

## New Jersey Court of Errors and Appeals

AMZI G. SMITH,	}	Action at Law.	10
<i>Respondent,</i>			
JOHN H. ORT,			
<i>Respondent,</i>			
<i>vs.</i>			
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,	}		
<i>Appellant.</i>			

### **BRIEF OF APPELLANT.** 20

#### **Statement.**

These appeals are from judgments rendered in the Morris County Circuit Court on Jan. 28, 1916, in two cases tried together by order of the Trial Court and the points raised for reversal are identical in each case.

In the complaints of the respective respondents, the appellant was charged with negligently causing a fire, on Sunday, April 18, 1915, which damaged both the real and personal properties of the respondents. 30

The negligent conduct of the appellant was charged to have been the running of an engine without taking or using all practical means to prevent the communication of fire from it and without using any modern, safe or sufficient spark arrester in the smoke-stack or pipe of its locomotive and carelessly allowing and permitting a large amount of dried grass, weed, brush and other 40

combustible material to be and remain upon its lands and its right of way, which combustible matter becoming ignited set fire and spread until it damaged the respondents' lands.

The place where the fire is alleged to have occurred was about 500 yards east of Muskee crossing (p. 47, ll. 12-20), a short distance east from Hackettstown, Morris County, New Jersey, at, by and through which place the appellant runs its  
 10 old main line from Hoboken, N. J., to Scranton, Pa.

The grade of the tracks east from Hackettstown ascends for about two miles; for a half of mile east of the crossing mentioned it descends and then begins to ascend again, raising one per cent in three miles until it reaches Waterloo (p. 87, ll. 1, et seq.).

The railroad section in the vicinity of which the fire occurred is double-tracked, with a cinder ballast, the ballast running four feet outside of the ends of the ties. Outside of the ballast are ditches running parallel to the tracks, sloped down to 18 inches below the bottom of the ties, the purposes of which were to carry off the surface water  
 20 (p. 81, l. 1, et seq.).

Upon behalf of the respondents it was made to appear that within three to five minutes (p. 65, ll. 1-2; p. 42, ll. 18-25) after the appellant's regularly scheduled train No. 2 had passed the place  
 30 where the fire was alleged to have occurred witnesses saw either smoke or fire coming up from the ground (p. 42, l. 24; p. 33, ll. 20-4, and p. 64, ll. 33.5).

No evidence was produced by the respondents of any other fires having occurred on the day in question after the passage of No. 2 along the line or on any other day, either previous or subsequent to the passage of No. 2 or after the passage of any other train of the appellant.  
 40

Neither was any evidence produced by the respondents of the size of either the sparks or live coals ever emitted by any of the respondent's engines on any occasions whatsoever.

They further either neglected or had no evidence to offer that it was possible for live coals to escape from the ash-pans of an engine if in good order, or that when in good order coals did escape and there was no evidence that any witness had ever seen coals from an ash-pan blown or carried to a point equal distance to where this fire took place, making it conclusive that the fire must have started from a spark from the smoke-stack. 10

With respect to the place where the fire is alleged to have occurred the witnesses for the respondents placed it at various points, thus, "between the railroad and bank" (p. 42, ll. 24-6), "a little ways off the track" (p. 33, ll. 8-9), "between the fence and the track" (p. 33, ll. 14-15), "down near the signal pole" (p. 52, ll. 27-8), "eight or ten feet from the track" (p. 52, ll. 30-1), "between the railroad and this wire fence" (p. 52, l. 33), where "I cut lots of grass there; cut it for years, every year" (p. 54, l. 26), "on the railroad bank" (p. 65, ll. 4-5). 20

In support of their allegation with respect to the charge that the appellant permitted a large amount of combustible material and weeds to remain upon its lands and right of way the respondents produced one Ezra Lawrence, who, being interrogated as to *where the smoke sprung from*, testified that it came from 30

"old dead grass and weeds; that is all I seen. Lots of leaves, of course, in the weeds" (p. 62, ll. 14-16).

But on further interrogation by the Court, said:

"A. I was around the place, but I don't know where the fire started. 40

"Q. Not where the fire started? A. No, sir; I happened to walk down that way after this train passed" (p. 63, ll. 10-15).

After proving their damages the respondents thereupon rested.

The appellant thereupon offered the following evidence:

10 First, as to its right of way, that the railroad section in which the fire is alleged to have occurred was only three and one-half miles long (p. 81, ll. 38-41); that during the month the fire occurred it was in charge of a section foreman (p. 80, ll. 19-21) and six other men (p. 82, ll. 17-18); that the right of way was burned every June and September (p. 72, ll. 37-41); that besides, every Saturday the bushes, refuse and combustible material was cleaned up and burned (p. 80, ll. 1-5); that March 15, 17, 19, 20 and April 1, 2 (p. 83, l. 3, et seq.) and April 3, 1915 (p. 83, ll. 20 32-34) extra work of cleaning and burning grass on the company's right of way was done by the section gang, and that April 17, the day before the fire, the appellant's roadbed and right of way at the place where the fire occurred was clean (p. 80, ll. 15-17, and p. 84, ll. 17-34).

30 With respect to the character of the screen used in engine No. 1112, which was drawing train No. 2 on the day in question (p. 89, ll. 12-16), it was proved by the testimony of the appellant's master mechanic, Barton (p. 90, l. 5, et seq.), that the screen in the engine in question was of a type in common use among other railroads at the time of the fire and approved by experience and that he knew of no more practical screen to prevent the escape of sparks (p. 94, ll. 28-30), and by John Mansfield, chief boiler inspector of the Central Railroad of New Jersey, that the screen in engine in question was of a type approved by experience and in common use to prevent the escape of sparks and 40 that it was of the same type as the "standard

netting in use by the different roads in the East" (p. 104, ll. 26-30).

It was further shown that the life of such screens was from eighteen months to three years (p. 95, ll. 9-10); that the screen had been in the engine only 11 months (p. 95, ll. 11-12); that engine No. 1112 was equipped with a super-heater (p. 91, l. 24), and that the action of super-heated engines made very little if any repairs necessary to be made to screens in engines of this type (p. 97, 10 good condition (p. 111, ll. 10-11).

Particularly with reference to the condition of the engine, the screen on the day of the fire on its arrival at Hoboken was found to be in good condition (p. 111, ll. 10-11), as were also its ash-pans (p. 111, ll. 13-14), and up to the time of the fire no repairs had been necessary to be made to the screen (p. 97, ll. 28-41; p. 111, ll. 21-3).

It was further shown that when the engine was given a hydrostatic test on May 4, 1915, seventeen 20 days after the fire, that the netting was examined and found to be in good condition (p. 102, ll. 34-36).

The appellant then continued its proofs and showed that the engine at the time it passed the place where the fire is alleged to have taken place was only being operated to within 70 per cent of its total capacity (p. 116, ll. 33-35); that no screen or device is known to prevent the escape of sparks and still successfully operate an engine (p. 95, 30 ll. 13-18; p. 119, ll. 35-40; p. 120, ll. 1-5), and that the engine in question could not have made the run in question, passing the place where the fire is alleged to have occurred, "without the emission of any spark" (p. 116, ll. 24-7).

Concluding, the appellant proved that sparks emitted from an engine, properly equipped with a screen such as engine No. 1112 had in it on the day of the fire, contained sufficient vitality to 40 cause a fire, at the distance where the fire was al-

leged to have started (p. 120, ll. 20-31), although in ordinary conditions the fire vitality of such a spark should be small (p. 116, ll. 33-39, and p. 100, ll. 17-22).

- At the conclusion of the appellant's case the respondents also rested, offering no evidence in rebuttal or questioning the type of the screen used as a practical means for the prevention of the escape of fire, no evidence questioning the efficiency of the engine inspections, no evidence to warrant an inference that the fire came from the ash-pans, no evidence disputing the fire vitality of a spark emitted from a properly equipped engine and no evidence to contradict the using of all practical means in keeping its right of way and roadbed clean, contenting themselves merely with the proof of the passing of the engine in question—which the appellant admitted—and the occurrence of the fire.*
- 20 At the conclusion of the case the appellant thereupon moved for the direction of a verdict upon the grounds: 1. That the defendant, having established, in the words of the statute, by evidence, that it took all practicable means to prevent the communication of fire from its engines, such evidence rebuts the prima facie case of the plaintiffs, that the injury was communicated from an engine in violation of the statute, and this, irrespective of the credibility of its witnesses
- 30 on said subject or the matter of the preponderance of the evidence. In view of which facts that the defendant had offered in evidence, the prima facie case of the plaintiffs had been rebutted.
2. That the uncontradicted evidence in the case showed that the defendant took all practicable means to prevent the communication of injury to the plaintiffs' property by the escape of fire from its engine, which is evidenced by having installed in said engine a screen or spark arrester of common design, in general use and approved by experience, and having taken reasonable care to
- 40 keep its lands free from combustible material.

### Argument.

The appellant makes two contentions with respect to having fully established a complete defense under the Statute 3, Comp. Statute 1910, p. 4245 sections 56 and 57—either one of which entitled it to a direction of a verdict.

First, it was contended, that inasmuch as the respondent's case by virtue of the statute, rested solely upon a presumption created by the statute, the appellant's case establishing every essential fact necessary to exonerate the appellant, the respondent's *prima facie* case was rebutted, and they not having then gone forward by other or further evidence or having had their case aided by evidence circumstantial or otherwise pointing to negligence on the part of the appellant the court should have directed a verdict (p. 121, ll. 1-16). 10

Second: That the uncontradicted evidence in the entire case showed that the appellant had exercised all practicable means to prevent the communication of fire from its engine a verdict should have been directed for the appellant (p. 122, ll. 24 et seq.). 20

Certain requests to charge tendered by the appellant, but which were refused by the trial court have also been made grounds of appeal, but these except where specifically referred to under a Point will be dealt with in considering Point II, hereafter. 30

### POINT I.

**The Statute 3-Comp. Statute p. 4245, Sections 56 and 57 creates but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof after which it becomes functus officio and the appellant having overcome the presumption by evidence, the Court should have directed a verdict.**

Grounds of Appeal, p. 17, and p. 121, ll. 1-16.

The learned Trial Court quite vigorously denied a direction of a verdict on the ground of appeal herein referred to first, because he doubted whether a direction of a verdict had ever been granted in a case like this and secondly that the *Goodman* case, (*Goodman v. L. V. R. R. Co.*, 78 N. J. L., 317) decided precisely the same point adversely to the appellant (p. 121, l. 19, et seq.; p. 122, ll. 1-2).

The first reason for refusal given by the learned trial court that because the appellant could not cite a similar case disposed of in manner as the appellant contended the instant case should have been disposed of, *non constat*, the appellant's contention was unsound, we take, begs the question; but in view of the fact that his second reason for refusal was on the broader and larger ground that the case of *Goodman v. L. V. R. R. Co.*, 78 N. J. L., 317, decided the precise point adversely to the appellant's contention we take it that the Trial Court's first reason for refusal was merged in its second reason and will before discussing this point at length, dispose of, as we believe, the non-applicability of the law as applied in the *Goodman* case cited, to the first reason urged in the instant case.

As the statement herein shows, the instant

case contains the smallest possible and conceivable amount of proof susceptible of even making out a *prima facie* case under the statute.

A passing engine and a subsequent fire, was the respondents' entire case.

That the *Goodman* case did not decide the precise point is apparent on a cursory reading of the opinion of Chancellor Pitney, wherein it is apparent that the following conditions in that case made it necessarily a question for the jury because it appeared, 10

First: That the plaintiff's *prima facie* case was aided by evidence circumstantial and otherwise pointing to negligence on the part of the railroad.

Second: The railroad company's evidence while purporting to cover every fact essential to exonerate it from the charge of negligence was inconclusive in character and even if believed was not necessarily inconsistent with a finding that it was negligent. 20

As illustrative of the first conditions being present in the *Goodman* case we find

1. That other fires were set out the same day by one of the engines involved, (78 N. J. L., at p. 320).

2. That the engine threw a spark which retained vitality enough to start a fire 115 feet away from its tracks, (78 N. J. L. at p. 323). 30

And relative to the second condition, it appeared—

1. That a screen in good condition would not allow the escape of a spark which would retain sufficient vitality to cause a fire 115 feet from the tracks, (78 N. J. L., at p. 323).

2. That the evidence was inconclusive that the screens were in good order, (78 N. J. L., at p. 324). 40

3. That the system of inspections of screens was not carefully adhered to, (78 N. J. L., at p. 325).

It is therefore apparent that the Goodman case *did not decide precisely the same point* and hence was neither disposition of the reason urged under this point nor controlling.

If the conditions in the Goodman case, discussed under first and second conditions, *supra*, had been  
 10 absent, the situation in that case would have been more nearly analogous to the instant case and the reason, here urged even to its exact phraseology, would have undoubtedly been sustained in the language of the Chancellor at p. 323—, when he says:

“We may assume—indeed, it is in effect admitted by the counsel for the plaintiff-in-error—that if this evidence must be fully credited, and constituted the only evidence that bore on  
 20 the care exercised by the defendant, it demonstrated that the defendant had used ‘all practicable means to prevent the communication of fire and had fulfilled its statutory duty.’”

Put in other words the appellant’s reason urged under this point raises the question as to whether the presumption of negligence or the *prima facie* case of the respondents, by virtue of the statute, arising from the fact that the injury  
 30 was communicated from one of the appellant’s engines, necessarily, makes the question of negligence for the jury when fully answered by a defendant.

We contend that the statute does not make all cases irrespective of the quantum, quality and character of the proof of the taking and using practicable means to prevent the communication of injury, a question for the jury but that it is both the province and duty of the  
 40 Trial Court when the plaintiff rests his case

solely upon the presumption and the otherwise uncontradicted evidence of the appellant's witnesses established every essential fact to exonerate the railroad, that the court should direct a verdict.

This we think what was meant by the Chancellor in the excerpt of his opinion, referred to above, also the practice as was indicated by Chief Justice Gummere, in the earlier Goodman case in 75 N. J. L., 277.

In *Woodward v. Chic. M. & St. P. R. Co.* 145 Fed. 577, the appellate court affirming the ruling of the trial court in directing a verdict with respect to a similar Fire statute said:—

“It is nothing but an artificial rebuttable presumption of fact, whose sole office is to change the burden of proof when that result has been attained, the presumption becomes *functus officio*. *It may not be used after the evidence of the facts has been adduced to raise an issue for the jury, which the evidence itself does not present.* Hence, in the first instance, it is always a question for the court at the close of the evidence, whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant”

How true this is and should be when we recognize that the charge against the railroad company and the gravamen of the action is not the mere setting out of the fire, but was the injury communicated by negligence.

If the scope and function of the presumption or prima facie case as here contended for by the appellant be accepted or better still if it is the rule of law to be read from the cases both in this court and our Supreme Court, it is apparent that there is no occasion for either the court or the jury to pass upon the credibility of the railroad company's witnesses; since under our contention, the plaintiff being left without evidence

to support his case he must fail, irrespective of the credibility of the defendant's witnesses.

The construction now placed upon the statute and contended for by the appellant finds not only support in the cases hereinbefore cited but of other respected authorities.

In *Spaulding vs. Chic. & N. W. Co.*, 33 Wis., 582, the Court, speaking by Lyon, J., said:

10 "The better opinion seems to be that no disputable presumption of law is to be regarded as testimony which must necessarily be submitted to a jury; but its office is merely to determine upon which party the onus probandi is laid."

In *L. & N. R. Co. v. Reese*, 83 Alabama, 503, the Court, although recognizing the advanced progress in mechanical appliances and the practical demonstration of their utility and efficiency, said that while a reasonable inference may arise  
20 when a fire originated from sparks emitted by a locomotive in sufficient quantity or volume to occasion damage that the engine was not properly constructed or that it had not approved appliances in it or that it was not managed with care, it concluded by saying:

30 "When the inference is rebutted by proof of the proper construction of the engine and use of the proper appliances and careful management, the plaintiff cannot maintain the action without making proof of other negligence or want of care."

In *Sou. Rwy Co. v. Pace*, 114 Georgia, 712; 40 Sou. E. 723, the Court said:

"The evidence of the defendant was sufficient to completely rebut the presumption of negligence."

The Court, however, distinguished the case under consideration from that class of cases where the railroad company's negligence had been established  
40 independently of the presumption.

*In Daly v. C. M. & St. P. R. R. Co.*, 45 N. W., 610 (Minn.), the Court held that if the uncontradicted evidence on the part of the Railway Company clearly showed that it has fully performed its duty

“\* \* \* the presumption of negligence is rebutted and evidence of negligence other than the bare fact that the fire was set by the engine will be necessary in order to warrant a verdict for the plaintiff.”

10

Again, in *Williams v. Sou. R. R. Co.*, 130 N. C., 140; 40 Sou. E. 979, the Court said:

“Where the testimony is all on one side or is not contradicted, the Court can decide whether there is or is not negligence.”

Having rebutted the negligence, the benefit of which presumption the statute gave the respondents, their failure to go forward and furnish other and sufficient evidence warranted the Trial Court in directing a verdict for the reason first urged by the appellant and here discussed.

20

*Bower v. Bower*, 78 N. J. L., 393;

3 *Hav. Law Review*, 165 Div. V;

2 *Chamberlain—on Evidence*, Sec. 1082, p. 1321, et seq.

## POINT II.

**The uncontradicted evidence in the entire case shows that the appellant was not negligent.**

30

Grounds of appeal No. 3, p. 17, and p. 122, l. 24 et seq.

Grounds of appeal No. 6, p. 18, and p. 134, ll. 35-37.

Failure to reiterate that the gravamen of the respondent's action was not the setting out or the starting of the fire but negligence in so doing would be apt to lend both character and weight

40

to the respondent's proof, because as it has been shown not only in the Statement under Point I, it was not only confined to proof of a passing engine and a subsequent fire *but to the further fact that the fire must have been caused by a spark from the smokestack of the locomotive in question, as the proof was the ask-pans were in good order, and there was no evidence whatever to warrant an inference that the fire came from that source.*

- 10 That being the respondent's case we believe there should be no difficulty in convincing the Court that such evidence alone is not only consistent with no negligence upon the part of the appellant, but that the evidence was uncontradictedly so.

*In limine* it is well to dispose what we consider will be featured in the respondent's brief, and that is that it will undoubtedly be contended that the fire started on the appellant's right of way or roadbed and spread therefrom owing to  
 20 the accumulation of combustible material thereon and that therefore the appellant's evidence with respect to the care, kind and condition of its engine, its operation, its screen and its condition are immaterial, and the evidence as to the care and condition of its right of way and roadbed against the uncertain evidence that the fire started in some old grass or weeds was sufficient to make the case one for the jury.

- 30 Conceding solely for the sake of argument that the fire did start on the appellant's right of way or roadbed, if the respondents should see fit to insist upon this point we conceive they will either miss or pass lightly over the true application of the rule with respect to the condition of the appellant's right of way or roadbed.

That the cleaning and care of the appellant's roadbed and right of way is embarrassed by the wording of the statute with respect to taking all  
 40 practical means to prevent the communication of

injury is apparent from a reading of the case of *Waters vs. At. C. Ry. Co.*, 43 Atl. Rep., 670, where the Court said:

“Since the duty of a railroad company, whether imposed by statute or by common law, is to use all practicable means to prevent the communication of fire from their locomotives, which includes every means within their control by which fire from their locomotives may be communicated to the property of others, which duty will be observed if they exercise reasonable care to keep their roadbed free from combustible materials,”—at pp. 670-1. 10

Much reliance undoubtedly will be placed upon the cases of *Salmon v. D., L. & W. R. R. Co.*, 38 N. J. L., p. 5, and 39 N. J. L., p. 299.

With respect to the application of the first Salmon case in 38 N. J. L., p. 5, which was on demurrer to a declaration, what was said by our present Chancellor in *Keeney v. D., L. & W. R. R. Co.*, 87 N. J. L., p. 507, is extremely applicable. 20

“It must be perfectly obvious that there is a wide difference between the sufficiency of averments in a declaration \* \* \* and lack of proof as in this case, that such a situation in fact existed.”

With respect to the second Salmon case, 39 N. J. L., 299, the points of differentiation are so marked as to be, when tested not even analogous in words, let alone facts. 30

In the present case, again referring to the testimony of Ezra Lawrence with respect to the condition of the place where the fire started, he said, the smoke sprung from

“old dead grass and weeds, that is all I seen. Lots of leaves of course in the weeds.”

(p. 62, ll. 18-18) but further

“I was around the place, but I don't know where the first started” (p. 63, ll. 10-12). 40

Yet he was the only witness by whom the respondents made any pretense to prove that the appellant "permitted a large amount of dried grass, brush, weeds or other combustible material to be and remain upon" its right of way and road-way.

10 Aside from the testimony (?) of this witness Lawrence, there appeared not an iota of testimony on the respondent's case as to the care taken of, character or condition of the appellant's roadbed or right of way.

Even after the appellant showed that its right of way was clean at the time of the fire and care had been exercised to keep it clean, *the respondents neither offered any evidence to prove the contrary or dispute it nor by cross-examination showed the appellant's evidence inconclusive on this point.*

20 That a railroad company is not liable for all fires starting on its right of way or road-bed is the law of this state, although one would gather that the Salmon case, supra, intended to construe the law to be to the contrary.

But in *Rollins v. At. C. Ry. Co.*, 73 N. J. L., 64, the Court said:

"If it [the fire] began inside of its right of way, it was equally bound to show a properly constructed and managed engine.

30 "It is true, of course, that for a fire kindled inside of its right of way *it might have been liable*, although its engine was perfect in construction and management, but as a perfectly equipped and managed engine was one of the practicable means for preventing the communication of fire to combustible matter \* \* \* " (at p. 76.)

Having established the "lack of proof" \* \* \* on the respondent's part "that such a situation in fact existed" (Keeney case, supra),  
40 with respect to the permitting of accumula-

tion of weeds, combustible material, etc., on its roadbed or right of way, the appellant then showed and it was uncontradicted that it took all practicable means to prevent and keep its roadbed free from combustible material (Waters case, supra), which at the end of the entire case remained uncontradicted and unimpeached.

The balance of the situation that the appellant is obliged to meet in its argument under this point relates to (A), whether the circumstances of the fire itself constituted sufficient evidence to infer negligence whereby the fire was kindled, and (B), whether it had exercised all practicable means to prevent the communication of injury by the fire. 10

#### A.

The evidence in the instant case points strongly to the fact that the engine undoubtedly did set out the fire. 20

More testimony was produced on this very point by the appellant than by the respondents themselves, but the point is, that it is not the setting out of the fire, that is the gravamen of the charge, but that it was negligently set out.

With regard, then, to the establishment of the fact that the fire was not negligently set out the evidence is uncontradicted. An analysis of the evidence proves it.

No inference can be drawn from the respondents' evidence of the passing of the engine and the subsequent fire, that the spark or sparks emitted by the engine were of any particular size, character or dimensions. 30

No inference can be drawn from the respondents' proof that the screen used was not of the type approved by experience and of common design.

No inference can be drawn from their meagre evidence that either the condition of the screen or 40

the care taken of it was aught but what was proper.

No inference can be drawn from their proof that the engine was negligently operated.

Respondents showed a passing engine and a subsequent fire; the appellants not in contradiction but affirmation of this testimony actually placed the engine passing the point of the fire (p. 89, ll. 29-35); it showed it was impossible to operate any engine without the emission of sparks (p. 95, ll. 13-19); it showed that the appellant's engine passing the place of the fire must have thrown some sparks (p. 116, ll. 22-27); it showed that even sparks from a properly equipped engine retained sufficient vitality to start a fire (p. 120, ll. 10-35; p. 116, ll. 33-39); in fact, it proved that the fire itself was one of those unfor-  
 10 tuitous and occasional happenings due to railroad operations, which could not be helped and which  
 20 the Legislature has freed it from liability for.

Tested by the queries which have been suggested by our courts, and on account of their being un-answered have been properly left to the juries to solve because our courts have rightfully refused to assume their answers, a reference to the case at bar shows the instant case is not based on un-answered queries or conjectural assumptions and that said queries have not been, as the Chancellor said in the Goodman case,

30 "left unsolved by the evidence" (78 N. J. L., 324).

In the Goodman case (78 N. J. L., 323), it was shown that the engine actually threw a spark 115 feet; moreover, the defendant's expert testified that a spark thrown that distance from the mesh of a properly equipped screen would not have retained sufficient vitality to have set out the fire.

In the instant case it was shown that the fire in  
 40

question could have been set out even though it passed through the spark-arrester of a properly equipped engine (p. 120, l. 116, and pp. 33-39, ll. 10-35).

So that there was no legitimate tendency of the evidence in the instant case to prove that the screen was not in good order at the time.

Again in the case of *Bobbink vs. Erie R. R. Co.*, 82 N. J. L., 547, the evidence showed that a spark from a screen in good order that was permitted to pass through it even if it fell on inflammable matter would not be large enough to set a fire. "that they died before coming down" (p. 549). 10

The evidence in the instant case hereinbefore referred to is just the other way.

In the instant case the evidence was all one way, that, to coin an expression, a "legal spark" could and did set out the fire in question.

Even though, as we claim, the Court erred in not directing a verdict, the jury—in law—could not from the evidence found otherwise than that the fire was caused by such a spark. 20

## B.

With respect to the character of the screen in the engine in question, its care and condition and the condition of the engine's ash-pans, the evidence was uncontradicted that the appellant had exercised all practicable means to prevent the escape of fire. 30

It must constantly be borne in mind that the respondents offer no proof whatever in rebuttal that the screen was not a proper one; that its condition was not good; that it had not been properly cared for, and that the ash-pans of the engine were not in a good condition or were a probable means of setting out the fire in question where it started. Further, the defendant's witnesses 40

were not impeached or their testimony shown to have been improbable or rendered inconclusive.

Upon behalf of the appellant it was shown that the screen was in common use, of common design, type and approved by experience (p. 94, ll. 21-31, and p. 104, ll. 26-30); that it was examined every day when the engine was in service (p. 98, ll. 26-30); that it showed no wear and tear (p. 112, ll. 11-15); that the action of the super-heater engine on screens was less wearing (p. 110, ll. 17-20); that on the day of the fire, right after the fire, both the ash-pans and screens were found to be in good condition (p. 111, ll. 10-11), and that at the time the engine passed the place of the fire it was not even being operated to its normal capacity (p. 116, ll. 13-19).

