

New Jersey Court of Errors and Appeals.

JAN DRELICH, as Administrator
ad Prosequendum of Ludwig
Drelich, &c.,

Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY,

Defendant-Respondent.

Action
At Law.
On Appeal. 10

BRIEF OF PLAINTIFF-APPELLANT.

This appeal is from a judgment of the Supreme Court, entered upon a directed verdict in favor of the defendant-respondent. The trial was had before a jury at the Bergen Circuit at the term of September, 1917, and the direction for a verdict was made on defendant's motion at the close of the whole case. 20

The Grounds of Appeal, as formulated by the plaintiff-appellant and appearing on page 184 of the Statement of the Case, bring up for review all questions touching the propriety and legality of the direction for a verdict and all subsequent proceedings culminating in the judgment appealed from. 30

The action was brought by the Administrator ad Prosequendum of Ludwig Drelich, an infant decedent, some two years of age, under the provisions of the Death Act, for damages in favor of the next of kin, comprising the father and mother of the deceased. The complaint sets forth a cause of action based on alleged wrongful and negligent acts of the defendant causing death. 40

Facts.

10 The accident resulting in the death of the infant decedent occurred on August 11, 1917, upon an open plot of ground known as the Dundee freight yard at Passaic, in this State. The deceased was struck by a freight car, the operation and control of which are conceded to have been in the defendant, and it is also admitted that he died on or about August 13, 1917, as the result of the injuries so sustained (Case, page 49).

20 It is not anywhere in the case contended that the complaint fails to set forth a sufficient cause of action against the defendant; and the verdict in its favor was directed squarely upon the ground that the proofs produced by the plaintiff upon the trial, as helped out by some piecemeal testimony given by various witnesses of the defendant, not only failed to establish a cause of action in plaintiff's favor, but on the contrary so established that defendant was entitled to a verdict as to warrant the direction of verdict appealed from.

30 Many of the allegations of the complaint were either admitted in the answer or their truth conceded by the defendant upon the trial. Thus it is admitted that the defendant was a New York corporation, that it controlled and operated a steam surface railroad at Passaic, in this State, and particularly the freight station and yard at that city known as the Dundee freight station, together with the tracks, switches and railroad equipment at that place, including certain engines, freight cars and rolling stock which were operated and used by it at its Dundee freight yard (see complaint, paragraphs 1, 2, 3 and 4, state of case, pp. 2 and 3; answer, paragraphs 40 1, 2, 3 and 4, state of case, pp. 8 and 9).

It is likewise admitted that plaintiff's intestate received the personal injuries set forth in the complaint at the time and place therein mentioned, and that as a result thereof he shortly thereafter died (see paragraphs 14 and 15 of the complaint, state of the case, pp. 5 and 6; answer, paragraphs 14 and 15, case, p. 9).

It is also alleged in the complaint that the deceased was an infant two years of age but not yet three years of age; that he died on August 13, 1917, and left him surviving his father, Jan Drelich, who as administrator ad pros. is the plaintiff in the action, and his mother, Catherine Drelich, who testified at page 110 of the case, who are his sole next of kin, and that he died as a result of the injuries complained of (see complaint, paragraphs 15 and 16; case, p. 6). 10

The answer denies knowledge or information sufficient to form a belief as to the allegations concerning the age of the deceased and the names of his next of kin (answer, paragraph 16; case, p. 9); but this is cured by the concession made by counsel upon the trial and appearing at pp. 48 and 49 of the printed case. 20

The Issues.

The issues presented by the pleadings, other than those covered by concessions upon the trial, relate exclusively to the use and condition of defendant's freight yard, whether one or more rights of way or of passage existed across it, whether the defendant is chargeable with an invitation to the infant deceased to go upon or cross the freight yard, and whether the defendant is chargeable with any wrongful and negligent acts in the use of its freight yard and premises and the rolling stock and railroad equipment therein. 30

Appropriate allegations covering these points are made by the complaint at paragraphs 5 et seq. (Case, p. 3 et seq.), where it is set forth that the defendant maintained and controlled certain crossings, passageways and footpaths leading into, through and across the freight yard at Passaic aforesaid, which intersected with and crossed the railroad tracks in the yard and connected with the adjacent highways; that defendant main-
10 tained these various passageways for the use and accommodations of persons having occasion to go upon and across these premises either on foot or in vehicles, including the infant deceased; that the defendant invited the public, including the deceased, to make use of the passageways in question; that the defendant held out to the public generally that these passageways were safe and proper ways to use for the purposes aforesaid and that it maintained them as and for crossing places;
20 it is further alleged that a right of way by prescription existed in favor of the public generally to make use of these crossings, passageways and footpaths in and across the freight yard in question, including the footpath upon which the deceased was injured, and that the defendant maintained the freight yard and premises as a public place in such manner and condition as to amount to a virtual dedication of the freight yard or so much thereof as was occupied by the crossings
30 and pathways in question to public uses.

It is alleged in the complaint that the infant deceased was engaged in crossing over upon one of these crossings or footpaths at the time when he was struck and injured. While the answer formally denies this, yet there is no dispute as to the place where the accident occurred. It was clearly marked by the plaintiff's witness Gaugler with an X-mark on the track indicated
40 on the map (Exhibit D 2), as "Main Track Dun-

dee Spur," and appears at a place which according to the scale to which the map is drawn is about three or four feet from the supposed line of Seventh Street. All of the witnesses who endeavored to locate the scene of the accident place it at substantially the same point.

Various allegations of negligence, some of which are alleged to amount to wilfulness and wantonness, are set forth in paragraphs 14 and 20 of the complaint (pp. 5 and 7, Case) and are denied by the corresponding paragraphs of the answer (pp. 9 and 10). 10

Motion to Direct Verdict.

At the conclusion of the testimony and after both sides had rested, defendant moved for a direction of a verdict in its favor. This motion, argued at length by counsel upon the trial, was based generally on four broad grounds, which really involve the substantial merits of the action, and which may be stated briefly as follows: 20

(1) That there is no sufficient evidence of a prescriptive right warranting the presence of decedent at the place of the accident and injury;

(2) That there is no sufficient evidence that decedent was at that place upon the invitation of the defendant;

(3) That deceased was upon the railroad track where he met with the fatality in violation of section 55 of the Railroad Law; and 30

(4) That the decedent, in the aspect most favorable to plaintiff's case, was only a licensee, and that there is no proof of any wilfull or wanton acts on defendant's part.

Plaintiff's counsel, in opposing this motion, took issue upon each of the four propositions put forward by the defendant as above stated, and in addition urged 40

(5) That the defendant was bound, as in the nature of an estoppel, by its own acts in creating upon its premises the semblance of a highway, to the incidents attending an actual highway crossing.

The trial court, after consideration of the questions thus involved, ruled upon the motion, determining each of them wholly in defendant's favor, and by his direction, a verdict was rendered in
 10 defendant's favor, upon the merits of the cause of action.

From this determination and the judgment entered in accordance therewith, plaintiff has appealed.

I.

**The evidence that a right of way over
 20 the track existed by prescription or
 immemorial user, with the knowledge
 and acquiescence of the railroad com-
 pany, presented a jury question.**

It is not important in this connection to discuss the difference between a mere right of way by prescription and a byroad or public way having its origin in immemorial user on the part of the public or a considerable part thereof and acquiesced in by the railroad corporation; because
 30 evidence sufficient to establish prima facie the existence of either of these ways would be sufficient to present a question for the jury. User, if persisted in for a sufficient period and acquiesced in, or not definitely obstructed by the railroad company, would create a prescriptive right sufficient to warrant the deceased Ludwig Drelich's being upon the path across the railroad track at the time of the accident. The effect of
 40 the acquiescence of the railroad company would be such as to presuppose an earlier grant or dedi-

cation on the part of the railroad company. Such a right as the witnesses testified to could only be a public right, or such a right as would be based upon a dedication either express or implied. The implication of dedication would arise from the fact that the public had been permitted during an immemorial period to make use of this path and crossing as a matter of right.

It is clearly in evidence that such a path exists. Every witness called by the plaintiff-appellant, with the single exception of the bereaved mother, Mrs. Catherine Drelich (who was not questioned on the subject), testified to its long continued and present existence; and they were in some respects corroborated by several of the opposing witnesses. 10

GEORGE GAUGLAR, after testifying, at pages 15 and 16, to his thorough familiarity with the scene of the accident and the location and surroundings of the freight yard, which he had been accustomed to visit daily (p. 15, line 24; p. 20, line 8) during the four years that he has worked for Armour & Company (p. 16, line 30), gave testimony as follows: 20

“Q. Have you observed whether or not there is any beaten path leading from Passaic Street near the freight station diagonally across to Seventh Street, pretty well along toward South Street? A. Well, people going up through there; I see them playing ball and everything—children. 30

“Q. How long have the conditions which you have described existed in that freight yard? A. They have always been that way; never saw them any different.

“Q. Coming back to the question, was there or was there not a beaten path leading from Passaic Street in the neighborhood of the freight station diagonally across the freight yard to Seventh Street at or near South Street, and going down the little hill that is close to the tracks there? A. They go 40

up that track, and they run down that hill, like, and go over on Seventh Street, and go through there. Peoples go all through there.

“Q. People passing through there made a beaten path? A. Yes, sir.

“Q. Is that a wide path or a narrow path? A. I could not tell you how wide it is.”
(State of the Case, p. 19.)

And at page 20:

10 “Q. Is there room for three people to walk abreast? A. Sure; more than that, too.

“Q. Referring now to the conditions surrounding this freight yard, and I refer to everything you have testified to—were the conditions as you have described them to-day the same on August 24th last as you have just said exist there? A. Yes, sir.

“Q. You refer to them to-day as they were at that time? A. Yes, sir; that Saturday morning.” (Case, p. 20.)

20 JACOB TROAST, a police officer of Passaic, during the last eleven years, 45 years of age, who has resided in Passaic for 30 years last past, and has been familiar with the neighborhood of the Dundee freight yard during all that time (Case, p. 49, lines 25-40), testified that the freight station was built “about twelve years ago; probably more; I won’t be sure about that” (top of p. 50), and that the tracks were laid about 20 years ago (p. 50), and proceeded to testify as follows:

30 “Q. At the time, before the place was a freight yard, before the tracks were laid and the freight station was built there, do you know whether or not there was a beaten path crossing that open space of ground there from a place near the corner of Passaic and Sixth Streets diagonally across that ground, which is Seventh Street? A. Yes, sir.

“Q. Will you describe what sort of a path that was? A. It was a path about three or four feet wide, I guess.

40 “Q. Was it a beaten down path or not? A. Why, yes, it was beaten down.

"Q. By that you mean, beaten down by many people passing? A. Beaten down, yes, sir." (Case, p. 51.)

The witness then, in response to a request by counsel, marked the supposed location of the path, at a place differing from his own testimony and that of all plaintiff's other witnesses, but in a measure explained his lapse by answering as follows to the question:

"Q. Are you familiar with maps? A. No, sir." (Case, page 52, line 28.) 10

And again, at page 57, as follows:

"Q. You never seen any path there during the time that you have been there, or at any time when your duties called you around this square? Never seen any path there at all, except this one old path? A. That is the only one I remember of, yes, sir.

"Q. Is that path there now? A. Yes, sir.

"Q. It is the only one that is there? A. 20
That is the only one that I remember.

"Q. The only one that you have ever seen there? A. Yes, sir. Just a minute. I want to correct that. I think that path was a little more where the freight cars was formerly; they went back of it.

"Q. Went back of the freight cars? A. Yes."

WILLIAM RUPIN, the neighborhood druggist, testified at pp. 102 et seq., as follows:

"Q. Did you take particular notice of the place where this accident happened? A. Yes, sir; I did. 30

"Q. What did you do at that time, if anything, that impressed it on your mind? A. Well, first I called an ambulance. The ambulance came along; they did not come along at once, but the ambulance came along the second time, and they took away the child.

"Q. Have you a camera? A. Yes, I have a camera. I took a picture of that certain place. 40

"Q. Did you look particularly at the place where you took this picture at the time? A. Indeed I did.

"Q. With reference to the question of whether or not there was a well beaten path at that place, what did you notice? A. You mean what I noticed?

"Q. Did you look at that place? Was there a path crossing the track at that place? A. Well, it is still there yet, the path is.

"Q. You mean the path? A. Yes.

10 "Q. What kind of a path is this? What did it look like? A. It is a kind of mud there; it isn't a concrete path. It is simply people walking, and it became hardened up. They generally walk over it; I walk myself over it there.

Q. "Where does that path lead between? A. Leads between—well, it all depends, it isn't such a wide path. Leads between—I don't know what streets are there; Sixth, Seventh and Eighth Streets, you have to cross that path; you have to cross that path, and you could go with that path to the mill."

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The fact that this path runs diagonally from the neighborhood of Passaic and Sixth Streets to a point in Seventh Street near where the siding and entrance of the Kaplan coal yard are shown on the map (Exhibit D-2) is evident from the testimony of many witnesses:

PHILIP KAPLAN, one of the firm which occupies the coal yard shown on the map, testified at pp.

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65-70 as follows:

"Q. I want you to indicate in a general way, without attempting to show about how it ran? A. Looking at it from Sixth Street, it would look straight; of course, it was diagonal from Sixth Street.

"Q. You have made a line between the first and last mark you have made? A. Yes.

"Q. Just sign your name under each of those marks you have made, please? A. I will put a 'P. K.'

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"Q. Put 'P. K.' on the other mark, if you please. A. I will put just a little 'l' there, so that you will know where I am going.

"Q. Now, put a 'P. K.' here. A. (Referring).

"Q. How long, to the best of your knowledge, have people in considerable numbers, and from day to day, been going over a path like that, as you have laid it out generally on this map, between the two arrow marks at the top and bottom of the map? How long, to your knowledge, have people in numbers and frequently gone through there? A. Well, as far back as I can remember it has been there; been there—because there were ball grounds right through Eighth Street to Tenth Street, and they would shoot across that into Tenth Street or Ninth Street; one or two grounds right—probably on Eighth and Ninth Street. There were no houses then. I was only a little bit of a tot then—that is a good many years ago. That is as far as I remember.

"Q. Were the streets all laid out as they are at present, Sixth and Seventh Street? A. Sixth and Seventh Street; well, they were mostly laid out, yes, sir.

"Q. You say people used that path then to go to the ball games? A. Yes.

"Q. Did they use them for any other purposes besides going to the ball games? A. Oh, yes; they used it as—really used it as a big path then.

"Q. At all times? A. At all times, as far as I know.

"Q. You said you were thirty-one years old? A. I said I would be thirty-one on the 5th of January.

"Q. This coming January? A. Yes.

"Q. How long ago can you remember, how far back? A. Well, it all depends on the nature of the affair. Some things I can remember twenty-five years, twenty-seven years; other things I forget in two years; all depends on what the incident may be.

"Q. I want you to use your memory now

as carefully as you can, and look back in the past, and tell how far back you can remember ever being in this neighborhood of Passaic Street and Seventh Street. How far back can you remember as a boy that you were in that neighborhood or walked through there, or saw what was going on there? A. Well, every bit of twenty years; twenty-one years ago, possibly a year more than that.

10 "Q. Now, referring to the period which you can remember as much as twenty or twenty-one years, or possibly a year longer ago than that, did the condition that you have just described as to the path between these arrow marks exist at that time? A. At that time they did.

"Q. Have they or have they not continued in the same manner that you have described as to the existence of a path and the use of it by people at all time from that time down to the present time? A. They did up to the time they put up structures.

20 "Q. Then what happened? A. Then after that they could not go through there whether they wanted to or not, because of the houses and coal yard and the like of that; could not go through there no how.

"Q. As to the part of the path that crosses this freight yard, and that has not been obstructed by houses, did that continue to be used, or did it not continue to be used? A. You mean the part—

30 "Q. I meant the part of that old path that went down to Eighth Street; that part that went across where Dundee freight yard now is, where your coal yard used to be, did the part of that path across the freight yard continue to be used by the people or not? A. Very frequently I find them running across, yes.

40 "Q. Have they ever, in the last twenty or twenty-one, twenty-two years, stopped using that path across the freight yard? A. Well, when I wasn't there to see it, I could not say, but when I was in that neighborhood somebody ran across, yes; been using that right along.

"Q. Did you ever see crowds of people use it?

A. Prior to the buildings being here, yes.

"Q. Well, did you last August see crowds of people using that path? A. Well, I have been in the yard pretty often; I did not watch that part, but I have seen people, when the cars were not there, run across it and shoot up Seventh Street to their mills.

"Q. Single people or groups of people? A. Some days you find a crowd, and other days maybe you find a few.

"Q. In the last twenty-odd years that you have been around there has that path across the freight yard, or where the freight yard now is, has it ever been obstructed in any way? Has the use of that ever been cut off? A. No, not as far as I know. You mean in regard to signal or sign or something to that effect?

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"Q. Has there ever been any sign up there not to use it? A. Not to my knowledge. If it was, it was not conspicuous.

"Q. If there were any signs, you would see it? A. Positively would.

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"Q. What is that? A. I positively would have seen it, if it were there.

"Q. And you have not seen it? A. I have not seen it.

"Q. Have you ever known of any people being ordered off of the crossing there? A. Never, when I have been in that neighborhood. When I wasn't there, I don't know—

"Q. That is what I mean? A. (Continuing) What has been going on. While I was present there was no orders given to anybody to stay away from there.

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"Q. Do you go through the neighborhood frequently? A. I go up through there, run across that myself a good many times; often do.

"Q. Have you been there so often that you are familiar with the neighborhood and have been familiar with the neighborhood or not? A. Well, in the last three years I have been quite familiar with the neighborhood; been down more often in the last three years than a good many years before that.

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“Q. Before that you were sufficiently familiar with the neighborhood to be familiar with it? A. Oh, yes, surely.

“Q. Does that apply to the period of twenty or more years? A. To about twenty years. When I was ten or eleven years old I was running around to football games and the like of that in that neighborhood, like a mere boy, ran to see them every day, if they occurred that often.” (Case, pp. 65-70).

10 Under cross-examination, the witness Kaplan said, at page 76, as follows:

“Q. How long have you worked in connection with the coal business there that now goes under the name of Kaplan’s Coal Yard? A. Well, I said for the past three years, but I ran—

“Q. You have been working steadily for the past three years? A. Yes.

20 “Q. Where did you work before that? A. Well, I was in the Post Office in the City of Passaic for about eight and one-half years, nine years. I did work about fifteen years ago right where our coal yard stands to-day, in the back of that there was a mill called the David & Carroll Mill. There was nothing from David & Carroll’s mill right back of the coal yard; that is, that particular block between there and McLaughlin’s mill that I remember; I won’t say for sure. I don’t remember anything being there.

30 “Q. You said you could not tell about this path, as to your using the path, except off and on; there was a time a couple of years or so ago when you did not know about that; what time did you refer to? A. Well, that was a time I did not go down there so often; I would stay away for a month, and go back for a few weeks, on and off.

And at pages 78 and 79 of the Case:

40 “Q. Can you recall any particular occasion when you were there, twelve years ago, any particular occasion other than this general statement you have given to us? A. I worked down there—

"Q. I don't mean any particular occasion, but any particular reason for going down there? A. No; got friends down there in the neighborhood.

"Q. To call on some friends down there, you mean? A. Called on some friends down there. In those days there were still the Tenth Street lots vacant; they had football games and baseball games going on; big play grounds, had not built up, and there was a good bit of it still there, wasn't built upon, lots all around not built on. 10

"Q. This path that you have referred to, which started up here near Sixth Street, and of course when the railroad tracks were built, that new freight house, and of course that cut off the path, as far as that part of it is concerned, didn't it? A. Well, it would—

"Q. Did it or didn't it cut it off, if you know? A. I will answer to the best of my knowledge.

"Q. Well, did it or didn't it? A. I could not swear that it did. 20

"Q. Did that path go right through the spot where the railroad tracks are now located near the freight house? A. The railroad tracks come along the side; does not necessarily cut off the passage.

"Q. That is not what I am asking you? Did it or didn't it, or don't you know? A. It does not even to this day.

"Q. Do you mean to say, that people to this day go over Sixth Street, across those railroad tracks near the freight house? A. Positively, if not obstructed by the cars." 30

And at page 82:

"Q. Is it not a fact that people who walk across this freight yard go through it in all directions? A. No; I noticed them taking the same course all the time.

"Q. They stick to that path, that is a favorite walk? A. It seems to be, yes; seems to have been that way.

"Q. How about these people that go to factories around the noon hour, do they all leave that path, or stick to it so close, or go around 40

in all directions? A. It all depends. If one wanted to go to his home he would take that path and follow it (indicating); if he went across here (indicating), he would cross there, take the nearest path to his home.

“Q. Don’t you know that those men who work in the factories around here, scatter themselves all over that freight yard on their way to and from their work? A. I do not.”

10 Three of plaintiff’s witnesses testify that they use the path in question themselves. See testimony of the witness Gangler, (p. 20, line 5), Kaplan (top of p. 69) and Rupin (p. 103).

Its width is described by Gangler as being sufficient for 3 persons to walk abreast (p. 20, line 28); Kaplan at page 70, says possibly 3 feet, enough for a few persons to pass abreast; Trauinski (p. 96, line 30) says about 3 feet; Rupin says 4 or 5 feet (page 103, line 28) and 3, 4 or 5 feet at page 106.

20 The use of this path is never cut off. Kaplan, middle of page 79; Gangler, (p. 20, top); nor its use by the people ever interfered with or denied. Froast pp. 59-60; Kaplan, foot of p. 68; Trauinski, p. 96; Langfeld, p. 111.

30 The path is trodden or beaten down by the passage of many feet. Gangler, p. 19; Kaplan, pp. 70, 90; defendant’s witness Bell, at page 143; Rupin, p. 103. Kaplan refers to it as “the old landmark, the old path” at p. 82 and Langfeld speaks of it as the crossing place,” p. 111, line 33.

This path, the existence of which is so firmly established by the proofs, crosses defendant’s main Dundee spur at the precise place where the little Drelich boy was injured by the moving freight car. Gangler says, at the top of p. 23, that the accident occurred at the point where this path crossed the Dundee spur track; Kaplan locates this place at page 64; Trauinski says that he found the injured
40 little boy nearly on the path and that there was

blood at the same place on the path (p. 97) and Rupin also says that he found the injured lad where this path crossed the track (p. 103). The last named found blood on the spot where the boy lay, and the car was still moving away from that spot (pp. 101, 102 and 108). Gangler testifies to the fact that there was blood on the track at this point (p. 25) and that the injured baby was bleeding and his foot had been cut off (p. 24).

Even the testimony of defendant's witness, the surveyor Kelleher, is convincing of the fact that this path exists (pp. 122-124) where he acknowledges that parts of the yard were covered with weeds and parts beaten down with dirt and screenings, the latter being particularly so near the line of 7th street, where the accident occurred (p. 127 lines 20 et seq). These peculiarities and contrasts upon the surface of the ground, he failed to bring out on his map, except where it pleased him to indicate supposed driveways by dotted lines (pp. 115, 116; as contrasted with p. 122, line 20 et seq.). This interested and partisan witness, while admitting (p. 119), that the ground bore evidence of "travel in through there," omitted to bring out these evidences, while showing remote driveways which apparently had no bearing on the issues, and imaginary street lines, which he thought essential to defendant's case.

A prescriptive right in the path in question, existing for upwards of 21 years, was shown to exist in favor of public by an overwhelming array of evidence, sufficient, in fact, to sustain the burden of proof. *A fortiori*, it is of ample weight to present a question for the jury.

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The path in question was in existence and in general use before the freight yard or station was installed. The proofs established uninterrupted uses for more than 21 years; hence, immemorial use is conclusively presumed, and can only be rebutted by evidence that the way did not exist for the full period of 20 years. Moreover, many of the cases are to the effect that less than 20 years use may be relied upon to establish a lawful way in favor of the public, as is the case at bar. It follows from this presumption of law of an immemorial user that when the defendant company took title to the land, which now forms the subservient tenement, it took it subject to an already established immemorial use. In this view, the question as to whether an easement by prescription can be acquired over railroad lands, if indeed there were any force in such a contention, is seen to have no applicability, since the defendant-respondent never in fact took title to anything more than a tenement subservient to this very right of the public, which in the nature of things, must have existed immemorially. Any measurable period of time is necessarily inferior to the infinitude which the term "immemorial" imputes.

It is an undisputed fact that the premises in question, while apparently railroad property, although it may be observed, *en passant*, that the deeds in evidence conveying the land generally occupied by the freight yard to the defendant company, are subject to an expressed exception of the strip upon which the main track is built, including the place where the accident occurred, yet do not in any sense comprise a line of railroad or main stem.

Certain sporadic cases, therefore, which hold that a prescriptive right may not be acquired across a line of railroad, fail of application to the peculiar facts of this case, which seem to come

rather within the rule laid down in *Dickinson v. D. L. & W. RR.*, 87 N. J., Law, p. 264; 93 Atl., 703, where a prescriptive right in railroad lands was recognized and enforced.

In the case above cited it was held that

“A public way by prescription may be acquired in a road upon a railroad’s land, not a part of its right of way, but connecting two public streets, and may be established by proof of a continuous public user for more than 20 years, acquiesced in by it without any act showing that it was not its intention to subject its fee to the public use. 10

“In such a case, the mere fact that the railroad used the road in approaching its freight house and passenger station was not sufficient to repel the presumption of dedication arising from a continuous public user for 20 years.

“In such a case, mere denials of the right or prohibitions of user, unaccompanied by any act which would amount to a disturbance of the public right, was ineffectual to destroy the right.” 20

Dickinson v. D. L. & W. RR. (supra.)

The cases which might be cited with some apparent weight against appellant’s position in favor of such a prescriptive right generally rest upon one of two fallacies, viz; (1) That prescription presupposes a prior grant (or dedication) and that a railroad company, being the holder of lands (often taken under eminent domain) for public use, has no power to make such a grant, which will therefore be deemed to be *ultra vires*; and (2) that the user of a way across a railroad in operation cannot be continuous, adverse nor acquiesced in, since the person or the public making use thereof must at his peril recognize and avoid the dominant potentialities of passing trains. 30

Considering the second of these sophistries first, it may be said that this reason might with equal force be urged to defeat the establishment of 40

a right of way otherwise unassailable, across one's neighbor's back yard, if the person claiming the right had on occasion deflected a little from his course to avoid the family wash, or the activities of the chore-man shoveling snow.

The other theory deserves and has received more serious consideration, both in and out of court. A distinction must here be made between the establishment of a public right and a private or personal right or one appurtenant to land. The case at bar concerns only the question as to whether a public right of way analogous to a highway, may be created in this manner. Common experience indicates that highways and by-ways, or crossings of various sorts do spring up and exist over railroad lands, main trunk lines as well as lands held by railroads for private or at best only quasi-public purposes, and their legality and use are seldom and then not successfully denied. The origin of many of the less prominent public and private railroad crossings in this state is lost in the obscurity of the remote past, yet without in any way detracting from their validity or usefulness. Equally so is the origin of the "*favorite path*," (p. 94) "*the old course*," (p. 83) "*the old landmark, the old path*," (p. 82) "*the crossing place*," (p. 111) in question in this cause, lost in the mists of the past, and equally truly is it in constant, popular and unrestricted use now, as at all times within the memories of the several witnesses who have largely in their own words told of it the very things which the law says are the tests and earmarks of a public highway.

Even if railroad property be deemed, in this connection, to be public property, yet a distinctively *public right* in it may be acquired by prescription. The power of a railroad corporation to *dedicate* an easement for a highway crossing over its tracks has never been successfully, perhaps never seriously questioned in this state.

The power to *dedicate* implies the power to *grant* the same sort of rights as might be the subject of a dedication.

The power to *grant* is a sufficient foundation on which to predicate the presumption of that *immemorial grant* which is the necessary and sufficient basis of all easements, whether public or private.

Indeed, our own courts have spoken with no uncertain emphasis on this subject, with such effect as to resolve all doubt, upon the main underlying points at issue. 10

N. Y. & L. B. RR. v. Drummond, 46
N. J., L. 644. Court of Errors and
Appeals. Opinion per Knapp, J.:

“The right of railroads and common highways to cross each other exists from necessity, and is indisputably established.

“*M. & E. RR. v. C. RR.*, 2 Vroom 205. 20

“And the claim cannot be yielded to that every unimportant erection on the roadway of a railroad, because useful or convenient to the company, shall suffice to bar off the important right of the people * * * to multiply and extend their common highways as necessity or public convenience may require.”

N. Y. & L. B. RR. v. Drummond, 45 N. J.
L., 511: Opinion per Dixon, J.:

“No act of the company evincing a purpose to dedicate its road-bed to use as a highway is shown, except the laying of planks between the tracks to facilitate crossing, and this act indicates a dedication to no further than the planks extend. * * * If we turn to look for the use of the road by the public or for the action of the public authorities of the borough, no other conclusion than that already indicated can be reached. It does not appear that any right of crossing has been exercised outside of the planking.” 30

Tarlucki v. West Jersey & S. S. R. Co., 40
86 N. J. L., 301, 90 Atl., 1117.

Opinion by Minturn, J.:

"The plaintiff was injured on the railroad of the defendant between the upper and lower stations at May's Landing, by coming in contact with an electrified from one side of the railroad to the other. The accident happened on or about the 23d day of May, 1908, at which time the plaintiff was about eight years old.

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"The plaintiff's theory of the liability of the defendant for the injury rests upon the proposition that at the place where the plaintiff tripped and fell over the electrified third rail there was an 'ancient byroad,' and that it was the duty of the railroad company, therefore, to so protect its third rail at the crossing that persons using such crossing could do so in safety, and that the defendant had neglected this duty by leaving the electrified third rail exposed.

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"The theory of the defense was that there was no byroad or byway or public crossing of any character crossing the railroad at or near the point where the accident took place; that the plaintiff was a trespasser, and the defendant owed him no greater duty than to refrain from willful injury; that the accident did not happen on the alleged crossing; and that the plaintiff was guilty of contributory negligence. The trial judge directed a verdict in favor of the defendant, from which judgment the plaintiff appeals.

30

"(1) The only question presented upon this record is whether, under the testimony, a jury case was presented, or whether the court's direction of a verdict for the defendant was proper. The case was before the Supreme Court on demurrer to the plaintiff's declaration, where the case presented was that of a manifest trespass by the plaintiff, and the demurrer was sustained. 80 N. J. Law, 688, 78 Atl., 149. Subsequently the amended declaration upon which the present action was tried was sustained by the same court. 82 N. J. Law, 138, 81 Atl. 495.

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"The doctrine enunciated in the latter case presented the principle and the theory upon which the case was tried. It was there declared that the averment in the declaration that the word 'byway,' in the declaration, must be taken to be the equivalent of a 'byroad,' and that, a byroad 'being a public way of which the public are entitled to make use as of right, a railroad company where its tracks cross it is under a duty not to subject the traveling public to latent dangers at such crossing.'

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"The only question for our consideration, therefore, is whether there was any evidence adduced at the trial from which the jury could legitimately infer that the road in question was what the declaration alleged it to be; and whether the learned trial court was correct under the circumstances, in directing a verdict. We think there was evidence pro and con upon the character and legal status of the road, whether under adverse enjoyment or under an easement, based upon a license from the owner of the fee, from which the jury might infer that the road had been in existence for over 60 or 70 years, and that it had been used as such by the public for various purposes upon either legal theory.

20

"Its boundaries were more or less accurately defined, and its history and use through that period of time were presented by witnesses of the vicinity, the value of whose testimony presented a fact question, which called for the consideration of a jury. *Van Blarcom v. Frike*, 29 N. J. Law, 516; *Wood v. Hurd*, 34 N. J. Law, 87; *Riverside v. Penn. R. R.* 74 N. J. Law, 476, 66 Atl., 433.

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"(2) The learned trial court assigned no reason for the direction of the verdict, and we are free to assume, therefore, that it was based upon the theory either that the road in question was private property, upon which the plaintiff was trespassing, or that, if it were deemed to be a public way, the plaintiff nevertheless, by his conduct, was guilty

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of contributory negligence, in attempting to cross the defendant's right of way over it, in the manner in which he attempted it. If the latter alternate presented the rationale for the direction, that also became a jury question under the debatable facts in the case, particularly in view of the immature age of the plaintiff. *Napodensky v. W. J. & S. Ry. Co.*, 88 Atl., 1033; *Munroe v. Pennsylvania R. R.*, 90 Atl., 254.

10 "Viewed from either aspect, the question was one of fact for the jury to determine.

"The judgment will be reversed, and a venire de novo may issue."

Tarlucki v. West Jersey &c. R. R., 86 N. J. Law, 301; 90 Atl., 1117.

20 The case of *Tarlucki v. West Jersey & S. S. R. Co.*, (supra) was before the Supreme Court upon demurrer to the declaration several years before the questions growing out of the trial of this action formed the subject for the decision of the Court of Errors and Appeals above quoted, and it is evident from the most casual comparison of the two opinions that the defects found to exist in the declaration at the earlier date were remedied by amendment before the trial. In this connection, it is held, per Minturn, J.; as follows:

30 "It is not alleged that the footway which the plaintiff was following upon defendant's right of way was generally used by the public as a public way, or that the defendant expressly or impliedly held out any invitation to the public to use it as such, and we are therefore constrained to construe the inference arising from the existence of this footway on the right of way most strongly against the pleader, and to assume that it was a private way maintained by the railroad upon its own property for the use of its employe's, who are presumed to be cognizant of the danger incident to its use.

40

"If the accident happend while the plaintiff was in the act of crossing tracks from one side of the transverse byroad or public way to the other without deviating from his path to enter upon the defendant's private property, an element of legal duty and tortfeasance might thereby be presented which the allegations of the declaration now before us do not require us to consider for the determination of this case. Such a question cannot arise here in the absence of an allegation presenting the right of the plaintiff as one of the travelling public to use the right of way diagonally to reach the intersecting public way; or presenting facts from which an invitation of the defendant, express or implied, might be legally inferred to make such a use of its roadbed. We consider, therefore, that the defendant is entitled to judgment on the demurrer." *Tarlucki v. West Jersey &c. R. R.*, 80 N. J. L., 688; 78, Atl., 149.

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This case was again before the Supreme Court on demurrer to the declaration (*Tarlucki v. West Jersey & S. R. R.*, 82 N. J. L., 138; 81 Atl., 495) and from the opinion of the unanimous court, per Voorhees, J., may be quoted:

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"(1) There is an allegation that the plaintiff walked along the ancient byway upon and over said roadbed, and, coming in contact with this rail, he was injured by the current. A byroad is recognized by the road act. Section 113, 3 Gen. Stat. p. 2827, and also by Section 154, 3 Gen. Stat. p. 2836. If obstructed, it may be opened by the freeholders, and its course and location altered and changed. It has no statutory origina. It is an obscure road, but is so far a public road that the public have of right free access to it at all times. *Wood v. Hurd*, 34 N. J. L., 87. See, also *Perrine v. Farr*, 22 N. J. L., 356; *Stevens v. Allen*, 29 N. J. L., 68; *Allen v. Stevens*, 29 N. J. L., 509; *Yeomans v. Ridgewood*, 46 N. J. L., 508.

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10 "The demurrer admits that the road was an 'ancient byway.' The term 'byway' must be taken to be the equivalent of 'byroad,' which is a public way that the plaintiff had a right to use. This seems inferentially to have been the view of this court when the case was here on a former occasion. *Tarlucki v. West Jersey & S. R. R.* 78 Atl., 149, for the learned justice who wrote the opinion says: 'If the accident happened while the plaintiff was in the act of crossing the tracks from one side of the transverse byroad or public way to the other * * * an element of legal duty might thereby be presented.' There is added force to be given to the expression by the qualifying adjective ancient, for from it, in connection with the admission arising from the demurrer, there is a presumption that the way originated in a dedication, and so has existed for more than 20 years, sufficient to establish the public right. *Wood v. Hurd*, supra.

20 "(2) Being, therefore, a public way, no invitation by the railroad company to use it was necessary to be proved, for the public were entitled to make use of it as of right, and the railroad company was under a duty not to subject the traveling public so using the public way to latent dangers."

30 The case of *Penn. R. R. Co. v. Hulse*, post, is cited to show that the question at issue in that case, whether a prescriptive right over a railroad main line could exist, was not decided, and that the determination was upon a different point entirely, and because the implication deducible therefrom is wholly in appellant's favor.

Penn. Railroad Co. v. Hulse, 59 N. J. L., 54. Unanimous opinion of the Supreme Court by Garrison, J.: "This is an action for damages for obstructing a private way."

40 * * * The plaintiff put her case upon a grant from the railroad and was permitted to prove an oral license or consent given to her

predecessor in title at the time the railroad was built * * * Notwithstanding the permissive origin and continuance of the plaintiff's use of the way, the case went to the jury as one where a hostile user had ripened into an adverse right. For this, if for no other reason, the cause must be retried.

“The case appears also to touch a question of general importance which, however, is not now here in such form that it can be dealt with. It is this: The right of way of a railroad company is a public highway in the possession of a corporation to enable it to perform a public duty. Whether such an agent may grant a dominant easement in such lands is the question to which reference has been made. The case now before us is disposed of, however, upon the ground before mentioned, and upon the further ground that the amount of damages given by the jury, to wit, \$5,000, indicates an entire misapprehension of the nature of the issue before them.

“There must be a retrial of the case.”

This decision is a virtual vindication of appellant's position that a jury question exists; else why should a new trial have been ordered?

Where defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use and where they suppose they will be safe, the liability is coextensive with the implied invitation. 29 Cyc. 451.

Walsh v. Fitchburg R. R., 145 N. Y., 301;

Holmes v. Drew, 151 Mass., 578; 25 N. E., 22;

Sweeny v. Old Colony R. R., 10 Allen (Mass.), 368;

Barry v. N. Y. C. & C. R. R., 92 N. Y., 289.

An owner or occupant of land, who induces persons to come on his premises by invitation, express or implied, owes to them the duty of using reasonable or ordinary care to keep the premises in a safe and suitable condition.

Smith v. Jackson, 70 N. J. L., 183;

Furey v. N. Y. C. & H. R., 67 N. J. L., 270;

10 *Sebeck v. Plattdeutsche &c.* 64 N. J. L., 624.

Invitation will not be assumed from mere failure to drive people off, but where the use has so long continued as to lead the public to think that the owner invited such use, a liability has been held to arise as upon an implied invitation.

Morrow v. Sweeney 10 Ind. App., 626; 38 N. E., 187;

20 *State, ex rel. Central Railroad v. Bayonne*, 52 N. J. L., 503.

Held: A railroad corporation may dedicate to public use a highway across lands owned by it and used for its railroad track.

Conveyances by a railroad corporation of lands bounding on a street laid out across its track will effect such a dedication.

MAGIE, J.:

30 "Let us consider the contention of prosecutor, that a railroad company cannot dedicate to public use as a highway lands already devoted to a public use as a railroad.

40 "A right to cross an existing railroad may be taken by condemnation for the use of another railroad, or for the use of the public as a highway. *M. & E. R. R. v. Central R. R.*, 2 Vroom 205; *N. Y. & L. B. R. R. v. Drummond*, 16 Id., 511; S. C. 17 Id., 644; *In re M. & E. R. R.* 9 N. J. L. J., 75. The right which may thus be wrested from the railroad company, it would seem absurd to

contend, could not be granted by it. And if capable of being granted, it surely may arise by dedication inferred from other acts of the company. In *Meredith v. Sayre*, 5 Stew. Eq., 557, Chancellor Runyon declared that a deed for lands described as bounding on a specified street, made by one who held title for a railroad company, would be a dedication of lands held by them within the line of the street. In *N. Y. & L. B. R. R. v. Drummond* ubi supra, it was held in this court that by the acceptance by a railroad company of a deed for lands described as lying upon a designated avenue, the public right to have the avenue became paramount to the right of the company. Trustees holding lands for public uses, and corporations having public duties, may dedicate to public use for highways, when such use is not inconsistent with the purposes for which the lands were vested in trustees, or incompatible with the duties required *Rex v. Leake*, 5 Barn. & A., 469; *Surrey Canal v. Hall*, 1 Man. & G., 392. 10 20

"I can perceive no reason why a railroad company cannot grant or dedicate to the public a public way over their railroad tracks. The public use is not inconsistent with the railroad use. Both may and do co-exist at innumerable crossings. I have not been able to discover that the precise question here presented has been dealt with elsewhere, except in Connecticut. There it is held that such corporations have the same right to dedicate their lands to public use as any other proprietors, unless it is contrary to the provisions of their charter, or amounts to a breach of duty to their stockholders. *Green v. Canaan*, 29 Conn., 157; *William v. N. Y. & N. H. R. R.*, 39 Id., 509." 30

A right of way across railroad tracks may be acquired by prescription.

