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JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

ELIZABETH SWANK, Admrx. of HERBERT L. SWANK, deceased,	}	Judgment Record.	10
vs.		Action at Law.	
PENNSYLVANIA RAILROAD COMPANY.	}	On Postea.	
		JAMES MERCER DAVIS, <i>Attorney.</i>	

Pennsylvania Railroad Company, the defendant in this cause, was summoned to answer unto Elizabeth Swank, Admrx. of Herbert L. Swank, deceased, the plaintiff therein, in an action at law upon the following complaint: 20

(Summons issued November 20, 1917.)

The plaintiff, residing at Bristol, in the County of Bucks and State of Pennsylvania, says:

1. That on or about September 18, 1917, the defendant was a corporation engaged in the business of a common carrier, by railroad, engaged in interstate commerce between the several states and territories and the District of Columbia, all within the United States of America, and especially owning, maintaining and operating a railroad in interstate commerce at or near Princeton Junction, in the County of Mercer and the State of New Jersey. 30

New Jersey State Library

2. That Herbert L. Swank, the plaintiff's intestate, was employed by the defendant in interstate commerce at the time and place aforesaid; the said defendant at the time and place aforesaid also being engaged in interstate commerce, by railroad, and while so engaged in said interstate commerce, the said Herbert L. Swank suffered personal injury, resulting in whole from the negligence of the said defendant; and injury resulting in instant death.

10 3. The negligence of which the defendant is guilty and of which the plaintiff complains consists in the fact that at or about Princeton Junction, in the County of Mercer and State of New Jersey, on or about September 18, 1917, when and where the said Herbert L. Swank was employed by the defendant in interstate commerce, by railroad as aforesaid, the defendant carelessly and negligently ran and operated a train on, over and along the track upon which the said Herbert L. Swank was employed at a high
20 and unreasonable rate of speed under the circumstances; that although the said Herbert L. Swank was employed on the tracks of the said defendant company, the said company, by its servants and agents failed and neglected to give any warning of the approach of said train; that the said defendant failed and neglected to give to the defendant a reasonably safe place to work under the circumstances.

4. The injury inflicted upon the said Herbert L.
30 Swank through the negligence of the defendant, as aforesaid, resulted in the death of the said Herbert L. Swank on September 18, 1917, who left him surviving the plaintiff, his widow, who thereby suffered pecuniary loss in the death of the said Herbert L. Swank.

5. Letters of administration upon the estate of the said Herbert L. Swank were granted to the plaintiff by the Register of Wills of Bucks County, in the State of Pennsylvania, on November 22, 1917, and an exemplified copy thereof filed with the Secretary of State of the State of New Jersey, on November 24, 1917.

6. This suit was brought within two years from the date of the death of the said Herbert L. Swank. 10

The plaintiff, therefore, claims of the defendant the sum of \$20,000, damages as aforesaid, and brings this her suit.

JAMES MERCER DAVIS,
Attorney of the Plaintiff.

(Filed Dec. 1, 1917.)

The defendant, a corporation of the State of Pennsylvania, with offices in the State of New Jersey, answering, says: 20

(1) It admits that on September 18, 1917, the defendant was a corporation engaged in interstate commerce, and owned, maintained, and operated a railroad in interstate commerce at or near Princeton Junction, Mercer County, New Jersey.

(2) It admits that Herbert L. Swank suffered personal injuries resulting in instant death on September 18, 1917, but denies the other matters stated in the second paragraph of the complaint. 30

(3) It denies the matters stated in the third paragraph of the complaint.

(4) It denies that Herbert L. Swank was injured through the negligence of the defendant, but is uninformed as to the other matters stated in the fourth paragraph of the complaint.

(5) It is not informed as to the matters stated in the fifth paragraph of the complaint, and leaves the plaintiff to her proof, as she may be advised.

10 (6) It admits the matters stated in the sixth paragraph of the complaint.

FIRST GROUND OF DEFENSE:

There was no negligence on the part of the defendant, its officers, agents or employees in the premises.

SECOND GROUND OF DEFENSE:

20 The accident named in the complaint did not occur by reason of any defect or insufficiency due to the defendant's negligence in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment.

THIRD GROUND OF DEFENSE:

30 That the plaintiff's intestate was guilty of contributory negligence to such a degree as to preclude the jury from rendering damages against the defendant. The contributory negligence consists in the plaintiff's intestate not taking proper precaution for his own safety, considering the knowledge and experience which he had or should have had or otherwise.

FOURTH GROUND OF DEFENSE:

That there was no violation by the defendant of any statute enacted for the safety of employees which contributed to the injury of the plaintiff's intestate.

FIFTH GROUND OF DEFENSE:

That the plaintiff's intestate assumed the risks of his employment, including the risks whereby he came to his injury. 10

SIXTH GROUND OF DEFENSE:

Defendant was not engaged in interstate commerce at the time and place of the alleged accident, because of which plaintiff's intestate received his injury. 20

SEVENTH GROUND OF DEFENSE:

Plaintiff's intestate was not engaged in interstate commerce at the time of the accident.

BOURGEOIS & COULOMB,
Attorneys of Defendant.

(Filed Aug. 23, 1918.)

30

The above-entitled matter having been regularly referred to Hon. Harold B. Wells for trial, the above-entitled matter was tried at the Burlington Circuit on November 7, 1919, before Hon. Harold B. Wells and a jury, when the jury returned a general

verdict in favor of the plaintiff and against the defendant for the sum of \$10,000.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of ten thousand dollars damages
 Damages \$10,000 and her costs which have been
 Costs _____ taxed at the sum of
 _____ dollars making in the whole the
 sum of

10 Judgment entered November 18, 1919.

WM. S. GUMMERE,
C. J.

20 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 the above-stated cause as the same remains of record in my office.

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

(Seal) ENOCH L. JOHNSON,
Clerk.

TESTIMONY.

**NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.**

ELIZABETH SWANK, Admin-
istratrix, etc.,

Plaintiff,

vs.

P E N N S Y L V A N I A R A I L R O A D
C O M P A N Y,

Defendant.

Action at Law.

10

Mount Holly, N. J., November 3, 1919.

Mr. Davis: As I understand, you admit that the
railroad was engaged in interstate commerce?

20

Mr. Coulomb: The railroad was engaged in in-
terstate commerce. That was admitted in the plead-
ings and we admit it now.

EDWARD N. COOK, sworn for plaintiff.

30

Direct examination.

By Mr. Davis:

Q. Mr. Cook, on September 18, 1917, you were
employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. As a gang leader.

Q. Gang leader of what?

A. Of a gang of men.

Q. Yes, and what did this gang of men do?

A. All repair work and everything that was supposed to be done in that work and all.

Q. Was Herbert L. Swank employed in the gang of which you were leader?

10 A. Yes, sir.

Q. On the 18th of September, 1917?

A. Yes, sir.

Q. How long had he been employed?

A. Well, that I am not positive of; must have been a month.

Q. And on this day you were working where?

A. We were working at Princeton Junction, CD tower.

Q. Princeton Junction is in this state, is it not?

20 A. In this state, yes, sir.

Q. Is it at the junction of the Pennsylvania Railroad with the branch road that goes off to the town of Princeton? That is correct?

A. That is correct.

Q. What were you doing on this day?

A. Well, we were doing various things.

Q. At the time that this boy was killed what were you doing?

30 (Objected to.)

Q. What was this man doing?

Mr. Coulomb: I withdraw my objection.

A. He was cleaning out the stone ballast between

the ties to operate a new switch we were going to put in.

Q. Now this new switch system was a system for the Pennsylvania Railroad at this point, was it not?

A. Oh, yes, Pennsylvania.

Q. Did it have a switch system in existence at that time?

A. Not at that point.

Q. Did it have a switching system in existence at that junction and along those railroad tracks at this place? 10

A. I don't get your question. There is an interlocking plant there, you know, a number of switches.

Q. But this particular one, how was it related to the other work that was existing there at that time?

A. This was new work we were doing.

Q. What was the new work you were doing? What relation did it have to the old work, if any?

A. We were getting up a new set from No. 5 to No. 4 track, getting ready to connect up. 20

Q. Was there a new switch installed?

A. It was installed but not in service.

Q. I am not talking about service. Was there a new switch installed?

A. I say the switch had been placed in position but not in service yet.

Q. A part of the roadbed used at that place and point, was it not?

A. How is that?

Q. The switch was between parts of the railroad that then existed? 30

A. From 4 to 5, yes, sir.

Q. What were 4 and 5 used for?

A. No. 5 is used for any purpose, for switching or anything around Princeton Junction. No. 4 is the main line west-bound.

Q. Now had these tracks, 4 and 5, been in existence before that time?

A. Ever since I have been on the railroad, nearly.

Q. How far was it from the former and old signal system?

A. Why, the distance between points on No. 4 was about ten feet.

10 Q. No, you apparently are not paying attention to what I am asking you.

A. I didn't get your question then.

Q. How far was this work that was being done now away from the nearest switch signal device?

A. Nearest signal device?

Q. Yes.

Mr. Coulomb: I don't think that question is capable of being answered. The nearest signal device; what does he mean by the nearest signaling device?
20 I am not sure of that.

Mr. Davis: That is your fault.

Mr. Coulomb: That may be, but I am entitled to know. If your Honor knows I would like to have your Honor tell me what he means.

The Court: Repeat the question.

30 (Question repeated.)

A. I don't understand that question, whether it means the signal or the switch.

Q. Do you understand that I asked you how far was this man working from the nearest switch signal device?

Mr. Coulomb: If your Honor please, that was not the question.

The Court: Well, that is the question now, so let us not waste any time.

A. He was working near the old switches. That is as I understand it.

The Court: The question is how far away from 10
the nearest switch signal device.

A. I hardly get that question now. The switch that was being installed was a new switch and of course they follow one another on the cross-over, if that is your question.

Q. The question is, Mr. Cook, how far was he away from the nearest switch signaling device?

A. Oh, how far from the signals as you stand? That is the question, is it? 20

Q. Well, now I have asked you four times. You ought to be able to understand what we are getting at.

A. He was over twelve hundred feet from any signals.

Mr. Coulomb: There might be several things known as a device. It might be a semaphore signal itself, it might be some mechanical contrivance that operates that signal or it might be some other de- 30
vice which contributes to that signal, such as a brace or pipe line or something of that sort. Now it is perfectly simple for Mr. Davis, if he wants to have his question answered, to say what device he has in mind.

The Court: He is asking for the nearest signal switching device, and if the witness can answer that question, state what he means by the nearest switch device.

A. The nearest signal is 1,247 feet from it.

Q. What was the nearest distance of any part of any signal device used for switching purposes?

A. Well, we call them switches occasionally and
10 sidings. We don't call them signals.

Q. I didn't say signals, I said signaling devices. Now you and your counsel ought to be able to understand the English language.

Mr. Coulomb: I object and ask that it be stricken out. This is his witness.

The Court: That will be stricken out. It is not
20 proper to argue with the witness.

Q. Now do you understand the question?

A. Ask it again, please.

(Question repeated.)

A. Well, there were switches within ten feet of the one he was working on.

Q. Is there any device there that is connected with the signaling?

30 A. Not connected with the signaling, connected with the switch, pipe line.

Q. Well, doesn't that connect with the signals?

A. Signals and switches are not connected together.

Q. Well, how do you operate a switch if you don't operate it with the signals?

A. Operate it by a lever in the tower.

Q. Well, it is not connected with any signal?

A. No, sir.

Q. So that there are no signals at all along that road with respect to the switches?

A. You have got to get your position —

Q. Now wait a minute. Just answer that question, please.

A. Is there what?

10

(Question repeated.)

A. No. There is an independent lever altogether on each.

Q. So that there were at this time no signals along this line at all which indicated the condition of the switches being open or shut?

A. Yes, sir.

Q. Well, now, that is what I have been trying to get you to answer me, Mr. Cook.

20

A. I could have answered that question for you right away if you had said that. Yes, there was a signal there to show you the position of the switch.

Q. Now when this switch is moved either open or shut, does it reflect in the signals?

A. When the switch is moved —

Q. Answer yes or no, won't you?

A. Yes, it reflects in the signals.

Q. Now from these signals to the mouth, or whatever you call it—entrance to the switches—are there pipes or wires or rods or cables connected with the signaling devices?

30

A. They are the cables, wires.

Q. Now I am asking you how far away was Swank from any of these cables or wires at the time that he was hurt?

A. Well, that is a rather hard question to answer.

Q. Well, you know, don't you?

A. The cables are run right along in a conduit along the track.

Q. And along the track that he was working on?

A. No, sir; outside entirely.

Q. Did they affect the track that he was working on or were they related to the track that he was
10 working on?

A. No, sir; not where he was.

Q. Now, Mr. Cook, let us be fair and understand the question. This man was working on the track, was he not, you have told us?

A. Yes.

Q. Now you say along on the outside of those tracks there were wires or cables which operated switches?

A. No, signals.

20 Q. They go to the switches, do they not?

A. They go through a switch box, not switch.

Q. Do they not go to the end of the switch?

A. To the switch box. That does not throw the switch.

Q. I understand it doesn't but does it operate the switch? Does it react as the switch is operated?

A. It reacts as far as the use of signals is concerned.

30 Q. Did any of these cables which ran alongside of this track cooperate with the rails or tracks upon which he was working or any switches attached to it?

A. It was quite a distance from where —

Q. Won't you answer yes or no?

Mr. Coulomb: He can't answer that yes or no.

The Court: He asked how far.

Mr. Davis: No.

(Question repeated.)

A. No.

Q. Were there any switches on the tracks that he was working?

A. Not near him.

Q. How far was the nearest one?

10

A. About 680 feet.

Q. Did that switch reflect in the semaphores or in the signaling system that was in operation at that point?

A. Yes.

Mr. Coulomb: Operation at what point, Mr. Davis?

Mr. Davis: The point that he was working at, at or near the point.

20

Q. Now you say that he was picking out the stones where the new switch was being put in or had been put in?

A. To be put in. The switch was in.

Q. The switch was in? He was only putting in—you were getting ready then to put in a signaling system, were you not?

A. To connect with the switches, pipe lines.

30

Q. Won't you answer whether it was the signaling system or not?

A. It was the signal system, it was the switch sytem.

Q. Along with the switch system there was a signal system that ran to the tower, did it not?

A. Always.

Q. Well, did it at this point?

A. Yes, would have done it after it was installed.

Q. That was the intention, was it not?

A. After it was installed.

Q. Was there at this time a signaling system attached to other switches in the neighborhood?

A. All of them later on.

Q. Will you just answer this question, please?

10

(Question repeated.)

A. Yes.

Q. This was an additional signaling system attached to the additional switch, was it not?

(Objected to as leading.)

Q. Was it or was it not?

20

The Court: The question as reframed is permitted.

(Question repeated.)

A. It was an additional pipe line to operate this switch.

Q. Well, was it or was it not a part of the signaling system?

30

A. Yes, would be.

Q. Was it any different from others that had been installed before that time?

A. No, sir.

Q. What was new then if anything with respect to this particular work that was being done?

A. It was new work going in.

Q. What do you mean by new work going in?

A. Something that had not been put in service yet.

Q. It was the installation then of an additional one, was it?

A. Additional switch, yes.

Q. The system was there, was it?

A. On other switches, yes.

Q. Of the same character as this one?

A. The same, yes, sir.

Q. And operated in the same way?

A. They are all operated the same way.

Q. No, won't you answer the question?

A. Yes, operated the same way.

Q. Now these two tracks, 4 and 5, were they at the time that this accident happened used in interstate commerce?

(Objected to. Question withdrawn.)

Q. These tracks 4 and 5, did trains from the State of New York going to the State of Pennsylvania through the State of New Jersey pass over them or not?

A. Trains passed over that No. 4 track, yes.

Q. Over both of them?

A. Not passenger, freight; used for drilling purposes, No. 5.

Q. Was 5 a through track?

A. No, sir.

Q. It was the local track?

A. 5 was just a short track from Plainsboro to Princeton Junction.

Q. That is about ten miles?

A. About a mile.

Q. Now the switch from No. 4 that you were putting in was over to No. 5?

A. Yes, sir.

Q. What was the purpose of that switch?

A. To make quicker moves, more convenient.

Q. From where to where?

A. From 5 to 4 or from 4 to 5.

Q. What was 5 used for?

A. Drilling purposes.

Q. What do you mean by drilling purposes?

A. Where there are cars thrown in there and had to be fixed up again and taken to Plainsboro or
10 Princeton, or something like that, you know.

Q. Was it for the purpose of accommodating traffic on track No. 4?

A. No, sir.

Q. Was that a through track?

A. No. 4?

Q. Yes.

A. Yes, sir.

Q. That one through track—I mean is it a track
20 that ran from the State of Pennsylvania to the State of New York?

A. Yes.

Q. Or to Jersey City, to accommodate traffic into New York?

A. Yes, sir.

Q. Used by interstate commerce?

A. Used by the Pennsylvania Railroad.

Q. And does it accommodate trains that arrive in Pennsylvania and go to New York and other trains from New York into the State of Pennsylvania?

30 A. Yes, it is a west-bound passenger track.

Q. Now as I understand then, this switch was a switch than ran from this main passenger track, No. 4 over into the switch track No. 5?

A. Yes, sir.

Q. And a certain system was in existence at the

point and this was additional work that was being done at that place; is that correct?

(Objected to.)

Mr. Davis: Well, I think you are entitled to that objection.

The Court: The question is withdrawn.

Cross-examination.

10

By Mr. Coulomb:

Q. Mr. Cook, I understood you to say that there was a switch connecting track No. 5 to No. 5?

A. That was the one we were installing at the time.

Q. That switch had not been in service, not being used?

20

A. No, sir.

Q. I also understood you to say that Mr. Swank at the time of his death was digging between the tracks, digging ballast for the purpose of laying a pipe line?

A. To that switch, yes, sir.

Q. And had there been a pipe line there at that time?

A. Not for that switch.

Q. That pipe line was for the purpose of operating something in connection with that switch?

30

A. Yes, sir.

Q. Where did that pipe line run to?

A. It starts at the tower and ends at the switch.

Q. Where did this new line of pipe begin, Mr. Cook?

A. Why, the beginning point is right in the tower; starts right from the lever in the tower, right directly to the switch.

Q. And runs to the switch?

A. Yes.

Q. And this pipe line that Mr. Swank was laying at the time of his death was part of that pipe line?

A. Part of that pipe line.

Q. Was any part of the pipe line or switch in
10 operation or service at that time?

A. No, sir.

Q. Had there ever been a pipe line or a switch of which this was the beginning, this place?

A. No, sir.

Re-direct examination.

By Mr. Davis:

20 Q. You say that this switch track No. 5 ran from Princeton Junction to Plainsboro?

A. Yes, sir.

Q. How long had it been there at the time of this accident?

A. Well, I should judge been there three or four years. I can't give you the exact date.

Q. Had been used, had it?

A. Just for switching up and down.

Q. Now what tracks did it connect with before
30 the installation of this switch in September, 1917?

A. It connected with the branch track going up to Princeton Junction.

Q. Well, how did you get from this track No. 5 onto the main railroad?

A. By a switch leading from No. 5 to 4 at Princeton Junction station.

Q. Well, then there was a switch which led from No. 5 onto No. 4?

A. About fifteen hundred feet from the one we were installing.

Q. What became of that switch?

A. Still there.

Q. Then this was up 1500 feet further away?

A. Yes, sir.

Q. At the point that this switch was put in was track No. 5 new or old?

10

A. Track No. 5 had been there some time before they installed it.

Q. Then they were both old established tracks at the time this switch was put in?

A. Yes, sir.

Q. How did cars from No. 5 get onto No. 4 at or beyond the point where this switch was put into effect?

A. They didn't get on No. 4.

Q. What did it get onto?

20

A. They had to go up to the station and back up before they went in.

Q. This additional switch then, was it or was it not intended to accommodate or to remove the necessity of going back to the station?

A. That is the idea; more convenient.

Q. Now this switch that you were putting in there, Mr. Cook, I suppose you have a blueprint of it, do you not?

A. Yes, sir.

30

Q. Was it a continuation of tracks of No. 5 that planted into No. 4?

A. No, sir.

Q. Just indicate on this paper track No. 4 and track No. 5 and how this switch bore relation to them.

A. They crossed over like this (illustrating on paper); No. 5 track, No. 4 track. That is the idea of it.

Q. And how far did 5 track continue on beyond the point of the switch?

A. Over a mile.

Q. In which direction?

A. East bound; both ways, in fact. It continued on here to the station and continued on to Plainsboro. The track was there for the purpose of switching; goes to Plainsboro.

10 Q. Then this was nearer Plainsboro than it was Princeton Junction?

A. No, sir.

Q. What was the station nearest this track, this switch?

A. Princeton Junction station.

20 Q. How far was it away from the Princeton Junction station?

A. Oh, I should judge about 1600 feet, something like that.

Q. East or west?

A. West.

Q. Then it was no nearer Trenton than it was Princeton Junction station?

A. No, sir. The switch was east of Princeton Junction station.

30 A Juror: May I ask the witness a question?

Mr. Davis: Sure.

By a Juror:

Q. If a car of lumber originating in South Carolina, consigned to either Princeton or Princeton

Junction, would there be a chance of its being switched onto No. 5 track?

A. Yes, sir.

Re-cross examination.

By Mr. Coulomb:

Q. I just want to ask you one question in respect to that. At the time this switch was being installed that would have had to be done at Princeton Junction; there was no other switch except at Princeton Junction, as I understood you to say, from the main line over to track No. 5? 10

A. No, not east of the tower, but of course there is a switch west of the tower leading off from No. 4 to No. 5 at the Princeton branch.

Q. Let me ask you this: at the time of this accident how many switches in the neighborhood of Princeton Junction leading from No. 4 to No. 5 exclusive of the switch you were building? 20

A. One.

Q. Where was that?

A. Near Princeton Junction station, right at the platform.

Q. Was there any way of getting over then from 4 to 5 track except that switch?

A. No, sir.

Q. This other switch which you were working on at that time, where Mr. Swank was killed, was, as I understood you to say, not in operation? 30

A. Not in operation, no, sir.

Q. Do you know when this switch went into operation, the switch that Mr. Swank was working on?

A. No, I don't know the date that it was installed. I know it was quite some time after this accident.

Re-direct examination.

By Mr. Davis:

Q. This switch that you are speaking about ran from the roadbed of track No. 4 over onto the roadbed of track No. 5?

A. Yes, sir.

10 Q. At the time that this accident took place I understand you that the switch, so far as the tracks were concerned, had been installed?

A. The switch was in position, yes, sir.

Q. How long had that been in?

A. I couldn't give you the exact date of that.

Q. Well, can you tell us? You had installed it, had you not?

A. Yes, but I don't remember now the time that it was installed or the time we were patching up.

Q. An hour, a day, a week or a month?

20 A. Oh, it runs into the months.

Q. The switch had been there for a month?

A. I wouldn't say positive.

Q. Well, but that is your best recollection; is that correct?

A. Yes, I think it had been there a month.

Q. Was there any device to throw the switch at that time?

A. No, sir.

Q. None at all?

30 A. No, sir.

Q. How was it fastened?

A. Spiked, clamped and wedged.

Q. Now track No. 5, I understand you, in answer to the juror's question, was used in transferring cars from the main line over to Princeton?

A. From the main line over to Princeton?

Q. Yes.

A. Not No. 5. That is just simply a storage track and a track to drill cars to Plainsboro.

Q. Well, did you have to cross over track No. 5 to get into Princeton from the main line?

A. Not necessarily. If it was going around that Princeton Branch station—yes, you had to go into No. 5, on the continuation of 5, yes, sir.

Q. So that 5 was used for transporting —

A. Just simply switch in there, but you had to cross track No. 5 to get from Princeton Junction line over to the main line. You were on No. 5 after you left No. 4 track, and that was a continuation of the branch line, branch track. 10

Q. Now won't you just answer my question, Mr. Cook? I am delighted over your enlightenment —

A. No. 5 ended right where the switch had started in off the Trenton Branch.

Q. When you would go from the main line into Princeton, just over the small short line which runs from Princeton Junction into Princeton, did you cross track No. 5? 20

A. No 5 ended —

Q. Won't you answer? Did you cross track No. 5? 5?

A. No.

Q. Did you touch any part of it?

A. You touched the end of it.

Q. Well, how did you touch the end of it? Did you pass over it or any part of it? 30

A. When you get in on that track you are on the Princeton Branch track. No 5 ends at the dwarf signal, just below.

Q. Then does the end of No. 5 come right up to the end the formed—or rather, it is continuous with the

short line, or whatever you call it, that runs over to Princeton?

A. In going off the main line you come right in out of the switch, a double point switch, and then No. 5 stops. We don't cross that.

Q. Let us see how you put it down on the paper here.

(Witness illustrates.)

10

Q. Doesn't 5 continue on up that direction?

A. No, sir; here is Princeton station right in here.

Q. 5 doesn't go west of Princeton station?

A. No, sir.

Mr. Davis (exhibiting paper to jury): This is No. 5, this is No. 4. Here is the Princeton station and here is the track that goes into Princeton.

20 Re-cross examination.

By Mr. Coulomb:

Q. But this switch which you have described here on this paper is not the switch on which Mr. Swank was working?

A. Oh, no.

Q. How far is the switch on which Mr. Swank was working from that point?

30 A. About 1500 feet.

By the Court:

Q. In what direction?

A. East.

Mr. Davis: I offer in evidence, if your Honor please, a certificate of the Secretary of State of the filing of letters of administration under the Act of Congress in the office of the Secretary of State, and ask that it be marked.

The Court: There is no objection, I understand, to that?

Mr. Coulomb: No. 10

The Court: It will be marked.

(Paper marked Exhibit P1.)

MRS. ELIZABETH SWANK, sworn for plaintiff.

Direct examination. 20

By Mr. Davis:

Q. Mrs. Swank, you are the widow of Herbert Swank, are you?

A. Yes, sir.

Q. And how old are you?

A. Twenty-five.

Q. You were married when?

A. 1917. 30

Q. And this little baby which you had here was your daughter?

A. Yes, sir.

Q. And was the daughter of your husband?

A. Yes, sir.

Q. And when was the baby born?

A. She was born in March, 1918.

Q. Now your husband was killed in September, 1917?

A. Yes, sir.

Q. And how long had he been working for the Pennsylvania Railroad Company before this accident?

A. Well, it was about a little over two weeks, as near as I can remember.

10 Q. Had he worked for the railroad before that, to your knowledge?

A. No, sir.

Q. What had he done before he went to work for the railroad?

A. He was working for the trolley company.

Q. What trolley company? Well, where does it run?

A. It runs from Morrisville to Frankford.

Q. Frankford, Pennsylvania?

A. Yes.

20 Q. How long had he worked there?

A. Well, it was over a year as near as I can remember.

Q. And what were his wages at the time of his death? Had he drawn any salary from the Pennsylvania Railroad?

A. Well, he had only worked a couple days and he had drawn—I won't say now whether it was \$6 or something like that.

Q. For two days?

30 A. Yes, that was before the pay.

Q. What had he made with the trolley company?

A. I couldn't say for I don't remember.

Q. How old was your husband at the time of his death?

A. Twenty-two.

Q. What was the condition of his health?

A. Well, he hadn't been sick. He has never been sick that I remember.

Q. How long had you known him?

A. I had known him for six or eight years.

Q. You were living at that time where?

A. In Bristol.

Q. Pennsylvania?

A. Yes, sir.

Q. You were born and raised where?

A. Pennsylvania.

10

Q. Had you always lived in Pennsylvania?

A. Yes, sir.

Q. What time did you hear or know of your husband's death?

A. Why, it was around one o'clock.

Q. In the day?

A. Yes, sir.

Q. But of course you knew nothing about how the accident happened except what people told you?

A. That is all.

20

Q. Did your husband have any property?

A. No, sir.

Q. Before your husband died how did you get money to live on?

A. Well, it was what he earned.

Q. You had no other source of income?

A. No, sir.

Q. Did you and your husband live together?

A. Yes, sir.

Q. And were you living apart from your father and mother?

30

A. Yes, sir.

Q. Keeping house?

A. Yes, sir.

Q. And how long had you been keeping house, about?

A. About five months.

Q. And during that time you say your husband worked on the trolley?

A. Yes, sir.

Q. Did he work on the cars or on the tracks?

A. No, he worked on the cars. That is, he repaired the cars.

Q. He repaired the cars?

A. Yes.

10 Q. What was he, a car repairer?

A. No, he just worked on the cars when the cars were out of order or something like that.

Q. I mean did he repair the cars when they got out of order?

A. Yes, sir.

Q. And don't you know how much your husband made at that time?

A. No, sir.

Q. You don't recall?

20 A. No.

Q. Your baby is a girl, is it not?

A. Yes, sir.

Cross-examination.

