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TRANSCRIPT OF JUDGMENT.

NEW JERSEY SUPREME COURT.

JONATHAN HESS, <i>Plaintiff,</i>	}	Action at Law.	
vs.		On Postea.	
ATLANTIC CITY RAILROAD COMPANY, <i>Defendant.</i>		Judgment for Defen- dant. 10	French & Richards, Attorneys.

Costs \$39.10 Judgment entered this thirty-first day of October, A. D. nineteen hundred and nineteen in favor of the defendant and against the plaintiff for the sum of thirty-nine dollars and ten cents costs. 20

WM. S. GUMMERE,
C. J.

I, ENOCH L. JOHNSON, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated cause which said judgment is recorded in this office in Vol. 12 of Judgments, page 105. 30

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twelfth day of August, A. D. nineteen hundred and twenty.

(Seal) ENOCH L. JOHNSON,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

JONATHAN HESS,
Plaintiff,

vs.

ATLANTIC CITY RAILROAD
COMPANY,

Defendant.

Action at Law.
Notice and Grounds
of Appeal.

20

*To French & Richards, Esqs., Attorneys for Defen-
dant:*

Sirs:

Take notice that the plaintiff appeals to the Court
of Errors and Appeals of the State of New Jersey
from the whole of the judgment, entered in the above
entitled cause, on the ground that the learned trial
Court erroneously directed a verdict in favor of the
30 defendant.

Dated August 11, 1920.

WESCOTT & WEAVER,
Attorneys for Plaintiff.

[ENDORSED]

Service of the within notice acknowledged this 12th day of August, 1920.

French & Richards,
Attys. for Deft.

10

SUMMONS AND COMPLAINT.

THE STATE OF NEW JERSEY TO THE
ATLANTIC CITY RAILROAD COMPANY

You are summoned to answer the annexed complaint of Jonathan Hess in an action at law in the Supreme Court. And take notice that unless you file your answer with the clerk of the Supreme Court, at

20

Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this nineteenth day of March, nineteen hundred and fifteen.

WILLIAM C. GEBHARDT,

Clerk. 30

WESCOTT & WEAVER,
Attorneys.

Complaint.SUPREME COURT OF NEW JERSEY.
CAMDEN COUNTY.

10	JONATHAN HESS, <i>Plaintiff,</i> vs. ATLANTIC CITY RAILROAD COMPANY, <i>Defendant.</i>	}	Action at Law. Complaint.
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20 The plaintiff, Jonathan Hess, of the town of Tuckahoe, in the County of Cape May and the State of New Jersey, says:

1. That the defendant is a corporation of the State of New Jersey and, as such, operates a railroad between the City of Camden, in the County of Camden, and the City of Cape May in the County of Cape May and through the town of Tuckahoe aforesaid.
- 30 2. That immediately north of the defendant's station at Tuckahoe, on the west side of its tracks, there is, immediately adjacent to said tracks, a well-defined and constantly used path or highway leading up to defendant's station.
3. That said path or highway has been used, with the knowledge of the defendant, by the public con-

stantly and without interference from the time said railroad was built to the present.

4. That on the first day of September, 1914, the plaintiff was proceeding along said path or highway in a southerly direction for the purpose of going to defendant's station and boarding one of defendant's trains bound for Camden.

5. That it was the duty of the defendant to warn persons using said path or highway of the approach of its trains on the tracks adjacent thereto. 10

6. That as the plaintiff was proceeding along said path or highway as aforesaid, the defendant's agents, without any warning and without fault on the plaintiff's part, negligently and carelessly propelled one of its trains along the tracks adjacent to said path or highway in such a manner as to strike the plaintiff and injure him. 20

7. That the plaintiff and the train of the defendant were both proceeding in a southerly direction.

8. That as a result of the circumstances above set forth the plaintiff was hurled to the ground, his left leg was broken, and the plaintiff was otherwise seriously and permanently injured and incapacitated for work and labor and caused to expend money in an effort to be relieved of his injuries and was caused to suffer pain, all of which conditions are permanent. 30

Plaintiff claims damages in the sum of ten thousand dollars.

WESCOTT & WEAVER,
Attorneys for the Plaintiff.

not exercising care or taking precautions at the time and place mentioned in the complaint.

SECOND DEFENCE.

2. The said plaintiff at the time and place mentioned in the complaint was injured while walking or standing on the railroad of defendant and was not crossing said railroad at any lawful public or private crossing.

10

THIRD DEFENCE.

3. The defendant was not at the time and place mentioned in the complaint guilty of any negligence which was the cause of the injuries and damages complained of.

FRENCH & RICHARDS,
Attorneys for Defendant.

20

30

PLAINTIFF'S TESTIMONY.

JOSEPH B. HUGHES, SWORN.

Direct examination.

By Mr. Wescott:

Q. Mr. Hughes, you live where?

A. Cape May.

10

Q. And do you know Mr. Hess, this gentleman sitting here (indicating)?

A. Yes, sir.

Q. You have known him for how long?

A. For quite a number of years.

Q. On the first of September, 1914, were you at Tuckahoe?

A. Yes, sir; coming up on the train.

Q. What track was your train on?

A. On the main track.

20

Q. And what part of the train were you on?

A. I was in the car so that I could see our train—part of the train had been detached.

Q. Part of your train?

A. Yes, sir; and taken back on the Ocean City division, and that left our track so I could see right up the track—our car, rather—and I could see the whole accident.

Q. Well, now, just tell these gentlemen here what you did see. You can tell them a good deal better than I can.

30

A. After these cars had been taken over on the other track, that left the car I was in, so I could see everything up the track in front of me. This man was walking down the track, on the outside of the track, down a path.

Q. Now, Mr. Hughes, will you let me interrupt you? Suppose you step here for a minute, Mr. Hughes. Will you point out where the station is, first?

A. Here is the station (indicating).

Q. Have you seen this map before?

A. No, sir.

Q. Now, there is the station, it is marked "Station."

10 A. Yes, there is the platform there, and a platform on this side. There are two platforms, on each side of the track. You see, here is the way you come from Cape May. Now, then, we had a train of, I guess, four cars, anyhow. They were cut in half and they took part of the train up here and shifted it back of the Ocean City division, so I understand. Mr. Hess came down this path. When he was going to Philadelphia—I could see, I sat here—this man, I don't know who it was, and I saw something fly from
20 the engine and thought possibly it was the fireman, then someone said somebody got hit. I said, "Well, I saw them."

Q. Now, have you any idea how far he was north of the station when he was hit?

A. Well, I should say he was probably two or three hundred feet.

Q. And do you know whether on the west side of the main track, coming toward the station, there was a path?

30 A. Oh, yes; there was a path there, and he walked along that path.

Q. How long had you known of that path there?

A. I never—well, of course, I knew there was always a path there, I don't know how long.

Q. Do you know whether that path was used by the public?

A. I really couldn't say that. I just travelled up and down the train.

Q. You saw somebody struck and this person was struck with what?

A. By the engine.

Q. And on which side of the engine was the person that was struck?

A. On the right-hand side of the engine.

Q. On the right-hand side?

A. Yes, sir.

Q. That is the right-hand side of the engine going toward Cape May?

A. Going south; yes, sir.

Q. Can you tell whether or not the engine that struck this person that you saw was drifting or going at full speed?

A. No, not drifting.

Q. Did any engine, before it struck this person that you saw, give any signals?

A. I didn't hear anything, not even the bell.

Q. What is that?

A. I didn't hear anything, either whistle or bell. I won't say it didn't but I didn't hear it.

Q. Was your train, when you saw this, making a noise or not?

A. No, sir; standing still.

Q. And was the train that struck this person making noise that you could hear?

A. No, sir.

Q. Is there anything the matter with your ears? 30

A. Not a bit that I know of.

Q. Were you close enough to hear?

A. Yes, sir.

Q. But you say you heard no whistle or bell?

A. No, sir.

Mr. Bradley: Objection. I think the witness said he wouldn't be positive, he heard none, but he wouldn't be positive.

The Witness: I heard nothing.

Mr. Bradley: I object to the question. The witness has already testified to it.

10 (Objection overruled.)

(Exception noted for defendant.)

Q. What did you do after you saw the person struck?

20 A. I stayed there until they brought out a stretcher and brought him over on the track, or over on the platform, rather, across the track and on the other platform, and I thought possibly that is someone I know, being in Cape May County, I know everybody there, anyhow, and sure enough it was Mr. Hess, and they brought him in the car and put him on the seats and I went back and talked to him and consoled him as much as I could. I was very sorry for him.

Q. Brought up to Camden on the train?

A. Yes, sir.

Q. Had you known Mr. Hess for some time before this?

30 A. Yes, sir.

Q. What sort of physical man did he appear to be, good or bad?

A. Very good health; he always enjoyed good health, as far as I know.

Cross-examination.

By Mr. Bradley:

Q. How well did you know him?

A. Beg pardon?

Q. How well did you know him?

A. In a casual way.

Q. Call at his house?

A. No, just casually met him is all.

Q. Now, will you designate, please, where Mr. Hess was walking when he was injured? 10

A. Walking along the west bound track.

Q. Will you point to where you think he was walking?

A. I think he was on the outside of the tracks.

Q. I don't want to confuse you. This is a siding. The train didn't come along here?

A. I won't say anything about that. He was walking along this track, along outside the track. 20

Q. Along in there (indicating)?

A. I couldn't say. Is that the path?

Q. There is no path there.

A. He was walking along the public path, that is all I know.

Q. This is the siding which ends at the frame building. The train wasn't coming along that siding?

A. No, the main track.

Q. Then you mean the track covered by green? 30

A. That is a track there?

Q. Yes. Was he coming between the green and the pink, which is the siding?

A. I don't know if the engine was coming down there. He was walking along here (indicating).

Q. Was there such a siding there?

A. There was a path there. Whether there was any siding I do not know.

CORSVILLE E. STILLE, SWORN.

Direct examination.

10 By Mr. Wescott:

Q. Where do you live, Mr. Stille?

A. Tuckahoe.

Q. And you have lived there how long?

A. Thirty-five years.

Q. What is your business, please?

A. Salesman part of the time, automobile business part of the time, during that time, present time automobile business.

20 Q. Have you seen this map here before?

A. No, sir; saw them when they moved it across there, never saw it before today.

Q. You haven't examined it?

A. No.

Q. Will you step here and tell the jury where the station is and where the tracks are?

A. That is the station there (indicating).

Q. Now be sure of it. You can take all the time you want to examine the map if you haven't seen it before. This is the road?

30 A. Yes, these are the tracks running to Philadelphia, going that way.

Q. Which are the tracks?

A. These two here, this is the siding.

(Witness points to pink.)

Q. Then the other two are double tracks going to and from Philadelphia?

A. Double tracks.

Q. Then what is there on the other side of the station?

A. The other side of the station is a single track going to Sea Isle City and Ocean City, a single track with a siding, I think double track as far as Woodbine.

Q. I just asked you what there was on the other side of the station. 10

A. I understand double tracks as far as Woodbine, to Cape May, and over here single tracks to Sea Isle.

Q. Now on the west side of the main track, which is marked with a kind of light blue, is there a siding?

A. There is at the present time.

Q. Was it there in September, 1914?

A. I couldn't answer truthfully. I don't know. 20

Q. Now, on the west side of that main track, coming from the road which is marked here on the map, down to the station, have you any knowledge as to the existence of a foot path next to the ties?

A. There is a well defined foot path next to the ties.

Q. And how long has that been there?

A. I have used it twenty-five years. It might have been there before that a few years.

Q. Do you know whether or not the general public 30 use that path going to and from the station?

A. I think ninety per cent of the public, what they call Marshallville, above the railroad, use it.

Q. In going to and from the station?

A. Yes.

Q. I suppose you know nothing of the accident itself?

A. I don't think I was home the day it happened. I remember coming home and my wife told me Mr. Hess had been hurt.

Cross-examination.

By Mr. Bradley:

10 Q. Where does this path run along, Mr. Stille, beginning —

A. It begins where the Marshallville road crosses the tracks.

Q. Come here and point where it runs, please.

A. Right in here at the present time, the side track, and in using it myself, I usually walk, when I get down here, I cross over.

Q. Does the path run across?

20 A. I think this would be the well defined path.

Q. You think it would be?

A. I know it would be.

Q. What is it?

A. It is a well defined path alongside the track, down to here, and then you have to go across to the platform.

Q. What kind of path is it?

A. Built out of cinders.

30 Q. Just the ordinary space between any two tracks?

A. There are no two tracks up here.

Q. Isn't it the ordinary space between two tracks that is walked on?

A. Not up here.

Q. What is it down here?

A. It would be an ordinary space of probably wider than the track space.

Q. You just mean the railroad permits people to walk up and down there?

A. They certainly do permit it, yes.

Q. You reside there in the city?

A. I reside up here.

Q. People residing in the other part of Tuckahoe don't use this?

A. They have no occasion to.

Q. Do ninety per cent of the people live down this way?

A. Ninety per cent of the people that live in Marshallville. 10

Q. What percentage of the people living in Tuckahoe live in the Marshallville district?

A. I should say one-third.

Q. You mean ninety per cent of one-third of the people of Tuckahoe use it?

A. The town of Marshallville.

Mr. Wescott: Tuckahoe isn't as big as New York City? 20

The Witness: Hardly.

Q. Ninety per cent of the people in Marshallville use that path?

A. I have seen both ladies, children and men.

Q. There is no automobile path there?

A. Hardly.

Mr. Wescott: Have you seen bicycles? 30

The Witness: I have.

Q. Do you know there is a sign down here, "Danger, do not trespass on the railroad"?

A. There may be. I haven't seen it.

Q. Do you know there is a sign, "Danger, do not trespass on the railroad," there?

A. I don't know.

Q. How often do you walk on that path?

A. I haven't walked on and off it lately, probably a week and a half ago I walked down.

Q. Isn't this a cinder ballast instead of a cinder path?

10 A. I don't know the difference.

Q. Do you recognize that as a view of Marshall-town road and the railroad?

(Examining counsel hands photograph to the witness.)

A. Yes.

Q. Do you see a sign there?

A. I do, yes.

20 Q. And it says, "Danger, do not trespass on the railroad"?

A. It does. It don't show in the photograph distinctly.

Q. Does that change your opinion?

A. I would say there was a sign there. I honestly never noticed it before.

Mr. Bradley: I suppose you have no objection to this being marked?

30

Mr. Wescott: No, if you say it is correct.

(Said photograph admitted in evidence and marked Exhibit D1.)

Q. Now, as to the other danger signal, does that photograph refresh your memory?

A. It might have been there twenty years and I wouldn't know it.

Q. In walking on this space between the south-bound track and the siding, don't you consider that dangerous?

Mr. Wescott: Objection.

Q. Don't you consider that a dangerous and hazardous place for anyone to walk?

10

Mr. Wescott: I object. His opinion of whether he considers it dangerous or hazardous has nothing to do with the case.

The Court: My own view is he can describe the conditions there and leave it to the jury.

A. There is ample room on this path to take care of yourself to go down to the station. I feel perfectly safe.

20

Q. You feel if you went down there with reasonable safety you wouldn't get hurt?

A. Yes.

Re-direct examination.

By Mr. Wescott:

Q. Now that you are here, Mr. Stille, and know the station so well, tell us what this big orange colored building is.

30

A. It is a canning factory.

Q. And the space between the two sets of tracks on each side of the station, which is marked "Platform" there, what is that space?

A. That is the platform. That is built out of crushed stone, probably.

Q. And these two black marks on each side of the tracks, crossing that siding that goes to the canning factory, is called the Marshallville road?

A. This is the Marshallville road, as I always understood it, here. This is a lane that comes in from here, that is a simple country road, no sidewalks on it, rather a rough road.

10

Re-cross examination.

By Mr. Bradley:

Q. It is a well defined road?

A. Oh, yes.

Re-direct examination.

20 By Mr. Wescott:

Q. I want to ask you one question, Mr. Stille. For how many years have you used this station?

A. Well, ever since the road has been built. I don't know how long. It has been thirty years, hasn't it?

Q. Ever since the road has been built? Now, you live on the west side of the tracks?

A. Yes.

30 Q. And going to that station, you go down that Marshallville road?

A. Why, yes, I go down the Marshallville road to the railroad and as a rule down the railroad to the station.

Q. Do you go down this foot path?

A. Yes.

Q. And you follow that foot path until you get to the station?

A. No, until I get nearly to the station and I cross over to the platform to the station.

Q. And get your ticket?

A. Yes.

Q. And if you are coming from any place and get off at the station, you go back the same way to your home?

A. Yes, and often times the trains run up there to make their switches, half way, and I get off and walk. 10

H. ELTON BIRCH, SWORN.

Direct examination.

By Mr. Wescott:

20

Q. Now, Mr. Birch, where do you live?

A. I live four mile out of Mays Landing just at present.

Q. Are you familiar with the Tuckahoe station and its surroundings?

A. Mostly, yes.

Q. How long have you known them?

A. Well, about six years.

Q. And have you seen this map before?

30

A. No, sir.

Q. Do you remember whether on the west side of the station there are two sets of main tracks?

A. Yes, sir.

Q. There are?

A. Yes.

Q. And on the other side of the station there is what?

A. Two sets of main tracks. No, pardon me, there is one. There may be a siding.

Q. But one main track?

A. One main track, yes.

Q. Now, have you ever had occasion to notice how people get to and from the station there at Tuckahoe, on the west side of the two main tracks?

10 A. Yes, sure, I have used it.

Q. How?

A. There is a side path along the west side of the main Cape May track.

Q. And what kind of side path is that?

A. Just common path that everyone uses.

Q. Passengers use it coming to and from the station?

A. Yes, school children, passengers and the like of that.

20 Q. Do you know whether on the west side of the western main track there is a siding?

A. Yes.

Q. And is this foot path that people use between the siding and the west main track?

A. Yes, runs down between.

Q. And goes to the station?

30 A. Yes, leads to the station, and keep on that siding you can go to the little platform, cut off to the south bound, or you can cross the tracks and go over to the station.

Q. And when you get down to the station to this path, do you remember whether there is a plank across the tracks?

A. Yes, leading from the platform to the station.

Q. How long have you seen people generally use that foot path?

A. I lived in Tuckahoe a little over a year and since then I haven't been there very much, but during that year it was very frequently used by the people.

Q. Is there any other way to get to and from the station?

A. Yes.

Q. What other way?

A. You have to go on down across this railroad perhaps a hundred and fifty yards to a road that leads down to the east side of the railroad, then cross over the tracks and come back to the station again. 10

Q. Now, suppose you wanted to get to the station from the west side of the tracks, out here, suppose you lived out here, how would you get to the station?

A. Just down to the edge of the track and down to the station on the west side of the track, I always went.

Q. Using what? 20

A. A foot path.

Q. Do you know whether or not the railroad keeps that path up?

A. I don't think they do but the path is used by everybody. It is not a raised path, not made; it only exists there.

Q. Now, when that path is torn up by —

Mr. Bradley: Objection. 30

Cross-examination.

By Mr. Bradley:

Q. You say your knowledge of that path only goes back six years?

A. Yes.

Q. Is this the public way to get to that station?

A. Yes.

Q. That is the Marshallville road?

A. No, that is not the Marshallville road. That is (indicating on map).

Q. The public way to get to that station from this Marshallville road is up to this point (indicating) and from there down there to the station, isn't it?

A. It is the public highway.

10

Re-direct examination.

By Mr. Wescott:

Q. That is, if anybody lives over in this part of the country and they want to go to the station —

A. Why, a majority of them go down the track.

Q. There are two ways to get to the station. One to walk this road and follow this road here, and
20 when they get opposite the station go across the tracks to the station. That is one way?

A. Yes.

Q. And the other way is to take this well-defined foot path to this planking and then go to the station?

A. Those are the two ways I know of.

Re-cross examination.

30 By Mr. Bradley:

Q. Isn't it also true that people coming down along there walk along to the east of that north bound track?

A. They may have walked there but there was no path existing there when I was there, that I recall.

ELLSWORTH SOMERS, SWORN.

Direct examination.

By Mr. Wescott:

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

A. I live in Tuckahoe.

Q. How big a place is Tuckahoe?

A. I don't know how many inhabitants, probably
a thousand scattered around there, both sides. 10

Q. It isn't as big as Philadelphia or New York?

A. No, we don't claim it is.

Q. Have you seen this map before (indicating)?

A. No.

Q. Well, can you tell these twelve gentlemen sitting here how long you have lived there?

A. Ten or twelve years.

Q. Can you tell these gentlemen sitting here anything about the ways people have to get to and from
the station at Tuckahoe? 20

A. May I get closer to the map?

Q. Yes, get right up there.

A. I think I comprehend. I live right here on the road.

Q. Now, the question is, how do the people get to and from the station, to and from the cars at the station?

A. You are speaking of the people living up Marshallville road? You are not speaking of the Tuckahoe people that live down here? You are speaking
of people who live west of the railroad? When I
want to go to the station, I hike down the path here,
generally. Sometimes I go down over that property,
down this side and along here, and getting down
here, I frequently cross before I get down to this 30

platform, if the crossing is good, and if not I keep on down, cross there to the platform, of course, get my ticket and get on the train.

Q. Do you walk on the railroad? Do you walk on an iron track or how?

A. The railroad is ballasted with cinders and it makes a path along there. Walk along there, you can, not in here, you have to walk on the ties, in that siding, you have to walk on the ties.

10 Mr. Bradley: You are pointing a distance from the frame building, south, to the ——

The Witness: Yes, the whole length of the siding is about you have to walk on the ties.

Q. What is over there, besides the tracks, where people can walk?

20 A. Why, the cinders along there, the ballast, I guess they call them, coating covering along here, that is about all there is, of course, the top coating of the railroad, cinders, I think.

Q. Did you ever see a path along there?

Mr. Bradley: I object to that. That is certainly leading.

Q. Have you ever seen any paths anywhere in that neighborhood?

30 Mr. Bradley: I object, unless the neighborhood is described.

(Objection sustained.)

Q. Well, is there anything there besides the railroad tracks and the ties?

A. Down the railroad there is a well beaten path where people walk, if that is what you are asking for, that is what is there.

Q. Now, where is that well beaten path?

A. Well, the most prominent part of it is the Marshallville side of the south bound track.

Q. How near the ties is it?

A. Out on the end of the ties.

10

Q. Right at the end of the ties is this well beaten path? Now, how long has that path been there to your knowledge?

A. People been going up and down there ever since I lived there.

Q. That is how many years?

A. Ten or twelve years.

Q. And when you take that path, where does it lead you to, if you want to take a train at the station?

20

A. Down to the station, of course.

Q. It leads you to the station?

A. Certainly.

Q. And do you remember whether at the end of that path there is a plank walk across the tracks to the station platform?

A. They have a crossing at the station so you can come out and get on the south bound train.

Cross-examination.

30

By Mr. Bradley:

Q. You said you had to walk on the ties between this siding, the points where the siding of the south bound track come together, down to the station, so there isn't any well-defined path you speak of there?

A. Not on the siding.

Q. There isn't any between the siding and the south bound track, there is no well-defined path along there, is there? You said you had to walk on ties.

A. You walk on the siding, you have to walk on ties, if you walk on the siding, if you use that siding, if you come down here and use that siding, you have to walk on ties. It is not filled up like a railroad there. It is before, in here, there is good walking
10 down along, of course, to this siding, down to that platform, leads off there gradually and comes in kind of a path there.

Q. Kind of path, cinders, just like between the ordinary railroad tracks, isn't it, cinders or ballast like between the ordinary railroad tracks?

A. Yes, it is cinders.

Q. How about on this side? People walk down there too, to the east of the north bound track?

A. I certainly have that side too.

20 Q. Use any side there?

A. Generally this side.

Q. In fact, they walk all over the railroad tracks down there, don't they?

A. I don't know. Generally they walk on this.

Q. And that is on the railroad property?

A. I suppose they are.

Q. Do you know that at the junction of the Marshallville road and the railroad there is a sign, "Danger, do not trespass on the railroad"?

30 A. It may be there.

Mr. Wescott: I will admit those signs are there, "Danger, don't trespass on the railroad."

