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COMPLAINT.

Filed December 10, 1927.

The plaintiff, Margaret M. Sullivan, administratrix *ad prosequendum* of Timothy F. Sullivan, deceased, residing in the Borough of Rockaway, County of Morris and State of New Jersey, says that: 10

FIRST COUNT.

1. The defendant is a corporation organized and existing under and by virtue of the laws of and is a citizen of the State of Pennsylvania and is duly authorized to operate a steam railroad in and through the State of New Jersey.

2. On November 2, 1927, plaintiff was duly appointed by William H. Thompson, Surrogate of Morris County, New Jersey, administratrix *ad prosequendum*, for the purpose of enabling her to prosecute an alleged claim of the widow and next of kin of one Timothy F. Sullivan, deceased, against Delaware, Lackawanna and Western Railroad Company, who it is alleged caused the death of the said Timothy F. Sullivan by its wrongful act, neglect or default. 20

3. On October 22, 1927, the defendant, by its officers, agents and employees, was and still is operating a double track railroad with the necessary locomotives, cars, track, switches and other equipment and appurtenances, as a common carrier of passengers and freight in interstate and intrastate commerce in a generally easterly and westerly direction in and through the State of New Jersey and more particularly through the Township of Denville, Morris County, New Jersey. 30
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4. At said time the defendant was also performing or causing to be performed certain excavation, grading and construction work for the purpose of straightening its railroad and increasing the number of its tracks, and for that purpose had employed Stange Construction Company to do and perform, under the direction and supervision of the defendant, such excavation and grading work by the use of men, steam shovels, cars, tracks and other equipment and appurtenances located, working and operating upon and along the defendant's railroad tracks and right of way between stations thereon known as Boonton and Dover.

5. The decedent, Timothy F. Sullivan, was then and there employed by Stange Construction Company as timekeeper to supervise and keep a record of the time of the men and equipment employed on said work and the car initials and numbers, and the number of loaded and empty cars used, to be used, or that had been used to carry material and supplies to, upon or from the work, and the weights and quantities of such materials and supplies, and for that purpose said decedent was connected with and employed, with the knowledge and consent of and in the furtherance of the business of the defendant, upon the railroad of the defendant and was, on said October 22, 1927, at about 7:25 A. M., at or near the Franklin Road Bridge in the Township of Denville, Morris County, New Jersey, in said District of New Jersey, lawfully and necessarily walking upon and along the tracks of the defendant engaged in making and keeping the records as aforesaid at the several points on said railroad between Boonton and Dover where men and equipment were then employed and

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used, and where loaded or empty cars were standing or stored; while passing from one group of workmen and equipment to another, whose time and performance he was required to record and while walking eastwardly for that purpose upon the westbound track, at a place where the tracks lay in a deep cut and on a sharp curve, and while exercising the customary and usual precautions to discover the approach of trains upon the track, the decedent was struck by a passenger train of the defendant then and there being operated by the servants and agents of the defendant in an easterly direction on the westbound or left-hand track against the current of traffic, whereby decedent was greatly injured and died shortly thereafter as a result of such injuries.

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6. Defendant, by its servants and agents, then and there so negligently, carelessly and unskillfully, operated said train that it and they failed to blow a whistle or ring a bell on the locomotive or to give any other form of warning reasonably required to apprise the plaintiff of the approach of said train; it and they failed to operate said train in a careful manner and at reasonable speed, but on the contrary did operate said train at an unreasonable, unsafe and excessive rate of speed and without taking reasonable and necessary precautions to observe the decedent lawfully upon said tracks, and to avoid striking and injuring him, wherefore by reason thereof, the defendant, by its servants did carelessly and negligently cause and permit said train to strike the decedent and injure him so severely that he died soon thereafter as a result of such injuries.

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7. Decedent left him surviving the plaintiff who is his widow, and next of kin consisting of an infant child two and half years of age and a living but unborn child *in ventre sa mere*, who were dependent upon decedent for their support and who have suffered great pecuniary injury resulting from such death and for whose benefit the statute in such case made and provided gives a right of action to the plaintiff as administratrix *ad prosequendum*.

8. This action has been instituted within twenty-four calendar months after the death of the decedent.

SECOND COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive, of the first count.

2. It has long been the custom, and it was the duty of the defendant to issue, publish and enforce orders, known as "slow orders" directed to its servants and agents engaged in the operation of trains, requiring the operation of such trains at reduced speed past and in the vicinity of construction work being performed upon or along the tracks or right of way and for the protection and benefit of persons there employed, and the defendant had, prior to said October 22, 1927, to wit, on October 11, 1927, and on October 20, 1927, issued and published such orders applicable to the movement of trains past and in the vicinity of the work where the decedent was employed. Said orders were known to and relied upon by the decedent. Said slow order issued and published October 20, 1927, and in force on said October 22, 1927, required

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all trains while moving in either direction between certain points therein designated, including the place where decedent was struck, to operate all trains at a speed of not to exceed ten miles per hour, but notwithstanding the existence in effect of said slow order, known to and relied upon by the decedent, and the duty of the defendant to enforce the same, the defendant, by its servants and agents, operated said train in total disregard and violation of said order, at an unreasonable, unsafe and excessive rate of speed, far in excess of ten miles per hour, and in reckless disregard of the safety of the decedent and other persons lawfully upon said tracks and right of way at said time and place, and who were entitled to rely upon the enforcement of said order, wherefore, by reason thereof, the defendant, by its servants and agents, did carelessly and negligently cause and permit said train to strike the decedent and injure him so severely that he died soon thereafter, as a result of such injuries.

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count.

THIRD COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraph 1 to 5, both inclusive, of the first count.

2. For a long time prior thereto the defendant has had, and on said October 22, 1927, it had, in full force and effect duly issued and published rules or orders requiring all trains operated in double track territory to run with the current of traffic, as specified by timetable, unless otherwise directed by proper authority, and that all

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such trains must keep to the right unless otherwise provided, namely to be operated on the right-hand track, and that when on double track trains are detoured from their proper track to run against the current of traffic on the opposite track between the hours of 7:00 A. M. and 6:00 P. M., such trains must be operated over the detouring section at slow speed, and under control and that where the view is obstructed by curvatures or otherwise, such train movements must be made with extreme care; enginemen keeping sharp lookout for stop or slow signals, and for persons at work on the tracks and be prepared to stop on short notice, and that enginemen give warning by frequent use of engine whistle upon approaching such localities; but, notwithstanding the existence in effect of said rules and orders, which were known to and relied upon by the decedent and the duty of the defendant to enforce the same, the defendant, by its servants and agents, operated said train in an eastward direction on the left-hand or opposite track, against the current of traffic without the authority or direction of proper authority and in total disregard and violation of said rules and orders and at an unreasonable, unsafe and excessive rate of speed, beyond the control of the enginemen through a deep cut and around a sharp curve where the view was obstructed by curvature and embankments, and without keeping a sharp lookout for such signals or persons, including the decedent, at work on the tracks, and without warning to and in reckless disregard of the safety of the decedent and other persons working upon said tracks and right of way at said time and place, wherefore, by reason thereof the defendant, by its servants

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and agents, did carelessly and negligently cause and permit said train to strike the decedent and injure him so severely that he died soon thereafter as a result thereof.

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count. 10

FOURTH COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive, of the first count.

2. Defendant knowing full well that the decedent was employed upon and along its tracks and right of way at the time and place and in the manner aforesaid, it was the duty of the defendant to make, publish and enforce such reasonable and proper rules and regulations requiring its trains to be operated at such safe and reasonable speed and under such control as should be necessary under the circumstances aforesaid, for the safety of the decedent; but notwithstanding said duty, the defendant by its officers and agents, failed to make, publish and enforce such reasonable and proper rules, and regulations and failed to govern and control the speed of its said train as aforesaid, but on the contrary so recklessly, negligently and unskillfully operated said train at said time and place, in such an unreasonable, unsafe and excessive rate of speed as to cause and permit said train to strike the decedent and to injure him so severely that he died soon thereafter as a result of such injuries. 20 30

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count. 40

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FIFTH COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive of the first count.

10 2. Defendant knowing full well that the decedent was employed upon and along its tracks and right of way at the time and place and in the manner aforesaid, it was the duty of the defendant to make, publish and enforce reasonable and proper rules and regulations requiring all trains operated in double track territory to run with the current of traffic, as specified by timetable, unless otherwise directed by proper authority; that all such trains keep to the right, namely to be operated on the right-hand track;
20 that when on double track trains are detoured from their proper track to run against the current of traffic on the opposite track, such trains must be operated over the detouring section at slow speed and under control and that where the view is obstructed by curvatures or otherwise, such train movements be made with extreme care; enginemen keeping sharp lookout for stop or slow signals, and for persons at work on the tracks and be prepared to stop on
30 short notice; that enginemen give warning by frequent use of engine whistle upon approaching such localities; and to take such other precautions as under the circumstance might be reasonably and necessary for the safety of the decedent lawfully upon said tracks; but, notwithstanding such duty, the defendant failed to make, publish and enforce such rules and regulations and by its servants and agents, operated said train in an eastward direction on the left-hand or opposite track, against the current of
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traffic without the authority or direction of proper authority and in total disregard and violation of said duty and at an unreasonable, unsafe and excessive rate of speed beyond the control of the engineman, through a deep cut and around a sharp curve where the view was obstructed by curvature and embankments and without keeping a sharp lookout for such signals or persons, including the decedent, at work on said tracks and without warning to, and in reckless disregard of the safety of, the decedent and other persons working upon said tracks and right of way at said time and place, wherefore, by reason thereof the defendant, by its servants and agents, did carelessly and negligently cause and permit said train to strike the decedent and injure him so severely that he died soon thereafter as a result thereof.

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count.

SIXTH COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive, of the first count.

2. A long time prior thereto the defendant had established, and on said October 22, 1927, it had in full force and effect, the custom whenever on double track, trains are detoured from their proper track and run against the current of traffic, on the opposite track, of notifying all station agents, trackmen, towermen and other persons including the decedent, working on or along said tracks and right of way of such movement or intended movement of trains, and of signalling to them by the engineers blowing

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whistles on their locomotives or by providing signalmen or flagmen at or near the work where such persons are employed, notifying such persons to enable and permit such persons so working as aforesaid to anticipate such movement of trains and avoid being injured thereby; but notwithstanding said custom, which the defendant failed to enforce, the defendant, by its servants and agents, operated said train in an eastwardly direction on the left-hand or opposite track against the current of traffic, at an unreasonable, unsafe and excessive rate of speed and without so notifying or signalling such agents, towermen and persons including the decedent, in total disregard and in violation of said custom and in reckless disregard of the safety of the decedent and other persons working on or along said tracks, and right of way, at said time and place, wherefore, by reason thereof, the defendant, by its servants and agents, did carelessly and negligently cause and permit said train to strike the decedent and injure him so seriously that he died soon thereafter as a result thereof.

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count.

SEVENTH COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive, of the first count.

2. It was the duty of the defendant, whenever on double track trains are detoured from their proper track and run against the current of traffic on the opposite track, to notify or warn, by signal from the locomotive of approaching train or by a flagman stationed on the ground,

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or otherwise, the decedent, and other persons working on or along said tracks and right of way thereof, for their protection and safety and to enable and permit them to anticipate such movement of trains and to avoid being injured thereby but, notwithstanding said duty said defendant failed and neglected to so notify or warn the decedent, and the defendant, by its servants and agents, operated said train in an eastwardly direction on the left-hand or opposite track against the current of traffic, at an unreasonable, unsafe and excessive rate of speed and without so notifying the decedent, in total disregard and in violation of said duty and in reckless disregard of the safety of the decedent and other persons working on or along said tracks, and right of way, at said time and place, wherefore, by reason thereof, the defendant, by its servants and agents, did carelessly and negligently cause and permit said train to strike the decedent and injure him so seriously that he died soon thereafter as a result thereof.

3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count.

EIGHTH COUNT.

1. Plaintiff repeats and reiterates the allegations of paragraphs 1 to 5, both inclusive, of the first count.

2. The defendant by its servants and agents operated said train in such a careless and negligent manner as to cause and permit it to strike the decedent after the engineman and other servants or agents of the defendant in charge and control of said train, observed that the decedent was in a position of danger and peril,

Answer.

and the defendant, through its said engineman, servants and agents, having sufficient time to avoid the said decedent, negligently, carelessly, recklessly and wilfully failed and refused to do so.

10 3. Plaintiff repeats and reiterates the allegations of paragraphs 7 and 8 of the first count.

WHEREFORE, the plaintiff demands of the defendant damages in the sum of \$50,000.

HOBART & MINARD,
Attorneys for Plaintiff.

ANSWER.

20 Filed January 10, 1928.

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

AS TO THE FIRST COUNT.

1. It admits the allegations contained in the first paragraph.

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

3. It admits the allegations contained in the third and fourth paragraphs.

4. It denies the allegations contained in the fifth and sixth paragraphs.

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

Answer.

6. It admits the allegations contained in the eighth paragraph.

AS TO THE SECOND COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to the fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated. 10

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated. 20

AS TO THE THIRD COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated. 30

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

Answer.

AS TO THE FOURTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and re-
10 iterated.

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

20

AS TO THE FIFTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and re-
iterated.

2. It denies the allegations contained in the second paragraph.

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3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

AS TO THE SIXTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth
40

Answer.

paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated.

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers 10
to the allegations contained in the third para-
graph, its answers to the allegations of para-
graphs 7 and 8 of the first count, the same as if
herewith fully set forth and reiterated.

AS TO THE SEVENTH COUNT.

1. It repeats as its answers to the allegations
contained in the first paragraph, its answers to
the allegations contained in the first to fifth
paragraphs, both inclusive, of the first count, 20
the same as if herewith fully set forth and re-
iterated.

2. It denies the allegations contained in the
second paragraph.

3. It repeats and reiterates as its answers
to the allegations contained in the third para-
graph, its answers to the allegations of para-
graphs 7 and 8 of the first count, the same as
if herewith fully set forth and reiterated. 30

AS TO THE EIGHTH COUNT.

1. It repeats as its answers to the allega-
tions contained in the first paragraph, its an-
swers to the allegations contained in the first to
fifth paragraphs, both inclusive, of the first count
the same as if herewith fully set forth and re-
iterated.

2. It denies the allegations contained in the 40
second paragraph.

Answer.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

10 AND FOR A SEPARATE AND DISTINCT SECOND DEFENSE this defendant says that the said plaintiff ought not to have or maintain her action against it for that the plaintiff's decedent was guilty of contributory negligence immediately prior to and for sometime before and at the time of the happening and occurrence of the accident alleged by the plaintiff to have occurred to her decedent at the time and place set forth in the plaintiff's complaint.

20 AND FOR A THIRD AND SEPARATE DISTINCT DEFENSE this defendant says that the said plaintiff ought not to have or maintain her action against it for that the said plaintiff's decedent, who was neither connected with nor employed upon the railroad of the defendant, was injured while walking along the tracks of its railroad at a place where said railroad was not laid out upon a public highway or a private crossing, contrary to the statute in such cases made and provided.

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

FREDERIC B. SCOTT,
Attorney of Defendant.

Received Morris County Clerk's office, January 10th, 12:26 P. M., 1928, Morristown, N. J.

E. BERTRAM MOTT,
Clerk.

REPLY.

Filed January 13, 1928.

1. Plaintiff denies the allegation of that part of the defendant's answer entitled "and for a separate and distinct second defense."

10

2. With respect to the allegations contained in that part of the defendant's answer entitled "and for a third and separate distinct defense," plaintiff admits that decedent was injured while walking along the tracks of the defendant's railroad at a place where said railroad was not laid out upon a public highway or a private crossing, but denies that decedent was neither connected with nor employed upon the railroad of the defendant and further denies that decedent was walking along the tracks of the defendant's railroad contrary to the statute in such case made and provided.

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HOBART & MINARD,
Attorneys for Plaintiff.

30

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Opening.

The Court: This is merely stating what is susceptible of proof, I suppose.

Mr. Scott: And conforms accurately with the contract that will be offered in evidence.

The Court: There being no objection, the amendment will be allowed and attached to the answer on file. 10

Mr. Selser: I take it from Mr. King's opening that it is admitted, and from this amendment, that the Stange Construction Company were performing their duties under the contract.

Mr. Scott: In response to request I now produce the contract in question as demanded by the plaintiff.

Mr. Selser: There's no use encumbering the record. 20

Mr. Scott: Nevertheless, I have been called upon to produce it and I tender it.

The Court: I don't find the complaint here. There is an answer in reply and a memorandum that it was not filed with the clerk.

Mr. King: We claim this contract, this agreement is entirely germane as to the matter before this court and jury. They say it is not necessary, but they called for it and there was a demand for the contract. 30

Mr. Selser: When I was preparing this case, I could not prove we were there by right, so I asked for the contract.

The Court: If you think it is necessary, you offer it and I will allow it to be put in as an exhibit.

Mr. Selser: In their own case, of course. I haven't read the contract. 40

Charles A. Righter, direct.

Mr. Scott: As I understand the law, a notice to produce makes their request to produce a part of the record and I make that offer at this time.

10 Mr. Selser: I have no objection to their offering it in their case and proving anything they desire from it. I don't need it. If the other side undertakes to use it, it would be evidence as to the entire contents. Now, the fact of Mr. Sullivan's death, Mr. King in his opening did admit he did die as the result of an accident and that he was struck by a train.

Mr. King: I made no such statement.

Mr. Selser: I offer the letters of administratrix *ad prosequendum* in evidence.

20 The Court: They will be received.
(Received in evidence and marked Exhibit P. 1.)

Mr. Selser: I offer a certified copy of certificate of death issued by the registrar of vital statistics.

Mr. King: That isn't admissible, they should have the person here who made the certificate and not the certificate.

Mr. Selser: I will connect it up.

30 The Court: With the assurance it will be connected up, it will be marked.

(Copy of death certificate received in evidence and marked Exhibit P. 2.)

CHARLES A. RIGHTER, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Selser.

40 Q On October 22, 1927, Mr. Righter, were you Coroner of Morris County? A I was.

Charles A. Richter, direct.

Q In your capacity as Coroner of Morris County, did you go to Denville, Denville or Rockaway, to inspect a body? A I was called to the Denville station. They had already brought the body down to the station.

Q When you went there did you actually inspect the body? A I did. 10

Q Whose body did you inspect? A A fellow by the name of Sullivan, Timothy Sullivan.

Q When you arrived there, you examined the body? A Yes, ordered it to be moved to a morgue.

Q Was he alive at the time you arrived or dead? A No, dead.

Q What condition did you find the body, just describe it? A The body was pretty well mangled, there was a fracture at the base of the skull and one leg was broken very bad and there was various bruises on the body and arms broken. The chest was all broken in. 20

Q Chest stoved in? A Yes.

Q Head itself stoved in? A Well, yes, the scalp was torn from the head.

Q And after the inspection you made the necessary record for the county? A Signed the death certificate for burial.

Q Is this a copy of the death certificate signed by you; I am now referring to Exhibit P. 2? A Yes, it is. 30

Mr. Selzer: I suppose I may read this to the jury at this time.

The Court: No objection.

(Thereupon Mr. Selzer reads Exhibit P. 2 to the jury.)

Mr. Selzer: Cross examine.

Mr. King: No questions.

(Witness excused.) 40

William Mungall Birtwell, Jr., direct.

WILLIAM MUNGALL BIRTWELL, JR., sworn
on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Selser.

10 Q Mr. Birtwell, where do you live? A Rock-
away.

Q In October 1927 by whom were you em-
ployed? A By the Stange Construction Com-
pany.

Q What position with the Stange Construc-
tion Company was that? A Resident engineer
on the construction job at Denville and Rocka-
way.

20 Q What construction job was that, just what
was it? A Making cuts for two additional
tracks for five miles and additional steel bridges.

Q That's the Delaware, Lackawanna and
Western right of way? A Yes.

Q Now, in your position as resident engineer,
did you have occasion to go upon the job and su-
pervise or superintend the doing of the work? A
Yes, I was up and down the tracks all day long
practically.

30 Q How long had this job been going on prior
to October 1927? A I went to Rockaway in
March, March 28th, and that was the very begin-
ning of the work.

Q You say you went to work in March 28th?
A March 27th.

Q From that time up to October, you were
continuously on the job? A Yes.

40 Q Now, in going from one place to another
upon this job for the purpose of your business or
your position on the job, did you or not go upon
the right of way of the railroad company?

William Mungall Birtwell, Jr., direct.

Mr. King: Object; not for the purpose of excluding the words "right of way" because if he did go on the right of way, there is no evidence that he used our railroad tracks.

The Court: Well he will indicate how much of the right of way was involved. 10

Mr. Selser: If they admit he had to go on the right of way—

Mr. King: I haven't admitted anything.

Mr. Selser: I will press my question.

The Court: He may answer that question and then you will indicate the portion of the right of way so used.

A Yes, I had occasion to go on the right of way of the railroad. 20

The Court: What part of it?

Q Yes, what portion of the right of way did you use going from one place to another on the job being done by your company?

Mr. King: Object to that; that is not admissible to show custom. If our contract is as we contend, they had no right to go on either of our two tracks and trespass. 30

The Court: This answer may clarify the entire situation and avoid an argument.

Mr. King: May I reserve the right to object and move to strike out the answer?

Q (Question read.) A Well, at times I walked along the side of the tracks. Other times I crossed the tracks. 40

William Mungall Birtwell, Jr., direct.

The Court: Where?

The Witness: Well, at various points wherever it was necessary to get across the tracks.

The Court: Where were these bridges being built?

10

The Witness: One at East Dover Junction, that's at Dickerson road; another one at Denville Brook, three-quarters of a mile from that one.

The Court: What was being done, an additional track laid?

The Witness: Yes, we were making an additional cut and fill to put in two additional tracks.

20

The Court: And were they parallel with the tracks that were there?

The Witness: Yes, practically always. At one place there was one track on one side of the present track and one on the other.

The Court: What was the condition where this accident happened?

The Witness: All the work was being done on one side.

30

The Court: Which side would that have been, north or south?

The Witness: That would have been south.

Q Are you familiar with the place where Mr. Sullivan was killed? A Yes.

Q And at that place you say the two tracks were being placed on the south of the mainline tracks? A Yes.

40

Q Now, at the time of Mr. Sullivan's death, were you familiar with the work which was actually then being done at that place? A Yes.

William Mungall Birtwell, Jr., direct.

Q Just what work, Mr. Birtwell, was being done at the place where Mr. Sullivan was killed?

The Court: A fill or what?

A Yes, there was a cut at the point opposite where he was killed. 10

Q I have a photograph here, Mr. Birtwell, and ask you if you recognize that photograph?

The Court: Whether that correctly reproduces the physical conditions that existed on the day of the accident?

A Yes, it does.

Mr. Selser: I offer it in evidence. 20

The Court: Show it to your adversary.

(Received in evidence and marked Exhibit P. 3.)

Q Now referring, Mr. Birtwell, to the picture now marked as Exhibit P. 3, the work which was being done by your company in this immediate vicinity is indicated on the right-hand side of the photograph, is that correct? A Yes, it is.

Q You speak of some excavation work being done; is that where you were digging out? A Well, it's back where that steam shovel is. We had previously put in the concrete of these abutments. 30

Q Referring to bridge abutments? A Yes.

Q Now, all along the right-hand side of the picture in front of the bridge, had that already been excavated in the manner shown in the picture? A Yes, it had.

Q I have another photograph, Mr. Birtwell, I would like to have you look at, and see if you can 40

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identify it as showing the situation at the place where Mr. Sullivan was killed? A Yes, that is a view looking the other way.

Q Can you say which direction this photograph, P. 3, is looking? A Yes, it's looking east.

10

The Court: And the right side of that photograph would be north, wouldn't it; the left side south; or vice versa?

The Witness: Vice versa. The right hand side is looking south.

Q Now, this picture which you have just identified you say is looking in the opposite direction; in other words, looking west? A Yes.

20

Mr. Selser: I offer it in evidence.

(Received in evidence and marked Exhibit P. 4.)

Q Now, Mr. Birtwell, how many years have you been engaged in the contracting work, associated with railroad rights of way? A Well, that is the first distinct railroad job I have worked on; that is, for a railroad, although I have been working on the New York, New Haven and Hartford, or in connection with the New York, New Haven and Hartford, and also in connection with railroad track construction work but they were our own tracks.

30

Q Now, I think that you have stated that during the time you were on this job you had occasion to cross over from one side of the right of way to the other side of the right of way, crossing over the main tracks, is that correct or not? A That is correct.

40

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Mr. King: I object to that; he didn't say he had occasion; he said he did so. Occasion has a prior significance.

The Court: Reframe it.

Q You said that you did, as a matter of fact, walk from one side of the right of way to the other side of the right of way, crossing the mainline tracks? A Yes. 10

Q And I believe you stated that certain places along this construction job one of your additional tracks would be on one side and another one would be on the other side of the then existing mainline tracks; is that right? A Yes.

Q Did you ever walk along the mainline tracks? A Yes.

Q In walking along the mainline tracks during the period of time you were upon this job, just what was your custom as to the use of either track for walking in either direction? 20

Mr. King: Object. Assume, if you please, that custom can apply to this gentleman by reason of his duty, there is nothing before the Court to indicate the same custom would apply to the deceased.

The Court: Well, of course, I assume, Mr. Selser, that you are going to connect it. 30

Mr. Selser: May I say, if it please your Honor, I say the duty arose out of the fact that for a period of several months this custom had been practiced; whether it was permitted by contract or wasn't permitted by contract, the railroad knew it was being done and just because their contract said they didn't have to pay any attention to us doesn't make that a fact. They did know it was our 40

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custom to do that and they are under the duty to protect us from being killed. That's probably the reason our accident occurred.

10 Mr. King: If I may complete my objection to the Court; even if the custom was shown to be true of this witness, it would give no right to actionable damages or a single right in the deceased; therefore the evidence of what this man did would not be evidential in this case. I further make objection because no customs, no custom can arise or evidence be admissible on the part of this man, a witness, at a place at which this accident did not occur, because you notice from the evidence that at one point there was a track on one side and a track on the other, which in itself might require travel from point to point but in the present instance both tracks were on the same side of the road and access thereto without passage over our rails. The third point is the contract provides specifically that they should not go upon it and any custom in violation of that contract right cannot raise a custom by which they can change the contract and pass the duty upon us to see they didn't continuously violate their contract.

20
30 The Court: What do you say to the suggestion that if the engineer walked upon the track, that they were charged with the duty of exercising due care; they could not run them down, could they?

40 Mr. King: Could not run them down, but I say it was a violation of the contract in the use of the prescribed area and can do nothing except make the person who violates that contract a trespasser.

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The Court: I am not going to allow you, Mr. Selser, to develop evidence as to custom or practice, what that had been, outside of the area where this accident happened.

Mr. Selser: Just to what extent is your Honor limiting the area? 10

The Court: Just what do you mean?

Mr. Selser: I mean, ten feet, say.

The Court: Not necessarily ten feet, wherever his duty carried him, that would be the area.

Q Mr. Birtwell, you were familiar with Mr. Sullivan's duties, were you not? A Yes.

Q Now, what territory of the right of way of the railroad company was covered in his duties or under his duties? A Well, during the summer I used to meet Mr. Sullivan about every morning and we drove generally to what they call the rock cut. That is the area immediately east of where the accident occurred. 20

Q Immediately east? A Yes.

Q Would that be east of the bridge? A Yes. And there I would leave him and he would take the lane through and then walk down the tracks to the office.

Q Now, in walking down the tracks, will you just tell us where upon the tracks he walked, every morning as you saw him? A Well, I didn't always see him; but when I did see him he was walking beside the right of way on the westbound track. 30

Q On the westbound track? A Yes.

Q Referring to Exhibit P. 3, will you indicate, Mr. Birtwell, where upon that photograph Mr. Sullivan walked when you saw him? A Well, as I say; it would be east of this that I 40

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would leave him. He would walk down on this side (indicating).

Q Indicating the right-hand side of the photograph? A Yes, because there was less room over there, inside the curve, he naturally transferred. In getting down there, it was the natural
10 thing for him to transfer over.

Q Just further beyond that bridge as shown in P. 3 he would walk over? A Yes, probably a half a mile, there's another bridge down there.

