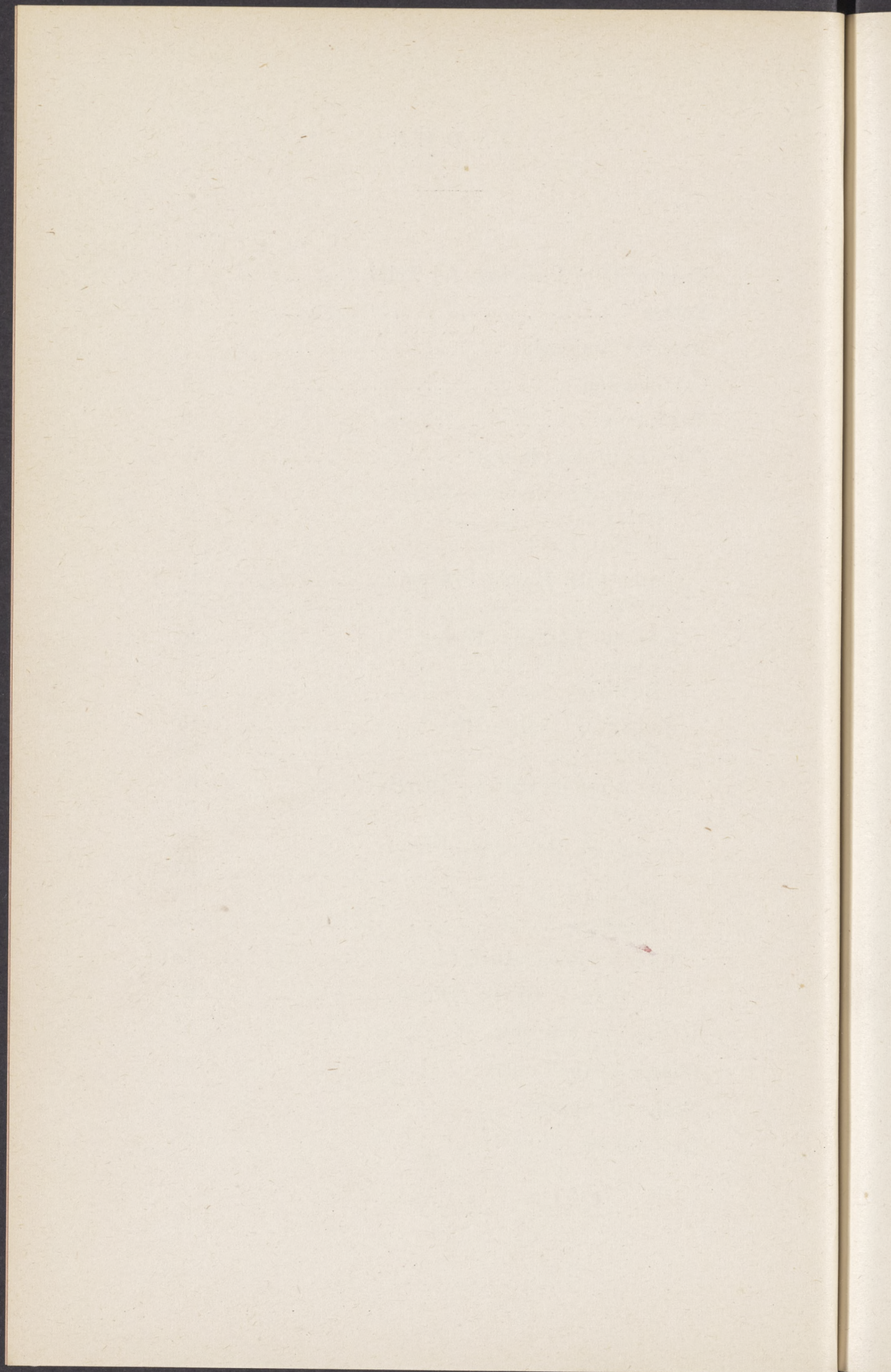


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TRANSCRIPT OF PLEADINGS FOR TRIAL.

NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

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MAY C. REED, Executrix of the last will and testa- ment of JOSEPH REED, de- ceased,  <i>Plaintiff,</i>	}	Transcript of Plead- ings for Trial. 10
vs.		
PENNSYLVANIA RAILROAD COMPANY, a corporation, <i>Defendant.</i>	}	James Mercer Davis, Atty. for Plaintiff. Bourgeois & Coulomb, Atty's for Def't.

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(Summons issued December 2, 1919.) 20

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The plaintiff, residing in the City of Bordentown, in the County of Burlington and State of New Jersey, says:

1. That on or about the second day of September, 1919, the defendant was a corporation engaged in the business of a common carrier, by railroad, in interstate commerce, between the several States, Territories and the District of Columbia, all within the United States of America, and especially operated its trains in interstate commerce at or near Manasquan, in the County of Monmouth and the State of New Jersey. 30

2. Joseph Reed, the plaintiff's testator, was employed by the defendant in interstate commerce, the said defendant also being engaged in interstate commerce, by railroad, and while so engaged in said interstate commerce, the said Joseph Reed, the plaintiff's testator, suffered personal injury, resulting in whole from the negligence of the said defendant, which said personal injury resulted in instant death.

10 3. The negligence of which the plaintiff complains and of which the defendant is guilty consists in the fact that at or near Manasquan, in said County of Monmouth, when and where the said Joseph Reed was employed by the defendant in interstate commerce, by railroad, as aforesaid, the defendant carelessly and negligently maintained a certain switch without proper safe-guards and unattended by reason of which the train on which the said Joseph Reed was working at the time was caused suddenly to  
20 leave the track upon which it was traveling and pass on to said switch, thereby throwing the said Joseph Reed from said train and inflicting upon him the injuries complained of; that no lights or other warning was given of the condition of said switch; that a reasonably safe place to work was not provided for the said Joseph Reed to work; that the road bed and appliances at the place complained of, of the said defendant, were not kept in a reasonably safe condition.

30 4. The injury inflicted upon the said Joseph Reed, through the negligence of the defendant, as aforesaid, resulted in the death of the said Joseph Reed on the second day of September, 1919, who left him surviving as next of kin and heirs at law, a widow, May C. Reed, and one minor child, each of whom

have suffered pecuniary loss in the death of said Joseph Reed.

5. Letters testamentary of the goods and chattels, rights and credits, which were of Joseph Reed, deceased, were granted by the Surrogate of the County of Burlington, in the State of New Jersey, to May C. Reed.

6. This suit was brought within two years from the date of the death of the said Joseph Reed. 10

The plaintiff, therefore, claims of the defendant the sum of \$50,000 damages as aforesaid, and brings this her suit.

JAMES MERCER DAVIS,  
*Attorney for Plaintiff.*

(Filed Dec. 12, 1919.)

It appearing by a general order of the United States Railroad Administrator, known as "General Order No. 50A," amending General Order No. 50, that all pleadings in any action arising from or out of the operation of any railroad or other carrier, may, on application, be amended by substituting the Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom; 20

And It Further Appearing that the cause upon which the above action was based, arose since the said last mentioned date,

It Is Thereupon, on the twelfth day of December, 1919, on motion of James Mercer Davis, Attorney, and with the consent of Bourgeois & Coulomb, Attorneys for the defendant and Director General of Railroads, Ordered that the Director General of Railroads be, and he is hereby substituted as a party 30

defendant in the above matter, in the place and stead of Pennsylvania Railroad Company, and that the said cause be, and the same is hereby dismissed as to the last mentioned Company, without costs, and it is further ordered that the Director General of Railroads have twenty days from the date hereof within which to file an answer to the amended complaint.

(Filed December 16, 1919.)

10

The defendant, Director General of Railroads, making answer to the complaint filed by the plaintiff in this cause says:

1. He admits paragraph 1.

2. He denies that plaintiff's testate, Joseph Reed, was engaged in interstate commerce at the time of the accident in question.

20

3. He denies paragraph 3.

4. He denies paragraph 4.

5. He has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraph 5.

6. He admits paragraph 6.

30

FIRST DEFENSE.

Plaintiff's testate, Joseph Reed, assumed the risk of injury in not choosing a safe place to ride on the train at the time of the accident.

SECOND DEFENSE.

Plaintiff's testate, Joseph Reed, was guilty of contributory negligence in not choosing a safe place to ride on the train when he was killed, which contributory negligence precludes his executrix from recovering damages.

THIRD DEFENSE.

Plaintiff's testate, Joseph Reed, was engaged in intrastate commerce at the time of the accident in question. 10

BOURGEOIS & COULOMB,  
*Attorneys for Defendant.*

(Filed January 2, 1920.)

20

30

**POSTEA.**

(Filed March 18, 1920.)

NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

10 MAY C. REED, Executrix of  
the last will and testa-  
ment of JOSEPH REED, de-  
ceased,

*Plaintiff,*

vs.

DIRECTOR GENERAL OF RAIL-  
ROADS,

*Defendant.*

Postea.  
Action at Law.

20

This case was tried before Judge Howard Carrow,  
with a jury, at the Burlington Circuit, on March 8th,  
1920.

The jury rendered a general verdict against the  
defendant, Director General of Railroads, and in  
favor of the plaintiff, May C. Reed, Executrix, for  
Eleven Thousand Dollars, (\$11,000).

HOWARD CARROW,

*Judge.*

30

**RULE FOR JUDGMENT.**

<p>MAY C. REED, Executrix of the last will and testa- ment of JOSEPH REED, de- ceased,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>DIRECTOR GENERAL OF RAIL- ROADS,</p> <p style="text-align: right;"><i>Defendant.</i></p>	}	<p>Action at Law.      10 On Postea.</p>
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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of Eleven thousand dollars, besides costs to be taxed *nisi*. 20

Entered March 18, 1920.

On motion of

JAMES MERCER DAVIS,  
*Attorney.*



TESTIMONY.

NEW JERSEY SUPREME COURT.  
BURLINGTON COUNTY.

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MAY C. REED, 10  
*Plaintiff,* }  
vs. } Action at Law.  
WALKER D. HINES, Director }  
General of Railroads, }  
*Defendant.* }

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Mt. Holly, N. J., March 8, 1920. 20

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Before HON. HOWARD CARROW, Judge and a jury.

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APPEARANCES:

For plaintiff, JAMES MERCER DAVIS, ESQ.

For defendant, MESSRS. BOURGEOIS & COULOMB. 30

## OPENING OF THE PLAINTIFF.

Mr. Davis: With submission to your Honor, gentlemen of the Jury: You have just been sworn to try the case of May C. Reed, the lady who sits here. She is the executrix of the last will and testament of her husband, Joseph Reed. And the defendant in this case is the Director General of Railroads. You know that the Director General of Railroads under the law and the proclamation of the President of the United States has been operating for some time up until March first, of this year, the railroads of the country, and especially the Pennsylvania Railroad. Now this suit is a suit which is brought under the United States law. That is what is called "The Federal Employers' Liability Law." That law provides that when a railroad is engaged in interstate commerce its servant or employee is engaged in interstate commerce, and is injured or killed through the negligence of the railroad, or its servants, while engaged in interstate commerce—while the individual is engaged in interstate commerce—the law provides that when an employee of the railroad company that is engaged in interstate commerce is injured through the carelessness of any of the fellow servants in the railroad employ, when the railroad is also engaged in interstate commerce, that that gives rise to a cause of action, under the Act of Congress. Now, you know, of course, what interstate commerce is; interstate commerce, shortly, is commerce between the several states. That is the carriage of passengers or the carriage of freight of any kind from one state into another. That becomes interstate commerce, and it is not necessary that the person who is carrying the com-

merce, that is the train men or people moving the commerce, shall have crossed the state lines themselves. It is only necessary that the freight or traffic shall have crossed the state lines.

Now, on the second day of September, nineteen hundred and nineteen, Joseph Reed, this lady's good husband, was employed as a freight conductor by the Director General of Railroads, conducting and operating the Pennsylvania Railroad Company; and his run was from Trenton to Sea Girt or perhaps Long Branch. He went through the towns of Freehold and Farmingdale, Manasquan, Sea Girt, and up to that point, and perhaps further on. On this day in question, or rather it happened to be night, he started out from Trenton with a train of cars, he acting as conductor of this freight train, which contained interstate commerce. There were in this train a couple of cars containing meat shipped by Swift and Company from their Western place of business, one of which was to go to Asbury Park, and another of which was consigned to Long Branch; and in addition to that there were carloads of coal in this train, and other commerce of an interstate character, that this man was carrying in this train. And as he went along from the different stations from Trenton on his way, he also picked up and discharged freight at the several stations. In other words, he took freight from Farmingdale and other stations and also discharged freight, and was picking it up and discharging it at different stations along the line.

Now the rule had been of the Pennsylvania Railroad Company, operated by the Director General at that time, for the conductor, at least, to assort the freight as they went along. In other words, when they would pick up a piece of freight at Freehold

to be discharged at Farmingdale, that was separated and assorted as they went along in the journey, so that when the train arrived at the station where it was to be discharged the freight was ready to be put in its proper place on the platform.

This train started, as I said before, at Trenton, and nothing of any importance occurred until they arrived at Farmingdale. Now, it might not be that you gentlemen know where Farmingdale is. It is  
10 a station between Freehold and Manasquan, or, perhaps better, Sea Girt, because the block, as it is called, at that place started at Farmingdale and ended at Sea Girt.

There was a single track road at least from Farmingdale until you arrived at Manasquan, and at Manasquan there was a double track, and, of course, a switch which ran into the single track. So that it was a double track from Manasquan to Sea Girt and on up to Long Branch.

20 But the block, as it is called, was controlled from Farmingdale, so that when a train was about to enter that block it received its orders and received its signals on that block from Farmingdale, to Sea Girt, at Farmingdale. They showed him—the lights and signals that he received at that time, directions or orders they may be called—indicated whether or not the track was clear; indicated which track he would run on from Manasquan in; and indicated generally the manner in which he was to conduct  
30 himself from the time that he left Farmingdale until he arrived at Sea Girt.

There also was at Manasquan, where these two roads—double track merged into one, a set of signals. There was the signal with its arms, you know what I mean, stretched out across the railroad to indicate to the persons in charge of the train the

condition of the track and the switch at that point, and also a low switch which also contained a light which indicated the condition of the switch at that point.

When this train crew arrived at Farmingdale, which is the beginning of this block, they noticed and watched of course for orders and signals. My understanding is that there were no orders given to the train at that time when they arrived at Farmingdale, because perhaps, and I think it is correct, that the office at that place was closed, the office controlling—what you might call the signal man, or whatever it is—the telegraph office at that point. 10

But the lights were set for a clear, straight, open track. In other words, proper lights were displayed to this engineer that this track was clear and open and straight through to Sea Girt. So he proceeded on his journey under the belief, and under the signals which were set for him for the block from Farmingdale to Sea Girt. 20

Now, there was also at Manasquan an operator's office. This operator received the orders and gave notices to the train crew as to the condition of the tracks, and therefore he controlled, as it were, the switch at that point. They have what they call on the railroad "tricks", in other words, the operators work in three turns, first operator eight hours, second operator eight hours, and the third eight hours, making the twenty-four hours; so that there are three operators in the course of a day. Now, 30 what they call the third trick operator at Manasquan had been laid off. So that there was no operator at the Manasquan operator's office, at the time that this train arrived at Manasquan. And the lights which should have been lighted on this signal post that controlled this switch and indicated to the engineer

the condition of the switch at this point of the line were extinguished on this signal pole at this point.

So that the engineer, having received his signal at Farmingdale that the track was clear to Sea Girt, proceeded, as he ought to have done under the circumstances, to run his train along into Sea Girt as he intended. And, therefore, as he approached this signal post at Manasquan, with its lights extinguished and with no danger signal or other thing indicating it was not safe to proceed,  
10 he proceeded on his journey. The night was dark and foggy, so that it was impossible to see lights at any great distance.

The switch at this point—and I will have a map here shortly to indicate to you what the condition is. The switch at this point instead of being closed so that this train could continue on in its straight journey, as the lights had indicated was the condition when he left Farmingdale, was carelessly and negligently set so that the train did not continue straight  
20 on—but suddenly turned into this switch.

Now, in the third car from the engineers' engine was Mr. Reed, there with some of his crew, assorting freight to be discharged at the different stations along the road. It was in September second, and consequently still warm weather. The door of this freight car was open in order that they might have air. And as this engine going at a considerable rate of speed turned into this switch, naturally there was a lurch of the cars, and as this car came by  
30 this switch and gave the lurch, the conductor, who was then in the car attending to his business, was thrown out of the door of this car onto the ground and killed.

Now, we are bringing this suit under the law provided by the Act of Congress to recover for this

good woman, and his son, such damages as the law provides that you gentlemen may give her under the facts and under the law, as his Honor will tell you.

Now, Mr. Reed was a man who had been in the employ of the railroad for a considerable time. He had risen through the different ranks up to the position—and the desirable position—as a freight conductor. Receiving good pay and having a good position. He was in good health, in the prime of life, industrious, sober, home-loving and a God-fearing man. 10

He left this good woman, his wife, and a young son, fourteen years of age, who is very sick at home at the present time and therefore unable to appear here. All of the wages that this good man had been earning he had, like most prudent men, been trying to save a little against the day when he wouldn't be able to work. He had bought a nice home in Bordentown, was paying for it, and supporting his wife and son in a manner creditable to himself; and when he received his pay every two weeks, his envelope or check, whatever it happened to be, was turned over to his wife and she had charge of the spending of every cent that her husband made from time to time. And they were using that money, as I said before, to buy for them this nice little home, in which this husband and his wife were living, and which he expected to be paid for in a short time. 20

Now, the law says, I think his Honor will tell you, that if Mr. Reed was engaged in interstate commerce for the railroad, and the railroad was engaged in interstate commerce—and there is no dispute about it—at the time that he received these injuries which resulted in his death, and if somebody in the employ of the railroad was guilty of carelessness, which resulted in this good man's death, then it will be- 30

come your duty, when you shall have heard all of the testimony, to assess against the railroad such damages as will compensate, so far as money will compensate this good woman and her son for the loss which they have sustained in the untimely death of her husband.

10 Now, we claim that the railroad company at this point was engaged in interstate commerce, and, as I understand from the defendant, that is admitted, and also that Mr. Reed was engaged in interstate  
20 commerce at the time; so that these two questions will be admitted. So that the next question for you to consider will be to consider whether or not the railroad, acting through its servants or agents, it doesn't matter who, some of whom were guilty of negligence and carelessness resulting in this man's death. Now, if these two facts shall have been established, and you find that that was the cause of his death, then, of course, you come to the one  
20 other remaining question—and that is, how much money you will give to this widow and her son for the death of this husband.

---

#### OPENING OF THE DEFENDANT.

30 Mr. Coulomb: If your Honor please, and gentlemen of the jury: This is an action brought to recover damages, brought by the executrix of the last will and testament of Joseph Reed, by May C. Reed, who was executrix, and also the wife, against the Director General for the purpose of recovering damages occasioned by the death of Mr. Reed while in the employ of the Director General.

It is conceded by the defendant in this case that

at the time of the accident both the railroad company for which Mr. Reed was working and Mr. Reed himself were engaged in interstate commerce. And therefore that fact of itself gives rise to an action under the Federal Employers' Liability Act. This is to say, it gives to the executrix in this case the right to bring her suit under that act, rather than under our own local laws in which the rules might be different.

The negligence alleged by the plaintiff in this suit and which he is obliged to stick to is as follows: 10  
The negligence of which the plaintiff complains is as follows and consists of the fact that at or near Manasquan, in the County of Monmouth where deceased met his death, the Director General of Railroads, the defendant, carelessly and negligently maintained a switch undefended, whereby the train was caused to leave the track on which it was traveling and to pass on to said switch.

Mr. Reed was an old railroad man, working since 20  
nineteen hundred and one and had advanced, as said, had risen during the course of his employment to the position of conductor of this freight train, which was operated at the time of his death. He was familiar with the particular portion of the road over which his train was going; that is to say, from Trenton to Sea Girt or beyond.

On the night in question, September second, he was conductor of this train going from Trenton to Manasquan, or beyond, which train contained interstate commerce; and he was in the third car from 30  
the engine. It was a misty, foggy and dark morning. The switch into which this train ran, as will be shown to you, is situated some little distance from Manasquan station, that is in the direction of Freehold

from Manasquan, and is on the right-hand side of the main track as the track approaches that switch.

The signalling devices at Farmingdale do not indicate and are not supposed to indicate the condition of this particular switch. This switch is operated by what is known as a ground lever on the ground itself. It is not operated from the tower and is not connected with the tower in any way. Attached to this lever is a lantern which revolves with  
10 it, showing red and white. As I understand it, this lantern will show white if the switch is closed, so that the train will continue on the main track; and will show red if open so that the train approaching will pass off onto the switch. This light is about two and one-half or three feet above the ground; and that is the only light which is designed to or intended to indicate the condition of that switch.