By Mr. Coulomb:

Q. Mrs. Swank, when were you married?

A. I was married in April.

Q. April of what year?

30 A. 1917.

Q. And you were living in Bristol all the time?

A. Yes, sir.

Q. How long had your husband been working for the railroad?

A. Well, it wasn't much over two weeks, as near as I can remember.

Q. And how long had he been out of employment with the trolley company at the time he started to work for the railroad?

A. About two days.

Q. He had been working as a car repairer, did you say, all the time for the trolley company?

A. Yes, sir.

Q. Do you know that of your own knowledge, Mrs. Swank?

A. Yes, sir.

10

EDWARD N. COOK, recalled for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Cook, what was the compensation or wages of the men employed in the gang at that time? 20

A. Twenty-six cents an hour.

Q. And how many hours did they work?

A. Ten.

Q. \$2.60 per day of ten hours?

A. Yes.

Cross-examination.

By Mr. Coulomb:

30

Q. How many days did they work?

A. Well, the working days of the month, twenty-six days or whatever —

Q. Working days of the month?

A. Working days of the month, yes.

HAROLD WILCOX, sworn for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Wilcox, you are wearing Uncle Sam's uniform now of the navy, are you?

10 A. Yes, sir.

Q. Did you know Herbert Swank in his lifetime?

A. Not before.

Q. Well, but did you know him any time?

A. Not before he went to work on the railroad. I knew him when he was working on the railroad, yes.

Q. Where do you live?

A. Bristol.

Q. He also lived in Bristol, did he not?

20 A. Yes.

Q. Were you working for the railroad at the time when Herbert Swank was killed?

A. Yes.

Q. How long had you been working there?

A. About four months, I guess.

Q. And had you been working in that same gang all this time?

A. Yes, sir.

Q. Mr. Cook was your boss?

30 A. Yes, sir.

Q. Do you remember the day of the week on which this accident happened?

A. No, sir; I don't.

Q. Where were you working on that day?

A. Princeton Junction.

Q. Who else was there at the time this accident happened?

A. With Mr. Swank?

Q. Yes.

A. Charles McGarry.

Q. And where were they? That is, where were they located with respect to the other men?

A. They were located on the other side of the tower, and the bridge is right below the tower. They were on the opposite side of the bridge.

10

Q. How far were they away from Mr. Cook?

A. I don't exactly know the distance.

Q. Well, about how far? In other words, where was the gang working at the time?

A. The rest of the gang was working down at the end of the tower at the time.

Q. Near the tower?

A. Yes.

Q. And these men were working where, at the switch, where they were putting in this switch?

20

A. Yes, sir.

Mr. Davis: How far is it from the switch to the tower?

Mr. Coulomb: I think it is about 600 or 800 feet.

Mr. Davis: 780 feet, isn't it?

Mr. Coulomb: About 800 feet.

30

Q. Now there was that distance then between McGarry and Swank and the main gang?

A. Yes, sir.

Q. Now was there anybody between these men and your gang?

A. I was.

Q. How far were you away from Swank and how far from the main gang?

A. I was about 300 feet away from the gang.

Q. About 300 feet away from the gang?

A. Yes.

Q. Were you nearer the gang than you were to Swank?

A. No, sir; I was nearer to Swank than I was to them.

10 Q. Nearer Swank than you were to the gang?

A. Yes.

Q. Then you must have been more than 300 feet away from the gang, if there was 800 feet between Swank and the gang?

A. I guess it was, yes, sir.

Q. Now what were you doing?

A. I was fixing a box for the pipe line.

Q. Does that mean the little wood box?

A. Yes.

20 Q. That the wires go in alongside the railroad tracks?

A. Yes, sir.

Q. Did you see a train?

A. Not before. I walked down to the tower —

Q. No, but any time.

A. Yes, I seen the train.

Q. Which way was this train going, toward Philadelphia or toward New York?

A. It was going toward New York.

30 Q. Do you know the directions at this point?

A. No, sir; I don't.

Q. Well, assuming that in the direction of New York is generally east and the direction of Philadelphia is generally west, on which side of the track, that is, these tracks, was this switch, south or north? Or, to express it differently, was this switch

on the side of the road next to Princeton or on the side of the road west of Princeton?

A. On the side that way, from Princeton.

Q. Away from Princeton?

A. Yes, sir.

Q. On the south side of the road then?

A. Yes, sir.

Q. Now track No. 5, was that the track furthest away from Princeton?

A. Well, track No. 5 runs north and south. 10

Q. No, it runs parallel with the other track, doesn't it?

A. Yes, sir.

Q. Now, was it on the side that the ticket office is at Princeton Junction?

A. Yes, sir.

Q. That is No. 5 track?

A. Yes, sir.

Q. Well, was this train that was going to New York on track No. 4? 20

A. No, sir; it was on track No. 2.

Q. Is track No. 2 the track on the right-hand side of the road going to New York?

A. Yes, sir.

Q. Now you were working, as I understand, on the north side?

A. No, sir; on the right-hand side.

Q. On the right-hand side?

A. Yes, sir.

Q. Was Swank working on that side also? 30

A. He was working in between 2 and 3 tracks.

Q. What was he doing between 2 and 3?

A. He was shoveling the ballast out between the ties.

Q. Were 2 and 3 tracks old tracks? That is, I mean they were in use?

A. Yes, sir; they were in use.

Q. What sort of work was being done between 2 and 3?

A. They were running a pipe line for a switch.

Q. Under the rails?

A. Yes, sir.

Q. Now how far was Swank and McGarry?

A. They were both right together, working right together.

10 Q. And could you yell loud enough for them to hear?

A. No, sir.

Q. They were out of the sound of your voice?

A. Yes, sir.

Q. And was the boss out of your sound of voice also?

A. Yes, sir.

Q. As I understand, you were not on the railroad track but on the side of the track?

20 A. On the side of the track.

Q. Now you had been working there about four months, I understand?

A. Yes, sir.

Q. Now during that time on the approach of a train was there any signal given to warn the men that were working along the track?

Mr. Coulomb: I object to that as being irrelevant and immaterial.

30

Mr. Davis: I would like to know how anybody figures that to be irrelevant and immaterial.

Mr. Coulomb: And an improper way of proving any such notice, if there was such notice given, by a custom. A period of four months time, I think that was the idea.

Mr. Davis: That is the very way that you prove it. Railroad companies establish rules two ways, at least: first, by a printed rule, and second by an established custom that men adopt, that are adopted by their employees, recognized by their representative.

The Court: I think the question is proper.

(Objection noted for defendant as ground of appeal.) 10

(Question repeated.)

A. Not that I know of.

Q. Well, how did you get warning of the approach of a train when you were working?

A. By the foreman's whistle.

Q. How long had that been the custom?

20

Mr. Coulomb: I object to that on the same ground.

(Objection overruled. Objection noted for defendant as ground of appeal.)

Q. How long had this been the custom, Mr. Wilcox, if it was the custom, for the leader or foreman to blow his whistle when a train was approaching?

A. They have always had it a system since I have worked on the railroad. 30

Q. Was it a system that was practiced at the time that Swank was working on the railroad?

A. Yes, sir.

Q. Did the gang have any other way or did the leader of the gang have any other way of notifying the workmen that a train was coming?

Mr. Coulomb: I object on the same ground, as immaterial and irrelevant and an improper way of proving a custom or rule.

(Objection overruled. Objection noted for defendant as ground of appeal.)

(Question repeated.)

10 A. No, sir.

Q. Was any one else in the habit of notifying the workmen that a train was coming except the leader?

Mr. Coulomb: That is objected to as being improper, irrelevant and immaterial.

(Objection overruled. Objection noted for defendant as ground of appeal.)

20 A. No, sir.

Q. Now on this day you say you were nearer to Swank than you were to the gang. Do you know where Mr. Cook was?

A. No, sir; I don't.

Q. Did you see him at the time of the accident or directly afterwards or directly before?

A. Afterwards I seen him.

Q. How soon after the accident?

A. Right away after the man was hit I walked
30 up to the man and I walked back to the tower again and seen Cook walking up.

Q. Well, had you then gotten to the man?

A. Yes, sir.

Q. And had started back toward the tower?

A. Yes, sir; after a stretcher.

Q. Was that the first time that you had seen Cook?

A. Yes, sir.

Q. At the time that the train passed you did you see Swank and McGarry?

A. No, sir; I didn't.

Q. Did you see them any time between the time that the train passed you and the time they were struck?

A. No, sir; I didn't.

Q. Now what was your first knowledge that the train was coming? 10

A. Most generally look up and look down the track when you are working on the track.

Q. Well, what first attracted your attention, if you know?

A. I was walking down to the tower after some tools.

Q. Facing toward the train?

A. Yes, sir.

Q. Now at the time that you saw the train when you were walking toward the train did you see Mr. Cook? 20

A. He was on the opposite side of the train.

Q. Well, before the train arrived did you see him?

A. No, sir; I didn't.

Q. Did you see the gang working?

A. Yes sir; some of the gang was on this side of the track and some on the other side of the track.

Q. Could you see all of the gang there working in front of you, before the train arrived, I mean?

A. Yes, sir. 30

Q. Now at that time did you see Mr. Cook among them?

A. Yes, sir; he was amongst them.

Q. Well, now, as I understand then, you were walking towards the train and towards Mr. Cook's gang?

A. Yes, sir.

Q. But you were nearer to Swank than you were to the gang?

A. Yes, sir.

Q. Did you hear any whistle from Cook?

A. No, sir; I didn't.

Q. Did you hear any whistle from the train?

A. No, sir.

Q. Was there any other train at that time and
10 place?

A. No, sir; there was not.

Q. Now we want you to tell us, if you please, Mr. Wilcox, about these tracks and about the track that the train was on, in a way that you can make these jurymen understand. I don't know that they will understand these numbers unless you point out their location. Now which track was this train approaching on?

A. The train was approaching on No. 1 track and
20 it crossed over to No. 2 track.

Q. No. 2 track is what track?

A. It is the first track on the right-hand side.

Q. Now then, on the right-hand side going toward New York?

A. Yes, sir.

Q. That would be the most righthand track of all?

A. Yes, sir.

Q. And the train was going in which direction?
30 A. Towards New York.

Q. That is the outside of the four tracks?

A. Yes, sir.

Q. Now where is No. 2 track?

A. No. 2 track is the next track.

Q. Next track to it?

A. Yes, sir.

Q. Now where did you say Swank was working?

A. He was working in between 2 and 3 tracks.

Q. Now here is 3 track in respect to 2?

A. 3 track is right next to No. 2 track.

Q. Now where did this train pass over from track No. 1 to track No. 2?

A. The train passes over right opposite the tower.

Q. And where is the tower? Is it further from Princeton Junction toward New York?

A. The tower is right opposite—right catercornered from the station. 10

Q. From Princeton station?

A. Yes, sir.

Q. It crossed there then from track No. 1 over to track No. 2?

A. Yes, sir.

Q. And how far away from the switch where the train passed from track No. 1 to track No. 2 was it that Swank was working? Of course you can't tell us in feet and inches, but your best judgment about it. Or maybe it can be determined definitely by your measurement, Mr. Coulomb. 20

Mr. Coulomb: I can't give you exact, but it is about the same distance.

Mr. Davis: Let Mr. Cook say.

EDWARD N. COOK, recalled for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Cook, is there a switch from track No. 1
10 to track No. 2 at or near the station at Princeton?

A. Yes, sir.

Q. How far was that switch from the point where
Swank was working?

A. 1047 feet, I think. I have it down here. Yes.

Q. 1047 feet?

A. From where he was working to where the
switch point leaves No. 1 track.

20

HAROLD WILCOX, resumed.

By Mr. Davis:

Q. Now the train was coming from Philadelphia
towards New York?

A. Yes, sir.

Q. And if you were on the train at the time that
it crossed from track No. 1 to track No. 2 was Mr.
30 Swank nearer to you, that is if you had been on the
train, than Mr. Cook was? In other words, did this
train after it struck Swank go on to the place where
the gang was working?

A. The tower stands here —

Q. No, I think if you will just answer my ques-
tion and put yourself in my place we will get along

very well. This train was coming from the direction of Philadelphia and going in the direction of New York, wasn't it?

A. Yes.

Q. Who was the first member of the crew that it passed?

A. Cook's gang.

Q. It passed Cook before it struck Swank?

A. Yes, sir.

Q. It had passed them then and gone on before it struck Swank? 10

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You were between Swank and the gang?

A. Yes, sir.

Q. Did you turn around or did you have to turn around to see Mr. Swank?

A. I was walking to the tower and I turned around to look at the train and I seen McGarry waving his hand. So I runs up to Swank and then runs back to the tower again to get a stretcher. 20

Q. The accident had happened at that time, had it not?

A. Yes, sir.

Q. Before the accident happened did you see Swank and McGarry?

A. Yes, sir.

Q. And what were they doing?

A. They were shoveling up the ballast between the tracks. 30

Q. At that time did you see the train coming?

A. No, sir; I didn't.

Q. You were working with your back toward them at the time that the accident happened, were you not?

A. Yes, sir.

Q. And were you looking in the direction of the gang?

A. Yes, sir.

Q. And walking in that direction?

A. Yes, sir.

Q. Did you see Mr. Cook or anybody in the gang give any warning to Swank?

A. No, sir; I didn't.

10 Q. Your eyes were on them, were they? That is, they were right ahead of you?

A. Yes, sir.

Q. Now when this train passed over from No. 1 to No. 2 did it give any signal, that is, by blowing?

A. No, sir; not that I know of.

Q. These men that were in the gang, were they stretched across four tracks working in that direction or were they upon any one particular track?

A. I couldn't tell you that.

20 Q. Well, when you were going up toward the tower you said you saw those men ahead of you. Were they on one track or were they on more than one track?

A. I think they were scattered there between three tracks, from 1 track to 3 track.

Q. Do you know what they were doing?

A. No, sir; I don't.

30 Q. Did this train have to pass over the tracks that they were working on or did it pass over the tracks that they were working on?

A. It did pass over the tracks.

Q. Now let me see if I get the geography of the situation correctly. When you were going from the place that you were working up to the tower the train was coming to meet you; is that correct?

A. Yes, sir.

Q. Did you continue to look ahead of you until the train had passed you?

A. No, sir; I didn't.

Q. When did you turn around?

A. When the train had went by me.

Q. Well, before the train had passed you did you continue to look ahead? Were you looking ahead all the time from the time that you started up until the train was about to pass you?

A. No, sir; I had some tools in my hand and I was looking at the tools all the time. They was broke and I was going back to get another one for them.

Q. Well, at the time you saw those people working on the track, you had looked in front of you at that time, had you not?

A. Yes, sir.

Q. Well, how far was the train away when you first saw it?

A. It was on the opposite side of the tower when I first saw it.

Q. And on what track?

A. No. 1 track.

Q. Did you see it when it passed from 1 to 2?

A. No, sir; I didn't. I wasn't looking then.

Q. At the time that it passed you was it on 1 or 2?

A. It was in between those. It was just going over the crossover when I looked again.

Q. No, you don't understand me. You are not paying attention to my question. At the time that it passed you on its way up toward New York was it on track No. 1 or track No. 2?

A. On track 2.

Q. Had it passed over that switch?

A. Yes, sir.

Q. From No. 1 to No. 2?

A. Yes, sir.

Q. Now at any of that time, from the time you first saw the train until the train had passed, did you hear any bell or any whistle on the train?

A. No, sir.

Q. Now you told us a minute ago that you saw Swank and McGarry digging out between the ties between No. 2 and No. 3, did you not?

A. Yes, sir.

10 Q. Now you said also that after the train had struck Swank that McGarry waved for you?

A. Yes, sir.

Q. Well now, between those two times did you look back to see whether you saw Swank or not?

A. No, sir.

Q. You don't know what was happening in that time?

A. No, sir.

20 Q. Did you know McGarry?

A. Just to speak to is all.

Q. How long had you known him?

A. Just in the time I worked on the railroad.

Q. How long had he worked on the railroad?

A. I couldn't tell you that.

Q. Well, had he worked there as long as Swank had?

A. I believe they went on the railroad about the same time together.

30 Q. Do you know whether he is living or dead?

A. I think McGarry is dead.

Q. Well now, how far was one able to hear this whistle of the boss'?

A. You can hear it quite a good distance away.

Q. If the whistle had been blown from where the boss was could you have heard it?

A. Yes, sir.

Q. And could Swank have heard it?

A. I guess he could have heard it.

Q. Had you been in the habit of hearing this whistle that the boss carried from time to time?

A. Yes, sir.

Q. Now after this train passed and McGarry waved his hand what did you do?

A. The train had passed and I just had turned around and I looked up and I seen McGarry waving for me to come up. So I runs up to where he was laying out and I run back to the tower again to get a stretcher and go back again. 10

Q. After you got down to where McGarry was what did you notice?

A. I noticed Cook was coming up to where Swank laid.

Q. Did you see Mr. Swank?

A. Yes, sir.

Q. When you got down there?

A. Yes, sir. 20

Q. What was his condition, dead or alive?

A. He was dead. He was breathing then.

Q. And then did you run up to the direction of the tower?

A. Yes, sir.

Q. And you met Mr. Cook, you say, coming?

A. Cook was going up, yes, when I was going after the stretcher.

Q. Did you go get the stretcher?

A. Yes, sir. 30

Q. And did you go back down there again?

A. Yes, sir.

Q. And after you got back down there with the stretcher what was Mr. Swank's condition, dead or alive?

A. He was still alive till we got him into the tower

again. When we got him into the tower he was dead.

Cross-examination.

By Mr. Coulomb:

Q. Mr. Wilcox, what time of day was this accident?

10 A. I judge it was around about half-past ten.

Q. And what side of the railroad track were you working on?

A. On the right-hand side.

Q. Now when you say the right-hand side, the right-hand side facing New York, or the right-hand side facing Philadelphia?

A. Facing New York.

Q. Then you were working on the side of the track that No. 1 track was on?

20 A. Yes, sir.

Q. What were you doing there?

A. I was fixing the box that goes on and holds the wires in, on the trunk and box.

Q. That was alongside the rails, was it?

A. Yes, sir.

Q. About how many feet from the nearest rail of track No. 1?

A. About the length of the desk there.

Q. About five feet?

50 A. Yes, sir.

Q. And who was working with you?

A. Nobody was working with me.

Q. And McGarry and Swank were working in the direction of New York or Philadelphia from where you were working?

A. In the direction of New York they were working.

Q. Mr. Cook and the rest of the gang were working in the direction of Philadelphia from where you were working?

A. Yes, sir.

Q. Did you observe Swank and McGarry working in between the tracks while you were doing your work?

A. Yes, sir; they were working.

Q. Now what was it occasioned your trip to the tower?

10

A. I had a brace and bit in my hand and the brace broke so I was going back to the tower to get another brace.

Q. Where did you walk as you walked to the tower, on the tracks, between the tracks or alongside of them?

A. No, sir; I was alongside of the tracks.

Q. Then you walked along the right-hand side of the tracks walking in the direction of New York or Philadelphia?

20

A. I was walking on the right-hand side, left-hand side towards Philadelphia.

Q. You were walking facing towards Philadelphia?

A. Yes, sir.

Q. And on the right-hand side of the track?

A. On the left-hand side.

Q. That was, you were walking alongside or nearest to No. 1 track?

A. Yes, sir.

30

Q. How far was it from where you were working to the tower?

A. A considerable distance away.

By the Court:

Q. How far was the switch from the tower, this connecting switch connecting track No. 1 with track No. 2?

A. I couldn't say that.

Q. How far was it from the tower where this train swung over from track No. 1 to track No. 2?

10 A. The tower lays here and the crossover lays right up like that alongside the tower. (Illustrating.)

Q. And the switch was nearly opposite the tower?

A. Yes, sir.

By Mr. Coulomb:

Q. How many feet was it, approximately, Mr. Wilcox, from where you were working to the tower?

A. About 500 feet away from the tower, I judge.

20 Q. And you walked in the direction of Philadelphia?

A. Yes, sir.

Q. So that Mr. McGarry and Mr. Swank were in your rear?

A. Yes, sir.

Q. You couldn't see them unless you looked around?

A. No, sir.

30 Q. Now from the time that you started to walk to the tower with your broken tool did you look around to see whether they were still working there at any time?

A. No, sir.

Q. Did you continue to walk right along?

A. Yes, sir.

Q. Now where did you see the men working?

A. Then men were working right in front of the tower.

Q. Right in front of the tower?

A. Yes, sir.

Q. Were they working on the tracks?

A. Yes, sir.

Q. Where did you see Mr. Cook?

A. He was working amongst the gang.

Q. Now, did you observe them all the time? I understood you to say that you were examining this broken brace and bit that you had with you as you walked along? 10

A. Yes, sir; I was examining it going down to get a new one the same size of it.

Q. And you were not paying very much attention to what the rest of the gang or Mr. Cook or anybody else was doing, were you?

A. No, sir.

Q. You were more interested in the brace and bit that you were going to have replaced? 20

A. Yes, sir.

Q. Now when the train came along that was running on track No. 1, as I understand you to say?

A. Yes, sir.

Q. And then switched over to track No. 2?

A. Yes, sir.

Q. And when you first saw it it was on track No. 1? 1?

A. Yes, sir.

Q. When did you see it again? 30

A. Not until it had got by me. I turned around to look at it.

Q. The train had gone by you when you turned around to look?

A. Yes, sir.

Q. You didn't see the train again? Why didn't you see it?

A. It was getting so far away from me.

Q. No, but it was coming towards you, wasn't it?

A. Well, it had passed me then.

Q. But you didn't see it cross over, did you, from track No. 1 to 2?

A. No, sir.

10 Q. And that crossover point was ahead of you in the direction in which you were walking, was it not?

A. Yes, sir.

Q. So that your eyes were off the train, off that direction for a while?

A. Yes, sir.

Q. Now as the train came along did it come between you and Mr. Cook and the rest of the gang?

A. Yes, sir.

20 Q. So it hid Mr. Cook and the rest of the gang from you?

A. Yes, sir.

Q. And of course you couldn't tell what Mr. Cook did while the train was going along, could you?

A. Not exactly, no, sir.

Q. Or what the rest of the gang did?

A. No, sir.

Q. Did the train make much or little noise as it passed by you?

A. Making lots of noise, yes.

30 Q. So Mr. Cook could have blown the whistle and you not have heard it; couldn't that have happened?

A. Yes, sir.

Q. You didn't depend on the whistle, did you, while you were working there?

A. No, sir.

Q. You looked out for yourself?

A. I looked out for myself.

Q. Now what made you look back in the direction that this train was going after it passed you?

A. It was going so fast I turned around to look back at it.

Q. You turned around to look back?

A. Yes, sir.

Q. And that was the only thing; you had heard nothing only that?

A. No, sir.

Q. Mr. McGarry and Mr. Swank were working between track 2 and 3, were they not?

A. Yes, sir.

Q. So that the train didn't hide them from your view too?

A. Yes, sir.

Q. As it passed down the track?

A. Yes, sir.

Q. Did I understand you to say that you didn't see McGarry or Mr. Swank from the time you started to walk to have your tool exchanged, this brace and bit exchanged, until you looked back and saw Mr. McGarry waving?

A. After the train had gotten by them.

Q. How long had you known Mr. Swank, Mr. Wilcox, just while he was working on the railroad?

A. Yes, sir.

Q. Was there much or little traffic along that railroad, Mr. Wilcox?

A. At that time?

Q. Yes.

A. There wasn't much traffic at that time.

Q. I don't mean at that particular time but during the general course of the time that you were working there.

A. There was traffic there, yes, sir.

10

30

Re-direct examination.

By Mr. Davis:

Q. When you went back where did you find Swank?

A. He was laying between 3 and 4 tracks.

Q. Did you see any blood there?

A. Yes, sir.

10 Q. Where was the blood there?

A. Out of his head.

Q. Well, I mean was there any on the ground?

A. On the stones, yes, sir.

Q. Where he was lying or elsewhere?

A. Where he was lying at.

Q. What sort of a train was this?

A. I couldn't tell you that.

Q. Well was it a freight train or a passenger train?

20 A. It was a freight train.

Q. Was it long or short?

A. It was only a short train.

Q. Now up until the train passed you or rather, up to the time that it came to you, could you see Cook and the gang ahead of you?

A. No, sir; I couldn't.

Q. What kept you from it?

A. The train kept me from it.

30 Q. Well, I mean before the train reached that point could you do that with the tower in front of you?

A. Yes, sir; after this train approached me.

Q. Did they give any signal to you when the train was approaching or up until the time the train obscured your view of it?

A. They didn't need to give me no signal.

Q. No, but did you hear them give anybody else any signal?

A. No, sir.

Q. They were in your view at that time?

A. Yes, sir.

Q. Now when the train was up at the point that it interfered with you seeing them did the train make so much noise that you couldn't hear the whistle?

A. I couldn't hear any whistle at that time, no, 10
sir.

Q. Was that on account of the train?

A. That was on account of the train.

Q. Did it make as much noise after it passed you as it did before it came to you?

A. Just about the same as it went by.

Q. Would it have interfered with Swank hearing the whistle as the train drew close to him if the whistle had blown?

A. No, sir. 20

Q. I am talking about after the train passed you and as it came up to Swank, suppose at that time that Cook had blown the whistle: would the noise of the train as it got close to Swank keep Swank from hearing the whistle?

A. No, sir; he could hear the whistle.

Q. Well, how could he hear the whistle if you couldn't hear it?

A. Well, Cook and his gang was on the side —

Q. No, I am talking about now Cook was up at 30
the place, was he not?

A. Yes, sir.

Q. What do you call that place?

A. The tower.

Q. Before the train came to you if a whistle had been blown I understand you could have heard it?

A. Exactly, yes; I could have heard it.

Q. But after the train got by you you couldn't hear it, as I understand you, because the train would have made so much noise you couldn't have heard it?

A. No, sir; I couldn't have heard it.

Q. Now if the train when it passed Swank, you say, was making as much noise as it did when it passed you would that also keep Swank from hearing the whistle if it had been blown at the time the train was alongside of Swank?

A. No, sir; he couldn't have heard it then.

Q. Couldn't have heard it?

A. No, sir.

By Mr. Coulomb:

Q. He could have heard it before?

A. Yes, sir.

20 Q. Now you were not looking at either Cook or these men at the time you were walking up to the tower?

A. No, sir; I was looking at my tool.

Q. You don't know what they did?

A. No, sir.

RECESS TILL 2 P. M.

(Trial of the cause resumed at 2 P. M.)

EDWARD N. COOK, recalled for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Cook, did you see the train pass that killed Swank?

A. Yes, sir.

Q. Did you see it at the time that it passed you?

A. I certainly did.

Q. And where were you at the time that the train passed you?

A. Just west of the tower, a very few feet.

Q. And when you say west that means in the direction of Philadelphia?

A. Philadelphia.

Q. About how many feet do you think?

A. Probably—I shouldn't judge over a hundred, hardly that.

Q. Very probably less than that?

A. I was just getting ready to cross the track.

DANIEL BOYLE, sworn for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Boyle, where do you live?

