NEW JERSEY

# Court of Errors and Appeals.

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LILLIAN WILLEVER, ADMINISTRATRIX OF WILLIAM WILLEVER, DECEASED,
*Plaintiff-Appellant,*

*vs.*

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

*Action at Law.*
*On Appeal.*

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## Plaintiff's Brief.

The plaintiff, Lillian Willever, administratrix of William Willever, deceased, brought suit for damages for the death of her husband, the said William Willever, which was caused by the negligence of the servants of the defendant company, and based upon the Federal Employers' Liability Act.

The deceased was a track foreman, earning at the time of his death sixty-five dollars per month, and was living with the plaintiff and supporting her, in the State of New Jersey.

The deceased was killed by being run over by a car while repairing or working at a switch at Port Morris, New Jersey. The car which ran over him was being pushed along with twenty-six other cars by an engine. There was no one near the deceased at the time of the accident and no one to warn him of the approach of this train of cars which was be-

ing pushed by an engine, which at the time was a thousand feet distant from the deceased, except the conductor of the train, David Burd, and he was on the rear end of the head car, that is, on the end next to the engine, instead of being on the front end, where he would have seen the deceased working on the track if he had looked.

The particular negligence complained of was that conductor Burd did not keep any lookout so as to avoid running over deceased, and did not give any warning of the approach of these cars, which is shown beyond any question, because Burd never saw the deceased at all, and was not aware of his working on the switch. The first thing he knew of the deceased being there was when the head car, on the rear end of which he was riding, became derailed because of its running over the deceased. It was impossible for the deceased to receive any warning from the engineer, because, as above stated, he was a thousand feet away at the time, and the only way he could receive any warning was from conductor Burd, who was stationed on this car for this very purpose.

The jury found a verdict in favor of the plaintiff, and the defendant sets up twelve grounds of appeal, which will be taken up in their order.

First, to the refusal of the Trial Court to dismiss the complaint of the plaintiff because the same failed to specify sufficient negligence to charge the defendant with liability. Under the ruling laid down by the Supreme Court in the case of *Breece vs. The Trenton Horse Car Ry. Co.*, 33 *Vr.*, 252, and *Van Horn vs. Central R. Co.*, 9 *Vr.*, 133, the complaint was more than sufficiently specific. In fact, it would have been very difficult to make it any more specific than it was.

The complaint alleges, page 11, that "the defendant by its servants and agents then and there propelled a locomotive engine and cars on its said track in a negligent and careless manner and without giving the said deceased any warning of the approach of said locomotive engine and cars on the track where the deceased was working as aforesaid, so that by means of the premises the said car ran into and over the said deceased, etc." How could the negligence be more fully charged? Besides, a motion was made at the trial to amend if the Court thought the complaint was not sufficiently specific; and an amendment was allowed with the consent of the defendant to correct a clerical error in the complaint by stating that the plaintiff was the widow of the deceased, page 10, lines 21 to 24.

The second ground of appeal is made against the admission of two questions propounded to a witness, the answers to which could not possibly have been injurious to the defendant. The object of these questions was merely to show that the witness Lake, who was the engineer running the locomotive, afterward went down to where the accident occurred, and learned that the stop signal which had been given him was given him because a car had become derailed. Evidence, pages 23 and 24.

I desire here to call the attention of the Court to the fact that nearly all of the witnesses produced on the part of the plaintiff were employees of the defendant company, and were, more or less, as is plainly shown by their testimony, unfriendly or hostile.

The third ground of appeal is to the allowance of the following question: Q. "State to the Court and jury whether or not you frequently came in from Maybrook and ran in on track number five?" Evidence, page 36. The only possible

objection that could be made to this question was that it might be considered in some degree leading, but from an unfriendly witness it was practically impossible to bring out the fact that track number five, on which the deceased was working at the time he was run over, was a track used in interstate commerce, except by putting a question of this kind. The witness, John Daly, was the conductor of the Lehigh and Hudson River train which ran between Maybrook, in the State of New York, and Port Morris, in the State of New Jersey, and the object of the question was to show by this witness that the train over which he had control, frequently ran in on this particular track. The question, therefore, was perfectly proper.

Ground number four is of the same character, and was asked for the same purpose of the witness, Mr. O'Neill, who had worked in these very yards for twenty-seven years, and knew just how the tracks were used.

I am unable to see how ground number five is any ground of appeal at all, because the question was proper in every respect, and the answer, "I put him on the stretcher," could not possibly be injurious to the defendant.

Ground number six is based upon the refusal of the Trial Court to grant a non-suit. The motion to non-suit was rightly denied, because as the case stood when plaintiff rested, it was clearly a question of fact for the jury to say whether or not the defendant company, through its servant, conductor Burd, was not negligent in failing to keep a lookout for the deceased, and to warn him, so as to avoid running over him. **It was negligent for him not to be on the front end of the car instead of rear end, and it was negligent in him not to have seen the deceased because his failure to see him**

was because he failed to keep a proper lookout, and he failed to warn him because he failed to keep a proper lookout.

Evidence of David Burd, page 76, lines 28 to 40; page 77, lines 1 to 15:

**Q. What part of this train that was taking up freight that morning and the car derailed were you on? A The leading car, or which I would term the head car; that was the first car coming east; we were shoving the train east.**

**Q. You mean running backwards? A. Yes, we came against the opposite ends of the cars to where I was and pushed them on through.**

**Q. What part of the car were you on? A. The westward end.**

**Q. That would not be the front end, would it? A. No, sir; that would be the end nearest the engine, the end connected to the car following it.**

**Q. And did you see Mr. Willever around there? A. No, sir.**

**Q. You didn't see him around there? A. No, sir.**

**Q. When did you see him, after he was run over? A. When he lay between the tracks.**

**Q. When did you first give the stop signal? A. Just as soon as the car that I was on jumped up I heard somebody holler; I looked down and I saw Mr. Willever laying between the tracks; that's the first I saw of him. I gave the stop signal at once, which was received at the other end and we did stop, because we didn't go no distance.**

Grounds seven, eight and nine, are based upon the allowance of plaintiff's Exhibit P 1, which was the

book of rules of the defendant company, and it was admitted for the purpose of getting before the jury rule No. 102, which is found at the top of page 136, and is as follows:

RULE 102—"When cars are pushed by an engine a man must take a conspicuous position on the **front** of the leading car and signal the engine man in case of need."

After the admission of the rule in evidence plaintiff's attorney asked the privilege of withdrawing the exhibit in order to lay a better foundation before its admission. The withdrawal of this exhibit was entirely harmless to the defendant, because the jury had not seen the book nor had any of its contents been read in evidence. The book was properly admitted in evidence, as it was offered by plaintiff's attorney with the understanding that its admission was solely for the purpose of placing before the jury rule No. 102.

Ground number ten is based upon the refusal of the Trial Court to allow a question of a witness: "Q. Is rule No. 102 the same as a rule adopted by the Standard Railway Association?" This is no ground of appeal whatever, because the question, page 110, lines 20 to 31, was asked and fully answered without objection, but after the question was asked and answered plaintiff's attorney remarked that it was a waste of time and the Court replied, "I think the objection is timely," and then an exception was allowed to defendant, for what purpose it is hard to tell, because the question had already been asked and answered and was not subsequently striken out, so that the defendant had the full benefit of the question and answer. Besides, the adoption of such a rule by the Standard Railway Association could not possibly relieve the defendant company from liability for negligence.

Ground number eleven is based upon the refusal of the Trial Court to direct a verdict for the defendant. This motion was properly refused because the defendant company really set up no defense whatever to the case made out by the plaintiff. There was no attempt made on the part of the defendant to prove that track number five, on which the deceased was working at the time of the injury, was not being used in interstate commerce, nor was there any proof that the deceased was not injured in the manner proved by the plaintiff.

The first ground on which the motion was rested was that "the movement of the train at the time of the accident was an interstate movement," and this in the face of the decision of the Supreme Court of the United States, in the case of *Pedersen vs. D., L. & W. R. R. Co.*, 229 *U. S.*, page 146, where an employee, who was at the time assisting in the repair of a bridge, was run down by an intrastate passenger train, and the Court in that case expressly held that the defendant was liable because the injured employee was himself engaged in interstate commerce, and that it was immaterial whether the train that ran him down was at the time doing intrastate work or interstate work.

Ground number twelve is based upon the alleged refusals of the Court to charge as requested. The Court did charge in almost the exact words of the first request to the effect that the jury must find that at the time the deceased was injured the defendant was engaged in interstate commerce and that the deceased at that time was also engaged in interstate commerce. **It was admitted by defendant's answer, page 12, lines 1 to 13, that at the time of the injury the defendant was engaged in interstate commerce,** and it was entirely immaterial whether the train crew was doing interstate

work or not. The only question to be considered being, **what was the deceased doing at the time of the injury?** *Pedersen vs. D., L. & W. R. R. Co.*, 229 *U. S.*, page 146.

This part of the Court's charge will be found on page 118, lines 7 to 27.

The case of *Behrens vs. Ill. Central R. R. Co.*, cited by defendant's attorney in his request to charge has no bearing on the case in hand, because in that case the injured person, the plaintiff, was the fireman of the locomotive which at the particular time of the accident was doing only intrastate work, and he was injured by a head-on collision in a yard; and no question of the assumption of the risk of the negligence of fellow servants was raised in that case, because the accident occurred in a yard and not on the main line road.

To hold that a servant assumed the risk of injuries caused by the negligence of fellow servants would wholly destroy the beneficial effects of the act, the chief intent of the act being to abolish the fellow servant doctrine.

Request number two was rightly refused, because it was a question for the jury to say whether or not the deceased received any notice or warning of the approach of the locomotive and cars, in view of the fact that the only person that could possibly have given him this notice or warning was the conductor, who not only failed to give this notice, but also failed to even see him, and was not aware of his presence on the track until after the deceased was run over and the car derailed, because of its con tact with his body.

The third request to charge was also refused, because there was no such question in dispute as the fact that the deceased was a fellow servant of the

train crew which caused the train to run over him, and because the act upon which the suit was based expressly made the defendant liable for injuries received through the negligence of fellow servants.

Request number four was rightfully refused, because there was no charge that the accident was caused by a defective track or switch, and no proof was offered for that purpose. And, besides, although it had nothing to do whatever with the case, the Court did charge this very request. On page 129, where the Court said, "You heard the evidence; there was no proof and you cannot infer that the tracks were out of order; that the damage was done by the fact that the tracks were out of order—but you have no right to consider that the tracks were out of order that the company, the defendant, in that it had been negligent that what was the result afterward."

The seventh request to charge (the next one in order), is a very long one and has to do only with the question of damages, and this also applies to request number eight.

While the Court in its charge went on to state what was the law of this State, that statement should be considered as mere surplusage, provided the law as laid down was correct.

On page 127, lines 30 to 33 the Court stated that "there being no children and no others dependent upon him under the law, the widow being entitled to the whole of the damages, if any you find." This was strictly in accordance with the federal statute. The Court again and again warned the jury that it could give only compensation from a pecuniary or money standpoint, and could not allow anything for sorrow or suffering or for any other cause than just pecuniary or money loss.

While the federal statute is somewhat different from New Jersey law, where the circumstances are different, still where the deceased leaves a widow only, and no children, the federal statute is precisely the same, and so long as the Court charged correctly with respect to the facts in this particular case, the statements of the Court, although wrong with respect to any other state of facts, was perfectly harmless in this case, and was mere surplusage. *Gulf Colorado & Sante Fe R. Co. vs. McGinnis*, 228 *U. S.*, *p.* 173; *Southern Pacific Co. vs. Schuyler*, 227 *U. S.*, 601; *North Carolina vs. Zachary*, 232 *U. S.*, *p.* 248.

The Court did charge in substance all of request number seven, so far as the defendant was entitled to have it charged. The Court very fully charged that if the deceased was guilty of any negligence which contributed to the accident there should be a deduction of the damages, if any, in proportion to the amount of negligence of which the deceased was guilty in comparison with the negligence of the defendant.

Ground of appeal number thirteen is based first, (a) upon the statement made by the Court that the decedent was killed on the tracks of the railroad company. This was practically admitted in defendant's answer and was proven beyond all question by the evidence in the case and was not denied by anybody. Second (b) to the statement of the Court: "I care not whether the train went out that day direct to New York State, or whether it went the week before, but whether or not they were used in their business in interstate commerce, and were part of the tracks used in the business off and on although they say frequently trains were shunted in." This statement was entirely correct, because the question was whether the track on which the

deceased was working at the time he was injured was a track which, in a general way, was used by the defendant in interstate commerce, and this was proven, beyond all question, **and not in any way denied by the defense.**

That the track in question was used in interstate commerce was shown by David H. Lake, page 24, line 34 to page 25, line 16; and by Clement Bossett, page 22, line 34 to page 33, line 3, and page 33, lines 13 to 21; and by John Daly, page 35, lines 23 to 33 and page 36, lines 23 to 31, and page 39, line 15 to page 40, line 11, where he testified as follows: Q. Is it your answer that you used sometimes each one of these tracks? A. We used them tracks. Q. All of them? A. Yes. Q. In coming in from Maybrook, N. Y.? A. Yes, sir; we used them all if necessary. And also on page 40, lines 14 to 30, and that the accident occurred on track number five was conclusively shown by Watson Ayres, page 42, lines 3 to 16. It was also shown by the same witness on page 43 that he was the first one to arrive on the scene and that there was nobody else anywhere near the deceased when he arrived, and which goes to show that there was nobody else than the conductor on top of the car who could have given any warning to the deceased.

It is further shown by the same witness on pages 46 and 47 that the car left the track right at the end of the switch points where the deceased was found.

That the accident occurred on track number five is also testified to by John O'Neill on pages 49 and 50, and that the car was derailed right over the switch.

John O'Neill also testifies on page 50 that some of the very cars that were being drilled that morning were bound for points out of the State, lines 20 to

31. Mr. O'Neill also testifies on page 51, line 5 to page 53, line 2: Q. Was this mud track number five, and has it for a period of the past year been used to drill cars that come from other States? A. *It isn't used for drilling cars: it is used for pulling trains in there to be drilled.* Q. In on track five? A. Yes. Q. Where do those trains come from? A. Only what comes off the Lehigh, and once in a while that comes from Sussex. Q. Are the trains run in on that track to go to points out of New Jersey? A. They are taken up on the Lehigh yard to be drilled; to be switched up. Q. And when they are run up on track five to get them to points out of the State, like Scranton and so on? A. They pull them back that way once in a while, or they go the other way over the cut-off. Q. No through freights at all? A. Yes, local freight; Scranton freight.

BY THE COURT: Scranton, Pennsylvania? A. Yes. Q. Do they commonly use this track or frequently use it? A. Very seldom use five. Q. Do they use it sometimes? A. I think they do. I would not be sure about number five; they generally go to the west main. Q. Is that to go to Scranton? A. Yes, if they go the old road.

On page 57, Mr. O'Neill also swears as follows: Q. What do you mean, they were put in the storage cars? A. The cars they hold not ready to go out at the time. Q. You speak of the Lehigh and Hudson Railroad; from what point did it extend? You speak of it being in New Jersey; where is it from? A. From Maybrook to Phillipsburg, I believe; then they come into Port Morris.

Same witness also testifies at the bottom of page 58: Q. You say, Mr. O'Neill, you went down where the car was derailed, after you heard of its being derailed? A. Yes, I was down there. Q. Did you

examine the switch? A. Yes; the switch seemed to be all right. Q. It seemed to be all right. A. Yes.

This shows that it was not any fault of the switch, but the running over of the deceased that caused the derailment of the car.

Nicholas Rosse, at the bottom of page 68 testifies as follows: Q. How did it happen that you weren't with Mr. Willever at this time? A. Mr. Willever left me at the switch to take the ice and he told me before he left to watch for the trains, and he said, look out, **and Mr. Willever took the hammer and went on.**

At the bottom of page 68: Q. What were you doing at that time? A. Cleaning the switch. Q. What switch? A. Caboose switch.

At the bottom of page 69, the same witness testifies as follows: **Q. What were you and Fort and Willever out doing that morning, and what was your general work? A. We were supposed to take ice out of the switch; clean up.**

At the bottom of page 70, same witness testifies: Q. How long was it after you left Mr. Willever before the accident occurred? A. About twenty minutes. Q. What was Mr. Willever doing when you left him? **A. He took the hammer and went on.**

The testimony of this witness shows that the general work that Mr. Willever and his helpers were doing that morning was at or about the switches, and that twenty minutes before the accident the deceased left this witness with his hammer in his hand and going in the direction of the switch where he was killed, and the evidence of David Burd, at the bottom of page 77 and the top of page 78, he testifies as follows: Q. Did you see Mr.

