

## New Jersey Court of Errors and Appeals.

FLARIO ALBANESE, Administrator, Plaintiff in Error.	}	In Tort.
v.  THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant in Error.		

### BRIEF FOR DEFENDANT IN ERROR.

#### The Facts.

Plaintiff's intestate, a laborer, was employed by a contractor engaged in elevating the tracks of the defendant's road in the City of Newark. At the time he met his death he was shoveling sand from the track upon which the defendant was running its passenger trains in and out of its depot in Newark; but one track was in use for that purpose, and the intestate was struck and killed by a train coming out of the depot on that track. On the south side of this track there was a pile of sand; the north side was entirely clear. The intestate was working between the rails, with his back partly or wholly turned towards the outcoming train, which in the case as made, gave no signal or warning of its approach save such as would be made by the noise of the engine and train when in motion, and that the

defendant had at all times prior to the accident run their trains at the point in question without any warning of their movements and no protection had been provided by the intestate's employer.

### **FIRST.**

#### **The deceased took upon himself the risk of the danger that caused his death.**

He knew or must have known from experience (for he had worked there over a month, Case, p. 23, fol. 30) that no warning or notice would be given of approaching trains, as it was not the practice and every one looked out for himself (pp. 53 and 54), and that he was working in a place of constant danger.

This is the ground upon which the learned Chief Justice granted a nonsuit (p. 72), taking the position that the case is the reverse of *Harmer v. The Reed Apartment House Co.*, 53 Atlantic, 402.

In the *Harmer* case plaintiff was working in an elevator shaft at a place where when the counterweight moved by the operation of the elevator it was dangerous for him. Warnings of its movement had always been given. It is held that the plaintiff could rely upon the customary warning. That the obvious danger was the moving weight of which notice would be given and hence plaintiff was not bound to look out for that until notice was given.

In the case at bar the obvious danger was the movement of trains without notice or warning upon a track, in constant use, hence the deceased was bound to constantly watch for that danger; it is clear from the evidence that he was not doing so,

at the time in question, and was quite oblivious to the approaching train, in a situation where he had voluntarily and unnecessarily placed himself and where the slightest relaxation of vigilance would contribute to cause his death.

In principle the case is within the decision of this Court in

*Furey v. N. Y. C. & H. R. R. Co.*, 38,  
Vr., 270.

I quote from the opinion, page 277: "The danger  
" to which the plaintiff would be exposed in attempt-  
" ing to pass between the standing cars was not only  
" a patent one, but its precise nature was obvious to  
" him. It was that the opening might be closed  
" without notice to him. To pass into such an  
" opening with the understanding that no notice  
" would be given of the movement of the cars  
" would be the taking of a palpable risk; to engage  
" in the same undertaking with a general expectation  
" that some notice would be given, but without ma-  
" king inquiry as to its nature and extent would be a  
" scarcely less negligent act. \* \* \* In the latter  
" case he had no right to expect any notice and hence  
" cannot complain that he received none."

The deceased here had no right to expect notice as none had ever been given.

Chief Justice Gummere, in granting the nonsuit, says (Case, p. 73):

"The plaintiff has proven that during all of this  
" work, that is, so far as the experience of the wit-  
" nesses called covers that period, there had been an  
" absolute and entire absence of any protection to the  
" plaintiff's decedent, or to the other workmen, by  
" this railroad company, or by any one else. They  
" had run their trains backward and forward there  
" without any warning, or without doing anything to

“ protect the plaintiff’s decedent, or any of the others.  
 “ Now, if that was so, even assuming that this de-  
 “ ceased was a man of low intelligence, which has not  
 “ been shown, still he knew enough to understand  
 “ that his safety depended upon his own care, his own  
 “ watchfulness ; that he could not depend for protec-  
 “ tion at all, either upon the railroad company or  
 “ upon his own employer. In other words, that, so  
 “ long as he was working in that dangerous place, his  
 “ life was in constant jeopardy, unless he carefully  
 “ used his eyes and ears to detect the approach of  
 “ trains, which were running with more or less fre-  
 “ quency backwards and forwards over the road at  
 “ that point. He was run down by a train which  
 “ could have been heard by him if he had been listen-  
 “ ing. It was heard by others. If he had not been  
 “ standing with his back to the train he could have  
 “ seen it. The proper use either of his powers of  
 “ vision or of hearing would have informed him of  
 “ the approach of the train in ample time for him to  
 “ avoid being struck by it. All that he had to do  
 “ was to step off the track to the north to be in a  
 “ place of safety.”

## SECOND.

### **The deceased was guilty of contributory negligence.**

The deceased was not defective in sight or hearing (p. 72) and was 17 years old (p. 25).

The train made some noise itself which was heard by one witness (p. 27) who called to the deceased (p. 28) who was then standing sidewise to the train, one foot inside and the other outside of the rail (p. 28), or with his back to the train (pp. 42, 69).

This point was some distance outside of the station and a train could be seen all the way into the station (p. 35). Only this one track was in use for passenger trains (p. 59).

The train was making a noise from the exhaust (p. 36).

There was no occasion for the plaintiff to be on the track. He was engaged to fill bags of sand from the pile alongside of the track, at the end or in the middle where it was safe (pp. 38, 40, 44, 57). He had filled some bags and then went down on the track, apparently throwing back on the pile some sand which was near the track. No one had ordered him to do this, and it does not appear that it was at all necessary that it should be done at the time (pp. 38, 40). Trains were passing over this track frequently (p. 41). Having a safe place to work he voluntarily and unnecessarily chose a place of great danger which, I submit, was clearly contributory negligence.

### LAST.

As the deceased had no duty to perform upon the track in question, the defendant was not obliged to give notice of the movement of trains on that track and therefore was not guilty of any negligence in the running of the train in question.

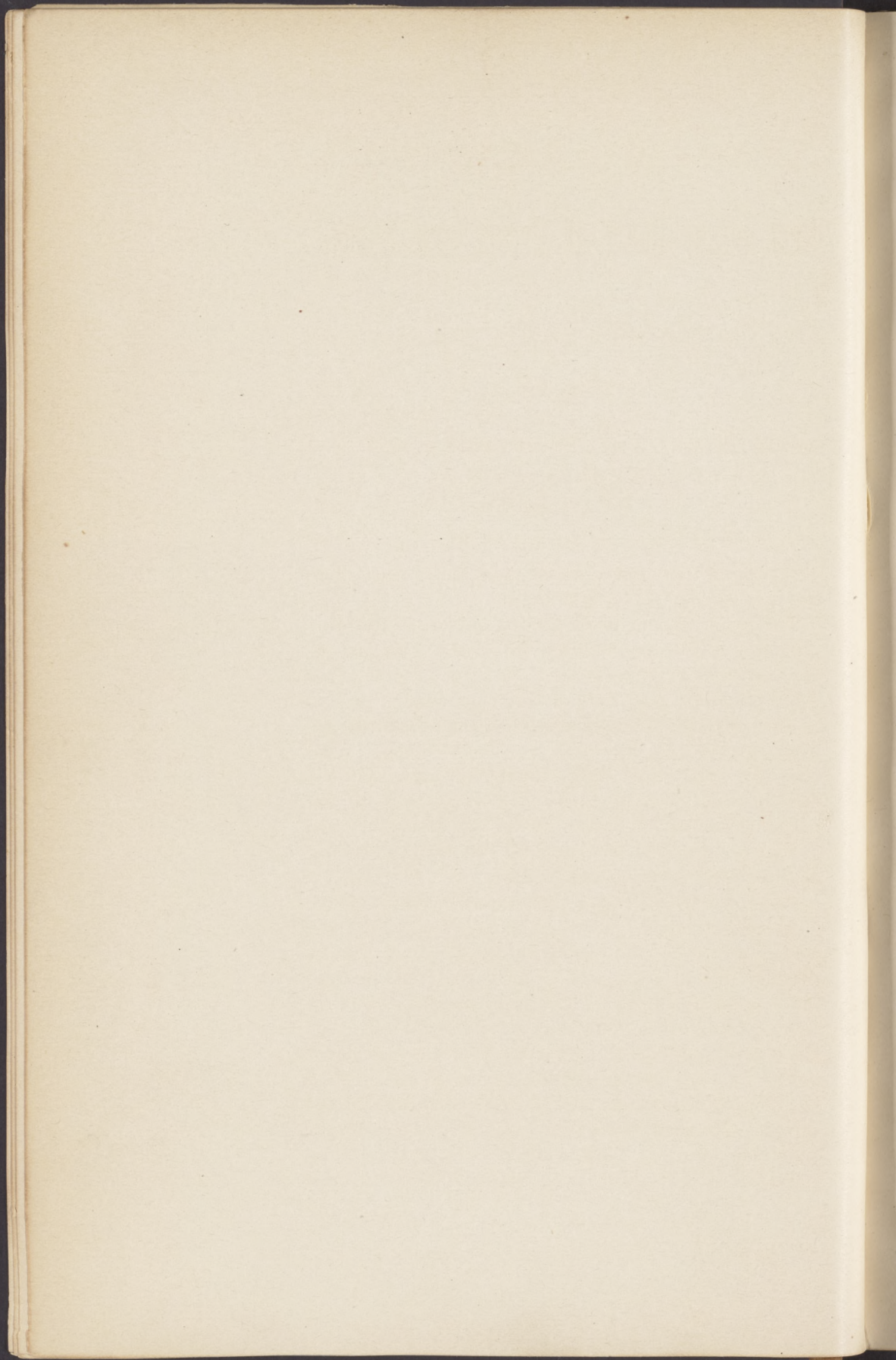
The defendant had a right to assume that the deceased would stay in the place provided for him to work, and would not unnecessarily go upon the passenger track.

The judgment of nonsuit should be affirmed.

GEO. HOLMES,  
Attorney and of Counsel for Defendant.







## New Jersey Court of Errors and Appeals.

FLORIO ALBANESE, Administrator,  
&c.,

Plaintiff in Error,

vs.

THE CENTRAL RAILROAD COM-  
PANY OF NEW JERSEY,

Defendant in Error,

In Tort. 10

On appeal from a decision of the Chief Justice, non-suiting the plaintiff, at Essex Circuit.

The action was one under the statute for the death of Augustino Albanese, who was killed the 18th day of September, 1901, at Newark, N. J., by the engine of an East bound passenger train of the defendants. 20

The Central Railroad Company at that time was engaged in elevating its tracks near Ward Street, in the City of Newark, New Jersey, and the deceased was in the employ of the firm of Burke Brothers, who were employed as contractors to do a part of said track elevation, to wit: construction of abutments, retaining walls, &c. See answer to interrogatory No. 15.

At the time of his death the deceased was 17 years, eight months old. He was at work, when hit by the engine, at a pile of sand which lay on the South side of the East bound track, and close to the Southern-most rail, near Ward Street. This pile of sand was five or six feet high, and about fourteen or fifteen *steps* in length—about two car lengths. It was used for the mixing of mortar for the abutments, and the deceased was engaged in filling the bags for the men who carried the same to the mixers. He was struck by the locomotive of a passenger train bound for New York, while at work, and was so injured that he died that day in the hospital. At the moment 40

he was struck he was engaged in shovelling the loose sand, which had fallen down from the pile onto the track, and had his back or side turned towards the West, the direction from which the train approached. The testimony shows that no signal or warning of any kind was given. He had one foot outside the track and the other in the track, so that he could get the sand out. See page 28.

The testimony also shows that he had been engaged in that work from 11 o'clock on the day in question until  
10 he was struck, which was about three o'clock in the afternoon.

The concurrent testimony of all the witnesses shows that the only warning of the approach of the train was the rumble of the train on the rails, and that this warning, and the striking of the deceased by the engine, were practically simultaneous.

Mazzei, a witness, says, "I heard a noise, the track noise. I turned around and saw the train coming, and got away." See page 27, line 30. As he stepped aside he  
20 looked towards the train. "I saw this man over there, and while I was hollering the train got him." See page 28.

Another witness says, page 50, "I hear the train. I lift myself up." Question. "How soon after that was the boy struck?" "It was an *instant*." Another witness says, "I just passed the tracks and I heard the engine. Then I turned around; when I turned around I seen Augustino was struck." Page 56.

It is submitted that the facts of the case do not justify  
30 the conclusion of the Judge, that the deceased had been guilty of contributory negligence, and therefore that the non-suiting of the plaintiff was illegal.

The first error is that the Judge imputes to the deceased a knowledge of which there is no proof. It is a matter of pure inference on the part of the learned Judge.

The Judge says, that decedent's knowledge of the fact that no protection was being afforded to him by the Railroad Company or by his employer, cast upon him a greater measure of watchfulness than he would otherwise  
40 have been required to exercise, and his failure to discover

the approach of this train was due to his failing to use his eyes and ears with the care which the law requires.

There is no evidence in this case to show what knowledge this boy possessed upon that subject. No proof of any instructions given him or of admissions upon his part, or of any circumstances from which his state of mind or knowledge can be inferred.

There is no testimony as to whether the employment of the deceased was, on any day prior to the date of the accident, of a character such as to expose him to danger 10  
At the time of the accident he was engaged in shovelling sand from the tracks, but it does not appear that he was on any other occasion actually at work in the path of the train, or so close to the path as to require warning. In the absence of such testimony there was no warrant for the finding of the court, that "he knew he could not depend for protection at all, either upon the railroad company or upon his own employer." It is not fair to infer his knowledge from words or acts of others.

It is submitted that the statement of the Judge that 20  
his failure to use his eyes and his ears, and the statement that he was run down by a train, which could have been heard by him if he had been listening, and that if he had not been standing with his back to the train he could have seen it, are not justified by the evidence. The facts are that he was performing his duty at a proper place and in a proper manner. It was physically impossible for him to have worked at that spot and kept his eyes towards the approaching train. To shovel up the sand, it was necessary for him to stand partly on the 30  
track. It was also necessary for him to face the south and have his side towards the approaching train. It was also necessary for him to bend over at his work. Other men escaped, says the Judge. True. But none of them were shown to have been in a place of danger and at work when they first heard the rumble of the train. They owed their safety to the fact that they were out of danger when they first heard the rumble of the train. Whether this boy heard the train or not and made some 40  
frantic effort to escape in the presence of imminent danger

can never be known, because the witnesses unite in testifying that perception on their part of his danger and his being struck by the train were practically simultaneous. It is evident that he was caught in a trap. The Court says he could have escaped, but how? In front of him was a high bank of sand, so near to the railroad that it fell upon the track. Could he have plunged into this pile of sand? The Court evidently does not think so. It says he could have escaped towards the north. But  
 10 this involved crossing the entire width of the track in front of the engine, and we maintain that if the train had suddenly crept upon him, unobserved by him absorbed in his work, as it must have done by the testimony of the witnesses, it would have been in violation of fundamental human instincts to have attempted to have escaped in that way. The statement that if deceased had not been standing with his back to the train he could have seen it, is simply equivalent to saying that if he had not been working at that spot, bent over, shovelling sand he would not have  
 20 been injured, and is therefore tantamount to saying that his working at that spot at that duty of itself constitutes contributory negligence, as it was a physical impossibility for him to have attended to his work and to have watched the train at the same time. It is submitted that this is not the law.

