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Notice of Appeal.

Filed January 16, 1929.

Hudson County Circuit Court

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, Plaintiff vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY Defendant	Action at Law

10

To: KINKEAD and KLAUSNER, Esqs., Attorneys of Plaintiff.

20

GENTLEMEN:

YOU WILL PLEASE TO TAKE NOTICE that the above defendant, The Delaware, Lackawanna and Western Railroad Company, hereby appeals to the New Jersey Court of Errors and Appeals from the judgment and all parts thereof, entered in the Hudson County Circuit Court on the verdict of the jury in the above entitled cause on the 1st day of November, 1928, and that pursuant to the practice and rules in such cases made and provided, the said The Delaware, Lackawanna and Western Railroad Company will file and serve upon you its reasons and grounds of appeal for the reversal and setting aside of said judgment.

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FREDERIC B. SCOTT
Attorney of Defendant.

40

Grounds of Appeal.

Filed February 13, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, Plaintiff-Respondent vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY Defendant-Appellant	Action at Law

The Delaware, Lackawanna and Western Railroad Company, defendant below and here appellant, herewith sets out and files its grounds of appeal for the reversal of the judgment and all parts thereof in the above entitled cause entered in the Hudson County Circuit Court on the 1st day of November, 1928, to-wit:—

1. Because the trial court erred in refusing to grant its application to nonsuit the plaintiff for and on account of the following reasons:—

a. That the proximate cause of the injury which resulted in Smith's death was his own negligence, that, as distinct from contributory negligence, which, under this Act does not figure in this part of the case.

b. That there has been no actionable negligence shown on the part of the defendant Company.

c. That the deceased, Mr. Smith, assumed the risk of the very injury and accident which happened.

2. Because the trial court erred in refusing to direct a verdict against the plaintiff and in favor of the defendant for the three identical reasons which were urged by the defendant on its motion that the plaintiff suffer a nonsuit. 10

3. The trial court erred in permitting the plaintiff over the objection of the defendant that the same was not proper proof of death or cause of death under the Federal Employers' Liability Act, to offer in evidence a certified transcript of the record of the death of Joseph A. Smith made by the Department of Health of the State of New Jersey, Bureau of Vital Statistics. 20

4. Because the trial court erred in permitting the plaintiff to introduce in evidence, over the objection of the defendant that the same was not proper proof of death or cause of death under the Federal Employers' Liability Act, a certified copy of the transcript of the death of Joseph A. Smith, certified by the City Clerk of the City of Newark.

5. Because the trial court erred in that it refused to permit the defendant to propound to the witness James L. Garretson, the following question: 30

> "Q. It was readily observable as you operated there whether the clearance was close or not?"

6. Because the trial court erred in refusing the application of the defendant to declare a mistrial when the plaintiff, through her counsel, propounded 40

the following question to the witness James L. Garretson:

> "Q. Did you not say to the representative of the estate that you could not and would not make a statement in writing and sign it because you feared your job with the company might be imperiled?"

7. Because the trial court erred in refusing to grant a mistrial on the motion of the defendant when the plaintiff's counsel in this summation to the jury, speaking with respect to the evidence in the plaintiff's case, made the following prejudicial remark:

> "Where did we get that information from? We got it from Washington."

8. Because the trial court erred in refusing to charge the defendant's request that:

> "If you should come to the conclusion that the deceased came to his death or received his fatal injuries on account of coming in contact with the New York Central car on the spur or stub track while endeavoring to get off the car on which he was riding by means of the side ladder, your verdict must nevertheless be for the Railroad Company if you find as a fact that the deceased was an experienced railroad man, because an experienced railroad man cannot be supposed to have been ignorant that such a close clearance between cars threatened danger and knowing so much, he assumed the risk that obviously would attend taking the chances of leaving or going in such a position on the car on which he was riding, and this even though he may not have appreciated the precise distance which the New York Central car would reach toward the car on which he was riding."

Frederic B. Scott
Attorney of Appellant.

Summons.

Filed May 31, 1927.

THE STATE OF NEW JERSEY TO: THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation.

You are summoned to answer the annexed complaint of NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, in an action at law in the Hudson County Circuit Court. (L. S.)

10

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, HENRY E. ACKERSON, JR., Judge of said Hudson County Circuit Court, at Jersey City, this 21st day of May, One Thousand Nine Hundred and Twenty-seven.

JOHN J. MCGOVERN
Clerk.

KINKEAD & KLAUSNER
Attorneys.

30

40

Complaint.

Filed May 31, 1927.

HUDSON COUNTY CIRCUIT COURT

10

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation,
Defendant.

20

Action at Law.
Complaint

The plaintiff, Nellie Reardon, general administratrix of the estate of Joseph A. Smith, deceased, residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

FIRST COUNT.

30

1. At all the times hereinafter mentioned the defendant was and still is a corporation organized and existing under the laws of the State of Pennsylvania and was and is duly authorized to transact business in the State of New Jersey.

2. At said times the defendant was a common carrier of freight and passengers and engaged in interstate commerce between the State of New Jersey and other States of the United States.

40

3. This action is brought under and by virtue of the Act of Congress of the United States entitled, "An act relating to the liability of common carriers by railroad to their employees in certain cases," known as the act of April 22, 1908, c. 149, sec. 1, and the amendments and supplements thereto; and also under the act entitled, "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," the said act being known as the Act of March 2, 1893, c. 196, sec. 1, and the acts amendatory thereof and supplementary thereto. 10

4. On March 11, 1926, the plaintiff's intestate, Joseph A. Smith, was in the employ of the defendant as a conductor in said interstate commerce. 20

5. At or about ten o'clock in the evening of said day, the plaintiff's said intestate was acting as a conductor in the employ of the defendant in said commerce, and with other employees of the defendant engaged in said commerce was by means of a locomotive engine transferring and shoving certain cars into the freight house of the defendant at its Broad Street yard in the City of Newark, County of Essex and State of New Jersey. 30

6. The said locomotive engine was known as drill engine No. 19 and at the time of said occurrence hereinafter more specifically referred to, said drill engine No. 19 was shoving four loaded and three empty freight cars west in on the freight house lead track to be placed in the north side of said freight house at the said Broad Street yard. 40

7. The leading car in the said train was DL&W 35889 and in the performance of his duty as conductor, said plaintiff's intestate was riding on top of said car as the same was being shoved or pushed as aforesaid.

8. As said freight train as aforesaid was being pushed as aforesaid on said freight house lead track, there was another freight car known as NYC 52449 which stood on the adjoining stub track and said freight car known as NYC 52449 was so close to the said lead track that an employee riding on the side of the said DL&W 35889 in the performance of his duties would not clear the said NYC car but would be struck by the same.

9. At the time of said occurrence hereinafter set forth and for a long time prior thereto, it was the custom and usage for the head brakeman or conductor to alight from the head car when shoving same into the freight house as aforesaid because of the close clearance at said place.

10. At the said time aforesaid, on March 11, 1926, said plaintiff's intestate proceeded to alight from the said head car known as DL&W 35889 in the customary manner and down the ladder on the side of said car, and as the said head car was passing the said car known as NYC 52449, which stood on said adjoining stub track, the plaintiff's said intestate was struck by said latter car and was fatally injured.

11. It was the duty of the defendant to exercise reasonable care in the placing of the said cars and in the movement of the said train of freight cars

so as not to injure the plaintiff's intestate, and it was also the duty of the defendant to use reasonable care to furnish the plaintiff's intestate with a reasonably safe place in which to work.

12. Notwithstanding the said duty of the defendant to the plaintiff's intestate and in violation thereof, the defendant, acting through its agents and servants, was negligent and careless in one or more of the following respects: 10

(*a*) It failed to exercise reasonable care to provide the plaintiff's intestate with a reasonably safe place in which to work;

It failed to exercise reasonable care in that—

(*b*) It failed and neglected to keep and maintain the said spur or stub track in such a condition that it would be reasonably safe for the plaintiff's intestate to get off the said lead car as it was going into the freight house as aforesaid; 20

(*c*) It failed and neglected to so place the said car known as NYC 52449 in such a position on said spur or stub track that it would clear the plaintiff's intestate as he was alighting from the said lead car of the said freight train which he was riding into the said freight house; 30

(*d*) It failed and neglected to keep and maintain the cars on the said spur or stub track in such a position as to provide sufficient clearance between the said car or cars and the said lead car upon which the plaintiff's intestate was riding on the adjoining track so 40

that it would be reasonably safe for the plaintiff's intestate in the performance of his duty to alight from the said lead car in safety;

(*e*) It failed and neglected to provide sufficient light or any light so that the plaintiff's intestate might observe the position of the said car or cars on the adjoining track so that he
10 might avoid the same as he was alighting from the said lead car as same was entering the said freight house;

(*f*) It failed to provide a sufficient or proper place within which the plaintiff's intestate could perform the work which he was directed to do;

(*g*) It failed and neglected to warn the
20 plaintiff's intestate of the position of the said car or cars on the said adjoining spur track;

(*h*) It failed and neglected to have and maintain a sufficient and adequate number of men in the movement of the said cars upon which the plaintiff's intestate was working so as to properly control the movement of said train and the proper giving of signals to stop the said train so as to prevent injury to the
30 plaintiff's intestate;

(*i*) It failed and neglected to operate said train of cars upon which the plaintiff's said intestate was working so as to avoid injuring plaintiff's said intestate, but, on the contrary, it carelessly and negligently operated the said train of cars without proper signals so that after plaintiff's said intestate was forced from the said head car of said train by the car on
40 the adjoining track, the said train was per-

mitted to continue on and run over the plaintiff's said intestate;

(*ii*) It violated one or more of its rules for the operation of its railroad in placing said car or cars on the stub track too near the switch point where said track joined the lead track, thereby making the clearance between said car or cars and the car on which the deceased was riding too narrow. 10

(*j*) It unlawfully permitted said cars in said train on which the plaintiff's intestate was working to be moved and operated without proper air brakes properly coupled, as required by the Safety Appliance Act, but on the contrary permitted said cars in said train to be operated without power driving-wheel brakes and appliances as required by law; and 20

(*k*) It failed and neglected to have and maintain a sufficient and adequate crew on said train on which the plaintiff's intestate was employed to ascertain the fall of the plaintiff's intestate from the said head car of said train and to operate the safety appliances or otherwise warn the engineer of the locomotive engine so that said train could be stopped in time to avoid running over the plaintiff's intestate. 30

13. As a proximate result of one or more of the foregoing acts of negligence on the part of the defendant's agents and servants, the plaintiff's intestate was struck by one or more of said cars and run over by said cars. His left foot was crushed. He sustained a crushing injury to his right arm, making amputation thereof necessary, and there was a mangling of his arm and leg. He lived until 40

March 16, 1926, when he died as the result of his injuries received in said accident.

14. The plaintiff's intestate left surviving as next of kin two minor sons, Joseph E. Smith and Robert E. Smith, who have suffered great pecuniary injury by reason of his death and for whose benefit this action is brought.

10

15. The within action is commenced within two years from the day the said cause of action accrued.

16. The plaintiff is the general administratrix of the estate of said Joseph A. Smith, deceased, and letters of administration upon the estate of said Joseph A. Smith have been duly issued to her by the Surrogate of the said County of Hudson, which said letters she now brings into court.

20

Plaintiff, Nellie Reardon, General Administratrix of the Estate of Joseph A. Smith, deceased, demands as damages the sum of $100,000. against the defendant.

Second Count.

30

1. She reiterates all the allegations of the first count.

2. The plaintiff's intestate was injured as aforesaid on March 11, 1926, and immediately thereafter was taken to St. Michael's Hospital in said City of Newark, where he remained suffering from his injuries hereinbefore alleged until March 16, 1926, a period of five days, during which time he was conscious practically all of the time.

40

3. The said injuries, to wit, crushing of his left foot, crushing injury to his right arm and the amputation thereof and the mangling of his arm and leg, caused the plaintiff's intestate great pain and suffering and mental and physical shock, and said conscious pain and suffering continued during the period between the inflicting of said fatal injuries to the time when he expired. 10

Plaintiff, Nellie Reardon, General Administratrix of the Estate of Joseph A. Smith, deceased, demands as damages the sum of $25,000. against the defendant.

KINKEAD & KLAUSNER
Attorneys of Plaintiff.

20

30

40

Answer.

Filed June 13, 1927.

HUDSON COUNTY CIRCUIT COURT.

NELLIE REARDON, as General Administratrix of the Estate of Joseph A. Smith, Deceased, Plaintiff, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law, Answer.

10

20

The Delaware, Lackawanna and Western Railroad Company, answering the allegations contained in the plaintiff's complaint, says:

AS TO THE FIRST COUNT:

I. It admits the allegations contained in the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs, with the exception of the allegations contained in the sixth paragraph, that Engine No. 19 was shoving four loaded freight cars. This defendant admits that said drill engine No. 19 was shoving seven empty freight cars, as alleged in said sixth paragraph.

30

II. It denies the allegations contained in the ninth and tenth paragraphs.

III. It admits the allegations contained in the eleventh paragraph that "it was also the duty of the

40

defendant to use reasonable care to furnish the plaintiff's intestate with a reasonably safe place in which to work."

IV. It denies the allegations contained in the twelfth, thirteenth, fourteenth and fifteenth paragraphs.

10

V. It has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the sixteenth paragraph.

As to the Second Count:

I. This defendant reiterates its answers to all the allegations of the first count, as if herewith specifically repeated and set forth, as its answer to the allegations in the first paragraph. 20

II. It denies the allegations contained in the second and third paragraphs.

And for a second, separate and distinct defense, this defendant says that the said plaintiff ought not to have or maintain her action against it, for that the said plaintiff's decedent was guilty of negligence, which negligence was the sole and 30 proximate cause of the injuries resulting in his death, as complained of in the plaintiff's complaint.

And for a second, separate and distinct defense, this defendant says that the said plaintiff ought not to have or maintain her action against it, for that the said plaintiff's decedent assumed the very risk of the happening of the injuries to him which resulted in his death, for which the plaintiff has brought the above entitled action. 40

AND FOR A SECOND, SEPARATE AND DISTINCT DEFENSE, this defendant says that the said plaintiff ought not to have or maintain her action against it for that the said plaintiff's decedent was guilty of contributory negligence.

WHEREFORE, it prays that the above entitled action may be dismissed as against it.

10

FREDERIC B. SCOTT,
Attorney of Defendant.

Reply.

Filed June 14, 1927.

20

HUDSON COUNTY CIRCUIT COURT.

NELLIE REARDON, as General Administratrix of the Estate of Joseph A. Smith, Deceased, Plaintiff, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law Reply

30

The plaintiff denies each and every allegation contained in the answer of the defendant.

KINKEAD & KLAUSNER
Attorneys of Plaintiff.

40

Rule for Judgment.

Filed November 1, 1928.

HUDSON COUNTY CIRCUIT COURT

NELLIE REARDON, as General Administratrix of Estate of Joseph A. Smith, deceased, Plaintiff vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant	Action at Law Rule for Judgment

10

This action was tried before Judge Frank L. Cleary with a jury, at the Hudson Circuit, on October 30, 1928 and October 31, 1928.

20

The cause having been heard and submitted to the Jury they returned their verdict as follows:

They say they find for the plaintiff and against the defendant in the sum of $22,500.00 on the first count they find for the Plaintiff and against the Defendant in the sum of $2,500.00 on the second count.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Twenty-five thousand ($25,000.00) dollars and her costs to be taxed.

30

Judgment entered November 1, 1928.

FRANK L. CLEARY
Judge

On Motion of

KINKEAD & KLAUSNER
Attorneys for Plaintiff

Entered Nov. 1, 1928

40

Judgment.

Entered November 1, 1928.

HUDSON COUNTY CIRCUIT COURT

NELLIE REARDON, as General Administratrix of Estate of Joseph A. Smith, deceased Plaintiff vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY Defendant	Judgment entered November 1, 1928 Damages .... $25,000.00 Costs .... 85.86 Total .... $25,085.86 Kinkead and Klausner Attorneys for Plaintiff

10

Judgment On Verdict in the above entitled cause
20 was entered in this Court on the 1st day of November in the year of our Lord One Thousand Nine Hundred and twenty-eight in favor of the plaintiff Nellie Reardon, as General Administratrix of Estate of Joseph A. Smith, deceased, and against the defendant The Delaware, Lackawanna and Western Railroad Company, in a plea of Action at Law for the sum of Twenty-five Thousand ($25,000.00) Dollars damages and Eighty-five Dollars Eighty-
30 six Cents, costs of suit.

Judgment entered and signed this 1st day of November A. D. 1928.

FRANK L. CLEARY
Judge

40

Certificate of Judgment.

STATE OF NEW JERSEY

Hudson County, ss:

I, John J. McGovern, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas, holden therein Do hereby certify, That the foregoing is a true and correct copy of Rule for Judgment and Judgment Record in the case of Nellie Reardon, as General Administratrix of Estate of Joseph A. Smith, deceased, plaintiff vs. The Delaware, Lackawanna and Western Railroad Company, defendant, as the same is taken from and compared with the original as entered, filed and recorded in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City this Seventh day of December 1928.

John J. McGovern
Clerk.

[seal]

Transcript of Trial Proceedings.

HUDSON COUNTY CIRCUIT COURT

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, decd.

10

vs

THE DELAWARE LACKAWANNA & WESTERN RAILROAD COMPANY a Corporation.

Before Hon. FRANK L. CLEARY, J. and a Jury.

JERSEY CITY, N. J.
October 30, 1928.

20 Appearances:

KINKEAD & KLAUSNER, Esqrs. for the Plaintiff, by DAVID M. KLAUSNER, Esq.

EDWIN A. MARKLEY, Esq., of Counsel for Plaintiff.

FREDERIC B. SCOTT, Esq., for the Defendant.

A Jury was duly empanelled; being found satisfactory, they were sworn:

30

Counsel opened to the Jury.

Mr. Markley: I offer in evidence General Letters of Administration of the goods and chattels, rights and credits of Joseph A. Smith, granted by the Surrogate of the County of Hudson to Nellie Reardon, on March 24th, 1926.

ACCEPTED and MARKED as Plaintiff's Exhibit P-1 of this date.

40

Mr. Markley: I now offer in evidence certified transcript of the record of death of Joseph A. Smith made by the Department of Health of the State of New Jersey, Bureau of Vital Statistics.

Mr. Scott: I am going to object to it.

Mr. Markley: While counsel is looking at that, I also wish to offer certified copy of transcript of the death of Joseph A. Smith, certified by the City Clerk of the City of Newark. The reason I offer two is that one comes under one statute and the other under the other statute. I want to get the benefit of both statutes.

Mr. Scott: With respect to the certified copy of the Certificate of the State Department of Health of the State of New Jersey, first offered by Mr. Markley, I object to its introduction as to anything it contains with respect to facts not related to matters of vital statistics. In other words, the Certificate contains various facts as to the cause of death. I object to any statement therein contained, aside from matters of vital statistics, such as the disease from which he died, or the character of his injuries, as improper and incompetent and irrelevant; as not proper proof of death or the cause of death under the Federal Employers Liability Act, upon which this action is predicated.

This I say with due respect to what our Courts have already said as to similar certificates.

The Court: Objection overruled, with an exception.

Mr. Scott: Exception.

Accepted and marked as Plaintiff's Exhibit P-2 of this date.

Mr. Scott: With respect to the Certificate by the City Clerk of the City of Newark, which is quite

similar in form, I make the same objection, and especially emphasize the fact that the alleged probative effect of the same is illegal under the Federal Employers' Liability Act.

The Court: Overruled; with an exception.

Mr. Scott: Exception.

ACCEPTED and MARKED as Plaintiff's Exhibit P-3 of this date.

10

Mr. Markley: These transcripts, Exhibits P-2 and P-3, I will not read unless your Honor wishes me to. They go to the Jury anyway. Except I wish to point out that the date of death was March 16th 1926, and the cause of death, as given in Exhibit P-2 is "struck by railroad train D. L. & W. occupational accidental mangling of arm and leg" and the cause of death as stated in the Death Certificate P-3 is the same.

20

Now I offer in evidence the sworn answer of the defendant Railroad Company in the compensation suit which was brought under the Workmen's Compensation Act of the State of New Jersey, to prove interstate commerce, the manner in which the accident happened, and the rate of pay received by the deceased.

Mr. Scott: I object to that as incompetent, irrelevant and immaterial.

30

The Court: It may be marked.

Mr. Scott: Exception.

ACCEPTED and MARKED as Plaintiff's Exhibit P-4 of this date.

Mr. Markley: May I read this, if your Honor please. I think it is material.

40

(Exhibit P-4 read to the Jury.)

Mr. Markley: In order that we might shorten some of this proof, I think I ought to point out to your Honor, perhaps more particularly the Jury, in order to get the chronological order of events that paragraph 8 of our complaint—or perhaps I ought to read it to show that it is admitted.

From paragraph 4 to 8, they were all admitted. 10
In fact, the first three paragraphs, dealing with being engaged in interstate commerce, are admitted.

With your Honor's permission, I would like to read from paragraph four to eight, in order that the Jury may have them before it.

4. On March 11, 1926, plaintiff's intestate, Joseph A. Smith was in the employ of the defendant as a conductor . . . in said interstate commerce.

That is admitted. 20

5. At about 10 o'clock in the evening of said day, plaintiff's said intestate was acting as a conductor in the employ of defendant in said commerce and with other employes of defendant engaged in said commerce was by means of a locomotive engine transferring and shoving certain cars in the freight house of the defendant at its Broad Street yard in the City of Newark, County of Essex in the State 30 of New Jersey.

6. Said locomotive engine was known as drill engine No. 19 at the time of said occurrence hereinafter more specifically referred to. Said drill engine No. 19 was shoving four loaded and three empty freight cars west in the freight house lead track, to be placed in the north side of said freight house at said Broad Street yard. 40

That is admitted, except they state they were not four loaded and three empty cars, but that they were seven empty cars.

Paragraph 7 is also admitted.

7. Leading cars in the said train was D. L. & W.
10 35889 and in the performance of his duty as conductor, said plaintiff's intestate (That is Smith) was riding on top of said car as the same was being shoved or pushed as aforesaid.

No. 8, the next, is also admitted.

8. Said freight train as aforesaid was being pushed as aforesaid on said freight house lead track. There was another freight car known as NYC 52449
20 which stood on adjoining stub track, and said freight car known as NYC 52449 was so close to lead track that an employe riding on side of said D. L. & W. 35889 in the pursuance of his duty, would not clear said NYC 52449 but would be struck by the same.

That is admitted.

Then also paragraph 11 is admitted, that it was
30 also the duty of the defendant to use reasonable care to furnish plaintiff's intestate with a reasonably safe place in which to work.

Mr. Markley: Before we go into the proof and offer witnesses, I want to offer some interrogatories that were answered under oath by the defendant:

The first one that I offer is No. 5. These are questions that were submitted to the defendant and
40 which they answered, under oath, before trial.

No. 5. On March 11, 1926, was it not the custom and usage for the head brakeman or conductor to alight from the head car in shoving a train and cars into the freight house at the freight yard of the defendant in Newark?

Their answer to No. 5 is "Yes."

No. 7. On March 11, 1926, was not clearance between the top of a freight car and the freight house aforesaid so narrow as not to permit a brakeman or conductor to stand on top of the freight car as it entered said freight house. 10

And the answer to No. 7 is "Yes".

The next one is No. 10.

Did not the plaintiff's intestate, on March 11, 1926, proceed to alight from the head car known as D. L. & W. No. 35889 on the train which you admit he was riding as alleged in paragraph 7 of the complaint, as same was approaching said freight house. 20

And the answer to No. 10 is "Yes, he did proceed to alight".

The next is No. 15.

How far was said freight car NYC 52449 from said freight house when it was in the position alleged in paragraph 8 of the complaint, which is admitted by the defendant. 30

And the answer to 15 is: "Easterly end of NYC 52449 was approximately 125 feet from the east end of the freight house."

No. 19. How near was the body of the plaintiff's intestate to the said car NYC 52449 when it was picked up on March 11, 1926. 40

Answer: Approximately 14½ feet west from the east end of NYC 52449.

No. 20. Was it nearer or farther away from freight house than said car NYC 52449.

The answer to 20 is: Plaintiff's decedent's body was further away from the freight house than said
10 NYC car 52449.

No. 22. How long had plaintiff's intestate worked for the defendant prior to March 11, 1926.

The answer to 22 is "Since May 5, 1920."

No. 26. What was the approximate length of car NYC 52449 and said car DL&W 35889.

The answer to 26 is: Outside measurement of NYC 52449 was 40 feet 9¼ inches. That of DL&W
20 car 35889 38 feet ½ inch, outside measurement.

Map produced by Mr. Scott and offered in evidence by Mr. Markley.

Accepted and Marked as Plaintiff's Exhibit P-5 of this date.

John J. Pierce sworn:

Direct-examination by Mr. Markley:
30
Q. Mr. Pierce, you are employed by the D. L. & W. Railroad? A. I am.

Q. You were subpœnaed here this morning? A. I was.

Q. What is your occupation with the Lackawanna? A. Assistant superintendent.

Q. Where, Mr. Pierce? A. Hoboken.

Q. Assistant superintendent of what? A. In charge of operation.
40

Q. In charge of operation? A. Of the division.

Q. What do you mean by division, from Hoboken to where? A. To Easton, Pa.

Q. Would that include Newark? A. It would.

Q. Were you subpœnaed to bring here the operating rules of your Company? A. Yes, sir.

Q. Did you bring them? A. I did.

Q. In force on March 11, 1926? A. I have. 10

Q. May I ask you to produce them, Mr. Pierce? A. Right there.

Q. You have given me a pamphlet here marked DL&W Railroad time table No. 29? A. No, this is the one that was in operation then.

Q. Time table 48? A. Yes, sir.

Q. That is all of that date? A. That was February up until this date, up to April 25th 1926.

Q. You have another book here; is that also operating rules? A. Yes, sir. 20

Q. In other words, there are two books containing operating rules? A. These are the book of rules; they are corrected in these time tables, from time table to time table.

Q. In other words, the small green book is the permanent book of rules, which may be amended from time to time by the time table? A. Current time table.

Q. Each of these books contain rules with respect to the operation of cars on side tracks, lead tracks and spur or stub tracks? A. They both got rules in there. 30

Q. Could you give us the number of the rules? A. Yes, in these time tables 40 and 41.

Mr. Markley: Suppose I mark this for identification for the moment.

MARKED P-6 for identification of this date. 40

Q. I want you to refer to the rules in there that you say deal with the placing of freight cars on spur tracks near lead tracks? A. Do you want me to read that.

Q. No, just give the numbers? A. 40 and 41.

Q. And that is the only two in P-6 for identification? A. That is all.

10 Q. You say these are the only two rules in the time table 48 with respect to the placing of cars on stub tracks near lead tracks? A. Yes, sir.

Q. While I am looking at this, will you just check that for the same rules? A. I have checked this; I have already done it.

Q. Won't you state what the numbers of the rules are in the green book; suppose I have that marked P-7 for identification—— A. It is Rule R.

20 Marked P-7 for identification of this date.

Q. I am asking you, Mr. Pierce, for the rules with respect to the placing of cars on spur or stub tracks; did you misunderstand my question? A. No, I didn't.

Q. Can you refer to these rules and give me the number of any rule which deals with the placing of freight cars on stub tracks when they are in the vicinity of the leader tracks? A. I have reference

30 to the only rules that I know of pertaining to that.

Q. Are these two books the only books of rules? A. Yes, sir.

Q. Are there other rules in addition to those? A. Well, we have several methods of issuing instructions, by train order, bulletin, time table and book of rules. Now, there is nothing in this case pertaining to bulletin or train order. These are the only two.

40 Q. I am asking you, Mr. Pierce, about the plac-

ing of cars on side tracks in freight yards, with respect to their placement near leader tracks; can you refer me to the number of such rule? A. I have referred you to the only rules pertaining to that.

Q. You can't refer me to any other rule? A. No, sir.

Q. Of your Company? A. No, sir.

Q. On that subject? A. Yes, sir. 10

Q. In other words, the only rules that your Company has on that subject are these which you have given me? A. Yes, sir.

Q. Are you familiar with this yard at Newark? A. Yes, sir.

Q. As Assistant superintendent? A. Yes, worked in it.

Q. I wonder if you would come down and look at this map with me for a minute. Mr. Scott has permitted me to put on the map the word "spur", 20 this track that leads from the block, I suppose that square is the block? A. Yes, sir.

Q. Bumping block? A. Bumping block.

Q. Running from the bumping block out, that is the stub or spur track, isn't it? A. Yes, sir.

Q. And it connects with the leader track? A. House track.

Q. You call it the lead track, the same thing? A. Same thing. 30

Q. That lead track, where it meets the spur tracks, continues beyond it? A. Yes, sir.

Q. Goes out beyond Ogden Street? A. Goes out on the street, the lead?

Q. It goes out beyond Ogden Street? A. Yes, sir.

Q. Out beyond Ogden Street, does it connect with any other track? A. Yes, sir.

Q. And the track connects with what points on 40

this map? A. Goes down into the yard, Harrison yard.

Q. When it comes up from the opposite direction, going, that would be in a westerly direction, where does the lead track go to then? A. It goes out down into the yard.

Q. It is going in an easterly direction now? A. 10 You have to go across over into Harrison to go down that way.

Q. Suppose you come along on the lead track in a westerly direction from Ogden Avenue, and you come down—could not you go right on that lead track? A. Yes, in the other direction.

Q. Go right down into the station? A. No, you are speaking now of the freight house.

Q. Leads right into the freight house? A. Yes, sir.

20 Q. That is what I am referring to; it goes into the freight house and that is the end of it in a westerly direction? A. That is the end of it.

Cross-examination by Mr. Scott:

Q. As I understand it, Mr. Pierce, what you have is, you have a general book of rules, that green book that you turned over to Mr. Markley? A. Yes, sir.

Q. In response to the subpœna? A. Yes, sir.

30 Q. And then if there are any changes in those general rules, you issue a bulletin first? A. Yes, that is right.

Q. Then the bulletin rules, or changes, are incorporated in the working time tables that are published next after those bulletins are issued? A. Yes, it is carried into the time table.

Q. It is carried into the working time table? A. Yes, sir.

40

Q. Which each of the conductors and trainmen have? A. Yes, sir.

Q. And this rule you referred to, known as R in the General Rule book, in the green book, and 40 and 41 in the working time table No. 48, they are the only applicable rules, operating rules, with respect to the placing of cars such as Mr. Markley made inquiry about? A. They are. 10

Q. That were in force at the time, on March 11, 1926? A. Yes, sir.

Redirect-examination by Mr. Markley:

Mr. Markley: I am going to ask that Mr. Pierce remain until after recess, so that I may go into the rules.

Q. Mr. Pierce, may I ask you about this time table No. 48. That was of course issued on September 27th 1925; that is P-6 for identification? 20 A. Yes, sir.

Q. Were there any new rules promulgated after September 27th 1925 that would be taken up and put into the next time table that is published? A. Yes, sir.

Q. You have the next one with you, haven't you? A. Yes, sir.

Q. This is the one dated April 25, 1926, time table No. 49? A. Yes, sir. 30

Marked for Identification as P-8 for identification.

Q. Have you some other rules in your portfolio? A. No, I haven't got any. I brought the time table before this one, in effect, and the one after.

Q. Are these additional copies of those? A. That is the one before, 47; I have given you 48 and 49, and this is a duplicate of them. 40

James L. Garretson sworn for the Plaintiff:

Direct-examination by Mr. Markley:

Q. Mr. Garretson, where do you reside? A. East Orange.

Q. What is your local address? A. 39 Eaton Place.

10 Q. By whom are you employed, Mr. Garretson? A. Delaware Lackawanna & Western.

Q. Are you employed by them now? A. Yes, sir.

Q. In what capacity? A. Train service.

Q. What job? A. Brakeman.

Q. Freight brakeman? A. Yes, sir.

Q. Were you a freight brakeman at the time that Smith was killed? A. Yes, sir.

Q. You were a member of that crew, weren't you? A. I was.

20 Q. Now, had you known Smith prior to this accident? A. Yes, sir.

Q. How long had you known Joseph A. Smith prior to the accident? A. Since 1920.

Q. You worked there practically the whole time he did, then? A. Yes, sir.

Q. Was he a good workman? A. Yes, sir.

Q. Was he apparently healthy and sound? A. As far as I know.

30 Q. As far as you could observe? A. As far as I know, he was.

Q. Now, on this particular day, you went to work about six in the evening, didn't you? A. Yes, sir.

Q. And where did you go when you went to work? A. I went to Harrison yard; that is where we started.

Q. When did you start to run over these seven

40 cars from Harrison yard over to the freight house?

