New Jersey Court of Errors and Appeals

MSAON B. SPOFFORD, Administrator of William Ryan, deceased,

Plaintiff-Appellee,

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Defendant-Appellant.

At Law.
On Appeal from Hudson County Circuit Court.

Statement.

The above action was tried in the Hudson County Circuit Court before Hon. Luther A. Campbell and a jury, resulting in a verdict of $3,750 in favor of the plaintiff. From the judgment of the Circuit Court the case comes before this Court upon appeal.

Facts.

Defendant's steam railroad runs from Jersey City (at Communipaw) through Jersey City and Bayonne in Hudson County, and beyond. At is passes through Bayonne it runs approximately north and south. At Forty-ninth Street in Bayonne there are four tracks known as Nos. 1-2-3-4: The Forty-ninth Street station is to the west of the tracks. No. 4 track is nearest the station; No. 2 to the east of No. 4; No. 1 to the east of No. 2 and No. 3 is the most easterly track. The station platform is fifteen feet one inch away from the nearest rail of track No. 4. There is a plank walk eight feet wide extending from the

station platform at about in front of the ticket office across the track to the end of track No. 1, and a cinder-fill in front of the station where there is no planking.

To the east of the tracks of defendant, but very near the same, are the railroad tracks of the Lehigh Valley R. R. Co. and between the two sets of tracks is an open ditch about two feet wide at the bottom and five feet wide at the
10 top. There was no method provided for crossing this ditch to the east of the station.

East of the Lehigh Valley R. R. tracks and quite a long distance therefrom, is the shore of New York Bay, and between the Lehigh Valley tracks and the shore the land is vacant, save for one factory building south of the railroad station. East Forty-ninth Street does not cross the railroad tracks and only a crossing for trucks to
20 cross the tracks to the north of the station.

Trains running from Jersey City proceed on tracks Nos. 2 and 4, the two tracks nearer the station; trains to Jersey City proceed on tracks Nos. 1 and 3, the two tracks further away from the station. There is a bell which warns passengers of trains approaching *from Jersey City*. There is no overhead bridge nor tunnel for passengers to pass over or under the tracks, nor is there a fence between tracks Nos. 1 and 2.
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On December 31, 1914, in the night time, William Ryan, while on the tracks, on which trains proceeding toward Jersey City run, was struck by a train proceeding *toward Jersey City,* and was killed.

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Evidence.

Plaintiff's Testimony.

Plaintiff, on his direct examination testified that he recently measured the distance between the West 49th Street and West 8th Street depots of the Central Railroad Company (p. 12) by means of an automobile, on which a Warner autometer was fitted; that he drove the automobile along Avenue C, which runs exactly parallel with the Railroad, and at a distance of about 150 feet (p. 13). He went both ways; the distances were exactly the same, 2.4 miles (p. 14). 10

On cross examination he testified that he is not a relative of the deceased; that he is employed by plaintiff's attorney and has been for ovei twenty years, but is no relative of his. He did not know the decedent in his lifetime, nor ever saw him and did not know decedent's family in his lifetime (p. 14). 20

William D. Lodge, plaintiff's next witness, on direct examination testified that he is an architect and drew the sketch which forms part o\ the record, and on October 19th took measurements with a steel tape in company with Norman Ellsworth; that he has had fifteen years' experience; that he is familiar with the 49th Street station of the Central Railroad at Bayonne (p. 15) and has been for about ten years. There has been no change in the condition and lay-out of the station since he made the sketch in December, 1913 (p. 16). 30

On cross examination he testified that the map shows the true condition of the same; that there is a news-stand at the station 9 feet 3 inches away from the station platform and 15 feet 1 inch away from the track. The news-stand is on a line with the station building (p. 16); that he did not 40

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put the news-stand on the map because he was not requested to (p. 17). There is a little park back of the station toward the street and a little driveway that runs back past the station toward the street. He has not on the map the distance between track 4 and Avenue E (p. 18).

On re-direct examination he testified (p. 18) that everything shown on the sketch is exactly to the scale. The measurements were made with a steel tape about 10:30 in the morning, and witness was there at night from 10:30 to 11:15; that the lights about the premises are shown on the drawing one on each corner of the station and a light about seventy feet from the station (p. 19). They are ordinary gas lights with the old fashioned tip and are about seven or eight feet from the ground. He paced it off and the lights threw a diameter of about ten feet directly under the lights. Beyond the circumference the condition was dark. This was true of each of these four lights and also of the lamp seventy feet from the station. He examined the condition of the tracks in front of the station. There was a plank walk about in front of the ticket office running clear across the tracks (p. 21). It extended over to the end of track 1, the third track. It was eight feet wide and commenced at track 4 on the station side (marked A and B on the record at the request of the court). In places where there was no plank there were cinders on the track about flush with the track, all in front of the station (p. 21) and reaching over to track 3 all the way across the four tracks. He is not positive as to whether cinders were between the rails of track 3, but it was solid at least to track 3 flush with the track. There is no tunnel or overhead bridge there for reaching the other side of this track, nor any fence between these tracks. There is a bay window with three

windows in the station, permitting a view in all directions in front of the station and the ticket office is right behind it (p. 22). The platform is eight inches above the ground, one step. There are no buildings right across the tracks in front of the station. There is a radiator plant over the other side, a big factory building extending down about 200 feet south of the station, and on the other side of the factory beyond that and to the north of it, you can see all the lights of the Long Dock of the Pennsylvania yards over there. They look like a number of street lights, row after row (p. 23). 10

On re-cross examination he testified that there is no embankment on the other side of the tracks where the Lehigh Valley runs. He didn't make any measurements. There is a ditch between the Central Railroad tracks and the Lehigh tracks about two feet wide at the bottom and five or six at the top, and the land on the other side of that leads to the shore of New York Bay. The shore is a good way off at that point. Between the Lehigh Valley and the shore the only factory is this factory down there. That is not between the tracks, but between the Lehigh Valley tracks and the shore (p. 24). He does not know whether 49th Street crosses over. He knows there is no street; there is a crossing for trucks. The Long Dock is about half a mile from the street and runs out from the land about a mile. Between the Pennsylvania yard or dock and the station there are no lights at night (p. 25). 20 30

On re-direct examination (p. 25) he testified that the factory building starts at the point marked C on the map.

Edward T. Shaddeck, plaintiff's next witness, on direct examination, testified that he is a chauffeur for Mr. Salter, plaintiff's attorney, and drove the witness Spofford at the time the measurement 40

was made between the 8th and 49th Street stations; the distance was 2.4 miles (p. 26).

On cross examination he testified that he measured it with a Warner Speedometer. The car is a 1915 car; that he did not have his speedometer tested before making the measurement (p. 26).

William H. Kiernan, plaintiff's next witness, testified on direct examination that he is a mechanician; that he has lived in Bayonne on and
10 off for twenty-five years, probably out at 51st Street; that the 49th Street station of the Central Railroad is the station nearest his house. He had occasion to use it many times morning and evening during the twenty years or more, and is familiar with the lay-out of the station and tracks and recently made an examination at the request of plaintiff's attorney. To the best of his knowledge there was no difference, no change in the
20 tracks, surroundings and lighting since December, 1913. In making the examination he got there about 10:30 and stayed until about 11:10 (p. 27). In December, 1913 there was no fence between the tracks or tunnel or overhead bridge for reaching the other side, nor any gate; that they have a bell there which sounds or rings only on trains going west or out from Jersey City, not on trains going into Jersey City. There is planking in front of the station between the rails;
30 the other part of the railroad to a reasonably good distance on each side of the plank is filled with cracked stone or cinders flush with the top of the rail. The planking extends from the station up to the first rail or track three, he would say. Passengers would board the train going into Jersey City on the left hand side (p. 28). Going toward Jersey City you go on the left hand side of the train across tracks 2 and 4, and
40 get in and discharge passengers on the left hand side from both directions. There was nothing

to prevent passengers going off on the left hand side. These lamps throw a very poor light. They were gas lamps and looked to him (witness) like the ordinary tip burner, something like a Bray burner. The light was cast down from the lamps to the ground from a shade; he would call it a four foot burner. There was an area from eight to ten feet right from a direct point under the lamp, which was lit up. Beyond that it was dark. On the night that witness was there he waited for a train that comes to the 49th Street station at 11:06 and saw it come in and go out (p. 29). It left at 11:07 1/2 and about 11:08 express 628 passed the depot, leaving about thirty seconds between the going away of the local and the passing of the express. Witness has observed these two trains at other times (31). He came in there for a number of nights on that late train usually on time, and found that the express train and the other local were usually on time at about that same time. On this night he observed the lights across the tracks on the side of the Pennsylvania Long Dock (p. 32). To a stranger they appeared like a city. They are scattered all over, a large, big area, probably two, three or four hundred or more (p. 33).

On cross examination he testified that he has been living in New York on and off for over a year and went down to this 49th Street station last Friday evening at the request of Mr. Salter, not for his own business, and Mr. Salter was with him, and he talked over with Mr. Salter these things there, as to the distance of the planking etc., and whether or not they were the same as in 1913. One of those lights might have been changed for all witness knows, but the general location of the lights are the same (p. 33). It might have been raised higher, but he would have noticed had there been a change (p. 34).

NORMAN ELLSWORTH, plaintiff's next witness, on direct examination (p. 34) testified that he is an undertaker and is connected with the morgue of Bayonne. On the night of December 31, 1913 he made a call near the 49th Street station and found the body of some man lying in the gutter in a ditch in fifty feet of the crossing; brought him to the morgue and next day he was identified as William Ryan and taken home. The body
10 was found about fifty feet north of the station clear across all the tracks north of the crossing that goes to Long Dock (p. 34). There is a crossing just beyond the depot going across to Long Dock. Witness does not know whether it is a highway crossing, but there are boards that go across it for wagons. Witness went across with a basket. It was fifty feet above the north line of the crossing. The north line of the crossing is fourteen feet north of the platform. Wit-
20 ness held the tape for the measurements shown on the map. The north line of this crossing is about sixty feet north of the north side of the station building, and deceased was found fifty feet north of the crossing on the east side of all of the tracks (p. 35). Witness has known that crossing to exist there for maybe ten years. He can say eight years positively. He left the wagon on this side and carried the basket across to get the body. There is no gate there and there was
30 none that night, nor fence, nor bridge or tunnel. He did not notice whether there were one light, two lights or what. He could not tell whether there were any lights and does not remember whether it was light or dark. He was there just at midnight. He does no remember whether the station was all lit up. He was there with witnesses Kiernan and Lodge when they were down at the station (p. 36). He could not tell whether
40 the conditions were the same as the night when

he picked the body up. He did not notice or see any change, did not look for any (p. 37).

On cross examination (p. 37) he testified that the body was dressed as a longshoreman, a working man that would be around, loose shirt, heavy suit, no overcoat. He could not remember what color underclothing deceased had on, and did not find any hat. He took the body to the morgue and the next day was identified by decedent's son, but witness cannot recall the name. 10

JOHN J. RIGNEY, plaintiff's next witness, on his direct examination testified, that he is Lieutenant of Police connected with the police department in 1913; that on that night he was sent to the 49th Street depot with Detective Thatcher, and there was a man with his face all smashed lying in a ditch on the east side of the railroad track. He didn't examine the tracks for any marks or signs of blood, or anything like that. 20 Where the man's body was found it was dark in the ditch there. He didn't go back the next day. He got there around midnight. The whistles and bells were ringing. It was New Year's Eve. He is pretty familiar with the station (p. 38). He could not exactly say what lights were there. He didn't count them. The station was lit up, but over in the ditch where the body was found it was dark. He didn't count the lights; he could not tell. He believes it was lit up the same as 30 every night. There was lights all around the station there that night. He didn't count them but just the same as every night. He could not say whether they changed any since 1913 or not. They look about the same. He went to the morgue with the body. There was a ticket (Exhibit P-3) taken from it and a piece of paper and a brass key (p. 39).

On cross examination (p. 40) he testified that he noted the piece of paper very closely for iden- 40

tification and found on it name "Kettie" "163 West 43rd Street." Deceased had on red underwear and a gray flannel shirt and a pepper and salt suit. He didn't just recall whether he found a cap.

JAMES E. KEEGAN, the plaintiff's next witness, testified on his direct examination that he lives at 22 East 51st Street and saw a body picked up at the 49th Street station about 12 o'clock; it
10 was a dark night. There was not much of a light there. As well as he could see it was gas-light, the same as those that are there now (p. 41).

On cross examination he testified that there were about four lights there. There is four there on the station. There were four there that night —that is all he saw. The station itself was lighted. The bay window shown on the map was
20 there (p. 41). The light in the bay window did not show very light out there, but it shows so that you would know there was a light in the station. There was no light shining out of the station at any place except the bay window. There were other windows in the building, but he does not remember whether the lights came out of these windows. He knows Mr. Salter for about ten years and talked about this case the previous night for the first time, and that was
30 the first time this matter had been called to his attention since the happening of it, the first time that he was asked to remember the lights at the station as they were on December 31, 1913 (p. 42). He had this talk with Mr. Salter in his office. It was what Mr. Salter said to him that fixes in his mind that the night he was at the station was December 31, 1913 (p. 43).

On re-direct examination (p. 43) he testified
40 that the night of the accident he was standing on the corner of 48th Street when he saw the

morgue wagon go down and he followed down in back of it. He had never been there any other time when the morgue wagon picked up a body.

Allen A. Brown, plaintiff's next witness, on his direct examination testified, that he was employed by the defendant as station agent on December 31, 1913 and was on duty until after twelve in the morning. He did not know that a man had been killed in front of the station until 10 after (p. 44). The next day he looked at the premises in front of the station. He saw some blood on one side of the center of the bay window on the track one (marked D on the map) (p. 45).

On cross examination he testified that he went on duty at 7 o'clock in the morning; that his assistant, Robert A. Pitcher, was working with him; that he lives in the station; that he heard a man had been killed about 11:20. His atten- 20 tion was called to it when the train backed up. The number of the train was 628. The local that gets there at 11:06 was on time that night (p. 46).

Robert A. Pitcher, plaintiff's next witness, on direct examination testified that he lives at 19 East 46th Street and is assistant shipping clerk for the defendant; worked for defendant up to May 6, 1914. He was the assistant referred to by witness Brown, and was on duty about 11 30 o'clock on the night of the accident in the ticket office and remembers the night pretty well. They picked up a man down in the ditch that night who was killed. That fixes the night in his memory. He was there when the 11:06 train pulled in and when it pulled out. He knew decedent but did not see him get off the train that night (p. 47). He could see people getting off the train. He was right in the bay window and 40 could look out either way. He does not remember

whether he looked out that night. It was three or four minutes after this 11:06 came in and went out that the 628 express went by. He has worked at this station about three years. He sees them go by every night. He has seen it go by every night for about twelve years (p. 48). He was down there every night for close on to three years. The time of passing varies. The point where the trains pass one another was not about where
10 the station is. The condition of the tracks was just about the same then as it is now. He examined the tracks next day after the accident and found marks of blood and what looked to him from seeing it before was brains right about opposite the bay window just the other side of the railing on track one (p. 49) (marked E on the map). He did not see Ryan that night until after the accident. He did not know that Ryan was killed until the next day. Brown was in
20 the office with witness at the time. The Central Railroad has other stations in Bayonne, at East 33rd St., East 22nd Street, West 8th Street and Avenue C; the next station below the 49th Street station is the East 33rd Street, and below that the 22nd Street, and below that the 8th Street (p. 50). There are two stations at 33rd Street--one on each side of the track (p. 51).

On cross examination he testified that he saw
30 the body of decedent. It had red flannel underclothing on it. He got a regular Winter driver's cap with a button on it. He could not tell what kind of a button it was just now, but the initials on it, which he has forgotten, looked like a longshoreman's button. He didn't give the cap to anybody, but hung it up in the station in the ticket office. He heard afterwards that Mr. Ryan's son got it. He doesn't know the name of Mr. Ryan's son (p. 54).
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MICHAEL J. RYAN, plaintiff's next witness, tes-

tified that he is decedent's brother, and testified concerning decedent's age, state of health, dependent survivors, wages and contributions to support of said survivors (pp. 55-62).

WILLIAM RYAN, plaintiff's next witness, testified that he was decedent's son. His testimony followed the same lines as that of preceding witness.

BRYAN CONNELL, plaintiff's next witness, testified on direct examination that he was a friend of decedent and in general concerning decedent's 10 health and wages (pp. 68-69).

ALLAN A. BROWN, recalled, testified on direct examination that the Exhibit P-4 is the time table of defendant in evidence on December 31, 1913 (p. 69). That the distance from the 49th Street station to the Jersey City terminal is about 5.1 miles; that he knows train 628; that it is an express and makes no stop in Bayonne except on flag at West 8th Street (p. 70). 20

MARGARET RYAN, plaintiff's next witness, testified that she is plaintiff's daughter; that her father paid the expenses of the family (pp. 70-71).

MICHAEL F. LOUGHERY, plaintiff's next witness, testified on direct examination that he was the engineer of train 628 on December 31, 1913 (p. 72); that it is an express and stops at 8th Street, Bayonne on signal; otherwise it goes right 30 through Bayonne without stopping. That on December 31, 1913 his train was scheduled to pass through 8th Street station at 11:02 and there is no stop between there and Jersey City; that there is no regular average running time between 8th Street and 49th of that train (p. 74). It takes about five minutes generally, sometimes a little more, sometimes a little less (p. 75).

At the close of the plaintiff's case defendant moved for a non-suit upon the ground that no 40 negligence upon the part of the defendant had

been proven. This motion being denied, and defendant being of the opinion that plaintiff had shown nothing requiring it to go to its defense, produced no evidence in its own behalf, but closed its case and moved, upon the same ground, for a direction of a verdict in its favor. This was also denied. It is the denial of these motions which defendant now assigns as error.

Argument.

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Although the tracks at 49th Street, Bayonne, run approximately north and south, the trains are spoken of as east-bound (proceeding toward Jersey City) and west-bound (proceeding toward Elizabeth) and we shall therefore, refer to them as east-bound and west-bound trains.

Decedent's presence as a passenger on the west-bound train which arrived at the 49th Street station at 11:06 P. M., and that he was struck by

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the east-bound train and killed were admitted by defendant.

The question remaining thus concerns simply the proof offered by plaintiff of the negligence claimed by him to have been proximately responsible for the accident.

This alleged negligence is set forth in the complaint (record, p. 11) to have been that defendant failed to exercise reasonable care

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> "to provide said Ryan with a reasonably safe and proper place to alight from said train, and to make the said station a reasonably safe place for the discharge of its passengers, and to afford Ryan with a reasonably safe place for his discharge as a passenger, and that it failed to maintain a fence to prevent passengers from crossing its tracks, and from the dangers of being struck by a passing train upon an adjoining track, and that it failed to provide an overhead bridge

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> or tunnel for the purpose of going across its

tracks, and to warn and protect said Ryan from dangers which it should reasonably have apprehended at said station."

The alleged negligent construction of the 49th Street station as regards fences, tunnels, bridges and other mechanical arrangement plaintiff attempted (on pages 51-54 of the record) to prove by the testimony of the witness, Pitcher, the assistant station agent of defendant on the night of the accident, without producing an expert upon standards of safety in station construction; of course the trial court excluded such evidence. 10

No further attempt being made by plaintiff to prove these allegations, the trial court in its charge (Record, page 86) declared these alleged elements of negligence eliminated by this failure to offer proof, from the consideration of the jury:

> "That there might have been, as has been suggested, a fence built between the tracks; that there might have been an overhead bridge; 20 that there might have been an underground passage or tunnel as it has been suggested, is not of consequence. It has not been shown that the method employed or the plan or class of structure or the layout of the property of the company was not a standard form of lay-out or standard form of construction such as was in general use by a well regulated company."

The only questions, or elements of alleged negligence, therefore, which the trial court submitted 30 to the jury, over defendant's motions for a non-suit and for a direction of verdict, and which the jury considered and found as facts upon the evidence in rendering their verdict were

> (a) an alleged failure of defendant to use reasonable care to provide Ryan with a reasonably safe and proper place to alight from said train; 40

(b) to make the said station a reasonably safe place for the discharge of its passengers;

(c) to afford said Ryan a reasonably safe place for his discharge as a passenger; and

(d) an alleged failure to use reasonable care to warn and protect said Ryan from dangers which it should reasonably have apprehended at said station,

in some respects other than that of the material
10 construction and mechanical arrangement of the 49th Street station, and the repair and maintenance thereof (complaint, record, pages 11, 12).

Now the only *other* respect in which railroad way stations may become unsafe for alighting passengers, is in regard to the incident dangers of railroad operations, such as passing trains, shunting cars, etc. Plaintiff does not claim any want of care in the maintenance of the platform,
20 tracks or lighting of the 49th Street station, as the night of the accident.

Plaintiff's case therefore, as presented upon the defendant's motions for a non-suit and direction of verdict, simmered down to the question whether defendant upon the evidence could be charged with negligence in the operation of the east-bound express 628 past the station at 49th Street on the night in question.

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Defendant's Insistment.

It is defendant's claim that the evidence produced by plaintiff warranted no reasonable inference of negligence in the above respect for the following reasons:

(1) Defendant was under no duty to prevent the passage of the east-bound express past the 49th Street station at the time when it must, under the evidence, be found to have actually passed the
40 station, to-wit, at least four minutes after the train on which Ryan arrived had pulled out.

(2) Defendant was under no duty to prevent the passage of the east-bound train on the track which it actually used, viz: on the opposite or wrong side of Ryan's train from the passenger platform of the 49th Street station, had the west-bound train been standing at the station.

(3) Defendant owed no duty to decedent at the time of the passage of the east-bound train other than that which it owed a mere licensee, to-wit, not to wantonly or wilfully injure him. 10

We shall divide the argument according to these three divisions.

POINT I.

No inference of negligence could reasonably be drawn from the evidence that the circumstances of the passage of the east-bound train imposed any duty on defendant to passengers who had alighted from decedent's train. 20

In response to demand served upon it by plaintiff, defendant admitted in writing, (read in evidence at page 71 of record) that decedent's train, the 10:35 train from New York, west-bound, arrived at the 49th Street station on the night of the accident at 11:06 P. M. (*the actual arrival* of the west-bound train at 49th Street at 11:06 (on time,) was also *testified* to (page 46) by the station agent, plaintiff's witness Brown); and that 30 the east-bound train, number 628, leaving Trenton Junction at 9:43 P. M., was scheduled to arrive at the West 8th Street station at 11:03 P. M.

It is necessary, therefore, to ascertain what the record shows of the actual time of passage of this east-bound train. The station agent, the witness, Pitcher, testified (p. 48) that he has looked out of the station every night for close on to three years prior to the accident and has seen both trains go by every night; that he has seen the 40

trains go by every night for about twelve years. The time of passing varies. *That the usual point of passing was not near or about where the station is* (page 49, line 12). The station agent, Brown, on his recall to the stand, testified that the only stop made by the east-bound train is at the West Eighth Street station, where it stops on flag; and that the West Eighth Street station is about 5.1 miles away. Other witnesses measured this distance as 2.4 miles (page 14); the distance
10 stipulated by defendant (Exhibit P2) was 2.5 miles. Plaintiff then called the engineer of the east-bound train, who testified the schedule time for his train to pass 8th Street is 11.02, and that he generally runs according to his schedule; that there is no regular running time of the train from 8th Street to 49th Street, that they could depend on, but it generally takes about five minutes, sometimes a little more, sometimes a little
20 less. This would usually bring the train to the 49th Street station *after* the arrival of the west-bound train. *But plaintiff did not ask the witness about his actual time of passage of the 8th or the 49th Street stations, or whether he was actually on schedule time that night.* This testimony must therefore yield to the testimony of the witnesses who told of the actual passage of the east-bound train; all presumptive inferences from this testimony must yield to the positive evi-
30 dence of another witness. Now what does the record show as to the actual passing time of the east-bound train at 49th Street? The only witness who actually testified about the time of passage of the 49th Street station by the east-bound express was the assistant station agent, Pitcher, who testified as follows: (pp. 47-48):

"Q. Were you on duty at above eleven o'clock that night? A. Yes, sir.

"Q. Where were you at that time? A. In
40 the ticket office.

"Q. Do you remember that night pretty well? A. Yes sir, I do.

"Q. Something out of the ordinary happened that night? A. Yes, sir.

"Q. What? A. Well, we picked up a man down in the ditch down there that night.

"Q. A man was killed that night? A. Yes.

"Q. Is that so? A. Yes.

"Q. That fixes that night in your memory, does it? A. Yes, sir.

"Q. Now, were you there when that 11:06 train pulled in? A. I was. 10

"Q. And when it pulled out? A. I was.

"Q. Did you know Ryan? A. I did.

"Q. Did you see him get off the train that night? A. I did not.

"Q. Were you in a position that night at that time when that train pulled in to see people getting off the train? A. I could see people getting off.

"Q. Where were you with regard to the bay window? A. Bay window? I was right in here. 20

"Q. Were you in a place in the bay window where you could look out? A. I could look out either way.

"Q. You could look out in all directions? A. All directions.

"Q. Do you remember whether or not you did look out that night? A. I don't remember.

"Q. How soon after or about what time with relation to this 11.06 coming in and going out did the 628 express go by? A. 30 Well, it was some time, but I couldn't judge right to the minute, but it was three or four minutes.

"Q. Three or four minutes after what? A. That 11.06 pulled out—or started to pull out."

The station agent, the witness Brown, was not asked about the actual passing time of the eastbound express on the evening of the accident.

This is all the evidence in the case as to the 40

actual time of passage of the east-bound express past the 49th Street station. No presumption from the testimony that it *usually* runs on schedule, and takes five minutes from the time it passes 8th Street at 11.02, can overcome Pitcher's testimony.

It is submitted that this evidence admits of no other inference but that the east-bound express passed the 49th Street station *four minutes after decedent's train had pulled out.*

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Now plaintiff certainly cannot maintain that any duty rested on defendant, or upon any railroad, to keep its tracks at way stations clear of passing trains for a period as long as *four minutes* after every train pulls out. The greatest length of time during which such a duty exists is that reasonable period necessary to permit alighting passengers to cross the tracks intervening between their train and the station platform. (Moreover, as we shall hereafter argue, the east-bound train did not use an intervening track in this case between decedent's train and the station, but ran on the wrong or blind side of it.) It cannot be maintained that this reasonable period could under ordinary circumstances extend to four mnutes. It should take an adult passenger not more than ten seconds to walk from the west-bound train to the station platform at 49th Street, a distance which, under the evidence, could not be more than 30 feet. There was no evidence submitted here showing why decedent should not be held to this reasonable period of time necessary to walk from the train on track two to the station platform. Any other rule, or any doctrine extending this reasonable time to so long a period as four minutes, would, as can be readily imagined, seriously interfere with the operation of railroads. It frequently happens that way stations (sometimes many successive way stations as on the outskirts of large cities or in suburban cen-

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ters, or the commuter districts around New York and other large cities) are less than four minutes apart. In this very case the evidence shows that there are three other stations in Bayonne at which local trains stop, at 33rd, 22nd and West Eighth street; and that the running time between 8th Street and 49th Street is about five minutes. It would be practically impossible to operate through trains on defendant's road in the City of Bayonne if each through train had to wait four minutes after every local going the other way had pulled out of each of these stations. It is submitted that under these facts defendant violated no duty to decedent in respect to this east-bound train.