The rule which requires travellers who are about to cross a railroad track to look and listen for an approaching train does not apply to workmen engaged in their labor upon the tracks of the railroad company. To  
 30 require a laborer so engaged to be continuously on the lookout for an approaching train would render it impossible for him to give proper attention to his work. *Daum vs. North Jersey Street Railway Co.* 54 Atlantic Reporter, 221.

The workman is passive and is not a source of danger to the train; those in control of the train are active, and are directing an instrument of danger. The reasonable care, therefore, which the law requires a railroad company to observe towards those lawfully at work upon the  
 40 tracks demands nothing less than an active vigilance in

favor of those thus employed; and the company is required, in the exercise of reasonable care, to give danger signals to those at work upon the approach of trains, so that they may be enabled to leave their work and to get out of the way of the approaching train in time to avoid a collision. Thompson's Commentaries on the Law of Negligence, Volume 2, Paragraph 1839.

Ominger vs. New York Central Railroad Company, 4 Hun., 159.

Harmer vs. Reed Apartment and Investment Co., 53 Atl. Rep., 402.

*D. L. & W. R. R. vs. Hardy. 30 Vr. 40.*

The Court says, that during all this work, so far as the experience of the witnesses called covered that period, there had been an absolute and entire absence of any protection to the plaintiff's decedent, or to the other workmen by this Railroad Company, or by any one else.

It is submitted that the inference is larger than the facts proven warrant. The interrogatories showed that no *special* rules of regulations were to be observed by its engineers and trainmen.

One witness, page 54, says that every one looked out for himself.

But this testimony does not prove that the ordinary and usual signals of ringing bells or blowing whistles had been dispensed with, nor if it were the fact, that any notice of such state of facts had been given to the deceased, or brought to his knowledge.

It is well settled in this State, that where the plaintiff is injured while engaged in his employment, by reason of the failure of the defendant to give customary signals of danger, warning him of the approaching object of danger, he can recover.

Harmer vs. Reed Apartment and Investment Co., 53 Atl. Reporter, 402.

Daum vs. North Jersey Street Railway Co., 54 Atl. Reporter, 221.

See Goodfellow vs. Boston, &c., Railway Co., 106 Mass.

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Assume, as the Judge erroneously does, that the customary signals of blowing whistles, ringing bells, etc., had been dispensed with in this work, would that fact of itself excuse the defendant? No. It seems to us that in order to charge the decedent with contributory negligence, at least another fact must clearly and indisputably appear, to wit: that this omission to give customary signals had been called to the decedent's attention. And there is not a scintilla of evidence to connect him with any such knowledge.

The non-suit is therefore illegal, because all the necessary facts must clearly and indisputably appear in order to warrant a non-suit.

Moebus vs. Becker, 17 Vroom, 41.

Pennsylvania R. R. Co. v. Matthews, 7 Vroom, 531.

P. R. R. Co. vs. Middleton, 28 Vr., 154.

Assume this further fact, that not only had the customary signals of danger been dispensed with, but that the decedent was fully aware of that fact, and that therefore, as matter of law, "that greater watchfulness" had been imposed upon him to which the Chief Justice refers.

How did the Court know that this boy did not exercise this "greater watchfulness"? On what evidence did it base its finding? Certainly not on any testimony or on any circumstance that we can see, except the fact that the boy got killed. And no presumption arises from this fact.

Penn. R. R. Co. vs. Middleton, Administrator, &c., 28 Vroom, 154.

And what is the measure of the "greater watchfulness" to which his Honor refers?

The distance between Ward Street and the Railroad Station is assumed by counsel for defendant to be about eight hundred feet (page 33). An engine traveling fifteen miles an hour would cover this distance in half a minute. Was this boy then obliged to desist from his labors and to scan this distance every half minute, or every minute?

Nothing less would have protected him against trains approaching without signals.

And what are the conditions which impose this greater watchfulness, the absence of which constitute contributory negligence on the part of a workman engaged on a railroad track? In this case the Court evidently thought that: *a*, absence of special rules, and *b*, the assumed fact that each man knew he had to look out for himself, were such conditions. Not so the Supreme Court, First Department, N. Y.

Felice vs. N. Y. C. & H. R. R. Co., 14 Hun., 345. *App. Div.*

In that case the Court said there were no special rules, "each man was required to look out for himself." *That being so*, it was clearly the duty of the defendant to give such warning of the approach of trains as would permit each man looking out for himself to become aware of their approach. That is to say, as we understand it, that the absence of special rules and the knowledge of the fact, did not so much impose greater watchfulness upon the workman, as it did *greater care* on the railroad company. *McGovern vs. C. F. R. R. Co., 123 N. Y. 288*

We do not consider it material, however, to inquire in this case, for reasons already apparent, which is the correct rule.

We submit further that the reasoning and conclusions of the Court in this case, are in conflict with those of the case of the D. L. & W. R. R. Co. vs. Hardy, 30 Vroom, 40-562.

And even though it were not customary for the defendants to give warning of the approach of its cars to the plaintiff's decedent, the question of whether or not he was under the circumstances guilty of contributory negligence is one for the Jury.

*Police vs. N. Y. C. & H. R. R. Co. 14 App. Div. 34*  
 Ominger vs. N. Y. Central R. R. Co., 4 Hun., 159.

10 And see Lake Shore and M. S. Railway Co. vs. Murphy, 33 N. E. Reporter, 403 (Mass.).  
 Westchester & Phil. R. R. vs. McElwel, 67 Penn., 311.

Haley vs. N. Y., &c., R. R. Co., 7 Hun., 84.

One of the witnesses testified that he heard the noise of the rail; none of the other witnesses employed near the decedent heard any sound apprising them of the approach of the train, until the moment when the deceased was struck.

20 Under these circumstances the question of whether he could have heard the train if he had been listening was for the Jury.

McLean vs. Erie R. R. Co., 54 Atl. Reporter, 238.

Lake Shore and M. S. Railway Co. vs. Murphy, 33 N. E. Rep., 403 (Mass.).

30 Where the evidence as to contributory negligence on the part of the deceased presents a case which is doubtful, and about which different minds might differ as to the proper inference to be drawn, the question cannot properly be determined by the Court as a matter of law, and should be submitted to the Jury.

*P. R. R. Co. vs. Middleton. 28 N. 154*  
 Lake Shore and M. S. Railway Co. vs. Murphy, 33 N. E. Reporter, 403.

It is submitted, therefore, that the non-suit should be set aside.

JAMES M. TRIMBLE.  
 NATHAN KUSSY.

And even though it were not necessary for the de-  
fendant to give warning of the approach of his case to the  
plaintiff's deponent the question of whether or not he  
was under the circumstances guilty of contributory  
negligence is not for the jury.

Central B. R. Co. v. Hann

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New Jersey Court of Errors and Appeals

Volume 1

NEW JERSEY  
Court of Errors and Appeals

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FLORIO ALBANESE, ADMINISTRA-  
TOR, ETC.,

*Plaintiff in Error,*

*vs.*

THE CENTRAL RAILROAD COM-  
PANY OF NEW JERSEY,

*Defendant in Error.*

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WRIT OF ERROR.

*(Filed March 23, 1903.)*

*(Returnable March 24, 1903.)*

NEW JERSEY, ss.

The State of New Jersey to the Chief  
[L. s.] 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 said Supreme Court of Judicature, before  
you, between Florio Albanese, administrator, etc., of <sup>IO</sup>  
Agostino Albanese, deceased, plaintiff, and The Central

Railroad Company of New Jersey, defendant, in an action of tort, manifest error hath intervened, to the great damage of the said Albanese, 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 the judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with  
 10 all the 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 4th Tuesday of March, inst., 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 the law and custom of the State of New Jersey, ought to be done.

Witness, William J. Magie, our Chancellor and President Judge of our said Court of Errors and  
 20 Appeals, at Trenton aforesaid, the ninth day of March, in the year of our Lord one thousand nine hundred and three, etc.

JAMES M. TRIMBLE,  
*Attorney.*

S. D. DICKINSON,  
*Clerk.*

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do  
 30 certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, [L. S.]  
*C. J.*

NEW JERSEY SUPREME COURT.

FLORIO ALBANESE, ADMINISTRATOR OF	}	In Tort.
AGOSTINO ALBANESE, DECEASED,		
<i>vs.</i>		} On Postea.
THE CENTRAL RAILROAD OF NEW		
JERSEY.		

JUDGMENT FOR DEFENDANT.

John L. Conover, Attorney.

As yet of the twentieth day of February, one thousand nine hundred and two.

10

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice.

WILLIAM RIKER, JR., Clerk.

ESSEX COUNTY, ss.

The Central Railroad of New Jersey, a corporation, the defendant in this suit, was summoned to answer unto Florio Albanese, administrator of the goods and chattels, rights and credits, which were of Agostino Albanese, deceased, at the time of his death, in an action of tort, and thereupon the said plaintiff, by James H. Trimble, his attorney, complains:

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For that whereas the said defendant heretofore, to wit, on the eighteenth day of September, nineteen hundred and one, at Newark, in the said county of Essex, the said defendant was the owner and in possession of a certain railroad which extended from said city of Newark, through said county of Essex and to and through the county of Hudson, to the city of Jersey City, in said latter county, and which said railroad was intersected and crossed in the city of Newark aforesaid by a certain public highway of said city known as Ward street, and along which it is necessary for the inhabitants of this State constantly to pass for business

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or pleasure; and being so possessed of said railroad, the said defendant was then and there engaged in elevating its tracks at or near said crossing, and had entered into a contract with certain persons, to wit, John M. Burke and Timothy Burke, trading as Burke Brothers, wherein and whereby, at the request of the defendant, and in consideration of certain moneys to be paid by said defendant to said John M. Burke and Timothy Burke, trading as Burke Brothers, the latter had undertaken and agreed  
10 to do the excavating and masonry work, in connection with the elevation of said railroad, and to engage and employ such laborers as might be required in and about said work, and the said Agostino Albanese, being a minor of the age of seventeen years, was then and there, together with other laborers, employed by the said John M. Burke and Timothy Burke in and about said work, and was then and there, together with other laborers, engaged in the work of elevating said railroad and in the excavating and masonry work connected  
20 therewith; and said defendant, being so possessed of said railroad, was then and there engaged in operating, managing and using said railroad, and was then and there possessed of certain locomotive engines and cars which were then and there propelled by steam, under the care, government and direction of certain servants of said defendant, who were running and directing the same upon and along the said railroad, and over and across the said public highway known as Ward street, in the city of Newark, county of Essex aforesaid; and  
30 being so possessed of said railroad, and engaged in operating the same, it became and was the duty of the said defendant to use due and proper care in the operation, management and use of said railroad to avoid injuring the persons employed in and about the work aforesaid, and to use due and proper care to protect the persons so employed from all injury caused by the acts of its servants, and to establish, provide and promulgate rules and regulations in the management of its engines

and cars, so as to insure the safety of the persons employed in and about the work connected with the elevation of its road and tracks as aforesaid, and to place a bell upon its locomotive engines, and to cause the same to be rung, or a whistle to be sounded while approaching said persons, and to place a flagman or other person near them while so employed to warn them of the approach of locomotive engines and cars, and to cause its locomotive engines and cars to approach the persons so employed at a slow rate of speed so as to avoid exposing 10  
said persons needlessly to danger; yet the said defendant, not regarding its duty in this behalf, did not use due and proper care in the operation, management and use of said railroad to avoid injuring the persons employed in and about said work, and did not use due and proper care to protect them from all injury caused by the acts of its servants, and did not establish, provide and promulgate rules and regulations in the management of its engines and cars to as to insure the safety 20  
of the persons employed in and about said work, and did not place a bell upon its locomotive engines and cause the same to be rung, and did not cause a whistle to be sounded while approaching said persons, and did not place a flagman or other person near them while so employed to warn them of the approach of engines and cars, and did not cause its locomotive engines and cars to approach said persons at a slow rate of speed so as to avoid exposing said persons needlessly to danger; but the said defendants then and there so carelessly, 30  
recklessly, negligently and improperly operated, managed and used said railroad, and so carelessly, recklessly, negligently and improperly managed, drove, governed and directed said locomotive engines and cars, and ran the same at such an excessive rate of speed that by reason of the premises, and by and through the carelessness, negligence and default of the said defendant, certain of said locomotive engines, drawing certain of said cars, ran into and struck with great force and violence

the body of said Agostino Albanese as he, the said Agostino Albanese, was then and there engaged in the work of elevating said railroad, and in the excavating and masonry work connected therewith, to wit, at or near the intersection of said highway known as Ward street with said railroad, at Newark aforesaid, as he lawfully might, whereby the said Agostino Albanese was greatly cut, bruised and wounded in and about his head, body and limbs, in so much that the said Agostino Albanese did then and there, to wit, on the eighteenth

10 day of September, nineteen hundred and one, die of his wounds, to wit, at Newark, in the said county of Essex.

And whereas also heretofore, to wit, on the eighteenth day of September, nineteen hundred and one, at Newark, in the said county of Essex, the said Agostino Albanese, being a minor under the age of twenty-one, to wit, seventeen years of age, at the special instance and request of the said defendant, for certain wages and reward to be paid to him, undertook and agreed to assist in the labor

20 of elevating the railroad of the defendant, which said railroad extended through said city of Newark to the city of Jersey City, in the county of Hudson, and in the excavating and masonry work connected therewith, and did so labor in the aforesaid employment; and thereupon it then and there became and was the duty of the said defendant to use due and proper care to avoid injuring the said Agostino Albanese while so employed, and to use due and proper care to protect him while so employed from all injury caused by the acts of its servants, and to establish, provide and promulgate rules

30 and regulations in the management of its locomotive engines and cars so as to insure his safety while thus employed, and to place a guard or other person near him while so engaged to warn him of the approach of the locomotive engines and cars, yet the said defendant, not regarding its duty in this behalf, did not use due and proper care to avoid injuring the said Agostino Albanese while so employed, and did not use due and

proper care to protect him while so employed from all injury caused by the acts of its servants, and did not establish, provide and promulgate rules and regulations in the management of its locomotive engines and cars so as to insure his safety while thus employed, and did not place a guard or other person near him while so employed to warn him of the approach of locomotive engines and cars, but wholly neglected so to do; by reason whereof, and because of the careless, reckless, negligent and improper management, operation and use of said railroad and said locomotive engines and cars, and by and through the carelessness, negligence and default of said defendant certain of said locomotive engines and cars ran into and struck the body of the said Agostino Albanese with great force and violence as he, the said Agostino Albanese, was then and there engaged in the work aforesaid, to wit, at Newark aforesaid, whereby the said Agostino Albanese was greatly cut, bruised and wounded in and about his head, body and limbs, in so much that the said Agostino Albanese did then and there, to wit, on the eighteenth day of September, nineteen hundred and one, die of his wounds, to wit, at Newark, in the county of Essex.

