INDEX.

Witnesses for Plaintiff.

Witnesses for Defendant.

Plaintiff's Exhibits.

Defendant's Exhibits.

Summons.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY *to* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

(L. S.)

You are summoned to answer the annexed complaint of AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, in an action at law in the Hudson County Circuit Court. And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

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

JOHN J. MCGOVERN,
Clerk.

COLLINS & CORBIN,
Attorneys.

Complaint.

(Filed May 31, 1927.)

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Complaint.

The plaintiff, Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased, residing in the City of Elizabeth, County of Union and State of New Jersey, says that:

1. At all the times hereinafter mentioned, the defendant was and still is a railroad corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. At said times, the defendant as such railroad corporation, was a common carrier of freight and passengers and as such was engaged in interstate commerce by railroad between the State of New Jersey and other states of the United States.

3. This action is brought under and by virtue of an act of Congress of the United States, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," known as the Act of April 22,

1908, c. 149, sec. 1 and the amendments and supplements thereto.

4. On December 18, 1926, the plaintiff's intestate, John McGarry, was in the employ of the defendant as a gang foreman in said interstate commerce.

5. On the evening of said day, when it was dark or dusk, the plaintiff's said intestate, while employed as a gang foreman by said defendant in said commerce as aforesaid, and at about quitting time, was struck by a train of the defendant on defendant's said railroad at Elizabethport in the County of Union aforesaid.

6. Said accident happened at a point on the defendant's said railroad about 500 feet West of "F. H." Tower opposite switch No. 39.

7. As a result of being struck by said train, the plaintiff's intestate was fatally injured and died shortly thereafter.

8. The said death of plaintiff's said intestate resulted in whole or in part from the negligence of the officers, agents and employees of the defendant and by defect and insufficiency due to the defendant's negligence in a certain engine, cars, brakes, signals, appliances, equipment, tracks and roadbed.

9. The negligence of the defendant consisted in this: That at the time and place aforesaid, while the plaintiff's said intestate was then and there employed by the defendant in interstate commerce as aforesaid, and was walking and stand-

ing on the defendant's said railroad in such a position that he failed to see said train approaching and while said plaintiff's intestate was visible for a considerable distance to the defendant's agents and servants who were then and there operating defendant's said engine on one of the tracks of said railroad, the defendant by its agents and servants negligently caused one of its said trains or engines to be operated at a high rate of speed toward the said plaintiff's intestate without slacking its speed and without signal or warning to give said plaintiff's intestate notice of the approach of said engine or train and as a result, said engine or train struck the plaintiff's intestate with great force and violence and injured him as aforesaid.

10. The Surrogate of Union County has duly granted letters of general administration upon the estate of said John McGarry to plaintiff who accepted the same, and duly qualified as such administratrix of the goods and chattels, rights and credits which were of the said John McGarry, deceased.

11. Said plaintiff's intestate left him surviving the plaintiff who is his widow and two minor children.

12. This action is commenced within two years from the day said cause of action accrued.

Plaintiff demands $100,000. damages.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Answer.

(Filed June 11, 1927.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Answer.

The answer of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says that:

I.—It admits paragraphs 1 and 2 of the complaint.

II.—It admits that during December 18th, 1926, plaintiff's intestate, John McGarry, had been employed by the defendant as an assistant foreman in both intrastate and interstate commerce.

III.—It denies paragraphs 5, 6, 7, 8 and 9 of the complaint.

IV.—It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 10 and 11 of the complaint.

V.—It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 of the complaint, except that it specifically denies that any cause of action has accrued to the plaintiff herein as against the defendant.

As a Separate Defense, it alleges that the accident mentioned in the complaint was wholly the result of contributory negligence upon the part of the plaintiff's intestate.

As a Second Separate Defense, it alleges that the accident mentioned in the complaint was a risk which arose out of the employment of the plaintiff's intestate, and which was assumed by him.

As a Third Separate Defense, it alleges that at the time of the accident mentioned in the complaint, plaintiff's intestate was a trespasser upon the private property of the defendant.

As a Fourth Separate Defense, it alleges that at the time of the accident mentioned in the complaint, plaintiff's intestate was a mere licensee upon the private property of the defendant.

As a Fifth Separate Defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff's intestate was walking or standing upon the railroad of the defendant.

Wm. A. Barkalow,
Attorney for Defendant.

Reply.

(Filed June 14, 1927.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Reply.

Plaintiff for reply says that:

She denies the allegations of the separate defenses.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation.

Before:

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

Jersey City, N. J., October 31, 1928.

Appearances:

COLLINS & CORBIN, Esqs., for the Plaintiff, by EDWARD A. MARKLEY, Esq.

WILLIAM A. BARKALOW, Esq., by WILLIAM F. HANLON, JR., Esq., and

EDWARDS & SMITH, Esqs., by EDWIN F. SMITH, Esq., for the Defendant.

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

Counsel opened to the Jury.

Mr. Markley: May I have this map marked in evidence?

Accepted and marked as Plaintiff's Exhibit P-1 of this date.

Mr. Markley: I offer in evidence General Letters of Administration granted by the Surrogate of Union County, showing the appointment of the plaintiff, Agnes McGarry, as administratrix of the estate of the deceased, John McGarry.

Mr. Smith: We have no objection.

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

Mr. Markley: I now offer in evidence, the transcript of the Department of Health, State of New Jersey, Bureau of Vital Statistics, certified by Henry B. Costill, Medical Superintendent of the Bureau of Statistics, the foregoing annexed to the outer copy of the Certificate of Death of John McGarry.

Mr. Smith: So far as the Certificate itself is concerned—showing that Mr. McGarry is dead—I have no objection to that portion. But as to portion of the Certificate which sets forth the cause of death and the contributing cause of death, because such matters could not possibly have been within the knowledge of the person certifying to them or the person who certified to the certificate, I do object to it.

Mr. Markley: I offer it under authority of the Evidence Act, and the Act concerning the Bureau of Vital Statistics. Also under the case of *Nestico* vs. *D., L. & W. Railroad.*

The Court: Under the Nestico case, I will admit it.

Mr. Smith: I don't think that covers the point of my objection, so I ask an exception.

The Court: You may have an exception.

Accepted and marked as Plaintiff's Exhibit P-3 of this date.

(Recess to 10 a. m. November 1, 1928.)

10 a. m. November 1st, 1928.

Met pursuant to adjournment.

Mr. Markley: Your Honor has admitted as P-3 the transcript of the record of the death of the deceased in this case, John McGarry.

I would like to point out to the Jury, with your Honor's permission, that the cause of death as given on here is, fracture of the skull, railroad accident, fracture of left arm and leg.

I also offer a transcript of the Death Certificate, as certified by the City Clerk of the City of Elizabeth.

Mr. Smith: I make the same objection, if the Court please, that I made before. The statements made in the certificate as to the cause of death and as to how it happened, are not relevant and not admissible.

The Court: It will be admitted, and exception allowed.

Mr. Smith: Exception.

Accepted and marked as Plaintiff's Exhibit P-4 of this date.

Mr. Markley: If the Court please, I have some interrogatories, and sworn answers by the defendant that I would like to read at this time.

There are two sets, the first, the main set of interrogatories, and then there was an additional set.

No. 1, main set, the question and answer by defendant.

1. On December 18, 1926, was the plaintiff's intestate (that is John McGarry) found dead on the defendant's railroad right-of-way at a point on the defendant's railroad about 500 feet west of F. H. tower, opposite switch No. 39 at or near Elizabethport, Elizabeth, in the County of Union?

And the answer was:

Yes, except that the intestate was found at a point opposite the west end of switch No. 39, at a point about 800 feet west of F. H. tower.

2. If so, between what tracks or rails was his body found?

Answer: Between tracks 1 and 2.

3. What time of the day was his body found?

Answer: About 4.31 p. m.

4. Who found plaintiff's intestate?

Answer: Defendant refuses to answer this interrogatory, on the ground that it calls for the name of a witness.

5. Was the body of the plaintiff's intestate found on December 18, 1926, between tracks 1 and 2?

Answer: Yes.

6. Was plaintiff's intestate last seen on December 18, 1926, crossing the main line tracks south to north?

Answer: Defendant has no knowledge as to when plaintiff's intestate was last seen.

7. Was the body of the plaintiff's intestate found on December 18, 1926, at about 4.32 p. m.?

Answer: Body of the plaintiff's intestate was seen on December 18, 1926, between 4.32 p. m. and 4.35 p. m.

8. Did train 707 pass point where the body of the plaintiff's intestate was found on December 18, 1926, at 4.30 p. m.?

Answer: Train 707 passed this point between 4.30 and 4.31 p. m.

9. What work did plaintiff's intestate do on December 18, 1926, for the defendant?

Answer: Assistant foreman in charge of supervising leveling of dirt.

10. Where was he working?

Answer: On the south side of track No. 3.

11. If he was working on the right of way of the defendant repairing tracks, were said tracks used for both interstate and intrastate commerce?

Answer: He was not repairing tracks.

12. How far from the point where plaintiff's intestate's body was found on December 18, 1926, was the place where he had been working?

Answer: On December 18, 1926, prior to the time, approximately 4.15 p. m., plaintiff's intestate had been working in space of ground extending approximate 75 feet east of a point opposite 39 switch and approximate 25 feet of a point opposite 39 switch. Subsequent to said approximate time of 4.15 p. m. plaintiff's intestate left this space of ground and proceeded to a tower known as F. H. tower, which is situated approximately 4,800 feet east of the point where the plaintiff's intestate's body was found. As to what work plaintiff's intestate was performing in going to such tower, or as to whether he was performing any work in going to such tower, or as to his purpose in going to such tower, this defendant has no knowledge.

The next one I read is 17.

17. On what track was said train No. 707 proceeding on December 18, 1926?

Answer: Track No. 2.

18. What were the names of the engineer and fireman on train 707?

Answer: Philip Eater, engineer and John Wilcox, fireman.

Now I go to the additional interrogatories.

No. 8. On what track was said train 619 proceeding on December 18, 1926, as it passed F. H. tower and proceeded towards switch No. 39?

Answer: Track No. 2.

No. 10. Describe what work was performed by plaintiff's intestate for the defendant on December 18, 1926, and whether said work was performed for the defendant?

Answer: Supervising leveling of dirt.

And the answer to "Working for defendant?", "Yes".

No. 11. At what speed was each of said trains 619 and 707 proceeding as they passed F. H. tower and switch No. 39 on December 18, 1926?

Answer: Train No. 619 speed between 35 to 40 miles an hour. Train No. 707 speed approximately 40 miles an hour.

I wish to point out to your Honor and the jury that the defendant admits paragraphs one and two of the complaint and part of paragraph three.

I want to read those:

No. 1. At all times hereinafter mentioned the defendant was and still is a railroad corporation, organized and existing under and by virtue of the laws of the State of New Jersey.

That is admitted.

No. 2. At said times (that is at all the times mentioned in the complaint) the defendant as such railroad corporation was a common carrier of freight and passengers and as such was engaged in interstate commerce by railroad between the State of New Jersey and other states of the United States.

That is admitted.

No. 3. Nothing is said about three, so it is admitted.

3. This action is brought under and by virtue of an Act of Congress of the United States entitled "An Act relating to liability of common carriers by railroad to their employees in certain cases," known as Act of April 22nd, 1905, Chapter 109, and Chapter one and amendments and supplements thereto.

With respect to paragraph 4, they say:

Defendant railroad Company admits that during December 18, 1926, plaintiff's intestate John McGarry, has been employed by the defendant as an assistant foreman, in both intrastate and interstate commerce.

STEWART L. PACH, sworn for the plaintiff:

Direct examination by Mr. Markley:

Q. You are the gentleman who made this map, I believe? A. Yes, sir.

Q. Marked P-1. You are a civil engineer? A. Yes, sir.

Q. Employed by the Central Railroad Company of New Jersey? A. Yes, sir.

Q. And have been for how long? A. Nineteen years.

Q. Now, may I ask you to please step down here for a moment? On this map you give the scale of the map, as I understand it as one inch equals twenty feet? A. Yes, sir.

Q. That is, one inch on the map represents twenty feet on the ground? A. Yes, sir.

Q. Every inch shown on here, you have twenty feet on the ground, actually? A. Yes, sir.

Q. You have also shown F. H. tower, haven't you? A. Yes, sir.

Q. And that is at the extreme right of your map and south of the tracks of the Railroad Company? A. Yes, sir.

Q. You have also given the points of the compass by an arrow, haven't you? A. Yes, the arrow points north.

Q. And the other way is south; to the right is east; to the left is west? A. Yes, sir.

Q. How many stories has that building marked F. H. tower? A. That is a two-story building above the level of the tracks; there is also a basement to it. Above the level of the tracks is a two-story building.

Q. Above the level of the railroad or tracks, there is two stories above that? A. Yes, sir.

Q. And the second story, what is up in the second story? A. The second story contains the machine which operates the switches and signals on this entire interlocking plant.

Q. Within the confines of your map, is that an interlocking plant? A. Yes, sir.

Q. That interlocking plant extends how far to the east of F. H. tower? A. It starts the west end of the bridge.

Q. Newark Bay bridge? A. A little over 1,000 feet east of the tower and extends to the westerly end of the map.

Q. That is right down to where you show it at this end? A. A little beyond that.

Q. Does it extend all the way down to Elizabethport station? A. No, just a little bit beyond.

Q. How far west of F. H. tower does that interlocking system or plant of the Company extend,

approximately? A. 1800 feet west of the signal tower.

Q. So that this interlocking system which is operated from F. H. tower, or plant as you call it, extends one thousand feet east of the tower, to the Newark Bay bridge, and approximately 1800 feet to the west? A. Yes, sir.

Q. How near is that to Elizabethport station? A. The west end of the interlocking system is about two thousand feet east of the station.

Q. How far is it to the station from F. H. tower; 1800 plus 2000 feet would be 3800 feet, wouldn't it? A. The actual distance from F. H. tower to Elizabethport station is 4288 feet.

Q. Now, would you mind giving the Jury the dimensions of F. H. tower, the building? A. The building is 30 feet long, that is, distance parallel to the railroad east and west, 30 feet. Depth of the building 16 feet. That is, right angles to the railroad.

Q. Upstairs on the second floor, where this interlocking system or plant is operated, and the 30 feet that faces the railroad, that is mostly window, isn't it? A. Yes, sir.

Q. Large panes of glass? A. As much as possible is glass.

Q. How large would you say these panes are? A. I didn't measure them. I would say the north end of the tower is practically one sheet of glass.

Q. The side that faces the railroad is practically one big sheet of glass? A. Yes, sir.

Q. What about the sides, the 16 feet side, west side and east side; are they glass too? A. Yes, sir.

Q. Practically all glass? A. Practically, yes, sir.

Q. Is that where the man who operates that plant stands ordinarily? A. Yes, sir.

Q. Now, how far is it from the west building line of F. H. tower down to the westerly end of switch 39, I believe it is on track 2? A. 805 feet.

Q. In other words, to the westerly end of switch 39, which is on track 2, it is eight hundred how many feet? A. 805.

Q. You have shown within the confines of this map the various switches, haven't you? A. Yes, sir.

Q. Starting at the east end, you have switch No. 9 on track 2; is that switch No. 9? A. Number 9, yes, sir.

Q. Are there other switches to the east of that, do they run down to No. 1? A. No, No. 5 is east of No. 9. Then it goes to Bay bridge.

Q. Newark Bay bridge? A. On which there are no switches.

Q. Newark Bay bridge, I understand, is a thousand feet from F. H. tower, approximately? A. Yes, sir.

Q. As you look down toward Newark Bay bridge, which is in an easterly direction, from F. H. tower down to switch 39, which is 800 off feet to the west of F. H. tower, the railroad is straight, isn't it? A. Yes, sir.

Q. There is no curve in it? A. No, it is a true tangent.

Q. Are these four main tracks? A. Yes, sir.

Q. Main tracks that you depicted on here? A. Yes, sir.

Q. 4, 2? A. 1 and 3.

Q. They are main line tracks? A. Yes, sir.

Q. Running from where? A. Jersey City to Elizabethport; then diverging to the south and

east, to the Shore, and continuing straight to Philadelphia, westward to Scranton, Pa.

Q. These are the main line tracks from Jersey City, N. J., to Philadelphia, Pa., and Scranton, Pa.? A. Yes, sir.

Q. Do your through passenger trains run through here? A. Most of them do.

Q. Trains that run from Jersey City, taking passengers from New York? A. Yes, sir.

Q. The westerly tracks, that is, the westbound trains run on which track, ordinarily? A. On tracks Nos. 2 and 4, the two most northerly tracks.

Q. And the east bound? A. One and 3, the southerly tracks. West bound are on either track two or four, unless there is a special due on two or four. There is no special line at this point.

Q. And on the east bound? A. The same thing.

Q. In addition to that, can the man in the tower switch his trains automatically, say place west bound trains, trains going on track two, could he switch them over by means of one of these switches to one of the east bound tracks? A. Yes, sir.

Q. And vice versa? A. Yes, sir.

Q. So that by means of this interlocking, trains can be run in either direction, on each track? A. Except the northerly track, which is an exclusive westbound track.

Q. You have a switch on that? A. Yes; it is a hand signal against that track.

Q. As a practical matter, could you switch from track four to two? A. Yes, sir.

Q. You would switch from four to one, or three? A. It could be done.

Q. It can be done; it is not done? A. No, sir, it is not.

Q. Now, this map was made to scale? A. Yes, sir.

Q. Take the point where track No. 3 is marked; what is the width of the railroad from the outside of the most southerly rail of track 3, to the most northerly rail of track 4? A. About 59 feet.

Q. What is the distance between rails? A. Four feet eight and a half inches, standard gauge.

Q. Taking the view from switch 39 on the No. 2 track, which is the westerly track, isn't it—? A. Yes, sir.

Q. Down towards Elizabethport. What view have you there, towards Elizabethport? A. I did not make any special observation. I would say that the view from switch 39 to the west is unobstructed all the way to the station.

Q. Which is over four thousand feet? A. Which is 3,483 feet from the switch.

Q. How about the view from switch 39 up towards the Newark Bay bridge, in an easterly direction? How far is that unobstructed? A. That view is unobstructed for over a mile.

Q. Is it straight for a mile? A. Yes, over a mile.

Q. When was this map made? A. The map was made March 15, 1928. Survey for the map was made March 3, 1927 and July 10, 1927, two separate dates.

Q. Isn't there a track that runs below this embankment, south of track three? A. Yes, sir; shown by dotted lines on the map, marked "low grade", formerly the main line.

Q. That track continues right on up? A. Yes, sir.

Q. Connects up here with track 3? A. Yes, sir; at the west end of the Newark Bay bridge.

Q. This track which is down the embankment connects up with and runs into the other by means of the switch, into your eastbound No. 3 track? A. Yes, sir.

Q. You don't show that on the map? A. No, that is beyond the limits of the map.

Q. Do you know where that runs in the other direction? A. Yes, the track was in at the time of the accident. Yes, it runs up past the Singer factory and leads into track three again with a hand switch.

Q. So that it connects at both ends with track three? A. Yes, sir.

Q. Do you know what that is used for? A. That is used for their work train, or for the Singer train which daily takes up employes of the Singer Manufacturing Company on the low-grade track as they come out of the factory.

Q. At the point of the F. H. tower? A. It is a one-foot down, one foot down is one foot down grade.

Q. So that a hundred feet down, you go down a hundred feet.

Q. It slopes a foot on every foot? A. Yes, sir.

Q. How far down to the bottom of the bank, from the top of the railroad? A. From the top of the track through to the bottom of the bank there is a difference of twenty feet.

Q. At F. H. tower? A. Well, I have no elevation of the low-grade track; I could estimate it. About fifteen feet below the signal tower.

Q. It is a fifteen foot drop from the signal tower? A. From the level of the rail.

Q. That is not actual measurement? A. At the underpass, twenty feet at the underpass, estimated at the tower, about 15 feet; the reason for that is the low-grade track is climbing all the while.

Q. Is there a fence along the southerly part of the embankment? A. No, sir.

Q. Is there a fence as you come in just this side of Elizabethport? A. Yes, sir; Elizabethport.

Stewart L. Pach, for Plaintiff—Cross.

Q. There is a fence that blocks off the railroad, doesn't it? A. Yes, sir, the Elizabethport end.

Q. How far is that east of the Elizabethport station? A. Well, it starts at the station.

Q. How far west of the station building, or east of the station building, I should say? A. About three hundred feet east of the station building.

Q. That extends right across the railroad? A. Parallels the railroad. It joins with the building of the Singer Manufacturing Co. Part of it is their fence.

Q. Were you up there around December, 1926, at the time of this accident on December 18th? A. I was probably in that vicinity. I have no record of it in connection with this accident.

Q. You didn't make any measurements at the time? A. No, sir.

Q. I don't suppose you are able to say whether there was any material piled up between tracks one and two? A. At the time of the accident?

Q. Yes? A. No, sir, I am not able to say that.

Cross-examination by Mr. Smith:

Q. This fence you talk about, that fence is down here, out of the way of the railroad? A. It is about fifty feet south of the center line of the tracks.

Q. It connects up with the property? A. The Singer Manufacturing Company.

Q. The objects that you have marked down here "Factory, Singer Manufacturing Company", that is the factory building of the Singer Manufacturing Co.? A. Yes, sir.

Q. As I understand, this embankment down here at the tower is about fifteen feet above ground? A. No, it is about 15 feet above the top of the

main line; about five feet above the natural surface.

Q. About 15 feet above the top of the main line? A. Below the main line.

Q. In other words, the ground slopes up in the direction toward the Bridge? A. Yes, sir.

Q. Then from the top of the rail to the level of the low ground it grows higher as it goes up that way (indicating)? A. Yes, sir.

Q. Then, as it gets towards Elizabethport station, it starts up towards the level again? A. Yes, sir.

Q. So that up towards Elizabethport station, it is practically level? A. Yes, it all comes together.

Q. Down here it is on the embankment? A. Yes, sir.

Q. You say the embankment at this point, near the underpass, is about 20 feet below ground? A. Yes, sir.

Q. As it goes down below at F. H. tower, it is only about 15 feet? A. Yes, sir.

Q. You are familiar with this location? A. Yes, sir.

Q. You say you made this survey on July, 1927, and earlier? A. Yes, sir.

Q. And this is the same as then; conditions were the same? A. Yes, sir.

Q. You have been there since, haven't you? A. Yes, sir.

Q. Conditions are the same today? A. Yes, sir.

Q. And were the same in December, 1918? A. Yes, sir; December, 1926.

Q. On the south side of the track, does the embankment come out so that there is a space there where people can walk? A. Yes, sir, from the end of the ties to the south of the track.

Q. What is the distance between the tracks, say the northerly track of track 1 and the southerly track of track 2; in other words, what is the space between tracks 1 and 2? A. I measured that at switch point 39, 23.3 feet.

Q. So that between track 1 and 2, at the switch point, there is 23 feet and three-tenths of a space? A. That is between the nearest rail.

Q. Now, take down here at the tower; what is the distance? A. The same thing.

Q. Does that stay the same all the way up? A. All the way from the underpass, then the rails start to widen.

Q. Then it widens? A. Yes, sir.

Q. What is the distance, about, at the underpass? A. Widens out to 27 feet to the bridge, and then it starts to narrow down.

Q. What is the distance between the northerly track of track 4 and the edge of the embankment or right of way? A. The edge of the top of the slope is—the distance of the north track of 4 varies considerably; anywhere from five to ten feet going near the underpass, the roof of the underpass, it runs out to about 20 feet.

Q. What is it, we will say from Tower F. H. up west to the underpass, approximately what is the average width? A. I would say the average width is about 7 or 8 feet.

Q. Now, can you tell me how high the second floor of F. H. tower is above the surface, to, we will say, the top of the rail? A. I didn't measure that distance, but I would estimate it to be about 10 feet, the floor of the second floor about 10 feet.

Q. As I understand, you say that the railroad from, we will say, the point of switch 39, clean down to the bridge is flat, straight? A. Yes, sir.

Q. So that anybody taking a look could see a train coming up from the bridge? A. Yes, sir.

Q. Easily, couldn't they? A. Yes, sir.

Q. You have done that yourself? A. Yes, sir.

Q. Now, from switch 39, the westerly side of switch 39, that is a good view, isn't it? A. All the way to Elizabethport station.

Q. Now, then, a person walking, we will say, from Elizabethport station, east from Elizabethport to the bridge is a plain view, isn't it? A. Yes, sir.

Q. This low track on the bottom of the embankment is ground level? A. At the bottom of the embankment.

Q. The bottom of the embankment and the main line as it is, and where you have marked "low-grade track" is ground level down there? A. Yes, sir.

Q. And is there any place there for people, where people can walk at the bottom of the embankment all the way up towards Elizabethport? A. Yes, sir.

Q. This underpass, as you have here, has a concrete foundation, supporting the bridge, or we will say, the hole in the mountain? A. Yes, sir; similar to a subway.

Q. Now, north of the map and north of track 4 and down at the end of the embankment, are the Elizabethport shops over there? A. Yes, sir.

Q. Can you tell me, Mr. Pach, how many overhead signals there are between, we will say, the bridge and Elizabethport station; I suppose you call them semaphore signals? A. Yes, sir; at the west end of Newark Bay bridge, there is a signal bridge, which is distant 2,984 feet from the automatic signal No. 91, which is on the ground just west of the limits of the map. Then beyond that, there is a signal near Elizabethport station, called the diverging route signal.

Q. Is that overhead? A. Overhead mast, not a bridge, on a signal pole; 1594 feet from signal 91, and beyond that, there is a signal at Elizabethport crossing on the map. That is governed by R. U. signal tower. Beyond that, there is another signal on the map, governed by R. U. tower. All of these signals govern westbound trains.

Q. Taking to the left of your map, as I understand, as your tracks approach Elizabethport station, one line diverges to the left, to go to the Shore? A. Yes, sir.

Q. And then at right angles, we will say, across your map, from south to north, there is a set of tracks that cross the main line tracks that run from the Shore, we will say to Newark? A. Yes, sir.

Q. How many of these tracks? A. One track, single track.

Q. That crosses all these main line tracks? A. Four main line tracks, yes, sir.

Q. Is that crossing governed by overhead signals? A. Yes, sir.

Q. They are to govern westbound traffic? A. Yes, sir.

Re-direct examination by Mr. Markley:

Q. Is there any signal shown on the face of your map, overhead signal? A. There are two signals, just west of the subway, which govern reverse traffic on tracks 2 and 4.

Q. What do you mean by reverse traffic? A. That governs moving trains against traffic; in other words, trains west to east.

Q. They would not work either ways? A. No, they are not visible either ways; they are shielded.

Q. Are there any other signals visible in the

confines of your map, other than those? A. Yes, a point just north of track 3, the extreme left, extreme left hand edge of the map, there is a positive stop signal that governs eastbound traffic on track 1.

Q. That is traffic going eastbound, not westbound? A. Yes, sir.

Q. That is over here, the point where I have marked "x"? A. Yes, sir.

Q. That is for eastbound traffic on track 3? A. No; track 1.

Q. No others you can point to on this map? A. No, sir; none other.

Q. Your map was made, you say, in March, I think, and some later date? A. My survey was made in March, March 3, 1927, and again July 15, 1927.

Q. During the spring and summer of 1927? A. Yes, sir.

Q. You don't attempt to show on there the physical conditions with respect to snow or ice or material on the ground in December, 1926, do you? A. No, sir.

Q. Now, I want to show you a photograph, which has been kindly offered to me by the Company's attorney. Does that show the embankment on the south side of the railroad and the F. H. tower? A. Yes, sir.

Q. It also shows the concrete bridge, or what you call it? A. I marked it "underpass" on the map.

Q. How high would you say the top of the concrete underpass is from the ground at that point? A. About 20 feet above ground.

Q. Is that actual measurement? A. Yes, that is measured down from the room of the subway.

Q. From the roof of the subway? A. Yes, sir.

Q. How high is the concrete top above the roof? A. That is level with the top of the rail.

Q. You say from the roof of the subway? A. The top of this concrete roof is the same as the top of the rail, measured down from that down below, is 20 feet.

Q. Would you mind putting a little cross alongside F. H. tower, to identify it? A. I will put it right over the peak of the roof of F. H. tower.

Mr. Markley: I will offer this photograph in evidence.

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

Q. This photograph, referring to P-5, also shows the view in a westerly direction towards Newark Bay bridge, doesn't it? A. Easterly direction.

Q. Easterly direction, I should say? A. Yes, sir.

Q. In other words, that is the direction from which trains westbound would come? A. Yes, sir.

Q. That same thing would apply to the engineer, if he was operating a train westbound. There is no reason why——

Mr. Smith: I object, unless he can show the witness is in the position of the engineer of the train.

Mr. Markley: Let me finish.

Q. If the engineer is in the cab of his engine, going in a westerly direction, down at Newark Bay bridge, coming along, there is no reason why he could not see a man on the track ahead, down near switch 39?

Mr. Smith: I object to this, unless it is shown that the witness has made the observation from an engine.

The Court: Yes; I think the question ought to be qualified so as to bring it within the limits of this case.

Q. You took observations down there at times, didn't you, Mr. Pach? A. Yes, sir.

Q. Did you take observations from the Newark Bay bridge? A. No, sir; I was standing at the point of switch No. 39.

Q. Did you walk down towards Newark Bay bridge? A. Yes, sir.

Q. Looking back up towards switch 39? A. Yes, sir.

Q. Could you see down to switch 39 without any difficulty? A. Yes, sir.

Q. You were standing on the ground? A. Yes, on the track.

Q. At Newark Bay bridge? A. Yes, sir.

Q. Did you go beyond the bridge, further east? A. No, I didn't go out on the bridge.

Q. There is nothing to obstruct the view further east, is there? A. No, sir.

Q. For a mile, I believe you said? A. About a mile, yes, sir.

Mr. Markley: I will take the slip off these photographs.

Q. Have you been up in the tower, Mr. Pach, F. H. tower? A. Yes, sir.

Q. Have you looked out of the window up towards the Newark Bay bridge and down towards Elizabethport? A. Yes, sir.

Q. Have you a view in each direction? A. Yes, sir.

Q. Clear view? A. Yes, sir.

Q. How far up towards Newark Bay bridge can you see, or beyond it? A. Well, I didn't make any record of it, but I would assume you could see all the way to the draw span, nearly a mile.

Q. And looking towards Elizabethport? A. The same thing is true. I am sure you could see to Elizabethport station, if not beyond.

Q. This under pass, which is part of a concrete structure shown on this photograph P-5, there is tracks underneath? A. A single track; at present it is constructed for a double track.

Re-cross-examination by Mr. Smith:

Q. In the observation you made from the point of switch 39, that was along the track, or made while you were standing on the track? A. Yes, sir.

Q. In other words, you made it from the ground, as a man stands on the ground? A. Yes, sir.

Q. And that is the view that you can—could be had by a person standing on the ground? A. Yes sir.

Q. Either looking west or looking east? A. Yes, sir.

Re-direct examination by Mr. Markley:

Q. Did you ever have occasion to make an observation from the cab of an engine? A. At this point?

Q. At any point? A. I am trying to think. I don't recall the exact way I made the observation. I don't recall making any specific observation.

Q. Didn't you make some observations in the Nestico case from the cab of the engine? A. I don't think I was ever on that case.

Q. Were you ever in that case? A. Not that I recall.

Q. Do you recall making any observation from the cab of an engine on the road? A. I don't recall any. I may have made some; I have ridden in a good many cabs. Where did the Nestico accident occur?

Mr. Smith: A D. L. & W. case?
The Witness: No, sir.

Q. Have you sat in the cab of an engine and looked out? A. Yes, sir.

Q. You are higher above the railroad than when you are standing on the railroad? A. Yes, sir.

Q. How much higher? A. A modern locomotive, about 12 feet.

Q. Above ground? A. Above ground.

Q. Would you have just as good a view there as you would have standing on the ground? A. Yes, sir.

Q. As you stood in F. H. tower, or sat there and looked out of these broad windows, how high above ground were you? A. Why, I think the floor I estimated to be 10 feet above the top of the rail.

Q. So standing there, I assume you are about 6 feet high, you would be about 16 feet above ground, or your eyes would? A. Yes, sir.

Q. You said the cab of an engine is 12 feet above ground? A. Approximately.

Re-cross examination by Mr. Smith:

Q. Mr. Pach, sitting in the cab of the engine, how far back of the front of the engine is the cab? A. In modern engines, I would estimate it about fifty feet.

Q. So that, if you are sitting in the cab, in the engineer's seat, or the seat in the cab, your vision is cut off for about 50 feet towards the side of you? A. By the boiler.

Q. I mean if you sit up in the cab of the engine, and looking straight ahead, and the object is straight ahead of you and is some distance ahead, you can see? A. Yes, sir.

Q. So far as the left side is concerned, the boiler cuts off your view? A. Yes, sir.

Q. That would be so to the side on the other wise? A. Precisely, yes, sir.

Q. You are familiar, you say, with this place of the accident, are you? A. Yes, sir.

Q. I show you a picture and ask you if that is a clear representation, looking east between tracks 1 and 2, with the camera set about 25 feet west of the westerly point of switch 39? A. Yes, that is a good photograph, looking east.

Q. Does that accurately represent the conditions there? A. Yes, sir.

Mr. Smith: I ask that it may be marked for identification.

Mr. Markley: You can put it right in evidence. Put them all in.

Accepted and Marked as Defendant's Exhibit D-1 of this date.

Q. As I understand you, this picture, with the camera placed 25 feet west of the point of switch 39, shows the view looking east? A. The camera 25 feet west of the switch, yes, sir.

Q. I show you another photograph, with the camera placed 8 feet south of the south rail of the westbound track No. 2, and 25 feet east of the westerly point of switch crossover 39. Is that the view looking west towards Elizabethport station? A. Yes, sir, it is.

Q. So that, to a person standing at that point, 25 feet west of the point of switch 39, that is one view, looking east; and this picture I have here is the view looking west? A. Yes, sir.

Mr. Smith: I offer that.

Accepted and Marked as Defendant's Exhibit D-2 of this date.

Q. I show you a photograph, taken from the northwest window of F. H. tower on the operator's floor, showing the view looking west towards Elizabethport station. Is that a correct view? A. Yes, sir.

Mr. Smith: I offer this.

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

Q. Do I understand you that that shows the view looking west from the northwest window of F. H. tower; that shows the embankment, does it? A. Yes, sir.

Q. And at the left of the picture, what is that, the Singer shops? A. The Singer shops shown on the map.

Q. I show you another photograph taken with the camera 20 feet north of the north rail of the westbound track 4, opposite the westerly point of switch 39 and purporting to show a view looking south across the track, and ask you if that correctly represents the condition? A. Yes, it does, and in the background, there is also shown the shop of the Singer Manufacturing Company.

Mr. Smith: I offer that.

Accepted and Marked as Defendant's Exhibit D-4 of this date.

Q. I show you another photograph, with the camera placed 5 feet south of the south rail of the eastbound track 3, opposite the westerly point of switch or crossover 39, purporting to show the view looking north, that is across the tracks; and ask you if that correctly represents the condition? A. Yes, it does, and in the background, it shows the roof of the Central Railroad shops, north of the main line tracks.

Mr. Smith: I offer that.

Accepted and Marked as Defendant's Exhibit D-5 of this date.

MICHAEL DUFFY, sworn for the plaintiff.

Direct examination by Mr. Markley:

Q. What is your name? A. Michael Duffy.

Q. Where do you live? A. 609 Westchester Avenue, New York City.

Q. How old are you? A. Thirty-four.

Q. Who are you employed by at the present time? A. The Interborough Rapid Transit Company, New York City, as signal-man.

Q. What are your duties as a signal-man? A. To install——

Mr. Smith: I object.

Mr. Markley: I won't press it.

Q. On December 18, 1926, by whom were you employed? A. I was employed by the Central Railroad Company of New Jersey.

Q. In what capacity were you employed by the Central Railroad Company on December 18, 1926? A. Signal maintainer.

Q. How long had you been signal maintainer for the Central prior to December 18, 1926? A. About a month, and prior to that I worked formerly from November, 1920, to January, 1921.

Q. Also as signal maintainer? A. As signal maintainer.

Q. Looking at this photograph, exhibit P-5, which shows the signal tower with an X over it, do you recognize that picture? A. Yes, sir.

Q. Were you employed in the vicinity of that tower on December 18, 1926? A. Yes, sir.

Q. What were your duties as signal-man there? A. To inspect and repair signals and switches in the interlocking plant in the vicinity of F. H. tower.

Q. What were your hours of employment? A. From 3 P. M. to 11 P. M.

Q. You say you had worked there for a month prior to the accident? A. Yes, sir.

Q. Prior to that you had worked there when? A. From November, 1920, to January, 1921.

Q. At that time did you work in the same place or some other place? A. No, sir, I worked between Bayonne and Newark Bay drawbridge.

Q. That is the drawbridge about 1000 feet east of F. H. tower? A. East of F. H. tower.

Q. Now, did you know the man who was killed, John McGarry? A. Yes, sir.

Q. How long had you known him? A. While I worked at F. H. tower, about a month.

Q. Did you see him every day? A. I saw him very near every day. I would not say I saw him every day, but near every day.

Q. Do you know what work he did there? A. He was assistant track foreman.

Q. Assistant track what? A. Track foreman.

Q. Do you know who the foreman was? A. Why, Mr. Donahue was a foreman, and——

Q. Who else? A. Mr. Spangenberg was a foreman, also.

Q. On December 18, 1926, do you know whether there were some section men, gangs of section men working in the vicinity of F. H. tower? A. There were, yes, sir.

Q. Do you know how many gangs were working there? A. There were two gangs working near F. H. tower.

Q. I wonder if you would mind coming down to this map for me, Mr. Duffy, and see if you can point out on the map where the two gangs were. Stand over at the side and take the pointer and point out on this Exhibit P-1. This is F. H. tower marked on there. Switch 39 is here on track 2, and here is marked track 4. Now, will you point out to the jury where these gangs were working as you remember it on that day? A. There was McGarry's gang, was working in back of the tower, that would be south of the tower, on filling in or making an embankment.

Q. Will you point out about where it was that you say that gang was working? A. Yes, sir (indicating).

Q. Keep in mind that one inch on this map equals twenty feet on the ground. How far east would you say it was from F. H. tower? A. About fifty feet.

Q. How far south of it? A. About ten or fifteen feet.

Q. Where was the other gang working? A. Somewheres down here (indicating).

Q. On track 2, I suppose? A. On track 2.

Q. Suppose you point out where the other gang, keeping in mind that switch 39 is here? A. Well, the other gang was working down in the vicinity of here (indicating).

Q. Suppose I put right here the letter G. What time did you go to work that day? A. Three o'clock.

Q. You say that McGarry was doing what there with his gang, southeast of the tower? A. He was making, they were unloading dirt from some flat cars and making an embankment there to put in some extra tracks.

Q. Now, on that day, about what time was it you saw McGarry working out there with his gang? A. When I came on duty at three o'clock I saw McGarry there.

Q. Did he continue there? A. What is that?

Q. Did he continue working there? A. Yes, sir.

Q. Were you there when he quit? A. Yes, sir.

Q. Working in the gang? A. Yes, sir.

Q. What time was that? A. About four o'clock.

Q. Did the gang quit at the same time? A. No, the gang quit about 4.15.

Q. What did McGarry do when he left his gang? A. When McGarry left his gang he came into the tower about four o'clock. When he quit the gang there he came into the tower to make out his time.

Q. Were you there? A. Yes.

Q. Where did he make out his time in the tower? A. At a desk in the tower.

Q. On what floor? A. He made out the time for the gang for that day.

Q. What floor of the tower? A. On the first floor.

Q. Was there a table or desk there? A. There was a desk in the tower.

Q. And a chair too? A. Yes, sir, two chairs.

Q. Was that where he made out his time? A. Yes, sir.

Q. What did he make it out in, do you know? A. He had a company time book.

Q. I show you what purports to be a company time book and ask you whether you recognize that as the kind of book he had? A. That looks like a book that he had.

Mr. Markley: I will mark that for identification.

Marked for identification, as Plaintiff's Exhibit P-6 for identification, of this date.

Q. While he was making out that time book were you talking to him? A. Yes, sir.

Q. Just general talk? A. Well, we commenced on the weather and he asked me about some electric light bulbs. He told me he would like to buy some bulbs for his home. He asked me the size of bulbs he should get and about how much they would cost. So I told him what size to get, and I told him they cost about thirty cents apiece.

Q. Well now, do you know whether the foreman or section foreman came in there daily making out their reports?

Mr. Smith: I object to that as immaterial and irrelevant, and leading.

Mr. Markley: I withdraw it.

Q. Tell the jury if you can, whether, or rather what if anything the section foreman came in the tower for? A. Well, the section foreman came in the tower as a sort of a central point, receiving orders from the office, such as if there was a carload of dirt coming in, or if the office wanted them to work overtime that night, or work on Sunday, and so forth. It was the central point for receiving orders from the office. Also they came in to get warm on cold days, because that is the only place they could get warm in that vicinity. Then they made out their time in the tower.

Q. You mean made out their time books? A. Yes, sir.

Q. Can you name any of the men who did those things in the tower? A. There was McGarry and Donohue and Spangenberg.

Q. Have you seen them in there on prior occasions to this accident? A. Yes, sir.

Q. How long did McGarry remain in there making out his report, or report book, or whatever it was, on the day that he was killed? A. He was in the tower about fifteen or twenty minutes.

Q. Were you there when he left? A. Yes, sir.

Q. What time did he leave? A. About 4:20.

Q. Did you have any occasion to check up, about the time when he did leave? A. Why, yes. He told me that he was going to get the 4:42 or 40 train out for Elizabethport. So I pulled out my watch and it was 4:20. So I told him, "You had better hurry, you had better start right away, because you could make it if you start out right away."

Q. And did he start right away? A. Yes, sir.

Q. And when he left what did you do? A. When McGarry left I went down, looked at the furnace and went upstairs to the second story of F. H. tower.

Q. Did you have any duty to perform up there on the second story of the tower? A. Well, not at the time, not at the present time, no, I did not, but it was our duty to go upstairs between the hours, well, in the rush hour, from four to six thirty and stand by with the towerman in case the signals or switches failed; we would be there to go right out and repair them and of course less delay in making repairs.

Q. Then you did go upstairs for that purpose? A. Yes, sir.

Q. Did you have anything to do except stand by while you were up there? A. No, sir.

Q. Now, this upstairs part, I understand three sides of it are of glass; is that right? A. Yes, sir.

Q. Which sides, do you know? A. The east side, west side and the north side. The north side is facing the track.

Q. As you were up there looking out on either of the sides, had you a clear view? A. Yes, sir.

Q. How far could you see as you looked out of that tower in an easterly direction, that is up toward Newark Bay bridge? A. Well, about 1,500 to 2,000 feet.

Q. Looking down toward Switch 39 and toward Elizabethport? A. About the same, 1,500 or 2,000 feet.

Q. As you were up there that day, did you look out of the window? A. Yes.

Q. What kind of a day was it? A. It was a clear, cold day.

Q. As you looked out, did you see anything of McGarry? A. I saw McGarry walking down the track when I looked out.

Q. And as he walked down which way was he walking? A. He was walking west towards Elizabethport.

Q. From the tower? A. Yes, sir.

Q. That is, looking at this map for a moment, stay right where you are, this being F. H. tower, he was walking that way or this way? A. This way (indicating).

Q. That is down this way? A. Yes, sir.

Q. Towards the West? A. Yes, sir.

Q. When you looked down and saw him, what part of the railroad was he walking on? A. Why, he was walking between track 1 and track 2.

Q. That is, he was walking between track 1 and 2, the inside tracks? A. Between the two tracks.

Q. There are four tracks there, two rails each? A. Yes, sir.

Q. He was walking between the inside tracks; there were four rails on each side of him? A. Four rails on each side of him, yes, sir.

Q. Did you have any trouble seeing him? A. No.

Q. Was it still light? A. Yes, sir.

Q. Did any train pass while he was walking along? A. There was a train passed, 619.

Q. 619 passed? A. Yes, sir.

Q. Which direction was that train going? A. Going West.

Q. Did you know what track it was on? A. Track two.

Q. Track 2 would be the third track from the tower house? A. Yes, sir.

Q. From F. H. tower? A. Yes, sir.

Q. You say that went west. That would be going from Newark Bay bridge towards Elizabethport? A. Yes, sir.

Q. And when that went west where was McGarry then, do you know? A. He was about 200 feet, about two to three hundred feet west of the tower.

Q. And where was he then, did you notice? A. He was between tracks one and two, walking between tracks one and two.

Q. That is he was on the part of the railroad in the center about, with four rails on each side of him? A. Four rails.

Q. You say two or three hundred feet west of F. H. tower? A. Yes, sir.

Q. Did that train give any audible signal by bell or whistle? A. They had a bell ringing.

Q. The bell was ringing? A. Yes, sir.

Q. You heard it, did you? A. Yes, sir.

Q. Now then, did another train come along? A. Yes.

Q. By the way, do you know what time this 619 passed, about? A. About 4.24.

Q. Do you know whether it was on time? A. It was on time that day.

Q. Will you say about how fast it was going? A. Well, about 35 to 40 miles an hour.

Q. What was the next train that came along, westbound? A. Westbound 707.

Q. Did that train come along, did you see it? A. Yes, sir.

Q. Did you still notice where McGarry was? A. Yes, sir.

Q. Well now, when 607— A. 707 was the second train.

Q. Well now, when 707, when that passed your tower, can you give the jury any idea where McGarry was then? A. Well, he was about 500 hundred feet down west of F. H. tower.

Q. Did you notice where he was on the railroad then? A. Why, he was walking on track 2 at the time that 707 was passing. He was past the tower walking on track 2, near the southerly rail of track 2.

Q. Won't you step down here a moment, Mr. Duffy? Here is F. H. tower where you were at that time, and you say he was about 500 feet west of F. H. tower, and he was walking, was he? A. He was walking.

Q. On the southerly rail, I think you said, on track 2? A. Yes, sir.

Q. How far would you say he was at that time from the switch number 39, the westerly end of

track 2, about how far from that point? A. I would say this point here.

Q. From the switch point? A. He was about one hundred feet east.

Q. That is he had still another hundred feet to walk to reach switch 39 on track 2? A. Yes, sir.

Q. This is switch 39, suppose I mark that with an X. You say he was still one hundred feet east of that switch? A. Yes, sir.

Q. As you saw him, he was near the southerly rail? A. Yes, sir.

Q. He was walking in a westerly direction? A. Yes, sir.

Q. And that was when the train was passing your tower? A. Yes, sir.

Q. Train 707? A. Yes, sir.

Q. Did that train give any signals, 707? A. No, sir.

Q. Did it ring its bell? A. No, sir.

Q. Blow its whistle? A. No, sir.

Q. Was its headlight lighted? A. No, sir.

Q. About how fast was it going? A. About 35 or 40 miles an hour.

Q. As that train came along past your tower proceeding down to where McGarry was, could you see either the fireman or the engineer? A. I could see the fireman because he was on the side facing the tower, but past the engineer.

Q. Did you see the fireman of train 707? A. Yes, sir.

Q. Where was he on the engine? A. He was at the cab window, sitting at the cab window of the engine.

Q. Which direction was he facing, did you notice? A. Well, he was facing west, looking towards the west.

Q. In the direction that the train was going? A. Yes, sir.

Q. And the direction in which McGarry was, and in the direction the train was going? A. Yes, sir.

Q. Now, did you observe prior to this accident when you were on the railroad watching repairing switches and putting in new ones, whether when an engine came along in the interlocking plant, did it blow any whistles?

Mr. Smith: I object to that if your Honor please. If your Honor will look at the complaint, it is purely on the point that no signal was given. There is nothing in the complaint that alleges a custom of any kind. If it is intended to prove any custom it must be alleged. There is nothing in the complaint about that. It is based entirely on the fact that the engineer or person in charge of the train gave no signal on this occasion.

Mr. Markley: If your Honor please, I think the paragraph of the complaint is sufficiently broad, in fact comprehensively broad enough to carry this evidence before the jury; looking at paragraph 8 first. It states that the death of the plaintiff's intestate resulted in whole or in part from the negligence of the officers and agents or employees of the defendant by defect and insufficiency due to defendant's negligence in a certain engine, cars, tracks, etc., at the time and place aforesaid, while the plaintiff's said intestate was then and there employed by the defendant in interstate commerce, and was walking, and so forth.

The Court (After further argument): I will overrule the objection and allow an exception. This charge of negligence covers

any negligent act done that day, or failure to do anything that day which should have been done. You may have your exception, Mr. Smith.

Mr. Smith: Exception.

Q. Now, did you observe prior to this accident when you were on the railroad watching repairing switches and putting in new ones, whether when an engine came along in the interlocking plant, did it blow any whistles? A. Well, when we were walking along the railroad there, the engine, why the engineer he used to give a number of short blasts on a whistle to warn us that they were approaching.

Q. How many short blasts? A. Four or five or six; there was no standard.

Q. Were any such short blasts given by 707 on the day of this accident? A. No, sir.

Q. Was its bell ringing? A. No, sir.

Q. Did you actually see the contact between train 707 and McGarry? A. No, sir.

Q. Why not? A. Why, I could not, because on that day, as the train went down, especially 707, the smoke came out of the engine, while it went toward the ground, the wind forced it toward the ground, and then back again. I would not have been able to observe anything that happened.

Q. You did not actually observe the contact? A. I did not.

Q. Did you go after the accident, that evening, did you go down to switch 39? A. When, that evening?

Q. Yes. A. About 5.30 that evening why, I went down. There was one of the policemen, one of the railroad policemen, came up into the tower and told us that the engineer of a train told them

down there or reported that there was a man lying west of the tower. So he asked me would I go down with him; so I went with him and we discovered McGarry's body.

Q. Did you know before that that he had actually been struck by the train? A. I did not know before that.

Q. Is that policeman in court now, the railroad policeman that went down with you? A. Yes, sir.

Mr. Officer, will you stand up?

Q. Is that the gentleman? A. Yes, sir.

Mr. Markley: What is your name?
The Gentleman: My name is Haase.

Q. When you went down the track with Mr. Haase, the police officer, where did you find McGarry's body? A. About 25 feet west of 39 switch.

Q. Just step down here a minute, will you. This is 39 switch on track 2, will you just point to where McGarry's body was when you went down with Policeman Haase?

(Witness indicates.)

Q. Was it east or west of that? A. West.

Q. Where was it? A. About 25 feet west of the point here.

Q. That is the point that is represented with upright black lines? A. That is the point, it would be about 25 feet west of that.

Q. Twenty-five feet west, or nearer Elizabethport? A. Yes, sir.

Q. Suppose I put a B, the distance from X to B would be 25 feet? A. Yes, sir.

Q. That was on track 2? A. Yes, sir.

Q. Was that the track on which this 707 train was travelling? A. Yes, sir.

Q. Or moving? A. Yes, sir.

Q. What part of McGarry's body was nearer to the rail at the point marked B 25 feet west of X? A. His head.

Q. How close was his head to the southerly rail, we will say? A. His head was against the rail.

Q. Did Mr. Haase say which train it was that he got this information from? A. He says the jitney reported it.

Q. Is that the Singer train? A. That is the Singer train.

Q. Did he say who on the Singer train reported it? A. No, sir.

Q. At what time did the 707 pass? A. At about 4:28.

Q. Passed your tower at about 4:28? A. Yes, sir.

Q. Was that on time? A. Yes, sir.

Q. The section men on there, the assistant foreman and the four men, how did they go from where they were working, from their work, at the end of the day when they quit? A. You mean in what direction?

Q. Yes. A. They went west.

Q. How did they go west? A. Why, they walked along the tracks.

Q. To where, do you know? A. Some of them used to walk between tracks 1 and 2, and others would walk on track 4, some on track 2 till they came to the under-pass.

Q. And then how would they go? A. They would all go off on the side, on the north side of track 4, or on the path there.

Q. Was there any path below that? A. You mean west of that?

Q. Yes. A. There is a path west of the under-pass.

Q. Is there any path east of the under-pass? A. No, sir.

Q. Is that the way you went home at night? A. Yes, sir.

Q. You saw them all go that way yourself? A. Yes, sir.

Q. Is that the way you went home? A. Yes, sir.

Q. Where was the nearest station for the men to board a train? A. Elizabethport.

Q. Is that the direction in which the section men walked, toward Elizabethport? A. Yes, sir.

Q. Is that the way you went home, too? A. Yes, sir.

Q. Is that the way McGarry was going? A. Yes, sir.

Q. Did you notice how the wind was blowing that afternoon around 4:20 to 4:30, when McGarry was walking west toward Elizabethport? A. The wind was blowing from the west.

Q. From west towards east? A. Towards east.

Q. That was blowing against McGarry, then? A. Yes, sir.

Q. Could you tell whether it was heavy wind or not? A. Well, it was a pretty stiff wind.

Q. How could you tell that? A. Because he had his head down slightly, had his head down slightly, and then I saw his coat flapping against the wind.

Q. When you got down to McGarry's body that night about 5:30 with the policeman, were you able to talk to him? A. To who?

Q. To McGarry? A. No, he was dead.

Q. He was dead then? A. Yes, sir.

Q. Who was the towerman that night who was operating the switches that operate in the second

story of F. H. tower in the interlocking system? A. Mr. Horstman.

Q. Is he here, Mr. Horstman? A. Yes, sir.

Q. Is Mr. Donahue, the section foreman, here? A. Yes, sir.

Q. And is Mr. Spangenberg here? A. Yes, sir.

Q. Outside of meeting McGarry on the railroad there, were you intimate with him at all? A. Well, I had only known him since I worked on the railroad.

