railroad? **30**

Ans. Yes.

Ques. On both sides of Greenwood avenue?

Ans. On both sides.

Ques. And as to their being equal, what have you to say?

Ans. About equally divided between the north side and the south side.

Ques. Now, what do you say that good engineering at that point required as to the quantity of water to be taken care of in the careful and proper construction of a railroad and the maintenance of it?

Ans. Not less than 227 cubic feet per second.

Ques. That is railroad engineering?

Ans. That is railroad engineering.

10 Ques. And does careful engineering demand that?

Ans. It demands it.

Ques. As a railroad engineer what do you say good and careful engineering requires for the taking care of water falling upon that rain-shed and gathering at the point of Greenwood avenue just east of the railroad?

Ans. You must have an area of outlet of at least twenty square feet.

Ques. Outlet or inlet?

20 Ans. Outlet. The inlet must be sufficient to supply that part. You might say each, inlet and outlet, both of twenty square feet. The area of the conduit must be at least twenty square feet.

Ques. How should that be constructed?

Ans. At that point the best construction would be two inlets, one on each side of the street, direct interceptors. They might be carried through as separate conduits or they might be brought together and vented as one conduit.

Ques. Formed as a sort of Y?

30 Ans. As a sort of Y under the street, which would bring the two together and have one outlet for the two inlets. That would be a question for the economy of construction. Local conditions would govern.

Ques. As you observed the conditions there, would you state whether that is practicable, whether it could be done and done in a workmanlike manner and done in an engineering and skillful manner?

Ans. No difficulty about it.

Ques. None at all, eh?

Ans. No, sir.

Ques. Why do you speak of direct intercepting sewers for this particular locality?

Ans. A direct interceptor at that point will take more water, will collect and vent more water than an indirect interceptor, and it will also catch the floating or moving debris that is carried down with the water.

Ques. Now, have these direct intercepting sewers, direct open sewers, any attraction for water? **10**

Ans. Well, you can only say that they afford an easier line of travel for water. It is not especially a case of attraction for water; the water follows the line of least resistance.

Ques. Just like electricity?

Ans. Just like it—similar. And it will follow this line because of the attraction of gravitation, the following of the line of least resistance.

Ques. Do you say, as Mr. Swan does, that each side of Greenwood avenue ought to take care of the water that fell on the respective sides of the water-shed? **20**

Ans. Yes, they should; otherwise you would have it flowing all over your street.

Ques. And upon what basis, in the ascertainment of the quantity of water you want to take care of, do you make your calculation as engineer?

Ans. We take the number of acres and the rainfall, the heaviest rainfalls that we have the records of in those vicinities, as the basis of calculation.

Ques. And those rainfalls, the records of the rainfalls, **30** where do you obtain those?

(Objected to.)

Ques. Where are they obtainable? How do you get at them?

Ans. You can get them in Philadelphia from the Weather Department, the United States Government Agricultural Department—the weather and crop bulletin.

Ques. And what other course do you pursue?

Ans. Well, if there is a stream flowing through where you want to make your conduit, then you take your water marks that have been left by previous high waters.

Ques. What else?

10 Ans. Or as a rule, we will inquire of the people living in the vicinity and ask of them as to the quantity of flow at this point, and build according to the information that we gather from them.

Ques. In good engineering is this waterfall, at the rate of three inches per hour, the minimum, the smallest amount that you take into consideration, or the maximum or largest amount?

Ans. The smallest amount.

20 Ques. And then if, from information that you obtain as to the rainfall, you see it requires greater capacity, what then does good engineering require?

Mr. Cole: I object. I don't think the witness can answer a question based upon information furnished by other people.

Mr. Backes: That is not the question.

(Question repeated.)

30 Mr. Cole: The question is irrelevant, and I think it is based upon hearsay. It must be, the answer.

Mr. Backes: I am not asking what people told him.

The Court: Well, it is based upon what he obtains from people.

(Objection sustained. Exception noted for plaintiff.)

Ques. You say this sewer had to be of an opening, an in-take capacity, of twenty square feet; is that ten square feet on each side?

Ans. Yes, sir.

Ques. In what way could that be constructed at this place?

Ans. At that point we would give it a rectangular opening, and as long as we get ten square feet of area of each opening, the size of it as to width and height, and the proportions of width and height would depend upon the encroachment upon the street or sidewalk. We would give it depth instead of width, in all probability, or we might make it square, as long as we get the area.

10

Ques. Did you also observe on some of these streets—I mean Greenwood avenue and those that intersect it—that they were macadamized and improved?

Ans. Yes, sir.

Ques. Did you also notice that some were dirt streets?

Ans. My impression is that those streets had been macadamized?

Ques. Now, with the nature, the rolling character of the land here, and the steep grades that are within this area or rain-shed, would you calculate to take care of the wash that would come down in heavy rains?

20

Ans. Yes; undoubtedly.

Ques. Does good engineering demand that?

Ans. It does.

Ques. Now, these inlets which you have stated good engineering required and which are practicable at this place, would they take care of the wash of macadam that would come down in heavy rain storms?

30

Ans. They would.

Ques. What is the in-take capacity of an 18-inch pipe laid with its mouth forty-five degrees, or about that, at Beechwood and Greenwood avenues, and running from that point, laid at grade or below grade, properly laid at grade or below grade, properly laid and continued from

that point across Greenwood avenue to a ditch running along that northbound track of the Philadelphia and Reading Railway Company?

Ans. That pipe, laid at an even grade and running full, would vent about fifteen cubic feet per second.

Ques. And against how much, did you say?

Ans. As against one hundred and thirteen and one-half cubic feet which would gather there.

10 Ques. And the sewers that you say good engineering required, the sewer on the north side with the capacity that you have stated, ten square feet, that would take care of that one hundred and thirteen cubic feet of water per second gathering at that point?

Ans. Yes, sir.

Ques. In case it rained at the rate of three inches per hour on this water-shed?

Ans. Yes, sir.

20 Ques. Now, what is the in-take capacity of an inlet laid at grade, laid flat on the ground, at the foot of Greenwood avenue, just at the railroad on the south side of Greenwood avenue, having an opening of three feet square, with grating over it, the grating and opening being about of equal width?

Ans. That in-take would take in about seventy-two cubic feet per second.

Ques. Under favorable or unfavorable conditions? Under all conditions?

Ans. Under favorable conditions, with the gratings clean and with free flow.

30 Ques. If the stones and material gathered on there in the rush of water down, would you say that had a free flow?

Ans. No; that lessens the capacity; that reduces the capacity of the in-take.

Ques. What governs the amount of water that you have got to take care of, the outlet or the inlet of the culvert?

Ans. The smallest area of the culvert, no matter where it is, whether at the inlet or the outlet or the center of it, along the line of it, will govern.

Ques. But what does good engineering require as to that, as to equality of size of area?

Ans. Well, it is the rule that we make it equal, make it the same size through.

Ques. Would good and careful engineering, for the purpose of taking care of the waters that flow from the water-shed north of Greenwood avenue, provide there a pipe eighteen inches in diameter, laid at an angle of forty-five degrees to Greenwood and Beechwood avenues at grade, or properly laid there and extending from there across and depositing in a ditch alongside of the north-bound track of the Reading Railway Company? 10

Mr. Cole: I object. I think it is a question for the jury.

(Question withdrawn.)

20

Cross-examination.

By Mr. Cole:

Ques. How many times, Mr. Nelson, were you over this ground?

Ans. Twice.

Ques. When?

Ans. Once was in April, 1903, and the other was a later date during the same year; I don't recall the date. 30

Ques. 1903?

Ans. 1903.

Ques. In fixing the amount of rainfall at three inches per hour, did you fix it with relation to the conditions or the rain that is supposed to fall in the vicinity of Jenkintown?

Ans. I did; yes, sir.

Ques. Where did you get your information as to the amount of rainfall in the vicinity of Jenkintown?

Ans. I got that from the Weather Department in Philadelphia, where there is a record.

Ques. So that when you fixed the amount of rainfall at three inches per hour you were relying upon information that you got in the Weather Bureau at Philadelphia?

10 Ans. Yes, sir.

Ques. And you were fixing that rate of rainfall with reference to this locality?

Ans. Yes, sir.

Mr. Cole: Now at this point I move that this testimony concerning the amount of rainfall be stricken out, on the ground that it is based upon pure hearsay.

20 The Court: I do not understand him as testifying to the amount of rainfall, but as to the minimum amount to be taken care of, that good engineering would require.

Mr. Cole: But he has based that, may it please your Honor, upon the information as to the amount of rainfall in this vicinity which comes to this jury as pure hearsay. That is my objection.

(Mr. Backes replies.)

30 The Court: I will deny the motion to strike out.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ques. Did you ever measure a rainfall?

Ans. No; I have not.

Ques. Did you ever see one measured?

Ans. No, sir.

Ques. Did you ever test a sewer that took in water with any knowledge at the time as to the amount of rainfall per hour?

Ans. No; I took the reports of those—

Ques. I beg your pardon; I ask you a question; you can answer yes or no to it. I ask you whether you ever made an actual test of the intake of a sewer with a knowledge at the time of the amount of rainfall per hour? **10**

Ans. No; I did not.

Ques. Were you ever upon this land when it was raining?

Ans. No; I think it was not a rainy day. It was a rainy day the first time I was there.

Ques. Were you ever upon land of like character to this when it was raining?

Ans. Yes.

Ques. And when you were there did you observe as to whether or not the soil would take the water? **20**

Ans. I can't say that I made a special inspection—

Ques. That is all I want to know.

Ans. To determine that.

Ques. How wide is Greenwood avenue?

Ans. It is about a sixty foot street, from out to out.

Ques. How were the gutters constructed when you were there?

Ans. I think they were cobble gutters.

Ques. Cobble? **30**

Ans. Yes, sir.

Ques. How wide were they?

Ans. The gutters were about three foot gutters.

Ques. Were the gutters sufficient to carry the water that came down that avenue to the point where the intake was? I am talking now about a rainfall at the rate of three inches an hour.

Ans. No; it would extend over the lines of the gutter, beyond the lines of the gutter.

Ques. The gutters would not take it off?

Ans. The gutters would not carry it off.

Ques. So that if on the day in question the water flowed over the gutters, it would be an indication, I suppose, that the gutters were not capable of taking the water off?

Ans. Yes; that is a demonstration of it.

10 Ques. That is a demonstration, isn't it?

Ans. That is a demonstration.

Ques. Would a system of sewerage or dainage as proposed by you and which you say careful engineering would require at the point of intake, take off all the water at the rate of three inches per hour, provided the gutters themselves were incapable of taking the water to the point of the intake?

20 Ans. The intakes would not be dependent entirely on the gutters for the gathering of that water. If that water were flowing the full width of the street as it came to the intakes, that it would gather to the intake. The current would change there going directly down the street, and would divert in both directions to the intakes, and then the intakes would carry it away.

(Question repeated.)

