INDEX

	Page
Notice of Appeal	1
Grounds of Appeal	2
Copy of Judgment	3
Testimony:	
Lewis S. Smith—Direct	8
Cross	13
Re-direct	29
Re-cross	31
Daniel E. Iszard—Direct	33
Cross	37
Frank Tarlucki—Direct	39
Cross	51
Michael Gupin—Direct	62
Cross	67
Re-direct	75
Re-cross	75
John Matusiwicz—Direct	76
Gussie Maszcynski—Direct	78
Cross	80
Re-direct	86
William Mattix—Direct	87
Cross	88
Dr. William A. Wescott—Direct	90
Defendant's Testimony:	
Baker C. Lloyd—Direct	99
Cross	101
Harry F. Horner—Direct	105
Harry Smith—Direct	107
Cross	109

INDEX

	Page
John Carr—Direct	110
Cross	112
Re-direct	113
Charles P. McDonald—Direct	113
Cross	120
Edwin M. Haas—Direct	120
Daniel E. Iszard—Direct	125
Cross	128
Re-direct	129
William Rogers—Direct	134
Cross	138
Re-direct	142
Robert Woodcock—Direct	143
Cross	144
Motion to Direct Verdict	146

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

EDMUND TARLUCKI, etc.,
Plaintiff,

vs.

WEST JERSEY & SEASHORE RAILROAD COMPANY,
Defendant.

NOTICE OF APPEAL.

To Bourgeois & Coulomb, Esqs., Attorneys of Defendant:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

WESCOTT & WESCOTT,
Attorneys of Plaintiff.

Dated August 8, 1913.

[ENDORSED]

Service of a copy of the within notice of appeal acknowledged this 12th day of August, 1913.

BOURGEOIS & COULOMB,
Attys. of Deft.

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

EDMUND TARLUCKI, etc.,
Plaintiff,

vs.

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Defendant.

GROUNDS OF APPEAL.

The appellant states the following grounds of appeal:

1. That the trial Court permitted the defendant to answer, over the objection of the plaintiff, the following question: "I want to know whether that river bank was within the following description: 'beginning at a point where the centre line of the West Jersey & Atlantic Railroad intersects the boundary line bearing south 29 degrees, 15 minutes west between lands of Christopher M. Rape and the land belonging to said Mays Landing Water Power Company and extending thence along said centre line of the West Jersey & Atlantic Railroad 82 degrees and 58 minutes east, with a width of 66 feet, that is, 33 feet on each side of the centre line for a distance of 134 feet, more or less, to the high water mark of the Great Egg Harbor River' "?

2. That the trial Court directed a verdict in favor of the defendant.

WESCOTT & WESCOTT,
Attorneys of Plaintiff.

[ENDORSED]

Service of a copy of the within grounds of appeal acknowledged this 12th day of August, 1913.

BOURGEOIS & COULOMB,
Attys. of Deft.

10

COPY OF JUDGMENT.

NEW JERSEY SUPREME COURT.

EDMUND TARLUCKI, by his next friend, FRANK TARLUCKI,

vs.

WEST JERSEY & SEASHORE RAILROAD COMPANY.

IN TORT.

ON POSTEA. 20

JUDGMENT FOR DEFENDANT.

BOURGEOIS & COULOMB, Attorneys.

30

As yet of the ninth day of July, A. D. one thousand nine hundred and nine.

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

WILLIAM RIKER, JR.,
Clerk.

ATLANTIC COUNTY, *ss.:*

The West Jersey & Seashore Railroad Company, the defendant in this suit, was summoned to answer unto Edmund Tarlucki, by his next friend, Frank Tarlucki, in a plea of an action in tort; and thereupon the said plaintiff, by his next friend and by John W. Wescott, his attorney, and by leave of the Court, complains for that, heretofore, to wit, on or about the twenty-seventh day of May, nineteen hundred and eight, the defendant had and maintained its roadbed, in the County of Atlantic, State of New Jersey, to wit, at or near Mays Landing, in said county, for the purpose of operating and did operate there along electric cars on two sets of tracks running east and west, and parallel with each other, by means of a third rail, charged with an electric current; that, along each side of its roadbed, for the purpose of guarding the public from contact with said third rail, the defendant erected and maintained, at the time aforesaid, a fence, that, at the time and place aforesaid, an ancient by-way, running north and south, led up to and over said roadbed, and across the same; that the defendant permitted and allowed said ancient by-way to remain open, unguarded and unfenced, and allowed said third rail at said crossing place, to be and remain unguarded and unprotected; that, at the time and place aforesaid, said Edmund Tarlucki was eight years of age, and had no knowledge of the danger of the said third rail; that, at the time and place aforesaid, said Edmund Tarlucki walked along said ancient by-way, in a northerly direction, through said opening in said fence, upon and over said roadbed and, in so doing, stepped against and came in contact with said third rail and was burned by the electric current therein in such way as to deprive him of eyesight and otherwise permanently disable him and render him a permanent cripple; that it was the duty of the de-

fendant, either to guard said opening in said fence, at said by-way, or guard said third rail, so that the said Edmund Tarlucki would not or could not come in contact therewith; yet the defendant disregarded its duty in this behalf and negligently and carelessly failed to either guard said opening or said third rail, and negligently left said fence and opening in such condition as to invite the said Edmund Tarlucki to enter the same, and negligently kept its roadbed in such condition as to invite him to enter upon the same, whereby he came in contact with the third rail of defendant's road, charged with electricity, and was seriously and permanently injured as aforesaid, and totally incapacitated, to his damage twenty thousand dollars, therefore he brings his suit, &c.

And now comes the said defendant, by Bourgeois & Coulomb, its attorneys, and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them or any part thereof, in manner and form as the said plaintiff has above thereof complained against it. And of this the said defendant puts itself upon the country, and the plaintiff doth the like.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Mays Landing, in and for the County of Atlantic, on the second Tuesday of May, in the year of our Lord one thousand nine hundred and thirteen, by whom, etc., and the same day is given to the parties aforesaid there, etc.

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

Afterwards, that is to say, on the nineteenth day of

May, at a Circuit Court held at Mays Landing in and for the County of Atlantic, by his Honor Howard Carrow, one of the Judges of the Circuit Court of the State of New Jersey, to whom said cause was referred by his Honor Samuel Kalisch, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided comes as well the within named plaintiff as the within named defendant, by their respective attorneys within mentioned, and the jurors of the jury, whereof mention is within made, being summoned also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, and the evidence for the plaintiff being heard, and the evidence for the defendant being heard, and the Court having considered the evidence and the arguments of respective counsel, and being of the opinion that the defendant is not guilty as charged in the declaration, directed the jury to bring a verdict for the defendant, and the jury having retired to consider the direction, upon their oath say that the defendant is not guilty in the manner and form as the plaintiff hath complained against it.

Therefore it is considered that the said plaintiff, Edmund Tarlucki, by his next friend, Frank Tarlucki, take nothing by his said writ, and that the said defendant, West Jersey & Seashore Railroad Company do go thereof without day, &c.

And it is further considered that the said defendant, West Jersey & Seashore Railroad Company, do recover against the said plaintiff, Edmund Tarlucki, by his next friend Frank Tarlucki, the sum of , for its costs and charges by it about its defense in this behalf laid out and expended by the Court now here adjudged to the said defendant and with its assent according to the form of the statute in such case made and provided, and that the said defendant, West Jersey & Seashore Railroad Company have execution thereof, etc.

Judgment signed this third day of June, A. D. nineteen hundred and thirteen.

WILLIAM S. GUMMERE,
C. J.

I, WLLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this [SEAL] twenty-sixth day of June, A. D. nineteen hundred and thirteen.

WM. C. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

EDMUND TARLUCKI, etc.,

vs.

WEST JERSEY & SEASHORE RAILROAD COMPANY.

IN TORT.

Mays anding, N. J., May 14th, 1913.

TESTIMONY.

Before HONORABLE HOWARD CARROW, Judge, and Jury.

APPEARANCES:

For Plaintiff, MESSRS. WESCOTT & WESCOTT.
For Defendant, MESSRS. BOURGEOIS & COULOMB.

LEWIS S. SMITH, sworn.

Direct examination.

By Mr. Wescott:

Q. Mr. Smith, where do you live?
A. Mays Landing.

Q. How long have you lived in Mays Landing?

A. Well, almost 73 years.

Q. What has been your business in a general way?

A. Well, my main trade was foundryman, core-maker in an iron foundry.

Q. Now you are engaged in what?

A. Barber business. I have a shop up the street.

Q. Do you remember of hearing of this accident to little Tarlucki?

A. Yes, sir.

Q. Are you familiar with the place where it occurred?

A. Yes, sir.

Q. At the time of the occurrence of this accident, will you state whether or not there was a path that led up to and across the tracks through an opening in a fence?

A. Yes, sir.

Q. That path began where in Mays Landing?

A. Where it began at?

Q. Yes.

A. Began just below the bridge, below what we call Water Street. There used to be a foundry there; I worked in the foundry. It commenced just below that and ran over to what they call Kate's Landing. That is close to the river, where men would go that way fishing and woodchoppers would go off that way and take their axes, go off chopping wood, and come back that way at night.

Q. You remember that way how many years back?

A. Oh, sixty years.

Mr. Bourgeois: How much?

A. Over sixty years.

Q. Was it there before the railroad tracks were laid?

A. Yes, sir; I went that way before the tracks was laid and since.

Q. Before the tracks were laid do you recollect whether there was any house across what is now the railroad along this path?

A. I don't remember of any house there at that time, but I remember playing around in the cellar hole where the foundation was after the house was gone away. That was gone before I can remember.

Q. Where was that located?

A. That is located just back from the water, just a little ways back on the other side of the dam or bank.

Q. Will you tell us whether or not when you first knew this way, it was used by the general public?

A. Yes, sir.

Q. It was?

A. A great many went that way to and fro. Some went that way to their work chopping wood, and fishermen.

Q. Was it used by wagons?

A. After I came home out of the army I bought a team and I was employed under the Water Power Company, it is now, Mr. Green had it then, and the bank broke close to the sluice, which is close to the far end of the bank.

Q. The bank in the road?

A. Yes, sir, and he sent me there with my team to work on the road. We carted sand out from the far end and as soon as they got the water shut off, and came home at noon time to dinner to feed my horse and at night, I came out this way because it was nigher than to go around the other way. It was just about wide enough for a wagon to go along.

Q. Did you see other wagons use the road?

A. Yes, sir.

Q. For how many years?

A. Sir?

Q. For how many years was that road used by wagons?

A. Off and on for several years.

Q. When did you come out of the army?

A. Eighteen hundred and sixty-five, I think it was; at the close of the war.

Q. Do you remember any trees along the road?

A. Yes, sir; I remember pine tree on the right hand side going from this way down the bank; there is a pine tree and sometimes a wagon hub would strike that and knock the bark off and it wore quite a hollow and someone took an axe and cut a piece out of it so that the wagon hubs wouldn't hit the tree. I don't know whether it is there yet or not.

Q. Was that tree on this or the other side of the railroad?

A. On this side.

Q. Do you remember when the railroad was laid?

A. Not exactly the year, I couldn't say.

Q. Did you and others use this road by wagons before the railroad tracks were put down?

A. Well, I had no wagon then.

Q. Before the tracks were put down?

A. Yes, sir.

Q. Did you see others use it?

A. Only when they would cart sand in there to put on the bank. Sometimes came in a high tide then they would send teams there.

Q. When people cut wood, where would they cut the wood?

A. They cut for—Squire Taylor had wood down below South River bridge, two miles below, and they used to go that way because it was nigher.

Q. Was the wood hauled by this road?

A. No, sir; that was carted down to what they called High Bank, principally.

Q. Did the teams in going to the wood travel this road?

A. No, sir, I don't remember any teams; only woodchoppers.

Q. Well, the woodchoppers—were they on foot or in wagons?

A. Foot. Carried their axes.

Q. Do you remember when the road for wagon purposes fell into disuse?

A. You couldn't get across after the railroad was laid there.

Q. It was after the railroad?

A. Yes, sir. Couldn't get over if they wanted to.

Q. Do you remember when the railroad was electrified?

A. I can't recall the year but I remember when it was done, all right.

Q. At the time that that was done have you any recollection or not about fences being along either side of the railroad tracks any distance?

A. Well, after they had laid the tracks, some time after, they put a wire fence on each side.

Q. Yes.

A. But shortly after that I was down that way and I saw where the footmen had mashed it down or put it away so they could go backwards and forwards.

Q. Over this old path?

A. Yes, sir.

Q. At the time this accident occurred have you any recollection as to whether that fence was open through this path?

A. Well, they could go right over it. There was a space there that most anyone could get through.

Q. Did you go down there at or about the time of this accident?

A. Yes, sir, and I went right over where the fence was gone, all down, bent in where there had been so many gone over it. I wanted to see the spot where the boy was burned.

Q. Was that the same place where the road used to be that you have spoken of?

A. Which, the bank railroad?

Q. No. Is it the same place where you used to repair the road?

A. Yes, sir.

Q. Same path, is it?

A. Same path, yes, sir.

Q. Well, at that crossing by that path there, can you recollect whether or not the third rail, the electrified rail, was guarded or covered?

A. It wasn't covered at that time. All the protection was this wire fence on each side.

Q. But that you say was down?

A. Yes, partly down.

Q. Where the path was?

A. Didn't run any width much but just so a person could go backward and forward over it.

Q. About how wide was the opening?

A. Well, I should judge probably three or four foot wide that way or maybe a little more than that; so you could step over, anyhow. I don't know how long it laid that way. I ain't never been down there but once since, and that has been some time ago.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Smith, when was the railroad built?

A. I couldn't tell you. I can't remember the date.

Q. You remember the fact that it was built?

A. I know it was built, yes, sir.

Q. You remember this piece of land before it was built?

A. Oh, yes, sir.

Q. Where was Kit Rape's cranberry bog?

A. It went right through the lower end of the cranberry bog.

Q. This bank?

A. The bank took that all in, all the way around.

Q. In other words, the bank furnished the head water, backed the water up to cover his cranberries?

A. When they would shut it off and let it in by the sluiceway, it would.

Q. I am trying to find out what it was that held the water in on Kit Rape's cranberry bog, and that was held in by this bank you have been talking about?

A. Yes; the water could be held in there if they didn't let it run off.

Q. How long have you known Rape's cranberry bog there?

A. I have known that ever since I was twelve or thirteen years old. Not the full bog. There used to be some wild berries in there and my mother and I used to pick them for his grandmother when I was a little boy.

Q. Who besides yourself have you ever known to use that bank for teaming purposes?

A. Water Power Company had the horses on there and Mr. Iszard used to have horses on there. He had property that adjoined this bank.

The Court: What do you mean by that bank?

Mr. Bourgeois: The bank Mr. Smith has been talking about, running along the edge of the river. It runs along the west bank of the edge of the Egg Harbor River?

A. Not exactly west. It runs more southwesterly.

Q. It is on that side?

A. Oh, yes.

Q. Where was Iszard's land?

A. Mr. Iszard had some land that run right down and adjoined the Water Power Company's bank, and sometimes come in a heavy tide and it would overflow the bank and they would send teams down there to put sand on.

Q. Iszard's land was up near to the Water Power store, wasn't it?

A. Where the store is now?

Q. Yes.

A. He owned all that property where the Water Power store is now.

Q. This bank you speak about was built there to keep the water off of this meadow part of the land?

A. Off of that road and to keep it from going in. It used to come right up to Mr. Baker's road in back. I have waded it many a time; used to take boats to get up the hill there.

Q. While Mr. Iszard owned that land he used to take teams down there to repair the banks?

A. Sometimes, and sometimes the Water Power Company would do the same, because they owned down next to the bank to Mr. Wood's property now.

Q. And when you went down there and carted sand for the Water Power Company, you carted sand to repair that bank, didn't you?

A. Yes, sir.

Q. And at that time the Water Power Company owned this land, didn't it?

A. Owned that land?

Q. Owned the land where you were repairing the bank. It was the Water Power Company's land that you were repairing the bank for?

A. Not all of it. Part of it belonged to the Rapes. The lower end of it belonged to the Rapes.

Q. And you were repairing the bank to keep the water out from off of the Water Power Company's land?

A. Yes; they sent down to help do it.

Q. Who else besides you and Mr. Iszard have you ever seen use that bank for teaming purposes?

A. Well, I know one or two men that had teams worked there for them, and he is dead and gone. If he was living he would come and testify to the same thing. That was William Herbert.

Q. He was working for Mr. Iszard?

A. I don't know who he was working for, but he was there carting sand in. I think the Water Company sent him there.

Q. The railroad was built along there about 1879, wasn't it?

A. I couldn't say about that; I don't remember; I never memorized all of those things.

Q. How long have you kown Kate's Landing?

A. Ever since I was a little boy twelve or thirteen years old.

Q. And the road leading to Kate's Landing puts in from the Estelville road beyond the station, doesn't it?

A. Which way do you mean?

Q. I mean when you want to go—I don't mean the road that goes down along the track now and cuts through, but the old road that went in to Kate's Landing went off of the Estelville road quite some distance below the station, cut through the woods.

A. Used to come in there next to the swamp.

Q. Which swamp?

A. Mr. Rape owned some of the swamp and I think the rest of the swamp belonged to the Taylor meadow tract.

Q. That came out on the Estelville road?

A. Yes.

Q. Where did it leave the Estelville road? Where did the road leading to Kate's Landing leave the Estelville road?

A. Well, I should judge a half mile or such down that way; maybe not that far.

Q. That is beyond the station?

A. Came out on the main Estelville road.

Q. After the railroad was built and a station was built up here at the upper station, then they made a sort of road from the westerly side of the railroad down to Kate's Landing, didn't they?

A. Used to go anywhere across the old field. No regular road was made there at all.

Q. There was a road there used by wagons?

A. Not close to the station, no.

Q. Where?

A. Not close to the station there was no regular road made at that time.

Q. I mean for the last twenty or thirty years there has been?

A. It is further off.

Q. You cross over the track and turn down along the track through the railroad yard and when you get to the railroad yard there is a little road leads off through the woods to Kate's Landing?

A. There is now, I think.

Q. And has been for years and years?

A. It used to go that way, yes, sir, from this road. From the Estelville road they used to go down around that way. I have known them to go down that way to get fish, wagons come there and buy fish from the men fishing down there.

Q. Sometimes they shipped hay on the road and came to Kate's Landing and hauled it up that way?

A. Sometimes get hay and haul it up that way, yes, sir.

Q. Now, about these fences that were built along the railroad track; when were they built?

A. I couldn't tell you when they was put there. Some time after the track was laid.

Q. How long after the track was laid before the fences were built?

A. I couldn't tell you that.

Q. Was it six months?

A. I couldn't say.

Q. All you know is that when you went down there on the day of the accident, the fence was there?

A. Fence was there then.

Q. When you went down on the day of the accident, how did you go?

A. I went down the bank way same as we always used to go.

Q. From the Water Power store?

A. Yes; right down that way along the river.

Q. When you came to the fence, you say it was down?

A. It was swagged down so you could go right over.

Q. How high was it above the ground, this sagged part?

A. I suppose maybe that high (illustrating) so you could step over it.

Q. And you think that opening was three or four feet?

A. I think it was, yes, sir.

Q. How far apart were these posts that supported the fence? Weren't they about eight feet?

A. I couldn't tell you.

Q. This wire was sagged down from one post to the other?

A. Not all the way.

Q. Just a part of it?

A. Just a part of it.

Q. In other words, the wire was some of it bent down?

A. Someone had bent it so they could get over backwards and forwards.

Q. And you couldn't get over it without climbing?

A. Didn't have to climb. Just walk up and step over this way.

Q. But you had to climb over the fence, over the wire?
A. The top of the wire was all down.
Q. You had to climb over it or walk over it?
A. Just step over it.
Q. What sort of a wire fence was that, Mr. Smith?
A. I suppose it was about—this here common wire, twisted, you know; I can't tell how thick it was; probably a quarter of an inch or such matter.
Q. How high was the wire? If it had been straightened up, how high would it have been?
A. I suppose probably four foot or such matter.
Q. How large were the meshes? It was a mesh wire fence?
A. No, sir.
Q. What was it?
A. It had places into it about so wide along. I don't know whether you call them meshes or not.
Q. I call that a mesh.
A. Oh, yes; just the same as it is all along the road here.
Q. The openings about the size of that sheet of paper?
A. I couldn't say whether it was open that much, because I don't remember.
Q. Maybe not that much. What time of the day was it that you went down there?
A. I couldn't say whether it was in the forenoon or afternoon, but I think I didn't go down there until the next day afterwards, anyhow.
Q. What did you go for?
A. I went over to see if there was any blood or anything on the track.
Q. Just curiosity?
A. Yes, sir.
Q. Did you see where the boy was hurt?
A. Seen the place where he was on the track, yes, sir.
Q. Which track was it on, the first track that you came to or the second one?

A. I think it was the second one from this way.

Q. Then the boy, if he came down that path, must have gone over the fence and climbed over one track into the second?

A. Hold on a minute. There is two electric rails there.

Q. Yes.

A. I think it was on this one this way, because he would have to come off of that one this way to get home. He would have to get over this rail to come up home. I think it was the one nighest this way next to the station.

Q. What was he going to go up home for?

A. I don't know what he was starting up home for.

Q. But that is what he was doing?

A. I think his papa told him to come back home. I think he did. So I heard. I didn't hear his father say so.

Mr. Wescott: I move to strike that out.

Mr. Bourgeois: Judge Wescott let it go in. He has had the benefit of it.

The Court: Strike it out.

(Exception noted for defendant.)

Q. Now, Mr. Smith, don't you remember that when you went down there to see where the boy had been hurt that it was in fact on the track on the opposite side from this; it was on the south bound track?

A. South bound track?

Q. Yes, south bound track. That is the one furthest over. That is where the boy was hurt?

A. Yes.

Q. Now, isn't that so?

A. I think so, if I remember right. I think it was.

Q. You were there?

A. I didn't stay very long. I just went and looked and came right back because I hadn't time. I had to attend to the mail.

Q. You could see where the boy got hurt?

A. Oh, yes.

Q. Some of the grease and hair there, wasn't there?

A. I couldn't say about that.

Q. But you could see the marks of where he had been hurt?

A. I could see where he had kicked the dirt, you know.

Q. And that was on what we call the south bound track, that is, the furthest track over?

The Court: What do you mean?

Mr. Bourgeois: It is a double track road and speaking from where we are sitting here, it would be the furthest track over. That would be passing west.

Q. And, Mr. Smith, if he had gone from his home down the path that you have spoken of, in order to get on the track where he was hurt he must have passed over one track before he got there, must not he?

A. If he was on the south bound track, he would.

Q. Well, you saw the prints there, didn't you, on the south bound track?

A. I think it was on the south bound track. I think he had been on that south side where his father was.

Mr. Wescott: You say you think that. Do you know it?

A. I couldn't—no, I don't know it positive. I couldn't say that for certain. It has been so long ago.

Q. Your best recollection is that it was on the south bound track, isn't it?

A. As far as I know.

Q. I want your best recollection, Mr. Smith.

A. That is the best I can give you.

Q. Your best recollection is that they were on the south bound track?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. Now, Mr. Smith, what was the condition of the wire on the westerly side of the track?

A. Pretty much the same.

Q. The wire fence?

A. Pretty much the same as it was on this side at the end of the bank.

Q. The wire in that part of the fence; was that pressed down or was that upright straight along the poles?

A. Pretty much the same, because they went to and fro up around that way.

Q. Did you go over it?

A. I don't think I went over that wire, no, sir.

Q. But you do remember seeing it?

A. Yes sir; I went up to it and I had no occasion to go any further because I was in a hurry to get back to carry the mail. It was getting close to mail time.

Q. And you remember, do you, that that was somewhat down?

A. Yes, sir.

Q. Bent down?

A. Yes, sir.

By the Court:

Q. Describe what you mean by "bent down." How far was it down?

A. Well, it was down far enough, please your Honor,

so a person could step over it without getting tangled up into it.

Q. Could you tell the number of inches it was from the bed of the railroad?

A. Well, I should judge from the ground, where you had to step over, would be twelve or fourteen inches, probably a little more than that.

Q. How near was the fence to this wire screen?

A. Fence to the wire screen?

Q. Yes.

A. That was the fence, this wire was.

Q. There was no other fence?

A. No, sir, no other fence there at all, no other protection whatever.

Q. And for what distance was this wire down?

A. Down towards the ground?

Q. Yes.

A. Well, as nigh as I can remember, probably twelve or fifteen inches, somewhere along there, maybe a little more and maybe not so much.

Q. I mean in length.

A. Probably three or four foot.

Q. Was it down on both sides of the railroad or only one side?

A. On both sides. Of course, people, they followed it and went right on over it. There was no fence put up there until after the third rail was laid there and then they put the fence up, but not right away, they didn't.

By Mr. Bourgeois:

Q. And on the westerly side of the track, that is, the further side, was it down for a distance of three or four feet, do you say?

A. Probably three or four, somewhere along there.

Q. That down part that you speak of was simply the sagging of the wire?

A. No; it had been bent down by foot men.
Q. It was sagged down or bent down?
A. By someone, yes.
Q. It was fast to the posts at either end?
A. Yes, sir.
Q. But just in between the posts it had been sagged down?
A. Yes, sir.
Q. Or bent down?
A. Yes.
Q. Pressed down?
A. Yes, pressed down.
Q. When you went down to look at the spot where this boy was hurt, did you notice the railroad bridge?
A. Railroad bridge down below to the left, yes, sir.
Q. To the left?
A. Yes, sir.
Q. Did you notice it?
A. Did I notice the railroad bridge?
Q. Yes.
A. I didn't go down to it.
Q. Didn't notice particularly?
A. I didn't go clear to the bridge, no, sir.
Q. You are familiar with the railroad bridge, are you not?
A. I never went over it since it was built.
Q. Haven't you?
A. No, sir, never walked it.
Q. When did you cease to work for the Water Power Company?
A. Ceased to work? I couldn't tell; several years.
Q. How many?
A. Several years; I couldn't remember.
Q. It has been more than twenty, hasn't it?
A. Yes, I think it has been more than twenty years, yes, sir.

Q. Has it been twenty-five?

A. I couldn't say about that.

Q. Well, at any rate, it has been more than twenty?

A. I got books home that I could show when I worked for the company, because I dealt in the store right up to the date, but I didn't bring them with me. I got them home locked up in my trunk. I could bring the exact date when I got done working for the company.

