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1871

TESTIMONY.

CAMDEN COUNTY CIRCUIT COURT.

10

ADELE GIARDINI, Admx., &c.,)
vs.) Action at Law.
PENNSYLVANIA RAILROAD)
COMPANY.)

20

December Term, 1918. 12-18-'18.

APPEARANCES:

For the plaintiff, ALBERT S. WOODRUFF, Esq.

For the defendant, GASKILL & GASKILL, Esqs. 30

Before LLOYD, J., and a jury.

THE CASE FOR THE PLAINTIFF.

(Mr. Woodruff opens the case for the plaintiff to the jury.)

(Mr. Gaskill opens the case for the defendant to the jury.)

10 Mr. Gaskill: Did you amend by substituting the director general of railroads?

Mr. Woodruff: No.

Mr. Gaskill: Are you willing to do that?

Mr. Woodruff: Yes, I will amend now.

Mr. Gaskill: I am willing to consent to that.

20 Mr. Woodruff: I offer a certified copy from the surrogate of Camden County showing that letters ad prosequendam were issued to Adele Giardini on the estate of William Giardini on July 24, 1918.

(Said letters are marked Exhibit P1, for the plaintiff.)

30 Mr. Woodruff: Now, gentlemen of the jury, I am going to read to you the deposition of Luigi Carpaini. The reason I have to read to you his deposition is because by agreement with Mr. Gaskill, we took his testimony while he was in camp at Camp Dix for fear he was going to go to France before the case came up. Instead of going to France, he died of the influenza at Camp Dix, so that under the law his testimony is read to you the same as if he were on the stand and testifying to you.

(The deposition in question was then read by Mr. Woodruff to the jury.)

The Court: Does it appear now—I didn't follow it closely—that this was a vestibuled train?

Mr. Woodruff: Yes, that door that closes the platform that goes ——

Mr. Gaskill: No, it does not appear that this was 10
a vestibuled train at all. There was a question asked the witness whether the door was open and the platform up or down, but whether there was a platform there to be let down does not appear, and if I may amplify my point, not knowing anything about this accident, I am absolutely unable to produce any crew; nobody knew anything about it.

Mr. Woodruff: I will read into the record the answers to the interrogatories. These, gentlemen 20
or the jury, are questions which under the law I asked the Railroad Company in advance of the trial and which they have answered. I had better read from the beginning I guess. "First interrogatory. Which of defendant's employees found the dismembered body of William Giardini in the tunnel near the 32nd and Market Streets station?" That question they have not answered. "What was the address of said employee?" They have not answered that. "Second Interrogatory. At what time in the 30
evening of said day was said body found? Answer: 9.30 P. M. Third Interrogatory. Where were the various parts of the body found, with respect to the tracks, with respect to the tunnel, and with respect to the passenger station? Answer: In the tunnel, 60 feet from south end. Parts of body on each side

of east rail, northbound track, 900 feet from passenger station at West Philadelphia. Fourth Interrogatory. What means of identification were found upon the body? Answer: Naturalization papers found in pocket of deceased. Fifth Interrogatory. What were the times of departure of trains from Eddystone station to the 32nd and Market Streets station, between the hours of six and nine P. M. on the evening of February 1, 1918? Answer: Scheduled
 10 to leave Eddystone 5.58 P. M., 6.02 P. M., 6.15 P. M., 7.01 P. M., 9.16 P. M. Sixth Interrogatory. What were the times of arrival of such trains at the 32nd and Market Streets station? Answer: Time arrived 32nd and Market Streets station 6.30 P. M., 6.36 P. M., 6.49 P. M., 8.10 P. M., 9.58 P. M.”

JOSEPH S. CONWELL, Esq., sworn.

20

By Mr. Woodruff:

Q. Mr. Conwell, you are a member of the bar?

A. Yes, sir.

Q. Of what State?

A. Pennsylvania.

Q. And where do you practice?

A. In Philadelphia.

30 Q. And you are an associate, aren't you, of George Wharton Pepper?

A. I am, yes, sir.

Q. For me, have you made an examination of the law in Pennsylvania with respect to the duty of a common carrier under the circumstances set forth in this deposition?

A. Yes, sir.

Q. Will you tell us what the duty of the carrier

is under such circumstances, as you have learned it from your examination of the authorities?

A. Yes.

Q. Pardon me, first, Mr. Conwell; you had the deposition of the witness that I read to the jury to examine, didn't you?

A. I had, yes, sir. Do you have any objection to my reading from a memo?

Q. Cannot you just state it in a word?

A. It is the duty of the carrier to exercise the strictest vigilance, not only in carrying the passenger, but in setting him down at a station, and it is also the duty of the carrier to announce the name of the station, and when the name of the station has been announced, if the train stops prior to arriving at the station, that is, short of the station, or if it goes on beyond the station, it is the duty of the carrier to warn the passengers not to alight, and if they fail to do so, then they are liable in damages for the consequences of their negligence. I think that sums it up as nearly as I can do so. 10

Q. What is the duty of the carrier with respect to safe-guarding its passengers when it has permitted its cars to be overcrowded?

A. If a passenger is permitted to remain on the platform of the car and he has paid for his passage, then the carrier owes him a greater degree of safety, or to put it in another way, having permitted him to occupy that position, it owes him a little more care. 20

30

The Court: What is the situation where no station has been announced and the train stops at a point in advance of the station?

Mr. Woodruff: Pardon me; would your Honor include in that question a through train? This train was a through train, its first stop being that station.

The Court: He may answer my question, though, as it stands first. It does not appear, does it, that there was any announcement of a stop at the station?

Mr. Woodruff: No.

The Court: Or the approach to a station?

Mr. Woodruff: No.

10

The Court: What is the situation, Mr. Conwell, under such circumstances?

The Witness: My recollection of the law there, your Honor, is, that if a passenger alights, thinking it is a station, whether the station was announced or not, the carrier would be liable for the negligence in not advising him that it was not a station.

20

By the Court:

Q. What is the duty of the carrier with respect to protecting a passenger against being jostled off of an open entrance-way?

A. There are cases which would seem to hold that the carrier is not liable for the rudeness or for the mere jostling off, if I may use that expression, of the passenger, and those cases have all been decided against the plaintiff, but each one of those cases—

30

Q. I was not speaking of individual acts of passengers; I am speaking of the jostling in view of the conception of a stopping point on the part of passengers; in other words, on the assumption that passengers understand that they have reached a stopping point, a station, if you please, and in that situation they jostle a person to the ground, what —

A. If the passenger is on the platform from choice rather than from necessity —

Q. Well, I am not speaking of that; I am speaking of the facts of this case as they appear; he goes as far in as he can and is still on the platform.

A. Then I think, sir, the carrier would be liable.

Q. Is there any rule there with respect to the opening and closing of doors that are susceptible of being closed?

A. No, sir; I found none.

Q. You mean that there is no decision on it? 10

A. I found none, no, sir. I can give your Honor cases which hold that which I have enunciated.

Q. Well, we have a case in our own State.

A. Yes, this case cites your case, I think.

Q. There is a decision in Pennsylvania?

A. The decision in Pennsylvania is *Engelhaupt vs. Erie R. R.*, 209 Pa. 182.

Q. Is there a decision in Pennsylvania on the point?

A. On this particular matter? 20

Q. No, on the point as to whether the carrier is obliged to close the doors on a vestibule train?

A. I don't believe there is, at least, I don't know that there is.

By Mr. Gaskill: Mr. Conwell, one question occurs to me as a result of the queries propounded by Judge Lloyd, and that is this: Does a passenger assume the risk in boarding a crowded train?

A. No, sir. 30

Q. No assumption of risk on his part in boarding a train which he knows is crowded and on which there is no safe place for him to ride?

A. No, sir; if the carrier permits him to remain there, then the carrier would be liable for the neglect to carry him safely.

Q. In other words, then, according to your notion of the Pennsylvania law, it was the duty of the railroad not to permit passengers to get on a crowded train where there would be no safe place for them?

A. If they could not house him or carry him safely, yes, sir.

10 CARL IPPOLITI, SWORN.

(Mr. Cocchirialey acting as interpreter.)

By Mr. Woodruff:

Q. Carl, where do you live?

A. 1023 Federal Street.

Q. What city?

A. Philadelphia.

20 Q. Where did you work in February of this year?

A. Eddystone.

Q. Did you know William Giardini of Camden?

A. Yes, sir.

Q. Did you visit over here in Camden?

A. Yes, sir.

Q. Did you visit Mr. Giardini here?

A. Where?

Q. In Camden.

A. Yes, sir, many times.

30 Q. Do you remember the evening of February 1st, pay-day?

A. Yes, sir.

Q. How did you get from your work at Eddystone to Philadelphia on that evening?

A. With the train.

Q. Where did you take that train?

A. Eddystone.

Q. Did you see William Giardini before you got on the train?

A. Yes, sir.

Q. Where did you see him?

A. Outside of the door of the factory when we get out.

Q. Is that where they were paying off?

A. After we get paid then we come out.

Q. Did he go to the station with you?

A. Yes, sir.

10

Q. Did you get on the same train?

A. Yes.

Q. What part of the train was it that you and Mr. Giardini got on?

A. Giardini went in ahead of me, in one car, and I went to the next car, but I could see him; he was on one side of the platform and I was on the other side of the platform.

Q. Were those cars in the middle of the train or at the end of the train?

20

A. He was going in the front of the train.

Q. How far did you get in that car, you yourself?

A. Why, I was on one side of the platform and he was on the other, but where the two cars come together, you know.

By the Court:

Q. You mean you were on the platform of one car and he was on the other?

30

A. That is right.

By Mr. Woodruff:

Q. Were you on the platform of the car ahead of him or was he on the platform of the car ahead of you?

A. I was on the platform behind him; he was ahead of me.

By the Court:

Q. Then he was at the rear and you were at the front of a car?

A. That is true, he was behind on the platform of the car, and I was ahead on the platform of the car where I was.

10 Q. You were more toward the front of the train?

A. Yes, I was ahead on the train.

By Mr. Woodruff:

Q. Now, were there many people in the car on which you were riding?

A. Yes, sir.

Q. How full was it?

20 A. It was pretty well filled up.

Q. Could you get on in the car?

A. There was too many people inside; that is the reason I was standing on the platform.

Q. Were there other people out on the platform beside you?

A. Yes, sir.

Q. Now, on the platform in front of you—pardon me, first, I will withdraw that. Which way were you standing and looking?

30 A. I was watching toward the front, and he was watching me also; we were facing one another.

Q. Where did Giardini stand?

A. Right on the platform near to the door.

Q. Were there other people on that platform?

A. Yes, sure.

Q. How full was it?

A. I couldn't tell you how many there were, but it was pretty well filled up.

Q. In the car on which Giardini was riding, were there very many people?

A. Oh, yes, it was pretty well filled.

Mr. Woodruff (To the interpreter): Mr. Cocchiale, doesn't he say, "filled," not "pretty well filled" but "filled"?

10

The Interpreter: It was pretty well filled, all the seats were occupied and there were others standing up.

By the Court:

Q. What kind of platform was this?

A. Platform of an old style train.

By Mr. Woodruff:

20

Q. On the platform that you were on, were there doors at the side by the steps?

A. The doors were there, but they were open.

By the Court:

Q. How about the other one, the one that he was on?

A. Giardini, you mean?

30

Q. Yes.

A. It was the same way.

Q. Do you mean that there were doors at the foot of the steps, and there was a flush platform that ran out to the door when the door was closed?

A. The door was open, but you could see steps; there was no platform all the way through.

Q. Well, what I am asking is whether or not there was a door and a platform there to close if they had wanted to?

A. Sure, yes, there was a door there that could be closed.

By Mr. Woodruff:

Q. And was there a little platform, too, against
10 the car that you could drop down over the steps?

A. Yes, sir.

Q. And were both of these cars so equipped with doors and platforms?

A. Yes, sir.

Q. Were your tickets taken up that day?

A. Yes, sir.

Q. Whereabouts on the journey were those tickets taken up?

A. Before we got to Darby.

Q. Were there any stops made after you left Eddy-
20 stone until you got into the city of Philadelphia?

A. That one stop, about a minute under the tunnel.

Q. Did you ride in that train every night?

A. Yes, sir.

Q. Did that train usually make any stops between the Eddystone station and 32nd and Market Street station, Philadelphia?

A. No, except West Philadelphia, that is the only
30 place.

Q. Well, that is the same station.

By the Court:

Q. How far was the station from the point that it stopped at this night?

A. I don't know, I couldn't say; I couldn't measure the distance.

Q. Well, about how far, do you know?

A. About six or seven hundred feet away.

By Mr. Woodruff:

Q. Now, when it stopped were the platforms that you and Giardini were on still in the tunnel?

A. Yes, sir.

10

Q. Now, what happened when the train stopped there?

A. Why, the people thought that the train was getting to the station, they all come together to the door. Then the train stopped for about a minute, and then it started off again, for the station, and then I didn't see Giardini any more.

Q. Now, what happened to you when these people started to crowd out?

A. These people that were going to get off at West Philadelphia, naturally they pushed me on the side to get off, but I was going to get off at Philadelphia.

20

Q. Now, what did you see of Giardini when they began to push out?

A. Yes, I did see him.

Q. What happened to him?

A. I don't know, then I didn't see him no more, I don't know.

Q. Well, what was the last thing you saw of Giardini?

30

A. The last time that I saw Giardini was right under the tunnel when the people began to push.

Q. Where was he at that minute?

A. Right at the platform where I seen him.

Q. How close to the steps?

A. I couldn't tell you exactly, because then the people began to push.

Q. Well, in which direction did they push him?

A. They were pushing where they were going to go up on the step.

Q. Now, how soon after you saw Giardini pushed by that crowd did the train start?

A. About a minute or two that the people began to push and the train started over again.

Q. Did you see Mr. Giardini that night after that?

A. No, I didn't see him any more because I live in Philadelphia and he was living here in Camden.

Q. Did the train go on then to the station?

A. Yes, sir.

Q. The people got off at the West Philadelphia station?

A. Yes, sir, sure.

Q. Do you remember what time it was that you were there, what time you left Eddystone?

A. About quarter to six.

Q. What time were you paid off, do you remember?

A. Around six o'clock.

Q. Did you have to get in line?

A. Yes, sir.

Q. Then after you got your pay you went over to the station, did you?

A. Yes, sir.

Q. And do you remember exactly, or don't you, as to the time the train went when you got there to the station?

A. No, I don't remember the exact time when the train started.

Q. Did you take the next train after you got to the station?

A. Yes, sir.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Culin, will you stand up a minute, please? Have you seen that man before?

A. Yes, sir.

Q. Did you tell that gentleman what you knew about this accident?

A. Yes, he come and asked me and I told him.

Q. Didn't you tell Mr. Culin that Giardini succeeded in getting into the car?

A. I don't know that, because on the Sunday I got so confused that he had an interpreter; I don't know if I understand him right or not.

Q. Well, you did see Giardini get into the car, didn't you?

A. Not inside the car, but he was safe on the platform.

Q. Didn't you say that you saw Giardini after he got into the car one time, but after that you didn't see him?

A. I didn't understand them right when they put the question to me.

Q. Well, didn't you see Giardini get into the car?

A. No, sir.

Q. You did not see Giardini fall off the train, did you?

A. No, sir.

Q. And you didn't see anybody push him off the train, did you?

A. No, sir, I only seen people caught together there.

Q. These were old fashioned cars, weren't they, on the train?

A. I don't know that, I couldn't tell you.

Q. The only door that there was there was the door from the car to the platform, wasn't it?

A. No, first there is a door to get in from the steps, then there is another door to go into the car.

Q. Were these doors to the steps closed at any time after you left Eddystone?

A. Yes, sometimes they do and sometimes they don't.

Q. No, but on this night, on this day?

10 A. Yes, I did see, they did close and they were opened again.

Q. When were they opened?

A. Well, opened them before they got to West Philadelphia station.

Q. How long before the train stopped?

A. About five or six minutes before.

Q. Who opened those doors at the bottom of the step?

20 A. That night I didn't see anybody opening or closing them.

Q. Weren't the doors when they got to Philadelphia at the foot of the steps just the same as they were when they left Eddystone?

A. Yes, they were open when we got to the station the same way they left Eddystone.

By the Court:

30 Q. You mean by that that they had not been closed all the way up, is that right?

A. That is right; they were not closed.

Q. What about other nights? Had you been in the habit of riding on this train?

A. Yes, every night.

Q. And Giardini, too?

A. Pretty near all the time we travel together.

Q. How about the doors, were they closed or open on other nights?

A. Sometimes they were closed, sometimes they were open.

At this point a recess was taken until Thursday morning, December 19, 1918, at ten o'clock A. M.

10

Camden, N. J., December 19, 1918.

Trial resumed at ten o'clock A. M. on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.

ADELE GIARDINI, SWORN.

(Through the interpreter.)

