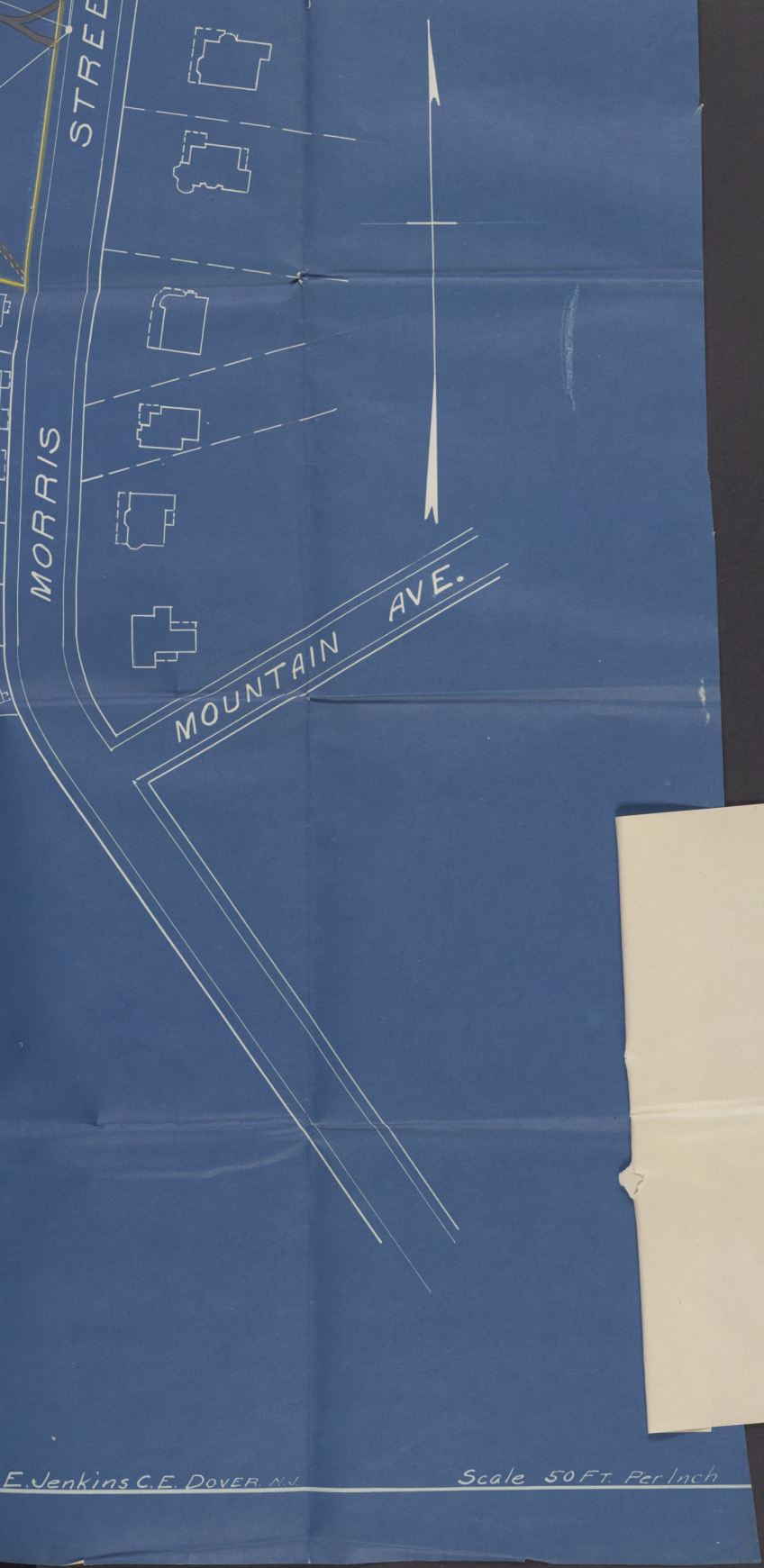

WARREN ST.
SUSSEX ST.
MORRIS ST.
ESSEX ST.
NORTH DICKERSON STREET
MORRIS AND ESSES RAILROAD
SOUTH DICKERSON
FREIGHT STAT.
FREIGHT YARD
MONMOUTH AVE
ELECTRIC SIGNAL MACHINE SHOP
OUTLET
POND
MORRIS STREET
FORD'S POND
MOUNTAIN AVE.
R.R. Co.
FARM
JOHN T. LAWRENCE
SECOND ST.
LAWRENCE
George E. Jenkins C.E. Dover N.J.
Scale 50 Ft. Per Inch


STREE
MORRIS
MOUNTAIN AVE.
E. Jenkins C.E. DOVER, N.J.
Scale 50 FT. Per Inch


Copy of Defendants Photo
showing locus in quo
Brown coloring indicates paths
Red star-Where plaintiff's
intestate was found
X1366
X1367


X1369
WBB.JR
X1370
WBB.JR

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WITNESSES

Plaintiff's:

EXHIBITS

New Jersey Court of Errors and Appeals

Summons and Complaint

Filed, December 27, 1919

State of New Jersey, ss:

To Walker D. Hines, Director General of Railroads, and Delaware, Lackwanna & Western Railroad Co.,

(Seal)

You Are Summoned to answer the annexed complaint of Louis Piraccini, Administrator *ad Prosequendum* of the Estate of Emelia Piraccini, deceased, in an action at law, in the Supreme Court.

And Take Notice that unless you file your answer to the complaint with the Clerk of the Supreme Court, at Trenton, Within Twenty Days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment will be entered against you.

Witness, William S. Gummere, Chief Justice, of the Supreme Court, at Trenton, this 22d day of December, A. D. 1919.

ENOCH L. JOHNSON,
Clerk.

Elmer W. Romine,
Attorney.

Complaint

NEW JERSEY SUPREME COURT

MORRIS COUNTY

LOUIS PIRACCINI, Administrator *ad Prosequendum* of the Estate of Emelia Piraccini, deceased,
Plaintiff,

vs.

WALKER D. HINES, Director General of Railroads, and DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
Defendants.

FIRST COUNT

1. On March 25th, 1919, the defendant, Delaware, Lackawanna & Western Railroad Company, was the owner of an unenclosed tract of land in the Town of Dover, in the County of Morris and State of New Jersey, situate on the northwesterly side of Morris Street, and adjoining the tracks of the said Railroad Company.

2. On said day, the said Delaware, Lackawanna & Western Railroad Company, by its agent or servant, caused to be made on said tract of land a fire which thereafter, because of the negligence of the defendant, its agent or servant, spread to the grass adjoining and thence to the public sidewalk along and adjoining said tract of land, on Morris Street.

3. On said day, the plaintff's intestate, being a child of the age of about five years, was lawfully upon the sidewalk on the westerly side of Morris Street, adjoining the said property of the Delaware, Lackawanna & Western Railroad Company.

4. By reason of the fire which had been started by the defendant, its agent or servant, spreading to the sidewalk, and because of the failure and negligence of the defendant to properly guard said fire, the clothes of plaintiff's intestate took fire and she was severely burned so that she died as a result thereof.

5. The said decedent left her surviving:
Louis Piraccini, Dover, New Jersey, father.
Adella Piraccini, Dover, New Jersey, mother.
Mary Piraccini, Dover, New Jersey, sister.

6. On November 25th, 1919, letters of administration *ad prosequendum* were granted upon the estate of said Emelia Piraccini by the Surrogate of the County of Morris, to plaintiff and were accepted by him.

7. This action was commenced within twenty-four calendar months after death of plaintiff's intestate.

By reason of the premises, plaintiff as administrator *ad prosequendum* as aforesaid, demands the sum of $10,000 as damages.

SECOND COUNT

1. On March 25th, 1919, the defendant, Delaware, Lackawanna & Western Railroad Co., was the owner of an unenclosed tract of land in the

Town of Dover, in the County of Morris and State of New Jersey, situate on the northwesterly side of Morris Street, and adjoining the tracks of the said Railroad Company.

2. On said day and for a long time prior thereto, the general public had been in the habit and custom of crossing and re-crossing said tract of land for the purpose of reaching Orchard Street and other places to the west of said tract and children had been in the habit and custom of using said property as a play ground to the knowledge of the defendants.

3. On said day, the said Delaware, Lackawanna & Western Railroad Company, by its agent or servant, caused and permitted to be made on said tract of land, a fire which thereafter, because of the negligence of the defendant, its agent or servant, spread to the grass adjoining on said tract of land.

4. On said day, the plaintiff's intestate, being a child of the age of about five years, was lawfully in and upon the tract of land aforesaid, at or near the sidewalk on the westerly side of Morris Street, in the Town of Dover.

5. By reason of the fire which had been started by the defendant, its agent or servant, spreading to that part of the tract where plaintiff's intestate was, and because defendant had failed and neglected to take proper precautions to guard said fire, the clothes of plaintiff's intestate took fire and she was severely burned so that she died as a result thereof.

6. The said decedent left her surviving—
Louis Piraccini, Dover, New Jersey, father.
Adella Piraccini, Dover, New Jersey, mother.
Mary Piraccini, Dover, New Jersey, sister.

7. On November 25th, 1919, letters of administration *ad prosequendum* were granted upon the estate of said Emelia Piraccini by the Surrogate of the County of Morris, to plaintiff and were accepted by him.

8. This action is commenced within twenty-four calendar months after death of plaintiff's intestate.

By reason of the premises, plaintiff as administrator *ad prosequendum*, as aforesaid, demands the sum of $10,000 as damages.

ELMER W. ROMINE,
Attorney for Plaintiff.

Answer

(Filed, December 27, 1919)

The defendants in the above entitled action, answering the allegations contained in the plaintiff's complaint, say:

1. They admit the allegations contained in the first paragraph of the plaintiff's complaint.

2. They deny the allegations contained in the second paragraph of the plaintiff's complaint.

3. They have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the third paragraph of the plaintiff's complaint.

4. They deny the allegations contained in the fourth paragraph of the plaintiff's complaint.

5. They have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the fifth and sixth paragraphs of the plaintiff's complaint.

AS TO THE SECOND COUNT:

1. These defendants admit the allegations contained in the first paragraph of the plaintiff's complaint.

2. These defendants deny the allegations contained in the second paragraph.

3. These defendants deny the allegations contained in the third paragraph.

4. These defendants deny the allegations contained in the fourth paragraph.

Answer

5. These defendants deny the allegations contained in the fifth paragraph.

6. These defendants deny the allegations contained in the sixth paragraph, seventh paragraph and eighth paragraph of the plaintiff's complaint.

AND FOR A SECOND AND SEPARATE DISTINCT DEFENSE:

The Delaware, Lackawanna and Western Railroad Company, one of the defendants in the above entitled action, says that it will, on, at, or before the trial of the above entitled action, move to dismiss the above entitled action as against it for and on the ground that at the time of the alleged action against it the said The Delaware, Lackwanna and Western Railroad Company was in the possession and under the management and control of its co-defendant, Walker D. Hines, Director General of Railroads, and that it had no agents or servants in its employ in the Town of Dover, County of Morris and State of New Jersey, who could lawfully be charged with the negligent acts alleged to have been committed by this defendant as set forth and described in the plaintiff's complaint.

FREDERIC B. SCOTT,
Attorney for Defendants.

Amended Complaint

(Filed, Jan. 3, 1920)

FIRST COUNT

1. On March 25th, 1919, the defendant, Delaware, Lackwanna & Western Railroad Company, was the owner of an unenclosed tract of land in the Town of Dover, in the County of Morris and State of New Jersey, situate on the northwesterly side of Morris Street, and adjoining the tracks of the said Railroad Company.

2. Defendant, Walter D. Hines, Director General of Railroads, is an officer acting for the United States of America, and the President thereof, and is exercising authority delegated to him by the President, in the possession, use, control and operation of the Railroads and system of transportation of the Delaware, Lackwanna & Western Railroad Co., taken over by the United States under the powers conferred upon him.

3. On said 25th day of March, 1919, said Walker D. Hines, Director General of Railroads, having possession, control and operation of the Delaware, Lackawanna & Western Railroad Co., as aforesaid, by his agent or servant and by the agent or servant acting for the Delaware, Lackawanna & Western Railroad Co., under his management, control and supervision of said Railroad, caused to be made on said tract of land aforesaid, a fire which thereafter, because of the negligence of the defendants as aforesaid, spread to the grass adjoining and thence to the public sidewalk along and adjoining said tract of land on Morris Street.

4. On said day, the plaintff's intestate, being a child of the age of about five years, was lawfully upon the sidewalk on the westerly side of Morris Street, adjoining the said property of the Delaware, Lackawanna & Western Railroad Co., which was then under the management and control of Walker D. Hines, Director General of Railroads as aforesaid.

5. By reason of the fire which had been started as aforesaid, spreading to the sidewalk and because of the failure and negligence of the defendant, Walker D. Hines, Director General of Railroads, having control and management of the Delaware, Lackwanna & Western Railroad Co., his servant or agent or the servant or agent acting for the Delaware, Lackawanna & Western Railroad Co., under his management, control and supervision of said Railroad, to properly guard said fire, the clothes of plaintiff's intestate took fire and she was severely burned so that she died as a result thereof.

6. The said decedent left her surviving:
Louis Piraccini, Dover, New Jersey, father.
Adella Piraccini, Dover, New Jersey, mother.
Mary Piraccini, Dover, New Jersey, sister.

7. On November 25th, 1919, letters of administration *ad prosequendum* were granted upon the estate of said Emelia Piraccini by the Surrogate of the County of Morris, to plaintiff and were accepted by him.

8. This action was commenced within twenty-four calendar months after death of plaintiff's intestate.

By reason of the premises, plaintiff as administrator *ad prosequendum* as aforesaid, demands the sum of $10,000 as damages.

SECOND COUNT

1. On March 25th, 1919, the defendant, Delaware, Lackawanna & Western Railroad Co., was the owner of an unenclosed tract of land in the Town of Dover, in the County of Morris and State of New Jersey, situate on the northwesterly side of Morris Street, and adjoining the tracks of said Railroad Co.

2. Defendant, Walker D. Hines, Director General of Railroads, is an officer acting for the United States of America, and the President thereof; and is exercising authority delegated to him by the President, in the possession, use, control and operation of the Railroads and system of transportation of the Delaware, Lackawanna & Western Railroad Company taken over by the United States under the powers conferred upon him.

3. On said day and for a long time prior thereto, the general public had been in the habit and custom of crossing and re-crossing said tract of land for the purpose of reaching Orchard Street, and other places to the west of said tract and children had been in the habit and custom of using said property as a play ground to the knowledge of the defendants.

4. On said 25th day of March, 1919, the said Walker D. Hines, Director General of Rialroads, having possession, control and operation of the

Delaware, Lackawanna & Western Railroad Co., as aforesaid, by his agent and servant and by the agent or servant acting for the Delaware, Lackawanna & Western Railroad Co., under his management, control and supervision of said Railroad, caused and permitted to be made on said tract of land a fire which thereafter, because of the negligence of the defendant aforesaid, spread to the grass adjoining on said tract of land.

5. On said day the plaintiff's intestate, being a child of the age of about five years, was lawfully in and upon the tract of land as aforesaid, at or near the sidewalk on the westerly side of Morris Street, in the Town of Dover, which said tract of land was under the control and management of Walker D. Hines, Director General of Railroads he having possession of the Delaware, Lackawanna & Western Railroad Co., as aforesaid.

6. By reason of the fire which had been started by the defendant, Walker D. Hines, Director General of Railroads, having control and management of the Delaware, Lackawanna & Western Railroad Co., his servant or agent or the servant or agent acting for the Delaware, Lackawanna & Western Railroad Co., under his management, control and supervision of said Railroad, spreading to that part of the tract where plaintiff's intestate was, and because said defendant failed and neglected to take proper precautions to guard said fire, the clothes of plaintiff's intestate took fire and she was severely burned so that she died as a result thereof.

7. The said decedent left her surviving:
Louis Piraccini, Dover, New Jersey, father.
Adella Piraccini, Dover, New Jersey, mother.
Mary Piraccini, Dover, New Jersey, sister.

8. On November 25th, 1919, letters of administration *ad prosequendum* were granted upon the estate of said Emilia Piraccini by the Surrogate of the County of Morris, to plaintiff and were accepted by him.

9. This action is commenced within twenty-four calendar months after death of plaintiff's intestate.

By reason of the premises, plaintiff as administrator *ad prosequendum*, as aforesaid, demands the sum of $10,000 as damages.

ELMER W. ROMINE,
Attorney for Plaintiff.

Answer to Amended Complaint

(Filed Feb. 9, 1920)

The above defendants answering the amended complaint filed in the above entitled cause, say:

AS TO THE FIRST COUNT:

1. They admit the allegations contained in the first paragraph of said count.

2. They admit the allegations contained in the second paragraph of said count.

3. They admit the allegations contained in the third paragraph of said count, to wit: that "on said twenty-fifth day of March, 1919, said Walker D. Hines, Director General of Railroads, having possession, control and operation of The Delaware, Lackawanna and Western Railroad Company, as aforesaid, by his agent or servant * * * caused to be made on said tract of land aforesaid a fire," but these defendants deny the balance and remainder of the allegations contained in the said paragraph.

4. These defendants have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the fourth paragraph of said count.

5. These defendants deny the allegations contained in the fifth paragraph of said count.

6. These defendants have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the sixth, seventh and eighth paragraphs of said count.

AS TO THE SECOND COUNT:

1. These defendants admit the allegations contained in the first and second paragraphs of said count.

2. These defendants deny the allegations contained in the third paragraph of said count.

3. These defendants admit the allegations contained in the fourth paragraph of said count that "on the said twenty-fifth day of March, 1919, the said Walker D. Hines, Director General of

Railroads, having possession, control and operation of The Delaware, Lackwanna and Western Railroad Company, as aforesaid, by his agent and servant * * * caused and permitted to be made on said tract of land a fire," but these defendants deny the balance and remainder of the allegations contained in said paragraph.

4. These defendants deny the allegations contained in the fifth and sixth paragraphs of the said count.

5. These defendants deny the allegations contained in the seventh, eighth and ninth paragraphs of said count.

AND FOR A SEPARATE AND DISTINCT DEFENSE:

To the allegations contained in the second count of the plaintiff's amended complaint, these defendants say that the above plaintiff should not have or maintain his action against them because plaintiff's decedent at the time of the alleged injuries complained of in the plaintiff's complaint was unlawfully upon the properties of The Delaware, Lackawanna and Western Railroad Company, which were in possession and under the control of Walker D. Hines, Director General of Railroads, and that the injuries inflicted upon the plaintiff's decedent were not wilfully or maliciously committed, if at all.

WHEREFORE, these defendants pray that the above entitled action may be dismissed as against them with their taxed costs in the premises.

FREDERIC B. SCOTT,
Attorney for Defendants.

Stipulation

(Filed Feb. 17, 1920)

It is hereby STIPULATED and agreed by and between the Attorneys of the respective parties hereto, that the complaint of the plaintiff may be amended so as to include a third count as follows:

THIRD COUNT

1. On March 25th, 1919, the defendant Delaware, Lackawanna & Western Railroad Co., was the owner of an unenclosed tract of land in the Town of Dover, in the County of Morris and State of New Jersey, situate on the northwesterly side of Morris Street and adjoining the tracks of the said Railroad Company.

2. That running through said tract of land from a point at Morris Street, near the Southeasterly corner of the land to the westerly end thereof, is a path or roadway which has been used by the general public continuously and without interruption, to pass and re-pass over said tract of land, as a thoroughfare for over twenty years last past.

3. The general public have also, without interruption and for a period of over twenty years, crossed and re-crossed the lands herein referred to and particularly from the northerly side of Morris Street to the right of way above mentioned, and have also used a certain path from said right of way running northerly between the head of a small pond on said tract and a brick build-

ing known as the signal repair shop, in reaching the street known as Orchard Street.

