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New Jersey Court of Errors and Appeals

Summons

(Filed January 8, 1914)

The State of New Jersey, To the Lehigh Valley Railroad Company of New Jersey
(Seal)

You are summoned to answer the annexed complaint of Samuel Martin who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation of said State, in an action at law in the Supreme Court.

And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within 20 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.

Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton, this 30th day of December 1913.

WILLIAM C. GEBHARDT,
Clerk.

Huston Dixon,
Attorney.

Complaint

SUPREME COURT OF NEW JERSEY

MIDDLESEX COUNTY

SAMUEL MARTIN who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action-at-Law.

The plaintiff, Samuel Martin, residing in the Township of Raritan in the County of Middlesex, and State of New Jersey, rural free delivery No. 1, New Brunswick, New Jersey, who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation organized and existing under and by virtue of the law of the State of New Jersey, and having its principal office or place of business at No. 15 West State St., Trenton, in said State, says that:

1. On or about the 2d day of May 1913, the plaintiff, Samuel Martin, was lawfully seized and possessed of a certain farm and tract of land and premises, together with the buildings thereon erected, situate in the Township of Raritan, in the County of Middlesex, and State of New Jersey, which said farm or tract of land was near to a certain railroad upon and over which railroad the

said defendant was then and there accustomed to run and did run from time to time, and propelled, by means of steam, certain engines and locomotives containing fire and igneous matter.

2. That the said defendant was on the said 2d day of May, 1913, at said Township of Raritan, possessed of certain engine or engines, locomotive or locomotives, which were then and there unlawfully and negligently driven and propelled by the said defendant by means of steam power generated by fire, carried in and about the said engine or engines, locomotive or locomotives, upon, over and along the said railroad, and which were then and there under the management, control and operation of the said defendant by its servants and agents in that behalf.

3. The said defendant, by its said servants and agents, unlawfully carelessly and improperly managed and directed and controlled the said steam engine or engines, locomotive or locomotives, and they were carelessly, defectively and unskillfully constructed, and were carelessly, defectively and unskillfully and negligently repaired and kept in repair, and were carelessly and negligently inspected and reinspected at infrequent and improper intervals, and the said fire and igneous matter contained therein was not kept, held and retained within the said engine or engines, locomotive or locomotives, and that said defendant did not take and use all practicable means to prevent the communication of fire and igneous matter from said engine or engines, locomotive or locomotives, used by them in passing along or being upon the said railroad to the land and right of way of said rail-

road, and to the property adjacent to and near to said railroad, and to the land and buildings thereon of the plaintiff.

4. By reason whereof certain sparks, particles of fire and igneous matter passed and escaped from, and were thrown out of, or dropped by said engine or engines, locomotive or locomotives, and some thereof fell upon certain land adjacent to said railroad company, and near to said farm and tract of land of plaintiff, and then and there ignited and set fire to the growth, timber and fences thereon, and certain other of the said sparks and particles of fire and igneous matter fell upon the said roadbed and right of way of the said railroad and then and there ignited and set fire to certain grass, herbage, bushes and other inflammable matter and material, then and there negligently and unlawfully suffered and permitted by the said defendant to be upon said roadbed and right of way and from the said fire so ignited as aforesaid upon the said roadbed and right of way and the said tract of land adjacent to the said railroad and near to the said tract of land and farm of plaintiff, certain particles of fire and igneous matter passed and were communicated to like material upon land of said plaintiff and to the growth, timber, crops, grass, fences, barns, buildings and structures of the said plaintiff then and there upon his said land being.

5. Whereby, and by means of the said fire and igneous matter so communicated, as aforesaid, from the said engine or engines, locomotive or locomotives, the grass, herbage, trees, crops, grain, fences, barns, dwellings and buildings and struc-

tures and erections of the said plaintiff, then and there being upon the said land, as aforesaid, were wholly destroyed and consumed by means whereof the said plaintiff has wholly lost and been deprived of the use, benefit and advantage of the same so as aforesaid.

6. That on or about the 1st day of October in the year 1912 the said Samuel Martin entered into a contract or policy of fire insurance with the said Standard Fire Insurance Company of New Jersey, by which contract or policy of insurance the said insurance company in consideration of the stipulations therein contained and of the sum of $19.00 premium, did insure the said Samuel Martin for the term of 3 years from the 1st day of October, 1912 against all direct loss or damage by fire except thereinafter provided to an amount not exceeding $1,500, of which sum $1,100 was on his two-story shingle-roof frame building, located as aforesaid; that by reason of said fire on the 2d day of May 1913, the said insurance company became liable to pay and did pay to the said Martin on said building the sum of $1,100, less 1% or $1,089; that on the 7th day of May, 1913, in consideration of the sum of $1,089 the said Samuel Martin assigned, set over and transferred to said company, its successors and assigns, all claim and cause of action existing in his favor to the extent of the amount above mentioned against any person, persons or corporations, or property, for or by reason of the said loss and damage or the cause thereof, with full power to enforce any right of action which he then had against any person, persons or corporations; and that the said defendant hereto had notice and knowledge of said assignment and

of the fact that the said Martin had received the said sum of $1,089, and has duly assigned his said claim to said company, and a copy of said assignment is hereto annexed and make a part hereof.

Wherefore, the said plaintiff says that he is injured and has sustained damages.

Plaintiff demands as damages $1,089 with interest from May 7, 1913, beside costs of suit.

HUSTON DIXON,
Atty. of Plaintiff.

Subrogation Receipt

Annexed to Complaint

$1,089.00

In consideration of the sum of ten hundred and eighty-nine Dollars (the receipt whereof is hereby acknowledged), paid by The Standard Fire Insurance Company of New Jersey, being in full satisfaction of all my claims and demands for loss and damage caused by fire of May 2, 1913, sustained by me as the insured under policy No. 10,-731 of said Company, issued at its Metuchen, N. J. Agency, I hereby assign, set over and transfer to the said Company, its successors and assigns, all claim and cause of action existing in my favor to the extent of the amount above mentioned against any person, persons or corporations, or property, for or by reason of the said loss and damage or the cause thereof, with full power to enforce any

right of action which I now have against such person, persons or corporations, or property, saving me harmless from all costs or expenses by reason thereof.

Dated at Millville, N. J. this 7th day of May, 1913.

CAPT. SAMUEL MARTIN.

Witness
Wm. M. Crozer.

Answer

(Filed, January 20, 1914)

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

SAMUEL MARTIN who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action-at-Law.

The defendant a corporation of the State of New Jersey having its office in the City of Jersey City in the County of Hudson in said State says that:

Answer

First Defence:

1. Defendant will object that the complaint discloses no cause of action. It shows that plaintiff has assigned only a part of his said claim for damages to said Standard Fire Insurance Company of New Jersey, and the said plaintiff cannot bring action thereon to the use of said Company for such part and thereby split the cause of action.

Second Defence:

1. As to the statements in the first paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

2. As to the statements in the second paragraph, defendant admits it was on said day possessed of a certain engine and locomotive which was under the management and control of its servants, but denies that it was unlawfully driven and propelled over and along said railroad.

3. Defendant denies the third paragraph.

4. Defendant denies the fourth paragraph.

5. Defendant denies the fifth paragraph.

Third Defence:

1. Plaintiff contributed to the destruction of his said buildings and other property by his own negligence in that he saw the said fire in the grass, herbage and trees, in dangerous proximity to his buildings, and could have taken precautions to protect them therefrom, which he failed to do.

Answer

FOURTH DEFENCE:

1. As to the statements in the sixth paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

FIFTH DEFENCE:

1. Defendant denies that it had notice and knowledge of said assignment and of the fact that the said Martin had received said sum of $1,089.00 and had duly assigned his said claim to said Company as set forth in the sixth paragraph of said Complaint.

SIXTH DEFENCE:

1. Defendant says that on July 16, 1913, said plaintiff commenced an action in this court to recover damages from said defendant for the same cause of action as set forth in the complaint herein, and such proceedings were had therein that the said plaintiff recovered from the said defendant and the said defendant paid to the said plaintiff the sum of $1,500 in full satisfaction of all claims that the said plaintiff had against the said defendant by reason of his damage on account of said fire, and received from said plaintiff a release and discharge of all such claims, a copy of which is hereto annexed and hereby made a part hereof.

2. An action having heretofore been brought against defendant for the same cause of action and a recovery had therein, defendant cannot be again subjected to another action for the same cause.

SEVENTH DEFENCE:

1. Plaintiff assigned only a part of his claim to said Company and having brought suit to recover on that part of his claim not so assigned, no further action can be brought to recover for that part so assigned.

ADRIAN LYON,
Attorney for Defendant.

General Release

Annexed to Answer

KNOW ALL MEN by these Presents, That I, Samuel Martin of Raritan Township, New Jersey, for and in consideration of the sum of Fifteen hundred ($1,500.00) dollars, lawful money, to me in hand paid by the Lehigh Valley Railroad Company, the receipt whereof is hereby acknowledged, HEREBY RELEASE AND FOREVER DISCHARGE the said Company and Lehigh Valley R. R. Co. of New Jersey of and from all claims, demands and causes of action I have against them or either of them and especially do I release and forever discharge the said Lehigh Valley Railroad Company and Lehigh Valley R. R. Co. of New Jersey and all persons and corporations which might be held liable of and from all liability for loss and damage sustained by me or that may hereafter result from all damage to property owned by me, at or near Raritan Township, New Jersey, on or about the second day of May 1913, by reason of fire having been conveyed to it from the property of the said Railroad Company. I am the sole owner of the said property.

Witness my hand and seal this twelfth day of November, One thousand nine hundred and thirteen.

Dated, November 13, 1913.

CAPT. SAMUEL MARTIN.

In the presence of
M. A. Harkins
Fred W. De Voe.

Received of the Lehigh Valley Railroad Company Fifteen hundred Dollars in full of the above account.

RUSSELL E. WATSON,
Attorney for Samuel Martin.

Amendment to Answer

(Filed April 19, 1916)

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

SAMUEL MARTIN who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action-at-Law.

The defendant, a corporation of the State of New Jersey, having its office in the City or Jersey City, in the County of Hudson, in said State, by

way of amendment to its answer heretofore filed in this case, says that

EIGHTH DEFENCE: Defendant took and used all practicable means to prevent communication by fire from its engines.

ADRIAN LYON,
Attorney for Defendant.

Reply

(Filed, February 7, 1914)

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

SAMUEL MARTIN who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY, Defendant.	Action-at-Law.

As to the 1st Defense, plaintiff denies the same.
As to the 3d Defense, plaintiff denies the same.
As to the 6th Defense, plaintiff denies the same.
As to the 7th Defense, plaintiff denies the same.

HUSTON DIXON,
Att'y for Plaintiff.

Supplemental Answer

(Filed, February 7, 1914)

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

SAMUEL MARTIN who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY, Defendant.	Action-at-Law.

Defendant, by way of supplemental answer, by leave of the Court, says:

1. Defendant will object that this action cannot now be maintained because more than one year has elapsed since the cause of action accrued, and more than one year has elapsed since this action was sued.

ADRIAN LYON,
Attorney for Defendant.

Reply

(Filed April 14, 1916)

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

SAMUEL MARTIN, who sues to the use of the Standard Fire Insurance Company of New Jersey, a corporation, Plaintiff, vs. THE LEHIGH VALLEY RAILROAD COMPANY, Defendant.	Action-at-Law.

Plaintiff by way of reply to the supplemental answer says

1. Plaintiff denies every allegation in said answer.

2. The action was commenced and sued within one year after the cause of action accrued.

3. Defendant is estopped by its own act from objecting that this action cannot now be maintained because more than one year has elapsed since the cause of action accrued and more than one year has elapsed since this action was sued.

HUSTON DIXON,
Attorney for Plaintiff.

On Postea

This case was tried before Judge Frank T. Lloyd with the jury at the Middlesex Circuit on April 27, 1916.

The jury entered a general verdict against the Defendant and in favor of the Plaintiff for one thousand eighty-nine ($1,089) Dollars.

FRANK T. LLOYD,
J.

SAMUEL MARTIN who sues to the use of The Standard Fire Insurance Company of New Jersey, versus LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.	Action-at-Law.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of ten hundred and eighty-nine dollars besides costs to be taxed *nisi.*

Entered May 16, 1916, on motion of

HUSTON DIXON, Att'y.

1089.
50.76

1139.76

Notice of Appeal

(Filed June 19, 1916)

NEW JERSEY SUPREME COURT

SAMUEL MARTIN, who sues to the use of Standard Fire Insurance Company,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.

To Honorable Huston Dixon, Attorney of Plaintiff:

Please take notice that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

ADRIAN LYON,
Attorney for Defendant.

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

SAMUEL MARTIN, who sues for the use of the Standard Fire Insurance Company,
Respondent,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY.
Appellant.

The appellant states the following grounds of appeal:

1. The Court denied the motion of the defendant for a nonsuit, which motion was upon the grounds that another suit had been commenced and determined for the same cause of action, and that more than one year had elapsed since this cause of action was sued.

2. The Court denied the motion of the defendant for a direction of a verdict for the defendant, which motion was upon the grounds that another suit had been commenced and determined for the same cause of action, and that more than one year had elapsed since the cause of action was sued, and that no negligence was shown upon the part of the defendant, and that the *prima facie* case of negligence presented by the plaintiff was met and rebutted by the proofs offered by the defendant.

ADRIAN LYON,
Attorney of Appellant.

Testimony

CIRCUIT COURT OF NEW JERSEY

MIDDLESEX COUNTY CIRCUIT

SAMUEL MARTIN, who sues to the use of Standard Fire Insurance Co., vs. THE LEHIGH VALLEY RAILROAD COMPANY.	Action at Law. No. 13 in the list.

Transcript of Stenographer's notes of evidence, in the above entitled matter, taken before Hon. Frank T. Lloyd, Circuit Judge, and a jury, in the Middlesex County Court House, in the City of New Brunswick, New Jersey, on the twenty-seventh day of April, A. D. 1916, at 11:-15 a. m.

Appearances:
Huston Dixon, Esquire., for the Plaintiff.
Adrian Lyon, Esquire, for the Defendant.
fendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Dixon opens the case for the plaintiff.
Mr. Lyon opens the case for the defendant.

Mr. Lyon: The testimony will be that the fifteen hundred dollars—the contention of the de-

fendant is, and the fact was, while there was no formal discontinuance of the suit on the record that that suit was ended, substantially and practically discontinued. Settled. The whole affair between Martin and the railroad company was settled by the payment of the fifteen hundred dollars, and after that was all settled then the insurance company comes along and says, we want our share, and so they begin a suit. Now, I say that is obnoxious to the rule against splitting of actions, and I have authority upon that subject to submit to your Honor.

The Court: Oh, yes, that rule is familiar that a man cannot divide his claim up into several suits. He must recover all in one.

Mr. Lyon: That is one point. This action is brought under section fifty-six of the railroad act. If I may have that now, it will facilitate matters. Compiled statutes.

The Court: Do you mean the one dealing with fires?

Mr. Lyon: Yes, sir.

The Court: I am familiar with that.

Mr. Lyon: I will refer to the other point which I shall contend, that this action cannot lie at this time. That section provides that actions of this sort shall be commenced and sued within one year after the cause of action accrues. This action was commenced within a year after the accident. It, however, was allowed to lie for more than a year without anything done. And my contention is that it was not sued in accordance with that law and the spirit of the wording of the act, that a person must follow up his suit.

The Court: Has it been kept alive?

Mr. Lyon: Simply by notice of trial and by letting it go off for the term. It has not been moved for trial for a period of more than a year.

The Court: I do not know of any rule that would permit me to deal with that as a question of law.

Mr. Lyon: That is one of the grounds of objection by the defendant.

The Court: Proceed, Judge Dixon.

Mr. Dixon: Do you want me to answer the questions?

The Court: No, I will meet them as I come to them.

Mr. Dixon: You want me to proceed with the merits of the matter?

The Court: Yes. I don't know, of course—there is no proof before me that it is for the same action, or anything of the sort. Or that there was a settlement of the other action. I do think, however, it is important that without going into a long line of testimony as to this loss and the liability for it, that it should be determined just exactly what was done with that other matter, the other case.