Willever's tools around at that time? A. No, not at that time. Q. When did you see them? A. **When we went back to put the car on the track there was a hammer there, laid at the switch.**

All this testimony made it a question of fact for the jury, and the jury was fully justified in drawing the inference from these facts that at the time the deceased was killed he was working on an interstate track, known as track number five, at the switch where he was found, and because he left Rosse a few minutes before and went in the direction of the switch, and working about switches was their particular work that morning and his hammer was found beside him. Besides, the defendant's answer, page 12, lines 10 to 21, admits deceased was engaged in repairing a track of defendant and that he was killed.

The evidence of James Clark, civil engineer, page 86, shows that the train that ran over the deceased was pushing up a slight grade, which is all the more reason why conductor Burd should have seen the deceased in time to avoid the accident.

The evidence of Charles J. Yoest, page 92, shows that all the tracks were used in both **interstate** and **intrastate** business. Q. Will you state just how trains are made up in that yard? A. They are classified according to their destination; that is, we make up so many trains; trains for Hoboken are classified in Hoboken classification; cars for Sussex in that section; west bound, such as Scranton and points beyond, are classified accordingly.

The last objection under ground thirteen was an objection to the statement by the Court that contributory negligence could not be implied from the mere fact of the deceased being found in the condition he was, with his legs nearly cut off, and

that being found in that condition did not raise a legal presumption of contributory negligence.

Contributory negligence is matter of defense and cannot be implied but must be proved. *N. J. Express Co. vs. Nichols*, 4 *Vr.*, 434; *Consolidated Traction Co. v. Bahr*, 30 *Vr.*, 477; *Durand vs. Palmer*, 5 *Dutcher*, 544.

One of the claims made by the defendant company is that it would be impracticable to give signals in a yard of this kind.

The evidence of defendant's own witness, John E. Church, trainmaster, at the bottom of page 98 and top of page 99 shows, that the length of the Port Morris Yard is two and a quarter miles, and that in that yard they have only three engines for twenty-four hours work.

Another point made by the defense is that it was not customary to give notice of any warning in this yard. Even if this were true, that would not excuse the defendant, because a custom of that kind cannot overcome the law of negligence. Besides, the evidence of Mr. Church, page 99, lines 24 to 40, that warning was always given in order to avoid injuring anybody, and on page 100 same witness testifies as follows: Q. Would he be required by the company to give a signal if he saw men on the track? A. **Yes; we are told we must not take any chances. Q. What do you mean by that? A. Injuring or colliding with anything. Q. You are told to do that? A. That is one of the general rules.**

On page 101: Q. In that way. But if he saw him on the track and did run him down without giving him any warning he would not be violating his duty to the company? A. Yes, he would vio-

late his duty to the company as well as to the State.

And on page 102: Q. Isn't it, for instance, the duty of an engineer or man stationed on the car that is being pushed backward to look out as he goes ahead that the switches are right? A. **It is his duty to be up in a conspicuous place and signal the engineer. Q. And see that things are all right ahead of it? A. He would be crazy if he didn't do that.**

And at the bottom of same page and the top of page 103: **Q. And it is his duty as a trainman if he sees somebody on the track and can stop to stop, isn't it? A. That is everybody's duty. Q. And if he cannot stop then he should do his best to warn him? A. If he sees anybody.**

On page 104: Q. Isn't there danger in starting up the trains when the men are over between the cars? A. Yes; if there are cars in front of the engine, possibly. Q. And that is one particular reason he does not move until he gets the signal he knows they are cutting away? A. No, he does not know any more than he would move on when he has the signal. Q. But he wouldn't move without the signal; he would get the signal, and if he did move before he got that signal he would be in danger of injuring the men? A. He might be.

That the book of rules which was admitted in evidence was to guide the men in the yard as well as those out on the main line, is conclusively shown first by the testimony of Charles Eycke, who was a yard brakeman or switchman, at the bottom of page 106: Q. And did you have a copy of that book of rules furnished you by the company? A. Yes.

And by the evidence of David Burd, on page 107, where he testifies that he was furnished with one of these same books: Q. Did you work on the main line? A. Well. no, sir, my work was in the yard. Q. And still the company gave you one of these books for instructions? A. Yes, sir; I had a book given to me before I went into the yard.

And also by the evidence of James O'Neill, page 109: Q. Mr. O'Neill, I show you a book and ask you if you know what it is? A. That is a book of the rules of the company. Q. Was a book of that company furnished you or not by the company? A. Yes, I have one of these. Q. When was it furnished you? A. I don't know what date. I couldn't tell. Q. Since you have been occupying the position you now occupy with the company? A. Yes. Q. Was it given to you for your guidance in your position? A. I suppose so; it was handed to me and told it was a book of rules.

This witness had testified positively on page 48, lines 24 to 34 that he had been employed by the Delaware, Lackawanna & Western Railroad Company, as switchman, about twenty-seven years.

At the bottom of page 109 and top of page 110: By the Court: Q. Was one of those books given to you after you were in the Port Morris Yard? A. Yes, sir. Q. From whom did you receive it? A. One of the yardmasters from the yardmaster's office.

In the case of *Pederson vs. D., L. & W. R. R. Co.*, 229 U. S., 146, the U. S. Supreme Court held, that to run down a track-repairer, which the plaintiff was in that case, without sounding any warning, was negligent, and they held the defendant company liable. In the *Pedersen* case the locomotive was ahead and was pulling a train of cars, and the great noise made by the locomotive

was far more likely to attract attention of an employee who was on the track than was the situation in the case in hand where the locomotive was a thousand feet away and pushing a train of twenty-seven cars which came quietly stealing along and ran over the plaintiff. To run down a track repairer under the circumstances of this case, was much more negligent than it was in the *Pedersen* case.

It was just as practical to give warning in the case in hand as it was in the *Pedersen* case or in the *Behrens* case, both of which occurred in yards.

In the *Pedersen* case the Court said on page 152: "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair, or in keeping it in a suitable condition for use, from being **employment in interstate commerce.**

In the case of *St. Louis & San Francisco R. Co. vs. Seale*, 229 *U. S.*, 160, where the deceased was killed **while going through yards**, when he was struck by a switch engine and killed by other employees in the yard, the Court said: "Interstate transportation is not ended by the arrival of the train at the terminal. The breaking up of the train and moving the cars to the appropriate tracks for the making up of new trains for further destination, or for unloading, is as much a part of interstate transportation as the movement across the State line, even if the cars were not to go to points beyond."

The deceased in the above case was what is known as a yard clerk, and his duties were to make a record of incoming and outgoing trains, checking cars and putting on cars or labels to guide switchmen in

making up outgoing trains. And the Court held that he was doing interstate commerce work and that the case came under the Federal Act and should have been brought in the name of the personal representative of deceased and not underthe law of the state where the accident occurred.

(7). *Aerkfetz vs. Humphreys, Receiver*, 145 U. S., p. 418, which is the case upon which the Supreme Court based its opinion, is an entirely different case at bar. In that case there was evidence of contributory negligence on the part of the plaintiff. In this case, there is no such evidence because nobody saw the accident.

The chief ground of the opinion in the Aerkfetz case was that the ringing of the bell or blowing of the whistle to give warning would only tend to confusion, and would make the yard even more dangerous. That reason does not apply to this case at all, because the locomotive was a thousand feet away and was pushing the train, which as I have stated before, stole quietly along and was liable to catch any man and run over him that might be working in the yard, no matter how careful he might be, and no matter what was the character of his work, and it is for this reason that the railroad company itself promulgated and enforced a rule, that when trains were backing there should be a man stationed on the head car for the express purpose of avoiding just what happened in this case. The charge in this case is not the failure to ring the bell or blow the whistle, but failure to see and warn.

The Federal Statute makes the company liable for all injuries "Resulting **in whole or in part** from the negligence of any of the **officers, agents** or **employees** of such carrier," &c.

This completely changes the law of negligence

with respect to interstate employees, making the master liable not only for neglect of duties owed by the master to a servant, but also for the neglect of a duty owed by the fellow servant in such employment to another servant of the same master.

A careful reading of the testimony will show that track No. 5, on which this accident occurred, was not correctly described by our Supreme Court as a **yard track;** but, on the other hand, it was testified by a number of witnesses, particularly Mr. O'Neil, page 51, lives &c., that **it was a track on which cars were not drilled.**

Q. Was this mud track number five, and has it for a period of the past year been used to drill cars that come from other States? A. **It isn't used for drilling cars, it is used for pulling trains in there to be drilled.**

Q. In on track five? A. Yes.

Q. Where do these trains come from? A. Only what comes off the Lehigh (meaning Lehigh & Hudson River R. R.) and once in a while that comes from Sussex.

Q. Are the trains run in on that track to go to points out of New Jersey? A. They are taken up in the Lehigh yard to be drilled; to be switched up.

I particularly call your attention to the testimony of Mr. Church, page .

Q. Would he be required by the company to give a signal if he saw men on the track? **A. Yes, we are told we must not take any chances.**

Q. What do you mean by that? **A. Injuring or colliding with anything.**

**Q. You are told to do that? A. That is one of the general rules.**

Page 101, lines 39 to 40.

Q. In that way. But if he saw him on the track and did run him down without giving him any warn-

ing he would not be violating his duty to the company? A. Yes, he would violate his duty to the company as well as to the State.

Q. Isn't it, for instance, the duty of an engineer or man stationed on the car that is being pushed backward to look out as he goes ahead that the switches are right? A. It is his duty to be up in a conspicuous place and signal the engineer.

Q. And see that things are all right ahead of it? A. He would be crazy if he didn't do that.

**Q. And it is his duty as a trainman if he sees somebody on the track and can stop to stop, isn,t it. A. That is everybody's duty.**

**Q. And if he cannot stop then he should do his best to warn him? A. If he sees anybody.**

The deceased undoubtedly knew that such rule was in force and had a right to suppose that if cars were being pushed as these were that the conductor or someone else would be on top of the forward car and would warn him of any dangers. All of the men were furnished with the book of rules *containing this rule.*

It was clearly a question for the jury whether track No. 5 on which deceased in this case was killed was a yard track or not.

While the employees of the company testified that this rule was for the protection of the com pany's property and not for the protection of the men in its employ, they had no more right to place a construction upon, or give the reason for, this rule, than the jury did, and, under the instructions of the Court, it was a question for the jury as to whether or not it was not the object of the rule to prevent just such accidents as this. The employees of the company say it was to prevent collisions and to prevent running over obstacles and derailing the cars, which is exactly what occurred in this case.

Again, the Aerkfetz case was decided many years before the Federal Employers' Liability Law, upon which this action is based, became a law, and the fact that the engineer in the Aerkfetz case was a fellow servant of the plaintiff was one of the three reasons why the Court in that case decided that the company, as such, did not owe the duty of warning to the deceased. Had it not been for the Employers' Liability Law the defendant would *not* have been liable in the case of *Pederson vs. Delaware, Lackawanna & Western R. R. Company*, above referred to, because of the fact that the brakeman who failed to give Pederson warning was a fellow servant of Pederson.

The Pederson case occurred in the yards of the Delaware, Lackawanna & Western R. R. Company, and so did the accident in the case of *St. Louis & San Francisco R. R. Company vs. Seale*, 229 U. S., 160, and no question of this kind was raised by the attorneys in the case or by the Court. The Federal Employers' Liability Law, on which this case is based, abolishes the fellow servant doctrine and makes the railroad company liable for the negligence of its employees and agents.

Our Supreme Court cites the case of *Precodnick vs. Lehigh Valley R. R.*, 74 N. J. Law, 566, and says that the decision is controlling upon the Supreme Court, but that case was decided under the New Jersey law, when the fellow servant doctrine was in force. Had the present New Jersey law, or the Federal Employers' Liability Law been in force at the time the Precodnick decision was given it would have been exactly to the contrary, because in the Precodnick case the duty of warning did not rest directly upon the company under the New Jersey decisions, and Precodnick was run over through the negligence of the brakeman in failing

to give him warning of the approach of the cars, and the brakeman being a fellow servant of Precodnick, the master was not liable for his negligence, as the law was at that time, because, and only because, of the fellow servant doctrine, since then abolished.

The negligence in the present case was not directly the negligence of the defendant company itself, as in the case of D'Agostina v. Penn R. Co., 43 Vr., p. 358, case, but was the negligence of one of its servants, the conductor who was on the top, but on the rear end, instead of the front end, of the head car, and who failed to keep a look-out and then warn the deceased, or signal the engineer to stop. The Court should keep in mind the distinction between the negligence of a master because of the failure to warn under the rule laid down in the case of D'Agostino v. Penn R. R. Co., 43 Vroom, p. 358, where it became the duty of the master to give the warning, and those cases in which injuries are committed because of the negligence of a servant of the master, where some object is set in motion by a servant resulting in injury to a fellow servant which would have been prevented if the other servants seeing the impending danger, had given warning, or in some other way tried to avoid the injury.

In the present case, the conductor, who was in a place where he could have seen, and where it was his duty to have seen, negligently failed to keep a look-out and then warn the deceased or signal the engineer to stop, and did not even know that the deceased was on the track until the car on which he was riding was derailed by coming into contact with the deceased's body.

The Supreme Court says in this opinion that it was the duty of the foreman to not only look out

for himself, but the men under him. In this case there were no men under him, and he was working alone, and while it may have been his duty to look out just as it has been the duty of every man working on a railroad track to look out for himself, that duty on his part does not excuse the negligence of the servant of the defendant company, neither can any instructions to that effect on the part of the company abolish the law of negligence. The deceased was no more bound to look out for himself working where he was than if he had been engaged in some other work and was injured through the carelessness of some other fellow servant.

Again, in the *Aerkfetz case* there were three grounds of defence:

1. The receivers were guilty of no negligence.

2. If they were, deceased was guilty of contributory negligence.

3. Whatever negligence there was, if any, was that of a fellow-servant.

Under the Federal Employers' Liability Law, the interstate railroads are made liable for all injuries received by their employees while engaged in interstate commerce **resulting in "whole" or in "part" from the negligence of any of the officers, agents or employees of such carrier,** and also adopts the "Comparative Negligence Doctrine," so that the second and third grounds have no applicability to this case.

In that case, the Trial Court directed a verdict for the defendants on the ground of contributory negligence, and the United States Supreme Court goes on to say:

"Much might be said in favor of each of the three propositions advanced by the defendants. We rest

our affirmance of the judgment upon the grounds that, under the circumstances, there was no negligence on the part of the defendants, and that the accident occurred through a lack of proper attention on the part of the deceased."

In other words, that the deceased himself was guilty of contributory negligence, which, under the present law, is not a complete defense, but only a partial defense.

The proof in the *Aerkfetz case* was that deceased stood with his back toward the approaching cars and remained that way at work, without watching for the moving engine, until he was struck and run over by the first car.

There is no such evidence or proof in the present case, and, in fact, there is no proof whatever of the deceased's negligence, because it is not known how the accident occurred, nor is it shown that the deceased in the case **did know** that the cars were backing up on this track, which was generally used for bringing in Lehigh and Hudson trains, **and was not used for drilling cars.**

The Court goes on to say that:

"He went on with his work without turning to look."

There is no such evidence in the present case.

Further on in the opinion the Court says that:

"The other employees were not bound to assume that the deceased would be wholly indifferent to the going and coming of the cars."

There was no evidence in the present case that the deceased was indifferent, but the proof is that there was nothing to warn him of the oncoming train. In the present case, the engine was twenty-seven cars away, and the great noise of the puffing,

snorting engine, as in the *Aerkfetz case*, could not afford any warning of the approach of the cars whatsoever, because it was at least 1,000 feet away.

In the *Aerkfetz case* the Court holds that:

"Under the circumstances the defendants were not compelled to send a man in front of the cars to give notice to the employees, who had all the time knowledge of what was to be expected." In the present case it was a rule of the company that a man should be stationed on the front car, and he was actually there. As I have said, that rule was undoubtedly known to the deceased, and, as a matter of fact, the man was actually there, and was stationed there for the very purpose of **looking out ahead, which he failed to do**.

In the *Aerkfetz case*, in the concluding part of the Court's opinion, it says: "We see in the facts as disclosed, no negligence on the part of the defendants; in the *Aerkfetz case* it seems that it was not the custom to station a man on the front of the cars that were being pushed, **but in the present case it was the custom, and known to be the custom, by** the deceased, and he had a right to rely upon that custom being carried out."

In the *Aerkfetz case* the Court goes on to say:

"And if by any means negligence could be imputed to them, surely the deceased, by his negligent inattention, contributed directly to his injury."

Those words cannot apply to the present case, because contributory negligence is now only a partial defense.

In the case of Rosenbloom v. Pecos &c. R. Co., U. S., 241, p. 390, where a clerk was killed in a yard while taking the number of car which was his

usual duty or employment and the U. S. Supreme Court held the company liable or at least said it was a question for the jury.