4. On said 25th day of March, 1919, the said Delaware, Lackawanna & Western Railroad Co., or the servants or agents of Walker D. Hines, Director General of Railroads, having charge of the Delaware, Lackawanna & Western Railroad Co., caused or permitted to be made on the aforesaid tract of land a fire, which thereafter, because of the negligence and carelessness of the defendants or either of them, their agents and servants, spread to the grass adjoining on said tract of land and particularly to that portion used by the general public adjoining said right of way herein mentioned, and between the same and the northerly side of Morris Street.

5. On said day the plaintiff's intestate, being a child of the age of about five years, was lawfully in and upon the said tract of land aforesaid, at or near the right of way herein mentioned.

6. By reason of the fire which had been started by the defendants aforesaid, their agents or servants, spreading to that part of the tract where plaintiff's intestate was, and because defendants had failed and neglected to take proper precautions to guard said fire, the clothes of the plaintiff's intestate took fire and she was severely burned so that she died as a result thereof.

7. The said decedent left her surviving:
Louis Piraccini, Dover, New Jersey, father.
Adella Piraccini, Dover, New Jersey, mother.
Mary Piraccini, Dover, New Jersey, sister.

8. On November 25th, 1919, letters of administration *ad prosequendum* were granted upon the estate of said Emelia Piraccini by the Surrogate of the County of Morris, to plaintiff and were accepted by him.

9. This action is commenced within twenty-four calendar months after the death of plaintiff's intestate.

By reason of the premises, plaintiff as administrator *ad prosequendum*, as aforesaid, demands the sum of $10,000.00 as damages.

ELMER W. ROMINE,
Attorney for Plaintiff.
FREDERIC B. SCOTT,
Attorney for Defendants.

Stipulation

(Filed Feb. 27, 1920)

It Is Hereby Stipulated by and between the attorneys of the respective parties that the following answer to the third count of the amended complaint be filed with the Court and considered as the answer of the above defendant to said third count of said amended complaint:

"AS TO THE THIRD COUNT:

1. The defendants admit the allegations contained in the first paragraph of the third count.

2. The defendants deny the allegations contained in the second paragraph of said count.

Stipulation

3. The defendants deny the allegations contained in the third pargraph of said count.

4. The defendants deny the allegations contained in the fourth paragraph of said count.

5. The defendants deny the allegations contained in the fifth paragraph of said count.

6. The defendants deny the allegations contained in the sixth paragraph of said count.

7. Defendants have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the seventh paragraph of said count.

8. Defendants have no knowledge or information sufficient to form a belief so as to answer the allegations contained in the eighth paragraph of said count.

And the said defendants, for a separate and distinct defense to the allegations contained in the third count, re-allege their separate and distinct defense set forth in their answer to the amended complaint filed in this cause, the same as if fully herein set forth.

WHEREFORE, these defendants pray that the above entitled action may be dismissed as against them, with their taxed costs in the premises."

ELMER W. ROMINE,
Attorney of Plaintiff.
FREDERIC B. SCOTT,
Attorney of Defendants.

Testimony

MORRIS COUNTY SUPREME COURT

LOUIS PIRACCINI, Administrator *ad Prosequendum* of the Estate of Amelia Piraccini, Plaintiff, vs. WALKER D. HINES, Director General of Railroads, and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law.

Morristown, N. J., February 20, 1920.

Before HON. WILLARD W. CUTLER, Judge, and a jury.

For the Plaintiff, Elmer W. Romine, Esq.
For the Defendant, Frederic B. Scott, Esq.

The jury was empanelled, accepted and sworn.

Mr. Scott: May it please the Court, at this time, after drawing my answer in the case, I find that the title to the property in question, involved in the suit, the paper title, is in the Morris and Essex Railroad Company; but for the purpose of this trial I am desirous of admitting that the title of the property is in the Delaware, Lackawanna & Western Railroad Company. Your

Honor recognizes the lease between the Morris & Essex—

The Court: Yes. I do not suppose the plaintiff makes any objection to that?

Mr. Romine: Oh, no.

Mr. Romine opened the case to the jury on behalf of the plaintiff.

Mr. Scott opened the case to the jury on behalf of the defendant.

GEORGE D. JENKINS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Romine: I desire to offer at this time, if your Honor please, the letters of administration granted to the plaintiff in this case.

The Court: Let it be marked.

Marked Exhibit P-1.

Direct-examination by Mr. Romine:

Q. Mr. Jenkins, what is your business? A. I am a civil engineer.

Q. And how long have you been a civil engineer? A. Since 1883.

Q. And you have been practicing where? A. In Dover, New Jersey.

Q. Did you make a map of the property of the Lackawanna Railroad Company adjoining Morris Street in Dover? A. Yes, sir.

Q. And the map that is pinned in the chart here, is that the map that you made? A. Yes, sir.

George D. Jenkins—Direct

Q. And was that made from actual survey? A. Yes, sir.

Q. Will you describe the map to us? A. The map represents the portion of land in Dover and its immediate vicinity of the freight yard lot or what is also known as the Ford Pond lot, the property of the Morris & Essex Railroad Company, and on this map I have indicated the outlines of the property with a coloring of dark red crayon and the outlines of the pond are indicated by blue crayon, and the outlet from the pond down to the storm sewer that carries it down Morris Street into the Rockaway River, and also the blow-off pipe and the by-pass that drains the pond when the pond is empty. There is also shown upon the map a thoroughfare going from Morris Street just south of the railroad crossing, crossing the property of the Lackawanna, or of the Morris & Essex Railroad Company, and also the property of John T. Lawrence, and the inlet brook to Ford's Pond to the junction of Second Street and Academy Street; also, indicates the adjoining neighborhood of Morris Street to the east of Ford's Pond, of Mountain Avenue, a street going off from Morris Street; also, Monmouth Avenue, South Dickerson Street and North Dickerson Street, and the adjoining streets of Warren, Morris, Sussex and Essex, as well as the main railroad tracks and the switch yard and the three tracks butting into Morris Street upon which are several cars that are used by the painters.

Q. Is the map shown to a scale? A. Yes, sir; fifty feet the inch.

Q. And can you indicate where Blackwell

Street would be, that is, the main thoroughfare where the trolley tracks are, just so we may know where this property is located? A. Yes, sir. Blackwell Street runs parallel with North Dickerson Street, and 275 feet north from it.

Q. In other words—A. So that it would be indicated about where that black line is (indicating).

Q. It is to the right of the map, but not indicated on the map? A. Yes, sir; to the right of the map, but not indicated.

Q. Now, have you indicated a school house that is to the south of Ford's Pond? A. I have indicated the location of the lot. The school building would come off of the map, being somewhat further south from Academy Street; but the lot is indicated on the map.

Q. You have indicated on the map a portion of the property of the defendant in this case as bordering on Morris Street? A. Yes, sir.

Q. Can you tell us whether any portion of that property adjoining Morris Street is fenced? A. There is a guard fence along part way up Morris ris Street from where the pathway joins Morris Street for a distance, perhaps, of 300 feet in that neighborhood, and then it is open the rest of the way on the property.

Q. So that there is nothing to separate the land in the extreme southerly portion as joining on Morris Street from the street itself? A. No, sir.

Q. The thoroughfare that you have mentioned as coming into Morris Street, is there any gate or fence there, or is that open? A. That is open.

Q. And is there any obstruction or fence from that point up to the end where it joins Academy Street? A. No, sir.

Q. How long have you resided in Dover? A. I have resided in Dover as a citizen of Dover since 1894.

Q. And how long have you been familiar with this particular property? A. Oh, since I was a small boy.

Q. And have you ever had occasion to use the pathway that you have mentioned and indicated on the map? A. Yes, sir; many times.

Q. And when did you first begin to use that path? A. Well, in about at the time that I began my professional work in Dover, in 1883, it was the thoroughfare going from Morris Street to the section of Dover to the southwest.

Q. And how frequently have you used that pathway since 1883? A. Oh, well, continuously, as I had occasion to.

Q. Well, how frequently during a week or month? A. Oh, sometimes, perchance, it would be every day—

Q. Yes. A. —if my work should be in that section of the —of the town.

Q. And during recent years, have you lived in that vicinity? A. Yes, I live on Morris Street.

Q. Yes. A. Just a little bit to the south of this section of the map, so I pass by it every day.

Q. And you have passed by that every day for a period of how long? A. Well, I have lived on Morris Street since 1903, and passed that every day in that time.

Q. And during that period of time you have how frequently during a month or a year used this particular pathway? A. Well, I couldn't specify the number of times, but anywhere from

thirty to fifty, and perhaps a hundred times a year.

Q. Yes. A. As my duties would be called in that part of the town.

Q. Has that roadway ever been fenced off or blocked off during your knowledge—A. No, sir.

Q. —of that path being there? A. No, sir.

Q. Can you tell us the people that use that, whether they are adults or children? Q. They are both, both adults and children, but since the south side—the building of the south side school, it has been the thoroughfare for the children, for the reason that they escape the climb from Morris Street up to Byram Avenue, where they would have to go down Byram Avenue to Second Street and then down Second Street to Academy, and then along Academy to the school; so that it cuts off a long distance for the children, and also cuts off a great deal in the line of the grade.

Q. In mentioning the south side school, is that the school to which you referred as being located just off of the upper left-hand corner of the map? A. Yes, sir, that—this—no, that is the name that it is known by, as the south side school.

Q. Now, with reference to the triangular piece of land between the thoroughfare and Morris Street? A. Yes, sir.

Q. Are there any defined paths on that portion of the land? A. Yes, sir; there are.

Q. And you have indicated something on the map. Can you tell us what that is (indicating)? A. Yes, sir, that is a foot-path that is used by the people who have occasion to make a short-cut to Orchard Street, or to Warren Street, and

is open to public use, and a bridge or planking is across the outlet of the stream here, maintained there for the passage along the dam over to Orchard Street.

Q. And with reference to the other portion of the land, the triangular portion, you say there are other paths there? A. Yes, sir.

Q. And they lead from where to where? A. Well, they all lead from along Morris Street out toward the pond down here (indicating). That pond is used for—

Q. Who have you observed using that? A. I beg your pardon.

Q. Who have you observed using that portion of the land? A. Well, Ford's Pond is a sort of recreation pond; in the winter time they allow it to be filled and it is used for skating, and the children all go down there to skate and they go over these paths to get down to the pond, as well as people going across a short cut to the other sections of the town to the west as their business or other engagements might call them.

Q. With reference to the spring time or the summer time, have you observed anyone using the land? A. Yes, sir.

Q. The triangular portion? A. Yes, sir.

Q. Who? A. Well, people use it for—well, I see people very frequently use the grassed portion here to—for recreation the summer time under the shade trees there, and also workmen use it for—well, in the spring of the year you will often see men out there beating carpets taken from the houses along Morris Street, and taken out on that grass plot cleaning the carpets.

Q. Have you ever observed any children? A. Yes, sir.

Q. During the spring time and the summer time? A. Yes, sir; both.

Q. What would they be doing there? A. Well,—

Mr. Scott: I object to what children were doing there as immaterial. We haven't in our State the doctrine of playgrounds like they have in the State of Pennsylvania. There is no obligation on the part of the defendant or a duty cast upon it, merely because children play around on some grounds, to especially watch and guard. I object to any continuation of evidence along the line now interrogated about.

The Court: Well, why do you think it is competent as far as the playground is concerned?

Mr. Romine: Well, I am not offering it for the purpose of showing that they didn't maintain a playground there. I am only offering it for the purpose of showing what it was used for, and to show what children did use it for without objection It has already been shown that they used it to go from the right of way to Morris Street. I merely want to show that they have been using it, as a preliminary to the main part of my case, that if this fire was started there it was reasonable to be anticipated on the part of the defendants that children having used that for various purposes, that they were chargeable with the duty of guarding it, the fire, the original fire.

The Court: Well, do you think because a child played on the lot you are bound to take more than ordinary care?

Mr. Romine: Well, I offer it for the purpose of showing that the child—of course, we do not know whether the child crossed that portion of the land or not the child was down near the pathway which has been in use for a great many more years than twenty years as has been shown, but I want to offer this evidence for the purpose of showing that if there was any possibility of the child having crossed the land to reach that main thoroughfare, that the child was not a trespasser, but was there as a matter of right, because other children had been permitted for a great many years to cross and re-cross the land and use it for various purposes.

The Court: Well, we will take the evidence: if it isn't competent, I will strike it out.

Mr. Romine: Read the last question, Mr. Stenographer.

Mr. Scott: Subject to my objection?

The Court: Yes, subject to your objection.

(Question read by the stenographer.)

Q. Referring to the children, Mr. Jenkins. A. Well, they used those paths and the main thoroughfare there for the purpose of going to and there.

from school; that's what it—what they are principally there, when I have noticed the children

Q. Well, aside from using the paths and going

to and from, have you seen any of the children linger and play there? A. Oh, yes.

Mr. Scott: I object to Mr. Romine leading the witness.

The Court: Yes, the question is objectionable as leading.

Mr. Romine: I will withdraw it if it is objectionable.

Q. Aside from the use of the land, the triangular portion, in going to and from Morris Street to the pathway, have you observed the children using it for any other purpose? A. Yes, sir.

Q. What? A. As a place of recreation.

Q. Now, can you tell us, Mr. Jenkins, so that we won't have to measure off the distance, the distance from the southeasterly corner of the land where it joins Morris Street—

The Court: Wait a minute, Mr. Romine.

Q. Now, Mr. Jenkins, will you tell us the distance from the southeasterly corner of the land where it joins Morris Street down to the end, as you have indicated it on the map, near the railroad track? A. (Referring) about 425 feet.

Mr. Scott: Where was that point from, Mr. Jenkins?

The Witness: From the extreme southeast corner, the junction of the path.

Q. Now, can you tell us what the distance would be from the westerly side line of Morris Street down to the pathway at a point opposite the signal repair shop? A. (Referring) 90 feet.

Q. And from the westerly side of the pathway to the signal repair shop? A. From the nearest point, it is 35 feet; from the farthest point it is 60.

Q. Now, from Morris Street at a point opposite Monmouth Avenue, can you tell us what the distance is to the farthest house indicated on the map? A. Four hundred feet.

Q. And from the extreme northerly point of the land where it joins the pathway to a point on the pathway about opposite the signal repair shop, can you tell us the distance? A. Two hundred fifty feet along the pathway.

Q. Now, can you describe to us the height of the building known as the signal repair shop? A. The height of it I would estimate was 20 feet, or more. It was originally used as a round-house, so it has considerable height because it had to take care of the locomotives than ran in and out of it.

Q. And can you tell us what the character of the ground is around the westerly, southerly and easterly side of the signal repair shop? A. The westerly, southerly and easterly side are in grass.

Q. And do you recall how it was around March 26th and 25th, 1919? A. Not at that particular date. It has always been the same.

Q. That is, year in and year out? A. Yes, sir.

Q. In the springtime it is usually covered with grass? A. Yes, sir.

Q. And how far does that grass extend according to your recollection on the easterly side of the signal repair shop, how near the stream of water? A. Well, it extends from the building out to the by-pass and then between the by-pass and the main outlet, it is in grass again, and that extends pretty well out toward the painters' cars, although there is a pathway that extends from—not shown on this map—that extends from here (indicating)

—that is, at the junction with—of the bend across to the north end of the building where the entrance to the building is, and that used as a passageway to and from that building.

Q. And does that cross to the westerly side of the right of way or pathway, and the stream of water join right up to the pathway? A. Yes, sir.

Q. What is the character of the ground between Morris Street and the pathway? A. It is a terrace, sloping ground, quite steep, from Morris Street to the pathway, which is about at the base of the terrace.

Q. And can you tell us the character of the ground, that is, as to whether there is grass or not? A. Yes, sir; that is sodded.

Q. And can you give us an idea whether Morris Street, that is, how much higher Morris Street is at that point than the pathway opposite the signal repair shop? A. It varies. At the lower end, the north end, it is perhaps eight or ten feet, maybe twelve feet, below Morris Street; and at this northeast corner it is fully thirty to forty feet. Morris Street is set on a grade of ten percent, ten feet to a hundred, so it goes up pretty fast.

Q. You have indicated between the signal repair shop and the head of the pond in dotted lines, something; what is that, Mr. Jenkins? A. It is a foot path.

Q. Well, with reference to the point right opposite the signal repair shop and continuing on over to Orchard Street? A. Yes, that represents a foot path that is used in traveling from Morris Street to Orchard Street.

Q. And do you know how long that has been in existence? A. As long as I remember anything about the property.

Q. Well, is it as long as the other path has been — A. Yes, sir.

Q. —located there. Did you ever have occasion to stand on the westerly side of the signal repair shop? A. The westerly side?

Q. Yes. A. Yes, sir.

Q. And can you tell us whether it would be possible to look over and see the pathway? A. No, sir; not when you are on the westerly side.

Q. And what obstructs your view? A. Why, the—the building.

Q. The height of the building? A. The height of the building.

Mr. Romine: That is all.

CROSS-EXAMINATION by Mr. Scott:

Q. When did you make the survey for this map, Mr. Jenkins? A. A week ago.

Q. Sir? A. A week ago.

Q. Was it an actual survey? A. Yes, sir.

Q. On the ground? A. Yes, sir.

Q. And you went on there without any permission of the railroad company, or anybody? A. Yes, sir.

Q. Just on your own initiative? A. Yes, sir.

Q. You knew it was private property? A. I knew it was railroad property.

Q. You knew it was private property? A. Yes, sir.

Q. There is no difference to a railroad's owning property and anybody else owning property, is there? They are both private property so far as outsiders are concerned? A. I presume so; yes, sir.

Q. And you knew that at the time? A. Yes, sir.

Q. And that was only a quibble on your part with respect to knowing it was railroad property as distinguished from private property? A. I didn't intend to give any such impression as a quibble.

Q. Well, that is what it was, was it not? A. I do not think so.

Q. I say, you knew it was private property? A. Yes, sir; and I knew it was railroad property.

Q. And no difference between railroad property and any other private property, privately owned property? A. Perhaps not.

Q. You say your map was an exact representation of the conditions that were existent at the time you made the survey? A. Yes, sir, I made the—

Q. All the paths and everything? A. Yes, sir.

Q. That were on the property. And yet you have told us just a few minutes ago that there was some paths up to the shop itself that weren't shown on the map; why didn't you show those on the map? A. Well, that is a matter that I should have put on.

Q. Is there anything else that you should have put on? A. I think that that covers completely the conditions that are there.

Q. When you made the map, did you receive any particular instructions as to what you were to show up on the map? A. Yes, sir.

Q. And what were those instructions? A. I was to show the building that I found, upon that map, and to show the main thorough fare or path-way across the property.

Q. Now, this main thoroughfare, as you call it, that is a short-cut from the point, the points where

you have indicated to the other points? A. Yes, sir.

Q. Used for the convenience of people going in the directions of the paths indicated? A. Yes, sir.

Q. And it isn't laid out in any particular way; it is wider in some places and narrower in other places? A. Yes, sir.

Q. Trodden down by the feet of the people as they pass, so it makes it look like a pathway? A. Well, this—along the—along the—this line, it has evidently been cut into the bank, because it is on the side hill and the pathway is level across.

Q. The pathway itself is level? A. Yes, sir; so that at some time it must have been cut into the bank and the dirt thrown to the west so as to form the level pathway.

Q. That is nothing you know of your own personal knowledge? A. As I observe it; it is to be seen there now.

Q. I say, it is not known to you from your personal knowledge? A. What is not known?

Q. As to how that condition arose? A. No, sir. I only make that from inference.

Q. That is your inference? A. Yes, sir.

Q. Now, with respect to the fence: You spoke about a guard fence? A. Yes, sir.

Q. And you indicated that as running from—down at what corner of the map— A. That runs—

Q. —would that be? A. —from near where the pathway joins Morris Street.

Q. And it goes up some, how many feet? A. I should judge about 300 feet.

Q. I see. A. Yes, sir.

Q. And why do you call that a guard fence? A. Because it is a guard fence.

Q. Well, I want to know why you call it a guard fence. I am not only pretending ignorance, but I am ignorant. A. Yes, sir.

Q. With respect to why you call it a guard fence? A. Yes, sir.

Q. What is specially needful there with respect to having a guard fence at that point? A. Because the —the path is—or the street is higher than the ground.