Ques. I think that can be answered, Mr. Nelson, yes or no.

30 Mr. Backes: I submit it is answered. I submit a witness occupying the position that he does here may answer in the manner in which he has—an explanatory answer.

(Question repeated.)

The Court: I think the answer may stand.

Mr. Cole: I except to the Court's refusal to require the witness to give a yes or no answer.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ques. Where, with relation to the tracks, must the point of intake be by your proposed system?

Ans. The best location would be from ten to fifteen feet, you might say, from the tracks; not necessarily actually ten feet, but about that distance. **10**

Ques. If Greenwood avenue slopes constantly until it gets to the tracks, how would you provide for the water between the point of in-take, as you describe, and the tracks?

Ans. There would be actually a distance of about ten feet of the width of the roadway, being about thirty feet; there would only be about three hundred square feet of road to take care of, and it would be so slight it would be perfectly harmless. **20**

Ques. Wouldn't it go on the track?

Ans. If it went on the track there would be a very small part there, and the street being perfectly level at that point the velocity would be so slight there would be no danger.

Ques. Suppose the rain fell at the rate of three inches per hour; would there be no water on the tracks at that point?

Ans. Yes; it would fall on the track.

Ques. And between the point of in-take and the tracks? **30**

Ans. Yes; the tracks would get it.

Ques. Would the tracks get it if it sloped all the way down to the track?

Ans. Oh, yes.

Ques. Now, suppose the fact to be that on the day in question your system of sewerage was in existence and

that when this water came down Greenwood avenue and down the side avenues and brought with it macadam from the streets over which it flowed, and that that macadam that came to the point of in-take was in the center of Greenwood avenue or between the curbs; would your system have taken the macadam from that point?

Ans. The macadam was where?

(Question repeated.)

10

Ans. There would have been either one of two effects there. When the water was diverted, came from the center of the street toward the in-take, that reduces the velocity of the water; the slackening of the velocity of the water would cause a deposit of the gravel at that point; or if the velocity after it was diverted was sufficient to continue to move the gravel, it would go in the in-takes and be carried off.

20 Ques. In other words, the tendency would be to deposit the gravel at the point where it was when it reached the point of in-take, unless the volume of water was so great as to carry the macadam with it into your in-take?

Ans. That is right.

Ques. Have you made any calculation to determine how great the flow of water was; that is, the rate of the flow of water would be at that in-take, at the rate of three inches per hour? Have you made any calculation, I ask you; not make it now, but have you before made it?

30

Ans. Well, I have roughly.

Ques. Will you tell the jury, please, at what rate the water would flow coming from that rain-shed if the rain was falling at the rate of three inches per hour?

Ans. It would be about three miles per hour at that point.

Ques. I didn't ask you what the rate was; I asked you whether you had made a calculation?

Ans. Well, I did answer that.

Ques. Oh, did you? Pardon me.

Ans. I didn't do that; no, sir.

Ques. Have you answered that question?

Ans. About three miles per hour.

Ques. Suppose the rain on the day in question fell at the rate of three inches a half hour—I don't mean at the rate of three inches per half hour, but if it fell three inches in a half hour; would your system have taken it off?

10

Ans. No. I will tell you why.

Ques. I didn't ask you that.

The Court: No; don't add anything. If your counsel wants anything he can ask it.

Re-direct examination.

By Mr. Backes:

Ques. Mr. Nelson, Mr. Swan has drawn a rough sketch here for me which indicated the grade of Greenwood avenue—I mean the crown grade of Greenwood avenue—and the gutters. Now, as you either are looking down or up Greenwood avenue—do you understand that the conformation of Greenwood avenue is about that shape?

20

Ans. Yes; about that shape.

Ques. Now, if the water rushes down Greenwood avenue, where would the greatest velocity be and the greatest quantity of water?

Ans. Where the greatest depth is.

30

Ques. And if the gutters were full and overflowing, what effect would that have on the center of the street?

Ans. Well, the velocity at the center would be much slower.

Ques. Much slower?

Ans. Much slower.

Ques. Suppose that the gutters are just equal to the grade of the crown, up to the crown of the street; where would the velocity of the water be?

Ans. It would be at the gutter line.

Ques. Would there be any in the center of the street if it was just equal to it?

Ans. Very little.

10 Ques. Then what would be the effect of the water in the center of the street so far as carrying any debris from the center of it? I mean that water which is in the center of the street and moving down hill.

Ans. It would not carry the debris. The debris would be moved by the water in the gutters.

Ques. Now, you said in your cross-examination that if the water and material went down the center of the street it would take two courses?

Ans. No; the material itself would be one of two effects upon it.

20 Ques. Now the one effect was, you said, that it would go with the current and through the intakes and deposit at the outlet?

Ans. Yes, sir.

Ques. Now the other one, if the intakes were ten or fifteen feet east of the track, where did you say that the material would deposit then?

Ans. Well, the material would deposit where the slackening of the current was just sufficient to cause that.

Ques. At the edge of the current?

30 Ans. At the edge where it diverts.

Ques. And the effect of that would be what?

Ans. Deposit the material.

Ques. And that would bank up then, wouldn't it?

Ans. Yes, sir.

Ques. And then if that was ten feet, or about that away from the track, the deposit would be ten or fifteen feet east of the track?

Ans. East of the track.

Ques. Now you said further that if it rained upon this rainshed three inches—not at the rate of three inches, but three inches in a half hour—that the system of sewer which you say good engineering demanded would not take off that water, and you stated why. You were ready to state why when counsel stopped you. Why wouldn't it?

Ans. We have no experience in such rainfalls, and we would not—it doesn't occur. 10

Mr. Cole: I ask that that answer be stricken out. This witness is passing upon a condition that prevailed at that station on this day. He doesn't know anything about what occurred at Jenkintown; he was not there.

The Court: I thought he was speaking of this three inches in a half hour.

Mr. Cole: No; he is saying to this jury that there is 20  
no such thing as a rainfall of three inches in a half hour. I submit that is not—

The Witness: In this vicinity, I would add.

Mr. Cole: I don't think you have any right.

The Court: Yes; I don't think that is the way to show that. 30

Mr. Backes: I am not showing it; I am simply amplifying on the question asked on cross-examination. It is not re-direct examination in the sense of showing something which I desired to develop in my direct, but it is to make clear that which was developed on cross-examination.

The Court: That was the object, Mr. Backes, but I don't think his answer was even responsive to your question; and I strike it out for that reason, that I don't think it was responsive.

Mr. Backes: If the answer was not responsive and satisfactory to me I can object, but the practice is that the other side cannot.

- 10 The Court: Well, I merely suggest that to you as the examiner, and I have doubts about the legality of this testimony, that there is no such rainfall in that vicinity, by virtue of reference to some records, and I don't think it is proper. I rule it out.

Mr. Cole: I will ask your Honor at this time, if the case goes so far, to instruct the jury to ignore that testimony. I think that testimony is prejudicial, and I don't think this witness should have given it. I think the witness ought to have known better.

20

Ques. Now, Mr. Nelson, suppose, as Mr. Cole intimated in his question, that it rains upon this rainshed three inches in a half hour; and the rainwater gathered in Greenwood avenue and at the point of intake; the conduit or drainage system that you proposed would not carry off all the water?

Ans. No, sir.

Ques. Would it carry off the wash?

- 30 (Objected to.)

Mr. Backes: I submit it is perfectly proper, in view of the fact that the engineer of the Pennsylvania Railroad Company said if there had been only water there he would have gone through. I am asking if it rained at three inches per half hour on this surface and rushed

down that street, what would be the effect of the rushing of that water down that street upon that material or wash.

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Ans. The heavy material, such as stone and sand and gravel, would go through the conduit with the swifter current. **10**

Ques. And that is why?

Ans. Because that is moved by the swifter current, and that is the deeper portion of the channel.

Ques. Which is the heavier of the two, the water or the gravel and sand?

Ans. The sand and gravel and stones are heavier than the water. The water would take the surface and the gravel, sand and stones would fall to the bottom or the lower level of the rushing water. **20**

Re-cross-examination.

By Mr. Cole:

Ques. Suppose that all this water came down Greenwood avenue three inches in a half hour and brought with it macadam and other debris in the center of the street; your system of sewer is now overflowing with water, not being able to take the water off. Would that macadam in the center of the street at the point of the intake, with the water in the center of the street, be taken into the sewer? **30**

Ans. It would be pretty hard to calculate that. I would have to determine the velocity of the water in

the center of the street in relation to its velocity as it goes into the intake; and a velocity of two and a quarter miles per hour will carry the debris with it. Now the velocity depends upon the gradient, and it would be an intricate calculation to determine just whether that would be deposited there; whether the water which passed the intakes would have sufficient velocity to move it or not, or whether it would deposit.

**10** Re-direct examination.

By Mr. Backes:

Ques. Well, now, in the proper construction of the sewer in-takes, at the point of in-take, and produced from one in-take to the other that is across the street, could not that be provided for?

Ans. You mean the case of slack water at that point?

**20** Ques. No; I mean as Mr. Cole intimates in his question; if the debris washed down the center of the street together with this water, at the point of in-take, which is ten or fifteen feet east of the railroad, could not that place be so provided as to conduct the material that may wash down the center of the highway to either side and into these in-takes?

**30** Ans. The tendency of the material from the head of the street to the in-take would be to work from the center of the street, from the crown constantly toward the sides. As I understood Mr. Cole's question, if the macadam was moving just at the time it reached the in-take, or about in the center of the street—a condition so seldom that I could not say that it never prevails, but it would require an intricate calculation to determine whether or not it would prevail, or else standing on the spot to look at it at the particular instant, and the probabilities—

Ques. Does good and careful engineering provide for such a thing?

Ans. It would. We would make an effort to intercept that and not allow it to continue on.

Re-cross examination.

By Mr. Cole :

Ques. It wouldn't make any difference how hard it rained, I suppose; you could provide for that

Ans. Well, I wouldn't say that there could not be such a rain that would move it.

10

Ques. How much experience have you had as a railroad engineer?

Ans. About twenty-five or six years.

Ques. Did you ever know of a case in the railroads you have worked on where after you have made this careful provision for the taking off of water, where the tracks had water and debris on them?

Ans. I have seen such conditions in very heavy rain-falls, in long continued rains and great freshets, like we had in the Delaware river two years ago.

20

Ques. Haven't you know of such cases in heavy rain storms?

Ans. A few, in—

Ques. I didn't ask you the place. Where have you ever known that to happen?

Ans. I have known that to happen in Trenton, the tracks of the Pennsylvania Railroad.

Ques. Where else?

Ans. I have known it to happen at Kinkora, on the Amboy Division.

30

Ques. Where else?

Ans. I don't know that I can specify.

By Mr. Backes :

Ques. Now, Mr. Nelson, these places where you say this occurred, in Trenton and Kinkora, was that after rains, after freshets, the natural streams had filled up?