A. It was in the neighborhood of around ten o'clock in the evening; after we done drilling Broad Street yard we got in there then.

Q. After you got through drilling Broad Street yard, you then picked up these empties I think they were? A. Yes, sir.

Q. Then you ran these over to the freight house? A. Newark freight house. 10

Q. Is that Ogden Street? A. No, it is nearer Broad Street than Ogden Street.

Q. That was about ten o'clock you went over there with these cars? A. Yes, sir.

Q. What time did the accident happen? A. It was a little after ten.

Q. It was while you were pushing these seven cars up to the freight house? A. Yes, sir.

Q. You were the brakeman; there was another brakeman, wasn't there? A. Yes, sir. 20

Q. What was his name? A. Parker.

Q. And then Smith was the conductor; and you had a fireman; what was his name? A. Merrill.

Q. And then you had an engineer? A. Rutan.

Q. As you pushed these cars into the freight house, you were on the lead track, weren't you? A. Yes, sir, on the main track.

Q. You got on that main track on the other side of Ogden Street, didn't you? A. Yes, sir. 30

Q. How far was Ogden Street from the main track you got on as you pushed these seven cars ahead toward the freight house? A. I don't know. I imagine about 300 feet away from the drawbridge, switch-point.

Q. As you pushed these cars in on this main track into the freight house, the cars were ahead of the engine in the direction you were going, were they not? A. Yes, headed west. 40

Q. So that as they came along from Ogden Street, they were headed west on the main or lead track for the freight house? A. Yes, sir.

Q. What car were you on in this train as you came along the main or lead track? A. Second head car.

Q. That is, in the direction you were going, you were on the second car from the head-end; is that 10 right? A. Yes, sir.

Q. The engine was on the other end, that is, at the back of the seven cars. Was the engine nose pointed in the direction you were going? A. Yes, it was headed west.

Q. Was there anything behind the engine? A. No.

Q. The engine was the last vehicle, the engine tender, in the train, wasn't it? A. Yes, sir.

20 Q. As you came along there and just about the time that the accident happened, about how fast were you going? A. I should judge about three times as fast as a man could walk.

Q. About three times as fast as a man could walk. Where was Smith? A. The leading car.

Q. He was on the head car? A. On the head car.

Q. You were on the next to the head car. Were you near to each other? A. Yes, sir.

Q. He was standing on the rear end of the front 30 car and you were on the front end of the next car? A. I was on the middle of the second car going in.

Q. Now, as you approached the freight house. what did you do, if anything? A. I climbed out in between them. After we found the road crossing was clear to go in there and the watchman out there watching——

Q. Was that your practice to climb down as you came to the freight house? A. Yes, unless we lay 40 down and go all the way in that way.

Q. You climbed down on the inside ladder from the top of the car? A. Yes, sir.

Q. And what ladder did Smith start down? A. I can't say whether he was coming down in behind me or on the side ladder, but I know his lamp fell down and hit me first; then he kind of brushed alongside me with his arm. I hollered to him but got no answer. 10

Q. He brushed alongside of you? A. Kind of brushed me when he came down, see.

Q. Did he come in contact with you? A. He hit me; if I hadn't a good hold on I would have probably got knocked off.

Q. Where were you at the time his body struck yours? A. In between the two cars.

Q. What ladder were you on? A. The inside ladder. 20

Q. Of the head car? A. Yes, sir.

Q. So that you came over to the head car and came down the inside ladder of the head car? A. I came over for the purpose of getting off, to go to the road crossing and flag in case the watchman wasn't there to do it for us.

Q. When you started coming down the inside ladder of the head car, where was Smith then? A. On top. 30

Q. Standing right alongside of you? A. He was walking back to get down himself, because I walked away. I found out it was all right——

Q. Now, let us go back; was he standing alongside of you? A. He was coming towards the end of the car to come down himself.

Q. To go back a bit and to make it clear. As I understand you—correct me if I am mistaken—you had been previously standing on the second head car? A. Yes, sir. 40

Q. You walked over to the first head car; is that right? A. Yes, sir.

Q. You proceeded down the inside ladder? A. On the first car going in.

Q. On the left hand side in the direction you were going? A. That would be the left hand side.

Q. These were box cars, were they not? A. Yes,
10 sir.

Q. Assume that was the first box car and this was the second? (Illustrating.) A. Yes, sir.

Q. You had walked over, as I understand, from the top of the second car to the top of the first car. Then you proceeded down the inside ladder? A. Inside ladder.

Q. On the left hand side? A. Yes, sir.

Q. As you started down there, Smith was walking over towards you? A. Walking over towards
20 me.

Q. Did you see him start down? A. He walked towards me.

Q. This train, then, if you can visualize it as the train, is coming that way. In other words, it is headed in in the direction you are going, coming this way into the freight house. This would be the first car, the front end?

30 Mr. Scott: Will Mr. Markley direct his questions to the witness and not explain to the Jury.

Q. This is the head car, Mr. Garretson? A. Yes, sir.

Q. This is the second car and we are going towards you, west? A. Yes, sir.

Q. As I understand, you testify you came from the second head car, walked over to the first and
40 started down the ladder on the inside, on the left

side of the head car in the direction you were going? A. On the inside ladder.

Q. As you started down that ladder, Smith was walking towards you? A. He started towards me.

Q. How far away was he from you when he started walking towards you? A. Well, about the middle of the car, I guess. 10

Q. How far when he started down; how close was he to you? A. He was pretty near the end of the car, I guess.

Q. You saw him, didn't you, as you started down? A. I seen him after I started down the inside ladder. I didn't see him after that, to watch which way he was coming down.

Q. I didn't hear that? A. I say I didn't make it important to look which ladder he was coming down. 20

Q. I didn't ask you that. I am asking you what you saw with your own eyes. Now, you started down the inside ladder on the left side of the head car, didn't you? A. Yes, sir.

Q. And as you started down that ladder, Smith was walking towards you wasn't he? A. Yes, sir.

Q. You saw that, didn't you? A. Yes, sir.

Q. Now, when you were coming down the inside ladder, when your eyes were just about leaving the 30 top of the car, how far away from you was he? A. He wasn't very far away.

Q. A couple of feet? A. That is about all.

Q. Was it your practice to get down the ladder at that point as you drove into that freight house? A. Yes, I always did.

Q. That is what you always did? A. Either you have to do that or ride all the way back down on the car; or get off. 40

Q. You either have to lay flat on the car or get off? A. That is, you can't stand up on it.

Q. Was it your usual practice to get off? A. Yes, usually when we come to the freight house.

Q. Did you get off as you usually did? A. Yes, sir.

Q. When Smith fell, you say his lantern fell first.
10 Did that strike you? A. Struck me on the shoulder.

Q. Tapped you on the shoulder, and when he fell, what part of him struck you? A. I can't say whether it was his arm or his shoulder, what it was hit me. I know something brushed by me; that was all.

Q. What part of you was touched by his body as it came down? A. Left side.

Q. The left side of your body was the side nearer
20 the corner or outside of the car, wasn't it? A. Yes, sir.

Q. As you came down that ladder, was your shoulder right alongside the corner of the car? A. Pretty near.

Q. As you came down. When he fell, did he fall on the rail or outside of the rail? A. I found him on the outside of the rail.

Q. How far from the left rail as you were going in? A. Well, it wasn't very far.
30
Q. Well, two feet, three feet or half a foot? A. About that, three feet probably. Three feet from the rail, probably.

Q. In other words, his body, when you found it, was about three feet from the rail, your left rail? A. The left rail going into the freight house.

Q. As you came down that ladder, you were about right at the corner, the left rear corner of that car, weren't you? A. Yes, sir.

40 Q. Now, as you came down, how close was your

shoulder to the corner, the left rear corner of the car? A. The car I was riding on? Well, I don't know.

Q. A couple of inches? A. A little more than that, maybe. I never took any measurements of it.

Q. In addition to that ladder and rail, there was one on the outside of the car, wasn't there? A. On the opposite side? 10

Q. No, on your side? A. Yes, sir.

Q. There was one on the side of the front car? A. Yes, sir.

Q. At the same corner, left rear corner of the car? A. Yes, sir.

Q. And was that right close to the corner too? A. Well, no.

Q. It was as close to the corner as your rail? A. Eh? 20

Q. It was as close to the left rear corner of the car as your rail. In other words, one ladder was inside. Take this to be the one inside? A. You mean going to the frog of the rail.

Q. There was two ladders there? A. Yes, outside and inside.

Q. The inside ladder you came down? A. Yes, sir.

Q. Right near this rear left corner of the car. Then there is one on the outside of the corner? A. Yes, sir. 30

Q. That is right close, right near this rear left corner of the car; isn't it? A. Yes, sir.

Q. As you came down the inside ladder, you were not touched by this New York Central car on the spur track, were you? A. No, sir.

Q. Do you drive an automobile? A. No.

Q. Can you say how fast your train was going in miles as it passed the point where the New York 40

Central car was on the spur track? A. Not over eight or ten miles an hour, I imagine.

Q. Is it dark at that point? A. Yes; it ain't exactly dark. There is a light there inside the freight house that shines out quite a ways.

Q. There is no light at the point where the accident happened? A. Any electric light?

10 Q. There is no light on the stub track, is there, on the main or lead track? A. Only switch lights.

Q. Outside of that there is no other light there? A. No, sir.

Q. And the entrance to the freight house is about how far west of the point where the lead track joins the switch track? A. From the point of the switch to the freight house?

Q. Yes, the point where they join? A. The frog?

Q. Yes? A. I don't know what the distance is.

20 Q. It is over 100 feet? A. Yes, sir.

Q. This light you speak of is down in the freight house? A. Yes, inside of the freight house.

Q. How far from the entrance to the freight house? A. About a hundred feet, I imagine.

Q. And inside the freight house? A. Inside the freight house.

Q. When his body brushed against you as it fell, what did you do? A. Well, I called him. I got

30 no answer. I thought it was funny, and I ran out past these cars that were on the stub track, gave the signal as quick as I possibly could.

Q. How many cars passed over him before the train stopped? A. I think about seven. Didn't pass over him, probably, but there was that many there, shoved in towards the freight house before we got the train stopped.

Q. Did they pass over his body? A. I can't

40 say that.

Q. Was any part of his body on the rails of your track? A. No.

Q. His whole body was clear of the rails, so that he wasn't run over by the wheels on any of your cars? A. I can't say that he was run over by the wheels of the car I was on. His body wasn't lying on the rail when I got to him after stopping the train. 10

Q. Was his leg mangled? A. No.

Q. Did you see his leg? A. His foot was—I guess his toes was cut off, across, his toes I think were cut. His leg I don't think was mangled.

Q. His head, did you see his head? A. Yes, sir.

Q. Was there anything the matter with his head? A. Not that I know of.

Q. You didn't notice that? A. No.

Q. Did you notice his arm? A. Well, his arm 20 was cut.

Q. His arm was mangled? A. Mangled, if that is the way you call it.

Q. Did he speak to you, did he try to speak or did you try to speak to him? A. Yes, sir.

Q. Did he answer you? A. I could not get no answer out of him. The only words was "Jimmy". He hollered "Jimmy" once; that was for me.

Q. Then he was taken to the hospital in the 30 ambulance, wasn't he? A. Yes, sir.

Q. This New York Central car, did you see that on the stub track? A. Yes, sir.

Q. Where was his body with respect to the New York Central car on the stub track when you saw it after the accident? A. About the west end of the New York central car.

Q. Now, with respect to the ends; would that be the end nearer to the freight house? A. To the freight house. 40

Q. It was not quite to the west end, was it? A. Well, I can't say that.

Q. Well, you saw it there? A. I saw the car, Yes sir.

Q. At the point where you saw it, the west end, that is the nearer end of the New York Central car, 10 was nearer to the freight house than the body was? A. Yes, I guess it was.

Cross-examination by Mr. Scott:

Q. How long had you and Mr. Smith worked together, Mr. Garretson? A. Since 1920; that was the time I hired.

Q. You hired in 1920? A. No, it wasn't that long, because he was only on that job, I think, 20 something around six months, or a year probably.

Q. When did you first get acquainted with Smith? A. When I first went, in that year.

Q. When was that, in 1920? A. 1920.

Q. And they have different tricks or jobs in that Broad Street yard? A. Yes, sir.

Q. This trick was known as what? A. Six o'clock.

Q. They worked from six till when? A. Two.

Q. Then there was another job called the three 30 o'clock job? A. Three to eleven.

Q. That was three to eleven. How many night jobs were there in that yard? A. 3 to 11; 6 to 2; 8 to 4; 10.30, and there is 11 o'clock.

Q. You knew Smith continuously since 1920? A. Yes, sir.

Q. During all that time Smith had night jobs, did he not? A. As far as I know.

Q. As far as you know, he had night jobs? A. 40 Yes, sir.

Q. These jobs were different tricks in the Newark yard? A. Yes, sir.

Q. Going into this freight house and using this lead track and this spur track that we have been talking about? A. Yes, sir.

Q. How long were you a member of his crew, of which he was conductor? A. Well, from the time he took the position until the accident. 10

Mr. Markley: From the time he took the position?

The Witness: From the time he took the position on the job until the accident.

Q. He took this position of conductor of this particular trick, this six o'clock trick, in November 1925, did he not? A. I think it was.

Q. And he worked continuously every night up until the happening of the accident? A. Yes, sir. 20

Mr. Markley: Do you know that?

Q. You know that because you were a member of his crew? A. Yes, but I don't just remember the dates, that was all.

Q. The work of the trick, that six o'clock trick was to drill cars, put cars in the freight house? A. Well, we drilled Newark yard first.

Q. First you drilled Newark yard, Broad Street 30 yard, and then you drilled or put cars in the yard and took cars out of the freight house? A. We took cars out of the freight house; it was drilling empties, we went to Harrison and brought these empties, or whatever they might be, to put in there that morning.

Q. You took empty cars from Harrison, you took them and put them into the freight house? A. Yes, sir. 40

Q. And in coming to and from Harrison yard, did you have to cross any bridge? A. One, the Passaic River.

Q. What bridge was that? A. The Passaic.

Q. When you came over that bridge, how did you happen to conduct yourself; did you stand up on top of your box cars? A. No, had to sit down.

10 Q. How was that, because the clearance was small? A. Or lay; you could not stand up.

Q. From the time you started over the Passaic River bridge, to go towards the freight house, you had to be continually on the jump and watch out for yourself? A. Yes, sir.

Q. On account of the narrow overhead clearances, as well as the close clearances on the side? A. Yes, sir.

20 Q. Now, this condition, the condition of the Broad Street yard, and this spur track and the lead track into the freight house; they had been the same ever since you worked in the yard? A. Never seen it any different.

Q. The lead track is the same place; the spur track is the same place? A. Yes, sir.

Q. And the freight house is in the same place, and there was the same clearance between the
30 tracks as well as the overhead clearance? A. Yes, sir.

Q. It had not changed during all the time you had been in that yard? A. No.

Q. Before you started working as a member of Smith's crew, did you work as a member of any other crew? A. I have always worked that job, ever since I started.

Q. You have always worked? A. On that same job.
40

Q. On the Broad Street job? A. On that same Broad Street job, ever since I started in 1920.

Q. Always at night? A. Always at night.

Q. When you are coming over the Passaic River, you could see the cars on the stub track as you came over the Passaic River bridge, could you not? A. After we got to the west end of it.

Q. After you get to the west end of the Passaic River bridge? A. Yes, sir. 10

Q. How far would you say the Passaic River bridge was from the stub track? A. Well, I don't know, the end of the drawbridge to the stub track, I imagine is about three or four hundred feet anyway.

Q. You had no difficulty, if you were looking up towards the stub track to see the cars that were placed on it, did you? A. No, sir. 20

Q. On the night in question, from the time you came over the Passaic River bridge up until the time this accident happened, your string of cars were operated properly, weren't they? A. Yes, sir.

Q. There wasn't any shake-ups or anything of that kind? A. No; because we slowed at this road crossing to see if there was any trucks on that corner before we go in. If there isn't any watchman, we stop.

Q. You had the same number in your crew that you always had? A. Yes, sir. 30

Q. That is, you had your engine man, your fireman, you had your conductor, Mr. Smith, and then you had Parker and yourself? A. Yes, sir.

Q. That was your complete crew that used that particular drill? A. It was.

Q. Now, as I take it, Smith being the conductor, he was in absolute charge of the train, was he not? A. Yes, sir. 40

Q. He could stop it where he saw fit, or order it to go ahead? A. Yes, sir.

Q. Or maneuver it as he thought wise and proper? A. Yes, sir.

Q. And at the time, or just immediately prior to the time this accident happened, you were going about three times as fast as a person could walk? A. Yes, sir.

10 Q. You said that was about ten miles an hour? A. Yes, sir, I did.

Q. It was light enough around where these cars were on the stub track on the night in question for you to see them as you were riding on top of your string of cars, wasn't it? A. Yes, sir.

Q. You didn't need any extra lights to disclose these cars on the track? A. No, we knew they were there.

20 Q. And Smith knew they were there? A. Yes, because they were there all day. Somebody else put them there; we didn't.

Q. Had you seen them there during the day while you were doing your other work in that particular freight yard? A. During the evening; that is the only time we seen them. We didn't go there in the day time.

Q. You started your trick at six o'clock and at that time you saw these cars were on the stub
30 track? A. Yes, sir.

Q. You say your crew didn't put them there; you knew they were there? A. Yes, sir.

Q. Mr. Smith knew they were there? A. As far as I know.

Q. Now, after you got off the car, after you found Smith on the ground, as I understand it, you gave a stop signal? A. Yes, sir.

Q. You were on the ground; you relayed that to
40 who? A. Parker on the head end.

Q. And how soon after you gave him that signal was it that the train came to a stop? A. Well, he stopped as quick as he possibly could, I suppose.

Q. Stopped as quick as he possibly could. During all the time that you were a member of Smith's crew, you would see various cars on that stub track every night that you operated? A. Yes, sir.

Q. And that was a usual thing? A. It was regular to find cars there. 10

Q. A regular thing to find cars on the stub track? A. Yes, sir.

Q. Each night as you came to drill? A. Yes, sir.

Q. And sometimes the cars were of one size and sometimes of another size? A. Yes, sir.

Q. And as you were coming into the freight house, moving into the freight house with a string of cars operating like you were at the time, you could readily observe if there were cars on the stub track if you were standing on the string of cars going into the freight house; you could readily observe whether it was a close clearance between those cars and your string of cars? A. Yes, sir; because we always make a practice to look at those things, to keep yourself out of trouble. 20

Q. What is that? A. To keep yourself out of trouble, you looked for those things. 30

Q. Did Mr. Smith ever speak to you, as conductor of the crew, with respect to being careful about the clearance between cars on the stub track and the lead track as you were operating into the freight house?

Mr. Markley: I object to that, as to Mr. Smith. As I understand, under the statute and under the Evidence Act, you can't relate a 40

conversation with a dead man, where his estate is a party litigant, unless they first open the door as to the conversation. Here this man Smith is dead and can't answer for himself. I think this comes squarely within that Evidence Act provision.

The Court: I will allow the question to be answered.

10 Mr. Markley: Exception.

A. Yes, we told one another when we found those things, close clearance, when we used to come, say "look out for this, look out for that", as close as something like that.

Q. It was readily observable as you operated there, whether the clearance was close or not?

Mr. Markley: I object as argumentative.

20 The Court: Sustained.

Mr. Scott: I pray an exception.

The Court: You may have an exception.

(To the witness) Do I understand you that sometimes there were cars placed upon this siding, where the clearance between that and the main track was made much smaller than in other cases?

The Witness: Yes, sir.

30 Q. As I recollect it, Mr. Garretson, the last you saw of Smith, he was standing on top of the car? A. Yes, sir.

Q. Of the leading car, of the car close to the freight house, or nearest to the freight house? A. Yes, sir.

Q. You were moving in towards the freight house at the time? A. Yes, sir.

Q. Then Mr. Smith was walking towards the
40 rear of the car? A. Yes, sir.

Q. That was the last you saw Smith? A. That was the last I saw him, because I started down the ladder ahead of him on the inside, as I said before.

Q. And the next thing you knew, you felt his lantern hit you in passing by? A. Yes, sir.

Q. You didn't see him go down, or attempt to go down the other side of the car, the back? A. No, I don't know.

10

Q. Or the side? A. No, he started down one of the ladders somewhere; I was in between them. I wasn't looking up when I was coming down.

Q. You were holding on going down? A. Yes, sir.

Q. The last you saw Smith, he was walking towards you? A. Yes, sir.

Q. You don't know how he actually did come to fall off the car or get off the car? A. No, sir.

20

Redirect-examination by Mr. Markley:

Q. You were the only man other than Smith on these first two cars, weren't you? A. Yes, sir.

Q. And there was no other witness there, was there? A. No, sir.

Q. You were the first one to get to him after the accident happened, weren't you? A. Yes, sir.

Q. Now, this lead track that you have referred to as the main track, is that right? A. Yes, sir.

30

Q. What did you mean by that, when you said it was the main track? A. Well, the lead is a straight track out there and the spur is an off-set track.

Q. The spur track is the track on which this New York Central car was? A. That was on the spur track.

Q. The spur or stub track? A. Stub track; whatever you want to call it.

40

Q. That was how long; do you know? A. I don't just remember now how long it was.

Q. Well, it was over 100 feet long, wasn't it, from where it left the main track, the lead track, down to the block, it was over 100 feet long? A. The two cars together?

Q. No, I am talking about the spur or stub track;
10 it was over a hundred feet long? A. Yes, I guess it is a little.

Q. How many cars were there on the stub track that night? A. Two.

Q. The lead track, you were operating on the main track, weren't you? A. Yes, sir.

Q. You didn't get off that when you came opposite this spur track, to see how close these two cars were to the main track, did you? A. No, sir.

Q. Neither did your side-kick Smith? A. No.
20
Q. You mean neither did he? A. No, because we knew going in what it was.

Q. This is the first time you were in the freight house that night? A. No, it wasn't the first time we were in the freight house.

Q. How many times had you been in the freight house that night? A. Twice.

Q. This was the second time? A. Yes, sir.

Q. When you first went to work, it was around
30 six o'clock? A. Yes sir, using the yard.

Q. You don't know how long before that time this New York Central car was placed on the stub track? A. I have no idea.

Q. You say it was placed there in the afternoon; you don't know whether it was the afternoon or five o'clock or half past five? A. No, I don't; it was placed some time during the day.

Q. You didn't go to work until six o'clock? A.
40 No, sir.

Q. Then, when you did go to work, where did you report? A. Harrison yard.

Q. How far is that from this freight house? A. Well, it is quite a ways; it is quite a walk.

Q. Was it west or east of it? A. It is east of the freight house.

Q. East would be on the other side of Ogden Street? A. Yes, sir. 10

Q. How far on the other side of Ogden Street were the shops where you reported for work at six o'clock? A. Two or three miles I imagine.

Q. Two or three miles, and when you started work there, then your first job was to drill Harrison yard, wasn't it? A. Yes, sir.

Q. How long did you drill Harrison yard that night? A. About 35 minutes, or forty minutes.

Q. What did you drill over there, freight cars? 20 A. Yes, sir.

Q. Then after you drilled freight cars over in Harrison yard, what did you do? A. Shoved into Broad Street.

Q. How far; what is it you call Broad Street? A. Newark.

Q. How long did you do that shoving into Newark yard; how long about? A. How long? You mean how long it took me.

Q. For how long a period of time did you do it? 30 A. Well, got in there about 7.10 in the evening.

Q. For how long a period did you do that? A. Ever since I have been there.

Q. That night I am talking about; how long a period did you drill cars in the Newark yard? A. From the time we started until we finished?

Q. Yes? A. It was about nine o'clock.

Q. Then after that you went over where? A. To the Harrison yard. 40

Q. That is two or three miles away from here? A. Yes, sir.

Q. You brought over there some empties? A. Yes, sir.

Q. From the Newark yard? A. Yes, sir.

Q. When you got through bringing these cars over from the Harrison yard, two or three miles 10 away, then you started back from the Harrison yard for the station, or rather the freight house with seven cars, didn't you? A. Yes, sir.

Q. Wasn't that the first time you came in there? A. No, sir.

Q. With these seven empties? A. With them seven empties, yes sir.

Q. When had you been in there before? A. Why, with empties out of the yard.

20 Q. You were in the yard afterwards to get these into the freight house? A. No, we drilled them out of Broad Street into the freight house.

Q. When you came down that night, there at six o'clock, I am asking you when, before you brought these seven empties down at the time the accident happened, when before that night were you down on the lead track going into the freight house? A. When we drilled the yard in there.

Q. I know you are in the Newark yard, and were 30 in the Harrison yard? A. We started in Harrison yard and came into Broad Street yard to drill Broad Street yard.

Q. I am not asking you about that. All I am asking you is when were you down on the lead track into the freight house before the accident? A. Why several times during the night. We had to back up on the drawbridge there to drill.

Q. When did you come down past that spur track 40 before the accident? A. At six o'clock.

Q. You were drilling, you said on your examination before, you were drilling in Harrison yard for an hour or more when you first started? A. We started in Harrison yard but we finished in Broad Street.

Q. Didn't you work in Harrison yard for an hour? A. Yes, sir.

Q. After you went to work at six o'clock? A. Yes, sir. 10

Q. How did you say you were in the freight house around six o'clock? A. I hadn't been there at six o'clock. I thought you meant after six.

Q. You didn't mean that? A. No, I could not be in two places.

The Court: Had you passed the scene where this accident occurred before the time when the accident occurred on that same night; had you 20 drilled any cars past the scene where this accident happened on the night in question, before the accident?

The Witness: Yes, sir.

Q. What time? A. Around half past seven. 7.10 something like that when we came there.

Q. Did you make a statement to the Railroad Company about this accident? A. Yes, sir.

Q. And sign it? A. Yes, sir. 30

Mr. Markley: May I have that statement, Mr. Scott?

Mr. Scott: There is no notice to produce, in the first place. In the second place, there is no necessity; in the third place, the witness is your witness.

Mr. Markley: Then you refuse to produce it?

Mr. Scott: Yes, I do, and I ask the Court to instruct the Jury at this time that on this 40

request of the plaintiff to have the statement produced (which we conceive is prejudicial to the defendant) that the Jury be instructed that the refusal of the defendant Company to produce it is proper under the circumstances as shown to the Court.

10 The Court: The only thing I can pass upon at this time is whether the refusal is proper and I inform the Jury that within the rules, and from a legal standpoint, the refusal is proper. That is all I can be called upon to pass upon.

Q. You were also interviewed by a representative of the Estate of these two children, weren't you?

Mr. Scott: I object to that as immaterial;
20 not proper redirect-examination.

The Court: That question may be answered.

Q. Will you answer the question? A. Yes, I was.

Q. Did you not say to the representative of the estate that you could not and would not make a statement in writing and sign it, because you feared your job with the Company might be imperilled?

30 Mr. Scott: I object and ask for a mistrial. I think that is highly prejudicial. Here is a witness that has not evidenced any hostility whatever. He might have evinced unsatisfactory recollection, but there is nothing he has done or said, either in his manner or in his testimony that has evinced any hostility whatever. Mr. Markley is too experienced and astute an attorney to not appreciate just what the situation he is confronted with is, and
40 not having secured what he wants, he seeks by

innuendo to create in the Jurors' minds an impression that this man is concealing something.

I also object on the ground that the question is manifestly improper at this time, and I ask for a mistrial.

The Court: The objection will be sustained. The motion for a mistrial will be refused. 10

Mr. Markley: Exception.

Mr. Scott: Exception as to refusal to grant a mistrial.

Recess at 2 P. M.

After recess, 2 P. M. 20

Mr. Scott: I have Mr. Pierce here; I would like to get him away.

Mr. Markley: I haven't any more questions to ask of him.

Mr. Scott: Are you going to offer the rules in evidence?

Mr. Markley: I don't know; I don't think so at this time.

30

James L. Garretson recalled:

Redirect-examination by Mr. Markley (continued):

Q. Mr. Garrison, you said that you had different hours of employment while you were there. I think you said you had one trick from six to two. That was the trick you had at the time of the accident? A. Yes, sir.

40

Q. Then you had hours from three to eleven? A. Not me; I never worked 3 to 11.

Q. There were crews worked in there from 3 to 11? A. Yes, sir.

Q. Then there were other crews worked in from 8 to 4? A. Yes, sir.

Q. 3 to 11; is that 3 A. M. to 11 A. M.? A. 3 P. M.

Q. To 11 P. M. A. Yes, sir.

10 Q. Then there is other crews worked in there from 8 to 4? A. Yes, sir.

Q. Was that A. M. or P. M? A. P. M.

Q. From 8 P. M to 4 A. M.? A. Yes, sir.

Q. Then there is one worked 10.30 A. M? A. P. M.

Q. To when? A. 10.30 to 6.30.

Q. Then others worked from 11 P. M. to when? A. Seven.

Q. Then there were crews in there in the day 20 time, too? A. Yes, sir.

Q. What were the hours in the day time? A. I don't know whether they were regular, the same crew or not.

Q. There was different crews around? A. Yes, sir.

Q. In other words, that yard was worked twenty four hours of the day? A. Yes, sir.

Q. Yours was from 6 P. M. to 2 A. M? A. Yes, 30 sir.

Q. That was the job you worked on with Mr. Smith at the time of the accident? A. Yes, sir.

Q. How long had you worked those hours of employment with him? A. As long as he was on the job.

Q. How long was that? A. I don't know just how long he was on the job.

Q. You don't know how long he was on that job? A. I don't remember when he first took that posi-40 tion.

Q. You mean those hours? A. No.

Q. You don't know how long he had those hours, for how long a time he had that trick? A. I imagine he was on there——

Q. You don't know, that is, you haven't any definite knowledge? A. I don't recollect what date it was he took the job. He was on there a year or more. 10

Q. You are only guessing when you say he was? A. I am not guessing.

Q. What do you mean when you say you guess he was on over a year? A. I mean that he had that job for a long time, that length of time anyway.

Q. You are not sure about it? A. Oh yes, sure I am.

Q. Prior to that had you worked with him? A. Prior to that?

Q. Yes? A. No, he was on another job and I 20 was on the same.

Q. You can't say, prior to the year of the accident, what trick he had or what hours he had? A. Yes, I think he worked 8 to 4.

Q. How do you know if you didn't work with him? A. Well, he was assigned to that position.

Q. How do you know; you say you think those were his hours. You say he only worked a year with you on that job; what he did before you don't 30 know? A. Sure; he had a job at Harrison yard.

Q. Sure he had a job; what his hours were—he worked five years altogether? A. I think he had 8 to 4 job if I am not mistaken; yes, 8 to 4.

Q. How do you know that? A. Because I see him going to it.

Q. You would not be up there when he came to work, were you? A. He would be coming to the trick after I had gone to work. 40

Q. How many bridges are there from Harrison to Newark as you come along the railroad in a freight train? A. What do you mean, drawbridges.

Q. Any kind of overhead bridges? A. There is only one overhead bridge.

Q. Well, isn't there a bridge over Ogden Street? A. Yes, that is the one I am talking about.

10 Q. There is one there? A. That is the same one.

Q. You pass under it twice? A. No, it is the same bridge.

Q. You pass under the same bridge? A. Yes, sir.

Q. Are there some other overhead bridges? A. No, not between Harrison and Newark.

Recross-examination by Mr. Scott:

Q. Mr. Garretson, this accident happened on the 20 11th of March 1926, did it not? A. Yes, sir.

Q. And on the 13th of March, two days afterwards, you gave a statement to the claim department did you not? A. Yes, sir.

Q. Well, now, will you tell me if this is the statement that you gave to the claim department:

> "On the 11th day of March 1926, I was employed"——

Mr. Markley: I object to counsel reading the 30 statement. It is an improper way to prove it. If the witness said anything that surprised Mr. Scott, the thing to do is to submit the statement to the witness and ask him whether that is his signature, and his statement and then offer it for the purpose of contradiction.