Q. You mean Morris Street? A. On the west side of Morris Street, there extends a stone wall from about opposite the end of the switches all the way up the street into the—the wall runs into the natural grade of the ground at this point (indicating). And, consequently, this pathway has to be guarded for pedestrians, and the railroad company have constructed there a three-rail pipe guard fence.

Q. I see? A. With iron posts.

Q. And where that stops going up, up Morris Street— A. Yes, sir.

Q. Then the property, the private property of the railroad company, runs practically level? A. Yes, sir; it joins the natural grade of the ground.

Q. Or the natural grade as you call it? A. Yes, sir; and the grass comes right up to the wall.

Q. No, that ten percent grade of the street there— A. Yes, sir.

Q. Running up ten feet in a hundred feet? A. Yes, sir.

Q. Where does that start, on Morris Street? A. It starts probably about opposite South Dickerson.

Q. About opposite South Dickerson Street? A. Yes, sir.

Q. And it proceeds from— A. From—

Q. —that point and goes up Morris Street? A. Goes up Morris Street to beyond Monmouth Avenue, when it strikes another very flat grade.

Q. I see. Now, these children—will you take a seat, Mr. Jenkins—these children that you have seen there on what they call that triangular piece of ground adjoining Morris Street, were just playing at no well-defined parts of that triangular piece? A. No, they were playing.

Q. Just like children, wherever any ground is unfenced? A. Yes, sir.

Q. Any property is unfenced? A. Yes, sir.

Q. You have been a resident of Dover, I take it, for some time, and would be familiar with the conditions up there if you saw the photographs of those places? A. Yes, sir.

Q. I will show you a photograph and ask you if that correctly represents the conditions as they were in March 1919, outside of the matter of vegetation? A. (Referring) Yes, sir.

Q. Such as foliage and like that? A. Yes, sir; that represents conditions.

Q. Correctly? A. Correct conditions; yes, sir.

Q. And I show you another photograph and ask you if that correctly represents the conditions with respect to the property in question, that it depicts as it was in March, 1919, aside from the condition of foliage? A. (Referring) Yes, sir.

Mr. Scott: And I would like to have these photographs marked for identification.

The Court: You may so have them marked.

Marked Exhibits D-1 and D-2 for identification.

Q. Now, looking at this photograph D-1 for identification, I call your attention to a telegraph pole that appears to be in line with the signal repair shop, and I ask you if you can indicate where that telegraph pole is on your map? A. Yes, sir; right there (indicating).

Q. So that you marked the pole yourself when you— A. I took it up on the ground; it is there, you see; here is the path going through here (indicating); it is just a little above the path.

Q. And that is the pole? A. That is the pole (indicating).

Q. Now, about how far is that pole from this what you call thoroughfare to Morris Street? A. Just ten feet.

Q. The nearest line? A. Just ten feet.

Q. And how wide is the thoroughfare at that point? A. From ten to twelve.

Q. And how far is the nearest line of the thoroughfare to what you call the pond outlet? A. Fifteen feet.

Q. And then the outlet at that point is how wide? A. From eight to ten feet wide; that varies a little.

Q. And then one more question: I noticed that beyond the pond outlet you have indicated something in pencil or marking; will you tell us what that is? A. It represents the top of the embankment.

Q. The top of the embankment? A. Yes, sir.

Q. Well now, how far is it from the nearest edge of the pond outlet to the top of the embankment? A. Ten feet.

Q. On your map, Mr. Jenkins, I notice what appears to be some railroad tracks with what apparently also appears to be some cars on it? A. Yes, sir.

Q. Will you tell the jury what those tracks are? A. They are standard railroad tracks that run back to dead ends close to the—near the face of this wall on Morris Street.

Q. Those what you call the painters' tracks? A. Yes, sir; and on that day I made the survey were four cars on one side and two on the other, and they are marked—

Q. Painters' cars? A. Yes.

Mr. Scott: Have you any objection marking the—

Mr. Romine: No, none at all.

Q. Would you mind indicating that in pencil, the painters' cars? A. (Marking map with pencil).

Q. Now, Mr. Jenkins, on that map crossing that pond outlet, as I recollect it, there is a sort of a planking to go across from the signal house to the other side of the property? A. Yes, sir.

Q. And that is indicated on your map, is it not? A. Yes, sir; it is.

Q. Would you just mind indicating that planking? A. That is, to write the name "planking"?

Q. Yes. A. It is already written, sir, on the map.

Q. Mr. Jenkins, when was it you made this survey? A. A week ago Thursday.

Q. Yes. A. Yes, sir.

Q. When was it you made the survey? A. On the 12th.

Q. Twelfth of this month? A. Of February.

Q. And wasn't it snow-covered? A. Yes, sir.

Q. The ground was covered with snow? A. Yes, sir.

Q. Now, with respect to the accuracy of some of these widths, both of the path and matters like that; is that an accurate measurement? A. Why no; I couldn't make an accurate measurement with the snow on the ground, but they are approximate, that part of it.

Q. But your distances with respect to those matters are approximate? A. Yes, sir.

Q. I see. A. The pathway was well trodden, but it wasn't 12 feet wide the day I made the survey.

Q. Much obliged to you.

Mr. Romine: Eugene Cooper.

EUGENE J. COOPER, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Romine:

Q. Mr. Cooper, where do you live? A. Dover.

Q. And you are a lawyer? A. Yes.

Q. How long have you resided in Dover? A. Well, I—let me see—in the corporate limits I have lived there over twenty years, but I had—I lived up on Chrystal Street which just was across the line, prior to moving in the corporate limits.

Q. Are you familiar with the railroad property adjoining Morris Street in the town of Dover? A. I am.

Q. And have you had occasion, during the time

that you were in Dover to travel over any portion of that property? A. Yes, I have. I went to that old school there; my earliest school days, I think, was there, and I think that was about fifty years ago.

Q. Was that the south side school? A. No. The old school; it is what they call Birch's Boiler Shop now; that was the public school then.

Q. Can you indicate about where that was? A. (Referring) Well, let us see. This (indicating) is Morris Street. Why, that is it there.

Q. Right on the corner of the railroad? A. Why, it is—that is part of that—is the old school. Mr. Birch enlarged that down there; they used it for a garage; and now, Lehman now owns it; but it stood there; that was the old school house.

Q. While there what portion of the railroad yard did you cross? A. Well, fifty years ago, Second Street was not here. We started in from Morris Street—I do not see it here—but this is your school house, we will say, here (indicating); right up Morris Street just above there a little bit—I suppose the jury wants to see—there used to be a road, and you can see the roadway yet where they drove teams. It went right down like this (indicating). We didn't go down across here then. The old roadway is there now. We went right down to this place; then we went up—up here (indicating), and then there wasn't no Second Street—yes, there was a kind of a road; it was a very poor road, went up across here, and went across this brook to a little bridge here (indicating), and over and across Second Street; and went up by the old Chrystal house right up on the hill; that is the way the—the path was into Second Street, was laid out there.

Q. Was Ford's Pond there at that time? A. Yes, sir.

Q. And with the exception of the entrance near Morris Street by the end up near the brook, did the traveled road follow the same course? A. Yes.

Q. As indicated on the map? A. Just about. It went—it went down somewhere around here (indicating), and then it struck that road, and that was just about the same line up as far as their ground went, and then, instead of bearing off up here (indicating), we came up right across here, and then up like that; that is the way the old road used to go.

Q. And during 55 years— A. I would say about 50; it is 50, because it was when I first went to school.

Q. And for the last fifty years, how frequently have you traveled over that path or roadway? A. Well, when I went to school I suppose I went five days a week, but that was only a few years; then we went over to Mill Brook to school. Then when I began to read law, I lived at the old Cooper homestead, and we traveled that same road then too, and that is 35 years ago, and I used to go to the office most every day and back, and I usually went across that way, because it was a direct cross.

Q. Did you observe whether any other people used the roadway that has been called a thoroughfare, and for how long? A. Well, ever since I went to school.

Q. And during the past twenty or twenty-five years, do you know whether it has been traveled frequently or not? A. I know it has, because I have gone that way. I live now up on First

Street, and First Street would be—and I lived there for over twenty years. This is Morris—First Street ain't here, but it runs right along here (indicating), and this Second Street—where is Second Street? Second Street runs across my property—oh, there is Second Street there (indicating). Well, there is this street goes across my property, and Second Street does, and I live right up here (indicating) on First Street, I suppose further up than that; any how it is on First Street, and I go down Second Street, and part of the time go across First when it is pleasant weather, and when it isn't, I go right up to Morris and take the walk down.

Q. And how many times a week or month or year did you use that? A. Well, in pleasant weather, oh, sometimes once, twice, three times a day just as I feel like it. I generally go that way in pleasant weather to get clear of walking Morris Street; but when there is snow on the ground and it is unpleasant I go up Morris Street.

Q. Do you recall the building of the south side school? A. I do.

Q. And do you know how many years ago that was? A. I do not know. I know when it was built well, but to fix the date, I do not remember the date.

Q. Is it more than twenty years? A. Well, I —I wouldn't be surprised if it is; it is in that neighborhood anyway.

Q. And have you observed whether that traveled path has been used more frequently since the south side school than before? A. Well, it is on account of so many children going there.

Q. And in coming down that pathway in recent

years, have you observed whether any portion of the land down near Morris Street, between Morris Street and the pathway, whether that has been used; the little triangular portion that I have referred to? A. Well now, as I said, we used to go this way, go right out here on Morris; the railroad built a fence up here, I don't know how many years ago, but it is an iron fence that shut off this roadway here. Then after that—I don't know how long now—someone, I remember, when this was done, dug a path, that is, it was on the side hill like this and somebody dug up here and shoveled the dirt over from this here right down there, and since that time we have been going down across that way; it is quite a wide path, but it has been dug.

Q. Do you know how many years ago that was? A. No, I cannot give you the dates, but I know when it was done, because I was surprised to see it done there.

Q. Was that before or after the school was erected? A. Afterwards, I would say.

Q. Now, with reference to the upper portion of that little triangle up near the first house joining Morris Street, have you ever observed anyone using that land? A. Yes.

Q. In going to the path? A. There is a path goes right there, it goes from there (indicating) right down across the dam; there is a regular beaten path down across there.

Q. And how frequently have you seen people using that portion of the land? A. Oh, well, they use it all the time. Whenever, most, you go up there, you will see them nights and mornings, any time of the day. And the mill over there, the

people cut over across those paths at the head of the pond, and walk either path that is nearest to their homes.

Q. Have you observed any children on that portion of the land? A. Well, I have noticed lots of children going to school over that way, and they go these paths to their homes, and on above there, there is paths.

Q. Now, this main pathway or thoroughfare that you have spoken about, was that ever closed off or shut off so that the public couldn't use it? A. The only shut-off was building that iron fence there that I have ever--

Q. Changing the entrance a little lower down? A. Yes, yes.

CROSS-EXAMINATION by Mr. Scott:

Q. These paths are ways of convenience for the people? A. Yes.

Q. Both for one direction and across another? A. Yes, that is it.

Q. Not laid out? A. No. No, they are just simply well-beaten paths.

Q. Developed like boys will— A. Yes.

Q. You were one? A. I helped it; I helped do it.

Mr. Scott: That is all.

Does your Honor desire me to make that motion with respect to striking out the testimony regarding playgrounds now, or shall I do it later?

The Court: No, you had better do it later.

WILLIAM H. HEDDEN, sworn as a witness on behalf of the Plaintiff:

Mr. Scott: I will admit that this witness will testify practically as Counselor Cooper did, to save time.

Mr. Romine: That is all, Mr. Hedden. You may be excused as far as we are concerned. I just want to ask Mr. Jenkins one question, if you will take the stand.

GEORGE D. JENKINS, re-called as a witness on behalf of the plaintiff, testified as follows:

By Mr. Romine: Q. I neglected to ask you, Mr. Jenkins, respecting the south side school, if you knew about when that was erected? A. I made the survey for the school site, and I think it was in 1889; about that time.

Q. Well, is there anything with reference to your children going to school that fixes it in your mind? A. Yes. My children went to school at the south side, and my—my oldest child is approaching 25, and south side school was there long before my children went there.

Mr. Romine: That is all.

REGINA PIRACCINI, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. Romine: I wanted to ask your Honor if we may use an interpreter here. What is your name?

A Voice: Cattano.

Mr. Romine: He is from Morristown, and not interested in the case.

The Court: It is satisfactory to the Court.

Mr. Scott: I would like to ask the interpreter—

The Court: Yes, you may.

Mr. Scott: Do you know anything about this case, Mr. Interpreter?

Mr. Cattano: Just what I heard here today.

Mr. Scott: And you haven't talked it over with anybody?

Mr. Cattano: No, sir.

(Anthony Cattano, sworn as Italian Interpreter.)

The Court: Did you understand the oath?

The Witness: No, sir.

The Court: Well now, swear her through the Interpreter. I didn't think she did. Swear her over again.

REGINA PIRACCINI, re-sworn through the the Interpreter, testified on behalf of the plaintiff, as follows:

Direct-examination by Mr. Romine:

Q. You are the mother? A. Yes.

Q. Of the little girl that died? A. Yes.

Q. What was the little girl's name? A. Amelia Piraccini.

Q. And how old was she? A. Four years.

Q. Where did you live in March, 1919? A. Monmouth Avenue.

Q. Where, what place? A. Dover, New Jersey.

Q. What part of Monmouth Avenue was it? A. Twenty-third.

Q. Number 23? That is the last house, I think.

Mr. Scott: Do you know, Mr. Romine?

Mr. Romine: It is marked on there, 23.

Mr. Scott: It is marked on there?

Mr. Romine: Yes.

Q. On March 25th last year, was your little girl home at noon time? A. She was home till one o'clock.

Q. And where did she go; that is, did she leave the house? A. She was playing in front of the door about one o'clock, and fifteen minutes afterwards Mr. Cook brought her in his arms.

Q. Mr. Cook brought her in his arms? A. Yes, sir.

Mr. Scott: May I hear that answer again, please?

(Answer read by the stenographer.)

Q. Is Mr. Cook in Court?

Mr. Romine: Will you stand up, please?

Q. Is this the gentleman you refer to? A. Yes, ma'am.

Q. When the little girl left your house, how was she dressed? A. She was dressed in winter clothes; sweater, heavy underclothes and everything like that.

Q. Did she have a little dress on? A. She had dress and under-dress also.

Q. When the little girl came back 15 minutes, later with Mr. Cook, what was the condition of her dress? A. She was burned up this way (indicating).

Q. You are referring now to the front part of the body? A. Stomach and dress, everything.

Q. Can you tell us where the burning started from, or where it indicated on her clothing where it started from?

Mr. Scott: I object.

The Court: How can she tell that?

Q. Well, with reference—from the shoes on up, can you tell us how much of the clothing was burned, including stockings and dress? A. She was burned from here (indicating)—

Q. Now, from here, you indicate the top of the shoe? A. Yes, over the shoe; very little at the shoe.

Q. What is that? A. Very little at the shoe; then all the way up.

Q. Yes. Was any part, any of the back part of the dress burned? A. No; it was all right in the back.

Q. Was the little girl burned in any part of her body? A. Sure.

Q. What was done with the little—oh, just tell us what part of the body was burned? A. She was burned in the stomach and between the legs, and her face and hands.

Q. What was done with the little girl? A. She only had just the little eyes—

Q. What was done with the little girl, after she was brought home by Mr. Cook? A. I undressed her and telephoned for the doctor.

Q. Did the doctor come? A. Yes, sir.

Q. What doctor was it? A. Costello.

Q. And after the doctor came, was the little girl removed from your home any place? A. Yes.

Mr. Scott: We admit now, Mr. Romine, that the child died from those burns that the witness has described.

Mr. Romine: Yes.

Q. What was the condition of health of the little girl when she went out of your house that noon to play? A. Good.

Q. Had the little girl ever been sick? A. No, sir.

Mr. Romine: That is all.

CROSS-EXAMINATION by Mr. Scott:

Q. Never had any children's diseases at all? A. No, sir.

Mr. Scott: That is all.

Mr. Romine: That is all, Miss Lucy Coe.

LUCY D. COE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Romine:

Q. Miss Coe, do you live in Dover? A. Yes.

Q. And are you connected with the public school there? A. I am the attendance officer in the school.

Q. And on the 25th day of March, do you remember being on Morris Street in Dover? A. Yes; between one and one-fifteen I was going up Morris Street.

Q. And in going up Morris Street, did you have occasion to observe or look in the direction of Ford's Pond, or where the signal repair shop of the railroad company's building is? A. Yes, I did.

Q. And as you looked over there, did you observe anything with reference to a child? A. I heard a child scream; I saw two children there; there were—there were two small children about the ages of five, under five, and one screamed, and as I looked, there wasn't a soul in sight that I could see, at least, and I saw this one child all in a blaze. I clutched the railing for everything turned black to see that.

Q. And the little child that was all in flames, can you tell us about where that little child was? A. Down near this brick building in the walk.

Q. In the walk? A. Right by the side of the walk, I should say.

Q. That is the walk as indicated on this map, and been referred to as the pathway? A. The pathway, yes.

Q. And was it about opposite the brick building you think?

Mr. Scott: Now, may it please the Court, this apparently is an intelligent witness, and I will object to Mr. Romine leading her.

The Court: Yes.

Mr. Romine: Well, the witness has already made some direction about it; I don't want to lead the witness.

The Court: She may locate the place on the map.

Q. Can you locate it on the map? Do you understand the map? A. Yes, sir.

Q. Now, this (indicating) is going up Morris Street. A. (Referring) This is going up Morris Street; I know; I travel the ground at least once a week every day, or every Wednesday, at least four times a day, for I have the south side school work, and I know there is a telegraph pole very near that red brick building. I think it is nearer the pond, but I remember seeing that child very near that brick—they both—or she was near the the walk, the path.

Q. And was the pole that you refer to near the pathway? A. Yes.

Q. And the little child was alongside of the pathway? A. Yes

Q. Now, just a moment. Did you observe the grass around the child as it— A. Yes, the child—the grass from the path up to Morris Street on that end was all ablaze when I saw the child.

Mr. Scott: May I hear that answer?

(Answer read by the Stenographer.)

Q. Now, with reference to the grass or ground between the roadway and the brick building; Did you observe the condition of the ground there, or the grass? A. Yes. That had all been burned off, but nothing ablaze at the time.

Q. Did you see any men around there, or any man at the time you saw the little girl? A. The child, the one who was not burned, started toward me and I started to go through this rail which you would have to go between the two bars to get down to the child, and I saw the man near enough

to the child, so instead of going to her, I turned around and called to this little one and asked her where this other one that was burning lived. She told me, "Up there."

Q. Not what you told her. But this man that you saw, where did he come from? A. I do not know. I just saw him appear.

Q. Was he a working man, or dressed in civilian clothes? A. Oh, he was dressed in civilian clothes.

Q. Did you see any working men around there? A. No.

Q. Did anyone come to take the child while you were there, that is, did anyone come to get the child and pick it up? A. From—from—from near where it was burning?

Q. Yes? A. Oh, yes.

Q. And where did that man come from? A. I do not know where the man came from. I saw this man pick the child up and I went to the child's home.

Q. Did you know who the man was? A. Not when I saw the man pick the child up; I knew him afterwards.

Q. Is he in Court? A. Yes.

Q. Do you know what his name is? A. I did not know at the time, but I know he is Mr. Cook, manager of Childs' store.

Q. Was there any fire around there at that time except the one on the grass?

Mr. Scott: I object to leading the witness.

Q. Did you see any other fire around there other than what you have described? A. No.

Q. Do you know what the man did with the child after he picked her up? A. Yes. He carried her up home.

Q. To the child's home? A. Yes.

Q. And when you came back—or did you come back to that point after leaving the child's home? A. I met Mr. Cook going up to the home with the child.

Q. And after leaving Mr. Cook, did you go back to the vicinity of the fire, where the fire had been? A. Yes, I went on up Morris.

Q. And can you tell us anything about the fire as to whether it had spread or not? A. Yes, it was still burning, and there were people there putting it out.

Mr. Romine: That is all.