Hardy v. Alabama R. R., 73 Miss., 719;
19 So., 661;
Plitt v. Cox, 43 Pa. St., 486. 40

The validity of the user is not affected by occasional deviations to avoid obstructions.

Cheney v. O'Brien, 69 Cal., 199; 10 Pac., 479;

Everidge v. Alexander, 75 Ga., 858;

Bubbenzer v. P. B. & W. Co., (Delaware) 57 Atl., 242;

Easley v. Mis. P. R. Co., 113 Mo., 236; 20 S. W., 1073;

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Guthrie v. C. P. R. Co., 27 Ont. App. Rep., 64;

Fitchburg R. Co. v. Page, 131 Mass., 391;

Turner v. Fitchburg R. Co., 145 Mass., 433; 14 N. E., 627;

Talbot v. Thorn, 91 Ky., 417; 16 S. W., 88;

Kurtz v. Hoke, 172 Pa. St., 165; 33 Atl., 549.

20

The right must be exercised substantially in the same direction; that is, user in one direction may not be pieced onto an entirely different user to make up the necessary time in the aggregate.

Peters v. Little, 95 Ga., 151; 22 S. E., 44.

See

Furey v. N. Y. C. & H. R. R. Co., 67 N. J. L., 270,

30 as to implied invitation.

It would seem that, under the rule laid down in *Tarlucki v. West Jersey &c. R. R.*, 86 N. J. L., 301, (supra) whatever probative effect might be given to plaintiff's evidence as to the ancient origin, continued and unrestricted user and actual present existence of the by-way or passage in question, a sufficient case has been presented, on the face of that testimony, for presentation to the jury. A verdict, finding upon these facts

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in evidence in plaintiff's favor, could not have been disturbed.

The fact, if it be a fact, that people crossed the freight yard at other places, besides this beaten path does not in any wise militate against it as an established way. The proof as to this path is positive and plenary. That other paths exist is de hors the issues of this case. If, by reason of the passing of many people at once, the path took on an extraordinary width, that circumstance would not render it any less a lawful by-way or path. As well might it be said that a brook ceased to be a watercourse in time of freshet, because the waters overflowed its banks. 10

It is submitted that it is in evidence that this path had a definite course and was beaten down by the long continued tread of many feet. What other feet did at other places need not concern us. 20

II.

The case should have been submitted to the jury on plaintiff's evidence of dedication.

Dedication may be effected by acts in pais, and need not be long enough continued to give rise to a prescription. 30

Ward v. Davis, 3 Sand., 502.

A railroad corporation may dedicate lands for public use in New Jersey.

State, C. R. R. of N. J., Pros. v. Bayonne, 52 N. J. L., 503.

The map of the freight yard, Exhibit D-2, a blue-print copy of which is annexed to the printed 40

Statement of the Case, shows clearly the place of the accident and its surroundings. It will be observed by reference to that map that the place of the accident, indicated by the witness Gauglar by an X-mark in the main Dundee spur track is located just above the supposed street line of Seventh street, at the lower part of the map.

10 This point is definitely located by the testimony of the witness Gauglar, who states at page 19 of the Case, that there is a long track which curves across the freight yard from one corner to the other and there is another track or siding alongside of it. The track upon which the accident happened, the same track upon which the witness Gauglar placed both the X-mark (indicating the place of the accident) and the small circle, indicating the point where the engine stood, (see pp. 30 and 31) to both which marks he attached his signature while on the stand, is
20 the only track in the whole neighborhood which answers the description at page 19 of the record.

Again, at p. 22, Gauglar says that he saw the car which caused the accident, which was then "On that track that leads up around to the freight house; goes off to a circle; that is all I could tell you;" and in answer to the question "Q. It is built on a curve?" he answered "A. Yes, sir."
30

He continues at pp. 22 and 23 as follows:

"Q. Is that one of the tracks I described a while ago as leading from the corner of South Street and Sixth street diagonally across the freight yard to Passaic Street?
A. That is the street, yes, sir.

"Q. Was it or was it not at the point where this pathway which you have described, crosses this freight yard and goes across the track? A. Goes across the track.

40 "Q. Was that the place where the accident happened? A. Yes, sir."

The witness Gauglar also testifies, at page 21, that at the time of the accident he was on Passaic street "right in the center of that main track where it happened" and (on the same page) that he was distant at that time from the child and consequently from the place of the accident: "It must be about—*maybe eighty to one hundred feet* from the platform," referring to the highway planking on which he stood.

He says further, at page 24, that when his attention was attracted to the scene of the accident by the screaming he went over and picked up the child from the track (page 24, line 10); that he heard him holler and the car was about to stop and that he saw the child right alongside the track and picked him up; and, at page 25, he says that he found the child lying alongside the track and picked him up; that on the track, "right there at the same place" there was a little blood; that the front end of the car was toward the witness and that the car was still moving. He says further that when the car stopped its front end was about 5 or 6 feet beyond the point where the injured boy lay (bottom page 25).

He says again, at p. 28, that the car was about *eighty feet from the place where the witness stood on the crossing of Passaic street* and that the engine was about one hundred yards away. He then proceeds, at p. 31, to indicate the location of the accident with an X-mark and the location of the engine with a small circle, authenticating both marks by his signatures, and placing them directly upon the main Dundee spur.

At page 35 he says that the boy lay with his leg across to the rail of this track and about six feet distant from the front end of the car.

This witness further definitely locates the place of the accident at pp. 35 and 36 of the record when he testifies as follows:

"Q. Was his foot in between the rails when you got there? A. The foot?

"Q. Yes. A. I don't know; his foot was cut off, but the leg was up against the track. I did not take that much notice until I got back and found it somewhere there.

10 "Q. At any rate, the body of the boy, or a part of his body, when you got there— A. Was on the outside of the track.

"Q. And very close to the rail? A. Yes, sir.

"Q. How close? Right against the rail? A. Flat up right against the rail.

"Q. Was the car entirely clear of his body, or was it— A. About that far away from the wheel (indicating).

20 "Q. About four or five feet away from the wheel? A. About six feet away from the end of the car; about two feet away from the wheel anyway that went over him.

"Q. Could you tell which wheel it was that had crushed the foot? A. Sure; the front wheel; that was coming down this way.

"Q. The front wheel? A. Yes, sir; on the right-hand side.

"Q. By the front wheel, you mean the wheel that was nearer Passaic Street? A. Yes, sir; on the right-hand side.

"THE COURT: When you speak of the right-hand side, which do you mean?

30 "Q. Which do you mean by the right-hand side? A. Coming towards Passaic Street; coming down this way.

"Q. That would be the side towards— A. On the right-hand side.

"Q. That would be the right-hand side of the car in the direction in which the car was moving? A. The cars came down this way; this here wheel on this side (indicating).

40 "Q. The right-hand side of the car as it moved towards Passaic Street? A. Yes, sir.

"MR. WINANS: Will you stipulate that by indicating the side nearest to 7th Street?

"MR. HOBART: Yes, that is correct. That is what you mean?

"THE WITNESS: Yes."

It is clear from the testimony of this witness above quoted that the place where this little boy was struck was almost on the line indicated on the map by the witness Kelleher, defendant's surveyor, as the supposed boundary line between the public highway known as Seventh street and the land in the freight yard, title to which appears to be in the defendant. 10

Applying the scale of 20 feet to 1 inch to which this map is drawn, it is found that a distance of 80 feet (or 4 inches on the map), from the point on the sidewalk of Passaic Street where this main spur track crosses the sidewalk, would place the scene of the injury about 10 feet nearer to Passaic Street than the point marked by the witness; certainly an indication of integrity, careful observation and sound judgment on the part of the witness. From his testimony above it is also indicated that the accident happened upon the rail of that track nearest to Seventh Street. See concession of counsel above quoted and appearing at page 36, lines 22-24. 20

The distance from the line of Seventh street, as indicated by the witness Kelleher to the nearer rail of the Dundee spur track at the place where the boy was struck, measured at a distance of 80 feet from where the witness Gaugler stood on the Passaic Street sidewalk (which point, as noted above, is 10 feet north of and nearer to Passaic Street than the X-mark) is only three-sixteenths of an inch on the map, which according to the scale of 20 feet to 1 inch is only 3 feet, 9 inches. 30 40

It must therefore be taken as the law of this case, since it is nowhere denied, but rather borne out by the testimony of the surveyor Kelleher, that the accident happened *less than 4 feet from what the defendant concedes to be highway property.*

10 There is ample corroboration for this, since the location of the path, as indicated by the testimony of Philip Kaplan and the other witnesses is at or immediately north (toward the right hand side on the map) of the place indicated by the X-mark. This will be seen clearly by drawing a line upon the map from Mr. Kaplan's initials "P. K." and the cross and arrow mark placed by him at the foot of the map, to a point in the sidewalk of Passaic street, immediately adjoining the railroad platforms and sidings adjacent to the freight station.

20 Mr. Kaplan's testimony was that the original path ran from the corner of Sixth and Passaic streets to the point indicated by him at the foot of the map, that there is no such thing as a straight path but that this path was slightly zigzag, and that when the freight platforms were built people were obliged to deflect slightly.

In answer to the direct question at the foot of page 20, he testified as follows:

30 "Q. Have you seen them climb over the platform? A. I haven't.

"Q. Now, they have to go in from Passaic Street, is that right? A. About fifty or sixty feet I believe, from Passaic Street."

Kaplan testifies also in many places that this path crossed the main Dundee spur track and its position as indicated by his testimony above would be just where the testimony would be just where the testimony of George Gauglar
40 places it, that is about 10 feet nearer to Passaic

street than the X-mark and between 3 and 4 feet from the supposed line of Seventh Street.

This definite location of the place of the accident is it important in connection with what will be said in connection with the case of *Black v. Central Railroad Company of New Jersey*, and the discussion of the subject of Estoppel under Point III.

The freight yard, so called, comprises the entire block of ground, included between Passaic and South Streets on the north and south respectively and Sixth and Seventh Streets which from the longer sides of the rectangle. The map, Exhibit D-2 in evidence, shows the situation and surroundings of this freight yard sufficiently. Four lines forming a regular rectangle have been drawn about this space by the Surveyor Kelleher who prepared and testified concerning the map, and on Passaic Street, South Street and Sixth Street broken lines have been placed indicating the sidewalk spaces adjacent to the freight yard on those streets. No such sidewalk space is indicated in or along Seventh Street and it is in evidence by a number of witnesses that no sidewalk exists at that place.

Gaugler testifies, at page 18, at follows:

“Q. Are there any sidewalks on Seventh Street? A. No sidewalks. There are wagons, and people all go over there.”

“Q. All mixed together? A. Yes, sir.”

Philip Kaplan, the coal-yard man, testifies at page 75 as follows:

“Q. Is there any sidewalk on either side of 7th street between South street and Passaic street? A. Between 7th and Passaic?”

“Q. Is there any sidewalk—A. Not at all. Just a path, like a street; that is what it is.”

And at pages 71 and 72 the same witness testifies as follows:

10 "Q. I want to ask you about 7th Street. Is 7th Street, where it runs between Passaic Street and South Street along by the freight yard, is that blocked up at all with tracks and switches? A. 7th Street is—of course, I don't know whether they surveyed the land as the freight yard itself, the additional few streets there—if they have that on 7th Street but I know that—7th Street has the main track that runs through, and then there is—I don't know whether they call it 7th Street; I don't know how much the side line takes of 7th Street.

"Q. I am referring to the strip—

"THE COURT: Is 7th Street a laid out street?

"THE WITNESS: 7th Street is a laid out street, yes sir.

20 "THE COURT: On the ground is it laid out?

"THE WITNESS: Yes, laid out.

"THE COURT: How wide is it?

"THE WITNESS: That is just the question. To my knowledge—

"THE COURT: How wide is it? Haven't you any idea? You say you are right there?

30 "THE WITNESS: Yes, to my knowledge 7th Street itself is—here is what I would call 7th Street; there are a few more tracks through there; I do not know, whether the City calls—

"THE COURT: What do call 7th Street? How wide is it?

"THE WITNESS: I would call 7th Street about—I guess it runs at some parts wider than others; I mean where the yard comes in and takes part of the—

"THE COURT: Is that what they call the yard on 7th Street?

40 "THE WITNESS: The yard is on 7th Street and Passaic.

"THE COURT: Out in the street?"

"THE WITNESS: Well, it is up to the City line.

"THE COURT: How wide is the street? You say it is there?"

"THE WITNESS: I should judge about thirty-five to forty feet.

"THE COURT: Wide?"

"THE WITNESS: In some places I would say.

"THE COURT: Is that a macadam or simply dirt yard? **10**

"THE WITNESS: Just simply dirt.

"THE COURT: Sidewalk on either side?"

"THE WITNESS: No, no sidewalk.

"Q. Is there anything on the ground there to indicate where the line is drawn between 7th Street and the freight yard? A. Where the line is drawn from 7th Street to the freight yard?"

"Q. Wait a minute. No, between 7th Street and the freight yard? A. There is— **20**

"Q. *What is there between 7th Street and the freight yard? Is there a fence?* A. *No, no fence at all.*

"Q. *Is there any curb?* A. *Just railroad tracks, that I can see.*

"Q. *Is there anything to show where 7th Street ends and the freight yard begins?* A. *Not that, I know of."*

It is clearly in evidence by the testimony of many witnesses that there is no visible line of demarkation between Seventh Street and the company's property, nor is there any fence, curb, sidewalk or any physical construction or condition upon the ground to indicate where the street ends and the freight yard begins. The whole premises occupied by the defendant as a freight yard including not only its own parcel of land but also the land lying within Seventh Street, comprises one huge switching yard open at all sides to the surrounding streets excepting along **30**

a short space upon Sixth Street where the freight station and platforms form something of an obstruction.

10 The surveyor Kelleher testified to these facts stating that the only way in which he was able to locate the division line was by assuming the proper location of an adjacent building on the opposite side of Seventh Street and locating the line of the defendant's property by reference thereto. See testimony of Philip Kaplan, at p. 72.

The witness Kelleher was not by any means certain as to the true location of this street line and testified, at pp. 125-127, in relation thereto as follows:

20 "Q. Is there as a matter of fact anything to indicate where the street ends and where the freight yard begins, any physical evidence to show where one ends and the other begins?
A. Why, yes.

"Q. What? A. Why, the crossing planks on Passaic Street.

"Q. Wait one minute. Do the crossing planks on Passaic Street shows where 7th Street ends and the freight yard begins?
A. Well, the crossing, planks are ordinarily built right up alongside of the street; that is, from building line to buiding line.

30 "Q. You say ordinarily so built? A. Yes, sir; I think so. I found lots of them that way.

"Q. You found lots of them were not that way? A. I found them probably four or five feet off.

"Q. What possible relation have the crossing planks on Passaic Street with an imaginary line dividing 7th Street from the freight yard? A. None at all.

40 "Q. None whatever. So that in placing that line, those crossing planks had nothing to do with the matter? A. Absolutely nothing.

"Q. Then what was your reason for placing your street line there? A. My reason was, I had to place it there to complete my survey.

"Q. Anyone walking along 7th Street who happened to be a surveyor and had access to the city map, and placed it or used a transit and found out where 7th Street is and was walking along 7th Street, as he goes on public property what is there there, if anything, to tell him where 7th Street ends and this property that is supposed to be railroad property begins? A. Well, there is a building of McLaughlin, Miller & Company down there, right on the building line of Passaic Street.

10

"Q. That is on the opposite side of 7th Street? A. That is the only way to find that out.

"Q. And there is nothing whatever on the west side of 7th Street to tell a person which is public property and which is railroad property? A. Only the sidewalk there, that is all.

20

"Q. The sidewalk there; where is the sidewalk? A. The sidewalk is on Passaic Street.

"Q. I am talking about 7th Street is there any sidewalk on 7th Street? A. No, sir.

* * * * *

"Q. Seventh Street, all the way along between Passaic Street and South Street, is more or less cut up with railroad tracks?

A. Yes, sir.

30

"Q. And switches? A. Yes, sir.

"Q. And they are not built flush with the road, are they? A. No, some places they are, and some places they are not.

"Q. What is that street made of? A. A. Why dirt street.

"Q. With more or less cinders mixed up with it? A. Yes, sort of screenings on top of it.

"Q. Screenings ashes and black railroad droppings, isn't it? A. Well, no, I would not call it that; I would say it was a dirt road.

40

Q. With a lot of soot and ashes mixed with it? A. Yes, the same as any other road.

“Q. What is the character of the soil immediately over this imaginary line of the freight yard; what is the character of the soil there? A. That is practically the same with the exception of around the tracks.

“Q. So far as the soil is concerned, you could not tell the difference between the two? A. No.

10 “Q. As to the railroad tracks, the construction of those railroad tracks, do the railroad tracks in the freight yard differ in any way in construction or appearance, from the railroad tracks in 7th Street? A. No, sir.

“Q. They are just the same way, are they? A. (No answer).”

Gauglar says at page 17, that there are 3 or 4 tracks in Seventh Street and at page 18 that there are 4 or 5 sidings in that street; at 20 pp. 73 and 74, Philip Kaplan makes a similar statement with reference to the tracks in Seventh Street and at pp. 126 and 127 defendant's surveyor Kelleher characterizes the condition and appearance of the soil, the construction of the tracks and other physical characteristics of Seventh Street as being identical with the corresponding characteristics on the other side of the imaginary line which he had drawn, and therefore admittedly on defendant's premises.

30 Gauglar says at page 17, that the tracks in this street are not laid “tight;” Philip Kaplan says that the irons of the tracks stick up above the dirt (p. 75) and Kelleher at pp. 126 and 127, says that at some places they are built flush and at some places they are not.

It is also in evidence that freight cars are frequently left standing in Seventh Street, necessarily obstructing the passage of persons 40

through that street, and defendant's witness Roseman, the fireman on the engine which kicked the car down the track and killed the little boy testifies at page 174 that immediately after performing the operation which resulted in the boy's death, the engine proceeded towards Seventh Street with him on board, and says further that the engine then went on to Seventh Street.

This presents a case of such confusion of boundaries as would bewilder an adult highway traveller, to say nothing of a child of 2 years of age. 10

Furthermore, it is by no means certain, and there is no evidence in the case which clearly establishes that the place where the accident occurred is upon the defendant's premises at all. The defendant's surveyor who testified that he spent from three and one-half to four and one-quarter hours in making this survey, makes an admission damaging to the defendant's contention at pp. 129 and 130, where after stating that he located this imaginary street line by reference to the supposed proper placing of a neighboring building, proceeds to testify as follows: 20

"Q. If you were wrong in your hypothesis, that that brick building is properly located—when I say properly located, I mean it is located precisely on the edge of 7th Street—if you are wrong about that; if it is really a few feet back; then your whole location of this imaginary street line might be wrong, mightn't it? A. It would be if I surveyed wrong. 30

"Q. It might be that the line should be located several feet east or west of where you have located it, naturally, if the location of the building is wrong, is that right? A. Yes, sir."

It is in evidence that at a period antedating the establishment of a freight yard at this point, 40

the neighborhood was almost entirely open country. The construction of the freight tracks and sidings has not in any essential particular changed the character of the land, and it has been shown by the testimony of many witnesses that the space over which the tracks and sidings were constructed and which is now known as the freight yard, including not only the defendant's own premises, but certain of the adjoining streets as well, has since remained an open common to which children have resorted without objection on the part of the railroad company for the purpose of playing baseball and that large numbers of persons have always used it as means of passage to and from the neighboring streets and more remote portions of the city.

Defendant's acts, particularly those of omission, it is submitted, amount to a dedication of this plot as an open public square. Such a dedication is not *ultra vires* the railroad company; if it were *ultra vires*, the fact that the railroad company took title to this property subject to this then existing right of way, would make the objection inapplicable.

POINT III.

The defendant below was estopped to deny the right of plaintiff's intestate to cross its track at the place of the accident.

The case of *Black v. Central Railroad Company of New Jersey*, 85 N. J. L., 197; 89 Atl. 24, may be cited in this connection.

This case, decided by this honorable court in 1913, is too well known and understood to require much elaboration. Suffice it to say that it was there held as follows:

"A landowner whose conduct is such as to induce members of the public to use a private way under the belief that it is a public street, owes to them the same duty as if such way were in fact a public street."

In this case, although the accident occurred upon a railroad track crossing a strip of land which was not a public highway it was held not to come within the provisions of Section 55 of the Railroad Law, relative to persons walking, standing or playing upon a railroad track; and it would seem that for even stronger reasons the section in question should not apply to the case at bar. **10**

The Black case turned upon the question as to whether the defendant railroad company had made its own premises resemble public property. In the case now under consideration the defendant-respondent not only made its freight yard resemble Seventh Street, immediately adjacent thereto, but also by its own acts in going into that and other streets in the neighborhood made them resemble its own adjacent premises. This has been discussed rather fully on prior pages of this brief, and it may suffice to say that a large number of tracks were built in Seventh Street with the rails projecting above the dirt, that switches were constructed in that street and cars allowed to stand therein occasioning frequent switching operations, with locomotives and cars moving up and down the street; furthermore, that the soil and physical characteristics of the streets and the adjacent yard of the defendant were made closely to resemble each other. **20**
30

Witnesses testified many times, as cited above, that there was no way, short of a precise and careful survey, by which persons on the ground **40**

could determine the line of demarcation between the street and private property. There was no way in which a distinction between the two places could be made by any casual passenger along the highway or across the yard.

10 The doctrine of liability on defendant's part by reason of the maintenance of a place attractive to children contiguous to a highway, in so far as the same was involved in the "turntable cases," is properly regarded as settled in this state, and is not invoked by appellant.

It is respectively submitted that the case at bar presents precisely this feature and that the little Drelich boy, if in fact he did stray 3 or 4 feet over the line, which Kelleher thinks was the street line, was protected in so doing by the doctrine enunciated in the case of *Black v. Central Railroad Co., of N. J.* supra and by
20 the long settled line of case to which the turntable cases at most form merely an exception.

POINT IV.

Sufficient evidence of negligence on the part of defendant-respondent was presented to warrant a verdict in plaintiff's favor.

30 Plaintiff-appellant was bound only to establish a prima facie case of negligence against the defendant-respondent. This was done by the testimony of a large number of witnesses, to say nothing of damaging admissions made by several of the witnesses of the defendant. The facts are that although it was known that small children were in the habit of passing through and congregating in the freight yard in the neighborhood of the railroad tracks, and although the
40 defendant's employees had seen children there

that morning, yet the dangerous operation of "kicking a car" or making a flying switch was resorted to and a car was sent flying down hill toward the precise place where the well-defined path crossed this track and where the children had only recently been seen. No engine was attached to this car and its movement was controlled solely by a man at the rear brake whose vision of the track ahead was cut off by the body of the car itself. It was at the rear brake wheel, up near the roof of the car, that the brakeman rode, and defendant's witnesses virtually conceded that no signal was given by shouted warning. Plaintiff's witnesses testified also that no whistle was blown nor bell rung and some of defendant's witnesses admitted as much. 10

It is submitted that the plaintiff-appellant is bound only to establish that a *prima facie* case has been presented, i. e. that the case presented a question for the jury. It might successfully be urged that the plaintiff's evidence, supported in many particulars by piecemeal testimony by some of defendant's witnesses, sustained the burden of proof, not only by a preponderance of evidence, but beyond a reasonable doubt. 20

The question of negligence should have been submitted with the other questions at issue to the determination of the jury. 30

Elements of Negligence.

GAUGLAR testifies at page 28 that the railroad men were "kicking" the car and that he had often seen them doing this. LANGFELD says at page 114 that he had seen them making these "flying switches," i. e. propelling a car down the track without guidance, and he adds: "and the men jump on to stop them." JOHN CONKLING, 40

who was working with the train crew at the time, although he was a freight clerk and not a train hand, (p. 145) says that he "rode the cars without the engine," that that is what is called "kicking cars (p. 148)." Defendant's witness GORMAN says that at page 152 that "these cars * * * were pulled up and let go; that is MR. CONKLING rode them down." And this was on a down-grade. Bell, at page 140.

10

GAUGLAR testifies that he did not hear any signal given by bell or whistle or shouted warning (p. 28); that there was nobody there to give any such signal (p. 29) that his attention was first attracted by the hollering of the child, and that he was standing where he would have heard a signal if given, only 80 feet from the place of the accident (p. 28, line 32; p. 29, lines 20 to 38). CONKLING, the Erie Railroad freight clerk

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who "rode the cars down" upon the child (p. 148) says that no signal was given at the time (p. 149). The engineer SOOP says that the bell is stopped when the engine is standing still (p. 167) as it was at that time (see page 27, line 20) and that the car runs on without any bell (foot of p. 167). He blew whistles only at the street crossings coming into the yard before beginning the switching operations (p. 168) and that "there is no necessity of blowing a whistle in the yard unless there is something on the track (p. 168 line 30)." But on the day of the accident he did not see any children about (p. 162, line 20) and did not look (p. 162, lines 23 et seq).

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TRAUINSKI saw a group of little boys playing at the scene of the accident five minutes before its occurrence (pp. 98, 99) and when he went to the place, attracted by the fatal occurrence, he saw them still there, and they had been there about 15 minutes (p. 99), and had gone over by

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the fence of Kaplan's coal yard (about 60 feet distant). SOOP, the engineer testifies at page 162—"You can always see children around the yard," but that he did not see any at the time of the accident, and did not look. Yet without looking he sent the car flying down the grade toward the little children on the track.

GAUGLAR places the brakeman on the rear end of the car, and says that there was no one on the front end (pp. 26, 27), and that the brakeman ran away and that the brakeman did not even see the accident (pp. 25 and 28). All of the railroad men admit that they did not know about the accident until long after it occurred. Their own statements as to when they first learned of it are as follows:

MCCORMACK, freight agent, 10 minutes after the accident (p. 131). 10

BELL, the yard master, about 20 minutes after the accident p. 139). 20

CONKLING, the freight clerk, who "rode the cars down" (p. 148) first heard of the accident "10 or 15 minutes probably" after its occurrence, when his train had reached Second Street (p. 147).

GORMAN, one of the brakemen on the train says nothing about the accident and evidently did not know about it until long after. He says, in fact, that he "did not see any children, did not see anybody" (p. 152). 30

SOOP, the engineer, did not learn of the accident until his fireman told him of it when they got to Second Street (p. 164).

ROSEMAN, the fireman, at page 174, says that the first he knew of the accident was after he got to Second Street.

The fact that the engine was operating upon the tracks in Seventh Street, immediately adjoining defendant's property, and almost if not quite 40

reaching the exact place of the accident, was a sufficient reason for persons resorting to the defendant's premises as the safer place of the two, and may have been the immediate cause of this little boy's being at the spot where and when he was killed. See testimony of the fireman ROSEMAN, at page 174; also map, Exhibit D-2, attached to the printed case.

10 It has been demonstrated, under Point II, that the place of the accident was either within or very near the line of Seventh Street.

Defendant's witness, McCORMACK, speaks at page 133 of using the tracks to distribute cars to the mills; and PHILIP KAPLAN speaks of the tracks in Seventh Street which lead into his coal-yard, and of others leading into O'Brien's, the Passaic Print Mills and to McLaughlin's and other mills (foot of page 73). GAUGLAR (p. 31) speaks also of a track in Seventh Street which he 20 refers to as Speinberg's track and another switch track. The map, Exhibit D-2, shows no less than five of these "switch tracks" in Seventh Street, and their frequent use in the same sort of switching operations which have been shown to occur in the yard proper, must form a sufficient menace to drive highway passengers to the comparative safety and quietude of the freight yard while the trains are operating in the street. The uneven and rough condition of this street, due to the 30 presence, character and construction of defendant's tracks and switches has already been adverted to.

The owner of premises along a public highway or abutting thereon was held to owe a duty to the public to exercise reasonable care to protect the public, but not to be liable as an insurer, nor for acts of third persons on his premises

Sutphen v. Hedden, 67 N. J. L., 324.

So liability was held to exist where an excavation existed some feet from the highway and the highway line was rendered indistinct by reason of the intervening space being paved.

Crogan v. Schiele, 53 Conn., 186; 1 Atl. 899; 5 Atl. 673;

Sears v. Merrick, 175 Mass., 25; 55 N. E. 476;

Norwich v. Breed, 30 Conn., 535.

10

Persons using a private way with the consent or permission of the owner are entitled to the same degree of protection from danger as they would be in a public highway.

Haack v. Brooklyn Labor Lyceum, 93 N. Y., App. Div., 491.

In the case of *C. R. I. & P. R. Co. v. Austin*, 163 Pac., 517, L. R. A. N. S. 1917 D. p. 666, it is held by the highest appellate court of that state as follows: 20

“Where it appeared from the evidence that plaintiff, who was injured, was travelling across the yards and tracks of a railway company along a well-defined pathway which had been constantly used by the public in large numbers for eight or ten years, and two members of a train crew engaged in switching in the yards across which plaintiff was passing saw him and knew of his presence, the defendant company and its employees in charge of its engine and cars were bound to use reasonable care to avoid injury to him. 30

“Where, with knowledge of plaintiff’s presence upon its premises, defendant kicked four cars upon a switch across which plaintiff was about to pass, without any warning or signal notifying him of the approach of said train of cars, and regardless of the fact that such acts might result in plaintiff’s death or serious injury, defendant was guilty of gross negligence.” 40

In the opinion of the court in this case, per Hardy J., it is said at page 672:

10 "Plaintiff conducted a hotel northwest of Sixth Street and north of the tracks of defendant railway company, in the city of Anadarko, and upon the day of the accident had started for the depot of defendant company for the purpose of mailing a letter upon a passenger train which carried mail. He travelled southeast to Sixth Street, and thence in an easterly direction along the railway tracks of the defendant between Sixth and Seventh Streets, it being his intention to cross the tracks of the company between Sixth and Seventh Streets, and at the east edge of Seventh Street take a cinder platform leading east and practically a block in length to the depot, which was located about opposite Eighth Street, and it was while passing along this path between Sixth and Seventh Streets that he was struck by moving cars and injured. The employees of the company were engaged in switching at the time, and had made what is referred to as a drop switch throwing some cars onto the track that plaintiff was crossing, which ran against and injured him.

20

30 "The evidence tends to show that the path along which plaintiff was travelling had been used by the people of the town of Andarko to go to and from the depot of defendant for at least 8 or 10 years, and that from 100 to 300 people used the path every day, and that it was used by more people at about the time passenger trains were due than at other times; that the use was continuous and was evidenced by a well-defined pathway. The cars by which plaintiff was injured were moving at a speed of from 10 to 15 miles per hour, with no engine attached, nor lights nor signals."

40 The opinion then recites portions of the testimony tending to show that defendant's employees knew that persons were present in the neighborhood of the track upon which the cars were

about to be thrown, yet failed to give any signal or warning, and after reciting a number of cases which will be referred to hereinafter, the opinion proceeds as follows:

“So, in the present case, when the train of cars was thrown upon the track where plaintiff was about to pass, resulting in his injury, the defendant did not exercise that degree of care and precaution for plaintiff’s safety that was its duty under the circumstances. The facts are even stronger here than in the Wilhelm case. When it was made to appear that a well-defined pathway existed along the route which plaintiff was travelling, and this pathway had existed for a long period of time and the use thereof by the public was continuous and in large numbers, these facts were sufficient to put the defendant company and its employees upon notice that persons were liable to be passing thereon, and imposed upon them the duty to use that degree of care for the safety of human life that was commensurate with the circumstances; or differently stated, to use reasonable and ordinary care to avoid injury to persons whose presence on its premises was known, or whose presence it might reasonably have anticipated; and, under the circumstances disclosed by the evidence, defendant was guilty of gross negligence rendering it liable for any injuries occasioned thereby. * * *

“Finding no such error in the record, the judgment is affirmed.”

All the Justices concur, except Kane, Ch. J., absent. 30

The learned Court, in the opinion in the above cited case of *C. R. I. & P. R. Co. v. Austin*, cites with approval the case of *St. Louis & S. F.R. Co. v. Hodge*, 157 Pac., 60, in which the same rule was recognized and applied, in the language of the opinion:

“upon a state of facts where it appeared that children of a community had been in the 40

10 habit of going upon and across the tracks in the yards of the company for a long period of time, with knowledge of the company's servants or employees, for the purpose of playing thereon or to pick up coal in the yards of the company and near its coal chute; and it was held that the company, under the circumstances, was bound to use reasonable care to avoid injury to those whose presence on its premises it might reasonably anticipate, and that this was true even though the children on some occasions had been warned not to take coal or play about the premises of the company, and that such warning did not absolve the company from its duty to exercise reasonable care in operating its trains in the yards where it was shown that the former custom had not been discontinued."

20 See also *Wilhelm v. Mis. O. & G. R. Co.*, L. R. A. 1916 C, 1029; 152 Pac. 1088, in which the same precise question received the same treatment by the court.

See *Hamill v. Penn. R. Co.*, 56 N. J. L., 370; 24 L. R. A., 531, where the defendant railroad company permitted the use by the public of a path on its property, and invitation was imputed.

30 The case of *Diebold v. Penn. R. Co.*, 50 N. J. L., 476, may be distinguished from the case at bar, because the trespasser there was an adult and no questions of prescription, dedication, confusion of boundaries, attraction to children or estoppel arising from the acts of the railroad upon its own and the adjacent highway premises were presented. The accident there occurred in an enclosed freight yard.

V.

Plaintiff-Appellant was not precluded from recovering a verdict by any provision of the railroad law.

Section 55 of the Railroad Law, which reads as follows:

“It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing.” Laws of 1903, p. 673, Comp. Stat., p. 4245, sec. 55.

was invoked by the defendant as a ground for the direction of a verdict in its favor.

It is respectfully submitted that the decedent came within the exception in that law which reads as follows:

“except when the same shall be laid upon a public highway;”

and that the section quoted is not applicable to the case at bar by reason of the proviso at the end thereof, which reads as follows:

“provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing.”

The facts upon which the existence and legality of the crossing depend have been too fully brought out in Points I and II of this brief to require further elaboration at this point.

Granted that a legal crossing or way existed at the point of the accident, which counsel deems to be well established for the reasons before stated, the decedent and his administrator, as plaintiff-appellant in this action, are entitled to benefit by the operation of the statute which reads as follows:

10 "In any action against any steam railroad
company brought to recover damages for in-
juries or death occurring at any crossing of
the right of way of such steam railroad com-
pany, where such company has not installed
any safety gates, bell or device usually em-
ployed to warn and protect the travelling
public at such crossing, which injuries or
death are alleged to be due to the negligence
of said railroad company or its agents, the
20 plaintiff in such action shall not be non-suit-
ed on the ground of contributory negligence
on his own part or on the part of the person
for whom such suit is brought, but in all
cases it shall be left to the jury to determine
whether the person injured or killed was exer-
cising due and reasonable care under the con-
ditions existing at said crossing at the time
of such injury or death, and if the jury shall
determine that the person injured or killed
was not exercising due and reasonable care
under the conditions existing at the said cross-
ing at the time of such injury or death, the
verdict shall be against the plaintiff and in
favor of the defendant." Laws of 1910, p. 490,
Comp. Stat., p. 4238, Sec. 36c.

30 The force and applicability of the act lastly
above cited would seem to have entitled the plain-
tiff-appellant, as a matter of right, to have the
questions at issue submitted to the jury.

VI.

Contributory negligence either in law or in fact, is not chargeable against the decedent.

There can be no question of contributory negligence on the part of the infant, on account of his tender age of scarcely more than 2 years of age; and even if the defense of negligence on the part of the custodians of the child, imputable to him, could have been availed of, it was waived by the concession at page 49 of the Case, as follows: 10

“The defendant waives any benefit of claim of negligence on the ground of imputed negligence of the guardian or custodian of the deceased infant.

“Mr Hobart: We also admit that the boy died as a result of the injuries.”

The case of *Barcolini v. Atlantic City and S. R. Co.*, 89 N. J. L. 107 would seem to apply the rule set forth in Section 89 N. J. L. 107 would seem to indicate that the provisions of Section 55 of the Railroad Law (quoted above) apply to the case of this small child; but this can be true only after the defendant has established as a matter of law, and beyond reasonable contention that a jury question exists upon the subject; that the child was actually on defendant's premises and was actually not on a lawful, public or private crossing. 20 30

In the case of *Black v. Central R. R. Co. of N. J.*, (supra) the defendant was held precluded upon grounds analogous to an estoppel, by reason of his being misled as to the character of the premises upon which he was then passing. It would seem that the reasons set forth under Point II of this brief even more abundantly protected the infant deceased in this case, and that 40

they form an exception to the *Barcolini* case under which the plaintiff-appellant here is undoubtedly entitled to recover.

Indeed, it appears to counsel that, under the wording of the section above quoted, particularly the words "such person shall be deemed to have contributed to the injuries sustained, and shall not recover any damages" the doctrine in the *Barcolini* case must be subject to some exceptions or possible modifications.

It may be noted, in the first place, that there is nothing contained in the section of the Railroad Law in question which states that the personal representative of the person killed on a railroad track shall be precluded of his remedy under the Death Act.

It may be said further that the language of this section states merely that the person injured "shall be deemed to have contributed" to the injuries, but there is nothing contained in the section which states that this presumption is conclusive, nor that it cannot be rebutted by competent proof, such as evidence of mental incapability or the like.

It is true that as to actions brought by the injured party himself, this contention that the presumption is rebuttable, is of little consequence, in view of the fact that the section then proceeds to impose a further limitation upon him to the effect that he shall not recover any damages. It would appear, merely by reference to the section of the Railroad Law above quoted, and the text of the opinion in the *Barcolini* case, that while the preclusion may be absolute as to the injured party in the maintenance of his own action, yet there is nothing either in the act nor the opinion which amounts to an absolute prohibition against the maintenance of an action such as the one now at bar.

It is by no means certain, and the burden was on the defendant railroad company to establish this, that the place of the accident was clearly upon its own premises and that the track in question or the nearer rail thereof was not as a matter of fact laid upon the edge of Seventh Street, thus bringing the case within the exception above quoted "except when the same (the track) shall be laid upon a public highway".

Moreover, the deceased infant was enticed to the place in question by something maintained by the railroad company and its employees near a public highway, essentially attractive to children, and not obviously maintained for another purpose. Common experience tells us that ball games are usually intended as a diversion for the onlookers than as a sport for the players themselves; and this is indicated by the fact that in many cases spectators pay considerable sums as entrance fees to witness the games and the players as frequently receive salaries for their participation therein.

VII.

The learned Trial Court erred in directing a verdict.

The motion to direct a verdict was based upon fallacious grounds for reasons sufficiently discussed above.

1. There was sufficient proof of negligence, not only to present a question for the consideration of the jury, but sufficient to sustain the burden of proof on plaintiff's part.

2. The infant deceased was not within the provisions of section 55 of the General Railroad Law, because he came within the exception and proviso thereof, and because his presence at the place of the accident was otherwise justified.

3. A prescriptive way across the track at this place existed and the decedent was warranted in using the same, if in fact he was not at the time actually upon the public highway.

4. The premises in question had been effectually dedicated to public use, at least to the extent of a dominant easement, by act of the defendant or its predecessor in title prior to the time of the accident.

10 5. There was no contributory negligence as a matter of law; by reason of the tender age of the deceased, because imputed negligence was not in the case and was waived by the defendant, and because the statutory assumption of contributory negligence, as contained in section 55 of the Railroad Law, did not apply for reasons hereinbefore stated.

20 6. There was no proof of actual willful or wanton acts by the defendant and such proof was not necessary, as it has been shown that the deceased was neither a trespasser nor a licensee, but on the contrary was there either by invitation or more likely of actual right.

VIII.

The judgment appealed from should be reversed, and a new trial ordered.