The Court: (After argument.) The objection will be sustained and you may have an exception, unless it is offered for the purpose of 40 contradicting something the witness has said,

inconsistent with something contained in the statement.

Mr. Scott: I will candidly say it was not to contradict him.

Q. I show you a photograph, Mr. Garretson, and ask you if you recognize that as a part of the Newark freight yard? (Handing witness.) A. I do. 10

Q. What is the track shown to the left of the picture as you look at it? A. That is the stub.

Q. The stub track? A. Yes, sir.

Q. What is the track that is next to the stub track, the one next to it? A. That is the north side of Harrison yards.

Q. What is the track to the right of the picture, the extreme right? A. That is the end of the universal siding. 20

Q. What is this object at the end of what you call the stub track? A. That is the bumping block.

Mr. Scott: I will have that marked for identification.

Marked for Identification as Defendant's Exhibit D-1 for identification of this date.

Q. I show you another photograph and ask you if you recognize that locality shown in the picture? 30 A. Yes, sir, I do.

Q. What is that building in the center of the picture? A. That is the freight house.

Q. What is the track furthest on the left shown in the picture? A. This here one, that is the stub track.

Q. What is the track next to that, the middle track? A. Between the two cars, that is the running track, the main running track. 40

Q. What we have been calling the lead track, is it? A. Yes, sir.

Q. And this track farthest away? A. That is the universal.

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

10 Mr. Scott: I will have that marked for identification.

MARKED for identification as Defendant's Exhibit D-2.

MRS. NELLIE REARDON sworn:

DIRECT-EXAMINATION BY MR. MARKLEY:

20 Q. Mrs. Reardon, where do you reside? A. 64 Cottage Street, Jersey City.

Q. Are you married? A. No, I am a widow.

Q. What relation were you to Joseph A. Smith, who met with an accident on March 16th 1926, while employed by the Delaware, Lackawanna & Western Railroad? A. His mother in law.

Q. You were his wife's mother? A. Yes, sir.

Q. At the time when he was injured and died in March 1926, was your daughter, his wife, alive? 30 A. No, she was dead six years at the time.

Q. After she died, did the children come to live with you? A. He and the children came to live with me.

Q. How many children were there? A. Two boys.

Q. Did their father, the deceased, live with you too? A. Yes, sir.

Q. You all lived together? A. Yes, sir.

40 Q. Where? A. 535 Summit Avenue.

Q. May I ask how old you are, Mrs. Reardon? A. 51 years old.

Q. I believe you take in boarders? A. Yes, sir, I do.

Q. That is the way you get your living? A. Yes, sir.

Q. Take the younger child, what is the younger child's name? A. Robert Russell Smith. 10

Q. How old is he now? A. He was seven years old last month.

Q. What does he do, go to school? A. He goes to school.

Q. And the older child, what is his name? A. Joseph.

Q. How old is he now? A. He is ten now. He will be eleven the 14th of December.

Q. What does he do? A. He goes to school. 20

Q. Who takes care of them while they are home? A. Myself and my daughter.

Q. You feed them? A. Yes, sir.

Q. Give them a home? A. Yes, sir.

Q. And send them to school? A. Yes, sir.

Q. Now, when Joseph Smith, their father, was alone, did he give you money for their keep, support and clothes? A. He gave me $80. a month for himself and the boys. $40. twice a month. 30

Q. For himself? A. And that was not accounting their clothes.

Q. That did not count their clothes; what about their clothes? A. If I got them, if they wanted them, he would give me money towards them.

Q. He would give you money for their clothes? A. Yes, sir.

Q. That $40. was for his board and the children's board? A. Yes, sir.

40

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Q. You spent it on him and them? A. Well, their board, yes sir.

Q. You say when you bought clothes for the children? A. I didn't; I am not very well——

Q. Then he would reimburse you? A. I would not take it at times; lots of times he would, but I would not take it at times.

10 Q. Can you give the Jury approximately during the course of a year he would give you towards their clothes? A. Well, I could not positively say, because I never kept account of it.

Q. Would it amount to as much as $100? A. Sometimes it would and sometimes it would not amount to that much.

Q. How long before the death of Joseph, the father, had he lived with you? A. They lived with me for a time when he was married, from the time 20 he was married, with the exception of a year and a half before my daughter died. They always lived home.

Q. When did your daughter die? A. April 4, 1922.

Q. When she died, they came back to live with you again? A. Yes, sir.

Q. They gave up housekeeping? A. Yes, sir.

Q. Can you say what kind of a man Joseph was 30 with respect to health? A. Very healthy young man.

Q. Was he in good health at the time of his accident, so far as you can tell? A. As far as I can tell.

Q. Did he go to work every day? A. Every day.

Q. What kind of a father was he? A. Very good father and very good provider.

Q. Well, did he ever take them out? A. Always 40 when he had Sunday off, he took them out.

Q. What meals did the father eat home with you; did you give him lunch? A. No, the father worked at night, until 2 o'clock in the morning. He left during lunch hour, get up for supper at 5 o'clock, and went back at 5.30.

Q. What meals did he have with you? A. Breakfast, supper and then he would take a lunch. 10

Q. How did you find out that Mr. Smith had been injured on the railroad? A. Well, I was sick at the time and had the doctor that day. I was in bed. My daughter got around word there between ten and eleven o'clock, that he had been injured and she and my brother in law went to St. Michael's Hospital in Newark.

Q. Did you go? A. My daughter went; I went next morning.

Q. Did you see him at the hospital next morning? 20 A. I did.

Q. Was he conscious? A. He was talking to me. He had his arm off at the time.

Q. Could you tell whether or not he seemed to be in pain? A. He was in very much pain when I was talking to him, when I was there at half past ten on Friday morning.

Q. Did you visit him after that at the hospital? A. Every night. The day he died I was there twice 30 that day; that afternoon we were called to the bedside before he died.

Q. Was he conscious at that time? A. I was talking to him five minutes before he died.

Q. Was he conscious then? A. Yes, sir, he was.

Q. Could you tell whether he was in pain? A. He was in very much pain at the time.

Q. His children have been living with you continuously since his death? A. Yes, sir, they have. 40

Q. These are the children you have in the Court room? A. These are the children.

Mr. Scott: No questions.

Mr. Markley: We rest, your Honor.

Mr. Scott: If the Court please, I would like to make a motion for a non-suit, and the three grounds on which I rest my motion are as follows:

10

First: that the proximate cause of the injuries which resulted in Mr. Smith's death was his own negligence; that, as distinct from contributory negligence, which, under this Act, does not figure in this part of the case.

Second: that there has been no actionable negligence shown on the part of the defendant Company; and,

20

Third: That the deceased, Mr. Smith, assumed the risk of the very injury and accident which happened.

The Court: I will refuse the motion and allow you an exception, unless there is anything further you want to put in the record. I think you have covered the points without elaborating. That is to say, I think you have got sufficient on the record.

30

Mr. Scott: Yes; I have stated my three specific grounds, inasmuch as argument is not part of the record.

40

DEFENSE.

Madison H. Doughty sworn:

Direct-examination by Mr. Scott:

Q. Mr. Doughty, you are the Division Engineer of the Lackawanna? A. Yes, sir. 10

Q. You have been connected with the railroad for how long a time? A. 25 years.

Q. Your office is located in Hoboken? A. Yes, sir.

Q. You are familiar with the Broad Street yard that is depicted on this map, Exhibit P-5? A. Yes, sir, I am.

Q. You have looked it over? A. Yes, sir.

Q. Before we came to Court, and you are familiar with that location at the Broad Street yard? A. 20 Yes, sir, I am.

Q. Does that map show the fixed objects and lay out of the tracks and platforms of the freight house in the Broad Street yard? A. Yes, it does.

Q. Now, will you tell the Court and Jury how long you have been familiar with those conditions out in the Newark yard? A. Well, I have been somewhat familiar with them for twenty years and closely familiar with them for eleven years. 30

Q. Will you tell the Court and Jury whether those conditions, as shown on that map, have changed during that time? A. As to those tracks, there has been no change, I am sure, for 11 years and undoubtedly no change for more than twenty years.

Q. And the freight house itself? A. And the freight house.

40

CROSS-EXAMINATION BY MR. MARKLEY:

Q. Did you make this map, Mr. Doughty? A. No.

Q. Did you supervise its making? A. In a very general way.

Q. Did you bring your ruler with you? A. I did
10 not, no sir.

Q. Do you know the length of the spur track that we are talking about from the block over to where it goes in the switch on the main or lead track? A. I think that from the end of the track to the frog would be approximate a hundred feet.

Q. This map was made according to the scale of one inch on this map indicates twenty feet on the ground? A. Yes, sir.

20 Q. It is made from actual survey, I assume? A. That is true.

Q. If you measure the length of that spur track which appears on the map, D-5, allowing for each inch twenty feet, we could get the length of the spur track? A. Very true.

Q. Down to the last board? A. Yes, sir.

Q. Likewise, for any measurement, if you take a ruler, finding out how many inches from a given point to another given point, multiply that by
30 twenty you would get the number of feet? A. That is true.

Q. Taking the lead track, where it parallels the spur track, I am speaking now of the lead track going into the freight house as appears on Exhibit D-5, what is the clearance or distance between the rails, the inside rails of the lead track and the spur track at the point where they are parallel and do not begin to converge? A. I could not give you
40 that exactly; I don't know.

Edmund F. Henckel sworn:

Direct-examination by Mr. Scott:

Q. Mr. Henckel, you are assistant engineer of the Lackawanna Railroad? A. Yes, sir.

Q. On March 12th did you take data at the Newark freight yard to prepare this map here? A. I did. 10

Q. And the map was prepared by you from the data you took at the time? A. It was.

Cross-examination by Mr. Markley:

Q. I want to know how long that spur track is from the block where it comes to an end at here, (indicating) down to the point where it converges; what do you call that, where it converges? A. To the point of switch. 20

Q. Measure along the rail? A. Yes; 176½ feet.

Q. Its entire length? A. Yes, sir; I beg your pardon here. That is the wrong frog there; that is 246 feet.

Q. That is its entire length? A. Its entire length, yes sir. 30

Q. At the point where the spur track parallels the lead track and there is no convergence of the rails, what is the width between the inside rails of the lead or main track and the spur track? A. That is 8 feet 8½ inches.

Q. That is where they run parallel? A. Yes, sir.

Q. The space between the inside rails of the lead track and the inside rail of the spur track is 8½ feet? A. No; 8 feet 8½ inches. 40

Q. Now I want you to measure, if you don't mind, the distance from the block—I suppose this square on your map represents the block or end of the track, the bumper against which cars would be placed, if they were right snug up against the end of the track; how far is it from there down to this parallelogram that appears on the track? What is
10 that parallelogram? A. Planking.

Q. In other words, the parallelogram in these block lines, inside of the rails of the spur track, represents planking? A. Planking, yes sir.

Q. How far would it be from the westerly end of the planking down to the bumper? A. 85 feet.

Q. How long is the planking? A. 32½ feet.

Q. Then this triangular space, designated by three lines, between the lead track and the spur track, what is that? A. That is also planking.
20

Q. The triangle between the lead track and the spur track also represents planking, does it? A. It does.

Q. You just gave me two measurements: first, the length of the spur track from the bumper to the inner end of the planking between the rails, which was 85 feet, and then you said the length of the planking was 32½ feet, and that planking is all within the rails of the spur track, isn't it? A.
30 It is.

Q. Now, how many feet is it, may I ask, from the east end of the planking between the rails of the spur track, over to the point of switch, along the rail? A. That is about 131 feet.

Q. Now, then, how far is it, Mr. Henckel, from the point of switch, and by the point of switch, you mean where the spur track rails converge with the lead track rails, where they become as one? A.
40 Yes, sir.

Q. That is the point I have my finger at. Suppose I put an "S" there. How far is it from the switch point along the lead track, down to the entrance to the warehouse? A. 290 feet.

Q. What does that small line, closely put together, alongside of the parallelogram, immediately south of the spur track; what does that represent? A. That is an automobile platform, and this cross line is what you might call a ramp, or incline, leading from that surface to the ground. 10

Q. Now, the length of the platform is how much; what is the length of the automobile platform? A. 86 feet.

Q. And for the entire distance of that plaform, the spur track runs parallel to it, practically? A. Practically so.

Q. It runs for that same distance, practically, parallel to the lead track? A. I should say not quite. 20

Q. Almost? A. Almost; within 10 feet.

Q. So that it is about at the point where the platform, the easterly end of the platform ends, that the spur track begins to curve out to the north, to meet the lead track? A. It is.

Q. How many cars would that spur track hold, opposite the platform? A. Well, you could handle two cars. 30

Q. At the platform? A. Yes, sir.

Q. How far is it from the easterly end of this parallelogram, which represents the planking between the rails of the spur track, to the point where the most northerly rail of that spur track meets the southerly rail of the lead track; in other words, where the rails cross each other for the first time, what is the distance? A. 11 feet 6 inches.

Q. And taking that point where they intersect, 40

which I will mark with a "T", how far is it from that point of intersection of the two rails, the inner rails of the two tracks, the spur track and the lead track, to the easterly end of the automobile platform? A. 48 feet.

Q. That is along the northerly rail? A. Yes, sir.

Q. Could you take it on a straight line from the northeasterly corner of the automobile platform
10 to the point of intersection of the two rails? A. 49 feet 6 inches.

Q. So a freight car, standing opposite the automobile platform, there is a space beyond the easterly end of the automobile platfrom that would be 49 feet 6 inches from the point where the rails would cross each other? A. Yes, sir.

REDIRECT-EXAMINATION BY MR. SCOTT:
20

Q. Will you mark on that square block part, which Mr. Markley calls the bumping block, a "B"? (Witness indicates.)

Q. And where you told Mr. Markley that parallelogram is shown on that spur track—you called it planking. Will you mark that with a "P"? (Witness indicates.)

30 RECROSS-EXAMINATION BY MR. MARKLEY:

Q. Suppose you mark the triangular planking "P" also, if you don't mind, and also mark the automobile platform "auto platform"? (Witness indicates.)

40

EDGAR R. SMITH: sworn:

DIRECT-EXAMINATION BY MR. SCOTT:

Q. Mr. Smith you live where? A. Roseville, N. J.

Q. You have been employed by the Lackawanna Railroad for how long? A. 28 years.

Q. In what capacity? A. Yard master.

Q. Where does your territory cover? A. Newark, Roseville, Harrison and Bloomfield; Montclair, Orange, South Orange. 10

Q. Does that take in the Broad Street yard? A. It does.

Q. Does that take in the place where this accident happened to Conductor Smith? A. Yes, sir.

Q. How long had you known Conductor Smith, Mr. Smith? A. Well, possibly six months prior to his date of hiring.

Q. Can you tell us when he was hired? A. It was 1920, shortly after, about two or three months after the so-called "outlaw" strike. I could not say the date offhand. 20

Q. I show you a paper and ask you if by looking at that paper, you could refresh your recollection as to when he was hired? A. May 5th 1920.

Q. He worked continuously up until the time he died? A. Except when he was "extra" at first.

Recess to 10 A. M. October 31st, 1928. 30

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10 A. M. October 31, 1928.

Met pursuant to adjournment.

Mr. Markley: Yesterday, I offered as one of my Exhibits, the Answer of the defendant in the Workmen's Compensation Act proceeding. 40

Mr. Scott objected generally on the ground it was incompetent, irrelevant and immaterial.

I spoke to Mr. Scott this morning. He did not mean to object to the answer on the ground it was not formally proven to be their answer.

Mr. Scott: I do not require formal proof, assuming it is the answer and properly proven. It was not objected to on that ground.

10

George W. Smith sworn:

Direct-examination by Mr. Scott:

Q. Mr. Smith, you live where? A. 134 North 12th Street, Newark.

Q. You are employed by the Lackawanna Railroad as what? A. Chief Clerk, Harrison yards.

Q. Your duties there with respect to the employment of men is what? A. Keeping their time.

20

Q. And in keeping their time, do you learn and know what different jobs the men have? A. Yes, sir.

Q. And you were acquainted with Mr. Joseph Smith, the deceased in this case? A. Yes, sir.

Q. It appears from the testimony of Mr. Edward Smith that he came to work in May 1920? A. Right.

Q. Now, can you tell the Jury what jobs he had from the time he came in the employ of the Company up until the time he was killed, or received fatal injuries? A. Yes, sir.

30

Q. You have there, wrapped up, a number of books, time books, as I understand it? A. Yes, sir, time books.

Q. Those time books are in your handwriting? A. Yes, sir.

Q. You have also with you this morning, to save the time of the Court and Jury, a tabulation as it were of what those books show? A. Yes, sir.

40

Q. Without looking at the books, or that tabulation, you could not tell what particular jobs he was working on at any specific time, could you? A. Well, yes sir.

Q. But could you, within your mind and from your memory, tell us each particular job he worked on from May 1920 up to 1926 when he received his fatal injuiries? A. I could not without looking at the records. 10

Mr. Markley: Go ahead; I have no objection to looking at the papers.

Q. Using that paper, Mr. Smith, will you tell the Jury what jobs Mr. Smith worked on from May 1920 up to the time he received his fatal injuries? A. Yes, sir.

Q. Speak loud so that the Jury can hear you? 20 A. Started as yard brakeman on May 6, 1920. Worked extra during the month of May 1920. June, July, August, worked as helper on 11 P. M. for Conductor J. C. Cook, now out of the service. September, October, November and December, worked as yard foreman conductor on 11 P. M. job. 1922; during the year, worked as yard foreman conductor in charge of 11 P. M. job. 1922, during the year up to December 26th, worked as conductor in charge of 11 P. M. job. On December 30 26th, started as yard helper on 10.30 P. M. job for conductor John W. Loftus, still in our employ. Year 1923, as yard helper on 10.30 P. M. job for Conductor J. W. Loftus. 1924, as yard helper on 10.30 P. M. job for Conductor J. W. Loftus up to February 16th. February 16th, started as yard helper on 8 P. M. Orange Street job, with foreman J. W. Shippe; worked at this job the remainder of the year, with the exception of four days in Sep- 40

tember and four in October when acting as conductor. Year 1925 worked up to November 19th as yard helper on 8 P. M. job, Orange Street yard with Conductor Shippe. On November 20th started as yard foreman 6 P. M. job which job he held until the day of the accident.

Q. When you speak of the 11 P. M. job, or the 10 10.30 P. M. job, or the 8 P. M. job, or 6 P. M. job, does that indicate when he quit that trick or when he started that trick? A. When he started.

Q. Those tricks were how many hours? A. Eight hours.

Q. 11 P. M. job, 10.30 P. M. job and the 6 P. M. job, where did they take in, where did he work? A. 6 P. M. job, worked in Broad Street yard up until around 10.30 or 11 o'clock, when they worked on 20 the meadows thereafter.

Q. How about the 11 P. M. job? A. Worked on the meadows and in the Broad Street yard also.

Q. 10.30 P. M.? A. That is a kind of route-about job; works anywhere they are sent.

Q. How about the 8 P. M. job? A. Works entirely Orange Street yard and the meadows.

Q. When you speak of the Broad Street yard, will you tell the Jury whether these tracks running into the freight house and the spur track next to 30 the auto platform, are in the Broad Street yard? A. In the Broad Street yard, yes sir.

Cross-examination by Mr. Markley:

Q. Mr. Smith, where is the Orange Street yard to which you have referred repeatedly? A. Orange Street yard is up above Broad Street.

Q. How far? A. About three blocks.

40

Edmund F. Henckel recalled:

Direct-examination by Mr. Scott:

Q. Mr. Henckel, you are a civil engineer? A. I am.

Q. And employed by the Lackawanna Railroad? A. I am. 10

Q. I think you told us yesterday you made that map? A. I did.

Q. Will you just give me the distance from the west end of the Passaic River bridge up to the point of frog or switch of the spur track shown in the map? A. 210 feet.

Q. You made those measurements before we started trying the case this morning? A. I did.

Q. I note by looking at the trial map, Exhibit P-5, that the track we call the lead track, and the track referred to as the spur track, to a certain extent parallel each other? A. It does. 20

Q. And yesterday, in response to some question, I think you told us that there was a clearance of 8 feet 8½ inches? A. There is.

Q. For how great a distance between the lead track and the spur track was that distance existent? A. Why 60 feet from the end of the bumper in an easterly direction. 30

Q. East from the end of the bumper? A. Yes, sir.

Q. From that point east on the spur track, as I take it, after looking at the map, the spur track starts to converge towards the lead track? A. It does.

Mr. Markley: No questions.

Mr. Scott: I offer in evidence what is known 40

as the Official Railway Equipment Registry, duly certified by the Secretary of the Interstate Commerce Commission, showing the registered car numbers, capacity, length and dimensions, of freight cars used in the United States, Canada and Mexico in the railroads.

10 Mr. Markley: I object to that as incompetent, irrelevant and immaterial.

The Court: I will hear you as to its relevancy.

Mr. Scott: The purpose is to show that in the operation of the railroads generally and this specific defendant, any of these cars were subject to being delivered to the Lackawanna Railroad, and that they were of varying sizes and any men engaged in railroad operation
20 are apt to come in touch and in contact in a business way with any of the specific cars in question.

The Court: I don't see much relevancy to it, but I am going to admit it if it shows the information Mr. Scott says it does. It will be admitted over objection and with an exception.

Mr. Markley: Your Honor grants me an exception.

30

Accepted and marked as Defendant's Exhibit D-3 of this date.

Mr. Scott: I offer in evidence Exhibits D-1 and D-2 for identification.

Mr. Markley: No objection.

(Exhibits D-1 and D-2 for identification now marked in evidence.)

40

HARRY E. RUTAN sworn:

DIRECT-EXAMINATION BY MR. SCOTT:

Q. Mr. Rutan, you were the engineer or engine man of the late Conductor Smith's train on the night that he received his fatal injuries? A. I was. 10

Q. What was the first word or information you had that something was unusual as you were coming into the Broad Street yard in the vicinity of the spur track, near the auto platform shown on this map? A. I got a stop signal.

Q. What kind of signal is that? A. Why, he swings his lantern across ways, stop signal.

Q. What did you do with the engine at that time? A. I applied my brakes in emergency.

Q. You applied your brakes in emergency? A. 20 Yes, sir.

Q. You say he gave you a signal; who was that? A. The head man.

Q. What was his name? A. Parker.

Q. Where was he when he gave you that signal? A. On the head car, right in front of the engine.

Q. The head car next to the engine? A. Next to the engine.

Q. In the plaintiff's complaint in this case, they 30 charge that the Railroad Company unlawfully permitted this string of cars which you were moving to be moved and operated without proper air brakes properly coupled. Will you tell the Court and Jury just what the situation was with respect to the operation of your train as to your brakes, whether the brakes were properly coupled? A. We couple our train, drill our cars and couple our cars in Harrison yard. The brakes are tested in Harrison 40

yard before we leave so that we know that we have all brakes O. K.

Q. And on the particular night in question, before you left the Harrison yards, what did you do with respect to the brakes on this train; did you test them? A. Yes, sir.

Q. And in what condition were they? A. The
10 brakes were all O. K. in good working order.

Q. At the time you received the stop signal from Parker, what was the condition of your brakes? A. Very good.

Q. It is also charged in the plaintiff's complaint that the train was operated without power driving wheel brakes and other appliances? A. We had the brakes on the engine and cars.

Q. Now, will you tell the Jury whether it is possi-
20 ble—how long have you been an engineer? A. Since 1916.

Q. Will you tell the Jury just how and what an emergency application of brakes is? A. That applies the brakes in emergency; it puts them on immediately. When you apply the brakes in emergency it lets—of course you won't understand, a slide valve—it puts the brakes on immediately, very quick.

Q. Will you tell the Court and Jury, whether
30 there is any other method of stopping a train quicker or the engine stopping quicker than the operation of emergency brakes? A. No, sir.

Cross-examination by Mr. Markley:

Q. How fast were you going at the time you got that signal? A. About five miles an hour.

Q. How many cars did you have? A. Seven.

Q. Empties? A. Well, I could not say whether
40 they were all empties or loaded.

Q. You were on the engine? A. Yes, sir.

Q. Your engine was pushing the cars towards the freight house? A. Yes, sir.

Q. Now, this man lay right opposite the engine when he was picked up after the accident? A. Yes, sir.

Q. So that the seven cars had passed him on their way toward the freight house? A. Yes, sir. 10

Q. At the point where he lay? A. Yes, sir.

Q. Where was Parker when he gave you the signal? A. On the head car; that is right next to the engine.

Q. That is, he was on the 7th car in the train, in the direction you were going? A. Yes, sir.

Q. That would be the seventh car from the head end as you went along? A. Yes, sir.

Q. He was on the ground? A. Parker? On top of the car. 20

Q. He gave you the signal with his lantern to make a quick stop? A. Yes, sir.

Q. You were only going five miles an hour then? A. Yes, sir.

Q. You immediately applied your emergency brakes? A. Yes, sir.

Q. Which applied on all the cars? A. Yes, sir.

Q. You went how far after that? A. I didn't move four feet after I applied the brakes. 30

Q. You only moved four feet? A. I don't think I moved over four or five feet after I applied the brakes in emergency.

Q. So at the time you got the signal from Parker, you immediately applied your brakes? A. Yes, sir.

Q. And you only went four feet? A. About four or five feet.

Q. And yet Mr. Smith's body lay at your engine? A. Yes, sir. 40

John J. Pierce recalled:

Direct-examination by Mr. Scott:

Q. Mr. Pierce, you came here under subpœna didn't you? A. Yes, sir.

Q. Subpœna of the plaintiff in this case? A. Yes, sir.

10 Q. The plaintiff's attorneys called you to the witness stand? A. They did.

Q. And Mr. Markley interrogated you about certain rules with respect to the operation, regarding the movements of trains near spur tracks? A. Yes, sir, he did.

Q. You gave him the applicable rules in force and effect at the time Mr. Smith was killed or received fatal injuries? A. I did.

20 Q. As I recollect it, those rules you told him were Rules R and rules 40 and 41? A. That is right.

Q. Then in the afternoon, they excused you, did they not? A. Yes, they did.

Q. Will you kindly read Rule R?

Mr. Markley: I object to that as immaterial and irrelevant. I want your Honor to look at that rule, which the witness says is a rule that deals with the placing of freight cars on stub
30 tracks near main or lead tracks. I ask your Honor to pass on whether that rule has anything to do with that question. I say it has not.

(After argument.)

Mr. Markley: I am going to withdraw my objection and let these three rules go in and have the Jury say whether they have anything to do with side tracks.

The Court: Mr. Scott only offered one rule
40 as yet.

Mr. Scott: I am going to offer the others, but I hadn't gotten to that point yet.

Mr. Markley: I object to the reading of the rules that are in evidence.

The Witness: Rule R is: "Employes must not places themselves in positions where the movement of a car, engine, or train would injure them. In the performance of their duties 10 in connection therewith they must know that they are fully protected as prescribed in the rules." Now, the rule refers to——

Mr. Markley: I object to any explanation.

Q. That was Rule R? A. That was Rule R.

Q. Now, will you kindly read Rules 40 and 41? A. Rules 40 and 41 are contained in the time table which was in effect at the time and prior to that and still carried in the time table. It says, 40 says: 20 "In handling cars on tracks where there is limited side clearance of platforms, docks, structures of any kind, telegraph and signal poles, piles of lumber or other material, men must not go between cars and such obstructions, nor use ladders on the side of cars toward such obstructions."

Mr. Markley: May I just interrupt you, Mr. Pierce. I don't think you read all of Rule R, did you? 30

The Witness: I thought I did. I meant to. No, there is another paragraph.

Mr. Markley: I think there are two other paragraphs there?

The Witness: I read the first paragraph. The second paragraph says: "Employes must stand outside and clear of all main tracks while trains are passing. They must not rely on others to notify them of the approach of a 40

train". Third paragraph: "Employes who are careless of the safety of themselves or others will not be retained in the service".

Q. Now, will you read Rule 40? A. I read 40. "In handling cars on tracks where there is limited side clearance of platforms, docks, structures of any kind, telegraph and signal poles, piles of lum-
10 ber or other material, men must not go between cars and such obstructions nor use ladders on the side of cars toward such obstructions." Rule 41 is: "It is unsafe to ride on cars the roofs or lading of which are higher than a standard box car. Cars of special type for transportation of automobiles, carriages and other vehicles, furniture, agricultural implements, etc. are higher than the standard car. (*a*) On account of the width of the 1400 and 2100 class
20 engines, trainmen and enginemen must at all times look out for close clearances especially when two engines of this class are passing each other."

Q. Is that all 41? A. Yes, sir.

Mr. Markley: No questions.

Charles L. Fehon sworn:

Direct-examination by Mr. Scott:

30 Q. Mr. Fehon, the plaintiff's lawyers in this case subpœnæd you, too, yesterday, did they not? A. Yes, sir.

Q. To produce certain records? A. Yes, sir.

Q. You came to Court with these records? A. Yes, sir.

Q. They did not call you?

Mr. Markley: I object to that as unfair examination.

40 (Argued and objection overruled.)

Q. (Read as follows: They did not call you?)

The Court: The answer, presumably, is in the negative.

The Witness: Yes, sir.

Q. You brought with you your records, with respect to the cars in the Broad Street yard? A. Yes, sir. 10

Q. Your records show what cars were on the stub or spur track on March 11, 1926? A. Yes, sir.

Q. And what cars were they? A. Initial MDT 17026. That means Merchants Dispatch 17026 and NYC 52449.

Q. What time were they on that track on March 11, 1926? A. At 7 A. M. morning of March 11th.

20

CROSS-EXAMINATION BY MR. MARKLEY:

Q. Were they loaded when they were put on? A. They were not loaded when this check was taken.

Q. That check was taken when? A. At 7 A. M. March 11th.

Q. When was the next check taken? A. The next check is 7 A. M. March 12th.

Q. Were they loaded then? A. MDT shows as still being loaded. These cars were empty and they were being loaded. They were still on the stub track on March 12th, the same cars. 30

Q. They were partially loaded? A. They were in course of being loaded.

Q. Now, can you give us the length of NYC car 52449? A. I can't give you the length except from the Equipment Register.

Q. Well, is that the book that is in evidence? A. Yes, sir.

40

Q. Suppose you take that book and give me the length of NYC car 52449? A. From 52,000 to 52,999, that would be included in that, the length, outside 40 feet 9¼ inches.

Q. What do you mean by outside? A. That is the outside of the box car.

10 Q. From the outside of the bumper? A. No, that is the outside of the box car.

Q. That is the box itself? A. The box itself, yes sir.

Q. Give me MTD 17026? A. From 16,000 to 18,999; that would include that car, length, outside, 41 feet 4¾ inches.

Redirect-examination by Mr. Scott:

20 Q. Mr. Fehon, you said that the length did not include the bumpers? A. Yes; does not include the bumpers.

Mr. Scott: I don't want to call any more witnesses than are necessary, and if counsel on the other side will agree that this is a correct statement of fact, I won't have to prove it.

That they had under subpœna a man by the name of Parker, the train-man of this crew and a man by the name of Merrill, fireman of this 30 crew; and that since yesterday, they have neither served on me a Notice to Produce the Garrison statement, nor a subpœna on anybody connected with the Railroad to produce it.

If they will admit that, I will rest.

Mr. Markley: We will admit that we had Parker here and excused him; and Merrill. That we have not served a notice to produce nor a subpœna. We didn't think it was necessary. 40

Mr. Scott: I now offer, subject to objection on the part of Plaintiff, the Garrison statement.

Mr. Markley: I have no objection to it.

ACCEPTED AND MARKED as Defendant's Exhibit D-4 of this date.

[BOTH SIDES REST.] 10

Mr. Scott: I renew my motion, now, as a motion for a direction of verdict. The reasons are the three identical reasons which I gave on my argument for a motion for non-suit. I now incorporate them in my motion for a direction of verdict as if I fully repeated them and set them out.

The Court: The motion will be refused and 20 an exception allowed.

Mr. Scott: Exception.

Mr. Scott then summed up to the Jury.

Mr. Markley summed up to the Jury, during which summation, the following remark was made:

> "Where did we get that information from? We got it from Washington".

(Thereupon the following colloquy took 30 place):

Mr. Scott: I object to that and ask that a mistrial be granted. That is a distinct violation of the section of the Interstate Commerce Act, which expressly prohibits the use of information from Washington to be used on the trial of a case.

(Argued.) 40

The Court: There is nothing in the case to show that the information was obtained from Washington, but that the proof was obtained by interrogatories and otherwise.