A. 931 Garden Street, Bristol.

Q. Where did you work on September, 1917?

A. For the Pennsylvania Railroad.

Q. And with Mr. Cook's gang?

A. Yes, sir.

Q. How long did you work there?

A. What do you mean, before Swank got killed or altogether?

Q. Yes, before this time.

10 A. I worked there about—I come on about two days after Swank and worked there about two or three weeks, I guess.

Q. You didn't work very long, then?

A. No, sir.

Q. And during the time that you were working there how were you warned, if at all, for an approaching train?

20 Mr. Coulomb: I object to that on the ground that it is an improper way of proving it and also immaterial and irrelevant.

The Court: It is admitted.

(Objection noted for defendant as ground of appeal.)

A. Why, nobody ever warned me of the approaching trains, only I knowed better from other gangs. I had worked before —

30 Q. No, at the time you worked with this particular gang did they have any way in which they notified your fellow workmen and yourself that a train was approaching?

A. Yes, sir; by a whistle.

Q. And who blew the whistle?

A. The leader of the gang, or whistle man, as they called him.

Q. Where were you working on the day that Swank was killed?

A. Back of the tower.

Q. Back of the tower, does that mean behind the tower, away from the railroad tracks?

A. Yes, sir.

Q. Who was with you?

A. Mr. Carver.

Q. What were you doing back there?

A. We was cutting pipe and threading them. 10

Q. Did you see this train when it passed?

A. No, sir.

Q. Did you see it after it had passed?

A. Not till after it hit Swank.

Q. Why didn't you see it?

A. I wasn't watching it at all; just working and cutting pipe and threading them.

Q. Could you see it if it passed you?

A. I could have if I went out and looked around the corner. 20

Q. No, I mean standing where you were could you see it?

A. Yes, I could see from one end of it, one corner of it, where I was working around the corner of the tower.

Q. Which corner of the tower were you working on?

A. The east corner.

Q. And the east corner was the corner next to New York, wasn't it? 30

A. Yes, sir; I wasn't working right along the tracks, I was working back of the tower.

Q. I understand, but on the east end of it?

A. Yes, sir.

Q. That is, on the end that was just next to New York?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now from where you were could you see Mr. Cook?

A. Well, I don't know where he was working at.

Q. Well, did you see him when you were working there?

A. No, sir.

10 Q. Was he in sight at the time you worked, from your position?

A. No, sir.

Q. Was Carver working with you?

A. Yes, sir.

Q. How far away from you?

A. Right next to me. We was both working together cutting pipe.

Q. How far were you away from the building?

A. The building?

20 Q. Yes.

A. There is a workbench right up against the building, you know.

Q. And you were working right on the workbench?

A. Yes, sir.

Q. Now you saw, you say, the train after it had struck Swank?

A. After it struck Swank, yes, sir.

Q. Did you hear it as it passed?

30 A. No, sir.

Q. Was any whistle blown on the train?

A. I couldn't say that I did hear a whistle.

Q. Well, do you know whether you did hear one?

A. No, sir; I didn't hear nothing.

Q. Did you hear any whistle blown by the leader of the gang?

A. No, sir.

Q. Could you have heard it if it had been blown?

A. I guess I could. It was a danger whistle.

Q. Could you have heard the whistle of the train if that had been blown?

A. I suppose I could.

Q. Was there any noise around there that prevented you from hearing it?

A. No, sir.

Q. Are there any factories or any other noises of any consequence at that place?

A. No, sir; nobody only loading potatoes and such stuff, farmers.

Q. Well, they load them on that side or on the far side?

A. On the far side.

Q. That is, the far side away from you?

A. Yes, sir.

Q. Now this is open country there for the most part, isn't it? 20

A. Yes, sir.

Q. Now this danger whistle, this whistle that you spoke of, is that the whistle that Mr. Cook is supposed to blow?

A. Yes, sir.

Q. Now that danger whistle is the whistle that is blown on the approach of a train, is it not?

Mr. Coulomb: I object to that on the ground that it is improper and irrelevant and immaterial. 30

(Question withdrawn.)

Q. Is that the whistle that was accustomed to be blown on the approach of trains?

(Objected to.)

The Court: Are you referring now to the whistle from the leader, as you call him?

Mr. Davis: Yes, the danger whistle, as he has called it.

The Court: It is admitted.

(Objection noted for defendant as ground of appeal.)

A. Yes, sir.

Q. Now had your ears become trained to that whistle?

(Objected to. * Objection sustained.)

The Court: About his ears having become accustomed to the whistle, I don't think that has anything to do with the case.

Mr. Davis: I think it is very material, your Honor, and very material for this reason: it is evidential of the fact whether or not, having become accustomed to that and to know its note and what it signifies, the attention that would be paid to it in case of its being blown.

Mr. Coulomb: If your Honor please, it is objected to on this particular ground: that this witness was not engaged in any place where he was in danger at all, and therefore whatever his mind or ears might have been accustomed to ordinarily, when he was working on the track, even assuming it might be evidential for that purpose, it is clearly not evidential because he was not working on the track, he

was in no place of danger, he was working off the tracks and behind the tower. He has already testified that he didn't hear the train itself, not the whistle of the train itself; not the whistle of the train, I don't refer to, but the train itself.

The Court: That is all a matter for the jury's consideration, how much weight they shall give it, but if it is evidential for any purpose at all it is the Court's duty to admit it, I understand it. I 10 think the question is improper and I have overruled the question. At least, I sustain the objection to it.

(Objection noted for plaintiff as ground of appeal.)

Q. What else did you see or hear, Mr. Boyle?

A. Well, I heard Cook when he come around the corner of the tower to say that Dunn fellow got 20 hit; he said that Dunn boy got hit, or fellow.

Q. Then what did you do?

A. We started up to the tower and come back to get a stretcher and then went up with the stretcher.

Q. Did you see the train before it arrived at the crossover switch?

A. No, sir.

Q. Did you see Mr. Swank's body after it was hit?

A. Yes, sir. 30

Q. And could you see where he was struck?

A. Well, he was struck in this arm, and when we picked him up, and all the ways underneath here, and Mr. Dunn put his fist underneath his head and it was covered with blood, a big blood spot on it.

Q. In the back?

A. Yes, in the back of his head.

Q. Did you see any other place where he was struck?

A. Well, only he was bleeding from the mouth and nose.

Q. Did you see any wounds on his body other than those you have just mentioned?

A. No, sir.

10 Cross-examination.

By Mr. Coulomb:

Q. Mr. Boyle, I understood you to say that you neither heard nor saw this train until after Mr. Swank had been hit?

A. After he was hit I seen it, yes, sir.

Q. You were working at the east corner of the tower, I understand?

20 A. Yes, sir.

Q. And in back of the tower?

A. Yes, sir.

Q. The east corner is the corner towards New York?

A. Yes, sir.

Q. And this train was approaching from what direction?

A. Coming east bound.

Q. It was going towards New York?

30 A. Towards New York.

Q. And how wide is that tower in the direction parallel with the rails?

A. About twenty-five feet wide.

Q. So you had a twenty-five foot obstruction all along in the direction from which this train was coming; is that correct?

A. Yes, sir.

Q. You were not listening for any whistle, were you?

A. No, sir.

Q. You were not in any place of danger, were you?

A. No, sir.

Q. And there was no occasion for you to pay any attention to whether a whistle was blown or not?

A. No, sir.

10

Q. You wouldn't say that a whistle was not blown, would you?

A. I wouldn't say it was blown or was not blown, but if it was blown I could hear it; that is, providing Cook was in front of the tower.

Q. You don't know where Mr. Cook was, do you?

A. I don't know where Cook was at.

Q. And you were not listening for the whistle?

A. No, sir.

20

Re-direct examination.

By Mr. Davis:

Q. What was the first thing that you knew that this train was there?

A. Sir?

Q. What was the first thing that you heard about this train?

A. The first thing I heard was Cook coming 30 around and saying that Dunn fellow got hit.

Q. Who was Dunn, Mr. Boyle?

A. There he is, right over there, a brother-in-law of mine.

Q. Where was he working?

A. He was working up the track somewhere, I don't know where at.

Q. Some distance away from where you were?

A. I judge he was. I don't know where he was at.

Re-cross examination.

By Mr. Coulomb:

Q. Did you know Mr. Swank, Mr. Boyle, prior to
10 his working for the railroad?

A. I knowed him before we had worked for the railroad, to speak to.

Q. How long had you known him?

A. For about five or six years. I knowed him just by going to school. Went to school with him. He went to school when I did.

20 JOSEPH DUNN, SWORN for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Dunn, you live in Bristol?

A. Yes, sir.

Q. You are a brother-in-law of Mr. Boyle that was just on the stand, are you not?

30 A. Yes, sir.

Q. Did you work for the Pennsylvania Railroad in 1917?

A. Yes, sir.

Q. How long had you been working there?

A. About two months.

Q. You had been working there two months before Mr. Swank was killed?

A. Well, about six weeks, I think. I think I worked there about two months altogether.

Q. And during the time that you were working there who was your boss?

A. Mr. Cook, Mr. Kennedy and Mr. Glover. Mr. Cook used to generally tell us what to do.

Q. Was he the head boss?

A. No, I don't think so. Mr. Glover was the head boss. 10

Q. Well, you were in what is known as the signal gang?

A. Yes, sir.

Q. How long had you worked at Princeton Junction at the time that Swank was killed?

A. Well, very near all the time after I went on, very nearly all that six weeks, I judge.

Q. What were you doing while you were there?

A. Well, different work. Sometimes we mixed concrete and other times we put on those pipes and helped repair the switches and different things, different work. 20

Q. Do you remember the day that Swank was killed?

A. I remember the day but I don't remember the date.

Q. What were you doing on that day?

A. I was working on those pipes along No. 1 track; not on the track, understand, alongside of it. 30

Q. Alongside the track?

A. Yes.

Q. That is, the pipes that run parallel with the track?

A. Yes, sir.

Q. From the switch to the tower?

A. Yes, sir.

Q. And do you know where Mr. Cook was at the time that this accident took place?

A. No, sir.

Q. How far were you away from that end of the gang?

A. Well, I should judge I was about one hundred yards from the tower. I didn't pay no attention to where the gang was.

10 Q. Do you know where the gang was working up there near the tower?

A. No, not exactly, I don't. I know there was some one behind the tower.

Q. Did you see any of them out in front of the tower?

A. No, I can't say that I did.

Q. Where was Swank working?

A. Well, he was, I should judge, about 150 yards up the track from me.

20 Q. When you say up the track do you mean towards New York?

A. Towards New York, yes, sir.

Q. The other part of the gang I understand was down towards the tower, which was toward Philadelphia?

A. All with the exception of Wilcox.

Q. Now you were between, were you, that is, between Swank and the tower?

A. Yes, sir.

30 Q. And what were you doing at the time the train came?

A. Well, we were fixing those brackets. There is little brackets that hold those rails that those pipes run on. I was helping Mr. Burrows to put those in.

Q. Did you see the train coming?

- A. Yes, but I heard it before I saw it.
- Q. What do you say?
- A. I saw it but I heard it first.
- Q. Heard it first?
- A. Yes, heard the train.
- Q. When you heard it did you look to see which direction it was coming from?
- A. Yes, sir.
- Q. Where did you see that train?
- A. Coming up towards New York. 10
- Q. From Philadelphia way?
- A. Philadelphia, yes, sir.
- Q. On what track?
- A. No. 1.
- Q. Do you know where the switch is there that crosses over from 1 to 2?
- A. Well, I very near know.
- Q. What?
- A. Pretty near, yes.
- Q. I say you know where it was? 20
- A. Yes, I pretty near know.
- Q. Well, you knew that a switch was there?
- A. Yes, sir.
- Q. Well, had the train arrived at the switch at the time that you first saw it?
- A. Oh, no; it was below the tower when I saw it.
- Q. And on 1 track?
- A. On 1 track.
- Q. Did you see it when it crossed over into No. 2? 30
- A. I saw it crossing, yes.
- Q. Before it crossed or at the time that it crossed or after it crossed was there any whistle from the engine blown?
- A. I heard none.

Q. Could you have heard it if it had been blown?

A. I think so.

Q. And how far were you from the tower?

A. Well, I should judge 100 yards.

Q. And did you hear any whistle blown by the leader?

A. No, sir.

Q. Could you have heard it if it had been blown?

10 A. I think I could if he had blown it before the train got real close.

Q. The train made some noise, did it not?

A. Yes, sir.

Q. Well, did you hear any?

A. No, sir.

Q. Was there any other noise at the place at the time?

A. No, I don't think so, none but the noise of the train.

20 Q. No, I mean before the train arrived was there any other noise?

A. Not to my knowledge.

Q. Well, you were there and could hear it?

A. Yes, sir.

Q. Did you hear any?

A. No, there was none; that is, there was none that would attract your attention. If there was any it was just some slight noise. There was none so that you couldn't hear the train or anything.

30 Q. Was there any noise to prevent you from hearing a whistle if it had been blown?

A. No, sir.

Q. You had heard those whistles before, had you?

A. Yes, sir.

Q. Were they, loud and plain when they were blown or sufficient for you to hear that distance?

A. Generally.

Q. Now when the train came over in No. 2 did you notice anything unusual?

A. No, I looked up the track and I noticed where Swank was working and I thought that he was close but of course I didn't know how close he was.

Q. At the time that the train was on that track?

A. Previous to crossing to the track. I seen Swank as the train passed me, I looked up the track and saw Swank and McGarry both working.

Q. And their back was towards you? 10

A. Well, kind of side. Swank's back was towards No. 2 track.

Q. Was that the track that the train was on?

A. No, it was on 1 then. It hadn't crossed yet.

Q. Well, I understood from another witness that Swank was between 2 and 3.

A. Yes, sir.

Q. Was he there when you saw him last?

A. Yes, sir.

Q. Now after the train passed over onto track 20 No. 2 did you see Mr. Swank?

A. No, I couldn't see him after that.

Q. The train was between you and him; is that right?

A. Yes, sir.

Q. And what sort of a train was this?

A. Well, a fast freight.

Q. Do you know whether it was a short or a long train?

A. Well, it just seemed about medium to me, or- 30 dinary length.

Q. What was the speed of the train when it passed you?

A. Well, I am a poor judge of speed. I would say it was going fast.

Q. Was it going fast when compared to the speed of other trains that you saw going through?

A. Yes, it was.

Q. What was the speed of the train as compared to the fast passenger trains that go through?

A. Well, I don't think it was quite that fast. It went as fast, I should judge, as an ordinary passenger train.

10 Q. Now did you see Swank after he was killed?

A. Yes, sir.

Q. What did you notice about his body?

A. Well, nothing in particular. I know his head was cut, just from seeing the blood on my fist that I placed under it, and I noticed one of his arms was broken, and the blood from the mouth, that was all I noticed.

Q. Which arm was broken?

A. Well, it apparently seemed to me to be the left. I wouldn't be sure.

20 Q. Was that the side that he had toward the train or not when you last saw him?

A. Well, when I last saw him his back was towards the train; that is, his back was towards the track that the train was coming up on.

Cross-examination.

By Mr. Coulomb:

30 Q. How close to the rail of track No. 1 were you working, Mr. Dunn?

A. About three or four feet.

Q. Were you working with Mr. Wilcox?

A. No, with Mr. Burrows.

Q. Were you working near Mr. Wilcox?

A. Well, I should judge about 75 feet away from him, 75 yards, rather.

Q. Was he between you and Mr. Swank?

A. Yes, Wilcox, you mean?

Q. Yes.

A. Yes, sir.

Q. You heard this train before you saw it, you say?

A. Yes, heard the noise of it.

Q. And where was it when you heard it first?

A. A little ways below the tower.

Q. And about how far from you?

10

A. About 150 yards, maybe 200.

Q. Did the train make considerable noise then?

A. No, I can't say that it made considerable noise.

Q. It made enough noise to attract your attention?

A. Well, I don't know whether that attracted my attention or whether I just looked down the track and saw it, but I know that I saw it before it was very close to me.

Q. You won't say now whether it was the noise of the train or something else that attracted your attention down the track?

20

A. No, but still I am pretty near positive that it was the noise of the train.

Q. You are positive that it was the noise of the train, that it made enough noise to attract you from your work to look in the direction this train was coming; that is true, isn't it?

A. Yes.

Q. And the train, of course, made more noise as it got to you, didn't it?

30

A. Oh, naturally.

Q. And so when it got close to you it was making considerable noise?

A. Yes, sir.

Q. And you couldn't have heard any whistle, no

matter what whistle blew, except possibly a train whistle?

A. No, sir; not when it got close to me.

Q. How far were you working from Mr. Swank and Mr. McGarry?

A. I judge about 150 yards.

Q. About 150 yards?

A. About that.

10 Q. And you say when you first saw the train it was above the tower?

A. Below the tower, the other side of the tower.

Q. That is, the other side from you?

A. Yes, sir.

Q. The tower was between you and the train?

A. Yes, sir.

Q. And you think it was about 150 yards away?

A. About that.

20 Q. Now is the place where the switch is where the train crosses over from track No. 1 to No. 2 between you and the tower?

A. No, sir; the other side of me.

Q. The other side of you?

A. Yes, sir.

Q. Beyond you?

A. Beyond me. The switch was between me and Swank.

Q. Between you and Swank?

A. Yes, sir.

30 Q. Now Mr. Dunn, are you sure about that?

A. Yes, sir; because if it hadn't been I would have had to sit up to get out of the way of it, if it had been coming up on No. 2 when it passed me.

Q. It passed you on No. 1, did it?

A. Yes, sir.

Q. Passed you on No. 1 track?

A. Yes, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Now are you just as positive about that as you are that you were only about 150 yards or 150 feet, as you said?

Mr. Davis: I object. That is a question for the jury.

The Court: It is cross-examination. It is 10 proper.

A. What is the question?

Q. Are you just as positive that this switch was between you and Swank as you are that you were only 150 yards from Mr. Swank?

A. Well, I am not positive that I was only 150 yards from Mr. Swank. I said about 150 yards.

Q. When you say about how much leeway have you in your mind? What would be the most that you would say? What would be the greatest distance that you would say you were from Mr. Swank? 20

A. I don't suppose I was more than 200 yards anyway.

Q. I understand it is pretty hard for any one to make a correct estimate of distance, that is, an absolutely correct one, but you can say the limit and you say the limit was 200 yards?

A. You know it is two years since I was near that place. 30

Q. Yes, I understand that.

A. And those things slip a person's memory.

Q. But it might be of some importance to the jury to know those things. We would like to know them as correctly as you can state them.

A. I would like to state them as correctly as I can too.

Q. 200 yards is 600 feet?

A. Yes.

Q. Would you say that you were that far from Mr. Swank?

A. No, I don't think I was, because I understood that from Mr. Swank to the tower was 780.

Q. Not what you understood, just what you know about it, Mr. Dunn, as to the distance. That is your best estimate?

10 A. That is my best estimate, yes, sir.

Q. But you are positive that the crossover from track No. 1 to track No. 2 was between you and Mr. Swank?

A. Yes, I know that.

Q. You are positive of that?

A. Yes.

Q. There can be absolutely no doubt in your mind about that fact?

A. No, I am pretty near positive of that.

20 Q. Now not nearly positive but are you positive?

A. Well, I would say yes.

Q. So that whatever the distance was it was at least the distance from that crossover to Swank?

A. Sir?

Q. Whatever the distance you were from Mr. Swank it was greater than the distance of the crossover from Mr. Swank?

A. I don't understand your question.

30 Q. Whatever distance you were from Mr. Swank, it was greater than the distance to the crossover from Mr. Swank?

A. Oh, yes.

Q. Because the crossover was between you and Mr. Swank?

A. Yes.

Q. Did you see Mr. Cook?

- A. Not until after the accident.
- Q. Did you see any of the other of the gang?
- A. Only Wilcox.
- Q. He was the only one you saw?
- A. Mr. Burrows alongside of me until after the accident.
- Q. Mr. Burrows and Mr. Wilcox?
- A. Yes.
- Q. They were the only ones that you saw?
- A. What do you mean, around the time of the ac- 10
cident?
- Q. Yes.
- A. Yes.
- Q. Did you see Mr. McGarry and Mr. Swank before you saw the train?
- A. Oh, yes; several times.
- Q. I mean immediately before you saw the train?
- A. No, but as the train passed me I looked up the track and saw them, or as it was passing me, before it had altogether gone by. 20
- Q. And at that time it was on track No. 1, you say?
- A. Yes.
- Q. And hadn't yet crossed over?
- A. No, sir.
- Q. Were both Mr. McGarry and Swank working?
- A. Yes, sir.

Re-direct examination.

30

By Mr. Davis:

- Q. Where was the tower with respect to yourself? Was it nearer Philadelphia than you were?
- A. Yes, sir.
- Q. At the time the accident happened?
- A. Yes, sir.

Q. And about how far away from that tower did you say you were?

A. About 100 yards.

Q. Is there any doubt about that in your mind?

A. What, about the distance?

Q. Yes.

A. No, I should judge that. It might ——

Q. And is there any doubt that you were nearer New York than the tower was?

10 A. No, no doubt.

Re-cross examination.

By Mr. Coulomb:

Q. You say you were 100 yards, about, from the tower?

A. Yes, sir.

20 Q. And how far was the train from the tower when you saw it?

A. About fifty yards from the tower.

Q. So that would make the train about 150 yards from you when you saw it?

A. Yes, sir.

By Mr. Davis:

Q. That is the time you first saw it?

A. Yes, sir.

30

EDWARD N. COOK, recalled for plaintiff.

Direct examination.

By Mr. Davis:

Q. Mr. Cook, you said in your examination in chief that Swank was paid twenty-six cents per hour and that the working day at that time was ten hours? 10

A. Yes, sir.

Q. Have wages raised since that time?

A. Oh, yes.

Q. And what are you paying now for the same sort of work?

(Objected to.)

The Court: What is the objection?

Mr. Coulomb: The objection is, if your Honor please, that there is no question that Mr. Swank would be getting any extra pay. We are not chargeable with that, if your Honor please. 20

The Court: As I understand it, that is the question that is being asked the witness, as to the price of work of the same character, the price that is now being received by laboring men who are employed in this same gang doing the same work that Mr. Swank was doing. 30

Mr. Coulomb: No, sir, but if your Honor please, I call your attention particularly to the case of Gardenia vs. the Railroad Company, recently decided, in which Justice Swayze wrote the opinion, in which the increase of wages was particularly referred to.

Mr. Davis: Well, let us see it.

The Court: What do you say was the point of the case?

10 Mr. Coulomb: The point of the case was that the Court in that case referred to the fact that the question of damages could not—as I understand, it turns on what he was getting then, the excess wages that he was actually getting then, they were not permitted to take into consideration. That accident happened in December of 1917, just three months after this accident took place, or three or four months. It was a man who was not working for the railroad, grading or working for the Remington Arms Company at Eddystone.

20 The Court: You may withdraw the witness until Mr. Atkinson finds the case.

Mr. Davis: I am going to close with this witness. Of course I can well understand why the judge would refer to the case, but I can't tell why any judge held that testimony of that character was incompetent.

Mr. Coulomb: No, I am not saying that he said it was incompetent.

30 Mr. Davis: For what purpose are you citing it to the Court?

Mr. Coulomb: I am citing the case for the proposition that it is immaterial what subsequent wages might have been paid for this same class of work, on the theory that you can tell what this man was doing, what his wages were then, and the jury can

infer, perhaps, what they please or what is naturally inferable from that, as to what the natural increases were. But to say that the next day the wages were increased a certain amount is no evidence upon which damages can be based.

(After further argument.)

The Court: It has been my understanding of the law that these suits are based upon the present earning capacity and the future loss to the wife in earning capacity must necessarily be based upon the present earning capacity. But if you can show by direct evidence that this particular gang in which this man was working at the time of his employment has increased, that seems to me to be definite enough to admit this evidence, and I am going to admit the question with the understanding that it will be stricken from the record if I find that the law is against it. 10 20

Mr. Davis: Of course your Honor would do that.

(Objection noted for defendant as ground of appeal.)

By Mr. Davis:

Q. The question is, Mr. Cook, what wages are you paying to men employed in the same line of work that Swank was employed? 30

A. Forty-five cents per hour for eight hours now.

Q. You mean they get forty-five cents for each of eight hours?

A. Each of eight hours, yes, sir.

Q. They are not paid for ten at the present time?

A. No, sir.

Q. Work eight?

A. Work eight.

Q. Eight hours at forty-five cents?

A. Yes, sir.

Q. How long has that been in effect?

A. Last October, I think, October or September,
I don't know which.

Q. Of this present year?

A. No, last year.

10 Q. That is 1918?

A. Yes, sir. I am not quite positive about that.
It was the last of last year.

Q. Was it jumped from twenty-six to forty-five
or was there an intermediate rate?

A. No, intermediate.

Q. What was that intermediate rate?

A. I couldn't say.

Q. Do you remember what they got in the mean-
time?

20 A. No, there were different rates there for differ-
ent months but I couldn't tell you really what they
were.

No cross-examination.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

Mr. Coulomb: If your Honor please, I desire to move for a non-suit at this time on two grounds, or perhaps I might rather say, on three grounds. The first is that there is no proof in this case whatsoever to go to the jury at this time that the plaintiff's intestate was engaged at the time of his death in interstate commerce. The whole testimony in this case shows that the work which was being done was new work, the installation of a switch and the operating device for that switch, which was not in use in interstate commerce, had not been put into use, and the testimony was that it did not come into use until some time afterwards, on the east side of the switch track, which had been clamped down and spiked down, running from track No. 5, which it is testified to here was a siding or a track used for a siding and shifting purposes, to track No. 4, which was the main track; and at the time of his death, Mr. Swank, the decedent, had been digging out between the tracks, digging the ballast out for the purpose of running a pipe line which ran across the track and then to the tower. The whole of that pipe line from the tower to this point of crossing, then across to where this switch was to be put in, was all new and was all connected with and solely used by this one switch which operated this new track cross-over from track 5 to track 4. It was not then in use in interstate commerce, it had not been put in use in interstate commerce, and as a matter of fact there is no testimony here from which it can be said it was designed to be used in interstate trade at all.

Now the cases require, it seems to me, that the work done must be work used in interstate com-

merce. Now I will read to your Honor from the opinion in the Circuit Court of Appeals which has been followed; there are three cases and this is one which seems to illustrate it as well as any other one.

(Reads from *Bravis vs. Chicago, Minneapolis and St. Paul Railroad*, 217 Federal Reporter, 234.)

Now they have here had certain repairs; the instrumentalities which are used in the work are not new work within the meaning of that act. In other words, if they were repairing a switch already in
10 existence, if they were putting in a switch connection with a switch already in existence, or if they were repairing some signal already in existence, then it would be interstate commerce, it would be something in connection with interstate traffic. Now Mr. Davis would be hard up today to show what this device that this man was engaged in building at that time had to do with interstate traffic. It did not have a thing to do with that track No. 4. If
20 your Honor will bear in mind, this switch was running from track 5 to track 4. If the switch had been connected up and in operation it might be said that it had some connection with interstate traffic. It was not connected up. Whether that man did work or did not would not interfere with or promote interstate commerce at that time, because the work was not in use in interstate commerce yet, any more than they were building a switch along there and had not put that switch in. Assuming they were starting work, and were later on to switch around, the
30 question is whether it was a part of interstate commerce. The cases are clear that the work must be work which is used in interstate commerce. I do not think that there is any use of my elaborating on it, if your Honor please, because it is within such a narrow, brief compass. So much for that.

And the second point is this: that he assumed the risk of this injury. And the case to which I want to refer your Honor is *Boldt vs. Pennsylvania Railroad Company*, 245 U. S. Reports, 441; or 62 Lawyers' Edition, 385. Now the act provides that the employee shall not be considered to have assumed the risk arising from the failure to perform certain acts or certain duties under the Safety Appliance Act, which is the prior statute to this; and also the courts have said in the case of *Boldt vs. Pennsylvania Railroad*, and the case of *Seaboard Air Line vs. Horton*, in an opinion written by Justice Pitney, that they still assume the risk of their fellow servants and agents. 10

(Reads from decision.)