Ans. Well, at Trenton there was a dam in the Assanpink creek below the Pennsylvania Railroad, and that caused the backing up of the water, and during heavy rains that would overflow the tracks sometimes. They have been working on that to get that obstruction away for—

Ques. Now, at Kinkora what were the circumstances?

Ans. It was exceptionally high water in the river there, overflowed the surrounding country.

10 Ques. Did you ever know of such a condition in a public street or highway like this one at Jenkintown?

Ans. I can't recall any.

Plaintiff rests.

20

30

## DEFENDANT'S TESTIMONY.

PATRICK LEE, recalled for defendant.

Direct examination.

By Mr. Cole:

Ques. Did you see the planking between the tracks at  
Jenkintown station, on Greenwood avenue, after the  
water had gone off on the day of this accident? **10**

Ans. Yes, sir.

Ques. Did you see the pilot or cowcatcher of the en-  
gine on that day after the accident?

Ans. Yes, sir.

Ques. Where did you see the cowcatcher?

(Answer ordered stricken out.)

Ques. My question is where you saw the cowcatcher **20**  
after the accident; that is, where with relation to some  
particular thing, for instance?

Ans. The first place it struck.

(Objected to.)

Ques. Yes; don't say that. Don't say where it struck.  
Mr. Lee. Well, there was a platform, wasn't there, on  
the right hand side of the track going to New York?

Ans. Yes, sir. **30**

Ques. How far was it from Greenwood avenue that  
that platform began?

Ans. Just about eight feet.

Ques. About eight feet?

Ans. Yes; come on a level with Greenwood avenue.

Ques. Now, where was it with relation to that platform  
that you saw the cowcatcher?

Ans. Eight feet north of that.

Ques. Eight feet north of it?

Ans. Yes, sir.

Ques. Well, eight feet north; where was it, on the tracks?

Ans. No; on the inside of the platform.

Ques. Well, what do you mean by the inside, between the tracks and the platform?

Ans. Between the platform and the walk.

10 Ques. Between the platform and the walk?

Ans. Yes, sir.

Ques. Now, were there any marks on the cowcatcher? Anything on the cowcatcher, any marks of anything?

Ans. Yes, sir; where the big driving wheels—

Ques. I don't want you to say about the big driving wheels. Where were these marks?

Ans. Right on the inside of the rail, where the plank was torn.

Ques. Where were the marks on the cowcatcher, top or bottom or what?

20 Ans. On the top.

Ques. What marks were they?

Ans. Looked as if it was running right up—

(Objected to and asked to be stricken out.)

The Court: He is speaking of marks on the cowcatcher. Where on the cowcatcher were any marks?

30 Mr. Cole: I want to know what kind of marks they were that he saw on the cowcatcher. What did they look like?

Ans. Looked as if there was something run over it.

Ques. Well, what did it look like?

Ans. About as though it had run over it.

(Objected to.)

The Court: Just describe to the jury the marks.

Ans. Looked to me as if something had run over it pretty heavy, on that cowcatcher.

Ques. Well, wheels, or a wagon, or what?

Ans. Well, wheels, something like that; ridges on it and gutters and grooves.

Ques. How many marks did you see on it of that kind?

Ans. That was the only one,

Ques. How long was it? 10

Ans. I couldn't say. The length of this cowcatcher, it was only—

Ques. How deep in the top of the cowcatcher did these marks go? Can you tell the jury about how deep they were, about how wide they were? Give us your best judgment about it.

Ans. Well, just about the flange of the wheel, that cut.

Mr. Backes: I object. This witness is testifying to what he thinks—just about the size of the flange of the wheel. 20

Mr. Cole: I think he has a right to do that.

Mr. Backes: I ask that the answer be stricken out.

Mr. Cole: I insist that he has a right to give his judgment of the width of the mark on the cowcatcher, and its depth.

The Court: He has told us what it looks like, what it resembled. Of course, I would like to know what material it was of the cowcatcher that he saw those marks on. Was it iron or wood that was marked, or what? 30

Ques. What was this mark iron?

Ans. No; it was a flat piece on the bottom of the cowcatcher, I judge an inch thick.

By the Court:

Ques. Was it wood or metal?

Ans. It was cast-iron.

By Mr. Cole:

Ques. Was it part of the cowcatcher?

10 Ans. It was the frame on the cowcatcher; the bottom part of the cowcatcher.

Mr. Backes: The shoe, isn't it?

Ans. Well, you can call it a shoe or whatever you like.

Mr. Cole: You don't know what they call it, do you?

Ans. No, sir; I don't. I say the bottom—

Ques. Was the pilot broken in any way or any place?

Ans. No, sir.

20 Ques. It was intact, was it?

Ans. It was intact, yes, sir; only what little pieces came off with this frame.

Ques. Was there anything at all broken on the cowcatcher?

Ans. I couldn't say that.

Ques. Do you remember now whether there was anything broken? You saw the cowcatcher?

30 Mr. Backes: It doesn't appear that he saw the cowcatcher.

Mr. Cole: He says he did.

Ans. It was a very little thing, a part of this frame

Ques. Did you see the cowcatcher that day?

Ans. Yes, sir.

Ques. I ask you whether there was anything broken on the cowcatcher.

Ans. What came off with this frame.

Ques. What was that?

Ans. I couldn't exactly explain.

Ques. Was it iron or wood?

Ans. Wood and iron both. This was real iron, this frame; took four men to carry it.

Ques. Was that on that piece that you saw these marks and indentations?

10

Ans. Yes; on this frame I saw the marks.

Ques. Did you see any marks on the planking on the crossing?

Ans. Yes, sir.

Ques. Where did the marks begin on the planking with respect to the south side of Greenwood avenue? How far was it north of the south side of Greenwood avenue?

Ans. It began on the south end, about six feet.

Ques. South end of what?

Ans. Of the planking, and went along like this just the same as if he had a jack plane and shaved right into the crossing plank.

20

Ques. How far did that continue?

Ans. Just about four feet, until it got so far in it couldn't come out any more.

Ques. How deep did this mark or shaving go into this planking?

Ans. I judge about an inch and a half or two.

Ques. Was it between the rails of the track on which this engine was?

Ans. It was on the inside of the rail on the westbound track.

30

Ques. Let me ask you, was this planking that you saw shaved between the rails of the track on which this engine was running?

Ans. Yes, sir; on the inside of the rail, on the same track that the engine was running.

Ques. Did you say how deep that cut was?

Ans. To the best of my knowledge, between an inch and a half or two.

Ques. Mr. Lee, can you tell the jury how the planking which was next to the rails there was constructed with respect to the rail?

Ans. Yes, sir; it was a solid crossing, and planked four inches inside of that rail with good yellow pine planking.

10 Ques. I know, but I mean how with respect to the rail did the planking come, how near to the rail?

Ans. About two inches.

Ques. About two inches from the rail?

Ans. Yes, sir; from the rail.

Ques. And was the rail clear all the way down to the ground in that distance of two inches?

Ans. Yes, sir.

Ques. Is that so on the inside of both rails, the same condition?

Ans. The same way on both sides.

20 Cross-examination.

By Mr. Backes:

Ques. You were three miles away, I understood you, at the time of this accident?

Ans. Yes, sir; I was two miles and a half away.

Ques. And you didn't get down to the place in question until an hour afterwards, did you?

Ans. No, sir.

30 Ques. Got down there with your men?

Ans. Yes, sir.

Ques. Everything was cleaned up then, wasn't it?

Ans. Everything was cleaned up.

Ques. The train taken away?

Ans. It hadn't been taken away when I got there.

Ques. It was cleaned up?

Ans. It was cleaned up.

Ques. You didn't have anything to do with that?

Ans. No, sir.

Ques. Where was the cowcatcher? I mean the pilot—that whole point there.

Ans. Well, that was inside of the platform. It was on the outside of the platform.

Ques. There is Greenwood avenue plank crossing? (Indicating on map.)

Ans. Yes, sir.

Ques. That would be the sidewalk on Beechwood avenue. It was thrown in here in the grass-plot, wasn't it?

Ans. It was inside of the grassplot, inside of the platform. That is what I want to try to explain to you.

Ques. And when was it that you saw it there first?

Ans. Why, after I got there.

Ques. I suppose it was. How soon after you got there?

Ans. It was an hour afterwards, after the thing happened.

Ques. How soon after you got to the place of this accident was it that you first saw the cowcatcher up there?

Ans. I discovered the crossing—

Ques. Answer the question. How soon afterwards?

Ans. Probably twenty minutes.

Ques. Then it was an hour and twenty minutes after the accident

Ans. Yes, sir; when I discovered it.

Ques. Do you know who took it there? Do you know who put it there?

Ans. I couldn't tell you who put it there.

Ques. Was there any indication on the platform or on the sod or grass to show that it had been forced or thrown up there?

Ans. Well, I didn't examine that at the time.

Ques. Didn't see anything of that kind?

Ans. I say I didn't examine it.

Ques. Well, there was a crew ahead of you there, wasn't there?

Ans. Yes, sir.

Ques. And they may have carried it over there; is that right?

Ans. I couldn't say, but that is where I found it.

Ques. Didn't you report to your company of the occurrence of this accident?

Ans. Yes, sir.

10 Ques. And didn't you in that report state to them that the train, in going at a speed, threw the cowcatcher over there?

Mr. Cole: I object. It is not cross-examination, and if there is any such report it ought to be here.

The Court: This is a question to cross-examine him.

20 Mr. Cole: But the witness has said that he had nothing to do with its being there. He has told where it was and what he saw. Now what difference does it make how it got there.

The Court: That I understand was loose from the engine?

Mr. Cole: Oh, yes.

Ques. Wasn't any part of the cowcatcher or pilot on the engine?

30 Ans. Yes; the woodwork was on there.

Ques. Wasn't any of the iron work on it?

Ans. No; this iron work was all together.

Ques. Well, the only bit of iron was a sort of triangle, wasn't it? The only iron that you saw up here in the grassplot was a triangular piece about four inches wide?

Ans. That is what I call the frame of the pilot.

Ques. What iron piece?

Ans. In the bottom of the pilot?

Ques. In the bottom of the pilot?

Ans. And some fragment, some pieces that were torn off the other part of the pilot, little short pieces.

Ques. About two inches high?

Ans. Oh, more than that.

Recess to 2 P. M.

10

Trial of the cause resumed at 2 P. M.

PATRICK LEE, resumed.

By Mr. Backes:

Ques. You don't mean to say that this angle piece or shoe was made of cast iron, do you? 20

Ans. Well, it was made out of wrought iron.

Ques. Wrought iron, is it?

Ans. Yes, sir; I call it wrought iron. I don't know what it is.

Ques. You called it cast iron.

Ans. Well, I may say cast iron, but it is wrought iron.

Ques. And about half an inch thick, wasn't it?

Ans. Well, to the best of my knowledge I judge it was about a half an inch thick.

Ques. And about two inches wide, wasn't it? 30

Ans. It was more than that wide.