The motion will be denied, and an exception allowed.

Summation then concluded.

10 Recess to 2 P. M.

AFTER RECESS, 2 P. M.

The Court then charged the Jury as follows:

The Court: Gentlemen of the Jury:

This is an action brought and maintained by Nellie Reardon, General Administratrix of the Estate of Joseph A. Smith, deceased, against the Dela-
20 ware, Lackawanna & Western Railroad Company.

It is brought for the purpose of recovering damages under what is known as the "Death Act" for the death of Joseph A. Smith, which it is alleged was caused by the negligence of the defendant Company.

The action is brought under what we commonly in law speak of as the Federal Employers' Liability Act. I will give you that part of the Act in ques-
30 tion which may be of value or service to you in this case. I am not giving, or reading, any section in its entirety, nor am I giving you the exact language of the particular section. But I am giving you such parts of it as in my judgment it will be necessary for you to have.

That act provides that every common carrier by railroad, engaged in interstate commerce, that is, commerce between the several states of the Union
40 (and in this case, a railroad which is engaged in

interstate commerce between the several states of the Union, would be a common carrier, engaged in interstate commerce) shall be liable in damages to any person suffering injury while he is employed by such carrier in any such jurisdiction; or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, and children, of such employee 10 (and in this feature of it, we are only concerned with the first count, which is for the death of the decedent) resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, etc.

In actions of this character, and in this action, Gentlemen of the Jury, there are several matters 20 which require your attention and your determination, under the evidence as you find it, and under the law as it is applicable to the issues as raised in this case. I shall endeavor to give them to you in what appears to me to be the order in which you would naturally consider and determine them. However, you will understand that just because of the fact that I give you, or place before you, the several issues in a certain order, or in a certain manner, so far as one relates to the other, is no 30 reason why you should consider them in that manner, if a consideration of them in another order is more satisfactory to you and satisfies your convenience better. All I can do is to do that which in my judgment would best lay before you, and most clearly lay before you, the issues which you will have to determine.

Now, in a case of this kind, the first question that must be determined by a Jury is whether or not 40

this Act applies, and of course there are a number of rules to be applied to determine that question—whether or not the defendant at the time was engaged in interstate commerce; whether the employee was engaged in interstate commerce when injured, and so forth. I am not going to discuss these with you, because, fortunately in this case, you don't have
10 to worry about that feature of this case. It has been admitted by the defendant, as a matter of fact it is admitted by the pleadings in the case, and no question has been raised that this Act does not apply so far as that particular feature of the case is concerned. Then the Federal Act applies, because at the time of the injury, both employer and employe were engaged in interstate commerce.

Am I correct about that?

20 (No audible response from counsel.)

If you find, Gentlemen, that the plaintiff has a right of action under the rules which I have just given you, which have been admitted under the evidence, then your consideration of the issues does not stop there, because then another question immediately presents itself to you and that is: Did the death of the plaintiff's intestate happen and was it
30 caused as a proximate result of any negligence on the part of the defendant Railroad Company, as charged by the plaintiff in her complaint?

Now the rule, Gentlemen, in relation to that question is this: that a Company such as this defendant Railroad Company is under an obligation in law to use reasonable care to keep and maintain and provide a place where its servants and employees may work, and which shall be reasonably safe. Now you
40 will mark, Gentlemen, what I have said, and the

terms and words which I have used, the qualifying words: the obligation in law upon a company such as this is, is that it must use reasonable care to provide, maintain and keep the place or places in which its servants and employees are to perform their work and execute their duties for and toward it as servants of the defendant, in a reasonably safe condition. If it has done that, if the defendant Company has performed its legal duty to its employees, then there cannot be a recovery. It is only when the plaintiff has shown you by a fair preponderance of the evidence that the defendant Company has been negligent with respect to that duty which I have just stated to you, and that, because of that negligence the accident occurred. Or, putting it another way, that that negligence was the proximate cause of the happening. Then only can there be a recovery.

Now, what does the plaintiff charge as negligence upon the part of the defendant Company? Reading from the complaint, she charges a number of things. The complaint first says that the defendant failed to exercise reasonable care to provide the plaintiff's intestate with a reasonably safe place in which to work.

It charges that "it failed and neglected to keep and maintain said spur or stub track in such condition that it would be reasonably safe for the plaintiff's intestate to get off said lead car as it was going into the freight house aforesaid."

"It failed and neglected to so place said cars on said stub or spur track that they would clear plaintiff's intestate as he was alighting from said lead car of the said freight train which he was riding into the said freight house".

You will take the pleadings into the juryroom

with you, and will take the allegations as they are. That is as I recall them and if I am incorrect, you will correct me on that.

The plaintiff alleges that on the day in question that this defendant Company negligently placed cars upon this spur track, in such close proximity to the main line and in such a negligent manner as
10 to make the place where this plaintiff's intestate was engaged in his usual course of employment and where he had to be in order to perform the service for which he was engaged, and the circumstances under which he found himself, that that was negligence upon their part in placing these cars in that condition, and in failing to supply and maintain and keep a reasonably safe place for this employee to work at his usual course of employment.

20 Now, if she is entitled to a verdict, then it will be necessary for you to know what this plaintiff is entitled to recover.

As I indicated to you at the opening of my charge, this is an action brought under the Death Act. It is not necessary for me to read to you this statute, but let it suffice for me to say to you that without that statute which I have indicated and called the Death Act, there could not be any recovery for death in the State of New Jersey.

30 So therefore, you are guided, and must be entirely guided, and explicitly guided in the determination in the amount of any verdict, if there is to be one for the plaintiff, by what the act says a verdict may be for, and I trust, Gentlemen, that to what I am about to read and say to you, you will give your best attention, because it is important that you should have this rule of the statute, as well as what our Courts have said upon it, firmly
40 impressed in your minds.

The statute says the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed between such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate.

In every such action the jury must give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person. 10

Of course, in this case, there is no wife, there is no next of kin, except the two children, who are the parties, really, to this action.

I will re-read that, because that is what the statute says a verdict in a case of this character shall be based upon and be for. 20

> "In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

And then, our Courts have said, construing that statute: 30

> "What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the widow and next of kin by the premature taking-off of the intestate."

That is, the father in this case.

> "That fund is ascertained by taking into account all the possibilities. The intestate" 40

(that is, the father in this case) "might have died by the course of nature shortly after the accident".

This is, had the accident not happened and had he lived, he might have been taken down by disease
10 or some other casualty might have overtaken him and he might have died.

"He might, had he lived, have suffered financial reverses." He might have been out of employment; he might not, because of other conditions, have been unable to earn as much as he had been earning. Again, his position in a business sense, might have increased or bettered; he might have earned more, and had ability to earn more. The children, had the father lived, might have died before he did. It
20 might have been that had this accident not happened to the father, and had he lived, yet the children, as I say, might have died before he died in the course of events. Of course upon their death, the contribution or right of contribution, would have ceased.

Nothing is to be added for loss of society, or wounded feelings, or anything else which cannot be measured by money and satisfied by pecuniary
30 recompense.

The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death.

The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is, therefore, the
40 sole measure of damages.

In other words, what the plaintiff says in this case is that had not this casualty taken place, had not this father met his death in the manner in which he did, but had he lived during his lifetime and during the lifetime of his children, he would have, in reasonable probability, earned money, and in like reasonable probability he would have contributed from his earnings to their support; but, because of this happening, he met his death, and therefore his ability to earn, and likewise his ability to contribute to the children, has been cut off.

What she is entitled to have and what the law says the next of kin are entitled to have in such a situation is that sum of money which represents in reasonable probability those sums which the father, had he lived, would during the lifetime of these children, have contributed to their support and maintenance and for their benefit. Not the gross sum that you would find, if any, that he would have so contributed had he lived, during their periods of life, but that gross sum that you would find, capitalized, as the Courts have said, or reduced to its present worth; that lesser sum than the whole loss, which is the present worth of the total loss. Because, you see, Gentlemen, the reason for that is this; had the intestate continued to live, and continued to earn, and continued to contribute to his children, he would have earned by the week, or month, or as the manner of payment of wages was, and he would naturally have contributed as he earned. So that, had he lived during the lifetime of the children, whatever contributions, if any, were made by him, would have been made in those periodical payments, or contributions, running over the entire period when the contribution would have continued.

Now, by your verdict, you are satisfying for all loss; both that which has accrued, as well as that which it is reasonably probable, under the evidence, would have accrued at this time.

It appears uncontroverted that this intestate was at the time of his death thirty years of age; that he left these two children. I have forgotten what their ages were respectively. I think both of them were under ten at the time of the accident, if I am correct about that. If I am not, you will correct me. You are to determine the reasonable probability of the expectancy of life of the intestate, that is the father. That is, how long, in reasonable probability, he would have lived, had not this accident befallen him, because you see that is one of the terms which mark the time of contribution. At his death, his contributions would have ceased, of course.

You are also to determine the same things with respect to the children, because even though the father had lived, but the children had died before him, the contributions to them would have ceased.

It appears in the case that at the time of the intestate's death, he was earning about $44.50 per week, and you have also heard the testimony as to what amount he was contributing each week for the support of these children. I have forgotten just what the testimony as to that amount was, how much was taken out of that, or how much was to be used, if any, for his board, or if he was paying his own board out of the amount which he was contributing, or how much he was retaining for his own clothing and so forth. But from the amount which he was getting, in toto, if there was any evidence of any deduction which was taken out for his own personal use, of course, that would be de-

ducted from the amount which was given toward the children.

The only figure that you have a right to take into consideration is the gross sum of what he was getting per week or per two weeks, or month, whatever the case may be, which was being applied to the maintenance and support of the children and not to his own support and maintenance, because 10 you see, there could be no loss to these children for what the father has been having and taking and using for his own use. They didn't get that anyhow, and of course they could not be deprived of it because of his death.

But that is not all, Gentlemen. I have given you the rule of measurement of damages, as if the plaintiff were entitled thereto, without any deduction, or without any defenses. 20

Now, the defendant in this case sets up defenses against this action and says that while that measure of damages and the law covering it, and so forth, as the Court has described to you, is all right so far as the law is concerned, that is predicated only upon the theory that the defendant is liable at all. That is part of the plaintiff's case, first of all to satisfy you by a preponderance of the evidence, that is, by the greater weight of the evidence, first that this Company was guilty of negligence, which neg- 30 ligence was the proximate or moving, or main cause which brought about this death. And if they were, and if you should come to that question only, I have given you the rule as to the measure of damages in a case of this kind.

Now, as I say, the defendant sets up in this case, first of all, that it was not negligent at all. Of course, unless the plaintiff has made out, by the greater weight of the evidence, that this Company 40

was negligent, I charge you there could be no recovery against the defendant.

Secondly, the defendant says that the plaintiff's intestate assumed the risk of injury, and the plaintiff is thereby incapacitated in this suit from recovering damages. That brings me naturally to
10 talk for a moment or two with respect to this doctrine of what assumption of risk is.

The law says that an employee assumes the risk, not only of dangers arising from the facts known to him, but also of such dangers attending his work as he might discover by the exercise of ordinary care for his safety.

Another case has lain down the rule clearly in these words:

20 That the doctrine of assumption of obvious risks by a servant applies as well to those which arise or become known to the servant during the service as those in contemplation at the time of his original hiring.

And another case, treating the subject more fully said:

In the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for the
30 servant to perform his work in, or to provide safe appliances for him to do his work with, still when the risks of danger arising are incidental to the employment and obvious to the servant or discoverable by the exercise of ordinary care on the part of the servant, the neglect of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues
40 in the employment.

And another case says the servant assumes the usual and obvious risks of his employment and those which he would discover with ordinary care, but not the negligence of his employer.

An employee assumes the risk, not only of dangers arising from facts known to him, but also such danger attending his work as he might discover by the exercise of ordinary care for his safety. 10

Now, assumption of risk is a defense, and the burden of its establishment, if the defendant is to avail itself of it, rests upon the defendant and it must make it out by the greater weight of the evidence. If it does make it out, under the rules which I have given you, by a greater weight of the evidence, then your verdict would be for the defendant.

The next thing to which your attention must be 20 directed is the doctrine of contributory negligence, of which the defendant has sought to avail himself in this suit.

As I said to you a moment ago, if the plaintiff's intestate's negligence was the sole contributing cause of the accident, manifestly the plaintiff could not recover anything, for the very obvious reason that he being the sole cause of the accident, must bear the sole responsibility.

If, however, the plaintiff's intestate contributed 30 in part by his negligence to the production of the accident, and the defendant contributed in part by its negligence to the production of the accident, then if this Act is applicable, and it is, because it is admitted to be, you would have to recall the section of the statute to which I directed your attention when I said that in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this 40

Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the Jury, in proportion to the amount of negligence attributable to such employee.

In other words, you have got a problem of arith-
10 metic. You have got to say how much, what proportion of negligence is attributable to the defendant Company, if any; and secondly, what proportion of negligence is attributable, if any, to the plaintiff's interstate.

For example, and I use a sum merely for the purpose of illustration, not to indicate that that is the amount of damage at all, for I do not. Suppose the whole damages are $1,000. and suppose that the
20 plaintiff's intestate, by his negligence contributed one half and the defendant by its negligence contributed the other half, you can readily see that the statute would indicate that you must diminish the recovery in favor of the plaintiff to the extent to which the negligence contributed, and which would require you to reduce the total sum by just so much as the negligence of the plaintiff, if there was any contributory negligence, (that is what I am speaking of now) contributed to the whole acci-
30 dent.

And so, Gentlemen of the Jury, that is practically the case as I see it.

The plaintiff rests her case, brings this action, basing it upon the theory of negligence. It is admitted that this Act, as I said at the beginning of my charge, applies, and hence the provisions of this Act apply to this case, bringing this action under this Act.

40 The plaintiff alleges that because of the negli-

gence of this Company, this father was killed. She says that that negligence, as I said a moment ago, consisted in placing these cars in such a position that they became dangerous to others who were working there, and to this deceased while engaged in the employment for which he had been employed.

Secondly; that they failed to provide, by reason of the circumstances surrounding this particular 10 place, a reasonably safe place for a man, in the exercise of his ordinary employment, to safely enjoy that employment. And that, by reason of that negligence and as a proximate result thereof, this accident occurred which caused the death of this father. And under the Death Act, the right being given to the next of kin, there being no widow in this case, goes to the two children, the right to bring this action and recover, if recovery should 20 be had, and as I said to you, if there is any recovery, then that will be determined entirely by the rules which I have given you in reference to the measure of damages in cases of this kind.

You are not to be swayed by sympathy, or sentiment. It is a cold-blooded proposition, if any recovery is to be had, and that recovery is to be for the pecuniary loss, not for the love and affection, because it is an absolute impossibility to ever arrive at any determination as to what the measure 30 of damages is for the loss of a person's parent or for the loss of one's wife or the loss of one's child. And so, the measure of damages is for the pecuniary loss which a person suffers by the premature taking off and whatever that loss is, is to be compensated for in the measure of damages.

Now, the defendant in this case sets up, to summarize again, three defenses.

First; that it was not negligent at all, that this 40

accident was caused solely by the negligence of the plaintiff's intestate.

Of course, it is evident that if that is so, there can be no recovery, because if the defendant is not negligent, then it ought not to be made to pay.

The defendant says secondly, that this plaintiff's intestate assumed the risk of his employment,

10 which, under this law which I have given you and from the cases which I have cited, and applying this rule which I have given you, if you find that he did assume the risk of this employment, and that having assumed that he was injured and killed while in that employment, that would bar a recovery.

Thirdly, the defendant says that even though you should find that the defendant was guilty of negligence, nevertheless the plaintiff was guilty of con-

20 tributory negligence, which would not bar (as it would under the State Act) a recovery.

During the course of the week, you may have tried what, for the lack of a better term, we might call the ordinary negligence case that appears in these Courts. You have probably heard the trial Judge either across the hall or here say to you that contributory negligence is an absolute bar to recovery, and that regardless of what degree that contributory negligence enters in.

30 That is not so in this case, under this Act, this Federal Act. Under this Act, contributory negligence is a defense, not in toto, but only in diminution of the damages which would otherwise have accrued if that contributory negligence were not there.

I think, Gentlemen of the Jury, that I have covered the situation as far as I can remember it, and unless Counsel has something to call my attention

40 to which I have overlooked, you may retire.

Mr. Markley: I think your Honor did not cover the second count.

The Court: Gentlemen: In this case, there is a second count, in which these children, through the Administratrix, are suing to recover for the plain and suffering which their father had undergone during the time in which he lived after the accident. 10

Section 9 of the Act, one of the 1910 amendments, provides that any right of action given by the statute to an employe suffering injury, shall survive to the personal representative, for the benefit of the same beneficiaries that are named in section one.

The beneficiaries under section one I spoke to you about in the course of my remarks. In this case, it is the next of kin, who are the children alone. 20

"If therefore an employe is injured and lives an appreciable time after the injury, and is conscious and capable of suffering pain, then the beneficiary may not only recover under section one for the loss and damage to them sustained by reason of the death, but they may also in addition thereto recover damages under section 9 which the decedent suffered while he lived, that is for his loss and pain and suffering up to the time of his death".

Now, that is the second count, and for that you 30 have got to determine, if there is to be any recovery for that amount at all, you have got to determine first of all as to the negligence of the defendant, and the rules as to negligence and to the defenses interposed, as they apply to the first count, apply to this count equally.

If there has been no negligence proven on the part of the defendant, then this count goes out with the other count. 40

If the other defense, the assumption of risk, has been proven as to the first count, it would also apply to this and would go out with the other count.

All of the defenses interposed as to the first count, apply to the second count, and having determined the question of liability, and only if you come to the question of damages and determine that the
10 plaintiff is entitled to recover under the rules I have given you, do you consider the damages under this second count. The measure of damages in this count is different from that in the other, and is to be dependent upon these circumstances: that the deceased had lived an appreciable length of time after the injury and was conscious and capable of suffering pain. Otherwise, if it was sudden death, instantaneous death, almost immediately, or if there
20 was no pain suffered, so that the decedent suffered no other loss than the loss of his life, that loss is fully compensated and fully covered by the Death Act which I have read to you. By this amendment, the next of kin are only entitled, if entitled at all, to such a sum as the father himself, would have been entitled to for his pain and suffering and for his loss up to and between the time of the accident and the death itself.

You will take that into consideration when you
30 go to the Jury room.

Mr. Markley: Will your Honor ask the Jury to bring in two verdicts, one on each count?

The Court: I would suggest, Gentlemen of the Jury, if you find in favor of the plaintiff, you should divide the verdict, determining by the first whether you find for the plaintiff on the first count and if so, how much, or for the defendant; and if you find for the plaintiff on the second count, how much, or
40 for the defendant; whatever the case may be.

I have been requested by the defendant to charge a request, which I refuse except as already charged, and allowed it an exception.

(The Jury retired.)

Mr. Scott: Exception to refusal to charge as requested.

Mr. Markley: No exceptions. 10

Defendant's Requests to Charge.

If you should come to the conclusion that the deceased came to his death or received his fatal injuries on account of coming in contact with the New York Central car on the spur or stub track 20 while endeavoring to get off the car on which he was riding by means of the side ladder, your verdict must nevertheless be for the railroad company if you find as a fact that the deceased was an experienced railroad man because an experienced railroad man cannot be supposed to have been ignorant that such a close clearance between cars threatened danger and knowing so much, he assumed the risk that obviously would attend 30 taking the chances of leving or going in such as a position on the car on which he was riding and this even though he may not have appreciated the precise distance which the New York Central car would reach toward the car on which he was riding.

40

Exhibit P-1.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } SS.

I, JAMES F. NORTON, Surrogate of the County of Hudson, do certify that on the 24th day of March, in the year of our Lord one thousand nine hundred and twenty-six Administration of the goods and
10
chattels rights and credits which were of JOSEPH A. SMITH, late of the County of Hudson, who died intestate was granted by me to NELLIE REARDON of the County of Hudson who is duly authorized to administer the same agreeably to law.

WITNESS, my hand and seal of Office the twenty-fourth day of March, in the year of our Lord, One thousand nine hundred and twenty-six.

20

JAMES F. NORTON,
Surrogate.

[SEAL] Per
JOHN F. CALLAHAN,
Deputy Surrogate.

30

40

Exhibit P-2.

St Pr
94 V. S.

State of New Jersey

STATE DEPARTMENT OF HEALTH — **BUREAU OF VITAL STATISTICS**

1 PLACE OF DEATH

County Essex State NEW JERSEY Registered No. 6825

Township .... or Borough ....

City Newark No. St. Micheal Hospital St., ... Ward
(If death occurred in a hospital or institution, give its NAME instead of street and number.)

2 FULL NAME Joseph R. Smith

3 Residence. No. 444 Boulevard St., ... Ward Bayonne, N. J.
(Usual place of abode.) (If non-resident give city, town and State.)
Length of residence in city or town where death occured yrs. mos. days. How long in U. S., if of foreign birth? yrs. mos. days.

PERSONAL AND STATISTICAL PARTICULARS

4 SEX	5 COLOR OR RACE	6 Single, Married, Widowed or Divorced (write the word)
Male	White	Widowed

7 If married, widowed or divorced HUSBAND OF (or) WIFE OF (Give full maiden name) Margaret Reardon

8 DATE OF BIRTH (month, day and year) Cannot learn

9 AGE Years	Months	Days	If Less Than One Day Hrs. Min.
About 30			

10 OCCUPATION OF DECEASED
(a) Trade, profession or particular kind of work Brakeman
(b) General nature of industry, business, or establishment in which employed (or employer) ....
(c) Name of employer D. L. & W.·R. R.

11 BIRTHPLACE (City or town) Jersey City (State or country) N. J.

PARENTS

12 NAME OF FATHER William Smith

13 BIRTHPLACE OF FATHER (City or town) .... (State or country) New Jersey

14 MAIDEN NAME OF MOTHER Margaret Walsh

13 (a) BIRTHPLACE OF MOTHER (City or town) .... (State or country) New Jersey

15 SIGNATURE OF INFORMANT William Smith
(Address) 444 Boulevard, Bayonne

16

Received Mar. 17, 1926 W. J. Egan
LOCAL REGISTRAR.

MEDICAL CERTIFICATE OF DEATH

17 DATE OF DEATH March 16 1926

18 I HEREBY CERTIFY That I ~~attended~~ viewed deceased from ...., 19...., to ...., 19....,

I last saw h.......... alive on ...., 19....,

and death occurred on date stated above, at ....m.

The CAUSE OF DEATH was (see over)
Struck by railroad train. D. L. & W. occupational. Accidental-Mangling of arm and leg.

.... (Duration) ....yrs. ....mos. ....ds.

Contributory (Secondary) Acute pericarditis. Pleurisy with effusion (Duration) ....yrs. ....mos. ....ds.

19 Where was disease contracted, if not at place of death? Newark, N. J.

If an operation preceded death give date March 11, 1926

Was there an autopsy? Yes

What test confirmed diagnosis? Autopsy

(Signed) L. S. Herudon, D.C.P. M. D.

(Address) 33 Johnson Ave.

20 PLACE OF BURIAL Cremation or Removal Holy Name Cem.

Date of Burial	21 Undertaker
March 20, 1926	W. A. McDonald

Address	New Jersey License Number
570 Newark Ave. Jersey City, N.J.	510

Exhibit P-2.

DEPARTMENT OF HEALTH

OF THE

STATE OF NEW JERSEY

BUREAU OF VITAL STATISTICS

10 I. HENRY B. COSTILL, Medical Superintendent of the Bureau of Vital Statistics of the State of New Jersey, do hereby Certify that the foregoing and annexed is a true copy of a certain Certificate of Death, as taken from and compared with the original remaining on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of said Bureau, at
20 Trenton, this seventh day of May, A. D. 1927.

HENRY B. COSTILL, M. D.
Medical Superintendent.

[SEAL]

Attest:
DAVID S. SOUTH,
State Registrar of Vital Statistics.

30

40

Exhibit P-3.

CITY OF NEWARK

Essex County, State of New Jersey

UNITED STATES OF AMERICA

I, W. J. Egan, City Clerk of the City of Newark, 10
Essex County, State of New Jersey, do hereby certify that the following is a true and correct transcript from Record of Deaths in my office.

1 PLACE OF DEATH

City Newark St. Michaels Hosp.

2 FULL NAME Joseph R. Smith

(a) Residence No. 444 Boulevard, Bayonne, N. J. 20

Length of Residence in city or town where death occurred yrs. mos. ds. How long in U. S., if of foreign birth? yrs. mos. ds.

Personal and Statistical Particulars

3 SEX M 4 Color or race W 5 Single, Married, Widowed or Divorced Widowed

5a If married, widowed or divorced HUSBAND of 30
(or) WIFE of Margaret Reardon

6 DATE OF BIRTH Unknown

7 AGE Years Months Days If LESS than 1 day,..
About 30 hrs. or......min.

8 OCCUPATION OF DECEASED

(*a*) Trade, profession or particular kind of work Brakeman

40

Exhibit P-3.

(*b*) General nature of industry, business, or establishment in which employed or employer D. L. & W. R. R.

(*c*) Name of employer....................

9 BIRTHPLACE Jersey City, N. J.

PARENTS

10 NAME OF FATHER William

11 Birthplace of Father N. J.

10

12 MAIDEN NAME OF MOTHER Margaret Walsh

13 Birthplace of Mother N. J.

14 Informant William Smith
(Address) 444 Boulevard Bayonne N. J.

15 Filed 3/17, 1926 W. J. Egan Registrar

MEDICAL CERTIFICATE OF DEATH

20

16 DATE OF DEATH March 16 1926

17 I HEREBY CERTIFY that I attended deceased from ...., 19..., to ...., 19..., that I last saw h.... alive on ...., 19..., and that death occurred on the date stated above at ....M.

THE CAUSE OF DEATH* was as follows:

Struck by railroad train D. L. & W. occupational accidental mangling of arm and leg.

30

.... (duration) ...yrs. ...mos. ...ds.

CONTRIBUTORY Acute Pericarditis
(Secondary) Pleurisy and effusion
.... (duration) ....yrs.....mos.....ds.

18 Where was disease contracted if not at place of death? Newark, N. J.

Did an operation precede death? Yes Date of

40

3/1/26

Exhibit P-3.

Was there an autopsy? Yes
What test confirmed diagnosis? Autopsy

Signed L. S. Herudon, M. D.
(Address) Dep. Co. Phy

19 Place of Burial Cremation or Removal Holy Name Cem.
Date of Burial 3/20/26

10

20 Undertaker W. A. McDonald
Address Jersey City

WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said city this 6 day of Oct A. D. 1928

[SEAL]

W. J. EGAN
City Clerk.

20

30

40

Exhibit P-4.

Form No. 25

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.

10 RESPONDENT'S ANSWER TO DEPENDENT'S CLAIM PETITION

NELLIE REARDON, Administratrix of the Estate of Joseph A. Smith, Deceased, Petitioner, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Respondent.	Claim Petition No. 5685 September 14, 1926.

20

Attorney for Respondent—Frederic B. Scott,
90 West Street, New York, N. Y.
(Address)

30 In answer to Claim Petition filed in this cause:

1. What was decedent's name? Joseph A. Smith.

2. Where did decedent reside? 535 Summit Avenue, Jersey City, N. J.
(Street Address) (City or Town)

5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify No.

40

Exhibit P-4.

6. Was the decedent in your employ at the time of the accident? Yes.

7. State your business Common carrier, engaged in Interstate Commerce.

8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No. 10

9. Did you give such notice to him? No.

10. When did you first have knowledge of this accident? At the time of the happening of the accident.

11. Did you receive notice of this accident from the Petitioner? No.

12. If so, on what date? —— 20

13. Has any claim for compensation been made? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Yard conductor.

15. When did the accident happen? March 11th, 1926. (State month, day, year and hour) 30

16. Where did the accident happen? At Newark, New Jersey.

17. What was the nature of the accident, and how did it happen? Decedent was pushed or knocked from a car on which he was riding.

18. Did the decedent work any after the accident? No.

19. If so, give date he stopped work —— 40

Exhibit P-4.

20. Give date of death ——

21. Were his wages fixed by piece-work? ——

22. If so, what was his average weekly wage? ——

23. If wages were fixed by the hour, state rate per hour ——

10 24. Give number of hours in an ordinary working day ——

25. Give number of days in an ordinary working week ——

26. State the amount of weekly wages $44.50

27. How much have you paid as compensation (not medical aid) since the accident? ——

28. Have you promised to pay compensation? No.

20

29. If so, how much? ——

30. Was medical aid required? ——

31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness? ——

32. Between what dates was service rendered? ——

33. Give name and address of physician and hospi-
30 tal rendering service at your direction ——

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion. Petitioner has started an action against respondent under the Federal Employers' Liability Act, alleging that the petitioner's decedent, Joseph A. Smith, was engaged in Interstate Commerce and your

40

respondent has admitted the same, and, therefore, it is contended by the respondent that the Workmen's Compensation Bureau has no jurisdiction.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
(Respondent)
By FREDERIC B. SCOTT,
Its Attorney
90 West Street,
New York, N. Y.

10

STATE OF NEW YORK,
County of New York, } SS:

FREDERIC B. SCOTT, of full age, being duly sworn according to law, on his oath deposes and says: That he is the Attorney of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

20

FREDERIC B. SCOTT,
Respondent's Attorney.

Subscribed and sworn to before me, this 14th day of September, 1926 at New York City, N. Y.

30

JOSEPH FIELL,
A Foreign Commissioner of Deeds for the State of New Jersey in New York.
Commission expires June 3, 1928.
(SEAL)

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

40

Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, Deceased,
Plaintiff-Respondent,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
20 Defendant-Appellant.

Action at Law Stipulation.

In lieu of the appellant printing its trial Exhibit D-3, to-wit, a certified copy of The Official Railway Equipment Register, Vol. XLI, No. 9, issue of February, 1926, it is hereby stipulated and agreed by and between the attorneys of the respective parties that the certification of said register
30 by the Secretary of the Interstate Commerce Commission, and the cover of said register, together with a statement that said register is a book of 1,040 pages, be printed.

KINKEAD & KLAUSNER
Attorneys of Respondent.

FREDERIC B. SCOTT
40 Attorney of Appellant.

Exhibit D-3.

INTERSTATE COMMERCE COMMISSION

WASHINGTON

10

I, GEORGE B. MCGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached is a true copy of The Official Railway Equipment Register, G. P. Conard, Agent, I. C. C. R. E. R. No. 162, said schedule having been filed with the said Interstate Commerce Commission on February 12, 1926.

And I do further certify that the said I. C. C. No. 162 was in force on March 11, 1926. 20

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 6th day of May, A. D. 1927.

GEORGE B. MCGINTY
Secretary of the Interstate
[SEAL] Commerce Commission.

30

40

Exhibit D-3.

No Tariff Supplements will be Issued to this Publication

I. C. C. - R. E. R. - No. 162
Cancels I. C. C. - R. E. R. - No. 161

C. R. C.-R. E. R. .... No. 162
Cancels C. R. C.-R. E. R. .... No. 161
Ark. R. C.-R. E. R. ...... No. 162
Cancels Ark. R. C.-R. E. R. .... No. 161
Cal. R. C.-R. E. R. ...... No. 162
Cancels Cal. R. C.-R. E. R. .... No. 161
Ill. C. C.-R. E. R. .... No. 162
Cancels Ill. C. C.-R. E. R. .... No. 161
P. S. C.-Ind.-R. E. R. ... No. 162
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N. M. C. C.-R. E. R. ..... No. 162
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Cancels P. U. C. U.-R. E. R. .... No. 161
P S. C.-W. Va.-R. E. R. . No. 162
Cancels P. S. C.-W. Va-R. E. R. .. No. 161

Vol. XLI **FEBRUARY, 1926.** **No. 9**

OF THE

UNITED STATES, CANADIAN AND MEXICAN RAILROADS

Stamp here date received.

PUBLISHED MONTHLY

Showing by Car Numbers, the Marked Capacity, Length, Dimensions and Cubical Capacity, of Freight Cars used to transport Freight.

This publication does NOT set forth Gallonage of Tank Cars for Tariff purposes. (See note page ii.)

ISSUED FEBRUARY 10, 1926. **EFFECTIVE FEBRUARY 20, 1926.**

Issued on one day's notice under special permission of the Interstate Commerce Commission No. 21894 of August 2nd, 1912.