Q. Now, how many times since you ceased working for the Water Power Company have you walked down over this bank?

A. Well, I don't think I have walked over it half a dozen times, because I have no occasion to. I didn't keep a team very long after I got done working for the Water Power Company. I sold out my team and went to work on a place and worked on that sixteen years.

Q. I say how many times have you walked down?

A. How many times? I say I don't think I have walked it half a dozen times. I have no occasion to unless something in particular called me there.

Q. What?

A. Without something very particular called me there that I wanted to see, and I don't think I have walked it half a dozen times.

Q. The Water Power Company owned the land at Kate's Landing, didn't they?

A. I don't think they did at that time, not before the railroad company went through, but they used to help keep the sluice up and the bank in repair. They didn't own there at that time.

Q. Who did own it?

A. Mr. Rape. They owned it and they sold afterwards, some time after that.

Q. If Mr. Rape sold to the Water Company before the railroad was built there, then the Water Power Company owned the land, didn't they?

A. Yes, the Water Power Company owned through there. It didn't own all of that. It went kind of across this way. The line went across close to a big maple tree, I think, which was in the edge of the meadow.

Q. Which line?

A. The line between Mr. Rape and the Water Power Company.

Q. Where was that maple tree, the meadow back of Rape's house?

A. Down on this same meadow ground, only to the south side of it.

Q. And on the northerly side of the railroad?

A. No, sir, it wasn't on the northerly side.

Q. On the southerly side of the railroad?

A. Southwesterly side.

Q. Then I ask you if the Water Power Company, after it purchased from Rape, whatever land it did purchase, didn't it become the owner of Kate's Landing?

A. They didn't get it all at that time. They bought since. The Water Power Company bought them a part of that land afterwards.

Q. When?

A. I couldn't say what time, but I understood they bought there afterwards. There was a man by the name of Mr. Langley bought back in there to get sand for the glass factory, and I understood Mr. Woods had bought that since, some few years ago, and that takes in the whole of it now.

Q. Mr. Smith, when you went down on the day after this accident, went down to the railroad track on the day after this accident, there was no plank crossing across that railroad at that point, was there?

A. No, sir, not there at the end of this bank where they went across.

Q. All there was ——

A. Was no protection at all only this wire fence.

Q. When you got inside of the wire fence, there was the railroad bank; that was about how high above the other surrounding ground?

A. I couldn't say hardly how high it was.

Q. About four or five feet?

A. Probably it might be that much.

Q. And after you got to the top of the bank, there was just the railroad ties?

A. Railroad ties.

Q. Four rails and two what we call third rails?

A. Two third rails, yes, sir.

Q. And the regular four other rails; that is a double track road?

A. Regular running rails, yes, sir.

Q. And these third rails were about how much higher than the regular railroad track rails?

A. I couldn't say about that.

Q. They were higher, weren't they?

A. Run pretty near level, I think.

Q. Weren't they about eight or ten inches above the level of the other rails?

A. I don't think they was. I couldn't say about that.

Q. You don't remember?

A. No, sir, I couldn't say about that. I couldn't say how much higher they was. They was some little higher, but I couldn't say how much.

Q. This path that you have been speaking about is right on the top of this bank, isn't it? The path from the Water Power store down to Kate's Landing, we will say, that was right on the top of the bank, was it not?

A. When the road went through there, they made it higher, of course. You had to go up this way.

Q. I mean before the railroad went there, the path part was right along on the top of this bank?

A. Pathway went right straight through, yes, sir.

Q. It wasn't down in the meadow?

A. No, sir.
Q. And it wasn't down in the river?
A. No, sir.
Q. It was right along the top of the bank?
A. Yes, sir.
Q. What you would call along the top of the meadow bank, wasn't it?
A. Sure, the top part of the bank, yes, sir.
Q. And that was a meadow bank?
A. Meadow bank, yes, sir. It was built there to keep water out and let water in if they wanted it in after they made a bog of it.
Q. And it was built there by the owner of the lands there?
A. Yes, sir.
Q. And maintained by the owner of those lands?
A. Yes, sir, I suppose so, yes, sir.

The Court: To what does your question relate, the path or the bank?

Mr. Bourgeois: It was a meadow bank built there by the owners of the land to keep the water out, he says.

A. I suppose it was built there in the first place by Mr. Christopher Rape's grandfather, in the first place. He owned all that land all the way around down to what they call Taylor's meadow.
Q. But so long as you have known it, it has been maintained by the owners of the respective lands there to protect their land from the water of Egg Harbor River, hasn't it?
A. They generally made the bank up for themselves, paid for it, one pay part of it and the other pay part of it.
Q. It has been maintained by the owners of the land there to keep the water off of their land?

A. Oh, yes.

By the Court:

Q. How close was this bank to the railroad?

A. Railroad run right over the lower end of the bank, towards the lower end of it.

Q. It does not run along the railroad?

A. No, sir.

Q. Comes up to the railroad?

A. The railroad went right across it.

By Mr. Wescott:

Q. You used the word "path" and the word "road" and the word "bank." Do you mean the same thing?

A. Just the same thing. So me call it a roadway, some call it a bankway and some call it a pathway, but we most generally call it a bankway when we go down that way.

Q. And that is the place you have been talking about that you used with teams?

A. Oh, yes, sir. We went from one end of it to the other with teams when I worked there for Mr. Green, put sand on there when the sluice was washing out.

Q. Is that the path that you say the general public has used all these years?

A. Same one, yes, sir, same place.

Q. This Kate's Landing, let me understand more particularly where that was. How far was it on the south side of the railroad?

A. The railroad went right through it. They call all that Kate's Landing there where the railroad went across.

Q. Where was it you got the sand?

A. Just around a little distance from the end of the bank, the foot way.

By the Court:

Q. How long was the bank?

A. I couldn't say how long that was. Quite a little distance.

By Mr. Wescott:

Q. Well, this path extended, this road, pathway, or bank, as you call it, from the power house down here out how far beyond the railroad?

A. The bank commenced down below the houses, the foundry, it used to be, commenced down below that from fast land until it came to the meadow ground, where it came up, and the bank commenced and went right around to fast land on the Kate's Landing side.

Q. How far did it extend southerly of the railroad as the railroad now runs?

A. A short distance; short distance.

Q. Up to where this old cellar used to be?

A. Oh, this old cellar used to be back further. Where the house used to be was back further.

Q. Did the path go to that?

A. No, sir; just went to fast land. After you got off the end of this bank it was fast land. What we used to call sand field.

Q. Has this path or bank or road been there ever since?

A. This pathway?

Q. Yes.

A. Yes, sir.

Q. And used ever since by the public?

A. Used ever since and used yet. You can go along there any day and see where people has gone, walked it to and fro and walked right on over.

The Court: Over where?

A. Over the third rail; walked right on over.

Q. You spoke of sand for the factory. Where was this factory?

A. Cotton factory. I was working for them.

Q. I understand you to say sand got for glass factory.

A. Oh, that was down below further down below some little distance from Kate's Landing.

Q. Where was that sand got?

A. Where did they take it to?

Q. No; where did they get it?

A. Dug it right out of the ground there next to this swamp.

Q. South of the railroad?

A. Oh, yes, sir, away down south some little distance from the railroad.

Q. How was it carted, on this same road?

A. No, it was carted by wagon up to the station and they shipped some over to Millville.

Q. Carted by the other road up to the station?

A. Yes, sir; put on cars, the sand was.

By Mr. Bourgeois:

Q. Mr. Smith, you spoke about the foundry?

A. Yes, sir.

Q. The foundry was right up here by the bridge, wasn't it, where the Water Power store is now?

A. No, sir; the foundry was right where Mr. Roger's blacksmith shop is.

Q. That is right back of the store?

A. Yes, sir, just below a little ways.

Q. It wasn't anywhere down by the railroad?

A. Oh, no.

Q. The foundry was up here by the Egg Harbor bridge?

A. There was two then, one above the bridge and the

other below. One was Mr. Iszard's and one Mr. Bartlett's.

Q. You say you can go down almost any day and see where people had walked along that path. Now, Mr. Smith, if you have only been down there six times in the last twenty years, how do you know you can go down there and see?

A. There is a man told me so this morning. He told me you could see tracks there any day you wanted to go. I didn't take trouble to go over there and see, because I hadn't time.

Q. Then you get your information about the use of this because somebody told you?

A. Seeing these tracks since, yes, sir.

Q. Your barber shop is right up this street?

A. Yes, sir.

Q. And from your barber shop you can't see this bank?

A. No, you can't see it for the shrubbery, bushes.

Q. And your business is right there in the barber shop or else down to this lower station?

A. No, I don't go to the station any more. I gave up the mail carrying the last day of last January. I carried it twenty-five years and thought I had it long enough. Wasn't getting enough for it and I give it up. I lost two trips in that time.

Q. Where is your home?

A. My home is here in Mays Landing.

Q. Right there by your barber shop?

A. Right close by within ten or twelve steps of the barber shop door.

Q. Then you would have no occasion whatever to go down over that bank except those six times in the last twenty years?

A. No, sir, no occasion whatever.

DANIEL E. ISZARD, sworn.

Direct examination.

By Mr. Wescott:

Q. Squire, how old are you, please?
A. I am 78 last month.
Q. How long have you lived in Mays Landing?
A. All my life.
Q. How long, if at all, have you known the old road that came out down here by the power house and went across the railroad tracks out here at the other end of the bridge?
A. About seventy years; somewheres near that.
Q. Do you recollect whether or not that road was used by teams many years ago?
A. One—well, to work on it.
Q. Teams worked on it?
A. Well, when they was to work on the dam or hauling sand there. I know it could be used, because my brother had a horse run away and he ran clear to the other end of it and never struck a tree. How he did it I can't say.
Q. How wide was this road in past years? Was it a wide or narrow road?
A. I know there was one or two trees, or three or four trees, that was pretty close work with the wagon to get in between.
Q. And in those years how high was this road above the general level?
A. I couldn't tell you as far as feet is concerned. I remember that in case of high tide it would overflow and run into the lands outside.
Q. And then had to be repaired?
A. No. Let it run out again.

Q. Have you known that way or path or road ever since the time you mentioned a moment ago?

A. No, not since it has been used as a—not since the railroad has been built I haven't been over it but very few times. I have walked it Sunday, I have walked it once or twice.

Q. Since the railroad was built?

A. Yes.

Q. And when was the railroad built, do you recall?

Mr. Wescott: When was it built, Mr. Bourgeois?

Mr. Bourgeois: Eighteen hundred and seventy-nine.

A. Eighteen hundred and seventy-nine. I remember it but I couldn't tell the year.

Q. Up to the time the railroad was built had you been along that way yourself personally?

A. Up to the time the railroad was built?

Q. Yes.

A. Oh, yes, occasionally.

Q. Did you see others use it?

A. Yes. When I was a young man I used to take Sunday walks around there.

Q. Can you state whether or not people generally used it?

A. Anybody that wanted to, I guess.

Q. Since the railroad was built there, have you used it yourself, ever been on it?

A. Yes, I was—I can't tell you how many times. Just casually took walks.

Q. What was it like since the railroad was built when you walked along it? What was it like? Can you give us a general description?

A. Well, it was like an old bank that had—trees had grown each side of it and the middle part was clear where they had walked over it.

Q. Was it a well worn path?

A. Yes, sir; a walking path, it was.

Q. It led up to where? Where did it go to?

A. Went clear to the—well, to the upland on the other side.

Q. On the other side of the railroad?

A. Yes.

Q. Did this path go up to and across the railroad?

A. Yes.

Q. And is that the same path that you knew sixty years ago?

A. Yes, seventy.

Q. Seventy years ago?

A. Caught a rabbit there when I was seven years old.

Q. Was the rabbit running?

A. No. First one I ever caught. Down at the end of that road.

Q. Do you remember when the road put down the electric rails?

A. I can't tell you what year. I remember when it was built. I was down oftentimes—not oftentimes, to see them to work on the road.

Q. Did you go along this path or way, ever, when you went to see them work?

A. If I walked down, but I generally would drive down the other way around.

Q. Can you tell whether or not the railroad built a wire fence along either side for miles along the roadway, or haven't you noticed that?

A. Oh, I have seen it going along, but I don't remember when it was built, that is, the year; I couldn't tell that.

Q. Did you ever go down this path where it crosses the road after the fence was put up, the wire fence?

A. No, I don't remember it; I don't recall it.

By Mr. Coulomb:

Q. Where did this bank run from, Mr. Iszard? Where did it start from?

A. It started from where the factory store is there now, that is ——

Mr. Wescott: Pardon me just one second.

By Mr. Wescott:

Q. Do you remember whether there was any house on the south side of the railroad to which this road or way or path went, or by which it went?

A. On the south side?

Q. Yes, on the other side.

A. I don't recall it. There was a house, but it was near the Estelville Road, the main road, but I don't remember any house being ——

Q. Don't remember whether this road or way went to that house?

A. Oh, there was old roads that went all the way from there clear down to the Estelville road where the teams hauled and so on, but I don't remember any laid-out road.

Q. I am not talking about a laid-out road. I am talking about this road down there which you have been testifying about, this way, this path. Did that lead out, go to a house out there?

A. No, I think it just stopped at the other upland, when you got on the upland.

Q. Beyond, on the upland, did it lead anywhere that you recall?

A. I don't recall it leading anywhere, because if we wanted to go any further down we would go the Estelville road.

Cross-examination.

By Mr. Coulomb:

Q. Mr. Iszard, where did this bank begin?

A. Why, it commenced around the factory store, that is, went down there, and the lower house, father owned afterwards, two grass lots that extended there and the bank virtually, that is, the bank itself commenced there and then went on down and I think Mr. Rape owned, think Mr. Rape's father, that is, the old Rape property, owned the balance of it. I am speaking now years ago.

Q. How far did it run?

A. How far?

Q. Yes.

A. Well, it ran down across where the railroad goes across till it struck the upland.

Q. And what was it built there for?

A. That is before I can tell.

Q. What was it used for when you knew it?

A. It was used for the general public, that is, to travel over, that is, I mean by foot.

Q. Had it any use for the purpose of protecting land?

A. Yes.

Q. Well, wasn't it built there for that purpose?

A. I suppose it was.

Q. To keep the water out?

A. Yes.

Q. At times, and to keep the water in at other times?

A. Yes.

Q. Was there a sluiceway in the bank?

A. Yes.

Q. Where was the sluiceway?

A. That was down at the lower end, the southern end.

By the Court:

Q. Was that bank built within your recollection, Squire?

A. No, sir, it was built before I can recollect, that is, but it was repaired and worked on since my recollection.

By Mr. Coulomb:

Q. Who did the work on it and the repairs?

A. My recollection is that Kit Rape did the most of it, in later years.

Q. Did Mr. Rape own the land in back of it?

A. Yes, he owned the biggest part of it, and I think the water power—later the water power. It got so low that the high tides would run over it and they worked at it different times.

Q. And raised the height of it?

A. Yes.

Q. And was the work that was done on that road with teams for the purpose of carting sand and materials to make repairs and heighten the road?

A. Yes. Well, some parts of it never broke, but certain sections of it would give way. I never remember the whole dam being broke.

Q. After the railroad was put through there, was it possible for wagons to drive across the railroad at the path?

A. I don't remember about that.

Q. Your recollection ceases when it ——

A. My business was here in the offices and I didn't ——

Q. What offices did you hold?

A. Well, I had county collector, township collector, county clerk five years, and twenty five, virtually, deputy clerk.

Q. And your business was right in this neighborhood where we now are?

A. Yes.

Q. And you had no occasion to visit ——

A. No, nothing only for curiosity's sake once in a while of late years.

By the Court:

Q. When did you begin to hold offices, Squire?

A. When President Lincoln was elected I ran on the ticket with him, in 1860.

By Mr. Coulomb:

Q. There was no business of any kind at the other end of this road, that is, at the southerly end of it, was there?

A. Not as I know of, not as I ever remember. That is, no legitimate business, only people working cutting wood or choppers or so on would go over this, same as the mill hands go over it now to and from their work.

FRANK TARLUCKI, sworn.

Direct examination.

By Mr. Wescott:

Q. Mr. Tarlucki, what is your age, please?

A. Thirty-nine.

Q. You are the father of the little boy ——

A. Yes, sir.

Q. —— for whom you brought the suit?

A. Yes, sir.

Q. How long have you been in this country?

A. I came here to this country in 1893.

Q. Did you know any English when you came here, speak English?

A. No; what I know I learned here.

Q. Did you ever live in Mays Landing?

A. Yes, sir.

Q. How long did you live here?

A. About fourteen years.

Q. What did you do when you lived here?

A. Weaving in the cotton mill.

Q. Where did you live, what part of Mays Landing?

A. I lived what they call on the hill here in Mays Landing, in the Water Power Company tenements.

Q. Whereabouts is that?

A. On the other end of Mays Landing on the road that leads to Minotola.

Q. Did your family live there with you?

A. Yes, sir.

Q. When did you leave Mays Landing?

A. I leave Mays Landing about two years ago now and a couple of months.

Q. And you live where now?

A. In New Bedford, Massachusetts.

Q. Do you know this way or path or road that we have been talking about?

A. Yes, sir.

Q. Where does it begin?

A. Beginning at the bridge there and company's store, and leads right along the river until it comes to the railroad and then go the other side up to the Kate's Landing, where they have a lot of row boats there and all that stuff for the people that don't like to go around to take this road here to walk down.

Q. How far does this road go beyond the railroad, about?

A. On the other side of the railroad?

Q. On the south side.

A. Well, I couldn't tell how far, but is it a little bit of difference. Say two or three hundred feet or yards. I don't know exactly, but I know it is a little distance.

Q. Does it run along the water on the other side of the railroad; run near water?

A. Yes, part of it, and then the foot path leads right up to the upland and goes right around in the woods there.

Q. Goes on into the woods?

A. Yes.

Q. And where are these boats that you speak of?

A. Oh, well, they always been laid on the other side of the bridge about three hundred or more feet from the bridge.

Q. Are there boat houses there, too?

A. No, no boat houses, only maybe somebody go fishing.

Q. Are there any landings there?

A. Oh, there isn't a landing built, like buildings; a nice beach, sandy beach that you can land a boat or tie them some place to a tree.

Q. How many years did you say you lived here?

A. About fourteen.

Q. Did you know this road all that time?

A. Yes; since I came here to Mays Landing I went the first time on with a couple of fellows.

Q. What kind of a road is it?

A. To my recollection now, that was built same as road sometime, but now since I came it was only a walking path, trees on all sides.

Q. It was a road sometime and since you came here it was what?

A. Since I came here I recollect only as a walking path where people walk. I been walking myself many times that way.

Q. Is it a well defined path?

A. Yes, sir.

Q. Hard?

A. Yes, sir.

Q. Are there any bushes along it?

A. On one side, and on the other side was bushes there.

Q. Have you seen people use that path ever since you were here in May's Landing?

A. Yes, sir.

Q. On both sides of the railroad?

A. Yes, sir.

Q. Do you recollect when the electric rails were laid down?

A. Yes, I saw them build the railroad, but if you ask me exactly the date of it, I couldn't tell.

Q. What was done, if anything, in the shape of fences along the road?

A. Why, the fences of wire.

Q. Do you know whether there are any fences along the railroad on either side?

A. Yes, there was fences.

Q. Wire?

A. Wire fence.

Q. When you came to this railroad, traveling this path, was there any fence across the pathway, or was there a bank there?

A. There was fences, but people going so often, there were broke down the fences in front of the path where they walked.

Q. And how long did you know before the accident to your boy that this fence was down?

A. I haven't got no time to walk often there. There is only once in a week I have time to go there. I should say maybe a week before that.

Q. Week before you went there?

A. I went there on the same expedition, fishing.

Q. Well, how many times had you been there before your boy got hurt, have you any idea?

A. No, I couldn't tell you.

Q. Was it more than once?

A. Oh, yes, more than once.

Q. What I want to know is whether this fence was down when you went there.

A. Yes, I recollect it was down. People walking so much there, they tore it down, broke it down.

Q. Were the wires stretched and sagged or broken?

A. Broke.

Q. And how wide an opening was there?

A. I should say only as wide as probably if two men walked in arm and arm can go through.

Q. Can you recall whether there were any posts on each side of this path?

A. I think there was, but I am not sure of it.

Q. Are not sure?

A. No.

Q. When you speak of the wire being broken, which side of the railroad do you refer to, or do you refer to both sides?

A. Well, this side—from this side.

Q. Was it down on the other side, too?

A. Yes, it was down on the other side.

Q. Can you recall the day your boy got burned?

A. I couldn't tell you exactly the date, but I just know so much that it was Saturday afternoon in May.

Q. In May?

A. Yes.

Q. Do you recall the year?

A. I should say five years or something like that; I don't know. I don't know exactly how many years, but I think it was five years, somewhere near to that.

Q. Well, have you any way of fixing the time when this accident occurred?

A. What?

Q. The time when it occurred. Can you fix it in any way? Have you any way of ascertaining it?

A. I don't understand just what you mean.

Q. You say it was about five years ago, you think, and it was on Sunday and it was in May?

A. It was on Saturday afternoon in May.

Q. Have you any way of telling what year it was? Any bills or papers or anything?

A. Oh, I can't, because Dr. Saulsbury, he got the date there in the books, because he is the doctor that came first to my boy and saw to him.

Q. Where does he live?

A. I think he lived maybe—I don't know where he lived, but I think he lived in Brunswick somewhere.

The Court: Is there any question about the date?

Mr. Bourgeois: I think it was the twenty-third of May, 1908. There is no point made of that at all.

Q. About what time of the day was it this accident happened?

A. I should say between four and something around that time in the afternoon.

Q. At the place where this opening was in the fence, where the path went across the railroad, can you recollect whether or not the electric rails were covered or protected or were they uncovered and unprotected?

A. No, there was no protection at that time on that place and especially right along the road there was no protection excepting where the station where the train stops. Further down the road there was no protection at all.

Q. Did you happen to be down in that locality at the time of the accident?

A. Yes, I was there; I was fishing at that time about three hundred yards on the other side of the railroad.

Q. How did you get there?

A. Well, I went on a public way right on a road with my couple of boys, Eddie, Leonard and Frankie; there was three of my boys and me, and we went, and a couple of more fellows went by my station and followed the road.

Q. You went across the tracks up there at the station?

A. Yes, and then go on the other side of the road to the river and went fishing there.

Q. Did you leave this little boy, Edmund, home or not?

(Objected to as leading.)

Q. Where was the little boy, Edmund, when you went fishing?

A. Well, I think he began to follow us.

Q. Where was he when you went away from home?

A. Right at home in the yard.

Q. How old was he?

A. I should say about eight years old.

Q. At that time?

A. Yes.

Q. You went down there fishing and how long had you been there before you—how long had you been fishing before you learned about your boy?

A. I was maybe an hour or so or an hour and a half or something like that; I don't remember exactly.

Q. How near this path or way were you fishing on the other side of the railroad track?

A. Well, maybe—you mean I fishing—how far I was fishing from that path?

Q. Yes.

A. Well, as I say, the path maybe twenty-five feet from the path, right in the water.

Q. You fished in the water?

A. Yes, sir, I was in the water.

Q. You were in the water yourself?

A. Yes, sir, I was wading in the water, fishing.

Q. What first attracted your attention to any trouble?

A. First thing I know, a couple of fellows hollered that my boy was stuck on the rail.

Q. What did you do?

A. I look up and they hollered again so I just as quick as I can I came out to the shore and I ran as fast as I could.

Q. How did you run? Where did you go, in this path?

A. On that path, yes. Came to this path and run in towards the railroad.

Q. Where was the boy when you got to the railroad?

A. When I came to the railroad he was right on the rail, stuck, and I looked around ——

Q. Which rail was he on?

A. He was on the other side. I couldn't explain exactly. There is two tracks there.

Q. Yes.

A. It was on the south side, I mean to say, on that third rail, on the electric rail. He was laying between the rails.

Q. On the south side?

A. Yes.

Q. Right where the path goes over?

A. Yes, sir.

Q. What was the first thing that you saw when you—what did you notice about the boy, if anything?

A. Well, the first thing, I noticed the boy, and then I looked around to see how to take him off. I don't

remember—I was shook up, never saw anything in my life this way. I began to grab the boy and a couple of fellows hollered to me, "Don't do it," and they told me when I touched him I was wet and it knocked me down, but I don't remember that. Then I looked for some kind of a pole to take him off from the rail. I seen a man was standing close holding a fishing pole in his hands. I jumped to him to get that pole from him and put the fishing pole between the rail and the boy's foot and tear him off from the rail. I thought the boy was dead. I take him on my arms and carry him about fifty yards and then I heard him begin to moaning, you know, so I gave this boy to another man and a freight crew was by the station there and I began to run up to the station and they saw that this fellow carried the boy and they asked me what was the trouble. I told them ——

Q. What were you running for?

A. For a doctor; to the station to telephone for a doctor, and I went ——

Q. Wait one second. When you got the boy loose from the rail, what course did you take to go away from the railroad?

A. Going up ——

Q. This path?

A. Not this path. Followed right along the other side. There was a little path. It was the nearest place to go to the station, and I know there was a telephone and I know they will telephone for me to get a doctor as soon as they can, so I got the side way, the path there, and go that way.

Q. When you saw the boy on this rail did you notice anything, see anything?

A. Well, when I came up there, I seen there was three men.

Q. No; did you notice about the boy or his body?

A. Oh, yes.

Q. What?

A. Everybody knows that.

Q. What?

A. His two toes.

Q. I don't mean where he was burned. How did you know he was getting burned?

A. Well, I know by the way the people came. When I got to him I seen he was burning. There was smoke.

Q. Where was the smoke?

A. He was stuck to the rail, side rail, with his foot, and it was knocking him like this and the smoke was going. It was burning. Smoke was going high. A man with poor health can't stand in that place. It smelled bad and when I raised him up his face and everything was nothing but blue, he was burning, you know, and everything; couldn't recognize the boy, even in the face. How I got to save him so he is alive yet, I don't know. That is more than man can tell.

Q. Did you get him home? This gentleman you gave him to get him home right away?

A. We carried him close to the station and before the man with him came to the station, the doctor came in, too, but before doctor reached the man, the crew from the freight train began to work at him and give him—get the air to the lungs.