Q. And up here, pointing to a position a little north of what is designated as the water column, there is another signal, "Danger——"

Mr. Wescott: If you say it is there, we will admit it.

Mr. Bradley: It is admitted there is a sign there, "Danger, do not trespass on the railroad," near the water column.

THOMAS C. PARKER, SWORN.

10

Direct examination.

By Mr. Wescott:

Q. Mr. Parker, where do you live?

A. Tuckahoe.

Q. How long have you lived there?

A. I was bred and born there and I lived there until I was twenty years of age and forty years I was out in the ministry and retired six years ago and been living at Tuckahoe. 20

Q. You are a retired minister?

A. Yes, sir.

Q. Are you familiar with the station at Tuckahoe and its surroundings?

A. Yes. I live near Mr. Hess. Neighbors.

Q. When you want to approach the station from the west side of the tracks, how do you get to the station? 30

A. In the daytime I generally come to the crossing and walk down the track. Never at night.

Q. When you say you walk on the track, do you mean an iron rail?

A. No, the side of the track.

Q. What is there there?

A. There isn't much there, a rough path part of the way.

Q. What do you mean by path, how rough is the path?

A. Rough enough to wear your shoes out if you travel it very much, over clinkers.

Q. How long has that path been there?

A. Been there, I presume, as long as the railroad has been built, so far as I know.

10 Mr. Bradley: I object. I would like to have the answer stricken out unless the witness knows how long it has been.

(Objection overruled.)

(Exception noted for defendant.)

Q. Who uses that path?

20 A. It is pretty generally used by men folks. I don't know that I ever saw many ladies travelling along there.

Q. And what do they use it for?

A. To go to the station.

Q. And do they use it to get from the station too?

A. Yes, sir.

Q. How near is that path to the railroad ties?

A. Why, it is right near the ties, side of the ties, close by.

Cross-examination.

By Mr. Bradley:

Q. Now, do you say it is generally used by men?

A. Yes, sir.

Q. Would you designate where the—This is the Marshallville road, here is the “Do not trespass on the railroad” sign, and this is the south bound track. You said that just men use that path generally? 10

A. Generally. I have seen ladies travel it.

Q. Have you a family?

A. Yes, wife and daughter.

Q. Do you permit your wife and daughter to travel it?

A. My wife never goes that way and I advised my daughter not to travel it.

Q. And do you consider it ——

Mr. Wescott: I move to strike out those answers about the wife and daughter. 20

The Court: I will allow the answers to remain. The question was not completed.

Q. Do you know what percentage of the people going down here from Marshallville to the station use that road?

A. I should judge ninety per cent of the men use it. 30

Q. Now, on the east of the north bound track, people also walk along there, don't they?

A. I don't understand that.

Q. Now, do people walk along down there to the station, on the east side of the north bound track?

A. Yes, sir.

Q. You walk that way yourself?

A. Yes, sir.

Q. So that people walk up and down the tracks promiscuously on either side or between tracks?

A. Yes, sir.

Re-direct examination.

10 By Mr. Wescott:

Q. Is there a path on the east side?

A. A very rough path.

Q. No, on the east side?

A. A very rough path.

Q. How do you compare the roughness with the west side?

A. I think it is travelled more on the west side.

20 Q. The west side is much more distinct, a well-defined path, isn't it? I say the west path is a much more distinct and well-defined path, isn't it?

A. Yes, it is much more travelled, smoother.

Q. Are you sure there is any path on the east side?

A. Yes, I have been down there.

Q. No, not whether you have been there. Is there a path there?

A. Yes, a rough path part of the way.

Q. You were subpoenaed to come here?

30 A. Yes, sir.

Q. And you didn't like it a bit?

A. No, sir; I did not.

Re-cross examination.

By Mr. Bradley:

Q. Are you telling the truth in this case?

A. I think I am.

Q. Did that affect your telling the truth, the fact of your coming here?

A. It was very inconvenient for me to come at this time. (10)

Q. You are subpoenaed by the plaintiff, aren't you?

A. Yes, sir.

CHRISTOPHER HAND, SWORN.

Direct examination.

By Mr. Wescott:

20

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

A. Tuckahoe.

Q. How long have you lived there?

A. I was born there and lived there three years the last time.

Q. And prior to this three years, how long were you away from Tuckahoe?

A. Four or five years possibly.

Q. What is your age?

30

A. Forty-seven.

Q. How long have you been familiar with the depot there, the station, and the surroundings?

A. All my life.

Q. What is your business?

A. I have been in the contracting business the last year or two.

Q. Prior to that time?

A. I was a railroad conductor most of the time.

Q. For what company?

A. Atlantic City Railroad.

Q. For this very defendant company? I didn't know that. Well, now, as a railroad man, how many years were you familiar with this place?

A. I went with this railroad company I think in 1897 or 1898, and I resigned in 1912.

10 Q. Fourteen years?

A. About fourteen years.

Q. Can you tell how people living on the west side of the tracks get to the station?

A. You are speaking now from Marshallville?

Q. Yes.

A. Most of them use the path on the west side of the tracks, coming to the station.

Q. How long has that path been there, to your knowledge?

20 A. Well, I have only been living in Marshallville for the last three years. I have known of it since then. Previous to that I have seen people using the path but I never noticed particularly about the path.

Q. Are you able to tell us whether or not people use that path coming to and from the station?

A. They do.

Q. Do you know whether people used that path while you were in the service of the company, going to and from the station?

30 A. I think so.

Q. How wide about is that path?

A. I should judge eighteen inches, the part of the path that is used.

Q. And how near the ties is the path?

A. Right adjoining the ties, just clears the ties.

Cross-examination.

By Mr. Bradley:

Q. When you speak of this as a path, Mr. Hand, just what do you mean?

A. Well, it is a path that has been established there by use.

Q. You mean that the people merely have walked between the railroad tracks and by the continued walking? 10

A. The custom of the people in that locality to use that particular piece of track there.

Q. You wouldn't have us to believe it is a path just built for people to walk on?

A. No.

Q. They also come up and down on the east side of the north bound track when they wish, don't they?

A. I have seen people walking on that side. The majority of the people use the west side. 20

Q. You know of the trespass signs at the Marshallville road and also up near the water column, don't you?

A. Yes.

Q. You say this is about eighteen inches wide. You don't mean to say there is any special path that the railroad keeps, eighteen inches wide, for people to walk on, do you?

A. I should judge that the path is well-defined for about eighteen inches and used. 30

Q. That is by continuous use?

A. Yes.

Q. There is no path the railroad company built there for people to walk on, is there?

A. No.

Mr. Bradley: Subject to the right to ask for a non-suit, I would like to put these out of town witnesses on.

Mr. Wescott: Certainly.

DEFENDANT'S TESTIMONY.

10 HOPE W. GANDY, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Gandy, you reside at Tuckahoe?

A. Yes, sir.

Q. How long have you lived there?

A. All my lifetime.

20 Q. How old are you?

A. Forty-nine.

Q. You hold an official position there?

A. Yes, sir.

Q. As what?

A. Freeholder.

Q. Do you remember on September 1, 1914, an accident happened to Mr. Hess?

A. Yes.

30 Q. Where were you at the time of that accident?

A. I was at the Tuckahoe station, on the frame side.

Q. Will you designate it here?

A. That is on the south bound track. I was right near the station, waiting for the train to come in.

Q. The train that hit Mr. Hess?

A. Yes.

Q. Will you just tell the Court and jury how this accident happened?

A. I stood there, looking up the track, and the train that hit Mr. Hess—I was going to Cape May Court House on that train ———

Mr. Wescott: You were looking up the track?

The Witness: Yes, sir.

Mr. Wescott: To see the train hit him?

10

The Witness: I did not. Mr. Hess was walking down the track, between this siding and the main Cape May track.

Q. That is the south bound track?

A. South bound track, and I saw the train hit Mr. Hess. I knew Mr. Hess was coming to the city that morning, because he told me he was coming.

20

Q. Just where was Mr. Hess at the time he was hit, if you can designate here on the map?

A. I should say about five hundred feet above the station, five or six hundred feet.

Q. And did you observe the train before it hit Mr. Hess?

A. I did. I was looking at it.

Q. And what, if anything, did you observe, before Mr. Hess was hit?

A. I saw Mr. Hess walking along the track.

30

Q. On the track?

A. Yes.

Mr. Wescott: On or along?

The Witness: Along the track. Between the ———

Q. Did you hear any warning of any kind given by this approaching train before it reached the station?

A. I heard the train blow, yes.

Q. How far away was the train from the station?

A. That was some distance up near the bridge when I heard the train blow.

Q. Did you hear any other signals given by the train?

10 A. I don't remember.

Q. You are familiar with this locality of the accident?

A. Pretty familiar, yes.

Q. Will you say whether or not there is a well-defined path from the Marshallville road to the station?

A. I couldn't say about that.

Q. Is there any public path running between Marshallville road and the station?

20 A. Public path?

Q. Yes.

A. There is a public road that leads to the station.

Q. Leads to the station up this way and around here?

A. Yes.

Q. There is no public path down this way to the station?

A. Not to my knowledge.

30 Q. Do you know of those trespass signs?

A. Yes.

The Court: They are admitted in the case.

Q. Where is the bridge, as to the Marshallville road, Mr. Gandy? Is it north of the Marshallville road?

A. North, yes.

Q. How far above the road is the bridge?

A. Couple of hundred feet, I guess.

Q. Did you hear this approaching train give any signals other than that as it approached the station?

A. I just heard the train blow once. I wasn't paying much attention.

Q. And you saw the front of the engine hit Mr. Hess?

10

A. Yes.

Q. Did you observe Mr. Hess walking down that space between the two tracks before he was hit?

A. He seemed to be on the end of the ties when I seen him, that is the way it looked from where I was.

Q. The end of the ties on the south bound track?

A. That is the way it looked from where I was.

Cross-examination.

20

By Mr. Wescott:

Q. That is to say, it looked to you as if, instead of walking in that path between the tracks, he was walking from tie to tie, is that correct?

Mr. Bradley: Objection. He hasn't said there is any path between the tracks.

Q. You understand then that instead of his walking on the ground or on the level, he seemed to be walking from tie to tie?

30

A. Yes. Understand, I know how those ties are.

Q. What made you think he was walking from tie to tie?

A. He must have been or he wouldn't have got hit.

Q. If he was right close to the ties, he might have been hit?

A. I don't know about that. I don't think so.

Q. Now, you have spoken about public paths and you were asked if there was any public path going to the station, on the west side of this west track. Is there any public path anywhere there on the west side?

A. No, sir.

10 Q. Or the east side, going to that station?

A. Not to my knowledge.

Q. To your knowledge, there is no public path there at all?

A. No, sir.

Q. So that the only way the people have to get to and from the station is either to walk on the iron rail, between the iron rail, on the ties, or on the space between the west side and that?

A. Certainly.

20

Re-direct examination.

By Mr. Bradley:

Q. Well, they have another way to get to the station by going up this road?

A. That is a township road maintained by the township.

Q. And that is the public road to the station?

30 A. Yes, sir.

Re-cross examination.

By Mr. Wescott:

Q. Or they might use a flying machine?

A. Sure.

DANIEL McKEAGUE, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. McKeague, where do you reside?

A. Tuckahoe.

Q. How long have you lived there?

A. Thirty-five years.

Q. And you know the locality of this station and the surrounding country? 10

A. I do.

Q. Do you hold any official position?

A. Township committeeman and have control of the township roads.

Q. How long have you been township committeeman?

A. Four years.

Q. Is it one of your duties, as township committeeman, to have charge of all public roads? 20

A. No, sir; only the township roads. The State roads, the freeholders have charge of them.

Q. You know all the roads and public highways around there?

A. Yes, sir.

Q. Is there any public highway from the Marshallville road to the station?

A. Yes, sir, about four hundred feet east of the railroad crossing, there is a road there. 30

Q. No. From the railroad crossing at the Marshallville road up there to the station, is there any public highway running between the tracks?

A. No, sir.

Q. Does the public in general use that?

A. Well, I am down the other way in the town.

Q. You mean south?

A. No, I am down in the main town. I don't belong in Marshallville. I have seen people walk the tracks there, yes, sir.

Q. Do you know whether or not there is a well defined path there?

A. Never knew of any.

Q. You know of the trespass signs?

A. Yes, sir.

10

Cross-examination.

By Mr. Wescott:

Q. Haven't you ever noticed a path between the main west track and that side track leading on down to the station?

A. I have noticed cinders in there they can use for anything they might.

20 Q. Haven't you noticed a path?

A. No, sir.

Q. You live there?

A. Yes, sir.

Q. Going there tonight?

A. I am.

Q. Will you do me the kindness and all of us to go there and look and see if you can't see a path there and come back and tell us in the morning?

A. I don't think I will take the time, Judge.

30 Q. If you will go and look, I will subpoena you and make you come.

A. I don't think I will look, Judge.

Q. Do you remember where you were Sunday a week ago?

A. Yes, sir.

Q. Where?

A. Walked up the railroad track on the ties, up above the drawbridge.

Q. Did you walk on the ties or on that path?

A. On the ties.

Q. Why did you walk on the ties?

A. Because that suited me better.

Re-direct examination.

10

By Mr. Bradley:

Q. You knew when you were walking there that you were walking on railroad property?

A. I did.

(Adjournment until October 10, 1919, at 10 A. M.)

20

30

October 10, 1919.

PLAINTIFF'S TESTIMONY.

JOHN HARRIS, sworn.

Direct examination.

By Mr. Wescott:

10 Q. Mr. Harris, you are a member of the New Jersey bar?

A. Yes, sir.

Q. Are you familiar with the station at Tuckahoe?

A. Yes, sir.

Q. And have been for how many years?

A. I suppose ten or fifteen; more than ten, anyway.

Q. There is a map there on the board ——

20 A. I looked at it while you were waiting.

Q. The station there is between tracks, isn't it?

A. Yes, sir. You can't get to it without going over some track.

Q. Now, on the west side of the station there are two tracks, a pair of double tracks?

A. Yes, sir.

Q. And then still west of that, the green street, is another track.

A. Yes, sir.

30 Q. Remember all those?

A. Yes, sir.

Q. Now, do you know whether there is any way of getting to the station from the road up here?

A. You mean the Marshallville road?

Q. Marshallville road. How do passengers on the west side of the road get to the station?

Mr. Bradley: I think you ought to qualify him. He doesn't live there.

Q. Between the side tracks and the west main track, do you remember whether there is a foot path?

Mr. Bradley: I object to that unless Mr. Harris has shown how many times he has been there, it seems to me. We all know he is a resident up here. 10

The Court: I think there should be a foundation laid as to his knowledge.

Q. How many times, Mr. Harris, have you been there?

A. Well, I suppose twenty-five, in the last ten or fifteen years.

Mr. Bradley: I don't think that is sufficient. 20

The Court: I think he can testify to the character of the path.

(Exception noted for defendant.)

Q. Is there any path there, Mr. Harris?

A. Yes, sir. As you come from the Marshallville road, there is a well-defined path here. Some walk there and some walk the other side. 30

Q. And that leads to where?

A. Across to the station.

Cross-examination.

By Mr. Bradley :

Q. Where does the path cross to the station?

A. Well, which path do you mean?

Q. The path between.

A. Over here.

Q. Is it a well-defined path from there to the station?

10 A. Not so much so between the siding and the main line as on the other side.

Q. You mean down here to the west of this siding is where the path goes along?

A. It is immediately next to the siding.

Q. On the west?

A. Yes, on the west.

Q. Right down here and not between the main track and the siding?

20 A. Well, there are two paths, one between the main track and the siding and one to the extreme left of the siding.

Q. What kind of path is that?

A. At the time of this accident, which is several years ago, I don't know which is the best defined. I only know which one I took.

Q. Where does it cross to the station?

A. It makes up to the main track before you reach the station.

30 Q. It doesn't go between the tracks, in any well-defined path, over to the station?

A. Not across the tracks; no.

Q. Now, you saw these trespass signs there?

A. I don't recall. I think they were put up about the time of this accident.

Q. Do you know that?

A. My attention was called to them right after this accident. That is the first time I noticed them. There was a woman hurt down there about that time.

Q. What year?

A. Whenever that woman was hurt down there, getting fast in the frog, my attention was called to the trespass signs, and that is the first time I recall seeing them.

Q. You don't know that they were not there before? 10

A. No.

Q. I call your attention to a photograph—I will have it marked for identification —

Mr. Bradley: It is consented that it be offered in evidence at this time.

(Said photograph admitted in evidence and marked Exhibit D2.) 20

Q. Witness being shown Exhibit D2 is asked if he recognizes that locality.

A. Yes, sir.

Q. The track to the extreme left of the picture is the spur track?

A. Yes, sir.

Q. And the track adjoining it on the right is the main south bound track?

A. South bound track. 30

Q. Now, will you tell from that picture where that well-defined path is?

A. The well-defined path comes down until you can go no farther and then you cross over to the station.

Q. There is no well-defined path to the station?

A. The well-defined path doesn't go all the way to the station.

Q. In that well-defined path of which you speak there is a switch running through?

A. Yes, sir.

Q. And that well-defined path is very rough, just the same as between any ordinary railroad track?

A. I should say not. When you get down here, you will find ballast.

10 Q. What do you find there?

A. Gravel, farther back.

Q. What do you find here, approaching that switch?

A. I don't know.

Q. When is the last time you saw it?

A. Two or three days ago.

Q. Did you take a look at it particularly for this case?

20 A. Not particularly. We were switched off there, waiting for a train. Well, it has been a week ago.

Q. When you walked down there, you knew you were a trespasser on the railroad property?

Mr. Wescott: Objection. Whether he was trespassing or not depends on circumstances.

Q. You knew that was railroad property?

A. I assumed it was. It appeared to be.

Q. You knew it wasn't any public highway?

30 A. No, it is not a public highway. Everybody goes there, that is all.

Q. How do you know?

A. I have been around there, everybody going to catch a train, we cut off there.

Q. In your opinion, the railroad doesn't stop the people from going down there?

A. When we go down to Tuckahoe, take a back car, they leave that back car up there to connect it up for Ocean City. We all get off there.

Q. People going to the station that way go for their own convenience?

A. I go off there to save walking.

Q. This is the public road that leads to the station. That is the public way, isn't it?

A. That is going toward Tuckahoe.

Q. This is the Marshallville road they speak of and there is some question whether that is the Marshallville road, that is the public road to the station. 10

A. I always understood it was the other way.

Q. Coming up here is a road running down there, you know that?

A. Yes.

Q. And you come down that road and go over to the station?

A. Yes, and when you ——

Q. You are acquainted with Mr. Hess? 20

A. Yes.

Q. And go gunning with him quite often?

A. Not often.

Q. When was the last time you visited him?

A. I had some business for him, law business.

Q. You represent him?

A. I defended him for shooting a dog.

Re-direct examination.

By Mr. Wescott:

Q. Mr. Harris, my friend on the other side seems to think people have no right on what is called railroad property, they are trespassers when they get on railroad property. You are a lawyer and understand the law. I suppose that a station is railroad
10 property, isn't it?

Mr. Bradley: Objection. I don't think this —

(Objection overruled.)

(Exception noted for defendant.)

A. Yes, sir.

Q. And a platform is railroad property?

20 A. Yes, sir.

Q. And cars are railroad property?

A. Yes, sir.

Q. When people get in a station or on a platform or cars, they are trespassers?

Mr. Bradley: It is admitted they are not trespassers.

Q. When they get on approaches to the station,
30 are they trespassers?

Mr. Bradley: I object, unless he shows what he means by approaches.

(Question withdrawn.)

JONATHAN HESS, SWORN.

Direct examination.

By Mr. Wescott:

Q. Mr. Hess, you are the plaintiff in this case?

A. Yes, sir.

Q. And you live where?

A. Tuckahoe.

Q. Were you born and brought up down there? 10

A. No, sir.

Q. How long have you lived there?

A. Thirty years.

Q. What is your business?

A. Carpenter and mason by trade.

Q. How long have you been a carpenter and mason?

A. Oh, I imagine thirty-five year, forty probably.

Q. Whereabouts do you live at Tuckahoe?

A. I live on what is called the Marshallville road. 20

Q. West or east of the tracks?

A. West.

Q. How far from the tracks do you live?

A. Oh, I would say eight or nine hundred feet, somewheres thereabout.

Q. Are you familiar with the station there and the surroundings?

A. Yes, sir.

Q. How long have you known the station and surroundings? 30

A. Sir?

Q. How long have you known the station and its surroundings there?

A. Ever since it was there, helped build it.

Q. Remember when it was built?

A. I helped build it. Oh, I couldn't tell the year it was built in.

Q. Now, you met with an accident down there on the first of September, 1914?

A. Yes, sir.

Q. What time did you leave home in the morning?

A. About ten minutes of ten.

10 Q. For what purpose?

A. To come to Philadelphia.

Q. Well, were you going to swim or walk?

A. No, I was going in the train.

Q. And you left home for the purpose of taking a train?

A. Yes, sir.

Q. To go to Philadelphia? Now, where?

A. At the Reading depot.

20 Q. Where is that depot? Step up here and show us on this map.

A. (Witness indicates on map.)

Q. Pointing to a building marked "Station." Now, on the west side of that station what are there?

A. Two tracks.

Q. Running north and south?

A. Yes, sir.

Q. And on the other side of the station what are there?

A. One main track and one side track.

30 Q. Have you examined this map?

A. No, sir.

Q. Now, west of the westernmost track, on the west of the station, what is there?

A. There is another long siding.

Q. Where does that siding begin and where does it end?

A. It ends down nearly to the depot.

Q. Where does it begin?

A. Up the track a couple hundred feet from the Marshallville road.

Q. How did you customarily get to the station when you went?

A. By going down along the railroad.

Q. Well, along what railroad?

A. Along this railroad, a path we have there.

Q. Where was the path?

10

A. Right along the railroad, along in the ties.

Q. What kind of path was it?

A. Well, it is a path well worn, made out of such material as a railroad uses for the roadbed, cinders, gravel.

Q. How long has that path been there?

A. Well, they tear it up occasionally.

Q. No, I didn't ask you that.

A. Judge, I think I answered you correctly —

20

Mr. Bradley: I object.

The Witness: The path has been there —

Q. (Question repeated.)

A. Ever since the road was there.

Q. Who uses that path going to and from the station?

A. Everybody that lives up our way except one man.

30

Q. Did you ever come from towards Cape May, on the trains?

A. Yes, sir.

Q. And get off at the station?

A. No, sir; generally get off up there along the path.

- Q. Get off at the station?
A. No, sir.
Q. Where do you get off?
A. Get off along this path.
Q. Trains stop anywhere near the path?
A. Stops right along the path.
Q. And you get off on that path?
A. Yes, sir.
Q. And when you get off on that path, where do
10 you go?
A. Go home.
Q. Well, do you stand still?
A. No, sir; walk up the path.
Q. You walk up that path?
A. Yes, sir.
Q. Until you get to where?
A. To the main road.
Q. What is the name of that road?
A. Marshallville road.
20 Q. Then you go home?
A. Yes, sir.
Q. Now, when you are going from your home to
the station, how do you proceed?
A. Go back the same way I have just gone up.
Q. You go down the Marshallville road?
A. Yes, sir.
Q. Until you come to what?
A. Until I come to the railroad.
Q. Is there a path there?
30 A. Yes, sir.
Q. Then how do you get to the station?
A. Go down this path.
Q. And how many years have you been doing
that?
A. Ever since the road was there. The road came
through in 1891.