CROSS-EXAMINATION by Mr. Scott:

Q. You have been connected with the school department in Dover for how long, Miss Coe? A. Last year, a year ago February.

Q. And you know this property of the railroad company? A. Yes.

Q. And you would recognize photographs, you believe, of the conditions as it appeared in March, 1919? Now, with the exception of the weather conditions, I mean the foliage conditions, does that correctly represent the conditions as they appeared to you on the day of the accident (handing photograph)? A. (Referring) yes.

Q. It does, with respect to this exhibit? A. Yes.

Q. D-1 for identification. May I trouble you to look at this second one (handing photograph)? A. Yes, sir.

Q. And does that correctly represent the conditions as they appeared on that day, aside from the foliage conditions? A. Yes.

Q. It does? A. Yes, sir.

Q. Now— and that is the photograph I just showed you now, was Exhibit D-2 for identification. In this Exhibit D-2 for identification, opposite—will you just take a seat, I will hand it to you—opposite the signal house on the hill is a telegraph pole; is that the telegraph pole that you — A. Yes, sir.

Q. —referred to when you were speaking before? A. Yes, sir. Here is the little—

Q. And to the left of that photograph, left of the telegraph pole on the photograph, is a runway or a walk across a spillway? A. Yes.

Q. And looking at this Exhibit D-1, I call your attention to another telegraph pole which I have marked "cross" with a pencil marking, and ask you if that is the telegraph pole that you had in mind when you were testifying before? A. (Referring) Isn't that above—isn't that above the building?

Q. I show you the Exhibit D-2 for identification, which is a nearer view of the signal house, and which shows the telegraph pole? A. Yes.

Q. And looking at this Exhibit D-2, can you tell us whether this telegraph pole which I am indicating and have marked with a lead pencil mark, is the same telegraph pole? A. (Referring) Yes, I think it is.

Q. You think it is? Now, at the—your duties are what in the Town or Township of Dover, Miss Coe? A. I am the attendance officer in the school.

Q. And on the day that the fire in question was observed by you and this child was burned, just prior to that time, where had you come from? A. I had come from home on Bergen Street.

Q. And which side of the railroad track, the main railroad tracks of the railroad, is that? A. The north side.

Q. Is that the other side from the property in question? A. Yes.

Q. And you were coming up Morris Avenue? A. Yes, I came up Morris Street.

Q. And as you got to Morris Avenue, after you had crossed over the railroad tracks, you started to go up on the side nearest the property in question? A. Yes.

Q. There is a sidewalk there? A. Yes.

Q. And for a certain distance as shown in this photograph D-1 for identification, there is a fence, or a guard fence? A. Yes.

Q. That is shown on the— A. Yes.

Q. Now, about how far had you gone from the beginning of the fence down near the railroad tracks along the sidewalk before you observed or heard the cry of this child? A. I had gotten just above Monmouth Avenue.

Q. Just above Monmouth Avenue, and that is the first street that you come to as you— A. On the left-hand side.

Q. —were going up, and that is on the left-hand side. Now, you say you got about to Monmouth Avenue; had you gotten to Monmouth Avenue? A. I had gone beyond Monmouth Avenue.

Q. Very far? A. Not very far.

Q. About how far? A. Well, I do not know about distances.

Q. Well, I will take your judgment. Had you gone half a block further, or— A. Just about.

Q. —about a half a block further, probably; when you heard this cry, had you passed the guard rail fence? A. No.

Q. You were still— A. I was still by the guard rail fence.

Q. Paralleling the guard rail fence? A. Yes.

Q. And when you heard the cry, it came from the direction of the signal repair shop of the railroad company? A. Yes, sir.

Q. Now, did you make any—have you any recollection as to how the wind was blowing at that time, or were you more or less—your interest was centered on this child? A. It was more on the child just at that moment.

Q. And when you heard the child, I imagine you instinctively turned to the direction from which the cry came? A. I do not understand.

Q. I say when you heard this child cry, you instinctively turned in that direction? A. Certainly.

Q. Before you heard the child cry, you hadn't observed these children down there? A. Well, it is my business to—

Q. Now, we would like to know your business, but we do not care to pry into it. What we want to know is whether you had seen these children before you heard the cry? A. No.

Q. And the first thing you knew about these little tots being around there was when you heard the cry? A. Yes.

Q. And then you turned over and looked in that direction? A. Yes.

Q. As you looked, will you tell us again just what you saw? A. I saw one child ablaze.

Q. One child was ablaze. A. And another child, about the same size, started up the hill and turned around and went back, and then came toward me again.

Q. Do you know whose child that was? A. I don't.

Q. Now, this child that was ablaze with respect to that telegraph pole that I have had you indicate on both of these two photographs, both D-1 and 2, where was that child, nearer Morris Avenue, or between the telegraph pole and the—what Mr. Romine had seen fit to call the roadway? A. Nearer the roadway.

Q. Nearer the roadway? A. Yes.

Q. She was between the telegraph pole and the roadway? A. Yes.

Q. Now, is there any definite way that you have of fixing what time it was when you first saw this child, outside of the fact that I presume you, like most of us, have lunch hour around twelve o'clock? A. Yes.

Q. But I mean is there any other way that you can definitely fix the time? A. Because I must watch the children when they go to school; see that they are there on time, between one and one-fifteen, when the bells ring.

Q. The children must be at school at one-fifteen? A. Yes.

Q. And in the exercise of your duties, you knew it was about that time? A. Yes.

Q. That the little ones should get to school? A. I knew she wasn't of school age.

Q. You knew she wasn't of school age? A. I could tell that by the size.

Q. There weren't any other children of school age in sight, were there? A. Up on the school grounds.

Q. Up on the school grounds; they hadn't gone in school yet? A. No.

Q. So, taking all those circumstances, that is, your luncheon hour, and the duties that you were performing, and the seeing of the children up there on the school grounds, can you fix the time quite accurately as to when it was you first saw this child? A. Between one and one-fifteen.

Q. Between one and one-fifteen. And if I was to ask you to get the time closer to one or closer to one-fifteen, would you have any difficulty in doing that, or would you like to keep yourself—give yourself that much leeway with respect to the time? A. Why, I simply know it was between one and one-fifteen, I think.

Q. Yes, but my point is, have you any means of telling us whether it was nearer one o'clock or whether it was nearer one-fifteen. It was during that quarter of an hour. A. No, I haven't any.

Q. I see. When you saw this little youngster, you recognized that she was not of school age? I mean, when you saw her. A. Yes.

Q. Even by the child who was ablaze, you could see that it was a little child? A. Yes.

Q. And when you first observed the child, was its clothes on fire? A. Oh my, yes.

Q. And they were all blazing up? A. All ablaze

Q. And simultaneously with seeing the child, did this other little one start running up toward you? A. Yes.

Q. I do not mean running up toward you particularly, but up in your direction? A. In my direction.

Q. And you say it ran for some distance, and then it turned back? A. Yes.

Q. What did it do then, go back to where the child was? A. To where the burned child was.

Q. I see. A. It ran about the distance from you to me.

Mr. Scott: May I hear that answer.

The Witness: Just about the distance between you and I.

Q. It ran back to the child, and then what did it do? Run back again— A. Yes.

Q. —in your direction? And it did come up to where you were? A. I went and met it. I asked where the child lived that was burned.

Q. Yes. But after this child—you say you first saw it running up in your direction, then it ran back and then it left the burned child again? A. Yes.

Q. And ran up in your direction. Now, did you go to meet this child that wasn't harmed? A. Yes.

Q. Or did you wait until the child came up to you? A. No, I started toward the child, I called to her.

Q. And the child came over to you? A. Not all the way; I didn't give her time.

Q. Well, you went over as quickly as you could to where this child that was coming up was? A. I went within calling distance so the child could make me hear.

Q. And did you recognize the child? A. No, I had never seen it before.

Q. How old a child was that? A. She was under 5, I should think.

Q. About 5? A. About 5; under 5, probably.

Q. A little girl or boy, could you tell? A. A little girl.

Q. And you asked that child where the child that was burned lived? A. Yes.

Q. And did she tell you? A. She told me "Up there," pointing to Monmouth Avenue.

Q. Was she an Italian child? A. Yes.

Q. You don't know who that child was? A. No.

Q. Did you ever make any inquiry as to who that child was? A. No.

Q. And when you learned who the child was, where the child lived, what did you do? A. I went directly to the home and told the people there, there was a little one there burning.

Q. Did you happen to strike the right place right off? A. Yes.

Q. How did this coincidence happen? A. I think it is because this other child was following me, and I asked people on the front—on the first porch, on the porch in the first house, and I asked where the children lived, and they pointed to this other house.

Q. Well, did you subsequently find out it was another one of Mr. Piraccini's children? A. I do not know. I do not know who the second child was.

Q. You don't know who the second child was? A. No.

Q. Did the second child follow you right— A. Yes.

Q. —to the house with the burned child? A. Yes.

Q. And did it go in the house with it? A. No, not that I know of.

Q. Now, how long did you stay there, Miss Coe? A. I—there are steps on the outside of the house; I went down in the house and told the people, and came right out, and Mr. Cook had

come up with the child in his arms and I met him.

Q. Then how long did it take you to get down to the Piraccini home from— A. Not very many minutes.

Q. About five minutes? A. No, I do not think it took that long; I ran all the way.

Q. I see; about three or four minutes? A. Yes.

Q. Or two or three minutes; and you only stayed there a couple of minutes? A. Yes.

Q. And then what did you do, go immediately back to Morris Avenue? A. Yes.

Q. And when you went back there, did you go down to the place where you had seen this child burned? A. No, I went on up Morris hill.

Q. You went on up Morris Hill? A. On up Morris Hill.

Q. And that is on up Morris Avenue? A. Yes.

Q. Did you stop any length of time to sort of take in the situation as it was when the—this accident was happening, or did you just go out of Monmouth Street and cross over and go up the hill? A. I crossed over and started up the hill.

Q. Now, when you went off of Morris Avenue prior to—subsequent to hearing this child holler and met this other child, how far on this triangular piece of ground was it that you went in before you met this other child? A. I hadn't gone as far as the triangular—

Q. You hadn't gone as far as that? A. No.

Q. About how far had you gone off the sidewalk onto the railroad's private property before you met this other child? A. Not very far.

Q. Well, will you tell us what that is? A. About as far as from you to me, I guess.

Q. Well, that don't mean anything to the record. A. I don't know about distances.

Q. Had you then gone about 10 or 15 feet, something like that? A. A very short distance, so that I could hear this child tell me where this other one lived.

Q. You would say that was about ten or fifteen feet? A. In hearing distance.

Q. And that hearing distance, gotten down to more natural figures, would be the distance from your chair to my chair? A. Yes.

Q. And would you say that was about 15— A. Oh, Mr. Romine—

Mr. Romine: 15 or 20 feet.

Mr. Scott: Mr. Romine isn't any closer than the witness.

Q. Then when you met this child, you didn't stop and measure; you started right back to Monmouth Avenue to find the parents? A. Yes.

Q. And I take it that your observation with respect to the place where this child was—or had been burned, or was burning, wasn't a very extensive observation at that time in view of the urgency of the situation; in other words, when you met this little child coming back, and to find out where it was, you didn't look at the spot where this child was burning and observe that the space of ground that the grass was burning was certain number of feet in circumference, or anything of that kind, did you? A. No.

Q. And can you tell us now from the observation you made at that time how large a space it was that had been burned over, if any, at the time you first saw this child? A. What do you mean, on the whole side?

Q. On the ground near the pole? A. Why, right from the path, right up, a long distance. Half

of the distance, at least, was ablaze when the child was burning.

Q. When the child was what? A. When the child was burning, when I saw it.

Q. Now, was the child standing up when you saw it? A. Yes.

Q. And did anything happen to it? Did it fall down while you were observing it? A. No.

Q. Did you see Mr. Cook pick it up? A. No.

Q. You didn't see Mr. Cook touch it? A. I saw him just as he had it in his arms, as he started up.

Q. Did you see Mr. Cook before he— A. No.

Q. You didn't see him before? A. No.

Q. Then your observation with respect to this child from the time when you first heard the cry wasn't a continuous observation? A. (No response.)

Q. Apparently Mr. Cook got on the scene from some place unknown to you, and the next thing you saw was Mr. Cook lifting up the child? A. Yes.

Q. But you didn't see Mr. Cook come there on the scene? A. No.

Q. And you don't know how he got there? A. No.

Q. What were you doing in the meantime when your attention was apparently distracted from the child? A. Why, I started right for the home.

Q. And you would have us understand that at the present time, that with such an observation you could tell exactly what part of the grass was burning? A. All from the path was burning.

Q. Was it burning around the telegraph pole? A. Yes, up this side of the—right up the side of the hill.

Q. Which side of the telegraph pole, between Morris Avenue and the telegraph pole in question? A. Yes, the upper part.

Q. By the upper part, you mean that portion of the property between the telegraph pole that we have been discussing on these two photographs that we have marked as Exhibits, and Morris Avenue? A. Yes.

Q. And how far from that telegraph pole had the fire gone when you saw it? Now, I want an accurate distance on that if you are capable of giving it? A. As I remember, it was all ablaze there right up—the whole path right along right at the side, I couldn't give you any definitions.

Q. You are going to get the whole path was ablaze in every time, I appreciate. Now, what I want to get is what the facts were from your recollection. A. Well, a third of the hill, then.

Q. About a third of the hill? A. Yes.

Q. From the telegraph pole, the property between the telegraph pole that we have had you identify in the two photographs, D-1 and D-2 for identification, up to Morris Avenue, the property between those two points, you say there was about a third of the hill burning? A. Yes.

Q. And about a third of the hill, looking at this photograph D-2 for identification, you mean the fire had burned up to about how far? A. Well, just about here (indicating). This was all ablaze.

Mr. Scott: I don't know if the jury hear it. May we have that question and answer read to the jury?

(Question and answer read by the Stenographer.)

Q. Now, will you indicate with this pencil on

this photograph, if you please, what you mean by how far it had burned from the telegraph pole in question up toward Morris Avenue? A. Just as it goes up the hill.

Q. Well, you say about one-third. Would you mean it had burned from the telegraph pole up to there (indicating)? A. Yes, fully up to there (indicating). I would call that more than a third, wouldn't you, from there?

Q. You are the witness, now, if you will tell us. A. Is that the distance, is that from this pole that you are talking, to the sidewalk here (indicating)?

Q. Here is the telegraph pole (indicating) that we have been discussing; here is the sidewalk on Morris Avenue. You have told us that the fire had burned a third up the hill? A. Yes, I will say a third.

Q. Now, you mean a third of the distance between the telegraph pole— A. Yes.

Q. —and the sidewalk? A. Yes.

Q. In a direct line? A. All of a third of it.

Q. All of a third of it? A. Yes.

Q. And that was the distance that the fire had gone up the hill. Now, bearing in mind this telegraph pole that we have been discussing as a starting point, how far had the fire spread or burned each side of the telegraph pole? A. That is down toward Blackwell Street, and up towards, I think the Grant property is up at the other end, I believe, the lot? How far had it burned, how far had it burned down, first, toward the railroad tracks in that direction? A. I wouldn't say it had burned any toward the railroad tracks.

Q. It hadn't burned any? And, now up toward the Grant property, how far had it? A. After

going to the house, I could tell more about the condition of the grass than I could when I first saw the child.

Q. And is any of the evidence with respect to the condition of this place that you have—this place where the fire took place that you have described just now, is that the condition that you found it in when you came back from the house? May I have the question again?

The Court: Read it, Mr. Robinson.

(Question read by the stenographer.)

A. Why, there was more fire when I came back from the house than there was when I went up.

Q. Well, what I am trying to find out is what the condition was at the time you first saw the child. You have told us that the fire had burned one-third up the hill between the telegraph pole in question and the sidewalk on Morris Avenue; that it had not burn down toward the railroad tracks. Now, I want to know how far up toward the Grant property, that is, the house toward the hill on Morris Avenue, it had burned? A. Very close to it.

Q. Very close to it; in other words, the area of the fire, as you—

Mr. Romine: Now, just a minute, Mr. Scott. Do I understand that to apply to your last question, after she came back from the—

Mr. Scott: No, I am talking before it.

A. I understood you afterward.

Q. I will tell you when I mean afterwards. I am discussing before it. Now, I will reframe that question then. With respect to the condition before you went up to Monmouth Street to see the parents of the child, how far had the fire burn-

ed toward the Grant property, which is up on the—Morris Avenue up the hill from the telegraph pole? A. I couldn't answer that question, because I didn't observe that.

Q. You didn't observe that; so that, so far as your recollection is concerned at the present time, the fire in question had burned from the pole which is indicated on this map one-third up the hill toward the sidewalk on Morris Avenue? A. Yes, sir.

Q. And it had not burned at that time prior to going up to see the parents, down toward the railroad tracks, and it had not burned or you have no recollection of how far it had burned up toward the Grant property, that is, before you went up to Monmouth Avenue? A. No, I didn't notice on that side; from the point that you point, off in that direction, was ablaze.

Q. You don't know how far it had gone up the hill prior to— A. No.

Q. —going up there? A. No.

Q. Whether it was one or two feet? A. No.

Q. Or how many feet? A. No.

Q. Now can you tell us—and all I want is your observation—what the area of the fire was when you first saw this child with its clothing on fire?

Mr. Romine: If your Honor please, Mr. Scott has asked that three or four times.

The Court: The area of the fire?

Mr. Romine: The area of the fire, and the witness has described it the best she can. I don't see the necessity— I don't want to preclude Mr. Scott from any cross-examination that he is rightfully entitled to, but I think he has gone over it.

Mr. Scott: I press my question without any argument.

The Court: You may answer it. Read it, Mr. Robinson.

(Question read by the stenographer.)

A. Well, I—about a third of that distance.

Q. Can you give us a more accurate description? Was it as large as that portion of the court room inside of the railing where counsel are now sitting, this entire portion inside of this railing? A. I think a third of that distance would cover more than that.

Q. It was larger than that? A. Yes.

Q. Was it as large as the half of the court room in back of the railing? A. Yes.

Q. It was. A. Yes.

Q. Larger than that? A. (No response.)

Q. I am only trying to get what the facts are, Madam; I am not trying to puzzle you; I am trying to get the facts. Was it larger than the back part, the back half of the court room? A. I do not know.

The Court: The witness says she does not know.

Q. And when you came back, although you say you do not know what the area of the fire was at that time, your recollection is it was at least as large as the back of the court room? A. I should think so.

Mr. Scott: I only have one or two other questions, may it please the Court.

Q. What was the first knowledge you had that there was any fire on the property in question? A. Just seeing it.

Q. Seeing it or hearing the child? A. Seeing it.

Q. You saw it before you— A. Yes.

Q. —saw the child? A. Yes.

Q. And which way was the smoke going? A. I couldn't answer that.

Q. No smoke at all? A. I don't know; I didn't observe.

Q. You didn't make any observation? A. No.

Q. And you never have made any endeavor to ascertain who the child was that told you where the parents lived of this— A. No.

Q. Have you discussed this case with the counsel for the plaintiff prior to going on the stand? A. I never discussed the case with anyone.

Q. Never discussed it with anyone? A. I tried to forget it after I saw it.

Q. And you never talked it over with anybody since the accident? A. No.

Q. And the reason you tried to forget about it was because it was a sad occurrence, I take it? A. Yes, after seeing the child.

Q. Yes. A. It was all I wanted to see.

Q. And it is a thing that has impressed itself very forcibly on your mind? A. It certainly has.

Q. And the very occurrence, I take it, of such a thing as this created such an impression on your mind that it may have to a large extent unconsciously tinged your recollection with respect to the size of the area of this fire? A. No. I can see the picture of that blaze going up the side of that hill.

Q. You saw a blaze going up the side of a hill? A. Yes, this dry grass all burning.

Q. And your recollection is that it was of the size that you have already described, the area? A. Yes.

The Court: Anything further?

Mr. Scott: That is all, sir.