Mr. Dixon: I am ready to argue that point now. I cannot see that there will be any dispute about the facts.

The Court: Do you admit that the other case was a suit for this same claim and that that was settled between the parties?

Mr. Dixon: No, sir; I do not.

The Court: Then you are right away in dispute on the facts.

Mr. Dixon: Counsel does not so contend, as I understand it.

The Court: Wasn't there a release in this case before?

Mr. Dixon: There was.

The Court: What has become of it?

Mr. Dixon: I got a decree from the Court of Chancery to prevent their using it in bar in the defense of this suit.

The Court: That is what the case was stopped for before, wasn't it?

Mr. Dixon: Yes, sir. That is the fact.

The Court: Judge Lyon, I understand the other side in the opening to contend not now upon a claim for damages for a wrongful act that is unliquidated, but for a compromise, and that part of it has only been paid.

Mr. Lyon: No, sir, that is not the case. You misunderstood.

The Court: That was the opening. The opening was that there was an agreement of compromise of twenty-six hundred dollars, and that fifteen hundred dollars of it had been paid and this was a suit for the other eleven hundred dollars.

Mr. Lyon: There has been no trial on the merits—

The Court: No, but if there was a settlement between the parties, and the plaintiff only got fifteen hundred dollars at that time, and there is eleven hundred dollars due on it, that would make a basis of a suit, of course. That is what I understood this opening to be, is that right?

Mr. Dixon: In part, sir, that is to say, I understand this case to be here on its merits, as Judge Lyon says, to show whether there was in fact a loss occurring by reason of this fire.

The Court: I know, but if the thing is based upon a settlement between the parties and this is to enforce it, that drops out of the case.

Mr. Dixon: No, sir: I do not understand it that way, and I did not mean—

The Court: Then you are only going to use it as evidence that the damages have been—

Mr. Dixon: Agreed on. That is all.

The Court: As to actual loss?

Mr. Dixon: As to actual loss and the admitted liability.

The Court: There you see right away you get into the other question. Or eliminate the other question. If you are going to rest upon an admitted liability for twenty-five hundred dollars and acceptance of it, that means the suit is on that contract of settlement, which has been only partly carried out. If, on the other hand, you are resting on the theory that this was a negligent act, and that the twenty-five hundred dollars, or whatever the sum may have been was simply a talk among themselves as to what the loss was without regard to liablity, then that leaves the liability still open. I do not know what the exact position is.

Mr. Dixon: I rest on the fact that this is a negligent act, but I think it is also true, and I want to contend later on that point that the fact that they agreed on this sum, and admitted their liability by release is evidence clear and positive, and will shut out that part of the defense that they took and used all practicable means, which I suppose Judge Lyon is referring to.

The Court: Perhaps it is best to go on and let both openings be complete.

Mr. Lyon: There are two or three questions of law, which your Honor has observed are raised by the pleadings, which I shall also raise at the proper time.

The Court: I had not examined them; what are they?

Mr. Lyon: Well, I shall insist that the action of the plaintiff must fall because he is suing on a split action. There was another action brought by Samuel Martin, the same one who is suing now for the benefit of the insurance company, whose name is simply used by the insurance company for the purpose of this suit, for the same cause of action. It was in settlement of that suit that the fifteen hundred dollars was paid. That suit discontinued and the release taken.

The Court: No verdict taken?

Mr. Lyon: No verdict taken. But there was a settlement of that suit by reason of the payment of fifteen hundred dollars. I think the cases—

The Court: Is that admitted, Judge Dixon?

Mr. Dixon; No, sir. That suit was never settled, sir. The record will show there was no judgment, no verdict.

Mr. Lyon: Then the pending suit—I think that is all the stronger in favor of the defendant.

The Court: No, that would simply be *lis pendens,* or plea of abatement.

Mr. Dixon: The case started by Martin was for the whole loss. Had it been completed and the verdict rendered, of course, we would have been barred? They certainly cannot stand trial twice. They never did stand trial. They have not up to this moment. If this case is completed

and goes to a verdict, this will be the first time that they have stood trial on this issue. So I say that as a matter of fact.

The Court: Let me have then what the facts are with reference to this alleged settlement.

Mr. Lyon: This is the fact. I am perfectly willing that counsel shall put in the letters that Samuel Martin sued the railroad company for damages arising out of this fire. An answer was put in by the defendant on the merits of the case. The cause was at issue, and was on the list and set down for trial in this Court. The parties then entered into negotiations for the settlement of the case. There were many communications between the railroad company and Mr. Martin, between counsel as to the amount that the railroad company should pay Mr. Martin in settlement of the case. Those negotiations resulted in the railroad company paying to Mr. Martin fifteen hundred dollars and taking his release. That sum was arrived at by taking a certain sum representing the value of the property destroyed, which the company was willing to admit in case of the proposed compromise, and by deducting from it the amount of insurance which Martin had received from the insurance company. There was no admission of liability on the part of the railroad company. It was merely the compromise of a pending action. The company would not have paid the money if it was led to believe that another suit would have been brought by the fire insurance company for its amount. It would have fought the case on the merits otherwise.

The Court: How much of that is assented to, Judge Dixon?

Mr. Dixon: I cannot assent to the conclusion that counsel says that there was any compromise of the matter at all. The release, which is part of the transcript here set up by them, will show that there was no compromise.

The Court: I understand that is out of the case now.

Mr. Dixon: It is part of the record. I am referring to it as being before your Honor.

The Court: I know but if it is excluded by the Court of Chancery it is not part of the case.

Mr. Dixon: Only excluded as a defense to this issue. It is not excluded as evidence. So that that release shows that out of that fire they paid to Captain Martin fifteen hundred dollars. What the release did not show was that that was this loss over and above the insurance, and they set it up as such in this former suit, and so I had to get the decree of the Court of Chancery saying they could not set it up as a defense for that purpose.

The Court: Was there anything in the settlement as you understand the proofs to show that the right was reserved to the then plaintiff to proceed for and recover something for the use of the insurance company?

Mr. Dixon: Yes, sir there is in every such situation.

The Court: That is the point that must be determined here.

Mr. Dixon: Do not let your Honor misunderstand me. There is in every such situation. The

latest case I have in this state right before me. Decided last July Fire Insurance Company, vs. Wells, sets that out clearly. In the Court of Errors. (Citing case.) The Court held repeatedly and this is the last case by the Court of Errors that we have a right to bring just such an action as we are bringing now. There was no compromise of that suit. It was simply paid in excess to Martin. They knew then that if they were liable for that loss, if they had done wrong, they were liable for all of it. And they deliberately chose to pay the part to Martin, and stand a trial on the other part. That was their own action. They have waived any question of splitting involved in that. They may so waive it.

The Court: You need not press that further. I think that is sound.

Mr. Dixon: They brought this issue right before them. On the amount, that amount is fixed by counsel's own letter. He will deny, of course. Here is the letter signed by Judge Lyon to Mr. Watson, the attorney of Martin, in discussing the value of this property, he says, these two items—

The Court: I understand all that establishes is the amount of the loss.

Mr. Dixon: Yes.

The Court: It does not establish the liability.

Mr. Lyon: No, sir.

The Court: There is no contest over the value then?

Mr. Lyon: No.

The Court: Now, proceed with your proofs as to the cause of the fire.

SAMUEL MARTIN, produced as a witness, on behalf of the plaintiff, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Dixon:

Q. What is your name, sir? A. Samuel Martin.

Q. Where do you live? A. Centerville.

Q. And where is that from here, Captain? A. That is between, right towards Millville, between Piscataway town, and Bonhamtown, about half way of the road leading down towards the salt meadows near the powder works and near the railroad, the Lehigh Valley Railroad.

Q. You owned a house there in May, 1913, three years ago? A. Yes, sir; I did.

Q. What happened to it? A. Well, one day the woods caught fire, which had been a common thing more or less, but this day we paid a little attention to it, the same as usual, being working all the time, and about twelve o'clock the wind sprang up and it blew so hard that it took the cinders and things from the fire which the railroad crew—which the locomotive, when she went out, she left a smoke, and as soon as you could see the fire come up right away after the smoke.

Well after she went out it burnt there then until about twelve o'clock, moderately, and then the wind braced up and blew a gale of wind, and it took the fire away out in the big trees, and towards my house, and it went up higher than the big trees, flew away up when the wind blew, landed on my roof, and around the windows, and over the roof and in amongst the trees and things that were south of the house, the opposite

side. And it kept blowing so hard, and it was such a hot day, it was impossible for any man to help the fire any. You could not put it out to do your best, if there had been forty men there. We saved the rest of the buildings by working very hard, carrying water and throwing it on the other buildings, and for that reason we kept them from getting afire, but we had hard work to do so. The wind blew so hard it got in the windows, and the air come through, and it was a big heavy frame house, white oak frame, and the wind blew so hard it burned up quicker than a person could believe, filled in with brick, clean to the very peaks, and all went down with the fire.

Q. Your house is on the road that leads south from the main street through New Brunswick, how far, Captain? A. About three-quarters of a mile.

Q. And how far is the railroad from your house? A. I should think about fifty yards.

Q. And it is the railroad of the Lehigh Valley Railroad Company, is it? A. Yes, sir. A little further maybe. Fifty or sixty yards. I never exactly measured it.

Q. Is it a single or double track? A. Single track there, but where the crew was setting afire was a double track on the switch and it was up grade. When she puffed so hard to start this heavy train, that is the time that the smoke came out of the smoke stack, so, and fell—after it settled down right away after she went out the fire blazed right up right when she was going out.

Q. Where does it lead to? A. The railroad?

Q. Where was the train going? A. Train was going to Amboy.

Q. What kind of a train was it, passenger, or freight? A. Freight; heavy freight. Same as usual.

Q. The grade leads up, does it there? A. Yes, sir. It is all going—going up that grade it is hard to start there. And a switch there also, it is hard to start. She had to puff going up grade because the cars was loaded heavy, and that is what caused the—generally the cause of the trouble with the fires when she has to puff so hard starting a car up a grade.

Q. Where were you that morning? A. I was right down the road fixing the road. I was road commissioner. I was working on the road with some men below there, just so I could see everything going. I paid little attention to it being so many recently fires we had there I didn't suppose any hard, and it didn't make any headway until about—

The Court: He has told us that two or three times.

Q. How far away were you from the railroad track? A. About three hundred yards.

Q. And how far from the house? A. I was about two hundred and fifty yards.

Q. The house was between you and the railroad track? A. Yes, sir.

The Court: Fifty yards away, I understood him to say. Is that right? Fifty yards from the railroad to your house?

A. To the house, and I was about two hundred and fifty south of the house, where I was working.

Q. What covers the ground between the track and your house? What covers the ground between the track and your house? A, Why, there is woods along on the side of the road where the fire came, only a few trees. I suppose about twenty. And it hadn't been burnt off nor cut off in that little point of woods for a great many years, and these big briars grew up.

Q. Was the weather dry or wet? A. Dry, and it was a terribly dry day. It was the second day of May.

Q. And the wind was blowing in which direction? A. The wind was blowing right direct for the house from where the fire was, and come in those big woods, and it blew harder than it had any day in the spring. If it hadn't been such a heavy wind, the fire wouldn't have caught, would n't have damage.

Q. And the ground, was that covered with fresh wood, or dead wood? A. Only the bushes which grows up between the trees more or less, dies, and some of the branches on the trees when they get old they fall off and drop down. A lot of briars and so on.

Q. How near to the track did this growth come? A. Why, it come right from the track just a few yards south of the track.

By the Court: Q. No. How near to the track did the grass and growth grow? A. Oh, right up along close up along within a yard or two each side.

Q. Of the rails, do you mean? A. Yes, sir; within a yard or two of the rails, where they have it filled in with cinders.

By Mr. Dixon: Q. How near is any other house to the point where you saw the fire? A. Any other house?

Q. Yes? A. Right across the way on the south of the railroad, to the west of my house.

Q. How far away? A. Why, it is about one hundred and fifty yards, I guess.

Q. One hundred and fifty yards? A. From my house.

Q. Is there any other dwelling house or place of habitation near the point where the fire started except yours? And this one? A. We are the two nearest ones.

Q. You were working in full sight of this place all morning? A. Yes, sir.

Q. Did you see anybody going along there? A. There was nobody passed up or down only just the railroad men.

Q. Is there any highway or path or place for people to walk there? A. No, sir. No need of going that way for a public highway. It ain't necessary. Don't no one travel that way of any account. Never seen anyone.

By the Court: What time of the day did this happen? A. This happened when the house burned down it was after twelve; about twelve o'clock.

Q. Yes, but what time did the fire start? A. When it started?

Q. When the fire first started, yes? A. Why, it started somewheres near nine o'clock. It might have been sooner and it might have been later. I didn't have no watch with me working. I didn't really know exact the time.

By Mr. Dixon: Q. When you first saw the fire where was it with reference to your house? A. Right by the switch where the railroad engine or locomotive was standing, and when they waved for the locomotive to go ahead, she had to puff very heavily.

Q. Did you see that? A. Yes, sir. And what she did, why, of course, then she had to throw out some fire out of her pipe, the same as usual. She had done at different times the same way.

Mr. Lyon: I object to that and ask it be stricken out. That is, about what was done at other times.

Mr. Dixon: I think that is proper. As I understand the rule, he may testify to other fires, if that was the fact.

The Court: Yes, but not on other occasions, can he?

Mr. Dixon: Yes, I think so. As I understand the ruling we may show that the fire had frequently occurred there.

The Court: Yes, he may show that that same engine in the course of its trip set other fires.

Mr. Lyon: Do you mean in the course of the same trip?

The Court: Same trip. That was decided in the Cox case. He is speaking about other days. There would be no inference that setting fires some other day that it would this day.

Mr. Dixon: I think t may be. Iunderstand the rule is broad enough to show any other fires occurring from the engines of the company.

The Court: I think for the present that ought not to be put in unless more is shown to connect it.

By the Court: Q. Go on and tell us what happened on this morning. You say the engine began to throw out fire and what occurred? Did you see the fire coming from it? A. Yes, sir.

Q. What became of it? A. I said, I hope my house is insured, I said, because that fire, I am a little afraid of it, for, I said, I sold Mr. Campbell a piece of meadow land and told him to reinsure my house, and I have not been up to see, and after the fire I hurried up there, and sure enough he had it all fixed for me all right, just the same as though I had been there before, because I sold him the piece of meadow land for that purpose. I was afraid—

Q. We are not interested in that now. What we want to know is the course of this fire. You say you saw the fire coming from the locomotive, the sparks? A. I saw the smoke coming from the locomotive and as soon as the locomotive puffed and smoke came up and right away after the blaze came.

Q. Was there anybody else there at that time? A. Well, yes, sir.

Q. Who was there? I mean at the place where the fire started? A. There was in view—

Q. No. Was there anybody where the fire started except the engine? A. No, sir; only the men on the cars.

Q. They were on the train, were they? A. Yes, sir.

By Mr. Dixon: Q. There is no place there for people to walk or go, is there? A. No, sir. Hard-

ly ever see anybody on that road at any time. And they can't go when the train is coming back and forth. They have to wait and stay away. That is natural. Train takes up—

By the Court: Q. What kind of a train did the engine have? A. Had on about ten to thirteen cars of gravel and sand, from Mr. Campbell's. Big cars; heavy load.

By Mr. Dixon: Q. It had stopped at the switch had it? A. It had stopped at the switch; yes, sir.

Q. And you saw it start? A. And when they had it all made up and the crew ready to go out, the cars ready to go out, I saw it start and I stood and watched on account that I was afraid on account of my insurance. Made me more particular than I would have been any other time. I took particular notice of it.

The Court: Does the negligence in the case rest upon the condition of the road bed, is that any part of the defense?

Mr. Dixon: That is one of the elements.

By the Court: Q. You said that this growth that you spoke of went to within about a yard or so of the rail, of the track? A. Yes, sir; two or three yards.

Q. How wide is the road up there, do you know? A. The road bed is—

The Court: Can that be admitted, gentlemen?

Mr. Lyon: No, sir; it cannot be admitted.