And whereas also heretofore, to wit, on the eighteenth day of September, nineteen hundred and one, at Newark, in said county of Essex, the said defendant was possessed of a certain railroad, extending through and from said city of Newark, in said county of Essex, to the city of Jersey City, in the said county of Hudson, and being so possessed of said railroad, the said defendant was then and there engaged in operating, managing and using said railroad, and was then and there possessed of a certain locomotive engine and cars propelled by steam, under the care, government and direction of certain servants of said defendant, who were running and directing the same upon and along the said railroad, to wit, at Newark aforesaid, nevertheless the said defendant, not regarding its duty in this behalf,

then and there so carelessly, recklessly, negligently and improperly operated, managed and used said railroad, and managed, drove, governed and directed said locomotive engine and cars that, for want of good and sufficient care in the management thereof, and by and through the carelessness, negligence and default of said defendant and its servants, certain of said locomotive engines, drawing certain of said cars, ran into and struck, with great force and violence, the body of  
10 Agostino Albanese, a minor under the age of twenty-one, to wit, seventeen years of age, as he, the said Agostino Albanese, was then and there employed, at the special instance and request of the defendant, in excavating and masonry work connected with the elevation of the railroad of the defendant, to wit, at Newark, in said county aforesaid, as he lawfully might; whereby the said Agostino Albanese was greatly cut, bruised and wounded in and about his head, body and limbs, inso-  
20 much that the said Agostino Albanese did then and there, to wit, on the eighteenth day of September, nineteen hundred and one, die of his said wounds, to wit, at Newark, in said county of Essex, which said wounds, bruises and death were caused by the negligence of the said defendants and their servants and employes solely, and not by or through the negligence of the said Agostino Albanese in any respect whatsoever.

By means whereof Florio Albanese and Filomena Albanese, the parents and next of kin of said Agostino Albanese have sustained great loss and damage, to wit,  
30 ten thousand dollars, whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, as administrator, as aforesaid, and personal representative of the said Agostino Albanese, for the exclusive benefit of the said Florio Albanese and Filomena Albanese, the parents and next of kin of said Agostino Albanese, deceased, as aforesaid.

And the said plaintiff brings into court here the letters of administration of John W. Ellor, the surrogate of

the county of Essex, which give sufficient evidence to the said court here of the grant of administration as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the fourth day of February, nineteen hundred and two.

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

And the said plaintiff doth the like.

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 Newark, in and for the county of Essex, on the second Tuesday of December, in the year of our Lord one thousand nine hundred and two, by whom, etc., and the same day is given to the parties aforesaid there, etc. 20

And now, at this day, to wit, the seventeenth day of February, nineteen hundred and three, before our said Supreme Court, at Trenton, come the said parties by their attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, on the sixteenth day of January, A.D. nineteen hundred and three, at a Circuit Court held at Newark, in and for the county of Essex, before his Honor William S. Gummere, one of the Justices of the Supreme Court of the State of New Jersey, according 30 to the form of the statutes in such case made and provided, comes as well the within named plaintiff as the within named defendant, The Central Railroad Company of New Jersey, and the jurors of that jury being summoned also come who to speak the truth of the matters within contained were tried and sworn, and after evidence being given to them thereupon plaintiff rested

his case, and the Justice being of the opinion that such evidence did not establish a cause of action against the said defendant, The Central Railroad Company of New Jersey, ordered that the plaintiff be nonsuited.

Therefore it is considered that the said Florio Albanese take nothing by his said writ, and that the said The Central Railroad Company of New Jersey do go thereof without day, etc.

Judgment signed the seventeenth day of February, A.  
10 D. nineteen hundred and three.

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  
[L. s.] sixteenth day of March, A.D. nineteen hundred and three.

20

WM. RIKER, JR., *Clerk.*

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NEW JERSEY COURT OF ERRORS AND APPEALS.

FLORIO ALBANESE, ADMINISTRATOR, &C.,

*vs.*

THE CENTRAL RAILROAD COMPANY OF  
NEW JERSEY.

ASSIGNMENT OF ERRORS.

(*Filed April 23, 1903.*)

Afterwards, to wit, on the twenty-fourth day of  
March, in this term, before the judges of the said Court  
30 of Errors and Appeals in the last resort in all causes, at

Trenton, comes the said Florio Albanese in his proper person, and says that in the record and proceedings aforesaid, and also in giving of judgment aforesaid, there is manifest error in this, to wit:

That by the record aforesaid it appears that the judgment in form aforesaid was given for the Central Railroad Company of New Jersey, whereas, by the law of the land, judgment ought to have been given for the said Florio Albanese and against The Central Railroad Company of New Jersey.

10

There is also manifest error in this, to wit: that the said Judge did then and there give his opinion and decide that judgment as of nonsuit should be entered against the plaintiff, and did then and there order that judgment of nonsuit be entered against said plaintiff accordingly, whereas, by the law of the land, judgment of nonsuit should not have been entered, because the said plaintiff had proved such a case as entitled him to have the same submitted to the jury, which was then and there impaneled to try the said cause.

20

And there is manifest error in this, to wit: that the said Judge did then and there decide that the said Agostino Albanese had been guilty of contributory negligence; from the evidence adduced it did not appear that the said Agostino Albanese had been guilty of contributory negligence.

There is also manifest error in this, to wit: that the said Judge did give it as his opinion and decide that the knowledge of the said Agostino Albanese of the fact that no protection was being afforded to him by the railroad company or by his employer cast upon him a much greater measure of watchfulness than he would otherwise have been required to have exercised, whereas there was no evidence adduced on the part of the plaintiff to show what knowledge the deceased possessed on that point.

30

There is also manifest error in this, that the said Judge did give it as his opinion and decide that the

evidence of negligence on the part of the railroad company being complete, and this casting upon the said Agostino Albanese a duty of greater watchfulness, he was guilty of contributory negligence, whereas it did not appear from the evidence adduced that the said Agostino Albanese had not exercised such watchfulness.

There is also manifest error in this, that the said Judge gave it as his opinion and did decide that if the said Agostino Albanese had not been standing with his  
10 back to the train he could have seen it, whereas the evidence in this case showed that the said Albanese stood with his side toward the approaching train, and that he was obliged to stand where he was in order to perform his work.

And there is also manifest error in this, that the said Judge did give it as his opinion and did decide that the said plaintiff had not shown any cause of action, whereas the said plaintiff had shown a cause of action.

And the said Florio Albanese prays that the judgment  
20 aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being may be reversed, annulled and altogether holden for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

Newark, N. J., April 22d, 1903.

JAMES M. TRIMBLE,  
*Attorney of Plaintiff.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

FLORIO ALBANESE, ADMINISTRATOR OF AGOSTINO ALBANESE, DECEASED, <i>Plaintiff in Error,</i> <i>vs.</i> THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, <i>Defendant in Error.</i>	}	In Tort. On writ of Error.
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JOINDER IN ERROR.

(Filed May 4, 1903.)

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And hereupon, afterwards, to wit, on the second day of May, in the year nineteen hundred and three, the said The Central Railroad Company of New Jersey, by John L. Conover, its attorney, comes into court and says: that there is no error either in the record and proceeding aforesaid, or in giving the judgment aforesaid, and it prays here that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given may in all things be affirmed, etc. 20

JOHN L. CONOVER,  
*Attorney of Defendant in Error.*

NEW JERSEY SUPREME COURT. ESSEX CIRCUIT.

FLORIO ALBANESE, ADMINISTRATOR OF AGOSTINO ALBANESE, DECEASED,  vs.  THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.	}	Tort.
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TESTIMONY.

(Filed April 29, 1903.)

Transcript of shorthand notes of testimony taken in  
 10 the above stated cause, upon the trial thereof, at the  
 Court House, Newark, N. J., January 14th, 1903.

Before Hon. William S. Gummere, Chief Justice,  
 and a jury.

James M. Trimble and Mr. Kussy for the plaintiff.

Mr. Conover and Mr. George Holmes for the de-  
 fendant.

Mr. Kussy opened for the plaintiff.

Mr. Trimble—There are certain interrogatories, and  
 the answers thereto, which have been served; we will  
 20 put them in now.

The same are read and marked *Exhibits P 1* and *P 2*.

*Florio Albanese*, a witness produced on behalf of the  
 plaintiff, is duly sworn and examined through the in-  
 terpreter.

Direct examination by Mr. Trimble.

Q. Where do you live?

A. 11 Newark street.

Q. In the city of Newark?

A. Yes, sir.

30 Q. How long have you lived there?

A. Six or seven years.

Q. How old are you?

*A.* Sixty.

*Q.* What family have you got?

*A.* I have got one lad, my wife; another one dead.

*Q.* Another one what?

*A.* Son.

*Q.* One living son, a dead son and a wife, is that it?

*A.* Yes, sir.

*Q.* What is the name of the living son?

*A.* Autino.

*Q.* What is the name of the dead son?

10

*A.* Agostino.

*Q.* When did he die?

*A.* On the 18th of September, last year.

*Q.* Does that mean the year that is just passed, or the year before?

*A.* A year ago last September.

*Q.* How old was he when he died?

*A.* Seventeen years.

*Q.* When was his birthday?

*A.* He was born in January.

20

*Q.* This month, January, but what date? Can he tell us what day in January?

*A.* I think on the 18th of January.

*Q.* Now, he would have been, if he had lived, then—he says he was seventeen; that is to say the boy would have been eighteen on the 18th day of the next January; is that it?

Mr. Holmes—That is rather leading. Ask him what year his son was born in, if he knows the date.

*A.* I don't remember.

30

*Q.* How old would the boy have been if he had lived to the 18th of January a year ago?

Mr. Holmes—That is objected to, because he cannot give the year in which he was born.

The Court—He may answer it.

*A.* He would now, this year, complete nineteen years.

Mr. Holmes—I move to strike the answer out as not responsive to the question.

The Court—It seems to me quite immaterial, so far as counsel for the defendant is concerned, whether the answer is irresponsive, if counsel asking the question does not object.

*Q.* Where did he die?

*A.* Central Railroad track.

*Q.* Where did he die?

*A.* Ward street.

*Q.* Repeat that question; I asked him where he died;  
10 in what place?

*A.* He died on the track, near the bridge of Ward street.

*Q.* Well, now, was he on the track at Ward street? What track?

*A.* On the right-hand side as you go down; the New York track.

*Q.* How did he happen to die there?

The Court—Was this witness there?

Mr. Trimble—He was there, sir.

20 *A.* He was shoveling sand; the train came along and caught him.

*Q.* Now, what day was that?

*A.* On the 18th.

*Q.* Of what month?

*A.* September.

*Q.* What time in the day?

*A.* It must have been around half past two, more or less.

*Q.* What was your son—whom was your son employed by?  
30

*A.* A boarder there; a man that acted as agent on the work.

*Q.* Whom did he work for, that is my question.

*A.* Mr. Burke.

*Q.* Did you see your son on that day, when the train ran into him?

*A.* I seen him.

*Q.* Were you there, too, on that day?

*A.* Yes.

*Q.* What was he doing there, the witness himself?

*A.* I was working there.

*Q.* For whom was he working?

*A.* For the same boss.

*Q.* Does he know what wages his son was getting?

*A.* \$1.35 a day.

Mr. Holmes—Ask him if he knows.

*Q.* Well, does he know what wages his son was getting?

10

*A.* \$1.35.

*Q.* Tell him we don't ask him what sum the son was getting, but if he knows what he was getting.

*A.* I know it.

*Q.* Now, he says he knows how much his son was getting; how does he know?

*A.* Because he brought the money home.

*Q.* Well, who collected the money from the boss at the cabin?

*A.* I did.

20

*Q.* For his son?

*A.* Yes.

*Q.* Now, how much did your son get?

*A.* \$1.35 a day.

*Q.* Did he see the accident?

*A.* Yes.

*Q.* Did he see the accident—the locomotive hitting the boy?

*A.* No, I did not.

*Q.* Now, tell him that we want to know what was the first thing he saw or knew of the accident?

30

Mr. Holmes—Let me suggest that you instruct him that he is to only say what he actually saw himself, has personal knowledge of, not what people told him.

*Q.* I want to know just exactly what he himself saw of the accident, or of his boy, first?

*A.* I was working at Mulberry street, carrying cement. As I was going off to get the bags of cement, I see the population gathered down towards Ward street, and I asked someone there what has happened there; "There is trouble."

*Mr. Holmes*—It seems to me, at this stage, we ought to ask that the witness be questioned so I can object to the questions. It appears now that he did not see the accident.

10 *The Court* (to the interpreter)—It will be better if you just translate the questions *Mr. Trimble* asks, and the answers.

*Mr. Trimble*—I submit the witness has begun to relate the circumstances under which he saw his boy.

*Q.* Now, he said the last thing that somebody told him there was trouble there. Now, what did he do, if anything, when somebody told him there was trouble there?

20 *A.* I went down towards the train to see what was going on.

*Q.* Now, go ahead; did he get down to the train?

*A.* I did not reach right near the train.

*Q.* Where did he go to?

*A.* I got as far as from here to the end of the room here from Mulberry street.

*Q.* Then what happened?

30 *Mr. Holmes*—I object. I don't know what the object of this is, but I think I do. The interrogatories answered that this deceased was killed at this point. It seems to me to be utterly immaterial what the witness did, or what happened after he got there, after the boy was killed.

*The Court*—We will hear what it is. I cannot tell whether it is immaterial or not until I hear what it is.

*Q.* Now, when he got to that place, what happened, or what did he see?

Mr. Holmes—I object to that.

The Court—You may have your exception. Go on.

A. I seen other people there, and they asked me—

The Court—Never mind that; we don't want to know what other people said; it is incompetent.

A. That is all I seen. They called me and they asked me what—

The Court—Don't tell us what they asked him.

Q. What did he see? Tell him we don't want to know what other people told him at all; we only want to know what he saw.

A. What I seen; I got near the train, and I recognized my son there.

Q. Now, was there anything the matter with his son, when he recognized his son?

Mr. Holmes—I object to this on the ground that it is only done to bring the horrors of this case before the jury.

The Court—You do not contend that when there is anything horrible about an accident it is incompetent to tell the jury, do you?

Mr. Holmes—It is only done to aggravate damages.

The Court—Proceed.

Q. (Question repeated.)

The interpreter—He don't answer my question yet.

A. I seen him lying flat on the platform of the last car going towards New York.

30

Q. Was he alive or dead?

A. He was alive.

Q. Was he injured?

A. Yes.

Q. Now, what were his injuries as he saw them?

The Court—One moment. I understand this witness says he saw him on the back platform of the train that was going to New York. Now, un-

less he was on the platform also, I do not suppose he can tell anything about what his injuries were.