Ques. Four inches wide?

Ans. Probably over.

Ques. And you know that that went around the bottom of the cowcatcher, don't you?

Ans. Yes; like a shoe.

Ques. And that is all that you saw, it was on the grass alongside the platform, wasn't it?

Ans. That is all it was then. Well, there was some attachment of the pilot attached to it.

Ques. Something where it had been ripped off?

Ans. Yes, sir; ripped off.

Ques. And what did you do with that?

Ans. I brought it up to my toolhouse.

Ques. When?

10 Ans. Just about shortly after it happened.

Ques. Who was the foreman of the gang who preceded you and did the cleaning?

Ans. I couldn't tell you who the other foreman was. It was all cleaned up.

Ques. You don't know who that foreman is, eh?

Ans. No, sir.

Ques. He is not here to-day?

Ans. Oh, no; he ain't here.

20 Ques. When was it that you saw some abrasion in the plank on the street crossing? When did you see that?

Ans. Well, after I arrived there.

Ques. I presume it was after you arrived there. I didn't think it was before. How soon after you arrived?

Ans. Just about twenty minutes I discovered it.

Ques. You then discovered the angle piece and had it removed?

Ans. I discovered this crossing plank, the first thing I discovered.

30 Ques. Did you discover the abrasion in the crossing plank before you did the angle piece?

Ans. Yes; the first thing I discovered.

Ques. Which crossing plank was it?

Ans. The one inside of the rail.

Ques. The one on the Wyncote side, the west side.

Ans. The one on the Wyncote side.

Ques. And you didn't at that time make measurements as to just how far it was north of the south end of the

street platform or street planking? You didn't make any measurements of it, did you?

Ans. Well—

Ques. At that time, did you?

Ans. No; not when I discovered it, till after.

Ques. What say?

Ans. Not at that time, I didn't, till after.

Ques. Till afterwards?

Ans. Till afterwards.

Ques. How long afterwards?

10

Ans. Might be just a half an hour afterwards.

Ques. Well, the men had been along there with their shovels, hadn't they, cleaning up and scraping up?

Ans. The men was done before I got there.

Ques. And did you make an accurate measurement?

Ans. Yes; where I found this crossing plank shaved down.

Ques. Was the crossing plank intact; was it in place?

Ans. It was in place, but the piece that was torn off, shaved off, was not in place; it was torn up.

20

Ques. How large a piece was torn up?

Ans. Well, I judge about two inches in one end.

Ques. About two inches?

Ans. About two that way.

Ques. Wide?

Ans. Wide.

Ques. And how long?

Ans. Well, about four feet in length.

Ques. Just a little piece off the edge?

Ans. Just a little piece off the edge; but then it cut in deeper and wider.

30

Ques. Now, you don't know whether the men in shoveling before you ripped that off, do you?

(Objected to.)

Ans. No, sir.

Ques. I say you don't know that?

Ans. I do not.

(Objection withdrawn.)

Ques. You say it started from nothing, didn't it?

Ans. Started from nothing.

Ques. And then gradually went in?

Ans. Went in the same as a plane cut in it or a rip

**10** saw.

Ques. But it took just the corner of a plank off?

Ans. This piece was attached to the plank still yet.

Ques. You said that one of the pieces that it took off and which was not there was about two inches wide and four feet long?

Ans. I said that piece that started two inches and cut wider into the plank was still connected to the plank.

Ques. That was still there?

Ans. Yes, sir.

**20**

Ques. Hadn't been ripped out of the place?

Ans. Not at that time.

Ques. And you don't know what did that, do you? You don't know of your own knowledge what caused that?

Ans. Just—

(Question repeated.)

Ans. No.

**30**

Ques. You don't know whether the men that were there ahead of you caused that or any part of it, do you?

(Answer ordered stricken out.)

Ques. Was there any other part of the plank touched?

Ans. No; not the north end of the plank wasn't touched.

Ques. What?

Ans. There was a portion of the plank wasn't touched, except where this was—

Ques. Won't you answer my question? Was there any other part of the planking ripped?

Ans. Only this part.

Ques. That you have just described?

Ans. Just described. And that began about six feet north of the south end of the plank.

Ques. About six feet north from the south end of the street?

Ans. About that. 10

Ques. You measured it, didn't you?

Ans. I said about six feet when it began to shave into the plank.

Ques. How far did it shave that?

Ans. I judge about four feet, only it got deeper.

Ques. That was in there?

Ans. Yes, sir.

Ques. It wasn't ripped up?

Ans. This piece I say was still hanging, up the end where this deep cutting was done, that was still there with the plank. 20

Ques. That was still there?

Ans. Yes, sir.

Ques. Was it the edge of the plank inside of the track? Was it the edge nearest the rail or the edge of the plank nearest the center of the track?

Ans. The top of the plank nearer to the rail.

Ques. And it looked as though it was cut off?

Ans. Looked as if it was planed off. This was the top of the— 30

Ques. Now, when you arrived there weren't there some of the Pullman cars standing there on that crossing off the track?

Ans. No; there was one standing there when I arrived there.

Ques. That was off the track, wasn't it?

Ans. That was off the track.

Ques. And that was on the crossing, wasn't it?

Ans. No, sir.

Ques. Right near the crossing?

Ans. North of the crossing.

Ques. They had the wrecking crew there, didn't they, though?

Ans. The wrecking crew was there all night.

Ques. And the wrecking cars, weren't they?

Ans. Yes, sir.

**10** Ques. They were there before you went there, weren't they?

Ans. No; they were not there.

Re-direct examination.

By Mr. Cole:

Ques. Did the wrecking crew get there after you got there?

**20** Ans. Yes, sir; the wrecking crew came after I got there.

Ques. How deep was the deepest cut in the plank?

Ans. Well, between an inch and a half or two inches, to the best of my knowledge.

Ques. Were these planks afterwards taken up?

Ans. Yes, sir; the plank was taken up.

---

**30** Mr. Cole: We offer in evidence the public laws of the State of Pennsylvania of 1868, at page 58, an act of the Legislature of the State of Pennsylvania, entitled "An act relating to railroad companies and common carriers, defining their liabilities and authorizing them to provide means of indemnity against loss of life and personal property," approved the 4th day of April, anno domini

1868. Section 1 reads: "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the roads, works, depots and premises of a railroad company, or in or about any train or car therein, or trains of which company such person is not an employee, the right of action in all such cases against the company shall be such only as would exist if such person were not an employee; provided, that this action shall not apply to passengers."

10

Both sides rest.

---

Mr. Cole: On behalf of The Philadelphia & Reading Railway Company, defendant, we ask a direction upon the following grounds:

That this action is improperly brought. It should be brought in the name of the personal representative of Charles Ferguson and not in the name of his widow. I might say that under the pleadings and evidence and the act of 1868, no duty was owing to Charles Ferguson, the fireman of The Philadelphia & Reading Railway Company; that under the act of 1868 the tracks at Jenkintown station at the time of the accident were the tracks of The Central Railroad of New Jersey and not the tracks of The Philadelphia & Reading Railway Company, and that any obligation due or duty owing to Ferguson was an obligation and duty from The Central Railroad Company of New Jersey, that claim being made under the act of 1868; that under the act of 1868 the flagman at that crossing was a co-employee or fellow-servant with Ferguson, and that his negligence is to be attributed to Ferguson; that under the evidence the accident was caused by the failure of that flagman to notify the train of danger, and failing to do that, the flagman is guilty of negligence, which is to be attributed

20

30

to Ferguson as a fellow-servant; that under the evidence he was himself guilty of contributory negligence; that there is no evidence to go to the jury under the pleadings to show that The Philadelphia & Reading Railway Company failed to discharge any duty that it owed to Ferguson; the point being there that there is nothing in this case to show that the company failed under the conditions that existed at the time of this accident to exercise reasonable care to protect Ferguson from danger, assuming that they were under any obligation to do that.

Mr. Barkalow: I desire to move for a direction for The Central Railroad Company of New Jersey upon the following grounds:

First. Upon the ground that this suit should have been brought by the personal representative of the deceased, and not by the widow, under the Pennsylvania statute.

20 Second. That under the contract which the declaration is based upon here, it was the duty of The Philadelphia & Reading Railway Company to maintain this roadbed in proper condition for the operation of trains, and that if there is any negligence shown in this case it is the failure of The Philadelphia & Reading Railway Company to perform that duty for which it is responsible. If there be any negligence it is the negligence of The Philadelphia & Reading Railway Company.

30 Third. That the evidence in this case shows that this is the roadbed of The Philadelphia & Reading Railway Company, and if any company is liable for this accident The Philadelphia & Reading Railway Company is that company.

Fourth. That the evidence in this case shows that at the time that this train was being operated over this road at this point, Ferguson, the fireman, was in fact an employee of The Philadelphia & Reading Railway Com-

pany, and that the negligence of the flagman that has been spoken of here is the negligence of a co-employee, for which, of course, this company could not be liable. I am speaking now of The Central Railroad Company of New Jersey.

The fifth ground is, that it appears in the case that Ferguson himself was guilty of contributory negligence; and this company prays a direction for that reason.

(Mr. Backes replies.)

10

The Court: I shall hold in this case that there is a liability of both companies. The motion here, as I understood it, was mostly on the question of fellow-servants. I don't think it is worth while to argue. I shall hold that if there is any liability for negligence it attaches to both companies. I think I must deny the motion to direct a verdict in the case of these companies, so that counsel may sum up to the jury. I think the question must go to the jury.

20

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [L. s.]  
J. S. C.

Adjourned till December 15, 1905, 10 A. M.

30

TOMS RIVER, N. J., December 15, 1905.

Trial of the cause resumed at 10 A. M.

CHARGE OF THE COURT.

**10** *Gentlemen of the Jury:* Before a recovery can be had in this case it must be shown that the accident occurred by some fault or negligence on the part of the defendants, and some fault or negligence which had been pleaded in the declaration and established by the proofs to your satisfaction by the weight of the evidence. The particular fault or negligence, as described in the declaration, is in substance the failure on the part of the defendant railway companies to exercise reasonable care to prevent water and earth, stones and rocks from being washed and deposited on the track and roadbed of the Philadelphia and Reading Railway at Jenkintown, Pennsylvania, where this accident happened, in such quantities as to render the same at the crossing of Greenwood avenue insecure and unsafe for the passage of locomotive engines and cars thereon; that is, by the danger of derailment thereby. And hence the proof must show that the derailment occurred from the cause alleged in the declaration; and if it did not occur from that cause but from some other cause, then this action fails and you should return a verdict for the defendants.