Q. Crew from a freight train?

A. Yes.

Q. Where was that?

A. Close to the station, right in the station yard.

Q. How many people were on the railroad when you rushed to get your boy off of the rail? How many people were there?

A. About four mans was there, what I know.

Q. Where are those four men?

A. They was standing close to the ——

Q. Where are they now, these four men?

A. Three of them are here and one of them has gone to Europe.

Q. Anybody else there at all?

A. I didn't see anything, but I saw a couple of boys running up that direction. When I looked for the pole, for something to get the boy out, I happened to look that way, or this way, to get it, I saw a couple of boys runnng outside of the bridge, the other side of the river. That is what I know and nothing else.

Q. Small boys?

A. Small boys.

Q. Aside from that, was there anybody else there?

A. I don't recollect; I don't know; didn't see anybody.

Q. Where was the boy burned? Tell us what places on his body were burned.

A. Why, he got two toes burned off of that foot.

Q. Burned off?

A. Burned off clear to this joint here. Then he got on both legs big scars all up on the top of the knee and the other some place inside here on the other leg, very heavy burns. Then outside of that, he have his whole knuckles on his hands, some marks are there now that you see, burned, and then his face.

Q. Where was his face burned?

A. Why, his face, the burn starts right there and comes close here, this side of the mouth, and went around again this way, and a little bit of a place left well. Doctor told us if it wasn't for this little well place that is left there, that little spot, he can't save him and he would die that time but for that. Then on the other side of his face, his eye, he got scorched his eye, which he don't see out of that eye.

Q. Did you keep the little boy home or take him to a hospital?

A. I asked the doctor's advice ——

(Objected to.)

Q. Did you keep him home?

A. No, I keep him home.

Q. At the time of this injury to the little boy, what kind of a physical boy was he? What kind of health had he?

A. He was the strongest boy I got in my family.

Q. Did he go to school?

A. Yes, sir.

Q. How was he in his mind, in his work?

A. To say with his age the way he was, he was a smart little fellow.

Q. Well, since he got hurt what else have you noticed in him? What have you noticed about him?

A. Well, once in a while he gets sick, hollers at night, we have got to give him some medicine, and once in a while when you sit down and look at him you don't suspect anything, he begin to play with his hands, or another kid by, he will pinch him and laugh without no case. It seems he is affected somewheres.

Q. Have you noticed any change in his mind?

A. Yes.

Q. Well, how? Describe that.

A. Well, as I say, if the boy was like he was before, I could never see him go and do something around, laugh by himself, got no case for it at all.

Q. He laughs without any excuse?

A. Without any excuse, no case at all. Same as when he works, sometimes tell him to do this or that, he says he can't because he will be dizzy in the head.

Q. Did you ever see him fall?

A. I saw him once do that. I have case to bring him in, he faint, after the accident happened, once.

Q. How about his sleeping at nights? Do you have any trouble with him?

A. Well, once in a while he will get up and begin to holler, say that something scared him. No trouble whatever the other way. He often gets sick.

Q. Has he undergone any operations?

A. No.

Q. Hasn't been operated on?

A. No.

Q. Does he go to school now?

A. Yes, he goes to school now.

Q. Can he learn?

A. Learned very, very poor.

Q. Can he learn as well now as he did before?

A. I don't think he can.

Q. Does he play the way he did before?

A. He can't play well, because he just gets excited, and he says noise in the head and he got to stop it, and besides, the other boys up there make fun out of his face and he gets ashamed sometimes and hides himself.

Q. Sensitive about his face, is he?

A. Yes.

Q. Did you see other people use this path while you were living here seventeen years?

A. Oh, yes; working people go very often through.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Tarlucki, how many times did you ever use that path?

A. I use it pretty often, that is, once a week sometimes; not more than that. Been working every day and when I got time on Saturday to spend the afternoon, sometimes go the other way, sometimes go this way.

Q. You lived where?

A. In the company houses here in Mays Landing.

Q. That is up on the other side of the Estelville road?

A. Yes.

Q. And when you went down over the path, did your son Edmund sometimes go with you?

A. No, I don't know. He went many times with my older boy before the electric track was there. He was going pretty often there when the steam road was there.

Q. After the electric track was there, did he go down there then, too?

A. I don't recollect that.

Q. You knew they had been accustomed to going down there when the steam road was there?

A. Yes.

Q. And you knew when they put the third rail in? I suppose you cautioned your children about the danger of the third rail?

A. Yes, I tell them so.

Q. Told them they shouldn't go on the track, shouldn't go there?

A. Yes.

Q. Did Edmund ever use that path after the accident?

A. Couldn't tell.

Q. But you had cautioned them not to use it prior to the accident, before the accident?

A. Yes, I tell my boys, because a lot of people don't know what was that, and our Polish people they don't understand that.

Q. And you told them?

A. I told my boys to get out from the place.

Q. How many times do you suppose you cautioned or told your boys not to use that path after the third rails were laid along there? Half a dozen times?

A. Couldn't tell how many times, but I know I had told them.

Q. It was several times, however?

A. Yes.

Q. Did you see Edmund when he came down that morning?

A. No.

Q. Did not? Then you don't know how he came down, do you?

A. No, I don't know.

Q. He knows?

A. He knows, yes.

Q. Did you go down to the place of the accident after it happened for the purpose of finding out just where it did happen?

A. I didn't go.

Q. Didn't go? And when you found your boy was injured, of course you were excited?

A. Yes. I don't understand just the question.

(Question repeated.)

A. Oh, yes.

Q. In other words, you were very greatly excited, weren't you?

A. Yes.

Q. And you didn't notice anything in particular excepting your son, did you?

A. At the start, yes.

Q. You were anxious about him, weren't you?

A. Yes, but when I came to get him out of there, then is when I looked around what chance I got to get him out.

Q. What did you look around for?

A. To get something to get him out of the rail.

Q. You were looking for some piece of wood, weren't you?

A. Yes, sir.

Q. And after you got the piece of wood, then you proceeded immediately to get the boy off of the rail?

A. Yes, sir.

Q. And your whole attention and thought was for the safety and care of your boy, wasn't it?

A. Yes.

Q. Certainly. And as soon as you got him off the rail, you picked him up and immediately ran up the track?

A. Yes, but there was a couple of mans I give the boy after I run about fifty feet or fifty yards, I don't remember which, give the boy to another man and run myself ahead again.

Q. Can you tell the difference between fifty feet and fifty yards?

A. No, I don't remember.

Q. You can't tell now whether you ran fifty feet or fifty yards, can you?

A. No, I can't.

Q. Fifty yards is a hundred and fifty feet, isn't it?

A. Yes.

Q. The reason you can't tell at this time is because you were so greatly excited?

A. Yes.

Q. You were not thinking about distance at all?

A. No.

Q. You were thinking just of helping your boy?

A. Yes.

Q. But you did run some distance? I say you did run some distance with your boy before you met the two men?

A. No; the man run behind me.

Q. Who was the man that ran behind you?

A. The man that was fishing at the time.

Q. What is his name?

A. John Matusiwicz.
Q. Who else was there?
A. There was Mike Gupin.
Q. Who else?
A. Gussie Maszcynski.
Q. Who else?
A. There was one man that was there, but he isn't here now. He went to Europe.
Q. Mike Gupin, is it?
A. Yes.
Q. Is he here in court today?
A. Yes, he is in the court.
Q. Does he work with you in New Bedford?
A. He is in New Bedford but don't work with me.
Q. And this other man whose name you spelled, where is he?
A. He is here.
Q. Where does he live?
A. In Mays Landing.
Q. And the other man, where does he live?
A. He lives in Mays Landing.
Q. Also?
A. Yes.
Q. How long had you been fishing before this accident occurred?
A. I couldn't recollect. I think an hour and a half or so or more; I couldn't tell.
Q. And who was it that went fishing with you?
A. Well, those man.
Q. Those three men?
A. Yes.
Q. Were any children with you?
A. Yes, I have my three boys with me.
Q. Your two boys?
A. Three of them.
Q. Were they younger or older than Edmund?

A. One was older and two was younger.

Q. Did Edmund have anything with him?

A. I don't know; not as I recollect.

Q. Did he have a fishing pole with him?

A. No; when I saw him on the track he has nothing in his hands.

Q. Did you have a fishing pole with you?

A. Yes, I got my fishing pole with me.

Q. What kind of bait did you fish with that day?

A. Fishing with some kind of little bait for a little fish.

Q. What kind of fish were you fishing for?

A. They call it roach here. Little kind of fish.

Q. How far into the water did you wade to fish?

A. I was about twenty-five or more foot from the shore.

Q. That is right parallel with the railroad?

A. No; go away back from the railroad.

Q. Twenty-five feet away from the railroad, were you?

A. No; that is twenty-five feet from the shore. If you take a straight line from the railroad it might be two or three hundred yards, something like that.

Q. Which was it, two or three hundred yards, or was it about twenty-five feet?

A. From the railroad?

Q. Yes.

A. Oh, no, it would sooner be three hundred yards than twenty-five feet.

Q. Two or three hundred yards?

A. Yes.

Q. How close were these other three men that were with you, to you?

A. They wasn't with me at all; they was close to the railroad.

Q. They were close to the railroad?

A. Yes.

Q. How close to the railroad were they?

A. Well, I couldn't tell. When they hollered to me they was right on the bank on the road there where the road goes in.

Q. Did they try to get the boy off?

A. No.

Q. They just called to you to get him off?

A. Yes, sir.

Q. You don't know how they knew he was there, do you?

A. What?

Q. You don't know how those men knew he was on the railroad? Do you know how it was they knew he was there?

A. Well, they seen him. They seen him coming there.

Q. They saw him coming? Which one of them saw him coming, do you know?

A. Well, I don't know which one saw him coming the first or something like that, but they say they saw him.

Q. In which direction from the railroad were you when you were fishing?

A. On the south side.

Q. On the south side about three hundred yards below?

A. Yes, two or three, I couldn't tell. Little difference, anyway.

Q. I beg pardon.

A. Little difference in the distance, anyhow.

Q. In other words, from six to nine hundred feet?

A. Something like that.

Q. And you were out in the water?

A. I was in the water.

Q. And you say that the wire fencing was bent or broken down?

A. Yes.

Q. Large enough place so two men could walk through abreast?

A. Yes.

Q. Was it upright, all the rest of the places, except that little place?

A. Some little bent was on the side, but this place was broken.

Q. But it was fastened up at each post?

A. Yes.

Q. And just down in between the posts?

A. Yes, that is it.

Q. How did you happen to know a week previous that this fence was broken down?

A. Week or so, I say. I won't exactly say a week, but I say a week or so I was going there with a couple of men and noticed that it was broke down.

Q. What did you go for? Fishing that day?

A. Fishing.

Q. After you knew that the fence was broken down, did you again notify your boys not to go there?

A. I told my wife to tell the boys to keep away from there.

Q. Is your wife here today?

A. No, she can't come.

Q. You say when you left home that day, Edmund was in the yard doing what?

A. Nothing.

Q. Just in the yard?

A. Standing there.

Q. Did you live on the street that leads up to Weymouth, on that road right past the hotel?

A. Back further in the field there.

Q. Nearer to the railroad?

A. Yes, sir.

Q. Now, Mr. Tarlucki, from where you lived it was

nearer to go to Kate's Landing, if that is where you were going to fish ——

A. Yes, sir.

Q. —— by going to the station and crossing over?

A. Yes, sir.

Q. And that was the reason you went that direction, or was the walking better?

A. No, I didn't went this way myself.

Q. I beg pardon.

A. I didn't went this way.

Q. You went by the station? You took the nearest cut?

A. Yes, sir.

Q. Went right across the track there at the road crossing?

A. Yes, sir.

Q. Then down along through the freight yard?

A. Yes, sir.

Q. And down to the river?

A. Yes, sir.

Q. At this landing there isn't anything to indicate a landing, is there, except simply the shelving beach?

A. Yes, sir.

Q. No wharf there?

A. No.

Q. Just sort of a shallow ——

A. Shallow, nice looking place, sand there.

Q. You have frequently taken Edmund with you down to the landing the way you went, haven't you, past the station and then on down?

A. Oh, I didn't take him with me.

Q. Not this time, but I mean before that time?

A. Yes, sir.

Q. You had taken many of your children down past the station and down to the river that way?

A. Not very often, but once in a while.

Q. But you never took Edmund down to the river over that path after the electric road was built, did you?

A. No, I didn't.

Q. And as a matter of fact, it would be further from your house to go to the river if you went by the path than it would be if you went by the station, wouldn't it?

A. In case I would go this way if I haven't got no fish hooks or something like that I need to buy in the company's store, then it would be nearer.

Q. But if you were not going to go to the store, it would be nearer to go directly to the station there?

A. Yes.

Q. When did you first see the smoke caused by Edmund being burned?

A. Just as soon as I came on the top of the railroad bank, on the track there.

Q. Was there much smoke?

A. Smoke a good bit.

Q. Quite a good deal, was there?

A. Yes, sir.

Q. Do you know how long that freight train had been there? How long had the freight train been there?

A. Freight?

Q. The freight train.

A. Oh, freight train?

Q. Yes.

A. I didn't notice until I came with my boy and saw them there and run a good distance. That is a good distance from that place to the station. They helped me to take care of the boy then after I came there.

Q. You were six or nine hundred feet away? You were two or three hundred yards away?

A. Was two hundred, maybe a little more or less.

Q. Now, tell me—I forget, at least I am not quite sure. After you leave the place where that sandy

beach is and go west or south along the river, the river bends around to the right, doesn't it? A cove in there, isn't there?

A. Cove, yes.

Q. And it bends around to the right?

A. Yes.

Q. So that you couldn't have seen your boy from where you were fishing?

A. No.

Q. You could only know because they called to you?

A. That is the only way, yes.

Q. Is it very much of a bend in there?

A. A pretty good bend. I was right in that cove, in that bend there.

Q. You were in the cove, in the bend? What sort of a day was it, Mr. Tarlucki? Was it a clear day?

A. Yes, clear day.

Q. And you had Saturday afternoon off?

A. Yes.

Q. You did not work Saturday afternoon?

A. No.

Q. Now, do you know how long it was after you left home before your boy Edmund started to follow you?

A. I don't know exactly how long I was fishing. I don't know how he is going to follow me. I know he did follow somewheres when I came up this way, but I don't know just how long it was.

Q. Did you tell him not to follow you when you left home?

A. The mother asked me if I take all the boys. I told the mother I have a lot of them already.

Q. How is that?

A. The mother asked me to take all the boys with me but I told her I had too many of them already on my hands, so I went and I suppose the boy followed us, but which way he followed us I don't know.

Q. Did you speak to the boy before you left home about it?

A. No.

Q. Did he see you when you left?

A. Yes.

Q. Did he see which way you went?

A. If he look after me, the way I went, I guess he see it.

Q. Do you know whether he did look?

A. I couldn't tell.

Q. Did he know where you were going?

A. Yes, he know where I was going.

Q. Mr. Tarlucki, you say there were boats there, near there where you were fishing, that is, in the river there. Whose boats were there?

A. I couldn't tell you, sir; I don't know. Some boats was there, a few of them, but to whom they belonged I couldn't tell.

Q. Anchored out in the river?

A. No, they been right on the beach. Lay tied. Generally when we go fishing like that, it is on low tide.

Q. When you went down from the station to the river, you saw them there?

A. Yes, sir.

MICHAEL GUPIN, sworn.

Direct examination.

By Mr. Wescott:

Q. Mr. Gupin, where do you live, please?

A. I live in New Bedford now.

Q. Do you remember this accident to this little boy on the 27th of May, 1908?

A. Yes, sir.

Q. Where were you living then?

A. I was living up here on the hill; two big houses up on the hill.

Q. You remember this path or way down to the railroad and across it here?

A. Yes, I know that place.

Q. Did you ever go it yourself, walk along there?

A. Many a time.

Q. For how many years did you know it?

A. Well, I don't know how many years it could be. Eight or nine years, I guess.

Q. See other people use it?

A. Yes.

Q. Was it a regular, well-worn path?

(Objected to as leading.)

A. I could see wagons on them paths. I never seen them crossing the railroad, but I seen them there.

Q. What kind of a path was it? Just describe it.

Mr. Wescott: I shall make a motion that this jury be permitted during the recess to go down and look at this place.

Mr. Bourgeois: I am willing they shall go there and look at it.

The Court: Go and see it, gentlemen.

Recess to 1.30 P. M.

Afternoon Session, 1.30 P. M.

MICHAEL GUPIN, resumed.

Direct examination continued.

By Mr. Wescott:

Q. How many years did you say you lived here?

A. Altogether, I lived here about four or five years steady that was.

Q. During that time did you use this path?

A. Yes, sir, I used this here path quite often when I first came here.

Q. Did you see others use it?

A. Yes, sir.

Q. I asked you to describe the path as it was when you knew it back in 1908.

A. The path is kind of getting grew up now. You see, it was a wagon—wagons used to go there.

Q. Do you remember when there were wagon tracks there?

A. I remember I seen wagons on the road there but I didn't see them going across the track; I don't remember that.

Q. Were you down at the place of the accident to the little boy?

A. Yes sir.

Q. Whereabouts were you?

A. I was right alongside of the track, on the other track on the other side, about four or five feet away from the track.

Q. What had you been doing there?

A. I was fixing my pole, fishing line what I had there.

Q. Did you see this little boy?

A. I seen him and two other boys, I don't know who the other two were.

Q. Where was this boy when you first saw him? Where did he come from?

A. I don't know what way he came from. I didn't see him. I only saw him when he stood there, he and the other two boys, on that path.

Q. Where was he on the path when you first saw him?

A. Up towards the railroad.

Q. Up the bank?

A. Yes.

Q. How much of a bank was it?

A. Oh, it was just a little hill like.

Q. Was there a fence along there?

A. Well, on this side there was a fence. It was caved in, you know, pulled in from the two posts down.

Q. Open, was it?

A. It was kind of squeezed down to the ground about a foot or so up from the ground. Walk right over it.

Q. How wide a space was there for anybody to go through?

A. Oh, I don't know; three feet or something like that.

Q. Did you see the little boy come through there?

A. I didn't see him come through there, but I just seen him when he got up the hill there. I don't know where he came from.

Q. Then what did he do?

A. They stood there, the other two and he walked across the track and he got caught on the other track on that side.

Q. Where the path goes across?

A. Right where it goes on the other side.

Q. When you say he got caught, what do you mean?

A. In the rail, you know. He crossed the first rail and as he was going over the other side, his knee caught this charged rail and he fell right down and his face

caught on the dead rail and his other foot was up against the other one and one was on the ground.

Q. What did you notice after he got caught?

A. I hollered for his father. His father was fishing right straight across as the path goes and I was up on the bank and I couldn't shove him off with my pole, for it was green and I was afraid I would get shocked, and I hollered for him and he got a pole off of some fellow there.

Q. Was the boy burning?

A. Yes, smoking like frying lard or anything.

Q. How did he get away finally?

A. Well, his father came over and I hollered for his father and his father pushed him off the track and took him up towards the station.

Q. How did he get him off?

A. With a stick. He had a stick and he shoved him off.

Q. Did you see his father take hold of the boy?

A. No; he shoved him off the track first and then he got hold of the boy and carried him over to the station.

Q. Before he shoved him off, did you see him take hold of him?

A. No, he hadn't hold of him. I told him, I says, "Don't get hold of him at all until you get him off the track."

Q. Did you know the little boy before he got burned?

A. Yes, sir.

Q. What kind of a boy was he?

A. Good, healthy boy in everything as far as I could see.

Q. Was he a bright boy?

A. Bright. I didn't see nothing wrong about him. He had good health and everything before.

Q. Is there any change in him now that you notice?

A. Well, I don't happen to see him very much that

way, you know, where I live. Few days here I saw him. I don't know.

Q. Who else was there?

A. There was me and a fellow here by the name of John Matusiwicz. Me and him and Frank. He was down below, you know.

Q. Frank was down fishing?

A. Yes.

Q. But right there at the place of the accident how many men were there?

A. Two.

Q. You and two others?

A. Me and John. I seen him first and John right after me.

Q. Anybody else there?

A. Nobody else there then as I could see.

Cross-examination.

By Mr. Coulomb:

Q. Where do you live now?

A. New Bedford.

Q. How long have you lived there?

A. Why, it has been three years the 28th of this February past.

Q. Where did you live before you went to New Bedford?

A. Well, I stayed here about a week at Mays Landing and went to Philadelphia and worked for a while and then went to Chester and from Chester I came here again and stayed here a while, and back again.

Q. How long had you lived in Mays Landing?

A. Put it altogether, I guess around four years or five. Come and work here about a year or so and then go back to my father and from there come back again.

Q. Did you live here before the electric road was built through here?

A. Yes.

Q. How long before?

A. That I don't know; I couldn't tell you how long before that.

Q. How many wagons have you seen on this path that you speak of?

A. Oh, I don't know; I didn't count any, but I know I seen a wagon on that path.

Q. You saw one wagon on that path? Where was the wagon?

A. Little ways from the railroad.

Q. How far?

A. Oh, I don't know how far it was. I know a little ways down from the bank.

Q. When was it you saw that wagon there?

A. It was a good while ago now; I couldn't tell you how long it is.

Q. When you first came to Mays Landing?

A. Before that, I guess.

Q. Before you came to Mays Landing?

A. No, after that, I guess; I had been here a good while when I seen that wagon there.

Q. It was some distance away from the railroad track?

A. Little distance away, yes.

Q. What was in the wagon?

A. Some lumber wagon or something. I don't know what was in it at all; I don't remember.

Q. Where were you standing on the day of this accident?

A. Right on the other side of the track.

Q. What do you mean; the south side of the track?

A. Yes, the other side, south side.

Q. Whereabouts on the south side of the track?

A. Well, I was about twenty feet from the path.

Q. What were you doing there?

A. I was fixing my line on the pole.

Q. Were you up on the railroad track or down close to the river?

A. No; right up about four feet away from the track.

Q. Alongside of the track?

A. Right alongside of the track on the other side.

Q. Alongside of the track?

A. Yes, and this other fellow, he was right next to me there, and I just happened to turn around like that and I seen him coming across the track.

Q. Seen who?

A. Tarlucki's boy.

Q. The first time you saw the boy was when he was coming across the track?

A. No; the two of them was standing there and he started between them and he went right across.

Q. When did you first see the boy?

A. When he was standing there.

Q. Standing where?

A. Right on the path where you come up the hill.

Q. Which path?

A. The path that goes from the factory store down.

Q. Where was he, up on the railroad tracks?

A. I was on the railroad, yes.

Q. Where was he?

A. Right up near the railroad.

Q. Right up near the railroad tracks?

A. Yes.

Q. Near which track was he when you first saw him?

A. He was on this side of the railroad, just left that path where that fence is.

Q. Where was he? You say he was near the railroad. How far away from the railroad was he?

A. Well, he was about—I don't know how far he

could be; a little ways; maybe five feet, six, something like that, from the track, five or six feet.

Q. Was he up on the embankment, on the railroad embankment?

A. Yes.

Q. How far was he above where the fence crosses the path?

A. He was right straight from the path up by the railroad.

Q. This fence crosses the path, this wire fence that you have said was broken down?

A. Yes.

Q. After you pass through that, the railroad is up on an embankment?

A. Yes, sir.

Q. How high is that embankment?

A. I couldn't tell you how high it is.

Q. Is it four feet?

A. I guess it is around three or four foot from the level of that path.

Q. Three or four feet above the path?

A. Yes.

Q. Was he standing up on this place which was three or four feet above the path when you first saw him?

A. Yes; he was standing right on that path.

Q. You have told me that the path comes up to the fence and then the railroad is up on an embankment about four feet above that path?

A. I seen him up on that bank.

Q. You saw him up above the path then, above where the fence is?

A. Yes, he was up on the other side of the fence.

Q. On the other side of the fence?

A. On the other side, on the south side of the fence.

Q. And up even with the railroad tracks?

A. Yes.

Q. Even with the railroad tracks? Did you see him start across?

A. Yes, sir.

Q. In what direction did he come across?

A. Well, I couldn't tell you what way he came. I didn't see him.

Q. After you saw him, after you watched him start across?

A. He started on the other side.

Q. Did you see him start there?

A. Yes, sir.

Q. What rail did he cross first?

A. Well, he started, I guess, over to his father. He was going right out that way.

Q. Which rail did he start over first?

A. Well, he walked over the first rail, electric rail, and he crossed the other one. The electric rail caught him here in the knee and he fell right down.

Q. You know where the railroad bridge is?

A. Yes, sir.

Q. Where were you standing with respect to the railroad bridge?

A. Well, I was standing right on that side about twenty feet from the path.

Q. Between the path and the railroad bridge?

A. No; about twenty feet from the path.

Q. Were you standing between the path and the railroad bridge or between the path and the railroad station, the upper station?

A. No; between the path and the bridge.

Q. When this boy started to come across, did he come towards you?

A. No.

Q. How did he come?

A. He was going across the other way. I was a little ways off. He was going right across the other side on the other path.

Q. What side of the railroad were you on?

A. On the south side.

Q. Was he coming from the north side to the south side?

A. He was going right across.

Q. He was coming over to your side of the railroad?

A. Yes, he was going over to that same side.

Q. He was coming over to the side where you were?

A. Yes, on that side.

Q. Was he coming towards you?

A. No.

Q. How was he going?

A. He was going that way.

Q. Where were you?

A. I was standing a little ways off from him.

Q. You saw him get over the first track?

A. Yes, sir.

Q. Then he stumbled over the third rail which forms part of the south bound track?

A. Yes.

Q. As you come up from the path, from where this fence is, you have to climb up an embankment first, don't you, about four feet high, before you reach the railroad tracks?

A. Yes, it is a little high there.

Q. After you come through the fence? Then is the ballast of the railroad there, where the ties are laid?

A. What do you mean?

Q. The stone or cinders.

A. There was cinders along there.

Q. And the railroad ties are laid in those cinders?

A. Yes.

Q. Then you have to step up how high to get up over those ties?

A. I don't know.

Q. Do you know what a tie is?

A. Yes. You mean the ties of the track?

Q. Yes, after you come up from the fence, you come up, you say, an embankment about four feet high?

A. Yes.

Q. When you get up there, you are on the top of the railroad bed, aren't you?

A. It run up on a slant.

Q. When you come up through the fence, you have to climb a hill or little embankment there about four feet high?

A. Yes, it is around there.

Q. When you climb that, then you are on top of the railroad?

A. Yes.

Q. When you want to cross the first track you come to, are there any ties in your road? Do you have to come up over the ties?