Mr. Trimble—Simply the appearance of it.

The Court—I should not think that was worth anything, the glimpse he could catch of a man lying on a back platform of a moving train.

*Q.* Was the train moving?

*A.* It was going slowly.

*Q.* Now, what was done with his son after that; did  
10 he see anything done to his son after that?

*A.* When he got to the Broad street station the ambulance was ready to take him.

*Q.* What direction was the train moving when he saw the train?

*A.* It went to the station.

*Q.* Was it backing up to the station?

*A.* Yes, sir.

*Q.* Now, when they got to the station he was put in an ambulance, I understand the witness to say?

20 *A.* Yes, sir.

*Q.* Where did he go when his son was put in the ambulance?

*A.* I went with him.

*Q.* How did he go with him?

*A.* In the ambulance, right by him.

*Q.* Did he do anything to his son there when he was in the ambulance?

*A.* I was crying.

*Q.* No, did he do anything to his son, help his son in  
30 any way?

*A.* He said to me, he said, "Pop, it hurts me in the back."

*Q.* Now, where did the ambulance take his son?

*A.* St. Michael's Hospital.

*Q.* Did he see his son after he was in the hospital?

*A.* I remained there.

*Q.* How long did you remain at the hospital?

*A.* Up to half-past five in the afternoon.

*Q.* Then what did he do, the witness?

*A.* Then the sister told me that I had no right to remain there, and I went out, and I said to the sister, "I want to go and call his mother."

*Q.* Never mind what he said to the sister. Now, he went home, did he?

*A.* Yes.

*Q.* Did he return to the hospital?

*A.* Yes, I and my wife.

*Q.* When?

10

*A.* It must have been around six o'clock.

*Q.* The same day?

*A.* Yes.

*Q.* Did you see your son then?

*A.* Yes, I remained there.

*Q.* Now, how long did he remain with his son that time?

The Court—What difference does all this make?

Mr. Trimble—Simply to identify the body and trace it up to the point of death and subsequent 20 burial, and so on.

The Court—I don't suppose its subsequent burial has anything to do with it.

*Q.* When did your son die, do you know?

*A.* They told me he died after half-past seven.

*Q.* That same day?

*A.* Yes, the same day.

*Q.* Now, when was his son buried?

*A.* On the 20th.

*Q.* Was the body taken to his house?

30

*A.* Yes.

*Q.* In Newark street?

*A.* Yes.

*Q.* What was the name of the undertaker?

*A.* Joseph Coppola.

*Q.* What is your wife's name; I forgot to ask you?

*A.* Philomena.

*Q.* What were the funeral expenses?

*A.* \$150.

*Q.* Now, with whom was your son living at the time of his death?

*A.* With me at my house.

*Q.* And who received his wages?

*A.* He brought that to me, all to me.

*Q.* (Showing witness a paper.) Now, ask him if he knows what that paper is.

*A.* It is a paper that is sealed downstairs.

10 *Q.* You are the Florio Albanese mentioned there?

*A.* Yes, sir.

Said paper offered in evidence and marked *Ex.*

*P.* 3.

*Q.* How old is your son Autino?

*A.* About fifteen years.

Cross-examination by Mr. Holmes.

*Q.* Your son Autino was fifteen years old when the other boy was killed, wasn't he?

*A.* He is now fifteen years.

20 *Q.* When was he born?

*A.* He was born in July.

*Q.* July of what year?

*A.* I don't know the year; I know he was born the second of July.

*Q.* Was he working at the time of this accident?

*A.* He wasn't at work then.

*Q.* Is he working now?

*A.* When he does find work he works.

30 *Q.* What is his business, what trade, what does he work at?

*A.* Sometimes he works as a boy around the shops; if he gets work there, he works.

*Q.* What wages does he get, the living son?

Objected to as immaterial.

Objection sustained. Exception.

*Q.* Have you any property?

Objected to as immaterial.

Objection sustained. Exception.

Q. I understand that you were at work at this time on this particular work?

A. Yes.

Q. What wages did you receive at that time?

Objected to as immaterial.

Objection sustained. Exception.

Q. How old is your wife?

A. She is around sixty years old.

Q. And have you any trade?

10

Objected to as immaterial.

Objection sustained. Exception.

Q. Have you been a day laborer during your lifetime?

A. All the time.

Q. Can you read and write?

A. No.

Q. Could your son who was killed read and write?

A. No, sir.

Q. And he had been a laborer from the time he commenced to work until he died, hadn't he?

20

A. Yes.

Q. How long had he been working on this work where he was killed prior to his death?

A. He worked before I did. I only made there seven days at the time of the accident.

Q. Do I understand that he means he worked himself seven days on this work before the accident?

A. My son, he start work there before I did.

Q. Yes, but he worked seven days?

30

A. Yes.

Q. And the son was there how long before he was killed, at this place?

A. Over a month and a half.

Q. Did he see the train, the passenger train, go out of the depot at Broad street which struck his son?

A. No.

Q. Does he know what his son was doing at the time he was struck by the train; did he see what his son was doing at the time he was struck?

A. I didn't, no.

Q. Then when you say he was shoveling sand, you state that from what someone has told you, don't you?

A. I asked my boy when he was in the ambulance and he told me he was shoveling said.

Q. And that is the only knowledge that you had of  
10 what he was doing, is that so?

A. Yes, from what he said.

Mr. Holmes—Now, I move to strike out the testimony of this witness as to what his son was doing, the statement he made that he was shoveling sand.

The Court—Yes, that was not competent.

Mr. Holmes—Also that he was caught by the train; "He was shoveling sand and the train came along and caught him."

20 The Court—Yes, strike that out.

*Philomena Albanese*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Trimble.

Q. Ask her if she is the wife of the preceding witness, Florio Albanese?

A. Yes, sir.

Q. And the mother of Augustino Albanese, deceased?

A. Yes, sir.

30 Q. Does she know when her son, Augustino Albanese, was born?

A. I know when he was born, but I can't remember the year.

Q. What day was he born, of the month?

A. The 14th day of December.

Q. Of December?

A. Yes, sir. December, February—December.

Q. She cannot tell us the year?

A. No; he was seventeen years old when he died.

Q. How old in she?

A. Sixty years.

Q. How long has she been in this country?

A. Three years.

Q. How many children has she got now living, besides Augustino, the son that is dead?

A. One only.

Q. Did Augustino live with her and her husband at the time of his death?

A. Yes.

Q. Does she remember the day of his death?

A. The 18th of September.

Q. Of what year?

A. A year ago last September.

Not cross-examined.

Mr. Trimble—I had intended to ask Mr. Albanese about the wounds that he saw upon his boy when he was in the ambulance.

20

The Court—Does it make any difference what kind of wounds he had, beside the fact that they were fatal? That is not disputed, that the boy died, is it, Mr. Holmes?

Mr. Holmes—I took that position long ago, before they had any testimony on the subject at all.

*Generoso Mazzei*, a witness produced on the part of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Trimble.

30

Q. Where do you live?

A. 11 Newark street.

Q. How long have you lived there?

A. It is only eight days that I came back from Schenectady?

Q. How long has he been at Schenectady?

A. Three months.

*Q.* Where did he live before he went to Schenectady?

*A.* Lived in Newark.

*Q.* And whereabouts in Newark?

*A.* 49 Garside street.

*Q.* How long is it since he came to Newark first?

*A.* Three years.

*Q.* Did he know Augustino Albanese?

*A.* Yes; I became acquainted with him in this country; we worked together.

19 *Q.* Where did you work together?

*A.* On the Central Railroad track.

*Q.* In the city of Newark?

*A.* Yes.

*Q.* Were you working there on the 18th day of September, 1901?

*A.* Yes.

*Q.* Did you see Albanese on that day?

*A.* Yes.

*Q.* And when you saw him what was Albanese doing?

20 *A.* He was gathering sand; taking sand away from the rails, and putting it on a pile.

*Q.* Now, what time in the day was that?

*A.* Around three o'clock.

*Q.* Now, how big was this pile of sand?

*A.* About two carloads of the train cars.

*Q.* Yes, but I asked him how long was the pile?

*A.* Ten metres.

*Q.* How high was it, can you tell us?

*A.* Four or five feet high.

30 *Q.* Now, where was that pile of sand with reference to the tracks of the Central Railroad?

*A.* (Indicating) This is the New York track; on this side was the sand.

*Q.* But which way is the New York track looking now?

*A.* As I stand now this is the track, and this track goes to New York.

*Q.* Is he facing New York now?

*A.* Sure.

*Q.* So that it was on the south side of the east bound track?

*A.* Yes.

*Q.* Now, how near was that pile of sand to the track itself?

*A.* Just space enough to let the train pass through, probably a foot.

*Q.* Was there any of the sand on the track itself?

*A.* Yes, the sand would fall off. 10

*Q.* Now, can you tell us near what street that pile of sand was, cross street?

*A.* Yes, Ward street.

*Q.* Near Ward street?

*A.* Yes.

*Q.* Where was he standing or working?

*A.* I was about thirty steps away from there.

*Q.* In what direction?

*A.* I was turned towards this way.

The interpreter—He means west. 20

*Q.* Was he facing west?

*A.* Facing west.

*Q.* That is he was facing the station?

*A.* Yes.

*Q.* (By the Court.) That is Broad street station?

*A.* Yes.

*Q.* (Further direct.) Now, did you see anything happen to Augustine Albanese?

*A.* Yes, sir.

*Q.* Now, just tell us what he saw happen to Albanese. 30

*A.* As I was piling stones I heard a noise, the track noise, and I turned around, and I seen the train coming, and I got away.

*Q.* Well, what was that noise that he heard?

*A.* Only the rail, the track.

*Q.* The noise of the rails; did he hear any bell?

*A.* No.

*Q.* Was there any bell sounded when the train passed him?

*A.* None.

*Q.* Did he hear any whistle?

*A.* No.

*Q.* Now, when he stepped aside, what did he see, if anything?

*A.* I looked towards the train, and I seen this man over there, and while I was hollering at the man the train got him.

*Q.* What did he say when you hollered?

10 *A.* Well, I saying, "Augustino, get away from there."

*Q.* Now the train got him while he hollered to Augustino. In what position was Augustino standing, can he tell us?

*A.* One foot outside the track and the other foot in the track to get the sand out.

*Q.* What was he doing with the sand?

*A.* Putting it near the pile of sand.

*Q.* One foot in the track and one foot out, is that it?

*A.* Yes, sir.

*Q.* Well, which way did he have his back?

20 *A.* As I stand now, that is the way he was standing.

*Q.* With his face towards the south, or the east, towards New York.

*A.* Yes.

*Q.* Which way was it; which way were his shoulders turned?

The Interpreter—He says: "As I stand here."

*Q.* Tell him that back of him is the station, and that that is south, and that is New York; now I want him to show us just how Augustino stood when this train  
30 struck him.

*A.* He was like this (illustrating). He could see towards him; he could see sideways.

*Q.* As I understand Augustino had his back, he was sideways towards the station?

*A.* Yes.

*Q.* Now, did he see what struck him, what part of the locomotive, or what car?

A. The engine.

Q. What part of the engine?

A. This is the engine, goes toward New York; he was caught sideways.

Q. Well, what I want to know was—can't he tell us what part of the engine struck Augustino?

A. That wood beam that stands on the front of the engine caught him.

Q. When the engine struck him can he tell us what happened to Augustino? 10

A. Yes.

Q. What was it?

A. Why, as soon as he got caught, the engine whistled and stopped.

Q. How many whistles?

A. Two or three times.

Q. Had there been any whistling before that?

A. No.

Q. What became of Augustino's body after the engine struck him; can you tell us? 20

A. He was about six or seven feet away from where he was struck on the bridge.

Q. Well, was he thrown or carried there by the engine?

A. He was thrown there.

Q. Thrown?

A. Yes; he was thrown there, and the engine stopped right there.

Q. Now, how many feet was he thrown?

A. Seven or eight or ten steps. 30

Q. Well, did he go to him after he was thrown?

A. Yes, I was right near there.

Q. And can he tell what injuries he saw on Augustino?

A. I seen a big hole on his back, and his feet crushed.

Q. Anything the matter with his head?

A. The scalp was all taken off; the skin was all taken off of the scalp.

*Q.* Was he alive then?

*A.* Yes.

*Q.* For whom was he working, this witness, at that time?

*A.* Mr. Burke; Burke Brothers.

*Q.* Was Augustino working for Mr. Burke, too?

Mr. Holmes—I object to that unless he knows.

The Court—He can tell what he saw there, but he cannot draw conclusions.

10 *Q.* What is the name of his foreman?

*A.* Murphy.

*Q.* And what was the name of Augustino's foreman; does he know?

*A.* The same man, the same name.

*Q.* Does he know Mr. Murphy's first name?

*A.* They all called him Murphy, that is all I know.

*Q.* As I understand the witness' testimony, Albanese, when he was struck, was standing—

Mr. Holmes—I object.

20 The Court—Yes; just put your question.

*Q.* You have testified that—

Objected to.

The Court—Yes; don't tell us what he has testified to, either.

Mr. Trimble—I simply wish to connect my question with the previous testimony.

The Court—Ask your question, and see if it needs anything more.

30 *Q.* Augustino was standing on the track, and I want to know if there was any room for him to stand anywhere else and do the work he was doing?

Objected to as leading.

The Court—It is objectionable because it calls for the judgment of the witness as to whether there was any room. He may tell us how much space there was between the track and the edge of the embankment, if it was an embankment.

*Q.* How much room was there between the track and the pile of sand, if any?

*A.* About a foot, more or less.

*Q.* How high was the sand which had rolled off of the pile on to the track?

*A.* A little around about half a foot.

The Interpreter—He shows about four fingers.

The Court—About four fingers, he says.

*Q.* Had any instructions ever been given to the men there employed about signals or the time of trains, running of trains?

Objected to.

10

The Court—He may prove it.

Exception to defendant.

*A.* No, no one.

Cross-examination by Mr. Holmes.

*Q.* Are you stopping with the Albanese family at the present time?

*A.* Now I do.

*Q.* And you have been there since you came down from Schenectady?

20

*A.* Yes.

*Q.* Were you at work at Schnectady when you came down here?

*A.* Yes, I was working there.

*Q.* Who were you working for?

*A.* On the electric cars, the track.

*Q.* And who sent for you to come down here?

*A.* I received a letter from the father of the deceased to come down here.

*Q.* Pay your own expenses?

30

*A.* Yes.

*Q.* Have you got a promise to have them paid back to you by the father of the deceased?

*A.* No.

*Q.* Are you paying any board at the father's house?

*A.* Sure.

*Q.* So that you have come down from Schenectady, paid your own expenses, and are paying board to the plaintiff?

*A.* Yes.

*Q.* For the purpose of testifying in this case?

*A.* That is all.

*Q.* And without any promise to have it repaid back to you?

*A.* Without any promise.