Respectfully submitted,

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JOHN WINANS,
Of Counsel with the Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

JAN DRELICH, Administrator
ad pros. of Ludwig Drelich,
deceased,

Appellant,

vs.

ERIE RAILROAD COMPANY,

Respondent.

*On Appeal
from
Supreme
Court.*

Brief of Collins & Corbin in Favor of Erie Railroad Company.

The appeal in this case was taken to review a judgment entered in the Supreme Court against the appellant (plaintiff below) and in favor of the respondent (defendant below), in an action instituted in that court for the purpose of recovering damages by reason of an accident resulting in the death of the plaintiff's intestate on August 11, 1917, on account of his being run over by a box car operated by the defendant's servants while he was on or near the defendant's railroad tracks known as the "Dundee Spur" in the City of Passaic, New Jersey. Plaintiff's intestate was a little boy two years and twenty-one days old at the time of the accident. On the occasion of the accident he was on or near the railroad tracks with several other children (p. 22, ll. 10-20). Just what he was doing at the moment of the accident did not appear in the evidence, but presumably he was either playing or standing near the rails. The plaintiff claimed, and produced some evidence in support of such claim, that the defendant's servants "kicked" a box car along the track where the intestate was;

that there was a brakeman on the car at the rear end thereof, that is to say, the end opposite the direction of the movement of the car along the track and that the brakeman by reason of his position at the opposite end of the car did not see the intestate; that the car was almost at a stop when the first wheel ran over the intestate's foot, and that as a result of the shock he shortly thereafter died.

Plaintiff's attorney claimed that under these facts there was sufficient evidence to go to the jury on the point as to whether or not there was negligence in the manner of operating the car. Motion was made for a direction of verdict in favor of the defendant, on the grounds

- (a) that there was no proof of negligence;
- (b) that recovery was barred by virtue of the provisions of Section 55 of the General Railroad Law, and
- (c) that there was no proof of any wilful or wanton negligence (p. 178, l. 30; p. 180, l. 15).

The motion for direction was granted (pp. 180-183). It is from the judgment entered on this direction that the present appeal has been taken. The grounds of appeal, expressed in various forms, all relate to the action of the trial judge in directing a verdict for the defendant (p. 184).

I.

Verdict in favor of the defendant was properly directed on the ground that recovery was barred by virtue of the provisions of Section 55 of the General Railroad Law.

At the time of the accident there were several other children with plaintiff's intestate (p. 36 l. 40). He was two years and twenty-

one days old (p. 110, l. 28). A Mr. Gauglar was the first man to reach the scene of the accident. He happened to be walking along Passaic Street; he had passed Seventh Street and, as he expressed it, "was right in the center of that main track where it happened" (p. 21, l. 18). This is the track which is marked on the map, Exhibit P. 2, "Main Track Dundee Spur." He at first said that he saw the accident, but afterwards corrected himself by stating that he heard the child cry after the car hit it (p. 21, l. 40); and he further said that he did not see the child just before the accident (p. 22, l. 10). He then said:

"Q Did you see the child just before it was struck?

"A No, sir.

"Q Did you see a group of children—

"A Three or four children around there.

"Q They were passing over this track, were they—

"*The Court.* Not so leading.

"Q What were the children doing when you saw them before the accident?

"A Playing, I could not tell you. I just heard the screams and I went up there."

(P. 22, ll. 10-20.)

The car was just about to stop and then he heard the cry and he ran and picked up the child. He was not sure as to what the child had been doing just before the accident. "I did not see him playing or anything. All I heard him holler and the car was about to stop" (p. 24, l. 20).

He found the child lying alongside of the track five or six feet from the front end of the car (p. 25, ll. 30-40).

He indicated on the map the point where the accident happened and marked it with an "X" with his name directly underneath. The point fixed by him was on the main track about 90 feet east of the easterly sidewalk line of Passaic Street and about 8 feet south of the "street line" of Seventh Street. He also indicated the location of the locomotive and marked it with a circle and signed his name. This was also on the main track and distant about 250 feet easterly from the point of the accident, in the direction of South Street.

At the point where the accident happened there is no board-walk or planking and never has been (pp. 37, 38). The rails at that point are two or three inches above the level of the ground, like an ordinary rail, and rest on wooden ties (p. 39, ll. 20-35).

There was some indefinite evidence produced as to various paths leading across these tracks, but the plaintiff's own evidence shows that the accident did not happen on any of the paths; the nearest path was about a foot from the blood marks which were afterwards found on the tracks and ties (p. 97; p. 108).

About five minutes *before* the accident occurred a witness by the name of Trauinski had seen the plaintiff's intestate and some other little boys playing around the tracks, near the point where the accident occurred. They had been playing there for about fifteen minutes.

"Q What were they playing, did you notice?

"A With dirt, putting dirt on the tracks and everything like that.

"Q They were small boys, two or three or four years old, something like that?

"A Yes, sir.

“Q They were not walking over the tracks, crossing over the tracks?”

“A No, they were on one side of the track.

“Q Playing near the track, is that it?”

“A Yes.”

(P, 99, l. 35, to p. 100, l. 15.)

The fair inference from this testimony is that the intestate was either walking or standing or playing on the defendant's railroad at the time of the accident. Under these circumstances we submit that Section 55 is applicable. This section provides as follows:

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

Pamph. Laws of N. J. of 1903, p. 673.

3 Comp. St. of 1910, p. 4245, sec. 55.

*History of the Statute and Construction thereof
in New Jersey.*

The second clause of this section beginning, “if any person shall be injured,” was originally passed in 1869, and is known as Chapter 285 of Laws of that year (p. 806). It is entitled, “An

Act to Prevent Accidents on Railroads." It was re-enacted as Section 67 of "An Act respecting railroads and canals," approved March 27, 1874. (See Vol. II, General Statutes of New Jersey (of 1896), page 2680, Section 178.)

The first clause of the present section 55 is a re-enactment of the last clause of section 32 of the statute entitled, "An act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873 (P. L. 1873, p. 88). As passed in 1873, this provision was incorporated with the provisions of the law relative to the construction and maintenance of fences and cattle guards. (See Vol. II, Gen. Stat., page 2646.)

When the revised Railroad Law of 1903 was passed, this clause was taken out of the section relative to fences, and put in its present position as the first paragraph of section 55.

(a) *The application of the statute is not limited to the main line of a railroad.*

The Act of 1869 was considered in *Diebold v. Penn. R. R. Co.*, 50 N. J. L. 478. In that case the plaintiff's intestate had gone into the freight station to transact some business with one of the railroad clerks. When next seen he was walking in the freight yard in company with an employe of the defendant, and a moment later while standing "on or near" the track of the railroad in the yard, he was struck by a freight car that was being shunted, and was killed. In referring to this statute, the court said (italics ours):

"It is quite evident that Diebold's death was occasioned solely by his standing on defendant's railroad, in contravention to the

plain provisions of this statute. Whether he was standing between the rails or beside them is immaterial. The language of the Circuit Judge in refusing the non-suit gives to this act its proper construction. 'I think,' he said, 'that the rule, with regard to standing on a track applies also to a man standing so near a track as to be struck by a car.'

"The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se*, because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car.' *The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained.* Now, if the main track of a railroad, where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blowing of whistles if this be a place of admitted danger, how much more so is the privacy of a drilling yard, where employees, alive to the dangers of their calling, are alone admitted, and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply" (p. 480).

This decision was approved by this court in the cases of *Phillips v. Library Co.*, 55 N. J. L. 307, 315, and *Furey v. New York Central R. Co.*, 67 N. J. L. 270, 274.

(b) *The statute applies to all persons without distinction as to age.*

In *Barcolini v. West Jersey &c. R. R. Co.*, 82 N. J. L. 107, 81 Atl., p. 494, the plaintiff was twenty-one months old and was hit by a train while straying on defendants' tracks. The New Jersey Supreme Court in an opinion filed November 13, 1911, held that in the absence of proof of wilful negligence a verdict should have been directed for the defendant, saying:

"This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition."

The case last cited did not reach this court, but we submit that the decision is correct. The original statute as shown above is entitled "An Act to prevent accidents on railroads." No logical reason can be suggested why it is not just as important to "prevent accidents" to minors as it is to persons of mature age.

The use in the statute of the word "playing" indicates, we submit, a legislative intent that the statute should be applicable to children—at least to those who are old enough to "play," as that word is generally used with reference to children rather than adults. As pointed out by

the New Jersey Supreme Court in the *Diebold* case, *supra*,

“The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained.”

That case has received the approval of the highest court of New Jersey on two occasions, as shown above (*Phillips* and *Furey* cases).

The only reported case in this court in which the question of the application of Section 55 has been considered is *Carleo v. Delaware etc. R. R. Co.*, 77 N. J. L. 607 (decided March 1909). In that case the plaintiff was a child about two and a half years of age; he was picked up from the ground at a point alongside of or very near to a street crossing just after a train had passed. The opinion does not refer in terms to Section 55 but an examination of the briefs filed with the court shows that the defendant relied upon Section 55 as a bar to recovery. The court held that there was sufficient evidence to justify the jury in finding that the accident happened *on the street crossing*, and a verdict for plaintiff was therefore sustained, there being some evidence of negligence on the part of the company either in the management of the gates at the crossing or in the giving of the statutory signals of the approach of the train. Of course, under these circumstances it was not necessary for the court to pass upon the question of the application of Section 55 because that in terms provides that it shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing. We suggest, however, that if this court thought that Section 55 was *not* applicable to a child of that age, it would have been

unnecessary to discuss the question of whether the accident happened on or off the crossing. The fact that the court found it necessary to pass upon the question of where the accident happened justifies the inference that Section 55 would have been held to be applicable *if* the accident had happened away from the crossing.

Another case in this court in which the point may have been considered, although it was not mentioned in the opinion, is *Tarlucki v. West Jersey etc. R. R.*, 86 N. J. L. 301. The plaintiff was a boy about eight years of age and was injured by coming in contact with the electrified third rail while he was passing from one side of the railroad to the other. A demurrer to the original declaration was sustained by the Supreme Court on the ground that the facts stated in the declaration showed a manifest trespass. See 80 N. J. L. 688. Thereafter an amended declaration was filed setting up that at the place where the plaintiff was injured there was an "ancient by-road." This declaration was sustained by the Supreme Court. See 82 N. J. L. 138. Thereafter the case came to trial and it was held that there was sufficient evidence to justify the jury in inferring that the plaintiff was crossing the track at a point which had been used by the public as a means of passage from one side of the road to the other for over sixty years. The inference from this opinion is that the plaintiff would have been barred of recovery *unless* there had been sufficient evidence to make it a question of fact for the jury as to whether or not he came within the exception of Section 55.

It may be urged by counsel for the plaintiff that the word "person" as used in Section 55 should not be held to be applicable to minors

who in law are incapable of contributory negligence. The Supreme Court ruled to the contrary in the *Barcolini* case, where the plaintiff was only twenty-one months old. That this was the correct interpretation of the statute is further demonstrated by an examination of the decisions in other States involving similar statutes. Thus, in the State of New York, there is a statute known as Section 53 of the Railroad Law, which reads as follows:

“No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same.”

In the case of *Butler v. New York Central R. Co.*, 152 Fed. 976, the Circuit Court of Appeals for the Second Circuit held that the statute applied to the case of a girl 16 years of age, who was struck by a locomotive while walking along the railroad, in violation of the statute. A direction of verdict for the defendant was affirmed, the court saying:

“The evidence does not warrant a finding that the engine driver was reckless or grossly negligent in running his train along the path upon which a person was walking at a safe distance from the rails, nor in failing to anticipate that, when the semaphore was reached, the deceased would, without any glance behind to see what the conditions were, step from a position of safety to one of deadly peril.”

In *Holmes v. Delaware & Hudson Co.*, 112 N. Y. Supp. 421, 128 App. Div. 24 (see also 113 N.

Y. Supp. 1134), plaintiff, a boy of 16 years of age, was walking along the tracks of defendant and found a railroad torpedo. He tried to open it and was injured by the resulting explosion. Judgment for plaintiff was reversed, the court saying:

“The claim of the plaintiff rests upon the assumption that the defendant invited, enticed or allured him to come upon the railroad tracks. The claim is not tenable. The plaintiff was not invited upon the railroad tracks in any sense further than that the defendant had not taken occasion to prevent the public from using them as a footpath.
* * * Indeed, one of the statutes of the state provided that”:

(Quoting Sec. 53.)

“Under such circumstances, the plaintiff was there by sufferance only, and the company did not owe him the duty of active vigilance to see that he was not injured while upon its land for his own convenience.”

The New York Court of Appeals, in *Keller v. Erie R. R.*, 183 N. Y. 67, 75 N. E. 965, referring to this statute, said:

“An act expressly prohibited by the public statute is, in its inception and always must continue to be unlawful. The defendant’s powers and capacity to act are defined and controlled by statute law, and, as a creature of statute, it could, neither expressly nor passively, confer a right which the statute denies. Whoever walks upon, or along, the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the

law and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully, or recklessly, injuring him."

While it is true that the last cited case was not that of a minor, the language of the New York Court of Appeals in construing the statute is broad enough to apply to all persons, regardless of age.

To the same effect see the case of *Marra v. New York Central R. R.*, 139 App. Div. 707, 124 N. Y. Supp. 443.

In *Colston v. Boston & Maine R. R.*, 99 Atl. 649 (N. H.), a statute provided as follows:

"Section 1. If any person shall without right enter upon or remain in any right of way, tracks, yard, station ground, bridge, depot, or other building of any railroad, when notice has been posted forbidding such trespass, he may be fined not exceeding twenty dollars; and no right to enter or be upon any railroad track shall be implied from custom or user however long continued.

"Sec. 2. If any person shall be injured while engaged in any act prohibited by Section 1 of this act, neither he nor his executor or administrator shall have any cause of action against the railroad company * * * arising from such injury unless the injuries are occasioned by the willful or gross negligence of the railroad or its employees."

Held, that under this statute a trespasser upon the railroad tracks was not entitled to recover in the absence of proof that the injuries were

caused by willful or gross negligence. The report does not show whether or not the plaintiff was a minor.

The same statute of New Hampshire was considered in the case of *Nappi v. Grand Trunk Ry. Co.*, 99 Atl. 185, and was held to be applicable to a trespassing child who, at the time of the accident, was about four years of age. The Court said:

“The plaintiff’s intestate was a trespasser upon the railroad tracks when he was killed. The fact that he was an infant makes no difference.”

In *Barney v. Hannibal &c. R. R. Co.*, 126 Mo. 372; 28 S. W. 1069, 26 L. R. A. 847, the plaintiff was not quite six years of age. He was injured while stealing a ride on a car, caused by slipping from the car and the wheel running over his foot. A statute of the State made it a misdemeanor for “any person, minor or adult, to climb upon, hold to, or in any manner attach himself to, any locomotive engine or car while the same is in motion, or running into or through any city or town in this State.” The plaintiff’s attorney claimed that this law did not apply to “babies”, but the Supreme Court of the State of Missouri said:

“While the law may not apply in a criminal proceeding to a child of very tender years, yet still, for the purposes of a civil action, the consequences of the unlawful act must be the same as in the case of an infant, even of very tender years, as in the case of an adult.”

In *Kapernaros v. Boston & M. R. R.*, 99 Atl. 441 (Me.), a statute provided as follows:

“No railroad corporation shall be liable for the death of a person walking or being

on its road contrary to law." R. S. c. 52, sec. 76.

"Whoever without right, stands or walks on a railroad track forfeits not less than five, nor more than twenty dollars, to be recovered by complainant." *Id.* sec. 77.

The court held that this statute was applicable to the case of a trespassing child "slightly less than two years old."

II.

The application of Section 55 of the Railroad Law is not affected by the testimony relating to the alleged path across the railroad tracks.

It may be urged by counsel for the plaintiff that there was evidence to bring the case within the exception of the proviso in Section 55 that the section should not apply "to the crossing of a railroad by any person at any lawful public or private crossing." There are several reasons why the case does not come within this exception.

(a) *There is no evidence to show that the plaintiff's intestate was in fact actually crossing the tracks at the time of the accident.*

As we have shown under Point I, there was no eye-witness of the accident. But there was a witness who, about five minutes *before* the accident, saw the plaintiff's intestate and some other children playing around the tracks. This witness said they had been playing for about fifteen minutes (p. 99, l. 35, to p. 100, l. 15). There is nothing to show that the plaintiff's intestate was in the act of *crossing* the tracks at

the time the car passed over his foot. The witness Gauglar, who picked up the plaintiff's intestate immediately after the accident, says that he found him lying alongside of the track (not between the rails) five or six feet from the end of the car and two or three feet away from the wheel (p. 25, l. 30, to p. 26, l. 15). The same witness said that the boy's leg was against the track and his body was outside of the track "flat up" against the rail (p. 35, ll. 20-25). Blood marks were found near an alleged path but there is no evidence that any of them were found either on the rails or between the rails (p. 97, ll. 10-30; p. 108, l. 38).

The fair inference from this part of the testimony is that at the time of the accident the plaintiff's intestate was playing either on or near the rails. There certainly is nothing therein to suggest that he was in the act of crossing over the track at the time of the accident.

(b) *The accident did not happen on the alleged crossing.*

Assuming for the purpose of the present discussion that there was evidence to show a path across the railroad tracks at some point within the limits of the square bounded by Sixth Street, Seventh Street, Passaic Street and South Street, nevertheless the evidence does not show that the plaintiff's intestate was run over while he was *on* the alleged crossing. The witness Trauinski said that he did not see "exactly" where the accident happened but that he knew where it was (p. 97, l. 10). He fixed the point as "right near the path, nearly on the path" (p. 97, l. 15). His further testimony indicated that he fixed the place of the accident by reference to certain blood marks which he said were

about a foot from the "path" (p. 97, ll. 30-40; p. 98, l. 10).

The witness Rupin also saw the blood marks. He also fixed their location as "near" the path. Afterwards he said they were three or four feet from the edge of the path (p. 108, l. 30, to p. 109, l. 15). This witness said that he took "particular notice" of the place where the accident happened and that he took a picture of the place (p. 102, ll. 20-30).

The witness Gauglar was not asked to state where, with reference to the alleged path, he picked up the plaintiff's intestate. He did say, however, that at the point where he found the body there was no boardwalk nor any regular crossing (p. 37). He also said that at that point the rails were two or three inches above the level and rested on wooden ties (p. 39).

(c) *The testimony does not show that there was a path or a crossing at or near the point where the accident happened.*

An attempt was made by the plaintiff's attorney to show that there was a path leading across the tracks *at* the point where the accident happened. As we have shown above, the witnesses who testified to the location of the blood marks did not fix them *on* the path but somewhere near the path. This fact is enough in itself to destroy the plaintiff's theory that the intestate was passing over the tracks at a *crossing*, but in addition to that fact we further submit that the evidence did not show a crossing either by twenty years' user or otherwise near the point of the accident. The testimony on this point was as follows:

Gauglar; has been familiar with the neighborhood for about four years. He was asked

whether he had observed if there was any beaten path and his reply was: "People go up through there; I see them playing ball and everything—children" (p. 19, l. 25). The same question was again put to him and he then testified as follows:

"A They go up that track, and they run down that hill, like, and go over on Seventh Street, and go through there. People go all through there.

"Q People passing through there made a beaten path?

"A Yes, sir.

"Q Is that a wide path or a narrow path?

"A I could not tell you how wide it is.

"Q Indicate, please, to the jury as nearly as you can, how wide the path is?

"A Well, people run all through there; I could not say how wide it was. I know people goes all through that whole yard to the mills and all. Nobody ever stops them.

"Q You cross through there yourself?

"A Yes, sir; many times.

"Q How many times?

"A A lot of times.

"Q Daily?

"A Yes, sir.

"Q Will you now attempt to indicate how much of a path there is there, Mr. Gauglar, just with your hands, or by pointing to some object in the courtroom, give us an idea what the size of the path is? How many people could walk along it abreast, give us some indication of the width?

"A All bunched up; I could not tell you how wide the path is; it is all open through there.

"Q Is there room for three people to walk abreast?

"A Sure; more than that, too."

(P. 19, l. 35, to p. 20, l. 28.)

On cross examination he said that there never was any crossing of a boardwalk or planking such as there is at Passaic Street; that there are several paths which run over the tracks and that all the people "run through there" (pp. 38, 39). He also said that the people go across the tracks in all directions. "They go through there like a bunch of sheep at noon hour" (p. 42, l. 38). Further, that they "walk all through there; they never look for a path. Might as well say the whole thing is a path" (pp. 43, 44).

Troast, employed on the Passaic police force for eleven years. Has been familiar with the neighborhood for thirty years. He was then asked whether there was "beaten" path across the open space in a diagonal direction. He said there was a path about three or four feet wide and was then asked to indicate it. He marked it on the blue print offered in evidence, by drawing a line all the way across the square. *The point where this line crosses the main track of the Dundee Spur is about two hundred feet from the point of the accident*, as may be ascertained by scaling the map. He was then asked if there way any path which led from a point where Kaplan's coal yard was located and he said he did not remember any path at that point and that there was only one path which ran across the freight yard (pp. 51, 52). Furthermore, that the only path that now is, or ever was, across that square was the path thus indicated by him (p. 56, ll. 30-40; p. 57, ll. 20-30).

Kaplan, coal dealer. The business in which he is engaged was established about 1907. He has either been in business or lived in that section since a boy, except that there were times when he would be away for a couple of years (p. 63, l. 30). He said there was another path across the square which "used to run" through the coal yard from Sixth Street to Eighth Street. He indicated on the blue print the point where this path left Passaic Street near Sixth Street and also where it came out on Seventh Street. Of course, his estimate of the locations was necessarily more or less guesswork. But even assuming them to be accurate it will be observed that a straight line drawn between the two points indicated by him does not pass the point of the accident, but is at least ten feet to the east thereof (pp. 64, 65). He said he could remember this path for twenty or twenty-one years (p. 66, l. 40). But then he admitted that certain "structures" were put up, and of course after that the part of the path near the corner of Sixth Street and Passaic Street was cut off (p. 67, l. 15). The structures to which he refers are the freight house, the platform in front thereof, several sidings and another platform between the sidings (p. 80). These are all indicated on the blue print. He also admitted that people that walked over the freight yard could not get to their favorite path when cars were being switched around, and that as a rule there are cars standing on the main track; in that event the people would go around the cars (pp. 83, 85).

Travinski. He said there was a little path about three feet wide going down the hill, but he did not attempt to fix the exact location of same (p. 96). This path ran from Passaic

Street to Seventh Street but there was no walk between the rails. These stood up above the ground like the ordinary railroad track (p. 100).

Rupin. This witness took a picture of the scene of the accident. His best description of the alleged path was that it is a kind of mud (p. 103, l. 10). He further said that the people who wanted to cross the square went in whatever way they could go across the quickest (p. 107, ll. 20-30).

Langfeld. Has lived in the neighborhood about seven years. People go across the freight yard. If they are in a hurry they go another way (p. 113, ll. 10-20). Cars stand over the path some times (p. 114, ll. 10-20).

Kelleher, surveyor. Made the map that was offered in evidence. Made particular observation to see if there was a path anywhere within the square.

“Q Did you find any path?”

“A Why, no, I could not see anything like that, like a well defined path.”

(P. 117, l. 40.)

He further testified:

“Q You have got pretty good eyesight?”

“A Pretty fair.

“Q Had considerable experience as a surveyor?”

“A About twelve years.

“Q Made a great many hundreds of maps based on observation, which in turn depend on eyesight?”

“A Yes, sir.

“Q Could you find any path at all, anything that looked like a path, resembling a

path, down here near the street line of Seventh Street?

“A No, sir; there wasn't anything that looked like a path at all, anywheres there, anywheres near Passaic Street or Seventh Street, or Sixth Street.

“Q How is the ground there, what kind of ground is it?

“A Why, it is sort of rough ground; where a lot of wagons and things have been driving in and around loosened up the ground. There is some weeds and things growing up around there.”

(P. 118, ll. 12-38.)

McCormack, freight agent at Dundee. There is no path leading across the Dundee Spur (p. 132, l. 40).

O'Brien, in the grain and coal business. There is no path; people sometimes walk across there. But they do not follow any particular place. There are cars on the siding practically every day. The only path is from near the corner of South Street running towards the freight house (p. 154, ll. 30-40).

According to the map the corner of South Street is nearly three hundred feet from the point of the accident. No doubt the path to which this witness refers is the same as the one indicated by Officer Troast.

Under this evidence it is obvious that the plaintiff has failed to show any legal crossing either at or near the point where this accident happened. Assuming, for the purpose of argument, that twenty years' adverse user would establish some prescriptive right in favor of the public as against the railroad, the evidence comes very far short of establishing such user.

There is nothing to show that the user was continuous for twenty years or that it was limited to any particular point. The fact of the matter is that people who wanted to take a short cut across this open square have been trespassing thereon for several years at whatever point they saw fit, and this use has finally established a more or less defined path at a point beginning at the intersection of South Street and Seventh Street and thence leading across the freight yard to Sixth Street. Many years ago there probably was a zig-zag path leading across the freight yard from a point somewhere near the corner of Sixth Street and Passaic Street to a point opposite the coal yard. But this path, if it ever was a path, was cut off many years ago by the construction of the freight house and the sidings and platforms used in connection therewith. There is no question about the fact that the defendant's predecessor in title is the owner of the legal title of all the property within the square, which has since been leased to the present defendant (p. 177, l. 20, to p. 178, l. 20).

Under these circumstances the plaintiff, we submit, has failed to prove any prescriptive right to have or maintain a crossing at any point within the limits of this freight yard.

(d) *No prescriptive right could be established against the defendant.*

It is admitted that the defendant is a railroad company and has possession of the premises in question by virtue of a lease from the Bergen County Railroad Company—which latter company has title to the premises (pp. 177, 178.) There is no doubt that the accident happened at some point on the defendant's prop-

erty and not within the limits of any public street. The point of the accident is fixed as on the right of way of the main line of the Bergen County Railroad known as the main track of the Dundee Spur. We submit that no prescriptive right to use a path across the property of a railroad company—at least across the right of way thereof—can be obtained by adverse user. The railroad is in possession of its right of way as the agent of the State, and no easement can be obtained against it.

See the following authorities:

Penn. R. R. Co. v. Hulse, 59 N. J. L. 54;

Dickinson v. D. L. & W. R. R. Co., 87 N. J. L. 264;

3 *Elliott on Railroads* (Second Ed.) Sec. 1250, p. 589;

See also *Ill. R. Co. v. Eicher*, 202 Ill. 556, 67 N. E. 376;

Cannon v. Cleveland R. Co., 157 Ind. 682, 688; 62 N. E. 8;

Huff v. Chesapeake R. Co., 48 W. Va. 45; 35 S. E. 866, 868;

S. P. Co. v. Hyatt, 132 Cal. 240; 54 L. R. A. 522; 64 Pac. 272.

III.

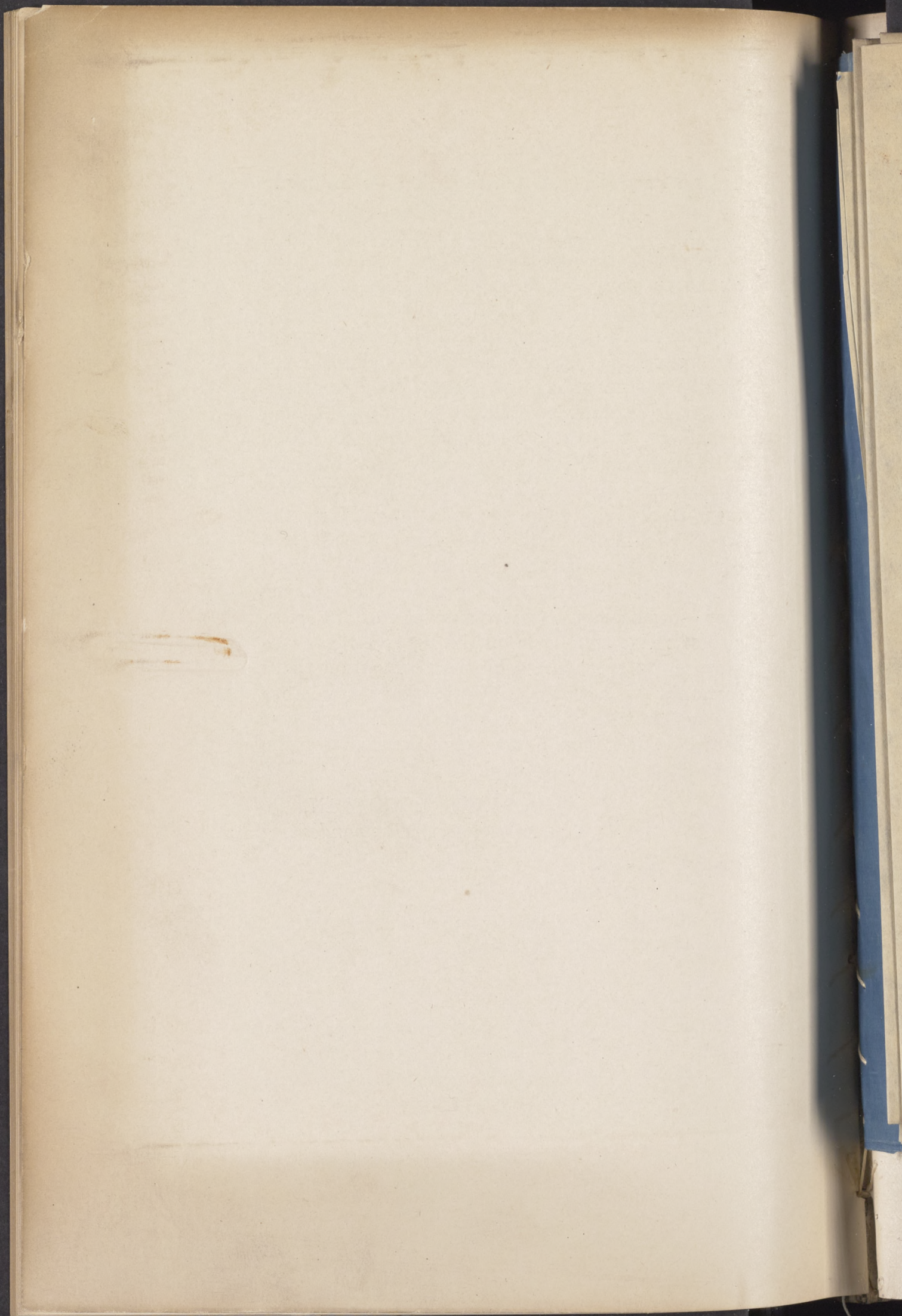
There is no proof of wilful or wanton negligence on the part of any of the defendant's agents.

There is no claim in the complaint that the defendant's agents were chargeable with wilful or wanton negligence, and the evidence does not justify any such allegation, if it had been made. The employes of the defendant who had charge of the operation of the car which ran over the plaintiff's intestate all say that they

had no knowledge of the fact that the intestate was on or near the track at the time the car was moved. They told a somewhat different story as to the details of the operations as compared with the story told by the plaintiff's witness Gauglar. But there is nothing whatever to show that the defendant's agents knew or had any reason to suppose that the plaintiff's intestate was on or near the track. See the testimony of Yardmaster Bell, at p. 137; Brakeman Conkling, at p. 145; Brakeman Gorman, at p. 151; Engineer Soop, at p. 159; and Fireman Roseman, at p. 172. Their evidence shows that they made the usual observation before the train was moved; gave the usual signals and conducted the operations in the usual manner. It is doubtful indeed whether under the evidence there is sufficient to show any lack of the exercise of reasonable care on the part of these employees, but regardless of that contention there certainly is nothing to show that they were chargeable with wilful or wanton negligence, and hence verdict should have been directed for the defendant on that ground.

COLLINS & CORBIN,
Attorneys of Respondent.

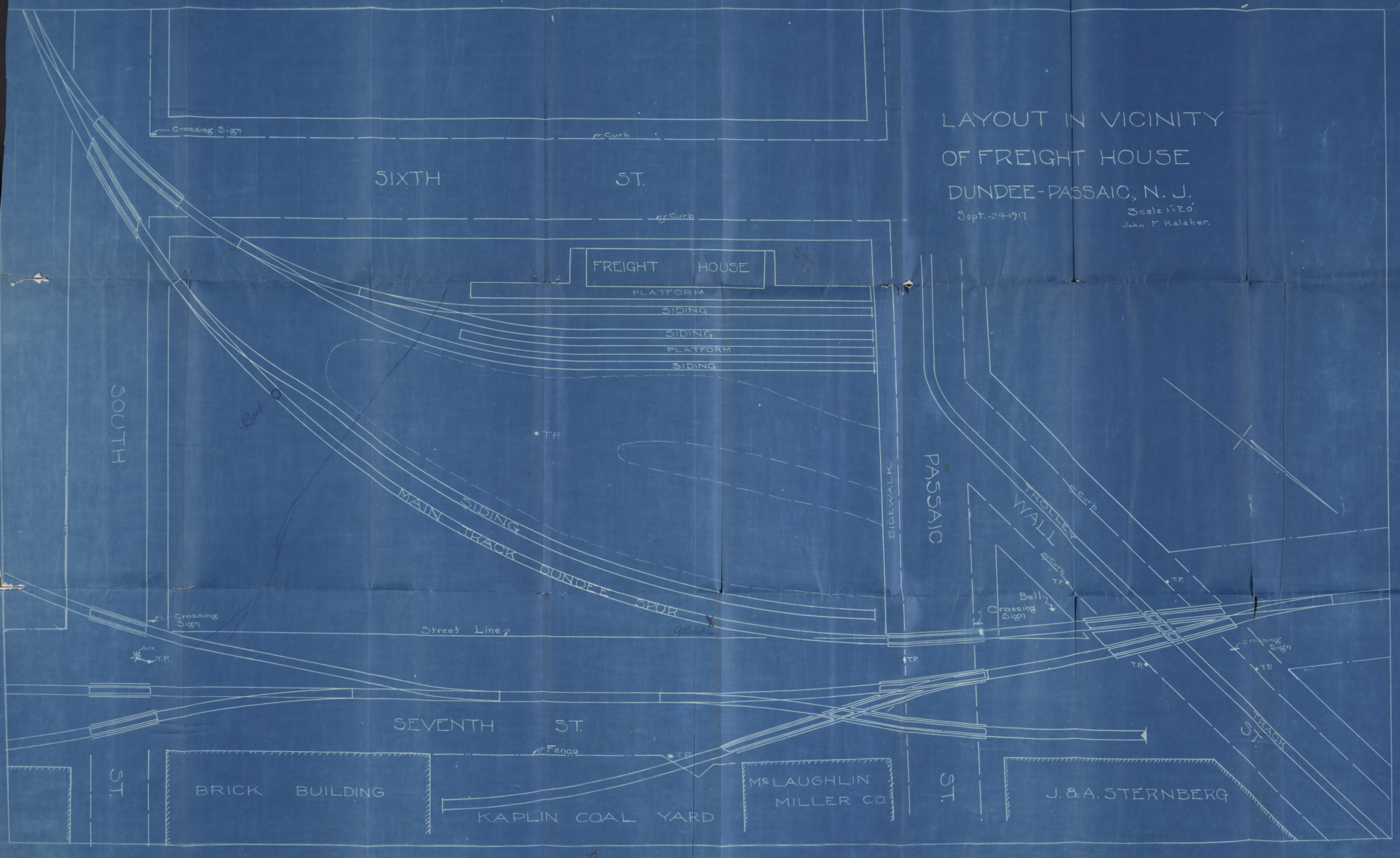
GEO. S. HOBART,
Of Counsel.



LAYOUT IN VICINITY
OF FREIGHT HOUSE
DUNDEE-PASSAIC, N. J.

Sept. 29-1917

Scale 1"=20'
John F. Kalahan



SIXTH ST.

FREIGHT HOUSE

PLATFORM
SIDING
SIDING
PLATFORM
SIDING

SOUTH

MAIN TRACK
SIDING
DUNDEE SPUR

PASSAIC

TROLLEY WALL

SEVENTH ST.

BRICK BUILDING

KAPLIN COAL YARD

MCLAUGHLIN MILLER CO.

J. & A. STERNBERG

ST. TRACK

Class

~~Copyright~~

Nov 18

Public

File No.

6908 } Panor
6909 } rama
6910 } View.

Case of Drelich Ludwig Negative No.

Date of Taking AUG 14 1917 Time 2:20-3:30 P. M

Place Passaic, N.J.

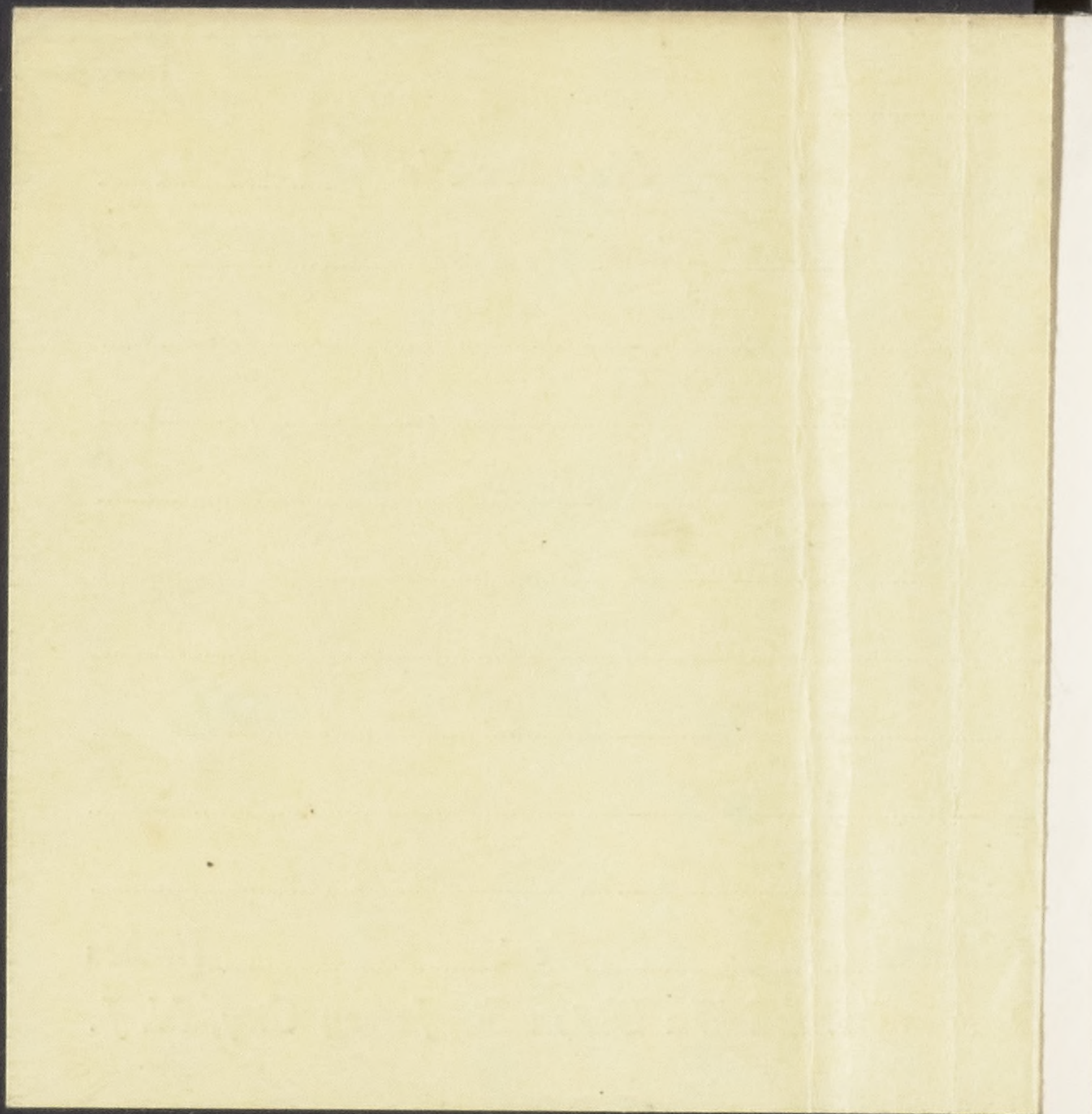
Weather Conditions Clear.