All of which testimony was uncontradicted and unimpeached.

Chief Justice Beasley well said in *Beseman vs. Penn. R. R. Co.*, 50 N. J. L., at 243-4:

“It has been of frequent occurrence that valuable tracks of woodland have been fired from locomotives drawing trains, and on such occasions the judicial construction has uniformly been that the damages so occasioned could not be made the ground of suit, unless the spark arresters were out of order, or were not of approved pattern, or negligence of some kind had been exhibited.”

The negligence referred in the excerpt of the Court’s opinion, or inferrable proof thereof we contend was absolutely lacking in the instant case.

That the screen in the engine conformed to the statutory requirements is plain.

*Hoff v. W. J. & S. R. Co.*, 45 N. J. L., 201;

*W. J. & S. S. R. Co. v. Abbott*, 60 N. J. L., 150;

*Vallaster v. At. C. R. Co.*, 72 N. J. L.,  
334;

*Goodman v. L. V. R. R. Co.*, 78 N. J. L.,  
323.

Reviewing other cases in our State where the liability of the railroad companies were determined adversely to them we find the following causes for said determinations.

In *Wiley v. W. J. & S. R. Co.*, 44 N. J. L., 247, **10**  
the evidence warranted a finding that one of the screens was not the best preventative of the escape of fire, at p. 251.

In *Rollins v. Atl. City R. R. Co.*, 73 N. J. L., 65,  
the defendant admitted it was unable to prove it had taken all preventable means to prevent the escape of sparks, at p. 77.

In *Minard v. W. J. & S. R. Co.*, 74 N. J. L., 39,  
the evidence warranted a finding that the spark arrester was not in good order on the day of the **20**  
fire, p. 40.

In conclusion one needs but refer not only to the evidence (p. 116, ll. 24-27, and p. 95, ll. 13-35), but the remarks of that venerable jurist Chancellor Magie when pronouncing the opinion of this court, as Chief Justice, in the case of *W. J. & S. S. R. Co. v. Abbot*, 60 N. J. L., 150, with respect to devices to prevent the escape of fire, he said:

“It seems that no devise has been invented **30**  
that will absolutely and at all times control the escape of sparks capable of igniting inflammable matter” p. 153.

To allow therefor the verdicts in the present cases to stand—when the uncontradicted evidence shows that this was one of the very occasions which is above referred to, would be to work a grave injustice to the appellant.

### POINT III.

**In view of the fact that the place of the origin of the fire—whether on the lands of the Railroad Company or outside of its lands is one of the necessary elements of the plaintiff's cases it is essential that proof should be made in the same manner as in actions with respect to damage to the land.**

Grounds of Appeal No. 4, p. , and p. 134, ll. 27-30.

Grounds of Appeal No. 5, p. , and p. 134, ll. 31-34.

There was no evidence produced by the respondents as to the metes and bounds of the appellant's lands in the neighborhood or vicinity of the fire, neither was it shown that the place where the fire started was within the metes and bounds of the appellant's lands, road-bed or right of way.

We take it that no presumption can be indulged in shifting the burden on the railroad to show that the fire did not start on its road-bed or right of way, but that a plaintiff's proof must be satisfactory to the extent showing, if he intends to secure a benefit therefrom that the fire actually started on the railroad property.

True, there was evidence testimony that the fire started on the "railroad bank" (p. 65, ll. 4-5), that it started about 8 feet from the edge of the ties (p. 52, ll. 30-1), that it started down near where one witness used to work for the railroad company (p. 54, ll. 26-27), although this witness subsequently said he didn't know where the fire started (p. 63, ll. 10-15).

None—however of these witnesses had the slightest knowledge of the limits or boundaries

of the appellant's property at the place when the fire occurred.

This evidence was just as susceptible of proof by the respondents as by the appellant, *and it was a part of their case as made by the pleadings.*

If the rule is so well settled that in injuries to land the plaintiff to recover must recover upon the strength of his own title and that must be by the tracing of his paper title back to some one who is shown to have been in possession of the locus in quo, or failing in that, he must show that his grantor acquired title from the original proprietors. 10

*Troth v. Smith*, 68 N. J. L. 37;  
*Rollins v. Atl. C. R. Co.*, 73 N. J. L., 65.

It seems both reasonable and logical that when the respondents base their action essentially on the fact that the fire started on the lands of the appellant, their proof should have been of equally as high an order as they were required to make as respects to their own damaged property. 20

If our contention here is sound the learned trial court was in error in refusing to charge the appellant's requests Nos. 1 and 2 (p. 134) assigned as grounds of appeal Nos. 4 and 5, that the fire was not shown to have started on the appellant's lands.

However, as contended under Point II, whether the fire started on the appellant's lands or not, was not, if our contention there is correct of controlling importance in view of the fact that the uncontradicted testimony was to the effect that the appellant had taken all practical means to prevent the escape of fire, and that the care and condition of its road-bed and right of way, was included in the "practical means" referred to. 30

**POINT IV.**

**The Trial Court should have directed  
a verdict in favor of the appellant.**

For the reasons herein urged the judgment should be reversed.

Respectfully submitted,

10

FREDERIC B. SCOTT,  
Attorney and of Counsel  
with Appellant.

20

30

40

NEW JERSEY  
Court of Errors and Appeals

AMZI G. SMITH,  
*Plaintiff-Appellee,*

*vs.*

DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,  
*Defendant-Appellant.*

*Action at Law.*

*On Appeal  
from the Mor-  
ris County Cir-  
cuit Court.*

JOHN H. ORT,  
*Plaintiff-Appellee,*

*vs.*

DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,  
*Defendant-Appellant.*

**Plaintiffs' Brief.**

These two cases were tried together at the Mor-  
ris County Circuit on January 26th and 27th,  
1916, and verdicts were rendered in favor of the  
plaintiffs.

The actions were brought for the destruction by  
fire of the plaintiffs' timber lands, communicated  
from a locomotive of the defendant company.

The first ground alleged by the defendant for  
reversal is, because the Trial Court refused to non-  
sue the plaintiff, John H. Ort, on the ground that  
he had not shown himself to be either the owner of

or in possession of the timber lands which were destroyed by the fire in question, has by stipulation been abandoned by the defendant.

The second ground for reversal is that the Court refused to non-suit both of the plaintiffs on the ground that it has not been shown that fire was communicated to the plaintiffs' property from the locomotive of the defendant company, either directly or by setting on fire combustible material allowed to be upon the right of way of the defendant company.

Grounds 3, 4 and 5 for reversal are really embraced in the second.

The proof in this case that the fire originated upon the company's right of way from one of its locomotives was unusually strong.

The evidence of Samuel Thompson (pp. 28-40,) William G. Kutz (pp. 42-48), Ezra Lawrence (pp. 51-62) and Mrs. Vindette Smith (pp. 63-66), shows beyond any possibility of question the following facts: That an express train of the defendant company passed along where the fire originated at about 1.30 in the afternoon on the day of the fire, and that within a few minutes after the train had passed smoke was seen arising from the plaintiffs' right of way, and that there was no one in the neighborhood at the time, and that there was no smoke there until after the train had passed.

SAMUEL THOMPSON, on page 28, testifies of follows:

Q. When you first saw this fire, where was it burning?

A. Well it looked to me to be between the railroad and the fence.

On page 29:

Q. Do you know where the railroad track is up at Hackettstown.

A. Yes, sir.

Q. Do you know the boundaries of that property?

A. Yes, sir.

Q. How did you learn the boundaries?

A. I worked on the railroad myself.

Q. When did you learn the boundaries?

A. Why, a couple of years ago when I worked on the road, saw the lines where they had their posts in where a line runs.

On page 31:

Q. Did you see any stakes of the railroad company marking their line?

A. Why, yes, it is an iron post every little ways along the line.

*The Court.*

Q. Did you see how far out they ran, that is, when you were there?

A. Yes, sir; we cut weeds and brush along there in the summer.

Q. Did you see those posts?

A. I saw those posts on both sides where the line goes.

On page 32:

Q. How far were you from the fire?

A. I must have been five or six hundred yards from it.

Q. That was as near as you got to the place?

A. Yes, we just got up to the crossing, and looked out across—we could see smoke right in between the track and the fence.

He further says below:

The wind was southeast, that is, I should say went right across toward the mountain there.

At the top of p. 33:

A. Well, we walked up the road and got to the crossing and looked up and saw smoke along the track.

Q. How close to the track?

A. It looked to me just a little off the track.

Q. How many feet about?

A. I couldn't estimate, but close down in the hollow there.

Q. Where was the smoke rising?

A. Rising in between the fence and the track at that time. It was five minutes after the train went by that we made the crossing, and we looked up after the train went by and I saw this smoke.

Q. That space, Mr. Thompson, between the railroad rails and this fence that you speak of, do you know who took care of that with reference to any work that was done on it?

A. You mean between the fence and the railroad track?

Q. Yes?

A. The company.

On page 36:

Q. From that point, between the place where you saw the smoke to where you were standing, did you see anybody you knew?

A. No, sir; I didn't see anybody at all.

Q. Was there anybody around?

A. No, sir; I seen nobody round.

Q. Did you see anybody around on the wagon road?

A. No, sir.

WILLIAM G. KUTZ, testifies as follows (page 42):

Q. When you arrived at the crossing, what

did you see along the railroad track or anywhere in that direction?

A. I seen a little smoke.

Q. Where was that smoke coming from?

A. Between the railroad and the bank, that is right up a little place that runs up to the fence.

Q. How close to the railroad rail, the steel rail, was the smoke?

A. I would judge it could not be over four feet.

Q. Four feet?

A. Yes.

Q. Did the train you speak of having seen five minutes before you arrived at this crossing, which direction was that going?

A. Coming east.

Q. Did you state the direction it was going was up grade or down grade or where?

A. I should say it was up grade.

Same witness on page 43, lines 30-40:

States that the fire burned in a southeasterly direction away from the railroad company's property, and that it had not yet gone over the fence along the company's property.

He further testifies on page 49:

That there was nobody around at the time the train passed and the fire started.

On same page, lines 10-20:

Q. Now, at the time you saw this smoke arising from the locality where you testified, was there any smoke arising from any part of the adjoining field?

A. No, not that I saw.

MR. THOMPSON, at the bottom of page 49, testifies:  
We could see where the smoke was coming up

between the track and the fence I believe, but we did not stay long enough to watch where it did go, you know.

On page 50:

Q. State to the Court the situation then with reference to seeing any person who might have been in that locality.

A. If there had been any person round there we could have seen them.

Q. Did you see any?

A. We didn't see any one. Never saw a living soul.

EZRA LAWRENCE, testifies at bottom of page 51: That we went down to the place where the fire started and arrived there at about five minutes after the express train had gone by, and saw fire down by the signal bell.

At the bottom of page 52:

Q. Where, with reference to the railroad track, how close?

A. Maybe 8 or 10 feet away from the track, as near as I could tell.

Q. I suppose it was on the railroad?

A. I don't know; it was between the railroad and this wire fence.

Q. A part of the railroad track that you saw—you worked on in the repair section, or repair gang, just state whether or not this was a part of the section that you worked on where you saw this fire started?

A. *Just on the same section, same ground that we was clearing off last summer, Hackettstown section.*

At the top of page 54:

Q. What was the distance from the railroad rail?

A. It might have been 8 or 10 feet, maybe a little more. I didn't measure it, only just as I saw it.

Q. These 8 or 10 feet that you speak of from the rail, please state what work you had done along there at the time you were with the railroad company. What did you do on the track when you worked for the company?

A. Put in railroad ties and drove stakes.

Q. Cut brush and grass?

A. Cut brush and grass and such stuff as that.

Same page, lines 20-30:

Q. State whether you ever cut grass where the fire was?

A. I cut lots of grass there; cut it for years, every year.

Same witness, page 62:

Q. What was there there to burn, to make smoke?

A. Old dead grass and weeds. That is all I seen.

Q. Leaves?

A. Lots of leaves, of course, in the weeds.

MRS. VINDETTE SMITH, (p. 64):

Mrs. Smith, who lived in plain sight of the place where the fire started, as she stood washing her dishes in the kitchen, testifies as follows (page 64):

Q. Where was the fire?

A. On the railroad bank when I first saw it.

Q. How far from the fence?

A. Well, that I could not say, about half

way between the fence and the railroad track.

Q. This fence that you speak of, was that between the railroad and the property that you farmed?

A. Yes, sir; it was dividing the two.

Q. You speak of seeing fire and smoke; what do you mean by fire?

A. Why, after No. 2 went through east.

Q. What is No. 2?

A. The fast line that goes east about 1.30.

Q. Did you see it go by that day?

A. Yes, sir.

Q. And then what did you see next?

Q. I saw the smoke before the train was out of my hearing.

Q. Before the train passed was there smoke?

A. No, sir; I was right by my window working.

Q. What did you see besides smoke, if any?

A. I saw fire, when I got up from my needle work I could see it.

Top page 65:

Q. How long after was that?

A. Not more than three minutes.

Q. Where was this fire you speak of now?

A. It was on the railroad bank.

Q. Just describe what you saw of the fire from that time on, Mrs. Smith?

A. Well, from that time on there it was on the bank burning, and of course I could not send down at the time to put it out because I could not. I went back to my work and did not see it for an hour. I went back and it was through our fence and burning in the posts, in the rail fence and a tract along the road there was burning, just a smouldering blaze, not a blaze, but just a little in the field had

caught fire. I went back to the house, it was not much of a blaze, and that was the end of the fire we saw.

Q. Well, where else did it go after it crossed your field?

A. It went on through in our woods to our place and from there on in a tract of timber; I don't know who owns it. I could not say, but it would be better known as the Stevens' property, and so it went to Mr. Smith's and Mr. Ort's woods and so on to Mr. Lawrence's.

At the bottom of same page:

Q. Which way was the wind blowing on that afternoon, Mrs. Smith?

A. The fire went southeast.

Q. Now, you say you could see this blaze where the fire seemed to start. Was there anybody around there at all?

A. No, there was not.

Q. Was there anybody around there for a little time before that, before the train went up.

A. No, sir; not that I seen of anybody that knowed anything about it.

At the bottom of page 67, and top of page 68:

Q. Did you watch the train as it came down?

A. I watched the train as it went out of sight, and it had not gone out of my hearing, as I said, until I saw smoke and went right out in the field.

Bottom of page 68 and top of page 69:

Q. When you saw the train coming in the direction of Muskee Bridge, was it coming in the direction of your house, coming east?

A. Coming east.

Q. How long did that take?

A. Why, it would not take a minute to get out of my sight.

Q. After the train passed, how long did you remain in the house?

A. Why, I didn't remain in the house. I seen the smoke right out of my window just as soon as the train—before it was out of my reach; not more than two or three minutes I seen smoke.

Q. Then as the end of the train passed up toward Muskee Bridge, did you see smoke then?

A. Well, not so quick as that. I could not say. I seen it right away.

The above state of facts is much stronger than the facts proven in the case of *Wiley v. West Jersey & Sea Shore R. R. Company*, 15 Vr., 247, in which verdict for the plaintiff was upheld. See also *Salmon v. Delaware, Lackawanna & Western R. R. Co.*, 9 Vr., p. 5, and *Goodman v. Lehigh Valley R. R. Co.*, 49 Vr., 317.

Ground No. 6 is based upon the refusal of the Court to charge that "the uncontradicted evidence is that the screen or spark arrester in the engine in question complied with the requirements of the statute.

This is no ground for reversal, first, because this was a jury question, and second, because the Court did, in effect, charge this several times, and particularly on page 127, lines 20-30 where the Court said: "Proof that they have taken and used such means furnished a defense in that respect," and what immediately follows.

For the above reasons I respectfully submit that the judgment in both cases should be affirmed.

WILLIAM C. GEBHARDT,

Attorney for Plaintiff-Appellees.

# INDEX.

## ORT CASE.

	Page.
Notice of Appeal .....	1
Summons .....	2
Complaint .....	3
Answer .....	5
Reply .....	6
Record of Trial .....	7
Judgment .....	8
Grounds of Appeal .....	17

## SMITH CASE.

Notice of Appeal .....	9
Summons .....	10
Complaint .....	11
Answer .....	13
Reply .....	14
Record of Trial .....	15
Judgment .....	16
Grounds of Appeal .....	17

---

## TESTIMONY.

### FOR PLAINTIFFS:

#### AMZI G. SMITH:

Direct .....	21
Cross .....	22

#### SAMUEL THOMPSON:

Direct .....	28
Cross .....	35
Re-Direct .....	40
<i>Recalled</i>	
Direct .....	49
Cross .....	50

	Page.
WILLIAM G. KUTZ:	
Direct .....	42
Cross .....	44
Re-Direct .....	48
EZRA LAWRENCE:	
Direct .....	51
Cross .....	55
Re-Direct .....	62
VINDETTE SMITH:	
Direct .....	63
Cross .....	66
JOHN H. ORT:	
Direct .....	69
FOR DEFENDANT:	
JOHN SEXTON:	
Direct .....	78
EMIL VISIORI:	
Direct .....	81
Cross .....	85
LOUIS BAKER:	
Direct .....	87
OWEN F. KERNEY:	
Direct .....	88
Cross .....	89
THOMAS F. BARTON:	
Direct .....	90
Cross .....	95
CHARLES KEHOE:	
Direct .....	96
Cross .....	98

	Page.
<b>MORRIS QUINN:</b>	
Direct .....	100
<b>JOHN BURKE:</b>	
Direct .....	102
Cross .....	103
<b>JOHN J. MANSFIELD:</b>	
Direct .....	104
Cross .....	105
<b>JOHN MADIGEN:</b>	
Direct .....	107
Cross .....	108
<b>BENJAMINE PRITCHARD:</b>	
Direct .....	109
Cross .....	111
<b>JOHN R. MOONEY:</b>	
Direct .....	112
Cross .....	113
<b>MELLEN C. F. HATCH:</b>	
Direct .....	113
Cross .....	117
<b>CHARLES DUCAS:</b>	
Direct .....	118
—•—	
Motion for Non-Suit .....	71
Motion for Direction of Verdict .....	121
Charge .....	124
Defendant's Requests to Charge .....	134



**Notice of Appeal.**

(Filed April 27, 1916.)

**MORRIS COUNTY CIRCUIT COURT.**

---

JOHN H. ORT,	}	10
<i>Plaintiff,</i>		
<i>against</i>		Action at
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,		Law.
<i>Defendant.</i>		

---

To WILLIAM C. GEBHARDT, ESQ.,  
Attorney of Above Plaintiff. 20

SIR:

YOU WILL PLEASE TO TAKE NOTICE that the above defendant appeals from the verdict and the judgment entered in the above case on the 27th day of January, 1916, from the Morris County Circuit Court to the Court of Errors and Appeals for the State of New Jersey.

AND YOU WILL FURTHER TAKE NOTICE that the above defendant will serve upon you within the time required by law and the practice in such cases made and provided its Grounds of Appeal not now stated in this Notice. 30

FREDERIC B. SCOTT,  
Attorney of Defendant.

Dated, April 20, 1916.

**Summons.**

(Filed Nov. 24, 1915.)

The State of New Jersey to The Delaware, Lackawanna and Western Railroad Company:

10           (Seal.)       You are summoned to answer the annexed complaint of JOHN H. ORT, in an action at law in the Circuit Court of the County of Morris. And take notice that unless you file your answer to said complaint with the Clerk of the Circuit Court of the County of Morris, at Morristown, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20           WITNESS, CHARLES W. PARKER, Esquire, Judge of the Circuit Court of the County of Morris, at Morristown, this fifth day of November, Nineteen Hundred and Fifteen.

ELIAS BERTRAM MOTT,  
Clerk.

WM. C. GEBHARDT,  
Attorney.

30

40

**Complaint.****MORRIS COUNTY CIRCUIT COURT.**

<p style="text-align: center;">JOHN H. ORT,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>against</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY,</p> <p style="text-align: right;"><i>Defendant.</i></p>	}	<p>Action at Law.</p> <p style="text-align: right;"><b>10</b></p>
---	---	---

The plaintiff, who resides in the Township of Mount Olive, in the County of Morris, and State of New Jersey, says:

1. That the defendant is the proprietor and operator of a certain steam railroad with its equipments and appurtenances extending from the City of Jersey City, in the County of Hudson, to the Town of Phillipsburg, in the County of Warren, in said State. **20**

2. That the said plaintiff upon the 19th day of April, 1915, lawfully possessed and owned a certain wood or timber lot containing fifty acres, more or less, situate in said Township near to the said railroad tracks of the defendant.

3. That on the said 19th day of April, 1915, the said defendant, by its servants and agents, negligently and carelessly ran and propelled a certain locomotive engine upon the said tracks without taking and using all practicable means of preventing the communication of fire from the said locomotive engine to the nearby and adjacent property of the said plaintiff and without using any modern, safe or sufficient spark arrester, screen or cover, in good repair upon the smoke stack or smoke pipe of the said locomotive engine **30**

*Complaint.*

and also carelessly and negligently allowed and permitted a large amount of dried grass, brush, weeds and other combustible material to be and remain upon the lands and property of the said defendant along its right of way and near to the said wood or timber land of said plaintiff and immediately adjoining lands then owned by Wil-

10 liam Aiken.

4. By and through the carelessness and negligence aforesaid a large amount of sparks and coals of fire were allowed to be emitted and thrown from the smoke stack or smoke pipe and other parts of said locomotive engine to and upon the said dried grass, brush, weeds and other combustible material allowed and permitted by the said defendant to be and remain upon its said lands as aforesaid, and by reason thereof the said dried

20 grass, brush, weeds and other combustible material were set on fire, which said fire spread thence to lands of S. E. Stevens, and thence to the said wood or timber lands of the said defendant, and consumed and destroyed the same.

Plaintiff demands \$5,000 damages.

WM. C. GEBHARDT,  
Attorney of Plaintiff.

30

40

**Answer.**

(Filed Dec. 21, 1915.)

**MORRIS COUNTY CIRCUIT COURT.**

<p style="text-align: center;">JOHN H. ORT, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>against</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	<p>Action at    10 Law.</p>
---	---	---------------------------------

The above defendant, The Delaware, Lackawanna and Western Railroad Company, answering the allegations contained in the above plaintiff's complaint, says:

1. That it admits the allegations contained in 20  
the first paragraph of the plaintiff's complaint.

2. That it has not knowledge or information sufficient to form a belief so as to answer the allegations contained in the second paragraph of the plaintiff's complaint.

3. That it denies the allegations contained in the third and fourth paragraphs of the plaintiff's complaint, and prays that the above plaintiff's complaint be dismissed against it with its costs in the premises. 30

And for a first and separate defense, the above defendant says that if the fire mentioned in the plaintiff's complaint was caused as alleged by the said plaintiff in his complaint, the said plaintiff was guilty of contributory negligence, in this that having notice of the said fire, the said plaintiff, its servants and agents refused and neglected to put said fire out and extinguish the same as the

said fire entered upon the premises of the above plaintiff.

And for a second and separate defense the above defendant says that the fire which the above plaintiff alleges in his complaint damaged his property as alleged in his complaint was caused by the acts of persons and things not connected with or controlled by the above defendant.

10

FREDERIC B. SCOTT,  
Attorney of Defendant.

**Reply.**

(Filed Dec. 27, 1915.)

MORRIS COUNTY CIRCUIT COURT.

20

JOHN H. ORT,

*Plaintiff,*

*vs.*

THE DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,

*Defendant.*

Action at  
Law.

1. Plaintiff denies all of the allegations of the defendant's answer.

30

2 He denies the first defense set up in the third paragraph of the defendant's answer, and denies that he was guilty of contributory negligence, and denies that he neglected to put out the fire in question.

3. He denies the second defense contained in the third paragraph of defendant's answer.

WM. C. GEBHARDT,  
Attorney of Plaintiff.

40

### Record of Trial.

At a Circuit Court holden at Morristown, in and for the County of Morris, on Wednesday, the Twenty-sixth day of January, A. D. Nineteen Hundred and Sixteen.

Present:

HON. WILLIAM H. SPEER,  
Judge, &c. 19

<p style="text-align: center;">JOHN H. ORT, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	<p>#23. Circuit Court Issue. Action at Law.</p>	20
---	---	---	----

Attorney for Plaintiff, WM. C. GEBHARDT.

Attorney for Defendant, FREDERIC B. SCOTT.

This case being moved the Jury was called and sworn.

Court adjourned until Thursday morning, January 27, 1916, at ten o'clock.

Thursday morning, January 27, 1916, Court met pursuant to adjournment.

Court adjourned until Friday Morning, January 28, 1916, at ten o'clock. 30

Friday Morning, January 28, 1916, Court met pursuant to adjournment.

Trial continued.

The evidence in this case being closed, the Jury, after argument of Counsel and a charge from the Court, retired to a private room to consider their verdict, with a Constable sworn to attend

them, after being out a short time, they returned into Court, and say they have agreed upon their verdict and by their foreman say they find a verdict in favor of the Plaintiff and against the Defendant and assess the damages of the Plaintiff in the sum of Seven hundred dollars (\$700.00), and so say they all. Therefore &c.

**Judgment.**

10

No. 1799.

**MORRIS COUNTY CIRCUIT COURT.**

---

JOHN H. ORT,

*vs.*

THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY.

---

Action at  
Law.  
On Trial.

20

Judgment in an Action at Law on Trial and verdict of Jury rendered in favor of the Plaintiff and against the Defendant above named for the sum of Seven hundred dollars damages. \$700.00 and Seventy-seven dollars and twenty-eight cents costs of suit. 77.28

Whole amount of Damages and Costs. \$777.28

---

30

On motion of William C. Gebhardt,  
Attorney of Plaintiff.

Judgment signed January 28, 1916.

WM. H. SPEER,  
Judge.

---

Recorded in Book "C" of Abstract of Judgments,  
page 176.

40

**Notice of Appeal.**

(Filed April 27, 1916.)

**MORRIS COUNTY CIRCUIT COURT.**

AMZI G. SMITH,

*Plaintiff,**against*THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY.*Defendant.*Action at 10  
Law.  
Notice.To William C. Gebhardt, Esq.,  
Attorney of Above Plaintiff.