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In this connection it must be borne in mind that the question here does not concern opportunity to leave the premises of the carrier; for this is not a case of falling down stairs, or assault by an employee, and has none of the circumstances of those cases where the question of opportunity to leave the premises is in issue. The cases, therefore, which pass upon the duty of the carrier toward its passengers who have not yet left the carrier's premises have no application here.

20

Nor was such period of four minutes, as plaintiff may argue, a question for the jury to decide upon all the circumstances, but it is so greatly in excess of what constitutes a reasonable period that it was the duty of the Trial Court to withdraw the question from the jury and its failure to do so is error.

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(See authorities cited under Point III, below.)

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POINT II.

Under the evidence defendant violated no duty owing by it to decedent with respect to trains moving on the wrong side of decedent's train.

The argument under the preceding head proceeds on the assumption of the passage of trains on intervening tracks between the train dis-
10 charging passengers and the station platform. The argument is much stronger in defendant's favor when it is borne in mind that this 49th street station was not a double station, with platform on either side, but on one side only, to wit, the west side and that the train which struck decedent was using the track beyond that from which decedent had alighted to wit, to the east thereof.

20 The evidence on the point is clear. The Central Railroad in the City of Bayonne at 49th Street skirts the eastern edge of the City. There are no houses east of the right of way, which almost skirts the west bank of New York Bay; the witness Lodge testified (p. 23) that there were no sort of buildings east of the line, but a radiator factory about 200 feet south of the station. 49th Street does not cross over the railroad (p. 25): there is a crossing, of wooden boards, over the
30 tracks, (for wagons going to the Pennsylvania Dock) about 14 feet north of the station building, but no street (Ellsworth p 35); and about half a mile distant are the Long Dock and Greenville Yard of the Pennsylvania Railroad (p. 25). Immediately east of the Central Railroad, and parallel to it, run the tracks of the Lehigh Valley Railroad; and between the two rights of way is a ditch five or six feet wide at the top and two
40 feet at the bottom (p. 24). At night, on the date of the accident, the station is lighted with gas

lamps at each corner of the station and a light about seventy feet from either end of the station, raised seven or eight feet above the ground (p. 20). There was also a light which shone through the bay window of the ticket office in the middle of the station (Keegan p. 42). There are no lights east of the track for half a mile, up to the Pennsylvania Yards, which have rows of lights resembling street lights; but the intervening space is dark. Thus all the lighted section of Bayonne, the city with its houses, and stores and its lighted streets lies to the west of the railroad. The station, with its lamps, runs along the west side of the tracks.

In addition to this general condition apprising the reasonably intelligent and prudent traveller at 49th street of the situation, there were certain additional and unmistakable indicia that passengers alighting should proceed to the west side of the railroad. The defendant had laid out a planked crosswalk from the edge of the station platform on the west side of the railroad across the first three tracks, and extending to the easternmost rail of the third track, counting from the station platform; these tracks were numbered from west to east, 4, 2 and 1. The witnesses Lodge (p. 21) and Kiernan (p. 28) testified that this planking extended over to the end of track 1, the third track, commencing on the station side of track 4. *But there it ended,* leaving no cross walk over the easternmost track. The rest of the tracks were filled with cinders. Plainly, therefore, to the observation of reasonably intelligent travelers, alighting passengers had notice from this arrangement that they were not to cross the right of way to the east side, but were to follow the planking to the west and to the platform.

Moreover, the result of this arrangement was that passengers on west bound trains, such as de-

cedent, were to alight on the *right* side, the most natural one; whereas east-bound passengers were forced to alight on their left (Kiernan pp. 28, 29).

Now the east-bound train, which struck decedent *was using track 1* and decedent's train used track 2.

There was no evidence at all in the case to trace the movements of decedent. His body was
10 found after the accident, in the ditch between the two railroad rights of way, about 50 feet north of the station (Ellsworth p. 34), beyond the board crossing for wagons; there were blood marks on track 1 (Brown, p. 45), to one side of the bay window of the station; the assistant station agent Pitcher, (p. 49) found blood and what looked like brains the other side of track one (marked E on map used at argument).

Decedent lived at 306 28th Street, New York,
20 had been working all day on December 31, 1914, at his occupation of longshoreman till 7 P. M., and was coming to visit his family who lived at 17 East 50th street, Bayonne (Ryan, p. 62): as no street crosses the railroad at this point decedent's course after leaving the train would take him to the west side of the tracks.

Moreover, decedent had previously lived in Bayonne (Michael J. Ryan, p. 56). It is fair
30 to presume that he had some familiarity with the situation of the defendant's right of way with respect to the settled and built up portion of the city, and also with the arrangement of defendant's stations. He certainly can be presumed as a reasonably intelligent man to have known that defendant's right of way skirted the east edge of the city.

No evidence was produced by plaintiff to show any failure of defendant's servant to warn and
40 direct decedent while still a passenger or at the

moment of alighting to get off the right hand side of the train and use the way to the station and the west side of the track. If any duty rested on defendant to give such warning and direction where the station, as here, was not two sided, but single, then we submit that in the absence of any showing either way, it is to be presumed that defendant's servants did their duty and gave the warning and direction.

Now what are the inferences which we may draw as to what decedent actually did? It is submitted that whether we infer that decedent got off the right or the wrong side of the west-bound train, his injury can in no wise have been the result of any negligence on the part of defendant.

According to the hypothesis of plaintiff's case, decedent must have got off on the wrong side of the west-bound train, away from the station; for his claim rests on the assumption that these trains passed each other directly in front of the station, and that decedent was struck before his train had pulled out. The result then is that decedent was not using the way provided by defendant for its passengers arriving at 49th Street station; there being no station or platform, or anything at all, as decedent could observe and must have known, east of the right of way, and no cross walk over the easternmost track for passengers alighting on the east side of trains.

On the other hand, even if decedent alighted on the proper side of his train, to his right, and on the same side with the station, there arises the more difficult question, how came he to get in the path of a train moving on [illegible] track. No reason appears why he should want to go eastward, where there were no houses, as he must have known and could see for himself; and his ultimate destination, his son's home, be-

ing to the west. If we presume that his movements were those of a reasonable man, he would have no occasion at all to turn eastward—for he knew Bayonne; and all was dark to the east for half a mile. In this view it would seem more natural for plaintiff to claim that he alighted on the wrong or east side of the train. But if he did turn to his right, then, in order to get on track 3 he would have to advance beyond the
10 planking which ended at the easterly rail of the third track, or track No. 1; the ending of the plank was notice to him that he had left the path provided by the carrier.

Upon either inference therefore, it results that decedent was not using the way provided by the carrier for alighting passengers at the station and was not acting in compliance with arrangements obvious to him and designed for his benefit and safety. Defendant having made these ar-
20 rangements, cannot be held to have violated any duty to one who fails to comply with them.

It is well settled that a passenger who leaves the designated route provided for him cannot claim the benefit of any duty of care. In *Garrett v. Atlantic City & Shore Railroad Co.,* 79 Law (50 Vr.) 127, plaintiff after alighting took a short cut around the rear of his train, across defendant's tracks, instead of using the designated
30 path, and was struck by a train on another track, our Supreme Court held:

> "A railroad company owes no duty of care to a traveler that, after alighting from a train on a station platform, undertakes to cross the railroad tracks at a place on the company's property not provided or designated for that purpose by the railroad company."

It is true that in this Garrett case the Court
40 distinguishes an earlier decision (*Atlantic City R. R. v. Kiefer,* 75 Law 55) upon the ground that

in the Garrett case the company had provided no planked passageway across the tracks especially for the use of passengers, as in the Kiefer case. But in the case at bar there was no planked passageway across Track 3 [illegible] It is submitted that this case is directly governed by the Garrett case.

The Garrett case seems to be the only case in New Jersey applicable to our insistment under this Point. But it is amply supported by the great weight of authority elsewhere. 10

> "A railroad company however is bound to furnish one safe exit from trains provided such exit is sufficient for the number of passengers which it carries * * * Where the railroad company has provided all necessary stational facilities for enabling its passengers to enter or depart from its stations and trains and such facilities are reasonably safe and convenient, it will, in respect to such facilities, have performed its full duty, and it cannot be bound to suppose that a passenger who does not know the way will neglect to avail himself of the means open to his sight and go off in the darkness somewhere else." 20

Hutchinson, "Carrier" (3rd ed.) § 937.

> "When a railroad company has provided a sufficient platform for the egress of passengers from its cars, it is not liable for injuries to a passenger sustained in consequence of his voluntarily leaving them on the opposite side, and stepping on the other track, instead of on the platform." 30

Thompson on Negligence § 3046.

> "Where a railroad train has provided safe and convenient means for passengers to get on and off their trains, if the passengers without necessity and without being misled by any fault of the company uses a way of his own choice in preference to that provided by the company, he will be responsible for accidents which happen in consequence." 40

Thompson Negligence §3045.

"As a general rule, a passenger who elects to get off on the wrong side of the train, where he either knows or has reasonable opportunity of discovering which is the proper side on which to alight, takes upon himself the risks of any injury which may happen to him in consequence of his so alighting not imputable to the subsequent negligence or misconduct of the servants of the carrier after discovering his exposed situation. Contributory negligence has been imputed to a passenger who
10 knowing that the station platform was well lighted and safe got off at night on the opposite side for the purpose of saving a short walk, and was injured by reason of stumbling in the darkness * * * to a passenger who was injured by falling into a ditch when alighting from a railroad train, on the opposite side from the depot building and the platform provided by the company for egress from and ingress to its trains; to a passenger who was injured in consequence of having
20 knowingly alighted on the wrong side of the train, on a very dark night, and before it came to a full stop; to a passenger who in getting off a train at a stopping place where there was no platform slipped down, not on the side where passengers usually alight, but on the other side, where there was another track, and was injured by a passing train which he could not have failed to see had he used his eyes and where his only reason for getting down on that side was that it was a more level surface and an easier place to get
30 down."

Ibid § 3046.

"The passenger should obey the reasonable rules of the carrier as to the place for alighting, and if one place rather than the other is indicated he should alight at that place. Thus, it may be negligent to get off at the wrong side of the car where there are conveniences offered for the alighting of the passenger at one side of the car and not at the
40 other, and if this is contrary to the plain in-

tent of the carrier, or manifestly dangerous, it will constitute contributory negligence."

6 Cyc. ("Carriers") 646.

"Where a passenger, somewhat intoxicated, leaves the train at 12 o'clock at night, at a station with which he is acquainted, on the side of the track on which there is no platform, and falls off the bridge on which the train was standing and is killed, a non-suit is properly directed in a suit by his representatives against the company." 10

Pastons v. B. & O. R.R. Co., 149 Pa. St., 432, 24 Atl. 283.

"A passenger, who on leaving the train at a place where passengers are received and discharged without station or platform, gets off on the track side, instead of getting off on the side where passengers usually alight, is properly non-suited in an action for injuries received by a passing train, through he testifies that the track side was the leveler surface and the easier place to alight; it not appearing that the other side was dangerous." 20

Morgan v. Camden & A. R.R. Co. 23 Wkly. Notes Cas. (Pa.) 189, 16 Atl. 353.

"A passenger on a railroad train, in the night time, alighted, in violation of the rules of the company, on the north side instead of the south side of the train, and in so doing fell into a ditch, dug that day and was injured. He knew that a platform and accommodations for passengers to alight and been provided on the south side of the track, but that there were none on the north side, and that passengers were forbidden to alight there." 30

"HELD, that the injury was the result of his own negligence."

Drake v. P. R.R. Co. 137 Pa. St. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

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POINT III.

Under the evidence defendant owed no duty to decedent at the time of his injury, other that the duty owing to a mere licensee, of refraining from wilful or wanton injury, because he had ceased to be a passenger.

It is defendant's insistment under this Point that at the time decedent was struck by the eastbound train, the relation of passenger and carrier had terminated, under the well settled rules of the law; so that defendant did not owe him a high degree of care; that he had become a trespasser, or at most a mere licensee, to whom no duty was owing from defendant except not to injure him wilfully or wantonly. And this for two reasons.

His failure to use the designated pathway and means of exit from defendant's premises, argued under Point 2, alone sufficed to terminate that relationship.

> "It has been well reasoned that if a passenger on a railroad train alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company it is necessary to cross intervening tracks, he remains a passenger until he has crossed such tracks, *providing he uses the means of egress which the company has provided.*"
>
> Thompson, Negligence §2705.

Citing:

> *Chesapeake etc. R.R. v. King* 40 C. C. A. 1; 99 Fed. 251.

> "When a railroad company has provided a sufficient platform for the egress of passengers from its cars, it is not liable for injuries to a passenger sustained in consequence of his voluntarily leaving them *on the opposite side,* and stepping on the other track, in-

stead of on the platform. By such action, it would seem, the individual terminates the relation of carrier and passenger existing between himself and the company and thereby becomes responsible for the result of his negligence and folly."

Thompson, "Negligence." §3046.

"As a general rule it may be said that the relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises *in the customary manner."* 10

Hutchinson, "Carriers", §1016.

"The general rule is that the relation of carrier and passenger does not terminate until the passenger has alighted from the train and left the place where passengers are discharged * * *. Where a passenger leaves the train and voluntarily walks along the track the relation ceases." 20

Elliot, "Railroads" (2nd ed.) §1592.

"Where a passenger intentionally fails to use the ways provided for departing from station grounds, he ceases to be a passenger.

Legge v. N. Y. N. H. & H. R. Co. 83 N. E. 367. 30

"If a passenger on a railroad train alights by direction of the company or by its implied invitation, at a place where, in order to leave the premises of the company, it is necessary to cross intervening tracks, he remains a passenger until he has crossed such tracks, provided he uses the means of egress which the company has provided or which is customarily used with its knowledge and consent."

Chesapeake & O. Ry. Co. v. King 99 Fed., 251, 40 C. C. A. 432, 49 L. R. A. 102. 40

"When a carrier has provided a safe and commodious exit from its train, a passenger who leaves a train and proceeds along the track, instead of to the safe exit provided, becomes a trespasser to whom the railroad company is only liable for wilful or wanton injury."

Railroad Co. v. Oberhoefer 76 Ill. App., 672.

"Where a passenger has a safe route to 10 the eating house open to him, and chooses a path by which he may be injured by trucks being unloaded from the baggage car, the company is not liable."

Duvernet v. R.R. Co., 49 La. Am., 484, 21 So. Rep., 644.

"When one who has been a passenger on a train leaves the platform in a reverse direction from that in which passengers usually depart from, and not intended for them to 20 take, and undertakes to cross the train to the opposite side from the depot, for the purpose of seeing the engineer on some private business, he ceases to be a passenger."

Hendrick v. Chic. & A. R.R. Co., 136 Mo., 548, 38 S. W., 297.

"It appeared that decedent alighted from a train in the night at the town where he resided: that the station, the town and his home were all on the west side of the tracks and the 30 doors of the coaches, which were vestibuled, were opened on that side; and that after his train had departed, he was killed by another train on a track to the westward.

"Held that deceased had ceased to be a passenger prior to his death, and the carrier at that time owed no duty to him as such."

Payne v. Ill. Central R. Co., 83 C. C. A., 589, 155 Fed., 73.

"A carrier had provided a safe walk for exit from its station grounds to a highway. 40 A passenger was on it, but left it and under-

took to reach the highway by crossing the railroad tracks, where he was struck by a train. There was no path after he left the walk. There was nothing to indicate that the place he walked on was intended for passengers.

"HELD that he ceased to be a passenger, and was not entitled to protection as such."

Legge v. N. Y., N. H. & H. R.R. Co., 197 Mass., 88, 83 N. E. 367.

But of far greater, and, it is submitted, decisive significance, of the termination of the relation of passenger and carrier between decedent and defendant at the time of his injury is the *element of time.* Under Point I it has been argued that the only evidence in the case as to the actual arriving time of the east bound express, shows it to have reached the 49th Street Station four minutes after the decedent's train had pulled out. That decedent allowed this period to elapse without getting out of danger, it is submitted, shows that he had ceased to be a passenger.

What was decedent's duty, and the measure of decedent's responsibility, when he alighted? Plainly, it was to use reasonable expedition to get beyond the place of danger; and the law gives him a reasonable opportunity to accomplish this result and fixes the reasonable time necessary to do so as the limit of the existence of the relation of passenger and carrier. The rule is well expressed in the following passage:

"It seems perfectly clear, unless we are to exclude all conceptions of justice and humanity in cases where railroad companies are parties, that when a passenger train stops opposite a station, with intervening tracks between the train and the station house, the company is under a duty of refraining from moving trains on such intervening tracks until the passengers on the train which has stopped have had a *reason-*

able opportunity to alight and to make their way to the station house."

Thompson, "Negligence," §3050.

"If a carrier discharges its passengers at a place where they have to cross other railway tracks, in order to make their egress from the grounds of the carrier, the carrier owes them the duty of taking reasonable precautions to the end that, *while making their egress,* they be not struck by other passing
10 trains."

Thompson, "Negligence," §2705.

"Passengers who are obliged in boarding a train or in leaving it to cross railroad tracks intervening between the train and the station, have the right to assume that the company will so regulate the movement of its trains on such tracks as to enable them *to cross the tracks in safety."*

Thompson, "Negligence," §2701.

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This rule must not be confused with that well recognized class of decisions defining the limits of the existence of the relation of carrier and passenger as a reasonable opportunity to leave the premises of the carrier, to reach the public highway, etc. This is not a case, as we have already remarked, of injuries received in the station itself, as by falling down stairways or trapdoors, or tripping over baggage or other ob-
30 structions; nor of assaults by the employees of the carrier; for which classes of cases that rule has been formulated. But for injuries received by alighting passengers from passing trains, the rule defining the termination of the relation of passenger is more confined and comprises simply the period reasonably necessary to get beyond the reach of passing trains.

This distinction disposes of the only New Jersey
40 cases which at all resemble the case at bar.

In *Atlantic City R.R. Co. v. Goodin,* 62 Law

(33 Vr.), 394, decedent Goodin was struck as he stepped from the train.

In *Redhing v. Central R.R.,* 68 Law (39 Vr.), 641, plaintiff was in the act of crossing the tracks to board what he thought was his train pulling in, when he was struck.

In *Atlantic City R.R. Co. v. Kiefer,* 75 Law (46 Vr.), 55, decedent Kiefer, after alighting, paused simply to light his pipe, and was struck before his train had gotten more than 175-700 feet from the place where he had alighted. 10

In none of these cases, moreover, did it appear that the trains which injured plaintiffs were moving on a track on the wrong side of the train from which plaintiff had alighted, at a station which was equipped with a platform and facilities for disembarkation on one side only, as in the case at bar.

The principal question in these cases was whether the plaintiffs were under any duty to look or listen before crossing *intervening* tracks, or whether they had a right to presume that no trains would be operated over such intervening tracks while they were alighting. 20

In the case at bar however, the element of time was very different. Decedent's train, in the four minutes which elapsed after it started to pull out, and before the arrival of the east bound express, must have gotten at least a full mile away from the 49th Street station. Decedent on the other hand had not more than 30 feet to walk to reach the station platform if he alighted from the near side of the train, and only a little further if he alighted from the far side. As already observed under Point I he could traverse this distance walking very slowly in ten seconds, certainly not more than half a minute. And it was his duty to take the designated way, toward the station, which was cer- 30 40

tainly the shortest and quickest route. Yet four minutes later the east bound express found him still on the defendant's right of way, on a different track from that used by his train, and away from the pathway provided for him to use. How can it be argued that he still remained a passenger?

It is submitted that under the doctrines above quoted, by the only evidence in the case, the reasonable opportunity afforded by the law to de-
10 cedent to get beyond reach of danger from passing trains had long elapsed at the time that he was struck, so that the relation of passenger and carrier had terminated, and he had become a trespasser or mere licensee, to whom no duty was owing from defendant except not to injure him wantonly or wilfully.

No decisions seem to have passed upon what period constitutes the reasonable opportunity of alighting passengers to cross to the station plat-
20 form. The question of course must necessarily turn upon the attendant circumstances of each case. The numerous decisions as to what is a reasonable opportunity to leave the *carrier's premises,* offer no assistance here. But we submit that on the face of this evidence there should be no question that in this case four minutes was entirely in excess of the reasonable opportunity allowed decedent by the law to reach
30 the station platform and he was not thereafter entitled to the rights and protection of a passenger.

Plaintiff may argue that it was for the jury here to pass upon the reasonableness of this period of 4 minutes. But reasonableness in such cases cannot always be a jury question; it cannot be maintained that no period however lengthy is not too long to warrant a conclusion of tardiness
40 upon the part of the passenger—such a rule would be productive of absurdity. Here then it

is submitted the period of 4 minutes was of such excessive duration that no one could say that it was reasonable; the jury would not have been and were not justified in so finding; the trial court should not have permitted them to consider it.

The judgment should be reversed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

MASON B. SPOFFORD, Administrator of William Ryan, deceased, *Plaintiff-Appellee,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Defendant-Appellant.*	Action at Law.

10

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the Hudson County Circuit Court in favor of the plaintiff. The refusal to non-suit and to direct a verdict for the defendant are the sole grounds of appeal.

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The facts.

The action is brought by Mason B. Spofford, the administrator of the estate of William Ryan, deceased, against the Central Railroad Company of New Jersey, a common carrier, operating a steam railroad between Jersey City and various stations in Bayonne and points beyond.

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It was admitted by defendant's counsel in his opening and again in the argument for non-suit (p. 80, l. 10), that Ryan was on the train. There was found on his person the return coupon of an excursion ticket on the Central Railroad between New York and East 49th Street, Bayonne (p. 40, l. 4). It was a fair and proper inference, and in fact it was admitted (p. 86, l. 10; p. 87, l. 20) that decedent was a passenger on the train of the

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defendant Company due to arrive at the 49th Street station at about 11:06 P. M., on December 31st, 1913. The train appears to have been on time on the night in question (p. 46, l. 31). There is no evidence, however, to show how long it stopped or how long it was getting under way nor when it had cleared the station on its departure.

Decedent's body was found on the easterly side of the tracks clear across the tracks from the
10 station (p. 34, l. 34), which is on the westerly side of the tracks and about 110 feet north of the station (p. 35, l. 38). There were four tracks in front of the station (p. 22, l. 4); two east bound and two west bound; that is, two for trains leaving Jersey City and two for trains going into Jersey City. The tracks are numbered 1, 2, 3 and 4. Track 4 is the one nearest the station; next to that is track 2; the next track is track 1 and the one farthest from the station is
20 track 3. Tracks 2 and 4, the two westerly tracks nearest the station, carry west bound traffic; tracks 1 and 3, the two tracks farthest from the station, carry the east bound traffic.

The only illumination of the station at the time came from four gas lights, one at each corner of the station. These were the ordinary gas tip burner type and threw a light over a space directly under the light of about ten feet in diameter. There was another lamp of the same
30 type about seventy feet (p. 19, l. 42) north of the station and about twenty-five feet west of the tracks, which threw a similar light. All else was in total darkness except for a light shining out of the bay window of the station which did not show very strongly (p. 42, l. 2). Across the tracks on the easterly side, at some little distance, was the yard of the Pennsylvania Railroad with lights scattered all over it, presenting the appearance of
40 a city (p. 33, l. 10) or rows of street lights (p.

23, l. 38). There was a big factory building on the east side of the tracks opposite the station. In front of the station, about opposite the bay window, there was a plank walk eight feet wide running clear across the tracks from the station to the westerly rail of track 3. The rest of the space between the rails, clear across the tracks from the station to track 3, the entire space in front of the station, was solid filled with cinders flush to the top of the rails (p. 22, l. 5). Passengers boarding or alighting from east bound tracks, 1 and 3, were obliged to walk across tracks 2 and 4. There was no fence or gate between the tracks, no tunnel, nor any overhead bridge. There was a crossing bell at the station which rings only for trains going west (p. 28, l. 13), but not for trains going into Jersey City.

10

On December 31st, 1913, and for a considerable period prior thereto (p. 73 l. 22) train No. 628, an express train bound for Jersey City, was scheduled to stop at West 8th Street, Bayonne, on signal at 11:02 P. M. (p. 73, l. 29). Its running time from West 8th Street to the 49th Street station was about five minutes (p. 75, l. 5), thus bringing it to the 49th Street station at about 11:07 P. M., one minute after the 10:35 P. M. New York west bound train was scheduled to arrive at the 49th Street station, so that allowing a minute or a minute and a half for the 10:35 train to discharge its passengers, the east bound express No. 628 would pass the west bound local at about the 49th Street station just as the latter train was pulling out.

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The witness Kirnan (p. 33, l. 32) testified that on an occasion of a particular observation there was thirty seconds between the leaving time of one train and the passing of the other, and that this was the usual time (p. 32, l. 9). It was admitted that the decedent was struck and killed

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by train No. 628 on the night in question, which, as mentioned before, was scheduled to pass 8th Street at 11:02 P. M., and was due to pass 49th Street at about 11:07 P. M. He was struck almost directly in front of the bay window on track 1, as evidenced by the marks of blood, etc., on the tracks. These marks were apparently on the plank walk heretofore described running across the tracks in front of the station.

10 Brown, the station agent, testified (p. 46, l. 18) that his attention was first called to the fatality at about 11 or 11:20 by the backing up of the express train No. 628. Allowing a reasonable time for the train to have proceeded on its way after it struck the decedent, and for the train to have stopped and then to have backed up, bearing in mind that it was an express, and subtracting such reasonable time from 11:20, the time when the station agent said he first knew

20 that a man had been killed, would bring the time when the decedent was struck by the express, pretty close to the arrival and departure of the train upon which he was a passenger, so that upon the night in question it appears that these two trains passed each other at or in very close proximity to the 49th Street station.

Pitcher, the assistant station agent, who knew the decedent, was in the bay window of the 49th

30 Street station at the time the local upon which Ryan was a passenger arrived and departed (p. 47, l. 40). He was in a position where he could see people getting off the train and could look out in all directions. He did not see Ryan get off the train (p. 47, l. 39). Apparently no one saw him get off the train. It is a fair inference, therefore, that the decedent alighted from the train on the side farthest away from the station, which would bring him on the east bound track

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number 1, and directly in the path of the No. 628 express.

This situation having been established by plaintiff's proofs, the Court refused to non-suit or direct a verdict for the defendant.

The refusal of the Trial Court to non-suit or direct a verdict for the defendant was not error.

A. Was decedent a passenger? 10

The liability of the defendant was predicated upon the existence of the relationship of carrier and passenger. Whether that relationship existed at the time decedent was struck was a question for the jury.

> "Whether a person who has alighted from a standing train at a station and who is crossing the railway tracks by a planked way provided by the company for that purpose, after the train from which he has alighted has moved out, is still a passenger entitled to so cross without looking or listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from the station platform to a place of safety within a reasonable time after he had alighted from the train. 20
>
> "The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. 30
>
> "The relation of carrier and passenger continues until the passenger has left the carrier's premises, or has been allowed a reasonable time to leave the premises.
>
> "What, under all the circumstances, is a reasonable time, is a question of fact for the jury.
>
> "Reasonable time is defined in *Imhoff v. C. & M. R. Co.*, supra, as the time in which 40

persons of ordinary care and prudence, under like circumstances, get off the car.