So there can be no doubt, if your Honor please, that in working at this place, which is obviously a dangerous place in any circumstances, working by himself, particularly when he was 800 feet away from the balance of his gang and Mr. Cook, that he assumed the risk of his injuries. 20

Now I desire to call your Honor's attention to a case in our own reports, which it seems to me does establish that he assumed the risk under those circumstances.

(Cites 74 N. J. Law 366.)

Now if your Honor please, in the first place I might say that there is no affirmative testimony offered, or no strictly speaking negative testimony, as to the blowing of this whistle. Everybody that testified on that subject or appeared in the case has said that they did not hear the whistle, all of them were engaged in some other work and all of them were engaged in a place where they were under no mental necessity, if I may call it such, or no physical necessity of paying any attention to this warning whistle. 30

He was 800 feet from this gang, from the rest of the gang. In this case there was only 325 feet. He was working by himself in one case; in our present case he was working along with another man.

10 Now the facts in the Precogney case are stronger, it seems to me, for liability than they are here, because he was working so close to the gang in the first place, and in the second place he was working by himself, he said, in company with another. And in addition to that there was the question whether he did not have a right to work with his back to the train, and in our own case it was that while his back was to the track he was working sideways and that his left side was hit. While that might possibly be an inference to be drawn that I am not justified in here drawing, yet it seems to me that he was working in a better position to see this approaching train than was Precogney in the case that I have just mentioned.

20 So it seems to me that under the cases, independent of this Precogney case, that he assumed the risk, assuming these facts to be true, assuming that the foreman did not give that warning whistle, assuming that to be the fact—and that was all there was in this case—assuming that was the negligent act on the part of him or his servants, just like it was a negligent act in the Boldt case, to shoot that string of cars down against another string of cars without giving any warning of the approach to be made; just as much in the Horton case, I might say, which was a case where there was a defective steam gauge on an engine which exploded; and the question was whether he assumed that risk. But in that Boldt case the question was whether he assumed the risk of the relation such as I have described. In this case he assumed the risk of the negligence, assuming that

there was negligence, of the foreman to give that whistle. That was the risk which he assumed. And in the Precogney case they held that they were under no duty to give him that. That was a risk which he assumed, working in a dangerous place, and it was up to him to take care of himself. And as you heard one man say on the stand this morning, that is what he did, take care of himself, look out for these trains himself.

Now it is simply restating the matter for me to state that a railroad of four tracks, such as the main line between New York and Philadelphia, is at any time a dangerous place, and particularly so during that particular year and that particular month in the year, it was a dangerous place to work. And he knew it, he knew he was working away from his gang, 800 feet, more or less, from his gang, where it might possibly be very difficult to hear the whistle; and therefore he assumed the risk of working there without taking care of himself, and he assumed also the risk of the failure, if there was a failure, on the part of the foreman to give him the warning whistle. And as I say, there is no evidence, really, in this case at the present time to go to the jury, or scarcely any, even on that question alone, standing by itself, even if there was such a duty for the violation of which this railroad company would be responsible.

So I say to your Honor, on the theory that he was not engaged in interstate commerce, because he was engaged in the installation of an entirely new device which had not yet been used in interstate commerce, and as the testimony was, was not used or connected up for some time after he was working there; and on the ground that he assumed the obvious risk of working in that dangerous place; and on the further ground of this Precogney case, which

was in the Court of Errors and Appeals, that we are now, at this stage of the case, entitled to a non-suit.

The Court: What is the third ground?

Mr. Coulomb: Well, the two grounds might be that he assumed the risk of the failure to blow or he assumed the risk whether or not the whistle was
10 blown; whether or not there was any duty at all.

(Mr. Davis replies.)

The Court: I will reserve my decision until Friday.

(Adjourned till Friday, November 7, 1919, at 10 A. M.)

20

Mount Holly, N. J., November 7, 1919.

(Trial of the cause resumed at 10.00 A. M.)

(On account of the absence of a juror by reason of sickness it was agreed by counsel to continue the case with eleven jurors.)

30 The Court: There was a motion pending, gentlemen. Is there anything further to be said on the motion, the motion for non-suit?

Mr. Davis: I have some authorities, if your Honor please, if I can bring them up. (Argues and cites authorities.)

The Court: There is testimony tending to prove a custom for the leader to sound a whistle or signal on the approach of a train. Having established that custom, then if that whistle or signal is not given the defendant may be held liable, and I do not see how the doctrine of the assumption of risk can interfere in this kind of a case, because it is not my understanding that under the doctrine of assumption of risk the deceased assumed the risk of a negligent act on the part of a fellow servant who is charged with a particular duty, and who neglects to perform that particular duty; but only such risks as are incident to his employment; for instance, if he were a boatman, working on a boat, and the waves suddenly came down and brushed him off, the master could not be held responsible, because that risk would be an incident to his employment for which the master would not be held to be negligent or to be responsible. But I do not take it that the Federal Act means that in case the negligence of the pilot in leaving unguarded the wheel and going to the back without any right whatever, was the cause of the accident, the employee would assume the risk of the negligence on the part of the pilot. That particular phase of it, I am trying to state, Mr. Coulomb, does not appeal to me as much as the other.

But I am going to let this matter go to the jury under instructions from the Court as to the character of the work, because there is evidence here which might indicate that this work was part of an existing system in operation, and the jury from the facts as testified to and the instructions as to the law which they will receive from the Court can determine the question as to whether or not this em-

ployee comes within the purview of this Employers' Liability Act, whether he was employed in interstate commerce. So I will refuse the motion for a non-suit and allow you an exception.

(Objection noted for defendant as ground of appeal.)

10

DEFENDANT'S TESTIMONY.

EDWARD N. COOK, recalled for defendant.

Direct examination.

By Mr. Coulomb:

20 Q. Mr. Cook, you testified that you were in charge of the gang of men working near Princeton Junction, I think it was, on the 17th of September, 1917?

A. Yes.

Q. The day that Mr. Swank was killed?

A. The 18th of September.

Q. Who put Mr. Swank at work in the particular work that he was doing at that time?

A. I placed he and the man that was with him there at work.

Q. Was the man with him Mr. McGarry?

30 A. Mr. McGarry, yes, sir.

Q. What if anything did you tell them with respect to the work that they were to do and that you were going to do?

A. I left them with the understanding—I left them and gave them to understand I was leaving them

and for them to look out for themselves, cautioned them particularly.

Q. Did you tell them where you were going?

A. Yes.

Q. Where did you tell them you were going?

A. To the tower.

Q. How far was that away from where you had placed them at work?

A. I judge about 860 feet, by measurements.

Q. Did you go to the tower?

10

A. Yes, sir.

Q. Now was the tower towards Philadelphia or towards New York from where Mr. Swank was working?

A. Towards Philadelphia.

Q. Was there any other of your gang working at that point?

A. Not right near there, but they were scattered toward where Mr. Swank was and between me and the tower, east of the tower.

20

Q. That is, toward New York from the tower?

A. Yes, sir.

Q. Did you see the train which struck Mr. Swank approaching?

A. I saw the train before it reached the tower or the station either one.

Q. Where were you standing, on what side of the track, on the railroad?

A. I was standing on what we call on the south side of the track, along No. 1 track.

30

Q. Was that along the rail leading from New York to Philadelphia or Philadelphia to New York?

A. Philadelphia to New York.

Q. In other words, the track leading from Philadelphia to New York is called No. 1 track?

A. No. 1 track, yes, sir.

Q. Was anybody standing there with you?

A. Yes, sir.

Q. Who?

A. Mr. Stout.

Q. What if anything did you do when you saw this train coming?

A. I got out and blew my mouth whistle and tried to attract their attention, which I thought I did, by one man looking up.

10 Q. Could you see Mr. McGarry and Swank from where you were standing?

A. Plainly.

Q. Which man looked up?

A. McGarry.

Q. What did you do then?

A. I didn't stop then, I kept on blowing my whistle and waved my arm until the train had passed me and still kept on giving that warning as near as I could with my arm.

20 Q. Did or did not the train obscure Mr. McGarry and Swank from you as it proceeded along in the direction they were working?

A. I could see them within possibly one hundred yards or maybe less than that, before it struck him.

Q. I ask you, Mr. Cook, did or did not the train at any time on its approach from you to Mr. Swank obscure you from their view or them from your view?

A. No, sir.

30 Q. You could see them all the time?

A. All the time.

Q. Is the whistle that you blew the whistle that is used for the purpose of giving warning on the tracks?

A. Yes, sir.

Q. To workmen?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. McGarry is dead, isn't he, Mr. Cook?

A. I didn't know it till a short time ago. Yes, I understand he is.

Q. I ask you what you know now. You know now he is dead, don't you?

A. No, I don't, only from a statement I heard he is. 10

Q. You understand he is?

A. Yes.

Q. Did you try to subpoena him for this cause?

A. No, sir.

Q. Why not?

A. Well, I don't know. I had nothing to do with the subpoenaing part of it. I couldn't say about that.

Q. Of course Mr. Swank is dead? 20

A. Yes, I understand that part.

Q. They were the only people that were present at the time that you had this alleged conversation with them; isn't that a fact?

A. They were the only people that were present, yes, at the time I was telling about the warning.

Q. Who else did you give a statement to to that effect?

A. The statement is written to our office.

Q. No, I don't mean that. Between Swank and the tower there were other people, were there not? 30

A. Yes, sir.

Q. Who were they?

A. Well, there is Burrows and Wilcox and Dunn. That is all I can recollect now.

Q. How far were you from Dunn?

A. Well, I couldn't positively state. They were about half way, I think, between the tower and where Mr. Swank was working.

Q. That was further than you usually had your men work away from you, was it not?

A. No, sir.

Q. Did you tell them that you were going away?

A. I told these two men, yes, sir.

10 Q. No, I am not talking about these other two, I am talking about Dunn and this other fellow.

A. They were out of harm's way, out of danger.

Mr. Davis: I move to strike that out.

The Court: That will be stricken out. You are not asked for the reason, but the mere fact of whether you told them.

20 A. No, I didn't tell those people anything about it.

Q. Now there was another man working alongside of the track fixing a box, was there not?

A. I don't recollect what they were doing. I know they were working.

Q. There was one man, who was that?

A. I don't know.

Q. Wilcox was working alongside of the track fixing a box, was he not?

A. He might have been.

30 Q. Well, don't you know?

A. Well, not positively.

Q. Why not?

A. Because I don't remember what each and every man was doing at the time.

Q. Did you tell this man Wilcox that you were going away?

A. It wasn't necessary to tell him.

Mr. Davis: I move to strike that out.

The Court: It will be stricken out.

Q. Did you tell him?

A. No, sir.

Q. Were there any other men working along the road between Swank and the crowd except Wilcox?

A. Burrows.

Q. Where was Burrows working?

10

A. About half way between the tower and where these men were working.

Q. What was he doing?

A. They were on the outside working on the pipe run, I think, or something like that.

Q. Did their business require them to take the pipe over to the track and fit it in?

A. No, sir.

Q. Did you tell them that you were going away?

A. No, sir.

20

Q. Now this train that came as it approached you was on track No. 1, was it not?

A. Approaching, yes.

Q. Now if that train had continued on track No. 1 it would not have struck Swank, would it?

A. No, he was working on No. 2.

Q. He was working between 2 and 3, was he not?

A. Yes.

Q. So if the train had continued on track No. 1 this accident would not have happened?

30

A. Certainly not.

Q. Did you see it after it came from 1 into No. 2?

A. Saw it before it came there.

Q. I haven't asked you that. I am asking you if you saw it when it came from No. 1 to 2.

- A. Yes.
- Q. How far away were you at that time?
- A. When this entered?
- Q. Yes.
- A. Possibly 200 feet or 300.
- Q. Now it was unusual, was it not, for trains to cross over and pass up that way?
- A. No, sir.
- Q. When did you blow your whistle?
- 10 A. When I saw the train approaching.
- Q. How far away from you?
- A. How far away from me? It was over a thousand feet from me when I saw it first approaching.
- Q. When did you blow the whistle?
- A. Just as soon as I saw it approaching.
- Q. When it was a thousand feet away from you?
- A. Yes.
- Q. It was then on track No. 1?
- 20 A. On track No. 1, when I started to give the warning.
- Q. And how long did you continue to blow?
- A. I kept right on blowing as long as I knew they could hear the whistle and continued blowing it.
- Q. Well, did you continue to blow until the train had passed them?
- A. No, not in passing them, no, sir.
- Q. Well, until it had reached them?
- A. Well, yes, until it reached them, almost, kept blowing the whistle.
- 30 Q. All that time you continued to blow?
- A. Yes; that is a very short time.
- Q. Were you in the tower any of that time?
- A. No, sir.
- Q. Before you began to blow your whistle were you in the tower at any time?
- A. No, sir.

Q. Now Mr. Cook, did you not expect the engineer to blow his whistle?

Mr. Coulomb: I object, on the ground, if your Honor please, in the first place it is not cross-examination; and in the second place there can be no negligence at all charged against this company by reason of failure of the locomotive engineer or fireman or any one else in charge of that train to give warning of its approach. 10

Mr. Davis: I have the right, if your Honor please, to ask him to explain his conduct there at this time. He is attempting to explain his conduct. I am asking him whether or not he did not expect the engineer to give notice. It may throw light upon his conduct.

The Court: I think it is a proper question. I will admit it and allow an exception. 20

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

A. Well, I don't know. I don't think I did. I wasn't looking for anything of the kind. I was just simply looking out for the men's safety.

Q. When these men crossed over—that is, this train had crossed over from track No. 1 over to track No. 2 and was going into your men, didn't you expect him at that time to blow his whistle? 30

A. Well, it is not customary on going over a track that way.

Q. No, I am not talking about going over a track but when you are approaching a crew of men working on the track isn't it customary, if they are near the track, for the engineer to blow his whistle?

(Objected to.)

The Court: I think the objection is proper there, because that is not proper cross-examination.

10 Q. Didn't you expect him, following the usual custom, to blow at that time?

Mr. Coulomb: I object. It can't make any difference. There can be no possible ground of negligence against this company for failure, whether it is customary or not to blow this whistle.

Mr. Davis: Why do you say that, Mr. Coulomb?

20 Mr. Coulomb: I say that because that is the law.

Mr. Davis: Well, if your Honor please, if that is his basis I most respectfully urge that that is not the law and that we are entitled to have the question answered.

30 The Court: I would not sustain the objection on the ground that that is the law, but I think that the question as originally asked was not proper cross-examination, inasmuch as he did not go into the operation of this train, only the operation of his own conduct at the time on direct examination.

Q. Won't you tell us why you began to blow this

whistle when the train was on track No. 1 and it was a thousand feet away?

A. To attract these men's attention.

Q. Well, why was it necessary to attract their attention when this train was a thousand yards away from the switch and 800 yards further away from the men than you were?

A. It is customary to do so.

Q. Oh, it is customary?

A. Yes, blow your whistle of warning.

10

Q. Regardless of what track the trains are on?

A. It doesn't matter what track they are on, if a train is approaching you are supposed to blow that whistle.

Q. Did you see Swank look up?

A. No, sir.

Q. At no time?

A. At no time.

Q. Well, was it customary to blow the whistle when you were as far away from him as you were?

20

A. Yes, sir, any place.

Q. It was your duty then to warn them even at that place any time?

A. My duty to do it.

Q. So that when you told them that you were going away they still expected you to blow the whistle if a train came?

A. Well, that part I don't know. Of course, look for warning; if there was any one there look for warning. But they had warning.

30

Q. You have already said that it was your duty to blow the whistle, didn't you?

A. Yes, sir.

Re-direct examination.

By Mr. Coulomb:

Q. You did blow the whistle?

A. Yes, sir.

Q. Mr. Cook, have you the whistle with you that you had on that occasion?

A. Yes, sir.

10 Q. Will you produce it?

(Witness produces whistle.)

Mr. Coulomb: Does your Honor want to have a demonstration?

The Court: I think they can all see by the whistle without raising the roof of the courtroom.

20 Q. Mr. Cook, there is one question I forgot to ask you on direct examination. Is there any signal displayed on the signal bridge which shows the operation of a train, or rather, the movement of a train from one track to another?

A. Yes, sir.

Q. Were there any signals at this place which showed that movement?

A. Yes, sir.

30 Q. Where was the signal bridge that showed it, towards Philadelphia or towards New York?

A. Towards Philadelphia.

Q. From you?

A. From me, yes, towards Philadelphia.

By the Court:

Q. How far from the tower was that signal bridge?

A. About 400 feet, I think.

Q. Which side, east or west?

A. West.

Q. West is towards Philadelphia?

A. West is towards Philadelphia, yes, sir.

10

By Mr. Coulomb:

Q. How was that indicated on those signals, the fact that the train was going to move from one track onto another?

A. By the position of the blades, called signal blades.

Q. Just explain what the position of the blade is which would show that movement.

A. Well, there are two blades there on the home signal.

Q. No, I am speaking about that point. Confine your testimony to what was on that particular signal bridge.

A. At that point there were two blades on each home signal pole, and if the top blade was displayed a clear signal you knew the train was passing directly on that track. If the second blade was displayed you knew it was leaving that track on the track opposite.

30

Q. What do you mean by signal displayed?

A. The position of the arm, either up or down.

Q. When is the signal in a position to indicate the passing of a train?

A. When it is out in the air or at 45 position; at 90, we call it, or 45.

Q. Did the signals on this bridge indicate that the train was going to pass from No. 1 track to No. 2 track?

A. Yes, sir.

Q. Had you at any time ever explained to Mr. Swank the operation of these signals with respect to the movements of trains from one track to another?

10 A. Yes, sir.

Re-cross examination.

By Mr. Davis:

Q. When?

A. Well, when he first come on, we usually do that. And the same day that he was killed I did it before I left him.

20 Q. You say you usually do it?

A. Always do it.

Q. Do they understand them?

A. Yes.

Q. Why did you take them and give them schooling on those questions afterwards?

A. Afterwards?

Q. Yes.

A. That has been the custom ever since I have been on the railroad, to be —

30 Q. No, but you are not answering my question. After this accident happened isn't it a fact that you took all of these men and gave them instruction in those signals?

A. Not to my knowledge.

Q. Now you would know, wouldn't you?

A. Well, they were taken up before that.

Q. Don't you know whether or not these men after

this accident were taken into what you would call a school and instructed with respect to those signals?

A. Not to my knowledge, after this accident.

Q. Now if they had been instructed in those signals by you it would have been unnecessary to give them a schooling on it, wouldn't it?

Mr. Coulomb: I object to that as being immaterial and irrelevant, what he might have done before or what might have been necessary to do after that 10 day again.

The Court: He has a right to test the accuracy of his statement on cross-examination. I will admit the question and allow an exception.

(Objection noted for defendant as ground of appeal.)

A. No, it is customary at all times to give instructions; at different times, you know, we are called up for instruction. 20

By the Court:

Q. For whose benefit, Mr. Cook, were these signals on this tower?

A. The instruction part of it, you mean?

Q. No, for whose benefit were the signals displayed indicating that the train was about to pass 30 from one track to another?

A. For the benefit of the engineer approaching.

Q. Were they for the benefit of the men working on the track?

A. Not necessarily, no, sir; because the engineer would have to have those signals displayed, you know, to pass a given point.

Q. Was it the custom or the instruction from you as the leader or the foreman of this working gang to warn them that they must be guided in their movements on the track by these signals?

A. Yes, sir.

Q. As to the movements of the train from one track to another, that they must watch the signals?

10 A. Yes, that they must watch the signals. The men that is placed out, they must watch those signals, to give him an idea how the train is approaching.

By a Juror:

Q. May I ask a question? Mr. Cook, when you left Swank and his fellow workman at this distant point did you tell them that they would be entirely dependent upon themselves for protection?

A. For the time being, yes, sir.

20 Q. For how long a time?

A. Well, that you can't always depend on. I went away to look after some other work.

Q. Well, you blew this whistle after having told them that they would be entirely dependent on themselves; you attempted to give them the additional dependence on the whistle?

A. Yes, sir.

Q. And while they were not supposed to be dependent on the whistle at all?

30 A. All men are.

Q. They are?

A. All men are.

Q. I want to get it clearly in my mind whether they were depending entirely on themselves, without instructions, depending entirely on themselves, or whether they could on a reasonable scale depend on your whistle.

A. They were left with the understanding to look out for themselves, but naturally when I was in a position and saw a person on the tracks with a train approaching I blew the whistle as protection.

Q. You saw them all the time?

A. Yes, sir.

Q. Could you see the train hit Swank?

A. I couldn't see it hit him, no, but of course the engine within a hundred feet or less than that.

Q. He was between 2 and 3 track?

10

A. Yes.

Q. The train on 2 track going east?

A. 2 track.

Q. The left side of the engine hit him?

A. The left side.

Q. That was the side he was on?

A. He was on the right-hand side.

Q. And therefore you were obscured?

A. Just for the time.

Q. You originally thought that Dunn was struck? 20

A. Possibly I did, I don't know.

Q. I think that was in the testimony. I don't remember. I just wanted to get a few points.

By Mr. Davis:

Q. Mr. Cook, the No. 3 track accommodated trains coming from the other direction, did it not?

A. Yes, sir.

Q. And was not Swank's and also McGarry's face 30 directed toward what I would call the east?

A. They were facing the east.

Q. They were facing the east?

A. Yes.

Q. That is the way traffic would come that was coming on those tracks, 3 and 4?

A. Yes, sir.

By Mr. Coulomb:

Q. They were working between 2 and 3, were they not?

A. Yes, sir.

Q. And on 1 and 2 tracks the traffic was in what direction?

A. East.

10 By Mr. Davis:

Q. That would come from their back, traffic that came on No. 1 and 2 would come from the back of McGarry and Swank?

A. Yes, sir.

20 WILLIAM GLOVER, sworn for defendant.

Direct examination.

By Mr. Coulomb:

Q. Mr. Glover, by whom are you employed?

A. Pennsylvania Railroad.

Q. And were you employed by the Pennsylvania Railroad on the 18th of September, 1917?

A. Yes, sir.

30 Q. What was your position with the railroad company at that time?

A. Construction foreman.

Q. Where were you located on that day?

A. I was in the tower.

Q. No, I mean where were you in charge of any work?

A. Princeton Junction.

Q. Who had charge of the entire gang that was present there?

A. I was the foreman but Cook was the gang leader in charge.

Q. Did you see this accident?

A. No, sir.

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

A. Inside of the CD tower.

Q. What work was being done at that point that Mr. Swank was working on? 10

A. Installing a new crossover and digging between the tracks to install new pipe.

Q. Now is that pipe that you speak of a pipe for the purpose of transmitting compressed air or does it simply act as a connecting rod with some other contrivance?

A. It is manually operated, just like a connecting rod.

Q. And it is composed of hollow iron pipe? 20

A. Iron pipe.

Q. What was the purpose of this pipe?

A. To operate the west end of that switch.

Q. West end of which switch?

A. The new switch that was going to be installed, the new switch we were going to put in.

Q. Where was that switch going to be, going to operate from and to where?

A. From CD tower.

Q. No, I mean the switch, what direction was it going to lead? 30

A. Going to lead from No. 5 to No. 4.

Q. Is No. 5 track a siding?

A. Yes, sir.

Q. And No. 4 track is the main track?

A. Main passenger track, yes, sir.

Q. That is what, track No. 4, east or west bound?

That would be the track going from New York to Philadelphia?

A. Yes, sir.

Q. And this pipe which was going to be installed was for the purpose of doing what?

A. Operating the west end of that switch, or the end on 4 track.

Q. Now did that pipe or any part of it or that switch or any part have any connection with any
10 other part of the switches on the railroad company's ground at that place?

A. No, sir.

Q. Just tell us how that switch operates from the tower.

A. It is connected to a lever inside of the tower and a direct pipe line parallel with the track until it gets opposite to the switch point, and then we have a crank in the shape of a bell crank, we call it, right
20 angles, and as we pull from the tower on this direct line of pipe it operates accordingly, whichever position he pulls the lever inside the tower.

Q. Now in order to operate that lever does he do anything else except pull the switch from No. 4 to No. 5?

A. No, sir.

Q. Had any part of that work been used?

A. No, sir.

Q. Can you tell us when it was used?

A. It was put at service on August 23, 1918.
30

Cross-examination.

By Mr. Davis:

Q. Mr. Glover, you say you are construction foreman?

A. Yes, sir.

Q. And how long had you been familiar with the situation at Princeton Junction?

A. Oh, for a month or so.

Q. Before that?

A. Yes; that is, with this particular work.

Q. No, I am not talking about this particular work; I am talking about the general physical situation there.

A. Six or seven years—twenty years.

Q. Twenty years?

10

A. Yes.

Q. During that time you have been employed by the railroad company?

A. Yes, sir.

Q. And how long had you been construction foreman?

A. At that time about six years.

Q. Did you have charge of all the construction work along this part of the railroad?

A. Between Holmesburg Junction and Princeton, 20
yes.

Q. From where?

A. From east Holmesburg Junction to Princeton.

Q. Well, was this west of Princeton Junction or east of Princeton Junction?

A. East of Princeton Junction.

Q. Well, then you had charge of this construction work, did you not?

A. Yes.

Q. Well, then you went further than Princeton, 30
did you?

A. Well, we went to what they call the mile post east of Princeton.

Q. You went out to Princeton Junction, so this work was under your jurisdiction?

A. Yes.

Q. Had you had charge of this distance of track during the six years that you had been construction foreman?

A. Yes, sir.

Q. So that you were familiar with the construction of those tracks and the uses to which they were put, were you not?

A. Yes, sir.

10 Q. Now as I understand, there are four main tracks at this point, are there not?

A. Yes.

Q. There is No. 1 and 2, which are eastbound, that is, tracks that accommodate trains that are traveling in the direction of New York from Philadelphia?

A. Yes.

Q. That is correct, is it not?

A. Yes.

20 Q. Now No. 3 and 4 are tracks that accommodate travel going from Philadelphia toward New York?

A. No, the opposite way.

Q. I mean from New York to Philadelphia.

A. Yes.

Q. Now 5, as I understand, is an additional track that is laid parallel with and alongside of No. 4?

A. Yes.

Q. Now as I understand this No. 5 track was used for the purpose of doing switching operations?

A. Yes.

30 Q. And to accommodate the switching operations of trains and cars that went from either of those four tracks into Princeton Junction?

A. Yes.

Q. That is correct, is it not?

A. Yes, sir.

Q. Well, now, No. 1, 2, 3 and 4 were tracks that accommodated interstate commerce, were they not?

A. Yes, sir.

Q. And also No. 5 accommodated interstate commerce?

A. Not that I am aware of.

Q. Well, if a train that came from New York, destined for below Princeton, would they not be switched out of the train over this track into the main line?

A. Not absolutely necessary that they would be.

Q. Well, may they not do it? 10

A. They may and they may not.

Q. Now this switch that was being installed at the west end of track No. 5 was being installed for the purpose of permitting trains to pull directly from track No. 5 onto track No. 4?

A. Yes, but it was on the east end.

Q. This was on the east end?

A. East end of CD tower.

Q. No, I mean is it on the east end of track No. 5?

A. Yes, on the east end of track No. 5. 20

Q. The switch that these men were struck?

A. Yes.

Q. Was there a switch at the west end of No. 5?

A. Yes.

Q. That switch accommodated traffic from track No. 4, did it not, that might be pulled in on there?

A. Yes, but there was track No. 6 in addition.

Q. Now what was track No. 6?

A. The same purpose.

Q. For the purpose of — 30

A. Shifting cars.

Q. Of switching?

A. Switching, yes.

Q. Where did that come into No. 4?

A. On the west end of our interlocking, on the interlocking CD.

Q. Did you have an interlocking switch?

A. Yes.

Q. At the west end?

A. Yes.

Q. And did that interlocking switch at the west end also accommodate track No. 5?

A. Well, it went on it, what we call the Princeton main line.

Q. Won't you just take that paper there and draw
10 a little rough diagram of the relation of those tracks to one another?