A. It is narrow.

Q. How far is the road bed then outside of the rails? A. Well, it goes a little further, it comes

down. The higher it gets the narrower it is on top of the rails.

Q. Outside of the roadbed, how wide is the right of way, do you know? How far is the fence? A. I think they got thirty feet there. I think they own thirty feet.

Q. Outside of the rails? A. Altogether on the road, for the road to go through.

Q. Well, the road takes up part of it? A. Yes, most all of it. Leaves a little on each side. They got a switch on each side. Room for the switch.

Q. Where was this grass and undergrowth that you speak of? A. Right on the south side of this road; on both sides of the railroad. It was full. It is low ground and full of little bushes.

Q. Yes, I know, but was that on the right of way, or off of it? A. It was off of it. Started right adjoining, just as far as cinders went, why, of course, it keeps the bushes and grass away.

Q. No, I am speaking of the right of way. Was it on the right of way—is there a fence line of the railroad property? A. No, sir.

Q. It is not fenced at all? A. No, sir.

Mr. Lyon: I hesitate to object.

The Court: You are quite right. I do not think it is sure, unless he knows what the right of way is, that he ought to answer. I assumed that it was fenced. He says it was not.

By Mr. Dixon: Q. It was not fenced, was it? A. No. Nor ditched, neither one.

Q. How near to the centre of the track, did the growth come?

By the Court: Q. It is a single track railroad, is it or double? A. It is single only in places where

the switches are. They have switches in a great many place so they can double back and forth.

By Mr. Dixon: Q. How near to the centre of the track did the growth come on either side?

Mr. Lyon: I object to that, because the question has been asked and answered. The witness has said a yard of the rails.

Mr. Dixon: If that may go in, I am satisfied.

Q. Within a yard or two of the rails, the growth came, is that the fact, Captain? A. Yes. It had more than two yards. It was all along. The same as here was the railroad and the fire about as far as you from me.

The Court: You do not listen to what is asked you.

Q. How close to the rail did the growth come? A. Did the fire come?

Q. No. Did the growth, the trees, the bushes, was it within two feet, three feet, four or how near? A. Oh, no. I suppose from the rail next to it probably might have been two or three yards.

Q. Two or three yards? A. Yes, sir.

Q. Either side within that much? A. On either side; yes, sir. Maybe three or four yards in places. According to how the cinders works down. More in one place than another. Can't have it all exact.

Q. All right. Your house was entirely consumed, was it?

The Court: There is no dispute about that?

Mr. Dixon: I understand not.

Mr. Lyon: Oh, no. No dispute. All burned up.

Mr. Dixon: You can take the witness then.

CROSS-EXAMINATION by Mr. Lyon:

Q. Mr. Martin, how soon after the engine went out, did you see the fire start up? A. Why, right away, right away just as—first it was smoke, and then come up the blaze right away.

Q. No, the smoke you refer to was the smoke that came up from the ground? A. As it come down from the fire down to the ground and right away you could see the fire come up as soon as the engine went out.

Q. This fire, Captain, started, of course, on the ground, didn't it? A. Started from the fire to the ground all through. It puffed very heavy.

Q. I am not speaking of the smoke. And I am not speaking of anything but the fire that was kindled on the ground. A. Yes, sir.

Q. It was kindled on the ground, wasn't it? A. Yes, sir.

Q. Of course, it could not be kindled anywhere else? A. No, sir.

Q. And how far away from where you were was that fire kindled on the ground? A. About three hundred yards.

Q. About three hundred yards? A. Yes, sir.

Q. That is nine hundred feet and that would be about one-fifth of a mile, or one-sixth of a mile? A. No, it was level ground and a good view. I had no trouble to see it at all.

Q. It takes some little time, a moment or two for fire to spring up that has been kindled, don't it? A. Yes, sir. When it come up—the engine just got past the place where she stood when you

could see the blaze. Just come up gradually, naturally it kept getting heavier all the time, afterwards.

Q. And the first that you saw any fire was when you saw it springing up from the ground? A. Yes, sir.

Q. After the engine had started out? A. Yes, sir; right away.

Q. This was in broad daylight, of course? A. Oh, yes.

Q. Nine or ten o'clock in the morning? A. Somewheres there. I couldn't tell exactly. It might have been a little before nine; might have been a little after nine. Sometimes she would go out quarter past nine.

Q. And of course, you didn't see any actual sparks coming out of the engine, did you? You just saw the smoke? A. That is all. I saw the smoke that distance; yes, sir.

Q. Now, Captain, you began a suit against the Lehigh Valley Company, didn't you, for your loss? A. Yes, sir.

Q. Shortly after the fire occurred? A. Yes, sir.

Q. And Mr. Russell E. Watson was your attorney? A. Yes, sir.

Q. How much did you get? A. I got fifteen hundred dollars.

Q. And what happened to your suit then? A. I was expecting the suit to come on the next day but my counsel and you together settled the case by arbitration in a way that was satisfactory and I was just as well satisfied, and in this suit I would be satisfied without any, if you had settled it the same way it would have been better for me. It loses time to come to Court.

Q. I am not asking you that, Captain? A. Yes, sir.

Q. So that the suit didn't come off, that ended your suit? A. That ended my suit; yes, sir.

Q. And is that your signature, Captain (handing paper to witness)? A. Yes, sir. I trusted to my counsel, and I mentioned and explained to him about the insurance for the insurance company, they paid me and I was willing to fall, I told him, I told him, enough for to cover their loss, so as they would have it back again, and so long as they were willing to do that I was perfectly satisfied.

Mr. Lyon: I ask this paper be marked for identification.

Paper marked D-1 for Identification.

Q. After the settlement of this suit by the payment of fifteen hundred dollars, you had no further claim against the company, did you? A. I didn't, any more than I want enough for to make this insurance come back to the insurance company. I want enough in valuation, I supposed that everything was specified and all right by my counsel and you. That is what I calculated.

Q. But as far as you supposed at the time you signed this document, that ended any claim you had against the railroad company. A. Yes, I supposed the railroad company would come to you for the rest. I didn't suppose to fight their share at all. I was satisfied.

Q. When you say the railroad company, you mean the insurance company? A. I mean the insurance company ought to come to you for shares. They didn't help me in my case and I have no need to help them in their case.

Q. You say the insurance company didn't help you in your case? A. No, sir. They was looking for their own.

Mr. Lyon: That is all.

Mr. Dixon: That is all, sir.

ANDREW HENDERSON, produced as a witness, on behalf of the plaintiff, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Dixon:

Q. Where do you live, Mr. Henderson? A. At Millville, New Jersey.

Q. And where is that from here? A. Between New Brunswick, and Bonhamtown.

Q. How near to where Captain Martin lives? A. Oh, about fifteen minutes walk, twenty minutes walk, or something like that.

Q. Where were you on the day of this occurrence? A. Hauling clay at the New Jersey Clay Products Company.

Q. And how far is that from Captain Martin's house? A. About five hundred yards, or six hundred yards.

Q. Which way? A. West of his house.

Q. West of the house? A. Yes, sir.

Q. And where, with reference to where the railroad and the public road cross each other? A. Well, what do you mean, the Millville Lane?

Q. The road on which Martin house is?

The Court: Did he see this fire?

Mr. Dixon: I believe he did.

By the Court: Q. How near were you to the fire? A. Oh, I was five hundred yards away from it. I didn't exactly see the fire. I only noticed fire after the engine went out.

Q. You were five hundred yards away? A. Yes, sir.

Mr. Dixon: Q. You were five hundred yards away? A. Yes, sir.

Q. What did you notice? A. Why, about nine o'clock or so after the engine pulled out, I took notice that the woods was on fire. They burned along all morning until around noontime, and I tied the team of horses up. I happened to look over and see Captain Martin's house afire, and I went down to help him, but it was no use. It burned to the ground.

By Mr. Dixon: Q. Did you see any train or engine there that morning? A. Yes, sir.

Q. What time, about? A. About around nine o'clock.

Q. Tell us what you saw. A. All I saw them pull out and after they went out—

Q. What pulled out? A. The engine; the locomotive.

Q. And what was attached to it? A. Cars, sand cars.

Q. Loaded or unloaded? A. Loaded.

Q. Was it standing still or moving when you first saw it? A. They were drilling around all morning there.

Q. Drilling back and forth? A. Yes, sir.

Q. With loaded cars? A. Loaded and empties.

Q. Now, about the time you first saw the fire where was the engine and train? A. Well, pulling

around near the Millville road, when I first took notice there was a fire.

Q. And that is the road on which Martin's house is situated? A. Yes, sir.

Q. And about how far from his house? A. What, the train?

Q. The engine and train at the time you saw them? A. One hundred and fifty yards, or something like that from his house.

Q. What happened to the train? A. Why, the train went on out, and I saw the woods burning all morning.

By the Court: Q. How soon after the engine started to pull out, did the fire start? A. I saw it about five minutes or so afterwards, or something like that. When I looked up I saw the woods burning.

Q. And how far had the engine and train gotten away? A. Oh, I should judge they had got up about one-quarter of a mile or something like that.

Q. Before the fire started? A. Before I took notice of it.

Q. And did you notice just where the fire started? A. Why, it started right at the curve, there is a switch and a curve. That is about where I took notice of it.

By Mr. Dixon: Q. What is the condition of the ground there between that point and Martin's? A. Oh, small grass and brush.

Q. And the weather on that day was what? A. That was dry and windy.

Q. And the wind in which direction? A. The wind was blowing from the northwest.

Q. And that is toward or away from Martin's house? A. Right towards it.

Q. How did the train move when it first started? A. Oh, I couldn't say that. I didn't pay much just exactly attention to it.

Q. You were not looking at it sufficiently for that purpose? Is there a grade at that point? A. Not exactly right there isn't a grade. There is kind of a shallow grade comes up all along there. Not very heavy grade, but pretty good sized grade.

Q. Going up in the direction the train was going? A. Yes, sir.

Q. Did you see any other fire on that day? A. No, sir; on the house burned down, that is all.

Q. Only this house? A. Yes.

Q. After the fire started did it burn continually for sometime? A. Yes, sir.

Q. And until you heard the cry of alarm about the fire? A. Yes, sir.

Q. And then you went over and helped put out the fire? A. Yes, sir.

Q. The house was burned down, however, was it not? A. Pretty near all the way down, it was when I got there.

Mr. Dixon: That is all.

Mr. Lyon: No questions, Mr. Henderson.

EDWARD HAGERTY, produced as a witness, on behalf of the Plaintiff, being duly sworn on his oath, according to law, saith:

Direct-examination, by Mr. Dixon:

Q. Where do you live, Mr. Hagerty? A. Millville.

Q. And where from Martin's house? A. About a quarter of a mile, I think it is, or something like that.

Q. Where were you on the morning of this occurrence? A. I think it was about that. I was digging in the garden, planting potatoes.

Q. How far from the railroad track? A. Oh, about two hundred yards, I guess, or something like that.

Q. Did you see the fire? A. I did; yes, sir.

Q. Tell us what you first saw and all about it. A. Well, I saw it after the engine went out, about nine o'clock I suppose it was.

The Court: Well, tell us about that.

Q. Where was it? Where did you first see the fire? A. Over along the railroad track.

By the Court: Q. How soon after the engine? Tell us all about it? A. Well, about five minutes I think, as near as I could judge.

Q. How far had the train gotten before you noticed it? A. Oh, I suppose it got up to Campbell's bank.

Q. That is how far? A. About a quarter of a mile, I guess, as near as I can judge.

By Mr. Dixon: Q. Which way was the train going? A. Perth Amboy.

Q. What kind of a train was it? A. Loaded with sand from Campbells.

Q. Was it standing still or moving when you first saw it? A. It was moving.

Q. And is there a grade there? A. Yes, sir.

By the Court: Q. Which way? Was the train going up grade or down? A. Yes, up grade.

Q. Did you see anybody around there where the fire started, except the train? A. No, sir; I did not.

Q. Did you look? A. I looked; I didn't see anybody.

By Mr. Dixon: Q. Is there any public highway along that track, or path, or place for people to go? A. No, sir; not as I know of.

Q. Is there any house or habitation near there except Martin's and this other house of which he has spoken? A. No, not along there, no.

Q. Several hundred yards away? A. Yes, there is nothing there.

Q. What is the ground covered with on either side of the track? A. Bushes and grass.

Q. And how close to the track do they come? A. What, those bushes?

Q. Yes? A. Oh, I suppose about as far as from here to that over there, you know, I can't exactly tell.

The Court: What do you mean?

By Mr. Lyon: Q. This railing? A. Yes, about there.

Mr. Lyon: I think that ought to go on the record about how far that is.

By Mr. Dixon: Q. Well, from the center of the track, Mr. Hagerty, to the growth on either side is in feet how much? A. Up to the track?

Q. No. From the center of the track out to the growth on either side is how much in feet, about? A. Oh, I couldn't—

Q. Well, do your best, Two feet? A. No.

Q. Three feet, four feet? A. It is more than that.

Q. Five, six, how much? A. It might be about fifteen. It might be.

Q. From the center of the track to the growth? A. Yes. I might be that. Of course, I am no judge.

Q. And it is on both sides of the track, is it not? A. Yes, sir.

By the Court: Q. You understand counsel is asking you from the center of the track? A. Yes.

Q. You think about fifteen feet? A. I think so, as near as I can tell.

By Mr. Dixon: Q. From the center of the track on either side, would it be thirty feet across from growth to the growth? Do you understand what I mean? A. No.

Q. The track going here this way, between the growth on either side, would it be thirty feet from the grass on this side to the grass on that side, or les than that? A. It might be less. I couldn't tell now. I am no judge of anything like that. I tell as near as I can.

Q. Between that growth on either side of the track there is nothing except the grass and trees— A. That is all.

Q. —(continued) to Martin's house? A. That is all.

Q. And the fire burned where? A. All over it.

The Court: I suppose there is no dispute about that. No dispute that this fire caused destruction of that house.

Q. You saw that? A. Yes.

Mr. Dixon: Nothing further. You may take the witness.

Mr. Lyon: That is all.

Mr. Dixon: I desire to offer these letters in evidence.

The Court: What are they?

Mr. Dixon: They are letters between Mr. Watson, and Judge Lyon in regard to the settlement of this matter, and show the amount fixed on, and the amount of the loss. Then after these letters were written, by agreement between counsel, the amount agreed on here was raised to fifteen hundred dollars. The release in question shows that. It also shows that the money was paid because of this very fire.

The Court: That is admitted, is it, Judge Lyon?

Mr. Lyon: Yes, sir.

The Court: Now, is it also admitted that there was an insurance on it? I suppose that is admitted in the pleadings, isn't it?

Mr. Dixon: Yes, sir.

The Court: And that the company paid the loss? That is all admitted in the pleadings?

Mr. Dixon: I understand it is.

Mr. Lyon: If it is not, I admit it now.

Mr. Dixon: It is admitted that there was insurance of eleven hundred dollars. Judge Lyon's own letter shows that.

The Court: It is admitted now in the trial of the case.

Mr. Dixon: And Judge Lyon admits that the company paid that loss.

The Court: I see in the papers also an assignment by the plaintiff to use to the insurance company.

Mr. Dixon: Yes, sir.

The Court: That is admitted, I suppose?

Mr. Lyon: The subrogation that is attached to the complaint?

The Court: Yes.

Mr. Lyon: Yes, that is admitted.

Mr. Dixon: I think that is all, sir, then.

The Court: Proceed, Judge Lyon.

Plaintiff rests.

Motion for nonsuit.

Mr. Lyon: I desire to move for a nonsuit upon two grounds:

First: Because it appears in the case by the subrogation receipt, by the letters in evidence, by the testimony of Mr. Martin, that another suit was commenced for this same cause of action and was determined by the payment of the sum of fifteen hundred dollars to Mr. Martin, and that now another suit is brought by Mr. Martin for the same cause of action. And that that cannot be done.

Second: Upon the ground that more than one year has elapsed from the time of the former trial in this case, which, as the record will show herein, was in April, 1914, and the moving of this case for trial at the present term. On those two grounds I ask for a nonsuit.