"The mere fact that a person is lawfully crossing a railway track is not enough to entitle him to claim the rights of a passenger.

"A person alighting from a standing train, and crossing the tracks to get to the station platform, a place of safety, is undoubtedly a passenger, and is not required to look or listen in anticipation that a train may pass and hit him. That law is too familiar to re-
10 quire any citation of authority. But this rule does not apply after the train moved out. *Goldberg v. New York Central and Hudson River Railroad,* 133 N. Y., 561.

"How long may a person remain at a station, after alighting from the train, and after it has moved out, before crossing the tracks to get to a place of safety, and still remain a passenger and be freed from any duty to look out for himself in such a place of known danger?

20 "The court cannot, in such a case, take from the defendant the right to have the jury say whether the person injured was or was not a passenger. There must be some period of time, after a train moves out of a station, when even one who has been a passenger, although lawfully crossing, cannot go blindly across the tracks without using any care to protect himself against the dangers that are always to be anticipated when crossing railway tracks."

30 *Atlantic City Railroad Co. v. Kiefer,* 75 N. J. L., 57, 58.

"The duty of the railroad company as carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its stations for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe."

40 *D., L., & W. R.R. Co. v. Trautwein,* 52 L., 176.

B. The relationship of carrier and passenger still existing, what duty did the defendant owe the decedent?

The defendant owed the decedent the duty of providing him with a reasonably safe and proper place to alight from its train and to make its station where he lighted a reasonably safe place to discharge him as a passenger, and to afford him a reasonable opportunity to leave its premises in safety, and to warn and protect him against dangers which it could reasonably apprehend passengers at that station were subject to. For its failure to exercise that reasonable care which a reasonably prudent person is obliged to exercise under such circumstances in any one of these particulars, it would be liable for injuries resulting from such neglect. 10

In the case of *Hansen v. North Jersey Street Railway Co.*, 64 N. J. L., 696, the Court said: 20

> "A common carrier is negligent if it fails to take a high degree of care to protect its passengers from every danger that the exercise of reasonable foresight would anticipate." Citing a number of cases.

At page 701:

> "It may be generally said of this line of authorities, that they are attempts to apply to widely different states of facts, the distinguishing principle that the risks which a common carrier should try to guard its passengers against, are only those that reasonable foresight would anticipate. This does not mean that the accident must be foreknown or that exactly such an occurrence was anticipated or apprehended, but rather more generally that its characteristics must be such that it can be classified among events which sooner or later, in the absence of due care, 30 40

were likely to happen, and which due care would prevent."

"It is the duty of a railway company to provide passengers with reasonably safe and convenient means of ingress and egress from its cars and coaches, and the railroad company is liable for accidents happening by reason of the neglect of such duties to passengers in descending from a car when at rest at a station, if the circumstances are such as to induce the passenger to believe that he has reached his point of destination and that it is safe for him to get out."

Falk v. N. Y., S. & W. R.R. Co., 56 L., 380.

"The likelihood that in the ordinary transaction of business in the Red Bank freight yards cars would escape and run down a descending grade to the passenger tracks was one which reasonable foresight should have perceived and it was plainly within the duty owed by the carrying company to its passengers to make adequate provision against such an occurrence.

Dunn v. P. R.R. Co., 71 L., 25.

"A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.

"By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent."

Rivers v. P. R.R. Co., 83 N. J. L., 513.

"To permit a train to pass on a track between a depot and another track on which a passenger train was standing while discharging and receiving passengers, just as passengers were passing from the depot to take that

train, and across which track they were obliged to walk to reach their train, without any provision having been made on the part of the company to avert danger; Held to have been actionable negligence.

"The rule that any person who goes upon a railroad track incautiously, or without using all reasonable precautions to escape injury, assumes the hazard, and if injury ensues, is without remedy, is to be applied in determining the liability of a railroad corporation where the injury is sustained by a per- 10 son while crossing the track on a public highway; but it has no application to a case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to the cars.

"When a railroad company has created extra danger it is bound to use extra precautions, and the precautions to be adopted must be adequate to insure the safety of every passenger who exercises ordinary care." 20

Klein v. Jewett, 26 N. J. E., 474.

"The test of generic duty imposed by law upon the defendant, under such circumstances, was to exercise reasonable foresight for harm." (Cases cited.)

"The specific duty imposed by law under the circumstances was to give reasonable warning to persons lawfully on the platform of the approach of a belated train, traveling at a high rate of speed" (Cases cited.)

Munroe v. P. R.R., 85 N. J. L., 688. 30

C. WHETHER THE DEFENDANT HAD BEEN NEGLIGENT IN THE PERFORMANCE OF ITS DUTY TO EXERCISE REASONABLE CARE WAS A QUESTION FOR THE JURY.

The proofs were that the defendant company had made no provision to prevent its passengers from crossing its tracks in front of the station, or to prevent passengers from alighting from 40

trains in the path of trains moving upon adjacent tracks, nor had the defendant shown that there was any difficulty in the way of such construction. In fact, it invited such crossing by laying out a plank walk clear across the tracks and filling in all the rest of the space between the tracks in front of the station with cinders flush with the top of the rails.

It was a reasonable, proper and probable inference that it had failed to warn or protect the decedent against the danger of alighting on the side of the train nearest the track upon which the express train was running. The decedent should have been prevented or at least warned against alighting on that side. In the absence of explanation it was reasonable and proper to infer that he had not been so warned. This was culpable negligence on the part of the defendant company.

A bell was provided to give warning of the approach of west bound trains, but it did not ring to warn of the approach of east bound trains, and no explanation is given of why no provision was made for such warning.

The defendant company was charged with the knowledge that the east bound express was due to pass the 49th Street station at about the time the west bound local was discharging passengers, viz: at about 11:07 P. M., and with the knowledge that passengers could alight from either side in the path of trains moving along adjacent tracks, and with the knowledge of the dangers existing by reason thereof which it could and should have reasonably apprehended. This was a habitual customary danger which the defendant company could reasonably anticipate might exist. Being so charged with such knowledge it was the duty of the defendant to exercise reasonable care to protect its passengers from such danger. The death

of the decedent under the circumstances of the case permitted an inference that such reasonable care had not been exercised. Whether such an inference should be drawn from all the circumstances was a matter for the jury to determine.

Whether the situation as it existed at that station created a condition of danger, such as the defendant should reasonably have anticipated, was a question for the jury. It was sufficient for the plaintiff to have established by testimony what the situation was. The inferences to be drawn were for the jury. It might very well be that the construction was the best that was possible under the circumstances, but it was for the defendant to show that the construction adopted was such as would render its station as reasonably safe as the exigencies of its business would permit. This is not a question of standardization of construction or use of standardized appliances. If the plaintiff had attempted to prove that another and different form of construction would have rendered the station safer, the offer would have been ruled out. The most plaintiff could do was to show the situation and the circumstances, resulting in the death of the decedent. And if, from such situation and circumstances, the negligence of the defendant was a probable inference, the burden of going forward with the proof was upon the defendant.

> "The legal obligation upon the part of the defendant to exercise due care being the measure of its duty, the jury were entitled to determine whether under the circumstances of the case the defendant's conduct was consistent with that legal requirement."
>
> *Munroe v. Penn. R.R. Co.,* 85 N. J. L., 691.

This was on a motion to non-suit. In this case plaintiff's decedent while standing near the edge of a railway platform was killed by a passing

express train. The Court held it was defendant's duty to exercise reasonable foresight for harm and to give reasonable warning to persons lawfully on the platform, of the approach of a belated train traveling at a high rate of speed. The Court held whether under the circumstances the defendant's conduct was consistent with that legal duty, was a question for the jury, and that the determination of that question would be taken from the jury only while the contributory negli-
10 gence of the decedent was so clear and definite "as to make his guilt manifest and indubitable as a matter of law."

In the case of *Suburban Electric Company v. Nugent,* 58 L., 658, an action was brought for the death of a policeman whose dead body was found at the base of an electric light pole of the defendant company. The court held that the motion for a non-suit was properly refused. The opinion
20 reads in part:

> "It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for decedent's death in order to entitle him to a verdict. It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful
> 30 act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. And this, it seems to me, he has done. No one was present when decedent came to his death, and, therefore, there was no direct evidence to show how it was caused, but it appeared from plaintiff's proofs that there was fastened upon the pole, at the foot of which decedent's body was found, a reel, around which was wound a wire rope, used for the purpose of
> 40 raising and lowering one of the defendant's

> arc lamps; that the reel was about on a level with the top of a man's head; that the wire rope around it was practically uninsulated and was heavily charged with electricity. It also appeared that the post mortem examination showed all his organs to have been in a normal condition; that his death was not caused by disease of any kind; that there was upon his left hand and running all the way across it, a freshly made burn, about one-sixth of an inch in width, and that the blood was in an abnormal state, his con- 10 dition being such as was found in bodies of persons who had died from electric shock. These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death by having touched the uninsulated wire upon the reel which was fastened to the defendant's electric light pole, and thereby received a fatal shock, but excluded any other inference."

The case of *Gwinn v. Delaware and Atlantic Telephone Company,* 72 L., 276, is also an electric 20 wire case. Defendant put in no evidence. The trial judge refused to non-suit. The court held that in the absence of explanations by the defendant, that because of the breaking of the wire, no other inference was open than that of negligence, and further held that it was permissible for the jury to infer that the omission of a guard between the electric light wire and the guy wire was an act of negligence.

In the case of *Goodin v. Atlantic City Railroad* 30 *Company,* 62 N. J. L., 394, the court held:

> "What is the duty of passengers where, after they have alighted, there is necessity to cross a track in order to reach the company's station? We are asked to apply the same rule of duty to look and listen that is rigidly enforced upon the traveller on a highway. There is a plain difference between the case of such a traveller about to cross a railroad and the case of a passenger entitled to 40

safe conduct to or from the company's station. In this state and in most other jurisdictions this difference is recognized by the courts.

"Vice Chancellor Van Fleet, in *Klein v. Jewett,* 11 C. E. Gr., 474, 479, points out that the rule of duty at a public crossing has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross a track in order to reach the station or the cars. He says: 'They (the railroad company) are bound to provide a way by which passengers may pass in safety. If the way provided crosses a track, no train should be permitted to pass over it at the point where passengers are required to cross it while a train is receiving or discharging passengers.'

"On affirmance by this court (*Jewett v. Klein,* 12 C. E. Gr., 550) Mr. Justice Dalrimple said that a passenger crossing a track which intervened between a station and a train standing at the station to receive passengers, was not bound to look to see whether another train was approaching. That decision would seem to be controlling in this case. A distinction is urged because it related to a crossing from station to train—not from train to station. This is a distinction without a difference. It is the passenger's right to go to the company's station, and a safe way for the purpose must be provided. In the later case in this court of the *Delaware, Lackawanna and Western Railroad Co. v. Trautwein,* 23 Vroom, 169, 175, Mr. Justice Depue well states the true rule thus: 'The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its station for the use of passengers, and passengers have a right to assume that the means of access are reasonably safe.'

"The great current of authority elsewhere is to the effect that failure to look for trains when crossing a track in passing from train to station is not necessarily negligent. The question is always one for the jury. The New

York cases are most numerous, many of them being in the court of last resort. A full citation will be found in *Van Ostram v. New York Central and Hudson River Railroad Co.,* 35 Hun, 590. The following decisions in other jurisdictions are clear and explicit on the subject: *Railroad Co. v. Johnson,* 59 Ark., 122; *Denver, etc., Railroad Co. v. Hodgson,* 18 Col., 117; *Philadelphia, Wilmington and Baltimore Railroad Company v. Anderson,* 72 Md. 519; *Boss v. Providence and Worcester Railroad Company,* 15 R. I., 149; *Chicago,* 10 *Milwaukee and St. Paul Railroad Co. v. Lowell,* 151 U. S., 209; *Rogostelli v. New York, New Haven and Hartford Railroad Company,* 33 Fed., 796.

"In the case last cited, the doctrine was even applied where the crossing was not to a station building, but to a mere gate of exit, customarily used to reach the town, the stopping-place being at a junction and the single platform being on the opposite side. Some of the earlier Pennsylvania decisions were not very discriminating and may seem to 20 uphold the defendant's contention, but the later cases are in substantial accord with the general trend of judicial opinion. *Pennsylvania Railroad Company v. White,* 88 Pa. St., 327; *Flanagan v. Philadelphia, Wilmington and Baltimore Railroad Company,* 181 Id., 277. The only decision to which we have been referred directly supporting the proposition that it is necessarily negligent for a passenger to cross from train to station without looking for a possible train on an inter- 30 vening track is, *Connolly v. New York and New England Railroad Company,* 158 Mass., 8. That decision treats the question inadequately without noticing the right of passengers to assume that their safety will not be imperilled by the carrier. The precedents cited are all highway cases. Massachusetts seems to stand alone on this subject.

"That in the case in hand the passengers were only invited to alight upon a platform upon the side away from the tracks is not a 40 controlling circumstance, but simply a fact

for the jury; such was the fact in all the cases cited. The passengers were not forbidden to alight on the other side, but, on the contrary, had always been permitted to do so. Wherever they should alight, they would have to cross the tracks to reach the station, where they had a right to go, and there could be no appreciable difference whether they should alight on the platform and then walk around the train and cross or wait until the train should move on before crossing, or, as Goodin did, alight on the other side towards the sta- 10 **tion and cross at once.**

"In *Chicago, etc., Railroad Co. v. Lowell,* supra, there was a notice posted in the cars that passengers leaving a car by the front should pass to the right, and by the rear to the left (to a platform), in order to avoid trains on the other track. A passenger failed to observe this rule in alighting from a car, and in attempting to cross an intervening track to the opposite side of a double station, was struck and injured by a passing 20 train. In delivering the opinion of the Supreme Court of the United States, Mr. Justice Brown remarked: 'Had the plaintiff complied with the notice and alighted upon the platform, he would still have been obliged to cross the track with the same possibility of being struck by a passing train that confronted him in this instance.' And in *Robostalli v. New York, New Haven and Hartford Railroad Co.,* supra, Judge Wheeler thus elaborates the same argument: 'Passengers 30 from West New Rochelle, stopping at this station could not reach there from the train on the track which this train was on, without crossing the other track. They could get off on to the platform and go past the end of the train, and cross, or get directly down on the other side and cross. If they should get off on the platform and wait for the train to leave, they would still have to cross, and there was no shelter there or other conveniences for waiting. The train could not pass on the other track without the liability of encountering 40 these passengers, and if it passed while the

train was standing and the passengers alighting, it would be quite likely to encounter them when attempting to cross by the rear of the other train.'

"It is noteworthy that in the case in hand the company's rule only forbade the passing of trains until the train at the station should move on. Strictly construed, that rule made it more dangerous to wait for the train to move on than to cross at once. In the Massachusetts case it was conceded that the passenger had the right to alight on the side of the train toward the station, although there was provided on the other side a platform for that purpose. The ruling was that wherever he alighted he was bound to look before crossing the track.

"It is suggested that Goodin was not intending to go to the station, but to his home on the same side of the tracks. That circumstance is immaterial. It existed in several of the cases above cited. Goodin had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track."

In the case of *Newark Electric Light Company v. Ruddy,* 62 N. J. L., 505, also an electric light case, the court said (p. 507):

"It is impracticable to frame a rule of general application on a subject so concrete as that involved in a jury's right to say that a particular occurrence speaks in itself of negligence. It is well said by Mr. Justice Garrison, in *Bahr v. Lombard, Ayres & Co.,* 24 Vroom, 233, that 'the quantum of proof which a plaintiff must give in order to draw from the defendant explanatory evidence, must, with certain limits, be dependent upon the circumstances of each case.' One textwriter sententiously sums up the matter thus: 'If the accident is connected with the defendant, the question whether the phrase *res ipsa loquitur* applies or not becomes a simple question of common sense.' Sn. Neg., *248.

"The following statement is fairly satisfac-

tory: 'Where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is or not, it is within the knowledge of the defendant and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was the negligence on the part of the defendant.' Baron Channell in *Bridges v. North London Railway Company,* L. R. 6 Q. B., 377, 391. The weakness of this statement is inherent in all attempts to formulate the rule. The circumstances to be proved are, as they must be, left indefinite.

"A plaintiff must, of course, present all evidence reasonably within his power. The case of *Bahr v. Lombard, Ayres & Co.,* ubi, supra, is authority that 'when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence, which the defendant can be called upon to rebut. This is both reasonable and just, but to exact from a plaintiff such negative proof as will exclude all possible theories of accident, consistent with the defendant's care, would be unreasonable and would not accord with common sense."

And again on page 508:

"In *Trenton Passenger Railway Company v. Bennett,* 31 Vroom, 219, the only proof of negligence was the fact that a horse was shocked by electricity when it stepped upon the track of defendant's electric street railway. The Court of Errors and Appeals sustained the submission of the case to the jury. In an almost exactly similar case, an appellate division of the New York Supreme Court reached like results. *Clark v. Nassau Electric Railroad Company,* 9 App. Div. (N. Y.), 51,

6 Am. Elec. Cas., 234. In that case, as here, the defendant argued that to sustain an inference of negligence, all other hypotheses must be excluded by the plaintiff's proof. It was suggested that the defendant's road might have been in perfect order and that the accident might have been occasioned by the carelessness of third persons engaged in stringing telegraph or telephone or electric light wires. Mr. Justice Bartlett thus met the argument: 'The rule is one that relates merely to negligence prima facie and it is available without excluding all other possibilities. * * * The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proving the accident, to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the non-existence of an adequate explanation or excuse.'

"In the case before us, how could the plaintiff have shown that the wire 'parted without any apparent reason other than its own weakness'? He had no control over it, or power or opportunity to examine and test it. Proof that the fracture must have come from external violence was peculiarly within the province of defendant. It could have proved when and how the wire was put up, to what usage it had been subjected, how often, how carefully and how recently it had been inspected, and what its appearance after disruption indicated. In short, the defendant could have exonerated itself from the prima facie case made against it if exoneration had been possible."

In the case of *Austin v. P. R.R.,* 82 L., 416, the court said:

"The defendant appealed to the well established rule that it is not enough for the plaintiff to prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude the inference that the damage was due to a cause for which the defendant was not responsible. That is the rule, and

the plaintiff must prove circumstances which render it probable and not merely possible that the defendant is at fault, but when it is said that the circumstances must exclude the inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases, and to force the plaintiff to exclude such inference beyond doubt. All that is required is, that the circumstances should be so strong that the jury might properly, on the ground of probability, rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and where probability may be all that is attainable." Citing *Suburban Electric Company v. Nugent.*

In the case of *Hughes v. Atlantic City Railroad Co.,* 85 N. J. L., 212, at p. 214, the court said:

"In the absence of direct evidence, he (the trial judge) may, in cases where the maxim (*res ipsa loquitur*) applies, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant had nothing to do; they may find the inference of negligence too weak to pursuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and in any event they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant. When there is such explanation, it is for the jury to decide just as in the ordinary case of whatever kind, what the actual facts are and what inference should be drawn therefrom. The most that is required of the defendant is explanation, not exculpation; and that explanation may leave the mind in epuipoise, in which case

the defendant would be entitled to a verdict, because the plaintiff has failed to prove his case by the weight of evidence.

"The question discussed in the cases that involve the application of the maxim *res ipsa loquitur* has always been whether mere proof of the injury justified a jury in drawing an inference of negligence so that a non-suit would be improper, or, in other words, whether it sufficed to prevent a non-suit. Negligence in such a case may be a permissible inference but is not a necessary one as the judge's charge treated it. In the first case in which the maxim was discussed in this state Chief Justice Beasley, who dissented because he thought the plaintiff had made out a case, said that the facts as proved would have legally warranted a verdict against the defendants, but he did not suggest that in the absence of explanation such a verdict would have been required, and the court would have been justified in directing a verdict for the plaintiff. The reason, of course, is that negligence in such a case is only a matter of inference and under our system is for the jury.

"The rule has been stated with great accuracy by Mr. Justice Dixon, speaking for this court, in an action by a passenger against a carrier. He says: 'The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or **omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.** *Whalen v. Consolidated Traction Co.*, 32 Vroom, 626. In *Mumma v. Easton and Amboy Railroad Co.*, 44 Id., 653, we again said that the meaning of the maxim *res ipsa loquitur* was that 'the occurrence itself in the absence of explanation by the defendant affords prima facie evidence that there was want of due care'. It is evidence; whether it amounts to proof is for the jury to say, even in the absence of explanation by the defendant.

A very good statement of the law in a case much like the present is to be found in *White v. Boston and Albany Railroad*, 144 Mass., 404. The court said: 'If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant would be for the jury; and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to author-
10 ize the jury to find that the defendant was negligent in regard to it.' This is a full recognition of the ordinary rule that inferences from the facts of the case are for the jury. The result we reach is also sustained by a recent opinion of Mr. Justice Pitney in the United States Supreme Court. *Sweeney v. Irving*, 228 U. S., 233.

"The inference of negligence from the mere happening of the accident may be a legal inference in the sense that it is permitted by the
20 law, but it is not a legal inference in the sense that it is required. It is true that in some cases language may be found to the effect that under certain circumstances the burden of proof shifts, while other cases declare quite as explicitly that the burden of proof never shifts. The seeming conflict arises from the ambiguous meaning of the words 'burden of proof', as applied to jury trials. This ambiguity is dealt with by Thayer in two of the most enlightening chapters of a most enlightening book, well said by Wigmore
30 to be epoch-making (Preliminary Treatise on Evidence, 353), and by Wigmore, with a somewhat different form of statement and ample citation of authorities (Wig. Evid., Ch. 2483, and the following). In one sense 'burden of proof' means the duty of the actor, i. e., the party having the affirmation of the issue to establish the proposition at the end of the case. In this sense the burden never shifts. The distinction is pointed out in a case cited by Thayer, of an action to recover dam-
40 ages for injuries caused by the explosion of a boiler of a steamboat in which the plain-

tiff was a passenger. *Caldwell v. New Jersey Co.,* 47 N. Y., 282, 290. In a second sense the expression means the duty in going forward in argument or in producing evidence, and in this case the burden may shift as one side or the other satisfies the judge that the evidence suffices to make a prima facie case in his favor. The practical distinction is well stated by Wigmore and it is, as he says, important: 'The risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability 10 to a ruling by the judge disposing of the issue without leaving the question open to the jury's deliberations' (Wig. Ev., Ch., 2487). In applying the law to a case like the present, we think it is clear that the plaintiff was bound to satisfy the jury by the preponderance of evidence that the defendant was guilty of negligence that caused the accident; if he introduced no evidence or no evidence from which an inference of negligence could be drawn, it would be the duty of the judge to direct a verdict for the defendant; if he introduced evi- 20 dence which permitted or required an inference of negligence, it would be for the jury to say whether they believed the witnesses and, where an inference of negligence was permissible but not required, whether they drew that inference."

In the case of *Vosler v. D., L. & W. R.R. Co.,* 77 N. J. L., 727, at page 730, the court said:

"We think that a fair jury question was presented whether the defendant was not 30 negligent in having failed to provide sufficient lights to warn passengers of the dangerous opening in a platform which they had been invited to use for the purpose of reaching defendant's trains, and that the trial court would not have been justified in withdrawing that question from the jury.

"Another ground urged in support of the motions was that upon the evidence there was no casual connection between the conditions shown and the death of the decedent. The 40 contention of the defendant being that the

plaintiff must present such a train of circumstances as offered a logical basis for an inference of negligence, and must remove the cause from the realm of speculation; that the mere fact that decedent was last seen alive in the waiting room and found four hours afterwards at the foot of the stairway 'requires a conjecture or guess' that he walked into the stairway because of insufficient lights and guards. The fact that the deceased left the waiting room by the side door, and if he turned along the
10 platform towards the train after leaving the door, walking within three feet of the wall of the station, he would fall into the stairway, is not a conjecture, but, on the contrary, a reasonable inference, which is supported by the fact that his dead body was found at the foot of the stairway, a logical sequence of what would be likely to happen under the conditions stated."

"The conclusion is that there was evidence to go to the jury, not merely as to whether the
20 plaintiff's account of her injury was correct, but as to whether, if her account was correct, the accident was such that it might have been prevented by the exercise of due care on the part of the defendant. If the jury could answer this latter question in the affirmative they need look no further, for they might have inferred negligence. In such a situation the burden shifts, and the common carrier, in order to exonerate himself, must show, if he can that due care was exercised." And cases cited.

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Hansen v. North Jersey St. Rway. Co., supra, p. 698.

"Whether, under the circumstances, due care was exercised, was, under the well settled rule, a jury question, and the motion to direct a verdict for the defendant was, therefore, properly refused."

Martin v. West Jersey & S. R. Co., 94 Atl., 597;

40 *Newark R.R. v. McCann*, 58 N. J. L., 642.

"This principle is that when through any instrumentality or agency under the control or management of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care."

Mumma v. Eastern and Amboy R.R. Co.,
73 N. J. L., 653, 658, 65 Atl., 208, 210. 10

"The questions whether dangers exist, and whether they were habitual and notorious, and whether the company had knowledge of them, or should have had such knowledge, where the evidence is in dispute, are questions which must be submitted to the jury for their determination.

"It was proper to submit to the jury the question of the dangers of this way, and whether they were habitual, customary dangers which the defendant could reasonably antici- 20 pate might exist, and whether they were such as required precautions against accident and injury to passengers therefrom, and whether the defendant had exercised the required degree of care and caution to protect its passengers from such dangers. If the defendant had notice or knowledge of what might happen in its depot, or could reasonably anticipate what might happen there dangerous to others lawfully there, it was bound to use care to avoid the injury which might be occasioned and 30 it would matter little whether the danger was habitually existing or might occur only at intervals. Nor can it matter but little whether the dangers arose from the acts of the servants and employes or others, so long as the dangers existing were not observable by the passenger so as to be avoided, and they were known to or ought to have been known to the defendant, or anticipated by the officers of the defendant company in charge of the station."

Exton v. C. R. R. Co., 62 N. J. L., pp. 13 40 and 14.

D. If an inference of negligence is permissible from the proofs a non-suit or a direction of a verdict is improper.

"To justify a trial judge (in his charge) in deciding a question of law against the plaintiff, the proofs must be in such a state that no inferences of fact upon which the legal question depends can be legitimately drawn in his favor."

McCoy v. Millville Traction Co., 83 N. J. L., 511.

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"On an application to take the case from the jury, the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all the legitimate inferences therefrom in his favor."

Abbott's Civil Trial Brief, 3rd Ed., p. 606,

and numerous cases cited.

"It does not follow that because there is no contradictory testimony, the court must take the question from the jury, and determine it as one of law. On the contrary, if different results will be reached by different minds, the question must go to the jury."

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Ditto—p. 609.

"A motion for a non-suit or to direct a verdict for the defendant, based upon the insufficiency of the evidence, to establish a cause of action, admits the truth of the plaintiff's evidence and of every inference of fact which can be legitimately drawn therefrom, but denies the sufficiency in law."

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Jones v. Public Service, 86 N. J. L., 646; citing *Fox v. Atlantic, etc., Co.,* and *Dallas v. Sea Isle City,* in 84 N. J. L.