IRVING COOK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Romine:

Q. Mr. Cook, you live in Dover? A. Yes, sir.

Q. On what street? A. Morris Street.

Q. That is the Morris Street that has been spoken of here and indicated on the map? A. Yes, sir.

Q. And you are employed where? A. At the American Store on Warren Street.

Q. That is the street to the right of the map? A. Yes, sir.

Q. And you are familiar with the railroad property? A. Yes.

Q. Spoken of here? A. Yes.

Q. Do you have occasion to cross that property? A. I do, four times a day, except in the wintertime.

Q. And just indicate on the map where you cross the property. A. I use this path right here (indicating).

Q. That is commencing at the westerly side of Morris Street? A. The westerly—yes. I made a path of my own. It isn't like the one that he has on here, and I made one of my own, and I use that, this one down there (indicating); I go around this side, and out Warren Street.

Q. And you have been traveling that path in that manner how long? A. Nine years this spring that I moved up there on the hill.

Q. And have you been traveling that path continuously during that time? A. Most of the time.

Q. With the exception of the winter? A. With the exception of the winter; yes, sir.

Q. Do you know where the pathway is leading from Morris Street along the little brook and Ford's Pond? A. Yes, there is a path there, a driveway that runs right along the pond; this is Morris Street (indicating).

Q. Well, it is thoroughfare, it says? A. It runs along a little ways from the spillway here out along the pond to the upper end of the pond.

Q. Now, during the years that you have been traveling back and forth over the land between Morris Street and that right of way, have you observed other people using that land? A. Oh, yes; a good many of them use it.

Q. And can you tell us whether they are adults or children? A. They are both; I have seen both of them there.

Q. And what have you observed the children doing there? A. Playing along there. I have two boys. I find them sometimes playing along the water.

Q. Have you observed whether children use the pathway that runs along the spillway and the pond? A. Along the side of the spillway, yes.

Q. That is the pathway or the roadway leading from Morris Street up to the street indicated on the map as Academy Street? A. Yes, a great many school children I notice going through there.

Q. Have you observed any other persons using it, adults? A. Oh, yes; a number of them.

Q. Have you ever been stopped from using this land as you have indicated? A. I have never been been stopped, no.

Q. Do you recall the 25th day of March, last

year? A. Well, I couldn't say exactly it was the 25th day of March. I remember sometime in March, the day in March last year.

Q. Well, you recall an occasion last year in March when there was an injury to a child near there—this land? A. I do.

Q. And where were you coming from? A. I was coming across the dam (indicating); across the dam. I was behind the house, and I heard screaming. I came across the dam and across the plank there.

Q. As you came across by the head of the pond, did you observe anything on the west side of the brick building known as a signal repair shop? A. Yes, I noticed there was a fire there.

Q. And can you describe to us what kind of a fire it was? A. Why, it was burning the dead grass and weeds that had been there all through the winter and the fall.

Q. And can you indicate on the map by a pencil across approximately where that fire was? A. I cannot give you the spot.

Q. Well, approximately? A. I noticed the fire was this side here (indicating), under the dam.

Q. Just make a cross there, will you? A. Yes, this part (indicating) I think extended on around this way.

Q. Now, just make that a little more legible, if you can, right there. A. Yes.

Q. Now, was that where the fire was burning? A. Yes, that was where the fire was burning.

Q. Was there anyone there around that fire? A. There was a man attending the fire, looking after it.

Q. And what was he doing with reference to the

fire, if anything? A. Well, I didn't take any notice; he had a fork or rake in his hand as I passed by; I didn't take particular notice.

Q. And how was he dressed? A. I couldn't tell that.

Q. Well, as to whether he was a workman or not? A. Oh, he was a workman.

Q. Now, you say around this south side of the brick building, you observed what? A. The fire had been burning there, but I don't just remember whether it was burning there at that time; it was black there; the fire was right on the other side.

Q. That was where the fire was then burning? A. Yes, fire where the man was.

Q. Did you observe at that time anything with reference to the east side of the signal repair shop, that is, toward Morris Street, between the repair shop and the pond outlet? A. No.

Q. You didn't observe anything? A. No.

Q. Now, you say as you came across the head of the dam there, you heard a child screaming? A. Yes.

Q. Did you find a child anywhere in that vicinity? A. Yes, I came around the house, and I heard a child screaming and I couldn't see her. I found the child lying just over by the side of the path with the clothing all afire.

Q. Now, can you indicate on the map about where that was? A. As near as I can tell, it was just this side of the telegraph pole that stands there, somewhere along there, about two feet from the bank.

Mr. Scott: Please mark that with a cross, Mr. Romine.

Mr. Romine: I had better put a little ring about it.

The Witness: That is just about the spot that I found it.

Q. Did you observe the character of the ground there where the child was, as to whether there was a fire around— A. The fire I saw—yes, the grass was shorter where the child was, but the grass was burning around the child.

Q. And for how great a distance? A. It seems to me just a small space. I wouldn't say it was any larger than this here (indicating).

Mr. Scott: By that you mean.

The Witness: My attention was on the child, not on the fire.

Mr. Scott: May I have it indicated on the record that the witness has indicated with the pointer a space about—what would you agree on, Mr. Romine?

Mr. Romine: I would say six by eight, something of that sort.

The Witness: It might have been a larger fire. I didn't take notice; I couldn't say about that.

Q. You know that there was fire around the child, but as to whether it extended out into the field for any further distance, you didn't observe? A. I couldn't say.

Q. Did you see any other child there at the time? A. Yes, I saw two or three other children around there, small ones.

Q. What did you do with the child? A. I picked it up and carried it in my arms, and smothered it in my overcoat. I wrapped my overcoat around it and tried to smother the fire out of it, and as I carried the child along.

Q. Did you observe the condition of the child, as to its clothing? A. Yes.

Q. Just describe it, will you? A. The front part was all burned off.

Q. Did you see Miss Coe after you picked up the child? A. Yes, I was going up toward the house, and I met Miss Coe coming from the house; she stopped and spoke to me.

Q. And then you took the child where? A. I took the child on up nearer to the house and met the mother, and she took it from me.

Q. Did you see the child again after that? A. No, I don't think so.

Q. When you came back into Morris Street, did you then observe the condition of the land where the child had been found? A. Not particularly where the child was found. In the meantime, while I was home to lunch, the whole field had been burned over. I noticed that.

Q. I mean, before you went home to lunch and immediately after coming back from leaving the child at the house, did you then observe the fire, or did you go home to lunch first? A. I went right home to lunch just as soon as I left the child.

Q. So you made no observation immediately after taking the child home? A. In less than an hour, I went back again, and I saw some of the clothing laying there.

Q. Now, when you came back, that was how long afterward? A. Well, I should think probably three-quarters of an hour.

Q. And what was the condition of the field at that time? A. The whole hill had been burned over, all this up to Morris Street. All this space had been burned over when I come back; it was all black.

Q. And did it reach up to the line of the first house on Morris Street? A. I think it did, yes.

Q. And did you make any observation on your way back as to whether any portion of the land had been burned between the brick building and the pond; that would be to the east toward Morris Street, did you observe whether there was any— A. Not on the east side, no.

Q. You didn't observe that? A. Not on the east side, no.

Q. When you came around the head of the dam and saw the child near the pathway, did you see any other fire other than the one that you have indicated? A. No other fires, no, except one back to the west of the round house, and just a little fire around the child.

Mr. Romine: That is all.

Mr. Scott: May I hear that last answer?

(Answer read by the stenographer.)

CROSS-EXAMINATION by Mr. Scott:

Q. The child was laying down on the ground when you saw it? A. Yes, it was lying down.

Q. And I take it you have indicated on the map where you found the child, which shows near a telegraph pole; and looking on these two photographs, D-1 and D-2 for Identification, the photograph marked with a cross or a line in D-1, is the telegraph pole near where the child was found by you? A. Where the cross is?

Q. No, just the pencil mark? A. Yes.

Q. That is the— A. Yes, near the—

Q. And this telegraph pole opposite the signal repair house on photograph D-2 for Identification is the same telegraph pole? A. Not this one, no. This is the one here (indicating).

Q. That one? A. This is the pole here (indicating), and not this one.

Q. The pole in D-2 which I have— A. That one in the field (indicating).

Q. —marked with the cross at the foot of it? A. This one (indicating) is farther up in the field.

Q. Now, looking at the map,—can I trouble you for the pointer—looking at the map, I am indicating the electrical signal and machine shop; when you came across to go home for lunch, you came across the dotted path indicated in the neighborhood of the— A. Yes.

Q. And as you got near the machine shop, or the back of it, the back of it being the side opposite from Morris Avenue, you say you saw the fire? A. Yes.

Q. Being attended by some man in working clothes? A. Yes.

Q. This fellow, whoever he was, had a rake? A. Yes, something in his hand.

Q. And he was taking charge of that fire? A. Yes, sir.

Q. And the fire was apparently in his control? A. It seemed to be; yes, sir.

Q. Then you came and crossed over what they call the plank walk? A. Yes, two planks there.

Q. Before you crossed over the plank walk, had you heard the cry of this child? A. Oh, yes; before I could see it. Before I could see the child, I heard the screaming.

Q. And that was when you crossed over the plank walk? A. Yes.

Q. Looking at this photograph D-2 for Identification, can you tell us how far the fire which was in the back of the signal repair shop shown on

that exhibit, or that exhibit for identification extended? Did it extend along the entire side? A. This—the fire was burning over here further on this side (indicating); you see this slopes way down in there; it doesn't show it very plainly there, but this is where the best part of the fire was, over in here, and this hadn't been burned, and I think there was a little fire burning around the back of that.

Q. Then with the aid of this photograph, you indicate to the jury that when you got to the signal house, or machine shop, the fire was burning where you have already marked with a cross? A. Yes, on the west side of the signal.

Q. What side of the signal machine shop would you call the part that I am indicating now? A. South.

Q. That runs parallel with Fords Pond? A. The south side.

Q. Now, on the south side of the machine shop was the grass burning there? A. It had been burned over. It was dying out, as I remember it.

Q. And where was the fire that was dying out? A. Along that slope. There is a slope runs right down pretty near to the machine shop there from the dam.

Q. From the dam? A. Yes, sir.

Q. Toward the machine shop? A. Toward the machine shop.

Q. Nearer the westerly end of it? A. Well, it runs all the way down the whole east—the southerly side of the round house and it slopes right down toward the round house; it slopes from here (indicating).

Q. Looking at this photograph D-2 for identification, will you mark on it where the fire was on the southerly side of the machine shop? You can mark right on the desk there. A. This (indicating) is the southerly side, that had been burned over, and as I remember, just—the fire was dying out; it was just burning a little.

Q. At the point where you have indicated? A. Yes, right all the way across there.

Q. Will you indicate that more closely, Mr. Cook, or more strongly? A. Yes, but it doesn't show the—bank there very well (indicating on photograph with pencil).

Q. Now, photograph D-2 for identification, on the southerly side of the machine shop, you have indicated with a cross, or two crosses, the place where there was a little fire? A. Yes.

Q. Well now, how far was that from the man who was tending this fire at the westerly side of the shop? A. Well, I should think fifteen or twenty feet probably.

Q. And from the point where you say you saw this little fire that was dying out up to the outlet of the pond, that was all black grass as if it had already been burned over? A. Yes. Just on the south side of the signal house here.

Q. And that appeared to have been burned? A. Yes.

Q. Already burned over? A. Yes.

Q. Well, now when you went over the path, this portion here, you say with the exception of a small flame at the southeasterly part of the signal shop which was ablaze, the rest of it had been burned over? A. It had all been burned over, yes.

Q. And it appeared to be black? A. The most

part there was a little burning there, just a little that was dying out there.

Q. And before you got over to where the child was, or between you and this fire on the southerly side of the machine shop, there was what is known as the pond outlet? A. Yes.

Q. Well now, was the grass burned right up to the pond outlet? A. I couldn't say about that.

Q. I see. A. No, I couldn't say.

Q. But you have no recollection that it was burning? A. No, I couldn't—I didn't take notice of that; as I came by there, I was running.

Q. Now, when you crossed over the plank of this plank walk, you crossed over the upper end of the pond outlet? A. Yes.

Q. And before you got to the child, there was what is known as this roadway or highway through the yard? A. Yes, I had to cross that.

Q. You had to cross that? A. Yes.

Q. Now, there is a strip of land between the pond outlet and the roadway in question, is there not? A. Yes, a little space between.

Q. And that wasn't on fire at the time? A. I didn't see that, no.

Q. The only portion that was on fire was the part where the child was? A. Around the child.

Q. And as my recollection is, you say the child was some two and a half feet away from the edge of the driveway? A. From the driveway.

Q. Near that telegraph pole? A. Yes, sir.

Q. That you have pointed out to us? A. Yes, sir.

Q. And how many children did you see besides the little one that was burned? A. Why, it seems to me there were three or four around there, I think.

Q. All about the same size, about the size— A. Well, no; there was one boy larger, a colored boy, a tall colored boy.

Q. A colored boy? A. I should imagine about fourteen years old, a colored boy.

Q. A colored boy about fourteen years old? A. Yes, sir.

Q. And the rest of them were little tots like this four-year-old? A. The rest was little; yes, sir.

Q. Have you any recollection of what direction the wind was blowing that day, I mean, at the time you went over? A. No. It doesn't seem to me there was any wind blowing to amount to anything at all. I didn't take notice of that.

Q. It wasn't noticeable? A. No.

Q. What became of these other children, the children that were not harmed by the fire or burned by the fire, they disappeared? A. I didn't pay any attention to them at all; I couldn't say where they went.

Q. You picked up the little one, and how did you learn where it belonged? A. One of the little children by it, I asked where she lived, and she pointed up to Monmouth Avenue, and I started for Monmouth Avenue right away with the child.

Q. You picked up the child and took off your overcoat— A. I had my overcoat—I smothered the overcoat around it as I went along.

Q. This other little one followed you up? A. No, I didn't see it after.

Q. How did you know where to go? A. I asked the child that was following me where the child that was burned lived, and she told me Monmouth Avenue herself; she knew what I asked her and what I said to her.

Q. Then when you got up to the place where the child lived, you met Miss Coe? A. No, I met Miss Coe before that. I didn't go up to the house. I met Miss Coe part of the way up, and the child's mother was a little further, and I took the child on up to its mother.

Q. You met the mother before you got to their house? A. Yes, I met the mother.

Q. You don't know who these children were? A. No, I never knew.

Q. This colored boy or these other children? A. None of them, no.

Q. And your recollection is that there was a colored boy and this little tot and two other children? A. Yes, there were two or three other children, I think, around there, it seems to me, my best memory.

Q. And they were all—the colored boy was the large one and the rest— A. Yes, sir; the others were all small.

The Court: Do you know who any of them were?

The Witness: No, I didn't know any of them.

Q. You also came under subpoena for the railroad company? A. Yes.

Q. To testify to it, didn't you? A. Yes.

Mr. Scott: That is all.

Mr. Romine: That is all. Mrs. Grant.

STELLA GRANT, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Romine:

Q. You live on Morris Street in Dover? A. Yes, sir.

Q. And can you tell us which house it is? A. Sixty—

Q. After leaving the railroad and going up Morris Street? A. The first house on the right-hand side.

Q. And do you recall the day that the little child was burned? A. No, I don't remember; I think it was around the Twenty-fifth.

Q. Well, you remember the time? A. Yes.

Q. On that day did you observe the fire in the field? A. Yes, I seen the fire.

Q. And what time of the day did you see the fire? A. Well, it was between one and after one; I couldn't—don't know just what time it was.

Q. And did you have occasion to go outside that afternoon and observe the direction in which the wind was blowing? A. It was blowing towards the house.

Q. Towards your house? A. Yes.

Q. From which direction? A. The north wind, I think, was blowing towards the south.

Q. Yes. It was coming from which direction? Can you tell us on the map in reference to the building, the brick building? A. (Referring) It was coming this way (indicating).

Q. Coming in your direction? A. Yes, because it blew the smoke, and I had to shut the windows.

Mr. Romine: That is all.

CROSS-EXAMINATION by Mr. Scott:

Q. You didn't learn about this child being burned until about six o'clock that night? A. Well, around five and six, a friend of mine called me up on the telephone.

Mr. Scott: I would like to make an exception relating to this witness; I would like to make her my witness.

The Court: You may.

Mr. Scott: No, I won't take up any further time. That is all.

Mr. Romine: That is all. I want to read answers to two or three interrogatories.

Mr. Scott: May it please the Court—well, until the—Mr. Romine decides what interrogatories he is going to read, I think all of these answers and interrogatories are so closely connected and interwoven with each other that I call upon him to read the entire set of interrogatories rather than any one specific interrogatory.

Mr. Romine: I think it is within my province to read those that I—

The Court: The rule is that you may read any particular interrogatory, but if you read one, all on that same subject must be read.

Mr. Scott: Yes, sir.

Mr. Romine: That is right.

The Court: I haven't seen these interrogatories, so I do not know what they are.

Mr. Scott: I make the statement to the Court in my opinion and in the opinion of the defendant the interrogatories and an-

swers are so closely connected with respect to the various alleged fires on the property that it is impossible to read one without reading the others, without getting certain qualifications necessary.

The Court: Let me see them; I will pass on them now.

Mr. Romine: I propose reading the third, fourth and fifth.

Mr. Scott: Third, fourth,—

Mr. Romine: And fifth.

The Court: Well, do you think the first one has any reference to the—

Mr. Scott: I withdraw my objection, may it please the Court; the selection there I do not think works any harm to the defendant.

Mr. Romine: The third interrogatory is: Did any of the employes of the defendants, or either of them, maintain or cause to be made, a fire on the property herein referred to on the 25th day of March, 1919? And the answer is: Yes.

Fourth interrogatory: State whether the man guarding the fire in the above lot on the premises herein referred to between the brick building west of the freight station and the outlet of the pond was in the employ of the defendants, or either of them? Answer: The employee inquired about in the third interrogatory who caused the fire to be made on the property described and referred to in the plaintiff's complaint was in the employ of the defendant, Walker D. Hines, Director General of Railroads.

Fifth interrogatory: State for what purpose and when the fire was started, how long it continued to burn near the brick building west of the freight station adjoining the pond known as Ford's Pond, and the character of materials which were consumed at the time. Answer: The purpose for which the fire inquired about in the third interrogatory was started, was to burn the old grass near and about the signal repair shop on the premises mentioned. Said fire was started at approximately 11 o'clock on the morning of March 25, 1919, and continued to burn between thirty-five and forty-five minutes. Character of the material which was consumed at said time was the old grass near and about said signal repair shop.

That closes our case, if your Honor please.

Mr. Scott: May it please the Court, at this time I ask that a non-suit be directed on the ground that there is no evidence that the defendant or defendants in this case have failed or neglected in any duty owing to the plaintiff's intestate.

The Court: I refuse that motion now. It seems to me there is a question which the defendant is obliged to meet. It may be that they can meet it so there will be no question to go to the jury, but as it stands now, I think there is.

Mr. Scott: I will call Mr. Drake.

JOHN T. DRAKE, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Scott:

Q. Mr. Drake, you are a civil engineer? A. Yes, sir.

Q. And have been for how long?

Mr. Romine: I will admit his qualifications.

Q. Will you put up—you have drawn a map, Mr.— A. Yes, sir.

Q. And will you put that map up. Is that map drawn to scale? A. Yes. Twenty feet to the inch.

Mr. Romine: I suggest to Mr. Drake and Mr. Scott, if we can put it between the windows, if it will go between there.

The Witness: (Hanging sketch across window.)

Q. Mr. Drake, that map was drawn to what scale? A. Twenty feet to the inch.

Q. And will you show to the jury just where the signal repair house is? A. (Indicating) Red tinted house.

Q. Signal shop? A. Signal shop.

Q. And will you show them where the brook coming out of Ford's Pond is located? A. Immediately to the east of the signal shop.

Q. And that is in what color? A. Blue.

Q. And there is a pathway— A. East of the brook parallel to it.

Q. That is the pathway that has been described throughout this case? A. Yes.

Q. And there is an Exhibit D-2 for identification—D-1 for identification—

Mr. Romine: If you want to offer them, Mr. Scott, I will consent.

Mr. Scott: I am going to offer them in just a moment.