Sir :

YOU WILL PLEASE TO TAKE NOTICE, that the above defendant appeals from the verdict and the judgment entered in the above case on the 27th day of January, 1916, from the Morris County Circuit Court to the Court of Errors and Appeals for the State of New Jersey; 20

AND YOU WILL FURTHER TAKE NOTICE, that the above defendant will serve upon you within the time required by law and the practice in such cases made and provided its Grounds of Appeal not now stated in this Notice. 30

FREDERIC B. SCOTT,  
Attorney of Defendant.

Dated April 20, 1916.

**Summons.**

(Filed Nov. 24, 1915.)

*The State of New Jersey to The Delaware, Lackawanna and Western Railroad Company.*

(Seal).

10

You are summoned to answer the annexed complaint of Amzi G. Smith, in an action at law in the Circuit Court of the County of Morris. And take notice that unless you file your answer to said complaint with the Clerk of the Circuit Court

20

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

WITNESS, CHARLES W. PARKER, ESQUIRE, Judge of the Circuit Court of the County of Morris, at Morristown, this fifth day of November, Nineteen Hundred and Fifteen.

ELIAS BERTRAM MOTT,  
Clerk.

W. C. Gebhardt,  
Attorney.

30

40

**Complaint.****MORRIS COUNTY CIRCUIT COURT.**


---

AMZI G. SMITH,  
*Plaintiff,*  
 vs.  
 THE DELAWARE, LACKAWANNA AND  
 WESTERN RAILROAD COMPANY.  
*Defendant.*

---

at Law.  
 Action 19

The plaintiff, who resides in the Township of Mount Olive, in the County of Morris, and State of New Jersey, says: :

1. That the defendant is the proprietor and operator of a certain steam railroad with its equipments and appurtenances extending from the City of Jersey City, in the County of Hudson, to the Town of Phillipsburg, in the County of Warren, in said State. 20

2. That the said plaintiff upon the 19th day of April, 1915, lawfully possessed and owned a certain wood or timber lot containing fifty acres, more or less, situate in said Township near to the said railroad tracks of the defendant.

3. That on the said 19th day of April, 1915, the said defendant, by its servants and agents, negligently and carelessly ran and propelled a certain locomotive engine upon the said tracks without taking and using all practicable means of preventing the communication of fire from the said locomotive engine to the nearby and adjacent property of the said plaintiff and without using any modern, safe or sufficient spark arrester, screen or cover, in good repair upon the smoke stack or smoke pipe of the said locomotive engine 30 40

*Complaint.*

and also carelessly and negligently allowed and permitted a large amount of dried grass, brush, weeds and other combustible material to be and remain upon the lands and property of the said defendant along its right of way and near to the said wood or timber land of said plaintiff and immediately adjoining lands then owned by

10 William Aiken.

4. By and through the carelessness and negligence aforesaid a large amount of sparks and coals of fire were allowed to be emitted and thrown from the smoke stack or smoke pipe and other parts of the said locomotive engine to and upon the said dried grass, brush, weeds and other combustible material allowed and permitted by the said defendant to be and remain upon its said lands as aforesaid, and by reason thereof the

20 the said dried grass, brush, weeds and other combustible material were set on fire, which said fire spread thence to lands of S. E. Stevens, and thence to lands of John H. Ort, and thence to the said wood or timber lands of the said plaintiff, and consumed and destroyed the same, together with 1000 rails, 200 posts, a large amount of wire, 16 apple trees, and other property of the said plaintiff.

30 Plaintiff demands \$5,000 damages.

WM. C. GEBHARDT,  
Attorney of Plaintiff.

**Answer.**

(Filed Dec. 21, 1915.)

**MORRIS COUNTY CIRCUIT COURT.**

<hr/> AMZI G. SMITH,  <i>Plaintiff,</i>  <i>against</i>  THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,  <i>Defendant.</i> <hr/>	}	Action <b>10</b> at Law.
---	---	-----------------------------

The above defendant, The Delaware, Lackawanna & Western Railroad Company, answering the allegations contained in the above plaintiff's complaint, says:

1. That it admits the allegations contained in the first paragraph of the plaintiff's complaint. **20**

2. That it has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the second paragraph of the plaintiff's complaint.

3. That it denies the allegations contained in the third and fourth paragraphs of the plaintiff's complaint and prays that the above plaintiff's complaint be dismissed against it with its costs in the premises. **30**

And for a first and separate defense, the above defendant says that if the fire mentioned in the plaintiff's complaint was caused as alleged by the said plaintiff in his complaint, the said plaintiff was guilty of contributory negligence, in this, that having notice of the said fire, the said plaintiff, its servants and agents refused and neglected to put said fire out and extinguish the same as

the said fire entered upon the premises of the above plaintiff.

And for a second and separate defense the above defendant says that the fire which the above plaintiff alleges in his complaint damaged his property as alleged in his complaint was caused by the acts of persons and things not connected with or controlled by the above defendant.

FREDERIC B. SCOTT.

10

**Reply.**

(Filed, Dec. 27, 1915.)

**MORRIS COUNTY CIRCUIT COURT.**

20

<p>AMZI G. SMITH, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>against</i></p> <p>THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	<p>Action at Law.</p>
---	---	---------------------------

30

1. Plaintiff denies all of the allegations of the defendant's answer.

2. He denies the first defense set up in the third paragraph of the defendant's answer, and denies that the plaintiff was guilty of contributory negligence, and denies that he neglected to put out the fire in question.

3. He denies the second defense contained in the third paragraph of defendant's answer.

WM. C. GEBHARDT,  
Attorney of Plaintiff.

40

**Record of Trial.**

At a Circuit Court holden at Morristown, in and for the County of Morris, on Wednesday, the Twenty-sixth day of January, A. D., Nineteen hundred and Sixteen.

Present

Hon. WILLIAM H. SPEER,

Judge &c.

10

<p style="text-align: center;">AMZI G. SMITH, <i>Plaintiff,</i>  <i>against</i>  THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY,  <i>Defendant.</i></p>	}	<p>Circuit Court issue Action at Law. No. 22.</p>
--	---	---

20

WM. C. GEBHARDT,  
Attorney of Plaintiff.

FREDERIC B. SCOTT,  
Attorney of Defendant.

This case being moved, the Jury was called and sworn.

Court adjourned until Thursday morning, January 27, 1916, at ten o'clock.

Thursday morning, January 27, 1916, Court met pursuant to adjournment.

30

—●—  
TRIAL CONTINUED.

Court adjourned until Friday morning, January 28, 1916, at ten o'clock.

Friday morning, January 28, 1916, Court met pursuant to adjournment.

—●—  
TRIAL CONTINUED.

40

The evidence in this case being closed, the Jury after argument of Counsel and a charge from the Court, retired to a private room to consider their verdict, with a Constable sworn to attend them, after being out a short time they returned into Court and say they have agreed upon their verdict and by their foreman say they find a verdict in favor of the plaintiff and against the defendant, and assess the damages of the plaintiff in the sum of Three hundred and Fifty Dollars (\$350.00) and so say they all. Therefore etc.

**Judgment.**

**MORRIS COUNTY CIRCUIT COURT.**

20	<hr/> AMZI G. SMITH, <i>Plaintiff,</i> against THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, <i>Defendant.</i> <hr/>	}	On Trial Action at Law.
----	--	---	-------------------------------

Judgment in an Action at Law on trial and verdict of Jury rendered in favor of the plaintiff and against the defendant above named for the sum of Three hundred and Fifty Dollars

30	Damages .....	\$350.00
	And Seventy-seven Dollars and	
	Twenty-eight cents	
	Costs of Suit .....	77.28

Whole amount of damages and costs \$427.28  
 On motion of WM. C. GEBHARDT,  
 Attorney of Plaintiff.

Judgment signed January 28, 1916.

WM. H. SPEER,  
 Judge.

40  
 Recorded in Book "C" of Abstract of Judgments, page 175.

**Grounds of Appeal.**

(Filed May 20, 1916.)

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

<p style="text-align: center;">AMZI G. SMITH, <i>Plaintiff-Respondent,</i> <i>against</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY, <i>Defendant-Appellant.</i></p>	} 10
<p style="text-align: center;">JOHN H. ORT, <i>Plaintiff-Respondent,</i> <i>against</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY, <i>Defendant-Appellant.</i></p>	} at Law. Action  } 20

The above appellant, The Delaware, Lackawanna and Western Railroad Company, within the time required by law and the practice in such cases made and provided, hereby writes and sets down its grounds of appeal in the above cases.

1. Because the Trial Court refused to non-suit the plaintiff-respondent, John H. Ort, for the first reason set forth in the defendant-appellant's application for said non-suit. 30

2. Because the Trial Court refused to non-suit the plaintiffs-respondents Amzi G. Smith and John H. Ort for the reasons shown in the record of said cases under the defendant-appellant's second, third and fifth reasons.

3. Because the Trial Court refused to direct a 40

*Grounds of Appeal.*

verdict in favor of the defendant-appellant and against the plaintiffs-respondents for and on account of the first and second reasons of the defendant-appellant as shown by the record of said case.

4. Because the Trial Court refused to charge the jury the first request of the defendant-appellant which was handed to the said Trial Court before the close of said cases and was as follows:

“There is no legal or competent proof that fire started on the road-bed or right of way or land of the defendant.”

5. Because the Trial Court refused to charge the jury the second request of the defendant-appellant which was handed to the said Trial Court before the close of said cases and was as follows:

“There is no legal or competent proof that the defendant allowed grass, weeds, or other combustible matter to accumulate upon its road-bed, right of way or lands.”

6. Because the Trial Court refused to charge the jury the fifth request of the defendant-appellant which was handed to the said Trial Court before the close of said cases and was as follows:

“The uncontradicted evidence is that the screen or spark resister in the engine in question complied with the requirements of the statute.”

FREDERIC B. SCOTT,  
Attorney of Defendant-Appellant.

**Testimony.****MORRIS COUNTY CIRCUIT COURT.**

AMZI G. SMITH,	
<i>Plaintiff,</i>	
<i>vs.</i>	
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,	10
<i>Defendant.</i>	
<i>and</i>	
JOHN H. ORT,	
<i>Plaintiff.</i>	
<i>vs.</i>	
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,	20
<i>Defendant.</i>	

Transcript of so much of testimony taken in the above entitled cause at the Court House in Morristown, N. J., on January 26th and 27th, 1916, as will present the question raised on appeal.

Before HON. WILLIAM H. SPEER, Judge, and a jury.

For the Plaintiffs, WM. C. GEBHARDT. 30

For the Defendant, FREDERIC B. SCOTT.

It is stipulated by the parties that the two cases may be tried together.

MR. GEBHARDT: I desire to offer in evidence first a deed from George A. Murphy and wife to Amzi G. Smith, dated June 20th, 1899, and recorded in the Clerk's office of the

*Colloquy.*

County of Morris in Book Z-15 of Deeds for said county, page 165, and so forth.

Exhibit P-1.

Also a deed from William Gard to John H. Ort, dated April 21st, 1914, and recorded in the same office in Book O-22 of Deeds on pages 60 and so forth.

10       MR. SCOTT: My objection to the two deeds would be that under the case of *Smith against Troth*, I believe it is 68 Law, to the effect that the mere offering of the deeds themselves would not prove the title in the present plaintiffs.

20       THE COURT: There is such a decision; a case in 39 Law. The deeds are admissible if properly acknowledged under the Conveyance Act. You have got to go further than that. There is a case in 41 Vroom, *Atlantic City Railroad Company*. The real point is that you have got not only to show that you have a deed, but you have got to show that you either have been in actual possession of that property yourself, or that you have derived the property from somebody whom you prove has been in possession, or you have got to go back and work back from that and prove that you have got your deed from the preceding owner. That is the law in that case.

30       MR. GEBHARDT: Of course, we will show possession.

The second deed admitted in evidence as Exhibit P-2.

---

*Amzi G. Smith—Direct.*

AMZI G. SMITH, sworn in his own behalf, testifies as follows:

## DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Are you the plaintiff in the case of Amzi G. Smith against the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. Where do you live, Mr. Smith? A. Well, I live three miles east of Hackettstown. 10

Q. I show you a deed, Mr. Smith, which is marked, you will notice, on the back, P-2 for identification, and I ask whether you are the Amzi G. Smith mentioned in the deed? A. Yes, sir.

Q. You know where the property is? A. Yes, sir.

Q. With respect to that property where have you been living since the date of that deed? A. Never lived anywhere else. 20

Q. What is the date of it? A. June 20th, 1899.

THE COURT: So that you have lived on this particular property since you were born?

WITNESS: Yes, on this place.

THE COURT: You have lived on it before you got the deed?

WITNESS: Sure; sure.

Q. With respect to that deed, what is there on that particular land? A. Well, there is timber, land, farm land and swamp land. 30

Q. How much timber land is there? A. Well, there is 38 acres upland, timber land.

Q. What occurred to this timber, or any part of it, on the 18th or 19th or 20th days of April, 1915? A. Well, the fire came up there on Monday; I think it was the 18th, and about between ten and eleven o'clock we discovered smoke from the hill; we went back there and seen it coming up the hill in a northeasterly direction. I went out and 40

*Amzi G. Smith—Cross.*

notified one of the neighbors; when we came back, we thought we could get it out, for it was coming over to me. I went out there, and seen we had to run for our lives or we would have been burned up; we worked on up and got to a field that leads back to—going to the road, leads to my fields. We thought we could head it off and keep it from coming towards my place. So I ordered my man who was working for me to go in and get my team; we will plow a path right in front of my place. So we did; we plowed around and around the field, way back; and plowed around and kept it from getting to the house, the side field; we could see it coming up over the hill, on our side; but it went right on and jumped over, so we pulled for the house; it protected our place; if we hadn't, our place would have all burned.

20

\* \* \*

CROSS EXAMINATION BY MR. SCOTT:

Q. I will ask you, Mr. Smith, whether that property that you have described there as having been destroyed by this fire is a part of the property described in the deed which you have in your hand?

A. Yes, sir.

Q. How do you know? A. Sir.

30 Q. How do you know that? A. This property that was burned was in that deed.

Q. How do you know that property described—affected by the fire was property described, or particularly described in that deed, or included in that deed? A. Why, that property that was burned over is included in that deed.

Q. I would like you to tell the jury how you know that? A. Why, my deed covers that ground that was burned over.

40

Q. In what way do you know that this deed

*Amzi G. Smith—Cross.*

covers the property that was burned over? A. Why, I traced up that survey, included in that deed; covered all that land that was burned over.

Q. Did you personally do the tracing over? A. Sir?

Q. Did you do the surveying or tracing over? A. No, I did not survey it.

Q. Who did it? A. Well, I could not tell you; 10 other parties.

Q. Your knowledge of the fact that this deed covers the property burned over is from what somebody else told you, your surveyor? A. According to that deed is what I go by.

Q. I say, your knowledge comes from what the surveyor told you? A. From what I see in that deed is what I go by.

Q. In what manner do you ascertain from this deed that this deed covers the burned property? 20 How did you learn it? A. How did I learn it?

Q. How did you learn that this deed covers part of the burned property? A. Why, I read over the deed and found my corners and that is what the deed calls for.

Q. Having found the corners, did you make a survey? A. Did I? No.

Q. Or run out the lines, in any particular way? A. No, I did not.

Q. Did you have anybody else do it for you? 30 A. No, sir; that deed was transferred over to me.

Q. The only knowledge you have is the fact that some of these lines are the same monuments or posts mentioned in the deed which you believe covers the property in question? A. Why, certainly I believe it.

Q. There were two fields of timber burned by the fire; two separate acreages of timber burned by the fire, one of small timber and the other of sprouts? A. Yes, sir. 40

*Amzi G. Smith—Cross.*

Q. Were they close together, those fields? A. These two different sections?

Q. This timber land? A. Yes, they adjoined.

Q. They adjoined? A. Yes, sir.

Q. How far were they, on the top of the mountain or on the north or south side of the mountain? A. Right up on top of the mountain.

10 Q. Right on top of the mountain? A. Yes, sir.

Q. Where was the medium timber, east or west?

A. That was to the northeast of the railroad.

Q. To the northeast? A. Yes, sir.

\* \* \*

Q. About what time did you learn of this fire?

A. Betwixt ten and eleven o'clock on Monday.

Q. From whom did you learn that? A. We saw it; I was out in the field plowing.

20 Q. Where was the fire at that time? A. It was coming up the hill.

Q. On your property? A. No, sir.

Q. How was the wind at that time? A. Well, it had been in a northeasterly direction.

Q. With respect to the wind, how would you say that was blowing, out to the top of the hill? A. Coming west up the top of the hill. At spells the wind would change and take—it seemed to be going in a northeasterly direction.

Q. Was it a high wind or— A. Fairly.

30 Q. By fairly, what do you mean? A. Well, it did not blow hard, just fair; seemed to make a suction wind.

Q. I am talking about the wind; was the wind blowing— A. Not so very.

Q. How fast? A. I could not tell you that.

Q. Wasn't it blowing a gale? A. No, no.

Q. But it was noticeable? A. Oh, well, you could notice the wind blowing a little, but never hard.

*Amzi G. Smith—Cross.*

Q. Who was with you at the time you discovered the fire? A. Well, my nephew, and my work hand.

Q. Who is your nephew? A. His name is Smith.

Q. What is his first name? A. Anson.

Q. And your laborer's name was what? A. Fish.

Q. About how far from your property was the fire when you first saw it? A. Well, I should 10  
judge it was about a mile.

Q. About a mile? A. Yes.

Q. When did you next pay any attention to it after you saw it around ten o'clock in the morning? A. What did I do afterwards?

Q. No, when you next paid attention to the fire? A. As soon as I discovered it, I went to tell some of my neighbors.

Q. How soon after that? A. Why, I went back and seen it coming; went right directly and told 20  
the neighbors. That was on the way to the fire, when I met them.

Q. Did you direct your helper, Mr. Bishop, to do anything at that time? A. I went on and they come on out.

Q. When you first discovered the fire, did you tell Mr. Fish to do anything? A. He come on back; I went on to tell the neighbors. I could not say what he done afterwards.

Q. You did not direct him to do anything? A. 30  
When I got back he was fighting the fire.

Q. How long were you away? A. Well, I don't think I was gone more than half an hour, if it was that.

Q. What was young Smith doing, if anything? A. Fighting.

Q. After you got back to where Mr. Fish was, what did you do? A. What did I do then? Why, when I got back, why, my neighbor and I seen it coming up and we thought we could head it off 40

*Amzi G. Smith—Cross.*

from coming over my land, but we could not keep it from coming; could not head it from coming on me. It come down there so quick that we had to run to save our lives, or we would have been burned up.

Q. After that you did not do anything more?

A. Then we come back on up and my man was there then, who was working for me; I said, "You  
10 go on in and get my team and plough; we will plow this road up, and maybe we can keep it from getting on my place." We plowed it right up, that road to the field; I said, "Plow it right around the field"—a lot of grass and stuff—"we can keep it from going across there"; but it was all in vain; did not amount to nothing.

Q. And there were three or four persons work-  
ing, all trying to put out the fire? A. Oh, I don't  
20 know how many; there was a lot of them there then. I could not tell you that now.

THE COURT: These corners that you mentioned in your deed; did you look at those yourself?

WITNESS: I know where every one is.

THE COURT: This fence that you have here; where was that with reference to the corners?

WITNESS: Well, some of the fences wasn't  
30 on—didn't go on the line; in betwixt the inside of my property, see?

THE COURT: I know; are all of your fences inside of the corners?

WITNESS: Yes, sir.

THE COURT: The monuments?

WITNESS: Yes, sir.

THE COURT: They all are?

WITNESS: Yes, sir.

THE COURT: And the burned part that you  
40

*Amzi G. Smith—Cross.*

are complaining about here was all inside of the fence, was it?

WITNESS: Well, it burned right up to the fence and through the fence, yes.

THE COURT: Your complaint is that it was inside of the fence?

WITNESS: Yes.

MR. GEBHARDT: The fence is included. 10

THE COURT: I understand; the fence is included.

MR. GEBHARDT: How long did you say you had been in possession of this property?

WITNESS: Well, I have been ever since the 20th of June, 1899.

Q. Was this entire property fenced in? A. Where the fire was?

Q. Was this another piece of property? A. No, no; it ain't all fenced. The fence burned up around my fields. I had fields back in the woods, you see. 20

Q. In your answer to the Court, with respect to how you know that these fences were located with respect to the various points, was that gained from information conveyed to you by somebody else? Or do you know that of your own knowledge? A. I don't understand what you mean.

THE COURT: He said he located the corners of the land; located them all, and the corners were inside the fence. 30

*Samuel Thompson—Direct.*

SAMUEL THOMPSON, sworn for the plaintiffs, testifies as follows:

## DIRECT EXAMINATION BY MR. GEBHARDT:

MR. GEBHARDT: This witness' testimony will apply to both cases.

10 Q. Where do you live, Mr. Thompson? A. Hackettstown.

Q. Hackettstown? A. Yes, sir.

Q. Do you remember the fire which has been spoken of as burning over the timber of Mr. Smith and Mr. Ort? A. Yes, sir.

Q. Can you give us the date of that fire? A. I could not; I don't remember the date.

Q. What day of the week was it? A. On Sunday.

20 Q. What month? A. Well, I think it was in April. I know it was a nice day in spring that we took a walk out, my friend and myself, and we walked up that way. That is the way I came to see it.

Q. When you first saw this fire, where was it burning? A. Well, it looked to me to be between the railroad and the fence; the field on that side (indicating) of the railroad.

30 Q. Where with respect to the railroad company's property? A. How is that?

Q. Where was the fire when you saw it, on the railroad company's property or adjoining the property? A. Well, I wasn't close by it. It looked from where—

MR. SCOTT: I would like to ask this witness preliminarily whether he knows where the railroad property is?

THE COURT: Ask him.

*Samuel Thompson—Direct.*

BY MR. SCOTT :

Q. Do you know where the railroad track is up at Hackettstown? A. Yes, sir.

Q. Do you know the boundaries of that property? A. Yes, sir.

Q. How did you learn the boundaries? A. I worked on the railroad myself.

Q. When did you learn the boundaries? A. <sup>10</sup> Why, a couple of years ago when I worked on the road; saw the lines where they have their posts in, where the line runs.

Q. When was the last time prior to the fire that you discovered or that you saw the lines or posts? A. Oh, I could not tell you. I have been up and down the railroad pretty frequently.

Q. What was your business, sir, with the railroad? A. With the railroad?

Q. Yes? A. I worked on the tracks when I <sup>20</sup> worked for the company; track work.

Q. Track walker? A. No, sir working on the section gang.

Q. What section was that? A. Waterloo section.

Q. What section? A. Waterloo section.

Q. What was the number of that section? A. Now, I really don't remember what the identical number was now.

Q. From what mile post to what mile post did that section go? A. Well, it ran from below Stanhope and goes on below Waterloo. <sup>30</sup>

Q. Where did it begin east—the section you worked on, where did it begin? What was the easterly end of that section? A. That there was just way up above where this fire started; up the track further, quite a little ways further than where the fire started.

Q. How long were you working in that section gang? A. Worked one summer. <sup>40</sup>

*Samuel Thompson—Direct.*

Q. Only one summer? A. Yes, sir.

Q. You know that sections have certain well defined limits, east and west limits? A. Yes.

Q. Where did the section that you were working on begin, with reference to any monument or mile post on the railroad? A. Well, all I can tell you about that was about a mile back below  
 10 Muskee bridge, you call it, where the section ends, and goes on towards Stanhope.

Q. East or west of Muskee bridge? A. East.

Q. How far east did it begin? A. Well, I think it was very close to a mile.

Q. What were your duties with the section gang? A. Putting in ties; taking them out and putting in new ones.

Q. Was that all? A. That was all.

Q. You never had anything to do with the  
 20 property lines of the defendant, the railroad company, had you? A. Oh, I helped to clean the brush and like that along the railroad in the summer time.

Q. I say, you never had anything to do with the property line? A. Oh, no.

Q. Did you ever measure any of the property lines? A. No, sir.

Q. Or see them measured? A. No, sir.

Q. Did you ever construct any fence for the  
 30 railroad company in the neighborhood or along the section on which you worked? A. No, sir.

Q. Was there any fence erected by the railroad to your knowledge along that section? A. No, sir, there was not.

Q. Would you say, at the time the fire took place, there was none? A. Wasn't any; that is what I mean; they did not have any fences of their own.

Q. The railroad company had no fences? A.  
 40 No, that is what I mean.

*Samuel Thompson—Direct.*

THE COURT: Did you see any stakes that the railroad company marked as their line?

WITNESS: Why, yes, it is an iron post every little ways along the line.

THE COURT: Did you see how far out they ran—that is, when you were there?

WITNESS: Yes, sir, we cut weeds and brush along there in the summer. 10

THE COURT: Did you see those posts?

WITNESS: I saw those posts on both sides where the line goes.

Q. Were those posts there at that time? A. Must have been.

Q. I say, were they? A. They are all the way along the line.

Q. Did you help put them in? A. No, sir.

Q. Did you see them put in? A. No, sir.

Q. You don't know of your own knowledge who 20 put them in? A. No, sir.

Q. Or when they were put in? A. No, sir.

THE COURT: Did they have any marks on them?

WITNESS: No, wasn't any marks on; just a piece of iron; right on the ground.

Q. What was the nature of those posts?

THE COURT: Railroad iron. 30

A. A piece of railroad iron.

Q. Railroad ties? A. Iron tracks.

Q. By railroad iron, you mean what? A. Just the same as its tracks, put down in the ground.

Q. A piece of rail? A. Yes, sir.

Q. Those are the only markers, as you designate them, that you ever saw? A. The only ones up through there, in that section of the country.

Q. At the time of the fire did you see any of those railroad tracks near the place of the fire? 40

*Samuel Thompson—Direct.*

A. No, sir, I wasn't out near the fire; I was quite a little ways off from the fire.

Q. How far were you from the fire? A. Oh, I must have been five or six hundred yards, anyhow.

Q. That was as near as you got to the place?

A. Yes, we just got up to the crossing and looked out across; we could see smoke right in between  
10 the track and the fence.