A. No; you go right up on the rail then.

Q. And the rail is laid on ties?

A. Yes.

Q. And those ties are laid in cinder or stone ballast?

A. I don't know whether it is cinder or stones.

Q. It is either one or the other?

A. Yes.

Q. That makes it a little bit above the side of the railroad so you have to step up to get over it?

A. Yes, there might have been a little place there you have to step.

Q. Then you have to step still higher to get over the third rail, don't you?

A. I don't think so. You have to step higher to get over the third rail, yes.

Q. Then when you get over the third rail you come in between the two tracks, the north bound and the south bound track?

A. Yes, sir.

Q. Then the next thing you come to is the next third rail?

A. Yes.

Q. The third rail on the south bound track, and you have to step over that?

A. Yes.

Q. Is there any planking in there at this crossing that you speak of where this path comes up to the railroad?

A. Planks?

Q. What?

A. I don't know.

Q. There are no planks there?

A. I don't know. I don't think I seen any.

Q. How many boys did you see with Edmund Tarlucki?

A. There was two and he was the third one.

Q. Who were the other two boys?

A. I don't know who they are.

Q. Did they come across before he did?

A. No, I didn't see them. No, after he fell down these other two boys, they run through the woods there somewheres. They got scared or something, I guess. I didn't see them no more.

Q. They didn't stay there?

A. No.

Q. Have you been down there since this accident happened?

A. Yes, sir.

Q. When did you go down?

A. Well, I have been down yesterday around there and I have been down before when I was down here.

Q. When did you come from New Bedford?

A. Now, do you mean?

Q. Yes.

A. Monday afternoon.

Q. When you first saw Edmund Tarlucki then he

was up on the top of the railroad embankment, that is, the embankment that the railroad runs on?

A. Yes.

Q. And he wasn't down where the fence is?

A. No, he wasn't down where the fence is.

Q. He was up on top of the railroad?

A. About five or six feet away from the railroad, he is.

By Mr. Wescott:

Q. How did this boy get caught? Did you see?

A. Yes, sir, certainly I seen him.

Q. Well, how was it? Which foot? What was he doing when he got caught?

A. I don't know the foot; I think it was the left foot or right foot, I don't know, but I know how he fell and everything.

Q. See his foot strike the rail?

A. Yes, sir; when he crossed over that up, it caught him right here and he fell on his side that way and he laid with his cheek on the rail.

Q. When he was crossing over the rail, it caught him on the shin?

A. Yes, sir.

Q. That is the way it happened?

By Mr. Coulomb:

Q. Did he run across the track?

A. No.

Q. Walked over?

A. Walked across, yes, sir.

JOHN MATUSIWICZ, called.

By Mr. Wescott:

Q. Can you speak English?

(Witness nods head in the negative.)

Q. Can't you speak at all?
A. No, I can't speak English.

(Witness sworn through interpreter.)

Direct examination.

By Mr. Wescott:

Q. How old are you?
A. Thirty years old.
Q. How long have you lived in Mays Landing?
A. Seven years.
Q. Did you know Edmund Tarlucki, the little boy that got burned?
A. Yes, sir.
Q. Were you down on the railroad when he got burned?
A. Yes.
Q. Did you know a path, do you remember a path that led up to the railroad?
A. Yes.
Q. Where were you when the little boy got burned?
A. He was on the other side of the railroad track.
Q. How near where the path went across?
A. He says fifteen or twenty feet he was off.
Q. Was there anybody there besides you?
A. He says somebody else was there.

Q. Who?

A. Mike Gupin.

Q. What did you see the little boy do?

A. He says there was some boys, they went past the railroad and this here boy was crossing on this crossing.

Q. Where did the boy come from?

A. He was walking toward where his father was in there, and he was on this road.

Q. Was the boy walking on this road that led up to the railroad?

A. He says them boys all passed ahead of him and this one walked behind them and before he knowed, got caught on the third rail. He was back of all the rest of them.

Q. He was back of the rest of the boys?

A. Yes.

Q. Do you remember the hole through the fence?

A. Yes, he says there was a hole in the wire.

Q. Did you see the little boy come out of that fence, through that hole in the fence?

A. He says he didn't need to climb on account of this wire was down.

Q. Did you see the boy come through the opening in the fence where the wire was down?

A. Yes.

Q. And then where did he go, up the bank, the railroad bank?

A. Them boys go underneath, he says.

Q. I asked him if he saw this boy come up the railroad bank.

Mr. Bourgeois: What was the answer? What did that man say to you?

Mr. Wescott: What did you say to him?

The Interpreter: I asked him where them boys go to.

Mr. Wescott: I didn't tell you to ask him where the boys went to. I told you to ask him whether he saw this little Tarlucki boy come out of that path and walk up the railroad bank.

The Interpreter: I asked him that.

Mr. Wescott: Ask him that again.

A. He says one passed it and the railroad caught him and began to burn him, that is all.

Q. How did the little boy get caught, if he knows?

A. He says when he was stepping over the railroad from one rail to another and stepped over, then caught by the foot to the railroad, then he fall over against the other one and then he began burning then.

Q. What were you doing there?

A. He just intended to go fishing and happened to come and see that.

Q. Whom do you work for in Mays Landing?

A. He work in cotton mill.

Q. Were you subpoenaed to come here?

A. He says come straight in here from Europe.

Q. Did you have a paper served on you where you work to come here to testify and have money given you, fifty cents?

A. Yes.

No cross-examination.

GUSSIE MASZCYNSKI, sworn.

Direct examination.

By Mr. Wescott:

Q. Do you speak English?

A. Speak some.

Q. Do you know Mr. Tarlucki?
A. Yes, sir.
Q. Did you know his little boy?
A. Yes, sir.
Q. The one that got burned on the rails?
A. Yes, sir.
Q. How long have you lived in Mays Landing?
A. Oh, I guess about four years or three and a half.
Q. Well, were you down there at the place of this accident?
A. Yes, sir.
Q. What were you doing there?
A. I was fishing with him.
Q. With whom?
A. With Tarlucki.
Q. With the father?
A. Yes.
Q. Now, what did you see of this accident?
A. Why, I didn't see. All I see is two men stood on the bridge and hollered, "Frank, that your boy is gone," and he throw his fishing pole down and begin to run and I run after him. When he come to the railroad the boy was laying on the third rail and burning.
Q. Where were these two men that you saw?
A. They was about twenty or fifteen feet away from the boy.
Q. And where was the boy?
A. He was laying on the third rail.
Q. Did you know about the path that went across the railroad there?
A. Yes, I know some of it.
Q. Did you ever go through that opening?
A. Yes.
Q. By that path across the railroad?
A. Yes.
Q. Into the path on the other side?

A. Yes.

Q. Now, where was the boy lying as to that path when you saw him? In front of it?

A. Yes, he was right on the path, laying right on the path.

Q. Did you see what the father did to the boy?

A. Yes; he was going to grab him with bare hands but I hollered at him he shouldn't do it because he was going to hurt him, so he took a fishing pole or something and he stuck it under his leg and throwed it off the rail; then he picked him up and carried him away a ways and then he give him to another man.

Q. What did you do?

A. I ran in the swamp and got some water to put on the boy.

Q. Was the boy conscious when his father got him loose? Did he have his mind?

A. No; he was dead.

Q. He was dead?

A. Didn't breathe or nothing.

Q. You thought he was dead from the way he looked and acted?

A. Yes.

Q. Did you know the little boy before this accident?

A. Not hardly.

Q. Weren't much acquainted with him?

A. No.

Cross-examination.

By Mr. Bourgeois:

Q. Just where were you when these men holloaed?

A. I was fishing with Mr. Tarlucki about two or three hundred yards away from the railroad down below on the south side.

Q. And from a distance of two or three hundred yards away from these men, you can say that they were about fifteen or twenty feet away from the boy?

A. Yes.

Q. How near to the bridge were these two men?

A. Well, I don't know. I can't tell you that; I don't hardly remember; it is quite a few years back.

Q. Yes.

A. And when I got there they was about ——

Q. Not when you got there.

A. When I got there I didn't see nothing because Tarlucki was fishing there and he didn't see what was going on on the railroad because there is bushes standing there, and when they hollered to him that the boy is gone ——

Q. How near to the bridge were these two men at the time they called?

A. Oh, they was about twenty feet away from the bridge.

Q. The four of you had been together, hadn't you?

A. Yes, sir.

Q. Went down to the river together?

A. Yes.

Q. And you and Tarlucki got in a boat together, didn't you?

A. Not in a boat.

Q. Didn't get in a boat?

A. I was standing on the shore. Tarlucki went inside to fish and I was on the shore.

Q. You were fishing?

A. Yes.

Q. Where was it you left the two men whom you afterwards saw on the railroad track?

A. What?

Q. Where did you part from these two men, Gupin and the other man?

A. Well, we was fishing down below and the two men, they went up on the bridge to fish.

Q. You were fishing two or three hundred yards from the railroad.

A. I know.

Q. Now, let me ask you, didn't the four of you come down the old road down to the place where there is a shelving beach there where they land the boats sometimes?

A. Yes.

Q. Together, didn't you? And when you got there, you and Tarlucki went to the right, down the river further, or up the river further, it is, possibly, and the other two men went out to the railroad, didn't they?

A. They went up on the shore and went up towards the railroad and we stayed this way.

Q. You went that way? You went about two or three hundred yards from the railroad track and then you and Tarlucki commenced to fish, didn't you?

A. Yes.

Q. And these other two men, Gupin and the man with the unpronounceable name, they went and fished right along the railroad?

A. Who?

Q. Gupin and the other man.

A. Yes.

Q. And they fished along the railroad for quite a long while, didn't they?

A. Well, they fished for quite a little while, yes.

Q. It was an hour and a half, wasn't it, from the time you first went down there until this accident happened?

A. Somewheres around there.

Q. And during all that time those men had been fishing next to the railroad, hadn't they?

A. Well, they was about seven or eight foot away from the railroad.

Q. Down the embankment, weren't they, on the other side of the road down the embankment?

A. I don't hardly remember. I couldn't tell you that.

Q. They were fishing in the water, weren't they?

A. Yes.

Q. Then they must have been down next to the water and the railroad embankment there by the river is eight or ten feet high, isn't it?

A. I don't know.

Q. Do you know this: do you know when Gupin started to go across from the westerly side or southerly side of the railroad track, that is, the side you were, when he started to go across to the other side?

A. No, I don't know.

Q. Do you remember those two men fishing out there by the railroad bridge?

A. Yes.

Q. You remember that? Do you remember that young Tarlucki was with them at that time?

A. Edmund?

Q. Edmund Tarlucki.

A. No, he wasn't there.

Q. Wasn't with them? Wasn't Edmund Tarlucki with Gupin at the time that Gupin started to go across the track from the south side to the north side, and didn't Edmund Tarlucki follow him and fall?

A. No.

Q. How do you know?

A. Because I know. I saw them two mens and I didn't see Edmund Tarlucki there.

Q. When did you see those two men?

A. I seen them on the bridge; not on the bridge, but on the bank.

Q. Right close to the bridge?

A. Yes.

Q. And how soon before this boy was hurt did you see them on the bank right close to the bridge?

A. Oh, about an hour and a half.

Q. Now, did you see them when they started across the track?

A. No.

Q. Did you see Tarlucki when he started across the track?

A. No.

Q. Then how do you know that Tarlucki did not follow Gupin across that track? How do you know that?

A. Because I know he didn't.

Q. How do you know it?

A. Because we left the boy home when we went fishing.

Q. Then because you left him home you think he stayed home all the time, do you?

A. I don't know.

Q. Well, don't you know he didn't stay home?

A. That might be so.

Q. Isn't it a fact that he did not?

A. I don't know.

Q. Don't know? How do you suppose he got down there and got burned? Do you still say you don't know whether he stayed home or not? You don't know?

A. No. Yes, I know he stayed home when we left the house.

Q. You know what?

A. I know he left home when we left the house.

Q. He left home when you left the house? Where did he go?

A. He was playing in the yard.

Q. You mean he remained at home when you left the house and the next thing you saw of him was when?

A. When he was laying on the third rail burning.

Q. And you didn't see him between that time?

A. No, because we was fishing about two or three hundred yards away from him. Because there is bushes right on that path and we was fishing there and there is a cave came out there by the bridge and I saw them two men but I never saw Edmund with them.

Q. You saw those two men right close to the end of the bridge, didn't you? How far were they from the bridge?

A. About twenty feet.

Q. About twenty feet from the end of the bridge, and the boy was about fifteen or twenty feet from them. Is that right?

A. Yes.

Q. That is where he fell on the track. You could see the smoke, could you?

A. I didn't see it until I got there.

Q. You say that the—you need not look at him yet.

A. I will tell you; some words I don't understand.

Mr. Wescott: If you do not understand, ask, because you are not in the hands of your friends.

Q. Now, Gussie, you say that the wire was down in the fence on this side of the track?

A. Well, I don't know, I told you I wasn't down there very much time, but I think it was down. I didn't use that path myself so many times. I went down two or three times but that time I got so excited I don't remember whether it was down or not.

Q. For how long a time was that wire down?

A. I don't know.

Q. How long was it down before the day of the accident?

A. I can't tell you. I didn't go down there so much.

Q. How soon after the accident was it put up again?

A. I don't know. I didn't go down there since.
Q. Haven't you been there since?
A. Yes, once.
Q. Did you notice the wire then?
A. Sure. The wire was up.
Q. And there were two extra posts put down there then, weren't there?
A. I don't remember; I don't know.

By Mr. Wescott:

Q. How long after the accident did you go there?
A. What?
Q. How long after the accident do you judge it was that you went there to this place?
A. I didn't go there after the accident. I went away.
Q. Have you been there since you came back?
A. Yes; I went to New Bedford and lived there for a year and a half or two.
Q. When were you down there the last time?
A. I don't know; I guess about two or three months ago.
Q. Did it look the same there at that path?
A. No; it is kind of grown up and they got new fence there.
Q. What new was there there?
A. There wasn't nothing new there before.
Q. What?
A. There wasn't nothing new there before.
Q. When you went there the last time, what was there that was new there? Has this opening been closed up?
A. Yes.
Q. Other posts put in there?
A. I don't know if there was any posts there or not because I didn't look.

WILLIAM MATTIX, sworn.

Direct examination.

By Mr. Wescott:

Q. Where do you live, Mr. Mattix?
A. Mays Landing.
Q. What is your age, please?
A. Seventy-nine last Tuesday.
Q. How many years have you lived in this neighborhood?
A. Oh, practically all my life. Been away a little at odd spells.
Q. Do you remember an old road that began down near the power house, where the power house now is, and went out?
A. Do you mean the Water Power Company?
Q. Yes.
A. No.
Q. Do you remember a path through the woods down here that goes over the railroad down, meeting the end of the ——
A. Do you mean the river bank?
Q. Yes.
A. Yes, oh, yes. Familiar with that all my life since I have been big enough.
Q. How long have you known that?
A. Oh, ever since I was big enough to run around the town.
Q. When you first knew it, what was it like?
A. Well, it wasn't in as good condition as it is at present. It was a narrow bank that was used to keep the water out of the meadow there.
Q. Where did it begin? Was there a path there, road?

A. Well, the entrance to it is between the Water Power store and the bridge right down the river perhaps 150 yards, and then the meadow comes near the river and the bank runs between the two.

Q. Was there a wagon way on top of the bank?

A. No, not to my recollection.

Q. Well, was there a footway there?

A. Oh, yes.

Q. Well, where did that extend to, where did it go?

A. Just about the same place it does now. Run right down between the river and that meadow.

Q. Did it go beyond where the railroad is?

A. Yes. Well, it landed right close to where the railroad is, on high ground.

Q. Did it go beyond the railroad?

A. Well, I don't know whether the path extended beyond that or not.

Q. There is a path that extends beyond the railroad now, isn't there?

A. Well, I can't remember anything of that kind.

Q. The path as you recollect it has been used by the general public how many years?

A. Oh, all that time, ever since I can remember. Been used by foot passengers. I never knew a wagon to use it.

Cross-examination.

By Mr. Bourgeois:

Q. Mr. Mattix, that bank was simply an ordinary river bank, wasn't it, put to keep the water out from the meadow?

A. Yes, what we call the bank meadow, inside there, with a bank with a sluice to let the water in and out.

Q. And of later years it was used to hold the water

in for Kit Rape's cranberry patch, wasn't it?

A. Yes; operated with an old-fashioned sluice, and it would either let it in or out as you wanted to.

Q. Always private property?

A. Yes.

Q. And went from the high land up back of where the foundry was down to the high land down near Kate's Landing?

A. What they call Kate's Landing, yes.

Q. It was a bank built along that strip of low land, was it not?

A. Yes.

By Mr. Wescott:

Q. Went to Kate's Landing?

A. Yes, at the lower end of the bank near where the railroad bridge is, there is an open place there, or used to be, it is getting growed up with pines now, where they used to land charcoal and ship it on board vessels down here.

Q. By this path?

A. No, they came in from the other way.

By the Court:

Q. Where is Kate's Landing with reference to the railroad?

A. Well, it is perhaps a southeast course from the railroad to the river, that is, Kate's Landing.

By Mr. Wescott:

Q. On the other side of the railroad?

A. On the other side of the railroad and the other side of the river from here.

By Mr. Bourgeois:

Q. Mr. Mattix, do you remember when it was the railroad was built?

A. I don't remember what year. I was around and saw it built.

DR. WILLIAM A. WESCOTT, **sworn.**

By Mr. Wescott:

Q. You are related to me how?

A. Brother.

Q. You have practised medicine how long?

A. About thirty years.

Q. Have you at my request examined this little Tarlucki boy?

A. Yes, sir.

Q. More than once?

A. Yes, sir; twice.

(Tarlucki boy comes forward.)

Q. Take this little boy before the jury and point out what you found in a physical way when you first and last examined him.

Mr. Bourgeois: I object. I submit that is not a competent examination of any witness. If the Judge wants this little boy shown to the jury, he may show him, and he may ask his brother to describe, but Dr. Wescott has not the right to expose this boy to the jury and make an object lesson of the boy to the jury.

(Objection overruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

[SEAL]

A. Do you want to strip him here?

Q. Just take the boy there and show the jury, as far as you can without stripping him, what you found. Stand right here before the jury. That is a simple thing.

A. It is a very difficult thing to show the scars on this boy wtihout taking his clothes off.

Q. I can see scars on his face without taking his clothes off.

A. It is patent to you, gentlemen ——

(Objected to.)

The Court: It must be done by question and answer

Q. Did you find any scars on his face?

A. I did.

Q. Where are they?

A. Right side of this boy's face is practically all scar tissue.

Q. Point it out to the jury.

(Witness complies.)

A. Extends into his mouth at the right corner. His left eyelid is drooping because it is bound down by scar tissue on the left side of his face.

Q. Point it out.

(Witness complies.)

A. The little fellow has lost —

Q. One second, please. Can you tell us how deep the burn in his face was, whether it was beneath the skin or simply the skin that was burned?

A. The skin and muscles in the right side of this boy's face have been practically destroyed. This is new tissue, scar tissue, due to burning. I am not certain, but I believe there has been a hole clear into his mouth.

Q. Is his mouth in its original and normal shape?

A. No; his mouth is drawn to the right.

Q. Turn him so the jury can see. Is there any difficulty in the use of the mouth due to that burn?

A. Yes; he doesn't speak normally, and the tendency is to still further draw his mouth to the right.

Q. Why is that?

A. Because it is a pathological fact that scar tissue of this kind continues to contract.

Mr. Bourgeois: I object. This same question was before the Court of Errors and Appeals, and the Court held it was not proper examination. He is testifying as an expert and there is just one way for him to do it and that is to describe what he found in answer to questions, or else, if he is giving expert opinions, then in answer to hypothetical questions.

(Objection overruled.)

Mr. Bourgeois: I say this is not a proper line of examination because he is asking for expert testimony without putting it in the proper form.

Q. Why is it that his mouth has a tendency to draw out of shape?

A. It is because of the destruction of all of the tissues on the right side of his face and the pathological

fact that scar tissue of this character contracts and it will keep on contracting. There is no way of stopping it.

Q. Did you observe whether in the right hand corner of this boy's mouth, where these scars appear in his face, there is any difficulty?

(Objected to as leading.)

(Objection overruled.)

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

[SEAL]

A. Well, I would make practically the same answer, except this: that the mucous linings are changed so that while they are not ulcerated, they are in a sort of semi-condition of that kind and keep up an irritable state all of the time. It is analagous to that which you see in the eyelid on the other side.

Q. Can you tell whether or not this little boy is blind in either eye?

(Objected to as leading.)

(Objection overruled.)

Mr. Bourgeois: I realize that ordinarily a leading question is in the discretion of the Court, but my thought is that where it is to a material point, then it is not a matter of discretion, but becomes a matter of law.

(Question repeated.)

The Court: I cannot see how you can say that is a leading question.

A. The boy is practically blind on the left side. He has what the doctors call light perception, but he cannot distinguish objects or couldn't read with it, he couldn't use it in the ordinary sense of the use of the eye. He is practically blind on the left side.

Q. Will he ever have his vision restored?

A. No, sir.

Q. Describe the condition and appearance of the eyelids of his left eye.

A. The structures beneath the eye have been scarred and burned and destroyed and the same effect pertains there and continuously holds that eye open. This boy can close his eye with an effort, but the contracting of the muscular tissue under the eye averts the lower lid enough to make the mucous linings palpable and unnatural. In other words, the lower lid is averted.

Q. What is the color of the lower lid?

A. The mucous covering of the lower lid is unnaturally congested and red.

Q. About how much of it is exposed?

A. Oh, there is an irregular quarter of an inch turned inside out; more than that, I guess.

Q. Did you find any trouble with the boy's hearing on either side?

A. He is entirely deaf on the right side.

Q. Did you find any other marks on this little boy's body?

A. There is a great loss of tissue above the knee on the right side, and the thigh. Muscles and skin and everything has been destroyed. Between the knee and the foot there is a long scar, say half a foot, irregular, and there has been tremendous burning there. There are other small scars I don't remember about the boy.

Q. Do you remember about his toes?

A. Oh, yes; his right side, the two outer toes are gone, and the heads of the metacarpal, of the metatarsal bones are gone, that is to say, the bones that extend out to the two toes on the outside of the right foot are gone, and the toes are gone.

Q. Burned off?

A. Probably, yes. Whether a surgeon had anything to do with smoothing it up I can't tell, but they were burned off.

Mr. Wescott: Son, take your shoe and stocking off. Turn around toward the jury.

Q. What is the condition of that foot?

A. The condition of the foot is lessening in his power to run or walk, while it does not make the boy limp. Of course, the physical loss is apparent.

Q. On that right leg did you find any scars?

A. Just above. Let him pull his ——

Mr. Wescott: Pull your pants up.

A. And still above the knee there is a large loss of tissue.

Mr. Wescott: Can you get it up any further than that?

Q. Now, were there scars on any other part of his body?

A. I forget. I think there were scars on his hand, but I forget. They were smaller burns. Those are the principal burns.

Q. What have you to say, if anything, about the normal physical development of this boy, or the type of a physical boy that this fellow was or is?

A. He is an unusually powerful child and his general physical makeup is above the average, I should say.

Q. Can you tell from an examination of these scars on the boy's limbs what the character of the burning was which produced these scars, how deep it was?

A. The burning, of course, was very profound, and the only thing that saved this boy was that they did not occur on his trunk or he would have died.

Q. If these scars ——

A. If he had had that amount of burning on his trunk over his abdomen, he would have died; that is my opinion.

Q. What effect will these scars on the boy's legs have as time goes by?

A. The repair in a burn is brought about by nature's putting in a tissue which is weaker than the normal structures. The sweat glands, the hair follicles, and the hair and everything is gone, of course, and that is filled up by a process of granulation and, as I remarked before, this weaker tissue. There is one condition that these scars have or present, and that is continued contracting, and that is the reason this boy's mouth is drawing, and that is the reason his eye is coming down, that is, the lower lid. In the lower limb the history will be if this fellow lives to have a good many years, that he will probably ——

Mr. Bourgeois: I object to the history.

The Court: He may testify to reasonable probabilities.

A. The prognosis will be that in the leg more particularly, since it is farther from the heart, as years come on he may be subject to ulcers and breaking down of these tissues. That is a common thing in burn tis-

sues, or cicatricial tissues, due to distance from the heart.

Mr. Bourgeois: I move to strike that out because it is not competent testimony and not given in answer to any question.

(Motion refused.)

(Exception noted for defendant.)

Q. Could these burns such as are evidenced by these scars explain the loss of vision in the boy?
A. They do explain it.
Q. They do explain it?
A. Yes, sir.
Q. Do those burns explain the loss of hearing in his right ear, right side of his head?
A. Yes, sir.
Q. Would such experience as this boy went through in this burning affect his general health?

(Objected to as not the proper form of a hypothetical question.)

(Objection overruled.)

(Exception noted for defendant.)

A. Yes, sir.
Q. Would the burning that this boy was subjected to have any effect upon his mind, his mental vigor and power?

(Objected to as not the proper form of a hypothetical question.)

(Objection overruled.)

(Exception noted for defendant.)

A. Yes, sir.

Q. Suppose it be true that this little boy, since his experience in being burned, is unable to play as he did before the burning; suppose it to be true that he is unable to do chores about the house at the command of his parents as he did before; suppose it to be true that when he attempts to exert himself in such matters he has dizziness and falls; suppose it to be true that sometimes at night he starts in his sleep and screams; would those manifestations be attributable to his experience in being burned as he was?

A. Yes, sir.

Mr. Bourgeois: Did you say would they or might they be?

Q. Might they be? I said would they be, and I add might they be?

A. Yes, sir.

Q. Now, suppose it to be true that this little boy, before he was burned in May, 1908, was a normal, healthy, active boy, with active mind and active body, and suppose since that time he has lost the vision of one eye and the hearing of one ear and that he is at times afflicted with dizziness so that he falls, and that he unable to play normally, healthily, is unable to study normally, healthily, and that his mental vigor is impaired so that it is not as good as it was when he was in a normal condition, and that he wakes in the night and screams with fright, would those things be attributable to such burning as you see the scarred evidences of now?