Q. That was a little over a month? A. Yes, sir.

Q. Had you ever been to his home? A. No, sir.

Q. Ever socially intimate with him? A. No, sir.

Q. Just met him on the railroad? A. Yes, sir.

Cross-examination by Mr. Smith:

Q. Mr. Duffy, how did you get here to-day? A. How did I get here to-day? Why, Mr. Markley asked me would I come over here.

Q. Where did you see Mr. Markley? A. I saw Mr. Markley at his office.

Q. When? A. About a week ago.

Q. How did you get over there, who called you there? A. About a year ago a man from Mr. Markley's office came over to my house and asked me would I make a statement. So I told him that I wanted nothing at all to do with the case. So he asked me when, at any time, if I ever come over to Jersey City, if I do would I stop in and see Mr. Markley. Well, I promised him that I would step in and see Mr. Markley.

Q. When was that? A. That was in September, 1927.

Q. September, 1927. Who was the man, what was his name? A. A Mr. McCarthy.

Q. Did you know him before? A. No, sir.

Q. Never saw him? A. No, sir.

Q. Knew nothing about him? A. No, sir.

Q. And to-day you came over, did you, from New York? A. Yes, sir.

Q. You live in New York? A. I live in New York.

Q. Now, you say that on this occasion you had been working at F. H. tower how long on December 18, 1926? A. About a month.

Q. Do you know when F. H. tower was opened? A. Yes, sir.

Q. When? A. The latter part of November.

Q. Were you working there prior to it opening? A. A couple of weeks prior to the opening.

Q. A couple of weeks prior to the opening you were working there? A. Yes, sir.

Q. Did you know Mr. Spangenberg? A. Only from working there.

Q. Now you say on this day when you came to work at three o'clock there were two gangs working. You say Mr. McGarry's gang, as you call it, was working just back of the tower? A. Yes, sir.

Q. At three o'clock? A. Yes, sir.

Q. You are sure of that, are you? A. Yes, sir.

Q. And you saw him on that day? A. I saw McGarry there.

Q. You saw him at three o'clock? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. And spoke to him? A. No, I did not speak to him.

Q. Where was he? A. He was over with the gang.

Q. Don't you know that that gang was working up at the underpass? A. No, they were not.

Q. You are sure of that? A. Yes, sir.

Q. You are sure that gang was working down

by the tower? A. McGarry's gang was not working down by the underpass.

Q. McGarry's gang was not working down by the underpass? A. No, sir.

Q. McGarry's gang was working at the tower?

Mr. Markley: I object to all this.

Q. Well, the tower is down here (indicating). McGarry's gang was working down by the tower? A. Yes, sir.

Q. There was another track gang working at tracks two and four? A. Yes, sir.

Q. At three o'clock in the afternoon? A. Yes, sir.

Q. Don't you know that is not so? Don't you know that all men were taken off track two and four before twelve o'clock that day? A. No, sir.

Q. How do you recall it was December 18th that you saw these men working on track 4 in the afternoon? A. How do I recollect December 18th, because that is the day that Mr. McGarry was killed.

Q. That is how you recollect it then? A. Yes, sir.

Q. Who were these men that were working by tracks two and four, near the underpass; give me the name of the foreman? A. Well there was—Mr. Spangenberg was the foreman.

Q. Mr. Spangenberg was the foreman? A. Yes, sir; well, he was in charge anyway.

Q. Of two gangs? A. No, sir, one gang.

Q. Was Mr. Spangenberg in charge of the gang of men working up here at the underpass on track two? A. Yes, sir.

Q. At three o'clock in the afternoon? A. Yes, sir.

Q. You are sure of that, are you? A. Yes, sir.

Q. And was McGarry in charge of the gang down here by F. H. tower? A. Yes, sir.

Q. He was then in charge of the gang at F. H. tower? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. How many men were in the gang McGarry had down at F. H. tower? A. I don't know how many men were in the gang.

Q. How many do you estimate were there? A. I would say about forty.

Q. Down by the tower? A. Yes, sir.

Q. How many men were up here on track 2, that you say, near the underpass? A. There were about twenty-five or thirty up there.

Q. About twenty-five or thirty up here? A. Yes, sir.

Q. So altogether there was about sixty-five or seventy in the two gangs? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. And you are sure that you saw McGarry on that day back of tower F. H.? A. Yes, sir.

Q. At three o'clock in the afternoon? A. Yes, sir.

Q. You are sure of that, are you? A. Yes, sir.

Q. And you could not possibly be mistaken now? A. No, sir.

Q. I show you a paper and ask you if that is your signature (handing witness)? A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. Is this writing, "I have read this statement and found it to be correct", in your writing? A. Yes, sir.

Q. That is your writing, is it? A. Yes, sir.

Q. And that was made September 7, 1928, on the day you were over to the office of the Central Railroad?

Mr. Markley: 1928?

The Witness: Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now I ask you to look at this, just look at this paper here: "I first saw Mr. McGarry about 4 P. M., Est."—that is Eastern Standard Time? A. Yes, sir.

Q. "When he came in the tower downstairs in the maintainer's room." Now you signed that as true? A. Not that statement.

Q. You signed this? A. Yes.

Q. You say, "I have read this statement and found it to be correct." You wrote that in your own handwriting that you read this statement? A. I read the typewritten statement.

Q. Didn't you read this? A. I don't remember reading that.

Q. Didn't you sign this? A. That is my signature.

Q. You didn't sign a typewritten statement, did you? A. No, sir.

Q. Now you have written on this statement, "I have read this statement and found it to be correct", and you have signed it in your name. Was that the truth when you wrote it? A. If I signed it? I don't remember signing that, but it is my signature.

Q. And it is on the same sheet of paper, isn't it? A. Yes, sir.

Q. You wrote on it, "I have read it"? A. Yes, sir.

Q. And it is true that is what you say over your own signature, don't you? A. It is not true.

Q. In other words, you say now that having written on this paper, "I have read this statement and found it to be correct", and signed your name to it, you now want to swear that it is not true, is that right?

Mr. Markley: I object to that. What the witness says is that was not on there when he signed it. Counsel ought to be fair with the witness.

Q. There is the statement without any interlineations? A. What do you mean by that?

Q. You don't know what interlineations is? It is one continuous statement, isn't it? A. Yes, sir.

Q. On the bottom you have written, "I have read this statement and found it to be correct." Do you know that is a fact? A. That I made that?

Q. That you wrote, "I have read it". That is your writing? A. Yes, sir.

Mr. Markley: I object to that. Counsel is again asking a double question. He wrote that. He admits it, as to whether he read the statement he has not said anything yet. That is as I understand the Witness' testimony.

Q. Mr. Duffy, you read English, don't you? A. Yes, sir.

Q. This statement says, "I have read the statement." You knew what that meant, didn't you? A. Yes, sir.

Q. What do you think it means when it says, "I have read this statement." A. Just what it says there.

Q. It means you have read this statement? A. Yes, sir.

Q. And then you say, "and found it to be correct"? A. Yes, sir.

Q. What do you think that means? A. Just what it says.

Q. In other words it means—— A. The statement is not correct.

Q. That is what it means? A. Means what?

Q. Do you see anything in there that bears any erasure on this statement? A. No, sir.

Q. So now you say, although in this statement it appears, "The first I saw McGarry was about 4 P. M., Est, when he came into the tower downstairs in the maintainer's room"—that is a fact, isn't it? Isn't that the fact? A. That is not the first I saw him.

Q. That's what you have said in this statement, that it was the first you saw him, and you have signed that it was correct on September 7th, 1928, only about a month or so ago. It was not correct?

Mr. Markley: I object to that question because it is an unfair question, and it is a double question. The witness says he did put these words at the bottom, but he has not said he read the statement at all, and he says now that what appears in the statement that Mr. Smith has just read is not correct, and is not the fact, because that says he did not see McGarry until four o'clock, whereas he says he did see him prior to four o'clock.

(Argued.)

Mr. Smith: I will ask him the direct question.

Q. Mr. Duffy, having written on this paper, "I have read this statement," was that at that time, when you wrote those words on the statement— A Could I explain that?

Q. I say, having written on the statement, "I have read this statement," I ask you if, at the

time you wrote it, it was the truth that you had read the statement? A. No.

Q. It was not the truth? A. No, sir.

Q. So you wrote a lie, will you answer that? A. I did not read the statement.

Q. So that when you wrote on the bottom of it, "I have read this statement," you were not telling the truth? A. I took it for granted, it was read to me. I took it for granted, that was enough.

Q. It was read to you, you say? A. Yes, sir.

Q. So you say when you wrote, "I have read it," you mean, "It was read to me," is that what you mean? A. It was read to me.

Q. That is what you mean, "It was read to me"? A. Yes, sir.

Q. Now then, you say, that having seen McGarry work at tower F. H.—annexed to that statement there was a second page, wasn't there, and on the bottom of that you wrote something, didn't you? A. Yes, sir.

Q. What does that say? A. The same thing.

Q. Read it to me. A. "I have read this statement and found it to be correct."

Q. And that is your signature again, isn't it? A. Yes, sir.

Q. Now, that is wrong also? A. Yes, sir.

Q. You did not read that, did you? A. No, sir.

Q. Somebody else read it to you? A. Yes, sir.

Mr. Smith: I would like to have this marked, please, for identification.

Marked Defendant's Exhibit D-6 for Identification of this date.

Q. Now, when McGarry left the tower it was just about dusk, wasn't it? A. It was about dusk, yes, sir.

Q. Now then, could you recognize McGarry when you saw him walking up the track? A. Yes, sir, if he was facing to me I could recognize him.

Q. You mean that he was facing you? A. As he was walking up the track I would recognize his clothing.

Q. So you knew him, and you say you saw him? A. Yes, sir.

Q. Well, I show you this statement again, and in it you say, "After I got up in the tower, I looked out of the window toward E-port",—E-port is an abbreviation for Elizabethport? A. Yes, sir.

Q. "And saw some one whom I judged was McGarry",—is that the fact? A. Yes, sir.

Q. Now, Mr. Duffy, isn't it a fact that you only judged that this man you saw walking down the track was McGarry? A. Why, I was sure it was McGarry walking down.

Q. Will you tell me why you say you saw some one whom you judged to be Mr. McGarry walking west between the tracks? A. Because I was sure it was McGarry.

Q. You were sure that day, but did you just say you judged it was. Now then, Mr. McGarry, you say, was in your place about four o'clock? A. Yes, sir.

Q. He was there until 4.15 or 4.20? A. 4.20.

Q. Until 4.20? A. Yes, sir.

Q. And then he left? A. Yes, sir.

Q. How was he dressed? A. Why, he had on a black cap, sheepskin coat, black trousers and a pair of rubbers.

Q. Did the coat have a collar to it? A. Had a sheepskin collar on the sheepskin coat.

Q. A large collar? A. Large collar.

Q. Was it up or down when he left? A. It was up when he left the tower.

Q. The cap, what kind of a cap was that? A. He had a black cap.

Q. Ear flaps to it? A. Yes, sir.

Q. Were they down or up? A. They were up.

Q. You mean up around the cap? A. They were turned in in the cap, they were not over his ears.

Q. They were not over his ears? A. No, sir.

Q. Sure about that, are you? A. Yes, sir.

Q. Now, then, he left and you went down to the furnace? A. Yes, sir.

Q. And then you did something with the furnace, I assume? A. Why, I opened the door, looked at the furnace, closed it again, and went upstairs.

Q. Then you went upstairs to the towerman's room? A. Yes, sir.

Q. While you were there, you saw McGarry walking west between tracks 1 and 2? A. Yes, sir.

Q. Between tracks 1 and 2 there is quite a distance, quite a space? A. Yes, sir.

Q. Was he walking nearer to track 1 or nearer to track 2? A. Two, nearer track 2.

Q. While you were up there, you say you saw the engine go by? A. Yes, sir.

Q. Had it a train with it? A. A train, passenger train.

Q. Did you take notice of the number of the train? A. No, sir.

Q. Did you take notice of the train itself? A. Why, yes, sir.

Q. What did you see about it? A. I saw that it was a Philadelphia and Reading train.

Q. Were you watching it? A. Yes, sir.

Q. Where was it when you first saw it? A. It was right outside the tower, had passed the signal at the drawbridge, was half-way between the tower and the drawbridge.

Q. Was half-way between the tower and the drawbridge? A. Yes, sir.

Q. Now, all the windows were closed, were they not, of the tower? A. Yes, sir.

Q. You were then looking which way, which way were you looking? A. At the time I was looking north.

Q. At the time you were looking north? A. Yes, sir.

Q. The train was east of you? A. Yes, sir.

Q. How did you come to see the train? A. I could see on the side.

Q. You did see it? A. I saw it as it passed the tower.

Q. The first you saw of the train was when it passed the tower? A. Yes, sir.

Q. And at that time you looked right at it? A. Yes, sir.

Q. And you could see the operatives of the engine, you could see the engineer? A. No, sir, I didn't see the engineer.

Q. Did you see the fireman of 619? A. Yes, sir.

Q. Where was he? A. He was sitting by the window.

Q. In the cab? A. Yes, sir.

Q. That was of 619? A. Yes, sir.

Q. You could see that? A. Yes, sir.

Q. Could you see the bell ringing? A. No, sir.

Q. You could not see it? A. No; I heard it.

Q. Couldn't you see it? A. I could just see it, too.

Q. Did you see it? A. I didn't take special notice, but I heard it.

Q. At that time you say you saw McGarry walking up between tracks 1 and 2? A. Yes, sir.

Q. You are sure of that, aren't you? A. Yes, sir.

Q. Did you watch him walk up the track? A. Yes, sir.

Q. He was then walking from the tower you say on up toward E-port? A. Towards E-port.

Q. How far was he from the tower? A. When 619 passed he was about between two hundred and three hundred feet.

Q. And then walking, you say, with his head down? A. Why, slightly, down to the side.

Q. And you could see him? A. Yes, sir.

Q. It was light enough for you to see him? A. Yes, sir.

Q. And did you see the train go by you? A. Yes, sir.

Q. The train went on right past you? A. Why, as the train was passing by I saw the train as it got near him, and after the train passed I still saw him.

Q. After the train passed, you still saw him? A. Yes, sir.

Q. What time did that train pass the tower? A. 4.24.

Q. How do you know? A. Because that is the schedule time they had to pass.

Q. So you are saying it passed the tower because that was the schedule time for it to pass? A. Yes, sir.

Q. What time is it due at E-port? A. 4.25.

Q. You think there is a minute between the tower and E-port? A. Yes, sir.

Q. The only reason you know that it passed at 4.24 is because that is what you call the scheduled time? A. Yes, sir.

Q. That is the reason? A. Yes, sir.

Q. Now after the 619 went by did you see another train come? A. I saw 707.

Q. Did you see any other train come? A. Why, there was another train came east.

Q. Did you see any other train go west? A. 707.

Q. That is the only one you saw? A. Yes, sir.

Q. You are sure of that? A. Going west at that time.

Q. What I want to know, are you sure you even saw 707 go by? A. Yes, sir.

Q. You took notice of it, did you? A. Yes, sir.

Q. But between 707 and 619 you didn't see any train, did you? A. Not going west.

Q. Not going west? A. No, sir.

Q. You didn't see any train there at all? A. No, sir.

Q. You are sure of that, are you? A. Yes, sir.

Q. I show you a paper, another paper than the one I showed you a little while ago, and I ask you if that is your signature (handing witness)? A. Yes, sir.

Q. I show you the next sheet, and I ask you if that is your signature? A. Yes, sir.

Q. And I show you the sheets after that and ask you if that is your signature? A. Yes, sir.

Q. And I show you the last sheet and ask you if that is your signature? A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. Now I call your attention to these words on the last sheet, suppose you read it, "I did not watch McGarry when he left here, and I took no notice to trains passing after he left, as I had work to do." You see those words, don't you? A. Yes, sir.

Q. You can read them, can't you? A. Yes, sir.

Q. Now, will you tell me, that those words were not in this statement when you read it; do you tell me they were not in the statement? A. I don't know what was in the statement.

Q. You don't know what was in the statement? A. That statement was read to me too.

Q. That was read to you? A. Yes, sir.

Q. And you signed it? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And that statement was made the 19th of December, 1926, that is the day after the accident, wasn't it? A. Yes, sir.

Q. And you made that statement at the time? A. Yes, sir.

Q. And you signed it? A. Yes, sir.

Q. But now you are going to say that is not true, what is in it, that these words, "I took no notice of trains passing after he had left as I had work to do, work inside to do." A. It is not true.

Q. It is not true? A. That is not true. The statement is not true.

Q. Those words are not true in the statement? A. No.

Q. Although you have signed it? A. Yes, sir.

Q. Now, both of these statements are untrue? A. Some of it is true and some of it is not.

Q. Was there any erasure in this exhibit where you have looked at it? Look, read it from side to side? A. No.

Q. Of course your recollection of this matter the day after the accident was fresher than it is today? A. Yes, sir.

Mr. Smith: I ask that this be marked for identification.

Marked for identification as Defendant's Exhibits D-7, A. B. C. and D., of this date, for identification.

Q. At the time this statement was signed by you, you were then working for the Central Railroad, were you? A. Yes, sir.

Q. At the time this statement of September 7, 1928, was made by you, or signed by you, you

were not working for the railroad company, were you? A. No, sir.

Q. Now, 707, which you say you saw go by, you say you noticed that particularly go by, didn't you? A. Yes, sir.

Q. Where was it when you first saw it? A. Well, that was passing the tower when I saw it.

Q. At the time you watched it, didn't you? A. Yes, sir.

Q. Had you been watching McGarry walking along all the time? A. Yes, sir.

Q. You had been watching him? A. Yes, sir.

Q. Where was he when he entered upon track 2? A. When he entered upon track 2?

Q. How far from the tower? A. He was about two hundred feet from 39 Switch when he got on track 2.

Q. That is east of 39 switch?

Mr. Markley: Let him finish his answer.

Q. Hadn't you finished? A. He got on track 2 at the crossover, at where the crossover is, 45 crossover.

Q. Here you mean? A. From that crossover from track 1 to track 2.

Q. The crossover from track 1 to 2? A. Yes, sir.

Q. Here is where the crossover is? A. That crossover there (indicating).

Q. That is where you say he was? A. He was at that point, at the south end. As he came to the crossover, he walked on track 2 from the crossover down.

Q. You mean this crossover here? A. Not that crossover.

Q. Suppose you come down. Where was he when you say he got on track 2? A. When he got on track 2, he was about here (indicating).

Q. Suppose you mark that with a D-1, that is where he entered upon track 2? A. Yes, sir.

Q. What time did you say train 619 went by? A. At 4:29.

Q. Do you know what time train 707 went by the tower? A. At 4:28.

Q. Now, did you see where train 707 was when McGarry entered upon track 2? A. 707 was on track two.

Q. Where was it when he entered on track two, how far away from him? A. From the tower?

Q. From McGarry? A. McGarry was about say 150 feet, about 150 feet.

Q. About 150 feet in advance of the train? A. From east of 39th Street when he entered upon track two.

Q. Well, you say when he entered upon track two he was at the point where you have marked D-1? A. Yes, sir.

Q. Now at the time he entered upon track 2, where was train 707? A. I didn't see 707.

Q. You didn't see 707 then? A. No.

Q. Did you watch McGarry walk up track two? A. Yes, sir.

Q. You saw him walk up track two? A. Yes, sir.

Q. How far did you see him walk from the point where he entered upon the track until you first saw train 707? A. Well, he walked about fifty feet.

Q. And then train 707 was passing the tower? A. Yes, sir.

Q. How far was McGarry from the tower when train 707 passed the tower? A. Well, he was about around between seven and eight hundred feet.

Q. From the tower? A. About seven hundred feet from the tower.

Q. That is at the time the train passed the tower? A. Yes, sir.

Q. You say that you sometimes repaired signals on the tracks? A. I repaired signals on the tracks when they were out of order.

Q. You have to work on the track? A. Yes, sir.

Q. Who did you have with you? A. Nobody.

Q. Nobody at all? A. No, sir.

Q. When you are working, are you working right on the track itself? A. Well, at times I am, yes, sir. At times I was on the track.

Q. On the track itself? A. Yes, sir.

Q. Which way do you work, with your back towards the train or your face towards the train? A. Well, I worked face toward the train unless I cannot help but have my back toward the train.

Q. You worked with your face toward the train? A. At times.

Q. Unless you cannot help it? A. Unless I cannot help it.

Q. You do that so you can see trains coming? A. Yes, sir.

Q. As I understand you, you saw 707 go by and McGarry was then walking on track 2 up toward Elizabethport with his back to the train? A. Yes, sir.

Q. With his head down? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. He had left the space between tracks 1 and 2? A. Yes, sir.

Q. And he got on to track 2? A. Yes, sir.

Q. The train was coming from behind him, is that right? A. Yes, sir.

Q. You could see it, could you? A. Yes, sir.

Q. Plainly? A. Yes, sir.

Q. He was still on the track when you saw the train go by the tower? A. Yes, sir.

Q. Did you watch McGarry? A. Yes, sir.

Q. Did you watch him? A. Yes, sir.

Q. You watched the train go towards him? A. Yes, sir.

Q. Did you see him leave the track? A. No, sir.

Q. And the train went by? A. Yes, sir.

Q. Did you look for McGarry? A. No.

Q. You didn't look for him at all? A. No.

Q. You didn't see him? A. I didn't see him.

Q. Did you know what became of him? A. No, sir.

Q. Didn't go downstairs and rush up there? A. No, sir.

Q. In other words, you didn't pay any attention to it? A. What is that?

Q. You didn't pay any attention to it? A. Not after the train passed.

Q. Now, let's see if I get you. As I understand you, here is Mr. McGarry walking up on track 2 with his back toward the train? A. Yes, sir.

Q. You saw the train go by on track 2? A. Yes, sir.

Q. Going towards McGarry? A. Yes, sir.

Q. You saw McGarry walk, you saw the train go by. You watched it, didn't you? A. Yes, sir.

Q. You saw the train go right up to the spot where you saw McGarry? A. Yes, sir.

Q. And go by? A. Yes, sir.

Q. You didn't see McGarry? A. No, sir.

Q. Didn't you know where he went? A. No.

Q. Didn't pay any attention to him? A. Not after that, no.

Q. Do you mean, Mr. Duffy, to tell us, that after seeing Mr. McGarry walk right on track 2 with his back to the engine and the engine running right on him, and seeing the engine go right by the place where he was, where you saw McGarry,

that you didn't pay any more attention, although you could not see McGarry after you saw the train went by? A. I didn't pay any more attention to him.

Q. Didn't have any idea of an accident, did you? A. No, sir.

Q. Although you saw this train rush right at him, as you say? A. No.

Q. Now, as a matter of fact, the first you knew anything about an accident was when this policeman came up to the tower? A. Yes, sir.

Q. That is the first you knew? A. Yes, sir.

Q. And then the policeman and you took a light, didn't you? A. Yes, sir.

Q. What did you take a light for? A. Because it was dark then.

Q. You went up to the place where a body lay? A. Yes, sir.

Q. You didn't even know who it was? A. I knew who it was.

Q. You didn't know? A. I didn't know his name, but I knew who he was though I didn't know his last name.

Q. You didn't know his name was McGarry? A. No, sir.

Q. As a matter of fact you thought it was Spangenberg? A. No, sir.

Q. Didn't you find his book there? A. No.

Q. Didn't you find the day book, the time book? A. No, sir.

Q. But you didn't know who that man was? A. I knew who he was, but not his name.

Q. You knew who he was but not his name? A. Yes, sir.

Q. Did you know this man from that man and Mr. Spangenberg? A. Yes, sir.

The Court: You didn't know it was Spangenberg?

The Witness: I knew it was not Spangenberg.

Q. Didn't you tell the policeman that you didn't know who it was? A. I told the policeman that it was a track foreman.

Q. But you didn't know who he was? A. But I didn't know his name.

Q. So as a matter of fact when you say you saw McGarry working there on the afternoon at three o'clock, you saw a man whose name you didn't know? A. I didn't know his last name at the time.

Q. Did you know his first name? A. Yes, sir.

Q. What was it? A. John.

Q. Had you been calling him "John"? A. Yes, sir.

Q. You never knew his last name? A. No, sir.

Q. You had known him for a month? A. Yes, sir.

Q. How did you know the wind was blowing west to east? A. I can't hear you.

Q. I say how did you know that the wind was blowing west to east? A. Well, McGarry had his head down towards the side, and his sheepskin coat was flapping.

Q. Well, he was walking west, wasn't he? A. Yes, and the wind was blowing against him.

Q. He had his head down to the side, which side, left or right? A. Left side.

Q. You are sure of that? A. Yes, sir.

Q. In other words his head was down to the left side, and he would be inclined to the south as he was walking west? A. Yes, sir.

Q. His head down walking straight ahead? A. Yes, sir.

Q. You knew Mr. Spangenberg by name, didn't you? A. Yes, sir.

Q. Now, Mr. Duffy, on the north side of the track, all the way from the tower, F. H. tower, up to Elizabethport station, there is a wide space, isn't there? A. On what side?

Q. On the north side toward Elizabethport? A. Well, from the underpass to the shop, from the underpass there is a wide space, but there is no wide space from the F. H. tower to the underpass.

Q. Well, from F. H. tower to the underpass is where there is a wide space on the north side? A. No, there is not.

Q. From the underpass up on the other side there is a regular boardwalk covering some pipes there, isn't there? A. Not from the underpass.

Q. From the underpass west, I am talking about. A. From the underpass, west, there is no boardwalk, not from the underpass. The boardwalk is at Elizabethport from the shops to the station.

Q. How far does it go east of the station? A. How far what?

Q. How far does this boardwalk you speak of go east from the station? A. Why, it extends, I would say, not more than five hundred feet.

Q. Then it goes right off into cinders, doesn't it, on the top of the embankment? A. To cinders, yes, sir.

Re-direct examination by Mr. Markley:

Mr. Markley: May I have this statement a minute, Mr. Smith?

Q. This statement of four pages was taken from you by the claim agent, wasn't it? A. Yes, sir.

Q. Where were you when he took this supposed statement? A. At F. H. tower.

Q. Did he ask you questions? A. Yes, sir.

Q. And after he had asked you a number of questions, what did he do? A. He wrote down the answers.

Q. Did he ask you to write them down? A. No, sir.

Q. Did he write down the questions? A. No, sir.

Q. When he got through he asked you to sign it, didn't he? A. Yes, sir.

Q. Did he ask you to put these words at the bottom, looking at D-7 for identification which purports to be the statement of yours of December 19, 1926——

Mr. Markley: I don't see anything on there about "I have read".

The Witness: It is on the other side.

Q. This statement that it is true is not in there, is it (handing witness)? A. No, sir.

Q. Nothing like that on there in your handwriting? A. No, sir.

Q. Did you read that statement? A. No, sir.

Q. He read something to you from the statement, did he? A. Yes, sir.

Q. And then he asked you to sign it? A. Yes, sir.

Q. Did you tell him any different story than you have told the jury here to-day, or was it the same? A. The same story, the same story as I told.

Q. You told him the same story as you told on the witness stand? A. Yes, sir.

Q. Now, when you made the statement on September 7, 1928, you were no longer employed by the Central Railroad Company of New Jersey? A. No.

Q. You worked for them in September, 1927? A. The Interborough Rapid Transit Company.

Q. How long had you been working for the Interborough Rapid Transit? A. A year and a half, I am working for them.

Q. Where do you work for them? A. I worked at Tremont Avenue and 147th.

Q. You live in New York? A. Yes, sir.

Q. Where did you make this second statement, this so-called statement marked D-6; where did you make that? Where was it taken from you? A. That is in the offices of the Central Railroad Company of New Jersey.

Q. Where? A. In Jersey City.

Q. How did you come to go in September, 1928, to the Central Railroad Company's offices in Jersey City? A. My boss told me to go over to the Central Railroad Company, they wanted to see me and get a statement from me.

Q. Did you go over? A. Yes, sir.

Q. Did you go over to the Central Railroad Company's office? A. Yes, sir.

Q. Did they talk to you at all? A. Yes, sir.

Q. Did you refuse to talk to them? A. No, sir.

Q. Did you tell them what you knew? A. Yes, sir.

Q. Did they ask you a whole lot more questions? A. No, sir.

Q. What did they do? A. Well, they asked me questions about the accident, and I told them.

Q. And did you tell them the same as you told the jury here? A. Yes, sir.

Q. And that, notwithstanding the fact that you had made a four-page statement here they took another statement from you. Did you read the statement that they took then? A. No, sir.

Q. Did somebody read it to you? A. Yes, sir.

Q. Do you know who it was? A. Mr. Noyes.

Q. Did he ask you to put this, "I have read this statement and found it to be correct?" A. Yes, sir.

Q. You did that at his request? A. Yes, sir.

Q. So that you had not read the statement at all? A. No, sir.

Q. After you gave that so-called statement, did they write you a letter? A. Yes, sir.

Q. Did you answer their letter? A. Yes, sir.

Q. Were there some questions in the letter? A. Yes, sir.

Mr. Markley: May I have those, please?

Mr. Smith: You want both our letter and his?

Mr. Markley: Have you got a copy?

(Received papers from counsel.)

Q. Now I show you a letter written by James B. Noyes, Jr., claim agent, to you at 918 Melrose Avenue, New York City, dated October 1st, 1928. Is that a copy of the letter that you received (handing witness)? A. Yes, sir.

Q. And is this letter of yours, dated October 2nd, 1928, addressed to Mr. J. B. Noyes, Jr., Central Railroad of New Jersey and signed "Michael J. Duffy," your answer to that letter (handing witness)? A. Yes, sir.

Mr. Markley: Now I offer these in evidence.

(Accepted and marked as Plaintiff's Exhibit 7 and 8, respectively of this date.)

Q. Did they ask you to come to court to-day? A. They asked would I be willing to come to court.

Q. And when did they say that to you? A. On September 7th.

Q. September 7, 1928, when you were over to their office in Jersey City? A. Yes, sir.

Q. They asked you whether you were willing to come to court when the trial came up? A. Yes, sir.

Q. What did you say? A. I told them yes.

Q. Did they notify you of the trial? A. No, sir.

Q. Did they ask you to come here to the trial? A. No, sir.

Q. Have you received a subpoena from them? A. No, sir.

(Mr. Markley then read Exhibits P-7 and P-8 to the jury as follows:)

(Exhibit P-7.)

"October 1st, 1928.

Our file P. I. 32605
Law Dept's. 22-427.

Mr. Michael A. Duffy,
918 Melrose Avenue,
New York City, N. Y.

Dear Mr. Duffy:—

This will acknowledge receipt of your letter dated October 1st, 1928, relative time lost by reason of reporting to this office September 7th, 1928. As advised, this time will be taken care of just as soon as the case comes to trial, which will be in about two or three weeks, but if you need it before that time kindly let me know at once.

I have been asked the following questions in connection with the case and I wish that you would answer them for me by re-

turn mail. *(1) Was it customary for Mr. McGarry to make out his time sheet or book in the tower. (2) If it was not customary, did he ever do it before and how often? (3) Was there any other place where he could have made it up?*

You were on duty at the tower every day and undoubtedly will be able to answer all of these questions, just write me the answer according to the best of your recollection, I do not expect that you will be able to give me the exact number of times that he did come to the tower to make up his time book, but you will no doubt recall if he did so and about how many times.

I am enclosing a stamped envelope for your reply and also some stationery for your use. I should thank you to send me the answers as soon as possible.

Yours very truly,

JAMES B. NOYES, JR.,
Claim Agent."

Exhibit P-8 reads as follows:

"New York City,
October 2, 1928.

Mr. J. B. Noyes, Jr.,
C. R. R. of N. J.

Dear Sir:

In regards to questions you have asked me to answer:

1. Was it customary for McGarry to make out his time sheet or book in the tower?

Mr. McGarry used to make out his time and book in the tower on an average of about 4 days of the week. Where he made out his time on the other days I cannot say.

2. Was there any other place where he could have made it up?

The only place that I know of is the box car down at Singers which the section gang used as an office or tool car. To the best of my knowledge this car was put in the cut at Singer's about a week before Mr. McGarry was killed. As Mr. McGarry done most of his work near F. H. tower I suppose he found it more convenient to make up his time there in the tower.

Should you desire any further information let me know and I will gladly furnish same.

Very truly yours,

MICHAEL A. DUFFY."

Q. Is that your answer? A. Yes, sir.

Q. So that it is a fact that he did make up his time on an average of four days a week in the tower? A. Yes, sir.

Q. His time book? A. Yes, sir.

Mr. Markley: May I have Mr. Duffy's letter of October 1st, 1928?

Mr. Smith: No objection to that.

Mr. Markley: I offer that in evidence.

Accepted and marked as Plaintiff's Exhibit P-9 of this date.

(Mr. Markley read Plaintiff's Exhibit P-9 to the jury as follows:)

Exhibit P-9 reads as follows:

"New York City,

October 2, 1928.

Mr. J. B. Noyes, Jr.,
C. R. R. of N. J.

Dear Sir:

In regards to time lost by reporting to your office:

At the present time I am badly in debt due to one of my children having typhoid fever. Although the amount is small to your Company, to me it is quite a sum, at the present time.

Please do not feel that I think the Company is trying to do me out of it.

I only wrote to ask you if it were possible for your company to send this to me as soon as possible as it will be greatly appreciated.

Thanking you in advance for any help you can give me, I am

Yours very truly,

MICHAEL A. DUFFY,
918 Melrose Ave.,
New York City, N. Y."

Q. Did you get your lost time yet? A. Yes, sir.

Q. When did you get it? A. I got it shortly after that letter.

Q. Was it after the second letter that you wrote? A. After the second letter.

Q. You were not called to this trial by the Central Railroad, were you? A. No, sir.

Q. Now, when that train 707 went by your tower and proceeded down to where McGarry was, I believe you said on your direct examination that it gave off some smoke; is that right? A. Yes, sir.

Q. Did it give off smoke? A. Yes, sir.

Q. A cloud of smoke? A. Yes, sir.

Q. Did that have anything to do with obscuring your vision? A. Yes, sir.

Q. What was it; just tell the jury? A. As the smoke came out of the engine, why, the wind carried it to the ground, and then along the side of the engine.

Q. Now when you went down there with the police officer, I understand it was 5:30? A. Yes, sir.

Q. And it was dark then, wasn't it? A. Yes, sir.

Q. It was not dark when McGarry walked down there around 4:30? A. No, sir.

Q. Now, when you were walking out on the tracks, as you testified in answer to Mr. Smith, fixing something on the track, so that you had to be on the track, did you get your short blasts of the whistle of the engine? A. Yes, sir.

Q. When these section men were working out there on the tracks and the train came along, were there short blasts of the whistle blown? A. Yes, sir.

Q. Did you hear them? A. Yes, sir.

Q. And how about the engine bell? A. Well, the engine bell they ring it too in the majority of cases.

Q. Coming into the interlocking plant from Newark Bay bridge, would the engine bell be ringing? A. Yes, sir.

Q. If a man walking on the track, a section man, would be out there, he would get in addition these several short blasts of the whistle?

Mr. Smith: I object to that.

Mr. Markley: I withdraw the question.

Q. When the men would be walking on the tracks, or you were walking on the tracks, or the section men would be walking on the tracks, what kind of a whistle would you get from the engine, if anything? A. Several short blasts.

Mr. Smith: I object to that.

Q. If any section foreman or any member of the gang were walking on the track and the train came along to the point where they were walking, and was approaching, would the engineer give any signal of the whistle?

Mr. Smith: I object to the question upon the ground that the witness must speak from his observation.

The Witness: Yes, sir.

Q. Did you ever see that condition, did you see men walking on the track, section men when trains were coming along? A. Yes, sir.

Q. What kind of a whistle would they get? A. The engineer blew several short blasts of the whistle.

Q. How many blasts? A. Four or five or six.

Q. When the men would be walking along the track and an engine came from behind, wouldn't get any whistle or signal? A. Yes, sir.

Q. What kind of a signal would he get? A. Well, the same.

Q. When you were out there working yourself on the track and a train came, what kind of whistle or signal would you get, if any? A. The same.

Q. Now, when this man came from my office,

Mr. McCarthy, to your home over in New York City, and asked you whether you would make a statement for Mr. McGarry, what did you tell him? A. I told him I didn't want to have anything to do with the case.

Q. Then he asked if you had any occasion to come over to New Jersey? A. Yes, sir.

Q. You told him you had? A. Yes, sir.

Q. Did you tell him when you expected to come over? A. I told him I was coming over the following Saturday.

Q. On Saturday afternoon? A. Yes, sir.

Q. Did he ask you to step in then? A. Asked me would I step in.

Q. Did you step in to see me? A. Yes, sir.

Q. On Saturday afternoon? A. Yes, sir.

Q. Was I in? A. Yes, sir.

Q. Did you tell me what you knew? A. Yes, sir.

Q. Did I tell you what to say? A. No, sir.

Q. Then I asked you whether you would come to the trial, did I not, when this case was reached for trial, whether you would come and testify as a witness? A. Yes, sir.

Q. What did you say? A. I would.

Q. When the case came up for trial did I notify you? A. Yes, sir.

Q. Did you come here at my request? A. Yes, sir.

Q. What were you going to get for testifying for me? A. Only my wages.

Q. I said I would pay you a day's pay? A. Yes, sir.

Re-cross-examination by Mr. Smith:

Q. Did you get it? A. Not yet.

Q. The letter that you wrote to the railroad company, you were speaking here of time lost. Is that what you meant, the wages you lost by reason of having to take a day off to come over to the office? A. Yes, sir.

Q. Is that what you mean? A. Yes, sir.

Q. You got paid? A. Yes, sir.

Q. You say that although you told Mr. McCarthy, was it, that you didn't want to have anything to do with the case—you told him that in plain English, didn't you? A. Yes, sir.

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

Q. Then when he said, "Will you step over in the office some day when you are in Jersey City," you said, "Yes, sir," didn't you? A. He asked me would I. He asked me for a statement, and I told him I would not have anything to do with the case. He said, "Would you mind stepping in to see Mr. Markley over in Jersey City?"

Q. And then, although you didn't want to have anything to do with the case you stepped over to Mr. Markley's office? A. Yes, sir.

Q. And he changed your mind, didn't he? A. Well, I gave him a statement.

Q. And he changed your mind, didn't he, after you had seen him you did want to have something to do with it? A. Only out of fairness.

Q. Well, he changed your mind; you could not have been swerved before? A. I felt it my duty to come to the trial.

Q. And you felt it your duty to come to the trial after you had seen Mr. Markley, that's what you mean, isn't it? Isn't that so? A. Well, after I spoke to Mr. Markley——

Q. Before you saw Mr. Markley, you didn't want to have anything to do with it, but after you saw Mr. Markley you changed your mind? A. He asked me if I would please come over out of consideration for the widow.

Q. In other words, he asked you would you please come over out of consideration for the widow? A. Yes, sir.

Q. And then this story, that you are telling out of consideration for the widow— A. I don't understand you.

Q. I say the story you are telling from the witness stand is what you call out of consideration for the widow? A. Well, I am only telling the truth.

Q. And in the statement, of course what is in there is not the truth? A. No, sir.

Q. Now, you say Mr. Noyes read this statement to you, did he? A. Yes, sir.

Q. Mr. Noyes asked you to write on the bottom of the statement: "I have read the statement and found it to be correct"? A. Yes, sir.

Q. And you signed it, although you knew it was not true, didn't you? A. I signed it, yes, sir.

Q. You knew you had not read it? A. Yes, sir.

Q. And you wrote: "I have read it", when you knew you had not read it? A. Yes, sir.

Q. Did you write a statement for Mr. Markley? A. Mr. Markley wrote a statement; I read it over, and I signed it.

Q. Mr. Markley wrote a statement, and that one you read over? A. I read it over, yes, sir.

Q. Didn't you trust Mr. Markley? A. Certainly.

Q. What did you read it over for? A. Why, I wanted to see it was right.

Q. Why didn't you read over the other one, to

see if it was right? A. Because I already gave you people a statement.

Q. Do you realize——

Mr. Markley: All right; go ahead.

The Witness: Mr. Markley persuaded me to read it over. He asked if there was anything in it different from what I had said.

Q. Then you read it all over? A. Yes, sir.

Q. You didn't ask him to read it to you? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. He said to you: "Now you read it over and see if there is anything in there that you don't want in"? A. He didn't say that.

Q. Is that what happened? A. He didn't say that. He said: "Read it over and see if it is true."

Q. And you read it? A. Yes, sir.

Q. Did you write on the bottom there: "I have read this statement and it is true"? A. I put my name on it, and it was signed before a Notary.

Q. In other words, Mr. Markley made you swear to it, did he, before a Notary Public? A. Yes, sir.

Recess to 2:15 P. M.

Ilven Haase, sworn for the plaintiff.

Direct examination by Mr. Markley:

Q. Mr. Haase, are you employed by the Central Railroad Company? A. Not at this time.

Q. You were employed by it on December 18, 1926? A. Yes, sir.

Q. In what capacity? A. Railroad patrolman.

Q. Did you have occasion to go down to F. H. tower at E-port on that evening? A. I did.

Q. About what time? A. I got notified at five o'clock to go down there; approximately five o'clock.

Q. You were notified around five o'clock? A. Yes, sir.

Q. Where were you then? A. In the Elizabethport yard.

Q. How far is that from F. H. tower? A. Approximately—I don't know exactly; it may be a mile and a half.

Q. How did you get down to F. H. tower? A. Walked.

Q. How did you walk down, along the track? A. Along the track.

Q. And in fact, that was the only way you could go down there? A. Yes, sir.

Q. You were in the Elizabethport yard, you say, on the north side of the railroad, were you, down at Elizabethport? A. Well, the yards extend on both sides, north and south.

Q. Which side were you on? A. On the south side.

Q. And you walked along the railroad, did you? A. Yes, sir.

Q. Along the railroad right-of-way, did you? A. Yes, sir.

Q. On the track right of way where the tracks are? A. Yes, sir.

Q. You got down to F. H. tower about what time? A. Possibly 5:20, I don't know exactly.

Q. You were notified of the accident down at the Elizabethport yard, were you? A. Yes, sir.

Q. Who notified you? A. The Sergeant from our office in Jersey City.

Q. What is his name? A. Sergeant Ballow.

Q. Do you know how he got the message? A. No, I don't know. I believe he was notified by a trainman, or something, but I would not say that because I don't know.

Q. Now, when you went down to F. H. tower, did you meet the previous witness, Duffy, there? A. He was at the tower.

Q. Did you walk up with him to the point where the body lay? A. Not at first, we went to the bridge first.

Mr. Smith: Went where?

The Witness: The drawbridge.

Q. You mean the bridge where? A. East of the tower.

Q. And then from there, you went down to the switch 39? A. From there we came back to the tower and we came upon another patrolman of the railroad, and the three of us went back to the west end of switch 39 where the body lay.

Q. How close was it to switch 39? A. Really I didn't take any measurement of it at the time.

Q. Well, approximately? A. I have a report here that was written at that time.

Q. I want your recollection. How far was the body from switch 39? A. I would say it was at the west end of switch 39.

Q. That would be on track 2, wouldn't it? A. Yes, sir.

Q. What part of the body— A. That would be on track 1, wouldn't it?

Q. Well, the west end of switch 39? A. The west end of switch 39.

Q. Suppose you come down here and look at it, Mr. Haase, here is switch 39 on Exhibit P-1, and the west end is here, and that is track 2. Here

is a point here marked X, right near switch 39, isn't that it? A. Yes, sir.

Q. What part of the body lay nearer to the switch point, the head or feet, do you know? A. The feet were closer to the rail.

Q. Do you remember? A. No, sir, I do not.

Q. Was it dark then? A. At the time we found the body, yes, sir.

Q. What time was that, about? A. Well, possibly 5:30.

Q. Was the man dead then? A. To the best of my knowledge.

Q. He did not speak? A. No, sir.

Q. Could you tell where he had been injured? A. No, sir, he had blood around his face. I could not tell anything about the extent of his injury.

Q. What did you do with him? A. He was taken to Elizabethport, and later to Martin's morgue.

Q. Where is that? A. On East Jersey Street, Elizabeth.

Q. He was first taken to Elizabethport station? A. Yes, sir.

Q. And from the Elizabethport station he was taken to Martin's morgue in Elizabeth? A. Yes, sir.

Q. Did you notify Mrs. McGarry? A. No, sir, —I notified, I think it was a brother across the street from where the McGarrys were living at that time.

Q. You notified Mr. McGarry's brother? A. Perhaps the wife of Mr. McGarry's brother,— Mr. McGarry's brother was working at the time I was at the house.

Cross-examination by Mr. Smith:

Q. And you got notified, if I understand you, about five o'clock? A. Yes, sir.

Q. That is about the time you got the notice? A. Yes, sir, approximately; I don't know exactly.

Q. And you were working in the yard at the south side of the track, you say? A. Yes, sir.

Q. Well, that was up at E-port station? A. No, it was in the avenue, above the station, west of the station.

Q. Where are the avenue yards? A. They run from what is known as tower 2, to Division street.

Q. And is that on the Long Branch line? A. No, sir, on the main line.

Q. Is that up towards where the Newark Road goes across? A. It is west of where the Newark Road goes across.

Q. And that is west of E-port station? A. It is, yes, sir.

Q. You got word there, and then you went down to F. H. tower? A. Right.

Q. And there you saw Mr. Duffy? A. Yes, sir.

Q. And from tower F. H. where did you first go? A. To the west end of the Bay drawbridge.

Q. Well, that is what I thought, but I was not sure. In other words, when you came down from Elizabethport, which is up towards the left of the map, you walked down here to tower F. H.? A. Yes, sir.

Q. And from there you walked to the bridge? A. Yes, sir, to the bridge.

Q. Then from the bridge you came back? A. Toward the tower.

Q. Toward tower F. H.? A. Yes, sir.

Q. There you met another policeman, you say? A. Yes, sir.

Q. From there you and Duffy walked with this other policeman, you walked up to the west end of switch 39, as we call it? A. Yes, sir.

Q. And that is where you saw this body? A. Yes, sir.

Q. Was Duffy with you at the time? A. Yes, sir.

Q. Did you ask Duffy who the man was? A. Yes, he was asked at that time if he knew the man.

Q. Did he say? A. He didn't know him; he was a section man, but he didn't know him.

Q. When did you first notify anybody? A. The officer that was with me notified our office, I believe, in Jersey City.

Q. Your office at Jersey City? A. Yes, sir.

Q. And from there, did you go anywhere to notify anybody? A. No, sir.

Q. You say subsequently you notified Mrs. McGarry, the wife of the brother? A. That is right.

Q. Did you know where he lived, where McGarry lived? A. No, I had the address, but I don't know at the present time. I believe I had the address.

Q. Did the other police officer go anywhere to notify anybody? A. He went to notify Mrs. Spangenberg, whom we thought it was.

Q. Why did you think it was Mr. Spangenberg? A. Because at Elizabethport, when we tried to identify the man, he had a time book with Mr. Spangenberg's name on it.

Q. That is, the body had a time book on it? A. A time book.

Q. And that was the name on the time book, Spangenberg, was it? A. Yes, sir.

Q. Did you see or did you hand that time book, do you know whether you handed it or showed it to Mr. Duffy? A. I don't recall showing it to him; in fact, I don't think that he was down at the station.

Q. You don't think he went to the station? A. I don't think so. I am not sure about that, but I don't think that he did.

Re-direct examination by Mr. Markley:

Q. The reason that you thought it was Spangenberg was because you found a time book on the body with the name of Fred Spangenberg, foreman, on the cover? A. Yes, sir.

Q. And that is the book, isn't it (handing witness)? A. It is very much like it.

Q. What is the mark up here at the top, the red mark? Do you know? A. Presumably it is blood, but I don't know.

Q. That was on there when you had it, wasn't it? A. Well——

Mr. Markley: The witness is referring to Exhibit P-6 for identification.

Q. You shake your head yes? A. I think it was. I am sure it was.

WALLACE L. VANDERHOOF, sworn for plaintiff.

Direct examination by Mr. Markley:

Mr. Markley: I would now like to offer this book in evidence, which is marked Exhibit P-6 for identification.

Mr. Smith: No objection.

Accepted and marked as Exhibit P-6 in evidence.

Q. Mr. Vanderhoof, are you employed by the Central Railroad of New Jersey? A. Yes, sir.

Q. In what capacity? A. Passenger trainmaster.

Q. And have you with you the operating rules of the operating department of your company? A. I have, yes, sir.

Q. Will you please produce them?

(Witness produces book.)

Q. Now I refer you to page 18 of this book, and to subdivision P. Before I refer to that; it appears that this rule book, according to the cover, that the rules were effective on November 1st, 1922. A. November 17, 1915.

Q. The rules for the government of the operating department take effect November 1st, 1922? A. Yes, sir.

Q. And I presume in view of the fact that you produce them, that they were in effect on December 18, 1926? A. Yes, sir.

Q. There is a date on the bottom, "Issued in accordance with the Standard Code, November 1st, 1915"? A. Yes, sir.

Q. Turning to page 18, to rule P, it says, does it not,—"P. A succession of short sounds alarm for persons of live stock on the tracks"? A. Yes, sir.

Q. Was that rule in force on December 18, 1926? A. Yes, sir.

Q. Now, I wonder if you could refer me in this book to the rules with respect to the firemen's duties? A. Yes, sir, page 119, I think.

Q. I refer you to rule 1429, which reads: "When their other duties permit, they must keep a careful lookout ahead and immediately warn the engine man of any obstruction or indication of danger, or of stops or caution signals. They must carefully observe any signals given by conductor or trainman, and when necessary communicate

them to the engineer. They must read all train orders received.'' I presume that rule was also in effect on December 18, 1926? A. It was, yes, sir.

Q. Now, won't you please refer me to the rules for enginemen, or engineers? A. Right here on page 117, Mr. Markley.

Q. Rule 1401 says: ''Enginemen on duty after sunset must have in their caps when they cannot be seen by passing trains, night signals as prescribed in rules 35 and 99.''

Mr. Smith: I object to the reading of rules promiscuously. If he intends to prove the rule he must first identify it by showing the witness, and then use it. I think the rule ought to be first shown, to be applicable.

Mr. Markley: I would be glad to show it to him, your Honor.

Before you look at the rule I have just read, rule 1401, and before I read it tell me whether that rule was in force on December 18, 1926? A. Yes, sir, it was.

Mr. Markley: The rule says:

Mr. Smith: I object to that. I think the rule should be passed upon by the court.

Mr. Markley: I will be glad to show it to his Honor, and let his Honor decide whether it is applicable or not.

The Court: I don't see how it can be applicable, or of any importance to this case. I don't see why it is offered.

Mr. Markley: I will withdraw it for the present.

I also will have this book marked for identification for the present.

Marked Plaintiff's Exhibit P-9, for identification, of this date.

Q. Now, Mr. Vanderhoof, is it one of the duties of the engineer operating an engine, to keep a constant lookout ahead? A. Yes, sir.

Mr. Smith: Just a moment, please,—I have no objection to that.

The Witness: Yes, sir.

Q. Is it the duty of the fireman, when he is sitting in the cab also to keep constant lookout ahead? A. When his other duties permit.

Q. Well, when he is in the cab looking out? A. Yes, sir.

Q. It is then part of his duty to keep a constant lookout ahead? A. Yes, sir.

Q. Trainmaster, is that your position? A. Yes, sir.

Q. You are the superior of both the fireman and the engineer, are you not? A. Well, in a position, yes, sir.

Cross-examination by Mr. Smith:

Q. Mr. Vanderhoof, were you an engineer? A. No, sir.

Q. You never were an engineer, were you? A. No.

Q. Of course you know that an engineer has a great many things to do besides keeping a constant lookout ahead? A. I do, yes, sir.

Q. As a matter of fact the engineer is required to look inside his engine, watch his steam, and watch his air? A. Yes, he has duties inside.

Q. What you mean is that it is the engineer's duty when he has time from watching out from his engine, and so forth, to look ahead? A. Yes, he must be on the lookout.

Q. He has got to look——

Mr. Markley: I didn't hear that.

(Last question and answer read to Mr. Markley.)

Q. He must be on the lookout; he has signals to watch for? A. Yes, sir.

Q. Overhead signals? A. Yes, sir.

Q. Some along the track? A. Yes, sir.

Q. At night they are lighted? A. Yes, sir.

Q. And at times they show colors? A. Colors sometimes, and the overarm indications.

Q. As I understood there what you mean is one of the duties of the engineer is to look ahead for signals? A. Yes, sir.

Q. For obstructions on the track? A. Yes, sir.

Q. And for grade crossings? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. That is what you mean when you say it is his duty to keep a lookout ahead? A. Yes, sir, it is.

AUGUST C. HORSTMANN, sworn for plaintiff.

Direct examination by Mr. Markley:

Q. Are you employed by the Central Railroad Company? A. Yes, sir.

Q. In what capacity? A. Tower operator, telegraph operator and towerman.

Q. Where, Mr. Horstmann? A. At F. H. tower.

Q. Are you still employed as a towerman at that tower? A. Yes, sir.

Q. For how long have you been employed as a towerman? A. On the Jersey Central, you mean?

Q. Yes, sir. A. Nine years.

Q. Were you so employed on December 18, 1926? A. Yes, sir.

Q. What were your hours of employment on that day? A. Three to eleven P. M.

Q. Did you go to work at 3 P. M. on that day? A. Yes, sir.

Q. Were you in the tower at four and five o'clock? A. I was.

Q. When would you go for your lunch? A. We do not eat lunch.

Q. You worked right through from three to eleven? A. Yes, sir.

Q. Did you see McGarry that day? A. I didn't know McGarry.

Q. Did you see this man who was the assistant section foreman? A. I saw a man walking up the track; in fact I saw several men walking up the track.