The Court: Judge Lyon, does it appear in the papers, or is it admitted that the defendant at the time of this arrangement

with the plaintiff, Martin, that the company knew of the existence of this insurance and of the fact of its having been paid?

Mr. Lyon: I think there is; yes, sir. I do not dispute that.

The Court: That is a fact anyway in the case.

Mr. Lyon: I do not dispute that at this point. I think the company knew of it.

The Court: All right. The motion will be denied and exception allowed.

Exception allowed, sealed accordingly.

Judge.

DANIEL GALLAGHER, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination, by Mr. Lyon:

Q. Mr. Gallagher what is your business? A. Conductor on the Lehigh Valley Railroad.

Q. Do you remember the day of Captain Martin's fire? A. Captain Martin's trial?

Q. Do you remember the day that Captain Martin's house was burned? A. Well, I am pretty positive it was on May second in thirteen.

Q. I don't ask you to fix the calendar date, but you remember the occurrence, do you? A. Yes, sir; I was told that it was burned, yes. I didn't see it.

Q. Well, were you out there on that branch with

your engine on that day? A. In the morning; yes, sir.

Q. What was the number of your engine? A. Engine 1108.

Q. Was there any other engine there that day? A. Yes, sir. Another engine. There was two engines there that morning.

Q. Now, were there any more than those two engines on that branch that day? A. No, sir.

Q. Do you know the number of the other engine? A. No, sir. Don't know the conductor either.

Mr. Lyon. That is all. I just asked him to fix the number of the engine.

Mr. Dixon: No questions.

JAMES CAMPBELL, produced as a witness on behalf of the Defendant, being duly sworn on his oath, according to law, saith:

Direct-examination, by Mr. Lyon:

Q. Mr. Campbell what is your business? A. Conductor of the Lehigh Valley Rairoad.

Q. Do you remember the occurrence of Captain Martin's house burning? A. I didn't see no fire that morning when I left there.

Q. Well, do you remember the day when it occurred? A. Yes, sir.

Q. You remember hearing about it, at the time? A. Yes, sir.

Q. Were you out there with your engine on the day of that fire? A. Yes, sir; I was out there in the morning and afternoon.

Q. What is the number of your engine? A. 3420.

Q. What was the number of the other engine? A. 1108.

Q. Were there any other engines than those two out there that day? A. No, sir.

Mr. Lyon: Cross-examine.

Mr. Dixon: No questions.

LEANDER W. SCHOONOVER, produced as a witness, on behalf of the Defendant, being duly sworn on his oath, according to law, saith:

Direct-examination, by Mr. Lyon:

Q. Mr. Schoonover, where do you live? A. Perth Amboy, 271 Maple Street.

Q. What is your age? A. Sixty-eight.

Q. What is your business, Mr. Schoonover? A. My busines is shop foreman of the Lehigh Valley Railroad.

Q. How long have you held that position? A. The position that I held at the time of this occurrence I held that position for eleven years. General foreman.

Q. How long have you been in the employ of the Lehigh Valley Railroad in this department? A. Forty-eight years.

Q. And what have been your duties with reference to engines or locomotives, during the last eleven years, we will say? A. To see that they are kept in proper condition for service, and prevent any accident on account of their condition.

Q. You are familiar with locomotives and engines therefore? A. Yes, sir.

Q. And you are familiar with the system observed by the company in the inspection of engines? A. Yes, sir.

Q. Will you please state what system you observe in the inspection of engines, locomotives? A. There is a man assigned to duty of inspectng the spark arrester screens, and the condition of the ash pans, they being the only two sources that would produce an accident through fire, and he was to examine these and any defects found by him were to be reported and repairs were attended to at once.

Q. Was a record kept of such inspections? A. If you will allow me, I will just—

Q. Pull up your chair.

(Question repeated by the stenographer.)

A. Yes, sir; kept in this book (indicating).

Q. You produce what now? What is that book you now produce? A. This book is the record of smokestack and spark arrestors examinations and also the examination and condition of ash pans.

Q. Is the young man here in Court who made the examination and took the record? A. Yes, sir. Michael Pisoski.

Q. Will you turn to the record on or about May second, 1913 and find— A. Here is May first, 1913.

Q. Now, do you find on this record, reference to engine number 1108 prior to May second, 1913? A. Yes, sir. We have—here is May first. Here is May second. You mean prior to May second?

Q. Prior to May second.

The Court: Yes, he told us he has a reference there of May first. That was this engine.

Mr. Lyon: That is of the other engine I am taking them up in their order.

Q. Refer to April twenty-sixth. A. 1108.

Q. What does your record show now, April twenty-sixth, 1913, as to 1108?

Mr. Dixon: I want to enter an objection to this testimony.

The Court: If it is objected to it is incompetent. It is purely a self serving declaration.

Mr. Lyon: Of course, I intend to produce the man who made the examination.

The Court: I would not make any difference. The record itself would not be evidence.

Mr. Lyon: I am not asking to put in the record.

The Court: No, but you are asking him to read it, which is the same thing.

Mr. Lyon: I did not intend that construction to be placed on it.

The Court: Well, all he knows is what he sees in the book, I suppose.

Mr. Lyon: Certainly. I really intended to ask this witness only the method pursued in the examination of the engines.

The Court: Of course the man who made the inspection is the only man—

Mr. Lyon: He is here and I intend to put him on next.

Q. Mr. Schoonover, what appliance is used in connection with locomotives or engines—

The Court: I suppose it will be admitted that the approved appliances that are

recognized in the railroad business were in these engines?

Mr. Dixon: No, sir; it will not. There was a fire.

The Court: Yes, I know, but fires sometimes come in spite of such conditions. Almost always the question in these cases is whether or not the screens were in condition. Or if the road too is relied on, what that condition was.

Mr. Dixon: In view of the facts surrounding this I do not think I ought to admit that.

The Court: They will have to prove then that they come within the act.

(Question repeated by the stenographer), —(continuing) by way of protection from fires?

A. We form a screen around the exhaust nozzles of 3/16 mesh, and that is clamped around the extension pipe that leads to the smokestack and all sparks that go out of the smokestack have to go through this screen, and the mesh and make of this screen is in approved practice by the railroad companies.

By the Court: Q. Is it used generally by most of the railroads? A. By the Lehigh Valley. I do not know much about foreign roads.

Q. Do you know whether the same screen is in general use? A. It is in approved practice on the Lehigh Valley Railroad.

The Court: That does not prove anything.

Mr. Lyon: I submit, your Honor—

The Court: No, it does not.

Mr. Lyon: It is competent testimony.

The Court: Oh, yes, it is competent testimony, but it does not prove that it is an approved advised use generally in the railroad business.

Mr. Lyon: I will have another witness as to that.

The Court: He has a right to tell us what he used.

A. Here is a sample of the screen that is used, and its application, I just made a rough sketch here this morning, shows the application of this screen.

The Court: I understand it is a screen that you use to prevent the sparks escaping from the stack? A. Yes, sir.

By the Court: Q. And you say that it intervenes wholly to prevent sparks going through beyond the size of that mesh? A. Yes, sir. Must pass through this screen before they go out in the atmosphere.

By Mr. Lyon: Q. Mr. Schoonover—

The Court: He said, while you were busy there, that it is a screen that is so placed in the engine as to prevent all sparks going out through the stack that will not pass through that mesh.

Q. Will you make a diagram, or produce one, if you have it made, describing the screen as it is placed in locomotives? A. That is the—

By the Court: Q. That shows it, does it? A. That is a general description; yes, sir.

Q. The sketch you have drawn there shows it? A. Yes, sir.

The Court: Do you want to offer that for illustration?

Mr. Lyon: Yes.

The Court: It will be received for that purpose.

Sketch entered in evidence and marked Exhibit D No. 2.

CROSS-EXAMINATION, by Mr. Dixon:

Q. Do you know these particular engines, 1108, and 3420? A. Yes, sir.

Q. Were they new or old? A. Well, they were comparatively—they were in good repair.

Q. No, I asked you were they new or old? A. New or old?

Q. New or old? A. Engines?

Q. Yes? A. Well, 1108 is comparatively an old engine, but 3420 hadn't been in service but a few years.

Q. How many years, do you know? A. Well, I couldn't tell exactly. Probably 3420 had been down about four years at Perth Amboy. I don't know how long before that.

Q. This particular branch of road, do you know it, that runs past Martin's house? A. Well, I don't know much about the course there. I have been over the road several times.

Q. Do you know where the road is? A. Oh, certainly; yes, sir.

Q. It is a spur track, is it not? A. Spur track running in along the Raritan River.

Q. It runs up to these factories and mills along there? A. Yes.

Q. It is not used for the regular service of the

railroad, simply for carrying freight? A. It is not a main line road; no, sir.

Q. These screens that you put in, they wear out sometimes, do they not? A. Yes, sir.

Q. What are they made of? A. Well, they are made of steel.

Q. It deteriorates with the action of the smoke and gas and fire? A. The exhaust steam, moisture from the exhaust steam has a tendency to close them holes and you sometimes have to clean them out.

Q. Frequently, do you not? A. Yes, sir.

Q. What kind of coal is used on these engines? A. Well, the mixture that we were using at the time was fifty per-cent of buckwheat coal and fifty per-cent of stove, bituminous. Anthracite, buckwheat size.

Q. Fifty percent of buckwheat, which is a very small size of what we call anthracite, is it not? A. Anthracite; yes, sir.

Q. And fifty percent of bituminous? A. Yes, sir.

Q. Which makes the most and best sparks?

The Court: Best fire do you mean?

Mr. Dixon: Best spark.

The Court: I don't suppose they call them best.

Mr. Dixon: I do not suppose they do.

A. Any kind of a fire is liable to make a spark. Forming a comparison between the two I am not able to judge that.

Q. Don't you know from your experience that one kind of coal makes the better spark, makes a larger spark, and one less difficult to put out than the other? A. No, I don't know that.

Q. What material are the screens made of? A. Steel wire.

Q. Is there any method used to protect your ash pans, or ash trays from escaping fire or ashes? A. When they are in good condition they are not liable to throw fire at all. There is no danger from an ash pan.

Q. When they are in good condition they are not liable, but when they are in bad condition what happens? A. They are not allowed to get that way.

Q. I did not ask you that. I ask you when they are in bad condition how does it happen that fire escapes? Describe the situation of the ash pan? A. I presume we would take it then that an ash pan in bad condition is one that has holes into it, so that the spark or ashes could escape through this hole.

Q. And where is it on the engine? A. The ash pan is below the fire box.

Q. And that is how near to the track? A. Well, the ash pan probably would go down within about six or eight inches.

Q. Very close to the track? A. Well, it varies on different engines. Probably eight or nine inches.

Q. And trere is an opening in it, is there not, for the purpose of throwing out or throwing off the ashes or sparks? A. There is a slide that fits in the hole.

Q. Does that ever get out of order? A. I have no recollection of one getting out of order unless it has broken.

Q. It might get broken or loose? A. It might

get broken; yes, sir. Impossible for it to get loose. It goes into a cast iron side each side? It fits in a grove.

Mr. Dixon: That is all.

RE-DIRECT-EXAMINATION, by Mr. Lyon:

Q. Mr. Schoonover, you say that you are not familiar with the spark arrestors used on other roads. How long did you say you had been interested in your present line of work? A. Well, in the present line of work in connection with a locomotive, I have been eleven years.

Q. Do you know from any source what the standard of spark arrestors is? A. Nothing more than the recognized standard on the road with which I am employed. That is all. I couldn't say what the recognized standard is for other railroads.

Q. Well, when you say recognized standard does that have any application for any particular road, or does that mean recognized standard for the use to which the appliance is adapted, irrespective of any road? A. Why, it was my understanding that this screen is in general practice on different roads, but I am not conversant with that fact.

Mr. Dixon: I object to that.

The Court: He cannot tell us, of course.

Q. Well, if you know from any source, by reason of your experience, you may state, I submit, to the Court.

The Court: It depends on how he knows it.

Mr. Lyons: Yes, I am asking him to state the source, of course.

A. Wel', the source, in conversation with other men working on different roads.

By the Court: Q. Have you ever seen them on other engines? A. I never took notice of them, on other engines; no, sir; on other roads.

The Court: I think you will have to show that by somebody else.

Mr. Lyon: That is all.

The Court: Can you show by somebody else here that it is an approved pattern?

Mr. Lyon: I think so; yes, sir.

The Court: I was going to suggest your doing that now before you call the inspector. I suppose this is an inspector.

Mr. Lyon: I do not like to do it unless your Honor insists on it.

The Court: I thought if there was any delay in it, you would have notice and get a chance to get somebody here who knew. I am only trying to save you time.

MICHAEL PIKARSKI, produced as a witness, on behalf of the Defendant, being duly sworn on his oath, according to law, saith:

Direct-examination, by Mr. Lyon:

Q. Where do you live, Michael? A. Perth Amboy.

Q. How long have you lived there? A. I was born there.

Q. Who do you work for? A. W. L. Bowler.

Q. Who do you work for now?

By the Court: Q. What concern do you work for? A. I am working on the Valley.

Q. Lehigh Valley Railroad? A. Yes, sir.

By Mr. Lyon: Q. How long have you worked for the Lehigh Valley? A. About six years.

Q. At what have you been working? What has been your job, your business? A. Why, the first job was call boy.

Q. What was your next job? A. Filling lamps.

Q. What is your present job? A. What now?

Q. Yes? A. Why, inspector of engines.

Q. How long have you been inspector of engines? A. About three months.

Q. What were you in May of 1913, three years ago? A. What I been doing?

Q. Yes? A. Why, I have been filling grease cups and examining front engines.

Q. What is your job now about examining front of engines? Tell us what you do?

The Court: That was at that time?

Mr. Lyon: Yes, sir.

Q. Three years ago in May, 1913? A. Why, I looked at them were they in good condition.

Q. Tell us how you did it. A. If they were in bad condition, well I was supposed to report it, report it in the book here.

Q. Well, now, tell us how you did it. A. Well, I opened the front end; it has big doors in the front and I opened it, and of course I have got to hit it with something to see if it is solid or not, if it has any holes in it.

Q. Did you examine in that way engine 1108 on the twenty-sixth of April, 1913? A. Yes, sir.

Q. I show you a book which you may look at

for the purpose of refreshing your memory as to what you did on that day—

The Court: Can't he tell us what condition he found it in at that time?

Mr. Lyon: Yes.

Q. What condition did you find 1108 in on the twenty-sixth of April, 1913? A. Found her in good condition.

Mr. Dixon: Wait a minute please. He is asked to look at this book.

The Court: Of course he cannot look at the book if his memory is good. It is only in case his memory is deficient. It would rather be assumed he would not know about this unless he had looked it up before.

By the Court: Q. Any holes in it? A. No, sir. O. K.

By Mr. Lyon: Q. Did you examine engine 3420? A. Yes, sir. She been on that job as 1108.

By the Court: Q. Is 3420 the number? A. #420.

Q. Well, when did you examine that? What day did you examine that? A. That was on May twenty-sixth.

By Mr. Lyon: Q. May or April? A. May.

Q. Well, look at your book and see if that is the book that you made?

By Mr. Dixon: Q. Did you make it? A. I examined 3420 on May second, I guess it was.

Mr. Dixon: I would like to know whether he made this book.

By the Court: Q. Did you write those entries in the book? A. Yes, sir.

By Mr. Dixon: Q. Is this your handwriting? A. Right here.

Q. All of it? A. There was a day man. I was the night staff.

By the Court: Q. What was your inspection, night or day, at that time? A. Nights.

By Mr. Dixon: Q. Is that your signature (indicating)? A. Yes, sir.

Mr. Dixon: Show us in the book, if you will.

Q. Did you write that figure there, 3420? A. The night foreman done this. That is his writing. Of course, I told him what engines and he marked them down.

Q. You didn't write that then? A. Well, here is my handwriting right here.

Q. We are talking about this particular number, 3420. A. That is the night foreman's writing.

By Mr. Lyon: Q. Is that your name? A. That is my name.

By the Court: Q. Did you see him write that number? A. Yes, sir.

By Mr. Lyon: Q. And did you see him write your name? A. Yes, sir.