Q. And have you seen others do the same thing?

A. Yes, sir.

Q. Have you seen people board the cars from that path?

A. I have.

Q. How often? Many or few times?

A. Well, I have seen quite a lot do it.

Q. Many or few times?

A. Well, the people living up our way do it.

Q. Many or few times?

10

A. A number of times.

Q. As many as twice?

A. Yes, sir.

Q. Three times?

A. Yes, sir; fifty of them.

Q. Now, how wide is that path?

A. Well, the path they walk in is in the neighborhood of eighteen inches to twenty-one wide.

Q. Does it vary in its width?

A. The path doesn't vary much in its width but the space is wider in some places than others.

Q. How near the railroad ties is that path?

A. Down toward the depot it runs right up to the end of the ties.

Q. How near the ties is that path?

A. Up next to the Marshallville road it is a little distance away.

Q. How far?

A. I would say a foot, foot and a half, and as you get down it gets closer to the ties.

30

Q. Where is this path located as to the side track you have spoken of, that spur, and the main track?

A. Well, the path is next to the main track and the side track is on the west side.

Q. Then the path is between the tracks?

A. Between the tracks.

Q. How much is that siding used?

A. Not very much.

Q. Now, that path leads to what place?

A. To the depot and the platform.

Q. And at the end of the path what is there to cross the tracks by, if anything?

A. A plank platform.

Q. Plank laid longitudinally with the tracks?

A. Yes, sir.

10 Q. Now, as you were walking on that path, on the first of September—I want to call your mind first to the moment when you reached the tracks by taking the main road, did you look to see what was coming in either direction?

A. Yes, sir; I looked up.

Q. What?

A. I looked up the road to see if any train was coming down.

Q. Towards Philadelphia?

20 A. To see if any was coming from Philadelphia down in the direction I was going.

Q. Was there any?

A. No, sir.

Q. Then what did you do afterwards?

A. I went down the path to the depot.

Q. And as you were walking along that path, what happened to you?

A. The Cape May express came down and hit me.

Q. What part of the express hit you?

30 A. The engineer's step.

Q. Where is that step located?

A. Between the cylinder head and the button block.

Q. And how far does it extend out from the engine, the step?

A. Judge, I don't know as I could give any distance on that.

Q. Does it extend any at all?

A. Certainly it extends out.

Q. So that you can see it?

A. Yes, sir.

Q. Does it extend out beyond the ties at the place where you were struck?

A. I think some of them do.

Q. Now, what was that train doing when it struck you?

A. Drifting into the depot.

10

Q. How was the wind blowing?

A. From the southward.

Q. Blowing in your face?

A. Yes, sir.

Q. Did this train, before it struck you, give any warning of any kind?

A. None that I heard.

Q. I didn't ask you that. I asked you whether it gave any warning?

A. No, sir.

20

Q. Well, how do you know it didn't?

A. I didn't hear it.

Q. Was your hearing good?

A. Yes, sir.

Q. Did you hear any whistle blown?

A. No, sir.

Q. Or any bell rung?

A. No, sir.

Q. You told us already that you were going to the station for the purpose of taking what train?

30

A. Taking the express up from Cape May.

Q. What time did it leave?

A. 10.07.

Q. What time did this accident happen?

A. About ten o'clock.

Q. How were you injured?

A. Compound fracture.

Q. Of which leg?

A. The left.

Q. Where? Put your hand and show us.

A. Just above the knee.

Q. What was the state of your health before you got hurt?

A. Good.

Q. Did you work every day?

A. Yes, sir.

10 Q. Now, after you were struck, what was done with you?

A. Put on a stretcher and brought to Cooper Hospital.

Q. How long were you in Cooper Hospital?

A. Eight weeks.

Q. Who set your leg there?

A. Dr. Sharp and Dr. Schellinger.

Q. Is Schellinger alive?

A. No, sir.

20 Q. Is Sharp alive?

A. I think he is.

Q. Has he been here in court to testify in this case?

A. No, sir.

Q. Did you see him here the other day, Dr. Sharp?

A. I saw Dr. Sharp out there.

Q. Well, he came here to testify, didn't he?

A. You asked me if he was here to testify.

Q. I beg your pardon. He was here?

30 A. Yes, sir; he was here.

Q. Why isn't he here now?

A. He said he couldn't get back.

Q. Well, he couldn't on account of the seriousness of his engagements?

A. Yes, sir.

Q. Now, when you were taken from the hospital, where were you taken to?

A. Home.

Q. How long were you laid up there?

A. Until the next spring, in April.

Q. Could you do any work in the meantime?

A. No, sir.

Q. When you got about, how did you travel?

A. With crutches and a cane.

Q. How long did you use crutches and a cane? 10

A. Until sometime in April.

Q. How much wages did you make before and at the time you got hurt?

A. Fifty cents an hour.

Q. What was your business at that time?

A. Mason work.

Q. What were you going to Philadelphia for?

A. To buy some cement.

Q. How many hours a day did you work?

A. Eight. 20

Q. Worked every day?

A. Yes, sir.

Q. Now, how many days did you lose, have you any idea, from the first of September?

A. I lost from the first of September until sometime the first of April.

Q. September to April?

A. Yes, from the first day of September until sometime in April, I think it was the latter part of April before I did anything. I did a little then, not 30 much. I had to lean up against the house with one shoulder, to lay some brick on the house, on some piers. That is the first I did.

Q. How regularly have you worked since?

A. Well, not so very regular.

Q. Well, why?

A. Because I don't like to climb on account of my crippled leg.

Q. Have you any idea how much time you have lost since you were hurt, outside of what you have already given us?

A. Well, I could have worked a good deal more if I could have gone away. I imagine I lost fully half time.

10 Q. You said you don't like to climb. Why? What is the matter?

A. Because my leg interferes with me and it won't carry me up. I fall down when I stub my toe. I am afraid I would fall off the scaffold.

Q. Is your left leg any shorter than your right?

A. Yes, sir.

Q. Does it trouble you to walk?

A. Yes, sir.

20 Q. Get up from your seat and walk diagonally across to that chair.

A. (Witness walks.)

Q. You say you stumble and fall sometimes?

A. Yes, sir.

Q. Under what circumstances do you stumble and fall?

A. If I hit anything with either foot I can't catch myself.

Q. Have you had the free use of that leg since it got hurt?

30 A. No, sir.

Q. What is the trouble with it?

A. It is weak. When it is bent it won't bear anything.

Q. Can't bear weight on it?

A. No, sir.

Q. How do you have to hold your foot? Do you hold it in the same position you did before you got hurt?

A. Well, when I lay down it falls over that way unless I keep it in mind and hold it up. It won't stay up itself like that foot, but that one always falls over.

Q. When you are lying down, your foot falls over unless by an act of will you hold it up?

A. Yes, sir.

10

Q. Have you suffered any pain from this?

A. Yes, sir.

Q. Much or little?

A. Sometimes quite a little.

Q. Sometimes very little?

A. Well, sometimes very little is true. Before a storm it hurts quite considerable.

Q. Now, when you use your leg, what effect do you feel when you are about your work, working about or lifting?

20

A. It tires. It has a very funny feeling, pain in it.

Q. Where is the pain?

A. In my knee.

Q. Now, how much strength have you in that leg, compared with the other?

A. Well, I haven't much unless it is straight on its end.

Q. What say?

A. I have but very little unless it is straight on its end, when I stand straight, but if I wanted to bend down that way with a load on, it gives way with me.

30

Q. Can't you climb?

A. I can climb but not very good.

Q. What do you mean by that? You know all about it. You say "Not very good." What is your experience when you undertake to climb?

A. I don't know how I can answer you, Judge.

Q. You say you can't climb very good?

A. No, sir.

Q. What do you mean by that?

A. Well, I can manage to get up. I couldn't possibly say I couldn't climb at all.

10 Q. No, I don't want you to say what isn't the truth. Do you have any trouble in climbing?

A. Sure.

Q. That is just what I want you to tell us. What is your trouble? What trouble do you have, in climbing up or down?

A. Both ways.

Q. What kind of trouble do you have?

A. I don't think I understand you, Judge.

Q. Do you have any trouble with your right leg?

20 A. No, sir.

Q. Do you have any trouble with your left leg?

A. Yes, sir.

Q. What is it?

A. The weakness in my leg. I see now.

Q. You see now what I was driving at?

A. Yes, sir; what I was driving at.

Q. Are you troubled with it in your sleep?

A. Yes, sir.

Q. What trouble do you have then?

30 A. Pain.

Mr. Bradley: I object to that. He doesn't have trouble when he is sleeping. He isn't conscious of any trouble in his sleep. It isn't conscious pain.

(Objection sustained.)

Q. What trouble does this leg give you when you are sleeping?

A. Well, it pains me, wakes me up sometimes.

Q. Does that happen after you work?

A. Yes, sir.

Q. How many hours a day can you work now conveniently?

A. I work eight when I work.

Q. Well, do you have any trouble?

A. Yes, sir.

10

Q. What is it?

A. My leg.

Q. Well, what is the trouble?

A. It tires me.

Q. Pain any?

A. Pains me when I work on it; yes, sir.

Q. What have been your doctor bills, have you any idea?

A. No, sir.

Q. Did the railroad ever do anything for you?

20

A. No, sir.

Q. Have you noticed whether this injury has had any effect upon your general health?

A. I don't think it has.

Q. Can you walk as far now as you could before?

A. No, sir.

Q. Why not?

A. Because that leg plays out on me.

Q. Can you run?

A. No, sir.

30

Q. Well, have you tried to run?

A. Yes, sir.

Q. With what result?

A. Well, I can't run. I have only got one leg to run with.

Q. Can't you run with that leg?

A. Not very well.

- Q. Why don't you leave the other one home when you are out? Do you have any trouble getting in and out of a wagon?
- A. Yes, sir.
- Q. What?
- A. Well, that leg don't bend up so I can step up.
- Q. Have you fallen?
- A. Yes, sir.
- Q. How frequently do you fall?
- 10 A. If I am in the woods, I fall quite often.
- Q. Now, what makes you fall?
- A. Catches my toes, this leg, I can't control myself.
- Q. And down you go?
- A. Down I go.
- Q. Have you fallen trying to get in or out of a wagon?
- A. Yes, sir.
- Q. Why?
- 20 A. On account of that leg.
- Q. When you have pain in that leg, about where is it located?
- A. Right around the knee.
- Q. Have pain anywhere else?
- A. No, sir.
- Q. Now, you stated that from the first of September until the following April you lost all your time?
- A. All; yes, sir.
- Q. When you began to go to work, did you work
- 30 as much right off the reel as you do now?
- A. No, sir.
- Q. About how much time did you work a day after you started to work?
- A. I wasn't working, Judge. I was superintending a little job for a man. Didn't work at all.

Q. Well, after you got to work, what portion of the day did you work?

A. I worked the whole day.

Q. After you started?

A. Yes, sir.

Q. Did you work every day in the week?

A. No, sir.

Q. Why not?

A. I couldn't do it.

Q. That was on account of your leg?

A. Yes, sir.

10

Q. Is that correct?

A. Yes, sir.

Q. You lost about how much time when you first began to go to work? How many days a week did you work?

A. If my memory serves me right, I didn't follow my trade that year. I think I farmed, because I could work on the soil better than work around brick or on a scaffold, and I farmed since.

Q. Then you haven't followed your trade?

20

A. I haven't followed my trade on account of I don't like to.

Q. How do you make out in farming?

A. Very poor this year.

Q. Well, did you make as much farming as you did following your trade?

A. No, sir.

Q. How much less?

A. Well, this year I have made all less.

Q. Well, take the year 1914, the year this accident happened?

30

Mr. Bradley: I object to this question. He said he didn't follow his trade because he didn't like it. As to what difference in the amount of money he made, it is entirely immaterial.

Q. What do you mean when you say you didn't like your trade?

The Court: It is inferred he has withdrawn his other question.

Mr. Bradley: I object. This is his witness. I think the words are perfectly obvious, didn't follow his trade because he didn't like it.

10 (Objection overruled.)

(Exception noted for defendant.)

Q. What do you mean when you say you didn't like to follow your trade?

A. I was afraid to climb in carpenter work and mason work, we have to climb on scaffolds, and I am afraid to do it.

20 Q. Well, compared with what you made at your trade, what have you made farming?

A. I don't consider that I have made anything.

Q. Have you made half as much?

A. No, sir.

Q. Have you a family?

A. Yes, sir.

Q. Consisting of what?

A. Three.

Q. Wife and ——

30 A. Wife and daughter.

Q. Now, there is one question I want to ask you. Coming down that road that you take to go to the station, is there any other way to get to the station than the way you took?

A. Yes, sir.

Q. Where is it? What other way?

A. Go down the Marshallville road until you cross the railroad and you come to that lane, as we always called it.

Q. How much longer would it take you to go that way than to go the way you usually went?

A. Around four to five minutes.

Q. Now, is there any other way, on the west side of the railroad, to get to the station, than the one you took?

A. No, sir.

Q. No street?

A. No street.

Q. Just that path?

A. That is all.

Q. And that is the one that the public uses?

A. (No answer.)

10

Cross-examination.

By Mr. Bradley:

20

Q. You say there is no other way? You could come down here and go on this side of the siding?

A. If you want to walk out through a man's field, go across the swamp.

Q. How near does the field run to the siding?

A. Right jamb up.

Q. There is no board to walk to the siding?

A. No, sir.

Q. You heard Mr. Harris testify that you could?

A. No, sir. It could be done but a man wouldn't have good sense.

30

Q. If Mr. Harris said he walked there, he is mistaken?

A. Mr. Harris doesn't understand the plan.

Q. If any other man testified he walks along there, you say it can't be done?

A. If any man testifies he walks on the west side of that, he doesn't know where he is at.

Q. Can't he walk between the whistle board and the track?

A. How close is the whistle board to the track?

Q. Eight feet.

A. A man ought to walk in eight feet.

10 Q. The corn field doesn't run up to the whistle board?

A. No. There isn't eight feet out there. I farmed that land and know all about it.

Q. How about that relay box? Can you walk between the track and the relay box?

A. That relay box runs across all the tracks.

Q. You can walk between there and the track, can't you?

A. How wide is your space there?

20 Q. Practically the same distance.

A. Eight foot?

Q. Yes. The eight foot space is between the side track and the relay box.

A. And the field?

Q. Yes.

A. No, you are wrong. The space isn't there. I farmed that. I ought to know what it is.

Q. At the time of this accident, you were not employed by the railroad?

30 A. I were not; no, sir.

Q. You had formerly been employed by the railroad?

A. Yes, sir.

Q. As a railroad man, you used that path, didn't you?

A. Yes, sir.

Q. How old are you, Mr. Hess?

A. I will be fifty-eight the ninth of next month.

Q. You were about fifty-three or four?

A. Fifty-three then.

Q. Now, how often, to your knowledge, did the railroad tear up this path between these tracks?

A. They never tear it up. When they put in ties they dig holes to draw the ties out.

Q. They use that space whenever they want to?

A. Sure.

10

Q. They dig it up any place?

A. Any place they want to; yes, sir.

Q. Now, you say this path runs all the way to the station?

A. Clear down until you come to the side track and across the side track.

Q. Where does the well-defined path go between the side track and the main track, where does the well-defined path take you?

A. Right down to the platform.

20

Q. Right down to there? Does it stop there, that well-defined path?

A. That well-defined path comes right along. This is your side track, that comes between the side track and the main line.

Q. Where does it branch off?

A. It comes right on down and goes on this side track until it strikes the platform. That is correct, isn't it?

Q. I don't know.

30

A. I do.

Q. It comes down here and ——

A. Then you go across this crossing to the depot.

Q. Witness is shown Exhibit D2 and is asked where the well-defined path is across there?

A. Don't seem to understand this very well, brother.

Q. This is the siding, that is your main southern track. Do you understand it? This is coming up to the point —

A. This is the Ocean City branch, is it?

Q. Yes.

A. And this is the Cape May branch?

Q. Yes. Coming in this direction, the path comes along there?

A. The two main lines leading to Cape May?

10 Q. Yes.

A. I don't understand that. I can understand that, but not the picture.

Q. Do you see the pink on the map?

A. Yes.

Q. This is the pink. You see the green?

A. Yes.

Q. Now, this is the path you speak of that comes right on down there over to the track. Now, where over these ties is your well-defined path?

20 A. It isn't over the ties.

Q. Does it stop before it gets to the ties? Does it run all the way across over the main track to the extreme side?

A. The path doesn't show. I could explain it to you on that but I can't show it to you on this.

Q. It doesn't run across ties, does it?

A. The path, when it comes to the side track, we go right on across the side track until we strike the depot.

30 Q. Now take the other side. Where does it go across down there?

A. I don't see how I can explain it to you on that.

Q. The ties run all the way across under the two tracks?

A. Sure.

Q. Well, there isn't any well-defined path over those ties, is there?

A. How can you make a well-defined path over wood? You can't make any impression, but we go over there, it is on wood in place of cinders.

Q. It isn't well-defined if you can't see it?

A. It is as well-defined as on that floor.

Q. Where?

A. Where you walk.

Q. You mean well-defined is where you walk and 10
not the impression made on it?

A. Yes, sir.

Q. (Question repeated.) When you say the well-defined path coming down over these railroad ties, you mean that is where the people walk and not the path which they make on the ties, there isn't any path on those ties?

A. Can't possibly be.

Q. Then all the way down to the station there isn't a well-defined path, because you don't see it on the 20
floor, you couldn't see it on the wood?

A. The path is all the way down there.

Q. If you couldn't see it on the wood, it isn't there?

A. I never saw any man's tracks on the ties but I have seen them go there.

Q. Now, since this accident, how have you been getting to the station? You have been going down this road?

A. No, sir; the same way. 30

Q. You have never gone that other way since the accident?

A. No, sir.

Q. Are you sure of that?

A. I never got off the train and gone that way unless it was way after dark.

Q. At night you consider it unsafe?

A. I don't like to stub my toes and fall down.

Q. It is rather a rough place?

A. No, sir; the path is alright.

Q. But it has a switch running across it?

A. Yes, sir.

Q. So that is the only time you used the road, at night?

A. Yes, sir.

10 Q. Meaning the Marshallville road?

A. Not the Marshallville road, the lane running to the station.

Q. The lane connecting with the Marshallville road?

A. Yes, sir.

Q. You said the railroad company never did anything for you. Dr. Schellinger didn't charge you anything?

20 A. The railroad company crippled me and took me there and I suppose they settled the bill.

Q. You never paid it?

A. No.

Q. Then the railroad company might have paid it?

A. I don't know.

Q. Do you remember Mr. Miller, investigator of the Atlantic City Railroad Company, coming to you in the hospital?

A. Some man came. I don't know whether it was Mr. Miller or who it was.

30 Q. Did you tell him that you used that path as a short cut and that you attached no blame to the railroad company?

A. I never told nobody that.

Q. And that you hoped the railroad company would do something for you?

A. No, sir; never dreamed of such a thing.

Q. Now, you were in a hurry to get to the station that morning, you hadn't very much time?

A. I don't think I was in such an awful big hurry.

Q. Where had you been trying to get cement just before this accident?

A. I hadn't been anywhere.

Q. Didn't you go to Mr. McKeague's place?

A. I made a contract with Mr. McKeague to do that work that morning and went back and changed my clothes.

10

Q. You hadn't much time?

A. I had plenty of time.

Q. You went to the station to see the agent to find the rates before you went home?

A. No, sir; I knew the rates. I might possibly have come to the station. I came that way home, I expect. I always do travel that, but I had no reason to ask the rates, for I knew.

Q. You said you had a compound fracture of the left leg. What did you mean by that?

20

A. The bone was busted out through my pants in two places.

Q. Did you usually go along that path without listening as to whether or not a train was coming?

A. No, sir.

Q. Did you usually turn around to see if a train was coming?

A. Always looked before I went down the track.

Q. But you never looked from the time you left the Marshallville road until you got to the station?

30

A. Sometimes I presume I did.

Q. Why did you look then?

A. The thought would strike me to look.

Q. You thought you ought to look out for the trains?

A. A man would usually think so, wouldn't he?

Q. Now, you said after you were injured you were superintending some work?

A. The next spring.

Q. How long did that work last?

A. About three weeks, I think.

Q. You worked every day, didn't you, then?

A. No, sir.

Q. How often?

A. Well, bad weather, in it I couldn't work. I don't just remember the dates.

10 Q. You wouldn't have worked in the bad weather if you had been perfectly well?

A. I wasn't getting paid for it. I was working for my brother-in-law.

Q. Then after that where did you work?

A. I think I worked three or four days on the silk mill at the depot. We got fifty cents an hour, four dollars a day.

Q. The same rate as before you got hurt?

20 A. Yes, sir.

Q. How long did you continue to get the same rate as before you were hurt?

A. Whenever I worked.

Q. The loss was only in the difference between the number of hours you worked?

A. The number of days.

Q. Have you any idea of the percentage of the time you worked after you were injured?

A. I really haven't anything more than I know I 30 didn't work but very little.

Q. Before you were injured, when it was raining, you didn't work on cement work?

A. Not outdoors.

Q. So that both before and after you were injured, your work depended somewhat on the weather?

A. Sure.

Q. Did you ever stumble before you were hurt?

A. Not very often. I wasn't in the habit of falling down.

Q. How often do you fall down now?

A. Every time I catch my toes.

Q. How often is that?

A. I don't know. I never kept no record.

Q. Fall down very often?

A. Yes, sir.

Q. When you worked for the railroad, in what capacity were you employed? 10

A. One time was night man, boss over the engines, and I fired and I have run.

Q. So you were familiar with the sound of the engines?

A. Sure.

Q. And you were familiar with the sound of the engines drifting into the station, were you not?

A. Yes, sir.

Q. How near was this engine to you before you heard it? 20

A. I never heard it until she hit me and knocked me down.

Q. You knew the wind was blowing in your face at that time?

A. I reckon I did.

Q. And you knew, if any signals were given, you couldn't hear them?

A. I wasn't thinking anything about that. If a signal had been given, I would have heard it. 30

Q. Then the fact the wind was blowing in your face had nothing to do with it?

A. Nothing more than it would deaden the sound.

Q. Were you paying attention to any sound?

A. Sure.

Q. Because a train was shortly to come along?

A. No, I didn't know the train was due soon. I didn't know what time she was due there. I knew what time my train was due that I was going away on.

Q. You were not familiar with this other train?

A. No, sir.

Q. How far from the Marshallville road is it to this spur? Did you say two hundred feet?

10 A. I should say in the neighborhood of two hundred, two hundred and fifty, somewhere along there. I really couldn't give any accurate measurement because I had no reason to measure it.

Q. How far had you gone between the spur and the south bound track when you were hit, do you know?

A. No, I couldn't give you the distance.

Q. Have you any idea?

A. I haven't, because I never measured it.

20 Q. Could you tell where you were in reference to the signal tower?

A. I think I could give you some idea about that.

Q. Were you up to the whistle board? Somewhere along here, do you think?

A. That is the signal tower. Well, now, I should think a little toward—I hadn't reached the tower.

Q. As near as you can.

A. As near as I can remember, somewheres in that neighborhood.

30 Q. Not quite to the tower?

A. Not quite to the tower.

Q. As you came down the track, you didn't observe the semaphore, whether or not that was open to let a train go by?

A. No, I didn't notice it.

Q. You didn't notice that at all?

A. No.

Q. How often did you say the railroad company had torn up this path to fix?

A. I didn't say how often.

Q. How often did you say?

A. I didn't say how often.

Q. Do you know how often?

A. No, sir.

Q. When you were a railroad man, you saw them do that?

A. I didn't do that kind of work.

10

Q. You saw them do it?

A. Yes, sir.

Q. And you have seen them do it since?

A. Yes, sir.

Q. They tear it up whenever they want to?

A. Yes, sir.

Q. Without regard to whether the public wants it or not?

A. Sure.

20

Re-direct examination.

By Mr. Wescott:

Q. Now, Mr. Hess, when you say they tear up this path, what do you mean?

A. When they put ties in under the rail they dig at the end of the tie, pull the tie out and slip one in and fill up the hole. I did that work when I was a young man.

30

Q. After they put the tie back, what did you observe them to do with reference to the path?

A. Fill up the hole and level it off.

Q. As it was before?

A. Yes, sir.

Q. So that the path is left in the same condition it was before?

A. Yes, sir.

Q. Calling your attention now to the Marshallville road, which you call the lane, east of the tracks, what kind of road is that?

A. That is a pretty good road now. It hasn't been one for a few years past.

Q. And the space between the road, the Marshallville road, what is that occupied with?

A. Between the railroad and this lane we are
10 speaking about going to the depot, that is a farm field, farm land.

Q. It is all sandy soil?

A. Yes, sir.

Re-cross examination.