Q. Did you see this assistant foreman walk up the track? A. I didn't know him.

Q. You didn't know him; you didn't have any idea who "John", the assistant foreman was? A. No.

Q. You didn't have any idea who he was? A. No.

Q. You didn't have any idea who he was? A. No, sir.

Q. Did you see anybody walk up the track before 707 came along? A. Yes, sir; I saw several men walk up the track.

Q. Did you see the section gang walk up the track when they quit work that day? A. There were men there walking up the track in single file.

Q. Section men? A. I presume they were section men.

Q. You don't know whether they were section men or not? A. They were railroad men. They were track men on the track, yes, sir.

Q. I am asking you do you know whether they were section men or not? A. No, sir, I don't.

Q. You can't tell us whether they were section men or not? A. They were track men.

Q. How do you distinguish between section men and track men? A. A section man is a man regularly employed in a section of the track, and the track extra men are employed any time for any particular work and they are finished when that particular work is over.

Q. What kind of men were these that day? A. They were track men.

Q. They were not men hired to work on the tracks of the railroad embankment; is that what you mean? A. I mean they may have been section men or they may have belonged to the extra gang.

Q. Is a track man the man who walks along the track; isn't that what a trackman is? A. What a trackman is, what his work is?

Q. Isn't it a trackman who goes along the railroad right of way, to see if the right of way is all right? A. No, he is a trackwalker.

Q. You think he is a trackwalker as distinguished from a track workman? A. Yes, sir.

Q. How many men did you see walking along the tracks that day from the time you went to work at three o'clock until say 4.30? A. I can't say; I didn't watch them.

Q. Did you see ten? A. I don't know.

Q. How many men were working in the gang there? A. I don't know.

Q. More than ten? A. I have not the least idea.

Q. You haven't the least idea how many men

walked on the track? A. At one time I had, but that one time only.

Q. About how many that one time? A. About four or five.

Q. What time? A. About 4.22 or 4.23.

Q. P. M.? A. P. M., yes, sir.

Q. Had you seen where these men had been working? A No, sir.

Q. You don't know where they were working? A. No, sir.

Q. Did you see any men working on the railroad that day? A. There were men working in that vicinity, yes, sir.

Q. You don't know where? A. Not exactly.

Q. Where did you see them working that day? A. I didn't see them working.

Q. Did you see Mr. Spangenberg, the section foreman, that day? A. Not that I recall.

Q. Do you know him when you see him? A. I know him.

Q. Did you see Mr. Donahue, the section foreman, that day? A. I don't recall that, either.

Q. As a matter of fact, didn't you see McGarry walking up the track? A. No, I didn't.

Q. Didn't you see a man in a sheepskin coat? A. I did see a man in a sheepskin coat walk up the track.

Q. With a black hat? A. I am not sure what kind of a hat he had.

Q. He was one of the section men? A. I don't know who he was. I didn't know the man.

Q. You had never seen him before? A. Not to my knowledge.

Q. You did see a man walk on the track that day with a sheepskin coat on, did you? A. Yes, sir.

Q. Was that sheepskin collar up on the coat? A. I can't recall whether it was up or not.

Q. What time did you see him walking up the track? A. About 4.23 or 4.24.

Q. Where was he when you saw him on the track? A. He was on the outside of track 3, that is the south side of track 3, and there were three or four men ahead of him.

Q. Three or four men ahead of him? A. When I saw him, yes, sir.

Q. How far were these men ahead of him? A. Perhaps four or five yards.

Q. Were these the men that you referred to as trackmen? A. As trackmen, yes, sir.

Q. And this man with the sheepskin coat on was where on the railroad? A. He was the last man walking up.

Q. I mean where was he, between what tracks? A. He was on the outside of track 3.

Q. When you saw him? A. When I saw him.

Q. That would be on your F. H. tower side of track 3? A. Yes, sir.

Q. How close was he to your F. H. tower when you saw him. A. About one hundred yards away.

Q. West or east of the tower? A. West of the tower.

Q. At that time he was about three hundred feet west of the tower? A. About that.

Q. He was on the south side of track 3, wasn't he? A. Yes, sir.

Q. And that, you say, was about 4:23 or 4:24? A. Yes, sir.

Q. You were the tower man? A. I was.

Q. Was there a train that day known as 619? A. Yes, sir.

Q. What time did that pass the tower? A. About 4:24:40.

Q. What do you mean by that? A. I mean 4:24 and forty seconds.

Q. Did you make a note of the exact time it passed? A. Not the exact time.

Q. Did you get down forty seconds? A. Because that is the time it passed; I looked at the clock.

Q. You were in the tower? A. Yes, sir.

Q. And you saw the clock? A. Yes, sir.

Q. At 4:24:40 that train passed the tower? A. Yes, sir.

Q. It was at that time that the man with the sheepskin coat was 300 feet west of your tower? A. Yes, sir.

Q. After the train went by did you see the man with the sheepskin coat? A. No, sir.

Q. When was the last you saw him? A. The last I saw him, he was walking over track 3 over towards track 2.

Q. How far was he from your tower then? A. About the same distance he was when I saw him. He was about 300 feet away when I saw him.

Q. He was then south of track 3? A. He was on the south side of track 3.

Q. He was starting to go across then? A. Yes, sir.

Q. Now, what time did 707 pass your tower? A. 707, about 4:30.

Q. Was that exactly 4:30? A. Yes, sir.

Q. When did you first hear that an accident had happened? A. About five o'clock in the afternoon.

Q. How did you hear it? A. Somebody telephoned to me that a man had been seen lying on the track west of the Bay Bridge, as they call it.

Q. Who was it gave you that telephone call? A. That I don't remember, who called, because I could not leave the tower, anyway.

Q. Did you make a statement after this accident? A. Yes, sir.

Q. To the railroad company? A. Yes, sir.

Q. When? A. The following day, on a Sunday.

Mr. Markley: May I have that statement?

Mr. Smith: Do you want to offer it if you get it?

Mr. Markley: I will be very glad to offer it.

Q. How many statements did you make? A. One.

Q. Did you make one last September? A. I was in the office one time. I don't recall whether I made another statement or not.

Q. You don't recall whether you made two statements or not? A. I don't recall it, no.

Mr. Markley: I offer this in evidence.

Accepted and marked Plaintiff's Exhibit P-10 of this date.

Mr. Markley: Read Exhibit P-10 to the jury, as follows:

"I am second trick towerman at F. H. tower. I do not keep a record of the time that passenger trains pass here. I have a schedule of the time that they are due to pass here. The first train that passed here after McGarry left the tower at 4:20 was train 619, which is due to pass here at 4:24, and was on time. It was on track 2. The next train was 707, due to pass here at 4:31 P. M. on track 2. The jitney I held

to follow 707. It came on track 4 and I put it in on track 2, following 707. There were about four or five men on the south side of the track, and about the same number on the north side of the track, all walking west, but they were some distance ahead of McGarry when I last saw him, probably fifty or sixty feet. Train 619 was running pretty fast, and that was the train that I saw steam and smoke blowing down from. It must have been. I don't remember seeing smoke from 707, but then as soon as is passed here I was busy putting the jitney in on track 2. After the train passed I saw smoke coming down there. The smoke cleared up. I looked west and didn't see McGarry, and thought that he must have got across. The headlights on engine, I think, were all burning.

I was towerman on F. H. tower above, on duty 3 to 11 P. M., and I didn't see the accident happen. The first I knew about the presence of a body on the track was about 6:15 P. M., when one of our policemen came in here and phoned. I did not go up to where the body was, and I did not see it.

The last I saw McGarry was when I saw him walking diagonally across the tracks, he had left the eastbound and was walking toward the westbound on the space between the two sets of tracks, in the middle between the two sets. He was at least one hundred yards from here at the time, west, and I am not able to tell whether he had his coat collar up, or his hat down over his ears at that distance, because it was dusk at the

time. There were other men walking west on the south side of the eastbound track, and they were all west of McGarry. At that time there was a train coming westward, either 707 or 109. Train 707 is due here at 4:30 P. M., and 109 is due up here at 4:50 P. M. No cause for the train to sound whistle here. There was no train going eastward at the time I saw him. Trains 707 and 109 both ran on track 2. The first train before 707 was 619, due Elizabethport at . The only train he could get from Elizabethport—from the Port—after he left here at 4:20 would be train 857, due at the Port at 4:44 P. M. It would come by here on track 4. Weather was clear and cold. The wind was blowing from the north and the smoke from the train that passed immediately after I saw McGarry crossing towards track 2, obstructed my further view of him. After the train passed and the smoke cleared up I looked to see what became of him and could not see him. When he was walking towards track 2, diagonally towards it, the westward train was just about opposite the tower and running fast, and I figure if he kept on going he would be pretty close to being struck by that train there on track number 2. It is my opinion that was train 129. After the smoke had cleared I figured he had moved and had either gone on the north side of the westbound or had come back to the eastbound side.

AUGUST C. HORSTMANN."

Q. No, Mr. Horstmann, you say that you did see McGarry? A. I saw a man; I didn't know at that time who it was.

Q. In that statement you call him McGarry? A. I don't. The writer there did. I didn't. I didn't write that.

Q. I know you didn't write it, who did? A. One of the men from the claim department.

Q. He put you down here as saying, "The first train that passed here after McGarry left the tower at 4:20, was 619." Did you say that?

Mr. Smith: I object to that if the Court please. This is not a statement given to Mr. Markley. He cannot impeach this witness, who is his own witness, unless the statement was given to him. He may offer the statement for what it is worth to the jury.

The Witness: They wrote the name for me. I was told it was McGarry, or whatever his name is. That is all I know.

Q. The claim agent told you the man in the sheepskin coat was McGarry? A. He gave him his name. I didn't know him.

Q. You never named him, you didn't know who it was? A. No.

Cross-examination by Mr. Smith:

Q. Mr. Horstmann, as I understand you, you were in the tower and you saw this man, being the last man of a number of men, walking west on the south side of track 3? A. Yes, sir.

Q. The south side of track 3. This side of track 3, toward the bottom of the map (indicating)? A. Yes, sir.

Q. They were walking up off the tracks on the south side? A. Yes, sir.

Q. Walking up this way, towards the top (indicating)? A. Yes, sir.

Q. Then as I understand you, you say you saw this man, you didn't know who it was, go across from that point, go across from there over track 1, towards track 2? A. Yes, sir.

Q. At that time you saw train 619 pass? A. Yes, sir.

Q. When 619 passed, you say in your statement as read by Mr. Markley, that you thought at that time he was going pretty close to track 2? A. Yes, sir.

Q. Then 619 went by? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And after it went by you you no longer saw the man? A. No.

Q. You were under the impression, as I gather, that he had either gone across or had come back to the south side? A. That is what I believed, yes, sir.

Q. Now that was when 619 went by? A. When 619 went by.

Q. And after 619 went by you never saw that man? A. No.

Q. Now, you say the statement that Mr. Markley has produced, the one that was made by you on the Sunday, that was the day after the accident? A. Yes, sir.

Q. Where was that made? A. In the tower.

Q. Who was there? A. The maintainer, Mr. Duffy, and the claim agent and myself.

Q. Did you see Mr. Duffy make a statement that day? A. Yes, sir.

Q. Were you there when he made it? A. Yes, sir.

Q. Were you there when it was written out? A. Yes, sir.

Q. Was it handed to him?

Mr. Markley: I object to that as not cross-examination.

The Court: That question purports to be in relation to the Duffy statement, not in relation to the making of this statement.

Mr. Smith: I submit that he has said that they were made together. I submit it is relevant. They were all made at the same time.

The Witness: We gave our statements together. That is how I gave mine first, and then he gave his.

Q. Right at the same spot? A. Right in the tower.

Q. I ask you now, at the time when Duffy's statement was made, do you know whether that was handed to him, whether he read it or not?

Mr. Markley: I object to that as not cross-examination.

The Court: Sustained.

Mr. Smith: Your Honor will grant me an exception?

The Court: Yes.

Q. Did you read yours? A. I did.

Re-direct examination by Mr. Markley:

Q. Did you say it was the truth, after you read it? A. Why, I suppose I said the usual things that you fellows make us say in a case like that.

Q. You said whatever they made you say? A. No, but what is customary. You put on these documents, as you would do.

Q. Is it customary for a claim agent to do that? A. Yes, if you had the case you would do the same.

Q. As I understand you, you said you heard first that this accident happened, at five o'clock, over the telephone? A. Somewhere around that time. I haven't the exact time.

Q. Who sent you the telephone call? A. I don't know who called.

Q. I want you to listen to this part of your statement and tell me whether this refreshes your recollection about it: "I didn't see this accident happen. The first I knew about the presence of a body on the tracks was about 6.15 P. M., when one of our policemen came in here and phoned." Now which was it, was it at five o'clock, the telephone call that you got from somebody, or was it the policeman who came in at 6.15 and informed you of the fact that an accident had happened? A. If I am not mistaken, I got a call relative to this accident, that there was a man lying west of the draw. Whether that was before or after that policeman came in I don't recall. I had the idea that it was before.

Q. That would be about five o'clock, you say? A. Well, I am not sure just what time it was.

Q. And when the claim agent put in here: "I didn't see this accident happen. The first I knew about the presence of a body on the tracks was about 6:15 P. M., when one of our policemen came in here and phoned." Did you tell him that you heard about it at five o'clock?

Mr. Smith: I want to make the same objection that I made before, that this witness may not be contradicted by Mr. Markley on this statement.

The Court: I overrule the objection, and an exception will be allowed.

Mr. Smith: Exception.

Q. Do you understand the question? A. You spoke of a body having been found.

(Question read as follows):

"When the claim agent put in here: 'I didn't see this accident happen. The first I knew about the presence of a body on the tracks was about 6:15 P. M. when one of our policemen came in here and phoned.' Did you tell him that you heard about it at five o'clock?"

A. No.

Q. Now, I call your attention to another statement in here, and I ask you whether you suggested it to the claim agent at the time that he took the statement: "There were other men walking west on the south side of the eastbound track, and they were west of McGarry. At that time there was a train coming westbound, either 707 or 109." Did you tell him that? A. Yes, sir, I did.

Q. Well, that was after 619 went by, wasn't it? A. Yes, sir.

PETER DONAHUE, sworn for the plaintiff.

Direct examination by Mr. Markley:

Q. Mr. Donahue, you work for the Central Railroad Company, of New Jersey? A. Yes, sir.

Q. What is your position? A. Why, extra gang foreman.

Q. Extra gang foreman? A. Extra gang track foreman.

Q. How long have you been a track foreman? A. About thirty-eight years.

Q. How long have you worked for the Central Railroad Company, Mr. Donahue? A. Why, about thirty-nine years, or a little over.

Q. Were you working for the company on December 18th, 1926? A. I was.

Q. Were you gang foreman on that day? A. Yes, sir.

Q. Where were you working that day? A. I was working on the south side of the embankment, south side of track 3 on the embankment.

Q. How close to F. H. tower? A. Just west of it.

Q. About how many feet west of F. H. tower? A. Another hundred feet or fifty feet straight along, shovelling out, making the fill.

Q. What were you making the fill for? A. For a track, shovelling out the embankment.

Q. You were putting in an embankment? A. Cutting out an embankment. The embankment was not wide enough and we were widening it.

Q. You were widening the embankment for the railroad? A. Exactly.

Q. That was fifty or a hundred feet west of F. H. tower? A. Yes, sir.

Q. How many men did you have working there, Mr. Donahue? A. I had about twenty-five.

Q. Do you know Mr. Spangenberg? A. I do.

Q. Was he a section foreman? A. He is the same as I am.

Q. He is the same kind of section foreman that you are? A. Yes, sir.

Q. How long have you known Mr. Spangenberg? A. I should judge about eighteen years or so.

Q. Did he have a gang up there, too, that day? A. Yes, sir, he did.

Q. What were they doing? A. They were doing the same as I was doing, but they were further west than I was.

Q. How much further west were they from you? A. Why, possibly five hundred feet.

Q. Were they also helping to make this bank for the railroad? A. Yes, shovelling out the bank.

Q. What is that? A. Widening the bank.

Q. Widening the bank of the railroad? A. Yes, sir.

Q. That is the railroad where the four main tracks run? A. Yes, sir.

Q. How many men did he have in his gang? A. That I could not say, he had his regular gang; I suppose he had about the same as I have.

Q. About how many? A. Twenty-five, or maybe twenty-three; he might be short a few, you know.

Q. How many hours a day did you work? A. We worked ten.

Q. Ten hours was your ordinary day? A. Yes, sir.

Q. Then you worked some overtime? A. Why, at times, yes, sir.

Q. What time did your gang and you go to work in the morning? A. Seven o'clock.

Q. What was the quitting time in the afternoon? A. About half past five, around that time.

Q. On this particular day, how would the men go up from work in your section gang, would they go up from Elizabethport? A. Yes, sir.

Q. How did they go up? A. They could go down from there, and from that underpass under there they could go along on the outside of the tracks.

Q. They come along the tracks, is that what you mean?

Mr. Smith: I object as directly leading.

The Witness: I said along the outside of the tracks.

Q. They came along the outside of the track, you mean? A. Yes, generally always, yes, sir.

Q. You have walked along the outside of the tracks, haven't you? A. Yes, sir.

Q. You have walked along the inside of the tracks?

Mr. Smith: I object to that as directly leading.

Q. Have you walked inside of the track? A. I have at times. I have walked inside of these tracks to get them in condition. It is my business to walk along the inside.

Q. You were the section foreman? A. I was the section foreman.

Q. You knew John McGarry? A. Yes, I did, I knew him before he was killed. I knew him about six or seven years before he was killed.

Q. What was his position? A. He was assistant to Mr. Spangenberg.

Q. How long had he been assistant to Mr. Spangenberg? A. I guess he was about a year and a half with Mr. Spangenberg, as his assistant.

Q. He had been your assistant, too? A. He had, previous to that.

Q. What kind of a man was he? A. He was a good fellow, a good workman.

Q. He was a good, hard workman? A. Yes, sir.

Q. Did you ever know him to be absent from his work? A. No, not while he was working with me, only one time he had a death in his family, one of his children. He was out for that.

Q. Outside of that was he ever absent? A. No.

Q. Was he ever sick? A. No, not while he worked with me.

Q. On this particular day that he was killed, had you seen him that day? A. I did.

Q. And he had been working up there on the railroad that day?

Mr. Smith: I object to that. I am going now to object to each question when it is leading.

Q. What time did the gangs quit work that day? A. Well, we were going to work up at the Port the next day laying rails, and we had to take some tools.

Q. I didn't hear you? A. We had to go up to the Port the next day, and we had to quit a little earlier on account of taking tools up there.

Q. What time did your gangs quit that day? A. I left down there I should judge about 4:30, or around that time.

Q. When you quit at 4:30, where would the men go from where they were working; down to Elizabethport? A. Down to Elizabethport, we had a tool box up there. We would all leave our tools—

Q. What time would it take them to get from where they were working to F. H. tower, or west of it, up to Elizabethport; would that be counted in their time? A. Why, certainly.

Q. Did you see Mr. McGarry around four o'clock that day? A. I did. I believe it was really around four o'clock; might be a quarter to four.

Q. Was anybody else present when you saw him? Was Mr. Spangenberg present? A. Yes, Mr. Spangenberg was down over there, he was down near the underpass.

Q. Did you have occasion to go into F. H. tower? A. I didn't go in there. I was not in the tower.

Q. Not that day? A. I go in there sometimes during the day, or in the afternoon.

Q. You do go in there at times? A. At times, when I had occasion to go in there once in a while. Well, there was a toilet in there, and I had to go too, in the first place; there was a toilet in the cellar, and I went many times to the toilet in the cellar.

Q. And what other occasions? A. Sometimes when a call from the office came in we had to go in there and answer it.

Q. Anything else? A. Why no.

Q. Did Spangenberg go in there, do you know? A. I suppose he did, at times, when he was called, if he was called to the telephone.

Q. Was he? A. Or anything like that, I suppose he did.

Cross-examination by Mr. Smith:

Q. You were a track gang foreman, Mr. Donahue? A. Yes, sir.

Q. By that you mean you did work around the tracks? A. Yes, sir.

Q. You say Spangenberg was about the same as you were? A. The same line of business.

Q. And you had men under you? A. Yes, sir.

Q. Well, now, when the men were working on the tracks did you maintain a lookout for them? A. Yes, sir.

Q. How did you do that? A. Well, I done it by a whistle, blowing a whistle when a train was approaching, blow a whistle, get them out of the way; the men would go inside of the tracks.

Q. How would you know when a train was coming? A. Well, I have got pretty good eyesight, thank God.

Q. You could see? A. Yes, sir.

Q. It was your business to keep a lookout for the trains? A. Exactly.

Q. McGarry was a sub-foreman at times? A. Yes, he was, some years ago, maybe four or five years ago.

Q. Did he at times do work that he had to look out for trains? A. Yes, sir.

Q. Did you or he have any knowledge when regular trains were coming along? A. I have a timetable, yes, sir.

Q. A timetable informing you as to when trains would come through? A. Yes, sir.

Q. Were you familiar with them? A. Yes, sir.

Q. Do you know whether McGarry was? A. Yes, he was, he carried a timetable also, had it furnished to him the same as I had. I had mine and he had his.

Q. When he was with you, was it his duty to look out for trains? A. Certainly.

Q. Warn the men of their approach? A. To get out of the way.

Q. When you worked on tracks on which trains were approaching, how did you place yourself, in the direction in which the train was coming, or in the opposite direction? A. Sometimes the opposite, and sometimes in the direction in which the train was coming, according to what I had to do. I had to sometimes be on the side of the road, when surfacing the tracks.

Q. When you were going back did the assistant foreman watch the trains? A. He watched the trains and I watched them myself also. We had enough to do the both of us to watch, believe me.

Q. To watch for the trains? A. Yes, sir.

Q. How long had you seen McGarry working with Mr. Spangenberg prior, that is before December 18, 1926? A. Well, I guess a year and a half, around that time.

Q. How long had you seen him work around there at this place, in Elizabethport, or the place where this accident happened, before December 18th? A. He didn't work in that particular place. They worked, he was going all over, it was new fill, and it was settled here and there; we had to jump from this place to that place, and so forth.

Q. The west end, we will say, the west end of the bridge to E-port? A. I have seen him several times.

Q. About how long a time, three weeks before, or a week before? A. Yes, a month, two months.

Q. And during that time he was assistant to Mr. Spangenberg? A. Yes, sir.

Q. And during that time of course, trains were running back and forth there? A. Yes, sir.

Q. And during that time, was it Mr. McGarry's duty to watch for the trains and warn his men? A. Well, I suppose so. He done it while he was with me; I suppose he done the same thing with Mr. Spangenberg.

Q. Now, in the afternoon, you say you were working on this fill, as you call it? A. Yes, sir.

Q. Widening the bank? A. Yes, sir.

Q. You were not on the track? A. No, sir.

Q. Had you been on the tracks in the morning? A. No, sir, we worked on the outside of the tracks all day.

Q. And it was your gang that was working down there at the tower? A. Close to the tower, yes, sir.

Q. And Spangenberg's gang was working up further towards Elizabethport? A. The underpass.

Q. Up by the underpass? A. Yes, way up there.

Q. And McGarry was a member of your gang? A. Not of the gang, no.

Q. He was a member of Spangenberg's gang? A. Yes, sir.

Q. Which worked up here by the underpass? A. Yes, sir.

Q. And on that day, December 18th, McGarry was not working with your gang at any time down at F. H. tower? A. No.

Q. Had you seen what Mr. Spangenberg's gang was doing in the morning of that day? A. I didn't pay no attention, I could not say.

Re-direct examination by Mr. Markley:

Q. I show you a book, Mr. Donahue, is that a time book that was used for the men in the gang? A. Yes, sir.

Mr. Markley: Referring to Exhibit P-6.

Q. Do you know McGarry's handwriting? A. Yes, that is his handwriting.

Q. Was it the duty of the assistant foreman of the section gang to keep the time of the men? A. Yes, if he was told to do it,—if he was told to do it by his foreman. The foreman could stay more over his men by having the assistant do that work.

Q. And this is the handwriting of McGarry? A. Yes, sir.

Q. What would he do with the book after he made it up? A. Why, kept it with him, I suppose. I suppose he brought it home with him.

Q. You had to take it in to the timekeeper? A. No, this only went in twice a month.

Q. That book would go in twice a month? A. Oh, yes; one of them books on the first to the fifteenth, and from the fifteenth to the last of the month, when we would get another book.

Q. And the assistant section foreman would

keep the book? A. If he was told to keep it and his foreman wanted him to keep it.

Q. When would he turn it in so that the men's time could be made up? A. After the 15th on the first part, then at the end of the month he had another book.

Q. Did he have to make up a daily report for the camp men, for them to check up? A. They were copied in this book on a different page, or I am not sure now that they have another book.

Q. Didn't they have a daily report that they had to make up for the camp men? A. Yes, the camp men's names is in this book. These are all camp men, regular men. Let's see, there was one of these books kept for the camp men, and the other book just for the regular men.

Q. What did you do with the camp men? A. Just keep it in that book.

Q. Didn't you have to turn it in to the camp men? A. He had a camp book besides the regular, a small book.

Q. What is that? A. The camp men would be taken to the camp to show the camp man that these men had been working that day. If he didn't have that book, why these men would get no supper.

Q. Would he turn that into the camp? A. Each night, that small book.

Q. Where was that camp where you would have to turn that in? A. Elizabethport at that time,—it was Aldene, Elizabeth.

Q. In December, 1928? A. Yes, sir.

Q. Would he have to go up there to turn it in? A. No, one of the men carried it up.

Q. Each night? A. Each night.

Q. So that each night, a record of the men

who worked that day would be taken to the camp where the camp men lived? A. Yes, sir.

Q. Taken so that they would get credit for it? A. Yes, so the commissary man knew they worked that day.

Q. This accident happened on a Saturday, didn't it? A. Yes.

Q. Did the assistant foreman have anything to do with notifying the men they were to come back on the Sunday? A. Why, yes, I believe he did notify them.

Q. Do you remember that? A. I think I do remember hearing Mr. Spangenberg tell him to notify these men that they had to bring their tools up in the afternoon, and to get ready. And the fellows had to carry a couple of heavy jacks up and they had to go ahead of the others.

Q. Did you talk to McGarry? A. Yes, sir.

Q. What did he say to McGarry? A. He told him about bringing these tools up, that they had to walk up there the next day.

Q. What time in the afternoon was that? A. That was around half past three, I should judge, around that time.

Re-cross-examination by Mr. Smith:

Q. Who were these camp men, extra men? A. There were men that are carried in New York City from a fellow that keeps an employment agency, and hires them to the company to do their work.

Q. In order to get their grub, as you say, they had to have the book? A. That's about it.

Recess to 10 A. M., November 2, 1928.

Jersey City, N. J.,
November 2, 1928, 10 A. M.

Trial resumed pursuant to adjournment.

PATRICK MCGARRY, sworn for the plaintiff.

Direct examination by Mr. Markley:

Q. Where do you reside, Mr. McGarry? A. Elizabeth.

Q. How old are you? A. I am about forty-one years old now.

Q. Who are you employed by? A. The Gas Company in Elizabeth.

Q. Was John McGarry a brother of yours? A. Yes, sir.

Q. Was he older or younger? A. Younger.

Q. What was his age at the time he was killed? A. Thirty-one.

Q. Did he live with his family near you in Elizabeth? A. Yes, sir.

Q. Where did you live in Elizabeth? A. He lived just across the street from me on Anna Street.

Q. Do you remember December 18, 1926, when he was killed? A. Yes, very well.

Q. Was your home notified of the fact that your brother was dead? A. Yes, my home was notified.

Q. About what time? A. As near as I can recall now, it was about a quarter after eleven at night.

Q. Had you seen your brother daily up until the time he died? A. Yes, sir.

Q. What kind of a man was he with respect to his health? A. Always in good health, never known him to be sick or ailing.

Q. So far as you could observe, what were his relations in his home? A. Very good.

Q. Did you have occasion to go down to the railroad near F. H. tower after he was killed? A. Yes, sir.

Q. The day that he was killed, what kind of a day was that, a warm day, or wet? A. It was a very bitter, cold day.

Q. When did you go down to the railroad? A. I went down on the Monday.

Q. This accident happened on Saturday? A. On Saturday, the 18th, yes. I went down the following Monday, in the morning.

Q. About what time? A. Around ten o'clock.

Q. Did you go down to switch 39? A. I went down to switch 39; I went in there to see what I could find.

Q. You can't say what you went for; did you go down? A. Yes, sir, I went down.

Q. This bitter cold, did that continue up until Monday? A. Well, on Monday, it was not so cold; it was not so cold on the Monday as it had been on the Saturday before.

Q. How about Sunday, do you remember? A. Sunday it was cold, yes, sir.

Q. When you went down there on Monday, did you observe whether or not there was anything between the two inside tracks on the railroad, west of switch 39? A. Yes, as I came along there I observed in that walk between, I think tracks 1 and 2——

Q. The inside track? A. I noticed that there was some repair work being done there, and there was like hills of stone.

Q. What is that? A. There was hills of stone; I don't know whether dumped out of a railroad car, or whether piled out of a truck, or whether

they were repairing the track. There was several piles of that along there.

Q. For what length, how long a length, fifty or a hundred feet? A. Well, they were in different places along, I would say, about thirty or forty feet. They had been covered over with snow and it was freezing. What called my attention to them, I stepped over myself, as I was proceeding along.

Mr. Smith: I object to that, and ask that the last remark be stricken out.

The Court: Strike it out.

Q. Will you come down here and point out on the map, Mr. McGarry, where these hills or piles of stone were. Here is switch 39 on track 2, and here is the inside track, track 1, on this exhibit P-5, now where were the piles of material? A. This 39 on this side, somewhere I would say about one hundred or maybe a hundred and fifty feet on this side of switch 39.

Q. That is you mean on the southerly side, here on this side (indicating.)? A. Yes, on this side.

Q. That is the south side, the south side of the track? A. On the east side of the tracks; they were on the east side of 39 switch.

Q. That would be the south side, when you say on this side? A. No, I mean that they were on the east side of 39 switch, near the F. H. tower. The F. H. tower on the east side.

Q. You say east of 39 switch? A. East of 39 switch.

Q. And between track 2 and track 1? A. Between track 2 and track 1.

Q. How high were these piles? A. They were not very high.

Q. How high? A. I would say about twelve or fourteen inches.

Q. And they extended for what length along the track, how long along the track? A. About forty or fifty feet.

Q. Do you know Mrs. McGarry, your brother's wife? A. Yes, sir.

Q. How many children did your brother have? A. Two.

Mr. Markley: Cross-examine.

Mr. Smith: None.

Mrs. Agnes McGarry, sworn for the plaintiff.

Direct examination by Mr. Markley:

Q. Mrs. McGarry, are you Mrs. Agnes McGarry? A. Yes, sir.

Q. Are you the widow of John McGarry? A. Yes, sir.

Q. Speak up so the jurymen can all hear you, Mrs. McGarry. How old are you, Mrs. McGarry? A. I am thirty-two.

Q. Thirty-two now? A. Yes, sir.

Q. How old was your husband when he was killed? A. Thirty-one.

Q. That was on December 18, 1926? A. Yes, sir.

Q. How many children have you, Mrs. McGarry? A. Two.

Q. What is the name of your elder child? A. Anna Marie.

Q. How old is she? A. She was five August 16th.

Q. On August 16th of this year? A. Yes, sir.

Q. Is that the older child? A. Yes, sir.

Q. Now the younger child, how old is she? A. Four September 27th.

Q. Of this year? A. Yes, sir.

Q. What was your husband's health prior to the time he was killed? A. He had good health. He was in good health.

Q. Did he live with you? A. Yes, sir.

Q. And the children? A. Yes, sir.

Q. What kind of a husband was he, Mrs. McGarry? A. He was a good husband.

Q. Was in good health? A. Yes, sir.

Q. Were you in good health? A. Yes, sir.

Q. Are you still in good health? A. Yes, sir.

Q. How about the health of the children? A. They are in good health.

Q. How long have you been married? A. I am married six years.

Q. Six years when he died? A. No, six years last October.

Q. Now, with regard to his earnings, do you know what he did with his earnings? A. Well, he always brought home his check to me.

Q. How much did he give you on an average? A. Well, he got paid twice a month.

Q. How much did he get twice a month? A. Sometimes his check would come around one hundred dollars; sometimes a little over, sometimes it would not be one hundred dollars. Sometimes it would be a little over that.

Q. Would it average about one hundred dollars? A. Yes, it would average around that.

Q. Did that include his overtime? A. Yes, sir.

Q. Did he work Sundays? A. He did, yes, sir.

Q. Do you know whether he worked overtime during the ordinary days, week days? A. Except in case of snow or storm they worked overtime.

Q. Would he bring home all his wages to you? A. Yes, sir.

Q. Did you give him anything for himself? A. Well, he could always have what he wanted. He never spent much money.

Q. About how much did you give him? A. About a couple of dollars.

Q. A couple of dollars each day? A. Well, he just smoked; he worked long hours.

Q. Did he ever take you and the children out? A. Yes, always when he was off Sundays, we always went out together.

Q. I show you a book which has been marked P-6, and ask you whether you can tell the court and jury whether that is your husband's handwriting (handing witness)? A. Yes, sir, that is his handwriting.

Q. You are sure of that? A. Yes, I am sure.

Q. Where did you get this book? A. The undertaker delivered this book to me.

Q. You got the book from the undertaker? A. Yes, sir.

Cross-examination by Mr. Smith:

Q. Mrs. McGarry, how many checks did you get from your husband every two weeks that amounted to one hundred dollars? A. I got one every two weeks.

Q. How many checks amounting to one hundred dollars did you ever get from your husband? A. Well, that I could not exactly say, because I did not keep any track of them.

Q. Don't you know that, as a matter of fact, the average check for your husband for a year was only seventy-one dollars and some odd cents, the average for a year? A. Well, I could not say what his average pay; he worked an awful lot of overtime.

Q. That is all included in his check? A. Yes,

that is what I am saying; I always got his check, whatever it was, I got it.

Q. Sometimes he got sixty-seven dollars for two weeks, sometimes fifty-four dollars for two weeks' work? A. Well, he did not get these small checks in a long time, near the end of the summer——

Q. Here is January? A. During June, July and August of that year he got quite——

Q. In January, 1926, February, 1926, he got one hundred dollars, didn't he, for the first half of the month; February, 1926, he got one hundred dollars, that is the check, isn't it? A. It is $116.74.

Mr. Smith: $116.74. All right.

Q. That has got Mr. McGarry's name on the back? A. Yes, that is his own handwriting.

Q. We will take the next half of the month, the last half of the month of February, 1926. That is $47.00, isn't it, for the last half of the month of February? A. Well, yes, sir.

Q. Now, we will take the first half of the month of March, 1926. That says $57.20, doesn't it? Is that right? A. I see it, yes, sir.

Q. That is his name on the back of it, isn't it? A. Yes, sir.

Q. Now, we will take the last half of March, that is $70.32? A. Yes, by the end of the time he was working——

Q. Here is April, 1926; for the first half of the month of April, that is $67.00? A. Well, I should judge from around June of that year——

Q. Let's go to June. A. He was over an extra gang the last half.

Q. The last half of June? A. Around June, I think, until he got injured in December.

Q. The last half of June; the last half of the month he earned only six dollars that last half of

June? A. That was an extra check. He had two checks in that pay. That was overtime.

Q. It reads on the check, last half of June. A. Well, he got two checks. Sometimes he got two checks for the pay; probably the overtime would not come in with the other one.

Q. The last half of the month of June? A. That is extra. He had two checks that pay.

Q. Here is the first half of the month of July, $63.18, am I right? A. Yes, sir.

Q. And here is— A. I told you there were some times his overtime did not come in, and he would get an extra check.

Q. Here is the last half, "For services rendered as shown on payroll, the last half of the month of July, 1926, $5.29". A. Well, that was his overtime. That was not his weekly pay.

Q. Here is the first half of the month of August, 1926, $50.27. A. Well, he might have an extra check for that.

Q. Here is the last check for the month of August, reading: "For services rendered, as shown on payroll for the last half of the month of August, $84.39". A. Well, that was pretty good.

Q. Well, now, we will take September, for the first half of the month of September he earned $102, didn't he? A. Yes, sir.

Q. Now, for the last half of the month of September he earned $80.86; is that right? A. Yes, sir.

Q. And for the first half of the month of October he earned $78.36. Isn't that what it says? A. For two weeks.

Q. And for the last half of the month of October he earned $105.81? A. Yes, sir.

Q. In the first half of the month of November he earned $98.16; is that right? A. Yes, sir.

Q. And in the last half of the month of November he earned $105.75? A. Yes, sir.

Q. Is that what you mean, that his pay kept on, you think, increasing? A. Well, whatever he got, I am saying, he would give me the checks.

Q. You know that the average for the year is about seventy-one dollars, don't you? A. Of course I don't know; I am just only saying what I got.

Mr. Markley: That is the plaintiff's case.

The Court: Gentlemen of the jury, for certain reasons, I might just as well say, so that you won't have any misunderstanding of the reasons and attribute it to either counsel. Both counsel in the case are here and ready and willing to go on to a finish, but I find that I am not able to finish this case today.

So that is why I am going to put off this case until Monday. I want to say this to you, that between now and Monday you are not to discuss it with anyone or have anyone discuss it in your presence. Don't misunderstand me when I say that. There is no doubt in my mind that you would deliberately do that, of course, but there is always the danger that in discussing a case of this kind with one of your colleagues on the jury that you might do it in the presence of someone whom you would not know, and whom you really would not want to hear it, but would be forced to hear it. And by the same token, there is always the danger of someone discussing it in your presence, not knowing you are a juror in the case, not knowing you personally, and not knowing you as one of the jurors in the case, and

might inadvertently discuss it in your presence. So I am going to admonish you and warn you not to discuss it, not to deliberate upon it until the case is all in, and not to discuss it with anyone until the case is all through.

I am just merely calling your attention to the fact, and asking you to be extra careful between now and Monday not to discuss the case with anyone, or to allow anyone to discuss it either with you or in your presence.

You will return on Monday morning at ten o'clock.

IN CHAMBERS.

Mr. Smith: I move for a non-suit in this case upon the ground that the decedent assumed the risk of being injured in the manner in which he was injured.

This case is brought under the Federal Employers' Liability Act, and the complaint as the sole ground of negligence sets forth this in paragraph 8.

It says that "the said death of the plaintiff's said intestate resulted in whole or in part from the negligence of the officers, agents and employees of the defendant, and by defect and insufficiency due to defendant's negligence in a certain engine, cars, brakes, signals, appliances, equipment, tracks, and roadbed."

Now that is just taken bodily from the Federal Employers' Liability Act.

The negligence as testified by the plaintiff is this: That at the time and place

aforesaid, while plaintiff's said intestate was then employed in interstate commerce as aforesaid, and was walking and standing on defendant's said railroad in such position that he failed to see said train approaching, and while said plaintiff's intestate was visible for a considerable distance to its agents and servants who were then and there operating defendant's said engine, on the tracks of said railroad, the defendant, by its servants and agents negligently caused one of defendant's said trains and engines to be operated at a high rate of speed towards plaintiff's said intestate without slackening its speed, and without signal or warning to give said plaintiff's intestate notice of the approach of said engine or train, and as a result said engine or train struck said plaintiff's intestate with great violence and injured him as aforesaid.

That is the specific negligence, and that is the specific point which I make this motion on.

In this case it is my contention that the decisions of the United States courts and of the Supreme Court are final, and in a case brought under the Federal Employers' Liability Act.

Therefore I move, upon the case as made out by the plaintiff, that a non-suit be granted upon the ground of the assumption of risk by the decedent.

The Court (after argument): Well, gentlemen, I have your memorandums, and I will reserve decision and make my decision known when the case comes up on Monday morning.

Jersey City, N. J.,
November 5, 1928, 10 A. M.

Trial resumed pursuant to adjournment.

The Court: I am going to refuse the motion for a non-suit and allow an exception.

Mr. Smith: Exception.

Mr. Markley: If your Honor please, on Friday, through inadvertence, I forgot to put in the life expectancy, and I spoke to Mr. Smith this morning and he said I might do so.

According to the Carlisle Table the expectancy of life of a person in good health, thirty years of age, has a life expectancy of 34.34 years. A person thirty-one years of age, has a life expectancy of 33.69 years. A person thirty-two years of age has a life expectancy of 33.03 years.

DEFENDANT'S TESTIMONY.

PETER DONAHUE, recalled for the defendant.

Direct examination by Mr. Smith:

Q. You are familiar with the condition of the tracks and the scene of this accident on December 18, 1926? A. Yes, sir.

Q. Will you tell me whether or not there were any piles of stones between tracks 1 and 2 at that time? A. No, sir; there was no stone at that time there, only cinder, engine cinder.

Q. Were they dumped there? A. No, covered with dirt, covered full up.

Q. Was that smooth at that time? A. Yes, it was all pretty well levelled off in between there, all the way through, as far as I know.

Mr. Markley: No questions.

FRED SPANGENBERG, sworn for the defendant.

Direct examination by Mr. Smith:

Q. Mr. Spangenberg, you are what is known as a section foreman on the railroad, the Central Railroad? A. Extra gang foreman.

Q. What does an extra gang do? A. Do all kinds of work.

Q. On the railroad? A. Yes, sir.

Q. Just tell us some of the kinds of work you do? A. Well, we lay tracks, lay switches and surface the tracks, level off dirt, anything that comes along.

Q. Is that gang called a section gang? A. No, they are called extra gang.

Q. Did you know John McGarry? A. I did.

Q. How long had you known him? A. I had known him about three years, I think, when I first saw him.

Q. Was he in your gang? A. Yes, he was in my gang, yes, sir.

Q. What was his position? A. He was assistant foreman.

Q. How long had he been there? A. Well, probably a year or so.

Q. What had he been before that? A. Why, he worked for—he was laboring.

Q. Had he ever been foreman in charge of a gang himself? A. Yes, he was in charge of a gang, yes, sir.

Q. When? A. Why, I think about three months, from September till December 1st.

Q. That was before he was with you in December? A. Yes, sir.

Q. Now, as assistant foreman, what were his duties? A. Well, his duty was to assist me in doing the work, and look out for the men.

Q. What do you mean by look out for the men? A. Well, you have to look out for the men to be on the watch if any train comes, and have to have a whistle and blow the whistle to get the men out of the way.

Q. Was it his duty to watch out for trains? A. Yes, that is his duty and that is my duty.

Q. Both duties? A. Yes, sir.

Q. Did you have timetables? A. Yes, sir.

Q. Did he have one? A. All foremen, and assistant foremen on the Central Railroad are supposed to carry timetables and standard watches, and a whistle.

Q. What do you mean by standard watch? A. A watch with twenty-one jewels, I think it has to be. They have to be examined every three months.

Q. So that it is accurate? A. Yes, sir.

Q. And then the whistle, what kind of a whistle is that? A. Well, it is a whistle like a policeman's whistle; like a policeman's whistle.

Q. And what did you use it for? A. To blow when we see a train coming.

Q. As I understand you, you say it is your duty and Mr. McGarry's duty to watch out for the trains? A. Yes, sir.

Q. Now, having that timetable, and as foreman and assistant foreman, did you know and did Mr. McGarry know what time, the approximate time, the regular trains would come along?

Mr. Markley: I object to the question first as a leading question, and second calls

for knowledge the dead man had. I submit that this witness is not qualified to answer that.

The Court: I sustain the objection to the question as put.

Mr. Smith: Your Honor will grant me an exception?

The Court: Yes, the exception is allowed.

Q. Were assistant foremen, including Mr. McGarry, required to know the approximate time that regular trains would approach the place where you were working on December 18th, 1926? A. I don't quite understand you.

Q. (Question read as follows: "Were assistant foremen, including Mr. McGarry, required to know the approximate time that regular trains would approach the place where you were working on December 18, 1926?") A. Yes, that is the reason we have timetables, so that we know when trains were due. That is one reason why we carry the standard watch.

Q. Now, Mr. Spangenberg, on this day, December 18, 1926, in the morning of that day, where had you been working? A. I was working on tracks 2 and 4.

Q. And about where? A. About, just around the underpass, west of the underpass, the underpass down west.

Q. How long that day did you work on tracks 2 and 4, up to what time? A. I worked up until noontime.

Q. Did Mr. McGarry work the same time? A. McGarry worked with me, yes, sir.

Q. Now, at that time, on that day, were those working on the tracks to get any orders, and if so, what were they? A. The supervisor came up early in the morning, and he said it is a bad track

to work on in the afternoon. He said: "You find something to do in the afternoon and get off tracks 2 and 4".

Q. Did you tell that to Mr. McGarry? A. Yes, I told Mr. McGarry.

Q. And then what did you do? A. Well, we kept on working on tracks 2 and 4 until dinner time, until noontime.

Q. Then after that where did you go? A. After dinner we went levelling off dirt, on the south side of the underpass.

Q. Was that south of track 3? A. South of track 3, yes, sir.

Q. What were you doing there; you say leveling off dirt; what were you doing? A. Well, dirt had been dumped there to widen the bank.

Q. Where, on top of the tracks, or on the side? A. Down below.

Q. That is on the side of the bank? A. Down below on the side of the bank, yes, sir.

Q. Was McGarry there with you? A. Yes, he was there with me.

Q. Now, at any time that day, in the afternoon, were you or Mr. McGarry or your men working down at F. H. tower? A. No, sir.

Q. Was there a gang down at F. H. tower? A. My gang was at the underpass.

Q. Was there another gang down at F. H. tower? A. Yes, sir, there was.

Q. Who had charge of it? A. I believe Pete Donahue had charge of them.

Q. Now, then, as you worked in the afternoon on this bank, about what time did you quit or send any of your men away? A. I sent two men away with a jack, down to the toolbox near Port station, a quarter past four, fifteen minutes past four.

Q. Who did you give instructions to? A. McGarry and I were standing over down the bank. I said to McGarry to tell two guys to take the jacks down to the box, because we had orders from the supervisors to take our tools down because we had to work next day——

Q. Did you see what Mr. McGarry did? A. I saw what he did, yes, sir.

Q. What did he do? A. He walked up to the men.

Q. Did you see the men leave? A. Did I see the men leave? I saw him walking up to the men and I turned around. I had to attend to nature's call.

Q. Now, Mr. Spangenberg, on that day, do you know whether Mr. McGarry made up the book, the time book? A. I don't get the question.

Q. I say on that day do you know where McGarry made up the time book? A. Yes, he made up the time book.

Q. Where did he make it up? A. Why, in an old car, what we call the snowstorm car.

Q. Where was that? A. That was down at the underpass.

Q. Down by the underpass? A. Yes.

Q. On the low level? A. On the low level, an old track which used to be there goes into the bank.

Q. Did Mr. McGarry on that day have any business to perform at F. H. tower? A. Not that I know of, no, sir.

Mr. Markley: I object to that. I withdraw the objection, it is already answered.

Q. Was he to take his instructions from you? A. Yes, sir.

Q. Did you give him any instructions to go to the tower F. H. that day? A. No, sir.

Q. What time did you quit that day? A. I gave orders to the men that were levelling off the dirt on the bank about twenty minutes past four.

Q. To quit? A. Not exactly quit. We don't quit when we say tools down, but to take the tools down as I had ordered to look over the ground and see if proper material was there for the next day. We had to lay rails.

Q. What kind of materials? A. Why, the supervisor mentioned the particular joint which were required, two offset joints. There was a side where we had to lay rails, and it required two offset joints. He told me to look to see if they were there, and if they were not there to give him a call so that he could bring them out next morning.

Q. Did you find them? A. I found them, yes, sir.

Q. Where were they? A. They were there, where we were going to lay them off.

Q. Where is your— A. When we start on the rail, where we left off, the heavy rail, where we could be laying the rail.

Q. What was the position along there? A. They were laying right along the track there.

Q. Near the underpass or near the tower, or where? A. Near the Port station.

Q. When you told some one to go, which way did they go? A. They went across the track, and down the bank under the underpass.

Q. Down the track, across the track, and down the bank near the underpass? A. Right down to the low track, what you might call the north side of the bank.

Q. Did you see McGarry then? A. I didn't see him.

Q. Did you know where he had gone to? A. No, sir.

Q. Did you send him to any place? A. No, sir.

Q. If he wanted to leave the place where you were working, did he or did he not have to get instructions from you? A. Well, he always did, if he was going away, he always notified me.

Q. Now then, as you men worked, if you worked on the tracks, you say it was the duty of yourself and Mr. McGarry to look out for trains. Was there any system there at all for notice being given to you on the trains, or did you have to look out yourself for the trains? A. We had to look out. We had to be on the lookout all the time, not alone for the regular trains, but other extra trains coming along.

Q. For whatever trains were coming along? A. Yes, you always have to be on the lookout.

Q. On that day, Mr. Spangenberg, can you tell whether or not the space between tracks 1 and 2 was clear or was it filled up with piles of dirt or stone? A. No, it was, the place in between tracks 1 and 2 there, was about approximately twenty feet clear. It was level there.

Q. Was it level? A. It was level, that is outside there was a little shoulder on the end of the ties.

Q. Shoulder on the ties, but the space in between? A. In between there it was level.

Q. Was that so on December 18, 1926? A. What is that?

Q. Was it in that condition on December 18, 1926? A. Yes, sir.

Q. Do you know the amount of wages that McGarry was earning at the time? A. I believe it was fifty-five.

Q. Fifty-five what? A. Fifty-five cents per hour.

Cross-examination by Mr. Markley:

Q. How many hours a day? A. He worked at that time ten hours.

Q. How many days a week? A. Six days.

Q. And during December, up till the time he died, he worked every day? A. Well, from the first of December he was under me. He came under me on the first of December. Up till the time he was found dead.

Q. He worked every day that month, didn't he? A. No, sir.

Q. You had a gang working there every day that month, didn't you? A. Yes, sir.

Q. Didn't he work there every day that the gang worked there that month? A. No, he was off I believe in the beginning of the month.

Q. Wasn't he there whenever the gang was there? A. If he was off duty he was not there, no.

Q. Now you look at his book. You know this time book, don't you? A. Yes, sir.

Q. That was the book kept in your name, Fred Spangenberg (referring to Exhibit P-6). Kept by him, wasn't it? A. Yes, sir.

Q. Did he keep that on your orders; did you ask him to keep this book? A. Yes, sir.

Q. All right, turn to December. Look at the month of December, 1926. That is his handwriting, isn't it? A. Yes, sir.

Q. Looking at that book, and looking at the page which you have before you, which I will mark with a cross, being the second page of the book. The numbers up across the top of the page represent the days of the week, do they not? A. Yes, sir.

Q. One, two, three, four, five, down to eighteen? A. Yes, sir.

Fred Spangenberg, for Defendant—Cross.

Q. Does that show that the members of the gang worked every day that month? A. Yes, as they have got a special order to work.

Q. They have worked, according to the book? A. Yes, sir.

Q. If they did work every day of the month he worked too? A. Well, he was off duty.

Q. When was he off? A. I believe it was the first of the month, around the first of the month.

Q. What part around the first of the month? A. Well, I don't remember.

Q. How could he keep the book for every man of the gang every day from the first of December to the 18th, if he was not there? A. There was a couple of days when he was off.

Q. I will take his own handwriting. It is in his own handwriting here for the eighteen days, shows the members of the gang working there eighteen days out of eighteen days from the first of December to the 18th? A. His figures here—it seems to me around here, those figures don't look to me as if they were his.

Q. You don't think they are his figures, Mr. Spangenberg, looking at this book. Take this member of the gang, Patrick Connolly, December 1st, he worked 19 hours, didn't he? A. Yes, sir.

Q. Not ten, but nineteen? A. Nineteen.

Q. This page, "X", shows, according to this, that the men worked nineteen hours? A. Yes, that was overtime.

Q. When they worked overtime they got more than fifty-five cents an hour, didn't they? What did they get for overtime? A. Time and a half.

Q. Now, going to the back of the book. In the back of the book there is some more writing, whose handwriting is that, under the head of

"Distribution of time, extra gang Number 20." A. This is his handwriting.

Q. It is all his handwriting, isn't it? Look at it, and see it. Turn over to the next page and see if that isn't his handwriting too. A. Well, this is his handwriting. This is not his handwriting.

Q. You say this is not? A. I think that is mine.

Q. You say the handwriting under number 2, December 2nd, that day is not his handwriting? A. That is his handwriting, yes, sir.

Q. On December 1st, is that his handwriting? A. Yes, that is his handwriting.

Q. Now, we are referring to page 5? A. That is not his handwriting.

Q. Look at page 5. That is page 5. You say that December 3rd is not his handwriting? A. You can see that yourself.

Q. I am asking you? A. No, sir.

Q. Now, take December 4th, is that his handwriting? A. No, sir.

Q. Is December 5th his handwriting? A. No, sir.

Q. Whose handwriting is it? A. Mine.

Q. You say December 3rd, 4th and 5th is your handwriting? A. That one there is my handwriting.

Q. You say that December 4th, 5th and 6th? A. That is my handwriting, and that is his too.

Mr. Smith: Which ones? December 5th is whose handwriting?

The Witness: That is mine.

Q. December 6th yours? A. Yes, sir.

Q. December 7th yours? A. Yes, sir.

Q. December 8th yours? A. Yes, sir.

Q. December 9th yours? A. Yes, sir.

Q. December 10th yours? A. Yes, sir.
Q. December 11th? A. Yes, sir.
Q. December 12th? A. Yes, sir.
Q. December 13th? A. Yes, sir.
Q. December 14th? A. Yes, sir.
Q. December 15th? A. 15th is his.
Q. December 16th? A. Yes, sir.
Q. Whose is that? A. That is his handwriting.
Q. December 17th? A. McGarry.
Q. December 18th? A. McGarry's.
Q. And that is the last day, isn't it? A. That is the last day, yes, sir.