"On a motion for a non-suit, the question is not whether the judge would infer whether the defendant had been negligent, but whether the jury *might* legitimately find from the testimony that negligence had been established."

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Dirigalano v. J. C. H. & B. Street Railroad Company, 76 L., 505.

"Where there is proof from which negligence can be inferred, it is not error to refuse to non-suit."

Daggett v. North Jersey Street Railway Co., 75 L., 630.

Bower v. Bower, 78 L., 387.

Hummer v. L. V. R.R. Co., 74 L., 196.

"A motion for a non-suit admits the truth of the plaintiff's evidence, and of every inference that can be legitimately drawn therefrom." 10

Weston Electric Instrument Company v. Benecke, 82 Atl., 878.

Fox v. Great Atlantic & Pacific Tea Co., 87 Atl., 339.

"Where evidence, though undisputed, might be differently construed and considered by different conscientious and intelligent men, in determining the ultimate fact of negligence, it is for the jury."

Cetefonte v. Camden Coke Co., 78 L., 662. 20

Rand v. Armn, 74 L., 704;

Wilkins v. Standard Oil Co., 78 L., 624.

Weston Electric Instrument Co. v. Benecke, 82 Atl., 878.

Diederick v. C. R.R., 74 L., 424.

Bennett v. Bush, 75 L., 240;

McCarthy v. Metropolitan Life Ins. Co., 75 L., 887.

The motion to non-suit and to direct a verdict for the defendant was properly refused and the judgment should be affirmed. 30

Respectfully submitted,

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New Jersey Court of Errors and Appeals

MASON B. SPOFFORD, Administrator of William Ryan, deceased, *Plaintiff-Respondent,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Defendant-Appellant.*	At Law. On Appeal from Hudson County Circuit Court.

10

SUPPLEMENTAL BRIEF FOR RESPONDENT.

The occasion for this supplemental brief arises from the fact that appellant's brief was not served within the time provided by the rules. Respondent thereupon prepared and printed its brief. Thereafter, appellant served its brief, to which this is a reply. 20

Respondent desires, in the first place, to call attention to some discrepancies between the printed testimony and the statements in appellant's brief.

On page 2, l. 7, appellant says:

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> "Between the two sets of tracks is an open ditch about two feet wide at the top and about five feet wide at the bottom."

There is no proof to that effect. The testimony is that there was a ditch,—a gutter or ditch—where the body was found (Case, p. 24, l. 20). But that was about fifty feet north of the crossing, the northerly line of which is about sixty feet north of the station (p. 35, l. 37). So that the only evidence of the location of the ditch is 40

that it is north of the crossing. There is no evidence in the case that the ditch extended the other side (south) of the crossing in front of the station. (See also testimony of Ellsworth, p. 34.) Nowhere is the depth of this so-called ditch given. Witness Ellsworth calls it a gutter, probably a depression for drainage purposes.

Appellant next says (brief, p. 2, l. 10):

10 "There was no method provided for crossing this ditch to the east of the station."

The proof is just to the contrary (Case, p. 25, l. 8, and p. 35, l. 12).

Appellant further says (p. 2, l. 12):

> "East of the Lehigh Valley Railroad tracks, quite a long distance therefrom, is the shore of New York Bay, and between the Lehigh Valley tracks and the Bay the land is vacant save for one factory building south of the railroad station."

20 None of these statements are substantiated by the testimony. There is no evidence that the shore of New York Bay is a long distance from the Lehigh Valley Railroad tracks. There is no evidence that between the Lehigh Valley tracks and the shore the land is vacant save for one factory building south of the railroad station. The witness Lodge (p. 24, l. 36) when asked whether that was the only building there, said he did not

30 know about that. This is the only testimony there is on the subject.

On p. 3, l. 31, appellant's brief reads:

> "There has been no change in the condition and lay-out of the station since he made the sketch in December, 1913."

This is a misquotation of the testimony, which is that there was no change in the condition and lay-out of the station as it was in December, 1913, and as it was at the time the sketch was made on

40 October 19th, 1915.

On p. 5, l. 17, appellant again states that there is a ditch between the Central Railroad tracks and the Lehigh Valley tracks. We have heretofore called attention to the fact that the only testimony with regard to this ditch or gutter was that there was such a ditch or gutter north of the crossing, where the body was found.

Appellant also repeats the statement that between the Lehigh Valley tracks and the shore there is only the one factory. As was pointed out before, there is no testimony to that effect. 10

On p. 22, l. 20, appellant says:

> "The Central Railroad in the City of Bayonne, at 49th Street, skirts the eastern edge of the city."

There is no evidence in the case of that fact.
He says further:

> "There are no houses east of the right of way, which almost skirts the eastern bank of New York Bay." 20

There is no evidence of that. In fact, at another place, appellant says that the shore is a long distance away (p. 2, l. 13).

He says further:

> "The witness Lodge testified that there were no sort of buildings east of the line, but a radiator factory about 200 feet south of the station."

This is not Lodge's testimony. He said that there were no buildings right across the track in front of the station, except the radiator plant, which extends about two hundred feet south of the station. 30

Further down on page 22, appellant again refers to the ditch between the tracks, about which, as stated before, there is no proof.

On page 23, l. 2, the brief states:

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> "And a light about 70 feet from either end of the station raised 7 or 8 feet above the ground."

There is no testimony that there was a light at *either* end of the station. The testimony is that there was one light about seventy feet from the station (p. 20, l. 34).

Again, on page 23, l. 10, the brief says:

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> "The city, with its lights and stores and its lighted streets, lies to the west of the railroad."

There is no such testimony in the case.

Turning, now, to the appellant's presentation of its argument:

We find, on p. 16 of the brief, this statement:

> "Plaintiff's case, therefore, as presented * * * simmers down to the question whether defendant, upon the evidence, could be charged with negligence in the operation of the east bound express 628 past the station at 49th Street, on the night in question."

20

Appellant makes his premise too narrow. This statement of the basis of the defendant's liability does not take into account the defendant's duty to warn and protect its passengers against dangers arising from the operation of this train at that station, which is a more comprehensive duty than merely the duty of operating the east bound express train with care.

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Appellant rests its contention in this case entirely upon the claim that the east bound express passed the 49th Street station four minutes after the west bound local upon which decedent was a passenger, had pulled out. Appellant's argument assumes as a fact that on the particular occasion in question, four minutes elapsed between the passing of the two trains, and starting with that as an uncontrovertible fact, it concludes that because of such lapse of time, no duty rested upon

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it to protect the decedent from harm. The fallacy in that argument is

First—That the duty which the defendant company owed the decedent did not arise from the circumstances of the passing of the two trains on that particular occasion, but that it arose from the circumstances of the usual passing time of the trains at that point, and

Second—That it was not an undisputed fact that at the time Ryan was killed, four minutes had elapsed between the passing of the two trains. 10

On the first point, the evidence was that the west-bound local was due at 49th Street at 11:06 P. M. The east-bound express was due to pass West 8th Street at 11:02 P. M. (Case, p. 73, l. 31) and generally took about five minutes to get to 49th Street, (Case, p. 75, l. 5), which would bring it to 49th Street about 11:07 P. M. or just about the time the local was discharging its passengers. This was the testimony of the company's engineer, Loughrey. The witness Kiernan testified that there was usually about thirty seconds between the passing of these trains at the 49th Street station (Case, p. 32, l. 9). These trains passed on adjacent tracks (Brief, p. 24, l. 5). 20

These circumstances—the knowledge which the defendant company had or was charged with having, of the passing of the express train upon the adjacent track, at a time when the local was generally discharging passengers; that there was nothing to prevent passengers from getting off the local in front of the express; that there was a plank walk clear across the track upon which the express was moving, that the place was poorly lighted—gave rise to the duty of warning and protecting passengers against the danger which the defendant company could and should have anticipated, namely, the danger, of passengers alighting upon the track in front of the express 30 40

train. Knowledge of these circumstances, actual or implied, created the duty which the defendant company owed to its passengers.

The fact, if it were a fact, that on the particular night in question, the express passed four minutes after the local pulled out, which was four minutes later than it usually passed, would not alter the defendant's obligation or duty as it was created or followed as a matter of law, from these
10 circumstances. That obligation or duty stood as an immutable principle of law. The only bearing that the fact, if it were a fact, of the express train being four minutes late on the night in question, would have on the matter would be in determining whether or to what extent the defendant company was relieved of the performance of this duty of warning and protecting its passengers on the particular night in question. It may be, that if defendant's servants, in charge
20 of the operation of the train upon which defendant was a passenger, knew that the express, which usually passed at 11:07 or 11:08 would, in fact, on that particular night, be four minutes late, they might have the right to assume that under those circumstances, passengers would have sufficient time to get to a place of safety, even though they alighted on the wrong side, and would, perhaps, be relieved of the duty of warning pas-
30 sengers of possible danger. Even then, there might be a question whether they had exercised that high degree of care which is required of a carrier. But it does not appear that defendant's servants knew that the express train was going to be four minutes late, if it was late, and therefore, might be excused from warning the decedent of his danger.

To reiterate, it was not the actual passing time of the trains on the night Ryan was killed, which
40 gave rise to the defendant's duty to warn and

protect Ryan against the dangers which existed there, but it was the usual passing time of the trains under the conditions which existed at that station which gave rise to that duty.

However, the appellant is entirely unwarranted in assuming throughout its argument, that four minutes did elapse between the passing of the trains. Appellant relies entirely and solely upon the testimony of Pitcher, assistant station agent of the defendant, who was subpoenaed by the defendant, but was called by the plaintiff, for the reason that plaintiff had no witnesses at all as to the occurrence of the accident to support this claim. Pitcher, who very obviously favored the defendant in his testimony, did not testify that the express passed four minutes after the local pulled out, although appellant, throughout its brief, makes that statement unqualifiedly, time and time again. Pitcher's testimony is as follows:

> "Q. How soon after or about what time, with relation to this 11:06 coming in and going out, did the 628 express go by? A. Well, it was some time, but I couldn't judge right to the minute, but it was 3 or 4 minutes.
>
> "Q. 3 or 4 minutes after what? A. That 11:06 pulled out—or started to pull out."

In the first place, he says: "I couldn't judge right to the minute." Then he says "but it was 3 or 4 minutes." The elementary rule that on motion for direction plaintiff is entitled to the benefit of the testimony presented in its most favorable light, would reduce the four minutes to three minutes, and the three minutes would have a further cloud cast on them by Pitcher's statement that he couldn't judge right to the minute, and then to cast still more doubt upon his testimony, comes his statement that it was three or four minutes after the 11:06 *started* to

pull out. Now, three or four minutes after the 11:06 *pulled out,* and three or four minutes after the 11:06 *started* to pull out, are far from being the same thing. The 11:06 may have been very slow in pulling out; it may have been a very long or very heavy train; any one of a number of reasons may have operated to make the *starting* to pull out a very long-drawn-out affair. So that the three or four minutes may thereby have been so materially reduced as to finally be entirely wiped out.

As opposed to his testimony was the testimony of the engineer (case p. 73, l. 23), that the train generally ran on time, and that it passed 49th Street at about 11:07, which was one minute after the local arrived at 49th Street, and the testimony of Kiernan that there was usually 30 seconds between the passing of these trains.

Still further opposed to appellant's contention and Pitcher's uncertain testimony, is the improbability of Pitcher's failure to see Ryan if he was standing out on the track in front of the station for four minutes after his train pulled out. Pitcher knew Ryan (case p. 47, l. 28). Pitcher testified that when the local pulled in, he was in a position where he could see people getting off (p. 48, l. 1). He was right in the bay-window, where he could look out in all directions. Ryan was struck directly in front of the bay-window, within thirty feet of it, in fact. Was it probable that he could have stood out there on that track directly in front of the bay-window where Pitcher was located, in a position to see anybody getting off the train, at that time of night, for four minutes without Pitcher seeing him? Pitcher did not see him and the reasonable inference is that he did not see Ryan because Ryan was not there for four minutes. He was not there long enough for Pitcher to see him. The reasonable inference was that he was struck as soon as he stepped off

the train, and if that is so, then there is no basis for the assumption that four minutes elapsed between the passing of the two trains, nor is there any basis for the assumption that Pitcher's statement on that subject is final and conclusive, and undisputed.

All those circumstances raised a question of fact for the jury, whether the express train passed the station four minutes after the local pulled out, or when it did in fact pass the station. The mere fact that Pitcher said it was three or four minutes at one time in his testimony, did not make it so. Plaintiff was not bound by his statement, in the sense that it excluded other possible inferences from other testimony in the case. From all the testimony and all the circumstances, the jury had to determine how much time elapsed between the passing of the two trains.

If the jury arrived at the permissible conclusion that on the night in question, the trains passed each other at or about the usual time, about the usual place, namely, the 49th Street station, then all of appellant's argument, based upon the assumption that four minutes had actually elapsed, would fall to the ground. If the jury found, as it had a right to find, that the trains passed each other at the usual time and at the usual place, and with the usual interval of time elapsing, then the next question which would present itself for determination, was whether the defendant, charged with the knowledge of the time and place of the passing of these trains, and the consequent danger to passengers reasonably to be apprehended therefrom, had exercised that reasonable care to protect those passengers from such dangers, which was required of it.

Appellant in its argument (brief, p. 20) resorts to the time-worn expedient of setting up a man of straw, which offers but little resistance when its creator knocks it down. All that appellant

says might be true, if it were assumed that four minutes had elapsed between the passing of the two trains, but, as has been demonstrated, that was a disputable question of fact for the jury.

Appellant contends that it would be unreasonable to require a railroad company to keep its tracks clear for four minutes after its train had discharged its passengers (brief p. 21).

10 "In this very case, the evidence shows that there are three other stations in Bayonne, at which local trains stopped—at 33rd, 22nd and West 8th Streets, and that the running time between West 8th Street and 49th Street is about five minutes. It would be practically impossible to operate through trains on defendant's road in the City of Bayonne if each through train had to wait four minutes after every local going either way had pulled out of each of these stations."

20 There is no merit in this argument. It leaves out of account the possibility, and in this case, the fact, that at the other stations the railroad company had met and overcome that very problem by erecting fences between the tracks, which it had failed to do at 49th Street station. This argument presupposes that the company had failed to provide fences or other safe-guards at the other stations, as it had at 49th Street, which supposition appellant had no right to assume. 30 The evidence as to the conditions at the other stations was ruled out by the trial court. If it had been permitted, it would have been made clear why the defendant was able to operate its trains without the difficulties suggested by counsel. And, if the company had failed to erect fences or other safe-guards at the other stations as it had at 49th Street, then there would be nothing unreasonable in requiring it to operate its trains when passing these stations in such a 40 manner as not to kill off its passengers.

Appellant further says (brief p. 21, l. 15):

> "In this connection it must be borne in mind that the question here does not concern opportunity to leave the premises of the carrier, for this is not a case of falling down-stairs or assault by an employee, and has none of the circumstances of those cases, where the question of opportunity to leave the premises is in issue. The cases, therefore, which pass upon the duty of a carrier towards its passengers, who have not yet left the carrier's premises, have no application here." 10

Why this is so is not quite clear. Surely the right of an alighting passenger, who is deposited upon the tracks, to a reasonable opportunity to leave the carrier's premises, so as not to be killed by a passing train, is at least as great or as urgent as the right of a passenger to an opportunity to leave the carrier's premises without having his anatomy disordered by an employee of 20 the company or by quarrelling hackmen frequenting its depot. Why, therefore, have the cases which pass upon the duty of the carrier toward its passengers who have not yet left its premises, no application here?

Under point Two, appellant says (p. 22, l. 20):

> "The Central Railroad in the City of Bayonne, at 49th Street, skirts the Eastern edge of the city. There are no houses East of 30 the right of way, which almost skirts the West bank of New York Bay. The witness Lodge testified that there were no sort of buildings East of the line, but a radiator factory about 200 feet south of the station."

As we have pointed out before, this is a misstatement of the testimony. There is no evidence that the railroad at this point skirts the Eastern edge of the city. In fact, the appellant emphasizes the statement made at other times that the shore was a long distance from the rail- 40

road. The only witness, Lodge, who was asked about this, said he did not know about it. He said there were no buildings directly on the other side of the track, and directly in front of the station. He did not say there was a radiator factory 200 feet south of the station, but that it extended about 200 feet south of the station.

The appellant again refers to the ditch between the two rights of way, about which there
10 is no evidence, except that at the point where the body was found, 110 feet north of the station, there was this ditch, to which appellant constantly refers. There is no testimony that this ditch runs south of the crossing in front of the station.

Appellant again says (p. 23), that there was a light "about 70 feet from either end of the station."

There is absolutely no basis for this statement.
20 There is one light about 70 feet north of the station (case p. 20, l. 35).

Appellant says (brief, p. 23, l. 4):

> "There was also a light which shown through the bay-window of the ticket office."

but neglects to say that the witness said that it

> "did not show very light" (case p. 42, l. 2).

Appellant says:

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> "Thus all the lighted section of Bayonne, the city with its houses and stores and its lighted streets lies to the West of the railroad."

There is no testimony to that effect.

Appellant goes on to say, after describing the condition of the tracks (p. 23, l. 30), referring to the plank walk across the tracks:

> "But there it ended, leaving no cross walk over the Easternmost track."

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But appellant neglects to show how Ryan knew of that condition.

Reading further:

> "Plainly, therefore, to the observation of reasonably intelligent passengers, alighting passengers had notice from this arrangement, that they were not to cross the right of way to the East side, but were to follow the planking to the West and to the platform."

10

This might be true, by day, but this accident occurred in utter darkness. According to appellant's argument, there were no lights on that side of the train. There is no evidence that Ryan had ever been there before, or that he knew anything about the conditions that existed there. Of course, in the day-time he could have seen this situation. But it could hardly be seen at night. Ryan never got as far as the end of the plank walk. If he was struck where the marks of 20 blood were, as it is reasonable to suppose, then he was still on the plank walk when he was struck. He had not only not reached the end of the plank walk, but he could not even see it in the dark. He had no opportunity for observation, and before he got to the end of the planks, if he was going in that direction, at all, he was struck. How then, does the fact that the plank walk ended a few feet further on have any bearing on the situation at all. 30

Quoting further (l. 40):

> "Moreover, the result of this arrangement was that passengers on West-bound trains, such as decedent, were to alight on the right side, the most natural one, whereas East-bound passengers were forced to alight on their left."

Why were they to alight on the right side? And if they were to alight on the right side, how was Ryan to know that? What was there to apprise 40

him of that situation? According to Kiernan, there was nothing to prevent passengers from getting off on either side (case, p. 29).

Appellant says further (p. 24, l. 25).

> "As no street crossed the railroad at this point, decedent's course, after he left the train, would take him to the West side of the track."

All the proof is to the contrary. The proof
10 was that there is a public crossing right at the station, which had been there for years. (Case p. 36.)

Appellant says further (p. 24, l. 30):

> "It is fair to presume that he had some familiarity with the situation of the defendant's right of way with respect to the settled and built up portion of the city, and also with the arrangement of defendant's station."

20 There is no basis for that presumption, not one word of proof to support it, no evidence that he was ever on or near the station, or was familiar with it, or what opportunities he had for becoming familiar with the situation.

Appellant says further:

> "He certainly can be presumed, as a reasonably intelligent man, to know that defendant's right of way skirted the Eastern edge of the city."

30 Why? At another place, (brief p. 2, l. 13) appellant makes a point of the fact that the shore is a long distance from the station, Here, for the convenience of the argument, the railroad is made to skirt the edge of the city.

Appellant says further (p. 24, l. 38):

> "No evidence was produced by plaintiff to show any failure of defendant's servants to warn and direct decedent, while still a passenger, or at the moment of alighting to get
40 off the right of way, after the stopping of

> the train, to use the way to the station on the West side of the track."

The plaintiff could not prove that, except by inference, and is not obliged to produce direct evidence of that fact. The fact that decedent did not get off on the safe side permits of a fair inference that he was not warned or directed how to alight in safety. The plaintiff is permitted to prove, circumstantially, that no warning or direction had been given, and if the circumstances will reasonably permit of such an inference, the lack of direct testimony is not fatal to plaintiff's claim. All the plaintiff could do was to present all the evidence available, and let it speak for itself, and if from the situation, so presented, a reasonable inference of neglect of duty was permissible, then the appellant is liable

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Quoting further from the brief:

> "If any duty rested on defendant to give such warning and direction * * * then we submit that in the absence of any showing either way, it is to be presumed that defendant's servants did their duty and gave the warning and direction."

20

Why is it to be presumed? The presumption is all to the contrary. How can it reasonably be presumed that the decedent wilfully and deliberately disregarded a warning and walked off the train to his death. What warrant is there in common sense to presume that defendant's servants had warned Ryan, and that, despite the warning, he had stepped off in front of the East-bound train? Is not the fair inference just to the contrary? Is it not natural to infer from the fact that he had stepped off in the path of the oncoming express, that he had not been warned?

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Appellant goes on to say (l. 23):

> "The result then is that the decedent was not using the way provided by defendant for its passengers, arriving at 49th Street sta-

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> tion, there being no station or platform or anything at all, as decedent could observe, and must have known, East of the right of way, and no cross walk over the easternmost track, for passengers alighting on the east side of the train."

How could he observe? Why must he have known? So far as the testimony discloses, he was a total stranger to his surroundings. It was close to midnight. The only light around the place came from a few old-fashioned gas lamps at each corner of the station, only two of which were, of course, on the side where the tracks were. There was another lamp seventy feet north of the station. These threw light for about ten feet directly under them. Presumably, the train was between these lights and decedent. It does not appear that he knew the condition appellant described, and it does appear that he could *not* readily have observed, as appellant contends. And as for their being no cross-walk over the easternmost track, so far as decedent was concerned, there *was* a cross walk, for he was upon it when he was struck.

Continuing, (l. 31), appellant proved quite conclusively that decedent did not get off the train on the west or station side, and consequently, it follows that he must have stepped off on the side away from the station on to track 1, in front of the express. This explains why Pitcher, the assistant station agent, in the bay-window, did not see Ryan get off the train, and further forces us to the conclusion that Ryan was not warned or directed not to get off on that side.

Continuing, (p. 26) appellant says:

> "But if he did turn to his right, then went to get on track 3, he would have to advance beyond the planking, which ended at the easterly rail of the third track or track No. 1. The ending of the plank was notice to him that he had left the path provided by the carrier."

The difficulty with this is that Ryan did not get that far. He did not get beyond the planking, which ended at the easterly rail of the track 1, so that the ending of the planking was no notice to him. He was struck before he got to the end of the planking.

Appellant says it is well settled that a passenger who leaves the designated route provided for him, cannot claim the benefit of any duty of care, and cites *Garret v. Atlantic City, etc., R. R. Co.,* as authority. This is only a half statement of the principle. This is true if the passenger knew of the designated route or should have known of it in the exercise of reasonable care. In the case before the court, there is no evidence that Ryan knew of the designated route, and whether he *should* have known of it in the exercise of reasonable care, was a question for the jury. The Garret case furthermore decided that the railroad company owes no duty to a traveller who, after alighting from a train on a *station platform,* undertakes to cross the railroad tracks. It has no application to the case before the court, for Ryan never was on the station platform. Furthermore the court held as a matter of law, that the plaintiff was not a passenger and reversed the lower court, on the ground that that question should not have been left to the jury. According to the plaintiff's own story, he had left the defendant's premises and was on the highway, when he returned and was struck.

On page 27, l. 5, appellant states that the East bound train was moving on track 3. This is directly contradictory to the statements made on page 4, l. 5, that the express was moving on track 1. That the express train could not have been moving on track 3 is quite conclusively shown by the marks of blood on track 1. It was a physical impossibility for Ryan to have been struck on track 3 with the marks of blood where they were.

The quotation from Section 937 of Hutchinson

upon which appellant relies is incomplete. To continue from where appellant leaves off (brief p. 27):

"But in the absence of knowledge that only one route has been provided by the company for leaving its trains and in the absence of any direction or notice from the company, to use a particular route, the passenger is at liberty to make use of any route which appears to him, while acting as a reasonably prudent person, to be designed for use by foot passengers, and as to him, the company is bound to see that all such routes are reasonably safe and sufficient. Whether the passenger was justified in selecting a particular route and whether in attempting to pass over it in the condition it appeared to him to be in, he was in the exercise of reasonable care, and whether the route itself was reasonably safe and sufficient, are usually questions of fact for the jury."

Appellant's citation of Section 3046 of Thompson is also incomplete. That section states further:

"Proof that the passenger violated the regulations of the company in leaving the car on the wrong side, even without the excuse of a cogent necessity, will not, in all cases, as a matter of law, debar him from recovering damages, if he sustains an injury while so alighting, and making his agress from the grounds of the carrier, since there may be circumstances which will justify or at least excuse this course of action, but the question will, in many cases, go to the jury."

Appellant's citation of Section 3045, of Thompson on Negligence, is also incomplete. It goes on to say:

"So, where the arrangements of the road for the accommodation of persons in taking or leaving the cars or crossing the track, afford a reasonable justification to the passenger for being upon the track, the railway

company still owes him a duty of protection."

There is a note, also, to Section 3045, which cites *Mo. R. R. Company v. Long,* 16 S. W., 1016, to the effect that a passenger is not precluded from recovery from a railroad company for injuries received in leaving a car by a way used by the other passengers, but unsafe, by the fact that a safe way was provided, unless he knew of such safe way, and that the rules of the company required passengers to use it. 10

The printed reports of the cases cited in appellant's brief do not in any one instance bear out appellant's statement of them.

In the case of

Pastores v. B. & O. R. R., 24 Atl. 283;

The entire opinion of the court follows:

"Plaintiff's intestate having returned from a Democratic meeting with a number of companions in a somewhat intoxicated condition, at about 12 o'clock at night, on leaving the car, got off on the wrong side where there was no platform and fell off the bridge on which the car stopped and was killed. The station was at the home of deceased. The other passengers got off at the platform. 20

"The non-suit was affirmed."

In the case of

Morgan v. Camden R. R. Co., 16 Atl., 353, the Court said: 30

"Had he used his eyes, he could not have failed to see the approaching train at a sufficient distance to have avoided the accident. We have repeatedly said that a man who deliberately or negligently steps in front of an approaching train, has no cause of action in case of injury. If plaintiff voluntarily got off at a known place of danger, he has no one to blame but himself for this unfortunate accident." 40

In the case of *Drake v. P. R. R.,* 20 Atl., 994, the Court said:

"The plaintiff had been a resident of the place for 12 years, and his home was near the depot. He was well acquainted with the locality. He knew there was no platform or place provided by the company for its passengers to alight on the north side of the tracks, and that it had constructed a safe and convenient platform on the south side. This knowledge was notice to him of a rule of the company that they should get on and off there. In violation of this rule, which it was his duty to conform to, he refused the safe means of exit and stepped into the ditch on the other side, and, for the consequences of his leap in the dark, seeks to hold the company responsible. * * * In this case there was nothing to justify or excuse the appellant's deliberate disregard of the rules of the company."

Under Point 3 appellant makes the claim that decedent was a trespasser or licensee. This claim proceeds upon the assumption

1. That decedent knew of the defendant company's arrangement for discharging its passengers at 49th Street Station, for which assumption, as we have shown, there is no warrant, and

2. That decedent waited four minutes on the track after alighting from his train, for which assumption there is also no warrant.