**20**

**30** So that is one of the matters for you to determine, and you should look at all the evidence you have heard respecting that matter as to the cause of the derailment which resulted in the unfortunate death of Mr. Ferguson, the fireman. And if after looking over all that evidence you should find that the derailment did occur from this cause set forth in the declaration, still, in order to warrant a recovery, it must be proved that the defendants were negligent in not exercising reasonable care to pre-

vent such deposits and accumulations. Then if that is established to your satisfaction by the weight of evidence, that it did occur through such negligence, then unless the decedent, Mr. Ferguson, was himself guilty of negligence resulting from a failure to use reasonable care on his part to do what he could to avoid the accident, and that his negligence contributed proximately to the accident, then the plaintiff would be entitled to recover in this action such damages as I will explain to you further in my charge.

Now, on the matter of the exercise of reasonable care and as to such acts as you may conclude indicate negligence in that respect, you will look naturally and properly at the acts of the Philadelphia and Reading Railway, which company was in the ownership and control of this part of the railway upon which this train was traveling from Philadelphia to Jersey City. And if the negligence is established against that company, in view of my ruling already made, such negligence would be chargeable also to the New Jersey Central Railroad Company; so that if you find the Philadelphia and Reading Railway Company negligent in these respects, and that the plaintiff is entitled to a verdict of recovery, it should be a verdict against both of the companies jointly.

I need not go over the facts, I think, generally, relating to the deposits of dirt, gravel or stone upon the roadbed at this crossing by the rains resulting in a flow of water down Greenwood avenue and down the gutters of that avenue on to the railway crossing; that is, such as did not at least pass and was not vented by the culverts or drains that were there; because in these matters the facts have been fully stated, in the arguments of the respective counsel who addressed you. But in looking at the question of the exercise of reasonable care on the part of the Philadelphia and Reading Railway Company, you must look at all the conditions, circumstances and surroundings as developed by the evidence;

10

20

30

and you will look, of course, at what evidence there is to show, naturally, whether the railway company, by its employes and agents, had knowledge of the tendency, in times of rainstorms and very heavy showers, to carry such debris as I have referred to upon the railway track at this place, and in such quantities as you would conclude from the evidence would be dangerous and render travel over the tracks insecure and unsafe. Several witnesses have spoken upon that matter, and I refer you to the testimony to ascertain how far the company, by its agents, had notice of this tendency, notwithstanding any drainage system that had been inaugurated there, in times of heavy storms for this debris to come up on the track. I may say it appears, as I understand the evidence, that the mere flowing of water to that depression over the tracks would not have caused any derailment. But you will see that the chief cause of danger, if there was any, was in the material that was carried during these rains or storms by the wash down the hillsides and down this street, which was, as I remember it, quite a sharp grade, upon the track of the road. And in this connection you will refer naturally to the testimony whether in previous years, before this occurrence, there were any such deposits there during or after such rainfalls or storms as occurred at that point as would give reasonable notice to the officers and agents of the railway, so that they would have reasonable ground to anticipate such a deposit and such danger as might arise therefrom; and also to the evidence relating to another company—a land company of some kind—and the changes that had been made by it perhaps a year or so before in the surface of the ground in opening some of the streets and in loosening the earth and filling in certain places with loose earth, which might cause an unusual wash, perhaps, during heavy rainfalls down upon the track, and see whether that had existed at any time before and had washed down in such quantities upon the track as to give a reasonable

notice to the company or its agents, who were bound to use reasonable care in inspecting the condition of the road and track and reasonable care also to provide for proper venting of the waters that accumulated and flowed down at that point, and see what there was, if anything, to give reasonable notice and warning, so that the defendant company should be called upon to use reasonable care to provide against such occurrences. All those matters will come necessarily into your view, and should come in in forming your judgment as to whether this railroad company, the Philadelphia and Reading, was guilty of negligence; that is, neglect in not using reasonable care of their property at that point, and reasonable care to provide against the occurrence of such deposits, if they did occur there. All these facts, of course, are for you; I may misstate a fact, but you must correct me, because all the facts are for you. I merely suggest some of them, so as to direct your mind in the investigation. So that you will carefully look at the testimony in forming your conclusions upon the subject matter under investigation. And, of course, while you are upon the subject matter just alluded to, you will look also as to the nature and character of the rain or storm out of which this accident occurred, it if did so occur, whether it was of such great or abnormal violence that in the exercise of reasonable care the company should or should not have anticipated its effects in creating such a danger as did arise, if it occurred in the way that is suggested and stated by the plaintiff; whether there were such conditions and circumstances that they might reasonably anticipate such an occurrence. That would be considered by you naturally in forming your conclusion as to whether there was in this case a failure to exercise reasonable care by the company and its agents at that point.

Now reasonable care, I need merely hint at what that means. It does not, of course, mean the highest degree of care or prudence, but it means reasonable, ordinary

10

20

30

care—such care as prudent railway companies, or men engaged in that business, would exercise under similar circumstances; would ordinarily, I mean to say—would ordinarily exercise under similar circumstances. One company or one person might be, you know, much more careful and prudent than another. This idea of reasonable care is as to what care would ordinarily be exercised by prudent companies or railroad companies engaged in that business.

- 10 Now, if you think, under all the circumstances of the situation, The Philadelphia & Reading Railway Company, by its agents, did exercise this reasonable care to take care of their tracks and to prevent the gathering of such debris thereon at that point, as to render it unsafe and insecure, if they did this, they cannot be held liable in this action. The facts must be established to your satisfaction under all the circumstances as to what did occur and of what the railroad company had notice or could have known by the exercise of reasonable care themselves as to the possibility of such a danger.
- 20 Then, if they did, I say, fail to exercise reasonable care under those circumstances, as I before stated, you will naturally proceed further in the investigation of the case, if the negligence of the company is established in this respect as the cause of the accident. Then you will see whether Mr. Ferguson, the decedant, whose widow is the plaintiff in this action, contributed to this accident by his own negligence. That is the general rule of law, as has been stated in this case to you by counsel; that if
- 30 he failed to exercise reasonable care, that is, reasonable care of the kind I have described, such as would ordinarily be exercised by men, firemen, and persons in his situation; not the highest care, but ordinary, reasonable care. And in this connection you will take the evidence and see whether he neglected to use reasonable care under the circumstances.

The allegation of the defendant is, as I understand it, that under the evidence Mr. Ferguson was not looking

out, looking ahead at the time, but he was looking down. Now I have only hinted this, simply to put your mind upon the evidence. You must go by the evidence; I cannot remember it all. And their position is this: that if he had been exercising the diligence which they say he ought to have exercised in looking out, he might have seen the condition of this crossing or might have learned its condition to such an extent that he would have notified the engineer, who, it seems, did not see the obstruction; he might have been otherwise engaged. 10  
At least, I think the engineer's testimony was that his attention was not called to the condition of the crossing by the fireman. I don't know that there is any evidence that the fireman saw anything of it at all; whether he did or did not, at least it appears he did not mention it to the engineer. And whether if he had done so, and by the exercise of reasonable care if he could have ascertained and known the condition of this crossing and notified the engineer in time to have slowed up the train or have stopped, so that it would have prevented this unfortunate derailment and disaster. 20  
Now that is another matter for your consideration under all the circumstances. Of course you must put yourself in the place of a man thus situated. Of course you take the condition of the atmosphere and the rain, the heavy rain. You have heard what was said by the engineer and others about that, as to the rain being heavy at that time, and as to how far they could see or whether it obscured the view. Of course you must consider also whether at the time the fireman had any other duties besides keeping an out-look. 30  
If he had, of course you have got to allow for all those things, as to whether something required his attention, and whether in the exercise of his duty he was looking at something that interfered with his looking directly forward. I don't know that there is any evidence about that, but whatever there is, I want you to look at it, and give it proper weight and effect. And you

must look at all these circumstances in reaching your judgment; whether Mr. Ferguson was negligent and careless in this way in not using proper and reasonable care himself to guard against obstructions on the track and elsewhere, and whether he did in that case; or whether if he had used reasonable care he could have learned the dangerous condition of that crossing and notified the engineer in time to have saved this accident. Now if he was guilty of contributory negligence, then

10 even though the defendants were negligent, it defeats the action, defeats the right of the plaintiff to recover under the general law of the land. But if he was not, if you cannot say under the evidence that he was guilty of such negligence that it contributed proximately to the cause of this accident, then it must not interfere with the recovery, if you find negligence against the defendants as causing this accident. It depends, you see, upon your solution also of that question.

Now, gentlemen, you see if you find all these propositions in favor of the plaintiff and against the defendant, —that is, these propositions of negligence on the part of the defendants with regard to the alleged accumulations upon the track, and also that the decedent himself was not negligent in the sense that I have stated,—then the plaintiff would be entitled to recover and you would then proceed to see what damages should be allowed to the plaintiff in this case. If you find on either of these propositions that I have mentioned in favor of the defendant companies, then there could not be any recovery, and your verdict must be for these defendants.

30 That is just where the thing stands, upon those very questions that you are to solve and decide on the evidence.

So if you come to the question of damages, as has already been stated and discussed here by both the counsel, I may say the plaintiff does not sue for damages that come from the sorrow and anguish that may have

occurred to Mrs. Ferguson, the plaintiff, because of the death of her husband. Under the law that does not come into this kind of an action. It is agreed by both counsel and has been very fairly and properly stated that the only ground of recovery is the money loss, the pecuniary loss by the death of Mr. Ferguson, the fireman; that is, the amount of money that he would have paid to his widow for the benefit of herself and her children from that time, from the period when he lost his life, not only up to now, the time of the trial, but in the future, so long as he might have lived; whatever money he would have paid over, whatever money the present plaintiff, Mrs. Ferguson, would have received for herself and for her children. Now as to the time. In estimating the amount that she would have derived from him in that way, as to the time, that becomes a matter for your judgment, upon such evidence as is before you. How long would he have been likely to live is one question. Now the table of mortality has been offered in evidence, and it is before you. As I understand counsel, the age of Mr. Ferguson was forty years and ten months; and that according to this table, which is used by insurance companies and others, the average expectancy of life at such an age as that, of any ordinarily healthy person, would be twenty-seven years. I think I understand counsel to so state. They will correct me if I am wrong. Now that is not controlling upon you at all, but it is allowed to aid you in determining your opinion about what would have been the length of life of this decedent. Of course you cannot tell positively; none of us can tell; but you must form your best judgment. In doing that you look at his condition of health as testified to, if it has been, by the witnesses. How long would he be in your judgment likely to live? Then in getting at the amount that he would have earned, of course you look at such evidence as there is here—what his trade and business was; what he was receiving in his trade; whether he

10

20

30

would have been likely to get more through promotion in future years if he lived; also whether or not as he advanced in life he would have maintained his position and been able to earn as much. All these things are matters for the jury to look at in getting at the probability. You see we have to go according to the probabilities. You are to look at the probabilities in forming your judgment or forming your estimate of what these damages would amount to, considering that the

10 decedent had lived and was likely to live in the future. That is what I mean. And there is another consideration here: How long would Mrs. Ferguson be likely to live? She might die; and the possibilities are to be considered by you in forming your estimate. You have got to look at all these possibilities, so as to be entirely fair and just to both sides. Then you have got to look, as I say, to the liability and possibility of Mr. Ferguson having died from natural causes. If he had died soon after this accident by natural causes, you see at once,

20 then, that that would have ended any receipt of moneys by this plaintiff. And so you take all of these possibilities into your consideration in forming a fair judgment of the damage which Mrs. Ferguson has sustained by reason of the death of her husband; that is, the damages arising from the loss of the receipts of moneys from him. And you will look also in regard to the amount to the question of how much he would have used himself; that is, that is to have some consideration in forming your judgment of what Mrs. Ferguson would have received from her husband. For if she did not receive it, it would

30 not be any loss, only for what she would have received. Now what he would have used himself for his own expenses and would not therefore have paid over to her, you could not include in the amount of your judgment of the damages. You have a right to look at the fact, as one of the circumstances, that while he was in the employ of The Central Railroad Company of New Jersey

and drew his wages regularly, that he handed them over to his wife; and that after making some small payments or some payments out of that money for matters of his own, the bulk of it was handed to her for her benefit or the benefit of her children. That does not matter. I am only speaking of this to show you that the circumstances should have some bearing, and that you can judge from that what she would have been likely to receive in the future had he lived. You will look at all those circumstances with reference to that matter.