In the case of North Carolina R. Co. v. Zachary, 232 U. S., p. 248, the deceased was a fireman and was killed **while crossing the tracks in a yard,** to get to his home and the U. S. Supreme Court held the case should have been submitted to the jury.

In the case of Carr v. N. Y. N. H. & H. R. Co., 238 U. S., 261, the injuries were received while working on a car on a siding; held, the was company liable.

In the case of Penn. R. R. Co. v. Donat, 239 U. S., p. 50, a yard conductor was **injured in a yard,** and the U. S. Supreme Court held the R. R. Co. liable.

Kanaha, &c., R. Co. v. Kerse, U. S., 239, p. 576.

McGovern v. Phila. & R. R. Co., U. S., 235, p. 389.

The case of Yazoo &c. R. Co. v. Wright, 235 U. S., p. 376, holds that the fact that the engineer knew that his fellow employes were likely to leave cars protruding over the tracks in yards when the accident occurred, he therefore assumed the risk, but the Court held otherwise and said it was not a question of assumed risk but of negligence of fellow servants.

For the above reasons I respectfully submit that the judgment of the Supreme Court should be reversed and the judgment of the Court of Common Pleas should be affirmed.

WILLIAM C. GEBHARDT,
Of Counsel with Plaintiff in Error-
Appellant.

No 38-

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| LILLIAN WILLIVER, Administratrix,<br>*Plaintiff-Appellant,*<br>*vs.*<br>THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,<br>*Defendant-Appellee.* | Action at Law.<br>On Appeal. |

## *BRIEF OF APPELLEE.*

### Statement.

This is an appeal from the reversal by the Supreme Court of a judgment entered upon verdict of a jury rendered in Hunterdon Common Pleas Court for Six Thousand Dollars in an action for the death of one William Williver, the action being brought under the Federal Employers' Liability Act, 35 Stat. at L., 65, Chapter 149, U. S. Comp. Statutes Supp., 1911, p. 1322.

The negligence charged by the plaintiff was that the defendant "then and there propelled and operated a locomotive engine and cars on said track in a negligent and careless manner, and without giving the deceased any notice or warning of the approach of said locomotive engine and cars on the track where said deceased was working" * * * so that, etc.

The deceased was a section foreman of the appellee and had been such for at least six years before the injury complained of; the last five years prior to his death he had charge of the

section which included the Port Morris freight yard of the appellee, in which yard he was found injured.

When the deceased was hired as section foreman he was instructed that he must always protect himself and his gang of men against all chances of accident and danger.

The place where the deceased was injured was the Port Morris freight yard of the appellee at Port Morris, New Jersey, which yard was about two and one-quarter miles long, running east and west, containing some forty tracks, through the most southerly part of which ran the two main line passenger tracks of the appellee.

Within the main yard and near the easterly end of the same was a division of the yard known and designated interchangeably as the west or light yard. Into this light yard cars were drilled or shifted from the main yard to be stored or held until they were inspected, and later on assembled into new trains. They were then taken away by road engines on orders from the dispatcher's office at Hoboken. These road engines were distinguished from yard engines because they run on the road or main line, while the latter operated exclusively within yard limits.

The movement of cars in this yard was handled by yard engines, three operating continuously each day, and one, half day and half night. These engines were continuously moving in and about the yard, switching cars, making up trains or storing them so that they could be classified and subsequently made up into trains.

During the month of December, 1913, in which the deceased was injured, there were 94,000 cars handled in the Port Morris yard.

In view of the fact that the engines were continuously running backward and forward in this yard, passing each other and at times operating in the immediate vicinity of each other, it was

impracticable to devise any rules for the giving of warning signals to persons moving in and about the yard, because such signals would tend to a greater confusion than to have a man look out for himself, knowing the frequency of the moves to be made and expected at any moment.

On the morning of December 11, 1913, between 7 and 8 o'clock, the deceased took his gang of men up to certain switches in the yard, known as the Hill switches, and ordered them to clean the same, he standing around and watching them for a time, after which, having warned his men to look out for the locomotive engines and trains, he left and proceeded up the yard in a westerly direction, soon getting out of the sight of his gang, on account of certain caboose cars standing on a track intervening between them and the deceased.

The day was clear. About 9:30 on the same morning, one Ayers saw a car on a track known as the "mud track," or No. 5, bumping along the ties and jump off the track in a southeasterly direction toward a track known as No. 3. Ayers went up to where the car jumped off the track, and when he arrived there found the deceased between tracks No. 3 and No. 5, with his legs run over.

How the deceased got there, how he came to be injured, and what he was doing just prior to his injury, is not shown in the testimony, nor were any of the witnesses able to tell how the accident happened to the deceased, as the last person who saw the deceased before the accident was one of his gang, who immediately lost sight of the deceased after the deceased left him.

The place where the deceased was found was between 600 and 700 feet west of where the deceased was last seen before he was found injured.

It is assumed, but it does not appear in the testimony, that the deceased was run over by the wheels of forward truck of car numbered 28191,

which was the car Ayers saw leave track No. 5.

Car 28191 was the forward car of a string of twenty-seven cars being pushed by a yard engine in an easterly direction down on track 5 to the west, or light, yard; this track was straight for a distance of nearly a quarter of a mile from the place where the car jumped the track down toward the light yard.

Just before this car became derailed it was going about as fast as one could walk and as soon as the conductor of the train saw that it had become derailed he gave a stop signal to his trainman, who conveyed it to the engineer and the engineer stopped the cars inside of twenty or twenty-five feet.

The place at which this car left track No. 5 was at the point of a switch to a caboose track, and this switch was found to be in good condition, no charge being made by the plaintiff that the injuries to the deceased were caused by any defective or negligent roadbed or track conditions, or of the switch in question.

The plaintiff's case signally lacked any evidence as to what the deceased was doing at the time just prior to his being found injured or that the 27 cars, of which No. 28191 was the first car, was engaged in any movement that had any relation to interstate commerce.

The plaintiff did introduce evidence that a certain Lehigh and Hudson River R. R. Company train, which originated at Maybrook, New York, and whose destination was Port Morris, did arrive at Port Morris yard about 9:30 on the evening of December 10, 1913, that after it arrived there its Lehigh and Hudson engine was detached from the train, taken to an ash pit, and the engineer of said train thereupon went home for the night, his work being done.

But what track this Maybrook train came in on at the Port Morris yard that evening, and

whether any of the cars in that train were in the string of 27 cars which were being moved on track 5, on the morning of December 11, 1913, twelve hours after the Maybrook train arrived at Port Morris, was left not only in uncertainty but entirely to conjecture.

When the defendant was heard it was learned that these 27 cars were empty cars, containing no interstate freight, and that the movement that they were making at the time the deceased was injured was a drill by a yard engine to the light or west yard for storage.

It was further shown by the defendant why it was impracticable to have a system of warning signals for use in a freight yard, such as the Port Morris yard; that the deceased had been instructed as to protecting himself against dangers of such operation and that he not only had a knowledge of the existent dangerous conditions in the yard, but that he had an appreciation of those dangers.

The Supreme Court having determined that the Federal Employers' Liability Act was applicable to the situation that point is not here raised by the appellee.

## Argument.

In view of the fact that the Supreme Court reversed the judgment of the Common Pleas of the County of Hunterdon for the reason that no negligence was disclosed upon the part of the defendant-appellee, the contention of the appellee for the affirmance of the judgment of the Supreme Court is that there was no negligence shown upon its part and further that, even assuming, for the sake of the argument, that negligence was shown upon the part of the appellee, the decedent of the appellant assumed the risk of the injury which caused his death.

## POINT I.

### There was no proof that the Defendant was negligent.

The specific charge of negligence which the appellee was alleged to have committed was the failure to give the deceased a warning of the approach of some empty cars which were being pushed backward in a large freight yard with the engine at least 700 feet away from the car which was derailed, taking the freight cars in question as being about 34 feet in length, that being the ordinary length of a freight car.

Track No. 5 on which the cars were being moved was a straight stack for the distance of nearly a quarter of a mile down to the west, or light yard from where Car #28191 left the track (p. 61, l. 23 et seq.).

Just prior to the car leaving the track, the cars were moving about as fast as a man could walk (p. 65, l. 24 et seq.) and they were stopped within 20 or 25 feet from the time the conductor first noticed the car bumping the rails (p. 60, l. 18 et seq.) and the exchange of signals by his brakeman wtih the engineer (p. 63, l. 33 et seq.).

There was no proof that any member of the crew of this string of cars occupied at the time the deceased is alleged to have been injured any other than his proper place, either in the management or the handling of the train.

The uncontradicted evidence showed that the rules for operating trains and giving signals such as were used on the road or main line of the appellee's railroad were not applicable to yard movements (p. 107, l. 21 et seq.; p. 109, ll. 34-5; p. 111, l. 31 et seq.), and further the reasons why said rules were not applicable were gone into and shown at great length and in detail (pp. 110-1-2-3).

It was also made to appear that a great volume of business was done in this yard in the very month of the deceased's injury and the whole situation shown by the uncontradicted proof was that there was no negligence on the part of the defendant appellee.

The Supreme Court, is affirming the instant case, relied upon the case of *Precodnick v. Lehigh Valley R. R. Co.,* 74 N. J. L., 566, wherein this Court, after reviewing the circumstances, said that there was no proof of the want of reasonable care upon the part of the employees of the defendant company and sustained the direction of the verdict on the grounds that it affirmatively appeared that there was no negligence upon the part of the defendant company.

This Court, in *Germanus v. Lehigh Valley R. R. Co.,* 74 N. J. L., 659, distinguishing that case from the Precodnick case, supra, said that the distinction in the Germanus case from the Precodnick case was that in the Germanus case the deceased "had the right to expect a warning while in the Precodnick case he had no such a right by reason of the system under which he was working" (74 N. J. L., 655).

There was no charge made by the plaintiff-appellant that the deceased was seen by any member of the train crew before the happening of the accident and the evidence with respect to this matter is uncontradicted that he was not seen by any member of the train crew until after the accident, in view of which fact, a verdict against the appellee on this secondary ground of liability would have been unsustainable (27 Harvard Law Review, 403).

## POINT II.

**Granting, that the defendant was negligent, the deceased assumed the risk of the injury.**

Section IV. of the Federal Act, under which this action was brought, leaves to the carrier the defense of the assumption of risk unless the injury was caused through or by negligence in the violation of some statute enacted for the protection of employees; for example, defective appliances such as covered by the "Safety Appliance Act".

The appellant did not and does not complain against the appellee for or on account of the violation of any such statute; neither did she offer any evidence on that point. Further, there was no charge of defectiveness of the roadbed or track conditions. Under these circumstances, the assumption of risk was valid defense. (*Horton v. Seaboard Air-Line,* 233 U. S., 492-508.)

If the testimony in this case had been of a contradictory nature, the Trial Court would have undoubtedly been justified in allowing the matter to be submitted to the jury (considering, for the sake of the argument, that the defendant was negligent), as was done in the case of *McGovern v. Philadelphia & Reading R. R. Co.,* 235 U. S., 389-402, but no such conditions having existed, the only point for the consideration of this Court is whether it will apply the law as laid down in this State and the Federal Courts as to the assumption of risk.

The uncontradicted evidence showed that the place where the deceased was found injured was a freight yard, over two miles long, that it contained some forty tracks (p. 99, ll. 9-10), that the yard was used to receive and drill cars (p. 91, l. 9, et fol.), that the operations in the yard were continuous both day and night (p. 97, ll. 38-40),

that taking the month of December, 1913, as an example, 94,000 cars were moved in and about the yard (p. 91, ll. 26-31), that the tracks No. 5 and 3 were straight track for a quarter of a mile east from the place where the deceased was found, that the cars just prior to leaving the tracks were only moving as fast as a man could walk (p. 65, l. 24 et seq.), that the day was clear (p. 65, ll. 38-40), and that the time the injury is alleged to have been inflicted was in the day-time, about 9:30 A. M.

To which may be added, that when the deceased was employed he was instructed as section foreman always to protect himself and his gang from danger and accident (p. 90, ll. 1-9), that he had charge of the section which included the Port Morris Yard for five years prior to the accident (p. 89, ll. 35-7), that there were no rules or regulations relative to giving warning of movements of cars in this yard (p. 98, l. 11, et fol.), that the reason therefor was their very impracticability (p. 110 et seq.), that the books of rules furnished the deceased (p. 113, ll. 39-40) contained no rule as to giving warnings (p. 109, ll. 35-6) of yard or switch movements, and that the deceased had not only a knowledge of these very dangers on account of the layout of the yard and the operation therein, but openly and distinctly evidenced his very appreciation of the obviousness of his risks by warning his own gang to look out for the locomotive, engines and trains (p. 68, ll. 21-26).

The case of *Aerkfetz v. Humphreys,* 145 U. S. 418, contains as distinct an enunciation of the doctrine of the assumption of risk particularly applicable to a situation thus presented by the case at bar as can be found.

The opinion in this case being short, we quote from it at length.

> "Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard?

They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of the bell and the sounding of the whistles on the trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that various employes in the yard familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was part of the constant business of the yard would have made him aware of the approach of the cars, and enable him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to the employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant," * * *

The underlying principle in cases relative to assumption of risk seems to us to be, that it is not the obviousness of the physical condition which gives force to this law, but the obviousness of the dangers which the physical condition or situation produces.

Five years in the Port Morris yard as section foreman, familiar with the situation as presented by the physical conditions, warned in his hiring as to them, we last see the deceased alive, with a warning on his lips against the very thing we claimed caused his death.

Our contention seems too clear to need further argument or citation.

In the case of *Colasurdo v. C. R. R. of N. J.*, 182 Fed., 832, the learned trial judge on an application for a new trial pointed out the difference in that case and the *Aerkfetz* case by calling attention to the following facts: that the accident happened in the night time, that the rear of the train was not lighted and that the train was running swiftly and without any means of control, all of which are not only absent in this case at bar but absolutely the reverse, if one should so put it. In the case at bar, as has already been stated, it was daylight, a clear day, no necessity for train lights, and this train was not only going slowly, but the quick stop it made showed it was under absolute control.

No clearer case of assumption of risk, either from the instruction during employment theory, or appreciation of the obviousness of danger could have been presented.

## POINT III.

### The reversal of the Common Pleas by the Supreme Court should be affirmed.

For the reasons hereinbefore set forth it is respectfully submitted that there was no error committed by the Supreme Court in reversing the Hunterdon County Court of Common Pleas and the Supreme Court's reversal of the Common Pleas Court should be affirmed.

Respectfully submitted,

FREDERIC B. SCOTT,

Attorney of Defendant-Appellee.

Tel. 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.

# INDEX.



## TESTIMONY.

### FOR PLAINTIFF.

REBUTTAL FOR PLAINTIFF.



REBUTTAL FOR DEFENDANT.

## *EXHIBITS.*

# New Jersey Supreme Court

| | |
|---|---|
| LILLIAN WILLEVER, Admr. of WILLIAM WILLEVER, deceased, *Plaintiff.* | |
| *vs.* | *Notice of Appeal.* |
| DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.* | |

## NOTICE OF APPEAL.

To FREDERICK B. SCOTT, Attorney of Defendant:

Please take notice, that the plaintiff appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court reversed the judgment of the Court of Common Pleas of the County of Hunterdon.

2. Because the Supreme Court held that the plaintiff was not entitled to recovery because there was no negligence on the part of the defendant company or its agents or servants.

3. Because the Supreme Court held that the defendant company owed no duty to warn the deceased, but that the deceased was bound to look out for himself while working on a siding of the defendant company.

4. Because the Supreme Court held that the Act of Congress entitled "An Act relating to the liability of common carriers by railroad to their

employees in certain cases" approved April 22d, 1908, and the acts amendatory thereof and supplementary thereto did not apply to accidents which occured on a siding or in the yards of the defendant company.

Yours respectfully,
ELINOR R. GILSON (nee Gebhardt),
Attorney for Plaintiff.

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## NOTICE OF APPEAL.

Filed Aug. 7, 1914,

HUNTERDON COUNTY COMMON PLEAS COURT.

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LILLIAN WILLEVER, Administratrix, etc., of WILLIAM WILLEVER, deceased,

*Plaintiff-Appellee,*

*against*

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
*Defendant-Appellant.*

*Action at Law.*

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To WILLIAM C. GEBHARDT, Esq., Attorney of Plaintiff-Appellee:

SIR:

You will please to take notice that the above defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in the above case, and that it herewith sets out and files as its ground and reason for appeal, according to

the statute in such case made and provided, the following matters:

1. To the refusal of the Trial Court to dismiss the complaint of the plaintiff because the same failed to specify sufficient negligence to charge the defendant with liability.