(Witness illustrates on paper.)

A. There is track No. 4, there is track 5.

Q. You are drawing the east end now, are you?

A. I am drawing the west end. This leads from 4 onto 5 this way. This is the other end of it.

Q. Don't you have a map or blueprint of that
20 here?

A. Yes, we have got it right here, the whole layout.

Q. You might produce it.

Mr. Coulomb: We haven't got any.

Mr. Davis: He says you have.

The Witness: Mr. Cook has.

30

(Blueprint produced.)

Mr. Coulomb: Is this the blueprint?

The Witness: This is the switch we were installing.

Q. Is that marked so it can be indicated on the map to the jury? Can you mark it so they can know what one it is? Mark it A.

(Witness marks on blueprint.)

Q. That indicates the switch that was being installed?

A. Yes.

Q. A to B. Put B here.

10

(Witness marks on blueprint.)

Q. Now which is east and which is west?

A. This is westbound. (Indicating.)

Q. Which is this, is this east or west on this map?

A. This is east.

Q. All right, mark E there, please.

(Witness marks on blueprint.)

20

Q. Put E here.

A. This is west of the tower.

Q. I don't care anything about the tower. I mean just to show the east and west direction.

(Witness marks on blueprint.)

Q. Where is that tower?

A. Right here.

Q. Mark that with a T, please.

30

(Witness marks on blueprint.)

Q. Are these tracks numbered on this blueprint?

A. Yes, sir.

Q. Where are those numbers?

A. This is 16, that is 17.

Q. No, I am speaking of the tracks, not of the switches.

A. They are there, 1, 2, 3 and 4.

Q. Now as I understand, this switch that you have marked AB indicates the switch that was being put in at the time of this accident.

A. Yes, sir.

10 Q. Now you say that there were six tracks at this point?

A. Yes.

By Mr. Coulomb:

Q. That is not down there though?

A. No, it is not down there.

Q. Mr. Davis was directing your attention to the number of tracks where the switch was.

20 A. No, there is no 6 there.

Q. Where is Princeton Junction here? Is that indicated by this junction of white lines?

A. Yes.

Mr. Coulomb: It is indicated on the map as Princeton Junction station.

By Mr. Davis:

30 Q. This would be the New York end from Princeton Junction?

A. Yes.

Q. The east end would be the New York end from Princeton Junction?

A. Yes.

Q. Now, Mr. Glover, I want to know what you used this track No. 5 for.

A. Shifting cars.

Q. From where to where?

A. Oh, I suppose —

Q. Was it used indiscriminately?

A. Yes, used continually.

Q. And indiscriminately as to traffic?

A. Well, I suppose it is, yes.

Q. And that would naturally include interstate 10 commerce as well as intrastate, would it not?

A. Yes.

Q. That was track No. 5?

A. Yes.

Q. Now, track No. 6, was that used for interstate and intrastate commerce indiscriminately?

A. Yes.

Mr. Coulomb: I object, because track No. 6 apparently has nothing at all to do with this case. 20

Mr. Davis: I understand, but I want to know to what extent these tracks were put and what was their use.

The Court: The question will be admitted.

(Objection noted for defendant as ground of appeal.)

30

Q. Now this switch that was being run from track No. 4 to track No. 5 was for the purpose of adding greater facility in the switching operations on track No. 5, was it not?

A. To make quicker moves there.

Q. And to facilitate the switching operations, was it not?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. And it was intended to make easy the transfer of cars from track No. 5 to track No. 4 more especially, was it not?

A. No.

Q. At the point that this switch came from No. 5 to No. 4 was there also a switch from No. 4 to No.

10 3?

A. Yes.

Q. And from No. 3 to No. 2?

A. Yes.

Q. Was that all new work that was put in there?

A. No.

Q. How long had there been switches from No. 1 to No. 2 and from No. 2 to No. 3 and No. 3 to No. 4?

A. Longer than I can recollect.

20 Q. And was this piece of switching work that you were constructing at this point an extension of the switch from 1 to 4 onto No. 5?

A. I suppose it was, but it was new work.

Q. Well, you know as a matter of fact, don't you, whether or not this was merely an extension of this same switch?

A. It was not an extension of the same, it was new. It had never been there before.

30 Q. You mean that the rails between No. 4 and No. 5 had never been there before, don't you?

A. Yes.

Q. You don't mean to say that the rails to the switch between 4 to 3 and 3 to 2 and 2 to 1 had not been there?

A. No.

Q. When you laid down these rails between 4 and

5 they were continuous with the switches that had been laid from 1 to 4, were they not?

A. Well, they were continuous with it but it was a new lead.

Q. Oh, yes, I understand about being a new lead, but I am saying it was a continuous track, was it not, from 1 to 2 and 3 to 4, and then you continued it on over to 5; isn't that a fact?

A. Yes.

Q. Now when you continued this work from 4 to 5 did you not have to take out the rails on what I would call the north side of the track in order to accommodate the switching operations that you put in there? 10

A. Had to remove the rail, yes.

Q. And put in a switch from or frog, or whatever you call it?

A. Put in a frog, yes.

Q. To that extent it was a substitution of new for old, was it not? 20

Mr. Coulomb: I object to that as being a conclusion.

The Court: It is proper cross-examination. This witness has testified that this was new track and he has a right to be tested.

(Objection noted for defendant as ground of appeal.) 30

Q. Is that a fact?

A. The question again, please.

(Question repeated.)

A. Yes.

Q. Now that had to be done in two places, didn't it, Mr. Glover? It had to be done on each rail; I mean there were two rails, of course, on the switch as it crosses from 4 to the two rails on track No. 5; so that in both of those places new rails were substituted for old, were they not?

A. No, just —

10 Q. That is, the frogs with new apparatus was substituted for the old rails that had been there theretofor?

A. Yes.

Q. That is a fact, isn't it?

A. Yes.

Q. Now these rails that were in the intervening space between the two rails of track No. 4, were they new or—I mean was it absolutely new work or was that merely replaced with other?

20 A. New.

Q. Well, how did you get from 3 to 4?

A. 3 to 4 had been there.

Q. Well, when you ran a switch from track No. 3 over to track No. 4 you had to run rails over the intervening space between the two rails to No. 4, did you not?

A. Yes.

30 Q. That is, there was one rail at least running from track No. 3 that crossed the inner rail and went across to the far rail of No. 4, didn't it?

A. Yes.

Q. Now when you installed the new switch or the extension of this new switch from 4 over to 5 was any part of the roadbed of track No. 4 disturbed?

A. The roadbed, yes. The roadbed was disturbed to put in ties.

Q. And was it disturbed for any other purpose?

A. To put in the lead and the switchpoint between No. 4 track.

Q. Now which track of No. 4 was disturbed, which rail of No. 4 track?

A. The north rail.

Q. Was the south rail disturbed at all?

A. Yes, the south rail was broke.

Q. That had to be broken in order to put the switch in?

A. To make the lead, yes.

10

Q. Now the new work therefore which was being done on this new switch was for the purpose of facilitating the travel from tracks No. 1, No. 2, No. 3, No. 4 over into No. 5?

A. Yes.

Q. Or any one of them?

A. Yes.

Q. That is a fact, isn't it?

A. Yes.

Q. Now the switches that were from No. 1 to No. 2 and from No. 2 to No. 3 and No. 3 to No. 4 were controlled in the same way that this second, or rather, fifth track and switch was controlled, was it not?

20

A. Yes.

Q. You had pipes running across the track to the side of the track and from the track alongside of the track to the tower?

A. Yes.

Q. All of those four were controlled in that way?

30

A. Yes.

Q. And the work that Swank was doing was to add this fifth pipe to this fifth switch, was it not?

A. Yes.

Q. Now at the time that this accident took place

the physical work of laying the switch rails and the switch ties had all been completed, had it not?

A. Had all been completed, yes.

Q. The track had been restored to its natural condition, that is, the track No. 4 and No. 3 and No. 2?

A. Yes.

Q. Insofar as they had been disturbed they had been restored to their former condition?

A. Yes.

10 Q. And the switch on track No. 4 to track No. 5 had actually been spiked to the ties both on track No. 4 and on track No. 5?

A. Not the switch point.

Q. What?

A. Not the point, no.

Q. The points had not been put in at all?

A. Yes, they had been put in but it was not spiked to the ties, that connected from 4 to 5 tracks. They were the No. 5 track gang.

20 Q. But the point went over into track No. 4 there, did it not?

A. Yes.

Q. Was that fast or loose?

A. Fast on No. 4.

Q. Spiked fast?

A. Spiked, wedged and clamped.

Q. Now that was awaiting the installation of this pipe?

30 A. Yes.

Q. And the completion of the signal work, was it not?

A. Yes.

Q. Now this signal work that was being installed was no different from the signal work that was already in existence on the other tracks?

A. No.

- Q. It went to the same tower?
A. Yes.
Q. And operated by the same men?
A. Yes.
Q. Giving the same reflex as the other switches that were in existence, was it not?
A. Yes.
Q. Now these levers, as you call them, that were in the tower, were they already installed?
A. No. 10
Q. A new lever had to be installed?
A. Yes.
Q. Was it installed at the time of the accident?
A. Well, that I couldn't say. I guess it was though.

Re-direct examination.

By Mr. Coulomb:

20

- Q. Mr. Glover, this work that Mr. Swank was doing had nothing at all to do with the switches passing from 1 to 2 and 3 to 4, did it?
A. No, sir. Well, it was a direct lead right across.
Q. I am asking you whether it had anything to do with that work.
A. None whatever.
Q. Nor did the pipe line that he was digging out between the tracks to accommodate have anything to do with that work, did it? 30
A. No.
Q. The work that he was doing there, did that have anything to do with the signal system at all?
A. No.

Q. And as a matter of fact, as I understood you to say, it did not go into operation until August, 1918?

A. August 23, 1918.

Re-cross examination.

By Mr. Davis:

Q. I think, Mr. Glover, that you said he was dig-
10 ging out between No. 3 and 4 to establish a switch-
ing system; I mean a signal system.

A. No signal; operating a switch.

Q. Well, but that also operates to the signal, does it not?

A. No, sir; we have wires.

Q. When you throw a switch doesn't that auto-
matically operate the signals?

A. No.

Q. Does not?

20 A. You have got to have a separate lever to work
the signals.

Q. Then this did control the switch, did it not,
the work that he was doing there, intended to con-
trol this switch?

A. Yes.

Q. Now at this switch isn't there a dummy signal
post at the entrance to the switch?

A. Yes.

30 Q. Well, didn't the switching operation to that
extent cooperate with the dummy signal post there?

A. Cooperated with it, with the movement of the
switch, yes.

Q. So that when you moved the switch it auto-
matically turned the switch light?

A. No.

Q. I mean the dummy switch light.

A. No, no dummy switch lights on that kind of switch.

Q. Well, I think you just said that there were dummy switch lights.

A. No, they are not dummy switch lights, they are what we call dwarf signals. They are very small signals to clear the trains as they pass on each side of the track. They have got to be very small.

Q. But there are signals there?

A. But they are not connected with the switch. 10
They are an electric device which is operated by another lever.

Q. You don't mean to say that this was not in the continuous lead from No. 1 over to No. 5, do you?

A. Well, it was a continuous from No. 1 track to the other.

Q. Well, then, to that extent it did have something to do with it, didn't it, and it was a continuous one from one to the other?

A. One track to the other across in that way, but 20
it had nothing to do whatever with the operation of any of the other switches.

Q. Well, every switch operates independent of the other, doesn't it? That is the way you construct them?

A. Yes.

Q. No. 1 is separate from No. 4 on each one?

A. Yes.

Q. And they form one continuous line of transit 30
from track No. 1 to No. 5, don't they?

A. Yes.

Re-direct examination.

By Mr. Coulomb:

Q. Mr. Glover, this didn't form one continuous line of transit —

Mr. Davis: I object to the leading question.

10 Q. Did this form one continuous line of lead or communication from track No. 1 to track No. 4 until it was put in operation August, 1918?

A. No, not until 1918.

Q. It didn't form any such lead or communication at the time of this accident?

A. No, sir.

Re-cross examination.

20 By Mr. Davis:

Q. Weren't the rails there in continuity from track No. 1 to track No. 5?

A. Yes.

Q. They were there in continuity at the time of this accident?

A. The switches could not be operated.

30 Q. I am not talking about the switches being operated, I am asking you if the switch that you had was not in continuity with these tracks from No. 1 to No. 5; you don't mean to deny that, do you?

A. No, the rails were there.

Q. But the switch was in position and the switch from track No. 1 to 2 and from track 2 to 3 was in operation right along, wasn't it?

A. From 4 to 3 and 2 to 1, yes.

Q. All of them. The only thing that was not all ready was the switch from No. 4 to No. 5?

A. Yes, but they didn't in any way connect with each other.

Re-direct examination.

By Mr. Coulomb:

10

Q. Mr. Glover, could you operate a train from No. 4 to No. 5?

A. No.

Q. Over this switch?

A. No, sir.

Q. Impossible to do it, was it?

A. Impossible to do it.

By Mr. Davis:

20

Q. And all you mean to say is that this part of it was not in operation at the time?

A. Yes.

By Mr. Coulomb:

Q. What have you to do in order to facilitate or in order to make this thing a complete operation?

A. Well, we had the concrete foundations to install to put on what we call the compensators, to equalize the expansion and contraction of the pipe line, in addition to putting in the new pipe line continuously for a distance of about 950 feet.

30

Mr. Davis: If your Honor please, pardon me for pursuing this matter, but I think it is important for everybody to know what the fact is.

Re-cross examination.

By Mr. Davis:

Q. Swank, as I understand, Mr. Glover, was working between tracks No. 2 and 3?

A. Yes.

Q. And what sort of work was he doing there at the time?

10 A. Digging the ballast out between the ties.

Q. Between the rails, was he not, between the ties?

A. Yes.

Q. To put in new ties, did you say?

A. In order to put in new pipe for our connection.

Q. The ballast had been there, had it not?

A. Yes.

20 Q. And this purpose, this thing, was to dig out this ballast between those ties in order that you might run a continuous pipe from one side of the railroad to the other?

A. Yes.

Q. That is, from the location of track No. 5 across all of the tracks, including track No. 1, to the side in order that the pipe might run along down the side?

A. Yes.

30 Q. Now track No. 2 and track No. 3 had been all the time that you have been employed by the railroad used in interstate commerce, had they not?

A. Yes, sir.

Q. This various ballast that he was removing had been ballast that supported the ties that supported the rails that carried interstate commerce from time to time, day by day and hour by hour; isn't that a fact?

A. Yes.

Q. This pipe that was to be installed to connect this switch with the tower was a pipe that was running across the roadbed underneath the rails and between the ties of four sets of tracks that were hourly carrying interstate commerce, weren't they?

A. Yes.

Q. And this switch, that is, track No. 5—was day by day, so far as you know, carrying interstate commerce, wasn't it, in the switching operations?

10

Mr. Coulomb: From 4 to 5?

Mr. Davis: Let me reframe it.

Q. This track No. 5, so far as you know, day by day was accommodating interstate and intrastate traffic in its switching operations?

A. Yes.

Q. And those switches between track No. 1, track No. 2 to track No. 3, to track No. 4, which in the construction of the switch between track No. 4 and track No. 5 constituted one continuous switch from track No. 5 to track No. 1, was also used in interstate commerce except that part of it which was between 4 and 5?

20

A. Yes.

Re-direct examination.

30

By Mr. Coulomb:

Q. Mr. Glover, when you set these switches to shift a train from track No. 1 to track No. 2 it was not necessary that that train be shifted over to track No. 5, was it?

A. No, indeed.

Q. You can shift a train between any one of four?

A. 1 to 2, 2 to 3, or 1 to 4 or anywhere you want to shift them, and vice versa.

Mr. Davis: I would like to ask Mr. Coulomb if he intends to offer this map. If he does not I would like to have it marked for identification.

Mr. Coulomb: I intend to offer it.

10

WILLIAM STOUT, sworn for defendant.

Direct examination.

By Mr. Coulomb:

Q. Mr. Stout, what is your business?

20 A. Signal maintainer.

Q. For what corporation?

A. Pennsylvania Railroad.

Q. And were you employed in that capacity by the Pennsylvania Railroad on September 18, 1917?

A. Yes, sir.

Q. Where were you stationed on that day?

A. CD, Princeton Junction.

Q. Was that near the place where Mr. Swank was killed?

50 A. Why, right at the place.

Q. Where were you standing at the time that Mr. Swank was hit?

A. I was standing west of CD tower, about 900 feet away.

Q. You mean about 900 feet away from the tower?

A. No. 900 feet away from where Mr. Swank was hit.

Q. When you say you were standing west of the tower you mean in the direction of Philadelphia from the tower?

A. Yes.

Q. Did you see the train approaching that struck Mr. Swank?

A. Yes, sir.

Q. By the way, who was with you at that time, standing with you?

A. Why, Mr. Cook was about seven or eight feet 10
away from me.

Q. Did you see the train coming, did I understand you?

A. Yes.

Q. Where was it when you saw it?

A. It was about 400 or 500 feet down one track away from the signal bridge.

Q. In the direction of Philadelphia or the direction of New York from where you stood?

A. The direction of Philadelphia. 20

Q. What if anything did Mr. Cook do as this train approached?

A. Why, he blew his whistle and waved his arm.

Q. Was your attention attracted by anything that he did?

A. Why, by blowing the whistle and waving his arm.

Q. At that time did you see Mr. Swank or Mr. McGarry on the track?

A. No, I didn't see Mr. Swank or Mr. McGarry. 30

Q. At the time you first saw the train was it on track No. 1 or track No. 2?

A. Track No. 1.

Q. Did it finally or eventually pass over to track No. 2?

A. Yes, sir.

Q. And where did it pass over to track No. 2?

A. Just about 20 or 25 feet from where I was standing.

Q. What is there on the signal bridge at the point of this crossing to indicate that a train is going to cross over?

A. There are poles with signal blades onto them.

Q. And how do they indicate that the train is going to pass from one track to another?

A. There are two arms on the pole and if they
10 are going to pass from one track to another the middle arm is either at a 45 or diagonal, or else it is 90 or upright.

Q. Now I don't know as I quite understand that, Mr. Stout. If I were looking at that signal and wanted to determine whether or not a train was going to cross over, what position would the signal arm be in to indicate that?

A. Well, it would be—as long as there was any position but right out straight it would show you
20 that the train was going to pass over from one track to another.

Q. That is, if the signal was in any other position—I mean the arm was in any other position than being out straight, it would show that the train approaching was going to pass from one track to another?

A. One track to another, yes, sir.

Q. Did you notice the signal on this day?

A. Yes, sir; I got off the track because the sig-
30 nal was in that condition.

Q. The signal indicated to you that the train was going to pass from one track to what other track?

A. Yes, sir.

Q. What track did it show to you it was going to pass to?

A. Showed to me it was going to pass to No. 2 track.

Cross-examination.

By Mr. Davis:

Q. How long had you known Swank?
A. I didn't know Swank at all. 10
Q. How long had he worked on the railroad?
A. I don't know that.

Re-direct examination.

By Mr. Coulomb:

Q. Mr. Stout, how long had you been engaged as signal maintainer?
A. About four years. 20
Q. As such maintainer is your duty confined to any particular section of the railroad or is your duty over the whole line?
A. It was confined to CD tower duty.

ALBERT CARVER, sworn for defendant.

Direct examination. 30

By Mr. Coulomb:

Q. Mr. Carver, where do you live?
A. Trenton.
Q. And what is your business?
A. Ship fitter.

Q. And with what concern are you connected?

A. Merchant, at Bristol.

Q. Were you employed by the Pennsylvania Railroad on the 18th of September, 1917?

A. Yes, sir.

Q. And what was your capacity or employment?

A. Signal fitter.

Q. And where were you engaged in your work on that day?

10 A. Princeton Junction.

Q. Was that the day that Mr. Swank was killed?

A. Yes.

Q. Did you know Mr. Swank?

A. I knew him from the time he worked on the road.

Q. Where were you working?

A. In back of the tower.

Q. And what sort of work were you doing?

A. Cutting pipe, fitting pipe.

20 Q. Did you hear the train approach that struck Mr. Swank?

A. Yes, sir.

Q. What attracted your attention to it?

A. Why, I was taking out a piece of pipe and I heard Cook blow his whistle and I naturally looked up.

Q. Was Mr. Cook in plain sight of you?

A. Yes, sir.

30 Q. As I understand, you were attracted by the fact that he blew his whistle?

A. Yes, sir.

Q. Did you see Mr. Swank or Mr. McGarry on the track?

A. No, sir.

Q. Did you see Mr. Swank struck?

A. No, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. Carver, you know Mr. Atkinson here?

A. Yes, sir.

Q. And did he call to see you?

A. Yes, sir.

Q. In Trenton?

A. Yes, sir.

10

Q. Did you at that time tell him that no whistle was blown by Mr. Cook?

A. I did when he first started to question me, yes sir.

Q. And did you tell Mr. Boyle that when you got out of a job that you wanted to go back to the railroad company to get a job?

A. No, I didn't tell him that. We were talking about—he said he didn't know whether—no, he said he would never go back on the railroad and I said I didn't know whether I would or not.

20

Q. Didn't you downstairs here when you were in attendance at the court say to him that if you got out of a job you might want to go back to the railroad company and get a job?

A. Yes, I did say that.

Re-direct examination.

By Mr. Coulomb:

30

Q. Mr. Crawford, you were subpoenaed by Mr. Davis, weren't you?

A. Yes, sir.

Q. And did you have a conversation with him in regard to this case?

A. I had a conversation with Mr. Atkinson.

Q. And did you tell Mr. Atkinson that the whistle had blown or was blown?

A. At first I ——

Mr. Davis: Answer yes or no.

10 A. No. Can I have that question over again, please?

(Question repeated.)

A. I told him it hadn't blown.

Q. Afterwards did you say anything to him about the blowing of this whistle?

20 A. Yes, before he went out I began to recollect about the case and I remembered—started to remember about the whistle, and before he subpoenaed me Mr. Atkinson told me that it didn't make any difference about the whistle as long as I didn't hear the—asked me if I heard the engineer blow his whistle.

Q. Where did this conversation take place?

A. In Trenton.

Q. Where?

A. At my home.

Q. Did the telling Mr. Atkinson about your recollection as to the whistle take place there in your home before he left?

30 A. No, I didn't. I will tell you. I told him—it began to come to me about Mr. Cook. It had been two years since I worked on the railroad and I had forgotten practically all about the case at the time when he came in, and of course when I found out I was going to be subpoenaed then I started to think about the case.

Q. Did you tell Mr. Atkinson or Mr. Davis at any time that you had heard the whistle blown, that you had heard it blown?

A. Yes, I told them when I came down here that morning, the first morning I was subpoenaed, as soon as I got here.

Q. That was last Monday morning?

A. Yes, sir.

Re-cross examination.

10

By Mr. Davis:

Q. And I told you, did I not, that it would look funny for you to say when you talked to Mr. Atkinson that you told him that no whistle had blown and now for you to say that the whistle had blown, did I not?

A. Yes, you did.

Q. That you had told two stories about it and it would call for an explanation, did I not?

A. Yes, sir.

BOTH SIDES REST.

RECESS TILL 1.30 P. M.

30

(Trial of the cause resumed at 1.30 P. M.)

(On the application of Mr. Coulomb the case was reopened for the admission of further testimony.)

EDWARD N. COOK, recalled for defendant.

Direct examination.

10 By Mr. Coulomb:

Q. Mr. Cook, what were the weather conditions on the 18th of September, 1917, the day Mr. Swank was killed?

A. Clear.

Q. How far could the whistle that you used on that occasion be heard?

A. 1500 feet or more.

Cross-examination.

20 By Mr. Davis:

Q. That is, providing the noise of the train didn't interfere with it?

A. It certainly is. If there is no noise, you know, to interfere with the whistle.

Q. But the noise of the train would interfere with it if a train was near, would it not?

A. Naturally so, if there was noise around of course that would drown the sound of some other

30 —

By Mr. Coulomb:

Q. The train had to be nearer, however, to the person who was listening than to the person who was blowing the whistle, wouldn't it?

A. Oh, yes; that sound will carry.

Mr. Davis: If your Honor please, I desire to amend my complaint in one or two small matters. At the time this complaint was drawn, if your Honor please, no child was born of the father at this time, and I desire to amend the fourth paragraph of the complaint, which reads as follows: "The injury inflicted upon said Herbert Swank through the negligence of the defendant as aforesaid resulted in the death of the said Herbert L. Swank on September 18, 1917, who left him surviving the plaintiff, his widow, who thereby suffered pecuniary loss in the death of the said Herbert L. Swank;" and I wish to insert one word, "his widow and one minor child."

Mr. Coulomb: If your Honor please, I cannot consent to the making of that amendment. I do not believe it is possible to make an amendment after two years. The statutory limitation of two years has run. I won't say to your Honor that it can't be done, but it is my impression that it can't be done. There are certain respects in which it cannot be amended. Whether that would go so far as to prevent your Honor from making the amendment in this particular I don't know, but I cannot consent to it.

The Court: The amendment will be permitted. It is my understanding that the pleadings may be amended.

(Objection noted for defendant as ground of appeal.)

Mr. Davis: I desire to amend that paragraph of my complaint, the third paragraph, by alleging dis-

tinctly as an act of negligence the fact that the foreman or the person charged with giving notice of the approach of the train failed to give notice.

Mr. Coulomb: If your Honor please, I object on the same ground, that it cannot be amended at this time, two years having expired.

10 The Court: The amendment will be allowed and exception noted.

(Objection noted for defendant as ground of appeal.)

Mr. Davis: Those are matters within your discretion, I understand, your Honor, where no exception lies.

20

30

MOTION FOR DIRECTION.

Mr. Coulomb: If your Honor please, I desire to renew my motion, or rather, to make a motion for direction, on the same ground that I argued for the motion for non-suit, which I ask your Honor to consider without repetition as being used here; and also on the further ground that it now appears that this whistle was blown—that is, which was the ground of negligence in this case—this whistle was blown. It is testified to by three witnesses, and the only witness who testified against it are not witnesses who testify that it was not blown but witnesses who testify that they did not hear it, and those were the witnesses, your Honor will remember, who were all in places of safety, where they were not required to be on the alert for such whistle. 10

(Continues argument and cites authorities.)

20

The Court: I think it is a question for the jury from the facts as they have been testified to in this case and the motion will be denied and an exception allowed.

(Objection noted for defendant as ground of appeal.)

30

CHARGE OF THE COURT.

Gentlemen of the jury: the plaintiff, Elizabeth Swank, administratrix of Herbert L. Swank, deceased, is bringing this action to recover for the pecuniary loss which she has sustained and which her child has sustained because of the death of her husband, who was employed by the defendant company. She claims that the company should pay her or compensate her and this child because this death was brought about by the negligence of the defendant company. It is an undisputed fact that at the time of the death of the plaintiff's intestate he was in the employ of the defendant company and at the time was working near Princeton Junction.

The action is based on what is known as the Federal Employers' Liability Act, which was passed by Congress April 22, 1908, and which I shall read to you.

“Every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering an injury, while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the widow, or husband and children of such employee, and if none then to such employee's parents, and if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the

officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment."

Now, negligence has been defined by our court to consist in omitting something that a reasonably prudent person would do or the doing of something that a reasonably prudent person would not do under the circumstances. The plaintiff in this case insists that the defendant was engaged in interstate commerce and that the plaintiff's intestate was likewise engaged in interstate commerce when he was killed, and that the negligence of the defendant company consisted in the failure on the part of the defendant to give the plaintiff's intestate a reasonably safe place in which to work under the circumstances, and she affirmatively undertakes to show a custom on the part of the defendant to warn the members of the gang, in which the plaintiff's intestate was working, of the approach of a train by the blowing of a whistle or the sounding of an alarm on the part of a leader or boss of the gang. And she states that on the day in question the leader did not blow any whistle or sound any alarm or give the plaintiff's intestate any warning of the approach of this train; and that the failure on the part of this leader or this boss to blow the customary signal constituted actionable negligence under the act of Congress which I have just read to you.