*Q.* Now, isn't it a fact, young man, that you expect to be repaid these expenses if the plaintiff recovers in this case?

10 *A.* No.

*Q.* Not at all?

*A.* Not at all.

*Q.* How long had you been at work on this track elevation before the accident?

*A.* Three months.

*Q.* And were you standing to the eastward of Albanese at the time that you say that he was shoveling sand, just prior to his being struck by the locomotive?

*A.* Yes.

20 *Q.* You were east of him, you said?

*A.* Yes.

*Q.* That is, towards New York?

*A.* Yes.

*Q.* And what were you engaged in doing?

*A.* I was filling up with stones where they make concrete.

*Q.* And you were about thirty feet then, I understand you to say, you were thirty steps east of where Albanese was standing; about thirty steps east of it?

30 *A.* Yes.

*Q.* And how close to the track upon which the train came were you?

*A.* I was right near; I had my feet on the track.

*Q.* Well, you were as close to it as Albanese was then?

*A.* Yes.

*Q.* Now, from the point where you stood, towards Broad Street station, the grade of the track at that time ran down, did it not?

A. No, it was level.

Q. Wasn't it down; wasn't there a difference of about four feet between the point where he stood, and Broad Street station, on a down grade.

Mr Trimble—I think this is objectionable because it is not cross-examination, and also because it calls for an opinion upon a matter about which this witness perhaps is not competent to testify.

The Court—I will admit the question.

A. I could not exactly say, but I should say it was a little above the level, it was going up.

Q. Was it higher at Broad Street station than at the point where he stood?

A. About the same; probably higher where I stood.

Q. Now, how near to Ward street was he standing, the line of Ward street?

Mr. Trimble—"He" you say, which one?

Mr. Holmes—The witness.

Q. How near to Ward street were you standing?

A. About forty steps.

20

Q. Which side of the street?

The Interpreter—He describes the westerly side of ward street.

Q. And was Albanese on this side also?

A. Yes.

Q. Now, the next street toward the Board Street station is Lawrence street, isn't it?

A. I don't know.

Q. Well, there was another street, two other streets, between Ward street and the Broad Street station.

30

A. Yes, there were.

Q. So that from the point where you and Albanese were standing, to the station, or to the front of the station, rather, was about seven to eight hundred feet, wasn't it?

A. About that: I didn't measure it.

Q. Now, from where you stood looking towards

Broad Street station, you could see a train when it was standing in the station, couldn't you?

*A.* I couldn't see while the freight cars were in front of me; when they weren't I could see it.

*Q.* At the point where you stood were they using more than one track for the purpose of running passenger trains?

Mr. Trimble—I object to that on the ground that it is not cross-examination.

10 The Court—I think it is.

*A.* We knew two tracks were in use; one was going, the other was coming.

*Q.* And the track which went into the station, carrying trains from New York, was to the north of the track upon which Albanese was; isn't that so?

*A.* Yes, that is right.

*Q.* And was the next track to it?

*A.* Two, only two tracks, one goes down, the other goes up.

20 *Q.* I understand that, but the track upon which the train was coming from New York, going into the station, was the next track on the north side of the track on which Albanese was killed?

*A.* There are switches there.

*Q.* Of course, there are switches there, as everywhere; he understands very well. Now, to the north—let us put it this way—to the north of the track upon which Albanese was killed there was another passenger track, was there not?

30 *A.* On this side there are switches.

The Interpreter—He means the north side.

*Q.* On the north side of the track wasn't there a clear track right alongside of the track upon which the train ran that killed Albanese, and on the north of that track?

*A.* Yes, it was clear.

*Q.* And there was no train running or coming on that track at this time?

*A.* I didn't look at that time.

*Q.* Well, if there had been, you would have seen it, wouldn't you; you were right there?

*A.* Sure I would have seen it.

*Q.* Now, when the engines come out of—this track that Albanese was on, that was the track on which the trains coming out of the station, going to New York, ran all the time, wasn't it?

*A.* Yes.

*Q.* And a person standing on that track, as Albanese was, and looking towards Broad street, right down that track, how far could he see? 10

*Mr. Trimble*—That is objected to on the ground that it assumes as a fact something that has not been proven. It has not been proven that Albanese was looking toward Broad street.

The Court—I understand the question was if he had looked, how far he could have seen. He may answer the question.

*Q.* (Question read.)

*A.* He could see as far as the station. 20

*Q.* Now, when the trains came out of there didn't they—first, the trains did not go beyond Broad street station, did they; that was the end of the road?

*A.* Yes, it was the station.

*Q.* That was the end of the road, wasn't it?

*A.* At the end of the road.

*Q.* And that is where they start from coming toward New York?

*A.* Yes.

*Q.* Now, didn't you hear that train start out from the station? Didn't you hear the puff of the exhaust from it? 30

*A.* You could have heard it, but I didn't hear it that time.

*Q.* Isn't it a fact, in starting from the station, getting under way, that the train always, every train must make a noise from the exhaust?

The Court—Are you examining him as an expert?

Mr. Holmes—I think we all know that fact; I don't think we need an expert.

The Court—Then the jury know it as well as the witness.

Mr. Trimble I object to the question.

The Court—I don't think the question is competent; it does not call for any special knowledge on the part of the witness, or, if it does, it has not been shown that he has any more knowledge about those matters than the jury has.

Q. Wasn't this train, as it was coming towards you, making a noise from the exhaust, a puffing noise, like a train puffs?

A. Yes, but very little.

Q. Well, it was making noise enough so that you heard it, isn't that so?

A. You couldn't hear far away; you could hear right near to it.

Q. Well, you got out of the way of it, didn't you?

A. Why, I knew from the rail; that made the noise.

Q. I say you stepped out of the way of it yourself?

A. Certainly.

Q. Now, are you positive that at that time Albanese was shoveling sand?

A. Yes, sir.

Q. You are sure of that, eh?

A. Yes, sir.

Q. Now, where was Mr. Murphy standing?

A. He was a little way from us commanding the other people, commanding the others on the work.

Q. Do you see Mr. Murphy here?

A. No.

Q. Mr. Murphy, will you stand up where you are?

(A gentleman stands up in the court-room.)

A. There he is.

Q. Is that Mr. Murphy?

A. Yes, sir.

Q. Now, near those abutments on Ward street, or

near this place where you were, or Albanese, rather, there was a platform, wasn't there, a mixing platform?

*A.* It was behind the pile of sand, not right near us.

*Q.* Well, put it this way; there was a platform?

*A.* Yes.

*Q.* And wasn't Murphy standing on the platform?

*A.* Yes.

*Q.* And near that platform there was a water barrel, wasn't there?

*A.* Sure.

10

Objected to as not cross-examination.

The Court—I think it is competent.

*Q.* Now, the water barrel was near the end of the sand pile, wasn't it?

*A.* Yes, it was at the end.

*Q.* And that water barrel from where you stood was toward Broad Street station?

*A.* Yes.

*Q.* Now, Albanese was between you and the water barrel, wasn't he, before he was struck?

20

*A.* When he was struck.

Mr. Trimble—He said "No"; give his answer.

The Interpreter—He said "yes" first, then he said "no," and then he explained to me how he stood.

The Court—Go on, Mr. Interpreter.

The Interpreter—He said that behind him was the barrel.

*Q.* But it was right close by him, wasn't it?

*A.* It was away about four or five steps.

*Q.* Now, Murphy was—he said Murphy was standing on the platform. Now was there any other man shoveling sand at the time, right at this time, just as the train was coming; any other men shoveling sand?

30

*A.* At the same place?

*Q.* Yes?

*A.* Only Albanese; only him.

*Q.* No other men?

*A.* The others had already filled up the bags to carry them on the other side of the track.

*Q.* Now I understand it; was Albanese filling the bag just before the train came?

*A.* He had already filled the bags at the time, and when the men went away, then he shoveled the sand that was on the track.

*Q.* Now that was just—the men had gone away from there just as this train was coming out, hadn't they?

10 *A.* Yes.

*Q.* When he filled the bags he filled those on the top of the sand pile, didn't he?

*A.* No, on the front.

*Q.* On the end of it?

*A.* On the ground.

*Q.* But wasn't it on the south side of the sand pile? wasn't he working there filling the bags?

*A.* It was right in the middle of the pile, on this side.

*Q.* Oh, I see; he filled the bags in the middle of the pile?

20 *A.* Yes.

*Q.* And then, after the bags were filled, and the men were carrying them away, he came down off the pile to clean up between the tracks.

Mr. Trimble—He has not said so.

Mr. Holmes—I am asking him that.

The Court—He may ask that.

Mr. Trimble—We ask an exception on the ground that this question involves a statement, and puts it as a fact.

30 *Q.* (Question read.)

*A.* Yes, it was right near there.

*Q.* Do you swear that the bell of that engine was not ringing from the time it started from the Broad Street station until it got to where Albanese was?

*A.* I do swear.

*Q.* Were you listening for the bell?

*A.* Certainly; I have my ears to hear.

*Q.* You were always on the lookout for the trains, weren't you, when you were working around the tracks there?

*A.* Certainly.

*Q.* Now didn't the train blow a whistle when it was about one hundred feet away from Albanese?

*A.* No.

*Q.* Now, you say that you worked under a foreman?

*A.* Yes.

*Q.* And that foreman was Mr. Murphy?

10

*A.* Yes.

*Q.* Mr. Murphy was standing not more than fifteen feet from where Albanese was, wasn't he?

*A.* About that; seven or eight or ten steps away.

*Q.* While you men were working on the track there didn't your foremen look out for you; didn't they warn you when trains were coming?

*A.* He never said anything.

*Q.* Well, you mean he never said anything on this occasion?

20

*A.* On this occasion he didn't say anything.

*Q.* Didn't he call to Albanese?

*A.* No.

Re-direct examination.

*Q.* Now, counsel made you say in his question, that after filling the bags, Augustino Albanese descended from the top of the pile of sand to the track and commenced to shovel up the sand. Now, I want to know whether you intend to testify, or have testified, that the deceased ever stood on the top of the sand?

30

Objected to.

The Court—Yes, you need not put that question; you may ask him the question without all the preliminaries.

*Q.* Was Augustino Albanese ever on top of the pile of sand?

*A.* No.

Mr. Holmes—He didn't say he was.

*Q.* Did Augustino Albanese stand on the pile of sand when he filled the bag?

*A.* No, it was a high pile.

Re-cross examination.

*Q.* He didn't stand on the railroad track to fill the bags, did he?

*A.* Not while he was filling the bags.

*Q.* And there was a big pile of sand there at the time  
10 that he was killed, wasn't there?

*A.* Sure.

*Q.* (By the Court.) Where did he stand while he was filling these bags?

*A.* He stood right alongside of the track.

*Q.* (Further re-cross.) Alongside of what track?

*A.* That same track. When a train was passing, why he used to get around the pile to get away from it.

*Q.* Now, isn't it a fact that he filled the sand-bags at the end of the sand pile and between the tracks; isn't  
20 that the fact; at the end of the pile, and not alongside of the track; were not the bags filled at the end of the sand pile towards the Broad Street station?

*A.* They were filled in the middle?

*Q.* In the middle of the sand pile?

*A.* Yes.

*Q.* Wasn't that over on the south side of the sand pile? Didn't they do that on the southerly side of the sand pile?

*A.* This is the pile (illustrating) and he was filling  
30 right in the middle.

*Q.* (By the Court.) Was he at work on the side of the pile furthest from the track, or nearest the track; which side of the sand pile?

*A.* Nearest the track.

*Q.* (Further re-cross.) How did the men get over the sand pile with the bags of sand; did they go right over the pile?

Mr. Trimble—That is objected to because it is a question that is not reasonable.

The Court—I will permit it.

A. Passing the track.

Q. There was room enough for them to do that, was there?

A. Yes, simply pass through the rails.

Q. (By Mr. Trimble.) Between the rails, do you mean?

A. Yes, between the rails. 10

Q. (Further re-cross.) About how many trains—how often would a train come out of the depot on that track that Albanese was on?

Mr. Trimble—I object because it calls for knowledge on the part of this witness that he probably does not possess.

Q. (Question read.) Going towards New York.

The Court—If he cannot answer it he may say so.

A. I don't know; sometimes every hour; every two hours; less. 20

Q. Isn't it a fact they went out about every fifteen or twenty minutes?

A. No, every once in a while they passed.

Q. But there were frequent trains there?

A. Yes.

*Raphael D'Alesandra*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Trimble.

Q. Where do you live? 30

A. 20 Drift street.

Q. City of Newark?

A. Yes, sir.

Q. Do you know, or did you know, Augustino Albanese?

A. Yes, I know him.

Q. Where were you living in September, 1901?

The Court—What difference does that make?

Mr. Trimble—It was only preliminary.

The Court—Don't let us waste time on preliminaries.

Q. Where were you working in September, 1901?

A. I wasn't working at the time; I was looking for work.

Q. Did you see the accident to Augustino Albanese?

A. Yes, certainly I seen it.

10 Q. When did it happen, at what hour in the day?

A. Half past two or quarter to three in the afternoon.

Q. Well, now, what did you see?

A. I seen him when he was struck.

Q. Now, just tell what you saw.

A. I seen a good many men working in one corner where they were laying concrete, and I was looking there, and I turned around, I seen this boy working at this pile of sand.

Q. Well, what was he doing?

20 A. He was filling up bags.

Q. What else?

A. He was helping to put on the shoulder of another fellow to carry them across the track.

Q. Do you know who that was that had the bags on the shoulder?

A. No, I don't.

Q. Now, then, what happened?

A. Right at that time I took my pipe and filled it and lighted it; at the same time I seen the train come and  
30 strike this boy.

Q. Now, what part of the train struck the boy?

A. It was the front of the engine; he was struck behind.

Q. Where was the boy standing when he was struck?

A. He was shoveling sand then.

Q. And where was he standing, the boy?

A. He was facing toward New York.

Q. And where was he standing; he was facing toward New York; where was he standing?

*A.* He was alongside the track, near the sand pile.

*Q.* Now, what part of the sand pile?

*A.* He was at the end of the pile going toward New York.

*Q.* How long was the pile?

*A.* Fourteen or fifteen—fourteen or fifteen steps.

*Q.* How high was the pile?

*A.* It was just as big as I am.

*Q.* And how far, how near was it to the track?

*A.* Right near the track. 10

*Q.* Well, how far; give us some idea?

*A.* Less than a foot.

*Q.* Now, then, where did the boy stand with reference to the two ends of the pile?

*Mr. Holmes*—He said he was standing at the end of the pile towards New York.

*The Court*—Yes, he has already answered that.

*Mr. Trimble*—Well, your Honor, perhaps he has and perhaps he has not.

*The Court*—Ask him over again. Where was the boy standing; what part of the pile? 20

(The question is repeated by the interpreter.)

*A.* The end of the pile towards New York.

*Q.* Now, after the boy was struck what happened?

*A.* Why, dragged him along.