On the night in question, this train consisting of, I think, ten or eleven or twelve cars, was moving in  
20 the direction of Manasquan. And the engineer will testify, I think, that it was moving not very fast. At all events as he got within a few car lengths of this red lamp he saw it. The reason he didn't see it sooner was because of the condition of the weather. As soon as he saw the red lamp, he immediately applied his brakes to bring his train to the proper standstill, knowing that he was going on to the track where he didn't suppose and really he knew he had no right to be; and therefore he slowed up his train  
30 as rapidly as he could act and as promptly as he could, so that the train stopped after he had just about gotten on the switch. From the time he saw the red lamp, three or four car lengths away from him, until the train was actually brought to a stop, the entire train had passed over the switch point and on to the siding.

It appears that Mr. Reed, who was working in this third car from the front, with one or two other men, as the train approached Manasquan, for some reason or other, apparently to see how close to the station he was or whether they had reached the station or perhaps, as is more likely, warned by the application of these brakes, went to the door and as the train passed from the main track onto the side track that jar or jolt, it is said, threw him from the train.

Now, we contend that from these circumstances there can be no inference at all drawn of negligence. If this signal was set with the red lamp, and if the train was being operated in an ordinary, careful way as this train was usually operated in, and that it was due to the weather that this red lamp was not seen sooner, and that the whole accident, which can be termed such, was one that happens ordinarily; and we will ask his Honor to find as a matter of law that an accident such as this, no matter how deplorable it is and how sad it is and how sorry we all are that it happened, it arose out of the ordinary and obvious risks which everyone goes into railroads assumes as a risk of the dangerous occupation in which he is engaged. The fact that this train would pass from one track to another under such circumstances is one of the obvious and dangerous risks of railroads which every man engaged in railroad-ing assumes, and therefore in this case there is no liability whatsoever in the defendant by reason of this accident.

I desire, if your Honor please, to say at this time, in the course of Mr. Davis' opening he referred to the fact that one of the tower men or switch men engaged in the tower for what he termed the third trick was not on duty, having been laid off, and I

ask that—I do not know whether he intends to rely upon that as grounds for negligence, but it is not within the scope of his complaint, and if he intends to rely on it we should be given an opportunity of meeting it.

Mr. Davis: (Producing map) Mr. Coulomb, I suppose that is a correct drawing, representing the station at Manasquan?

10

Mr. Coulomb: It was handed to me as such.

---

THOMAS W. MADDEN, sworn for plaintiff.

Direct examination.

By Mr. Davis:

20

Q. Where do you live?

A. Trenton.

Q. On September second of last year, you lived there?

A. Yes, sir.

Q. At that time what was your occupation?

A. Locomotive engineer.

Q. And you are yet?

A. Yes, sir.

30

Q. And employed by the Director General on the Pennsylvania Railroad Company?

A. Yes, sir.

Q. And on this day and night of September second, nineteen hundred and nineteen, did your run go out of Trenton?

A. Yes, sir.

- Q. A freight or passenger train?  
A. Freight.
- Q. You were conductor, were you not?  
A. Engineer.
- Q. What was the end of your run?  
A. Long Branch.
- Q. Did that run take you through Freehold, Farm-  
ingdale, Manasquan and Sea Girt?  
A. Yes, sir.
- Q. And on up the coast to Long Branch? 10  
A. Yes, sir.
- Q. What time did you start out on this run?  
A. Why, I think it was about ten o'clock.
- Q. At night?  
A. At night; yes, sir.
- Q. Did you have a regular time for leaving?  
A. We had a schedule leaving time, but the train  
had no schedule.
- Q. Did you have a regular leaving time?  
A. Yes, sir.
- Q. Who beside yourself were the crew of this 20  
train?  
A. Fireman Petty, and the flagman's name was  
Falomb, I think; I don't remember the other two  
brakemen's names; and Mr. Reed, conductor.
- Q. Was John Latham one of them?  
A. I don't know.
- Q. Did you know John Falsey?  
A. Yes, sir.
- Q. Was he on this train? 30  
A. Yes, sir.
- Q. Was he your regular flagman?  
A. I think he was the regular flagman on that job,  
but I was not the regular engineer.
- Q. How long had you run or had charge of this  
run?

A. That was the first night on that job.

Q. Had you been running trains over this branch before?

A. No; I hadn't been running trains over there, but I have qualified there; I was sent there to learn the road and had been examined on it.

Q. You have to serve some little time getting acquainted with the road before you are put on the road?

10 A. Yes, sir; and be examined on it.

Q. And that is what you referred to as being qualified on it?

A. Yes, sir.

Q. Now, your position on the engine was on which side.

A. Right side.

Q. Now, from Freehold or Farmingdale eastward is the track single or double?

A. Single as far as Manasquan.

20 Q. And from Manasquan is it a double track road?

A. Yes, sir.

Q. Did you have a block system on that road?

A. Yes, sir.

Q. Won't you tell the Court and jury what you mean by a block system?

A. Well, it's the signal that I would get. To explain it, would be if I received a signal at Farmingdale that takes me to the next block station which is finally open. That might be five miles, or  
30 might be twenty miles, for that matter.

Q. When you are in that space, you receive a favorable signal at the beginning of the block, does that indicate whether or not you have the right of way and what route you shall take throughout that block?

A. Yes, sir.

Q. Where did the block begin in which Manasquan station is situated?

A. Farmingdale.

Q. Do you know how many cars were in this train?

A. Not exactly. No, I couldn't say. I did know at the time, but I have forgotten. I can give you an estimate on that.

The Court: Defendant admitted in his opening there were eleven cars.

10

Mr. Davis: There were seventeen as a matter of fact.

The Court: Is there any dispute about that?

Mr. Coulomb: It is immaterial, I think.

The Court: Well, you don't dispute there were seventeen?

20

Mr. Coulomb: No, we don't dispute that.

Q. When you got to Farmingdale what signals did you receive, Mr. Madden?

A. I received a clear signal.

Q. What lights indicate that signal?

A. Green.

Q. And what did that indicate to you?

A. That I had a clear block to Sea Girt.

30

Q. Did that also indicate the road over which you were to travel?

A. Yes, sir.

Q. And what road did it indicate you should travel?

A. Eastward.

Q. What I referred to—perhaps my question was indefinite. What did it indicate with respect to what track you would travel on from Manasquan station eastward toward Sea Girt?

A. That I would travel on the eastward track with the current of traffic.

Q. Was it permitted for trains going eastward to take the left-hand or switch track at Manasquan station, or was that reserved for westward traffic?

10 A. That was reserved for westward traffic.

Q. You say you got a green light at Farmingdale, which indicated you had a clear track as far as Sea Girt?

A. Yes, sir.

The Court: Green light where?

Mr. Davis: Farmingdale.

20 Q. Now, was there anything at Farmingdale or elsewhere before you arrived at Manasquan that indicated to you, or that gave you any warning with respect to the condition of the switch at Manasquan?

A. Nothing beforehand, no.

Q. Then, having received this green light and having received no other instructions with respect to the switch at Manasquan, what was your duty?

A. To proceed to Sea Girt or next stop where I had work to do.

30 Q. You were familiar and had familiarized yourself with the station at Manasquan?

A. Yes, sir.

Q. What was there there at Manasquan?

A. Well, there was a switch leading into the freight house, switch leading into the beginning of the double track, and the block signal pole.

Q. Now, this block signal, you say block signal pole, is that one of these high poles with arms extending across the track?

A. Yes, sir.

Q. Is there or was there at that place an operator's tower or box?

A. There was one there; yes, sir.

Q. And during the time that you had familiarized yourself with conditions along this road in your endeavor to qualify yourself for the job of running an engine over these tracks had there been operators at this point? 10

A. Yes.

Mr. Coulomb: That is objected to, if your Honor please, on the ground that it was immaterial whether there were operators there prior to this accident or not. The question of operators has nothing to do with this case under the pleadings, as I see them.

20

The Court: The negligence of which the plaintiff complains and with which the defendant is charged consists of the fact that at or near Manasquan, in the County of Monmouth, when and where the said Joseph Reed was employed by the defendant in interstate commerce, the defendant carelessly and negligently maintained a certain switch without proper safeguards and unattended, by reason of which the train on which the said Joseph Reed was working at the time was caused suddenly to leave the track upon which it was traveling and to pass onto said switch, thereby throwing said Joseph Reed from said train and inflicting the injuries complained of. That no lights or other warning was given of the condition of said switch. That a reasonably safe place to work was not provided for the said Joseph 30

Reed. That the road-bed and appliances at the place complained of of the said defendant were not kept in a reasonably safe condition. I will hear you.

Mr. Coulomb: It is not within the scope of the negligence charged in the complaint.

Mr. Davis: I don't see how a matter could be more clearly stated. I alleged that one of the items  
10 of negligence was the fact that they maintained a certain switch without proper safeguards and unattended. And that is alleged as clear as I know how to use the English language.

Mr. Coulomb: I desire to state the further reason that assuming that by unattended he means no operators there, there can be no negligence based upon the theory or opinion or fact that there was no person there to watch the switch. That is not a  
20 ground of negligence.

The Court: Objection overruled, and exception noted.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge (Seal)*

30 (Question repeated.)

A. Yes.

Mr. Coulomb: In case there is any question as to the opportuneness of my objection—

Mr. Davis: I consent that your objection may be considered as timely.

Q. How was this switch, and by whom was it controlled, if you know, Mr. Madden? I don't mean the individual's name; but what duties did he have to perform?

A. Well, that block office was open and was controlled by the block operator.

Q. And where was the block operator located? 10

A. At the tower right at the switch. The switch is outside.

Q. You mean that the office was nearby the switch, do you not?

A. Yes.

Q. Had you any notice of knowledge that the switch was unattended at any time during the twenty-four hours?

A. Oh, yes.

Q. What part of the day was this switch unattended so far as you had been notified? 20

A. From ten o'clock at night until six in the morning.

Q. Is that what they called the "third trick?"

A. Yes, sir.

Q. What had been the instructions and information which you had received with respect to the condition that that switch would be left in during the time that the operator was not present?

A. Well, it would be left set for the ordinary track. 30

Q. That had been your information had it?

A. It had not been my information. That was what I expected to find, because I had never received any other kind of information.

Mr. Coulomb: I move the answer be stricken out because it is not responsive.

Mr. Davis: He can't complain whether the answer is responsive to my question or not.

The Court: The answer will stand, and an exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

10

*Judge* (Seal)

Q. In the absence of information to the effect that the signal would be set against you for a clear passage from Farmingdale to Sea Girt, in good rail-roading and under the rules of the railroad under which you operated, what did you have a right to expect that switch to be, in what condition?

Mr. Coulomb: Objected to as being immaterial and irrelevant.

The Court: According to your experience and custom.

A. It should be set clear for the eastward track in the direction in which I was going.

The Court: Is that the way it always had been done?

30 A. Yes; as far as I know.

Q. Mr. Madden, how many days had you run over this track?

The Court: What do you mean set clear for the eastern track?

A. So it wouldn't interfere with the train going east—so we wouldn't get in on the westward track going east. That is the beginning of the double track.

The Court: Well, now, could you go on your journey with your train proper unless the track—unless the switch had been set in the way you say it should have been set?

A. Not properly, no.

10

The Court: Do you know the question?

A. I think I understand you. The switch was set for the eastward movement, that is to run eastward on the eastward track, was the way I expected to find the switch.

The Court: Was it necessary it should be that way in order for you to make the journey?

20

A. To make it properly, yes, sir.

The Court: Could you make it otherwise?

A. Yes, by running against the current of traffic; but I couldn't do that without orders from the superintendent.

The Court: Did you have to have that switch in the way you say it should have been in order to make your journey?

30

A. Yes, sir; I had to have that switch set.

The Court: For what?

A. For me—for the eastward movement.

The Court: Do you have anything to do with getting out and setting the switches, yourself?

A. No, sir.

The Court: Have you any right to do so?

10 A. I have a right if it is necessary.

The Court: If you know it?

A. Yes, if the switch is wrong or any trouble I have authority to set the switch right for myself.

Q. Now, Mr. Madden, you were familiar with the situation at Manasquan, and we have before us here a map which shows the line of railroad there. Will you come down here and point out to the jury the situation as it then appeared to you?

20 A. According to this, this is West to Jamesburg, and this is East to Sea Girt—

Q. And the little white rectangular mark on the map is marked "M. S. Cabin", and a little further to the west of that is a little rectangular figure indicated by the work "tool house", and a place on the map to the east of "M. S." which is marked "Main Street." Will you point out to us where the switch is?

30 A. This is the switch which I expected to find clear.

Q. Set for the eastward movement going eastward?

The Court: When you mean set, you mean so you wouldn't be interfered with?

A. So I wouldn't be stopped.

Q. When you say the eastward track do you mean the straight continuation of this single track line?

A. The single track line ends there, and the new railroad begins—the double track system.

Q. Where are the signals located at this point?

A. Just to cover these switches.

Q. Is that the high signal tower?

A. Yes; the high signal room.

Q. Located where?

A. In the neighborhood of what is known as the tool house. 10

Q. Now, Mr. Madden what lights, if any, were showing in this signal tower, that is the high signal station there, which has the arms?

A. There wasn't any; they were extinguished.

Q. They were extinguished?

A. Yes, sir.

Q. If these lights had been burning, would they have indicated the condition of the switch at this point? 20

A. No; they wouldn't have anything to do with the switch.

Q. What do those lights indicate?

A. The condition of the block ahead.

Q. That is whether or not it is occupied by other traffic?

A. Yes.

Q. What was there there at this point, if anything, which indicated that the switch was open? 30

A. The switch lamp was the only indication.

Q. What is the nature of that lamp and where is it placed?

A. Well, it set to the left of the railroad about perhaps two feet or one foot, set to show two different colors, red and green.

Q. How high is that from the ground?

A. Probably one foot.

Q. What sort of a night was this?

A. Foggy and dark.

Q. What kind of a lamp was it?

A. It was a switch lamp.

Q. What did it indicate?

A. Red.

Q. What does that mean?

10 A. It was that I was taking the westward track,  
westward main track.

Q. That you should have taken?

A. No, sir; the one I should not have taken without orders.

Q. What did it indicate with reference to the switch? Anything?

A. Yes; if the switch lamp showed red it was set for the westward main track, if it showed green it was set for the eastward main track.

Q. How did you interpret it?

20 A. I interpreted it was set for the westward track when I seen it—in fact, I knew it was.

Q. What did you do?

A. Tried to stop. And I stopped.

Q. I was asking you Mr. Madden what sort of a night it was, and you said it was a dark, foggy night. What time of night was it?

A. About four o'clock.

Q. About four—

30 A. Between three fifty-five and four o'clock in the morning.

Q. Did the fog interfere with your view?

A. Oh, yes.

Q. How far were you away from this switch before you were able to see this light?

A. Probably two or three cars.

- Q. Why couldn't you see it before?  
A. The weather conditions.  
Q. The fog and darkness?  
A. The fog—yes.  
Q. Is this light on the right or left-hand side of the track in the direction in which you were going?  
A. On the left.  
Q. Did your engine interfere with the view of this light at any time?  
A. No. 10  
Q. Only the weather conditions?  
A. Yes.  
Q. When you saw this light, you have already said that you might say you were taking what I would call the left-hand track.  
A. Yes.  
Q. And you tried to stop your engine?  
A. Yes.  
Q. What happened after that?  
A. Well, I undertook to stop. 20  
Q. What did you do toward stopping?  
A. Pulled the air brakes. I already had the air brakes pulled before I seen the condition of that switch because I had Manasquan stop for the train. Conductor Reed told me he had Manasquan stop and I endeavored to stop at Manasquan, therefore I had the air pulled before I ever seen the condition of that switch; and when I seen it red I pulled the emergency brake.  
Q. How far did you proceed after you had entered on the switch? 30  
A. One train length anyhow.  
Q. How far would that be?  
A. Not to be exact, but I would say I went in there about eight or ten car lengths.

The Court: It was your duty, in view of that red light, not to go on the switch?

A. No, sir; I wasn't allowed to go in there.

The Court: If you had performed your duty you wouldn't have gone in there, strictly, I am speaking?

A. I wouldn't have gone in there, no.

Q. Well, now, when you went on this switch, was  
10 there any motion to your engine or cars?

A. Oh, I don't know anything about the cars. There was a lurch to the engine.

Q. If you had been standing in your engine, to which direction would you have been thrown or moved?

A. I would have been thrown to the right if thrown at all.

Q. You brought your cars to a stop, I presume?

A. Yes.

20 Q. What did you do then, Mr. Madden?

A. Well, I didn't go back at once. The brakeman that was in the car with Mr. Reed came up to the engine and asked us—

Q. In response to what he said, what did you do, if anything?

30 A. I asked the fireman to go back with him. He asked for help—he said, "Come back and help me find the conductor, he fell off." I asked him where, and he said, "I don't know where." I asked him how far back, and he didn't know. And then I had other work to do which was necessary. I had an engine with the safety valves up, and I couldn't leave that boiler until I had a sufficient amount of water, and so I asked the fireman to go back.

Q. Did you leave the engine at that time?

A. I left the engine afterward and went back.

Q. When you went back what did you see?

A. I saw Mr. Reed injured on the tracks.

Q. Was he at that time dead?

A. No, sir.

Q. Was he able to talk?

A. No, sir.

Q. Where did he lie?

The Court: Is there any doubt he died as a result of this injury?

10

Mr. Coulomb: No, sir.

Q. Where did he lie?

A. Between the eastward and westward track. Not to be exact I couldn't tell you.

Q. Was there any blood or anything at the place where he laid?

A. There was some where he laid. I seen that afterward. I didn't see it at the time.

20

Q. Now, Mr. Madden, had there been anything to advise you or warn you of the condition of this switch before you arrived there?

A. No.

Q. And as you proceeded eastward from Farmingdale had you had any cause to believe it to know that the switch was in any other condition than a safe condition?

A. No.

30

Cross-examination.

By Mr. Coulomb:

Q. When you left Farmingdale, Mr. Madden, on the night of this accident, did your train stop at Farmingdale?

A. No.

Q. You went through Farmingdale?

A. Yes.

Q. Were there signals there displayed?

A. Yes.

Q. Block signals—block indication?

A. Yes.

Q. Would they have indicated anything of the circumstances—the condition of this switch at Manas-

10 quan?

A. No.

Q. When you got to Manasquan, I understand you to say, the block signal there was extinguished?

A. Yes.

Q. Would that have anything to do with a switch signal?

A. When a block station is closed by orders it is in the special instructions these lights must be extinguished, that takes that block station out of ser-

20 vice.

Q. And therefore these block signal lights were properly extinguished then?

A. Yes, sir.

Q. There wouldn't be any other way of your getting notice of this switch signal, which was turned red, against you, on this night, excepting the signal itself—the red lamp itself?

A. That's the only indication I would get would be the switch lamp.

30 Q. That switch isn't operated from the tower, is it?

A. No.

Q. Has no connection with the tower?

A. It is interlocked there with the signals that the operator throws. His levers are in the tower,

but that interlocking is outside. An interlocking placed in there for safety.

Q. And this switch itself is operated from outside?

A. Yes.

Q. And levered with a ground lever?

A. Yes.

Q. How does the lever operate on the signal?

A. It turns with the switch. When you turn the switch, the same switch turns the lamp.

10

The Court: If you had heeded the warning given by the red light, you wouldn't have gone on the switch?

A. Not if I could have got stopped. I couldn't get stopped from the time I seen the red switch, I couldn't get stopped. I didn't have room enough.

The Court: Why not?

20

A. Because the observation—I didn't have enough observation of it on account of the weather conditions to stop without going in there. If you are running a train it takes time and room to stop the momentum of the train.

The Court: How far could you see ahead?

A. Two or three car lengths.

30

The Court: Is that all?

A. That's about all, as near as I could judge.

The Court: And when you saw the red light, you didn't have time to stop?

A. I was already trying to make my station stop, and reduced speed, and I did try to stop at once, but I knew I couldn't do it. I couldn't stop because I didn't have the room.

The Court: What sort of a light would have enabled you to see the situation clearly in order to have kept out of the switch?

10 A. With that office closed, the only thing I could have had would have been some indication further west of where the switch was; something to tell me that the switch was set other than it was supposed to be.

The Court: You were on guard were you, and paying attention?

A. Oh, yes; yes, sir.

20 The Court: And you say it was impossible from the situation as it then existed for you to keep out of that switch?

A. I couldn't done it. It was impossible to keep out of there. Had I seen the switch in time, or had the weather conditions been clear, I would not have went in there. I could see in clear weather that switch a sufficient distance to stop.