Camera Placed on freight-Platform + 75' W. of the E. end thereof.

Extent of View - from left - to right: - South - West, South + West.
(Pt. of Accident at X).

Height of Lens from Ground 9 Feet 3 Inches

Views taken by F. D. Pangborn, 245a Union St., Jersey City, N. J.



ESTABLISHED 1832
ERECTED
1908
GRAIN ELEVATOR
J. G. STEINBERG CO.

LAW AND SALES

MT LAUGHLIN - MILLER CO. TELEPHONE 37-441
PAPER BOXES OF EVERY DESCRIPTION

6908

KAPLAN'S
COAL
POCKETS

6909

BRIEN & BRO'S CO
GRAIN HAY COAL & WOOD

Person sitting on a wooden structure near railroad tracks.

FINISH
P

OS.

F. D. PANIGORN
245 A UNION ST.
JERSEY CITY, N. J.

J. J. Allen

vol 10

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Notice of Appeal.

(Filed, November 9, 1917.)

10

New Jersey Supreme Court,

JAN DRELICH, as Administrator
ad Prosequendum of Ludwig
Drellich, late of the County of
Passaic, deceased,

Plaintiff,

against

ERIE RAILROAD COMPANY,
Defendant.

Action at Law.

20

Please take notice that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment rendered against him and entered in this cause and from the order and direction made upon the trial thereof by the Hon. WILLARD W. CUTLER, Circuit Judge, requiring the jury to render a verdict in defendant's favor, and from the verdict rendered in accordance with such direction, and from each and every part of said judgment, order, direction and verdict.

30

Dated, November 2, 1917.

Yours, &c.,

JOHN WINANS,
Attorney of Plaintiff.

To:

COLLINS & CORBIN, Esquires,
Attorneys of Defendant.

40

10

Complaint, as Amended.

(Filed, September 19, 1917.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

JAN DRELICH, as Administrator
ad Prosequendum of Ludwig
Drelich, late of the County of
Passaic, deceased,

Plaintiff,

Action at Law.

20

against

ERIE RAILROAD COMPANY,
Defendant.

Plaintiff, who resides at No. 84 Passaic Street,
Passaic, New Jersey, says that:

1. At all times herein mentioned, defendant was
and is a corporation organized and existing under
the laws of the State of New York.

30

2. At all said times defendant owned, controlled
and operated a certain steam surface railroad or
railroads for the transportation of passengers and
goods, in, through and across certain portions of
the State of New Jersey, and particularly at Pas-
saic in that state.

3. At all said times, defendant maintained, con-
trolled and operated a certain freight yard, station
and premises known as the Dundee freight station
at Passaic aforesaid, together with certain railroad
tracks, switches and railroad equipment in and
upon its said Dundee freight station at Passaic
aforesaid.

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Complaint

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4. At all said times, defendant was in the possession of and controlled and operated certain engines, freight cars and other rolling stocks which were operated and used by it in and upon its said freight yard and premises at Passaic aforesaid.

5. At all said times defendant maintained and controlled certain crossings, passageways, wagonways and foot-paths leading into, through, across and upon its said freight station and premises at Passaic aforesaid.

20

6. At all said times defendant maintained and controlled certain crossings, passageways, wagonways and foot-paths intersecting and crossing its said railroad tracks in its said freight yard and premises at Passaic aforesaid, between and in connection with the highways impinging upon the same.

7. At all said times defendant maintained said crossings, passageways, wagonways and foot-paths in and upon its said freight yard and premises and crossing over and intersecting its tracks and rails therein for the use and accommodation of persons on foot or in vehicles having occasion to go upon, cross over or transact business in said freight yard, station and premises and for the use and accommodation of the public generally, including plaintiff's intestate, Ludwig Drelich.

30

8. At all said times defendant invited the public generally, including plaintiff's said intestate, to come upon, to pass through and across and to be and remain in and upon its said freight yard and premises and to make use of the said crossings, passageways, wagonways and foot-paths in passing to and from and across and in being in and upon said freight yard and premises.

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Complaint

9. At all said times defendant maintained its said freight yard and premises known as the Dundee freight yard at Passaic aforesaid, with the several tracks, rails, switches, cars, engines and other railroad property and equipment therein adjacent to the public highways as a place attractive to children, and caused and invited children, including plaintiff's said intestate, to go upon and remain in and about said freight yard and premises.

20

10. At all said times defendant maintained said crossings, passageways, wagonways and foot-paths in and upon its said freight yard and premises as a crossing and way for the use of pedestrians and held the same out to be a safe and proper place and means for passing into, upon and across its said freight yard and premises.

30

11. On and for a long time prior to August 11, 1917, a right of way by prescription existed in favor of the public generally, including plaintiff's said intestate, to go upon, over and across and to make use of the certain crossings, passageways, wagonways and foot-paths provided, maintained and controlled by the defendant, and hereinbefore mentioned, in, upon and across its said freight yard and premises, including the particular passageway and foot-path hereinafter mentioned upon which plaintiff's said intestate sustained the accident and injury hereinafter mentioned.

40

12. On and for a long time prior to August 11, 1917, defendant maintained its said freight yard and premises as a public place and constituted the same as, and the same thereby became and was, a place for the reception and delivery of freight and other goods and for the passage of persons and the public generally, including plaintiff's said intestate,

Complaint

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in going to and from the Dundee freight station of the defendant adjacent to and forming part of said freight station and premises and to and from one or more of the contiguous highways, and the factories, mills, shops, coal and wood yards and other places adjacent to and forming part thereof, and constituted the said crossings, passageways, wagonways and foot-paths as lawful and proper rights of way, passageways and means of going to and from its said Dundee freight station and the several highways, mills, factories, shops, yards and other premises then and there being. 20

13. On or about August 11, 1917, plaintiff's intestate, Ludwig Drelich, was lawfully in and upon the said freight yard and premises of the defendant and was engaged in crossing over and upon one of the said crossings, passageways, wagonways and foot-paths.

14. At the time and place last aforesaid, wholly by reason of the negligence and the wilful and wanton acts of the defendant, and its negligent, wilful, wanton and wrongful acts by and through its certain servants, agents and employees having charge for it of its said freight yard and premises, and of its tracks, rails and switches therein and of its certain engine or engines, freight car or cars and other rolling stock then in its possession in and upon said freight yard and being operated and controlled by it, one of said freight cars, in the possession and under the control of the defendant, was caused violently to strike, collide with and run against, over and upon the body and person of plaintiff's said intestate, Ludwig Drelich, throwing him to the ground, cutting off his foot and inflicting upon him other serious personal injuries which caused his death. 30 40

Complaint

15. By reason of the accident and injuries suffered by plaintiff's said intestate at the time and place aforesaid, the said Ludwig Drelich was killed and on or about August 13, 1917, he died as a result of the injuries so sustained.

20 16. On or about August 13, 1917, Ludwig Drelich, the infant son of plaintiff, then 2 years of age and upwards, but not yet 3 years of age, died intestate, a resident of the county of Passaic, in this state, leaving him surviving his next of kin, his father, Jan Drelich, the plaintiff above named; his mother, and certain infant brothers and sisters, and no widow or other next of kin.

30 17. On or about September 11, 1917, Jan Drelich, the plaintiff above named, was duly appointed administrator *ad prosequendum* of the said Ludwig Drelich, deceased, for the purpose of enabling him to prosecute the cause of action herein set forth on account of the wrongful acts, negligence and default of the defendant above named, by the Surrogate's Court of the said County of Passaic, and letters of administration *ad prosequendum* were accordingly issued to plaintiff on the day and year last aforesaid out of said court under the seal of the Surrogate of said County of Passaic and duly signed by George L. King, Deputy Surrogate of said county; that said letters have never been modified nor revoked and are now in full force.

40 18. Always, prior to the death of the said Ludwig Drelich on or about August 13, 1917, plaintiff and the next of kin of said decedent were entitled to and actually received and enjoyed the comfort, society, aid, services and earnings of the said Ludwig Drelich, and were thereafter entitled to receive the same during and throughout the minority of said decedent.

Complaint

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19. By reason of the premises plaintiff and the next of kin of said decedent have forever been deprived of and lost the aid, society, comfort, services and earnings of said decedent, whereby they have sustained damages in the sum of \$10,000.

20. At and prior to the occurrence of the accident and injuries aforesaid, the defendant was guilty of negligence in that it maintained its said freight yard and premises in a dangerous condition, in that it failed to provide, use or to make proper and effective use of any guards, barriers, gates, signals or signal devices, watchmen or other ways and means in common use to make its said premises safe and to guard the lives and safety of persons then and there being, including plaintiff's said intestate; in that it failed to make, observe and provide for and enforce the observance and carrying out of rules and regulations to make its said freight yard and premises safe and to safeguard and to avoid accidents and injuries to persons then and there being, including plaintiff's said intestate; in that it failed to provide and use proper brakes or otherwise so to operate and control its engines, cars and other rolling stock that same should not run over and strike persons passing through and then being in and upon said freight yard and premises; in that it caused the said car which struck the decedent to proceed along one of its tracks to and toward plaintiff's said intestate at a dangerous and excessive rate of speed, without signal or warning of its approach, without making proper use of any brakes or any guards or barriers to safeguard the said people, including decedent, and without having one or more watchmen, flagmen, brakemen or other servants and employees in charge of said freight yard, premises, tracks and

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Complaint

equipment, capable of and actually engaged in safeguarding the lives and safety of the public, including said intestate, in that the defendant failed to provide proper appliances in and upon said freight car and used and operated the same without proper appliances, as required by the statutes of the United States of America and of the State of New Jersey relative thereto, then in full force and effect, in that it kicked or caused said car to run along the track without control and without adequate control and without any engine being attached thereto, and then and there make a flying switch, and in that it so controlled and operated its premises and railroad property so as to cause the accident and injuries herein complained of.

He demands as damages \$10,000.

JOHN WINANS,
Attorney of Plaintiff,
No. 75 Montgomery Street,
Jersey City, N. J

30

Answer.

(Filed, September 22, 1917.)

Defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the foot of Pavonia Avenue, Jersey City, says that:

FIRST DEFENSE.

1. It admits paragraph one.
2. It admits paragraph two.
- 40 3. It admittis paragraph three.

Answer

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4. It admits paragraph four.
5. It denies paragraph five.
6. It denies paragraph six.
7. It denies paragraph seven.
8. It denies paragraph eight.
9. It denies paragraph nine.
10. It denies paragraph ten.

11. It denies paragraph eleven.

20

12. It admits that for a long time prior to August 11, 1917, its said freight yard and premises were a place for the reception and delivery of freight and other goods; it denies all the other allegations of paragraph twelve.

13. It denies paragraph thirteen.

14. It denies paragraph fourteen, except it says that it has been informed and believes that the plaintiff's intestate received certain personal injuries at the time and place mentioned in the complaint, as a result whereof he shortly thereafter died.

30

15. It admits paragraph fifteen.

16. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph sixteen.

17. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph seventeen.

18. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph eighteen.

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Answer

19. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph nineteen.

20. It denies paragraph twenty.

SECOND DEFENSE.

Plaintiff's intestate was a trespasser on the railroad tracks and other property of the defendant. The defendant did not violate its legal duty to the said intestate as such trespasser.

20

THIRD DEFENSE.

Plaintiff's intestate was injured by an engine or car while walking, standing or playing on a railroad in violation of Section 55 of an act entitled: "An act concerning Railroads (Revision of 1903)" approved April 14, 1906.

COLLINS & CORBIN,
Attorneys for Defendant,
Jersey City, N. J.

30

Reply.

(Filed, September 19, 1917.)

Plaintiff denies every allegation in the answer.

JOHN WINANS,
Plaintiff's Attorney.

40

Rule Changing Venue.

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(Entered, September 22, 1917.)

NEW JERSEY SUPREME COURT.

JAN DRELICH, Administrator,
Plaintiff,

against

ERIE RAILROAD COMPANY,
Defendant.

At Law.

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On consent of the attorneys of the defendant,
Ordered that the venue in the above case be changed
from the County of Passaic to the County of Ber-
gen.

Rule entered this 22 day of September, 1917.

On motion of

JOHN WINANS,
Attorney of Plaintiff.

We consent to the above Order.

30

COLLINS & CORBIN,
Attorneys of Defendant.

Postea.

(Filed, November 7, 1917.)

This case was tried before Judge WILLARD W.
CUTLER, with a jury at the Bergen Circuit on No-
vember 1st and 2d, 1917.

The jury by direction of the Court rendered a 40
general verdict against the plaintiff and in favor of
the defendant.

WILLARD W. CUTLER,
Circuit Judge.

10

Rule for Judgment.

(Entered, November 7, 1917.)

NEW JERSEY SUPREME COURT,

 ERIE RAILROAD COMPANY,
against
 JAN DRELICH, Administrator *ad*
Prosequendum of Ludwig
 Drellich, deceased.

20

 Action at Law.
 On Postea.

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff without costs *nisi*.

Entered, November 7, 1917.

On motion of

 COLLINS & CORBIN,
 Attorneys.

30

40

Judgment.

10

(Entered, November 7, 1917.)

JAN DRELICH, Administrator,
ad Prosequendum of Ludwig
Drelich, deceased,

against

ERIE RAILROAD COMPANY.

Action at Law.
On Postea.

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COLLINS & CORBIN, Attorneys.

Judgment entered this seventh day of November,
A. D., Nineteen Hundred and Seventeen, without
costs, in favor of the defendant and against the
plaintiff.

No costs.

WM. S. GUMMERE,
C. J.

(Vol. 10 of Judgments, page 362.)

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Testimony.

NEW JERSEY SUPREME COURT.

JAN DRELICH, as Administrator,
etc.,

Plaintiff,

against

ERIE RAILROAD COMPANY,
Defendant.

20

TRIAL on the 1st day of November, 1917, before Hon. WILLARD W. CUTLER, *Circuit Judge*, with a jury.

The plaintiff appeared by his attorney, John Winans.

The defendant appeared by its attorneys, Collins & Corbin; George S. Hobart of counsel.

The jury was empanelled and sworn.

30 Mr. Winans opened the case to the jury for the plaintiff.

Mr. Hobart opened the case to the jury for the defendant.

Mr. Winans: I offer in evidence, if your Honor please, letters of administration *ad prosequendum* issued by the Surrogate of Passaic County, in which these parties lived, to Jan Drelich, upon the estate of Ludwig Drelich, his deceased son.

The Court: Show it to the other side. Any objection?

40 Mr. Hobart: No, sir.

Paper received in evidence and marked "Exhibit P-1."

George Gauglar—Direct

10

GEORGE GAUGLAR, sworn for the plaintiff, testified as follows:

Direct examination by Mr. Winans:

Q. Mr. Gauglar, where do you reside?

A. Haledon, 28 Tilt Street.

Q. No. 28 Tilt Street, Haledon?

A. Yes, sir.

Q. You are employed by whom?

A. Armour & Company.

Q. That is the wholesale meat business, is it not? 20

A. Yes, sir; in Paterson.

Q. Are you an outside man in the business?

A. Yes, sir.

Q. Have any occasion to go around to Dundee freight yard at Passaic, at all?

A. Go around there every day, yes, sir.

Q. You are familiar with the layout of the ground, are you?

A. Yes, sir.

Q. Do you know where Passaic Street is?

A. Yes, sir; pass it every day.

Q. You pass this freight yard? 30

A. Yes, sir.

Q. At the point where Wall Street diverges off toward the north?

A. Yes, sir.

Q. Where is South Street located with regard to that freight yard?

A. South Street, where is South Street located?

(Map shown witness.)

Q. Is that on the other side of the freight yard?

A. On this here (indicating) side; yes, sir.

Q. How about Sixth and Seventh Streets, how are they located? 40

10

George Gauglar—Direct

A. Sixth Street is located all right, and Seventh Street is not far away. I never took that much notice.

Q. What I mean, more particularly—that is all right, Mr. Gauglar—here are these two streets that are respectively, you might say, north and south of this freight yard, which lies between them, does it?

A. Lies between them, yes, sir.

Q. There is a freight station there, is there?

A. Yes, sir.

20

Q. And that adjoins which street?

A. Sixth Street.

Q. There is a trolley line that runs off towards Wall Street?

A. Yes, sir.

Q. And that is the line that runs to Lodi?

A. Yes, sir.

Q. With regard to Seventh Street, you have had occasion to go through the street recently?

A. Go over there many times to South Street, yes, sir.

Q. During how many years last past?

30

A. Four years that I am with Armour & Company.

Q. Are there or are there not any tracks of the Erie Railroad in Seventh Street?

A. Are there any tracks on Seventh Street?

Q. Yes, sir.

A. On the side; there is a wagon goes through there, I know.

Q. I am asking you whether on Seventh Street there are tracks of the Erie Railroad?

A. There is tracks.

Q. And switches?

40

A. There is a switch.

Q. And sidings?

A. Yes, sir.

Q. Just a few or quite a number of them?

A. Three or four, something like that; I don't know.

Q. At the street crossing—I refer now to South Street, where that runs over Seventh Street, are those tracks boarded up to enable wagons to pass?

A. No, sir.

Q. I mean are there planks set flush to the rails at the street crossings?

A. On Passaic Street?

Q. When Passaic Street goes over the tracks that run along Seventh Street? 20

A. Is there a board walk, do you mean?

Q. No, are there boards set flush with the rails of the railroad there so that wagon wheels go over them without bumping over the rails?

A. Oh, yes.

Q. That is the case at Passaic Street where it crosses over Seventh Street?

A. Yes, sir.

Q. Is it also the case with South Street that goes over Seventh Street?

A. South Street goes over, too. 30

Q. Between Passaic Street and South Street through the length of Seventh Street are those rails protected by board crossings or not?

A. You mean go over? There is wagons go over all the time. The track doesn't lay tight, the way it should.

Q. Is it boarded between and alongside of the tracks along Seventh Street, between Passaic Street and South Street? Is it built up with boards, or are the tracks simply sticking out of the dirt?

A. I never took that much notice. I notice wagons go over without going over the tracks the way she sets up on top of the rails. It isn't like 40

10

George Gauglar—Direct

that, for wagons to go up without going over that way.

Q. When a wagon goes over it is necessary for the wheels to go over the tracks, isn't it?

A. Sure.

Q. Are there any sidewalks on Seventh Street?

A. No sidewalks. There is wagons, and people all go over there.

Q. All mixed in together?

A. Yes, sir.

20

Q. Are there cars standing there all hours of the day?

A. There is cars down through there, yes, sir.

Q. Taking the freight yard itself, have you ever observed how many tracks are running through that freight yard?

A. No, I haven't noticed them; haven't took that much notice.

Q. To the best of your recollection, how many tracks are there there?

A. You mean, how many tracks cross.

Q. No, how many tracks are there?

30

A. In that yard?

Q. That run through the yard, whether they cross it entirely or not?

A. Cross——

Q. Whether or not they cross it entirely?

A. No, they branch off.

Q. Branches or sidings?

A. About four or five, something like that.

Q. There are some up by the freight house?

A. A few up around there.

40

Q. Did you notice whether or not there is one or more tracks that run diagonally across the freight yard from the corner of South Street and Sixth Street over to about the corner of Passaic and Seventh Street?

A. I don't know what you mean.

Q. Is there a great long track with curves across that yard from one corner to the other?

A. Yes, sir.

Q. Another track or siding alongside of that?

A. There is a track alongside of that.

Q. Have you observed, during the four years that you have been around that part of the yard so frequently, whether cars stand on those sidings and tracks?

A. Yes, sir; I have seen cars standing there.

20

Q. Have you observed whether or not there is any beaten path leading from Passaic Street near the freight station diagonally across to Seventh Street, pretty well along toward South Street?

A. Well, people go up through there; I see them playing ball and everything—children.

Q. How long have the conditions which you have described existed in that freight yard?

A. They have always been that way; never saw them any different.

Q. Coming back to the question, was there or was there not a beaten path leading from Passaic Street in the neighborhood of the freight station diagonally across the freight yard to Seventh Street at or near South Street, and going down the little hill that is close to the tracks there?

30

A. They go up that track, and they run down that hill, like, and go over on Seventh Street, and go through there. Peoples go all through there.

Q. People passing through there made a beaten path?

A. Yes, sir.

Q. Is that a wide path or a narrow path?

A. I could not tell you how wide it is.

40

Q. Indicate, please, to the jury as nearly as you can, how wide the path is?

10

George Gauglar—Direct

A. Well, people run all through there; I could not say how wide it was. I know people goes all through that whole yard to the mills and all. Nobody ever stops them.

Q. You cross through there yourself?

A. Yes, sir; many times.

Q. How many times?

A. A lot of times.

Q. Daily?

A. Yes, sir.

20

Q. Will you now attempt to indicate how much of a path there is there, Mr. Gauglar, just with your hands, or by pointing to some object in the courtroom, give us an idea what the size of the path is? How many people could walk along it abreast, give us some indication of the width?

A. All bunched up; I could not tell you how wide the path is; it is all open through there.

Q. Is there room for three people to walk abreast?

A. Sure; more than that, too.

30 Q. Referring now to the condition surrounding this freight yard, and I refer to everything you have testified to—were the conditions as you have described them today the same on August 24th last as you have just said exist there?

A. Yes, sir.

Q. You refer to them today as they were at that time?

A. Yes, sir; that Saturday morning.

Q. You remember that day, do you?

A. Yes, sir.

Q. Where were you?

40 A. Just coming up the track; just coming up Passaic Street.

Q. From what direction?

George Gauglar—Direct

10

A. From Eighth Street.

Q. Then you walked toward Passaic, did you?

A. Passaic, yes, sir.

Q. How far along that street had you reached—how far along Passaic Street had you passed when you observed something unusual take place?

A. I was right in the center of that main track where it happened.

Q. What do you refer to by the main track?

A. The child that got run over there.

Q. You were standing on the track?

20

A. Yes, sir.

Q. How far away from the child?

A. I could not tell you how many yards. It must be about—maybe eighty to one hundred feet from the platform.

Q. Tell us where the accident happened?

A. That is, how far I was away from it?

Q. Will you tell the jury where the accident happened?

A. It happened right—

Mr. Hobart: If he saw it; he has not said yet that he saw it.

30

The Witness: Well, I seen it—

Mr. Hobart: You saw it, did you?

The Witness: What I seen of it, to tell you the truth, there was an engine up by the freight station—

Q. Just one moment. You are getting a little ahead of the story. Mr. Hobart asked you very properly whether you saw the accident.

A. I seen the accident. I heard the child cry after the car hit it.

40

The Court: Did you see the child hit or not?

The Witness: I seen the child after the car hit it.

10

George Gauglar—Direct

Q. Did you see the child just before it was struck?

A. No, sir.

Q. Did you see a group of children——

A. Three or four children around there.

Q. They were passing over this track were they——

The Court: Not so leading.

20

Q. What were the children doing when you saw them before the accident?

A. Playing, I could not tell you. I just heard the screams and I went up there.

Q. Did you see any railroad cars around there at that time?

A. One. Only one I seen.

Q. You seen one car?

A. Yes, sir.

Q. Was that standing still or in motion?

A. Just about stopped; then I heard the cry.

Q. What track was that car on?

A. What track was it on?

30

Q. Yes, sir.

A. On that track that leads up around to the freight house; goes off to a circle; that is all I could tell you.

Q. It is built on a curve?

A. Yes, sir.

Q. Is that one of the tracks I described awhile ago as leading from the corner of South Street and Sixth Street diagonally across the freight yard to Passaic Street?

A. That is the street, yes, sir.

40

Q. Was it or was it not at the point where this pathway which you have described, crosses this freight yard and goes across the track?

A. Goes across the track.

Q. Was that the place where the accident happened? A. Yes, sir.

Q. You saw this freight car; who was in charge of the freight car? Who was operating the freight car at the time? A. I could not tell you.

Q. Was there any men on the car—any man or men?

A. I did not see anybody; there was men on there, but I did not hear no noise at all. He had his brake; he should have put his brake on the other end of the car. 20

Mr. Hobart: I object to what he should have done.

The Court: Strike that out.

Mr. Winans: I consent to have it stricken out.

The Witness: I see the brakeman running from the car, to catch up to the engine. The engine was about one hundred feet from the car.

Q. Now, you say the car was moving then, just about to stop? 30

A. Just about to stop, and then I heard the cry. I ran up and picked the child up.

Q. When you looked the accident had just happened, had it?

A. Yes, sir.

Q. Did you stand off to the front of the car, or to the rear of the car, as you saw it moving, just before it stopped?

A. The car was coming—it looked to me——

Q. Coming towards you or going away from you? 40

A. Coming towards me.

10

George Gauglar—Direct

Q. After the accident happened, did you go any nearer to the place where the accident happened?

A. What do you mean?

Q. Did you go over to the place where the accident happened?

A. I went over there, picked up the child from the track.

Q. State whether or not you saw this little Drelich boy there at that time.

A. I did not see him playing or anything. All I heard him holler and the car was about to stop.

20 Q. You say you went right over to the place of the accident; did you see the little child?

A. Yes, seen him right along the track; I picked him up and asked the other little boys with him where he lived. The boy said this way (indicating), and I picked him up and ran home.

Q. Did you notice anything about that boy's condition?

A. In bad condition.

Q. Tell the jury just what you noticed about the boy's condition at that time?

30 A. Screaming and crying; that is all I can tell you. Bleeding, his foot was off.

Q. His foot was off?

A. Yes, sir.

Q. When you say his foot was off, you mean cut off, and part of the flesh and bone protruding?

A. Cut off, just about half of the foot, like that (illustrating), just about that; half of the foot.

Q. Was it a fresh cut or old cut?

A. No, fresh cut.

40 Q. From your view of it, as you saw it there at that moment, was it a cut that had just been done, bleeding, fresh blood coming from it?

A. Yes, sure.

George Gauglar—Direct

10

Q. You say this car was coming towards you?

A. Yes, sir.

Q. You first heard a scream?

A. Just coming to a standstill—just coming to a standstill. When it came to a standstill I happened to look and heard somebody screaming. I seen the brakeman running up; I seen it happen on this side (indicating); the brakeman was on the other side. I seen the brakeman run up towards the engine; he never seen it at all.

Q. When this car came to a stop, and you went and found the little child lying— 20

A. Lying there.

Q. Alongside of the track?

A. Alongside of the track.

Q. You picked him up?

A. Yes, sir.

Q. Did you notice how far the little child was when you picked him up from the front end of this car when the car stopped? In other words, how far had the front end of the car passed before it stopped?

A. Well, the car was coming down this way. It was the front end of the car that ran over his leg. 30

Q. Was there any blood still on the tracks?

A. On the track was a little blood. That was right there at the same place; went back and found it after.

Q. How far was the front end of the car then from the place where you picked up the little boy?

A. The front end was towards me.

Q. Yes, the front end of the freight car. You had been there and you saw the car moving. How far was that end of the freight car past the place where you picked up the little boy? 40

A. It was five or six feet from the end of the car;

10

George Gauglar—Direct

might have been two or three feet away from the wheel.

Q. You spoke something about—this car, by the way, what kind of a car was it?

A. Red car.

Q. Was it a passenger or freight car?

A. Freight car.

Q. Was it a gondola or box car?

A. Box car.

Q. One of these with doors on the side?

20 A. Doors sliding.

Q. And with a runway on the cars for a man to walk, and were there any brake wheels on the roof of that car?

A. Brake wheels on both sides.

Q. At the ends of the car were they located?

A. Yes, sir.

Q. As you looked at the front end of that car when you heard this scream; will you tell the jury whether or not there was a man on the front end of that car at the brake wheel, the front end of the car that was coming towards you?

30 A. He was on the back end of the car when I seen him. If he had been on the front end of the car where the accident happened, he would have seen the accident. He did not see anything. He was on the rear end of the car, and I seen him get off and run up to the engine. He did not see anything at all.

Q. If you will just give me a little bit—just give me another answer to almost the same question, please: When you saw this car, the moment you heard the scream, when it came toward you, was there or was there not any man at the brake wheel on the front end of the car?

40

A. He had a brake wheel behind; not on the front end. He was on the back end of the car.

George Gauglar—Direct

10

Q. What is your answer to my question: Was there any man at the brake wheel on the front end of the car?

A. No, sir.

Q. You spoke a few moments ago about a locomotive engine; how far was that away?

A. About a hundred feet away from there; maybe more.

Q. In the direction toward you or away from you?

A. Away from me.

20

Q. Which way was that locomotive pointing?

A. Towards the car.

Q. Was it moving or standing still?

A. Standing still, waiting for the brakeman to come up and get on. He got on to it and went away. How far that went, or what it did, I don't know.

Q. There was no other locomotive any nearer to that car than you have described?

A. No.

Q. Was there any other locomotive engine there?

30

A. There was, about one hundred feet away further.

Q. There was no other locomotive engine there?

A. No.

Q. Was the locomotive engine you have just spoken about on the same track as the freight car?

A. Yes, sir.

Q. Were there any other freight cars around there at that time on other tracks on Seventh Street, or anywhere?

A. I could not just tell you that. Did not take that much notice.

40

Q. Where did the brakeman run to after the accident?

10

George Gauglar—Direct

A. Run up on the engine.

Q. Did he first come to where the child lay or after?

A. No, did not see anything of the child. If he had been at the other end of the car, he would have seen it.

Q. Do you know what is known as kicking cars?

A. Yes, sir.

Q. Is that what the railroad men were doing there that day?

20 A. I guess they must have been; the brakeman would not have run up that way.

Q. From what you saw, were they or were they not?

A. Sure; I seen them kicking many times.

Q. You were passing along Passaic Street, were you, at that time?

A. Yes, sir.

Q. How near were you to that locomotive?

A. From the engine?

Q. Yes.

30 A. I could not guess; about one hundred yards, something like that.

Q. How far from the car where the accident happened?

A. From the car? About eighty feet; something like that.

Q. Will you tell, to the best of your recollection, whether or not, just before this accident happened, there was any signal given by blowing a whistle or ringing a bell or by any shouting warning that the car was coming down the track toward where this child was

40 A. I did not hear that.

Q. Was there or was there not such signal given?

A. I could not tell you that; there was nobody there.

George Gauglar—Direct

10

Q. Nobody who could have given a signal?

A. No, the car had just stopped, and I heard a scream and ran.

Q. Your attention was first attracted by what?

A. By the brakeman.

Q. No, your attention was first attracted to the fact that there had been an accident by what?

A. By the child.

Q. What did the child do?

A. Holler.

Q. It was the sound of the hollering, was it, that first attracted your attention? 20

A. Sure.

Q. Can you tell whether or not, before you heard the child holler, you had heard any other noise such as the ringing of a bell or the blowing of a whistle?

A. No, I did not take that much notice.

Q. Well, did you or did you not hear such signal?

A. No, I did not hear anything like that; I just seen the engine stand up there.

Q. Were you or were you not in a position where you could have heard such a signal if it had been given? Were you near enough to hear? 30

A. The car was facing right in front of me; I could not hear anything. I did not see the engine before, and I did not take that much notice.

Q. Were you near enough to hear a bell or whistle if it had been sounded from the engine at that time?

A. Sure, I would have heard it; sure.

Q. Was there, or were there, on August 24, 1917, any signs or any warning around this path, around this freight yard, which said, in substance, "Keep off," to trespassers over the property? 40

A. I never seen it, no.

Q. You are thoroughly familiar with the freight yard?

10

George Gauglar—Direct

A. What is that?

Q. You are thoroughly familiar with the freight yard?

A. Yes, I go through there very often.

Mr. Winans: I ask to have this map marked for identification, if your Honor please. I want to show it to the witness.

The Court: It may be marked.

(Marked Exhibit P-2 for identification.)

20

Q. Does this map, or does it not, show the location of that freight yard and surroundings substantially as you have testified to them?

A. There is the track it happened on (indicating).

Q. Won't you just answer that question, please?

A. What do you mean?

Q. Does that substantially show the freight yard and its surroundings as you have just testified to them? Is that just about the way the ground lies there? This is 7th Street, South Street, Passaic Street, 6th Street, Wall Street, and this is supposed to indicate the freight yard (indicating).

30

A. Yes, there is the freight house. This is the freight house, isn't it (indicating)?

Q. Yes.

A. Yes, that is about right, yes, sir.

Q. Will you indicate on that map by making a lead pencil mark the location where this accident happened?

A. This is Passaic Street, isn't it?

Q. Yes, sir.

A. Where it happened?

40

Q. This (indicating) is Passaic Street; this is South Street; this is 6th Street, this is 7th Street; here is Kaplan's coal yard; here is McLaughlin's

mill, and here is where Wall Street comes out and goes to Lodi; here (indicating) are the tracks on 7th Street that you have spoken about.

A. This (indicating) is Speinberg's track, and a switch track right here (indicating).

Q. Will you make a good clear mark there, an "X" mark, using Mr. Hobart's indelible pencil—will you just sign your name right under where you put your mark?

A. (Referring.)

Q. Suppose you make a mark with an indelible pencil, that will hold it better. 20

A. (Referring.)

Mr. Hobart: Indicating a point a little to the right of the word marked "Spur" on the map.

Q. For greater definiteness——

A. The engine laid up somewheres around here (indicating).

Q. Just mark where the engine lay.

The Court: Put a circle where you say the engine was. 30

The Witness: Up around here (indicating). I could not say whereabouts it was.

Q. The Court says to make a circle where the engine was. Just put your initials there, if you will.

A. (Referring.)

The Court: Did he put his initials in the other place?

Mr. Winans: Yes; signed his name in both places.

Cross examination by Mr. Hobart: 40

Q. You have been engaged in business in that neighborhood about four years, I believe you said?

10

George Gauglar—Cross

A. Yes.

Q. For Armour & Company?

A. Yes.

Q. Where is your place located?

A. Paterson.

Q. Well, where is it located in Passaic with reference to the place where the accident happened?

A. What, the beef house?

Q. Yes.

A. We are located in Passaic and Paterson both.

20 I work in the Paterson branch house.

Q. Where is the beef house in Passaic?

A. Up on Main Avenue.

Q. Anywhere near the scene of this accident?

A. No.

Q. How did you happen to walk along Passaic Street at the time of the accident?

A. I have business all through there.

Q. You act as a salesman?

A. Yes, sir.

Q. Selling the goods for Armour & Company?

30 A. Yes, sir.

Q. What time of day was that?

A. Ten or eleven o'clock, something like that.

Q. In the morning?

A. Yes, sir.

Q. Clear weather?

A. Saturday morning.

Q. Clear weather?

A. Yes, sir.

Q. Do you remember which direction you were walking on Passaic Street?

A. Yes, sir.

40 Q. Will you please tell us, towards the bottom of the map, according to the pointer on the map towards the south.

George Gauglar—Cross

10

A. Going towards Main Avenue; coming up on this sidewalk (indicating).

Mr. Winans: Indicating a direction——

Mr. Hobart: Towards the top of the map.

Mr. Winans: Towards the City of Passaic.

The Witness (continuing): I was coming towards Main Avenue, going up this way (indicating).

Mr. Winans: Going towards Main Avenue, Passaic.

20

Q. Indicating towards the top of the map?

A. Yes, sir.

Q. And walking along the sidewalk?

A. On the sidewalk here (indicating).

Q. On a point marked "E" on this map?

A. Yes, sir.

Q. You had just crossed the planks located on Passaic Street?

A. Yes, sir.

Q. There are three sets of planks, are there not?

A. I could not tell you.

30

Q. There is more than one?

A. Yes, I think.

Q. Had you crossed all of the planks before your attention was attracted to this accident?

A. No; I was in the middle of that last track; crossed over to Main Street.

Q. You were in the center?

A. Yes, sir; right about here (indicating).

Q. Of the third track, going in the direction in which you were going when your attention was attracted by this child hollering; is that right?

A. Yes, sir.

40

Q. At about that time you did not pay any particular attention to other people or anybody else?

10

George Gauglar—Cross

A. Well, I heard a child scream and ran up there right away.

Q. When you went over there, did you see any other children playing around there?

A. Did not see anybody playing around there. There were three or four other children there.

Q. What were they doing?

A. I was trying to help them out.

Q. You were the first man there, were you not?

A. Yes, sir.

20

Q. Indeed, you were the only man there?

A. The only man that was there, yes, sir; at that time.

Q. As you walked along Passaic Street in the direction you indicated, did you happen to look over that way at any time before the accident, and if so did you see any children?

A. No more than got up there I heard screams, looked quick, and then seen the car stop, and seen the brakeman running up from the car.

Q. Had you seen any of the children who were around there, after the accident happened?

30

A. I did not take notice.

Q. Had you seen them before the accident happened?

A. No; just heard screams and the car just about stopped.

Q. When the car stopped, you, of course, ran over there to see what happened?

A. Yes, sir.

Q. Did you find the boy under the car?

A. On the side; the boy was a little on this side of the track.

Q. A little outside of the rails?

40

A. Yes, sir.

Q. You said his foot was cut off?

A. Yes, sir.

Q. Was his foot in between the rails when you got there?

A. The foot?

Q. Yes.

A. I don't know; his foot was cut off, but the leg was up against the track. I did not take that much notice until I got back and found it somewhere there.

Q. At any rate, the body of the boy, or a part of his body, when you got there——

20

A. Was on the outside of the track.

Q. And very close to the rail?

A. Yes, sir.

Q. How close? Right against the rail?

A. Flat up right against the rail.

Q. Was the car entirely clear of his body, or was it——

A. About that far away from the wheel (indicating).

Q. About four or five feet away from the wheel?

A. About six feet away from the end of the car; about two feet away from the wheel anyway that went over him.

30

Q. Could you tell which wheel it was that had crushed the foot?

A. Sure; the front wheel; that was coming down this way.

Q. The front wheel?

A. Yes, sir; on the right-hand side.

Q. By the front wheel, you mean the wheel that was nearer Passaic Street?

A. Yes, sir; on the right-hand side.

The Court: When you speak of the right-hand side, which do you mean? 40

10

George Gauglar—Cross

Q. Which do you mean by the right-hand side?

A. Coming towards Passaic Street; coming down this way.

Q. That would be the side towards——

A. On the right-hand side.

Q. That would be the right-hand side of the car in the direction in which the car was moving?

A. The cars came down this way; this here wheel on this side (indicating).

Q. The right-hand side of the car as it moved towards Passaic Street?

20

A. Yes, sir.

Mr. Winans: Will you stipulate that by indicating the side nearest to 7th Street?

Mr. Hobart: Yes, that is correct. That is what you mean?

The Witness: Yes.

Q. Could you tell whether one or two wheels had passed over him?

A. Only one wheel went over the leg.

Q. Was that the first wheel on the car?

30

A. Yes, sir.

Q. And that wheel was about two feet beyond the foot?

A. The leg.

Q. As you found it?

A. Yes, sir.

Q. You had not seen that car at any time before that, had you?

A. No; just as I got there the car just about stopped, and I heard the scream.

Q. These children that you found when you got there, can you tell how old they were?

40

A. No; all I know, three or four years old, some of them, two of them were.

Q. This boy was quite young?

A. Two or three years old, something like that.

Q. At the point where you found the body of this child when you picked him up there is no crosswalk or no planks, anything of that kind, is there?

A. Where I picked him up?

Q. Where you picked him up?

A. People walk all through there.

Q. Answer my question. You know what I mean by plank.

A. Boardwalk? 20

Q. Yes, boardwalk.

A. No, there is no boardwalk.

Q. Never has been any there, so far as you know, has there been?

A. There is no boardwalk, no, sir.

Q. Never has been any boardwalk?

A. On Passaic there is.

Q. Has there ever been any boardwalk at the point where you picked up the child, so far as you have seen?

A. No; there is paths through there.

Q. Answer the question. 30

A. No boardwalk.

Q. No plank?

A. I could not tell you about planks.

Q. You know what I mean by plank; did you ever see any there?

A. What do you mean, crossing?

Q. Any regular crossing?

A. No.

Q. Such as there is——

Mr. Winans: I object to the statement "regular crossing." I think that is a conclusion. 40

The Court: Yes.

10

George Gauglar—Cross

Q. There never was any crossing at that point such as there is at Passaic Street?

A. No, nothing like that.

Q. There never has been any boardwalk or any crossing such as there is at Passaic Street anywhere near the point of this accident?