The defendant does not deny that the decedent was killed by the train, and admits that the defendant was engaged in interstate commerce at the time of the death; but it denies that the plaintiff's intestate was engaged in interstate commerce, claiming that the work upon which he was engaged was

not in the repair of old work but it was new work; that it was the installation of a new switching system which never had been operated up to the time of the death of plaintiff's intestate, and in fact was not put in operation for a long time thereafter; that it was not a part of the plant but an addition to the system; that the work which decedent was doing did not serve to advance interstate commerce at that time, that is, at the time of the death of the decedent.

10 But there is evidence in the case, however, which you may or may not believe—for you are the judges of the fact—that this was a part of the system in existence; that it was connected to tracks or switches already laid and in use; and that though it was an extension to an existing plant, it was a part and parcel of it; that the work did not amount to the construction of a new instrumentality of commerce, but was rather in the nature of a repair or the making more efficient of an instrumentality then in use,
20 and that the decedent therefore was engaged in interstate commerce within the meaning of the Act of Congress.

Now you have heard the facts and you are the judges of the facts. If you believe that the plaintiff's contention is true you might then find that the plaintiff's intestate was engaged in interstate commerce at the time of his death. If you believe defendant's contention, that he was engaged in the
30 installation of a new and separate switching system, which was not a part or parcel of an existing system, that the work which he was doing did not serve to advance interstate commerce, then you would be justified in concluding that he was not engaged in interstate commerce at the time of his death.

This Act of 1908 applies only to railroad companies while engaged in interstate commerce at the time of the happening of the accident which caused the death, and even then it does not impose a liability unless the person injured or killed is at the time of the accident himself employed in such commerce. The purpose of the statute is to secure the safety of interstate transportation to those employed therein. Tracks, switches and signals are as indispensable to interstate commerce by railroad as are engines and cars, and these instrumentalities must be kept in repair and extended as increasing business calls for it. The efficiency and security of commerce depends upon this being done. The work of keeping such instrumentalities in a proper state of repair and efficiency is so closely related to commerce as to be a part of it; and our Court of Errors and Appeals has held that the true test is—is the work in question a part of the interstate commerce in which the carrier is engaged? One engaged in the work of maintaining tracks, bridges, signals and switches in proper condition after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce and even if these instrumentalities are used in both interstate and intrastate commerce.

You are to apply this law, gentlemen, to the facts. You have heard the witnesses. The case has been very ably argued by counsel for both parties. You are to weigh them carefully and bring in your verdict accordingly. Always remember that the burden of proof is upon the plaintiff, that if the scale balances equally in your mind that you must give the advantage to the defendant, because upon the plaintiff rests the burden of proof, and she must convince you by a preponderance of the evidence

of the allegations in her claim before you can give her a verdict.

Now the defendant further contends that it is not responsible because the danger to which the plaintiff's intestate was exposed was one that he assumed as an incident of his employment, and that he also assumed, in spite of this Federal Act of Congress, the risk that one of his fellow servants might be guilty of negligence and that he might be injured or killed 10) thereby. The act abolishes the fellow-servant rule, and if the death was caused by the negligence of an employee the defendant might be held liable therefor; for he does not under the act assume the risk that a fellow-servant might be negligent.

It was the duty of the defendant, gentlemen, to exercise reasonable care for the safety of the deceased while he was doing its work; and reasonable care has been held by our courts to be that degree of care which you would have a right to expect of 20) reasonably prudent persons under the same or similar circumstances. He had the right to assume that the place where he worked was reasonably safe, unless he had information or notice to the contrary which as a reasonably prudent man he was bound to observe.

A servant assumes the ordinary risks incident to his employment and also risks arising in consequence of special features known to him or which he could have discovered by the exercise of reasonable care 30) or which should have been observed by one ordinarily skilled in the employment in which he engages. The burden of proof is on the plaintiff to make out a case of actionable negligence against the defendant and he must do it by a fair preponderance of the evidence.

Now if the plaintiff has convinced you from the testimony that the custom existed—and the defendant practically concedes that—that the men of his gang should be warned by the leader or foreman of the approach of a train, and that the plaintiff's intestate was run down and killed while engaged in interstate commerce because of the failure of the foreman to give such warning, then I charge you that the decedent has a right to rely upon such warning being given in case there was any danger from an approaching train; and giving warning by the foreman is then embraced in the duty owed by the defendant to the decedent, and for the failure of the foreman or leader to discharge that duty the defendant would be chargeable. 10

The testimony of one witness for defendant was to the effect that there was a custom in existence that would require an alarm or whistle from the leader or boss of the approach of a train. But he states that certain signals were set and required to be set notifying the decedent and those who were working in gangs similar to that in which the decedent was employed that a train would change or cross over from one track to another; and he says that certain rules were laid down specifically and given to the decedent before the leader of the gang left him on this day in question, requiring the decedent to take care of himself; and the defendant insists that those signals were given, that the leader or the boss blew a whistle, but that the deceased either did not hear it or disregarded the signals and the alarm. If you believe this contention to be true, gentlemen, you would not be justified in finding a verdict against the defendant on the ground of negligence; for the risk of not hearing the alarm or hearing or seeing the signal was one which the de- 20 30

ceased would assume as part of his employment, and the defendant would have done all then that could be reasonably required of it.

Of course more weight should be given, naturally—and reasonable men understand that—to positive evidence of the hearing of a signal than to negative evidence of those who did not hear it. But you are the judges of the facts in this case. You heard the evidence on the stand, you heard the statements
10 made by defendant's witnesses that the whistle was blown; you heard the testimony of the plaintiff to the effect that no whistle was blown; you heard them say whether they were in a position to have heard the whistle if it were blown. If my recollection is correct—and you must not be guided by my recol-
20 lection of the facts, because you are the judges of the facts—some witnesses for the plaintiff testified that they were in a position to have heard this whistle and they could have heard it if the whistle had been blown. You must weigh carefully the evidence of both plaintiff and defendant and remember that the burden of proof, as I have stated before, is upon the plaintiff to establish the failure on defendant's part to give this customary signal by the whistle, or warning, of the approach of this train.

Now if you should find that the decedent was not engaged in interstate commerce or if you should find that this accident or the death resulting from this
30 accident was not caused by the negligence of the defendant, your verdict should therefore be for the defendant and you should find a verdict of no cause of action.

If, on the other hand, you find that this death was the result of negligence on the part of the defendant company's employee because of the failure to give this customary signal or whistle, then you might

be justified under the facts in finding a verdict for plaintiff. And if you should find a verdict for plaintiff the question of the damages would naturally come into the case.

Both the defendant's attorney and the plaintiff's attorney have very explicitly explained to you the nature of the damages in a case of this kind. You should give her such damages as you think would compensate her and the child for the financial loss which she has sustained. You, of course, are to take into consideration not at all the element of sympathy which you would feel toward a woman who has lost her husband, but award just such a sum as you think from the testimony she has lost in dollars and cents by his death. Of course she would not have received all of his wages, as has been argued both by the defendant's attorney and the plaintiff's attorney, because his living expenses must come out. She would not have received it all in a lump sum if he had been living, because it would have been paid out for the benefit of herself and her child in installments. So that it would not be proper to give her in a lump sum such an amount of money that would produce an income to equal what he might be earning per year. Neither would it be proper to take the average yearly earnings of the decedent and multiply it by his expectancy of life; because that would then give her both the principal and the interest of the fund. In figuring on the amount you must take into consideration, if you find that the verdict should be for the plaintiff, the age of the decedent and of the plaintiff, making allowance as to the probability of his life, sickness that might take him away, the probability of her life and the marriage relationship, of its continuance, of the age of the child and how long it

would have a reasonable expectation of being supported by the father. And then after you have given those matters, gentlemen, serious consideration you will find then such a sum, if you find at all for plaintiff, as would compensate her and the child for the pecuniary loss that she has sustained under the rules as laid down by the Court in this charge.

Certain requests have been made for charging. The first are on the part of the defendant, these re-
10 quests all having been made by defendant:

1. The plaintiff's intestate assumed the risk of all dangers obvious or known to him or which should have been obvious to him. I have already charged that and decline to charge it except as has been charged.

2. It is not negligent for defendant's engineer or fireman in charge of the train which struck dece-
20 dent to fail to signal his approach by either bell or whistle.

That has been eliminated from the case and I do not need to charge upon it.

3. Unless the work which decedent was doing at the time of his death was in the repair of an instrumentality then in use for interstate traffic the plaintiff cannot recover.

30) 4. If the work decedent was doing at the time of his death was new work not then in use in interstate traffic the plaintiff cannot recover.

The third and fourth I decline to charge except as I have already charged, but I think that I have covered the ground in the charge.

5. The defendant cannot be chargeable with negligence by reason of the speed of the train.

I do so charge.

6. The plaintiff's intestate assumed the risk of the negligence of his fellow-servants. I decline to charge this.

7. It was not negligent for the train to move from track 1 to track 2.

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I so charge you.

You may select your officers and retire. First, before you retire, I will listen to any exceptions that may be made.

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DEFENDANT'S OBJECTION.

Mr. Coulomb: 1. The defendant prays an exception to the refusal of the Court to charge the requests as requested.

2. The defendant also prays an exception to your Honor's charging that there was testimony that it
10 was part of an existing plan or system.

3. The defendant also excepts to the charge that the plaintiff's intestate does not assume the risk that a fellow-servant might not be negligent.

4. The defendant also excepts to the charge that the intestate had a right to rely on the warning.

20 5. The defendant also excepts to your Honor's charge that the signals notifying the men of the change of train from one track to another applied to men working on the track.

6. The defendant excepts to what your Honor said that there was testimony that no whistle was blown. The testimony was that they did not hear the whistle. There was no testimony that the whistle was not blown.

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OPINION.

Elizabeth Swank, Admx. vs. Pennsylvania R. Co.

(Supreme Court of New Jersey. June 11, 1918.)

Act March 27, 1917 (P. L. p. 531), supplemental of the Death Act, requiring action instituted under and by virtue thereof to be in the name of an administrator *ad prosequendum*, does not apply to action under Federal Employer's Liability Act (U. S. Comp. St. 1916, sections 8657-8665), declaring liability of carrier for death of employe to his personal representative, meaning his executor or general administrator. 10

Action by Elizabeth Swank, administratrix, against the Pennsylvania Railroad Company. Heard on defendant's rule to show cause. Rule discharged.

Argued February Term, 1918, before Gummere, C. J., and Parker and Kalisch, J. J.

Gaskill & Gaskill, of Camden, for the rule. James Mercer Davis, of Camden, opposed. 20

GUMMERE, C. J.:

This suit is brought by the plaintiff as the general administratrix of Herbert L. Swank, deceased. Mr. Swank, at the time of his death, was in the employ of the defendant company, and, according to the averment of the complaint, lost his life by accident while being employed by the defendant company in interstate commerce. The action is brought under the Federal Employers' Liability Act. Upon being brought into court the defendant moved at chambers to strike out the complaint and dismiss the action upon the ground that the suit was brought by the general administratrix of the decedent contrary to the provisions of chapter 180 of the laws 30

passed by our Legislature, and approved by the Governor, in 1917. Pamph. Laws, p. 531. A rule to show cause why this application should not prevail was allowed, and the matter is before us for determination.

The statute appealed to by the defendant is a supplement of our "Death Act" (2 Comp. St. 1910, p. 1907, sections 7-9), and provides that every action instituted under and by virtue of its provisions
10 "shall be brought in the name of an administrator *ad prosequendum*." It is, of course, apparent that if this action was brought for the enforcement of a remedy given by our "Death Act" the procedure must be that provided by the statute and its supplements. The trouble with the defendant's case, however, is that the remedy sought to be enforced is not provided by our state statute, but is conferred by federal legislation; and in the enforcement of a remedy thus conferred the method of procedure provided by Congress must control. The language of the Federal Act is that the liability of the carrier in case of the death of the employe is "to his or her personal representative for the benefit of the surviving widow," etc.; and that language has been construed by the United States Supreme Court to mean the executor or general administrator. American Railroad Co. vs. Birch, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879; Missouri, Kansas & Texas Ry. Co. vs. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Louis. & C. Ry. Co. vs. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156.
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The plaintiff, as general administratrix, being the only person who is entitled to maintain the present action, the rule to show cause will be discharged.

NOTICE OF APPEAL.

(Served Dec. 12, 1919.)

(Filed Dec. 15, 1919.)

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

10

ELIZABETH SWANK, admin-
istratrix of HERBERT L.
SWANK, deceased,

Plaintiff-Respondent,

vs.

P E N N S Y L V A N I A R A I L R O A D
C O M P A N Y,

Defendant-Appellant.

Action at Law.
Notice of Appeal.

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To James Mercer Davis, Attorney of Plaintiff-Respondent:

Take Notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case.

BOURGEOIS & COULOMB, 30
Attorneys of Defendant-Appellant.

NOTICE.

NEW JERSEY SUPREME COURT.

ELIZABETH SWANK, Admin-
istratrix of HERBERT L.
SWANK, deceased,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD
COMPANY, a Corporation,
Defendant.

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Action at Law.
Notice.

To James Mercer Davis, Attorney of Plaintiff:

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Pursuant to a letter from Justice Garrison, copy herewith enclosed, the rule to show cause granted in the above matter why the summons and complaint should not be struck out will be brought on for hearing before the Supreme Court on Tuesday next, the nineteenth instant, or as soon thereafter as the same can be heard.

February 13, 1918.

GASKILL & GASKILL,
Attorneys of Defendant.

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(Copy of letter received from Justice Garrison.)
 Supreme Court of New Jersey.
 Trenton.
 Swank vs. P. R. R. Co.

Dear Sir:

After considering your motion in this case I have concluded that it should be decided in the Court and not by a Judge at Chambers. If you will send me a Rule to Show Cause returnable February 19, I will
 10 sign it.

Very truly yours,

C. G. Garrison.

[ENDORSED]

20 New Jersey Supreme Court.
 Elizabeth Swank, Administratrix of
 Herbert L. Swank, Deceased,
 Plaintiff,
 vs.
 Pennsylvania Railroad Company, a
 Corporation,
 Defendant.

Action at Law.
 Notice.

30 Gaskill & Gaskill,
 Attys. of Defendant,
 301 Market Street.

Service ack. 2/13/18.
 James Mercer Davis,
 Atty. of Pltff.

RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

<p>ELIZABETH SWANK, Admin- istratrix of HERBERT L. SWANK, deceased, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>P E N N S Y L V A N I A R A I L R O A D C O M P A N Y, a Corporation, <i>Defendant.</i></p>	}	<p>Action at Law. 10</p> <p>Rule to Show Cause.</p>
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Application having been made before me to strike
out the complaint and dismiss the above-entitled 20
action on the ground that it is improperly brought
in the name of Elizabeth Swank, administratrix of
Herbert L. Swank, deceased, as a general admin-
istrator, contrary to the provisions of Chapter 180
of the Pamphlet Laws of 1917, and good cause being
shown therefor;

It is, on this thirteenth day of February, A. D.
nineteen hundred and eighteen, ordered that a rule
to show cause why the complaint should not be
struck out and the action dismissed and in the event 30
that the said complaint should not be ordered struck
out or the action dismissed, that an extension of
ten days from and after filing opinion hereon be
granted for filing answer in such cause, be and the
same is hereby allowed.

C. G. GARRISON,
Justice of Supreme Court.

[ENDORSED]

New Jersey Supreme Court.
Elizabeth Swank, Administratrix of
Herbert L. Swank, Deceased,
Plaintiff,

vs.

Pennsylvania Railroad Company, a
Corporation,
Defendant.

10

Action at Law.
Rule to Show Cause.

Gaskill & Gaskill,
Attys. of Defendant,
301 Market Street,
Camden, N. J.

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Service ack. 2/13/18.
James Mercer Davis,
Atty. of Pltff.

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NOTICE.

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

ELIZABETH SWANK, Admin- istratrix of HERBERT L. SWANK, deceased, Plaintiff, vs. P E N N S Y L V A N I A R A I L R O A D COMPANY, a Corporation, Defendant.	}	Action at Law. Notice.	10
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To James Mercer Davis, Attorney of Plaintiff: 20

Take notice that application will be made on the twenty-fourth day of December, instant, before the Honorable Charles G. Garrison, one of the Justices of our Supreme Court, at 10 A. M., at the Court House, in the City of Camden, County of Camden, New Jersey, to strike out the complaint and dismiss the above-entitled action on the ground that it is improperly brought in the name of Elizabeth Swank, administratrix of Herbert L. Swank, deceased, as a general administratrix, contrary to the provisions of "An Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, negligence or default" approved March 3rd, 1848, amendments thereof and supplements thereto and more particularly by a supple-

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ment approved March 27th, 1917, and contained in 1917 Pamphlet Laws, Chapter 180.

And take notice further, that application will also be made for an extension of time for filing answer, in the event that the motion to strike out the complaint and dismiss the action should be denied.

GASKILL & GASKILL,
Attorneys of Defendant.

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[ENDORSED]

New Jersey Supreme Court.
Elizabeth Swank, Administratrix of
Herbert L. Swank, Deceased,
Plaintiff,

vs.

Pennsylvania Railroad Company, a
Corporation,
Defendant.

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Action at Law.
Notice.

Gaskill & Gaskill,
301 Market Street,
Camden, N. J.

Due and legal service of the within
notice is hereby acknowledged this 15th
day of December, A. D. 1917.

James Mercer Davis,
Atty. of Plaintiff.

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GROUND OF APPEAL.

(Served Jan. 10, 1920.)

(Filed Jan. 12, 1920.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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ELIZABETH SWANK, Admrx.
&c.,

*Plaintiff and
Respondent,*

vs.

PENNSYLVANIA RAILROAD
COMPANY,

*Defendant and
Appellant.*

Action at Law.

Grounds of Appeal.

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The appellant states the following grounds of appeal:

1. The Court refused to grant the defendant's motion for a non-suit.

2. The Court refused to grant the defendant's motion for a direction of a verdict in favor of the defendant.

3. The Court refused to charge the defendant's first request to charge.

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4. The Court refused to charge the defendant's second request to charge.
5. The Court refused to charge the defendant's third request to charge.
6. The Court refused to charge the defendant's fourth request to charge.
- 10 7. The Court refused to charge the defendant's sixth request to charge.
8. The Court charged the jury as follows:
"But there is evidence in this case, however, which you may or may not believe, for you are the judges of the fact, that this was a part of the system in existence; that it was connected to tracks or switches already laid and in use, and that though it was an extension to the exist-
20 ing plant, it was part and parcel of it."
There being no evidence to that effect.
9. The Court charged the jury as follows:
"The Act (Federal Employers' Liability Act) abolishes the fellow servant rule, and if the death was caused by the negligence of an employe the defendant might be held liable therefor, for he does not under the act assume the risk that a fellow servant might be negli-
30 gent."
10. The Court charged the jury as follows:
"Then I charge you that the decedent has a right to rely upon such warning being given in case there was any danger from an approach-
ing train."

11. The Court charged the jury as follows:

“The testimony of one witness for defendant was to the effect that there was a custom in existence that would require an alarm or whistle from the leader or boss of the approach of a train. But he states that certain signals were set and required to be set notifying the decedent and those who were working in gangs similar to that in which the decedent was employed, that a train would change or cross over from one track to another.” 10

There being no evidence that the signal showing that a train would pass from one track to another was for the benefit of men working on the tracks.

12. The Court charged the jury as follows:

“You heard the testimony of the plaintiff to the effect that no whistle was blown.”

The only evidence in the case being that the plaintiff's witnesses did not hear the whistle. 20

13. The Court admitted over defendant's objection the following question and answer:

“Q. Is that the whistle that was accustomed to be blown on the approach of trains?”

(Objected to. Objection overruled and noted.)

“A. Yes, sir.”

14. The Court admitted the following question and answer: 30

“Q. And what are you paying now for the same sort of work?”

(Objected to. Objection overruled.)

(Question re-asked.)

“Q. The question is, Mr. Cook, what wages are you paying to men employed in the same line of work that Swank was employed?”

“A. Forty-five cents per hour for eight hours.”

15. The Court permitted the following question to be asked and answered over defendant's objection:

10 “Q. Now, if they had been instructed in those signals by you, it would have been unnecessary to give them a schooling on it, wouldn't it?”

(Objection. Objection overruled and noted.)

“A. No, it is customary at all times to give instruction. At different times, you know, we are called up for instruction.”

16. The Court permitted the plaintiff to amend her declaration by inserting the words “his widow and one minor child.”

17. The Court permitted the plaintiff to amend her complaint by adding as a ground of negligence the fact that the foreman or person charged with giving notice of the approach of the train failed to give notice.

BOURGEOIS & COULOMB,
Attorneys for Appellant.

ADDITIONAL GROUNDS OF APPEAL.

(Served Jan. 14, 1920.)

(Filed Jan. 15, 1920.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ELIZABETH SWANK, Admrx.
&c.,

*Plaintiff and
Respondent,*

vs.

PENNSYLVANIA RAILROAD
COMPANY,

*Defendant and
Appellant.*

Action at Law.
Additional Grounds
of Appeal.

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18. Because said action is improperly brought in the name of Elizabeth Swank, administratrix of Herbert L. Swank, deceased, as general administrator, contrary to the provisions of Chapter 180 of Pamphlet Laws of 1917.

19. Because the Supreme Court erred in refusing to grant the defendant's motion to strike out the summons and complaint on the ground that said action was improperly brought in the name of Elizabeth Swank, administratrix of Herbert L. Swank, deceased, contrary to the provisions of Chapter 180 of the Pamphlet laws of 1917.

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BOURGEOIS & COULOMB,
Attorneys for Appellant.

[ENDORSED]

New Jersey Court of Errors and
Appeals.

Elizabeth Swank, admrx. &c.,
Plaintiff and
Respondent.

vs.

Pennsylvania Railroad Co.,
Defendant and
Appellant.

10

Action at law.

Additional Grounds of Appeal.

Bourgeois & Coulomb,
attys. of appellant.
36 Security Trust Bldg.,
Camden, New Jersey.

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Due and legal service of copy of
within additional grounds of appeal
is acknowledged this 14th day of Jan-
uary, 1920.

Attys. of respondent.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

ELIZABETH SWANK, Admin-
istratrix of HERBERT L.
SWANK, deceased,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD
COMPANY, a corporation,
Defendant.

Action at Law.

On Appeal.

BRIEF OF APPELLEE.

FACTS.

Herbert L. Swank was employed by the Pennsylvania Railroad Company as a section man, and on the eighteenth day of September, 1917, he was engaged in installing the apparatus designed to operate a switch at Princeton Junction, New Jersey. He was engaged at the time in removing stone from between the ties under tracks Nos. 2 and 3 preparatory to running a line of pipe designed to operate the switch, as aforesaid.

The railroad tracks at this point are numbered from the south towards the north consecutively, 1, 2, 3, 4, and then a long switch numbered 5. The switch to be operated by the device on which Swank

was working connected tracks 4 and 5. All of these tracks were used continuously in interstate commerce. From track No. 1 to track No. 2 and thence to Nos. 3 and 4, there was a switch already in operation and controlled by the same sort of device on which Swank was working at the time. In order to make possible the continuation of switching operations, which already existed between the tracks Nos. 1 to 4 inclusive, another switch had been laid between tracks Nos. 4 and 5, and the controlling and signaling device was what was being installed at the time of the death of Swank. The switch between Nos. 4 and 5 tracks had not been used nor at the time of Swank's death were they in shape to be used, but they run from tracks No. 4 to No. 5, and had become nailed and spiked to the roadbed of these two tracks, which were continually used in interstate commerce and the purpose of the switch in question was to facilitate the operation of inter- and intra-state commerce between the several tracks of the defendant's road at this point and was merely the extension of their switch facilities already in existence—four switches already being in existence and this making the fifth. Without this switch it was necessary in order to complete the switching operations from track No. 5 to any of the other tracks to go to what is known as the east or New York end of switch No. 5 before cars could be moved from track No. 5 to the other tracks. This switch made possible the movement of cars from track No. 5 to any of the other four tracks from its westerly, or Philadelphia, end, and was, therefore, in aid of interstate commerce that might be moved on these tracks. It was admitted that the Railroad Company was engaged in interstate commerce at this point, but denied that the deceased was engaged in interstate commerce. While the deceased was en-

gaged in this work between tracks Nos. 2 and 3, he was run down by a train going east that had approached him on track No. 1 and then had crossed over to track No. 2. The act of negligence complained of was that the boss or foreman of the section gang in which Swank was employed failed to discharge his duty in blowing a whistle to notify Swank and the others of the approach of the train that killed him.

Suit was brought by Elizabeth Swank, general administratrix of Herbert L. Swank. At the time of the bringing of the suit a motion was made to strike out and to dismiss the cause of action, on the ground that the suit should have been prosecuted by an administratrix *ad prosequendum*, under the act of Congress of April 22, 1908. This motion was dismissed by the Supreme Court and the cause went to trial in the Burlington Circuit, before his Honor Harold B. Wells, Common Pleas Judge, to whom the cause had been referred for trial, and the jury returned a verdict of \$10,000. From this verdict an appeal was prosecuted to this Court. We shall argue this case in a somewhat different order from that followed by the appellant, and shall consider the question of the proper parties first.

ARGUMENT.

1. The Plaintiff is a Proper Party in Her Present Capacity to Maintain This Cause of Action.

This suit was brought under the act of Congress of April 22, 1908, which provides "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or

between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages * * * * in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow * * * * .”

Indeed the suit could be maintained on no other theory, if the deceased was engaged in interstate commerce, for the Supreme Court in *Winfield vs. Erie R. R.*, 243 U. S. 556, held that the Federal Employers Liability Act “ousts the Court of Common Pleas of this State of jurisdiction under the New Jersey Workmen’s Compensation Act to award compensation to be paid by carrier to its employee for injuries received by the latter while both were engaged in interstate commerce.” And further held, that where Congress exercises jurisdiction in any field authorized by the Constitution, all State laws are immediately superseded.”

The cause of action is a creation of the Federal statute and in contravention of the common law. Such an action does not exist unless and except created by the statute, and the Federal statute provides that the right of action is in the “personal representative” of the deceased. The words “personal representative” have been construed by the Federal Courts to mean executor or administrator (See *Fithian vs. Railroad*, 188 Federal Rep. 842; *American Railroad Company vs. Birch*, 224 U. S. 547; *R. R. Co. vs. Wulf*, 226 U. S. 570; *R. R. Co. vs. Seale*, 229 U. S. 156). Our statute, of 1896, page 173, permits the maintenance of suits by foreign administrators, and this suit has been so brought. We submit that the decisions and the statute above quoted conclusively dispose of this objection.

2. The Refusal of a Non-suit Was Correct.

The evidence at the close of the plaintiff's case showed that the defendant was engaged in interstate commerce; that the five tracks of the defendant at the place of the accident were used continuously in interstate commerce; that the deceased was engaged in installing some apparatus necessary to the operation of a switch between tracks Nos. 4 and 5, both of which were engaged in interstate commerce, and that the switch in question was the extension of switches that began with track No. 1 and went through to track No. 4—all of which switches, together with the tracks, were used in interstate commerce; that the purpose for which the switch had been installed was to give traffic, which was to pass from one track to another, all of which tracks and the other switches had been and were being used in interstate commerce, greater facility.

The evidence further showed that there was a custom which had been in practice ever since the deceased undertook his employment with the defendant for the foreman of the section gang to blow a whistle upon the approach of a train (S. C. 37-19 & following, 58-30 & following, 70-30 & following) and further that the foreman did not blow the whistle on the approach of the train in question (S. C. 40-5, 44-7, 46-30, 61-35 & following, 70-5).