A. Yes, sir.
Q. Is there any cure for this boy?
A. No, sir.
Q. Is his condition of debility permanent?
A. He will never get over the impression that has been made upon him by this accident.
Q. Will he recover his eyesight or hearing?
A. No, sir.

No cross-examination.

PLAINTIFF RESTS.

DEFENDANT'S TESTIMONY.

BAKER C. LLOYD, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Lloyd, you are the section foreman of the West Jersey and Seashore Railroad Company, are you not?
A. I am.
Q. And your district is where?
A. Three miles north of Mays Landing station and a half mile south.
Q. Does that include the portion of the track where the accident to the young Tarlucki boy happened?
A. Yes, sir.
Q. Do you remember the accident to this boy?

A. Yes, sir.

Q. You know the wire fence on this side of the railroad track, do you not?

A. Yes, sir.

Q. At that location?

A. Yes, sir.

Q. Now, since the date of the accident have there been some additional posts put in there?

A. I couldn't say whether it was since or before, but since the fence has been built there has been two additional posts put in.

Q. Do you know why they were put in?

A. Yes, sir.

Q. Why?

A. Because the people was tearing the fence down and we couldn't keep it up with the present posts that was in there, and I put two additional posts in to keep the fence up.

Q. Make the fastenings closer together?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir.

Q. How soon after it occurred was it that you were there?

A. About an hour and a half, I reckon.

Q. When you got there were you able to determine where the accident had happened?

A. Yes, sir.

Q. How could you tell?

A. By the stains of the flesh and skin on the rail.

Q. And which rail was it?

A. On the third rail and also on the running rail.

Q. Which track?

A. On the south bound track.

Q. Did you make any measurement to ascertain precisely where this skin was, I mean with regard to the location of the rail, how far from any given point?

A. Yes, sir.

Q. Where was it, precisely?

A. It was ten feet north of the north butment of the bridge, Egg Harbor bridge.

Q. The same bridge that is there now?

A. Yes, sir.

Q. Has there been any change in the bridge since that time, in the location of it?

A. Nothing only some new material put in it. No change in the position.

Q. Were the marks on the rails such as to plainly indicate where this boy had been hurt or otherwise?

A. I should think so.

Q. And that you say was ten feet towards the station from the abutment of the bridge?

A. Yes, sir.

Cross-examination.

By Mr. Wescott:

Q. How long have you lived here, Mr. Lloyd?

A. Twenty years next June.

Q. Do you remember when the road was electrified?

A. Yes, sir.

Q. When was it?

A. In 1906.

Q. And were fences built along the railroad to keep out cattle and human beings?

A. Yes, sir.

Q. You remember this old by-path down there where the little—that is down there now?

A. I remember the bank and path or whatever you might call it.

Q. You can put the bank in if you want to, but there is a path. The bank is not necessarily pathless, is it? It is possible that a bank may have a path on it?

A. Oh, yes, sir.

Q. And it is possible that a bank may have a road on it if it is wide enough?

A. If it is wide enough, yes, sir.

Q. You have seen banks and dams with roads on, haven't you?

(Objected to as not cross-examination.)

(Question withdrawn.)

Q. There was a fence built across this path on top of the bank, wasn't there, when the road was electrified?

A. Yes, sir.

Q. How far apart were the original two posts on each side of that path?

A. Sixteen feet.

Q. Were there other posts put in afterwards closer together?

A. I don't know whether they was put in afterwards or before.

Q. Well, after the first two posts that were sixteen feet apart, were there posts put in?

A. There were two posts put in, yes, sir.

Q. Now, how far apart were they?

A. Why, I suppose they were about four foot; I don't know.

Q. One on each side of this path?

A. One is right in the middle of the path.

Q. And one on the side of it?

A. The other was right in between the other posts.

By the Court:

Q. Do I understand you to say there is a path leading right up to the roadbed?

A. There is a bank leading right up to the roadbed, yes, sir.

Q. Is there a path on it?

A. Foot path on it, yes, sir.

Q. Leading right up to the railroad?

A. Yes, sir.

By Mr. Wescott:

Q. Don't you know now, Mr. Lloyd, that those extra posts were put in there after a second fatal accident at that very crossing?

(Objected to as irrelevant, immaterial and incompetent.)

(Question withdrawn.)

Q. I want to get the time these posts were put in there; that is what I am after. These posts were not in there, were they, when this accident to the Tarlucki boy happened?

A. I don't know.

Q. Did you say it was afterwards?

A. No, sir, I didn't say it was afterwards. I said I didn't know which it was, before or after.

Q. Let me ask you this: Did you help build that fence?

A. No, sir.

Q. You went along there very day or so, didn't you?

A. Yes, sir.

Q. Now, how soon after that fence was put over that path was it broken down?

A. I couldn't say.

Q. Well, it was right afterwards, wasn't it?

A. I have rebuilt it a good many times afterwards.

Q. And as fast as you would rebuild it, people would tear it down, wouldn't they?

A. They would go over it, yes, sir.

Q. And then use that path on both sides of the railroad? Break the fences down on both sides?

A. I don't know whether they used the path on the other side of the railroad.

Q. Well, they used the path on this side of the railroad?

A. Yes, sir.

Q. How many times do you judge you closed that path up and people tore it down?

A. I couldn't say.

Q. Well, about how many times?

A. That I wouldn't say, how many; I couldn't say.

Q. A dozen times?

A. I would say this: that they haven't broke it down since I put the two new posts there.

Q. When did you do that?

A. I say I don't know.

Q. Well, was it a long while ago or recently?

A. I can't say when.

Q. Haven't you any record?

A. I have no record, no, of them two posts.

Q. Did you put two in on the other side?

A. No, sir.

Mr. Bourgeois: We want to offer in evidence the record of a deed from the Mays Landing Water Power Company to the West Jersey and Seashore Railroad Company for the following tract of land. It has several descriptions, but I only want to read the one pertaining to this: "Beginning at the point where the centre line of the West Jersey and Atlantic Railroad intersects the

boundary line bearing south 29 degrees, 15 minutes west between lands of Christopher M. Rape and the lands belonging to said Mays Landing Water Power Company, and extending thence along said centre line of the West Jersey and Atlantic Railroad south 82 degrees 58 minutes east, with a width of 66 feet, that is, 33 feet on each side of said centre line, for a distance of 134 feet, more or less, to the high water mark of the Great Egg Harbor River, containing two-tenths of an acre, be the same more or less, of record in Deed Book 79 at page 418."

Will you admit that that covers the land in question?

Mr. Wescott: I don't know a thing about it.

HARRY F. HORNER, sworn.

Direct examination.

By Mr. Coulomb:

Q. Mr. Horner, are you the agent at the Mays Landing station?

A. No, sir; I was at that time.

Q. You were at the time of this accident?

A. Yes, sir.

Q. By whom are you employed now?

A. By the New York Division of the Pennsylvania Railroad.

Q. Do you remember when this accident occurred?

A. Yes, sir.

Q. To Edmund Tarlucki?

A. Yes, sir, I remember the time.

Q. Where were you at the time it happened?

A. Why, in the station, I suppose, at that time.

Q. Did you afterwards go down to where it had happened?

A. Yes, I went down; that night as I went to supper I stopped there.

Q. What time did you go down there?

A. About six o'clock.

Q. Was it light?

A. Oh, yes.

Q. Could you see any evidences of this accident on the rails of the railroad company at that place?

A. Yes, sir.

Q. What evidences did you see?

A. You could see grease spots on the third rail and the running rail, and little pieces of hair.

Q. And on which track could you see those evidences of the accident?

A. On the south bound track.

Q. That is on the track where the trains run to Atlantic City?

A. Yes, sir.

Q. Did you make any measurements to show how far that point where you saw these evidences of this accident was from any other given point?

A. No, sir, didn't make any measurements.

Q. Is there a bridge of the railroad just beyond where you saw these marks?

A. Bridge, yes, sir.

Q. What river does that bridge span?

A. Great Egg Harbor River.

Q. How far towards the station, that is, towards the upper station, were these marks from the end of that bridge, from the upper end of the bridge?

A. About ten or fifteen feet, I should judge.

Q. Was there anybody with you when you saw them?

A. I don't think there was that night.

No cross-examination.

HARRY SMITH, sworn.

Direct examination.

By Mr. Coulomb:

Q. Mr. Smith, where do you live?
A. Mays Landing.
Q. How long have you lived here?
A. About fifty years.
Q. Were you living here on the 27th of May, 1908?
A. Yes.
Q. Twenty-third of May, 1908?
A. Yes.
Q. What was your business at that time?
A. Well, laboring.
Q. Do you remember the day of the accident?
A. Yes, sir.
Q. Where were you at the time?
A. I were down on the end of the island there opposite the railroad bridge.
Q. How far was that from the railroad bridge?
A. I should judge somewheres in the neighborhood of three or four hundred feet across there.
Q. Is it in the Egg Harbor River?
A. Yes, sir.
Q. Which side of the railroad is it on?
A. It is on the upper, northern side; on this side.
Q. That is on the side towards Mays Landing?
A. Yes, sir.
Q. What were you doing there?
A. I were down to my boat.
Q. About what time of the day was it?
A. Well, I can't just exactly remember. I think it was in the afternoon.
Q. What attracted your attention?

A. I heard—in the first place, I seen some boys around there and then I heard ——

Q. Where did you see these two boys?

A. I don't know what boys they were. I was across on the end of this island. I seen some boys around there in swimming and fishing and I heard a cry, hollering, you know, and I looked over and I seen this smoke raising from the third rail.

Q. Where did you see the smoke?

A. Raising up from the third rail.

Q. Did you go over?

A. No, sir, I didn't go over.

Q. You didn't go over?

A. No, sir.

Q. Did you see anybody there?

A. I saw some boys around there from where I were.

Q. From the place where you were could you see the upper end of the railroad bridge across the river?

A. Yes, sir.

Q. That is the end of the bridge towards the upper station?

A. Yes, sir.

Q. How far from the end of that bridge did you see this smoke arising?

A. Well, it was somewhere around in the neighborhood of ten or fifteen feet, as near as I could tell.

Q. Did you go over there at all after the accident?

A. No; I started to go in my boat and they had got the boy and was going up the railroad.

Q. What position has this island you were on with relation to the end of the railroad bridge, that is, the upper end, toward the upper station?

A. Well, it ain't exactly opposite. It is kind of quartering across. Same as this is the island where I was, it is off in that course.

Q. Is the island above or below that end of the bridge?

A. Above. Below a little, yes, sir; this way a little.

Cross-examination.

By Mr. Wescott:

Q. Is the island on this or the other side of the railroad?
A. Sir?
Q. Is the island on this side of the railroad?
A. On this side of the railroad, yes, sir.
Q. And how far from the bridge, did you say?
A. It is about three or four hundred feet, I should judge, across there.
Q. And you were on that island?
A. I was on the end of the island.
Q. And you saw some boys around the bridge?
A. Yes, sir.
Q. About how many?
A. Oh, I don't know; there were some of them there in swimming.
Q. Several of them?
A. Yes; they are generally around there right along.
Q. You saw some smoke there?
A. Yes, sir.
Q. Did you see any men there?
A. No, sir.

By Mr. Coulomb:

Q. When you saw the smoke what had attracted you to it?
A. Hollering.
Q. What sort of holloaing?
A. Well, like someone calling for help, you know.

JOHN CARR, sworn.

Direct examination.

By Mr. Coulomb:

Q. How long have you lived in Mays Landing?
A. Fifteen year.
Q. How old are you?
A. Nineteen.
Q. Do you remember the accident which happened to Edmund Tarlucki?
A. Yes, sir.
Q. Do you recall about when it was?
A. About five year ago.
Q. Where were you? What time of day was it?
A. About four o'clock.
Q. In the afternoon?
A. Afternoon.
Q. Where were you?
A. Down to the bridge in swimming.
Q. How is that?
A. Down by the bridge in swimming.
Q. What side of the bridge were you in swimming?
A. This side.
Q. That is the north side?
A. North side.
Q. Side towards the court house?
A. Side towards the court house.
Q. Whereabouts with respect to the bridge were you?
A. Whereabouts by the bridge?
Q. Yes, with respect to the bridge. Were you right at the edge of the bridge?
A. Yes, sir.
Q. What attracted you to this accident?
A. Why, I heard some fellows hollering, or heard him hollering, and I run up there.

Q. Could you see him until you did run up?
A. No, I couldn't see him; only smoke going up there.
Q. You couldn't see anything before you ran up?
A. Saw the smoke.
Q. When you say you ran up, what did you run up?
A. Up the bank, you know. It is a big, steep bank there.
Q. Run up on the railroad tracks?
A. Yes, sir.
Q. What did you see when you got up there?
A. Saw him laying on the third rail or alongside of the third rail.
Q. Was there anybody there at that time?
A. No, sir; only his brother, little brother.
Q. His little brother was there?
A. Yes, sir.
Q. Did anybody come while you were there?
A. His father and another fellow.
Q. And what did they do?
A. Why, they tried to get him off and they couldn't, so they went and got a pole and got him off.
Q. Do you know where the upper end of the railroad bridge is?
A. Yes, sir.
Q. That is, the end towards the upper station?
A. Yes, sir.
Q. How far from that upper end of the railroad bridge did you see Edmund Tarlucki on the rail?
A. About fifteen or twenty feet.
Q. What track was he on?
A. Far side; south side.
Q. That is on the track where the trains move in the direction of Atlantic City?
A. Yes, sir.
Q. Do you know Edmund Tarlucki?
A. Yes, sir.

Q. Had you seen him before on that day?
A. That day?
Q. Yes.
A. I hadn't saw him that day, no.
Q. Do you know his brother's name, the brother you saw with him?
A. No, I don't believe I do.
Q. Do you know whether he was a younger brother or older brother?
A. Can't just remember now whether it was or not.

Cross-examination.

By Mr. Wescott:

Q. How do you know he was his brother?
A. How do I know he was his brother?
Q. Yes.
A. Why, I seen him going up the track with his father.
Q. That is the reason you say he was his brother, because you saw them go up the track with his father?
A. Yes, sir.
Q. That is the only reason you have for saying it was his brother? What do you do?
A. What do I do?
Q. Yes.
A. Labor.
Q. What?
A. Labor.
Q. Did you get very much excited over this thing?
A. No, sir.
Q. You did not? Did you make any measurements?
A. No.
Q. How many boys were there swimming?
A. One besides me.
Q. Who was he?

A. Will O'Grady, I think.
Q. Where is he?
A. Connecticut.
Q. Younger or older than you?
A. About the same age as me.
Q. You and he were the only boys there?
A. We was the only two in swimming.
Q. Anybody there that wasn't swimming?
A. No, sir.
Q. You two boys were the only two that were there?
A. Only two that were there.

By Mr. Coulomb:

Q. Was Tarlucki's brother there?
A. I think I saw him up the track with his father.
Q. How old is he, would you say?
A. His little brother?
Q. Yes.
A. I couldn't say.
Q. He was a boy, was he?
A. Yes.
Q. Young lad?
A. I don't know whether he was as old as Edmund or not.
Q. About the same age, do you think?
A. I don't know whether he was the same age or not.

CHARLES P. MCDONALD, sworn.

Direct examination.

By Mr. Coulomb:

Q. What is your employment at the present time?
A. Locomotive engineman.

Q. By what company are you employed?

A. West Jersey and Seashore Railroad.

Q. Were you employed as locomotive engineman on the twenty-third day of May, 1907?

A. I was.

Q. Were you in the vicinity of Mays Landing on the afternoon of that day?

A. I was.

Q. Were you working?

A. I was.

Q. What were you doing?

A. Shifting cars out of our train on to the siding.

Q. Siding where?

A. At the Mays Landing station proper.

Q. Do you remember the day of this accident?

A. I do. I remember the occasion.

Q. What attracted you to it?

A. Well, my attention was called by naturally seeing boys as I do, run to and fro and across the third rail, I generally watch them if I can, if I can without avoiding the signals given by the train crew.

Mr. Wescott: I ask that be stricken out. It is immaterial.

The Court: The objection is sustained. That is stricken out.

(Exception noted for defendant.)

Q. What attracted your attention to the scene of this accident on this day?

A. Well, as near as I can tell you, I was shifting cars and I pulled down over the bridge with cars far enough to clear the siding with the rear end of the train.

Q. What did you do then with your cars?

A. Backed them in on the siding.

Q. Did you see this accident?

A. I didn't see the boy strike the rail.

Q. Did you see what occurred immediately after that?

A. Several persons, or persons trying to get him from the rail.

Q. Had you seen any of those people before you saw the accident?

A. Yes.

Q. Whom had you seen?

A. I don't know who they were. I saw three men as near as I could tell, and one or two boys down along the river bank standing in the water fishing.

Q. When did you next see those men?

A. Up along the rail, trying to loose the boy from the rail.

Q. Do you know where the railroad bridge that crosses the Egg Harbor River is?

A. I do.

Q. Is that the bridge you just referred to when you said you went out to the bridge in order to clear the siding?

A. It is.

Q. Did you go up to see what was going on at this place?

A. Do you mean get off of my engine and go?

Q. Either get off your engine or ——

A. I did not.

Q. You stayed where you were?

A. I stayed on my engine.

Q. And where were you?

A. About two hundred feet with the engine from the point of the switch.

Q. How far was that from where you saw these men trying to get the boy from the tracks?

A. Well, I don't know the exact distance, but I should

judge I was somewhere half way between the switch and the bridge.

Q. Where were you immediately before you saw these people attempting to lift the boy from the track?

A. On my engine.

Q. On what side of the engine were you?

A. On the right side.

Q. And could you see down the track in the direction of the bridge?

A. I could.

Q. Did you see anybody attempt to cross over the track?

A. I saw a boy run up.

Q. Where did you see him run from?

A. Out of the edge of the water.

Q. And what did he do?

A. The last I saw of him, he had just about approached the hip of the railroad bank.

Q. What do you mean by the hip?

A. Where you come up on the face of the bank where the track sets.

Q. Is that the first time you saw him?

A. That is the last time I saw him before he got burned.

Q. What was the next time you saw him after you saw him on the hip of the railroad bank?

A. Saw the men folks trying to take him from the rail.

Q. Did you see any other boys there but this boy?

A. Yes, there were some other boys there.

Q. Where did you see those boys?

A. They were around there in that vicinity.

Q. Did you see those boys at the time you saw this boy you have described come up on the railroad bank?

Recess taken to Friday, May 16, 1913, 10 A. M.

Mays Landing, N. J., Friday, May 16, 1913.
Trial of the cause resumed at 10 A. M.

Mr. Wescott: If your Honor please, yesterday when I closed, owing to my weariness there was a lapse of memory on my part as to a little circumstance I wanted to prove, namely the identification of this boy. I ought to have asked the father whether this little boy was the boy who was burned.

The Court: I suppose that is conceded, is it not?

Mr. Coulomb: Yes.

Mr. Wescott: Then I wanted to offer the boy as a physical exhibit.

The Court: Well, the boy was here. The jury saw the boy.

Mr. Wescott: I thought possibly the jury might want to make a further physical examination of him. For that purpose I would like to offer the boy in evidence.

Mr. Coulomb: That is an unheard of proposition to me. The boy was produced before the jury and Dr. Wescott was sworn.

The Court: The doctor went over his case thoroughly. The boy was before the jury. What else did you want?

Mr. Wescott: That was all. I just wanted to offer him as an exhibit. It has been done repeatedly. It has been done in New Jersey.

The Court: Is there any objection?

Mr. Coulomb: If your Honor please, I do not understand exactly what Judge Wescott means by offering the boy as an exhibit, but if he means the boy could be taken into the jury room and examined by the jury out of the court room, then we certainly do object, whether it be a physical examination or any other kind of examination.

Mr. Bourgeois: Why don't you offer him as a witness? Then the jury will get a chance to see him.

Mr. Wescott: He cannot testify.

The Court: Are you satisfied, Judge Wescott? Do you want anything further?

Mr. Wescott: I made that proposition. It has been done in New Jersey. Your Honor remembers a case up in Camden where a boy was offered.

The Court: He was offered in that case, State vs. Gaunt, for the purpose of giving the jury a chance to determine whether there was any resemblance between the child and the putative father.

CHARLES P. MCDONALD, resumed.

Further direct examination.

By Mr. Coulomb:

Q. I will ask you what you were doing on the day of this accident?

A. Running a locomotive.

Q. What were you doing with the locomotive?

The Court: He testified to that yesterday.

Q. You testified yesterday that you saw the boy on the rail and some men trying to lift him from the rail, as I understand it?

A. Yes.

Q. Now, at the time you saw that, could you see from where you were in your locomotive the pathway which has been testified to, as it approached and came up to the railroad bank?

A. Could I see the approach?

Q. Could you see the path as it came up to the railroad bank?

A. On the south side of the south bound track, which was the right side of the engine.

Q. How far was your locomotive from that point where the path approached the bank?

A. I should judge about fifty feet west of this path toward the main station.

Q. That is what you call the upper station?

A. Main depot.

Q. Now, with respect to that path, where was the boy, or rather, where was the boy on the rail at the time that you saw the men trying to lift him from it?

A. It looked to me from the view I had out of the cab window about from between twenty-five and fifty feet from the bridge.

Q. Would that be beyond where the path approached the railroad tracks?

A. A considerable distance.

Cross-examination.

By Mr. Wescott:

Q. What were you doing, did you say?
A. Locomotive engineer.
Q. I know, but what work were you engaged in about the time of this accident? Drilling?
A. Drilling cars.
Q. Shifting cars? Was the switch on the main station side of this path?
A. On the opposite side from where the main station was.
Q. It was on this side?
A. Yes, sir.
Q. Between the bridge and the road?
A. Between the bridge and the depot.
Q. What depot?
A. Main depot.
Q. How much of a train had you?
A. When I first started to drill off cars and pull down over the bridge, I think I had something like nineteen cars, and then I backed down and put in some on the side track.
Q. That is the work you were engaged in doing at the time this accident occurred?
A. Yes, sir.

EDWIN M. HAAS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Haas, you work for the West Jersey and Seashore Railroad Company?

A. I do, yes, sir.

Q. And you are a civil engineer?

A. Yes, sir.

Q. Have you made some calculation and examination for the purpose of determining just where the bank running along the westerly side of Egg Harbor River is located with relation to your right of way, that is, the purchase of your right of way?

A. I have, yes, sir.

Q. Do you know from whom the railroad company purchased its right of way across Egg Harbor River?

A. I do.

Q. From whom?

A. They got the right of way across Great Egg Harbor River from the State of New Jersey.

Q. That extended on the westerly side to what point?

A. On the westerly side?

Q. Yes, on the other side of the river, which is the westerly side.

A. It extended from the westerly side up to the lands of the Mays Landing Water Power Company.

Q. To their property?

A. Yes, sir.

Q. And that went to the high water mark?

A. Yes, sir.

Q. Can you tell me for what distance the railroad company purchased its right of way from the Mays Landing Water Power Company?

A. I can.

Q. Along the centre line of the railroad?

A. Yes, sir.

Q. What was that distance?

A. One hundred and thirty-four feet.

Q. I call your attention to the record of a deed from Mays Landing Water Power Company to the West Jersey and Atlantic Railroad Company, of record in Book

79, at page 418, to the last description, which begins at a point in the division line between the Water Power Company's land and Christopher Rape's and extends southeasterly along the centre line of the railroad company's right of way a distance of 33 feet on either side thereof for 134 feet to the high water mark of Great Egg Harbor River, and ask you whether or not you can tell if the river bank that has been spoken of was within the confines of that deed. I will read you the exact description. You know where the river bank is there?

A. Yes, sir.

Q. And you have it located?

A. Yes, sir.

Q. I want to know whether that river bank was ——

(Objected to as immaterial.)

Mr. Bourgeois: We are going to show that we own the land.

Mr. Wescott: What of it? Ownership by the railroad of a strip of land has nothing to do with this case. The simple question here is whether there was a way across this property, and the evidence is uncontradicted up to this point that there was one of sixty or seventy years of age, used by the general public. The mere purchase of a right of way from the original owner of that property does not destroy the easement acquired by the public in the use of that path or way. It was a use that was acquired by prescription. Therefore, mere change of ownership does not destroy the right to use that path or road or way or whatever it was. How can it? I have not the slightest doubt in the world but that the Chancellor of New Jersey upon a bill being filed would compel the railroad company to remove that obstruction to this path.

The Court: That is another matter. That is not germane to the question. You are anticipating the question which at the conclusion of the case may arise. The question now is upon the admission of certain testimony. The defendant's contention is that this boy was a trespasser and this land belonged to the defendant, and the testimony I think is admissible.

(Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

HOWARD CARROW. [SEAL]

(Question repeated.)

Q. I want to know whether that river bank was within the following description: "Beginning at a point where the centre line of the West Jersey and Atlantic Railroad intersects the boundary line bearing south 29 degrees, 15 minutes west between lands of Christopher M. Rape and the lands belonging to said Mays Landing Water Power Company, and extending thence along said centre line of the West Jersey and Atlantic Railroad 82 degrees, 58 minutes east, with a width of 66 feet, that is, 33 feet on each side of said centre line, for a distance of 134 feet, more or less, to the high water mark of the Great Egg Harbor River?"

A. Yes, sir, it was.

Mr. Bourgeois: I want to offer in evidence also the record of a deed from the State of New Jersey to the West Jersey and Atlantic Railroad for a strip of land 66 feet in width across Great Egg Harbor River from high water mark on the westerly side of Egg Harbor River to the high water mark on the easterly side, of record in Book 79 at page 561.

Q. Now, Mr. Haas, can you state to the jury when the West Jersey and Atlantic Railroad was built?

A. I can, yes, sir.

The Court: What portion of the by-road or way that has been testified about in this case is embraced within the description of the deed which the State gave to the railroad company, the last deed which you offered in evidence?

Mr. Bourgeois: The entire bank for the width of the railroad company's right of way, that is, the 66 feet. The railroad bed was built right over it.

The Court: Over land acquired from the State?

Mr. Bourgeois: Yes, and also over land acquired from the Water Company.

The Court: How much of the land occupied by the roadbed of the railroad company was acquired from the State?

Mr. Bourgeois: No part of this old bank was on land acquired by the railroad company from the State of New Jersey. That is true, isn't it, Mr. Haas?