With regard to the first assumption, the appellant's citations are not altogether apt.

Appellant's citation from Section 1016, Hutchinson, is incomplete (p. 31). It goes on to say:

"And where the passenger is unnecessarily hindered or delayed in leaving the carrier's premises, the question whether he failed to depart within a reasonable time, is one of fact for the jury."

Cites *Railroad Company v. Tracey,* 109 Ill. Appl., 563, which holds that the mere fact that a passenger gets off a car on the side of the train opposite the depot, does not, as a matter of law, make him a trespasser. Whether he is or not is

dependent on the attending facts and circumstances.

In the case of *Legge v. N. Y., N. H. & H. R. R. Co.,* 83 N. E., 367, the Court said:

> "If a passenger knowingly fails to use the exit provided, and without any invitation, express or fairly to be implied from the situation and arrangement of the station and grounds, leaves the way marked out by the defendants and proceeds to make his exit in some other way, he ceases to be a passenger and becomes a trespasser, or at most, a mere licensee. Plaintiff's intestate was upon the way of exit provided by the company, and had nearly reached the highway. Instead of continuing to walk upon it, he deliberately left it and undertook to reach the highway by crossing the railroad tracks. * * * There was no plank, not even any beaten path, where he walked, after he left the platform. Everything indicated that it was not intended as such a way."

In *King v. Chesapeake & Ohio R. R.,* 99 Fed., 251, the Court said the question whether the plaintiff was still a passenger was a question for the jury. The judgment for plaintiff was sustained. Appellant's brief quotes the head note, which is not fully borne out by the opinion. The Court said:

> "The question whether the company had provided a proper way of egress from its premises or acquiesces in the crossing of its tracks at any point between the station and head of the public street, was a question of fact submitted to the jury."

The case of *Oberhoefer v. Illinois Central,* 76 Ill. App., 672—1898, was not in the Supreme Court, but in the District Appellate Court.

The plaintiff used the trains daily and was entirely familiar with trains, tracks, station, approaches, etc. Was run over by train he had just left. He was walking ahead of it and was

frightened by the headlight in front of the train. The Court said:

> "The appellee unnecessarily and negligently went into a known place of danger, upon the appellant's railway track, fully known by him to be dangerous, when he knew of and might have taken at least three other ways to reach the street * * * and therefore failed to exercise ordinary care for his own safety."

10 In *Duvernet v. Railroad,* 21 So., 644, the plaintiff passed the baggage car, saw defendant's servants unloading trunks, moving and shifting them around. The open door of the baggage car was in full view. As plaintiff approached, an employee was in the act of shoving out a trunk. Plaintiff passed so close to the car as to receive the falling trunk on his foot. The court held as a matter of law that he was guilty of contributory negligence.

In *Henrick v. Chicago & A. R. R.,* 38 S. W., 297, 20 the plaintiff was perfectly familiar with the location of the road and the management of trains at this point, having worked in the defendant's yard there for many months. Desiring to see the engineer on some private business of his own, after he got on the depot platform he started east on the south side of the train to the engine, where the engineer was, and, finding the way obstructed by the baggage and trunks on the platform, he turned back and passed over the platform at the 30 front end of the smoking car, to the north side of the train, and again turned east toward the engine. There were other facts, but this was enough to show that he was no longer a passenger. The Court held that he was a trespasser.

In the case of *Paine v. Illinois Central,* 155 Fed., 73, there was a vestibuled train. The vestibule opened on the west side. The station was on the west side, as was also the town and home of deceased. Paine was well acquainted with the 40 town and had lived there 18 years, and was accustomed to travel. The Court said:

> "There was a presumption that Paine had alighted on the west side. No reason is given in the testimony, no explanation is offered, which would justify him either in alighting on the east side of the vestibuled train or in crossing the west track and attempting to cross the passing track. When he was run over and killed, on the passing track, his own train had pulled out and gone south, and his relation to it as passenger had long ceased. Paine was in a part of the station grounds where a passenger had no right to be, and the railroad company owed him no duty or obligation, unless his presence in that place was known to its employees, and this is not claimed."

10

As to the second assumption, it has already been pointed out that the matter of time was a disputable question of fact for the jury to determine and, therefore, cannot form the basis for the application of the legal principles invoked by the appellant.

20

Decedent was entitled to a reasonable opportunity to alight in safety. Whether he had it, was, under the circumstances of this case, a question for the jury.

Appellant, in referring to the New Jersey cases applying to this situation, says (p. 35, l. 12):

> "In none of these cases, however, did it appear that the trains which injures plaintiff were moving on a track on the wrong side of the train from which plaintiff had alighted."

30

In the *Kiefer* case, the plaintiff was struck by a train moving on a track on the wrong side of the train from which the plaintiff had alighted.

The appellant says further:

> "The principal question in these cases was whether the plaintiffs were under any duty to look or listen before crossing intervening tracks."

40

This is not true in the *Kiefer* case, as that was not a case of crossing intervening tracks.

On p. 36, l. 1, appellant says:

> "Yet four minutes later the east-bound express found him still on defendant's right of way, on a different track from that used by his train, away from the pathway provided for him to use."

Of course he was on a different track from that used by his train. How could he be on the same track as was the train from which he had alighted?
10 And he was not away from the pathway provided for him to use. The evidence is clear and conclusive that he was right on the plank pathway provided for the use of passengers. That is where he was struck. He had not gotten more than six feet away from the train when he was struck by the express.

The questions whether decedent had had reasonable opportunity to leave the premises of the carrier, and whether he had been warned and pro-
20 tected against the dangers existing at that time and place, and whether the defendant had used reasonable care for his safety, were all questions for the jury, and the Court properly refused to take them from the jury. It would have been clearly error for the trial court to have said as a matter of law that there was no duty of care upon the defendant company under these circumstances, and that, if there was any duty of care upon the defendant company, it had fully performed it, and
30 that the plaintiff was indubitably guilty of contributory negligence, as a matter of law. The trial court would have had to so declare in order to sustain defendant's motion.

There was no error in the court's refusal to so rule, and the judgment should be affirmed.

Respectfully submitted,

Wm. D. Salter,
Attorney of Respondent.

40 A. A. Melniker,
Of Counsel.

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EXHIBITS.

Plaintiff's Exhibit 1—Certificate. Admitted in evidence at page 12; not printed.

Plaintiff's Exhibit 2—Map. Admitted in evidence at page 19; not printed. (See Stipulation, p. 94.)

Plaintiff's Exhibit 3—Ticket. Admitted in evidence at page 40; not printed.

Plaintiff's Exhibit 4—Time-table. Admitted in evidence at page 69; not printed. (See Stipulation, p. 94.)

Notice of Appeal.

(Filed, January 9, 1916.)

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of William Ryan, deceased, *Plaintiff*, *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Defendant.*	Action at Law.

10

To:

William D. Salter, Esq., Attorney for Plaintiff.

20

SIR:

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

Dated, January 3, 1916.

CHARLES E. MILLER,
Attorney for Defendant.

30

40

Complaint.

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

Plaintiff residing at No. 23 East 43rd Street, Bayonne, New Jersey, complains of the defendant and says:

1. Defendant is, and on Deember 31st, 1914, was a corporation and a common carrier of passengers by steam railroad between Jersey City and Bayonne, in the County aforesaid.

20

2. On said day, William Ryan, was a passenger on a train of said Company, and it became and was the duty of the defendant to afford said Ryan a reasonably safe and proper place to alight from said train at the station of said Company at East 49th Street, in said City of Bayonne, where said Ryan attempted to alight from said train, and to exercise reasonable care to protect and warn said Ryan against danger which it could reasonably apprehend at said station.

30

3. That defendant did not exercise reasonable care to provide said Ryan with a reasonably safe and proper place to alight from said train and to warn and protect said Ryan from dangers which it should reasonably have apprehended at said station, by reason whereof said Ryan, while alight-

40

ing from said train at said station on the said thirty-first day of December, 1914, was struck by another train of said Company running upon and along an adjacent track, and was killed.

4. That on March 1st, 1915, letters of administration upon the estate of said William Ryan were granted by the Surrogate of Hudson County to plaintiff, who was duly qualified. 10

5. Said William Ryan left him surviving a son and two daughters who are infants, who with another adult son, are his only next of kin, and who were dependent upon said decedent for their support and who have, by his death, suffered great pecuniary injury.

Plaintiff demands Twenty-five thousand dollars damages.

William D. Salter, 20
Attorney for Plaintiff.

30

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Answer.

(Filed, March 13, 1915.)

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff*, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

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, Hudson County and State of New Jersey, says;

20

1. It admits the allegations contained in Paragraph One of the complaint.

2. It denies the allegations contained in Paragraphs Two and Three of the compaint.

3. It has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraphs Four and Five of the complaint.

30

As a separate defense this defendant says that at the time plaintiff's intestate was injured, he was unlawfully walking upon the tracks of this defendant and that being a trespasser, plaintiff has no cause of action against this defendant.

As a separate defense, this defendant says that at the time plaintiff's intestate was injured he failed to exercise reasonable care for his safety in that he failed to observe an approaching train which was plainly visible to him and which was giving audible signals of its approach and was, therefore, guilty of contributory negligence, barring a recovery.

40

GEO. HOLMES,

Consent to Amend Complaint.

(Filed, March 22, 1916.)

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased,

Plaintiff,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation,

Defendant.

Action at Law.

10

It is hereby consented on the part of the defendant in the above stated suit, that the plaintiff may amend paragraphs 1 and 3 of the Complaint filed herein, by changing the dates therein set forth, from December 31st, 1914 to December 31st, 1913.

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Dated, March 22nd, 1915.

GEO. HOLMES,
Attorney for Defendant.

30

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Reply.

(Filed, March 29, 1915.)

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

The plaintiff replies to the Answer herein and says:

(1) He denies that at the time plaintiff's in-
20 testate was injured, that plaintiff's intestate was unlawfully walking upon the tracks of the defendant, and denies that plaintiff's intestate was a trespasser.

(2) He denies that plaintiff's intestate failed to exercise reasonable care for his safety, and that said intestate was guilty of contributory negligence.

WM. D. SALTER,
30 Attorney for Plaintiff.

40

Substitution of Attorney.

(Filed, August 26, 1915.)

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff*, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

It is hereby consented that Charles E. Miller be substituted in my place as attorney of record of the above named defendant.

GEO. HOLMES,
Attorney for Defendant.

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30

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Demand.

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

To:

William D. Salter,
Attorney of Plaintiff.

20 Sir:

PLEASE TAKE NOTICE that the defendant demands that you deliver to it a particular account in writing of the nature of the claim in respect to which damages will be sought to be recovered in this action.

GEO. HOLMES,
Attorney for Defendant.

30

40

Answer to Demand for Particulars.

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased, *Plaintiff,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation, *Defendant.*	Action at Law.

10

To:

George Holmes, Esq.,
Attorney of Defendant.

Sir:

20

PLEASE TAKE NOTICE that the following is a particular account of the nature of the claim in respect to which damages will be sought to be recovered in this action.

William Ryan, deceased, herein referred to, aged about forty-five years, was a passenger on a train which left Jersey City at about 10:57 on the night of December 31st, 1914, and which arrived at the East 49th Street station, Bayonne, at 11:06. Decedent, when alighting from said train at said station, stepped off from the steps on the easterly side of the train and was struck by another train of the Central Railroad Company of New Jersey, running along and upon an adjacent track toward Jersey City, and decedent was then and there killed. Decedent left surviving him three children dependent upon him for their support, aged respectively, 14, 17 and 18 years. The said William Ryan, deceased, was

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employed at the time of his death, as a longshoreman, earning wages which averaged $25.00 weekly.

The loss of the earning capacity of decedent, upon which the said minor children were dependent is the element of damage upon which a recovery will be sought.

Dated, March 16th, 1915.

Yours etc.,

10 WM. D. SALTER,

Attorney for Plaintiff.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

MASON B. SPOFFORD, Administrator of the Estate of William Ryan, Deceased,

20 *Plaintiff,*

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a Corporation,

Defendant.

APPEARANCES:

William D. Salter and Aaron A. Melniker for
30 plaintiff.

Charles E. Miller, attorney for defendant, Edwards & Smith (Edwin F. Smith), of Counsel, for defendant.

BE IT REMEMBERED, that on this twenty-sixth day of October, Nineteen hundred and fifteen, at a Circuit Court, holden at Jersey City in and for the County of Hudson before his Honor, Luther A. Campbell, Judge of the Circuit Court,
40 to whom the issue above joined had been referred

for trial, the said issue between the parties (pro ut the proceedings), came on to be tried by a jury for that purpose, duly empanelled, and thereupon the plaintiff and defendant offered evidence as hereinafter set out to maintain the issue on their respective parts as follows:

Amendments to Complaint.

10

(Counsel for the plaintiff asked leave to amend the second paragraph of plaintiff's complaint as follows:)

2. On said day William Ryan was a passenger on a train of said company and it became and was the duty of the said defendant to afford said Ryan a reasonably safe and proper place to alight from said train at the station of said company at East 49th Street in said City of Bayonne, where said Ryan alighted from said train, and to make the said station a reasonably safe place for the discharge of its passengers, and to exercise reasonable care to protect and warn said Ryan against danger which it could reasonably apprehend at said station.

20

The third paragraph of plaintiff's complaint to read as follows:

That defendant did not exercise reasonable care to provide said Ryan with a reasonably safe and proper place to alight from said train, and to make the said station a reasonably safe place for the discharge of its passengers and to afford Ryan a reasonably safe place for his discharge as a passenger, and that it failed to maintain a fence to prevent passengers from crossing its tracks, and from the dangers of being struck by a passing train upon an adjoining track, and that it failed to provide an overhead bridge or tunnel for the purpose of going across its tracks, and

30

40

to warn and protect said Ryan from dangers which it should reasonably have apprehended at said station, by reason whereof said Ryan immediately after alighting from said train at said station on the said 31st day of December 1913, was struck by another train of said company running upon and along an adjacent track and was
10 killed.

Counsel for defendant stated that the defendant denies the fact, and that the first answer to the complaint stands for all uses and purposes.

(A jury was called and sworn, and counsel for the respective parties opened to the jury.)

---

20 MASON B. SPOFFORD, sworn.

DIRECT EXAMINATION BY MR. SALTER:

Q. Mr. Spofford, are you the administrator of William Ryan, deceased, the decedent referred to in this case? A Yes, sir.

Q. I show you a certificate issued by the Surrogate of the County of Hudson, dated the first of March, 1915, in which Mason P. Spofford is
30 appointed administrator of William Ryan. Are you the Mason B. Spofford referred to? A. Yes, sir.

MR. SALTER: I offer the certificate in evidence.

Paper marked Exhibit P-1.

Q. Now, on a recent day, at the request of myself, did you make any investigation as to the distance between the West 49th Street and the
40 West 8th Street depots? A. Yes I did.

Mason B. Spofford—Direct.

Q. Tell us what you did and how you made your investigation? A. Took an automobile, upon which was fitted—

Q. Just as to distance?

Mr. Smith: What is that, please?
Answer repeated.

Q. On which was fitted what? A. A Warner Autometer. 10

Q. What did you do with the automobile upon which such an autometer was fitted? A. Measured the distance between 49th Street depot and West 8th Street depot.

Q. And what is the distance shown upon that autometer?

Mr. Smith: I object, unless he proves he ran the automobile along the track.

Mr. Melniker: He can prove that. Go on. 20

Q. Well now—

The Court: Well, I don't know what the purpose of the testimony is.

Mr. Salter: I propose to show the distance from West 8th Street in West 49th Street.

The Court: Via the railroad tracks?

Mr. Salter: Alongside of the railroad tracks, yes. I will withdraw that question. 30

Q. Upon what avenue did you travel? A. Avenue E.

Q. And do you know whether or not Avenue E runs exactly parallel with the railroad? A. It does.

Q. And at what distance from the rairoad? A. About 150 feet.

Q. And when you started did you start directly 40

abreast of the West 8th Street depot? A. No—coming back, yes.

Q. Did you go both ways? A. Yes.

Q. Was the distance the same both ways? A. Exactly.

Q. And when you stopped did you stop directly abreast of the 49th Street depot? A. Yes.

10 Q. What is the distance between those two depots? A. 2.4 miles.

CROSS EXAMINATION BY MR. SMITH:

Q. Mr. Spofford, were you any relation to the Ryan, the deceased in this case? A. No, sir.

Q. Are you any relation to Mr. Salter? A. No, sir.

Q. None at all? A. No, sir.

20 Q. Are you employed by Mr Salter? A. Yes, sir.

Q. How long have you been employed by Mr. Salter? A. Over twenty years.

Q. You are no relative of his? A. No, sir.

Q. Either by blood or by marriage? A. No, sir.

Q. And never have been? A. No, sir.

Q. And did you know Mr. Ryan in his lifetime? A. No, sir.

Q. You never knew him, did you? A. No, sir.

30 Q. Did you ever see him in his lifetime? A. Not that I know of.

Q. Did you know Mr. Ryan's family in his lifetime? A. No, sir.

Q. Yet you were appointed administrator? A. Yes, sir.

40

William D. Lodge, sworn.

Direct Examination by Mr. Melniker:

Q. Where do you live, Mr. Lodge? A. Bayonne, New Jersey.

Q. What is your occupation? A. Architect.

Q. Did you draw this sketch that I referred to in the opening? A. I did. 10

Q. And take these measurements? A. I took these measurements.

Q. Who with? A. With Norman Ellsworth and myself, with a steel tape.

Q. How much experience have you had in drawing sketches and maps, and things of that sort? A. Fifteen years.

> Mr. Melniker: I want to offer that sketch, Mr. Smith. 20
>
> Mr. Smith: Well, when did he make it?
>
> Mr. Melniker: Do you want to cross examine him?
>
> Mr. Smith: I object to the offer on the ground that there is no proof if your Honor please, as to when this sketch was made and as to what it represents.
>
> The Court: Well, suppose you go on with your proof, then. It was used and I supposed there was no contest over it. 30
>
> Mr. Smith: He asked us to use it saying he would prove it.
>
> Mr. Melniker: Well, we will go on and prove it.

Q. Mr. Lodge, when did you draw this sketch? A. I took the measurements on the morning of October 19th.

Q. Are you familiar with that station? A. Yes, sir. 40

Q. How long have you been familiar with it? A. About ten years.

Q. As far as you know is there any change in the condition and lay-out of that station when you made that sketch as it was in December, 1913? A. No change at all as far as I know.

MR. MELNIKER: I offer the sketch.

10 MR. SMITH: I want to cross examine.

CROSS EXAMINATION BY MR. SMITH:

Q. Well, does that show the true condition of the scene at the station at 49th Street? A. It does.

Q. Is there any news-stand there at that station? A. Beyond the platform?

Q. Is there any news-stand at the station? A.

20 Yes.

Q. Is it shown on the map? A. No.

Q. What distance is it away from the station platform? A. 9 feet 3 inches.

Q. What distance is it away from the track, track 4? A. 15 feet 1.

Q. The station is—the news-stand is? A. Or with the additional eight feet there—I am not sure on that point.

Q. Does not the news-stand stand a little bit

30 further west than the station? A. The news-stand is on a line with the station, I think.

Q. Is on the line with the station building, is is? A. Yes.

Q. Why didn't you put it on there?

MR. MELNIKER: I object.

A. I didn't want it on there.

MR. MELNIKER: I object, that we are not

40 obliged to put everything in that locality

on the map. He was told to draw a map for the purpose of the case to show what we thought essential to our case here. If that is correct that is all we are concerned with. If they want other things on the map they could have prepared a map of their own. There is a big factory over there, there is a tree down here. We did not show that tree, because it has nothing to do with our case. What difference does it make if he did not put on a hundred things. There is a freight platform down below here. We do not show it because it had nothing to do with our case. The question is whether what he put on is right. 10

THE COURT: The purpose of cross examination is to apprise the court as to whether or not the diagram is sufficiently accurate to be of use in the case. 20

MR. MELNIKER: That is the only thing, whether it is accurate.

THE COURT: It is cross examination.

MR. MELNIKER: The question of what he left off cannot be of any concern.

THE COURT: Might be very material.

MR. MELNIKER: Could not affect the question of the accuracy of that sketch. 30

MR. SMITH: Suppose he left off a track.

THE COURT: Never mind. I will allow the cross examination.

Q. What I am trying to find out is, if the newsstand was there why didn't you put it on the map? A. Because I was not requested to.

MR. MELNIKER: That is the point, that is the question I object to. He asked him why didn't he put it on. 40

Q. Then, in other words, I gather you put on there what you were told to put on there; is that it? A. No, not exactly it.

Q. Isn't that what you said? A. No, I didn't say that.

Q. You were requested to put on the station, weren't you? You were requested to draw the
10 tracks? A. Yes.

Q. You were requested to make a measurement of these things here? A. Yes.

Q. You were not requested to make the news-stand? A. That is right.

Q. And therefore you did not put it on? A. That is right.

Q. And you just put on what you were told to put on? A. That is right—in a sense, yes.

Q. Now, there is a little park back here, isn't
20 there, back of the station towards the street? A. I believe there is, yes.

Q. And there is a road that runs—a little driveway that runs back past the station towards the street? A. Yes.

Q. And then curves on out this way toward the street? A. Yes.

Q. Have you got on here the distance between track 4 and the street? A. And Avenue E?

30 Q. Yes. A. No.

Q. You have not that. Do you know the size of that news-stand? A. No.

Re-Direct Examination by Mr. Melniker:

Q. Just one more question. Is everything that you have shown on that sketch an accurate representation of the conditions down at that station? A. Exactly to the scale a quarter of an inch to
40 the foot.

William D. Lodge—Re-Direct.

Q. The measurements are all accurate? A. The measurements are accurate, with a steel tape.

Mr. Melniker: I offer it.

Mr. Smith: I have no objection to the map.

The Court: Let it be marked.

Map marked Exhibit P-2.

Q. Mr. Lodge, what time were you there? A. I was there about ten thirty in the morning. 10

Q. Were you over there at night? A. Yes.

Q. What time in the night? A. From half past ten until about quarter after eleven.

Q. What lights are there about those premises?

Mr. Smith: I object. This is practically two years after the time of this accident.

Mr. Melniker: We are going to show the conditions were the same. 20

The Court: Subject to your connecting it up—

Mr. Melniker: I will connect it.

The Court: I will permit it subject to your connecting it up. If they do not I will strike it out on motion. This, I understand, was when?

Mr. Smith: He says October 19, 1915?

The Witness: That is when I took the measurements. 30

The Court: 1915, the present year?

The Witness: Yes sir.

(Question repeated).

A. Just those lights that are shown on the drawing.

Q. One at each corner of the station? A. One at each corner.

Q. And is this a light here? A. Yes sir. 40

Q. About how far is that from the station? A. About seventy feet.

Q. What kind of lights are those? A. Ordinary gas lights.

Q. Do you mean— A. Ordinary tip.

Q. The old fashioned gas burner or tip? A. The old fashioned tip.

Q. About how high is it from the floor or ground? A. I should judge about seven feet from the ground, or eight feet.

10 Q. How much of a light do these lamps show?

MR. SMITH: I object.

A. I paced it off the night I was there. It threw—

MR. SMITH: I object upon the ground that it is calling upon the witness to give a conclusion as to what he thinks exists. (Question repeated).

20 THE COURT: Well, find out what he did to ascertain that, Mr. Melniker.

MR. MELNIKER: He is just testifying to it.

A. I paced it off and the lights threw a radius of about ten feet.

Q. Do you mean a radius? A. A diameter.

Q. A diameter of ten feet directly under the lights? A. Directly under the lights.

30 Q. Beyond the circumference of that diameter what was the condition? A. Dark.

Q. That is true of each one of these four lights? A. Yes sir.

Q. How about this lamp here, off seventy feet from the station? A. The same condition there.

Q. Now did you examine or look at the condition of the tracks in front of the station as to whether or not they were filled in any way? A. Yes.

40 Q. What was that condition? A. There was a plank walk about in front of the ticket office.

Q. Clear across the tracks? A Running clear across the tracks.

MR. SMITH: Do not lead, Mr. Melniker.

Q. About how wide was this plank walk? A. About eight feet wide.

BY THE COURT:

Q. How far outward from the station did it extend, Mr. Witness? A. It extended over to the end of track one. 10

Q. Track one is where? A. That third track.

Q. Is it marked on the diagram? A. About where your pencil is.

BY MR. MELNIKER:

Q. That is the plank walk eight feet wide? A. Yes.

Q. Commencing where? A. Commencing at the track, I think. 20

THE COURT: At which track?

Q. At which track? A. Track 4.

Q. Which side of it? A. This side of it.

THE COURT: The station side?

THE WITNESS: Yes.

THE COURT: Mark that A where you have made that X—reverse it and mark that A and the other one B. 30

MR. MELNIKER: Yes.

BY MR. MELNIKER:

Q. What was the condition of the track in places where there was no plank? A. Cinders.

Q. And flush with the track? A. Yes, about flush.

Q. For as wide a distance, I suppose, as the plankings? A. No; all in front of the station. 40

Q. And reaching how far across the track was the cinder fill? A. Over to track three.

Q. Over to track— A. All the way across.

Q. All the way across the four tracks to track 3? A. Yes.

Q. In between the rails of track three? A. No—I am not positive of that.

Q. You know it was at least track to 3 solid
10 filled right across? A. Yes, sir.

Q. Flush with the track? A. Yes.

Q. Is there any tunnel there for reaching the other side of this track? A. No.

Q. Any overhead bridge? A. No sir.

Q. Any fence between any of these tracks? A. No.

Q. I call your attention to this sketch of the station, and ask you what this line represents
20 where my pencil is? What is that there? A. That is a bay window in the ticket office.

Q. The ticket office is right behind that? A. Yes.

Q. That is a bay window, is it? A. Yes.

Q. With how many windows? A. Three.

Q. One, two, three windows? A. Yes.

Q. Permitting a view in all directions in front of the station? A. Yes sir.

30 MR. SMITH: I object to that as leading and ask that it be stricken out.

(Question repeated).

MR. MELNIKER: I am referring to this sketch, your Honor, it shows three windows in front of the station and I asked him whether they permit a view in all directions in front of the station.

THE COURT: What is the objection?

MR. SMITH: The objection is that Mr.
40 Melniker is continually suggesting to the

William D. Lodge—Re-Direct.

witness what he wants the witness to say, and I object to it.

MR. MELNIKER: I only save time.

THE COURT: Apparently we are not saving time. We are losing time, because he raises an objection each time, so a better plan would be to continue with general questions.

10

Q. Now Mr. Lodge, how high above the ground is this platform raised? A. Eight inches, about.

Q. Just about one step, isn't it? A. One step.

Q. Mr. Lodge, what is there right across these tracks in front of the station? A. You mean the condition of the ground?

Q. Yes; what sort of buildings are there, if any? A. There are none right there. Over the other side is a radiator plant. Is that what you mean?

20

Q. Yes; I mean across the track from the station, is there any? A. Big factory building.

Q. And that extends down about how far south of the station? A. I should judge two hundred feet. That is only judging.

Q. And the other side of the factory beyond that to the north of it, do you know what there is here? A. Well, you can see all the lights of the Long Dock of the Pennsylvania yards over there. That is all I see over that way.