*Q.* How far?

*A.* Fourteen or fifteen feet, steps.

*Q.* Did you hear any whistle?

*A.* I heard the whistle when the boy was struck.

*Q.* How many? 30

*A.* Toot, toot, so, twice.

*Q.* Was there any whistle before that?

*A.* None.

*Q.* And any bell?

*A.* No.

*Q.* What directed your attention first to the approach of the train?

*A.* Why, in a sudden I seen the train coming.

*Q.* Was there anything that directed your attention to it at all?

*A.* Why, it was while I was lighting my pipe.

Cross-examination by Mr. Holmes.

*Q.* Your attention was on lighting your pipe, wasn't it?

*A.* At that time.

*Q.* Well, how close to the track were you standing?

*A.* Ten or twelve steps.

10 *Q.* Which side of the track; I mean the track upon which the train was running?

*A.* I was towards south, the southerly side of it.

*Q.* You say that this sand pile was higher than your head?

*A.* Above my head.

*Q.* Just stand up; let us see how high you are?

*A.* (Witness stands up.)

20 *Q.* All right. Now, you are quite positive that Albanese was at the end of the sand pile towards New York; you are quite positive about that, are you?

*A.* Yes.

*Q.* And he was stooping over, shoveling?

*A.* Yes.

30 *Q.* Now, this sand pile, being higher than your head, if Albanese had been in the middle of the sand pile—bear in mind you say this sand pile was higher than your head, and you were standing south of it; if the sand pile had been as high as that, and Albanese was standing in the middle of it, you could not have seen him, if he was stooping over shoveling, could you?

*A.* If he was in the middle, I couldn't see him.

*Q.* And it was because he was at the end of it that you could see him?

*A.* Yes, sir.

*Q.* Where the sand was low?

*A.* Yes.

*Q.* Had you seen him fill up the bags of some of the men?

*A.* Another fellow.

*Q.* How long before the train struck him was it that he had helped to put this bag on the shoulder of the other fellow?

*A.* About three minutes.

*Q.* Yes, as long as that, and the other fellow had gone away?

*A.* Yes.

*Q.* And then Albanese went to shoveling sand up between the tracks, was that it? 10

*A.* He was shoveling the sand then.

*Q.* Well, where was he standing with reference to the track; was he on the track when he was shoveling or off of it?

*A.* He was half in the track and the other half outside of the track.

*Q.* One foot inside the track and the other out, is that what you mean?

*A.* I couldn't exactly tell you whether the two of them were inside the track or the two of them were outside the track, but I know he was right between. 20

*Q.* That was the south rail of this track, wasn't it, the rail nearest the sand pile?

*A.* Yes.

*Q.* Now, was he facing towards the south?

*A.* He was looking both ways, towards New York, and this side, and the southerly side.

*Q.* Now, did you see—how was this train coming, fast or slow?

*A.* I didn't see the train, whether it came down fast or not; I seen the train come, and it caught this boy, that is all. 30

*Q.* Now, the train stopped, didn't it, right off?

*A.* Yes, when it struck the boy it stopped.

*Q.* Stopped right still there, didn't it?

*A.* Ten or fifteen steps away from there, right at the bridge.

*Q.* I understand you were standing further toward New York—standing from Albanese toward New York; is that so?

*A.* I was towards Newark, where they were laying the foundations.

*Q.* But the train—how far away from Albanese were you?

*A.* About fifteen steps, more or less.

*Q.* The train didn't pass you, did it?

10 *A.* No.

*Q.* Now, wasn't the train—let me ask you this: You have been on a railroad track frequently, haven't you?

*A.* Yes. That was the first time I went down there.

*Q.* Didn't this engine, when it was coming along up toward you, didn't you hear it exhausting the steam—puffing, making a noise?

*A.* No, I didn't hear anything.

*Q.* You didn't hear anything at all. Well, were you listening for anything? Were you on the lookout for  
20 anything?

*A.* I was on the outside of the rails.

*Q.* You were in a safe place, weren't you?

*A.* I was in a safe place.

*Q.* And therefore you had no need to pay any attention to whether a train was coming or not?

*A.* I didn't know what tracks the train would go on.

*Q.* That doesn't answer my question. Repeat it.

*A.* I paid no attention.

*Q.* Then the bell might have rung and you not have  
30 heard it, is that so?

*A.* I didn't hear a whistle.

*Q.* Well, the bell—didn't you hear the bell?

*A.* No, sir.

*Q.* It might have been ringing and you not hear it?

*A.* It might be, but I didn't hear it ringing.

*Q.* There was a bell on the engine, wasn't there?

*A.* Certainly.

Re-direct examination.

Q. You were standing, as I understand your testimony—

Mr. Holmes—I object to this form of question.

The Court—Yes; don't tell the witness what he has said. If you are confused as to what the witness says, and think you may misunderstand him, you are entitled to have your misunderstanding cleared up. But if you are doing it merely for the purpose of emphasizing what the witness has testified to, that is improper. 10

Mr. Trimble—I am not doing it for that purpose, your Honor.

The Court—I assume not. If you have any misunderstanding as to what the witness has said you may ask him over again; let him describe it.

Mr. Trimble—Well, I have no further questions.  
Recess.

*Joseph Coppola* sworn for the plaintiffs.

Direct examination by Mr. Trimble. 20

Q. Where do you reside?

A. 175 Eighth avenue.

Q. What is your business?

A. Undertaker.

Q. Did you have the funeral of Augustino Albanese?

A. Yes, sir.

The Court—Mr. Trimble, how is this competent?

Mr. Trimble—Simply to show there is no question about the death of Augustino Albanese, and his burial; that is all. 30

Mr. Holmes—We have admitted that twice before.

Mr. Trimble—The only question is the funeral expenses.

The Court—I don't think you can recover funeral expenses.

Mr. Trimble—That is all.

*Pellegrino Oria*, a witness produced on behalf of the plaintiffs, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Trimble.

Q. Where do you live?

A. 23 Cutler street.

Q. In Newark?

A. Yes, sir.

Q. Did you know Augustino Albanese?

10 A. I knowed him while we were at work.

Q. Where were you working?

A. On the Central Railroad.

Q. Whereabouts, and what were you doing?

A. At the north hand side, carrying sand to a place for concrete.

Q. Where was this sand?

The Interpreter—He said "On this side," motioning on the left-hand side.

Q. Where was he working?

20 A. On the right-hand side, towards New York, on the right-hand side, the one that goes towards New York.

Q. Does he know near what street in Newark he was working?

A. Yes.

Q. What street?

A. Ward street.

Q. Now, how many tracks was there there, does he know that?

30 A. There were two tracks, one going to New York, another returning, and then alongside the tracks were switches where the engine goes to it.

Q. Now where was the pile of sand with reference to the track that goes to New York?

A. It was alongside, on this side.

The Interpreter—He means the southerly side.

Q. How large was that pile of sand?

A. As high as me.

*Q.* How long?

*A.* As long as the car of the train is.

*Q.* Does he know how wide it was?

*A.* Six or seven feet.

*Q.* Now, he was working there, and who else was working there?

*A.* Other people.

*Q.* Who were they; does he know?

*A.* No.

*Q.* How many men were carrying sand? 10

*A.* Only me.

*Q.* Was there anybody else working at the pile of sand except him?

*A.* I carried the sand for all the company that worked on that side.

*Q.* How near was Albanese to him?

*A.* It was a distance the size that the pile of sand was.

*Q.* What was Albanese doing?

*A.* He was filling the bags of sand.

*Q.* For whom? 20

*A.* Other people.

*Q.* Where was he standing, Augustino Albanese, when he was filling the bags of sand?

*A.* He was standing one foot in the track, another foot outside the track.

*Q.* And with reference to the length of the pile, where was he standing, the length east and west, where was he standing?

*A.* He was in the middle, because the middle was the nearest part where they cart the sand away. 30

*Q.* When they took the sand away, where would they carry it?

*A.* Where the other gang was working.

*Q.* Yes, but in what direction did they go?

*A.* Right towards the switches, across the track, all of them.

*Q.* Now, did he see the accident?

*A.* Yes.

*Q.* And what was Albanese doing, if he knows, at the time of the accident?

*A.* He was accumulating the said near the pile.

*Q.* Where was he standing at that moment?

*A.* One foot was in the middle of the track (The Interpreter—What he calls the milk track), and the other foot was near the rail on the outside.

*Q.* How much distance was there, if any, between the southern rail, and the pile of sand where one of his  
10 feet was?

*A.* It could not have been any more than a foot and a half.

*Q.* Now, have you told us just exactly what Albanese was doing at the moment he was struck with the train?

Mr. Holmes—Certainly. He has told us he was filling sand up on the pile.

*A.* Yes, that is what he was doing.

*Q.* Were the men, whose bags were to be filled, there at that moment when he was struck?

20 *A.* No.

*Q.* What was the first thing you know of the train striking Albanese?

*A.* At that moment I heard the noise of the train and I turned around and I seen this Albanese, that he was putting the sand near the pile, and the train struck him.

*Q.* Well, what did he do, if anything?

The Interpreter—The witness?

Mr. Trimble—Yes.

*A.* I hollered.

30 *Q.* And what did Albanese do when he hollered, if anything?

*A.* The train had already caught him.

*Q.* Was there any whistle sounded?

*A.* At first I didn't hear.

*Q.* Well, what did he hear?

*A.* Nothing at all.

*Q.* Didn't he hear any whistling at all?

*A.* No. At this moment when the man was struck,

why, everybody hollered, and I couldn't hear anything any more.

*Q.* How near were you standing to Albanese when he was struck?

*A.* Six or seven feet; as big as the pile was.

*Q.* Were you on the track?

*A.* No.

*Q.* Where were you standing?

*A.* I was further away from the track; the train could never injure me.

10

*Q.* Now, what attracted your attention first to the train?

*A.* While I was putting the sand on the wheelbarrow I heard the train, and I lift up myself.

*Q.* How soon after that was the boy struck?

*A.* It was an instant.

*Q.* Now, does he know who put Mr. Albanese there?

Mr. Holmes—Just if he knows; that is all.

*Q.* Yes; does he know who put Mr. Albanese to work there?

20

*A.* No.

*Q.* Who put him to work there (the witness)?

Objected to as immaterial.

The Court—He may answer it.

*A.* The boarder, the man that had the board there.

*Q.* I don't mean the job, who got him the job; I mean if he knows who put Mr. Augustino to work that day upon shoveling sand?

Mr. Holmes—He says he doesn't know.

The Court—He might not understand the question.

30

*A.* I don't know.

*Q.* Did you see Augustino after the train stopped?

*A.* Yes.

*Q.* Did you see where he was hurt?

*A.* Yes.

*Q.* Where?

*A.* All his body, head, feet.

Mr. Holmes—We have admitted that the man was killed on the track there. This is the fourth time.

Cross-examination by Mr. Holmes.

*Q.* You were in a safe place at the time, were you not?

*A.* No.

The Interpreter—He wasn't in a dangerous place.

10 *Q.* He wasn't in danger?

*A.* No.

*Q.* You were not looking out for a train to come, were you?

*A.* If I looked at the train, they couldn't hurt me, and if I didn't look, why, they couldn't hurt me either; I was minding work.

*Q.* You were working in a place where there were no trains at all; trains wouldn't come there anyway, so you had no business to look out for one?

20 *A.* Not danger.

*Q.* There was what they call a mixing platform, wasn't there?

*A.* Yes.

*Q.* At Ward street?

*A.* Yes.

*Q.* And that was on the side of Ward street nearest the Broad street depot, wasn't it?

*A.* Yes.

*Q.* Now, at this place Ward street wasn't level with  
30 the track, was it; it was way below it?

*A.* They were level.

*Q.* He doesn't understand. Wasn't the track higher than Ward street, the roadway on Ward street?

*A.* Yes.

*Q.* Now, did you see Mr. Murphy there?

*A.* Yes.

*Q.* He was standing on this platform, wasn't he?

*A.* Yes.

*Q.* Now, the platform was used to mix up the cement which they were making the abutments of, was it not?

*A.* Yes.

*Q.* And it was to that platform that you were carrying sand?

*A.* Yes.

*Q.* Now, that platform was on the right hand, standing toward New York, the platform was on the right-hand side, wasn't it, of the track?

10

*A.* Yes.

*Q.* And the sand pile was also on the same side, was it not?

*A.* It was on the other side.

*Q.* On the north side of the track?

*A.* Near the track.

*Q.* But wasn't it on the same side, the south side of the track?

*A.* The same side.

*Q.* Wasn't the sand pile toward the Broad street station from the platform?

*A.* They were on a level.

*Q.* Yes, on a level, but wasn't the sand pile toward the Broad street station furthest from him?

*A.* It wasn't; they were the same distance.

*Q.* Oh, right there together?

*A.* At the same level.

The Interpreter—He means the same side. The sand and the platform was straight with one another, so it made the same distance from the depot; that is what he describes.

*Q.* Now, there was no other track on the south side of the track upon which Albanese stood, was there?

*A.* From the other side there were.

*Q.* No, on the south?

*A.* There were none.

*Q.* But on the other side there was a track?

*A.* Yes.

*Q.* Upon which the other trains ran to the depot at Broad street?

*A.* Yes.

Mr. Holmes—I think that is all, sir.

Mr. Trimble—I should like to ask the witness a question I neglected to ask.

Mr. Holmes—Ask it.

Re-direct examination.

*Q.* Were there any cars upon the tracks or switches  
10 to the north of this track whereon Albanese stood?

*A.* I don't know.

*Q.* I want to know if any rules or signals were given to the workmen there about the approach of trains?

Objected to.

The Court—You may ask him whether he knows of any being given.

*Q.* Does he know whether any rules or signals or instructions were given to the men about the approach of trains?

20 Mr. Holmes—By whom?

Mr. Trimble—By anyone.

Mr. Holmes—I object to this question; it is too general.

The Court—I will allow it.

Exception to defendant.

*A.* No, no one; everyone looked for himself.

Re-cross examination.

*Q.* Everyone looked out for himself there, eh?

*A.* Yes, sir; everyone looked for himself; if they kill  
30 us, they kill us; if not, why we were in a safe place every man looked for himself.

*Q.* You didn't get killed?

*A.* No, I am well.

*Q.* You looked out for yourself and got out of the way of trains when they came, didn't you?

*A.* Certainly.

Further re-direct examination.

Q. How old are you?

A. Forty-four years old.

*Dominic Didomato*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Q. Where does he live?