Q And he went over to the other side of the track and then continued down? A Yes, because there was a road that continued parallel with that and I have been, in fact, way up there myself.

20 The Court: What was right there in operation?

The Witness: There was a rock cut.

The Court: What was the road that ran parallel?

The Witness: The rock cut was there and of course the track was finished there for a short distance and then the road went off in the woods.

30 Q Now, in his work he would cover the entire area of your work, would he not? A Yes, well, I said there was sub-contractors on the job and he ordinarily did not check their men.

Q Just what extent of the territory would he cover between Denville and Dover? A I suppose you mean at the time of the accident?

Q Yes.

40 The Court: Or about the time of the accident.

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A Well, he would cover from the bridge or maybe a little west of the bridge—

Q The bridge shown in these photographs?

A From there to a point a half or three-quarters of a mile below the Denville station.

Q Now, at the time that work was being done there, I suppose the shovels were actually working along the right-hand side of the tracks shown in P. 3? A Yes. 10

Q And blasting was being done in that rock cut? A That is not the rock cut.

Q That's just a little further around the curve? A Yes.

Q But in the rock cut itself blasting was being done? A Yes.

Q And it was about there he would go over to the west track? 20

Mr. King: Just a moment; that's wrong, now, the witness cannot guess at that, we want the facts.

A I can't say about that; it's further down—

Q Further down you saw him walk over? A There was a grade crossing.

Q When these shovels were actually working at that place, was his custom always the same? 30

A Generally the same.

Q Do you know whether or not at any time during the performance of this contract the railroad company had put men there of their own to give warning of the approach of trains? A There were flagmen at the rock cut for the blasting.

Q They were railroad employees, were they not? A Yes, sir. 40

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Q And they would inform the men of the approach of trains? A No, they would tell us when we could blast. They would call up the signal tower and find out if there were any trains coming; and after we would blast we would get the tracks cleared off by the next train.

10 Q On your various trips to this immediate vicinity, have you ever seen employees of your company who were engaged in work being done upon this right of way upon the main line tracks?

Mr. King: I object. There was no right on the part of an employee of this independent contractor to use our track at this point for their own purpose. It provided an overhead approach.

20 The Court: I am going to allow that contract to be marked a neutral exhibit in this case in order to make your argument have some application to the fact with which we are not familiar.

Mr. Selser: We are not familiar with it either.

The Court: So mark that contract neutral Exhibit "A."

30 (Contract marked Exhibit "A.")

Mr. King: I might say there are a number of cases which we have in which custom was permitted as an evidential fact in cases of—

The Court: Where the contract provided to the contrary?

40 Mr. King: Not in any case I have just found, but in a case where the work itself required the duty on the part of the railroad company in the operation of its trains,

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one an overhead crossing with which you probably are familiar, they could not operate their trains over there because the very work they were doing required care on the part of the railroad company in operating its trains so the men would not be killed. There's a case down in Jersey City where a man was in along the tracks fixing up a walk and the Pennsylvania ran a train in and struck the man and they held they owed a duty— 10

Mr. Selser: Well—

Mr. King: Please permit me to talk.

The Court: Read that provision in the contract.

Mr. King: "That the contractor, for and in consideration of the agreement hereinafter contained, to be kept and performed by the railroad company, agrees with the railroad company, as follows: First: The contractor agrees to do and complete, and to furnish all labor, materials, tools, equipment and everything else required to do and complete, for the railroad company, in the most substantial and workmanlike manner, in strict accordance with the specification hereto attached and hereby made a part hereof and the drawings which are identified by the signatures of the parties and hereby made a part hereof, and to the satisfaction and acceptance of the engineer, the following work (except insofar as this contract may expressly require any part of the work to be furnished or performed by the railroad company); that is to say, the construction of a new third and fourth track road-bed on 20 30 40

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10 the Morris and Essex division of the rail-
road company's railroad from a point ap-
proximately four thousand feet westerly of
Mountain Lake station and extending west-
erly about five miles to a point approximately
one thousand feet easterly of mile post num-
ber thirty-seven, and designated on said
drawings as section number two." In the
second paragraph; "All the work shall be
done by skilled workmen, in the most sub-
stantial and workmanlike manner, in strict
accordance with the specifications and draw-
ings, and subject to the direction and ap-
proval of the engineer, who shall have the
right to subject the work, or any part
thereof, to such test as he may desire." I
20 will read this where I have picked out the
essential points. First, the contract, entire
contract, was to be performed by the Stange
and we had no duty except to pass on and
superintend the work which we embody in
the contract concerning the right to use
our other tracks by their employees. The
second paragraph gives an actionable right
to accept or condemn any materials used.
In the fourth paragraph the work shall be
30 commenced promptly and shall be prosecuted
with such force of men, workmen and labor-
ers as shall be necessary in the opinion of
the engineer to complete the same within the
time hereinafter specified for the completion
thereof.

The Court: Now, what provision is there
for the employees to use the right of way?

Mr. King: There is in this contract a
40 further provision that the Stange Corpora-
tion at the expense of the railroad shall and

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will furnish a bond in the sum of one hundred and thirty-five thousand dollars for the completion of the work, premium to be paid by the railroad company and for indemnification against it for any damages until the completeness of the whole work. Eleven: "The contractor agrees to obtain and pay for all necessary municipal or state permits for carrying on the work." Now, as I read this paragraph it will not be amiss to call your Honor's attention to the fact that there is no such provision regarding the railroad company. (Argument.) And then in the thirteenth paragraph, the last part, "The contractor shall under no circumstances use, or cause to be blocked, any operating track of the railroad company unless specifically authorized by a written permission of the engineer. When the use of any operating track is desired, a notice shall be given the engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the work, it is impossible to carry on the work without the use thereof. Movements of cars or equipment (belonging to the contractor) on an operating track will be permitted only when handled by an engine and crew of the railroad company, for which the railroad company will charge the contractor in accordance with the prevailing schedule of rates as filed in the office of the general superintendent of the railroad company, and the contractor agrees to pay such charges promptly upon the receipt of the railroad company's bills therefor.

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The Court: Now, this last question asked related to the custom of the employees of the Stange Company in going upon the right of way. Mr. Wheaton better read that question.

10 Q (Question read.) On your various trips to this immediate vicinity, have you ever seen employees of your company who were engaged in work being done upon this right of way upon the main line tracks?

The Court: That may or may not include the decedent.

Mr. Selser: Not only the decedent, but it was quite a custom.

20 The Court: I think you better bring out the fact whether the decedent was employed there merely as a timekeeper. With the assurance that you will connect it properly I am going to allow an answer to this question, naturally they will have to connect the decedent.

30 Mr. King: The question is whether they had any right, the language is this, the last clause of the thirteenth paragraph. "The contractor shall under no circumstance use, or cause to be blocked, any operating track of the railroad company unless specifically authorized by a written permission of the engineer." Now, what we have contended and what we contend before you under the construction of this contract, it says the contractor shall not use, and an employee of the contractor cannot obtain any greater right than the contractor. Under this contract, the contractor cannot use the main
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operating line. Can an employee obtain a greater right than the contractor?

The Court: I am inclined to the view as to whether Mr. Sullivan was a trespasser or not is one of fact for the jury. I will allow the answer to this question, plus such questions that will bring out the fact as to what duty was on this man, whether he was in the performance of his duty at the time of the accident. The question will be answered and the objection overruled. You may have an exception. 10

(Exception allowed and sealed.)

Q (Question read.)

Mr. Selser: That ruling is made with the Court taking into consideration the contract itself? 20

The Court: Yes. In other words, I am not willing under the terms of the contract to say in no circumstance could the employees of the Stange Company go upon the tracks.

Mr. Selser: I asked the Court whether the Court made the ruling he just made in view of the fact that the contract is already in evidence and in making his ruling he includes as part of that determination the construction of the contract, which is in evidence. 30

The Court: Before I answer that, you might give me, Mr. Selser, that section again; read the whole thing.

Mr. Selser: The contractor shall under no circumstance use, or cause to be blocked, any operating track of the railroad company 40

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10 unless specifically authorized by a written permission of the engineer. When the use of any operating track is desired, a notice shall be given the engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the work, it is impossible to carry on the work without the use thereof. Movements of cars or equipment (belonging to the contractor) on an operating track will be permitted only when handled by an engine and crew of the railroad company, for which the railroad company will charge the contractor in accordance with the prevailing schedule of rates as filed in the office of the general superintendent of the railroad company, and the contractor agrees to pay such charges promptly upon the receipt of the railroad company's bills therefor.

20
30 The Court: I think it is obvious what that means. That would mean the carrying through of the work. In connection with the performance of the contractor. I think it is quite obvious what it means. The contractor shall not use nor block the track during the progress of the work. I think it is obvious what that means. That is inserted undoubtedly in order to prohibit any interference with the traffic on the track while the work is going on.

Mr. Scott: And that is more plainly indicated if your Honor would read the first, second and third paragraphs of section thirteen.

40 The Court: That is more or less the stereotype clauses you find in all these rail-

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road contracts. The contractor is to do the work without interference with the business of the company. The ruling I have just made is with knowledge of the provision of the contract and the interpretation I have just made with regard thereto. You may have an exception. 10

Q (Question read.)

Mr. King: Isn't there another objection to that? It may be under the present ruling that neither employee was obliged to use these tracks.

The Court: I have just indicated that he must bring that down to apply to Mr. Sullivan. 20

Mr. King: But the damage is done. What we object to is evidence of custom of any other employee. No matter if a, b and c had done things while passing over the railroad, that cannot meet these issues that will be raised by this question. A, b and c might have had the right to pass over the tracks. The point involved is did the timekeeper in persuance of his duty, did he have the right; did he have the right to go over these tracks. I cannot see how this evidence would be admissible— 30

Mr. Selser: May I withdraw this witness and put another one on? I will clear it up in two minutes.

The Court: Yes.

(Witness withdrawn.)

Arthur Goddard, direct.

ARTHUR GODDARD, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Selser.

10 Q Mr. Goddard, where do you live? A I live in New York.

Q Where in New York? A Bronx.

Q What street number? A 2464 Washington avenue, Bronx.

Q In October, 1927, were you employed by the Stange Construction Company? A Yes, sir.

Q And just what work did you have to do?

A I was employed as steam shovel trainman.

Q What kind of work is that? A We had to dig with the steam shovel.

20 Q In other words, operating the steam shovel?

A Yes.

Q You knew Timothy Sullivan, didn't you?

A Yes, sir.

Q How often prior to October 22, 1927, would you see him? A I saw him most every day.

Q How long had you been on the job, Mr. Goddard? A About a little over four months.

Q Four months prior to October? A Yes.

30 Q Were you present at the time Timothy was killed? A Yes, I saw him when he was killed.

Q Now, looking at this picture, P. 3, Mr. Goddard, can you show us upon that picture where you were at the time Timothy was killed?

A Yes, I was back here; east of the bridge.

Q There is a steam shovel shown there; were you further east of the bridge than that? A Yes.

40 Q Now, what time did Timothy ordinarily get to this immediate vicinity to the place where

Arthur Goddard, direct.

this bridge is? A He would get there about seven-twenty.

Q And when he would come there, what did he do? A Why, he came at his employment to take the men's time at the little shanty.

The Court: Where was that located? 10

The Witness: That was on the west of the shovel I was working.

Q Where was that with respect to the bridge; in the place where it is shown in that picture?

A Yes.

Q Now, when he would leave that little shovel, just where would he go and what would he do? A He would walk down to the big shovel where I was working and take the men's 20 time.

Q Where would he go to walk down? A Why, he went to walk over the tracks.

Q Did he walk over the tracks? A Yes.

Q Which track, the eastbound or the westbound track? A The eastbound track.

Q Then what would he do? A He would take the men's time.

The Court: What was the distance between the shovels; the little shovel and the one you were operating? 30

The Witness: About four hundred feet.

The Court: Where were you located?

The Witness: That was located on the westbound track.

The Court: And on the south—I don't know whether you know the direction.

Q Do you know the points of the compass? 40

Arthur Goddard, direct.

The Witness: It was north, I believe.

The Court: Were they both on the north side?

The Witness: Yes.

10 The Court: And were men working on the south side at the same time?

The Witness: Yes, your Honor.

The Court: Working on both sides of the right of way?

The Witness: Yes.

Q When Timothy would come from one shovel nearest the bridge, do I understand you to say he would walk across the tracks to the other side? A Yes.

20 Q And then where would he walk along the railroad right of way? A On the outside of the tracks.

Q Show me in this picture, will you, Mr. Goddard, where he would walk? A Walk along here (indicating).

The Court: Take him down to the jury and let him illustrate his testimony on that photograph.

30 Q Just show the jury where he walked? A Walked along here (indicating). There's a wall here, and he walked over here and walked against it, and the train came along under this bridge and killed him.

40 Q Now, you see the eastbound tracks; which direction did the trains ordinarily come when they came along that track? A He was coming against traffic, that way he turned ordinarily in next to the wall. They go toward Hoboken down the other way. This way west.

Arthur Goddard, direct.

Q The trains go westward? A Yes.

Q And the morning when this accident happened which way was the train going? A Toward Hoboken, upon the way east, toward Hoboken.

Q Was the train going in the direction trains ordinarily go along that track? A No. 10

Q How often would you see Mr. Sullivan walk between that track and wall? A I saw him near every day.

The Court: When did he take the time?

The Witness: About half-past seven.

The Court: In the morning?

The Witness: Yes.

The Court: Did he appear again? 20

The Witness: Yes.

The Court: When?

The Witness: In the afternoon about 4 o'clock.

The Court: Half-past seven in the morning and 4 o'clock in the afternoon?

The Witness: Yes, your Honor.

The Court: That was his usual custom or practice? 30

The Witness: Yes, your Honor.

Q Now, the morning that Mr. Sullivan was killed, did you see him down on the shovel nearer the bridge? A Yes, sir.

Q And then was he or not walking toward your shovel in a general direction? A Yes, sir.

Q Now—

Mr. King: Just a minute; did you see the man killed? 40

Arthur Goddard, direct.

The Court: He said so. Did you see him struck?

The Witness: Yes, sir.

The Court: Where was he walking the moment of the accident?

10 The Witness: He was walking on the outside of the track.

The Court: On the outside of the track?

The Witness: Yes, between the stone wall and the track.

The Court: Was he on the ties?

The Witness: No, he was outside the tracks, but didn't have room as far as I can see to pass the engine.

20 The Court: What is the width there between the wall?

The Witness: About four feet.

The Court: And he was on the dirt; not on the rail or between the rails?

The Witness: No, your Honor.

The Court: Was he on the ties?

The Witness: No, your Honor.

The Court: He was off the track entirely?

30 The Witness: Yes, your Honor.

The Court: And this train came from what direction, his back?

The Witness: His back, yes, your Honor. He was walking against the traffic and the train came behind him.

The Court: This accident happened on the westbound track?

The Witness: Yes, your Honor.

Arthur Goddard, direct.

Q Now, what was the first you saw of this train coming along?

The Court: Pardon me; he wasn't on the westbound track.

The Witness: Next to the westbound track. 10

The Court: You say he was walking between the wall and the rail of the westbound track?

The Witness: Yes.

Q What was the first you saw, Mr. Goddard, of this train which killed Timothy? A I saw it west of the bridge.

Q About how far west of the bridge? A Oh, I should say about two hundred feet or so. 20

Q Now, at that time, Mr. Goddard, was the train going fast or slow? A Yes, the train was going at a good rate of speed.

Q And did you pay attention to it as it approached? A Yes, sir.

Q Were you actually operating your steam shovel at the time? A I was waiting for a couple of trains to load the cars at the time being. 30

Q Was your shovel actually working or not? A No, it was standing still at the time.

Q Now, did you hear any whistle blown by this engine? A No, sir.

Q Did you hear any bell rung by the engine? A No, sir.

Q Have you been at that place at other times when trains would come along and you have heard the whistle blown? 40

Arthur Goddard, direct.

Mr. King: I object.

The Court: Objection sustained. You said you didn't hear any blown?

The Witness: No, I did not.

The Court: Or bell rung?

10 The Witness: No, your Honor, I did not.

The Court: Were you listening?

The Witness: Yes, sir, your Honor; I was facing that way.

Mr. Selser: My question wasn't to prove the custom of blowing a whistle but rather to qualify the witness as to his hearing.

Q Has he at other times under the same circumstances heard trains blow their whistles?

20 The Court: Anything the matter with your hearing?

The Witness: No.

The Court: Was it all right that day?

The Witness: Yes.

Q Now, did or did not this train slacken its speed up until the time Timothy was struck? A No, it did not.

30 Q Did or did not you hear any whistle blown or any bell rung up until Timothy was struck? A No, sir.

Q Now after Timothy was struck, just what did you do? A Why, I came down off the steam shovel and walked around the engine and went down to see what happened and found Mr. Sullivan was all smashed up.

40 Q How far away was he from you? A About two hundred feet.

Arthur Goddard, direct.

Q You say you saw him all smashed up? A Yes.

Q Then what did you do after that? A After I got the railroad man to help me put him on a stretcher and they put him in the baggage car and took him to Denville.

Q Did you go up to Denville? A Yes. 10

Q You stayed with him how long? A I stayed with him until he was taken away to the undertaker's.

Q The coroner who was on the stand took him away? A Yes.

Q Now, Mr. Goddard—

The Court: How far up that track could you see from the direction that train came? 20

The Witness: I could see six hundred feet.

The Court: Is there any curve in the track at that point?

The Witness: There is a curve around there, yes.

The Court: Under the bridge?

The Witness: There is a slight curve under the bridge but you can see a train coming. 30

The Court: You could see the train coming six hundred feet away?

The Witness: Yes, sir.

Q Now, on this day and other days prior to this during the time you were on the job, did you ever see any person other than Sullivan walk on the place where Sullivan was walking when he was struck? 40

Arthur Goddard, direct.

Mr. King: I object.

The Court: Objection sustained. The issue may turn on whether it was the duty of Sullivan to go on the track from one place to the other. I don't think it makes any difference what other employees did.

10

Mr. Selser: May I read your Honor a case on the question of custom; there are numerous cases.

The Court: All you have to show is to show his custom is entirely consistent with his duty to pass from one side of the track to the other in order to perform his work as a timekeeper. That is all you have to show, isn't it?

20

Mr. Selser: I have to show the railroad company knew that that was the custom existing and because of that knowledge of the situation without regard to contract, I don't care anything about that, their knowledge of the situation, they were under duty to exercise care for his safety.

The Court: The ruling stands; you may have an exception.

30

Mr. Selser: Mr. Scott can testify to what the intention was but there has to be proof, and it was the custom of railroad men to walk against the line of traffic so trains would come toward their face only and that's the reason for Sullivan being in this situation. That's the only question; he walked in that place expecting trains—

The Court: You already have in the case that that train came unexpectedly on the westbound track.

40

Arthur Goddard, direct.

Mr. Selser: That doesn't mean anything unless a signal be heard in the direction Sullivan was.

The Court: Well, here's a train coming on a track where trains were accustomed to go in the opposite direction.

10

Q Mr. Goddard, in your experience in this immediate locality for the period of four months as you describe it, was or was not it the custom of the men engaged in the work for the Stange Company to walk east on the westbound—

The Court: No, that is leading.

Q —which track were the men accustomed to use?

20

Mr. King: I ask for an exception.

The Court: I overrule you.

A They walk against traffic.

The Court: Well, you already said that as a matter of fact.

The Court: You say you saw Sullivan frequently?

30

The Witness: Yes.

The Court: He walked against traffic?

The Witness: Yes.

The Court: Now, which track would that mean?

The Witness: He was going on the west-bound track; that was against the traffic.

The Court: How do you know that was against the traffic?

40

Arthur Goddard, direct.

The Witness: Yes, your Honor.

The Court: How do you know it was; you say the westbound track was against traffic, how do you know that?

The Witness: He was walking against traffic, your Honor.

10

Q Have you seen trains running on that right of way before? A Yes, I saw trains.

Q Did the trains which ordinarily ran on the track on which this particular train was running run in the same direction as this train was running? A Running east.

Q Is that the right direction or wrong direction as you observed on every previous time?

20

A If it was the right direction it would be going west.

The Court: Ordinarily that train would not have been on that track?

The Witness: No.

The Court: Is that right?

The Witness: Yes.

Q Did you at any time previous to this occurrence see any trains running along that same track in the same direction that train was running? A No, sir.

30

Mr. King: I object; the objection is because it is attempting to establish a custom. I say it makes no difference to us, if your Honor please. We have the right to operate our cars and not cause an accident going eastbound on a westbound track; we had a perfect right to do that.

40

Arthur Goddard, cross.

The Court: Objection overruled. You may have an exception.

(Exception allowed and sealed.)

Mr. Selser: Cross examine.

Cross examination by Mr. King.

10

Q Are you any relation to the deceased? A Sir?

The Court: Were you related to Timothy?

The Witness: Yes.

The Court: How?

The Witness: About fourth cousins.

The Court: What relation does that make you?

20

Q Prior to his death, did you go up to see him? A Yes, I saw him, yes.

Q You and he were friendly? A Yes, sir.

Q Now, from Denville going on toward Dover all of your apparatus were on the left side of the two operating tracks? A Yes.

Q Now then, the place that he left that morning was below the bridge toward Denville?

A No, right on the bridge.

Q Well, he was a little below it, wasn't he, when he was struck? A Yes, when he got struck.

30

Q He was a little below the bridge? A Yes.

Q And he was attempting to pass from this larger or smaller steam shovel, which was it? A The small shovel to the big shovel.

Q Oh, he was trying to pass from the small steam shovel to the big steam shovel? A Yes.

Q And both of these were on the same side of the track? A Yes.

40

Arthur Goddard, cross.

Q Now, if both were on the same side of the track, what was the occasion of his passing over either of the tracks? A Why, he walked every morning against the traffic.

Q I don't care what he did; I am asking the occasion for it? A I don't know.

10 Q But he could have gone from the little shovel to the big shovel and have never crossed either one of the tracks? A I don't know.

Q No, but isn't it so? A I don't know.

The Court: Well, he could have walked from the little shovel to your shovel on the same side of the track, couldn't he?

The Witness: Yes, he could.

20 Q Yes, that's what I thought. Now, he had left his automobile—

The Court: I wish you would illustrate that on the blackboard.

Mr. King: I have passed that place for forty-five years.

The Court: Well, you are not going to be examined as a witness.

30 Mr. King: I was going to sketch it here and see whether he says it's right.

The Court: Go ahead.

40 Q Look here with me; we will call that the Denville Station, the main line from Boonton in here. Now, here runs this track that goes to the old icehouse. Now, as we come out here, your tracks go up along that and then like that, I will put in only one track. Now, see if I have it right. There's a road that comes down here by this little house right there, and goes on out

Arthur Goddard, cross.

toward Denville. Is that correct so far? A Yes.

Q Now, the bridge of which we spoke is a bridge somewheres right in here; it's right on this south side and leads over to Rockaway? Now, is that so far all right? A So far as I know. 10

Mr. Selser: What do you mean by that?

The Witness: Why, in respect to the diagram it's not correct, the curve in the bridge is the opposite direction.

Mr. Selser: The curve in the bridge—

The Court: That is cross examination and I am going to allow him to go on.

Q Now, bearing in mind that this is Estling Lake right in here, you were working on that side of the train? A Yes, on the Estling Lake side of the train. 20

Q You know where the lake was? A No.

Q Didn't you ever see Estling Lake? On which side of the tracks was Rockaway from where you were working; was Rockaway across the tracks? A Yes.

Q Now, you say you were going from Rockaway right in there; so you were working on this side of the track? A Yes. 30

Q Now, assuming that's the bridge, where did you have your shovel, the Denville side or the Dover side? A Denville.

Q That's the Denville side, so, and we will make your shovel where? A Four hundred feet.

Q Now, was your shovel the little or the big shovel? A The big one. 40

Arthur Goddard, cross.

Q Where was the little shovel, what side of the bridge, up toward Dover? A Yes.

Q Now, four hundred feet from your shovel to the bridge, how far was the little shovel on up? A It was between the two.

10 Q Then there was another shovel in there?
A Yes.

Q How far was your shovel from the little shovel, the distance from your shovel to the bridge was four hundred feet? A Yes.

Q And then the shovel got in between? A Yes.

Q This other shovel was in between? A Yes.

Q Now, then, he could have gone from the little shovel to your shovel without crossing the tracks, couldn't he? A Well, I suppose—

20 Q No, you know he could, couldn't he? A I never saw him pass that way.

Q Couldn't he have gone from your shovel to the other shovel without crossing the track? A I don't know.

Q Why do you say you don't know when you could see it and you know about it?

Mr. Selser: Why have Mr. King testify.

30 The Court: He isn't, this is cross examination. Keep within the rule.

Mr. King: I want the record to show either yes or no.

The Court: Why couldn't he walk from the big shovel to the little shovel without crossing the track?

The Witness: I don't know, your Honor; I never saw him walk that way.

40 The Court: Well, he could have walked that way, couldn't he, if he wanted to?

Arthur Goddard, cross.

The Witness: Yes, sir.

The Court: Nothing to prevent him walking from the little shovel to the big shovel?

The Witness: No, so far as I know.

Q Now assuming this here is right, is the westbound track, that is traffic on the westbound track coming from Denville and going up toward Dover, that's the ordinary direction? A Yes. 10

Q Where was this man when he was killed, how far from this rail? A There's a wall in there and he was between the wall and the rail.

Q How far was he from the bridge when he was struck? A He was struck about two hundred feet from the bridge.

Q All right, toward Denville two hundred feet? A Yes. 20

Q And you are four hundred feet from him? A Yes.

Q How did Mr. Sullivan come to work mornings; how did he get over there, in automobiles? A Yes.

Q He left his car near the bridge? A Yes.

Q On which side of the bridge did he leave the car, the side toward Rockaway or the opposite side? A The side toward Rockaway.

Q All right, we will mark that "C" for car. He left his car up there? A Yes. 30

Q So on this morning after he passed you instead of going here and crossing the tracks, he came like this, didn't he? A No.

Q Where was he going? A I don't know, he came over the bridge and down that side.

Q Just before he was killed, he had been to your place? A No, he was not to our place yet.

The Court: Hadn't he been to the little shovel? 40

Arthur Goddard, cross.

The Witness: Yes.

The Court: He had been there and took the time?

The Witness: Yes, but he was not down to the other shovel.

10 The Court: He had not been to the big shovel?

The Witness: No, and it was his custom every morning to go down against traffic.

The Court: To go to the big shovel?

The Witness: Yes.

Q Then he had been to the little shovel here—

20 The Court: Pardon me a moment. Do you know where he was going at the time of the accident?

The Witness: Always come up that way in the morning to take the men's time.

The Court: Well, you said you saw him at the little shovel?

The Witness: Yes, your Honor.

The Court: And the only place he would be going would be to the big shovel?

The Witness: Yes, and to the dam.

30 The Court: Where was the dam?

The Witness: About a half a mile away from there.

The Court: On the same side of the track?

The Witness: On the same side of the track.

The Court: Proceed, Mr. King.

Q And yet after he left the little shovel, he would cross over here over across the track? A

40 Yes.

Arthur Goddard, cross.

Q And as you say, walked between the railroad track and some abutment? A Yes, the wall.

Q And was it two hundred feet from the point where he was struck to the bridge? A Yes.

Q Now, this bridge furnishes access across both railroad tracks, so that it would take you to the side to which he wanted to go? He could have walked across the bridge and gone to the little shovel and the big shovel? A I don't know anything about that. 10

Q Please don't do that. A I never seen him do that.

The Court: Could he have gone over the bridge to the two shovels? 20

The Witness: Yes.

Q Now, there is an embankment down here because that is a storm wall holding up the embankment, isn't it? A Yes.

Q How far is it from the level of the brook up to the bottom of the bridge? A I don't know.

Q About how far, fifteen or twenty feet? A No, I don't think it is about that. 30

The Court: We will take a recess until one-thirty.

Arthur Goddard, cross.

AFTER RECESS.

ARTHUR GODDARD, resumes the stand:

Further cross examination by Mr. King.

10 Q I show you a photograph and ask you whether this photograph shows the big and little shovel to which you refer? A Yes.

Q Now, the big shovel is the one here? A Yes.

Q Is this the little shovel? A Yes.

Q And where would be the railroad bridge?