30

Q. What do these lights look like, as you look from the station towards the dock? What is the arrangement there? A. You could take it to be most anything.

Q. What is the arrangement of that? A. They look like a number of street lights, row after row of them.

Q. Row after row of street lights? Who did you say was with you when you made these measurements? A. Norman Ellsworth.

40

Q. Who else? A. I don't know the other fellows by name.

Re-Cross Examination By Mr. Smith:

Q. Right on the other side of these tracks there is a sort of embankment where the Lehigh Valley runs trains, right over here? A. No embank-
10 ment.

Q. Isn't there an embankment? Aren't they just above the Central Railroad tracks? A. Not to any noticeable degree.

Q. Didn't you make any measurements? A. No, I did not.

Q. You know there is a ditch between the Central Railroad tracks and the Lehigh Valley tracks? A. Yes sir.

Q. Did not show that on there? A. I show
20 the location of the body which is in the ditch.

Q. That is the ditch here? A. Yes.

Q. About how wide is the ditch? A. About two feet wide at the bottom.

Q. How wide at the top? A. Five or six feet.

Q. Five or six feet; and the other side of that leads to the shore of New York Bay? A. Yes, but the shore is a good way off at that point.

Q. Yes; and between the Lehigh Valley and the shore the only factory you know of is this factory
30 down here, south, isn't it? A. Yes—that is not between the tracks there.

Q. I say between the Lehigh Valley tracks and the shore? A. Yes.

Q. That is the only building there? A. I don't know about that.

Q. There is a street right down here, isn't there, east of the station? A Yes.

Q. Isn't that right? Got that on the map? A. You mean running with the station?
40

Q. No; east, going to New York Bay? A. No, I did not know.

Q. What is the 49th street—does that cross over? A. I don't think so.

Q. You don't know whether there is any crossing there or not? A. I know there is no street; there is a crossing for trucks.

Q. A crossing for trucks, but not a street? A. Yes. 10

Q. Way over on the east, or rather the northeast, is what you call the lights of the Pennsylvania yard; is that it? A. Yes

Q. That is the yard that the Pennsylvania built away out into the water? A. Way out on the Long Dock.

Q. Way out on the Long Dock, that is how far away from the street? A. I don't know.

Q. Well, approximately? A. I should say half a mile. 20

Q. Half a mile away. And how far does the dock, as you call it, run out from the land? A. About a mile, I should judge.

Q. Between the Pennsylvania yard, as you call it, or dock and the station there are no lights there, are there, at night? A. I do not think so, no.

Re-Direct Examination By Mr. Melniker: 30

Q. Do you know how far this factory building extends in front of the station? A. It starts about there (indicating).

Mr. Smith: How far to what?

Q. It starts somewhere in front of the station, does it? A. I think below the station a little bit.

Mr. Smith: He said two hundred feet south. 40

MR. MELNIKER: It runs two hundred feet south, but I am asking him to put where it starts.

THE COURT: Suppose you go down there, Mr. Witness, and indicate where you say it starts?

A. Where I should say it starts (indicating).

10 Q. About here?

THE COURT: Mark C there.

MR. MELNIKER: All right.

EDWARD T. SHADDECK, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. What is your occupation, Mr. Shaddeck?

20 A. Chauffeur.

Q. For Mr. Salter? A. Mr. Salter.

Q. Did you drive Mr. Spofford at the time this measurement was made between 8th street and the 49th street station? A. I did.

Q. What was the distance? A. Two miles and four tenths.

CROSS EXAMINATION BY MR. SMITH:

30 Q. How did you measure it? A. With a Warner Speedometer.

Q. Measured it on the speedometer? A. With a Warner speedometer.

Q. How old was the speedometer? A. The car is 1915 car and the speedometer was over to the Warner people in the latter part of August.

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

Q. 1915? A. 1915.

Q. You had been running it? A. I had.

40 Q. Did not have your speedometer tested, did you, before making this trip? A. No sir.

William H. Kiernan, sworn.

Direct Examination By Mr. Melniker:

Q. Mr. Kiernan, what is your occupation? A. Mechanic.

Q. In what line? A. Well, electrical machinery, what one would call a mechanician.

Q. Where do you live? A. Hotel Roland, New York. 10

Q. Did you ever live in 51st Street, Bayonne? A. I did.

Q. How long? A. Why, probably out there—have been on and off for twenty-five years.

Q. When you lived there did you have occasion—I withdraw that. Is the 49th street station of the Central Railroad the station nearest to your house? A. Yes.

Q. During the time that you lived there did you have occasion to use the station much? A. Many a time. 20

Q. How many times? A. Morning and evening probably for—during the twenty years or more.

Q. Are you familiar with the lay-out of that station and tracks? A. Yes sir.

Q. Did you make an examination of that station and the tracks recently at Mr. Salter's request? A. I did. 30

Q. When was that? A. Last Friday evening.

Q. When you examined it then was the station and were the tracks and surroundings the same as they were in December, 1913? A. To the best of my knowledge—no difference—no change.

Q. And the lighting? A. Was the same.

Q. What time were you there this last time? A. I got there shortly before eleven o'clock and stayed until—well, about half past ten, probably somewheres around between half past ten and 40

eleven, and stayed until after—about ten minutes past eleven.

Q. Do you know whether in December, 1913, there was any fence between the tracks? A. There was not.

Q. Or any tunnel for reaching the other side? A. There was not.

Q. Or an overhead bridge? A. There was not.

10 Q. Any gate? A. There was not.

Q. Any bell? A. Well, they have a bell there.

Q. Do you know anything about the operation of that bell, when it rings? A. It sounds, it rings on trains going west only.

Q. Only on trains going from Jersey City out? A. Yes, sir.

Q. Not on trains going into Jersey City? A. No.

Q. Now what was the condition of these tracks

20 in front of the station with regard to their being flush with the rails by planking or other filling? A. Beginning here and running back through there is planking; the other part of the railroad to a reasonably good distance is filled with cracked stone or cinders.

Q. Flush with the top of the rail? A. Flush with the top of the rail.

Q. You say a reasonable distance—on each side of the plank? A. On each side of the plank.

30 Q. Does that extend from the station clear across the four tracks? A. Up to the first rail or track 3, I would say.

Q. Now in the use of that station, what is the manner in which passengers board it to get off trains going into Jersey City; how would they board them, on which side of the train? A. Well, they would board the train going into Jersey City on the left hand side.

Q. Coming from the station and crossing all

40

the tracks? A. Going towards Jersey City you go on the left hand side of the train.

Q. They cross tracks 2 and 4? A. Yes.

Q. And get in on the left hand side? A. Yes.

Q. And discharge passengers on the left hand side? A. Always.

Q. From both directions? A. Yes sir.

Q. Was there anything to prevent passengers from getting off on the left hand side? A. Nothing. 10

Q. Now what sort of a light did these lamps throw, what extent? A. Very poor light.

Q. What kind of lamps were they? A. Well, they were gas lamps.

Q. What kind of burners? A. They looked to me like the ordinary burner, something on the plan of the Bray.

Q. Tip burner? A. Yes, tip burner, something like a Bray burner. 20

Q. Was the light thrown around or cast down on the ground? A. Well, there was a cast down to it from a shade; I would call it about a four foot burner.

Q. How great an area under the lamp was lit up? A. From eight to ten feet, that is right from the direct point.

Q. And beyond that was there any light? A. Then there was dark. 30

Q. The night that you were there that did you wait for this train that comes into the 49th street station at 11.06? A. I did.

Q. Did you see it come in and go out? A. Yes.

Q. And how close to the arrival and departure of that train did the 6.28 express go by?

Mr. Smith: I object.

The Court: How can that be relevant? 40

Mr. Melniker: I think I have a right

to show that this train goes by generally about that time, and that the company has reason to anticipate that that was a danger which it should have apprehended. They knew this train goes by about that time, and by showing the various times it went by and at that same time I think that I charge them with that duty of knowledge.

10

MR. SMITH: That is proof a year after or two years .

MR. MELNIKER: I do not see that it makes any difference, if the schedule time was the same.

THE COURT: Why is not the proper way to prove it by the schedules then?

MR. MELNIKER: Well, the nearest we can come to it is the time—this express train is not scheduled to pass the 49th street station; it is scheduled for the 8th street station, and then the next point appears on the time table is Jersey City. Now, it seems to me we have a right to show that in the operation of that road ordinarily that train, that express train, passes the local at 49th street, and if that is so, then the railroad is charged with knowledge of that fact, and the duty that goes with that knowledge of protecting its passengers from walking off in front of this train.

20

30

THE COURT: Yes, but the time he is talking about is a matter of nearly two years after the time you are concerned.

MR. MELNIKER: If the schedule is the same as we expect to show—the schedule as to the time this train reaches 8th street and goes on and the time the local goes by 49th street is exactly the same time,

40

which was 11.06 at 49th street, just as it is now.

The Court: What is the objection?

Mr. Smith: The objection is that he is trying to prove a general custom, and the question at issue is what happened this night.

Mr. Melniker: I am not trying to prove a custom. 10

Mr. Smith: Mr. Melniker cannot prove a case by inference entirely, but he must prove what happened this night; he cannot prove—

Mr. Melniker: If I can prove what happened the night he was there and I can prove by other witnesses what happened the night they were there, and I can show on the night we took observations 20 that is what happened, and if the schedule is the same as two years ago, why isn't it a perfectly—

The Court: I will overrule the objection, subject to your showing those matters, and if you cannot I will strike it out.

Mr. Smith: An objection.

Q. Now, the night that you observed these trains, how soon, with regard to the coming in 30 and going out of the local, did the express 628 go through? A. The local came in, according to the clock in the depot, at 11.06 and left about 11.07½, and about 11.08 the express train passed the depot, leaving about thirty seconds between the going away of the local and the passing of the express.

Q. Have you ever observed those two trains at any other time? A. Yes sir.

Q. And has it been your observation that they 40 passed each other about that same way each night?

A. Well, I cannot say each night, but I came in there for a number of nights on that late train, and find that train coming in—

Q. Just about that time? A. Usually on time—that express train and the other local usually on time.

Q. And about that same time? A. Yes sir.

10 Q. Now this night that you were there did you observe the lights across the track? A. Yes sir.

Q. On the other side—where is that? A. That is the Pennsylvania Long Dock.

Q. On the Long Dock? A. Yes.

Q. What does it look like from the station? A. It might represent—

Mr. Smith: I object to what it looks like or what it might represent.

20 Mr. Melniker: I want him to tell what he saw.

Mr. Smith: I object to it as immaterial, incompetent and irrelevant.

The Court: I cannot see the materiality of it.

Mr. Melniker: We want to show the lights over there looked from the station just like a street, and that a person might very well have taken that to be a street,

30 right across the tracks, a little ways off but you could not tell that at night. I have a right to show, regardless from the inference that might be drawn from it, the physical surroundings of the accident. It might be that the inference is unwarranted, but I do not think that that affects the question of the competency of the proof.

Mr. Smith: This man cannot draw a conclusion.

40 The Court: Describe it.

Mr. Melniker: That is what I am asking for.

A. Well, to me, I know what it is, but to a stranger it might appear as a city—I know what it is, and it looks like a city.

Q. Never mind your knowledge of what it is, but standing at the station at night how do those lights appear? A. They are scattered all over, a large, big area, scattered all over, probably two or three or four hundred, or more. **10**

Cross Examination By Mr. Smith:

Q. Mr. Kiernan, how long have you lived in New York? A. Well, I have been on and off living in New York over a year.

Q. Over a year? A. Yes sir.

Q. And when was it you went down to this 49th street station last, last Friday? A. Last Friday evening. **20**

Q. You went there at the request of Mr. Salter? A. Yes sir.

Q. Not for your own business? A. No, no.

Q. But for Mr. Salter; is that right? A. Mr. Salter.

Q. Was Mr. Salter with you? A. Yes sir.

Q. You and he talked over these things there as to the distance to the planking and so forth? A. Yes sir. **30**

Q. As to whether or not they were the same as they were in 1913? A. Yes.

Q. Tell you to impress upon your mind that they were exactly the same? A. No.

Q. You knew that one of those lights had not been changed, didn't you? A. Well, it might have been changed, for all I know, but the general locations of the lights are the same—might have been shifted five or six inches, something of that kind. **40**

Q. Might have been shifted quite some distance? A. Not so much as to be noticeable.

Q. And might have been raised higher, too? A. Not so high, but I would have noticed there had been a change.

Q. You would have noticed it? A. Yes.

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10 NORMAN ELLSWORTH, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Mr. Ellsworth, where do you live? A. 20 East 39th street.

Q. What is your occupation? A. Undertaker.

Q. Have you any connection with the morgue, of Bayonne? A. I have.

Q. Now, on the night of December 31, 1913, did
20 you make a call at or near the 49th street station? A. Yes sir.

Q. What did you find when you got there and what did you do? A. I found the body of some man lying in the gutter, in the ditch, in about fifty foot of the crossing; brought him to the morgue and next day was identified and taken home.

Q. Identified as who? A. William Ryan.

Q. Now, can you tell us about how many feet
30 north of the station this body was found? A. About fifty feet.

Q. On which side of the tracks; on the side where the station is or clear across? A. Across the tracks.

Q. Clear across all the tracks? A. Yes.

Q. In the ditch about fifty feet north of the station? A. North of the crossing.

MR. SMITH: North of what crossing.
40 THE WITNESS: That goes to Long Dock.

The Court: Is that shown?

Mr. Melniker: No.

Q. How many feet is that north of the station? A. What, the crossing?

Q. Where the body was found? A. The body was found—

By The Court:

10

Q. In the first place, let me interrupt you. You speak of a crossing. What do you mean? A. Going—there is a crossing just beyond the depot, going across to Long Dock.

Q. You mean a highway crossing or a street crossing? A. I don't know whether it is a highway crossing, but there is boards that go across it for wagons. That is what I went across with a basket. It was fifty feet above that.

20

Q. Fifty feet above the north line of that crossing, you mean? A. Yes.

Q. How far is the north line of that crossing north of the station building, I mean the platform? A. Why, fourteen.

By Mr. Melniker:

Q. Did you hold the tape for the measurements? A. Yes.

Q. The measurements as shown on that map? A. Yes, I held the line. I don't remember the measurements. I just held the tape.

30

By The Court:

Q. And can you tell us how far the north line of this crossing that you speak of is north of the north side of the station building, about approximately? A. About sixty feet.

Q. And he was found—the body was found fifty feet north of that? A. Of the crossing.

Q. And on the east side of all the tracks? A. Yes.

40

By Mr. Melniker:

Q. How long have you known that crossing to exist there, Mr. Ellsworth? A. Well, I don't know, quite a long time—maybe six or seven years—ten years—ten years.

Q. At least ten years? A. I can say eight years positively.

10 Q. This is the way you went across to get his body? A. I left the wagon on this side and carried the basket across.

Q. Is there any gate there? A. No sir.

Q. Was there any gate there that night? A. No sir.

Q. Any fence? A. No sir.

Q. Or bridge or tunnel? A. No sir.

Q. Did you observe the condition of that station and tracks as to lighting, whether it was

20 lit up all right or not? A. I did not. I went up there and brought the body away—didn't know whether it was light—one light or two lights, or what.

Q. Were there any lights? A. I couldn't tell you.

Q. Do you remember whether it was light or dark? A. No sir.

Q. Eh? A. No sir, I do not.

30 Q. What time of the night were you there? A. Just at midnight.

Q. Was the station all lit up? A. That is what I don't remember.

The Court: He says he did not notice any lights, as I understand the testimony.

Q. Were you with Kiernan and Lodge the other night? A. Yes.

Q. When they were down at the station? A.

40 Yes sir.

Q. Were the conditions there then the same as

they were the night you picked the body up? A. I couldn't tell you—two years—I don't know whether it was the same or not.

Q. Well, did you notice any change? A. No sir; I did not notice any change or did not see any change, did not look for any.

CROSS EXAMINATION BY MR. SMITH: 10

Q. Mr. Ellsworth, how was this body dressed, do you know? A. Well, I think it was dressed as a longshoreman, a working man.

Q. Dressed as what? A. As a working man that would be around—loose shirt, heavy suit, no overcoat.

Q. Loose shirt? A. Yes.

Q. See what color underclothing he had on? A. No sir, I could not remember.

Q. Find any hat? A. No sir. 20

Q. You took him to the morgue, you say? A. Yes.

Q. And the next day he was identified? A. Yes.

Q. Who identified him? A. His son.

Q. What was his name? A. I cannot call his name.

Q. You cannot remember his name? A. No.

30

40

JOHN J. RIGNEY, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Mr. Rigney, what is your business? A. Lieutenant of police.

Q. Were you connected with the police department in December 1913? A. Yes.

10 Q. Do you know anything about an accident to Mr. William Ryan? A. Yes. That night I was sent to 49th street depot with Detective Thatcher, and there was a body of a man with his face all smashed in laying in a ditch on the east side of the railroad track.

Q. Did you examine the tracks or the ground between the tracks for any marks or signs of blood, or anything like that? A. No; I did not examine the tracks.

20 Q. Did you see any signs of blood or any part of this man's body any place along that track? A. Well, where the man's body was found it was dark in the ditch there.

Q. You did not go back next day? A. Back next day? No, I didn't go back next day.

Q. Now, what time did you get there that night? A. Well, it was around midnight. The whistles and bells were ringing, it was New Year's

30 Eve.

Q. Are you familiar with that station? A. Yes, pretty familiar.

Q. On that night would you say that the station was well lit up or dark?

> MR. SMITH: I object to it as calling directly for a conclusion. He can describe it.
>
> THE COURT: Yes. I will sustain the objection on that ground.

40

Q. What lights were there that night you

observed? A. Well, I couldn't say exactly; I did not count the lights. The station was lit up, but over in the ditch where the body was found it was dark there.

Q. Do you know in what manner and by what lights the station was lit up? A. No, I didn't count them, I couldn't tell.

Q. When you say it was lit up what did you mean? A. The same as every night, I believe. 10

Q. The same as every night? A. Yes sir.

Q. Do you mean there was a light inside of the station? A. Inside of the station?

Q. Yes? A. There was lights all around the station there that night.

Q. What lights? A. Well, I didn't count them, but just the same as every night.

Q. Same as every other night? A. Every other night. 20

Q. Same lights there now?

> Mr. Smith: I object. He hasn't said that. It is leading.

Q. Are they the same lights as are there now? A. I couldn't say whether they changed any of them since 1913 or not.

Q. Well, does it look the same? A. They look about the same thing.

Q. Did you take anything from his body? A. Yes; went to the morgue with the body. 30

Q. I show you this ticket, a part of a ticket, and ask you whether you recognize that? A. Yes, there was a ticket taken.

Q. Was that what you took from him? A. A ticket and a piece of paper.

> Mr. Melniker: Any objection to that? (Ticket shown to Mr. Smith).

A. A brass key. 40

MR. SMITH: No.

MR. MELNIKER: I offer that part of a ticket (Paper marked Exhibit P-3).

MR. MELNIKER: Return coupon from East 49th street, Bayonne, purporting to be from New York, with "New York City" stamped on the back, the only part—

10 MR. SMITH: It speaks for itself.

CROSS EXAMINATION BY MR. SMITH:

Q. What was this piece of paper that you say you took from the body, too? A. Why, it had a name on to it and I noted it very closely for to try to make an identification of his body.

Q. What name did you find on it? A. I think it was the name Bettie.

20 Q. Kettie? A. No; P, I believe, 163 West 43rd street.

Q. 3143 West 63rd street? A. No. 163 West 43rd.

Q. West 63rd? A. No, West 43rd.

Q. How was this body dressed, did you notice, Mr. Rigney? A. Yes, I took a report—we make a report of that. It was put on the blotter at Police Headquarters for to try to get identification.

30 Q. How was it dressed? A. I got it here if you want it.

Q. Can you tell me without looking at that? A. Well, it was red underwear, I know, and I think it was gray flannel shirt and a pepper and salt suit.

Q. Pepper and salt? A. Yes, I believe that is it.

Q. Did you find any cap at all—any hat? A. Sir?

40 Q. Any hat or cap? A. I just don't recall. I don't think I did.

James E. Keegan, sworn.

Direct Examination By Mr. Melniker:

Q. Where do you live, Mr. Keegan? A. 22 East 51st street.

Q. Did you see a body picked up at 49th street station on December 31st, 1913? A. Yes sir.

Q. What time were you there? A. Well, about twelve o'colck. 10

Q. What kind of a night was this, dark or fairly light? A. Yes, it was a dark night.

Q. How was the illumination there in that neighborhood?

> The Court: Ask him how it was lighted, otherwise you will be asking a conclusion.

Q. How was the station lighted up? A. Well, it wasn't much of a light there. As well as I could see it was gas lamp. 20

Q. Gas lamps, the same as those that are there now? A. Yes sir.

Cross Examination By Mr. Smith:

Q. How many lights? A. Well, there was about four there.

Q. About four? A. Yes.

Q Well, was there four or five? A. Well, there is four there on the station. 30

Q. What was there that night? A. Yes sir.

Q. There were four there on the station? A. Yes sir.

Q. Any other lights around there at all except those four? A. Only four, that is all I see.

Q. That is all you saw that night? A. Yes sir.

Q. Was the station itself lighted? A. Yes.

Q. And this bay window was there? Was that bay window shown on the plans there at that time? A. Yes sir. 40

Q. Light shone out through the bay window, did it? A. Well, they did not show very light out there.

Q. Does it show? A. Yes sir.

Q. Shows out there? A. Yes.

Q. So that even you would know there was a light in the station would you? A. Yes sir.

10 By Mr. Melniker:

Q. Was there any light shining out of this station any place except this bay window? A. No sir; not that I see.

By Mr. Smith:

Q. Were there any other windows in the building besides this bay window? A. Yes sir.

Q. Lights came out of those windows, didn't they? A Not that I know.

20 Q. You don't know? A. No sir.

Q. You don't remember, do you? A. No sir.

Q. You know Mr. Salter, don't you? A. Yes sir.

Q. How long have you known him? A. Well, about ten years.

Q. About ten years. Had a talk with him about this case, didn't you? A. Yes sir.

Q. When did you first talk to him about it? A. Well, last night.

30 Q. Last night was the last time, wasn't it? A. Last night was the first time and last.

Q. Last night was the first time? A. Yes.

Q. And as a matter of fact that is the first time this matter has been called to your attention since the happening of it? A. Yes sir.

Q. Last night was the first time you were asked to remember about the lights at the station as they were on December 31st, 1913? That is so, isn't it? A. Yes sir.

40

Q. And where did you have this talk with Mr. Salter last night? A. Up in the office.

Q. At his office? A. At his office.

Q. He sent for you? A. Yes sir.

Q. What is it that fixes in your mind that you were there on December 31, 1913—what Mr. Salter said to you? That is what fixes it in your mind, isn't it? A. I don't understand.

10

Q. Eh? I say what fixes in your mind that the night you were at this station was December 31, 1915, what Mr. Salter said to you, wasn't it? A. Yes.

Q. Yes. I think that is all.

Re-Direct Examination By Mr. Melniker:

Q. Did Mr. Salter send you down there that night? A. No sir.

20

Q. How did you come to be there? A. Well, I was standing on the corner of 48th street when I seen the morgue wagon go down and I followed down in back of it.

Q. There is not any doubt about your going down after the morgue wagon, is there? A. No sir.

Q. You were there, weren't you? A. Yes.

Q. Have you ever been there any other time when the morgue wagon picked up a body? A. No sir.

30

Q. That was the only time in your life? A. Only time.

40

Allan A. Brown, sworn.

Direct Examination By Mr. Melniker:

Q. What is your occupation, Mr. Brown? A. Station agent.

Q. Central Railroad? A. Central Railroad of New Jersey.

10 Q. The defendant in this case? A. Yes.

Q. At 49th street station? A. East 49th street station.

Q. You are still employed by the defendant? A. I am.

Q. You are under subpoena from the defendant? A. Yes—what is the question.

Q. You are under subpoena from the defendant? A. Yes sir.

Q. Were you station agent on December 31st, 20 1913? A. I was.

Q. Were you on duty at about eleven o'clock that night? A. I was on duty up until after twelve in the morning.

Q. Did you know on that night that a man had been killed out in front of the station? A. Not until after it had happened—not until after.

Mr. Melniker: I ask that that be stricken out. I just want a responsive answer 30 whether he knew or not.

The Court: Does not that respond to the question?

Mr. Melniker: I don't want to know when. I just want to know. You see, the reason for insisting on a responsive answer is that I have called a defendant's witness and a man in their employ, and I do not want anything but a responsive answer, because I am subjecting him to cross 40 examination at my peril and I do not want him to open up so as to permit them to ramble at large on cross examination.

THE COURT: Let me have the question.

(Question repeated).

THE COURT: I suppose you may answer that yes or no. Without regard to when you knew it, did you know it that night?

A. Certainly I knew that night.

Q. That is all I want. Now the next day you looked at the premises in front of the station? A. I did. 10

Q. Did you see any marks? A. Yes.

Q. Blood? A. Some blood.

Q. Where did you see it? A. Where is the bay window (indicating on map)?

Q. Right here. A. Well, I should judge about here; not direct, not in the center—the bay window—here is the center of the bay window, but more this side.

Q. Almost to the front of the bay window on track one? A. Yes, sir. 20

Q. Is that right? Just mark with the pencil there just about the spot? A. I could not do that. I don't know anything about the lines.

Q. There is track one and there is one bay window; there is track 4 and track 2. Just mark? A I know them tracks all right; I can't just dope that out there.

BY THE COURT: 30

Q. Why can't you? Just guide yourself by the bay window. A. All right. Well, put it there.

THE COURT: Mark it D.

MR. MELNIKER: That will be D. That will be all.

CROSS EXAMINATION BY MR. SMITH:

Q. You say you were station agent that night? A. Yes. 40

Q. You were on duty up to what time? A. Until after midnight.

Q. What time did you go on? A. I went on at seven o'clock in the morning.

Q. Seven o'clock in the morning? Was there another man there working with you? A. My night assistant.

Q. What is his name? A. Robert Pitcher.

10 Q. Where do you live? A. East 49th Street Station.

Q. In the station itself? A. In the station, yes.

Q. I see. And you say on that night you knew a man had been killed, and about what time was it that you heard of it? A. Well about eleven, about eleven twenty.

Q. What called your attention to it? A. When
20 the train backed up.

Q. You say the train backed up? A. Yes.

Q. Do you know the number of that train that backed up? A. Number 628.

Q. Do you remember the local that gets there at 11.06? A. Yes.

Q. Was that there on time that night?

MR. MELNIKER: I object to it as immaterial and as improper cross examination.

Objection overruled.

30

A. Yes, sir.

40

Robert A. Pitcher, sworn.