30 By Mr. Coulomb:

Q. As I understand, you were making a regular stop at Manasquan?

A. Yes.

Q. And you had attempted to stop your train, or

check it and slow it down for that stop, prior to your seeing this red light?

A. Yes.

Q. So that your train had slowed down somewhat at that time?

A. Yes.

Re-direct examination.

By Mr. Davis:

10

Q. Was there an operator's office at Farmingdale whose duty it was to advise you of the condition of this switch if the switch was not in shape for you to proceed on?

Mr. Coulomb: Objected to as leading and improper under the pleadings.

Mr. Davis: I will strike that question.

20

Q. Was there an operator's office at Manasquan— or at Farmingdale?

A. Yes.

Q. Did that operator's office, among others, give orders to the engineers and others in charge of the conduct of trains?

A. Yes.

Q. Was Manasquan in that block operated by that operator's office at Farmingdale?

30

A. Yes.

Q. What was the normal position in which that switch should have been set at Manasquan?

A. It—

Mr. Coulomb: That has already been answered on direct examination.

The Court: It may be answered again.

A. It should have been set for the eastward movement.

Q. Was there any rule used and in force at that time on the railroad in that effect.

10

Mr. Coulomb: That is objected to.

The Court: Objection overruled and exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge (Seal)*

20

A. There was a rule that if I received a clear block signal, that is the indication for that block, that is, when I received a clear signal I don't expect to find any trains in the block or no open switches.

Q. Was the condition that you found at Farmingdale such a signal?

A. Clear signal.

30

Mr. Coulomb: If your Honor please, I move to strike that out. If the condition of this switch is said to be controlled by something at Farmingdale, then we have a right to meet it.

The Court: Objection overruled and exception allowed.

(Whereupon the defendant, by its counsel, prays

a bill of exceptions, which is hereby allowed and sealed accordingly.)

Judge (Seal)

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CLARENCE H. BRECHT, SWORN for plaintiff.

Direct examination.

By Mr. Davis:

10

Q. You live where?

A. Bordentown.

Q. On September second, nineteen hundred and nineteen, were you working for the Director General of the Pennsylvania Railroad?

A. I was.

Q. Were you a part of the crew on which Mr. Joseph Reed was conductor?

20

A. Yes, sir.

Q. Were you on that train and in that crew on September second, nineteen nineteen?

A. Yes, sir.

Q. Your train started where?

A. From Trenton.

Q. What is your position?

A. Brakeman.

Q. Were you first, second or what brakeman, or don't they have any distinction?

30

A. No; I was riding what they called the head end.

Q. How long had you been working on this division?

A. Two years this time.

Q. Up to that time, two years?

A. Yes.

Q. Had you worked on that division before?

A. Oh, yes, extra brakemen works all over.

Q. How long had you been a regular brakeman?

A. Sometime.

Q. But you were working extra, were you?

A. Yes.

Q. Were you familiar with the signals and conditions along the tracks?

A. Yes, sir.

10 Q. Your beginning was Trenton, and the end of your run was what?

A. Well, Long Branch at the present time; we were running to Long Branch.

Q. Are you familiar with the signals and lights at Farmingdale?

A. Yes, sir.

Q. Were you familiar with the signals and lights at Manasquan?

A. Yes, sir.

20 Q. What numerals or what letters indicate the station at Manasquan?

A. MS.

Q. Where does the block begin and where does it end, in which Manasquan is?

A. The block starts at Farmingdale; but the third trick operator wasn't there; that made the block from Farmingdale to Sea Girt.

Q. So that the block began at Farmingdale and continued at this time until you got to Sea Girt.

30 A. Yes, sir.

Q. Where did you get your orders for entering that block?

A. Didn't get any orders—only the signals.

Q. That is an order, is it not?

A. Yes.

Q. Did you get any signals?

A. A clear signal at Farmingdale.

Q. What is that indicated by?

A. Indicated we had a clear track to Sea Girt.

Q. What sort of light?

A. Green.

Q. When you say you had a clear track all the way to Sea Girt, please describe what you mean by that.

A. Track supposed to be clear of all trains, and switches set all straight.

10

Q. Did these lights which you received at Farmingdale indicate on which track you proceeded when you arrived at Manasquan?

A. Certainly; it indicated an eastbound movement, and we only had an eastbound movement at Manasquan starting with the double track.

Q. And that would have kept you to the right-hand side, or to the left?

A. Yes, sir.

Q. You say your lights were for a clear track when you left Farmingdale?

20

A. Yes, sir.

Q. Did you make any stops between Farmingdale and Manasquan?

A. No, sir.

Q. Where were you riding in this train?

A. On the engine.

Q. It was your business or right to ride in that engine at that time?

A. As far as I know, I had a right in there; yes, sir.

30

Q. What were you doing at the time of this accident?

A. I was sitting on the fireman's seat.

Q. What particular—or was your attention attracted to any particular thing?

A. My attention was attracted when he put the air on and went into the switch.

Q. How far were you away?

A. I was overcome—I gave a jump, and we were on the switch.

Q. You had been traveling on this train for two years?

A. Had been working on the road for two years.

Q. How long had you been working on this train?

10 A. The first night on there.

Q. Had you been running freights along this track during these two years?

A. I had worked down there; yes, sir.

Q. What sort of a night was it, Mr. Brecht?

A. It was a heavy, foggy, dark, and an awful low fog. You could see your high signals. It was like a ground fog.

Q. Did it prevent you from seeing clearly the ground signals?

20 A. I never saw it at all and I sat on the fireman's seat.

Q. Did you look for it?

A. I was looking ahead all the time.

Q. How high was the signal from the ground?

A. It is right on the ground, and sits on an arm about that high from the ground. (Indicating about eight inches.)

Q. When the train took the switch, what happened?

30 A. The engineer did all he possibly could do to stop it; but we went in quite a distance.

Q. Do you know how far? If you don't know, don't answer.

A. I can indicate on the map of the track.

Q. Did you make a map or drawing of the station yourself?

A. Yes.

Q. Did you make any measurements?

A. Not to be exact; no, sir; only with the naked eye.

Q. Can you indicate on this map where the engine was at the time it stopped?

A. Yes.

Q. Show us on the map.

A. The rear end of the hack was right down here cater-cornered from the station. The train blocked 10 the third crossing.

Q. Is the third crossing indicated on that map there?

A. The rear end of the hack was right there.

Q. You mean under the letter "M"?

A. Yes; and it was cater-cornered from the station.

Q. I have marked with "X" the location of what you call the hack.

A. Yes, sir.

20

Q. Is the hack what we call the caboose?

A. Yes, sir.

Q. And was that at the rear end of your train?

A. Yes, sir.

Q. When had you last seen Mr. Reed?

A. At Freehold.

Q. Was there the last stop you had made before you stopped at Manasquan?

A. Yes, we had a brakeman on that hadn't been on very long, and we were going to make a fly. 30

Q. What did you do?

A. We pulled two cars down and put them in on the siding, ran around the train and pushed them in, came on out, and Mr. Reed said—

Q. Never mind what he said. What did you do?

A. Anyway, I went back and threw the switch

and caught the train as it came on down and got on the engine.

Q. Your next stop was where?

A. Manasquan.

Q. You rode, did you, all the way from Freehold to Manasquan in the engine?

A. Yes, sir.

Q. Consequently, you didn't see Mr. Reed during that time?

A. No, sir.

10 Q. Now, when the engine had come to a stop did you get out?

A. Got out after the other brakeman ran up.

Q. And where did you go?

A. Got the stretcher and went on back to Mr. Reed.

Q. What did you see?

A. Mr. Reed was lying there. I ran right on over to the tower—MS.

20 Q. What did you do?

A. I tried to get on the telephone, to get Sea Girt, but couldn't do it.

Q. When you saw Mr. Reed was he dead or alive?

A. Alive.

Q. How long before he died?

A. Twenty-five minutes.

Q. How fast, in your opinion, was this train moving at the time that it took the switch, Mr. Brecht?

30 A. If I said the exact speed you would have to prove it. I don't know.

Q. What was your best judgment?

A. We were going at a good rate of speed.

Q. In your opinion, how many miles per hour was that?

A. Twenty-five or thirty miles at the least.

Q. Mr. Brecht was it your duty to be familiar

with the signals such as lights and other signalling devices along the road, and also to be familiar with their meaning?

A. I don't know as it was necessary for a brakeman to be familiar—

Q. As a matter of fact were you?

A. Yes, sir; we have to learn them to work up.

Q. Was there anything so far as you observed with respect to the signals at the time that you arrived at Farmingdale up till the time that you arrived at Manasquan to indicate that the track was in anywise except a safe condition? 10

A. No, sir.

Q. Now, if you were to use this left-hand track, that is, the switch as we might call it, at Manasquan, what was necessary to be done in order for you to enter on that switch?

A. Get orders at Farmingdale.

Q. And these orders are delivered to you from whom? 20

A. From the operator.

Q. Who issues the orders?

A. The superintendent.

Q. Where is the superintendent located?

A. I don't know.

Q. Now, in the absence of orders that you were to take that switch, and with a clear light at Farmingdale, what did you, as a practical railroad man, expect to be your line of travel from Farmingdale toward Sea Girt? 30

A. Clear.

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

The Court: Objection overruled.

Cross-examination.

By Mr. Coulomb:

Q. Had you ever ridden on this freight train before?

A. Not the exact train. I had gone over the same track.

10 Q. Had you ever gone down on the ten o'clock freight?

A. Yes, sir.

Q. Prior to this night?

A. Yes, sir.

Q. Ever gone down there when the freight train stopped at Manasquan, the train that left Trenton at ten?

A. I can't recall all the stops; no, sir.

Q. Was it to have stopped at Manasquan on the night of this accident? Was it a regular stop?

20 A. Yes, sir.

Q. Where does the train stop when it does stop at Manasquan?

A. At the freight house.

Q. Will you point out on the map where the freight station is?

(Witness indicates.)

30 Q. That's where the train was regularly stopped—STA?

A. Yes, sir.

Q. You were riding on the engine?

A. Yes, sir.

Q. Where was the engine when you got out?

A. I took no particular notice; but I did take particular notice of the rear end of the station.

Q. You say the rear point of the train was opposite the station?

A. Cater-cornered from the main station.

Q. Where was Mr. Reed lying?

A. Well—

Q. How far back of the train?

A. There is a switch that goes out into the coal tressle, and he laid right there.

Q. How far back of the train?

A. Considerable distance.

Q. Can you tell us how far?

A. Twelve cars, anyway.

Q. About twelve cars back of where the train was standing?

A. Yes, sir.

Q. The rear end of the train?

A. Yes.

Q. You heard and felt the brakes being applied before it went into the switch?

A. Yes, sir.

Q. Did you feel any indication of the train making a stop prior to that?

A. No, sir.

Q. Slowing down, or anything of the sort?

A. No, sir.

Q. It was to have slowed down and stopped at the freight station in Manasquan?

A. Yes, sir.

Q. Were the air brakes turned on very sharply?

A. Yes, sir. He threw on his emergency—threw his reverse on—everything on.

Q. Threw on the emergency, put on the reverse, and did that before coming to the switch, as I understand you to say?

A. I didn't say that.

Q. You didn't say that?

A. No; I said when he put them on. He threw his emergency on first. He threw his emergency on first.

Q. Yet this train did not stop until it had gone some little distance past the freight station?

A. Yes, sir.

Q. You don't work for the railroad company any more?

A. No, sir.

10 Q. You claim to have some claim against them by reason of this accident?

A. I—

Mr. Davis: I object. Never mind, I will withdraw it.

A. I have not put in any claim. No, sir.

Q. Don't you claim to have one?

20 (No answer.)

---

JOHN W. LATHAM, sworn for plaintiff.

Direct examination.

By Mr. Davis:

30 Q. Where were you employed on the second day of September, 1919?

A. By the Pennsylvania Railroad.

Q. Were you a member of Mr. Reed's crew, Conductor Reed?

A. I was that night.

Q. How long had you worked on this crew?

A. My first night.

Q. How long had you worked for the railroad company?

A. One month.

Q. During that time had you worked as a freight brakeman?

A. Freight brakeman.

Q. Where were you at the time that this accident happened?

A. In the car with Mr. Reed.

Q. What car was that numbered from the engine?

A. Third car from the engine.

Q. And what were you doing at the time?

A. At the time the accident happened?

Q. Yes.

A. We were sitting down.

Q. What had you been doing?

A. Sorting out freight.

Q. What do you mean by sorting out freight?

A. Sorting freight out for the different stations 20  
along the line.

Q. Was that preparatory to leaving the freight out to the station?

A. Yes, sir.

Q. How long had you been sitting down?

A. A few minutes.

Q. Was this car that you were riding in the car you picked up and discharged the way freight in?

A. I couldn't tell you.

Q. Perhaps I don't make myself plain. Do you 30  
pick up any freight as you come along from Trenton?

A. Not that I know of.

Q. Do you discharge any freight?

A. Yes.

Q. Where were you to discharge any freight?

A. At Manasquan.

Q. In what car was the freight you were to discharge at Manasquan?

A. In the freight car.

Q. In the car in which you were?

A. Yes, sir.

Q. As you approached Manasquan was the door of this car open or closed?

A. One door was ready.

Q. Which door, the right or left?

10 A. The right door.

Q. What sort of a night was it?

A. Dark, foggy night.

Q. What was the condition of the weather with respect to heat or cold?

A. It was a pretty warm night.

Q. Was it necessary to keep the door open in order to keep comfortable?

A. Yes, it was.

20 Q. What was the first thing you noticed about anything being wrong?

A. I didn't notice anything until the lurch came and threw Mr. Reed out.

Q. Where was Mr. Reed at the time the lurch came?

A. Standing at the door, looking out.

Q. How long had he been there?

A. About a minute.

Q. Had anything happened up to that time to attract him to the door?

30 A. Not that I know of.

Q. Did he say anything to you at the time that he went to the door?

A. No, sir.

Q. Did he while he was standing at the door?

A. No, sir.

Q. As to why he was going to the door?

A. No, sir.

Q. Had any signals been given to indicate the position of your train, or anything like that?

A. Not that I know of.

Q. How was he standing at the door?

A. He had one hand on the door and one hand in the car leaning out.

Q. Was he in that position at the time that the lurch came?

A. Yes, sir.

10

Q. What sort of a movement was this that you call a lurch?

A. Kind of a sudden movement you get on the trolley car, if the trolley car stopped quick.

Q. Was it quick? Was it enough to unbalance you?

Mr. Coulomb: That is objected to as clearly leading.

20

The Court: Tell what happened and the jury can draw their own inferences.

Q. What effect did this lurch have on you?

A. Threw me to the floor of the car.

Q. Were you sitting at the time?

A. Yes, sir; I was sitting on a box.

Q. When did Mr. Reed fall out of the car?

A. Just at the same moment the lurch came.

Q. Do you know why Mr. Reed went to the door? 30

A. I imagine to see how close we were to the depot.

Cross-examination.

By Mr. Coulomb:

Q. Do you know whether that was the reason?

A. No, sir.

Q. How long had he been standing there when the lurch came?

A. About one minute.

10 Q. And he was standing supporting himself with one hand on the side of the door?

A. Yes, sir.

Q. And one foot in the car and leaning out?

A. Yes, sir.

Q. One foot out of the car?

A. Yes, sir.

Q. You say there was freight in this car which was to be discharged at Manasquan?

A. Yes, sir.

20

Re-direct examination.

By Mr. Davis:

Q. Had you seen Mr. Reed or other people occupy this same position on approaching stations before?

A. No, sir.

Q. You hadn't been long on the road?

A. No, sir; I was new at it.

30

WILLIAM G. PETTY, sworn for plaintiff.

Direct examination.

By Mr. Davis:

Q. You were fireman on this train, were you not?

A. Yes, sir.

Q. How long had you been fireman?

A. About four years.

Q. How long running over this particular branch  
of the road? 10

A. I was on this job about a month, I imagine.

Q. Before you went on this particular job, had  
you been running over this branch of the road?

A. No, sir.

Q. While you were working on this branch, during  
that month, how often did you run over it?

A. I never ran.

Q. How many times had you traveled over this  
run? I don't mean run the engine. 20

A. Fifteen or twenty times.

Q. Did you have to pass an examination to qualify  
to go over the road?

A. No, sir.

Q. A fireman isn't required to qualify?

A. No, sir.

Q. Did you notice any signals that you received  
at Farmingdale?

A. The engineer called out clear signal, and I  
answered him and looked. 30

The Court: Did you have any railroad experience  
before?

Mr. Davis: He said four years before. Four  
years on the railroad and a month on this job.

The Court: If I understand the thing rightly, engineers come from the firemen. You become an engineer after a certain time?

A. Yes, sir.

Q. Or experience?

A. Yes, sir.

Q. Now, as a fireman, were you familiar with all the rules?

A. Yes.

10 Q. You do?

A. Well, just explain what you mean by "all the rules."

Q. You probably remember about the rules. Does the company have rules?

A. Yes, sir.

Q. Were you familiar with the rules?

A. I was quite familiar—not fully familiar with the rules.

Q. You were not fully?

20 A. No.

Q. At Farmingdale what was the situation?

A. The engineer hollowed clear signal to me, and I answered him.

Q. What did you see?

A. Clear signal is all I seen.

Q. What did that indicate according to the rules?

A. Block was clear from Farmingdale to Sea Girt.

Q. And that was the indication, was it?

A. Yes, sir.

30

Mr. Coulomb: I have objected to the fore part of the testimony.

Mr. Davis: I consent that the witness' recital of the words spoken by the engineer—

Mr. Coulomb: I mean the conditions at Farmingdale have no part in the negligence charged in this case.

The Court: I don't suppose you have any objection to letting the objection say that the objection is to question relating to that matter as immaterial?

Mr. Davis: Not at all.

The Court: And you have an exception, Mr. Coulomb. 10

Mr. Davis: I contend this switch, and the whole running of the train to Sea Girt, were controlled at the beginning of the block, to wit, Farmingdale.

Q. If your train was to pass to the westbound track, that is into the switch, at Manasquan, where you would have received any indication or notice of that fact, if you would have received it? 20

A. You wouldn't have received any until you received the switch light.

Q. Would you have received any orders at Farmingdale?

Mr. Coulomb: That is objected to as leading.

The Court: Withdraw that and reframe it, please.

Q. When your train is to pass from the westbound track to the eastbound track at Manasquan, do you receive any orders from any person in authority? 30

A. The superintendent.

Q. And where do you receive these orders?

A. They come from Trenton.

Q. And where do you get them?

A. From the operator at Farmingdale.

Q. On this night did you receive any orders to that effect?

A. No, sir.

Mr. Coulomb: Is objected to as immaterial and irrelevant.

10 The Court: Objection overruled and exception noted.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

20 Q. In the absence of these instructions, what do you, as one of the men in charge of this train, expect to be your route of travel under the rules of the company and under the custom as pursued by men in charge of that train?

Mr. Coulomb: Objected to.

The Court: In the absence of these instructions from the superintendent when you arrived at Farmingdale, what was the rule?

30 A. We should have gone on the eastward track.

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

The Court: Objection is overruled and exception noted.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

The Court: Do you mean to say that when you failed to get orders at Farmingdale to go on the westbound track, that you were to go on the eastbound track without interruption as far as Sea Girt?

A. If they wanted you to run into the westbound from Manasquan to Sea Girt he would give you an order at Farmingdale; which he didn't, and we had no light in there, and we should have gone down the eastbound track.

Q. Do you mean to say then that Farmingdale is the station at which you got your orders?

A. If there are any for us.

Q. Between Farmingdale and Sea Girt?

A. Yes, sir.

Q. What kind of a night was this, Mr. Petty?

A. It was dark and foggy.

Q. Did the darkness and fog interfere with the observation of the low signals?

A. As far as to me, I am kept busy all the time—I can't look out very often.

Q. Did you as a matter of fact notice whether any along this line were obscured by fog and darkness?

A. You couldn't see over two or three cars ahead.

Q. Did you see at all the signal at the switch at Manasquan, before you passed into it?

A. No, sir.

Q. You don't know what was shown there?

A. No, sir; I was on deck working.

10

20

30

Cross-examination.

By Mr. Coulomb:

Q. You were busy from the time you left Farmingdale until the time of the accident?

A. From the time we left Freehold until the accident happened.

10 Q. There is a red light, isn't there, at this switch, which indicates the switch is opened or closed, as the case may be?

A. Yes, sir.

Q. And the engineman and fireman are supposed to be on the lookout for that red light?

A. When he gives his clear signal at Farmingdale, that indication shows the switch should be set green.

The Court: What would that green light mean?