Issued on one day's notice under special authority of the Board of Railway Commissioners for Canada No. 142 of May 12th, 1924.

(Also issued on one day's notice under authority of respective State Commissions, as follows):

ALABAMA PUBLIC SERVICE COMMISSION	SPECIAL APPROVAL	No. 1149	OF DECEMBER 21, 1925.
ARKANSAS RAILROAD COMMISSION	AUTHORITY	A. R. C.-No. 84	OF JUNE 28, 1923.
CALIFORNIA RAILROAD COMMISSION	SPECIAL PERMISSION	No. 15-2797	OF JANUARY 6, 1913.
ILLINOIS COMMERCE COMMISSION	ORDER	No. R-1167	OF OCTOBER 3, 1915.
INDIANA PUBLIC SERVICE COMMISSION	SPECIAL PERMISSION	No. DT-5226	OF JANUARY 22, 1913.
MAINE PUBLIC UTILITIES COMMISSION	ORDER	R. R. #1106	OF JULY 28, 1924.
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES	SPECIAL PERMISSION	P. S. C.-503-H	OF SEPTEMBER 14, 1914.
MICHIGAN PUBLIC UTILITIES COMMISSION	SPECIAL PERMISSION	No. R-18	OF NOVEMBER 21, 1914.
MISSOURI PUBLIC SERVICE COMMISSION	AUTHORITY	No. 70	OF NOVEMBER 3, 1913.
NEVADA PUBLIC SERVICE COMMISSION	AUTHORITY	No. 792	OF AUGUST 27, 1924.
NEW YORK PUBLIC SERVICE COMMISSION	SPECIAL PERMISSION	No. 3635	OF AUGUST 13, 1912.
PENNSYLVANIA PUBLIC SERVICE COMMISSION	SPECIAL PERMISSION	No. 962	OF JANUARY 25, 1916.
UTAH PUBLIC UTILITIES COMMISSION	AUTHORITY	No. GPC-1	OF APRIL 13, 1918.
WISCONSIN RAILROAD COMMISSION	AUTHORITY	RVA	OF FEBRUARY 1, 1922.

ISSUED BY
G. P. CONARD, Agent
No. 424 West 33rd Street
NEW YORK

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Exhibit D-4.

STATEMENT IN THE MATTER OF

Joseph Smith	at Newark yard	
Taken at Hoboken	on March 13 1926,	By C. C. Hartig
Name	Residence	
James L. Garretson,	145 Chadwick Ave.,	Newark.
Employment	Employer	Business Address
Switchman.	D. L. & W. R. R.	

ON the 11th day of March, 1926, I was employed by the D. L. & W. R. R. as switchman on drill engine # 19 in charge of conductor Joe Smith working Harrison & Newark yard. I started work 6 P. M. to 2 A. M. On the above day we picked up seven empty box cars from track # 4 Harrison yard to take to Broad St. freight house. I took record of the cars and gave same to yardmaster Leonard. Our engine was headed west pushing cars west to Broad St. yard. Conductor Smith and I rode the leading car or most westerly car in string. We shoved in under bridge onto freight house lead. We sat down on top of cars going under bridge and then stood up approaching freight house. The watchman was at the crossing east end of freight house protecting crossing. We did not come to a dead stop; just went along slowly and when we saw crossing clear conductor Smith and I gave come ahead signal to head man, and I started down end ladder east and south side of leading car. When I was about to step off to watch train and give signal to head man a lantern fell down on the knuckles of car and a second later something struck me and almost knocked me off car. I hollered, "Joe!" and did not get an answer. I jumped off and ran west to crossing and out in the open so head man could see me and I gave signal to stop; train came to a stop immediately and I ran back and found Joe laying alongside of the south rail of lead track

and north rail of stub track; he lay about six feet west of south lead switch; we were placing the cars in north house track. I could not say alongside of which car Joe lay with respect to our train. I did not look. I was quite excited. I could not say how many cars ran over him. There was two cars standing on stub track south of lead track; he lay as near as I can recall about opposite the west end of the easterly one of the two cars. I did not pay
10 much attention to positions of Joe or ground and cars. I was more busy looking after Joe. I could not truly state how Joe fell or what caused him to fall off car. I do not even know what ladder he started down. I got down in between cars while he was still on top. I cannot even state whether he came in contact with car or stub track. I did not see how it happened. The clearance between cars moving on lead and cars standing on stub track is
20 close; especially when there is two long cars on stub track; the clearance of the east end of most easterly car would be close; sometimes clear a man on side ladder and sometimes it will not; depends upon size of car. Smith has worked this job with me about four months. He was acquainted with conditions in the yard. We made the drill into the freight house every night. Smith was a very careful man. I examined the car Smith and I rode and
30 found grab irons and ladders O. K. I found his lamp on the knuckles between the two leading cars. Weather clear; dark. The train was handled properly according to rules. The above is a true and correct statement of all I know about this matter.

I Have Read This Statement and Find it Correct.

(Sd.) James L. Garretson.
Signed 3/13/26
40 C. C. Hartig.

New Jersey Court of Errors and Appeals

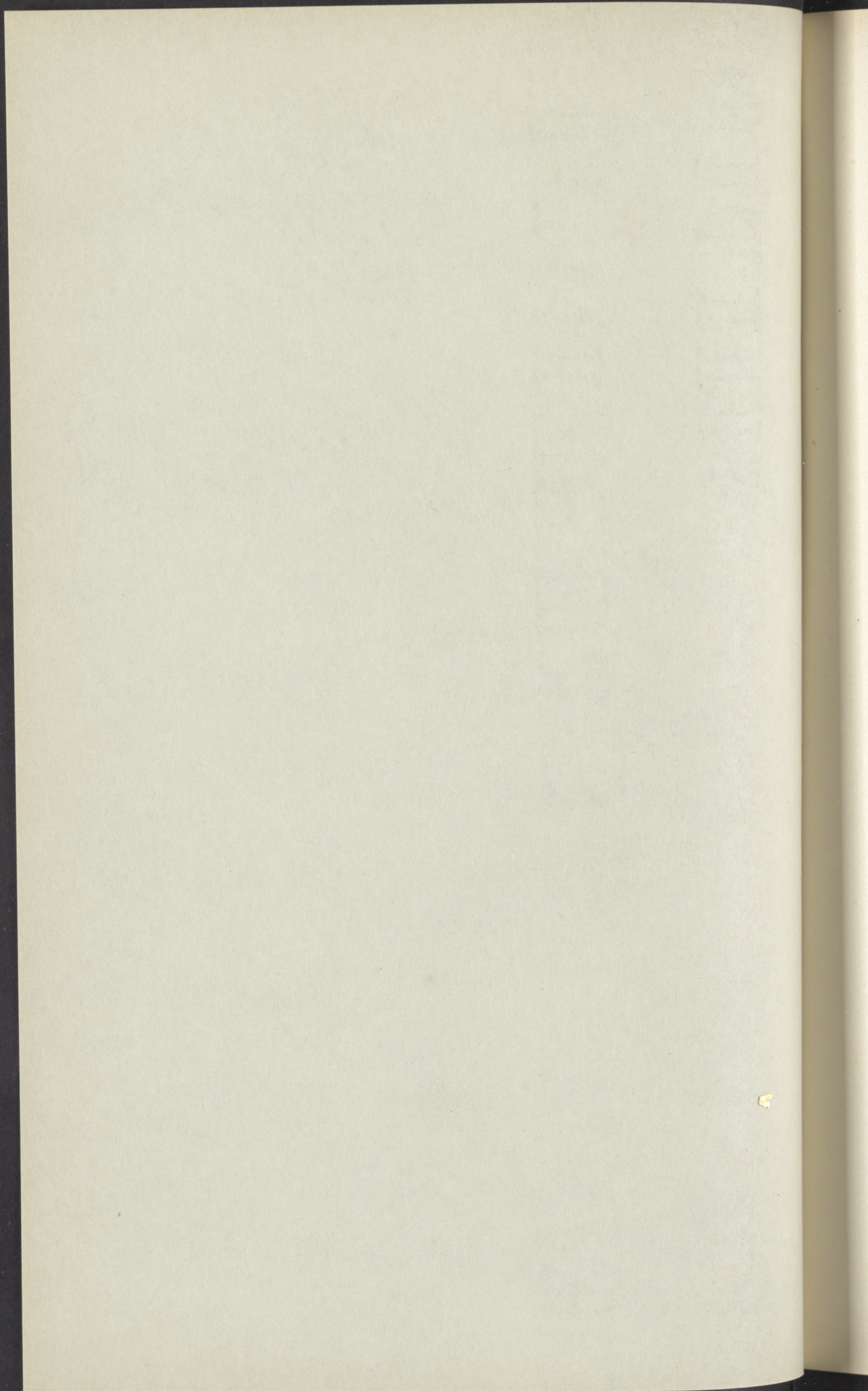
Nellie [illegible], General Administratrix of the Estate of Joseph A. Smith, deceased, Plaintiff-Respondent, vs. The Delaware, Lackawanna and Western Railroad Company, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Circuit Court.

APPELLANT'S BRIEF

Statement of the Case

This is an appeal from a judgment for [illegible] entered November 1, 1928, in the Hudson County Circuit Court on a jury verdict for that amount rendered October 31, 1928, against the appellant and in favor of the respondent as general administratrix of the estate of Joseph A. Smith, deceased.

The action was brought by respondent under the Federal Employers' Liability Act to recover for personal injuries resulting in death sustained by decedent in the course of his employment as



New Jersey Court of Errors and Appeals.

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, Plaintiff-Respondent, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Appellant.	**Action at Law.** **On Appeal from Hudson County Circuit Court.**

APPELLANT'S BRIEF.

Statement of the Case.

This is an appeal from a judgment for $25,000 entered November 1, 1928, in the Hudson County Circuit Court on a jury verdict for that amount rendered October 31, 1928, against the appellant and in favor of the respondent as general administratrix of the estate of Joseph A. Smith, deceased.

The action was brought by respondent under the Federal Employers' Liability Act to recover for personal injuries resulting in death sustained by decedent in the course of his employment as

a freight train conductor in the service of the appellant. That the decedent and the appellant were engaged in interstate commerce when decedent was injured is admitted.

The accident happened on March 11, 1926, about ten o'clock at night, in the Broad Street freight yard of appellant, in the City of Newark, New Jersey, under the following circumstances.

At the time and place mentioned, decedent and other members of the same switching crew, with the aid of a locomotive, were engaged in pushing train of seven freight cars into appellant's freight house, located in said Broad Street yard. The train was moving in a westerly direction, and the engine, headed west, was attached to its easterly end (p. 32, ll. 10-20; p. 33, ll. 13-25; 37-40; p. 34, ll. 1-3).

All of the cars in the train were of the type commonly known as box cars (p. 117, ll. 14-16) and as it approached the freight house decedent was standing on top of the first or leading car, that is to say, the seventh car from the engine (p. 34, ll. 26-27; 11-18).

Because of close clearance above the top of a box car at the entrance to the freight house (see exhibits D-1 and D-2, pp. 119, 120) it was necessary for persons riding on top of such a car to either get off the top or lie down upon it while passing through the freight house entrance (p. 34, ll. 38-40; p. 37, ll. 38-40; p. 38, ll. 3-4).

The cars were being pushed into the freight house on the track marked "lead" on the trial

map, Exhibit P-5, a reproduction of which, on a reduced scale, appears at page 121 of the State of Case.

The inferences of fact most favorable to respondent which may be drawn from the evidence are that as the train neared the freight house entrance decedent proceeded to get off the top of the car (DL&W 35889) on which he was riding, and while in the act of descending therefrom by means of a ladder attached to the side of the car near its easterly end, or while standing on said ladder, he came into contact with car NYC 52449, which was the first, or most easterly, of two box cars standing on an adjoining stub or spur track (marked "spur" on the trial map, p. 121), fell to the ground and was run over by one or more of the cars of his own train (p. 35, ll. 31-36, ll. 5-21; p. 38, ll. 9-40; p. 39, ll. 3-40; p. 40, ll. 3-40; p. 41, ll. 3-10; p. 111, ll. 34-36).

Decedent was an experienced freight train conductor, having been engaged in the work of switching cars almost continuously since May 6, 1920 (when he entered appellant's service), always at night, and, during a very considerable part of that period, in the identical yard where the accident happened (p. 32, ll. 20-25; p. 42, ll. 34-40; p. 43, ll. 3-29; p. 73, ll. 20-40; p. 74, ll. 3-31). As disclosed by the trial map (Ex. P-5, p. 121) the yard in question is a small one and contains only a few tracks. No change had been made in the location of any of the tracks in the yard between the date when decedent entered appellant's

employment and the date of the accident (p. 65, ll. 20-40; p. 44, ll. 20-33).

As decedent's train approached the freight house just prior to the accident, the two cars standing on this stub or spur track were plainly visible to decedent and the members of his crew for a distance of from three to four hundred feet (p. 45, ll. 6-20), and to a person positioned as was decedent at that time (*i. e.,* standing on top of a box car), the close clearance between the cars on the stub or spur track and the cars of decedent's train was readily observable (p. 47, ll. 19-29). Witness Garretson, a fellow employee and the person nearest decedent when the accident happened, was the only witness sworn by the respondent who testified concerning it, and he stated, in substance (p. 50, ll. 16-21), that neither he nor decedent got off their train when it came opposite the spur track to see how close the clearance was between the cars of their train and those standing on the spur track "* * * because we" (meaning the decedent and himself) "knew going in what it was".

The drill movement being made on the lead track past the two cars standing on the spur track at the time the accident happened was not the first movement of that character made by decedent and his crew on the same night. On the contrary, they had drilled cars past the identical spot where the accident happened and on the same track about ten minutes past seven o'clock on that night (p. 50, ll. 22-27; p. 52, ll. 23-28; p. 53, ll. 18-27), during

which operation said two cars were standing on the spur track (p. 46, ll. 19-34), and there is not even a scintilla of evidence from which it can be inferred that the position of said two cars on the spur track was not the same when the first drill movement past them was made as it was when the second was made and the accident happened.

It was the usual thing for the drill crew of which decedent was conductor to find cars on the stub or spur track every night as they came to the yard to drill, and such cars were sometimes of one size and sometimes of another (p. 47, ll. 6-18). The clearance between cars moving on the lead track and cars standing on the stub was close, especially when there were two long cars on the stub. In such a situation the east end of the most easterly car on the stub track sometimes would clear a man standing on the side ladder of a car passing on the lead track and sometimes it would not, depending on the size of the cars on the stub track—a condition known to decedent, who had made the same drill movement every night during the period of about four months immediately preceding the date of the accident (p. 118, ll. 18-27).

No evidence was adduced at the trial from which it could be found:

(a) That the tracks in question were not all properly laid out, maintained and kept in repair in accordance with approved engineering standards;

New Jersey State Library

(b) That any of the cars mentioned in the complaint or having relation to the accident was of dimensions or character of construction different from those ordinarily handled and dealt with by decedent and his drill crew in the regular routine performance of their duties;

(c) That any of said cars was defective or in any condition other than good order;

(d) That it was contrary to the usual practice or custom in the operation of said Broad Street yard to place two cars on said stub track of the dimensions of those occupying it at the time the accident happened and to drill other box cars past them into the freight house via said lead track, or that such an operation was not in accordance with approved standards of railroad operation;

(e) That said two cars which were standing on said stub track when the accident happened had not been originally placed and thereafter, throughout the night of the accident, did not continuously remain in positions as far in (*i. e.,* west) from the point of the switch connecting said stub track with said lead track as it was possible to place them;

(f) That the train in decedent's charge was insufficiently manned, that it was operated negligently having regard to decedent's safety or that it was in any respect operated in violation of any law, as charged in the complaint.

At the close of the whole case, appellant moved for the direction of a verdict upon grounds theretofore, at the close of the respondent's case, urged in support of a motion to nonsuit, among others, that no actionable negligence on appellant's part had been shown, and that the decedent had assumed the risk of the accident and injury which happened (p. 85, ll. 13-19; p. 64, ll. 12-24). This motion was denied and the case sent to the jury over appellant's objection (p. 85, ll. 20-22).

Grounds of Appeal.

The grounds of appeal here urged are that the trial court erred in refusing, on motion of appellant, to direct a verdict in favor of appellant on the grounds that no actionable negligence on appellant's part had been shown, and that the decedent had assumed the risk of the accident and injury which happened.

ARGUMENT.

POINT I.

The evidence was not sufficient to warrant submission to the jury of the question of appellant's negligence.

This case is governed by the Federal Employers' Liability Act (35 U. S. Stat. at Large, Ch. 149, p. 65, as amended 36 U. S. Stat. at Large, Ch. 149, p. 291) and the applicable principles of common law as established and applied in the Federal Courts.

Toledo, etc. Ry. Co. v. Allen 276 U. S. 165, 168;

Missouri Pacific Ry. Co. v. Aeby, 275 U. S. 426, 429.

There is no liability in the absence of proof of negligence on the part of the appellant, nor may negligence on its part be inferred merely from the fact that decedent, while descending a ladder attached to the side of a car of his own train collided with the car on the adjoining stub track and was thrown to the ground and run over, conceding, *arguendo,* that the accident happened in that manner.

D. L. & W. R. R. Co. v. Koske (decided Feb. 18, 1929), 49 S. Ct. Rep. 202; #7 U. S. Sup. Ct. Adv. Op. 1928-9, 73 L. Ed. 235, 236;

Toledo etc. Ry. Co. v. Allen, supra, 168, 169;
Missouri Pacific R. R. Co. v. Aeby, supra, 429, 430.

With the foregoing rules or principles of law in mind we will proceed to a consideration of the several allegations of negligence charged in the complaint, and the evidence or lack of evidence in the record having relation thereto. The allegations referred to appear at pages 9, 10 and 11 of the State of Case.

A.

There Was No Evidence Showing Failure to Furnish a Safe Place to Work.

Paragraph 12 of the complaint, sub-divisions "(a)", "(b)", "(e)" and "(f)" (Case, pp. 9, 10) sets up four separate charges of negligence having to do with the place where decedent was working when he was injured, viz:

(a) Failure to exercise reasonable care to provide decedent with a reasonably safe place in which to work;

(b) Failure to exercise reasonable care to keep and maintain the said spur track or stub track in such a condition that it would be reasonably safe for decedent to get off the said lead car as it was going into the freight house;

(e) Failure to exercise reasonable care in failing and neglecting to provide sufficient light or any light so that decedent might

observe the position of said car or cars on the adjoining track so that he might avoid the same as he was alighting from the said lead car as same was entering the said freight house;

(f) Failure to provide a sufficient or proper place within which the plaintiff's intestate (decedent) could perform the work which he was directed to do.

With respect to the allegations of paragraphs "(a)", "(b)" and "(f)", we here reiterate what we have hereinbefore stated, viz, that no evidence was adduced at the trial from which it could be found that the tracks involved in the complaint were not all properly laid out, maintained and kept in repair in accordance with approved engineering standards, nor was any evidence adduced from which it could be found that they were not in perfect condition at the time of the accident. In fact, the record is silent as to each of these features, from which it follows that the three allegations of negligence set forth in the paragraph of the complaint referred to stand without even a scintilla of evidence to support them.

As to the matter of light (artificial), failure to maintain a sufficiency of which is charged in paragraph 12(e) of the complaint, it may be dismissed with the comment, first: that it affirmatively appears (p. 40, ll. 5-27) that there was a light not over two hundred feet away, inside the freight house, which "shines out quite a ways" and, for

aught that appears in the record, cast its rays on the place where the accident happened and furnished ample illumination at all times, regardless of weather conditions; second: decedent had a clear view of and could see the cars standing on the stub track for a distance of from three to four hundred feet as his train approached them just prior to the accident (p. 45, ll. 6-20); third: decedent could readily note, under lighting conditions as they existed, the meager clearance between the car on the stub track and the one on which he was riding as his train approached the car on the stub track (p. 47, ll. 19-29); fourth: decedent was, at the time he elected to go down the side ladder of the car on which he was riding (conceding, *arguendo,* that that is what he attempted to do), fully aware of the presence of the car on the stub track with which it is claimed he collided and of the close clearance between said car and the one on which he was riding (p. 46, ll. 19-21; p. 50, ll. 16-21). In view of the facts referred to in this paragraph, it is obvious that the plaintiff below not only failed to adduce evidence from which it could be inferred that there was any deficiency of light at the *locus in quo* on the night of the accident, but that she also failed to establish any causal relationship between the happening of the accident and the alleged lack of sufficient light.

The appellant's duty in respect of its yard in which decedent was working when injured did not make it an insurer of decedent's safety. There

was no guaranty that the place would be absolutely safe. The measure of appellant's duty was that of reasonable care having regard to the circumstances (*D. L. & W. R. R. v. Koske, supra; Missouri Pacific R. R. v. Aeby, supra; Patton v. Texas & Pacific Ry. Co.,* 179 U. S. 658, 663, 664).

There is, of course, danger in drilling cars in any railroad yard. But fault or negligence may not legally be inferred from the mere existence of danger (*Toledo, etc. Ry. Co. v. Allen, supra,* p. 169). As to the construction, spacing and maintenance of the tracks in appellant's Broad Street yard and the matter of facilities therein and places for the use of decedent in the performance of his duties, it is clear from the *Allen* case that appellant was under no legal obligation to decedent that was not fully performed. In that case, the United States Supreme Court (p. 170) said:

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger,* 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such

> engineering questions to the uncertain and varying opinions of juries." (Citing cases.) "Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri Pacific Railroad Co. v. Aeby, supra.* The court erred in submitting that question to the jury."

In the *Allen* case the plaintiff was a car checker whose duties required him to work in a switching yard, and the case is closely analagous, with respect to controlling facts, to the case at bar. In the *Allen* case, while the space between the two tracks (in which he was standing when struck by a shunted car) was sufficient to enable him to keep out of the way of moving cars, the danger attending his work would have been lessened if the space had been greater. In the instant case the space between the two cars, while not shown in figures, was sufficient to permit of the free passage of decedent's car, if not more than sufficient, although if the space had been greater decedent might have done what it is claimed he attempted to do, in safety. In each of the two cases the accident occurred at night and the speeds of the moving cars were about the same, viz., from four to six miles per hour in the *Allen* case and from five to ten miles per hour (p. 78, ll. 36-37; p. 40, ll. 3-4) in the instant case. Both Allen and decedent were well acquainted with conditions in the yards in

which they were respectively employed and were aware of the conduct of the particular operating movements which affected their safety. In neither the *Allen* case nor the case at bar was there anything to show that in the conduct of the respective operating movements which resulted in the injuries complained of, there was any departure from the ordinary practice obtaining with respect thereto. The Court, in the *Allen* case (p. 170) said, with respect to the question of defendant's negligence in view of its knowledge of the alleged dangerous physical conditions due to the close clearance between tracks and cars, "that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant", citing *Missouri Pacific R. R. Co. v. Aeby, supra,* and we respectfully submit that same conclusion must be reached in the instant case with regard to decedent's knowledge of the situation existing in the Broad Street yard and the dangers inherent therein.

In one respect, at least, respondent's proof of negligence on appellant's part with regard to its duty to provide a safe place to work is even less convincing than the proof in the *Allen* case. In that case it does not appear that the plaintiff could have performed his duties in the yard at any place other than the one occupied by him when he was injured. In the instant case there is nothing from which it can be inferred that decedent was required, in the performance of his duties, to make

use of the side ladder on the car in question, as it is claimed he was doing when injured, or that such action was usual under similar circumstances. He could have ridden past the car on the stub track in safety and continued on into the freight house by either lying down on the roof of his own car or by descending to a lower level by means of one or another of the ladders attached to the ends of his car (as did his fellow employee, Garretson) or the ladder on the near end of the car immediately following.

See, also, *Reese v. P. & R. Ry.*, 239 U. S. 463.

B.

The Record Contains No Evidence from which it Can be Found that Appellant was Negligent with Respect to the Positions of Cars on the Stub or Spur Track.

Subdivisions "(c)" and "(d)" of paragraph 12 of the complaint charge appellant with negligence in that:

> "(c) It failed and neglected to so place the said car known as NYC 52449 in such a position on said spur track that it would clear the plaintiff's intestate as he was alighting from the said lead car of the said freight train which he was riding into the said freight house."

and

> "(d) It failed and neglected to keep and maintain the cars on the said spur or stub track in such a position as to provide sufficient clearence between the said car or cars

and the said lead car upon which the plaintiff's intestate was riding on the adjoining track so that it would be reasonably safe for the plaintiff's intestate in the performance of his duty to alight from the said lead car in safety."

It will be noted from the foregoing excerpts from the complaint that paragraph "(c)" is directed to the *placing* of car NYC 52449 (the one which it is claimed decedent came into physical contact with and which occupied the most easterly position on the stub track), while paragraph "(d)" is directed to the *keeping and maintaining* of that car and the other one (MDT 17026—Case, p. 83, ll. 12-20) on the stub or spur track. In other words, paragraph "(c)" has to do with the initial placement or the movement onto the track, while paragraph "(d)" refers to the positions occupied from time to time on the track, after original placement, with regard to the clearance between "said car or cars" and the car on which decedent was riding.

As heretofore pointed out in our statement of the case, there is no evidence in the record from which it can be found that the two cars which were standing on the stub track when the accident happened, were not, at that time, in a position on said stub track as far west from the point of the switch connecting said stub track with the lead track as it was physically possible to place them, and that being so, there is no evidence from which it can be found that the clearance between the

most easterly (NYC 52449) of said two cars and the car on which decedent was riding was not as great as it was possible to provide under existing conditions in the yard.

In the absence of evidence that the clearance was less than it was possible to provide under existing conditions in the yard, no inference of negligence can be drawn with respect to the position of the cars on the stub track.

C.

Alleged Failure to Warn.

Paragraph 12(g) of the complaint (p. 10) charges appellant with negligence in that:

> "(g) It failed and neglected to warn the plaintiff's intestate of the position of the said car or cars on said adjoining spur track."

We have heretofore, in our statement of the case (*ante*, pp. 3-5), shown that decedent was an experienced freight conductor; was fully acquainted with the *locus in quo;* knew of the custom to place on said stub track from time to time two cars of varying dimensions, some of which would clear a man standing on the side ladder of a car passing on the lead track and some of which would not; had made the same drill movement many times before under substantially similar circumstances and a short time before the accident had made it under the identical conditions obtaining when the accident happened; knew

that the cars in question were standing on the stub track and their exact location; and could not only readily see that the clearance between said cars and the one on which he was riding was close but knew it to be so.

Under the circumstances there was no duty to warn, as alleged in paragraph 12(g) of the complaint.

Toledo, etc. R. R. v. Allen, supra, 171.

D.

The Train on which Decedent was Employed was Adequately Manned.

Paragraphs 12(h) and 12(k) allege that appellant was negligent in the following respects:

> "(h) It failed and neglected to have and maintain a sufficient and adequate number of men in the movement of the said cars upon which the plaintiff's intestate was working so as to properly control the movement of said train and the proper giving of signals to stop the said train so as to prevent injury to the plaintiff's intestate."

> "(k) It failed and neglected to have and maintain a sufficient and adequate crew on said train on which the plaintiff's intestate was employed to ascertain the fall of the plaintiff's intestate from the head car of said train and to operate the safety appliances or otherwise warn the engineer of the locomotive engine so that said train could be stopped in time to avoid running over the plaintiff's intestate."

There is absolutely no evidence that the train on which decedent was employed was undermanned on the night of the accident. On the other hand the proof is plenary that the train was manned by the same sized crew that had always theretofore been employed, that is to say, a crew of five men, consisting of a conductor (the decedent) two brakemen, an engineer and a fireman, and that such complement of men constituted the "complete crew" for that particular drill (p. 33, ll. 20-25; p. 45, ll. 30-36).

Further, it affirmatively appears from the uncontradicted evidence that the train was under complete control at all times. Respondent's witness, Garretson, testified that it was moving about three times as fast as a man could walk, or at a speed of from eight to ten miles per hour, when opposite the most easterly of the two cars standing on the stub track (p. 34, ll. 19-22; p. 39, ll. 39-40; p. 40, ll. 3-4; p. 46, ll. 6-11). The engineer, Rutan, for appellant, testified that at the time he received the signal to stop, the speed was about five miles per hour (p. 78, ll. 36-37), and that on receiving said signal he immediately applied the brakes "in emergency" and brought the train to a standstill within a distance of five feet (p. 79, ll. 12-38).

With respect to the degree of diligence with which decedent's fellow employees acted to convey the stop signal to the engineer on learning that decedent had fallen from the car, the evidence shows that witness Garretson, as soon as he had

reason to believe that decedent had so fallen, jumped to the ground from his position in between the first two cars of the train, ran out into the open so the "head man" could see him, and gave a signal to stop; whereupon the train came to a stop immediately and he ran back and found decedent lying along the south rail of the lead track (p. 117, ll. 30-40; p. 35, ll. 5-10; p. 40, ll. 28-32; p. 41, ll. 4-10).

E.

No Negligence in the Operation of the Train.

Paragraph 12(i) of the complaint charges negligence in operating decedent's train without proper signals, with result that after decedent fell from the head car the train was permitted to continue on and run over the decedent.

What we have heretofore (subdivision D) said with respect to the allegations of negligence charged in paragraphs 12(h) and 12(k) apply to the allegations of paragraph 12(i) and need not here be repeated.

F.

No Violation of Any Operating Rule or of the Federal Safety Appliance Act.

The allegations considered hereunder are those of paragraphs 12(ii) and 12(j) of the complaint (p. 11), the first of which charges violation by appellant of "one or more" of appellant's rules,

while the second charges violation of the Federal Safety Appliance Act, in that appellant permitted the decedent's train to be operated without power driving wheel brakes and appliances.

There is not a scintilla of evidence tending to support either of said allegations.

On the other hand, it affirmatively appears that the only violation of rules was by decedent himself in attempting to use the side ladder of his car (again assuming that he was doing so when the accident happened) in disregard of appellant's operating rule No. 40, which reads (p. 81, ll. 20-26) as follows:

> "In handling cars on tracks where there is limited side clearance of platforms, docks, *structures of any kind,* * * * men must not go between cars and such obstructions, nor use ladders on the side of cars toward such obstructions." (Italics ours.)

Where injury to an employee is the result of his failure to comply with a rule of the employer, he cannot recover under the Federal Employers' Liability Act. *Great Northern R. R. Co. v. Wiles,* 240 U. S. 444. A railroad company is entitled to expect self-protection from its employees. *Chesapeake etc. R. R. Co. v. Nixon,* 271 U. S. 218, 219.

As to the matter of brakes, the evidence conclusively shows that every car and the engine were equipped with air brakes properly coupled and in perfect operation (p. 77, ll. 30-40; p. 78, ll. 3-32).

POINT II.

If it be held that the evidence presented a question for the jury with respect to appellant's negligence, then decedent assumed the risk of the accident and injury resulting therefrom.

Section 4 of the Federal Employers' Liability Act provides:

> "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The United States Supreme Court has held that in so eliminating the defense of assumption of risk in the cases indicated, Congress plainly evidenced its intent that in all other cases such assumption shall have its former effect as a complete bar to the action (*Seaboard Air Line v. Horton,* 233 U. S. 492, 503). Having heretofore (Point I, Subdivision "F") shown that there was no violation of the Safety Appliance Act in regard to the matter of air brakes, and there being no suggestion that any other statute enacted for decedent's safety was violated, we come at once to the question: What conditions justify barring an employee's, or his personal representative's action for personal injuries or death, upon the ground

that the employee assumed a risk which resulted from his employer's negligence.

Of the many cases in which the courts have applied the doctrine referred to, we have selected for discussion a few presenting features analagous to those in the case at bar, and, as we believe, more clearly and definitely than others, indicating the propriety of applying the doctrine in the case at bar.

In *Toledo etc. Ry. Co. v. Allen, supra,* the facts in which case are outlined and compared with those in the instant case under our first point (*ante,* pp. 13-15), it was held not only that the trial court erred in submitting to the jury the question of the railroad company's negligence, but also that the plaintiff had assumed the risk. At pages 171, 172 of the report, the United States Supreme Court said:

> "In any event plaintiff assumed the risk. He was familiar with the yard and with the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him" (citing cases).