By Mr. Bradley:

Q. With reference to the tearing up of the path,
20 they put cinders or anything they want?

A. They put the same material they took out.

Q. They don't pound it down?

A. I never saw them. It doesn't take very much time to pound it when enough travel it.

Q. The railroad company doesn't do it?

A. No.

Q. Now, there are wagons that can pass on this road, can't they?

A. They can pass.

Q. And that is public?
30

A. That is public.

Q. How long has it been there, to your knowledge?

A. I am only fifty-eight years old. I can't tell how long it has been there.

Q. Has it been there as long as you have known it?

A. Yes, sir. That wasn't the road until recently. It used to be the lane went down to a farm.

Q. They use this Marshallville road, called public road, marked on the map "Marshallville road," or lane—they have used it ever since you have known anything about it?

A. Wagons have, yes, sir.

WILLIAM A. WESCOTT, SWORN.

10

Direct examination.

By Mr. Wescott:

Q. You are a doctor, are you, by profession?

A. Yes, sir.

Q. And have been for how many years?

A. Thirty-six.

Q. Did you, at Dr. Sharp's request, for the purpose of testifying in this case, examine Hess's leg?

20

A. Saw him yesterday, yes, sir.

Q. Tell the jury what originally was the matter with his leg and what condition it is in now.

A. This man has had what is known to the profession as a compound fracture of the femur, the big bone above the knee, a few inches above the joint. Now, there are a number of scars, there is an area that is all scarred up, three or four inches above the joint, on the outside the flesh is white and presents the usual appearance of a scar. Underneath this, the bone is thickened, there is a bunch on the bone, the bony structure, which is half as big as my fist. It is difficult to say exactly how big that is, roughly speaking. That is what the leg presents, except the

30

shortening, which is an inch and three-quarters, the left leg.

Q. Has the original function of that leg been diminished?

A. It is diminished just as much as the shortening can be understood and the working of the tendons over this big bunch of bone and the resulting inflammation has changed the bone somewhat. It is weakened. The action of the tendons of that portion of the leg is impeded and the man hasn't perfect use of it.

Q. Will he ever have?

A. No, sir.

Q. Is it a condition that would cause him any pain, do you think?

A. I have no doubt that the man suffers with the limb now. Originally, it was a very profound injury and doctors approach it with great respect. It is a hard thing to cure. The reason it is called compound is that the bone was pushed through the flesh and comes out into the open air, and gets the expression compound fracture.

Q. Is that leg relatively as strong as the other?

A. No.

Q. It has been suggested that I bring out the fact you are my brother?

A. Yes, sir.

Cross-examination.

30

By Mr. Bradley:

Q. Now, Doctor, is there any evidence at the present time of a compound fracture?

A. Everything about the leg indicates. In other words, you could make a diagnosis of what caused the thing without a word from anybody.

Q. What evidence did you find of a compound fracture?

A. The whitened, scarred tissue on the outside, which extends three or four inches, indirectly, and the bunched up callous under the flesh, and the bone itself, and the shortness of the leg. An ordinary fracture, well treated, I am very certain wouldn't be so —

Q. You were informed it was a compound fracture by Dr. Sharp?

A. I heard that expression used. 10

Q. And you expected to find such evidence on examination?

A. To a certain extent.

Q. Then your opinion is partly based on what Dr. Sharp said?

A. No.

Q. Not at all?

A. No.

Q. If this man had had his leg broken and the skin had been broken from the outside, or cut, what difference in appearance would it have than the appearance it has now? 20

A. Well, the chances are that such a condition would have made a very different scar.

Q. We are speaking about the probability.

A. I can't be absolute about that.

Q. You didn't see the man until the time of your examination yesterday?

A. Never until yesterday.

Q. You don't know what condition he was in before the accident? 30

A. Except —

Q. I would like to have yes or no to that, please.

(Question repeated.)

A. No, sir.

Q. Now, you say that the tendons diminish the functions of this leg?

A. I say the irregularity of the bone hinders the tendon from doing its work. It has more distance to travel. It travels over a roughened surface.

Q. Did you have an X-ray picture of this?

A. No.

Q. Simply by feeling it?

10 A. Feeling it.

Q. How long were you in your examination?

A. Ten or twenty minutes, something of that kind; I don't know.

Q. Now, you say they changed the joint somewhat. What was the shape of the joint before this accident, if you know of your own knowledge?

A. Nothing, except I inferred he was a normal man.

Q. That is an inference on your part, is it?

20 A. Yes, putting it that way, of course.

Q. How does this joint appear at the present time?

A. There is very little to see from the outside other than the other joint. It is a matter of touch, feeling the bone underneath.

Q. The joint is about the same size of the other leg?

A. I think so.

PLAINTIFF RESTS.

DEFENDANT'S MOTION TO NON-SUIT.

Mr. Bradley: If your Honor please, I would like to make a motion.

This action is based upon the negligence of the defendant company in operating one of its trains along the tracks adjacent to a path or highway in such a manner as to strike the plaintiff and injure him. 10

In this case we think your Honor should direct a verdict. I think we should be entitled to a non-suit, on the ground that the statute prohibits the man walking in this particular place in which he was injured.

Section 55, Railroads and Canals, page 4245, Compiled Statutes: "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing." 20 30

The evidence in this case fails to show anything more than that this man was using this property of the railroad company, was going between the main

track and a spur, which the railroad company had torn up whenever they wanted to; and their own witnesses who come here state that it wasn't a safe place for a woman to walk, men wouldn't allow their children to walk there, and the only people who used it were the people down in Marshallville.

There has been no evidence submitted to you of any negligence on the part of the railroad company in operating its trains; and if he were a licensee in
10 this case, there is no evidence that we wilfully, wantonly or intentionally injured him, which must be presented before the plaintiff would be entitled to have this case go before a jury.

The Court: I will reserve my decision on the non-suit and allow the defendant to put in its case.

(Exception noted for defendant.)

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DEFENDANT'S TESTIMONY.

WALLIS J. WRIGHT, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Wright, where are you employed?

10

A. Atlantic City Railroad, baggage master.

Q. Were you baggage master in 1914?

A. Yes, sir.

Q. Do you remember the day of the accident to Mr. Hess?

A. I remember that morning. I don't remember the date.

Q. I said do you remember the day?

A. Yes.

Q. What were you doing on the train at that time? 20

A. I was baggage master, standing up in the car.

Q. What car?

A. Baggage car.

Q. Where was that?

A. Right behind the tank of the engine.

Q. And what did you observe, if anything, in approaching the station that day?

A. I was standing up and I heard the engineer blow his whistle signal warning.

Q. What kind of whistle?

30

A. Four or five short blasts of the whistle.

Q. Is that a distress signal ordinarily?

A. Why, something on the road.

Q. What did you see?

A. I saw something, kind of dark object. I pulled myself back in the car again, because I didn't want it to come up over me. I didn't know what it was.

Q. Then afterwards you found it was Mr. Hess who was injured?

A. We stopped and found the man there.

Q. Where Mr. Hess was walking, was there a distinct foot path there?

A. No, sir.

Q. Where was he walking?

A. Walking in between the side track and the main south bound track.

10 Q. Have you ever seen the railroad company making a path for the people to walk there?

A. No, sir.

Q. Ever seen that torn up along there?

A. We don't stop there long enough, only to cut off cars, and then we proceed. I wouldn't take much notice of that.

Cross-examination.

20 By Mr. Wescott:

Q. What train were you on, the train that struck Mr. Hess?

A. We call it 403, the Cape May express.

Q. Was it the train that struck Mr. Hess?

A. Yes, sir.

Q. And you say there were four or five blasts given. Where was the train then?

30 A. Where was the train then? Why, coming into Tuckahoe station, getting ready to stop.

Q. Drifting into the station?

A. Drifting in, yes.

Q. Those were danger signals, I suppose?

A. That is what we take them for, when the engineer blows so many sounds of the whistle, we take it for a warning.

Q. Four or five?

A. As near as I can judge, it was four or five blasts of the whistle.

Q. Did the train stop immediately?

A. He couldn't stop no quicker than he was going to stop, because he had his brakes on then at the time.

10

EBENEZER BROWN, SWORN.

Direct examination.

By Mr. Bradley:

Q. Where are you employed?

A. Tuckahoe tower.

Q. Where were you employed on September 1, 1914?

20

A. Tuckahoe tower.

Q. Of the Atlantic City Railroad?

A. Yes, sir.

Q. Do you remember the day of this accident?

A. I do.

Q. What first attracted your attention about the time that this train was coming in?

A. Several sharp blasts of the whistle.

Q. Whistle on what?

A. On the locomotive of train 403.

30

Q. On train 403?

A. The south bound train.

Q. What time was that train due there?

A. I think she is due to leave at 10.02.

Q. What time was it due to arrive there, do you know?

A. Well, it gets there about ten o'clock, 9.59. It lays two or three minutes, generally takes water.

Q. Did you throw the switches for that train?

A. Yes, sir.

Q. Did you throw the switch that day?

A. Yes, sir.

Q. What did you do after you heard these distress signals, if anything?

A. I didn't do anything.

10 Q. How did you know it was this train that hit the man?

A. Well, it runs that way every day.

Q. Mr. Brown, you have heard spoken of a well-defined path. Do you know any well-defined path between the siding and the south bound track?

A. There is no path maintained by the company.

Q. You know that?

A. Yes, sir.

20 Cross-examination.

By Mr. Wescott:

Q. But there is a path there?

A. People walk there.

Q. There is a path there, isn't there?

A. I wouldn't call it a path.

Q. Well, you can see it distinctly?

A. Part of the time there is.

30

Re-direct examination.

By Mr. Bradley:

Q. How far up does that path run? It doesn't run up any farther than those cross ties?

A. No.

Q. Does it run all the way up to the station?

A. No.

10

Re-cross examination.

By Mr. Wescott:

Q. How far does the path run?

A. I can't say.

Q. Well, give us a good, square guess, how far does it run?

A. As far as that switch.

Q. Well, how many feet, how long is the path?

A. I couldn't say.

20

Q. Can't you give us your judgment?

A. Maybe four hundred feet.

Q. Four hundred feet?

A. Maybe.

Q. Now, it takes a good deal of walking to make a path, doesn't it?

Mr. Bradley: I object. I don't think this witness is competent to tell how much walking it takes.

30

Q. It takes a good deal of walking to make a path?

A. Yes, sir.

Q. Paths don't make themselves, do they?

A. No, sir.

THOMAS H. ASHTON, sworn.

Direct examination.

By Mr. Bradley:

Q. Mr. Ashton, where are you employed?

A. Atlantic City Railroad.

Q. Where were you employed at the time of this
10 accident?

A. On the train you speak of, conductor of the train.

Q. Conductor of the train that hit Mr. Hess?

A. Yes, sir.

Q. And will you tell what you know of the movement of the train or anything that happened on the train from the time it passed the Marshallville crossing until the time of the accident?

A. After passing the Marshallville road, I was in
20 the cars, getting ready to announce that station and discharge passengers, and my attention was directed by the short blasts of the whistle, and knowing that meant danger ahead I stepped forward between the cars to see what happened and I discovered the train was stopping rapidly and I stepped from the train and found Mr. Hess lying between the tracks.

Q. Between what tracks?

A. The south bound main.

Q. Below the tower?

30 A. Just a short space below the tower.

Q. You know of the space between that track, the main south bound track and the spur, you have seen that space there?

A. There is a space there.

Q. Do you consider that a well-defined path?

A. Well, no more than some other spaces around

the tracks. Of course, people walk there, employees and others.

Q. You have seen them walk other places along there too, haven't you?

A. Sure.

Q. Did you ever see the company make any path for the public to walk there?

A. Never has been.

Q. How long have you known it?

A. Twenty years.

10

Q. Twenty years from the time of the accident or twenty years from this time?

A. I have been running trains on that division for the last twenty years as baggage master and conductor.

Cross-examination.

By Mr. Wescott:

20

Q. How long is the path?

A. Well, there is a space between the track from the Marshallville road down a short distance below the tower.

Q. How long is the path?

A. I judge four or five hundred feet from the crossing to the tower.

Q. People use that path to get on the cars and get off the cars?

A. That I couldn't say. If they were walking there, I don't know whether going to the cars or where they were going.

30

Q. Well, trains often stop along there?

A. When we have occasion to stop there, we are cutting off cars of the Ocean City division and my duty would be to pay attention to necessary work I am doing.

Q. You are conductor?

A. Yes, sir.

Q. You saw people get on and off there at that path?

A. Not from the train that I operate. We discharge our passengers at Tuckahoe station.

Q. How wide about is the path?

A. Well, the space between the tracks is about four foot.

10 Q. How wide is the path where people walk?

A. Well, I should judge eighteen inches, two feet.

Q. It is right next to the ties?

A. Yes, between the ties of the siding and the main track.

Q. And people walk that path to get to the station?

A. Well, if I see them walking there I couldn't tell where they are going.

Q. The path didn't come there of its own accord?

20 A. There is a space between —

Q. The path didn't get there itself?

A. I didn't say there was a path. I said a space.

Q. Is it worn where people walk?

A. It might be no more than other places.

Q. I am talking about that place.

A. I couldn't judge. I never paid attention to see whether it was a worn path or not.

Q. Well, you look at it the next time you go by there.

30 A. I might have occasion if you want me to.

WALTER ZIMMERMAN, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Zimmerman, you were formerly an employee of the Atlantic City Railroad?

A. I was.

Q. You are now, as I understand, on pension? 10

A. Yes.

Q. Are you familiar with the surroundings at Tuckahoe station?

A. I am.

Q. How long have you been familiar with that locality?

A. Since 1896.

Q. And what was your position at that time?

A. Foreman carpenter.

Q. Do you recall the day Mr. Hess was injured? 20

A. I do.

Q. Where were you just before he was injured?

A. I stood on the south bound track, on the platform, the south bound track.

Q. This platform, the smaller platform?

A. It is the station platform on the south bound track, in front of the station.

Q. Right in front of the station?

A. Yes.

Q. Did you observe Mr. Hess before he was hit? 30

A. I did.

Q. Where was he coming?

A. He was walking toward the station.

Q. Whereabouts?

A. About, I judge, three or four hundred feet from the station.

Q. And where was he in reference to the tracks?

A. Where was he when I seen him? When he was struck, he was walking on the end of the ties.

Q. When you saw him walking, he was on the edge of the ties?

A. Yes.

Q. Between the main south bound track and the spur?

A. Yes.

10 Q. Is there any well-worn path there?

A. Not along there there is not, nothing only where workmen and anybody that happens to walk along there.

Q. Do you know of the company building any path there for people to walk?

A. I do not.

Q. Have you ever known that space between the tracks to be obstructed with lumber and other things?

20 A. I have. It has been there for months, as much as three months, between the Marshallville road, when we built the bridges there on each side of the tracks, north and south bound tracks, full of stone and lumber so nobody could walk there without them walking on the tracks.

Q. And it has been as much as three and four months at a time?

A. Yes.

30 Q. Between those tracks, what is the construction there, what material?

A. Stone and stringers, ties, piling.

Q. Switches?

A. Yes.

Q. Is that any different in appearance from any of the other places along there between the tracks?

A. I didn't understand you.

Q. Is there any difference between the construction of the materials or is there any difference in the materials that are used between these tracks and on other tracks?

A. No, it is all cinders.

Cross-examination.

By Mr. Wescott:

Q. If I understand you, you say the space between the south bound main track—I mean the west bound main track, the west main track and that little spur, is filled up with stone and material of different kinds? 10

A. No, I didn't say that.

Q. I understood you to.

A. I said the space south of the Marshallville road, for probably two hundred feet, was occupied, the gutter was filled up on each side of the ties with lumber. 20

Q. Yes, now when was that?

A. When was that? Six or seven years ago.

Q. And how long were those obstructions there?

A. Probably three months.

Q. Then you don't mean the space between the spur and the west track, clean down to the depot, is filled up with material?

A. I did not, because there is no room there for any lumber.

Q. And how long is the path between those two tracks? 30

A. How long is it?

Q. Yes.

Mr. Bradley: I object. The witness hasn't testified to any path.

The Court: As I understand from the testimony of the witness, there is no admission on his part of any path. To that extent it will be stricken out. You may ask him the distance between certain points.

Q. Is there a path of any sort there?

A. Yes, from Marshallville road down to where the company had a little blacksmith shop, there is a gutter along there that people walk it. It was no path. It was a gutter at the outside end of the ties.

10 Q. Is there a path between the spur and the west track, along which people walk going to and from the station?

A. I wouldn't say there was. There is no path there. I have walked there hundreds of times, and I always, got on the ties, going to the station. Other people did the same.

Q. You don't have to walk on the ties?

A. You would walk on the cinders if you didn't.

20 Q. How big are those cinders?

A. From two inches, four inches, half inch, inch, in diameter.

Q. You mean to say that space between the tracks is filled up with cinders?

A. Yes.

Q. Now?

A. I don't say now. I haven't been there now.

Q. How long since you were there?

A. About a week ago.

30 Q. Well, then it was filled up with these cinders?

A. No, I didn't look at it.

Q. When did you see these big cinders there between the tracks the last time?

A. When I worked there on the road.

Q. How long ago was that?

A. Four years ago.

Q. How did those big cinders get there?

A. Brought there by trains and dumped there, cinders and stone.

Q. What kind of stone was it?

A. Broken stone, crushed stone.

Q. How big?

A. Probably two inches in diameter.

Q. And all that space between the west track and the switch was filled up with cinders and stone as you described four years ago?

A. Yes.

10

Q. Sure about that?

A. Not filled up level, I don't mean leveled, but it was graded off from the end of the ties down to the gutter between the tracks.

Q. When you got to the end of the ties, what condition was the ground in there?

A. Stone and cinders.

Q. Then it was all stone and cinders four years ago?

A. Yes.

20

Q. Is it so yet?

A. I haven't been there to look at it.

Q. You were down there the other day. Couldn't you see?

A. I had no business to look at it. I only stopped there going to Cape May.

Q. Didn't you see the stone and cinders there?

A. Yes, I could see stones when I was there.

Q. All that distance between the west track and the spur, clean down to the depot?

30

A. Yes.

Q. All stones and cinders?

A. Yes.

Q. And they are there yet?

A. And they are there yet.

HARVEY W. SNYDER, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Snyder, you are in the employ of the Atlantic City Railroad Company?

A. I am.

10 Q. How long have you been?

A. Since January 15, 1901.

Q. And were you on the train which ran into Mr. Hess?

A. I was.

Q. Will you tell the Court and jury just what happened before the train came into the station and what you observed?

A. I was riding on the rear part of the coach, on the rear coach.

20 Q. What was your position with the railroad?

A. Supervisor. I was riding on the rear coach, on the rear end of it, and I heard several short, sharp blasts of the whistle, which attracted my attention to go outside. I seen Mr. Hess laying between the south bound track and the siding. When the train came to a stop enough for me to get off, I was approaching him when the conductor, Mr. Ashton, told me to go around and hold the train that was coming to Philadelphia, so they could place

30 him on the train, which I did.

Q. How fast was the train coming into the station?

A. Well, it was slowed down to stop at the station. I couldn't tell exactly the speed but it was slowed down.

Q. Is it your duty to keep the railroad equipment in repair?

A. As far as the tracks are concerned, yes.

Q. And whose duty is it to keep between the tracks?

A. Mine.

Q. Now, between this main south bound track and this spur, is there any well-defined path there?

A. Well, there is a space that our employees and outsiders from Marshallville use. I wouldn't call it no path.

Q. Has that ever been dug up by the railroad? 10

A. When we place ties in the south bound track, we are compelled to dig a trench in order to get them out and in.

Q. Now have you ever been there when such work was under construction?

A. Oh, yes.

Q. And did you say that you were the man who directs the work to be done?

A. To a certain extent. I give the foreman orders and he sees that it is done. 20

Q. How often have you seen that path dug up?

A. I don't know. We place ties there once a year, what needs to come out.

Q. Now, is the space between the south bound track and the siding any different in construction and materials there than the spaces between the other tracks?

A. No difference whatever. We ballast the track and fill up between the track and siding with cinders everywhere on the Cape May division. 30

Q. And there are cinders there?

A. Yes.

Q. And you didn't pack that down with any instruments, to make a path for the public to walk on, did you?

A. No, sir.

Q. There is access to that station other than using the railroad?

A. Yes, sir.

Q. Where is that?

A. The public road.

Q. Did you ever see Mr. Hess use that public road since the accident?

A. I did.

Q. When?

10 A. After he came from the hospital, a number of times.

Q. You are sure of that?

A. I am certain of it.

Q. Do you know Mr. Hess?

A. I certainly do.

Q. Did you know him when he was in the employ of the railroad?

A. Yes, sir.

20 Cross-examination.

By Mr. Wescott:

Q. How long is that path?

A. There is no path there.

Mr. Bradley: I object. The witness hasn't said there was any path.

30 Q. Well, there is a place where people walk?

A. There is a place where they can; yes, sir.

Q. How long is the place where people walk?

A. Well, they walk from the Marshallville road to the station.

Q. And how wide is the place where people walk?

A. They walk all over the tracks.

Q. How wide is the space where people walk?

A. Well, that is a pretty hard question to answer your way.

Q. What people walk there?

A. Well, Mr. Hess says he walked there. I have seen him walk there and others.

Q. You have seen lots of people walk there?

A. Well, quite a number.

Q. Who were they?

A. I don't know just as I can name them. I can name some of them. 10

Q. What were they walking there for?

A. They walked there, I suppose, to get to the station.

Q. And they walked along that space there until they got to the platform and then went across to the station?

A. That space you are speaking about doesn't reach the station—doesn't reach the platform.

Q. Well, about how long is that space where you have seen people walk? 20

A. You mean from the Marshallville road?

Q. Yes. You said it went from there to the station. How far is that?

A. The space between the siding and the south bound track, from the Marshallville road down, is something like twelve or thirteen hundred feet.

Q. So this space where people walk is twelve or thirteen hundred feet long?

A. Yes. 30

Q. When you take ties out, you dig a hole, don't you?

A. Dig a trench across this space.

Q. Then when you put the ties back you fill up the hole, don't you?

A. Yes, sir; for the safety of our employees.

Q. And level it off?

A. Yes.

Q. And that is the space you have in mind that you say you have seen people walk, isn't it?

A. I have in mind ——

Q. Isn't it?

A. No; I have in mind ——

Q. Where did people walk?

A. People walked on both tracks, all three tracks.

10 Q. Did people walk between the west track and this spur?

A. They walked there, yes.

Q. For the purpose of getting to the railroad station?

A. Yes.

Q. And they used that when they went away from the station, didn't they?

A. Well, when they generally went away from the station they used the other side.

20 Q. Well, they used that too?

A. I don't know any more than the other side.

Q. But they used it some?

A. Yes; there they walk over everything.

Q. Even get out in the field?

A. Yes, I have seen them in the field.

Q. Well, that is a place that isn't thickly populated?

A. What place is that?

Q. This place where the station is, it isn't a city?

30 A. No; don't expect it ever will be.

Q. And people that want to get to that depot, they have to get there by some means or other, don't they?

A. Yes.

Q. And you have seen them use what you call a space and not a path?

A. Yes.

Q. Going to and from the depot?

A. Yes.

Q. How many years have you seen people using that?

A. Ever since I have been on the road.

Q. How long?

A. Ever since the fifteenth of January, 1901.

Q. So that this space has been used since the fifteenth of January, 1901, by people going to and from the station? 10

A. Yes, a certain part of it.

Q. A certain part of it?

A. Yes.

Q. Well, is that space filled up with stones and cinders three or four inches big?

A. Well, cinders vary in size.

Re-direct examination.

By Mr. Bradley: 20

Q. You said that this space people walked down doesn't have cinders down there at the point?

A. When it gets down to the point, the track itself covers all of the space.

Q. And some go in one direction and some in others?

A. A certain part of this is switch timber, both the main track and siding. There is no room for cinders only between the ties and the timber. 30

HENRY J. MORGAN, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Morgan, where are you employed?