Mr. Markley: May I have the pay checks for December, Mr. Smith?

(Received checks from counsel.)

Q. You say there were two gangs worked there that day, is that right? A. Well, there was one at F. H. Tower, and I was at the underpass.
Q. Well, you had two gangs working there that day? A. Well, they were apart.
Q. I am not asking you that. Were there two gangs working up there that day? A. Yes, sir.
Q. One was working at F. H. tower, wasn't it? A. Yes, sir.
Q. How far east of F. H. tower was that gang working? A. They were working west.
Q. Which gang? A. Two gangs?
Q. Won't you come down here and look at this map and tell me, Mr. Spangenberg,—you have seen this map before, you have seen this map of Mr. Smith's? A. I haven't seen that.
Q. Well, here is F. H. tower? A. Yes, sir.
Q. Where was Donahue's gang working? A. This is from Jersey City (indicating)?

Mr. Smith: No, that's from Elizabethport.

Q. It is west, north, east and south (indicating). Now, can you tell me by looking at this map, which is shown one inch equals twenty feet, one inch on this map represents twenty feet on the ground. Now, where was Donahue's gang working with respect to F. H. tower that day? A. This is west, he was working in here, by the tower.

Q. Put a line where he was working? A. He was working about one hundred feet west of the tower.

Q. Won't you put a line there? A. I would have to put a rule and scale it off. You say one inch to twenty feet?

Q. That would be five inches? A. Yes, sir. I would have to have a rule.

Q. Five inches this side west of F. H. tower. How far west of number 3 track was he working? A. He was working on the bank.

Q. How far down? A. The men were working there. You could just about see the head——

Q. The top of the railroad? A. Yes, sir.

Q. You see this here (indicating); that represents 39 switch on track number 2, and 39 switch on track number 4. Do you know whether there was any material left between tracks 1 and 2? A. No.

Q. Wasn't there little hills there? A. A little shoulder along the ties, yes.

Q. A little what? A. A little shoulder.

Q. I know about that, but I am speaking about piles of material between tracks 1 and 2. Wasn't there material there, stone piles? A. No stone piles, no, sir.

Q. When was the first half of the month calculated, up to the 15th? A. Yes, sir.

Q. From the first to the 15th? A. Yes, sir.

Mr. Markley: I offer this check for the first half of the month of December, 1926,

showing that there is $68.12 paid for that first half.

Accepted and marked as Plaintiff's Exhibit P-11, of this date.

Q. You say that in the morning of the day McGarry was killed, your gang was working on tracks 2 and 4. What were you doing on tracks 2 and 4? A. Surfacing tracks.

Q. What do you mean by surfacing tracks? A. Levelling it off, levelling and raising it up, making it level.

Q. Making what level? A. Making the tracks level.

Q. Were you fixing the track, that is raising it? A. We raise the track, the rails from the ties, to fill it in under.

Q. So you were putting fill under the rails and under the ties? A. Under the ties.

Q. What is that fill made of? A. Cinders.

Q. Where were the piles of cinders from which you got the cinders? A. Right alongside the track.

Q. Where was it lying alongside of the track? A. Lying all the way, always when we are surfacing track, the piles are lying all along the track.

Q. Then you did have piles of cinders lying along the tracks, didn't you? A. No, not there. We always have enough. We can fill in level with the ties.

Q. You just said a moment ago that you had piles of cinders lying along the tracks, that you could put in the fill?

Mr. Smith: He didn't say anything of the kind.

(Question and answer read as follows:

"Where was it lying alongside the track? A. Lying all the way, always when we are

surfacing track, the piles are lying all along the track".)

Q. Did you have any piles? A. We have along the shoulder, what we call the shoulder, we always have the shoulder along the track, which extended about perhaps a foot and a half or two feet outside the ties.

Q. That is you have a shoulder, you say, a foot and a half or two feet outside of the tracks? A. It varies, I could not just say.

Q. How high were these piles of cinders? A. Well, they are level with the ties, sometimes a little above the ties.

Q. And where did you get these piles of cinders from when you put them along the track? A. We get them from the cars.

Q. They dump them off from the cars? A. Yes, sir.

Q. Were these cinders dumped off the cars that day? A. Yes, sir.

Q. When? A. When the track was put along there.

Q. How long before the accident was that? A. Well, the track has been building all summer there.

Q. You have been building tracks there all summer, haven't you? A. Yes, sir, building track all through for a couple of years.

Q. Now, how many times did the supervisor come up there and give you orders about the tracks? A. On that new works, we saw him pretty near every day, up around the new works.

Q. Who was the supervisor? A. His name is Mr. Greener.

Q. You say that when the men stopped working on the tracks or on the embankment putting in the fill that you then ordered two of them to carry tools down to the tool house? A. To the tool box.

Q. The tool box was where, on the north side of the railroad? A. Down near Port station on the north side.

Q. Down near Elizabethport on the north side? A. Yes, sir.

Q. That was on the side opposite the side you were working on, wasn't it? A. Yes, sir.

Q. You were working on the south side? A. Yes, sir.

Q. And these men would be paid their time when they reached Elizabethport? A. Yes, what is that?

Q. Your section men were paid their time till they got to Elizabethport? A. They were paid to when they got to Aldene Camp.

Q. How far is that to Elizabethport; is it near Elizabethport? A. No, they had to go on the train probably about eight miles, approximately, —would have had to go on a train.

Q. You paid them the time until they got to camp? A. Yes, sir.

Q. They were on the payroll until they got to the camp at Aldene? A. Yes, sir.

Q. That was left of Elizabethport, wasn't it? A. Yes, sir.

Q. On this particular day, your gang was working until about 4.15, did you say? A. I don't quite understand.

Q. (Question read as follows: "On this particular day your gang was working until about 4 P. M., did you say?") A. The two men were working until about 4.15 until they got orders from McGarry to take the jack down to the box.

Q. At 4.15, and how many men did you have in the gang? A. I think I was allowed, I don't know whether the reduction took place at that time or not.

Q. Suppose you look at the book? A. We generally have a reduction on the first of the year.

Q. Suppose you look at the time book and tell us how many men you had working on December 18, 1926? A. I believe my force was twenty men on that day.

Q. Well, that is near enough, suppose we count them up in the book by the hours, about how many? A. Just eighteen in the book.

Q. That doesn't include you? A. That is laborers.

Q. And it doesn't include your section foreman, does it? You and the section foreman made twenty? A. Yes, two and eighteen makes twenty.

Q. What time did the gang quit? A. They quit, the two men went from there fifteen minutes past four; when I gave orders to the other men, that was twenty minutes past five.

Q. So that at fifteen minutes past four the two men started ahead to put the jack in the tool box? A. They took it to the tool box.

Q. And the tool box was on the north side of the railroad? A. Yes, sir.

Q. About how far down? A. Three quarters of a mile, or half a mile, approximately.

Q. Three quarters of a mile towards Elizabethport? A. Yes, sir.

Q. And the rest of the gang quit at 4:20, didn't they? A. They didn't, they left there.

Q. They didn't quit until they got to Aldene, did they? A. They were paid when they got to Aldene.

Q. So that they were actually paid their time until they got to the camps? A. Yes, sir.

Q. And so were these two men? A. Yes, sir.

Q. When these two men started down with the jack— A. I don't quite understand; I don't

quite get you on the two men, what was that? They lived in Elizabeth, a little closer by.

Q. Were they paid— A. They got paid. They went to go on the same train, they get paid the same.

Q. They got paid until when? A. Half past five.

Q. Their time would be included up until half past five? A. Yes, sir.

Q. When these two men left at 4:15 with the jack for the tool house on the other side of the railroad, you said something to McGarry, didn't you? What did you say to McGarry? A. I told McGarry to tell the men to take the jacks down to the tool box.

Q. You told him? A. I told McGarry to tell the men.

Q. Where were the men when you told him? A. They were levelling off dirt on the bank.

Q. Where were you? A. I was down the bank.

Q. How far away from the men were you? A. We were on the west side, McGarry and I were on the west side, just a ways off.

Q. McGarry and you were west of the gang? A. Well, we were right close by, we were on the westerly end.

Q. How far away were you from the gang yourself, when you told McGarry to tell two men in the gang to take the jack to the tool house? A. McGarry and I were approximately about fifty feet west of the gang down the bank.

Q. Who was the head section man there? A. I was the head section foreman there at the time. There was nobody else over us.

Q. Were you over Donahue? A. I am not over Donahue. I was over McGarry and the gang.

Q. Were you Donahue's superior? A. No, sir, I had nothing to do with Pete Donahue.

Q. Did you at the same time tell McGarry to have the men report for Sunday work next day? A. Did I tell him? No, I didn't tell him to report to the men.

Q. For Sunday work next day? A. They all understood that before.

Q. How did they understand they were to work on Sunday? A. Because they were all told at dinner time that we had to get our tools up and take them down to Port in the afternoon.

Q. Why was it necessary to tell McGarry again at 4:15? A. Because we have to tell the men what to do.

Q. You told him at 4:15 to get two of the men and have them bring the tools up to the toolhouse on the north side of the track? A. Yes, sir.

Q. Was there anybody there when you told McGarry to do that? A. Donahue was there.

Q. Wasn't that up at F. H. tower that you told him that? A. That was down at the underpass.

Q. Was not McGarry and you and Donahue up at F. H. tower when you told McGarry to see two of the men, or go after two of the men and tell them to be sure to put the tools in the toolbox, so that they would have them ready for Sunday work? A. No, sir, we were down at the underpass.

Q. Donahue was down there too? A. Yes, sir.

Q. What was Donahue doing down there? A. He used to work down along the bank.

Q. And you used to work at F. H. tower, didn't you? A. We didn't work up there, no, sir.

Q. You went up to the tower to get messages, didn't you? A. We didn't get no messages, no, sir.

Q. Didn't you do your telephoning from F. H. tower? A. That day?

Q. Any day, whenever you had telephones? A. When the tower man wanted us, he would blow his whistle.

Q. Then what did you do? A. Then either of us, the section foreman, would go into the tower.

Q. You would go into the tower, there was a table or desk there, with some chairs, on the first floor? A. On the first floor,—up where, in the tower?

Q. On the first floor of the tower? A. Yes, sir.

Q. You used to sit down there? A. I never sat down there.

Q. Did you make your reports there? A. I didn't make reports, no, sir.

Q. Didn't you take your telephone messages? A. Well, when we were called, whenever they had to tell us anything, we would get a phone and we would go out again.

Q. When you had to make a telephone call, where did you go and make your telephone call? A. If we had to do it, if we were working any place around the towers, if we have a telephone, we would go to the tower.

Q. Now, wasn't Donahue present when you said to McGarry, "Go after the men and tell them to report back here for work to-morrow, Sunday?" Was Donahue there then? A. Donahue was with me at 4:15 when I told them to take the jack down to the box.

Q. Didn't you say to McGarry, "Go after the men to be sure to tell them to come back to-morrow, Sunday?" A. No, sir.

Q. And wasn't Donahue there then? A. I didn't tell them that, I didn't say anything of that sort.

Re-direct examination by Mr. Smith:

Q. The supervisor that was there that time, what was his name? A. Mr. Greener.

Q. Is he dead or alive? A. He is dead.

Q. I understood you to say that Mr. Donahue had a separate gang, didn't he? A. Yes, sir.

Q. He was a foreman, too, wasn't he? A. Yes, sir.

Q. Over a separate gang? A. Yes, sir.

Q. He had nothing to do with your gang? A. Nothing to do with my gang and I had nothing to do with him.

Q. These jacks you were speaking of, when you told two men to take jacks, were these light or heavy tools? A. They were heavy tools.

Q. Was it because they were heavy that you told these two men to start ahead, before the rest of the gang?

Mr. Markley: I object to that as leading, let the witness tell.

Mr. Smith: Withdrawn.

Q. What was the reason you told these two men to go ahead before the other men? A. Because the jacks were heavy and they have to sit down.

Q. Where is the telephone in the tower, upstairs or downstairs? A. Upstairs.

Q. Where the operator is? A. Yes, sir.

Re-cross-examination by Mr. Markley:

Q. There is an extension of the telephone downstairs to the first floor, isn't there? A. Not that I know of, I never used that one.

Q. When you telephoned, you telephoned from the first floor, didn't you? A. Yes, sir.

Q. Now, looking at this page 10 once again, and looking at the date, December 16th: Look at the first line where it says, "Lab. 40" and 85 under that twice. What does that mean? A. That means the hours.

Q. What does "Lab. 40" mean? A. That means forty cents per hour.

Q. And 85 means what? A. Hours.

Q. 85 means hours? A. Yes, sir.

Q. It means you had labor at 40 cents an hour working on December 16th, 170 hours, altogether. Is that what it means? A. Here is the way it is, 85,—85 per trick. 85 hours of labor up there.

Q. So that you had laborers—half and half; that means half a day on that job and half a day on this?

Q. It means 170 hours altogether? A. Yes, sir.

Q. And December 17, you had 170 hours altogether? A. Yes, sir.

Q. On December 18, you had 180 hours altogether, didn't you? A. Yes, sir.

Q. Is that right? A. Yes, sir, that is correct.

Re-direct examination by Mr. Smith:

Q. When you speak of the first floor of the tower do you mean upstairs and downstairs? A. I mean upstairs with the operator.

Re-cross-examination by Mr. Markley:

Q. Wasn't there a phone on the first floor of this building where you could telephone? A. I don't know, I never used it.

Q. You never used it? A. No, sir.

Q. Couldn't you sit at the desk on the first floor, you know what the first floor is? A. Yes, sir.

Q. The first floor is the first floor you come to when you go into the building? A. Yes, sir.

Q. And on that first floor, is there a telephone? A. I don't know, I never used the telephone there.

AUGUST C. HORSTMANN, recalled by defendant.

Direct examination by Mr. Smith:

Q. Mr. Horstmann, you remember the day after this accident you were down at the office of the railroad company, or at the tower of the railroad company? A. Yes, sir.

Q. Do you remember the statement there being taken from you? A. Yes, sir.

Q. Was Mr. Duffy there at the time? A. He was.

Q. Do you remember the statement being taken from Mr. Duffy? A. I saw him, yes, sir.

Q. Did you see that statement handed to Mr. Duffy to read? A. Yes, sir.

Q. Did you see him read it? A. He looked at it and appeared to be reading it, yes, sir.

Q. And then what did he do, did he sign it or not? A. He signed it.

Q. Did the same thing happen to you? A. Same thing.

Q. Did you read your statement? A. I did.

Q. Did you sign it? A. Yes, sir.

Q. Now, Mr. Horstmann, you remember the day of the accident? A. Yes, sir.

Q. You remember the train that you spoke of, 619 going by? A. Yes, sir.

Q. Were you there upstairs in the tower when it went by? A. Yes, sir.

Q. Do you remember 707 going by? A. Yes, sir.

Q. Was Mr. Duffy upstairs in the tower when these trains went by? A. No, sir.

Q. He was not? A. No.

Cross-examination by Mr. Markley:

Q. Who attended to your switches while you were making this long four page statement the day after the accident? A. I did.

Q. Didn't Duffy look after your switches? A. No.

Q. Who looked after your switches while Duffy was making his four page statement? A. I did.

Q. Well, while both of these statements were being written up and prepared you were looking after your job up in the tower? A. Yes, sir. That was on Sunday, there wasn't much doing anyway. Duffy wasn't able to look after the switches.

Q. Now, you say that after this statement was made by you, you read it over? A. Yes, sir.

Q. Carefully? A. I did.

Q. And after you read it over carefully you signed it? A. I did.

Q. What was contained there was true, wasn't it? A. As far as I knew, yes, sir.

Mr. Markley: May I have the statement?
(Statement received from counsel.)

Q. How many statements did you make? A. I only remember making one.

Q. You only remember making one. Don't you know you made two statements? A. I don't recall making two.

Q. When did you make your first statement that you remember? A. The day after the accident.

Q. When did you make any other statement after that, do you know? A. No, there was another man came in the tower, but I supposed that was all belonging to the first statement.

Q. Another man came into the tower on another day, didn't he? A. Yes.

Q. He took another statement from you, didn't he? A. Yes, sir.

Q. When was that? A. That I don't know.

Q. You don't remember when that was? A. I don't remember the date, no.

Q. Was it a week after the first statement? A. Perhaps more.

Q. Was it a month after the first statement? A. I could not say.

Q. Well, now, look at your second statement. It was taken the day after the first statement, wasn't it? A. I don't know.

Q. Look at it and see? A. Well, how am I to find out?

Q. You can read English? A. How can I tell when it was taken by the date?

Q. Isn't there a date on there? A. I have looked for it, yes, December 18th.

Q. Here is the date, down at the bottom. "Signed at F. H. tower on December 20th?" A. Yes, sir.

Q. That is two days after the accident, isn't it? A. That is right.

Q. And the first statement was taken on December 19th, wasn't it? A. On December 19th, yes, sir.

Q. The day after the accident? A. Yes, sir.

Q. So you made two statements, didn't you? A. According to that, I did.

Q. Do you recall now whether you made two statements or not? A. Yes, it looks so.

Q. You couldn't recall that a minute ago, could you? A. Not exactly, no.

Q. Well, do you recall now whether you made two statements? A. Yes, it looks so.

Q. How can you recall the details of this accident if you cannot recall the very simple fact that you made two written statements, one right after another, on two successive dates? A. I don't say I could recall the details of the accident.

Q. You can't recall the details of the accident? A. Some parts of it.

Q. Some you can, and some you cannot? A. No, sir.

Q. On each of these statements, was Duffy present when you made it? A. Both of them.

Q. He was there both times? A. Yes, sir.

Q. What time of the day were these statements taken? A. Early in the evening.

Q. What time in the evening? A. I don't know the exact time.

Q. Well, approximately? A. Well, between six and seven.

Q. And Duffy was in the tower then, was he? A. Yes, sir, he came up there for that purpose, to have a statement taken.

Q. You are sure he was there then? A. Yes, sir.

Q. Now, you say in here: "There were other men walking west on the south side of the eastbound tracks, and they were west of McGarry. At that time there was a train coming westbound, either 707 or 109." Did you say that?

Mr. Smith: I object to that as not cross-examination.

Mr. Markley: Let me finish my question.

Did you make that statement to the investigator who came to you on December 19, 1926?

Mr. Smith: I object to that as not cross-examination. I only asked this man was he present when the statement of Mr. Duffy was signed.

The Court: Sustained.

Mr. Markley: Your Honor will allow me an exception?

The Court: Exception allowed.

Mr. Markley: That's all.

THOMAS M. EGAN, sworn for the defendant.

Direct examination by Mr. Smith:

Q. You are employed by the Central Railroad Company? A. Yes, sir.

Q. Were you employed by them in December, 1926? A. I was.

Q. What was your position? A. Supervisor of tracks.

Q. What was your position in December, 1926? A. Supervisor of tracks.

Q. Were you ever a section foreman? A. Yes, sir.

Q. Were you familiar with the duties of a section foreman and assistant foreman of the extra gangs or section gangs in December, 1926? A. Yes, sir.

Q. Will you tell me what their duties were? A. The duties of a foreman?

Q. Yes, foreman or assistant foreman? A. The duties of a foreman were to carry out the instructions given to him directly by the supervisor, or indirectly by assistant supervisors. Those in-

structions covered the work of repairing tracks, in fact any of the work that might be assigned to him.

Q. And what instructions or duties did they have in relation to watching for trains, as they came along? A. The instructions are positive that a foreman must at all times know that his men are protected in moving trains over the tracks over which they are working.

Q. How are they protected? A. By blowing the whistle as provided, to them.

Q. How do they know the approximate time trains are supposed to pass where they are working? A. Regular scheduled trains are listed in the time-table that is provided.

Q. Are they provided with time-tables? A. They are.

Q. Have they any instruments or watches? A. They have a standard watch.

Q. What do you mean by a standard watch? A. A watch that is known by the company to keep accurate time and which is examined frequently to know that fact.

Q. How do they give notice to the men who were working under them, of the coming of trains? A. The whistle is blown in advance of the train, for the men to hear it.

Q. Who blows the whistle? A. The foreman or the assistant foreman.

Q. And the duties of the assistant foreman are practically the same as the duties of the foreman? A. Yes, sir.

Q. Who is in charge, the foreman or the assistant? A. The foreman.

Mr. Markley: No questions.

JAMES B. NOYES, JR., sworn for the defendant.

Direct examination by Mr. Smith:

Q. Mr. Noyes, what is your business? A. Claim agent, Central Railroad of New Jersey.

Q. Were you such in September, 1928? A. Yes, sir.

Q. Did you go and see or did you have Mr. Duffy see you on September 7, 1928, in relation to your taking a statement from him? A. He did.

Q. I show you a statement and ask you if that is the statement that you took from him that time? A. It is.

Q. Did he give you the information that is there? A. Yes, sir.

Q. Did you write it down? A. I did.

Q. In his presence? A. I did.

Q. And what did you do with it then? A. After I wrote it down I handed it up to him and asked him to read it.

Q. Did he read it? A. Yes, sir.

Q. I notice on the bottom of it these words, "I have read this statement and found it to be correct." Is that in your handwriting? A. It is not.

Q. Whose handwriting is it? A. Mr. Duffy's.

Q. Did you see him write it? A. I did.

Q. Did you see him read the statement? A. I did.

Q. Did he sign it then? A. He did.

Q. Is the signature on both pages his? A. Yes, sir.

Q. I notice on this second page also there are the words, "I have read this statement and found it to be correct." And signed "Michael A. Duffy." Is that his handwriting? A. It is.

Q. And signed by him? A. Yes, sir, it was.

Q. In your presence? A. Yes, sir.

Q. Mr. Noyes, how did you come to ask Mr. Duffy to come there to give you this statement?

Mr. Markley: I object to that if the court please, as immaterial.

Mr. Smith: I think it is very material. However, I want to know whether it was under instructions or of his own volition.

Mr. Markley: I object. I don't see how we care how we came to take this statement. It seems to me that that is immaterial.

The Court: I think that you may ask him how he came to take the statement, but I don't see how it makes much difference how he came to make the statement.

Mr. Markley: I withdraw the objection.

Question read as follows:

"Mr. Noyes, how did you come to ask Mr. Duffy to come there to give you this statement?"

A. It was requested through our legal department that I get in touch with Mr. Duffy.

Q. And you did, and he came? A. I did, yes, sir.

Cross-examination by Mr. Markley:

Q. You wrote this statement did you? A. Yes, sir.

Q. Did you use your language or his language? A. I asked him questions.

Q. Please answer my question, won't you? A. I used the language.

Q. Did he say to you "supplementive as to my statement made December 19, 1926?" Did he use that language? A. I asked him.

Q. Did he use that language? A. He did not.

Q. He didn't say, "Supplementive to my statement made December 19, 1926, I can further state as follows": Did he say that, or is that your language? A. I asked him.

Q. Is that your language?

Mr. Smith: I object. The man has a right to answer.

Q. I am asking you the specific question whether that is his language? A. That is my language, yes, I——

Mr. Markley: All right, that answers it.

Q. Did he say to you, "I first saw McGarry about 4 P. M., when he came into the tower and downstairs in the maintainer's room"— A. Yes, sir.

Q. "It was cold outside and he came in to work on his time book and he stayed about twenty minutes." Did he say that to you? A. That is what he told me.

Q. Now, your legal department asked you to get this statement? A. That is right.

Q. Did your legal department ask you to write a letter to him after you took this statement?

Mr. Smith: I object to that as not cross-examination. I didn't ask any question about a letter.

Mr. Markley: But I am going to.

The Court: I will sustain the objection.

Mr. Markley: Your Honor will allow me an exception?

The Court: Exception allowed.

Q. Did you take any other statement or get any other statement from Duffy after this one?

Mr. Smith: I object as not cross-examination.

The Court: I will permit the question.

Mr. Smith: I ask an exception.

Exception allowed.

A. I did not.

Q. Did you write to him? A. Yes, sir.

Q. Did he reply to your letter? A. He did.

Mr. Smith: I make the same objection.

The Court: The same ruling, with an exception.

Q. You wrote these two letters which have already been marked in evidence, October 1st and October 2nd, 1928, did you not?

Mr. Smith: I object as not cross-examination.

Mr. Markley: Well, they are all in evidence and I will rely on the evidence, your Honor.

Q. You asked Duffy questions when you took Exhibit D-6? A. Yes, sir.

Q. Did you write down the questions answered here as you asked them? A. Yes, sir.

Q. What you wrote down was your understanding? A. What I wrote down was just what he said.

Q. Not in his exact words? A. In his exact words.

Q. And did he say to you, "After I got up in the tower I looked out of the window towards Elizabethport". Did he say that to you? A. That is what he said.

Q. And was Horstmann there when he said that to you? A. Mr. Horstmann was not present when I took the statement.

Q. Did you take the statement that was taken when Mr. Horstmann was present? A. No, sir.

Q. Who suggested the idea that you write on here, "I have read this statement and found it to be correct"? Whose suggestion is that? A. That is the instructions——

Q. No, whose suggestion was that? A. I asked him after he read it, to sign that, and he put that on there.

Q. You dictated that, didn't you, for him? A. Mr. Duffy had been in our employ——

Q. Didn't you dictate this for him? A. I told him what to write, yes, sir.

Q. That was dictation when he wrote, "I have read this statement and found it to be correct"? A. After he read it, yes, sir.

Q. Did you read it to him? A. I did not.

Q. How long have you been claim agent? A. I have been claim agent since November, 1926.

Q. What did you do before that? A. I was a freight conductor on the Jersey Central Railroad.

Q. How long have you worked for the Central Railroad altogether? A. Since February, 1925.

HARRY B. DEMAREST, sworn for the defendant.

Direct examination by Mr. Smith:

Mr. Smith: Now I offer the statements marked for identification in evidence.

Exhibit D-6 for identification marked in evidence.

Q. Mr. Demarest, you work for the Central Railroad Company? A. No, sir.

Q. Where do you work? A. For the Federal Mutual Liability Insurance Company of New York.

Q. Did you work for the Central Railroad in December, 1926? A. I did.

Q. How long had you been working for them? Or did you work for them? A. Seventeen years.

Q. In what capacity? A. As yard clerk, timekeeper, and claim agent.

Q. And in December, 1926, were you claim agent? A. Claim agent.

Q. Do you remember taking a statement from Mr. Duffy in relation to this case on this date, December 19, 1926? A. I do.

Q. I show you a paper and ask you if that is in your handwriting (handing witness)? A. Yes, sir.

Q. Did you take that from Mr. Duffy? A. I did.

Q. How did you get it from him; did you ask him questions? A. I asked him to tell me what he knew of the accident, and asked him questions.

Q. And did he tell you? A. He did.

Q. And did he reply to your questions? A. He did.

Q. You wrote down then what he said to you? A. I did.

Q. Did you show that to him? A. I did.

Q. Did he read it? A. Absolutely. I handed it to him for that purpose.

Q. What did you do with it? A. After he had read it I asked him if it was true. He said it was, and signed it.

Q. And is the signature annexed to it the signature of Mr. Duffy? A. Yes, sir.

Q. You saw him write it? A. I saw him, yes, sir.

Q. Is that the same day you took the statement from Mr. Horstmann? A. Yes, sir.

Mr. Smith: I offer this statement.

Statement now marked as Defendant's Statement D-7 of this date.

Cross-examination by Mr. Markley:

Q. You did not put on the bottom of this, "I have read this and it is true?" A. No, sir, I didn't.

Q. Are you still doing accident work for the insurance company? A. Yes, sir.

Q. The investigation of accidents? A. Yes, sir.

Q. How long were you investigator or claim agent for the Central? A. Thirteen years.

Q. You asked him questions and then he replied and you wrote down the answers, is that it? Is that what you did? A. Yes, sir.

Q. Did Mr. Duffy write any part of this statement except his signature? A. No, sir.

Q. Did he say to you, "I knew it was 4.20 P. M. at the time he (McGarry) left me, because I looked at my watch at the time"? A. Yes, sir.

Q. Did he say to you, "I knew McGarry by working here, but not by name. McGarry was downstairs in the tower with me at 4.20 P. M., and he left at that time. He was going to get the train to Elizabeth where he intended to buy something." Did he say that to you? A. He did.

Q. "When he left me he appeared to be in perfect health." Did he say that? A. He did.

Q. Did you write down here everything that he told you? A. I did.

Q. You left nothing out? A. Nothing out, no, sir.

Re-direct examination by Mr. Smith:

Q. Mr. Demarest, did he say to you, "I did not watch McGarry when he left here, and I took no notice to trains passing after he left, as I had work to do, work inside to do." A. Yes, sir.

JOHN BOARDMAN, sworn for the defendant.

Direct examination by Mr. Smith:

Q. In December, 1926, were you employed by the Central Railroad Company? A. Yes, sir.

Q. What is your job? A. Police department.

Q. Where were you stationed? A. Elizabethport.

Q. You heard about this accident, did you? A. Yes, sir.

Q. Did you go down to the scene? A. Yes, sir.

Q Did you see Mr. Duffy there? A. No, sir.

Q. When was the first you saw him? A. While going down I found Mr. McGarry lying between the tracks.

Q. You saw Mr. McGarry's body between the tracks? A. Yes, sir.

Q. Can you tell me whether or not between tracks 1 and 2 there was any piles of stone or cinders? A. I didn't see any while going down.

Q. You walked down, did you? A. I walked down.

Q. When you got to the body did you go anywhere then? A. After I seen there was no light there I went down to the tower.

Q. Did you walk down between tracks 1 and 2? A. Between tracks 1 and 2.

Q. Can you tell me whether or not from the body down to the tower the space between tracks 1 and 2 was clear or was piled up with stone? A. Clear.

Q. Did you go back from the tower then to the body? A. Yes, sir.

Q. Was Mr. Duffy with you then? A. Mr. Duffy and Mr. Haase.

Q. Did Mr. Duffy go right up to the body with you? A. Yes, sir.

Q. Did you know who it was? A. I asked if he knew who it was, and he said he thought it was a section man.

Q. Did you find that timebook there? A. No, sir, the timebook was in his pocket.

Q. You didn't find it right at the scene of the accident? A. No, sir.

Cross-examination by Mr. Markley:

Q. Yet it was in his pocket, his coat was on him? A. Yes, sir.

Q. So it must have been right at the scene of the accident? A. Inside of his pocket, yes, sir.

Q. Haase was with you, was he? A. He was not with me when I found the body.

Q. Did you go ahead of Haase and Duffy? A. He went ahead of me.

Q. Haase went up first? A. Yes, sir.

Q. From Elizabethport? A. Yes, sir.

Q. He is the police officer who was on the witness stand here the other day? A. Yes, sir.

Q. Haase preceded you up to the scene of the accident, ahead of you, after which you followed him? A. Yes, sir.

Q. How long after Haase went up there? A. I left about 5.10 and he took charge.

The Court: What time did you leave Elizabethport?

The Witness: 5.10 off my job.

Q. Were you there when the message came in about the accident at police headquarters of the Central? A. I was on my job when I was notified by our office about it.

Q. Notified by whom? A. By our office; I was notified at five o'clock by our office.

Q. What I am trying to get at is who in the police department of the railroad company received this message about the accident? A. Sergeant Ballow, of Jersey City.

Q. Is he here? A. No, sir, he is not here.

Q. And then they relayed the message from Jersey City to you at Elizabethport? A. To Officer Haase and myself.

Q. Where did you encounter Haase when you got up there? A. Just coming in from the Bay drawbridge going to the tower.

Q. You were going into the tower about the same time he was? A. I was.

Oscar H. Whichard, sworn for the defendant.

Direct examination by Mr. Smith:

Q. You are employed by the Central Railroad Company? A. I am.

Q. How long have you been employed by them? A. Nine years.

Q. On December 18, 1926, what was your job? A. Fireman.

Q. Of what train? A. The train known as the Point Pleasant Workmen's train.

Q. On this day, December 18, 1926, were you firing on that train? A. I was.

Q. The train came from Jersey City, did it? A. Claremont, Jersey City.

Q. Claremont yard? A. Yes, sir.

Q. You came over the Central road? A. Yes, sir.

Q. When you got to the west end of the bridge near Newark Bay, what did you do with the train? A. We lay there at the west end of the bridge.

Q. On what track? A. Track 4.

Q. When you lay there, did a train go by? A. Yes, sir.

Q. What train was it? A. Number 619, Philadelphia.

Q. That is, Philadelphia and Reading? A. Yes, sir.

Q. That went by? A. Yes, sir.

Q. After that train went by, what did you do? A. We followed that train out across over, right behind it.

Q. Crossed over on what track? A. Track 2.

Q. Was the train going on toward Elizabethport? A. Our train, yes, sir.

Q. Now as you passed and got on beyond F. H. tower, which side of your engine were you on? A. On the west side.

Q. As you got beyond the tower and got on up toward the underpass, did you see anything there on the track? A. I did, as I was coming out of the cab.

Q. As you were coming out of the cab? A. Yes, sir.

Q. What did you see? A. I saw a man's body lying there.

Q. On the track or between the tracks? A. Well, it was off the track, didn't lay on the track.

Q. It lay between tracks 1 and 2? A. Yes, sir.

Q. Your train was then going, wasn't it? A. Yes, sir.

Q. About how fast was your train going? A. Probably fifteen miles an hour, fifteen or twenty.

Q. Where did you go, into the Long Branch Road? A. Yes, sir.

Q. Did you stop at Elizabethport? A. We did, yes, sir.

Q. What did you do there? A. I notified the ticket agent.

Q. Of the presence of the body? A. Of the presence of the body there.

Q. What time did you get up to E-Port station? A. About 4.32, I should say.

Q. You followed the Philadelphia & Reading train 619? A. From the west end of the bridge.

Q. From the west end of the bridge? A. Yes, sir.

Cross-examination by Mr. Markley:

Q. What track were you on? A. What time was this?

Q. When you came from the Newark Bay bridge west to go to Elizabethport? A. West of the bridge we crossed over to track 2.

Q. West of the bridge you crossed over to track 2? A. Yes, sir.

Q. What track were you on east of the bridge? A. Four.

Q. Four is the main Central track where you crossed over from track 4 to track 2? A. West end of the bridge.

Q. Is that the west end? A. The other side of it.

Q. Before you got to F. H. tower? A. Yes, sir.

Q. So that when you came along you were on track 2? A. Yes, sir.

Q. What time did you pass F. H. tower? A. I have no idea.

Q. You haven't any idea what time you passed F. H. tower, was it 4.30? A. Probably around that time.

Q. Was it 4.31 or 4.32? A. I could not say.

Q. What time did train 707 pass that point on that day? A. I didn't see 707.

Q. Don't you know that 707 passed the point of the accident at 4.30. Do you know that? A. Maybe it did, I don't know.

Q. That is very indefinite, you are very indefinite about time, aren't you? As far as the time of this train passing F. H. tower? A. Well, that did not concern me.

Q. Now, when you passed on track 2, you were looking out, were you? A. I was, yes, sir.

Q. You were the fireman? A. Yes, sir.

Q. And you were going in a westerly direction? A. Yes, sir.

Q. That is you were going down towards Elizabethport? A. Yes, sir.

Q. When you looked out you saw the body of this man lying there? A. I did, as I went to go out of the cab.

Q. Where was he lying? A. Lying down along the track.

Q. Along track 2? A. Well, it was nearer track 2.

Q. It was not near switch 39 on track 2, was it? A. Yes, sir.

Q. How close to switch 39? A. Oh, probably a couple of feet, I think.

Q. A foot? A. I would say so.

Q. Which way? A. Let me see 39 switch.

Q. Certainly. There is track 2 and here is 39 switch. This is east of the bridge and the other is west. The map represents one inch to twenty feet, one inch on the map is twenty feet on the ground. Now where was he with respect to switch 39 on track 2? A. I could not say.

Q. You can't say whether he was east or west? A. No.

Q. Could you say how close he was to the southerly rail? A. Out about two feet.

Q. Which was nearer to the track, his head or his feet? A. I don't remember that.

WILLIAM FERGUSON, sworn for the defendant.

Direct examination by Mr. Smith:

Q. Mr. Ferguson, are you employed by the Central Railroad Company? A. Yes, sir.

Q. How long have you been employed by them? A. About forty-three years.

Q. What is your position now? A. Locomotive engineer.

Q. How long have you been an engineer? A. Thirty years.

Q. Were you an engineer in December, 1926, on December 18, 1926, for the Central? A. Yes, sir.

Q. What train were you on? A. I was on the Point Pleasant Workmen's train.

Q. That is the train Mr. Whichard was fireman on? A. Yes, sir.

Q. You were the engineer? A. Yes, sir.

Q. Do you remember coming from Jersey City and getting to the west end of the draw, over the

west end of the bridge, over Newark Bay? A. Yes, sir.

Q. When you got to the west end of the bridge, what did you do, what did you do, go on, or did you lay up? A. The signal was against me, and I stopped.

Q. Where did you stop? A. East of the signal bridge.

Q. And is that the west end of the bridge? A. Well, it is off the bridge, just beyond the west, yes, sir.

Q. What track did you stop on? A. Number 4.

Q. And you stayed still there for a while? A. Yes, sir.

Q. Did you see 619 go by? A. I did.

Q. That is the Philadelphia and Reading train? A. Yes, sir.

Q. Did you then pull out? A. Just as soon as she cleared the tower gave me a switch, a signal, and I crossed over to track 2 and followed her.

Q. You crossed to track 2? A. Yes, sir.

Q. From there where did you go? A. Went down to Perth Amboy and branched to the Sea-shore branch.

Q. That is on the Long Branch Road? A. Yes, sir.

Q. You did not see this man on the ground? A. I did not.

Q. You were on the right side of the cab? A. Yes, sir.

Q. That is the north side of your engine as it proceeded? A. Yes, sir.

Q. You went up into the station? A. Yes, sir.

Q. While you were in the station at E-port, do you know whether or not 707 went by? A. 707 went by when I was lying at E-port station.

Q. And 707 is on the main line? A. Yes, sir.

Cross-examination by Mr. Markley:

Q. What time did you pass F. H. tower? A. I crossed over there about 25½, I would think.

Q. 25½ after what? A. Four.

Q. 25½ after four? A. Yes, but I would not say that was right to the second, around that time.

Q. Was your train a scheduled train? A. No, sir.

Q. It was not on schedule? A. No, sir.

Q. You were not on the time-table? A. I was not on the time-table.

Q. You say you were the Point Pleasant Workmen's train? A. Yes, sir.

Q. You say that your train stopped west of the Newark Bay bridge, west of the bridge? A. Yes, sir.

Q. You were not on the bridge when you stopped? A. No, sir.

Q. How far west of the bridge did you stop? A. Well, I suppose the signal is three or four hundred feet; I don't know exactly.

Q. Three or four hundred feet west of the west end? A. West of the west end of the bridge.

Q. So you were not on the bridge at that time? A. No, sir, not on the bridge.

Q. When you stopped? A. Yes, sir.

Q. Then you were about opposite F. H. tower? A. No, sir, I was not nearby the F. H. tower.

Q. What time did the 707 train pass F. H. tower, do you know? A. I don't know; I was not there; I had gone.

Q. You think you had gone? A. I know I had.

Q. Which side of the engine were you on? A. Right hand.

Q. The right hand side? A. Yes, sir.

Q. As you were stopped this other train would come up on your left, wouldn't it? A. What is that?

Q. As you were stopped this other train would come up on your left, wouldn't it, on track number 4; that is the train that passed you would come up on track number 2? A. Yes, sir.

Q. That would be on your left hand side? A. Yes, sir.

Q. So that it was on your left hand side and you were on your side of the engine, which would be the north side of track 4, and the train that went by was on track 2? A. Yes, sir, the train was on track 2 that passed me.

Q. You are sure the train passed? A. I know 619 passed.

Q. How do you know it passed, 619 passed? A. I know what time she is due. I know by the looks of the train.

Q. You were not on the schedule? A. No, sir.

Q. You say that 619 was a passenger train? A. Yes, sir.

Q. 707 was a passenger train? A. Yes, sir.

Q. Do you know what time 707 would go by there? A. No, sir, I don't know what time she would go by. I know what time she passed 8th Street.

Q. Do you know what time 619 goes by? A. 619 is due to report?

Q. No, what time at F. H. tower? A. No.

Q. Do you know the number of minutes that would pass between the time these two trains would go by there? A. The number of minutes between them?

Q. Yes? A. About six.

Q. Your train would not take the track between them? A. Certainly would if you got up there. You have a perfect right to go. An extra has as much right to go behind a train as anything.

Q. Why didn't your train go ahead on track number 4? You were on track 4, which was the westbound track? A. Yes, sir.

Q. There was no train ahead of you on track 4, was there? A. No, sir.

Q. And this train was not a scheduled passenger train, was it? A. No, sir.

Q. The track was a track that was used for express trains? A. Yes, sir.

Q. Track 4 was ordinarily used for slow trains? A. Yes, sir.

Q. You were on track 4, weren't you? A. Yes, sir.

Re-direct examination by Mr. Smith:

Q. Mr. Ferguson, track 4 is on the north side of the road, isn't it? A. Yes, sir.

Q. As I understand you, you say you laid on track 4, way down here by the bridge? A. Yes, sir.

Q. You had to go along the Long Branch road? A. Yes, sir.

Mr. Markley: I object to the witness being led. I think the witness ought to tell his own story.

Q. Now, is the Long Branch road south of the railroad? A. South. I could not get from 4 on the Long Branch railroad.

Q. So that in order to get to the Long Branch Railroad you had to pass from track 4 to track 2, and then on over? A. Yes, at F. H. tower.

Q. And then you passed over to what you would call the eastbound track, leading to the Long Branch road? A. Yes, sir.

Q. The Long Branch road, as I understand you, goes down and turns off at E-port to the south? A. Yes, sir.

Re-cross-examination by Mr. Markley:

Q. Do you know that 39 switch runs from track 4 to track 2? A. I know there is two crossouts there from track 4 to track 2.

Q. Switch 39 is one of the switches, and then that will take you over from track 4 to track 2. Do you know which switch you went over? A. I went over the first crossover west of the Bay bridge.

Q. Which number is that? A. I don't know.

Q. There are along there, there is switch 39—how many switches are there that will take you over from track 4 to track 2? A. There is two sets of crossovers.

Q. You mean there are two different switches over which you can go? A. Yes, sir, from track 4 to track 2.

Q. And one is 39, isn't it? A. I don't know what the number of it is. I know where they are, though.

Q. One of them is west of the tower? A. One of them is west of the tower.

Q. How far west of the tower? A. I don't know. Quite a little piece. I just don't know how far. Maybe four or five hundred.

Q. Maybe four or five feet west of the tower? A. Yes, sir.

Q. How far east of the tower is the first crossover? A. I don't know exactly about that either. It is a couple of hundred feet, three hundred feet.

Q. Three hundred feet? A. I don't say for sure. I never measured the distance.

Re-direct examination by Mr. Smith:

Q. Come here, Mr. Ferguson, to this map. The right of the map is towards Jersey City, and the

left of the map is towards Elizabethport. As I understand you, down here on the bridge you were on track 4? A. Yes, sir.

Q. You crossed over from track 4 to 2? A. Yes, sir, at the first crossover.

Q. That is down east of F. H. tower? A. Yes, sir.

Q. You came off track 2? A. Yes, sir.

Q. And here you crossed over track 1? A. Not track 1 until after I left E-port by the junction switch.

Q. Beyond this map then? A. Yes, sir, way up.

Q. So what you did was reached track 2 up towards E-port, and then passed from the track, you would cross the track, track 1, on to the Long Branch Road? A. Yes, sir.

Q. How did you know that there had been anybody hurt. Who first told you? A. The first I heard when I got in at the junction switches that lead down to Long Branch.

Mr. Markley: I object to what the fireman told him.

Q. The fireman just told you? A. Yes, sir.

Re-cross-examination by Mr. Markley:

Q. Do you know that 45 switch is the switch that leads from track 2 to track 1? A. From track 2 to track 1. I don't know the number of the switches at all.

Q. How many crossovers are there from track 2 to track 1, going in a westerly direction? A. Going in a westerly direction? Well, I am not sure, but I think there is but one.

Q. There is only one, and that crossover there is the crossover from 2 to 1, switch 45, that is the

crossover you talk about? A. No, I don't, I didn't go from 2 to 1.

Q. Didn't you go from 2 to 1? A. No, sir.

Q. You went from 4 to 2? A. I went from 4 to 2.

Q. Then didn't you go from 2 to 1? A. Up at E-port, I said, on crossover number 1, to the Long Branch Road. That is not controlled by F. H. tower.

Q. There is only one? A. No, there is several of them up at F. H.; all the crossovers there are——

Q. I am talking about the crossovers going in a westerly direction. There is only that one controlled by F. H. tower, and that is right in the vicinity of F. H. tower? A. Somewhere around there.

Q. To go over that crossover to get from 2 to 1— A. I didn't go to 1, not then.

Q. You told Mr. Smith you did go from 2 to 1?

Mr. Smith: He said crossing over one.

A. At E-port station I went over 1. I have to go over one. I have to go over to get on to the Perth Amboy Branch, the seashore road.

Q. That is way down beyond you go over, you cross over from 1 to the Perth Amboy Branch, into the Perth Amboy branch? A. Yes, sir.

Q. You can cross from 1 at Elizabethport, can't you? A. From 1 you can cross over if you wanted to.

Q. You can cross over from 3 down at Perth Amboy, can't you? A. Yes, sir.

Q. I mean at Elizabethport, to the Perth Amboy branch? A. Yes, sir.

Q. In other words, any one of these four tracks, when you get down to Elizabethport you can cross over from any one of the four to the Perth Amboy branch? A. No, you cannot cross four to Perth Amboy, because there is no switches.

Q. Did you take— A. There isn't a switch, I have been going over there forty years or so. I think I know the road pretty well.

Q. You mean your main line track goes into Elizabethport? A. I don't say it continues to, but there is no cross switches there.

Q. Isn't there a crossover down at Elizabethport to that track? A. No, sir.

GASTON C. FREY, sworn for the defendant.

Direct examination by Mr. Smith:

Q. Were you employed by the Central Railroad in December, 1926? A. Yes, sir.

Q. What was your position? A. Ticket agent.

Q. Where? A. Elizabethport.

Q. Were you ticket agent on December 18, 1926? A. Yes, sir.

Q. Were you on duty that day? A. Yes, sir.

Q. Do you remember Mr. Whichard coming in and telling you about seeing a dead man along the track? A. Yes, sir.

Q. What did you do? A. I notified the police at Jersey City, the Central Railroad police.

Mr. Markley: No questions

JOHN WILCOX, sworn, for the defendant.

Direct examination by Mr. Smith:

Q. Mr. Wilcox, are you employed by the Central Railroad Company? A. Yes, sir.

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

Q. Were you employed by it in December, 1926? A. Yes, sir.

Q. What was your position? A. Locomotive fireman.

Q. What train were you on? A. 707.

Q. That was the Central Railroad train? A. Yes, sir.

Q. Do you remember on this day, going past the bridge on track 4, the bridge west of Newark Bay draw? A. We were on track 2.

Q. You were on track 2, and track 4 is on your right? A. Yes, sir.

Q. As you got west of the place and between the bridge, we will say, and F. H. tower, did you see the workmen's train there? A. Yes, sir.

Q. The Point Pleasant Workmen's train? A. Yes, sir.

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

Q. And as you went by F. H. tower, can you tell me what side of the engine you were on? A. I was on what we call the tank.

Q. On the tank, where is the tank? A. Approximately behind the firing doors, I was firing the engine.

Q. The boiler and the cab are in front? A. Yes, immediately back, I was in between.

Q. Taking care of your fires? A. Yes, sir.

Q. You don't know anything about this accident at all then, do you? A. No, sir.

Mr. Markley: No questions.

Mr. Markley: May I recall Mr. Whichard for one question I overlooked?

OSCAR H. WHICHARD, recalled:

Cross-examination by Mr. Markley:

Q. Are you Oscar H. Whichard? A. I am.

Q. You were the fireman on this Point Pleasant workmen's train? A. I was.

Q. Now, you answered some interrogatories in this case, didn't you? A. I did.

Q. You swore to them? A. I did.

Q. I show you your signature, "Oscar H. Whichard". Is that your signature? A. Yes, sir.

Q. You swore to these answers 1 and 2, I believe it was, before a Notary Public, Maude F. Finn? A. Yes, sir.

Q. I am going to read these to you. The first question is: "On December 18, 1926, did train 619 give any audible signal, by bell or whistle, of its approach, as it passed F. H. tower, and proceeded towards 39. If it did, please describe what kind of audible signal was given by it." You said: "Yes, bell"? A. Yes, sir.

Q. You also answered: "2. On December 18, 1926, did train 707 give any audible signal by bell or whistle of its approach as it passed F. H. tower, and proceeded towards switch 39. If it did please describe what kind of audible signal it gave." You say: "Yes, bell". You answered that "yes". That is your answer under oath, isn't it? It says: "Yes, bell". A. You see, this was taken——

Q. You just swore to it under oath? A. Well, the statement that I gave at the time this happened——

Q. I am talking about these sworn interrogatories that you answered under oath in this case, in which you said: "2. On December 18, 1926, did train 707 give any audible signal by bell or whistle of its approach as it passed F. H. tower, and proceeded to switch 39. If it did please describe what kind of audible signal was given by it." And your answer under oath was: "Yes, bell." A. Well, I didn't see 707.

Q. You swore in here you did.

Mr. Smith: I don't know whether he did or not.

Q. You answered these two interrogatories? A. Yes, sir.

Q. Well, I will read you the affidavit.

"State of New Jersey,
County of Monmouth.

Oscar H. Whichard, of full age, being duly sworn according to law upon his oath deposes and says: That he is a fireman of the Central Railroad of New Jersey. That he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the first and second are true to the best of his knowledge and belief."

Mr. Smith: The first and second, he said?

Mr. Markley: The second: "On December 18, 1926, did train 707 give any audible signal by bell or whistle of its approach as it passed F. H. tower and proceeded towards switch 39. If it did, please describe what kind of audible signal was given by it."

And you said: "Yes, a bell." Is it true. Is that true? A. No, sir, it is not.

Q. You swore to it? A. I don't know whether I did or not.

Q. You swore to it. You just told me you did a moment ago. Here is your signature. There is your answer sworn to in your affidavit. A. Where is the question out here?

Q. I don't mean the question. Your answers to 1 and 2? A. It is your question, isn't it?

Q. This is the question that you answered under oath. Here it is, up at the top. Now, what track was your train standing on when this 707 passed F. H. tower and proceeded towards switch 39 on track 2. What track at that time was your train standing on so that you could hear the bell ringing on 707 as it passed by F. H. tower down to switch 39? A. We were standing in front of Elizabethport station.

Q. And that is four thousand feet away? A. Probably.

Q. You heard the bell down there, did you? A. I could hear it.

Q. Did you? A. I was not—I didn't hear the bell, no, sir.

Mr. Markley: That is all.

Re-direct examination by Mr. Smith:

Q. Where were you when you answered these interrogatories, do you know? A. I do not.

Q. These interrogatories or questions propounded by the attorney of the plaintiff, and they are contained in written papers like this, and then here is the answer to them, and it appears by this affidavit here that you answered questions 1 and 2. Do you remember answering those questions that way?

The Court: That is your affidavit. That won't help you.

The Witness: I don't recall it.

Q. You say at that time, when train 707 went by, you were at E-port station? A. We were.

Q. As train 707 went by E-port station, do you know whether the bell of 707 was ringing as it went by E-port station? A. I can't recall that, either.

Re-cross-examination by Mr. Markley:

Q. Now I will put to you again the question that you answered in here. "On December 18, 1926, did train 707 give any audible signal by bell or whistle, of its approach as it passed F. H. tower and proceeded towards switch 39?" Did it? A. I don't know.

Q. Who was present when you signed this sworn affidavit, signed your name, Oscar H. Whichard, who was present, do you remember that? A. There was one made at the office——

Q. There was the notary public who swore you to the answers. Who else was present? A. The New York and Long Branch claim agent. I can't think of his name.

Q. Where did you make these answers to these questions? A. Where did I make them?

Q. Where? A. Long Branch, New Jersey.

Q. Where, in Long Branch? A. In the City Hall.

Q. And the claim agent was present, you were present, and the notary public was present? A. Yes, sir.

Q. Anybody else present? A. I don't recall.

Q. Was the attorney present? A. What attorney?

Q. For the railroad company? A. No, sir, not that I know of.

Q. You would know him if you saw him? A. Yes, sir.

Q. Do you know Mr. Tomlinson? A. Tomlinson, no sir.

Q. You don't know him. Was a man present with eyeglasses, a tall, blackhaired fellow? A. No, sir not to my knowledge.

Q. Was there anybody else present besides you three? A. Well, there was people worked there, clerks.

Q. I mean who was there when they were taking all these sworn answers, do you know? A. No, sir.

Q. Do you remember that? A. I do.

Mr. Smith: Are you offering the answers to the interrogatories?

Mr. Markley: I am offering these two, yes.

Mr. Smith: I offer the interrogatories and the answers to them.

Mr. Markley: I offer 1 and 2.

Mr. Smith: I offer all the interrogatories and the answers.

Mr. Markley: I don't understand that counsel has a right to offer my interrogatories. They are only offerable by the man who has taken them.

Mr. Smith: I think I have a perfect right to offer them.

Mr. Markley: All right, I have no objection. I will offer the whole bunch.

Mr. Smith: No, I have offered them.

Accepted and marked as Defendant's Exhibits D-8-a and b, respectively, of this date.

GEORGE KOEHLER, sworn for the defendant.