A Up in here (indicating).

Q Let me ask, is the railroad bridge back in here? A I don't know.

20 Q Is the shovel to the right, the little shovel? A Yes, that's the little shovel.

Q And that one over there is the big shovel?

A Yes.

Q Now, there's a piece of paper here which I might say is where this gentleman was killed; we claim it to be so, and looking at your big shovel and the little shovel here, does that piece of paper show about where he was killed?

A I can't tell much about it because the bridge isn't there.

30 Q From your big shovel the next thing toward the bridge is the little shovel? A Yes.

Q And then came the bridge? A Yes.

Q Now, looking at the photograph you have got the big shovel there and the little shovel and the bridge must have been beyond this little shovel somewhere? A I can't tell much about this picture; I don't know much about pictures.

40 Q From your big shovel next came the little shovel and next came the bridge? A Yes.

Arthur Goddard, cross.

Q Now, there was the big shovel there, and here's your little shovel here? A Yes.

Q Now beyond this little shovel somewhere is the bridge? A Yes.

Q And this man was killed between the little shovel and the bridge and crossed the track from the little shovel? A From the big shovel. 10

Q He wasn't still beside your shovel?

The Court: I understood him to testify he was still between the big shovel and the little shovel on the opposite side.

Mr. King: That is what this picture shows.

The Court: Can you tell us where the little shovel is in that picture? 20

The Witness: Yes.

The Court: Is that the little shovel?

The Witness: Yes.

The Court: Now, your big shovel is above that?

The Witness: Yes.

The Court: Was that on the opposite side?

The Witness: No, on the same side. 30

The Court: And he was killed between the two?

The Witness: Yes.

The Court: Well, then, your answer will be that where the white paper shows, as indicated down here in the left of the picture, it was not the place where the man was killed, where Mr. Sullivan was killed?

Mr. King: I beg your pardon. 40

Arthur Goddard, cross.

The Witness: Was killed between the bridge and the big shovel, wherever it was.

Mr. King: But on the opposite side of the track—

The Witness: Opposite side of the track.

10 The Court: I get that.

Q Now, this paper shown here is the opposite side of the track? A Yes.

Q All right, that's the big shovel and this is the little shovel? A Yes.

Q And that you can identify? A Yes.

Mr. King: I would like the photograph marked for identification.

20 (Photograph marked as D. 1 for identification.)

Q Now, I show you another picture; does that show the bridge over the railroad and here a steam shovel? A Yes.

Q Is that the big or little one? A Little one.

Q And is that the bridge over the railroad? A Yes.

30 Q And is the little shovel in this picture here the same little shovel that you identified on the other picture? A Yes.

Q So that really two were working there? A Yes.

Q Now, was he killed—there you have the bridge and there's a white piece of paper; is that about where he was killed? You say past beyond the bridge, was he killed about there? A From that bridge back?

40 Q Yes. A Yes, sir.

Arthur Goddard, cross.

Mr. King: I would like to have this marked for identification.

(Photograph marked D. 2 for identification.)

Q This photograph, does this show where you were working or had been working underneath the bridge and this side of the bridge? A No, we were working away. 10

Q But does this show where you had been working on this picture? A No.

Q It don't? Well, there is your bridge and here's where the embankment had been taken down by your steam shovel? A Yes, that's the little shovel, not the big shovel.

Mr. King: I would like that marked. 20
(Picture marked D. 3 for identification.)

Q This shows the bridge and automobile on top? A Yes.

Q Is that the little or big shovel? A That's the little shovel.

Q Now, is this coming from Dover or Denville? A This track?

Q Yes, this track. Are the tracks, are they coming from Dover or Denville? A From Denville, this track (indicating). 30

Mr. King: I would like to have this marked.

(Picture marked D. 4 for identification.)

Q At the time this man was killed you say you were on your shovel? A Yes.

Q Ready to load the cars? A Yes, I was sitting upon the boom about twenty feet from the ground. 40

Arthur Goddard, cross.

Q Sitting on the boom? A Yes.

Q Is that where you worked? A Yes.

Q Now, look at this photograph and see if that photograph shows the place you worked and if that is a picture of your steam shovel? A Yes, that's a picture of the steam shovel.

10 Q Where were you sitting? A Way up here in the boom; you see there's a seat up there where I sit; it's up there twenty feet from the ground.

Q Put an "X" there—

The Court: Put his initial, mark it with a "G."

20 Q That "G" is the place where you operated your shovel? A Yes.

Mr. King: I would like to have this marked.

(Picture marked D. 5 for identification.)

Q Now, I show you another photograph of a steam shovel and ask you if that is the steam shovel on which you worked? A Yes.

Q That's the big steam shovel? A Yes.

30 Q Now, you can't see on this exactly where you sat? A No, not on this side; I worked on the opposite side.

Q On the day you were working, was your crane pointing toward the bridge? A Toward the bridge; yes, sir.

Q It was? A Yes.

Q Now, look at this photograph and see if you can see the bridge? This man was killed beyond the bridge, as you say? A Yes.

40

Arthur Goddard, cross.

Q Can you see the bridge there? A No; I can't see the bridge.

Mr. King: I would like to have this marked.

(Picture marked D. 6 for identification.)

10

Q And yet you tell this jury you saw this man killed? A Yes.

Q And yet you say from the place where you were working you can't see the bridge? A No.

Mr. Selser: And why was that?

The Court: He said the man was killed beyond the bridge.

Mr. Selser: He said no.

The Court: He said; didn't you say he was killed beyond the bridge and he said yes. Now, the situation however is susceptible to explanation; you didn't ask him which side of the bridge he was killed on.

20

Mr. Selser: He did say, he said between the big steam shovel and the bridge where the accident occurred.

The Court: Well, that would be consistent with the photograph, he said he couldn't see the bridge.

30

Mr. Selser: He meant to say the place where he was killed.

The Court: You ask him that, if he can see where he was killed; I don't want to take your examination away from you.

Mr. King: I think if the Court has asked the question, it is susceptible to explanation. A man is about five foot eight or nine inches tall from the rail and this bridge was some

40

Arthur Goddard, cross.

twenty-two feet above the rail. I was trying to call his attention in a polite way to the fact that he couldn't see the bridge and couldn't see the man.

The Court: You ask him.

10 Mr. King: Either it is right or wrong.

Q Now, I show you this photograph again, marked D. 6 for identification, and this is the front. I ask you which way your crane worked, on the side toward the bridge? A Toward Dover.

Q Well, toward the bridge? A Yes.

Q Now, the man was killed between your shovel and the bridge? A Yes, sir.

Q Can you show on that photograph where the man was struck? A I can't see my bridge
20 here; that's what you asked me before and you are criticising me.

The Court: No, he is not criticising you; you were sensitive; that's the trouble.

The Witness: This picture shows the steam shovel where it was erected.

Q Well, does that picture, which is D. 6 for identification, does that show where this man was struck? A No; you can't see it.

30 Q You can't see where he was struck there?
A That is where the shovel was erected.

Q Is that the condition of that steam shovel the day the accident occurred? A No; this is not here.

Q You say this was not taken the day the accident happened? A No; this curve was not there; that's there when our steam shovel—

Q So this was taken long before the accident occurred? A According to that picture, at least
40 it must.

Arthur Goddard, cross.

Q You are quite sure about that? A Yes, sir.

Q Now, as this train rounded the curve, did you as a matter of fact see the man struck? A Sir?

Q As the train rounded the curve, did you as a matter of fact see the man struck? A I saw the man on the opposite side of the track when the train came out in there; he was walking on the outside of the train, and as he came along I was up in the boom where I belonged and when the train came along with the good rate of speed and I saw when the man was killed on the opposite side of the train. 10

Q Now, do I gather from that that you were looking? A Yes. 20

Q As the train approached you saw the man between the rails and the wall and after the train stopped you found some man was killed? A Yes.

Q As a matter of fact, your eye didn't witness the killing? A He got killed right there.

The Court: You didn't see the train hit the man?

The Witness: No, not at the moment. 30

Q So really what did happen, you did see a man there in this place, you saw the approaching train and saw the train stop and you went up and found some man killed? A Yes.

Q And the man you found had been killed by the train was between the train and the wall? A Yes.

The Court: Anything more? 40

William Mungall Birtwell, Jr., further direct.

Re-direct examination by Mr. Selser.

Q Mr. Goddard, when you last saw Mr. Sullivan before the train passed, how far was the engine away from him? I mean how close were Mr. Sullivan and the engine together when
10 you last saw Mr. Sullivan; do you understand what I mean? A Coming toward Mr. Sullivan?

Q How far was the engine away from him when you didn't see him anymore? A When—

The Court: He can't answer that.

Mr. Selser: I think he can—

The Court: If he didn't see him, how can he tell?

20 Q At the instant you last saw Mr. Sullivan, how far was the engine away from Mr. Sullivan? A That engine and train as far as I can say was two hundred feet the last time I saw Mr. Sullivan.

Mr. Selser: That is all.
(Witness excused.)

30

WILLIAM MUNGALL BIRTWELL, JR., recalled.

Further direct examination by Mr. Selser.

Q Mr. Birtwell, on the occasions when you went down to this immediate locality, did you see any employees of the Stange gang who were working on this job walking upon the main
40 tracks of the railroad? A Yes.

William Mungall Birtwell, Jr., further direct.

Mr. King: Object. As I stated before and argue again that under the rule there may be a right for some one to use that track as a way of necessity in pursuance to their labor, but what some one else did would not give rise to a common use by him; I am using the word "common" in the general interpretation as not an individual. 10

The Court: Suppose the engineer driving the engine of the train in question had been accustomed to see employees of the Stange Company on that track, would he be charged with knowledge, in regard to their right to be there, with the knowledge that they were accustomed to walk there?

Mr. King: He was charged, he would be charged, I would say to refrain from acts of willful negligence. That's perfectly true, but I say because he saw an employee of the Stange Company on the tracks, would we have to stop our train, can that be the law? 20

The Court: Am I going to tell the jury you ought to stop your trains?

Mr. King: Not obliged to stop the trains.

The Court: It may be you were obliged to blow your whistle or ring your bell. 30

Mr. King: I should not wonder that that might be the law, I shouldn't wonder, I don't say it is.

The Court: If I say so, it is.

Mr. King: You haven't said it yet.

The Court: I mean just for the moment.

Mr. King: Just to get back to this proposition, if either as his duty or necessity in connection with his duty, a necessity in 40

William Mungall Birtwell, Jr., further direct.

connection with his duty that could give rise to the use or custom which must be recognized by the railroad company.

The Court: But if such was observed by the engineer in question then it was his duty to use reasonable care on his part.

10

Mr. King: I should say yes to that proposition.

The Court: Well, that is my difficulty with this situation.

Mr. King: No difficulty as in connection with charging the duty, the duty in connection with his employment.

20

The Court: I have no hesitation in saying there is an issue of fact here in the event contributory negligence arises as undoubtedly may and whether it becomes a question of law or fact depends altogether upon the situation of the case at its conclusion. If there was no duty on Sullivan to cross the tracks to go down to the shovel, why, it may very well be said he is guilty of contributory negligence having crossed the main track, and that it would be an act of danger. I am going to allow the witness to answer the question. You may have an exception. (Further argument.)

30

The Court: Mr. Birtwell, do you know where this accident happened?

The Witness: Yes.

The Court: Know the spot?

The Witness: Yes.

The Court: Know the conditions there?

The Witness: Yes.

40

The Court: Just describe that condition as existed there on that side of the track?

William Mungall Birtwell, Jr., further direct.

The Witness: Well, the north side of the track where he was killed, why, there's a stone retaining wall seven or eight feet from the center line of the westbound track. That's approximate only.

The Court: The length of the retaining wall was what? 10

The Witness: Down to the bridge just about four or five hundred feet. And on the other side we had the shovels, through there the ground is very wet. We had a lot of trouble there, it's sandy formation and considerable water had got in.

The Court: I want you to physically describe the side he was killed, which is said to be the north side. 20

The Witness: Well, there was a retaining wall. 20

The Court: You told us that, four or five times.

The Witness: About seven or eight feet from the center line of the westbound track. From the top of that retaining wall the ground slopes up about—it went down fifteen feet approximately and went that level to the right of way fence. 30

The Court: Now, the opposite side.

The Witness: The opposite side, we had made a cut through, there had been originally a wall there. We had made a cut there and had taken that wall out and as I said, the ground was sandy material that was full of water and there was a narrow gauge dinky track just alongside of the mainline track. The mainline was between.

The Court: Proceed. 40

William Mungall Birtwell, Jr., further direct.

Q And of course on that side, on the south side the steam shovels were in operation actually digging and throwing the dirt into cars? A Yes, digging the second cut.

10 The Court: These shovels on the same side?

The Witness: Both on the same side.

The Court: Little shovel and big shovel.

The Witness: Yes.

Q Now, at this place just beyond the bridge where the accident occurred the railroad right of way makes a considerable of a turn, doesn't it, or bend? A Yes.

20 Q Now, is or is not there a better view in the direction from which this train came or along in the opposite direction, the direction the train would normally come on the north track, from a point north on the north track where Sullivan was killed? In other words, is that position in favor of a view around the curve or is it against a view around the curve if trains were coming along in the proper direction? A Well, it was on the outside of the curve.

30 Q Referring now to P. 3, he was in a position between the wall upon which I now have my pencil and the track nearer the wall? A Yes, he was.

Q Now, at that point would one have a better view around the curve than one would have on the other track? A Yes, he would; he would be on the outside of the curve.

40 Q So that if trains were coming in the right direction on the track one would more easily see that train than if on the other? A Yes.

William Mungall Birtwell, Jr., further direct.

The Court: Do you know Sullivan?

The Witness: Yes, very well.

The Court: Talk to him frequently?

The Witness: Yes.

The Court: Driving alongside of him, anything the matter with his hearing? 10

The Witness: I never noticed anything.

The Court: Seemed to be normal in that regard?

The Witness: Yes.

Q Now, I think you said in direct examination awhile ago that Sullivan's duty took him around the entire job for a distance of about a mile from that bridge? A Yes, it was really more than a mile down to the office and some distance below the office. 20

Q And it was his job to take the time at the various points along that job? A Yes.

Q And check materials and that sort of thing? A Yes, the usual timekeeper's job.

The Court: Did he check materials, too?

The Witness: Yes, he kept a record of any materials received on the job; didn't check it all, but kept some of it. 30

The Court: And that material was unloaded at various places along the tracks?

The Witness: Well, material was needed, sand and gravel came in carload lots and he had been given orders where the material was to go to.

The Court: At that particular time was he doing that; at the time of the accident?

The Witness: Why, he was taking care of the records. 40

William Mungall Birtwell, Jr., further direct.

The Court: He was taking care of the records?

The Witness: Yes, in the office.

The Court: But on that day he was really looking after the time of the men?

10 The Witness: Well, yes, sir.

The Court: Not materials?

The Witness: Well, if any materials came in at the office he would have to check it.

The Court: In the job?

The Witness: Actually in the field outside the office he would check the materials up.

20 The Court: Was he checking materials that day?

The Witness: No, he was checking time.

The Court: And Mr. Goddard testified on that day he was taking time at 7 o'clock when the men went on and again at 4:00 in the afternoon?

The Witness: Yes, in the meantime he was in the office, he was in the office keeping the records and entering his time.

30 The Court: What was the hour of this accident?

Mr. Selser: Approximately 7:20.

The Court: Proceed.

Q That was the usual time for him to get at that place? A Yes, around 7 o'clock.

40 Q Now, on this morning, had you any notice from the railroad company by any means whatsoever that they were running trains against the normal current of traffic? A No, sir, I didn't.

William Mungall Birtwell, Jr., further direct.

Q Did you have knowledge in any way that trains were being run or were to be run against the normal current of traffic? A No, sir.

Q What are the regular working hours of the men there, Mr. Birtwell, the men on the job?

A Seven to twelve and twelve-thirty to five-thirty. 10

Q You mean twelve noon? A Yes.

Q Then from twelve-thirty to five-thirty in the afternoon? A Yes.

Q Were you ever supplied, Mr. Birtwell, with a copy of the railroad company's rules for operation by the railroad company officials in your capacity as local engineer?

Mr. King: I object.

The Court: I think we will have the answer. 20

A No, I don't recall.

Q Do you know anything about whether or not the railroad issued slow orders with respect to the movement of its trains and supplied copies of its slow orders to you? A I had heard that there—

The Court: No. 30

Q You cannot tell what you heard; only your personal knowledge.

The Court: Well, there are two points to that question, will you kindly repeat it.

Q (Question read.) A I have never seen a copy of a slow order.

Q Did you have record of how much Sullivan was earning at the time; do you know as en- 40

William Mungall Birtwell, Jr., cross.

gineer, would you have charge of his wages? A No, his wages come by check directly from—

Mr. Selser: Never mind that, then. Cross examine.

10 *Cross examination by Mr. King.*

Q Where is your office in reference to the bridge of which we have been speaking about?

A Roughly two miles east of that bridge.

Q That would carry you down beyond the Denville Station? A Just at the Denville Station.

Q And on which side of the railroad was that? A On the north side.

20 Q Now, how did this man usually come to this place where the accident occurred; did he come by automobile? A Yes.

Q And drove there from his home in Rockaway? A Yes.

Q And that is commonly known as the Franklin Road? A Yes.

Q And passes over the railroad track on a bridge? A Yes.

30 Q How near was the closest shovel, commonly called the little shovel, to the bridge? I am speaking now of the day of the accident? A Well, I never measured it, but I would say roughly four or five hundred feet.

Q How far was the big shovel beyond the little shovel? A Two or three hundred feet.

Q That would make it seven hundred feet to the bridge? A Yes, but understand these are approximate figures only, just as I recall that.

40 Q When you were at the big shovel, from the big shovel, what is between you and the bridge,

William Mungall Birtwell, Jr., cross.

the little shovel and then this embankment which you are digging down with these shovels, isn't there? A Yes.

Q Do you know the point, the place—I suppose you didn't see the accident that morning?

A No.

Q But you saw where the accident took place? 10

A It was pointed out to me.

Q How near was that to the bridge? A I would say between a hundred and fifty to two hundred feet.

Q So the point of the accident was between the bridge and the little shovel?

Mr. Selser: The point where the accident was placed, he didn't see the accident, Mr. King. 20

Q The point at which the accident occurred was between the bridge and the little shovel, was it not?

Mr. Selser: I object to that unless this witness actually saw it. Some point was indicated to him.

The Court: Well, as the point indicated to you. 30

Q (Question read.) A Well, I will answer yes to that question.

Q And was that point on the opposite side of the two tracks? A Of the two new tracks?

Q No, of the two old tracks, the operating tracks, from the steam shovel? A Yes, sir.

Q So that you have got the two steam shovels on the south side of the track, then you have the two operating tracks and then between the 40

William Mungall Birtwell, Jr., cross.

furtherest operating rail and the wall is where this point was shown to you? A Yes.

Q So that if he was over there taking the time of the men at the little shovel and was going from there to the big shovel to get their time, he could have passed on the same side of the
10 railroad track from the little shovel to the big shovel without crossing the rails at all? A Yes, that's possible.

Q The distance between the little shovel and the big shovel was how much? A Around two hundred feet, I should say.

Q What was the distance between the little shovel and where he was taking the time of the men across to the point where you say it was he had been struck, what is that distance? A Well,
20 as I recall that particular distance, it seems like about a hundred feet.

Q And the point where he was struck would really be in between the large shovel and the small shovel? A It wasn't between the two shovels.

Q I mean in point of distance, I am trying to show the angle, the point where he was struck, was that nearer the bridge or nearer the shovel? A I would say the actual spot was nearer the
30 bridge.

Q So that if he was going from the little shovel to the big shovel to take the time, as a matter of fact he was struck at a place which took him away from the big shovel? A If he was doing what?

Q Going from the little shovel, he was going away from that place? A No, going in between it when he was struck.

Q Bearing that in mind, from the little shovel would that have been the route that would have
40

William Mungall Birtwell, Jr., cross.

taken him by the embankment to his car if he had left it on the bridge, assuming he was coming from the small shovel? A Going to his car, yes, the automobile.

Q Would that be the direction he would have taken across the tracks? A That's one way he could have got there. 10

Q And that would have taken him to his automobile? A Well, it would have taken him to the top of the incline but he would have to walk around another way.

Q Now, he could have walked from the little shovel on the same side of the track up to the bridge and gone up to the bridge on the same side and passed over the bridge without having to cross the railroad tracks except at that safe elevation? A Yes, that's so, but it isn't the natural way. 20

Q Why are you talking about the natural way, he could have done that, couldn't he? A Yes.

Q And there was no necessity, using the word necessity in this common interpretation; there was no necessity for he crossing the railroad tracks for his getting to his car? A Just what do you mean by necessity? That was muddy ground in there and he would get his feet wet. 30

Q So, it was the natural procedure and the procedure a necessity? A Yes.

Q He wasn't compelled to do it, was he? A To cross the railroad tracks?

Q Yes. No.

Q I mean to cross over at grade. Of course, he had to cross it over the bridge? A Oh, he could have crossed over the bridge.

Q The bridge was how far from the little shovel? A Bridge about 400 feet. 40

William Mungall Birtwell, Jr., re-direct.

Q So, had he passed on the same side of the railroad three or four hundred feet and went over the railroad on the bridge, he would have been perfectly safe? A Yes.

10 Q Now, these other men of whom you speak as using the railroad, were these men working at this point or at other points on the railroad? A No; I have seen men working all along there. I worked all along there myself, worked all along there all the time, and walked along there.

Q And you say he was taking time at the time this accident took place? A Yes; I myself saw him.

Q And there was no necessity for him to cross the tracks; he could have gone over the bridge because there had been work completed?

20 A Oh, yes, right.

Re-direct examination by Mr. Selser.

Q Let us consider some other possibilities. At that time he could have stayed on the south side of the tracks, the excavation having been made in the manner that you described, and he may have, considering now new possibilities, he may have broken his leg?

30

Mr. King: I object to that.

The Court: You don't expect him to answer that?

Mr. Selser: Yes.

The Court: The objection is sustained.

Q The ground along the south side of the track and the embankment leading from the railroad company's right of way level and that wall
40 had been excavated as you say and put in on the

William Mungall Birtwell, Jr., re-direct.

level of the right of way at the bridge, was that loose or was it solidly filled and built in? I mean along the side where you had made your excavation; was that loose or otherwise? A Well, it was loose except right at the bridge. There on the left side took in the side where the swamp was.

10

Q And all along there where the excavation was being made the soil was loose and torn up by your steam shovels, wasn't it? A Yes.

Q Now, Mr. Birtwell, you have been answering questions about the place where the accident occurred and you, of course, are referring only to a point indicated to you by somebody else? A Yes, entirely.

Q Did you find bloodmarks there? A I don't recall seeing them.

20

Q Do you know? A I don't recall.

Q Are you sure that the point indicated to you as the point at which he was struck was the point at which the body was finally picked up after it had come to rest upon its being struck? A No, as I recall it, I was told that a mark on the stone wall showed where the body was picked up; that's what I recall as being told.

Q And that's the point you are indicating somewhere between the little shovel and the bridge? A Yes, sir.

30

Q Now, the train was traveling from the direction of the big shovel toward the bridge, wasn't it? A No.

Q I beg your pardon? A No.

Q Was it not? A That's not as I understand.

Q From the big shovel to the bridge, that's the westbound track, is it not? A Yes.

40

William F. Cone, direct.

Q Now, let's see, the train, referring to P. 3, was moving away from the camera or toward the camera? A Away from the camera.

Mr. Selser: That is all.
(Witness excused.)

10

WILLIAM F. CONE, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Selser.

Q Mr. Cone, you are a photographer by profession? A Yes.

20 Q And have been how many years? A Thirty-three years.

Q Have you taken pictures continuously during that period of time? A Yes.

Q Did you at our request make certain pictures of the Delaware, Lackawanna and Western Railroad's right of way in the vicinity of the bridge at or near Rockaway? A I did.

Q Between Denville and Dover? A I did.

30 Q I show you a picture marked in evidence P. 3 and ask you whether or not you made that picture? A I did.

Q When did you make it? A October 28, 1927.

Q What was the elevation of the lens when that picture was taken? A Five feet.

Q The picture is looking in what direction, Mr. Cone? A In an easterly direction.

40 Q And your camera was placed where for the taking of the picture? A Between the east and westbound tracks.

John J. English, direct.

Q At a point where upon the right of way with respect to the bridge? A Well, I do—

Q Here are some slips that will help, help with your location. A Two hundred feet west on the right of way, of the bridge.

Q Two hundred feet west of the bridge? A Yes. 10

Q Now, referring to Exhibit P. 4, will you just tell us the elevation of your lens at the time that was taken? A The same date, October 28th, elevation of camera was five feet, at a point 100 feet east of the bridge.

Q Looking in which direction? A Looking west. Between the rails of the westbound track.

Mr. Selser: That is all; take the witness. 20

Mr. King: No questions.

(Witness excused.)

JOHN J. ENGLISH, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Selser.

Q Where do you live, Mr. English? A New York City. 30

Q What's your business? A Railroad contractor.

Q How many years have you been engaged in railroad contract work? A Somewhere around forty years, forty-one.

Q Were you familiar with the work that was being done by the Stange Construction Company on the Delaware, Lackawanna and Western Railroad between Denville and Dover? A No, I 40

John J. English, direct.

wasn't, but I was out there when this timekeeper was killed and took care of the burial.

Q Are you related to the timekeeper in some way? A Second cousin.

10 Q I believe Mr. Sullivan had worked for you prior to his taking up work with the Stange Construction Company? A Mr. Stange went to take a shovel out for me and I met Mr. Sullivan there and hired him.

Q How long did Sullivan work for you? A A little over eleven years.

Q In what capacity? A Timekeeper, accountant.

Q Now, how long prior to this accident had Sullivan left your employ? A I should say only four or five months.

20 Q Just for the period while he was in Den-ville? A He came out there and Mr. Stange was running the shovel, and he hired him as timekeeper and I put another boy in his place.

Q After he went on this job? A Yes.

Q Now, what were Mr. Sullivan's qualifications as you observed him for the position he was occupying during the time he worked for you? Will you just describe his abilities? A Very good timekeeper, knew a whole lot of the work.

30

The Court: Was he a trained accountant?

The Witness: Trained, yes, sir, in that line. He had been with me for eleven years and we procure our timekeepers generally—

Mr. King: I object.

40 Q Let us talk only of Mr. Sullivan. Just what was Sullivan's relation with your company and just describe it? A Keeping cost of the business—

John J. English, direct.

Q What were his wages? A He started at a hundred dollars a month and got two hundred dollars at the finish; I think the past five years two hundred.

Q Now, during the time Sullivan was working for you as timekeeper was he engaged upon railroad jobs? A Practically entirely, all railroad work. 10

Q And the jobs which you had during the time he was employed by your company, were any of these similar in nature to that being done for the Delaware, Lackawanna and Western by the Stange Company? A Yes, a good many.

Q Now, Mr. English, during your experience in handling railroad contracts, do you acquaint yourself with the best methods for making use of the railroad tracks in traveling from one place to another? 20

Mr. King: I object.

Q To various parts of the job?

Mr. King: I object. My objection is not what the man may have learned, but what some other railroad did has nothing to do with this case. We are dealing only with this case. He used the tracks of the railroad company for the purpose of his convenience. Now, what the New York and New Haven did or the Erie did or somebody else, has no bearing on this case. 30

The Court: What is the theory?

Mr. Selser: It goes to the question of contributory negligence in this particular case. I may say very frankly it is a general custom of railroad men and particularly in 40

John J. English, direct.

circumstances existing as in this case, to walk against the normal current of traffic.

The Court: All right; you have sufficiently developed your case.

10 The Witness: I had a job in Perth Amboy—

Mr. Selser: Does your Honor make the same ruling?

The Court: Yes, I think the test there must be the background of the picture that's involved here. The conditions there.

Q The job you were doing down at Perth Amboy, just what kind of a job was that? A We were depressing the tracks through Perth Amboy.

20 Q Were you adding a number of tracks which were upon the right of way or taking in the tracks which were then existing? A Originally there were two tracks and we depressed two tracks and cut two new tracks at the bottom and then excavated where the old tracks were, so that finally there was added two tracks to the then existing right of way.