By Mr. Woodruff:

20

Q. Mrs. Giardini, you are the plaintiff in this case, are you?

A. Yes, sir.

Q. And you are the widow of whom?

A. Giardini.

Q. When were you married to Mr. Giardini?

A. The 3rd of August, 1910.

Q. How many children had you and Mr. Giardini before his death?

30

A. Six, one died in the old country and five here.

Q. How old are you?

A. April 11, 1901; now, you can figure it up.

The Court: You say you were born in April, 1901?

The Witness: I was born the 11 of April, 1891.

Q. How old was your husband at the time of his death?

Mr. Gaskill: I object to that unless she knows. I submit it is not the best proof.

The Court: I guess that is so.

Q. Do you know how old your husband was?

10 Mr. Gaskill: I object.

The Court: Well, if she knows from declarations that he made, I suppose it is competent. That is one of the things that I think declarations are admissible on, but she must know more than by observation, where it is an essential matter in the case, under that recent case in the Court of Errors on the disorderly house.

20 Mr. Gaskill: Yes, I know that family tradition is admissible with reference to births and marriages and such matters, but it seems to me that this is stretching the rule too far. Here is the plaintiff, the person directly interested in the result of the suit, and the age of the deceased is a vital and important factor, and it seems to me that there should be other proof than her declaration as to the age of the deceased, and I object to that.

30 The Court: I do not understand exactly that they are offering her declaration; that is to say, they are having her testify as to what his declarations have been as to his age. What is the pending question?

(Question repeated.)

Mr. Gaskill: That should be answered yes or no, then the source of her information, not to have her state ——

The Court: Yes, that is probably true; it ought to come in better form.

(Question repeated.)

A. Yes, sir.

10

Q. How do you know his age?

A. I had his passport.

Q. And did that passport show his age?

A. Yes.

Mr. Gaskill: I submit then, if the Court please, that as the age was stated in the passport, the passport itself should be produced.

The Court: She cannot give the contents if it is 20 objected to.

Q. Have you that passport now?

A. No, not here.

Q. Was that passport on your husband the day he went to work on February 1st?

A. No, sir.

Q. Do you know where it is now?

A. I think it is home.

Q. Had your husband ever spoken of his age or 30 his birthday?

(Objected to.)

The Court: She may answer that.

A. Yes, sir.

Q. How old did he say he was—on what day of the month was his birthday?

Mr. Gaskill: I object to that as incompetent and not the best evidence.

By the Court:

- 10 Q. How long had you known your husband?
 A. About six years before our marriage.
 Q. You were then about twenty years old, weren't you?
 A. I was not quite twenty.
 Q. How long had you known him before you were married?
 A. About three years before.
 Q. Was he a grown man when you first knew him or did he grow up afterwards?
 A. Oh, yes, he was a grown man.

20

The Court: The Court of Errors has very recently circumscribed very much the powers of the observing witness to give age—I won't say circumscribed; I should say they have declared the rule to be much narrower than many of us have previously conceived it to be. It has been quite a common practice in these cases to ask a person how old their husband or their wife was, and it has commonly been received in evidence, as based of course, upon such knowledge as they had, and usually elements of observation, but where the issue is directly the age of the party, and that is an ingredient that enters into the recovery, the Court of Errors has recently said that that is not competent. Now, the question that is asked as to her knowledge from statements that he made, of course, presents another question.

30

Q. What country were you and your husband born in?

Mr. Gaskill: One moment; there is a question pending and no decision, Mr. Woodruff.

Mr. Woodruff: I beg pardon.

The Court: Well, if you want to withdraw that question in its present form ——— 10

Mr. Woodruff: I will withdraw it at the present time.

Q. In what country were you and your husband born?

(Objected to.)

The Court: Does she know where her husband was born? 20

Q. Where were you born?

A. Monte Urano.

Q. That is in what country?

A. Italy.

Q. And did you live in that place in Italy until you came to this country?

A. Yes, sir.

Q. Did your husband also live in the same place when you first met him? 30

A. Yes, sir.

Q. Did you come to this country together?

A. Yes, sir.

Q. In what year?

A. 1912.

Q. Where had you been married?

A. In Monte Urano, Italy.

Q. Had your husband made any declaration as to his age at the time you were married?

(Objected to.)

The Court: She may answer that, but not the next question until I have passed on it.

10

A. Yes, sir.

Q. Were you with him at the time that he obtained his passport to come to this country?

A. Yes, sir.

Q. Did he make a declaration of his age at that time?

Mr. Gaskill: I object to that on the same ground.

20

The Court: Well, she may answer that; that as far as it goes does not —

A. Yes, sir.

Q. Was your husband in the first class to be registered in the recent draft?

Mr. Gaskill: I object to that as incompetent and not the best proof.

30

The Court: I think that is admissible on another ground, and that is that it shows what his availability was, and has bearing, possibly, upon his earning capacity. It may not be admissible for the purpose of this question of getting the age; I will determine that later.

Mr. Gaskill: On the ground which your Honor states that the question is admissible, I take no exception.

The Court: Well, I will restrict it for the time being.

(Question repeated.)

A. He was in the first draft; I don't remember exactly what class he was in. 10

Q. Were you with him when he made out his questionnaire?

A. Yes, we come to this room.

Q. And did he take oath to his age there?

A. Yes, sir.

Q. And did you hear him say how old he was at that time?

A. Yes, sir.

Q. Have you ever heard him make other declarations with regard to his age and his birthday? 20

A. Surely.

Mr. Woodruff: Now, if your Honor please, I am up to the point where I want to ask the direct question.

The Court: I will tell you what to do; suppose you suspend it until I have a chance to examine it a little. 30

Q. What business had your husband worked at in the old country?

A. At a ladies' shoemaker place.

Q. How many years did he follow that business?

A. Since he left his father.

Q. You mean by that since he was a boy grown up?

A. Always did that, since I knew him he always did have that kind of business.

Q. What business did he go into when he came to this country?

A. He was working at the Remington plant.

Q. Where did he work before that?

A. At the Victor Talking Machine.

10 Q. Do you know what kind of work he did at the Victor?

A. I don't know sure, but I think it was painting cases.

Q. Was he doing that just before he got work at the Remington?

A. Yes.

Q. How long did he work at the Victor?

A. I think about a year.

20 Q. What was his habit with regard to bringing home his wages?

A. He would always give his full wages to me.

Q. And who would pay the bills for the house?

A. I would pay it all.

Q. How much would he bring you home when he was working at the Victor?

Mr. Gaskill: I object to that as incompetent to prove the earning capacity of the deceased.

30 The Court: I think that is competent.

Mr. Gaskill: It is what he contributes to his family.

The Court: That is competent on other grounds, not necessarily on what he earned, but what benefit they derived, what they actually received.

A. He was getting \$18.00 a week, but he was working overtime, and he would bring home between \$25.00 and \$30.00 a week.

Q. When did he go to work at the Remington?

A. I don't remember exactly the day.

Q. Give it to us as nearly as you can fix it.

A. I think it was around November some time.

Mr. Gaskill: Of what year?

10

Q. Last year?

A. No.

Q. I will put the question in another way; how long had he been working there at the time of his death?

A. About seven or eight months.

Q. Did he continue to bring you home his pay envelope while he was working there?

A. Yes, sir.

Q. And how much did he bring you home at first when he first went there to work? 20

A. He bring to me about \$25.00.

Q. Now, did he bring you home more than that a little later?

A. Yes, he brought as much as \$35.00 to \$38.00 a week.

Q. When he began to bring you home that larger sum of money, did his envelope contain slips such as I have in my hand?

A. Yes, sir.

30

Q. I show you slips dated January 21, January 22, January 23, January 24, and January 28, in which the worker's check number is given as 7449, and I ask you what are those slips and where did you get them?

Mr. Gaskill: I object to them as incompetent and no proof of the earnings.

The Court: I do not think they are admissible.

Q. What would you do with this thirty-five to thirty-eight dollars a week that he would bring you home?

A. I was paying the rent and expenses for the
10 children and everything that was necessary for the house.

Q. Did you provide for your husband's expenses?

A. Yes, I was giving him a couple of dollars at a time.

Q. What were your husband's habits as to spending money?

A. He had no habit to go anywhere in the saloon or drink, but it was nothing but smoking cigarettes, and when he wanted a drink, he would bring it home.

20 Q. Was he a man that stayed at home with you in the evenings?

A. Yes, sir.

Q. How did he treat you and the children?

A. Very good.

Q. Did you ever have any trouble with him in that regard?

A. No, he was loving me very much with the children together.

Q. Did he lose any time from his work?

30 A. Yes, sometimes when I was sick or maybe some of the children.

Q. Would he lose any time unnecessarily, to loaf around?

A. No, sir.

Q. Did you and the children have any other means of living except what your husband earned?

A. We had nothing.

Q. How old is the oldest child?

A. He was just seven years old October 28th.

Q. What is that child's name?

A. Dolores.

Q. What is the next child?

A. Cecilia Giardini; she will be six years May 4th.

Q. And the next one?

A. Olga Giardini; she was three years August 28th.

Q. What is the name of the next child?

10

A. There is a couple now, one Josephine and the other Francescina.

Q. They are twins, are they?

A. Yes, they were just about a year old last September.

Q. These are your children, Mrs. Giardini, that you have just given us the names of, that are here in the court room?

A. Yes, sir.

Q. What was the first that you knew or when did you first know of your husband's death?

A. I knew about one o'clock at night the 1st of February.

Q. Had he gone to work at his usual hour that morning?

A. Yes, sir.

Q. When was his body brought home to you?

A. On a Saturday, February 2nd.

Q. How have you been able to live since your husband's death?

30

Mr. Gaskill: I object to that as incompetent and immaterial.

The Court: I do not think we are concerned with that.

Q. Are you able to go out to work?

A. I couldn't because I've got children; I can't go to work.

Q. Had you ever worked in any factory or any occupation?

A. Never, they never did send me to work.

Cross-examination.

10 By Mr. Gaskill:

Q. Out of your husband's earnings, he bought his clothes or you bought his clothes for him, and everything else that was necessary, didn't you?

A. Yes, he was taking something out of some wages to buy his clothes or whatever was necessary.

Q. Yes, he lived at home with you and the children?

A. Yes, sir.

20

By Mr. Woodruff:

Q. Did he buy himself expensive clothing?

A. No, he wasn't spending it for expensive clothes. He always did like to see his children dress well.

Q. Did you have any money left over to save from his wages?

A. Yes, sir.

30

The Court: Mr. Woodruff, I find in the case of Hubatka vs. Maierhofer practically the same question presented. That was whether a marriage had been effected between a party and another party to the suit, and the declarations of the one in the absence of the other were received by the Supreme

Court and thrown out in the Court of Errors. You might examine the case if you want to look at it. In that case it was a marriage, but the Court held strictly to the rule that the declarations to be admissible must be declarations of outside persons who are related by blood or consanguinity to the persons to be affected.

Mr. Gaskill: Mr. Woodruff, I would like to ask a question that I inadvertently omitted yesterday of the young man that was here. Is he here now? 10

Mr. Woodruff: Yes, he is here.

CARL IPPOLYTE, recalled for further cross-examination.

(Through the interpreter.)

20

By Mr. Gaskill:

Q. Are you still working at the Remington?

A. Yes, I do, but it is about two or three weeks that I am sick and I have been home from work.

Q. Have you been there this last week?

A. No, I didn't go yet.

Q. The plant is going to be closed up in January, isn't it?

30

(Objected to.)

Mr. Gaskill: I am offering this testimony on the question of the deceased's earning power.

The Court: I think it is competent if the method

of proving it is competent; I don't know about that. That is worse than asking somebody's age.

Q. Haven't you seen a notice posted at the plant that they were going to close the plant in January?

Mr. Woodruff: I object to that as not competent.

The Court: Oh, yes, I think that is competent.

10

Mr. Woodruff: The question itself, but perhaps the next question —

The Court: Well, I think the next question is competent. You see this is a question in re, a question in fact of what is taking place at the plant.

A. I didn't see any such notice.

20

ALEXANDER CAPPARUCCIA, SWORN.

By Mr. Woodruff:

Q. Mr. Capparuccia, are you a brother of Mrs. Giardini, who was just on the stand?

A. Yes.

Q. Where do you live?

30

A. 310 Benson Street, Camden, New Jersey.

Q. With whom do you live?

A. With my sister.

Q. And her children there too?

A. Yes, sir.

Q. Are you married?

A. No, sir.

Q. How long have you lived with your sister?

- A. Since her husband died.
- Q. You did not live with her prior to that time?
- A. No.
- Q. Did you go to her home frequently before that?
- A. Yes.
- Q. How often would you go to their home?
- A. About three or four time a week.
- Q. How near did you live to them—how far away did you live from their house?
- A. Oh, two blocks from their house; they lived on Benson and she lived on Stevens Street. 10
- Q. Who came to this country first, you or your sister?
- A. I did.
- Q. Were you living in Camden when they came here to Camden to live?
- A. No, living in Bristol.
- Q. When did you see them first? After they came to this country?
- A. I seen them in Bristol; she came up to my house. 20
- Q. When did they start to live in Camden, do you know?
- A. About two years ago.
- Q. And were you living in Camden at the time they started to live here?
- A. Yes, sir.
- Q. And from that time up until the time of Mr. Giardini's death, did you go to their home as frequently as you have said? 30
- A. Yes, sir.
- Q. How did he treat your sister and his children?
- A. Good.
- Q. Was he a man that went out at night?
- A. No, sir.
- Q. What would he do in that regard?
- A. He come home late, you know, then he can't

go out because he got to go to work in the morning, got to get up early.

Q. Was he a man who went to saloons?

A. No, sir.

Q. Did he have any expensive habits that you know of where he spent money more or less foolishly?

A. Smoking cigarettes, that is all.

Q. Smoking cigarettes?

A. Yes.

10 Mr. Gaskill: Well, that is not considered very wicked nowadays.

Q. Was he a man that wore expensive clothing—did he spend a lot of money on his clothes?

A. Not much.

Q. Do you know what he did with his pay envelope when he got it at the end of the week?

20 Mr. Gaskill: I object to that. Well, if he knows.

Q. Do you know?

A. Yes, gave it to my sister.

Mr. Gaskill: No, no.

Q. The first question is, do you know what he did with it?

A. Yes, I know.

30 Q. Have you seen him do something with it when he came home?

A. I never did see.

Q. All right, you weren't there. Who paid the bills around your sister's house, do you know?

A. She did.

Q. How were the children and wife kept with regard to their clothing, their food?

A. He went out with his wife and bought clothes for them.

Q. How long had you known Mr. Giardini?

A. I know him for ten years.

Q. You had known him in the old country?

A. Yes.

Q. Were you in the old country at the time he married your sister?

A. No, sir.

Q. You had already come over here? 10

A. Yes, sir.

Q. How old was he in appearance at the time when you first came to know him, ten years ago?

(Objected to as incompetent.)

Mr. Woodruff: I will put it the way your Honor put it.

Q. Was he a grown man at that time? 20

A. Yes, sir.

The Court: I suppose you can ask this witness and the wife too whether he was a young man or an old man, but I don't think you can have him undertake to give the age where the age is involved.

Mr. Woodruff: If your Honor please, the other witness has gone, because I sent her home. This case seems to me to hold that where they are related by marriage, then declarations are permissible, but where they are not related by either blood or marriage, then the declarations are not admissible. 30

The Court: Oh, no, the point in that case is that it was the declaration of the party whose act was involved, just as it is here the declaration of the party

whose age was involved; in that case it was whether the party had been married or not, in this case the question is as to the age.

Mr. Woodruff: But in this case these are declarations made to persons who are not in the family.

The Court: It doesn't make any difference who they were made to.

10 Mr. Woodruff: Yes, I think it does, if your Honor please, because the Court points out that the only possible way of proving age by declarations is because it is a family matter, a question of pedigree.

The Court: No, you will find it excludes the declaration of the principal himself.

20 Mr. Woodruff: To a person who was not related by blood or marriage.

The Court: It don't seem to me to turn on that question; it turns upon the question —

Mr. Woodruff: Yes, but if the Court please, the Supreme Court says that the declarations are not admissible on the ground stated. They were declarations of outside persons.

30 The Court: Very true; if you had the declaration here of the father, for instance, of this boy as to his age, it would be competent, but not the boy himself, because it is his own age that is involved, just as it was the girl's own marriage that was involved.

Mr. Gaskill: It is a self-serving declaration.

Mr. Woodruff: Now, if the Court please, I offer such proof both by Mrs. Giardini and by this witness so that I may have the benefit of an exception.