Direct examination by Mr. Smith:

Q. Mr. Koehler, what is your occupation? A. Locomotive engineer.

Q. How long have you been a locomotive engineer? A. About forty years and six months.

Q. And you were working on December 18, 1926? A. Yes, sir.

Q. Whom did you work for? A. Philadelphia and Reading.

Q. Philadelphia and Reading Railroad? A. Yes, sir.

Q. The Philadelphia and Reading Railroad runs over the Central there, don't they? A. Yes, sir.

Q. Do you remember the 18th day of December, 1926? A. Yes, sir, I have a recollection of it.

Q. What trains were you running then? A. 606 and 619.

Q. In the afternoon? A. 619.

Q. Where was that train coming from, and where was it going? A. From Jersey City to Reading terminal.

Q. Where is the Reading terminal? A. Philadelphia.

Q. Jersey City to Philadelphia? A. Yes, sir.

Q. Now on this day, on the afternoon of this day, do you know whether or not you passed the work train as you came out from the west end of the Newark Bay Bridge? A. I passed a train there, or a work train—I could not say which.

Q. Which track was it on? A. On number 4, I was on 2.

Q. You were on number 2. Did you see anything of Mr. McGarry there? A. No, sir.

Q. When did you first ascertain there had been an accident that day? A. I can't remember now. A week after, I believe; somewhere around there.

Q. As you came along there on that day and as you passed F. H. tower and this work train, can you tell me whether or not your engine bell was ringing? A. My bell, yes, sir.

Q. Where did you turn it on? A. Why, I turned the bell on, I think it is 49th Street, I am not sure of the name of the street, east of Bayonne.

Q. In Bayonne? A. Yes, sir.

Cross-examination by Mr. Markley:

Q. Were you looking out ahead as train 619 proceeded west from the Newark Bay bridge? A. I certainly was looking out, yes, sir.

Q. Were you looking ahead as you went by F. H. tower down towards Elizabethport? A. Yes, sir.

Q. Was your stop Elizabethport? A. No, sir.

Q. You didn't see anybody on the track ahead of your train, did you? A. No, sir.

Q. You didn't hear about any accident until about a week after? A. I could not say just how long it was. I was away a couple of days and came back, and I heard of it. I could not say whether it was Friday or Saturday following.

Charles H. Trout, sworn for the defendant.

Direct examination by Mr. Smith:

Q. Who are you employed by? A. Philadelphia and Reading Railroad.

Q. Were you employed by them in December, 1926? A. Yes, sir.

Q. Were you the fireman for Mr. Koehler on December 18, 1926? A. Yes, sir.

Q. What number train were you on? A. 619.

Q. That is a Philadelphia and Reading train? A. Philadelphia and Reading train.

Q. Do you remember going past F. H. tower on the afternoon of that day? A. Yes, sir, we went by it.

Q. Did you see any man there? A. No, sir, I didn't.

Q. You didn't see anything of this injury to Mr. McGarry, did you? A. No, sir.

Q. Did you know as you came west that day whether or not your bell was ringing? A. Yes, the bell was ringing.

Q. Was the headlight lighted, do you know? A. The headlight was on, dim, dim headlight.

Cross-examination by Mr. Markley:

Q. Where were you, in the cab, as you came along? A. Well, both the cab and the firebox together.

Q. Were you seated or standing up? A. No, sir, I was standing.

Q. So you were not looking out ahead as you came along? A. No, sir.

Dr. Charles F. Lufburrow, sworn for defendant.

Direct examination by Mr. Smith:

Q. You are a practicing physician and surgeon of this State? A. I am.

Q. And have practiced how long? A. Thirty years.

Dr. Charles F. Lufburrow, for Defendant—Cross.

Q. Where? A. Plainfield, New Jersey.

Q. You are in Plainfield now? A. Yes, sir.

Q. Do you know any man by the name of Philip Eder? A. Yes, sir.

Q. Do you know whether he was the engineer of 707 train or not? A. I know he is an engineer.

Q. Where is he now? A. At his home in bed.

Q. What is the matter with him? A. Apoplexy.

Q. How long has he been that way? A. Since the 17th of October.

Q. Could he come to court? A. On a stretcher. The man had a paralytic stroke; it is not customary to move people in that condition.

Q. He has had a paralytic stroke? A. Yes, sir.

Cross-examination by Mr. Markley:

Q. Can he talk? A. Yes, sir.

Q. Is he mentally all right? A. He is now. I would not say all right, he has periods when he is all right. The last week or so he was not perfectly normal.

Q. When you speak to him does he speak and understand your questions? A. Partially.

Q. Are you his attending physician? A. Yes, sir.

Q. How old is he? A. Fifty-six, I think.

Mr. Smith: That is our case.

Mr. Markley: No rebuttal.

Move for Direction of Verdict.

Mr. Smith: I move for a direction of verdict upon the ground that the evidence shows that at the time of this accident Mr. McGarry had been a laborer, a section man, and assistant foreman, a foreman and assistant foreman, that he was familiar with the rules requiring him to look out for trains, and it was his duty to know the time of the approach of the regular trains, and his duty to know the time of the approach of the regular trains, and his duty to watch out for extra trains and to notify the men under him of the approach thereof. That he therefore knew at the time, of the approach of train 619 and train 707, and that if he, with this knowledge, entered upon track 2, upon which he knew trains 707 and 619 would approach and walked westerly with trains approaching from the east, that he then assumed the risk of being struck by trains overtaking him from his rear on this track, and that under the decisions of the United States Supreme Court he assumed the risk.

Secondly, that section men, or men engaged as McGarry was engaged at the time, assumed the risks of being injured by the inattention of train operators.

The Court: The motion will be refused and an exception allowed.

Mr. Smith: Exception.

Recess to 2 P. M.

After Recess: 2 P. M.

Mr. Markley: I object to Mr. Smith's statement to the jury that I had the right

to offer an affidavit that I took some time ago—September 24, 1927—from the witness Michael A. Duffy, on the ground that I had offered such statement, taken *ex parte* and not in court, it would have been incompetent and immaterial and irrelevant to the issue. I further say to your Honor that I am willing to offer it now in evidence if Mr. Smith will consent.

The Court: The Court states to the jury that such an affidavit would have been immaterial, irrelevant and incompetent if offered by the plaintiff under the circumstances.

Mr. Smith: Exception.

Counsel summed up to the jury.

Court's Charge.

The Court then charged the jury as follows:

The Court: Gentlemen of the Jury:

This is an action brought and maintained by Agnes McGarry, general administratrix of the estate of John McGarry, deceased, against the Central Railroad Company of New Jersey, and is brought by Agnes McGarry for the death of her husband John McGarry, which it is alleged was due to the negligence of the railroad company.

The action is brought under what we know in the law as The Federal Employers' Liability Act. I will give you that part of the act in question which may be of value or service to you in this case. I am not giving, or reading any section in its entirety, nor am I giving you the exact lan-

guage of the particular section. But I am giving you such parts of it as in my judgment it will be necessary for you to have.

That act provides that every common carrier by railroad, engaged in interstate commerce, that is commerce between the several states of the Union, shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, and children, of such employee, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, etc.

In actions of this character, and in this action, gentlemen of the jury, there are several matters which require your attention and your determination under the evidence as you find it, and under the law as it is applicable to the issues as raised in this case.

I shall endeavor to give them to you in what appears to me to be the order in which you would naturally consider and determine them.

However, you will understand that just because of the fact that I give you, or place before you, the several issues in a certain order, or in a certain manner, so far as one relates to the other, is no reason why you should consider them in that manner, if a consideration of them in another order is more satisfactory to you and satisfies your convenience better. All I can do is to do that which in my judgment would best lay before you and most clearly lay before you, the issues which you have to determine.

First and foremost, it is necessary that the plaintiff has established, and must have estab-

lished by a fair preponderance of the evidence, those facts and conditions which give her the right of action under the statute in question, because she is suing and maintaining her action entirely upon a right which she alleges here, which her husband had, and she in turn, as his administratrix, under this Federal Act.

Therefore I say that it is necessary and important for you to determine whether or not the plaintiff has, by a fair preponderance of the evidence, established a right to the use of this act in question.

Under this act, in order to have the benefit of an action under this law, it must appear that the defendant company at the time complained of was engaged in interstate commerce, and it is likewise necessary that it appear by the same degree of evidence that the intestate himself was at the time of the occurrence complained of engaged in interstate commerce, and unless both of these things appear and are shown by the plaintiff by a fair preponderance of the evidence, then the plaintiff has no right of action at all under the act in question.

So for that reason, gentlemen, I am first presenting that point to you for your consideration because if you find that she has not established those things which she must establish in order to have the benefit of the statute, why of course you need not go any further with your deliberations and the case must end there.

Now in this case, without going over a great deal of the evidence that has been introduced, it is sufficient to say that it is either admitted in the interrogatories or in the answer, or at least not disputed by the defendants, that during the day, or during the time up to some short time before

the accident at least, the defendant and the plaintiff's intestate were engaged in interstate commerce. That is conceded.

Mr. Smith: Yes, your Honor, up to twelve o'clock.

The Court: And from that time on then comes this question of fact that you have to determine from then on because the parties in interest differ as to what the situation was.

The defendant claims that the plaintiff was not working at his regular work at the time when he was killed; that he had no business up at this tower F. H., where the plaintiff says he had been, and the defendant says he had no business walking where he was at the time he was hit.

The defendant, in other words, says, that even though he was engaged in interstate commerce during the day at his employment, that his employment had ceased, or at least that he had gone out upon some other employment or some other occupation other than that for which he was employed, that whatever brought him there, if he was there, that it was upon some business and for some reason of his own not connected in any way with the business of the company; that he had been working at some distance; that his work required that he be some distance westward of this tower. That in order to get where he should have gone at the end of the day, in order to get the train or what not, he was already in close proximity to that particular section of track, and that he had no occasion and no business in connection with his occupation or work for having to be anywhere near tower F. H. Of course if he had not gone to tower F. H., he would not then have been walking on the track and would not be in the position he was.

So that, regardless of his connection during the day, the defendant says that had been severed by some act of the plaintiff's decedent himself and that at the time of the accident one of the necessary elements, that he must have been employed in interstate commerce, the defendant says at that time he was not so engaged because he was on some other occupation other than one connected with his employment.

Now the plaintiff says that he was at the time engaged still in his occupation. Plaintiff says that he had been working all day in connection with this railroad company in interstate commerce, both the company and himself were both engaged in interstate commerce; that at the end of the day it was necessary, at least it had been the custom and that he having been working in the neighborhood of this tower, had gone on there for the purpose of making up reports that were necessary in the performance of his work, that had to be made up; that then, as part of his employment, he was to be transported from this station at some distance from this tower to the place where he was living; that was part of his employment and he was still engaged, the plaintiff says, in his regular daily employment in going from the tower to the train at the time he was struck and killed, and that therefore he was actually engaged in the same line of work and in the same occupation, although perhaps doing a little different thing than he had been during the day, but nevertheless was still engaged, and his day's work was not finished, that whatever he had been engaged in during the day still continued until such time as he got to the station, boarded his train, and had been transported to wherever he was going to go for the night.

The plaintiff relies and offers in support of the contention, a case that has been decided in the United States Supreme Court, *Erie Railroad Company* vs. *Winfield,* in 244 U. S. 170, where the court, in dealing with the character of employment of a locomotive engineer who sustained injuries by being struck by a locomotive while leaving the railroad premises, has laid down the rule of law to be applied as follows:

> "In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment."
>
> See *North Carolina Railroad Company* vs. *Zachary,* 232 U. S., 248.
>
> "Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for the present purposes of no importance."

So that, the defendant says, if you find that he was employed at some other place in your determination of the facts, which brought him into no contact with this tower, and he volunteered, either for his own purposes or something disconnected with his employment, was there without any right

or any reason or any necessity in order to follow the terms of his employment, but had gone there for his own convenience or for some other work outside of that at which he was employed, he would not have been, at the time of his employment, engaged in interstate commerce. If, on the other hand, you believe from the evidence in this case that he was there at the time engaged in his regular employment, that it became necessary for him to go to the tower and from the tower to where he was struck in going from there and still on the premises of the defendant in order to get to the train that was to transport him home, and if you believe that that was part of his employment and part of the contract of hiring, that he should be transported home in the evening after his day's work was done, then at the time of this accident, if you believe that the accident happened in the way that it is outlined at the time, and so forth, from all the evidence in the case, then the decedent would have been under this case which I have just stated to you engaged in his regular employment in such a manner as to bring him within the terms of the action under which this suit is brought under.

So that the first question of fact is, was he or was he not, at the time of his accident, engaged in interstate commerce so as to give his widow as the general administratrix a right under this act, in order for her to resort to the provisions of the act under which this suit is brought.

Having determined that, then if you find that all of the provisions here, the essential elements would give her the right of action under the rules which I have given you and under the evidence, have been established, then your consideration of the issues does not stop there, because then the

other consideration immediately presents itself to you.

And that is, did the death of the plaintiff's intestate happen, and was it caused as a proximate result of any negligent conduct on the part of the defendant company as charged by the plaintiff in her complaint?

Now, what does the plaintiff charge as negligence upon the part of the defendant company?

She says first that it did not use reasonable care to maintain a system for the protection of its employees against the approach of trains; that it did not use reasonable care to give any warning of the approach of this train which struck this decedent; that it did not use reasonable care in propelling said train at a safe rate of speed, and propelled same at an excessive rate of speed.

Now, gentlemen of the jury, as I say to you, that is first predicated upon the determination that this decedent was engaged in such employment so as to entitle this widow to bring this suit under this Federal Act. Then, as I said to you a moment ago, you have one step further to go. Even if she had the right to come under the provisions of this act, still, in this case, like all negligence cases, before the defendant can be called upon to pay damages, the plaintiff has the burden of proof, that is she must satisfy you by a fair preponderance of the evidence, not only that the accident occurred, because, regrettable as it might be, and sympathetic as you might be towards this plaintiff and these children, but the plaintiff must also prove, if she has the right to recover, that the accident was caused by the negligence of the defendant company. If there was no negligence on the part of the defendant company, then there is no liability. That goes without saying. Then

you must go a step further and if you find that there was negligence on the part of the defendant, you must satisfy yourselves by a preponderance of the evidence that this negligence was the proximate cause of this accident, that is, that it was the main cause, the moving cause, the cause without which the other causes would not have occurred and the accident itself would not have happened.

Now, having done that, if this widow is entitled to a verdict then it will be necessary to know what she is entitled to recover.

As I indicated to you at the opening of my charge, this is an action brought under the Death Act. It is not necessary for me to read to you this statute, but let it suffice for me to say to you that without that statute which I have indicated and called the Death Act, there could not be any recovery for death in the State of New Jersey.

So therefore, you are guided, and must be entirely guided and explicitly guided in the determination of the amount of any verdict, if there is to be one for the plaintiff, by what the act says a verdict may be for, and I trust, gentlemen, that what I am about to read and say to you, you will give your best attention, because it is important that you should have this rule of the statute, as well as what our courts have said upon it, firmly impressed in your minds.

The statute says that the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed between such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate.

In every such action the jury must give such damages as they shall deem fair and just with

reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.

I will re-read that section, because that is what the statute says, in a case of this character, the verdict shall be based upon and be for:

> "In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

And then our courts have said, construing that statute, that what the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the widow and next of kin by the premature taking off of the intestate. That is the husband and father in this case.

That fund is ascertained by taking into account all the possibilities. The intestate (that is, the husband and father in this case) might have died by the course of nature shortly after the accident. That is, had the accident not happened and had he lived, he might have been taken down by disease, or some other casualty might have overtaken him and he might have died. He might, had he lived, have suffered financial reverses. He might have been out of employment; he might not, because of other conditions, have been able to earn as much as he had been earning. Again, in a business sense, his business opportunities might have increased and he might have earned more, might have been able to earn more. The wife and children might have died before he did. Likewise, the next of kin, that is the children in this case.

It might have been that had not this accident happened the father and husband, and had he lived, yet the wife might have died before he would. Likewise, she might have died and the children might have died. Of course, upon their death, the contribution or right of contribution, would have ceased.

Nothing is to be added for loss of society, or wounded feelings, or anything else which cannot be measured by money and satisfied by pecuniary recompense.

The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death.

The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased.

Compensation for such deprivation is therefore the sole measure of damages.

In other words, what the plaintiff says in this case is this: That had not this accident taken place, had not this intestate, this husband and father, met his death in the manner in which he did, but had lived during his lifetime or during the lifetime of the wife and during the lifetime of the children, he would, in reasonable probability have earned money, and in like reasonable probability he would have contributed from his earnings to their support. But, because of this accident the plaintiff's intestate met his death, and therefore his ability to earn, and likewise his ability to contribute to the wife and children, has been cut off.

What she is entitled to have and what the law says that the widow and next of kin are entitled to

have in such a situation, is that sum of money which represents in reasonable probability those sums which the father and husband, had he lived, would during the lifetime of this widow and children, have contributed to their support and maintenance and for their benefit. Not the gross sum that you would find, if any, that he would have so contributed had he lived, during their periods of life, but that gross sum that you would find, capitalized, as the courts have said, reduced to its present worth; that lesser sum than the whole, which is the present worth of the total loss. Because you see, gentlemen, the reason for that is this: Had the intestate continued to live and continued to earn, and continued to contribute to his wife and family, he would have earned by the week or month, or whatever the manner of payment of wages was, and he would have naturally contributed as he earned. So that, had he lived during the lifetime of his wife and family, whatever contributions, if any, were made by him, would have been made in those periodical payments, or contributions, running over the entire period when the contribution would have continued.

So you see, gentlemen, you have a right to take into account in connection with the question of damages, the probabilities and the possibilities, and then by figuring up how long he would live, how much each month he would give toward the maintenance and support of his widow and children, and then capitalize that, because you see, you would be giving now, if you should figure that this man would live for a number of years and make so much a year which he would contribute, you see, it would take all those years to give that much money, and then remembering during all these years all the probabilities that you have a

right to take into consideration, you have got to reduce that to a sum which represents the present value of that expectation which you would figure out from all the circumstances in the case.

You have a right, as the law says, and as the cases have held, to take into consideration, if the husband died a month after from natural causes, that that would end the contribution.

But if you find that the plaintiff is entitled to a verdict, you may give such sum as in your judgment, under the rules that I have given you, as would compensate the widow and the next of kin for the deprivation of reasonable expectation from the deceased.

You would have to take into consideration all the probabilities, what might have happened, what might have happened in the natural course of events. All those things you must take into consideration in this case, leaving out any idea of love and affection which cannot be taken into consideration in a case of this kind, because it cannot be determined by dollars and cents. And then you will determine what this widow is entitled to recover having in mind the law which I have given you and as you find from the evidence.

Now, by your verdict, you are satisfying for all loss, both that which has accrued as well as that which in reasonable probability would have accrued under the evidence at this time, and therefore they should not have the total sum, but that lesser sum which is the present worth of the total loss.

Now, you will remember what the evidence was as to this man's age, somewhere around thirty.

Mr. Markley: Thirty-one.

The Court: You will recall what the evidence was. There is some conflict as to how much he

was making and how much he was contributing to his wife and children. You are to take those things into consideration, gentlemen, recalling what the evidence was, and you are to determine in reasonable probability the expectancy of the life of the intestate, that is how long in reasonable probability he would have lived had not this accident befallen him, because you see, that is one of the terms which mark the time of contribution. Then you will also take into consideration that this man, when he gave his wife and children a certain amount, that something was necessary for himself to live on, because out of the moneys he received his maintenance and clothing and so on, so that from his total earnings there must at least be deducted that sum of money which you find was spent upon himself.

But, gentlemen, that is not all. I have given you in this case the rule of the measurement of damages that the plaintiff was entitled to, without any deduction.

In this action the defendant raises a number of defenses. The first one which the defendant raises is that they are not responsible for the accident in the sense that they were not negligent, and if you find in this case that the defendant was not negligent, as I have already said to you, the measure of damages would be necessarily not for your consideration, because that would end the case.

Secondly, the defendant says that this accident was caused solely through the negligence of the decedent himself, and if that is so, then it naturally follows that if it was caused solely by the negligence of this decedent, this railroad company would not be liable.

Then another defense raised by the railroad company in this case says, regardless of the existence of negligence, as to whether there was negligence on the part of the company, or whether there was negligence on behalf of the plaintiff, the defendant says is of no interest in this case, because, this defendant says, this decedent assumed the risk of his employment, and assumed all of the ordinary, obvious risks which went with that kind of employment.

Then, too, the defendant says, that this decedent would be guilty of contributory negligence and I will come to a discussion of that with you in just a moment, together with all the other defenses raised, in the manner in which they have been raised.

In this action the defendant raises as one of its defenses the defense of contributory negligence; that is that the defendant says that even though you should, gentlemen of the jury, find from the facts and under the law that I have given you, that the intestate met his death as the result of some negligence on the part of the defendant company, yet he, the intestate himself, was guilty of what is called contributory negligence, that is, negligence which contributed to the happening of the accident.

Now, the burden of satisfying you of that rests upon the defendant, because it is a defense urged by it, and it must satisfy you from the evidence as presented here, by a fair preponderance of the evidence, if it would be entitled to the benefit of that defense, to prove to you that the intestate himself was guilty of negligence which contributed to the happening of the accident.

Now, there is a rule of law which applies, and did apply to this intestate, and that is that he

was bound to use reasonable care to protect himself against injury.

Did he use such care as a reasonable person would under like circumstances and under like conditions? It was the duty of the plaintiff's intestate in this case to use reasonable care, such care as a person would use under the circumstances that then existed and at the time those circumstances and conditions existed.

This defendant raises as its second defense, as I said a moment ago, the assumption of risk. Assumption of risk is a defense, and the burden is upon the defendant of establishing that if he is to avail himself of it, the defendant must prove it by a greater weight of the evidence. If it does that, under the rules I have given you or will give you, by a greater weight of the evidence, then your verdict would be for the defendant no matter how guilty of negligence the defendant may be proven or the plaintiff may have been proven.

Now, that brings me naturally to talk for a moment or two with respect to this doctrine of assumption of risk, as to what assumption of risk is.

The law says that an employee assumes the risk, not only of dangers arising from the facts known to him, but also of such dangers attending his work as he might discover by the exercise of ordinary care for his safety.

Another case has laid down the rule clearly in these words:

> "That the doctrine of assumption of obvious risk by a servant applies as well to those which arose, or became known to the servant during the service as those in con-

templation at the time of his original hiring."

And another case, treating the subject more fully, says:

"In the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for the servant to perform his work in, or to provide safe appliances for him to do his work with, still, when the risks of danger arising are incidental to the employment and obvious to the servant, or discoverable by the exercise of ordinary care on the part of the servant, the neglect of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues in the employment."

And so, gentlemen of the jury, I think that practically covers the case as I see it.

To summarize it again——

Mr. Smith: I don't think you covered the doctrine of contributory negligence.

The Court: Yes, that is so.

The next thing to which your attention must be directed is the doctrine of contributory negligence, of which the defendant has sought to avail itself in this suit. As I said to you a moment ago, if the plaintiff's intestate's negligence was the sole contributing cause of the accident, manifestly the plaintiff could not recover anything, for the various obvious reason that he being the sole cause of the accident, must bear the sole responsibility.

If, however, the plaintiff's intestate contributed in part by his negligence to the production of the

accident, and the defendant contributed in part by its negligence to the production of the accident, then if this act is applicable, by which I mean if the parties were both at the time of the injury engaged in interstate commerce, you would have to recall the section of the statute to which I directed your attention when I said that in all actions brought against a common carrier by railroad, under or by virtue of the provisions of this act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury, in proportion to the amount of the negligence attributable to such employee.

And so, in order to do that, you have got a problem of arithmetic. You have got to say how much, what proportion, of negligence is attributable to the defendant company, if any; and secondly, what proportion of negligence is attributable, if any, to the plaintiff's intestate.

And so, gentlemen, to summarize what the situation is:

This is an action to recover by this widow and the next of kin for the death of the husband which the widow, as administratrix, alleges was caused by the negligence of this defendant company, and which negligence was the approximate cause of the injury. Of course your first duty is to ascertain whether the plaintiff's intestate and the defendant were at the time of the accident engaged in interstate commerce to have this Federal Act apply.

The duty, as I told you, is upon the plaintiff to establish that by a fair preponderance of the evidence under the rules which I have just given you.

The defendant says that they were not negligent at all, and of course if you should find that there was no negligence on their part, of course they should not have to pay for the accident. If you believe that to be so, if you believe that this defendant was not guilty of negligence, then your verdict should be for the defendant.

Then the defendant says that it was the sole negligence of the decedent that caused the accident. If that is so, then the defendant would not be liable and your verdict should be a verdict of no cause of action.

They say that as a matter of fact in this case the plaintiff assumed the risks of his employment, and if you find that to be true under the rules I have given you, that would be an absolute defense and your verdict should be for the defendant.

They say further that the decedent was guilty of contributory negligence. If you find that to be true and you measure the damages in the manner in which I have described to you by taking into consideration the relationship of such negligence to that of the defendant, that is, of course, if you find that the defendant was negligent. Now, after having determined under the rules which I have just given you, and you come to the question where you have to find the damages, you come to the question of damages, the damages for the plaintiff would be the measure of the liability which I have tried to give you, and as I said to you, if there is any recovery then that will be determined entirely by the rules which I have given you in reference to the measure of damages in cases of this kind.

You are not to be swayed by sympathy or sentiment. It is a cold-blooded proposition, if any recovery is to be had, and that recovery is to be for

the pecuniary loss, not for the love and affection, but the measure of damages is for the pecuniary loss which a person suffers by the premature taking off, and whatever that loss is is to be compensated for in the measure of damages.

You should take the case just as you find it from the evidence, and if you find any damages at all you will find damages in a sum that in your judgment should be used as a basis to compensate this widow for the pecuniary loss. It should not include any compensation for loss of society or for love and affection, because that cannot be done. You are to make the cold-blooded application which I have just described to you, as to what you consider the pecuniary loss to this widow and next of kin, the children in this case, in case any recovery at all should be had.

I have been requested by the defendant to charge a number of requests.

The first, second, third, fourth and fifth I refuse to charge except as I have already charged.

Sixth: If you find that the decedent was killed by coming into contact with, or being struck by, Train No. 619, then you must return a verdict for this defendant.

I so charge you.

But, the proof in this case, as contended by the plaintiff, is that train No. 707 is the train which same in contact with the decedent.

Seventh: If you find that the accident and death of McGarry was occasioned by his negligence only, then you must return a verdict for the defendant.

I so charge you.

Eighth: I refuse to charge.

Mr. Smith: I ask an exception to your Honor's refusal to charge 1, 2, 3, 4, 5 and 8.

The Court: Gentlemen, you may now retire.

(The jury retired.)

DEFENDANT'S REQUESTS TO CHARGE.

1. This action is based upon the Federal Employers' Liability Act. Under that act the decedent, a section man, assumed the risk of being injured by trains running upon the tracks of the railroad (assuming him to have been working on the tracks at the time of his injury).

2. Among the risks assumed by the decedent was the risk of being injured by a train driven by an inattentive operator.

3. If the injury to decedent resulted from the fact that the train operator was inattentive and did not see decedent, there can be no recovery.

4. And even though the train operator could have seen decedent and did not see him because he was inattentive, the risk of such an occurrence was a risk assumed by the decedent and there can be no recovery.

5. If the train operator failed to sound a whistle or ring a bell in order to warn decedent of the approach of the train, and such failure was occasioned by the inattention of the train operator, there can be no recovery.

6. If you find that decedent was killed by coming into contact with, or being struck by, Train No. 619, then you must return a verdict for this defendant.

7. If you find that the accident and death of McGarry was occasioned by his negligence solely, then you must return a verdict for defendant.

8. If you find that McGarry knew of the approximate time that the train by which he was struck would arrive at the place where he entered upon Track No. 2, and with that knowledge entered upon that track and walked along the same with his back toward the train, then he assumed the risk of being struck thereby, and your verdict must be for the defendant.

Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of JOHN McGARRY, deceased,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation,
Defendant.

Action at Law.
Rule for Judgment.

This action was tried before Judge Frank L. Cleary with a jury, in the presence of counsel of the respective parties, at the Hudson Circuit, on October 31, November 1st, 2nd and 5th, 1928. The cause having been heard and submitted to the jury they returned their verdict as follows:

They find a general verdict in favor of the plaintiff and against the defendant for Forty thousand dollars ($40,000).

WHEREUPON, IT IS ADJUDGED that the plaintiff, Agnes McGarry, general administratrix of the estate of John McGarry, deceased, recover of the defendant, The Central Railroad Company of New Jersey, a corporation, the sum of Forty thousand dollars ($40,000) and her costs to be taxed.

Rule actually entered this 7th day of November, 1928.

Entered upon motion of
COLLINS & CORBIN
Attys. for Plaintiff

Filed Clerk's Office
November 7, 1928
Hudson County, N. J.

JOHN J. McGOVERN
Clerk

Judgment.

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of JOHN MCGARRY, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Judgment entered November 7, 1928. Damages $40,000.00 Costs ..... 108.96 Total ..... $40,108.96 Collins & Corbin, Attorneys for Plaintiff.

Judgment On Verdict on the above entitled cause was entered in this Court on the 7th day of November in the year of our Lord One Thousand Nine Hundred and twenty-eight in favor of the Plaintiff Agnes McGarry, Administratrix of the Estate of John McGarry, deceased, and against the defendant The Central Railroad Company of New Jersey, a corporation, in a plea of Action at Law in the sum of Forty Thousand ($40,000) Dollars, damages and One Hundred Eight Dollars Ninety-six Cents, costs of suit.

Judgment entered and signed this 7th day of November A. D. 1928.

FRANK L. CLEARY,
Judge.

Clerk's Certificate.

State of New Jersey, }
Hudson County, } ss.:

I, John J. McGovern, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas, holden therein

Do Hereby Certify That the foregoing is a true and correct copy of Rule for Judgment and Judgment Record in the case of Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased *vs.* The Central Railroad Company of New Jersey, a corporation, as the same is taken from and compared with the original as filed and recorded in my office.

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

John McGovern,
Clerk.

(Seal)

Rule to Show Cause.

(Filed November 15, 1928.)

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of JOHN McGARRY, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Rule to Show Cause.

Application having been made, within six days after the rendering of the verdict in the above-entitled action, for a rule to show cause, requiring the plaintiff to show cause why the verdict rendered in her favor should not be set aside and a new trial granted, it is, on this 7th day of November, 1928, on motion of William A. Barkalow, attorney of defendant, the Central Railroad Company of New Jersey,

ORDERED, that the plaintiff show cause before this Court, on the 28th day of November, instant, at ten o'clock in the forenoon, at the Court House, in Jersey City, New Jersey, why the verdict should not be set aside and a new trial granted, and, it is

FURTHER ORDERED, that the exceptions taken by the defendant at the trial be reserved; and, it is

FURTHER ORDERED, that pending the determination of this rule, the issuing of execution be stayed.

FRANK L. CLEARY, *J.*

Reasons.

(Filed November 20, 1928.)

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of JOHN McGARRY, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Reasons.

The following are the causes upon which the defendant rests its motion for a new trial of the above stated cause:

1. The verdict of the jury was contrary to the charge of the Court.

2. The damages awarded by the verdict are excessive.

WM. A. BARKALOW,
Attorney of Defendant.

Rule for Judgment Final.

(Filed December 18, 1928.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Rule for Judgment Final.

The above-entitled court having granted a rule to show cause why the verdict herein should not be set aside and a new trial granted, and the defendant having filed reasons in support of its said rule to show cause, to wit, that the verdict of the jury was contrary to the charge of the court, and the damages awarded by the verdict were excessive, and the court having considered the arguments and briefs of counsel, and having concluded that there is no merit in the first reason, but that the verdict is excessive by Ten thousand dollars ($10,000), and the court further having concluded that if the plaintiff will accept the sum of Thirty thousand dollars ($30,000), the rule will be discharged, otherwise it will be made absolute, and the plaintiff having filed a written acceptance of the said verdict, as reduced, to the said sum of Thirty thousand dollars ($30,000),

Rule for Judgment Final.

WHEREUPON, it is ADJUDGED that the plaintiff, Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased, recover of the defendant, The Central Railroad Company of New Jersey, a corporation, the sum of Thirty thousand dollars ($30,000) and her costs to be taxed.

FRANK L. CLEARY,
Circuit Court Judge.

Rule actually entered this 18th day of December, 1928, on motion of

COLLINS & CORBIN,
Attorneys for Plaintiff.

Certified Copy of Judgment Final as Entered Upon the Judgment Book.

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Judgment entered Dec. 18, 1928. Damages $30,000.00 Costs ..... 108.96 Total ..... $30,108.96 Collins & Corbin, Attorneys.

Judgment on verdict in the above entitled cause was entered in this Court on the 18th day of December in the year of our Lord One thousand nine hundred and Twenty-eight in favor of the plaintiff, AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, and against the defendant, CENTRAL RAILROAD COMPANY OF NEW JERSEY, in a plea of action at law for the sum of Thirty Thousand Dollars, Damages and One Hundred Eight Dollars ninety-six cents, cost of suit.

Judgment entered and signed this 18th day of December, A. D. 1928.

FRANK L. CLEARY,
Judge.

Certified Copy of Judgment Final as Entered Upon the Judgment Book.

STATE OF NEW JERSEY, } ss.:
HUDSON COUNTY, }

I, JOHN J. McGOVERN, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court, holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain judgment obtained in the above stated Court in favor of the plaintiff, AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased, and against the defendant, CENTRAL RAILROAD COMPANY OF NEW JERSEY. Said judgment stands open and unpaid of record in this Court, as the same is taken from and compared with the original as filed and recorded in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City this 31st day of December, A. D. 1928.

JOHN J. McGOVERN,
(SEAL) Clerk.

Acceptance of Verdict as Reduced.

(Filed December 18, 1928.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law. On Defendant's Rule to Show Cause. Acceptance of Verdict as Reduced.

The plaintiff hereby accepts, in writing, the sum of Thirty Thousand Dollars ($30,000) as the verdict in this case, in accordance with the memorandum opinion of the Court.

Dated: Dec. 18, 1928.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Notice and Grounds of Appeal.

(Filed December 18, 1928.)

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Notice and Grounds of Appeal.

To MESSRS. COLLINS & CORBIN,
Attorneys for Plaintiff:

TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, upon the following grounds:

1. Because the Court refused to non-suit when requested so to do by defendant upon the ground stated in the motion, to wit, that

> Decedent assumed the risk of being injured in the manner in which (and as) he was injured.

2. Because the Court refused to direct a verdict for defendant when requested so to do upon the grounds stated in the motion, to wit, that

> (a) Decedent, under the circumstances of this case, assumed the risk of being injured by trains overtaking him from the rear.

(b) Decedent assumed the risk of being injured by inattention of train operators.

(c) Decedent assumed the risk of being injured in the manner in which (and as) he was injured.

3. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> This action is based upon the Federal Employers' Liability Act. Under that act the decedent, a section man, assumed the risk of being injured by trains running upon the tracks of the railroad (assuming him to have been working on the tracks at the time of his injury).

4. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> Among the risks assumed by the defendant was the risk of being injured by a train driven by an inattentive operator.

5. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> If the injury to decedent resulted from the fact that the train operator was inattentive and did not see decedent, there can be no recovery.

6. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> And even though the train operator could have seen decedent and did not see him because he was inattentive, the risk of such an occurrence was a risk assumed by the decedent and there can be no recovery.

7. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> If the train operator failed to sound a whistle or ring a bell in order to warn decedent of the approach of the train, and such failure was occasioned by the inattention of the train operator, there can be no recovery.

8. Because the Court refused to charge the jury, when requested so to do by the defendant, as follows:

> If you find that McGarry knew of the approximate time that the train by which he was struck would arrive at the place where he entered upon Track No. 2, and with that knowledge entered upon that track and walked along the same with his back toward the train, then he assumed the risk of being struck thereby, and your verdict must be for the defendant.

Dated, December 24, 1928.

WILLIAM A. BARKALOW,
Attorney of Defendant.

Stipulation That No Bond Be Filed on Appeal.

HUDSON COUNTY CIRCUIT COURT

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Stipulation.

It is hereby stipulated and agreed that the filing of bond by the defendant in the above-entitled matter, on appeal, is hereby waived.

Dated: December 31st, 1928.

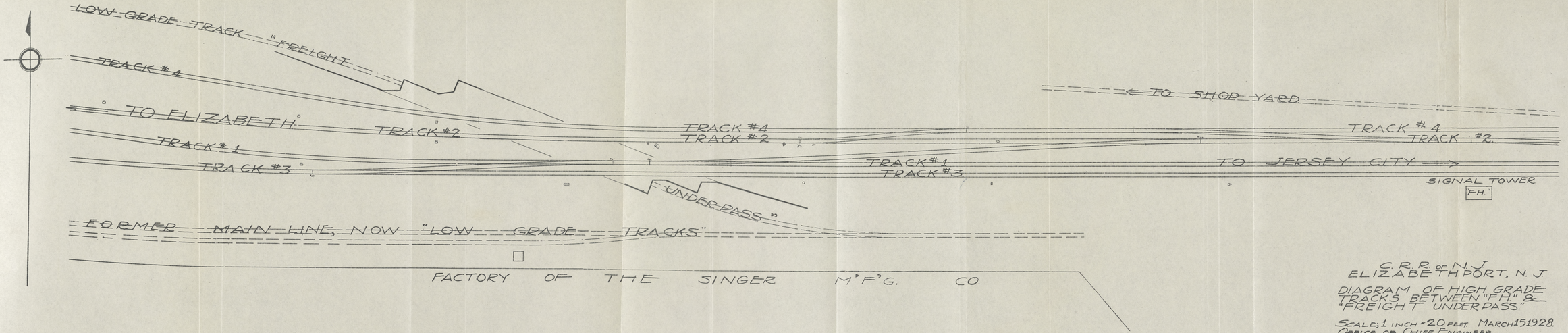
COLLINS & CORBIN,
Attorneys of Plaintiff.

WILLIAM A. BARKALOW,
Attorney of Defendant.

Exhibit P-1.

(*Opposite*)

EXHIBIT P1



C.R.R. of N.J.
ELIZABETHPORT, N.J.

DIAGRAM OF HIGH GRADE TRACKS BETWEEN "FH" & "FREIGHT UNDERPASS."

SCALE: 1 INCH = 20 FEET. MARCH 15 1928.
OFFICE OF CHIEF ENGINEER
JERSEY CITY, N.J.
SURVEYED & DRAWN BY Swinnerton Pratt

Map.

Exhibit P-3.

STATE OF NEW JERSEY

STATE DEPARTMENT OF HEALTH

BUREAU OF VITAL STATISTICS

1. Place of Death: County, Union; State, New Jersey; City, Elizabeth; C. R. R. Tracks, Elizabethport.

2. Full name: John McGarry.

3. Residence: No. 927 Anna Street; length of residence in city or town where death occurred, 14 years.

PERSONAL AND STATISTICAL PARTICULARS

4. Sex: Male.

5. Color or race: White.

6. Single, married, widowed or divorced (write the word): Married.

7. If married, widowed or divorced, husband of (or) wife of (give full maiden name) Agnes McInty.

8. Date of birth:

9. Age: 31 years.

10. Occupation of deceased: (a) Trade, profession or particular kind of work, foreman; (b) General nature of industry, business, or establishment in which employed (or employer), C. R. R. of N. J.; (c) Name of employer, C. R. R. of N. J.

11. Birthplace (city or town): Ireland.

Exhibit P-3.

PARENTS

12. Name of father: John McGarry.

13. Birthplace of father (city or town): Ireland.

14. Maiden name of mother: Ann French.

13. (a) Birthplace of mother (city or town): Ireland.

15. Signature of informant, Agnes McGarry, 927 Anna Street.

16. Received Dec. 21, 1926, THEO. W. BROKAW, Local Registrar.

MEDICAL CERTIFICATE OF DEATH

17. Date of Death: Dec. 18, 1926.

18. I HEREBY CERTIFY That I attended deceased and death occurred on date stated above. The cause of death was fracture of skull, R. R. accident, fracture of left arm and leg. Contributory: Employee of C. R. R. struck by locomotive at Elizabethport.

19. Was there an autopsy? No.

(Signed) C. A. BROKAW, CO. PHYS., M. D.
Elizabeth, N. J.

20. Place of burial: Mt. Olivet Cemetery.

Date of burial: Dec. 22, 1926.

21. Undertaker: R. J. Mitchell.

Address: Elizabeth, N. J.
New Jersey License Number: 534.

Exhibit P-3.

DEPARTMENT OF HEALTH

of the

STATE OF NEW JERSEY

BUREAU OF VITAL STATISTICS

I, HENRY B. COSTILL, Medical Superintendent of the Bureau of Vital Statistics of the State of New Jersey, do hereby certify that the foregoing and annexed is a true copy of a certain Certificate of Death, as taken from and compared with the original remaining on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official Seal of said Bureau, at Trenton, this twenty-ninth day of April, A. D. 1927.

HENRY B. COSTILL, M. D.
Medical Superintendent

(Seal)

Attest:
DAVID S. SOUTH
State Registrar of Vital Statistics

Exhibit P-4.

CITY OF ELIZABETH

UNION COUNTY, STATE OF NEW JERSEY

[SEAL OF THE CITY OF ELIZABETH]

UNITED STATES OF AMERICA

I, THEO. W. BROKAW, City Clerk of the City of Elizabeth, Union County, State of New Jersey, do hereby certify that the following is a true and correct transcript from the Records of Death in my Office.

Name of deceased, John McGarry; Date of death, December 18, 1926; Sex of deceased, Male; Married or single, Married; Age, 31 Years; Occupation, Foreman; Medical attendant, C. A. Brokaw; Place of death, Central R. R. tracks at Elizabethport; place of birth, Ireland; Name of parents, John McGarry, Anna French; Cause of death, Fracture of Skull—left arm & leg—Railroad accident; Place of burial, Mt. Olivet Cemetery; Name of Undertaker, R. J. Mitchell.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the City of Elizabeth on this Sixth day of July, A. D. 1927.

THEO. W. BROKAW,
City Clerk.

(SEAL)

Exhibit P-5.

(*Opposite*)

(Photostat.)

Exhibit P-6.

By agreement of counsel Exhibit P-6 (timebook kept by decedent) has been omitted. It is agreed that part of the said timebook is in the handwriting of decedent and part is in the handwriting of witness Spangenberg.

Exhibit P-7.

Exhibit P-7, the letter of James B. Noyes, Jr., claim agent of the C. R. R., to Michael A. Duffy, 918 Melrose Avenue, New York City, N. Y., dated October 1, 1928, is set out in full on page of the testimony.

Exhibit P-8.

N. Y. City, Oct. 2—28.

Mr. J. B. Noyes, Jr.,
C. R. R. of N. J.

Dear Sir:

In regards to questions you have asked me to answer:

(1) Was it customary for McGarry to make out his time sheet or book in the tower?

Mr. McGarry used to make out his time and book in the tower on an average of about 4 days of the week. Where he made out his time on the other days I cannot say.

(3) Was there any other place where he could have made it up?

Exhibit P-8.

The only place that I know of is the box car down at Singer's which the section gang used as an office and tool car. To the best of my knowledge this car was put in the cut at Singer's about a week before Mr. McGarry was killed. As Mr. McGarry done most of his work near F. H. Tower, I suppose he found it more convenient to make up his time there, in the tower.

Should you desire any further information let me know and I will gladly furnish same.

Yours very truly,

MICHAEL A. DUFFY.

Exhibit P-9.

N. Y. City, Oct. 2—28.

Mr. J. B. NOYES, JR.,
C. R. R. of N. J.

Dear Sir:

In regards to time lost by reporting to your office:

At the present time I am badly in debt, due to one of my children having typhoid fever. Although the amount is small to your company, to me it is quite a sum, at the present time.

Please do not feel that I think the company is trying to do me out of it. I only wrote to ask you if it were possible for your company to send this to me as soon as possible, it will be greatly appreciated.

Thanking you in advance for any help you can give me, I am yours very truly

MICHAEL A. DUFFY,
918 Melrose Ave.,
N. Y. City, N. Y.

Exhibit P-10-A.

STATEMENT relative to the personal injury sustained by John McGarry at E'port on Dec. 18, 1926:

I am 2nd Trick Towerman at F. H. Tower. I do not keep a record of the time that passenger trains pass here. I have a schedule of the time that they are due to pass here. The first train that passed here after McGarry left the tower at 4.20 P. M. was train # 619 which is due to pass here at 4.24 P. M. and was on time. It was on Track 2. The next train was #707 due to pass here about 4.31 P. M. on Track 2. The jitney I held to follow #707. It came here on Track 4 and I put him on Track 2 following #707.

There were about 4 or 5 men on the south side of the tracks and about the same number on the north side of tracks, all walking west, but they were some distance ahead of McGarry when I last saw him, probably 50 or 60 feet. Train 619 was running pretty fast and that was the train I saw the steam and smoke blowing down from. It must have been. I do not remember seeing smoke from 707, but then as soon as it passed here I was busy putting the jitney in on Track 2. After the train passed that I saw the smoke coming down from passed and the smoke cleared up I looked west and did not see McGarry and thought that he must have got across. The headlights of the engines, I think, were all burning.

AUG. C. HORSTMANN.

Signed at F. H. Tower on the 20th day of Dec., 1926.

We saw this statement signed by Aug. C. Horstmann and heard him admit it was full, true and correct.

Name, S. W. Kingsland; occupation, C. A.

Exhibit P-10-B.

STATEMENT relative to the personal injury sustained by John McGarry at E'Port, N. J., on Dec. 18, 1926:

I was Towerman at F. H. Tower on the above date, on duty from 3 to 11 P. M. I did not see this accident happen. First I knew about the presence of a body on the tracks was about 6:15 P. M. when one of our Policemen came in here and phoned. I did not go up to where the body was at all and did not see it. Last I saw of McGarry was when I saw him walking diagonally across the tracks, had left the E'bound tracks and was walking toward the westbound in the space between the two sets of tracks, in the middle between the two sets. He was at least 100 yards from here at the time, west, and I am not able to tell whether he had his coat collar up or his hat down over his ears at that distance and because it was dusk at the time. There were other men walking west on the south side of the E'bound tracks and they were west of McGarry. At that time there was a train coming westbound, either 707 or #109. Train 707 is due here at

AUG. C. HORSTMANN.

Signed at E'Port on the 19th day of Dec., 1926.

I saw this statement signed by Aug. C. Horstmann and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A., residence, J. C.

Exhibit P-10-C.

4:30 P. M. and 109 is due by here at 4:50 P. M. No occasion for those trains to sound a whistle here. There were no trains coming E'bound at time I saw him. Trains #707 and 109 both ran on track #2. The first train before #107 was train #619 due at E'Port at 4:25 P. M. The only train he could get for Elizabeth from the Port, if he left here at 4:20 P. M., would be train #857 due at the Port at 4:44 P. M. and would go by here on track #4. Weather was clear and cold.

The wind was blowing from the north and the smoke from the train that passed immediately after I saw McGarry crossing toward track #2 obstructed my further view of him. After the train passed and the smoke cleared up, I looked to see what became of him but could not see him. When he was walking toward track #2, diagonally toward it, westward, the train was just about opposite the Tower

AUG. C. HORSTMANN.

Signed at E'Port on the 19th day of Dec., 1926.

I saw this statement signed by Aug. C. Horstmann and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C.

Exhibit P-10-D.

and running fast and I figured then if he kept on going he would be pretty close to being struck and that train was on track #2. It is my opinion that was train #109. After the smoke had cleared I figured he had cleared and had either gone on the north side of the W'Bound or had come back to the E'bound side.

AUG. C. HORSTMANN.

Signed at E'Port on the 19th day of Dec., 1926.

I saw this statement signed by Aug. C. Horstmann and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C.

Name, Aug. C. Horstmann; occupation, Towerman 3.

Exhibit P-11.

(*Opposite*)

Request Engr. Main. of Way-J. City-1/18/27

ACCOUNTING DEPARTMENT

23

New Jersey Central

NEW YORK, N. Y. December 15th, 1926 No. 2615 JFW

PAY CHECK

FOR SERVICES RENDERED AS SHOWN ON PAY ROLL FOR THE FIRST HALF OF MONTH OF DEC., 1926

NOT VALID IN EXCESS OF $400.00

PAY TO THE ORDER OF

* Mrs. Agnes McGarry, widow of John McHarry, deceased. *SIXTY EIGHT & 12/100* DOLLARS $68.12 *

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

NOT NEGOTIABLE UNLESS COUNTERSIGNED BY
C. W. KINSMAN, W. E. WEST OR Wm. KOHLER

To The
FIDELITY TRUST COMPANY
1-108 OF NEW YORK 1-108
COAL & IRON OFFICE

COUNTERSIGNED C. W. Kinsman

F. T. Dickerson
TREASURER

DO NOT ENDORSE UNTIL READY TO CASH

THE ENDORSEMENT ON THIS CHECK MUST CORRESPOND WITH NAME AS SHOWN IN BODY OF CHECK.
IF ENDORSEMENT IS BY MARK (X) THE ENDORSEMENT MUST BE WITNESSED AND THE ADDRESS OF WITNESS SHOWN.

Mrs. Agnes McGarry
Mrs. Agnes McGarry, widow of John McGarry

SIGNATURE OF EMPLOYEE

WITNESS AND ADDRESS

ENDORSEMENT GUARANTEED BY (WHEN REQUIRED BY BANK)

PAY TO ORDER OF NATIONAL STATE BANK FOR CREDIT OF J. J. [illegible] NATIONAL SAVINGS DEPT. ELIZABETH, N. J. UNION COUNTY TRUST CO.

PAY TO THE ORDER OF ANY BANK OR TRUST COMPANY
NATIONAL STATE BANK
55-98 ELIZABETH, N. J. 55-98
[illegible] WETTON, Cashier
[illegible] 1927

RECEIVED PAYMENT
THROUGH NEW YORK CLEARING HOUSE
PRIOR ENDORSEMENTS GUARANTEED
JAN 29 1927
THE NATIONAL PARK BANK OF N.Y.

(Photostat)

Exhibit D-1.

(*Opposite*)

(Photostat)

Exhibit D-2.

(*Opposite*)

(Photostat)

Exhibit D-3.

(*Opposite*)

(Photostat)

Exhibit D-4.

(*Opposite*)

(Photostat)

Exhibit D-5.

(*Opposite*)

(Photostat)

Exhibit D-6.

STATEMENT relative to the personal injury sustained by John McGarry at E'port, N. J. on Dec. 18th 1926.

Supplementive to my statement made Dec 19th 1926 I can state further as follows, I first saw McGarry about 4.00 pm E. S. T. when he came into the tower downstairs in the maintainer's room, it was cold outside and he came in to work on his time book and he stayed about 20 minutes, he left the tower at 4.20 pm. and that was the last time I saw him alive. I was in the maintainer's room when he came in. He left from the door that is on the level with the tracks. I saw him go and bid him "Good night!" After he left the tower I went downstairs in the cellar and opened the furnace and then went up stairs with the towerman. McGarry had been gone a few minutes possibly when I got up with the Towerman. While McGarry was in the tower he worked at my desk that is located at the end of the tower towards E'port Station next to Singers factory—on that side. While McGarry was in the maintainer's room he told me he wanted to buy some bulbs for his parlor lights and asked me the size to get and I told him 25 Watt and he said he was going to Elizabeth to buy them. The other conversation was general—about the weather etc. It was just about dusk when he left the tower. After I got up in the tower I looked out of the window towards E'port and

I have read this statement and found it to be correct.

MICHAEL A. DUFFY.

Signed at Jersey City Office on the 7th day of September 1928.

We saw this statement signed by Michael A. Duffy and heard him admit it was full, true and correct.

Name, James B. Noyes, Jr.; occupation, C. A.; residence, J. C.

Exhibit D-7.

STATEMENT relative to the personal injury sustained by John McGarry at E'port, N. J. on Dec. 18th, 1926.

saw someone (whom I judge was McGarry) walking west between tracks 1 and 2 then about 200 to 300 yards west of the tower. I did not pay particular attention to him and I'm not sure if it was him. He had an employees time book in the tower and he worked on that while in the tower. I didn't notice if he had a time table. I saw the track laborers walking west on the north side of the fill (not on the tracks) when I got up with the towerman after looking at the furnace, I can't say how far away from the tower they were tho. McGarry did not go upstairs where the Towerman was at any time and only he and I were in the maintainer's room together from 4.00 pm to 4.20 pm. No one came in and went out during that time either.

I have read this statement and found it to be correct.

MICHAEL A. DUFFY.

Signed at Jersey City office on the 7th day of September 1928.

We saw this statement signed by Michael A. Duffy, and heard him admit it was full, true and correct.

Name, James B. Noyes, Jr.; occupation, C. A.; residence, J. C.

Exhibit D-7-A.

STATEMENT relative to the personal injury sustained by John McGarry at E'Port, N. J., on December 18, 1926.

I was Maintainer at F. H. Tower on the above date. I did not see this accident happen. I am on duty from 2:30 P. M. to 10:30 P. M. First I knew about accident was in the neighborhood of between 5:20 and 5:30 P. M. when an officer of the C. R. R. Police Department came in the Tower and wanted to know where the body lay. I took a lantern and went out with him. He said it was west of the Bay Draw. We started out and went west of our Tower first and found a body between tracks one and two and about 20 rail lengths west of Tower, or up to the "Underpath", first Bridge west of Tower. Body was on east end of bridge, feet close to track #1 and his head toward #2. Body was on right side, feet straight out and fingers stretched out as though he was about to grab something. Body was cold and blue when we got to it. One of his rubbers was off, both shoes on, and laces were

MICHAEL A. DUFFY.

Signed at E'Port on the 19th day of December, 1926. I saw this statement signed by Michael A. Duffy and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C. .