20 A. Set for the eastward track.

Q. That indicates also, doesn't it, if there be another train in there?

A. What, that green switch light?

Q. Yes.

A. No, sir; we get our signal at Farmingdale.

Q. Yes, sir. You got a clear signal at Farmingdale?

A. Yes, sir.

Q. Indicating your way was clear to Sea Girt?

30 A. Yes, sir.

Q. This red light was lit, wasn't it?

A. I don't know, sir.

Q. The engineer said he saw it three or four car lengths before he came to it. What did that indicate?

A. He was going on the westward track.

Q. Didn't it indicate anything else?

The Court: What do you mean, he was going, or should go?

A. He wasn't to go on the west track.

Q. What track was he to go on?

A. The eastbound track.

Q. Having seen this red lamp that indicated to him that if he continued his course he would pass over the westbound track?

A. Yes, sir.

10

Q. What was his duty?

A. To stop.

Q. That red lamp indicated to him that he should not go in there?

A. Yes, sir.

Q. And that's what it was there for, wasn't it?

A. Yes, sir.

Q. In event the switch got turned after the clear signal at Farmingdale for any reason at all, he would know there was this red danger signal and stop his train? Isn't it? 20

A. Yes, sir.

Q. Anybody might have turned that switch there in the night?

A. That's hard to tell.

Q. At all events it was turned on this night, wasn't it?

A. Yes, sir.

Q. And the mere fact that he got a clear signal at Farmingdale, while it indicated to him he might expect clear traveling all the way through, didn't relieve him from the necessity of looking for other signal lights along there? 30

A. I don't quite get you.

Q. Because an engineman or fireman gets a clear

signal at one end of the block, he can't rush through to the other end of the block with his eyes closed?

A. No, sir.

Q. He has got to expect that something might have happened in between?

A. He is supposed to be on the lookout all the time.

Q. If this switch was changed, after you had passed through Farmingdale by somebody, it did show that it had been changed, didn't it?

10 A. Yes, sir.

Q. By showing a red light?

A. Yes, sir.

Q. If he had seen that red light it was his duty to stop the train, was it not?

A. Yes, sir.

Q. Then you had—

The Court: Was the complaint broad enough to cover the negligence of the engineer?

20

Mr. Davis: I think so. If it doesn't I am going to ask to amend it.

Mr. Coulomb: We are going to object to any amendment.

30

The Court: What do you mean by objection to it? It is the duty of the Court to allow proper amendments in order that justice may be done. What is your objection to it?

Mr. Coulomb: There is a good deal. First of all, they have injected into it the condition of the tower at Farmingdale, which has been admitted in evidence. We say that that is outside the four corners of this complaint. That we should have a right if

they want to amend their complaint to have a chance to produce the operator here in charge of the tower. There is nothing to indicate that the negligence had anything to do with the tower in Farmingdale.

The Court: What is the objection to amending so far as the engineer is concerned?

Mr. Coulomb: He says he got a clear signal at Farmingdale and that he drove his engine along until he saw the red lamp. He saw it as soon as he could see it by reason of the weather. If his negligence consists in his failure, there is no ground of negligence, because he did all he could have done. He saw the signal as soon as he could see it. If it relates back to Farmingdale, there is nothing in this case to show that we are supposed to meet how this train appeared from Farmingdale. We are certainly entitled to be made known that this signal was given at Farmingdale, and that that is where the mistake was made. We certainly object to these amendments unless we have an opportunity.

The Court: What do you mean by that, Mr. Coulomb?

Mr. Coulomb: I don't understand that a person can file a complaint on one theory, and come into Court—

The Court: What's your objection, that you are surprised?

Mr. Coulomb: Certainly we are surprised, and have been surprised since they started to introduce testimony with regard to conditions at Farmingdale.

If they want to bring it within the complaint they would have to amend.

The Court: Of course, the Court would not allow a failure of justice because of imperfect pleading. But if the pleadings are amended the case will have to lay over for two weeks until the defendant can have an opportunity to meet the other situations. That is the rule, if he pleads surprise. I think that  
10 the complaint ought to be more comprehensive.

Mr. Davis: Let me address your Honor on that question.

The Court: I have stated it.

Mr. Davis: The fact that counsel is ignorant of the situation is no defense. It is whether or not the defendant is surprised. Now, the negligence of  
20 which the plaintiffs complain, and of which the defendant is aware consists in the fact that at or near Manasquan, in said County of Monmouth, when and where Joseph Reed was employed by the defendant in interstate commerce by railroad, the defendant carelessly and negligently maintained a certain switch, without proper safeguards, and unattended, by reason of which the said train, on which the said  
30 Joseph Reed was working at the time, was caused suddenly to leave the track upon which it was traveling and to pass on to said switch, thereby throwing said Reed from said train, and inflicting upon him the injuries complained of.

NOON RECESS.

The Court: There was some question raised respecting the pleadings. Is any motion to be made?

Mr. Davis: I want to introduce some further testimony before I make the motion. I shall move when further testimony is in to amend the pleadings according to the facts.

The Court: Now is the time to make your motion, if you desire to do so in order that the other side may be apprised for the purpose of cross-examination. 10  
may be apprised for the purpose of cross-examination.

Mr. Davis: I suppose that your Honor would like to have some testimony as to whether or not counsel is surprised, inasmuch as he says he is surprised.

The Court: I understand counsel for the defendant to say that he knew that the red lantern light was there at the switch, and that the conductor or the engineer had disregarded it. 20

Mr. Coulomb: I don't admit that, and that's not the testimony. The testimony is that he didn't see it until within three or four car lengths, because of the fog.

The Court: You know it was there? 30

Mr. Coulomb: From the testimony of this witness; yes, sir.

Mr. Davis: I move you that paragraph three of the complaint be amended by alleging, "as an act

of negligence on the part of the railroad company, through its servants and agents, that the engineer in charge of this train ran into the open switch with the red lights against him.”

Mr. Coulomb: I object to that amendment.

10 The Court: The objection is overruled. I think the amendment should be allowed. I can't see that the defendant can be surprised because he has admitted that he knew that the red light was there. It was a warning signal and the engineer was in the employ of the defendant. The amendment is allowed. I will allow an exception, if you are entitled to an exception. The matter of amendment is within the discretion of the Court.

Mr. Coulomb: I don't think so when the change is so radical.

20 The Court: If the Court has erred, it will be regarded that the exception is allowed.

---

JOHN JOSEPH FALSEY, sworn for plaintiff.

Direct examination.

30 By Mr. Davis:

Q. Where do you live?

A. Trenton, N. J.

Q. Are you employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. In 1919, September 2nd, were you employed on that railroad as a brakeman?

A. Yes, sir.

Q. And were you or were you not in the crew of which Mr. Joseph Reed was conductor?

A. I was.

Q. How long had you worked on that road?

A. Since 1912.

Q. Seven years, then, at that time?

A. Yes, sir.

Q. How long had you worked on the crew of which Mr. Joseph Reed was conductor?

A. About one month—not quite.

Q. You had worked with him about a month?

A. Yes.

Q. Had he been accustomed to run this particular train out?

A. Yes, sir.

Q. You left Trenton at what time?

A. About ten o'clock.

Q. And in what capacity did you go?

A. Rear brakeman.

Q. Your duty was what?

A. To protect the train when it stopped.

Q. Any other duties? Did you have any duties at switching operations, and so forth?

A. If we went in on the side track it is my duty to close the switches and report the train into clear.

Q. Where were you riding on the train at the time that this accident occurred to Joseph Reed?

A. In the caboose—the rear car.

Q. What was the first you knew of this accident?

A. We went in on the siding. The hack gave a lurch and I knew we went in on the wrong track, the westbound instead of the eastbound track.

10

20

30

Q. Did you know you had gone on the wrong track until the hack reached the switch?

A. No.

Q. How fast were you going?

A. Pretty good rate—I couldn't say just how fast.

Q. What's your judgment?

A. I should say about twenty-five or thirty miles per hour.

Q. Had you observed any signals?

10 A. It is hard to see signals from the rear end on account of the steam from the engine even in clear weather.

Q. When you came through Farmingdale, what did you see there, if anything, about signals?

A. I didn't see the signals.

Q. Didn't see them any time as you were coming through?

A. No.

20 Q. What would be the signal at Farmingdale if the track was clear to Sea Girt?

Mr. Coulomb: Objected to as immaterial and irrelevant.

The Court: Objection is overruled, and an exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

30

*Judge (Seal)*

A. We would get a clear signal at Farmingdale.

Q. What is that clear signal? What color of light?

A. Green.

Q. You had worked on this road for how long a time? I mean on this branch?

A. From August 4, 1919.

Q. Before that time what branch had you worked on?

A. The Belvidere mostly. I had made three trips before on this particular branch.

Q. As I understand you, from August 4th until the date of this accident you had been running with conductor Reed on this run?

10

A. Yes, sir.

Q. Now, as I understand, you testified that when you arrived at Farmingdale, if the road was clear from there to Sea Girt, that you got a green light?

A. Yes, sir.

Q. What was the rule in case the switch at Manasquan was open?

A. Well, I hadn't had any instructions on it.

Q. Did you receive any instructions on that point at all?

20

A. No, sir.

Q. Was it part of your duty to know?

A. Well, I should close out the switch going by. That is, if I had any instructions on it. But I never did, because I was told to leave it open.

Q. I am speaking now when you are going east?

A. I wouldn't have to bother with that switch.

Q. If the switch was open and you were going east, when you arrived at Farmingdale, do you know whether or not any message was given to the crew with respect to the condition of that switch?

30

Mr. Coulomb: Objected to.

The Court: Objection overruled, and an exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

A. I had heard that they received—

The Court: Strike that out.

10 Q. Do you know of your own knowledge whether the crew had received instructions about it?

A. No, sir.

Q. The first thing you knew about the train being on the switch was the lurch in the hack?

A. Yes, sir.

Q. What sort of a lurch was that?

A. Well—

Q. Was it mild, or what?

A. No; it wasn't mild.

20 Q. Well, what?

A. Had I been standing up, it would have thrown me down. As it was, I was in a reclining position.

Q. How far did this train go before you stopped?

A. Well, when it stopped my hack, or the rear car, was down below the freight house—between the freight house and the passenger station.

30 Q. Come to the map and indicate on this map where your hack was. Now this is Jamesburg end and this is Sea Girt end, and there is the freight station and here is the passenger station.

A. Well, it was right about here—somewhere around here. (Indicating.)

The Court: Your caboose was?

A. Yes, sir.

Q. How far is that "X" mark there in the vicinity of the hack when the train stopped?

A. Pretty close to that.

Q. How far is it from this "X", what I call frog of the switch?

A. To the point of the switch?

Q. Yes; how many car lengths?

A. Well, I should judge about fifteen.

Q. That would be practically the length of the train?

10

A. Between twelve and fifteen.

Q. How far was it from the point where your caboose stopped, to the freight station?

A. Just about half way between the passenger station and the freight station.

Q. What would the distance be?

A. I should say about one hundred feet, or more; about one hundred feet.

Q. What were you going to stop at Manasquan station for?

20

A. To unload freight.

Q. Then you went beyond the station, did you?

A. Yes, sir.

Q. What sort of a night was it, Mr. Falsey?

A. Why, dark and rather foggy.

Q. Did the darkness and fog obscure the lights?

A. Of course I was on the rear end.

Q. After you got out?

A. After I got out, yes; I couldn't see the switch that we had come past.

30

Q. And why?

A. Because of the fog.

Q. What condition were the lights on the what do you call the thing?

A. The signal.

Q. Yes?

- A. Out; extinguished.  
Q. When the train stopped did you get out?  
A. Yes, sir.  
Q. Where did you go?  
A. Back beyond the tower.  
Q. Did you see Mr. Reed?  
A. Yes, sir.  
Q. Where was he?  
A. He was lying out along side of the freight  
10 track, between the eastbound and the freight track.  
Q. Is the freight track the switch that goes into  
the freight yard?  
A. To the freight station.  
Q. How far was he from the point of the switch?  
A. I should say about fifty feet.  
Q. To the east of the point of the switch?  
A. To the east of the point of the switch, yes, sir.  
Q. Alive at that time?  
A. Yes, sir.  
20 Q. How long had you known Mr. Reed?  
A. Over five years.  
Q. Did you know him well?  
A. Not so well until I went to work with him.  
Q. Was he a sober man?  
A. Yes, sir.  
Q. What did you know about his habits?  
A. Why, not much.

Cross-examination.

30

By Mr. Coulomb:

- Q. Mr. Falsey, whereabouts were you in the hack?  
A. Where was I in the hack?  
Q. Yes?  
A. On the right-hand side to the rear.

Q. Sitting down?

A. Yes, sir.

Q. On the floor of the hack?

A. No, sir; on the seat.

Q. On the right-hand side, did you say?

A. On the right-hand side to the rear.

Q. Were you paying any particular attention to the speed at which this train was going?

A. Yes, sir.

Q. What caused you to do that?

A. Well, when I felt the air—I didn't pay much attention until I felt the air applied, and as soon as I felt the air applied I braced myself and I leaned down and held on to a bunk, or upper cushion that we use as an upper bunk, that was down and I grabbed a hold of that, because you can never tell what is going to happen.

10

Q. That was before the lurch happened?

A. Yes, sir.

Q. You felt the air before the lurch occurred and braced yourself accordingly?

20

A. Yes, sir.

---

GEORGE E. HOLLOWAY, sworn for the plaintiff.

Direct examination.

By Mr. Davis:

30

Q. Where do you live?

A. Bordentown, New Jersey.

Q. You are related by marriage to Joseph Reed, were you not?

A. Yes, sir.

Q. What was that relation?

A. I am his brother-in-law.

Q. Did you marry his sister?

A. I did.

Q. How long had you known him?

A. Why, about thirty years.

Q. At the time of his death, you lived next door to him, did you not?

A. Yes, sir.

10 Q. How long had you lived next door to him?

A. Where we lived then, we had been there nearly five years; and before that we were living beside each other six or seven years.

Q. During all of these thirty years were you very intimate and friendly with him?

A. Just like brothers.

Q. What did you know about his habits, Mr. Holloway?

20 A. Well, he had good habits, we all said that about him, and I will say it myself.

Q. Did he smoke?

A. Once in a while.

Q. Did he have any extravagant habits?

A. Not to my knowledge he didn't, no, sir.

Q. How long had he been a freight conductor?

A. Why, in the neighborhood of ten years or more.

Q. How old was he?

A. Thirty-six or thirty-seven years old.

Q. What was his condition of health?

30 A. Fine; good health.

Q. Worked all the time?

A. Pretty near all the time.

Q. What do you mean pretty near all the time?

A. Only laid off occasionally, colds or something like that, nothing to take him off for a week at a time. Just colds same as we all have.

Q. Industrious man?

A. Yes, sir.

Q. Did he live with his family?

A. Yes, sir.

Q. Provide for his family?

A. Yes, sir; well.

Q. Did you know anything about his financial affairs, Mr. Holloway?

A. I know that he and I, through our wives, purchased our homes together, through the Bordentown Building and Loan Association. 10

Q. At the same time?

A. At the same time we supervised the building of the houses, built at the same time, and we had to borrow money out of the Building Loan to build them. At the time of his death they were no where near paid for. We were working and saving all the money we could to pay for them.

Q. You were working on that night?

A. Yes, we worked on opposite trains to one another. 20

Q. Were you familiar with his business affairs in particular?

A. I was, yes, sir.

Q. Often in his house?

A. Every day that I was home.

Q. What was his custom to provide for his family—Who handled his money affairs?

A. His wife handled the check and the money and that's the way my wife does. 30

Q. Do you know what his habit was about his check? What did he do when he got his check?

A. Lots of times he got it and took it home and gave it to his wife—he didn't even take it to work with him, he gave it to me to take home. I took his money when we got paid in cash the same way.

Q. For what purpose did he spend money for himself?

A. Only tobacco, that I know of.

Q. He had to have clothes?

A. Very few clothes he bought himself—his wife and mine bought clothes for us. I have only bought two suits of clothes since I have been married, and I have been married nineteen years. But I expect to reap something some day from it. That's the way I figure it out and that the way he did.

10 Q. You are a freight conductor on the Pennsylvania Railroad operated by the Director General at the time of this accident.

A. Yes, sir.

Q. How long had you been a freight conductor?

A. Thirteen years.

Q. You had the opposite run to Mr. Reed?

A. That was my regular job. I was offered that during July, August and September.

20 Q. Does your run take you through Farmingdale, Manasquan and Sea Girt?

A. Yes, sir; I am on the run now that Mr. Reed was killed on and the same crew.

Q. How long have you been on that run?

A. Since the twentieth of September. I worked on the other side of that job for four years before that.

Q. When you arrive at Farmingdale, if the road is clear through to Sea Girt, what signals did you  
30 get?

A. A clear signal, which is a green signal, that indicates that the track is clear. We use a green light for clear block signal.

Q. Won't you tell us what you mean by the use of the word clear?

A. I mean that the territory that the block covers

at that time is clear between the two points in the block. In other words, if it was day time, certain hours of the day, the block extension is short. At night time the block extension is long. From Farmingdale to Sea Girt is the block extension at night.

Q. What would that indicate with respect to switches?

A. The signal did not give the switches. The man that gives the signal ought to know, if he is on the job, that the railroad is perfectly set and there is nothing in the way. 10

Q. If it is perfectly set and ready for you to go through what light do you get?

A. A green one.

Q. Suppose the switch at Manasquan is open so that if you proceed eastward that you would come into that switch? What information, if any, would be given to you with respect to the condition of that switch?

Mr. Coulomb: Objected to as immaterial and irrelevant. 20

The Court: Objection overruled and exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

Judge (Seal) 30

A. We would be given a message or an order to stop and examine the switch.

Q. If no message or order was given to you, what was the rule with respect to that switch?

A. The rule was, the switch was set properly for the eastbound movement.

Q. Mr. Holloway, was this switch locked?

A. Was it locked?

Q. Yes?

A. When?

Q. Before the time of this accident?

A. I never saw the switch locked since I went up there until after this accident.

Mr. Coulomb: I move that be stricken out.

10 The Court: The words "Until after the accident" will be stricken out.

Q. We are concerned with the time up to the accident. Now, was that switch permitted to be open after you had received a clear light at Farmingdale?

Mr. Coulomb: Objected to as immaterial and irrelevant.

20 The Court: Objection overruled and exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

30 A. Do you want to know if it was allowed to be open?

(Question repeated.)

A. I don't understand what you mean.

Q. Suppose you were going eastward and you re-

ceived at Farmingdale a clear light, and after you had entered upon the block going toward Manasquan, was it permitted to open that switch and display a red light?

A. The switch would be left open before we passed the tower.

(Question repeated.)

A. What I want to know from you, who is going to be permitted to open the switch after I pass Farmingdale? 10

Q. Does the railroad rules permit after you have entered upon this block with a clear signal to open that switch and leave it open.

A. Oh, you are asking me a rule. The rules is that the switch shall be set for the current of traffic. The switch could have been left that way and we could have received a clear signal, not knowing the switch was on.

Q. Don't the rules of the company permit— 20

A. No; the rules of the company don't permit us to leave switches open to run in on sidings.

Cross-examination.

By Mr. Coulomb:

Q. Was this a siding?

A. You call it a siding. It is the westbound main track; yes, sir. 30

Q. Mr. Holloway, how long have you been rail-roading?

A. Twenty-two years.

Q. And along this section?

A. I have been on that territory and track for the last seven or eight years.

Q. You are familiar with the stations at Manasquan, Farmingdale and Sea Girt?

A. Yes, sir.

Q. The condition this signal was in at the time of this accident, it being testified in this case that there was a red light displayed—

A. Where was the red light displayed?

Q. It was testified in this case that there was a red light displayed at the switch.

10 The Court: The conductor said there was a red light at the switch.

Q. You call that a signal or the switch—

A. It is the switch target to indicate the position of the switch.

Q. Indicate it to whom?

A. Anybody who wants to see the switch.

20 Q. What does it indicate to you when the red light is shown?

A. That the switch is set for the westbound track.

Q. Why is it important that the switch is set for the westbound track?

A. Because he should know the current of traffic he is traveling.

Q. What would be the effect of that switch if set to the westbound track?

A. The train, if it did not stop before it got to the switch point would be on the westbound track.

30 Q. That switch is not controlled—the switch at Manasquan, which has this switch target, is not controlled from Farmingdale, is it?

A. Not the switch; no, sir.

Q. And the target isn't controlled—

A. Not the target; no, sir.

Q. That is what they call a ground lever switch, isn't it?

A. Yes, sir.

Q. And when the switch is turned so as to pass the train or the traffic going eastbound from the eastbound track to the westbound track, there is a red light shows on the direction of the eastbound train?