Q. The only thing you could see was smoke?

A. Oh, seen smoke around up further.

Q. You did not see any blaze? A. No, didn't see any blaze.

Q. How was the wind blowing at that time?

A. The wind was north, or southeast; I should say; going right across this way (indicating).

Q. Blowing pretty heavy? A. Went right across  
20 toward the mountain there, right that way (indicating).

Q. When was the last time that you worked for the railroad company before the fire in question? A. Over a year ago.

Q. Over a year ago? A. Yes.

Q. A year before the fire? A. Yes, sir.

Q. Had you been down in the neighborhood of the fire during that year that you did work for the company? A. Yes, a hundred times.

Q. Will you tell me how many posts or rails  
30 you saw in the ground at any time in that year before the fire, when you were working for the company? A. I could not tell you that; could not answer that question; never paid any attention to that; saw them on the ground and worked on the road there.

Q. Never paid any particular attention to that? A. No.

BY MR. GEBHARDT:

40 Q. What do you mean by fire, if you please? Just tell the Court and jury what you did say?

*Samuel Thompson—Direct.*

THE COURT: That brings it up.

A. Well, we walked up the road and got to the crossing and looked up and we saw smoke along the track.

Q. How close to the track? A. It looked to me just a little ways off the track.

Q. How many feet, about? A. I could not estimate, but close down in the hollow there. 10

Q. Where was it with respect to the fence next the adjoining field? A. Must be twenty feet, I should judge, from the fence over to the track.

Q. Where was the smoke arising? A. Arising in between the fence and the track at that time.

Q. Now, what had you noticed with respect to the train prior to that? A. When we came up that Sunday, there was a train went by; I suppose a local. It was five minutes after the train went by that we made the crossing, see? And we looked up after the train went by and I saw this smoke; whether the train set it on fire, that I could not say, for I don't know anything about that. 20

Q. I wish you would describe in a general way the appearance of the land between the railroad rails and this fence which you spoke of? A. Well, the track is a little higher; goes down, like that (illustrating), and is a fence; the back is up a little ways from the level of the earth there; just a little knoll like, goes down toward the track. 30

Q. That space, Mr. Thompson, between the railroad rails and this fence that you speak of, do you know who took care of that with reference to any work that was done on it? A. You mean between the fence and the railroad track?

Q. Yes? A. The company.

Q. How long had they been doing that?

MR. SCOTT: May I preliminarily examine this witness on that point? 40

THE COURT: You may.

*Samuel Thompson—Direct.*

BY MR. SCOTT:

Q. When were you down near the place where the fire occurred before the fire? A. Oh, I could not tell you; quite a while before.

Q. A year? A. No, inside of a year.

Q. A half a year? A. About that, likely.

Q. Not nearer than half a year? A. Well, I  
10 don't think it, no.

Q. When were you down after this Sunday in question—down to the place where the fire took place? After the fire took place? A. After the fire took place?

Q. Yes; you saw this smoke on Sunday; when were you, after that Sunday, when were you down near the place where the smoke was seen by you? A. Oh, I could not tell you how long it was.

Q. About half a year after? A. Oh, no; it was  
20 not as long as that; might have been a month, a month and a half, something like that.

Q. Was that on a Sunday, too? A. I generally walk up on Sunday; yes, most generally.

Q. That was on Sunday, too; you did not see anybody working on that day? A. Oh, no, sir.

MR. SCOTT: Now, I ask that this witness' testimony be stricken out because he was there  
30 half a year before the time and a couple of months after the time, and there is no presumption that when he was working for the railroad company, at that one time, that the property lines had not changed.

THE COURT: I think there is a presumption of that kind. I think proof, so far as respecting ownership and possession, once proved to exist, is presumed to continue until the contrary is shown. I think that is the general presumption of the law.

MR. SCOTT: Further, on the ground that  
40

*Samuel Thompson—Cross.*

there has been nothing shown by this witness as to the property lines of the defendant company.

THE COURT: I suppose the jury can conclude, from the fact that he was employed and did see the company do work on the right of way of the company, and under the instruction of the foreman worked up to a certain line marked out by the railroad iron. They were not doing the work on somebody else's property, or property that they did not have control of. They may conclude that. I think I will leave it to them to say whether they will or not. 10

MR. GEBHARDT: If that is the conclusion of the Court, you may cross examine.

## CROSS EXAMINATION BY MR. SCOTT:

20

Q. Who were you with walking on this Sunday when you saw this smoke? A. Mr. Kutz—Kutz.

Q. Where does he live? A. Lives in Hackettstown.

Q. In Hackettstown? A. Yes, sir.

Q. Is he here in court to-day? A. Yes, sir.

Q. Anybody else with you? A. No, we were there alone; just him and I.

Q. You did not work for either one of these gentlemen, at the time of the fire, did you? A. No, sir, never worked for neither one of them, at any time. 30

Q. And you are not related in any way? A. No, sir.

Q. Ever had any financial dealings with them? A. No, sir.

Q. About what time of day was it when you saw this train? A. Well, now, in the neighborhood of half-past one, somewhere along there.

Q. Half-past one? A. Somewhere near there. 40

*Samuel Thompson—Cross.*

Q. Which way was the train going, from Hoboken? A. She was going toward Hoboken, going east.

Q. Going toward Hoboken? A. Yes, sir.

Q. What direction were you going in? A. I was walking up the wagon road; the wagon goes like that (indicating). We were walking up  
10 towards the railroad crossing at Muskee bridge.

Q. You say you walked on the road? A. On the wagon road. We came up the wagon road.

Q. Did you see anybody that you knew—when you first saw the fire, you say you were about five hundred or six hundred yards from the smoke? A. Yes, must be easy that.

Q. From that point, between the place where you saw the smoke and where you were standing, did you see anybody you knew? A. No, sir, did  
20 not see anyone at all.

Q. Was there anybody around? A. No, sir, seen nobody around.

Q. Did you see anybody around on the wagon road? A. No, sir.

Q. What kind of a country is it there, hilly? A. Oh, it isn't so bad; up and down.

Q. Just the wagon road running over the railroad track? A. Yes, goes across the track, like this (indicating).

30 Q. Across the track? A. Yes.

Q. Are the railroad tracks and the wagon road on a level, or is one higher than the other? A. There ain't much difference there; very little.

Q. About the same? A. Very little.

Q. Is the country between the point between where you were standing and the place where you saw the smoke an open country or are there trees? A. Open.

Q. Woods? A. Open country; open fields.

40 Q. Open country? A. Yes, sir.

*Samuel Thompson—Cross.*

Q. Practically level? A. Yes, sir.

Q. I mean practically free— A. I know what you mean, yes.

Q. Of trees? What were you and Mr. Kutz doing at that time? I mean where were you going at the time? A. We started out for a walk.

Q. Just for a walk? A. Yes, I used to come up there; I was coming up there for five years, and we started to go up there, and got up to the crossing and walked up there; turned around and did not go any further. 10

Q. You were just out for a walk? A. Just out for a walk; that was all.

Q. This train you saw coming had how many cars? A. I could not tell you; I did not count them.

Q. Didn't pay any particular attention to it? A. I wasn't close enough to count them; I was on the road quite a ways away when the train went by. 20

Q. About how far? A. I don't know; maybe a quarter of a mile, something like that. It took us five minutes to walk up there, I should judge.

Q. You say you were about a quarter of a mile from it? A. I should say that is what it was, yes, down the road. We was coming up toward the railroad; the train went by at that time.

Q. You say you don't know how many cars there were? A. I did not notice how many cars were on it. 30

Q. Do you remember whether it had one of these big engines? A. No, don't remember that, either; did not notice that. I was on the road, quite a ways; I know the train went by; we was back of the railroad; we was by the crossing, anyhow, five minutes after the train went by, we was up to the crossing.

Q. Do you know whether it was a passenger 40

*Samuel Thompson—Cross.*

train or freight train? A. Passenger train, of course.

Q. How do you know? A. Well, there was no freight trains, because it was on Sunday.

Q. Are you sure it was a passenger train? A. Positive of it; sure.

Q. You were positive? A. Yes, sir.

10 Q. Are you positive because you saw it? A. Yes, couldn't I tell a passenger train from a freight train?

Q. I believe so. The fact I want to know is whether you did see it was a passenger train? A. Yes, I saw the train there.

Q. And did you observe it particularly? A. No, I did not pay much attention to it.

Q. Do you know how many coaches it had? A. Do not; did not count it.

20 Q. You used to be on the railroad? A. Sure.

Q. Do you know whether that was one of the through trains? A. The train goes over there about that time on Sunday.

Q. The same train? A. I think so.

Q. That train is Number Two? A. I don't know what the number is.

Q. What is known as the Number Two? Did you ever hear of Number Two before? A. Yes, I heard of Number Two.

30 Q. You worked up there for a year? A. Yes, worked up there about a year.

Q. You know Number Two is a regular train? A. It run the same as a regular train on Sunday and week days.

Q. You say you know Number Two was a regular train when you were working there? A. Yes.

Q. And it came by where you saw it on this Sunday at what time? A. Well, somewhere around half-past one.

40 Q. About half-past one? A. Somewhere; I could

*Samuel Thompson—Cross.*

not tell you exactly what time; it was after dinner, anyway; it was after dinner that we started off that way, walked up that way; somewhere around there.

Q. Do you know the time of all the trains which run up there on Sunday afternoon? A. Oh, I seen them at different times; never paid much attention to them. 10

Q. You know, as a railroad man, from your experience and knowledge, that there are trains that run up there on Sunday afternoon, going east? A. Yes.

Q. You know that the through train, the Buffalo train, runs by there about half-past one, Sunday afternoon? A. I don't know whether it does now or not. That is the train that goes up, anyhow, on different days.

Q. What do you mean by that is the train? 20  
A. That is the train that goes up there about that time on Sundays.

Q. Half-past one train? A. Yes.

Q. Or about that time? A. Yes.

Q. How long, when you looked at that train, did you observe it, a minute or so? A. Half a minute at the outside.

Q. Did you notice whether it had one of these big engines on or not? A. Did not.

Q. Did you pay any particular attention to the engine? A. Did not. 30

Q. Did you pay any particular attention to the speed of the train? A. No, I did not pay much attention to it, anyway; just seen it fly along, and that is all there was to it.

Q. You don't know whether it had one coach or five coaches? A. Had more than one, I know that; I could not tell you how many it did have exactly.

Q. You do think it was the regular train, the 40

*Samuel Thompson—Re-Direct.*

train that usually went by about that time on Sunday afternoon? A. Yes, that was the train, all right.

Q. When you saw the train go by did you speak to Mr. Kutz about that? A. No, sir.

Q. Say anything about, "There goes the through train"? A. No, sir, no reason for saying that  
10 when we were talking about something else, and I did not say anything about the train.

Q. As a railroad man formerly, do you know that train used to go by about half-past one or about one-twenty-five on Sunday afternoon? A. No, sir, I don't; paid no attention to that.

Q. After you saw this smoke, you say when you saw it, it was five or six hundred yards from you, did you go down toward it? A. No, sir, did not go any further; that is what I told you.  
20 Turned around and went on back down the railroad.

Q. You went on back? A. Yes, went back to Hackettstown again; did not go up any further.

Q. The only thing you can assist us in, apparently, is in telling us that you saw smoke there? A. Yes, sir, I did see smoke.

Q. And after you saw the smoke, you went on back? A. Went on back again.

Q. You had no particular further interest in  
30 the matter? A. No, indeed.

## RE-DIRECT EXAMINATION BY MR. GEBHARDT:

Q. How far was this from Hackettstown, Mr. Thompson? A. How far?

Q. Yes, in what direction? A. Must be three miles.

Q. From Hackettstown? A. Yes, sir, close to it.

Q. In what direction, east or west? A. East.

Q. Was there anything near where you saw  
40 this smoke arising, on the railroad property? I

*Samuel Thompson—Re-Direct.*

mean, was there a signal? A. Yes, sir, one right on the other side of the track, very close by.

Q. What sort of a signal was it? A. Well—

Q. What do they call that signal? Is it a part of the block system or not? A. No, it is the light, I guess; where they put this light on.

Q. What is that? That is what I am trying to get; what do they call it? A. I don't know. 10

Q. How high is it? A. Must be fifteen feet, likely.

Q. What is there in it? A. Well, now, I did not look.

Q. In the way of signal; light? A. Yes, put lights up there, yes.

Q. In the direction in which this train was coming that day, was that going up grade or down grade or in the hollow or level or what? A. Well, now, I don't know; I think the track there is a 20 little up-grade.

THE COURT: You spoke about a fence; what fence have you reference to? On whose property is that, do you know?

WITNESS: A man by the name of Haken or Aiken, whatever the name is—Bill Aiken.

Q. There is a wagon road near that fence? A. By the crossing; by the crossing.

Q. There is a wagon road runs in front of the fence? A. No, way back up on the other side, across the field. 30

Q. This signal that you spoke about, how far is that from what you call the Muskee bridge? A. Five or six hundred yards. That is where we was, on the Muskee bridge, and then the fire was somewhere near the signal.

Q. You were on the Muskee bridge? A. I was on the Muskee bridge crossing.

Q. This smoke was about five or six hundred yards east of you? A. Yes, sir. 40

Q. Near some signal? A. Yes.

*William G. Kutz—Direct.*

WILLIAM G. KUTZ, sworn for the plaintiffs, testifies as follows:

## DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Mr. Kutz, where do you live? A. In Hackettstown.

10 Q. Are you the same Mr. Kutz who was out walking on Sunday in April last with Mr. Thompson? A. Yes, sir.

Q. What did you notice with reference to trains before or after you started on your walk? A. I don't know much about them.

Q. What? A. I don't know much about the trains; I am not a railroad man.

Q. What? A. I am no railroad man.

20 Q. What did you notice with reference to passing trains? A. Oh, we passed a train about five minutes before we got to the crossing.

Q. When you arrived at the crossing, what did you see along the railroad track or anywhere off in that direction? A. Seen a little smoke.

Q. Where was that smoke coming from? A. Between the railroad and bank; that is, right up a little bank that runs up to the fence.

Q. How close to the railroad rail, the steel rail? A. Was the fence?

30 Q. No, was the smoke? A. I would judge it could not be over four feet.

Q. Four feet? A. Yes.

Q. What have you to say with respect to a signal post of the company? A. Well, I noticed it; did not know anything about that.

Q. Did you notice that? A. Noticed the signal post, yes.

Q. Did the train you speak of having seen five minutes before you arrived at this crossing, which direction was that train going? A. Coming east.

40 Q. Will you state whether the direction it was

*William G. Kutz—Direct.*

going was up grade or down grade or what? A. I should judge it was up grade.

Q. How much space was there between the railroad rail, the outer rail and the fence on that side toward where you saw the smoke arising? A. As near as I could say, about twenty feet from where we stood.

Q. What kind of a fence was that? A. Wire **10**  
fence.

Q. What was there right on the other side of the fence, away from the railroad property? A. In the other direction?

Q. Yes? A. The direction of the tracks?

Q. Yes? A. I guess wood along there.

Q. Which way did the—which way did the wind appear to be, Mr. Kutz? A. I should judge it was southeast; coming north.

Q. In which direction was that, toward the **20**  
railroad track or away from it? A. Away from it; the smoke was coming up the bank; surely it would be in that way.

Q. How long did you watch it? A. Oh, a few minutes.

Q. What became of it? A. What became of what?

Q. What became of the smoke after you saw it arise from the ground? A. I know where the smoke goes; goes up in the air. **30**

Q. I am asking you now whether the smoke came straight from the place you saw it, and if so, in what direction? A. Yes.

Q. Which way, straight? A. Southeast.

Q. Which way was that, away from the railroad company's property? A. Away from the railroad company's property, yes; surely.

Q. Had it gone over the fence or not when you stood there? A. No, sir, I did not see it go over the fence. **40**

*William G. Kutz—Cross.*

Q. Do you remember the date of this? A. I think it was about the 17th, on Sunday afternoon.

## CROSS EXAMINATION BY MR. SCOTT :

Q. You saw this smoke from the Muskee crossing? A. Yes, sir; the wagon crossing, yes, sir.

10 Q. Down at the Muskee crossing? A. Yes, sir.

Q. About what time in the afternoon? A. I should judge about half-past one.

Q. Had you seen the train before you got to the crossing? A. Did I what?

Q. Did you see a train before you got to the crossing? A. Just about saw it, yes.

Q. Sir? A. Followed it back; just about saw the train coming along, yes.

20 Q. When you got to the crossing, did the train pass you at the crossing? A. No, sir.

Q. How long before you got to the crossing had the train passed the crossing? A. Well, I suppose about five minutes.

Q. When you got to the crossing, was the train in sight? A. Was the train what?

Q. In sight? A. No, sir.

Q. Did you look for it? A. Well, looked up that way naturally, but did not see any train.

Q. You did not see any train? A. No, sir.

30 Q. Were you in a position to look down the railroad track east before you got to the Muskee crossing? A. No, sir, not very handy.

Q. What is that, sir? A. Not very handy; not before we got to the crossing.

Q. Where was that? A. Had almost got to get to the crossing to look down the railroad.

Q. On account of the hilly country? A. Yes.

Q. And the woods there? A. Woods.

40 Q. Was there any woods right there? A. Not right there, no.

*William G. Kutz—Cross.*

Q. On account of the hilly country? A. On account of the hilly country.

Q. It wasn't until you got down to the crossing— A. Down to the crossing.

Q. And did you look down the railroad track? A. Looked down, yes, sir.

Q. About how far from the crossing were you when you saw the train? A. Saw what? 10

Q. Saw the train? A. Oh, well, five minutes, say; oh, four or five hundred yards; maybe more than that; I could not just exactly tell you.

Q. Did you observe whether that was a freight train or passenger train? A. I know the difference between a passenger train and freight train, I guess.

Q. But will you tell us what it was? A. Well, it was a passenger train.

Q. It was a passenger train? A. Yes. 20

Q. Do you remember whether it had one coach or two coaches? A. Well, I did not count the coaches; but it had more than one coach.

Q. Fairly long train? A. Yes.

Q. Do you remember whether it had one of those large engines? A. I could not tell you that; did not look close enough.

Q. You paid no particular attention to the engine? A. No, sir.

Q. Did you pay any particular attention to the speed of the train? A. No, sir, I did not. 30

Q. After it disappeared from your sight, you did not give the train any further thought, did you? A. I did not catch that.

Q. I will ask you another question. How long did you remain at the crossing? A. Oh, a couple of minutes.

Q. A couple of minutes? A. Yes.

Q. And is that a crossing bridge or just an ordinary highway crossing? A. Just a regular wagon crossing. 40

*William G. Kutz—Cross.*

Q. Just a regular wagon crossing? A. Yes, sir.

Q. The railroad track from the crossing down toward where you saw the smoke, is that level or on grade? A. No, there is a grade there.

Q. Light grade? A. It is not a very heavy grade just there.

Q. What do you call it? A. Up, coming this  
10 way.

Q. Slight degree? A. Yes, sir.

Q. After you stood a couple of minutes, did you retrace your steps and go back? A. Yes, went back to Hackettstown, but on the railroad.

Q. Along the railroad? A. Along the railroad.

Q. When you got to the crossing, you say you stood there for a couple of minutes? A. Stood there a couple of minutes.

Q. Looking down; between the crossing, the  
20 Muskee crossing and the place where you saw this smoke, did you see anybody that day there? A. No, sir.

Q. Along the track? A. Did not see anybody.

Q. Did you pay any particular attention to see whether there was anybody? A. No, did not pay particular attention; did not see any people.

Q. There might have been? A. Not on the track; there might have been in some of those houses, but I did not see any person around at  
30 all.

Q. Which houses do you mean? On which side of the track are they, south? A. One on the left-hand side, one on the right-hand side.

Q. And the right-hand side, do you call that south? A. South side.

Q. South side. You said that there is a house on the south side of the track? A. Yes.

Q. How far is that house from the place where you first saw the smoke? A. About one hundred  
40 yards.

*William G. Kutz—Cross.*

Q. East or west? A. Well, it is direct east, I guess, from the railroad.

Q. I am trying to get the direction. First is the Muskee crossing? A. Yes.

Q. And then looking down the track toward this place where you saw the smoke, was the house between the point where you saw the smoke and the Muskee crossing? A. Yes, sir. No, it is not between. 10

Q. Was that further east? A. It is further west of the crossing. The crossing lies diagonally across by this house, and then across the railroad.

Q. With relation to the place where you saw the smoke, was this house east or west of that place? A. West.

Q. About how far west? A. Well, very close to where the house is; about five hundred yards, something like that. 20

Q. You were about five or six hundred yards from the place where you saw the smoke? A. Yes.

Q. About how far was this house from the crossing? A. One hundred yards.

Q. One hundred yards? A. Yes.

Q. Do you know whether there were any other houses between the place where you saw the smoke and the crossing? A. No, sir.

Q. Do you know it to be a fact that there are none? A. There was only one house on the north side, the left-hand side; the railroad coming this way (indicating). 30

Q. On the other side of the railroad, toward the north side, there are two houses? A. Well, up on the bank.

Q. How near the place where you saw the smoke were these other houses? A. The house you have reference to?

Q. Sir? A. The house you have got, I think, is across the railroad. 40

*William G. Kutz—Re-Direct.*

Q. You say you saw smoke; how near the place where you saw this smoke were those other houses? A. Might have been five hundred yards, as I told you, something like that.

Q. Five hundred yards west? A. No; west from the smoke, yes.

Q. That would bring them just about up near  
10 the bridge? A. Yes.

Q. Between the Muskee crossing and the place of the fire on the north side, over on the north side, you say that there were two or three houses?

A. Yes, two or three houses.

Q. And the first house was about five hundred yards from the crossing? Were there some more further down? A. No.

Q. Had you ever gone down in that direction along the railroad track? A. Yes, sir, down  
20 toward the track.

Q. Down towards the track, when you saw the smoke? A. Yes, but not before that, likely.

Q. Not before that likely? A. No.

Q. Do you know whether there were any other houses near and on either side of the railroad track? A. No, sir.

Q. At the place where you saw the smoke? A. I don't know; there is on the north side; that is, up toward the canal; I don't know really how  
30 many is up there.

Q. You did not go down; you stayed on the crossing a couple of minutes and then went back toward Hackettstown? A. Yes.

Q. What is your business, Mr. Kutz? A. I am a carpenter by trade.

## RE-DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Mr. Kutz, as you walked down the track  
40 that day, after you saw that train pass, going

*Samuel Thompson—Direct.*

down toward the direction where you saw this smoke, was there anybody present or around?

A. No, sir, I did not see any myself.

Q. What was the situation there with reference to seeing people? A. Well, it looked as if, by the fire, might be somebody around somewhere, but I did not see them.

Q. Were you looking? A. Not particularly, no, 10  
for people.

Q. How? A. Not for people; I just walked up

Q. What was the situation there with reference to seeing people, if there was anybody there? A. Well, you could not see them if they ain't there.

Q. If they had been there, wouldn't you have seen them? A. Probably would have seen them.

Q. Now, at the time that you saw this smoke arising from the locality where you testified, was there any smoke arising from any part of the 20  
adjoining field? A. No, sir, not that I saw.

BY MR. SCOTT:

Q. There might have been? A. I don't know; I was not close enough to see.

MR. GEBHARDT: I would like to ask Mr. Thompson one more question.

---

SAMUEL THOMPSON, recalled.

30

BY MR. GEBHARDT:

Q. Mr. Thompson, as you arrived at the crossing that day, and saw smoke arising from along the railroad track, state what evidence there was of any fire or smoke over in the field, the adjoining field? A. I did not see any, no, sir.

Q. Well, were you in a position to see it? A. Not exactly, no; we could not see over the fence. 40  
We could see where the smoke was coming up

*Samuel Thompson—Direct.*

between the track and fence, I believe; but we did not stay long enough to watch where it did go, you know.

Q. State to the Court and jury the situation there with reference to seeing anybody, any person that might have been in that locality? A. If there had been any person around there, we could have  
10 seen them.

Q. Did you see any? A. We did not see any one; never saw a living soul.

BY MR. SCOTT:

Q. Did you look for anybody? A. No, sir, wasn't looking for anybody; did not see anyone there.

Q. Didn't look over in the fields, did you? A. No, not particularly. We looked around a little  
20 bit.

Q. Sir? A. We looked around a little bit. Stood there probably a minute or two, looked up the track and then started back.

Q. Instead of asking you to return to-morrow, Mr. Thompson, with the permission of the Court I ask you to tell me where you work now, your business? A. Well, I am laboring now, working by the day.

Q. What? A. I am laboring. I am a carpenter  
30 by trade, but I don't follow that any more.

Q. You live in Hackettstown? A. Yes, sir.

Q. Who was the section foreman that you worked under? A. John Mooney.

Q. Mr. Mooney? A. Yes, sir, the Waterloo section.

*Ezra Lawrence—Direct.*

EZRA LAWRENCE, sworn for the plaintiff testifies as follows:

## DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Mr. Lawrence, where do you live? A. I live a couple of miles below Waterloo depot.

Q. What is your business, Mr. Lawrence? A. Well, it is working around; it is work what I can get to do. 10

Q. Did you ever work for the D. L. & W. Railroad Company? A. Yes, sir.

Q. When did you work for them? A. I worked last summer.

Q. How long did you work for them? A. Well, I left them last fall.

Q. How long had you been working for them, Mr. Lawrence, when you left them? A. Been working for them for the last twenty-five years; maybe more, off and on. 20

Q. In what capacity did you work? A. Section work.

Q. Section work? A. Yes.

Q. What do you mean by that? A. Putting up railroad ties.

Q. You mean working on the tracks? A. Yes, sir, repairs.

Q. During that time where was your section that you worked on? A. You mean the section? 30

Q. Yes? A. Why, working on the Hackettstown section at that time; last summer worked on it.

Q. Where does that run from? A. From Hackettstown on the up side to Muskee bridge, a little bit this way.

Q. Do you remember the Sunday of the fire in April last? A. Yes, sir.

Q. Where were you at the time? A. Well, I was up to the house and got tired sitting in the 40

*Ezra Lawrence—Direct.*

room on Sunday; I did take a walk out a little; of course I come down the track; I went down to the railroad track; this passenger train comes up about twenty-five minutes or half-past one most generally; so I used maybe five minutes going on the track, going down towards Muskee bridge; I got—I went on by—half way up there  
 10 by the signal bell, and looked up and seen smoke down there, down by the signal bell; so I went on down, when I got up there, it was very near by to the wagon road, the fire was; maybe four or five hundred yards; I could not tell you exactly how much, because it was something like that; maybe not a quarter of a mile up the track, down where the signal pole is; when I got down there, the train passed me—this fire, you know, I seen smoke coming over the fields; I looked down  
 20 this side of the signal pole and seen where it lit up. Of course I went on down, paid no more attention to it. It seemed to go over the field. I went to Muskee bridge and went down there, and did not pay any attention to it.