It is plain from the opinion in the *Allen* case that knowledge of the physical situation and of the danger inherent therein was imputed to the plaintiff because of the fact that for about 18 months prior to the accident he had worked in the yard as a car checker under conditions substantially similar to those which obtained on the night he

was injured. In the instant case knowledge of the physical situation due to the spacing of the tracks, the presence of the particular cars thereon, and the drill operation being conducted past the cars on the stub track, is not only imputable to decedent because of his familiarity with the *locus in quo* and the nature of his own work therein, but he had actual knowledge of such physical situation, and, as an experienced railroad man he must have fully known and appreciated the dangers.

In *Southern Pacific Co. v. Berkshire,* 254 U. S. 415, decedent, an engineer, was held to have assumed the risk, while leaning out of his cab window in the performance of his duty, of being struck by the hand of a mail crane or a mail sack that had been placed on it to be picked up by a mail train which was following the train of decedent. When elevated, the hand of the crane cleared the train about 14 inches and when down the clearance was about 3 feet 8 inches. It does not appear that the deceased engineer knew that the hand of the crane was elevated at the time in question although he knew of the existence of the crane and could have seen that the hand was elevated, had he looked, for a long distance before reaching the crane. The court said (p. 418):

> "The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a

projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

Applying the foregoing rule to the case at bar, it may well be said that the only element of danger which decedent may not have appreciated was the precise distance which the side of the car standing on the stub track would reach in the direction of his own car. But he was an experienced railroad man, intimately acquainted with the yard in which he was working and with the customs and practices having to do with the placing of cars on the stub track and the drilling of cars past them into the freight house, and as such he cannot be supposed to have been ignorant that the situation as to clearance threatened danger. And, knowing so much, he assumed the risk that obviously would attend taking the chances of standing on the side ladder of his own car.

See, also: *Chesapeake & Ohio R. R. Co. v. Leitch,* 48 Sup. Ct. 158, reargued March 14, 1928 and decided April 9, 1928, 48 Sup. Ct. 336; *Baugham v. N. Y. P. & N. R. R.,* 241 U. S. 237; *Tuttle v. Detroit etc. R. R.,* 122 U. S. 189; *Randall v. B. & O. R. R.,* 109 U. S. 478.

CONCLUSION.

For the reasons heretofore stated, the judgment should be set aside.

Respectfully submitted,

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WALTER J. LARRABEE,
Of Counsel.

Y5320

New Jersey Court of Errors and Appeals

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, *Plaintiff-Respondent,* *v.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law. On Defendant's Appeal.

BRIEF IN BEHALF OF THE ~~COMPLAINANT~~-RESPONDENT.

Plaintiff

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment of the Hudson County Circuit Court for $25,000 in favor of the plaintiff, Nellie Reardon, General Administratrix of the estate of her deceased son-in-law, Joseph A. Smith, in an action brought under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 9388, sec. 8657), to recover damages against the defendant, The Delaware, Lackawanna & Western Railroad Company, for the benefit of her two grandchildren, for the death of their father, the plaintiff's intestate (the mother of the children having predeceased the father).

The accident happened on March 11, 1926, while the plaintiff's intestate was employed by the defendant in interstate commerce. It was dark at the place of accident, the nearest light being within the freight house, the entrance to which was 290 feet west of the scene of the accident. The freight train crew of which the deceased was a member, had charge of seven freight cars which were being pushed by an engine at about 8 to 10 miles an hour (the engine being at the rear of the train) in a westerly direction on the main or lead track toward the freight house, located in the Broad Street freight yard of the defendant, at Newark, New Jersey.

The following facts were proven:

1. The roof of the freight house would not clear a trainman on top of a freight car as it entered the freight house;

2. It was the custom and practice, therefore, of the defendant, to have its trainmen alight from the trains as they approached the freight house;

3. The deceased, in the performance of his duty as conductor of the train, was riding on top of the first freight car in the direction the train was moving (westerly) as it approached the freight house;

4. In accordance with the usual and customary practice, he proceeded to alight from the top of that freight car by going down the ladder on the side of the car. The deceased was going down the outside ladder and the brakeman was going down the inside ladder of the first car;

5. As the deceased was going down the ladder, he was "pushed or knocked" from the

ladder by another freight car placed on a stub, spur or side track, being a yard track connecting with and to the left of the approaching train, which was on the main track of the yard;

6. The freight car on the side track protruded toward the main track and was so close to the main track that it would not clear an employee in the performance of his duty, descending the ladder on the side of a car in a train moving on the main track;

7. The freight car was improperly or negligently placed on the spur track, because if it had been properly placed, it would have been entirely clear of the main track, for there was ample space on the stub track to accommodate at least two freight cars without in any way making a narrow clearance between the stub track and the main track, the clearance between the inner rails of those two tracks being 8 feet, 8½ inches;

8. As a result the deceased received a crushing or mangling of his arm and leg and other injuries. He suffered great pain and anguish from March 11, 1926, to March 16, 1926, when he died as a result of his injuries.

This is not a case of a narrow clearance existing for a long period of time, with full knowledge of the employee, between permanent structures, such as station platforms, tracks, fences, mail cranes, bridges, permanent drains, etc. On the contrary, it is a case of the improper and negligent placing of a freight car on a side or stub track so as to temporarily protrude, so near to the main or lead track in the yard, as not to clear an employee on a moving train proceeding on the main

track, who at the time was strictly performing his duties in accordance with the custom and practice of the defendant. The foregoing statement of the undisputed facts indicates quite clearly that this accident resulted from negligence upon the part of the defendant. Also, it is clear that the deceased did not assume the risk of that injury, because he did not have anything to do with the placing of the freight car on the side track and there is no evidence that he had any knowledge or was at all conscious of the fact that it was negligently placed on the side track.

The complaint contains two counts. The first is for the pecuniary loss suffered by the next of kin of the deceased; the second is for the conscious pain and suffering which the deceased endured during the days that he survived the accident. The jury brought in a verdict in favor of the two orphan children, who were 7 and 10 years old respectively at the time of the trial (October 30, 1928) on the first count for $22,500 and on the second count for $2,500, making the total verdict $25,000. It is from judgment entered upon that verdict that the present appeal has been taken. Although eight grounds of appeal were filed, only one ground of appeal has been argued in the brief of the appellant. That is, that the trial court erred in refusing to direct a verdict in favor of the appellant (p. 7 of brief). We shall hereinafter refer to the appellant as defendant and to the respondent as plaintiff.

(2)

Alleged Ground of Appeal.

The alleged ground of appeal is two-fold. The defendant contends that it was entitled to a direction of verdict in its favor, first, because "no

actionable negligence on appellant's part had been shown," and second "that the decedent had assumed the risk of the accident and injury which happened (p. 7 of brief)."

(3)

BRIEF OF THE ARGUMENT.

I.

The question whether or not the defendant was negligent was a question of fact to be decided by the jury.

(a)

The Facts.

The defendant's brief misstates a number of the facts and omits entirely references to many of the vital facts with respect to the defendant's negligence. The nature and extent of the negligence of the defendant has a two-fold importance. First, its value in proving the liability of the defendant, and second, as will be shown, an employee does not under the Federal act assume the risk of injuries resulting from the negligence of the master or his agents or servants; at least not until he becomes fully aware of the negligence and fully appreciates the danger resulting therefrom.

The brief of the defendant seems to proceed on the theory that this Court on appeal, has a right to weigh the testimony, whereas the rule is that this Court is not concerned with the weight of the evidence or the credibility of the witnesses, but is concerned only with correcting errors in law.

In *Osbun* v. *De Young,* 99 N. J. L. 204, 207, this Court, speaking through Kalisch, J., said:

> "There can be no good excuse offered why an elementary legal rule should be so often disregarded by counsel in arguing on the weight of the evidence in a civil case at law, on appeal, before this court, which is only concerned with correcting errors in law. With the credibility of the witnesses or the weight of the evidence we have no concern."

Counsel has lost sight of another well settled rule, namely, that in passing on a motion for a direction of a verdict, all the evidence against the party making the motion must be taken as true and the adverse party must be given the benefit of all legitimate inferences reasonably deducible therefrom.

In *Andre* v. *Mertens,* 88 N. J. L. 626, 627, this Court, speaking through TRENCHARD, J., said:

> "Of course, in passing upon motions to nonsuit and for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor."

Another well settled rule is that where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue must go to the jury. The trial judge is only justified in nonsuiting the plaintiff or directing a verdict for the defendant upon a court question arising from the admitted or uncontroverted facts of a case.

Nolan v. *Bridgetown, etc., Traction Co.,* 74 N. J. L. 196;

Dickinson v. *Erie R. R. Co.,* 85 N. J. L. 586.

With these rules in mind, we find that the brief of the defendant contains the following remarkable statement of fact which has no foundation at all in the testimony to support it (pp. 16 and 17 of brief of defendant):

> "As heretofore pointed out in our statement of the case, there is no evidence in the record from which it can be found that the two cars which were standing on the stub track when the accident happened, were not, at that time, in a position on said stub track as far west from the point of the switch connecting said stub track with the lead track as it was physically possible to place them, and that being so, there is no evidence from which it can be found that the clearance between the most easterly (NYC 52449) of said two cars and the car on which decedent was riding was not as great as it was possible to provide under existing conditions in the yard.
>
> "In the absence of evidence that the clearance was less than it was possible to provide under existing conditions in the yard, no inference of negligence can be drawn with respect to the position of the cars on the stub track."

The facts with respect to the position of the two freight cars on the side or stub track are as follows:

Henckel, a civil engineer employed by the defendant, made a map (Exhibit P-5, copy of which is annexed to the state of case), which gives only part of one of a group of freight yards of the defendant in the vicinity of Harrison, Jersey City and Newark (pp. 43 and 51; p. 73, line 20, *et seq.*). On this map will be found the lead or main track marked "lead." He marked the spur or side-track with the word "spur." The bumping block or dead end of the spur track is indicated by a

"b." The planking between the rails of the spur track as well as the planking between the inner rails of the spur track and the lead track by two "ps." The auto platform opposite the spur track on the southerly side thereof is marked "auto plat (p. 70)." Henckel gave detailed measurements from an actual survey on the ground as to the length of the spur track, the planking and the auto platform, which demonstrate that there was ample clearance and sufficient length on the spur track for the two cars to be placed there, without protruding or in any way cutting down the clearance between the spur track and the lead track.

The entire length of the spur track was 246 feet (p. 67, lines 20-30). The aggregate length of the two cars on the sidetrack was 82 ft. 2 inches (pp. 83 and 84). It was proven that these two cars were MDT 17026 and NYC 52449. The outside measurement of NYC 52449 was 40 ft. 9¼ inches. The outside measurement of MDT 17026 was 41 ft. 4¾ inches. *This would make the total length of the two cars 82 feet 2 inches.* These were outside measurements (p. 26, line 20; p. 84, lines 1-20). However, the witness who testified to the foregoing facts seemed to think that it did not include the bumper (p. 84, line 20). It therefore appears that the two cars had a length of less than 82 feet while the length of the spur track was 246 feet.

The spur track converges toward and connects with the lead track. The distance that it runs parallel to the lead track is 85 ft. (p. 68, lines 1-15; p. 69, lines 10-20). For that 85 ft. the clearance between the inner rails of the two tracks is 8 feet 8½ inches (p. 67, lines 30-40). That is the distance from the bumper down to the westerly end of the planking between the rails of the spur track (p.

68, lines 1-15). However, that planking has a length of 32½ feet (p. 68, lines 15-20), which added to 85 feet makes 117½ feet. Then from the easterly end of that planking to the point where the inside rails of the spur track and lead track *intersect and cross for the first time* is another 11 feet 6 inches (p. 69, lines 30-40) making the total distance of the spur track from the bumper before it touches the lead track at all, 129 feet, to the point marked T on the map, Exhibit P5.

The auto platform which parallels the spur track on the south thereof has a length of 86 feet (p. 69, lines 10-25). The spur track opposite the platform would hold two cars (p. 69, lines 25-35). From the easterly end of the planking between the rails of the spur track to the point of switch (marked "s" on the main or lead track) is 131 feet (p. 68, lines 30-35). From the easterly end of the auto platform to the point where the inner rails of the two tracks cross each other is 49 feet 6 inches (p. 70, lines 1-20).

The two photographs D1 and D2 show (although the view is on an angle, and somewhat distorted, keeping in mind the measurements hereinbefore given from actual survey) the layout, including the main and spur tracks, the bumper, auto platform and the entrance to the freight house. On D2 will be found two *large* freight cars on the spur track. In examining the spur track east of the easterly end of the auto platform there will be seen part of the planking between the rails of the spur track and the point where the inner rail of the spur track first meets the inner rail of the lead track. The two large freight cars shown on the photograph D2 are not the two freight cars that were on the spur track at the time of the accident, although it will be noted that even the cars in the photograph do not extend beyond the easterly end of the auto platform.

The proven facts demonstrate that had the two cars been properly placed on the spur track opposite the auto platform, this accident would not have happened for the reason that the width of the clearance between the inner rail of the spur track and the inner rail of the main track where they run parallel for a distance of 85 or 86 feet (opposite the auto platform) is 8 feet 8½ inches (p. 67, lines 30-40).

It is also proven that for a considerable distance east of the easterly end of the auto platform, there is likewise an ample clearance of from 7 to 8 feet for a distance of at least the length of the planking between the rails of the spur track, which planking is in length 32½ feet. It will also be noted on page 5 that the planking does not begin at the easterly end of the auto platform, but there is a space of 7 to 8 feet between the easterly end of the platform and the westerly end of the planking.

We submit that since for at least these two distances of 86 feet and 32½ feet, making a total of 118½ feet, there was a clearance between the inner rails of the two tracks of from 7 to 8 feet, there was no reason at all why the two cars could not have been placed on the spur track, being in length only 82 feet 2 inches, so as to easily permit of the passage of the deceased on the side of the car in the train on the main track. It will be remembered that there remains another 11 feet 6 inches before the inner rails of these two track cross each other (p. 69, lines 30-40).

It is therefore manifest that any two freight cars could have been placed on the spur track if they were properly placed and the clearance between the two tracks would have in no way been reduced.

We therefore submit that counsel for the defendant in his brief (p. 16) was not justified in making

the statement quoted *supra,* viz.: "There is no evidence in the record from which it can be found that the two cars which were standing on the stub track when the accident happened, were not, at that time, in a position on said stub track as far west from the point of the switch connecting said stub track with the lead track as it was physically possible to place them." On the contrary, the evidence is undisputed in this case that had the two cars, having a total length of less than 83 feet, been placed as far west from the point of switch as it was practical to place them, this accident could not have happened because there would have been ample clearance between the two tracks for the length of approximately 150 feet of the stub track, to permit the deceased, in the performance of his duties, to pass the two freight cars without injury. Indeed, had the two cars on the spur track been properly placed thereon, there would have been from 50 to 60 feet from the easterly end of the car that struck the plaintiff to the point where the car the plaintiff was riding on passed the point of switch marked "T" on the map, and there would have been a clearance of 8 feet 8½ inches between the side of the car on the spur track and the side of the car the plaintiff was riding on as the two cars came opposite each other as the plaintiff's train moved into the freight house. It would have been impossible for this accident to happen.

It is absurd for counsel for the plaintiff to say (pp. 16, 17 of his brief): "There is no evidence from which it can be found that the clearance between the most easterly end (N. Y. C. 52449) of said two cars and the car on which decedent was riding was not as great as it was possible to provide under existing conditions in the yard. The conclusion of counsel for the defendant (p. 17) "In the absence

of evidence that the clearance was less than it was possible to provide under existing conditions in the yard, no inference of negligence can be drawn with respect to the position of the cars on the stub track," cannot follow. In view of the fact that a clearance of 8 feet 8½ inches could have been provided under existing conditions in the yard, had the two cars been properly placed, the inference can be drawn that the defendant was negligent in the placing of those two cars on the stub track and that negligence was the proximate cause of the accident; to say the least that question was one of fact for the jury to pass upon.

On page 3 of defendant's brief, counsel says: "The inferences of fact most favorable to respondent, which may be drawn from the evidence, are that as the train neared the freight house entrance, decedent proceeded to get off the top of the car (D., L. & W. 35889) on which he was riding, and while in the act of descending therefrom by means of a ladder attached to the side of the car, near its easterly end, or while standing on said ladder, *he came into contact with* car N. Y. C. 52449, which was the first or most easterly of two box cars standing on an adjoining stub or spur track." It will be noted that counsel cautiously uses the phrase "came into contact with." The proof is much stronger for the defendant's sworn answer in a proceeding under the Workmen's Compensation Act of this State, which was dismissed, which was offered in evidence, admitted that the deceased was "pushed or knocked" from the car on which he was riding (p. 111, lines 30-31). This was evidential against the defendant. *Lincks* v. *Erie R. R. Co.*, 97 N. J. L. 343. The death certificate, which was offered in evidence (p. 105), proved that the deceased was struck by a railroad train for under the Evidence Act such certified transcripts "shall

be received as *prima facie* evidence of the matters and facts therein stated."

> *Vanderbilt* v. *Mitchell,* 62 N. J. E. 910, 914;
> *State* v. *Kottjen,* 89 N. J. L. 678, 684;
> *State* v. *Suleimen,* 126 A. 425, 426;
> *Nestico* v. *D., L. & W. R. R. Co.,* 133 A. 83.

As to the circumstances under which the deceased was injured, we point out that the first eight paragraphs of the complaint (with the exception of an unimportant minor allegation contained in the sixth paragraph, which alleged that there were four loaded and three empty freight cars in the train, whereas there were seven empty freight cars in the train) are admitted in the answer (pp. 6, 7 and 8; p. 14, lines 25-25).

Among the allegations of the complaint admitted are the following p. 7, *et seq.*).

> "4. On March 11, 1926, the plaintiff's intestate, Joseph A. Smith, was in the employ of the defendant as a conductor in said interstate commerce.
>
> "5. At or about ten o'clock in the evening of said day, the plaintiff's said intestate was acting as a conductor in the employ of the defendant in said commerce, and with other employees of the defendant engaged in said commerce was by means of a locomotive engine transferring and shoving certain cars into the freight house of the defendant at its Broad Street yard in the City of Newark, County of Essex and State of New Jersey.
>
> "6. The said locomotive engine was known as drill engine No. 19 and at the time of said occurrence hereinafter more specifically referred to, said drill engine No. 19 was shoving four loaded and three empty freight cars west in on the freight house lead track to be placed in the north side of said freight house at the said Broad Street yard.

"7. *The leading car in the said train was DL&W 35889 and in the performance of his duty as conductor, said plaintiff's intestate was riding on top of said car as the same was being shoved or pushed as aforesaid.*

"8. As said train as aforesaid was being pushed as aforesaid on said freight house lead track, there was another freight car known as N. Y. C. 52449 which stood on the adjoining stub track *and said freight car known as N. Y. C. 52449 was so close to the said lead track that an employee riding on the side of the said DL&W 35889 in the performance of his duties would not clear the said NYC car but would be struck* by the same."

It is important to note those parts of Paragraphs 7 and 8 which are italicized. Defendant admitted that it was decedent's duty to ride on top of the first car in the train as it was being pushed by the engine toward the freight house. That car NYC 52449 on the stub track would not clear an employee (such as the plaintiff's intestate) riding on the side of car D. L. & W. 35889 *in the performance of his duties.* It is specifically admitted *that the car on the stub track was placed so close to the lead track that it would not clear* the deceased as he was riding on the side of the head car. These are admissions of negligence on the part of the defendant. Freight car N. Y. C. 52449 could have been placed on the stub track so that it would have cleared the deceased riding on the side of the head car on the main track. Not only was the plaintiff's intestate in the performance of his duty at the time he was struck and fatally injured but it was the custom for the head brakeman or conductor to alight from the first car as the train was being shoved into the freight house (p. 25, lines 1-10). The clearance between the top of the freight car and the freight house was so small as not to

permit the decedent to remain on top of the freight car as it entered the freight house (p. 25, lines 10-15). The deceased proceeded to alight from the head car known as D. L. & W. 35889 as it approached the freight yard (p. 25, lines 15-25). His body was picked up 14½ feet west of the easterly end of the N. Y. C. car on the stub track (p. 25, line 40, to p. 26, line 5).

As to the amount of light at the point of the accident (the accident happened at ten o'clock at night, p. 7, lines 20-30), counsel gives the version of the testimony most favorable to the defendant, whereas he should give that most favorable to the plaintiff. There was no light at the scene of the accident. The nearest light was inside the freight house, the entrance to which was 290 feet west of th switch point of the lead track and stub track (p. 69, lines 1-10). Garretson, an employee of the defendant, in answer to the question "Is it dark at the point of accident?" testified "*Yes;* it ain't exactly dark, there is a light there inside the freight house that shines out quite aways." He then admitted that there was no light except a small switch light (p. 40, lines 1-15). In his statement to defendant he said it was "dark" and deceased was "a very careful man (p. 118)." There was no evidence that any light "cast its rays on the place where the accident happened and furnished ample illumination at all times regardless of weather conditions (bottom of page 10 and top of page 11 of defendant's brief)." Therefore the conclusion does not follow (p. 11). "Decedent could readily *know* under lighting conditions as they existed, the *meager* clearance between the car on the stub track and the one on which he was riding." There is no evidence that the deceased was "fully aware of the presence of the car on the stub track with which it is claimed he collided, and of the close clearance

between said car and the one on which he was riding." The deceased was dead and could not testify as to what he was aware of. The fact is undisputed that these cars on the stub track were not placed there by the deceased or his train crew (p. 46, lines 20-25). The deceased did not begin his work until six o'clock at night. Garretson does not know anything about what Smith knew (p. 46, lines 25-35).

Smith did not get off his train (as it was moving into the freight house) to measure the distance between it and the freight car on the stub track, to see whether it would clear or not. It cannot be assumed in the absence of proof that he knew that the freight cars were improperly placed on the spur track (p. 50, lines 15-25).

It is therefore clear that the question of how much light there was and whether it was sufficient for the deceased to see and definitely tell that the clearance was so narrow that he would be struck was a question of fact for the jury.

As to the speed of the train, counsel takes the testimony most favorable to the defendant. At the bottom of page 13 he says that the speed of the train was from five to ten miles per hour. Defendant's employee, Garretson, said that the speed was eight to ten miles an hour (p. 40, line 1). The testimony of the engineer was that he had seven cars in the train; the brakes were in perfect condition and he applied them in emergency; and yet, although the deceased fell from the first of the seven cars, the engine did not stop until it was opposite the deceased. Seven cars passed over the deceased's body before the train stopped (p. 79). Garretson was going down the inside ladder as the deceased went down the outside ladder (p. 37). It seems strange that if the engine was only going five miles an hour, and could stop, according to

the engineer, in four feet, that it should go seven car lengths (p. 78, line 35, to p. 79, line 40).

If the condition of light was so ogod that the engineer could see a distance of from 300 to 400 feet as his train approached the scene of the accident, why was it that a signal was not given and the train was not stopped in four feet (see p. 11 of defendant's brief where counsel makes the absurd statement that at night with no light deceased had a clear view of and could see the cars standing on the stub track and the narrow clearance for a distance of from 300 to 400 feet as his train approached them just prior to the accident). As to how long the N. Y. C. car was on the stub track Garretson said he had no idea (p. 50, lines 30-35).

Counsel refers to the fact (bottom of p. 4) that Garretson testified that his crew about 7:10 P. M. had run one other string of cars into the freight house over the main or lead track. Garretson testified that the deceased's crew did not start work until six P. M. (p. 50, line 40). They began work in the Harrison freight yard, which is two or three miles east of the freight house (p. 51, lines 1-10). The first work was to drill that yard. They arrived at the Newark yard about 7:10 P. M. (p. 51, lines 30-35). Then they went back again to the Harrison yard (p. 51, line 40). They brought over some empty cars (p. 52, lines 1-10). After those cars had been disposed of then the crew started with the seven cars for the freight house which were being pushed at the time of the accident (p. 52, line 10). Garretson contradicts himself. He says that the occasion prior to the accident that the crew passed over the main track leading into the freight house was at six o'clock (p. 52, line 40), whereas he also said that they were in the Harrison yard from 6 until 7:10 (p. 51). He also said it was half past seven that the

first trip into the freight house was made (p. 53, lines 20-30). In his written statement before the trial, to the defendant, he made no mention of any such movement (p. 118). Garretson's credibility was of course for the jury. Also what part of his testimony was to be taken as true.

Counsel (p. 3 of brief) says that the yard at Newark is a small one and contains only a few tracks. The yard at Newark is merely an adjunct of the Harrison yard and the other adjacent yards. Most of the time of the train crew was spent in the group of yards which surround Newark and run to Jersey City. It is not a fair statement to infer that the deceased's work was only on the few tracks shown on Exhibit P5, for the foregoing testimony of Garretson clearly shows that the greater part of the time of the crew was spent in drilling at the Harrison yard (p. 53, line 1, *et seq.*). That yard apparently was two to three miles long (p. 51, lines 1-20). There was also an Ogden Street yard which was three blocks from Broad Street (p. 74, lines 35-40). The testimony of the witness Smith shows the varied work that the deceased did during his employment with the defendant (p. 73, line 20, *et seq.*). Counsel (p. 15) attempts to contend that the deceased should have remained on top of the freight car, flat on his back as it went into the freight house. The usual practice according to Garretson was to get off (p. 38, lines 1-10). According to the admission of the defendant that was the custom and practice (p. 25, lines 1-10).

Counsel (p. 4) says, "The witness Garretson (defendant's employee) was the only witness sworn by the respondent to testify concerning it (the accident)." It is true that Garretson was the only witness to the accident. His testimony is by no means the only proof in the case. The proof in the case consists of the testimony of all the wit-

nesses whether called by the plaintiff or defendant; also admissions of the defendant. The admission that the first eight paragraphs of the complaint were true. The sworn answers to the interrogatories (p. 25). The sworn admissions in the defendant's answer in the Compensation Court (p. 111). The cause of death as set forth in the death certificate (p. 105). The inferences to be drawn from all of the testimony. If there was nothing in the plaintiff's proofs upon which to predicate the existence of defendant's negligence, that is not a ground for nonsuit or direction of verdict provided on the whole case there is evidence to justify the conclusion that such negligence existed. *Cappuccio* v. *Hammonton Electric Light Co.*, 98 N. J. L., page 6. A denial of a nonsuit for instance is not error if the defect in the proofs of the plaintiff is supplied by evidence taken in the progress of the cause. *Esler* v. *Camden, &c. R. Co.*, 71 N. J. L. 180. Therefore in passing upon the question whether or not there should be a direction of verdict in favor of the defendant the Trial Court was entitled to consider all of the testimony and the proofs for the purpose of determining whether or not a question of fact was presented for the consideration of the jury.

(b)

The Law.

Having in mind the facts, was the defendant negligent?

The rule is settled that where the evidence of negligence is circumstantial and where probability may be all that is attainable, all that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability

rather than of certainty, exclude the inference favorable to the defendant.

> *Hannon* v. *D., L. & W. R. R. Co.*, 98 N. J. L. 191, 193;
> *Austin* v. *Penn. R. R. Co.*, 82 N. J. L. 416, 617;
> *Goodman* v. *L. V. R. R. Co.*, 78 N. J. L. 317;
> *Suburban Electric Co.* v. *Nugent*, 58 N. J. L. 659;
> *Choctaw, Oklahoma, etc., R. R. Co.* v. *McDade*, 191 U. S. 64.

The negligence of the defendant is clear. It was for the jury to say whether the defendant was negligent in placing two freight cars on a spur or stub track so near to a main or lead track as to come in contact with and strike an employee, who, in the performance of his duty, is riding on a train on the main track into the freight house. That the deceased was standing on the head car of a train that was moving on the *main track* or lead track in the yard is undisputed. Garretson's testimony on that point was as follows (p. 33, line 25, to p. 35, line 15):

> "Q. As you pushed these cars into the freight house, you were on the lead track, weren't you? A. *Yes, sir, on the main track.*
>
> "Q. You got on that main track on the other side of Ogden Street, didn't you? A. Yes, sir.
>
> "Q. How far was Ogden Street from the main track you got on as you pushed these seven cars ahead toward the freight house? A. I don't know. I imagine about 300 feet away from the drawbridge, switch-point.
>
> "Q. As you pushed these cars in *on this main track into the freight house*, the cars were ahead of the engine in the direction you were going, were they not? A. Yes, headed west.
>
> "Q. So that as they came along from Ogden Street, they were headed west *on the main or lead track* for the freight house? A. Yes, sir.

"Q. What car were you on in this train as you came along the main or lead track? A. Second head car.

"Q. That is, in the direction you were going, you were on the second car from the head-end; is that right? A. Yes, sir.

"Q. The engine was on the other end, that is, at the back of the seven cars. Was the engine nose pointed in the direction you were going? A. Yes, it was headed west.

"Q. Was there anything behind the engine? A. No."

It is manifest that if the freight car on the side track had been so placed as to collide with a car moving in the train on the main track, a clear case of negligence would be presented. *A fortiori*, the defendant is equally negligent in permitting a car to be placed on the side track so close to the main track as to strike an employee who, in the performance of his duty, is in the act of descending a car in the train on the main track. The cases cited in defendant's brief (p. 8) are not in point.

In *Toledo &c. Ry. Co.* v. *Allen*, 276 U. S. 165, there was presented a case of narrow clearance between two tracks in a railroad yard. This clearance was not between cars but between tracks. In the case at bar there was ample clearance between the two tracks, *viz*: 8 ft. 8½ inches. It was more than ample to clear the deceased as he went by the cars on the stub track had those cars been properly placed. In the *Allen* case the tracks were all of equal rank; one was not a main track and the other a mere stub track as in the case at bar. The employee in that case was standing on the ground in a position where he knew that he would be struck by cars moving unattended and unlighted on the adjoining track. He could have very easily avoided the car by stepping aside. In the case *sub*

judice the deceased was riding on a moving freight car on a main track from which he was compelled to alight while in motion because of the narrow clearance of the freight house. He was in a position where he lawfully and properly should have been with no knowledge of the improper position of the cars on the side track. The point of the decision in the *Allen* case is clearly stated on page 169 as follows:

> "The (lower) court authorized the jury to find defendant guilty of negligence if the space between the tracks was found to be so narrow that when track 5 was occupied plaintiff was in danger of being struck by cars moving on track 4."

In the case at bar no such contention is made nor did the Trial Court make any such finding or ruling. The question which the Trial Judge submitted to the jury was whether the defendant was negligent in placing cars upon the spur track in such close proximity to the main line as to strike the plaintiff's intestate while he was engaged in his usual employment and in a position he had a right to be in in order to perform the service for which he was engaged. The trial judge's instruction to the jury was as follows (p. 89, line 20, to p. 90, line 20):

> "Now, what does the plaintiff charge as negligence upon the part of the defendant company? Reading from the complaint, she charges a number of things. The complainant first says that the defendant failed to exercise reasonable care to provide the plaintiff's intestate with a reasonably safe place in which to work.
>
> "It charges that 'it failed and neglected to keep and maintain said spur or stub track in such condition that it would be reasonably safe for the plaintiff's intestate to get off said

lead car as it was going into the freight house aforesaid.'

" 'It failed and neglected to so place said cars on said stub or spur track that they would clear plaintiff's intestate as he was alighting from said lead car of the said freight train which he was riding into the said freight house.'

"The plaintiff alleges that on the day in question that this defendant company negligently placed cars upon this spur track, in such close proximity to the main line and in such a negligent manner as to make the place where this plaintiff's intestate was engaged in his usual course of employment and where he had to be in order to perform the service for which he was engaged, and the circumstances under which he found himself, that that was negligence upon their part in placing these cars in that condition, and in failing to supply and maintain and keep a reasonably safe place for this employee to work at his usual course of employment."

That was the issue that was submitted to the jury. The defendant took no exception to that instruction. There was ample evidence to support that charge.

This action does not involve the question of clearance (long existing and well known to the employee) between fixed and stationary structures such as tracks, stations, fences, buildings, etc. In the *Allen* case the track upon which the accident happened was merely a switching track and not the main track as in the case at bar. The *Allen* case merely held (what has always been the law) that there was no obligation upon the part of the defendant railroad company to adopt or maintain "any particular standard for the spacing or construction of its tracks and yards." At page 170:

"The rule of law which holds the employer to ordinary care to provide his employees a

reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Milwaukee Railway,* 122 U. S. 189, 194; *Randall* v. *Baltimore & Ohio R. R. Co.,* 109 U. S. 478, 482; *Washington, &c. Railroad Co.* v. *McDade,* 135 U. S. 554, 570. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri Pacific Railroad Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury."