A. No; just paths; they run over the tracks.

Q. Several paths, are there not?

A. Yes.

Q. More than one?

20

A. Yes, sir.

Q. How many?

A. I could not tell you how many.

Q. Well, half a dozen?

A. They run all through there; all the people do.

Q. No, how many paths; never mind the people.

How many paths are there?

A. I could not tell you; never counted it.

Q. Do you know what a path is?

A. Yes, sir.

Q. What is it?

30

A. A place where people walk over; packed down.

Q. How many such paths were there in or around the freight yard in this square that you have described?

A. Wagons go all through there.

Q. Never mind that. You said you know what a path is. How many paths are there in that square?

A. I could not tell you; I did not count them.

Q. Was there more than one?

A. Sure, sure.

40

Q. Are there as many as eight or ten?

A. I could not tell you.

Q. Couldn't you tell us your best recollection?

A. I couldn't tell you, no.

Q. You have been in business around there for four years?

A. There is tracks all through there, and they run all through there, all kinds of paths.

Q. All kinds of paths, in all directions?

A. Sure; they go all through there; some of them walk through the tracks, walk across the property, and go all through the yard here (indicating).

Q. At the point where this accident happened the rails are lifted above the level of the ground, are they not, two or three inches? 20

A. Where is that?

Q. Where the accident happened aren't the rails above the level of the ground?

A. Where the accident happened, yes.

Q. Two or three inches above the level. Just like the ordinary rail, as we see on the railroad tracks?

A. It is where the accident happened.

Q. Is that right?

A. Yes, sir.

Q. Those rails rest on what; wooden tier, do they not? 30

A. Yes, right there they do where the accident happened.

Q. And those are exposed, aren't they?

A. What do you mean, exposed?

Q. They are open so that you can see them?

A. Yes, sir.

Q. And it is true, is it not, that the railroad tracks, the rails themselves are exposed and above the level of the ground all the way along from Passaic Street down to South Street?

A. I could not tell you if they are up that way. 40

Q. At any rate there is——

George Gauglar—Cross

10

A. Just where the accident happened there ain't a boardwalk right there.

Q. Is there any boardwalk at all anywhere along the line of that track which you have described between Passaic Street and South Street?

A. Sure on Passaic Street.

Q. On Passaic Street, yes. But this one place isn't?

A. Right there where the accident happened?

Q. No, between Passaic Street and South Street there is place for a boardwalk except on Passaic Street?

20

A. I never took much notice of South Street.

Q. I am not asking about South Street, I am asking between South Street and Passaic Street?

A. No, there is not.

Q. No boardwalk along there?

A. No.

Q. Never has been, so far as you know or ever saw?

A. On 7th Street there is.

Q. Just think of the question please. I am asking you in here (indicating), in this freight yard, in this square; has there ever been a crosswalk or a boardwalk?

30

A. I don't know; never seen it.

Q. You never saw any?

A. No.

Q. During the four years you have worked down there?

A. No.

Q. Could you tell how fast this car was moving when you first caught sight of it?

A. Just stopped; just come to a stop when I

40

Q. Could you tell how much further it moved

George Gauglar—Cross

10

after you first saw it until it came to a full stop?

A. How do you mean?

Q. How far did it go?

A. Just about stopped when I seen it.

Q. Moved two or three feet, something like that?

A. Moved two or three feet; not any more; come to a stop and I looked.

Q. I understood you to say it was an ordinary freight car, box car, with doors on each side, what we call a box car?

A. Yes, sir; closed car.

20

Q. And this brakeman that you saw, he was moving towards South Street where this engine was?

A. Yes, he was running up there.

Q. Running? How high was this box car?

A. I could not tell you.

Q. Twelve inches?

A. High?

Q. Yes.

A. The same as an ordinary box car; I don't know how high they are.

Q. Well, the brakeman who was riding at the rear of the box car, the man that was on the side furthest away from you, or the end furthest away from you, he could not see anybody on the track, could he? 30

A. He was on the wrong side of the car.

Q. Could he see anybody on the track there from where he had been riding?

A. No.

Q. He could not? The car was moving through Passaic Street, was it not?

A. Yes, sir.

Q. When you saw the engine, was the engine standing or moving? 40

A. Standing.

Q. Standing still?

10

George Gauglar—Cross

A. Yes, sir.

Q. Which way was it headed?

A. Towards Passaic Street.

Q. Were there any other cars fastened to the engine?

A. I did not take that much notice.

Q. There were not any cars in the front of the engine?

A. Not in the front of it. There might have been in the back. I could not tell you that.

20

Q. Did you see the brakeman to talk to at all after the accident?

A. No, sir; I just seen him run.

Q. Where did you take the boy?

A. Took him home. Called up an ambulance; they sent down a patrolman and took him away right away.

Q. Where did you take the boy?

A. Took him home first.

Q. Well, did you carry him home?

A. Yes, sir.

Q. How far away did he live?

30

A. About a block from the place it happened.

Q. You say you have seen people go across these tracks at different times?

A. Yes, sir.

Q. They go across them in all directions, don't they?

A. Yes, sir.

Q. Don't pay any attention to any paths, or things of that sort, around there, do they?

A. I don't think so; they go through there like a bunch of sheep at noon hour.

40 Q. In all directions? They don't pay any attention to any paths or anything of that sort?

A. Along here, yes (indicating).

Q. That is on 7th Street? A. 7th Street.

Q. In this square bounded by 6th Street, South Street, 7th Street and Passaic Street, people who go across there as you have described, they go anywhere they see fit, don't they?

A. There is paths running through there.

Q. Do they follow the paths or go all through there in all directions?

A. I don't know; never paid that much notice; see them going all through there; there is paths all through that place.

Q. Well, do they walk on the paths, or do they walk across the tracks, and wherever they see fit? 20

A. It is where they walk; it is all paths; walk all through there; they never look for a path. Might as well say the whole thing is a path.

Q. How do you mean, the entire square, two hundred feet long, is all one solid path, do you?

A. They go all through there, where they pack it all down. I see them all running through there.

Q. By a path, do you mean that is a place where people go, where they walk, is that what you mean by a path?

A. Sure; where people walk. 30

Q. By a path do you mean that entire square, two hundred feet long, is a path, is that what you mean?

A. Where they go along there——

Q. Answer the question.

A. I could not tell you if there are all paths through there; I seen where they go through.

Q. Is the path you are talking about two hundred feet wide?

A. No answer.

Q. Is it or isn't it?

A. I could not tell you. 40

Q. Do you know whether it is two hundred feet wide?

10

George Gauglar—Cross

A. I do not know if it is that wide.

Q. Is it two feet wide?

A. Sure, wider than that.

Q. How wide is it?

A. Do you mean the path?

Q. The path, yes.

A. Never measured; I couldn't tell you; I have seen people walk through there; that is all I know.

Q. That is all you know about it?

A. Yes.

20

Q. You really don't know much about these paths after all, do you?

A. There is paths there, where people walk, walk through there; not fresh grass; they goes through there, through them paths.

Q. You mean the entire square, where the people walk is all beaten down and hard ground, is that what you mean by a path?

A. Yes, sir.

Q. The whole square, is that it?

A. They go all through there. I don't know whether it is all beaten down or not.

30

Q. Let me show you a picture; I would like to have you look at this picture for a moment. Just so you get the direction in mind. I call your attention to the place in the picture marked Kaplan's coal pockets, do you know where that is?

A. Yes, sir.

Q. And McLaughlin, Miller & Company?

A. Yes.

Q. I ask you to look at that for a moment. Does that show the direction of the square to which you have referred?

A. That is all packed down here; they run all over these tracks through here (indicating).

40

Q. What is all packed down?

George Guglar—Redirect

10

A. This, here; away around through here (indicating); they go all through it.

Q. You mean, the entire section between the two streets is packed down?

A. They all go over.

Q. Horses and wagons?

A. Sure; and load cars, and all through there.

Q. Look on that picture and see if you can find any path, or do you mean that the entire section is a path?

A. Beaten down, I say.

20

Q. What is beaten down or hard?

A. All beaten down.

Q. All beaten down?

A. Sure.

Q. Then it is all path, is that what you mean?

A. Across the track isn't a path; they go across the track.

Q. There are no paths across the track itself, are there?

A. No; not where the accident happened.

Q. No path where the accident happened leading across the track?

30

A. They go across.

Q. Listen to the question and answer it. At the point where the accident happened, is there any path across the tracks?

A. Not where the accident happened.

Redirect examination by Mr. Winans:

Q. Mr. Gauglar, you spoke about some rails being raised two or three inches above the ground so that the ties were exposed; does that refer only to the tracks in the freight yard, or does it apply equally to the tracks that are built over towards Kaplan's coal yard?

40

10

George Guglar—Redirect

A. You asked me about on 7th Street?

Q. Yes.

A. The tracks is right down even, right at 7th Street; not where the accident happened; the tracks are exposed there.

Q. In this freight yard is the whole ground perfectly level or is there a hill where people have to pass up and down in going from one side to the other?

A. Where the accident happened?

20

Q. Yes.

A. There is a hill, yes; the track lays up a little.

Q. Have you ever observed on that hill leading up from the lower ground which is beyond the track and between the track and 7th Street—whether on that little hill leading up from the lower ground to the rails of the track there is any indication of a beaten down path where people walk up to that track to go across it?

A. Well, it is all beaten down through there. They go all through there; I could not tell, they did not make one little path to go through there; they go all over them tracks. Go down there any time, noon hour and see them going all different ways.

30

By Mr. Hobart:

Q. This accident was before the noon hour, wasn't it?

A. Yes, sir; noon hours you can see them every day down there; people go over all different directions.

By Mr. Winans:

40

Q. You can see them at the noon hour?

A. On the noon hour I see people go all through there.

Q. How about in the morning when people go to work?

A. I guess they do the same.

Q. How do the people working in the factories and business places go through there?

A. I ain't around there in the morning when they go to work.

Q. Is it or is it not true that the number of people passing through that way on these paths is determined by the time of day and with regard to whether people are going to work or coming back from work or to luncheon or to school? 20

A. They run all through there.

Q. What hours of the day do most people run through there?

A. Twelve o'clock, I think.

Q. And other times of the day do some people go through there, or not at all?

A. I see people lots of times in the morning going through there.

By Mr. Hobart:

Q. Did you ever see anybody going through there between ten and eleven o'clock in the morning before the day when the accident happened? 30

A. When I go over there I come there sometimes at twelve and sometimes after. I see lots of people going through there.

Q. Were you ever there before about ten or eleven o'clock in the morning at the same hour when the accident happened?

A. Yes, went past there many times.

Q. During those hours, between ten and eleven o'clock?

A. Sure. 40

Q. Didn't see people pass back and forth, did you?

10

Jacob Troast—Direct

A. I seen people go through there.

Q. You did?

A. Yes.

Q. How many?

A. I could not tell you how many. Seen people go through there; never took that much notice.

Q. Of course, not so many as when the factories are out?

A. The factories at twelve o'clock, and other places, you can see a whole lot of people go through there.

20

Q. Did you ever see any children there before?

A. Yes, sir.

Q. Between ten and eleven o'clock in the morning?

A. No, only in the summer time they play ball down around there.

Q. Between ten and eleven o'clock in the morning?

A. Sure.

Q. Have you ever seen them?

A. Yes, in the summer time.

30

Mr. Winans: This happened in the summer time?

The Witness: Yes. I seen them play baseball up there.

JACOB TROAST, sworn for the plaintiff, testifies as follows:

Direct examination by Mr. Winans:

40

Mr. Winans: The parties admit that Ludwig Drelich, deceased, at the time of his death, was a child between two and three years of age, and was the son of Jan Drelich, and Catherine Drelich, his mother, who are his sole next

of kin. The defendant waives any benefit of claim of negligence on the ground of imputed negligence of the mother or custodian of the deceased infant.

Mr. Hobart: We also admits that the boy died as the result of the injury.

Mr. Winans: That is admitted in the answer.

The Court: That will shorten the case considerably.

Q. Mr. Troast, where do you live? 20

A. Passaic, New Jersey.

Q. You are connected with the Passaic police force?

A. Yes, sir.

Q. You are a police officer in Passaic?

A. Yes, sir.

Q. How long have you been a Passaic police officer?

A. For eleven years.

Q. How old are you?

A. Forty-five. 30

Q. Forty-five?

A. Yes, sir.

Q. How long have you lived in Passaic?

A. Thirty years, about.

Q. During that period of thirty years, last past, I suppose? A. This last thirty years?

A. Yes, sir.

Q. Have you been familiar during that period of thirty years last past with the part of Passaic that lies between Sixth Street and Seventh Street, Passaic Street and South Street, where the Dundee freight yard is now located? 40

A. Yes, sir; quite familiar.

10

Jacob Troast—Direct

Q. When was the freight house built at that place? About when?

A. Oh, I think that is—I hardly dare say that—about twelve years ago, probably more; I won't be sure about that.

Q. When were the tracks crossing what is now the Dundee freight yard which are shown on this map Exhibit P-2 for identification, which I now show you—when were those tracks shown on this map laid through there, about, as nearly as you can tell?

20

A. They are there about, as long as I can remember, the biggest part of them.

Q. Well, how long were they there?

A. Say, twenty years.

Q. You remember the time when they were not there?

A. Yes, I do remember.

Q. Before the tracks and freight house were put there, who occupied the land in what is now the freight yard fronting out on Passaic Street?

A. Before the tracks were there?

30

Q. Yes.

A. I don't know as there is anybody.

Q. Before the freight station was built there?

A. I guess Kaplan's coal yard had been there a number of years.

Q. Before the freight station was put there?

A. Yes.

Q. And that is the same Kaplan's coal yard that is now moved over to the other side of 7th Street?

A. Yes, sir.

Q. As shown on the map?

A. Yes.

40

Q. At the time, before that place was a freight yard, before the tracks were laid and the freight

station was built there, do you know whether or not there was a beaten path crossing that open space of ground there from a place near the corner of Passaic and 6th Streets diagonally across that ground, which is 7th Street?

A. Yes, sir.

Q. Will you describe what sort of a path that was?

A. It was a path about three or four feet wide, I guess.

Q. Was it a beaten down path or not?

20

A. Why, yes, it was beaten down.

Q. By that you mean, beaten down by many people passing?

A. Beaten down, yes, sir.

Q. Will you indicate with Mr. Hobart's indelible pencil, which I will ask you to kindly let me have again, just roughly about where that path went across that ground, starting at Passaic Street and running across to 7th Street. Here (indicating) is 6th Street; this is the freight house; this is off towards Passaic, here is where the trolleys come down, and this is Wall Street, out there; here are the tracks and platforms out here; here is the track where the accident happened; there is 7th Street; here is Kaplan and McLaughlin's there; and the various other places off in that direction (indicating).

30

A. This here (indicating), is a part of the freight house, too.

Q. Yes, that is the platform, adjoining the freight house.

Mr. Hobart: Mark it with a straight line running out.

40

The Witness: (Referring) Is that large enough?

10

Jacob Troast—Direct

Mr. Hobart: Mark it where it began, and draw a line all the way across to where it ran.

The Witness: (Drawing a dotted line.)

Mr. Hobart: This is South Street crossing where you see the planks and lines indicating railroads. You have marked that with a blue pencil, have you?

The Witness: I think I have drawn that now.

20 Q. I want to call your attention to the place indicated on that map where Kaplan's coal yard is now located, and ask you whether there was any path running from the neighborhood of 7th Street where Kaplan's coal yard now is, diagonally over to Passaic Street, the people walked across in those old days?

A. I don't remember any there. I don't remember that, whether there was one there or not. I know that old place was there.

Q. Are you familiar with maps?

A. No, sir.

30 Q. Can you tell whether there was only one path, or more than one path running across that freight yard?

A. Yes, sir; only one that I can remember of.

Q. How many people used the path across there?

A. Well, at the time I refer to is the time they used to have the ball games down there, 8th and 10th Streets; used to be lots of people go there, and to and from work from the Print Works, and the Atchison & Hardings Mills down there; Passaic Print Works; lots of people used to cross to work there.

40 Q. Did they cross over the ground that is now part of this freight yard only sometimes, or did they do it substantially every day?

Jacob Troast—Direct

10

A. Well, they used to do it always; but lately I have not been down there so much.

Q. I am referring now to the old days. In your answers are you referring to the period back to thirty years ago?

A. Well, not as far back as that, no.

Q. Well, how far back?

A. Say about twenty years.

Q. At the period, we will say, thirty years ago, can you remember as long ago as that?

A. Yes, sir.

20

Q. Were there people that went across that freight yard as long ago as that?

A. Crossed through there, yes, sir.

Q. Did they cross in large numbers, or only a few?

A. Large numbers.

Q. Did they do it frequently, or only now and then?

A. Frequently; every morning and every night when they came from work.

Q. Did they also do it between morning and night, at different times?

30

A. I had no occasion to be there, at that time.

Q. You had no occasion to be there?

A. No, sir.

Q. Were you there quite frequently every day or so?

A. Yes, sir.

Q. Have you, in recent years, while you have been on the police force, had occasion to go around the neighborhood of that freight yard?

A. Yes, sir.

Q. Have you noticed whether or not people during the last few years have been crossing over from Passaic Street, near where the freight house now is, over diagonally until they strike 7th Street

40

10

Jacob Troast—Direct

along towards South Street? Do people cross through there?

A. I haven't noticed them through there, not over Passaic Street.

Q. Have you ever noticed any boys playing baseball there?

A. I have seen them playing there at the noon hour between the tracks and the freight house.

Q. In what is now known as the freight yard?

A. There is a driveway there to the cars.

20 Q. Is that driveway also used for foot passengers for walking?

A. No, sir.

Q. You never saw anybody walking on the driveway?

A. No, sir; only those teamsters, like that.

Q. That goes into the freight house, you mean, doesn't it?

A. No, sir; that is alongside of the freight house. That is the freight house standing alongside of the platform of the freight house.

30 Q. That runs substantially parallel with the track, doesn't it?

A. Yes.

Q. Persons who are walking on foot and who want to go over that way, you say they don't go alongside of the wagon way?

A. No, sir.

Q. How do they go?

A. The ones I spoke of, do you mean?

Q. The people that are walking across the freight yard, how do they go?

A. They go across the other way from Sixth Street, right across the tracks.

40 Q. Will you indicate here with a regular lead pencil where the people who want to go from Passaic Street over to 7th Street, how they go?

A. Passaic Street?

Q. How do they go, people that are coming down from Passaic and want to go up here (indicating), how do they go?

A. They go right down straight across here (indicating), 7th Street.

Q. Suppose they want to go over towards South Street, how have you noticed them going?

A. Right here (indicating); come down to 7th Street, and go along 7th Street.

Cross examination by Mr. Hobart:

20

Q. This line that you have marked with the blue pencil, indicating this old path that appears on this map, where it crosses the track called the main track, Dundee Spur, which happens to be two and one-half inches from the word "main," doesn't it?

A. Yes, sir.

Q. That is the old path through there before the railroad tracks were built in the square?

A. Yes, sir.

Q. Do you remember about when the railroad tracks were built there?

30

A. So many years ago that I don't, specially this main one.

Q. The freight house was built about twelve years ago?

A. As near as I can remember.

Q. That is the only one that you are sure about as to time?

A. Yes, sir.

Q. And at the time the freight house was built, were these tracks that are alongside of the freight house, built at about the same time?

A. Not all of them.

40

Q. Well, were some of them built afterwards?

10

Jacob Troast—Cross

A. Yes, one there built a few years, I think. This one here (indicating).

Q. At any rate none of the tracks that are now alongside of the freight house were built before the freight house, were they?

A. No, sir; I don't think so.

Q. There were all either built at the time the freight house was built or since that time, weren't they?

A. I don't remember that; I could not answer it.

20 Q. You don't remember any track near the freight house being built before the freight house was built, do you?

A. No, sir; I would not be sure.

Q. You could not recall the number of years that these other tracks that reached right across the square, from one corner to the other, as appears, when they were built, do you?

A. This one here (indicating). That has been built, I said, twenty years. It is longer than that; it is over thirty years.

Q. This main track?

30 A. This main track, yes, sir.

Q. That was built over thirty years ago?

A. I think it was, as near as I can remember.

Q. That was built before this path that you have marked was used, wasn't it?

A. No, sir; I think that path was there at the time.

Q. At the time the tracks were built?

A. Yes, sir.

Q. That is the only path you have any recollection about, isn't it?

A. That is the only one I can remember.

40 Q. The only path there is or ever was across that square, isn't it?

A. Yes, sir; that is the only one I know of.

Jacob Troast—Redirect

19

Q. You live near there, do you?

A. Yes, sir.

Q. You have occasion to pass by along these various streets, South Street, from time to time?

A. My duty brings me around there.

Q. Your duty as an officer of the police?

A. Yes, sir.

Q. Of course you did not see this accident?

A. No, sir.

Q. You don't know where it happened?

A. Don't know anything about it.

20

Q. You never seen any path there during the time that you have been there, or at any time when your duties called you around this square? Never seen any path there at all, except this one old path?

A. That is the only one I remember of, yes, sir.

Q. Is that path there now?

A. Yes, sir.

Q. It is the only one that is there?

A. That is the only one that I remember.

Q. The only one that you have ever seen there?

A. Yes, sir. Just a minute. I want to correct that. I think that path was a little more where the freight cars was formerly; they went back of it.

30

Q. Went back of the freight cars?

A. Yes.

Redirect examination by Mr. Winans:

Q. Is your beat in the neighborhood of this freight station?

A. At times it is, yes, sir.

Q. And has been during the last few years, has it?

A. Yes; that is, some weeks it would be there.

Q. Now, you say you have seen boys playing baseball there very often?

40

10

Jacob Troast—Redirect

A. During the noon hour, yes, sir; that is, between the tracks alongside.

Q. On the freight yard you mean?

A. On the freight yard.

Q. In the freight yard. Do you know the railroad men who are employed by the Erie Railroad, and in charge of that freight yard, who work around it, the station agent, and yard master and brakemen, and all those men working in the freight yard?

20

A. Well, brakemen, and the like of those, I don't know, no, sir.

Q. What is that?

A. I don't know any of the train men, no.

Q. Do you know the yardmaster and the station agent?

A. Yes, I do. Don't know him by name, but I know him.

Q. He knows you, don't he?

A. I guess he does.

Q. You talk to these men, do you, when you are around there?

30

A. Nothing, any more than bid them the time of day, that is all.

Q. You do exchange some words with them, do you? Do you know a man by the name of Bell, yardmaster?

A. Bell? No, sir; don't know them by name.

Q. But you know him as yardmaster?

A. No, I don't know the yardmaster; I know the agent.

40

Q. When you are on duty on your beat around in the neighborhood of the freight yard, do you see those men, and other men in the employ of the defendant working on the railroad, working around that freight station, in the freight yard?

A. You mean on the trains?

Q. Yes, working anywhere around the freight yard; did you see them at their work as you go up there?

A. Yes.

Q. That has been the case how many years past?

A. Ever since I have been on the police force, eleven years; different ones, of course.

Q. While you have seen various men employed by the defendant, did you see these boys playing baseball at the same time?

20

A. I have only noticed them at noon hours.

Q. When you did see them, particularly at the noon hours, were men employed by the railroad around the freight yard at the same time?

A. I have seen some employees playing there with them.

Q. And that includes the yardmaster, does it?

A. No, they are mostly clerks.

Q. Has a person connected with the railroad ever directed you as an officer on that beat to clear the boys out?

A. No, sir.

30

Mr. Hobart: I object to that as immaterial.

The Court: That will be stricken out. How is it material?

Mr. Winans: Well, I will submit to your Honor's ruling.

Q. Have you ever been requested by the railroad company, or its employees to prevent boys or other persons from stealing coal from that freight yard, or to chase them away if they attempted to?

A. Yes, sir.

Q. Or have you caught them in the act of stealing coal?

40

A. Yes, sir.

10

Philip C. Kaplan—Direct

Q. Have those instructions from the railroad or its employees ever been to chase boys out for any other purpose except when you found them stealing coal?

A. I think not.

Q. Did any employee of the railroad ever direct you not to let people cross over the yard, walk across the freight yard?

A. No, sir.

By Mr. Hobart:

20

Q. You have chased them away quite often, haven't you, officer?

A. No, not very often, only on a few occasions when they were stealing coal.

By Mr. Winans:

Q. When you chased them off, it has been people who have been attempting to steal coal, has it? A. Yes, sir.

30

PHILLIP C. KAPLAN, sworn for the plaintiff, testifies as follows:

Direct examination by Mr. Winans:

Q. Mr. Kaplan, where do you reside?

A. Passaic.

Q. What is your business?

A. Coal.

Q. Are you connected with the Kaplan Coal Yard that fronts on Passaic and also on Seventh Street, right next to this Dundee freight yard?

A. Yes, sir.

40

Q. You and your father, I understand, are in that business?

A. Yes, sir.

Q. How long has that business been established in the neighborhood of the present Dundee freight yard?

A. Well, the old, you mean?

Q. No, how long has the business as a business, been going on in that neighborhood?

A. Oh, since—I have only been connected with that for the last three years; but I have been there—I think, 1907. I may be a year one way or the other; approximately ten years.

Q. You mean in the business as established? 20

A. In that vicinity.

Q. When was the business first established?

A. I believe in 1907. I won't say positively when, but about 1907.

Q. Well, ever since it has been established in 1907, where was it located?

A. Where the Erie Railroad switches are about, this situation (indicating).

Q. I am going to show you this exhibit, P-2 for identification; you are familiar with maps, are you?

A. Not very much, but I can get an idea. 30

Q. This is Passaic Street (indicating); this is South Street, this is 7th Street along here; this is the freight house on 6th Street; this is Kaplan's coal yard; this is McLaughlin's mill. Now, you are looking from Passaic Street.

A. (Referring) This is 6th, Passaic, South and 7th; this is the switch. What do you want to know on this?

Q. Will you indicate with this lead pencil where your coal yard was located ten years ago?

A. There (indicating), is the freight house, platform, siding. 40

Q. What street does it front on?

10

Philip C. Kaplan—Direct

A. Fronted on Passaic, running through—I can tell the map better this way (turning map); this is the freight house, this is the space of ground from the freight house to the street; there (indicating) is the platform; the yard would be—well, it would start here (indicating), and run through, we will say, about—I guess it must have been about 175 feet approximately. I could not remember well, say 175 feet from the front of Passaic Street.

20

Mr. Hobart: Was it on Passaic Street?

The Witness: On Passaic Street and ran through to South Street, and the end of the yard would be just about—almost—no, half way in where the freight house stands now.

Q. It did not go out to 6th Street nor to 7th Street, did it?

30

A. No, no. It was between those two sidings; these sidings had been put up—this (indicating) was there before the coal yard, as far as I can remember, and that platform had been—the siding and platform, I believe, were there, and there was a siding there after the coal yard was there. The coal yard was between these two sidings (indicating). These additional sidings and the platform were put on——

Q. How wide was the coal yard? How wide was the ground you occupied?

A. I guess it must have been about fifty feet.

Q. And did it run back from Passaic Street quite a distance?

A. I should judge about one hundred and seventy-five feet.

40

Q. And somewhere in the place where the freight yard is now laid out, is that right?

A. Yes, it was all in where the freight yard is

Philip C. Kaplan—Direct

10

laid out now, the whole thing. The freight yard is now where the coal yard was.

Q. Since then you have moved over to the other side of the street?

A. Moved over to this yard.

Q. Since you moved the railroad has occupied the whole property that you used to have?

A. Yes.

Q. You are a man how old?

A. Will be thirty-one the 5th of January.

Q. You have lived in Passaic how long?

20

A. The same time.

Q. Have you been at Passaic Street just where Dundee freight station is now, more or less all your life?

A. Oh, yes, been down there in that neighborhood on and off a good many years.

Q. Well, have you been at that street and in the neighborhood where that freight yard now is, off and on ever since you were a little boy?

A. Oh, yes; I have been on it for years, and stayed away for possibly a couple of years, and then back again, but off and on I have been there for all those years.

30

Q. Do you remember it when it was mostly a piece of open ground?

A. Yes, I do remember; oh, yes, a good many years prior to the coal yard being there.

Q. Coming down to the present time, can you state whether or not there is any path crossing that freight yard—and I don't refer to the one that Officer Troast referred to—was there any path crossing that freight yard and nearer to Passaic Street than the one Mr. Troast testified to?

A. I know one path that is very well down trodden now; it doesn't show much walking on it as it

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Philip C. Kaplan—Direct

stands, on account of the coal yard taking up the spot where the trespassing was. It used to run over—say from 6th and Passaic Streets—used to run diagonally right through where the yard, the coal yard stands today, and right through there to 8th Street.

Q. Mark on the map where that path ran?

A. I am giving you approximate figures; I won't say exactly.

20 Q. Indicate first with a cross mark about where it left Passaic Street in the neighborhood of 6th Street?

A. Well, right here (indicating); say all this (indicating) was vacant ground—ran through there—

Mr. Hobart: Mark it with a cross.

The Witness: (Referring).

Q. Now, come down to the other end, here, and tell us about where—here is where your coal yard is now located (indicating)—about where did it come out on to 7th Street?

30 A. It ran diagonally about—just about where our switch would begin—between—it run up to—what does this represent there?

Q. Where the sidings go into your yard.

A. Run right through that way; right up in here to 8th Street, and from there it used to shoot across, through the lots to—

Q. Start from this cross which you have made at the extreme lower margin of the map, and trace a line indicating where that path went, until you bring it clear up to Passaic and 6th Streets; in other words, take your pencil and start at this last

40

A. What is this here (indicating)?

Q. This is the spur?

A. The line of the freight yard?

Q. Yes.

A. Draw a line right through there?

Mr. Hobart: If it was straight.

The Witness: There is no such thing as a straight path, as I know of. It all depends on how they run across. Maybe they run across zigzag—it could not be a zigzag path.

Q. I want you to indicate in a general way, without attempting to show about how it ran? 20

A. Looking at it from 6th Street, it would look straight; of course, it was diagonal from 6th Street.

Q. You have made a line between the first and last mark you have made?

A. Yes.

Q. Just sign your name under each of those marks you have made, please?

A. I will put a "P. K."

Q. Put "P. K." on the other mark, if you please.

A. I will put just a little "1" there, so that you will know where I am going. 30

Q. Now, put a "P. K." here.

A. (Referring.)

Q. How long, to the best of your knowledge, have people in considerable numbers, and from day to day, been going over a path like that, as you have laid it out generally on this map, between the two arrow marks at the top and bottom of the map? How long, to your knowledge, have people in numbers and frequently gone through there?

A. Well, as far back as I can remember it has been there; been there—because there were ball grounds right through 8th Street to Tenth Street, and they would shoot across that into 10th Street or 9th Street; one or two grounds right—probably 40

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Philip C. Kaplan—Direct

on 8th and 9th Street. There were no houses then. I was only a little bit of a tot then,—that is a good many years ago. That is as far as I remember.

Q. Were the streets all laid out as they are at present, 6th and 7th Street?

A. 6th and 7th Street; well, they were mostly laid out, yes, sir.

Q. You say people used that path then to go to the ball games?

A. Yes.

20

Q. Did they use them for any other purposes besides going to the ball games?

A. Oh, yes; they used it as—really used it as a big path then.

Q. At all times?

A. At all times, as far as I know.

Q. You said you were thirty-one years old? A. I said I would be thirty-one on the 5th of January.

Q. This coming January?

A. Yes.

Q. How long ago can you remember, how far back?

30

A. Well, it all depends on the nature of the affair. Some things I can remember twenty five years, twenty-seven years; other things I forget in two years; all depends on what the incident may be.

Q. I want you to use your memory now as carefully as you can, and look back in the past, and tell how far back you can remember ever being in this neighborhood of Passaic Street and 7th Street. How far back can you remember as a boy that you were in that neighborhood or walked through there, or saw what was going on there?

A. Well, every bit of twenty years; twenty-one
40 years ago, possibly a year more than that.

Q. Now, referring to the period which you can remember as much as twenty or twenty-one years,

or possibly a year longer ago than that, did the condition that you have just described as to the path between these arrow marks exist at that time?

A. At that time they did.

Q. Have they or have they not continued in the same manner that you have described as to the existence of a path and the use of it by people at all time from that time down to the present time?

A. They did up to the time they put up structures.

Q. Then what happened?

20

A. Then after that they could not go through there whether they wanted to or not, because of the houses and coal yard and the like of that; could not go through there no how.

Q. As to the part of the path that crosses this freight yard, and that has not been obstructed by houses, did that continue to be used, or did it not continue to be used?

A. You mean the part——

Q. I meant the part of that old path that went down to 8th Street; that part that went across where Dundee freight yard now is, where your coal yard used to be, did the part of that path across the freight yard continue to be used by the people or not?

30

A. Very frequently I find them running across, yes.

Q. Have they ever, in the last twenty or twenty-one, twenty-two years, stopped using that path across the freight yard?

A. Well, when I wasn't there to see it, I could not say, but when I was in that neighborhood somebody ran across, yes; been using that right along.

40

Q. Did you ever see crowds of people use it?

A. Prior to the buildings being here, yes.

10

Philip C. Kaplan—Direct

Q. Well, did you last August see crowds of people using that path?

A. Well, I have been in the yard pretty often; I did not watch that part, but I have seen people, when the cars were not there, run across it and shoot up 7th Street to their mills.

Q. Single people or groups of people?

A. Some days you find a crowd, and other days maybe you find a few.

20

Q. In the last twenty-odd years that you have been around there has that path across the freight yard, or where the freight yard now is, has it ever been obstructed in any way? Has the use of that ever been cut off?

A. No, not as far as I know. You mean in regard to signal or sign or something to that effect?

Q. Has there ever been any sign up there not to use it?

A. Not to my knowledge. If it was, it was not conspicuous.

Q. If there were any signs, you would see it?

A. Positively would.

30

Q. What is that?

A. I positively would have seen it, if it were there.

Q. And you have not seen it?

A. I have not seen it.

Q. Have you ever known of any people being ordered off of the crossing there?

A. Never, when I have been in that neighborhood. When I wasn't there, I don't know—

Q. That is what I mean?

A. (Continuing) What has been going on. While I was present there was no orders given to anybody to stay away from there.

40

Q. Do you go through the neighborhood frequently?

A. I go up through there, run across that myself a good many times; often do.

Q. Have you been there so often that you are familiar with the neighborhood and have been familiar with the neighborhood or not?

A. Well, in the last three years I have been quite familiar with the neighborhood; been down more often in the last three years than a good many years before that.

Q. Before that were you sufficiently familiar with the neighborhood to be familiar with it?

20

A. Oh, yes, surely.

Q. Does that apply to the period of twenty or more years?

A. To about twenty years. When I was ten or eleven years old I was running around to football games and the like of that in that neighborhood, like a mere boy, ran to see them every day, if they occurred that often.

Q. Has the place been pointed out to you where the little boy was killed?

A. No, I don't remember just where that boy was killed. I heard of the accident, but never made inquiry as to where or what there was about it.

30

Q. I am going to refer to the track that goes into the freight yard, up at the corner of South Street and 6th Street, and that runs on a slight curve down from the freight yard, and runs out and across Passaic Street. It goes in at South and 6th Street and runs at slight curve until it runs out of the freight yard and crosses over Passaic Street. I want to ask you if the path that you have just testified about crosses that track?

A. This path crosses—which track have you reference to?

40

Q. Crosses what is labeled "Main track Dundee spur."

10

Philip C. Kaplan—Direct

A. Yes, it does.

Q. Have you noticed whether, between your place, your coal yard, and that track, there is a slight hill that goes down from the railroad track?

A. There is; there was just a little hollow like, but I don't quite remember—

Q. On each side of that hollow like there is a slanting place, a place where the ground slants, coming down to the hollow?

20 A. Yes, sure. The railroad tracks are just a little above the level of the rough ground. There is a little hollow like, and then of course levels off the same as the other.

Q. The path that you testified about, how wide is that where it goes across the freight yard from Passaic Street over towards 7th Street; how wide a path is that?

A. The first path I had reference to in the beginning?

Q. Yes, how wide is the path as it exists there today?

30 A. Possibly three feet; enough for a few standing abreast to go through there.

Q. Have you seen numbers of people go across there that way?

A. Oh, yes; see them bunched up pretty well going through there.

Q. How is that path different from the land on the sides of it? When you look at the path how do you know where the path is? Is there any vegetation growing in the path?

40 A. No, it has been trampled down so much, that there would not be much vegetation growing up; it would have to grow up in about fifteen minutes during the night; don't give enough time to grow anything; it was trodden down pretty lively.

Q. Do you ever have coal cars standing in the freight yard?

A. No, we have our cars—there may be cars in there, that are put there by the Erie, but our cars are ordered put in our yard, and the yard itself has nothing to do with it.

Q. I want to ask you about 7th Street. Is 7th Street, where it runs between Passaic Street and South Street along by the freight yard, is that blocked up at all with tracks and switches?

A. 7th Street is—of course, I don't know whether they surveyed the land as the freight yard itself, the additional few streets there—if they have that on 7th Street, but I know that 7th Street has the main track that runs through, and then there is—I don't know whether they call it 7th Street; I don't know how much the side line takes of 7th Street.

Q. I am referring to the strip—

The Court: Is 7th Street a laid out street?

The Witness: 7th Street is a laid out street, yes, sir.

The Court: On the ground is it laid out? 30

The Witness: Yes, laid out.

The Court: How wide is it?

The Witness: That is just the question. To my knowledge—

The Court: How wide is it? Haven't you any idea? You say you are right there?

The Witness: Yes, to my knowledge 7th Street itself is—here is what I would call 7th Street; there is a few more tracks through there; I do not know whether the City calls—

The Court: What do you call 7th Street? How wide is it? 40

The Witness: I would call 7th Street about—I guess it runs at some parts wider than others;

10

Philip C. Kaplan—Direct

I mean where the yard comes in and takes part of the——

The Court: Is that what they call the yard on 7th Street?

The Witness: The yard is on 7th Street and Passaic.

The Court: Out in the street?

The Witness: Well, it is up to the City line.

20

The Court: How wide is the street? You say it is there?

The Witness: I should judge about thirty-five to forty feet.

The Court: Wide?

The Witness: In some places I would say.

The Court: Is that a macadam or simply dirt yard?

The Witness: Just simply dirt.

The Court: Sidewalk on either side?

The Witness: No, no sidewalk.

30

Q. Is there anything on the ground there to indicate where the line is drawn between 7th Street and the freight yard?

A. Where the line is drawn from 7th Street to the freight yard?

Q. Wait a minute. No, between 7th Street and the freight yard?

A. There is——

Q. What is there between 7th Street and the freight yard? Is there a fence?

A. No, no fence at all.

Q. Is there any curb?

A. Just railroad tracks, that I can see.

40

Q. Is there anything to show where 7th Street ends and the freight yard begins?

A. Not that I know of.

Philip C. Kaplan—Direct

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Q. So that you are not able to tell which is 7th Street and which is the freight yard?

A. No. I can't tell the freight yard up to where our coal yard used to be, but there has been some additional tracks, I don't know whether those are on 7th Street, or in the street at all, or just hard ground.

Q. So that you refer to those tracks which are over nearer to your coal yard?

A. Yes. I figure the main track, and then a couple of switches down 7th Street to be thirty-five or forty feet. These other tracks, whether they are called tracks on 7th Street or not, I could not say. That depends upon how the city would have them surveyed. 20

Q. Do you know of any way that you could find that out without having a survey made?

A. Well, the only way I could find out—take 7th Street from the other end of Passaic Street.

Q. Well, you would have to find out some way?

A. Yes; take the different widths through there and draw a straight line. That is the only way.

Q. There are tracks, are there, near to your coal yard? About how far out from your coal yard? 30

A. Well, there are tracks running into our yard. That is the private switch.

Q. And leading to this track in the space marked 7th Street here, how far out is that track from the side of the coal yard?

A. About fifteen or twenty feet.

Q. And that track, as it goes along to South Street, branches out into a number of sidings, does it?

A. As it gets beyond it runs into—one runs into O'Brien's, another runs into the Passaic Print Works, and runs right along down to McLaughlin's and other mills. 40

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Philip C. Kaplan—Direct

Q. As a matter of fact, in 7th Street, before getting to South Street, each one of the tracks branches into several? A. Yes, sir.