10

And, then, another thing you should consider in forming it is this: that this suit is, you see, for the damages not only up to the time of the trial, but, as I say, for the future damages; that is, future loss which she may sustain. Now, your verdict will represent—if you find a verdict against these defendants, I mean, for any money, whatever it is—it means cash; it is payable on date of the verdict; and any moneys that would have been received, to be estimated in forming your verdict, by the plaintiff in the future, you see, they would not be cash. Now, you must in those cases where you estimate future earnings and sums of money received, you can only allow in your verdict the cash value of those moneys. You understand, I think; for instance, one year, two years, three years or ten years. Hence, in making your estimate you must allow for that; because if you give the money now that would only naturally have arisen two years hence, you would be giving more than the amount alone; you would be giving the cash money now and the plaintiff would have the use of it from now on, or interest on it. So that I merely call your attention to that fact, if you reach the question of damages at all, in estimating those damages, any future amounts that you include in must only represent what the cash value of those amounts will be at the present time. You are practical men, and no doubt you can reach a proper result in making such an estimate of what would be the cash value.

20

30

If you should find a verdict against these defendants, gentlemen, what I am saying to you about this matter of damages is not to lead you to any idea at all of what the Court expects, because this case is one that is for you to settle upon the facts. The issue here is whether or not the defendants are guilty in this case; and only in case you should decide for the plaintiff I am giving you what I understand to be the legal rules in regard to estimating damages, which have been discussed by counsel.

10 And, of course, the plaintiff, if entitled to damages at all, would be entitled to full compensation for the loss, the pecuniary, the money loss that she has sustained and will continue to sustain by the death of her husband, Mr. Ferguson. And while the amount should be full and to the extent that it is proven to your satisfaction and is based upon the money that she would receive from her husband had he lived, of course, you understand already that you are not to go beyond that; that is all. If you have to give a verdict for damages under the evidence, I say,

20 while you give her a full compensation and give her the money damages that she is entitled to, you must be careful not to go beyond that and go into other questions, such as I referred to in the opening of my charge; that is, you are not in any way to be controlled by the feeling that her loss in other respects is very great. Of course, we all know that any one suffers greatly, but you are not to measure that in this action. This is only for the money value, as Mr. Backes himself stated more than once; it is only the money value, the money damages; that is, the amount that she loses by his death, that she

30 would have received from him. And in the administration of justice in the courts we want to be just; we want to make every effort to be fair and just by both parties, allowing no feeling of sympathy or prejudice to swerve us one way or the other. I only mention that now because sometimes in a trial, a long trial of a case, there may be conversations outside that may reach the ear of

a juror, and unintentionally, perhaps, may influence or swerve one way or the other. We must avoid all that, and only be governed by the evidence and the law.

Now, I have some requests to charge; I will dispose of those, and then I think I am ready to submit the matter to the jury.

Mr. Backes: I withdraw my requests. Your Honor has covered them as far as I desire. I withdraw my requests to charge in the language in which I requested them. 10

The Court: Now, these are requests to the Court to charge, and lest I may not have included them in my charge fully, I will read such as I have concluded to charge. I will read them as they are presented to me by the counsel of the Philadelphia and Reading Railway Company.

1. In no event can the plaintiff recover unless the jury shall find as a fact that either the water or debris, or both, upon the track at the time of the accident, was the sole and proximate cause of the accident. 20

I so charge.

2. If the jury should find that the water or debris, or both, upon the track at the time of the accident was the sole and proximate cause of the accident, still the plaintiff cannot recover unless the jury should further find that the defendant, Philadelphia and Reading Railway Company, failed to exercise reasonable care in preventing the presence of said water and debris upon the tracks. 30

I so charge.

3. If the jury should believe that the derailment of the engine was caused by the defect of the pilot or other part of said engine, plaintiff cannot recover.

I so charge.

5. If the jury should find as a fact that the presence of water and debris upon the tracks at the time of the accident was due to an unusual and extraordinary rainstorm which the Philadelphia and Reading Railway Company, in the exercise of reasonable care, was not called upon to anticipate, it did not fail in the discharge of any duty it owed Charles Ferguson, and the plaintiff cannot recover.

I so charge.

10

6. Notwithstanding the jury should find that the drainage system provided by the Philadelphia and Reading Railway Company was inadequate to carry off the water of Greenwood avenue during an ordinary rainstorm, still the plaintiff cannot recover if the jury should find that the rainfall on the day of the accident was so unusually and abnormally heavy that the water and debris would have been deposited upon the tracks and the derailment happened, although the company had provided an adequate system of drainage for ordinary conditions.

20

I so charge.

7. If the jury should find as a fact that the fireman, Ferguson, in the exercise of reasonable caution, could have discovered the condition of the crossing in time to have warned the engineer so that he could have stopped his engine before reaching the crossing or approached it slowly and thus have avoided the accident, and the fireman failed so to do, and his failure proximately contributed to the accident, then plaintiff cannot recover.

30

I so charge. The other requests in this case I decline to charge.

I have requests given by the Central Railroad Company of New Jersey:

1. In no event can the plaintiff recover unless the jury shall find as a fact that either the water or the debris, or

both, upon the track at the time was the sole cause of the derailment of the train.

I so charge.

2. If the jury should find that the water or debris or both upon the track at the time of the derailment was the sole and proximate cause of the accident, still the plaintiff cannot recover against The Central Railroad Company of New Jersey unless the jury shall further find that said company failed to exercise reasonable care in preventing the presence of said water and debris upon the tracks. 10

I charge that, but with the explanation that if The Philadelphia & Reading Railway Company was negligent in the respect mentioned, even though The Central Railroad Company itself as a corporation physically was not, yet that the plaintiff can recover of The Central Railroad Company if there is any recovery against The Philadelphia & Reading Railway Company. I will modify that request in that way. 20

3. If the jury should believe that the derailment of the engine was caused by a defect in the pilot or other part of said engine, plaintiff cannot recover.

I so charge.

5. If the jury should find as a fact that the presence of water and debris upon the track at the time of the accident was due to an unusual or extraordinary rainstorm which The Central Railroad Company of New Jersey, in the exercise of reasonable care, was not called upon to anticipate, it did not fail in the discharge of any duty it owed Charles Ferguson, and the plaintiff cannot recover. 30

I so charge.

6. Notwithstanding the jury should find that the drainage system provided was inadequate to carry off

the water of Greenwood avenue during an ordinary rain storm, still the plaintiff cannot recover if the jury should find that the rainfall on the day of the accident was so unusually and abnormally heavy that the water and debris would have deposited upon the tracks and the derailment happened, although an adequate system of drainage for ordinary conditions had been provided.

I so charge.

- 10 7. If the jury should find as a fact that the fireman, Ferguson, in the exercise of reasonable caution, could have discovered the condition of the crossing in time to have warned the engineer so that he could have stopped his engine before reaching the crossing or approached it slowly, and thus have avoided the accident, and the fireman failed so to do, and his failure proximately contributed thereto then plaintiff cannot recover.

I so charge. I refuse the other requests.

- 20 So, gentlemen, now you may retire to consider of your verdict. If you should find a verdict it will be one of guilty or not guilty as against the defendants. And if you find a verdict of guilty, then you will name the amount of damages which you assess to the plaintiff. You may now retire in charge of the officer.

In order that it may be clearly understood, I will add to my charge that if a verdict is found against the defendants it should be a joint verdict against both, and not a verdict against them separately.

30

## DEFENDANTS' EXCEPTIONS.

## CENTRAL RAILROAD COMPANY OF NEW JERSEY.

1. The defendant, Central Railroad Company, excepts to that portion of the charge which stated that if The Philadelphia & Reading Railway Company was negligent, under the view that the Court had already given in deciding the motion to direct a verdict, that The Central Railroad Company was also liable, recovery must be had against both companies, or words to that effect. **10**

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

2. The defendant, Central Railroad Company, also excepts to that part of the charge in which the Court said: "Several witnesses have spoken upon that matter, and I refer you to the evidence, the testimony that was given, to ascertain how far the company, by its agents, had notice of this tendency and the liability, notwithstanding any drainage system that had been inaugurated there, in times of heavy storms for this debris to come upon the track." **20**

(Which exception is hereby allowed and sealed accordingly.) **30**

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

3. The defendant, Central Railroad Company, also excepts to that part of the charge in which the Court stated that if the jury found that The Philadelphia &

Reading Railway Company exercised ordinary care, The Philadelphia & Reading Railway Company was not liable. That is excepted to because the Court did not state that The Central Railroad Company, therefore, as well as The Philadelphia & Reading, would not be liable.

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

10

4. The defendant, Central Railroad Company, also excepts to that part of the charge in which the Court stated that the measure of damages to be recovered in this case was whatever money Ferguson would have paid and the widow would have received for herself and children.

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

20

5. The defendant, Central Railroad Company, also excepts to that part of the charge in which the Court referred to the fact that Ferguson might have been promoted; upon the ground that there was no evidence in the case from which the jury could say that he would have been promoted.

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

30

6. The defendant, Central Railroad Company, also excepts to that part of the charge in which the Court told the jury that there must be a joint verdict against both

defendants in this case—whatever language the Court used in charging the jury to that effect.

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

7. The defendant, Central Railroad Company, also excepts to the refusal of the Court to charge the several requests of the defendant, Central Railroad Company, except as the Court so charged them. **10**

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

---

**20**

### DEFENDANT'S EXCEPTIONS.

#### PHILADELPHIA AND READING RAILWAY COMPANY.

1. The defendant, Philadelphia and Reading Railway Company, excepts to the refusal of the Court to charge the defendant's fourth, eighth, ninth and tenth requests.