Q. D-1 for identification, there is a telegraph pole; can you indicate where that pole is on the map? A. Yes, at this point (indicating).

Q. Will you mark that with a cross through the pole? You have indicated on that— A. Yes, with a cross, the pole.

Q. Now, how far is it from that pole up to Morris Avenue in a direct line? A. Eighty-four feet.

Q. And from that pole to the roadway is how far? A. That is, to the pathway?

Q. To the pathway to the edge of the pathway? A. It scales 7 feet.

Q. And the pathway at that point is how wide? A. Twelve feet.

Q. And then comes a strip of land between the pathway and the brook? A. Yes.

Q. How wide is that? A. Eight feet.

Q. And the brook itself is how wide? A. Ten.

Q. At that point? A. Ten.

Q. Well, now does it get wider or narrower as it goes south toward the plank walk? A. It is wider; wider.

Q. And how much wider does it— A. At the plank crossing, it is about 20 feet wide.

Mr. Scott: That is all.

Mr. Romine: No questions.

Mr. Scott: I offer the map.

The Court: Let it be marked.

(Marked Exhibit D-3.)

Mr. Scott: Have you offered your map, Mr. Romine?

Exhibits Offered in Evidence

Mr. Romine: I was going to, but I neglected to offer my map; I do so.

The Court: That may be marked.

(Marked Exhibit P-2.)

Mr. Scott: And I offer the photographs D-1 and 2 for identification.

The Court: They may be marked.

(Marked Exhibits D-1 and D-2 in evidence.)

Mr. Scott: I desire to read in evidence the sixth, seventh and eighth interrogatories and answers of the defendant.

The Court: The interrogatories that the other side took?

Mr. Scott: That have been propounded to the defendant and that haven't been read.

Mr. Romine: I object to that.

Th Court: I know of no authority that you have to read them.

Mr. Scott: No authority that I have to read them, but I have the privilege.

The Court: I know of no authority that you have a right to use them.

Mr. Scott: Well, I make the offer.

The Court: You may make the offer, and that is refused.

Mr. Scott: The offer to read the third—

The Court: Well, interrogatories, as I understand it—

Mr. Romine: Their own answers.

Mr. Scott: I take it that it is my right under the statute, sir.

The Court: Well, you turn to the statute and show me any right. The statute says distinctly it may be offered by the party

on whose behalf it was taken. If you can show me any statute to the contrary, I will be very glad to admit them.

Mr. Scott: The defendant rests.

Mr. Romine: I have nothing further.

Mr. Scott: Now, if it please the Court, I make a motion for the direction of a verdict on the ground that there was no duty violated by the defendant due the plaintiff's intestate under the doctrine of attractive nuisance under the Friedman vs. Snare & Triest case, 71 law; that with respect to the private way, there has been no duty violated by the defendant, and for the authority under that complexion of the case and situation, I cite your Honor the case of Phillips vs. Library in 55 N. J. Law, and if the Court should feel the case is in the situation that this is a public way, this thoroughfare, then under the ground that—of the case of Reaney vs. The Central Railroad of New Jersey (89 Law), that a land owner who invites others to use a private way owned by him as though it was a public street and under the belief that it is such, owes to them as such owner no greater duty than that owed by the public to one using a highway, and that Reaney case in connection with the case of Reilly vs. The City of New Brunswick in 92 N. J. Law, 548, which holds that there is no duty owing the public, and I take it the public is the public as an entity, as a corporation, in favor of a party on account of a fire of this character.

The Court: What is that last case you refer to?

Mr. Scott: Reilly vs. New Brunswick, 92 N. J. Law.

The Court: What does that case say? I am not familiar with that case?

Motion for direction of a verdict

Mr. Scott: Reilly vs. New Brunswick, 92 N. J. Law, at 547, which was an action against the Mayor and Council of New Brunswick, against the municipality, for damage to adjoining property because of a fire which had been negligently kindled and guarded by municipal employes, used by the municipality for the disposition of waste collected from the streets in accordance with the mandates of the charter, and there the Court of Errors & Appeals said that the common law rule with respect to the occupant of property for a fire communicated from his premises to that of his neighbor is that he is not to be held responsible unless he negligently kindles or negligently guards the fire upon his premises, and this is the rule that prevails in our state. This being so, the liability of the municipality must be predicated upon the negligence of its employes, either in the kindling or guarding of the fire in question, and the legal obligation of the municipality to answer for such negligence.The propriety of the judicial action complained of, therefore, must depend upon whether the doctrine applies in this case before us; for if it does apply, then certainly the proofs in the case entitled the plaintiff to go to the jury on a question of the existence or non-existence of negligence on the part of the city's employes. The Court held that there was no obligation on the municipality and, as I take it, the public, under the Reaney case, to respond in damages for a fire on a highway.

Those are the reasons which I urge upon your Honor.

The Court: Now, I will hear you, Mr. Romine.

Mr. Romine: The only answer I care to make

to Mr. Scott is this: This cases that he cites go to the question as to whether the fire was properly guarded or not. In the cases he cited, it appears that they did have a watchman who was guarding the fires, and that they were not negligently started because they were built by virtue of some ordinance respecting the burning of materials.

(Citing Compiled Statutes, Meaney vs. Sampson, 20 Law, p. 183. Van Winkle vs. The American Steam Boiler Company, 52 Law, p. 240. Nugent vs. Suburban Electric Company. Continuing Argument.)

The Court: Anything further, Mr. Scott?

Mr. Scott: No, sir.

The Court: I will hold this matter until Tuesday morning, I do not want to take it away from the jury if there is any way I can leave it to them. Gentlemen, you may be excused until Tuesday morning at half-past nine.

Recess.

Morristown, N. J., February 24, 1920.

Trial continued.

The Court: Gentlemen, have you anything further to say in this case than was said on Friday?

Mr. Romine: I want to call your Honor's attention to the case of Meyer vs. Benton; I don't know whether your Honor looked at that case or not. In that particular case, I think the Court has referred to the rule which applies in this case. In that case, there was a factory owned by the defendant company at Weehawken and they had emptied ashes alongside of an alleyway and a small child or boy who had been playing in a field adjoining where children had been in the

habit of going, with another boy came up near this alleyway and happened to get over into the hot ashes and was severely burned. The proof was, he testified, that he had previously been through the alley, presumably using it as a way of passage, but whether on more than one occasion does not appear. One of his witnesses testified that he was in the habit of playing on the ice back of the pumping station, but not in the alley; did not use the alley. He testified to having seen boys go through the alleyway to reach the playground in the rear. How often this was observed, he did not state, when it occurred he did not state, nor did his testimony include mention of circumstances tending to show that the practice was either frequent, long-continued or notorious. The user of a passage way as a mode of access to the lots in the rear was confined, so far as appears, to the limited times when the ice on the rear lots was frozen so as to afford a playground. The evidence did not go to the extent of establishing a custom on the part of the children to use the alley as a way of passage, still less to show that it was used so frequently as to charge the defendants with notice; and the Court said:

"Assuming that defendant's contention in this regard is not well-founded, the responsibility of the defendants in the premises still depended, we think, upon the question whether injury to the plaintiff, or to a class of which the plaintiff was one, ought reasonably to have been anticipated. This is the rule laid down by the Court in the case of Guinn vs. The Delaware & Atlantic Telephone Company, 43 Vroom, 276, and it under-

lies the decision of the Supreme Court in the Van Winkle case''—which I referred your Honor to the other day

Now, in that particular case they had not shown there had been an open and notorious use of the alleyway so that defendants would have been charged with notice and so that an injury might reasonably have been anticipated.

In this particular case we have gone further and we have shown facts which come within the law, that this pathway had been used for upwards of fifty-five years; for over twenty years had been used continuously by the children going to and from school, and that the land lying between the pathway and Morris Street had been used continuously for that period of time by children, so that it had been such a user as to bring to the knowledge of the defendants the fact that children had been upon that land, and the building of this fire, and the fire as we show being contiguous to and so closely connected with it, and the wind blowing in that direction, that it is a question for the jury to say whether the fire on the other side of the road was a part of it, and that, leaving it unguarded, they were not negligent in their failure to reasonably anticipate, children having been using this property, that injury might come to them, and under those circumstances and the law, I simply want to repeat that it is a question for the jury.

The Court: Where do you say the evidence shows this child to have been when it was seen and picked up?

Mr. Romine: The evidence shows that the child was along the path, right directly opposite the

signal repair shop right in here is where one witness marked it, right alongside of the path.

Now, if your Honor will remember, the testimony is, and the defendants admitted, that a fire had been started around the signal repair house and Miss Coe, in coming up Morris Street, saw this whole arear between the signal repair shop and the westerly edge of the right of way was all burned. Mr. Cook saw the fire in this vicinity right on the edge of the signal repair shop, and off to the west there was a large fire where a workman was still heaping on dead grass. We showed that the wind was blowing in this direction, and that within an hour or so after the fire had been started around the signal repair shop and while the fire was still in evidence in the south corner of the building, the fire had started over here and was burning at the time from the pathway one-third of the distance up.

The Court: Anything further, Mr. Scott?

Mr. Scott: No, sir.

The Court: I have carefully gone over this evidence, and that was the reason that I was a little late in opening court; I had the evidence written out and I could not get it until this morning; and I fail to see that there is anything that I can submit to the jury in this case. The evidence shows that the defendant had a fire; that that fire was attended by one of its employes; there is nothing to show that the child was injured by that particular fire. There were two paths through this property which, according to the evidence, had been used for many years. If this child had been injured while on either of these paths, another question would

have been injected into this case; but, as it is, neither the lady who first saw the child, nor the gentleman who picked the child up, found this child on the path; it was beyond the path, between the pathway and the public road. The mere fact that children had played there without the consent or knowledge of the defendant, or of the railroad company prior to the defendant operating it, could not be construed as an invitation; so the case as presented to the jury is simply the case of a child, in law a trespasser, being upon the property of the defendant and being injured. Now, it is a well-settled rule of law that as to a trespasser the defendant owed no duty or care other than to refrain from wilful injury, and even if it was admitted, which I do not understand in this case it is, that the fire escaped from the man in charge and communicated to the other part of the land and the trespasser was on that other portion of the land, there would be no liability. If the fire had gone off of the defendant's property and onto a property where the plaintiff had a right, then another question would have been injected into it. But, as it is now, the case presented to the jury is, that the child was injured while, in law, a trespasser upon the property of the defendant, and I cannot see how I can do anything else except to direct a verdict, unless the plaintiff would prefer to suffer a voluntary non-suit; then the same question of law would arise again, and it would probably be better for the plaintiff to allow the direction of a verdict and then raise the question that would have to be raised, even if a voluntary nonsuit was granted and a new suit brought; the same question would arise.

Argument

Mr. Romine: I call your Honor's attention to this fact: that you said that although the child may be a trespasser, all the defendant company owed was to abstain from wilful negligence. Now, in that respect I refer your Honor to the question in this case as to whether they properly guarded this fire. You see, there are two questions; if we pass the first question, it makes no difference, as I see it, whether the child was burned while walking along the path or whether the child was on the land between the pathway and Morris Street, because the proof is that children had been in the habit and custom of using that portion of the land, and if they had, it had been in the open the notorious, that the company should be reasonably anticipated injury.

Now, your Honor refers to the fact that there is no evidence in the case that the fire on one side of the right of way was a part of the fire on the other. It seems to me, under the decisions, that is a question for the jury. We have proven there was no other fire in the immediate vicinity at the time; we have proved that at the time this fire was burning this other fire started burning. There is also evidence of a fire at the southeast corner of the building. There is also evidence that in a very short distance, within twenty or thirty feet of a large fire, in charge of a workman who was there for the defendant company, in building a fire. Now, it seems to me that with the testimony, that the wind was blowing in that direction, it is a question for the jury to say whether or not the fire on the side of the right of way where the child was found had any connection with the fire on the other side which was

started by the defendant company. If the jury so find, then the question is whether they were properly guarding the fire. Now, the evidence is that there was a workman on the other side of the building who could not see on this side of the land there, the testimony of Mr. Jenkins. Now, assume that they are only charged with wilful negligence? They are bound, under the law, to have someone there to guard that fire. There are several questions for the jury to consider: First, whether children had been in the habit and custom of using this land so that it was open and notorious to the knowledge of the defendant company; secondly, whether they were responsible for the fire that traversed the other side of the right of way, and having shown within such a short space of time the origin of the fire on the one side, and the wind blowing over the other, and the fact that there was dead grass there at the time, is a question for the jury to say, it seems to me, under the law whether or not they were responsible for that fire, and if they were, whether they properly guarded it.

The Court: I think the question in the case at present is in such a shape that the Court has nothing to leave to the jury. If your views are correct, why, of course, it will be sent back for re-trial.

Mr. Romine: Well, did your Honor refer to this case?

The Court: I did. I think there is no question but what this child is a trespasser, and there is nothing in the case to show such negligence as would bind the company, there being nothing to show an invitation. The Court directs a verdict in favor of the defendant.

Postea

Mr. Romine: And in order that the record may be kept straight, I take an exception.

The Court: Oh, yes, certainly; you ought to take an exception—and note the exception of the plaintiff to the ruling of the Court. By direction of the Court a verdict is found for the defendant.

Postea

This case was tried before Willard W. Cutler Circuit Court Judge with a jury at the Morris Circuit on February 20 and 24th 1920.

By direction of the Court the jury found a verdict in favor of the defendant and against the plaintiff:

WILLARD W. CUTLER,
Judge &c.

Notice and Grounds of Appeal

(Filed, March 13, 1920.)

NEW JERSEY SUPREME COURT

MORRIS COUNTY

LOUIS PIRACCINI, Administrator *ad Prosequendum* of the Estate of Amelia Piraccini, dec'd, Plaintiff, vs. WALKER D. HINES, Director General of Railroads and THE DELAWARE LACKAWANNA & WESTERN RAILROAD COMPANY, Defendants.	Action at Law

To Frederic B. Scott, Esq., Attorney for Defendants.

Sir:

YOU WILL PLEASE TAKE NOTICE that the above named plaintiff appeals to the New Jersey Court of Errors and Appeals, from the ruling of the trial court directing a verdict in favor of the defendants, in the above entitled cause, at the Morris Circuit on February 24, 1920 and from each and every part of said judgment, and that the said plaintiff herewith sets down his reasons and grounds of appeal to be as follows.

1. The trial Court committed error in directing the jury to render a verdict of no cause of action

in favor of the defendants and against the plaintiff.

2. The trial Court should have allowed the case to go to the jury as there were facts for the jury to consider respecting the defendant's liability.

3. The defendants, under the law of the case, being chargeable with the duty to exercise great care and skill in setting out a fire upon its lands and to guard the same so as to prevent damage or injury to any one rightfully using any portion of its property and there being evidence that plaintiff's intestate died, as a result of burns received, while in and along a pathway on defendant's property, which had become a public thoroughfare by user for upwards of fifty years, and the evidence also disclosing, as well as being admitted by defendants, that shortly before the child was found in and along said pathway, they by their servants and agents had caused to be made a fire to burn off dead grass adjoining said pathway and there also, being evidence to show that at the time the plaintiff's intestate was found in and along said pathway, that there was still evidence of fire to the south of the building where the fire had originally been started and that there was also a fire across the pathway some twenty or thirty feet distant and surrounding the child; and there being evidence that the wind was blowing in that direction and that the fire was left unguarded by the defendants; therefore, there were questions of fact for the jury to consider in determining legal liability.

4. There were questions of fact presented by the evidence from which the jury could have de-

termined that defendants, their servants and agents were responsible for the fire that burned plaintiff intestate; that she was lawfully on said property; that defendants were negligent in failing to properly guard said fire and therefore it was error for the trial Court to hold there was no liability, and direct a verdict for defendant.

5. The plaintiff was also entitled to have the case go to the jury on the question of whether injury to plaintiff's intestate was one that should reasonably have been anticipated by the defendants because there was evidence that the pathway or roadway had been used by the general public for upwards of fifty years and particularly during the past twenty years had been used principally by children in going to the South Side School, and there was also evidence of an open, continuous and notorious use of the lands lying between the pathway, where the child was found, and the street known as Morris Street; and the jury were entitled to find from the evidence, respecting defendants' liability, whether they were responsible for the fire on both sides of the pathway; whether such injury was one that should have been reasonably anticipated and also whether the fire was left unguarded, and a refusal of the Court to allow case to go to the Jury on this ground was error.

6. The ruling of the trial Court, in directing a verdict in favor of the defendant was contrary to the law and facts of the case and for that reason a new trial should be granted.

ELMER W. ROMINE,
Attorney for Plaintiff.

Service acknowledged by
Frederic B. Scott on

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

LOUIS PIRACCINI, administrator *ad prosequendum* of the estate of Emelia Piraccini, deceased,

Plaintiff-Appellant,

vs.

WALKER D. HINES, Director General of Railroads, and THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Defendants-Appellee.

Action at Law.

BRIEF OF PLAINTIFF-APPELLANT.

Preliminary Statement.

On the trial of this case in the Morris Circuit, a verdict of no cause of action was directed by the Court in favor of the defendant, to which exception was taken, and from such judgment this appeal has been taken by plaintiff.

The plaintiff, as the father and administrator of Emelia Piraccini, claims damages from defendant for the death of his child, resulting from burns received by her while lawfully on property or lands of the defendants.

The Trial Judge, in disposing of the case, concluded that the child was a trespasser (97, l. 38), but the evidence clearly shows a legal right to be on defendants' property and that it was responsible for the death.

The railroad company admitted for the purposes of the suit that it was the owner or possessor of a tract of land in the town of Dover (19, l. 40).

This tract adjoined the main railroad tracks and lay along the westerly side of Morris street. At the upper or southerly part of the land was a pond. Commencing at the extreme northerly portion near main line tracks and running off from Morris street, was a path or roadway leading southerly (and branching westward in its course) until it intersected a street known as Second street. Alongside the pathway, near the head of the pond, and about four hundred feet from the main line tracks

was located a brick building of defendants' and called "The Signal Repair Shop."

The land around the shop and easterly toward Morris street was at the time of the injury in question, covered with a dry grass (30-35-50). This pathway had been in existence and used continuously by the general public upwards of fifty years (40, l. 20), and particularly for over twenty years by school children without interruption or objection (27-42, l. 24; 44, l. 22). In connection with the use of this pathway, were various other intersecting paths, one coming from the westerly portion of the property between the signal repair shop and the head of the pond, and several others from Morris street down to the main path. (The photos show the beaten paths.)

The land between the main path and Morris street was vacant but used by children in going to and from Morris street to the South Side school. There had been an open notorious use of this land by children, as a playground, and also by adults (35-42-70).

On the day in question the railroad company admit, by answering interrogatories (84-85), having started a fire at about 11:45 A. M. around the signal repair shop adjacent to the main path for the purpose of burning the dead grass.

At about one o'clock the same day, the plaintiff's intestate, a girl of five years, left her home just off Morris street in company with another small girl (40-59). At 1:15 a Miss Coe, truant officer for the Dover School, was walking up Morris street in a southerly direction and looking over toward the signal repair shop, *saw the plaintiff's intestate in the pathway opposite the repair shop with her clothes afire* (49-57).

The witness observed a burned area between the main path where the child was up toward and around the repair shop; also observed that the fire was across the path and from the point in the path where the child stood, was about one-third the distance up toward Morris street (50-63). Another witness coming across the intersecting path at the head of the pond saw a workman burning debris and dead grass at the west end of the repair shop (71-72), saw fire still burning at the south side of the shop near the main path (77, ll. 20 to 40), heard the child cry (72, l. 26), saw her afire in and alongside of the main path (72, l. 32), with fire from that point upwards and in the field. There was also evidence that the wind was blowing from the direction of the signal repair shop easterly toward the child and

the point where the fire had started around the child (82). The proof showed that the workman, from where he then had the fire, could not see on the south side of the building, nor in the path where the child was found (31, l. 8), *there was no one guarding the fire at this point* (50, ll. 40-51, l. 12), *and no evidence of any other fire except the one started and burning by defendant company.*

The defendants offered no evidence except the map and photos but admitted the child died as a result of burns received while on the railroad property (48, l. 14).