The testimony further shows that the deceased and one by the name of McGarry were working between tracks Nos. 2 and 3 taking out the ballast, as aforesaid, and that their faces were turned toward the seat, so that the train came up from behind and struck the deceased (S. C. 71-7 & following, 72-21 & following).

It is, therefore, clear that at the close of the plaintiff's case she had established the fact that a custom existed in this gang for the leader of the gang to blow a whistle on the approach of the train to warn the workmen on the track of its approach, and it was further proven that no whistle was blown by the foreman to warn the deceased. With these facts before the Court, it had no power to direct a verdict for the defendant, but was required to submit the testimony to the jury. A *prima facie* case had, certainly, at this time, been made out. It is contended in the present case that a non-suit should have been granted, because the deceased was engaged on new work. In a sense, all work is new. The question is, is it interstate commerce, not whether the work is new.

In *Collings vs. Michigan Central R. R. Co.*, 159 N. W. 535, the Supreme Court of Michigan said: "It is contended that new construction work is never interstate commerce, and that, as the wires at the depot end were not attached to any wires there, and as there had never been a 'phone at the Monon box office, and as this new wire was being strung to be attached to a 'phone at the Monon box office, where there had never been one, it was new construction, and, therefore, intrastate commerce and not interstate commerce, * * * *". In the instant case, the plaintiff had been in the employ of defendant road, which has tracks in three States, at a monthly wage for nearly a year. He was nearly all the time stringing or repairing telegraph and telephone wires used for conveying messages necessary to the expeditious and safe movement, not only of local trains, but of trains passing in and out of the State. At the time of his injury, he was stringing a wire on poles carrying wires which were used in interstate commerce.

The primary purpose of stringing the wires he was handling was to enable the employe at the Monon box office to move cars coming in and going out of the State more safely and expeditiously. We think the plaintiff was engaged in interstate commerce."

Again in *Grow vs. Oregon Short Line R. Co.*, 44 Utah, 160, 138 Pac. 398, 36 Ann. Cas. 481, in that case "The evidence shows that the defendant, an interstate carrier by rail, was installing and equipping its main line from Salt Lake City, Utah, to Huntington, Ore., with automatic block signals. It began such work at both ends, one at Salt Lake, the other at Huntington." At the time of the accident, the system was completed except for a distance of about 45 or 50 miles in Idaho between Nampa on the West and Reverse on the East, and was in operation and in use west from Nampa to Huntington and east from Reverse to Salt Lake City by the defendant in the operation of trains and in doing an interstate commerce business. For the distance of 45 or 50 miles nothing had been done, except the construction of concrete foundations for the signals. The deceased and four other employees were engaged in installing the system about three miles east of Kuna, a place between Nampa and Reverse. They were in charge of a foreman. The deceased and the foreman preceded the other employees measuring off and locating places to put holes, the others followed digging post holes and stringing wire." The deceased was killed while going from work and it was held by the Supreme Court "For the better conduct of such commerce and the moving of such traffic, and to promote the safety of employees in operating interstate trains and of passengers transported from State to State, it was necessary, or, at least, desirable, to equip its line of railway with block signals. For that purpose

were they installed. There are not separate and apart from the track, something operated independently of it, or independently of the interstate commerce in which the defendant was engaged, but are, in a sense, a part and parcel of the track itself, something attached to, and operated in connection with it in carrying on such commerce. Now, should it be said that an employee in repairing a car which had been, and was intended to be, used in interstate commerce is employed in such commerce, but if he be engaged in attaching to such a car a new appliance, or equipment, something not theretofore used on such car, or by such carrier, he is not engaged in such commerce? or, if the employee is engaged in repairing a bridge along a track used in interstate commerce he is engaged in such commerce, but if he, along such a track, is engaged in putting in a new bridge or conduit where theretofore there was none, he is not engaged in such commerce? or, if one along such a track—one used in interstate commerce—is engaged in taking up an old or defective rail and inserting a new one he is engaged in such commerce, but if he, for the better operation of trains along such a track and to promote the safety of passengers carried on and employees operating interstate trains, is engaged in attaching to such a track some new appliance or equipment, he is not engaged in such commerce? Suppose that in pursuance of its business of interstate commerce, and to better carry it on, the defendant had been engaged in putting in a switch along its track used in such commerce, or in constructing a double track over a part or all of the way. Is there any good reason for holding that an employee, who is engaged in repairing the track or switch theretofore constructed and used, is employed in such commerce, but that one engaged in putting

in the new switch, or the additional track, is not employed in such commerce? Or, suppose an employee had been engaged several blocks to the west from where the plaintiff was at work, say near Nampa, where the blocks were completed and in use, in repairing one of those blocks. Admittedly such an employee would have been employed in interstate commerce, for such a block was then in use, but since the plaintiff was at work on an uncompleted or unfinished block, which was not yet in use, he was not engaged in such commerce. Or, lastly, if an employee is employed in repairing a water tank along a track, one used to supply interstate trains, operated over an interstate track, with water, he is employed in interstate commerce, but if he is engaged in constructing along such a track and for such purpose a new tank, which, because of its incompleteness, has not yet been used by the carrier, he is not employed in such commerce. We see no good reason for such artificial distinctions, for the one as directly relates to the interstate commerce in which the carrier is engaged as does the other."

"Here the remarks of Mr. Justice VanDevanter are pertinent, when he said that it is an erroneous assumption 'that the interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others, or to the business as a whole,' and that 'the true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?'"

"Viewed from that standpoint, we think it clear that one employed in installing and equipping the road with the block signals was engaged in doing something which was a part of the interstate commerce in which the defendant was engaged, to the

same extent as one engaged in repairing a bridge or a track used in such commerce."

On the undisputed facts of this case, the plaintiff was clearly engaged in interstate commerce. As was stated above, tracks Nos. 4 and 5 were engaged in and used continuously in interstate commerce. This switch was connected with tracks Nos. 4 and 5. The rails that constituted this switch extended from and connected with the rails of tracks Nos. 4 and 5, over which trains constantly passed. For the protection of trains passing over the points of this switch, it was necessary and proper that proper signalling and controlling devices be installed. It was just this work that the plaintiff was engaged in, so that although no train had run over the rails of this switch, the work that the decedent was doing was to make interstate traffic more secure and safe, as it then existed. Of course, there was the further purpose of facilitating interstate commerce between the several tracks, as aforesaid, so that no one reason requires us to hold that this was interstate commerce, but the facts themselves conclusively show that the plaintiff was engaged in interstate commerce. (See testimony of Glover, construction foreman, in charge of this part of the track, on S. C. pages 117 & 118), so that here there was negligence on the part of the defendant, who was engaged in interstate commerce, resulting in the death of an employee engaged in interstate commerce. The cases cited by the defendant on this subject are without application.

The Peterson case has no application to the point involved.

In the Bravis case, a short cut was being built on which there were neither ties nor rails, nor was the railroad in any wise connected up with the intended short cut. The deceased was not engaged in a rail-

road. The work that he had been doing had not resulted into what might be called a railroad.

In the Behrens case, the deceased was engaged in a switching operation, all the cars involved were intrastate.

In the Jackson case, the deceased was engaged in the construction of a tunnel, which had no connection with the railroad, which had been used in interstate commerce. It was an intended, not an existing railroad.

In *Chicago R. R. vs. Steel*, 108 N. E. 4, the plaintiff was engaged on a work train in work on a new track. He was engaged in throwing off ties. No part of the proposed track had been used for any purpose, but it was intended when completed to be used in interstate commerce.

So that none of these cases offer any comfort to the defendant on the question of interstate commerce.

We will not argue the defendant's second point further than to refer to the cases under our preceding paragraph.

The defendant's counsel has ingeniously omitted to quote all the testimony which he purports to quote as given by Mr. Cook, in response to the juror's question. In addition to the testimony there quoted, the following occurs:

“Q. And they were not supposed to be dependent on the whistle at all?

A. All men are.

Q. They are?

A. All men are.”

So that it was the testimony of the defendant's boss in this case that Swank, as well as the rest of the gang, were dependent on his whistle for warning

of an approaching train. Also Cook testified that he actually was looking out for the men's safety (S. C. 97-27 & following). Although he testified that he was leaving he warned no one else of the men employed under him. It is to be remembered that Swank is dead and cannot contradict Cook, so that his testimony that Swank was warned may, under the circumstances, have been viewed with a great deal of suspicion. Furthermore, Cook testified that it was customary to blow the warning whistle on the approach of trains. And further, that it was his duty to warn them even at that time and place (S. C. 99-8), and further that the men employed under him would "of course, look for warning" (S. C. 99-28). So that it follows that if the deceased had a right to depend upon the boss blowing the whistle, the failure to give that warning was negligence, and there was nothing to show that the plaintiff assumed any such risk of negligence on the part of his boss.

The case of *Precodnick vs. R. R.*, 74 N. J. Law 366, cited by the defendant, is not in point for the reason that in that case it was proved that the custom was that each man employed in the gang should rely upon himself. He, therefore, assumed the risk.

In the case of *Germanus vs. R. R.*, 74 N. J. Law 662, it was held "Where the custom of giving a warning by the foreman is proved, it is embraced in the duty owed by the master to the servants, and for the failure of the foreman properly to discharge that duty, the master is responsible." This was a Court of Errors case, and, therefore, the law of the State.

In the case of *Bolt vs. R. R.*, 245 U. S. 441, the injured person went in between railroad cars contrary to the rules of the company, and it was held that he assumed the risk, which was obvious or fully known to him, but the risk in this case was one which was

inherent in his employment, by reason of the rules of the company. It was not the negligence of his fellow servant that caused the injury, it was the disobedience of the rules by the injured party.

The case of *Seaboard Air Line vs. Horton*, 233 U. S. 492, holds only to the effect that assumption of risk in other cases than those forbidden by the statute remain, as does *Jacobs vs. Southern Railway*.

In *R. R. vs. Maron*, 246 Fed. 916, the plaintiff knew of the danger of working without glasses and in continuing in that work he assumed the risk naturally inherent in his employment.

The case of *Martin vs. R. R.*, 166 U. S. 399, arose before the present statute. Neither does the case of *Casey vs. R. R.*, 121 U. S. 403, and *Connelly vs. R. R.*, we submit, affect our case.

The *R. R. vs. Gesswine*, 144 Fed. 56, went more upon the question of negligence than upon the assumption of risk. Likewise *Aerkfetz vs. Humphreys*, 145 U. S. 418, was decided in 1887, and, therefore, not in view of the statute.

The Act of April 22, 1908, section 1, gives a right of action to every injured employee in interstate commerce for negligence "resulting in whole or in part from the negligence of any of its officers, agents or employees of such carrier." So that the negligence of a fellow servant is made by the statute the cause of the right of action, and Thornton's Federal Employers Liability Act, page 208, Section 129, lays down the law as follows: "The employee does not assume the risk to injury arising out of negligence of the employer or a fellow servant," and cites cases and instances, and *Michigan Central R. R. vs. Shafter*, 220 Fed. Rep. 6, Circuit Court of Appeals, said "Upon the subject of assumption of risk, no question is open, save whether or not the undisputed tes-

tiomony showed such a risk assumption as required the direction of the verdict for defendant."

By *Seaboard Air Line vs. Horton*, 233 U. S. 492, it is now settled that "the common law defense of assumption of risk remains in actions brought under this statute, but it is also recognized by recent decision in this court (citing cases) that to make the defense good in cases depending upon the negligence of fellow servants, it must appear first that the negligence was either in fact known to plaintiff or was so customary that he must be charged with knowledge, and second, he must appreciate or be bound to appreciate the danger."

In *Lehigh Valley R. R. Co. vs. Scanlan*, 259 Fed. 137, Judge Manton said "Nor can we say that the defendant in error assumed the risk as a matter of law. An employee, maintaining a cause of action under the Federal Employers Liability Act does not assume a risk attributable to the negligence of his co-employees until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would know and appreciate it."

We now come to the fourth point of the appellant's brief.

**There Was no Error in the Charge to the Jury Com-
plained of in the Fourth Point of the Appel-
lant's Brief.**

I am unable to follow the reasoning of the defendant's counsel in this particular. The evidence shows that somewhere near the scene of the accident, there was a bridge extending across all of the tracks where they had erected certain signals; that these signals were so operated as to indicate the movement of the

train, and that at the particular time the signals were set so as to indicate that the train in question would pass from track No. 1 to track No. 2 at the switch, of which the one in question was an extension. It is also in the testimony that Swank had been instructed with respect to the significance of these signals. The failure, therefore, to observe these signals did not give the Court the right to take the matter from the jury, for it means it could have only operated in the nature of contributory negligence in failing to observe these signals, and contributory negligence under the statute does not bar the action, but merely diminishes the damages. Nor could the Court as a matter of law, say that this was such an assumption of risk as precluded the plaintiff's right of recovery, because the Court charged correctly with respect to assumption of risk. (See charge of the Court, page 144, line 27.)

We now come to the appellant's fifth point.

Testimony Complained About in This Point Was Properly Admitted.

One element of proof of the damages in a death case is the amount of wages earned by the deceased as tending to show the benefit that the next of kin would have derived had the deceased not died. It is therefore proper to show the amount of wages he was making, the state of his health, his habits of life, and other information which would bear upon the question of the probable benefit to be derived from his continuance of life. It certainly, therefore, was proper to show the wages received by Swank at the time of his death, the wages received by others in the same employ on up until the time of the trial,

as throwing light upon the *quantum* of benefit that the deceased and her child would have received from the deceased. All of this was proper testimony to enlighten the jury. The defendant submits no case or authority to the contrary, and we contend that a simple statement of the matter is sufficient to justify the ruling of the Court.

Regarding the appellant's sixth point, we think that his brief is a sufficient statement of our position.

The seventh point of the appellant's brief concerns the order of the Court permitting the plaintiff to amend her complaint. The facts were that at the time of the death of the husband, there was a child in *ventre sa mere* and at the time the complaint was made, no mention of this unborn child was made. The child was born in the interim of the filing of the complaint and the trial of the case. The amendment asked was for the purpose of making the proper allowance for the benefit of this infant child. The Court permitted this amendment and we submit that the Court acted correctly in amending this complaint. The power to amend is defined in sections 23 and 24 of the supplement to the Practice Act of 1912, and is without limitation as to the right of the Court to amend.

In *Thompson vs. Peppler*, 102 Atl. Rep. 379, decided in the Court of Errors and Appeals, Chancellor Walker said: "It will be observed that there is in the act (above referred to) no limitation whatever upon the power of amendment, but that power is given to permit the statement of a new or different cause of action. In *Miller vs. West Jersey R. R. Co.*, 76 Law 282, at page 284 (70 Atl. 175), it is observed that in *Farrier vs. Shroeder*, 40 N. J. L. 601, an amendment was permitted after trial. This mere statement might give the impression that the amend-

ment was allowed some considerable time after trial, but an examination of the case discloses that it was made at the conclusion of the trial, which, in a sense, is after the trial."

So that the statute distinctly confers upon the Court the power to permit "before or at the trial the statement of a new or different cause of action in the complaint or counter-claim." We submit that the citation of the statute is a sufficient answer to the appellant's claim.

There being no error in the record, it is submitted that the judgment of the Court should be affirmed.

Respectfully submitted,

JAMES MERCER DAVIS,
Attorney for Plaintiff.

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**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

ELIZABETH SWANK, Admin-
istratrix of HERBERT L.
SWANK, deceased,
Plaintiff-Respondent,
vs.
PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at Law.
On Appeal.

BRIEF OF APPELLANT.

The appeal in this case brings up for review a judgment for \$10,000 entered on the verdict of a jury at the Burlington County Circuit of the Supreme Court. The case was tried before Judge Wells, Judge of the Court of Common Pleas of Burlington County, to whom it had been referred by Judge Carrow, a Circuit Court Judge.

STATEMENT OF FACTS.

The plaintiff's intestate, Herbert L. Swank, was employed by the Pennsylvania Railroad Company in September of 1917, and on the 18th day of that

month was employed with a number of other men in installing an entirely new switch from track No. 4 to a siding known as track No. 5, near Princeton Junction. On the 18th day of September, 1917, Herbert L. Swank was engaged in removing the stone ballast from between the tracks for the purpose of installing a pipe line for the operation of the switch point. Both the switching device and the operating device were new installations. They were not repairs. The testimony shows that there had been no switch from tracks No. 4 to No. 5 prior to the installation of the work upon which the deceased was engaged at the time of his death. The deceased and his companion were working by themselves about 900 feet from the balance of the gang and had been told by the foreman in charge of the gang, Edward N. Cook, that they were to be entirely dependent upon themselves for protection. At the point of the accident there were four tracks, tracks No. 1 and 2 for the accommodation of east bound traffic and tracks No. 3 and 4 for the accommodation of west bound traffic, which were the main tracks of the Pennsylvania Railroad. In addition to these four main tracks, there was a side track known as track No. 5. Decedent was working between tracks No. 2 and 3 and was struck by an east bound freight train that moved over from track No. 1 to track No. 2 on a cross-over located about 1,000 feet from where the decedent was working. Between the place where the decedent was working and the cross-over where the train passed from track No. 1 to track No. 2, there was a signal bridge which supported among other signals a signal denoting that the train would make such a cross-over. The operation of this signal had been explained to the deceased, who had been working for the company at that time about one month.

The foreman of the gang testified that he blew the ordinary whistle which was used to warn men working around the tracks. Several other witnesses said that they did not hear this signal, but a witness who stood right alongside of the foreman not only heard him blow the whistle but actually saw him blow it. The foreman also testified that a man named McGarry who was working with the deceased looked up when he blew the whistle and moved to a place of safety. It appears that McGarry died sometime before the trial.

The suit was based upon the Federal Employers Liability Act, April 22, 1908, Compiled Statutes, 1916, Section 8657, and was grounded upon the proposition that both the decedent employee and the Railroad Company itself were engaged in interstate commerce at the time of the accident. It was conceded by the defendant that it was engaged in interstate commerce at the time of the accident, but it was denied that the decedent was engaged in interstate commerce at that time. The denial that the decedent was engaged in interstate commerce was based upon the fact that the work that he was engaged in was new work.

POINTS OF LAW.

1. There should have been a non-suit or a direction in favor of the defendant.

A. Because the work upon which the decedent was engaged was new work.

B. Because the decedent assumed the risk of the negligence of his fellow-servant in failing to give the warning signal.

(See Motion for Non-suit, page 83; Motion for Direction, page 139, and Grounds of Appeal, No. 1 and 2, page 161.)

2. The Court erred in refusing to charge the defendant's first request as follows: "The plaintiff's intestate assumed the risk of all dangers obvious or known to him or which should have been obvious to him."

(See Request to Charge No. 1, page 148; Ground of Appeal No. 3, page 161; Objection No. 1, page 150.)

3. The Court erred in refusing to charge the defendant's third request as follows: "Unless the work which decedent was doing at the time of his death was in the repair of an instrumentality then in use for interstate traffic the plaintiff cannot recover."

(See Request to Charge No. 3, page 148; Ground of Appeal No. 5, page 162; Objection No. 1, page 150.)

4. The Court erred in refusing to charge the defendant's fourth request as follows: "If the work decedent was doing at the time of his death was new work not then in use in interstate traffic the plaintiff cannot recover."

(See Request to Charge No. 4, page 148; Grounds of Appeal No. 6, page 162; Objection No. 1, page 150.)

5. The Court erred in refusing to charge the defendant's sixth request as follows: "The plaintiff's intestate assumed the risk of the negligence of his fellow-servants."

(See Request to Charge No. 6, page 149; Grounds of Appeal No. 7, page 162; Objection No. 1, page 150.)

6. The Court erred in charging as follows: "But there is evidence in this case, however, which you may or may not believe, for you are the judges of the fact, that this was a part of the system in existence; that it was connected to tracks or switches already laid and in use, and that though it was an extension to the existing plant, it was part and parcel of it."

(See Defendant's Objection No. 2, page 150; Grounds of Appeal No. 8, page 162.)

7. The Court erred in charging as follows: "The Act (Federal Employers' Liability Act) abolishes the fellow-servant rule, and if the death was caused by the negligence of an employee the defendant might be held liable therefor, for he does not under the act assume the risk that a fellow servant might be negligent."

(See Objection No. 3, page 150; Grounds of Appeal No. 9, page 162.)

8. The Court erred in charging the jury as follows: "Then I charge you that the decedent has a right to rely upon such warning being given in case there was any danger from an approaching train."

(See Defendant's Objection No. 4, page 150; Grounds of Appeal No. 10, page 162.)

9. The Court erred in charging the jury as follows: "The testimony of one witness for defendant was to the effect that there was a custom in existence that would require an alarm or whistle from the leader or boss of the approach of a train. But he states that certain signals were set and required to be set notifying the decedent and those who were working in gangs similar to that in which the de-

cedent was employed, that a train would change or cross-over from one track to another.”

(See Defendant's Objection No. 5, page 150; Grounds of Appeal No. 11, page 163.)

10. The Court erred in charging the jury as follows: “You heard the testimony of the plaintiff to the effect that no whistle was blown.”

(See Defendant's Objection No. 6, page 150; Grounds of Appeal No. 12, page 163.)

11. The Court erred in admitting the following question over the defendant's objection:

“Q. And what are you paying now for the same sort of work?

(Objected to.)

(Objection overruled.)

(Question re-asked.)

Q. The question is, Mr. Cook, what wages are you paying to men employed in the same line of work that Swank was employed?

A. Forty-five cents per hour for eight hours.”

(See Defendant's Objection, page 81, line 23; Grounds of Appeal No. 14, page 163.)

12. The Court erred in permitting the following question to be asked over the defendant's objection:

“Q. Now, if they had been instructed in those signals by you it would have been unnecessary to give them a schooling on it, wouldn't it?

(Objection.)

(Objection overruled and noted.)

A. No, it is customary at all times to give instruction. At different times, you know, we are called up for instruction.”

(See Defendant's Objection, page 103, line 18; Ground of Appeal No. 15, page 164.)

13. The Court erred in permitting the plaintiff to amend her declaration:

A. By inserting the words "his widow and one minor child."

B. By adding as a ground of negligence the fact that the foreman or person charged with giving notice of the approach of the train failed to give notice.

(See Defendant's Objection, page 137, line 31, page 138, line 12; Grounds of Appeal Nos. 16 and 17, page 164.)

14. Said action is improperly brought in the name of Elizabeth Swank, administratrix of Herbert L. Swank, deceased.

(See Nos. 18 and 19, Additional Grounds of Appeal, page 165.)

ARGUMENT.

I.

There Should Have Been a Non-suit or Direction in Favor of the Defendant on the Ground that the Work Upon Which the Decedent Was Engaged Was New Work.

The evidence in the case shows that the decedent, along with a man named McGarry, was engaged in putting in a pipe line for the purpose of operating a switch extending from track No. 4, which was a

main track, to track No. 5, which was a siding (page 19, line 21). The proof further shows that the track forming the switch itself had been laid but had not been connected with the main track, and as a matter of fact was not connected or put in operation for nearly a year, it not having been put into service until August 23, 1918. (Testimony of Mr. Glover, page 108, line 29.)

The testimony further shows that the pipe line is merely a connecting rod (page 107, line 19), and was for the purpose of operating the west end of the switch which was being installed (page 107, line 23); that the switch was going to be operated from tower known as "C. D. Tower," (page 107, line 29), and that it operates as follows: It is connected to a lever inside of the tower and a direct line parallel with the track until it gets opposite to the switch point, and then we have a crank in the shape of a bell crank, we call it, right angles, and as we pull from the tower on this direct line of pipe, it operates accordingly, whichever position he pulls the lever inside of the tower (page 108, line 15)," and that the lever and switch in question have nothing to do with any other operation (page 108, line 24).

It is true that the testimony showed that there were a series of switches crossing over from track No. 1 to track No. 4, which were not in operation at the time of the accident. It is also true that track No. 5, a siding track, was in use at the time of the accident, but there was no switch at the point in question from track No. 4 to track No. 5, nor was the switch which was being installed by the decedent put in operation or use for more than a year.

The defendant contends that from these facts the Court must determine as a matter of law that the work in question was new work and was not repairs.

In the case of *Pederson vs. D. L. & W. R. Co.*, 229 U. S. 144, 57 L. Ed. 1125, Mr. Justice VanDevanter, delivering the opinion in the United States Supreme Court, said:

“We are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce (Interstate Commerce), but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.”

In the *Pederson* case the plaintiff was injured while carrying some bolts and nuts for the purpose of installing a new girder in a bridge which had already been constructed and which was being used in interstate commerce.

In the case of *Bravis vs. Chicago, Minn. & St. Paul R. Co.*, 217 Fed. Rep. 234, the Court held:

“The Federal Employers’ Liability Act, (April 22, 1908, Chap. 149, U. S. Comp. Stat. 1916, Sec. 8657-8665) protects only those employed in interstate commerce. Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines and other instrumentalities which are intended for use in interstate commerce but have never been and are not in use therein are not employed in interstate commerce and are not protected by that act.”

In the *Bravis* case a verdict was directed in favor of the defendant, which direction was affirmed by Judge Sanborn, sitting in the Eighth Circuit.

In the case of *Jackson vs. Chicago & St. Paul R. Co.*, 210 Fed. Rep. 495, it was held that:

“Where plaintiff while engaged in the con-

struction of a tunnel to be used when completed by a railroad in interstate commerce, was injured by the alleged negligence of a railroad company, plaintiff could not recover under the Federal Employers' Liability Act, which only deals with the liability of the carrier engaged in interstate commerce for injury sustained by its employees while engaged in such commerce, and does not apply to a railroad construction which has not yet become an instrumentality of commerce."

The above case was determined on a demurrer to a complaint, the demurrer being sustained.

In the case of *Chicago and E. R. Co. vs. Steele*, 108 N. E. 4, the Supreme Court of Indiana held that:

"A railroad laborer working on a track which was to be used for both interstate and intrastate commerce but over which interstate commerce had not passed, is not engaged in interstate commerce within the Federal Employers' Liability Act."

The Court further said (page 5):

"The proposed new track had never been used for any kind of traffic, and might never have been completed so as to be used in any kind of commerce."

In the Steele case the Court cited the case of *Illinois R. Co. vs. Behrens*, 233 U. S. 473, 58 L. Ed. 1051.

In the Behrens case, Mr. Justice VanDevanter, speaking for the Supreme Court, said:

"The true test always is, is the work in question a part of the interstate commerce in which the carrier is engaged." Citing a number of cases.

We respectfully submit that work which was not in use in interstate commerce at the time of the accident and which was not as a matter of fact placed in use until nearly a year later, cannot be said to be an instrumentality of interstate commerce so as to give a person injured or killed while working on it a right of action under the Federal Employers' Liability Act.

II.

If the Jury Found That the Plaintiff's Intestate Was Injured on New Work at the Time of the Accident, She Could Not Recover.

The principle of law above stated is contained in the defendant's third and fourth requests (page 148, line 24). The Court refused to charge these requests, and we submit that what the Court said with respect to this phase of the case was not sufficient. The Court said (page 142, line 27):

"If you believe defendant's contention that he was engaged in the installation of a new and separate switching system which was not a part or parcel of an existing system, that the work which he was doing did not serve to advance interstate commerce, then you would be justified in concluding that he was not engaged in interstate commerce at the time of his death."

We submit that this instruction left the jury with the impression that it would have a right to decide that the plaintiff's intestate was engaged in interstate commerce, notwithstanding he was engaged on new work, whereas as a matter of law, if the jury found that he was engaged in new work, the jury

would have to find a verdict in favor of the defendant.

The defendant having submitted a request embodying the correct principle of law, it was entitled to have it charged substantially as requested, and the defendant contends that the language used by the Court did not convey to the jury either the substance of the request or the principle of law upon which it is based, but by the Court's language the jury was permitted to give a verdict in favor of the plaintiff notwithstanding it might find that the plaintiff's intestate was engaged in new work. If the work upon which the plaintiff's intestate was engaged was new work, he was not entitled to recover under the authority of the Pederson case and the other cases cited under Point I.