(Which exception is hereby allowed and sealed accordingly.) **30**

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

2. The defendant, Philadelphia and Reading Railway Company, also excepts to that part of the charge in which the Court stated to the jury that if it found the

cause of the accident was as alleged by the plaintiff, and that the company failed to exercise reasonable care in anticipating the condition that existed on the day of the accident, and found there was no contributory negligence on the part of the fireman, then the plaintiff would be entitled to recover.

(Which exception is hereby allowed and sealed accordingly.)

10

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

3. The defendant, Philadelphia and Reading Railway Company, also excepts to that part of the charge in which the Court stated that if the plaintiff is entitled to recover there must be a joint verdict, or whatever the Court said in that respect.

(Which exception is hereby allowed and sealed accordingly.)

20

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

4. The defendant, Philadelphia and Reading Railway Company, also excepts to that part of the charge in which the Court made a statement to the jury concerning the measure of damages, saying that the plaintiff was entitled to recover whatever money she would receive from her husband.

30

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

5. The defendant, Philadelphia and Reading Railway Company, also excepts to that part of the charge in

which the Court permitted the jury to take into consideration that Ferguson might have been promoted; there being no evidence of any such likelihood, or that if promoted there would have been any increase in salary.

(Which exception is hereby allowed and sealed accordingly.)

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

6. The defendant, Philadelphia and Reading Railway Company, also excepts to that part of the charge in which the Court said that there are several witnesses who have testified as to the condition prevailing at the crossing before the accident, and notwithstanding the drainage system, etc., or whatever words the Court used in that respect; being the same exception taken by the Central Railroad Company.

10

(Which exception is hereby allowed and sealed accordingly.)

20

C. E. HENDRICKSON, [SEAL.]  
J. S. C.

---

(The jury was then re-called to the court-room and was charged further by the Court as follows):

The Court: My attention has been called to some matters which I have stated to you, gentlemen, which led me to think that possibly I may not have made myself clear to you, and perhaps in some particulars may not have been entirely accurate.

30

There is one matter that my attention has been called to, that if you find that the Philadelphia and Reading Railway Company did, in your judgment, exercise reas-

onable care with regard to the system of venting the water or as to its track where the accident occurred, I think I stated that you would find the Philadelphia and Reading Railway Company not liable, not guilty. And I failed perhaps to state then that the New Jersey Central Railroad Company would also not be liable and be found not guilty. I want to say that if you do find that the Philadelphia and Reading Railway Company did exercise reasonable care in the particular I have stated, then the action fails against both of the defendants; and if you find that the Philadelphia and Reading Railway Company was not guilty, you would say the same as to the Central Railroad Company of New Jersey. And if in any other respect you find in favor of the Philadelphia and Reading Railway Company, you would also find in favor of the Central Railroad Company of New Jersey.

10 There is another matter that may not be in the same order or line, in regard to damages; that in stating to you, in case you come to the point of settling damages, I stated to you that it would be the amount—that is, I perhaps stated it in that way—the amount which the decedent would have paid to the widow in case he had lived. I want to qualify that in this way; that it must be the loss which the widow, who is suing, would sustain from failure to receive from her husband what she otherwise would have received for her benefit and her children. And I ought to say that I did not mean to convey the idea that these damages might be whatever amounts were received from him by the widow.

20 I thought in some place in my charge I explained that, but I want to make it clear that whatever of his own money was used for himself, for his clothing or board or support, that could not be any loss to the widow. If he had lived and had earned money he would naturally have had to pay his own expenses. So you will understand my remark; it was not a verdict for the amount that he

30

happened to pay, but the money out of his earnings that he would have paid to his widow and which she lost by means of the death; that is, moneys outside of what he would have applied to his own sustenance and support in the way I have already stated—what would go to his own support or what he saw fit to use himself; but it is only what she would lose by not getting what he would have paid her just simply for her own support and the children, over and above what he used for himself.

10

And there is another matter which in delivering my charge to you—which I did with very slight notes—in referring to what Mr. Ferguson might have received as an increase of wages by promotion. I do not wish that to stand unless there is evidence, and I understand there is no evidence in that line; and you are not permitted to go into matters not shown by the evidence, not to speculate in that direction. So that I withdraw that part of the charge with reference to considering whether he might have been promoted to some higher position afterwards which would bring an increase of wages. You will not consider it in that way at all. Just leave out the fact of whether he might be promoted or not.

20

And then I spoke to you at some little length as to what you would consider with regard to the evidence in forming your judgment as to whether or not the railroad company had or had not exercised reasonable care in the drainage of their road through the system at the place of the accident; and I made some remark that you would look at the matter; that in case the storm was very heavy, and such as, notwithstanding the drainage system, might cause the debris, whatever it was there, to be deposited on the railroad track in dangerous quantities, that you should look to see whether or not the railroad company, by its agents, had any notice of that, that notwithstanding their system, that a heavy rain or storm would cause these deposits to be made

30

through the water on the track. I only want to make it clear to you that it was only to be considered by you in making up your mind whether they had exercised reasonable care, as to whether the facts in evidence were sufficient to notify or give notice to The Philadelphia & Reading Railway Company so that they knew of such conditions or happenings, or might have known of them by the exercise of reasonable care. It was only to see that you should look at these circumstances in the evidence. I did not mean to say that that would render the defendants liable, or either of them, to your verdict; I only referred to that, and I emphasize it now, that you are to look carefully at those circumstances as matters of evidence in forming your judgment whether the railroad company had exercised reasonable care or not.

---

The following are the requests to charge on the part of the defendant, Philadelphia & Reading Railway Company, which were refused by the Court:

4. If the jury should believe that the proximate cause of the accident was the failure of the flagman at the crossing to warn the approaching train to stop, plaintiff cannot recover.
8. If the jury should find as a fact that the accident was caused by two separate contributing acts of negligence, one on the part of the defendant, Philadelphia & Reading Railway Company, and the other by the defendant, Central Railroad Company of New Jersey, plaintiff cannot recover.
9. It was not negligence on the part of The Philadelphia & Reading Railway Company toward Charles Ferguson in not preventing the deposit of water and debris upon its tracks.

10. The only duty that The Philadelphia & Reading Railway Company owed to Charles Ferguson was to remove the deposit and debris within a reasonable time after it had knowledge of their existence upon the tracks or to warn the approaching train in time to prevent its crossing the avenue, provided it knew or in the exercise of reasonable care ought to have known within time to warn, that the presence of water and debris or either upon the tracks might have derailed the engine.

10

---

The following are the requests to charge on the part of the defendant, Central Railroad Company of New Jersey, which were refused by the Court :

4. If the jury should believe that the proximate cause of the accident was the failure of the flagman at the crossing to warn the approaching train in time to stop, plaintiff cannot recover.

20

8. If the jury should find as a fact that the accident was caused by two separate contributing acts of negligence, one on the part of the defendant, Philadelphia & Reading Railway Company, and the other by The Central Railroad Company of New Jersey, plaintiff cannot recover.

9. It was not negligence on the part of The Central Railroad Company of New Jersey toward Charles Ferguson in not preventing the deposit of water and debris upon the tracks.

30

10. The only duty that The Central Railroad Company of New Jersey owed to Charles Ferguson was to remove the deposit and debris within a reasonable time after it had knowledge of their existence upon the tracks

or to warn the approaching train in time to prevent its crossing the avenue, provided it knew or in the exercise of reasonable care ought to have known within time to warn, that the presence of the water or debris or either upon the track might have derailed the engine.

10 11. If the jury find from the facts that the derailment of the train was caused solely by the acts or omissions of The Philadelphia & Reading Railway Company, a verdict must be found in favor of The Central Railroad Company of New Jersey.

12. If the jury find from the facts that the derailment of the train was caused solely by the failure of The Philadelphia & Reading Railway Company to maintain a proper drainage system under its tracks at Greenwood avenue, a verdict must be found in favor of The Central Railroad Company of New Jersey.

20

30

NEW JERSEY COURT OF ERRORS AND AP-  
PEALS.

<p>HELEN GRAY FERGUSON,  Defendant in Error,  vs.  CENTRAL RAILROAD COMPANY OF  NEW JERSEY, ET AL.,  Plaintiffs in Error.</p>	}	<p>ON ERROR. <span style="float: right;">10</span></p>
---	---	--

ASSIGNMENTS OF ERROR.

Now come Central Railroad Company of New Jersey 20  
and Philadelphia and Reading Railway Company, plain-  
tiffs in error, and assign the following reasons for re-  
versal of the judgment under review:

1. Because the Trial Justice refused to non-suit the plaintiff.
2. Because the Trial Justice refused to direct a verdict in favor of defendants.
3. Because the Trial Justice admitted in evidence the deposition of James F. Martell.
4. Because the Trial Justice refused to charge the fourth, eighth, ninth and tenth requests of the Philadelphia and Reading Railway Company. 30
5. Because the Trial Justice refused to charge the fourth, eighth, ninth, tenth, eleventh and twelfth requests of the Central Railroad Company of New Jersey.
6. Because the Trial Justice charged the jury that if

the plaintiff was entitled to recover at all, it must be a joint verdict.

GEORGE HOLMES,  
Attorney for Central Railroad Company of  
New Jersey.

THOMPSON & COLE,  
Attorneys of Philadelphia and Reading Rail-  
way Company.

10

---

NEW JERSEY COURT OF ERRORS AND AP-  
PEALS.

HELEN GRAY FERGUSON,

Plaintiff in Error,

20

vs.

THE PHILADELPHIA AND READ-  
ING RAILWAY COMPANY,

THE CENTRAL RAILROAD COM-  
PAN OF NEW JERSEY,

30

Defendants in Error.

ON APPEAL.

AGREEMENT.

It is agreed that the following excerpts of the exhibits offered at the trial of the above cause be printed in lieu of said exhibits:

## EXHIBIT NO. I.

Lease between the North Pennsylvania Railroad Company, of the first part, and the Philadelphia and Reading Railroad Company, of the second part, bearing date May 14, 1879, and recorded in the office of the Recorder of Deeds of the city and county of Philadelphia, in Deed Book L. W. No. 39, page 481, &c., by which lease the said party of the first part leases to the said party of the second part its entire railroad as then constructed, or which might thereafter be constructed, "Together with the branch railroad known as 'the Delaware River Branch,' extending from its intersection with the main line of the railroad of the said party of the first part at Jenkintown, in the county of Montgomery, in the State of Pennsylvania, to its connection with the railroad of the Delaware and Bound Brook Railroad Company, at the centre of the bridge crossing the river Delaware near Yardley, in the county of Bucks and State aforesaid" \* \* \* for the full term of nine hundred and ninety years from the first day of May, 1879 \* \* \* upon the following considerations and terms (interalia):

Sixth. That the party of the second part shall and will, during the continuance of the hereby demised term, keep and maintain the demised railroad and appurtenances, buildings, structures and fixtures in good order and repair, keep in public use, manage and efficiently operate the said railroad, and either by a connection with the Philadelphia and Germantown and Norristown Branch Railroad of the party of the second part, or some other reasonably practicable connection, run passenger trains on the said demised railroad to and from the Philadelphia city passenger depot of the said branch road, or to and from such other depot in the city of Philadelphia as shall at the time be the principal passenger depot of the party of the second part, and from time to time and at all

times indemnify and save harmless the said party of the first part from all liabilities, damages, claims and suits by reason of anything done or omitted by the party of

the second part in the premises:

Fifteenth. That the party of the second part assume and fulfil all liabilities to which the party part may be subject under the existing contracts between party of the first part and The North East Pennsylvania Company, The Central Railroad Company of New Jersey and Bound Brook Railroad Company.

and Bound Brook Railroad Company, of the second part, and the Central Railroad Company of New Jersey, of the third part, bearing date March 30, 1876.