A. The red light and the green light shows the position; the green is for eastbound and the red for westbound movements.

Q. When that light is turned green, what position is the switch in? 10

A. Eastbound movement; normal position.

Q. And what would be the position in the westbound?

A. It would be red and improper position for the switch for the eastbound train.

Q. Is that switch arranged so that if the light shows red in the direction of Farmingdale it would admit trains passing from eastbound to westbound and also from westbound to eastbound—trains passing in both directions? 20

A. There is a position in both directions, and would give you switches to go on the westbound track if coming east.

Q. This switch was turned so that the train would pass from eastbound to westbound?

A. Yes.

Q. And it showed a red light in the direction of the eastbound train?

A. Yes, sir. 30

Q. Would the switch in that position accommodate traffic going westward?

A. Yes, sir.

Q. And that would show a green light I suppose in the direction of the westbound train?

A. Yes, sir; green indication to the westbound movement.

Q. That red light on that switch target—I call it a signal, because it is there to signal somebody—

A. Do you know the difference between—

Q. I am not asking any question, you have volunteered a lot; I would appreciate it some time out of court; but not now. That is there for the purpose of warning the engineers that the switch is open  
10 to the westbound track, so that he knows—

A. It is a warning to anyone that has a right to use it.

Q. It is a warning to the engineer?

A. It is a warning to all the crew.

Q. It is a warning to the engineer?

A. It is.

Q. I am speaking about the engineer?

A. It is a warning to the engineer.

Q. It don't make any difference what kind of a  
20 signal he got at Farmingdale, he is bound to expect there might be something happen there through negligence of some trespasser that might change the situation as he receives it at Farmingdale?

A. When he received the clear signal at Farmingdale and he is supposed to know, the man that delivers the signal, that the track is set perfectly to Sea Girt.

Q. Then he can go on with his eyes shut?

A. He don't go on with his eyes shut, but he can  
30 go on at the rate which he would move his train from one point to another.

Q. I am talking about signals, Mr. Holloway.

By the Court:

Q. Even though he got signals at Farmingdale which indicated a clear road to Sea Girt—

A. Yes, sir.

Q. Was he, nevertheless, bound to observe the danger signal or any other signal that might require him to shift his course?

A. He was bound to look that the signals was properly set ahead of him between any one of the points. There are a good many cuts in the track between the two points.

Q. That would include this red light indicating the position of this switch at Manasquan?

A. Yes, sir; indicating the position of the switch.

10

Re-direct examination.

By Mr. Davis:

Q. In case the switch was set for the through movement eastbound at Farmingdale, did that have any significance or bearing upon the question of rate of speed that the engineer would use in passing through the block?

20

Mr. Coulomb: Objected to as being immaterial and irrelevant under the pleadings, and this accident.

The Court: Objection overruled and exception allowed.

(Whereupon the defendant, by its counsel, prays a bill of exceptions which is hereby allowed and sealed accordingly.)

30

*Judge* (Seal)

A. The train had a right to run the speed that was specified for the train to run, and there was no ruling prohibiting us from running to the switch

provided we had the railroad set for us, and we don't reduce speed at every switch to see whether it is right or wrong. If we can't use it we go right on, because we expect it clear, because the block indication tells us that.

Re-cross examination.

By Mr. Coulomb:

10

Q. Do you mean to say that after receiving this clear signal at Farmingdale, that the conductor was perfectly proper in running his speed at 25 or 30 miles per hour?

A. After receiving the signal at Farmingdale.

Q. Yes?

A. Sure he was.

Q. That was perfectly good railroading?

A. Yes, sir.

20

Q. He had a perfect right?

A. Yes, sir.

Q. It was the customary thing for him to do?

A. Yes, sir.

Q. If due to the weather, he could not see this signal in time by reason of the fog, in your estimation, he was perfectly excusable?

A. I don't see why he would not be. If somebody left the switch wrong and he went in there, that was not his fault.

30

MAY C. REED, sworn for plaintiff.

Direct examination.

By Mr. Davis:

Q. You were the wife of Joseph Reed?

A. I was.

Q. And how long have you lived in Bordentown?

A. Most all my life.

Q. You were born there?

10

A. No; I was born in Brooklyn, N. Y.

Q. Did you come here when you were young?

A. When I was quite small.

Q. Who was your father?

A. Mr. Snyder at Hainesport.

Q. How long had you and your husband been married?

A. It would have been sixteen years in October.

Q. During all that time, of course, you and your husband lived together as husband and wife?

20

A. We did.

Q. How many children did you have?

A. One.

Q. A boy?

A. Yes.

Q. How old is he?

A. Thirteen. He was just about a week from thirteen when his father was killed.

Q. He lives with you?

30

A. He does.

Q. How old was your husband?

The Court: Does he go to school?

A. Yes.

Mr. Davis: He is under age to do anything else, if your Honor please.

Q. Where does he go to school?

A. Bordentown.

Q. In the High School?

A. Not yet; eighth grade.

Q. How old was your husband?

A. He would have been thirty-eight in October.

10 Q. This past October?

A. Yes.

Q. So that he was not quite thirty-eight at the time he died?

A. No.

Q. Do you know how long he worked for the railroad?

A. Well, I just don't know. He was qualified for freight conductor since 1904.

Q. As freight conductor?

20 A. Freight conductor.

Q. Did he work from that time on up to the time of his death as a conductor?

A. When he had opportunities.

Q. At first he had to stand extra?

A. Yes.

Q. At the time of his death was he a regular conductor?

A. He was.

Q. Did you know what his rate of wages were?

30 A. Well, as near as I can judge they was from \$150 to \$175, sometimes more according to the time he put in.

Q. You mean that per month?

A. Yes, per month.

Q. Did you get a statement from the railroad as to the wages he received in 1919?

A. I did and I can't find them. I think you mean 1918.

Q. Is this the statement made by the railroad as to the earnings of your husband during the year 1919?

A. That was up to the time of his death.

Q. From the first of January 1919?

A. He was off one month in April on a vacation.

Q. Does this mean that this was the wages that he earned from the first day of January, 1919 up to the day of his death, with the exception of such time as he was off? 10

A. I judge that is what it is.

Q. Was this sent you by the railroad?

A. Yes.

Mr. Davis: I offer it in evidence. (Admitted and marked "P1".)

The Court: If he made about \$175 per month, I suppose his income was about twenty-one hundred dollars per year. 20

Mr. Coulomb: This shows it was less than that.

The Court: This is only from the first of January to the first of September, with a month off.

Q. Mrs. Reed, your husband had received his pay how often? 30

A. Twice a month.

Q. What did he do with that money?

A. Brought it home when I didn't go after it.

Q. What did he do with it after he brought it home?

A. He didn't do anything with it, I had the handling of the money.

Q. You handled the money, all of it?

A. Yes, sir.

Q. What did you do?

A. I spent for the advantage of the family and the home.

Q. Did you save any money out of that?

A. I did, some.

Q. Were you buying a property?

A. We were.

10 Q. Paying on account of that from month to month?

A. Yes.

Q. Mr. Holloway testified that you were paying it to the Building and Loan at Bordentown?

A. We were.

Q. And that required you to pay from month to month?

A. Yes.

20 Q. Did you pay that out of your husband's earnings?

A. I did.

Q. What part or how much money did your husband use himself?

A. Well, he was allowed about five dollars per month but he didn't always spend it.

Q. He took that out of his—

A. I gave it to him.

Q. He received that out of his earnings?

A. Yes.

30 Q. The balance of it was spent on the family, was it?

A. Yes, and saved on the home.

Q. How long has that been going on?

A. The home?

Q. That custom prevailed of you taking care of the money?

A. Ever since we lived together as man and wife.

Q. Had he been getting about the same amount out of it?

A. No; when we were first married he got about a dollar every two weeks.

Q. Just use that for spending money?

A. Yes.

Q. How old are you, Mrs. Reed?

A. Thirty-seven.

Q. What was the condition of your husband's 10 health?

A. Well, I considered him, wouldn't say a real robust man, but a man could do a day's work any time—once in a while a cold.

Q. Any serious spells of sickness?

A. Never since I have known him.

Q. Was he an industrious man?

A. He surely was.

Q. Did he lose much time?

A. No.

20

Q. Could you tell us about how much time he was off during the course of the year?

A. Well, I don't just know. Of course last year he was off more because he took a vacation in April.

Q. Did he lose all of that?

A. He didn't lose any time after that until the time of his death.

Q. In 1919, the year of his death, you said he had a month off. Did he lose all of that month or did the railroad give him a vacation of the part of that 30 time with pay?

A. He took it of his own accord.

Q. So he lost that?

A. Yes; the railroad does not give you a vacation.

Q. How many vacations did he have before, do you recall?

A. I know of two; we went to Buffalo two different times.

Q. During the whole of your married life?

A. Yes.

Q. How long were you gone?

A. Both were ten days as far as I can recall.

Q. Do you remember any other vacations he has had?

A. No.

10 Q. Worked all the other time?

A. Outside of a day now and then to do a little work at home.

Q. Can you tell us, aside from this spending money that you have testified to, about how much he spent on himself for clothes?

A. Very little; that is all I can say.

Q. Can you give us any idea, Mrs. Reed?

A. Well, I don't know, but I know we didn't get any more than we needed. He had not had a suit  
20 within four years up to the time he died.

Q. And why were you doing that?

A. Buying a home.

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BENJAMIN A. BROOK, sworn for plaintiff.

Direct examination.

30 By Mr. Davis:

Q. Where do you live?

A. Windmore, Montgomery County, Pennsylvania.

Q. What is your business?

A. I am employed by the Penn Mutual Life Insurance Company.

Q. In what capacity?

A. I have charge of rates and values in the Actuary Department.

Q. How long have you been employed in that capacity?

A. I have been in that department ever since 1897, and for the last 15 years have had charge of this work.

Q. Does that work in which you are engaged have to do with the estimating of the expectancies of life and values of income? 10

A. It does.

The Court: Not values of incomes—expectancy of life.

Mr. Davis: I said expectancy of life and values of incomes. 20

Q. Mr. Brook, what method is used or tables in reaching the expectancy of life?

A. The expectancy of life can be ascertained from any mortality table. The one I have in mind is the Carlyle Table of Mortality. To make a mortality table you have to have the statistics to go into it. After you have the number living at each age and the number dying at each age, you can very easily get the expectancy of life. 30

The Court: That is the probable expectancy of life?

A. We don't mean that any particular person will live so many years, because you can't say that. It

is the average life time of the group at that age. One might die anytime and another might go through to age 104.

Q. Mr. Brook are there tables used for that purpose?

The Court: Is there any doubt, gentlemen, about the probable expectancy of life of this man? He was 36 years old.

10 Mr. Davis: 37—he was more than 37 but not 38.

Q. What was the probable expectancy of life for a man in good health at the age of 37?

A. Under the Carlyle table, 29 and 64/100 years.

Q. Do you have the American Experience?

A. I have.

Q. And what is the expectancy of life under the American Experience?

20 Mr. Coulomb: That is objected to, I don't know what it is.

The Court: There seems to be some slight difference.

Mr. Coulomb: I know there is some slight difference between the Carlyle Table and the other tables.

30 Q. Now, Mr. Brook, supposing a man had an earning capacity of \$175.00 per month at the age of 37, what would be the present money value based upon his expectancy?

A. At what per cent.

Q. You may give us the different per cents. at which it is calculated.

The Court: It is a matter for the jury.

Mr. Davis: It is permissible.

The Court: I think the jury is just as capable as this man. I never knew such testimony to be introduced. However, I will hear you on it. But I have not the slightest doubt that this jury is just as competent as this gentleman is to figure that out. You see there are other elements to be considered in the case too. 10

Mr. Davis: Of course they are considered under any condition, whether he testifies or whether he doesn't.

Q. Do you have it figured out?

The Court: I don't want him to figure it out, because I think the jury is perfectly competent. 20

Mr. Davis: I will waive the question then, if your Honor please. That is our case.

PLAINTIFF RESTS.

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Mr. Coulomb: I desire at this time to make a motion for non-suit on the ground that from the evidence in this case, as it now appears, there is no negligence with which the defendant may be charged and which contributed to the death of Mr. Reed. In the second place, that the accident which caused his death was one which he was in law charged with having assumed the risk or being incident to the natural and ordinary operation of rail- 30

road trains. And in the third place, that he himself assumed the risk. Also as a matter of law under the case of Bogue vs. Pennsylvania Railroad Company that the negligence of his fellow servants obviously should have been known to him. And that, further than that there is no proof in this case that there was any negligence at all on the part of the railroad company in the maintaining of that signal. There is no allegation or proof that there was negligence in the operation of the train, itself, excepting  
10 the admission of the pleadings, which I understand your Honor allowed, that is, that the engineer negligently operated the train and there is no proof of that. Because the only testimony we have in the case was that it was good railroading for Mr. Madden, the engineer, to have operated his train in the way he did. And the further point that he testified and the others have testified that he was unable to see this red signal by reason of the fog, and that  
20 he stopped his train as soon as he saw it.

The Court: Motion to Non-suit is denied, and exception noted.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

Mr. Coulomb: Now if your Honor please, the defendant has no witnesses. I desire at this time to  
30 renew my application for a direction, on the same ground on which I move for non-suit.

The Court: The motion is denied and an exception is allowed for the defendant.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

*Judge* (Seal)

**CHARGE OF THE COURT.**

The Court: Gentlemen of the Jury, this case must be decided by you in the strict light of the proof and the law, regardless of every other consideration.

It is the function of the Court to lay down the rules of law for your guidance, which must be applied to the facts. You have no power to lay down any law. You are bound by the law which the Court pronounces. 10

The facts, however, are for your exclusive consideration and decision. It is the function of the Court, however, to point out questions for your consideration and it is your duty to consider these questions, and not transcend the bounds of your authority by undertaking to decide something that is not in the case, or by undertaking to lay down any law which you think should govern the case. 20

You have nothing to do with the wisdom or unwisdom of the law. As law abiding men, you are bound by the law and you are bound by the proof regardless of the consequences, wherever it leads you in the decision of the case.

Now, the plaintiff is Mrs. Reed. She is the executrix of her deceased husband. She sues the defendant, the Director General of Railroads of the United States, in behalf of herself and her infant son, a lad of thirteen years of age, for compensatory damages growing out of the death of her husband, which occurred on the morning of September 2nd, 1919, in the locality of Manasquan, Monmouth County, this state. He was employed as a conductor under the Director General of Railroads when he met his 30

death. He was in the service of the company at that time and on duty.

The suit is based upon the theory that Mr. Reed came by his death through the negligence of the defendant or the defendant's agents, either in whole or in part. The suit is brought under an act of the Congress of the United States, which it saw fit in its wisdom to pass some years ago.

10 I will read the statute to you and ask you to pay particular attention to the contents of the statute, because it is very important that you should have a correct knowledge of this case.

20 Now the law says, "Every common carrier by railroad while engaged in commerce between any of the several states or territories or between any states and territories, or between the District of Columbia and any of the states and territories, and foreign nation or nations, shall be liable in damages to any person suffering an injury while he is employed by such carrier in such commerce, or in case of the death of such employee to his or her personal representative for the benefit of the widow or husband and children of such employees, and if none then to such employees' parents, and if none then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, works, boats, wharves, or other equipment."

30 Now, there you have the law as it has been declared by the Congress of the United States. Now, gentlemen, the plaintiff has the burden of proof in this case and she cannot recover unless she carries that burden successfully. She is bound to prove a

case of negligence under the act of Congress by a fair preponderance of the evidence.

Negligence has been defined to ~~exist~~<sup>consist</sup> in omitting something that a reasonably prudent man would do, or the doing of something that a reasonably prudent man would not do. If in either case, an injury be done to another, though unintentional, he may recover compensation therefor. It was the duty of the defendant company to provide the deceased with a reasonably safe place in which to do his work. It was always the duty of the defendant to furnish deceased with reasonably safe appliances. It was also the duty of the defendant to exercise reasonable care for the sake of the deceased while doing his work.

Reasonable care is that degree of care which you would have a right to expect of reasonably prudent person under the same or similar circumstances. Deceased had a right <sup>to expect</sup> that the place and his work were reasonably safe unless he had information or knowledge to the contrary, ~~but~~<sup>or</sup> was chargeable with such knowledge under the doctrine of reasonable care, which he was bound to observe for his own safety.

An employee assumes the ordinary risks of his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

The defendant denies liability in this case. It contends that it was in no sense guilty of any negligence whatever. The defendant, gentlemen of the jury, bear in mind is under no obligation to prove its innocence of the charge of negligence. The plain-

tiff has the burden of proof and must show that the defendant is guilty of negligence in whole or in part.

Defendant also contends that deceased was exposed to no dangers beyond those necessarily incident to his employment. You will have to consider all that has been contended by the defendant, in that connection, and in the light of the law which I have read to you.

10 Defendant furthermore contends that if you should find it was guilty of actionable negligence, you should also find deceased was himself guilty of contributory negligence for failure to exercise reasonable care for his own safety.

Contributory negligence is a defense and defendant has the burden of showing it, and the defendant must show it by a fair preponderance of the evidence, unless it has already been shown by the plaintiff in her side of the case. And if it is already shown, defendant is under no obligation to show it  
20 again.

Gentlemen, if the defendant was guilty of actionable negligence according to the proof, and the deceased was also guilty of negligence which contributed proximately to the cause of his death, that would be contributory negligence. And in the trial of a death case in the courts of New Jersey, contributory negligence, if shown on the part of the deceased, would prevent his widow from recovering any damages. But that is not so in this case. Be careful  
30 to bear that in mind, because the act of Congress upon which this suit is founded is different in that respect from the law of New Jersey.

I will read the act of Congress. Be careful to pay attention, gentlemen, to the provisions of this act. "That in all actions hereafter brought against any such carrier by railroad in and by virtue of

any provision of this act to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Now, gentlemen, you have heard the evidence bearing upon and touching the question of liability and contributory negligence. And you have heard the arguments of learned and experience counsel on both sides of this case. You must therefore investigate all the facts and circumstances carefully in the light of the contentions, the legitimate contentions, on both sides, regardless of whether the defendant submitted any proof or not. You must consider the proof that is before you and say whether or not the case of negligence has been made out under the act of Congress.

You must decide from the evidence, in the light of the law, whether defendant was guilty of actionable negligence which resulted in whole or in part in deceased death. If you find that he was not so guilty you will then be bound to return a verdict of no cause for action.

But if you find that the defendant was guilty of actionable negligence, then you must decide, if deceased was himself guilty of contributory negligence. If you find the deceased was so guilty you must diminish, cut down, the damages in proportion to the amount of the negligence attributable to the deceased. In other words, you must do exactly what the statute which I have read said.

It would be unjust and unlawful to compel the defendant to bear the whole burden of the damages

if the deceased himself was guilty of contributory negligence. If, however, you decide that deceased was not guilty of contributory negligence, after you have decided the question of actionable negligence, then, gentlemen, you will assess the damages without reference to the feature of contributory negligence. Because if you find the deceased was innocent of contributory negligence you cannot cut down the damages on that account. It is, I have said, 10 only when the deceased is found to have been guilty of contributory negligence that the damages must be cut down. The deceased might not have been guilty of contributory negligence. And then he may have been. Whether he was or not, is a question which you must decide from all the facts and circumstances—that is a jury question.

You must examine every fact and circumstance in the case before reaching a decision upon that question. If the deceased exercised reasonable care 20 for his own safety and acted like a reasonable prudent man under all the circumstances, he was certainly not guilty of contributory negligence.

Do not reach a decision, gentlemen, respecting the questions of fact which are involved in this case until you have considered the evidence thoroughly in the light of the contentions on both sides.

The damages recoverable in such a case are, what are known in the law as compensatory damages, not punitive damages; but by way of compensation 30 and not by way of punishment. The damages must, therefore, be measured by and therefore limited to the pecuniary loss, the money loss, which plaintiff and her son have sustained by reason of the premature taking off of the head of that family.

The statute says that the damages must be fair and just with reference to the injury—that is the

money loss which the widow and next of kin have sustained. You are not permitted to consider any thing but the financial loss. Excepting, as I have said, the element of contributory negligence, if you find that the deceased was guilty of that.

Deceased was 37 years of age. The deceased had a probable expectancy of life for twenty-nine years and something over. Of course, there is no certainty that he would have lived twenty-nine years. There is no certainty that he would have been able to work for twenty-nine years. There is no certainty that he would have been able to earn so much money the next year of his life. There are certain contingencies which you as reasonable men must necessarily take into consideration. He was earning approximately, if I remember the testimony, about one hundred and seventy-five dollars per month. He had regular employment. The testimony shows that he was a man of good habits, fair health, and lived with his family, and that he gave his wife his money, and that she managed the money, according to the proof, prudently.