2. To the allowance of the following questions to the witness, David H. Lake, over the objection of this defendant-appellant.

"Q. Did you subsequently learn how you got this stop signal?

"Q. Did you subsequently learn what was the cause of your getting the signal to stop?

"Q. What was the cause?"

3. To the allowance of the following question to the witness, John Daly, over the objection of this defendant-appellant:

"Q. State to the Court and jury whether or not you frequently came in from Maybrook and ran in on Track No. 5."

4. To the allowance of the following questions to James O'Neill over the objection of this defendant-appellant:

"Q. Did you know, Mr. O'Neill, whether or not this mud track 5 was commonly used to run the Lehigh and Hudson River trains in that came from Maybrook?

"Q. Was this mud track No. 5 and has it for a period of the past year been used to drill cars that came from other States?"

5. To the allowance of the following question propounded to Charles Ike over the objection of this defendant-appellant:

"Q. After you came down there and found Mr. Willever, what did you do?"

6. To the refusal of the Trial Court to grant this defendant-appellant its motion to non-suit the said plaintiff for the five reasons stated at length to the Trial Court.

7. To the allowance in evidence of a certain book known and referred to as "Plaintiff's Exhibit P 1."

8. To the allowance by the Court of the withdrawal by the plaintiff of said "Exhibit P 1" after the same has already been offered in evidence.

9. To the allowance and re-offer into evidence of a certain book known as "Plaintiff's Exhibit P 1."

10. To the refusal of the Trial Court to allow the following question to be propounded to the witness, John E. Church:

> "Q. Is Rule 102 the same as the rule adopted by the Standard Railway Association?"

11. To the refusal of the Trial Court to direct a verdict in favor of this defendant-appellant and against the plaintiff appellee for the reasons stated at length to the Trial Court.

12. To the denial of the Trial Court to charge the jury the following requests made by the defendant:

> 1. Before the plaintiff can maintain her action at all under the Federal Statute under which she has brought this suit, you must first find as a fact from all the evidence that at the time the deceased was injured the defendant was engaged at the time of the injury to deceased in interstate commerce and that the deceased at that time was also engaged in interstate commerce.
>
> The true test of liability being the nature of

the work being done at the time of the injury.

That the deceased has been doing work in the Port Morris Yard at some other point in the morning of the accident or expected to do some work at some other point in the Port Morris Yard on the day of the accident which would have been part of interstate commerce, is immaterial, the only and true test of the plaintiff's right of action is as I have already given to you.

*Behrens v. I. C. R. R. Co.*, (U. S. Ct., April 27, 1914).

2. I charge you that there is no evidence in this case that the defendant negligently operated its locomotive and engines or that it failed to give the deceased any notice or warning of the approach of said locomotive and cars.

3. I charge you that the deceased, Willever, in his employment as section foreman, under the terms and nature of his hiring, employment and work, was a fellow servant of the crew of the train, a car of which train ran into him, producing fatal injuries.

4. I charge you that there has been no charge made by the plaintiff in her complaint and that there is no evidence in this case that the tracks or switch at or near where the car was derailed and where the deceased was found, were in a defective or dangerous condition or negligently maintained at the time by the defendant and that you can find no verdict for the plaintiff and against the defendant merely because the car which was derailed, left the tracks.

7. If you should find in favor of the plaintiff and against the defendant company, your last

consideration must be the question of damages.

The section of the Federal Act which covers this point reading as follows:

> "That in all actions hereafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where 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, the point about this is simply this, that prior to the passage of the Employer's Liability Act, if an employee were himself negligent he could not recover anything at all, but this new Federal Employees' Liability Act has changed that condition of the law with respect to those who are engaged as I have indicated in interstate commerce, and has said that if an employee is himself negligent and that negligence contributes in part to the bringing about of the injury of which he complains, then contributory negligence shall not defeat his recovery, but the jury will then resolve itself into a sort of bookkeeper to ascertain from the facts in the case just how much of the total loss each one of the parties to the suit must bear. By that is meant this: Suppose, for instance, that the railroad company was negligent and that their negligence resulted in the injury to the employee, and suppose that in the production of

that injury the employee himself contributed; now, if the employee contributed one-half to the production of the injury for which this suit is brought, then you would say to yourselves, in ascertaining how much damage the plaintiff was to be allowed, what was the full injury to the plaintiff? Say you found it was five hundred dollars, or a thousand dollars, or whatever the fact might be; now, if it were a thousand dollars and the deceased himself had contributed one-half to the production of the injury of which it is complained, you would subtract one-half from the thousand dollars and only give the plaintiff five hundred dollars, because the deceased's own negligence under the act would subtract from the plaintiff's right to recover one-half of the full injury which was suffered. If he was contributory, to the extent of one-third, to the injury and the railroad company had to bear the other two-thirds, why, of course, you would only give a verdict of six hundred and sixty-six dollars and sixty-six cents, because that would be two-thirds, and he would have incapacitated the plaintiff from recovering the one-third because of his contribution, to the extent of one-third, to the injury of which it is complained and for which this suit is brought.

8. While the law presumes that the widow of the deceased suffered a pecuniary loss by reason of his death, you cannot base your verdict merely upon such presumption; you must go further and decide the case upon the evidence before you.

And I further charge you that although there is evidence in this case that the deceased received a certain monthly salary, there is no

evidence in this case to show whether he ever turned over any of his money to his wife, or if he turned over any money, how much he turned over to her, and in the absence of such proof, you cannot assume as a fact that he ever turned over either the whole or part of his monthly salary to her and that unless you find from the other evidence in this case that the plaintiff suffered a pecuniary loss by reason of the death of her husband, your verdict must be for nominal damages only.

13. To the error of the Trial Court in its charge to the jury in the following particulars:

(a) To that part of the Trial Court's charge in which the Trial Court made the statement that the decedent was killed on the tracks of the railroad company.

(b) To the statement of the Court that "I care not whether the train went out that day direct to New York State or whether it went the week before, but whether or not they were used in their business in interstate commerce and were part of the tracks used in the business off and on although they say frequently trains were shunted in."

(c) To the statement of the Trial Court that "it has been stated that these cars were standing in and about, or being shunted or pushed from one point to another, preparatory perhaps, to sending them on to other points of work, so it is not necessary that the train and crew of the defendant should have been at the time engaged in interstate commerce."

(d) To the statement by the Court that "the law with respect to the regulation of damages in our State, etc., etc."

(e) To the statement of the Court that "the fact that this man was found in the condition that he was, both legs nearly cut off, having died from the results, being found by the side of or under the car or in whatever the situation was, his mouth being closed and no one seeing the accident, how it happened, does not raise a legal presumption that he was guilty of contributory negligence—such contributory negligence as would bar a recovery in this section."

It cannot be said that being found in that condition as I have heretofore stated, that contributory negligence upon his part is implied; that is to say, you cannot imply contributory negligence just for the reason that he was found in that condition and no one to understand and show how it happened.

FREDERICK B. SCOTT,
Attorney of Defendant-Appellant.

Dated August 4, 1914.

## COMPLAINT.

(Filed March 13, 1914.)

HUNTERDON COUNTY COMMON PLEAS COURT.

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LILLIAN WILLEVER, Admrx. of WILLIAM WILLEVER, Dec'd,

*Plaintiff,*

*vs.*

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

*Defendant.*

*Complaint.*
*Judgment.*
*Record.*

---

Plaintiff, Lillian Willever, administratrix of William Willever, deceased, who resides in the Town of Hackettstown, County of Warren and State of New Jersey, says that:

1. On the 11th day of December, 1913, the said defendant owned and operated a certain railroad extending from the City of Hoboken, in the County of Hudson, and State of New Jersey, to the City of Scranton, in the State of Pennsylvania, and was then and there engaged in interstate commerce between the State of New Jersey and the State of Pennsylvania.

2. On the said 11th day of December, 1913, the said deceased was employed by the said defendant in the capacity of section foreman, or foreman of track repairers, and was then and there engaged in interstate commerce in repairing a track used by the said defendant in interstate commerce between the State of New Jersey and the State of Pennsylvania.

3. On the above mentioned day, the said deceased was engaged in repairing a track of the defendant in the Village of Port Morris, in the County of Morris, and State of New Jersey, which said track was then and there being used by the said defendant in interstate commerce as aforesaid, when the said defendant by its servants and agents then and there propelled and operated a locomotive engine and cars on its said track in a negligent and careless manner, and without giving the said deceased any notice or warning of the approach of said locomotive engine and cars on the track where the said deceased was working as aforesaid, so that by means of the premises the said cars ran into and over the said deceased with great force and violence; by reason whereof the said deceased was so crushed and injured that on the said 11th day of December, 1913, the said deceased died, leaving him surviving the said Lillian Willever, but leaving no children.

4. This action was commenced within two years from the time the said action accrued.

5. This action is based on an Act of Congress of the United States of America, entitled, "An act relating to liability of common carriers by railroad to their employees in certain cases, being a public act and approved April 22nd, 1908, and the amendment thereof being a public act approved April 5th, 1910.

6. The said plaintiff brings here into Court the letters of administration upon the estate of the said deceased, granted unto her by the Surrogate of the County of Morris, in the State of New Jersey, on the 21st day of January, 1914.

Plaintiff demands $20,000.00 damages.

WILLIAM C. GEBHARDT,
Attorney of Plaintiff.

## ANSWER.

(Filed April 4, 1914.)

The defendant, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, answers the complaint herein as follows:

1. It admits that it operated a railroad between Hoboken and Scranton, on December 11th, 1913, and that on said day it was engaged in interstate commerce between said points.

2. It admits that plaintiff's intestate was employed by defendant on said date as a section foreman, and on said date was engaged in repairing a track, but denies that said track was used in interstate commerce.

3. Defendant admits that deceased was engaged in repairing a track of defendant in Port Morris on the day aforesaid, but denies that said track was used in interstate commerce, as alleged in Paragraph "3" of the complaint. It admits that deceased died on or about December 11th, 1913.

As to the balance of said paragraph, and Paragraphs "4" and "5" defendant raises objections of law, as will be shown hereinafter.

4. Defendant has no knowledge or information sufficient to form a belief as to whether plaintiff has letters of administration to bring into Court.

Defendant objects that the complaint herein is not good in law, and will move at the trial of this cause to strike out said complaint on the following grounds:

1. Because the allegations of negligence contained in Paragraph "3" of the complaint lack certainty, in that they do not sufficiently set forth facts showing negligence on the part of said defendant, or facts showing any duty owed

by defendant to deceased, the breach of which duty resulted in negligence.

2. Because said Paragraph "3" unnecessarily repeats facts alleged in Paragraph "2" of the complaint, as to the work deceased was engaged in on said day, and the character of such work.

3. Because Paragraphs "4" and "5" of the complaint contain non issuable matter.

For a defense to this action defendant says:

1. That the injury complained of arose without any fault or negligence on the part of defendant.

2. That deceased was guilty of contributory negligence in that, while engaged in a dangerous occupation, in a dangerous place, he did not take proper precautions to see and hear passing and approaching engines and cars, and did not exercise proper care to guard himself from injury.

FREDERIC B. SCOTT,
Attorney of Defendant.

## REPLY.

(Filed April 7, 1914.)

*First Replication:* Plaintiff *denies* every allegation in the answer.

*Second Replication:* Plaintiff *denies* that the accident which resulted in the death of the deceased was due to his own negligence or want of care.

WM. C. GEBHARDT,
Attorney of Plaintiff.

## JUDGMENT.

After hearing the evidence and the argument of counsel and the charge of the Court, the jury retired in charge of L. D. Larison, Constable duly sworn to attend them; after being out a short

time they returned into Court and being called all appeared and say that they have agreed on their verdict and by their foreman further say that they find for the plaintiff the sum of six thousand dollars and so say they all, whereupon it is ordered and adjudged that the plaintiff, Lillian Willever, administratrix of William Willever, deceased to recover against The Delaware, Lackawanna and Western Railroad Company, defendant, the sum of six thousand dollars, besides costs of suit to be taxed.

Judgment on verdict in an action at law was rendered in favor of the plaintiff, Lillian Willever, administratrix of William Willever, deceased, and against The Delaware, Lackawanna and Western Railroad, Company, defendant, for the sum six thousand dollars damages ($6,000.00) and the sum of two hundred fifty-nine dollars and thirty-two cents costs ($259.32). Whole amount of judgment and costs sixty-two hundred fifty-nine dollars and thirty-two cents ($6,259.32).

Judgment entered and signed this third day of June, A. D. nineteen hundred and fourteen, at six o'clock and thirty minutes in the afternoon.

## TESTIMONY.

HUNTERDON COUNTY COMMON PLEAS COURT.

LILLIAN WILLEVER, Administratrix, etc., of William Willever, deceased,
*Plaintiff,*
*vs.*
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
*Defendant.*
} *Action at Law.*

Transcript of the testimony, etc., taken in the above entitled matter, at the Court House, Flemington, N. J., on Tuesday, June 22nd, 1914, at 10:30 o'clock in the forenoon, before Hon. PAUL A. QUEEN, C. J., and a jury.

APPEARANCES:

For Plaintiff—WILLIAM C. GERHARDT, ESQ.
For Defendant—GEORGE H. LARGE and FREDERIC B. SCOTT, ESQ.

Jury called and sworn.

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Mr. SCOTT—I have a preliminary motion to make in this case to dismiss the complaint. The first ground is that the complaint, as regards the fourth paragraph, shows the action to be brought by one Lillian Willever as administratrix. There is nothing in the complaint to show what relation the administratrix bore to this plaintiff—to the decedent. I take it that under the case of *Taylor v. Taylor*, U. S. Sup. Ct., Feb. 24, 1914, there can be no

presumption that the next of kin outside of a widow and children have suffered any pecuniary loss unless it is especially shown in the complaint. Perhaps that amendment would follow as a matter of course but we have nothing here to appraise us who the next of kin are That is apparent right on the face of the complaint.

The second ground is that the negligence charged in the third paragraph of complaint, the negligence which the plaintiff predicates her right of action upon, is uncertain and obscure, and fails to specify sufficient negligence to appraise the defendant of the case it intends to make against the defendant company, and in support of that I desire to cite your Honor to the case of Minuci against the Philadelphia & Reading Railroad Company, 53 Atlantic Reporter, 229, wherein the Chief Justice said that the plaintiff in his declaration alleges that while he was engaged as an employe of the defendant company in assisting at unloading certain cars, etc. (reading the case), and the Chief Justice there points out that the defendant is entitled to be apprised of some specific act of negligence on which the plaintiff at trial will rely, and our contention is that the complaint fails to set out sufficient negligence to apprise the defendant of what it is obliged to meet; and further for the purpose of limiting the issue that is to be tried before your Honor.

Mr. GEBHARDT—As to the first objection, your Honor will notice on page 2, "leaving him surviving him," etc. By a technical error merely the words "his widow" were left out. I had not noticed it and it is not mentioned in the notice at all.

Mr. SCOTT—As I stated, that can be amended.

Mr. GEBHARDT—Now, as to the other ground, not only have I especially stated the negligence that we charge against this company, but I have gone a good deal further than was necessary in doing it (citing *Breese v. The Trenton Horse Car Railroad Company*, 23 Vroom, 253), and the Court goes on to say: "It need not appear with much particularity how the tort was committed." Now, then, if my declaration stopped with these words, "When the said defendant, by its agents," etc., "in a negligent and careless manner"—if it stopped right there it could still be good, according to this decision, but it does not stop there but goes on particularly to specify the negligence. "And without giving the said deceased," etc. It is not possible to make the complaint more specific nor to tell more particularly what caused this accident. The fact in general terms stated it was carelessly done by going on and particularly specifying, and even if it isn't so sufficiently specified I should then ask to amend, but I don't consider it necessary.

THE COURT—Do you desire to amend it?

Mr. GEBHARDT—If the Court should think it necessary, I should desire to amend. I don't at this time.

THE COURT—If you feel it your duty to amend—

Mr. GEBHARDT—I don't think it is my duty but we can tell better after the case progresses.

THE COURT—There is no question about the first point; that the plaintiff has the right to amend.

Mr. GEBHARDT—I am perfectly frank to say

that as to amending the third paragraph which is suggested, I would not know how to make it more specific.

THE COURT—The third paragraph says (reading), "in a negligent and careless manner and without giving the said deceased any notice or warning of the approach of said locomotive engine and cars on the track where the said deceased was working," and so forth.

While the complaint might not be as full as it might be, I think it is sufficient for the trial of the issue, and the motion will be denied.

Exception to defendant.

Mr. Gebhardt opened for plaintiff.

Mr. Scott opened for defendant.

Mrs. LILLIAN WILLEVER, the plaintiff, sworn.