Direct Examination by Mr. Melniker:

Q. Where do you live? A. 19 East 46th Street, Bayonne, New Jersey.

Q. What is your occupation? A. Assistant shipping clerk.

Q. Did you ever work for the Central Railroad? A. I did. 10

Q. Up until when? A. Up until about May 6th, 1914.

Q. Are you under subpoena from the Central Railroad here today? A. Yes, sir.

Q. Were you working for the railroad on December 31st, 1913? A. Yes, sir.

Q. Were you the assistant that Mr. Brown, the station agent referred to? A. Yes, sir.

Q. Were you on duty at about eleven o'clock that night? A. Yes, sir. 20

Q. Where were you at that time? A. In the ticket office.

Q. Do you remember that night pretty well? A. Yes, sir, I do.

Q. Something out of the ordinary happened that night? A. Yes, sir.

Q. What? A. Well, we picked up a man down in the ditch down there that night.

Q. A man was killed that night? A. Yes. 30

Q. Is that so? A. Yes.

Q. That fixes that night in your memory, does it? A. Yes, sir.

Q. Now were you there when that 11.06 train pulled in? A. I was.

Q. And when it pulled out? A. I was.

Q. Did you know Ryan? A. I did.

Q. Did you see him get off the train that night? A. I did not. 40

Q. Were you in a position that night at that

time when that train pulled in to see people getting off the train? A. I could see people getting off.

Q. Where were you with regard to the bay window? A. Bay window? I was right in here.

Q. Were you in a place in the bay window where you could look out? A. I could look out either way.

10 Q. You could look out in all directions? A. All directions.

Q. Do you remember whether or not you did look out that night? A. I don't remember.

Q. How soon after or about what time with relation to this 11.06 coming in and going out did the 6.28 express go by? A. Well, it was some time, but I couldn't judge right to the minute, but it was three or four minutes.

Q. Three or four minutes after what? A. That
20 11.06 pulled out—or started to pull out.

Q. How long did you work there at that station? A. Well, I should judge about three years.

Q. Whereabouts did those two trains generally cross or pass each other with relation to the station? A. Well, it ought to have been about—

Mr. Smith: I object.

The Court: Has he any knowledge? He started off by saying it ought to. What
30 knowledge have you on which you can base an answer, Mr. Pitcher?

The Witness: Seeing the train going by there. I have seen the train go by there.

Q. See it go by every night? A. Every night.

Q. For how many years? A. Well, I have seen it go by every night—I won't say it ran at the same time—for about twelve years.

40 Q. The time varied, did it, different nights?

A. Well, I was down there every night for close on to three years.

Q. Know the time of passing varied, but it was not always the same? A. No, sir.

Q. Used to vary? A. Varied.

Q. But did they pass when they were near the station? Was the point of passing about where the station is?

10

MR. SMITH: I object to it as leading.

A. No.

MR. MILLER: He answered no, so it is all right.

MR. MELNIKER: I withdraw the question.

THE COURT: He has answered it now.

MR. MELNIKER: He objected to it.

MR. MILLER: We withdraw the objection.

MR. MELNIKER: Your Honor overrules the question?

20

THE COURT: I asked how he answered and he said he answered no. Your objection, I suppose, is withdrawn?

MR. SMITH: Withdrawn.

Q. Now, Mr. Pitcher, the condition of that station and tracks and so forth was the same then as it is now? A. Just about.

Q. Did you examine the tracks the next day after this accident? A. I did.

30

Q. Find any spot or marks of blood? A. I did.

Q. What did you see? A. I found blood and what looked to me from seeing it before was brains.

Q. Whereabouts? A. Right about opposite the bay window, on track—wasn't quite on track one, it was just laying the other side of the railing.

Q. The other side of track one? A. Uh-huh.

Q. Just mark, will you, on here, whereabouts

40

you found those spots and marks? A. About there (indicating on map).

The Court: That will be E.

Mr. Melniker: That will be E.

Q. You did not see Ryan that night? A. I did not—not until after the accident.

10 Q. When did you first know that Ryan was killed? A. Didn't know that until next day.

Q. Next day? Was Brown in the office with you at that time? A. He was.

The Court: You mean at what time, at the time of the arrival of the trains, Mr. Melniker?

Mr. Melniker: At the time of the arrival of the 11.06 and the passing of the 6.28, yes.

20 The Witness: Yes, sir.

Q. What other stations has the Central Railroad in Bayonne? A. East 33rd, East 22nd, West 8th and Avenue A.

Q. The next station below this 49th is 33rd? A. East 33rd.

Q. And then the one below that is the 22nd? A. 22nd.

Q. And the one below that is the 8th Street

30 station? A. West 8th.

Q. At the 33rd Street station is there a fence between the two tracks, east and west bound?

Mr. Smith: I object to it as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection for the time being.

Q. Now at the 33rd Street station do they sell tickets on both sides?

40

MR. SMITH: I object to it as immaterial.

A. They do not.

THE COURT: Suppose they do or do not, Mr. Melniker; is that the question before us?

MR. MELNIKER: I want to show that the physical surroundings are just the same in all these places, and that they have adopted a method of construction at all these stations which protects their passengers, and at this one they did not. 10

MR. SMITH: Have to show such a method all over the line.

MR. MELNIKER: In Bayonne is far enough, four stations in Bayonne to protect.

THE COURT: I will sustain the objection as to this question also. 20

Q. Are there two stations at 33rd Street, one on each side of the track? A. There is.

Q. Now are they both the same in their construction and the purposes and uses to which they are put?

MR. SMITH: I object to it on the ground it is immaterial.

THE COURT: We are getting back to the same question. 30

MR. MELNIKER: I want to be sure I cover the whole subject.

THE COURT: Have you now covered the whole subject, in your judgment?

MR. MELNIKER: That one question may be met with the proposition that I did not press my questions far enough.

THE COURT: I am asking you now whether you are satisfied that the present ques- 40

tion is going as far as you feel you ought to go in order to present the matter properly to the Court?

Mr. Melniker: Well, I want to ask him the same questions about the 22nd Street and the 8th Street stations.

The Court: All right. I will sustain the objection to this, upon the same ground, that it does not go to the point required.

Mr. Melniker: Suppose I make a general statement of what I offer to prove?

The Court: Very well.

Mr. Melniker: I want to show that at the 33rd Street, 22nd Street and the 8th Street stations the physical surroundings are the same, and that on one side of the track there is a depot and on the other side of the track there is merely a shelter shed, and that in all these other places the company has erected a fence between the east and westbound tracks, and provided also either overhead bridges for crossing from one side to the other or tunnels under the tracks.

The Court: Now then, if you were permitted to show that, what do you propose to use that showing for?

Mr. Melniker: I would show that it was such a method of construction as this company, in the exercise of reasonable care, should have provided at this 49th Street station; that it adopted that construction at all their other stations, it was a practicable, feasible and standard method of construction to protect their passengers, and that there was no reason why they should not have done the same thing here, and that the failure to do that, of course,

was failure to exercise reasonable care for the protection of the passengers.

THE COURT: Well, what say you as to whether that goes to the point of showing standardization of construction?

MR. SMITH: It could not, sir. In the first place, what Mr. Melniker really should do, if he is trying to prove that, is to prove the physical surroundings and then ask an expert if such was standard construction. He is asking this witness questions which are absolutely immaterial, and so it has been held.

MR. MELNIKER: Where?

MR. SMITH: In *Kinsley vs. D. L. & W. Railroad.*

THE COURT: Let me ask you. Do you propose to use the testimony that you may so get from this witness by the questions you are proposing for the purpose of submitting them as matters of fact to an expert?

MR. MELNIKER: No, sir; I am going to show by this man, and this man has been with the company for three years.

THE COURT: That the facts existed as you say they do?

MR. MELNIKER: The physical facts, and then I think the inference is a proper inference for the jury to draw from those facts.

THE COURT: With that statement I will sustain the objection at this time, and if you want I will announce that you may have the privilege of recalling the witness. I do not think it goes to the point you are obliged to go.

MR. MELNIKER: If your Honor please,

under that ruling, if we are able to get an expert on railroad construction we will ask the privilege of recalling this man and putting in the proof.

The Court: All right.

Mr. Melniker: If your Honor please, I would like to have my objection noted to the ruling.

10 The Court: All right.

Cross Examination by Mr. Smith:

Q. Mr. Pitcher, did you see this body, you say, there? A. Yes.

Q. What kind of underclothing did it have? A. Red flannel.

Q. Did you find or get a cap there the next day? A. I got a cap, yes.

20 Q. And what kind of a cap was it? A. Well, it was a regular driver's cap—a winter driver's cap, with a button on it.

Q. Do you know what kind of a button it was? A. I couldn't tell you what kind of a button it was, just now, but I said when I picked it up it looked like—the initials on it, which I have forgotten, looked like a longshoreman's button.

Q. Who did you give that cap to? A. I didn't give it to anybody; I hung it up in the station, 30 in the ticket office.

Q. Hung it up in the station, in the ticket office? A. Yes, sir.

Q. Do you know who got it? A. Well, I heard after that Mr. Ryan's son got it.

Q. Do you know Ryan's son's name? A. I don't know the name of the one that got it.

40

MICHAEL J. RYAN, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Where do you live, Mr. Ryan? A. 144 Van Nostrand, Jersey City.

Q. Are you a brother of William Ryan? A. Yes.

Q. The decedent? A. Yes. 10

Q. How old was your brother at the time of his death? A. He was about forty-five or forty-six, I guess.

Q. What was his occupation? A. Why, he was a freight handler, longshoreman, you might call it.

Q. Do you know how much he earned a week? A. Well, he averaged from twenty-five to thirty dollars a week.

Q. How long had he been averaging that much? A. Oh, fourteen or fifteen years. 20

Q. Where was he living in December, 1913? A. His address was on 28th Street, I don't know—

Q. In New York? A. Yes.

Q. Do you know what his condition of health was? A. Sound.

Q. Sound? A. Good health.

Q. When did you next see him after December 31, 1913? Did you see the body? A. I seen it down at the undertaker's.

Q. When was it? A. It was—I think it was 30 two days after the accident.

Q. Did he leave any family? A. Yes, sir.

Q. What does his family consist of? A. Four children.

Q. What are their names? A. Three young ones, and one is an older boy.

Q. What are the names of the children? A. There is Willard, James—

Q. How old? Was William over age? A. I 40 think he is.

The Court: Over twenty-one?

A. Yes, sir.

Q. What are the others? A. James.

Q. How old is he? A. About eighteen, I guess.

Q. And who else? A. I believe there is—oh, what is the other one's name? I think Margaret is the name.

10 Q. Do you know how old she is? A. Well, I don't really know their ages.

Q. Who else is there? A. And then there is another young one there; she is about fourteen—either twelve or fourteen.

The Court: What is her name? If you don't know say so.

The Witness: I don't know.

Q. Mary? Oh, he said he didn't know. A. I
20 think Margaret is her name.

The Court: You have spoken of Margaret and James and William, you say is over twenty-one, and James, you say, is eighteen, and Margaret you spoke of and said you didn't know how old she is.

Mr. Salter: We will prove it.

Cross Examination by Mr. Smith:

30 Q. Mr. Ryan, where did your brother live in New York? A. I think it was 28th Street, New York.

Q. Don't you know? A. 28th Street.

Q. Whereabouts on 28th Street? A. 306 or something like that.

Q. Have you ever been over there? A. Yes.

Q. When were you over there? A. Oh, I was there about a year before the accident.

Q. Did your brother ever live in Bayonne? A.
40 Yes, sir. I believe he did, yes.

Q. When? A Oh, that was years ago, about I should say five or six years or seven—more.

Q. Five or six or seven years ago? A. Previous to that. He moved back.

Q. And where was William living at the time of this accident, the son? A. He was living in Bayonne.

Q. Where in Bayonne? A. I think it is in 36th Street, isn't it, or 26th Street. 10

Q. Was he married and living there? A. Yes.

Q. Where did James live? A. He lived 28th Street.

Q. New York? A. Yes.

Q. And Margaret? A. Yes.

Q. And the other one? A. Margaret, yes.

Q. How many children did he have altogether? A. He had four altogether.

Q. You don't know the name of the other one? You have given William, James and Margaret? A. No. 20

Q. You don't know the name of the other one? A. No.

Q. Were they all living over in 28th Street? A. Well, with the exception of Willie they were to and from.

Q. Except for Willie? A. Yes.

Q. Where in Bayonne had your brother lived—William, the dead man? A. That I don't know, sir. 30

Q. Eh? A. I have not been out to his residence in Bayonne.

Q. Well, did you know where he lived?

THE COURT: He shakes his head no.

Q. You have never been to Bayonne to see him? A. No.

Q. Well, the last time you saw him was a year before the accident, wasn't it? A. No. I seen him a week before the accident. 40

Q. Where? A. On the street, coming from work.

Q. Ever work with him? A. Sure did.

Q. You have worked with him? A Yes.

Q. Where? A. On the various piers.

Q. In your business of longshoreman? A. Foreman.

Q. Foreman of longshoremen? A. Yes.

10 Q. When did you work with him last? A. Oh, about ten years ago.

Q. About ten years ago? Well, you didn't know personally what wages he was getting? A. Yes.

Q. Why and how? A. Well, we used to draw our pay together at that time.

Q. That was ten years ago? A. Yes.

Q. I am speaking of now? A. Yes.

20 Q. At the time he was killed? A. Yes.

Q. You did not know at the time he was killed what wages he was getting, did you? A. I knew by the average hours he made that he made that much.

Q. You don't know what average hours he made, do you? A. Sure. If he worked all day I know.

Q. If he worked all day; but you don't know how long he worked? A. Well, he averaged that twenty-five dollars a week, anyhow.

30 Q. Well, were you there? A. No.

Q. You were not there where he was working were you? A. No.

Q. You don't know how many hours he worked a day, do you? A. No, I do not.

Q. Don't you know how many days a week he worked, do you? A. No.

Mr. Smith: Then I ask, if your Honor please, that his testimony as to the wages

40 received by the deceased, be stricken out

Mr. Melniker: I think I will supplement that.

Re-Direct Examination by Mr. Melniker:

Q. Mr. Ryan, you were foreman of longshoremen? A. Yes.

Q. What are the wages of a longshoreman per hour?

Mr. Smith: I object.

A. Per hour they get— 10

Mr. Smith: I object on the ground that he must confine his testimony to the wages this man received.

The Court: How will it benefit us, anyway, Mr. Melniker, unless you go further and are able to show by this witness that he has knowledge of the time of the working of this man.

Mr. Melniker: I will show this man belonged to the union and I will show the union wages, and I am going to show he worked all the time. 20

The Court: By this man?

Mr. Melniker: No; by other people, that he was working all day long, or whatever his hours were.

Mr. Smith: Trying to prove a case piecemeal by different witnesses.

Mr. Melniker: I do not think that is objectionable. (Question repeated). 30

Mr. Smith: Oh what were they at that time?

Mr. Melniker: Yes.

The Court: I will permit it.

A. Want me to answer?

The Court: Yes, answer.

A. They were thirty-three cents. 40

Q. Thirty-three cents an hour? A. A day; fifty cents over time, and sixty cents Sundays.

Q. Thirty cents an hour day time, fifty cents overtime, and Sundays what? A. Sixty cents.

Q. Was he a member of the union? A. Yes, sir.

MR. MELNIKER: That is all.

THE COURT: Cross examine.

MR. SMITH: No cross.

10 THE COURT: I think, Mr. Melniker, his testimony that his earning was twenty-five dollars is not substantiated. You say you intend to show by others—

MR. MELNIKER: I won't press it.

THE COURT: I think it should be stricken out. He has gone undoubtedly as far as he can go as to what the rate of wages is.

MR. MELNIKER: That is all right. He can testify what this man earned ten years

20 ago doing the same kind of work.

THE COURT: Isn't that too remote?

MR. MELNIKER: If we can show he was doing the same kind of work, same hours, it would be a fair basis for an inference that he was earning the same money.

THE COURT: Well, we will see when you get to that point. I will hold the question to strike out, Mr. Smith, until he has exhausted this line of testimony. You remind

30 me of it.

MR. SMITH: I will forget it.

THE COURT: Then it will be your fault.

BY MR. MELNIKER:

Q. Have the wages of longshoremen increased in the last ten years? A. They have.

Q. How much? A. There is three cents—oh, there is two cents on the hour, five cents at night, and the sixty still holds.

40

By the Court:

Q. When did that increase take place, how long ago? A. About a year ago.

Q. About a year ago? A. Yes.

Q. Go back to December 31, 1913, that increase had not taken place at that time, had it? A. No.

By Mr. Melniker: 10

Q. Let me get that clear. Was there any increase in the pay of longshoremen between the time you worked with your brother—when did you say that was, about ten years ago? A. Yes.

Q. —and the time he was killed? A. Increase?

Q. Yes, increase in the scale? A. Oh, there was.

Q. There was? A. Yes.

Q. How many times was there an increase during that ten years or eight years? A. Why, there was twice. 20

Q. Twice? A. Yes.

Q. How much of an increase was it? A. That was the two and five cents.

Q. Was that between the time you worked with him and the time he was killed? A. And the present time, yes.

Q. There has been an increase since then, is that what you mean; that after he died there was another increase? A. No, no, that is not what I mean. I mean since the time I worked with him he had two cents of an increase, in a day's work. 30

Q. Were both those times before he died? A. No, after he died.

Q. Were they both after he died? A. Yes.

Q. There was no increase during the eight years from the time you last worked with him until the time he was killed? A. That was a 40

standing wage. That time they had fifty—no, forty-five and sixty.

Q. All right.

By the Court:

Q. That is forty-five for over time and sixty for Sundays? A. Yes, sir.

Q. What was the scale at the time you worked
10 with him for the day time? A. Well, you know he was what you call—he was five or six cents more. Sometimes he had thirty-five cents an hour, whatever he had charge of, by the hour.

William Ryan, sworn.

Direct Examination by Mr. Melniker:

20 Q. Where do you live, Mr. Ryan? A. 17 East 50th Street, Bayonne.

Q. How long have you lived there? A. A year and a half.

Q. Are you a son of William Ryan, deceased? A. Yes.

Q. What family did your father leave? A. The youngest is Margaret.

Q. How old is she? A. Thirteen.

Q. Thirteen? A. Yes, May.

30 Q. May? A. Yes, sixteen.

Q. Sixteen? A. And Jimmie—James, eighteen.

Q. And yourself? A. Yes.

Q. How old are you? A. Twenty-five.

Q. When did you last see your father before December 31st? A. A week before.

Q. What was his condition of health then as far as you could see? A. Health was all right.

Q. Where was he working? A. He was working over in Pier 21, White Star Line.

40 Q. Had he been working steadily? A. Yes, he was working all that week—worked all that week,

and he was working until eleven o'clock—up until after seven o'clock, until he came over to Bayonne, and he sent the two sisters—he sent my little sister and my big sister over to me.

Q. Ahead of him? A. Ahead of him—no, he didn't send them over, they came over themselves, and when they got home he was not home there, and they went out to Bayonne, and they started right up to Bayonne to get them— 10

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

The Court: How does he know that, except by hearsay?

Mr. Melniker: I don't care anything about it.

The Court: I do not see any importance one way or the other. I will strike it out. 20

Q. He was working all that day? A. Yes, he was working up until seven o'clock.

Q. Had he been working steadily some time before that? A. Yes, he always worked steadily.

Mr. Smith: I object unless he testifies from personal knowledge.

By the Court:

Q. How do you know? A. Father always did work steady. 30

Q. Besides that, how did you know? A. When I was home he always worked steadily, he always went to work at seven o'clock.

Q. When were you home? A. I was home a year before that.

By Mr. Melniker:

Q. You were home a year before he was killed? A. Yes.

Q. Know he went to work every day? A. Went to work every day. 40

MR. SMITH: I object to it as leading.

BY THE COURT:

Q. For a year prior to the time of his death you had not lived at home with him? A. No, I did not live at home.

Q. What means had you of knowing with what regularity he worked? Had you any means of
10 knowing except what he told you? A. Yes; what I found out from my sisters when they came to Bayonne to see me, and what I knew before.

Q. Then you are only to talk from what you know. They may speak for themselves, probably.

BY MR. MELNIKER:

Q. Did you visit in his house in New York? A. Yes.

Q. Did you ever see him bring home his pay?
20 A. Yes.

Q. How much money did he bring home? A. Well, he averaged some weeks—he would average from twenty-two. I have seen him bring home as high as forty-six.

Q. For one week? A. For one week.

Q. Do you know what rate of pay or wages he was getting? A. Well, they get now thirty cents an hour for regular work, but he used to boss—be boss of the gangs.
30
Q. What did he get? A. And they average thirty-five—thirty-five to thirty-eight cents an hour.

Q. For day work? A. For day work.

Q. How much for night work? A. Night work —I think night work went up as high as time and a half—time and a half they get for night work. They get thirty-eight cents for—I think they had a strike and got thirty-eight—yes, and they—that is, for the bosses—and they get thirty-eight and
40

time and a half for overtime, and half of thirty-eight—that is nineteen and thirty-eight.

Q. How long have you lived in Bayonne? A. Three years and a half now.

Q. You say the two sisters, the youngsters, had come up to visit you that night? A. Yes, sir, they were supposed to wait for my father.

Q. No, no. They came out to visit you? A. Yes. 10

Q. When did you hear about your father being killed? A. The following morning.

Q. Where did you see the body? A. Well, I was notified by my father-in-law, and they had a paper which had Petty on it, I was living in my father-in-law's house at the time—

Q. Just repeat the question, please.

Question repeated by stenographer. 20

A. I seen the body in the morgue.

Q. Your mother is not alive? A. No.

Q. Who were the children living with? A. Now?

Q. No; at that time? A. Oh, at that time they were living with my aunt—lived on this side of the house—on this side of the floor, and my father lived on this side, and she used to take care of them and see they went to school.

Q. Your father kept house over there, did he? 30 A. Yes. Father had their own rooms, but the aunt took care of them for him.

Q. And he kept house with these children? A. Yes, sir.

Q. Lived together? A. Liver together.

Q. And did anybody else support this family outside of your father? A. No, sir.

Q. They depended on your father, did they?

Mr. Smith: I object. 40

A. Depended on my father.

Mr. Smith: I object. I cannot be objecting every minute in the week.

The Court: It is leading, Mr. Melniker, I suppose.

Mr. Smith: Leading all the time.

Mr. Melniker: What difference is it whether I say they depended on the father or did they depend on the father.

10 The Court: Did they depend on their father for support?

Mr. Smith: I object to it as leading.

The Court: That is leading. How were they supported?

Q. What do you mean? A. They were supported by him.

The Court: By your father?

20 A. They depended on him for support.

Cross Examination By Mr. Smith:

Q. Did Jim work? A. No, sir.

Q. Not at all? What did he do? A. He went to school.

Q. Eighteen years old? A. Eighteen years old.

Q. What school did he go? A. He went to 28th Street between Ninth and Tenth Avenue He was not eighteen years old then.

30 Q. He was not eighteen? A. No.

Q. How old was he then? A. He was about sixteeen.

The Court: Pardon me; these ages, are they are ages now or when your father died?

The Witness: Now.

Q. You say you lived in Bayonne for three years or three and a half years? A. Three and

40 a half years now.

Q. Then you have not lived with your father? A. I did not live with my father in over—a little over a year.

Q. At the time he died? A. At the time he died.

Q. Did your father then live in Bayonne? A. No, my father lived in New York, and I lived with an aunt in Bayonne.

10

Q. For three and a half years before your father's death? A. No; after.

Q. Well, you say three and a half; when did you fix that? A. Three and a half? I mean a year before my father died—a little over a year before my father died and since the time he has been dead.

Re-Direct Examination by Mr. Melniker:

20

Q. Did your father ever live in Bayonne? A. Yes, he lived in Bayonne about twelve years ago.

Q. How long did he live there? A. Lived in Bayonne for about two years.

Q. Where did he live? A. He lived on 52nd Street and Broadway.

Recess.

30

40

Bryan Connell, sworn.

Direct Examination by Mr. Melniker:

Q. Where do you live, Mr. Connell? A. 255 West 50th Street, New York.

Q. What is your occupation? A. Longshoreman.

10 Q. Did you know William Ryan? A. Yes, sir.

Q. Did you work with him? A. Yes, sir.

Q. How long? A. Fifteen or sixteen years.

Q. Was he working with you at the time of his death? A. Yes, sir.

Q. Where? A. He was working on the Cunard Line at the time he met his death.

Q. How long prior to his death were you working together with him? A. A couple of days ahead of him getting killed I was in the same 20 ship, not in the same gang, you know, the same hatch with him, but in the same employ, though.

Q. The same firm? A. Yes.

Q. Had you worked together with him at any other time before that? A. Yes, we worked together nine or ten years nearly, steady.

Q. Steady up to the time of his death? A. Yes.

Q. Did you ever see him draw his pay? A. 30 Yes.

Q. Now how much pay did he usually draw? A. Well, he—

Q. You knew how much pay? A. Sometimes he would have twenty and twenty-five and thirty and thirty-three dollars I see him draw, because we were friends together, you know, me and him worked together often.

Q. I did not get those figures that you said. He drew how much? A. Well, he had twenty 40 and twenty-five and thirty and thirty-three dollars some weeks.

Q. For how long a time had he been doing that? A. Well, I knew him nearly all the time.

Q. All the time you worked with him? A. Yes.

Q. Was he steady? A. Yes; he had charge of a gang of men.

Q. Had charge of a gang? A. Yes.

Q. What was the condition of his health? A. He was strong,—rugged and strong always. Yes, and he was a skilled man at his work. 10

Q. Did he belong to the union? A. Yes.

Q. What was the union scale at that time? A. Thirty-five and fifty was his pay—we got thirty and forty-five and sixty cents an hour of a Sunday.

Q. Thirty and forty-five and sixty cents, is that it? A. Yes. 20

Cross Examination by Mr. Smith:

Q. You say he was strong and rugged; was he active? A. Yes; he was a good man any way you take him.

Q. I mean was he active on his feet? A. Yes.

Allan A. Brown, recalled. 30

Direct Examination by Mr. Melniker:

Q. Mr. Brown, I want to show you a paper which purports to be a time table, and ask you whether that is the time table of the Central Railroad which was in effect on December 31, 1913? A. Yes, sir.

Mr. Melniker: I offer that.
Mr. Smith: No objection. 40
Table marked P-4.

Q. Do you know the distance from the 49th Street station to the Jersey City Terminal? A. Not the exact distance, no.

Q. About? A. About five and a tenth.

MR. SMITH: About what?

THE WITNESS: Five and one tenth.

Q. Are you familiar with the 6.28 train? A.
10 Do I know that train?

Q. Do you know the train? A. Yes, I know the train.

Q. Express or local? A. Express.

Q. Any stops in Bayonne? A. None in Bayonne except on flag at West 8th Street.

NO CROSS EXAMINATION.

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20 MARGARET RYAN, sworn.

DIRECT EXAMINATION BY MR. MELNIKER:

Q. Are you the daughter of William Ryan, deceased? A. Yes, sir.

Q. Where were you living in December, 1913? A. 517 West 28th Street.

Q. New York? A. Yes, sir.

Q. Did you see your father that day, the day
30 of December 31st? A. No, sir.

Q. December 31st where were you—the last day of the year? A. In Jersey.

Q. When did you go to Jersey? A. I don't remember.

Q. Did you live with your father? A. Yes.

Q. Who paid the bills in support of the family? A. My father.

Q. Who have you have been living with since? A. My aunt.
40

Q. The aunt taking care of you? A. Yes, sir.

Q. Is your sister here? A. No, sir.

Q. Did your father go to work steadily? A. Yes, sir.

(No cross examination).

ADMISSIONS. 10

MR. MELNIKER: I want to read some admissions that we have.