This appeal is taken because it is insisted that the Court committed error in refusing to allow the case to go to the jury and in deciding that plaintiff's intestate was a trespasser.

Under the law and the evidence of the case the liability of defendants was clearly established and argument for a new trial will be had under the following divisions, namely:

(1) The defendants were legally responsible for the death of plaintiff's intestate and liable therefor in damages.

(2) The case should have been submitted to the jury.

ARGUMENT.

I.

The defendants were legally responsible for the death of plaintiff's intestate and liable therefor in damages.

The liability of the defendants is two fold.

(1) *Injury to plaintiff's intestate occurred while on a right of way running over and across defendants' property.*

(2) *The injury to plaintiff's intestate, resulting in her death, was one that should have been anticipated.*

As to the first feature of liability, that occurring on a right of way, the evidence in the case disclosed that for upwards of fifty years pedestrians had used this pathway continuously, year in and year out, without objection or interruption on the part of the defendants (40, l. 20), and the Court in the case of *Phillips* v. *Library Co.,* reported in 55 Law, page 307, laid down a principle of law which is applicable to the present case, in the following language:

> "A person entering premises of right or by invitation, express or implied, and using a path which for many years had been used with the acquiescence of the owner,

is not precluded from recovering damages for an injury caused by a danger placed by the owner across the path, solely on the ground that the owner has provided another way that was safe and might have been used by the plaintiff. In such a case, it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use."

See also

Nolan v. *Bridgeton Traction Co.*, 74 Law, p. 559;
Duel v. *Mansfield Plumbing Co.*, 86 Law, p. 582;
Black v. *Central Railroad Co.*, 85 Law, p. 197.

It was uncontroverted and undisputed that the pathway had been used for upwards of fifty years by the general public.

Under the circumstances and the evidence, the plaintiff's intestate had a right to be on this path and was not a trespasser as the Court concluded, and not being a trespasser and a child of five years of age, she was *non sui juris* and could not be guilty of contributory negligence.

The Trial Court found as a fact that plaintiff's intestate was not in the path and therefore decided against the plaintiff, whereas the testimony on this point is as follows (testimony of Miss Coe, page 49, line 22):

"Q And the little child that was all in flames, can you tell us about where that child was? A Down near this brick building. *In the walk.*

Q In the walk? A Right by the side of the walk I should say."

and the testimony of Irving Cook, page 72, line 28:

"Q Did you find the child anywhere in that vicinity? A Yes, I came around the house and I heard a child screaming and I couldn't see her. I found the child lying just over *by the side of the path with the clothing all afire.*"

Thus the evidence established that the child was in or alongside of the path.

It was held in the case of *Suburban Electric Co.* v. *Nugent*, 58 Law, page 658, that liability was established although no one was present at the time the decedent came to his death, and the Court, after stating the salient features of the case, said:

"These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death through

having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole and thereby received a fatal shock, but exclude any other inference. *For such a death the defendant was plainly responsible.*"

"It was using in the public streets of Elizabeth an agency dangerous to human life *and it was bound to take every reasonable precaution to protect the public while using those streets, against injury from that agency.*"

See *Price* v. *N. Y. Central R. R. Co.*, 105 Atl., p. 187.

In the instant case the evidence disclosed that the child was found ablaze in or alongside the pathway. Just how or where she stood when her clothes became ignited is not known. The child's mother gave testimony which indicated that the burning was from the shoe tops upwards on the body (47, l. 25). The evidence disclosed that the grass was ablaze from the point where the child was in the path one-third of the way up the hill, and it was admitted by the defendants that they had started the fire on the opposite side of the path an hour or so prior thereto, and the testimony of Mr. Cook shows that there was still evidence of a fire which had been started by defendants, within twenty feet of where the child was and which fire was connected with a larger fire on the opposite side of "The Signal Repair Shop" where defendants' workman was then engaged in heaping dead grass and debris on the fire. It was also proven and undisputed that there was no other fire in the vicinity at the time and that the wind was blowing in that direction.

It being unexplained how the injury occurred, and the child being found in or along the path where the fire was burning makes it reasonable to suppose that the child's clothes caught fire as she walked in or alongside the path and seems to exclude other inferences. The defendants were bound to use every precaution to prevent injury to those having access to the path.

The defendants urged before the Trial Court that there should be a non-suit and direction of the verdict upon the theory that they were responsible and chargeable only to refrain from acts willfully injurious. Under the circumstances of the case, considering the right to be in and upon the land, this contention could not be tenable but if arguable would be a question for the jury.

Compiled Statutes, Vol. 2, page 2335, Sec. 47, contains a provision as follows:

> "All persons who shall burn any pit of charcoal or set fire to or burn any brush, grass or other material whereby any property may be endangered or destroyed, *shall keep and maintain a careful and competent watchman in charge of said pit, brush or other material while burning.*"

If the defendants were liable only for willful negligence, the starting of a fire, on its property, which was dangerous to those using the land *and leaving the fire unguarded, would be willful negligence.*

The Court gave expression to this application of the law in *Meany* v. *Sampson,* 20 N. J. L. Journal, page 132, as follows:

> "The defendant left his horse, attached to a wagon, standing, *unfastened* and *unguarded,* in a much frequented public street. *Held to be prima facie proof of defendant's negligence in an action brought for damages sustained by the horse running away.*"
> *Read* v. *Pennsylvania R. Co.,* 44 Law, p. 280;
> *Kuhn* v. *Jewett,* 32 Eq., p. 647;
> *Delaware, etc.,* v. *Salmon,* 39 L., p. 299.
> 33 Cyc., 1386-1385.

In setting out a fire of dead grass, and without guarding same, allowing it to burn across lands and pathways where people are accustomed to walk, especially small children, is the most apparent and manifest negligence of all.

In the case of *Van Winkle* v. *American Steam Boiler Co.,* 52 Law, p. 240, the Court held that dangerous operations must be conducted and managed so as to prevent injury, and in the language of the decision,

> "There is a public duty to exercise great care and skill incumbent on those having charge of instruments which, if mismanaged, are highly dangerous to the lives and persons of men who happen to be in their neighborhood; and for the non-performance of such duty, a person specially injured thereby is entitled to sue, * * * And it would seem that there is a broader ground than the one above defined on which the present case can be based. It is this, *that in all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill.* The law hedges around the lives and persons of men with much more care than it employs when guarding

> their property so that, in this particular, it makes, in a way, every one his brother's keeper, and, therefore, *it may well be doubted, whether in any supposable case, redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm.*"

As to the second proposition of liability it was proven and undisputed that for years people had been using the lands without restriction which lay between the right of way where the child was and Morris street; that it was unenclosed property, which was traversed by various paths for over twenty years, and especially since the building of the South Side school, small children had roamed over this property down to the pathway day in and day out, month in and month out, for upwards of twenty years so that there had been an open and notorious use of the lands to the knowledge of the defendants by children, and speaking of the degree of liability under such circumstances, the Court in the case of *Guinn* v. *Delaware & Atlantic Telephone Co.*, reported in 72 Law, p. 216, said:

> "The test of defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated."

See also

Barnett v. *Atlantic City Elec. Co.*, 87 Law, p. 29;
Lightcap v. *Lehigh Valley R. R. Co.*, 94 Atl., p. 35;
Durant v. *Palmer*, 29 Law, p. 544.

The Court of Errors and Appeals in dealing with the situation in the case of *Meyer* v. *Benton*, 74 Law, p. 533, denied recovery because of the limited use of the alleyway, and failure of defendants to become chargeable because of the limited use.

But in the same case reiterated the principle of anticipated dangers and injury by declaring that:

> "*The responsibility of the defendants in the premises still depended, as we think, upon the question whether injury to the plaintiff, or to a class of which the plaintiff was one, ought reasonably to have been anticipated.* This is the rule laid down by this Court in the recent case of Guinn *v.* Delaware & Atlantic Telephone Co., 43 Vroom, page 276, which underlies the decision of Supreme Court in Van Winkle *v.* American Steam Boiler Co."

The Court in disposing of the Benton case, intimated that under the cases of *Haber* v. *Jenkins Rubber Co.*, 43 Vr., 171, and *Friedman* v. *Snare & Triest Co.*, 42 Vr. 605, even though it should appear that the alleyway was frequently used by children and others yet it was unnecessary to explain, if there had been such uses, that liability could not attach for injury resulting by reaching over beyond the alleyway for a stick, *because there was no proof to show a use of the land adjoining the alleyway.* But in the case now before the Court, in addition to the right to use the pathway, the evidence goes farther in its scope and establishes without contradiction that the land between the main path and Morris street was a common playground, traversed constantly and having usable paths running in various directions so that under the principle, enunciated in the Benton and Guinn cases, there was an open notorious use of the entire land to the notice of the defendants, thus raising the question whether injury to the plaintiff's intestate or to a class of which she was one, ought reasonably to have been anticipated and such a question should have been left to the jury.

See *Furey* v. *N. Y. C. & H. R. R. Co.*, 6 Law, p. 270.

It may also be argued by the defendants that the doctrine of attractive dangers, such as expressed in the cases of *Turess* v. *N. Y., Susq. & W. R. R. Co.*, and the *Friedman* v. *Snare & Triest Co.*, precludes recovery, but it will be observed that these cases deal with the situation where the person injured is either a trespasser or a mere licensee and that the person injured is making use of some property of the land owner which is dangerous *per se.*

The case at bar does not come within the construction of this class because there was a legal right acquired by the public to use the lands of the railroad company as a mode of access from one street to another and the public thereby acquired an easement over the land, and in addition thereto the use of the lands in question were not dangerous *per se,* but the danger on the particular day was created by the defendant in placing or allowing a fire to occur thereon, and the principle which underlies the class of cases just referred to is that liability attaches to a trespasser or mere licensee where there is willful negligence, which has already been discussed by pointing out that the defendants left the fire unguarded.

The case of *Reaney* v. *Central R. R. Co.*, reported in 89 Law, p. 282, was cited by counsel on the trial of the case, as expressive

of a principle which would operate to defeat plaintiff's right of recovery. The injury in that case resulted from the use of an alleyway or laneway in the night-time, or while it was still dark. The injured party having been run into by some other person using the pathway, and the Court held in that case that the defendant was not chargeable with the duty of lighting the passageway. The company had done nothing itself to create a liability or to make the pathway dangerous. They were not responsible for the darkness, but as applied to the present case now before the Court, on appeal, the defendant here had committed an act which created a danger, namely, the building or setting of a fire at or near the pathway and leaving it unguarded.

It is conceded that where a land owner has upon his property a turn table or piles of building materials, that such, by virtue of its very existence is to be used only in connection with the business or operations of the land owner, and there could be no right acquired such as would bind or hold the land owner for damages, because the use of such by the public or children would be dangerous and the land owner could not be chargeable with anticipated injury as it would not be expected that anyone would attempt to use such in any way, without being a trespasser, as the thing itself is manifestly dangerous, but where there is vacant land unenclosed, adjoining a right of way to a public street, it is obvious and apparent that such would naturally be used by the public as a mode of access where the use of the lands are not dangerous *per se.* A greater degree of liability attaches where for many years various paths across lands are made use of by the public and the property incidentally used by children, with no objection on the part of the land owner. Under such circumstances, there is at least an acquiesence or an implied invitation on the part of the land owner to use the lands, and by the continuous use of the lands, an easement or right is acquired and the land owner cannot absolve himself from liability on the theory of attractive dangers, *if the land in the ordinary use was not dangerous,* and if injury occurred because of a danger created by the land owner he would be liable not only for negligence, but for an injury which should have been anticipated would be the result of the dangerous condition which he himself or his agent created.

II.

The case should have been submitted to the jury.

The Trial Court in directing a verdict said (94):

> "I have carefully gone over this evidence, and that was the reason that I was a little late in opening the court; I had the evidence written out and could not get it until this morning; and I fail to see that there is anything that I can submit to the jury in this case. The evidence shows that the defendant had a fire; that that fire was attended by one of its employees; there is nothing to show that the child was injured by that particular fire. There were two paths through this property, which according to the evidence had been used for many years. If this child had been injured while on either of these paths, another question would have been ejected into this case; but, as it is, neither the lady who first saw the child, or the gentleman who picked the child up, found this child on the path; it was beyond the path, between the pathway and the public road. The mere fact that children had played there without the consent or knowledge of the defendant, or of the railroad company prior to the defendant operating it, could not be construed as an invitation; so the case, as presented to the jury, is simply the case of a child, in law a trespasser, being upon the property of the defendant and being injured. Now, it is a well-settled rule of law that as to a trespasser the defendant owed no duty or care other than to refrain from willful injury, and even if it was admitted, which I do not understand in this case it is, that the fire escaped from the man in charge and communicated to the other part of the land and the trespasser was on that other portion of the land, there would be no liability. If the fire had gone off of the defendant's property and onto a property where the plaintiff had a right, then another question would have been injected into it, but, as it is now, the case presented to the jury is, that the child was injured, while, in law, a trespasser upon the property of the defendant, and I cannot see how I can do anything else except to direct a verdict unless the plaintiff would prefer to suffer a voluntary non-suit; then the same question of law would arise again, and it would probably be better for the plaintiff to allow the direction of a verdict and then raise the question that would have to be raised, even if a voluntary non-suit was granted and a new suit brought; the same question would arise."

The Court evidently misunderstood the situation. *There was no one guarding the fire on the side of the building where the child was.* The defendants' employee was around to the end of the building from which point Mr. Jenkins said it was impossible

to see the land where the child stood, *and this remains uncontradicted.*

The testimony of Miss Coe (49, l. 22) *and Mr. Cook* (72, l. 28), heretofore referred to, *establishes that the child was in and along the path not beyond the path,* or between the path and Morris Street, and even though there may have been a variance in their testimony on cross examination, as to the exact position, it was a question for the jury to say exactly where the child was when ablaze, and as the photographs show that there were no defined lines in connection with the path and the child being found alongside of the path, or in such close proximity thereto, it would be a reasonable inference that she was within the area of the path or right of way.

In view of the circumstances and law of this case, it would be immaterial whether the child was burned while in and along the path or between the path and the main street, because it was ground traversed and used constantly by the pubic and children, and leaving a fire unguarded so that it spread to portions of the land so used by children, resulting in an injury was one that should have been anticipated.

The Court also held that the child was a trespasser and therefore the defendant owed no duty other than to refrain from willful injury. The Trial Court undoubtedly misconstrued the child's position and disregarded the fact that she was upon this property by right, but as hereinbefore adverted to, if plaintiff was to be bound by the application of such a principle, there were facts and circumstances such as leaving the fire unguarded which would warrant the defendants being considered willfully negligent, so as to leave the case with the jury.

See *Nolan* v. *Bridgeton Traction Co.,* 74 L. 539.

It was also held in the case of *Phillips* v. *Library Co., supra,* that:

> "The liability of the owner or occupier of premises for their condition is only co-extensive with his invitation, and a person on private grounds by invitation of the owner, going of his own volition onto other parts of the premises, exceeds the bound of his invitation, and if he does not thereby become a trespasser, goes out of his way to create a risk for himself, *in this aspect of the case, evidence of the usual custom with respect to the parts of the premises into which persons were admitted who enter for the purpose for which the invitation was extended, is competent to show the extent of the implied invitation.*"

The jury were entitled to consider, as argued by counsel (p. 97), first, whether children had been in the habit and custom of using the land so that it was open and notorious to the knowledge of the defendant company; secondly, whether they were responsible for the fire which traversed the other side of the right of way, and having shown within a short space of time, the origin of the fire on the one side and the wind blowing over the other, and the fact that there was dead grass there at the time, was a question for the jury to say, under the law, whether or not the defendants were responsible for the fire, and if they were, whether they properly guarded it. It was also for the jury to say just where the child was, whether in and along the path, or just beyond it.

The portion of this request, not already covered by references to decisions establishing liability, was sustained by the decision in *Minard* v. *West Jersey Seashore R. R. Co.,* 74 Law, p. 39, wherein the Court said:

> "1. In an action of tort to recover damages for the loss resulting to the plaintiff's property from a fire alleged to have been communicated by sparks from a locomotive engine, *circumstantial evidence is frequently the only kind of proof obtainable,* and if the circumstances proven furnish ground for the jury to find it was reasonably probable that the fire did thus originate, then a verdict for the plaintiff will not be set aside."
>
> See *Wiley* v. *West Shore R. R. Co.,* 15 Vr., 247;
>
> *Napurana* v. *Young,* 74 Law, p. 627;
>
> *Price* v. *New York Central R. R. Co.,* 105 Atl., 187;
>
> *Owens* v. *Associated Realty Corporation,* 81 L., 586.

Our Court of Errors and Appeals in the case of *Fedele* v. *West Jersey & R. R. Co.,* 103 Atl., p. 208, approved the action of the Trial Court in leaving the case with the jury and at the conclusion of the decision remarked:

> "The learned Trial Court properly left to the jury the determination of the question whether the pathway in question was one used by the public with the recognition of the defendant and whether the plaintiff was upon it by the defendant's invitation, and also whether the plaintiff was negligent in going upon the grass plot without observing the iron plate up on it, and finally *whether the placing by the defendant, of the iron plates so near to the pathway was, under the circumstances, a negligent act.*"

It was therefore highly important that the jury be allowed to consider in the case at bar, not only whether the fire surround-

ing the child was the result of a fire set by the defendants, but whether the setting or allowing the fire as they did was negligent.

Evidence that defendants' employees set out a fire on a windy day on defendants' right of way which was covered with dry grass and adjoined plaintiff's premises on which there was also dry grass, supports a finding of negligence. American Digest Vol.—Dec. Edition, page 452.

Under the law and the facts of the case there was *prima facie* negligence on the part of defendants, giving rise to a legal liability, and the Court committed error in directing a verdict, as the case should have gone to the jury for their consideration, determination and verdict. Therefore, judgment should be reversed to the end that a new trial be granted.

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New Jersey Court of Errors and Appeals

LOUIS PIRACCINI, administrator *ad prosequendum* of the estate of Amelia Piraccini, deceased,

Plaintiff-Appellant,

vs.

WALKER D. HINES, Director General of Railroads, and THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,

Defendants-Appellee.

REPLY BY PLAINTIFF-APPELLANT TO THE ARGUMENT OF THE DEFENDANTS-RESPONDENTS.

Under Point I the defendant argues that at best there was a situation which may have been produced by one of two causes for one of which the respondent was responsible but not for the other, and as authority cites the case of *Stumpf* v. *D. L. & W. R. R. Co.*, 76 Law, p. 153, but the principle underlying that case is founded upon a situation where there are two producing causes shown to exist, either of which could have caused the injury, whereas in the case now before the Court there was no evidence of any other producing cause, nor was there any other established act or circumstance shown to have existed which could have produced the burning. There was no testimony which would tend to indicate that the fire had been carried from one side of the path to the other side by a third party, nor was there any evidence that the children were playing with fire at the time of the injury. Therefore, it is a mere naked presumption or suggestion advanced by the defendants that the burning might have been caused by a tall colored boy standing nearby, and such a suggestion is quite unfair in the present status of the case and certainly not tolerated by the decisions cited by defendant. The defendants in order to have availed themselves of this decision should have shown by evidence that something was being done by the colored boy which would lead to the conclusion, at least, that he may have committed some act from which injury had resulted to plaintiff's intestate. None of the decisions permit,

by a process of imagination, a guess or supposition that injury might have occurred in some other way unless some other producing cause is shown to have actually existed. *There was no evidence connecting the colored boy with any act which could have been a producing cause,* and for all that appears he came upon the scene at the same time as Miss Coe and Mr. Cook. Defendants' argument is negative of any fact or evidence to support it and leave the question to the single proposition, of the fire on one side of the path, started by the defendant company, with a strong wind blowing in the direction where the child was, and the fire being left unguarded. The defendant did not make any attempt or denial to contradict the situation as presented by plaintiff. *The case as presented shows facts from which defendant alone was responsible for the burning.*

See *Suburban Electric Co.* v. *Nugent, supra;*
Chester v. *Cape May Real Estate Co.,* 78 L. 133;
Minard v. *West Jersey,* 74 L. 39;
Price v. *N. Y. Cent. R. R. Co.,* 105 Atl. 187.