Q. Did you know the parents of Mrs. Giardini?

A. In the old country.

Q. You knew them?

A. Yes.

Q. Knew them in the old country?

A. Yes.

10

Q. Did his parents or any of his relatives ever come to this country?

A. His parents—what do you mean?

Q. Did his father or mother or any of his people come to this country to live?

A. No, sir.

Q. They all remained in Italy?

A. Yes, sir.

By the Court:

20

Q. How old are you?

A. Twenty-five.

Q. Did you know him in Italy?

A. Yes, sir.

Q. How long before you came to this country did you know him? How old were you when you first knew him?

A. Sixteen.

Q. Sixteen?

30

A. Yes, sir, I was fifteen.

Q. Well, was he a grown man, or not grown?

A. He was a pretty big fellow.

Q. What do you mean by that, that he was a man or a boy yet?

A. He was a man.

Q. He was a man?

A. Sure.

Q. When you were fifteen?

A. Yes, sir.

By Mr. Woodruff:

Q. Was he an old man or a young man?

A. A young man.

Q. Would you say from his appearance that he
10 had been a man very long?

A. What is that?

Q. Would you say from looking at him, his appearance, that he had been a man very many years?

A. I don't understand.

Q. You don't understand me?

A. No.

Q. Did he have the appearance of having been grown up, a man for very many years?

A. Yes.

20 Q. When you were fifteen he appeared to you to be a regular grown up man, did he?

A. He was a pretty big fellow.

Q. A great big fellow?

A. Yes.

Q. But how about as to his age?

Mr. Gaskill: One moment; now, what is your question?

30 Q. He was a big fellow physically—his body was big?

A. Yes.

Q. But I am asking you whether he was a young man or an old man?

A. He was a young man.

Q. And I am asking you whether from looking at him, his appearance, he appeared to have been a

grown up man, past the boyhood age for a very long time?

A. Well, he wasn't looking but about twenty years.

Mr. Gaskill: I object to that and ask that it be stricken out.

Q. How much older than a boy did he look?

The Court: Just a moment. Won't you both come here, please? 10

(A conference was then held between Court and counsel at side bar.)

No cross-examination.

TONY MECCA, SWORN.

20

By Mr. Woodruff:

Q. Mr. Mecca, what is your business?

A. Undertaker.

Q. And where is your place of business?

A. 819 So. 4th.

Q. Camden?

A. Camden.

30

The Court: What is this for, to prove the death and burial?

Mr. Woodruff: As to the home conditions and the fact that he received the body and its condition.

The Court: I suppose there is no dispute about

the fact of burial, the identity of the man and his death?

Mr. Gaskill: No, the corpus delicti is proven.

Q. Mr. Mecca, had you known Mr. Giardini before his death?

A. Yes, I have seen him.

Q. How many years had you known him?

10 A. Well, not very long, a little over a year.

Q. Did you visit his home?

A. No, I didn't visit his home but he used to visit my office and then buy a sandwich, or something like that, you know, come in there once in a while.

Q. What sort of a man was he—was he hard working or was he a man that hung around saloons and loafed?

A. No, I never seen him hang around saloons; he was a man that always took care of his business,
20 worked, never seen him any way at all, always seemed to be a pretty good fellow.

Q. Now, you went up to Philadelphia and got the body, didn't you?

A. Yes, I went up to Philadelphia morgue and got the body.

Q. What was the condition of the body—was it in whole or in part?

A. It was in quite a few parts.

Q. Where was the body severed?

30 Mr. Gaskill: It seems to me there can be but one purpose of this examination; I think it is improper. The man was killed.

The Court: It is clear —

Mr. Woodruff: All right, that is all.

No cross-examination.

Mr. Woodruff: If the Court please, with the consent of the other side I offer the Carlisle tables. Of course, in this case the age is not definite, but I desire to read into the record —

The Court: Have you got that passport?

Mr. Woodruff: She is bringing that.

The Court: I suppose that would be more satisfactory to all of us than almost anything you can get. 10

Mr. Woodruff: Well, perhaps; I will hold this and the passport until she comes with it and Mr. Gaskill can go on with his witnesses, if that is satisfactory to you.

Mr. Gaskill: Then I understand that you rest.

Mr. Woodruff: Except as to proof of the passport and the Carlisle tables. 20

Mr. Gaskill: If the Court please, I move that the plaintiff be non-suited. The fact of the death of the plaintiff does not of itself establish negligence. There has no proof, it seems to me, that establishes negligence on the part of the Railroad Company in the transportation of this man on the day in question, and the proof of the Pennsylvania law by Mr. Conwell yesterday was to the effect that the company was not liable where a person was jostled off of a platform of a crowded car, and it seems to me that when a person boards a train knowing and seeing 30

that he cannot enter the car, that he cannot ride in a safe position, that he is liable to the movement of a jostling crowd and the results of that movement, that he assumes the risk, and that the fact that he falls from the train or steps from the train or is pushed from the train does not impute negligence to the Railroad Company. The testimony is that the doors at the foot of the steps on this train were not closed from the time the train left one station to the
10 time that it reached the other station.

The Court: That is, on this trip.

Mr. Gaskill: Yes, on this trip; and therefore it seems to me that in the absence of any proof of negligence on the part of the Railroad Company there must be a failure to recover in this case.

The Court: Judge Gaskill, is not the rule that you
20 invoke applicable only to the jostling of a crowd in the normal operations of the train—in other words, if there is a jostling resulting from the practical invitation if you please, of the company to alight and no warning given of the danger of alighting, does not that present a different situation?

Mr. Gaskill: It seems to me that in connection with that, we must bear in mind the fact that there was no call of the station, and that Mr. Conwell testified that the rule or law in Pennsylvania was that
30 the train crew were obliged to call out the next station, the next stop, and there is no proof in this case that the station was called out.

Mr. Woodruff: Of course, with respect to that, if your Honor please, this was a through train, so that the passengers had only one thought in their mind,

and that was that the next stop was West Philadelphia station, which would be equivalent, it seems to me, to the actual calling out of the station. Now, in addition to that Mr. Conwell stated the rule to be that it was the duty of the carrier not only to exercise the strictest vigilance in receiving and conveying him, but to set him down safely at a station, and it seems to me they have woefully failed in that duty in this case. The man did not enter the car, which was so crowded that he could not get in, and knowing that to be the fact, we cannot presume that — 10

The Court: I suppose that the obligation of the company rests upon the duty to guard him against known dangers or dangers that by the exercise of the care required of carriers could be ascertained; that would be, I apprehend, our rule on the subject. Now, Mr. Conwell has said with respect to the situation in this case, the Court asked, "What is the situation where no station has been announced and the train stops at a point in advance of the station?" 20
Mr. Woodruff suggested that the question ought to include the fact that it is a through train, and the Court says he might answer the question then as it stands, "Or the approach to a station—what is the situation, Mr. Conwell, under such circumstances?
A. My recollection of the law there, your Honor, is, that if a passenger alights, thinking it is a station, whether a station is announced or not, the carrier would be liable for the negligence in not advising 30
him that it was not a station." Now, of course, it follows if they would be obliged to protect him against a misstep of his own, they would equally be obliged to protect him against a misstep of other passengers or the jostling of other passengers based upon such contention. What have you to say, Judge, as to the other points in the case, as to the doors? In Penn-

sylvania there seems to be no decision, but we have a decision in our own State on the subject.

Mr. Gaskill: I think that the trend of the decisions is, not only in our State, as I recall them, but the United States Court, that where a train is advertised as a vestibuled train, that then the failure to close the vestibuled doors and let the little trap down would be negligence on the part of the Railroad Company, but where it is not advertised as a vestibuled
10 train, the duty or the obligation to close the doors and let down the trap does not exist. That is my understanding of the law.

The Court: What would constitute advertising—you don't have to put it in a newspaper or on the schedule, do you?

Mr. Gaskill: No, not necessarily; there must be
20 some notice given that this is a vestibuled train.

The Court: Yes, but is not the fact that it is equipped so, and sometimes the doors are closed, isn't that some advertisement of the fact that it is supposed to be a closed train?

Mr. Gaskill: I would think not, particularly when your Honor bears in mind the fact, which is apparent in this case, and that is that this was practically
30 a workman's train, and while the word "through" has been used by counsel, that simply means that it is through from Essington or the Remington Arms Works this side of Wilmington or Chester, and does not make local stops at Darby and at various little suburban towns, that it simply goes from one station to the next station.

The Court: It has appeared in this case that this is a travelled train, and it was habitually travelled, and that it was provided with means of protecting the passengers against dangers that might arise from the movements of the train or from jostling of crowds or what not by doors. Now, don't you think under these circumstances there was an obligation to put the doors up? In other words, if they were going to carry passengers in such a way that they would be exposed to a danger that those would protect them against, that there was added reason then beyond that of the ordinary vestibuled train where people simply pass back and forth through? 10

Mr. Gaskill: It does not strike me that way.

The Court: Do either of you remember the recent case in our Court of Errors holding in regard to a vestibuled train? 20

Mr. Gaskill: No.

The Court: We happen to have one on the subject.

Mr. Gaskill: No, I do not. Can your Honor refer us to it?

The Court: I cannot at the moment, but it is within the last two years and it holds flatly that they are obliged to close the doors; that is my recollection of it. 30

Mr. Gaskill: In a vestibuled train?

The Court: In a vestibuled train.

Mr. Gaskill: Yes, I would take that to be the law, that where a train is advertised to be a vestibuled train, a train from New York to Chicago or from Philadelphia to New York City, a train of that character, I haven't any question in my mind but what if it is held out to the public as a vestibuled train, that the obligation would rest upon the employees of the company to see that the vestibule doors were closed; but where it is not so held out—and there is
10 no proof in this case that it was held out as a vestibuled train—it would seem to me in view of what is common knowledge on the part of all of us who travel now-a-days during this war period, when all sorts of cars are used, even the old wooden Pullman cars that have been brought in out of the dump and are used on the trains, the mere fact that there were vestibuled doors on the train at some time, perhaps all the time, does not seem to me in view of the known circumstances to affect this situation.

20

The Court: I happen to know as a matter of early experience that the law of Pennsylvania in regard to carriers is exceptionally stringent. The very early case of Lang vs. The Railroad held that they were bound to use the highest degree of care that was possible. Then that was slightly modified in another case of Sullivan vs. The Railroad bringing it on down until Spear vs. The Railroad was decided where they laid down the rule that they were obliged
30 to use a high degree of care, the highest practicable degree of care known in the business, so that they have consistently adhered to a stringent rule on the subject. Now, of course, I have no right to use my own judgment or my own view on the subject because it so happens that this is a jury question, anomalously so, but it is, and it would strongly lend value to Mr. Conwell's statement in my mind that a con-

dition described in the statement created an obligation.

Mr. Gaskill: I am prepared to show that Mr. Conwell was examined with reference to one question, and that is with reference to the responsibility of a Railroad Company stopping before it reaches a station without announcing the station. In that case there is no liability.

The Court: You may recollect that I asked him that very question with a view to getting just the situation.

10

Mr. Gaskill: Yes, and I think Mr. Conwell fell into error there, but I think in other respects his answers were, as I am advised, in accordance with the law of Pennsylvania.

The Court: That will raise a jury question.

20

Mr. Gaskill: I just simply mention it now; as a matter of course that has nothing to do with my motion for non-suit.

The Court: But don't you think that his testimony, apart from the other questions, necessarily takes it to the jury? His complete statement was that where a train stops in advance of a stopping place, and where a passenger was injured by reason of attempting to alight at that point, that it is negligence and the company would be liable. Now, if that be so, does it not follow almost as the night the day that if the company is responsible for his own voluntary act in attempting to alight it is responsible for the indirect effect when somebody else attempts to alight and forces him to the ground?

30

Mr. Gaskill: I was just going to state that latter part of the query that you are now propounding to me as being the fact in this case, that it was not an attempt on his part to alight; I think that your Honor and myself would be in entire agreement that if the train stopped we will say, at a station, and was too long, we will say, for the platform, and that the train crew announced the station and the people were getting out of the train, and if, we will say, 10 either the head car or the rear car was not at the platform and a person getting out fell into a ditch or over some obstacle there at that place when invited to get out supposedly at a safe place, I think there would be no question as to the liability of the Railroad Company under those circumstances. But that does not seem to me to be the case here.

The Court: The line of decisions of that kind gave rise to that rule of the road, you know, where 20 they called out for a number of years, "The next station stop will be so and so," to meet that very situation in case the train stopped in advance of the station and relieve the company of liability. Gentlemen, I am inclined to think that the case is one that must be determined by the jury and not by the Court. My present impression is that that results not only from the testimony of Mr. Conwell as a member of the Philadelphia bar, but it also results from the vestibuled construction of the train and 30 the non-use of the doors upon this occasion. It is true he said that in Pennsylvania there is no decision on that point, but we have our own familiar rule that the common law of this State is presumed to be the common law of another State until the contrary is shown and the common law of another State is presumed to be that of this State until the contrary is shown. Even further than that, the law

of the other State is presumed to be the same as our common law until the contrary is shown. That being so, if I am right in recollecting the decision that I speak of, our own State would carry it to the jury, and necessarily the law of Pennsylvania would. The motion will be denied and exception noted for the defendant.

Mr. Gaskill: It seems to me that I ought to also object to the admission of this passport as proving age on the ground that it must necessarily appear, I think, that this is a self-serving declaration. 10

The Court: I think that if it is objected to it falls under the same ban.

(Exception noted for the plaintiff.)

The Court: Mr. Woodruff, I do not see that there can be any misconception of this case whatever. If you care to press it, I will hear anything you have to say. 20

Mr. Woodruff (after argument): Well, we would like to prove the exact age, but as the Court says I don't think it is important, because we have it within a year or so anyhow. The Carlisle tables are admitted by consent of counsel for the defendant, and I desire to have on the record that these tables show that a man of 21 would have an expectancy of life of 40.75. 30

The Court: Now, Mr. Woodruff, is it wise to confuse the record? This man was undoubtedly at least 27 years of age, wasn't he? The woman was 27.

Mr. Woodruff: I was going to read 21 to 31.

The Court: Do we want that? Why can't you agree on an average, say 26, from that on?

Mr. Gaskill: Yes, why not just give the four years, 26, 27, 28, 29, 30?

10 Mr. Woodruff: That at the age of 26 a man would have a reasonable expectancy of 37.14 years; at 27 an expectancy of 36.41 years; at 28 an expectancy of 35.69 years; and at 29 an expectancy of 35 years; at 30 an expectancy of 34.34 years; and at 31 an expectancy of 33.68 years.

THE CASE FOR THE DEFENDANT.

20 CLARENCE P. CULIN, SWORN.

By Mr. Gaskill:

Q. Mr. Culin, are you a member of the bar of the State of Pennsylvania?

A. I am, sir.

Q. Of how many years standing?

A. Over 5 years, and also a member of the Philadelphia County bar.

30 Q. Were you in the same class with Mr. Conwell, the witness yesterday?

A. I was.

Q. And the same class with my associate, Mr. Diverdy?

A. I was, sir.

Q. And some other good men?

A. Yes, sir.

Q. What is your present employment, Mr. Culin?

A. At the time of this accident I was special agent in the legal department of the Pennsylvania Railroad Company; at the present time I am assistant to the chief claim agent.

Q. Has your work in connection with the legal department caused you to make any special study of the law of Pennsylvania with reference to the negligence of employees of railroad companies?

A. That is part of my business.

10

Q. And you have specialized in that, have you?

A. I have specialized in railroad law since I have been admitted.

Q. What is the law of the State of Pennsylvania, assuming that a train momentarily stops without any call being made by any of the employees of a station or a stopping?

A. In the absence of a call made by a train man or train employee the Railroad Company cannot be held responsible for negligence for a passenger alighting, the passenger in that case assuming the risk.

20

Q. What is the law of the State of Pennsylvania, to any failure on the part of employees of a railroad to close the trap doors on a train that is not advertised as a vestibuled train?

A. There is no decision in Pennsylvania on that point.

Q. Have you examined any of the United States authorities on that point?

30

A. I have, sir. In the Federal Court from the Sixth District, if I am not mistaken, in the case of Diggs vs. Louisville & Nashville Railroad Company, the Court there held under a state of facts to a great degree similar to the state of facts in the present case that there was no negligence on the part of the Railroad Company in failing to close trap doors on

a train which, while carrying vestibule equipment, was not advertised as a vestibuled train. May I be permitted to state the facts in that case?

Mr. Gaskill: If the Judge wants any further elucidation; if not, perhaps we had better let the answer rest with the question.

Cross-examination.

10 By Mr. Woodruff:

Q. When did you make your examination of authorities?

A. In this particular case—for this particular case?

Q. Yes.

A. Last night.

Q. You had heard Mr. Conwell testify?

A. Certainly.

20 Q. How long a time did you consume in that examination?

A. I arrived at my home last night, Mr. Woodruff, at a little after 12 o'clock.

Q. But how long had you been in a law library examining the authorities?

A. Possibly four hours.

Q. Four hours?

A. Yes.

Q. Where did you examine those authorities?

30 A. In our own library at the office.

Q. That is, your own private office?

A. That is our own private library.

Q. When you say "ours" who do you mean?

A. I mean the Railroad Company's library there in our department.

Q. Then you are still connected with the Railroad Company, are you?

A. Certainly.

Q. What is your capacity now?

A. Assistant to the chief claim agent.

Q. Then you are not on the legal staff of the Railroad Company?

A. Yes, the claim bureau was a part of the legal department.

Q. You don't go into court and try their cases? 10

A. I do.

Q. You do that in Pennsylvania?

A. I do.

Q. How frequently?

A. I am in direct charge at the present time of all of our compensation work, I mean by that, all of our employee injury cases. The trial of those cases takes me into court possibly at least once a week.