*Direct examination by Mr. Gebhardt.*

Q. Mrs. Willever, how were you related to William Willever in his lifetime? A. As his wife.

Q. How old was he? A. At the time of his death?

Q. Yes. A. Thirty-six.

Q. How old are you? A. Thirty-three.

Q. Just tell the Court and jury in a general way what condition of health he was in? A. He was in good health.

Q. Did he leave any children? A. No, sir.

Q. How long had you been married? A. Fifteen years.

Q. And when did he die? A. The eleventh of December.

Q. Where was he employed at the time he died? A. Netcong.

Q. By whom was he employed? A. The D., L. & W. Railroad Company.

Mr. GEBHARDT—It is admitted, I suppose, that she is the administratrix?

Mr. SCOTT—Yes.

Q. What was his position with the railroad company? A. Section foreman.

Q. And do you know what his wages were? A. Seventy dollars a month.

Q. How long had he been track foreman? A. Five years at Netcong—I forget how long at Hackettstown.

*Cross-examination by Mr. Scott.*

Q. You say section foreman at Netcong—that was for five years? A. Yes.

Q. Before that he was section foreman where? A. Hackettstown.

Q. How many years at that? A. I don't know just how long—it was over a year.

Q And prior to that time was he in the employ of the railroad company? A. Yes, he was track walker.

Q. And for how many years was he track walker? A. Altogether he was on the track thirteen years.

Q. During the entire time you were married he was in the employ of the railroad company either as track walker or section foreman? A. Yes.

Q. You have stated to the jury his wages were $70 a month? A. Yes.

Q. Did you collect his wages? A. No, sir.

Q. How do you know? A. I saw his check.

Q. And you are positive it was seventy dollars? A. I am not positive.

Q. You are not positive. When was the last time you saw a seventy-dollar check? A. I didn't, because they paid him twice a month.

Q. What was the amount of the check you saw?

A. I am not positive, I think it was thirty-two fifty the last I saw—two weeks.

Q. And when was that, Mrs. Willever? A. I don't know just how long; it was before he died. I didn't always see his check.

Q. Were those bi-monthly checks? A. Half month.

Mr. GEBHARDT—Is there any dispute about it?

Mr. SCOTT—Yes.

Mr. GEBHARDT—My understanding was it was $65.00.

Mr. SCOTT—It is not $70, as a witness has testified.

Q. The only check you have ever seen payable to Mr. Willever was for $32.50? A. Yes.

Q. And you are positive of that? A. Yes.

Q. And the last one you say you saw was two weeks before the accident? A. I won't say it was because I didn't always see his check; he had it cashed before he came home.

Q. Did Mr. Willever carry any life insurance? A. Yes.

Q. In the Prudential Insurance Company? A. Yes.

Mr. GEBHARDT—I object to this. I don't think it makes the slightest difference so long as the insurance was not in a brotherhood or relief fund of the railroad company. If Mr. Scott has anything to show on that point I would be glad to see it.

Mr. SCOTT—My point is that any payment which the decedent made to others reduced the amount of the income.

THE COURT—Is that growing out of the contract of the railroad company?

Mr. SCOTT—No; that which he paid out to somebody else he didn't pay to the widow.

Mr. GEBHARDT—I withdraw the objection, if that is the point.

Objection withdrawn.

Q. And was the premium, how much a week? A. Twenty-five cents a week.

DAVID H. LAKE, sworn on behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Lake, where are you employed? A. On the D., L. & W.

Q. How long have you been employed there? A. About twenty-two—three—years.

Q. What is your position? A. Engineer—Locomotive engineer.

Q. Were you employed by the D., L. & W. Railroad Company in that capacity on the eleventh day of December last? A. On the D., L. & W., on engine No. 142.

Q. By the D., L. & W. Railroad Company? A. Yes.

Q. Do you remember this accident to William Willever? A. I heard about it.

Q. You remember the day of it? A. Well, I couldn't remember—I don't exactly remember. I remember the date, yes, it happened on the eleventh of last December.

Q. What were you doing on that day? A. I run the drill engine up to Port Morris yard.

Q. Were you running the train of cars which injured Mr. Willever on that day?

Mr. SCOTT—I object on the ground that witness has testified that he knows nothing

about the accident and says he heard about it.

THE WITNESS—I know nothing about the accident, no.

Question withdrawn.

*By the Court.*

Q. Are you still in the employ of the D., L. & W.? A. Yes.

Q. Do you remember anything especially that occured in your work on the eleventh day of last December? A. Well, I don't—that's quite a ways to remember.

Q. Do you remember anything special that occurred on the day that you heard that Mr. Willever was injured in the yards at Port Morris? A. I heard he was injured, yes.

Q. You remember that day, do you? A. Well, yes, I remember that day.

Q. Now, what was there that called it especially to your attention that day? A. Called to my attention?

Q. What was that that specially occured that day?

Mr. GEBHARDT—I don't want to ask leading questions.

THE COURT—It may become necessary.

Q. Were you running an engine on that day? A. Yes.

Q. In the yards at Port Morris? A. Yes.

Q. Do you remember how many cars you were pushing that afternoon? Was it afternoon or forenoon? A. They tell me I was pushing twenty-seven; I didn't count the cars.

Q. Do you think or not that you were pushing about twenty seven cars? A. Yes, I was pushing about twenty-seven cars.

Q. And while you were pushing these cars what occurred? A. Well, I pushed these cars according to signals.

Q. You were pushing these cars according to signals? A. Yes.

Q. What occurred? A. I don't know what occurred.

Q. Yes, you do know what occurred. I shall have to be a little more pointed in my question. Did you get a signal? A. Yes.

Q. What kind? A. To back up.

Q. Did you get any more signals? A I got a signal to stop.

Q. What did you do then? A. I stopped.

Q. Did you subsequently learn why you got this signal to stop?

Objected to as immaterial and incompetent.
Objection overruled.
Exception to defendant.

Q. Did you subsequently learn what was the cause of your getting the signal to stop? A. It was an hour, if not longer—

Q. What was the cause?

Objected to on the same grounds.

A. I was told that Willever was—

Q. I don't ask you what you were told. I am not trying to mix you up. I am not asking you to tell what somebody told you, just what you saw. A. Yes.

Q. What did you see? A. I didn't see it.

Q. I want you to tell the Court and jury what you did see? A. I didn't see nothing. I got a signal to stop, that's all I can tell you.

Q. I want you to tell the story just as you would tell it to Mr. Scott or anybody else. You say an hour later—what did you see an hour later?

A. I didn't see anything an hour later, no more than that we took the cars back.

Q. I will ask you a pointed question; you needn't answer it until Mr. Scott has an opportunity to object. Did you some time after the signal was given, go up to the first car—that is, the car farthest away from your engine or not? A. No, sir; after the stop signal was given, do you mean?

Q. Yes, after that was done? A. No, sir; I didn't get off the engine.

Q At no time at all? A. At no time at all; I was right on the engine.

Q. Did you at any time see any trouble with any of the cars that you were pushing that day?

Mr. SCOTT—I object as immaterial and not covered by the allegations in the complaint.

THE COURT—I think the question could be put in a little better form, Senator.

Q. Well, I will just come right down and ask a question which of a friendly witness would be considered probably leading. Did you go to the front part of the train that you were pushing that day and find one or more cars off the track? A. Which do you call the front car?

Q. I call the front part, as I just said—the farthest away from your engine. A. The rear car was off the track.

Q. By the rear car do you mean or not the—A. The rear trucks of the rear car was off the track.

Q. The car farthest away from your engine, do you mean? A. Yes.

Q. Now, what track was it that you were pushing these cars on, what is it known there as? A. I don't know; the mud truck.

Q. Can you give the number of it? A. Number five.

Q. Now, please tell the Court and jury whether this track on which you were pushing the cars that day was or was not used by the Lehigh and Hudson River Railroad Company in bringing in its trains from the State of New York? A. They used them from coming in there.

Q. Did they commonly use this track? A. Not altogether, no.

Q. Frequently? A. No.

Q. Did they use it? A. They have used it; they can use them all.

THE COURT—Whether they did or not?

WITNESS—I say they can use them all coming in there.

Q. Isn't this particular track? A. I can't tell you the particular track they used.

Q. Have you or not seen these trains come in on the Lehigh & Hudson River Railroad using these tracks, this mud track? A. I don't watch them.

THE COURT—The question is whether you saw.

A. I don't know as I ever see a train come in on the mud track from the Lehigh & Hudson.

Q. Did you see trains of the D. L. & W.? A. They generally pulled in the transfer there. I don't know as I ever seen a train come in on the mud truck from the Lehigh & Hudson River.

Q. Did you see them come in from the D., L. & W.? A. They have got to come in from the D., L. & W.

Q. What do you mean by that? A. They got to come in from the D., L. &W., bring those trains in.

Q The D., L. & W. brings those trains in—they come in over the D., L. & W. and run on this track? A. Yes.

Q. From Pennsylvania and New York? A. I don't know. I was never over that road; I couldn't tell you.

Q. You know the through freights, don't you? A. I am talking now of the D., L. & W. trains.

Q. The through freight trains coming in from the State of Pennsylvania use that track, don't they? A. I don't know.

Q. What sort of a signal was this, Mr. Lake, that you got that day?

Mr. SCOTT—I object as indefinite; he has testified he received two signals.

THE COURT—Let him describe both.

A. I got a back-up.

Q. What sort of a signal was the stop signal? A. It was a stop signal. I stopped.

Q. Was there anything unusual about it in the way of emergency or not? A. You can't always tell about that; I don't know.

Q. Tell about this particular signal? A. They gave me a stop signal and I stopped. He gave me a stop signal and I stopped.

Q. What kind of a signal was it? A. He gave me a stop signal and I stopped.

Q. An emergency signal? A. I don't know whether there is any such thing as that; I couldn't tell you.

Q. Is there not a difference in the signals? A. Go ahead and back up, and like that.

Q. Who gives you, or who gave you the signal to stop? A. Charles Ike.

Q. What position did he occupy on the train? A. Head brakeman.

Q. What do you mean? A. The man that does the cutting and like of that.

Q. Do you mean that Mr. Ike was the brakeman next to the engine? A. Yes.

Q. And what other men did this train crew compose that day? A. Mr. Bird—Mr. O'Neill.

Q. What was Mr. Bird? A. He was a drill foreman, had charge of the drill.

Q. Do you mean he was the conductor of the train? A. Well, yes; that means he had charge of that drill.

Q. It is what ordinary people would understand as conductor? A. Conductor; he had charge that day.

Q. And what position did Mr. O'Neill occupy? A. Switch brakeman—throwed switches and like of that.

Q. And where was it Mr. O'Neill's duty to be? A. I couldn't tell you; I never done that kind of work, I couldn't tell you that.

Q. Was it customary for a man—who looked after the switches on this train? A. It was his place to look after the switches; outside of that I couldn't tell you.

Q. Does he look after the switches on the train or off? A. Of course, a man is going to be where the most work is.

Q. Was Mr. O'Neill's place on the train or off the train? A. I couldn't tell you that.

Q. Did you look after the switches off the train or on? A. He couldn't look after them on the train, that's sure, or up in the engine.

Q. Isn't it a fact, then, Mr. Lake, that his place was ahead of this trian, the rear car as you would call it? A. Yes, the rear car.

Q. Ahead of the rear car? A. I should think the man throwing switches ought to be at the rear properly lined up.

Q. Was there anybody else in this crew besides

those whose names you have given? A. Mr. Bird —no.

Q. Mr. Bird and Mr. Ike and Mr. O'Neill? A. Yes.

Q. Did you see Mr. Willever that afternoon? A. No, sir.

Q. How did you come to go back and see this car off the track? A. I didn't go back.

Q. You didn't go back? A. No.

Q. What did you do? A. I stayed on the engine.

Q. How did you come to see this car off the track? A. Well, later on the day we went down there after the car; I don't know exactly what time.

Q. How did you go, afoot? A. With the engine.

Q. What did you do about it? A. I mostly forget, to tell the truth.

Q. Did you leave the engine on the track or not? A. The engine was on the track.

Q. I mean the car? A. I most forget what we did see.

Q. Did you leave the car off the track or did you put it on? A. I mostly forget, I can't tell you.

THE COURT —" Mostly." What do you mean?

THE WITNESS—I forgot what we did do.

THE COURT—Then you don't know?

WITNESS—No, I forget about that.

Q. What did you go down there for? A. We went down there; I forget what we done; I see the car was off the track.

Q. What did you go down there for? A. I forget about it; I can't give you no answer.

Q. Do you know whether you placed the car back

on the track or not? A. I don't remember; no.

Q. How long did you stay there? A. I don't remember that.

Q. What did you do after you left there? A. I can't tell you; that's been so long; we make so many drills in that yard in one day.

Q. Do you have a car go off the track every day? A. No, sir.

Q. Have you been pushing any cars that run off the track since that time? A. Lots of times.

Q. Just answer my question. A. I don't remember; I don't remember whether we have or not; we have cars off the track different times.

Q. Do you recall any car jumping the track since that day? A. I don't remember.

Q. Do you recall any car jumping the track that you were pushing since that time? A. We haven't had any cars off the track lately as I know of.

Q. How old are you, Mr. Lake? A. I am forty-five.

*By the Court.*

Q. Was this the only car that you ever run that went off the track? A. We have lots of them off; they are liable to go off the track any time drilling them around—snow, one thing or another—cars are liable to jump the track any time.

*By Mr. Gebhardt.*

Q. When did you first hear of Mr. Willever being hurt?

MR. SCOTT—I object to that as being immaterial. I have no objection to any question which I think throws light on the situation. Anything which occurred that this man had knowledge of the man Willever.

Mr. GEBHARDT—My purpose in asking these

questions—the witness clearly is a hostile witness; I think anybody can see that. I am trying to get out of this witness, without being too leading, such a situation as would necessarily make a distinct impression—an unusual impression, on this man's mind. That is the point.

THE COURT—Repeat the question.

Q. (Former question repeated). When did you hear of Mr. Willever being hurt? A. I couldn't tell; sometime during the forenoon.

Q. Was it in the forenoon that this car that you have spoken of was off the track? A. Well, yes; Charles Ike, I think, was telling me about William Willever getting run over.

Q. Did he tell you the day that this car run off the track? A. It was that day.

*By the Court.*

Q. That forenoon? A. Yes.

*By Mr. Gebhardt.*

Q. And it was that forenoon? A. Yes.

Q. That forenoon that the car run off the track you heard of Mr. Willever being hurt? A Yes.

*Cross-examination by Mr. Scott.*

Q. You were an engine man at Port Morris? A. Engineman, yes.

Q. And this engine was No. 142 you have described was a yard engine. Will you describe what a yard engine is? A. Works inside of the yard limits.

Q. And engine No. 142 was a yard engine for that yard? A. Port Morris.

Q. And was your work confined to the Port Morris yard? A. Yes.

Q. Were you out of it on that day that you heard about Willever being hurt? A. Was I out of the yard?

Q. Out of the yard with that engine? A. I don't know that I was; I don't think we went; sometime we do go out; I don't remember; I don't think we was

Q. And in answer to the Court you stated something about "We have lots of cars go off the track?" A. The cars go off the track different times; they often go off the track different times; they often go off the track.

Q. Was there anything unusual about the manner of going off the track? A. I didn't notice anything unusual.

Q. And about what time, relative to the noonday hour, did you see this car that was off the track? A. Some time in the forenoon; we went down there some time in the forenoon; I forgot what we done there, whether we put it on or not.

Q. It was near twelve o'clock? A. Some time in the forenoon; I couldn't tell you.

Q. What time did you eat up there? A. We go to dinner anywheres from twelve fifteen or twenty; something like that; start.

Q. Was it before you went to dinner that you saw this car? A. Yes.

Q. And do you know how long, before you went to dinner? A. I couldn't tell you that; I don't remember.

*Re-direct examination by Mr. Gebhardt.*

Q. Do you remember having a conversation with Mrs. Willever about this accident?

Mr. SCOTT—I object. This is not a matter of re-direct examination.

Mr. GEBHARDT—It is something I overlooked.

A. Mrs. Willever?

Q. Yes. A. No, sir; I do not.

Q. Did you tell her in a conversation with her a few weeks after this accident that you that morning got a nasty stop signal?

Mr. SCOTT—I object on the ground that whatever this witness says is not binding on the defendant company.

Objection overruled.

Exception to defendant.

A. I don't remember.

CLEMENT BOSSETT, sworn in behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Bossett, what is your business? A. Locomotive engineer.