Q. Were you there at that time? A. Yes, sir. I always gave him the slip, right in the morning right before five o'clock.

By Mr. Dixon: Q. And he wrote your name, and you didn't? A. Yes.

By the Court: Can you write? A. Yes, I can write.

Q. Why didn't you write it? A. Well, he always done it before I got the job.

Q. And he kept on after you got the job. All right. Now tell us whether or not you inspected that engine, and when.

By Mr. Lyon: Q. When did you inspect—

Mr. Dixon: May I enter an objection? Here is a man who gives this information to some other man, and this other man writes for him.

The Court: Yes, but he says he did it in his presence. Writes it down. All that the law exacts is that the matter shall be proper for refreshing the memory where it is deficient, and I take it that memory three years ago of an individual engine would be deficient. Now, the only question is whether or not this writing he knew at the time to be correct, and saw it, it is not essential that he should make it. It is sufficient if it is done by anyone, if he knows at the time it is done by anyone, if he knows at the time it is done and sees it.

Mr. Dixon: I will not press that.

By Mr. Lyon: Q. Now, on May second, did you examine engine 3420 as to the screen and the ash pan? A. She worked that night but—

Q. You hear my question, don't you? A. Yes.

Q. Did you examine engine 3420 on May second? A. Yes, sir.

By the Court: Q. What time, day or night? A. That was night.

Q. Well, the night of May second, or the morning of May second? A. That was at night.

Q. After this fire? Did you hear anything about this fire? A. Yes, sir.

Q. Did you hear of it, at the time? A. Yes, sir.

Q. Did you make your examination right after the fire, or just before? A. That was right after.

I heard there was a fire and I looked the engines over.

By Mr. Lyon: Q. You heard of this fire, did you? A. Yes, sir.

Q. Up at Martin's? A. Yes, sir.

Q.Then at the time that you heard of the fire you say you examined the engines? A. Yes, sir. 3420 and 1108.

Q. How did you find the spark arrester, ash pan, on those engines at that time, when you examined it? A. In good condition.

Q. Everything was whole, was it? A. Yes, sir.

Mr. Lyon: Cross-examine.

CROSS-EXAMINATION by Mr. Dixon:

Q. It was on the evening of May second, or night of May second that you examined them? A. Yes, sir.

Q. And you remember that now, do you? A. Yes, sir.

Q. After three years? A. Yes, sir; I remember it.

Q. How did you come to look at them? A. Well, that is what I was supposed to do is look after it.

Q. How did you come to look at this engine on that night? A. Well, I look them over pretty near every second night.

Q. Every second night? A. Yes, sir.

Q. Was this the regular night for that purpose? A. Why, 1108 and 3420 was on May third.

Q. Is on what? A. May third.

Q. You mean that was the regular time for looking at them? A. No, sir.

Q. Then I don't understand what you do mean. I am asking you—You say they were examined every second night. Now, I ask you whether the second of May was the regular night, the order for examining them? A. No, sir. But I looked at them anyway.

Q. You looked at them anyway on that night? A. Yes, sir.

Q. How did you come to do that out of order?

By the Court: Q. Why did you examine them the night of May second, the question is? A. Well, I had time to look them over. If I got time.

Q. No. I say, why did you examine them that night? Why did you happen to examine them that night, a day ahead of time? Had you any reason for doing it then? A. No.

Q. You did not connect anything with this fire in the engine? A. No, sir.

Q. Did you know that this engine was in any way connected with the fire? A. No, sir.

Q. What engines came down there except these two to you for inspection? A lot of them? A. Oh, there was about thirty engines.

Q. About thirty? A. Yes, sir.

Q. Well, now, did you know which engines were connected with this fire; or which might be connected with it? A. I don't know.

Q. Did you know where this enigne had been working? A. Yes, sir.

Q. And did you know where the fire was? A. It was on—

Q. I say, did you know at the time where the fire was? A. No. I didn't know where it was.

Q. You didn't know where it was? A. No.

Q. What did you mean then when you said you heard of this fire? A. Well, they all were talking about the fire there was 1108 and 3420 worked around there somewheres.

Q. Now, did you know that at the time you inspected the engines, Had you heard about this fire? A. No. I didn't hear it.

The Court: I do not know what this witness is trying to say Judge.

By Mr. Lyon: Q. Can you speak loud? Is there anything the matter with your voice? A. I can't speak loud.

Q. Sit up straight and see if you can speak so the jury can hear you. We are not going to hurt you. You say a moment ago, you heard them all talking about the fire, did you? A. Yes, sir; I heard them talking about the fire.

Q. Heard who talking about it? A. Well, the train crew and all them.

Q. Well, when did you hear it? A. Well, that was about five o'clock in the evening.

Q. Of the day it happened? A. Yes, sir.

Q. You heard them talking about the fire at 5 o'clock on the day it happened? A. Yes, sir.

Q. And what engines had been out there? A. Why, 1108 and 3420.

Q. Well now then, when did you examine 1108 and 3420 with reference to that time? A. Why, 1108 I looked her over at 12.15 or May third. and 3420 at one a. m. On May third.

By the Court: Q. Well, now, at that time you knew then that there had been a fire? A. Yes, sir.

Q. And did you have any idea that these en-

gines might have had anything connected with it? A. No, sir; I didn't have any idea.

Q. Well, did you have any idea that the fire might have started from the railroad track?

A. No, sir.

By Mr. Dixon: Q. That is what the men were talking about, weren't they? And you looked at the engines out of order too, didn't you? Wasn't that what the men were talking about, that the railroad company had started the fire?

Mr. Lyon: He has not said that. And I hardly think that is proper.

The Court: I think that would be an exceedingly important thing to determine. That would be a reason for examining it, if he knew that the railroad might be charged with a fire, it would be every reason in the word for his making an examination. I think the witness is under some embarrassment here in the Court room.

By the Court: Q. Have you ever been in a court room before? A. No.

Q. You can be just as much at home here as you could up at your own home, and there is nobody going to hurt you for anything you say just so long as you tell what you know, and only that. Now, what these gentlemen want to know is this: You heard something about a fire that day, late in the afternoon, on that afternoon, didn't you? A. Yes, sir.

Q. And did you hear where it had been? Where the fire was? A. I don't know where it was. I just found out the engine crew were talking about a fire around the place there.

Q. Around what place? A. Where 1108 and 3420 worked.

Q. The train crew were talking about a fire? A. Yes, sir.

Q. Where 1108 and 3420 had been working? A. Yes, sir.

Q. What did you do? Did you do anything on account of that? A. No, sir.

Q. Well, you would not have made an examination in regular order until the next night, would you? A. Well, of course, the night foreman told me to look the front end over, the spark screen, and see if they were in good condition.

Q. Did he tell you why? A. No, he didn't tell me why. I suppose maybe he knowed that there was a fire around there.

Q. And then you made an inspection that night? A. Yes, sir.

Adjourned until two p. m.

Afternoon session, two p. m.

MICHAEL PIKARSKI, resumed:

Direct-examination (continued) by Mr. Lyon:

By Mr. Lyon: Q. Michael, what hour in the day did you hear the crews of these two engines talking about the fire? A. About five o'clock.

Q. Then what hour was it when the foreman—what was the foreman's name? A. John Norman.

Q. What hour was it when he told you to examine the engine? A. About 7 o'clock at night.

Q. How soon after that did you examine them? A. Why 12.15, 1108 and 3420 at one a. m.

Q. That was about five hours then after he told you? A. Yes, sir; five hours afterward.

The Court: He told us all this, this morning.

Mr. Lyon: He was so involved and so confused—

Q. How did you find them when you examined them? A. In good condition.

Q. Both the fire pan and the spark arrestors? A. The spark arrestings and the fire pan.

Q. Found them how? A. Good condition.

Mr. Lyon: Cross-examine.

Mr. Dixon: I wanted to enter objection to all this line of testimony and as it goes to all the line I did not enter it to any particular question, first.

My reason for that is this, the testimony being to show that they took and used all practical means, my reason for that is this: that Captain Martin started a suit for this whole loss, the company had the opportunity to put in this kind of testimony, to make that issue, and they did not choose to. They chose to pay money arising out of this loss and entered into this release by the very terms of which they set up that the money was paid by reason of this very fire. They did not provide in that release that it should be with out prejudice, that they did not admit liability, or any of those terms or phrases at all.

The Court: Is not the most you can get out of it that it comes as a question of evidence?

Mr. Dixon: I think I can get some more out of it.

The Court: You think it amounts to an estoppel?

Mr. Dixon: I do. That is what I am about to say. They knowing all this, and formally putting on the record their understanding when the money was paid, arising out of this particular fire, and with the opportunity then, as we hoped they would do three years ago, to go in and prove this whole case and determine whether there was or was not used practicable means and so forth. Now, not having done that, and waiting all this time, and forced us to come in here, I say they are now estopped from putting in testimony showing that they complied with this particular statute. The way was open. I want to say so far as I myself was concerned, that was the situation. When they started this suit, I said, if they get a judgment, we are entitled to our share, if they do not get any judgment, we are not entitled to anything. If they settle with Martin this loss, they will put on the record the facts that—

The Court: The trouble is they did not put anything on the record.

Mr. Dixon: By the release. May I call your attention to its language?

The Court: You mean they put it in this case?

Mr. Dixon: Yes.

The Court: But they did not put in on the record of the other case.

Mr. Dixon: No, not in the other case. But when they knew they were liable, and they said so in the release they did not take any of the forms used to deny liability. They did not say this is without prejudice. They said this money is paid arising out of this very fire, and they had that opportunity, they had this day in Court then.

The Court: Well, Judge, do you think that the law goes so far as to say that if a man claims five thousand dollars from me and I give him two thousand and take a release from him, and that release is not effective to prevent me suing for the other three that he still— that it is not open to him still to say that while he paid a certain amount of money, it was a voluntary payment and was not a settlement as the suit shows, and, therefore, I am not shut out from proceeding and showing that I ought not to pay this, not that he ought not to have paid that. Because that is settled and ended, but that he ought not to pay this claim. Now here it is a little further removed from that, because the insurance company was a known outstanding interest, entitled to subrogation. I question very much whether, even, if the absolute identity were of one, it would be conclusive, further than being evidential. And it would certainly be more doubtful still if there was a third person's interest involved who was not a party to the suit.

Mr. Dixon: He is relying now on a particular statute. He comes here and says that under that—

The Court: The whole situation involved is this, whether or not the defendant has a right to say that they are not liable by reason of having paid your client.

Mr. Dixon: Not liable because they took—

The Court: And somebody paid money before.

Mr. Dixon: Because they took all practical means of preventing it by putting these fire screens in.

The Court: Suppose I have an accident on the street, and I voluntarily pay a man fifty dollars, and after it is all over he comes to me and says I want five hundred, I find my damages are a whole lot more than I thought they were, could not I still be at liberty to say that it was not my fault, if the accident was not through my fault?

Mr. Dixon: Yes, sir. But I do not think the case are quite similar.

The Court: What is the difference?

Mr. Dixon: The difference is this: they then entered into a writing formally setting forth that that money was paid for the very accident.

The Court: For the claim.

Mr. Dixon: And for the claim arising out of the fire. They did not say we did not have any liability; they did not say this is without prejudice. They did not say we

are not liable. They admitted they were liable and now they are relying on the particular statute that they took ind used practicable means, that they put these five screens in. They had that opportunity then to do that, and they did not choose to do it. They choose to admit that, it seems to me, when they agreed to this very release.

The Court: I think the furthest I can go with it is to direct it as evidence in the case. I do not think it amounts to a legal estoppel.

Mr. Dixon: May I have an exception?

The Court: I will give you an exception when the question may arise in any way that I can deal with it. Of course, it is on a motion now to strike out, but it is not objected to.

Mr. Lyon: I admitted to put on record the fact asking your Honor for an exception to my motion for a nonsuit.

The Court: I think I granted it anyway.

CROSS-EXAMINATION by Mr. Dixon:

Q. Michael, how long have you worked for the company? A. Six years.

Q. And what were you doing in 1913, about three years ago? A. Why, examining front ends and filling grease cups.

Q. Examining the fronts of engines and filling grease cups? A. Yes, mam.

Q. Do you mean you opened the front to look in

and see whether these screens were all right or not? A. Yes, sir.

Q. Did you ever find them wrong? A. Yes, sir; I reported them when they were in bad condition, I reported them bad.

Q. How bad? What was the matter with them? A. Well, if they were burned off or anything like that.

Q. Burned off? A. Yes.

Q. You mean that this wire was burned through do you mean that? A. Yes, sir.

Q. These screens like that would be burned through, holes in it? A. Yes, sir.

Q. So that sparks could get through? A. Make a report about it.

Q. And you made that report? A. Yes, sir.

Q. Do you often find that to be the case? A. Don't find them often. In case they get the fire out they put new screens in.

Q. These engines, this 1108 and 3420, were they new or old? A. They weren't new but they were in good condition, though.

Q. You had been using them for some time, had you not? A. Yes, sir.

Q. And using them on this particular line, do you know? A. Yes, sir.

Q. On this particular spur or branch? A. Yes, sir.

Q. Did you examine the fire boxes? A. The fire boxes?

Q. Yes? A. I didn't do that.

Q. Or ash pans? A. Why, the ash pans.

Q. Ash pans? A. Ash pans.

Q. Was it a part of your duty to examine those? A. Yes, sir.

Q. Did you examine those on those engines? A. Yes, sir.

Q. You didn't tell us that on direct-examination, did you?

The Court: Yes, he did.

Mr. Dixon: I beg your pardon then.

Q. What did you find about those? A. Found them in good condition.

Q. On this same night? A. Yes, sir. It is right below the fire box, the ash pan.

Q. You heard about this fire around five o'clock? A. Yes, sir.

Q. But you didn't examine the engine until quarter past twelve, that next morning? A. Midnight.

Q. At midnight? A. Yes, sir.

Q. All that time went by? Why didn't you look right away? A. Well, they lay on a side track and I looked after when they clean the fire, then after they clean the fire I looked the screens over. Of course, you can't see it until the hostler cleans the fire. There is a fire in the front end and there is sparks inside.

Q. Well, how long did it take them to clean the fire? A. There is about thirty engines.

Q. No. But these two engines. How long would it take to clean two? A. How long? Well, about an hour each.

Q. From five to seven o'clock would have cleaned those two engines, wouldn't it? A. Yes, sir..

Q. You didn't look at them until quarter past twelve the next morning, did you? A. Yes, sir.

Q. Now, you knew that these were the engines that the men were talking about as having caused this fire, didn't you? A. Yes, sir.

Q. Why didn't you look at them sooner? A. Well, they had been lying on the side track. I couldn't look at them then.

Q. And you don't know what was done to them, do you, meantime? A. No, sir.

Q. Or who handed them? A. (No answer.)

Q. What else happens to these screens after they are use for a long time beside getting holes in them? A. The only thing they do is burn through, that is all I know.

Q. Well, don't something else happen to them? Don't those holes get clogged up? A. Yes, they get clogged up, but the sparks all around the bottom. It is only about a foot up top, that is, the spark arrestings.

Q. Your other duty was to fill grease cups, was it? A. Fill grease cups, and examine front ends.

Q. The only thing you were to do with regard to these screens was to look to see whether it had a hole in it, was that all? A. Yes, sir.

Q. Had there ever been any claim before that day, or after that day that these two particular engines had caused any other fire that you know of? A. No, sir.

Q. You didn't know that just before this time that there had been talk about these two particular engines causing fire down in that vicinity, did you? A. No, sir.

Q. Did you hear that? A. Not before.

Q. Didn't you inspect for that purpose? A. No, sir.

Q. Didn't you hear that on several occasions these engines or one of them had caused a fire in that vicinity? And didn't you inspect to see whether they were all right? A. No, sir.

Q. Are you sure about that? I mean, are you sure you didn't hear that talk among the trainmen? A. Before the fire?

Q. Before this time of May second? A. No, sir.

Q. Or after that day?

By the Court: Q. Did you ever hear of any other fires caused by these engines?

By Mr. Dixon: Q. These two particular engines? A. No, sir.