30 Mr. Selser: I submit this is similar to the present case.

Mr. King: No similarity at all; they made a depression. The conditions could not have been the same.

Mr. Selser: All right; I won't press it.

Q Now, Mr. English, I understand that you actually did go to this particular work and make an inspection of the work which was there being done? A Yes.

40 Q And did you observe the physical situation there existing? A Yes.

John J. English, direct.

Q Now, as a man of forty years' experience in railroad contract work, what have you to say as to whether or not under these conditions existing at that place it was proper conduct on the part of an employee of the construction company to walk easterly on the westbound track at the place just west of the overhead bridge where the two steam shovels were at work? 10

Mr. King: I object.

The Court: If you will amend that question so as to develop the fact that Mr. English was there, did you fix the time?

Q When did you go there? A The afternoon the boy got killed.

Q On the very afternoon? A Yes. 20

Q What was the physical condition there?

Mr. King: Object to that question; it does not relate to the employee that was killed. It might apply to some other employee.

The Court: Yes; you confine that question to the timekeeper.

Mr. King: And it is not what the witness saw, but what the timekeeper did. 30

Mr. Selser: I withdraw that question so as not to have it subject to objection.

Q Assuming Mr. English, that a timekeeper employed by the Stange company was moving from a steam shovel south of the railroad main track at a point approximately which was 200 feet east of the overhead bridge, that the timekeeper had just taken the time from the employees on that shovel and walked across two main tracks to 40

John J. English, direct.

a point between the nearer rail of one track and a stone retaining wall at the side of the company's right of way and then proceeded toward the big steam shovel in that position, what have you to say as to whether or not a man under those conditions and those circumstances was
 10 following the general custom existing among men engaged in that type of work?

Mr. King: Object. I say the question doesn't state the truth about it.

Mr. Selser: Will you please state wherein I do not state the truth?

Mr. King: You conduct your own case. I have my troubles. He says he was walking toward the steam shovel; that's exactly what
 20 didn't happen. He wasn't walking from the little shovel to the big shovel. He was going away from the big shovel; that's exactly what they say.

The Court: The difficulty of that situation is when Mr. Goddard was on the stand he gave me the impression that Sullivan had been at the big shovel and was on his way to the little shovel and crossed the tracks in order to get down to the little shovel. Now,
 30 that was the impression I got.

Mr. Selser: What he said was he had been to the little shovel.

The Court: Yes, he brought that out on cross examination that Goddard entirely knew the situation. In other words, my impression was that he was going from one shovel to the other, either from the little to the big or the big to the little, and crossed the tracks to do it. Now, you brought out
 40

John J. English, direct.

apparently from Birtwell that he was walking away from these entirely. I don't know what the situation is.

Mr. Selser: May I suggest to your Honor that I brought out from Birtwell merely the same thing plus the added fact that he was between the little shovel and the big shovel. 10

The Court: Different witnesses say he was going from one shovel to the other. Assuming that to be so, walking from one shovel to the other and assuming the witness knows where the shovel was and walking across the track in doing that, then would that be a proper question? I don't know. I think you are coloring that question a little bit yourself. 20

Q Do you remember the question now? A In general, yes. With the conditions there, if the man had to pass between one shovel and the other one, the big one to the small one or the small one to the big one, would it be necessary for him to cross the tracks to do it? He would if he went where he had the best walking. The opposite side had the construction work going on; you would need hip boots to go through there. There was an old retaining wall taken down and one cut over there, and a man would be in a big hazard if he tried to go through there. 30

Q Now, during the time Mr. Sullivan worked for you was he regular on his job or otherwise?

A At all times.

Q What have you to say about his health?

A Never missed him a day off the payroll.

Q He was a man physically fit? A Yes.

The Court: A man of sobriety? 40

John J. English, direct.

The Witness: Well, he never took a drink.

The Court: Sober as a judge?

The Witness: Yes, I vouch for that.

Q Now, did he smoke, do you know? A Oh, yes.

10 Q Smoked cigarettes—

The Court: If you want to get an adverse ruling, you just talk to me about that. Well, he was a man of good habits, physically fit, approximately how old, Mr. English, would you say?

The Witness: Somewhere around thirty.

20 The Court: And you would say as you saw him that he would have the ordinary expectancy of life of a person of that age?

The Witness: I should think he would, your Honor. He was not off our payroll a day.

The Court: No sickness of any kind?

The Witness: No, sir; your Honor.

The Court: Steady worker?

The Witness: All the time.

30 The Court: You paid him \$200 a month?

The Witness: Yes, and he had good prospects.

The Court: Proceed.

Mr. Selser: Take the witness.

Mr. King: No questions.

(Witness excused.)

Margaret M. Sullivan, direct.

MARGARET M. SULLIVAN, sworn on her own behalf as plaintiff, testifies as follows:

Direct examination by Mr. Selser.

Q Mrs. Sullivan, where do you live? A
Rockaway. 10

Q You are the widow of Timothy Sullivan?
A Yes, sir.

Q When was the last prior to October 22,
1927, that you saw him? A October 12th.

Q And at the time he was killed, I believe
you were in the New England States? A I had
gone away to visit my folks.

Q And when you last saw him what was the
condition of his health? A Just the same as
it always was. 20

Q And that was just what; was he healthy
or sickly? A The only sickness he had was
when he was bit by a dog last summer.

Q Did he work regularly? A Every day,
Sundays and all.

Q Just prior to the time that this accident
occurred, what was his average earnings? A
Fifty dollars a week.

Q I believe he turned over to you his entire
pay check, did he not? A Yes. 30

Q And you saved the stubs of these pay
checks? I am referring particularly to the docu-
ments I hold in my hand?

The Court: In the nature of a voucher
that was attached to the pay check?

The Witness: They were at the bottom.

The Court: You say you detached these
from the checks and saved them?

The Witness: Yes. 40

Margaret M. Sullivan, direct.

The Court: The amount indicated on these vouchers are the same as upon the checks?

The Witness: Yes.

Mr. Selser: I offer them all in evidence.

10 The Court: Is there objection, look them over.

Mr. King: No objection.

The Court: They may be marked.

Mr. King: I consent they may be marked in bulk.

(Eight vouchers marked as Exhibit P. 5.)

Q Now, Mrs. Sullivan, how old was your husband at the time he met his death? A
20 Thirty-one.

Q How old were you at that time? A
Twenty-eight.

Q At the time he was killed, how many children did you have? A One.

Q And what was that, a boy or girl? A
Boy.

Q How old was the boy at that time? A
Two years and seven months.

30 Q Now, since he was killed I believe you gave birth to another child? A Yes.

Q How long after? A Three months after.

The Court: How old is that child now?

The Witness: He will be five months a week from Saturday.

The Court: What is your condition of health?

40 The Witness: Just now? Very, very good.

Margaret M. Sullivan, direct.

The Court: And the children?

The Witness: Yes.

Q Now, the moneys which your husband turned over to you, his entire pay check, just what would you do with this? Use that for general household expenses? A Yes. 10

Q Would you give your husband any money back for his personal needs? A As he would need it, why, he would ask me for it.

Q Well, on an average how much would you give back to him for his personal comforts, and spend money? A Five dollars a week.

The Court: You bought his clothing?

The Witness: Well, when we were married he was pretty well supplied with clothing and he had five suits and got them yet. 20

The Court: Then of course he would pay all bills?

The Witness: He would.

The Court: He would pay the household bills?

The Witness: His personal bills.

Q When he needed money for clothings and things it was gotten out of his regular salary? A Yes. 30

Q How much would come out of his salary for clothes? A About two hundred dollars a year.

Q That was for his clothing? A Yes.

Q Then of course you gave him five dollars a week approximately for his personal needs and the rest of it was used for the support of yourself and the children? A Yes. 40

Margaret M. Sullivan, direct.

The Court: Do you own the house in which you live?

The Witness: No, we had always rented furnished apartments.

The Court: Rented apartments?

10 The Witness: Yes.

The Court: What was your rent?

The Witness: Fifty dollars a month.

Q Did you bring down a picture of your husband? A Yes, I have it.

Q Have you it here? A Yes, they are over in my bag. Mr. English will get it.

Q Are they in this package? A Yes.

20 Q Now, will you let me have the last picture taken of your husband? A This is the very last one but these are better.

Q The picture you are now handing me you say is the very last one. When was that taken with respect to the time of his death? A Last August.

Q August of 1927? A Yes.

Q And that's a picture of yourself and your youngster and your husband? A Yes.

30 Q That's a true representation of your husband as he then looked? A Yes.

Mr. Selser: I offer that in evidence.
(Picture marked as Exhibit P. 6.)

Q You say you have some other pictures taken before that which were better pictures? A Yes.

40 The Court: The issue, if it becomes one, as to the expectancy of Mr. Sullivan—

Margaret M. Sullivan, cross.

Mr. King: No contest about that. In other words, they say he would have the ordinary usual expectancy of three score years and ten, whatever it may be as laid in the mortality table.

Mr. Selser: That is all.

The Court: Any cross examination? 10

Mr. King: Very little.

Cross examination by Mr. King.

Q Mrs. Sullivan, I want to ask you this with due caution; please don't answer until the other side may object. Did you make application to the Workman's Compensation Bureau for compensation to you and your children from the Stange Construction Company arising from and out of the death of your husband? 20

Mr. Selser: Of course I object, because it doesn't make a particle of difference, your Honor, and I know and everybody knows it is far less than the pecuniary loss sustained.

The Court: Well, the railroad company don't cause this. In event these payments have been made under the provision of the Workman's Compensation there is a provision that all payments made by the employer in this case, the Stange Company, to the widow or next of kin, as the case may be, may be recovered by the Stange Company of any person found legally liable or responsible, having in mind negligence, of course, for the death of Mr. Sullivan. But to take advantage of that, the liable company would be obliged to have given notice to the defendant in this case, as it happens 30 40

Margaret M. Sullivan, cross.

10 to be, that they intended to rely upon that provision of the statute and therefore that is the only significance of the question as to whether or not any payments were made by the Stange Company to Mrs. Sullivan and next of kin. Now, I will give the provisions of the statute if you want it.

Mr. King: We have the notice. We are in duty bound to make this inquiry.

The Court: Oh well—

Mr. Selser: I don't object.

The Court: That being so, that doesn't relieve you from responsibility.

Mr. King: It does not.

20 The Court: You cannot gain anything but I will allow you to ask your question.

Mr. Selser: I withdraw my objection.

The Court: You have been paid by the Stange Company, have you not, certain sums?

The Witness: My check comes from the Maryland Casualty Company.

The Court: How much have they been per week?

30 The Witness: Seventeen dollars.

The Court: That was fifty per cent. of his earnings, I suppose, seventeen dollars—

Mr. Selser: That is the maximum payment under the act.

The Court: You have been receiving that how long?

The Witness: Since October.

The Court: 1927?

40 The Witness: Yes.

Margaret M. Sullivan, re-direct.

Q And you will receive it until the children arrive at the age of sixteen years, you will receive seventeen dollars a week?

The Court: You understand that?

The Witness: Yes.

10

Q That is true, is it not? A Yes.

Mr. Selser: Assuming the insurance company doesn't become bankrupt.

The Court: Well, you have no right to assume that.

Mr. King: That is all.

Re-direct examination by Mr. Selser.

20

Q You understand, do you not, Mrs. Sullivan, that if you get a recovery from the Delaware, Lackawanna and Western Railroad Company in this case you will have to repay to the Maryland Casualty Company every cent you have received to the present time by reason of the section of the act we are speaking about? A Yes.

Q And you won't get any more payments from the Maryland Casualty?

30

Mr. King: Oh, yes, they do. The Maryland Casualty Company is—

The Court: Wait a minute, what difference does it make whether the Maryland Casualty Company goes bankrupt or not. The Stange Company is responsible, the Maryland Casualty Company is merely security.

40

Interrogatories and Answers.

Mr. King: The Stange Company is not sued.

10 The Court: I understand, but that makes no difference, that is to say if the Stange Company remain liable, whether the Maryland Casualty Company went bankrupt or not, the seventeen dollars a week would have to be paid by the Stange or the Maryland.

Mr. Selser: Yes.

Mr. King: As to the continuance irrespective of this statement until the time fixed by law expires. That's what he says would not happen. We take exception to that.

20 Mr. Selser: Of course your Honor knows if recovery is had in this case compensation ends. Does your Honor wish me to give you the act in question?

The Court: No, I have the statute here.

Mr. Selser: I have interrogatories which I desire to read at this time and answers.

30 Mr. Scott: Then, if it please the Court, we should have them go in in the proper way. I call upon the Court to have Mr. Selser read in the interrogatories and answers.

The Court: I do.

Mr. Selser: And I may say this that under the rule and my interpretation of the law, I am required to read only such interrogatories as pertain to a particular set of facts and will begin with interrogatory number four and the answer thereto.

The Court: Because—

40 Mr. Selser: Because it is not part of the fact.

Interrogatories and Answers.

Mr. Scott: Mr. Selser's statement, "I do not choose to read," I request it—

The Court: Well, there is nothing before me, go on.

Mr. Selser: This is number four. "Had the plaintiff in force at the time and place aforesaid a rule or bulletin issued by the superintendent on October 20, 1927, (No. 3488) providing as follows: Effective at once, the following slow orders are in effect, in addition to those shown in timetable No. 53. All trains must reduce speed as indicated below and be governed by rules 768 and 769. Slow and resume speed boards will be placed to indicate exact location.

Eastward
to 10 miles per hour

About 1,000 ft. of new eastward main track at Wright's crossing between East Dover Junction and Denville. Temporary main track around rock cut about one mile west of Mountain Lakes." The answer is the defendant had in force October 20, 1927, a general operating rule known as No. 768.

The Court: Was that the slow down rule?

Mr. Selser: Yes.

The Court: They said that they had that in operation?

Mr. Selser: They said they had in operation 768, which is the slow territory rule.

Mr. Scott: But we didn't say where.

The Court: In effect at that place, you don't say where?

Mr. Scott: We had one in force but not at that place.

Interrogatories and Answers.

10 Mr. Selser: That's understood. Now, the seventh. Had the defendant in force at said time and place a general operating rule governing the train in question, reading as follows: "81. (Double, three or more tracks.) Trains must run with the current of traffic, as specified by timetable, unless otherwise directed by proper authority." The answer is, yes, we had such a rule.

20 Now the ninth; had the defendant in force at said time and place a general operating rule governing the train in question, reading as follows: "154. When on double track trains are detoured from their proper track to run against the current of traffic on the opposite track, between the hours of 7:00 A. M. and 6:00 P. M., the first train or pilot engine so moving will run at slow speed over the detouring section, irrespective of distance, and following trains, day and night, run under control. Where the view is obstructed by curvature or otherwise, reverse train movements must be made with extreme care, enginemen keeping sharp look-out for stop or slow signals, and for bridge-

30 men, line repairmen, signal maintainers, and other persons authorized to run hand-cars, etc., moving on such cars or at work, and be prepared to stop on short notice. Enginemen will give warning by frequent use of engine whistle upon approaching such localities." And the answer is yes, such a rule was in existence.

The Court: What is the general expectancy at the age of thirty-one?

40 Mr. King: I think it is under the law a percentage rate.

Defendant's Motion to Strike Out.

Mr. Selser: It gives the value in dollars and cents.

The Court: It is four per cent., no, it is six per cent.

Mr. King: It is rates from six to four per cent. (Argument.)

10

Mr. Scott: I will produce the Carlisle table giving the expectancy in years.

The Court: That is much better. I will allow you to put that in, the Carlisle table is a good deal better than this percentage here.

The Court: Is that all.

Mr. Selser: We rest.

The Court: Both sides rest.

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Mr. Scott: At this time I desire to first make a motion that we should be relieved from answering certain of the counts in the complaint because the plaintiff has significantly failed with respect to its proof as to those counts. I shall mention and specify and point out to your Honor wherein they have failed to show any duty and therefor we should be relieved from going into and answering with respect to such duty, my motion being distinguished, however, if your Honor should eliminate only certain of my counts, my motion being distinguished from a motion for a non-suit.

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The Court: I so understand.

Mr. Scott: The counts which I have in mind, sir, are as follows: I will recollect from the amendment of the first count, that the railroad company is charged with negligently, carelessly and excessively operating the train which struck Sullivan, that they failed to blow a whistle or

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Defendant's Motion to Strike Out.

ring a bell on the locomotive or in any other form to warn and reasonably apprise the decedent of the approach of the train and did fail to operate the train in a careful manner and at a reasonable speed and control but did operate the train at an unreasonable, unsafe and excessive rate of speed without taking reasonable and necessary precaution to observe the decedent lawfully on the tracks and to avoid striking him and injuring him. (Argument.)

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The second count deals with what is known as the slow order, with the operating slow order and that slow order prescribed that trains must be run at reduced rates of speed past these places. Now the evidence in this case is that there was a slow order but there is no proof that the slow order had any reference to the vicinity where this accident happened. (Argument.)

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The Court: I am afraid that second count will have to stand in the circumstances.

Mr. Scott: Exception, if your Honor please.

Mr. Scott: Now, we get down to the third count.

The Court: What is the third count?

Mr. Scott: The third count sets forth that the defendant at and on October 22, 1927, had in full force operating rules concerning trains operating on a double track and operating with the regular current of traffic unless otherwise directed by proper authority, and so forth. (Argument.)

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The Court: Well, what is the next count?

Mr. Scott: Your Honor denies the third?

The Court: Yes.

Mr. Scott: The fourth, I ask your Honor to dismiss for the reason there's no proof that the

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Defendant's Motion to Strike Out.

defendant had knowledge that the decedent was employed upon and along its track or right of way at the time and place and manner aforesaid. (Argument.)

The Court: I am inclined to the view it should not be stricken out.

Mr. Scott: Exception, if your Honor please. 10

Mr. Scott: The fifth count deals with the same proposition of the railroad company's knowledge that the decedent was employed at the time and place, that the railroad company knew and had knowledge that the decedent was employed or engaged in or about the place, they refer to the place of the accident. (Argument.)

Mr. Scott: Your Honor denies that the same way? 20

The Court: Yes.

Mr. Scott: Exception.

The Court: Yes.

Mr. Scott: The sixth count deals with the fact that the railroad company had in force and effect the operating rule that the custom for double track, trains to operate on said tracks, and so forth.

The Court: That motion is denied. 30

Mr. Scott: Exception.

Mr. Scott: The seventh count charges it was the duty of the defendant on these double tracks to notify or warn or signal the decedent or any other person walking along, for their precaution and safety.

The Court: Well, generally speaking that would not be true, to notify persons walking along the track. That necessarily would not be so. 40

Defendant's Motion for a Non-suit.

The Court: I am not so sure that that is not a good count.

Mr. Scott: Exception.

The Court: The train was going from where to where?

10 Mr. Scott: It was going from Dover down toward Denville.

The Court: What kind of a train was it?

Mr. Scott: Passenger train.

The Court: I will strike out the allegation with respect to the duty regarding the flagmen, there is no proof here in the plaintiff's case which will justify that.

20 Mr. Scott: The eighth count is a charge of willful negligence, claiming that we had sufficient time to avoid the decedent and did negligently and carelessly operate our train and so forth. (Argument.)

Mr. Selser: I will consent that the word "willfully" will go out.

The Court: This count will not be stricken out.

Mr. Scott: Exception.

30 Mr. Scott: Now, having completed the motion with respect to the eight counts, I respectfully ask that a non-suit be directed in favor of the defendant against the plaintiff for the following reasons: first, that there has been no actionable negligence shown on behalf of the defendant company and second that the plaintiff was guilty of contributory negligence.

The Court: I will hear what you have to say on that. (Argument.)

40 The Court: We will adjourn until tomorrow morning, June 20, 1928.

Charge to Jury on Motion for a Non-suit.

Thereupon the Court adjourned until Wednesday, June 20, 1928, at ten o'clock in the forenoon.

Morristown, N. J., June 20, 1928. 10

Court having been duly opened, the case was continued by the Court giving his conclusion on the motion made heretofore, as follows:

COURT'S CHARGE.

LAWRENCE, J. The Court will dispose of the motion made in the pending case at the end of the session yesterday. That motion was that the Court non-suit the plaintiff on the legal ground which was advanced by counsel for the defendant company. I might say in former days where a legal situation arose in the course of the trial, especially in the circuit, it was the practice to refer such question where it appeared to be of doubt and difficulty to the Supreme Court for its advisory opinion. That practice, apparently for some reason, has fallen into disuse with the result that the trial judge ordinarily, I may say customarily, in these days takes the responsibility for defining the rule applicable to the issue presented and settles the doubt himself, with the result that if he be wrong, an appeal is taken to the Supreme Court, particularly in Circuit Court issues. If the old practice prevailed, I would be inclined to refer to the Supreme Court this legal question that has arisen here. However, I shall follow the present

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Charge to Jury on Motion for a Non-suit.

day practice and determine the motion in accordance with the view that I have arrived at after studying this question with some diligence and realizing it as one of doubt and difficulty. In disposing of this motion, therefore, it will be understood that the plaintiff does not lose
10 her day in court, unless, of course, the Supreme Court on appeal should affirm the action of the trial judge as I shall presently announce it.

The question here is whether or not the decedent at the time of the accident was an invitee of the defendant company upon its right of way or a mere licensee, and in order to determine that question, which is purely one of law, I have had occasion to examine the
20 contract entered into between the Stange Company and the railroad company for the construction work contemplated thereby. That contract contains some very significant provisions which in my opinion lead to the conclusion that the clear purpose and intent of the defendant company was that the construction work should not only not interfere with traffic upon the main tracks of the railroad company, but that none of the work should impinge upon such
30 tracks. In other words, one of the earlier provisions of the contract is to the effect that the Stange Company shall protect the railroad company and save it harmless—entering into a bond in the sum of one hundred and thirty-five thousand dollars—against any injury to persons employed on the work or to the property that may be involved. Then there are other provisions that are emphasized under this contract repeatedly indicating the intent of the railroad company that the Stange Company should
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Charge to Jury on Motion for a Non-suit.

not use the main tracks during the progress of the work. There is the significant paragraph referred to by counsel as No. 13 whereby it was agreed that if the work or any part thereof shall be carried on in proximity to existing operating tracks of the railroad company, the contractor shall perform said work in such manner and with such care as not to interfere in any way with such operating tracks or the passage of trains, cars or engines thereover, in accordance with regular schedule time, and will provide and pay a sufficient number of qualified watchmen to protect the tracks at such points. The contractor further agrees that he will perform said work in such manner and with such care as not to interfere in any way with telephone or telegraph lines along said operating tracks, or with any underground conduits, pipes, sewers and cables. Then the provision is that the duty is cast upon the railroad company only to furnish a flagman to protect grade crossings of the tracks of the railroad company used in moving excavated material from one side of the right of way to the other in accordance with article one of the agreement. The following paragraph, which is likewise significant, as I see it, is this: The contractor shall under no circumstances use, or cause to be blocked, any operating track of the railroad company unless specifically authorized by a written permission of the engineer. When the use of any operating track is desired, a notice shall be given the engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the work, it is impossible to carry on the work without the use thereof. Movements of cars or equipment (be-

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Charge to Jury on Motion for a Non-suit.

longing to the contractor) on an operating track will be permitted only when handled by an engine and crew of the railroad company, for which the railroad company will charge the contractor in accordance with the prevailing schedule of rates as filed in the office of the general superintendent of the railroad company, and the contractor agrees to pay such charges promptly upon the receipt of the railroad company's bills therefor.

Now, reading this contract as a whole, it seems to me that the entire atmosphere, for want of a better term, legally indicates that the railroad company intended that this work should be carried on without permitting the use of the tracks upon which trains were going back and forth from day to day. Having that in mind, I conclude that it must be decided that at the time of this accident which occurred upon a part of the right of way where no work was being done or even contemplated by the terms of the contract that the decedent became in law a licensee. The evidence tends to indicate that he was a timekeeper and he was in the performance of his duty at the time of this accident in that he had gone, according to Goddard, the witness, to the large steam shovel and then was on his way to the smaller one, both of which apparently were on the same side of the right of way, or was on his way to either the larger or smaller one, I do not recall now, and instead of remaining on the same side, he apparently crossed the tracks and was walking upon the right of way between one of the tracks and a stone retaining wall when the accident happened. The space between the retaining wall and the nearest rail was either four or seven feet, I have forgotten

Charge to Jury on Motion for a Non-suit.

which; as I recall the testimony now, from the center of that track to the retaining wall was either four or seven feet, whatever the distance may be is quite immaterial for my purpose; in any event, he was walking in a place of obvious danger. If a train came upon that track as it did, it was inevitable that he would be struck because there was not sufficient space to escape. I shall rest my ruling upon the finding as a matter of law, therefore, that when the decedent crossed the tracks, even though he were on his way to perform a duty, he was a licensee merely, and the rule of course is that the railroad company owed to him through its employees the duty of refraining from willfully injuring him. There is no claim here that there was any intent on the part of the engineer to willfully injure the man. The definition of willful negligence will be found defined by the Court of Errors in the case of *Rose v. Squires*, in which I sat at the trial. Therefore, there is nothing in the case to indicate any willful negligence on the part of the operator of the train which apparently struck the man. Now, I may say that it seems clear to me that the decedent was not an invitee, express or implied, of the railroad company, and I am relying upon the usual definition in such case, as for example: "An express invitation is where the owner or occupier of land, by words, invites another to come on it, or make use of it, or something thereon."

"An implied invitation arises when such owner or occupier by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the inten-

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Charge to Jury on Motion for a Non-suit.

tion or design for which the way or place or thing was adapted and prepared, or allowed to be used." There could be no expressed invitation here because the contract, as I say, states that the Stange Company and necessarily the employees, of whom the decedent was one, were
10 not to use the tracks without permission. Then, again, a licensee as defined is a person who is neither passenger, servant, nor trespasser, and not standing in any contractual relation with the owner, and is permitted to come upon the premises for his own interest, convenience or gratification. Now it may be in view of Mr. English's testimony yesterday that the decedent found the more comfortable way for him to pass
20 from one part of his work to another was by crossing the tracks, but that would be for his own convenience. No contractual relation or any expressed or implied invitation would arise by reason of such act on his part. It may well be it was more convenient for him to go that way. However, that would not change the status as I see it from a licensee to an invitee, expressed or implied. Now, I have examined the cases that counsel for the plaintiff submitted to me last night and I conclude that they are not
30 applicable to the present case. For example, in the case of the soldier who was killed on the bridge; there the railroad company had requested and asked from the State or some Federal authority soldiers to guard the bridge and there was direct invitation there to those men to guard that bridge, and if it was necessary, as it appears to have been, for them to have gone from one side to the other in order to reach their camp, as it were, why necessarily the relation was that
40 of invitee so far as that soldier was concerned

Charge to Jury on Motion for a Non-suit.

with the railroad company. It was part of his function to cross the bridge in order to reach the place where he had a right to go and he was in the performance of his duty at the time. But the situation in this case is different from that. Likewise in the case of *Riley v. Jersey Leather Company*, in 100 Law, page 300, the second paragraph of the syllabus clearly indicates it is not applicable to the present case: "Where the contractee actively interferes with and participates in the work contracted for by the independent contractor, and the real cause of the injury of the plaintiff, an employee of the contractor, is the independent negligence of both the contractee and the contractor, the contractee, as well as the contractor, is liable. 10

In the circumstances, I conclude, as a matter of law, from the evidence in the case that the decedent was a licensee—I am not willing to say a trespasser—and that the only function on the part of the railroad company was to refrain from willful negligence with regard to him, and there is no such claim made in this case. The point is also made that the decedent was guilty of contributory negligence. I think that that would be a matter of fact for the jury for the reason that it appeared on the morning in question that the train that struck the decedent was a regular train, but the schedule has been changed for some operating reason, apparently a necessary one, and the train came upon a track which it was not accustomed to travel. Therefore it would have been a question for the jury as to whether or not the decedent was guilty of contributory negligence in the immediate circumstances, plus that physical situation there as to his walking at the moment between the 20 30 40

Charge to Jury on Motion for a Non-suit.

wall and the track where there was not sufficient space for the train to pass if it did come over that track.

10 The motion will be granted therefore upon the theory that in law the decedent was a licensee and not an invitee, express or implied, of the defendant company. You may have an exception and I hope the case will go to the Supreme Court.

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NON-SUIT.