Q. By what railroad company are you employed? A. Lehigh & Hudson River Railroad.

Q. Where is your run? A. Port Morris to Maybrook.

Q. In Port Morris, Morris County, New Jersey? A. Yes.

Q. And where is Maybrook? A. In the State of New York.

Q. How long have you been on that run? A. Since 1906.

Q. Steadily? A. Yes.

Q. Are you acquainted with the D., L. & W. Company's tracks at Port Morris? A. Yes.

Q. Do you know what is commonly called the "mud" track? A. Well, yes, I do.

Q. Please state to the Court and jury whether in bringing in your trains from Maybrook, New York, you frequently run in on that track? A. Sometimes we don't, sometimes we do.

Q. During the whole of this period did you

sometimes do it? A. Sometimes we do and sometimes we don't.

Q. Were you there on the eleventh of December, 1913? A. Was I where?

Q. At the Port Morris yard? A. Yes, we were ready to go out at that time, yes.

Q. When did you arrive there? A. We came there every evening.

Q. Did you arrive there the day before? A. The night before.

Q. Which track did you run in on that night? A. I couldn't tell you that; I couldn't remember; sometimes we pulled in on different tracks; sometimes was over on the right side—I couldn't tell you where.

Q. But you did frequently run in on the mud track? A. Sometimes we do and sometimes we don't.

*Cross-examination by Mr. Scott.*

Q. You say you were ready to leave on December 11th, 1913. Where was that, to return to where? A. What is that?

Q. You said in answer to Senator Gebhardt's question that you were ready to leave on the morning of December 11th. A. Yes, we leave Port Morris every day at eleven-thirty.

Q. And you also told him that you arrived the night before? A. Yes.

Q. What time? A. I couldn't tell you just the time.

Q. About what time? A. Well, now, Mr. Scott, I couldn't tell you because perhaps I would be telling something that was not so.

Q. Give us the best of your recollection. Was there any schedule time? A. Yes, there was, but we had been running two hours late at the time.

Our schedule time leaves there nine-fifty-five and we had been leaving there eleven-thirty.

Q. On the night before, what was your schedule time, arrival at Port Morris? A. Six-thirty, I think, or six-twenty-five.

Q. After you got to Port Morris what did you do with your engine? A. We cut loose and go on the ash track?

Q. Cut the engine loose from the train and go on the ash track? A. Yes.

Q. And where is the ash track. A. Right alongside of the round house, Port Morris yard.

Q. And after you take the engine down to the ash track what do you do there? A. I am through then.

Q. As soon as you put it on the ash pit you are through? A. Yes.

Q. As regards the bringing in of that train?

THE COURT—Do I understand the ash pit?

Mr. SCOTT—Or ash track; it is just the same.

Q. After you take the engine down to the ash track or ash pit you leave it? A. I leave the engine.

Q. And what do you do then, after you leave your engine? A. I went in and registered and went home.

Q. And is that the usual manner of your business? A. Yes; put it on the ash track, then I am through with the engine until the next day.

JOHN DALY, sworn on behalf of the plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Daly, what is your business? A. Conductor.

Q. Conductor of what? A. Freight train.

Q. For what railroad? A Lehigh & Hudson.

Q. Where was your run in December last? A. Why, Port Morris to Maybrook.

Q. Port Morris, New Jersey? A. Yes.

Q. And Maybrook is where? A. New York.

Q. Were you on the same train that Mr. Bird runs? A. Yes.

Q. What time did you usually leave Maybrook, New York? A. Hard to tell you.

Q. As near as you can? A. We are due to leave there three-fifteen, but I couldn't tell you what time we left there.

Q. I mean usually, I don't mean back to this particular day. A. You can't tell, sometimes we might be held there and might not.

Q. What time did you usually arrive at Port Morris? A. Somewheres around nine o'clock, usually. Probably it was one o'clock in the morning. Some nights we wouldn't get in, we were out late, cut us out.

Q. Did you see anything of this car being off the track on December 11th that Mr. Lake has spoken of? A. No, sir.

Q. Do you know what is known as the mud track? A. The mud track ain't there no more.

Q. At that time, we are speaking. A. No, sir; there wasn't any mud track there.

Q. What track was it? A. Track 5.

Q. That is sometimes called the "mud" track, isn't it? A. Not that I know of; the mud track was gone two or three years ago.

Q. Well, it was track No. 5? A. I don't know.

Q. What track did you come in on the night before the eleventh? A. I don't know.

Q. You know what No. 5 track is, don't you? A. Yes, all the tracks in the yard.

Q Do you know where the little side track is, where the cabooses are shifted off on? A. Yes.

Q. Now, what track is that? A. It's the caboose track.

Q. I meant what track is the track, this little caboose track runs off on? A. Track 5.

Q. State to the Court and jury whether or not you frequently came in from Maybrook, New York, and run in on track No. 5?

Mr. SCOTT—I object, as immaterial. The frequency of coming in on various tracks is immaterial.

Exception to defendant.

Q. (Former question repeated.) A. I couldn't tell you that. We pulled in: the towerman puts it on the track.

Q. When it runs in on the track you are supposed to be with the train yet, are you? A. Yes.

Q. You say you know what No. 5 track is? A. Yes.

Q. The question is whether you frequently run in on that track or not? A. We run in on any track they put us on.

Q. Did you not frequently run in on track No. 5? A. Track No. 5, yes.

Q. Now, I ask you whether you run in on No. 5 track the night before the eleventh? A. No, sir.

Q. You don't remember? A. No, sir; don't know which track we pulled in on.

Q. How long have you been employed by the Lehigh & Hudson River Railroad Company? A. The last time since 1892.

Q. And during that period where has your run been from and to where? A. We have been from Belvidere, Easton to Maybrook, all along the line.

Q. How long have you run from Maybrook to Port Morris? A. It will be six years next November.

Q. Can you give the Court and jury some idea of how many times during that period of years you run in on track No. 5? A. No, sir.

Q. Was it a hundred times? A. No, sir; I couldn't tell you, because I was on another job, not there.

Q. We are talking about this six years? A. No, I couldn't.

Q. How many times do you think? A. I don't know.

Q. I didn't ask you what you thought? A. I don't know.

Q. Did you do it a hundred times? A. I couldn't say.

Q. Did you do it fifty times? A. I couldn't say.

Q. Did you do it ten times? A. I couldn't say.

Q. But you did it frequently, is that right? A. I couldn't say how many times we done it or anything else; ain't going to say.

Q. I just want the jury to get an idea of about how frequently you did it? A. I don't know.

Q. You have some idea, haven't you? A. No, I have not.

Q. Have no idea at all? A. No, sir.

Q. How long was track No. 5? A. How long?

Q. Yes. A. I couldn't tell you that.

Q. You can give us some idea whether it is ten miles or one hundred feet? A. I should judge it would hold about sixty cars.

Q. And how long are the cars? A. Well, some average from thirty-eight to forty—forty some odd feet.

Q. How is this track No. 5 situated with reference to the mud track, going to Maybrook. A. I don't understand your question.

Q. How is it situated with reference to the main

track which goes from Port Morris to Maybrook? You don't understand yet? A. No, sir.

Q. You leave Maybrook to go to Port Morris? A. Yes.

Q. Now, as you approach Port Morris that is the principal track you run in on? A. That is up to the tower and yard master.

Q. I mean from your experience—we have nothing whatever to do with the towerman? A. I don't know; we go just where they put us.

Q. Which track was used most? A. Well, we pull in on 3, on 4, on the other side lots of other times.

Q. Can't you tell whether you pulled in most on 3, 4, or 5? A. No, sir; I couldn't tell you that; they give you the signal and we pull according to signal.

Q. I am not asking you about that; I am asking your opinion as to which you used the most in coming from Maybrook to Port Morris? A. I couldn't tell you that.

Q. Give us your opinion? A. I don't know, I wouldn't say.

Q. Can you tell us what you think? A. No, think don't go.

Q. Yes, it does go right here. We want an answer. A. I don't think; think don't go.

THE COURT—That is not your concern Mr. Daly. There is no objection on the part of counsel and you may answer the question.

Mr. GEBHARDT—I ask him what he thought.

Mr. SCOTT—If there is any way he can get at what the Senator wants there is no objection.

A. I couldn't tell you which track we pull in frequently. I am telling the truth.

Q. I want you to tell what you think about it, as near as you can recollect. How many tracks are there to pull in on when you come from Maybrook? A. There is to pull in on? If you want to pull in you pull in wherever they send you.

Q. We all understand that. A. I know I am trying to tell you.

Q. There are six tracks to pull in on? A. Yes.

Q. Can't you tell the Court and jury whether it is one, two, three, four, five or six that you use the most? A. I don't know; you pull in everywhere they tell you.

Q. Can't you tell by experience? A. One night you might pull in on three, the next night on five, the next on four.

Q. Which did you pull in on the most frequently? A. That I cannot tell you.

Q. Tell as near as you can? A. I won't say, because I don't know.

*By the Court.*

Q. Was one used as much as the other? A. Yes.

Q. And wherever they wanted they put you? A. Yes.

*By Mr. Gebhardt.*

Q. And is it your answer sometimes you used each one of these tracks? A. Wherever they put you.

Q. Is it your answer that you used sometimes each one of these tracks? A. I will answer the question if you put it right, yes.

Q. I put it right, sir.

THE COURT—You have no right to parley with the attorney.

Q. (Question repeated: "Is it your answer that you used sometimes each one of these tracks?") A. We used them tracks, yes.

Q. All of them? A. Yes.

Q. In coming from Maybrook, New York? A. Yes, sir, we used them all if necessary.

At this point the Court took a recess until one o'clock P. M.

Q. Mr. Daly, when you arrived in the D., L. & W. yards at Port Morris, on this No. 5 track, at any time when you came from Maybrook, who took charge of your train after you left it. A. I couldn't tell you that.

Q. I mean did the D., L. & W. Railroad take charge of it after you got to the yard or did the Lehigh and Hudson take charge? A. The yard took charge of it.

Q. What was the yard, the D., L. & W.? A. Yes, sir.

Q. And this yard then so far as your crew took the train? A. Yes, sir.

Q. After you got there it was taken charge of by the D., L. & W. men? A. Yes, as far as I know.

*Cross-examination by Mr. Scott.*

Q. Your train—where did your train originate, Maybrook, New York? A. Yes, sir.

Q. And what was the destination of that train? A. Port Morris, New Jersey.

Q. And when you got to Port Morris with the train what did you do with it? A. Pulled right on —the towerman put us on, I couldn't tell you which track we pulled in on.

Q. And you delivered the train at Port Morris? A. Yes.

Q. And I would like to have you, if you can, explain to the jury why it is that you cannot tell us with more certainty what tracks you used with any degree of frequency, if there is any way you can explain it to the jury—why you cannot tell us whether you used track 1, 2, 3, 4, or 5—explain why you stated this morning you couldn't tell us? A. Track 5 might be blocked, track 3 might be blocked and they put you where they can receive you. Of course, we ain't got it to say which track we can pull in on.

Q. And you put into a track by the towerman as you enter the yard? A. Yes.

*Re-direct examination by Mr. Gebhardt.*

Q. Where do you first strike, in coming from Maybrook, the D., L. & W. tracks? A. Andover Junction.

Q. How far away from Port Morris is that? A. They claim it is nine miles.

Q. And from there you run in on the D., L. & W. tracks? A. Yes.

WATSON AYRES, sworn in behalf of plaintiff:

*Direct examination by Mr. Gebhardt.*

Q. Mr. Ayres, what is your business? A. Car inspector.

Q. For what railroad company? A. D., L. &. W. and Lehigh & Hudson.

Q. How long have you been car inspector? A. Eight years.

Q. Where do you live. A. Port Morris.

Q. Do you remember the day of the accident to

Mr. Willever? A. I remember the day of the accident; I don't remember the exact date.

Q. About what time in the day was it? A. About nine-thirty A. M.

Q. And where was it? A. On track No. 5, Port Morris.

Q. Track of what road? A. D., L. & W.

Q. What were you doing at the time? A. I was just starting on duty. Started in on duty to inspect a train on track No 3.

Q. What was the first that you knew that there was anything happened that day? A. I saw a car derailed on track No. 5.

Q. What do you mean by "derailed?" A. I saw it bumping along the ties of the rail.

Q. How far did it go after it jumped the track? A. I should judge about fifteen or twenty feet.

Q. And what did you do when you saw the car jumping the track or off the track? A. I watched the car, thought it was going inside of track No. 3, which was running parallel to track No. 5, and the car stopped before it struck track No. 3.

Q. And now what did you do? Did you go up to where the car was off the track? A. Yes, I did.

Q. When you got there what did you find? A. I found Mr. Willever in between the two tracks, between track 5 and track 3.

Q. Were these two tracks side by side, running parallel with one another? A. Yes.

Q. Was there any track in between them? A. No, sir.

Q. What condition did you find him in? A. Mr. Willever?

Q. Yes. A. Well, I found him in between the two tracks with both legs run over.

Q. And was there one of them cut off? A. I couldn't say to that; his pants legs concealed that from me. I couldn't say whether they were cut off or whether they were not.

Q. When you got there who was there? A. Nobody at all.

Q. No workmen? A. No one, I was the first went to him.

Q. Do you know who the conductor of that train was that day? A. Mr. Bird.

Q. Was he there? A. I didn't see Mr. Bird.

Q. And you know who the flagman was, the one who attended the switches for this train? A. It was two switchmen on there.

Q. Who were they? A. Charles Ike and Mr. O'Neill.

Q. Which one of the two was located nearest the car that went off the track? A. I couldn't say that.

Q. You said the two were Mr. Ike and Mr. O'Neill? A. Mr. Ike was at the place of the accident; you mean immediately after?

Q. Where was Mr. O'Neill? A. I didn't see Mr. O'Neill.

Q. Was he down by the accident when you got there? A. No, sir.

Q. Who was there? A. There was nobody there—

Q. When you first got there? A. —when I first got there.

Q. What position, with reference to track No. 5 on which this car had been running—what position did the car occupy with reference to its being parallel with it or across it, or how? A. When I arrived there the car was crossways, it headed towards track No. 3, and the two tracks run parallel and the car headed towards track No. 3.

*Cross-examination by Mr. Scott.*

Q. Where did you go to work—what time did you go to work that morning? A. I was called for nine o'clock.

Q. And where did you begin work? A. I began work on the east end of track No. 3.

Q. And that is the track that is parallel to— A. (Interrupting) To track No. 5, yes.

Q. And how far down from where you subsequently saw Mr. Willever were you when you started to work? A. About ten or twelve car-lengths.

Q. And on track 3 was there a train of cars? A. On track three there were sixty cars, pulled in from Lehigh & Hudson.

Q. And those cars extended from what point east to what point west? A. They extended from the east end of track No. 3 to the extreme end of track No 3, over near the last cold storage tower west.

Q. And in relation to the transfer platform in the Port Morris yard, where was the east end of the train on track No. 3? A. It was about parallel the east end of the transfer platform.

Q. About even with? A. Just about even with.

Q. And then it extended west for sixty cars? A. About sixty car-lengths toward the west end of the yard.

Q. And your duty at that time was to inspect those cars? A. Inspect those sixty cars on track No. 3.

Q. At what time in the morning did you see Mr. Willever? A. I couldn't say the exact time.

Q. How long after you began to work there? A. I just got there to go to work, I should judge it, to the best of my knowledge, about nine-twenty-five or thirty.

Q. And had you started the work of your inspec-

tion? A. I just arrived there to go to work.

Q. And had you done any inspecting? A. I hadn't done any inspecting.

Q. Had you seen Mr. Willever during that morning before the accident? A. No, sir; I had not.

Q. And when you found Mr. Willever was there any of his gang with him? A. There was no one with him.

Q. No Italians or anybody? A. No.

Q. And you were the first person to arrive? A. I was the first one there to him, yes, after he was run over.

Q. And were there any persons between the place where you started to work that morning and the place where you found Mr. Willever? A. I didn't see anyone except two—

Q. I mean the point where you started to work and the point where you found Mr. Willever, did you see anybody in between, up along that track or between—in the runway between the track No. 3 and 5 up to the point where you subsequently saw Mr. Willever? A. I didn't see no one at all between the head end of No. 3 and the accident.

Q. And as you have stated, on track No. 3 there were cars. A. Yes, sir.

Q. Track No. 5 is the track next to three? A. Yes.

Q. And in the same direction as track 5 or from track 3? What is the next track? A. The caboose sidings where they store cabooses.

Q. Were there any cars or cabooses there? A. There were two or three cabooses in there, yes.

Q. And beyond the caboose track what cars were there? Were there any tracks there? A. This caboose track leads out on track No. 5.

Q. And beyond the caboose tracks are there any tracks there? A. Track No. 5.

Q. We are up to track 5, and then we have the caboose track that runs around track 5; then going further over are there any other tracks there; is there a high bank? A. You mean to the left? Yes, there is a bank here and two tracks, what we call the two hill tracks.