The parties to this agreement contract to open a new line, known as the "The New York and Philadelphia New Line," which said line is to be composed of the North Pennsylvania Railroad, from Berks street station, Philadelphia, to Jenkintown, and of the branch railroad from Jenkintown to the middle of the Delaware river southward of Yardleyville, belonging to the party of the first part; of the Delaware and Bound Brook Railroad, extending from said point in the Delaware river to a point in the Central Railroad of New Jersey west of Bound Brook, belonging to the party of the second part; and the Central Railroad of New Jersey, extending from said point to the Hudson river at Jersey City.

Second. The several parties hereto shall, at their own cost and charges, complete, maintain and perpetuate their several portions of railroad and keep the same in first-class order and repair and always in condition for efficient use. They shall severally furnish all tracks, sidings, passenger and freight houses, engine houses, water stations, shops and other facilities required for the prompt transaction of the business over their several portions of the said railroad line, and shall increase the same from time to time as required by the increasing business.

Fourth. The parties hereto shall be severally responsible for all damages to persons or property arising from accidents occasioned by defects in the portion of road

second part shall  
 the party of the first  
 acts between the said  
 Pennsylvania Railroad  
 Jersey and the Delaware  
 firemen, conductors, baggage-  
 men shall be severally furnished,  
 for employing them, at joint  
 be subject to the rules, regu-  
 road upon which they are run-

10

The duration of this contract shall be for  
 and during the continuation of the charters of the said  
 companies, and of any renewals or extensions of the  
 same, and no alterations shall be made in these articles,  
 except by the consent of all the parties hereto.

EXHIBIT No. 3.

Deed between the Pennsylvania Company for Insurance on Lives and Granting Annuities, as Trustee, of the first part, and Charles H. Coster and Francis L. Stetson, of the second part, dated October 23, 1896. 20

Recites mortgage made by the Philadelphia and Reading Railroad Company to the party of the first part, bearing date the third day of January, 1888, conveying to the party of the first part all of the railroad of the said Philadelphia and Reading Railroad Company. That upon default in the payment of interest upon the bond secured by the said mortgage such proceedings were had in a certain cause pending in the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein The Pennsylvania Company for Insurance on Lives and Granting Annuities was complainant and the Philadelphia and Reading Railroad Company and The Philadelphia and Reading Coal and Iron Company and others were defendants, that a certain decree of foreclosure and sale was, on the first day of 30

times indemnify and save harmless the said party of the first part from all liabilities, damages, claims and suits by reason of anything done or omitted by the party of the second part in the premises.

## EXHIBIT No. 2.

10 Articles of agreement between the North Pennsylvania Railroad Company, of the first part, the Delaware and Bound Brook Railroad Company, of the second part, and the Central Railroad Company of New Jersey, of the third part, bearing date March 30, 1876.

20 The parties to this agreement contract to open a new line, known as the "The New York and Philadelphia New Line," which said line is to be composed of the North Pennsylvania Railroad, from Berks street station, Philadelphia, to Jenkintown, and of the branch railroad from Jenkintown to the middle of the Delaware river southward of Yardleyville, belonging to the party of the first part; of the Delaware and Bound Brook Railroad, extending from said point in the Delaware river to a point in the Central Railroad of New Jersey west of Bound Brook, belonging to the party of the second part; and the Central Railroad of New Jersey, extending from said point to the Hudson river at Jersey City.

30 Second. The several parties hereto shall, at their own cost and charges, complete, maintain and perpetuate their several portions of railroad and keep the same in first-class order and repair and always in condition for efficient use. They shall severally furnish all tracks, sidings, passenger and freight houses, engine houses, water stations, shops and other facilities required for the prompt transaction of the business over their several portions of the said railroad line, and shall increase the same from time to time as required by the increasing business.

Fourth. The parties hereto shall be severally responsible for all damages to persons or property arising from accidents occasioned by defects in the portion of road controlled by them.

Ninth. All engineers, firemen, conductors, baggage-men and other trainmen shall be severally furnished, unless provision is made for employing them, at joint expense, and they shall be subject to the rules, regulations and orders of the road upon which they are running.

10

Fifteenth. The duration of this contract shall be for and during the continuation of the charters of the said companies, and of any renewals or extensions of the same, and no alterations shall be made in these articles, except by the consent of all the parties hereto.

EXHIBIT No. 3.

Deed between the Pennsylvania Company for Insurance on Lives and Granting Annuities, as Trustee, of the first part, and Charles H. Coster and Francis L. Stetson, of the second part, dated October 23, 1896.

20

Recites mortgage made by the Philadelphia and Reading Railroad Company to the party of the first part, bearing date the third day of January, 1888, conveying to the party of the first part all of the railroad of the said Philadelphia and Reading Railroad Company. That upon default in the payment of interest upon the bond secured by the said mortgage such proceedings were had in a certain cause pending in the Circuit Court of the United States for the Eastern District of Pennsylvania, wherein The Pennsylvania Company for Insurance on Lives and Granting Annuities was complainant and the Philadelphia and Reading Railroad Company and The Philadelphia and Reading Coal and Iron Company and others were defendants, that a certain decree of foreclosure and sale was, on the first day of

30

May, 1896, entered in said court, wherein and whereby it was adjudged and decreed that the Philadelphia and Reading Railroad Company pay, or cause to be paid within twenty days after the entry of said decree, certain amounts therein found to be due under said general mortgage, and that in default of such payment by said defendant, The Philadelphia and Reading Railroad Company, or by any one claiming under it, or by any one for its account, the property, premises and franchises of every description described in said general mortgage, or by said decree adjudged to have become subject thereto, should be sold as provided by said decree.

10

And further, in and by said decree it was provided and directed that the sale therein provided for might and should be made by The Pennsylvania Company for Insurance on Lives and Granting Annuities, as Trustee, under the said general mortgage, and that said trustee, on an order confirming such sale and upon payment as settlement of the purchase price bid as in said decree provided, should grant and convey the property sold to the purchaser, or purchasers, freed from all and every the trusts by the general mortgage created, and without liability on the part of such purchaser, or purchasers, to see to the application of the purchase money, and should execute and deliver a proper deed, or deeds, of conveyance thereof.

20

And recites further, that on the twenty-third day of September, 1896, the premises thereafter described were sold to the party of the second part, at public auction, for the price therein named.

30

And recites further the confirmation by the court of said sale.

Grants to the said party of the second part—

The leasehold interest in the main line of the railroad of the North Pennsylvania Railroad Company and the branches thereof, known as the Delaware River Branch and the Doylestown Branch.

The leasehold interest in the railroad of the Delaware and Bound Brook Railroad Company, together with the branch known as the Trenton Branch.

EXHIBIT No. 4.

Deed by the Philadelphia and Reading Railroad Company to Charles H. Coster and Francis L. Stetson, bearing date October 23, 1896, and conveys the lands, premises, interest and leasehold estate mentioned in the foregoing deed.

10

EXHIBIT No. 5.

Certificate of organization of the Philadelphia and Reading Railway Company, bearing date November 17, 1896, and filed in the office of the Secretary of State of the Commonwealth of Pennsylvania on November 17, 1896.

EXHIBIT No. 6.

Deed from Charles H. Coster and wife and Francis L. Stetson and wife to the Philadelphia and Reading Railway Company, bearing date November 16, 1896, and recorded January 2, 1897, in the office of the Recorder of Deeds in and for the county of Montgomery, in the State of Pennsylvania, in Deed Book No. 418, page 402, &c., conveys the lands and premises and leasehold estate conveyed to the grantors by the deed aforementioned.

20

EXHIBIT No. 7.

Agreement between the Baltimore and Ohio Railroad Company, of the first part, Philadelphia and Reading Railway Company, of the second part, Central Railroad Company of New Jersey, of the third part, and the Staten Island Rapid Transit Railroad Company, of the fourth part, and the Baltimore and New York Railroad Company, of the fifth part, bearing date June 13, 1898.

30

Article One. The lines of the Baltimore Companies, extending from the city of Washington, through the city

of Baltimore and into the city of Philadelphia, by way of East Side Junction to Park Junction, in the said city of Philadelphia; the lines of the Reading Companies, extending from said Park Junction, in the city of Philadelphia, to Bound Brook Junction, N. J.; the line of the Central Company, extending from Bound Brook Junction aforesaid to the waters of New York bay at Jersey City; and the lines of the Staten Island Companies, extending from Cranford Junction, N. J., to the waters of New York bay, at St. George, Staten Island, N. Y., shall be used as a system of connecting lines of railroad forming a through route hereinafter in this agreement designated as the "New Line" for the carriage of railway traffic, and the said term "New Line," whenever and as often as the same shall be hereinafter mentioned, shall be held and taken to mean and refer to the system of connecting lines of railroad in this article specifically defined and described.

10  
20 This contract shall take effect as of the first day of June, 1898, and shall continue in force and effect for the period of one year from the date hereof, and thereafter until terminated by either party on giving sixty days' notice to the others of its purpose to withdraw from the same, unless this contract shall be sooner determined on notice pursuant to the provisions of both or either of the other contracts of the said series.

30 It is further agreed that the public and private laws of the Commonwealth of Pennsylvania, offered at the trial of said cause, need not be printed, but that the same, as they appear in the bound volumes of the laws of said Commonwealth in the State Library, may be produced and offered on the argument of this cause.

JOHN H. BACKES,  
Attorney for Plaintiff in Error.

THOMPSON & COLE,  
Attorneys for the Philadelphia and Reading  
Railway Company, Defendant in Error.

GEORGE HOLMES,  
Attorney for Central Railroad of N. J.

Helen

The Ce  
Compan  
The Ph  
Reading

Notice

of Dec  
ten th  
Albert  
the c  
before  
Chance  
take t  
onthe  
the p  
presen

Dated

To Ge  
for T  
pany o  
Messrs  
Attys  
and R



NEW YORK, JUNE 10, 1900.

DEAR MR. [Name],

Yours of the 7th is received.

I have your letter of the 7th and am glad to hear that you are interested in the [subject]. I will be glad to discuss the matter with you if you wish.

I am, very respectfully,

Your obedient servant,  
[Name]  
[Title]  
[Address]

Very truly yours,  
[Name]

65

Enclosed find [subject].