We submit that the *Allen* case is no authority in the case at bar.

Likewise, *Missouri Pac. R. R. Co.* v. *Aeby,* 275 U. S. 426, is not in point. Snow and ice covered the station platform and the plaintiff fell upon it at night in the pursuit of her duties as station master. There was no evidence of any negligence or that the snow and ice had existed for such length of time as to charge the defendant with negligence. The statement at page 430 that the company was not required to have any particular type or kind of platforms, also distinguishes that case from this and that language refers to the evidence that part of the station platform which was composed of loose gravel and crushed stone, was somewhat worn and depressed.

Another case referred to by counsel is *D., L. & W. R. R. Co.* v. *Koske,* 73 L. Ed. 234. We can find no good reason for citing that case as an authority for the case at bar. The only apparent reason for citing it is that the United States Supreme Court reversed this Court. There is no similarity either on the law or the facts. In that case there was a drain some eight or ten inches deep which had remained in practically the same condition during the entire employment of the plaintiff and he testified that he had frequently traversed the particular region where he was injured and he knew of the existence of this permanent drain and of its exact position, and nevertheless jumped off an engine into the drain and was injured. The United States Supreme Court said at page 236 (italics ours):

> "The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect of the method employed or the condition of the drain at the time and place in question. *Nelson* v. *Southern R. Co.,* 246 U. S. 253, 62 L. ed. 699, 38 Sup. Ct. Rep. 233; *Missouri P. R. Co.* v. *Aeby,* 275 U. S. 426, 72 L. ed. 351, 48 Sup. Ct. Rep. 177.
>
> "The court takes judicial notice of the fact that for some weeks immediately before the accident the sun rose and it was light for some time before plaintiff's quitting hour. *Montenes* v. *Metropolitan Street R. Co.,* 77 App. Div. 493, 78 N. Y. Supp. 1059. He worked in daylight for some time every morning during the spring and summer months, and during one year he worked days. *There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping*

> *from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.*"

The *Koske* case is clearly distinguishable. There the decision is rested on the ground that there was "nothing obscure or of recent origin" about the place where the plaintiff was injured. Also, "the conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question." There the plaintiff testified to his knowledge of the existing conditions. Here the employee is dead. We are dealing not with a constant condition of long standing. We are not dealing with a permanent drain at a fixed location at a point known by the plaintiff.

The case of *Reese* v. *Philadelphia & Reading Ry. Co.*, 239 U. S. 463 (merely cited at p. 15 of defendant's brief) emphasizes the distinction we are making with respect to clearances between fixed and permanent structures, and clearances between movable objects such as railroad freight cars, which could by reasonable care be placed properly so as not to come in contact with employees on a main track riding on cars in the performance of their duties. In that case the employee was a fireman, who, while his train was moving along on one track of several parallel tracks, attempted to procure drinking water at a tap in the side near the bottom and three feet from the front of the tender, and in so doing, his body was extended outside the line of the tender and engine and crushed by contact with a freight car standing on another parallel track. The claim was that the railroad company had negligently constructed and maintained two parallel tracks too near to each other. The Court held that no negligence could be predicated on the mere happening of such an accident.

A case directly in point is *Yazoo & Miss. R. R.* v. *Wright,* 235 U. S. 376, where the facts were very similar to those in the case at bar. Mr. Chief Justice WHITE, speaking for the United States Supreme Court, stated them as follows:

> "A freight train of which the deceased was engineer, proceeding southward on a lead track, approached or was traversing a railroad yard. Ahead—the distance not being specifically defined—on a yard track connecting with, and to the left of, the lead track there stood some loaded coal cars which, while visible to the engineer from the right side of the engine, became more and more shut off from his view as the train advanced. The engineer asked the fireman, who was on the left side of the engine and therefore in full view of the cars, whether they were clear of the lead track and was answered that they were. There is a dispute as to whether a head brakeman was riding in the cab and whether subsequently, if there, he called the engineer's attention to the fact that the coal cars were not clear. But there is no dispute that the engineer again asked the fireman who answered that the cars were not clear and jumped from the locomotive. The engineer, having shut off his power, stepped to the left side where from the collision which immediately resulted he received the injuries from which he subsequently died."

In the brief of the appellant railroad company, it was contended that there was no negligence on the part of the railroad company and that the deceased employee assumed the risk of the injury which he received. However, when the case came on for argument in the United States Supreme Court, counsel for the railroad company discreetly withdrew the claim that there was no negligence and rested entirely upon the argument on the contention that the deceased employee assumed the

risk of the injury. At the top of page 373 it will be noted that in the brief of the railroad company the contention was made "there was no negligence on the part of the master." At the bottom of page 378, Chief Justice White said: "Error in holding that the facts afforded no ground for the application of the doctrine of assumption of the risk is the *sole* contention pressed in argument." The United States Supreme Court unanimously affirmed the judgment in favor of the administratrix of the estate of the deceased employee, and said at page 379:

> "Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.
>
> "The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employes of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to

have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

The *Wright* case is a direct precedent for the case at bar. In that case there was a freight train proceeding on the main track into a railroad yard and ahead on a yard track, connecting with and to the left of the main track, there were loaded coal cars which, while visible to the engineer, could not be definitely placed by him as the engine moved into the yard. The court not only held that the deceased did not assume the risk of the injury resulting from the placing of the cars on the side track which connected with the main track so close to the main track as to collide with the engineer, but necessarily and inferentially held that the facts of that case proved negligence because otherwise the risk would have been assumed. Counsel for the defendant fails to refer to the *Wright* case which is a leading case on the subject and directly in point on the law and the facts.

The law is settled under the decisions of the U. S. Supreme Court that it is *not* the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible but that the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. Also the law is settled under the Federal Employers' Liability Act that a co-employee's negligence (instead of defeating recovery by an employee on the

theory that a fellow servant's negligence is a defense for the master), when it is the ground of action, is placed in the same relation as that of the employer and the employer is liable for such negligence and there is no assumption of the risk thereof except as aforesaid.

> *Reed* v. *Directors General,* 258 U. S. 92, 93;
> *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, 21;
> *Yazoo & Miss. R. R.* v. *Wright,* 235 U. S. 378;
> *Choctaw, Oklahoma, &c. R. R. Co.* v. *McDade,* 191 U. S. 64.

In *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade,* 191 U. S. 64, *supra,* a head brakeman was killed by reason of coming in contact with a water spout, while engaged in the discharge of his duties as head brakeman on a car in one of the defendant's trains. He was transmitting a signal from the conductor to the engineer to run pass a station which the train was approaching. At the station there was a water tank, having attached thereto this iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing the station, the deceased was missed from the train and upon search being made a lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about 675 feet beyond the tank. There was testimony tending to show, from the location of the water spout and the injuries upon the head and person of the deceased, that he was killed as the result of being struck by the overhanging spout.

The U. S. Supreme Court, speaking through Mr. Justice Day, at page 65, said:

> "There was no eyewitness as to the exact manner of the injury to McDade, and it is

urged that the court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given. Furniture cars, like the one on which McDade was riding, were received and transported over this road. There is testimony tending to show that a proper construction of the tank and appliances required the spout to hang vertically when not in use, and other testimony to the effect that when hung in this manner it would be difficult, if not impossible, for the fireman to pull down the spout in taking water, and that to hang it at an angle is, at least, a more convenient method of adjustment. Be this as it may, the testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. The testimony makes it equally clear that when on the furniture car, McDade, sitting at his post, would be likely to be struck by the spout in passing. It is undoubtedly true that many duties required of employes in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employe should be subjected to dan-

gers wholly unnecessary to the proper operation of the business of the employer. *Kelleher, Admr.* v. *Milwaukee & Northern R. R. Co.*, 80 Wisconsin, 584; *Georgia & Pacific Railway Co.* v. *Davis*, 92 Alabama, 300; 1 Shearman & Redfield on Negligence, 5th edition, section 201, and cases cited.

"We agree with the Circuit Court of Appeals in affirming the instructions upon this subject given by Judge HAMMOND to the jury, in which he said: 'It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence.'

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures and track to be used in the operation of the road. *Union Pacific Ry. Co.* v. *O'Brien*, 161 U. S. 451. The spout might readily have been so constructed and hung as to be safe. As it was maintained it was a constant menace to the lives and limbs of employes whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence."

So far as we can find, whenever the question has been passed upon, it has been held that a rail-

road company is required to exercise reasonable care and diligence to prevent movable or temporary obstructions on or near its tracks (especially its main tracks) which obstructions are a source of danger to its servants, and this rule applies to the presence of other cars of the company on adjacent tracks, switches or sidings which tracks may run into and connect with main tracks (39 C. J. 398).

That rule is not inconsistent with the other rule that a presumption of negligence upon the part of the railroad company will not arise, where it is necessary for the proper conduct of the business of the railroad to maintain permanent structures so close to the track as to require caution on the part of employees against injury. Likewise, it does not conflict with the rule that the mere narrowing of the clearance space between tracks when compelled or advised as a matter of engineering, will not raise a presumption of negligence where it does not appear that a standard of engineering or railroad practice has not been violated. The distinction is clearly pointed out in the authority last cited, 39 C. J. 398, 399.

II.

The plaintiff's intestate as a matter of law did not assume the risk of the injuries resulting in his death. That question was one of fact and was properly submitted by the Trial Judge to the jury.

Having in mind the facts, did the deceased as a matter of law assume the risk of the injury resulting in his death? Under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 8399, sec. 8657) the employer is liable to the employee and to his

estate in the event of his death when he is employed in interstate commerce, for such injury or death "resulting *in whole or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, etc., or other equipment." Under Section 3 (U. S. Comp. Stat. 9423, sec. 8659) "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

That the deceased was not engaged in interstate commerce is not urged here by the defendant.

The United States Supreme Court has repeatedly held that in an action under the Federal Employers' Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured person did not foresee, is the proximate cause of the injury. That Act places a co-employee's negligence when it is the ground of the action in the same relation as that of the employer upon the matter of assumption of risk. The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee. The effect of the statute is to abolish in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff.

The Second Employers' Liability Cases, 233 U. S. 1, 49;

Gila Valley Globe, etc., Ry. Co. v. *Hall*, 232 U. S. 94, 102;

Yazoo & Miss. R. R. Co. v. *Wright*, 235 U. S. 378;
N. Y. C. & H. R. R. Co. v. *Carr*, 238 U. S. 260;
Chesapeake & Ohio Ry. Co. v. *De Atley*, 241 U. S. 310, 313;
Chicago, Rock Island & Pac. Ry. Co. v. *Ward*, 252 U. S. 18;
Reed v. *Director General*, 258 U. S. 93.

In *Reed* v. *Director General*, 258 U. S. 92, at 94, the United States Supreme Court held:

"Accepting the view that the engineer's negligence was the proximate cause of the fatal injury, the court below held the decedent had assumed the risk of such negligence and the master was not liable, citing among other cases *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492. This we think was error.

"*Seaboard Air Line Ry.* v. *Horton*—often followed—ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section 'has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff.' The Second Employers' Liability Cases, 223 U. S. 1, 49, declared that 'the rule that the negligence of one employe resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employe.' And in *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward*, 252 U. S. 18, we said: 'The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk.' See *New*

York Central & Hudson River R. R. Co. v. *Carr,* 238 U. S. 260; *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310, 313.

"In actions under the Federal Act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed, while employed therein, when death results from the negligence of any of the officers, agents or employees of such carriers."

In *Yazoo & Miss. R. R.* v. *Wright,* 235 U. S. 378, *supra,* Chief Justice White, speaking for the United States Supreme Court, held:

"Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.

"The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employes of the company, a danger which the engineer must have known might arise, therefore he assumed the

risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, 21, the same Court defined the settled rule with respect to assumption of risk under the Federal Act as follows:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310, 315: 'According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of action, in the same relation as that of the employer upon the matter of assumption of risk."

It is therefore clear that under the settled law of the United States Supreme Court construing the Federal Employers' Liability Act, it is not the duty

of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible. On the other hand, the employee has the right to assume that the employer or his agents have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. The employee has the right to assume that the employer and his agents have exercised for his safety such care as the circumstances will reasonably permit and such care as is ordinarily exercised in the customary operation of the railroad for his safety. *Smith* v. *Payne*, 269 Fed. 1, 4. *Lehigh Valley R. R. Co.* v. *Doktor*, 290 Fed. 760, 763, 764.

The New Jersey cases are uniform and follow the rules of law laid down in the Federal cases cited *supra*, with respect to construing the Federal Employers' Liability Act as to, first, abolition of fellow servant rule; second, charging master with the negligence of the fellow servant; third, employee does not assume the risk of negligence of the master when he is unaware of it; and fourth, contributory negligence is not a bar, but merely goes to reduce the damages in proportion to the contributory negligence of the employee.

Albanese v. *Central R. R. Co.*, 70 N. J. L. 241;
D'Agostino v. *P. R. R. Co.*, 72 N. J. L. 358;
Germanus v. *L. V. R. R. Co.*, 74 N. J. L. 662;
Tonsellito v. *New York Central R. R. Co.*, 87 N. J. L. 651;
Grybowski v. *Erie R. R. Co.*, 88 N. J. L. 1, 4, affirmed on the opinion below, 89 N. J. L. 361;

Willever v. *D., L. & W. R. R. Co.*, 89 N. J. L. 697;
Armbrecht v. *D., L. & W. R. R. Co.*, 90 N. J. L. 529, 531;
Santomassimo v. *N. Y. S. & W. R. R. Co.*, 92 N. J. L. 10;
Swank v. *P. R. R. Co.*, 94 N. J. L. 546;
Steidtler v. *P. R. R. Co.*, 94 N. J. L. 199;
Certiorari denied by U. S. Supreme Court, *P. R. R. Co.* v. *Steidtler*, 253 U. S. 459;
Cervona v. *D., L. & W. R. R. Co.*, 95 N. J. L. 246;
Hannon v. *D., L. & W. R. R. Co.*, 98 N. J. L. 191, 194;
Nestico v. *D., L. & W. R. R. Co.*, 133 Atl. (N. J. S.) 83, 84.

The deceased had a right to assume that the defendant in the exercise of reasonable care for his safety would use due care to properly place the two freight cars on the spur track. He had a right to assume that whether one or two cars were placed on the spur track they would be so placed as not to strike him while he was in the performance of his duty on a moving train on a main track going into the freight house. The fact that it was at night, that it was dark, that there was no light within a space of 290 feet of the point of accident, and the light at that distance was within a freight house, all bear upon the question whether the deceased, as a matter of law, could be said to have assumed the risk which clearly was not obvious, for even if the cars might have been seen at night in the dark, there is no proof that a man in the performance of his duty on a moving train, could tell that they were so far out on the projection of the side track toward the main track, as to collide with him when he was lawfully descending the ladder on the head car of the main track.

Whether the plaintiff's intestate was conscious or unconscious of the narrow clearance caused by the defendant's negligence was for the jury to say. He is dead and cannot speak for himself. Certainly it cannot be said as a matter of law that he intentionally permitted himself to be knocked off the train upon which he was lawfully riding, and that is the conclusion that must be reached in order to charge him with assumption of risk as a matter of law in this case. The law is settled that where there are no eye-witnesses to the death, the law will presume that the decedent, acting on the instinct of self-preservation, was in the exercise of ordinary care; there is no presumption that he committed suicide.

The general rule is stated in *17 Corpus Juris*, page 1304, paragraph 167d as follows:

> "In most jurisdictions the rule is that where there are no eyewitnesses to the death, the law will presume that decedent, acting on the instinct of self-preservation, was in the exercise of ordinary care; there is no presumption of law that he committed suicide."

In the case of *Danskin* v. *P. R. R. Co.*, 97 N. J. L. 526, at page 529, this Court, TRENCHARD, J., states the rule as follows:

> "In view of the presumption of due care on the part of the decedent, we are of the opinion that this evidence left the question of his contributory negligence in doubt, and in such case it was for the determination of the jury. *McLean* v. *Erie R. R. Co.*, 40 Vr. 57."

In any event the question (whether the deceased assumed the risk of being knocked from the train upon which he was lawfully riding in the performance of his duty, and in accordance with the custom of the defendant, by a freight car negligently placed on the side track too near the main track)

was for the jury. This is especially true in view of all of the circumstances of this case, viz.: that it happened at night and it was dark; the train was moving eight to ten miles an hour; it was the duty of the deceased to keep a lookout ahead of the train as it neared the freight house in order to avoid the narrow clearance of the freight house. There is no evidence in the case at bar that the deceased had any knowledge of the narrow clearance of the protruding car or that the consciousness of it was brought home to him at any time prior to the moment that he was knocked from the moving train on the main track.

Counsel for the defendant in his brief at pages 4 and 5 attempts to make it appear that the deceased knew that the car on the side track protruded so close to the main track as not to clear the deceased as he went by on the train. The testimony does not justify that conclusion, or to say the least, it presented a fact question for the jury. There is no testimony that the deceased and Garretson, the only witness who testified on the subject, had any discussion or that either informed the other of the fact that the car was negligently placed on the spur track. Garretson said (p. 48, lines 10-20): "We (meaning himself and the deceased), told one another when we found those things, close clearance, when we used to go, say, 'lookout for this, lookout for that.' " It is apparent that Garretson is speaking generally and not specifically of the occasion of the accident. It is significant that he did not say that either one called the other's attention to the close clearance resulting from the negligent placing of the car which caused this accident. As a matter of fact, there was no opportunity for either Garretson or the deceased to ascertain that fact. They had passed on the main track on only one other occasion and

that was at night around 7:00 or 7:30 and apparently neither one observed on that occasion that there was any close clearance, for if they had, Garretson would certainly have mentioned it in his testimony. Neither on the first trip nor on the second trip had Garretson or the deceased any warning of the close clearance, and therefore no reason to anticipate any danger. When Garretson says in his testimony (p. 50, lines 20-30), "We knew going in what it was" he was merely stating a conclusion as to what his own knowledge might be, because there is nothing in his testimony to indicate that the deceased knew of the unusual condition or that Smith knew or that Garretson knew that the cars were improperly placed on the side track. Garretson was an employee of the defendant, the only witness to the accident, who had no personal knowledge as to the placing of the cars on the stub track.

In view of all of the testimony in the case, it was for the jury to say what credit they would give to Garretson. The other testimony that the length of the spur track was ample to accommodate the two cars without making a narrow clearance, shows that it was unnecessary for the proper conduct of the defendant's business to have either car on the spur track protrude toward the main track. That being so, the jury had the right to infer that the cars were negligently placed on the spur track and that negligence is not assumed by an employee until notified thereof, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. Whether the danger in the case at bar was of that character, was a question of fact for the jury under the cases cited *supra*.

Chief Justice White completely answers that contention that there was an assumption of risk

as a matter of law in this case, in *Yazoo & Miss. R. R. Co.* v. *Wright,* 235 U. S. 376, where the facts were very similar to those in the case at bar. There the court said:

> "The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protusion of cars negligently placed by employes of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

The foregoing case is also considered in Point I. In that point the facts are set forth at great length and will not be reiterated here.

All of the cases cited in Point II of appellant's brief deal with fixed clearances of permanent structures, and not with the protusion of freight cars negligently placed by employees of the railroad, on a side track so near the main track as to cause an accident.

In the overworked case of *Toledo, etc. Ry. Co.* v. *Allen,* 276 U. S. 165 (which is cited repeatedly in defendant's brief appearing at pp. 8, 9, 10, 11, 12, 18 and 19) the court was dealing with the fixed and definite and permanent clearances between tracks, of which the plaintiff was fully aware, the

same being also obvious and fully appreciated by him. Counsel for the defendant distinguishes that case from the one at bar by his reference to it at page 23 of his brief. We have also distinguished it from the case at bar in Point I of this brief. Here the cars protruded out toward the main track from a stub track because they were negligently placed by employees of the defendant. They were not stationary and permanent structures at all like the tracks in the *Allen* case. Here the cars could have been placed so as not to endanger the deceased at all. Here the space between the two cars was not sufficient to permit the deceased to pass without injury while in the performance of his duty on a moving car. In the *Allen* case, a space between two tracks was sufficient to enable the employee to keep out of the way of a moving car of which he was aware. In the *Allen* case, danger obvious because conditions always the same, but in this case, danger not obvious because condition was but recently created, unknown to the deceased and temporary in character. Ordinarily, cars should be pushed against bumper in the exercise of reasonable care, otherwise they might not only strike an employee on a car on the main track, but might cause a collision between the cars on the side track and the train on the main track. In this case, defendant offered no evidence to show that the two cars were against the bumper, whereas the undisputed testimony is that if they had been, there would have been ample clearance. In this case, Garretson, the brakeman, says that when he and Smith would know of any narrow clearance, they would call it to each other's attention, but there is no evidence in this case that either Smith, the deceased, or Garretson, knew of the improper placement and the protrusion of the cars from the side track out toward the main track.

In the *Allen* case, the court says that if the employee is exposed to an unusual danger by reason of a departure from reasonable care, then he is entitled to warning. At page 171 (276 U. S.) the Court said:

> "*In the absence of proof* that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that the defendant was in duty bound to give him warning. The members of the switching crew had the right to believe that he would keep out of the way of the shunted car."

In the case at bar, in view of the fact that the deceased was on a moving train on a main line track, he had the right to assume that he would not be exposed to any unusual danger without warning. Whether or not the danger was unusual in view of the fact that there was a car so near to the main track as to strike and knock an employee from his position of duty on a car of a moving train, is for the jury, as was decided in the *Yazoo* case, *supra.*

In the *Allen* case, at page 171, the Court said:

> "In any event, the plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

This language clearly shows that the decision was based upon the fixed and permanent space between the tracks, of which the employee had full knowledge as well as the knowledge that cars were liable to be shunted toward him without warning.

In *Missouri Pac. Ry. Co.* v. *Aeby,* 275 U. S. 426, which also appears repeatedly in defendant's brief,

a station agent fell on some snow and ice on the station platform. She knew that it had rained and that the place was covered with ice and snow and she had full knowledge of the entire situation at the station. The United States Supreme Court said at page 430:

> "Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. *National Biscuit Co.* v. *Nolan,* 138 Fed. 6, 12. It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her."

The foregoing quotation distinguishes that case from the case at bar.

The case of *D. L. & W. R. R.* v. *Koske,* 73 L. Ed. 235, has been completely analyzed in Point I. We shall not reiterate what was there said, except to say that it dealt with a permanent drain in a certain and specific place, the location and size of which was fully known to the plaintiff, and yet he stepped into it. In short, it was a case of a permanent structure—having no analogy at all to the case at bar.

The United States Supreme Court, in dealing with narrow clearances of permanent structures, has been very careful to confine itself to the particular case in hand. As an example of that, we point to *Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415, referred to, but not analyzed at page 24 of defendant's brief. There an experienced locomotive engineer who had operated many times over a

railroad where mail cranes were set up close to the track, was held to have known the danger of being struck by the projecting arms thereof when leaning out of his cab window and therefore as a matter of law he assumed the risk of being struck by the permanent fixture set close to the track of which he had knowledge. However, at page 419, the Court was careful to confine itself to that particular case and did so in the following language which is the concluding sentence of the opinion:

> "Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law."

Also, in that case, there was a very strong dissent by Mr. Justice CLARK who wrote a dissenting opinion which was concurred in by Mr. Justice DAY and Mr. Justice PITNEY. It is clear that that case is no authority in the case at bar.

A number of cases are cited in defendant's brief at the bottom of page 25 but no attempt is made to apply them to the case at bar. The first is *Chesapeake & Ohio R. R.* v. *Leitch*, 276 U. S. 429, which follows the case of *Southern Pac. Co.* v. *Berkshire*, 254 U. S. 415, *supra*, holding that an experienced locomotive engineer assumes the risk of being struck by a mail crane or mail sack hanging from it. At page 431 the U. S. Supreme Court said:

> "The plaintiff here as in Bershire's case well knew of the existence of the crane which had been in place for three or four years."

This is another case of a fixed and stationary clearance, full knowledge of which was possessed by the employee. The second case cited at page 25 of defendant's brief is *Baugham* v. *N. Y. P. & N. R. R.*, 241 U. S. 237, which was a case dealing

with four tracks on a barge, the center tracks being very close together. A brakeman who knew of the position of the tracks on the barge was injured by reason of the narrow clearance. This is another case of a fixed condition of tracks, fully known by the employee.

The next case is *Tuttle* v. *Detroit, &c. R. R.*, 122 U. S. 189, decided in May, 1887. It deals with the case of a brakeman who was killed while attempting to make a coupling of two cars because drawheads of the cars passed each other by reason of a sharp curve in the track of which he was aware and had full knowledge. The case has no similarity at all to the case at bar. The last case cited on page 125 of defendant's brief is *Randall* v. *B. & O. R. R.*, 109 U. S. 478, which held that a brakeman operating a switch for his train was a fellow servant with the engineman of another train of the same company upon an adjacent track and therefore could not maintain an action against the company for an injury caused by the negligence of that engineman operating his engine on the adjoining track. It is clear that that case as well as the case referred to just previously, decided in 1887, are not in point because in each case the doctrine that a fellow servant's negligence was a defense could be invoked; under the Federal Act, the negligence of a fellow servant is a good ground for recovery of damages against the employer, the employer being made liable for such negligence under the express wording of the statute, as hereinbefore shown. Counsel refers (p. 21) to *Great Northern R. R.* v. *Wiles*, 240 U. S. 444, as holding that where injury to an employee is the result of his failure to comply with a rule of the employer, he cannot recover under the Federal Employer's Liability Act. That case held that contributory

negligence was the sole cause of the injury. The employee was a flagman who failed to go back with a stop signal to insure protection for his train when it was stopped and delayed by the circumstance that the train broke in two by a drawbar pulling out of the sixth car from the engine. The Trial Court applied the doctrine *res ipsa loquitur* to the case wherein it appeared that another train ran into the rear of the flagman's train causing his death. At page 448 the Supreme Court said:

> "The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.
>
> "In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situa-

> tion and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

It is apparent that that case is not in point. Also it is apparent that in the case at bar the deceased did not violate any rule resulting in his death. The rule referred to at page 21 of the defendant's brief refers to structures, of which the employee has knowledge. It cannot apply to a temporary obstruction placed near a main track of which the employee has no knowledge. Certainly no knowledge as to how close to the main track the obstruction had been placed.

The case of *Chesapeake R. R. Co.* v. *Nixon*, 271 U. S. 218, is not in point. In that case it appeared without dispute that the employee was going along the railroad track on a velocipede in front of a train and was run down by the train and killed. It was undisputed that he knew that he was not entitled to any audible warning of any kind from the train; that it was not customary to give him such warning either by bell or whistle; that his duty was to look out for himself, and not to expect any warning of the approach of the train. The court held that he assumed the risk.

We therefore respectfully submit that the deceased did not assume the risk of the injury which he received as the result of the negligence of the defendant. To say the least that question was one of fact to be decided by the jury, and the trial court properly submitted it to the jury for their decision.

III.

Even if the deceased was guilty of contributory negligence, that would be no bar to this action, but the damages would be merely reduced in proportion to such contributory negligence.

Section 3 of the Federal Employers' Liability Act (8 U. S. Comp. Stat. 9388, Sec. 8657) provides that the fact that the employee may have been guilty of contributory negligence, would not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The United States Supreme Court in *Seaboard Air Line* v. *Horton*, 233 U. S. 492, at page 503, differentiates between contributory negligence and assumption of risk as follows:

> "The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account

> in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co.* v. *McDade,* 191 U. S. 64, 68; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.,* 220 U. S. 590, 596; *Tex. & Pac. Ry. Co* .v. *Harvey,* 228 U. S. 319, 321; *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 102, and cases cited."

So in the case at bar. If the deceased could be said to have contributed in some degree by reason of his own neglect to the accident, that is to say, assuming that because he was attending to his duties of alighting from the train and avoiding the lack of clearance at the freight house, he failed to observe that the freight car was protruding from the side track toward the main track, that would not be a bar or defense to this action, but would merely go to diminish the damages in proportion to the extent of the contributory negligence chargeable to the deceased.

The foregoing quotation from the *Horton* case is also pertinent on the question what risks an employee assumes. It says, "But risks of another sort, not naturally incident to the occupation may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the

work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, etc."

The *Horton* case is cited as authority at page 22 of the defendant's brief.

IV.

CONCLUSION.

For these reasons we respectfully submit that the trial court did not err in refusing to direct a verdict in favor of the defendant. The questions whether or not the defendant was negligent and whether or not plaintiff's intestate assumed the risk, were clearly questions of fact to be decided by the jury.

May Term, 1929.

EDWARD A. MARKLEY,
DAVID M. KLAUSNER,
Of Counsel.

KINKEAD & KLAUSNER,
Attorneys of Plaintiff-Respondent.

New Jersey Court of Errors and Appeals.

NELLIE REARDON, General Administratrix of the Estate of Joseph A. Smith, deceased, Plaintiff-Respondent, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Appellant.	**Action at Law.** **On Appeal from Hudson County Circuit Court.**

APPELLANT'S REPLY BRIEF.

While the complaint herein contains 12 distinct allegations of negligence (Case, pp. 9-11) it is apparent from a perusal of respondent's brief on this appeal that the ones most strongly pressed as having evidential support are those contained in subdivisions "(c)" and "(d)", paragraph 12, of the complaint, charging negligence in respect of the position in which the two cars on the stub or spur track had been placed and were maintained at the time of the accident. Thus, at page 3 of their brief respondent's counsel state:

> "This is not a case of a narrow clearance existing for a long period of time * * *. On the contrary, it is a case of the improper

and negligent placing of a freight car on a side or stub track so as to temporarily protrude, so near to the main or lead track in the yard, as not to clear an employee on a moving train", etc.,

and at page 11:

> "* * * the evidence is undisputed that had the two cars, having a total length of less than 83 feet, been placed as far west from the point of switch as it was practical to place them, this accident could not have happened because there would have been ample clearance", etc.,

while at page 14 they state:

> "Freight car N. Y. C. 52449 could have been placed on the stub track so that it would have cleared the deceased riding on the side of the head car on the main track."

Counsel for respondent devote the major part of pages 7-15 of their brief to an effort to convince this Court that there was evidence from which the jury could find that respondent was negligent in that the two cars referred to were not, when the accident happened, as far west on the spur track as it was possible to place them. The testimony of the witnesses at the trial disclosing nothing about the position of the cars with relation to the extreme westerly end of the track on which they stood, counsel now seek to attain their end by resorting to figures purporting to reflect distances between certain points in

the yard, space between rails at certain points, the total length of said two cars (nothing, however, as to width of either one appearing) and to the photographic exhibits, D-1 and D-2, annexed to the State of Case. In other words, having adduced no direct testimony that said two cars were not stationed at the extreme westerly end of the spur track when the accident happened, respondent's counsel now seek to show that there was evidence from which it could be found that they could not have been so stationed. The burden of proof to establish negligence in the respect indicated was, of course, on the respondent.

While the primary purpose in filing this reply brief is to point out the lack of merit in the argument of respondent's counsel that there was evidence from which it could be found that said two cars were not stationed at the extreme westerly end of the spur track when the accident happened, we will also avail ourselves of the occasion to call the Court's attention to certain mis-statements appearing in respondent's brief with respect to what the record discloses in the way of evidence bearing on other pertinent features of the case. We will first consider the various contentions of respondent's counsel having to do with the position of the cars on the spur track, discussing them, as nearly as may be, in the order in which they appear in respondent's brief.

(a)

As to the matter of "the entire length of the spur track" and its relation to the position of the cars thereon.