Mr. Dixon: That is all.

Mr. Lyon: That is all.

DAVID OXENFORD, produced as a witness, on behalf of the defendant, being duly sworn on his oath, according to law, saith:

Direct-examination by Mr. Lyon:

Q. Mr. Oxenford, where do you live? A. Easton.

Q. How old are you? A. If I live until the first of February, I will be seventy.

Q. What is your business? A. Road foreman of engines.

Q. What road? A. Lehigh Valley.

Q. How long have you been engaged with the Lehigh Valley? A. Forty-one years.

Q. How long have you been road foreman of engines? A. This coming July will be twenty-two years.

Q. What position did you hold before that? A. Engineer, locomotive engineer.

Q. Running where? A. Running from Perth Amboy to Mauch Chunk, and vice versa.

Q. What are you duties now as road foreman of engines? A. Do you wish me to detail the duties of road foreman?

Q. With reference to the construction of engines? A. Yes, sir. Well, the duties of a road foreman is, he reports to the superintendent, gets his instructions from the superintendent. He confers with the master mechanic relative to the condition of the engine and its efficiencies.

Q. What do you know, Mr. Oxenford, about screens, a sample of which I hold in my hand, in connection with their use on engines? A. That is what we call a one-eighth mesh, or in other words four squares to the inch. To the best of my knowledge that is the standard screen—I can only speak for roads that I have seen, but I might say further than that, the Lackawanna, the New Jersey Central, the Pennsylvania, the Philadelphia and Reading, and the Erie to my own personal observation are using this screen. While I might furthermore say for your information gentlemen, this screen has been adopted by the Master Mechanics Association, I wouldn't say if it was five years or six years ago, held at Atlantic City. The Master Mechanics Association is represented by nearly all the railroads through the United States, which hold their convention once a year.

By the Court: Q. Adopted as what? A. This screen, the size mesh.

Q. I say, adopted as what, for what purpose? A. As spark arrestor.

By Mr. Lyon: Q. For what use? A. To pre-

vent any thing larger than that to go to the atmosphere. To prevent fire.

By the Court: Is that as small a mesh as can be used and still leave the engine effective? A. Well, yes, sir, it is from the fact they have been experimenting with the various screens, your Honor, for a number of years, as to how small they could use them. Some roads have gone down so far as to two-thirty-seconds, and they found that it didn't have sufficient draft on the fire to cause the engine to steam and they come up higher and higher and finally they come as to keep within bouds of safety between fire line, they come up to this mesh.

Q. That is a standard mesh now used generally, is it? A. Yes, sir.

Mr. Lyon: That is all. You may cross-examine.

CROSS-EXAMINATION by Mr. Dixon:

Q. What is the fire line, that you talk about? A. The fire alarm?

Q. Line, I thought you said? A. Fire line, I don't know as I said fire line. But we are all interested in the fire. In fact, railroads running through congested territory with much undergrowth and the like of that it takes but very little to cause a fire, we all know that, and the question arose as to how close they could go down and how high they would dare to stay in order to prevent fires, and this mesh that was adopted by the Master Mechanic's Association for that very purpose.

Mr. Dixon: All right; that is all.

Mr. Lyon: That is all.

Mr. Lyon: I desire to offer in evidence the record—while I have a certified copy I do not think the Judge will object on that ground—the record in the suit brought by Samuel Martin, on which recovery was had, for which the release in question was given. I desire to offer it in evidence only the release which has been marked for identification, D 1. I also offer this piece of screen in evidence.

Mr. Dixon: So far as the record in the other suit is concerned, I am willing that it shall go in as it is, and say that Martin started the suit, but not that there was a recovery had, because there was none.

The Court: It only shows what is in it up to its date.

Mr. Dixon: Counsel is putting on the record the fact that there was a recovery, namely, fifteen hundred dollars. There was no recovery had.

The Court: It cannot go further than the record itself speaks.

Mr. Dixon: He started such a suit. We are not putting in an actual record. He wanted to show that there was not only a suit started but a recovery had in it. I cannot agree to that.

Mr. Lyon: All I desire to offer is what the record shows.

The Court: Was that a Supreme Court Issue?

Mr. Lyon: Yes, sir.

The Court: Gentlemen, if that record is offered in evidence and it is admitted that

a complaint was filed and an answer, I suppose, or at least pleadings were filed that is as far as it got?

Mr. Lyon: That is all. And the notice of trial. Setting it down.

ing as to recovery.

Mr. Lyon: No.

The Court: Of course, that shows noth-

Mr. Dixon: So far as the release is concerned, I am—it can only go in for the purpose of showing that money was paid for the purpose set out there, and cannot be in any way a bar in this matter because of the decree in the Court of Chancery. Counsel has a copy of that decree and it can be used to show that the release cannot in any way bar—

The Court: What is the decree in the Court of Chancery?

Mr. Lyon: I did not offer it for that purpose, and I did not offer it for that purpose two years ago on the other trial, of this action. I am offering it now only for the purpose I offered it then.

The Court: And that is what?

Mr. Lyon: As evidence of the payment of fifteen hnudred dollars by reason of the former suit.

Mr. Dixon: It does not show it was paid by reason of the former suit, but by reason of a former fire.

The Court: You mean the same fire?

Mr. Dixon: Yes, but not by reason of any suit. I do not think the release shows that.

Release heretofore marked D 1 for identification, entered in evidence and marked Exhibit D 1.

Plaintiff's Rebuttal Testimony

SAMUEL MARTIN, re-called:

Direct-examination by Mr. Dixon:

Q. Captain, do you know these engines that you saw there that morning? A. I did know them; yes, sir.

Q. How do you know them? A. I knew them by seeing them every day.

Q. Did you ever see any other fire there? A. Yes, sir.

Q. Coming from these engines? A. Yes, sir.

Q. When? A. On April 30th, two days before my house burned, it come near burning Edward Hagerty's house, and we put the fire out, and we had a lot of help.

Q. From the same engines? A. Caught from the engine the same, in the woods, the same as this did.

Q. No. But from the same engines? A. Well, they had two engines.

By the Court: Q. Were they the same engines, the question is? A. Yes, sir; they were the same engines. I had the number of them. I was looking, and I don't see the number on this book. I have it home. I had the number of this engine.

By Mr. Dixon: Q. You knew these engines while they travelled that line frequently, is that the

fact? A. Yes, sir. And on the seventh they set another fire, and the section boss that was up there helped us to put the fire out with shovels, and it was a common thing for the engine to set a fire.

Mr. Dixon: All right; that is all.

CROSS-EXAMINATION by Mr. Lyon:

Q. Captain, how do you know they were the same two engines that were there on the day of your fire? A. I think when I get used to looking at an engine I will know it pretty near, and by the number also.

Q. Well, don't most engines look alike? A. Little variations on them always, naturally, same as in people.

Q. And all you know about those other fires was that after the engines had been working around there fires started, is that what you mean to say? A. She generally starts the fires when they go out, Judge, that is the idea.

Q. And that is all you know about it, is it, that fires sprung up in the woods after the engines had gone out? A. Why, we stood right there, there was four or five of us stood there and saw the fire come right up as soon as the engine went out.

Q. And that is all you know about it? A. Well, we helped put the fire out.

Q. Yes, but that is all you know about the starting of the fire? A. Yes. Because there was nobody on the railroad, only the people on the engine. They wouldn't set it on purpose.

Mr. Lyon: That is all.

Mr. Dixon: That is all.

The Court: Anything further?
Mr. Dixon: No, sir.
The Court: Both sides through?
Mr. Dixon: Yes.
Mr. Lyon : I desire to make a motion.

MOTION FOR DIRECTION OF VERDICT

My Lyon: I desire to move to direct a verdict in this case for the defendant on three grounds: The first two I have adverted to in my motion for a nonsuit.

First: That the suit has not been prosecuted within one year after the cause of action accrued.

Second: That the action brought, which is now being tried is for the same cause of action—

The Court: There is no plea, as I understand, of a former action pending.

Mr. Iyon: No, sir; there is no plea of a former action pending, but there is a plea of a former action in the case pursuant to which this fifteen hundred dollars was recovered.

The Court: Yes, but it is not a plea in abatement. It is a plea in bar.

Mr. Lyon: No, sir. My position is this: I take the position that the payment of this money to Martin, fifteen hundred dollars, pursuant to the former suit, has the same legal effect as if a judgment had been recovered and been paid, pursuant to the judgment, for the reason that the principle of law for which I contend is the prin-

ciple that will not allow splitting of actions. I do not have to enlarge on that principle.

The Court: Is this the splitting of action?

Mr. Lyon: Yes, sir.

The Court: Is is the splitting of actions, where the railroad company knows that at the time it is dealing with a party that there is an outstanding interest which is entitled to subrogation, and which, by reason of that subrogation, had a claim arising out of this fire against the same company?

Mr. Lyon: I think so.

The Court: Can it be said that there is a splitting of actions there as between the parties?

Mr. Lyon: I think so.

The Court: Is not the action partly in the plaintiff in that action, and partly in the plaintiff in this action.

Mr. Lyon: I do not take that view of it. Permit me to say that I start out from a different premise from which the counsel on the other side does. He says and contends that by the payment of the fifteen hundred dollars to Martin we have admitted our liability. Now, I do not agree with him on that point. Because I say we did not admit our liability by the payment of fifteen hundred dollars. The Courts always favor compromise of actions. It is a thing that the Court always looks upon with favor.

The Court: You are not dealing now with the present right of the defendant to make its defense. Your motion for a direction rests upon the idea that the plaintiff has no right of action.

Mr. Lyon: Yes. And for the reason that there is a splitting of actions, and that when the plaintiff sued the company once and recovered money, the defendant paid the money because it was sued and because it had to go into Court, and it took the ground that the Court always favors of settling, compromising a suit out of Court. We were willing to go to the extent of paying fifteen hundred dollars to this plaintiff, to Mr Martin, for various reasons, by was of compromising this suit, and there is not anything in the record and the Court cannot imply into the record anything which would bind the defendant to any liability simply because he was willing to compromise a suit and give Mr. Martin fifteen hundred dollars, rather than bring anything into Court. Therefore I say that having paid fifteen hundred dollars as the result of that suit, Samuel Martin now, to the use of the insurance company, or the insurance company in Samuel Martin's name, cannot now bring us into Court again.

The Court: Judge, what have you to say to this declaration of the Court of Errors: "Where an owner has settled with a tort feasor for less than its liability, in derogation of the rights of a subrogee, the

latter may bring an action in the name of the owner, without his consent, to establish its liability, and out of any recovery he made whole for the amount paid, if recovery so far extends."

Mr. Lyon: Yes, but that is a statement of the rights as between—

The Court: In this case Wells actually recovered a verdict against the Atlantic City Railroad, or rather he got a settlement, I think, just as here, wasn't it?

Mr. Dixon: They got a verdict and then compromised the verdict for something less.

The Court: They got a verdict for five thousand dollars, and took forty-five hundred dollars.

Mr. Lyon: Yes, but if your Honor please—

The Court: Then the railroad company paid in that case a sum less than the loss, and it was held that the insurance company had a right to bring an action, had a right not to get from Wells, but had a right to proceed against the tort feasor, itself.

Mr. Lyon: I do not think they did in the Well's case.

The Court: Let me examine this case a little more closely. I may have a wrong impression about it. The action was apparently to compel the owner to give up some of the proceeds.

Mr. Lyon: There is another Kelenberger case in the same volume.

The Court: This case seems to recognize a right of the insurance company to proceed. I do not yet though see, Judge Dixon, why another action is brought, why that first action was not marked for the use of the insurance company.

Mr. Dixon: We would have been very glad if he had gone on and obtained a judgment.

The Court: Why didn't you?

Mr. Dixon: Do you mean that Martin had a suit in his own name?

The Court: Yes, sir.

Mr. Dixon: We had nothing to do with that, sir.

The Court: I know, but why didn't you avoid the circuity of action, bringing another action?

Mr. Dixon: Insist that he press that matter?

The Court: Yes, you had a right to have that case marked to your use after he had gotten what he was entitled to out of it.

Mr. Dixon: In my innocence I thought the moment the insurance company paid him, as I learned they were going to do, that this case would be so clear that the Lehigh Valley Railroad Company would not hesitate a minute to give us our money. They admitted it by this release. So I just sued by it.

The Court: The language of this decision, while of course it is not in the case, its dictum shows it to an extent.

Mr. Lyon: The principle for which I contend is set forth in this language in the cases as cited in the Cyc.: "But one action will lie for" (reading).

And in the case of Fire Associations vs. Shellinberger, Vice-Chancellor Leaming uses this language: "This case runs right along parallel with the Well's case because it was tried below and in the Court of Errors at the same time, and as I remember it, in the same volume of Atlantic, right together. This is the language of the Vice-Chancellor in the Shellingberger case: "After an insurance company has paid the amount of his indeminty," (reading).

(Citing of authorities.)

Mr. Lyon: Well, I do not want to proceed any further upon that line, on that point. I desire to continue my motion for the direction of a verdict now upon the ground that there has been no negligence shown on the part of the railroad.

This action is brought under the railroad act page 4245 of the Compiled statutes, section fifty-seven. (Quoting statute). The important provision of this section is included in the words "Subject, nevertheless, to be rebutted by evidence of taking and using all practicable means to prevent fire." Now, the doctrine is well settled in this state, and has been for many many years, that not every fire communicated from an engine is actionable. The Court

has stated in the cases that no means has ever been discovered yet to absolutely prevent fire.

The Court: Judge, I am fairly familiar with this line of authorities.

Mr. Lyon: I have no doubt. That is the case of the West Jersey Railroad, vs., Abbott. I desire simply to refer to three cases.

The Court: What is this based on, what is the motion?

Mr. Lyon: The motion is that no negligence has been shown on the part of the railroad company sufficient to allow this case to go to the jury; or in other words, that the testimony—

The Court: I suppose what you are relying upon then is that the *prima facie* case presented by the fact of the fire is rebutted by the proofs offered, and eliminate a jury question?

Mr. Lyon: Yes, sir; that is the point. Now, in the case of West Jersey vs. Abbott, the Court says: (reading).

And Chief Justice Gunmere, in the case of Ballaster vs. Atlantic City Railroad, Forty-three Vroom, 334, say:s "A railroad company which uses upon its engine, a spark arrestor in good condition of a design in common use and approved by experience is not liable for damages resulting from fire caused by sparks escaping through such spark arrestor."

The Court: Provided that fire arrestor is in good condition.

Mr. Lyon: Yes, sir.

The Court: What was done with that cas? Was that sent back for retrial?

Mr. Lyon: No, sir. Perhaps your Honor has in mind the only other case I have in my mind, and that is the leading case now upon this subject. The case which has had extraordinary judicial care because I believe it went to the Supreme Court and the Court of Errors three or four times, in various of its phases, and was tried *nisi prisi,* I think three times. There in a written opinion of Chancellor Mahlon Pitney, forty-nine Vroom. This is the situation in the Goodman case. (Further argument.)

The Court: There would be three fires. Two at least. Now that comes pretty near getting to be a bad habit it seems to me.

Mr. Lyon: I do not think so. I do not thing the bruden is upon us.

The Court: Oh, yes.

Mr. Lyon: Not after we show our engines are in good condition.

The Court: No, but you must remember I am dealing with a question as to whether this is a jury question, not how I would decide it. But, if, when the whole testimony is in, there remains a fairly debatable question whether these screens were in the condition which the law requires them to be I must submit it to a jury. Now, it seems to me, I want to say very frankly, that where it is shown in the first instance where the fire arose from this, or these locomotives, certainly that a number of fires,

before and after this time occurred from the same source, that that is not in keeping with the theory that a screen can be in the condition which the law calls using all practicable means, and at least it is evidence to go to the jury as to whether or not it was.

(Further argument by Judge Lyon.)

The Court: Judge, what probative force do you think this payment has? Do you thing is not of some value in the case, that if the company were not liable it would not pay out fifteen hundred dollars of full loss?

Mr. Lyon: No, sir.

The Court: You do not think that is of any value in this case now that it is in?