Q. These cases do not have anything to do with questions such as arise in this case, do they? 20

A. No.

Q. What was your first connection with this particular case?

A. I think back in April.

Mr. Gaskill: This is not cross-examination; I call attention to that.

The Court: It is getting pretty far off, but he may answer that one question, if you do not intend to go too far. 30

Q. From that time up until last night, have you made any examination of the authorities?

A. I am making an examination of authorities in various cases all the time, Mr. Woodruff.

Q. Have you made any with respect to this case?

A. Yes, early in the summer.

Q. Have you any memorandum with you of any cases that you examined last night?

A. No.

Q. Can you tell me the name of any case in Pennsylvania which holds that if a train makes a premature stop and a man is pushed off as this man was, according to the testimony of the witnesses, that the
10 company was not responsible?

A. No, the Engelhaupt case, which Mr. Conwell quoted on the stand yesterday, holds the Railroad Company to the highest degree of care, but the facts in that case clearly indicate that in line with the facts in this case the Railroad Company could not be held responsible.

Q. Now, Mr. Culin, are you not in error as to the rule that is laid down in that case?

A. No.

20 Q. In stating that it is the highest degree of care or a high degree of care?

A. No, not in connection with the facts in the Engelhaupt case and the facts in this case.

Q. The wording used by the Court in that case was that they must exercise the strictest vigilance, wasn't it?

A. That is true, and the highest degree of care.

Q. Did you find any case where a train which was not scheduled to stop between stations had made a
30 premature stop other than its destination and the passengers in overcrowded cars had pushed a man from a platform?

A. Passengers had pushed? None.

Q. You found no such case?

A. No.

Q. What is the duty in Pennsylvania in regard

to policing its cars to protect its passengers from overcrowding?

A. To use care and vigilance.

Q. What degree of care and what degree of vigilance?

A. The amount that the Engelhaupt case calls for.

Q. The strictest degree of care and vigilance?

A. Yes.

Q. To protect its passengers from overcrowding 10
in its cars?

A. No, I won't go that far, Mr. Woodruff.

By the Court:

Q. Has there been any modification of the very old rule of the cases that I referred to a few moments ago—are you familiar with them?

A. I am.

Q. You remember them; has there been any modification from the rule established? 20

A. Only to the extent that I have noted it here.

Q. You say there is no decision in Pennsylvania on the case of a carrier using a vestibuled car?

A. I know of none.

Q. On a crowded train. Mr. Conwell said also that there was no decision on it. As a member of the Pennsylvania bar—I don't know whether counsel wants this in or not ———

30

Mr. Gaskill: I am not objecting to any information that your Honor seeks to elucidate.

Q. What would be the situation with respect to a crowded car where passengers are permitted to get upon the platform, with the car full of people and the platform itself likewise, with respect to the ob-

ligation under the rule to use the highest degree of care to take the means at hand to prevent a man falling off of the car, assuming that it had gates or—I am speaking now,—you understand the situation—I am speaking now asking for your individual view in view of the fact that there seems to be no decision there, what would be your view of the obligation to use these gates or barriers where the car is so crowded and they have them at hand, wouldn't
10 you say that the highest degree of care would require them to use them?

A. It would require the highest degree of care that the trainmen could use under the particular circumstances of the case. In other words, where a car is crowded and the train makes a preliminary stop prior to reaching the station and he is crowded out by a fellow-passenger, and there is no overt act on the part of the train employees, then the passenger by reason of the fact that he has to ascertain extent
20 assumed the risk in riding on the platform —

Q. Now, let me put it this way: it is a very common thing for trains to stop, whether at stations or at some point other than a station.

A. Yes.

Q. Now, where the situation has been that a passenger may be misled into believing that they are at a stopping point and thereby crowding off an individual who is on the platform, would you or would you not say that the company ought to put up the
30 means at hand to protect that person from falling?

A. In the failure of announcing a train stop, and in view of the Federal decision in *Diggs vs. The Louisville & Nashville Railroad Company*, I would say that the carrier owed to any particular individual only the duty of not by any overt act causing him to be placed in a position of danger.

Q. Wouldn't you say that if the Railroad Company had gates to protect people from falling off, and they are liable to fall off, they ought to put up the gates?

A. Aren't we getting back to the point where it is a question as to whether the vestibules have to be used?

Q. No, I am not dealing with that; I am dealing with the practical situation before you of a car that is so equipped that you might have added one more degree of precaution and didn't do it. Now, doesn't this rule that you have already spoken of, to use the highest degree of care, necessarily imply the obligation to put up that gate and door? 10

A. No, sir.

Q. Why not—how can a man stop short of it?

A. Because there is no obligation on the part of the Railroad Company to use vestibule equipment.

Q. I am not talking about that.

A. Or put up a gate in the event that it is there. 20

Q. There might be no obligation to use a gate on a ferry boat, for instance, but if the gates were there you would say that they ought to use them, wouldn't you?

A. Certainly I would say they should use them in the event that they are there, but I do not see that the obligation is there to use them.

Q. Doesn't it follow that if they could use them they should do it because of some added safety that it would provide? 30

A. Merely as a matter of precaution, but not as an obligation.

Q. Then what becomes of the rule of severity as to using the highest degree of care? In other words, let me put it in another way: If you have got two steps that you can take, one would be a measurable precaution against injury and the other would be

an insurance against injury, do you think that it is the highest degree of care to use the measurable one and leave the insuring one go?

A. No.

Q. Well, now, isn't that this situation? They had the means here, didn't they, of closing these gates?

A. I don't know.

Q. Well, you know the testimony shows that there were doors and platforms on the car.

10 A. But I don't know that there were doors and platforms.

Q. I am not speaking about that; we will assume that for the purpose of the question. Assuming that there were, wouldn't you think the law would hold that they ought to close them?

A. That the highest degree of care would require the closing of the doors and platforms.

20

PUNDERSON RAINEY, SWORN.

By Mr. Gaskill:

Q. Mr. Rainey, what is your occupation?

A. I am supervisor of signals on the Pennsylvania Railroad, Philadelphia Terminal Division.

30 Q. Does that include the tunnel and approach to West Philadelphia station from the direction of the Remington Arms Works?

A. It does.

Q. Are there signals to warn or notify an engine-man operating a train as to where he shall stop in approaching West Philadelphia?

A. There are such signals, yes, sir.

Q. Is there any signal in the tunnel for the stoppage of a train?

A. Not for movement on the track which would normally be used for movement from Remington Arms.

Q. Where is the signal to stop a train, if it becomes necessary to stop a train before it enters the station at West Philadelphia?

A. Approximately 100 to 150 feet south of the south end of the tunnel.

Q. Under normal operations then, is there any signal for the stopping of a train in the tunnel? 10

A. No, sir.

Q. With respect to the length of the platform at West Philadelphia station, after the train emerges from the tunnel, would the cars of the train be within the tunnel at all?

A. Do I understand the question to be, if stopped by any signal?

Q. No, stopping at the station.

A. Our regular operation at that point provides that the train shall proceed far enough to bring the rear cars at the platform. 20

The Court: I understand the question is one of distance, whether or not a train stopping with a portion of it in front of the station, whether any part of it would be under the tunnel.

The Witness: It is our practice that the rear end of the train must be pulled clear of the tunnel quite some distance in order to reach the platform, primarily to clear the movement of trains in the other direction. 30

Q. Are there indications along on the platform or at the station which advise the engine-man controlling the engine where to stop with respect to the number of cars that he has in his train?

A. There are at some points; I believe there are there, although I cannot say definitely.

Q. The engine-man is always advised as to the number of cars that he has?

A. Yes, sir.

Q. Now, then, where are the trains approaching West Philadelphia station blocked with respect to the tunnel in the event of there being a train at the station or just beyond the station toward Broad
10 Street?

A. In the event of a train at the platform at West Philadelphia moving toward Broad Street from Ed-dystone direction, either standing at the platform or having moved away from the platform until the rear end of the train is entirely clear of the platform, any following movement would of necessity be stopped at the signal located as I have described about 100 feet south of the south end of the Market Street tunnel.

20 Q. And when you speak of the south end, you mean the end which the train enters coming from Remington?

A. Yes, it would be stopped with the engine at that point.

Q. Yes, the engine would be stopped there?

A. Yes.

Q. And the cars, none of them, would be within any tunnel?

A. No, sir.

30

Cross-examination.

By Mr. Woodruff:

Q. Do you know anything about the operation of this particular train on the evening that this man met his death?

A. I do not, no, sir.

Q. What is the distance from the platform to the mouth of the tunnel?

A. From the end of the platform nearest to the mouth of the tunnel?

Q. Yes.

A. Roughly, 300 feet.

Mr. Gaskill: There is one thing—I don't know whether it is within his knowledge or not; I will see. 10

Q. Is there a chart in the office there which indicates where trains are stopped or have been stopped? For example, to make a concrete case, is there a chart there in the office which shows where this train was stopped that night before it got to Philadelphia station?

A. The operator's train sheet should show by notation any irregular occurrence.

20

No cross-examination.

JOHN EMERY, SWORN.

By Mr. Gaskill:

Q. Mr. Emery, where do you live?

A. 659 No. 54th Street, Philadelphia.

30

Q. Have you any official position?

A. I am a P. R. R. policeman.

Q. Where are you stationed?

A. 3109 Powelton Avenue, that is police headquarters.

Q. Are you at the Remington Arms Works?

A. I was there yesterday.

Q. Please tell us if you have seen any publication with reference to the closing of the plant at Remington?

A. I did not, sir, didn't notice any.

Q. Have you seen any in the newspaper?

A. I saw it in the Philadelphia Bulletin.

Q. Yes, that is a publication. When is the plant to be closed?

10 (Objected to.)

Mr. Gaskill: The witness has testified that he has seen a publication in the paper to the effect that the Remington Arms Works are to be closed, and the question pending to which objection has been made is when the plant is to be closed according to that publication.

The Court: I have had experience with newspaper publications. The objection is sustained.

Mr. Gaskill: This is a notice.

The Court: Yes, but it is an advertisement in a paper, and it is one of those self-serving declarations that must be proven.

Q. Have you noticed any notice or bulletin posted down at the works?

A. No, sir.

30 Q. Your attention has not been directed to any?

A. No, sir.

Q. You are acquainted with the work that they are doing down there?

A. I understand they are making rifles.

Q. Rifles, army work?

A. Yes.

No cross-examination.

The Court: Gentlemen, I suppose the purpose of this is to show that the avenues of money-making and opportunity are no longer open in the same sense as they have been.

Mr. Gaskill: That is the idea, that the day of these enormous big wages is passing.

The Court: Well, I expect the jury knows that; they come from around this section. 10

DEFENDANT RESTS.

Mr. Gaskill: I want to make a motion, if the Court please, for binding instructions, that the jury should be directed to render a verdict on the whole case for the defendant company, on the ground of no proof or negligence, and the assumption of risk and the points more fully developed on the motion to non-suit, in connection with the additional testimony as to the law of Pennsylvania. 20

The Court: The motion will be denied.

(Exception noted for the defendant.)

At this point a recess was taken until 1.45 P. M.

CHARGE OF THE COURT.

LLOYD, J.

10 This case is anomalous in just one respect, that you are to be the ones to determine as a fact what the law of Pennsylvania is in certain respects. Usually the law that controls a jury must come from the Court, but the one exception is when the law of another State or another jurisdiction is invoked; then it becomes a question of fact like any other fact in a case, and therefore for a jury's determination.

The action that is here brought is one by the administrator of the deceased man Giardini, to recover the loss which the next of kin have sustained by his death, and is based upon the theory that the negligent operation of the train on which the deceased was riding by the defendant caused his death.

20 The evidence in the case discloses that on this night in question the deceased with another co-worker boarded the train at Eddystone, Pennsylvania, a train that ran through ordinarily to West Philadelphia station. The testimony on behalf of the plaintiff tends to show that the train was crowded within and that passengers were standing on the platform; that the deceased got upon one of the platforms and rode until he reached a tunnel in West Philadelphia when the train came to a stop for a moment, and as it did so, the passengers on the car commenced to get off or attempted to get off, and in doing so forced or pushed the deceased to the ground, in consequence of which he was killed. Fault or negligence is alleged in the Railroad Company in 30 two respects. One is that the company stopped its train without warning that it was not a station stop, and that the passengers on it were permitted to as-

sume without warning that they had reached a station and started to get off, and the contention is made that the company at that time should have guarded the deceased against being jostled or thrown off of the car by warning the passengers that it was not a station stop. Well, gentlemen, on that point the testimony is very meagre on the question of law, that there was any obligation resting upon the Railroad Company to exercise that sort of caution to protect its passengers. Mr. Conwell, a member of the Philadelphia bar, called as an expert upon the law of Pennsylvania, testified in answer to a question of the Court, or first in answer to questions generally that it was the duty of the carrier to exercise the strictest vigilance in carrying a passenger, and in setting him down at a station, and he went on and said, "And it is the duty of the carrier to announce the name of the station"—that is presumably the station at which it is setting the passenger down—
—"and when the name of the station has been announced, if the train stops prior to arriving at the station, that is, short of the station, or if it goes beyond the station,"—that is not the case here, nor is it true that the station was announced as being approached. He says that in that situation, however, it is the duty of the carrier to warn the passengers not to alight, and if they fail to do so, that is, to warn them, the carrier is liable in damages for the consequences of such negligence. The next question was, "What is the duty of the carrier with respect to safe-guarding its passengers when it has permitted its cars to become overcrowded? A. If the passenger is permitted to remain on the platform, on the car, and he has paid for his passage, then the carrier owes him a greater degree of safety, or, to put it in another way, having permitted him to occupy that position, it owes him a little more care."

Then the Court asks him this question: "What is the situation where no station has been announced and the train stops at a point in advance of the station?" The witness says, "My recollection of the law there is that if a passenger alights thinking it is a station, whether the station was announced or not, the carrier would be liable for the negligence in not advising him that it was not a station."

10 Now, gentlemen, having previously enunciated that where a station stop is announced, and the train stops in advance of the station, it was the duty of the carrier to warn passengers that they were not yet at the station, which I am sure will appeal to us all as a very reasonable proposition—probably we would all assent to it as the law—the witness then went further and stated, as I gather his meaning, that even though that were not the case and the train stopped short of the station, it was still the duty of the carrier to warn the passengers that they were not
20 at a station or a place presumably proper to alight. It is claimed, gentlemen, that this was a train without stops, that it ran from Eddystone to West Philadelphia. Now, I cannot withdraw that question of law from you, because the witness has stated it as I have already outlined, and it becomes a question for you, but that statement of the law is denied by the defendant. They have called another gentleman, Mr. Culin, of about the same years and standing at the bar, and his statement is that under such a situation, namely, if there has been no announcement of
30 the station, but the train stops in advance of the station, there is no duty resting upon the carrier under such circumstances to warn passengers on the train that they are not at a station. Speaking for myself as one trained in the law, that seems to me to be a more reasonable construction; and all I can do is to submit it to you with that admonition, not

intending, however, of course, to control you in your conclusions.

Well, gentlemen, there remains another situation. There was upon this train, according to some of the testimony, what is known as a vestibule door and platform from which I gather that it is some form of enclosure whereby when the passengers are in the car the doors are closed and the platform to the front and rear of the cars is made safe for people to move around in. Now, that was not done upon this occasion; if there was a door and platform upon this train, and upon the car upon which this deceased man was riding, the testimony shows that it was not closed. The testimony shows further that there was a crowded condition of the car, and that you may fairly infer that the deceased got as far as he could toward the interior of the car. In our own State, gentlemen, it has been held by our highest court that when a carrier provides a vestibuled car or train, meaning thereby a train with closed platforms, closed doors, exits, that it is a duty of the company as to those lawfully on the train and on the platform to keep them closed. The presumption of law would be that the law of Pennsylvania is the same as the law in our own State, it being a common law rule of conduct, but, gentlemen, expert testimony has been called upon that point, and both counsel agree that there has been no specific decision upon the question in the courts of Pennsylvania. Cases are cited, one side cites the decisions in the United States Courts, in which it is held that the obligation to use the vestibule doors does not exist unless the train is advertised as a through train, and Mr. Culin, for the defendant company at first testified quite emphatically that there was no obligation in his opinion in Pennsylvania to close the doors; but on further examination I think that statement was perhaps mark-

edly modified by the witness, and it may be that you will find that there was a duty under the circumstances of this case, of a crowded train and a platform with people necessarily kept on it, to use all the reasonable means at hand to protect those in that train and on the platform, and among those means at hand were the closing of this door and platform. Now, I think you would do no violence to the evidence if you came to such a conclusion.