Q. You went down to see where the fire started?

A. I went down where I seen smoke in the field.

Q. Where was that? A. Down by the signal pole, right below.

Q. Where with reference to the railroad track,  
 30 how close? A. Maybe eight or ten feet away from the track, as near as I could answer. I suppose it was on the railroad; I don't know; it was between the railroad and this wire fence.

Q. The part of the railroad track that you say you worked on, in the repair section or repair gang, just state whether or not this was a part of the section that you worked on where you saw this fire started? A. Just on the same section; the same ground that we was clearing off  
 40 last summer, the Hackettstown section.

*Ezra Lawrence—Direct.*

Q. Had you worked on it before the day of this fire? A. Had I worked on it before?

Q. Yes, had you worked in this section prior to the fire? A. Last summer I worked on to it three or four months, maybe.

Q. You said you worked on and off for twenty-five years? A. Well, I worked for two or three different ones. 10

Q. I mean before the day of this fire had you worked on this particular section before that time, at any time? A. No.

Q. Where did you work? A. I worked for a different boss, understand? Waterloo section, Hackettstown section—worked on different sections. The section last summer was the Hackettstown section.

Q. Had you ever worked on the Hackettstown section before last summer? A. I did some, yes, 20 sir.

Q. How long ago? A. Oh, many years ago; I could not tell you how long ago that has been.

Q. About how near? Five years, two years, three years? A. Oh, maybe something like that; maybe longer.

Q. With reference to the place where you say the fire had been, between the track and the fence, state what, if anything, while you were employed by the company you did there? A. I 30 went down after the train passed—

Q. I mean when you were working on the section, when you were working there, you say this was eight feet or so from the rails of the track? A. That is my judgment; I did not measure it.

Q. Did you state how far from the railroad track you saw where the fire had been? A. That is what I told you it was, as near as I can.

Q. Oh, did you tell that before? A. That is 40 what I told you.

*Ezra Lawrence—Direct.*

Q. How much did you say it was? A. What?

Q. What was the distance from the railroad rail? A. It might have been eight or ten feet; maybe a little more; I did not measure it; only just as I saw it.

10 Q. This eight or ten feet that you speak of from the rail, please state what work you had done along there at the time you were with the railroad company? What did you do on the track when you worked for the company? A. Put in railroad ties and drove stakes.

Q. Cut brush and grass? A. Cut brush and grass and such stuff as that.

Q. On how many occasions? A. Anything they put me at; anything they had to put me at—clean up.

20 THE COURT: I will permit it.

Q. Have you ever done any work for the railroad company in this locality where the fire occurred, near the switch pole, anywhere there? A. Oh, I have been along and cut that out.

Q. State whether you ever cut grass where the fire was? A. I cut lots of grass there; cut it for years, every year.

30 Q. Tell us which way the fire was going when you got there that day? A. This fire was going, when I seen it, down to the signal pole there. It was half way across the field or more; all I seen was smoke coming up across the field; maybe the field is four or five hundred yards across the field to the wagon road. When it got down there by the signal pole, it looked as if the smoke was going up on the hill, and the smoke was going down Muskee bridge.

Q. Going in the direction away from the track? A. Yes, sir.

40 Q. In the direction in which this train was go-

*Ezra Lawrence—Cross.*

ing that day, was that up grade or down grade or level? A. There is a little grade there.

Q. Do you remember what this train was? A. Well, it goes up at twenty-five minutes after one.

Q. Describe what you mean by this train? A. The fast line.

Q. The fast line? A. Yes.

Q. Can you tell us about how many coaches it had on that day? A. I did not count the coaches, but it was quite a long train. 10

Q. Can you give us any idea of the number of coaches, whether one, five or eight? A. Might have been four or five coaches on it; but it was quite a long train. I did not stop to count the cars. I only saw that there was a train and engine with cars fastened to it; a fast line; about half-past one it goes up, something like that, or twenty-five minutes after, along my place; twenty-five minutes after one or half past, as near as I can tell you. 20

Q. Please state whether, where you saw this train over on the railroad track, over in the fields, you saw anybody around there? A. No, sir, didn't see nothing. Never seen nobody at all. I was going down the track all alone and didn't see nobody; nor didn't see nobody in the fields, where the smoke were, nowhere; nobody at all. 30

## CROSS EXAMINATION BY MR. SCOTT:

Q. Whereabouts out in the field was it that you saw this smoke? A. I think it was about half way up the field; maybe it is four or five hundred yards, as near as I can tell you, across the field, the wagon road to the field; the smoke was coming up from the field. It was going up from the field. All I seen was smoke and this fire going up there had burned a strip right over the field. That is all I could tell you. 40

*Ezra Lawrence—Cross.*

Q. Which way was the wind blowing at the time you first saw the smoke? A. Why, the wind was blowing right across the track.

Q. Up hill? A. Yes, right up the hill; kind of west, straight across the track.

Q. You live right near there? A. Yes, sir.

10 Q. How far from the place where this fire started do you live? A. I think as near as I could tell you maybe a quarter of a mile; not quite that; I think it is a quarter of a mile anyway.

Q. A quarter of a mile? A. Yes. I live right across there.

Q. Were there any other houses down near the place where the fire started? A. There is no house in there, except at Muskee bridge there is two houses.

20 Q. Two houses near Muskee bridge? A. Yes.

Q. How far would you say it was when you first discovered this fire east of the Muskee bridge, how far east? A. How far east?

Q. Yes? A. I don't know what you mean.

Q. The Muskee bridge was west of the place where you saw this fire—west? A. No, the bridge, Muskee bridge is east. That is the way I come from, this way (indicating).

30 Q. Was the fire east or west of the Muskee bridge? A. East.

Q. Muskee crossing? A. It was east.

Q. It was east of the Muskee crossing? A. Yes, sir.

Q. How far? A. I think from Muskee bridge, it might be—I don't know how far; a quarter of a mile; might not be a quarter of a mile; I don't know; never measured it. That is what I think.

Q. Between five and six hundred yards? A. Something like that, maybe.

40 Q. When did you last work on the section which

*Ezra Lawrence—Cross.*

included the place, the neighborhood where the fire took place? When did you last work? A. You mean the last place I worked on the section?

Q. On the section nearest to the place where you saw the fire, when was the last time you worked there? A. I would not swear when I saw the fire; it was on Sunday when I was going down the track. 10

Q. When was the last time you worked for the company? A. Last time I worked for the company—

Q. Down at the place of the fire, on that section? A. Worked for them last fall, right around some place.

Q. Who did you work under? A. Why, this fellow's name is—I could not spell his name.

Q. Mooney? A. No, it ain't Mooney; a Hackettstown man. 20

Q. A foreigner? A. Yes, his name is—

Q. Visiori? A. I don't know what his name is; I called him Jim; that is what I called him.

Q. You worked for him last summer? A. Yes, sir.

Q. Is that the only time you worked on that section? A. Twice before; twice before.

Q. Under the same man? A. No, worked for his brother.

Q. For his brother? A. Yes, sir. 30

Q. When did you start to walk on the railroad track? A. I was going down as far as—I got tired sitting in the room on Sunday, thought I would take a walk down towards Muskee bridge.

Q. Did you go down to Muskee bridge? A. I went down to Muskee bridge and went up to somebody I knowed there, Johnny White, who lives down there on the other side of the creek, by the wagon road, and there is where I was going when I saw the fire. 40

*Ezra Lawrence—Cross.*

Q. At Muskee bridge did you walk over the railroad tracks? A. What?

Q. Did you then walk over the railroad track?

A. Went from my place down to the railroad track, going down to Johnny White's; when I got down by the signal, I saw the fire burning.

Q. Do you remember what kind of engine the  
10 train had, whether it was one of the large engines?

A. What kind of engine?

Q. Yes? A. I did not size the engine up. It was one of the fast lines; say four or five coaches next to it.

Recess until 10 o'clock to-morrow morning.

Morristown, N. J., January 27th, 1916, 10 A. M.

20 EZRA LAWRENCE, resumes the stand.

CROSS EXAMINATION BY MR. SCOTT (continued):

Q. Where were you when you saw this train?

A. I told you I was at home.

Q. How far up the track? A. I was going out walking—on a Sunday.

Q. How far from the track were you? A. When I saw this train? Well, I started—

30 Q. How far from the track?

THE COURT: How far from the track?

WITNESS: I was down on the track when the train was passing.

Q. You were on the track? A. Yes, sir, down on the track.

Q. Down on the track? A. Yes, sir.

Q. On which track, the east bound or west bound track? A. The east track.

Q. The east bound track? A. Yes, sir.

40 Q. When the train came by? A. Yes.

*Ezra Lawrence—Cross.*

Q. This train was an east bound train? A. Yes, sir; goes by my place at half past one.

Q. When the train went by, did you get out of the way? A. If I did not get out of the way, I would have been knocked away.

Q. What is that? A. If I did not get out of the way, it would have knocked me off.

Q. You were near enough to see the train, 10 were you? A. Yes, sir.

Q. And you could not tell us what kind of an engine it had, whether it was one of these large engines? A. I told you I did not size the thing up. Of course I told you it was a big long train.

Q. With regard to the Muskee crossing, where were you standing, when the train passed? A. I was right opposite the guard plate.

Q. Were you on the Muskee crossing then? A. 20 No, sir, not while the train was passing.

Q. How far east or west of Muskee crossing were you? A. From my place I should judge half a mile.

Q. How far? A. Half a mile.

Q. How far on the track? You were on the track when the train passed? How far east or west of the Muskee crossing were you? A. I think I was half a mile from the Muskee crossing.

Q. Which way, east or west? A. West. 30

Q. West of the— A. Or east; east.

Q. Well, which way is it? You went half a mile east— A. I did not say I was going east of the Muskee crossing; Muskee crossing is west.

Q. You were half a mile east of the Muskee crossing? A. Yes, I think so.

Q. When the train passed? A. Yes, sir.

Q. Then after the train passed, did you walk up the track? A. No, sir, went down to the Muskee crossing and walked on down. 40

*Ezra Lawrence—Cross.*

Q. After the train passed did you go on the track again? A. I went on down the track west.

Q. In what direction, west? A. West; down toward Muskee bridge.

Q. How long had you been walking before you saw any smoke? A. Well, it might have been;  
10 I could not say you know. I went down—

Q. How long would you say, half an hour, an hour or fifteen minutes? A. I think if I walked right to the place, I might walk it in maybe ten minutes, down to the signal pole from my place.

Q. In about ten minutes? A. Yes, sir.

Q. You saw smoke in about ten minutes after the train passed? A. No, after the train passed, I got in here by the signal pole; maybe not over  
20 five to ten minutes after I got down here by the signal pole, I saw smoke.

Q. You saw smoke? A. Yes, sir.

Q. You have presented a claim on account of this fire, haven't you? A. Yes, sir.

Q. How far from the point where you saw this smoke do you live? A. It is half a mile.

Q. Half a mile east or west? A. East; on the east side of the railroad.

Q. Do you know Mr. Ort or Mr. Smith? A.  
30 Yes sir.

Q. Both of them? A. I am acquainted with Mr. Smith not so much with the other one.

Q. Did you tell Mr. Smith that the engine set the place on fire? A. Did I?

Q. Yes? A. No—

Q. Yes, or no? A. I said—all I said about—

Q. Did you tell Mr. Smith that or not? A. Did I ever tell him, Mr. Smith—which Mr. Smith?

Q. Mr. Smith here (indicating)? A. In this  
40 manner, you know; I went down the railroad track—

*Ezra Lawrence—Cross.*

Q. Just answer the question?

THE COURT: Yes; did you tell him? If you did, say so; if you did not, say that you did not.

WITNESS: I only talked about—

THE COURT: You are only asked whether you told him.

WITNESS: What I told him? Why, I told him—I only told him what I know about it. 10

THE COURT: Did you tell him? You will either answer that question or something will happen to you.

WITNESS: Mr. Smith come down the—

THE COURT: Did you tell him?

WITNESS: Did I tell him?

THE COURT: Yes, say yes or no, you did or did not? You will not be permitted to enter a discussion now. 20

WITNESS: Yes, I told him.

Q. When did you tell him? A. When did I tell him?

Q. How many days after the fire? A. I could not tell you that.

Q. You could not? A. I could not say; may have been a week; may have been four or five days.

Q. But not more than two weeks after the fire you told Mr. Smith? A. I could not say how long it was, because it got out of my mind; I did not keep any account of this here. 30

Q. When you told Mr. Smith, did you tell him that the engine started the fire? A. Did I tell him?

Q. Yes? A. Why, I told him in this manner—

Q. Yes, or no? A. I supposed the engine set it on fire; that is the way I told it.

Q. You supposed it did? A. Yes. 40

*Ezra Lawrence—Re-Direct.*

Q. You told him you supposed the engine set it on fire?

THE COURT: That is what he said.

A. As far as I know.

## RE-DIRECT EXAMINATION BY MR. GEBHARDT:

10 Q. Now Mr. Lawrence, when you first saw this smoke that day, where did this smoke appear to be—where did it appear to spring from? A. When I first seen—

Q. What was there there to burn to make smoke? A. Old dead grass and weeds; that is all I seen.

Q. Leaves? A. Lots of leaves, of course in the weeds.

20 BY MR. SCOTT:

Q. Did you talk over this matter last night with anybody, after yesterday's session of court? A. I never said nothing to nobody; only talking to you.

Q. Did you talk over this matter last night with anybody? A. When would I be talking?

30 THE COURT: He did not ask you to ask the question; he asked you to answer his question: Did you talk or didn't you talk with anyone? Say yes or no?

WITNESS: I did not talk to nobody.

THE COURT: That is the answer.

Q. For a month prior to this fire were you on the railroad property within the vicinity of where you saw this fire—for a month before it? A. A month before?

Q. Yes? A. I don't understand you, what you mean.

40

*Vindette Smith—Direct.*

THE COURT: That is, a month before you saw the fire, were you on the railroad property where you saw the fire?

WITNESS: A month before the fire? Just a month? Or at any time?

THE COURT: At any time during the month before the fire?

WITNESS: I was around the place but I don't know where the fire started; I always lived right down there. 10

Q. Not where the fire started? A. No, sir; I happened to walk down that way after this train passed.

---

VINETTE SMITH, sworn for the plaintiffs testifies as follows: 20

DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Mrs. Smith, are you related to Amzi Smith in any way? A. No, sir.

Q. In April 1915, where did you live? A. I lived on Mrs. Aiken's farm near Muskee bridge.

Q. On whose farm did you live? A. Mrs. Aiken's farm.

Q. You know where the signal post is, the railroad company's signal post along the road? A. I don't know exactly. 30

Q. Did you remember seeing it? A. Just opposite? Yes, sir, I have seen it.

Q. You lived on Aiken's farm? A. Yes sir.

Q. As you call it? A. Yes, sir.

Q. On a Sunday in last April, the 18th of April I believe it was— A. Yes, sir, it was the 18th.

Q. Did you see a fire and if so where? A. I saw the fire about half way between the Muskee bridge and the signals west; the signals. 40

*Vindette Smith—Direct.*

Q. Where was that fire? A. On the railroad bank when I first saw it.

Q. How far from the fence? A. Well, that I could not say, about half way—between the fence and the railroad track.

Q. This fence that you speak of, was that between the railroad and the property that you farmed? A. Yes, sir, it was dividing the two.

Q. How much of a farm did you farm there, about? A. I think there is seventy-five acres in that farm all told.

Q. Whom did you rent it from? A. Mrs. William Aiken; the woman herself.

Q. Will you describe to the court and jury, please, the lay of the land from your house where you were on this occasion down to the railroad track; is it level or up hill or down? A. From where I lived to—

Q. Yes, to the railroad track? A. Well, it is right straight, just on a little knoll; we can see the track to the Muskee bridge from where we live, but it was near the field there where we lived where the fire took place.

Q. You spoke of seeing fire and smoke; what do you mean by fire? A. Why, after Number Two went through, east.

Q. What is Number Two? A. The fast line that goes east, about 1:30.

Q. Did you see that go by that day? A. Yes, sir.

Q. And then what did you next see? A. saw the smoke before the train was out of my hearing.

Q. Before the train passed, was there smoke? A. No, sir; I was right by my window working.

Q. What did you see besides smoke, if anything? A. I seen fire. When I got up from my needlework, I could see it.

*Vindette Smith—Direct.*

Q. How long after was that? A. Not more than three minutes.

Q. Where was this fire you speak of now? A. It was on the railroad bank.

Q. Just describe what you saw of the fire from that time on, Mrs. Smith? A. Well, from that time on, then it was on the bank burning, and of course I could not send down at the time to put it out, because I could not; I went back to my work and did not see it for an hour; I went back and it was through our fence and burning in the posts, in the rail fence, and a tract along the road there was burning; just a smouldering blaze; not a blaze, but just a little in the field had caught fire. I went back to the house; wasn't much of any blaze and that was the end of the fire we saw, except later in the evening, and then it had broken out and crossed our fields.

Q. Well, where else did it go after it crossed your fields? A. Went on through in our woods to our place and from there on in a tract of timber; I don't know who owns it; I could not say; but it is better known, it would be better known as the Stevens property, and so it went on to Mr. Smith and Mr. Ort's woods and so on to Mr. Lawrence's.

Q. Which way was the wind blowing on that afternoon, Mrs. Smith? A. The fire went south-east.

Q. Now, you say you could see this place where the fire seemed to start; was there anybody around there at all? A. No, sir, there wasn't.

Q. Was there anybody around there for any little time before that, before the train went up? A. No, sir, not that I seen of anybody that knowed anything about it.

Q. Well, from your house could you see down to this spot? A. I could not see to that very

*Vindette Smith—Cross.*

spot, no, sir, but, as I say I could not be around; my children was up there and they seen nobody up there.

## CROSS EXAMINATION BY MR. SCOTT:

Q. How far, Mrs. Smith, is your house from the place where you first saw the fire? A. Well,  
10 I could not give the distance; I should judge about three minutes' walk.

Q. Half a mile? A. No, sir, it is only across one field.

Q. On that afternoon before the Number Two came by, what were you doing—just before the Number Two came by? I was in my kitchen to work, where I could see right out of my window on the track.

Q. Does your kitchen face the railroad track?  
20 A. Yes, sir.

Q. What were you doing in your kitchen?  
A. I was washing my dinner dishes.

Q. Washing your dinner dishes? A. Yes, sir.

Q. What was the first knowledge you had of Number Two coming? A. Why it went over Muskee bridge; we can see Muskee bridge right from my window.

Q. Did you see it or hear it first? A. I seen it.

Q. You saw it first? A. Yes, sir.

Q. How did you know that it was Number Two coming, Mrs. Smith? A. That is the number  
30 of the train, and that is the time it goes; it goes by at 1:30, about 1:30.

Q. One-thirty o'clock? A. Yes, sir.

Q. Was that the time it passed there usually?  
A. Yes, sir.

Q. And how do you place the time of seeing the Number Two at 1:30, because it usually passes at that time or because you looked at the clock?

40 A. Because it usually passes at that time.

*Vindette Smith—Cross.*

Q. And did you subsequently confirm the time by looking at the clock? A. I did not, no, sir; but that is the time it always is due.

Q. And you are positive that was the time that it passed on this Sunday? A. Yes, sir, I am very sure it was the time it passed that day. It was shortly after I had my dinner, and I was doing my dinner work. 10

Q. You say that was 1:30, about 1:30? A. About 1:30, yes.

Q. What was there, Mrs. Smith, outside of the time of this train, this Number Two, to assist you in telling the jury that it was Number Two—aside from the fact that this train usually passed there, how do you know it was Number Two, by the engine or the Pullman coaches or how? A. Why, by the train that goes through every day; I know the train. 20

Q. What kind of engine—one of those big engines? A. It has a big engine.

Q. Was it a great big engine? A. Big engine, yes, sir.

Q. On this occasion that you saw the train, did it have that big engine on? A. Yes, sir, I am positive it did.

Q. Well now, by the big engine, will you tell the jury just what you mean? How is that big engine distinguished from any other engine? A. Well, the only thing is that some of them are actually larger than others. 30

Q. Then this one was a great deal larger, that is what you mean by bigger? A. This one is larger than others.

Q. Your kitchen window faces toward the west? A. Well, it faces the Muskee bridge.

Q. And the Muskee bridge is toward the west? A. Yes, sir.

Q. Did you watch the train as it came down? A. I watched the train as it went out of sight, 40

*Vindette Smith—Cross.*

and it had not been gone out of my hearing, as I said, until I saw smoke and went right out in the field.

Q. Prior to the train coming down, had you been washing your dishes? A. Yes, sir, I was at the table washing them at the time.

10 Q. And for how long a time you you been washing them? A. That I cannot tell to the minute; the usual time it would take to wash my dishes.

Q. Twenty minutes, half hour, had you been washing your dishes? A. Say about fifteen, twenty minutes I had been to work.

Q. During all that time you were paying attention to your dishes? A. Why, yes, but the train is so near to me I could not help see it.

20 Q. And coming back to the time before you saw the train, you were washing dishes? A. Yes, sir.

Q. And paying attention to it? A. Yes, sir.

Q. Did you have any occasion to look up toward Muskee bridge before you saw the train? A. Why, no, not before I heard the train.

Q. Is it a fact that you did not look up toward Muskee bridge until you heard the train? A. When I am standing, I generally look out of the window, clear up; you can see out of the window.

30 Q. You have no distinct recollection of looking up towards Muskee bridge before you heard the train, have you? A. Not in particular, no, sir.

Q. And about how long did it take for the train to come from Muskee bridge passed your house? A. To where the fire started?

Q. No, passed your house? A. Why, it wouldn't take more than a minute, from Muskee bridge to where the train got out of my sight.

40 Q. When you saw the train coming in the direction of Muskee bridge, was it coming in the direction of your house? A. Coming east.

Q. About how long did that take? A. Why, it wouldn't take a minute to get out of my sight.

*John H. Ort—Direct.*

Q. After the train passed, how long did you remain in the house? A. Why, I did not remain in the house—I seen the smoke right out of my window, just as soon as the train—before it was out of my reach; not more than two or three minutes, I saw smoke.

Q. Then as the end of the train passed up toward Muskee bridge, did you see smoke then? 10

A. Well, not so quick as that I could not say. I seen it right away.

---

JOHN H. ORT, sworn in his own behalf, testifies as follows:

## DIRECT EXAMINATION BY MR. GEBHARDT:

Q. Mr. Ort, you are the plaintiff in this case of Ort against the D. L. & W. Railroad Company? 20

A. Yes, sir.

Q. Just tell the Court and jury what you know about this fire on the 18th of April last?

A. Well, I don't know anything about the 18th of April; it come up to my place on the 19th.

Q. What time did it reach that property? A. It reached my property, when I saw it, between ten and eleven—when I first saw it.

Q. I show you a deed, from William Wack to John H. Ort and ask you if you are the John H. Ort mentioned in that deed? A. (Referring.) 30

A. Yes, sir.

Q. How many acres are there in that, do you know, Mr. Ort? A. One hundred and thirty and two-hundredths of an acre.

Q. What is the date of that deed? A. April 21st, 1914.

Q. When did you get possession of it? A. Well, I had possession of it in December; that it, I bought it. He let me go on there and cut my 40

*John H. Ort—Direct.*

wood and like of that, but he did not give me my deed—

Q. You have not told us what December, Mr. Ort? What December? A. Of the same year, 1914.

Q. And you bought it when, what date? A. The date was 1913; the date was, when I bought it.

10 Q. Have you been in possession of it since. A. Yes, sir.

Q. Now, you were speaking about the fire; just go on and tell the court and jury all you know about it? A. Well, I had wood scattered around there.

Q. Now, about the fire; you are talking about the fire, not about the damage? A. Well, between ten and eleven o'clock that day, on the 19th, I saw the fire was coming up there.

20 Q. What day of the week was it? A. On a Monday. And as soon as I saw smoke I unhooked my team, and my young man and I went back and tried to stop it all that we could; was at it all day, and we could not do anything to it. We did all we could and everybody else did the same.

Q. What is that? A. We did all we could.

30 Q. Where was it that you made these efforts to stop it? A. Down on my land, when we first started and fighting to get the best of it, and finally got over there on the hill, and so on up until it reached close to Mrs. Smith's place.

Q. What did you do? You said you tried everything you could; what did you do? A. Took a team and plowed the roads wherever we could, and we had shovels and forks and rakes, tried to clean the roads back, thinking we could get some hold on it, but it come so fast, jumped clear across the places that we got fixed.

40

\* \* \* \* \*

Plaintiff rests.

*Motion for Non-Suit.*

I move for a non-suit, and I will just state my reasons.

First, I move for a non-suit in the case of Mr. Ort. The action being an action for an injury to land, Mr. Ort, the plaintiff, has failed to show by legal and competent evidence his title to the lands in question under the cases. Mr. Ort's testimony is that it is all timber land; that he does not live on it; he lives miles away, and all he offers is a deed from one person to him. That is my first reason. 10

My second reason is that the plaintiffs have failed to prove either directly or specifically that the defendant carelessly and negligently allowed and permitted a large amount of dried grass, brush, weeds or other combustible material to remain upon its lands along its right of way. I take it, first, that the defendant has a right to use its property as it sees fit, and in that view subject its own property to fire from its locomotives, and where the allegation is that they suffered, permitted and allowed a large amount of dry grass, brush and weeds to accumulate on the right of way, that under those circumstances the plaintiffs have failed in that proof. The only proof in the whole case on that point is, as I recollect it, Mr. Lawrence's, who says that where the fire was, there was some old grass, old dead grass and weeds. 20 30

My third reason for requesting the Court to non-suit is that the plaintiffs have failed to prove either directly or specifically that the injury done by the fire was from a fire communicated from an engine of the defendant company's, that the injury done by the fire was from a fire communicated from an engine of 40

*Motion for Non-Suit.*

the defendant company; and as regards that, I briefly may say to the Court my recollection of the evidence most favorable to the plaintiffs is, that no one paid any particular attention to this place where the fire started before the train came in sight. So we have, up to that time, prior to the engine's appearance, no knowledge or no information as to what was done down there. They don't know whether a fire started or not. We have three witnesses—two witnesses at a distance of nearly one-third of a mile—who saw some smoke; the witnesses Thompson and Kutz, who saw smoke at a distance of one-third of a mile. There was no evidence in the case from these witnesses that there was not a fire down there before the train passed. And there was no evidence that the fire started on the lands and property of the defendant company.