A. Tuckahoe, New Jersey.

Q. In what capacity?

10 A. Station agent.

Q. At the Atlantic City Railroad Company station?

A. Yes, sir.

Q. How long have you been so employed?

A. Since January 2, 1900.

Q. Do you recall the day of this accident, when Mr. Hess was injured?

A. I do.

Q. Where were you at the time?

20 A. In my office.

Q. And you knew there was a train due shortly, at that time, or shortly after, did you?

A. Yes, sir.

Q. Any way that your attention was directed to that train?

A. My attention was directed to something unusual by several sharp, short blasts of the whistle.

Q. What is that known on the railroad?

A. That indicates danger.

30 Q. You heard them?

A. Yes, sir.

Q. And what did you do?

A. Why, I went outside.

Q. What did you find when you got out there?

A. The first thing I noticed was Mr. Hess being carried down the platform.

Q. Now, you are familiar with the surroundings of that station?

A. Yes, sir.

Q. Is there any well-defined path from the Marshallville road down the track and between the spur and the south bound track, all the way to the station?

A. There is no continuous path from the Marshallville road crossing to the station.

Q. You have seen that path torn up, I suppose? 10

A. Innumerable times.

Q. You know that people do come down the railroad to short cut to the station?

A. Yes, they use it as a short cut.

Q. There is also a roadway?

A. There is a highway that can be used, it don't take much longer to use the highway than it does the short cut.

Q. You saw Mr. Hess that morning at the station, before the train came in? 20

A. I did.

Q. About what time?

A. I couldn't state exactly but he was there in the early part of the morning.

Cross-examination.

By Mr. Wescott:

Q. You say you have seen this path torn up in- 30
numerable times?

A. Yes, sir.

Q. For what purpose?

A. Repairs to the track.

Q. Taking out ties and putting them in?

A. Yes, sir.

Q. Then when they were taken out and put in, the conditions were repaired?

A. No path, just merely cinder ballast.

Q. I asked you if conditions were not restored?

A. Not exactly. You couldn't leave things as they were before.

Q. You left that space torn up, did you, or did you level it off?

A. No, the cinder ballast was leveled off.

10 Q. Now, that is the space in which you have seen people walk, coming to the station and coming from the station?

A. I have seen them walk there and all over the tracks, in between and outside.

Q. That is a space you have seen people use, going to and from the station, isn't it?

A. Some of them, yes, some of the people.

Q. And unless they walked on the railroad bed or unless they went across and took the sandy road
20 called the lane?

A. It isn't sandy.

Q. Well, took the gravel road, then, that was the only way they had to get to and from the station?

A. That was the only and proper way to get to the station.

Q. Assuming they didn't go on the Marshallville road, and assuming they didn't walk between the iron rails, on the railroad bed, that space between those two tracks was the only way people had to get
30 to and from the station?

A. No, sir; there was another space.

Q. Where was it?

A. On the east side of the north bound track.

Q. Assuming people didn't go on the east side of the north bound track, assuming they didn't walk on the ties between the tracks and on the railroad

bed, and assuming they didn't take that Marshallville road, then the only place left for them to get to and from the station was the space between the tracks?

A. The space didn't go all the way to the station.

Q. That was the only way?

A. Rather than cross all three tracks.

Q. How long was the path?

A. Well, this space, about twelve or thirteen hundred feet, I judge. 10

Q. Then there was a space from twelve to thirteen hundred feet long that people walked to get to and from the station, didn't they?

A. They did if they felt so disposed.

Q. And how many years have people been using that space to get to and from the station?

A. Ever since I have been there, twenty years nearly.

Q. And they got off the trains on that space? 20

A. They do under protest, they have been told not to.

Q. And they got on the trains?

A. I haven't seen them get on the trains there. I have heard they did.

Q. And you have seen them get off?

A. Yes.

Q. And use that space. Was there any space west of the westernmost track that people could use to get to the station? 30

A. There is a siding but a field beyond that.

Q. People couldn't get to the station that way?

A. Not very well, unless they went through a swamp.

Q. Consequently, the people had a choice of getting to and from the trains, either going through the

swamp, first, or walking between the tracks on the railroad bed, second, or by taking that Marshallville road, third, or by walking east of the tracks, in the space between the Marshallville road and the tracks, fourth, or the space that you say they used ever since you have been there. They had their choice?

A. Yes, if they looked at it that way.

Q. Hadn't they their choice?

10

A. We didn't give it to them.

Q. They had their choice?

A. Yes, they cut wherever they wanted to.

Q. On the west side of these tracks, if people wanted to get to the station they had to cut through a swamp?

A. There is a field and part of a swamp.

Q. Now, another place was to cross the tracks and coming down that road and then cross these tracks?

A. Cross the tracks at the Marshallville road crossing.

20

Q. That is way No. 2. Instead of doing that, they could have walked between the Marshallville road and the tracks down here?

A. No, they had to walk on ties part of the way.

Q. Then that made that approach a little difficult?

A. Very difficult.

Q. Now, they had another way. They could have got on that east track and walked right down the track to the station?

30 A. As far as the tower, not all the way, the tower was right alongside.

Q. That wasn't a removable tower?

A. Yes, but they couldn't get by there on account of the signal pipes.

Q. They could have got between the rails?

A. Yes.

Q. Or between the two sets of iron rails and walked down to the station?

A. Yes, over the timbers.

Q. Or they could have gotten between the two rails of the western track and walked down to the station?

A. Yes.

Q. Or after they got to this spur they could have gotten between the rails on that spur and walked to the station?

A. You mean the siding?

10

Q. Yes.

A. Yes.

Q. Or, lastly, they could have taken what I call a path and you call a space, between the spur and the western track, and walked down to the station, couldn't they?

A. No, not all the way on that path you speak of.

Q. Part of the way?

A. Yes, but not all the way.

20

Q. Now, what would prevent them from going all the way?

A. There is no path, no space. They would have to walk down between the rails.

Q. Now, that space continues down to where the spur joins the western track?

A. It continues down to where the side track comes on the main track.

Q. Then they could walk between the spur and the western track, down to that point?

30

A. Yes.

Q. Then suppose they stepped right over to the platform, they would be at the depot?

A. You can't step on the platform at that point. The platform doesn't extend that far.

Q. Then your map seems to be inaccurate.

A. The platform extends to a water column.

Q. After they come, the pedestrians, between these two tracks, and the point where the spur joins the western track, they could walk over that connection, couldn't they, and then go on to the platform?

A. Yes, walk across the tracks at that point.

Q. And come right to this platform?

A. Yes.

10 Q. Then they would be on the platform?

A. Yes.

Q. Constructed by the railroad company for the use of people?

A. Yes.

Q. How else could they get on that platform?

A. By continuing down the road that connects with the Marshallville road.

Q. Cut up here to the station, then come across and get on that western platform?

20 A. Come up on the eastern side and cut over on the western platform? No, you can by crossing in front of the station. There is a crossing there, between the Ocean City side and the Cape May side.

Q. Suppose people wanted to get on that west crossing and —

A. Come to the station and go across at the crossing provided for that purpose.

Q. That is, go on the eastern side of the station, cross the two tracks and get on that platform?

30 A. No, continue on the eastern side down to the road crossing.

Q. Be frank with me. If people go on the eastern side of these tracks and go through the station, they could get on that west platform?

A. Yes, at the station.

Q. But you say that is the way they have to do it?

A. Yes.

Q. Now, will you admit this? There is no way of getting on that western platform unless you go on the eastern side of the tracks and cross the two tracks. You will admit that, won't you?

A. Well, they could come up another way. They could go down the eastern side of the track to the pump house crossing and cross over both tracks and come up on the western side.

Q. Then that is the only way outside of going through the station? Now, there is no way you could get to that platform, built there by the railroad company for the use of its patrons, on the west side of those tracks, is there, except this thing we have called a path? 10

A. Yes. You don't have to go on that path at all to get on the western side.

Q. How can you get to it?

A. By taking the public highway.

Q. What I am asking you is whether there is any way on the western side of that road—Your Honor sees that long platform, it is built there by the company. What I am trying to get out of this witness is to have him tell us how people on the west side can get on that. 20

A. If they choose to walk down the middle of the path.

Q. Except to follow that space between the spur and the western track, then they can get there?

A. Not without crossing tracks.

Q. But they can cross tracks and get there? 30

A. Sure, they can cross tracks.

CHARLES E. SMITH, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Smith, where are you employed?

A. Atlantic City Railroad Company.

Q. How long have you been employed?

10 A. About twenty-two years.

Q. And do you remember the day of this accident?

A. I do.

Q. In what capacity were you employed then?

A. Locomotive engineer.

Q. On the train that hit Mr. Hess?

A. On the train that hit Mr. Hess.

Q. Tell the Court and jury how this accident happened.

20 A. Well, I was approaching Tuckahoe, prepared to stop there, in fact, making the stop at Tuckahoe station. I saw Mr. Hess walking down. When I first saw him he was walking pretty well to the right, away from the track. As he got further down, he was walking on the edge of the side track, on the edge of the ties, as near as I could discern, and his back was toward me and his arms swinging and seemed to be in a very great hurry, and as he got down a short distance from where he was struck he stepped over between the tracks, and the thought
30 entered my mind he was getting dangerously close to the track I was on and I reached over and gave a number of short blasts of the whistle.

Q. What is that given for?

A. An alarm to attract attention.

Q. Known among railroad men as a danger alarm?

A. Yes, danger signal.

Q. How close were you to him then?

A. Probably forty or fifty feet.

Q. Then what happened?

A. He stepped over a little bit further and came in contact with the engine.

Q. Then what did you do?

A. I attempted to stop as soon as I could. I already had the brakes applied to make the station stop and used what more braking power I had and stopped at once.

Q. Was it possible for you to have stopped the engine from the time you thought he was in danger until you hit him? 10

A. No. If it were possible, I would have stopped.

Q. What part of the engine hit him?

A. Why, the head log and possibly the step used by men getting up on the engine.

Q. And he was walking between this main south bound track and the siding?

A. He was at the time he was hit.

Q. Was he up as far as the signal tower? 20

A. Well, as near as I can remember, he was possibly a little bit south of the signal tower, I think probably a little south, between the signal tower and the station, in other words.

Q. You are familiar with that space between the two tracks?

A. I am.

Q. Is that a well-worn path?

A. No more so than the right of way is all the way to Cape May, simply the ballast that extends out from the ties everywhere along the road. 30

Q. That is filled with what?

A. Cinder and gravel, different material. Of course, the side track leads into the main track and that forms a switch. That ends this space at that place.

Q. That space is ended before you get to the station?

A. Yes.

Q. By the junction of the main south bound track and the siding?

A. It leads into the south bound track before it gets to the platform.

Q. What was the fireman doing, if you know, approaching the station?

10 A. The fireman was in the tender of the engine. What he was doing I could not say.

Q. In what manner is the bell rung on that engine?

A. By an automatic or pneumatic bell ringer, compressed air.

Q. Was it ringing that day as you approached the station?

A. It was.

Q. How long?

20 A. For a mile north of there, down to the station.

Q. Continuously?

A. Continuously.

Q. Was it ringing after the accident too?

A. Yes, right up until the time I stopped. When I stopped I shut the bell off.

Cross-examination.

By Mr. Wescott:

30

Q. Where was Mr. Hess when you first saw him?

A. He was walking along to the right of the track.

Q. Between the spur and the western track?

A. Well, he was possibly, I don't think when I first saw him that he was down—no, he was walking along the side track. This spur doesn't run all the way up to the crossing.

Q. Wait. Now, where was Mr. Hess when you first saw him?

A. He was walking to the right of the track.

Q. Which track?

A. The main south bound track which I was running on.

Q. Then he was between the spur and the main track?

A. No, he was walking on the side track, on the edge of the side track.

Q. What part? Between the rails or on the ties? 10

A. On the ties.

Q. How far was he from the station then?

A. Well, I couldn't say about that.

Q. How far were you from Mr. Hess when you saw him walking on the ties on the spur?

A. Probably four or five hundred feet, roughly.

Q. You were within thirty or forty feet of him when you gave these blasts, you say?

A. Yes. 20

Q. Why didn't you give them before?

A. Because there was no occasion to.

Q. As you were drifting in there, you intended to stop at the station, didn't you?

A. Yes.

Q. Did you keep your eye on Mr. Hess?

A. Generally the same as I kept my eye on everything ahead of me.

Q. Where was Mr. Hess when he left the ties of the spur? 30

A. Where was he? In what way? I don't understand the question.

Q. Where was he along the road? How far from the station?

A. Oh, I couldn't say about that.

Q. You kept your eye on him, you saw him leave the ties of the spur, didn't you?

A. Yes, sir.

Q. Where did he go then?

A. He stepped down between the two tracks.

Q. Then what did he do?

A. He was walking all the time. When he stepped between the tracks ——

Q. Wait.

A. He continued walking.

Q. Now, then, he came down off the ties of the spur, in the space between the spur and the track, and was walking toward Cape May, wasn't he?

A. He was.

Q. Now, when he came off the ties, in that space, walking toward Cape May, how far were you from him?

A. Oh, I should judge possibly a hundred feet, possibly a hundred and fifty feet.

Q. And your bell was ringing?

A. The bell was ringing.

20 Q. And he seemed to be in a hurry?

A. He seemed to be in a hurry.

Q. How far did he walk between the spur and the western track? How far did he walk in that space, about?

A. Well, now, that is rather a general question.

Q. It is a pretty broad question. You noticed him very distinctly. You first say you saw him walking on the ties of the spur. That was the first definite thing you noticed about him. The second definite

30 thing you noticed about him was he stepped off those ties and got into the space between the two tracks. Now, the third definite thing you noticed about him was that you saw him walking toward Cape May and he seemed to be in a hurry. Now, you see, it is a pretty particular question I want to ask you fourth, which is this—How far did he walk between those tracks, in that space, about?

A. Well, possibly fifty to a hundred feet.

Q. And you are a hundred and fifty feet from him now. How fast was your train going?

A. My train was running, I should judge, about fifteen mile an hour.

Q. How fast was he walking?

A. I couldn't say about that.

Q. Well, he must have been walking a good bit faster than your train was going?

A. No, he wasn't.

10

Q. But you only had a hundred and fifty feet to go and he walked about how many feet did you say?

A. Walked where? He walked all the way down there, I should judge.

Q. Now, what was the next definite thing you noticed about his conduct?

A. I didn't notice anything definite, more than I have stated, that he was walking down there and stepped in front of the engine.

Q. How far were you from him when he stepped in front of the engine?

20

A. I said—well, he didn't step in front of the engine until he was hit.

Q. He couldn't have stepped there if he got hit.

A. That is what he did.

Q. How far were you from him when he stepped in front of the engine?

A. A very few feet, I should judge.

Q. That is when you blew the whistle?

A. No, sir.

30

Q. You had this man between the space—in the space between the tracks, where he was seen particularly?

A. When he was in the space in between the tracks, as long as he kept far enough out ——

Q. Now, this man, in that place of safety, unless he was struck by overhang of the train, despite that bell and despite the ringing and the blast of your whistle, stepped right in front of that train?

A. He did.

Q. Well, how far in front of the train did he get? Was he between the two rails?

A. He didn't get between the rails, he wasn't between the rails.

10 Q. Where was he?

A. He was on the ties.

Q. He stepped up on the edge of the ties?

A. On the ties.

Q. And all you did was to hit the bone in his left leg and break it?

A. That is all, as far as I know. I know he was knocked down, that is as far as my knowledge goes.

Q. Well, if he had been on the ties and struck by that train, there wouldn't have been much left of
20 Hess.

A. I don't believe he would have been here today. That is the supposition.

Q. If that is so, how do you expect anybody on earth to believe that this man stepped in front of the train?

Mr. Bradley: Objection.

A. If he didn't step in front of the train, he
30 wouldn't have been hit, would he?

Re-direct examination.

By Mr. Bradley:

Q. Mr. Smith, how fast were you drifting into that station when you came in contact with Mr. Hess?

A. I should judge about fifteen mile an hour, speaking roughly, approximately.

Q. Who was firing the train that day? 10

A. Thomas J. Rogers.

Q. Is he in the employ of the company at present?

A. He is not.

Q. Do you know where he is?

A. I do not.

Q. How long since you have seen him?

A. Oh, I guess probably a couple of years.

The Court: The photographs and map are admitted, are they, Judge? 20

Mr. Wescott: Yes, I have no objection.

(Adjournment to October 14, 1919, at ten A. M.)

October 14, 1919, ten A. M.

DEFENDANT'S TESTIMONY (Continued).

FREDERICK M. SKELTON, SWORN.

Direct examination.

By Mr. Bradley:

10

Q. Mr. Skelton, where do you reside?

A. Tuckahoe, New Jersey.

Q. And with what company are you associated?

A. Delaware Shipbuilding and Repair Company,
Beach and North Street, Camden.

Q. And are you familiar with the locality in and
surrounding the station at Tuckahoe of the Atlan-
tic City Railroad Company?

A. Yes, sir.

20

Q. How long have you been familiar with that lo-
cality?

A. Well, I have been living at Tuckahoe since May
6, 1918, but I have been travelling up and down that
road there more or less for the last fifteen years.

30

Q. Now, from the junction, what is known as the
Marshallville road, and the Atlantic City Railroad
Company's right of way, travelling southward to-
ward the station, do you know of the existence of a
well-defined foot path running on the west side of
the south bound track and between the south bound
track and the siding, coming up to the station?

A. No, sir, I do not. I have never seen any.

Q. Are you familiar with the construction of the
space between those tracks?

A. Fairly well; yes, sir.

Q. And what is it?

A. Why, it looks like cinder ballast and there are a good many obstructions crossing there, like pipes and wires leading to the signals. The road leading to Ocean City crosses both tracks, both main line tracks, above the tower.

Q. Now, are you familiar with another road leading from Marshallville down to the station, other than this Marshallville road, a back road? Are you familiar with any other road?

A. Leading off the Marshallville road? Yes, there 10
is a back road that comes ——

Q. Where does that go?

A. That leads through into another road that crosses the railroad south of the station.

Q. South of the station?

A. Yes, sir.

Cross-examination.

By Mr. Wescott:

20

Q. You have lived down there since when?

A. May, 6, 1918.

Q. Where do you live?

A. On the right-hand side of the Cape May division of the Reading track, about half a mile below the station.

Q. You live on the eastern side of the tracks?

A. No, sir.

Q. The western side?

30

A. The western side.

Q. And on the Cape May side of the station?

A. Yes, Cape May side of the station.

Q. And how far from the station?

A. I should say a good half mile.

Q. You have no occasion to use any path, if there

is any path, to get from the main road down to the platform of the station?

A. I don't understand you, sir.

Q. (Question repeated.)

A. From my house, do you mean?

Q. Yes.

A. Well, I travel back and forth to the station.

Q. You live down here in this direction?

A. I live south of the station, toward Cape May.

10 Q. Then you have no occasion to use this road here, called the Marshallville road, and this path, if there is any, to get to that platform?

A. Yes, sir, I have. I keep my motor-boat moored just above the bridge, just above the Marshallville road.

Q. From your motor-boat to the station —

A. From the house to the motor-boat.

Q. How do you get to the motor-boat and your house?

20 A. Sometimes down the track, sometimes down the back road.

Q. Do you go between the tracks or —

A. No, sir; I do not.

Q. You walk between the rails?

A. No, sir; I walk on the side.

Q. What side do you walk on?

A. Sometimes one, sometimes the other.

Q. Show us which side you walk on.

30 A. This is the south bound track? (Witness indicating on map.)

Mr. Bradley: No, north bound.

The Witness: Generally going north.

Q. From your motor-boat, which is down here (indicating on map), how do you go?

A. Along this side of the track. There is a spur track coming along here. I generally come along this side of the spur track.

Q. Right along the swamp?

A. There is no swamp there.

Q. Well, what is there for you to walk?

A. An ordinary, rough railroad bed.

Q. Now, you say that across the space between the spur and the track, if I understood you, there are lots of obstructions?

10

A. Yes, sir.

Q. A good many pipes and wires?

A. Yes, sir.

Q. Now, come up to the map and point out each one of those obstructions, pipes and wires.

A. There is pipes leading across there and wires to the signal tower.

Q. Leading across where?

A. Across those tracks.

Q. How many pipes are there there?

20

A. That I couldn't say.

Q. Give us a good guess—twenty or thirty?

A. Not that many, I should think three or four pipes running across.

Q. How big are those pipes?

A. One inch pipes.

Q. How high from the ground are they?

A. Well, I should say four inches, three to four inches.

Q. Now, what else is there between those three or four pipes?

30

A. I think there are wires running across here.

Q. How many?

A. Maybe possibly five or six.

Q. Where are those wires?

A. They run to the signals, for operating the signals.

Q. Show us where they are.

A. Well, they are about in this locality, I should say, very nearly across to the tower.

Q. How big are the wires?

A. I should say about three-sixteenths in diameter.

Q. How high from the ground?

A. About the same as the pipes.

Q. What other obstructions are there?

10 A. There are pipes running across down here, near the station.

Q. Whereabouts?

A. I couldn't tell exactly.

Q. Well, you have been there a great many times and noticed them. Tell us where they are.

A. I should say right in about, maybe, a hundred feet toward Marshallville road from the water tower and standpipe.

Q. What kind are they?

20 A. Same kind as the other, about an inch in diameter, for moving the switches.

Q. How many are there?

A. I should say possibly eight or ten.

Q. Where are there any other obstructions?

A. Really, that is all I can think of.

Q. They are the good many obstructions you speak of at different times? Did you ever see a rural depot station before where there were so many pipes and wires as are there?

30 A. I have; yes, sir.

Q. Now, then, these pipes and wires run underneath the tracks, don't they?

A. I think they do; yes, sir.

Q. How much underneath the tracks are they?

A. That I couldn't say. They just clear the rail, I judge, clear the bottom of the rail.

Q. They are under the ballast in the tracks, aren't they?

A. No, I think they are right flush with the ballast, between the rails and at the sides of the rails. They are not below the ballast. They are a good stumbling block.

Q. Sure obstructions to people walking?

A. Yes, sir.

Q. They are there now, are they?

A. Those crossing pipes and boxes? 10

Q. Yes.

A. Yes, sir; they were the last time I travelled there.

Q. And when was that?

A. Why, I was up and down that road a week ago last Sunday.

Q. I show you a picture, marked, for the purpose of identification, P1.

(Said picture marked Exhibit P1 for identification.) 20

Mr. Bradley: When were they taken, Judge?

Mr. Wescott: Yesterday. Want to object to them?

Mr. Bradley: It seems to me that pictures taken five years after, it is a pretty late date to show the existing conditions in 1914. 30

The Court: I suppose they are not offered for that purpose. They are merely offered to indicate the present condition of the trackage.

Mr. Wescott: They are offered to show the value of the testimony of the witness at the present time.

(Objection overruled.)

(Exception noted for defendant.)

Q. Look at P1 and see if you recognize that.

(Examining counsel hands Exhibit P1 to witness.)

A. I recognize the picture, but is this looking ——

10 Q. That is the beginning of the path from the road.

A. Marshallville road?

Q. Yes.

A. Yes, sir; I recognize that.

Q. Do you see any obstructions there?

A. Right here in front of that tower, in front of that semaphore signal.

Q. Those are one set of obstructions you recognize?

20 A. Yes, sir; that is one I mentioned.

Q. Now, I show you P2 for identification.

(Photograph marked Exhibit P2 for identification.)

Q. I ask you if you see any obstructions on that path?

Mr. Bradley: Were these taken at the same time?

30 Mr. Wescott: Yes.

Mr. Bradley: Same objection.

(Objection overruled.)

(Exception noted for defendant.)

A. There are obstructions here, also the cross-over. This is the spur track.

Q. Yes. Now, where are the obstructions?

Mr. Bradley: I object.

Q. What kind of obstructions do you see there?

A. The cross-over, that switch crossing there, also this switch.

Q. I am speaking now of the path between the tracks. What obstructions do you see there? 10

Mr. Bradley: I object to the form of the question.