10 Well, gentlemen, I have said to you that the case rests upon negligence, and negligence depends upon whether there has been a violation of duty. The first thing you want to determine is what was the duty, and that, you see, invokes your decision of the questions of law that I have submitted to you. If they are solved as the plaintiff contends for, or either of them is, you then determine whether there was negligence in the violation of that duty, in other words, whether, if the law exacted such care as the
20 witnesses described, it was performed. If it was, that absolves the defendant; if it was not, then pass to the question of damages unless the deceased himself was in some way negligent, and by such negligence brought about his own death.

Gentlemen, in this kind of case the damages differ very materially from most of the cases which come before you. Ordinarily damages cover not only pecuniary loss, that is, in case of injury, but they cover suffering. In this class of cases no suffering can be
30 allowed for, neither suffering of the deceased, which of course must have been exceedingly short-lived, nor the suffering of those who survived. The law has made no provision for it; indeed until modern times it made no provision for even the pecuniary loss suffered by the next of kin, but it has not yet and probably cannot make provision for the distress of mind of surviving persons by the taking off of a

near relative. The law does, however, gentlemen, direct a jury to award in a proper case, that is to say where there is liability, damages that shall make good the pecuniary loss, that means the money, the financial loss which the next of kin sustain. In this case it has been disclosed that the deceased left a wife and five children, most of them small children. You would probably be justified in assuming that they were in moderate circumstances, that they were dependent upon his wages for their living. Now, it is the money, the financial, the pecuniary loss which they sustain by the death which you are called upon to deal with, if your previous conclusion is that the defendant is liable. The law has laid down a formula by which a jury must be governed, and that formula or rule is that it is the present value of the loss, and when I say "present value" you will understand it as meaning the present money worth of the loss viewed in its entirety, taking into consideration all the circumstances of the parties, their circumstances in life, the earnings, and perhaps most important, or equally important with anything else, the fact that you are called upon to create a fund now which in great measure would be an anticipation of payments spread over a period of years in comparatively small amounts. The relation of a father to his children and to the wife is like all affairs in life, uncertain. The plaintiff has introduced into the case on the one question of the duration of life what is known as the Carlisle tables, tables of mortality, that is a long list of average lives of persons who have died, and then computing from them the expectation of life which at given ages is expected to accrue. The age of this deceased man is not definitely established; it seems that he was in the first draft, that he was in the classification which brought him between twenty-one and thirty-one years of age, but just exactly where

has not been clearly established. It appeared that he had these five children; it appeared that the wife was about twenty-seven years of age, so that you have got to ascertain first what his age was, and then on that you must ascertain what length of life he would have lived. When you have done that, you must compute all the factors of uncertainty which enter into the receipt of moneys by the next of kin from this time on, from the time of the death.

- 10 Now, it must be obvious that many, many contingencies are met with. In the first place, life is uncertain to us all. The existence of the relationship is one that may or may not continue. The dependence may not continue; the income may not continue; but you will determine as best you can what are the reasonable expectations under such circumstances, and when you have done all that you get back to the starting point of fixing the present value of the loss which the wife and these children sustain. It is
- 20 obvious that a portion of this deceased man's income must go for himself; they did not get that. It is obvious that sickness intervenes and loss of work or wages, many things may intervene. It developed in the case that just at the time he was killed he was earning exceptionally good returns for his services; you probably would conclude that that will not continue indefinitely, and yet you have no right to conclude that he would not get a fair wage return. Now, gentlemen, when you have done all that, you come
- 30 back to the important thing to which I called your attention a moment ago, and that is the anticipatory character of your verdict. You see, what this family would have received as its portion would be carried through the years of life-time or relationship of the man who is now deceased. It would come in small amounts weekly or monthly or semi-monthly as the case may be, and, as I say, spread over a long period

of time. What you are doing is capitalizing a fund which shall represent the present value of that loss, so that you see right away that you would be doing a great injustice if you were to calculate all that this man earned or would expect to earn, and turn over to his wife and children in the course of his life-time, and give it, because you would be giving both the thing itself, which would only come in years, and the immediate use of it, which would be long deferred as to much of it. Now, that important element must always be borne in mind in cases of this kind, and it is a most important factor in determining what is the present money worth of the loss. 10

Now, gentlemen, there is nothing else that I need give you to guide you, I think, to a conclusion. You will take up the questions as I have submitted them to you and in the order in which they have been given to you, and if either of the first two are resolved against the plaintiff, then that leaves the widow and children without redress. When I say the first two, 20 I mean either that the law of Pennsylvania imposes no duty, or if it did impose a duty, that there was no violation of it. If there was a duty imposed under the law of Pennsylvania which the defendant negligently violated and death ensued as a natural and direct consequence of such violation, then you pass to the question of the amount of money that should be awarded the administratrix, suing on behalf of the next of kin of the deceased man.

30

Mr. Gaskill: I wish to note an exception to the refusal of the Court to charge the first request of the defendant.

(Exception noted.)

DEFENDANT'S REQUEST REFUSED.

1. Where a passenger boards a crowded train and is unable to enter the cars, and rides on the platform, he assumes the risk, and if jostled by the crowd off the train, there can be no recovery.

10

STIPULATION.

CAMDEN COUNTY CIRCUIT COURT.

20	ADELE GIARDINI, Adminis- tratrix ad prosequendum of William Giardini, de- ceased, <i>Plaintiff,</i>	}	Action at Law. Stipulation.
	vs.		
	PENNSYLVANIA RAILROAD COMPANY, a corporation, <i>Defendant.</i>		

30 Whereas it appears that Luigi Carpani, whose testimony is necessary to the plaintiff in the trial of the issue in the above-stated cause, is now stationed at Camp Dix, New Jersey, and that it is probable that he will be sent to France before the matter will come on for a trial before a jury at the present term of court:

Now, therefore, it is on this eleventh day of September, A. D. nineteen hundred and eighteen, agreed and stipulated by and between Albert S. Woodruff, attorney for plaintiff, and Gaskill and Gaskill, attorneys for defendant, that the testimony of the said Luigi Carpani be taken orally before Edward I. Berry, Esquire, a Supreme Court Commissioner, at his office in the Court House, Camden, New Jersey, on Friday, the thirteenth day of September, A. D. nineteen hundred and eighteen, at the hour of three o'clock in the afternoon, and that his testimony so taken shall be used by plaintiff and defendant in this cause for all intents and purposes and with the same effect as if such testimony were being given by the said Luigi Carpani orally before the Court and a jury. And it is further agreed and stipulated by and between counsel that in the event that the said Luigi Carpani be in the State of New Jersey at the time of the trial of the issue in this cause, and permission can be obtained from the military authorities to have him present at the trial, then that he may be called to testify orally and that his testimony taken pursuant to this stipulation shall not be used, except if defendant desire upon cross-examination.

ALBERT S. WOODRUFF,
Attorney for Plaintiff.
GASKILL AND GASKILL,
Attorneys for Defendant.

DEPOSITIONS.

CAMDEN COUNTY CIRCUIT COURT.

10	ADELE GIARDINI, Adminis- tratrix, &c., of William Giardini, deceased, <i>Plaintiff,</i>	} Action at Law. Depositions.
	vs.	
	PENNSYLVANIA RAILROAD COMPANY, a corporation, <i>Defendant.</i>	

20 Depositions taken by consent of counsel in the above-entitled matter this thirteenth day of September, A. D. nineteen hundred and eighteen, at three o'clock P. M., before Edward I. Berry, Supreme Court Commissioner, at his office in the Court House, Camden, New Jersey. Present, A. S. Woodruff, Esq., for the plaintiff, and Joseph H. Gaskill, Esq., for the defendant.

30 By agreement of counsel, the depositions are taken stenographically, and the signature of the witness waived.

LUIGI CARPANI, SWORN.

By Mr. Woodruff:

Q. You are now in the military service of the United States, aren't you?

A. Yes, sir.

Q. Where are you stationed—what camp are you in?

A. Camp Dix.

Q. Where did you live on February 1, 1918? 10

A. I lived 310 Benson Street, Camden, New Jersey.

Q. And where did you work at that time?

A. Remington Arms Company, at Eddystone.

Q. Did you know William Giardini?

A. Yes, sir, I used to know him around Camden, and he used to work on a similar plant what I used to work.

Q. Did you work together in the plant?

A. No, sir. 20

Q. Did you visit in his home—did you know him very well?

A. I didn't go in his home.

Q. How often did you see him around Camden?

A. Well, about, sometimes three or four times a week.

Q. Now, were you working at Eddystone on February 1, 1918?

A. Yes, sir.

Q. What day of the week was that, do you re- 30
member?

A. Friday. What day of the week?

Q. Yes.

A. That day, you mean, about that case?

Q. Yes, I mean on February 1st, what day of the week was it?

A. Friday.

Q. And how did you get up to Philadelphia from your work that evening?

A. Train.

Q. Where did you take the train, what station?

A. Eddystone station.

Q. And where were you going from Eddystone station?

A. Philadelphia.

10 Q. Did you get a ticket?

A. Yes, sir.

Q. And where was your ticket taken up on the train? Don't you understand me?

A. You mean, where did I get the ticket—the place where I buy that ticket?

Q. No, where did the conductor take your ticket?

A. Oh—why, near Darby.

Q. Did the train make any stops after leaving Eddystone?

20 A. No, sir.

Q. Where was the first place that it stopped?

A. The first place was supposed to be at West Philadelphia station, but he stopped in the tunnel before he gets there at the station.

Q. What car were you riding in of the train?

A. About middle of the train.

Q. And what part of the car were you in yourself—what part of the car were you in?

A. On the front inside the door.

30 Q. Was the door of the car open?

A. Yes, sir.

Q. Were you standing up or sitting down?

A. Standing up.

Q. Why were you standing up?

A. Because we didn't have no place to sit down; the car was full up with men, one on top of the other, didn't have no place to sit down—see?

Q. How far inside of the door were you?

A. About between here and that door.

Q. About how far is that?

Mr. Gaskill: Indicating a distance of ten or twelve feet.

A. On the first seat, I was on the first seat inside the door; I was right in front of the first seat.

Q. Did you see Giardini on that car?

10

A. Yes.

Q. Where was he?

A. He was standing right on the platform, on top of the first step.

Q. On the front platform of that car?

A. On the front platform of the car where I was.

Q. And when you say the first step, do you mean the top step or the bottom step?

A. Here is the platform; here he was, standing out there; then comes the steps (indicating).

20

Q. Well, was he on the platform or on the step?

A. On the platform.

Q. And how close to the step?

A. He was pretty near to the step.

Q. Were there other people out on the platform?

A. Yes, sir, full up.

Q. What happened when the train stopped in the tunnel?

A. Why, every man pushed over; I think they thought they were getting at the station.

30

Mr. Gaskill: I take an exception to that and ask that it be stricken out.

Q. What did they do?

A. Well, they all of them pushed right over; they

pushed over me, too, but I held myself there at the door, at the front door, so I stand there.

Q. Why did you stop at the dōōr?

A. Why, I stopped at the door because—Why I stop at the door?

Q. Yes, why did you stop at the door—why didn't you go out?

A. I wanted to take my time, because I didn't want them to push me over.

10 Q. Now, did you see Giardini when they pushed you out on the platform?

A. If I see Giardini, you mean?

Q. At the same time, when they pushed you out on the front platform, did you see Giardini?

A. Yes.

Q. What happened to him?

A. Well, they pushed Giardini right over, right over the step.

Q. Did you see where he went?

20 A. I seen him when they pushed him right over the step; that is all I seen him.

Q. And after he went down out of sight beyond the people on the platform, did you see him any more?

A. When?

Q. After he went out of sight, back of the people on the platform, did you see him any more?

A. You mean when they pushed him right over the step, you mean?

30 Q. Yes, did you see him any more after that?

A. I didn't see him any more because the train started up again at the same time.

Q. Were there any people on the platform of the car ahead of you?

A. Yes, sir.

Q. What was the condition there?

A. The same as that, the same as the one I was

in myself; a similar condition to the car I was in myself.

Q. Did the people crowd out of that car when the train stopped in the tunnel?

A. What car, the next car?

Q. The car ahead of you?

A. Yes, sir.

Q. Was the door closed on either of the cars at the bottom of the steps?

A. Open.

10

Q. It was open?

A. Yes, sir.

Q. Did you notice whether the little platform which drops down to shut the steps was closed or open?

A. Open.

Q. Did you notice that that door was open before?

A. Yes, sir.

Q. When did you first notice it?

20

A. When I was standing up over there, before I got there, I seen that door all the time open.

Q. Was the door open when your ticket was taken up?

A. Yes, sir.

Q. And was the platform open then too?

A. Yes, sir.

Q. Was it closed at that time or after that?

A. No, sir.

Q. Now, when you stopped in the tunnel, was there any conductor or brakeman on the car that you were on in the front?

30

A. No, sir.

Q. On the other car ahead of you, on the back of it?

A. No, sir.

Q. Was there any conductor on either the plat-

form or the steps—was there a conductor on either the platforms or the steps?

A. What do you mean, on the car where I was?

Q. Yes, or the one ahead of you, either one?

A. No, sir.

Q. Was there any other official of the railroad,—any man that worked for the railroad there?

A. No, sir.

Q. Was any signal given when the train started up again, after it had stopped in the tunnel?

10 A. No, sir.

Cross-examination.

By Mr. Gaskill:

Q. What time did you leave Eddystone?

A. About quarter after eight or half-past eight, something like that.

Q. Quarter after eight or half-past eight?

20 A. Something like that; I can't remember right what time it was.

Q. Is the station right there at the works?

A. It is about ten minutes far away from the place where I work to the station.

Q. Now, then, do you know what time the train left the station?

A. I can't tell you right; I don't know the right time, but I think it is about quarter after eight or half-past eight.

30 Q. How long had you been at the station before the train came along?

A. I was standing there for about half an hour.

Q. Half an hour?

A. Yes, sir.

Q. This was the first train that stopped there, was it?

A. No, some of the other trains stopped there before that.

Q. Why didn't you take one of those trains?

A. Because that night it was pay-day on the place where I worked.

Q. You don't mean that you waited at the station a half hour?

A. Yes, I waited on the station about half an hour, yes.

Q. You did?

10

A. Yes.

Q. You got to the station and waited there half an hour before the train went?

A. Yes, sir.

Q. And this was the first train that came along after you got at the station that stopped at West Philadelphia?

A. Yes, sir, the first train.

Q. Where did you say you lived?

A. 310 Benson Street.

20

Q. How long have you been up at Camp?

A. In the Camp?

Q. How long have you been to Camp, Camp Dix?

A. Since the 25th of July.

Q. And how long had you lived at 310 Benson Street before you went to Camp?

A. I lived there about a year.

Q. Did you live there during Giardini's life-time?

A. Yes, sir.

Q. Are you any relation of Giardini's?

30

A. No, sir.

Q. Or of his wife's?

A. No, sir.

Q. Do you pay board—did you pay board?

A. Yes, sir.

Q. How much board did you pay?

A. Twenty-five dollars a month.

Q. Twenty-five dollars a month?

A. Yes.

Q. Who else was on the train that you know?

A. Nobody.

Q. At your end of the car that you were in, you didn't know anybody but Giardini?

A. But Giardini.

Q. You didn't see any one else there that you knew?

A. No, sir.

10 Q. How long had you been working at Eddystone?

A. Why, the first time I was employed there was 5-29-1916. I had a lay-off once and I went there to work again.

Q. And how long had Giardini been working there?

A. Well, I can't tell you that very good, but I think about anyhow three or four months; something like that.

Q. Was he working there before you went there to work?

20 A. Before I went there to work?

Q. Yes.

A. No, sir.

Q. Did he come there to work after you got there?

A. After me.

Q. After you?

A. Yes, sir.

Q. How much wages were you getting?

A. Why, thirty-five cents an hour.

Q. How many hours?

30 A. Ten hours a day.

Q. Was Giardini doing the same kind of work you were doing?

A. No, sir.

Q. He was not earning as much, was he?

A. Was he?

Q. He wasn't getting as much as you—you got more than he did?

A. I don't know how much he got.

Q. You don't know?

A. No.

Q. What kind of ticket were you using?

A. Why, a ten trip ticket.

Q. A ten trip ticket?

A. Yes, sir.

Q. How many of the trips had been used? 10

A. On my ticket?

Q. Yes.

A. I can't remember.

Q. That night?

A. I can't remember.

Q. What kind of ticket was Giardini using?

A. I guess a monthly ticket, but I don't know; I am not sure.

Q. Did you see him give his ticket up to the conductor? 20

A. Yes, sir.

Q. Where was he when the conductor took up his ticket?

A. Right on the platform.

Q. Outside of the car?

A. Outside of the car, on the platform.

Q. He had been there on the platform outside of the car all the way from Eddystone up, had he?

A. Yes, sir.

Q. It was dark, at night, wasn't it? 30

A. Yes, sir.

Q. When you got up there at the tunnel?

A. Yes, sir.

By Mr. Woodruff:

Q. Could the men on the platform get in the car to ride? Could the men out on the platform get in the car, to ride in the car?