III.

The Plaintiff's Intestate Assumed the Risk of the Negligence of His Fellow Servants in Failing to Give a Warning, if in Fact No Warning Was Given.

The principle of law embodied in the above statement is embraced in the defendant's sixth request to charge (page 149, line 7), and in the defendant's exception to the Court's charge as contained in the third objection (page 150, line 12).

The Court refused to charge the defendant's sixth request, and in place thereof charged as follows:

"Now, the defendant further contends that it is not responsible because the danger to which the plaintiff's intestate was exposed was one that he assumed as an incident of his employment, and that he also assumed, in spite of the

Federal Act of Congress, the risk that one of his fellow servants might be guilty of negligence, and that he might be injured or killed thereby. The Act abolishes the fellow servant rule, and if the death was caused by the negligence of an employee, the defendant might be held liable, therefor, for he does not under the act assume the risk that a fellow servant might be negligent."

Exception was taken to this portion of the charge as set forth in the defendant's third objection (page 150, line 12). We respectfully submit that this portion of the Judge's charge is contrary to the law as it has been laid down in our Federal Courts in construing the Federal Employers' Liability Act.

It must be borne in mind that in this case it is uncontradicted that the plaintiff's intestate and his companion were working at a considerable distance from the rest of the gang, and that he had been told by the foreman that he would be required to look after himself.

At page 104, line 13, the following question was asked by a juror:

"Q. May I ask a question, Mr. Cook, when you left Swank and his fellow workmen at this distant point, didn't you tell them that they would be entirely dependent upon themselves for protection?"

A. For the time being, yes, sir.

Q. For how long a time?

A. Well, that you can't always depend on. I went away to look after some other work.

Q. Well, you blew this whistle after having told them that they would be entirely dependent

upon themselves; you attempted to give them the additional dependence on the whistle?

A. Yes, sir.

Q. I want to get it clear in my mind whether they were depending entirely on themselves, without instructions, depending entirely on themselves, or whether they could on a reasonable scale depend on your whistle.

A. They were left with the understanding to look out for themselves, but naturally when I was in a position and saw a person on the track with a train approaching, I blew the whistle as protection."

It is clear from this testimony if it is to be believed, and it is not contradicted in any way, that Swank knew that the foreman was going away and that he would have to look after himself. This brings the case clearly within the case of *Precodnick, Admrx. vs. Lehigh Valley Railroad Co.*, 74 N. J. 366. It appeared in this case that the plaintiff's intestate was a track laborer in the employ of the defendant. It was shown that it was part of the system under which the men worked together as a gang upon the tracks that the foreman should warn them of approaching danger, yet it appeared that it was the custom that when one was working alone and separated from the rest of the gang, he should look out for his own safety. Deceased had been sent to a point to work 325 feet from the other men. He was run down by a train and killed. The Court of Errors and Appeals, in an opinion by Judge Vroom, held that the defendant owed no duty to the deceased, while so working of giving him warning. The risk was an obvious one, and assumed by deceased as one of his employment.

In this case, the Court at page 569 said:

“It cannot be contended that in the case under consideration the deceased was working in such position as to prevent his seeing the approaching train. True, he was working with his back to the train, yet he could have seen the train had he looked. He knew he was in a place of danger, and ordinary caution should have impelled him from time to time to make observation not only in front but to the rear in order to guard against any possible risk from trains approaching from either direction.”

In the case of *Boldt vs. Pennsylvania Railroad Co.*, 245 U. S. 441, 62 L. Ed. 385, it was held:

“The risks which the employee still assumes in other cases notwithstanding the elimination of the defense of assumed risk by the Employers’ Liability Act of April 22, 1908, Comp. Stat. 1916, Sec. 8657, in any case in which the violation by the carrier of any statute enacted for the safety of employees contributed to the death or injury of an employee, include those incident to the negligence of carriers, officers, agents or employees which are obvious or fully known to him.” (Opinion by Mr. Justice McReynolds.)

In this case Edward J. Boldt, the plaintiff’s intestate, while between cars and assisting in an effort to adjust a faulty coupler, was killed. The coupler was at the south end of a “string” standing on an incline switch. Another “string” moving down from the north hit the standing one violently and drove it against deceased and across a space of twenty feet. It was sought to charge the defendant with liability on the ground that the negligence consisted in the driving of one string of cars against the string

of cars on which the plaintiff's intestate was working.

In the case of *Seaboard Air Line vs. Horton*, 233 U. S. 492, 58 L. Ed. 1062, it was held:

“The elimination of the defense of assumption of risk by the Employers' Liability Act of April 22, 1908, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action.”

In the Horton case, Mr. Justice Pitney delivered the opinion of the Court, and it appeared that Horton sued the Seaboard Air Line Railway Company in the Superior Court of Wake County, North Carolina, to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. The action was brought under the Federal Employer's Liability Act of April 22, 1908. The circumstances of the case tended to show that defendant's locomotive engine was placed in plaintiff's charge; that it was equipped with a Buckner water gauge, a device attached to the boilerhead for the purpose of showing the level of the water in the boiler. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass, known as a guard glass, should have been provided. On the day of the accident the guard glass was missing.

There was a verdict rendered in favor of the plaintiff, Mr. Pitney, in writing the opinion of the Court, said:

“It seems to us that Section 4 in eliminating

the defense of assumption of risk in the cases indicated quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action, and taking Sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk, for while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is with respect to cases not in this category a limitation upon the effect that is to be given to contributory negligence while no corresponding limitation is imposed upon the defense of assumption of risk. Perhaps none was deemed feasible. The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present notwithstanding the exercise of all reasonable care on his part."

The judgment of the Supreme Court of North Carolina in favor of the plaintiff was reversed.

In the case of *Jacobs vs. Southern Railroad Co.*, 241 U. S. 299, 60 L. Ed. 970, it was held:

“In all cases other than those arising out of the safety appliance statute, the employee is deemed to have assumed the risk incident to his employment.”

In this case the opinion was written by Mr. Justice McKenna. It was held that:

“A railroad fireman who was injured by stumbling over a pile of cinders between the tracks while attempting to board a moving engine, with a can of drinking water in his hand, assumes the risk of the situation where he knows that it is the custom to deposit cinders between the tracks, and knows of their existence although he may have forgotten their existence at the time and does not notice them.”

In the case of *Union Pacific Railroad vs. Marone*, 246 Fed. 916, it was held that:

“Where the place in which a servant is required to work, or the machine or appliance with which he is required to work, or the method of doing the work becomes dangerous and results in injury only because of the negligence of the injured servant or of his fellow servants, the master is not liable.”

It was further held that:

“In the absence of statutory provision to the contrary each servant by accepting his employment voluntarily assumes the risk and danger of the negligence of his fellow servants in the discharge of their duties of operation whether those duties are of superintendence and direction or those of equal or subordinate service.”

In the Marone case the plaintiff's eye was injured by a piece of steel flying from a steel rail which he was chipping. The Railroad Company furnished goggles to protect the eyes of workmen. It appeared that a short time before the accident a piece of steel chipped off and struck the plaintiff on the wrist. On the day of the accident the plaintiff told his foreman that he wanted something to protect his eyes, but the foreman replied to him: "That's all right, we never use them," and plaintiff, fearing to lose his job, did as he was directed. It was held that the Railroad Company, having made its order and furnished goggles, was not negligent.

In the case of *Martin vs. Atchison, Topeka & Santa Fe Railroad*, 166 U. S. 399, 41 L. Ed. 1051, it was held that:

"The orders of a section foreman to a laborer who was with him on a handcar that he shall not look back to watch for a train, and an assurance that the foreman himself will watch and give warning of any danger, do not make the master liable for an injury to the laborer resulting from the negligence of the foreman in failing to watch for a train."

It was further held that:

"The doctrine as to the duty of the master to furnish a safe place for the servant to work has no application to the failure of the foreman in charge of a handcar to watch for an approaching train, when the car itself was in every way fit for the purpose for which it was used."

In the case of *Casey vs. Boston & Maine Railway Co.*, 121 N. E. 403, (Pamphlet No. 6), the Supreme Court of Massachusetts held:

“The Railroad Company’s rules relating to fireman and the giving of signals, and to the fireman’s duty to keep look out when the engineer could not, etc., were designed for the safe operation of trains and did not purport to be for the benefit of track and signal men, so that failure to observe them was not basis for finding of negligence in relation to the injury of a trackman.”

It was held further that it was not negligence of an engineer of a freight train which killed a signal foreman that the train was late and running much faster than witness ever saw it go before, it not being shown that the speed was excessive and the rule of the railroad company fixed no limit.

In this case the plaintiff’s intestate was employed by the defendant as a divisional signal foreman. It was his duty within the territory assigned to him to supervise the maintenance of signals. It appeared that while on the ground inspecting a dwarf signal he was struck by a passing train and instantly killed.

In the case of *Connelly vs. Pennsylvania Railroad Co.*, 228 Fed. Rep. 322, it was held by the Circuit Court of Appeals for the Third Circuit that:

“A railroad company which operates its trains in a proper and customary manner is not chargeable with negligence which renders it liable for the killing by one of such trains of a track-walker who assumes the risk from such danger as necessarily incidental to his employment.”

The suit in the above case was brought under the Federal Employers' Liability Act, and the plaintiff recovered a verdict in the court below. The Court in part adopted its former opinion and quoted from the opinion in the case of *Norfolk & Western Ry. Co. vs. Gesswine*, 144 Fed. 56, in which the Court said:

“This man was one of a number of men who were employed as section men on the railroad. They were engaged in repairing a track, taking out rails, putting in new ones, taking out cross ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad tracks while the trains were being operated in the usual way, manifestly a place of danger. A railroad does not suspend the operation of its trains until the track can be put in order, and the proposition to this section man was: We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourself, to avoid being injured by the trains, and the section men accept the employment upon these terms, and if an accident occurs and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad. It is not the fault of the railway company.”

In the case of *Aerkfetz vs. Humphreys*, 145 U. S. 418, 36 L. Ed. 758, an experienced trackman was injured by a moving train in the switching yard. The Supreme Court said:

“Under such circumstances what negligence can be attributed to the parties in control of the

train or the management of the yard? They could not have moved the train at any slower rate of speed. They were not bound to assume that any employee familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forward and backward would have simply tended to confusion. It cannot be said that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

In the case of *Healy vs. Erie Railroad Co.*, 91 N. J. L., p. 325, a verdict in favor of the plaintiff was set aside. It appeared that the decedent was standing between two tracks at the time a car was being switched on one of them. The decedent had his back turned but was struck by a portion of the car and thrown under a train passing on another track.

In the case of *R. & N. R. Co. vs. Elmore*, 203 S. W. 876, it appeared that Elmore was riding on a hand-car and was run down and killed by a train approaching from the rear. It was held that those employed on railroad tracks are required to anticipate the running of trains and that train men operating trains are not required to anticipate employees' presence on the tracks or to avoid injuring them after discovering their peril.

In the case of *Ingham vs. N. Y. & W. R. Co.*, 169 N. Y. S. 346, the decedent was run down by a fast moving train while he was clearing snow from a

switch on the main track. The train might have been seen by the decedent half a mile away. It was running 40 miles an hour and it was on time. It was held that the railroad company did not have to be on the lookout for and give warning to every group of employees working on the track nor did the railroad owe the duty of giving a foreman to each individual or group of employees. It was held also that under the circumstances the railroads' duty towards section hands was fulfilled when it has furnished the roadbed and right of way, free from any hidden danger.

IV.

The Court Erred in Charging with Respect to the Signals on the Signal Bridge Denoting the Passage of a Train from One Track to Another.

The Court's charge in this behalf is as follows: (Page 145, line 19.)

"He states that certain signals were set and required to be set notifying the decedent and those who were working with gangs similar to that in which the decedent was employed, that a train would change or cross-over from one track to another."

The proof in the case was that the signals were in proper position to indicate the passage of the train from track No. 1 to track No. 2 (page 102, line 1). It is further in the case, and uncontradicted, that the meaning of these signals had been explained to Mr. Swank on at least two occasions (Testimony, page 102, line 5 to 20).

The Court having undertaken to charge with re-

spect to this phase of the case, was obliged to charge correctly.

Kyle vs. Lehigh Valley R. Co., 81 N. J. L. 186-192.

If the bridge signals denoting the passage of the train from one track to another were intended for the protection of the individual, then it being undisputed that the signals were correctly set, the plaintiff's intestate assumed the risk of his failure to see these signals as a matter of law, and it should not have been submitted to the jury to say whether or not the signals were properly set, inasmuch as they were in plain view of all of the witnesses who were working there, and had there been any question as to the truthfulness of the foreman's testimony that they were properly set, such testimony should have been submitted, and not having been submitted, the jury were bound to find that the signals were properly set, and if these signals were properly set, then the jury should have been instructed to find a verdict in favor of defendant.

V.

The Testimony as to What the Defendant Was Paying Men at the Time of the Trial Was Immaterial on the Question of Damages.

The plaintiff's attorney was permitted to ask over objection the following question:

“The question is, Mr. Cook, what wages are you paying to men employed in the same line of work that Swank was employed?”

A. Forty-five cents per hour for eight hours, now.”

The plaintiff had already shown what the decedent's wages were at the time of his death, and it was immaterial as to what the Railroad Company were paying men in a similar line of employment at the time of the trial. Bearing in mind that the general rule where damages are restricted as they are in this State to the pecuniary compensation for the loss, the amount to be recovered is the amount which would with reasonable probability have been contributed by the deceased either during his lifetime or at his death to the use of the beneficiary.

Hackney vs. Delaware & Atlantic Tel. Co.,
69 N. J. L. 335.

There was no testimony whatever in the case as to how much the plaintiff's intestate contributed towards her support. Indeed, the plaintiff did not know how much her husband earned either with the trolley company, for whom he had worked before he went to work for the railroad company, (page 28, line 31) or with the railroad company (page 28, line 25). Before testimony as to the increase in his earning capacity would be admissible, there must be some testimony in the case from which the jury could infer that he would give a certain percentage or proportion of it to the beneficiary. In other words, there was no foundation laid for the introduction of the testimony. Testimony as to what the decedent was earning is valueless and immaterial unless there is testimony showing or tending to show how much of his earnings is contributed to his beneficiary. Such testimony being absent in this cause, testimony as to his earning capacity either at the time of his death or what it might have been had he lived at some future time, is immaterial.

VI.

The Court Erred in Permitting the Plaintiff to Cross-examine Mr. Cook as to the Giving of Certain Signals.

The testimony involved in this point may be found at page 103, line 6. It appeared that Mr. Cook had testified that he had explained the working of the signals on the signal bridge to Mr. Swank (page 102, line 6). He was then asked on cross-examination whether he gave the other men schooling in these signals after the accident (page 102, line 25), and he denied it, and then came the question to which objection was made.

It is our contention that it was immaterial whether he had given schooling in the operation of the signals after the accident or not, and that that question in itself was improper. It was not objected to, however, but the answer was that no such instruction had been given. That being the case, no ground was laid, so far as testing the witness' credibility is concerned, for asking the question, what would have been the effect of giving such instructions had the instructions been given. What the plaintiff's attorney evidently tried to do was to make it appear that instructions had been given to the men after the accident, from which evidently he thought an inference could be drawn that no instructions had been before the accident. This question having been answered in the negative, there was no inference which the jury could draw from the fact that instructions had been subsequently given, even assuming that such an inference was a proper one in any event, but it is certain that no such inference could be drawn hypothetically when the testimony as it stood

at the time the question was asked was that no such instructions had been subsequently given.

VII.

The Court Erred in Permitting the Plaintiff to Amend Her Complaint.

The question as to the validity of the amendment is raised by grounds of appeal Nos. 16 and 17. We submit that under the case of *Seaboard Air Line vs. Renn*, 241 U. S. 290, 60 L. Ed. 1006, the Court was without power to grant an amendment which in such a material way altered the complaint as to the question of negligence. The third paragraph of the plaintiff's complaint founded its negligence upon the failure of the defendant to give warning of the approach of the train itself, whereas the amendment charged negligence by reason of the fact that the foreman in charge of the gang working on the tracks failed to give the customary signal.

We submit that this comes clearly within the reasoning of the Court in the *Renn* case as to the right to amend after the two years has expired. In that case the Court said:

"If the amendment merely expanded or amplified what was alleged in the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time, but if it introduced a new or different cause of action it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

VIII.

A General Administratrix is Without Authority to Prosecute a Suit Under the Death Act in New Jersey.

This question was raised by the additional ground of appeal on page 165.

The New Jersey Death Act, 2 Comp. Stat. p. 1907, Sec. 7, etc., in specific terms applies and regulates the procedure in the case at hand. Section 7 states as follows:

“That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.” (Rev. 1877, p. 294.)

Chapter 180 of the Pamphlet Laws of 1917 is a supplement of the Death Act, and states in part, in Section 1, as follows:

“Every action, proceeding or claim brought, instituted or made under and by virtue of the remedy given by the act to which this act is a supplement *shall be brought, instituted or made in the name of an administrator ad prosequendum* of the decedent whose death gives rise to the claim under the act to which this act is a

supplement; except where such deceased dies testate. * * * The amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband and next of kin of such deceased person and shall be distributed to such widow, surviving husband and next of kin in proportion provided by law in relation to the distribution of personal property left by persons dying intestate. * * *"

The section further provides:

"That every action shall be commenced or sued within two years after the death of such deceased person and not after."

It is provided further by said section:

"That where such action is brought or proceeding instituted or claim made by an *administrator ad prosequendum*, no payment in settlement of any such claim or any satisfaction of any judgment obtained in any such action * * * shall be made to such *administrator ad prosequendum*, but such payment shall be made in such settlement or in such satisfaction only to a general administrator who has given bond as required by law and who has been appointed on a petition which recites the amount to be so paid in settlement or in satisfaction of such judgment, or to one who has been appointed and who has filed with the tribunal appointing him a supplemental bond with two able sureties, etc. * * *"

It is further provided:

"That no release by any *administrator ad prosequendum* and no cancellation of a judg-

ment * * * by an *administrator ad prosequendum* * * * shall release the person making such payment from any liability to such widow, husband or next of kin, of such deceased person under the act to which this act is a supplement. * * *"

Chapter 180, above referred to, is a supplement to the Death Act; while not in any terms amending the second section (Comp. Stat. Vol. 2, p. 1908), it is really a revision of that section and supersedes it. *It is the only authority at the present time for the maintenance of any action in the courts of the State of New Jersey for the recovery of damages on account of the death of a human being.*

If it were not for the existence of the Death Act or some similar statute of this State, Congress could not require that such an action should be entertained in any court of the State of New Jersey. In the case of *Rushworth vs. The Judges of the Inferior Court of Common Pleas of Hudson County* (58 N. J. L., p. 97) Justice VanSyckel, speaking for our Supreme Court, states that:

"There has been no surrender by the States of the right to establish their own courts, to define and limit their jurisdiction and functions, except as to appellate jurisdiction, and as to subjects within the exclusive jurisdiction of the United States, and to regulate and control them in all respects, except as to appellate jurisdiction, and as to subjects within the exclusive jurisdiction of the United States."

The Court stated further that:

"If Congress has, without the consent of the State, the power to impose such a duty (re-

ferring to the regulation of procedure in cases of naturalization in courts of this State) upon the State Courts, there is no legal limit to the authority of the National Legislature to burden the State courts with such a volume of business as to essentially impair their capacity to exercise the judicial functions for which they were created by the State."

The Act of Congress approved April 22, 1908, provided that:

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States and Territories or any foreign nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

The New Jersey statute (Death Act, Sec. 1, 2 Comp. Stat. p. 1907, sub-division 7) became literally and precisely applicable to continue the liability created by the act of Congress.

Section 2 of the New Jersey Death Act, prior to the enactment of Chapter 180, Laws of 1917, provided that every such action should be brought by and in the names of the personal representatives of such deceased person and the act proceeded to designate the beneficiaries of such action.

It is claimed on behalf of the plaintiff in this case that this suit is not brought under the New Jersey Death Act, but that the suit is brought under the Federal Employers' Liability Act. This conten-

tion is not correct. The action is brought under the New Jersey Death Act as well as under the Act of Congress. The Act of Congress creates a liability and suggests a remedy. The liability could not be enforced in the courts of New Jersey by virtue of the Act of Congress alone. The enforcement of the liability is contingent upon the statute of New Jersey, to wit: The Death Act and the statute of New Jersey creates the jurisdiction and regulates the procedure. The supplement to the Death Act (P. L. 1917, Chap. 180) deals only with procedure so far as concerns the duties of an *administrator ad prosequendum*. The requirement that suit shall be brought by such an administrator is purely formal. The authority of the *administrator ad prosequendum* is similar and altogether analogous to that of a next friend who is appointed by the Court to prosecute an action for an infant plaintiff. Would any one question the right, authority or necessity of appointing a next friend to prosecute such an action as would arise if a minor were injured while employed by a railroad carrier in interstate commerce, notwithstanding that the Act of Congress gives the action to the person injured?

In the second Employers' Liability Cases, 223 U. S. 1, 56-57, the Supreme Court, in disposing of the claim that the State courts were at liberty to refuse cognizance of actions under the Federal Employers' Liability Act, as had been held in the Supreme Court of Errors of Connecticut (73 Atl. 754); said:

“We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of said court or to control or affect their modes of procedure, but only a question of the duty of such a court, when its original jurisdiction as prescribed by

local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its original jurisdiction as prescribed by local laws is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors and Appeals that Superior courts of the States are courts of general jurisdiction and are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose under another State, under its laws, and under circumstances in which the laws of Connecticut give no right of recovery, as where the casual negligence was that of a fellow servant."

There is no inconsistency between the Act of Congress and Chapter 180 of the Laws of 1917. *The administrator ad prosequendum is the personal representative of the deceased just as much as the general administrator is the personal representative of the deceased*, and the Act of Congress is not explicit as to whether the plaintiff shall be the general representative or merely a special representative for the purpose of the suit; that is a matter of procedure which may be regulated by the State in the courts in which the action is brought. The personal representative must be such as is recognized and authorized by the laws of the State in which suits arising for similar causes of action are brought and are cognizable.

The statute under which the plaintiff seeks to maintain the action (2 Comp. Stat. p. 2265, Sec. 21, P. L. 1896, p. 173) does not apply to actions brought to recover damages for the death of a human being. An examination of the section is convincing. This act is a supplement to an act entitled, "An Act Concerning Executors and Administrators of Intestates' Estates." The effect claimed for it in this case would be beyond the scope of this title. The plaintiff is not an executor, and "the administrator of intestates' estates" is the only portion of the title that can be supposed to cover these provisions, but suit to recover for wrongful death, whether under the Death Act of New Jersey or under the Act of Congress, does not relate to the administration of an intestate's estate. The damages are not part of the estate of the decedent and are not recoverable as such. They are recoverable for the benefit of the widow and next of kin.

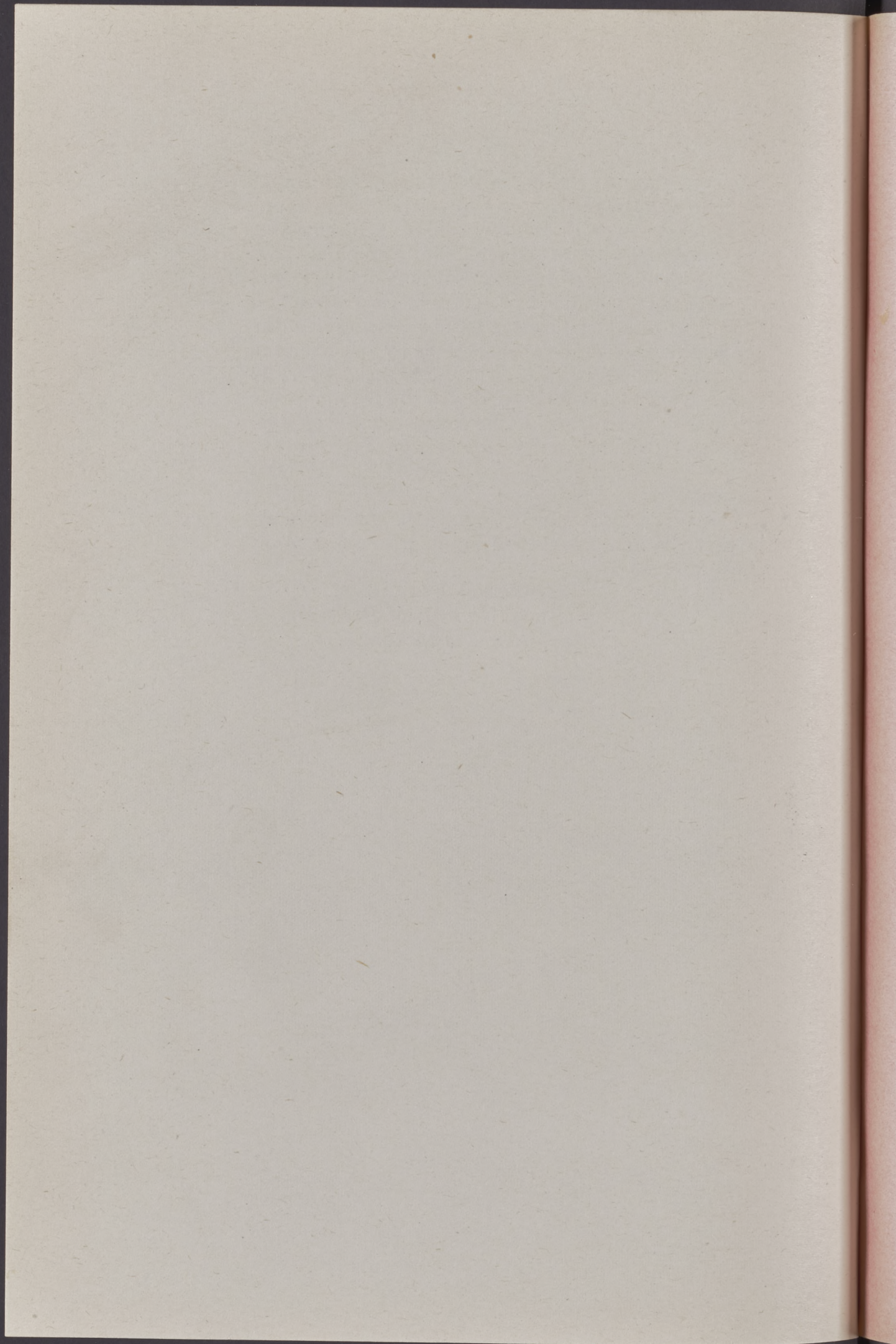
If, however, the Act of 1896, above mentioned, ever did apply so as to authorize the maintenance of an action for death upon filing foreign letters of administration as mentioned in that act, it has been superseded by Chapter 180 of the Laws of 1917, which specifically and unequivocally requires the intervention of an *administrator ad prosequendum* in all cases where suits are brought for damages for the death of a human being when said human being dies intestate.

In conclusion, we respectfully submit that the present action has not been brought by an *administratrix ad prosequendum* as required by Chapter 180 of the Laws of 1917, and further that said action has been wrongfully brought by an administratrix appointed in a foreign jurisdiction who has brought suit in the Courts of the State of New Jersey and

submitted herself to the jurisdiction of our courts without complying with the procedure which our said courts demand. We feel constrained, however, to strongly urge that Chapter 180 of Pamphlet Laws of 1917 defines and designates whom the personal representatives shall be. Congress has not attempted to fully regulate the matter by designating who the personal representatives shall be or by specifying in any way the procedure. The State has expressly specified the beneficiaries and who the personal representative who sues in its courts shall be, irrespective of whether actions are brought for recovery by a remedial act of the State or of the Federal Government.

We respectfully submit that the judgment should be reversed and a new trial granted for the reasons above discussed.

BOURGEOIS & COULOMB,
*Attorneys of Defendant-
Appellant.*



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