A. 35 Garside street.

Q. City of Newark?

A. Yes.

10

Q. How old is he?

A. Forty-six years old.

Q. Did he know Augustino Albanese in his lifetime?

A. I knew him while we were at work at the same place.

Q. Where was he working with Augustino Albanese?

A. On the track.

Q. What track and where?

A. With Mr. Burke, at the Valley road.

Q. (By Mr. Holmes.) Lehigh Valley?

20

A. Valley road.

Q. (Further direct.) Can he tell us near what street he was working?

A. Near the track where he was filling the bags with sand.

Q. I asked him if he could tell us near what street?

A. Mulberry street.

Q. Any other street there?

A. No.

Q. Now, what was he doing there?

30

A. I was carting sand on my shoulder; the deceased was filling up the bags.

Q. The bags that he was carting?

A. Yes.

Q. Now, did he see the accident?

A. Yes.

Q. Did he see the whole of the accident?

*A.* Yes.

*Q.* Now, where was he standing when he saw the accident?

*A.* I had just passed the track, and I heard the engine, then I turned around; when I turned around I seen Augustino was struck.

*Q.* Now, he says he had just passed the track; what track does he mean when he says had had just passed the track?

10 *A.* Why, it is three tracks going towards the station.

*Q.* Where was he carrying the sand to then?

*A.* On the platform, where they were making concrete.

*Q.* Now, where was that platform, on the same side as the sand, or some other side?

*A.* It was on the outside, the other side.

*Q.* Now, does he know how long this pile of sand was, about?

*A.* As big as the car is, railroad car.

20 *Q.* And how high was it, about?

*A.* As high as me.

*Q.* And where was Augustino standing when he left him, or when he saw him struck, rather?

*A.* In the middle of the pile.

*Q.* Now, whereabouts was he standing when he was struck, without reference to the middle of the sand, where was he as to north and south?

*A.* The northern side.

30 *Q.* Where was he standing with reference to north and south?

*A.* Just as I passed the three tracks.

*Q.* Yes, but where was Augustino standing when he was struck by the train, is what I want?

*A.* He was right in the middle of the pile; one foot on the track, and another foot was outside of the track.

*Q.* And what was he doing, if he knows?

*A.* He was gathering the sand.

*Q.* Did he see that?

*A.* Yes.

*Q.* What was the first thing that he heard of the train?

*A.* As I have the bag on my shoulder I heard the train whistle as it struck the man, and I turned around to see it, that is all.

*Q.* How many times did he hear the whistle?

*A.* Once, as it struck him.

*Q.* Did the train whistle before it struck the man?

Objected to as leading.

10

The Court—He may answer it.

*A.* No, sir.

*Q.* Was the bell rung?

*A.* No, sir.

*Q.* How fast was the train going when it struck Albanese; can he tell us how fast the train was going when it struck Albanese?

*A.* It was middling; it was at half speed.

Cross-examination by Mr. Holmes.

*Q.* You had a bag of sand on your shoulder, carrying it towards this platform?

*A.* Yes.

*Q.* And from what part of the sand pile was that taken?

*A.* In the middle.

*Q.* You carried that over to this platform, did you, on the southerly side?

*A.* Yes.

*Q.* Well to get over there didn't you go right through the middle of the sand pile?

30

*A.* No, sir.

*Q.* Went around the end of it?

*A.* Went across the tracks.

*Q.* Which track did you go across?

*A.* The northerly side.

*Q.* Went over to the northerly side?

*A.* Northerly side.

*Q.* Now, Albanese had filled all the bags, hadn't he?

*A.* Yes.

*Q.* And at the time he was struck he was not engaged in filling these bags?

*A.* No, sir.

*Q.* He was gathering the sand up off of the track, from between the rails?

*A.* Yes.

*Q.* And you say you think he had one foot outside,  
10 and one foot inside of the track?

*A.* Yes.

*Q.* And which way was he looking, to the south, or to the north, or to the west, or the east, which way?

*A.* Towards New York.

*Q.* How long had Albanese been at work there?

*A.* I don't know; we were not in the same gang all the time; we were moved on.

*Q.* But he had worked there all this day up to the time he was killed?

20 *A.* Yes.

*Q.* And filling sand-bags in this same way?

*A.* We done all kind of work.

*Q.* How long before he was killed there, on the day in question, was he filling bags?

*A.* He commenced at eleven o'clock.

*Q.* Out of this same sand pile, wasn't it?

*A.* Yes.

*Q.* And how late in the afternoon do you say it was that he was killed?

30 *A.* Between half past two and three o'clock.

*Q.* Now, during that time other trains had come out of the depot, hadn't they, on this same track?

*A.* It is the other track, not the track he was on.

*Q.* Not the track he was struck on?

*A.* No.

*Q.* Were not other trains frequently coming out of the depot between those hours that you mentioned?

*A.* They didn't pass that track; they passed the other track.

*Q.* What does he mean, the other track; there were only two tracks there, weren't there?

*A.* I mean the second from where he worked.

*Q.* Now, on that track, which way did they go; into the depot?

*A.* That same track was used going to New York, and returning from New York.

*Q.* Only had one track in use there? 10

*A.* There were two or three tracks we were carting all the material into.

*Q.* Yes, but so far as the passenger trains were concerned, they only used one track, didn't they?

*A.* Only one track.

*Q.* And that was the track upon which Mr. Albanese was, wasn't it?

*A.* Yes.

*Q.* And this was a passenger train which struck him, wasn't it? 20

*A.* This was a train that was transporting material, carting material.

*Q.* The train which killed Albanese was a passenger train, wasn't it?

*A.* No, sir; it wasn't.

*Q.* See if he is sure about that; he is mistaken entirely about that. The train which struck Albanese, ask him if it wasn't a passenger train?

*A.* It was the engine and one car, manœuvring.

*Q.* Wasn't there three cars? 30

*A.* It was an engine and one car.

*Q.* Wasn't there an engine and three cars in the train altogether?

*A.* I don't exactly remember.

*Q.* Well, now, is your recollection about the bell and the whistle as good as that?

*A.* Sure; I seen it.

*Q.* Well, now, were you on the lookout for this train; were you watching for it?

*A.* I was with the bag on my shoulder, and I heard the whistle when he had already struck the deceased.

*Q.* Well, had the train passed you when you heard the whistle?

*A.* Passed me.

*Q.* Had passed you?

*A.* Yes.

*Q.* So that you were then nearer the Broad Street station in Newark than Albanese was?

10 *A.* Yes.

*Q.* But the platform to which you were going to carry the sand was at Ward street, wasn't it?

*A.* I don't know the street.

*Q.* Well, it was near the street where the abutment was being made?

*A.* Yes.

*Q.* And you were walking towards that platform?

*A.* Yes.

*Q.* So your back was towards Albanese?

20 *A.* Yes.

*Q.* And you heard the whistle?

*A.* Yes, I heard the whistle when he got struck.

*Q.* And then you turned around?

*A.* Yes.

*Q.* And then you saw Albanese struck by the engine?

*A.* Yes.

*Q.* Now, was the sand pile between you and the engine?

*A.* I was going towards the station.

30 *Q.* He was going towards the station; what station; Broad street?

*A.* Yes.

*Q.* And where was this sand pile with reference to Ward street?

*A.* The pile of sand was in the middle of the work, where we work.

*Q.* Now, was the pile of sand toward the Broad street station from Ward street, west?

*A.* Yes, Broad street station.

*Q.* Wasn't the mixing platform nearer to Ward street than the sand pile?

*A.* The platform was further away from Ward street.

*Q.* Wasn't the platform right there where they were building the abutment, right on Ward street?

*A.* No.

*Q.* Further away, eh? Well, that is all.

Re-direct examination.

*Q.* How many mixing platforms were there there, 10  
does he know?

*A.* Five or six or seven.

*Q.* I ask him how many mixing platforms there were there; does he know?

*A.* A good many of them, five or six, four; all depends on how many they needed.

*Q.* I want to know how many were there; does he know, or doesn't he know?

The Court—Where?

Mr. Trimble—Within the neighborhood of this 20  
work.

The Court—Well, where? He has said five or six. Do you mean in the neighborhood of Ward street?

Mr. Trimble—Yes, sir; Ward and Mulberry.

The Court—Ask him how many.

*A.* Three in all.

*Q.* Well, now, where were they; can he describe?

*A.* One of these mixing platforms was behind the track, in the rear of the sand pile. 30

*Q.* Yes; that is one.

*A.* The other two were on the other side, where I carted the sand myself.

Re-cross examination.

*Q.* Two on the north side?

*A.* Yes.

Q. And this one which you were carting sand to?

A. Yes.

Q. So that you could walk from this sand pile where Albanese was, right across the track over to that mixing platform where you were carrying your sand to?

A. Yes.

*Antonio Corbo*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

10 Direct examination by Mr. Trimble.

Q. Where do you live?

A. 276 Orange street.

Q. What is your business?

A. Laborer.

Q. And how old are you?

A. Forty-four years old.

Q. Did you know Augustino Albanese in his lifetime?

A. Sure.

20 Q. Do you know where he was working on the 18th day of September, 1901?

A. Yes.

Q. Where?

A. Central Railroad.

Q. Whereabouts on the Central Railroad?

A. Below Mulberry street.

Q. And where was he working at that time?

A. I was thirty steps away further down than where he was.

30 Q. That is, you were working on the same job?

A. Yes.

Q. Who were you working for?

A. With another foreman.

Q. Who was the contractor?

Mr. Holmes—Does he know?

A. Mr. Burke.

Q. Now, did you see the accident that happened to Albanese?

A. No.

Q. You didn't see the accident, as I understand you?

Mr. Holmes—He says no.

Q. Now, did you see Albanese working there that day?

A. Yes, sir.

Q. Where was he working?

The Court—Is there any dispute about where he was working?

Mr. Trimble—No, sir, I don't think there is. 10

The Court—Then don't waste time on that.

Mr. Holmes—Working on this sand pile, and had been from eleven to three o'clock.

Q. Do you know what time of day this accident happened?

A. About quarter to three.

Q. What was Albanese doing when you saw him last?

The Court—What difference does that make?

Mr. Trimble—It is only cumulative evidence.

The Court—It is not that. What was he doing when he was struck? He did not see the accident. 20

Witnesses who saw him testified on that point.

Q. Did you see the train that hit Albanese?

A. I did not.

Q. Did you not see the train at all?

A. I did not.

Not cross-examined.

*John Armino*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Trimble. 30

Q. Where do you live?

A. 26 Drift street.

Q. And did you know Augustino Albanese in his lifetime?

A. Yes.

Q. Do you know where he worked in September, 1901?

*A.* Yes, sir.

*Q.* Where was it?

*A.* On the Central Railroad track.

*Q.* Whereabouts on the Central Railroad; does he know near what street?

*A.* Near Ward street.

*Q.* And were you employed there too?

*A.* No, sir.

*Q.* Did you see the accident?

10 *A.* Yes, sir.

*Q.* What were you doing there?

*A.* I was looking for work.

*Q.* And where were you standing when the accident happened?

*A.* I was on the northerly side, where they were mixing concrete.

*Q.* And did you see—was your attention called to Albanese before the accident?

*A.* No.

20 *Q.* What called your attention to the accident?

*A.* I heard hollering and I turned around.

*Q.* What did you hear?

*A.* I heard people hollering, and the boy was going under the train.

*Q.* Then what did you do when you heard the hollering?

*A.* I went over and see it.

*Q.* Then, I understand you did not actually see the locomotive strike the boy?

30 *A.* I did see it.

*Q.* Well, tell us what was the first thing you saw?

*A.* This is the first thing I saw.

*Q.* What was the first thing you saw of the accident?

*A.* I seen that he got struck; the engine struck him and carried him along about ten or fifteen steps.

*Q.* Did you see where Albanese stood and what he was doing just before the engine struck him?

*A.* He was gathering the sand in the middle of the track.

Q. Did you see him gathering the sand?

A. Yes, sir.

Q. Now, what was the next thing, after you saw him, that happened?

A. I seen that, when the train came along and struck him.

Q. What part of the train hit him?

A. The front part.

Q. Well, what part of the train, what was it composed of?

10

A. He was struck sideways of the engine.

Q. Can he tell us what kind of train it was—passenger, freight, or what?

A. I didn't go and see it; I couldn't read and write, so I couldn't take the number, or anything.

Q. What kind of train was it—what was it composed of?

A. A passenger train.

Q. Was there a locomotive on it?

A. Yes.

20

Q. Well, now, what was it, a car or locomotive, that struck Albanese?

A. The locomotive.

Q. Now, did he hear any whistle?

A. No, sir.

Q. Hear any bell rung?

A. I didn't hear anything.

Cross-examination by Mr. Holmes.

Q. Have you talked this case over with anybody?

A. I didn't talk with anyone.

30

Q. Not a soul; no one at all?

A. With no one.

Q. Haven't you been in the back room here all this last week with other witnesses, talking this case over?

A. I didn't go in there.

Q. Didn't go there at all?

A. No.

*Q.* You didn't tell anybody what you were going to testify to?

*A.* This is the truth, I didn't tell it to anyone.

*Q.* Even Mr. Trimble didn't know what you would swear to before he put you on the witness stand?

*A.* No.

*Q.* No; nor Mr. Kussy?

*A.* No.

*Q.* Nor the gentleman back there with glasses?

10 *A.* No, sir; with no one.

*Q.* You were not looking out for this train to come, were you, before this accident happened?

*A.* No; I was looking at the people that were working.

*Q.* And how far away—which direction were you from Albanese?

*A.* My back was towards Albanese.

*Q.* And you were on the north side of the track?

*A.* Yes.

20 *Q.* And was there anything between you and Albanese?

*A.* The sand was, where he worked—where Albanese was working.

*Q.* No, that is not what I asked you. Was there any sand pile between you and Albanese?

*A.* Yes.

*Q.* Well, then, you were not on the north side of the track, were you?

30 *A.* I was on this side (the interpreter describes north) and Albanese was on the other side (the interpreter describes south).

*Q.* Now, then, was the pile of sand which Albanese was shoveling, was that between him and Albanese?

*A.* No.

*Q.* Well, you were standing on the north, as I understand it. Now, was there anything between you and Albanese—any pile of material or anything?

*A.* It was the sand pile there; I could see Albanese very little.

Q. Was that the sand pile that Albanese was working at?

A. Yes.

Re-direct examination.

Q. Ask the witness if he knows who Mr. Kussy is?

A. No.

Re-cross examination.

Q. How did you come to be here; what brought you here?

A. I came.

10

Q. Were you subpoenaed?

A. I had a subpoena, and I came.

Q. Have you got it with you?

A. Yes.

Q. Have you got it there?

A. Yes.

Q. When was that served on you; how long ago, I mean?

A. Maybe ten days; I don't remember well.

Q. Now, haven't you been here every day this week? 20

A. Yes, every day.

Q. And you were here last week, Monday, Tuesday and Wednesday, weren't you?

A. Yes.

Q. Right here in the court-room?

A. Yes.

Adjourned for the day.

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NEWARK, N. J., January 15th, 1903.

Continued pursuant to adjournment.

Appearances as before noted.

30

*Molinaro Vincenzo*, a witness produced on behalf of the plaintiff, being duly sworn and examined through the interpreter, testified as follows:

Direct examination by Mr. Kussy.

*Q.* Where do you reside?