Q. And were there any cars on those tracks that morning? A. I couldn't say to that.

Q. Is the caboose track on the same grade or level as track 5? A. The caboose track is on the same level as track 5.

Q. This car that you saw derailed, what was—you say the general direction was that the head end or the east end was toward track 3? A. The east end, yes, sir.

Q. Taking these two lines to be track 3 and this track 5, was the train headed in that direction, if this was the east (indicating)? A. Yes; let me show you more plainly about that.

Q. Whenever the cars went this way—this is track 5 and track 3 (indicating). This car was derailed, it was headed off towards track 3; it was headed east in the direction of track 3? A. Yes.

Q. And how far from track 3 was the head end of the car which was pointing east? A. As I said before, it was about three or six inches when it stopped, going into the side of track 3.

Q. And the rear end of the car, did you examine that? A. The rear end of the car was still on the rail.

Q. And did you notice in looking at the car any marks that the car had made, the trucks or wheels that the car had made the ground in going from track 5 over to track 3? A. It certainly—when the car left the rail it made an indentation in the ties and dirt.

Q. And can you describe where in track 5, from

the appearances and signs made by the trucks or wheels of the car, where it left the track on track 5? A. It left the track right at the end of the switch points.

Q. Right at the end of the switch point? A. Where the switch led from track 5 into the caboose siding.

Q. Who was the next person arriving at the scene after you found Mr. Willever? A. Charles Ike was almost as soon as I was, right after.

Q. And the thing that attracted your attention to what was happening, Willever on track 5, was this car going off— A. This car bumping over the ties.

Q. You heard the car bumping over the ties? A. I didn't hear it; I saw it derailed.

Q. And did you hear it? A. No, I couldn't hear it that distance; I saw it on the ground.

*Re-direct examination by Mr. Gebhardt.*

Q. Mr. Ayres, had you inspected at any time, either that morning or the night before, these cars, one of which was derailed?

Objected to as not proper re-direct examination.

Mr. GEBHARDT—It is something that was overlooked.

THE COURT—If it was overlooked, he may answer it.

Q. Had you inspected these cars the night before? A. I couldn't say to that. I inspected a train the night before on that track, track 5.

Q. Where had the train come from? A. Lehigh & Hudson, but whether this was the same train of cars I could not say that.

Q. Did you notice the number on this car that was derailed? A. I didn't notice—of course, I have

got a record of that car; if that car was on that track, I have got a record of it.

Q. But you don't remember particularly? A. No, I don't.

*Re-cross examination by Mr. Scott.*

Q. You say you don't know whether the car you inspected on track 5 on the night before was a car in the track on track 5 on the day that there was a derailment? A. No, sir; I couldn't testify to that.

Q. Not from your memory? A. No, sir.

JAMES O'NEILL, sworn in behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. What is your business, Mr. O'Neill? A. Switching cars.

Q. By what railroad are you employed? A. D., L. & W., at Port Morris.

Q. Where were you employed by that road in December, 1913? A. At Port Morris.

Q And how long have you been employed by the D., L. & W. Railroad as switchman? A. About twenty-seven years.

Q. Do you remember the morning of the accident to William Willever? A. Yes.

Q. Now, what position on the train, if any, that Mr. Lake, the engineer, was pushing that morning, had you? A. I was up in the light yard waiting for the train to be pushed up.

Q. Was your position that morning one of a brakeman or switchman of this particular crew that Mr. Lake was running the engine? A. Yes, sir.

Q. You are the Mr. O'Neill that has been spoken of here along with Mr. Ike? A. Yes.

Q. And Mr. Bird? A. Yes.

Q. Now, what part of the work of that crew on that morning was it your duty to perform? A. To head the engine down and to go up the yard and turn the switches and keep other engines from getting out in the way.

Q. I wish you would be just as plain, Mr. O'Neill, as you can about that, because the rest of us are not railroad men and we don't understand railroad terms. A. Lining up switches to the mud—up that track—to shut trains off.

Q. What do you call the mud track? A. No. 5.

Q. And what is No. 5 is the mud track, and what is the mud track is No. 5, is that correct? A. Yes.

Q. Now, how soon did you know of the accident to Mr. Willever? A. Not until they brought another engine up on the other track, Mr. Bird told me. Well, they brought the engine up on the other side and I helped put cars from there on the other track.

Q. To whose orders are men that occupy the position that you and Mr. Ike occupy subject—who orders you what to do? A. The yardmaster, the yardmaster's clerks and helpers.

Q. What does the conductor of the train, Mr. Bird, have to do with you? A. We have to obey orders.

Q. Are you subject to Mr. Bird's orders? A Yes.

Q. He frequently tells you what switches to throw and so on? A. Yes.

Q. And had he given you the orders this morning? A. I knew where we were cutting away, the engine went after the cars, he told me where to go and to bring them up.

Q. Did you see where this car was derailed? A. After it was derailed I saw it.

Q. Do you know where the place was? A. Yes.

Q. Was it right over the switch? A Yes.

Q. Had you seen Mr. Willever there that morning? A. No, sir.

Q. You had not seen him? A. I saw him after he was on the stretcher, not before.

Q. Had you thrown that switch? A. Sir?

Q. Had you thrown that switch or looked at that switch that morning? A. No, sir.

Q. Why had you not been there? A. Those switches are always kept in that shape for that track, always kept closed up for that track.

Q. Why? A. Because they have cabooses lying in that track and they are not supposed to be left open; there are men sleeping in those cabooses.

*By the Court.*

Q. Do you remember what cars were in this train that they were drilling that morning? A. Remember what cars?

Q. Yes; what cars they were? A. No, sir.

Q. Do you know where their destination was? A. I couldn't tell you about that.

Q. Could you tell the destination of all of them? A. Some went West and different places.

Q. What do you mean by West? A. Why, Scranton; some would go toward Scranton, some for loading.

Q. Do you know how far you were away when this accident occurred to Mr. Willever? A. I was at least thirty or forty cars away from where the accident happened.

Q. How did you come to be so far away? A. My place, business called me there at that time; my switches were up there at that place where I was.

Q. Your duties then didn't require you to remain

with the train? A. No, sir; my duties were up above, protecting the train up above.

Q. Who was to remain with the train? A. Two men.

Q. Mr. Ike and Mr. Ike? A. Yes.

Q. Do you know, Mr. O'Neill, whether or not this mud track No. 5 was commonly used to run the Lehigh and Hudson River trains in that came from Maybrook?

Mr. SCOTT—I object on the ground that under the cases, the time at which the accident happened, and the nature of the happening of the accident, is the only pertinent inquiry for the Court and jury, and that any other time is irrelevant, incompetent and immaterial.

THE COURT—I think it may give us some light on the subject. The objection is overruled.

Exception to defendant.

Q. That track was used, five and three, and sometimes four; on every side of the train was used.

Q. For what? A. For running Lehigh trains independent of room in the yard.

Q. Please state whether or not it was commonly used to run the D., L. & W. trains in that came from other States?

Mr. SCOTT—I object on the same ground.

A. They almost always came up to load east of track No. 3.

Q. I didn't ask you whether they almost always came up, whether this track was used for that purpose, bringing in the D., L. & W. trains? A. Once in a while they would run a Sussex train in over the D., L. & W.

Q. How about the trains that came from Scranton? A. No, sir; not No. 5—No. 3.

Q. Was this mud track No. 5, and has it for a period of the past year been used to drill cars that came from other states.

Mr. SCOTT—I object on the same grounds.

Objection overruled.

Exception to defendant.

A. It isn't used for drilling cars, it is used for pulling trains in there to be drilled.

Q. In on No. 5 track? A. Yes.

Q. Where do those trains come from? A. Only what comes off the Lehigh, and once in a while what comes from Sussex.

Q. Are the trains run in on that track to go to points west out of New Jersey? A. They are taken up in the light yard to be drilled; to be switched up.

Q. And then are they run up on this track No. 5 to get them to points outside of the State, like Scranton, and so on? A. They pull them back that way once in a while, or they go the other way over the cut off.

Q. Well, there are freight trains that still run—Washington and the old line, as it is called; aren't they freight trains that run west? A. Yes.

Q. No through freights at all? A. Yes; local freights, Scranton freight.

*By the Court.*

Q. Scranton, Pennsylvania? A. Yes.

*By Mr. Gebhardt.*

Q. And does that commonly use this track or frequently use it? A. Very seldom use 5.

Q. Do they use it sometimes? A. I think they do; I would not be sure about No. 5; they generally go to the west main.

Q. That is to go to Scranton? A. Yes, if they go the old road.

*Cross-examination by Mr. Scott.*

Q. This track No. 5 is known as a storage track, isn't it? A. Yes.

Q. And it is commonly used and known as the Sussex storage track? A. Very seldom, once in a while.

Q. And by storage you mean that the cars when they are brought in there are put on that track; is that right? A. By storage you mean taken from the main over—

Q. Brought into the yard and left on that track. Is that correct? A. Yes.

Q. And when the cars are brought in there, where do they come from? A. Well, some come from the Lehigh, some come off the Sussex branch.

*By the Court.*

Q. What do you mean by Lehigh? A. The Lehigh & Hudson.

Q. The Lehigh and Hudson? A. Yes; that's what we call it for short—Lehigh.

*By Mr. Gebhardt.*

Q. And the west yard is how far from track 5? A. Not very far from the east end.

Q. It is not very far from the east end? A. No, sir.

Q. And what is the west yard—a storage yard? A. The light yard?

Q. Yes; you make your trains up in the west yard, and is that the yard proper of Port Morris? A. Yes.

Q. And there are no main tracks in the main yard? A The main tracks are outside of the yard.

Q. And the only tracks in the Port Morris yard are located where? A. What do you mean—those numbers? Yes.

Q. Which side of the yard are they on, relative to track 5, the opposite side? A. They are on the south side of track 5; 3 and 5.

Q. You didn't see any accident to Mr. Willever that morning, did you? A. No, sir.

Q. You didn't see this car derailed, did you? A. No, sir.

Q. You say you were about thirty car lengths away from the place where you subsequently saw Mr. Willever? A. All of thirty cars.

Q. Had you seen Mr. Willever that morning? A. Yes.

Q. And where was he working at that time? A. At a place called the hill switches.

Q. On the hill tracks? A. Yes.

Q. And who was with him at the time? A. He had two men with him; two of his section men.

Q. And what were the three of them doing at that time? A. He was standing there and the men were working at the track. Of course, when we came up there they had to move off. The two men were working there.

Q. He was there with his two men? A. When we were on the main track with the engine he had to move off to one side.

Q. What time of the day was that? A. That was between eight and nine o'clock, I couldn't tell exactly.

Q. What kind of a day was it? A. Clear.

Q. And was it cold? A. Well, that depends. I would call it quite cold, others might not.

Q. Have you stated what time you saw Mr. Willever up there with his gang? A. Between eight and nine o'clock.

Q. On the hill? A. Yes.

Q. And this car was derailed about what time? A. I couldn't say; somewhere near nine o'clock; I couldn't say.

Q. Your position was a trainman in David Bird's crew? A. Yes, switchman.

Q. And do you keep any records as switchman? A. No, sir; I don't.

Q You don't know what consists of the train—what the train in question consisted of? A. No, sir.

Q. You have no memorandum to that effect? A. No.

Q. I mean you made no memorandum or record? A. No, sir.

Q. And you weren't required to in the course of your duty? A. No, sir.

Q. During the morning that this train was derailed were you with Mr. Bird that entire morning? A. I was working with the crew up in the yard.

Q. And did Mr. Bird or his crew or the engine and the cars which he had charge of leave the Port Morris yard? A. They went to the west tower to push them up in the yard.

Q. And is the west tower in the yard? A. Yes, in the yard limits.

Q And you worked all that morning in the yard limits? A. Yes.

Q. How soon after this car was derailed did you go up there? A. Not until they took the engine down with the stretcher.

Q. Half an hour? A. I think it was half an hour; maybe fifteen or twenty minutes.

Q. And when you got there were any of Mr. Willever's section gang with him? A. I didn't go there right away.

Q. When you got there were any Italians there?

A. There were several there when I got there.

Q. And were the same ones you saw up at the hill switch? A. Yes.

Q. And who else was there when you got there? A. I couldn't say there was quite a number there; I wasn't in very good shape to remember the names of those people.

Q. You had been instructed to go up and stay by the switches so the train could go up the track, move east over track 5? A. Yes.

Q. And put the cars in the light yard? A. Yes, sir.

*By the Court.*

Q. What do you mean by the light yard? A. The empty cars were switched up there.

Q. What do you mean by saying they were put in the storage car? A. The cars they hold, not ready to go out at the time.

Q. You speak of the Lehigh & Hudson Railroad. From where, what point did it extend? You speak of it being in New Jersey. A. I think it was half an hour; maybe fifteen or twenty minutes.

Q. And when you got there were any of Mr. Willever's section gang with him? A. I didn't go there right away.

Q. And when you got there, were any Italians there? A. There were several there when I got there.

Q. And were they the same ones you saw up at the hill switch? A. Yes.

Q. And who else was there when you got there? A. I couldn't say; there was quite a number there; I wasn't in very good shape to remember the names of those people.

Q. You had been instructed to go up and stay by the switches so the train could go up the track, move east over track 5? A. Yes.

Q. And put the cars in the light yard? A. Yes, sir.

*By the Court.*

Q. What do you mean by the light yard? A. The empty cars were switched up there.

Q. What do you mean by saying they were put in the storage cars? A. The cars they hold, not ready to go out at the time.

Q. You speak of the Lehigh & Hudson Railroad. From where, what point did it extend. You speak of it being in New Jersey. Where was it from? A. From Maybrook to Phillipsburg, I believe, then they come into Port Morris.

Q Then is Port Morris on the branch? A. No, sir; Port Morris is not; it is on the main line of the D., L. & W. The main line is—they come over a branch to Port Morris—Andover Junction—they use the D., L. & W. tracks.

*Re-direct examination by Mr. Gebhardt.*

Q. Mr. O'Neill, you knew before it was done that these cars were going to be pushed along on track 5, didn't you? A. Yes, we went down to push them in the yard.

Q. Now, did you look at the switch where this car was derailed when you went past it? A. No, sir; I wasn't down there; I wasn't down below where I worked.

Q. Who was supposed to look after that switch? A. They were supposed to be left right all the time for that track. That's the order, to leave them that way.

Q. But you wouldn't run past any switch without seeing it was right? A. Oh, no, not if we were going by it; there isn't any man that would.

*Re-cross examination by Mr. Scott.*

Q. Did you subsequently move this train down

on track 5 after this derailment of the car between five and three, the remaining cars in David Bird's train; did you move it down on track 5, into the light yard? A. We moved it west and it came up No. 1, I think, because the car was off the track.

Q. And the reason you didn't move it down on No. 5 was because the derailed car had blocked track 5? A. Yes, because the car was derailed there on track 5, they pulled it west of the tower and came up on the other tracks.

Q. And pulled the cars west and ran them down another track? A. Yes.

Q. To the light yard? A. Pulled them down west and came up the other track.

*Re-direct examination by Mr. Gebhardt.*

Q You say, Mr. O'Neill, you went down where this car was derailed after you heard of its being derailed? A. Yes, I was down there.

Q Did you examine the switch? A. Yes, the switch seemed to be all right.

Q. It seemed to be all right? A. Yes.

Q. And where was Mr. Willever lying? A. When I saw him he was lying on the stretcher; I didn't go there until he was on the stretcher.

CHARLES IKE, sworn in behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Ike, what is your business? A. Switchman.

Q. For what railroad? A. D., L. & W.

Q. Were you employed on the D., L. & W. on the 11th of December last? A. Yes.

Q. Are you the Mr. Ike that has been spoken of as being brakeman or switchman on the train that Mr. Lake was engineer on? A. Yes.

Q. And where was your place of duty that day on this train? A. On the head of the end train.

Q. Which do you call the head end of the train? A. The one nearest the engine.

Q. And who was the conductor? A. Mr. Bird.

Q. Now, did you or not give the stop signal that day to Mr. Lake, the engineer? Do you remember getting a stop signal that day about the time this car was derailed? A. Yes, sir.

Q. Who gave you that signal? A. Mr. Bird.

Q. Where was he when he gave it to you? A. The rear end.

Q. Which do you mean by the rear end? A. The east end of the train.

Q. Is that the end you were on? A. No, sir.

Q. It was the end farthest from the engine? A. Yes, sir.

Q. And whereabouts on that rear end of the train, as you call it, whereabouts on the train was it? A. On the extreme end.

Q. Which car? A. I couldn't say positively what car; must have been the last car.

Q. Are you sure about that? A. I think he was on the last car.

Q. It looked from where you were as if he was on the last car? A. Yes.

Q. How far did the cars move after you got the signal from Mr. Bird? A. I couldn't say.

Q. About how far do you think? A. Oh, six or eight car lengths.

Q. After you gave the signal to the engineer? A. Yes.

Q. Now, Mr. Bird gave you the signal. What did you do after he gave you the stop signal? A. I give a stop signal to the engineer.