Entered June 20, 1928.

The above action came regularly on for trial before the Hon. Rulif V. Lawrence, Circuit Judge, on the 19th day of June, 1928, and when called for trial, plaintiff offered her evidence in support of her complaint before the jury impaneled to hear and try said cause, and thereupon rested her case, whereupon upon motion of the defendant that the above plaintiff be non-suited for failure to prove and establish the allegations of her complaint, said Court considered said matter, and did on the 20th day of June, 1928, direct that the above plaintiff be non-suited. Whereupon it is adjudged that the complaint of the above plaintiff be dismissed and that judgment of non-suit be entered against her in favor of the defendant, The Delaware, Lackawanna and Western Railroad Company.

Costs taxed at fifty dollars and sixty cents—\$50.60.

On motion of

FREDERICK B. SCOTT,
Attorney of Defendant.

Judgment signed June 20, 1928.

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ORDER.

Filed July 2, 1928.

10 Application having been made to this Court upon the trial of the above-entitled cause, by the above defendant for leave to amend its answer filed in said cause, and the Court having duly considered said matter, it is on this 19th day of June, 1928,

ORDERED that the above defendant have leave to file an amended answer in the above-entitled cause.

RULIF V. LAWRENCE,
Circuit Court Judge.

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AMENDED ANSWER.

Filed July 2, 1928.

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

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AS TO THE FIRST COUNT.

1. It admits the allegations contained in the first paragraph.

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

3. It admits the allegations contained in the third paragraph, and as to the allegations contained in the fourth paragraph, it admits the allegations that:

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“At the said time the defendant was also”
 * * * “causing to be performed certain excavation, grading and construction work for the purpose of” * * * “increasing the number of its tracks, and for that purpose had employed Stange Construction Company to do and perform,” * * * “such excavation and grading work by the use of men, steam shovels, cars, tracks and other equipment and appurtenances located, working and operating” * * * “along the defendant's railroad tracks and right of way between stations thereon known as Boonton and Dover.”

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but denies the balance and remainder of said allegations.

4. It denies the allegations contained in the fifth and six paragraphs.

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Amended Answer.

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

6. It admits the allegations contained in the eighth paragraph.

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AS TO THE SECOND COUNT.

1. It repeats as its answer to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated.

2. It denies the allegations contained in the second paragraph.

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3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

AS TO THE THIRD COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated.

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2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

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Amended Answer.

AS TO THE FOURTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated. 10

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

AS TO THE FIFTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated. 20

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated. 30

AS TO THE SIXTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated. 40

Amended Answer.

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

AS TO THE SEVENTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated.

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

AS TO THE EIGHTH COUNT.

1. It repeats as its answers to the allegations contained in the first paragraph, its answers to the allegations contained in the first to fifth paragraphs, both inclusive, of the first count, the same as if herewith fully set forth and reiterated.

2. It denies the allegations contained in the second paragraph.

3. It repeats and reiterates as its answers to the allegations contained in the third paragraph, its answers to the allegations of paragraphs 7 and 8 of the first count, the same as if herewith fully set forth and reiterated.

Amended Answer.

AND FOR A SEPARATE AND DISTINCT
SECOND DEFENSE

this defendant says that the said plaintiff ought not to have or maintain her action against it for that the plaintiff's decedent was guilty of contributory negligence immediately prior to and for sometime before and at the time of the happening and occurrence of the accident alleged by the plaintiff to have occurred to her decedent at the time and place set forth in the plaintiff's complaint. 10

AND FOR A THIRD AND SEPARATE
DISTINCT DEFENSE

this defendant says that the said plaintiff ought not to have or maintain her action against it for that the said plaintiff's decedent, who was neither connected with nor employed upon the railroad of the defendant, was injured while walking along the tracks of its railroad at a place where said railroad was not laid out upon a public highway or a private crossing, contrary to the statute in such cases made and provided. 20

WHEREFORE this defendant prays that the above-entitled action may be dismissed as against it. 30

FREDERIC B. SCOTT,
Attorney of Defendant.

NOTICE AND GROUNDS OF APPEAL.

Filed August 24, 1928.

To Frederic B. Scott, Esq., attorney for defendant:

10 TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The trial court erroneously ordered that judgment of non-suit be entered in favor of the defendant and against the plaintiff.

2. The trial court erroneously ordered that judgment of non-suit be entered in favor of the defendant and against the plaintiff for the following reason:

20 "The motion will be granted therefore upon the thory that in law the decedent was a licensee and not an invitee, express or implied, of the defendant company."

3. The trial court erroneously refused to submit to the jury the question whether the defendant was negligent, as alleged in the complaint, and whether such negligence was the proximate cause of the accident alleged in the complaint.

30 4. The trial court erroneously refused to submit to the jury the question whether the accident alleged in the complaint was proximately caused by the contributory negligence of the plaintiff's intestate.

Dated, August 3, 1928.

HOBART & MINARD,
Attorneys for Plaintiff.

Service acknowledged this 7th day of August, 1928.

40 style="text-align: right;">FREDERIC B. SCOTT,
Attorney for Defendant.

*Exhibits.***EXHIBITS.****Neutral Exhibit A.**

Contract.

Exhibit P. 1.10

Letters of Administration.

Exhibit P. 2.

Death Certificate.

Exhibit P. 3.**Exhibit P. 4.**20

Photographs.

Exhibit P. 5.

Eight Vouchers for Pay-checks.

Exhibit P. 6.

Photograph.

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*Neutral Exhibit A.***Neutral Exhibit A.**

CONTRACT.

10 THIS AGREEMENT, made this first day of April, in the year one thousand nine hundred and twenty-seven, By and Between the DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the State of Pennsylvania, hereinafter called the "Railroad Company," party of the first part, and OTTOMAR STANGE and ANNA A. STANGE, his wife, co-partners, doing business under the firm name and style of "STANGE CONSTRUCTION CO.," with principal place of business at No. 1600 Arch Street, Philadelphia, Pa. hereinafter called the "Contractor,"
20 party of the second part, WITNESSETH:

THAT the Contractor, for and in consideration of the agreements hereinafter contained, to be kept and performed by the Railroad Company, agrees with the Railroad Company, as follows:

30 FIRST:—The Contractor agrees to do and complete, and to furnish all labor, materials, tools, equipment and everything else required to do and complete, for the Railroad Company, in the most substantial and workmanlike manner, in strict accordance with the specifications hereto attached and hereby made a part hereof and the drawings which are identified by the signatures of the parties and hereby made a part hereof, and to the satisfaction and acceptance of the Engineer, the following WORK (except in so far as this contract may expressly require any part of the WORK to be furnished or performed by the Railroad Company); that is to say, the construction of a new third and fourth track road-
40 bed on The Morris and Essex Division of the

Neutral Exhibit A.

Railroad Company's railroad from a point approximately 4000 feet westerly of Mountain Lakes Station and extending westerly about five miles to a point approximately 1000 feet easterly of Mile Post No. 37, and designated on said drawings as Section No. 2. This WORK includes the required foundation excavations for the concrete work involved in the construction of a concrete arch ring with the necessary support to spring the arch across the railroad tracks at Pear Tree Road, abutments, wing walls, structural steel encasing, including slabs and sidewalks, parapets, walls, beams, piers, columns, culvert extensions, balustrades, reinforcing steel, waterproofing; removing old masonry; excavations for main line grading; ditching street grading, all in the manner and at the locations specified in said specifications and drawings.

For the reason that there is not sufficient room to build the entire structure without interfering with the existing tracks the undercrossing to be built for the road known as Wrights Crossing west of Estling Lake, as shown on said drawings, is to be built in two sections.

In the grading of the roadbed at the overlapping of Section No. 1. and Section No. 2., as shown upon the "Profile Showing Main Line Grading," dated January 31, 1927, the Contractor on Section No. 1. will make the fill of approximately 16,500 cubic yards on the north side of the present tracks as shown on said Profile, while the Contractor herein will make the remainder of the fill required on the north side of the present tracks and all the fill on the south side thereof.

Should the said drawings or specifications in any way conflict with or differ from the general

Neutral Exhibit A.

provisions of this contract, the latter shall govern.

10 Any work or materials which are not shown upon the drawings but which are mentioned in the specifications, or *vice versa*, or any incidental work or materials not expressly set forth in either, but which are reasonably implied or which are necessary for the full and proper completion of the WORK, must be performed, or furnished and installed by the Contractor the same as though specifically shown and mentioned in both the drawings and specifications.

20 Detail drawings shall be followed in preference to general plans and figured dimensions shall be followed in preference to scale measurements. All lines, measurements, levels and dimensions must be checked and verified by the Contractor at the site of the WORK.

Any additional drawings or specifications which may be required to illustrate or explain the WORK, shall be furnished by the Engineer, and the Contractor agrees to conform to and abide by the same, so far as they may be consistent with the original drawings and specifications above referred to.

30 It is understood and agreed that all statements and representations contained in this contract, or made at any time by the Engineer or other representative of the Railroad Company, relating to the amount or quantity of the WORK, or any part or parts thereof, are approximate only and any inaccuracy or discrepancy therein shall in no way subject the Railroad Company to damages or relieve the Contractor from full responsibility and liability in fulfilling all the terms of this contract.

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Neutral Exhibit A.

The Railroad Company, when in the judgment of the Chief Engineer it shall become necessary, will permit crossings of its tracks at grade, to be used in moving excavated material from one side of the right of way to the other.

Where additional construction tracks, in the judgment of the Chief Engineer of the Railroad Company shall be necessary and shall be required by the Contractor, the Railroad Company will lay such additional tracks and the Contractor shall pay to the Railroad Company the actual cost thereof. 10

Should the Contractor desire to re-handle any material by work train after such materials are once delivered on side-tracks, the cost of such work train, in accordance with the Railroad Company's regular schedule, will be borne by the Contractor. 20

SECOND:—All materials furnished by the Contractor hereunder, shall be the best of their several kinds, and satisfactory to the Engineer who shall have the right to subject them to such tests as he may desire. Where particulars kinds or brands of materials are mentioned in the specifications or shown on the drawings, no substitutions shall be made for the kinds or brands so mentioned or shown, except upon the written approval thereof of the Engineer. All the work shall be done by skilled workmen, in the most substantial and workmanlike manner, in strict accordance with the specifications and drawings, and subject to the direction and approval of the Engineer, who shall have the right to subject the WORK, or any part thereof, to such tests as he may desire. 30

Neutral Exhibit A.

The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the WORK by the Engineer, both at the site of the WORK and at the mills or shops where any materials or fixtures may be in the course of manufacture, construction or preparation.

10 The Engineer shall have the right to condemn and reject any materials furnished or work done by the Contractor hereunder, which shall in the opinion of the Engineer be improper or unsound, or fail in any way to conform to the drawings and specifications. The Contractor, within twenty-four (24) hours after receiving written notice so to do from the Engineer, shall proceed, at his own expense, to remove from the premises of the Railroad Company all materials,
20 and replace or reconstruct all work, whether finished or unfinished, which the Engineer shall so condemn and reject. If the Contractor shall fail to remove such rejected materials, or to replace or reconstruct such rejected work, in the manner and within the time fixed for so doing by the Engineer, the Railroad Company shall have the right to remove the said materials, or to replace or reconstruct the said work, or cause the same to be removed, replaced or reconstructed,
30 as it may deem expedient, and to charge the expense thereof to the Contractor, and to deduct the amount of such expense from any moneys then due or that may thereafter become due to the Contractor hereunder.

Any omission on the part of the Railroad Company, the Engineer or any Inspector, to condemn or reject any unsatisfactory, improper or unsound materials or work at the time of making any inspection or estimate thereof or any payment hereunder, shall not be deemed a waiver
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Neutral Exhibit A.

by the Railroad Company of its right to condemn and reject said materials or work hereunder; and the Railroad Company shall have the right thereafter to condemn and reject said materials or work, and the Contractor shall thereupon remove, replace or reconstruct the same, as hereinbefore provided. 10

THIRD:—The Railroad Company shall have the right at any time during the progress of the WORK to require the Contractor to make such alterations, omissions, additions or substitutions in or to the WORK as it may desire; and the Contractor agrees to accede to and carry the same into effect, as though originally contracted for hereunder and subject to all the terms and conditions hereof, so far as the same may be applicable. 20

No such alterations, omissions, additions or substitutions, however, shall be made or allowed, nor shall any payment be made by the Railroad Company on account thereof, unless the Engineer shall have given the Contractor a written order therefor, which order shall definitely describe such alterations, omissions, additions or substitutions, and state the amount of money (if any and if then agreed upon or determined as hereinafter in this Article provided), to be paid by the Railroad Company on account thereof, and the time within which any such work shall be completed. Such order shall be signed by both parties hereto and shall thereupon be deemed a part of this contract. 30

If the cost of the WORK to the Contractor shall be increased by reason of any such additions, alterations or substitutions, then the Railroad Company shall pay to the Contractor for and on account thereof, a reasonable sum to be 40

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agreed upon by the parties, which shall be computed upon the basis of the unit prices (if any) specified in Article "Sixth" hereof, so far as the same may be applicable.

10 If the cost of the WORK to the Contractor shall be decreased by reason of any such omissions, alterations or substitutions, then the Contractor shall allow to the Railroad Company for and on account thereof, a reasonable sum to be agreed upon by the parties, which shall be computed upon the basis of the unit prices (if any) specified in Article "Sixth" hereof, so far as the same may be applicable.

20 If the parties shall be unable to agree upon the amount or amounts to be paid by the Railroad Company or allowed by the Contractor for and on account of any such additions, omissions, alterations or substitutions, the question of the amount shall be submitted to two arbitrators, one to be chosen by each party. If these two arbitrators cannot agree, they shall select a third; and the decision of any two of said arbitrators as to the amount of any such payment or allowance shall be conclusive and binding upon both parties. The expense of such arbitration shall be divided equally between the parties hereto.

30 If the Railroad Company, however, shall be unable to agree with the Contractor as to the amount to be paid for and on account of any such work or materials required hereunder, or as to the time within which the same shall be performed or furnished, it shall have the right, at its election, instead of submitting the question to arbitration as aforesaid, to do the said work or furnish the said materials itself, or to contract with any third party for the doing or
40 furnishing thereof, the same as though this con-

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tract did not exist; and in such event the Contractor shall carry on the WORK embraced in this contract in such manner as not to hinder or interfere with the doing of such work or with the workmen or contractors employed by the Railroad Company in connection therewith.

The Contractor shall not have any claim or right of action against the Railroad Company for damages or anticipated profits by reason of any such additions, omissions, alterations or substitutions.

10

FOURTH:—The WORK shall be commenced promptly, and shall be prosecuted with such force of foremen, workmen and laborers as shall be necessary in the opinion of the Engineer to complete the same within the time hereinafter specified for the completion thereof.

20

If at any time in the opinion of the Engineer the Contractor shall refuse, neglect or fail to prosecute the WORK with a force sufficient for its completion within the time hereinafter specified, then the Railroad Company shall have the right upon giving to the Contractor forty-eight (48) hours' notice in writing of its intention so to do, and provided the Contractor shall not within such period of forty-eight (48) hours increase his force as required by the Engineer, to provide and to use and employ upon the WORK such labor, materials, tools and equipment as shall in the opinion of the Engineer be necessary to insure the completion of the WORK within the time hereinafter specified, and to deduct the amount of the cost and expense incurred by the Railroad Company in so doing from any moneys then due or that may thereafter become due the Contractor hereunder.

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The Engineer shall have the right, by notice in writing, to require the Contractor to do any particular work, next in order, included in this contract; and if such work shall not be commenced in place within forty-eight (48) hours after receipt of such notice by the Contractor, 10 the Railroad Company shall have the right to do such work, and to provide such labor, materials, tools and equipment as shall in the opinion of the Engineer be necessary therefor, and to deduct the amount of the cost and expense incurred by the Railroad Company in so doing from any moneys then due or that may thereafter become due the Contractor hereunder.

Where any particular part of the WORK shall be carried on by the Railroad Company under 20 the above provisions of this Article, the Contractor shall continue the performance of the remainder of the WORK in conformity with the terms of this contract, and in such manner as not to hinder or interfere with that part of the WORK so carried on by the Railroad Company, or with contractors or workmen employed by the Railroad Company in connection therewith.

If the Contractor shall at any time abandon 30 the WORK, or shall in the opinion of the Engineer at any time refuse, neglect or fail in any respect to prosecute the WORK with diligence and promptness or in accordance with the drawings and specifications hereof, or to abide by and perform any of the provisions of this contract or any proper directions of the Engineer relating to the WORK, or if the Contractor shall be adjudged a bankrupt, or make a general assignment for the benefit of creditors, or if the tools, equipment or materials of the Contractor shall be 40 levied upon or taken in execution or under attach-

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ment or by any judicial process whatever, whereby the prosecution of the WORK shall be hindered, delayed or interfered with, then and in any of such events the Railroad Company shall have the right, at its option, upon giving the Contractor written notice of its election so to do, to immediately terminate this contract and the employment of the Contractor hereunder, except as to the following provisions governing the adjustment of the rights and liabilities of the parties upon such termination. 10

Upon such termination of the contract, the Railroad Company shall complete the WORK and shall have the right, for that purpose, to enter upon the premises and take possession of and use all materials, tools and equipment of the Contractor thereon, and to re-let the WORK or otherwise arrange for the completion thereof upon such terms as it shall deem best for its interests. Upon such termination of the contract the Contractor shall not be entitled to receive any further payment hereunder until the WORK shall have been entirely completed by the Railroad Company. Upon the completion of the WORK the Engineer shall: 20

- (a) Compute the total amount that would have been paid to the Contractor for the full performance and completion of the WORK hereunder, had the WORK been completed by the Contractor in accordance with the provisions of this contract, and shall then deduct from such total amount any sum or sums which shall have been paid to the Contractor hereunder in part payment for work done up to said termination of the contract. 30

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- (b) Compute the cost and expense incurred by the Railroad Company in completing the WORK.

10 If the amount of the cost and expense, computed under subdivision "(b)" shall exceed the remainder arrived at under subdivision "(a)," then the Contractor shall pay such excess to the Railroad Company, and the Railroad Company, its successors and assigns, shall have a right of action to recover the amount thereof from the Contractor and his surety.

20 But if the remainder arrived at under subdivision "(a)" shall exceed the amount of the cost and expense computed under subdivision "(b)," then the Railroad Company shall pay such excess to the Contractor.

The computations made by the Engineer as aforesaid, being just and impartial, shall be conclusive and binding upon both parties.

30 Upon the completion of the WORK, the Railroad Company shall return to the Contractor at the site of the WORK, the tools, equipment, etc., of the Contractor so appropriated by it, in as good condition as when appropriated, natural wear and tear and damage by the elements excepted, and all surplus materials of the Contractor so appropriated by it remaining unused upon the completion of the WORK.

40 In case the Contractor shall abandon the WORK or shall refuse, fail or neglect to prosecute the WORK or shall in any way make default in the performance of this contract as aforesaid, the Railroad Company shall be under no obligation to complete the WORK under the provisions and conditions in this Article "Fourth" contained; but the Railroad Company

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shall have the right in such case, at its option, to proceed independently of the foregoing provisions and conditions of this Article and without being bound thereby, and to hold the Contractor liable for such damages as the Railroad Company may sustain by reason of such refusal, failure, neglect, abandonment or default on the part of the Contractor, and the Railroad Company shall be deemed to have elected to so proceed unless it shall have given the Contractor written notice of its election to complete the WORK under and in accordance with the provisions of this Article "Fourth."

FIFTH:—The WORK shall be fully completed in accordance with the drawings, specifications and provisions hereof and to the entire satisfaction of the Railroad Company and the Engineer, on or before January 1, 1928.

If the Railroad Company, pursuant to Article "THIRD" hereof, shall require any alterations, additions or substitutions in or to the WORK which shall necessitate the doing by the Contractor of a greater amount of work than originally required hereunder, the Contractor shall be allowed a reasonable time for the completion of said work in addition to the time above specified, which reasonable time shall be agreed upon by the parties at the time such extra work shall be ordered, and shall be specified in the order given for such work, and as so agreed upon shall be conclusive and binding upon the parties.

Moreover, if the Contractor shall be delayed in the prosecution or completion of the WORK, or any part thereof, by the neglect or fault of the Railroad Company, or by acts of God, fire, strikes or other causes beyond the control of the

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Contractor and which could not have been reasonably foreseen and avoided by the Contractor, then the time hereinbefore fixed for the completion of the WORK, or that part thereof so delayed, shall be extended for a period of time equal to the time lost by reason of any or all of the causes aforesaid. Such extended period of time shall be determined by the Engineer; but no extension of time shall be made or allowed unless a claim shall be made therefor in writing to the Engineer within forty-eight (48) hours after the commencement of such delay.

The Contractor shall not be entitled to recover damages from the Railroad Company for or by reason of delay in the completion of the WORK, due to or caused by any neglect or fault of the Railroad Company; and an extension of time for the completion of the WORK as above provided, shall constitute the sole right and remedy of the Contractor in the case of such delay.

SIXTH:—In consideration of the doing and completion of the WORK herein specified, and the proper performance by the Contractor of all the agreements herein contained on his part to be kept and performed, the Railroad Company agrees to pay to the Contractor, the following unit prices:

(Here follows typewritten list of items and prices)

Payments hereunder shall be made by the Railroad Company in current funds, in instalments, as follows:

On or about the first day of each month during the progress of the WORK, an estimate shall be made by the Engineer, or such assistant as he may designate, of the relative value of all the

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work done hereunder during the preceding month and ninety per centum (90%) of the amount of said estimate shall be paid to the Contractor on or before the twentieth day of the month following the month in which said work shall have been done, at such place as the Treasurer or Disbursing Agent of the Railroad Company shall designate. Payment shall not be made for materials, whether delivered or not, until they shall have been put into the WORK. 10

When the WORK shall have been fully completed in accordance with the specifications, drawings and provisions hereof, and to the satisfaction and acceptance of the Engineer, a final estimate shall be made of the quantity, character and value of the WORK, according to the terms of this contract, and the balance then appearing to be due the Contractor hereunder shall be paid to him within thirty (30) days after the completion of said estimate, upon his giving to the Railroad Company a release under seal from all claims and demands whatsoever, growing in any manner out of this contract, and upon his furnishing the Railroad Company with satisfactory evidence that all persons who have done work or furnished materials in connection with the WORK have been fully paid or satisfactorily secured. 20 30

No certificate given or payment made under this contract shall be conclusive evidence of the proper performance of the WORK, either wholly or in part, or be construed as conclusive acceptance by the Railroad Company or the Engineer of improper materials or imperfect work.

Upon the execution and delivery of this Contract, the Contractor shall deliver to the Railroad Company a good and sufficient bond, with sure- 40

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ties to be approved by it, in the sum of One hundred and thirty-five thousand dollars (\$135,000.00), conditioned upon the due and proper performance and completion of this Contract in accordance with the terms and conditions thereof. The cost of procuring such bond shall be added to the cost of the WORK hereinbefore specified and shall be paid by the Railroad Company.

SEVENTH:—The Contractor agrees to indemnify and save harmless the Railroad Company from and against any and all liens which may be filed upon or against the property of the Railroad Company by sub-contractors, laborers or materialmen, for work done, labor performed or materials furnished in connection with the WORK, and from and against any and all claims by sub-contractors, laborers or materialmen for work done, labor performed or materials furnished in connection with the WORK, which are chargeable to the Contractor or any sub-contractor, and from and against any and all loss, damages, costs, expense or liability that the Railroad Company may sustain, incur or be subjected to by reason of any such liens or claims.

If at any time there shall be any evidence of any such liens or claims, the Railroad Company shall have the right, at its option, to retain out of any moneys then due or thereafter becoming due the Contractor hereunder, such an amount as it may deem necessary to indemnify and protect itself from and against any such liens or claims, and any costs or expense that it might sustain, incur or be subjected to in connection therewith, until said liens or claims shall be fully satisfied and discharged by the Contractor, or

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the Railroad Company secured therefrom to its satisfaction.

The Contractor agrees to file with the Railroad Company from time to time, when so required by the Railroad Company, an affidavit stating the names of all sub-contractors, laborers and materialmen, at any time employed in connection with the WORK, and the amounts then due or thereafter to become due to each of them for work done, labor performed or materials furnished. 10

The Contractor also agrees to furnish and deliver to the Railroad Company, whenever so required by the Railroad Company, official searches, or a search and certificate of a Title Guaranty and Abstract Company, showing that the WORK and premises of the Railroad Company are free from liens and claims arising out of the WORK. 20

EIGHTH:—The Contractor shall not sub-let or transfer the WORK, or any part thereof (materials excepted), to any person, firm or corporation, without the consent in writing of the Engineer. If the WORK, or any part or parts thereof, shall be sub-let or transferred to any person, firm or corporation with the consent in writing of the Engineer, the Contractor shall still be responsible for the proper construction and performance of the WORK, or the part or parts thereof, which shall be so sub-let or transferred, and shall be responsible and liable for the failure of any sub-contractor to comply with all the agreements and conditions herein contained, applicable to the WORK, or to the part or parts thereof, sub-let or transferred to such sub-contractor. 30

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The Contractor shall give the WORK all necessary personal attention and shall have at all times at least one competent and responsible representative upon the WORK, who shall be satisfactory to the Engineer, and all instructions and notices given to such representative shall be of the same effect as if given to the Contractor directly.

The Contractor shall remove from the WORK any foreman or workman who shall, in the opinion of the Engineer, be incompetent, careless, or for any other reason whatsoever, unsatisfactory to the Engineer.

NINTH: The WORK, and all materials furnished by the Contractor, whether the same shall have gone into the WORK or not, and all tools and equipment of the Contractor, shall be in full charge of the Contractor, and the Contractor hereby assumes all risk of loss, destruction or damage thereto, or to any part or parts thereof, until the WORK shall have been finally completed by the Contractor and accepted by the Railroad Company as evidenced by the final certificate of the Engineer, and thereafter, as to all tools, equipment and surplus materials of the Contractor, until the same shall have been removed from the premises of the Railroad Company, except such loss, damage or destruction as may result from the acts of the Railroad Company, its servants or employes; and the Contractor agrees, at his own cost and expense, to replace, repair or reconstruct and make good any part or parts of the WORK that may be lost, damaged or destroyed except as aforesaid.

TENTH:—Particular care shall be taken by the Contractor of all finished work, which work

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must be covered when necessary and thoroughly protected from injury or defacement during the progress of the WORK.

All refuse material and rubbish that may accumulate during the progress of the WORK shall be removed by the Contractor from the premises of the Railroad Company, from time to time as may be directed by the Engineer; and upon the completion of the WORK the Contractor shall clean up the WORK and adjoining premises as soon as it is practicable so to do and remove therefrom all surplus materials, tools, equipment and rubbish resulting from the WORK and leave the WORK and premises in a clean and neat condition. 10

ELEVENTH:—The Contractor agrees to obtain and pay for all necessary municipal or state permits for carrying on the WORK. 20

The Contractor agrees to observe all state and municipal laws, ordinances and regulations in any way bearing upon the WORK, the performance thereof, the protection of persons or property from injury or damage arising therefrom, or sanitary conditions in connection therewith; and agrees to safely erect and maintain all scaffolding, employ all necessary watchmen, provide all necessary lights, and to take, use, provide and employ all other protection, safeguards and precautions to prevent loss of life or property or injury or damage to person or property during the progress of or in connection with the WORK; and hereby assumes all risk of and responsibility for, and agrees to indemnify and save harmless the Railroad Company from and against any and all loss of life or property of, or injury or damage to the person or property of any person 30
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or persons (including corporations), whomsoever, whether such person or persons be the Railroad Company, the Contractor, an agent or employe of the Railroad Company, a sub-contractor employed by the Contractor in or about the WORK, an agent or employe of the Contractor or of any
10 such sub-contractor, a shipper or passenger on or over the railroad of the Railroad Company, or any third person in nowise connected with the parties hereto or the performance of the WORK, which loss of life or property, or injury or damage to person or property, shall be due to, arise out of, result from or be in any way connected with the WORK or the performance or lack of performance thereof, or any act or omission of the Contractor or of any sub-contractor or of any agent or employe of the Contractor or any sub-contractor in connection there-
20 with, and whether such loss of life or property, or injury or damage to person or property, shall be due to or caused by the negligence of the Contractor or of any sub-contractor or of any agent or employe of the Contractor or any sub-contractor, or otherwise; and agrees to indemnify and save harmless the Railroad Company from and against any and all claims, demands, actions, damages, losses, costs, fines, penalties,
30 expenses and liability of every name and nature (including all reasonable expenses incurred by the Railroad Company in defending any such actions, claim or demands), which may arise or result, directly or indirectly, from or by reason of any such loss of life or property, or injury or damage to person or property, or from or by reason of the failure of the Contractor to fully keep, perform and fulfill each and every clause, agreement and condition hereinbefore in this
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Article "Eleventh" contained, on his part to be kept, performed and fulfilled.