A. I can't understand you.

Q. The men that were standing out on the platform, coming up from Eddystone —

A. Yes.

10 Q. Could they get in the car?

Mr. Gaskill: Well, that is only a matter of opinion, I suppose, Mr. Woodruff.

Mr. Woodruff: Well, I guess so, unless we get him to amplify the conditions existing.

Q. How crowded was the car in which you were riding—were all the seats taken?

20 A. Yes, all taken; some of them sitting down on top of the others.

Q. How about in the aisle?

A. It was all full up, you know; can't get through the car.

Q. Was it filled up all the way to the front door?

A. All the way through the car.

ORDER OF SUBSTITUTION.

CAMDEN COUNTY CIRCUIT COURT.

ADELE GIARDINI, Adminis-
tratrix ad prosequendum
of William Giardini, de-
ceased,

vs.

Plaintiff,

PENNSYLVANIA R A I L R O A D
COMPANY, a corporation,
Defendant.

Action at Law. 10
Order of Substitution

This matter being opened to the court by Albert S. Woodruff, attorney for plaintiff, and it appearing that by General Order No. 50 of the United States Railroad Administration, it is directed that William G. McAdoo, director general of railroads, be substituted as party defendant in all suits against the railroads under his direction where such suits have arisen since December 31st, 1917, and it further appearing that the cause of action in the above stated cause arose February 31st, 1918: 20

It is therefore, on this 15th day of November, A. D. nineteen hundred and eighteen, ordered that William G. McAdoo, director general of railroads, be and he is hereby substituted as party defendant in the place and stead of the Pennsylvania Railroad Company, and the Pennsylvania Railroad Company is hereby dismissed as such party defendant. 30

We consent to the entry of the above order,

Attorneys of Defendant.

JUDGMENT RECORD.

CAMDEN COUNTY CIRCUIT COURT.

10	ADELE GIARDINI, Adminis- tratrix ad prosequendum of William Giardini, de- ceased, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	} Action at Law. Judgment on Verdict
	vs.	
	WILLIAM G. McADOO, Direc- tor General of Railroads, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	

20 Witness, Frank T. Lloyd, Judge.
 Albert S. Woodruff, Attorney.
 F. F. Patterson, Jr., Clerk.

Judgment entered on the nineteenth day of De-
 cember, A. D. nineteen hundred and eighteen.

Damages	\$10,000.00
30 Costs	61.61
	\$10,061.61

Plaintiff, Adele Giardini, of 310 Benson Street,
 Camden, New Jersey, administratrix ad prosequen-
 dum of William Giardini, deceased, says that:

1. On February 1, 1918, the defendant, a corporation, operated a steam railroad from Chester, Pennsylvania, to Philadelphia, Pennsylvania, and at the latter place maintained a tunnel for its tracks and the passage of its trains underneath the city streets, and a station with platforms where passengers were received and discharged at Thirty-second and Market Streets.

2. On the evening of February 1, 1918, William Giardini, plaintiff's intestate, who was employed at Eddystone, Pennsylvania, boarded a train of said company at that place and became a passenger to be carried to said station at Thirty-second and Market Streets, Philadelphia. Said train was a through train scheduled by defendant to make no stops between Eddystone and said station. When said train prematurely stopped in said tunnel William Giardini, through the sole negligence of defendant, its servants and agents, was run over by said train when it again started, crushed, killed and his body dismembered.

3. The negligence of which the defendant was guilty and of which the plaintiff complains consisted in the fact that the vestibule door and platform of the car on which William Gairdini was a passenger were permitted to be and remain open, said car was permitted to be overcrowded by passengers, and no agent or servant of the company was at or upon said platform to protect said William Giardini from being pushed from the platform by such overcrowding; no warning was given by defendant, its servants or agents, that said stop was not for the purpose of having its passengers alight, and said train was again started without warning being given or care being

taken as to passengers who might alight by mistake or been forced from said train by such overcrowding.

4. Said William Giardini left him surviving as his next of kin and heirs at law a widow, Adele Giardini, the plaintiff, and five minor children, Dolores, Cecelia, Olga, Francesca and Giuseppe Giardini, each of whom have suffered pecuniary loss through his death.

10

5. Letters of administration ad prosequendum of William Giardini, deceased, were granted to plaintiff by the surrogate of the County of Camden, State of New Jersey, on July 24, 1918.

Plaintiff therefore claims of the defendant the sum of \$30,000 damages as aforesaid, and brings this her suit.

20 The defendant, Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, with offices in the City of Camden and elsewhere answering says that:

1. It admits the matters stated in the first paragraph of the complaint.

2. It denies the matters stated in the second paragraph of the complaint, and alleges that plaintiff's
30 intestate was a trespasser.

3. It denies the matters stated in the third paragraph of the complaint.

4. It has no knowledge of the matters stated in the fourth paragraph of the complaint and leaves the plaintiff to her proof as she may be advised.

5. It has no knowledge of the matters stated in the fifth paragraph of the complaint and leaves the plaintiff to her proof as she may be advised.

First Ground of Defense: There was no negligence on the part of the defendant, its servants, agents or employees in the premises.

Second Ground of Defense: There was contributory negligence on the part of the plaintiff's intes- 10
tate.

Whereas it appears that Luigi Carpani, whose testimony is necessary to the plaintiff in the trial of the issue in the above-stated cause, is now stationed at Camp Dix, New Jersey, and that it is probable that he will be sent to France before the matter will come on for a trial before a jury at the present term of court:

Now, therefore, it is on this eleventh day of Sep- 20
tember, A. D. nineteen hundred and eighteen, agreed and stipulated by and between Albert S. Woodruff, attorney for plaintiff, and Gaskill and Gaskill, attorneys for defendant, that the testimony of the said Luigi Carpani be taken orally before Edward I. Berry, Esquire, a Supreme Court Commissioner, at his office in the Court House, Camden, New Jersey, on Friday, the thirteenth day of September, A. D. nineteen hundred and eighteen, at the hour of three o'clock in the afternoon, and that his testimony so 30
taken shall be used by plaintiff and defendant in this cause for all intents and purposes and with the same effect as if such testimony were being given by the said Luigi Carpani orally before the Court and a jury. And it is further agreed and stipulated by and between counsel that in the event that the said Luigi Carpani be in the State of New Jersey

at the time of the trial of the issue in this cause, and permission can be obtained from the military authorities to have him present at the trial, then that he may be called to testify orally and that his testimony taken pursuant to this stipulation shall not be used, except if defendant desire upon cross-examination.

This matter being opened to the Court by Albert
10 S. Woodruff, attorney for plaintiff, and it appearing that by General Order No. 50 of the United States Railroad Administration, it is directed that William G. McAdoo, director general of railroads, be substituted as party defendant in all suits against the railroads under his direction where such suits have arisen since December 31st, 1917, and it further appearing that the cause of action in the above-stated cause arose February 31st, 1918:

It is therefore, on this 15th day of November,
20 A. D. nineteen hundred and eighteen, ordered that William G. McAdoo, director general of railroads, be and he is hereby substituted as party defendant in the place and stead of the Pennsylvania Railroad Company, and the Pennsylvania Railroad Company is hereby dismissed as such party defendant.

We consent to the entry of the above order.

GASKILL & GASKILL,
Attorneys of Defendant.

30

Please Take Notice that the following interrogatories are propounded and are required to be answered, under oath, by the defendant, its servants or agents, within ten days from the date of the service hereof upon you.

First Interrogatory. Which of defendant's employees found the dismembered body of William Giardini in the tunnel near the Thirty-second and Market Streets station, Philadelphia, Pennsylvania, on the evening of February 1st, 1918? What is the address of said employee?

Second Interrogatory. At what time in the evening of said day was said body found?

Third Interrogatory. Where were the various parts of the body found, with respect to the tracks, with respect to the tunnel, and with respect to the passenger station?

Fourth Interrogatory. What means of identification were found upon the body?

Fifth Interrogatory. What were the times of departure of trains from Eddystone station to the Thirty-second and Market Streets station, between the hours of six and nine P. M. on the evening of February 1st, 1918?

Sixth Interrogatory. What were the times of arrival of such trains at the Thirty-second and Market Streets station?

Therefore the sheriff is commanded that he cause to come before the Judge of our Circuit Court at Camden, in the County of Camden, on the nineteenth day of December, 1918, twelve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also come who to speak the truth of the matter within contained being chosen tried and sworn upon their

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oaths say that they find for the plaintiff damages at the sum of ten thousand dollars and the Court doth order judgment final in favor of the plaintiff and against the defendant for the sum of ten thousand dollars besides costs of suit to be taxed.

Therefore be it considered that the said plaintiff do recover against the said defendant her damages by the jurors aforesaid in form aforesaid assessed and also the sum of sixty-one dollars and sixty-one
10 cents for her costs and charges by the said Court before the Judge now here adjudged, of increase to the said plaintiff and with her assent which said damages, costs and charges in the whole amount to the sum of ten thousand and sixty-one dollars and sixty-one cents.

And the said defendant in mercy, etc.

Judgment entered and signed this nineteenth day of December, 1918.

FRANK T. LLOYD,
Circuit Judge.

20

STATE OF NEW JERSEY
(Shield)
COUNTY OF CAMDEN

I, Francis F. Patterson, Jr., Clerk of the County of Camden, Do Hereby Certify, that the foregoing is a
30 true copy of the records and proceedings with all things touching and concerning the same in the case of

Adele Giardini, Administratrix, &c., of William
Giardini,

vs.

William G. McAdoo, Director General of Railroads.
Action at Law

filed December 19, 1918, and recorded in the Clerk's Office of the County of Camden, in Book K of Circuit Court Judgments, page 90, &c.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal,
(Seal) at Camden, this twenty-ninth day of January, A. D. 1919.

F. F. PATTERSON, JR.,
Clerk.

10

NOTICE AND GROUNDS OF APPEAL.

CAMDEN COUNTY CIRCUIT COURT.

ADELE GIARDINI, Adminis-
tratrix, &c., of William
Giardini,

Plaintiff-Respondent,

vs.

WILLIAM G. MCADOO, Direc-
tor General of Railroads,

Defendant-Appellant.

Action at Law.
Notice of Appeal.
(Amended.)

20

To *Albert Woodruff, Esq., attorney of the above-* 30
named plaintiff:

Take notice, that the defendant hereby appeals from the judgment and every part thereof entered in the above-stated cause, from the Camden County Circuit Court, to the Court of Errors and Appeals, for the following reasons:

1. Because the trial Judge refused to direct a verdict against the plaintiff and in favor of the defendant at the close of the testimony in the case; (a) because there was no proof of negligence on the part of the defendant; (b) because the defendant assumed the risk of injury.

2. Because the Court refused to charge that where a person boards a crowded train and is unable to
10 enter the cars and rides on the platform he assumes the risk and that if jostled by the crowd off the train there can be no recovery.

3. Because the declaration and record in said cause fail to show a right in the plaintiff to prosecute this suit.

4. Because the declaration and record in said
20 cause show that there is no right of recovery in the plaintiff.

5. Because the declaration and record in said cause to fail to show a right of recovery against the defendant, in New Jersey, for an injury and death which occurred in Pennsylvania.

6. Because it appears from the declaration and record in said cause that there is no right of recovery against the defendant.

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BOURGEOIS & COULOMB,
Attorneys of Defendant-Appellant.

Dated January 27, 1919.

I hereby consent to the filing of within amended notice and grounds of appeal.

ALBERT S. WOODRUFF,
Attorney of Plaintiff-Respondent.

STATE OF NEW JERSEY
(Shield)
COUNTY OF CAMDEN

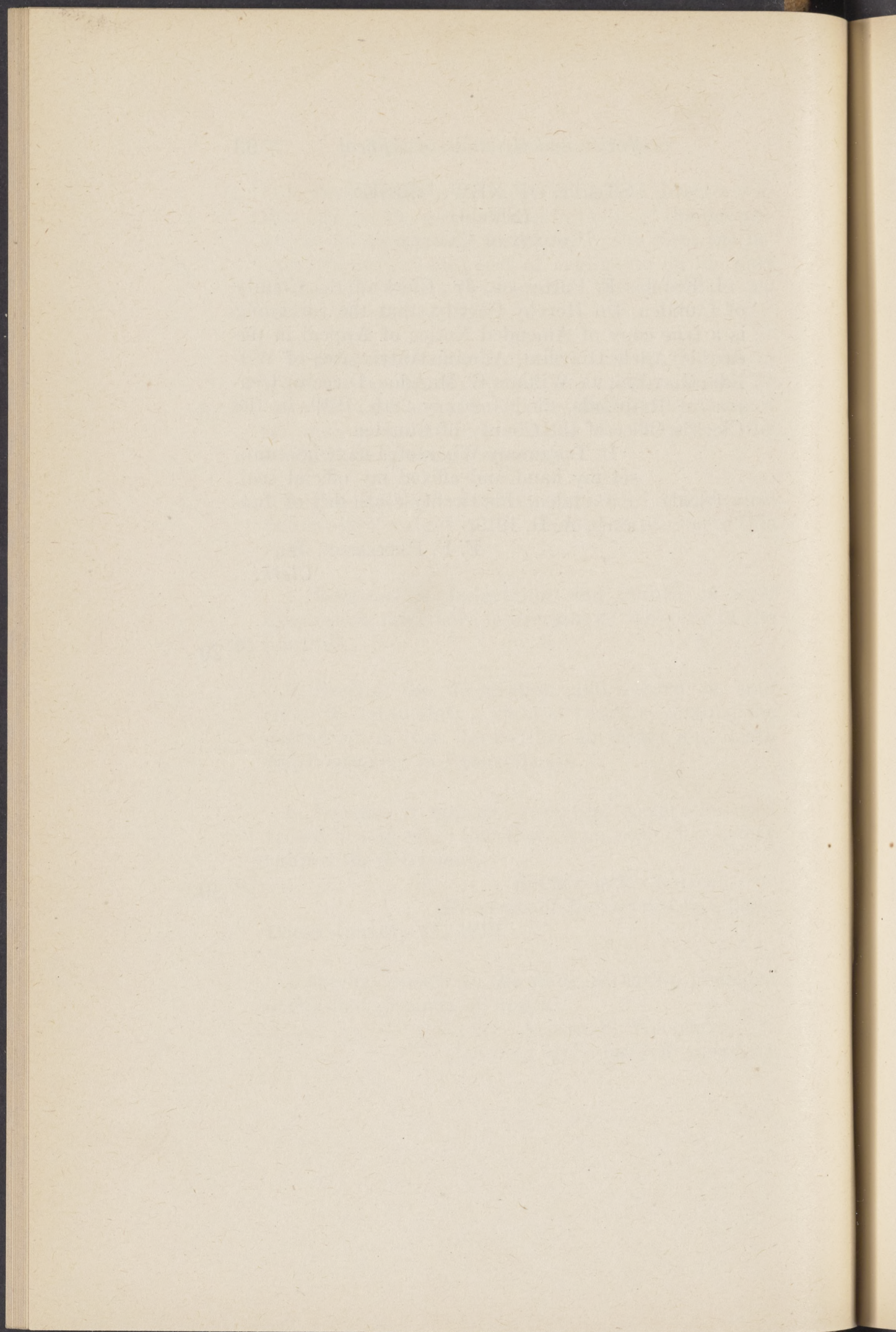
I, Francis F. Patterson, Jr., Clerk of the County of Camden, Do Hereby Certify, that the foregoing is a true copy of Amended Notice of Appeal in the case of Adele Giardini, Administratrix, &c., of William Giardini, vs. William G. McAdoo, Director General of Railroads, filed January 28th, 1919, in the Clerk's Office of the County of Camden. 10

(Seal) In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at Camden, this twenty-ninth day of January, A. D. 1919.

F. F. PATTERSON, JR.,
Clerk.

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30



New Jersey Court of Errors and Appeals

Adele Giardini, Administra-
trix, Etc.,
Plaintiff-Appellee,
vs.
William G. McAdoo, Direc-
tor General,
Defendant-Appellant.

} Brief of Applee.

FACTS.

This appeal is from a judgment of \$10,000 upon verdict at the Camden Circuit. Issue was joined and the case tried squarely upon its merits. No objections were made as to parties or pleadings and no claim is made that the verdict was contrary to the evidence or excessive.

This is a death case. William Giardini, the husband of Adele Giardini, was killed by a train in the tunnel approach to the West Philadelphia station on the Pennsylvania Railroad system on the evening of February 1st, 1918. He resided in Camden, New Jersey, and worked at Essington, Pennsylvania. As was his custom he boarded the Philadelphia train leaving Essington at about 5.45 P. M. This train was scheduled to make no stops until the West Philadelphia station was reached.