Mr. Lyon: No, sir. I think that a compromise—

The Court: This is not a compromise. It is a full payment. It is a full payment of his loss and a recognition of the eleven hundred dollars that he got from the insurance company, as though that were outstanding, isn't it?

Mr. Lyon: No.

Mr. Dixon: The letters show that. Judge Lyon's own letter shows it.

Mr. Lyon: He claimed a good deal more than that.

The Court: I know, but you paid him a good deal less than you admitted. It is admitted in this case that the loss was twenty-six hundred dollars.

Mr. Lyon: Yes, that was the value of the property destroyed.

The Court: And all the plaintiff had was sixteen hundred dollars, by reason of the insurance he had already received. That also appears in the case so that is all you paid him. You did not pay him any less than he is claiming. How was that a compromise?

Mr. Lyon: That agreement—

The Court: You must recognize that you paid with full knowledge of what the law was. That still reserved to the insurance company the eleven hundred dollars.

Mr. Lyon: But that agreement as to loss was a part of the compromise.

The Court: I know, but you agreed that The loss was twenty-five hundred dollars.

Mr. Lyon: Yes, for the purpose of the settlement.

The Court: Assume it was for the purpose of a settlement. Out of that twenty-six hundred, you paid fifteen hundred. Now, you did not pay the whole claim, and you did not do it because the plaintiff had already received eleven hundred dollars from the insurance company, and theoretically the defendant would be liable to the insurance company for the other eleven hundred. Now, I think it is what the law would say, wouldn't it? So in that situation—

Mr. Lyon: Yes?

The Court: So in that situation has there been any compromise at all? But be that as it may, it is in the case and it is in

the case by agreement of the parties. Now, can I ignore its effect as an admission or quasi-admission?

Mr. Lyon: I do not think it is competent, but, of course, if your Honor rules that way.

The Court: There were no restrictions placed on it when is was put in evidence.

Mr. Lyon: The fact of the matter was, and it is certainly an inference from the testimony, it is an ir-rebuttable one—

The Court: I would like to ask this gentleman who is familiar with these screens a question. Won't you come back a moment?

DAVID OXENFORD, re-called:

By the Court: Q. Mr. Oxenford, are you very familiar with the operation of these screens in preventing fires? A. Yes, sir.

Q. Do they prevent fires ordinarily? A. Do they prevent fires?

Q. Ordinarily, yes, in the running of engines? A. Yes, sir. Oh, yes, sir.

Q. If fires repeatedly occur from an engine is it pretty good evidence that it either is not provided with a screen, or that it is out of order? A. It is good evidence that it is out of order.

The Court: That is all, sir. Now, gentlemen, proceed to the Jury.

Letter dated October 6th, 1913, entered in evidence and marked Exhibit P-1.

Exhibits offered in evidence

Letter dated October 16th, 1913, entered in evidence and marked Exhibit P-2.

Letter dated October 27th, 1913, entered in evidence and marked Exhibit P-3.

Letter dated October 28th, 1913 entered in evidence and marked Exhibit P-4.

Letter dated November 7th, 1913, entered in evidence and marked Exhibit P-5.

The Court: When was this action brought, within the year.

Mr. Dixon: Oh, yes, sir; it was brought shortly after this settlement. We brought it here in April following the fire.

Mr. Lyon: This action was brought within the year and was tried in April—the fire was in May of 1913, and the first trial here where there was a mistrial was in April, 1914.

The Court: That is where a juror was withdrawn?

Mr. Lyon: Yes. And then there was nothing done until the fall of the following year. Over a year elapsed when Judge Dixon filed a plea in the Court of Chancery.

Mr. Dixon: I filed it during that summer.

Mr. Lyon: It was over a year.

Mr. Dixon: No, it was not.

The Court: I only had reference to the effect of—

Mr. Dixon: I was negotiating with them for settlement.

The Court: That is all I want to know.

Mr. Lyon: I pray an exception to your Honor's refusal to grant my motion for a direction of verdict in favor of the defendant.

The Court: Note an exception.

Exception allowed—sealed accordingly.

Judge.

Mr. Lyons sums up for the defendant.
Mr. Dixon sums up the case for the plaintiff.

Charge

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY CIRCUIT

April Term 1916.

SAMUEL MARTIN, who sues to the use of Standard Fire Insurance Co., vs. THE LEHIGH VALLEY RAILROAD COMPANY.	Action at Law. No 13 in the List.

Court's Charge to the Jury, by HON. FRANK T. LLOYD, Circuit Court Judge, as follows:

Gentlemen of the Jury: This action is by Martin for the benefit of an insurance company. He was the owner of property lying near the railroad of the defendant company, and the property consisted of a house and some other property. Under the testimony and admissions in the case he effected an insurance upon his property to the extent of eleven hundred dollars. On the

second of May, 1913, just about three years ago, a fire started along the line of the defendant railroad company, in a woods and some brush, and during the course of the day extended to a point where it reached Martin's house and the house was finally destroyed by fire. Subsequently to that Martin brought an action, brought a suit against the railroad company on the ground that the railroad company had negligently caused the fire and the destruction of his house. After some negotiations between the parties, in which the railroad company was apprised of the existence of this insurance, the railroad company paid to Martin the sum of fifteen hundred dollars, and it is agreed in this case that the loss, by reason of the fire was twenty-six hundred dollars. I say the railroad company had by reason of the correspondence full knowledge of the existence of this insurance and also of the fact that the company had been subrogated to the rights of Martin to the extent of the amount of money that it had paid him. By subrogation in such a case it means that it would be subrogated that is, it would have conferred upon it the rights which Martin had, to the extent of its interest, to recover against the railroad company for any negligence that might have caused this destruction, to the detriment of the insurance company. From that you will see that a paper of subrogation, or a transfer of Martin's rights, to the extent of the insurance company's claim, had been made by Martin to the company. After this payment was made, the railroad company took a release from Martin, about which there was some

discussion as to its form. You will see it in the correspondence which goes out with you, in which this insurance, and the fact of the insurance company having paid Martin the one thousand and eighty dollars, was discussed between the parties. That action resulted in no further steps, so far as the action itself upon the record is concerned. It did not go to judgment, and for that reason the Court has held in this case, of which, of course, counsel would better appreciate than the jury, that that is not a bar to the action now pending. The action now pending is one by Martin to the use of the insurance company to recover the amount which the insurance company lost by reason of this fire, namely, one thousand and eighty dollars. And it rests upon the same theory upon which Martin's case must have rested in the first instance, namely, that this fire was communicated by the railroad company's engine, and that through negligence, that is to say, by reason of the failure of the company to do the things which the law exacted of it.

In order that you may understand exactly what the duty of the railroad company was, and what the status of these parties was after the fire, and upon proof of the fire I will read to you two sections of our laws known as the General Railroad Law of the State, beginning with the fifty-seventh section:

"When injury is done to property by fire communicated from an engine of any company or person in violation of the foregoing section, such company or person shall be liable in damages to the person injured, and in every action for an injury done to the property of any person by fire

communicated from an engine in violation of the preceding section of this act''—that I will read to you in a moment—''proof that the injury was communicated from an engine shall be *prima facie* evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using of all practicable means to prevent such communication of fire, as by said section required.''

The section referred to has the following provision respecting its requirements:

''Every company or person operating any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them in passing along or being upon such railroad, to the property, of whatever description, of any owner or occupant of any land adjacent or near to said railroad and shall provide such engine with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire.'' Then there is a provision which I need not read to you, in the same section.

It has been held in this state that when a railroad company supplies a fire arrestor, spark arrestor of an approved pattern in general use such as this one was proved to be it has gone as far as the law requires with respect to the thing itself, as to its pattern and therefore I say to you that the screen in this case was a proper screen, such as the law required the defendant to use. The real question in the case for your determination is whether proper inspection was made of it to see that it was kept in the condition which the law requires. Upon that subject you have

understood what I have read to you from the law as to what inference, in the first instance, is drawn from the fact of the fire. And second you have heard what I have read to you as to the right of the defendant company and the duty of the defendant company to show that it has used the practicable means. The practicable means, of course are first using a proper arrestor. That I say to you was used in this case. The second duty is to use reasonable diligence, reasonable care to see that that spark arrestor is kept in reasonably proper condition. Was that done in this case? The plaintiff says it was not. The defendant says it was.

The spark arrestor, according to the testimony of the inspector, was inspected on the night of May second and third about midnight in both of these engines, and he says they were in good order.

The plaintiff contends that this fire was not isolated, was not a fire that occurred once from either of these engines, but that other fires had occurred. And you heard the testimony of the gentleman called as an expert on these arrestors, who said, in substance, that if repeated fires occurred it would not be evidence that it was not a proper arrestor, but that it was out of order. It is for you to say whether the evidence in this case satisfies you that this spark arrestor was not in order at the time this fire took place, and was not in order by reason of the neglect of the defendant company. If it was in order, that is the end of the case, because there would be no negligence then upon which an action could be

predicated. If it was not in order, and that due to the negligence of the defendant company, then of course, it would be liable for the fire, because the fire is not in dispute, as I understand, as to its origin, nor is it in dispute as to the amount of damages, and in that event, if you find for the plaintiff, your verdict would be for the sum of one thousand and eighty-nine dollars.

Exhibit P-1

October 6, 1913.

MARTIN vs. L. V. R. R. Co.

Hon. Adrian Lyon,
Perth Amboy, N. J.
Dear Judge Lyon:

I have consulted Samuel Martin with reference to an offer of settlement of his suit against the Lehigh Valley Railroad Company. I have an inventory and appraisement of the personal property, made by James A. Edgar, and some one else whose name I do not know, in which the personal property is estimated at $639.45. I am advised by Mr. Edgar that Mr. Martin's attitude was extremely fair, and that in his view, the valuation of the personal property is low. The house was 32 1/2 feet by 24 1/2 feet, contained 9 rooms, hall, large pantry, and the frame was built of solid oak. There was a cellar under the whole house. The house was a very old

one, but about ten years ago Mr. Martin spent $1350 on it in permanent repairs.

Obviously any substantially built house, 24 1/2 feet by 32 feet in any kind of good repair at all, would be worth at least $3000. Mr. Martin says that if there is an amicable settlement, he is willing to accept the $639.45 for the personal property and $2500 for the house. As you know, they were totally destroyed. This would total $3139.-45. Mr. Martin had $1100 insurance, which was paid. Just what effect this would have upon the settlement, I am not sure, as Mr. Martin signed some kind of a subrogation agreement. I am taking this matter up with the Company today. I am inclined to believe, however, that the Insurance Company would have to institute a separate action against the Railroad Company if it desires compensation, and that, therefore, upon the basis of the foregoing figures, Captain Martin would accept from the Railroad Company $3139.45, less the $1100 Insurance received, or the sum of $2039.45.

Yours very truly,

RUSSELL E. WATSON.

REW/H.

Exhibit P-2

Adrian Lyon,
Counsellor-at-Law,
110 Smith St.,
Perth Amboy, N. J.

October 16, 1913.

Mr. Russell E. Watson,
New Brunswick, N. J.

My dear Russell:

I have had a conversation with some of the officers of the Lehigh Valley Railroad Company about the Martin case. We discussed the probable value of the house and furniture.

My notion about the furniture, from the first, was that it had been valued too high, and am inclined to think that it could all be replaced for probably half the amount that he put on it. I am willing, however, to concede its value up to $450.

I believe you told me that the insurance agent had valued the house at $2000.

These two items make a total of $2450.

Deducting the insurance of $1100 leaves $1350.

We will give you this sum in settlement of the case.

Yours truly,

ADRIAN LYON.

(Dictated.)

Exhibit P-3

Adrian Lyon,
Counsellor-at-Law,
110 Smith St.,
Perth Amboy, N. J.

October 27, 1913.

Mr. Russell E. Watson,
New Brunswick, N. J.
My dear Russell:

Enclosed I hand you a blank release, received this morning from the Lehigh Valley R. R. Co., in the Martin matter, to be signed by Mr. Martin.

Their letter stated that they have arranged for a voucher to your order as attorney for the amount agreed upon and that a check would reach me in the course of a few days.

Yours truly,

ADRIAN LYON.

Exhibit P-4

MARTIN vs. L. V. R. R. Co.

Oct. 28, 1913.

Hon. Adrian Lyon,
Counsellor-at-Law,
Dear Judge Lyon:

I am in receipt of your letter of the 27th inst., enclosing blank release to be signed by Martin. The release, in part, reads as follows:

Exhibit P-4

"I release and forever discharge the said Lehigh Valley Railroad Company and Lehigh Valley R. R. Co. of New Jersey and all persons and corporations which might be held liable of and from all liability for loss and damage sustained by me or which may hereafter result from all damage to property owned by me at or near Raritan Township, New Jersey, on or about the second day of May, 1913, by reason of fire having been conveyed to it from the property of the said Railroad Company. I am the sole owner of the said property and the only person entitled to receive compensation therefor."

The last sentence gives me particular trouble. As I explained to you in my first letter, with reference to this settlement, Martin received $1086 from an insurance company for which he signed an instrument of subrogation. I cannot undertake to say that Martin is the only person who is entitled to receive compensation, as the insurance company may have a right of action. I enclose herewith that subrogation receipt, the effect of which you may determine for yourself. I am willing that Captain Martin sould sign an unconditional and unqualified release, but I do not see how in view of this instrument, he can sign any release stating he is the only person entitled to receive compensation. I return to you herewith enclosed the release for correction in this respect.

Yours very truly,

RUSSELL E. WATSON.

REW/H

Exhibit P-5

Adrian Lyon,
Counsellor-atLaw,
110 Smith St.,
Perth Amboy, N. J.

November 7, 1913.

Mr. Russell E. Watson,
Counsellor-at-Law,
New Brunswick, N. J.

My dear Russell:

I have received from the Lehigh Valley Railroad Company, the enclosed release and a letter from them as follows: "I am returning here with the form of release in the above matter. In view of Mr. Watson's objections to the last clause of the same, I have eliminated that feature. Will you please return the release to Mr. Watson for execution."

If this release is satisfactory you will have it executed and return it to me and I will send you the warrant.

Yours truly,

ADRIAN LYON.

(Dictated.)

New Jersey Court of Errors and Appeals

SAMUEL MARTIN, who sues to the use of the STANDARD FIRE INSURANCE COMPANY,
Plaintiff-Appellee,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

Brief of Adrian Lyon, Counsel for Defendant-Appellant.

BRIEF.

This action is brought to recover damages for setting fire to a building by sparks from a locomotive.

The grounds of appeal are:

1. That another suit had been commenced and determined for the same cause of action.

2. That more than one year had elapsed since this cause of action was sued.

3. That no negligence was shown on the part of the defendant.

4. That the prima facie case of negligence presented by the plaintiff was met and rebutted by proofs offered by the defendant.

1.

Samuel Martin sued for the same cause of action, which suit was determined by payment to him of Fif-

teen Hundred Dollars ($1,500.00) (Page 24). Thereafter this suit was brought by Martin for the use of the insurance company for damages arising out of the same cause of action. It is respectfully submitted that this is a splitting of actions and that the second suit will not lie.

> "The insurance company which has paid only a part of the loss cannot maintain an action against the third party as this would result in the splitting up of the cause of action. * * * The wrong-doer is not bound to submit to more than one action for damages."
>
> 19 Cyc., p. 897.
>
> "But one action will lie for damages resulting for setting fires which cause injury."
>
> 23 Cyc., p. 447.

The case of Monmouth County vs. Hutchinson, 21 N. J. Eq., 107, is relied on by the plaintiff in support of this case. It is respectfully submitted that that case differs from the case at bar by reason of the fact that in that case there was a voluntary settlement by the railroad company without suit. In this case the railroad company was sued and settled with the plaintiff to avoid a judgment.

2.

Compiled Statutes, page 4246, paragraph 58, provides that actions of this nature "shall be commenced and sued within one year after the cause of action accrued and not after."

This suit was commenced and tried in April of 1914. There was a mistrial and nothing further was done in the case until August 17, 1915, when a bill was filed to reform the release set up by the defendant; except noticing the case for trial, accompanied by a statement that it would not be moved. It is respectfully submitted that this is not a prosecution of the action.