Q. And there are switches connecting with the main track? A. Yes, sir.

Q. And leading from Passaic Street these tracks branch out into a number, do they?

A. Yes, sir.

20

Q. Have you observed whether, where Passaic Street crosses the cluster of tracks that you have spoken off, planked crossings are built to bring the wagon wheels up level with the top of the rails?

A. Well, from what I remember, they are planked up here——

Q. That is, referring to Passaic Street?

A. Referring to Passaic Street, a little ways in; and they have planked up on 7th Street a little ways in here; and then they have planked up at our switch, just a few feet.

Q. Is or is not the purpose of putting that planking in, to enable teams to go into McLaughlin's mill, and into your coal yard?

30

A. Why, as I understand it, that is to enable the users of this street to run a little easier.

Q. Are there also at South Street some planked up crossings used by vehicles in crossing over those tracks and passing up or down South Street?

A. I don't know. I don't remember on South Street.

Q. Well, now, referring to the space in 7th Street, between South Street and the place where you have just testified there are planked up crossings arranged, are the tracks in 7th Street planked up?

A. The tracks, no.

40

Q. Above the ground?

A. Yes, sir; the ground is lower than the tracks.

Q. Do the tracks, the iron of the tracks, stick up above the dirt?

A. Yes.

Q. Are the ties exposed at places along there?

A. Most of them are.

Q. Is there any sidewalk on either side of 7th Street between South Street and Passaic Street?

A. Between 7th and Passaic?

Q. Is there any sidewalk—

A. Not at all. Just a path, like a street; that is what it is. 20

Q. Did you see parties playing baseball in this freight yard?

A. Yes, occasionally they do.

Q. Did you see people there last summer?

A. Yes.

Q. On various days before August 24th?

A. Well, through the summer they have been playing baseball there.

Q. How many summers does it apply to? Just last summer or other summers?

A. That is the only one I took particular notice of, because I don't know whether they had any platform, anything in the way before or not to stop them. I noticed it in the previous summer any way. 30

Cross examination by Mr. Hobart:

Q. You remember when the freight house was built, do you, Mr. Kaplan?

A. No, I won't say I do.

Q. Was it about ten or twelve years ago?

A. I am pretty sure it was up at a time the old coal yard was there; I won't say positively about anything that I am not certain about, to answer a question of that kind. 40

10

Philip C. Kaplan—Cross

Q. How long have you worked in connection with the coal business there that now goes under the name of Kaplan's Coal Yard?

A. Well, I said for the past three years, but I ran——

Q. You have been working steadily for the past three years?

A. Yes.

Q. Where did you work before that?

20

A. Well, I was in the Post Office in the City of Passaic for about eight and one-half years, nine years. I did work about fifteen years ago right where our coal yard stands today, in the back of that there was a mill called the David & Carroll Mill. There was nothing from David & Carroll's mill right back of the coal yard; that is, that particular block between there and McLaughlin's mill that I remember; I won't say for sure. I don't remember anything being there.

30

Q. You said you could not tell about this path, as to your using the path, except off and on; there was a time a couple of years or so ago when you did not know about that; what time did you refer to?

A. Well, that was a time I did not go down there so often; I would stay away for a month, and go back for a few weeks, on and off.

Q. Was that while you were in the Post Office?

A. While I was in the Post Office. I did not run down there as often as when I was in the neighborhood.

Q. Then you worked in the Post Office for a period of about eight and one-half years?

A. Eight and one-half years.

Q. Beginning about three years ago?

40

A. Up to—no, up to three years ago.

Q. That is what I mean?

A. Beginning eleven years ago.

Q. You worked about eight and one-half years in the Post Office?

A. About that.

Q. When you worked in the Post Office, you did not go down to this part of the City very often, did you?

A. Quite often, because I had nothing to do during the day; so I would run down and see what was——

Q. What did you mean by saying there were times of about two years ago when you did not know about this path? 20

A. What I meant was I would go down there probably a few times, and then for months and months I would not go down, on and off, see? I did not go down there steadily.

Q. Was there as long a time as two years when you would not go there at all?

A. Not at that time.

Q. Well, when was it?

A. That was in—when I worked down in the city, about twelve years ago. It was about a year or so that I—a year or two before they built the old coal yard of Kaplan. 30

Q. Then about twelve years ago there was a time when you did not have occasion to go down there to notice anything about this path, for a matter of about two years?

A. I won't say I did stay away for two years.

Q. What will you say? That is what we want to find out.

A. That I have not been down there; away for awhile during those two years.

Q. How often?

A. I don't remember. 40

Q. Once or twice a year?

10

Philip C. Kaplan—Cross

A. I could not say. Might have had occasion to go oftener.

Q. Once or twice a month.

A. I could not say.

Q. You don't know how often?

A. I don't know how often, because that is something I cannot just think, what my mind was for going down there. When the coal yard was built at the old place, I went down for a purpose; can't remember why I went down, I don't know why I went down; might have went down to look for a job every other day in the week.

20

Q. As a matter of fact you have no recollection of being there except when you went there for some particular purpose?

Mr. Winans: I object to that.

A. Not that.

The Court: It is competent.

30

A. I would go down there, possibly, to see some friends down there; ran down to see them. I was always in the neighborhood.

Q. Can you recall any particular occasion when you were there, twelve years ago, any particular occasion other than this general statement you have given to us?

A. I worked down there——

Q. I don't mean any particular occasion, but any particular reason for going down there?

A. No; got friends down there in the neighborhood.

Q. To call on some friends down there, you mean?

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A. Called on some friends down there. In those days there were still the 10th Street lots vacant; they had football games and baseball games going

on; big play grounds, had not been built up, and there was a good bit of it still there, wasn't built upon, lots all around not built on.

Q. This path that you have referred to, which started up here near 6th Street, and of course when the railroad tracks were built, that new freight house, and of course that cut off the path, as far as that part of it is concerned, didn't it?

A. Well, it would——

Q. Did it or didn't it cut it off, if you know?

A. I will answer to the best of my knowledge.

20

Q. Well, did it or didn't it?

A. I could not swear that it did.

Q. Did that path go right through the spot where the railroad tracks are now located near the freight house?

A. The railroad tracks come along the side; does not necessarily cut off the passage.

Q. That is not what I am asking you? Did it or didn't it, or don't you know?

A. It does not even to this day.

Q. Do you mean to say, that people to this day go over 6th Street, across those railroad tracks near the freight house?

30

A. Positively, if not obstructed by the cars.

Q. How do they get over the platform?

A. There is no platform here.

Q. There is no platform where the path used to be?

A. From the side here (indicating); the coal yard was here; this is all built up here (indicating), your platform runs up to Passaic Street about fifty feet from 6th Street.

Q. Yes.

A. And then they very often run through what we call the driveway, right across that, and take

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Philip C. Kaplan—Cross

the same course if there are no cars in the way, right over the tracks. A person will not step over the platform if he can walk through a lot.

Q. Will you kindly listen to my question and answer without giving us a historical discourse. There is a platform there now, isn't there?

A. Today.

Q. Right in front of the freight house?

A. Right in front of the freight house, runs up to—

20

Q. Runs to the line of Passaic?

A. Fifty feet from Passaic street.

Q. Been there for a number of years?

A. I don't know.

Q. Hasn't it been up there for at least ten years?

A. I don't know. I don't know anything about the platform? The platform I only noticed a few years ago.

Q. You did notice it a few years ago?

A. Yes.

Q. You know it is there now? No doubt about it?

30

A. It was there.

Q. It is there now?

A. I don't know whether it is there now.

Q. Nobody has blown it up yet?

A. Yes, the Germans might get in.

Q. Ever since that platform has been there, people, of course, are not fools enough to climb over a platform for the sake of getting over to some old path?

A. Seems to be some around.

Q. Have you ever seen them climb over the platform?

40

A. I haven't.

Q. Now, they have to go in from Passaic Street, is that right?

A. About fifty or sixty feet, I believe, from Passaic Street.

Q. They have so often used this path that they persist in walking over these tracks to get back to the old path?

A. I have seen them, yes.

Q. How many?

A. I have seen them off and on. I am not on the street all the time to notice people going over; I have seen them very often.

Q. There are several paths around there? 20

A. There is another one, yes.

Q. Where is the other path located?

A. There is another one up here.

Q. You mean up near South Street?

A. Near South Street. It is that path, I believe (referring). I don't know whether it is indicated or marked—

Q. You are pointing to the line dictated by the other witness?

A. That is about where it is (indicating). There has a path been there.

30

Mr. Winans: Referring to the lead pencil line across the front here, near South Street.

The Witness: Diagonal to South Street.

Q. Are those the only paths?

A. Well, I don't know as I know that.

Q. Aren't there a half a dozen up—

A. The only ones that can be noticed are these two, because it has been trodden down so often you couldn't see the path there.

Q. Those paths haven't any curb line on the side of them, have they, anything of that sort, to mark them off from the rest of the ground? 40

A. Not that I noticed.

10

Philip C. Kaplan—Cross

Q. Is it not a fact that people who walk across this freight yard go through it in all directions?

A. No; I noticed them taking the same course all the time.

Q. They stick to that path, that is a favorite walk?

A. It seems to be, yes; seems to have been that way.

20

Q. How about these people that go to factories around the noon hour, do they all leave that path, or stick to it so close, or go around in all directions?

A. It all depends. If one wanted to go to his home, he would take that path and follow it (indicating); if he went across here (indicating), he would cross there, take the nearest path to his home.

Q. Don't you know that those men who work in the factories around here, scatter themselves all over that freight yard on their way to and from their work?

A. I do not.

Q. You never have seen that?

30

A. I haven't taken particular notice.

Q. You have never been down there at the noon hour?

A. I have been around there at the noon hour, yes.

Q. Haven't you seen parties coming out from the factories, walk all over the square?

A. Just at the time I was there, I saw them shoot across the old landmark, the old path.

Q. That is, if they shot across the same old path?

A. Yes; that I have noticed.

40 Q. You never saw anybody anywhere enter the freight yard except on that favorite path?

Mr. Winans: I submit that is irrelevant and immaterial.

The Court: I will allow that.

A. I have seen them go over that path; occasionally they might take other courses. I don't stand there and watch everybody walk. If they are switching cars around there, they could not go under the car, or over the car; they have got to get out of the way of them and go up Passaic; have to cross around them and shoot across that old path; in fact that has been the habit, doing that. 20

Q. When cars are standing, for example, on this track, which is called the siding and which is next to the main track, Dundee spur—when cars are standing on that siding in the line of this path, these people go around the cars, don't they?

A. If the cars are there, they will go up Passaic Street; and as a rule when there is one car there, there is quite a few there. At times there will be fourteen, fifteen or sixteen and obstruct the entire passageway from Passaic Street right over to 7th Street, and pedestrians will have to go by other streets; they could not go through there at all. Sometimes there will be quite a few that way. 30

Q. Unless they climb over the car and crawl under?

A. Or go underneath, that happens occasionally. I don't know how often it is done, however.

Q. But you have seen that?

A. I have seen that, and when there were no cars there, the people have taken the old course. I have myself come out of our back yard right here (indicating)—— 40

Q. Never mind about that. Suppose I again ask you to listen very carefully to my questions. You

10

Philip C. Kaplan—Cross

know where the main track, Dundee spur, is, what is called the main track?

A. That is the main track.

Q. I don't mean the track that runs through 7th Street across the square, and on down to Passaic Street—you know where that is, don't you?

A. Yes.

20 Q. Do you remember, also, right next to that, what I have called the main track, there is another track which is a side track and runs from South Street diagonally across the square and right alongside of the main track and stops near Passaic Street; do you remember that siding?

A. Yes, there is one that runs near the stops.

Q. You remember the one that stops with the bumper?

A. Yes.

Q. Is that the one that stops at the bumper; is that the track that you mean where at times there are fourteen or fifteen cars?

30 A. I don't remember; I have seen cars there for a few hours; say of hay, unloading, and then they pull out. I seen them, and then they would back out. I don't know exactly which track has had cars on it, because there is a double track there. Very likely it would be—that is the track which runs right through, isn't it?

Q. What is called the main track; runs right through and connects with the other tracks. You have seen cars on both tracks?

A. I have. I have seen them stored there, too, but off the street, fifty or seventy-five feet off the street.

Q. Fifty or seventy-five feet off of Passaic Street?

40 A. Yes, from the bumper. So people would run through there, as a matter of habit; go right through.

The Court: Where?

The Witness: I have seen them up from the bumper.

The Court: Fifty feet or so away from the bumper?

The Witness: Might have been there originally, but pulled up for some reason or other to facilitate unloading.

The Court: Fifty or seventy-five feet away from the bumper?

The Witness: Away from the bumper.

20

The Court: That bumper is near Passaic Street?

The Witness: That bumper is near Passaic Street, right opposite Passaic Street. I have seen them up against it.

Q. Right up against the bumper?

A. Right up against the bumper, occasionally.

Q. And were there cars right next to that?

A. Going by I just would notice a car; I don't know how many cars would be alongside of it, but occasionally I would see it standing there, where people can reach it and go through 7th Street.

30

Q. This path that you have referred to, is not a straight path, I believe you said; it sort of zigzags?

A. Well, like either Passaic Street it is—well, a wide street.

Q. Suppose, for instance, you were looking right at it, and suppose you were actually walking on it, would you walk in a straight line, or go zigzag?

A. I guess I could walk in a straight line.

Q. I don't mean to suggest that you could not. What I want to know is, if a person walks along that path, would he walk in a straight line, or will it be an irregular line or zigzag line, if he sticks closely to the path?

40

10

Philip C. Kaplan—Cross

A. I don't know how I could answer that question. A path will at times be straight, and at times be irregular.

Q. Is it straight or is it irregular?

A. I could not answer that question. I could not tell myself. It looks to be a straight path. People take the same course.

Q. Have you ever walked over it yourself?

A. I have walked over it myself.

20 Q. When you walked over it was it straight or irregular?

A. I never looked down; always looked ahead. Never look down when I walk.

Q. You could not tell whether you were walking straight or not?

A. I can tell whether I am walking straight, as long as I keep up level.

Q. What was there about this path—

A. If there is about a foot in and a foot out in walking, one could not notice that.

Q. That isn't a regular straight path like a sidewalk lined with a curb and all that?

30 A. To my knowledge it is a pretty straight path. The path, to my knowledge, looks as if it was made there, quite straight.

Q. I would like to show you a picture that has already been referred to, and which I will ask to have marked—

(D-1 for identification.)

Q. Please take a good look at this picture and observe, first, the Kaplan Coal pockets. That looks familiar, doesn't it?

A. Somewhat.

40 Q. You see the McLaughlin Mill Company, do you not?

A. Yes.

Q. And the brick building and the row of coal pockets?

A. Yes.

Q. You see a high board fence around the coal pockets?

A. Up to the brick building there.

Q. You see a couple of railroad tracks?

A. Yes, that is the main line.

Q. And the siding?

A. Yes.

20

Q. Now then, will you kindly point out on this picture where this path is?

A. This path runs——

Q. Show it to us on the picture?

A. (Referring) From——

Q. Never mind where it runs from—just show us.

A. I want to know just where I am at, so that I can answer correctly. This is the main line (indicating); this is the main line, double track. What does this represent?

Q. The coal pockets are right there; you could not possibly miss them? 30

A. This picture isn't the same as what the condition of it is today. It isn't a photograph of it today.

Q. What is wrong about the picture?

A. They have not got the two tracks here (indicating); unless the measurements are different from what I think they are. The old coal yard used to be——

Q. Never mind where the old coal yard used to be. Stick to the one that is right in front of you.

A. I cannot tell you just where this path ran from. 40

Q. Point it out.

10

Philip C. Kaplan—Cross

A. The path ran from here (indicating), in recent years it would run from here——

Q. Pointing to the left hand side of the picture?

A. Yes

Q. The extreme left hand side?

A. Yes.

Q. Just mark it.

A. You want to know the path of recent years or years ago?

20 Q. I want to know where it is now, or where it it was last August.

A. What is left of it runs from a driveway right across in here, more (indicating); runs up this way, right to there, up to where that door is.

Q. Right up close to the door leading to your coal yard? A. That is about the way it did run.

Q. Very close to the telephone pole that stands right in front of your coal pockets?

A. Just about in front. I remember that used to run through there.

Q. Right in front of your coal pockets?

30 A. That is where the path used to run to; about up to the coal yard.

Q. Is that where it was last August?

A. Well, it is there today; it must have been there then.

Q. Is that where it is today?

A. It is today.

Q. That is where it is today?

A. That is, I may be a few feet out today, what I think of it.

Q. At any rate——

A. That is to my knowledge where it has been and where it is.

40 Q. You have pictured the point by reference to the entrance into your coal pockets?

A. Well, we will say—take it within twenty-five feet of there; I could not say exactly, but to my knowledge it runs into the coal pocket, where the coal pocket stands now.

Q. To the entrance of the coal pockets. Looking at the photograph, there is a telegraph pole right in front of the entrance?

A. Yes.

Q. That is about where the path is, as near as you can tell, from the photograph?

A. As near as I can tell from the photograph. 20

Q. When you followed that path, or when you walked on the path, was there any plank or any board or anything of that kind where the path came to the railroad tracks?

A. I could not recall whether there was or not.

Q. Don't you know that there never was any hard walk anywhere near that path?

A. There is a—I don't know whether they call it a board walk or not; the railroad tracks are filled in quite a distance up.

Q. There isn't any board or any plank there, is there? 30

A. I could not tell you down there.

Q. You never saw any there, did you?

A. I never took any particular notice to see whether there was or not. I am not so observing to notice.

The Court: When did you walk across the path yourself?

The Witness: Walked across it?

The Court: Walked across it last?

The Witness: A week or ten days ago.

Q. When you walked across it a week or ten days ago, don't you remember you came to the rails and had to step over the rails? 10

10

Philip C. Kaplan—Cross

A. I went down there; I had occasion one time to go over back of our yard, ran across that path into our office, ran in there on a mission of that kind; never stopped to look whether there was or wasn't; just went ahead, never took particular notice.

Q. You did see the rails there?

A. I did see the rails there, but whether I stepped up or down, I really don't remember. I know I got up there all right, without tripping. I did not
20 take particular notice whether there were boards there or not.

The Court: When you walked over a week or ten days ago what was on each side of the path?

The Witness: Well, grass, some grass there.

The Court: On the ground, what was there, weeds, grass, trees, or what, or the same thing as the path?

The Witness: Yes, path.

The Court: On each side, the same as the
30 hard ground on each side?

The Witness: Now, of course, a little muddy ground on account of vehicles running through.

The Court: Muddy ground where the path is, too?

The Witness: No, pretty well hardened.

The Court: What is the difference between the path and the ground on each side of it?

The Witness: The path is trodden down; the ground on each side is not. There is some ashes, or something growing on the side of it, just around that particular path.

40

The Court: Well, is there anything growing on the side?

The Witness: I did not notice whether there

is or not. I know the ground where the path was or is, is pretty well trodden, and was pretty well trodden down.

The Court: Did you ever walk off that path? Do you know how it is on the side?

The Witness: How is that?

The Court: Do you know what it is on the outside; isn't it the same all along there?

The Witness: I did not quite get that.

The Court: Is there any difference between the path where you say the path is, and the ground on each side of it? 20

The Witness: Oh, yes, surely.

The Court: What is the difference?

The Witness: The path is hardened down where the other side isn't; the ground is looser.

The Court: How did you ever take notice of it? You say you could not tell whether the rails were up or not; how did you know if the ground was loose around the outside?

The Witness: I have been over that path years ago.

The Court: We are talking about now? 30

The Witness: And today it is pretty well hardened down; I passed it by this morning; I seen what was left of the path; pretty well hardened down.

The Court: What do you mean, was left of the path?

The Witness: Well, there is a car here, and the car may be just where that path was; you could not see the path until you get by. I just happened to notice it.

The Court: Is there anything in that photograph to show where the path was; can you see it at all? 40

The Witness: You could not see——

10

Philip C. Kaplan—Redirect

The Court: No, can you look at the photograph and see anything that you say is the path? Look at it, and see if you can see anything there that you say is the path.

The Witness: (Referring.) Not on this picture.

The Court: Is there anything that you can see in that photograph that you can pick out as a path?

The Witness: Right about here (indicating).

20

The Court: Can you see anything? Is there anything there, in that photograph, that designates a path? Not where you think it ought to be, is there anything that the eye can see in that photograph that shows where the path is?

The Witness: It is over here. There is some of it right here; right there (indicating).

Q. Pointing to the left hand side of the picture?

A. Yes, running right through there (indicating). You see, it stops occasionally. Of course here (indicating) you could not on account of—supposed to be weeds, whatever it is there. This here (indicating), I believe, is part of it there.

30

Q. There is where the path starts. That is all you can see, isn't it, Mr. Kaplan?

A. In other words, what is left of it. If the path wasn't trodden down as often as it is, why, naturally, there would be a chance for some vegetation to grow on it; if it is going to be disturbed all the time, people walking on it all the time, so much less. Of course, I don't know, my sight is not so good; it looks like a part of the path.

40

Redirect examination by Mr. Winans:

Q. Mr. Kaplan, when you stand in Seventh Street right along by the fence of your coal yard

up toward the freight station across the freight yard, does the main track, Dundee Spur, appear to be raised up or lowered down with reference to the level of the ground in 7th Street?

A. (Referring.) Why, these tracks you have reference to (indicating)?

Q. Yes.

A. They appear to me to be higher than the level of the ground.

Q. As you look at that track from 7th Street, is there any embankment or elevation or ridge between you and the track? 20

A. Between, say, this double track here (indicating)?

Q. Yes.

A. There is a little hollow there; a little hollow, and then again level.

Q. Is that lower part or hollow, that line between 7th Street and those double tracks, visible in this photograph, marked Exhibit D-1 for identification? Can you see that hollow in the photograph?

A. (Referring.) There is things in here that you could not see today, and you could not see on this picture. 30

Q. Does the hollow show in that photograph?

A. No, the hollow shows here (indicating).

Q. We are referring to that hollow, and where the ground goes out of the hollow, does the path show as you look towards the track from 7th Street where it crosses that hollow and goes up to the track?

A. If that hollow is there, that will take away a little of the path. That does not show the hollow. The chances are it won't show the path either. 40

Q. That is it exactly. Something was said in

10

Philip C. Kaplan—Redirect

your cross examination about your being away from the neighborhood of this freight yard for short periods of time. When you did happen to be away from the neighborhood of the freight yard for intervals of time, whether it is weeks, months, or whatever it may have been, when you next came back to the neighborhood, did you or did you not notice that any change had been made in regard to this path; had it been closed up or changed in any way?

20

A. None, but for a couple of railroad ties that were laid down, and maybe an additional spur, something of that order; but that has not changed the nature of the path, or the street any, as far as the crossings are concerned. What was there is there.

Q. Counsel in examining you referred to this path as a favorite walk. As a matter of fact, was this walk the favorite walk of people who had occasion to cross over from Passaic Street to 7th Street?

A. At one time it was a very favorite walk.

30

By Mr. Hobart:

Q. When was that?

A. Years ago; was very favorite.

Q. How long ago?

A. Well, as far back as I can remember.

Q. And after a while it wasn't quite so popular, was it?

A. Well, people kept walking on it until Kaplan's coal yard was built up, and somebody else's factory was built up; naturally that prevented the people from walking on it.

40

JOSEPH TRAUINSKI, sworn for the plaintiff, testified as follows:

Direct examination by Mr. Winans:

Q. Where do you live?

A. 100 Passaic Street, Passaic, New Jersey.

Q. Is that near the Dundee freight yard? A. Yes.

Q. Across the street from it?

A. Yes, sir.

Q. How old are you? 20

A. Fourteen years old.

Q. How long have you lived in the neighborhood of that freight yard?

A. Two years.

Q. Go to school, do you?

A. I stopped last year.

Q. Up to that time you went to school, did you?

A. Yes.

Q. During the last two years when you have lived in the neighborhood of that freight yard, have you and other boys played ball in that freight yard? 30

A. Yes.

Q. How many times?

A. About five or six times.

Q. Five or six times in how long a time?

A. Sometimes when the boys get mad we would play maybe ten minutes, and maybe sometimes an hour, sometimes two hours.

Q. How many times a week would you play?

A. Once a week, about, not all the time, though.

Q. You mean baseball, I suppose, don't you?

A. Yes, sir.

Q. When you and the other boys would be playing baseball there, would railroad men sometimes come there and play with you? 40

10

Joseph Trauinski—Direct

A. No; they never came to play with us.

Q. Did you ever see any railroad men playing ball there?

A. No; the guys that work in the office, they play by themselves.

Q. You mean the people that work in the freight office, do you?

A. Yes.

Q. Any of the boys around there ever play with the boys that work in the freight office?

20 A. No.

Q. Now, when you and your friends have been playing baseball there, have the railroad men ever ordered you to go away, chased you off?

A. No.

Q. Do you know anything about any path running from Passaic Street starting up near 6th Street along the sidewalk of Passaic Street, and running back opposite where the little boy got killed?

30

The Court: It does not appear that he knows where the boy was killed.

A. There is a little path about three feet wide when you go down the hill; there is about maybe two feet when you go towards Passaic Street, right down the hill.

Q. Does that cross the double tracks that cross the freight yard from South Street to Passaic Street? I mean the tracks that run from South Street to Passaic Street, does this path cross those tracks?

40

A. The path crosses over Passaic Street that way (indicating), from Sixth Street where the people go right down there——

Q. Did you see where this little boy got killed?

Joseph Trauwinski—Cross

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A. I did not see exactly where, but I know where, though.

Q. Were you there when the little boy was there, or when there was any blood on the tracks or anything to tell you where it was?

A. It was right near the path, nearly on the path, but there was some blood—

The Court: No. Find out if he knows. Did you see the blood?

The Witness: Yes, I see it when the boy picked up his brother, and took him. 20

The Court: Were you there and saw him pick the boy up?

The Witness: Yes, I seen him pick the boy up, but I did not see him get killed. I did not see the train strike him.

Q. The place you saw them take this little boy from, and where you saw the blood, was that on this path that you have spoken of?

A. Yes.

Cross examination by Mr. Hobart:

30

Q. Where was the blood?

A. The blood was on the track, and on the ties.

Q. There wasn't any path on the ties, was there?

A. No.

Q. There wasn't any path on the track, was there?

A. No, near the path.

Q. The place you saw the blood was near the path?

A. Yes.

Q. About how far away?

A. About a foot. 40

Q. About how far?

A. About a foot.

10

Joseph Trauinski—Cross

Q. About a foot from the path itself?

A. Yes.

Q. Had you seen this little Drelich boy play around there before?

A. No.

Q. Before you saw blood there?

A. I only saw a couple of boys, I did not know if that was him or not.

Q. Were they little boys?

A. Yes, sir.

20

Q. Two or three years old?

A. Sure, about that, two or three.

Q. Did you know the little Drelich boy?

A. No.

Q. How long was that before you saw the blood on the railroad track, that you saw some little boys playing around there?

A. I don't know what you mean.

Q. You said you saw some little boys playing around there before you saw this blood on the track, is that right?

A. Yes.

30

Q. How long before did you see that? Was it five minutes?

A. I seen them when I just went into the house and came back, and I seen there was a little blood around; I did not know what was there.

Q. That was after the accident, wasn't it?

A. Yes, sir.

Q. How long before that had you gone into the house?

A. For about five minutes, I think.

40 Q. Then had you seen some little boys playing around there, about five minutes before you went into the house?

A. I seen a crowd play around there.

Joseph Trauinski—Cross

10

Q. Before you saw the crowd, did you see some boys playing around there?

A. No.

Q. When did you see them? I mean now before the accident?

A. Yes, I seen some boys, but just when the accident was done, the little boys were all up against the fence, Kaplan's fence.

Q. Were they the same little boys, or don't you know whether they were or not?

A. They were the same little boys.

20

Q. Did you see those little boys playing around before you saw the crowd—these little boys that you said were two or three years old, how long had they been around there? A. About fifteen minutes.

Q. Did you see them playing around there for about fifteen minutes?

A. Yes.

Q. What were you doing there?

A. I went out in the street, because I had—I was selling papers. I came out; I was looking at them, because I seen a train was coming around there, and I just says to my mother,—“I bet they will all get killed”——

30

Q. Never mind what you said to your mother. You saw a train coming, did you?

A. Yes. Then my father——

Q. Did you watch them?

A. No.

Q. What were they playing, did you notice?

A. With dirt, putting dirt on the tracks and everything like that.

Q. They were small boys, two, or three, or four years old, something like that?

40

A. Yes, sir.

10

Joseph Trauinski—Cross

Q. They were not walking over the tracks, crossing over the tracks?

A. No, they were on one side of the track.

Q. Playing near the track, is that it?

A. Yes.

Q. Do you know where the little Drelich boy lived?

A. No.

Q. You did not know him before this, did you?

A. No.

20

Q. This path that you spoke of, where did that start?

A. It started right in front of Passaic Street, over here where the first road is.

Q. Did it run straight across to 7th Street, or did it zig zag?

A. Right straight across.

Q. To what street?

A. To 7th Street.

Q. When you got to the tracks there wasn't any walk or any path, or anything of that sort right in between the rails was there?

30

A. No.

Q. The rails stood up above the ground two or three inches, just like the ordinary railroad track?

A. Yes.

Q. You could see the railroad ties, the wooden ties, you could see them?

A. Yes.

Q. Then was there a little hill?

A. There was a little hill.

Q. That is on Kaplan's side?

A. Yes.

40

William Rupin—Direct

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WILLIAM RUPIN, sworn for the plaintiff, testifies as follows:

Direct examination by Mr. Winans:

Q. What is your business, sir?

A. I am a druggist.

Q. Your drug store is near this freight yard? A.

Yes, sir.

Q. Where do you reside?

A. What is that?

Q. Where do you live? 20

A. I live on 57 Hamilton Avenue.

Q. How long have you lived in the neighborhood of this freight yard?

A. About eleven months.

Q. Are you familiar with the freight yard itself? You know it is there?

A. Yes.

Q. You remember the day this little boy was hurt, Ludwig Drelich?

A. The day I don't remember exactly.

Q. I say, do you remember the day?

A. The day. 30

Q. You remember the day when it happened?

A. Yes, I remember the day.

Q. Where were you that time, at the time it happened?

A. I was in the store.

Q. Did someone call you to go to the place of the accident?

A. Yes, a woman came in, ran in, and she says, that a child's foot is chopped off. I ran over there; I seen the child carrying—one kid carry another kid. I was only about ten feet away from the accident. 40

Q. How do you know where the place of the accident was?

10

William Rupin—Direct

A. It was all covered with blood and the car had not stopped moving yet.

Q. The car had not stopped moving?

A. No.

Q. Which way was the car moving?

A. I think in a west direction.

Q. What is that?

A. Opposite direction; not to——

Q. You mean away from where the boy was hurt?

A. Yes, away from where the boy was hurt.

20 Q. Did you take particular notice of the place where this accident happened?

A. Yes, sir; I did.

Q. What did you do at that time, if anything, that impressed it on your mind?

A. Well, first I called an ambulance. The ambulance came along; they did not come along at once, but the ambulance came along the second time, and they took away the child.

Q. Have you a camera?

A. Yes, I have a camera. I took a picture of that certain place.

30 Q. Did you look particularly at the place where you took this picture at the time?

A. Indeed I did.

Q. With reference to the question of whether or not there was a well beaten path at that place, what did you notice?

A. You mean what I noticed?

Q. Did you look at that place? Was there a path crossing the track at that place.

A. Well, it is still there yet, the path is.

Q. You mean the path?

A. Yes.

40 Q. What kind of a path is this? What did it look like?

A. It is a kind of mud there; it isn't a concrete path. It is simply people walking, and it became hardened up. They generally walk over it; I walk myself over it there.

Q. Where does that path lead between?

A. Leads between—well, it all depends, it isn't such a wide path. Leads between—I don't know what streets are there; 6th, 7th and 8th Streets, you have to cross that path; you have to cross that path, and you could go with that path to the mill.

Q. At the place where this accident happened is the ground perfectly level, or is it on a slant? 20

A. It isn't perfectly level.

Q. On the part that is unlevel,—we will call it a little hill for the purpose of description—does this path that you speak of go up that hill and then across the track?

A. Yes, sir.

Cross examination by Mr. Hobart:

Q. How wide is the path?

A. About four or five feet wide.

Q. Do you mean to tell us that the path goes across the tracks? 30

A. Yes, sir.

Q. How do you tell it when you get to the tracks?

A. What do you mean? I don't understand the question.

Q. You don't understand that?

A. No, sir.

Q. I thought not. Do you know where the railroad tracks are?

A. Sure, I know where the railroad tracks are.

Q. You know there are rails. 40

A. Yes.

Q. You know that there are wooden ties?

10

William Rupin—Cross

A. Wooden ties.

Q. The wooden ties and the rails rest on sleepers?

A. Yes, I understand.

Q. You know where they are?

A. Certainly.

Q. Don't you know that there isn't any path across those tracks at all, within that square, or within the freight yard?

A. Well, I cross every day; that is like a path there; people walk over it.

20 Q. What do you mean, that there is a path for people to walk across the railroad tracks?

A. Yes.

Q. You don't mean to have us understand that between the rails and the tracks there is anything that you would call a path? You don't mean that, do you?

A. No.

Q. All you mean is that people walk across the tracks?

A. Yes.

30 Q. And they walk across the tracks in a good many different places, don't they?

A. No, in that particular place, because otherwise that wouldn't be possible—have to go up against a fence.

Q. Against what fence?

A. Kaplan's fence there.

Q. Kaplan's fence?

A. Yes. If you wanted to go across Passaic Street, for instance—

Q. Go on—go ahead. Have you finished your answer?

40 A. If you want to cross Passaic Street, and an engine or a train was there, you wouldn't go that way, but you would go right this way (indicating), and across the tracks there.

Q. If an engine was on the rails, or if cars were on the rails——

A. On Passaic Street.

Q. I am speaking now of the tracks within the square, within the freight yard?

A. Yes.

Q. If an engine was on those tracks, or if cars were on those tracks, people would have to go around them, wouldn't they?

A. Yes.

Q. You have often seen engines or cars on those tracks, and they go right across from one crossing to the other, don't they? 20

A. Yes, sir.

Q. The same as any other tracks that are blocked by cars or either standing there or moving back and forth?

A. Yes, sir; have to wait.

Q. They have to wait until the cars are moved away?

A. Moved away.

Q. Sometimes they stand there for several hours or a long time? 30

A. No, sir; not a long time.

Q. Quite a long time.

A. No, five or six minutes, because it blocks traffic.

Q. I don't mean Passaic street; just forget Passaic Street. I mean in the square itself, the cars often stand in the square, don't they?

A. I never noticed.

Q. Never noticed about that?

A. No.

Q. Do you know where the bumper is near Passaic Street? 40

A. Yes.

William Rupin—Cross

10

Q. The end switch that leads across the square, do you remember about that?

A. I was never walking around that section.

Q. You don't remember about that?

A. No, I don't remember about this particular place. That would be far away.

Q. Far away from what?

A. From the path where they have to cross.

Q. What would be far away from the path?

A. The bumper.

20

Q. The bumper would be far away from the path?

A. Yes.

Q. How far would the path be?

A. About fifty feet.

Q. Do you know where the bumper is?

A. Yes, sure, I do.

Q. You say that is about fifty feet from this path?

A. Yes.

Q. How wide is the path?

A. About three, four, five feet wide.

Q. Is it not a fact that the entire square is all open so that anybody can walk across the tracks anywhere they see fit?

30

A. Well, if that is the path that leads over there.

Q. Answer my question.

A. Well, I don't know. What is the question?

(Question read.)

A. No, that isn't it. When cars are blocked there, you could not walk.

Q. I am not asking about cars. When there isn't any cars there, couldn't people walk across the tracks anywhere they see fit?

A. Yes, they could.

40

Q. Don't they do that?

A. No, they do not.

Q. Have you ever been there at noon time when the crowd come out of the factories?

A. Yes, sir; I am there every day from eight o'clock in the morning until ten o'clock at night I see the people come out and go back.

Q. And they have to walk across this path, do they?

A. Not all of them.

Q. Where do the rest of them go that don't walk on the path?

A. Another block is down there; another square is down there; two places for them to cross. 20

Q. They go across anywhere they like, don't they?

A. Yes.

Q. Certainly. They don't all walk up like a military regiment, do they?

A. No, sir.

Q. And parade down the path two, or three or four abreast?

A. No, sir.

Q. They go wherever they can go across the quickest, is that it?

A. That is the idea. 30

Q. Did I understand you to say that you came to the place shortly after the accident?

A. Yes; about two or three minutes after that.

Q. Had the boy been taken home?

A. No, the other boy carried this boy; his little brother carried that kid away.

Q. Did you know the boys?

A. Yes, I know them.

Q. You knew the family?

A. Yes, know the family.

Q. Where did the family live?

A. Across the street from the drug store. 40

Q. On Passaic Street?

10

William Rupin—Cross

A. Yes; on Passaic Street.

Q. You say that the little boy's brother carried him home?

A. Yes.

Q. Did you see this man, Mr. Gauglar—did you see him there?

A. Yes, I seen him there.

Q. Didn't he carry the boy home?

A. I didn't see him carry him; I seen the little kid carry him. After, you know, when the people started to run over there, I did not see anybody—
20 I went over to the drug store and called up the ambulance; when I called for the ambulance the kid took him home, but at the beginning his brother carried the kid.

The Court: How big was the brother?

The Witness: About five years old.

Q. Had you seen the boys playing around there before the accident?

A. The same boys?

Q. Yes.

A. No, I never seen them.
30

Q. You went to the place where the accident— at least where you were told the accident happened?

A. Yes, I was there.

Q. You saw some blood?

A. Yes; I saw some blood.

Q. On the tracks?

A. On the path, near the path.

Q. Near the path?

A. Yes.

Q. But you did not see any on the tracks?

A. No, I did not see any on the tracks.

Q. How near the path?
40

A. Right three or four inches, you know.

Q. Just a few inches from the edge of the path?

A. Yes.

Q. On the side of the path?

A. Yes.

By Mr. Winans:

Q. You testified, in answer to a question a minute ago, that right on the top of the ties and in between the rails of the track that you could not see the path?

A. Yes.

Q. In crossing, what did people put their feet on when crossing the track? 20

A. Well, I don't know, some concrete, ties, I suppose; put up by the railroad.

Q. Right between the tracks, between the rails themselves?

A. Some mud there.

Mr. Hobart: You mean the railroad put mud there?

The Witness: I don't know who put the mud there; probably people.

Q. When you said there was no path, you were speaking then of the small space between the rails of the track, weren't you? 30

A. Yes.

By Mr. Hobart:

Q. And the space between the rails, you noticed was mud, didn't you?

A. Yes.

Q. Just like the other sides?

A. No, not like the other one; the other one is concrete. You could walk on that as good as the sidewalk; but this one is simply mud or dirt; I don't know what. 40

Q. Just mud between the rails?

A. Yes.

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Catherine Drelich—Direct

CATHERINE DRELICH, sworn through interpreter Jacob Futoransky, testifies as follows:

Direct examination by Mr. Winans:

Q. You are the mother of little Ludwig Drelich?

A. Yes.

Q. Who died last August?

A. Yes.

Q. Your husband is Jan Drelich, the plaintiff?

A. Yes.

20

Q. Does your husband work in the ammunition factory, where they would not let him go to court to-day?

A. Yes, sir.

Q. How old is your husband?

A. Thirty-three years old.

Q. How old are you?

A. Twenty-eight.

Q. How old was little Ludwig when he died?

A. Two years and twenty-one days.

Q. Do you remember the day when he died?

A. I didn't put down the date, and I don't re-
30 member the day.

Q. I will ask you whether it was in the month of August last?

A. Three months back.

Q. How many other children have you now living?

A. Three children, and the fourth one is the one that got killed.

Cross examination by Mr. Hobart:

Q. What is your husband's employment now?

A. He is working in the factory.

40

Q. Is he fireman in the factory?

A. He hauls coals.

Q. What pay does he get?

Richard Langfeld—Direct

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A. If he works the whole week he makes nineteen and one-half dollars, but he does not work steady.