A. Yes, sir.

Q. And that old bank was about what width at the top, as nearly as you can judge?

A. About ten feet.

Q. About how near did it come to the high water mark?

A. About ten feet.

The Court: What I would like to know is whether

that portion of the railroad land which it has been asserted by the plaintiff was used as a by-road or way was acquired from the State of New Jersey.

Mr. Bourgeois: No, it was not. That was acquired from the Mays Landing Water Power Company.

Q. When do you say the road was built?
A. The road was built between November fifth, 1879, to June fifteenth, 1880.
Q. Now, will you tell me whether or not the West Jersey and Atlantic Railroad is at present a part of the West Jersey and Seashore Railroad system?
A. It is, yes, sir.
Q. When was the road electrified?
A. In the summer of 1906.

No cross-examination.

DANIEL E. ISZARD, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Iszard, what buildings were built on the land that was formerly owned by you but later sold to the Water Power Company south of the Estelville Road? Is that south or east? East of the Estelville Road.

Mr. Wescott: Where is the Estelville Road?

Q. You know the Estelville Road?
A. Yes.

Q. Extends where?
A. Runs from the bridge down to Estelville.
Q. Past the upper station?
A. Past the upper station.

Mr. Wescott: What has that to do with the case? I object to the question.

(Mr. Bourgeois' first question repeated.)

The Court: The objection is overruled. I am assuming it is going to have some connection with the case as it stands now.

A. In the first place, the property was my father's estate. The Water Power store, Rogers' blacksmith shop, barns. That is as far as the old foundry property was concerned. Then the slaughter house.

Q. Now, the slaughter house, do you remember when that was built?

A. No, I can't tell.

Q. Do you remember a superintendent of the Water Department by the name of Wells?

A. Yes.

Q. Do you remember when he first came here? Do you know whether it was during his time it was built?

A. I can't remember.

Q. How was that slaughter house used?

A. For killing. They bought their cattle by the quantity and drive them down and it was used for killing hogs.

The Court: How near was that to this by-road?

Mr. Bourgeois: The upland that it adjoins. You had to go over this land to get to the by-road if there ever was a by-road there.

Q. Then the slaughter house was used in connection with the Water Power store? Is that the idea? They sold the meats?

A. Yes.

Q. Now, Mr. Iszard, where did they keep these cattle after they had purchased them in quantities?

A. They had a shed built where they could go under and then they fenced in the grass lot.

Q. And that fence extended where?

A. That extended right along—the slaughter house was right along this bank, and the fence run along the front of the slaughter house and back and all around.

Q. Across the bank to the river?

A. No.

Q. Didn't it run right over the bank to the river?

A. No, I don't think it did. It didn't run across this path, as you have called it, or roadway.

Q. Are you sure about that?

A. I think so. No, I don't think it run across the river.

Q. Not across the river, but it ran over the bank down to the river to keep the cattle in?

A. Yes, that is what I say, it ran on the front of this and then across the grass lot.

Q. Along whose line fence did that fence run?

A. Water Power, and the back line was Rape's.

Q. Do you recall any incident that fixes in your mind the fact that the fence was there?

A. Well, I saw it there several times, and I remember a little controversy that Mr. Rape had with the Water Power Company that hogs got out, got through it and destroyed his cranberry crop and he threatened to shoot them and I believe he did shoot one of them.

Q. Do you remember until when that fence remained there?

A. When it remained there?

Q. How long?

A. I don't know.

Q. How long has it been down, ten or fifteen years, or don't you know?

A. Can't tell you.

Cross-examination.

By Mr. Wescott:

Q. Mr. Iszard, let me understand the situation. You have already testified that this road or path begins down there by the bridge and runs alongside of the river, doesn't it?

A. It does after it gets down.

Q. It runs pretty close to the river down there by the bridge?

A. It turns around the corner. Leaves a strip of land between the river and this path, that we owned.

Q. Was that open at the time you are speaking of, that road there?

A. Oh, the road has been open, yes, down there.

Q. Have you been down there in recent years?

A. Not within—I don't know as I have been down there under four or five years, probably.

Q. Well, four or five years ago when you were down there, you saw that road, didn't you?

A. Oh, I saw the road, yes.

Q. And do you recollect whether or not it was then used by wagons to some distance towards the river?

A. Only when they were repairing—well, I don't know ——

Q. Isn't it used now? Hasn't it been used all of these years, part of it down there, the end of it, for wagons going in and out of there?

A. Well, only people that were to work on the road.

Q. I don't care who used it, it was used?
A. It was used, yes.
Q. You can see wagon tracks there today, can't you?
A. I couldn't tell you that; you can see footprints.
Q. Let me ask you this, whether or not this road that you have testified about already and are testifying about now wasn't marked on the left hand side as you were going in that direction just by the river. Bounded by the river, wasn't it, after you entered it?
A. After you got past this grass lot.
Q. Then it was bounded on the left by the river?
A. Yes.
Q. And were there trees along the river bank?
A. Yes.
Q. Now, on the right of it I want to ask you whether there was a well defined line of trees along this road?
A. Yes, there was trees on both sides.
Q. They are there yet, aren't they, to show where that road was?
A. I think they are. I couldn't say.

By Mr. Bourgeois:

Q. Mr. Iszard, that road that the Judge talks about, the trees, was all on the high land, wasn't it?
A. Yes, on top of the bank.
Q. And before you came to the slaughter house, wasn't it?
A. No, I think the trees commenced after it left—I think the trees didn't commence until somewheres nearly opposite the slaughter house.
Q. This road was used exclusively by the owners of that land for the purpose of hauling sand down there to repair it, wasn't it?
A. Yes.
Q. And the other part of the land was used by people

who had business with the Water Power Company or with the blacksmith shop or with the slaughter house, wasn't it?

A. Oh, yes, that was used by anybody that wanted it.

Q. That had business there with those people?

A. Yes.

Q. The land that was used by the Water Power Company for its store, its blacksmith shop and its slaughter house was private property, wasn't it?

A. Yes; well, it was after they bought it.

Q. After they bought it from you?

A. I forgot; there was two or three houses, two when they first bought it, I think there was three. They have been torn down.

Q. Where were those houses?

A. They were between the blacksmith shop and the slaughter house on the right hand side of the road.

Q. In other words, there were some houses fronting on the river? Did they front on the river, those houses?

A. No; the road was between them.

Q. But except for that they fronted on the river?

A. Yes.

Q. And the Water Power Company, or this road they talk about went down to those houses, didn't it?

A. Oh, yes.

Q. And the Water Power Company bought all of the land?

A. They bought all of the land.

Q. The houses and all?

A. The houses and all.

Q. Then they tore the houses down, didn't they?

A. They tore two of them down and I think rebuilt one.

Q. What do they use that for?

A. Tenant house.

Q. Where is it situate now?

A. Just about, just below Rogers' blacksmith shop.

Q. How far was it from the farthest house down before you came to this bank?

A. It is right along the edge of the bank.

Q. Right along the edge of the bank? Then the road from the Water Power store extended down as far as the last house, did it, years ago?

A. Oh, yes.

Q. And from that part the bank was built, wasn't it?

A. Yes.

Q. And maintained at private expense all the time?

Mr. Wescott: How does he know?

Q. Well, part was, wasn't it, Mr. Iszard?

A. Was what?

Q. Maintained at private expense, at your own expense?

A. At the estate's.

Q. That is what I mean, that is, the owner's expense?

A. That is up to the time we sold it.

By Mr. Wescott:

Q. Now, Mr. Iszard, this tenement house you speak of that backs right up to this road now, doesn't it?

A. Yes; on the right hand side.

Q. And that road is used now by anybody and everybody, isn't it?

A. Yes; I never heard no objections to their using it.

By the Court:

Q. Did I understand you to say there were ruts indicating a wagon road on this embankment?

A. As far as the lower tenement house is concerned.

Q. How close did the ruts come to the railroad?

A. Oh, you have to go clear down the bank, the roadway, to get to the railroad. These tenement houses was ——

Q. I am not talking about tenement houses. I am not asking you anything about tenement houses.

A. Excuse me.

Q. What is there along this embankment indicating a way or road as it comes up to the railroad?

A. Well, of later years it has been hauled on cinder and packed down very hard. Now, I don't know as a wheel of a wagon would make very much impression on it.

Q. Is there a pathway indicating that persons crossed it?

A. Oh, yes, there has been a pathway there.

Q. Going over the railroad?

A. Yes, going clear on down.

Q. What do you mean by clear on down?

A. Well, I mean clear down to the railroad. Now, if I understood you, your Honor, you mean from the time it commences?

Q. I am trying to find out what the real situation is with regard to a roadway or way of any kind over the railroad track. That is the only essential question.

A. Well, these houses and these buildings ——

Q. We are not talking about the houses or buildings.

A. They are at the first part of the road.

Q. They are far away from the railroad?

A. Yes, but the roadway goes on down till it crosses the railroad or the railroad is across that. After it leaves the last house ——

Q. Has the by-road been blocked off by the railroad or does it still exist, does it still run over the railroad?

A. The railroad runs across this road or path, as you call it, since—as it ran when I was a boy.

By Mr. Bourgeois:

Q. Mr. Iszard, this embankment that you speak of where these houses were, that was the river embankment, wasn't it?

A. Yes.

Q. They were built on the high ground, weren't they?

A. Oh, yes.

Q. And this meadow bank we have been talking about, that was built over the low ground, wasn't it?

A. I suppose it was originally.

Q. Started from the edge of the high ground and built along the river over the low ground, wasn't it?

A. Yes, I suppose so.

Q. That is the way it is now?

A. Yes.

Q. And this house you speak of was nearer to the bridge than the beginning of that river bank that was built up there, not the river bank, the embankment, I don't mean, the high ground before you go from the Mays Landing bridge over the Water Power Company's land over the high ground, don't you?

A. Yes.

Q. And while you are on that high land you have the Water Power store, the slaughter house, the blacksmith shop and these houses?

A. I think when we sold the property there was four old houses there.

Q. The houses were there. They were on the high land and then after you went beyond them you came to the low land and over that low land was this river bank that was built?

A. Yes.

By Mr. Wescott:

Q. And that was the road, was it?

A. That was the road.

Q. And before the railroad was put down, that road ran right across where the railroad is now, didn't it?

A. Yes.

Q. The railroad has been built over that old road?

A. Yes.

By Mr. Bourgeois:

Q. And, Mr. Iszard, is that the road that you say was used for the purpose of carting cinders down to repair the bank itself?

A. I said that was in the first part of the road they carted cinders down.

Q. That is all you used the road for, for repairing the bank itself?

A. That is all I know of, although they used to ——

Q. You have answered.

By Mr. Wescott:

Q. Although they used to what?

A. They used to drive down there, that is, I mean, as I remarked yesterday, a horse ran away and ran down there.

Q. Outside of the horse running away don't other people drive down there, other horses and wagons?

A. I wouldn't swear to that. I can't remember, although they could do it, I suppose.

WILLIAM ROGERS, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Rogers, you live in Mays Landing?

A. Yes, sir.
Q. How long have you lived here?
A. Since 1877.
Q. What is your business?
A. Run a blacksmith shop.
Q. Where is your blacksmith shop located?
A. Right down along the river.
Q. Do you rent it?
A. Yes, sir.
Q. From whom do you rent?
A. Water Power.
Q. Then your blacksmith shop is on the other side of the river?
A. Yes.
Q. How near to the Water Power store?
A. Oh, about maybe a hundred or hundred and fifty feet.
Q. Are you acquainted with the land around there?
A. Somewhat.
Q. How long have you been renting that property?
A. Ever since it was built; I guess that is twenty years.
Q. And before that time were you acquainted with the property generally there?
A. Yes; it belonged to Iszard, though, then when I first came there. My shop was right up next to the abutment of the bridge then.
Q. You remember those three or four tenement houses there?
A. There were four there.
Q. How far did they extend down from the Estelville Road?
A. They were all down below my shop a little piece.
Q. Close together, were they?
A. Yes.
Q. They were built on high land?
A. Yes; if there is any high land there.

Q. How is that?

A. They are built on the highest land there is there.

Q. How far was it from the furthest house that was built before you came to the beginning of this river bank, that is, the bank that was thrown up there to protect the river?

A. I guess the bank starts right about opposite the slaughter house.

Q. How far was that below the last of those cottages or houses?

A. Oh, couple of hundred feet, three hundred, maybe.

Q. Do you remember the building of the slaughter house?

A. Yes.

Q. By whom was that built?

A. The Water Power.

Q. How long ago?

A. Well, I just can't tell you; it must have been eighteen or twenty years, I guess.

Q. Do you remember what they used that slaughter house for?

A. Used to buy cattle and fetch down there and slaughter them.

Q. How did they keep the cattle in?

A. Well, they had a pen built around there with a lot of sheds and then they fenced in the grass lot there down to the swamp.

Q. Where did that fence go with relation to this river bank?

A. River bank?

Q. Yes.

A. There wasn't any along the river bank.

Q. How did you keep the cattle from going over it?

A. They built a fence from it back of the barn there along Norcross' line and Rape's down to just below the first sluice, and then across the bank into the river.

Q. How long did that fence remain there?

A. Well, some parts of it are there yet.

Q. How long did they continue to use that land for protecting their cattle?

A. Well, quite a while, until after Mr. Wells got killed and then we got new management and they didn't use it much longer.

Q. How long after Mr. Wells was killed did they continue to use it?

A. I don't think over one or two, perhaps.

Q. Do you know when Mr. Wells was killed?

A. Well, I can't just tell you. I can tell you when he was killed was after Grover Cleveland's last election.

Q. That has been almost twenty years ago?

A. Yes.

Q. You know this river bank down there, don't you?

A. Yes.

Q. Did you ever know any wagons to use it?

A. No further than down to the slaughter house.

Q. Could they use it further than that?

A. Well, they might drive down there a little ways further than that.

Q. How far could they drive if they tried?

A. Well, they could drive down as far as that sluice, but I don't know how they could get back. There ain't no room to turn around.

Q. Mr. Rogers, what is that property that you rent and the property of the Water Company there? Is it private or public property?

A. Well, I suppose it is public. People comes there. Public that far.

Q. They have the right to come to you?

A. Yes.

Q. But you rent it?

A. I rent from the Water Power.

Q. And the Water Power Company owns it?

A. Yes; well, I do their millwork, you know, and I do outside work, horse-shoeing and something like that, besides.

Q. Do they still have a tenement house there?

A. One.

Q. Where is that?

A. Down below the shop, between the shop and the slaughter house.

Q. And they rent that?

A. Yes.

Q. And for the purpose of people going to that house they go in and out there?

A. Yes.

Q. Many people? That is, anybody that has business with them?

A. Yes.

Q. Just the same as with you?

A. Yes. Well, she has two or three children that works in the mill and they go back and forth.

Q. Is the sluiceway that you speak of between the slaughter house and the railroad?

A. There is two sluiceways.

Q. And you could go down to the first one, you say?

A. Yes.

Cross-examination.

By Mr. Wescott:

Q. Did you know where Kate's Landing was?

A. Yes.

Q. That was west of the railroad?

A. Yes; well, south of the railroad.

Q. South of the railroad?

A. Yes.

Q. You said that there was no room for wagons to turn around?

A. Not on that bank after you get below the slaughter house.

Q. But if they had gone on to Kate's Landing, they could have turned around, couldn't they?

A. I never knew anyone to drive down there.

Q. I say, if they had gone there, they could have turned around?

A. If they could get across there they could have turned around. They didn't have to go there.

Q. I didn't ask you that. Are you a partisan in this case?

A. No.

Q. You have been talking to the railroad people about this case, haven't you?

A. Not much, I guess.

Q. Not much, you guess?

A. No.

Q. Did you get any money?

A. No.

Q. Promise of any?

A. No; I got fifty cents when I got a subpœna. That is all I got.

Q. Have you been over that bank in late years?

A. Yes; lots of times.

Q. Good many times?

A. Yes.

Q. Everybody goes over it that wants to?

A. Anybody walks down there that wants to, yes. I never knew anybody to be forbidden to go there.

Q. That bank on the left is bounded by the river, isn't it?

A. Well, when it first starts from the slaughter house ——

Q. Runs along the river?

A. Yes, and when you get down there a little further ——

Q. I am not asking you about that. Listen to me and we will get along better. Along that bank of the river there are trees, aren't there, good, big-sized trees?

A. A few birches grows along there.

Q. There are some trees there and bushes, too?

A. Yes.

Q. A few?

A. Plenty of bushes.

Q. On the other side of this bank there is a well defined line of trees, isn't there?

A. Few pines down below there.

Q. Between these birches and pines the distance was about how much?

A. Well, there is birches grows all along there.

Q. Between these trees on the bank of the river and on the right hand side of this bank that you speak of, the distance is about what, and always has been?

A. From where?

Q. Between these lines of trees.

A. Across the bank?

Q. Yes.

A. Oh, ten feet, perhaps; well, might be more than that.

Q. Ten or twelve feet?

A. Yes, from tree to tree.

Q. Isn't that just where people travel, between those rows of trees, since you can remember?

A. Go down the bank there, yes.

Q. Call it a bank if you please.

A. Well, a road.

Q. That is where people traveled right on over where the railroad now is on to Kate's Landing, didn't they?

A. Yes.

Q. Fishermen traveled there, didn't they, and woodchoppers?

A. Never knew any woodchoppers to go down there.

Q. Have you known fishermen to go down?
A. Yes.
Q. And gunners?
A. Yes.
Q. And everybody that wanted to go down?
A. Yes; plenty of them goes there yet.
Q. That road now is perfectly well defined, isn't it?
A. Well, you can go down below there, but the bushes will rub both sides of you.
Q. It is perfectly well defined, isn't it?
A. Yes, you can travel it.
Q. And at the bridge end of this road there is a wagon road still there, isn't there?
A. Bridge end?
Q. Yes, down here along the public street here next to the bridge.
A. Yes.
Q. And they drive in there now, don't they?
A. Water Power owns it.
Q. I don't care a rap who owns it. I ask if they don't drive in there.
A. Yes.
Q. Every day?
A. Every day.
Q. And they have been doing that as long as you can remember?
A. Ever since that store has been built there.
Q. How long is that?
A. Twenty years, I guess, or more.
Q. Didn't they do it before the store was built there?
A. Not very much.
Q. But they did it some?
A. Might maybe go down to those houses.
Q. These tenement houses that you speak of were right along this road?
A. Yes.

New Jersey State Library

Q. Which you call a bank?
A. On the south side of the road.
Q. Butting right up against it?
A. Yes, nearly.
Q. And one of them is there to this very day?
A. Yes. Well, it has been rebuilt.
Q. I don't care if it has been built half a dozen times; it is there today, isn't it?
A. Yes.
Q. Anybody can see it? This path as it is there now is a hard path, isn't it, covered with cinders for the most part?
A. Water Power Company done that, yes.
Q. It is there with cinders on it?
A. Yes.
Q. And anybody can walk along it, can't they, and it extends right over the railroad and goes on the other side of the railroad, doesn't it?
A. No cinders on the other side.
Q. I didn't ask you that. There is a path there, isn't there?
A. If you can get over that fence and go across the railroad you can get on the other side of it.
Q. And when the wire wasn't there, you didn't have to climb the fence?
A. No.
Q. You could walk right on over?
A. Yes.
Q. And follow this path the whole length of it?
A. Yes.
Q. And that path has been there, to your knowledge, ever since 1877, hasn't it?
A. Yes.

By Mr. Bourgeois:

Q. The Judge speaks about the bridge end of that

road. Does anybody use the bridge end of that road excepting people who have business with either the Water Power store or with your blacksmith shop or with this tenement house that is there on the Water Power's land?

A. No.

Q. Did they ever use it, except those people who had business with those houses and the store there?

A. Never to my knowledge.

Q. Now, the Judge has asked you if that is not a well defined road. I think he put the words in your mouth, extending from the Water Power store all the way to the railroad. Is there any well defined road extending from the Water Power house all the way to the railroad?

A. Well, there is a path down there.

Q. But not any wagon road?

A. No.

Q. The road part you speak of is up next to the Water Power store where you come in to do business with those different buildings there?

A. Yes. The road has been raised all the way from the bridge down to the slaughter house ——

Q. How is that?

A. —— since the Water Power had it. They hauled cinders there and raised it from the blacksmith shop on down.

Q. That is for their own use?

A. For their own use.

ROBERT WOODCOCK, sworn.

Direct examination.

By Mr. Coulomb:

Q. Mr. Woodcock, are you an engineer in the employ of the West Jersey and Seashore Railroad?

A. I am.

Q. Have you made some measurements along the electric road between the upper station at Mays Landing and the bridge?

A. I have.

Q. Did you make a measurement with respect to the distance of the place where the path which has been described comes up to the railroad tracks, and the bridge?

A. I did.

Q. What is that distance?

A. The centre of the path, do you want?

Q. Where the centre of the path would intersect the railroad.

A. One hundred and eighty-five feet.

Q. How much?

A. One hundred and eighty-five feet.

Cross-examination.

By Mr. Wescott:

Q. Is that from the bridge to the centre of this path?

A. That is from the bulkhead, yes, sir, the north bulkhead.

Q. I thought you told me yesterday down there it was 120 feet.

A. One hundred and seventy-nine feet, I told you, from one side of it; I didn't tell you 120 feet.

Q. You did not?

A. No, sir.

Q. Didn't you see me come through this path and get over that fence?

A. Yes, sir.

Q. And didn't you stand there and talk to me about it?

A. I did.

Q. Didn't I ask you the distance from that path to that bridge?

A. You did.
Q. Didn't you tell me it was 120 feet?
A. No, sir, I did not. Oh, no, I didn't tell you that.

By Mr. Bourgeois:

Q. What did you tell him it was?
A. I told him to one corner it was 179 feet. Wouldn't have any object in telling him it was 120 feet.

By Mr. Wescott:

Q. Which corner was it, the near corner or the far corner?
A. That is the one at the bottom of the slope is 179 feet and the other is 191 feet.
Q. Which side of the river did you measure from, this side or the other side?
A. The other side.

BOTH SIDES REST.

Mr. Bourgeois: We offer in evidence the original declaration. We have leave to open the case for the purpose of offering that, don't we?

Mr. Wescott: I object to it.

The Court: If you can show me its relevancy.

Mr. Bourgeois: Judge Wescott filed a declaration in this case and he knew the facts better then than he does

now and in that original declaration he alleged that that boy was hurt just where we have proved he was hurt.

Mr. Wescott: That is not true. If misstatements are to be made, I want them to be made out of the presence of the jury.

Mr. Bourgeois: I do, too. If the jury may be excused, or we may go in the other room.

The Court: I want to know upon what legal ground you are entitled to offer this declaration.

Mr. Bourgeois: On the broadest legal ground. It is a pleading in the case. Judge Wescott filed a declaration. This is it. To that declaration we demurred on the ground that it showed no cause of action. He filed an amended declaration which is materially different from the one he first filed, and we are entitled to have that go to the jury, and also for the purpose of arguing to the jury that our part of this testimony is correct.

The Court: The offer is overruled.

Mr. Bourgeois: The offer to admit it in evidence?

The Court: Yes.

(Exception noted for defendant.)

Mr. Bourgeois: I want the first declaration marked for identification.

(Paper marked D1 for identification.)

MOTION TO DIRECT VERDICT.

Mr. Coulomb: If your Honor please, we move for a directed verdict for the defendant. My first proposition

is that the age of this plaintiff is no excuse for him if he was in fact a trespasser on the railroad company's property. The only question, therefore, to be discussed, it seems to me, is whether or not there was a public way over the tracks of the railroad company at this point, the use of which was acquiesced in, or a way in which the use of which was not only acquiesced in, but to which there was an invitation extended, either express or implied, by the railroad company to the public. The testimony in this case shows that this by-way, whether it be an ancient by-way or whatever it is, this path which has been testified to here before your Honor, was originally the breast-high top of an ancient meadow bank built there by the parties who owned the land in back of it, and was built there for the purpose of protecting that land from the water when it was necessary, or allowing the water to flow in it and to hold it in when it was necessary to hold it in, and for that purpose there were two sluices built in this bank between the place where it begins on the east side of the railroad, and the railroad itself; or, to make it a little more specific, between the slaughter house which has been spoken of here, and the railroad; and that the main use to which this bank was subjected was for the purpose of carting material for repairs of that bank, and that those repairs were made by the owners of the land which was being protected by the bank. The testimony is that the bank has been there for probably seventy or seventy-five years and that it was used by persons going along it over to Kate's Landing, walking on it, but the only evidence of any hauling over it by horses or by teams was the evidence for the purpose of repairing that bank, and your Honor will remember that the testimony was that in some places they had to chop the trees away or cut them out in order to permit the hubs of the wagons to go by; and Mr. Iszard says that the only other use he can remember, other than the use made for the purpose

of repairs, is when a horse ran away and ran down that path. Then in 1879, the railroad company built its road over that. It bought the land from the owners of the land at that time, and that ownership included this bank which protected the lands in back of it, and they then built their railroad tracks, and from that time since those railroad tracks have been an effectual barrier, excepting for persons to walk up over those banks. Your Honor will remember that as you approached this railroad bed from this path there was an embankment four or five feet in height, that you then came up to what they call the shoulder, and then there was the ballast, ties and rail until you got to the other side and went down a similar embankment on the other side, so that your Honor can well say that in 1879 when this road was built through there, the railroad company said to the public, "You can use this pathway no longer," because there is no evidence in this case that there was any kind of plank road across it; or that there was any evidence at all of an invitation to use, or a user, or of the existence of that roadway.

(Lengthy argument by counsel followed.)

Recess taken to Monday, May 19, 1913, 9.45 A. M.

Mays Landing, N. J., May 19, 1913.

Trial of the cause resumed at 9.45 A. M.

The Court: Gentlemen of the jury, under the direction of the Court you are required to find a verdict for the defendant. A motion was made and it is granted.

(Whereupon the plaintiff, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

HOWARD CARROW. [SEAL]

INDEX OF CASES.