It consisted of coaches equipped with vestibule doors and traps closing over the steps so that the platforms could be kept entirely closed while the train was in motion. These precautions had been taken on other evenings previously when Giardini had been a passenger on the train. Giardini rode standing just outside of a car door on its front platform. That car and the one in front were so filled with passengers that many could not enter and were forced to remain out on the platforms. The conductor passed through the train, took the tickets of the passengers on the platforms and neglected to close the vestibule doors or the step coverings. Just before the train reached the station at West Philadelphia it stopped for a moment and the passengers, believing it to be the station-stop, pushed out of the cars. Giardini was crowded off the platform and down the steps. Had the vestibule doors been closed and the trap shut he could not have been forced off the train: there was no train-hand at either of the platforms, no warning was given of a premature stop, and the train again and almost immediately started without warning. Giardini's dismembered body was later found at that point, distant about three hundred and sixty feet from the passenger platform.

These facts were in no wise controverted by the defendant and no witness was called with respect thereto except a supervisor of signals who had no knowledge of the operation of the train in question. (p. 59, L. 1). A member of the defendant's legal staff called as an expert on Pennsylvania law admitted that the defendant was required to safeguard its passengers by using the highest degree of care and that such care required the defendant to close the vestibule doors and the step-covers. (p. 56, L. 5-17).

TESTIMONY.

CARL IPPOLITI, at page 9, line 13, testified as follows:

“Q. What part of the train was it that you and Mr. Giardini got on?”

A. Giardini went in ahead of me, in one car, and I went to the next car, but I could see him; he was on one side of the platform and I was on the other side of the platform.”

And at line 27: By the Court:

“Q. You mean you were on the platform of one car and he was on the other?”

A. That is right.”

On page 10, line 6:

“Q. Then he was at the rear and you were at the front of the car?”

A. That is true, he was behind on the platform of the car, and I was ahead on the platform of the car where I was.

Q. You were more toward the front of the train?”

A. Yes, I was ahead on the train.”

At line 16:

“Q. Now, were there many people in the car on which you were riding?”

A. Yes, sir.

Q. How full was it?

A. It was pretty well filled up.

Q. Could you get on in the car?”

A. There was too many people inside; that is the reason I was standing on the platform.

Brief for Defendant-Appellant

Q. Were there other people out on the platform beside you?

A. Yes, sir.

Q. Now, on the platform in front of you—pardon me, first, I will withdraw that. Which way were you standing and looking?

A. I was watching toward the front, and he was watching me also; we were facing one another.

Q. Where did Gardini stand?

A. Right on the platform near to the door.

Q. Were there other people on that platform?

A. Yes, sure.

Q. How full was it?

A. I couldn't tell you how many were there were, but it was pretty well filled up.

Q. In the car on which Giardini was riding, were there very many people?

A. Oh yes, it was pretty well filled.

Mr. Woodruff (To the Interpreter): Mr. Cocchiaraley, doesn't he say 'filled', not 'pretty well filled' but 'filled'?

The Interpreter: It was pretty well filled, all the seats were occupied and there were others standing up."

And at page 11, line 21:

"Q. On the platform that you were on, were there doors at the side by the steps?

A. The doors were there, but they were open.

By the Court:

Q. How about the other one, the one that he was on?

A. Giardini, you mean?

Q. Yes.

A. It was the same way.

Q. Do you mean that there were doors at the foot of the steps, and there was a flush platform that ran out to the door when the door was closed?

A. The door was open, but you could see steps; there was no platform all the way through.

Q. Well, what I am asking is whether or not there was a door and a platform there to close if they had wanted to?

A. Sure, yes, there was a door there that could be closed.

By Mr. Woodruff:

Q. And was there a little platform, too, against the car that you could drop down over the steps?

A. Yes, sir.

Q. And were both of these cars so equipped with doors and platforms?

A. Yes, sir."

And on cross-examination, page 16, line 21:

"Q. Weren't the doors when they got to Philadelphia at the foot of the steps just the same as they were when they left Eddystone?

A. Yes, they were open when we got to the station the sameway they left Eddystone.

By the Court:

Q. You mean by that that they had not been closed all the way up, is that right?

Brief for Defendant-Appellant

A. That is right; they were not closed.

Q. What about other nights? Had you been in the habit of riding on this train?

A. Yes, every night.

Q. And Giardini, too?

A. Pretty near all the time we travel together.

Q. How about the doors, were they closed or open on other nights?

A. Sometimes they were closed, sometimes they were open.

At line 15, page 12:

“Q. Were your tickets taken up that day?

A. Yes, sir.

Q. Whereabouts on the journey were those tickets taken up?

A. Before we got to Darby.

Q. Were there any stops made after you left Eddystone until you got into the city of Philadelphia?

A. That one stop, about a minute under the tunnel.

Q. Did you ride in that train every night?

A. Yes, sir.

Q. Did that train usually make any stops between Eddystone station and 32nd and Market street station, Philadelphia?

A. No, except West Philadelphia, that is the only place.”

At line 35:

“Q. How far was the station from the point that it stopped at this night?

A. I don't know, I couldn't say: I couldn't measure the distance.

Q. Well, about how far, do you know?

A. About six or seven hundred feet away.

Q. Now, when it stopped were the platforms that you and Giardini were on still in the tunnel?

A. Yes, sir."

And at line 11, page 13:

"Q. Now, what happened when the train stopped there?

A. Why, the people thought that the train was getting to the station, they all come together to the door. Then the train stopped for about a minute, and then it started off again, for the station, and then I didn't see Giardini any more.

Q. Now, what happened to you when these people started to crowd out?

A. These people that were going to get off at West Philadelphia naturally they pushed me on the side to get off, but I was going to get off at Philadelphia.

Q. Now, what did you see of Giardini when they began to push out?

A. Yes, I did see him.

Q. What happened to him?

A. I don't know, then I didn't see him no more, I don't know.

Q. Well, what was the last thing you saw of Giardini?

A. The last time that I saw Giardini was right under the tunnel when the people began to push.

Q. Where was he at that minute?

A. Right at the platform where I seen him.

Q. How close to the steps?

A. I couldn't tell you exactly, because then the people began to push."

LUIGI CARPANI, at page 74, line 13:

"Q. And where was your ticket taken up on the train? Don't you understand me?

A. You mean, where did I get the ticket—the place where I buy that ticket?

Q. No, where did the conductor take your ticket?

A. Oh—why, near Darby.

Q. Did the train make any stops after leaving Eddystone?

A. No, sir.

Q. Where was the first place that it stopped?

A. The first place was supposed to be at West Philadelphia station, but he stopped in the tunnel before he gets there at the station.

Q. What car were you riding in of the train?

A. About middle of the train.

Q. And what part of the car were you in yourself—what part of the car were you in?

A. On the front inside the door.

Q. Was the door of the car open?

A. Yes, sir.

Q. Were you standing up or sitting down?

A. Standing up.

Q. Why were you standing up?

A. Because we didn't have no place to sit down; the car was full up with men, one on top of the other, didn't have no place to sit down—see?"

Page 75, line 10:

“Q. Did you see Giardini on that car?

A. Yes.

Q. Where was he?

A. He was standing right on the platform, on top of the first step.

Q. On the front platform of that car?

A. On the front platform of the car where I was.”

At line 21:

“Q. Well, was he on the platform or on the step?

A. On the platform.

Q. And how close to the step?

A. He was pretty near to the step.

Q. Where there other people out on the platform?

A. Yes sir, full up.

Q. What happened when the train stopped in the tunnel?

A. Why, every man pushed over; I think they thought they were getting at the station.

Mr. Gaskill: I take an exception to that and ask that it be stricken out.

Q. What did they do?

A. Well, they all of them pushed right over; they pushed over me, too, but I held myself there at the door, at the front door, so I stand there.”

Page 76, line 13:

“Q. At the same time, when they pushed you out on the front platform, did you see Giardini?

A. Yes.

Q. What happened to him?

A. Well, they pushed Giardini right over, right over the step.

Q. Did you see where he went?

A. I seen him when they pushed him right over the step; that is all I seen him.

Q. And after he went down out of sight beyond the people on the platform, did you see him any more?

A. When?

Q. After he went out of sight, back of the people on the platform, did you see him any more?

A. You mean when they pushed him right over the step, you mean?

Q. Yes, did you see him any more after that?

A. I didn't see him any more because the train started up again at the same time.

Q. Were there any people on the platform of the car ahead of you?

A. Yes, sir.

Q. What was the condition there?

A. The same as that, the same as the one I was in myself; a similar condition to the car I was in myself.

Q. Did the people crowd out of that car when the train stopped in the tunnel?

A. What car, the next car?

Q. The car ahead of you?

A. Yes, sir.

Q. Was the door closed on either of the cars at the bottom of the steps?

A. Open.

Q. It was open?

A. Yes, sir.

Q. Did you notice whether the little platform which drops down to shut the steps was closed or open?

A. Open.

Q. Did you notice that that door was open before?

A. Yes, sir.

Q. When did you first notice it?

A. When I was standing up over there, before I got there, I seen that door all the time open.

Q. Was the door open when your ticket was taken up?

A. Yes, sir.

Q. And was the platform open then too?

A. Yes, sir.

Q. Was it closed at that time or after that?

A. No, sir.

Q. Now, when you stopped in the tunnel, was there any conductor or brakeman on the car that you were on in the front?

A. No, sir.

Q. On the other car ahead of you, on the back of it?

A. No, sir.

Q. Was there any conductor on either the platform or the steps—was there a conductor on either the platforms or the steps?

A. What do you mean, on the car where I was?

Q. Yes, or the one ahead of you, either one?

A. No, sir.

Q. Was there any other official of the railroad,—any man that worked for the railroad there?

A. No, sir.

Q. Was any signal given when the train started up again, after it had stopped in the tunnel?

A. No, sir.

REFUSAL TO DIRECT VERDICT

The accident happened and death occurred in the State of Pennsylvania. A member of the Philadelphia, Pennsylvania, bar testified for the plaintiff as to the law of that State on the facts of the case. The defendant also produced a Pennsylvania Attorney. Two propositions were discussed: the liability of the defendant for the negligence of his employees in failing to protect passengers riding on the platforms from falling or being pushed off by closing the step-trap and vestibule doors,—and, defendant's liability for negligence in making the premature stop and the following start without warnings and in permitting its cars and platform to be crowded and its passengers unprotected from injury through being forced off by fellow-passengers anticipating a proper station—halt through lack of employees on or at its car platforms.

Production of this testimony was in accordance with the rule in this State and questions so raised as to the law of Pennsylvania were questions of fact for the jury. *Fithian vs. P. R. R. Co., Er. & App. 1918, 103 Atl. 193.*

And there could be no error because defendant's legal expert when interrogated by counsel and the court as to these propositions testified:

1. That defendant was bound to use the strictest degree of care and vigilance in policing its cars to protect its passengers from over-crowding.
2. That, where passengers were permitted to ride on the platform of a crowded car, which car

was provided with vestibule doors and step-covers, defendant's obligation to protect passengers from falling or being pushed off required the trainmen to exercise the highest degree of care they could use under those circumstances and that such degree of care "would require the closing of the doors and platforms."

Defendant's legal expert was Clarence P. Culin, Esq., and his testimony was:

Page 52, line 28:

"Q. Did you find any case where a train which was not scheduled to stop between stations had made a premature stop other than its destination and the passengers in overcrowded cars had pushed a man from a platform?

A. Passengers had pushed? None.

Q. You found no such case?

A. No.

Q. What is the duty in Pennsylvania in regard to policing its cars to protect its passengers from overcrowding?

A. To use care and vigilance.

Q. What degree of care and what degree of vigilance?

A. The amount that the Engelhaupt case calls for.

Q. The strictest degree of care and vigilance?

A. Yes."

Page 53, line 34:

"By the Court:

Q. What would be the situation with respect to a crowded car where passengers are

permitted to get upon the platform, with the car full of people and the platform itself likewise, with respect to the obligation under the rule to use the highest degree of care to take the means at hand to prevent a man falling off of the car, assuming that it had gates or—I am speaking now,—you understand the situation—I am speaking now asking for your individual view in view of the fact that there seems to be no decision there, what would be your view of the obligation to use these gates or barriers where the car is so crowded and they have them at hand, wouldn't you say that the highest degree of care would require them to use them?

A. It would require the highest degree of care that the trainmen could use under the particular circumstances of the case. In other words, where a car is crowded and the train makes a preliminary stop prior to reaching the station and he is crowded out by a fellow-passenger, and there is no overt act on the part of the train employees, then the passenger by reason of the fact that he has to ascertain extent assumed the risk in riding on the platform—

Q. Now, let me put it this way: it is a very common thing for trains to stop, whether at stations or at some point other than a station.

A. Yes.

Q. Now, where the situation has been that a passenger may be misled into believing that they are at a stopping point and thereby crowding off an individual who is on the platform, would you or would you not say that the company ought to put up the means at

hand to protect that person from falling?

A. In the failure of announcing a train stop, and in view of the Federal decision in *Diggs vs. The Louisville & Nashville Railroad Company*, I would say that the carrier owed to any particular individual only the duty of not any overt act causing him to be placed in a position of danger.

Q. Wouldn't you say that if the Railroad Company had gates to protect people from falling off, and they are liable to fall off, they ought to put up the gates?

A. Aren't we getting back to the point where it is a question as to whether the vestibules have to be used?

Q. No, I am not dealing with that; I am dealing with the practical situation before you of a car that is so equipped that you might have added one more degree of precaution and didn't do it. Now, doesn't this rule that you have already spoken of, to use the highest degree of care, necessarily imply the obligation to put up that gate and door?

A. No, sir.

Q. Why not—how can a man stop short of it?

A. Because there is no obligation on the part of the Railroad Company to use vestibule equipment.

Q. I am not talking about that.

A. Or put up a gate in the event that it is there.

Q. There might be no obligation to use a gate on a ferry boat, for instance, but if the gates were there you would say that they ought to use them, wouldn't you?

A. Certainly I would say they should use

them in the event that they are there, but I do not see that the obligation is there to use them.

Q. Doesn't it follow that if they could use them they should do it because of some added safety that it would provide?

A. Merely as a matter of precaution, but not as an obligation.

Q. Then what becomes of the rule of severity as to using the highest degree of care? In other words, let me put it in another way: If you have got two steps that you can take, one would be a measurable precaution against injury and the other would be an insurance against injury, do you think that it is the highest degree of care to use the measurable one and leave the insuring one go?

A. No.

Q. Well, now, isn't that this situation? They had the means here, didn't they, of closing these gates?

A. I don't know.

Q. Well, you know the testimony shows that there were doors and platforms on the car.

A. But I don't know that there were doors and platforms.

Q. I am not speaking about that; we will assume that for the purpose of the question. Assuming that there were, wouldn't you think the law would hold that they ought to close them?

A. That the highest degree of care would require the closing of the doors and platforms."

THE DECLARATION AND RECORD.

It is true that suit was instituted by ADELE GIARDINI, administratrix ad prosequendum, and that the declaration did not set forth the death act of Pennsylvania. No motion was directed to the declaration and issue was joined and tried on the merits. Until grounds of appeal were served this question had not been raised or considered by plaintiff, defendant, or the Court.

Defendant relies upon two Supreme Court cases.

In the case of **Lower vs. Segal**, 59 L. 66, the action was not instituted in New Jersey until after the year, within which by the Pennsylvania Act suit must be begun, had expired. And in that case the real merits of the controversy had not been tried out because a demurrer was promptly taken.

And in the case of **Rankin vs. C. R. R. of N. J.**, 77 L. 175; 71 Atl. 53, the real facts were not tried out because a non-suit had been entered for failure to notice for trial.

In the present case however, all the facts were before the court, all the parties participated, the merits were determined, and a very substantial verdict rendered which is not challenged as to amount.

The Legislature has declared that under the circumstances here existent justice shall not be defeated by mistakes or technicalities: **Rev. 1877, p. 9, Comp. Stat. p. 43, Sec. 8.**

And although relief was denied because of the fact that the statute had run against plaintiff, when **Lower vs. Segal** was again before the Supreme Court on motion to amend, Magie, J. said: "Nor has the real question in controversy between the widow and the defendant ever been tried—" (60 L. 99).

The Legislature has also, in the successive Practice Acts, provided for amendments to sustain verdicts found upon the merits and to prevent the defeat of substantial justice. **Sec. 45, 1855. Sec. 138, 1874, Gen. Stat. p. 2556. P. L. 1903, p. 544, Comp. Stat. p. 4062, Sec. 36.**

And as was said by Justice Magie in **Lower vs. Segal, 60 L. 99**, these acts have been liberally construed and have been held "to justify and require amendments, when the real question in controversy has been fully and fairly tried and correctly settled, to adapt pleadings to the issue really tried although not that originally upon the record; to change the form of action so as to present the issue really tried, and that by a court of review; to change the plaintiff where her action was tried upon sealed instruments, by which it was deemed defendant's liability was shown to be, not to her, but to her agent, and to make such agent the plaintiff on the record, and to add a wife as plaintiff on the record when the damage done to property of which she and her husband (the original plaintiff) were seized by a conveyance to both, had been fully and fairly settled on a trial by arbitrators.'