Q. What nationality?

A. Polish, goes to the Polish Church.

Mr. Winans: It is stipulated that the parties are of Polish nationality.

Q. How long have you been in this country?

A. Thirteen years.

RICHARD LANGFELD, sworn for the plaintiff, testifies as follows: 20

Direct examination by Mr. Winans:

Q. Where do you live?

A. I live in Passaic, over the restaurant and paper box factory.

Q. Does the building in which you live overlook the freight yard?

A. Oh, pretty good.

Q. What is that?

A. Oh, yes; anybody can see that better over there, just as I sit here. 30

Q. Do you know the place where little Ludwig Drelich was killed last summer?

A. At the crossing place; I heard it.

Q. How long have you lived there?

A. It was seven years.

Q. During that time have you seen boys in the neighborhood playing baseball in that freight yard?

A. Oh, yes.

Q. Ever see them chased out or ordered out?

A. No.

Q. Do you know anything about the path running across that freight yard and crossing the railroad tracks, a path running from Passaic over to 7th Street? 40

10

Richard Langfeld—Direct

A. Oh, yes; over across the tracks there?

Q. Yes.

A. Oh, yes; they start about six o'clock in the mills up there, and go through 8th Street, and then they go across there.

Q. How long has that path been there?

A. Oh, I don't know; maybe three or four years before Kaplan put the coal yard there; nobody can shove them over the fence over there; they have to go in the yard, since that, three years, about that; they go across the tracks, that is nearer.

20

Q. You mean you remember that path?

A. Yes; the path is now there, yes.

Q. Did you ever remember the time when people did not cross over there?

A. Yes; when there was a fence over Kaplan.

Q. I mean in the freight yard, not where Kaplan is, across the freight yard?

A. Yes; they crossed there too before; as good as now.

Q. You know the place where the railroad tracks go across over 7th Street and across over Passaic Street?

30

A. They go over 7th Street, you mean?

Q. The tracks that run down toward 7th Street, they go across Passaic Street, don't they?

A. Yes, sure; they cross there.

Q. Do trains ever stand there and block up Passaic Street?

A. Yes, sometimes, right along; that is not along there.

Q. How long?

A. I don't know; maybe five or six minutes; that is not very, very long.

40

Q. How do people go that want to go up around Passaic Street?

Richard Langfeld—Cross

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A. When there is a wagon standing there in the block?

Q. People that are on foot?

A. If they are in a hurry then they go another way, might go between the tracks.

Q. Do some people go around the pathway that you have testified to?

A. They go around here, down here (indicating), and jump through, from that side.

Q. Do some use the path that you have testified to, going across the freight yard?

20

A. Oh, yes; they go across the freight yard, they do that.

Cross examination by Mr. Hobart:

Q. You know where the side track is, right alongside of the main track?

A. Yes; there are two, or three, or four tracks, maybe.

Q. There are two tracks, one alongside of the other, running from one crossing to the other of the square; do you know where they are?

A. Yes.

30

Q. Do you remember about that?

A. Yes.

Q. You have seen cars standing on those tracks, haven't you?

A. Standing cars, yes.

Q. Quite often?

A. Yes, sure.

Q. Block the entire tracks, sometimes?

A. No, not at all. Some three, four or five, they are waiting, somebody goes for cabbage, chickens, sometimes.

Q. People go there to get stuff from the cars?

40

A. Yes, they wait for that there.

10

Richard Langfeld—Cross

Q. When the cars are on the side track, then the people have to walk around them, don't they?

A. Yes, sure.

Q. And cars stand over this path sometimes, too, don't they?

A. On this track? Over the sidewalk, you mean?

Q. No, I don't mean the sidewalk. I mean the path you have been talking about?

A. The path?

Q. Yes; don't cars stand over the path?

20

A. Yes, sure.

By Mr. Winans:

Q. Have you seen them kick cars on the tracks in that freight yard?

A. Kick cars?

Q. Yes.

A. What is that?

Q. Making flying switches. Did you ever see them send over a car or two or more cars flying across that yard, without any engine hooked on to them?

30

A. Oh, yes.

Q. How often?

A. Not very often. It happens sometimes the others may be for the handkerchief factory, or for McLaughlin's yard, and the men jump on to stop them.

Q. Who sends the cars across, railroad men?

A. Yes; the man that runs the engine.

Q. You mean Erie Railroad men, don't you?

A. Sure, without doubt.

PLAINTIFF RESTS.

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John A. Kelleher—Direct

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JOHN A. KELLEHER, sworn for the defendant, testified as follows:

Direct examination by Mr. Hobart:

Q. You are a civil engineer, are you, Mr. Kelleher?

A. Yes, sir.

Mr. Winans: I admit his qualifications.

Q. Did you make this map that has already been referred to, a blueprint of which has been marked Exhibit P-2? 20

A. I did.

Q. Is it made from actual survey?

A. It is.

Q. Made the 24th of September, 1917?

A. Yes, sir.

Q. Scale twenty feet to the inch?

A. Yes, sir.

Q. Have you indicated these various streets that have been referred to, and the coal yard and factories and so on?

A. I did. 30

Q. Also marked the freight house?

A. Yes, sir.

Q. Please refer to the map marked "freight house," immediately in front of the word "platform"—referring to the platform in front of the freight house, how long is it, and how far does it extend towards Passaic Street?

A. 207 feet long; two feet off the line of Passaic Street.

Q. Does it run practically to the line of Passaic Street?

A. Within two feet of the line of Passaic Street. 40

Q. In this square you have certain broken lines; will you state what those represent?

10

John A. Kelleher—Direct

A. They represent the outside lines of the driveway, for wagons and automobiles and things that drive up to these platforms.

Q. Calling your attention to certain broken lines that appear close to the side track in the square marked "siding," immediately next to the track marked "Main track, Dundee spur," is there a driveway alongside of that siding?

A. Yes, sir.

Q. As indicated by these broken lines?

20

A. Yes, sir.

Q. Does it follow practically the entire length of the siding?

A. Practically the entire length.

Q. About how wide is the driveway?

A. Well, it varies from anywhere from fifty feet up to 110, 115 feet.

Q. Have you indicated on the map the crosswalks at Passaic Street, 7th Street and South Street?

A. Yes, sir.

Q. Also at 6th Street and South Street?

A. Yes, sir.

30

Q. Those are indicated in what way?

A. They are indicated by double lines alongside of the track.

Q. Outside?

A. Outside of each rail.

Q. With the exception of those you have just indicated on this plan, is there any crossing or any kind of walk or plank, anything of that sort on any of these tracks within the limits of that square?

A. No, sir.

40

Q. Calling your attention particularly to the main track, Dundee spur, at the point where it approaches what you have marked "street line of surface street," is there anything to distinguish that

section of the Dundee spur from the rest of it? Is there anything to distinguish it in any way, or is it all ordinary rails and wooden ties?

A. All ordinary rails and wooden ties.

Q. How far are the rails above the level of the ground?

A. I should say about, anywheres from two to three inches above the ground, and the ties probably stick out another couple of inches.

Q. The way they usually are?

A. I should say about three and one-half to four yes, sir. They vary according to the condition of the ground.

20

Q. Referring to the slope or slant in the ground, where is that?

A. That slope would be right about the corner of South Street and 7th Street; it rises there from about a straight line to a point, I should say, about seven feet back, rises up four to five feet; then flattens out.

Q. When you were there, did you make any particular observation to see whether or not there was any path anywhere within the line of that square crossing either siding or the main track of the Dundee spur?

30

Mr. Winans: I object to that, because it isn't in evidence that this witness was ever there at the time this accident happened.

The Court: He is asking when he went there whether he saw any. Answer the question.

The Witness: I did.

Q. Did you find any path?

A. Why, no, I could not see anything like that, like a well defined path.

40

Q. How long were you there?

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John A. Kelleher—Direct

A. I guess I was there anywhere from three to four and one-quarter hours.

Q. You have got pretty good eyesight.

A. Pretty fair.

Q. Had considerable experience as a surveyor?

A. About twelve years.

Q. Made a great many hundreds of maps based on observation, which in turn depend on eyesight?

A. Yes, sir.

20

Q. Could you find any path at all, anything that looked like a path, resembling a path, down here near the street line of 7th Street?

A. No, sir; there wasn't anything that looked like a path at all, anywheres there, anywheres near Passaic Street or 7th Street, or 6th Street.

Q. How is the ground there, what kind of ground is it?

A. Why, it is sort of rough ground; where a lot of wagons and things have been driving in and around, loosened up the ground. There is some weeds and things growing up around there.

30

Q. I show you this picture marked D-1 for identification—is that the way it looked when you saw it?

A. (Referring) Yes, sir.

Q. That is a fair representation of conditions as you found them?

A. That is a pretty good representation.

Q. I show you a few weeds that appear in this photograph; did you observe some weeds at different places?

40

A. Why, yes, there was a sort of depression in the ground, running along in here (indicating), somewheres, about a foot and a half deep, where there wasn't no travel over it, and that was the reason why there wasn't any weeds or anything there.

Q. Have you marked on this map the street line of the various streets?

A. Yes, sir.

Q. How did you ascertain those lines?

A. Why, from the City map of Passaic; found the line of Passaic Street, and from there I surveyed and got the line of South Street, all the way to 7th Street and 6th Street.

Q. There is no curb there to distinguish the line on the ground, is there?

A. No, sir; there is not. There is a sidewalk there on Passaic Street. That is the only thing. 20

Q. You checked that with the city maps and then on your survey marked the street lines?

A. Yes, sir.

Q. How wide is 7th Street?

A. 7th Street is sixty feet.

Q. Did you observe anything that looked something like a path up here (indicating), towards South Street and 6th Street?

A. Why, I looked generally around through there; I did not see anything at all, with the exception that there might be a little travel in through there. 30

Q. Where do you mean by "in through there"?

A. I should say from South Street to 6th Street, it looked like as if there had been something.

Q. As if it had been used?

A. Been using it.

Q. That is in the upper left hand corner of the square, is it?

A. Yes, sir; it is within sixty-five feet of South Street.

Q. Nowhere near Passaic Street? 40

A. No, sir.

Q. Referring to the freight platform which you

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John A. Kelleher—Cross

have already mentioned, how high is that above the ground?

A. Why, about twelve and one-half feet.

Q. And there is another freight platform so marked on the map, is there?

A. Yes, sir.

Q. Between two of the sidings, near the freight house?

A. Yes, sir.

Q. Is that also about twelve and one-half feet?

20

A. That is also about the same height.

Mr. Hobart: We offer the map in evidence.

(Marked Exhibit D-2.)

Mr. Hobart: I now offer the photograph, heretofore marked D-1 for identification.

(Marked Exhibit D-1.)

Cross examination by Mr. Winans:

Q. Mr. Kelleher, how long have you practised as a surveyor?

30

A. About twelve years.

Q. Have you made a great many maps for the Erie Railroad during that time?

A. Yes, sir.

Q. How many?

A. Oh, I should say probably eight hundred, a thousand, something like that.

Q. Others in addition to those eight hundred or a thousand that you made for Mr. Hobart and his partners, I presume?

A. I made them for a great number of people.

40

Q. A great many of those were railroad maps, of the various railroads of New Jersey?

A. Yes, sir; different railroads; different other cases.

Q. When you undertake to make a map, I suppose there are instructions given you as to what sort of a map they want?

A. They tell me they want a survey of a certain location; and I go out there and pick up the actual conditions on the ground, and show the street lines and different things.

Q. If it is a map of railroads, you are told to bring out the railroad tracks, I suppose?

A. Oh, yes; I bring out everything that is there.

Q. If it is a map of trolley tracks, you are told to bring out the trolley tracks, are you? 20

A. Well, I am not told, I am simply told to draw a map.

Q. Are you told to bring out every physical characteristic?

A. Everything there on the ground.

Q. Such, for instance, as telephone wires, do you bring those out?

A. Why, no. I don't do anything like that, unless there is probably something dependent upon that; they draw it to my attention.

Q. Who gives you instructions as to what is dependent upon the map you are to make? 30

A. Nobody gives me any instructions.

Q. Where do you learn what kind of a map you are to make?

A. I knew that there had been an accident case, in here, and they told me that they wanted a map of this section of the city, and I went up there.

Q. In this particular case you were told that?

A. In this particular case I was told that.

Q. And by Mr. Hobart?

A. Yes, sir.

Q. Mr. Hobart gave you instructions as to the particular piece of territory that he wanted you to make? 40

10

John A. Kelleher—Cross

A. Yes, sir; exactly.

Q. Did he tell you to bring out the street lines?

A. Show the street lines, tracks, buildings.

Q. And sidings?

A. Sidings, anything at all.

Q. Anything that was there?

A. Anything that was there, yes, sir.

Q. Did he tell you to bring out the weeds?

A. I could not show weeds on that.

Q. I did not ask you whether you could; I asked
20 you if he told you to bring out the weeds?

A. No, he did not tell me anything like that.

Q. Is there a way of bringing out the weeds?

A. I suppose you could, but you could not show
the weeds on a thing of this kind.

Q. Couldn't you show them as sprouts, growing
up, like they show vegetation, and so on; you know
those characters?

A. Yes, I know what you mean; you could not
draw that to a scale.

Q. You could have shown them?

A. I suppose you could; but could not draw them
30 to a scale.

Q. You could have made them with the little fig-
ures, drawn to a scale of your own?

A. I suppose you could.

Q. Your little figures would have shown the
weeds and growing stuff there?

A. Yes.

Q. You would have shown it if instructed to?

A. I probably would have shown it.

Q. In fact if you had been so instructed, then
you would have shown the line of cessation of those
weeds? In other words, you would have shown the
40 weeds, where the weeds stop, and where the beaten
ground begins?

A. I suppose I would.

Q. You would have shown it if instructed by Mr. Hobart, wouldn't you?

A. I would have shown anything that was there.

Q. You would have shown the weeds, and the place where the weeds stopped if Mr. Hobart had told you to do so?

A. I suppose I would.

Q. Then, as a matter of fact, you were not instructed to show the weeds at all, were you?

A. I was instructed to show everything that was on the ground there.

20

Q. Then upon your own responsibility you omitted the weeds?

A. Absolutely.

Q. Were you told to put paths in there?

A. I was told to show if there were any paths or driveways there, and I was told to put everything on the map.

Q. Did you look carefully to see what there was there?

A. I did.

Q. What do you call a path?

A. I call a path anything that is well defined on the ground that you could see, that was used for any length of time that would show up.

30

Q. Who would be the judge as to the length of time it had been there?

A. I suppose you are to judge it yourself, unless you know.

Q. By yourself, you mean your own method of ascertaining that?

A. By my own judgment.

Q. When you say a well defined path, do you mean there must be a drop at the edge?

A. No, not necessarily.

40

Q. Suppose you have a place where the ground

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John A. Kelleher—Cross

is beaten down hard, and that hard condition persisted for a width of four or five feet, and then the ground was a little bit hard, as if beaten down by people who in turning out, perhaps, for people going in the opposite direction, but only a little way, because it wasn't much trodden, and then you found the hard ground stopped, would you call that a path?

A. No, sir.

Q. You would not call that a path?

20

A. No, sir.

Q. I don't want to ask anything more about that. You have indicated a street line here; when I say street line I mean the line of 7th Street as you have indicated it here, nearer to the freight station; you understand the line I mean?

A. 6th Street.

Q. 7th Street; the line of 7th Street which is nearer the freight station?

A. Yes, sir.

Q. Is there any physical indication on the ground of that street line?

30

A. No, sir.

Q. Why did you put it there?

A. We always show the street lines when we make a survey.

Q. Were you instructed to show that?

A. I was instructed to make a survey.

Q. You said a moment ago that you were instructed to show everything that showed on the ground?

A. Yes, sir.

Q. Did this show on the ground?

A. No, sir; but I had to show it there to make
40 the survey.

Q. That is your best answer, is it?

A. Absolutely.

Q. Is there, as a matter of fact, anything to indicate where the street ends and where the freight yard begins, any physical evidence to show where one ends and the other begins?

A. Why, yes.

Q. What?

A. Why, the crossing planks on Passaic Street.

Q. Wait one minute. Do the crossing planks on Passaic Street show where 7th Street ends and the freight yard begins?

A. Well, the crossing planks are ordinarily built right up alongside of the street; that is, from building line to building line. 20

Q. You say ordinarily so built?

A. Yes, sir; I think so. I found lots of them that way.

Q. You found lots of them were not that way?

A. I found them probably four or five feet off.

Q. What possible relation have the crossing planks on Passaic Street with an imaginary line dividing 7th Street from the freight yard?

A. None at all.

Q. None whatever. So that in placing that line, those crossing planks had nothing to do with the matter? 30

A. Absolutely nothing.

Q. Then what was your reason for placing your street line there?

A. My reason was, I had to place it there to complete my survey.

Q. Anyone walking along 7th Street who happened to be a surveyor and had access to the city map, and paced it off or used a transit and found out where 7th Street is, and was walking along 7th Street, as he goes on public property, what is there there, if anything, to tell him where 7th 40

10

John A. Kelleher—Cross

Street ends and this property that is supposed to be railroad property begins?

A. Well, there is a building of McLaughlin, Miller & Company down there, right on the building line of Passaic Street.

Q. That is on the opposite side of 7th Street?

A. That is the only way to find that out.

Q. And there is nothing whatever on the west side of 7th Street to tell a person which is public property and which is railroad property?

20 A. Only the sidewalk there, that is all.

Q. The sidewalk there; where is the sidewalk?

A. The sidewalk is on Passaic Street.

Q. I am talking about 7th Street; is there any sidewalk on 7th Street?

A. No, sir.

Q. Will you please go back to the question, and tell this jury what there is to tell a man who is walking along 7th Street when he is going to put his foot over and step on railroad property, and to meet with the defence that he wasn't on a place where he had a right to be?

30

Mr. Hobart: I object to that question; it is immaterial, and has absolutely nothing to do with the case, ridiculous.

Mr. Winans: I withdraw the question. It is too involved anyway.

Q. Seventh Street, all the way along between Passaic Street and South Street, is more or less cut up with railroad tracks?

A. Yes, sir.

Q. And switches?

A. Yes, sir.

40

Q. And they are not built flush with the road, are they?

A. No, some places they are, and some places they are not.

Q. What is that street made of?

A. Why, dirt street.

Q. With more or less cinders mixed up with it?

A. Yes, sort of screenings on top of it.

Q. Screenings ashes and black railroad droppings, isn't it?

A. Well, no, I would not call it that; I would say it was a dirt road.

Q. With a lot of soot and ashes mixed with it? 20

A. Yes, the same as any other road.

Q. What is the character of the soil immediately over this imaginary line of the freight yard; what is the character of the soil there?

Q. That is practically the same, with the exception of around the tracks.

Q. So far as the soil is concerned, you could not tell the difference between the two?

A. No.

Q. As to the railroad tracks, the construction of those railroad tracks, do the railroad tracks in the freight yard differ in any way in construction or appearance, from the railroad tracks in 7th Street? 30

A. No, sir.

Q. They are just the same way, are they?

A. (No answer.)

Q. Did you make this photograph, Mr.—

A. Not this, no, sir; I did not.

Q. But you are familiar with the location sufficient to be able to testify to it, are you?

A. Yes, sir.

Q. You said a moment ago, I believe, that a path was something that had well defined boundaries, and had the evidence of long travel, didn't you? 40
Those are indications of a path to your mind?

A. Yes, sir.

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John A. Kelleher—Cross

Q. I want to call your attention to a place on this photograph, and ask you if this place, starting from a letter "A" which I will mark on the margin of this photograph,—if from the place of this photograph starting at the letter "A" and continuing to the letter that I am now making, a capital "B," and continuing to the light place at the edge of the ties marked "C," and over to the place on the other side of the track where a man is standing—if that answers the description of a path that you have laid down, that has definite boundaries, and has the indication of long travel?

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A. No, sir, I did not describe that path there at all.

Q. You don't think that looks anything like a path?

A. No, sir; would not call that a path.

Q. That streak that I have indicated by that row of letters, indicates a place which you would look at and say it is not a path, does it?

A. Yes, sir.

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By Mr. Hobart:

Q. This street line on 7th Street, I understand you took that to be your guide, the official map of the City?

A. The City of Passaic. I had to find this line here with the building, and then I found out that the other line of Passaic Street was sixty feet from there, so I put that in there. I had to put that in there to get this block inside here (indicating). There wasn't any use of distinguishing different property, without showing that particular line.

Q. You got that particular line by examination of the official map of the City?

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A. Yes, sir; and from an actual survey from Passaic Street.

By Mr. Winans:

Q. Mr. Kelleher, how long did it take you to make that map, including the survey?

A. Why, I was out there about three and one-half hours, and I think it took about—well, all told, the best part of a day; about two and one-half hours more down in the office.

Q. You located the imaginary street line between 7th Street and the freight yard, because it was sixty feet away from what is marked brick building on the map? A. Yes, sir.

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Q. How did you know that the brick building is properly located?

A. From running a certain distance from Passaic Street we located the corner of this building here (indicating) then we knew we are right with South Street.

Q. But you did not know where the building ought to be built? A. We know it is on the line.

Q. How do you know it is on the line?

A. Survey; that is the only way I can tell you.

Q. After assuming that the brick building across 7th Street was in its proper position, it took you three and one-half hours to find out whether this line was really on the street or on railroad property?

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A. No, sir; I did not say anything like that at all; it did not take me five minutes, three minutes to find that line.

Q. If you were wrong in your hypothesis, that that brick building is properly located—when I say properly located, I mean it is located precisely on the edge of 7th Street—if you are wrong about that; if it is really a few feet back; then your whole location of this imaginary street line might be wrong, mightn't it?

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John M. McCormack—Direct

A. It would be if I surveyed wrong.

Q. It might be that the line should be located several feet east or west of where you have located it, naturally, if the location of the building is wrong, is that right?

A. Yes, sir.

By Mr. Hobart:

Q. Was this building, do you remember, shown on the official map of the City?

20 A. Why, yes, sir.

Mr. Winans: I object to that. The official maps are not in evidence.

The Court: Yes, it is incompetent.

JOHN M. McCORMACK, sworn for the defendant, testifies as follows:

Direct examination by Mr. Hobart:

30 Q. On the 11th of August, 1917, were you employed by the Erie Railroad Company as freight agent?

A. Yes, sir.

Q. What station?

A. Dundee, New Jersey.

Q. Located in Passaic?

A. Yes, sir.

Q. Near Passaic Street and 6th Street?

A. Yes sir.

Q. That is a freight station, is it?

A. Yes, sir.

Q. Not used for passenger traffic?

A. No, sir.

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Q. How long have you been there?

A. Since February 5, 1916.

John M. McCormack—Direct

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Q. Are you working there now?

A. No, sir.

Q. Where are you working now?

A. At Croxton, New Jersey.

Q. Were you informed of this accident on the 11th of August, shortly after it occurred?

A. Yes, sir.

Mr. Winans: I object to that as immaterial and irrelevant.

Mr. Hobart: Simply to fix the occasion.

Mr. Winans: We will admit that he knew when the accident happened. 20

Q. Were you working at the station that day?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir.

Q. When were you informed about it?

A. Why, within about ten minutes of the time it happened.

Q. Did anyone indicate to you where the accident had happened?

A. Well, we looked up the place where the accident happened. 30

Q. Well, where did you look?

A. We looked where a car was standing, 150 feet from the Passaic Street crossing.

Q. Which way was it standing from Passaic Street, standing toward South Street or the opposite direction, or which way?

A. Toward South Street from Passaic Street.

Q. And what kind of a car was that?

A. Box car.

Q. Do you know whether that car had been placed at that position on the day of the accident. 40

A. Yes, sir.

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John M. McCormack—Direct

Q. Did you see it placed there?

A. I did not see it placed there, but I knew the crew was switching there.

Q. Was there more than one car on the switch?

A. When I saw it there was only one. It wasn't on the switch; it was on the main track.

Q. Is that known as the Dundee spur?

A. Yes, sir.

Q. How far from Passaic Street?

A. I would say about 150 feet.

20

Q. How do you fix that distance?

A. Well, it was about between four and five car lengths from the crossing.

Q. That was the only car on that spur at that moment?

A. At the time when I saw it.

Q. What time did you see it? Morning, afternoon or what?

A. In the morning.

Q. About what time?

A. I imagine about a quarter after ten.

30

Q. Did you look to see if you could find any blood or any indication of an accident anywhere on the side track?

A. Yes, sir; I did.

Q. What did you find?

A. I did not find anything, any sign of it anywhere.

Q. Was anybody with you when you looked?

A. Yes, sir; the yardmaster, Mr. Bell.

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Q. During the time that you worked at Dundee freight station, was there any path leading across the Dundee spur on the siding beginning somewhere along Passaic Street and running catecornered across 7th Street?

A. No, sir.

Q. What is the character of that ground at that part of the square?

A. You mean as to being level or——

Q. Yes; is it level?

A. No, it isn't; sloping towards the tracks; that is, from the track it slopes down toward 7th Street.

Q. How about the rails, are they above the level of the ground or on a level with the ground or how?

A. The track in 7th Street is high—the main line there is higher than the street going down on 7th Street.

20

Q. Is there anything anywhere along the main line or on the siding next to it to indicate a crossing?

Mr. Winans: I object, if your Honor please. That is calling, rather, for a conclusion.

Q. Is there anything in the way of boards or planks?

Mr. Winans: We will concede that there are no boards or planks placed there, Mr. Hobart.

Mr. Hobart: All right; it is admitted.

30

Q. What is that spur track used for?

A. You mean the main line?

Q. The main line, yes.

A. To take the cars to the different mills that are located opposite there. It is what we call the main track. All the cars coming in there from all points along the road are brought in and delivered to the New York Belting and Packing Company.

Q. What is the siding right next to the Dundee spur? What was that used for?

A. That is the delivery track.

Q. What do you mean by that?

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A. I mean that the cars are put in there, and

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John M. McCormack—Cross

teams and automobiles backed in there and take delivery of the freight from those cars.

Q. Do you usually have cars on that siding?

A. There is always cars on that siding.

Q. About how many?

A. Well, if I remember right, the switch holds thirteen cars. There is always two or three cars in there; anywhere from one up to thirteen in there all the time.

20 Q. On the part of the siding with reference to Passaic Street—that is, were they in that part of the siding which is nearest Passaic Street or that part which is nearer the center of the square, or towards South Street?

A. No particular place on there; they were placed anywhere on that switch.

Q. They were frequently placed on the switch at a point that would bring them near Passaic Street?

A. Yes sir; right down at the end.

30 Q. When cars were on that siding, did people drive in and out to get deliveries of goods from the cars?

A. Constantly.

Cross examination by Mr. Winans:

Q. Were you subpoenaed to testify here today?

A. No, sir; I was not.

Q. You were just relieved from your duties at the freight house to come here to testify for the defendant's weren't you?

A. I was directed to report here at the Hackensack Court House.

40 Q. By the Erie Railroad Company?

A. Yes, sir.

John M. McCormack—Cross

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Mr. Hobart: It is not customary to issue subpoenas to employees, is it?

The Witness: I never had one issued to me.

Q. You came from your duties as one of the employees sent over to Court?

A. I worked for them, yes, sir.

Q. Where did you look for this blood?

A. All over that track, what we call the main track. I also looked on the street; also looked in what we call the freight house track, which, as I remember, holds sixteen cars. I first looked at the main track; then on South Street switch, then I thought the accident had not happened there; I could not find anyone that had seen it, and I went over the tracks under the freight house, and between the platforms there.

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Q. You practically went over every track in the freight yard, did you?

A. Yes, sir; I did.

Q. And found no blood?

A. Not a sign of blood.

Q. The car went right over the foot and left no sign of any blood on the tracks?

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A. No, sir; it did not.

Q. How did you know that there was blood there to look for if you did not see any?

A. I did not know.

Q. You just sort of suspected that there might be blood?

A. No, I heard that there was an accident, and it was my business to make a report of the condition.

Q. You testified, did you not, that from what you call the Dundee spur track, toward 7th Street, it is a little down hill?

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John M. McCormack—Cross

A. Yes, sir; I did.

Q. The track is built on a curve there, is it not?

A. A slight curve, yes, sir.

Q. That is built the same as any other track, built on a curve, with the outer rail raised up a little, isn't it?

A. I am not an expert on tracks, but from my observation I should say that the outside rail was a little bit higher than the inside rail. I don't know that it is, but it appeared to be so.

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Q. The outside rail is the one from which the ground leaves off a little down, isn't it?

A. Yes, sir.

Q. Isn't it what we call a banked track, there?

A. I am not an expert on tracks; I don't know anything about that.

Q. Do you wish to say that there are always approximately thirteen freight cars standing on the track that you described as a siding in the freight yard?

A. I did not say that.

Q. Tell us what you did say?

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A. I said that the switch would hold thirteen cars, and at times was as high as thirteen cars in there; there was always cars in that siding.

Q. What is the least number of cars you have seen there at one time?

A. One.

Q. Have you ever seen a time when there wasn't any car on there at all?

A. Yes, I think that I have seen times when there wasn't a car there for a shore time.

Q. That has been the case within the last three months?

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A. I haven't been there. I left there the 15th of August. I was not there, and I don't know what the practice was since that.

William D. Bell—Direct

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Q. You left before the accident happened, then, did you?

A. No, sir; as I understand it, the accident was on August 11th; this was on the 15th of August.

WILLIAM D. BELL, sworn for the defendant, testifies as follows:

Direct examination by Mr. Hobart:

Q. You are the yardmaster employed by the Erie? 20

A. Yes, sir.

Q. You have charge of this yard at Dundee?

A. Yes, sir.

Q. You remember the 11th of August, last?

A. Yes, sir.

Q. Do you recall that on that day that there was some drilling going on in the yard in the morning?

A. I do.

Q. Where were you when the yard crew were drilling?

A. I was at the crossing between South Street and 6th Street, at the switch. 30

Q. Did you have anything to do with the siding switch, the care of cutting off the cars?

A. Well, I did it the biggest part of the time.

Q. Did you see this one car kick in, or back in on the Dundee spur?

A. As one car was backed down on that—but one car back of seven cars was cut off, on this lead as we were pulling around; our switching was the cars that were in that train, these seven cars.

Q. Were there any other cars on the main track when this one car was sent down on that track? 40
You know what I mean by the main track?

A. I understand you. When we pulled around

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William D. Bell—Direct

this main track, just back of seven cars was cut off; then we went on with the rest of our train, and started to do our switching, as you are talking about.

Q. When you undertook to do the switching, was there any car fastened to an engine except this one freight car or box car?

A. Twelve cars were fastened to the engine.

Q. At which end, front or back?

A. Front end.

20

Q. Do you remember this one car being kicked into the main track?

A. No, sir; that one car was not kicked in.

Q. How many were sent in?

A. Seven. There were seven cars cut off. Seven cars backed down; they were cut off while we were backing around.

Q. You have worked there for some years, have you?

A. Been there since the 4th day of last November.

Q. You are familiar with this siding which immediately adjoins the main track?

30

A. Yes, sir.

Q. What is that used for?

A. That is a local unloading track.

Q. During the time that you have been there, have you noticed whether there were generally cars in the siding?

A. Always.

Q. What part of the siding were they placed in usually?

A. Generally down toward Passaic Street, so as to leave us room if we wanted to back more cars in there, and the approach of this switch is near South Street.

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Q. Were you informed of this accident shortly after it happened?

William D. Bell—Direct

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A. I should judge about twenty minutes.

Q. What did you do when you heard of it?

A. We were working at the Okonite; in fact, we were finished. We had put one car into the Okonite Company, and was on our way back down toward this accident, toward the scene of this accident, and one of my men told me that somebody had told him——

Q. Never mind what somebody told you. You heard something about the accident?

A. Yes.

20

Q. What did you do when you heard of it?

A. I went right down to the scene of the accident.

Q. Where did you go?

A. Down on the main track where this one car was standing, just east of Passaic Street.

Q. How far from Passaic Street was that car, if you noticed?

A. Why, perhaps four or five car lengths; 150 feet.

Q. In which direction from Passaic Street was it?

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A. East.

Q. That would be toward South Street, wouldn't it?

A. Yes.

Q. Did you make an examination of the car to see if you could find any indication or sign of an accident?

A. Yes, sir; both on South Street and on the main track.

Q. Did you find anything?

A. None whatsoever.

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Q. During the time that you have been working around there, have you ever seen anything of any so-called path over here near Passaic Street, run-

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William D. Bell—Cross

ning from Passaic Street to 7th Street, and leading across the main track on this siding right next to the main track?

A. No, sir.

Q. Was there any path there?

A. No, sir.

Cross examination by Mr. Winans:

Q. Were these empty or loaded freight cars?

A. They were loaded freight cars.

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Q. The cars—whether one or seven—I don't care how many loaded cars, were sent down a flat and level track?

A. Well, the track is practically level; the ground is not.

Q. Considering only the level of the rails themselves, looking which way is down hill and which way is up hill?

A. Down hill would be looking from South Street to Passaic Street.

Q. That would be looking down hill?

A. Yes, sir.

30

Q. Did you look carefully to find blood on the rails of the tracks in that freight yard?

A. Yes, sir; both on South Street and on the main track.

Q. You went over, the same as your associate, every foot of the rails, did you?

A. Yes, sir.

Q. And look over them carefully, did you?

A. Yes, sir.

Q. Didn't find any blood?

A. No, sir.

Q. Did you look on the ties?

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A. Yes, sir.

Q. On the ground?

A. Yes, sir.

Q. What distance away from the track did you look on the ground?

A. Well, for a distance of ten feet.

Q. On each side of each of the tracks?

A. On each side of the tracks.

Q. Did Mr. McCormack go with you?

A. Yes, sir.

Q. You made this investigation together?

A. Yes, sir.

Q. One went on one side of the track, and one on the other?

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A. No, I would not say that; we went together. We surveyed the entire ground around there.

Q. You are prepared to swear that there was no blood in the freight yard?

A. I am.

Q. Nor on the ground within ten feet of any of the tracks?

A. No, sir; moreover there was no fresh ground or dirt kicked up. What I mean is, as if somebody had had a struggle in getting out from under cars, and so on.

Q. You mean, what looked like a two-year old child trying to pull his leg out from under a wheel, is that the idea?

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A. Well, for displaced stone, anything like that; moving around a little of the soil.

Q. You mean that there was no evidence of any such a commotion created there as a two-year-old child would be liable to create in trying to get away from a car, is that what you mean?

A. Yes.

Q. So you concluded from that that there was no accident?

A. No, no, I did not. In fact, I did not—I only know what I heard about the accident. So far as

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William D. Bell—Cross

my knowledge of the accident goes, I only know what they reported to me.

Q. So you really don't know whether an accident happened, do you?

A. I do not know that there was any accident happened there, only what they had reported to me.

Q. In looking for these paths crossing the freight yard, did you look as carefully for the paths as you did for the blood?

A. Looked for the paths?

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Q. Yes.

A. No, sir.

Q. You did not look for the path?

A. No, sir.

Q. Well, you have spoken about the ground being beaten down, and that you didn't see any evidence of its being disturbed or kicked up?

A. Yes, sir.

Q. In what places did you see it beaten down?

A. No, I didn't say anything about any ground being beaten down smooth.

30

Q. Well, the stenographer will correct me if I am wrong. I understood you to say so. Just tell us what you did say about any place——

A. For instance, that you might move around or slip, or so on and so forth, getting out from under a car, or anything where you would have fresh dirt kicked up, around where your foot might slide, or you might grab hold of some weeds and pull them up out of the ground; something of that sort.

Q. You are speaking now of a grown man with strenuous ability to get away from something——

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A. I am speaking of just what my answer said to the question you asked; if there was any blood, and I was trying to explain it to the best of my ability.

Q. At the place or places where you say you failed to discover the surface of the ground disturbed, in what condition did you see the surface of the ground?

A. Just exactly as it is—as you would see—as it is today.

Q. That is somewhat beaten down, is it?

A. Well, say beaten down.

Q. Tracks or footprints?

A. No.

Q. No footprints?

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A. No.

Q. Too hard for that, isn't it?

A. No, there had been none around; no, it isn't too hard for that.

Q. Well, is it soft enough to show footprints?

A. Well, I don't know as it would be soft enough to show footprints.

Q. Well, while you were looking for blood, did you look for footprints?

A. I looked for anything which might indicate a commotion on the ground.

Q. And you were not able to find footprints?

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A. No, sir.

Q. That applies to the whole freight yard, does it?

A. That applies to the territory in which they claim that this accident occurred.

Q. Well, the freight track, that was covered by your search, over a search of ten feet distance on each side of the freight tracks, that is the extent of your examination?

A. No, sir; South Street and the main track; within 300 feet of Passaic Street.

Q. Then you did not go everywhere with a microscope to look for blood, did you?

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William D. Bell—Cross

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A. No, sir.

Q. How far each side of the track did you examine?

A. Why, between ten and twenty feet.

Q. In all that space of ten to twenty feet on both sides of those tracks for a distance of 300 feet, as you have testified, there wasn't a footprint that day, is that right?

A. Well, I wasn't looking for footprints. There was no dirt kicked out or no blood, which would indicate a commotion of any kind.

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Q. There was no blood, no dirt kicked up; was there any footprints?

A. That I could not say.

Q. Well, you would not consider that a lot of footprints that would be visible on the ground, created in one place, created such a situation that might indicate to your mind that there had been an accident at that place?

A. Yes.

Q. Well, were there any footprints of that character?

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A. No.

Q. Do you remember that you saw any footprints in the freight yard at all when making your investigation?

A. Not then—around the tracks.

Q. Is it not a fact that the ground there is too beaten down and hard to show footprints in the bed?

A. Well, it is beaten down and too hard to show footprints, but it is full of cinders; it is a filled-in track, but if a man should slip or start a slide, miss his footing or slide down this bank there, from the bed of the road to this sort of gutterlike, why, it would show indications of the ground being turned over.

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John Conkling—Direct

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Q. And the absence of your seeing those marks of sliding, indicates merely that nobody slid down the bank, doesn't it?

A. What was that?

Q. And the absence of marks of sliding, such as you have spoken of, indicates merely that nobody slid down that bank, doesn't it?

A. Yes, sir.

JOHN CONKLING, sworn for the defendant, testifies as follows: 20

Direct examination by Mr. Hobart:

Q. I believe you are employed there as a freight clerk, Mr. Conkling?

A. Yes, sir.

Q. Were you with the freight crew working in the Dundee yard when this accident happened?

A. Yes, sir.

Q. About what time of the day did you leave the island?

A. Oh, perhaps about ten o'clock. 30

Q. How many cars did you have?

A. Twelve.

Q. Where did you go?

A. Up to the freight house.

Q. Did you leave any cars on any of the sidings at the freight house?

A. I rode seven cars down; down the main track.

Q. You left seven cars on the main track?

A. I rode them out, or rode them down the main switch; rode them about four car lengths from Passaic Street.

Q. When you say you rode them down, you mean you had charge of the brakes? 40

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John Conkling—Direct

A. Yes, sir.

Q. And charge of stopping them?

A. Yes, sir.

Q. Did you stop them?

A. Yes, sir.

Q. How far from Passaic Street was the last car when you came to a stop?

A. Well, about four car lengths, 150 feet probably.

20 Q. They were what is called the main track of the Dundee spur?

A. Yes, sir.

Q. After you had done that, where did you go?

A. We picked up six and went back to other mills.

Q. Did you have anything to do with backing up other cars against the seven that you had left there?

A. I made a coupling, yes, sir.

Q. In order to make that coupling did the other cars attached to the engine strike against the freight cars that you left there?

A. Yes, sir.

30 Q. Did they strike in the usual way?

A. Just the way we make a coupling.

Q. How far did the seven cars move?

A. Oh, wouldn't move over four or five feet.

Q. Before the coupling was made, did you make any observation to see whether there was anybody around?

A. Yes, sir.

Q. Where did you look? A. Looked down the track.

Q. Did you see anybody in sight?

A. No, sir.

40 Q. When those seven cars were backed in on to the main track, that is, when you rode them down,

what part of the train of seven cars were you riding on?