The defendant admits that on December 31, 1913, it was the owner and had the control of the depot, tracks, walks, ways and grounds surrounding and appertaining to the same on its railway at 49th Street in the City of Bayonne, New Jersey, known as the 49th Street station. 20

That on December 31, 1913, train number 628 of the defendant leaving Trenton Junction at 9.43 P. M. was scheduled to arrive at West 8th Street Bayonne, at 11.03 P. M. and the Jersey City Terminal at 11.14 P. M.

That on December 31st, 1913, the engine or some part of said train number 628 struck and killed plaintiff's intestate.

That the defendant—I will withdraw that. That has already been proved. 30

That the said train, referring to the 10.35 out of New York, arrived at the 49th Street station at about 11.06 P. M., on December 31, 1913.

40

John O'Neill, sworn.

Direct Examination by Mr. Melniker:

Q. Are you the engineer on the 628? A. Not 628, the other train.

Q. What is the name of the engineer on the 628? A. Lockley, I think it was.

Q. Is he here? A. I think so. I don't know.

Mr. Melniker: We will call him. That is all.

(No cross examination.)

Michael F. Loughery, sworn.

Direct Examination by Mr. Melniker:

Q. Where do you live, Mr. Loughery? A. 1631 North Eleventh Street, Philadelphia.

Q. Are you the engineer of the 628? A. Train number 628, yes.

Q. Were you the engineer on that train on December 31, 1913? A. Yes, sir.

Q. Is that a local or an express? A. An express.

Q. How many miles an hour does it average?

Objected to as incompetent, irrelevant and immaterial. Question withdrawn.

Q. What is the average running time of this train?

Mr. Smith: I object to it on the ground it is immaterial.

The Court: I do not think that helps you any. I will sustain the objection for the present until I see whether you get anything further from this witness upon which it can be based.

Mr. Melniker: Your Honor will allow me an exception?

The Court: You may have it for the present. I may change my mind.

Q. Does this train stop at 8th Street, Bayonne? A. On signal.

Q. Only on signal? A. Yes.

Q. Otherwise it goes right through Bayonne, without stopping? A. Yes, sir—West 8th Street she stops on signal. 10

Q. Stops at West 8th Street on signal? A. Yes.

Q. Otherwise it goes right through Bayonne without stop? A. Yes.

Q. Now, what is the average running time per hour—miles per hour—in going through Bayonne?

Mr. Smith: I object to it on the ground it is immaterial. 20

The Court: I will sustain the objection.

Mr. Melniker: Exception, please.

Q. Do you generally run according to your schedule? A. Yes, sir.

Q. And at that time and for some time prior to December 31, 1913, your train was scheduled to pass the 8th Street station at 11.02, wasn't it? A. Yes, sir.

Q. Now, how long had that train been scheduled to pass that station at that time? A. 11.02? 30

Q. Yes? A. I can't recall, but it was years.

Q. A year? Now there is no stop from there on to Jersey City, is there? A. No, sir, not from West 8th Street.

Q. What is the average running time generally, of your train from 8th Street to say 49th Street?

Mr. Smith: I object to it as absolutely immaterial. 40

The Court: Why is it immaterial?

Mr. Miller: Because conditions would not be the same; a board might block up this train at one time, or he might have a slippery rail or a good many different things change the situation.

The Court: Let me see if I understand counsel aright I understand that this line of testimony is not proposed for the purpose of showing the time that this number 628 train arrived at 49th Street on December 31st, but it is for the purpose of showing that the defendant company must be charged with knowledge that it was due in the course of events at its usual rate of running at that station at a certain time each night, and therefore was put upon notice that it was reasonable to assume that it would be at that point at that time each night, and therefore—

Mr. Melniker: That is the point.

Mr. Smith: We withdraw the objection.

The Court: That is the way I understand it.

Mr. Melniker: That is right.

The Court: Not for the purpose of proving that this train was at 49th Street at that time.

Mr. Melniker: It might have been there.

The Court: It might have been there. For the purpose of charging the defendant company with knowledge that it should have been or might have been there.

Mr. Melniker: That is all.

(Question repeated.)

The Court: 8th Street, Bayonne. to 49th Street.

A. Well, there is no regular time we could depend on, at that time.

Q. Well, about how long does it take you to run from 8th Street to 49th Street generally? A. Generally—well, takes five minutes.

Q. About five minutes? A. About five minutes.

Q. Sometimes a little more or sometimes a little less? A. Sometimes a little more or little less.

10

(No cross examination.)

(PLAINTIFF RESTS.)

MOTION TO NONSUIT.

MR. SMITH: If your Honor please, we move for a nonsuit upon the ground there has been no evidence of negligence produced which would hold this defendant company. 20

THE COURT: Wherein do you say, Mr. Melniker, that you have shown that which permits you to require the defendant to go to a defense?

MR. MELNIKER: Well, we contend, if the Court pleases, that the defendant's negligence is indicated or proved in several ways. In the first place, that the construction of the station at that place was not in accordance with that reasonable care which 30 the law imposes upon a carrier in the exercise of its duty to its passengers. The evidence is that these four tracks directly in front of this station are all filled in that there is a walk, apparently for the purpose of crossing these tracks, right in front of this station, and that whatever there are no planks between the tracks 40

that the space is filled in with cinders so as to make a level walk right across the tracks to the other side of the track—go right across to there (indicating on map). We have shown that over here there is a large factory building, and over here is a crossing, a dock, a water front, and railroad yards, that evidently for the purpose
10
of reaching some of these things across the track that this walk was provided, and also for the purpose of enabling passengers to go on and get off trains at this station; that these trains crossing each other, the eastbound and westbound trains, in such proximity, imposed a duty upon the defendant of putting a fence between the two sets of tracks so as to keep people from wander-
20
ing across these tracks in the way that they did, and there is nothing in the evidence to show that there was anything to prevent the company from constructing an overhead bridge so its passengers could cross, from one side to the other.

THE COURT: Well, now, Mr. Melniker, is that a question which under the proofs I may submit to this jury?

MR. MELNIKER: Certainly I think so.
30
THE COURT: Then are we not in that position—I mean now as to your last statement regarding there being no fence dividing the tracks or no underground method of passing from one side of the tracks to the other or an overhead method—if that is a question in the present state of the proofs in this case that is to be submitted to the jury, may not, under all circumstances,
40
every case that comes up to this court be

submitted to the jury and let the jury be the judges of what is reasonable care and proper construction for a railroad?

MR. MELNIKER: Under certain circumstances.

THE COURT: Now, is that one thing alone that you just raised—I am just going to read from the case of *Fields vs. West Jersey.* There the court says, and it is the Court of Errors— 10

"The duty of a railroad company to its passengers as to its station platforms is to use care of persons of ordinary prudence under like circumstances to see that the construction adopted will render the platforms as safe as the exigencies of its business will permit, and the adoption of a platform construction like that in general use by well regulated railway companies, and which is approved by experience, is a sufficient performance of its duty." 20

Now you have not shown that what they had there in the way of construction at this point was not such construction as in general use by well regulated railway companies and that which is approved by experience, have you?

MR. MELNIKER: But, if your Honor please, in the peculiar circumstances of this case we have shown that there was nothing here—here was a perfectly level place—there was nothing here to prevent the company from constructing an overhead bridge. 30

THE COURT: But, on the contrary, you have not shown that that is not the general safer, construction, have you?

MR. MELNIKER: Well, it seems to me that 40

if the circumstances are such that it is a matter of common knowledge and common deduction, it does not require the testimony of an expert, for the purpose of expert testimony is because of the assumption that the expert has peculiar knowledge as to a situation with which he can enlighten the jury, which is not supposed to have any peculiar
10 expert knowledge; but where the circumstances are such that one man's knowledge and one man's intelligence is as good as another, then there is no occasion for expert testimony, and if the circumstances as portrayed here are such that the situation of these tracks and this station, with the ordinary precautions, even the most ordinary precautions, would have required that this
20 company provide some other means of crossing than to permit passengers to walk right across on the level of the track. Now, the testimony and the surroundings are such that it is a fair inference which the jury would have a right to draw as men of ordinary intelligence that there was nothing to prevent this company from erecting this bridge, and that ordinary prudence required it should erect a bridge across those
30 tracks, hence, to leave it the way it did—

THE COURT: Then suppose the situation were not as it is, but, as a matter of fact there was an overhead way of getting across these tracks, and you might have shown that there was an overhead way and yet a person who might have used that overhead way did not do so, might you not reasonably, by the same process of reasoning, say it should be left to the jury to determine whe-
40 ther the overhead was the proper way to

have, or whether the safer way would have been for the railroad company to have constructed an underground way of going across? Should we always leave those things to the jury?

MR. MELNIKER: No; because if they have made some effort to protect its passengers from danger, then the question as to whether or not that effort has been sufficient might be a question of expert testimony, but where the circumstance is that nothing has been done, no fence put up to protect people from going across the track, no bridge, no tunnel, there is not anything for experts to testify about, it is a question of common, ordinary—

THE COURT: Yes. A man who was expert in that line should testify as to whether that construction which is there is generally accepted construction or not.

MR. MELNIKER: But there is not any construction there that is the difficulty.

THE COURT: There must be some construction.

MR. MELNIKER: They have left it there without any construction. They have four tracks without any other—

THE COURT: Go on with your next.

MR. MELNIKER: I did not want your Honor to overlook, the question of fact that there is no fence there, which I think, while taken in conjunction with the other, is yet in itself a distinct dereliction on their part, that they put no fence in between these two tracks. I will come to that again. Now the proof in the present posture of the case is that this man was on this train, and the last evidence that we have,

that is, in this case, is that he got off—that he got out of this train at this station.

MR. SMITH: No.

THE COURT: One minute. Where is that proof, Mr. Melniker?

MR. MELNIKER: Well, it is admitted he was on this train.

10 MR. MILLER: No.

MR. SMITH: Yes, I think it was admitted.

MR. MELNIKER: Yes.

MR. SMITH: I think it was admitted.

MR. MELNIKER: Mr. Smith admitted that in his opening; and he was on this train, and he naturally must have gotten off to have been killed.

MR. MILLER: Might have jumped off while the train was moving.

20 MR. MELNIKER: If he stayed on the train he evidently would not have been killed. Now, the inference from the present circumstances as they are now before the jury is that he got off on this, on the wrong side of the train and got out the left hand side of the train. There is nothing to show in fact there was nothing to prevent this man from getting off on this side, directly in front of this train. They have no notice,

30 no guards, no warning, and this man could have just as well gone off on one side as the other. As a matter of fact the station, except for the four lights, and the station window, was dark. The man might as well have got off on one side as the other. Nothing to direct him as to which was a safe side. If there had been a fence he could not have gotten off on that side in front of that train. If there had been any pro-

40 tection he would not have gotten off on

that side. As a matter of fact he probably did get off there and walked right directly in front of this train. Coupled with that is the knowledge that this company have that this express train 628 was due at the West 8th Street station at 11.02, and as the engineer says they generally run according to schedule.

THE COURT: 11.03, I thought it was. 10

MR. MELNIKER: 11.02, according to the time-table which I put in evidence.

THE COURT: I took it from your admissions that you read. I thought you said 11.03.

MR. MELNIKER: The time table says 11.02 at 8th Street. Now, the engineer says that the train has been doing that for years, and the engineer says that it takes you about 20 five minutes to get to 49th Street. That would bring him at 49th Street at 11.07 and the company, of course, is charged with knowledge of that fact. The local train pulls in 49th Street at 11.06, and the time it gets ready to start and go on is always a minute or a minute and a half, and it would then make these trains cross each other at about 49th Street. Of course it would not always be so, but once is enough 30 to put this duty on this defendant to provide some protection for passengers in getting off and on trains at that point. Now the duty that the law puts upon the defendant under these circumstances it seems to me is broad enough to cover this case. This man was a passenger at this point. Under all the cases he was entitled to a reasonably safe place or way in which to 40 leave the premises of the company, and he

was entitled to a reasonable time in which to leave the premises of the company. Apparently he was still on their premises, and as far as the proof goes he was still a passenger, and as a passenger he was not required and there was no obligation on him to look up and down the track, particularly in view of the fact that they failed to put any fence to prevent passengers from going over on the eastbound track; and they owed him a duty as a passenger to protect him and to warn him, and with a knowledge of the fact that this train was bearing down, coming down there every night at about that same time, it was their duty, and they knew that and he did not—it was their duty to afford him some safeguard, either by a fence or by having a railing or a man on the platform of the car, or by a warning from a brakeman or conductor or some other way, or by a notice posted or some other way, keeping that man from going across that track. They did not do any of these things, and it seems to me that they are negligent and the question is sufficient here to go to the jury as to just what their liability is.

Mr. Smith: Shall I reply?

The Court: Yes.

Mr. Smith: The situation, if your Honor please, is this. Mr. Melniker is not citing the evidence when he says there was nothing there. Suppose your Honor takes a look at the map. In the first place, there was, he said, planking out from the station to this track, track one. Your Honor will remember that the testimony is that on the other side of track 3 there was a ditch

some five or six feet in width, and two feet or more in depth, wide at the bottom; that on the other side there is nothing but a factory some distance south, and the roadway leading across the tracks. On the other side of the Central tracks are the tracks of the Lehigh Valley Railroad Company, so the testimony goes, and from that to the shore there is nothing. Now his testimony fails, as he proves nothing but the finding of a dead body. Then he says by inference from the time tables there is a train due at such and such a time, another train which might pass it about that time coming east, but that is not the proof. The proof is that there was a bell, established by his own witness. 10

Mr. Melniker: But it did not ring. 20

Mr. Smith: Wait a minute. There is no proof of that. The proof was that that bell rang on trains coming from Jersey City west, which are the two tracks next to the station. Now then, trains going in the other direction have no bell, because passengers disembarking from a train going west would go to the station, and any trains appearing on those tracks they would have ample warning by reason of the bell. There is nothing that shows any reason for any man getting off a train on the other side. As a matter of fact the proof is by his own witnesses that the passengers always get off at the station side, and always get on at the station side. That is the proof. The further proof is this, that there is no proof so far as he is concerned that this man did get off on the further side. There is no word of proof of that. 30 40

There is not any proof that there ever was a walk established by the railroad company across its tracks to reach the land on the other side. The proof is entirely to the contrary. The proof is that there is a ditch five feet wide there.

THE COURT: No, but the proof does go so far as to show there was a planking to the east of the track upon which the train was that this passenger alighted—towards the ditch there was a planking—some distance between or for some distance from the track on which was the train from which he is supposed to have alighted.

MR. SMITH: That may be true, but I am speaking of a walk. He says a walk, which would allow persons to walk from the station across the track, across the Lehigh Valley trains to the property on this side. Also there is no such proof. As a matter of fact the proof in the case is this, that the 11.06 train got into 49th Street at 11.06, and pulled out on time, and the further proof is by his own witnesses that the other train did not arrive at 49th Street or near 49th Street until from three to four minutes after that. That is the proof. That is his own proof. I say under such circumstances there is absolutely no proof of negligence in this case. Not a word from which this company could be held liable to this man's representatives.

THE COURT: I shall decline the motion, however.

MR. SMITH: If your Honor please, I move for a direction of verdict on the same ground.

THE COURT: Close your case then?

Mr. Smith: Close the case.

The Court: I shall decline that also.

Mr. Smith: Of course I make an objection and enter exception.

The Court: Yes.

Counsel for respective parties summed up to the jury.

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Court's Charge.

Gentlemen of the Jury:

This is an action brought for the purpose of a recovery under the Death Act, growing out of a happening on December 31, 1913, by and through which William Ryan, it is alleged, met his death, and as it is alleged, a happening which is chargeable to negligence upon the part of the defendant company. 20

As to what the Death Act is and what it provides for I will call to your attention later.

The question of the right of recovery depends in the first instance upon whether or not the plainiff has made out his case, in that he has shown you or it has been shown you by a fair preponderance of the evidence that the casualty happened, that is, the death of Ryan happened because of negligence chargeable to the defendant company. If that has not been made out, then, of course, there can be no recovery under any circumstances. 30

Now this case, I can readily perceive, will be one presenting difficulties to you for the one particular reason that a very large quantity of the testimony is circumstantial, and therefore, and in accordance with a rule which I will give you later, you shall have to deal with it with the greatest 40

care before you have arrived at a settlement and an adjustment of the facts in this case and the question particularly as to whether or not they are sufficient in weight to make for that fair preponderance of evidence upon the part of the plaintiff to which I have just recently called your attention.

10 My recollection is that it is admitted that the deceased was a passenger upon a train of the defendant company known as the local train, taking passage thereon at the terminal in Jersey City, and which train was scheduled to arrive at 49th Street station at 11.06 P. M., that he was hit or struck by train No. 628, which is known as the express train and which was scheduled to arrive at or pass the 8th Street station in Bayonne at 11.02, if my notes are correct.

20 The duty of a railroad company to its passengers is, as to its station platforms, to use the care of a person of ordinary prudence under like circumstances to see that the construction adopted will render the platforms as safe as the exigencies of its business will permit; and the adoption of a platform construction like that in general use by well regulated railway companies and which is approved by experience is a sufficient performance of the duty. The defendant is presumed to
30 have performed its duty until a failure is proved by a fair preponderance of the evidence. That there might have been, as has been suggested, a fence built between the tracks; that there might have been an overhead bridge; that there might have been an underground passage or tunnel, as it has been suggested, is not of consequence. It has not been shown that the method employed or the plan or the class of structure or the lay-out of the property of the company was not a standard
40 form of lay-out or standard form of construction

such as was in general use by a well regulated company.

The question, as I first suggested to you, gentlemen, is, has the plaintiff satisfied you that the defendant, from the testimony as it is before you, was negligent in that it lacked in the performance of that duty which the law has cast upon it and which is in accordance with the rule from which I have just read to you. 10

Now, as I have said before, much of this testimony is what we would denominate and term circumstantial. There is this other rule regarding the relationship of persons such as the deceased was to the railroad company, that is the rule as to the relation of passenger and carrier. The rule is that the relation of passenger and carrier when established—and it is admitted, as I understand it, in this case, that that relationship did 20 exist—does not terminate until the passenger has reached his destination, alighted from the train and had a reasonable time in which to leave the place where passengers are discharged. I know of no more concise, clear statement of the law than this:

> "The relation of carrier and passenger continues until the passenger has left the carrier's premises or has been allowed a reasonable time to leave the premises. What, under 30 all the circumstances, is a reasonable time is a question of fact for the jury."

I am bringing that to your attention for this purpose also, gentlemen, and that is that if you find that the relation of passenger and carrier no longer existed at the time this decedent met his death, then the rule of care which I have given you does not apply and there can be, as I understand the pleadings in this case, no recovery upon the part of the plaintiff; so that also is 40 a question of fact which you are to determine

aside from the question of negligence. If your first inquiry goes to that point and you find that under the circumstances the decedent had ceased to be a passenger, then of course you do not need to go any further in the case, because you then must find for the defendant.

Now upon the question of the proof and as it has relation to that proof which is circumstantial, 10 the courts have said these things:

> "It must be conceded that the plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict. It was incumbent upon the plaintiff, in the absence of direct evidence of the fact, to show that not only the existence of such possible responsibility, but the existence of such circumstances as would justify 20 the inference that the death was caused by the wrongful act of the defendant would exclude the idea that it was due to a cause with which the defendant was unconnected."

And again the rule has been stated in this manner, and this is the manner in which you are to treat of and treat with and pass upon that testimony which is not direct but which is only circumstantial:

> "It is not enough for the plaintiff to prove 30 the possible responsibility of the defendant. He must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude the inference that the damage was due to a cause for which the defendant was not responsible.
>
> "That is the rule and the plaintiff must prove circumstances which would render it probable and not merely possible that the defendant is at fault, but when it is said that the circumstances must exclude the inference 40 that the damage was due to a cause for which the defendant is not responsible it is not

meant to change the rule that ordinarily governs in civil cases and to force the plaintiff to exclude such inference beyond doubt; all that is required is that the circumstances should be so strong that a jury might properly, on the grounds of probability rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and where probability may be all that is attain- 10 able."

Now, gentlemen, applying those rules to the testimony, the test is, has the plaintiff satisfied you by a fair preponderance of the evidence that the defendant company was guilty of negligence and that such negligence was the proximate cause of this happening. If, as I told you before, the plaintiff has not so satisfied you then there cannot be any recovery in favor of the plaintiff, but your verdict must be for the defendant; and, as 20 I suggested to you before, gentlemen, because of the want of direct proof and the fact that the very great portion of it is circumstantial proof requires the exercise of your best care and your best judgment in determining that one point, and you should determine it by applying the rules which I have just given you.

Now if you find that the plaintiff has, in that manner and by that degree of proof which I have 30 just designated to you, established negligence upon the part of the defendant company which was the proximate result of the death of the decedent, then there is another question to which your attention must be directed, and that is whether the decedent used that care which he was called upon to use under the circumstances. He was also required to use that care which a reasonably prudent person would use, time, place and circumstances considered. If he did not do so 40

and because of his not doing so he met with this casualty and his death as the proximate result thereof, then he was guilty of contributory negligence; and even if you have already found, upon taking up that question, that the defendant was negligent and that its negligence was the proximate cause of this happening, still if you find that the plaintiff was guilty of contributory negligence then there can be no recovery in this action. The burden of satisfying you as to the question of contributory negligence is upon the defendant.

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If you find, under those rules which I have given you, that the plaintiff is entitled to recover, then it will be necessary for you to know, before you can arrive at a verdict, for what and upon what the plaintiff is entitled to recover, and that brings me to the question of the Death Act which I first spoke to you about. That portion which is applicable is very brief and I will read it to you:

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> "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.
>
> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and 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 to such widow and next of kin in

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proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and 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."

In this case with which we are treating there is no widow and there are only the three children who are and were below the age of twenty-one at the time of the death of the father. 10

The rule as expressed by the courts for the guidance of juries is as follows:

"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 next of kin by the premature taking off of the intestate. That fund is to 20 be ascertained by taking into account all the possibilities. The intestate might have died by the course of nature shortly after the accident; he might, had he lived, have suffered financial reverses; the children might, had the father lived, have died before he did. 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 30 injury resulting to the 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 damage."

Now, gentlemen of the jury, there is just this much more that I must say to you, and that is upon the question of damages, if you get to that 40 point. The sum that you may find of course

must be in accordance with those rules which I have just read to you. The sum which you find as the total sum or amount of the deprivation to those children is not the amount of the verdict which they are entitled to have. That sum, or that gross sum, as I will term it or speak of it, must be capitalized, or, to put it in another way, you must find its present worth—what that aggre-
10 gate sum that you find will be worth and is worth at the present time. Your verdict is as of the present time; therefore what you must find is the present worth of that total sum which you may determine from the testimony is the total amount of their deprivation or that which they have lost.

There is nothing more that I can say to you, gentlemen, except as I must to all juries and every time that you may be sitting in the trial of any case before me, and that is that if there has
20 been any statement of what purports to be testimony, by either counsel or court, and that statement does not match up with your recollection of what the testimony is, then you will disregard such statement, or such parts thereof as do not match up with your recollection of the testimony; you are to be guided as to what the testimony is by your recollection of it as you have heard it. You are also to determine what of all
30 the testimony is the truth and are the facts, and it is also your duty as well as your right to determine what weight is to be given to the testimony; and in this case, gentlemen, as I have before drawn to your attention, there is so much of the testimony that is circumstantial that you must give, if possible, more than the ordinary care that you would give in determining what weight is to be given to it. And let me call your attention again to those rules which I read to
40 you regarding the manner in which you shall treat and the way in which you shall determine

the weight of the circumstantial evidence. Apply that rule strictly, and if you find by that measure that the proof of negligence has not been made to you by the plaintiff by a fair preponderance of the evidence, then your verdict must under all the circumstances be for the defendant.

With that, gentlemen, you may take the case.

Verdict, $3750.00.

Grounds of Appeal.

(Filed January 15, 1916.) 10

NEW JERSEY COURT OF ERRORS AND APPEALS.

MASON B. SPOFFORD, Administrator of William Ryan, deceased, *Plaintiff-Respondent,* *v.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Defendant-Appellant.*	At Law. On Appeal.

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The appellant states the following grounds of appeal:

1. The Court refused to non-suit the plaintiff when requested so to do by the defendant, upon the ground that no negligence had been proven against the defendant, or any of its servants. 30

2. The Court refused to direct a verdict for defendant when requested so to do by the defendant, upon the ground that upon the whole case there was no negligence proven against the defendant or any of its servants.

CHAS. E. MILLER,
Attorney of Defendant.

(Served on Plaintiff-Respondent and acknowledged January 13, 1916.) 40

Stipulation as to Exhibits P-2 and P-4.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MASON B. SPOFFORD, Administrator of WILLIAM RYAN, deceased,
Plaintiff-Respondent,

vs.

10 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

At Law.
On Appeal.

It is hereby stipulated and agreed that appellant need not reproduce diagram of station marked in evidence Exhibit P-2 in the printed case, and that the original diagram so marked be used on the argument of the above appeal.

20 It is further stipulated that the time-table marked in evidence Exhibit P-4 need not be printed in the record and that said time-table was in effect on December 31, 1913, and shows that train #628 was scheduled to leave West 8th Street, Bayonne, at 11:02 P. M. and to arrive at Jersey City at 11:14 P. M.; that the distance from West 8th Street to Jersey City is six and seven-tenths (6.7) miles, and the distance from 49th Street to Jersey City is four and two-tenths
30 (4.2) miles, and from West 8th Street to 49th Street two and five-tenths (2.5) miles.

Dated, January 27, 1916.

A. A. MELNIKER,
Attorney of Plaintiff-Respondent.

CHAS. E. MILLER,
Attorney of Defendant-Appellant.

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At the request of attorneys of the plaintiff, the following is printed: such amended bill of particulars was served on attorneys of defendant on October 24th, 1915; it was not demanded:

HUDSON COUNTY CIRCUIT COURT.

Mason B. Spofford, Administrator of the Estate of William Ryan, Deceased, *Plaintiff*, *vs.* The Central Railroad Company of New Jersey, a corporation. *Defendant.*	Action at Law.

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AMENDED PARTICULARS OF CLAIM

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To Charles E. Miller, Esq.,
Attorney of Defendant.
Sir:—

Please TAKE NOTICE that the following is an amended particular account of the nature of the claim in respect to which damages will be sought to be recovered in this action.

William Ryan, deceased, herein referred to, aged about forty-five years, was a passenger on a train which left Jersey City at about 10:57 on the night of December 31st, 1913, and which arrived at the East 49th Street Station, Bayonne, at 11:06 P. M. Decedent immediately after alighting from the said train at said station, and while lawfully upon the tracks of the said defendant company, was struck by another train of the said company running along and upon an adjacent tract toward Jersey City, and was then and there killed. Decedent left him surviving three children dependent

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upon him for their support, aged respectively 14, 17 and 18 years. The said William Ryan, deceased, was employed at the time of his death as a longshoreman earning wages which averaged $25.00 weekly.

The loss of the earning capacity of the decedent upon which the said minor children were dependent is the element of damage upon which a recovery will be sought.

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Yours etc.,

WM. D. SALTER,
Attorney of Plaintiff.

Dated, Oct. 23rd, 1915.

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