Exhibit D-7-B.

not bursted. The only injury I saw was to his head, right side, where I saw blood from his cheek-bone upward. Blood was clotted there, not running. I could not say if it was frozen. His eyes were open and glassy. There was blood in his mouth out to his lips. Blood had come from his nose but was also clotted. His cap was lying about 15 feet east of the body near track #1. He wore a sheepskin coat and the collar was turned up. The cap was of the ear-flap type and when I found the cap the ear-flaps were open, or in a position to be put over the ears. Besides the Officer and myself there was no one by the body when we first got there. Body did not appear to have been run over and I did not look for marks on rails. I did not notice if ground was disturbed, to indicate he had fallen and rolled, ground was frozen and was a bitter cold night. On

MICHAEL A. DUFFY.

Signed at E'Port on the 19th day of December, 1926. I saw this statement signed by Michael A. Duffy and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C.

Exhibit D-7-C.

our way up to find the body we met another Officer and he went up with us. I do not know either of them by name. One of the Officers arranged to have the body removed. After a light engine came down I directed them to where the body was. Neither the Officers or I went through the clothing.

I knew McGarry by working here, but not by name. McGarry was downstairs in the Tower (F. H.) with me at 4.20 P. M. and he left at that time saying he was going to get a train to Elizabeth where he wanted to buy something. He said he would probably get a train from the "Port" about 4:40 P. M. When he left me he appeared to be in perfect health. He had the collar of his sheepskin coat turned up when he left. I saw him turn it up. I do not remember if he had the earflaps to his hat down over his ears or not. I do not remember. It was not dark at the time he left me, was just about dusk. I do not know if engine headlights

MICHAEL A. DUFFY.

Signed at E'Port on the 19th day of December, 1926. I saw this statement signed by Michael A. Duffy and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C.

Exhibit D-7-D.

were lit at that time, was not dark enough in my opinion. Weather was cold and clear. I did not watch McGarry when he left here and I took no notice to trains passing after he left as I had work inside to do. I know it was 4:20 P. M. at the time he left me because I looked at my watch at that time.

MICHAEL A. DUFFY.

Signed at E'Port on the 19th day of December, 1926. I saw this statement signed by Michael A. Duffy and heard him admit it was full, true and correct.

Name, H. B. Demarest; occupation, C. A.; residence, J. C.

Exhibit D-8-A.

HUDSON COUNTY CIRCUIT COURT

AGNES MCGARRY, General Administratrix of the Estate of JOHN MCGARRY, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Additional Interrogatories.

To William A. Barkalow, Esq., Attorney of Defendant:

SIR:

PLEASE TAKE NOTICE that the plaintiff desires answers under oath within the time required by law to the following additional interrogatories:

1. On December 18, 1926, did train No. 619 give any audible signals by bell or whistle of its approach as it passed FH tower and proceeded toward switch No. 39? If it did, please describe what kind of audible signal was given by it.

2. On December 18, 1926, did train No. 707 give any audible signal by bell or whistle of its approach as it passed FH tower and proceeded toward switch No. 39? If it did, please describe what kind of audible signal was given by it.

3. Was it customary for said train No. 619 to ring its bell automatically as it approached the point where the body of the plaintiff's intestate was found on December 18, 1926?

Exhibit D-8-A.

4. Was it customary for train No. 619 to have its headlight burning as it approached the point where the body of the plaintiff's intestate was found on December 18, 1926?

5. Was it customary for train No. 619 to blow its whistle as it approached the point where the body of the plaintiff's intestate was found on December 18, 1926?

6. Was the headlight on said train No. 619 lighted on December 18, 1926, as it passed FH tower and proceeded toward switch No. 39?

7. Was the headlight on said train No. 707 lighted on December 18, 1926, as it passed FH tower and proceeded toward switch No. 39?

8. On what track was said train No. 619 proceeding on December 18, 1926, as it passed FH tower and proceeded toward switch No. 39?

9. Did either said train No. 619 or said train No. 707 pass by means of a switch or otherwise from track No. 4 to track No. 2, or from track No. 2 to track No. 4, as it approached FH tower, pass the same and as it proceeded toward and past switch No. 39? If so, please describe what movement was made by either of said trains from one track to the other and name the tracks upon which the movements were made.

10. Describe what work was performed by the plaintiff's intestate for the defendant on December 18, 1926, and whether said work was performed for the defendant.

11. At what speed was each of said trains Nos. 619 and 707 proceeding as they passed FH tower and switch No. 39 on December 18, 1926?

Dated: September 26, 1927.

Respectfully yours,
COLLINS & CORBIN,
Attorneys of Plaintiff.

Exhibit D-8-B.

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased,
Plaintiff,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation,
Defendant.

Action at Law.

Answers to Additional Interrogatories.

To: COLLINS & CORBIN, Esqs.,
Attorneys for Plaintiff.

Sirs:

PLEASE TAKE NOTICE that the following are the answers to the additional interrogatories heretofore served upon the defendant, The Central Railroad Company of New Jersey:

Answer to Interrogatory 1: Yes. Bell.
Answer to Interrogatory 2: Yes. Bell.
Answer to Interrogatory 3: No.
Answer to Interrogatory 4: No.
Answer to Interrogatory 5: No.
Answer to Interrogatory 6: Yes.
Answer to Interrogatory 7: Yes.
Answer to Interrogatory 8: No. 2.
Answer to Interrogatory 9: No.
Answer to Interrogatory 10: Supervising the leveling of dirt. Yes.
Answer to Interrogatory 11: Train No. 619—speed between 35 and 40 miles an hour. Train No. 707—speed approximately 40 miles an hour.

Yours, &c.,

WM. A. BARKALOW,
Attorney for Defendant.

Exhibit D-8-B.

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH, } SS.:

OSCAR H. WHICHARD, of full age, being duly sworn according to law upon his oath deposes and says: That he is a fireman of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 1st and 2nd are true to the best of his knowledge and belief.

OSCAR H. WHICHARD.

Subscribed and sworn to before me, a Notary Public of New Jersey, this 21st day of October, A. D. 1927.

MAUDE F. FINN,
Notary Public of New Jersey.
My commission expires Sept. 27, 1928.

[SEAL]

Exhibit D-8-B.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

W. L. VANDERHOOF, of full age, being duly sworn according to law upon his oath deposes and says: That he is Passenger Trainmaster of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 3rd, 4th and 5th are true to the best of his knowledge and belief.

W. L. VANDERHOOF.

Subscribed and sworn to before me, a Notary Public, this 18th day of October, 1927.

JAMES B. NOYES, JR.,
Notary Public of N. J.
My commission expires Mar. 24, 1932.

[SEAL]

Exhibit D-8-B.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

AUGUST C. HORSTMANN, of full age, being duly sworn according to law upon his oath deposes and says: That he is a towerman of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 6th, 8th and 9th are true to the best of his knowledge and belief.

AUGUST C. HORSTMANN.

Subscribed and sworn to before me,
a Notary Public, this day of
October, A. D. 1927.

EDWARD A. JENNEY,
Notary Public for New Jersey.
Commission expires Feb. 17, 1931.

[SEAL]

Exhibit D-8-B.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

HARRY REICH, of full age, being duly sworn according to law upon his oath deposes and says: That he is a Train Dispatcher of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 11th are true to the best of his knowledge and belief.

HARRY REICH.

Subscribed and sworn to before me,
a Notary Public, this 20th day
of October, A. D. 1927.

JAMES B. NOYES, JR.,
Notary Public of N. J.
My commission expires Mar. 24, 1932.
[SEAL]

Exhibit D-8-B.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

PHILLIP EDER, of full age, being duly sworn according to law upon his oath deposes and says: That he is a locomotive engineer of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 7th are true to the best of his knowledge and belief.

PHILLIP EDER.

Subscribed and sworn to before me, a Notary Public, this 13th day of October, A. D. 1927.

JAMES B. NOYES, JR.,
Notary Public of N. J.
My commission expires Mar. 24, 1932.

[SEAL]

Exhibit D-8-B.

STATE OF NEW JERSEY,
COUNTY OF UNION, } ss.:

FRED SPANGENBERG, of full age, being duly sworn according to law upon his oath deposes and says: That he is Extra Gang Foreman of The Central Railroad Company of New Jersey; that he has read the foregoing answers to additional interrogatories, and that the matters and things contained in the answers to the 10th are true to the best of his knowledge and belief.

FRED SPANGENBERG.

Subscribed and sworn to before me, a Notary Public, this 18th day of October, A. D. 1927.

JAMES B. NOYES, JR.

[SEAL]

Opinion of Court of Errors and Appeals.

(Filed October 14, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

120. February Term, 1929.

Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased,
Respondent,
vs.
The Central Railroad Company of New Jersey, a corporation,
Appellant.

Submitted February Term, 1929. Decided October , 1929.

On appeal from Hudson County Circuit Court.

For Appellant: William A. Barkalow; Edwin F. Smith, of counsel.

For Respondent: Collins & Corbin; Edward A. Markley, Walter J. Freund, of counsel.

The opinion of the court was delivered by Lloyd, J.

Plaintiff below recovered a verdict under the Federal Employers' Liability Act (U. S. Com. Stat. sec. 8657) for the death of her husband due, it was claimed, to the negligence of fellow employees, and the defendant appeals.

The question presented on the appeal is whether the trial court should have controlled the case by

non-suit or by direction of a verdit for the defendant.

Deceased was an assistant section gang foreman on the Central Railroad at Elizabethport, and, when the accident occurred, was walking along the tracks of the railroad company where he was overtaken by a train going in the same direction and killed. His general employment was in interstate commerce and at the time he was in that service.

The negligence alleged against the defendant was that the engineer and fireman in charge of the train failed to give warning of its approach, in consequence of which the death resulted.

To impose responsibility on the employer it was necessary to show that some duty which the defendant owed to the deceased, either directly or through its employees, was violated. In the attempt to establish this responsibility in the present case a fair summary of the proofs, we think, would indicate that the deceased was proceeding along the railroad tracks in the performance of his duties when he was struck from behind by an engine of the defendant company; that no warning was given by those in charge of the engine of its approach; that a witness, Duffy, a signal maintenance man, prior to the accident had observed when walking along the track that the engineer used to give a number of short blasts to warn of the approach of his train. Perhaps the evidence most favorable to the plaintiff was that given as follows: "Q. Now when you were walking out on the track * * * fixing something on the track, so that you had to be on the track, did you get your short blasts of the whistle of the engine? A. Yes, sir. * * *" "Q. When the men would be walking on the tracks, as you were walking on

the tracks, as the section men would be walking on the tracks, what kind of a whistle would you get? A. Several short blasts." It further appeared that no warning was given to the deceased when the accident occurred.

It is clearly established by federal decisions (which are controlling here) that one in the position of the deceased assumed as part of his employment the risk of injury from the ordinary and usual operation of the trains with which his duties brought him into relation. Ches. & O. R. R. Co. *vs.* Nixon, 271 U. S., 218; Toledo, St. L. & W. R. R. Co. *vs.* Albany, 276 U. S., 165.

In the recent case of Unadilla Valley Ry. Co. *vs.* Caldine, 49 U. S. Sp. Ct., 91, a conductor violating a standing written order passed the meeting point with another train and a collision resulted. In an action for the death of the conductor it was held that he could not rely on either the failure of the station agent to apprise him of the approach of the colliding train (of which the agent had been informed), nor on the negligence of his own motorman in obeying the conductor's order to proceed (even though the motorman had information that the other train was approaching), as a basis of recovery; that the primary duty was his own to obey the order not to proceed and that he could not avoid the assumption of the risk incident to its violation by transferring it to the shoulders of his co-employees. While the analogy of this case with the present is not complete in its facts, it is pertinent in principle. The assumption of the risk of injury from the dangers incident to work on the tracks and road beds by the passage of trains was one which the deceased was as much bound to regard as the direct orders of the employer in the case cited, unless and until he

was relieved of that duty by warning from other employees provided for by his employer.

We think the facts shown in this case fall short of indicating a system of warning which would entitle the deceased to rely on those operating the train instead of on his own vigilance, and in consequence the danger of injury was, under the circumstances, one of the assumed risks incident to his employment.

As our conclusion is that the death of the plaintiff's husband was due to a cause the risk of which was assumed by him, the judgment is reversed.

Judgment of Reversal.

(Filed Oct. 31, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Respondent, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Appellant.	Judgment of Reversal.

This case having been duly argued at the February Term, 1929, of this Court, and the Court having considered the same and finding that the Hudson County Circuit Court erred in failing to grant defendant's motions for a non-suit and for a direction of a verdict in favor of defendant, it is therefore,

ORDERED and ADJUDGED that the judgment of the Hudson County Circuit Court in this case be reversed with costs, and the record remitted to the Hudson County Circuit Court to be proceeded with, in accordance with the practice of said Court.

On motion of

WILLIAM A. BARKELOW,
Attorney of Appellant.

Record on Retrial.

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of JOHN McGARRY, deceased, *vs.* THE CENTRAL RAILROAD OF NEW JERSEY.	Before Hon. Frank L. Cleary, J., and a Jury.

Jersey City, N. J.,

February 20, 1930.

Appearances:

COLLINS & CORBIN, Esqs., for the Plaintiff, by EDWARD A. MARKLEY, Esq.

WILLIAM A. BARKALOW, Esq., for the defendant, by ANDREW O. WITTREICH, Esq., of Counsel.

A jury was duly empanelled; being found satisfactory, they were sworn.

(Openings waived by counsel.)

Mr. Markley: This is a case, Your Honor, that was tried once before, and went to the Court of Errors.

I have a stipulation which I wish to present, in which counsel for the parties agree that the retrial here now may be on the printed record submitted to the Court of Errors and Appeals heretofore taken.

I offer this stipulation in evidence.

Accepted and marked as Plaintiff's Exhibit P-1 of this date.

Mr. Markley: In accordance with the stipulation of counsel for that purpose, I offer in evi-

dence a copy of the printed State of the Case in the Court of Errors and Appeals.

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

Mr. Markley: I rest.

Mr. Wittreich: I move for a direction of verdict upon the ground that the evidence shows that at the time of this accident, Mr. McGarry had been a laborer, section man and assistant foreman, a foreman and assistant foreman, that he was familiar with the rule requiring him to look out for trains, and it was his duty to know the time of the approach of the regular trains, and his duty to know the time of the approach of the regular trains, and his duty to watch out for extra trains and to notify the men under him of the approach thereof. That he therefore knew at the time of the approach of train 619 and train 707, and that if he, with this knowledge, entered upon track 2, upon which he knew trains 707 and 619 would approach and walked westerly with trains approaching from the east, that he then assumed the risk of being struck by trains overtaking him from his rear on this track, and that under the decisions of the United States Supreme Court, he assumed the risk.

Secondly, that section men, or men engaged as McGarry was engaged at the time, assumed the risks of being injured by the inattention of train operators.

For the foregoing reasons, I move for a direction of verdict.

The Court: The motion for a direction of a verdict will be granted.

Mr. Markley: May I ask for an exception?

The Court: You may have an exception.

Stipulation on Retrial—P-1.

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, Administratrix *ad Prosequendum* of the Estate of John McGarry, deceased,
Plaintiff,
v.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation,
Defendant.

Action at Law.
Stipulation.

It is hereby stipulated by and between the parties to the above action that on the retrial of this case that it be tried on the printed record submitted to the Court of Errors and Appeals on the appeal of the defendant to that Court under date of December 18, 1928.

Dated: December 30, 1929.

COLLINS & CORBIN,
Attorneys of Plaintiff.

WILLIAM A. BARKALOW,
Attorney of Defendant.

Rule for Judgment on Retrial.

(Filed Feb. 28, 1930.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Rule for Judgment.

This cause having come on for trial before Honorable Frank L. Cleary, Judge of the Hudson County Circuit Court, and a jury on February 20, 1930, in the presence of counsel for the respective parties, and the Court having directed a verdict in favor of the defendant and against the plaintiff,

It is on this 28 day of February, 1930, Ordered that judgment final be entered in favor of the Defendant The Central Railroad Company of New Jersey and against the Plaintiff Agnes McGarry, General Administratrix of the estate of John McGarry, deceased.

FRANK L. CLEARY,
Judge.

On Motion of
EDWARDS & SMITH,
Attorneys of Defendant.

Judgment on Retrial.

(Signed Feb. 28, 1930.)

HUDSON COUNTY CIRCUIT COURT.

AGNES McGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *advs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Judgment Entered February 28, 1930. Damages $..... Costs .... Total ..... $..... Edwards & Smith, Attorneys for Defendant.

Judgment on verdict on direction by the Court in the above entitled cause was entered in this Court on the 28th day of February in the year of our Lord One Thousand Nine Hundred and Thirty in favor of the defendant The Central Railroad Company of New Jersey, a corporation and against the plaintiff Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased, in a plea of action at law for the sum of Dollars Cents, damages and Dollars Cents, cost of suit.

Judgment entered and signed this 28th day of February, 1930.

FRANK L. CLEARY,
Judge.

Notice and Grounds of Appeal.

(After second trial.)

(Filed March 18, 1930.)

HUDSON COUNTY CIRCUIT COURT.

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Notice and Grounds of Appeal.

To Messrs. Edwards & Smith, Attorneys of Defendant.

Sirs:

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 ground:

The trial court directed a verdict in favor of the defendant when thereunto moved by the defendant, whereas said motion should have been denied and the issues therein involved submitted to the jury for decision.

Dated: March 5, 1930.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Service of a copy of the within Notice and Grounds of Appeal acknowledged this 12th day of March, 1930.

WM. A. BARKALOW,
EDWARDS & SMITH,
Attys. Deft.

Filed Clerk's Office
Mar. 18, 1930.
Hudson County, N. J.

New Jersey Court of Errors and Appeals

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff-Appellant, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant-Respondent.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF IN BEHALF OF THE PLAINTIFF-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review for the second time, a judgment in the above action of the Hudson County Circuit Court. The suit is brought under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 9388, Sec. 8657) to recover damages for the death of the plaintiff's intestate for the benefit of the plaintiff, who is the widow, and her two minor children.

On the first trial a judgment was rendered in favor of the plaintiff for $30,000 damages, which on appeal to this Court was reversed by a divided vote—eleven members of the Court voting to reverse and five to affirm (p. 263; also 147 Atl. 472). The check list was as follows:

"No. 120 of Feb. Term, 1929.
Date Oct. 14, 1929.
The Chancellor presiding.
Opinion by Lloyd, J.

Check List	*Affirm*	*Reverse*
The Chancellor,	1	
The Chief Justice,		1
Mr. Justice Trenchard,		1
" " Parker,		1
" " Kalisch,	1	
" " Black,	1	
" " Campbell,		1
" " Lloyd,		1
" " Case,		1
" " Bodine,		1
Judge White,		1
" Van Buskirk,	1	
" McGlennon,		1
" Kays,		1
" Hetfield,		1
" Dear,	1	
Totals,	5	11"

The action was remitted to the Circuit Court by judgment of reversal of this Court (p. 267), and was retried on the record in this Court (pp. 268 and 270). The Trial Court directed a verdict in favor of the defendant, upon which judgment was duly entered by the defendant (pp. 269, 271 and 272).

The plaintiff desires to take this case to the United States Supreme Court. In order to do so, it is necessary to have a final judgment in favor of the defendant.

Missouri & Kansas Interurban Ry. Co. v. *Olathe,* 222 U. S. 185;

Van Buskirk v. *Erie R. R. Co.,* 248 U. S. 549;

Haseltine v. *Central Bank of Springfield,* 183 U. S. 130;

Schlosser v. *Hemphill,* 198 U. S. 173, 175;
Louisiana Navigation Co. v. *Oyster Commission of Louisiana,* 226 U. S. 99, 101.

The grounds of appeal are part of the notice of appeal (p. 273).

(2)

Grounds of Appeal.

The only ground of appeal urged is that the Trial Court directed a verdict in favor of the defendant when thereunto moved by the defendant, whereas said motion should have been denied and the issues therein involved submitted to the jury for decision (p. 273).

(3)

Brief of the Argument.

I.

The Trial Court erred in directing a verdict in favor of the defendant when thereunto moved, because said motion involved the decision of a question of fact, viz., whether or not the plaintiff's intestate as a matter of law assumed the risk of the injuries resulting in his death, and that question of fact under the conflicting evidence should have been submitted to the jury for decision.

Since this appeal is before this Court on the identical record presented on the first appeal, we have taken the liberty of presenting *verbatim* our brief on the first appeal which is hereto annexed. The sole question presented is whether the deceased *as a matter of law* assumed the risk of the injury resulting in his death.

Under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 8399, sec. 8657) the employer is liable to the employee and to his estate in the event of his death when he is employed in interstate commerce, for such injury or death "resulting *in whole or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, etc., or other equipment." Under Section 3 (U. S. Comp. Stat. 9423, sec. 8659) "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The U. S. Supreme Court has repeatedly held that in an action under the Federal Employers' Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured person did not foresee, is the proximate cause of the injury. That Act places a co-employee's negligence when it is the ground of the action in the same relation as that of the employer upon the matter of assumption of risk. The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee. The effect of the statute is to abolish in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff.

The Second Employers' Liability Cases,
233 U. S. 1, 49;

Gila Valley Globe, etc., Ry. Co. v. *Hall,* 232 U. S. 94, 102;
Yazoo & Miss. R. R. Co. v. *Wright,* 235 U. S. 378;
N. Y. C. & H. R. R. Co. v. *Carr,* 238 U. S. 260;
Chesapeake & Ohio Ry. Co. v. *De Atley,* 241 U. S. 310, 313;
Chicago, Rock Island & Pac. Ry. Co. v. *Ward,* 252 U. S. 18;
Reed v. *Director General,* 258 U. S. 93.

In *Yazoo & Miss. R. R.* v. *Wright,* 235 U. S. 378, *supra,* Chief Justice WHITE, speaking for this Court, held:

> "Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.
>
> "The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employees of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precau-

> tion he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, 21, this Court defined the settled rule with respect to assumption of risk under the Federal Act as follows:

> "As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310, 315: 'According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of action, in the same relation as that of the employer upon the matter of assumption of risk."

It is therefore clear that under the settled law of that Court construing the Federal Employers' Liability Act, it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible. On the other hand, the employee

has the right to assume that the employer or his agents have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. The employee has the right to assume that the employer and his agents have exercised for his safety such care as the circumstances will reasonably permit and such care as is ordinarily exercised in the customary operation of the railroad for his safety. *Smith* v. *Payne,* 269 Fed. 1, 4. *Lehigh Valley R. R. Co.* v. *Doktor,* 290 Fed. 760, 763, 764.

In the opinion of this Court (p. 265, ll. 10-20) it is stated:

> "It is clearly established by Federal decisions that one in the position of the deceased assumed as part of his employment the risk of injury from the ordinary and usual operation of the trains with which his duties brought him into relation."

This rule is not disputed by the appellant. It is here claimed that there was an unusual and extraordinary operation of the engine which ran the deceased down—in short, a negligent operation—and with respect to that, under the foregoing decisions of the United States Supreme Court, there is no assumption of risk even as a matter of fact, to say nothing as a matter of law, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person would observe and appreciate them. This Court in its opinion cited two cases, namely, *Chesapeake & Ohio R. R. Co.* v. *Nixon,* 271 U. S. 218, and *Toledo St. L. & W. R. R. Co.* v. *Albany* (should be Allen), 276 U. S. 165 (p. 265, l. 15).

Both of these cases dealt with ordinary risks and usual operations. There was no negligence proved on the part of the railroad company and therefore the employee assumed the risk of being run down by the ordinary operation of the train. In the *Nixon* case the proof was undisputed that it was usual operation not to ring a bell or blow a whistle and not to keep a lookout as the engine went along and further it was proven that it was the practice on the defendant's road in that case for the employee himself to rely on his own watchfulness alone for the approach of trains, he knowing that no audible signal of approach would be given.

In the *Allen* case the question involved was whether a clearance between permanent structures such as between two tracks in a yard was assumed by an employee who had worked in the yard for a long time and who knew of the narrow clearance between such permanent structures and that switching would be done on those tracks. The United States Supreme Court on March 3, 1930 (74 L. Ed. 344) denied a writ of certiorari in *Delaware, Lackawanna & Western R. R. Co.* v. *Nellie Reardon, Gen. Admx. of the Estate of Joseph A. Smith, deceased,* where the Railroad Company sought by certiorari to review a decision of this Court in favor of the plaintiff in a clearance case where the clearance was between cars protruding from a stub track toward a lead track in a yard. In that case this Court affirmed the judgment in favor of the plaintiff (147 Atl. 544) by a vote of ten to six, on the theory that the placement of the cars was a negligent placement, thereby bringing about a narrow clearance which was a negligent clearance as distinguished from a permanent narrow clearance resulting from the construction and erection of permanent structures such as buildings, tracks, bridges, etc.

The distinction between the *Allen* case and the *Reardon* case is the distinction we make between the *Nixon* case and the case *sub judice.* In the case at bar it was the custom as appears from our main brief hereto annexed to give audible warning by bell and whistle and it was the custom for the engineer and fireman to keep a constant lookout ahead. In fact, that duty was imposed by the rules of the defendant company. We shall not reiterate the discussion which is contained in the main brief. Suffice to say that if the defendant did negligently operate the train, as appears from the main brief that it did, then there could be no assumption of risk as a matter of law because an employee does not assume the risk of injury resulting from the negligence of the master.

The law is settled *that it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible, but that the employee may assume that the employer, or his agents, have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.*

Also the law is settled under the Federal Employers' Liability Act that a co-employee's negligence (instead of defeating recovery by an employee on the theory that a fellow servant's negligence is a defense for the master), when it is the ground of action, is placed in the same relation as that of the employer and the employer is liable for such negligence and there is no assumption of the risk thereof except as aforesaid.

Reed v. *Directors General,* 258 U. S. 92, 93;

Chicago, Rock Island & Pacific Ry. Co. v. *Ward,* 252 U. S. 18, 21;
Yazoo & Miss. R. R. v. *Wright,* 235 U. S. 378;
Choctaw, Oklahoma, &c. R. R. Co. v. *McDade,* 191 U. S. 64.

This Court, in its opinion in this case, answering the contention made by the plaintiff that there was a custom to ring the bell and blow the whistle and an absolute rule and practice to keep a constant lookout ahead by the engineer, said (p. 266):

> "We think the facts shown in this case fall short of indicating a system of warning which would entitle the deceased to rely on those operating the train, instead of his own vigilance, and in consequence, the danger of injury was under the circumstances, one of the assumed risks incident to his employment."

This conclusion necessarily assumes that there was *some evidence* of the custom and practice to warn by bell and whistle, as well as the practice and the rule of the engineer or the fireman to keep a constant lookout ahead in order to apprise himself of the fact whether or not there was an employee on the track. This Court cannot weigh the evidence or the credibility of the witnesses. We contend that the testimony in the case, which is fully summarized in our main brief, shows beyond question a clear-cut fact issue as to whether or not the defendant was negligent, and that issue could not be decided by the Trial Court under the settled law as a matter of law against the plaintiff.

The case of *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, also referred to in the opinion of this Court in this case involving a violation of a rule by the conductor of a train, which violation resulted in his death, is not in point. The mere statement

of the decision distinguishes it from the case at bar. No other authority is cited by this Court to sustain its decision.

We respectfully submit that the Trial Court erred in directing a verdict in favor of the defendant.

II.

For these reasons we respectfully submit that the judgment below should be reversed and a *venire de novo* ordered.

Submitted May Term, 1930.

EDWARD A. MARKLEY,
WALTER J. FREUND,
Of Counsel with Plaintiff.

COLLINS & CORBIN,
Attorneys of Plaintiff.

New Jersey Court of Errors and Appeals

AGNES MCGARRY, General Administratrix of the Estate of JOHN MCGARRY, deceased, Plaintiff-Respondent, *v.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant-Appellant.	Action at Law. On Defendant's Appeal.

BRIEF IN BEHALF OF THE PLAINTIFF-RESPONDENT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment of the Hudson County Circuit Court for $30,000 in favor of the plaintiff, Agnes McGarry, general administratrix of the estate of her deceased husband, John McGarry, in an action brought under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 9388, sec. 8657) to recover damages against the defendant, Central Railroad Company of New Jersey, for the benefit of herself and her two children, for the death of the plaintiff's intestate.

The accident happened on December 18, 1926, at a point approximately 800 feet west of "F. H." tower near the Elizabethport Station of the defendant and on its main line railroad. The deceased, in accordance with his usual practice, had gone to "F. H." tower to make up the time book for his gang and thereafter in the performance of

a number of duties (which the jury could infer from the evidence) followed his gang from "F. H." tower west on the defendant's railroad toward Elizabethport Station, where the sectionmen would board a train for their respective destinations. "F. H." tower is about 1,000 feet west of the defendant's bridge over Newark Bay. The defendant's railroad from "F. H." tower to Elizabethport is built on a high embankment and is practically inaccessible from either side except by walking along it longitudinally between the two points. At Elizabethport a fence has been erected blocking off access to that part of the railroad which forms part of an interlocking plant which permits trains to be run in either direction on any one of the four main line tracks.

After making up his time book the deceased had to deliver it to the man in charge of the work camp in Elizabethport, so that the men in the gang who lived at the camp would be supplied with meals and lodging. His gang was also to work on the next day, which was Sunday, and he had been requested by the foreman to notify the sectionmen of that fact. The tool box to which the men carried their tools was at Elizabethport and it was his duty to supervise the handling of tools. He was also on his way home along the customary route of employees intending to go to Elizabethport Station for the purpose of boarding a train. While walking along the railroad it was his duty to inspect the rails for defects, etc. These men were all paid their full pay until they reached Elizabethport Station.

As the deceased was walking westerly along the railroad between "F. H." tower and Elizabethport, all of which formed a part of the defendant's interlocking system controlled automatically by levers operated at "F. H." tower, so as to permit trains to run in either direction on any one of

the four main line tracks, he was struck from behind by a train going forty miles an hour through the interlocking plant. At the time he was walking along the southerly rail, track 2, because there were piles of building material between that track and the adjoining track, which prevented him from walking in the space between the two tracks.

The engine failed to give him the customary and usual warnings of several short blasts of the whistle which the rules and practice of the defendant required. The engine failed to have its bell ringing, which was also customary as trains came to and passed through the interlocking plant. The engineer and fireman failed to keep a constant lookout ahead as was customary, under the rules and practice of the defendant. It was a clear day and the engineer and fireman had an unobstructed view ahead of the plaintiff for over a mile. The fireman was seated in his cab and apparently was facing in the direction the train was going, and when so situated, it was his duty to keep a careful lookout ahead. There was a high wind blowing against the plaintiff and the train, which prevented him from hearing its approach. The plaintiff was run down and killed without the customary or any audible warning of the approach of the train.

The jury brought in a verdict in favor of the plaintiff for $40,000. On rule to show cause it was reduced to $30,000. The pecuniary loss suffered by the widow and two children was greater than in *Noon* v. *D. L. & W. R. R. Co.*, 6 N. J. Misc. 285, where the Supreme Court (Gummere, C. J., and Black and Lloyd, JJ.) sustained a verdict of $30,000.

(2)

Alleged Grounds of Appeal.

The alleged grounds of appeal are eight in number, but only one in point of fact. The defendant at the close of the plaintiff's case moved for a nonsuit and at the close of the whole case for a direction of verdict on the *sole* ground that the plaintiff's intestate, as a matter of law, assumed the risk of the injury which resulted in his death. Both motions were denied and the Trial Court also refused to give binding instructions to the jury to the same effect. On the contrary, the Trial Judge left that question to the jury as one of fact in a clear and masterful charge to which no exception was taken by the defendant (p. 201, lines 1-15; p. 202, line 15, to p. 203, line 25; p. 206, line 40). The sole question before this Court is whether the deceased *as a matter of law* assumed the risk of the injury which resulted in his death, or whether that question was one of fact to be submitted to the jury. We contend it was a fact question for the jury.

It is conceded by the defendant (although perhaps not expressly admitted) that

1. The defendant was negligent.

2. The defendant's negligence was the proximate cause of the fatal injury to the deceased.

3. Under the Federal Act, contributory negligence is not a bar but merely goes to reduce the damages.

At no time during the trial did the defendant urge that the foregoing questions should be decided as questions of law, nor did it object to the submission of those questions to the jury as questions of fact.

(3)

Brief of the Argument.

I.

The plaintiff's intestate as a matter of law did not assume the risk of the injuries resulting in his death. That question was one of fact and was properly submitted by the Trial Judge to the jury for their decision.

(a)

The Facts.

The defendant's brief misstates a number of the facts and omits entirely references to many of the vital facts with respect to the defendant's negligence. The nature and extent of the negligence of the defendant is important because, as will be shown, an employee does not under the Federal act assume the risk of injuries resulting from the negligence of the master or his agents or servants; at least, not until he becomes fully aware of the negligence and fully appreciates the danger resulting from the negligence. We shall therefore give a careful review of the testimony with references to indicate where it will be found in the record.

The deceased was thirty-one years of age (p. 118, lines 25-30). He always had been in good health (p. 119, lines 1-20). His foreman said that for seven years he was a steady hard worker (p. 107, lines 25, *et seq.*). He was assistant section foreman on the railroad at Elizabethport, near Elizabeth (p. 11, line 40, to p. 12, line 10; p. 17, line 30, to p. 18, line 20).

Michael Duffy was the only eyewitness to the accident, although he did not actually see the engine strike the deceased and did not know until

an hour later that an accident had happened (p. 33, lines 20, *et seq.*). His testimony was strongly corroborated in all of its essential details by the other testimony in the case, most of which came from the defendant's employees. A review of all the testimony will show that even without Duffy's testimony, a clear-cut jury question was presented. He was repeatedly interviewed by the defendant prior to the trial. The defendant's representative stated that he would be called as a witness, but they failed to ask him to appear at the trial (p. 68, lines 35, *et seq.;* p. 71, lines 35, *et seq.*).

At the time of the trial Duffy was employed as a signal man by the Interborough Rapid Transit in New York (p. 33, line 20). At the time of the accident he was employed by the defendant as a signal maintainer (p. 33, line 20, to p. 34, line 10). His testimony should be read in connection with the map, Exhibit P-1, and the photograph, Exhibit P-5 (copies of which are annexed to the State of Case).

On the day of the accident Duffy was employed from 3:00 P. M. to 11:00 P. M. His headquarters were at "F.H." tower, which is a small building indicated by an "x" in ink over it in the photograph P-5, and is also shown on the map P-1 and marked "F.H. Signal Tower." His duties were to inspect and repair signals and switches at the interlocking plant controlled by "F.H." tower (p. 34, lines 1-25). Duffy was not intimate with the deceased, having known him casually for only a month before the accident (p. 48, lines 1-20).

We shall digress from the testimony of Duffy in order to give the physical layout of "F.H." tower and the interlocking plant controlled by it. Pach, defendant's civil engineer, who made the map P-1, called as a witness by the plaintiff, testified that "F.H." tower was a two-story building above the

level of the tracks with a basement below. The second story contains the machinery and levers which operate the switches and signals of the interlocking plant (p. 14, line 30, to p. 15, line 25). This plant starts at the west end of the Newark Bay Bridge, which is the nearer end of the bridge to "F.H." tower and that end of the bridge is 1,000 feet east of the tower. Beginning there it extends to the westerly end of the map and beyond a distance of 1,800 feet. In length it is 2,800 feet, of which 1,000 feet lies to the east and 1,800 feet to the west of "F.H." tower. The west end of the interlocking plant is east of the Elizabethport passenger station (p. 15, line 20, to p. 16, line 20).

"F.H." tower is a building 30 feet in length which parallels the railroad. The depth is 16 feet and is at right angles to the railroad (p. 16, lines 20-25). The length of the north side of the building which faces the railroad is one sheet of glass. Both sides of the building are glass (p. 16, lines 30-40).

It was undisputed that the plaintiff's intestate was struck by an engine of the defendant at a point in the vicinity of switch 39 on track 2, which is 800 feet west of "F.H." tower and is marked with an "x" on P-1 (p. 17, lines 1-10). The map, P-1, shows many switches in the interlocking plant. These switches are operated automatically from the tower by levers operated by the towerman and these switches connect each of the four tracks so that they can be used interchangeably by trains going in either direction. Within the confines of the interlocking plant, by means thereof, trains can be run in either direction on any one of the four tracks and trains can be switched from any one of the four tracks to any one of the other three (p. 18, lines 20-40). Standing at switch 39 on track, facing east, the railroad is straight as far as the eye can reach (p. 17, lines 20-35). An

engineer seated in the cab of his engine, going west and being at the Newark Bay Bridge or east thereof, can see all the way down to switch 39 and beyond. There is an unobstructed view of over a mile as the engine approaches switch 39, going westerly (p. 28, lines 10-30). A person at "F.H." tower facing the railroad has an unobstructed view in either direction along the railroad as far as the eye can reach or at least for a mile (p. 28, line 35 to p. 29, line 15).

This interlocking plant is part of the defendant's interstate railroad running through the States of New York, New Jersey and Pennsylvania. The four tracks shown on P-1 are the four main line tracks upon which freight and passengers are carried from New Jersey to points in New York and Pennsylvania.

The railroad is built on a very high embankment and is almost inaccessible from either side between the bridge over the Newark Bay and Elizabethport station except by walking longitudinally along it. At "F.H." tower there is a drop of from fifteen to twenty feet from the railroad right of way to the ground on either side and it becomes more steep to the west (see P-5; p. 22, lines 1-30). At a point 300 hundred feet east of the Elizabethport station a fence has been erected, blocking off access to the interlocking plant except along the railroad right of way (p. 20, line 40, *et seq.*).

In any event, it was always the practice of the sectionmen, as well as the employees at the tower, to walk longitudinally along the railroad from "F.H." tower to the Elizabethport station where a train could be boarded for their ultimate destination. They walked along the tracks and when they came to the underpass (which was very narrow and had a track running through it for trains;

see P-1) they would cross to the north side of the railroad to a pathway which was there provided.

Returning to Duffy's testimony, he sat in the glass-enclosed tower and said he had a view along the roalroad east and west of the tower for a distance of 1,500 to 2,000 feet in either direction. It was a clear, cold day and it was daylight. He saw McGarry walking westerly toward the Elizabethport station which is on the opposite side of the railroad, that is, on the north side. "F.H." tower is on the south side (p. 39, line 10, to p. 40, line 15; p. 59, lines 10-20; p. 76, lines 20-25; p. 141, lines 1-20). McGarry walked between the two inside tracks known as 1 and 2 (p. 40, lines 1-15). When he was 200 or 300 feet west of the tower, train 619 passed going westerly on track 2 about 4:24 P. M. (p. 40, lines 15-30; p. 41, lines 1-10; p. 38, lines 20-25). The next train to pass was 707, westbound.

There was a reason why McGarry walked along the southerly rail of track 2 at the point in question, which was an unusual one. It is important to note that he took that position, viz., walking along the southerly rail of track 2, when he was about 200 feet east of switch 39 (p. 62, line 10, to p. 63, line 10). That point can also be identified by the cross-over track 45 on track 2 (p. 62, lines 30-35). When McGarry started to walk along the southerly rail of track 2 there was no train in sight (p. 63, lines 20-25). He had walked along the southerly rail of track 2 over fifty feet when train 707 first appeared (p. 63, lines 10-30). When 707 passed the tower McGarry was between 700 and 800 feet west thereof (p. 63, lines 30-40).

The reason why he walked along the southerly rail of track 2 was that the section crew (of which he was not a member according to Duffy) that had been repairing the tracks and right of way at that point, viz., south of track 2 and between that track and track 1, had dumped from the freight

cars a large amount of building materials which formed hills of stone. There were a number of piles of this material (p. 116, line 20, to p. 117, line 10). This building material extended for a distance of 30 to 40 feet and was covered with snow and ice and somewhat frozen (p. 117, lines 1-10). These piles of building material were about 100 to 150 feet east of switch 39 and south of it on track 2 (p. 117, lines 10-40).

The foregoing testimony with respect to the unusual condition of the right of way was given by McGarry, a brother of the deceased, but it was fully corroborated by the section gang foreman, who said that was the place where one of the gangs was working repairing the track, which was being resurfaced, raised and levelled (p. 139, lines 1-20). This material was dumped in piles from freight cars alongside of the track (p. 139, line 20, to p. 140, line 30). The gang that the deceased worked with, according to Duffy, was the other gang which was working at "F.H." tower (p. 35, line 10, to p. 36, line 20).

These piles of frozen building material undoubtedly compelled the deceased to walk along the southerly rail of track 2 in order to avoid them and their slippery condition.

We now retrace our steps for the purpose of showing what the deceased did before he started to walk down the track. There were two section gangs. One was working in back or south of "F. H." tower making a fill or embankment for the side of the railroad right of way (p. 35, lines 10-25). This gang was about fifty feet east of "F.H." tower and about ten or fifteen feet south of it (p. 35, lines 25-35). McGarry was a member of that gang and when Duffy came on duty at 3:00 P. M. he saw McGarry with that gang near "F.H." tower and McGarry continued working with the gang until 4:00 P. M., when he quit, the

gang quitting at 4:15 P .M. (p. 36, lines 1-30). The other gang was working on main track 2 near switch 39 (p. 36, lines 1-10; p. 139, line 10, *et seq*).

McGarry upon quitting the gang went into the tower to make up the time book for his gang. There was a room in the tower, known as the sectionmen's room, which had a desk and chairs. It was customary for the section foremen and assistant section foremen to use that room whenever they desired to do any writing or to telephone or receive telephone calls with respect to material or labor or orders of any kind or on any company matter. It was a central point for receiving orders and they used the room for the purpose of making out their time books (p. 37, line 30, to p. 38, line 10). McGarry had the time book and he proceeded to make out the time of the men in the gang (p. 36, line 30, to p. 37, line 10). The time book on the trial was shown to the foreman of the gang and he identified the handwriting of the deceased showing that the deceased had filled out the time therein of all the members of the gang down to and including the day of the accident (p. 135, line 10, to p. 137, line 15).

While the deceased was making out his time book he and Duffy had a talk about the purchase of some electric light bulbs (p. 37, lines 10-30). The deceased was at the tower about fifteen or twenty minutes and left about 4:20 saying that he was going to board the 4:42 train at Elizabethport. Duffy looked at his watch and noted the time (p. 38, lines 20-25). After the deceased left Duffy looked at the furnace and then went upstairs to the second floor of the tower which was enclosed in glass. It was his duty to be there during the rush hours from 4:00 to 6:30 P. M. and stand by the towerman in case the signals or switches failed in the interlocking plant so that he could immediately repair them. He had noth-

ing to do but to watch and be ready in the event of an emergency (p. 38, line 30, to p. 39, line 10). It was while he was thus in the tower that he observed McGarry walking toward Elizabethport (p. 39, line 10, *et seq., supra*).

Train 707 did *not* ring its bell or blow its whistle as it came along the railroad past the tower and proceeded toward McGarry (p. 42, lines 20-25). It was going between 35 and 40 miles an hour. The fireman was seated in the left cab facing in a westerly direction, looking ahead (p. 42, lines 25-40).

It was the *custom* on the defendant's railroad when any employee was on the track working, walking or standing and unaware of the approach of an engine, for the engineer to give a number of short blasts (four, five or six) as a warning of the approach of the engine. Also, it was *customary* when engines came to the interlocking plant to have the engine bell ringing. Duffy, who had worked on the railroad as a signal maintainer on two different occasions prior to the accident, so testified as follows (p. 44, lines 10-25; p. 76, line 20, to p. 77, line 40):

> "Q. Now, did you observe prior to this accident when you were on the railroad watching repairing switches and putting in new ones, whether when an engine came along in the interlocking plant, did it blow any whistles? A. Well, when we were walking along the railroad there, the engine, why the engineer he used to give a number of short blasts on a whistle to warn us that they were approaching.
>
> "Q. How many short blasts? A. Four or five or six; there was no standard.
>
> "Q. Were any such short blasts given by 707 on the day of this accident? A. No, sir.
>
> "Q. Was its bell ringing? A. No, sir * * *.
>
> "Q. Now, when you were walking out on the tracks, as you testified in answer to Mr.

Smith, fixing something on the track, so that you had to be on the track, did you get your short blasts of the whistle of the engine? A. Yes, sir.

"Q. When these section men were working out there on the tracks and the train came along, were there short blasts of the whistle blown? A. Yes, sir.

"Q. Did you hear them? A. Yes, sir.

"Q. And how about the engine bell? A. Well, the engine bell they ring it too in the majority of cases.

"Q. Coming into the interlocking plant from Newark Bay bridge, would the engine bell be ringing? A. Yes, sir.

"Q. If a man walking on the track, a section man, would be out there, he would get in addition these several short blasts of the whistle?

"Mr. Smith: I object to that.

"Mr. Markley: I withdraw the question.

"Q. When the men would be walking on the tracks, or you were walking on the tracks, or the section men would be walking on the tracks, what kind of a whistle would you get from the engine, if anything? A. Several short blasts.

"Mr. Smith: I object to that.

"Q. If any section foreman or any member of the gang were walking on the track and the train came along to the point where they were walking, and was approaching, would the engineer give any signal of the whistle?

"Mr. Smith: I object to the question upon the ground that the witness must speak from his observation.

"The Witness: Yes, sir.

"Q. Did you ever see that condition, did you see men walking on the track, section men when trains were coming along? A. Yes, sir.

"Q. What kind of a whistle would they get? A. The engineer blew several short blasts of the whistle.

"Q. How many blasts? A. Four or five or six.

"Q. When the men would be walking along the track and an engine came from behind, wouldn't get any whistle or signal? A. Yes, sir.

"Q. What kind of a signal would he get? A. Well, the same.

"Q. When you were out there working yourself on the track and a train came, what kind of whistle or signal would you get, if any? A. The same."

The proof of the *customary* warning by bell and whistle for workmen to warn them of the approach of an engine is important. Duffy's testimony on these customs was corroborated by the defendant's witnesses, particularly Vanderhoof, who was the passenger train master and the superior of the engineer and fireman, who was called as a witness by the plaintiff (p. 90, lines 20-30). Vanderhoof, subpoenaed to produce the operating rules in effect at the time and place of this accident, testified that it was *customary* under Operating Rule P, on page 18 of the Book of Rules, *to warn employees on the track by a succession of short sounds as an alarm* (p. 88, lines 20-30). The book at page 18 has as its heading, "Engine and Motor Whistle Signals," and a note at the beginning of the rules says: "The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed."

The answers to the additional interrogatories (pp. 254 and 256) numbered 1 and 2, show that the defendant contended that the engine bell was ringing not only on 707 but also on 619 as it approached and passed "F.H." tower, thereby impliedly admitting that it was the custom to have the bells on the engines ringing as they passed through the interlocking plant.

Vanderhoof further testified that it was the positive *duty* of the engineer *to keep a constant lookout ahead* (p. 90, lines 10-15; p. 91, lines 1-30).

Operating Rule 1429 provides that it is also the duty of the fireman, when his other duties permit, to keep a careful lookout ahead and immediately warn the engineer of any obstruction or indication of danger on the track (p. 88, lines 30-40). It is the specific duty of the fireman, when he is seated in his cab as this fireman was, to keep a constant lookout ahead (p. 90, lines 10-25).

The actual contact between the engine of 707 and McGarry was not seen by Duffy because as the train passed the tower, smoke came out of the engine and was blown toward the ground by the wind which was high and the smoke obstructed his view (p. 44, lines 25-40; p. 76, lines 1-15). The wind was blowing from the west towards the east or against McGarry and the train. It was "a pretty stiff wind" (p. 47, lines 20-35). This wind would prevent McGarry from hearing the train without the customary audible warnings by bell and whistle. Duffy sat in the tower believing that the deceased had escaped injury until 5:30 P. M., an hour later, when a policeman came to the tower and reported the accident (p. 44, line 40, to p. 45, line 10). Duffy accompanied the policeman to the point where the body lay and it was twenty-five feet west of switch 39 on track 2. A capital "B" appears on the map P-1 at the point where the body lay (p. 45, lines 10-40). The deceased's head was against the southerly rail of track 2 and his feet were in a southerly direction from the rail (p. 45, lines 20-40; p. 250, lines 20-25). One of his rubbers was knocked off and his head was injured on the right side. There was blood from his cheek bone upward. There was blood in his mouth and on his lips and it was also coming from his nose. His cap lay about fifteen feet east of the

body (p. 250, line 25, to p. 251, line 10). The death certificate made by the county physician, which was offered in evidence, corroborated the foregoing testimony and showed that death was caused by a fracture of the skull, fractures of the left arm and leg, as a result of being struck by a locomotive at Elizabethport (p. 225, lines 20-30). This was *prima facie* evidence as to the cause of death, for under Sections 28 and 29 of the Evidence Act, "Such certified transcripts shall be received as *prima facie* evidence of the matters and fact therein stated."

Vanderbilt v. *Mitchell,* 62 N. J. E. 910, 914;
State v. *Kottjen,* 89 N. J. L. 678, 684;
State v. *Suleimen,* 126 A. 425, 426;
Nestico v. *D. L. & W. R. R. Co.,* 133 A. 83.

The deceased had a number of duties to perform as he walked from "F.H." tower toward the Elizabethport station to board a train. The jury at least had the right to infer that he had. Any one of these was sufficient to entitle him to the exercise of reasonable care by the defendant for his safety. Around 4:00 P. M. he had left his gang for the purpose of making out his time book. A copy of this record had to be left by him or one of the employees in the section gang with the person in charge of the laborers' camp near Elizabethport. Unless the record showing who worked that day was delivered to the man in charge of the camp, the laborers would get no supper. It, therefore, had to be turned in each night. So testified the foreman, Donahue (p. 113, line 25, to p. 114, line 10). It was after he had made out this record that the deceased started down the track toward the camp at Elizabethport, and undoubtedly it was his duty either personally to deliver the record to the

commissary or have one of the sectionmen do so. He was alone at the time so that undoubtedly he would have delivered it when he reached Elizabethport.

This accident happened on a Saturday and the section foreman, Spangenberg, desired the men to work the next day—Sunday. At 3:30 of that day Donahue, also section foreman, heard Spangenberg instruct the deceased to direct all of the sectionmen to return the next day (p. 114, lines 10-25). Again, McGarry had charge of directing the men to take their tools to the tool box which was on the north side of the railroad near the Elizabethport station. It was his job to see that the tools were put in the tool box (p. 141, lines 1-40). McGarry also had to arrange for the bringing of the tools up the next morning to the place where they were working (p. 114, lines 20-25). McGarry was only four or five yards behind the members of his gang as they proceeded toward the tool house, the laborers' camp and the Elizabethport station, according to the towerman, Horstmann, who is still in the employ of the defendant (p. 95, lines 1-15). It is clear that he made up his time book between 4:00 and 4:15 with the idea of being with his gang when they quit work at 4:15 at "F.H." tower so that he might direct their movements as they proceeded to the laborers' camp, the tool house and the Elizabethport station (p. 36, lines 20-25). McGarry ordered the men to take the tools to the tool box (p. 141, lines 25-40). The men and McGarry were all paid until they reached Elizabethport which was where the laborers' camp and the tool house were located (p. 141, lines 20-40). It was the duty of the section foreman to walk the tracks to inspect them and ascertain their condition (p. 107, lines 1-20). All these inferences were for the jury. Finally McGarry was using the customary route (the jury had the

right to infer it was the only practical route) to get to and from his work in the interlocking plant at "F.H." tower to Elizabethport station.

While in a civil case at law, on appeal, an appellate court has no concern with the credibility of witnesses or the weight of evidence, but is concerned only with correcting errors in law (*Osborne* v. *De Young,* 122 Atl. 809; *Martin* v. *De Young,* 122 Atl. 813; *Stickle* v. *Vreeland,* 2 N. J. Adv. Rep. 365), counsel for the defendant has attacked the credibility of the only disinterested witness in the case, Duffy, and we therefore pause to point out that the cross-examination of Duffy in no way shook his testimony on direct, but, on the contrary, reinforced it (p. 49, line 20, *et seq.*). Failing there the defendant produced three different written statements taken by claim agents at various times which corroborated Duffy's testimony in the main but with respect to vital facts they were remarkably silent or confused. These statements, piecemeal, cover various phases of what occurred and were written by the claim agent. The first statement (pp. 250-251) dealt wholly with the discovery of the body by Duffy and the policeman and failed to cover what Duffy had observed prior to the policeman's report of the accident. It was taken on Sunday (the day after the accident) and the claim agent was undoubtedly in a hurry. A supplemental statement was taken on September 7, 1928, two years later, in which the fact is revealed for the first time that Duffy saw and talked to McGarry prior to the call of the policeman. In so far as it covers what happened from three o'clock on, it specifically coincides with Duffy's testimony. It will be noted that this statement but briefly refers to what occurred in the tower when Duffy and McGarry were there together and after McGarry left (pp. 248, 249). The third statement in the form of a letter again fully cor-

roborates Duffy's testimony (p. 72, line 30, to p. 74, line 20). It is, therefore, apparent that Duffy's complete knowledge of what occurred from three o'clock on was taken picemeal by a negligent or careless claim agent and thereby vital facts were suppressed each time. Duffy readily admitted signing the statements but at the same time just as positively stated that he did not read the statements assuming that the claim agent knew what he was doing and that he had properly written down the answers (p. 52, lines 15-20; p. 54, lines 10-15; p. 54, line 40, to p. 55, line 10). Duffy is heartily corroborated by the towerman, Horstmann, still an employee, who said he put in his statement whatever was usual to put in such statements, that is, whatever the claim agent wanted to put in (p. 102, line 35, to p. 103, line 10).