You will have to take into consideration, gentlemen, the fact that deceased was getting his own living and necessary expenses out of his earnings, so that his family was not getting all of his earnings. There are certain contingencies to which I have adverted, natural contingencies, which you will have to take into consideration, like sickness and death and loss of earning power.

Justice Fort, of the Court of Errors and Appeals in this state, filed an opinion from which I will read. "What the plaintiff is entitled to recover is the capital fund, so to speak, which shall represent the present value of the pecuniary loss which will fall upon the widow and next of kin by the prema-

ture taking off of the deceased. That fund is to be ascertained by taking into account all the possibilities. The intestate might have died by the course of nature shortly after the occurrence of the accident. He might, had he lived, suffered financial reverses. The wife, had he lived, might have died before he did. So might his next of kin. Nothing is to be added for loss of society or wounded feelings, or anything else which cannot be measured by money and satisfied by pecuniary recompense.”

10 Mr. Justice Magee, who was afterwards Chancellor of this state, said in another case, speaking of damages of this sort, “They are to be determined” that is the damages, “Exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death.” The injury to be thus recovered for has been defined by this Court to be “The deprivation of a reasonable expectation of a pecuniary advantage which  
20 would have resulted by the continuance of the life of the deceased. Compensation for such deprivation is therefore the soul measure of damages in such a case.”

The defendant has handed me the following requests:

1. Under the testimony of this case it was not negligence for the railroad company to close the tower at Manasquan.

30 2. It was not negligence for the defendant not to have an attendant on duty at the switch at the point of the accident.

3. It was not negligence for the railroad company to fail to warn the engineer at Farmingdale that

the switch at Manasquan was open to admit a train to the westbound track.

4. It was not negligence for the defendant's engineer to fail to see the red signal on the switch target at Manasquan where the accident happened.

5. The engineer was not negligent in operating his train at a speed of 25 to 30 miles an hour.

10

6. The decedent assumed the risk incident to the dangers of his employment obvious to or known to him or which should have been known to him.

7. The decedent assumed the risk of the negligence of his fellow servants which you may find from the evidence were obvious or known to him or should have been known to him.

1st request. Under the testimony of this case it was not negligence for the railroad company to close the tower at Manasquan. I so charge you. It was not necessarily negligence. 20

2nd request. It was not negligence for the defendant not to have an attendant on duty at the switch at the point of the accident. I so charge you.

The third request is denied.

30

The fourth request is denied.

5th request. The engineer was not negligent in operating his train at a speed of 25 to 30 miles an hour. There is no law limiting the speed of a railroad train in this state. Now, whether or not in

the presence of a danger signal, this engineer was guilty of negligence in not slowing up, I submit to you. But I tell you, there is no law in the State of New Jersey limiting the speed of a train.

6th request. The decedent assumed the risk incident to the dangers of his employment obvious to or known to him or which should have been known to him. I have already charged you that, I think, in substance. I so charge you.

10

7th request. The decedent assumed the risk of the negligence of his fellow servants which you may find from the evidence were obvious or known to him or should have been known to him. I so charge you, if the risk was known to him or should have been known to him by the exercise of reasonable care—such care as you would expect a man of reasonable prudence to exercise.

20 That's all I have to say, gentlemen of the jury.

Mr. Coulomb: I would like to except to your Honor's refusal to charge—to the refusal to charge the third and fourth requests.

Mr. Davis: May we have an exception to your Honor's last charge with regard to the assumption of risk?

30 The Court: Gentlemen of the jury, I wish to charge you again on the assumption of risk. The employee assumes the ordinary risks incident to his employment, and also risks arising in consequence of special danger, known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by only

ordinary skill in the employment in which he engages.

Mr. Davis: My exception, your Honor, is that the last charge by the Court with regard to the assumption of the risk of negligence of the fellow servants—

The Court: Now, I laid down the rule of law. You will take as the assumption of the risk what I have just read to you, and that will be your exclusive guide. 10

Mr. Coulomb: Your Honor will allow me an exception to the refusal to charge?

Mr. Davis: The Court of Errors has expressly repudiated the assumption of the risk of negligence of a fellow servant. Now, the only thought that was in my mind as your Honor has charged is that he assumed the risk of the negligence of a fellow servant. 20

The Court: I charged you the seventh request of the defendant in the following language, "The decedent assumed the risk of the negligence of his fellow servants which you may find from the evidence were obvious or known to him or should have been known to him." I withdraw what I said in conformance of that request and withdraw that proposition from your consideration, and say that that is not the law. The law you understand is contained in the definition that I gave you of the as- 30  
sumption of risk, and I allow an exception to the refusal to charge the seventh request.

Mr. Coulomb: Your Honor, allow me an exception to the request—to the third, fourth and seventh requests to charge.

**NOTICE OF APPEAL.**

(Served July 22, 1920)

(Filed July 24, 1920)

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

10

MAY C. REED, Executrix of  
 JOSEPH REED, deceased,  
*Plaintiff-Respondent,*

vs.

WALKER D. HINES, Director  
 General of Railroads,  
 20 *Defendant-Appellant.*

Action at Law.  
 Notice of Appeal.

*To James Mercer Davis, Attorney of Plaintiff-Respondent:*

Take Notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case.

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BOURGEOIS & COULOMB,  
*Attorneys of Defendant-Appellant.*

[ENDORSED]

Service of copy of within notice of appeal is acknowledged this 22nd day of July, 1920.

James Mercer Davis,  
Attorney for Plaintiff-Respondent.

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**GROUND'S OF APPEAL.**

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(Served Aug. 2, 1920)  
(Filed Aug. 3, 1920)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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MAY C. REED, Executrix of  
the last will and testa-  
ment of JOSEPH REED,  
dec'd.,  
*Plaintiff-Respondent,*  
vs.  
DIRECTOR GENERAL OF RAIL-  
ROADS,  
*Defendant-Appellant.*

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Action at Law.  
Grounds of Appeal.

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The appellant states the following grounds of appeal:

1. The Court refused to grant the defendant's motion for a non-suit.

2. The Court refused to grant the defendant's motion for a direction of a verdict in favor of the defendant.

3. The Court refused to charge the defendant's third request to charge.

4. The Court refused to charge the defendant's fourth request to charge.

10 5. The Court refused to charge the defendant's seventh request to charge.

6. The Court permitted the following question to be asked and answered after defendant's objection:

“Q. And during the time that you had familiarized yourself with conditions along this road in your endeavor to qualify yourself for the job of running an engine over these tracks had there been operators at this point?

20 (Objected to. Objection overruled and noted.)  
A. Yes.”

7. The Court admitted over defendant's objection the following question and answer:

“Q. That had been your information had it?  
(Objection made and noted.)

30 A. It had not been my information. That was what I expected to find, because I had never received any other kind of information.”

8. The Court admitted over defendant's objection the following question and answer:

“Q. Was there any rule used and in force at that time on the railroad in that effect?  
(Objection made and noted.)

A. There was a rule that if I received a clear block signal, that is the indication for that block, that is, when I received a clear signal I don't expect to find any trains in the block or no open switches."

9. The Court admitted over defendant's objection the following question and answer:

"Q. Was the condition that you found at Farmingdale such a signal? 10

(Objected to and overruled.)

A. Clear signal."

10. The Court admitted over defendant's objection the following question and answer:

"Q. Now, in the absence of orders that you were to take that switch, and with a clear light at Farmingdale, what did you, as a practical railroad man, expect to be your line of travel from Farmingdale toward Sea Girt? 20

(Objected to. Objection overruled.)

A. Clear."

11. The Court admitted testimony showing conditions at Farmingdale over defendant's objection.

12. The Court admitted over defendant's objection the following question and answer:

"Q. On this night did you receive any orders to that effect? 30

(Objected to and objection overruled.)

A. No, sir."

13. The Court admitted over defendant's objection the following question and answer:

"Q. In the absence of these instructions,

what do you, as one of the men in charge of this train, expect to be your route of travel under the rules of the company and under the custom as pursued by men in charge of that train?

(Objection made and overruled.)

A. We should have gone on the eastward track."

10 14. The Court permitted the plaintiff to amend her complaint by adding as grounds of negligence, "as an act of negligence on the part of the railroad company, through its servants and agents, that the engineer in charge of this train ran into the open switch with the red lights against him."

15. The Court admitted over defendant's objection the following question and answer:

"Q. What would be the signal at Farmingdale if the track was clear to Sea Girt?

20 (Objected to. Objection overruled.)

A. We would get a clear signal at Farmingdale."

16. The Court admitted over defendant's objection the following question and answer:

"Q. If the switch was open and you were going east, when you arrived at Farmingdale, do you know whether or not any message was given to the crew with respect to the condition of that switch?

30 (Objected to. Objection overruled.)

A. No, sir."

17. The Court admitted over defendant's objection the following answer:

“Q. Suppose the switch at Manasquan is open so that if you proceed eastward that you would come into that switch? What information, if any, would be given to you with respect to the condition of that switch?

(Objection made and overruled.)

A. We would be given a message or an order to stop and examine the switch.”

18. The Court admitted over defendant’s objection the following question and answer: 10

“Q. Now, was that switch permitted to be open after you had received a clear light at Farmingdale?

(Objected to. Objection overruled.)

A. Oh, you are asking me a rule. The rule is that the switch shall be set for the current of traffic. The switch could have been left that way and we could have received a clear signal, not knowing the switch was on.” 20

19. The Court admitted over defendant’s objection the following question and answer:

“Q. In case the switch was set for the through movement eastbound at Farmingdale, did that have any significance or bearing upon the question of rate of speed that the engineer would use in passing through the block?

(Objected to and objection overruled.)

A. The train has a right to run the speed that was specified for the train to run, and there was no ruling prohibiting us from running to the switch provided we had the railroad set for us, and we don’t reduce speed at every switch to see whether it is right or wrong. If we can’t 30

use it we go right on, because we expect it clear,  
because the block indication tells us that.”

BOURGEOIS & COULOMB,  
*Attorneys for Defendant-Appellant.*

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[ENDORSED]

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Service of a copy of within grounds  
of appeal is acknowledged this 2nd day  
of August, 1920.

James Mercer Davis,  
Atty. for Pltf.-Respdt.

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NEW JERSEY COURT OF ERRORS AND  
APPEALS.

MAY C. REED, Executrix of  
the last Will and Testa-  
ment of JOSEPH REED,  
Deceased,

*Plaintiff-Respondent,*

VS.

DIRECTOR-GENERAL OF RAIL-  
ROADS,

*Defendant-Appellant.*

Action at Law.

BRIEF OF PLAINTIFF-RESPONDENT.

This suit arose under the Federal Employers' Liability Act of April 22, 1908.

The facts were that Joseph Reed, the plaintiff's intestate, on September 2, 1919, was engaged in interstate commerce in operating a train under the control of the Director-General of Railroads, from Trenton, New Jersey, to Sea Girt, New Jersey, which, in its course of travel, passed Farmingdale and Manasquan, New Jersey. There was a single track road leading from Monmouth Junction, through Freehold, Farmingdale, until Manasquan was reached, where there was a double track system on to Sea Girt; the two tracks converging into one at Manasquan. There was a switch light at the junction of the two tracks

at Manasquan, which indicated the condition of the switch to trains moving eastward, i. e., from Farmingdale to Sea Girt; from this point trains going eastward moved on the right-hand track and trains moving westward, i. e., from Sea Girt to Manasquan moved on the left-hand track. When a train was moving eastward and was to continue on the eastbound track, the light at Manasquan showed green; when it was to move from the eastbound track to the westbound track, the light showed red. There was a block signal station at Farmingdale, and if the track was clear for the eastbound movement of the train, which included passing on the eastbound track at Manasquan, green lights were set at Farmingdale. If the train moving east was to take the westbound track at Manasquan, or there was anything other than a free, clear, open track, special orders were given at Farmingdale.

On the night in question the decedent's train was moving east, and on the arrival at Farmingdale, the lights exposed to the train crew indicated a clear, unobstructed track for eastbound movement as far as Sea Girt, and the train continued on its journey under that supposition. It appears that there was a fog near the ground and when the train approached Manasquan, the engineer, still being under the opinion that the track was clear to Sea Girt, discovered a red light at the switch, which indicated to him that there was an open switch, causing his train to pass from the eastbound track to the westbound track.

There was freight in the freight car in which Reed was riding to be discharged from the train at Manasquan. Reed went to the door of the car as his train was approaching the freight station at Manasquan, doubtless for the purpose of observation, but just at that instant the car on which he was riding

passed suddenly from the straight line into the switch, and threw Reed out of the door onto the track and killed him.

This suit was brought under the Federal Employers' Liability Act, alleging that both Reed and the railroad were engaged in interstate commerce at the time. On the trial of the cause and in the pleadings, it was admitted that Reed and the railroad were engaged at the time in interstate commerce.

Reed left him surviving a widow and minor son, who sought damages for his untimely death in this accident, and a verdict of \$11,000 was rendered by the jury. From this verdict the defendant appeals. The Court permitted the plaintiff to amend her complaint by adding as a ground of negligence that "the engineer in charge of the train ran into the open switch with the red lights against him." That, and the condition of the lights at Farmingdale were the substantial acts of negligence charged against the defendant.

We will now proceed to argue the exceptions seriatim.

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### ARGUMENT.

1. The first exception is that the Court refused to grant the defendant's motion for a non-suit, and the second is, that the Court refused to grant the defendant's motion for a direction of a verdict in favor of the defendant. The testimony fully sustains the statement of facts set forth above. The defendant offered no testimony so that at the close of the entire case the undisputed facts were as indicated in my statement of facts above. It is submitted that no

argument is necessary to sustain the Court's ruling in refusing to grant a non-suit and to direct a verdict.

2. The third exception is that the Court refused to charge the defendant's third request to charge. "It was not negligence for the railroad company to fail to warn the engineer at Farmingdale that the switch at Manasquan was open to admit a train to the westbound track." The testimony shows (S. C. 82-24): "When he received the clear signal at Farmingdale, and he is supposed to know, the man that delivers the signal, that the track is set perfectly to Sea Girt." "He don't go on with his eyes shut, but he can go on at the rate which he would move his train from one point to another." And again, (S. C. 83-34), "The train had a right to run the speed that was specified for the train to run, and there was no ruling prohibiting us from running to the switch, provided we had the railroad set for us, and we don't reduce speed at every switch to see whether it is right or wrong. If we can't see it, we go right on, because we expect it clear, because the block indications tells us that." That is the testimony of other witnesses also called and is undisputed.

So that the Court had no right to charge the jury that it was not negligence for the railroad company to fail to warn the engineer at Farmingdale that the switch at Manasquan was open to admit a train to the westbound track; that was a question of fact for the jury, taking the most favorable view for the defendant; there being no dispute in the testimony, it might have become a Court question to have charged that it was negligence, but certainly the defendant could not expect the Court to charge his request.

3. The fourth request to charge was, "it was not negligence for the defendant's engineer to fail to see the red signal on the switch target at Manasquan, where the accident happened." It is true that there was some fog. The engineer, however, saw the light when he was two or three cars away from it, nevertheless, ran into the switch. The train was due for a stop at Manasquan and the evidence shows that the engineer ran his train considerably beyond the point where he was to stop for the purpose of discharging the freight, which indicates either that he failed to notice the signals or that he did not have his train under control. It was, therefore, in view of this state of facts perfectly proper for the Court to refuse to charge the fourth request of the defendant's request to charge.

4. The fifth ground of appeal concerns the defendant's seventh request to charge as follows: "The decedent assumed the risk of the negligence of his fellow-servants which you may find from the evidence were obvious or known to him or should have been known to him." The Court had a perfect right to refuse to charge this request, because there was no evidence in the case that any negligence of any fellow-servant was obvious or known to the decedent, for the Court is not bound to charge any proposition of law, even though it be correct, unless it has a proper application to the matter then in question, *New Brunswick, etc., vs. Tiers*, 24 N. J. Law 697; *Consolidated Traction Co. vs. Haight*, 59 N. J. Law 577; but as a matter of fact the statement of the law as contained in the seventh request to charge is not the law of the State of New Jersey.

In *Swank vs. P. R. R.*, 111 Atl. 44, the Court of Errors, speaking through Judge Ackerson, said:

“The second difficulty with defendant’s contention on this point is that, even though the foreman could under the facts in this case be considered as the fellow-servant of decedent, nevertheless the common law doctrine of assumption of risk, where it arises solely and directly out of the negligent acts of fellow-servants, has been abolished by the Federal Employers’ Liability Act, as was held by us in the recent case of *Stiedler vs. P. R. R. Co.*, 109 Atl. 512, where Justice Minturn, speaking for this court, said inter alia: ‘We think there was ample proof in the case from which the jury might infer negligence upon the part of the co-employee. Such negligence is contemplated as the basis for an action under the federal act; and the common law doctrine of assumption of risk from the negligence of fellow-servants is thereby abolished, and the plaintiff’s contributory negligence presents merely a basis for the reduction of damages, based upon the rule heretofore peculiar to admiralty,’ and citing cases.”

And in the very recent case, *Anderson vs. Director-General of Railroads*, 110 Atl. 829, Chief Justice Gummere said:

“To hold, therefore, that an injury resulting from the negligence of a fellow-servant is one of the risks assumed by an employe, and that the carrier may set up that assumption in bar of the action, would be in legal effect, to strike out the express provision of the act just recited. We find nothing in the opinions to which we have been referred which justifies the assertion that

such a construction of the statute has been put upon it by the federal courts; and in the absence of any judicial declaration to the contrary, we hold that the legislative purpose declared by the act is that the danger of injury resulting from such negligence shall not be considered to be a risk that has been assumed by the employe. In doing this, we follow our earlier declaration in *Stiedler vs. P. R. R. Co.*, 109 Atl. 512."

So that we have the controlling decisions of our Court of Errors and Appeals to the effect that the defendant's seventh request to charge is not the law of the land.

5. The sixth error complained of concerns the admission of testimony recorded on page 25 of the testimony, and it will appear from an examination of the testimony on that point that no objection was made to the question, but was only made after the question had been answered. That also applies to the tenth ground of appeal, to the twelfth ground of appeal, thirteenth ground of appeal and the seventeenth ground of appeal contains no objection and no ruling of the Court.

*Willet vs. Morrison*, 100 Atl. 154;

*Dickinson vs. D. L. & W.*, 100 Atl. 203;

*VanBlarcon vs. R. R.*, 72 N. J. L. 33;

*Hammond vs. Morrison*, 100 Atl. 154.

We think that this is a sufficient answer to the reasons assigned, but will take them up and discuss the merits of them seriatim.

Before proceeding further the Court should understand that the controlling signals in this block between Farmingdale and Sea Girt were located at

Farmingdale for traffic moving eastward and at Sea Court for traffic moving respectively eastwardly also, and that all instructions regarding the condition of the track and the manner of moving tracks were given at these points to trains entering the block and it appears from the testimony that if the track was clear for an eastwardly movement of a train from Farmingdale, a green light was displayed, which indicated that all switches were closed and that the track was set in a perfect order for an eastbound movement, and if there was anything wrong with any part of the track, namely, an open switch or anything else for which special notice was to be had, a special order was given at Farmingdale to trains entering on block from that direction, and in the absence of any special order when the light was given, it indicated that all switches including the one at Manasquan and every other feature of the block was in perfect order for the eastwardly movement of the train, so that the failure to warn, which was referred to as one of the acts of negligence was a failure to warn at the accustomed place, to wit, Farmingdale—there the warning was expected to be given if any was required, and there the trainmen had a right to rely that proper warnings would be given if needed, and the failure to give warning at Farmingdale of the fact that the switch was open at Manasquan was, therefore, proper proof under the facts of this case so that all of the testimony which was objected to on the part of the defendant as to the condition of things at Farmingdale became proper under this view of the case.

We shall, therefore, now proceed to the discussion of the particular items of testimony, to which objection was made.

The first objection to testimony occurs on page 25 S. C. to the following question and answer:

“Q. And during the time that you had familiarized yourself with conditions along this road in your endeavor to qualify yourself for the job of running an engine over these tracks, had there been operators at this point?

A. Yes.”

It should be borne in mind that one of the acts of negligence was that “the defendant carelessly and negligently maintained a certain switch without proper safeguards and unattended.” “That no lights or other warning was given of the condition of said switch; that a reasonably safe place to work was not provided for the said Joseph C. Reed; that the road-bed and appliances at the place complained of \* \* \* were not kept in a reasonably safe condition.”