Tarlucki *vs.* West Jersey & Seashore R. R. Co., 78 Atl. Rep. 149; 80 N. J. L. 688, ... 17, 34
Tarlucki *vs.* West Jersey & Seashore R. R. Co., 82 N. J. L. 138, 18
Wood *vs.* Hurd, 34 N. J. L. 87, ... 21
O'Neil *vs.* Annett, 27 N. J. L. 290, ... 22
Durgin *vs.* City of Lowell, 85 Mass. 398, ... 23
Perine *vs.* Farr, 22 N. J. L. 356–365, ... 25
Wood *vs.* Hurd, 34 N. J. L. 87–89, ... 27
Marino *vs.* Central R. R. Co., 69 N. J. L. 628, ... 28
Earle *vs.* Consolidated Traction Co., 64 N. J. L. 573, ... 29
Schwanewede *vs.* North Hudson Ry. Co., 67 N. J. L. 449, ... 29
Kriwinski *vs.* Pa. R. R. Co., 65 N. J. L. 392, ... 29
Velten *vs.* N. Y. Central & Hudson River R. R. Co., 57 Atl. Rep. 1134, ... 29
West Jersey R. R. Co. *vs.* Ewan, 55 N. J. L. 574, ... 30
Sweeney *vs.* Old Colony R. R. Co., 92 Mass 360, ... 30
Dieckman *vs.* D., L. & W. R. R. Co., 81 N. J. L. 460, ... 31
Devoe *vs.* New York, Ohio & Western R. R. Co., 63 N. J. L. 276, ... 31
Fury *vs.* N. Y. Central R. R. Co., 67 N. J. L. 270, ... 31
Corson *vs.* Atlantic City R. R. Co., 83 Atl. Rep. 885, ... 32
Kubinak *vs.* Lehigh Valley R. R. Co., 79 N. J. L. 438, ... 32
Sutton *vs.* W. J. & S. R. R. Co., 78 N. J. L. 17, ... 33
Brady *vs.* Traction Co., 64 N. J. L. 374, ... 35
Fitzhenry *vs.* Cons. Traction Co., 64 N. J. L. 674, ... 35
Sheets *vs.* Street Ry. Co., 54 N. J. L. 518–520, ... 35
North Hudson *vs.* Flannigan, 57 N. J. L. 696, ... 35
Verdon *vs.* Crescent Auto Co., 80 N. J. L. 199, ... 35
West Jersey Railroad Co. *vs.* Ewan, 55 N. J. L. 574, ... 36

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

EDMUND TARLUCKI, BY HIS NEXT FRIEND, ETC.,
Plaintiff-Appellant,
vs.
WEST JERSEY & SEASHORE RAILROAD COMPANY,
Defendant-Respondent.
} On Appeal.

Brief for Defendant—Respondent.

The plaintiff, Edmund Tarlucki, was injured on the railroad of the defendant between the upper and lower stations at May's Landing, New Jersey, by coming in contact with an electrified third rail, over which he had tripped in passing from one side of the railroad to the other.

The suit was brought prior to the adoption of the Practice Act of 1912, but was tried thereafter.

The accident happened on or about the twenty-third day of May, nineteen hundred and eight, at which time the plaintiff was about eight years old; at the time of the trial the plaintiff was about thirteen years old.

The plaintiff's theory of the liability of the defendant for the injury rests upon the proposition that at the place where the plaintiff tripped and fell over the electrified

third rail there was an "ancient by-road," and that it was the duty of the railroad company, therefore, to so protect its third rail at the crossing of this ancient by-road that persons using such crossing could do so in safety, and that the defendant had neglected this duty by leaving the electrified third rail exposed.

The theory of the defense was that there was no by-road or by-way or public crossing of any character crossing the railroad at or near the point where the accident took place, either as a matter of fact or in contemplation of law and that the plaintiff was a trespasser and the defendant owed him no greater duty than to refrain from willful injury, and there being no proof that there was any willfulness in permitting the third rail to be exposed, and it further appearing that the accident did not happen on the alleged crossing and that the plaintiff was guilty of contributory negligence, there should be a verdict directed in favor of the defendant.

The trial judge directed a verdict in favor of the defendant, from which judgment the plaintiff appeals.

FACTS.

The evidence showed that more than seventy years ago the owners of land lying along the south and west shore of the Egg Harbor River at May's Landing erected a meadow bank, in which were built two sluiceways, for the purpose of protecting the land inside the bank from the water, and permitting the land thus protected to be flowed and drained by the use of said sluiceways. This mud bank extended from a point some little distance from where the road from May's Landing to Estelville crosses the Egg Harbor River to a point a short distance below where the railroad now crosses, called "Keates' Landing." There was in fact no landing at that point, but simply a sandy, shelving beach, where fishermen sometimes landed their boats. There was another road running from Keates' Landing to the Estelville road, approximately parallel with the present

right of way of the railroad company and to the south thereof.

This meadow bank was kept in repair by the owners of the land which it protected, and in so doing wagon-loads of cinders and other materials were carted along the breast of the bank and deposited wherever needed.

From a point where the Estelville-May's Landing road crossed the Egg Harbor River down to the point of the beginning of the bank was highland, and on this land the May's Landing Water Power Company and other owners, from time to time, had erected some houses, a blacksmith shop and a slaughter house. The slaughter house was the building farthest away from the intersection of the road with the river, and it was about at this point that the bank itself began. From this point down to Keates' Landing the breast of the bank was never used by any wagons or teams other than those used in keeping the bank in repair, although pedestrians frequently used the road for the purpose of going to Keates' Landing, or for taking a stroll or pleasant walk, the bank running, as it did, along the edge of the river, and being protected and shaded by trees and bushes.

The bank was built, for its entire distance, upon private property; it was maintained at private expense for the sole purpose of protecting the land in back of it, and was never dedicated by the owners as a public road or public way, although for a period of sixty or seventy years anybody who cared to walk along the bank was permitted to do so.

A short time prior to 1879 the West Jersey & Atlantic Railroad Company, the predecessor of the West Jersey & Seashore Railroad Company, the defendant and the present owner of the railroad, purchased from the May's Landing Water Power Company a strip of land sixty-six feet in width, being thirty-three feet on either side of the center line, which piece of land included the mud bank above referred to; so that the portion of the mud bank crossed by the railroad was purchased by and

owned by the railroad company and its successor, the defendant in this suit.

Between November 5th, 1879, and June 15th, 1880, the West Jersey & Atlantic Railroad Company built its railroad crossing the mud bank, under and by virtue of its deed from the May's Landing Water Power Company. In constructing its railroad it elevated it a distance of about four feet above the top of the bank and constructed on the top of this extra bank or elevation its ties and railway tracks.

After the railroad company built its railroad in 1879 no wagons could get across at that point, although pedestrians continued to cross over the railroad tracks, being obliged, in doing so, to climb up the embankment which formed the railroad company's roadbed, then crossing the railroad and descending the embankment on the other side to the top of the meadow bank.

In 1897 the West Jersey & Seashore Railroad Company equipped its railroad so that the same could be operated by the third rail electric system, and in so doing added an additional track, making it a double-track road. The road was equipped with what is known as the "third-rail system" the electric current being conducted through two rails lying between the north and southbound track, one of which is used for the operation of trains on the northbound track, the other for the operation of trains on the southbound track. The current is communicated from the rail to the motors by a "shoe" which passes over the surface of the rail. The "third rails" are three or four inches above the level of the running rails.

At the time the defendant electrified its railroad it constructed along both sides of its right of way a wire fence, consisting of a wire mesh, about ten or twelve inches equare, the fence being four or five feet high and supported on posts set sixteen feet apart. At the point where the railroad crossed the mud bank this fence extended on both sides of the railroad, so that

a person walking along the bank or path was met with this fence four or five feet high, stretched across the path and obliging a person desiring to cross the railroad at that point to climb over it.

The proof shows that from time to time persons using this passageway would climb over the fence, thus bearing it down, and that the road foreman rebuilt or repaired this fence a number of times until finally, whether before or after the accident he could not state, he placed two posts in the ground where the path crosses, two or three feet apart, so as to hold the fence up, and one of these posts he drove right in the middle of the path.

The testimony showed that there was no pathway in fact across the railroad company's right of way at the point where the plaintiff claims he was injured, for it conclusively and undeniedly appeared that as you approached the railroad company's right of way, walking along the path in question, you first came to the wire fence; after the passing that you came to the embankment on which the tracks were laid, which was three or four feet in height; after mounting this embankment, you came to the shoulder of the right of way, then to the ballast, then to the rails of the northbound track and then to the electrified third rail for the northbound track, then to the electrified third rail for the southbound track, then to the rails of the southbound track and thence to the shoulder of the road, down the embankment to the fence along the south side of the railroad. It was shown that at about the time this accident happened the fence on the north side of the track, from which side is is claimed the plaintiff approached the railroad, was sagged down within about a foot or eighteen inches of the ground, but that it had to be either climbed or stepped over in order to get upon the railroad's right of way.

TESTIMONY OF WITNESSES AS TO CHARACTER AND USE OF PATH.

Mr. Lewis S. Smith, a witness produced on the part of the plaintiff, testified that when he came home from the army he bought a team and was employed by the Water Power Company, and that on occasions he carted sand for repairing the bank, and that the bank was just about wide enough for a wagon to go along (page 10, l. 20, 30). He further testified that the road was so narrow that the wagon hub would strike the bark of the trees and that a part of the tree had to be cut out to permit the wagon to pass (p. 11, l. 10). He also testified that the only wagons that would use the bank were such wagons as were being used in the repair of the bank (p. 11, l. 20-28), and that no other teams used it (p. 12, l. 3).

Mr. Smith also testifies that after the railroad was built you could not get across it if you wanted to (p. 12, l. 10). He also testifies that after the tracks were laid they put a wire fence on each side (p. 12, l. 20), and that he went down to see the place where the boy was hurt, but found there had been so many people gone over it that the fence was bent in (p. 12, l. 30-40). He further testified that all the protection the rail had was the wire fence on either side, which was partly down at the time he went to view the place where the boy was hurt (p. 13, l. 10-20).

On cross-examination Mr. Smith testified that the bank was built to protect the land inside (p. 14, l. 1-15), and that it was used by Mr. Iszard and the water power company, who owned land adjoining it, and that they used teams on it for the purpose of repairs, etc. (p. 14, l. 20, to p. 15, l. 30).

Mr. Smith further testified on cross-examination that when he went down to the railroad on the day of the accident, the fence was still there and that it had been sagged down between the posts, so that you had to step

over (p. 18), and that the fence was about four feet in height (p. 19, l. 10).

Mr. Smith further testified that he went down to see the marks on the third rail where the boy was burned, and that he found them on the south track, that is, the track farthest over (p. 21, l. 10).

In answer to a question by the court, he said that the fence was crushed down so that it was about twelve or fifteen inches high (p. 23, l. 5-20). He further testified that the fence was still fastened to the post on each side, but that between the posts it had sagged or was bent down (p. 24, l. 1-13).

Further, on cross-examination, Mr. Smith said that when he went down the day after the accident there was no plank crossing across the railroad at that point, and that there was no protection at all only the wire fence, and that when you got inside the wire fence the railroad bank was about four or five feet high, and after you got to the top of the bank there were railroad ties and the four running rails and two third rails.

He further said that the path from the water power store down to Keates' Landing was right on the top of the bank; that it was along the top of the mud bank and that the mud bank was built there to keep the water out, and was built by the owner of the lands (p. 27, l. 27, to p. 28, l. 18); that the bank was probably built there by Mr. Christopher Rape's grandfather, who owned all the land, and that the railroad ran right across it (p. 29, l. 10).

He also testified, in answer to a re-direct question by Mr. Wescott, that some call it a roadway, some call it a bankway, and some call it a pathway, but that it was most generally called a bankway (p. 29, l. 12-20).

He also testified, in answer to a question by the court, that people still used it walking over the third rail (p. 31, l. 1), but upon re-cross-examination testified that he had been told that people crossed over; that he had not seen it himself.

Daniel E. Iszard, a witness sworn on the part of the plaintiff, who had lived in Mays Landing for seventy-eight years, testified that he had known of the road or bankway for seventy years; that it was used by teams that were working on the road, and that it was pretty close work to get a wagon in between the trees (p. 33, l. 10-30).

He also testified that the bank was of such a height that on a high tide the water would overflow and run into the land outside the bank (p. 33, l. 10-34). He further testified that the road was not used as a road since the railroad was built (p. 34, l. 3), and that the railroad was built in 1879 (p. 34, l. 16).

He further testified on direct examination that it was "like an old bank that trees had grown on each side of it, and the middle part was clear where they had walked over it" (p. 34, l. 33-38). He testified that it was a walking path (p. 35, l. 2), and that it went clear to the upland on the other side of the railroad (p. 35, l. 4-7).

Mr. Iszard testified that he did not use this old road when he went down to see the workmen working on the electrification of the defendant's railroad, but drove down the other way. He testified that there were roads on the south side of the railroad, that is, on the Keates' Landing side, running from the Estelville road (p. 36, l. 10-30).

On cross-examination Mr. Iszard testified that the bank was built for the purpose of protecting the land, to keep the water out and also to keep it in, and that in order to control the water there was a sluice-way (p. 37, l. 10–37); that the carting done on it was for the purpose of making repairs (p. 38, ll. 10–30); that there was no business of any kind at the other (Keates' Landing) end of the road, but that people working, cutting wood, or choppers, go over the road or bank to and from their work (p. 39, l. 20).

Frank Tarlucki, a witness produced on the part of the plaintiff, was the father of the boy that was hurt. He describes the path as follows (p. 40, l. 27):

"*Q.* Do you know this way or path or road that we have been talking about?

"*A.* Yes, sir.

"*Q.* Where does it begin?

"*A.* Beginning at the bridge there and company's store and leads right along the river until it comes to the railroad and then go the other side up to the Keates' Landing, where they have a lot of row boats there and all that stuff for the people that don't like to go around that take this road here to walk down.

"*Q.* How far does this road go beyond the railroad, about?

"*A.* On the other side of the railroad?

"*Q.* On the south side.

"*A.* Well, I can't tell you how far, but it is a little bit of distance, say two or three hundred feet or yards, I don't know exactly, but I know it is a little distance."

He further testified (p. 41, l. 30) that since he came to May's Landing it was only a walking path, trees on both sides. He further testified that when the electrified rails were laid down, wire fences were built on both sides of the railroad, and that when you came to the railroad, traveling this path, there was a fence across it, but people going so often had broken down the fence. He further testified that he thought that there were posts on each side of this path (p. 43, l. 17).

Michael Gupin, one of plaintiff's witnesses, on direct examination, testified that he saw wagons on the path, but never saw them crossing the railroad (p. 63, l. 20; p. 64, l. 21). He also testified that on the day of the accident the fence was kind of squeezed down to the ground, about a foot or so from the ground (p. 65, l. 18). He also testified that at the time he saw the wagon, it was a good long while ago, and it was a little ways from the railroad (p. 68, l. 10–30).

He further testified on cross-examination that the fence crossed the path and that after you passed through

the fence the railroad is up on an embankment about three or four feet above the path (p. 70, l. 10–21).

Mr. Gupin also testified that as you came up from the path where the fence is you have to climb up an embankment first, then over the stone or cinders forming the ballast and the railroad ties, which are laid in the cinders; then you come up to the rail, then you have to step higher to get over the third rail, and when you get over the third rail, you come in between the two tracks, and then you come to the next third rail on the southbound tracks and you have to step over that; that there was no plank crossing at this point (p. 72, l. 20, to p. 74, l. 10).

Mr. William Mattix testified that he was seventy-nine years old, and that he lived practically all of that time in May's Landing; that he was familiar with the path through the woods that goes over the railroad which formed the "river bank" (p. 87, l. 24); that it was a narrow bank, and that it was used to keep the water out of the meadow (p. 37, l. 33); that the entrance to the path was at the water-power store and the bridge right down to the river, perhaps 150 yards, and then the meadow comes near the river and the bank runs between the two; that there was no wagonway on top of the bank, to his recollection, but that there was a footway there (p. 88, l. 1–10). The witness could not recall whether the path extended beyond the railroad, but knew that it had been used by foot passengers, but never knew a wagon to use it (p. 88, l. 20–25).

On cross-examination he testified that the bank was simply an ordinary river bank and was used to hold the water for Kit Rape's cranberry patch, and was operated by an old-fashioned sluice; that it was built on private property (p. 88, l. 30, to p. 89, l. 10).

Mr. Baker C. Lloyd, a witness produced on the part of the defendant, testified that he was a section foreman on the West Jersey & Seashore Railroad, and that his district covered the space three miles north of May's

Landing station to one-half mile south, and that it included the portion of the tracks where the accident to the plaintiff happened (p. 99, l. 27–30). He further testified that at some period, whether before or since the accident he did not know, he built two additional posts to hold the fence where the path comes up to the railroad, and that they were put in because people were bearing the fence down and he couldn't keep it up with the posts that were in there (p. 100, l. 10–20).

On cross-examination he testified that there was a fence built across the path on top of the bank when the road was electrified, and that the two original posts were about sixteen feet apart, and that when the two other posts were put in, either before or after the accident, one was driven right in the middle of the path. and the other about four feet from it (p. 102, l. 10–30).

In answer to a question by the Court, he said that there was a bank leading right up to the roadbed; that there was a path on it leading right up to the railroad (p. 103, l. 187). He further testified that the fence was rebuilt a number of times by him (p. 104, l. 10–20).

Edwin M. Haas, a civil engineer, testified that the bank was about ten feet in width and about ten feet above the high-water mark (p. 124, l. 30). He testified also that the West Jersey & Atlantic Railroad Company first built its railroad there some time between November 5th, 1879, and June 15th, 1880, and that it electrified its road in the summer of 1906 (p. 125, l. 10).

Daniel E. Iszard was recalled as a witness produced on the part of the defendant. He testified that there was a fence across this bank between its beginning point and the railroad, used for the purpose of keeping cattle in that the water-power company had purchased (p. 127, l. 10–30). He further testified that the road was used exclusively by the owners of the land for the purpose of hauling stone down there for the purpose of repairing the road (p. 129, l. 32), and that part of the land was owned by him and purchased from him by

the water-power company (p. 130, l. 7 to 11), and that the bank was maintained at private expense (p. 131, l. 10–20).

William Rogers, a witness produced on the part of the defendant, testified that he was a blacksmith and had been in business in May's Landing since 1877, and that his blacksmith shop was located along the river, right near the beginning of the meadow bank (p. 135, l. 1–20). He also testified that the land formerly belonged to Iszard (p. 135, l. 24), and that after the power company had bought it they kept cattle, and in order to keep them from running on other people's land they built a fence which ran from back of the land along Norcross' and Rape's line down just below the first sluice and then across the bank into the river (p. 136, l. 33); that no wagons ever used the road within his recollection any further down than to the slaughter-house; that if they drove down any further there would be no way of turning around (p. 137, l. 20–28).

TITLE TO PATH.

Mr. Haas, a civil engineer employed by the railroad company, testified that the deed offered in evidence (p. 104, l. 30), from the May's Landing Water-Power Company to the West Jersey & Atlantic Railroad Company, recorded in Book 79, p. 418, which began at a point in the division line of the water-power company's land and Christopher Rape's land and extends thence southeasterly along the center line of the railroad company's right of way a distance of 33 feet on either side thereof for 134 feet to the high-water mark of the Great Egg Harbor river, included a portion of the railroad right of way where the same intersected with the river bank and where it was alleged the accident took place (p. 121, l. 37; p. 123, l. 15); that the West Jersey & Atlantic Railroad Company bought from the State the land lying below high-water mark (p. 123,

l. 30); that no part of the bank was on the land acquired from the State, but that the bank was on the land acquired by the railroad company from the May's Landing Water-Power Company. Mr. Haas also testified that the West Jersey & Seashore Railroad Company succeeded to the rights of the West Jersey & Atlantic Railroad Company (p. 125, l. 11).

FACTS AS TO WHERE AND HOW PLAINTIFF WAS INJURED.

The plaintiff's father, Frank Tarlucki, testified that on the day of the accident he went fishing; that he took with him his boys, Eddie, Leonard and Frankie; that he did not follow the mud bank path, but went around by the railroad (p. 45, l. 10); that he left the plaintiff, Edmund, home (p. 45, l. 19). He says that as he started out, he thinks the boy began to follow them (p. 45, l. 20). He doesn't say anywhere in his testimony as to how the boy approached the railroad tracks. He testifies, however, that after he had been fishing about an hour or so, he heard someone call that his boy was stuck on the rail (p. 46, l. 10); that he ran up as quickly as he could; that he found the boy lying against the electric rail; that he got him loose from the rail and ran some distance down to where there were a couple of men to whom he gave the boy and ran along to the station in order to get word to a doctor (p. 54, l. 10–30).

Mr. Tarlucki testified that he had warned the boys against the using of the path and crossing over the electric rails (p. 52, l. 20–40). He also testified that before the accident he had frequently taken Edmund down to the river to fish, but that he always took him down by the station way and never along the path after the electric road was built (p. 59, l. 30; p. 60, l. 7). He also testified that the boy saw which way he went after he left the house (p. 62, l. 1–20).

Michael Gupin testified that he had been fishing, but at the time of the accident he was alongside the track, about four or five feet away from it (p. 64, l. 27). He says that he didn't see the boy come through, but just as he saw him he had got up on the hill (p. 65, l. 23). He further says: "He crossed the first rail and as he was going over the other side his knee caught this charged rail and he went right down and his face caught on the dead rail and his other foot was up against the other one and one was on the ground (p. 65, l. 33, to p. 66, l. 2).

He also says, on cross-examination, that at the time of the accident the boy was right up near the railroad tracks; that he was "on this side of the railroad; just left that path where the fence is." (p. 69, l. 30); that "he was right straight up from the path, up by the railroad." (p. 70, l. 8). He further testified on cross-examination as follows:

"*Q.* Did you see him start across?

"*A.* Yes, sir.

"*Q.* In what direction did he come across?

"*A.* Well, I couldn't tell you what way he came; I didn't see him.

"*Q.* After you saw him—after you watched him start across?

"*A.* He started on the other side."

"*Q.* Did you see him start there?

"*A.* Yes, sir.

"*Q.* What rail did he cross first?

"*A.* Well, he started, I guess, over to his father? He was going right out that way.

"*Q.* Which rail did he start over first?

"*A.* Well, he walked over the first rail, electric rail, and he crossed the other one. The electric rail caught him in the knee, and he went right down.

"*Q.* You know where the railroad bridge is?

"*A.* Yes, sir.

"*Q.* Where were you standing with respect to the railroad bridge?

"*A.* Well, I was standing right on that side, about 20 feet from the path." (P. 71, l. 1–30.)

John Matusiwicz, one of the plaintiff's witnesses, testified (page 78):

"*Q.* How did the little boy get caught?

"*A.* When he was stepping over the railroad from one rail to another and stepped over, then caught by the foot to the railroad, then he fell over against the other one, and then he began burning then."

Gussie Moszycnski testified that the two men who saw the accident were about twenty feet away from the bridge (p. 81, l. 17; p. 83, l. 30).

Mr. Lloyd, a witness produced on the part of the defendant testified that he went down to the scene of the accident within about an hour and half and that he could see the stains on the rail resulting from the accident and that these stains were about ten feet north of the north abutment of the railroad bridge crossing Egg Harbor river (p. 100, l. 20; p. 101, l. 10).

Mr. Horner, the station agent at May's Landing, visited the scene of the accident about six o'clock on the evening of the accident. That there was evidence of the accident on the rails and that they were about ten or fifteen feet from the abutment of the railroad bridge (p. 106, l. 1–30).

John Carr, a witness on the part of the defendant, said that he was in swimming right at the end of the bridge; that he heard someone hollow and that he ran up to the bridge, and when he got up on the railroad embankment he saw a boy lying on the third rail, and that he was about fifteen or twenty feet from the edge of the bridge (p. 110, l. 30, to p. 111, l. 30).

Charles P. McDonald, a locomotive engineman in the employ of the railroad company, testified that he saw the boy attempt to cross over the track; that when he first saw him he was just about the hip of the railroad, that is, the face of the bank where the track sets, but the next he saw him was when he saw him burning and the

men trying to get him free of the tracks (p. 116, l. 10 to 30).

He further testified that he was on his locomotive, about fifty feet west of where the path approaches the railroad, and that it looked to him from his view out of the cab window that the boy was about twenty-five or fifty feet from the bridge which was a considerable distance beyond where the path approached the railroad tracks (p. 119, l. 20–30).

Robert Woodcock, a civil engineer in the employ of the railroad company, testified that the distance from where the path comes up to the railroad tracks to the bridge is 185 feet.

ARGUMENT.

Theory upon which the declaration was sustained and case tried.

In the first declaration filed by the plaintiff in this case the allegation was that along each side of its roadbed, "for the purpose of guarding the public from contact with said third rail the defendant maintained at the time aforesaid a fence; that at the time aforesaid an ancient by-way led up and over said roadbed and across the same; that defendant permitted and allowed said ancient by-way to remain open, unguarded and unfenced and allowed said third rail at said crossing place to be unguarded and unprotected; that at the time and place aforesaid the said Edmund Tarlucki walked along said ancient by-way in a northerly direction, through said opening in said fence and over said roadbed; that at the time and place aforesaid the defendant had and maintained along the side of its northerly track a well-defined and worn footway, and that the said Edmund Tarlucki, after entering said opening at its southerly side, proceeded to cross said roadbed in a diagonal direction for the purpose of reaching said footway, and in so

doing stepped against and came in contact with said third rail," etc.

The Supreme Court, in sustaining the demurrer to this declaration, said:

> "There is nothing of a substantial character contained in this declaration which would enable us to distinguish the case at bar, in principle, from the Sutton case. It is not alleged that the footway, which the plaintiff was following, upon defendant's right of way, was generally used by the public as a public way, or that the defendant expressly or impliedly held out any invitation to the public to use it as such."
>
> *Tarlucki* v. *W. J. & S. R. R. Co., 78 Atl. Rep., p. 149; 80 N. J. L. 688.*

The declaration was afterwards amended, and, in its amended form, read as follows:

"That at the time and place aforesaid an ancient by-way, running north and south, led up to and over said roadbed and across the same; that the defendant permitted and allowed said ancient by-way to remain open, unguarded and unfenced and allowed said third rail at said crossing place to be and remain unguarded and unprotected; that at the time and place aforesaid said Edmund Tarlucki walked along said ancient by-way in a northerly direction, through said opening in said fence, upon and over said roadbed and in so doing stepped against and came in contact with said third rail and was burned," etc.