The defense of this case was peculiar. No attempt was made to combat the plaintiff's proof. On the contrary, the defendant's testimony in the main substantiated and corroborated the plaintiff's. The answers to interrogatories (p. 10, line 30, *et seq.*) show that the defendant admitted that the deceased was struck at or near switch 39 on track 2 at a point about 800 feet west of "F.H." tower shortly prior to 4:31 P. M. The body was found about 4:31 by the fireman of the work train, namely, Wichard, which train followed 707 on track 2. He verified the answers to the interrogatories appearing on pages 10 and 11 of the record, numbered 1, 2, 3, 5 and 7. Train 707, according to answer to interrogatory 8, passed the point where the body lay between 4:30 and 4:31 P. M. (p. 11, lines 30-40). This interrogatory is verified by Horstmann, the towerman, so that right after 707 went by the body was found by Whichard, the fireman of the work train, which followed it. It must have been fairly light for

him to see the body lying there upon the railroad and apparently he was keeping a lookout ahead or he would not have seen it (p. 163, lines 30-40).

The engineer of train 707 was not called as a witness. An attempt was made to explain his absence by saying he was ill (p. 184, line 40, to p. 185, line 15). This accident happened nearly two years prior to the trial and no effort was made during that period of almost two years, during a good part of which he was supposed to be ill, to take his testimony, although his doctor said he was mentally all right even at the time of the trial (p. 185, lines 20-40). The fireman of 707, although called as a witness, was asked nothing about his duty or that of the engineer to keep a constant lookout ahead and to have the engine bell ringing as the engine entered the interlocking plant 1,000 feet west of "F.H." tower. He was asked nothing about the custom to give five, six or seven short blasts of the whistle to warn employees on the track forming part of the interlocking plant (p. 176). Therefore, there could be no cross examination on those points (p. 176). No other member of the operating department was called to deny the rules and customs proven to exist by the plaintiff for the purpose of warning employees on the track.

The defense of the case seemingly was rested solely on attempting to prove that the first train, 619, struck McGarry and not 707. This defense rested wholly on the testimony of Whichard, the fireman of the work train, who testified that the work train went through on track 2 ahead of 707 and that he discovered the body as his engine passed switch 39 (p. 164, line 5, *et seq.*). Whichard's testimony was destroyed in two ways; first, on cross examination he admitted that he gave and verified the answers to paragraphs 1 and 2 of the additional interrogatories (p. 177, line 10, *et*

seq.; pp. 256, 257). His verification was "that he has read the foregoing answers to additional interrogatories and that the matters and things contained in the answers to the 1st and 2nd are true to the best of his knowledge and belief" (p. 257, lines 1-15). In additional interrogatory 2 the defendant was asked, "On December 18, 1926, did train 707 give any audible signal by bell or whistle of its approach as it passed 'F.H.' tower and proceeded toward switch 39? If it did, please describe what kind of audible signal was given by it," and the answer by Whichard was, "Yes. Bell." If the work train of which he was fireman had proceeded to Elizabethport ahead of 707, how did he know that 707 gave any audible signal as it came to and passed "F.H." tower? Also, he answered under oath in the same way the original interrogatories 1, 2, 3, 5 and 7 (p. 10, line 30, to p. 11, line 30). These interrogatories show that the plaintiff's body was found (and Whichard found it) about 4:31, 4:32 or up to 4:35 P. M. (p. 11, lines 1-40), and yet the train 707 passed the point between 4:30 and 4:31, according to the towerman, Horstmann, who answered interrogatory 8 (p. 11, lines 30-40). Secondly, Whichard's testimony was demolished by Horstmann, the towerman, who testified positively that he saw McGarry walking along the railroad after train 619 had passed, and further that he held up the work train on track 4 until after he had put 707 through on track 2 (p. 97, line 20, to p. 100, line 30). Specifically, Horstmann said (p. 98, line 30, to p. 99, line 10):

> "The last I saw McGarry was when I saw him walking diagonally across the tracks. He had left the eastbound and was walking toward the westbound on the space between the two sets of tracks, in the middle between the two sets. He was at least one hundred yards

> from here ('F.H.' tower) at the time, west * * *. They were all west of McGarry. At that time there was a train coming westward, either 707 or 109. Train 707 is due here at 4:30 P. M., and 109 is due here at 4:50 P. M. * * * The wind was blowing from the north and the smoke from the train that passed immediately after I saw McGarry crossing towards track 2 obstructed my further view of him. After the train passed and the smoke cleared up, I looked to see what became of him and could not see him."

Horstmann controlled the putting of the trains on the different tracks. He further said (p. 97, line 35, to p. 98, line 5):

> "The first train that passed here after McGarry left the tower at 4:20 was train 619, which is due to pass here at 4:24, and was on time. It was on track 2. The next train was 707, due to pass here at 4:31 P. M. on track 2. *The jitney I held to follow 707. It came on track 4 and I put it on track 2, following 707.*"

It is therefore apparent that Horstmann saw McGarry walking along the railroad after train 619 had passed. He reiterated that he saw McGarry walking along the railroad as train 707 approached (p. 104, lines 20-30).

It would be well to compare the two written statements made by Horstmann, one on December 19, 1926, and the other on December 20, 1926 (pp. 232 to 235). In these statements he contradicts himself in very important particulars. He identifies McGarry quite positively and testifies to his movements before the accident, and yet on the trial of this case he denied absolutely seeing McGarry at all on the day of the accident. He said in answer to the question, "As a matter of fact, didn't you see McGarry walking up the track?"

"No, I didn't" (p. 94, lines 25-30). This witness could not recall whether he had made one or two statements for the railroad company and admitted that he could not recall the details of the accident (p. 151, lines 1-15).

It is further apparent from the quotations *supra* from Horstmann's testimony that there was no definite time for this train to pass "F.H." tower, for he says that 707 was due at 4:30 in the first quotation and at 4:31 in the second. There was no station at this point. Elizabethport was approximately a mile to the west and Bayonne was miles to the east (p. 16, lines 1-20). At "F.H." tower the track was straight for miles and the engineers if late could make up their lost time. If the work train preceded 707 to Elizabethport then 707 was indeed late and was making up time, for the work train did not reach Elizabethport until 4:32 P. M. (p. 165, line 20). Whichard's testimony came to an end with his admission that he did not know whether 707 had its bell ringing or not (p. 180, lines 1-15).

The defendant attempted to prove that the sectionmen were supposed to look out for themselves, but this proof did not overcome the positive proof of the custom with respect to engine signals and constant lookout of the engineer and fireman offered by the plaintiff and, secondly, it was limited solely to the situation presented by a gang of sectionmen working on the track in the presence of the section foreman or his assistant. The two section foremen were called on the point and testified that when there was a gang working on the track and a train approached, under the system of work it was the duty of the foreman or his assistant attending the gang to blow a whistle and then the gang would leave the track (p. 133, lines 10-20; p. 109, lines 20-40). This is an entirely different situation from that presented by an em-

ployee walking, standing or working alone on the railroad with his back to the train as it approaches and unaware of its approach.

(b)

The Law.

Having in mind the facts, did the deceased as a matter of law assume the risk of the injury resulting in his death? Under the Federal Employers' Liability Act (8 U. S. Comp. Stat. 8399, sec. 8657) the employer is liable to the employee and to his estate in the event of his death when he is employed in interstate commerce, for such injury or death "resulting *in whole or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, etc., or other equipment." Under Section 3 (U. S. Comp. Stat. 9423, sec. 8659) "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

That the deceased was not engaged in interstate commerce is not urged here by the defendant. It is clear that he was engaged in interstate commerce. The United States Supreme Court settled that question in reversing this Court in the case of *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, at page 172, where, in a case which is almost identical on the facts, the Supreme Court held:

> "The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248, 260. Like his trip

> through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment was also extended to intrastate commerce is for present purposes of no importance."

The United States Supreme Court has repeatedly held that in an action under the Federal Employers' Liability Act, the doctrine of assumption of risk has no application when the negligence of a fellow servant which the injured person did not forsee, is the proximate cause of the injury. That Act places a co-employee's negligence when it is the ground of the action in the same relation as that of the employer upon the matter of assumption of risk. The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee. The effect of the statute is to abolish in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff.

The Second Employers' Liability Cases, 233 U. S. 1, 49;
Gila Valley Globe, etc., Ry. Co. v. *Hall,* 232 U. S. 94, 102;
Yazoo & Miss. R. R. Co. v. *Wright,* 235 U. S. 378;
N. Y. C. & H. R. R. Co. v. *Carr,* 238 U. S. 260;

Chesapeake & Ohio Ry. Co. v. *De Atley,* 241 U. S. 310, 313;
Chicago, Rock Island & Pac. Ry. Co. v. *Ward,* 252 U. S. 18;
Reed v. *Director General,* 258 U. S. 93.

In *Reed* v. *Director General,* 258 U. S. 92, at 94, the United States Supreme Court held:

> "Accepting the view that the engineer's negligence was the proximate cause of the fatal injury, the court below held the decedent had assumed the risk of such negligence and the master was not liable, citing among other cases *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492. This we think was error.
>
> "*Seaboard Air Line Ry.* v. *Horton*—often followed—ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section 'has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff.' The Second Employers' Liability Cases, 233 U. S. 1, 49, declared that 'the rule that the negligence of one employe resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employe.' And in *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, we said: 'The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk.' See *New York Central & Hudson River R. R. Co.* v. *Carr,* 238 U. S. 260; *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310, 313.
>
> "In actions under the Federal Act the doc-

trine of assumption of risk certainly has no application when the negligence of a fellow servant which the injured party could not have foreseen or expected is the sole, direct and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaging in interstate commerce shall be liable to the personal representative of any employee killed, while employed therein when death results from the negligence of any of the officers, agents or employees of such carriers."

In *Yazoo & Miss. R. R.* v. *Wright,* 235 U. S. 378, *supra,* Chief Justice WHITE, speaking for the United States Supreme Court, held:

"Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated absolutely preclude all inference that the engineer knew or from the fact shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train.

"The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employes of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result

> from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Ward,* 252 U. S. 18, 21, the same Court defined the settled rule with respect to assumption of risk under the Federal Act as follows:

> "As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310, 315: 'According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of action, in the same relation as that of the employer upon the matter of assumption of risk."

It is therefore clear that under the settled law of the United States Supreme Court construing the Federal Employers' Liability Act, it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose

conduct the employer is responsible. On the other hand, the employee has the right to assume that the employer or his agents have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. The employee has the right to assume that the employer and his agents have exercised for his safety such care as the circumstances will reasonably permit and such care as is ordinarily exercised in the customary operation of the railroad for his safety. *Smith* v. *Payne,* 269 Fed. 1, 4. *Lehigh Valley R. R. Co.* v. *Doktor,* 209 Fed. 760, 763, 764.

The deceased had a right to assume that the defendant in the exercise of reasonable care for his safety, would operate the railroad in the customary and usual manner. He had a right to assume that if a train came along on track 2 behind him, with a clear view of him for a mile, the engineer or the fireman, or both, in the exercise of reasonable care in the performance of their duty, to keep a constant lookout ahead, would see him and warn him in the usual and customary manner by the ringing of the engine bell as the engine approached and entered the interlocking system and by giving five, six or seven short, sharp blasts of the engine whistle as it proceeded toward him.

He had a right to assume as he took the usual pathway toward Elizabethport, that was used by other employees, that it would not be covered with piles of building material compelling him to walk along the southerly rail of track 2. It is undisputed that he had to walk for a distance of fifty feet along the southerly rail and that was before train 707 first came into view (p. 63, lines 20-40). The train was going thirty to forty miles

an hour. If it was going thirty miles an hour, it would cover forty-four feet a second and it would take the engine two minutes to cover the distance of a mile of straight track and clear view. If the engine was going forty miles an hour, there would be a lapse of over a minute and a half. During all that time, the plaintiff's intestate was in plain view in a perilous position, because of the approach of the train without the customary signals, with his back to the train. The wind was blowing from the west towards the east in the face of McGarry and the train. It was "a pretty stiff wind" (p. 47, lines 20-35). This wind would prevent McGarry from hearing the approach of the train without the customary audible warnings or alarms by bell and whistle. It was the duty of the engineer to keep a constant lookout ahead in any and all events and it was the duty of the fireman when seated in his cab with nothing else to do, which is the fact in this case, to likewise keep a constant lookout ahead and immediately warn the engineer of any unusual condition on the track.

The circumstances were such that the deceased had a right to assume that there was ample time and opportunity for the engineer and fireman to observe him and to give him the customary audible warnings by bell and whistle. The jury had the right to find that both the engineer and fireman were negligent in failing to keep a proper lookout ahead as required by the rules of the defendant and in failing to give the customary audible warnings by bell and whistle of the approach of the engine and that as a proximate result, the deceased received the injuries from which he died.

Whether the plaintiff's intestate was unconscious of the approach of the train, was for the jury to say. He is dead and cannot speak for himself. Certainly it cannot be said as a matter of

law that he committed suicide and to charge him with assumption of risk in this case would be to charge him with knowledge that the train was approaching without the lookout of the fireman and engineer as required by the rules, and without the audible warnings by bell and whistle required by the custom and rules. The law is settled that where there are no eyewitnesses to the death, the law will presume that the decedent, acting on the instinct of self-preservation, was in the exercise of ordinary care; there is no presumption that he committed suicide.

The general rule is stated in *17 Corpus Juris*, p. 1304, paragraph 167d as follows:

> "In most jurisdictions the rule is that where there are no eyewitnesses to the death, the law will presume that decedent, acting on the instinct of self-preservation, was in the exercise of ordinary care; there is no presumption of law that he committed suicide."

In the case of *Danskin* v. *P. R. R. Co.*, 97 N. J. L. 526, at p. 529, this Court, TRENCHARD, J., states the rule as follows:

> "In view of the presumption of due care on the part of the decedent, we are of the opinion that this evidence left the question of his contributory negligence in doubt, and in such case it was for the determination of the jury. *McLean* v. *Erie R. R. Co.*, 40 Vr. 57."

In any event, the question whether the danger arising from being run down by a train negligently operated both with respect to observations to be made by the engineer and fireman and audible warnings to be given by bell and whistle under the custom, practice and rules of the defendant, was for the jury. If this engine was operated by the owner and operator of the railroad, assum-

ing the owner and operator to be a person and not a corporation, there can be no question as to the liability under such circumstances and there is no distinction to be made where the engine is operated by the agents and servants of the owner and operator of the railroad.

The rule is well settled in this State that where the evidence of negligence is circumstantial and where probability may be all that is attainable, all that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability rather than of certainty, exclude the inference favorable to the defendant.

Hannon v. *D. L. & W. R. R. Co.,* 98 N. J. L. 191, 193;

Austin v. *Penn. R. R. Co.,* 82 N. J. L. 416, 617;

Goodman v. *L. V. R. R. Co.,* 78 N. J. L. 317;

Suburban Electric Co. v. *Nugent,* 58 N. J. L. 659.

The jury had a right to conclude that the deceased in the performance of any one of a number of duties which he was performing for the defendant, was walking toward Elizabethport. He had to deliver the time book to the commissary at the camp so that the laborers could be fed and housed. He had to arrange for the delivery of the tools at the toolhouse. He had to notify the men to work the next day, which was Sunday, there being no work ordinarily on Sunday. As he walked along the railroad as section foreman, it was his duty to continually observe the condition of the roadbed. Both he and the workmen generally were regarded by the defendant as still employed until they reached Elizabethport and were paid for their time from their place of work at "F.H."

tower to the Elizabethport station. The jury had a right to conclude that by reason of the piles of material, the deceased walked along the southerly rail of track 2. This was an unusual condition brought about by the defendant and there is no proof in the case that the deceased had knowledge of this unusual condition or at least that question was for the jury. The jury had a right to conclude that the engineer and fireman failed to keep a constant lookout, failed to use due care to observe the deceased, failed to give him the customary warnings by bell and whistle and that the train ran the deceased down while being negligently operated, which negligence was unknown to the deceased. Under such circumstances the Trial Court under the federal decisions cited, *supra*, could not non-suit or direct a verdict for the defendant. Those decisions have been repeatedly followed by the decisions of this state. The defendant in its brief refers to some of these decisions, but the more important are not referred to. Defendant refers to *Cervona* v. *D. L. & W. R. R. Co.*, 95 N. J. L. 246, decided by this Court for the rule that an employee is entitled to an audible warning, "Where it appears that such employees are engaged in work, the nature of which requires a warning being given them." Counsel missed the real purport of that decision which was that the fireman was negligent in failing to keep a lookout as the engine was proceeding backward or in reverse order and the failure to give warning was not assumed by the deceased as a matter of law, but on the contrary, it was for the jury to say whether that risk resulting from the negligence of the defendant, was an obvious one, if the question could be said to be in the case at all. This Court adopting the opinion of the Supreme Court held:

"The deceased was a section hand upon the railroad, and at the time of the accident was engaged with a fellow employe in repairing the track switch appliances. On his return from lunch he was run over by a light engine backing up on the main track near the place where the plaintiff had been working in the forenoon.

"There was no actual witness of the occurrence. It was shown to be the duty of the fireman to keep a lookout along the track. At this time he was engaged in clearing his fires, and no lookout was maintained. If the accident occurred from this failure of the fireman to perform his duty, the case was manifestly one of negligence of a fellow servant, and cognizable as such under the federal act.

"There is no proof that the deceased negligently stepped in front of the engine. There was testimony that no signal of any kind was given, and there was proof that the fireman was not attending to his specfic duty of keeping a lookout along the track and that the engine was coming down the track in the reverse order, a situation from which it might be reasonably argued that in the absence of a lookout a signal of the approach of the engine along the main track should have been given. There was sufficient in the case from which the jury might reasonably infer that the accident was produced by the negligence of a fellow employe, and that fact was sufficient upon which to predicate the action under the federal act, and carry the case to the jury, even if there was proof of contributory negligence as a proximate cause. If the case were here upon a rule to show cause, the argument as to the weight of evidence would be *apropos,* but in this appeal we are not concerned with that question. *Grybowski* v. *Erie R. R.,* 88 N. J. L. 1, affirmed 89 *id.* 361; *Santomassimo* v. *N. Y. S. & W. R. R.,* 92 *id* 10.

"Whether the deceased assumed the risk as an obvious one was not undisputed on the evidence, and, therefore, if it was in the case at all, was a jury and not a court question

under our cases. *Armbrecht* v. *D. L. & W. R. R.*, 90 N. J. L. 529; *Tonsellito* v. *N. Y. C. R. R.*, 87 *id.* 651.

"We think the situation created by the facts in the case presented a jury question, and that the motion to direct a verdict, as well as the motion to direct a nonsuit, were properly refused.

"The judgment will be affirmed."

The New Jersey cases are uniform following the federal decisions that where it is customary for an engine to give audible signal by bell or whistle or both for the purpose of warning employees on the track, the failure to give such warning is negligence on the part of the defendant and that negligence is not assumed by the employee, and the risk is not so obvious as to charge him with knowledge of it as a matter of law, but on the contrary, the question of assumption of risk under such circumstances is invariably for the jury.

Albanese v. *Central R. R. Co.*, 70 N. J. L. 241;

D'Agostino v. *P. R. R. Co.*, 72 N. J. L. 358;

Germanus v. *L. V. R. R. Co.*, 74 N. J. L. 662;

Grybowski v. *Erie R. R. Co.*, 88 N. J. L. 1, 4, affirmed on the opinion below, 89 N. J. L. 361;

Willever v. *D. L. & W. R. R. Co.*, 89 N. J. L. 697;

Armbrecht v. *D. L. & W. R. R. Co.*, 90 N. J. L. 529, 531;

Santomassimo v. *N. Y. S. & W. R. R.* Co., 92 N. J. L. 10;

Swank v. *P. R. R. Co.*, 94 N. J. L. 546;

Steidter v. *P. R. R. Co.*, 94 N. J. L. 199;

Hannon v. *D. L. & W. R. R. Co.*, 98 N. J. L. 191, 194;
Nestico v. *D. L. & W. R. R. Co.*, 133 Atl. (N. J. S.) 83, 84.

Precodnick v. *Lehigh Valley Railroad Co.*, 74 N. J. L. 566, is not applicable to the case at bar, first because it is not a decision construing the Federal Employers' Liability Act which relieves an employee of negligence of a fellow employee and makes the employer liable therefor to the employee injured. *Swank* v. *Penn. R. R. Co.*, 94 N. J. L. 546, *supra.* Secondly, because in the *Precodnick* case, there was no evidence that it was *customary* to give a warning. In the case at bar, it was customary. Finally, the circumstances of the case at bar, irrespective of any custom or practice, required a warning, because the engineer whose duty it was to keep a constant lookout, had a distinct and clear view up the track to the point where the deceased was struck, according to the defendant's own testimony, of at least a mile. *Albanese* v. *Central Railroad Co.*, 70 N. J. L. 241.

In the *Precodnick* case it appeared without dispute that it was the custom for the employee to look out for his own safety and that he did not rely on *any* warning from the engine to warn him of the approach of trains. The Court in that case refers to *Albanese* v. *C. R. R. Co.*, 70 N. J. L. 241, and distinguishes it on the ground that although in that case there was no custom to give signals of approach of trains, yet the workman, *because of the circumstances of the case had the right to expect that if he were actually working on the track in such a position as prevented his seeing the approaching train, the engineer of the train, having the workman in sight, would nevertheless sound a warning and not run him down.*

In *Albanese* v. *C. R. R. Co.*, 70 N. J. L. 241, at page 242, this Court, speaking through Dixon, J., said:

> "In the present case the fact that there was no custom to give signals and that no instructions were issued to workmen about the approach of trains, may have resulted from a belief that, ordinarily, the workmen were exposed to no danger which, with reasonable care they could not avoid, that, ordinarily, they could 'look out for themselves,' but it surely would not induce a workman to expect that, if he were actually working on the track in such a position as prevented his seeing an approaching train, the engineer of the train, having the workman in sight, would fail to sound a warning and so run him down. Such exceptional conditions required and therefore justified the expectation of an audible signal, *whether signals were customarily given or not.* In this respect the case differs from *Furey* v. *New York Central and Hudson River Railroad Co.*, 38 Vroom 270, and *Harmer* v. *Reed Apartment Co.*, 39 *id.* 332, for in those cases the person, from whom any warning might be expected, had no means of perceiving the danger of the plaintiff and hence had no reason to give warning unless there was a custom to do so. But no such custom is necessary, when the person controlling the cause of danger perceives the peril and has reason to believe that it cannot be escaped unless he gives warning.
>
> " 'It thus becomes evident that, when Agostino, in the discharge of his duty, placed himself in a position of danger which would be apparent to the engineers of approaching trains, he had a right to expect a warning from those engineers. *If there be a right to expect a warning, it makes no difference in principle whether the right springs from custom, as in Harmer's case, or from usual conditions, as in Hardy's case, or from exceptional conditions, as in the present case, and under such circumstances questions con-*

cerning the assumption of risk and contributory negligence cannot be decided by the court against the party injured. They are for the jury.'"

It will be noted that this Court says the right to expect a warning may spring from custom or from usual conditions or from exceptional conditions. We submit that in the case at bar the deceased had a right to expect a warning by bell and several short blasts of the whistle not only by reason of the customary practice to that effect which prevailed for years on the defendant's railroad, but also because of the conditions and circumstances of the case. The engineer who was supposed to keep a constant lookout so as not to injure trackmen and workmen, had a plain view of the plaintiff's intestate for a mile as he approached the place where the deceased was walking. Going at 30 miles an hour the engineer had a clear view of deceased for two minutes before he struck the deceased. The deceased had the right to expect that the engineer, having him in plain sight for that distance and length of time, would warn him and not run him down without warning. Furthermore, the custom on the defendant's railroad was to warn trackmen either walking or working along the track, and that custom was not disputed. There was also the exceptional condition of the piles of building material on the railroad. In *D'Agostino* v. *P. R. R. Co.,* 72 N. J. L. 358, the deceased, under the custom prevailing on the defendant's railroad, was entitled to a warning of the approach of the train. No warning was given. The Supreme Court, at page 360, said:

"On this state of facts we think that the deceased had a right to rely upon the fact that, if there was any danger from an approaching train the customary warning would be given. There was no error in the refusal to

nonsuit or to direct a verdict for the defendants.

"Where a workman in the discharge of his duty has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning was given, the question of whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court."

In *Germanus* v. *L. V. R. R. Co.*, 74 N. J. L. 662 *supra* (at p. 664), this Court in a case where it was customary to warn a trackman, said:

"I think the motion to nonsuit was properly denied. As the case stood when the case for the plaintiff was closed there was proof uncontradicted that it was the custom of the company, by its foreman, to warn men working on the tracks, as this gang were, of the approach of trains, and that in this particular instance the warning was not given. The deceased had the right to rely upon such a warning being given in case there was any danger from approaching trains. *D'Agostino* v. *Pennsylvania Railroad Co.*, 43 Vroom 358. It was correctly held in that case that where a workman, in the discharge of his duty, has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning is given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court."

The cases referred to were decided under the common law of this State, under which a servant could not recover against the master if the accident was due to the negligence of a fellow servant. Also the contributory negligence of the employee, no matter how slight, was an absolute bar to recovery.

In *Swank* v. *P. R. R. Co.,* 94 N. J. L. 546, 551, this Court held that the common law doctrine of assumption of risk, where it arises out of the negligent acts of a fellow servant, has been abolished by the Federal Employers' Liability Act, and that contributory negligence presents merely a basis for the reduction of damages. Also that where it is the custom to warn trackmen by the blowing of the engine whistle, the failure to give warning is negligence. At page 551, the Court held:

> "In support of its position, defendant refers us to the case of *Precodnick, Administratrix* v. *Lehigh Valley Railway Co.,* 74 N. J. L. 366, but there it was proven to be the custom that when one was working alone and separate from the rest of the gang, he should look out for his own safety, whereas, in the case *sub judice,* the custom was that the men must be warned at all times of approaching trains by the blowing of a whistle."

It will be noted that the *Precodnick* case is again distinguished and held not applicable.

The case of *Willever* v. *D. L. & W. R. R. Co.,* 89 N. J. L. 697, reversing 87 N. J. L. 384, was under the Federal Employers' Liability Act. This Court pointed out that the case of trackmen working in railroad yards where no system of audible warning could be devised because of the continual drilling of cars and trains, was not applicable to a trackman working along the right of way of the railroad company in plain view of the engineer of an approaching train, who was supposed to keep a lookout. At page 704, this Court said:

> "In the present case, on the contrary, the deceased knew that he was in a place where 'drilling' was not carried on, where cars were not being shunted about it making up trains, and as to the quarter-of-a-mile-long train of empty freight cars standing on an incoming

track, with no engine attached nor crew in charge, that he was protected by one of the rules forming a part of the system established by the defendant company for the 'movement of trains' which required that if that train were moved in his direction by being pushed from the other end, a man was required to first take 'a conspicuous position on the front end of the car' nearest him 'to signal the engineman in case of need,' and that a man so placed would of course see him at his work on the track only two hundred feet in front and not give the signal to start backing without warning to him to get out of the way. *Albanese* v. *Central Railroad Co.*, 70 N. J. L. 241. We think the essential difference between the two cases consists in the fact that here the cars, before the engine and crew came after them, were in a place and in a condition which indicated that they were not being 'drilled,' but that, on the contrary, they, when moved, would only be moved as a 'train' from that place to some other place, and therefore, in accordance with the rules of the system applicable to the 'movement of trains' provided for the safety of the employees whose duties took them on the track in front. We think the present case falls rather within that line of cases illustrated by *D'Agostino* v. *Penn. Railroad Co.*, 72 N. J. L. 358, in the Supreme Court, and *Germanus* v. *Lehigh Valley Railroad Co.*, 74 *id.* 662, in this court, both of which hold that where a system or custom of warnings under certain circumstances is established, the employees involved had the right to rely upon such warnings being given, and that failure to give them, resulting in injury, constitutes a cause of action.''

In *Santomassimo* v. *N. Y. S. & W. R. R. Co.*, 92 N. J. L. 10, where the plaintiff's intestate was struck by a passenger train which failed to give timely warning, and the suit was brought under the Federal Employers' Liability Act, the Supreme Court said:

"We think that the jury was justified from the proofs submitted in finding the following facts: 1. That it was the custom in the operation of the defendant company's trains to give a warning signal, consisting of several short blasts of the whistle, whenever anybody, whether an employee or stranger, was seen working on the track in apparent unconsciousness of the approach of a train. 2. That Di Pierro was unconscious of the approach of the passenger train from his rear until the engineer of that train blew the warning signal 3. That this signal was not given until the passenger train was so close to Di Pierro that he was compelled to act almost automatically in leaving the passenger track in time to escape the danger of being struck by the passenger train; that is to say, without having time to consider or observe whether, in attempting to avoid the danger threatening from his rear, he would reach a place of safety, or a place of equal danger. If the jury found these facts it was then for them to determine whether the engineer of the passenger train was not guilty of negligence in failing to give the warning signal to Di Pierro soon enough to enable him to discover whether it would be dangerous to step over on the freight track. The presumption is that the jury resolved all of these factors against the defendant company, and we cannot say that they were not justified in doing so under the evidence submitted to them.

"It is next argued that the rule should be made absolute for the reason that Di Pierro assumed the risk of just such an accident as that which brought about his death, and it is said that all the authorities hold this view. We do not so understand the trend of the decisions. Under the federal statute an employee does not assume a risk which arises out of the negligence of a fellow employee."

In *Nestico* v. *D. L. & W. R. R. Co.*, 133 Atl. 83, *supra,* the Supreme Court in the case of a trackman held:

"The first contention is that the verdict is against the weight of the evidence. We think this contention is without merit. The jury was entirely justified in finding that it was the duty of the defendant company to use reasonable care to protect its track laborers while at work on the tracks, and that it had failed in the performance of its duty. There is no suggestion that the engineer who was driving the engine which the plaintiff claimed ran the decedent down blew a whistle or did anything else to give warning of its approach. It is said that the alignment of the track at this point was such as to prevent the engineer from seeing the decedent. But, if that is so, then it was for the jury to say whether the company ought not to have provided some other method of protecting him. It was further argued on this point that, because the engineer testified that he did not see the decedent on the track, and did not know that he had been killed until some time after the accident happened, the jury was not justified in finding that the decedent was run down by this engine. We think there was plenty of testimony to support that conclusion."

In *Armbrecht* v. *D. L. & W. R. R. Co.*, 90 N. J. L. 529, 530, this Court said:

"The question of negligence is more difficult. The failure of the engineer of the passenger train to blow a whistle until too late for any good does not indicate negligence, since he could not be supposed to anticipate that men would be walking on the track at that point. But we think the failure to warn the men that the passenger train was behind time and might be expected, is sufficient to sustain the verdict, since the jury might have believed the evidence that the boss told the men to go to the covered car and that there was no way to go except along the track. *This disposes also of the question of the assumption of risk.*"

The United States Circuit Court of Appeals for this Circuit is also in accord with the decisions of this Court on the question of assumption of risk, holding that where a warning of some kind is reasonable and where it is customary to give it, there is no assumption of risk as a matter of law.

In *Lehigh Valley R. R. Co.* v. *Doktor,* 290 Fed. 760, 763, that Court held as follows (italics ours):

> "This case raises no new question of law. It is distinguished from *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and *Connelley* v. *Pennsylvania R. Co.,* 228 Fed. 322, 142 C. C. A. 614, in that the injured workmen in those cases were trackwalkers, who, from the very nature of their work, were required to look out for themselves, while here the injured man was a trackworker who, from the very nature of gang work, could not look out for himself when so employed. *Nor does this case fall within the class where there is neither a custom of giving warning nor a way of giving warning in freight yards as decided in Hines, Director General* v. *Jasko* (C. C. A.), 266 Fed. 336. *Rather it comes within the law of those cases where a warning of some kind is possible and where it is customary* to give it as in *Hines, Director General* v. *Knehr* (C. C. A.), 266 Fed. 340, 341; *Erie R. Co.* v. *Healy* (C. C. A.), 266 Fed. 342, 343; *Director General* v. *Templin* (C. C. A.), 268 Fed. 483, 484, Certiorari denied, 254 U. S. 656, 41 Sup. Ct. 218, 65 L. Ed. 460. Therefore the question of the existence of the two customs of warning, and of the defendant's corresponding duty, was a question of fact properly submitted to the jury—if the evidence was sufficient to sustain a finding.
>
> "Turning to the record, we have observed on the custom of warning by locomotive whistle that the plaintiff's testimony was sharply controverted, yet the defendant impliedly confirmed the custom by defending on the ground that it gave the requisite warn-

> ing. On this point its testimony is to the effect that the locomotive blew six or more whistles, yet when these whistles are analyzed it appears that the first two were in answer to a coupling signal and were therefore in no sense warning whistles; and the last four—three sharp short ones and one long one—were made at about the time the draft struck Doktor and were of a character to indicate that an accident had happened and the train must be stopped. This clearly left open the question whether these whistles were given before or after Doktor was hit and, accordingly, whether they were alarm whistles or warning whistles.
>
> "We are of opinion that the evidence was sufficient to submit the issue and to sustain the finding."

An examination of the brief of the defendant fails to disclose any authority holding to the contrary, although the defendant places great reliance in the single case of *Chesapeake & Ohio R. R. Co.* v. *Nixon,* 271 U. S. 218, which is clearly distinguishable from the case at bar. The facts do not fully appear in the opinion of the United States Supreme Court. We have examined the opinion of the Supreme Court of Appeals, State of Virginia (125 S. E. 325). The following facts seem undisputed in favor of the defendant. At a moment or two before the accident the train came around a curve and out of a cut so that the plaintiff's intestate was not visible until a moment or two before he was struck. He lived in a house by the side of the railroad on the north side and opposite a curve in the track. The track as it approached the point opposite his house from east to west came through a cut several hundred feet east of the house on a curve which bent to the left as it extended westward until it reached a point 575 feet west of a point opposite

the house and thence extended a distance of 1,377 feet in a straight line to a point beyond where the decedent was struck. In short, the track was straight for only approximately 1,000 feet prior to which it was curved and came from the cut. The facts *verbatim* as stated in the opinion of the Supreme Court of Appeals of Virginia are as follows:

> "The decedent was, at the time he was killed, and had been for a number of years, a section foreman, his regular hours of employment, on his section of the railroad being from 7 a. m. to 4 p. m. daily. For about a year next preceding his death he lived with his family in a house by the side of the railroad track, on the north side of and opposite a curve in the track. The track, as it approached the point opposite this house, from east to west, came through a cut several hundred feet east of the house, on a curve which bent to the left, as it extended westward, until it reached a point 575 feet west of the point opposite the house; thence extended a distance of 1,377 feet in a straight line to a point beyond where the decedent was struck on the track by an extra freight train, consisting of engine, tender, and 10 gondola coal cars, and was killed, on a clear June day, at 6:35 o'clock in the morning. From thence the track extended on westward, practically straight, for a distance of nearly a mile. The section on which the decedent was foreman extended from a point east of his house to Midway, a point about 1¼ miles west of his home. The decedent and his force of men began their regular hours of work each morning at Midway, where the toolhouse was located, at 7 a. m., and ended such hours of work at the same place each afternoon at 4 o'clock. It was the daily custom of the decedent, foreman, and his men to meet at the toolhouse from 7 to 20 minutes before 7 o'clock, so as to be ready to set out from the

toolhouse promptly at that hour. Prior to the beginning of his occupancy of the aforesaid dwelling house the decedent asked and obtained the express permission of the supervisor of track of the defendant company, his superior officer in charge of section foremen of the defendant company on that part of the system of the latter, to make use of a certain velocipede, after he moved into said house, in going to and from the toolhouse at Midway. The velocipede was a three-wheeled vehicle, made to run over a railroad track, propelled by foot pedals, with a seat for the person using it, located directly over the right-hand rail of the track, geared so that it could travel only at a speed of about 9 or 10 miles an hour, a slow enough speed for the person operating it to have time to inspect the track closely in going over it for any defects which might exist in it needing repair. And one of the rules of the defendant company, which the evidence tended to show was, among others, faithfully observed by the decedent, imposed the duty upon the decedent, whenever he was going over the track, whether in or out of his regular hours of employment, to inspect the track for the purpose aforesaid.

"The decedent was seen by the plaintiff, his wife, to go down to the railroad track opposite his home, there put the velocipede on the track, take his seat and set out thereon for Midway at 6:30 a. m. of the day he was killed, which the evidence tended to show was about his usual time for setting out for Midway each morning. After he had gone some distance he was seen by her to look back just before the train could be seen by him, and thereafter to go on his way, pedalling the velocipede along the track. Just at this moment she saw the train come around the curve above mentioned, dash by the front of the house and on behind the decedent, who was then seen by the wife with his face continuously turned forward, not again looking back while he was in her sight,

> and he was in her sight until the train interposed itself between her and him as he was proceeding on the track. The train must have overtaken him in a few seconds, as we must conclude from the speed of the train and the place where the body was found—such speed being about 25 miles an hour, as estimated by the defendant's witnesses, and a greater speed is estimated by witnesses for the plaintiff."

The engineer and fireman in that case both testified and their testimony was undisputed that it was not customary to keep a lookout and that they had no reason to anticipate anybody on that part of the railroad, that is, at the point where the train came out of the cut and around the curve and they further testified that under the system of operating the railroad they had no idea that they owed any duty to keep a lookout for the decedent on the track at the time and place in question. There was no proof that it was customary at that time and place to give any audible warning by bell or whistle to employees on the track. The testimony in that respect was as follows (125 S. E., p. 327):

> "The engineman and fireman both testified as witnesses for the defendant company, and both admitted that they were not keeping any lookout ahead from the time they would have seen the perilous position of the decedent until after they had gone past the place at which he was killed.
>
> "The reason the engineman gave for his keeping no lookout at the time just before the train turned the aforesaid curve and came upon the straight track of 1,377 feet and the further stretch of comparatively straight track west of that—altogether a mile or more of practically straight track—is that he stood up on his seat to examine the lubricator and to adjust it, if it needed adjustment, which

occupied him until the train had gone past the place where the decedent's body was afterwards found. He testified that this was a duty which he had to perform at some time as he neared the end of the train's run, which was Gladstone on this occasion, but that there was no particular need for him to have done this at the particular time he did—that the same result would have been attained had he done it a short while afterwards, after he had reached the home of the decedent and the aforesaid stretch of track, extending therefrom toward Midway, or a short while before he reached the home of the decedent and the aforesaid stretch of track. He testified further that he knew the decedent well; knew that he was section foreman on that section; knew the location of his home and that he had to go from his home to his place of work; but claimed that he did not know at the time whether the decedent's regular hours of work began at 7 or 7:30 a. m.; that he did not know that the decedent used a velocipede in going to and from his work; that he knew that there was a path alongside the railway from decedent's home to his beginning place of work at Midway, and that he expected the decedent would have been in such path at the time the train was passing over this locality if he was then on his way to work; and further to the effect that he had no idea that he owed any duty to keep a lookout for the decedent being on the track at the time, otherwise he would not have taken the time he did to attend to the lubricator.

"The testimony of the fireman was to the effect that he saw the engineman when he stood on his seat for the aforesaid purpose, and that he knew the engineman was not then keeping a lookout; yet that he, the fireman, did not thereupon keep a lookout; and knew that no one was keeping a lookout while the engineman was so engaged. The fireman's testimony on this subject, is, in substance, that he was on his seat, from which he could have looked out of the side window and seen

> the decedent ahead a farther distance away, as they approached him, than the engineman could have seen him, owing to the curve of the track being in the fireman's favor and not away from his line of vision; that he may have been engaged himself in the performance of some duty, but did not undertake to say whether he was so engaged or not; and the fact made prominent by his testimony is that he had no idea that he owed any duty of keeping a lookout for the decedent being on the track at the time; otherwise, as may be reasonably inferred from his testimony, he could have spared the time from his other duties to and would have done so."

We pause to point out that in the defendant's brief the statements made that the track was straight for a mile in the *Nixon* case, but the foregoing quotations show that it was curved and that it came out of a cut and that it was straight for only about 1,000 feet to the point where the deceased was struck. There was no proof that it was the duty of the engineer and fireman under the rules and custom to keep a lookout. On the contrary, the proof as shown, *supra,* was that they were not under any duty to keep a lookout at that time and place. It was not proven that it was customary to give the employee on the track an audible warning by bell and whistle. On the contrary, the proof was that such a warning was not given or expected by the trackmen. The *only* charge of negligence in that case was the failure of the engineer and fireman to keep a lookout. A lookout would not have prevented the accident; because it happened within a moment or two, the court saying:

> "The train must have overtaken him in a few seconds as we must conclude from the speed of the train and the place where the body was found."

Having thus determined the real facts of the case, the opinion of the United States Supreme Court is perfectly clear and understandable. That Court (271 U. S. 219) said:

> "For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout *and the question raised is whether as towards the deceased the defendant owed a duty to keep a lookout, or on the other hand, the deceased took the risk.*"

In the absence of any evidence that it was the duty of the engineer and fireman under the rules, practice and custom of the defendant to keep a lookout as the train came out of the cut and around the curve, and in view of the undisputed testimony that it was not the custom to keep a lookout and the further undisputed testimony that the deceased knew that he was not to expect any audible warning by bell or whistle from the engine, but on the contrary that he must rely solely upon his own watchfulness and keep out of the way, the Supreme Court held that he assumed the risk of being run down. It will be remembered that he was on his way to work. The United States Supreme Court said at page 219 (italics ours):

> "If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, *as he instructed his men, that he must rely upon his own watchfulness and keep out of the way.* The Railroad Company was entitled to expect that self-protection from its employees. *Aerkfetz* v. *Humphreys,* 145 U. S. 418; *Boldt* v. *Pennsylvania R. R. Co.,* 245 U. S. 441, 445, 446. *Connelley* v. *Pennsylvania R. Co.,* 204 Fed. 54; *Davis* v. *Philadelphia & R. Ry. Co.,* 276

> Fed. 187. *Pennsylvania R. R. Co.* v. *Wachter,* 60 Md. 395. *4 Elliott on Railroads,* 3rd ed., Sec. 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others.''

The reason and logic upon which that decision is based is found in *Aerkfetz* v. *Humphreys,* 145 U. S. 418, and *Connelley* v. *P. R. R. Co.,* 201 Fed. 54, cited in support thereof, which are clearly cases where there was *no custom* or opportunity to warn or to keep a lookout. They were cases that happened in a railroad yard where the giving of audible signals tended more to confusion than to aid in avoiding accidents and as a practical matter reasonable warning could not be given. The case of *Connelley* v. *P. R. R. Co.,* 201 Fed. 54, was decided by the United States Circuit Court of Appeals for this Circuit and that case and the *Aerkfetz* case are referred to in the quotation, *supra,* from *L. V. R. R. Co.* v. *Doktor,* 290 Fed. 760, 763, which case distinguishes those cases as not applicable in a case such as the case at bar where a warning can reasonably be given and it is customary to do so.

Boldt v. *P. R. R. Co.,* 245 U. S. 441, referred to in the quotation from the *Nixon* case, *supra,* was the case of an experienced yard conductor who was killed while making a switching movement in the yard and has no similarity to the case at bar. The question of assumption of risk was submitted to the jury in that case, page 443. The jury brought in a verdict for the defendant and the only question before the United States Supreme Court was as to whether certain requests of the plaintiff should have been given to the jury. The United States Supreme Court said (p. 445):

> ''In cases within the purview of the statute, the carrier is no longer shielded by the

> fellow servant rule, but must answer for an employee's negligence as well as for that of an officer or agent."

In that case the Trial Judge instructed the jury that the deceased assumed only the ordinary risks of his employment (p. 444). This would imply that the extraordinary risks were not assumed, certainly not until they became obvious and were fully known and appreciated by the employee (see p. 445).

We therefore respectfully submit that the *Nixon* case is clearly distinguishable from the case at bar and the other cases which involve a failure by the defendant to comply with its ordinary practices, customs and rules, without the knowledge of the employee who is injured, such negligence resulting proximately in injury or death. It is clear that under all of the decisions such risks are not assumed. To say the least, not as a matter of law.

The *Nixon* case refers also to *Davis* v. *Phil. & R. Ry. Co.*, 276 Fed. 187, which holds that a track worker *assumes the risk* of injury by trains *operated in the usual and customary manner.* At page 191, the Court clearly defines the rule that the failure to use reasonable care to observe a known rule, order, custom or practice is negligence and that such negligence is not assumed by the employee, certainly not until he became aware of it, and the Court distinguishes the *Aerkfetz* case which involved a yard movement from one on the main line where the track is straight and the rules of the company and reasonable care require a lookout to be kept and audible signal by bell or whistle to be given. The Court held (italics ours):

> "In *Curtis, Adm'r* v. *Erie R. R. Co.*, 267 Pa. 227, 109 Atl. 871, where the decedent was employed to repair tracks and remove snow

and ice from the yard of the defendant company, and while carrying it across the tracks, was struck by a switching engine operated in the usual way, moving backwards without warning, running 2 or 3 miles an hour, recognizing the doctrine of assumption of risk as modified by the Federal Employers' Liability Act, and defined in *Seaboard Air Line R. R.* v. *Horton,* 233 U. S. 498, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475 and *Boldt Adm'x* v. *Penn. R. R.,* 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the court held that *since the evidence was insufficient to establish a custom to provide protection by furnishing a lookout for trains using the tracks of the switching yard, and there was no proof of any rule or custom requiring those in charge of the engine engaged in switching cars to ring a bell or sound a whistle, it was not negligence on the part of the company to afford such protection or to neglect giving such warning; and that the danger of being injured by the engine in the absence of these precautions was a risk assumed by a yard workman as incident to the employment.*

"*It is true that some distinction has been recognized in favor of accidents occurring on main line tracks.* For instance, in *Van Zandt* v. *P., B. & W. R. R.,* 248 Pa. 276, 93 Atl. 1010; *Glunt* v. *Penna R. R.,* 249 Pa. 522, 95 Atl. 109, and *McGovern* v. *P. & R. Ry.,* 235 U. S. 389, 35 Sup. Ct. 127, 59 L. Ed. 283, *the accident occurred while the injured person was engaged in work on main line tracks. The same distinction* appears in *Seaboard Air Line R. R.* v. *Koennecke,* 239 U. S. 352, 355, 36 Sup. Ct. 126, 127 (60 L. Ed. 324), *where decedent was killed by a train in the act of entering the yard from the main line track, the basis of which decision appearing from the following quotations*:

> " '*The jury might have found that the case was not that of an injury done by switching engine known to be engaged upon its ordinary business in a yard like Aerk-*

> *fetz* v. *Humphreys,* 145 U. S. 418, *but one where the rules of the company and reasonable care required a lookout to be kept.'*
>
> *"On examination of the cases where recovery was allowed for accidents occurring on main line tracks, it will be observed that failure to observe a known rule or order of the company, coupled with want of reasonable care, is assigned as a foundation upon which such recovery is rested. In the cases depended on by defendant's counsel, the distinction from the case in hand may be noted as bearing on the conclusion reached."*

The foregoing case and the other cases relied on in the *Nixon* case clearly distinguished the *Nixon* case from the case at bar.

The *Nixon* case was so differentiated in a recent case in the United States Circuit Court of Appeals for the second Circuit. This case is referred to in the brief of defendant as holding "a railroad is not liable to its employees for a defective lookout on moving cars or none at all." It is *N. Y. C. R. R. Co.* v. *Devine,* 23 Fed (2nd) 558. *The case holds the contrary and that rule was held not applicable.* Judge L. HAND, at page 589, speaking for the United State Circuit Court of Appeals, said (italics ours):

> "An employee who was acquainted with the practice might perhaps assume, if, like the deceased, he had been away, that it had been followed. If he did, he would suppose his exit to be clear on either side, and at night he might not observe that it was not. A jury might find that this possibility imposed upon the defendant a duty either to apprise the deceased of the situation, or if it did not, to shunt the cars with more than usual care. The deceased was not warned, and the brakeman on the car may not have been duly attentive. To run a car improperly watched might therefore have been found negligent, and the de-

> fendant liable, even though the snowbank had had nothing directly to do with the disaster.
>
> "The defendant invokes the rule of *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758, and *Chesapeake, etc., R. Co.* v. *Nixon,* 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914, that a railroad is not liable to its employees for a defective lookout on moving cars or none at all. *That doctrine does not apply.* We agree that, had the deceased been warned of the banks, he could not have complained, however unguarded was the shunted car, but the alternatives were to guard it, or to warn him; *correlatives depending upon the departure from its accustomed practice.*"

In that case there was a snowbank alongside of the track which compelled the deceased to walk on the track. There was no evidence that it was customary to warn by bell or whistle, because it happened in a railroad yard where there could be no adequate system of warning due to the various curves in the tracks and the continual switching of engines and cars back and forth. Yet, the Court held quite clearly that simply because of the unusual condition of the roadbed, negligence might be inferred because the unusual condition called for a warning which if not given, was negligence, and such negligence was not assumed by the employees as a matter of law.

In *Pacheco* v. *N. Y., New Haven & Hartford R. R. Co.,* 15 Fed. (2nd) 467, the United States Circuit Court of Appeals for the Second Circuit again points out that the cases of *Nixon* and *Aerkfetz* did not apply when the rules, custom and practice provided for a lookout and warning. That case also points out that the distinction is made in all of the decided cases. We quote the facts at page 467, as follows:

> "The plaintiff was engaged in interstate commerce as a section hand of the defendant in Taunton, Mass. On the morning of the ac-

cident his foreman took him from the gang in which he was working and told him to spread over the roadbed an accumulation of dirt resulting from the exacavation of a trench under and across the tracks. As he was so engaged he was struck by a shift of three freight cars backing down from a siding. The *locus in quo* was a freight yard, not very active, and the plaintiff stood near a switch which led from one of the main tracks to a series of sidings. The shift which struck him had stood for some time about 400 feet away from him on one of these, and was backing onto the main track. Beyond him, across the main track, ran a highway over which the shift backed after it had passed him.

"There was no one on the rear of the cars to warn employees at work on the tracks, nor did the switching engine ring its bell, either when starting or before crossing the highway. The defendant had promulgated a rule that all engines must ring their bells when 'about to move'; also that they must ring 'on approaching every public road.' "

The Court held:

"Except for the two rules mentioned above, the case would clearly fall within *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758, *Boldt* v. *Pennsylvania R. R. Co.,* 245 U. S. 441, 38 S. Ct. 139, 62 L. Ed. 385, and *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 46 S. Ct. 495, 70 L. Ed. 914 (decided May 24, 1926). Apparently among the risks assumed is that of the inattention of other employees in train movements. *Chespeake & Ohio Ry. Co.* v. *Nixon* was decided under the Federal Employers' Liability Act and expressly reaffirmed *Aerkfetz* v. *Humphreys;* it is, of course, controlling. We are therefore absolved in this instance from a consideration of the niceties, if not casuistries, of distinguishing between assumption of risk and contributory negligenece, conceptions which never originated in clearly distinguished categories, but

were loosely interchangeable until the statute attached such vital differences to them.

"A number of decisions in the Circuit Courts of Appeals under the Employers' Liability Act (Comp. St., Sections 8657-8665) have, however, created an exception to the ruling in *Aerkfetz* v. *Humphreys,* when the plaintiff's fellow servants have failed to observe a rule or practice established by it for the protection of its employees. *Lehigh Valley R R. Co.* v. *Mangan,* 278 F. 85 (C. C. A. 2); *Director General* v. *Templin,* 268 F. 483 (C. C. A. 3); *Lehigh Valley R. R. Co.* v. *Doktor,* 290 F. 760 (C. C. A. 3); *Toledo, etc. R. R. Co.* v. *Bartley,* 172 F. 82, 96 C. C. A. 570 (C. C. A. 6); *Baltimore & Ohio R. R. Co.* v. *Robertson,* 300 F. 314 (C. C. A. 6); *St. Louis & San Francisco Ry.* v. *Jeffries,* 276 F. 73 (C. C. A. 8).

"Just what is the ground of the distinction is not altogether apparent, though there would seem to be more warrant for supposing that one's fellows will observe an express rule or practice for specific action in a particular situation than that they will be uniformly attentive. Possibly it has arisen merely from a disposition to relax the severity of the rule. *At any rate it has now become the established doctrine in four circuits without dissent, and, so far as we can see, had recognition by the Supreme Court in McGovern* v. *P. & R. Ry. Co.,* 235 U. S. 389, 35 S. Ct. 127, 59 L. Ed. 283, *though the ruling is not so certain as we could wish.*"

The case of *Toledo & St. Louis & W. R. Co.* v. *Allen,* 276 U. S. 165, is not in point for it is a clearance case holding that the spacing between tracks which was fully known to the plaintiff was an ordinary risk and not something unusual or extraordinary arising from the negligence of the defendant. The rule for which we contend is reaffirmed (p. 171) that where there is proof of

"unusual danger by reason of a departure from the practice generally followed" that is negligence and that negligence is not assumed as a matter of law.

In the brief of defendant, numerous assertions are made that the decedent knew of the approximate time when train 707 would arrive at switch 39 where he was struck. There is no proof of that in the case. The deceased was dead and nobody testified to the state of his mind. If it can be assumed he knew that fact as a matter of law, then as a matter of law it can also be assumed that the decedent knew that these engines and trains could go in either direction on any one of the four tracks and that as a matter of fact the towerman by controlling the levers could put a westbound train, and frequently did, on any one of the four tracks, suiting the convenience of the operation of the railroad. Two of the tracks were clearly passengers tracks. All four could have been used for passenger trains. This was a westbound train and the most northerly track, number 4, was used exclusively for westbound traffic. The deceased had a right to assume that that track would be used and not track 2. He also had a right to assume that tracks 1 and 3 might be used for westbound traffic (p. 18, lines 15-40). There is nothing to indicate that he knew that this train would come through on track 2 or that it was about to arrive at switch 39, where he was struck. On the contrary, the jury had a right to conclude that he thought this train had gone through because according to some of the evidence it should have passed switch 39 at 4:28 or 4:30 and did not pass until between 4:30 and 4:31. In any event, all those questions were questions of fact for the jury, as shown in the cases cited, *supra*. In Point III counsel for the defendant says there was no rule or custom for

the giving of audible warning by bell or whistle proven. He has forgotten the testimony of Duffy on that point, and also of the train master Vanderhoof which has been fully analyzed under subdivision (a) of this point and which is undisputed.