Q. The space—do you see any obstructions there?

A. Big lumps of ballast laying all along between the rails.

Q. Those are the obstructions, big lumps of ballast?

A. They would be pretty handy for a man to fall over, I think. That picture makes it look a great deal more extensive than it really is. 20

Q. That is, makes the obstructions look bigger than they are?

A. Everything, not merely the obstructions.

Q. Now, I show you P3 for identification.

(Photograph marked Exhibit P3 for identification.)

30

Q. Do you see any obstructions in that?

A. This is nearly in front of the station, isn't it?

Q. Do you see any obstructions in that?

A. There is no obstructions there. This is the station platform, not the platform but the station ground.

Q. There are no obstructions there?

A. None whatever; no, sir.

Q. Now, I show you P4.

(Photograph marked Exhibit P4 for identification.)

Q. Do you see any obstructions in that?

10 A. Yes, directly ahead of me there is an obstruction.

Q. What obstruction is that?

A. A box containing the wires leading from that signal.

Q. Are those the wires that stick up in the air, that hold up people?

A. There are some enclosed in the box.

Q. Those enclosed in the box won't trip people?

A. The box would trip them.

Q. Now, I show you P5.

20

(Photograph marked Exhibit P5 for identification.)

Q. You can see obstructions there, can't you?

A. Yes.

Q. What are they? Very distinctly?

A. Switches.

Q. How many?

A. Well, I can see two, two switches there, three.

30 Q. Can't you see more than three? Can't you see four?

A. Yes, I can see four.

Q. Can't you see five?

A. I can't really say that I can; no, sir.

Q. Can't you see six?

A. Not offhanded.

Q. Can't you in any handy kind of way see six?

Mr. Bradley: Six what?

Q. Six switches?

A. No, I can't.

Q. Can't see seven, can you?

A. No.

Q. There may be a hundred there?

A. Possibly is but I can't see them.

Q. So, so far as you can recall, there might be a hundred switches there? 10

Mr. Bradley: I object. This witness is asked what he can see, then he is asked, "So far as you can recall, there might be a hundred."

(Objection overruled.)

(Exception noted for defendant.)

20

Q. So, so far as you can recall, there may be a hundred switches there?

A. No, there is not.

Q. May there be fifty there?

A. I don't think there is.

Q. May there be thirty?

A. I don't think there is.

Q. May there be twenty?

A. I don't think there is twenty.

30

Q. May there be a dozen there?

A. No, I don't think there is a dozen, between the station and Marshallville road.

Q. May there be half a dozen?

A. Possibly there is.

RICHARD TOWNSEND, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Townsend, where do you reside?

A. Tuckahoe, on Marshallville road.

Q. How long have you resided there?

10 A. I have been in that neighborhood eleven or twelve years.

Q. Are you familiar with the station locality at Tuckahoe, of the Atlantic City Railroad Company?

A. Yes, sir; somewhat.

Q. Will you say whether or not there is a well-worn path from the intersection of the Marshallville road with the Atlantic City Railroad, running south to the Tuckahoe station?

20 A. Well, not so very much. I never seen one there, for I don't travel that road.

Q. What way do you travel?

A. I go across the railroad on the crossing on the Marshallville road.

Q. Do a great many people travel the same way, up the Marshallville road, instead of using the railroad?

A. There is a right good many.

Q. Have you ever observed the space between those two tracks?

30 A. Not much further than the—well, a hundred yards down, for I couldn't see any further.

Q. A hundred yards down from the Marshallville road?

A. Yes.

Q. Did you find any well-defined path running to the west of the south bound track?

A. I couldn't see any difference from that from any other railroad as it went along.

Q. Do you know of the existence of a back road to the station?

A. Well, there is a back road goes from the station.

Q. Where does that go?

A. That starts in, I reckon, four or five hundred yards from the railroad crossing.

Q. And where does it run?

A. Well, it runs—it is a road right across back and comes to a back road and runs down right to the station. 10

Q. And that isn't along these railroad tracks at all?

A. No.

Q. And you can get to the Tuckahoe station by that road?

A. You can get to the Tuckahoe station.

Q. Did you ever see the railroad company or any of its employees building a path there for the people to walk on? 20

A. Fixing it?

Q. Building a path for people to walk on?

A. Well, I don't know that I ever did, not that I know of they were doing that, I guess not.

Cross-examination.

By Mr. Wescott:

30

Q. You lived down there how many years?

A. About twelve years, I think. I have lived in Tuckahoe all my life.

Q. Now, when you go to the station, you know there is a platform on the west side of the tracks?

A. Yes, sir.

Q. And that is for people to use on the western side of the tracks, isn't it? Have you ever used that?

A. On the western side?

Q. Yes.

A. No, sir.

Q. Never used that platform?

A. Not on the western side.

Q. You know there is a station there, don't you?

10 A. Yes, sir; I know there is a station there.

Q. And on the west side of the tracks, westerly of the station, there is a long platform, a wooden platform, cinder platform?

A. I don't know, I don't have no call for that. When I go to the train I am on the south side of the tracks, the eastern side of the tracks all the time.

Q. We haven't got to that yet. You never used the western side of the track at all?

20 A. Not very often I don't.

Q. When you do, how do you get to the station?

A. When I do, I have my choice to go across the track or go to the drive road that comes from Tuckahoe and cross the cross-road into derail, and if a train goes back in that she goes off the track. There is where I cross.

Q. Now, you have your choice, as I understand you, either to go across the tracks by the Marshallville road—that is this road here?

30 A. Yes.

Q. Or you have your choice to go down here?

A. Yes, sir.

Q. Now, when you go down this way to the station, how do you go?

A. I don't go that way.

Q. No, but when you do. Haven't you ever gone that way?

A. Not very often. When they double tracked the road I quit walking that road.

Q. The few times you went, how did you go?

A. Why, I walked down the track, I suppose, when I did go.

Q. You walked down the space between the switch to the west track?

A. No, sir; the side of the road, along the side. 10

Q. Along the side?

A. Outside the switch; yes, sir.

Q. Were you in the habit of going to Ocean City this last summer?

A. Yes, sir; every day.

Q. On the five o'clock train?

A. On the Ocean City train.

Q. And that train went south?

A. Yes, sir.

Q. Now, didn't you get on that train every morning from the west side here? 20

A. No, sir; I got it from the eastern side.

Q. Always went to the eastward side?

A. That road is right on the eastern side.

Q. This road over here, the Marshallville road?

A. Yes, sir.

Q. Didn't you every morning board the train from that platform marked on that picture?

A. Yes, sir.

Q. How did you get there? 30

A. Just let me see if I can see that road.

(Question withdrawn.)

Q. Now, didn't you get on and off the train from that path along the western side of the track?

A. I didn't have nothing to do with the western side of the track.

The Court: You were going to Ocean City, were you not?

The Witness: Yes, sir; to Ocean City.

Q. Where was the train standing that you boarded,
10 which track?

A. Which track?

Q. Yes.

A. On the south bound Ocean City track on that side.

Q. On the Cape May division?

A. No, sir.

Q. Well, how could you get on that train?

A. How could I get on?

Q. Yes.

20 A. Why, I came across, came out that road and came across the road right down, good walking, a splendid road to walk. That road is a cross-over and come on to the platform and came aboard the train.

The Court: The train that goes to Ocean City doesn't use the same tracks that go to Cape May?

The Witness: No, sir; altogether different track.

THOMAS KENDALL, SWORN.

Direct examination.

By Mr. Bradley:

Q. Mr. Kendall, where do you live?

A. Tuckahoe.

Q. How long have you lived at Tuckahoe?

A. Sixty years.

Q. Are you familiar with the locality of this Atlantic City Railroad and the surrounding country there?

A. I am.

Q. Do you know of the existence of any well-defined path that runs from the Marshallville road south along the west side of the west bound track and between the south bound track and the siding up to the station?

A. Never know of any path.

Q. Well, is there a well-defined path that runs there?

A. Never saw it.

Q. You have been along there frequently?

A. Oh, sometimes two or three times a week.

Q. Do you know whether or not the railroad maintains any path for the people to walk this way to the station (indicating on map)?

A. Never heard tell of it or saw it.

Q. You know of that space between the side track and the main south bound track? You have seen it, have you?

A. On the west side?

Q. Yes.

A. Well, that is a waterway to free the water from the roadbed from the Tuckahoe river.

Q. You mean from the Marshallville road up this way?

A. Toward the river.

Q. Now, up toward the signal tower, between the siding and the main south bound track, what is the construction there? What is the construction of that space?

A. On the west side?

Q. Yes, between the south bound track and the siding.

A. There is a signal tower there with equipment
10) leads across.

Q. What is the construction between the tracks there, do you know? What is it built of, between the south bound track which goes to Ocean City and this side track, what is the construction there? What is it made of? I made a mistake—between the main south bound track to Cape May and the siding—what is this construction of that space between the tracks?

A. Cinders, built with cinders.

Q. Is it rough or smooth or what is it?

20) A. Well, it is rough when first put on, especially until it gets wore down a little.

Q. Is it any different there than anywhere else between the tracks?

A. No different.

Cross-examination.

By Mr. Wescott:

30) Q. Now, it is rough until it is worn down. What wears it down?

A. Well, the travel over it, the workmen, the cars.

Q. You have travelled over it yourself?

A. I have been over it; yes.

Q. For what purpose?

A. Well, for a near cut.

Q. For what?

A. For a little nearer cut.

Q. To what?

A. To the Marshallville road, to save about three hundred and fifty feet.

Q. And if you wanted to go to the station, it was a nearer cut?

A. Well, I don't always. I go the road part of the time.

Q. But sometimes you take that because it is **10** nearer?

A. Sometimes, when it is not time for trains, times I will go that way.

Q. It is a nearer cut to the platform, isn't it?

A. Well, it is about altogether three to four hundred feet nearer.

Q. And that is the reason you take it sometimes, isn't it?

A. I of course save all the steps I can.

Q. Well, that is the reason other people take it **20** sometimes?

Mr. Bradley: Objection.

Q. You have seen other people take that short cut, haven't you?

A. I have seen other people, yes, go that way.

Q. And they take that short cut to get to this platform on the map here, don't they, and then cross to the station?

30

A. Well, I don't know about that, whether they follow the track all the way down. I always go off and come on at the signal tower. There is where I enter the road, at the signal tower and go off at the signal tower.

Q. And do you get the train at the signal tower sometimes?

A. When I take the trains, I come from home the other way.

Q. Do you get the train at the signal tower sometimes?

A. Oh, no, I don't take the train ——

Q. Well, you get off the train at the signal tower?

A. Never get off, for she don't stop there.

Q. Do you get on the train from a space running along the western side of the track, sometimes?

10 A. I always stay in the car until she comes up the platform, when I usually cross on the station.

Q. On the west side?

A. No, on the Cape May side.

Q. And you never get off on the west side at all?

A. Well, I have.

Q. Yes, you have.

A. And cross right over abreast the station and go on.

Q. Go on down the track until you get to the road?

20 A. No, I go back on the driveway.

Q. Away over here on this ——

A. No, between the Cape May branch and the Ocean City branch there is a space, a flower garden, a walk.

Q. Where is that?

A. It comes from the mill road.

Q. And which side of the station is that flower bed and all that?

A. South of the station.

30 Q. You live up here, don't you (indicating on map)?

A. Between that and the mill road.

Q. You live up in this direction (indicating on map)?

A. I live on the south of the station, southeast of the station, on Petersburg road.

HENRY J. MORGAN, recalled.

Direct examination.

By Mr. Bradley:

Q. Mr. Morgan, you have testified in this case before?

A. Yes, sir.

Q. You are the station master?

10

A. Yes, sir.

Q. Now, Mr. Morgan, I want to ask you something about the operation of the trains and where they stop at this station. Trains going on the north and south bound tracks, where do they stop in reference to the station, to discharge passengers, if you know?

A. Trains from Cape May, north bound, that have no connections from Ocean City, they stop at the water column so they can take water and discharge passengers at the same time.

20

Q. You mean going this way (indicating)?

A. Toward Camden, north.

Q. And where would the train proper be then?

A. The train on the Cape May, north bound, would be right—there is a platform on the eastern side of the track.

Q. Where are those passengers discharged?

A. Right on the platform.

Q. Are those passengers discharged and the stations called for them to get off down between the siding and the south bound track?

30

A. Coming into the station south, you mean?

Q. Yes.

A. Well, I think it is the custom for the train crew to announce the next stop when they are approaching the station, and it is possible, as they are cross-

ing the drawbridge, they might announce the next station, Tuckahoe.

Q. Coming in that direction, where do the trains stop to discharge the passengers, if you know?

A. Well, if it is a through train, with no cut-off cars for Ocean City, they come right down to the station and discharge passengers on the west side, on the platform there for that purpose.

10 Q. If it isn't a through train and you have the cut-off cars, what happens then?

A. If it is a through train and cuts off cars for Ocean City, they cut cars off at the Marshallville road crossing.

Q. Down here (indicating)?

A. North of the station.

Q. Then what happens to the passengers in the car?

20 A. Why, the Ocean City engine and car—one car usually, sometimes two,—backs over the cross-over on the southward track, picks up these cars and pulls to the station on the Ocean City side.

Q. Where do they discharge passengers?

A. On the east side of the station, on the Ocean City branch.

Q. And they are discharged at the station?

A. On the platform; yes, sir.

Q. How long have you been familiar with the operation of trains at this station?

30 A. Well, the conditions that exist now have existed since the double track, 1906.

Q. And they are the conditions of which you speak now?

A. Practically the same; yes, sir.

Cross-examination.

By Mr. Wescott:

Q. And all the conditions are the same there now that they were five or six years ago?

A. Practically; yes, sir.

Mr. Bradley: You mean in reference to discharging passengers?

10

The Witness: Yes, sir.

Mr. Bradley: You don't mean that pictures taken yesterday would represent the conditions that existed, necessarily, in 1914, about the space between the tracks, do you?

The Witness: There may have been some alterations made between the tracks.

20

Q. That is to say, the path might have been more distinct in 1906 than it is now?

A. There never was a path, to my knowledge.

Q. Well, isn't the physical condition substantially the same?

A. Repairs are made at times, putting in ties. There is no semblance of a path, no path maintained.

Q. And when your trains are coming north, where do they let the passengers off?

30

A. From what point?

Q. Well, from any point at the station?

A. Well, trains from Cape May north stop at the water column, take water and discharge passengers on the east side of the Cape May side, Cape May tracks.

Q. And trains going south discharge passengers at that platform, don't they?

A. Trains going south to Cape May discharge passengers on the west side of the station.

Q. At the platform indicated on the map?

A. At the platform.

Q. That platform is intended for people to get on and off the train?

A. There are two platforms there.

10 Q. The two are intended for the public to get on and off the train?

A. Yes, sir.

Q. Now, the public has to get to those platforms and from those platforms?

A. Yes, sir.

Q. Do you mean to tell this jury that you haven't known for years people get to that platform by coming up the spur between the north and south track?

A. They do by trespassing.

20 Q. How many years have they been trespassing that way?

A. They have been doing it for the last twenty years, to my knowledge.

Q. And when they get off the cars at that platform, they become trespassers when they go down the tracks in that space, don't they?

A. They do if they go off the prescribed platform places for them to get off.

Q. What?

30 A. If they don't get off the platform for that purpose, for the taking on and discharge of passengers, if they go up a place that is dangerous, they are trespassers.

Q. Every place is more or less dangerous?

A. Those tracks are extremely dangerous.

Q. What is the danger? Here you stop a train at this platform, and I think you testified the other day that back of that station and along here was swamp and fields?

A. There is a small swamp directly opposite the station, what you call a spong in South Jersey.

Q. The people wouldn't go out into the spong and field, would they? Now, when people are landed at that platform for the purpose of getting off, they get off, don't they?

10

A. Most assuredly.

Q. And they can't go out in a spong or in the fields to get away from that platform?

A. They don't have to go there.

Q. Well, they can't, can they, unless they get into the spong, water and mud?

A. No.

Q. Unless they trespass upon the farms and fields there, they have got to go somewheres else, haven't they? Haven't they got to go somewheres else? Why can't you say yes?

20

A. Sure, they can go wherever they feel so disposed.

Q. Go somewhere else or stand and spend the balance of their lives on that platform. Suppose those people start down this way, those that live off here in the west, along that track, in that space. Now, what is the danger?

A. They are apt to get too close to a train, and, in railroad parlance, get side-swiped.

30

Q. The danger is they get too close to a train?

A. And get side-swiped.

Q. Suppose they don't get too close to a train, what is the danger?

A. There isn't very much space between those tracks.

Q. But what is the danger?

A. In order to get off that space, they must necessarily cross the tracks.

Q. And in doing that, they get hit. What track? The spur?

A. The spur is there, north bound and south bound tracks.

10 Mr. Bradley: I object to the method. It seems to me, if he asks this man a question.

The Court: I will permit you, Mr. Bradley, to re-examine the witness.

Q. How much is that spur used?

A. Well, at this season of the year it isn't used very much.

Q. At any season of the year is it used?

A. Sometimes every day.

20 Q. What for?

A. We have a way-train backs up to let express trains go by.

Q. How long does it use that spur?

A. Sometimes ten or fifteen minutes.

Q. What else is it used for?

A. South bound freight to set cars off.

Q. And when the cars are there, how long do they stay?

30 A. Sometimes two or three hours, sometimes nearly a whole day.

Q. How often does that happen?

A. Well, just now, why it is only used by passenger trains about once a day.

Q. So that that spur is practically unused?

A. At certain seasons of the year, yes.

Q. When it is unused and there is nothing on it, what is the danger to people going down that platform and down these tracks?

A. The danger crossing over the spur to the main tracks. There is no path there.

Q. What is that danger, stubbing their toes?

A. They are liable to encounter a train.

Q. There is no train on the spur?

A. There is on the main track.

Q. Then, to encounter the train on the main track, they have to get on it? 10

A. They must necessarily cross the spur to that middle platform.

Q. Sure, they must necessarily, going from this platform, cross that spur and get in this space.

A. To cross the tracks at that point.

Q. When there are no trains there, what would be the danger in crossing that spur?

A. They are liable to encounter a south bound or north bound train on the main tracks.

Q. Well, if they are not on the main track, are they in danger of encountering a train? 20

A. Yes, they don't know what minute a train from the main track may take that siding and back off there.

Q. Then the danger is that if a passenger has left that platform to go down that space between the tracks, and didn't get on the main track, a train, particularly an express train going right through, might switch off on that spur and hit him going over the end of the spur? 30

A. No, a through train has no occasion to go into the spur.

Q. A train that isn't through, it might switch off on the spur and hit them in crossing the spur, that is the danger?

A. Yes, that is the danger.

Q. Suppose a passenger was coming from the station here, across those two tracks, on that platform, a train might come up and strike him?

A. Crossing the tracks, yes.

Q. And it would be dangerous?

A. Most assuredly.

Q. So there would be more danger crossing from the station to that platform, going over the two main
10 tracks, than there would be crossing that spur?

A. Yes, but this crossing from the station, there is a bell and that bell rings and warns of the approach of trains.

Q. Won't that bell warn the people crossing over the end of that spur?

A. No.

Q. Why not? Couldn't they hear it? You mean to tell me that the bell at the station doesn't ring loud enough for people a few feet off to hear it?

20 A. Why, sure.

Q. What kind of bell have you?

A. A bell on the north bound track and one at the Marshallville road crossing for south bound trains.

Re-direct examination.

By Mr. Bradley:

30 Q. There appears to be a crossing from the main station to the platform?

A. Cape May platform, yes, there is a maintained platform there.

Q. And that is the regular passenger crossing?

A. Yes, that is it.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

ELEANOR HESS, SWORN.

Direct examination.

By Mr. Wescott:

Q. Mrs. Hess, you are the wife of Mr. Hess, are you? 10

A. Yes.

Q. And you have lived down at Tuckahoe how many years?

A. Fifty-three.

Q. Have you used the passenger trains?

A. I have.

Q. Many times?

A. I have.

Q. Were you ever taken on by the employees of the company, taken on the cars from that space, the path, as I call it, going between the spur and the main track? 20

A. I have.

Q. Have you ever been let off there?

A. I have.

Q. By the agents of the company?

A. I have.

Q. Do you recollect whether the conductor or brakeman or any officer of the company ever helped you on and off there? 30

A. Yes, they assisted me.

Q. Now, when you got off on that space, how did you get home?

A. Walked right up to the Marshallville road, right up alongside the track, the path that is worn there by people that travel.

Q. Now, when you got on the cars, how did you go, on that same path?

A. Yes.

Cross-examination.

By Mr. Bradley:

10 Q. Will you come here to the map and point to the Court and jury where you got on and off the train?

A. I don't know anything about that. I can tell you where I got on at.

Q. Well, you just come here and I will try to explain this map to you if you don't understand it, just say so and I will try to explain it to you. Now, you won't answer until you fully understand?

A. No.

20 Q. This is the south bound track in green, a light green, going to Cape May. Do you know of that track?

A. Yes.

Q. To the west of that track there is a siding that runs somewhere from the frame building, which is south, and connects with the main south bound track to Cape May before you get to the platform on the west side of the railroad. Now, do you remember the signal tower, on the east side of the railroad?

A. Yes.

30 Q. And do you remember the water column at the north end of the station?

A. Yes.

Q. Now, can you tell the Court and jury, please, where it was that you were helped on and off this train?

A. About two hundred or two hundred and fifty

feet from the crossing that goes to the Marshallville road.

Q. That was before you got up there at the spur?

A. Yes.

Q. Now, you have a daughter?

A. Yes.

Q. How old is she?

A. Twenty years old.

Q. You have heard Mr. Hess caution your daughter not to walk along this railroad, this space?

10

Mr. Wescott: Objection.

(Objection withdrawn.)

A. I don't know that I have.

Q. Are you certain that he hasn't?

Mr. Wescott: I will object now. It isn't cross-examination.

20

Mr. Bradley: I won't press it.

JONATHAN HESS, recalled.

Direct examination.

By Mr. Wescott:

Q. Mr. Hess, the other day, in your examination, you stated that you had often gotten on and off the cars on that path?

10 A. Yes, sir.

Q. Between the tracks?

A. Yes, sir.

Q. Now, did you ever do that with the knowledge or invitation of the people in charge of the train?

Mr. Bradley: I think that question is objectionable. It is leading.

Q. Well, how did you happen to do it?

20 A. They even told me, when I was going to get off at the platform, to stay on, they were going on to the cross-over that lands us up close to the Marshallville road.

Q. And did you get off on the path?

A. Yes, sir.

Q. Are the physical conditions there between the tracks and around the station the same as they were when this accident happened, substantially?

A. I think about the same.

30 Q. What changes have occurred there?

A. I don't know of any.

Q. Do they ever take up the ties?

A. They take the ties out and put in new ties and level off the bank again.

Cross-examination.

By Mr. Bradley:

Q. You say where you were let off was down here near the Marshallville road?

A. Practically all the way along. Sometimes we got off right on the Marshallville road and sometimes a little ways down and sometimes further, it depended on the number of cars; they had to come out far enough to clear the cross-over. 10

Q. So it was down in this vicinity?

A. All the way down there.

Q. Did you caution your daughter not to walk along the tracks there?

A. I told them when they were little kids going to school not to go that way.

Re-direct examination.

20

By Mr. Wescott:

Q. Now, would you get on and off between the spur and the western track?

A. Yes, sir.

Q. All along there?

A. All along there.

Mr. Bradley: If the Court please, I had one witness I forgot to call. 30

The Court: Call him at this time.

DEFENDANT'S TESTIMONY.

DANIEL McKEAGUE, recalled.

Direct examination.

By Mr. Bradley:

10 Q. Mr. McKeague, do you know of the existence of a back road, so called, to this station?

A. Yes, sir.

Q. What kind of road is it?

A. Well, it butts off the Marshallville road.

Q. Where?

A. About, I should think, five hundred feet up toward the Marshallville road, toward the Marshallville road.

Q. West from the railroad?

20 A. Yes.

Q. Down in this direction (indicating on map)?

A. Toward Marshallville; yes, sir.

Q. What kind of road is it?

A. Well, it is a new laid out road, about ten years old, I think. There is one house on the corner and three along it and it comes out to a laid out road that runs down to the station.