The defendants argue that a playground theory is not applicable to the present case and cites cases in support of that assertion, calling attention that persons who use land as such are trespassers or mere licensees, but by reference to one of the cases mentioned, that of *Gawronski* v. *McAdoo, Director General of Railroads,* 109 Atl. (No. 10 Pamphlet) 763, the Court in reversing a judgment for defendant, said:

> "In an action for injuries to a boy on a freight car, whether Railroad employes knowing that the youngsters were in the habit of playing about the cars, and that adjacent ground were use as ball-park by boys, *should have anticipated their presence* and warned them, *held a question for the jury.*"

Counsel for defendants questions in the brief, whether our courts should adopt this theory of law and yet it is in line with the decision in *Meyer-Benton and Guinn* v. *Delaware and Atlantic Telephone Co.* (cited in original brief of plaintiff), but as stated hertofore, if the above decision is not to be adopted defendant still remains liable on its own admission, for wilful injury, which was urged on the trial as evidenced by defendant leaving a fire unguarded, thus resolving a question for the jury under the cases cited.

In further support of defendants' insistment reference is made to the case of *Dirks* v. *Hiunk Land Co.,* reported in 80

Law, p. 369, wherein counsel points out that Justice Parker held that the children, in that situation, were trespassers, but in that case they entered the property not only for play but for malicious purposes and it was against the wishes of the land owner as evidenced by the fact that they were chased from the property repeatedly. In this case the Court admitted that defendant was liable even to a trespasser for wilful injury and sustained the verdict for the plaintiff. In the present situation before the Court, there were many beaten paths created and established by pedestrians over and across the railroad property and children were permitted to use these paths in connection with their play and roamed over the property without objection, and the use of the land was not for malicious purposes but largely as a means of ingress and egress from one street to another so that there was at least an implied invitation to use the land for such purposes.

All of these decisions cited by the defendants, where the use of lands is held to be a trespass, deal with situations where the use of the land or other property is dangerous *per se* and it is conceded, as heretofore admitted, that where the use of the property is dangerous *per se* that entrance upon the same would necessarily be classed as a trespass. The decisions cited under Point II cannot be considered as in any way branding the plaintiff's intestate as a trespasser in this case *because the use of this land in question was in no sense dangerous,* until made so by by defendants on the particular day when they set out the fire on the land. But again, if plaintiff's intestate was a trespasser the defendants would still be liable for wilful injury and this presented a question for the jury under the facts.

The defendant assumes that the child must have crossed the property from Morris street to the right of way, by going through the field. Thus again we have a mere supposition unsupported by evidence. By reference to one of the photographs it will be observed that there is a pathway leading diagonally across the northerly part of the triangle commencing at the point in the westerly side of Morris street about opposite Monmouth avenue, where the child lived, and leading southwesterly in the direction of the signal repair shop, intersecting the main pathway near the telegraph pole and near where the child was found in and alongside of the main path. It is immaterial how the child entered the property as children had been in the habit and custom, to the knowledge and with the consent of the defendants, in walking over any portion of the land and the particular dan-

ger, by fire on the day in question, could have been anticipated by defendants as to the use of this portion of the land.

Counsel for defendant suggests in the brief that plaintiff stresses the point where the child was. Aside from the testimony of Miss Coe and Mr. Cook, specifically referred to in plaintiff's original brief, the photos show that the intersecting path from Monmouth avenue, broadens where it reaches the main path near the telegraph pole, opposite the signal repair shop, and shows the thoroughfare at this point to be considerable wider with an embankment stretching upward toward Morris street. The gold star pasted on the blueprint, portion of plaintiff's map, accompanying the case shows exactly where the child was and the Court can readily observe by comparing the photos with the map, supported by the evidence that the child was not up on the embankment but in the area of the path itself.

It is unnecessary to discuss the argument advanced under Point III, as the laneway was in no sense a street and the fire which the defendants admit having started, and which crossed the laneway, was not in pursuance of a public duty but was one for the benefit of a private enterprise and regulated by statute so that a careful, competent watchman was required to guard the fire. In fact, in the case of *Reilly* v. *New Brunswick,* cited by defendants under Point III, there was in charge of the fire, therein mentioned, a careful and competent watchman, *whereas in the present case there was no watchman at the point of the fire near the child.*

The plaintiff-appellant herein repeats that the defendant has not shown by reference to any law or testimony that it should or could be absolved or excused from liability, while on the contrary it clearly appears that the child was on the property by right and was injured because of the carelessness and wilful negligence of the defendants; that it was an injury which should have been anticipated. It was as stated a question for the jury to say from the evidence just where the child was and, in view of the decisions suggested by defendant and those referred to by plaintiff, it was also a question for the jury to say whether the railroad company had permitted its lands to be used by children as was used by the plaintiff's intestate on the day in question.

The direction of a verdict was erroneous for the reasons stated by the plaintiff in the briefs and the judgment should be set aside and a new trial ordered.

ELMER W. ROMINE,
Attorney and Counsel for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals.

LOUIS PIRACCINI, Administrator *ad prosequendum* of the Estate of AMELIA PIRACCINI, Plaintiff-Appellant, vs. WALKER D. HINES, Director General of Railroads, and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Respondents.	**Action at Law.**

BRIEF OF RESPONDENTS.

Statement.

This appeal seeks to review a judgment entered upon the direction of a verdict in favor of the respondents in an action for personal injuries resulting in the death of a four year old child, tried before the Honorable Willard C. Cutler, at the Morris Circuit of the Supreme Court.

The facts giving rise to the action being as follows:

For the purpose of this action it was conceded that The Delaware, Lackawanna and Western Railroad Company was the owner of a tract of land at

Dover in Morris County, New Jersey, on which was erected its signal repair machine shops.

Examination of respondents' map, Exhibit D3, gives a clear conception of both the nature of the property and the various contentions raised by the parties.

The property in question lies south of its main tracks which pass through Dover in a general easterly and westerly direction. It is bounded on its easterly side by South Morris Street, which runs in a southerly direction from its main tracks, raising from its northerly end a distance of some 282 feet, the street at the point of the rise being somewhat higher than the railroad's adjoining property, being separated for the distance of this rise by a guard fence.

From the southerly end of the guard fence to the southerly end of the property in question along South Morris Steet, a distance of 202 feet, the property being about on a level with the street, no fence or barrier had ever been erected.

At the northwesterly corner of the property was located its freight house and running from its main tracks and entering at about the northeasterly corner of the property were side-tracks running up in back of the freight house and beyond them a side-track which ran up and connected with three storage tracks which were laid approximately due west and east, their easterly ends terminating about 20 feet from the property line on South Morris Street.

From the northeasterly corner of the property and running in an irregular, but approximately southwesterly direction, was a pathway about eleven feet wide throughout, which extended throughout the entire length of the land, forming the westerly boundary of the triangular portion of

the property in question and designated by the appellant and hereinafter designated for clarity as the "playground".

At the southwesterly side of the property and extending beyond was a pond known as Ford's Pond, the outlet to which was a brook, about eleven feet in width throughout, running parallel with the pathway described for the distance of about two hundred and forty feet. This brook, however, was separated from the pathway by a strip of land, approximately eight feet in width throughout.

About nineteen feet from where the brook came out of the Pond it was about twenty feet wide and was crossed by planking laid on its banks.

Forty-four feet from the brook outlet from the Pond and in a general northerly direction therefrom was located the Railroad's signal repair shop, a brick building about forty by sixty-six feet in size, its greater length extending in a general northerly and southerly direction.

The nearest westerly side of said building being seventy-two feet from the pathway.

There was no dispute that the pathway already described had been used by the public for a period of over forty years and that one of the purposes of its use was that of school-children in going to the south-side school of the Town.

Owing to the fact that the property was not fenced in on South Morris Street, except by the guard fence referred to, people, both adults and children, without let or hindrance, entered upon the Play-ground portion of the property from South Morris Street, both for the purpose of using it for crossing over the planking at the head of the brook to get to certain sections of the Town of Dover and also to get upon the pathway already described.

About sixty-two feet from and opposite a point one hundred and two feet from where

the southerly end of the guard fence ended and across South Morris Street a street known as Monmouth Avenue running in a general easterly and westerly direction entered South Morris Street, it being on this street that the child who was injured lived.

The land in question being covered with dry grass, on the morning of March 25th, 1919, an employee of the respondent started a fire near and about the signal repair shop for the purpose of clearing the land about it. This fire was started about 11:00 A. M. (p. 85, line 1, *et seq.*).

Between 1:00 P. M. and 1:15 P. M. a Miss Coe (p. 57, line 1, *et seq.*), a school-attendance officer, while proceeding up South Morris Street in a southerly direction, heard the cry of a child coming from the direction of the railroad signal repair shop, and turning in the direction of the cry saw two small children about the ages of five years, one of the children being "all in a blaze" (p. 49, line 20, *et seq.*). Before Miss Coe could render effective assistance a Mr. Cook, coming across the planking over the brook near the pond, discovered the child, and on reaching her put his coat about her in an endeavor to smother the flames.

Inasmuch as the appellant vigorously stresses the location of the child when she was discovered ablaze, for the purpose of predicating error in the ruling of the trial judge, an examination of the testimony is in order.

To the question as to where the child was on direct-examination Miss Coe said, she was "Right by the side of the walk" * * * sic., pathway (p. 49, line 26, *et seq.*). "She was near the walk, the path" (p. 50, line 10, *et seq.*). "And was the pole that you refer to near the pathway? A. Yes" (p. 50, line 18, *et seq.*).

The witness then identified the telegraph pole on the property in Exhibit D-II (p. 53, line 25, *et*

seq.), and subsequently testified that the child was "between the telegraph pole and the roadway" (p. 56, line 3, *et seq.*).

This pole, an examination of the map, Exhibit D-III, shows that it was at least eighty feet from the southeasterly corner of the signal repair shop, and 84 feet from South Morris Street (p. 87, line 15, *et seq.*).

From the pole to the edge of the pathway was 7 feet (p. 87, line 19, *et seq.*).

From the witness Cook, who picked up the child (and was not so terrified by the occurrence as was Miss Coe, who clutched the guard fence when she first saw the child because "everything turned black" (p. 49, line 20, *et seq.*), we get a clear and coherent statement as to the fire conditions on the railroad's property at the time he took charge of the child.

Cook was going home to dinner by way of the planking across the head of the brook. On his way he noticed a fire "on the west side" of the signal repair shop (p. 71, line 16, *et seq.*), *attended or being looked after by a man* (p. 71, line 35, *et seq.*). "The fire had been burning there" (the south side of the repair shop)—"but I don't just remember whether it was burning there at that time, it was black there; the fire was right on the other side" (p. 72, line 12, *et seq.*). When this witness reached the child there was a space of ground about six by eight feet burning about the child (p. 73, line 8, *et seq.*). This fire around the child and the one at the west end of the signal repair shop being the only fires seen by the witness when he came around the repair shop and first discovered the child (p. 75, line 15, *et seq.*).

The fire on the westerly side of the signal repair shop was both being guarded and under control (p. 79, line 20, *et seq.*).

Two other significant facts need but be called to the Court's attention before a discussion of the law applicable.

(1) The child who was burned was four years old. At 1:00 P. M. on the day of the accident she was playing in front of her home on Monmouth Avenue, and fifteen minutes after Mr. Cook returned her to her home burned (p. 46, line 26, *et seq.*), no evidence whatsoever being offered as to how the child got upon the railroad's premises.

(2) When the witness Cook arrived at where the child was there were three or four other children around, including a tall colored boy, about fourteen years old. The other children being about the age of the child burned (p. 79, line 38, *et seq.*, and p. 80, line 1, *et seq.*).

ARGUMENT.

POINT I.

Under Point I of appellant's brief liability of the respondent is predicated on the ground that the—"(*1*) *injury to plaintiff's intestate occurred while on a right of way running over and across defendant's lands.*"

This point, we contend, contains not only an unwarranted assumption of fact but is a distortion of the justifiable inferences to be made from the evidence in the case.

If there was any evidence that the pathway was on fire, and the child caught fire while travelling the path, we are inclined to the view that *Philips* vs. *Library Co.*, 55 N. J. L. 3, would have governed the case, provided that the fire had been negligently kindled or guarded.

Further, if the child had come upon the respondent's property by invitation either express or implied and caught fire in close proximity to the pathway, provided the fire had been negligently kindled or guarded, we are further inclined to the view that a case may have been presented, analogous at least in theory to those cases making the land-owner liable where the land is adjacent to a public highway, and the owner makes changes upon it which endanger the safety of travelers, who accidentally deviate from the highway limits.

State vs. *Society, etc.*, 42 N. J. L., at 506.
Daneck vs. *P. R. R. Co.*, 59 N. J. L. 414.

But the evidence being lacking to justify our first concession and the law being contrary to predicate liability upon our second concession, the dilemma

presented to the present appellant is that he has been unable to establish any status of the child at the time it caught fire, other than a bare licensee at best and further has failed to show that the injury was the result of the respondent's negligence, he having shown a situation that the fire may have been caused or occasioned by one of two causes for one of which the respondent might have been responsible, but not for the other, it being just as probable that it was caused by the one as the other.

Stumpf vs. *D. L. & W. RR. Co.*, 76 N. J. L. 153.

The *"other cause"* being that the fire which injured the child could have been caused by the "tall colored boy",—"about fourteen years old", who was where the burning child was when the witness Cook arrived (p. 79, line 39, *et seq.;* p. 80, line 1, *et seq.*), for, as said by one of our Courts:

> "The average boy can make a plaything out of almost anything, and then so use it to expose himself to danger" (*Twist* vs. *Winona, etc., RR.*, 39 Minn. at 167).

POINT II.

Appellant's intestate was at best a bare licensee and as no wilful injury was proven, the direction of a verdict for respondent was proper.

There was no evidence as to how the injured child got upon the premises of the respondent but considering her age, the location of her home and the place where she was discovered on fire, together with the time she left her home, the only logical inference would be that she entered the triangle

part of the respondent's premises designated by the appellant as the "play-ground" directly from South Morris Street, thus beyond a peradventure establishing her status as a bare licensee, unless this Court is inclined to adopt the play-ground theory of liability applied in the State of Pennsylvania and exemplified in the recent case of *Gawronski* vs. *McAdoo,* 109 Atl. Rep. (A. S. No. 10) p. 763, which doctrine we feel is not only antagonistic to the beneficial user of private property—(see 11 Harv. Law Review, 349 and 434) but the decisions of our own Courts, starting with *Vanderbeck* vs. *Hendry,* 34 N. J. L. 467, wherein it is laid down that

> "A mere permission to pass over dangerous lands or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the party giving such permission, except to refrain from acts wilfully injurious."

Assuming that the fire kindled on the respondent's premises can be likened to a dangerous instrument, our Courts have said, in the case of *Mathews* vs. *Bensel,* 51 N. J. L., at 33:

> "The substantial ground of complaint laid in the count is that the defendants did not properly construct their planer, and being a dangerous instrument, did not surround it with proper safeguards, but there is no legal principle that imposes such a duty as this on the owner of property with respect to a mere licensee. This is the recognized rule.
>
> In the case of *Holmes* vs. *N. E. Ry. Co.,* L. R. 4 Exchange 254-56, Baron Channel says that 'where a person is a mere licensee he has no cause of action on account of the dangers existing in the place he is permitted to enter.' "

In the leading case respecting rights and liabilities regarding the passage over dangerous lands, of *Philips* vs. *Library Co.,* 55 N. J. L. 307, referred to

in Point I of our brief, Justice Depew, speaking for this Court, said:

> "All that may be said in favor of a mere licensee is that he is only not a trespasser and the general rule of law is that the owner and occupier of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, and other persons who come upon the premises for their own convenience or pleasure, however innocent their purpose may be" (p. 310).

The gist of liability in cases of injuries to persons upon private property is stated by Justice Lippincott in the case of *Hammill* vs. *Pennsylvania Railroad Co.*, 56 N. J. L. 370, to be:

> "The gist of the liability in such cases consists in the fact that the person injured did not act merely on motion of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used" (p. 376).

In 61 N. J. L. we find three other cases adopting the law laid down in *Vanderbeck* vs. *Hendry, supra.*

1. The case of *Turess* vs. *N. Y. S. & W. R. Co.*, at 314, where the Court held that a railroad company which maintains a turntable upon its own land is not liable for an injury to a child who comes upon the land and receives the injury by playing with the turntable without any invitation, express or implied.

2. *Fitzpatrick* vs. *Glass Manufacturing Co.*, at 378, where the Court held that

> "Mere permission to pass over dangerous lands, or acquiescence in such passage, for the

> benefit or convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts wilfully injurious."

3. *D., L. & W. R. R. Co.* vs. *Reich,* at 638, where this Court again said that

> "Where the entry is made merely by his permission (and, *a fortiori,* where it is an actual trespass) the landowner is under no obligation to keep his premises in a non-hazardous state; his only duty to a licensee or trespasser is to abstain from acts wilfully injurious" (at p. 643).

The present Chief Justice, speaking for this Court in the case of *Saunders* vs. *Smith Realty Co.,* 84 N. J. L. 276, has said that:

> "But a mere passive acquiescence by an owner or his representative in a certain use of his property by others involved no liability. *Devoe* vs. *N. Y., O. & W. R. Co.,* 34 Vroom, 276; *Dickman* vs. *D., L. & W. R. R. Co.,* 52 *Id.* 463. It may relieve such users from liability as trespassers but the most that can be said in their favor is that their use is permissive and when that is the case the owner is under no obligation to them, except to abstain from acts which are wilfully injurious" (p. 279).

And that the above rule has not been deviated from, or qualified, appears from the opinion of this Court in the case of *Fleckenstein* vs. *Great Atlantic & Pacific Tea Co.,* 91 N. J. L. 145, at page 147, where this Court said:

> "There is no pretense in the matter before us that the infant plaintiff was injured by a wilful act of any of the defendant company's employees. That is entirely dispositive of the case."

The play-ground theory, which the appellant suggests for the consideration of this Court, seems to

us to be well answered by what Justice Parker, of this Court, said in the case of *Dierks* vs. *Hauxhurst Land Co.,* 80 N. J. L. 369.

> "The property was unfenced in a neighborhood frequented by children. There was considerable vegetation on it, including flowers and flowering plants and children were constantly trespassing on the property to pull and pick flowers and had done so for years. * * * That the children were trespassers is not to be doubted" (p. 370).

POINT III.

Respondent's reasons for direction of a verdict were also sufficient grounds for sustaining the direction.

According to the practice approved by this Court in the case of *Ippolito* vs. *Ridgefield, etc.,* 109 Atl. Rep. 337, the respondent stated its reasons for a direction of a verdict and in support thereof cited authorities therefor (p. 89, line 10, *et seq.*). We contend that the Trial Court's actions can be sustained for the reasons urged by the respondent.

If the fire can be likened to an attraction which drew the infant upon the respondent's premises, we believe that there can be no liability in view of what this Court has laid down the law to be in *Friedman* vs. *Snare & Triest Co.,* 71 N. J. L. 605.

Consideration of the duty of the respondent with respect to its liability, assuming the pathway to be a private way, under the *Philips* vs. *Library Co.* case, *supra,* has already been discussed under our Point I.

If the Court should assume to decide the case at bar on the ground that the pathway was used as a public street then the duty of the respondent has

been set forth by this Court in the case of *Reany* vs. *Central R. R. Co.*, 89 N. J. L. 282, where this Court held that

> "A landowner who invites others to use a private way owned by him as though it were a public street and under the belief that it is such owes to them as such owner no greater duty than that owed by the public to one using such a way."

What the duty of the public was in a situation such as occurred in the instant case, we are inclined to believe has been disposed of by this Court in the case of *Reilly* vs. *New Brunswick*, 92 N. J. L. 547, where it was held that

> "Negligence in the performance of public duties, (*i. e.*, in kindling and guarding a fire), is not chargeable against the municipality."

POINT IV.

For the reasons hereinbefore urged it is submitted that the judgment entered upon the direction of a verdict be sustained.

Respectfully submitted,

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