In passing on a motion for nonsuit or for direction of verdict, all the evidence against the party making the motion must be taken as true and the adverse party must be given the benefit of all legitimate inferences reasonably deducible therefrom. *Andre* v. *Mertens,* 88 N. J. L. 626. Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, whether controverted or uncontroverted, the question at issue must go to the jury. *Nolan* v. *Bridgetown, &c. Traction Co.,* 74 N. J. L. 196. The Trial Judge is only justified in nonsuiting the plaintiff or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case. *Dickinson* v. *Erie R. R. Co.,* 85 N. J. L. 586.

Counsel for the defendant in Point III says that the testimony of the two section foremen indicates that it was the duty of the section men to watch out for trains. As shown in subdivision (a) of this point, the testimony of the two section foremen related merely to the situation of a gang working on the track in the presence of the section foreman or his assistant. Under such circumstances, it was the duty of the section foreman or the assistant, whichever was in charge of the gang, to look out for trains and blow a whistle and warn the men on the track. However, that duty was not inconsistent with the duty of the engineer and fireman under the customs, rules and practice to keep a lookout ahead and give audible signal by bell and whistle at the time and place of this accident. Counsel for the defendant

says that the deceased was not working and was only walking. However, in this instance walking was working and the deceased was paid for walking as work, by the defendant. The walking involved work of inspecting the track, taking the time book to the commissary, supervising the loading of the tools into the toolhouse and reaching the point where he quit work at Elizabethport to board a train, when his wages as a worker ceased. He was also, as shown in the statement of facts in subdivision (a), supposed to notify all of the section men that they were to return to work the next day, Sunday. Any one of these duties would be sufficient to bring him within the Federal Act. *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, 172.

Counsel says in Point III that the rule under discussion differs entirely from the rule which regulates train movements at the place where men habitually work and where it is dangerous to set a train in motion or to have a train pass without an audible signal. He says: "Under such circumstances the men have a right to expect a warning before the train is set in motion or is allowed to pass." The deceased and his gang, in fact, the two gangs, had been habitually working at the place where this accident happened all summer and down through the winter until December 18, 1926, when this accident happened and therefore under defendant's counsel's statement of the rule the deceased was entitled to warning (p. 140, lines 25-30). In fact this part of the railroad was being made over entirely new and the work had been going on for several years (p. 140, line 30). We respectfully submit that the Trial Court properly decided that the question of whether or not the deceased assumed the risk of the injury from which he died, was a question of fact for the decision of the jury.

II.

The Trial Court did not err in refusing to instruct the jury as a matter of law that the deceased assumed the risk of the injury from which he died.

This was in effect reiteration of the defendant's motions for a nonsuit and direction of verdict. The first request in so many words instructed the jury that under the Federal Act the deceased assumed the risk of being injured by trains running upon the tracks of the railroad. This is not so in the case at bar as demonstrated in Point I. The second request instructed the jury that the deceased assumed the risk of being injured by a train driven by an inattentive operator which also included the negligence of the operator in failing to give audible signal by bell or whistle, when both a constant lookout ahead and audible signal by bell and whistle were called for by the custom, practice and rules of the defendant.

For the reasons advanced in Point I, this request ought to be refused. The third, fourth and fifth requests are in the same category. The eighth request is an attempt to sever a small part of the testimony from the whole and give a binding instruction with respect thereto. It is based on supposed knowledge of McGarry which was not proven and therefore was improper. It assumed that train 707 would invariably enter on track 2, when track 4 was the track ordinarily used for westbound traffic as hereinbefore shown (p. 18, lines 15-40). It also assumes that the deceased knew that it would come on track 2, but there is no knowledge of that fact. Finally, all of the requests were properly denied because the Trial Court fully charged the law with respect to

assumption of risk and in doing so charged it more favorably to the defendant than it deserved (p. 202, line 15 to p. 203, line 25). No exception was taken to that instruction by the defendant for it was unassailable and as stated, more favorable than the defendant deserved. For instance, the Trial Court said (p. 202, line 30 to p. 203, line 20):

> "The law says that an employee assumes the risk, not only of dangers arising from the facts known to him, but also of such dangers attending his work as he might discover by the exercise of ordinary care for his safety.
>
> "Another case has laid down the rule clearly in these words:
>
> " 'That the doctrine of assumption of obvious risk by a servant applies as well to those which arose, or became known to the servant during the service as those in contemplation at the time of his original hiring.'
>
> "And another case, treating the subject more fully, says:
>
> " 'In the relation of master and servant, whatever may be the negligence of the master to exercise reasonable care to provide a safe place for the servant to perform his work in, or to provide safe appliances for him to do his work with, still, when the risks of danger arising are incidental to the employment and obvious to the servant, or discoverable by the exercise of ordinary care on the part of the servant, the neglect of the master cannot be made the basis of an action for damages for injuries caused by such risks. In law they are assumed by the servant when he enters and continues in the employment.' "

In *Armstrong* v. *L. V. R. R. Co.*, 82 N. J. L. 704, this Court held that a charge would be unassailable if the Trial Judge merely charged the legal principle involved. At most, all that the Trial

Judge is required to do in dealing with requests when the legal principles involved therein are sound and applicable to the matter under discussion, is to charge the substance thereof.

> *Gluckman* v. *Darling,* 85 N. J. L. 457, affirmed 87 N. J. L. 320;
> *Grybowski* v. *Erie R. R. Co.,* 88 N. J. L. 1, affirmed 89 N. J. L. 361.

The refusal of the Trial Judge to charge certain requests is not error when all of the propositions contained therein which were sound and relevant to the case were charged. *Miller* v. *Thomas & Sons Co.,* 89 N. J. L. 364. The defendant cannot object to an instruction which is more favorable than it deserves.

> *Mallery* v. *Erie R. R. Co.,* 86 N. J. L. 210;
> *Gellaty* v. *C. R. R. Co. of N. J.,* 86 N. J. L. 416, 418.

Finally, under Section 27 of the Practice Act of 1912, it is provided:

> "No judgment shall be reserved or a new trial granted on the ground of misdirection, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party."

We respectfully submit that the Trial Court did not err in refusing to charge the requests in question.

III.

CONCLUSION.

For these reasons we respectfully submit that the judgment below should be affirmed, with costs.

Submitted February Term, 1929.

EDWARD A. MARKLEY,
WALTER J. FREUND,
Of Counsel with Plaintiff.

COLLINS & CORBIN,
Attorneys of Plaintiff.

In the case of *Stiedler* v. *P. R. R. Co.*, 94 N. J. L. 197 (referred to at page 36 of this brief), the United States Supreme Court denied a petition for a writ of certiorari. *P. R. R. Co.* v. *Alfred Stiedler*, 253 U. S. 459.

New Jersey Court of Errors and Appeals

Agnes McGarry, General Administratrix of the Estate of John McGarry, deceased, Plaintiff-Appellant, *vs.* The Central Railroad Company of New Jersey, a corporation, Defendant-Appellee.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE.

Statement.

A.

All of the matters involved on this appeal have already been determined by this Court at the October Term, 1929; the decision will be found in 147 Atl. Reporter, page 472; a copy of such decision is annexed to this brief.

B.

This appeal brings before this Court for review a judgment in the above entitled action rendered by the Hudson County Circuit Court. The suit is brought under the Federal Employers' Liability Act (8 U. S. Compt. Stat. 9388, Sec. 8657), to recover damages for the death of the plaintiff's intestate accruing to the widow and next of kin.

On the first trial, a judgment was rendered in favor of the plaintiff for $30,000 damages. *This judgment on appeal to this Court was reversed* (State of Case, page 263; also 147 Atl. 472).

For some purpose or other, plaintiff in her brief sets out the check list of the vote in the Court of Errors upon the decision of the case when it was heretofore before the Court.

The purpose of this is not clear to defendant.

Upon the decision of this Court as hereinabove mentioned a remittitur was filed and the case sent back to the Hudson County Circuit Court (page 277, Record). The case was then re-tried *on the record in this Court* on the former hearing (pages 268 and 270 of the Record).

The trial Court directed a verdict in favor of the defendant on which judgment was duly entered by the defendant (pages 269, 271, 272 of the Record).

Purpose of Plaintiff in Prosecuting This Appeal.

This appeal is merely a *pro forma* appeal. The Court has already decided the case upon the identical testimony, citations of law and argument.

Plaintiff in her brief states that it is her purpose to take the case to the U. S. Supreme Court and that in order to do so it is necessary to have a final judgment in this Court in the favor of the defendant. He cites various cases.

There is no question that the cases cited hold that in order to enable the plaintiff to bring this case before the U. S. Supreme Court there must be a final judgment on the case in this Court, it being the Court of last resort in the State of New Jersey.

Grounds of Appeal.

Plaintiff sets forth only one ground of appeal, to wit, "The trial Court directed a verdict in favor of the defendant when thereunto moved by the

defendant, whereas said motion should have been denied and the issues here involved submitted to the jury for decision'' (page 273).

Brief of the Argument.

Plaintiff, in her brief, states that since the present appeal is before the Court on the identical record presented on the first appeal, she has presented verbatim her brief on the first appeal, annexing the same to the brief on this appeal.

She then states: ''The sole question presented is whether the deceased as a matter of law assumed the risk of the injury resulting in his death.''

Such is the same question which was presented to this Court on the argument before it at the October Term, 1929, and that decision of the Court settles this matter.

The Trial Court Did Not Err in Directing a Verdict for Defendant.

A.

Since the case as adduced before the trial Court presented the identical questions of law and fact, based upon the same evidence, as were before this Court on the former appeal, and since this Court had decided that, under such evidence, facts and law, the plaintiff assumed the risks of injury resulting in his death, there was nothing the trial Court could do except to direct a verdict for defendant.

B.

Plaintiff, in her brief, cites a portion of the decision of this Court as follows:

> "It is clearly established by Federal decisions that one in the position of the deceased assumed as part of his employment the risk of injury from the ordinary and usual operation of the trains with which his duties brought him into relation."

and then says:

> "This rule is not disputed by the appellant",

but asserts that in the instant case,

> "There was an unusual and extraordinary operation of the engine which ran the decedent down—in short, a negligent operation—and with respect to that, under the foregoing decisions of the United States Supreme Court, there is no assumption of risk even as a matter of fact, to say nothing as a matter of law, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person would observe and appreciate them."

The plaintiff errs in asserting in her brief that there was "an unusual and extraordinary operation of the engine which ran decedent down" (page 7 of his Brief). There was none nor was there any evidence of such.

This aspect of the case is settled by the ruling of this Court in its decision on the former case, where it said:

> "We think the facts shown in this case fall short of indicating a system of warning which would entitle the deceased to rely on those operating the train instead of on his own vigilance, and in consequence the danger of injury was, under the circumstances, one of the assumed risks incident to his employment."

Argument on this point was fully made in the main brief verbatim, copy of which is attached hereto.

Summarizing the whole matter, we submit the following ruling of this Court on its decision in the former case, which clearly determines the matter:

> "It is clearly established by federal decisions (which are controlling here) that one in the position of the deceased, assumed as part of his employment the risk of injury from the ordinary and usual operation of the trains with which his duties brought him into relation. Ches. & O. R. R. Co. *vs.* Nixon, 271 U. S. 218; 46 S. Ct. 495; 70 L. Ed. 914; Toledo, St. L. & W. R. R. Co. *vs.* Albany, 276 U. S., 165; 48 S. Ct. 215; 72 L. Ed. 513."

Conclusion.

For the reasons herein set forth and those set forth in the main brief which is hereto annexed, we respectfully submit that the judgment below should be affirmed.

William A. Barkalow,
Attorney of Defendant-Appellee.

Edwin F. Smith,
Of Counsel.

New Jersey Court of Errors and Appeals

AGNES MCGARRY, General Administratrix of the Estate of John McGarry, deceased, Plaintiff-Appellee, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

This case was tried in the Hudson County Circuit Court before the Honorable Frank L. Cleary, Judge, and a jury. It resulted in a verdict for the plaintiff in the sum of $40,000.00. A rule to show cause reserving exceptions was obtained by defendant as to excessive damages, and the verdict was reduced to $30,000.00, which reduction was accepted by plaintiff. The case now comes before this Court on appeal.

Facts.

Defendant is a common carrier by railroad and operates its railroad from its Terminal at Communipaw in Jersey City through various cities and municipalities of the State of New Jersey to and beyond the State line near Easton, Pa. It is engaged in interstate commerce. Its line of rail-

road passes through Bayonne, New Jersey, across Newark Bay, on its trestle and bridge, to Elizabethport, and thence Westerly. Upon the bridge and trestle there are two tracks, and as these debouch off the bridge at the Elizabethport (or Westerly) end, they separate into four tracks. The tracks are laid on an embankment which is quite high at the bridge end, but which declines as it proceeds toward the Elizabethport station. The two Southerly tracks are numbered 1 and 3, and are used by Eastbound trains. The two Northerly tracks are numbered 2 and 4, and are used by Westbound trains. Tracks 1 and 2 are the inside tracks, and tracks 3 and 4 are the outside tracks. Counting from South to North, track No. 3 is the most Southerly track; then comes track 1; then track 2, and track 4 is the most Northerly track of all.

As one proceeds Westerly from the bridge over the Bay, and at a distance of about 1000 feet from the Westerly end of the bridge, there will be observed on the South side of the tracks a building known as F-H Tower. This is a switch controlling tower. It is an almost square building, built almost entirely of brick; it is two stories high; the upper room containing the switch handles; it is glass enclosed on three sides, to wit, the East, West and North sides (29-39). An examination of the Map Exhibit shown in the State of Case (p. 223) discloses that there are several switches, or cross-overs, from one track to another. Switch No. 39 is about 800 feet west of F-H Tower (17). On the map there also will be observed a portion marked "Underpass". This is a passageway containing a single railroad track passing from the north to the south side of the embankment on which the tracks of defendant are laid, as above mentioned.

Decedent was an assistant section gang foreman employed by defendant. He had been employed

by defendant for some years—first as a section gang laborer, then as assistant foreman (during the summer months acting as section gang foreman in charge of his own gang)—(127-128).

Under the system of work on defendant's railroad, a section gang is under a foreman, and in some instances, as in this case, an assistant foreman. It is the duty of the foreman and assistant foreman to watch out for trains and to warn their men of the approach thereof, so that they shall have an opportunity to get out of the way of the train (109), and such foreman and assistant foreman are supplied with a time table, a standard watch and a whistle (128). Decedent was so supplied (110).

They are required to know the time of arrival of all regular trains at the place where they are working (110-129, 153); (their watches are supposed to keep the same time as the watches of engineers and train dispatchers—that is, they are standard watches); and to be on the lookout for regular trains (129) and extra trains (133) and to give their men warning by blowing the whistle with which they were supplied, as hereinabove stated (128-153).

On December 18, 1926, decedent was employed as assistant foreman of a section gang which had been working *in the morning* of that day on track No. 2, at or near the "Underpass" above mentioned; they were levelling tracks. The gang was in charge of foreman Spangenberg, decedent being assistant foreman.

At twelve o'clock noon the gang quit work on track No. 2 under orders, because track No. 2 is exceedingly busy in the afternoon during what are known as the rush hours. The gang in the afternoon began work on the south side of the embankment near the "Underpass" levelling off the dirt on the side of the embankment. They were not working on the tracks (130).

At 4:15 o'clock P. M. Spangenberg, the foreman, ordered decedent to tell the "jack men" (two men who had charge of jacks which had been used by the men in the morning while working on the tracks and which lay between the tracks) to take the jacks to the tool box which was up near the Elizabethport station (131-141, 143). Decedent and these men went up to the top of the embankment (131). The men got the jacks and went away. Decedent was last seen by Spangenberg on or near the top of the embankment.

About 4:20 o'clock P. M. Spangenberg ordered all his men to quit work and take their tools up to the tool box, because they were to work elsewhere the next day (Sunday) (132). Spangenberg waited until his men went off and then he went down the embankment on the south side through the "Underpass" and up to the tool box (132).

The next observation of decedent was had by one Michael Duffy, an employe of defendant, occupying the position of Signal Maintainer. He was stationed in F-H Tower, and in the lower portion thereof.

Inasmuch as the whole case of plaintiff depends upon the story of the man Duffy as told upon the witness stand, it will be of interest to know more about him and his story.

His story on the witness stand is that he had known decedent for some weeks, observing him working near F-H Tower (34-35). That decedent had often come into the Tower to make up his time book (38). On the day of the accident he had observed decedent working behind F-H Tower about 3 o'clock (36) and that about 4 o'clock decedent came into the Tower and sat at a desk making up his time book (36-37). At about 4:20 decedent left the tower saying he was going to Elizabeth to buy some bulbs for electric lamps

(38). Witness fixed some fires and then went upstairs to the lever room (38). While there he saw decedent walking between tracks 1 and 2 (39-59) where the tracks are some 15 or 20 feet apart (222), and saw a train, No. 619, owned and operated by the Philadelphia & Reading Railroad (57), proceed westerly on track No. 2, approach and pass decedent and proceed further westerly (40). Its bell was ringing (40). Decedent then was about 200 to 300 feet west of F-H Tower (40).

This was about 4:24 P. M. (41). He then saw decedent walk from between the tracks No. 1 and No. 2 and get upon track No. 2 and walk between the rails and walk westerly (41). Then he saw train No. 707, a Central Railroad train, proceeding on track No. 2, pass the Tower (42-59). It rang no bell nor blew a whistle (42). It approached decedent from the rear (43-64-65) on track No. 2 (63). He continued to walk between the rails (65), and the train continued to approach him; it reached the spot where witness saw decedent walking, passed beyond, and as it passed beyond, witness, still looking, could no longer see decedent (65). He made no attempt to discover what had become of decedent; he told nobody, not even the Towerman who was standing almost alongside of him, of what he had seen. He made no outcry (65-66).

Both Train No. 619 and Train No. 707 were regular passenger trains.

This story of witness Duffy told on the witness stand is directly contradictory of two signed statements made by him,—the first made a day or so after the accident (and which is Exhibit D-7A, at page 250 of the State of Case), at a time when he was in the employ of defendant, and the second made Sept. 7, 1928 (Exhibit D-6, p. 248), at a time when he was no longer in the employ of defendant. The first statement is signed by him.

The second statement is not only signed by him but he wrote at the bottom of each page, "I have read this statement and found it to be correct," and signed his name thereto.

In the first of these statements witness states clearly and distinctly that he did not notice the trains which went by the Tower after McGarry left, as he had work to do inside (Exhibit D-7, p. 253). His language is:

> "I did not watch McGarry when he left here, and I took no notice to trains passing after he left as I had work inside to do."

In the second statement he asserts that the first he saw of decedent that day was when decedent entered the tower about 4 o'clock (Exhibit D-6, p. 248), while on the witness stand he said he saw him working behind F-H. Tower at 3 P. M. (36).

On the witness stand witness admitted his signature to the two statements above mentioned, but denied that he had stated the facts therein set forth, and stated, as to the second statement, that although he had written the words, "I have read this statement and found it to be correct", and then signed it, the fact was that such was untrue; that he had not read it and it was not correct (52, 55).

His statement on the witness stand is directly contradicted by the witness Horstman, the Towerman, who was present when Duffy gave the first statement, and, who states that he saw Duffy read his (Duffy's) statement (148); by Mr. Demarest, a former employee of defendant, who states that he wrote the statement from the information given to him by Duffy, gave it to Duffy, who read it, said it was true and signed it (159); and by Noyes, the man who took the second statement, who states Duffy read the statement before he (Duffy) wrote on the bottom in his own hand-

writing that he had read it and found it to be correct (154).

Duffy's statement on the witness stand that decedent was working behind F-H Tower at 3 P. M. is denied (a) by Spangenberg, the foreman of decedent, who says his gang did not work behind F-H Tower that afternoon (130), and (b) by Donohue, gang foreman, who states that it was his gang that worked behind F-H Tower that afternoon, and decedent had nothing to do with his gang and did not work with them (112).

The importance of the difference between the testimony of Duffy on the witness stand and his story in his two signed statements is that in his first signed statement Duffy says decedent left F-H Tower at 4:20 P. M., which was the *last* Duffy saw of him alone (Exhibit D-6, p. 248). Train 619 was the first train passing F-H Tower after 4:20. It passed about 4:24 P. M. It was this train (No. 619) witness Horstman says was passing as decedent walked between Tracks No. 1 and No. 2 and toward Track No. 2, and after the passage of which he says he could no longer see decedent (101). Of course, if decedent was struck by Train 619, defendant would not be liable, as its crew were not in defendant's employ, nor did defendant have any control over them; such crew worked for the Philadelphia & Reading R. R. Co. (182).

We set out the foregoing because it was on the testimony of Duffy, and his testimony alone, that the case was submitted to the jury.

The first knowledge anyone had that decedent was injured or killed was when the witness Whichard, who was fireman of the Workmen's Train, which lay at the westerly end of the Newark Bay Bridge while Train 619 went by and then crossed to Track No. 2, *after train 619 and before train 707,* (165-168), and who stood on his engine be-

tween the tank and the tender, happened to glance down and saw a body lying between tracks No. 1 and No. 2 (164-165) at about opposite the point of Switch No. 39, shown on the map (166), about 800 feet west of F-H Tower. This was at about 4:31 P. M. He reported at Elizabethport station (165). Later a railroad policeman who had been notified of the finding of the body near the tracks went to F-H Tower and took Duffy with him and another railroad policeman to the place where the body lay, and Duffy having looked at the body, told the officer he did not know who it was, but thought it was a section man (162-86).

Pleadings.

The complaint is based upon the Federal Employer's Liability Act. It alleges that defendant is a common carrier by railroad, engaged in interstate commerce, and that decedent was employed by defendant in such commerce, and asserts that decedent was killed by the negligence of defendant. It set out such negligence as follows:

> "The negligence of the defendant consisted in this: That at the time and place aforesaid, while the plaintiff's said intestate was then and there employed by the defendant in interstate commerce as aforesaid, and was walking and standing on the defendant's said railroad in such a position that he failed to see said train approaching, and while said plaintiff's intestate was visible for a considerable distance to the defendant's agents and servants who were then and there operating defendant's said engine on one of the tracks of said railroad, the defendant by its agents and servants negligently caused one of its said trains or engines to be operated at a high rate of speed toward the said plaintiff's intestate without slacking its speed and without signal

or warning to give said plaintiff's intestate notice of the approach of said engine or train and as a result, said engine or train struck the plaintiff's intestate with great force and violence and injured him as aforesaid."

The Answer admits that defendant was engaged in interstate commerce and that decedent was employed by it, but denies that he was engaged in interstate commerce when killed, and sets up certain defenses, among which are:

(a) Contributory negligence of decedent.

(b) Assumption of a risk which arose out of the employment of the plaintiff's intestate.

(c) Decedent was a trespasser.

(d) Decedent was a mere licensee.

(e) At the time of the accident decedent was walking or standing upon the railroad of the defendant.

(NOTE: Of the above defenses, the only defense argued in this brief is Assumption of Risk.)

ARGUMENT

POINT I.

The Trial Court erred in refusing to non-suit when requested so to do by defendant, upon the ground that decedent had assumed the risk of being injured in the manner in which he was injured.

It is to be observed that the negligence charged against defendant is the failure of the operators of the train which collided with decedent (assum-

ing that a train did so collide with him), to keep a lookout and to give warning of the approach of the train to decedent at a time when decedent was walking on the track upon which the train was running.

It is our contention that the risk of being injured in the manner and by the causes by which decedent was injured, was a risk assumed by decedent.

In order that we may fully appreciate the situation, we set forth certain facts as they appear in the evidence.

We first invite the Court's attention to the fact that *decedent was not engaged in work at the time of the accident. He had finished his work and was walking along the track.* He was not walking on the tracks of necessity. He could have walked on the south side of the embankment completely off the tracks (22); he could have walked on the northerly side of the embankment, completely off the tracks (23); he could have gone down the embankment on the south side and walked all the way to the Elizabethport station (24), and he could have walked between tracks No. 1 and No. 2 where there is a space 23 feet wide (23).

There was no necessity for his walking on the tracks.

It is clear that persons walking on railroad tracks assume the risk of being injured by trains, and this rule applies generally to railroad employees, except, of course, where it appears that such employees are engaged in work the nature of which requires a warning being given them (*Cervona* v. *D. L. & W. R. R. Co.*, 95 N. J. L. 246), or where they walk on the tracks of necessity and have no reason to expect the passing of trains on the tracks whereon they walk (*Ambrecht* v. *D. L. & W. R. R. Co.*, 90 N. J. L. 529, 530).

BUT, AS WE HAVE SHOWN, SUCH FACTS AS ARE REQUIRED TO TAKE THE CASE OUT OF THE GENERAL RULE DO NOT APPEAR IN THE CASE AT BAR.

Further, decedent was required, in the position he occupied with defendant, to know the time of arrival of trains at the place where he entered upon the track; he had been working on track No. 2 in the morning (110-129-153). He knew west-bound trains ran on track No. 2. He, therefore, knew the time trains No. 619 and No. 707 would pass the point where he entered upon track No. 2 and commenced to walk along between the rails. He knew the train would approach from his rear. He was an experienced section gang foreman and must be held to have appreciated the danger of acting as he did. If he knew of the danger and appreciated it, he must be held to have assumed the risk. Certainly, it cannot be argued that *he did not know and appreciate* the danger of entering upon a track at a time when he knew a train was due to pass on that track at the point where he entered upon the track, and to walk along such track in advance of the approaching train with his back toward the train. Yet, that is exactly what he did. That he assumed the risk of being injured in the manner and by the means he was injured, is clear.

Had decedent been engaged in his work as section gang foreman (or assistant foreman) and had such work required him to walk on the tracks, we still insist he would have assumed the risk for the reasons we shall hereafter set out.

Plaintiff, at the trial, relied upon the decision of the New Jersey Supreme Court in *Nestico* v. *D. L. & W. R. R. Co.*, 133 Atl. Rep. 83, and the Trial Court submitted the case to the jury under the authority of that case.

An examination of the charge of negligence in the case at bar and the charge of negligence in the

Nestico case shows that they are similar—in fact, almost identical.

Negligence Charged In Case At Bar.

"That at the time and place aforesaid, while the plaintiff's said intestate was then and there employed by the defendant in interstate commerce as aforesaid, and was walking and standing on the defendant's said railroad in such a position that he failed to see said train approaching and while said plaintiff's intestate was visible for a considerable distance to the defendant's agents and servants who were then and there operating defendant's said engine on one of the tracks of said railroad, the defendant by its agents and servants negligently caused one of its said trains or engines to be operated at a high rate of speed toward the said plaintiff's intestate without slacking its speed and without signal or warning to give said plaintiff's intestate notice of the approach of said engine or train and as a result, said engine or train struck the plaintiff's intestate with great force and violence and injured him as aforesaid."

Negligence Charged In Nestico Case.

"That at the time and place aforesaid, while the plaintiff's said intestate was then and there so employed by the defendant in interstate commerce as aforesaid, and was working on one of the said parallel tracks in such a position as to prevent his seeing an approaching train and while said plaintiff's intestate was visible for a considerable distance to the defendant's agents and servants who were then and there operating defendant's engine on said track, defendant, by its agents and servants, negligently caused one of its said trains or engines to be operated at a high rate of speed toward the said plaintiff's intestate without slacking its speed and without signal or warning of any kind to give said plaintiff's intestate notice of the approach of said engine or train, and as a result said engine or train struck the plaintiff's intestate with great force and violence and so seriously injured him that he died on the same day within a short time thereafter."

The *Nestico* case was decided solely upon the ground that the defendant therein owed a duty to a track *laborer, at work upon its track,* to give warning to him of the approach of an *off-schedule* engine, with no cars attached, and the approach of which he had no reason to anticipate, and that its failure to perform its duty in that respect was negligence.

In the *Nestico* case the decedent was a track *laborer engaged in his work,* presumably with his attention engrossed thereby. In the case at bar, decedent was a section gang foreman and was not engaged in his work but had quit work and was walking along the track where it was not necessary for him to walk. In the *Nestico* case, decedent was a track laborer who had (as the Court found) a right to expect a warning to be given him by others of the approach of an off-schedule train when he was engaged in labor on the tracks. In the case at bar, it was decedent's duty to *give* warning of the approach of trains (scheduled or unscheduled) to the men in his gang (track laborers). In the *Nestico* case, the engine which struck decedent was an *off-schedule* engine, the approach of which decedent had *no* reason to anticipate. In the case at bar, the train which presumably struck decedent was a regular scheduled train due to pass the point where decedent voluntarily, and without necessity, walked on its track at a certain time, of which time decedent had knowledge, and the approach of which he had *every* reason to anticipate, and, in fact, was bound to know.

Had the facts present in the case at bar been present in the *Nestico* case, undoubtedly a different result would have been arrived at.

While it might be true that (under certain circumstances) a track *laborer,* engaged in his work on the tracks, might have a right to expect a warn-

ing of the approach of an *off-scheduled* engine, running without cars, the presence of which engine he had no reason to anticipate, it does not follow that an *assistant section gang foreman,* not engaged in work at all, but simply walking along the track without necessity for so doing, would have a right to a warning of *a regular scheduled train,* the time of passing of which along the track at the point where he was walking he knew, and the presence of which he, from such knowledge, was bound to anticipate.

The cases are not similar.

Moreover, in the *Nestico* case, apparently no point was raised on the trial (and certainly not in the brief of defendant Railroad Company on the argument of the Rule to Show Cause) as to the assumption of risk by decedent, and no mention of such point is made in the decision relative thereto, and the case is no authority upon that point.

RAILROAD EMPLOYEES WORKING ON A NEAR RAILROAD TRACK ARE SUBJECTED TO GREAT RISKS, BUT SUCH RISKS ARE KNOWN AND GENERALLY ARE HELD TO BE ASSUMED BY THE EMPLOYEE.

In 39 *Corpus Juris,* 719 (where a long list of cases is cited), it is stated:

> "Servants working on or near a railroad track, roadbed, or railroad yard, such as section hands, track walkers, flagmen, watchmen and the like, assume the risks of injury ordinarily incident to the character of work in which they are engaged, although it is generally conceded that the risk is very great, and the Federal Employers' Liability Act does not affect the operation of this rule."

Cases such as *D'Agostina* vs. *P. R. R.,* 43 Vr. 568, where the proofs showed that it was the custom of the Company to give warning of the approach of the trains and that the men relied upon

such warning being given; and *Albanese* vs. *C. R. R.*, 41 Vr. 241, where the employee was *working* in such a position that he could not see the approaching train, though in plain sight of the engineer, have no application to the case at bar.

Here decedent was walking along the tracks and if engaged in work, there was nothing to prevent him seeing the approaching train.

As was said in *Pucodnick* vs. *Lehigh Valley R. Co.*, 74 N. J. L. 566:

> "It cannot be contended that in the case under consideration the deceased was working in such a position as to prevent his seeing the approaching train. True, he was working with his back to the train, yet, he could have seen the train had he looked. He knew he was in a place of danger, and ordinary caution should have impelled him from time to time to make observations, not only in front, but to the rear, in order to guard against any possible risk from trains approaching from either direction."

It is clear that in the case at bar decedent assumed the risk of being injured in the manner and by the means he was injured.

EVEN THOUGH THE RISK BE A RISK OCCASIONED BY THE NEGLIGENCE OF A FELLOW SERVANT, SUCH WAS ASSUMED BY DECEDENT.

Point may be raised by plaintiff that the negligence charged by plaintiff is the negligence of the operators of the train, which presumably struck decedent, in failing to keep a lookout and to give decedent warning of the approach of the train, and that such is the negligence of a fellow servant, and that by the terms of the Federal Employers' Liability Act (under which the suit is brought), the defense of negligence of a fellow servant has been abolished.

It is true that there are decisions of the New Jersey Courts holding that the defense of negligence of a fellow servant has been abolished by the Federal Act. Among these are: *Anderson* v. *Director General,* 110 Atl. Rep. 829; *Swank* v. *P. R. R.,* 111 Atl. 44; *Hardy* v. *D. L. & W. R. R. Co.,* 118 Atl. Rep. 104; *Reid* v. *Director General,* 95 N. J. L. 525; *Santomassimo* v. *N. J. S. & W. R. Co.,* 92 N. J. L. 10.

But it seems to us that practically all of the State Courts and the Federal Courts hold that "assumption of risk by the employee is open as a defense, except where the negligence of the carrier is in violation of some statute enacted for the safety of the employee"—*Ramsey* v. *Atlantic City R. R. Co.,* 116 Atl. 775; and also hold that "an employee, injured as the result of danger incident to his employment, of which he had knowledge or could, in the exercise of reasonable care, have discovered, cannot recover under the Act"—*Union City Trust Co.* v. *Davis,* 117 Atl. Rep. 43; and also hold that "the elimination of the defense of assumption of risk by the Act in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action"—*Seaboard Air Line Ry. Co.* v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062; *Jacobs* v. *Southern R. R.,* 241 U. S. 229, 60 L. Ed. 970; *Pryor* v. *Williams,* 254 U. S. 43, 65 L. Ed. 129; *Reid* v. *Director General,* 258 U. S. 92, 66 L. Ed. 480; and see 39 C. J. 689 where numerous cases are collected.

Therefore, while it may be true that under Section 1 of the Act the defense of "negligence of a fellow servant" has been abolished, yet it is also true that the defense of "assumption of risk" has

not been abolished except in cases of violation of a statute (see cases above).

Confusion seems to exist in some of the cases as to the application of the two doctrines. It would appear that under Section 1, Congress intended to take away from a defendant the common law defense available to a master, *i. e.,* that a servant could not hold a master liable for injuries received through the negligence of a fellow servant, *whether such negligence was foreseeable or not,* while under Section 4, the servant still assumes risks of injury from the negligence of a fellow servant, which risks were obvious, or which the servants could, in the exercise of due care, have foreseen, *i. e.,* risks which are foreseeable.

In *Chesapeake &c. R. Co.* v. *DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, the United States Supreme Court said:

> "* * * recent authority asserts that in saving the defense of assumption of risk in cases other than those where the violation by a carrier of a statute enacted for the safety of an employee may contribute to the injury or death of an employee, the act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether plaintiff is to be deemed to have assumed the risk."

In *Chicago R. I. & P. R. Co.* v. *Ward,* 252 U. S. 18, 64 L. Ed. 431, the United States Supreme Court held:

> "The Federal Employers' Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk."

As we have shown, the negligence charged against defendant in the case at bar is the negligence of the operators of the engine or train which

presumably struck decedent, in failing to keep a lookout and give decedent warning of the approach of the train.

IS SUCH FAILURE A RISK ASSUMED BY THE SERVANT?

Inasmuch as the case at bar is governed by the Federal Employers' Liability Act, and the decisions of the United States Supreme Court are conclusive upon the subject, we must look to such decisions for the answer to such inquiry.

The risk of injury from failure of enginemen and other operators of railroad trains to keep a lookout and give warning to trackmen, section men and section foremen has very lately been held by the United States Supreme Court to be a risk assumed by such trackmen, section men and/or section foremen.

In *Chesapeake & Ohio R. R. Co.* v. *Nixon,* 271 U. S. 218, 70 L. ed. 914, decided May 24th, 1926 (Mr. Justice Holmes writing the opinion), the United States Supreme Court held that under the Federal Employers' Liability Act a section foreman (and a section man) assumes the risk of the negligence of a fellow servant operating a train in failing to keep a lookout for employees on the track, and give warning of the approach of the train.

An examination of this case shows its great similarity to the case at bar, and we earnestly direct the Court's attention thereto.

The facts therein will be found fully set out in 125 S. E. Rep. 325. The following appeared therein:

(a) Decedent was a section gang foreman; the gang of which he was foreman met at a certain tool box along the track at a certain time.

(b) Decedent was on his way to meet the men.

(c) He was riding a velocipede, belonging to the defendant, which he had been given permission to ride to and from work.

(d) The track upon which he was riding was straight for nearly a mile.

(e) The track was a main line track and not a yard track.

(f) The train approached him from the rear and was on the track upon which he was riding.

(g) The train was an extra freight train.

(h) The engineer and fireman, if looking, could have seen decedent and his position in time to have given him warning.

(i) They were not keeping a lookout at the time.

(j) They knew nothing of the accident until they reached the next station.

The charge of negligence was the failure of the engineer and fireman to keep a lookout for decedent while he was performing his duty and give a warning of the approach of the train.

The State Supreme Court of Appeals (Va.) held that defendant owed decedent the duty of keeping a lookout and of giving warning, and having thus violated its duty, the defendant was liable as charged, and sustained a verdict for plaintiff.

Writ of Certiorari was allowed by the United States Supreme Court.

In deciding the case, the United States Supreme Court held:

1. "A section man engaged in maintaining a railroad track assumes the risk of injury from negligence on the part of train operators in failing to maintain a lookout for such employees along the track.

2. "A section foreman on a railroad who is authorized to use a velocipede on the tracks

> in going to and from his work, assumes the risk of injury through a neglect of train operators to maintain a lookout while the train is in motion."

The Supreme Court only briefly sets out the facts by stating that the injured was a section foreman whose duty it was to go over, inspect and repair tracks, and who was riding a velocipede, which fitted over the rails, on his way to work, and was overtaken by a train running in the same direction and on the same track. The Court said the question at issue was: "Did the Company owe the decedent the duty to keep a lookout, or did the decedent assume the risk?" The Court said:

> "If the accident had happened an hour later when the decedent was inspecting the tracks, we think there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect the self-protection from its employees."

and cites several cases.

In the later case of *Toledo & St. L. & W. R. Co.* vs. *Allen,* 72 L. ed. 267 (decided February 20, 1928), the United States Supreme Court held:

> "Except as specified in Section 4 of the Federal Employers' Liability Act of April 22nd, 1908, Chapter 149, the employee assumes the ordinary risks of his employment, and when obvious, or fully known and appreciated by him, the extraordinary ones and those due to the negligence of his employer and fellow servants."

citing as authorities *Boldt* vs. *P. R. R. Co.,* 254 U. S. 441, 62 L. ed. 385; *Chesapeake & Ohio* vs. *Nixon, supra.*

In the case of *N. Y. Central R. R. Co.* vs. *Devine,* 23 F. (2nd) 588, the Court approves the rule of the *Nixon* case (and cases cited therein) stating it to be that:

> "A railroad is not liable to its employees for a defective lookout on moving cars, or none at all."

Under the later decisions of the Federal Courts, therefore, we insist decedent in the case at bar assumed the risk of being injured in the manner and by the means he was injured.

As we have before stated, no point was raised in the *Nestico* case that the injured man had assumed the risk of being injured as he was, and the New Jersey Supreme Court did not consider the point. Had the point been raised, the Court would, undoubtedly, have stated the question at issue to be (as was done in the *Nixon* case) "Did the Company owe decedent the duty to keep a lookout, or did the decedent assume the risk?" Even then, the Court might, *under the facts presented in the Nestico case,* have held as it did.

We contend there is no conflict between the decision in the *Nestico* case and the decisions in the *Nixon, Allen* and *Devine* cases. The facts are entirely different. Had the facts in the *Nestico* case been the same as the facts in the *Nixon* case, and had the State Court held that under such facts the Company did owe the decedent a duty of warning and that decedent did not assume the risk, yet, we submit, after the decision in the *Nixon* case, the State Court would in future cases be bound by such decision.

In *Farrell* vs. *P. R. R.,* 87 N. J. L. 78, Mr. Justice Minturn, writing the opinion for the Supreme Court, said:

> "It must suffice to say that the construction given by the Federal Courts to the Act in

question must, upon familiar principles, applicable to Federal legislation, be controlling upon this Court in its construction and application of the Act."

NOTE: The Act under discussion in that case was the Safety Appliance Act.

In the case of *Ramsey* v. *Atlantic City R. R. Co., supra,* Mr. Justice Black, speaking for the Court of Errors and Appeals, said:

"The rulings of the United States Supreme Court, the ultimate authority on the construction of this statute (Federal Employers' Liability Act) are uniform to the effect that the assumption of risk by the employee is a defense open to the defendant in this class of actions brought under the Federal statute."

In *Southern Ry. Co.* vs. *Gray,* 241 U. S. 334, 60 L. ed. 1030, the United States Supreme Court held:

"In an action under the Act, rights and obligations depend on said Act, and applicable principles of common law as interpreted and applied in Federal Courts."

The facts in the *Nixon* case and the facts in the case at bar are almost identical. In the *Nixon* case, the decedent was a section foreman,—so was decedent in the case at bar. In the *Nixon* case, decedent was accustomed to rely upon his own watchfulness and keep out of the way,—so was decedent in the case at bar. In the *Nixon* case, decedent was overtaken by a train approaching from his rear on the track upon which decedent was,—so in the case at bar decedent was overtaken by a train approaching from his rear. In the *Nixon* case, the track was straight for a mile, —so in the case at bar claim is made the track was straight for a long distance. In the *Nixon*

case, the engine operators could have seen decedent had they looked,—so it is claimed in the case at bar. In the *Nixon* case, it was alleged the train operators failed to keep a lookout and gave no warning of the approach of the train,—so in the case at bar is such an allegation made. The case at bar is even stronger on the question of assumption of risk than the *Nixon* case for, in the case at bar, the evidence shows that decedent knew of the approximate time trains No. 619 and No. 707 would arrive at the point of the accident and the track upon which they would run, and, yet, he entered upon such track and walked thereon until struck by the train so running on that track.

A CLEARER CASE OF ASSUMPTION OF RISK COULD NOT BE FOUND.

POINT II.

The Trial Court erred in refusing to direct a verdict for defendant when requested so to do.

Had any of the foregoing facts not appeared in the testimony at the close of plaintiff's case (although we insist the essential facts did so appear) they were supplied by defendant's evidence.

Under the evidence at the close of the whole case it clearly appeared that decedent assumed the risk of being injured, in the manner and by the means by which he was injured, and the Court should have, on request, directed a verdict.

POINT III.

No rule or custom of giving warning under the circumstances of this case was proven.

Point may be made by plaintiff of the existence of a rule relative to warnings to be given by engineers to persons walking or standing on the tracks, and of the alleged existence of a practice of engineers to give warning to persons on the tracks, to the end that plaintiff may argue that such rule and such practice required the giving of warning by the engineer of the train to decedent as he walked along between the rails on the night of his injury.

The rule which plaintiff referred to is:

Alarm for persons or live stock on the tracks.	A succession of short sounds.

This rule was effective on the date of the accident. The testimony of Spangenberg and Donohue (both section gang foremen), shows that it is the duty of the foreman and assistant foremen (of which decedent was one), to watch out for trains and give warning to the men; that it is their duty to look out for the trains, and not the operators of the trains to look out for the men. Such foremen and assistant foremen are furnished with timetables, showing the approximate time all trains will arrive at the point the men are working with standard watches tested so as to be accurate and with a whistle with which to warn the men.

Spangenberg says (p. 133):

> "Q. Now then, as you men worked, if you worked on the tracks, you say it was the duty of yourself and Mr. McGarry to look out for

trains. Was there any system there at all for notice being given to you of the trains, or did you have to look out yourself for the trains?

"A. We had to look out. We had to be on the lookout all the time, not alone for the regular trains, but other extra trains coming along.

"Q. For whatever trains were coming along?

"A. Yes, you always have to be on the lookout."

Mr. Donohue testified that when the men were working on the tracks he (being foreman) maintained a lookout for trains (109), as it was his business to do (110).

Therefore, it is clear that under the system of work on defendant's railroad, the section men, working under a section foreman and/or assistant foreman, were dependent upon the foreman and/or assistant foreman for warning of the approach of the trains, and not upon signals from the approaching trains.

The rule, therefore, does not apply to men working on the tracks.

However, if it did so apply, decedent could derive no advantage from that application.

Decedent was not working *on the tracks* at the time of the accident. He was not working at all. He had finished his work. He was walking along the track with no work to engage his mind. He was not on track No. 2 of necessity. He voluntarily chose to walk there.

Does the rule apply to him? If it does, it has no greater application to him than to *any* person, trespasser, or licensee, or even to livestock. It is a rule clearly for the guidance of engineers when persons or livestock *are observed* on the tracks. It applies only *to the seen* person or livestock.

But, plaintiff asserts, it was the duty of the engineer to keep a lookout ahead and discover persons on the track.

Now, while it might be true that it is *the general duty* of enginemen to watch ahead, yet, it is also true that enginemen have other duties to perform inside the cab of the engine which occupy some of their time, i. e., watching the steam gauge, the water, the air, the oil, and numerous other things to take up their time (90-91), and these duties they must perform as well as the duty of looking ahead, and while looking ahead they must watch for signals overhead and along the track, for grade crossings, as well as for obstructions on the track (91). Under such circumstances, their attention must, of necessity, be diverted for a time from the track ahead.

All railroad employees know of the duties of an engineer aforementioned, and know that the engineer cannot be constantly watchnig ahead for persons walking on the track, and unless protected as hereinbefore set out, they must look out for themselves.

Of course, if the engineman observes a man walking or standing on the track, he would give him warning.

The rule applies only to the seen person on the track, and to seen livestock on the track.

The rule under discussion differs entirely from a rule which regulates train movements *at places where men habitually work,* and where it is dangerous to set a train in motion without a signal, or to a train about to pass a standing train. Under such circumstances, the men have a right to expect a warning *before* the train is set in motion, or is allowed to pass the standing train.

The rule does not aid plaintiff.

The alleged practice of engineers to give signals is contained in the testimony of the witness,

Duffy (to whom we have heretofore adverted). He states that at times he worked on the tracks repairing signals, and that, unless he could not help it, he worked so that he faced the direction from which a train would approach him (64), so that he could see it (64); and that when he was so working the oncoming train blew short blasts of the engine whistle (76), and that he has noticed that when he saw section men working or walking on the tracks short blasts of the whistle would be blown as a train approached.

His evidence amounts to nothing more than that when he has been working on the tracks, or when he has seen men walking on the tracks, he has heard engineers of approaching trains blow the whistle. This can mean nothing more than that on those occasions the engineer has seen such persons (including plaintiff) and has sounded his whistle.

POINT IV.

The Court erred in refusing to charge the jury as requested in the first, second, third, fourth, fifth and eighth requests of defendant.

The First Request was (p. 207):

> This action is based upon the Federal Employers' Liability Act. Under that Act the decedent, a section man, assumed the risk of being injured by trains running upon the tracks of the railroad (assuming him to have been working on the tracks at the time of his injury).

The Second Request was (p. 207):

> Among the risks assumed by the decedent was the risk of being injured by a train driven by an inattentive operator.

The Third Request was (p. 207):

> If the injury to decedent resulted from the fact that the train operator was inattentive and did not see decedent, there can be no recovery.

The Fourth Request was (p. 207):

> And even though the train operator could have seen decedent and did not see him because he was inattentive, the risk of such an occurrence was a risk assumed by the decedent and there can be no recovery.

The Fifth Request was (p. 207):

> If the train operator failed to sound a whistle or ring a bell in order to warn decedent of the approach of the train, and such failure was occasioned by the inattention of the train operator, there can be no recovery.

The Eighth Request was (p. 207):

> If you find that McGarry knew of the approximate time that the train by which he was struck would arrive at the place where he entered upon track No. 2, and with that knowledge entered upon that track and walked along the same with his back toward the train, then he assumed the risk of being struck thereby, and your verdict must be for the defendant.

If the testimony on the subject was undisputed (as we assert it was), and the argument presented in this brief under Points I and II is correct and the decedent assumed the risk of being injured in the manner and by the means whereby he was injured, then, of course, the Court erred in refusing to non-suit and/or direct a verdict for defendant. If there was any dispute in the evidence on the subject, then the Court erred in refusing to charge the jury as requested by defendant.

That the requests stated the law is entirely clear.

Chesapeake & Ohio v. *Nixon, supra;*
Toledo, etc. R. Co. v. *Allen, supra;*
N. Y. Central R. Co. v. *Devine, supra.*

For the foregoing reasons the verdict should be set aside.

Respectfully submitted,

WILLIAM A. BARKALOW,
Attorney of Defendant.

EDWIN F. SMITH,
of Counsel.

Decision of Court of Errors and Appeals, Decided October Term, 1929.

McGarry vs. *Central R. Co. of New Jersey* (No. 120).

COURT OF ERRORS AND APPEALS OF NEW JERSEY.
Oct. 14, 1929.

1. Courts—97 (5)—Federal decisions control in suit under the act (Federal Employers' Liability Act (45 USCA—Section 51).

Federal decisions are controlling in a suit under the Federal Employers' Liability Act (45 USCA —Section 51).

2. Master and servant 213 (4)—Section foreman killed while walking along tracks assumed risk of injury from ordinary operation of trains with which he came into relation.

Assistant section gang foreman walking along tracks of railroad company at time he was overtaken by train going in same direction and killed assumed as part of his employment, risk of injury from ordinary and usual operation of train with which his duties brought him into relation.

3. Master and servant 213 (4)—Section foreman killed while walking on tracks held to have assumed risk of failure of enginemen to warn of train's approach (Federal Employers' Liability Act) (45 USCA—Section 51).

Evidence, in action for employee's death under Federal Employers' Liability Act (45 USCA—Section 51), HELD insufficient to indicate system of warning which would entitle deceased assistant section foreman, who was killed while walking along tracks when overtaken by train, to rely on those operating train to give warning of approach rather than on his own vigilance, so that danger of injury was one of assumed risks incident to his employment.

The Chancellor and Kalisch, Black, Van Buskirk, and Dear, JJ., dissenting.

Appeal from Circuit Court, Hudson County.

Action by Agnes McGarry, as general administratrix of the estate of John McGarry, deceased, against the Central Railroad Company of New Jersey. Judgment for plaintiff, and the defendant appeals. Reversed.

William A. Barkalow, of Freehold (Edwin F. Smith, of Jersey City, of counsel), for appellant.

Collins & Corbin and Edward A. Markley, all of Jersey City (Walter J. Freund, of Jersey City, of counsel), for respondent.

Lloyd, J. Plaintiff below recovered a verdict under the Federal Employers' Liability Act (U. S. Comp. St. Section 8657 (45 USCA—Section 51) for the death of her husband, due, it was claimed, to the negligence of fellow employees, and the defendant appeals.

The question presented on the appeal is whether the Trial Court should have controlled the case by nonsuit or by direction of a verdict for the defendant.

Deceased was an assistant section gang foreman on the Central Railroad at Elizabethport, and, when the accident occurred, was walking along the tracks of the railroad company where he was overtaken by a train going in the same direction and killed. His general employment was in interstate commerce and at the time he was in that service.

The negligence alleged against the defendant was that the engineer and fireman in charge of the train failed to give warning of its approach, in consequence of which the death resulted.

To impose responsibility on the employer it was necessary to show that some duty which the defendant owed to the deceased, either directly or through its employees, was violated. In the at-

tempt to establish this responsibility in the present case a fair summary of the proofs, we think, would indicate that the deceased was proceeding along the railroad tracks in the performance of his duties when he was struck from behind by an engine of the defendant company; that no warning was given by those in charge of the engine of its approach; that a witness, Duffy, a signal maintenance man, prior to the accident had observed, when walking along the track, that the engineer used to give a number of short blasts to warn of the approach of his train. Perhaps the evidence most favorable to the plaintiff was that given as follows:

> "Q. Now when you were walking out on the track * * * fixing something on the track, so that you had to be on the track, did you get your short blasts of the whistle of the engine? A. Yes, sir. * * *
>
> "Q. When the men would be walking on the tracks, as you were walking on the tracks, as the section men would be walking on the tracks, what kind of a whistle would you get? A. Several short blasts."

It further appeared that no warning was given to the deceased when the accident occurred.

(1, 2) It is clearly established by Federal decisions (which are controlling here) that one in the position of the deceased assumed as part of his employment the risk of injury from the ordinary and usual operation of the trains with which his duties brought him into relation. *Chesapeake & O. R. R. Co.* vs. *Nixon,* 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, St. L. & W. R. R. Co.* vs. *Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513.

In the recent case of *Unadilla Valley Ry. Co.* vs. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, a conductor violating a standing written order passed the meeting point with another train and

a collision resulted. In an action for the death of the conductor it was held that he could not rely on either the failure of the station agent to apprise him of the approach of the colliding train (of which the agent had been informed), nor on the negligence of his own motorman in obeying the conductor's order to proceed (even though the motorman had information that the other train was approaching), as a basis of recovery; that the primary duty was his own to obey the order not to proceed; and that he could not avoid the assumption of the risk incident to its violation by transferring it to the shoulders of his co-employees. While the analogy of this case with the present is not complete in its facts, it is pertinent in principle. The assumption of the risk of injury from the dangers incident to work on the tracks and roadbeds by the passage of trains was one which the deceased was as much bound to regard as the direct orders of the employer in the case cited, unless and until he was relieved of that duty by warning from other employees provided for by his employer.

(3) We think the facts shown in this case fall short of indicating a system of warning which would entitle the deceased to rely on those operating the train instead of on his own vigilance, and in consequence the danger of injury was, under the circumstances, one of the assumed risks incident to his employment.

As our conclusion is that the death of the plaintiff's husband was due to a cause the risk of which was assumed by him, the judgment is reversed.

For affirmance: The Chancellor, Justices Kalisch and Black, and Judges Van Buskirk and Dear.

For Reversal: The Chief Justice, Justices Trenchard, Parker, Campbell, Lloyd, Case and Bodine, and Judges White, McGlennon, Kays and Hetfield.