The Contractor agrees to indemnify and save harmless the Railroad Company from and against any and all infringements of any patent right or rights in any article, device or process used in, upon or in connection with the WORK, and from and against any and all claims, demands, actions, damages, costs, penalties, expenses and liability of every name and nature (including all reasonable expenses incurred by the Railroad Company in defending any such actions, claims or demands), which may arise or result, directly or indirectly, from or by reason of any such infringement. 10

TWELFTH:—The Railroad Company agrees to transport over its lines for the Contractor, free of freight charges, to point or points at or near the site of the WORK, where the Railroad Company or the Contractor shall have available side-tracks for unloading carload freight, and there deliver to the Contractor on cars, all materials, tools and equipment of the Contractor intended to be used in connection with the WORK. Less than carload shipments may, at the option of the Railroad Company, be delivered through its freight house nearest the site of the WORK. 20 30

The Railroad Company also agrees to transport and return over its lines for the Contractor, free of freight charges, from the site of the WORK to the point or points on its lines from which the same shall have been shipped to the site of the WORK (but not otherwise), and there deliver to the Contractor on cars, the equipment and tools (but not surplus materials) of the Contractor that shall have been transported 40

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to the site of the WORK by the Railroad Company, with the *bona fide* intention on the part of the Contractor of using the same in connection with the WORK, provided, however, that the return movement of such equipment and tools, and every part thereof, shall be commenced within thirty (30) days after the completion of the WORK, as evidenced by the final certificate of the Engineer. All such returned tools and equipment must be loaded in the presence of a representative of the Engineer.

The decision of the Engineer as to whether such tools, equipment and materials shall have been in fact transported to the site of the WORK with the *bona fide* intention on the part of the Contractor of using the same in connection with the WORK, shall be conclusive and binding upon the parties.

The Contractor shall pay full tariff rates of freight, both to and from the site of the WORK, upon all materials which shall be condemned and rejected by the Engineer as being unsound or improper. Condemned materials shall not be loaded upon the same car with shipments entitled to transportation hereunder.

All materials, tools and equipment transported hereunder, must be billed in the name of and consigned to the Contractor, or as otherwise directed by the Railroad Company; and if not so billed and consigned, all freight charges must be paid thereon.

The Contractor agrees to pay all demurrage charges that shall accrue on cars containing materials, tools or equipment transported by the Railroad Company hereunder, in accordance with the Demurrage Rules of the Railroad Company in force at the time.

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The Railroad Company also agrees to transport over its lines to and from the site of the WORK, free of tariff charges, Ottomar Stange and one Superintendent and one Timekeeper to be nominated by him when such persons shall travel over its said lines in furtherance of or in connection with the proper performance of this contract, subject, however, to such limitations and conditions as the Railroad Company may from time to time prescribe. 10

It is hereby agreed by and between the parties that as to the transportation of the materials, tools and equipment of the Contractor or the transportation of persons, as hereinbefore provided, the Railroad Company shall not be deemed to be or to be acting as a common carrier; but such transportation of materials, tools, equipment and persons shall be considered as a part of the WORK included in this contract, which the Railroad Company has assumed. 20

The Contractor hereby releases the Railroad Company, and all Companies whose lines are leased or operated by it, from any and all claims, demands, actions, causes of action or liability for or by reason of loss, damage, injury or delay to the materials, tools or equipment of the Contractor transported as hereinbefore provided, whether such loss, damage, injury or delay shall be due to or caused by the negligence of the Railroad Company, or of any of the said Companies whose lines are leased or operated by it, its or their or any of their agents or employees or otherwise. 30

The Contractor agrees to release, indemnify and save harmless the Railroad Company, and all Companies whose lines are leased or oper- 40

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ated by it, from and against any and all loss of life or property of or damage or injury to the person or property of persons transported as hereinbefore provided, whether such loss, damage or injury shall be due to or caused by the negligence of the Railroad Company, or of any
10 of the said Companies whose lines are leased or operated by it, its or their or any of their agents or employees or otherwise, and from and against any and all claims, demands, liability, actions, damages, losses, costs and expense of every name and nature (including all reasonable expenses incurred by the Railroad Company in defending any such actions, claims or demands, which may arise or result, directly or indirectly, from or by reason of any such loss,
20 damage or injury.

THIRTEENTH:—If the WORK (including any additional work performed under Article THIRD hereof) or any part thereof, shall be carried on in proximity to existing operating tracks of the Railroad Company, the Contractor shall perform said WORK in such manner and with such care as not to interfere in any way with such operating tracks or the passage of trains cars or engines thereover, in accordance
30 with regular schedule time, and will provide and pay a sufficient number of qualified watchmen to protect the tracks at such points. The Contractor further agrees that he will perform said WORK in such manner and with such care as not to interfere in any way with telephone or telegraph lines along said operating tracks, or with any underground conduits, pipes, sewers and cables.

The Railroad Company shall furnish a flagman
40 to protect grade crossings of the tracks of the

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Railroad Company used in moving excavated material from one side of the right of way to the other in accordance with Article FIRST of this agreement.

In case there shall, in the opinion of the Engineer, be any unnecessary interference by the Contractor with such tracks or telephone or telegraph lines, or with any underground conduits, pipes, sewers and cables, the Railroad Company shall have the right to forthwith summarily terminate and cancel this Contract (except with respect to the provisions governing the adjustments of the rights and liabilities of the parties upon such termination) without other notice to the Contractor of its election so to do than a written notice to that effect; and upon such termination and cancellation of the Contract, the rights and liabilities of the parties hereto shall be determined and adjusted upon the basis of and in accordance with the provisions contained in Article FOURTH hereof.

The Contractor shall under no circumstances use, or caused to be blocked, any operating track of the Railroad Company unless specifically authorized by a written permission of the Engineer. When the use of any operating track is desired, a notice shall be given the Engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the Work, it is impossible to carry on the Work without the use thereof. Movements of cars or equipment (belonging to the Contractor) on an operating track will be permitted only when handled by an engine and crew of the Railroad Company, for which the Railroad Company will charge the Contractor in accordance with the prevailing

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schedule of rates as filed in the office of the General Superintendent of the Railroad Company, and the Contractor agrees to pay such charges promptly upon the receipt of the Railroad Company's bills therefor.

10 FOURTEENTH:—The Railroad Company shall have the right at all times to retain out of any moneys due the Contractor hereunder, such sum or sums as it shall deem necessary to protect and indemnify itself against any liens, claims or suits for damages against the Railroad Company for which the Contractor shall be liable or from and against which the Contractor has hereinbefore agreed to indemnify and save harmless the Railroad Company, until
20 such liens, claims or suits shall be settled by the Contractor, or the Railroad Company secured therefrom to its satisfaction, and further to retain out of any such moneys the amount of any loss, damage or expense which the Railroad Company shall have sustained or incurred by reason of the failure of the Contractor to perform any of the agreements herein contained on his part to be kept and performed.

30 FIFTEENTH:—The parties hereto agree that in the event of any dispute between the Contractor and the Railroad Company as to the meaning or construction of the drawings or specifications of this contract, or with reference to the WORK, or any part thereof, the decision of the Engineer, being just and impartial, shall be conclusive and binding upon both parties, and each of the said parties does hereby waive any right of action or remedy, in law or otherwise, in connection with any such matter or thing which shall have been so passed upon and
40 decided by the Engineer.

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SIXTEENTH :—Wherever the word “WORK” is used in this contract it is understood and agreed to mean and include all the materials, work and construction of every kind, nature and description to be furnished, done or performed by the Contractor under this contract.

Wherever the word “Engineer” or “Chief Engineer” is used in this contract, it is understood and agreed to mean the Chief Engineer for the time being of the Railroad Company, or his duly authorized agent, limited to the particular duties assigned to him. 10

Wherever the word “Architect” is used in the specifications of this contract, it is understood and agreed to mean the Architect for the time being of the Railroad Company, or his duly authorized agent, limited to the particular duties assigned to him. 20

The pronouns “his” and “him” are used in this contract to refer to the Contractor, whether the Contractor be one or more individuals, a co-partnership or a corporation.

SEVENTEENTH: This agreement shall bind and inure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed, in duplicate, the day and year first above written. 30

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

By G. J. Ray
Chief Engineer.

O.K.

J.L.S.

Ottomar Stange (L. s.)

Anna A. Stange (L. s.) 40

*Exhibit P. 1.***EXHIBIT P. 1.**

STATE OF NEW JERSEY, }
 (SEAL) } ss.
 COUNTY OF MORRIS. }

10 I, William H. Thompson, Surrogate of the
 County of Morris, do certify that on the Second
 day of November, in the year of our Lord one
 thousand nine hundred and twenty-seven, Ad-
 ministration Ad Prosequendum was granted by
 me to Margaret M. Sullivan, of the Borough of
 Rockaway, Morris County, New Jersey, for the
 purpose of enabling her to prosecute an alleged
 claim of the widow, and next of kin of the said
 Timothy F. Sullivan, against Delaware, Lacka-
 20 wanna & Western Railroad Company, who it is
 alleged caused the death of the said Timothy F.
 Sullivan, by its wrongful act, neglect or default.

Witness my hand and Seal of Office, the
 Second day of November, in the year of our
 Lord one thousand nine hundred and twenty-
 seven.

William H. Thompson,
 Surrogate.

(SEAL)

30 By Harry R. Thupe
 Deputy Surrogate.

Exhibit P. 1.

NOTICE

These letters of administration do not authorize the administrator hereby appointed to receive any moneys in settlement of any claim for damages, either before or after suit, or to collect claims against the estate of his intestate or to receive assets of said estate; but are issued for the sole purpose of enabling the said administrator to prosecute a claim for damages alleged to have been sustained by reason of his intestate's death, having been caused by the wrongful act, neglect or default of the person herein named. See P. L. 1917—Chapter 180.

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*Exhibit P. 2.***EXHIBIT P. 2.**

(SEAL)

Certified Copy of
RECORD OF DEATHMunicipality of Rockaway, County of Morris,
10 N. J.

Name of Deceased Timothy P Sullivan

Date of Death October 22, 1927

Month Day Year

Place of Death Denville Twp., Sex m, Color w,
Age 32 yr 9 mo 17 da.

Married, Married

Occupation Timekeeper for Stange Construction
Co Place of Birth Hartford ConnCause of Death Fracture of Skull, Struck by
20 Railroad TrainName of Parents Michael Sullivan, Ellen English
Medical Attendant Chas A Righter coroner
Undertaker G B WhithamPlace of Death Denville Twp., Sex m, Color w,
Cemetery Hartford Conn.

Rockaway, N. J., Nov. 9 1927

I hereby certify that the above is correctly
copied from the records of Deaths on file in this
office.30 (SEAL) Llewellyn Decker
Registrar of Vital Statistics, Municipality of
Rockaway, County of Morris, State of
New Jersey

*Exhibit P. 5.***EXHIBIT P. 5.**STANGE CONSTRUCTION CO.
Philadelphia, Pa.

STATEMENT OF ACCOUNT

Voucher No. 5-110		Check No. G-4672		10
Date of Bill	Description of Claim	Gross Amt.	Freight	Discount
	Pay to June 1st, inclusive	71.40		Net Amount
		7.00		
		<u>78.40</u>		

If Settlement Is Not Satisfactory, Return Both Statement and Check
to Stange Construction Co., Philadelphia, Pa.
Please Detach Check Before Presentation at Bank

STANGE CONSTRUCTION CO. 20
Philadelphia, Pa.

STATEMENT OF ACCOUNT

Voucher No. 6-41		Check No. G-4758	
Date of Bill	Description of Claim	Gross Amt.	Freight
	Pay to 6/15/27 inclusive	100.00	Discount
			Net Amount

If Settlement Is Not Satisfactory, Return Both Statement and Check
to Stange Construction Co., Philadelphia, Pa.
Please Detach Check Before Presentation at Bank

STANGE CONSTRUCTION CO. 30
Philadelphia, Pa.

STATEMENT OF ACCOUNT

Voucher No. 6-113		Check No. G-4901	
Date of Bill	Description of Claim	Gross Amt.	Freight
	Pay 6/16 to 6/29/27 inclusive	100.00	Discount
			Net Amount

If Settlement Is Not Satisfactory, Return Both Statement and Check
to Stange Construction Co., Philadelphia, Pa.
Please Detach Check Before Presentation at Bank

40

Exhibit P. 5.

STANGE CONSTRUCTION CO.
Philadelphia, Pa.

STATEMENT OF ACCOUNT

Voucher No. 9-148

Check No. G-5708

Date of Bill	Description of Claim	Gross Amt.	Freight	Discount	Net Amount
	Pay 9/22 to 10/5/27 inclusive	100.00			10

If Settlement Is Not Satisfactory, Return Both Statement and Check
to Stange Construction Co., Philadelphia, Pa.
Please Detach Check Before Presentation at Bank

STANGE CONSTRUCTION CO.
Philadelphia, Pa.

STATEMENT OF ACCOUNT

Voucher No. 9-77

Check No. G-5576

Date of Bill	Description of Claim	Gross Amt.	Freight	Discount	Net Amount
	Pay 9/8 to 9/21/27 inclusive	100.00			20

If Settlement Is Not Satisfactory, Return Both Statement and Check
to Stange Construction Co., Philadelphia, Pa.
Please Detach Check Before Presentation at Bank

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01

02

03

New Jersey Court of Errors and Appeals

MARGARET M. SULLIVAN, ad-
ministratrix *ad prosequendum*
of the Estate of Timothy F.
Sullivan,

Plaintiff-Appellant,

vs.

DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
a corporation of the State of
Pennsylvania,

Defendant-Appellee.

*Action
at Law.*

BRIEF FOR PLAINTIFF-APPELLANT.

(1)

Statement of the Case.

This is an appeal from a judgment of non-suit entered in the Morris County Circuit Court on June 20, 1928 (R. 111) in an action brought therein by the plaintiff-appellant (*administratrix ad prosequendum*), against the defendant-appellee to recover damages for the death of Timothy F. Sullivan on October 22, 1927, alleged to have been caused by the negligence of the defendant through its servants and agents in operating a railroad train at high speed and without ringing a bell or blowing a whistle to give warning to the deceased of its approach.

The decedent was a timekeeper employed by the Stange Construction Company, which had a contract, dated April 1, 1927 (Neutral Exhibit "A," R. 120) for excavating and grading the right of way of the railroad company between

a point east of Denville Station and a point east of Dover in the Township of Denville, Morris County, New Jersey, for the purpose of constructing two additional operating tracks.

In the performance of his duties as timekeeper and as keeper of records for the construction company of work performed and materials received, the decedent on the day of the accident, according to his custom and practice, had arrived at that part of the work, then being carried on in the vicinity of Franklin Road bridge in said Township, at about 7:20 A. M. He left his automobile near the roadway and went down into the cut where the railroad was located, for the purpose of taking the records on two steam shovels that were engaged at that point. He had taken the time of the men on what is called the small steam shovel, located easterly of and near the bridge, and was proceeding thence easterly toward the large steam shovel, located about 200 feet east of the small shovel. Owing to the fact that the steam shovels were working close beside the eastbound track and had torn up the ground in such a condition as to render it impracticable and unsafe for him to proceed on that side of the railroad, he crossed over the tracks to the opposite (north) side of the railroad and was walking on the outside of the westbound track along a retaining wall, in accordance with the practice of men thus employed on the railroad to walk in the opposite direction of the traffic, so as to be able to observe the approach of trains. While he was proceeding in this manner from one steam shovel to another, an eastbound passenger train of the defendant approached at a high rate of speed on the westbound track without giving any signal by bell or whistle and struck and killed him.

(2)

Grounds of Appeal.

The grounds of appeal asserted and intended to be argued are as follows:

1. The Trial Court erroneously ordered that judgment of non-suit be entered in favor of the defendant and against the plaintiff.

2. The Trial Court erroneously ordered that judgment of non-suit be entered in favor of the defendant and against the plaintiff for the following reason:

“The motion will be granted therefore upon the theory that in law the decedent was a licensee and not an invitee, express or implied, of the defendant company.”

3. The Trial Court erroneously refused to submit to the jury the question whether the defendant was negligent, as alleged in the complaint, and whether such negligence was the proximate cause of the accident alleged in the complaint.

4. The Trial Court erroneously refused to submit to the jury the question whether the accident alleged in the complaint was proximately caused by the contributory negligence of the plaintiff's intestate (R. 118).

ARGUMENT.**Summary of the Testimony.**

(a)

The Work.

On October 22, 1927, Timothy F. Sullivan, plaintiff's deceased, was killed by a passenger train of the defendant-appellee (Exhibit P. 2, R. 148). He was 31 years of age and left as his

dependents, his widow, aged 28, a boy 2 years of age, and a child, born three months after his death (R. 90).

Sullivan was employed as timekeeper (R. 71) at a salary of \$50 per week (R. 89) by Stange Construction Company, the contractor, who was carrying on the work of excavating and grading a roadbed for two additional tracks on the railroad of defendant from a point about 4,000 feet westerly of Mountain Lakes Station and extending westerly about five miles to a point about 1,000 feet easterly of Mile Post 37.

The work included the foundation excavations for the concrete work and other work for the construction of certain bridges; removing old masonry; excavation for main line grading; ditching street grading, all in the manner and at the locations specified in the specifications and drawings (Exhibit A, R. 121).

Attached to the contract was a plan of the proposed 3rd and 4th tracks from Boonton to East Dover Junction, dated January 31, 1927, upon which the excavation work is indicated in red, and the fills are indicated in yellow. The section covered by this contract is known as Section 2, and is shown on the map as beginning just east of the Bloomfield avenue undercrossing at Fox Hill. There was also attached to the contract a profile map, dated January 31, 1927, marked "Sheet No. 2," showing the location and cubic yardage of all excavations and fills; the former being indicated in red, and the latter in yellow, as on the plan.

The accident involved in this case occurred near the Franklin Road Bridge, carrying the highway leading from Rockaway to Franklin

across the top of the railroad cut at that point, as indicated at Station 36 on the Profile Map.

The work was begun in March, 1927. The new tracks practically paralleled the existing tracks. At certain places one new track was to be on one side and one on the other side of the existing tracks (R. 24, 27). At the point of the accident the work was being done on the south side of the two existing main line tracks (R. 25). At that place there was a cut, as shown on the right-hand side of the photograph Exhibit P. 3 (which shows the physical conditions as they existed on the day of the accident), and the excavation was being done by two steam shovels (R. 25, 31); one, called the "big" shovel, located about 400 feet east of the bridge and the other called the "little" shovel located between the big shovel and the bridge (R. 54).

Excavations had already been made and the concrete abutments put in for the bridge (known as Franklin Road Crossing, R. 74) shown in Exhibit P. 3 (R. 25). Blasting was being done in a rock cut just a little further around the curve (easterly) where employees of the railroad company were stationed to warn the men (R. 31). Men were working on both sides of the railroad right of way (R. 42). Some men were at a little shanty located on the north side of the tracks west of the steam shovels (R. 41, Exhibit P. 4), and others were at the dam about half a mile east of and on the same side of the tracks as the shovels (R. 56).

At the place of the accident all of the contractor's apparatus was on the left (south) side of the railroad tracks (R. 51), (Exhibit P. 3), on the inside of a curve of the railroad (R. 47, 70). On the opposite side, at a distance of

about seven or eight feet from the centre (or about four feet from the most northerly rail, R. 44) of the westbound (northerly) track, there is a retaining wall about 400 or 500 feet long extending easterly from the bridge. Above the retaining wall, the bank slopes up approximately fifteen feet to the right-of-way fence. On the side, where the shovels were working, there had been a similar retaining wall but it had been taken out. One (vertical) cut had been made and a narrow gauge track laid in that cut just alongside the main line track (R. 69). The shovels were digging a second cut and throwing the dirt in the cars on the narrow gauge track (R. 31).

The regular working hours for men and equipment on the work each day were from 7 A. M. to 12 noon and from 12:30 to 5:30 P. M. (R. 73).

(b)

Physical Conditions.

The physical conditions at the place where the steam shovels were working are shown in Exhibit P. 3, and are also described in the testimony. The steam shovels were digging (R. 31) and throwing the dirt in cars. Just a little further around the curve toward the east blasting was being done in the rock cut (R. 31). Cars were moved on the narrow gauge track located alongside the main line track to carry dirt from the shovels westerly through and beyond the bridge where it was used as fill. The ground in the bottom of the cut was very wet. The contractor had a lot of trouble there. The ground was sandy material and full of water (R. 69). The embankment, from which the shovels were digging

the dirt (R. 78) was loose, except right at the bridge, and took in the side where the swamp was. The soil was loose and was being torn up by the steam shovels (R. 79). In passing from one shovel to the other it was necessary to cross the main line tracks if one went where he had the best walking.* On south side the construction work was going on and hip boots would be needed to get through there. There was an old retaining wall taken down and a cut over there (R. 87). The witness, John W. English, a railroad contractor of 41 years' experience (R. 82) and who was on this work in the afternoon of the same day Sullivan was killed (R. 85) described the physical conditions existing on the south side of the railroad tracks where the shovels were working, and gave his opinion that a man would be in a "big hazard" if he tried to go through there from one shovel to the other (R. 87).

(c)

Sullivan's Duties.

Sullivan was a trained accountant who had previously worked for eleven years for a New York firm of railroad contractors, practically entirely on railroad work, where he kept the costs of the business as timekeeper and accountant. Many of the jobs he was on were similar to the one in question. He was a very good timekeeper because he knew a whole lot about the work. He was a young man of good health, was always physically fit and never missed a day during the eleven years he worked for his former employer (R. 87). His hearing was normal (R. 71). He never took a drink, was regular in his habits and steady on his work (R. 87, 88), Sundays as

well as weekdays (R. 89) and, that he had the ordinary expectancy according to the Carlisle Tables, was admitted by the defendants (R. 93).

A picture of the Sullivan family as it was constituted in August, 1927, was admitted in evidence (Exhibit P. 6). (R-92.)

Four or five months before the accident, Sullivan left the employ of the New York contracting firm and entered the employ of Stange Construction Company as timekeeper on the work in question (R. 82). His duties were to take records of the time of the men and equipment (R. 71), check materials both in the office and on the work (R. 72), and keep a record of the materials received and needed at the various points along the job (71) extending from a point a little west of the Franklin Road bridge to a point one-half or three-quarters of a mile below Denville Station (R. 31). Sand and gravel came in carload lots and orders for its distribution were given to Sullivan to be carried out. At the time of the accident he was also taking care of the records (R. 71) in the office of the contractor (R. 72) located on the north side of the tracks at Denville Station about, two miles east of the Franklin Road bridge (R. 74).

It was Sullivan's duty to take a record of the men's time at 7 A. M. when they went to work, and at 4 P. M. each day (R. 72) and he usually performed this work at the Franklin Road bridge at around 7 A. M. and 4 P. M. (R. 40, 72). When not checking time and materials on the work, he was busy in the office (R. 72).

(d)

Sullivan's Custom.

Mr. Goddard testified:

He had been on this work for a little over four months prior to the accident (R. 40); and operated the big shovel (R. 40) which was working on the eastbound (south) side of the railroad tracks about 400 feet east of the Franklin Road bridge.

There was another shovel (referred to as the "little" shovel) working on the same side between the big shovel and the bridge (R. 54). He knew Sullivan and saw him most every day (R. 40); Sullivan usually came upon the work in that vicinity at about 7:20 A. M. and took their time at about 7:30 A. M. (R. 41) and again at 4 P. M. (R. 43). Men were working on both sides of the right-of-way (R. 42). In the morning Sullivan always came on the work in an automobile which he left near the bridge on the side toward Rockaway (R. 55) which is on the north side of the railroad. He then crossed the bridge (to the south side) and came down onto the railroad on that side (R. 55), and took the time of the men at the shanty (west of the bridge) shown in the picture (Exhibit P. 4, R-51). Then he took the time of the men on the little shovel, and walked down to the big shovel where Goddard worked. In passing from the little shovel to the big shovel, Sullivan always walked across the tracks (R. 41, 56) to the other side and thence along the railroad right-of-way outside the tracks between the track and the wall (R. 42, 57). On that track the trains go west (from Denville toward Dover); that is their ordinary direction (R. 55). On the other track trains go toward Hoboken (R. 42). Sullivan walked there

every day (R. 43), and the occasion for his passing over the tracks and walking along the westbound, instead of the eastbound, track was to enable him to walk against the traffic (R. 52). He never saw Sullivan pass from the little shovel to the big shovel without crossing the tracks (R. 54).

Mr. Birtwell testified:

He was the Resident Engineer of the contractor, and had supervision of the work (R. 22) from the time it began in March, 1927 (R. 22), until after the accident (R. 72).

Each morning he met Sullivan (who came from his home in Rockaway) (R. 74) and they drove together in an automobile to the Rock Cut (near the Franklin Road bridge). There he left Sullivan and walked down the tracks to the office (R. 29) supervising the work as he went along (R. 22). It was Sullivan's custom to walk down the railroad right-of-way along the westbound track to take the time of the men working on or near the steam shovels along that stretch of the work. He did not always see Sullivan walk down the tracks but when he did see him, Sullivan walked beside the right-of-way on the westbound track (R. 29). This was the natural way for Sullivan to go because there was less room on the inside of the curve where the shovels were working (R. 30). After taking the time of the men at that place Sullivan usually walked down along the westbound track past the rock cut to a bridge about half a mile to the east, where there was a road that continued parallel with the tracks (R. 30). At the time of the accident, the shovels were working along the right-hand side of the track (looking east, as shown on Exhibit P. 3). When the shovels were working Sullivan's cus-

tom was generally the same as above described (R. 31). Sullivan walked on the outside of the curve because it gave him a better view around the curve than he could get from the other (east-bound) track. If trains were coming in the right direction on the track, he could more easily see the train than if he was on the other track (R. 70).

(e)

Workmen on the Track.

As Resident Engineer, Birtwell supervised and superintended the work throughout the entire five mile stretch of the job (R. 22) and had occasion to go from one place to another on the right-of-way of the railroad for the purposes of his business. At times he walked at the side of the tracks and at other times he crossed the tracks (R. 23, 26, 27) at various points whenever it was necessary to get across (R. 24). There was work, being done on both sides of the tracks. At certain places the excavation and grading work for one new track was on one side of the existing tracks and such work for the other new track was on the other side of the existing tracks (R. 24). Blasting was being done in the rock cut just a little further around the curve from where the shovels were working and the railroad employees were stationed there to give warning of the blasts (R. 31). After the blasts (R. 31) were fired, the contractor's men went on the tracks to clear off the debris of the blasting before the next train came (R. 32).

On the occasions when Birtwell went down to that immediate locality, he saw employees of the contractor, who were working on the job, walking on the main tracks of the railroad (R.

66). Sullivan's duties took him around the entire job to take the time of the men at the various points and to check materials and to carry out his orders for their distribution along the work (R. 71). Men were working all along where the shovels were working and where the blasting was being done in the rock cut nearby using the railroad and walking along there all the time (R. 78).

Goddard worked in that immediate locality for four months prior to the accident and he testified that during that time it was the custom for the men engaged in the work of the contractor to walk the tracks against traffic. He saw Sullivan do so frequently (R. 49). Sullivan did so every day (R. 41, 43, 56) and was so walking when he was struck by the train (R. 44). Men were working on both sides of the tracks (R. 42).

(f)

The Accident.