And cases cited.

And in **Rogers vs. Phiney, 13 N. J. L. 1**, an amendment was permitted to make the pleadings conform to the facts as tried after cause had been removed to Court of Appeals, judgment reversed, a venire de novo ordered, and the record remitted to the Supreme Court.

In **Den vs. Snowhill, 13 N. J. L. 23**, title had been and on appeal the pleadings were amended to conform to the facts as tried.

In **Price vs. N. J. R. & T. Co., 31 N. J. L. 229**, after trial the record was amended to conform to

the trial had on the merits; the court saying: "in point of the fact, the suit has been tried, in all respects, as though the record was correct, and the suit was in the case. Under these circumstances it is clear that the objection is purely formal, and on this account, it appears to me, it ought not to prevail."

In *Willis vs. Fernald*, 33 N. J. L. 206, trial was had with special reference to a written agreement and upon error to the Supreme Court the proceedings were amended to conform to the situation as tried by the parties.

The Practice Act of 1912, P. L., page 378, Supplement to Compiled Statutes, p. 1205, Sec. 98, has provided that:

"No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require."

In the present case it is respectfully insisted that the substantial verdict rendered should not be set aside for the error alleged. The objection is to the fact that the widow first obtained letters ad prosequendum in New Jersey before beginning suit and that the pleadings have been entitled in her name as such administratrix. This is at most mere surplusage; unquestionably the widow was entitled to bring suit and her appointment as administratrix ad prosequendum gave her no greater or added authority. It only permitted her to do what she already had the right to do.

The case having been fully and fairly tried, all of the parties having participated and considered the case as being tried as if sufficiently brought and

correctly entitled, the appellant should not be permitted to take advantage of any alleged defect upon appeal, the question of such defect having been first raised when grounds of appeal were served.

King vs. Holbrook, 58, N. J. L. 369. In this case judgment was given for a single plaintiff. On appeal defendant urged that the plaintiff had no right of action individually; if any right of action existed, it existed only in plaintiff and another. Under the Practice Act it was held that proper objection not having been made by the defendant advantage could not be taken of the alleged error on appeal.

Smith vs. Miller, 49 N. J. L. 521.

Marts vs. Cumberland Ins. Co., 44 N. J. L. 478.

In **Chotcaw R. Co., vs. Jackson, 192 Fed. 792**, the United States Circuit Court of Appeals held in an action for death of an employee by wrongful act the defendant was not entitled to a reversal because of plaintiff's failure to prove want of administration on decedent's estate, where the objection was not taken until the filing of a supplemental brief in an intermediate court of appeals. And see **Buckingham vs. Estes, 128 Fed. 584.**

In **St. Louis R. R. Co. vs. Henson, 58 Fed. 531**, objection was made that a husband could not maintain an action in his own name for the negligent killing of his wife. No objection had been made in the court below, and advantage was not permitted to be taken of the error on appeal.

It is therefore respectfully submitted that the judgment herein should be sustained.

ALBERT S. WOODRUFF,
Attorney of Plaintiff-Appellee.

NEW JERSEY COURT OF ERRORS AND
APPEALS

ADELE GIARDINI, Administratrix, &c.,
Plaintiff-Appellee,

vs.

WILLIAM G. McADOO, Director General,
Defendant-Appellant.

BRIEF OF APPELLANT

STATEMENT OF FACTS.

On the evening of February 1st, 1918, William Giardini, a resident of Camden, New Jersey, rode in a train operated by the defendant-appellant from Chester to a tunnel of the Railroad Company at West Philadelphia, in the State of Pennsylvania. He left Chester at about a quarter to six in the evening. He was seen on the platform of the car when the train came to a stop in the tunnel at 32nd Street, near Market. He was seen to be pushed by the people leaving the train, and at 9.30 o'clock in the evening of that day his dead body was found along the track in the tunnel about sixty feet distant from the south end thereof.

The suit for damages was instituted by Adele Giardini, who was appointed administratrix ad pros-

equendum by the surrogate of Camden County on the 24th day of July, 1918. The trial resulted in a verdict against the defendant in the sum of \$10,000, on which a judgment was entered. A motion was made to direct a verdict in favor of the defendant, first, on the grounds that there was no proof of negligence on the part of the defendant, and second, because the plaintiff assumed the risk of injury. The testimony showed that there was a large crowd of people waiting to board this train at Eddystone and that it was pretty well filled up and Giardini rode on the platform until they reached the tunnel and for some cause or another the train came to a stop and the people inside the car pushed out and pushed Giardini down on the step. Nobody actually saw him fall. Nobody knows whether he was pushed off or whether he fell off or whether he stepped off the train when it came to a stop and was killed by that or another train passing afterwards.

There was a dispute as to what the law in the State of Pennsylvania was regarding the obligation of a carrier to a person riding upon the platform. One lawyer stated that if the carrier permitted a passenger to ride upon the platform the Railroad Company was negligent. Another lawyer testified that it was negligence for the passenger to ride upon the platform of the car.

The complaint alleges that on the 1st of February defendant operated a railroad from Chester to Philadelphia, and in Philadelphia maintained a tunnel for its trains; that decedent was employed at Eddystone, boarded the train, which train prematurely stopped and decedent, through the sole negligence of defendant, was run over by said train when it again started, crushed and killed; that the negligence of the defendant consisted in not closing the vestibule door, but leaving

the same to be open and in not having some person on the platform to protect the decedent from the crowd; that decedent left a widow and five children; that letters of administration ad prosequendum were granted to the plaintiff by the surrogate of Camden County. It contained no allegation that a suit would lie in the State of Pennsylvania for death caused by negligence or wrongful act of another. It contained no allegation that any particular person was authorized by law to prosecute a suit for damages caused by the death of one through the negligence or wrongful act of another. It contained no allegation as to the time within which such suit, if it would lie, must be brought.

TESTIMONY.

Carl Ippoliti, at page 10, line 15, testified as follows:

“Q. Now, were there many people in the car on which you were riding?

A. Yes, sir.

Q. How full was it?

A. It was pretty well filled up.

Q. Could you get on in the car?

A. There was too many people inside; that is the reason I was standing on the platform.

Q. Were there other people out on the platform beside you?

A. Yes, sir.

Q. Now, on the platform in front of you—pardon me, first, I will withdraw that. Which way were you standing and looking?

A. I was watching toward the front, and he was watching me also; we were facing one another.

Q. Where did Giardini stand?

A. Right on the platform near the door.

Q. Were there other people on that platform?

A. Yes, sure.

Q. How full was it?

A. I couldn't tell you how many there were, but it was pretty well filled up.

Q. In the car on which Giardini was riding, were there very many people?

A. Oh, yes, it was pretty well filled.

By the Court:

Q. What kind of a platform was this?

A. Platform of an old style train."

Page 11, line 21:

"Q. On the platform that you were on, were there doors at the side of the steps?

A. The doors were there but they were open."

On page 13, line 8, he testified:

"Q. Now, when it stopped were the platform that you and Giardini were on still in the tunnel?

A. Yes, sir.

Q. Now, what happened when the train stopped there?

A. Why, the people thought the train was getting to the station, they all come together to the door. Then the train stopped for about a minute, and then it started off again, for the station, and then I didn't see Giardini any more."

At line 23:

"Q. Now, what did you see of Giardini when they began to push out?

A. Yes, I did see him.

Q. What happened to him?

A. I don't know, then I didn't see him no more, I don't know."

Luigi Carpani, at page 75, line 8, testified as follows:

"A. On the first seat, I was on the first seat inside the door; I was right in front of the first seat.

Q. Did you see Giardini on that car?

A. Yes.

Q. Where was he?

A. He was standing right on the platform, on top of the first step."

At line 25:

"Q. What happened when the train stopped in the tunnel?

A. Why, every man pushed over; I think they thought they were getting at the station.

Q. What did they do?

A. Well, they all of them pushed right over; they pushed over me, too, but I held myself there at the door, at the front door, so I stand there."

Page 76, line 13:

"Q. At the same time, when they pushed you out on the front platform, did you see Giardini?

A. Yes.

Q. What happened to him?

A. Well, they pushed Giardini right over, right over the step.

Q. Did you see where he went?

A. I seen him when they pushed him right over the step; that is all I seen him."

Line 27:

“Q. After he went out of sight, back of the people of the platform, did you see him any more?”

A. You mean when they pushed him right over the step, you mean?

Q. Yes, did you see him any more after that?

A. I didn't see him any more because the train started up again at the same time.”

Joseph S. Conwell, Esq., a Philadelphia lawyer, at page 6, line 22, testified as follows:

“Q. What is the duty of the carrier with respect to protecting a passenger against being jostled off of an open entrance-way?”

A. There are cases which would seem to hold that the carrier is not liable for the rudeness or for the mere jostling off, if I may use that expression, of the passenger, and those cases have all been decided against the plaintiff, but each of those cases ——”

At page 7, line 3, by the Court:

“Q. Well, I am not speaking of that; I am speaking of the facts of this case as they appear; he goes as far as he can and is still on the platform?”

A. Then I think, sir, the carrier would be liable.

Q. Is there any rule there with respect to the opening and closing of doors that are susceptible of being closed?

A. No, sir; I found none.”

At line 30, he testified:

“Q. No assumption of risk on his part in

boarding a train which he knows is crowded and on which there is no safe place for him to ride?

A. No, sir; if the carrier permits him to remain there, then the carrier would be liable for the neglect to carry him to safety."

Clarence P. Culin, Esq., another lawyer from the State of Pennsylvania, at page 49, line 12, testified as follows:

"Q. What is the law of the State of Pennsylvania, assuming that a train momentarily stops without any call being made by any of the employees of a station or a stopping?

A. In the absence of a call made by a train man or train employee the Railroad Company cannot be held responsible for negligence for a passenger alighting, the passenger in that case assuming the risk.

Q. What is the law of the State of Pennsylvania to any failure on the part of employees of a railroad to close the trap doors on a train that is not advertised as a vestibuled train?

A. There is no decision in Pennsylvania on that point.

Q. Have you examined any of the United States authorities on that point?

A. I have, sir. In the Federal Court from the Sixth District, if I am not mistaken in the case of *Diggs vs. Louisville & Nashville Railroad Company*, the Court there held under a state of facts to a great degree similar to the state of facts in the present case that there was no negligence on the part of the Railroad Company in failing to close trap doors on a train which, while carrying vestibule equipment, was not advertised as a vestibuled train."

LAW.

1. The first reason assigned for reversal is because the trial Judge refused to direct a verdict against the plaintiff and in favor of the defendant at the close of the testimony in the case; (a) because there was no proof of negligence on the part of the defendant; (b) because the defendant assumed the risk of injury.

The testimony of Mr. Culin, of the Philadelphia bar, was that in the absence of a call made by the train men or other employee, the Railroad Company cannot be held responsible for negligence for a passenger alighting, the passenger in that case assuming the risk. In the case at hand there is no evidence that any announcement was made of any station by any member of the train crew, so that if the decedent stepped off the train, he in law assumed the risk of injury.

Mr. Conwell, on page 6, testified that with respect to the duty of protecting the passenger against being jostled off, "There are cases which seem to hold that the carrier is not liable for the rudeness or for the mere jostling off, if I may use that expression, of the passenger, and those cases have all been decided against the plaintiff, but each of those cases —" Through this it appears that under the Pennsylvania law, if this man were pushed off the platform by the other passengers the Railroad Company would not be liable.

The only question still remaining is with respect to the negligence of the company in permitting the doors to remain open. On page 7, the Court asked the witness:

“Q. Well, I am not speaking of that; I am speaking of the facts of this case as they appear; he goes as far in as he can and is still on the platform?”

A. Then I think, sir, the carrier would be liable.”

It will be noticed that the witness in that answer is giving his own conclusions and apparently not based on any adjudication of the law in the State of Pennsylvania.

Mr. Culin, on page 49, testified that where the train was not scheduled as a vestibuled train, there was no decision in the State of Pennsylvania adjudicating the duty or care required by the carrier, and followed with a statement that in the Federal Court it was held that there was no negligence on the part of the Railroad Company in failing to close trap doors on the train which, while vestibule equipment, was not advertised as a vestibuled train.

Of course, the law of the State of New Jersey has no application to this case. From the foregoing testimony it is submitted that no case was made out which warranted the case in going to the jury. In other words, on the two points of law on which the lawyers had knowledge, both were against the plaintiff and there was no testimony of any adjudicated law in the State of Pennsylvania entitling a recovery, therefore a verdict should have been directed.

2. Because the declaration and record in said cause fail to show a right in the plaintiff to prosecute this suit.

3. Because the declaration and record in said cause show that there is no right of recovery in the plaintiff.

4. Because the declaration and record in said cause fail to show a right of recovery against the defendant in New Jersey for an injury and death which occurred in Pennsylvania.

5. Because it appears from the declaration and record in said cause that there is no right of recovery against the defendant.

These four reasons will be argued together and they were intended to take the place of an assignment of error on the record under our former practice.

The first case supporting these reasons arising in New Jersey was the case of *Lower vs. Segal*, 59 L. 66, where the Supreme Court, by Justice Garrison, said:

“The cause of action in this case arose in Pennsylvania. The plaintiff is an administratrix appointed by the Courts of New Jersey. The statute of this State providing for the recovery of damages in cases where the death of a person is caused by wrongful act, negligence or default (Rev., p. 294), confers no right of action in such case. It creates a rule unknown to the common law, and is, therefore, inoperative for the redress of wrongs done in other jurisdictions. For a like reason the statute of Pennsylvania, *propria vigore*, confers no right to sue in this State for a cause of action created by that jurisdiction and occurring there. The statute of Pennsylvania is, however, not repugnant to our domestic policy, as is evinced by our having modified the common law upon like principles in the interest of our own citizens. It is, therefore, the duty of our courts to recognize

and enforce the rule of the sister commonwealth." *Wright vs. Remington*, 12 Vroom, 48.

"If, however, the statutes be variant as to the form of the remedy, that given by the statute from which the right of action is derived will be enforced, unless it violated some rule or policy of the forum. A procedure that takes a right of action from the statute of one jurisdiction and a form of redress from that of the other, lacks the legal justification of either. That is the case here. The suit is brought by a personal representative, which is the proper form under our statute; but the action is not under our statute, but under that of Pennsylvania, where the widow and not the personal representative is given the right to sue. *Penna. Stat. Pamph. L.* 1851, p. 674, Sec. 19; *Id.* 1855, p. 309, Sec. 1. The construction put upon these statutes by the Courts of Pennsylvania is in no state of uncertainty. *Railway Company vs. Decker*, 84 Pa. St. 419, 425; *Birch vs. Pittsburgh Railroad Co.*, 30 Atl. Rep. 826.

"In these cases it is said, referring to the provision of the Act of 1855, 'if the deceased leaves a husband, he alone is clothed with the right of action; if the wife is a survivor, she is entitled to bring suit.' "

In the case of *Rankin vs. Central Railroad*, 77 L. page 175, our Supreme Court held that a suit instituted in New Jersey by an administratrix of a deceased person, for damages under the Death Act, when the death charged to the negligence of the defendant happened in the State of Pennsylvania, where the only person entitled to prosecute an action

for such damages is the widow of the deceased, cannot be maintained by such administratrix in the courts of this State.

In the absence of the law of the State of Pennsylvania, the plaintiff might rely on the common law, but under the common law there was no right to recover for the death of a person caused by the negligence or wrongful act of another.

Gross vs. D. L. & W., 50 L. 317;

Consolidated Traction Co. vs. Holme, 60 L. 445;

Callaghan vs. Lake Hopatcong Ice Co., 69 L. 100;

Myers vs. Holborn, 58 L. 193.

This defect appearing upon the face of the record may be taken advantage of upon appeal, and formerly upon a writ of error.

Potts vs. Clark, 20 L. 536;

Farwell vs. Smith, 16 L. 133;

Hanson vs. DeVita, 76 L. 96;

Karnuff vs. Kelch, 71 L. 558; 69 L. 499;

Consolidated Traction Co. vs. Whelan, 60 L. 154.

For the foregoing reasons, it is respectfully submitted the judgment should be reversed and a judgment entered in favor of the defendant.

BOURGEOIS & COULOMB,
Attorneys of Defendant-
Appellant.

Amendment not allowable

Lower v Segal 60 L. 99

Raukin v Central 77 L. 175-

Fitzhenry v Consol. Tr. 63 L. 142

Doran v Thomson 79 L. 99

Error on record even though no motion to arrest judgment.

Maker v Ashmead 30 Pa St. 344 72 Am. Dec. 708.

Griggs v Wadeau 221 Fed 381.

Bennett v Butterworth 11 How. 669 - 13 L Ed 859

Stacum v Pomeroy 9 Cranch 221 - 3 L Ed. 205-

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