A. I rode on the head car.

Q. What part of that car, the rear or head end of it?

A. Riding on the head end, where the brake staff was.

Q. That is where the brake was?

A. Yes.

Q. By the head end, do you mean the end that was at the front, in the direction in which the car was moving? 20

A. Yes, sir.

Q. And as those seven cars moved along, did you see any people, any children, or anybody else around?

A. I did not see any.

Q. What was the first you knew of any accident?

A. I was notified after we got up around 2d Street, while we were switching.

Q. About what time was that?

A. Perhaps fifteen minutes later; ten or fifteen minutes, probably. 30

Q. Were those cars afterwards taken out of the spur?

A. We took them all but one.

Q. You left one there?

A. Left one car there, yes, sir.

Q. How long after you put them in there did you take them all out except that one?

A. Oh, five minutes.

Q. You don't know how long the one stayed there?

A. Stayed there half an hour.

Q. You worked around this yard for some time past? 40

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John Conkling—Cross

A. Yes.

Q. How long?

A. Twenty-five years.

Q. During the twenty-five years that you worked around there, have you noticed any path over the yard, near that part of the yard which borders on Passaic Street and 7th Street?

A. No, sir.

Q. You have seen people go back and forward across the yard, I suppose, from time to time?

20 A. I have, yes, sir.

Q. Do they go over any particular place, or all over the place?

A. Whatever comes handy; go right across anywhere.

Q. After you were informed of the accident, did you make an examination of the tracks?

A. No, sir.

Cross examination by Mr. Winans:

Q. Was there any engine attached to these seven cars?

30 A. I rode them without the engine.

Q. Without the engine? In other words, that is what you call kicking cars, isn't it?

A. Yes, sir.

Q. Did you give any signal when the cars went down this track? Blow a whistle or ring a bell, shout a warning or anything at all? Do you do that on any of the cars?

A. I do, if we see anybody; we yell out at them.

Q. That is the only signal you ever give? Do you yell in a loud tone of voice?

A. Yes, sir.

40 Q. Do other men working there for the railroad also do the same kind of yelling?

A. Oh, yes, sure.

John Conkling—Cross

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Q. With regard to the loudness of the yelling, how far can a person of ordinary hearing hear that yelling? How far away from the man that is doing the yelling?

A. Oh, a couple or three blocks.

Q. Two or three blocks?

A. About two blocks.

Q. So that certainly at any place in the freight yard it could easily be heard, could it?

A. Yes, sir.

Q. Did you do any such yelling that day?

20

A. No.

Q. These other men who also yell, when the cars are making flying switches, yell in about the same tone of voice, the same loudness that you have just—

A. When it is necessary.

Q. When they do yell, they yell as loud as you have indicated, do they?

A. Yes, sir.

Q. Did you that day hear anybody yelling in that manner?

A. No, sir.

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Q. Yelling in any way at all?

A. No, sir.

Q. So that you are prepared to testify that no signal was given by yelling in the yard that day?

A. I won't say in the yard; I will say at that point.

Q. At any time that you were there no one yelled while you were there?

A. No, sir.

Q. Did you look carefully for evidence of a path in that yard?

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The Court: What?

Mr. Winans: Did you look carefully for evidence of a path in that freight yard?

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John Conkling—Cross

A. There is no path there.

Mr. Winans: I move that the answer be stricken out as not responsive, your Honor.

The Court: You may strike that out.

Q. Did you look carefully for a path in the freight yard when you were there?

A. I did not.

Q. So as to be able, if you were required, to testify as to whether or not there was a path in that freight yard?

20

Mr. Hobart: I object to that.

The Court: That is objectionable.

Q. What you have said about there being no path, refers to the whole freight yard, does it? You mean that there is no path anywhere in the freight yard, do you?

A. I think there is no path at that point.

Q. Is there any path anywhere else in the freight yard?

A. Why, no, not what I would say was a path.

Q. No path in the freight yard at all? Is there no path leading in from Passaic Street, up by the sidings, next to the freight yard? Any path going up that way?

30

A. No path.

Q. Any path coming in alongside of the main track on the siding next to it, running off towards South Street from Passaic?

A. No path there.

Q. Is there any path leading from 6th Street across to the corner of 7th and South, or anywhere across that way? Any path there at all?

40

A. No, sir.

Q. Any indication of a path?

A. No.

John J. Gorman—Direct

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Q. Nothing like a path?

A. No.

By Mr. Hobart:

Q. When these seven cars were backed in the first time, when you came in on the main track, was the engine attached to the car?

A. Yes, sir.

Q. That wasn't a flying switch?

A. Wasn't a flying switch, no.

By Mr. Winans:

20

Q. Do you see people frequently, very often, while you are at work in the freight yard—people not connected with the railroad?

A. Yes.

Q. Very often?

A. Very often.

Q. Every day?

A. Every day.

Q. Do they cross the freight yard from Passaic Street also near the freight station itself, down into 7th Street, by Kaplan's coal yard, and across the tracks in between those places, do they?

30

A. Yes, sir.

JOHN J. GORMAN, sworn for the defendant, testifies as follows:

Direct examination by Mr. Hobart:

Q. Mr. Gorman, you are one of the brakemen of this crew?

A. Yes, sir.

Q. Do you recall coming up from the Island that morning?

40

A. Yes, sir.

John J. Gorman—Direct

10

Q. What part of the freight yard did you go to when you got to the Dundee station?

A. Why, we come up and stopped between Passaic and South Street.

Q. Were any cars backed in on the main track?

A. That was on the main track, and we cut off seven cars and shoved them in the freight house.

Q. How were they shoved in?

A. Naturally just shoved in with the engine.

Q. They were not kicked in?

A. Not at the freight house; no, sir.

20

Q. Did you leave seven cars, or shove seven cars on to the main track?

A. Yes, these cars, that was the main track cars, were pulled up and left go; that is, Mr. Conkling rode them down. What I mean to say, they stood between Passaic and 6th Street.

Q. After those seven cars had been placed there, what did you next do?

A. Well, we put our freight house cars away; and then naturally backed out of the freight house and kicked on those cars that are to be picked up on the main track.

30

Q. While you were doing that did you see any children or anybody else around the main track or anywhere else around the sidings?

A. No, did not see any children, did not see anybody, in fact.

Q. How long did it take you to make these drill movements?

A. Why, maybe two or three minutes.

Q. How long have you worked around there?

A. Going on nine years.

Q. Do you know where the siding is right alongside of the main track?

40

A. Yes, sir.

Q. Do you have cars in there frequently?

A. Always.

Q. Taking up how much of the siding?

A. Well, the siding holds about eight cars, the South Street siding. We generally have from one to two cars in there all the time.

Mr. Winans: No cross examination.

NICHOLAS O'BRIEN, sworn for the defendant, testifies as follows:

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Direct examination by Mr. Hobart:

Q. Mr. O'Brien, what is your occupation, please?

A. Grain, hay, coal and feed.

Q. Is this your place of business that is shown in this photograph, and marked R. O'Brien & Brothers Company, Grain, Coal, Hay and Feed?

A. Yes, that is the place, right there.

Q. How long have you been in business there?

A. Practically twenty years.

Q. You are familiar with the freight yard in that section?

30

A. Know them pretty well.

Q. You are over there every day, practically, I suppose, in connection with your work and your business?

A. Yes.

Q. Is there any path leading from a point on Passaic Street across that part of the yard which is between Passaic Street and Seventh Street? Any path from Passaic Street across to 7th Street?

A. No direct path that I ever noticed.

Q. Do people sometimes walk across there?

40

A. Yes, sir; occasionally they want to go to the freight house.

10

Nicholas O'Brien—Direct

Q. Do they follow any particular place, or go wherever they like?

A. No, because they cannot cross at the same point every day.

Q. Why not?

A. There is cars standing on the siding.

Q. The siding you refer to is the one right next to the main track?

A. Parallel to the main track.

Q. Have cars there practically every day?

20 A. Well, we don't have them; they belong to the company.

Q. I mean the railroad cars?

A. Yes.

Q. It is a delivery track, isn't it?

A. Yes, sir.

Q. Is there any path at all anywhere around that freight yard that you have ever seen?

A. Not on the west side of the track.

Q. What do you mean by the west side?

A. Toward the freight house, on the freight house side.

30 Q. Is there a path anywhere else?

A. Well, there is a beaten path down here from the corner of South, running to the railroad.

Q. Running in which direction towards the railroad?

A. Running towards the freight house; but you could not recognize it on the other side of the track.

Q. It runs only as far as the track then?

A. Yes, on each side of the track.

Q. Is that the only path you have ever seen around there?

40 A. Yes; that is the only one.

Cross examination by Mr. Winans:

Q. When you say a path, just what do you mean by that word?

A. Well, where people pass through a short-cut.

Q. If it isn't a short-cut, it isn't a path, is that the idea?

A. Well, along the west of the yard, too.

Q. What do you consider a place where the ground is stamped down by the soles of people's feet until the ground is hard, so that it does not form mud readily, and does not leave footprints, do you call that place a path, if it runs from one place to another place? 20

A. I have always heard it called a path.

Q. Haven't you found any place in the freight yard where that condition exists? That is, where the surface of the ground is beaten down hard by the soles of people's feet?

A. What part of the ground do you call a freight yard?

Q. I call a freight yard, that part of the property that lies between the—the piece of land that lies between 6th and 7th Streets, South and Passaic Streets. 30

A. I never seen any between the railroad and 6th Street; that is, between that street and 6th Street.

Q. You mean here on this map, that path (indicating)?

A. Yes, sir.

Q. Have you seen a path running from 7th Street up a little hill, with sort of bushes and vegetation growing on both sides of the path, and going up quite a little sharp slope until it gets up over the rail, over 7th Street, up to the nearest rail on what is called Dundee spur? 40

Nicholas O'Brien—Cross

10

A. No, never seen that.

Q. Never seen any place where footprints have worn the ground smooth either?

A. No.

Q. I show you this photo, and ask you if that correctly shows the way this freight yard looks as you stand in the neighborhood of the freight station and look over it from that row of buildings, McLaughlin's mill, Kaplan's place and your place? (Exhibit D-1 shown witness.)

20

A. Yes.

Q. Does it correctly indicate the smoothness and roughness of the ground as it appeared there about the 11th of August last?

A. Yes.

Q. I call your attention now to a letter "C" in this photograph, running from the letter "A" in the margin to the letter "B," to the letter "C," and then reaching the track in the direction about where a man is shown standing on the opposite side of these tracks, and ask you if that, to your mind, indicates a place where people have walked?

30

A. Well, I could not tell anything about the path.

Q. Well, don't it look as if they had walked on it?

A. It looks a little lighter there.

Q. I am talking about this place.

A. No, it don't look lighter to me.

Q. It looks different from the other ground?

A. Yes.

Q. You are sure it doesn't look as though they had walked over it?

A. I could not say whether it does or not; I would not be positive. It don't look like it to me.

40

Q. You never saw anybody walk there, did you?

A. No.

Q. You never walked there yourself?

A. Not on that path, no; not on any path.

Q. And not on this particular path?

A. Not on any path through there.

Q. When you go from your place out toward Passaic Street and go to walk, how do you go?

A. Go right up along here to 7th Street, and to Passaic.

Q. Then up through the yard?

A. No, walk out.

Q. You never crossed the freight yard?

20

A. Not there, no.

Q. Where do you go across?

A. When I want to go from our place to the freight house, when the cars enable us to go across.

Q. And that may have been this place (indicating).

A. I never went on that path. Might better go South Street.

Q. Does it suit your convenience to go up this way (indicating)?

A. Yes, sir; and also at the freight house.

Q. You never have seen anybody who walked that way?

30

A. No.

Q. Have you seen people walk across the freight yard at other places?

A. I seen them go up this path toward the corner of 7th Street and South Street.

Q. This goes right in front of your plant?

A. Right across on the corner.

Q. Did you ever go up Passaic Street to go to Passaic from your place?

A. Go up 7th Street.

Q. Go from 7th Street to Passaic, and right along 7th Street?

40

Nicholas O'Brien—Cross

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A. Until you get to Passaic.

Q. Is the ground any different by walking over there than in the freight yard?

A. I don't have occasion to go to the freight house very much.

Q. Is the ground that you walk on in 7th Street any different from the ground right across the line in the freight yard?

A. Why, sure it is.

Q. What is the difference?

20

A. It is the drier walk of the two.

Q. Drier than the freight yard?

A. You mean on this side track?

Q. I mean is 7th Street drier than the freight yard is? Is the dirt in 7th Street any drier?

A. Very hard there.

Q. In other words, a low place?

A. A low place.

Q. This place that I now am asking about, that light line, is that a low place or high place?

A. On the side track it is high, but level with the track there.

30

Q. Is it higher than the ground next to it, or is it lower than the ground next to it?

A. This is about level on the side track.

Q. Will you tell me, from your observation of that neighborhood, why the dirt on this light place is light, and the dirt on both sides is dark?

A. No, I could not tell you that, any more than I could tell you why this (indicating) is light, and this is dark. That looks quite different, too.

40

Q. Is it not a fact that the only difference in the character of the surface of the ground at this place of the light streak that I am indicating to you, is that in one or some of those places the ground is smoothed down by people's feet, and in the other place it isn't?

James M. Soop—Direct

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A. I could not say that, no.

Q. You don't know, do you?

A. I know that there is not any path there.

Q. Have you ever been across there?

A. No.

Q. You don't know whether there is a path there or not?

A. I never seen any path there.

Q. You never have seen any path there?

A. I am pretty sure there is not a path there.

Q. You ship by the Erie Railroad considerably? 20

A. We do not do much shipping; we receive goods mostly.

Q. Pay a good many freight bills?

A. Quite a number.

Q. Have a good deal of business with the freight office?

A. Not lately.

Q. You run across over to the freight office often?

A. Occasionally.

Q. When you do, you go across the tracks?

A. If there are no cars in the way, I do. If there are any cars I go around 6th Street. 30

JAMES M. SOOP, sworn for the defendant, testifies as follows:

Direct examination by Mr. Hobart:

Q. Mr. Soop, you are an engineer?

A. Yes, sir.

Q. You remember coming from Dundee Island to the freight house?

A. Yes, sir.

Q. I believe you had twelve cars when you left the island? 40

10

James M. Soop—Direct

Q. That is what they told me I had; I don't know just exactly.

Q. After you got to the freight yard at Dundee what did you do?

A. As far as I can remember they stopped me there, and I think they cut off cars, and then we continued up there, and they had been working in the freight house——

20

Mr. Winans: I ask that that be stricken out, what they told this witness; he thinks they did this.

The Court: Yes.

Q. Will you answer according to your own recollection?

A. The reason why I put it this way, this is on a curve; I could not see anybody, only the fireman on the other side, and of course what he tells me to do, I have got to do, because he gets the signal from the left hand side of the train.

Q. Have you any recollection of backing some cars in on to the main track?

30

A. As far as I remember, when they took the cars in the freight house, we cut those freight cars and shoved them down on the main track, coupled up to it.

Q. Coupled up to what cars?

A. The cars up on the main track.

Q. Were those cars part of the string which you had taken from the island?

A. Yes, sir.

Q. When you coupled on to them, did you move them?

40

A. Why, I could not tell—was on the engine—whether they removed some or not; come against the cars, and they coupled and stopped right there.

James M. Soop—Direct

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If the cars moved, it was just to hook on to the cars.

Q. How far would that be?

A. That day; some cars would move more than others.

Q. Give us some idea, a matter of two feet, five feet?

A. Might be that, and might be less.

Q. It wouldn't be any less than that anyhow, that string of seven?

A. Hardly.

20

Q. Then do you remember whether or not you pulled all of those cars out again, except one?

A. No, after we done the work in the freight house, we coupled on those cars, on the main track, and started on the main track, as we call it, to do the rest of our work.

Q. You ride on the right hand side of the engine?

A. Yes, sir.

Q. Were you facing the direction in which the engine was moving?

A. Yes.

30

Q. Do you remember whether you were backing the engine, or whether you were moving it head on?

A. When we cut off the line, why, the engine was backing up, and we headed west, what we call west.

Q. When you made this movement of certain cars that bumped up against some cars which had been left on the main track, were you looking out in the direction in which you were moving?

A. Keeping an eye on my side, as well as looking over occasionally on the left hand side, to the fireman.

40

Q. As you were making that movement did you

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James M. Soop—Direct

see anybody anywhere around on the main track siding?

A. You can always see children around the yard.

Q. Did you see any that day?

A. I could not just recall now.

Q. Do you know whether you did or not?

A. I could not say.

Q. I mean when you were making that movement, did you see any children about?

A. No, I have got to look around for myself, without watching out for the others.

20

Q. No, did you see any?

A. No, not as I can remember.

Q. Did you look?

A. Did I look for children? No, sir.

Q. Did you look along ahead of the cars?

A. Looked along on my side as far as I could see, and could not on account of being on a curve; only could see about one or two car lengths away on the left hand side, because of the curve on that side. The firemen can see the full length on the other side.

30

Q. From whom did you receive signals?

A. The fireman gives me the signals, unless there is a man onto the car; I am close to the engine, so that I can see him.

Q. One of the crew gives the signals to the fireman?

A. Yes, sir.

Q. That is on account of the curve?

A. Yes, sir.

Q. He in turn passes it on to you, and tells you what to do?

A. Yes, sir.

40

Cross examination by Mr. Winans:

Q. How soon after this accident happened did you hear that it happened?

A. I don't know how soon after it was; I guess we went about two or three blocks before I knew about it. The fireman called my attention to it.

Q. You got two or three blocks from where?

A. From where we had been doing our switching.

Q. The fireman was sitting on the right hand side of you in the cab?

20

A. No, sir; on the left hand side; across on the other side.

Q. He was on your engine?

A. He was on my engine, yes, sir.

Q. How did he know about the accident?

A. Some driver told him when we got down near 2d Street.

Q. Wasn't your engine running all the time?

A. When we were doing the switching?

Q. When you were drilling up and down didn't your engine start and keep running until you had heard that there had been an accident?

30

A. Coupled on the cars and backed back into 2d Street.

Q. You kept backing up and down, didn't you, during this time after the accident happened, and then you heard that it had happened?

A. Kept working right along; did not know anything had happened.

Q. Did you go right down into the freight yard again?

A. We backed to the freight track.

Q. What was your work that day?

40.

A. Distributing cars to the different mills.

10

James M. Soop—Cross

Q. Down into the freight yard or outside of the freight yard?

A. No, sir; away from the yard.

Q. Between the freight yard and the island?

A. No, sir; between 2d Street; there is where I heard of it.

Q. 2d Street, Passaic?

A. Yes, sir.

Q. You went from this freight yard down to 2d Street, Passaic; when you got there your brakeman told you—

A. The fireman told me.

Q. The fireman told you you had run over and killed a little boy?

A. No, sir; he says, cut a little boy's foot off.

Q. Had your fireman been off the engine during the interval since the accident?

A. No, sir.

Q. You say that a driver told him; you mean an engine driver or a wagon driver?

A. No, wagon, driving a team.

Q. What did he do, drive alongside of the cab?

A. No, he must have hollered to him.

Q. How far away from the scene of the accident was it?

A. About from here to the middle of the court room. When the accident happened?

Q. Yes?

A. How far was we from where the accident happened?

A. Yes, when this was told.

Q. Two or three blocks, I should judge about three blocks.

Q. How long a time had passed after the accident happened until this man drove up alongside of your engine cab?

40

A. He got there almost the time that we did.

Q. He followed right after, did he, and told you?

A. I don't know where he come from. The driver told him, and he told me. I don't know where the driver come from.

Q. Was your engine going pretty fast?

A. No, sir.

Q. Was the man driving, going as fast as the engine?

A. I didn't see him.

Q. You did not see him?

20

A. No, sir.

Q. How many times that morning, up to the time that you heard there had been an accident, had you gone into that Dundee freight yard with your engine?

A. At the freight house you mean?

Q. How many times that morning, up to the time that you had been told there had been an accident, had you run your engine into the freight yard?

A. You mean from the time we put the car in there and took one out?

Q. Yes.

30

A. That is hard to tell. We go in there in the morning and do switching, and sometimes we don't.

Q. Tell us as nearly as you can?

A. I don't know. I don't know how many cars were in there.

Q. Was it as much as twenty times?

A. No, I don't think so.

Q. As many as eighteen?

A. I could not say.

Q. Fifteen?

A. Might have been eight or ten or twelve; I could not tell. On some days there are more than others.

40

10

James M. Soop—Cross

Q. Will you say as much as eleven times?

A. No, sir.

Q. As many as twelve?

A. I could not say that either.

Q. As many as ten?

A. Might have been around seven or eight times.

Q. At least seven times?

A. I could not say exactly.

Q. Each time that you went in did you have some car hooked on to your engine?

20 A. If we had any cars to leave, we would shove them in and leave them, or if a car had to come out, and we did not have any to go in there, we would have to go in with the engine.

Q. Each time you went in the freight yard, it was either to bring a car in or to hook on to a car and pull it out?

A. Yes, sir.

Q. Each time you gave signals, did you?

A. They gave me signals to go ahead.

Q. How did they give the signals?

A. They were given with the hands, to go ahead

30 or back up.

Q. That is, among you railroad men yourselves?

A. Standard rules.

Q. Did you give any signal to blow——

A. The bell was ringing.

Q. The bell was ringing?

A. Yes, sir.

Q. All this time?

A. Yes, sir.

Q. Every one of the seven or eight times you went in there?

40 Q. While we were switching there the crossing bells rang.

Q. When you kick a car and then the engine

stops and the car goes on, do you stand there ringing the bell until the car comes to a stop?

A. If we are on crossings.

Q. Suppose you are switching in this freight yard, switching into the Dundee freight yard?

A. Yes, sir; right there on the crossings.

Q. Do you then——

A. Yes, sir.

Q. ——ring your bell continuously, do you?

A. Yes, sir.

Q. Until the car comes to a stop?

20

A. Until we get a signal to go ahead. If we stand there too long, we shut the bell off, to avoid all unnecessary noise.

By the Court:

Q. Was the bell ringing automatically?

A. Yes, sir.

By Mr. Winans:

Q. You keep the bell ringing until you come to a stop?

A. On the crossings never wait. There are men 30
on them to ride them.

Q. Well, who handles this automatic bell?

A. I do.

Q. You say you keep it going until the car comes to a dead stop?

A. I keep the bell going, and if we are standing still too long I shut the bell off.

Q. And then the car runs on without any bell?

A. You couldn't cut off the bell without cutting off the engine.

Q. It does run on?

A. I suppose it does.

40

Q. You never blow a whistle in there?

10

James M. Soop—Cross

A. Blow a whistle when necessary.

Q. Did you blow a whistle that morning?

A. I blew a whistle coming into the yard, yes, sir.

Q. How many times?

A. The regular crossing whistle, four whistles.

Q. When you came into the yard?

A. Yes, sir.

Q. What is that regular crossing whistle?

A. Two long and two short.

Q. You did that just once, the first time you came into the yard?

20

A. Over the crossings, up around South Street; three times.

Q. Was that a crossing whistle and the ringing of the bell loud enough for any person in the neighborhood of the freight yard to hear?

A. Yes, sir.

Q. So that any of the railroad men who were over in that freight yard at about the time of the accident would have heard the bell and whistle, if they had been sounded, is that correct?

A. Whistle and the bell, right in the freight yard; after you pull in there and do your work around the freight house, there is no necessity of blowing the whistle unless there is something on the track.

30

Q. That wouldn't be a crossing signal, that would be a danger signal that you give because of someone on the track?

A. This signal, the crossing signal, and the whistle, are danger signals, of course.

Q. As a matter of fact, that day before you took the cars in there, did you blow your whistle?

A. When we come in the freight yard from Dundee Island.

40

Q. Just before you took the cars in there?

A. Before we took the cars.

Q. That crossing signal consisted of what?

A. Two long and two short.

Q. That was a crossing signal, and not a danger signal?

A. Not exactly.

Q. If it was a danger signal, what kind of a signal would it have been?

A. Blow a whistle as many times as you can, make all the necessary noise you can, and draw their attention to it.

Q. Where was your engine when you gave the crossing signal? 20

A. I should judge about three or four car lengths from the crossing; when I started, about that first crossing. I whistled at every crossing.

Q. Will you come down here and show me what you mean by the first crossing and the second crossing?

A. I don't know whether that shows Wall Street or not.

Q. Here (indicating) is Wall Street.

A. You go over Wall Street, and then go over Passaic Street. Down here there is two crossings. 30

Q. You mean down here (indicating)?

A. Down here.

Q. You blew for those, did you?

A. I blew for those crossings, blew for this crossing (indicating).

Q. Blew for this crossing (indicating) where the trolley goes over; when you sounded that crossing signal, two long and two short, how far was the engine from that crossing you were going over?

A. Two cars the other side of the crossing.

Q. Where was your engine when you finished giving your two long and two short? 40

James M. Soop—Cross

10

A. I was near the crossing.

Q. You say you gave another signal, another crossing signal; where was your engine when you gave that signal?

A. Up on the crossing; about on the crossing.

Q. Where was that, about on the crossing?

A. Over the crossing.

Q. The first crossing?

A. Over the second crossing.

20 Q. So that your engine went over two crossings, the first crossing and second crossing, when you were giving the second signal. Then you went in the yard, did you, sending your seven cars in there?

A. On the main track.

Q. Where did you go on the main track?

A. Around the curve, what we call the main track.

Q. You went up in South Street, did you?

A. Yes, sir.

Q. Did you give any other crossing signal?

A. About three, I think.

Q. A car is how long?

30 A. We have some forty and we have some fifty feet.

Q. None more than fifty?

A. I don't know.

Q. None less than forty? (No answer.)

Q. Then you went out into the yard?

A. Yes, sir.

Q. And then got ready to send the seven cars down here?

A. I don't know how many we sent down.

Q. Which track did you put them on?

40 A. I cannot say; I could not see when we went around here; (indicating). I could not see down there (indicating), on the main track, on account of being on the engine.

Q. When you ran in on that day, how far into South street did you go, or did you go clear up South street?

A. We went across.

Q. Clear over on the private right of way?

A. Alongside of the mills.

Q. After you got on there, you came back again, did you?

A. Yes.

Q. Did you give any other crossing signal for South street?

20

A. No, sir.

Q. Did you give any more signals that day?

A. The bell was ringing.

Q. The bell was ringing all this time, was it?

A. Yes, sir.

Q. How far away can it be heard?

A. Why, a block or more than a block.

Q. By a man of ordinary hearing? Any man working in this yard at this time would have heard it if it had been ringing?

A. Yes, sir.

Q. It rang at all times when the engine was working that morning?

30

A. Yes, sir.

By the Court:

Q. When did you start the bell ringing?

A. Just as soon as we left the island.

Q. How far is the island away from the freight yard?

A. Oh, I should judge about two hundred feet, two hundred and fifty, something like that, at a rough guess.

Q. What is the size of the bell, ordinary engine bell?

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A. Yes, sir.

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Joseph G. Roseman—Direct

JOSEPH G. ROSEMAN, sworn for the defendant, testified as follows:

Direct Examination by Mr. Hobart:

Q. Mr. Roseman, you are a fireman, I believe?

A. Yes, sir.

Q. You were riding on the left hand side of the engine?

A. Yes, sir.

20 Q. When you came into the Dundee freight yard, I suppose you came on the usual track which we are calling the Main track?

A. Yes, sir.

Q. After you passed along the main track, what was the first thing you did in the way of leaving any cars, or moving any cars?

A. Why, we cut off a car—we cut off cars on this side of—down by the freight station.

Q. Did you leave them on this same main track on which you had come into the yard?

A. Yes, sir.

30 Q. After you had done that, what was your next move?

A. To back up and switch cars in the freight yard.

Q. Those were some other cars that were still left on the train after you had cut off seven cars on the main track?

A. Yes, sir.

Q. After you had left some cars at the freight house, what was the next thing that you did?

A. As I remember, we backed down and picked up the seven cars.

40 Q. How fast did you move as you backed down?

A. I should judge about ten miles an hour.

Q. Is that the usual way of doing that work?

A. Yes, sir.

Joseph G. Roseman—Direct

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Q. Do you remember striking against the cars that had been left on the main track?

A. We did strike against the cars when we picked them up.

Q. In making the coupling?

A. Certainly.

Q. Did you strike against them in the usual way?

A. Yes, sir.

Q. As your train moved back in order to couple up to these cars that had been left on the main track, which way were you looking?

20

A. I was facing westward; that is the way we have to go.

Q. Is that the direction in which the engine was moving?

A. That is the way we have to move when we pick up those cars.

The Court: Was the engine going backwards then?

The Witness: Yes, sir.

Q. And as you were facing in that direction, your engine moved backward, did you observe whether or not there were any people, any children or anybody else, anywhere around the cars, that you had left on the main track?

30

A. No, sir; did not notice any children.

Q. Did you look along the line of the train to see whether there were or not?

A. Always.

Q. Did you that time?

A. Yes, sir.

Q. Could you see all the way along there?

A. I could see all over along there.

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Q. Of course on your—

A. On my side. I could not see over the car.

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Joseph G. Roseman—Cross

Q. Do you remember about how many cars were fastened to the engine?

A. No, sir; I couldn't say.

Q. Was there more than one?

A. Oh, yes.

Q. After you had made the coupling, what did you next do?

A. We proceeded towards 7th street.

Q. Did you leave any cars on the main track?

A. Not as I remember.

20

Q. You don't recall about that?

A. No, sir.

Q. You went on to 7th street?

A. Yes, sir.

Q. When did you know the first thing of any accident?

A. I was told by Harold Bird, a person by the name of Harold Bird, who said we cut a child's leg off.

Q. Who is he?

A. A man in Passaic.

Q. Do you know who he was?

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A. Harold Bird by name.

Q. Was he a railroad man?

A. No, sir. That was what we were told by the wagon driver. I did not believe this man.

Cross examination by Mr. Winans:

Q. Where were you when you were told that?

A. On the engine.

Q. At 2nd street, Passaic?

A. Yes, sir.

Q. Was the engine moving?

A. No, sir; it was waiting for them to throw the
40 switch.

Q. Who do you mean by "them"?

A. One of the brakemen.

Joseph G. Roseman—Cross

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Q. How many cars did you have on at the time?

A. How many—I could not say.

Q. A long string?

A. I could not exactly remember.

Q. Do you remember how many you brought in off the island that morning?

A. No, sir.

Q. What is that?

A. No, sir.

Q. Do you know how many you backed down on the switch that morning?

20

A. No, sir.

Q. Do you know how many you kicked into the yard that morning?

A. We did not kick any in the yard, as I remember.

Q. Do you remember that you did not?

A. If I remember right, yes, sir.

Q. You do sometimes?

A. What is that?

Q. You always do kick them in there?

A. I never saw any kicked around there while I was over there.

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Q. You mean that when they kicked them in there, you looked the other way?

A. Oh, no; I wouldn't say that.

Q. You never saw a car kicked in that yard at all?

A. Not that I can remember; there might have been broke loose from the engine and so forth.

Q. That broke loose from the engine?

A. Yes, sir.

Q. That is an accident every time?

A. No, I could not say it would be an accident every time.

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Q. I mean every time a car is kicked down into

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Joseph G. Roseman—Cross

the switch and brought into the freight yard, every time it was kicked down, it was an accident, was it?

A. Why, kicking it could not be an accident.

Q. Did you just say if it was kicked down into the yard it was an accident?

A. I said if a car broke loose it was an accident.

Q. Did they often break loose?

A. Yes, sir.

Q. And one broke loose this day?

A. I could not say that.

20 Q. Why couldn't you say that?

A. Why, because we left those cars and we pulled out and went in the freight house. We then went down and got cars——

Q. You mean if your train was so far away that you could not see what happened at the time?

A. No, I could cover my train altogether.

Q. You could cover your train with your eyes altogether?

A. Yes, sir, all except the right side.

30 Q. Why won't you tell the jury whether a car did come loose from the end of your string that morning?

A. There would be no use of telling the jury when I did not see any come loose.

Q. You don't know whether there was one or not?

A. No, sir.

By Mr. Hobart:

Q. If one did come loose you would know about it, would you?

A. Yes, sir; the brakeman would have given me a stop signal.

40 Q. Did one come loose that day?

A. Not as I remember.

By Mr. Winans:

Q. Is the reason why you say one did not come loose due to the fact that the brakeman did not give you a signal?

A. What is that question?

Q. The only way you would know if a car had come loose would be by a signal from the brakeman?

A. If it came loose, yes, sir.

By Mr. Hobart:

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Q. If one was broken loose?

A. Yes, sir.

Q. Did you see any break loose?

A. No, sir.

Mr. Hobart: I offer in evidence the following deeds:

Hiram Bellis and wife to John King, dated October 18, 1889.

John King, trustee, and wife, to Bergen County Railroad Company, dated April 5, 1895;

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And Dundee Water Power & Land Company to Hiram Bellis, dated July 9, 1889.

All deeds duly acknowledged and recorded; and, I might say for your Honor's information, covering, as I am informed, the square section that has been referred to as the freight yard.

The Court: How did it get into the yard?

Mr. Hobart: Well, I suppose we would have to have strict proof of that. I will have to call the secretary of the company. I think Mr. Winans will probably stipulate with me on that—at least, I will ask him.

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Mr. Winans: I will object to this on the

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Motion for Directed Verdict

ground it is irrelevant and immaterial, and not connected with the defendant.

Mr. Hobart: For the information of the plaintiff's attorney—and I don't believe he will question it—the Bergen County Railroad Company is operated by the Erie Railroad Company, and has been for a number of years past, under a lease conveying all the property of the Bergen County Railroad Company to the Erie.

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Mr. Winans: In view of that fact, I will withdraw my objection.

TESTIMONY CLOSED.

Motion for Directed Verdict.

Mr. Hobart: On behalf of the defendant, I ask for a direction of a verdict, and I make the motion on two grounds:

First, that there is no proof of negligence on the part of the defendant or its agents.

30 And, secondly, that recovery is barred by virtue of the provisions of Section 55 of the General Railroad Law.

The second ground perhaps is the most important one, and in that connection I ask your Honor's attention to a case of Barcolini against the Atlantic City Railway Company, 82 N. J. L., 107; which was a case of a small child who had been either injured or killed on the railroad track, and Section 55 was held to be applicable, even though the child was too young to be charged with contributory negligence.

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Another case, which has to do with the construction of the statute, is Diebold against the Pennsylvania Railroad, in 50 Law, 478; which was

Motion for Directed Verdict

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that this statute applies to side tracks; and I speak of that if it should be argued that this track, although called the main track, is in effect a little more or less than a side track.

There is also the Garlocki case, against the West Jersey, 86 Law, 301.

Then I would also ask your Honor's attention to a line of cases, not in New Jersey, but which I have from good authority, supporting that, on the proposition that it is impossible to secure by a jury a right of way or easement across the railroad property devoted to public purposes. I have a memorandum which gives a number of those cases, and will leave it with your Honor if you care to examine it further. 20

And I have in that same connection a decision of Judge SPEER at the Circuit Court, in another case tried a few months ago, in which a similar question was raised, and where it was attempted to be shown that the plaintiff had acquired some right to cross over the Fourth Avenue draw bridge in the City of Newark, where tens of thousands of people cross every day, and his Honor, in that case, ordered a non-suit, on the ground that they could not acquire any prescriptive right as against the railroad, no matter how many people used it, nor how long it was used. This is the official stenographer's report on that, it is not very long. Perhaps your Honor would like to look it over. 30

Adjourned until November 2, 1917, at 10 A. M.

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Argument

Hackensack, November 2, 1917.

Trial resumed before CUTLER, C. J.

Appearances: Same as last above.

Mr. Hobart: May I add one more reason to my motion, in addition to what I made yesterday?

Please add to my motion for a direction, that even if there may have been evidence of lack of reasonable care, there is no proof of any wilful or wanton negligence.

20 The Court: I want to hear from you especially on the point in regard to the right of the public to acquire right of way by prescription.

(Argument.)

The Court: In this case, the plaintiff as the administrator of his deceased infant child, brings a suit under what is generally known as the death act. The deceased was a child less than three years of age, and was struck in the freight yard of the defendant company at Passaic, in this State, by a car operated by the defendant company, and received injuries from which he died. Unless the defendant company was negligent, and such negligence was the proximate cause of the injury from which this child died, there could be no recovery.

30 It is admitted that the child was injured in the freight yard of the defendant company while upon or near the track of the company's railroad, known as the main track, Dundee spur. It is claimed by the plaintiff in this case that the child was upon a path over the defendant's property, extending from a point on Sixth street, near the corner of Passaic street, to a point in Seventh street, in front of or near Kaplan's coal yard, as it is now located, which path crossed over the tracks, and which path

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Argument

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was there and then used, and had been used by the general public for more than twenty years prior to the day on which this accident occurred.

There is no evidence that this child was upon a public road or by-road or a private crossing when injured, but it is claimed that the defendant company owes a duty to this child, which it failed to perform, because of the right that this child had as one of the general public to cross this track at the point where the path is alleged to have crossed it.

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The general public and this child had no prescriptive or other right over this track, so far as the evidence shows, for such right cannot be acquired by the public by continuously crossing over a track while the railroad company is using such track for the operation of its railroad trains.

This child had no right to cross over this track. If the child had such right, there would have been a question for the jury to determine, whether the injury was caused by the negligence of the defendant company in the operation of the car which struck the child. The child having no right upon this track where the path is alleged to have crossed it, was either a licensee, a trespasser, or was there by permission and acquiescence of the defendant company; but there is nothing in the evidence that would make this child an invitee.

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There is no evidence that this child was maliciously, intentionally, wilfully or wantonly injured by the defendant or its employees, so far as the evidence in this case shows.

Under the evidence in this case, if the child was a trespasser, there can be no recovery, under the 55th Section of the General Railroad Act, which reads as follows:

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Argument

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

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And this child was not, according to the evidence, connected with or employed by the railroad, and the place was not a public or private crossing. If this child was a licensee or was passing over the track by the permission or acquiescence of the defendant, there could be no recovery, for a mere licensee has no cause of action on account of the dangers existing in the place he is permitted to enter. Mere permission to pass over dangerous lands with acquiescence in such passage, creates no duty on the part of the owner, except to refrain from acts of wilful injuries. A land owner is ordinarily under no obligation to a mere licensee, or to a trespasser to keep premises in a safe condition; and the fact that a licensee or trespasser is an infant of tender years affords no reason for modifying this rule and charging the land owner with a duty which does not otherwise exist.

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There being, in the opinion of the Court, nothing in the case creating a liability on the part of the company, I am obliged to direct a verdict as re-

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Argument

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requested for the defendant, and to allow you, at the same time, an exception to this ruling, so that you may review it if the Court is wrong in his contention. It is a very interesting question, but I feel bound, under my view of this case, to direct a verdict.

Mr. Winans: Does your Honor desire to cover that case of Black against the Central Railroad?

The Court: No more than I have. I think I have covered it. I have covered all the points that I think are necessary, that have been raised.

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Mr. Winans: I ask an exception.

Verdict.

The jury thereupon, by direction of the Court, rendered a verdict against the plaintiff and in favor of the defendant.

Mr. Winans: The plaintiff excepts to the verdict of the jury, and to the reception of the same by the Court.

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Grounds of Appeal.

(Filed, November 22, 1917.)

COURT OF ERRORS AND APPEALS.

JAN DRELICH, as Administrator
ad Prosequendum of Ludwig
 Drelich, deceased,
 Plaintiff-Appellant,
against

Action at Law.
 On Appeal.

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ERIE RAILROAD COMPANY,
 Defendant-Respondent.

The grounds upon which the plaintiff-appellant appeals in this cause are as follows:

1. Because the honorable Trial Court directed a verdict in favor of the defendant below and against the plaintiff-appellant.

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2. Because the jury rendered a verdict upon the trial of this action, upon the direction of the court, and against the law and the evidence.

3. Because the court received, and directed the entry of judgment upon a pretended verdict given by direction and not based upon the law and the evidence.

4. Because the judgment herein was entered in error and contrary to the law and the evidence.

5. Because the plaintiff below was denied his right to a trial by a jury of his peers, and judgment was entered in the court below in derogation of that right.

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Dated at Jersey City, New Jersey, this 14th day of November, 1917.

JOHN WINANS,
 Attorney of Plaintiff-Appellant.