Goddard was the only witness who was present and saw the accident (R. 40). It occurred shortly after 7:20 A. M. on October 22, 1927 (R. 20). Sullivan had come upon the job at the usual time. On that morning Goddard saw Sullivan on the (little) shovel nearest the bridge. Then he saw him leave the little shovel and walk towards Goddard's shovel (R. 43, 56). Sullivan was checking time (R. 72). Sullivan crossed the tracks from the little shovel (R. 59) and was walking from the little shovel to the big shovel (R. 51) on the outside of the track on which the trains go west (R. 43), between the track and the stone wall. He was not on the rails or between the rails, or on the ties. He was off the track entirely and walking against traffic. The

space between the outside westbound rail and the stone wall was about four feet (R. 44). He was nearest the westbound track, walking between the wall and the rail of that track (R. 45). Goddard's shovel was headed toward Dover (toward the bridge) (R. 62, 64). Its work was to scoop earth out of the bank in front of it and carry it around toward the tracks and dump it into the cars (R. 70) on the narrow gauge track alongside the main line railroad tracks (R. 69). At the time Goddard was in his seat, up on the boom, from which he operates the shovel (R. 62) about 20 feet from the ground (R. 61) looking at Sullivan (R. 65).

His shovel was idle at the moment because he was working close to the eastbound operating track and he was waiting for a couple of trains to pass before he resumed loading the little cars (R. 45). As he sat there watching Sullivan approach, Goddard observed a (passenger) train about 200 feet west of the bridge, approaching "at a good rate of speed." He paid attention to it as it approached (R. 45). He was listening and facing that way. His hearing is good (R. 46). There was a curve in the track but he could see the train when it was about 600 feet from where he was (R. 47). As the train rounded the curve, he saw Sullivan on the opposite side of the tracks, walking along between the rails and the wall on the outside of the train. When he saw Sullivan last the engine of the train was about 200 feet from Sullivan (R. 66) and Sullivan had not yet reached the big shovel (R. 55). Sullivan was walking against traffic and the train came behind him—from his back (R. 44).

He was watching the train (R. 65), facing it and listening (R. 46). The train did not slacken speed until Sullivan was struck (R. 46) and he

heard no whistle blow or bell ringing on the engine (R. 45, 46). Sullivan was struck on the westbound track (R. 44). The train was running east toward Hoboken—on the westbound track. It was not going in the direction trains ordinarily go on that track (R. 43). If that train had been going in the right direction on that track it would have been going west. Ordinarily, that train would not have been on that track (R. 50). Goddard had worked in that immediate locality for four months (R. 49) but at no time previous to the accident had he seen any trains running along that track in the same direction as the train which struck Sullivan (R. 50).

He did not see the train strike Sullivan, but he saw the train stop and he went over and found Sullivan killed—between the train and the wall (R. 65). When Sullivan was struck Goddard came off the shovel and walked around the engine and found Sullivan all smashed up. Sullivan laid about 200 feet from where Goddard was on the shovel (R. 46). He got the railroad men to help him put Sullivan on a stretcher and placed in the baggage car of the train, and went with him to Denville where he stayed until the coroner came and took Sullivan away to the undertaker's (R. 47).

The coroner testified that the body was pretty well mangled. There was a fracture at the base of the skull, one leg was broken, both arms were broken, the chest was caved in, the scalp was torn off and there were various bruises on the body (R. 21).

I.

The Trial Court erroneously refused to submit to the jury the question whether the defendant was negligent, as alleged in the complaint, and whether such negligence was the proximate cause of the accident alleged in the complaint.

In submitting this case on the question of negligence of the defendant-appellee, we rely upon the first, third, fourth and seventh counts of the complaint (R. 1, 5, 7 and 10, respectively), each of which was sustained under the evidence by the Trial Judge on the motion of the defendant-appellee to strike them out at the close of the plaintiff's case (R. 99, 100, 100, 101, respectively).

Although the second, fifth, sixth and eighth counts (R. 4, 8, 9 and 11, respectively) were likewise sustained by the Court on the same motion (R. 100, 101, 101 and 102, respectively) we do not rely upon them in this argument for the reason that there is some doubt in our minds as to whether the evidence is adequate to support them.

The preceding summary of the testimony shows that during all of the time from the beginning of the work in March up to October 22, 1927, when the accident occurred, it was the daily custom of the contractor's men, from the Resident Engineer in charge of the work, down to the workmen, including Sullivan, the timekeeper, to walk upon, along and across the tracks in connection with the performance of the work along the contract section, and particularly at the place where Sullivan was struck, and more particularly with respect to Sullivan himself. He did the same thing every day at the same time, for four or five months.

A practice of such constancy and regularity could not have escaped the notice of the engineer, and other officers of the defendant-appellee who were constantly on the work inspecting quantities, material and performance, or of the enginemen and trainmen who daily passed the work on the regular scheduled trains.

Defendant-appellee's attorney admitted at the trial that the company had issued slow orders (that is, orders for the operation of trains at slow or reduced speed) on this work, but he denied that they applied to the particular place where Sullivan was struck (R. 97). Close to that place, blasting was being done and railroad employees were stationed along the tracks to protect passing trains. It was the defendant-appellee's duty to its passengers to operate its trains in that vicinity with care not only to avoid injury from blasting, but also to enable the enginemen to be sure the debris of the blasting had been cleared away in advance of the trains' approach. If there was no slow order applicable to the place where Sullivan was struck, there should have been, in the interest of the public safety as well as for the protection of the men at work, and it was negligence on the part of the defendant-appellee not to have issued such slow orders applicable to that place.

But there were general orders, printed in the defendant-appellee's Book of Rules, which were in force and applicable to the place where Sullivan was struck.

In answer to interrogatories defendant-appellee admitted that at the time and place of this accident it had in force and applicable, the following published general operating rules:

"768. A yellow Slow-Speed-Sign by day, displaying in addition a yellow light by

night, upon the right of and adjoining the track to which it refers, approximately 2,000 feet distant, indicates entrance to slow speed limits where track or bridge work is in progress. Speed must be reduced in compliance with bulletin instructions" (R. 97).

"81. (Double, Three or More Tracks.) Trains must run with the current of traffic, as specified by timetable, unless otherwise directed by proper authority" (R. 98).

"154. When on double track trains are detoured from their proper track to run against the current of traffic on the opposite track, between the hours of 7:00 A. M. and 6:00 P. M., the first train or pilot engine so moving will run at slow speed over the detouring section, irrespective of distance, and following trains, day and night, run under control. Where the view is obstructed by curvature or otherwise, reverse train movements must be made with extreme care, enginemen keeping sharp lookout for stop or slow signals, and for bridgemen, line repairmen, signal maintainers, and other persons authorized to run hand cars, etc., moving on such cars or at work, and be prepared to stop on short notice. Enginemen will give warning by frequent use of engine whistle upon approaching such localities" (R. 98).

The proof is that the train which struck Sullivan came at the what Goddard called "a good rate of speed" (R. 45) and that it did not slacken speed, or blow a whistle or ring a bell until Sullivan was struck (R. 45, 46). At that time, the train was being operated on double track and was running against the current of traffic on the opposite track between the hours of 7:00 A. M. and 6:00 P. M. It was the first train to so move (R. 50). It did not move at slow speed over the detouring section. At this place the view was obstructed by curvature in the tracks and the banks of the cut and the abutments of a bridge (Exhibit P. 4), yet this train was not moved with

extreme care, and the engineman did not keep a sharp lookout for persons; to wit, the deceased, at work along the track upon which he was moving. The engineman did not give warning by frequent use of engine whistle upon approaching that locality; all these precautions were required by Rule 154. Goddard testified that, although he was looking in that direction and listening and his hearing was good (R. 46), and was in a favorable position and condition to see and hear (R. 61), and saw the train, and paid attention to it (R. 45) as it approached for 600 feet (R. 47) before it struck Sullivan, he heard no bell or whistle (R. 45, 46).

In *Rogers v. West Jersey R. R. Co.* (75 N. J. L. 568), the Court of Errors and Appeals reviewed the proceedings at the trial in the Camden Circuit Court. It held (p. 569) as follows:

“It is insisted that there was no proof of a failure by defendant company to give the statutory signal by ringing the bell or blowing the whistle. We think there was sufficient proof upon this point to go to the jury. One of the witnesses testified that he was within a square of the crossing at the time of the collision; that it was a still night; that he saw and heard the train going over the crossing; that as the train approached the crossing it did not, to his knowledge, give any signal; that he had good hearing; that he heard the train strike the wagon, and heard a whistle blast given after the train had stopped. Another witness testified that he lived within a few feet of the crossing; that he was in bed, but not asleep at the time of the collision; that he did not hear the train coming; he heard the crash, but heard no signal, and that immediately after the crash he heard a whistle. The evidence of these witnesses was sufficient to raise the inference that if the statutory signal had been given before the collision they would

have heard it, and that since they did not hear such signal it was not given.

There was no opposing evidence, no witness testifying that the proper signal was given. Even had this been testified, there would still have been a question for the jury, under *McLean v. Erie Railroad Co.*, 40 *Vroom* 57; 41 *Id.* 337; *Goodwin v. Central Railroad Co.*, 44 *Id.* 576, 579. The cases of *Eissing v. Erie Railroad Co.*, *Id.* 343, and *Holmes v. Pennsylvania Railroad Co.*, 45 *Id.* 469, are not parallel."

In *Tischman v. Erie R. R. Co.* (81 N. J. L. 268), one of the questions considered by the Supreme Court on review of a judgment for the plaintiff was whether the case had been properly submitted to the jury on the question of signals of the approach of the train. The Court held (p. 270) as follows:

"Passing then to the question raised and argued, we think that the testimony of the plaintiff that he stopped ten or fifteen feet from the tracks, and looked and listened for a train, and that he did not hear any bell and that no bell was rung, fully justified the submission of the question whether the bell was rung to the jury, though the defendant's engineer and fireman testified that it was rung."

This decision was affirmed by the Court of Errors and Appeals for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court (83 N. J. L. 793).

In *Cowell v. Pennsylvania R. R. Co.* (101 N. J. L. 507), the Court of Errors and Appeals again discussed the question of signals of an approaching train and held (p. 510):

"The cases of *Eissing v. Erie Railroad Co.*, 73 N. J. L. 343, and *Holmes v. Pennsylvania Railroad Co.*, 74 *Id.* 469, cited in the brief for defendant-appellant, do not apply where the facts (as in this case) are not

parallel, and where one in a position to hear, hears nothing. In such posture the question is for the jury."

In the absence of any testimony that the bell was rung or the whistle blown, this testimony was sufficient to raise a presumption that no bell was rung and no whistle blown and to require the question of negligence to be submitted to the jury.

The contract for the work contained a provision that the contractor shall at all times keep at least one competent representative on the work, to whom all instructions and notices given by the railroad company will have the same effect as if given to the contractor direct. (Sec. Eighth, Second pgf., R. 136.)

Mr. Birtwell, the Resident Engineer in charge of the work, was the representative of the contractor who was constantly upon and in charge of the work from March, 1927, when the work began (R. 22) until after the accident occurred on October 22, 1927 (R. 72). The defendant-appellee could have given him notice of its intention to operate trains against traffic on the morning of the accident, but it did not do so (R. 72) and he had no knowledge of that fact (R. 73). Had he received such notice he could have warned Sullivan and the other men, for he went over the job at 7:00 o'clock each morning (R. 22, 29).

In view of the long-standing custom of Birtwell, Sullivan and the others to walk along the tracks, it was the defendant-appellee's duty to give such notice.

The railroad company knew of the employment of Sullivan on this work, since the third paragraph of Section Seventh of the contract pro-

vides that the contractor will file with the railroad company, from time to time as required, an affidavit stating the names of all subcontractors, laborers and materialmen employed on the work (R. 135). Moreover, the contract specifically mentions the timekeeper (which was Sullivan's job) as one of those who should be transported free of charge over the railroad (Section Twelfth, seventh paragraph (R. 141)). It also provides that the contractor will remove from the work any foreman or workman who the railroad company deems incompetent, *careless* or is for any other reason unsatisfactory to the engineer (Section Eighth, third paragraph, R. 136).

In the Seventeenth Section the contract provides:

“Whenever the word ‘Engineer’ or ‘Chief Engineer’ is used in this contract, it is understood and agreed to mean the Chief Engineer for the time being of the Railroad Company, or his duly authorized agent, limited to the particular duties assigned to him” (R. 145).

In the Second Section it was provided:

“* * * All the work shall be done by skilled workmen, in the most workmanlike manner, in strict accordance with the specifications and drawings, *and subject to the direction*, and approval of the Engineer, who shall have the right to subject the work, or any part thereof, to such tests as he may desire (R. 123).

The Contractor shall provide sufficient, safe and proper facilities *at all times* for the inspection of the work by the Engineer both *at the site of the work* and at the mills or shops where any materials or fixtures may be in the course of manufacture, construction or preparation” (R. 124).

Other provisions of the same section gave the Engineer the right to condemn and reject any materials or work done which in his opinion was improper or unsound or failed in any way to conform to drawings or specifications (R. 124).

These and other provisions show that the defendant-appellee intended to (and doubtless did) exercise a close supervision, on the ground, of the work as it progressed.

During the four or five months Sullivan was on the job, going about daily, as the testimony shows he did, in the performance of his duties of taking the time of the men at work, and superintending the delivery of materials, at all points on both sides of the tracks, throughout the five miles of the work, the officers of the defendant-appellee, who constantly supervised the work, could not have failed to observe his walking upon, along and across the tracks.

If they had considered Sullivan to be "careless" in so doing, they could have stopped him from doing so. If he persisted after notice to stop, they could have demanded and obtained his removal from the job, under Section Eighth (R. 136). They did not do so.

Also, this daily practice of Sullivan must have been known to the enginemen and other employees of the defendant-appellee who were operating trains daily past the work during all of that time, and particularly the engineman who operated the train that hit him, since that was a daily train scheduled to pass this work each day at the very time when Sullivan was accustomed to make the very trip across and along the westbound track where he was struck. That engineman must have seen Sullivan do this daily, and should have been particularly careful as he

came east that morning on the westbound track where he must have known that Sullivan was accustomed to walk.

During the trial, the following discussion of this phase of the testimony occurred between the Court and one of the attorneys for the defendant-appellee:

“The Court: Suppose the engineer driving the engine of the train in question had been accustomed to see employees of the Stange Company on that track, would he be charged with knowledge, in regard to their right to be there, with the knowledge that they were accustomed to walk there” (R. 67)?

The Court: It may be you were obliged to blow your whistle or ring your bell.

Mr. King: I should not wonder that that might be the law, I shouldn't wonder, I don't say it is.

The Court: If I say so, it is.

Mr. King: You haven't said it yet.

The Court: I mean just for the moment.

Mr. King: Just to get back to this proposition, if either as his duty or necessity in connection with his duty, a necessity in connection with his duty that could give rise to the use or custom which must be recognized by the railroad company.

The Court: But if such was observed by the engineer in question then it was his duty to use reasonable care on his part.

Mr. King: I should say yes to that proposition.

The Court: Well, that is my difficulty with this situation” (R. 67, 68).

In *Weston Co. v. Benecke*, 82 N. J. L. 445, this court reviewed a judgment of non-suit in the Supreme Court (Essex County Circuit) and held that the non-suit was erroneous for the reasons afterwards assigned in the opinion delivered by

Mr. Justice Trenchard, of which the following are extracts:

“A motion for a non-suit admits the truth of the plaintiff’s evidence, and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law. *Hayward v. North Jersey Street Railway Co.*, 45 *Vroom* 678; *Kaufman v. Bush*, 40 *Id.* 645.

Where the evidence, and the inferences reasonably arising therefrom, will support a verdict for the plaintiff, a motion for a non-suit must be denied. *Dayton v. Boettner*, *ante* p. 421.”

The defendant-appellee’s motion for non-suit admitted the truth of all of the plaintiff’s evidence and every inference of fact that could be legitimately drawn therefrom. From the testimony the fact could legitimately be drawn that the deceased was entitled to walk on the railroad right of way at the place he was struck and that his habit of doing so daily at the same time for four or five months prior to the accident, had put the defendant-appellee on notice of his custom to do so and had imposed upon it a duty to operate its trains in that vicinity with due care and to give warning of the approach of trains, so that the deceased might be protected from injury. This was particularly true under the circumstances in the case where the railroad lay in a deep cut on a sharp curve where the defendant-appellee’s employees operating the trains knew that work was being carried on along the tracks, and it was particularly the duty of those in charge of the operation of defendant-appellee’s trains to operate carefully and give warning when the train in question was being operated against traffic on the opposite track from that upon which trains in that direction were usually moved; that when no notice had

been given to the contractor or his employees of the defendant-appellee's intention to operate this train in this unusual manner, it was not only the duty to move the trains carefully and to give warning, in the ordinary exercise of due care, but this duty was expressly acknowledged and admitted by the defendant-appellee by its Rule No. 154 above quoted, and the testimony shows without contradiction that that rule was violated in every particular by the enginemen who operated the train which struck the deceased. That rule purported to be for the protection of not only the particular classes of employees specifically mentioned therein, but also for "other persons * * * at work" (R. 98). The testimony showed that Sullivan was "at work" at the time of the accident.

The fact could also be properly inferred from the testimony that whatever Section Nineteenth of the contract was originally intended to mean, the officers of the defendant-appellee had placed thereon a practical construction which permitted Sullivan, and other employees of the contractor, to walk on, along or across the operating tracks in the performance of their duties.

Under this testimony, the Trial Court erroneously refused to submit to the jury the question whether the defendant was negligent, as alleged in the complaint, and whether such negligence was the proximate cause of the accident alleged in the complaint.

II.

The Trial Court erroneously refused to submit to the jury the question whether the accident alleged in the complaint was proximately caused by the contributory negligence of the plaintiff's intestate.

During the trial the Trial Court ruled:

"I have no hesitation in saying there is an issue of fact here in the event contributory negligence arises as undoubtedly may and whether it becomes a question of law or fact depends altogether upon the situation of the case at its conclusion. If there was no duty on Sullivan to cross the tracks to go down to the shovel, why, it may very well be said he is guilty of contributory negligence having crossed the main track, and that it would be an act of danger. I am going to allow the witness to answer the question. You may have an exception" (R. 68).

In his conclusion, the Trial Court said:

"The point is also made that the decedent was guilty of contributory negligence. I think that that would be a matter of fact for the jury for the reason that it appeared on the morning in question that the train that struck the decedent was a regular train, but the schedule has been changed for some operating reason, apparently a necessary one, and the train came upon a track which it was not accustomed to travel. Therefore it would have been a question for the jury as to whether or not the decedent was guilty of contributory negligence in the immediate circumstances, plus that physical situation there as to his walking at the moment between the wall and the track where there was not sufficient space for the train to pass if it did come over that track" (R. 109).

The Trial Court also stated that Sullivan "was walking in a place of obvious danger. If a train

came upon that track as it did, it was inevitable that he would be struck because there was not sufficient space to escape" (R. 107).

This conclusion of the Court was erroneous for the following reasons:

That place was not one of obvious danger from trains moving in the ordinary direction (west) on that track. During all the time the men had been working there a train never came east on that track before (R. 50), and Sullivan had no reason to expect that a train would do so that morning. Even if he heard the train coming, he had no reason to suspect that it was not on its usual track. No whistle was sounded and no bell was rung (R. 46). In choosing the place he did to walk from the little shovel to the big shovel, he exercised what, under all existing conditions, except reverse movement of trains, was proper caution. This was a regular train which passed that part of the work every morning at the same time, shortly after Sullivan was accustomed to arrive. Goddard expected that train and was waiting for it. Sullivan, who was moving in his regular established daily orbit and on schedule time, must also have expected it. Doubtless that is one reason why, on that trip down each morning, he never risked walking down the inside of the curve between the eastbound track and the cars on the narrow gauge track. In crossing over and walking along the westbound track against traffic, he followed a time-honored practice, as old as double track railroads themselves. The railroad rule books all require it, and everyone with any experience on railroads (and Sullivan had had more than eleven years' experience on this kind of work (R. 82, 83)) followed that practice as a safety measure. The reason Sullivan walked on the outside of the track, between

the outside rail and the wall, was to enable him to obtain the most advantageous view possible around the curvature of the tracks, which in that place lay in a deep cut.

If the train came in its ordinary direction on that track, there is no reason to suppose that Sullivan could not, from his point of vantage on the very outer rim of the curve, have seen it in time to find a place of safety. He had been doing the same thing at the same time every day for four or five months (R. 41, 42, 56, 57, 82). If any westbound trains were due at that time, he must have found a way to protect himself before. If no such trains were due at that time, he was in no apparent danger. He knew whether there were any such trains due and presumably was prepared to take care of himself if and when they came.

Under normal conditions, and in the light of his experience and all the information he possessed or could obtain, and in the absence of a notice of the company's intention to operate trains against traffic, Sullivan did not walk in "a place of obvious danger." A thing that never happened before, and unexpectedly, and without warning, suddenly occurs, is not obvious.

Under the persistent cross examination by defendant-appellee's attorney, Goddard admitted that Sullivan *could* have walked from the little shovel to the big shovel without crossing the tracks (R. 52); also that Sullivan *could* have crossed the tracks by going back to the bridge, climbing the bank, crossing the bridge and coming down on the westbound side (R. 57). Of course Sullivan *could* have done either, but the evidence shows that the first alternative was unsafe and impracticable, and that the second

involved encountering a stone retaining wall on the westbound side (R. 57). A like cross examination brought from Birtwell the answer that it was *possible* for Sullivan to have adopted the first alternative (R. 76, 77) but Birtwell added "but it isn't the natural way." Birtwell admitted that Sullivan was not *compelled* to cross the tracks in going from the little shovel to the big shovel, but stated that it was muddy on the south side and Sullivan could not do it without getting his feet wet. He said the way Sullivan went was the natural procedure and the procedure a necessity (R. 77).

Under the conditions existing on the work at that place, Sullivan was not required to resort to the limit of *possibilities* to avoid crossing the tracks. It was sufficient to justify his action, if the alternatives were unsafe and impracticable. He was not obliged to subject himself to injury in walking where the shovels were working or to hug the inside of the curve in the narrow space between the dirt cars and a rapidly moving passenger train then due, nor was he obliged to attempt the precarious task of climbing a 33-foot embankment (almost perpendicular) of loose earth and rock on one side and drop from the top of a stone wall onto the tracks on the other side. To have gone back and crossed the bridge would have necessitated at least 400 feet (R. 76) further travel on the tracks, than the course he took. Laboratory tests are not the proper measure of human conduct under practical conditions. In any event whether he should have done so, under the circumstances disclosed by the evidence, was a question for the jury.

We submit that, under the evidence disclosed by the record, Sullivan was not guilty of contributory negligence, but whether he was guilty

of contributory negligence was, as the Trial Court stated, a question of fact for the jury.

It is therefore respectfully submitted that the Trial Court erroneously refused to submit to the jury the question whether the accident alleged in the complaint was proximately caused by the contributory negligence of the plaintiff's intestate.

III.

The Trial Judge erroneously construed the contract as a bar to recovery.

It is clear from the foregoing quotations from the Trial Judge's rulings on the admission of evidence and conclusions, that except for the construction placed by him upon Section Thirteenth of the contract between the defendant-appellee and the contractor (Neutral Exhibit A. R. 120), he would have submitted the case to the jury both on the question of the negligence of the defendant-appellee and on the question of contributory negligence of the deceased.

The Court rested its decision entirely upon Section Thirteenth (R. 142, 143, 144) of the contract (Neutral Exhibit A, R. 120) between the contractor and the defendant-appellee covering the work upon which deceased was employed (R. 105, 106). Under his interpretation of that provision, he announced his decision as follows:

"I shall rest my ruling upon the finding as a matter of law, therefore, that when the decedent crossed the tracks, even though he were on his way to perform a duty, he was a licensee merely, and the rule of course is that the railroad company owed to him through its employees the duty of refraining from wilfully injuring him" (R. 107).

The pertinent part of Section Thirteenth reads as follows:

“THIRTEENTH:—If the WORK (including any additional work performed under Article THIRD hereof) or any part thereof, shall be carried on in proximity to existing operating tracks of the Railroad Company, the Contractor shall perform said WORK in such manner and with such care as not to interfere in any way with such operating tracks or the passage of trains, cars or engines thereover, in accordance with regular schedule time, and will provide and pay a sufficient number of qualified watchmen to protect the tracks at such points * * * (R. 142).

* * * * *

The Contractor shall under no circumstances use, or caused to be blocked, any operating track of the Railroad Company unless specifically authorized by a written permission of the Engineer. When the use of any operating track is desired, a notice shall be given the Engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the Work, it is impossible to carry on the Work without the use thereof. Movements of cars or equipment (belonging to the Contractor) on an operating track will be permitted only when handled by an engine and crew of the Railroad Company, for which the Railroad Company will charge the Contractor in accordance with the prevailing schedule of rates as filed in the office of the General Superintendent of the Railroad Company, and the contractor agrees to pay such charges promptly upon the receipt of the Railroad Company's bills therefor” (R. 143, 144).

The first paragraph of that section relates to operations adjoining the railroad tracks and requires the use of steam shovels and other equip-

ment in such a manner as not to interfere with the operation of trains on the operating tracks (R. 142). It was on account of this provision that Goddard's shovel was idle when Sullivan was struck (R. 45). He was waiting for trains, one of which was the scheduled passenger train that hit Sullivan. He was expecting it on its regular track.

The fourth paragraph upon which the non-suit was based, forbids the contractor to "use, or cause to be blocked" any operating track without the specific authority, in the form of a written permission, of the Engineer of the railroad company.

The ordinary meaning of the term to "use" an operating track, is to use it for the purpose for which it was designed and constructed; *i. e.*, for the operation of cars and engines thereon. This provision was there because, owing to the contour of the country, the contractor's work consisted chiefly of excavating earth and rock from the hills and transferring it to fill in and level the intervening depressions. This had to be done in cars moved by engines. Without such a provision in the contract the contractor would doubtless find it convenient and economical to move this material over the operating tracks of the railroad company so readily at hand. It was the intention of that provision to require him to provide his own transportation facilities, so as not to require the "use" or blocking, of the operating tracks in the movement of the excavated material.

The contract recognizes the fact that such use might become necessary, due to some unforeseen reasons developing from the nature of the work. The contract did not forbid this use un-

conditionally. It only required that it must not be done unless it was necessary, and then not without authority in writing from the engineer of the railroad company, obtained on 48 hours' notice. When such use became necessary, and permission had been obtained, the contractor could use and block the operating tracks, but his cars and equipment must be handled by an engine and a crew of the railroad company.

The "use" of the railroad operating tracks contemplated therein was *for the movement of cars and equipment* of the contractor thereon. There is nothing in the agreement forbidding the contractor or his employees to go upon the railroad right-of-way. The testimony shows that it was necessary for them to do so; especially for a timekeeper who must pass along the railroad right-of-way, to all parts of the five mile stretch of the work, where men were working, or where materials were being distributed, for the purpose of checking time and superintending the delivery of materials.

The profile map attached to the contract shows that, throughout the entire five miles, the work consisted of a continuous succession of cuts and fills. Soil and rock was being removed from the hills and carried to the intervening fills where it was dumped and leveled off to make the roadbed for the new tracks. The plan attached to the contract shows that there were cuts and fills on both sides of the tracks, sometimes opposite each other at the same place. The fills are invariably longer than the cuts. In some places the fills did not adjoin the cuts. Work was being done and men were working on both sides of the track (R. 42). In some places the roadbed for one of the additional tracks was to be provided on one side of the operating tracks and in others,

on the opposite side (R. 24). It was necessary for the men to cross the tracks for these purposes and to walk along the tracks between sections of the work. The man in charge of the work did it every day (R. 22) in the performance of his duties (R. 23, 26, 27). Sullivan did it every day in the performance of his duties (R. 29, 41, 56). Other employees of the contractor walked on the tracks (R. 66).

Sullivan's duties took him all along the work wherever men were working or materials were being distributed for use. His duty was to take the time of the men and to check and superintend the distribution of materials (R. 71). Men were working all along where the shovels were working and, nearby, where the blasting was going on (R. 78).

The defendant-appellee expected the contractor's men to perform work on the railroad tracks, since they were required to clear the tracks of debris after the blasts (R. 32).