At page 8 of their brief, respondent's counsel say "the entire length of the spur track was 246 feet", but they omit to state that the distance of 246 feet was measured from the bumping block at the westerly end of the spur to the end of the switch point (marked "S" on the map, Ex. P-5) located just east of Ogden Street, where the spur track connects with the most northerly track in the yard. That this is true is obvious from the map, which, as reproduced and annexed to the State of Case, is drawn on a scale of 60 feet to the inch. The matter of "the entire length of the spur track" apparently is injected into the argument by respondent's counsel for the sole purpose of impressing this Court with the idea that the spur track being 246 feet long and the combined length of the two cars standing on it when the accident happened being, as claimed in the same paragraph, only 82 feet 2 inches or less, it could be found as a fact from which negligence could be inferred that the two cars in question had not been placed as far along the spur track as the bumping block at the end thereof would permit, because, if they had been so placed, the clearance between the most easterly car (NYC 52449) of the two on the spur track and the car (DL&W 35889) on which decedent was riding would have

been sufficient to permit decedent to pass the NYC car in safety despite his position on the side ladder of the DL&W car. But it will be obvious to the Court, upon reference to the map, that the "entire length of the spur track", be it 246 feet or any other figure, has nothing to do with the question whether or not the two cars standing on it when the accident happened were stationed at the extreme westerly end thereof and hence were as far beyond (*i. e.,* west of) the point where the inner rails of the spur track and the lead track intersect (marked "T" on the map) as it was possible to place them.

(b)

Total length of the two cars standing on the spur track.

Respondent's brief, page 8, states that the length of one car (NYC 52449) was 40 feet 9¼ inches, and of the other (MDT 17026) 41 feet 4¾ inches, *making the total length of the two cars 82 feet 2 inches.* This total length, respondent's counsel contend, includes the length of the "bumpers" (*i. e.,* couplers) of the cars, but the evidence of record cited by counsel affords no basis for such contention. On the contrary it permits of only one inference, viz., that the figures mentioned above represent the outside length of the boxes of the cars only and do not include the bumpers. Let us examine the record to see if that is so.

The first bit of evidence cited by respondent's counsel (Brief, p. 8) in support of their contention as to the lengths of the two cars is page 26, line 20, where appellant's answer to respondent's interrogatory as to the length of certain cars is read into the record. The interrogatory and the answer thereto are as follows:

> "No. 26. What was the approximate length of car NYC 52449 and said car DL&W 35889?
>
> "The answer to 26 is: Outside measurement of NYC 52449 was 40 feet 9¼ inches. That of DL&W car 35889 48 feet ½ inch, outside measurement." (Note)

The next reference to the record made by respondent's counsel is page 84, lines 1-20, where appellant's witness Fehon, reading from the Official Equipment Register (Ex. D-3, pp. 114-116), on cross-examination gave the outside dimensions of each of the two cars which stood on the spur track. The testimony is as follows:

> "Q. Suppose you take that book and give me the length of NYC car 52449? A. From 52,000 to 52,999, that would be included in that, *the length, outside 40 feet 9¼ inches.*
>
> "Q. What do you mean by outside? A. That is the outside of the box car.
>
> "Q. *From the outside of the bumper?* A. *No, that the outside of the box car.*

NOTE: The interrogatory and answer deal with but one of the two cars on the spur track, viz, NYC 52449. The other car (DL&W 35889) referred to therein is the one on which decedent was riding and does not enter into this phase of the argument.

"Q. *That is the box itself?* A. *The box itself, yes, sir.*

"Q. Give me MDT 17026? A. From 16,000 to 18,999; that would include that car, *length, outside, 41 feet 4¾ inches.*

REDIRECT-EXAMINATION BY MR. SCOTT:

"Q. Mr. Fehon, you said that the length did not include the bumpers? A. Yes; *does not include the bumpers.*"

From the foregoing it appears that the length of car NYC 52449, "outside measurement", given in the answer to the 26th interrogatory is the same as that given by witness Fehon as its "length outside", viz., 40 feet 9¼ inches, and we submit that from said answer and the testimony of witness Fehon the only inferences of fact which can be drawn are that the expressions "outside measurement" used in the answer to the interrogatory and "length outside" used by the witness, mean the outside length of the box itself, as distinguished from its length inside, and that the measurement of 40 feet 9¼ inches does *not* include the bumpers or couplers of the car. Stated in another way, our contention is that there is no conflict between the answer to the interrogatory and the testimony of the witness at the trial with respect to whether or not the figures referred to include the length of the bumpers or couplers; also that the uncontradicted testimony being that the figures 40 feet 9¼ inches do *not* include the length of the bumpers, there is no evidence from which it can be found that they do. And there

being nothing in the record from which the length of the bumpers of car NYC 52449 can be ascertained, there is no evidence upon which to predicate the statement of respondent's counsel (Brief, p. 8) that the combined length of the two cars on the spur track was 82 feet 2 inches, or less; as, manifestly, the length of the bumper or coupler on the westerly end of car NYC 52449 (where it was coupled to car MDT 17026) must be taken into consideration in attempting to figure out how far east of the westerly end of the spur track (that is, the bumping block, marked "B" on the map) the easterly end of the box of car NYC 52449 would have been if the two cars in question were standing as far west on the spur track as it was possible to place them.

In the preceding paragraph we have shown, we submit, that the record conclusively establishes that in so far as car NYC 52449 is concerned, the figures mentioned by respondent's counsel as reflecting its total length, do not include the bumpers or couplers. But whatever this Court may conclude as to that feature of the evidence, the fact remains, that as to the other car standing on the spur track, viz., MDT 17026, the testimony of witness Fehon (heretofore quoted) establishes beyond the shadow of a doubt that the figures given by him as to the length of that car (41 feet 4¾ inches) *do not include the bumpers.* And Fehon's testimony is all that appears in the record as to the length of car MDT 17026, data with relation thereto not having been also

covered by interrogatory and answer as was done in the case of car NYC 52449. In the absence of evidence from which the length of the bumpers or couplers at each end of car MDT 17026 can be found there is no evidence from which counsel for respondent could compute, nor from which the jury could find, what the total length of the space on the spur track was, east of the bumping block, which that car occupied, nor any evidence as to the total length of the space occupied by the two cars.

It is to be noted in connection with the testimony of witness Fehon as to the lengths of the two cars, respectively, that while counsel for respondent asked him whether his figures included the bumpers and received the direct and unequivocal answer that they did not, respondent's counsel did not pursue the matter further and ask the witness what the length of the bumpers was. Query: Was it the desire of respondent's counsel, for the purposes of the record, to make the longitudinal dimensions of the cars as short as possible, and did he fear to increase it by asking for the length of the bumpers?

(c)

The space between the inner rails of the spur track and the lead track.

At the bottom of page 8 of their brief, counsel for respondent erroneously state that the spur track runs parallel to the lead track for a distance

of 85 feet and that for that 85 feet the clearance between the inner rails of the two tracks is 8 feet 8½ inches, citing page 68, lines 1-15, page 69, lines 10-20 and page 67, lines 10-20, of the record.

The testimony at page 67 shows the space between the inner rails of the lead track and the spur track to be 8 feet 8½ inches for the distance throughout which they run parallel to each other.

The testimony at page 68, lines 1-15 is to the effect that the distance from the bumping block (marked "B" on the map) at the west end of the spur track to the westerly end of certain planking between the rails of said track (indicated on the map by a parallelogram marked "P") is 85 feet. But at that point it is perfectly obvious from the map that the inner rails of the spur track and the lead track are not parallel, nor is there any evidence of record which is at variance with the map in that regard. See, also, the photograph, Exhibit D-1, page 119, which shows, in the foreground between the rails of the track at the left of the picture, the westerly end of the planking referred to, and note therefrom that the spur track starts to converge toward the track next adjoining on the right (*i. e.,* the lead track) a considerable distance west of the westerly end of the planking.

The testimony at page 69, lines 10-20, cited by respondent's counsel, discloses that the length of an automobile platform on the south side of the spur track is 86 feet and that "for the entire dis-

tance of that platform, the spur track runs parallel to it, practically". (The platform mentioned is the one marked "Auto Plat" on the map and is also shown at the extreme left of the photograph, Exhibit D-1.) It also discloses that the witness, Henckel, when asked by respondent's counsel whether the spur track did not run practically parallel to the lead track for the length of said auto platform, answered, "I should say not quite. * * * Almost; within ten feet." In considering the quoted answer of the witness it should be borne in mind that the auto platform referred to as being 86 feet long, extends, as shown on the map, for a distance of about six feet west of the westerly end of the spur track, that is to say, about six feet west of the east face of the bumping block. The spur track, therefore, extends along the auto platform for a distance of about 80 feet, and if it be conceded that the spur track parallels the lead track for the same distance, less ten feet, that it extends along the side of and parallels the platform, then the maximum distance throughout which the two tracks are parallel and the clearance between the inner rails thereof 8 feet 8½ inches, is only 70 feet. But it is apparent from a reading of the testimony above referred to that the figure given by the witness at that time as the distance for which said tracks ran parallel to each other was but an approximation. Subsequently, he gave the exact distance as 60 feet, as appears from the following excerpt (p. 75, lines 20-36):

"Q. I note by looking at the trial map, Exhibit P-5, that the track we call the lead track,

and the track referred to as the spur track, to a certain extent parallel each other? A. It does.

Q. And yesterday, in response to some question, I think you told us that there was a clearance of 8 feet 8½ inches? A. There is.

Q. For how great a distance between the lead track and the spur track was that distance existent? A. Why 60 feet from the end of the bumper in an easterly direction.

Q. East from the end of the bumper? A. Yes, sir.

Q. From that point east on the spur track, as I take it, after looking at the map, the spur track starts to converge towards the lead track? A. It does."

That the tracks in question are parallel for a distance of but 60 feet east of the bumping block and that the space between the inner rails thereof is 8 feet 8½ inches for that distance only, as stated in the above excerpt, is obvious upon examination of the map (Ex. P-5, Case, p. 121).

At page 9, last paragraph, of respondent's brief, reference is made to the two photographs, Exhibits D-1 and D-2, and in connection with D-2 the information is volunteered that on it "will be found two *large* freight cars on the spur track." As to the characterization of said cars as "large", it seems sufficient to say that there is nothing in the record from which it can be determined whether they are large or small. But while it is admitted, in the same paragraph, that the cars shown on D-2 are not the ones which stood on

the spur track when the accident happened, respondent's counsel nevertheless direct the Court's attention to the fact "that even the cars in the photograph *do not extend beyond the easterly end of the auto platform*", this, as we presume, with the notion of impressing the Court that inasmuch as the most easterly of the two "large" cars shown on D-2 does not extend beyond (*i. e.,* east of) the easterly end of the auto platform, the jury might lawfully find that the most easterly of the two cars which stood on the spur track on the night of the accident *could* not have extended east of the easterly end of the platform had they been stationed as far west along the spur track as it was possible to place them. Of course such an inference of fact could not be lawfully drawn in the absence of evidence showing comparable dimensions of the cars appearing on D-2 and those involved in the accident, even if what counsel say about the cars in the photograph not extending east of the east end of the auto platform were true. But said statement is not true. The auto platform referred to is the structure, 86 feet in length, marked "Auto Plat." on the map, only the northeasterly corner of which is visible in Exhibit D-2. The photo, however, clearly shows that the easterly end of the most easterly car on the spur track overlaps the planking between the rails of said track, and the map shows that the westerly end of this planking (indicated by the parallelogram marked "P" thereon) is several feet east of the east end of said platform, from

which it follows that the most easterly car shown in D-2 on the spur track, must extend east of the easterly end of the auto platform in question. It would seem that respondent's counsel have confused the structure marked "Auto Plat." on the map, with the smaller platform located opposite and to the left (as viewed in the photo) of the planking between the rails of the spur track, said smaller platform being the most westerly of the group of three structures labeled "Automobile Platforms" on the map.

To summarize with respect to the question of negligence as to the position of the cars on the spur track: We submit that the major question is, were they at the extreme westerly end of said track when the accident happened? If they were, the clearance between the easterly end of the most easterly of said two cars was the maximum affordable under conditions existent in the yard, and respondent was, therefore, not chargeable with negligence in not affording such maximum clearance between said car and the car on which decedent was riding. Although the position of the two cars on the spur track with relation to the bumping block at the westerly end thereof was of vital importance to respondent in proving her allegation that appellant was negligent in respect of the location of said cars when the accident happened, counsel for respondent, at the trial, failed to interrogate a single witness in regard to that feature of the case; this notwithstanding respondent's counsel had Garretson, one of decedent's

train crew, on the stand as his own witness, also cross-examined appellant's witness, Rutan, the engineer of decedent's train, and had in the court room under subpœna during the trial two other members of the same crew, viz., Parker, a trainman, and Merrill, the fireman, who were not put on the witness stand (p. 84, lines 23-40). Having omitted to elicit any information on this vital point by direct questioning counsel now seek to show by mathematical computations that there was evidence from which the jury could find that the cars were negligently positioned on the spur track when the accident happened. That they signally failed in their efforts is obvious from what we have hereinbefore shown, in view of which our statement, heretofore made in our original brief (p. 15), to the effect that there was no evidence adduced from which it could be found that appellant was negligent with respect to the positions of the cars on the spur track, is amply supported.

(d)

Misleading statement in Respondent's Brief as to what is shown on the map, Exhibit P-5.

On page 7 of their brief counsel for respondent refer to the map (Ex. P-5) annexed to the State of Case as one *"which gives only part of one of a group of freight yards of the defendant in the vicinity of Harrison, Jersey City and Newark"*. Insofar as the statement intimates that the map shows *"only a part of one"* of said yards it is not

only misleading but untrue, nor can we assign any reason for the making of the statement except that it is made for the purpose of creating the impression on the mind of this Court that appellant's counsel sought to deceive the Court in stating, near the bottom of page 3 of their original brief, that

> "as disclosed by the trial map (Ex. P-5, p. 121) the yard in question is a small one and contains only a few tracks."

The size of the yard has some bearing, of course, on the question of decedent's ability to become familiar with its physical characteristics. The testimony (pp. 43, 51 and p. 70, lines 20 *et seq.*) cited by respondent's counsel in support of their statement contains nothing to the effect that the map shows *"only a part"* of the Broad Street yard or only a part of any yard, nor does it contain a single word from which it can be inferred that said map does not show the entire Broad Street yard of appellant. Moreover, if there be any doubt whatever that the entire Broad Street yard is shown, the statement of appellant's counsel that such is the fact can be verified by reference to any atlas of the City of Newark showing its location and geographical limits. See, for example Mueller's "Atlas of Volume One City of Newark, New Jersey, 1911", plate 7, which shows that the yard in question covers precisely the same ground as is shown on Exhibit P-5. Where the part of the yard is, which respondent's counsel insinuate

was left off the map, does not appear from their gratuitous statement aforesaid, nor are we able to conceive of where it might possibly be located in view of the fact that the yard shown on Exhibit P-5 (which, though introduced by the respondent was made by appellant) is hemmed in on three sides (west, south and east) by public streets of the City of Newark, viz., Broad Street, Division Street and Ogden Street, and on the north by appellant's freight house, its express building and its elevated main line tracks, which in turn are effectually hemmed in by Cross Street.

(e)

As to speed of the train.

At page 16 of their brief, respondent's counsel say that we, in stating at page 13 of our original brief, that the speed of the train was from five to ten miles per hour, we took the testimony most favorable to the defendant below. As to this, the testimony cited shows that when the first car (seventh from the engine) passed the NYC car on the spur track, the speed of the train was from eight to ten miles per hour (p. 40, lines 3-4) and that when the engineer received the signal to stop it was about five miles per hour (p. 78, lines 36-37), hence we gave the two extremes, viz., from five to ten miles per hour, as speed of the train. In this connection, however, it is to be noted that Garretson's testimony that the speed of the train was from 8 to 10 miles per hour, was given in

answer to the question as to what the speed was when he passed the NYC car on the spur track, while the testimony of the engineer, Rutan, that it was 5 miles per hour, is responsive to the question as to the speed when he received the signal to stop. Manifestly, some few seconds must have elapsed between the time when Garretson passed the NYC car (he was standing in between the sixth and seventh cars from the engine) and the time when the stop signal was conveyed to the engineer, because, as the uncontradicted evidence shows, Garretson, as soon as he had reason to think that decedent had fallen from the train, jumped to the ground, ran out into the open so the "head man" could see him and gave a signal to stop (p. 117, lines 30-40; p. 35, lines 5-10; p. 40, lines 28-32). It is, therefore, entirely consistent with the evidence to assume that during this short interval the speed of the train was being retarded as it neared the freight house, so that when the engineer received the signal to stop its speed, as stated by him, was but five miles per hour.

In concluding this caption we direct the Court's attention to what appears to be an unwarranted statement of fact in respondent's brief, near the bottom of page 16, where it is said that "seven cars passed *over* the deceased's body before the train stopped". The evidence cited (p. 79) is diametrically opposed to the statement and shows (lines 9-10) that the witness (Rutan) testified that seven cars had *passed* decedent's

body (not *over* it) by the time the train was stopped. See also, page 40, lines 34-40, and page 41, lines 3-10, where respondent's counsel unsuccessfully endeavored to elicit the information that seven cars of the train passed over decedent's body.

Respectfully submitted,

FREDERIC B. SCOTT,
Attorney and of Counsel for Appellant.

WALTER J. LARRABEE,
Of Counsel.

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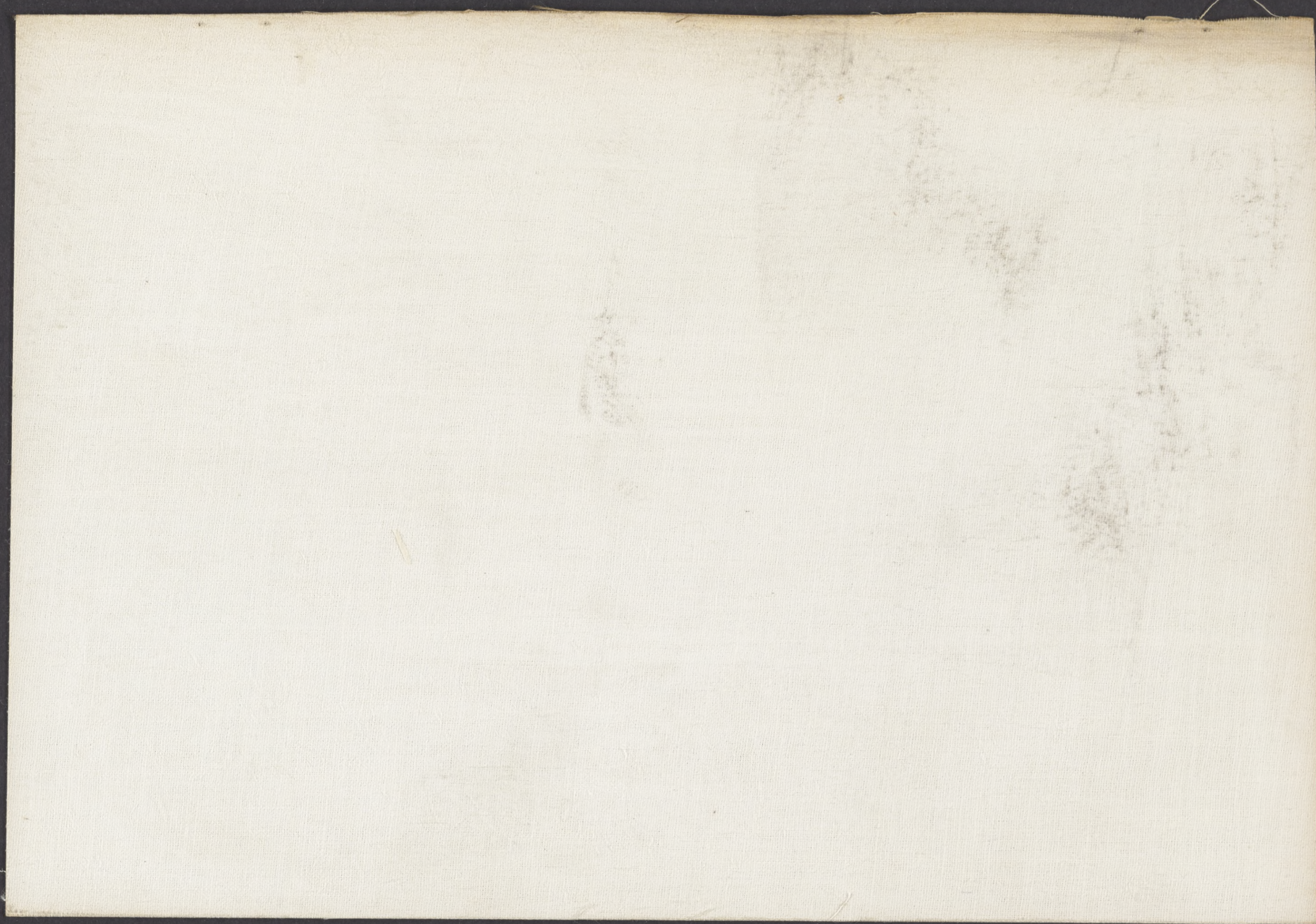

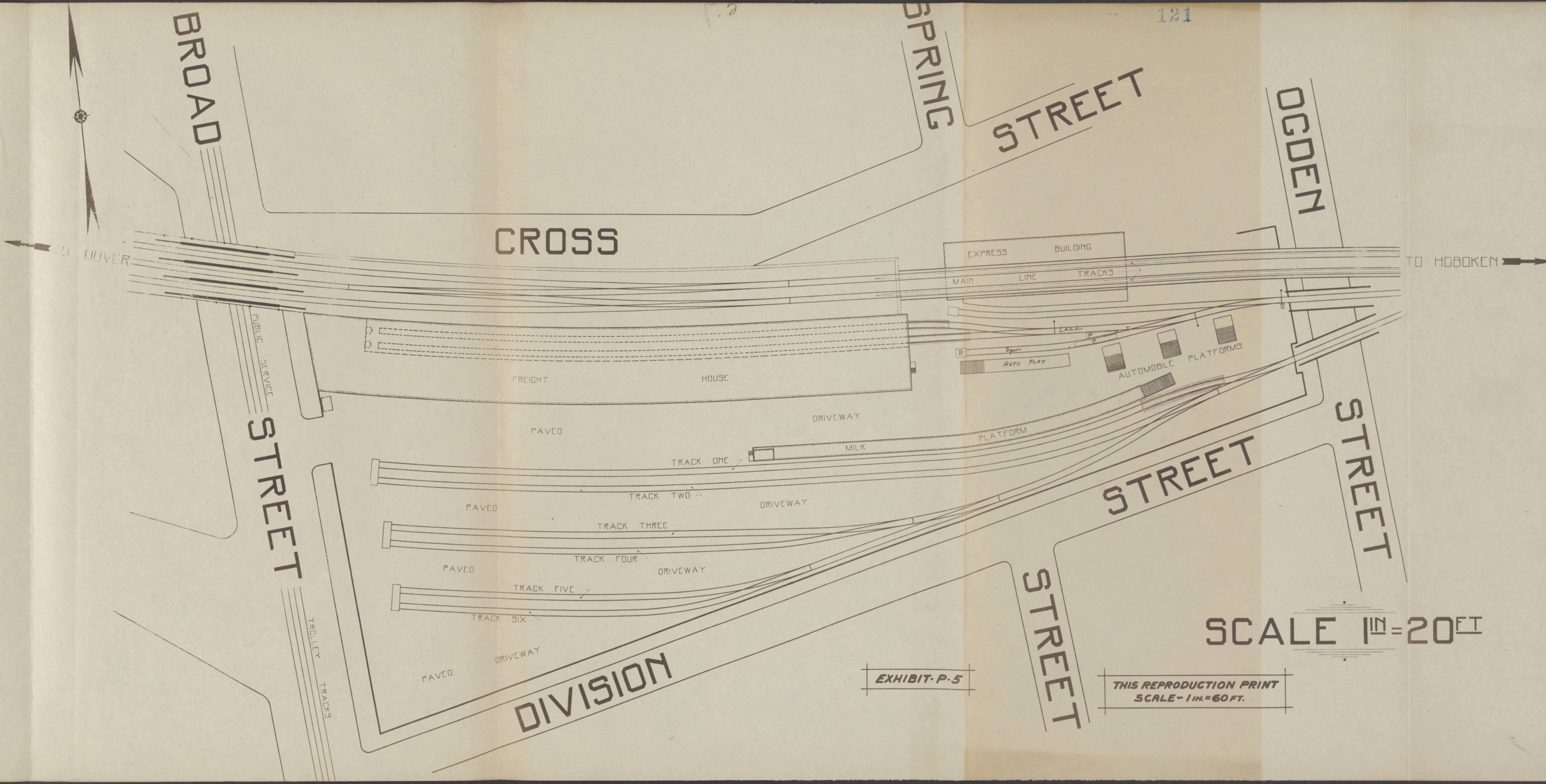

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SPRING STREET
OGDEN STREET
CROSS
DIVISION STREET
STREET
DOVER
TO HOBOKEN
EXPRESS BUILDING
MAIN LINE TRACKS
FREIGHT HOUSE
AUTO PLAT.
AUTOMOBILE PLATFORMS
PUBLIC SERVICE
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PAVED
DRIVEWAY
MILK PLATFORM
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TRACK TWO
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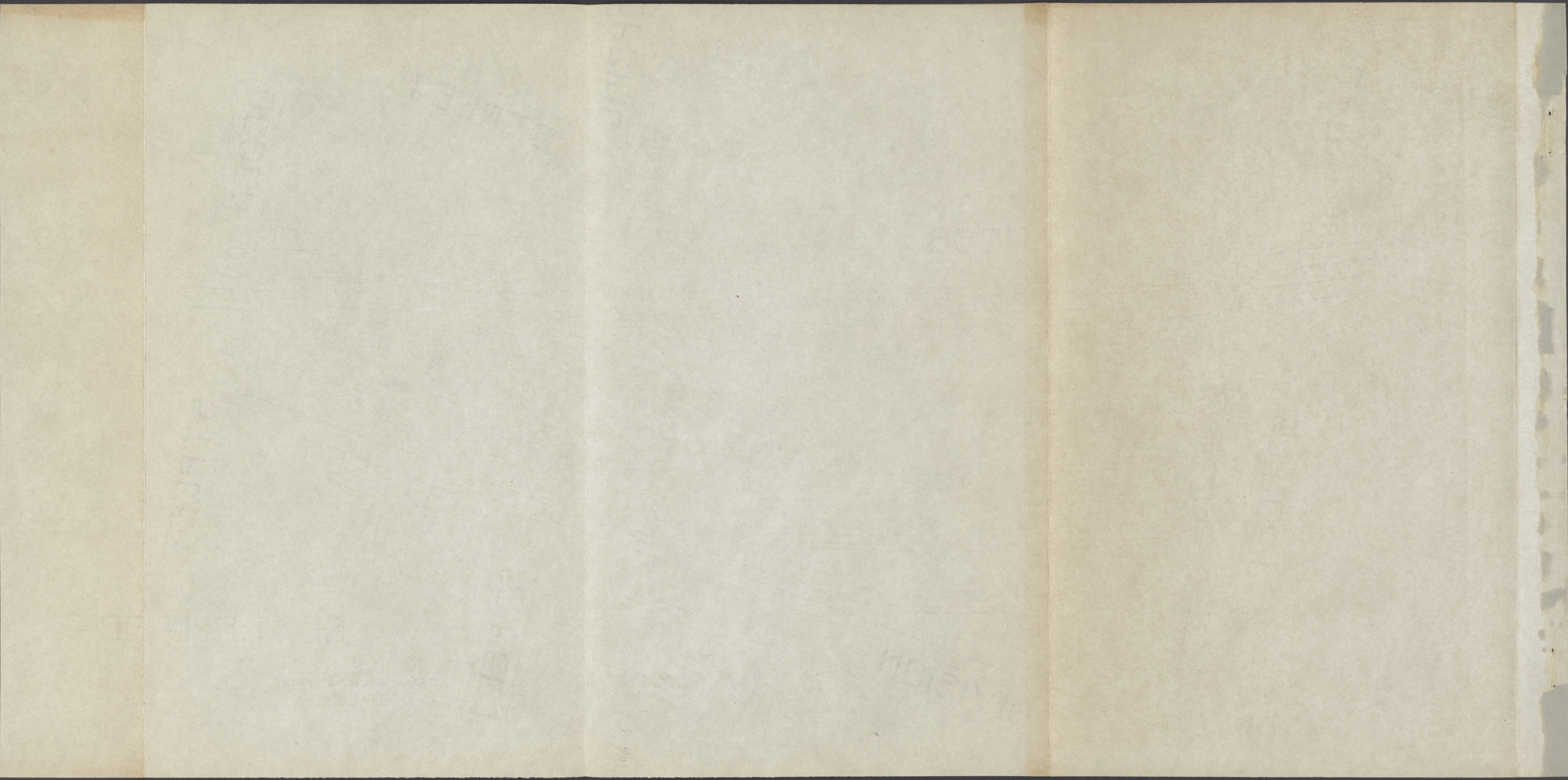

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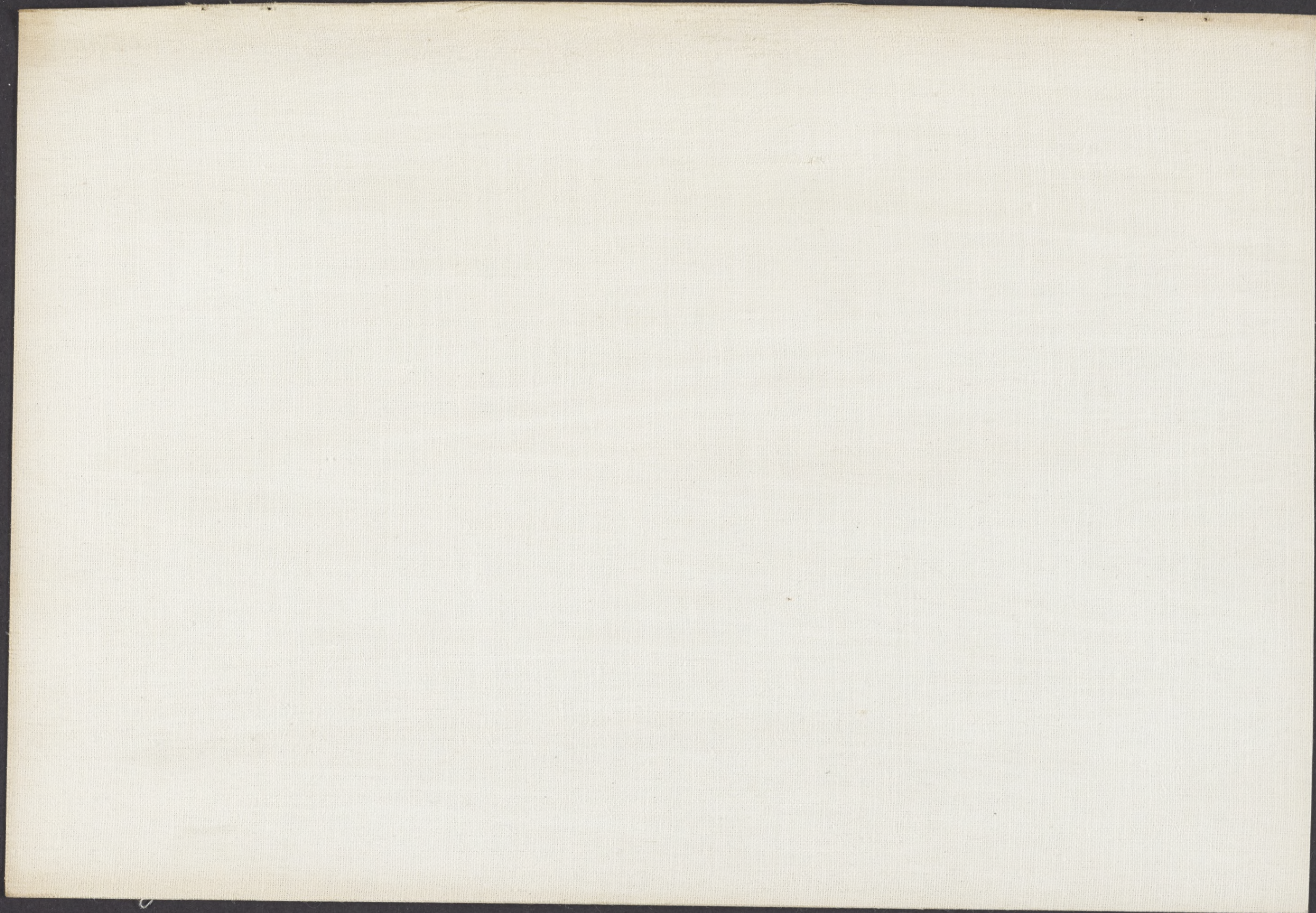

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RAILROAD PL

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C. R R

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SCALE 1" = 10'

Scale of Reduced Map

0 10 20 30 40 50 60 70 80 90 100ft.