> "An action commenced, but not prosecuted

to judgment, is no bar to the statute of limitations."

Ivins vs. Schooley, 3 Harr., 269.

3 and 4.

It is respectfully submitted that no negligence has been shown on the part of the defendant, or, if a prima facie case has been made out by the plaintiff, it is rebutted by the proofs of the defendant. The statute is found in the Compiled Statutes, page 4245, section 57, and is as follows:

> "When injury is done to property by fire communicated from an engine of any company or person in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act, proof that the injury was communicated from an engine shall be prima facie evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required."

The defendant produced testimony that it used the standard screen; that it was properly inspected and found in good condition. There was no testimony to dispute this.

Plaintiff's whole case rests upon testimony that other fires occurred in this vicinity from these engines at about the same time.

The only testimony produced, however, is that another fire occurred on April 30th and another fire on May 7th. The fire in question occurred on May 2nd.

The testimony shows that near the tracks (not on the roadbed or property of defendant) there was underbrush and leaves and much inflammable material; that the weather was extremely dry. Plaintiff says (page

28), "It was such a hot day." And on page 30, "It was a terribly dry day."

The conditions, therefore, for which the defendant was not responsible, were peculiarly susceptible to the starting of fires from the ordinary sparks of a locomotive, which could not be prevented by a locomotive in good condition. Chief Justice Magie said in the case of West Jersey Railroad vs. Abbott, 31 Vr., page 150, at bottom of page 152:

> "But in that case a requirement that a railroad company should, in times of excessive drought, absolutely prevent all escape of fire from its engine or be liable for the consequence, would be, not a reasonable, but an unreasonable, rule of precaution, for it seems that no device has yet been invented that will absolutely and at all times control the escape of sparks capable of igniting inflammable matter. Such a rule, therefore, would compel the companies either to abandon their duty to the public in running their trains or be answerable for every fire communicated, no matter how cautious they had been in using the best practicable means to prevent its escape."

The case of Goodman vs. the Lehigh Valley Railroad, reported in 46 Vr., page 277; 49 Vr., page 317, and 53 Vr., at page 450, seems now to be the leading case on the subject of fires started by locomotives. In the first opinion the Supreme Court (Chief Justice Gummere) held as follows:

> "The liability of a railroad company for fire communicated from one of its engines is not absolute, but depends upon whether or not they have conformed to the statutory requirements with relation to the equipment of such engine with a proper device to arrest the escape of sparks, and the maintenance of that device in good order."

Citing cases.

In the second opinion in the Court of Errors and Appeals (Chancellor Pitney) the judgment in the second trial was reversed. It was on the ground, however, that there was testimony in the case of an eye witness who testified that he saw the engine throw sparks of such a size and that retained their vitality so far that they could not have passed through a screen in good order.

There is absolutely no such testimony in this case. The only testimony is that the engine puffed hard and that shortly after it drew out fire sprung up very near the tracks; and that another fire had occurred in a similar manner on April 30th, two days before, and on May 7th, five days afterward. It is respectfully submitted that even this does not show negligence on the part of the company and is not inconsistent with the maintenance of screens in good condition.

It will doubtless be argued that the testimony of David Oxenford, as shown at the bottom of page 95, made a sufficient case to go to the jury.

It is respectfully submitted that this is not so, and that the testimony there given is without any probative force whatever. It is a matter of common knowledge that the screens ordinarily prevent the escape of sparks large enough to start fires. There is no testimony in the case to warrant the question by the learned Judge as to the repeated occurrence of fires. It is true that there is testimony that two other fires occurred within a period of eight days, but they occurred under such circumstances and from contributing causes, for which the company was not responsible or liable, that would not warrant the inference that the screens were out of order.

Furthermore, it is very respectfully suggested that the manner of calling the witness and the leading questions propounded give the testimony no probative force whatever. The taking of the testimony had ended. The subject matter of the screens had been closed. There must have been doubt in his Honor's mind as to whether or not the testimony was sufficient. The wit-

ness was an old man, seventy years of age. He was hard of hearing, as shown by his answer. He was unexpectedly called back to the stand and was plainly embarrassed. His Honor propounded the leading questions, which were briefly answered in the very words of the question. It is respectfully insisted that the manner of giving the testimony in connection with the subject matter makes it of no probative force whatever.

It is respectfully submitted that the judgment of the Court below should be reversed.

ADRIAN LYON,

Counsel for Defendant-Appellant.

State Gazette Publishing Co., Printers, Trenton, N. J.

New Jersey Court of Errors and Appeals.

SAMUEL MARTIN, WHO SUES TO THE USE OF THE STANDARD FIRE INSURANCE COMPANY,
Respondent,
vs.
LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY,
Appellant.

Brief of Huston Dixon, Counsel for Respondent.

FACTS.

The house of Samuel Martin was burned down by fire from a locomotive of the Lehigh Valley Railroad Company, on May 2d, 1913.

He had insurance on it in the Standard Fire Insurance Company in the sum of $1,100.

This amount less one per cent. or $1,089, in accordance with the terms of the policy, was paid to Martin and a subrogation receipt taken. (See page 6 of the Statement of the Case.)

Martin brought suit against the railroad company for *all* the loss. No trial was had of this matter nor verdict rendered (page 23, line 22) for the reason that Martin

and the railroad company agreed through counsel that the total loss was $2,450, and deducting the insurance, the railroad company offered to settle Martin's loss over and above the insurance for $1,350. (See page 104.) By negotiation between counsel the $1,350 was raised to $1,500 and a release given for that sum. (Page 10.)

Upon the railroad company refusing to pay the balance to the insurance company, the insurance company brought suit in Martin's name, for the sum of $1,089.

The summons was dated December 30th, 1913, and action filed January 8th, 1914. (Page 1.) The trial was commenced in April, 1914. (Page 96, line 20.) At that trial the release was put into the case by the railroad company and held by the court to constitute a defense thereto.

A juror was thereupon withdrawn by the plaintiff and a mistrial had. Negotiation was had with the railroad company in endeavor to settle the matter but without result, and in August, 1915, a bill was filed in the Court of Chancery to reform the release and restrain its use as a defense in this matter. A decree was obtained so restraining the railroad company. (Page 21, line 10.)

The case in the Supreme Court was noticed for trial during this time but not moved.

Upon securing the decree of the Court of Chancery the case was moved and this trial had.

A verdict was rendered for the plaintiff for $1,089, and this is the matter which is now appealed.

The first ground of appeal is that the court denied the motion of the defendant for a nonsuit upon the grounds—

1. That another suit had been commenced and determined for the same cause of action, and

2. That more than one year had elapsed since this cause of action was sued.

I.

AS ALL OF THE ABOVE FACTS ARE ADMITTED THEY DISPOSE OF THE FIRST CONTENTION OF COUNSEL THAT ANOTHER SUIT HAD BEEN COMMENCED AND DETERMINED FOR THE SAME CAUSE OF ACTION.

Another suit had been commenced but no trial had or verdict rendered. (Statement of Counsel, page 23, line 22.) It was not determined by the payment of the $1,500 nor was that sum paid in compromise of that suit. The suit was for *all* the loss.

The $1,500 simply represented the loss over and above the insurance as agreed on. (See letter, page 104, and release, page 10.) It was the part of the agreed on total loss, namely, $2,450; afterward raised to $2,600, which went to Martin; the other part, namely, $1,100, going to the insurance company.

There was, therefore, no splitting of actions.

The procedure taken was the proper one. See *Monmouth County, &c.,* v. *Hutchinson,* 21 *N. J. Eq.* 107; also *Fire Association of Philadelphia* v. *Wells,* 94 *Atl.* 619.

This case now appealed was the only time that the case was tried upon its merits and a verdict had. (Page 21, line 27.)

Counsel misapplies the citation from 19 *Cyc.* 897.

The reference there is to cases where there are a number of insurance companies on the loss. They cannot each in turn sue the wrong doer. This is the splitting referred to, as an examination of the cases cited will show. See *Fire Association of Philadelphia* v. *Wells,* 94 *Atl.* 620. (Second point of opinion.)

He also misapplies the quotation from 23 *Cyc.* 447, as an examination of the cases cited under it will show.

The reference there is to cases where there are several distinct and separate pieces of property burned by the same fire and a judgment has been had for the damage to one of them. Another suit cannot be had for the

damage to the other piece of property. They should be joined in the same action.

The distinction sought to be drawn between the Monmouth County Insurance Company case and this case is a distinction without a difference.

But I submit—

II.

WHATEVER WAS DONE WAS THE ACT OF THE RAILROAD COMPANY ITSELF, AND THEY HAVE WAIVED ANY CLAIM OF SPLITTING OF ACTIONS.

Had they settled the first action in full, compromised it or permitted the matter to be tried and a verdict rendered, we would have been barred.

They did none of these things, but chose to go outside of the action commenced to pay to Martin only his loss over and above the insurance.

They knew at that time that the insurance company had a claim. (See pages 104, 106 and 107.)

They cannot now be heard to say that there was any splitting of actions. 23 *Cyc.* 438.

"The rule against splitting being for the protection of the debtor, he may waive its benefits by expressly or impliedly consenting to the institution of separate actions upon a single demand."

III.

THE ACTION FOR INJURY DONE TO THE PROPERTY BY FIRE COMMUNICATED BY AN ENGINE OF THE RAILROAD COMPANY WAS COMMENCED AND SUED WITHIN ONE YEAR AFTER THE CAUSE OF ACTION ACCRUED IN ACCORDANCE WITH THE STATUTE.

3 Comp. Stat., p. 4246, § 58.

As all of the facts above set forth are admitted, they dispose of the second contention of the appellant.

The fire was May 2d, 1913. The summons was dated December 30th, 1913. Action filed January 8th, 1914, and trial commenced April, 1914.

The case was actually commenced and sued within one year after the cause of action accrued, and the delay in obtaining a judgment was due entirely to the act of the railroad company in putting in the release, making it necessary to secure a decree of the Court of Chancery.

There is nothing in the word "sued" to indicate that the legislature meant that an action must not only be commenced but go to a final judgment within one year.

The case cited by counsel, namely, *Ivins* v. *Schooley*, 3 *Harr.* 269, does not apply to this case.

The point there being that an action commenced within six years and a non-suit had for failing to file a sufficient state of demand was not an acknowledgment by the defendant of the debt so as to take the case out of the statute.

"The statute of limitations is a defense that is not always received with indulgence." *Vunk* v. *Raritan River Railroad Co.*, 56 *L.* 395 (at page 400).

The second ground of appeal is that the court denied the motion of the defendant for a direction of a verdict for the defendant upon the grounds—

1. That another suit had been commenced and determined for the same cause of action.

2. That more than one year had elapsed since the cause of action was sued.

3. That no negligence was shown on the part of the defendant.

4. That the *prima facie* case of negligence presented by the plaintiff was met and rebutted by the proofs offered by the defendant.

I desire to point out that there is no attack on the verdict itself but only that the court denied the motion for the direction of a verdict.

The first two grounds for the motion above set forth have already been discussed.

The third ground is that no negligence was shown on the part of the defendant.

I submit—

I.

THE DEFENDANT WAS GUILTY OF NEGLIGENCE.

The fifty-sixth section of the Railroad act (3 *Comp. Stat., p.* 4245, § 56) provides that

"Every company * * * operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine * * * and shall provide such engine with a screen or cover in the smokestack so as to arrest and prevent as much as practicable the escape of fire."

Section 57 provides that "In every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act, proof that the injury was communicated from an engine shall be *prima facie* evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using of all practicable means to prevent such communication of fire."

As it is admitted that the building was burned by fire communicated from an engine of the railroad company, it was not necessary for the plaintiff to prove anything further unless this proof was rebutted by evidence of the taking and using all practicable means to prevent such communication of fire.

But the evidence of the plaintiff's witnesses showed that fire from an engine caused the house to burn and it was not denied.

The railroad company paid the $1,500 by reason of this very fire. It was in no sense the buying of its peace or a compromise. The actual form of the release itself which was prepared and presented by the railroad company shows this.

It provides (page 10) that in consideration of the sum of $1,500 "I release and forever discharge the said Lehigh Valley Railroad Company * * * from all liability for loss and damage sustained by me * * *

to property owned by me at or near Raritan township, N. J., on or about the second day of May, 1913, by reason of fire having been conveyed to it from the property of the said railroad company."

There is no clause in the release denying liability; on the contrary, it admits liability.

As to the fourth ground on which the motion to direct was rested, I submit—

II.

THE PRIMA FACIE CASE OF NEGLIGENCE PRESENTED BY THE PLAINTIFF WAS NOT MET AND REBUTTED BY THE PROOFS OFFERED BY THE DEFENDANT.

The evidence that they took and used all practicable means to prevent such communication of fire rested in the testimony of Oxenford, who testified that the standard screen in general use is a one-eighth mesh (page 79, line 19), although Schoonover testified that a three-sixteenth mesh is used (page 54, line 24), leaving us in some doubt as to which size was used by the Lehigh Valley Railroad Company.

I am unable to find any testimony in the case that the standard screen of either size was in the two particular engines causing this fire. Their numbers were 1,108 and 3,420. (See page 50.) If there were screens in these particular engines, it nowhere appears that the screens were the standard screen adopted for general use on most of the railroads.

The testimony was that engine 1,108 was "comparatively an old engine" (page 56, line 21) and "3,420 had been down about four years at Perth Amboy. I don't know how long before that." (Page 56, lines 26, 27.)

This was a spur track running to the factories and mills simply for carrying freight and not for the regular service of the railroad company. (Page 56, lines 38, 39, and page 57, lines 1, 2.)

Therefore, it may well be that engines such as these would not have in them the standard screen which they should have had.

As to the condition of the screens the case rests entirely on the testimony of Pikarski whose testimony was "involved" and "confused." (See comment of counsel, page 70, lines 13, 14.)

His job was to fill grease cups and examine engines. (Page 61, line 20.) It was three years since he made the inspection (page 61, line 19) that he claimed to have made. The record on which he relied to refresh his recollection was not made by him but by another man who signed for him, although he could write. (Page 63, lines 13, &c.)

It was not his regular time for inspecting these engines. (Page 66, line 9.) He looked them over simply because he had time. (Page 66, line 16.) He heard the train crew talking about the fire at about 5 o'clock in the evening of that day. (Page 67, line 22.) He admits that they said it was where 1,108 and 3,420 had been working (page 69, line 9), but he did not examine the engines until quarter past twelve the next morning. (Page 76, line 18.) He does not know what happened to them meantime. (Page 77, line 8.)

It does not appear what did happen to them during this time.

The screens wear out. (Page 57, line 8.) They become burned through so that there are large holes in them. (Page 75, line 16.)

"A high degree of care" must be used in inspecting the screens. *Goodman* v. *Lehigh Valley Railroad Co.*, 82 *L.* 455.

There is no evidence that it was used in this case.

It appears by the testimony of Martin in rebuttal that another fire had occurred from the same engines on April 30th, two days before the fire in question. (Page 83, line 24.) Also on the 7th day of May. (Page 84, line 1.)

Oxenford testified that where fires repeatedly occur from an engine it is good evidence that it is out of order. (Page 95, line 32.)

I do not agree with counsel that any advantage was taken by the court of Mr. Oxenford.

Fire may also escape from the ash pans. (Page 52, line 11, and page 58, line 20.)

Counsel does not state exactly the ground upon which the case of *Goodman* v. *Lehigh Valley Railroad Co.*, 78 *L.* 317, was reversed in this court. There was no testimony of an eye-witness in that case. Quite the contrary, for the court said "the fact that no witness saw sparks actually flying from the engine toward the barn is not of great significance in view of the testimony (if testimony were needed) that such sparks are not visible in the daytime." (78 *L.*, at bottom of page 320.)

Upon this review of the evidence there was a case about which reasonable men might honestly differ, and therefore, the court acted properly in denying the motion of the defendant for the direction of a verdict. *Goodman* v. *Lehigh Valley Railroad Co.*, 78 *L.* 317.

It is respectfully submitted that the judgment of the court below should be affirmed.

HUSTON DIXON,
Counsel for Respondent.

November, 1916.