And for a fourth reason I ask the Court to non-suit as regards Mr. Smith, because there is no proof that the fire of Monday, April 19th, was the same fire that had proximately caused the fire of Sunday, April 18th, and that there was no proof of any negligent act of the railroad company committed on April 19th. That was Monday.

And my last, which is a general reason, is that there was no negligence shown upon the part of the defendant company and then, briefly, as regards my third reason, the plaintiff has failed to prove directly or specifically that injury was done by fire communicated from an engine. As I recollect the Goodman case, the evidence in that case is markedly distinguished from the evidence, I take it in this case. As I recollect the evidence in the Goodman case, it was that a train passed and

*Motion for Non-Suit.*

a fire started, that some of the witnesses saw the fire start after that train passed; that there was one man who saw either a spark, or caught or saw a spark—saw a large piece of coal which was hot and smoking immediately after the engine passed. The only thing we have in this case, as I recollect it, is the fact that the engine passed and then there was a fire. 10

THE COURT: Five minutes after the passing of the train?

MR. GEBHARDT: Mrs. Smith makes it less than that.

THE COURT: Well, Mr. Smith says five minutes after the passing of the train. I do not care to hear the other side in this matter. The first point raised is with respect to Mr. Ort's case alone. That has to do with the motion that he has not been shown to be the owner of the property, so as to be in a position to sustain an action for injury done to him. That motion is presumably based upon the two cases of *Troth against Smith*, 39 Vroom, and *Rollins against Atlantic City*, 41 Vroom. The rule laid down in both of those cases, in effect, is, in New Jersey, the practice has always been to require that the plaintiff, in an action for recovery of damages for injury to land, to either show a title derived from the original proprietor, or he must show possession by himself or by someone from whom his title comes. In this case, Mr. Ort testifies that he knew where his own corners or monuments were located; that he had obtained them intelligently himself by locating them, by discovering and seeing them. He testifies that this property, over which the burning had been done, was property which he had enclosed by a fence. 20 30 40

*Motion for Non-Suit.*

MR. SCOTT: May I interrupt the Court?

THE COURT: Yes, of course.

MR. SCOTT: I recollect that was Mr. Smith's testimony. I did not ask Mr. Ort anything about that. Mr. Smith's testimony I agree your Honor has stated correctly.

10 THE COURT: Well, with respect to Mr. Ort, then, as I recall his evidence, he said he had occupied or possessed or had in some way dealt with this land just as the deed describes as his own.

MR. GEBHARDT: Cut wood on it?

THE COURT: Yes, cut wood on it; exercised some act of control over it and possession of it. I think that is sufficient to take the case to the jury with respect to him.

20 With respect to Mr. Ort, of course, the motion is not made, but if it were made, the remarks I have stated in respect to him would be sufficient.

30 Now, that brings us to consider the question as to whether or not this fire is shown to have originated from a locomotive engine of the defendant company; and while we are on the subject, it may be well to use the last reason you allege as a reason for the motion to non-suit, because the statute itself provides that if you shall prove the fact of communication of fire from an engine of the company to the property which is alleged to have been damaged or destroyed, that that fact alone is sufficient to take the case to the jury, and to cast upon the defendant the burden of showing that it had used all practical means of preventing the escape of fire from its engine. At that point, then, we must consider this in the light of evidence. Ordinarily a fire is not  
40 seen in the very earliest stage of its origina-

*Motion for Non-Suit.*

tion by anybody. All that a person can do is to produce evidence or circumstances from which a jury as reasonable men may infer that the fire had originated from a spark communicated from a locomotive. In this case the evidence seems to be that this fire, just shortly after the passage of the locomotive attached to train number two, was seen burning upon what the jury might consider was the property of the railroad company. I say they may consider it such, because the evidence of at least two men who say they worked upon the railroad at various times, at this point, and of one man in particular that the railroad company presumably had placed marking lines or material there, and it may be presumed that they placed it there because it was railroad property; the marking lines were pieces of railroad track, and then it is said that one of the men who testified worked up to that line, in keeping the supposed right of way clear of all brush and stuff that might grow there. Of course it is a perfectly settled principle of law which nobody ever dreamed of disputing that ownership is evidenced by those objects and marks which everybody recognizes as being distinguishing marks, such as possession, use and control. In this case this employee of the company says that—apparently being so instructed—they caused him to go up to the line or the marks of these railroad tracks which were placed there, and which the jury would have the right to presume was the right of way of the company. Now, that being so, we consider whether or not there is any other likely origination of this fire. I take it to be perfectly clear that the burden resting upon the

10

20

30

40

*Motion for Non-Suit.*

plaintiff is to make it appear more probable that the fire originated from the railroad company than from any other cause. In other words, he is not obliged to entirely and conclusively eliminate every other cause, but must make it appear reasonable and more probable that it originated from a locomotive engine of the company than that it originated from any other cause. In this case witnesses who have testified to that thing say that shortly after the passage of the locomotive engine, they saw smoke apparently coming from this right of way. Mrs. Smith says that she saw the fire going up the bank of the railroad company; and these other witnesses say that they did not see this fire, but evidences of a fire, of which smoke is one, in the adjacent fields, and that they did not see anybody else around in that neighborhood whom the jury might say would be likely to have set this fire. And the evidence is that the wind was blowing in the direction toward which the fire was going from the place where these people observed the smoke. Now, it seems to me that from those facts and the other facts in the case, the jury might well conclude, though they are not obliged to, but they might well conclude that in the absence of any explanation, that the fire had originated on the property of the railroad company. Now, that being so, it brings us to consider the other question, which is whether or not the fire, having occurred on Smith's property on the 19th, can be connected up with the fire which originated on the property of the railroad company on the 17th, and as I recall the testimony of Mrs. Smith, in respect to this matter, she says that this

*Motion for Non-Suit.*

fire, which she saw climbing up the bank of the railroad company, travelled over her property, and then over the property next adjacent to hers, and from that property on to the property of Ort's, and so on until it communicated to the property of Smith. That is her evidence. And there is no cross examination or anything else to show any discontinuity of that fire from its origin on what she gives evidence may be inferred to be the railroad property, up to the time that it eventually reached this property. For these reasons, it seems to me I must deny the motion and allow you to have your objection entered on the records. 10

MR. SCOTT: Your Honor disposes of the proposition that there was no evidence or proof under the complaint that the defendant permitted and allowed combustible materials to be and remain upon the lands of the defendant company? 20

THE COURT: I don't have to dispose of that, Mr. Scott. That disposes of itself for these reasons: This accident is based upon two sets of facts. One is that the company negligently communicated fire, and the other one is that the right of way of the company was encumbered by this material, and the law provides that if it is shown that fire was communicated directly from the engine of the company on the property adjacent, or to the property alleged to have been burned, that then negligence may be presumed; and if the jury so conclude, that this fire was communicated directly from the engine of the company—I say directly; I mean was communicated from the engine of the company—and destroyed the property, it becomes immaterial on a mo- 30 40

*John Sexton—Direct.*

tion to non-suit whether the right of way was cumbered with material or not, because the action will lie even if that were out of the case. The case must go to the jury on the other facts of the case anyway. That is the way that is disposed of.

MR. SCOTT: May I have an objection noted?

10 THE COURT: Yes.

MR. SCOTT: With the permission of the Court and the Senator, I would like to make a little more extended opening.

THE COURT: A further opening?—you may do so.

\* \* \* \* \*

20 MR. SCOTT: Senator Gebhardt and I have agreed on that I may use without further proof the train dispatcher's sheet, showing that the engine drawing train Number Two was engine 1112.

---

JOHN SEXTON, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

30 Q. Mr. Sexton, where do you live? A. Washington, New Jersey.

Q. Your business is what? A. Roadmaster.

Q. That position includes what duties? A. Making repairs to the track.

Q. And what else? A. Taking care of the right of way and the company's property on that division.

Q. Do you know where Muskee crossing is? A. Yes, sir.

40 Q. Where is it? A. It is about two and one-half miles east of Hacketstown.

*John Sexton—Direct.*

Q. The Muskee crossing is in what section, what railroad section? A. It is known as being on section twenty.

Q. And your section runs from where to where? A. Runs from fifty-three to fifty-six and one-half, westward toward Hackettstown.

Q. By that, you mean mile posts? A. Yes, sir, mile posts. 10

Q. Who has charge of that section? A. Emil Vinzeola is the section foreman.

Q. How often, Mr. Sexton, in March and April, 1915, did you pass that section? A. Well, used to pass it twice a day; that is, go over it nights and mornings.

Q. In passing over that section, from what point did you observe the section? A. From the hind end of the train as it passed.

Q. Will you tell the jury why you made your observation from the hind end of the train? A. Well, my territory run from Washington to Denville, and I ride on the hind end of the train to look over the tracks in coming up in the mornings and going back at night. 20

Q. Have you any recollection of passing the section in question during the month of April? A. Yes, sir.

Q. Do you know the property lines? A. Yes, sir. 30

Q. Do you remember of hearing of the fire of April 17th, 1915? A. Yes, sir.

Q. Will you tell the Court and jury the condition of the company's road bed and the property on the sides of the track, especially the south side, during the month of April, 1915, prior to the fire of April 18th, 1915? A. We cut our right of way twice a year; in June and the first of September. As soon as the material is dry enough, we burn it up. In addition to that, we have a sys- 40

*John Sexton—Direct.*

tem where each and every Saturday in the month is taken up for what we call cleaning up day. We clean up along our section, all bushes and burn all refuse and combustible material on our right of way, back as far as our line.

Q. And will you tell the Court and jury the condition of the company's road-bed and right of way or property on east side of the track, just prior to April 17th, 1915?

MR. GEBHARDT: At this place?

MR. SCOTT: Yes, at this place, on this section?

A. Well, the foreman had cleaned up there a week or ten days before that fire; that is, cleaned up and burned the right of way.

Q. How many men are in the section gang in that section? A. In the summer season, we have six; in the winter four, and a track walker.

Q. Do you know where the signal pole or signal apparatus, five or six hundred yards west of Muskee crossing, is? A. West?

Q. West? A. West, Mr. Scott?

Q. West of Muskee crossing? A. Well, there is one, but it is more than five or six hundred yards west of the crossing.

Q. Is there a signal post five or six hundred yards east of the Muskee crossing? A. Yes, sir.

Q. With reference to the fire of April 18th, 1915, can you tell where this signal post east of the crossing was? A. I don't understand you, Mr. Scott?

Q. Did you subsequently see where there had been a fire? A. No, sir, I did not see the ground; I did not look it over at that time.

Q. Will you describe to the Court and jury the nature of the company's road-bed in the section which you have mentioned? A. You mean as to ballast and so forth used on it?

*Emil Visiori—Direct.*

Q. Ballast? A. It is a double track and cinder ballast.

Q. How far does the cinder ballast extend outside of the tracks? A. Outside of the tracks?

Q. Outside of the tracks? A. We have a cinder ballast that runs four feet outside of the end of our ties, and then ditches are sloped down to about eighteen inches below the bottom of our ties, and about five feet wide. 10

Q. What is the character of those ditches? What are they there for Mr. Sexton? A. They are for carrying off the surface water.

Q. On which side of the track, in the section in question, between mile post 53 and 56 1-2? A. On the south side of the east-bound track.

Q. South side of the east-bound track? A. Yes, sir.

MR. GEBHARDT: No cross-examination. 20

---

Recess until 1:45.

---

EMIL VISIORI, sworn for the defendant testifies through the interpreter as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Where do you live? A. Port Morris. 30

Q. What is your business? A. Section foreman.

Q. For the Lackawanna Railroad? A. Yes, sir.

Q. How long have you been section foreman? A. Since 1913.

Q. What section did you have charge of in April, 1915? A. I had charge of the twentieth section.

Q. From what point to what point does that run? A. It begins at 56 1-2 and ends at 53. 40

Q. You mean mile posts? A. Yes, sir.

*Emil Visiori—Direct.*

Q. Is Muskee crossing in your section? A. Yes, sir.

Q. Near which end of your section is it, the east or west end? A. On the east end; near the east end.

Q. What are your duties as section foreman? A. To put in—we take care of it and watch all along the track as far as one can see; to watch the trains up to the line where the company's line ends.

Q. What do you do to the ground in this section? A. Well, along the banks on the right and left we cut the grass.

Q. How many men did you have working for you in April, 1915? A. Six.

Q. How many men in March, 1915? A. Four.

Q. On which side of your section are the ditches? A. They are on both sides.

Q. On which side of the section does the land run off, toward the mountain? A. It is on the right as you go down toward the city: I don't know the name.

Q. Do you keep a record of the work you do each day on your section? A. Yes, sir.

Q. When do you make that record? A. Every evening.

Q. I show you two books and ask you if these books are your records? A. Yes, they are.

MR. GEBHARDT: Kept in Italian?

MR. SCOTT: No.

Q. Can you tell without looking at these books what you did on the various days of March and April, 1915? A. I cannot remember what I do from day to day.

Q. If you looked at these books, would they assist you in telling us what you did on those various days in March and April? A. Yes, because it is entered there.

*Emil Visiori—Direct.*

Q. These books are in your hand-writing? A. Yes, sir.

Q. I show you a book known as the time book of section gang number twentieth location Hackettstown, New Jersey, month of March, 1915, and that book is in your hand-writing? A. Yes, sir.

Q. I ask you to look at that book, on the 15th, 17th, 18th and 20th days of March and tell us 10 what you were doing on those respective days about cleaning the property of the railroad in your section? A. On the fifteenth of March, burning grass along the bank between mile post 53 and mile post 54 (referring). On the 17th of March, cutting brush along the bank and burning grass along the bank between mile posts 54 and 55. Now this is the 18th. Myself and my track walker burned grass along the bank between mile posts 53 and 54. On the 19th, burning grass 20 along the bank between mile posts 53 and 54.

Q. What were you doing on the 20th of March? A. Cutting brush and burning grass along the bank between mile posts 54 and 55.

Q. I show you a similar book for the month of April, 1915, and call your attention to the first, second and third days of April, and ask you what you were doing with respect to cleaning the company's property on your section? A. (Referring.) On the first of the month, this year is, put the 30 fire out between mile posts 55 and 56.

Q. Were you doing any cleaning on that day, on the first? A. Yes; fifty hours cleaning up ditches between mile posts 55 and 56

Q. Were you working on the second cleaning up? A. Also twelve more hours on the same day, extra time, putting fire out, at night time, between mile posts 55 and 56.

Q. What did you do on the second about cleaning? A. Cleaning up ditches between 55 and 56. 40

Q. What did you do on the third? A. The

*Emil Visiori—Direct.*

same on the third, cleaning out ditches and cleaning up ditches and snow.

Q. During the month of April, before April 17th, did you do any cleaning up of snow? A. It is written here.

Q. What does it show about cleaning up snow? A. Thirty hours cleaning up snow, on platform  
10 of station, and cleaning up switches on section twenty-one.

Q. I notice in your books, Mr. Visiori, you say something about surfacing the track; what do you mean by surfacing? A. It means to lift up the track where it is low in spots; leveling it up, lining it up.

Q. It has been testified, Visiori, that on April 17th, 1915, that up near the signal post, about five or six hundred yards east of Muskee crossing,  
20 there was a lot of dry grass and weeds and bushes near the track; what have you to say as to whether that was true or not?

MR. GEBHARDT: I object to that question because of the fact that it includes bushes. The word bushes is here in the complaint, but has not been testified to by anybody. It is grass and weeds.

THE COURT: I don't think the word bushes was testified to. Strike that out, the  
30 word bushes.

Question read with the word bushes left out of the question.

A. Along the railroad line, there was no grass or no weeds; it was clean.

Q. Will you tell the Court and jury what the condition of your section on the south side was on April 18th 1915? A. It was all clean up there.

40 Q. How many men did you have working for you at that time? A. Six.

*Emil Visiori—Cross.*

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. You have stated that you burned the grass along the tracks; do you know where this fire was on this Sunday, the 18th of April last?

MR. SCOTT: I object. I do not think that is cross-examination. I did not touch on the fire at all. 10

THE COURT: Well, you have qualified him as a track walker, and indicated what his duty was, and asked him about having cleaned the brush off for a certain length of time; I suppose he has a right now to test what he knows about the condition of the right of way, to find out whether he knew that there was a fire, or where the fire was.

WITNESS: I don't know where the fire burned. 20

MR. GEBHARDT: I am asking him about around the 18th of April last, there was a fire near this signal post, beyond the Muskee crossing, five or six hundred yards beyond—

WITNESS: I don't work on Sunday. I don't know whether the fire took place in the day or in the night time.

Q. Well, about that time? A. I remember I took notice of it on Monday morning 30

Q. What section was this fire in? A. In my section.

Q. Well, what number? We want to know what the number was? A. The twentieth section.

Q. Between what mile posts? A. Fifty-four and fifty-five.

Q. Between 54 and 55? A. Between 54 and 55.

Q. You say you worked there in both April and March? A. Yes.

Q. Taking the south side of the railroad track in that mile, 54 and 55, did you burn the entire mile on the south side of the track? A. I always burn everything. 40

*Emil Visiori—Cross.*

Q. I did not ask you that. Did you burn this entire mile or did you burn parts of it where you thought it should be burned? A. We have got orders to—

Q. That is not the point. Did you do it? In March and April? A. Yes, sir.

Q. The whole mile? A. Yes.

10 Q. When did you do it? A. Well, I used to do it in the day time; not in the night time.

Q. I mean in what month? A. And the month when there was no snow on the ground; it was dry and I could burn it.

Q. Well, last March, did you do it last March or last April? A. According; when the weather was good in March, burned it in March; otherwise in April.

20 Q. Did you also cut the grass last March and April? A. We got them ties in in July and September; after that we burned.

MR. SCOTT: I desire to read to the jury interrogatories and answers in the cases of both Mr. Smith and Mr. Ort; I desire to read interrogatories numbered 2, which are disconnected in the subject matter from all the other interrogatories.

THE COURT: All right.

30 MR. SCOTT: "State in what manner said fire was communicated from said certain locomotive engine mentioned in your complaint to the nearby and adjacent property of said plaintiffs, to wit, from the spark arrester, screen or cover in the smoke stack or smoke pipe of said locomotive, or from what other part or portion or device of said locomotive said fire came and was communicated?" Answer. "I cannot answer the second interrogatory."

40

---

*Louis Baker—Direct.*

LOUIS BAKER, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Baker, you are a civil engineer? A. Yes, sir.

Q. Are you familiar with the tracks of the Lackawanna Railroad from Hackettstown east? 10

A. Yes, sir.

Q. Are you familiar with the Muskee crossing?

A. Yes, sir.

Q. Will you tell us the nature of the grade of the east bound track from Hackettstown down and past the Muskee crossing? A. From Hack-

ettstown the grade ascends—that is, eastward—  
for about a mile and a half, two miles, and then  
about half a mile west of Muskee crossing the  
grade descends until it gets to the low point at  
about Muskee crossing, and then ascends again  
from Muskee crossing all the way through to  
Waterloo. 20

Q. From Muskee crossing to Waterloo is how far, about? A. About three miles.

Q. What is the grade from Muskee crossing to Waterloo? A. One per cent.

Q. By one per cent. you mean what? A. A rise of one foot in one hundred.

Q. For a half mile west of Muskee crossing  
what is the grade? Is that an ascending or de-  
scending grade, east? A. Half a mile west it is  
a descending grade eastward. 30

Q. And beyond that for a distance of a mile and a half, two miles, it is ascending? A. Ascending.

Q. About what grade? A. One per cent.

---

No Cross Examination.

---

*Owen F. Kerney—Direct.*

OWEN F. KERNEY, sworn for the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Kerney, you are conductor in the employ of the Lackawanna railroad? A. Yes, sir

Q. And you were such in April of last year?

10 A. Yes, sir.

Q. And on Sunday, April 18th, 1915, did you have charge of the train running to Hoboken?

A. Yes, sir.

Q. What train is that known as? A. Train Number Two.

Q. Do you recollect without refreshing your memory, from anything, how many cars you had in that train? A. Well, I think we had ten cars.

20 Q. Do you know what the numbers of those cars were? A. I do not.

Q. Could you refresh your recollection by looking at any paper which you made relative to the movement of that train? A. I think I could.

Q. Is that paper the wheelage report? A. Yes, sir.

Q. Made on the same day? A. The same day.

Q. And this paper is your wheelage report? A. Yes, sir, that is my wheelage.

30 Q. Made in your handwriting? A. No, sir.

Q. Made under your supervision? A. Yes, sir.

Q. In your presence? A. Yes, sir

Q. By whom? A. By my baggage master.

Q. Using that memorandum can you tell us what the numbers or initials of the cars you had in your train were? A. Yes, sir.

Q. What were they? A. Well the head car was D. L. & W. 2008; second car, D. L. & W. number 9; third car, D. L. & W. number 28; fourth car, nickel plate—that is, New York, Chi-

*Owen F. Kerney—Cross.*

cago and St. Louis; for short we say nickel plate. Thirty-six; and Pullman car Pilmerth, sleeping car, D. L. & W. car 553 and Pullman car Medea; D. L. & W. car 907, and D. L. & W. car 927; D. L. & W. 30; that is all.

Q. I only make that eight, Mr Kerney; eight cars and two Pullmans? A. Yes, that is right.

Q. Do you know of your own recollection, or can you refresh your memory from the wheelage report, whether your train was on time when it arrived at Hoboken? A. It was. 10

Q. Do you know whether it was on time when you left Scranton? A. As far as my recollection goes, I think it was on time, or thereabouts.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. What are these, steel cars, Mr. Kerney? A. Well, there were—I could name the steel cars for you. 20

Q. Just give us the number of the steel cars? A. Well, there were eight steel cars; yes, eight steel cars.

Q. Were you on time when you left Hackettstown? A. As far as my recollection goes we were on time at Hackettstown.

Q. Were you on time as you passed through Hackettstown for five miles or so? A. That I could not say; I could not conscientiously say whether we were ten minutes late or on time or thereabouts, but we were on time at Hoboken. 30

## BY MR. SCOTT:

Q. Does that wheelage report show the engine you had? A. Yes, sir (referring). Engine 1112.

## BY MR. GEBHARDT:

Q. Well, what sort of an engine is that, one of the very large new ones? A. It is one of the large type engines. 40

*Thomas F. Barton—Direct.*

THOMAS F. BARTON, sworn for the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Barton, you are a master mechanic of the Lackawanna Railroad? A. I am.

10 Q. And have been for how long? A. About seven years.

Q. Previous to that time where were you engaged? A. With the Illinois Central Railroad.

Q. In what capacity? A. Master mechanic.

Q. And as master mechanic what have you to do with the making up of the engines. A. You mean the original construction of the engine?

20 Q. The construction of the engine and the installation of screens in the front ends of the engine. A. Why, I have nothing to do with the original construction of new power; maintenance of the engines is what I look after.

Q. Do you know the engine known as number 1112 type? A. I do.

Q. Will you tell the jury what the nature of those engines is? A. It is what is known as a Pacific type passenger engine.

30 Q I show you a blue print and ask you if that blue print represents the type of engine known as number 1112? A. (Referring.) It does.

MR. SCOTT: May I have that marked for identification?

Marked Exhibit D-1 for identification.

Q. Will you tell the jury, Mr. Barton, just how sparks are made and how they are controlled in operation of an engine? A. Cinders and sparks are made by burning of the fire in the fire box; the exhaust draught causes them to be drawn through the flues, the sparks or cinders, into what

*Thomas F. Barton—Direct.*

is commonly known as the smoke arch of the engine, located on the front end of the boiler.

MR. SCOTT: I will offer this blue print in evidence.

Marked Exhibit D-1.

Q. Can you indicate on this blue print just what is known as the smoke arch of the engine? 10

A. It is the portion of the extension of the boiler on which the smoke stack is set.

Q. Can you mark it there? A. (Indicating).

Q. The fire is generated in the fire box of the engine; you have stated that the sparks go through the flues? A. Yes, sir.

Q. By the flues of the engine, what do you mean? A. Why, the tubes that pass from the front flue sheet to the back flue sheet giving communication from the fire box to the smoke arch. 20

Q. Those are the pipes? A. Yes.

Q. In the engine of the eleven hundred type, is there anything else in the flues, or are they just unobstructed? A. This engine is equipped with a superheater. There are about thirty eight 5 1-4 tubes to the superheater in addition which are inserted into and coupled to the header, inside the smoke arch. Below those is something like 280 standard 2 inch boiler tubes.

Q. After the fire has been generated will you explain to the jury just what becomes of the sparks which are generated in the fire, where they pass? A. Pass through the flues into the smoke arch; part of them coming in contact with what is known as the diaphragm sheets or baffle plates, and the front end netting or screen. Those that are so large that they cannot get through the pan or screen, are arrested in the smoke arch, and those that do pass through go out through the smoke stack. 30 40

*Thomas F. Barton—Direct.*

Q. I show you a print and ask you if this print correctly represents the smoke arch and spark arresting appliance known as the baffle plate and screen in the engine of the eleven hundred type, on April 18th, 1915? A. To the best of my knowledge it does.

10 Mr. SCOTT: I would like to offer that in evidence for the purpose of solely showing the construction; not the figure data.

Admitted and marked Exhibit D-2.

Q. Under the D-2, Mr. Barton, I notice a line which runs diagonally down to a point over the letter B; will you tell the jury what that represents? A. The baffle plate.

20 Q. And that baffle plate is constructed of what kind of material? A. Either sheet iron or sheet steel.

Q. And in the engine 1112, what was the baffle plate constructed of? A. I could not say whether it was steel or iron.

Q. And is that solid or perforated? A. That is solid.

30 Q. When the sparks go through the flues from the fire box, what connection do they make, if at all, with the baffle plate? A. They come in contact with the baffle plate and are deflected downward.