The physical conditions surrounding the scene of the accident are recited in detail above. The profile map shows that the shovels were making a cut at that place 33 feet deep and containing 20,000 cubic yards of material. It was all on the south side of the tracks and on the inside of a sharp curve. An old retaining wall next to the eastbound track had been taken out. Alongside the eastbound track a narrow gauge railroad had been laid for the purpose of carrying away the excavated material. Between the narrow gauge railroad and the bank of earth, the two steam shovels were working, scooping huge buckets full of earth and rocks from the hill, which were swung around on the boom and dumped into the cars on the narrow gauge tracks. Naturally,

quantities of earth and rock were constantly falling from the buckets as they tore up the face of the bank, filled themselves and were swung around over the cars, and quantities thereof would fall off the cars as they were loaded. No experienced employee would walk around the shovels under such conditions. It was for this reason that in the operation of the big shovel, which was near the tracks, Goddard suspended operations when eastbound trains were due, lest such material should fall either on or against a passing train, or in front of it as it approached. On this account he was waiting for this very train which struck Sullivan. It was a regular passenger train scheduled, by the timetable, to leave Dover at 7:20 A. M. and to leave Denville (4.2 miles east of Dover), at 7:27 A. M. Goddard was working between these two stations. He waited because he did not know that train was running east on the westbound track that morning.

Dirt cars were standing on the narrow gauge tracks waiting to be filled (R. 45). The ground in this excavation was very wet. The soil was sandy and full of water (R. 69). It would have required hip boots to walk through it (R. 87). The earth bank was loose (R. 79) and stones and earth were constantly falling down from its sides where it was being torn up by the shovels (R. 79).

Under these conditions, as he observed them on the afternoon of the same day that Sullivan was killed (R. 85), and as a result of his experience of forty-one years as a railroad contractor on similar work (R. 82) Mr. English expressed his opinion that "a man would be in a big hazard if he tried to go through there" (R. 87).

The employees of the contractor were *required* to use the right of way and the tracks

for the necessary purposes of their duties. It is always necessary on work of this kind for the contractor's employees to be on and about the right of way. This was anticipated when the defendant-appellee inserted the clause requiring the contractor to assume—

“all risk of and responsibility for, and agrees to indemnify and save harmless the Railroad Company from and against any and all loss of life, property of, or injury or damage to the person or property of any person (R. 137) or persons * * * whomsoever, whether such person or persons be * * * an agent or employee of the Contractor * * *, which loss of life or property, or injury or damage to person or property, shall be due to, arise out of, result from or be in any way connected with the work or the performance or lack of performance thereof, * * * and whether such loss of life or property, or injury or damage to person or property, shall be due to or caused by the negligence of the Contractor * * *, or otherwise; * * *” (R. 138).

It was only for its own negligence that a suit against the defendant-appellee could be sustained, and it could not relieve itself of liability for negligence, but it could and did undertake to pass to the Contractor the obligation to indemnify it for the financial expenditures resulting therefrom.

In *State v. Feigle* (162 N. E. 55), the Appellate Court of Indiana held (p. 58) that if an individual contracts for the construction of any building, it is necessarily implied as a part of his contract that he will furnish a place to build it, and in that case it was held that the State was similarly obligated with regard to providing a place to construct the highway involved in that contract. It follows that it was the defendant-appellant's duty here, not only to provide the

place upon which to perform the contract, but also to provide places in which contractor's employees would be able to perform their work safely and conveniently, and to exercise reasonable care for their safety while they were performing such duties in such places.

It does not appear that Sullivan had knowledge of Section Thirteenth of the contract, or that he had any knowledge or notice that that section was intended to prevent him from going upon the tracks for the purposes of his work. On the contrary, it is clear from the testimony of the Resident Engineer of the Contractor, who must have known of that provision, that he did not understand and was not advised that that section had such a meaning, since he walked the tracks himself daily in the performance of his duties, and he saw Sullivan and others do so, without instructing them to the contrary. Certain of the contractor's employees were required to work on the tracks to clear the debris from the blasting.

It also appears that this section was not so interpreted by the Engineer, and other officers of the defendant-appellee who were on the job constantly to supervise the work and to check up quantities, material and performance under the provisions of the Second and Sixth Sections of the contract (R. 123, 124), since they do not appear to have complained of, or issued any instructions against, what appears to have been the custom of Sullivan, Birtwell and others throughout the entire progress of the work. These officers frequently walked up and down the tracks with the contractor's Resident Engineer, as they inspected the work together, and checked quantities and performance each month, and made their estimates of the relative value of

all the work done under the contract, as required by Section Sixth (R. 132, 133) for the purpose of determining the amount due the contractor for each month's work.

Without having the matter brought to his attention, certainly this provision of the contract between the defendant-appellee and the contractor, would not be binding upon Sullivan.

If it could be said (which we deny) that such was the original purpose of Section Thirteenth, such a purpose was modified by the practical construction placed upon it and the different interpretation thereof assumed and acquiesced in by the defendant-appellee, by the subsequent conduct of its officers on the work, throughout the entire course of the work. This was a question for the jury.

The Trial Court therefore erred in construing said contract as forbidding the employees of the contractor to go upon the tracks and right of way for the reasonable and necessary purposes of their employment in carrying on the work for the benefit of the defendant-appellee.

In his conclusions, the Trial Court said:

“Now, I may say that it seems clear to me that the decedent was not an invitee, express or implied, of the railroad company, and I am relying upon the usual definition in such cases, as for example: ‘An express invitation is where the owner or occupier of land, by words, invites another to come on it, or make use of it, or something thereon.’

‘An implied invitation arises when such owner or occupier by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design

for which the way or place or thing was adapted and prepared, or allowed to be used.' * * *

Then, again, a licensee as defined is a person who is neither passenger, servant, nor trespasser, and not standing in any contractual relation with the owner, and is permitted to come upon the premises for his own interest, convenience or gratification. Now it may be in view of Mr. English's testimony yesterday that the decedent found the more comfortable way for him to pass from one part of his work to another was by crossing the tracks, but that would be for his own convenience.

"No contractual relation or any expressed or implied invitation would arise by reason of such act on his part. It may well be it was more convenient for him to go that way. However, that would not change the status as I see it from a licensee to an invitee, expressed or implied" (R. 107, 108).

* * * * *

"The motion will be granted therefore upon the theory that in law the decedent was a licensee and not an invitee, express or implied, of the defendant company. You may have an exception and I hope the case will go to the Supreme Court" (R. 109, 110).

That the Trial Court was in doubt on the question is shown from the following portion of his conclusions:

"I might say in former days where a legal situation arose in the course of the trial, especially in the circuit, it was the practice to refer such question where it appeared to be of doubt and difficulty to the Supreme Court for its advisory opinion. That practice, apparently for some reason, has fallen into disuse with the result that the trial judge ordinarily, I may say customarily, in these days takes the responsibility for defining the rule applicable to the issue presented and settles the doubt himself, with the result that if he be wrong, an appeal is

taken to the Supreme Court, particularly in Circuit Court issues. If the old practice prevailed, I would be inclined to refer to the Supreme Court this legal question that has arisen here. However, I shall follow the present day practice and determine the motion in accordance with the view that I have arrived at after studying this question with some diligence and realizing it as one of doubt and difficulty. In disposing of this motion, therefore, it will be understood that the plaintiff does not lose her day in court, unless, of course, the Supreme Court on appeal should affirm the action of the trial judge as I shall presently announce it" (R. 103, 104).

This doubt was also expressed by the Trial Court in the following rulings on the admission of evidence:

"The Court: Yes. In other words, I am not willing under the terms of the contract to say in no circumstance could the employees of the Stange Company go upon the tracks" (R. 37).

"The Court: I think it is obvious what that (Section Thirteenth) means. That would mean the carrying through of the work. In connection with the performance of the contractor. I think it is quite obvious what it means. The contractor shall not use nor block the track during the progress of the work. I think it is obvious what that means. That is inserted undoubtedly in order to prohibit any interference with the traffic on the track while the work is going on.

Mr. Scott: And that is more plainly indicated if your Honor would read the first, second and third paragraphs of section thirteen.

The Court: That is more or less the stereotype clauses you find in all these railroad contracts. The contractor is to do the work without interference with the business of the company. The ruling I have just

made is with knowledge of the provision of the contract and the interpretation I have just made with regard thereto. You may have an exception'' (R. 38, 39).

* * * * *

''The Court: All you have to show is to show his custom is entirely consistent with his duty to pass from one side of the track to the other in order to perform his work as a timekeeper. That is all you have to show, isn't it?'' (R. 48).

Under the evidence, it clearly appears that Sullivan *was* an invitee either express or implied, and that Sullivan's use of the railroad tracks and right of way *was not only acquiesced in* by the defendant-appellee, but was in accordance with the intention or design of the contract itself, for the performance of the work. Sullivan's title and occupation is expressly mentioned in Section Twelfth (seventh paragraph) of the contract (R. 135). The performance of his duties were necessary (even indispensable) to the performance of the work under the contract.

We have in this case an anomaly—something we have never heard of before in a lawsuit—in the form of ''Neutral Exhibit A'' offered by the defendant on the plaintiff's case. It was the contract between the defendant-appellee and the contractor for the work upon which the deceased was engaged at the time of his death. It was upon the terms of this contract, alone, that the Trial Court based its judgment for non-suit (R. 107).

This contract was not offered in evidence by or on behalf of the plaintiff. The defendant tried to introduce it in evidence at the opening of the plaintiff's case (R. 19) but the plaintiff's attorney refused to accept it and said he did not need it (R. 20). While the contract was

referred to a number of times by the defendant's attorneys, it was never referred to or offered in evidence by the plaintiff. Finally the Trial Court ordered the contract to be marked a "Neutral Exhibit," "In order to make your (defendant's attorneys) argument have some application to the fact with which we are not familiar" (R. 32).

The plaintiff-appellant had a right to put in her own case in her own way and she was not bound by the terms of that contract or by the fact that it had been admitted in evidence in this unusual manner. It was a part of the defendant's and not of the plaintiff's case.

In *Moebius v. Williams*, 84 N. J. L. 540, the Court reviewed a judgment of non-suit entered in the Camden District Court. The plaintiff called the defendant as a witness to prove that he had shot the plaintiff's dog. The defendant was then asked by his own counsel whether the dog had been killing chickens. His answer in the affirmative, admitted over the objection of the plaintiff on the ground that it was not a cross examination, was the basis of the non-suit. The Supreme Court held (p. 542) as follows:

"But passing this point, and treating the admission of the defendant's testimony on cross examination as proper, the court erred in regarding the plaintiff as concluded thereby. The idea that a party calling a witness is 'bound' by his testimony is a prevalent one, but is none the less a fiction. He may not impeach his character for veracity, nor impugn his credibility by general evidence to show him unworthy of belief, but he may prove the truth of any particular fact by any other competent testimony, in direct contradiction to what such a witness may have testified. *Ingersoll v. English*, 37 Vroom 463, citing 1 *Greenl. Evid.* (16th Ed.)

442, 443b; *Wigm. Ev.*, Sections 897, 908. Consequently, the court could not non-suit on the ground stated if there was any conflict between the evidence of plaintiff and that of defendant on the facts required to bring the case within the statute cited, even if such statute be construed to legalize the killing of a dog found killing or chasing chickens. If the defendant had rested his case, the finding of the court on weight of evidence would be final; but a non-suit was improper, even in a trial without jury."

The Trial Court placed an erroneous interpretation upon Mr. English's testimony when he interpreted it to mean "that the decedent found it the more comfortable way for him to pass from one part of his work to another was by crossing the tracks," as being "for own convenience" (R. 108). That testimony showed that Sullivan walked where he did, not for his own *convenience*, but for his own *safety*; that he could not safely walk from the little shovel to the big shovel along the work on the south side of the tracks; and that it was necessary for him to walk where he did.

Under the Trial Court's own definition, Sullivan was an invitee. If there was any doubt about that fact (as the Trial Court said there was), it was a question for the jury to determine that fact, under the evidence, and the Trial Court erred in taking that question of fact away from the jury, by granting the motion for non-suit.

For these reasons, it is respectfully submitted that the Trial Judge erroneously construed the contract as a bar to recovery.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of non-suit entered herein should be set aside and the case remanded to the Morris County Circuit Court for a new trial.

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Of Counsel.

New Jersey Court of Errors and Appeals.

MARGARET M. SULLIVAN, Adminis-
tratrix *ad prosequendum* of the Es-
tate of Timothy F. Sullivan,
Plaintiff-Appellant,

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY, a
corporation of the State of Pennsyl-
vania,
Defendant-Appellee.

Action at Law.

BRIEF OF DEFENDANT-APPELLEE.

Statement of the Case.

On April 1st, 1927, the Appellee and the Stange Construction Company entered into an agreement whereby the Construction Company agreed to construct a new third and fourth track road-bed on the Morris and Essex division of the Appellee's road, from a point some 4,000 feet westerly of its Mountain Lakes station and extending westerly about five miles, to a point approximately 1,000 feet easterly of its mile-post No. 37 near Dover, N. J.

The work included foundation excavations in the construction of a concrete arch ring with the

necessary support to spring a bridge arch across the railroad tracks near Pear Tree Road, besides making excavations for the main-line track grading in the manner and at the locations shown in the specifications and drawings attached to the contract, Exhibit A (p. 120, &c.).

The Appellant's decedent, Timothy F. Sullivan, was a time-keeper employed by the Construction Company, his duties being to take the record of time of the contractor's men on the job, as well as checking up the equipment and materials being used.

The portion of the contractor's work which was the *locus in quo* of the accident involved in this case, extended easterly toward Denville, N. J. from a bridge known as Franklin Road Bridge, shown in Exhibit D-4 for identification, and identified by the Appellant's witness Goddard (p. 61, l. 22, &c.), as well as in Appellant's Exhibits P-3 and 4. The work was all being done on one side, *i. e.*, the south side of the Railroad Company's operating tracks (p. 24, l. 20, &c.). The Franklin Road Bridge referred to crossed the two main operating tracks of the Railroad. To the south of these tracks was located the Railroad's old retaining wall which presented a barrier between the work upon which the contractor was engaged and the Railroad's operating tracks. The main operating tracks of the Railroad ran practically parallel with the old retaining wall of the defendant, the east-bound main track being nearest the old retaining wall and its companion west-bound track

north of the east-bound track. North of the west-bound track, and about seven or eight feet from its center (p. 44, l. 20, &c.) there was another retaining wall (p. 69, l. 1, &c.) 7 feet high.

In some manner, not made clear, the deceased, who had come to work in his automobile from his home at Rockaway, N. J., after leaving his machine on the Franklin Road bridge, got upon the Railroad Company's right-of-way between the retaining wall on the north, or righthand, side of the tracks, and its west-bound track (p. 55, l. 25).

In Exhibit D-1 for identification, as well as in Exhibits P-3 and 4 there appear two steam shovels identified by Appellant's witness Goddard as being the big shovel and the little shovel (p. 60, l. 11, &c.). The little shovel was located between the Franklin Road bridge and the big shovel. The latter was about 400 feet farther east of the little shovel (p. 41, l. 33).

Incongruous as it may appear the Appellant's case showed that Sullivan was killed while he was attempting to pass over the Railroad Company's main operating tracks from the small shovel to the big shovel (p. 51, l. 34 *et seq.*), he having apparently been over to the little shovel and taken the employees' time first (p. 55, l. 39, &c.; p. 56, l. 1, &c.), although it has already been noted that the two shovels were on the same or south side of the Railroad Company's operating tracks, and on the south side of the old retaining wall, and, as testified to by the witness Goddard, Sullivan could have gone from the little shovel to the big

shovel without crossing either one of these tracks (p. 52, l. 10, &c.). The only reasons advanced for Sullivan's action in crossing the tracks were given by the witness Birtwell that the ground on which the steam shovels were working "was muddy" and "he would get his feet wet" (p. 77, l. 29, &c.), and by the witness English who testified as follows:

"Q. * * * With the conditions there, if the man had to pass between one shovel and the other one, the big one to the small one or the small one to the big one, would it be necessary for him to cross the tracks to do it?

"A. He would if he went where he had the best walking. The opposite side had the construction work going on; you would need hip boots to go through there. There was an old retaining wall taken down and one cut there, and a man would be in a big hazard if he tried to go through there" (p. 87, l. 22 *et seq.*).

Although the witness Goddard, in answer to a Court question, as to whether there was anything to prevent Sullivan from walking from the little shovel to the big one, said, "No, so far as I know" (p. 55, l. 4).

The foregoing testimony loses its entire force when we further examine the testimony of Goddard with respect to the availability of the Franklin Road bridge. He testified in substance and effect that this bridge afforded Sullivan a means of crossing both railroad tracks and a means of access to both shovels without going on either track (p. 57, l. 10, etc.).

Pleadings.

The Appellant insists that on its first, third, fourth and seventh counts the trial Court erred in directing a nonsuit, but that with respect to its second, fifth, sixth and eighth counts "there is some doubt in our minds as to whether the evidence is adequate to support them" (Appellant's brief, p. 15, 3rd paragraph). The effect of the abandonment of the second, fifth, sixth and eighth counts on this appeal can be best shown by setting out in parallel columns the gravamen of the charges in the counts pressed and those abandoned.

First Count:

Alleges employment of the decedent by the contractor and his connection with the contractor's work with the knowledge and consent of the Railroad, and the right and necessity of the deceased to walk along the tracks of the Railroad, and the failure of the Railroad to blow a whistle or bell or give any other form of warning reasonably required to apprise the plaintiff of the approach

Second Count:

The violation of its "slow orders" requiring the operation of trains at reduced speed in the vicinity of the construction work being performed or along the tracks of the Railroad Company's right-of-way.

of its train, and the running and operating of said train at an excessive rate of speed without taking necessary precautions to observe the decedent lawfully on its tracks.

Third Count:

The violation of certain rules and orders of the Railroad Company in operating its trains against the current of traffic.

Fifth Count:

The failure of the Railroad Company to publish and enforce rules and regulations for the operation of its trains in an eastward direction, on the left-hand or opposite track, against the current of traffic, without the authority or direction of a proper authority and in total disregard and violation of said duty.

Fourth Count:

The failure of the Railroad Company to publish and enforce reasonable rules and regulations to protect the deceased, "knowing full well that the deceased was employed upon and along its tracks and right-of-way at a time

Sixth Count:

The violation of a custom, relative to trains detoured from their proper tracks and running against the current of traffic on the opposite track, of notifying all station - agents, trackmen, towermen and other persons, including

and place and in the manner aforesaid.”

the decedent, working on or alongside tracks and right-of-way, of said movement and intended movement of its trains and of signalling to them by engineers' blowing their whistle, etc.

Seventh Count:

In the failure of the Railroad to notify or warn by signal from the approaching locomotive or a flagman stationed on the ground of the approach of its locomotives on a double track when said locomotive was detoured and running against the current of the traffic.

Eighth Count:

In operating its train in such a negligent manner after the engineman and other servants or agents, of the defendant, in charge and control of the train observed the decedent was in a position of danger and peril, negligently and willfully injuring the plaintiff.

NOTE: The charge of willfulness, as set forth in the eighth count, was withdrawn on the trial (p. 102, l. 18 *et seq.*).

A R G U M E N T .

POINT I.

The Trial Court did not err in refusing to submit to the jury the question whether the Defendant was negligent, as alleged in the complaint (Counts Two, Five, Six, and Eight being abandoned), and whether such negligence was the proximate cause of the accident.

An examination of the Appellant's first point (briefed at pp. 15 *et seq.*), shows it to be founded on fallacious reasoning. *It begs the question as to decedent's status.* It assumes that the decedent was entitled to a warning, and that, being entitled to a warning, there was sufficient evidence in the case to warrant the trial Court in submitting to the jury the question whether or not a warning had been given to Sullivan.

Assuming for the purpose of the argument only that, if the status of the decedent were such as to entitle him to a warning, there was sufficient evidence to warrant the court in submitting that question to the jury, Appellant's brief signally fails to either support or establish the proposition that Sullivan was entitled to a warning.

What, then, was Sullivan's status?

This we must consider from two angles because of the trial Court's peculiar action in designating the Railroad Company's contract with the Construction Company as a "Neutral Exhibit A" (p. 32, l. 20, &c.).

A.

Considering the case without the contract in evidence, we find the situation to be: An employee of a construction company doing work under contract for a railroad company, was killed while walking along or across the railroad company's main operating tracks at a time when the work being done was wholly south of those main tracks and the place of work definitely separated from those tracks by a retaining wall—a barrier between the tracks and the place of work (see Exhibits D-1, D-2 and D-3 for identification; identified by Appellant's witness Goddard, pp. 60-61), as well as Exhibits P-3 and 4 and the administratrix is here basing the asserted right of her decedent to be upon such tracks on an alleged custom or practice of walking on them by decedent and other employees of the contractor.

Inasmuch, however, as there was not a scintilla of evidence to show that the defendant Railroad Company or its agents had knowledge of this alleged frequent use of its tracks by Sullivan, it is quite apparent that the trial Court was not in error in failing to permit the jury to infer that the Railroad Company had such knowledge and from that inference create a duty of warning.

Conceding for the sake of argument, that Sullivan had frequently used the Railroad Company's tracks, as he did on the morning of his death, again we say there was a failure of proof that he was connected with or employed upon the

railroad of the defendant (see third separate defense, p. 17, l. 19, &c.), and thus the trial Court had an additional reason for refusing to submit the case to the jury, for, at the most, Sullivan's actions and that of his fellow employees in going upon the tracks, as alleged, could be construed to be merely a "passive acquiescence" by the Railroad Company in the use of its right-of-way, especially in view of the fact that the Franklin Road bridge afforded Sullivan full, complete and adequate access to the south side of the track, the side to which the work was confined at the time Sullivan was killed.

If a Railroad Company cannot be held liable to its intending passengers, who are injured in using a pathway to its station premises for the purpose of crossing its railroad tracks to the station, where there was no physical indication that they were invited to cross, surely a contractor's employee, as in the instant case, is not entitled to claim a status giving him a right superior to such an intending passenger. Even though the agents of the Railroad had observed Sullivan and other employees of the contractor using the railroad tracks and its right-of-way, as alleged, that would not have been more than a passive recognition of such use by said employees, and would not have created a duty to the decedent.

See

Deickman, Admrx. vs. D. L. & W. R. R. Co., 81 N. J. L. 461;

Staub vs. P. S. Rwy. Co., 97 N. J. L. at 299.

Neither the convenience nor fastidiousness of the deceased created an invitation by the Railroad Company, either express or implied, to use its tracks and right-of-way, as he was doing at the time of his death.

It is argued by the Appellant (Appellant's brief, p. 22, paragraph 5), that Sullivan's daily practice must have been known to the engineman of the train which struck him, because the train itself was a daily train, scheduled to pass this work each day at the very time when, as alleged, Sullivan was accustomed to make the trip which brought about his death; but it does not at all follow that the engineman of that train was a "scheduled engineer," a term, so far as the Appellee is aware, unknown to railroad parlance. Whether the engineer who operated the train in question was a new man, an extra engineman, or the one in charge of the daily run of this scheduled train, nowhere appeared in the evidence.

B.

The discussion so far has been upon the assumption that the construction contract was not in evidence, but it is a fact that the contract marked by the Court as "Neutral Exhibit A" was a part of the Appellant's case, and this fact is a further reason why the trial Court committed no error in directing a nonsuit against the Appellant.

On the opening of the trial, it appears that the

Appellee's counsel made the following statement and tender:

"Mr. Scott: In response to request, I now produce the contract in question as demanded by the plaintiff.

"Mr. Selser: There's no use encumbering the record.

"Mr. Scott: Nevertheless, I have been called upon to produce it and I tender it. * * *

"Mr. King: We claim this contract, this agreement is entirely germane as to the matter before this court and jury. They say it is not necessary, but they called for it and there was a demand for the contract.

"Mr. Selser: When I was preparing this case, I could not prove we were there by right, so I asked for the contract.

"The Court: If you think it is necessary, you offer it and I will allow it to be put in as an exhibit.

"Mr. Selser: In their own case, of course. I haven't read the contract" (p. 19).

"Mr. Scott: As I understand the law, a notice to produce makes their request to produce a part of the record and I make that offer at this time.

"Mr. Selser: I have no objection offering it in their case and proving anything they desire from it. I don't need it. If the other side undertakes to use it, it would be evidence as to the entire contents" (p. 20, l. 1, &c.).

Later, on an objection by Appellee's counsel, to a question that:

"There was no right on the part of an employee of this independent contractor to

use our track at this point for their own purpose. It provided an overhead approach," the Court said,

"The Court: I am going to allow that contract to be marked a neutral exhibit in this case in order to make your argument have some application to the fact with which we are not familiar.

"Mr. Selser: We are not familiar with it either.

"The Court: So mark that contract neutral Exhibit 'A' " (p. 32, l. 20 *et seq.*).

Later on in the plaintiff's case, the following colloquy took place between the Appellant's attorney and the Court:

"Mr. Selser: That ruling is made with the Court taking into consideration the contract itself?

"The Court: Yes. In other words, I am not willing under the terms of the contract to say in no circumstances could the employees of the Stange Company go upon the tracks.

"Mr. Selser: I asked the Court whether the Court made the ruling he just made *in view of the fact that the contract is already in evidence* and in making his ruling he includes as part of that determination the construction of the contract, *which is in evidence*.

"The Court: Before I answer that, you might give me, Mr. Selser, that section again; read the whole thing" (p. 37, l. 20, &c.).

Whereupon counsel for the Appellant, Mr. Selser, read from the contract in question (p. 37, l. 37; p. 38, l. 1 *et seq.*).

That the inspection and use of the contract under the foregoing circumstances make said contract evidence on behalf of the plaintiff has long been settled by the decisions in New Jersey. In *Ellison vs. Cruser*, 40 N. J. L. 444, the Court said:

“It is a rule of practice that, if a party call on his adversary for the production of papers, on a notice to produce, and inspect them so as to become acquainted with their contents, he is obliged to use them in evidence if they be in any way material to the issue. The reason for this rule is that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties * * *”

(Cases cited.)

“The party by whose indiscretion an adverse witness is thus rendered competent, or evidence adverse to him is drawn out, must suffer the consequences, but the consequences of mistake should not attach themselves to the party and follow him into the new trial” (at p. 445).

The rule thus laid down was approved in *Decker vs. Smith*, 88 N. J. L. 630, at p. 635.

Section Thirteenth of the construction contract (p. 142, l. 21, *et seq.*, and p. 143, l. 1, *et seq.*) reads:

“The Contractor shall under no circumstances use, or cause to be blocked, any operating track of the Railroad Company, unless specifically authorized by a written permission of the Engineer” (p. 143, l. 25).

If it be true that the contract is to be relied upon to create a relationship between the decedent and the Railroad Company, it must, perforce, be also true that its prohibitions are equally effective against him, and where the latter expressly forbid the use, under any circumstances, of the Railroad’s operating tracks, or the blocking of them, surely Sullivan had no right to be in the place where he was when killed.

Therefore, whether we view the case without taking into consideration the construction contract, or give the contract its full force, the doctrine of *Moebus vs. Williams*, 84 N. J. L. at 540, is not at all applicable, for, in the instant case, under either view, the Court was not in error in directing the nonsuit, because the whole of the plaintiff’s favorable testimony, admitting its verity in point of fact, was insufficient in point of law to warrant its submission to the jury. (*Haywood vs. N. J. S. R. Co.*, 74 N. J. L. 678.)

Appellant’s brief sets out at considerable length colloquy between this Court and Appellee’s counsel, wherein it is quite manifest that at times the Court was in a quandary not only as to what the law applicable to the case was, but also as to the

manner in which he should handle the questions presented, as shown by his reference to the now disused practice of securing advisory opinion from the Supreme Court. But we take it that this Court is not vitally concerned with the reasons advanced by the learned Trial Judge, in nonsuiting the Appellant, if, on consideration of the whole case his determination is found to be correct. That it was correct we most strenuously urge for the reasons heretofore advanced.

POINT II.

The Trial Court was not in error in refusing to submit to the jury the question of contributory negligence of Plaintiff's decedent.

If we are correct in our contentions under Point I, there was no error in the Court's refusal to submit to the jury the question of contributory negligence of the plaintiff's decedent (see Appellant's brief, Point II, p. 26 *et seq.*), because such a submission would have to be predicated upon a proper finding by the jury of negligence on the part of the defendant.

CONCLUSION.

For the foregoing reasons, we submit the judgment of nonsuit should be affirmed.

Respectfully submitted,

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