Q. And that is another way for the people to get from Marshallville to the station?

30 A. Yes, sir.

Q. Runs entirely on the west of the railroad?

A. Yes, on the railroad.

Q. And did you say that was a township road?

A. One part of it. It runs down to the station as a township road and the other I don't think has ever been taken over by the township but they have worked on it to keep it in repairs.

Q. What can travel on that road?

A. Why, wagon or people, either one, they do travel.

Q. They do travel that way to the station?

A. Yes, sir.

No cross-examination.

10

PLAINTIFF'S TESTIMONY IN REBUTTAL
(Continued).

JONATHAN HESS, recalled.

Direct examination.

By Mr. Wescott:

20

Q. Do you know this road which the last witness has testified to?

A. I do.

Q. Is it passable?

A. No. There is a petition out now, and I signed it, to have it fixed up so we could use it.

Cross-examination.

By Mr. Bradley:

30

Q. What is the matter with it?

A. It would upset you.

The Court: You mean riding in a carriage?

The Witness: There is only a little bank and your hub drags, the hub of your wagon.

Q. Do you ever walk that way to the station?

A. No, sir; it is too far out. I never knew anybody to get to the depot that way.

Q. But you can get that way to the depot?

A. You can if you want to go that far around.

10

GEORGE A. WONFOR, SWORN.

Direct examination.

By Mr. Wescott:

Q. You live where, Mr. Wonfor?

A. 615 Market Street, Camden.

20

Q. Your business is what?

A. Professional photographer.

Q. Did you go down to Tuckahoe on Sunday and make some photographs at my request?

A. Yes, sir.

Q. I show you photographs marked 1, 2, 3, 4, 5, 6 and 7 for the plaintiff, and ask if you took those photographs?

A. Yes, sir.

30

Q. And will you step up here before the jury and show us where you stood when you took those photographs?

A. Pardon me, Judge, there are two that haven't been marked.

(Two photographs marked respectively Exhibit P6 and P7 for identification.)

Mr. Bradley: Same objection to the last two as I made before.

(Objection overruled.)

(Exception noted for defendant.)

The Witness: Picture marked P7 shows the Marshallville road looking east, crossing the Reading railroad tracks. Picture marked P6 is another view of the road looking north, approximately the same distance from the tracks. 10

Mr. Bradley: Looking west instead of north.

The Witness: Yes, I beg your pardon. Picture P1 a view taken from this point just off the Marshallville road, looking south, down the railroad track.

20

Q. Toward the station?

A. Toward the Tuckahoe station. I draw your attention to the embankment —

Mr. Bradley: I object.

(Objection sustained.)

Q. What is shown in that picture?

30

Mr. Bradley: I object. The pictures speaks for itself. This witness isn't called to call attention to any particular feature of this picture and comment on it.

The Court: You mean the photographer can't indicate what the picture shows?

Mr. Bradley: Yes, but not to comment.

*Q. Tell us what appears on the photograph.

A. Starting at the road, we lead along a space from the railroad track to the rise or embankment, which indicates a path —

Mr. Bradley: I object to anything indicating.

10 (Objection sustained.)

Q. Is there a path there?

A. Yes, sir.

Q. And about how wide is it?

A. Between five and eight feet.

Q. And on the right-hand side of the path there is a bank?

A. Yes, sir.

Q. And then beyond that bank what?

20 A. A field.

Q. Now proceed.

A. A distance of about two hundred and forty-six feet down to the track, or down this path, you come to an obstruction.

Q. What is it?

A. It has the appearance of a signal tower or pole.

Q. And how is that located?

A. It sets to the west of the south bound railroad track.

30 Q. How near the path?

A. Possibly a foot.

Q. On the west of the path?

A. On the west of the path.

Q. Now, that is the first obstruction or first thing you come to. Now, what is the next?

A. Picture P2, you come to this point where this

obstruction adjoining the path is and take another picture showing down this path, between the main south bound track and the siding.

Q. Is that space worn any?

A. Yes, sir.

Q. Well, now, proceed.

A. I will ask a question if I can explain it.

Q. What is it?

A. I want to explain the conditions existing when the pictures were made.

10

Q. Well, go on. I guess there is no objection to that.

A. These pictures were made on Sunday, and owing to the stormy condition of the day we could get no relief or contrast to define this path as much as it would do on a clear day. Picture P4 is farther down the track, nearer the signal tower or switch house, as it might be termed, showing a figure standing on this path which runs between the south bound track and the siding.

20

Q. Did you notice on that path the nature of the ground?

A. Yes, sir.

Q. Well, describe that.

A. There is —

Mr. Bradley: I suppose all this is subject to the exception granted that physical conditions today couldn't speak for the physical conditions existing in 1914?

30

The Court: Yes.

A. There is very noticeable to the eye a beaten wearing, or track, along the cinders.

Q. How large are those cinder along the track in any place? It has been testified they were five or six inches thick. Did you see any that size?

A. The only comparison that I could make to that would be that I saw coal, large lumps of coal, that possibly could have fallen off an engine going by, but not cinders.

Q. Go on with your pictures now.

10 A. Picture P5 brings us farther down the track, just before you cross the siding, going on to the platform on the westerly side of the south bound track.

Q. What obstructions were there there as shown in the picture?

A. There is a cross-over under the railroad tracks, through the path, to a switch which lays to the west of the siding. Farther on there were two pipes or arms which control a switch on the siding.

20 Q. Now, how many obstructions were there there by actual count?

A. Three.

Q. How high were they from the ground, if you noticed?

A. The first one is below the ground, necessitating stepping over a slight ditch, it might be termed, or indenture, in the ground. The next, the first crossing pipe, is practically on a level with the ground. The next one has a little rise above the ground.

Q. About how much?

30 A. An inch or two.

Q. Are they big pipes?

A. No, sir.

Q. Well, what is about your next picture?

A. Picture P3 is taken from the platform, looking east, showing the switch, or siding, rather, which this road or this path leads into.

Q. That is all of them, is it?

A. That is all of them.

Cross-examination.

By Mr. Bradley:

Q. Witness being shown Exhibit P5 for identification, is asked if he will designate whether there is anywhere in existence a well-defined path shown in that picture? 10

A. Atmospheric conditions ——

Q. I didn't ask you that. (Question repeated.) Is there or isn't there?

A. No.

Q. Witness is shown Exhibit P4 for identification and is asked if the space upon which the man is standing between the two tracks is the well-defined path of which he speaks?

A. Yes, sir. 20

Q. You will notice in the foreground it is very rough, isn't it?

A. Owing to the lens not being sharp in the immediate foreground it is out of focus, in the immediate foreground.

Q. Now, did you state how wide this path was at that point?

A. Yes—no, sir.

Q. How wide is it?

A. I didn't measure it. 30

Q. What obstruction is there shown just ahead of the figure in the picture?

A. A cross-over from the signal tower to some sort of signal.

Q. How much of an obstruction did that cause in the path?

A. Approximately four or five inches.

Q. And you had to step up and over that?

A. Yes, sir.

Q. Witness is shown Exhibit P2 for identification and his attention called to the fact that the track to the extreme right of the picture and the track on the left adjoining, there seems to be a very wide space between the rails, and is asked what that is due to?

10 A. Due to the interpretation of the photographic lens, gave us an object immediately on top of it.

Q. In other words, this tremendously wide space doesn't narrow down but it is the same space down?

A. Farther away; yes, sir.

Q. It is very rough in spots there, isn't it, between those tracks?

A. Owing to the dropping of coals.

Q. A considerable dropping of coals?

A. Yes.

20 Q. Witness is shown Exhibit P1 for identification and is asked to designate the existence of what he termed a path in that picture?

A. There is a visible beating of the cinders.

Q. I have put a cross below. Is that in a direct line with the path?

A. Yes, approximately, a little farther this way.

Q. Put your cross there.

A. (Witness indicates by cross.)

Q. How far does that run?

A. In what direction?

30 Q. North. You said ran up here to the obstruction?

A. Yes.

Q. Where does it go then?

A. Continues on around the obstruction. That obstruction doesn't block the path, though.

Mr. Wescott: I offer those photographs and rest.

(Said photographs admitted in evidence and marked respectively Exhibit P1, P2, P3, P4, P5, P6 and P7.)

BOTH SIDES REST.

10

DEFENDANT'S MOTION FOR DIRECTION.

Mr. Bradley: I would like to renew the motion I made at the conclusion of the plaintiff's case, for a direction of a verdict of no cause of action.

The Court: I will refuse your original motion and allow an exception.

20

(Exception noted for defendant.)

Mr. Bradley: I would like to make a motion for a direction of a verdict in favor of the defendant because the plaintiff has not introduced any evidence in this case showing an invitation by the railroad company, or its employees, to use this path, and because there is no well-defined path which leads to the Marshallville road all the way from the station, that is shown by the pictures and by the testimony of the witnesses. None of plaintiff's witnesses testified that the path came down any farther than the spur. That is as to the question of invitation. We claim there is no invitation. At most, all the plaintiff has shown in this case, to entitle him to go to the

30

jury, might be the question of negligence, which we hold is not in this case. As to whether or not, if your Honor holds, the plaintiff in this case was a licensee, there has been no evidence of any wilful, intentional or wanton injury, and in that case the plaintiff could not recover.

If your Honor holds there is any evidence of any negligence in the operation of the trains, which was the natural and proximate cause of the injury, I would like to direct your Honor's attention to the fact that when the engineer found this man was in actual peril, he gave the danger signals, and then it was too late to stop the train. The plaintiff has testified that when he went down this track before, he had kept a sharp lookout for trains and turned around occasionally. And from the fact that one person in the station heard this distress signal and came out, another man, on the train, got off the train when he heard it, the baggage master came to the door when he heard the distress signal, and the attention of other people was called to this distress signal, shows that the plaintiff was guilty of contributory negligence.

On these grounds we think the Court should direct a verdict for the defendant.

The Court: I have thought over this case very carefully and I have listened to all the testimony and I have looked at these photographs, and they satisfy me, in my own mind, whether they satisfy counsel or not, as I look at this particular photograph taken on Sunday, it shows the platform at the Tuckahoe station, which is to the west of the south bound Cape May track, and also indicates the condition of the land to the north of the Tuckahoe station, looking to the crossing head, and indicates the spur; and

that, in conjunction with this particular photograph offered by the defendant, leads me to this conclusion, that there is nothing in the case, either by any direct evidence or by implication, to show that the railroad company invited the plaintiff to make use of this path, you may call it path. In fact, to the contrary, here is a sign, indicated in the photograph, warning people to desist from the use of that particular passageway. Here is a sign on Mr. Wonfor's photograph, offered in evidence this morning, which was taken last Sunday. So that I can't see anything in the case which would indicate to my mind that the railroad company can be charged with inviting the plaintiff to make use of this particular space in approaching the platform. Now, the platform, as a matter of fact, and it is very clear from the testimony on both sides, is used by passengers who are to leave a train, who intend to leave a train, at Tuckahoe station, which train is bound south, and it is also for the use of passengers who intend to board the train going from Tuckahoe south toward Cape May, and it was there for that particular purpose, and the approach to it, designated by the railroad company in the layout of its property, is from the main platform of Tuckahoe station, across a crossing built purposely to the platform on the other side.

10

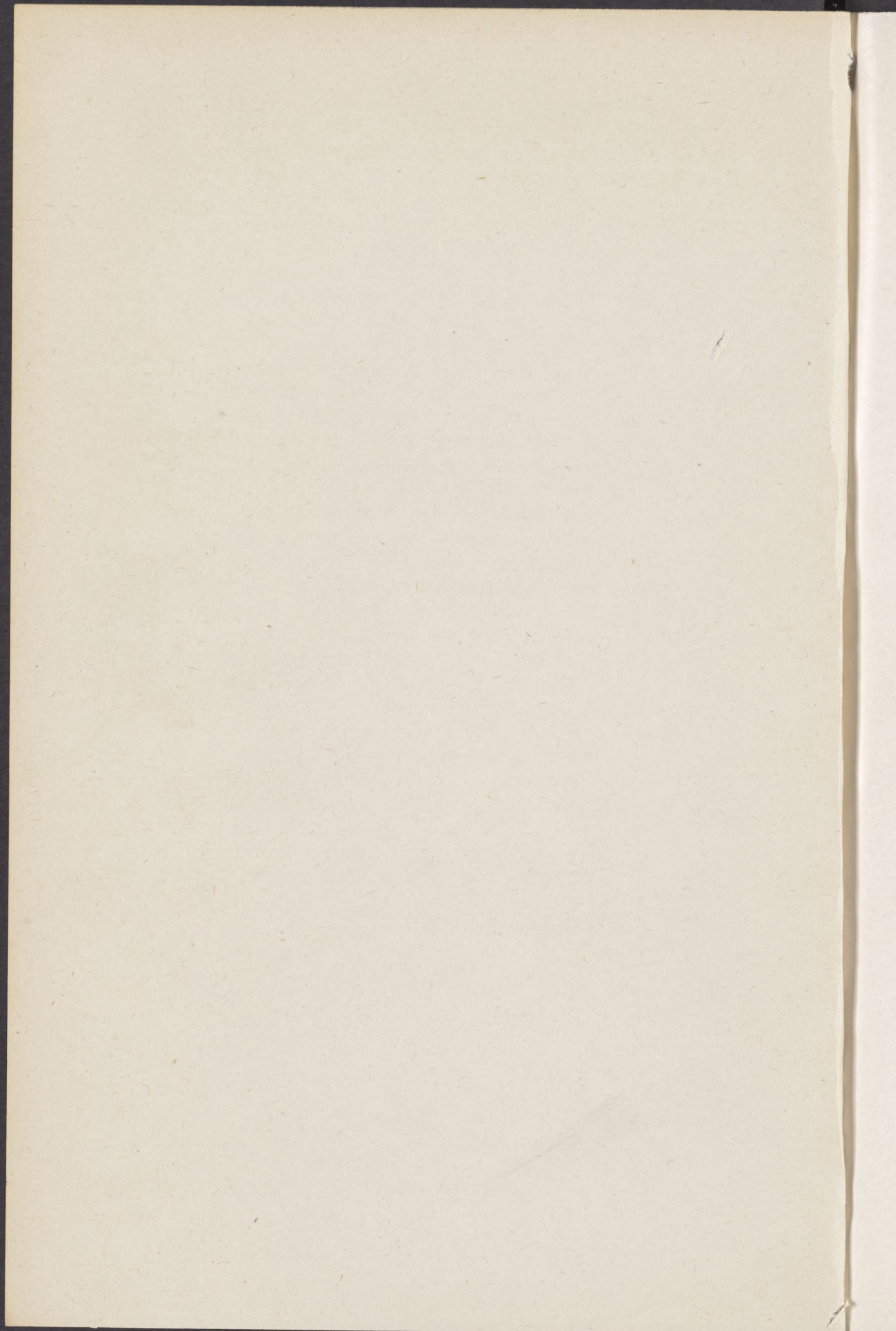
20

Under the circumstances, I am going to direct the jury to bring in a verdict for the defendant.

Gentlemen of the jury, the Court, under the authority conferred upon it by the law, directs you to bring in a verdict in favor of the defendant company.

30

(Exception noted for plaintiff.)



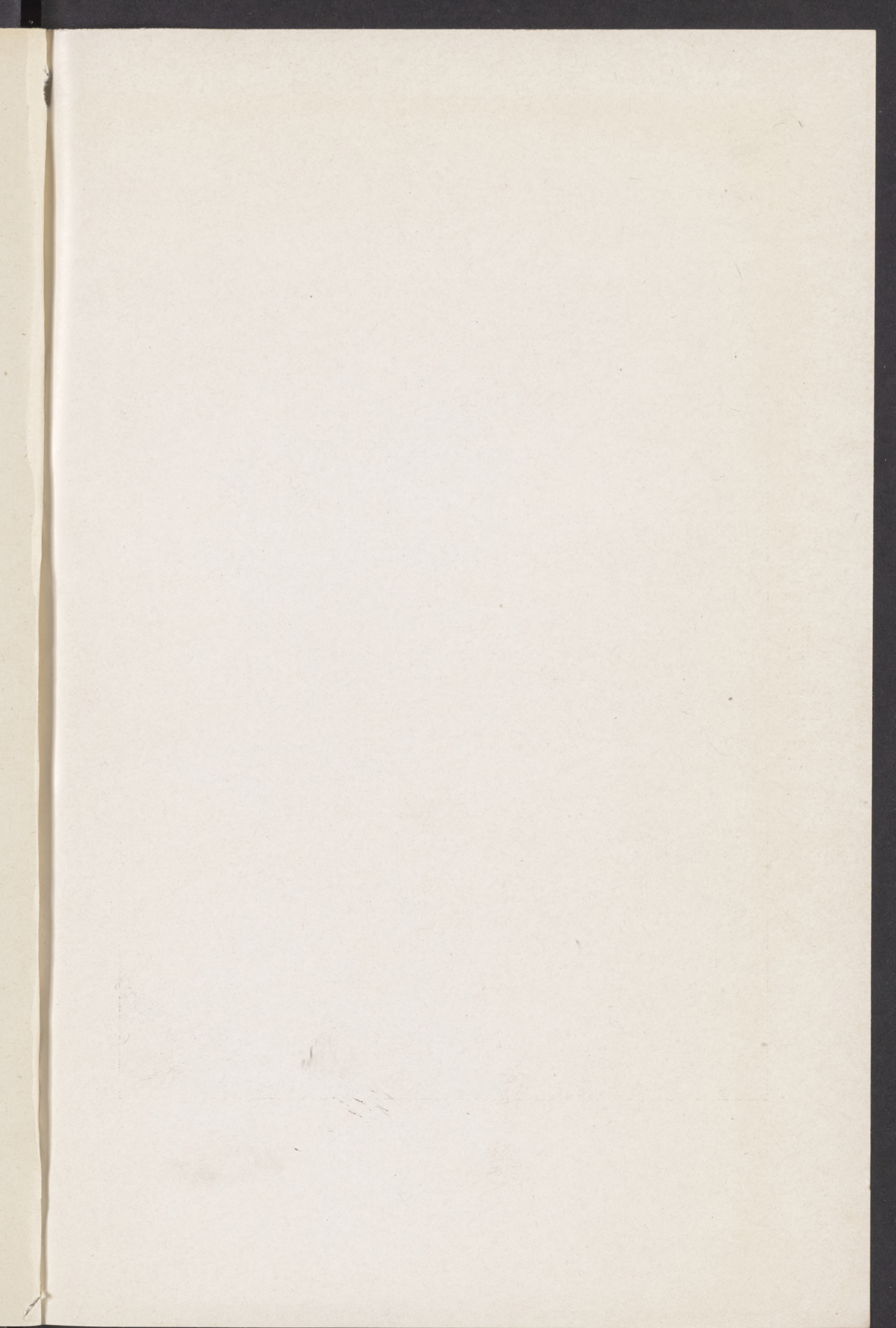
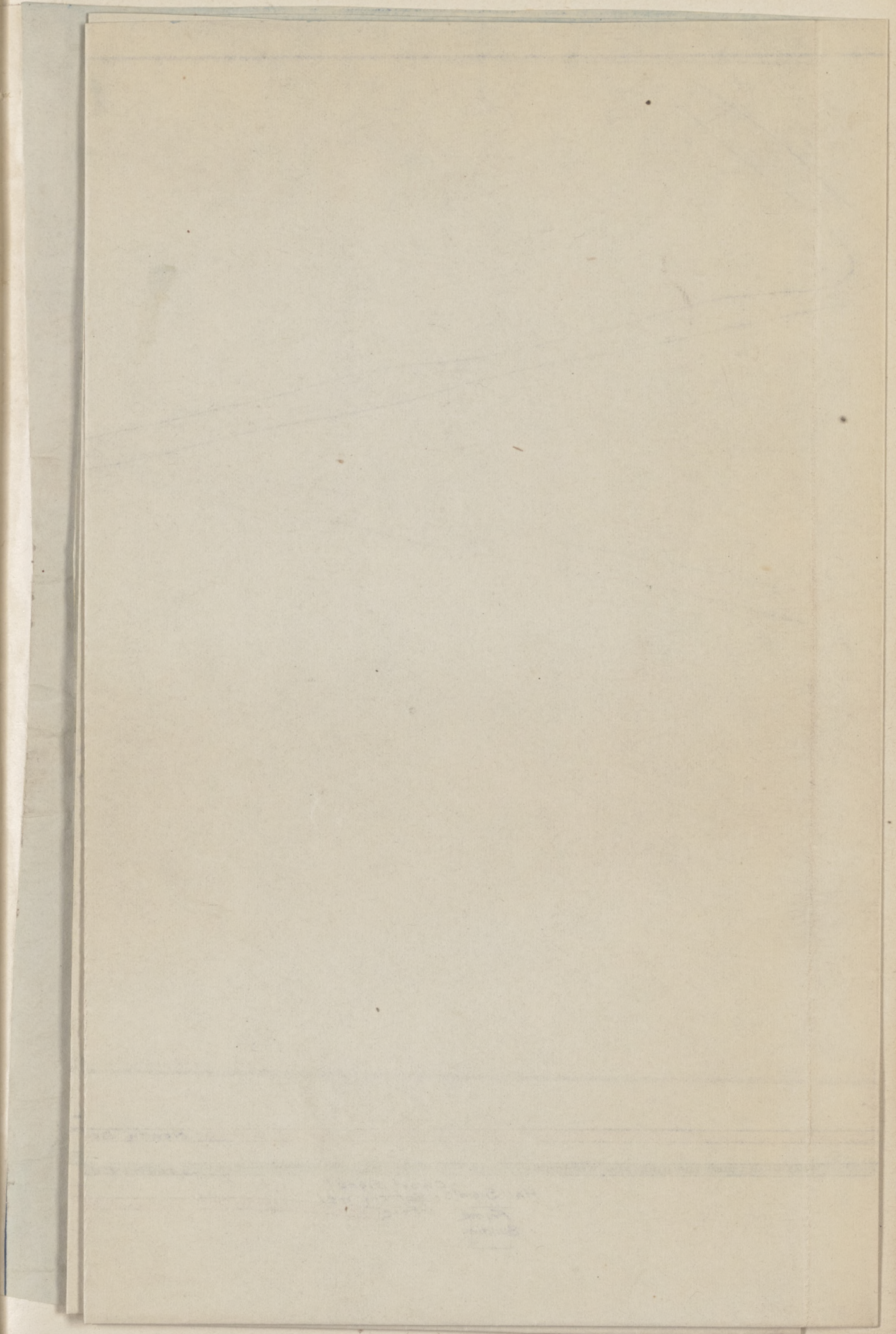




EXHIBIT D1.

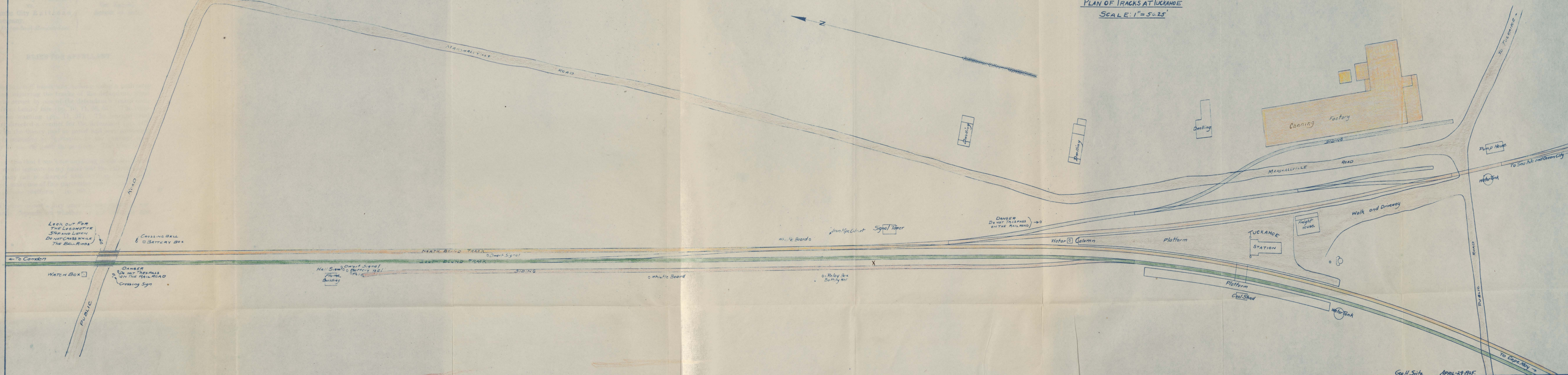


EXHIBIT D2.