To this declaration a demurrer was interposed on the theory that it did not appear that there was any public way crossing the tracks of the defendant company on which the plaintiff was walking at the time of the injury. The demurrer was dismissed. The opinion of the Court was delivered by Justice Voorhees. In his opinion he says:

> "The declaration reads that the defendant maintained and operated its railroad, operated

by a third rail charged with electric current and that an 'ancient by-way' crossed the right of way which was fenced and the rail guarded except at the 'by-way crossing.' Here the fences were open and the third rail was 'unguarded and unprotected.'

"There is an allegation that the plaintiff walked along an ancient by-way upon and over said roadbed and coming in contact with the third rail he was injured by the current.

"The demurrer admits that the road was an 'ancient by-way.' The term *by-way* must be taken to be the equivalent of by-road, which is a public way which the plaintiff had a right to use. This seems inferentially to have been the view of this Court when the case was here on a former occasion.

"There is added force to be given to the expression by the qualifying adjective 'ancient,' for, from it, in connection with the admission arising from the declaration, there is a presumption that the way originated in a dedication and so has existed for more than twenty years, sufficient to establish a public road. *Wood* v. *Herd, 34 N. J. L. 87.*"

Tarlucki v. *W. J. & S. R. R. Co., 82 N. J. L. 138.*

The demurrer having been overruled, a plea of general issue was filed and the case went to trial on the issue thus joined.

It will be observed that the theory upon which the declaration was sustained was that there was an "ancient by-way" or by-road crossing the tracks of the defendant company; that the railroad on either side was fenced in, excepting at a point where this ancient by-road or by-way crossed the railroad, and that while walking on this ancient by-road the plaintiff came in contact with an unprotected third rail.

Therefore, before the plaintiff could maintain his action he was obliged to establish these facts, namely, that there was an ancient by-road crossing the railroad; that there was an opening in the fence, through which the by-road entered; that the plaintiff came through such opening and used the by-road in crossing the railroad and without deviating from the alleged by-road came in contact with an electrified third rail and was injured.

Before reversing the judgment this Court must find that there was evidence from which the jury could infer that there was in existence at the time of the accident an ancient by-way or by-road crossing the line of the railroad company's right of way; that the accident happened on this by-road and that the plaintiff was free from contributory negligence.

There Was No By-road.

There is no proof in the case of any actual path of any sort crossing the railroad tracks or roadbed, and the testimony clearly shows that no such path in fact existed. The plaintiff clams, however, that there was such a path in contemplation of law, and that the defendant's duty to protect the passerby was the same whether there was a path actually there or whether the path was there only in contemplation of law.

Conceding the contention of the plaintiff for the purpose of argument, we contend in the present case there was not even in contemplation of law a by-road crossing the right of way of the railroad company.

A by-road is recognized by the Road Act. (*Sec. 113 of the General Statutes, p. 2827; Sec. 36, Comp. Stat., p. 4438*).

This act provides as follows:

> "If any by-road heretofore used as such by the inhabitants of this State, although not laid out agreeable to law, shall be shut up and rendered impassable, whereby the said inhabit-

ants may be put to immediate inconvenience or difficulty, or if any person or persons over whose land said by-way shall pass shall desire to change or alter the same, then any person so aggrieved or desiring to change or alter said by-road may apply in writing to three of the chosen freeholders of the county nearest to the said by-road, to lay out, alter or change the said road, and the said freeholders are hereby authorized to lay out, alter or change the same; provided the said by-road shall not be so altered or changed so as to place the same on any other person or person's land, which shall remain as a private road until it be vacated or altered as in the manner directed in the fourth section of this act."

Section 154 of the Road Act (*Gen. Stat., p. 2836, Sec. 36A, Comp. Stat., p. 4438*) provides that:

"Whenever the chosen freeholders shall meet to lay out, alter or change any by-road pursuant to the provisions of Sec. 36 (the above act), the said freeholders so met shall have power, and it shall be their duty to determine whether a by-road heretofore used as such shall have there existed, whether the same shall have been shut up or rendered impassable, whereby the inhabitants may be put to immediate inconvenience or difficulty aforesaid; and to that end shall have power as well to take testimony as to proceed upon their own view as to the existence, use and obstruction of said by-road; and it shall be their duty to make a report of their proceedings, which report shall fully set forth the application, the time and place of hearing, the names of witnesses by them examined, if any, their final determination of the matter, and all proceedings by them had, which said report shall be by them filed within ten days, in the office of the clerk of the Court of Common Pleas of the county, and by him recorded."

These acts were referred to by Justice Voorhees in his opinion overruling the demurrer in the case of *Tarlucki* v. *W. J. & S. R. R. Co.*

It is uncontradicted in this case that the road was in fact rendered impassable so far as wagons were concerned, in 1879, and after that date no wagons ever crossed the railroad; that the railroad rendered it, if not impassable, at least not conveniently passable to pedestrians after 1879, and further that after the road was electrified it was rendered entirely impassable by the erection of fences, which were repaired as often as they would be broken down, and further rendered impassable, and dangerously so, by the construction of third rails, electrified by a highly dangerous current. From 1879 there was no pathway across these tracks, such as one commonly meets at railroad crossings where there is planking or a cribbing, filled in with gravel, so as to make a crossover. There was no evidence of any worn pathway or user inside of the wire fence across the right of way and roadbed of the railroad company. It is submitted, therefore, that there was never any by-road at all within the meaning of the plaintiff's declaration or within the meaning of the acts of the Legislature above referred to.

To constitute a dedication there must be, first, evidence of acts done by the owner showing an intent to dedicate for the use of a highway or roadway.

13 Cyc. 452B.

Or, second, an acquiescence by the owner in the use of his lands by the public claiming to use it by right and not by permission for a period of twenty years.

Wood v. *Hurd, 34 N. J. L. 87.*

In the case at hand there is no evidence of any act done by the owner indicating his intention to devote this meadow bank to highway purposes, nor is there any evidence in the case tending to show that the previous owners of the bank, which was conveyed to the defendant by the water power company, ever knew or the use of this bank for traveling purposes. The very

use of the bank conclusively negatives the theory of a dedication for highway or by-road purposes.

The policy of our State is to reclaim all swamps, marshes and lowlands, first, for the purpose of rendering them more valuable, and second, for the purpose of rendering the location more healthful. This policy is clearly shown by the numerous acts of the Legislature making it possible to reclaim such land, even as against a minority of the owners thereof.

In the present case the meadow bank was built and maintained by the owners. Where the object of the building of the bank is so demonstrative as in the present case, there can be no presumed intention to dedicate it to a different use raised against the owner. The notion that the owner intended to devote this meadow bank to highway purposes, when the object of building it was to keep out the waters, cannot be presumed. So jealous is the State of the preservation of these mud banks in their continued use as mud banks, that the Legislature in the 20th Section of the Act of 1877 (*Revised Stat., p. 3247, Sec. 20; Comp. Stat., Sec.* *p.*), provided that in all cases where mud banks had been built under the act requiring them to be maintained by the State, if any owner or occupier should suffer to be put on said bank any horses, cattle or swine, by his consent, contrary to the direction of the managers, such owners should make good all damages occasioned thereby.

This clearly indicates the legislative policy of preventing these banks from being destroyed by horses and cattle passing over them, and further indicates the policy of the State to maintain these banks for the purpose for which they were built, namely, to keep out the water.

Where a structure is built for a specific purpose, our law will not raise a presumption of dedication of such construction to a different use.

In the case of *O'Neil* v. *Annett, 27 N. J. L. 290,*

defendant had erected a wharf from his land into the water, at his own expense, which had been used by him for the purpose for which it was built, to wit, wharf purposes, for many years. For more than twenty years before the suit was brought the public, or at least a portion of the public, had been accustomed to use this wharf for wharf purposes, without recognizing the owner's individual rights therein, a vessel was prevented from landing at the wharf by the owner. An action was brought against him, and it was contended that by reason of a part of the public having used this wharf for more than twenty years, it became dedicated to public purposes, and, therefore, the defendant's act in prohibiting the vessel landing was unlawful, and he should answer in damages. The Court held that the wharf having been built for wharf purposes and not for highway purposes and having been used for the purpose for which it was built by the owner, there was no dedication of the wharf for highway purposes, even though the public had used the wharf for more than twenty years without recognizing the defendant's rights.

A dedication is the intention of the owner to abandon the property dedicated to public use. In the present case the property has at all times remained in the possession of the individual owners; has been from time to time repaired by them for the purpose for which it was constructed, and at all times has served the purpose for which it was built, namely, to exclude the waters of Great Egg Harbor river from the land lying in back of it. The fact that three or four houses had been built along the river bank near the Estelville road, and that the roadway extended down to them, was urged as evidence of a dedication of the road to the public. Such contention is absolutely without weight, as is shown in the case of *Durgin* v. *City of Lowell, 85 Mass. 398,* wherein the Supreme Court of Mass. *Held:*

"A way constructed and kept in repair by a

> private corporation upon its own land, for its own use and convenience and the use and convenience of the tenants occupying those houses upon both sides thereof, opening into a public street, having a sign 'private way' upon the ground, but left open to public travel for more than twenty years without interference, is not thereby dedicated to the public, nor does it become a public way by prescription."

It was further argued in the present case that because trees and bushes were growing along either side of the mud bank that therefore the road was dedicated for a roadway. It is common knowledge that trees and bushes are planted on these banks to retain the earth and foundation, so that the presence of trees and bushes in the present case could not be attributed to an intention to dedicate it for roadway purposes.

If there was a by-road in existence within the contemplation and meaning of the above acts of the Legislature, the railroad company being the owner of the lands traversed by such by-road, closed it and prevented the public from using it. The plaintiff contends, however, that the railroad company had no right to close up or interfere with this by-road. The two sections of the Road Act above referred to show that such a road may be closed up, and if it is closed up it can only be opened upon application to the freeholders, and the freeholders can open it only when it is established to their satisfaction that there was a by-road, and that it had been rendered impassable and closed up, and that the closing of it had inconvenienced the public.

In the present case there is no proof of any application to the freeholders to open the alleged by-road and, of course, no proof of such proceedings as are provided for in *Sec. 154 of the Genl. Stat., Sec. 36A of the Comp. Stat.*

Chief Justice Green, in interpreting these statutes, says:

> "They (the freeholders) have no power to lay out a new road, but to remove obstructions from the old one, and that must be a road theretofore used as such, and *it must be shut up to the immediate inconvenience and difficulty of the inhabitants.*"
>
> *Perrine* v. *Farr, 22 N. J. L. 356, 365.*

In writing one of the opinions in this case, Justice Carpenter says, page 371:

> "It is not, course, because a by-road previously used has been closed, that therefore it must be opened, *but having been recently closed,* the freeholders in such case are to judge whether the inconvenience is so great to those by whom the road had been previously used that it ought to be opened and remain open until such provisions can be made for their necessity."

Justice Carpenter further said, at page 372:

> "The difficulty in this case does not seem to be in the failure to show previous existence and use of such road as is in contemplation of the act; *it is in the fact that the shutting up of the road was not recent.* It had been closed for several years before this application. It was not provided for when the freeholders were authorized to judge as to the extent of the inconvenience. It is not necessary to show how soon the application must be made, but after such lapse of time as has occurred in the present instance there can be no pretence to say that the inconvenience was immediate."

The above case was one in trespass brought by the owner of land traversed by the so-called by-road, against the defendant, who had removed an obstruction therefrom. The defendant attempted to justify the trespass upon the ground that there had been a by-road there which had been closed up and which the freeholders had ordered open. There was a verdict in favor of the de-

fendant, and the court held that his plea of justification under the order of the freeholders was without legal warrant and verdict should be reversed.

The above case is cited by Justice Voorhees in his opinion overruling the demurrer in the present case and is authority for the proposition contended for by the defendant, namely, that the public, or the plaintiff, as one of the public, had no absolute right in the by-road, whether the by-road existed by prescription or dedication or user, or otherwise, but that the owner of the land may close the road, and if the owner does so an application must be made to the freeholders to open the road under the acts above referred to, and that if they do order the road opened and it appears affirmatively that their action is unwarranted, even such an order would not justify a person entering upon the land within the bounds of such by-road so opened.

The defendant, in the present case, owned the land over which the by-road is alleged to have existed. It built its railroad and closed up the road, so far as teams are concerned, and made it inconvenient for passage by pedestrians; it then electrified the road and built fences, thus effectually closing the road. Under the doctrine of *Perrine* v. *Farr,* a person who removed those fences or breaks them down, or who went upon the land thus obstructed, even though a by-road might formerly have existed there, was guilty of trespass, in the absence of proceedings to open the road under the statutes above referred to, and even then he could not justify his act unless the obstruction had been recently placed there and had caused immediate inconvenience to the public. There is no proof whatsoever in this case that the obstruction had been recently placed or that the closing up of this by-road was an inconvenience to the public.

In another case an action was brought to recover damages alleged to have been sustained by the plaintiff due to the obstruction by the defendant of a by-road in the county of Morris, which the plaintiff alleged he had

a right to use on the theory that the road was a by-road. Justice VanSyckle, in writing the opinion, said:

> "The real question in the case is whether the by-road had a legal existence, and this leads to the consideration of the foundation upon which a public way, known as a by-way, rests in this State.
>
> "There are three kinds of roads known to our law: (1) public roads; (2) private roads; (3) by-roads.
>
> "No statutory provision is made for laying out the latter.
>
> * * * "A 'by-road' has no statutory origin beyond the right of the public to its enjoyment, is as securely held as in either of the other roads, and its free and uninterrupted travel is so absolutely necessary that it is important that the principle on which the public right rests should be clearly stated.
>
> "A by-road, as its name imparts, is an obscure or neighborhood road in its earlier existence, not used to any great extent by the public, yet so far a public road that the public have, of right, free access to it at all times.
>
> "To constitute such road the land occupied by it must be given up or dedicated by its owner for the purpose of a by-road, to all who may wish to enjoy it." *Wood* v. *Hurd, 34 N. J. L. 87–89.*

At page 91, Justice VanSyckle says:

> "The theory of the law is, where proof of devotion rests upon user that the essential intention existed at the beginning of the use and continued through the whole period necessary to evince a conclusive dereliction, and thus the user for the whole time of limitation must necessarily be of right; therefore, user by mere license, which is subject at any time to revocation, will

> offer no foundation from which to presume a gift."

In the above case the road in question was used by the public generally, but at no time was any act done or declaration made by the owner of the fee from which an intention to dedicate could have been inferred. One of the witnesses testified that up to the time he left the employ of the defendant he saw no one travel the road with a wagon, except those who were in the defendant's employ. A verdict was rendered in favor of the defendant and the plaintiff prosecuted a rule to show cause why the verdict should not be set aside. The rule to show cause was discharged.

In the case of *Marino* v. *Central R. R. Co., 69 N. J. L. 628,* the plaintiff sued the railroad company because it had removed a crossing. He recovered judgment and the railroad company appealed. The judgment was set aside. Chancellor Magie, in writing the opinion, at page 633, said:

> "There is also evidence that the plaintiff in error, *i. e.,* the railroad company, had constructed and maintained a planking and other convenience for crossing at the place in question and that many persons were accustomed to cross over the railroad tracks where these conveniences were provided, but these acts of the railroad company will not justify the inference that it maintained a public user."

In the above case the user had begun in 1848. If the railroad company was under no obligation to maintain or retain a crossing which had existed for such a long period of years, *a fortiori* would it be free from any obligation to protect its electric third rails at a point where there had never been any such crossing.

The Defendant Was Under No Obligation to Protect a By-road Not in Fact Existing.

Admitting, for the purpose of argument, that the public had a right to cross the defendant's tracks in the line of the old meadow bank, the defendant excluded the public therefrom in the manner heretofore referred to, and having thus excluded the public, was under no obligation to protect a road or crossing which existed only in contemplation of law, even if we assume that the railroad company had no right to exclude the public.

An analogous situation is presented in those cases which hold that even though a pedestrian may have a legal right to cross in front of a trolley car or other conveyance because he had reached the point of crossing first, yet if it was obvious to any reasonable man that his superior right was not respected by the approaching vehicle, he would be guilty of contributory negligence in attempting to cross.

> *Earle* v. *Consolidated Traction Co., 64 N. J. L. 573; Schwanewede* v. *North Hudson Ry. Co., 67 N. J. L. 449.*

In the case of *Kriwinski* v. *Pa. R. R. Co., 65 N. J. L. 392,* it was held that defendant, a railroad company, was not answerable in negligence to a plaintiff who had attempted to cross over its cars which had been blockading a public crossing for an unreasonable length of time. The opinion in this case was followed in the case of *Velten* v. *N. Y. Central and Hudson River R. R. Co., 57 Atl. Rep. 1134.*

We have been unable to find a case which holds that a railroad company is under any obligation to a person who comes upon its tracks at a point where there is no pathway actually existing, even though one may exist in contemplation of law, save to refrain from acts of wilful or malicious injury.

The plaintiff in this case at the time of the accident was eight years of age and of unusual brightness men-

tally (p. 50, l. 10–17). The situation presented to him as he approached the railroad must certainly have warned him that the railroad company did not intend that the place at which he crossed was to be used as a crossing. He had been warned by his father of the danger of crossing there. He is thus in the position of one who, instead of being overtaken by an unforseen peril, was overtaken by one recklessly incurred.

West Jersey R. R. Co. v. *Ewan, 55 N. J. L. 574–576.*

There was No Invitation to the Plaintiff to Cross the Tracks at the Point where He Was Injured.

The declaration was not founded upon any theory of invitation, nor was it sustained by the Court on the demurrer upon the theory of invitation. In fact the opinion of Justice Voorhees will show that the Court repudiated the idea of invitation, and based its judgment solely upon the proposition that the road or place in question was a by-road.

It appeared in the case, furthermore, that the railroad company, far from inviting the public to use this place, had, by its acts, excluded the public, and this it did not only by the erection of a fence but by the elevation of its tracks four or five feet above the path, and by the absence of any planking, cinder, gravel or other fill to make a convenient passageway over the land in question. The condition of the roadbed at that point repelled the idea of its use as a path, which is the criterion of invitation.

In the case of *Sweeney* v. *Old Colony R. R. Co., 92 Mass., p. 360,* the Court said:

> "The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and for motives to which no act or consent of the owner or occupant contributed, but that he entered on the premises because he was led to believe that they were

> intended to be used by visitors and passengers, and that such use was not only acquiesced in by the person in control of the premises, but that it was in accordance with the intent and design with which the way or place was adopted and prepared or allowed to be so used."

The principle laid down in the Sweeney case has been adopted in our own State in the very recent case of *Dieckman* v. *D., L. & W. R. R. Co., 81 N. J. L. p. 460,* in which Mr. Justice Reed, writing the opinion for the Court of Errors and Appeals, affirming a judgment of non-suit, said:

> "The path which led up to the track was not made by the railroad company, but was worn by the feet of those who traveled along its land. It did not lead to a point opposite the station. The ability to cross the tracks at a point directly to the west side of the station was destroyed by the fence erected by the railroad company. When the end of the ties was reached there was no indication of a path by the use of crushed stone or otherwise from the west side of the tracks to the station. There was no physical indication that the public was allowed to cross the dangerous interval between the mail crane and the station."

In the case of *Devoe* v. *New York, Ohio & Western R. R. Co., 63 N. J. L. 276,* it was held that where the residents along a railroad track which was enclosed by the company with a fence, built a stile over the fence without the consent of the company, in order that they might go directly across those tracks to the railroad station and to the street beyond, instead of going around by the public road, the acquiesence of the company in such use created no duty on the part of the company except to refrain from acts willfully injurious.

In the case of *Fury* v. *N. Y. Central R. R. Co., 67 N. J. L. 270,* the plaintiff was injured in passing through

an opening between railroad cars. It appeared that use had been made of the opening by the plaintiff and his co-servants without molestation. It was held that this, however, did not amount to an invitation and that the company was obliged only to refrain from willful or malicious injury.

In the case of *Corson* v. *Atlantic City R. R. Co., 83 Atl. Rep. 885,* it was held that under normal conditions the existence of a worn path across railroad tracks to the station cannot be relied on as an invitation to use that path so as to make the railroad company responsible for injuries due to mere negligence.

In the case of *Kubinak v. Lehigh Valley R. R. Co., 79 N. J. L. 438,* it was held that a declaration was insufficient which charged that the defendant constructed and maintained said crossing at grade over its road and the defendant thereby invited, induced and lured the public to use the crossing; that the public had been accustomed to use the crossing at the invitation and with the knowledge and consent of the defendant. Justice Voorhees, writing the opinion of the Supreme Court, said, at page 430:

> "The fact that the public had been accustomed to use the footway in crossing was not aided by the use of the words 'at the invitation of the defendant,' and customary use, even with the knowledge and consent of the defendant, does not amount to an invitation to use the same, nor can invitation be inferred from the use of the words 'accustomed' and 'with the knowledge and consent of the defendant,' for that would indicate nothing more than a permission or mere license."

The Court said:

> "Furthermore, there are very respectable authorities who hold that a person who goes upon land of another for his own convenience, or as a mere licensee, is not there by invitation."

Plaintiff Was a Trespasser.

There being no by-road, either in contemplation of law or as a matter of fact at the place where the plaintiff was injured, and there being no invitation on the part of the railroad company, either in contemplation of law or as a matter of fact to the plaintiff to cross its tracks at the place of the accident, the plaintiff was there as a trespasser, and to him the defendant owed no other duty than to refrain from acts of willful or malicious injury.

In the case of *Sutton* v. *W. J. & S. R. R. Co., 78 N. J. L. 17,* the plaintiff's intestate was killed by coming in contact with an electrified third rail of the defendant company. The facts as disclosed in the declaration showed that the defendant's railroad crossed a meadow which was frequented and traversed by many persons engaged in hunting and fishing and divers other pursuits; that at the time of decedent's death there were no signs, warning, signals or other devices to give notice of the dangerous character of the railroad, and that the decedent, a lad of thirteen years of age, while traversing this meadow land, came in contact with the third rail by stepping thereon while attempting to cross the railroad near its intersection with the meadow turnpike and by the contact he was immediately killed.

The Court said, page 18:

> "The right of the plaintiff, therefore, depends upon whether the defendant company owes to the trespasser upon its right of way the duty of using care, either to safeguard its third rail in such way as to prevent him coming in contact with it, or else by giving him notice that such contact is dangerous to life and lamb. The rule is settled in this State that a land owner is under no obligation to a trespasser to keep his premises in a non-hazardous state; that as to him the land owner's sole duty is to abstain from acts willfully injurious."

The Court further said (page 20):

> "The real distinction running through the case seems to me to be this: where a landowner in the development of his property and solely for the purpose of obtaining a more beneficial user therefrom, instals upon it an appliance which will be dangerous to people coming in contact with it, he is under no obligation to trespassers to so guard it that they will not be injured; but where he instals the appliance for the purpose of inflicting injury on persons who unlawfully come upon his land, he is liable when harm is inflicted by such appliance.
>
> "* * * (The defendant) Having the lawful right to instal this system for the operation of its road, it was within the protection of the rule which we have been discussing, and was under no obligation to the decedent other than to abstain from acts wilfully injurious to him."

The principle enunciated in the Sutton case was adopted by the Supreme Court in the case of *Tarlucki* v. *W. J. & S. R. R. Co., 80 N. J. L. 688–689*, when that case was before the Supreme Court on the demurrer to the first declaration.

Plaintiff Was Not Injured on the Alleged By-road.

The testimony shows, by evidence which amounts to a demonstration, that the plaintiff was injured at a point from fifteen to twenty-five feet westerly of the west abutment of the railroad bridge over the Egg Harbor river, which point is one hundred feet from the place where the alleged by-road crosses the railroad. The only testimony which in any way tends to negative this testimony is that of one or two witnesses, whose testimony was of such character as to leave in doubt exactly where the accident occurred.

Plaintiff Was Guilty of Contributory Negligence.

The plaintiff was a boy of eight years of age and "unusually smart for his age." He was therefore legally chargeable with his contributory negligence.

Brady v. *Traction Co., 64 N. J. L. 374;*
Fitzhenry v. *Consolidated Traction Co., 64 N. J. L. 674;*
Sheets v. *St. Ry. Co., 54 N. J. L. 518–520;*
North Hudson v. *Flannigan, 57 N. J. L. 696;*
Verdon v. *Crescent Auto Co., 80 N. J. L. 199.*

The proof in this case shows that the plaintiff was warned by his father on several occasions not to attempt to cross over the electrified tracks of the railroad company, and further warned not to use the path. In addition to the warning of the father, the boy, on approaching the railroad company's right of way along the path, was confronted with the fence, which, although it had been somewhat bent down, was still fifteen or sixteen inches above the ground, and of sufficient height to arrest his attention. Furthermore there was no physical path across the right of way of the railroad company. The boy was therefore not only confronted with a barrier to his progress over which he had to step, but his progress was further obstructed by the elevated embankment on which the railroad tracks were laid, the rails and ties and third rails, and the absence of any actual pathway or crossing over the rails at that point. The whole physical aspect of the place was one which must have appealed to the most immature mind as presenting a situation of danger, and one from which the public was excluded.

When it is considered that the plaintiff had been warned by his father of the danger of crossing the road (p. 52, l. 20–40), and that there was no path, either as a matter of fact or in contemplation of law, and that the condition of the defendant's road at the point of the accident was such as to repel the idea of any invitation, either in fact or in contemplation of

law, it is impossible to escape from the conclusion that the plaintiff, young as he was, was guilty of contributory negligence, and in the exercise of a reasonable prudence, which, in view of the above cases, he was chargeable with as a matter of law, it seems indisputable that he was not injured by reason of an unforeseen peril, but by one which he must be presumed to have recklessly encountered.

West Jersey R. R. Co. v. *Ewan, 55 N. J. L. 574–576.*

In recapitulation, we respectfully submit:

1. That there never was a by-road across the tracks of the defendant company;

2. That if any such by-road ever existed, it had been rendered impassable by the railroad company and no application had ever been made to the freeholders to reopen it, as provided by the statute; so that at the time of the accident there was no by-road;

3. That the physical condition of the place where the plaintiff was injured repels the idea of invitation to use it as a crossing;

4. That the plaintiff was guilty of contributory negligence.

It is respectfully submitted that upon any one or all of these grounds the direction of a verdict in favor of the defendant was legally proper and should not be disturbed.

BOURGEOIS & COULOMB,
Attorneys of Defendant-Respondent.