Q. At the end of the baffle plate running horizontally, there is another line depicted upon this sketch; will you tell us what that is known as? A. Known as the baffle plate.

Q. And in the engines of the 1112 type, is that solid or is that perforated? A. Solid.

Q. Of sheet iron or steel? A. Either one of the two; I could not say what was in that one.

40 Q. From that baffle plate up to the corner of this sketch, there are some dotted lines; will you

*Thomas F. Barton—Direct.*

tell us what they represent? A. (Referring.) Represents the location of the screen or netting in the front end for the arresting of sparks.

THE COURT: Won't you tell us what the function of the steam heating system on those two hundred pipes beneath the smoke arch is?

WITNESS: The function of the superheater is, 10  
as the steam leaves the boiler at a pressure of approximately two hundred pounds, it has a temperature of approximately 387 degrees: it is then returned through these superheater pipes, which are inserted in the large tubes in the boiler, and the heat passing through the fire box, going around them, increases the temperature of the steam, which is afterwards returned to the header and goes through the steam pipes down into the steam chest and enters the cylinders of the en- 20  
gine.

THE COURT: What function does that have with respect to the sparks?

WITNESS: It has nothing to do with the sparks.

Q. Will you tell this jury in what method or what manner sparks can escape from the front end of the smoke arch of an engine? A. Only through the netting or screen.

Q. And I have correctly marked on this D-2 30  
where the screen is, by marking "screen", have I not? A. Yes.

Q. In coming through the flues of one of these superheated engines, in which you have stated that there are certain other tubes, do you know what effect these other tubes have on the sparks themselves? A. Any sparks which come in contact with these tubes would have a tendency to break all up, pulverize them.

Q. The screens that are in the engine of the 40

*Thomas F. Barton—Direct.*

1112 type, or that engine particularly, are made of what sized wire? A. Number ten gauge.

Q. And I show you a piece of screen and ask you if that is the kind of wire and the size of the opening in the wire in the screen and engine 1112? A. Yes, sir.

Q. What was the kind of wire and the kind of  
10 screen in engine 1112 on April 18, 1915? A. Yes, sir.

Q. What have you to say, Mr. Barton, as to whether that kind of screen was in common use and approved by experience? A. It is the same kind of screen, and screens of the same standard dimension have been used on the Lackawanna Railroad prior to that time.

Q. Prior to what time? A. Prior to the date of the fire mentioned, April 15th, I believe, 1915.

20 Q. What have you to say as to whether that type of screen, or kind of screen was in common use among other railroads at the time of the fire in question? A. To my knowledge it is pretty generally used on many other railroads that I have knowledge of.

Q. On the same kind of engine? A. Yes, and on different kinds; most all standard type of locomotive.

30 Q. Do you know of any more practical screen to prevent the escape of sparks than that screen? A. I do not.

Q. What other railroads do you know use that type of screen at the time of the fire in question? A. Illinois Central Railroad, Grand Trunk Railroad, The Erie—I believe that is as many as I can think of just now.

THE COURT: What is the size of the mesh, Mr. Barton?

WITNESS: It is the standard, what is known as

*Thomas F. Barton—Cross.*

2 1-2 by 2 1-2 inch mesh. That means 2 1-2 openings to the square inch; that is, measuring each way of the square inch.

Q. Do you know what the life of those screens is, Mr. Barton, in the eleven hundred type engine?

A. It depends a good deal on the service of the engine. That will vary from eighteen months to three years.

10

Q. Will you tell us when engine 1112 went in service? A. About May 21st, 1914.

Q. Do you know of any screen or any device that could be put in the smoke arch or smoke box of an engine that would prevent the escape of sparks?

THE COURT: And at the same time keep the fire going?

A. Not in successful operating.

20

Q. Will you explain to the jury why? A. It is necessary to have the required draught caused by the exhaust of the engine to burn coal sufficiently fast enough to generate the steam pressure.

THE COURT: The fact is, I suppose, in modern times, there has been nothing yet discovered that will enable one to operate an engine and at the same time arrest entirely the escape of sparks.

30

WITNESS: Whenever we find that experienced men get a locomotive to a point where they don't draw the front end, they immediately fall down in something, and we cannot get them over the road.

CROSS EXAMINATION BY MR. GEBHART:

Q. You never saw the screen of engine 1112, did you, Mr. Barton? A. In engine 1112?

Q. That is the particular engine? A. No, I

40

*Charles Kehoe—Direct.*

cannot say that I have seen the screen in that particular engine.

Q. You don't know anything about the condition it was in on the 18th day of April last? A. No.

Q. This mesh could be made smaller, couldn't it, Mr. Barton? A. Oh, yes, you could make it  
10 smaller all through.

Q. What are the dimensions of those holes? A. They are about a quarter of an inch square.

Q. Have you measured them? A. Not those particular holes.

Q. You don't know whether that was the same kind of screen and the same size mesh in engine 1112, from personal knowledge, do you? A. I am reasonably well satisfied—

Q. Do you know of your own knowledge?  
20 A. No.

Q. The only effect of making the mesh smaller for the sparks to go through, would be that you could not run so fast, and you could not pull as heavy a load with these engines? A. That is the effect.

---

CHARLES KEHOE, sworn for the defendant, testifies as follows:

30 DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Kehoe, what is your business? A. Boiler foreman.

Q. Where are you located? A. Hoboken.

Q. Connected with the Lackawanna Railroad?  
A. Yes.

Q. For how long a time have you been there?  
A. Twenty-two years.

40 Q. In your duty as operating foreman, have you

*Charles Kehoe—Direct.*

occasion to have anything to do with the front ends of engines? A. Yes, sir.

Q. Will you tell the jury what that work consists of? A. Well, got to inspect all the front ends every day; inspect inside and all the appurtenances.

Q. Are you familiar with engine 1112? A. Yes, sir. 10

Q. During the last year or so, how often have you seen that? A. How often have I seen her?

Q. How often have you seen engine 1112? A. Every day.

Q. Sir? A. Every day.

Q. Every day? A. Every day she has been to Hoboken.

Q. How often does she come to Hoboken? A. Every day.

Q. Will you look—have you ever seen the screen of that locomotive? A. Yes, sir. 20

Q. I ask you to look at this piece of screen and ask you if that is similar in character to the material making up the screen in engine 1112? A. Yes, sir, similar to it.

Q. And has been for how long? A. Has been since the engine has been built.

Q. Will you tell the jury what your experience has been with the necessity for repairing the screen in engine 1112? A. Made no repairs to engine 1112. 30

Q. Can you tell why? A. It didn't need it. That engine is examined at both ends of the road and kept in condition, the same as any other engine—all engines.

Q. Tell the jury what has been your observation as to the working qualities of that character of screen of engine 1112? A. Well, I haven't had much wearing on it, only on the manhole; the manhole cap, and that is wearing on the bottom. 40

*Charles Kehoe—Cross.*

or is broken on the bottom, due to being burned on the front end.

Q. Is that due to the action of the engine? A. No, that is due to the action of the man that is doing it.

Q. Have you ever had occasion to repair the manhole of engine 1112? A. No, sir.

10 Q. Do you know from your own knowledge and experience the life of a screen of the character similar to the sample of screen on the desk in front of you—the life of it? A. The life of the screen?

Q. Yes? A. My experience has been that, we never had to renew any in less than eighteen months to three years. We might have had to patch them, but no renewal of them.

20 MR. SCOTT: I offer that piece of screen in evidence.

Exhibit D-3.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. Mr. Kehoe, did you ever examine, yourself personally, the screen in the smoke stack of engine 1112? A. Yes, sir.

Q. How many times? A. Every day.

30 Q. Every day? A. Every day. After my inspector goes through, I go through, with my gauge.

Q. Do you remember going over this on the 18th of April, 1915? A. No, I do not.

Q. You don't remember doing it? A. What?

Q. Don't remember doing it that day? A. No.

Q. Do you remember doing it the day before? A. I do it every day she is there, or every day that I am there.

Q. Do you remember doing it that day, the 17th? A. No, sir.

40 Q. You say that is similar to the screen 1112? A. Yes, sir.

*Charles Kehoe—Cross.*

Q. Is the screen in engine 1112 the same weight of wire that makes up that screen? A. Yes, sir.

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

Q. Have you looked at that carefully to see? A. Yes, sir.

Q. How? A. Yes, sir.

Q. Is this the same mesh exactly? A. The same mesh, quarter inch mesh, 2 1-2 by 2 1-2, 10 number 10 wire.

Q. Well, do your screens ever get out of order? A. Oh, yes, they get out of order.

Q. How frequently? A. Sir?

Q. How frequently? A. Well, not very frequently.

Q. So that they have to be patched? A. Well, not very often. When we find a wire cracked, why, we put a patch on it. We don't wait until it gets a hole in; we put a patch right over the crack. 20

Q. What do you mean by a crack? A. Just burns through the screen, cracked.

Q. Your screens get holes in them, don't they, before they are discovered? A. We don't wait until they get holes in.

Q. They sometimes do get holes in before you get them patched, don't they? A. Well, possibly.

Q. What? A. Possibly.

Q. Is that all you can say, possibly? A. Yes. 30

Q. What? A. Yes, sir.

Q. Well, do you mean to say that they never do then? A. Never do, no.

Q. When did you last look at the screen in the smoke stack of engine 1112? A. One day last week.

Q. How? A. One day last week.

Q. One day last week? Have you looked at it since? A. She has not been run in since. I did not see her since. She is tied up for repairs. 40

*Maurice Quinn—Direct.*

Q. Do you know what the repairs are? A. Trailer wheels.

Q. Pretty good size sparks can get through that kind of mesh, can't they? A. No, not on a superheated engine; I don't believe a big spark will go through.

Q. A big enough spark to burn grass and weeds,  
10 isn't that so? A. I don't think so.

Q. You don't think so? A. No, sir.

Q. That is the same kind that you have in all your engines? A. In all the engines, yes.

Q. No spark of any size will go through any of your smoke stacks? A. Oh, yes, sparks will go through them, but they are all comparatively small.

Q. They won't be big enough to burn everything? A. Well, might.

20 BY MR. SCOTT:

Q. You say they might be big enough to burn something? A. They might be big enough; it is doubtful.

---

MAURICE QUINN, sworn for the defendant, testifies as follows:

30 DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Quinn, what is your business? A. Boiler inspector.

Q. Where? A. Scranton, Pa.

Q. How do you inspect boilers of engines? Do you go in the front end of the engine? A. I inspect those boilers once in every thirty days. I got inside the fire box and tested the tables, the side sheets, the valves, rivets, and so forth.

Q. And to do that, did you have to go in the  
40 front end of the engine? A. After I go through

*Maurice Quinn—Direct.*

the fire box, the front end is open, the smoke box is open, the manhole, square the netting, and I examine the netting.

Q. Without refreshing your recollection from any paper or record, can you tell on what day in May, 1915, you examined engine 1112? A. On May 4th, I give that engine a hydrostatic test.

Q. And at that time, did you make any record of that test? A. Yes, sir. You have the record there, I think. There is a certificate made for a full test. 10

Q. Is this record—look at this record; is that the record that you made at that time? A. (Referring.) That is my record.

Q. And it was sworn to by you at that time? A. Sworn to.

MR. SCOTT: I offer that in evidence.

MR. GEBHARDT: Made by him? Or made by a typewriter? 20

Q. Did you do the typewriting? A. No, sir, I signed the paper. That is all there is necessary for me to do; my signature on it.

Q. You swore to that? A. That has been copied from the original by the typewriter. I signed it, and swore to it.

Admitted in evidence and marked Exhibit D-4. 30

Q. Who else inspected on that day or shortly thereafter, that engine, Mr. Quinn? A. Who inspected with me?

Q. At that time or shortly after that, who inspected the screen? A. Inspector Burke. He is inspector of our engines and screens and ash pans. He will look after that part.

MR. GEBHARDT: No questions.

*John Burke—Direct.*

JOHN BURKE, sworn for the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Burke, what is your business? A. Why, front end spark arrester inspector.

10 Q. Where do you work? A. Scranton round house.

Q. At the Scranton round house? Did you inspect engine 1112? A. Yes, sir.

Q. Inspect the screen? A. Yes, sir.

Q. In May, 1915, where were you working? A. May, 1915? I inspected in May, 1915—

Q. Where were you working? A. Down in Scranton round house.

20 Q. And after you made your inspection of engines up there, did you make any record of them? A. Yes, sir; I have got it here.

Q. After the hydrostatic test of an engine is made, do you make a front end inspection of the engine? A. Yes, sir.

Q. When a hydrostatic test is made, is the engine under fire? A. Yes.

Q. When you make your test, what is the condition of the engine? A. Why, it is always in good condition.

30 Q. Is it under fire or cold? A. Under fire.

Q. Have you a record of an examination of the screen of the engine 1112 or May 3, 4, 5, 1915? A. I have got it here on May 5th.

Q. Will you tell the jury what was the condition of the screen on that day? A. On May 5th, 1915, the screen was in good condition.

Q. You say it was in good condition? A. Yes, sir.

*John Burke—Cross.*

CROSS EXAMINATION BY MR. GEBHARDT:

Q. Have you inspected it since? A. Since?

Q. Yes? A. Yes.

Q. What condition is it in now? A. Good condition.

Q. Has it been repaired since? A. No, sir.

Q. Nothing been done to it at all? A. No, sir.

Q. When did you look at it last? A. What year? 10

Q. Now? When did you inspect it last? A. Why, not long ago.

Q. Well, when? A. Six months.

Q. When? A. I haven't the inspection here, a record of it.

Q. What have you got there? A. I have got here from May, 1915.

Q. Do you remember inspecting it then on the 5th of May last? A. Yes, sir. 20

Q. Do you remember doing it or do you depend upon your record? A. No, I remember doing it.

Q. On that day? A. Yes, sir.

Q. Do you remember doing it some days before that? A. Yes, on the second.

Q. How do you come to remember it particularly that on the 5th, you inspected it? A. Why, I have another book besides that, which I carry around with me every day. 30

Q. Had somebody told you that this engine had made a fire, something like that, so that it called your attention to it particularly? A. No, sir.

Q. Just done in your routine work. Do these spark arresters ever get out of order? A. Not 1112, that I remember.

Q. I say, do they ever get out of order? This class of engine? A. Eleven hundreds?

Q. Yes? A. No, I don't remember of any.

Q. Ever remember of one having been out of order. That is all. 40

*John J. Mansfield—Direct.*

JOHN J. MANSFIELD, sworn for the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Mansfield, what is your business, sir?  
A. Chief boiler inspector.

10 Q. Of what railroad? A. Central Railroad of New Jersey.

Q. And you have been for how long, sir? A. Twenty-three years.

Q. As such boiler inspector, chief boiler inspector to examine and observe spark arresters or screens in engines? A. I have in a general way.

Q. Are you familiar with the screen, the character of the screen in—are you familiar with the character of the screen in engine 1112 of the Lackawanna Railroad? A. I am.

20 Q. Before you on the desk there is a piece of screen; is that piece of screen similar in character, will you state whether you ever had occasion as regards the kind of wire and the mesh opening to that in 1112? A. (Referring.) Yes, it is practically the same as engine 1112.

Q. What have you to say as to whether that kind of a screen in engine 1112 is in common use and approved by experience? A. Yes, it is almost a standard netting in use by different roads in the east.

30 Q. What railroads have you reference to? A. Well, the Pennsylvania, Erie, Reading, New Jersey Central.

THE COURT: How long has it been in such standard use?

WITNESS: Well, I just could not tell you.

THE COURT: Approximately how long?

40 WITNESS: Oh, a great many years. You know, there is different sizes of netting. Some

*John J. Mansfield—Cross.*

roads use what we call three by three, with number twelve wire gauge. Number twelve is a little bit lighter than this; practically the same openings, about a quarter of an inch; maybe vary a little but they are very similar all over. That is the way netting runs.

THE COURT: Is a quarter of an inch mesh 10  
the standard opening in the road here in the east?

WITNESS: I think it would be about a quarter of an inch. That is in the different grades of netting.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. How did you come to examine this engine on the 19th of—whatever it was? A. By request.

Q. By what? A. On the 19th of January, 20  
1916.

Q. That is the only time you ever saw it? A. Yes, sir.

Q. Do you know what was in it last April? A. I don't know.

Q. You say that is almost standard netting; what do you mean by that? A. I mean that different sizes are used on different roads. We, for instance, the Jersey Central, use three different sizes. We are always trying to avoid throw- 30  
ing fire.

Q. The more you try to avoid it, the smaller your mesh will get, won't it? A. Well, you can get it too small, you know.

Q. Why? A. You could not operate; choke up.

Q. How much smaller must it be before you cannot operate? A. I think they have got it about as far as it will go now.

*John J. Mansfield—Cross.*

Q. By a smaller mesh, you mean it could not get draught, is that the idea? A. Could not get draught; choke up.

Q. Do your screens ever get out of order? A. Oh, yes, they get out of order.

Q. In what way? A. Well, the wires become worn.

10 Q. Worn by the sparks striking against them?  
A. By the sparks striking against them; striking on the wire.

Q. As the sparks continue to strike against the mesh, the mesh gets larger and larger, doesn't it? A. Yes, and the wire will get thinner and thinner.

Q. That is what I mean, and that occurs on four sides of each mesh, doesn't it? A. Well, yes. No, not on the whole screen; just on the  
20 fire side where it would strike it.

Q. I mean by that that it strikes the mesh on the four sides? A. Four sides.

THE COURT: You mean inside?

WITNESS: Yes, inside.

THE COURT: Four sides on the inside?

Q. Yes? A. Yes.

Q. That is what I mean. And the consequence is that if an engine ran a year or so, wouldn't it throw bigger sparks than when your standard  
30 mesh is put in? A. They wouldn't leave it go that long. They have a gauge that they run in this mesh, and when the mesh opens up, that gauge will show the condition it is in and it is time to take it out.

Q. How long does that take? A. Oh, it is pretty hard to say just how long it will run.

Q. A year? A. Yes, a year; more than a year

Q. Sometimes more? A. Sometimes more.

Q. And all the time it is wearing through? A.  
40 Well, no.

*John Madigen—Direct.*

Q. Isn't it wearing from the time it is put in?  
A. In case a piece wears through, they take it out.

Q. That means putting in a new screen, doesn't it?  
A. Put in part of a new screen.

Q. What do you mean by part of a new screen?

A. Some screens are in three or four sections.

Q. Oh. Was the screen on engine 1112 in sections or in one piece?  
A. Two sections. 10

Q. Two sections?  
A. Yes, sir, that is, one large piece in the center repaired over; that is two sections.

Q. Wouldn't a year's wear on one of these screens make a lot of difference so that a small spark could go through?  
A. It would, in a manner, wear a little bit, yes. This mesh will vary in size.

Q. And the heavier the wire is the more room there is for the wear to take place, isn't that so?  
A. Oh, yes. It will last longer. 20

Q. And the bigger the whole will get?  
A. It will last longer, yes.

Q. The bigger the hole will get?  
A. Well, it will get a little larger, yes.

---

JOHN MADIGEN, sworn for the defendant, testifies as follows: 30

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Madigen, you are an engine man of the D. L. & W. Railway Company?  
A. Yes, sir.

Q. And you were working on Sunday, April 18th, 1915?  
A. Yes, sir.

Q. Have you any distinct recollection about the trip of your train from Scranton to Hoboken on that day?  
A. No, I haven't, of anything unusual. 40

*John Madigen—Cross.*

Q. How long have you been running the engine 1112? A. Well, I think it was along in May, a year ago last May, that we got the engine new, assigned to that run.

Q. Will you tell us about the speed you make from Hackettstown east when you are running number two to Hoboken on time? A. About what  
10 speed?

Q. About what speed when your train is on time, from Hackettstown? A. The schedule running time varies in some places. Of course the time ain't so fast; I should judge about thirty-five to forty miles an hour. Some places we could not make that, on heavy grades or heavy trains.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. That includes all the stops and everything,  
20 doesn't it? A. Yes, that includes the stops. I don't think we make stops on the number two though.

Q. Does it stop at Hackettstown? A. Yes, sir; we have got time enough to allow for that, though.

Q. How? A. We have time to allow for that stop.

Q. Passing stations? A. Passing stations we  
30 have got about thirty miles an hour from there up to Port Morris. It is up grade; pretty heavy grade through there.

Q. Is it a heavy grade from Muskee bridge east? A. Yes, sir, all the way to Port Morris.

Q. From Hackettstown? A. Yes, sir, except we have to sand at Muskee; a little lighter through there.

Q. You think you were running thirty miles  
40 an hour from Hackettstown to Port Morris because of the heavy grade? A. We run as fast as

*Benjamin Pritchard—Direct.*

we can. The time, the actual running time ain't much over thirty miles an hour.

Q. The engine works very hard from Morristown up to Port Morris, doesn't it? A. Yes, sir.

Q. Throws sparks very rapidly? A. No, sir.

Q. Don't throw any sparks? A. Never saw any.

BY MR. SCOTT:

10

Q. Number two is an eastward run, and is in the daytime, Mr. Madigen? A. Yes, sir.

---

BENJAMINE PRITCHARD, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Pritchard, where do you live? A. Jersey City. 20

Q. What is your business? A. Inspector of front end spark arresters.

Q. Where did you learn to inspect the front ends of screens? A. At the Delaware, Lackawanna & Western, Hoboken.

Q. Who taught you? A. Mr. Rehoe.

Q. For how long a time did you serve your apprenticeship? A. Fourteenth months.

Q. So that it was fourteen months before you were appointed inspector? A. Yes, sir. 30

Q. Will you tell the jury just how you inspect the screens? You have a piece of screen up on the desk before you; can you show us in that way? A. We have the front end door opened up; a man goes in and takes the cap off. It is my business to go in, with an electric light, 16 candle power, and go around all the steam pipes, baffle plate and nozzle heads and make a thorough investigation of how that end is; if there is any holes or cracks in. That is my business. 40

*Benjamin Pritchard—Direct.*

Q. Are you familiar with the screen in engine 1112? A. Very familiar.

Q. How often, sir, have you seen it? A. Since he come down to Hoboken round-house.

Q. For how long a time is that? A. Well, it is now running around two years, I guess.

Q. About two years? A. Yes.

10 Q. When you say you have seen it quite frequently since that time, how frequently do you mean? A. Every day, every night she comes in.

Q. Why do you say every night she comes in? A. Every night she comes in at half past four.

Q. Where do you see her? A. In the round-house.

Q. As a result of your observation, will you tell the jury how the screen is worn on engine 1112? A. How she is worn?

20 Q. Yes? A. Well, she isn't worn at all.

Q. When you make your inspections, do you keep any record of it? A. Yes, sir.

Q. You have a book known as the inspection book, haven't you? A. Yes, sir.

Q. I show you an inspection book and ask you if this is your record book? A. (Referring) Yes.

Q. Is that made the same day? A. The same day; write it up every day, that book.

30 Q. And is made in your hand-writing? A. Yes, sir.

Q. All the memoranda that you made during the going hours— A: Yes, sir.

Q. —you entered into this book? A. Into that book, yes.

Q. Without looking at this book can you tell on what days you examined that engine 1112 in April, 1915, without looking at the book? A. I could not exactly say, so. If she was running

40 at that time, she was examined.

*Benjamin Pritchard—Cross.*

Q. But without looking at the book, could you tell? A. I could not give you the exact date, no sir. If she was running, she was inspected by me in April.

Q. Will you look at that book and see if you examined engine 1112 on April 18th, 1915? A. Yes, sir.

Q. What was the condition of the screen, netting or spark arrester? A. In good condition. 10

Q. What was the condition of the ash pans? A. Good condition.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. You say that this screen in engine 1112 is still in good condition, and not worn at all? A. Yes, sir.

Q. How long does it take one of these screens, in an engine of that character, to wear out? A. Three years. I have not repaired the eleven hundred class of engines from the time I have been there; that is three years time now. 20

Q. Has the screen in engine 1112 ever been repaired? A. No, sir.

Q. Has it ever been renewed? A. No, sir, not as far as it has to do with me, no; I have never repaired it.

Q. You wouldn't know whether somebody else repaired it or not, would you? A. Oh, I don't know anything about that. 30

Q. Could you tell by looking at it whether it was changed or not? A. Could not tell. By the time it got to Scranton she would—

Q. How? A. By the time it hit Hoboken, she would have every part of the screen covered with smoke from the flames.

Q. Couldn't you tell by the wear on it whether it was repaired or not? A. Could not tell by the wear, no. 40

Q. Because there is no wear? A. Oh, there is wear, yes; there certainly is.

Q. You said there had been no wear in engine 1112 until about two years ago? A. We have

*John R. Mooney—Direct.*

a man that uses a gauge, sometimes Mr. Kehoe—  
2½ x 2½; that is how we know she is wearing  
or not.

Q. Not from wear? A. Not from wear.

Q. Did you do that with engine 1112? A. We  
do that with every engine; that is our orders.

Q. Did you do that with engine 1112? A. Yes,  
10 sir.

Q. And you found there had been no wear?  
A. Yes, sir.

Q. And you are ready to say now, even up to  
this time, that the screen in engine 1112 is not  
worn at all? A. Yes, sir.

Recess until to-morrow morning at 10 o'clock.

---

Morristown, N. J., Jan. 28th, 1916, 10 A. M.

20 JOHN R. MOONEY, sworn for the defendant, tes-  
tifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business, Mr. Mooney? A.  
Section foreman.

Q. For the Lackawanna Railroad? A. Yes, sir.

Q. What is the number of your section? A.  
Nineteen.

30 Q. And with respect to section 20, up near  
Muskee crossing, is it east or west? A. West.

Q. What are the mile post limits of your sec-  
tion? A. Mile post 50 to mile post 53.

Q. Mile post 50 to mile post 53? A. Yes, sir.

Q. Do you know one Samuel Thompson? A.  
I do.

Q. Did he ever work for you? A. Yes, sir.

Q. Did you ever have charge of section twenty?  
A I did not.

*John R. Mooney—Cross.*  
*Mellen C. F. Hatch—Direct.*

CROSS EXAMINATION BY MR. GEBHARDT:

Q. How long have you been there as section foreman, Mr. Mooney? A. Six years.

Q. How? A. Six years.

Q. Do you know whether Mr. Thompson worked there before that or not? A. I do not.

Q. All you know is that since you have been there he did not work? A. Yes, sir; he worked for me.

Q. What? A. He worked for me, yes.

Q. He did work for you? A. Yes, sir.

Q. On what section? A. Nineteen.

don't know, at any other time but that particular time you speak of? A. I do not.