*A.* 9 Newark street, now.

*Q.* And what is your business?

*A.* Laborer.

*Q.* Where were you employed on the 18th of September, 1901?

*A.* The Central Railroad.

*Q.* And for whom were you working?

*A.* Mr. Burke.

10 *Q.* Were you acquainted with Augustino Albanese?

*A.* Sure.

*Q.* Where was he employed at that time?

*A.* He was working near the sand.

*Q.* Near what street was that?

*A.* This way, towards here, from the bridge.

*Q.* Does he know the name of the street?

*A.* I don't remember the name of the street; I think it is Ward street.

20 *Q.* Now, ask him whether he saw this accident on the 18th of September?

*A.* Sure.

*Q.* Where was Albanese working at that time; what was he doing?

*A.* He was working; he was filling the bags with sand.

*Q.* And from where did he gather the sand?

*A.* It was on this side.

The Interpreter—He means southerly.

30 *Q.* Where was he standing at the time this accident occurred?

*A.* He was in the middle of the sand pile.

*Q.* Ask him whether he saw the man struck by the train?

*A.* Sure.

*Q.* And at the time that the train struck him where was this man standing?

*A.* One foot in the track and the other foot in the sand outside the track.

*Q.* And what was he doing just before the train struck him?

*A.* He was shoveling the sand to put it on the pile.

*Q.* Could not the sand be shoveled onto that pile without standing on the track?

Objected to as calling for a conclusion from the witness.

The Court—I think there was evidence in that same line yesterday, Mr. Holmes; that the sand was shoveled from the end of the pile, where he did not have to stand on the track; in fact, was not on the track, stood away from it. 10

Mr. Trimble—One man testified to that; all the others testified to the contrary.

The Court—It is the same line.

Mr. Holmes—My objection to it is that it calls for a mere expression of opinion by this witness.

The Court—Not necessarily; what he knows, from what he sees. I will admit the question. I think it is competent.

Exception to defendant. 20

*A.* No; the pile was high, and he could not shovel from the outside of the track.

*Q.* Describe what you saw when the train approached Albanese?

Mr. Holmes—That is objectionable. It assumes that he saw the train approaching. He has not said so yet.

The Court—Proceed.

*A.* He was facing towards New York at the time, shoveling sand. 30

*Q.* And what happened then?

*A.* The train passed and caught him.

*Q.* What was the first notice that the witness had of the approach of the train?

*A.* I was facing towards New York.

*Q.* How then could he see the train?

Objected to.

Objection sustained.

*Q.* Ask the witness whether he heard any whistle blown, or bell rung, at the time, or just before the accident?

*A.* I didn't hear anything.

*Q.* Did he hear any whistle blown at all about that time?

The Court—He said he didn't hear any whistle.

*Mr. Kussy*—Before the accident; now, I am asking him whether, at the time of the accident, he  
10 heard any whistle.

The Court—Very well, proceed.

*A.* After he was struck with the front part of the engine, then the engine whistled.

Cross-examination by Mr. Holmes.

*Q.* Where were you standing?

*A.* I was on this side, towards the depot.

*Q.* How far from Ward street?

*A.* Twenty-six or twenty-seven steps.

*Q.* Now was the sand pile—were you on the south  
20 side of the track on which the train passed?

*A.* I was two or three steps away from the south side of the track.

*Q.* And you saw this over this sand pile, did you?

*A.* No, I could see right straight in front of me.

*Q.* Oh, you could see down along the sand pile from where you stood?

*A.* Yes, I could see straight.

*Q.* Now, this stuff, this pile that you call the sand pile, was nothing but soft sand, wasn't it?

30 *A.* Yes, it is sand.

*Q.* So that it would run right into the bags when shoveled in?

*A.* Yes; fill up the shovel, and put it in the bag.

*Q.* The pile itself, the edges of the pile, from the track, sloped up to the top, didn't they?

*A.* Yes.

*Q.* Now, it was not difficult for a man to have gone right up the pile of sand, was it?

*A.* Yes, but the sand would throw you down.

*Q.* Yes, but he could walk up this sand pile?

*A.* I don't know.

*Q.* Now, was Albanese shoveling sand from between the tracks when he saw him?

*A.* Yes.

*Q.* But there was very little sand in there, wasn't there?

*A.* There was some; any time he shoveled the sand why some of it went in the track. 10

*Q.* Now, where he filled these bags, when he was filling bags, where did he stand to fill the bags?

*A.* Near the track.

*Q.* Did not he stand at the end of the pile? Didn't he fill the bags at the end of the pile?

*A.* I couldn't tell; he might have been in the middle.

*Q.* Now, were you working on the track?

*A.* Yes.

*Q.* On this track; what were you doing?

*A.* Shoveling, making concrete. 20

*Q.* Did you hear this train coming?

*A.* No.

*Q.* Who told you to get out of the way?

*A.* I was two or three steps away from the track?

*Q.* What kind of a train was it?

*A.* A passenger train.

*Q.* How many cars?

*A.* Three or four, I can't tell exactly.

*Q.* Were you listening for this train to come?  
The Court—What difference does that make? 30

Mr. Holmes—On the question whether he heard any bell.

*Q.* Were you on the lookout for any train?

*A.* Yes, I was on the lookout; but the position that I was standing, it wasn't danger for me.

*Q.* So you were not paying much attention to it?

*A.* I wasn't afraid of it.

*Q.* You were in a safe place?

A. Yes, I was in a safe place.

Mr. Trimble—I neglected to ask Mr. Albanese yesterday certain questions which occurred to me afterwards, as to the health of his boy; whether he was defective in sight and hearing, and so on. I should like permission to ask him.

Mr. Holmes—We have no objections.

The Court—You may.

*Florio Albanese*, recalled for the plaintiff.

10 Direct examination by Mr. Trimble (through the Interpreter).

Q. Was your son defective in any of his senses, sight or hearing?

A. He was free; he was all well.

Q. What was the state of his health, and bodily condition?

The Court—He said he was all well.

Q. (By the Court)—Could he see all right, and hear all right?

20 A. Everything; nothing the matter with him.

Not cross-examined.

Plaintiff rests.

Defendant's counsel moves for nonsuit on the ground of contributory negligence on the part of the plaintiff. Also, that no negligence has been shown on the part of the defendant company. That the deceased took the risks and dangers attending his employment, which were there apparent. That there was no necessity, at the time he was struck, for the deceased to be where he was; that there is no neglect of duty shown on the part of the defendant; and that the allegations of the declaration are not proven.

30

(After argument.)

THE COURT—In my judgment it is quite apparent that the decision of this motion must turn entirely upon

the question whether or not the plaintiff's decedent was demonstratively guilty of contributory negligence; because the evidence of negligence on the part of the railroad company is complete, in my judgment.

Now, if the testimony had been to the effect that the railroad company usually gave adequate warning of the approach of its trains, and on this occasion failed to do that (in other words, failed in the duty which they owed to this decedent on that particular occasion), I should say that it was clearly within the case of *Harmer v. The Reed Apartment, &c., Co.*, decided by the Court of Errors at the last November term. But this is not the situation, as I understand the evidence in this case. The plaintiff has proven that during all of this work, that is, so far as the experience of the witnesses called covers that period, there had been an absolute and entire absence of any protection to the plaintiff's decedent, or to the other workmen, by this railroad company, or by anyone else. They had run their trains backward and forward there without any warning, or without doing anything to protect the plaintiff's decedent, or any of the others. Now, if that was so, even assuming that this deceased was a man of low intelligence, which has not been shown, still he knew enough to understand that his safety depended upon his own care, his own watchfulness; that he could not depend for protection at all either upon the railroad company or upon his own employer. In other words, that, so long as he was working in that dangerous place, his life was in constant jeopardy, unless he carefully used his eyes and ears to detect the approach of trains, which were running with more or less frequency backwards and forwards over the road at that point. He was run down by a train which could have been heard by him if he had been listening. It was heard by others. If he had not been standing with his back to the train he could have seen it. The proper use either of his powers of vision or of hearing would have informed him of the approach of

the train in ample time for him to avoid being struck by it. All that he had to do was to step off the track to the north to be in a place of safety.

His knowledge of the fact that no protection was being afforded to him by the railroad company or by his employer cast upon him a much greater measure of watchfulness than he would otherwise have been required to exercise. And his failure to discover the approach of this train was due to his failing to use, with  
 10 the care which the law requires, his eyes and his ears.

That being the view I have reached, there is no question to go to the jury.

Gentlemen of the jury, you are excused from the further consideration of this case.

Plaintiff's counsel prays exception to the ruling of the Court granting a nonsuit, and the same is allowed, and signed and sealed accordingly.

WM. S. GUMMERE,  
 C. J.

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EXHIBIT P I.

20

ESSEX COUNTY CIRCUIT COURT.

FLORIO ALBANESE

vs.

THE CENTRAL RAILROAD OF NEW  
 JERSEY.

} In Tort.  
 } Interrogatories.

*To John L. Conover, Esq., Attorney of the Defendant:*

SIR—Please take notice that the plaintiff in the above-  
 stated cause demands that within fifteen days from the  
 date of service hereof you give answers to the fol-  
 30 lowing interrogatories, to be made under oath, and that  
 you cause the same to be served upon said plaintiff  
 within the said time.

1. State whether the defendant, on the eighteenth day of September, nineteen hundred and one, was in the possession of a certain railroad, which extends from the city of Newark, through the county of Essex, to and through Hudson county to Jersey City, which said railroad was intersected and crossed in the city of Newark by a certain public highway of said city, known as Ward street.

2. State whether said defendant was, on said day last mentioned, engaged in operating, managing and using said railroad. 10

3. State whether said defendant had for a long time prior to said day last mentioned been engaged in operating, managing and using said railroad.

4. State whether said defendant was, on the day last aforesaid, possessed of certain cars and locomotive engines propelled by steam, which it was then and there using and running in the operation of said railroad.

5. State whether said locomotive engines and cars were, on said day, operated, run and managed by certain servants of the said defendant. 20

6. State whether said defendant was engaged in running passenger trains made up of certain of its engines and cars under the care of certain of its said servants from the city of Newark to the city of Jersey City on the said day last aforesaid.

7. State whether any other railroad company was engaged in running trains on the day last aforesaid, over said railroad.

8. State whether said defendant ran a passenger train, consisting of an engine and certain of its cars, under the care and direction of certain of its servants, over said railroad from the city of Newark to the city of Jersey City, and over and across said Ward street crossing, at or about the hour of three-thirty o'clock P. M., on the day last aforesaid. 30

9. State what the number of said locomotive was, and how many cars were attached thereto to form said train.

10. State the names of the engineer, fireman and conductor of said train.

11. State whether any report was made to said defendant of any person being injured by said train at or near the said Ward street crossing on said day.

12. If so, state when and by whom said report was made.

13. State the name of the person injured.

14. State whether the said defendant, on the day last  
10 aforesaid, was engaged in the work of elevating the tracks of said railroad at or near said Ward street.

15. Describe generally the nature of the work which was necessary for said work of elevation.

16. State how far the work of elevating the tracks had at that time progressed at or near said Ward street.

17. State whether said work was being done by contractors in whole or in part.

18. State the name of the firm who had charge of said work.

20 19. State whether the firm of Burke Brothers had a contract with the defendant to perform the whole or part of said work of elevation, and whether or not said contract is on file in the office of the Clerk of Essex county.

20. State what part, if the said firm contracted for a part of said work.

30 21. State whether any special rules and regulations had been made by the defendant to be observed by its engineers and conductors in the running of its said trains over said work during the progress thereof; and, if so, what said rules and regulations were when they were adopted, and whether they were in force on the day aforesaid.

JAMES M. TRIMBLE,  
*Att'y of Plt'ffs.*

EXHIBIT P 2.

ESSEX COUNTY CIRCUIT COURT.

FLORIO ALBANESE  vs.  THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY.	}	In Tort. Answers to Inter- rogatories.
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*To James M. Trimble, Esq., Attorney of Plaintiff:*

SIR—Please take notice, that the following are the answers of the Defendant to the interrogatories heretofore propounded by the plaintiff: 10

Answer to first interrogatory:

Yes.

Answer to second interrogatory:

Yes.

Answer to third interrogatory:

Yes.

Answer to fourth interrogatory:

Yes.

Answer to fifth interrogatory:

Yes. 20

Answer to sixth interrogatory:

Yes.

Answer to seventh interrogatory:

No.

Answer to eighth interrogatory:

Yes.

Answer to ninth interrogatory:

Locomotive No. 145, and three passenger cars.

Answer to tenth interrogatory:

James Doud, Engineer; Joseph McClelland, Fireman,  
 and George F. Trimmed, Conductor. 30

Answer to eleventh interrogatory:

Yes.

Answer to twelfth interrogatory:

By the Conductor.

Answer to thirteenth interrogatory:

Agastine Albanesse.

Answer to fourteenth interrogatory:

Yes.

Answer to fifteenth interrogatory:

The construction of abutments for the purpose of carrying bridges over streets, the construction of retaining walls on line of property of the defendant and the  
10 filling in and raising the surface of the earth within the lines of the said retaining walls, and the relaying of tracks.

Answer to sixteenth interrogatory:

Some of the tracks had been laid on the new elevation or nearly so; others not then laid, but the bridge abutments on Ward street sufficiently completed to put part of bridge in place to lay one track at least; filling partly done; retaining walls nearly completed.

Answer to seventeenth interrogatory:

20 Said work was partly done by contract and partly by the Company's own employes.

Answer to eighteenth interrogatory:

No firm had charge of the work; the defendant had that charge.

Answer to nineteenth interrogatory:

Burke Bros. had a contract to perform a part of the work; whether said contract was filed in the office of the Clerk of Essex county is not known.

Answer to twentieth interrogatory:

30 The construction of bridge abutments, retaining walls excavating and moving of the earth in connection with excavation.

Answer to twenty-first interrogatory:

The Defendant had not made any special rules and regulations to be observed by its engineers and conductors, except to designate what tracks should be used from time to time during the progress of the work.

JOHN L. CONOVER,

*Attorney of Defendant.*

STATE, COUNTY AND CITY OF NEW YORK, ss.

John L. Conover of full age being duly sworn according to law on his oath saith: that he is the General Attorney of the Defendant The Central Railroad Company of New Jersey; that as such attorney he is in charge of the legal business of said Company; that said business is of such a nature and is so conducted that deponent has personal knowledge of most of the facts embraced in the interrogatories to a greater extent than any other officer of the Company; that the facts set out in answers to first eight both inclusive and fourteenth to twentieth both inclusive and the statements made therein are true to deponent's personal knowledge; that the facts stated in answers nine to thirteen both inclusive and answer twenty-first, are stated upon information and belief after inquiry and he believes them to be true.

JOHN L. CONOVER.

Sworn and subscribed before me this 15th day of September, 1902.

WM. A. BARKALOW,  
*Master in Chancery of New Jersey.*