The testimony shows that the signals maintained at Farmingdale indicated the condition of the track and switches comprising the block from Farmingdale to Sea Girt, so that the signals at Farmingdale indicated the condition of the switch at Manasquan, and operators were stationed at Farmingdale for the purpose of seeing that the signals at Farmingdale were in proper shape and in giving orders to the trainmen. It is, therefore, perfectly apparent upon the statement of these facts that the question whether or not operators had been maintained or stationed at Farmingdale was an important and pertinent inquiry.

The second objection to testimony is on page 26 S. C. It is really not an exception to testimony. It is the refusal of the Court to strike out an answer because it was said not to be responsive. An examination of the question and answer will show that it was responsive.

The next exception to testimony is on page 40 S. C. The testimony sought to be elicited was to the effect whether or not there was a rule of the company governing the conduct in question. No reasons for the objection were assigned to the Court, just a simple bare objection and it is submitted first that the testimony was competent and proper, and second that the defendant cannot complain, because no ground of the objection was stated.

The next objection to testimony occurs on page 47 S. C. The information sought to be elicited by this question, what did the signals at Farmingdale indicate to this railroad man, and as a practical man, what did he have reason to expect the condition of the road to be? This testimony was objected to as immaterial and irrelevant.

I submit that this testimony is the very gist of the plaintiff's action and tends to support the contention of the plaintiff with respect to the acts of negligence complained of.

The next objection to testimony is found on pages 56 and 57 S. C., and the defendant's objection was that the conditions at Farmingdale had no bearing on the conditions as they existed at Manasquan. It is submitted that inasmuch as Farmingdale was the beginning of the block and that the signals maintained at Farmingdale controlled the conduct of the train and indicated the condition of the track from Farmingdale to Sea Girt, that it was material and proper testimony.

The same reasons and argument apply to the following objection to testimony found at the top of page 58 S. C. and the same argument applies to the objection to testimony found on page 68 S. C.

The next objection is found on page 77, and the question was intended to elicit what information, if

any, would be given to the engine man of train in question, as to the condition of the switch at Manasquan. Testimony shows, and it is common knowledge that conditions of these switches are indicated by lights and as to whether or not there was any light or whether or not any light or other information should have been given to this engine man, was certainly a pertinent inquiry.

The next objection to testimony is found on page 78. The inquiry made in the question objected to was as to the rule of the company concerning the condition of the switch when there was a clear light at Farmingdale. It is submitted that this is proper inquiry.

Another objection stated in the grounds for appeal is the testimony contained on page 79. No objection was made to the testimony and no ruling of the Court, and, therefore, it requires no argument.

The objection to testimony contained on page 83 was in the nature of a question asked an expert witness as to the significance of lights on a railroad track. It is submitted that the inquiry was proper.

This concludes the exceptions taken to the testimony and we think there is no error committed by the Court.

6 We return now to the defendant's fourteenth ground of appeal, which concerns the action of the Court in allowing the plaintiff to amend his complaint. We submit that this was a proper exercise of power and cite the following authorities:

*Thompson vs. Pepler*, 102 Atl. 379. Chancellor Walker said:

"It will be observed that there is in the act (the Practice Act) no limitation whatever upon the power of amendment, but that power is given to permit the statement of a new or different case of action."

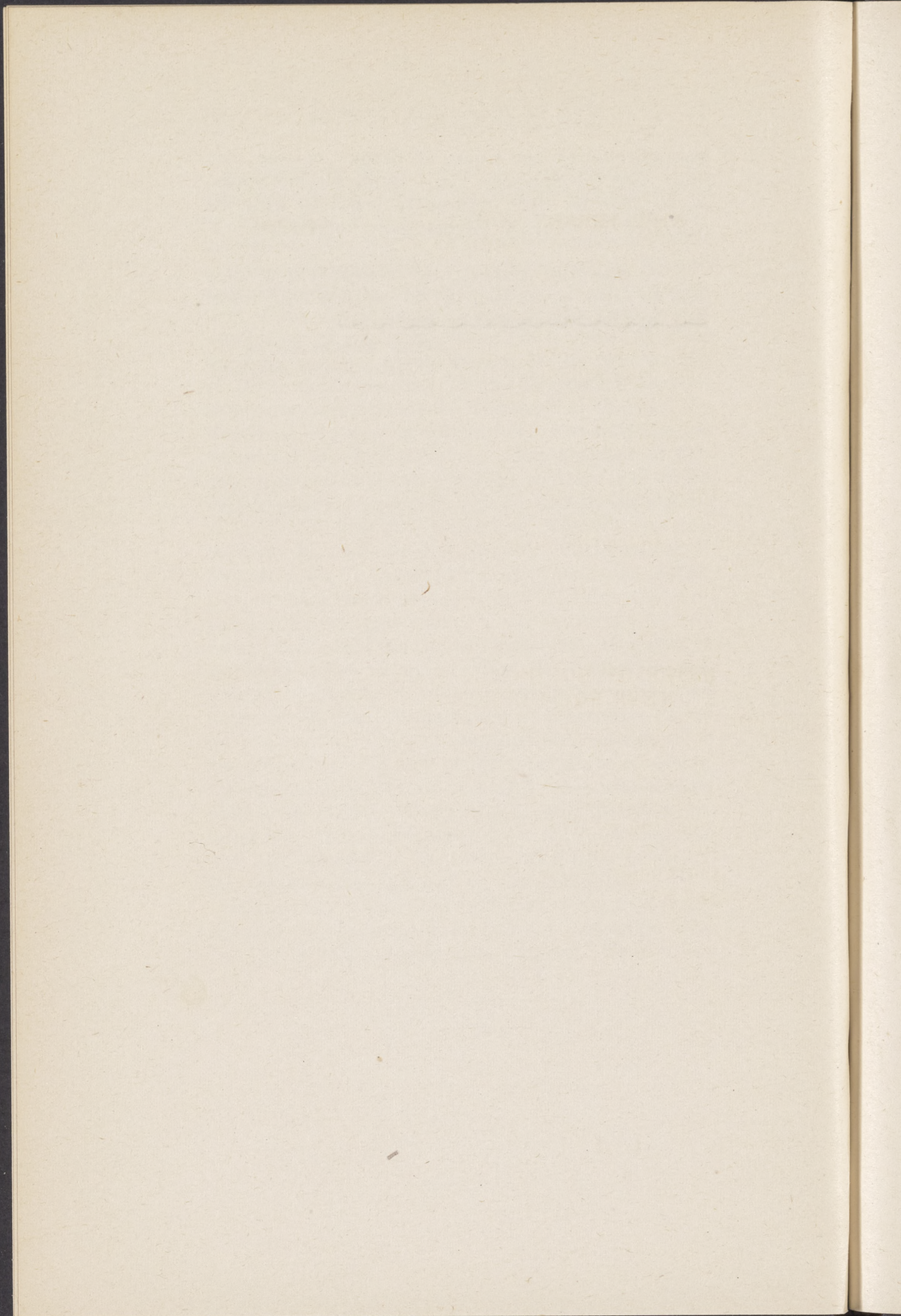
In *Miller vs. W. J. & S. R. R. Co.*, 76 Law 282, at page 284 (70 Atl. 175), it is observed that in *Farrier vs. Schroeder*, 40 N. J. Law 601, an amendment was permitted after trial. This mere statement might give the impression that the amendment was allowed some considerable time after trial, but an examination of the ~~Court~~ <sup>Case</sup> discloses that it was made at the conclusion of the trial, which, in a sense, is after the trial." The statute known as the practice act of 1912, under Sections 23 and 24 provide that an amendment may be made "before or at the trial the statement of a new or different cause of action in the complaint or counter-claim." The accident in this case occurred September 2, 1919, and the trial of the action occurred on March 8, 1920, so that the statute of limitation had not run and no objection can successfully be made on that ground. Furthermore, in *Swank vs. R. R.*, reported 111 Atl. 744, Judge Ackerson, writing the opinion, said, "Whether this (referring to the provisions of the practice act referred to) would permit the statement of a new or different cause of action after the limitation prescribed by statute in which to bring the action had matured, we find it unnecessary to determine, for we do not consider that the amendments amounted to the statement of a new or different cause of action, but merely expanded or amplified what was already alleged in support of the action, and, therefore, related back to the commencement of the action and were not effected by the intervening lapse of time." No surprise was claimed by the defendant.

In the Swank case above referred to the trial Court allowed the plaintiff to amend her complaint after the statute of limitations had expired. That ruling

was affirmed by the Court of Errors in our own State, and the Supreme Court of the United States, on October 18, 1920, refused to interfere with the ruling of the Court of Errors above referred to.

It is, therefore, respectfully submitted that there was no error committed by the learned trial Court, ~~and that the rule should be discharged.~~

JAMES MERCER DAVIS,  
*Attorney of Plaintiff.*



NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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MAY C. REED, Executrix of  
the last will and testa-  
ment of JOSEPH REED, de-  
ceased,  
*Plaintiff-Respondent,*

vs.

DIRECTOR-GENERAL OF RAIL-  
ROADS,  
*Defendant-Appellant.*

Action at Law.

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BRIEF OF BOURGEOIS & COULOMB, ATTOR-  
NEYS FOR DEFENDANT-APPELLANT.

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The appeal in this case brings up for review a judgment of \$11,000 rendered in favor of the plaintiff as a result of a trial and verdict in the Burlington County Circuit before Judge Howard Carrow, and jury.

**STATEMENT OF FACTS.**

The plaintiff's testate, Joseph Reed, was employed by the Director-General on September 2, 1919, as a freight conductor, his run being from Trenton to Sea Girt or Long Branch. This run took him through the village of Manasquan in Monmouth County. On the evening of the 2nd day of September, he started out from Trenton with a train of freight cars which it was admitted contained interstate freight. The proof shows that from Monmouth Junction to Manasquan the railroad is practically a single track railroad, with switches and turn-outs at different stations along the route. From Manasquan, eastward, the railroad is double tracked, forming a west bound and east bound track, the east bound track extending in the direction of Long Branch, and the west bound track ending at Manasquan. The single track of the railroad proceeds eastwardly without any deviation, and as the track approaches Manasquan there is a switch leading from from the east bound track to the west bound track of the double tracked railroad. It also appears that the switch was protected by a target carrying red and green lights and discs, and when the switch was in such a position that trains would move from the east bound track to the west bound track the target would show a red disc in daytime and a red light at night. The disc and the light changed from red to green as the switch was changed, so that if an engineer of a train proceeding eastwardly in the direction of Long Branch were confronted with a red light or a red disc, he would know that the switch was so placed that the train would move over

from the east bound track to the west bound track, and if confronted with a green light or green disc, he would know that the train would proceed along the east bound track. On the night in question there was a thick fog and as the engineer approached the switch, he could not see the red light until he got within such a short distance of it that he was unable to bring his train to a stop before it had passed from the east bound track to the west bound track. The train in so passing caused a jolt which threw the conductor out of the freight car in which he was riding to the ground. It appears in the proof that some circumstances attracted the conductor to the door of the car just before the train entered the switch, and while he was standing at the door, the train passed over from one track to the other causing the jolt which threw him out. The fall resulted in his death.

This suit was based upon the Federal Employers' Liability Act of April 22, 1908, U. S. Comp. Statutes, 1916, Section 8657.

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**POINTS OF LAW.**

The following points are relied upon for reversal:

1. The Court erred in refusing to grant defendant's motion for a non-suit. (Motion for non-suit, page 93, line 29; ground of appeal No. 1, page 107, line 34.)

2. The Court erred in refusing defendant's motion for a direction in favor of the defendant. (Motion for direction, page 94, line 30; ground of appeal No. 2, page 108, line 1.)

3. The Court erred in refusing to charge defendant's third request to charge, as follows:

"It was not negligence for the railroad to fail to warn the engineer at Farmingdale that the switch at Manasquan was open to admit a train to the west bound track."

(Defendant's third request to charge, page 102, line 34; ground of appeal, No. 3, page 108, line 6.)

4. The Court erred in refusing to charge defendant's fourth request to charge, as follows:

"It was not negligence for the defendant's engineer to fail to see the red signal on the switch target at Manasquan where the accident happened."

(Fourth request to charge, page 103, line 4; ground of appeal, No. 4, page 108, line 8.)

5. The Court erred in refusing to charge defendant's seventh request to charge, as follows:

"The decedent assumed the risk of the negligence of his fellow servants which you may find from the evidence were obvious or known to him or should have been known to him."

(Seventh request to charge, page 103, line 15; ground of appeal, No. 5, page 108, line 11.)

6. The Court erred in permitting the following question to be asked and answered over defendant's objection:

"Q. And during the time that you had familiarized yourself with conditions along this road in your endeavor to qualify yourself for the job of running an engine over these tracks had there been operators at this point?"

(Objected to. Objection overruled and noted.)

A. Yes.”

(Objection, page 25, line 15; ground of appeal No. 6, page 108, line 13.)

7. The Court erred in admitting over defendant's objection the following question and answer:

“Q. That had been your information, had it?  
(Objection made and noted.)

A. It had not been my information. That was what I expected to find, because I had never received any other kind of information.”

(Objection, page 26, line 38; ground of appeal No. 7, page 108, line 23.)

8. The Court erred in admitting over defendant's objection the following question and answer:

“Q. Was there any rule used and in force at that time on the railroad in that effect?

(Objection made and noted.)

A. There was a rule that if I received a clear block signal, that is the indication for that block, that is, when I received a clear signal I don't expect to find any trains in the block or no open switches.”

(Objection, page 40, line 14; ground of appeal No. 8, page 108, line 31.)

9. The Court erred in admitting over defendant's objection the following question and answer:

“Q. Was the condition that you found at Farmingdale such a signal?

(Objected to, and overruled.)

A. Clear signal.”

(Objection, page 40, line 28; ground of appeal No. 9, page 109, line 8.)

10. The Court erred in admitting over defendant's objection the following question and answer:

"Q. Now, in the absence of orders that you were to take that switch, and with a clear light at Farmingdale, what did you, as a practical railroad man, expect to be your line of travel from Farmingdale toward Sea Girt?

(Objected to. Objection overruled.)

A. Clear."

(Objection, page 47, line 31; ground of appeal No. 10, page 109, line 13.)

11. The Court erred in admitting testimony showing conditions at Farmingdale over defendant's objection.

(Objection, page 57, line 1; ground of appeal No. 11, page 109, line 24.)

12. The Court erred in admitting over defendant's objection the following question and answer:

"Q. On this night did you receive any orders to that effect?

(Objected to and objection overruled.)

A. No, sir."

(Objection, page 58, line 4; ground of appeal No. 12, page 109, line 28.)

13. The Court erred in admitting over defendant's objection the following question and answer:

"Q. In the absence of these instructions, what do you as one of the men in charge of the train expect to be your route of travel under the rules of the company and under the custom as pursued by men in charge of that train?

(Objection made and overruled.)

A. We should have gone on the eastward track."

(Objection, page 58, line 33; ground of appeal No. 13, page 109, line 33.)

14. The Court erred in permitting the plaintiff to amend her complaint by adding as grounds of negligence the following:

"As an act of negligence on the part of the railroad company, through its servants and agents, that the engineer in charge of this train ran into the open switch with the red lights against him."

(Objection, page 66, line 7; ground of appeal No. 14, page 110, line 10.)

15. The Court erred in admitting over defendant's objection the following question and answer:

"Q. What would be the signal at Farmingdale if the track was clear to Sea Girt?

(Objected to. Objection overruled.)

A. We would get a clear signal at Farmingdale."

(Objection, page 68, line 21; ground of appeal No. 15, page 110, line 16.)

16. The Court erred in admitting over defendant's objection the following question and answer:

"Q. If the switch was open and you were going east when you arrived at Farmingdale do you know whether or not any message was given to the crew with respect to the condition of that switch?

(Objected to. Objection overruled.)

A. No, sir."

(Objection, page 69, line 32; ground of appeal No. 16, page 110, line 24.)

17. The Court erred in admitting over defendant's objection the following question and answer:

"Q. Suppose the switch at Manasquan is open so that if you proceed eastward that you would come into that switch? What information, if any, would be given to you with respect to the condition of that switch?

(Objection made and overruled.)

A. We would be given a message or an order to stop and examine the switch."

(Objection, page 77, line 21; ground of appeal No. 17, page 110, line 36.)

18. The Court erred in admitting over defendant's objection the following question and answer:

"Q. Now, was that switch permitted to be open after you had received a clear light at Farmingdale?

(Objected to. Objection overruled.)

A. Oh, you are asking me a rule. The rule is that the switch shall be set for the current of traffic. The switch could have been left that way and we could have received a clear signal not knowing the switch was on."

(Objection, page 78, line 22; ground of appeal No. 18, page 111, line 9.)

19. The Court erred in admitting over defendant's objection the following question and answer:

"Q. In case the switch was set for the through movement east bound at Farmingdale, did that have any significance or bearing upon the question of rate of speed that the engineer would use in passing through the block?

(Objected to. Objection overruled.)

A. The train has a right to run the speed that was specified for the train to run, and there was no ruling prohibiting us from running to the switch provided we had the railroad set for us, and we don't reduce speed at every switch to see whether it is right or wrong. If we can't see it we go right on because we expect it clear, because the block indication tells us that."

(Objection, page 83, line 22; ground of appeal No. 19, page 111, line 21.)

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**ARGUMENT.**

I.

**The Court Erred in Refusing Defendant's Motion  
For a Non-suit.**

The negligence alleged in the complaint was expressed by the plaintiff as follows:

"The negligence of which the plaintiff complains and of which the defendant is guilty, consists in the fact that at or near Manasquan, in said County of Monmouth, when and where the said Joseph Reed was employed by the defendant in interstate commerce, by railroad, as aforesaid, the defendant carelessly and negligently maintained a certain switch without proper safe-guards and unattended by reason of which the train on which the said Joseph Reed was working at the time was caused suddenly to leave the track upon which it was travelling and pass on to said switch, thereby throwing the said Joseph Reed from said train and in-

flicting upon him the injuries complained of; that no lights or other warning was given of the condition of said switch; that a reasonably safe place to work was not provided for the said Joseph Reed to work; that the road bed and appliances at the place complained of, of the said defendant, were not kept in a reasonably safe condition."

(State of the Case, page 2, line 10.)

At the trial the plaintiff was permitted, over objection to amend her complaint, alleging as a ground of negligence the following:

"As an act of negligence on the part of the railroad company, through its servants and agents, that the engineer in charge of this train ran into the open switch with the red lights against him."

The propriety of allowing this amendment is discussed in point VII of this brief. For the purpose, however, of discussing the present point, we will assume that it was properly allowed.

The proof shows that on the night of the accident, the switch in question was protected with a red light, indicating that a train passing eastward over the east bound track would move over the switch to the west bound track. The testimony of this point is as follows (page 31, l. 30):

"Q. What was there at this point, if anything, which indicated that the switch was open?

A. The switch lamp was the only indication.

Q. What is the nature of that lamp and where is it placed?

A. Well, it set to the left of the railroad about perhaps two feet or one, set to show two different colors, red and green.

Q. How high is that from the ground?

A. Probably one foot.

Q. What sort of a night was this?

A. Foggy and dark.

Q. What kind of a lamp was it?

A. It was a switch lamp.

Q. What did it indicate?

A. Red.

Q. What does that mean?

A. It was that I was taking the westward track, westward main track."

There was testimony in the case that there were no lights showing in the signal tower (page 31, line 11); that the lights were extinguished, but that these lights would have shown nothing concerning the condition of the switch (page 31, line 20) and were properly extinguished.

Thomas W. Madden, the engineer in charge of the train, who was called as a witness for the plaintiff, on direct examination testified with respect to the matter of an attendant or operator, as follows:

"Q. How was this switch and by whom was it controlled, if you know, Mr. Madden? I don't mean the individual's name, but what duties did he have to perform?

A. Well, that block office was open and was controlled by the block operator.

Q. And where was the block operator located?

A. At the tower right at the switch. The switch is outside.

Q. You mean that the office was near by the switch do you not?

A. Yes.

Q. Had you any notice or knowledge that the switch was unattended at any time during the twenty-four hours?

A. Oh, yes.

Q. What part of the day was this switch unattended so far as you had been notified?

A. From ten o'clock at night until six in the morning.

Q. Is that what they call the "third trick"?

A. Yes, sir."

(State of the Case, page 26, line 4, to line 25.)

The accident through which Mr. Reed lost his life happened about four o'clock in the morning (page 32, line 28).

So far as the contention of the plaintiff that the defendant was negligent in failing to have the switch attended, we insist that she is not entitled to support the verdict upon that ground; (1) because it was eliminated from the case by the Court in charging the defendants second request, which was as follows:

"It was not negligence for the defendant not to have an attendant on duty at the switch at the point of the accident." (Page 102, line 31.)