Q. Whether he worked on twenty or not you

10

20

---

MELLEN C. F. HATCH, sworn for the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Hatch, what is your business? A. Superintendent of fuel service, Lackawanna railroad.

Q. How long have you been superintendent of fuel service of the Lackawanna railroad? A. About four years.

Q. What railroad experience have you had? A. Well, do you want me to detail the whole of it?

Q. Well, give it to us generally? A. My experience in the shops of the Santa Fe & Southern Pacific road and the different departments of the Southern Pacific. Six years chief draughtsman of the mechanical department of the Boston & Maine and engineering tests including the New England line—for the New England, Boston &

40

*Mellen C. F. Hatch—Direct.*

Maine and New Haven and the allied properties up there.

Q. Have you any experience or knowledge of the front end screens of engines? A. Yes, sir.

Q. How did you gain that knowledge? A. By practical experience and design work and inspection test work.

10 Q. Are you familiar with the screen in engine 1112? A. I am familiar with the design of the front end arrangement of engines of that class.

Q. Is the design arrangement of that class as regards the netting similar to this piece of netting, which is exhibit D. 3, in the case? A. (Referring) Yes, sir.

Q. Are you familiar with the opening, the size of that opening in the netting? A. The unit opening?

20 Q. Yes? A. Yes.

Q. What is the opening? A. Why it is—half an inch, larger than a quarter of an inch square, twenty-seven one-hundredths.

Q. Are you familiar with the size, the area of the openings of the netting on other roads? A. Yes, I made investigation regarding those things. I don't know as I know the particular figures just at present.

30 Q. I have a paper here, memorandum, was this memorandum made by you? A. Yes.

Q. And would that memorandum assist you in refreshing your recollection? A. It would.

Q. As to the size of area of the openings on other roads? A. Yes.

Q. Will you tell us what other roads you have data for? A. The Pennsylvania and Boston & Maine; Main Central; New York, New Haven & Hartford; Grand Trunk; Erie, Jersey Central. They use two forms on the front end up there.

40 Q. Are there five or six? A. Well, there is

*Mellen C. F. Hatch—Direct.*

more than that number of railroads; there are seven different nettings or plates listed here.

Q. Of the seven different plates that you have listed there, how many of the railroads using those plates, have a larger opening than the mesh used in 1112? A. Well, of the same form as this, the New Haven and Erie use the same mesh, but with a smaller wire, which calls for a larger unit opening. 10

Q. Are there any other railroads that have a larger unit opening? A. No. There are two roads here that show a larger opening as far as area goes in one direction but the holes are not square in that particular case; they are rectangular.

Q. You say there are two roads that have larger openings? A. Yes.

Q. How much larger are those? A. They 20 would be in the vicinity of one-sixty-fourths of an inch, both ways.

Q. Have you ridden on engines, Mr. Hatch, where a smaller mesh was endeavored to be used? A. Yes.

Q. And what has been your experience? A. Well, it has been generally found that—that is, I believe, my experience has been in cases of that kind that with most holes, trouble is experienced by the netting coating over, blocking the draught. 30 The only way that the draught can be communicated to the fire in the locomotive front end, is through the draught. If that is blocked, why the draught is stopped, and the result is that there is steam failure.

Q. Steam failure? A. Yes.

Q. You are familiar with the capacity of engine 1112? A. Yes, sir.

Q. It has been testified to that on the day in question, as the engine was approaching the place 40

*Mellen C. F. Hatch—Direct.*

where the fire is alleged to have occurred, it was running up a one percent. grade on time, which is the usual rate of speed when on time, being thirty miles an hour, and it was drawing the following cars: D. L. & W. 2008, number 9, 28, nickel plate 76, Lackawanna 553, 907, 927, 30 and two Pullman cars; what have you to say as to  
 10 whether that engine was wearing at its full capacity at that time? A. I should say it was not.

Q. What percentage of its capacity would you say it was wearing at? A. At thirty miles an hour, under those conditions?

Q. Thirty miles an hour? A. Well, without entering into more or less calculation, I should say that probably in the vicinity of 70 percent. of its total maximum capacity.

20 Q. You say you have ridden on engines and have observed the fuel? A. Yes, sir.

Q. And have you had opportunities to observe the emission? A. Yes.

Q. Is it possible, in your opinion, for a train to run, similar to the train in question, with the load in question, without the emission of any sparks? A. No.

30 Q. Have you ever made any observation as regards the fire vitality of a spark coming from a properly equipped engine? A. I could not say that I ever did; not in the line of testing, anything of that kind.

Q. In your experience as an operating man, what have you observed as to the fire vitality of a spark coming from a properly equipped engine? A. Under ordinary conditions, it would be very low; that is, I will qualify that. You said properly equipped; I should say the fire vitality would be very small.

40 Q. You say you have never made any observa-

*Mellen C. F. Hatch—Cross.*

tion to see whether there is a vitality or not?  
 A. No, I could not say personally that I ever have.

## CROSS EXAMINATION BY MR. GEBHARDT:

Q. Mr. Hatch, how long does it take for this netting to coat over as you speak of? A. For the netting to block up so that it would effect the draught? 10

Q. Yes? A. I remember one particular instance where I was on the engine—on the road of about 17 or 18 miles; I don't know exactly whether it was seventeen or eighteen, but in that vicinity, where we had to get out because the netting was not clean so that it would steam.

Q. That was because there was something the matter with the coal? A. No, nothing the matter with the coal. 20

Q. What was the matter? A. A combination of the two things; a combination of the solid front end and also the small mesh netting.

Q. It was more than in this case? A. Yes, sir. I might say that it was not on this railroad.

Q. That was not on this railroad? A. No, it was not on this railroad.

Q. That is where you had hard coal on a passenger? A. On a passenger train, yes. 30

Q. That is not so liable to block up, is it? A. Not so liable as bituminous coal.

Q. How long do you think it would take to block up with this kind of coal and this size mesh? A. This size mesh?

Q. Yes. A. I never knew it to block this size of mesh seriously enough to effect the steam to amount to anything. It will block to some extent, but not seriously. 40

*Charles Ducas—Direct.*

CHARLES DUCAS, sworn for the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Ducas, what is your business? A. Engineer; consulting engineer.

Q. Where are you located in business? A. New  
10 York.

Q. How long have you been in business there, sir? A. There?

Q. In New York? A. About fourteen years.

Q. What has been your education and experience as consulting engineer? A. Well, I went to school at an engineering school, Purdue University; specializing in railway engineering.

Q. State whether you have had any special experience with reference to the subject matter  
20 of locomotive sparks? A. Why, yes.

Q. How was that experience obtained, at the University or where else? A. That of course has been incidental to a general railway work; I mean, the matter of experience with locomotive sparks is rather a small part of the whole work of railway engineering, in the mechanical department.

Q. At the University did they make certain tests on engines with reference to nettings? A.  
30 That is a part of the work, naturally; but I suppose what you mean is some special work that I took up?

Q. Yes? A. I started when I was a student and followed it up from time to time since, as occasion has made it necessary. That work started at the time in making certain tests in the laboratory, and then afterwards observation out on the road. Most of it was in conjunction with other problems.

40 Q. In your tests and experience with reference

*Charles Ducas—Direct.*

to locomotive sparks or locomotive sparking, do you know whether the mesh or netting in the engines that were under observation, were similar to the mesh or netting which is an exhibit in this case and on the witness' desk before you? A. Well, I do not know just how to answer that question. I don't know as you want me to go into all of the details of where I have been. 10

Q. No, I want to know whether the mesh in this instance was similar in character to this (indicating)? A. Well, you know, Mr. Scott, that considerable of the work done was by observation of engines passing on the road, and there was no means of knowing just what kind of netting was in those engines. Those engines that were tested on stationary plants, had a netting that was practically the same; that is to say, there were several kinds of netting used; some of it is punched on plates with slots about an inch and a half long and I should judge about a quarter of an inch wide; and then some netting is made of wire about this same width, a quarter of an inch wide, with slots pretty nearly an inch and a half long. But this is about the standard netting that is used all over the country. Now, general work has brought me in touch with railways all over the country; I am in shops a great deal and see the power; have occasion, you know, to see these things, and I should say this is about the average netting that is used. 20 30

Q. Will you tell the jury what the results of your observations have been with reference to engines equipped with spark arresters of that standard type, the type generally in use as regards the emission of sparks? A. Well, sparks are always emitted, of course, from locomotives. That is something that must always come out of the stack. A locomotive could not operate 40

*Charles Ducas—Direct.*

without throwing—at least the fine powder, the formation of cinders out of the stack. That is the nature of an engine. You have got to have that. I suppose that is what you mean, does that answer your question?

10 Q. Yes, that answers my question. In these observations that you made, can you tell us whether you have made any observations as to fire vitality of sparks? A. Yes, sir, I made some tests along that line.

Q. How far from the railroad track, as the result of your observations and tests, could an engine or did an engine throw sparks when equipped with a standard mesh? A. Well, a spark is either on fire or dead you mean—sparks are thrown—I don't really know how to answer your question.

20 THE COURT: He wants to know how long a spark retains its vitality?

30 WITNESS: I should say—well, generally the conclusion of that would be that it would seem to justify the statement that about one hundred feet from the right of way be considered about the limit of either; although there was no actual fire set during the time of the experiment. That was based upon the fact that sparks of some little size were found that distance.

THE COURT: How did you experiment?

WITNESS: There were pans with cotton batting put along the track at different distances, and any scorching was noted if there was any.

(No cross examination.)

---

Testimony closed.

---

*Motion for direction of verdict.*

MR. SCOTT: I desire to make a motion for a direction of a verdict on two grounds. The first ground is, that the defendant, having established, in the words of the statute, by evidence that it took all practicable means to prevent the communication of fire from its engines, such evidence rebuts the prima facie case of the plaintiffs, that the injury was communicated from an engine in violation of the statute, and this, irrespective of the credibility of its witnesses on said subject or the matter of the preponderance of the evidence. In view of the fact that the defendant has offered evidence, the prima facie case of the plaintiffs has been rebutted. 10

The second reason is because—

THE COURT: Have you ever seen a case in the State of New Jersey where a verdict was directed in a case like this? 20

MR. SCOTT: I have never seen a case, but I have, in studying the matter of the peculiar wording of the statute, the idea suggested by a line of cases.

THE COURT: Well, that was the precise argument—the one you make now was the precise argument that was made in the Goodman case, but the Court held that even though it might be construed that the defendant had used all practicable means, still it must be weighed in connection with the evidence of the plaintiffs, with respect to the nature of the fire and other facts, and the jury must say whether the witnesses were telling the truth and whether they actually did make out that all practicable means had been used and that the means used were all practicable. Those are questions that I think must be passed on by the jury. That was the precise 30 40

*Motion for direction of verdict.*

point in the Goodman case, in 49 Vroom, the one that Justice Pitney decided.

Of course, there is another answer to that argument, and that is this: That the case of the plaintiffs is not based entirely upon the construction of the engine; it is based also upon the presence of combustible material upon the right of way.

10

MR. SCOTT: I appreciate that, and in my mind, although I have not expressed it, I include that in the presentation of the reason. It seems to me that comes within the reason, just the same as the construction of the engine, that clearing the right of way is a practicable means.

THE COURT: Oh, yes; you must show not only that your engine was constructed with all the improved methods of practicable construction, but you must also show that you used reasonable care in keeping the right of way clean.

20

MR. SCOTT: The second reason is that the uncontradicted evidence in the case shows that the defendant took all practicable means to prevent the communication of injury to the plaintiffs' property by the escape of fire from its engine, which is evidenced by having installed in said engine a screen or spark arrester of common design, in general use and approved by experience, and having taken reasonable care to keep its lands free from combustible material. In the Salmon case, the point was the combustible material—the case which your Honor just called my attention to, a Court of Errors and Appeals case, the Court used the expression or said that the Supreme Court, in charging the jury, had properly stated and submitted to the jury whether the

30

40

*Motion for direction of verdict.*

defendant had allowed the combustible material to remain on the right of way. And I find in the Power case, North Western Reporter, the Court said to allow is to acquiesce, or operating knowledge, expressed or implied, is essential. So in this case the only evidence that we allowed this to be or remain upon our right of way—this dried grass—is the mere fact that weeds and dried grass was there. I don't take it that the evidence as presented by the plaintiffs—the mere statement—that it was there is any proof that we allowed or permitted it to be or remain. 10

THE COURT: Why do you say that?

MR. SCOTT: Because the burden being upon the plaintiffs to establish the allowance or permission of combustible material being on the right of way, it necessarily follows that they must show the means or permission or the accumulation of this combustible material on the right of way. I think as the Court is familiar with the prior cases, I don't desire to extend my argument, except to state my reasons for record purposes. 20

THE COURT: All right. I will deny the motion and you may have an objection entered on the record. 30

---

**Charge.**

SPEER, J. Gentlemen of the Jury, there are two cases being tried here together against the Delaware, Lackawanna & Western Railroad Company. One of the cases is brought by Mr. Ort and the other is brought by Mr. Smith. The object of these suits is to recover damages for the destruction of or injury to property which these plaintiffs say  
10 resulted to them from fire, which they claim originated by the negligence of the defendant company. Now, one counsel, in summing up, told you that if your house happened to be burned down by a fire communicated from a railroad company's property or engine, that you would feel that the railroad company ought to pay for it. Now, of course it is important to bear in mind that juries do not decide cases by their feelings. They have been provided  
20 by the Almighty with intelligence and with intellect, and they decide the case in accordance with the facts, and just in so far as they permit their feelings to enter into it, they destroy the attitude of mind which is absolutely essential to a correct determination of the case. Your feelings have nothing whatever to do with this case, and in so far as you permit them to have something to do with the case, you destroy your ability to correctly decide the case. That applies to the rights of both  
30 parties. The plaintiffs have a right to have you dismiss your feelings and your sympathies from the case, and the defendants have a like right; and therefore just in so far as American juries can be kept aside from the gusts of passion and the impulses of feeling, just in so far as they will be aiding in the administration of justice; just in so far as they permit feelings and passions and prejudice to enter into a case, they destroy their ability to correctly decide the case. Now, that brings us, I hope, to a  
40 frame of mind to consider what these cases are

*Charge.*

really about, and how you may exercise that intelligence upon the facts; in other words, arrive at the correct solution of these cases.

There are two grounds of negligence charged in these cases; one ground of negligence is that with respect to the instrumentalities which the railroad company used by way of the locomotives to carry their trains; with respect to the condition of those locomotives; and the second is with respect to the condition of their right of way over which the locomotives travel. We have a statute in this State that lays down the rule with respect to cases of this character. Our statute provides that "every company or person operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them in passing along or being upon such railroads, to the property, of whatever description, or any owner or occupant of any land adjacent or near to said railroad, and shall provide such engine with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire." It further provides that, "When injury is done to property by fire communicated from an engine of any company or person in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act"—which is the one I read to you a moment since—"proof that the injury was communicated from an engine shall be prima facie evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required."

10

20

30

40

*Charge.*

Now, first or all it must be borne in mind that these railroad companies have the right to run their trains on their rights of way through the countries; and it must be borne in mind, furthermore, that in the present stage of affairs, they have a right to run them by the use of fire. If they haven't such right conferred upon them by the

10 Legislature, to run their locomotive engines through the country, without any right, such engines emitting fire and setting fire to adjacent property would be nuisances; but the law having conferred upon companies the right of running these engines through the country, prevents them from being a nuisance and confers upon them the right to run their engines in that way, provided they use all practicable means to prevent injury; and therefore the inquiry in every case is, have

20 they used all practicable means to prevent the escape of fire from their locomotive engines and to keep their rights of way free of combustible material. Now, the rules which I have just been stating to you have been stated in our Court of Errors in these words:

30 "Railroad companies have authority to use the dangerous element of fire in the propulsion of their trains. The danger is in the escape of the fire they are permitted to use upon adjoining lands, to the destruction of property thereon. In the absence of statutory regulations in respect to the precaution to be taken by railroads against such danger, doubtless the companies using, though by authority, the dangerous machines, would, upon the principles of the common law, be under a positive obligation to employ all reasonable precautions against doing harm thereby to others. But in that case a requirement that a railroad company, should, in times of excessive drought, absolutely prevent all escape

40 of fire from its engines, or be liable for the

*Charge.*

consequences, would be not a reasonable, but an unreasonable, rule of precaution; for it seems that no device has yet been invented that will absolutely, and at all times, control the escape of sparks capable of igniting inflammable matter. Such a rule, therefore, would compel the companies either to abandon their duty to the public in running their trains, or be answerable for every fire communicated, no matter how cautious they had been in using the best practicable means to prevent its escape. But statutory regulations on this subject have been made, and these regulations, in general terms, require companies to take and use all practicable means to prevent communication of fire from their engines. When the Legislature enacts regulations with respect to any precaution to be taken in the use of a dangerous instrumentality by those whom it has authorized to use it, those regulations define and limit the measure of duty in respect to that particular sort of precaution.”

10

20

In the case before us, the Legislature has prescribed what duty a railroad company must perform in respect to the escape of sparks from the smokestack of its engines. The prescribed duty does not require the company at any time to absolutely prevent the escape of sparks, but only to take and use all practicable means to that end. Proof that they have taken and used such means furnishes a defense in that respect.

30

It may be asked what are practicable means with respect to the equipment of its engine with spark arresters. That subject has been dealt with by our higher courts in these words:

“If a railroad company use upon its engine a spark arrester of an approved pattern, in general use, and which upon a careful inspection by a skilled mechanic, appears to be in good condition, such company will not

40

*Charge.*

be responsible for damage done by a fire occasioned by sparks escaping from such spark arrester."

And another case has dealt on the same subject and has provided that, "A railroad company is bound to employ the most approved safeguards against the escape of fire from locomotives."

10 Now, that brings us to ask what is the duty of the company with respect to its right of way. (All that I have said in the last few minutes has to do with the mere matter of spark arresters.) On that subject our courts have held this language:

20 "The duty of persons using locomotive engines is prescribed by this statute in comprehensive terms. They are required to use all practicable means to prevent the communication of fire from their locomotives. The duty is not limited to care in the construction and use of their engines; it extends to every means within their control by which fire from their locomotives may be communicated to the property of others. Fire kindled by coals dropped or thrown on the roadbed or alongside of it, from a locomotive properly constructed, may spread and be communicated to adjacent lands, by the inflammable condition in which the company's lands are permitted to be. The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives, as using the usual methods of preventing the escape of fire from the locomotives themselves.

30 "Whether regard be had to the statute or to the common law, a duty rests upon a railroad company to care for the condition of its tracks. Neglect to perform this duty is actionable negligence, and will impose a liability for the injurious consequences that may follow, and a company will not be discharged from responsibility from such consequences,

40

*Charge.*

by the fact that negligence in this respect was not combined with further negligence in the construction or management of its locomotives. If the defendants allowed combustible matter to remain on their right of way, so as to make it dangerous to adjoining property to run their locomotives by or through such combustible matter, it is negligence for which the company is culpable.”

10

And the word “allowed” there means allowed in the sense of so acting with respect to the presence of combustible matter upon their right of way as evidenced a lack of a high degree of care on their part to keep the right of way clear of such combustible material.

Now, you have observed that I said to you in the language of the statute that if the plaintiffs make out by the greater weight of the evidence that a fire was communicated—and the burden rests upon the plaintiffs so to make it out—that a fire was communicated from an engine of the company to the properties claimed to have been destroyed, either directly or by an unbroken chain of causation—by which I mean if it was communicated, we will say, from the engine of the company to its own right of way and from that across adjacent property to the property in question claimed to have been destroyed—if there was no interruption by any culpable agencies, by fire from the engine of the company to the properties claimed to have been destroyed, prima facie that makes out a case of negligence against the defendant company, and casts upon the defendant company the duty of showing that it used all practicable means to prevent the communication of fire to such properties. The burden then rests upon the defendant to make that out. If the defendant has made that out, why, of course there is no liability in either of these cases and the

20

30

40

*Charge.*

verdicts would have to be for the defendant. If it has not made that out, and the plaintiff has borne the burden which I have said rests upon him with respect to making out his case, then you would be entitled to say that the plaintiffs are entitled to a verdict, and to assess their damages.

10 Now, I have been requested by the parties here to deliver certain charges, and I will do so in these words:

The defendant requests me to charge that even though the fire started upon the defendant's lands along, over or through which its train ran, if the defendant had taken all practicable means to keep such lands free from combustible matter and had taken all practicable means to prevent the escape of fire from its engine, your verdict must be for the defendant company.

20 I charge you that states the rule of law.

I charge you further that the railroad company is not under an absolute duty to keep its lands and property free from combustible material, but it is sufficient if reasonable care is exercised in that regard.

I charge you furthermore—

MR. GEBHARDT: Did your Honor charge it?

30 THE COURT: I certainly did. I charge you furthermore that if the railroad company installed a screen or spark arrester in the engine of a design in common use and approved by experience, said company has a right to keep it in such engine for so long a time as the experience of its employees see fit that such screen will remain a practicable means to prevent the escape of fire; provided, however, during the time of its maintenance in said engine, the defendant, through its servants or agents, by the exercise of a high  
40 degree of care have been unable to detect or dis-

*Charge.*

cover such screen to be imperfect or defective in the engine in which it has been installed.

I charge you that.

I charge you, furthermore, that the railroad company is not bound to insure that its inspections will disclose defects in this screen. It is required to use a high degree of care in such inspection, but if, after exercising such degree of care, a defect nevertheless existed which escaped the observation of the inspector or inspectors and resulted in the communication of fire from the locomotive to the plaintiffs' property, the railroad company is not responsible, in the absence of the existence of other grounds of negligence. 10

I charge you that.

I charge you, furthermore, that the fact that it appeared in the evidence that there had been a fire upon a part of the premises of the plaintiff in 1910, for which the railroad company made some payment or appraisal, has absolutely nothing to do with the question of its liability in this case; such evidence having been merely introduced in regard to the condition of the timber on said tracts prior to the fire of April 15th, 1915. 20

I charge you in accordance with the request of the plaintiffs that negligence in suffering combustible material to accumulate on its right of way so as to make it dangerous to adjoining property to run its locomotives through it, will make the company liable for injury from fire originating in such combustible matter from sparks drawn from its locomotives and carried thereby to adjoining property. 30

Those are the rules I desire to give you with respect to the question of liability or non-liability in these two cases. If you find in these cases, under these rules, that the plaintiffs have made out 40

*Charge.*

by the greater weight of the evidence that the company is responsible, you then and then only come to the question of the assessment of damages. If you come to that question, you assess those damages in accordance with these rules:

First of all, there are different kinds of property in question here. But the rule of damage,  
 10 generally speaking, is that each plaintiff is entitled to compensation for the loss which he has proven resulted naturally and proximately from the fire communicated, if it was communicated by reason of the defendant's negligence. With respect to these different kinds of property, different rules apply. With respect to the timber, which is cut, such as fence rails and fence posts, and the timber piled up and so on, the measure of damage there would be the fair and reasonable market value at  
 20 the time and place of its destruction. With respect to the fence wire, if it was destroyed, the measure of damage would be the fair and reasonable market value of that. With respect to the growing timber, the measure of damage is the difference in the value of the land immediately before and immediately after the fire. In other words, you find out how much the land would have been worth with the timber uninjured or undestroyed by the fire, and then how much the  
 30 land was worth after the fire had injured or destroyed the timber, and the difference between the two values would be the amount that you would allow for the injury or destruction to the standing timber.

I have stated that same rule in these words, from a request to charge made of me by the defendant:

"No compensation, if you should decide to give any, must be awarded for burned trees as such.  
 40 All you can consider in regard to that is how

*Charge.*

much, if at all, their injury or destruction has affected the market value of the tracts in question." You can readily see, in the determination of this question, the difference in value between the two, immediately before and immediately after, it is highly important that you consider the nature and kind and value of the trees which were upon the land injured, alleged to have been either injured or destroyed, and then make up your estimate of the difference in value of the land. In the light of all the facts which have been testified in the case, bearing upon that subject. When you have reached your determination as to the difference in the value of the land with respect to the standing timber, you would add to it in each case just the amount you find to have been the value of the timber destroyed, and the other material destroyed which was not growing upon the land but which was merely placed there; either cut timber or fence posts or rails, or fence, besides the wire; and the aggregate of the value of those things would be the amount of the verdict that you would find in favor of each plaintiff. You will take the case under those rules and decide it.

MR. GEBHARDT: I want to take an exception to what your Honor said about the feeling; the jury should have no feelings in determining their verdict.

THE COURT: I want you to have that exception—absurd and silly notions, that have nothing to do with the case, ought not to determine the case.

MR. GEBHARDT: Also, where your Honor said that reasonable care in keeping their property clear of combustible matter was sufficient.

You say, also, that no damages, except the difference in value of the lands, can be allowed for the timber.

*Defendant's Requests to Charge.*

MR. SCOTT: I desire to except to your Honor's refusal to charge my first, second, and fifth request to charge.

THE COURT: Yes. Your first request was "There is no legal or competent proof that fire started upon the roadbed, right of way, or land of the defendant." I refused that, because it amounts to a request to me to direct a verdict.

Number two, "There is no legal or competent proof that the defendant allowed grass, weeds or other combustible matter to accumulate upon its roadbed, right of way or lands." I refused that because I think it is a jury question on a conflict of the evidence in the case.

Number five, "The uncontradicted evidence is that the screen or spark arrester in the engine in question, complied with the requirements of the statute." That is to say, it was a design in common use and approved by experience. I refused to charge that, because I think the jury must pass upon that question, and that is the end of this case.

**Defendant's Requests to Charge.**

1. There is no legal or competent proof that fire started on the road-bed or right of way or land of the defendant.

2. There is no legal or competent proof that the defendant allowed grass, weeds or other combustible matter to accumulate upon its road-bed, right of way or lands.

5. The uncontradicted evidence is that the screen or spark arrester in the engine in question complied with the requirements of the statute.