Ex D-3. 1/2 mi. v. C.R.R.
N.D.M.

ATLANTIC CITY RAILROAD
CAPE MAY BRANCH
PLAN OF TRACKS AT TUCKAHOE
SCALE: 1" = 56.25'



Dr. B. S. Jones & Co. R.R.

Memorandum

For the
The
The
The

1887

Dr. B. S. Jones & Co.
R.R.

1887

New Jersey Court of Errors and Appeals

Jonathan Hess,
Plaintiff-Appellant,
vs.
Atlantic City Railroad
Company,
Defendant-Respondent.

On Appeal.
Action at Law.

BRIEF FOR APPELLANT.

The plaintiff below was walking along a path next to and adjoining the tracks of the defendant, when he was struck by one of the defendant's trains coming from behind him (pp. 10, 11, 56, 57). The train gave no warning (pp. 11, 57). The learned trial Court directed a verdict for the defendant (pp. 162, 163) on the theory that no proof had been presented which indicated an invitation by the railroad company to use the path in question. The trial Court said:

“So that I can't see anything in the case which would indicate to my mind that the railroad company can be charged with inviting the plaintiff to make use of this particular space in approaching the platform.” (p. 163.)

Whether or not a jury question was involved, necessarily depends on whether or not evidence was

presented from which a jury could find that the defendant invited the plaintiff to use the path in question. It is interesting to note that the trial Court reserved its decision on a motion to non-suit, (p. 84) refused the motion to non-suit at the end of the case (p. 161) and then directed a verdict for the defendant (p. 163). The two rulings seem to be antagonistic. The refusal to non-suit evidently meant that the plaintiff had presented evidence from which an invitation to use the path could be inferred. The direction of a verdict for the defendant was based on the theory that there was no evidence from which invitation could be inferred. On motions to non-suit and direct verdicts, trial Courts must assume that all evidence is true and if, in the case at bar, there was evidence from which an invitation to use the path could be inferred, the ruling of the Court below was error.

The plaintiff below lives at Tuckahoe, New Jersey, on the Marshallville Road (p. 51). The Marshallville Road crosses the tracks of the defendant some 400 or 500 yards north of the depot. The plaintiff lives on the west side of the railroad tracks (p. 51). On the west side of the tracks the only means of reaching the depot is by a path running along the tracks (p. 67, l. 8). The plaintiff was walking along this path when he was injured (p. 52). He was going to the depot for the purpose of taking a train to Philadelphia (p. 52).

The testimony as to manner in which the path was used by the public is, in our opinion, quite complete. Mr. Hughes says, "There was a path there and he (meaning the plaintiff) walked along that path." (p. 10, l. 30.) Mr. Hughes further says, "I knew there was always a path there, I don't know how long." (p. 10, l. 33.) Mr. Hughes further says, "He was walking along the public path, that is all

I know." (p. 13, l. 24.) Mr. Stille says, "There is a well defined foot path next to the ties," (p. 15, l. 24) also, "I have used it twenty-five years. It might have been there before that a few years." (p. 15, l. 27.) Mr. Stille also says that ninety per cent. of the public living at Marshallville use the path in going to and from the station (p. 15, l. 30.) and that ladies, children, men and bicyclists use the path (p. 17, l. 24, *et seq.*). Mr. Birch says, "There is a side path along the west side of the main Cape May tracks," (p. 22, l. 11) that it is "just common path that every one uses," (p. 22, l. 13) that school children, passengers and the like use it (p. 22, l. 17) and when the end of the path is reached planks extend across the tracks to the station platform (p. 22, l. 30, *et seq.*). Mr. Somers says, "Down the railroad there is a well beaten path where people walk, if that is what you are asking for, that is what is there," (p. 27, l. 3) that people have been going up and down there ever since I lived there." (p. 27, l. 13.) Mr. Somers further states that he has lived there ten or twelve years, (p. 27, l. 15) and that a planking extends from the end of the path over the tracks to the station platform. (p. 27, l. 26.) Mr. Parker says the path has been there since the road was built, (p. 30, l. 8) and is used pretty generally by men folks to get to the station. (p. 30, l. 19.) Mr. Hand, a former employee of the defendant's, says most of the people coming from Marshallville use the path (p. 34, l. 15), that he worked for the defendant fourteen years (p. 34, l. 9), and that people used the path while he worked for the company. (p. 34, l. 26.) Mr. Harris, a member of the Bar, says there is a well defined path there (p. 45, l. 27), that people walk there (p. 45, l. 29), that he has known of the conditions for from ten to fifteen years (p. 44, l. 16) and everybody uses the path.

(p. 48, l. 30.) Mr. Hess says, "it is a path, well worn, made out of such material as a railroad uses for the roadbed, cinders, gravel" (p. 53, l. 12) and that the path has been there since the railroad was built. (p. 53, l. 25.) Mr. Hess also says, everyone who lives up his way, except one man, uses the path (p. 53, l. 28), that he has frequently gotten off trains onto the very path (p. 54, l. 4), and has seen others do so. (p. 55, l. 2.) Mr. Hess further states, that he has often seen people board trains from the path (p. 55, l. 3, *et seq.*). Mr. Hess further states, that on occasions when he was about to leave the defendant's train at the depot he has been invited by the train crew to stay on the train until it got on the "crossover" where he could get off on the very path in question (p. 150, l. 12, *et seq.*). Mr. Hess did accept the invitation and did get off on the path (p. 150, l. 23, *et seq.*). Mrs. Hess states, that she has gotten on and off trains from the path and that in so doing, employees of the defendant have helped her get on and off. (p. 147, l. 19, *et seq.*)

In view of the evidence that the path had been in use since the railroad was built, that the path was almost universally used by the people of Marshallville in getting to and from trains, that the path was the only means of reaching the depot on the west side of the tracks, that the path was used by bicyclists, women and children, that the path was connected by planking to the station platform, that passengers were invited to remain on trains until said trains had reached a point opposite the path and that people had been helped from trains onto the path and from the path onto trains by employees of the defendant, we earnestly insist that the presence of testimony showing invitation is manifest. The case of *Fedele vs. West Jersey & Seashore Railroad Company*, 91 N. J. L. 638, recently decided by this Hon-

orable Court, lays down the law applicable to the situation. In the Fedele case the plaintiff was walking along a pathway situated exactly as the pathway in the case at bar, and used for exactly the same purpose. This Honorable Court there held that the question whether the plaintiff occupied the pathway under an implied invitation was for a jury to determine.

The fact that trespass signs may have been displayed by the defendant has no force, since the defendant, by its conduct, indicated that such signs were to be disregarded. Again the signs may not have been in place until after the accident in question (p. 46, l. 52, *et seq.*) also (p. 17, l. 34, *et seq.*) also (p. 28, l. 27, *et seq.*).

We sincerely urge that there is an abundance of evidence showing invitation, that the learned trial Court erroneously directed a verdict for the defendant and that a new trial should be ordered.

Respectfully submitted,

WESCOTT & WEAVER,

Attorneys for Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

JONATHAN HESS,
Plaintiff-Appellant,
vs.
ATLANTIC CITY RAILROAD
COMPANY,
Defendant-Respondent.

} Appeal from Su-
preme Court.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Jonathan Hess, a former employee of the Atlantic City Railroad Company (page 75, lines 10-13), was walking in a southerly direction on the respondent's right-of-way, at Tuckahoe, New Jersey, in a space formed by the main southbound tracks and a siding to the west thereof. Instead of walking along the public road, crossing the said railroad's tracks and taking a public road to the east of the said right-of-way, which leads to the proper approach of the Tuckahoe Station, as provided by the respondent, he chose to walk along the railroad tracks as a short cut to the station (page 67, lines 5-8).

The appellant had entered the respondent's right-of-way from a public road about 1200 feet north of the station and had proceeded safely for a dis-

fance of about 1000 feet until he reached a point near the signal tower (page 76, lines 30-31; Exhibit D3 indicated by x) where he stepped over to the extreme easterly side of the space and then on the railroad ties of the main southbound track and was struck by the engineer's step on the engine of a train drifting into the said railroad station (page 112, line 18, to page 113, line 24).

The engineer had seen the appellant walking along the westerly side of this space on the ties of the siding and when the engine was 40 to 50 feet distant, the engineer observed the appellant moving to the easterly part of the space and getting dangerously close to the path of the train. Immediately, he blew the danger signals, which were heard by several people. Instead of paying any attention to these signals, the appellant stepped still further over to the left and was struck, as the engineer could not stop the train inasmuch as his air brakes were already on. The engine bell was ringing automatically in approaching the station but the appellant did not hear the approaching train nor the engine bell nor the danger signals. In fact, he never looked around from the time he first stepped on the railroad right-of-way until he was injured, even though he realized it was his duty to protect himself while making this short cut to the station (page 73, lines 23-36).

It is the contention of the respondent, that the evidence clearly shows the appellant was not walking on the railroad right-of-way by the express or implied invitation of the respondent but was a trespasser or a mere licensee. That there was no evidence of any wilful or wanton act of the respondent's employees is undisputed, so it therefore follows that upon the proofs introduced in this case, the appellant did not present a jury question.

**THE APPELLANT WAS NOT ENTITLED TO
TO HAVE HIS CASE SUBMITTED TO THE
JURY.**

The complaint is based upon the negligence and carelessness of the respondent company in propelling one of its trains against the appellant who was walking along an alleged well defined and constantly used path on the west side of its railroad tracks leading to its station. The complaint also alleges that this path has been used with the respondent's knowledge by the public constantly since the railroad was built.

The answer denies the negligence of the respondent and alleges (1) that the appellant was guilty of contributory negligence (2) that appellant was injured while walking or standing on respondent's right-of-way and (3) that the respondent was not guilty of any negligence.

Since there was no allegation or proof of any wilful or wanton act of the respondent, it must be evident that if the appellant was a trespasser or licensee, there would be no jury question involved. It is likewise a fact, that if the appellant was on this alleged path at the invitation of the respondent, yet if as a matter of law he was guilty of contributory negligence, then there was no question to submit to the jury.

I.

**APPELLANT WAS NOT USING THIS SPACE AS
A PATHWAY TO THE STATION BY IN-
VITATION OF RESPONDENT.****A. Trespass Signs Negative Invitation.**

To negative any implied invitation, we would call to the attention of the Court, the two trespass signs reading "DANGER" "DO NOT TRESPASS ON THE RAILROAD." One of these signs appears (Exhibit D3, State of Case, respondent's exhibits) where the public road crosses the railroad tracks, near the extreme left-hand of map, and the other appears down by the station near the water column. The first of these signs may also be seen in Exhibit D1 slightly to the right of the crossing signs on a separate small iron pole.

The appellant facetiously alleges in his brief that perhaps these signs may not have been put there until after this accident. In reply we would say that this accident occurred September 1st, 1914, and these signs were there on April 29, 1915 (date of Exhibit D3), also on September 9th, 1915 (date of Exhibit D1), and the reason the question was not gone into more thoroughly was that the appellant's counsel admitted these two trespass signs were there when the question was raised (page 28, line 32, to page 29, line 6). This was so thoroughly understood by the Court and counsel that when the attorney of respondent asked about these trespass signs of one of its witnesses, the Court said, "They are admitted in the case" (page 38, line 34). To this remark of the Court the counsel of appellant made no denial, showing that he so understood his previous admission.

Eliminating these trespass signs, we submit that it seems contrary to all reason, that the respondent would desire any of the public to make use of this dangerous space as a pathway which would seriously interfere with the operation of its trains. That the respondent had provided a regular approach to the station is shown by Exhibit D3 and the evidence (page 134, lines 20-24). That the respondent had failed to put any lights about this space or to use any means to protect people using it, is further evidence of no invitation. The appellant's wife testified that she had been helped on and off cars on this path but on cross-examination admitted it was about 250 feet from the public crossing and the railroad tracks (page 148, line 33, to page 149, line 4), which is nowhere near this scene of the accident. The appellant also testified to the same effect but as no time was fixed when this happened, how can it be said that it was before this accident? That the appellant was permitted to do this may have been due to the fact that he had been a former employee, but if these two people were permitted to get on and off down near the public road, how can it be said that these two isolated cases is evidence that the company invited the traveling public to use the whole space from the road to the station as a safe means of approach to its station? That it is not the intention of the railroad company to permit passengers to alight in this space is shown by the testimony of the station agent who has been there 20 years (page 104, lines 14-15). He says that the railroad protests against this practice and warns passengers not to do so (page 107, lines 20-22). The regular place to discharge all passengers coming from either direction is at the station platforms (page 139, line 12, to page 140, line 26).

B. Nature of the Alleged Path.**1. Physical Conditions.**

This space which the appellant alleges is a pathway may be seen by examining respondent's Exhibit D2. It is the open space between the second and third rails from the left-hand side of the picture. It can be observed that the space is not different from the space between the fourth and fifth tracks except the tracks converge and meet. That this space does not continue over the long ties is very apparent.

2. Testimony.

There was a real dispute concerning the existence of this alleged path and many of the witnesses denied its existence entirely (page 38, lines 27-29; page 40, lines 4-14; page 42, lines 5-25; page 86, lines 4-6; page 88, lines 13-18; page 90, line 35 to page 91, line 4; page 94, lines 10-13; page 96, lines 11-18; page 113, lines 25-36; page 120, lines 25-32; page 135, lines 14-22; page 141, lines 22-28).

That this alleged path does not exist in fact is apparent from the evidence of the appellant himself, when he knew unprotected switches run across it (page 72, lines 5-6); that the company tore up and used the space whenever it desired (page 53, lines 16-17; page 69, lines 9-12; page 77, lines 15-19); and that he did not use it at night (page 71, line 35; page 72, line 3), and that the appellant did not want his children to use this space (page 151, lines 14-17). Other of the appellant's witnesses testified that this was not a public highway (page 48, lines 29-31); that

people walk in the space on the east as well as the west side of the main southbound tracks (page 28, lines 17-24; page 31, line 35, to page 32, line 29; page 45, lines 27-30; page 46, lines 19-21). The respondent's witnesses also testify to the same effect (page 90, line 35, to page 91, line 4; page 102, lines 8-23; page 122, lines 26-27).

That this alleged path did not continue over the cross-ties and up to the station was admitted by the appellant himself (page 70, line 17, to page 71, line 18) and other of his witnesses (page 27, line 33, to page 28, line 12; page 47, line 36, to page 48, line 2), and by all of the respondent's witnesses. Since it is admitted by all of the witnesses that this alleged path did not extend to the station, how can it be urged that the respondent invited the appellant to use the alleged path to get to the station?

That this space was the ordinary space between any railroad double tracks is shown from appellant's testimony by the fact that it was very rough (page 72, line 2; page 53, lines 13-15) and the testimony of the appellant's witnesses; that there was no path, which the railroad company built for people to walk on (page 35, lines 8-35); and that it was so rough that it would wear out shoes in traveling over the clinkers (page 30, lines 1-8), and that the witness never permitted his wife nor daughter to walk on it (page 31, lines 14-18) and that it is used principally by men (page 30, lines 19-21).

That there was no path maintained by the company is shown by the supervisor (page 99, lines 30-36; page 105, line 30, to page 106, line 3; page 136, lines 18-24) and also by the many obstructions along this space. The appellant himself admitted that it had a switch running across it (page 73, lines 5-6); and by the testimony of Mr. Skelton who said there

were many obstructions including pipes, wires, several inches above the ground (page 123, line 8, to page 124, line 21) and that they are a good stumbling block (page 124, lines 3-6; pages 125-128). The appellant's witness also testified to these obstructions when he pointed out a signal tower or pole (page 156, lines 34-35); large lumps of coal and three obstructions (page 158, lines 4-36) and a cross-over causing an obstruction of four inches over which the witness had to step (page 159, line 31, to page 160, line 2).

Since there was no invitation for the appellant to use this alleged path as an approach to its station, it therefore follows, that the respondent owed the appellant no duty to refrain from injuring him by its negligence.

II.

APPELLANT WAS A TRESPASSER OR A MERE LICENSEE.

While it may be maintained that the respondent company permitted people to use the space between its tracks in going to and from its station and that therefore the appellant was there by license yet as a practical matter it seems impossible to keep the public off its tracks in country districts. It would seem that these trespass signs were all the respondent could do to notify the public that their presence on its right-of-way was that of trespassers. If this contention is correct he would be precluded from recovery under Section 55, Railroads and Canals (3 C. S. p. 4245).

If it has been shown to the satisfaction of this Court that the appellant was a licensee on the premises of the respondent, yet there was no evidence of any wilful or wanton act of the respondent's employees, and the appellant was precluded from recovering in this action.

III.

THE NEGLIGENCE OF THE APPELLANT WAS THE SOLE CAUSE OF THE ACCIDENT.

There were only a few witnesses who actually saw the accident, the first of whom was Mr. Hughes, a witness for the appellant. He stated (page 10, lines 9-22) that he was seated on a train and saw Mr. Hess coming down the path and something fly up in the air and thought it was the fireman. This witness says the appellant was walking on the outside of the tracks (page 13, line 16). This witness did not hear any bell or whistle but wouldn't say signals were not given (page 11, lines 18-23).

Mr. Gandy, one of respondent's witnesses stated, that he was standing at the station to take the train in question (page 36, lines 30-36) that he saw the appellant walking along the track (page 37, lines 30-32) and heard the train blow a whistle (page 38, lines 1-10) and that the appellant seemed to be on the end of ties (page 39, lines 13-18) when he was struck by the train (page 39, lines 9-11).

Mr. Zimmerman, another witness for respondent, was standing on the station platform and saw the appellant coming toward the station walking on the end of the railroad ties, when he was struck (page 93, line 25, to page 94, line 9).

The only other witness to the accident was the engineer to whose testimony reference has already been made. He states that the engine bell was ringing automatically and was not shut off until after the accident (page 114, lines 12-25) and that he sounded the danger signal when 40 or 50 feet from appellant (page 112, lines 30-36). That this danger signal was actually given must have been a fact, for it was heard by the baggage master of the train who was attracted by it and later saw a dark object (page 85, line 28, to page 87, line 6), as the train was drifting into the station. The conductor's attention was also attracted to these danger signals, when he was in the car about to announce his station and he looked out to see to whom these danger signals were given (page 90, lines 19-26). The supervisor of the railroad was seated in the rear coach on this train and states that he was also attracted by these danger signals and went outside (page 98, lines 20-30). The Tuckahoe station agent was inside the station and upon hearing these danger blasts went outside (page 104, lines 26-33). The tower man was also attracted to these danger blasts from this train (page 87, lines 27-30).

It is submitted, that the evidence of the appellant himself, that he didn't hear any signals (page 57, lines 15-17) and the testimony of the only other witnesses for appellant concerning signals who stated he didn't hear any but wouldn't say no signals were given (page 11, lines 18-23) is purely negative when contrasted with the positive testimony of the respondent's witnesses, some of whom were hundreds of feet away (page 37, lines 21-24; page 93, lines 34-36), on the station platform. We insist that there can be no question but that the engine bell was ringing and the danger signals blown.

It must be evident that the appellant, who had worked for the railroad company as a fireman and engineer, who was familiar with the sound of engines (page 75, lines 10-23) and who approached the station along this space without ascertaining whether a train was coming (page 73, lines 29-31) or even took the trouble to look at the semaphores to see if a train was coming (page 76, lines 32-38) even though he knew he would have to look out for his safety while taking this short cut (page 73, lines 33-36) must be guilty of negligence as a matter of law. The fact that he would not permit his children to use this space (page 151, lines 14-17) shows that he knew the railroad did not hold it out as a space in which the public could walk with safety. With the knowledge which the appellant had concerning the dangers of using this space how can it be said that he made any reasonable effort to protect himself from the accident?

IV.

THE APPELLANT FAILED TO CREATE A JURY QUESTION.

That the appellant was not on the alleged path by invitation of the respondent, must be apparent after an examination of our decisions governing this class of cases.

The question of implied invitation has been discussed by this Court in a case of injury at this very station, where a woman came down the Marshallville road and cut across the tracks near the station because the regular path to the station was habitually blocked by the very train she intended to take. She

tripped over some obstructions in making this short cut and this Court decided a jury question was involved inasmuch as passengers were frequently forced to take such a course, in order to board the train. We submit that in the case *sub judica*, there was no necessity for taking the alleged path but it was a matter of convenience for the appellant. Attention is called in part to the opinion of Mr. Justice Parker who stated, "Under normal conditions, the existence of a worn path across railroad tracks to a station cannot be relied on as an invitation to use that path so as to make the railroad company responsible for injuries due to mere negligence, so long as there is a safe pathway provided for such access; and the fact that the pathway provided is less convenient than the other will make no difference in the rule." "*Diekman vs. D. L. & W. R. R.*, 81 N. J. Law 460, 79 Atl. 310, 34 L. R. A. (N. S.) 693; *D. L. & W. R. R. vs. Trautwein*, 52 N. J. Law 175, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Garrett vs. Atl. City, Etc., R. R.*, 79 N. J. Law 127, 74 Atl. 273, affirmed 81 N. J. Law 570, 79 Atl. 1119. So that if the access by the aforesaid east and west road had been unobstructed at the time of plaintiff's approach, the existence of the trodden path without further evidence of its recognition and holding out by the defendant as a means of access would not have sufficed as an invitation, but she would have been bound to go around by the road; and on her taking the short cut the defendant would have owed her no duty except to abstain from wilful injury, as she would be a trespasser or at best a mere licensee. *Phillips vs. Library Co.*, 55 N. J. Law 307, 27 Atl. 478. See *Kubinak vs. L. V. R. R.*, 79 N. J. Law 438, 75 Atl. 443."

Corson vs. Atlantic City Railroad Company, 83 Atl. 885.

A railroad company occupied an enclosed shed of a railroad pier in which it loaded and unloaded freight cars. A freight train was broken to permit the car doors to be opposite pier doors and a painter attempted to pass between one of these open spaces and was injured. This Court held that no invitation to make use of this passageway between the cars was implied, either from the existence of the opening, the use made of it by employees of the company nor from the fact that such use had been made of it by the plaintiff or his co-servants without molestation. Mr. Justice Garrison in his opinion quoted with approval from the case of *Phillips vs. Library Co.*, 55 N. J. L. 307, at page 506, as follows:

“The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be used.” “To which was added in original opinion the following:

‘A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable to such use, and for a breach of this obliga-

tion he is liable in damages to a person injured thereby.' ”

Furey vs. New York Central R. R., 51 Atl. 505.

Where instead of using the regular stairway to the station the deceased used a path up to the tracks and around a fence built by the railroad company, the Court denied recovery and held there was no invitation even though the agents knew of the use the public was making of the path without complaint or remonstrance, for the reasons that the path was not made by the company nor was it kept in repair by it.

Dieckman vs. D. L. & W. R. R., 79 Atl. 310.

Reference is made in the brief of the appellant to the case of *Fedele vs. West Jersey & Seashore Railroad Company* (91 N. J. L. 638), which is claimed to be decisive of the main case. In the *Fedele* case the path was gravel and connected the public road with the railroad station and owing to the darkness at the time of the accident, it could not be said that the plaintiff was guilty of contributory negligence, for it was evident that he was using his senses. It further appears that the path was open and obvious and ran along the outside of the tracks and therefore the question of invitation was for the jury, but in the main case, this alleged pathway ran between tracks on which cars would frequently pass, and was no more than the open space between tracks and therefore the question of invitation was for the Court.

For the reasons above stated, we respectfully submit that the judgment herein appealed from should be sustained.

FRENCH & RICHARDS,
Attorneys for Respondent.

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