This was charged by the Court (page 103, line 28). (2) Because it was not the custom or practice of the railroad company to have an attendant at the switch during the period when the accident occurred; (testimony of Mr. Madden, above quoted) and Mr. Reed, the decedent, as the conductor of the train in question is chargeable with knowledge of that fact, and as a matter of law assumed the risk of any accident that might have happened by reason of the failure of the railroad company to have the switch attended by an operator or switch tender.

In the case of *Boldt vs. Pennsylvania Railroad Co.*, 245 U. S. 441, 62 Law Ed. 385, it was held:

“The risks which the employee still assumes in other cases notwithstanding the elimination of the defense of assumed risk by the Employers’ Liability Act of April 22, 1908, Comp. Stat. 1916, Sec. 8657, in any case in which the violation by the carrier of any statute enacted for the safety of employees contributed to the death or injury of an employee, include those incident to the negligence of carriers, officers, agents or employees which are obvious or fully known to him.” (Opinion by Mr. Justice McReynolds.)

In the case of *Seaboard Air Line vs. Horton*, 233 U. S. 492, 58 Law Ed. 1062, it was held:

“The elimination of the defense of assumption of risk by the Employers’ Liability Act of April 22, 1908, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employees, plainly evidences the legislative intent that in all other cases such assumption of risk shall have its former effect as a complete bar to the action.”

Mr. Justice Pitney in writing the opinion of the Court in the Horton case said:

“It seems to us that Section 4 in eliminating the defense of assumption of risk in the cases indicated quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action, and taking Sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk, for while it is declared that

neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is with respect to cases not in this category a limitation upon the effect that is to be given to contributory negligence while no corresponding limitation is imposed upon the defense of assumption of risk. Perhaps none was deemed feasible. The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present notwithstanding exercise of all reasonable care on his part."

In the case of *Baugham vs. New York, Philadelphia and Norfolk R. R. Co.*, 241 U. S. 236, 60 Law Ed. 977, the plaintiff's intestate, Richard T. Baugham, on the second day of his employ by the company was killed by being crushed between the car upon which he was working and other cars which were upon the barge. It was held that as a matter of law the plaintiff's intestate assumed the risk of the accident which caused his death.

So far as concerns the plaintiff's contention that the defendant was negligent in maintaining the

switch without proper safe guards or that no lights or other warning was given as to the condition of said switch, we submit that, as a matter of law, the plaintiff failed to carry the burden of proof.

The testimony is clear and explicit that the switch was guarded by a red light which indicated that the switch would admit a train from the east bound track to the west bound track, and that the light was burning upon the night of the accident (page 31, line 30, to page 32, line 10).

The plaintiff sought to establish the fact that the switch was improperly guarded by offering evidence which the Court admitted over defendant's objection, showing conditions as to signals at Farmingdale. The propriety of the admission of this evidence is discussed under point VI of this brief. The evidence which may be found at page 28, line 10; page 39, line 11; page 40, line 20; page 47, line 27; page 56, line 27; page 58, lines 1 to 35; page 68, line 19; page 77, lines 20 to 40, tended to show that if a train proceeding eastward was to take the west bound track at Manasquan, it would receive a message or instructions to that effect at Farmingdale, a station lying west of Manasquan; and that further, if the signal light at Farmingdale showed green, it would indicate that they had a clear track to Sea Girt, a station to the eastward of Manasquan. None of this testimony showed that there was any mechanical connection between the signal light at Farmingdale and the switch at Manasquan. All of the testimony showed that the switch at Manasquan was operated independently with an independent light and had no mechanical connection whatsoever with any other switch or signal.

There is no allegation in the complaint of negligence with respect to the operation of the tower at

Farmingdale, nor was any offer made to amend the complaint to show such negligence. The appellant contends that the operation of the signal light at Farmingdale had reference solely to the operation of trains and had nothing at all to do with the protection of the switch at Manasquan. It is difficult for us to see how it could be presumed from the allegation of negligence in the plaintiff's complaint, that the defendant was to meet proof touching the condition of the signal at Farmingdale which is several miles away from the scene of the accident. As we have above pointed out, the red light guarding the switch was properly lighted and set and clearly indicated to the engineer that it was in such a position as to cause the train to pass from the east bound track to the west bound track. So far as the proof shows it might have been set in that position after the train left Farmingdale, because there was no mechanical connection whatsoever between the switch at Manasquan and the signal tower at Farmingdale. It is contended by the plaintiff that there should have been some indication at Farmingdale to notify the train crew that the switch at Manasquan was in such a position as to cause the train to pass from the east bound track to the west bound track. It does not at all follow that because the train crew might have been entitled to information at Farmingdale as to whether or not it was to use the east bound track or the west bound track at Manasquan, that the **switch** at Manasquan was not set in a position to admit a train from the east bound track to the west bound track. The proof shows that the tower man at Manasquan left his post at ten o'clock, and from ten o'clock at night until six o'clock in the morning there was no one at Manasquan who would be in a position to notify the signal man at Farm-

ingdale of any change in the position of the switch so that even if it was the practice to notify the train crew at Farmingdale as to what track it was to use when it reached Manasquan, it would not necessarily indicate what the condition of the switch was at Manasquan. The condition of that switch was indicated only by the red light which, it is uncontradicted, was lighted and properly set. The defendant was entitled to be apprised by proper allegation in the complaint if it was to be contended that the switch at Manasquan had some relation to the tower at Farmingdale, and in the absence of such allegation, the defendant was in no position to offer evidence showing the true relation between the tower at Farmingdale and the movement of trains over the switch at Manasquan. We contend that the condition of the signal at Farmingdale or the failure to give warning of the condition of the switch at Manasquan was not a proximate cause of the accident and indeed could not have been, for the reason that there was no mechanical relationship or connection between the two points, and it was quite within the realm of possibility that after the train had left Farmingdale, the switch at Manasquan could have been changed and the only warning that could possibly be afforded the train crew of that condition would be the red light guarding the Manasquan switch. The strongest inference in favor of the plaintiff that can be drawn from the testimony concerning the conditions at Farmingdale, is that the train crew in the absence of notification at Farmingdale were to proceed along the east bound track to Sea Girt; but no inference can be drawn from the testimony that the conditions at Farmingdale actually did or were intended to indicate whether the switch at Manasquan was open or closed. That in-

formation was given by the condition of the signal light at the switch at Manasquan, which on the evening in question was properly set. Mr. Madden in this respect, testified on cross-examination:

“Q. You went through Farmingdale?

A. Yes.

Q. Were there signals there displayed?

A. Yes.

Q. Block signals—block indications?

A. Yes.

Q. Would they have indicated anything of the circumstances—the condition of this switch at Manasquan?

A. No.

Q. When you got to Manasquan, I understand you to say, the block signal there was extinguished?

A. Yes.

Q. Would that have anything to do with a switch signal?

A. When a block station is closed by orders, it is in the special instructions these lights must be extinguished, that takes that block station out of service.

Q. And therefore these block signal lights were properly extinguished then?

A. Yes, sir.

Q. There wouldn't be any other way of your getting notice of this switch signal, which was turned red, against you, on this night, excepting the signal itself—the red lamp itself?

A. That is the only indication I would get would be the switch lamp.

Q. That switch isn't operated from the tower, is it?

A. No.”

(Page 36, lines 1 to 32.)

We contend that the condition at Farmingdale was not a proximate cause of the accident.

Speaking for the Court of Errors of proximate cause, Justice Black, in the very recent case of *Kelson vs. Public Service R. Co.*, 110 Atl. Rep. 919, said:

“It is common knowledge that the negligence of the defendant must be the proximate cause of the plaintiff’s injuries. The ‘proximate cause’ is the efficient cause; the one that necessarily sets the other causes in operation. *Batton vs. Public Service Corporation*, 75 N. J. Law, 859, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855. There must be an unbroken causal connection. The famous *Squib* case is a familiar illustration. *Scott vs. Shephard*, 2 W. Bl. 892. The ‘proximate cause’ is that cause which naturally and probably led to, and which might have been expected to produce, the result. *Wiley vs. West Jersey R. Co.*, 44 N. J. Law 251; *Smith vs. Public Service Corporation*, 78 N. J. Law, 480, 75 Atl. 937, 20 Ann. Cas. 151. Whether the cause is too remote to allow compensation by way of damages is a question of law to be decided by the Court. *Mangan vs. Atterton*, L. R. 1 Exch. 239; *Clark vs. Chambers*, L. R. 3 Q. B. D. 327, 337.”

From the testimony of Mr. Madden, above quoted, it will be seen that the only indication he would get that the switch was turned against him was the red light. How could it then be said that the failure to warn him at Farmingdale that his train would pass from the east bound track to the west bound track was the proximate cause of the accident?

As a matter of fact, it was not intended that this train should pass from the east bound track to the west bound track. There was no testimony in the case whatsoever that the train was to take any such course, and therefore, there was no necessity of giving any warning at Farmingdale concerning such condition at Manasquan, and the failure to give such warning had no relationship to the accident at all.

The accident was entirely due to the fact that the engineer was unable to see the red lamp by reason of the fog. Mr. Madden says (page 38, line 21):

“The Court: And you say it was impossible from the situation as it then existed for you to keep out of that switch?

A. I couldn't done it. It was impossible to keep out of there. Had I seen the switch in time or had the weather conditions been clear, I would not have went in there. I could see in clear weather that switch a sufficient distance to stop.”

On direct examination he says (page 32, line 31):

“Q. Did the fog interfere with your view?

A. Oh, yes.

Q. How far were you away from this switch before you were able to see this light?

A. Probably two or three cars.

Q. Why couldn't you see it before?

A. The weather conditions.

Q. The fog and darkness?

A. The fog, yes.”

The question of the condition of the signals at Farmingdale, or the failure to give notice that the train would pass from the east bound track to the west bound track at Manasquan, we contend, are

not within the issue raised by the plaintiff, and not being within the issue, they should not have been submitted to the jury.

*Gilliard vs. Public Service*, 110 Atl. 688;

*Murphy vs. North Jersey R. R. Co.*, 71 N. J. L. 5.

“It is error to submit to a jury questions which are not within the issue raised by the pleadings.”

*Excelsior Electric Co. vs. Sweet*, 59 N. J. L. 441.

In this case, it appeared that the element of negligence complained of was that the defendant company permitted a rope and pulleys to become rotten, weak and defective. The defendant's testimony tended to disprove this allegation and tended to prove that the cleat on the pole had become broken. The trial Judge permitted the case to go to the jury, among other things, upon the condition of the cleat, and for this error judgment was reversed.

“It is a cardinal rule for the control of a trial Court that the questions submitted to the jury should be within the issues raised by the pleadings.”

*Partridge vs. Woodland Steamboat Co.*, 66 N. J. L., 290.

The negligence charged in this case by the pleadings was that the defendant company failed to take proper measures to stop and quell a fight. The trial Court permitted the case to go to the jury upon the theory that the defendant was negligent in not having a special officer on board the boat, and for this error the judgment was reversed.

We respectfully submit that an allegation of negligence that a switch was improperly guarded is not broad enough to cover a charge of negligence based upon the failure to notify a train crew that at a given point it was to pass from one track to another.

**A non-suit should have been granted because the plaintiff's testate, as a matter of law, assumed the risk of the accident which caused his death.**

It is clear that the common law defense of the assumption of risk is not eliminated by the Federal Employers' Liability Act.

*Boldt vs. Pennsylvania R. R. Co.*, 245 U. S. 441, 62 Law Ed. 385;

*Seaboard Air Line vs. Horton*, 233 U. S. 492, 58 Law Ed. 1062;

*Baugham vs. N. Y., Phila. and Norfolk R. R. Co.*, 241 U. S. 236, 60 Law Ed. 977;

*Jacobs vs. Southern Ry. Co.*, 241 U. S. 229, 60 Law Ed. 970.

We contend that under the doctrines enunciated in these cases that the deceased, as a matter of law, assumed the risk of the jolt caused by the train passing from one track to another, even though the train crew had no orders indicating that the train would take the west bound track.

## II.

### **The Court Erred in Refusing Defendant's Motion For a Direction in Favor of the Defendant.**

There was no evidence submitted by the defendant, and after the motion for a non-suit was re-

fused, the defendant announced to the Court it had no evidence to offer and then asked for a direction upon the same grounds as those asked on motion for non-suit, which was refused. (Page 94, line 30.)

III.

**The Court Erred in Refusing to Charge Defendant's Third Request to Charge.**

The defendant's third request to charge was as follows:

"It was not negligence for the railroad to fail to warn the engineer at Farmingdale that the switch at Manasquan was open to admit a train to the west bound track."

(Defendant's third request to charge, page 102, line 34; ground of appeal No. 3, page 108, line 6.)

We have argued under point I of this brief, in the discussion of the Court refusing to grant a non-suit or a direction in favor of the defendant, the point that no negligence could be inferred from the defendant's having failed to give the train crew orders at Farmingdale that the switch at Manasquan was open to admit a train to the west bound track.

It will be observed from reading the testimony in regard to this phase of the case, pages of which are indicated under point I, of this brief, that there might be an inference drawn that the defendant was required to give the train crew orders at Farmingdale, if the train was to take the west bound track at Manasquan, and this is the only inference, in our view, which can be drawn from the testimony. If, in fact, the train was not to take the west bound track at Manasquan, then there was no necessity

for giving any orders of any character at Farmingdale. Therefore, unless the train was to pass from the east bound track to the west bound track, there was no negligence in failing to give orders that it would pass from one track to the other. All of the testimony in the case shows that the train was to pass over the east bound track to Sea Girt and was not to pass over the west bound track at Manasquan. Mr. Petty (page 57, line 30), testified in this respect:

“Q. When your train is to pass from the east bound track to the west bound track at Manasquan, do you receive any orders from any person in authority?

A. The superintendent.

Q. And where do you receive these orders?

A. They come from Trenton.

Q. And where do you get them?

A. From the operator at Farmingdale.

Q. On this night, did you receive any orders to that effect?

A. No, sir.”

It is impossible to conceive under any aspect of the case, how negligence could be predicated upon the failure to give warning at Farmingdale that the train was to do something which in fact it was not to do. In other words, the plaintiff complains that the engineer should have been notified at Farmingdale that the train was to pass over the west bound track, when as a matter of fact, in the orderly course of its movement, it was to do no such thing. We, therefore, submit that the Court erred in refusing to charge the third request with respect to this phase of the alleged negligence.

IV.

**The Court Erred in Refusing to Charge Defendant's Fourth Request to Charge.**

The fourth request is as follows:

“It was not negligence for the defendant's engineer to fail to see the red signal on the switch target at Manasquan where the accident happened.”

(Fourth request to charge, page 103, line 4; ground of appeal No. 4, page 108, line 8.)

It is clear that this ground of negligence was not within the scope of the pleadings, and in order to make it so, the Court permitted the plaintiff to amend her complaint. (Page 66, line 7), over defendant's objection. The propriety of permitting this amendment is discussed under point VII, of this brief.

Assuming, however, for the purpose of argument, that the amendment was properly allowed, we contend that under the facts of the case, the engineer was not negligent in failing to see the red light. The testimony clearly demonstrates that he was unable to see it by reason of the fog and heavy weather, and as soon as he saw it, he immediately brought his train under control and to a stop as rapidly as possible. It is uncontradicted that there was a heavy ground fog on the night in question, and the engineer's statement that he could not see the red light until he got within two or three car lengths is not denied. (Page 32, line 31.) We respectfully submit that the defendant's fourth request was improperly refused.

Just what duty there was upon the defendant's engineer which he failed to perform was not pointed out by the trial Court or by counsel. The testimony is clear that he could not see the red light by reason of the fog and there was no charge that he was negligent in operating his train at the rate of speed it was operated, to wit: twenty-five or thirty miles an hour.

## V.

**The Court Erred in Refusing to Charge Defendant's Seventh Request.**

The defendant's seventh request is as follows:

“The decedent assumed the risk of the negligence of his fellow-servants which you may find from the evidence were obvious or known to him or should have been known to him.”

(Seventh request to charge, page 103, line 15; ground of appeal No. 5, page 108, line 11.)

The Court at first charged this request (page 104, line 11), and then on motion of Mr. David, withdrew it. (Page 104, line 30; page 105, line 20.)

We contend that the defendant's request correctly stated the law and should have been charged.

*Boldt vs. Pennsylvania R. R. Co.*, 245 U. S. 441, 2 Law 62 Ed. 385;

*Seaboard Air Line vs. Horton*, 233 U. S. 492, 58 Law Ed. 1062;

*Baugham vs. N. Y. Phila. and Norfolk R. Co.*, 241 U. S. 236, 60 Law Ed. 977,

all of which are cited under point I of this brief.

VI.

**The Court Erred in Permitting Certain Questions to Be Asked and Answered Over Defendant's Objection Concerning the Condition of the Signals at Farmingdale.**

The errors of the trial Court in this behalf are presented by the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth grounds of appeal. The pages and lines in the State of the Case where this testimony appears are as follows: Page 25, line 15; page 26, line 38; page 40, lines 14 and 28; page 47, line 31; page 57, line 1; page 58, lines 4 and 33; page 68, line 21; page 69, line 32; page 77, line 21 and page 78, line 22.

The matter was generally raised also by an understanding between the Court and counsel (page 57, line 1), wherein the following colloquy was held:

“Mr. Coulomb: I mean the conditions at Farmingdale have no part in the negligence charged in this case.

The Court: I don't suppose you have any objection to letting the objection say that the objection is to question relating to that matter as immaterial?

Mr. Davis: Not at all.

The Court: And you have an exception, Mr. Coulomb.”

As we have above argued, the negligence charged in the complaint was that the railroad company failed to properly guard the signal at Manasquan. The testimony offered and received over objection, it was contended, would show that in addition to

guarding the switch and the switch light or target at Manasquan it was also the duty of the railroad company to give certain signals or train orders at Farmingdale. We contend that this was not properly within the issue raised by the plaintiff's allegation of negligence. In reading the testimony it will appear that the train in question was to proceed over the east bound track as far as Sea Girt, and that it was only when the train was to take the west bound track at Manasquan that any orders were given to that effect, and that in the absence of orders the train was to proceed over the east bound track as far as Sea Girt, which was the end of the block. It also appears in the testimony, as has been pointed out, there is no mechanical connection whatsoever between the switch at Manasquan and the signals at Farmingdale; that the switch at Manasquan was independently operated and was guarded by a red switch light at night and a red disc in day time.

We contend that the testimony offered and received over objection had reference solely to the operation of trains and not to the condition of the switch at Manasquan, there being no interlocking or other mechanical device connecting the switch at Manasquan with the tower at Farmingdale. It would be impossible for the operator at Farmingdale to know at all times the condition of the switch at Manasquan and whatever orders he would give to the train crew as to what track it was to proceed upon to Sea Girt must have been subject always to the chance that the switch at Manasquan might be set against such a movement. In addition to all of which we respectfully urge that the testimony itself did not tend to show any negligence. As we have pointed out, the train was to proceed on the east bound track as far as Sea Girt. Orders were only given to

the train crew when it was to take the west bound track at Manasquan. The train in question was not to take the west bound track at Manasquan, and therefore, there was no necessity of giving any orders at Farmingdale. Had it been intended that the train in question should take the west bound track at Manasquan and no orders were given, then it might be questioned as to whether or not there was negligence in the failure to give such notice at Farmingdale; but that would be negligence, not with respect to the guarding of the switch at Manasquan, but with respect to the operation of the trains, and negligence which was not within the scope of the complaint.

Furthermore, the condition of the signal at Farmingdale was not the proximate cause of the accident. It is clear from the proof that no matter what warning signals or instructions had been given at Farmingdale that the position of the switch at Manasquan might still have remained in the position that it was at the time of the accident.

“It is common knowledge that the negligence of the defendant must be the proximate cause of the plaintiff’s injuries. The ‘proximate cause’ is the efficient cause; the one that necessarily sets the other causes in operation.”

*Kelson vs. Public Service R. Co.*, 110 Atl. 919;

*Batton vs. Public Service Corp.*, 75 N. J. L. 859.

## VII.

**The Court Erred in Permitting the Plaintiff to Amend Her Complaint.**

At the trial of the cause the Court permitted the plaintiff to amend her complaint by charging the engineer with negligence in running into the open switch with the red lights set against him. Objection to the amendment was made page 66, line 7. In the colloquy which preceded the making of the amendment, the attorney for the defendant claimed surprise (page 63, line 33). We respectfully submit that an amendment which entirely changed the character of the negligence complained of, namely, from negligence charging the improper guarding of the switch to negligence charging the defendant's engineer with failure to observe that the switch was properly guarded, could not be made without giving the defendant an opportunity to meet such a situation.

*Gilliard vs. Public Service*, 110 Atl. 688.

We respectfully submit that for the reasons above discussed the judgment should be reversed.

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*Attorneys for Defendant-Appellant.*