Q. Is there any difference, Mr. Ike, between a signal that you give to the engineer when you want

him to stop as quickly as possible and when there is no particular hurry or necessity for his stopping quickly? A. No, sir; there is only one signal; the one stop signal.

Q. And that is the same whether there is an emergency or not? A. When the engineer receives that he stops as quick as he can.

Q. At the time that you gave this stop signal to the engineer how fast were these cars going? A. About as fast as you could walk.

Q And why didn't they stop in less then six or eight car lengths? A. They did.

Q. I thought you just said they stopped in six or eight car lengths? A. Not after the signal.

Q. Then I misunderstood you. You say the cars were running about as fast as you could walk. How far, after you gave the signal to the engineer, did the cars run before they stopped? A. Do you mean after we started?

Q. After the stop signal was given to the engineer, how far did the cars run? A. Oh, probably twenty or twenty five feet.

Q. You were looking toward the end of the train where Mr. Bird was when he gave you the signal? A. Yes.

Q. And when you got the signal from him had the car yet run off the track? A. You didn't put the question right to me.

Mr. GEBHARDT—Read the question, please.

Q. (Question repeated as follows: "And when you got the signal from him had the car yet run off the track?") A. You mean the stop signal.

Q. Yes. A. I couldn't tell you that.

Q. Were you looking toward the end of the train where Mr. Bird was? A. Yes, sir.

Q. When you got the signal from him? A. Yes, sir.

Q. And did you notice whether there was anything wrong when he gave you the signal? A. No, sir.

Q. Had you reached the place where you expected to land these cars, the place where you expected to take these cars?

Mr. SCOTT—Objected to, on the ground that there is nothing to show this witness was to take these cars any place. The car was under the charge of the conductor. He was a member of the crew.

THE COURT—You may ask if he knew where the cars were to go.

Q. Do you know where these cars were to be taken to? A. I know where we were going to take them?

Q. Yes, where? A. Up the yard.

Q. How far away from where this derailment took place? A. I couldn't say.

Q. About how far, a mile or a quarter of a mile? A. Quarter of a mile, somewhere along there.

Q. Then you didn't expect to stop at the place where you did stop until you got the stop signal, did you? A. No, sir.

Q. Now, you say you were looking toward the end of the train where Mr. Bird was when you got this signal to stop. Had the head car yet jumped the track as you looked ahead? A. I didn't know that until later.

Q. Was the track a straight one? A. Yes.

Q. The track you were on, or were these tracks curved? A. Straight track.

Q. Could you see clearly then from where you were to the far end of the train where Mr. Bird was? A Yes, sir.

Q. Do you say now you couldn't see that the train had jumped the track when you got the stop signal from Mr. Bird? A. No, sir.

Q. As far as you could see, as far as you could judge from where you were had the car jumped the track when you got the stop signal? A. I knew it a few minutes afterward.

Q. I mean just at that moment? A. No, sir; I didn't know it.

Q. Could you see? A. I could see the rear end.

Q. You could see right straight down the track to where Mr. Bird was, to the end of the train? A. Yes.

Q. You were on top of the car? A. Yes.

Q. As you looked down there in a straight line, when you got this stop signal from Mr. Bird, was there anything to indicate to you that the car had jumped the track? A. No, sir.

Q. You are sure about that? A. Yes, sir.

Q. It appeared to be perfectly straight, did it? A. Yes.

Q. How soon did you see the car jump the track? A. I didn't see the car jump the track.

Q. How soon did you see that the car was off the track? A. Oh, probably after I got the stop signal, I saw Mr. Bird jump over on the other track.

Q. What do you mean? A. Jumped over on track three.

*By the Court.*

Q. Jump with the engine? A. Jump from one car to the other.

*By Mr. Gebhardt.*

Q. Jump from the car on which he was riding to the car which stood on track No. 3 alongside of track No. 5? A. Yes.

Q And at that time—Now, what car did he

jump from? A. The car that was derailed.

Q. You are sure about that? A. He was on the hind end there.

Q. All I want is the plain truth about it, Mr. Ike; there is no desire to mix you up, in any way. A. That is what I am giving you, the plain truth.

Q. And you could see from where you were that the car from which Mr. Bird jumped to the car on track No. 3 was the car that was derailed; could you see it? A. I saw him jump, yes.

Q. Where did you see him jump from, was it the front car or the second from the front or third from the front, or where was it? A. He was on the rear end.

Q. That does not answer the question, Mr. Ike. You saw him jump from a car of this train that you were also on to another car on the adjoining track, track No. 3. Now, was he on the front car or the second or third, or where was he when he jumped? A. He was on the head car, I believe.

Q. The first one of all? A. Yes.

Q. What part of it? A. I couldn't tell you just what part.

Q. The front end or the rear end or middle or where? A. I couldn't tell you what end he was on.

Q. Now, after you saw him jump and saw that the car was off the track, what did you do? A. I glanced up between track 3 and track 5 and saw a man laying there.

Q. Who was it? A. Mr. Willever I found out later.

Q. Did you know him at the time. A. Not until I got up.

Q. Had you known him before this day? A. Oh, yes.

Q. You found the man then to be Mr. Willever, did you? A. Yes.

Q. What condition did you find him in? A. He was laying between the tracks.

Q. Were there any tools there where he was found?

Mr. SCOTT—Objected to as leading.

THE COURT—State whether there were any tools there.

Q. Where he was found, where you saw him? A. I don't remember whether there was or not.

Q. Just think a moment. Who was there when you got there? A. Watson Ayres.

Q. Who else? A. That was all.

Q. Where was Mr. Bird? A. Mr. Bird had gone for help.

Q. How far did you have to go to get where Mr. Willever was? A. I couldn't say just how far.

Q. About how far, how many cars? A. About fifteen or twenty, somewhere along there.

Q. Now, how did you know Mr. Bird had gone for help? A. Well, I didn't know until afterward.

Q. Did you go up there from where you had been on the train as soon as you could or not? A. Yes.

Q. And was there anybody else there besides Mr. Ayres when you got there? A. No, sir.

Q. Was Mr. Willever conscious at the time? A. Yes.

Q. How close to this switch was Mr. Willever lying when you got there? A. Well, I couldn't say.

Q. After you got down there and found Mr. Willever, what did you do?

Mr. SCOTT—I object, because what this witness has done has no bearing on the case.

(Former question repeated.)

Objection overruled.

Exception to defendant.

A. I put him on the stretcher.

*Cross-examination by Mr. Scott.*

Q. Where were you located with reference to the engine after you received the last stop signal from Mr. Bird before the train was derailed? A. Five cars from the engine.

Q. How many cars were there between the car on which you were standing and the last car on track 5, toward the east? A. Fifteen or twenty.

Q. And what distance was that, if you can state, where you were located to the end of the car toward the east, about how far was that? A. How far was I from Mr. Bird?

Q. How far were you from the end of the last car? A. About fifteen or twenty cars.

Q. About how far in feet, if you know? A. I couldn't say.

Q. Before you received this stop signal from Mr. Bird what speed were you going? A. About as fast as you could walk.

Q. And for how long a time had you been proceeding at that speed? A. We had gone about six car lengths.

Q. At the same speed before you received the last signal from Mr. Bird to stop? A. Yes.

Q. And you have stated after you received the signal and after it was repeated to the engine man the train went twenty or twenty-five feet, is that correct? A. About fifteen or twenty feet, something along there.

Q. And was it daylight at this time? A. Yes.

Q. And will you state whether it was overcast or clear or what kind of day it was? A. Well, it was a clear day, it wasn't stormy.

Q. And just before you received the stop signal from Mr. Bird what had you been doing? A. Letting off brakes.

Q. Will you explain just what that was? A. There was a brake on every car; when the train comes in it is on a grade; we wind the brakes on to hold the cars but have to let them off so the engine can push them.

Q. And you were letting off brakes on the car on which you were on just prior to receiving signal from Mr Bird? A. Yes.

*By the Court.*

Q. What is the signal to stop? A. Like this (indicating) swinging with the arm.

Q. Swinging the arm backward and forward even, with your body extended? A. Yes.

Q. Either right or left hand? A. Yes.

*By Mr. Scott.*

Q. Is there any blowing of the whistle to attract attention? A. There is all kinds of whistle signals.

Q. Suppose you wanted to stop suddenly, quickly, what signal would the engineman give, if any? A. If he was going ahead he would usually blow a whistle.

Q. One whistle is to stop if he was going ahead? A. Yes.

Q. Who gives the signal to stop, the trainman using the arm, who gives that signal? A. The switchman.

Q. And the conductor? A. Yes.

Q. To whom is that signal given? A. The engineer.

Q. Well. if the engineer was not looking he could not see anything? A. He is always looking.

Q. Or supposed to be? A. He is always looking.

*By Mr. Gebhardt.*

Q. He is always looking, you say? A. Yes.

Q. Are you always looking when you are acting as brakeman, too?

Mr. SCOTT—I object, as not proper examination.

*Re-cross examination by Mr. Scott.*

Q. Mr. Ike, at the time you were moving, the engine was pushing this train down track 5? A. Yes.

Q. The engineman was on the west end and you were moving east and the car that was derailed was the head car on the east end of the train? A. Yes.

Q. And the signals you had to give were to the engineman who was west and pushing you down east, is that correct? A. Yes.

*By the Court.*

Q. Who gave the signal to stop that morning? A. Mr. Bird.

Q. And Mr. Bird is the conductor? A. Yes.

Q. And you saw him give that to the engineer? A. Gave to me and I gave it.

Q. And you passed it along to the engineer? A. Yes.

NICHOLAS ROSSE, sworn (through an interpreter) in behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Rosse, did you know William Willever before he died? A. Yes.

Q. Were you working with him the morning of the accident, the 11th of last December? A. Yes.

Q. Did you see the accident to him? A. I didn't see it but they called me.

Q. Where were you at the time? A. I was working at the switch.

Q. How far away? A. I couldn't hardly tell, there was cabooses in front of him.

Q. Were you by the caboose track? A. I was on the caboose track.

Q. How far away from the switch where Mr. Willever was working? A. From one switch to another, but I couldn't see because the cabooses was in front.

Q. What was Mr. Willever doing? Who was your boss that day? A. Mr. Willever.

Q. Had you been working with him just a little while before this? A. Yes, I was working with him two days.

Q. I mean this morning just before? A. Yes, we worked the night before and the same day, yes.

Q. How did it happen that you wasn't with Mr. Willever at this time? A. Mr. Willever left me at the switch to take the ice and he told me before he left to watch for the trains, and he says, "Look out," and Mr. Willever took the hammer and went on?

Q. Went on where? A. I don't know. Mr. Willever went on.

Q. Mr. Willever told you to watch for the train? A. Yes; I watch them myself.

Q. What were you doing at the time? A. I was cleaning the switch.

Q. What switch? A. Caboose switch.

Q. Were there two switches for the caboose track? A. Three.

Q. Which one were you working at? A. On the caboose switch.

Q. There are three caboose switches? A. There was two men, one on each switch.

Q. You said there were three switches? A. No-

body was on the other. They were two men working.

Q. Who was the other man? A. Billy Fort was with me.

Q. Was you and Fort working at the same switch? A. One man work one switch and another on the other.

Q. Were you up at the store? A. Yes.

Q. Had Mr. Willever sent you up to the store? A. No, sir.

Q. Had he sent you up to the switch by the store? A. He left me on the switch and he went on.

Q. Was this switch down by the store? A. On the other side of the store.

Q. How far away from the store, as far as across this room? A. I don't know.

Q. How far away were you working from where the car went off the track? A. About five, six or ten rail; I don't know exactly how far.

Q. How long is a rail?

Mr. GEBHARDT—Mr. Scott, can we agree on that?

Mr. SCOTT—About three hundred feet, his testimony would show. Mr. Gebhardt, will be satisfied with that.

Q. What were you and Fort and Willever out doing that morning, what was your general work? A. We were supposed to take the ice out of the switch, clean up.

Q. How soon after the car jumped the track did you go up there? A. About ten or twelve minutes after that.

Q. Did you go up right away? A. Yes.

Q. Who was there when you got there? A. There were five or six persons there, I don't know them.

Q. Was Fort there? A. No, there were two there, Bird and him.

Q. Up to where the car was derailed, where Willever was? A. The boss was on one side and the car was on the other.

Mr. SCOTT—I ask that the answer be stricken out as not responsive.

Mr. GEBHARDT—I think it ought to stand.

Q. Who was the boss? A. Mr. Willever.

Q. When you got to the place where Mr. Willever was wasn't Mr. Ayres there? A. I don't know him.

Mr. GEBHARDT—Mr. Ayres, stand up.

(Mr. Ayres stood up in the courtroom.)

A. Yes, he was there.

Q. Anybody else there? A. I don't know them; there were some there but I don't know them.

Q. Was Mr. Bird there? A If I saw him I might know him.

(Mr. Bird was requested to stand up.)

A. Yes, he was there.

Q. Mr. Bird was there when you got there? A. Yes.

Q. Was Mr. Charles Ike there? A. I don't know.

(Mr. Ike was requested to stand up.)

A. Yes

Q. How long was it after you left Mr. Willever before the accident occurred? A. About twenty minutes.

Q. What was Mr. Willever doing when you left him? A. He took the hammer and went on.

Mr. SCOTT—He is asking the witness where was Mr. Willever when the witness left him, and the situation is that Mr. Willever left these men.

THE COURT—I think the testimony was that Mr. Willever gave him instructions to clean out the switch and watch the trains, took the hammer and went on.

Mr. GEBHARDT—Subsequently this witness said Mr. Willever sent him down to the switch opposite the store.

Q. When you parted, when you and Mr. Willever parted, where were you both at the time? A. Left me at the switch.

Q. This switch where he was killed? A. He left me at the switch and he went on.

*By the Court.*

Q. At the caboose switch? A. Yes.

*By Mr. Gebhardt.*

Q. Now, when this accident occurred you were down at the switch by the store, is that right? A. Yes.

Q. How many rails away from where the accident occurred was that? A. About ten rails.

Mr. SCOTT—You see there is a contradiction here. It appears from this man's testimony when they separated that morning they were at this switch where the accident occurred.

Mr. GEBHARDT—There isn't one word of evidence in the case to that effect.

THE COURT—We will ask the question.

Q. When you and Mr. Willover separated that morning was Mr. Willever and you at the switch where he was killed or not? A. The man called me and said to go to where Mr. Willever was killed, and that is the way—

Q. When Mr. Willever sent you down to the switch by the store where was Mr. Willever, at the

place where he was killed or somewhere else? A. The boss put me at the switch.

Q. Where was the boss at that time? A. Put me there and went on and says to watch for the train from the west and east end.

Q. Where was Mr. Willever when he left you? A. Mr. Willever left me.

Q. Where were you at the time? A. I was working at the switch and he went on.

Q. Was Mr. Willever working at the same place where he was killed when he told you to go down to the switch by the store? A. No.

Q. Where was he? A. I didn't see him.

Q. Where did you see Mr. Willever alive last? A. Left him at the switch, last I saw him.

Q. What switch? Where he was killed? A. No, sir.

Q. Where was he? A. On the switch side of the store.

*Cross-examination by Mr. Scott.*

Q. You know where the main track is? A. No.

Q. Do you know where the caboose track is? A. I was walking on the caboose track.

Q. And do you know where the two tracks that go up on the hill are? A. Yes.

Q. Were you working near those two tracks on the hill that morning with Mr. Willever? A. Yes, sir.

Q. And what time did you get to work? A. Seven o'clock.

Q. And how long did you work there? A. One hour.

Q. And was Mr. Willever with you at the time? A. Yes.

Q. And who else was with you? A. Billy Fort.

Q. And what was Billy Fort doing? A. He was to get the—

Q. And what were you doing? A. I was cleaning at the switch.

Q. And what were you doing to the switch, taking snow out of it? A. Taking ice and snow.

Q. And what was Mr. Willever doing while he was with you and Billy Fort? A. He was watching us.

Q. And Mr. Willever stayed there until how long? A. About twenty minutes.

Q. Did he do any work while he was up there with you and Billy Fort? A. No, sir.

Q. What was he doing while he was with you and Billy Fort? A. He wasn't doing anything, just watching.

Q. And just before he left you and Billy Fort he told you to watch out for the train, is that a fact? A. Yes.

Q. Tell the Court and jury just what Mr. Willever's words were about your watching out just before he left you to go away? A. "Watch for the trains and for the engines."

Q And then Mr. Willever left you, is that the fact? A. Yes.

Q. And where did he go, in what direction did he go after he left you, east or west? A. To the west.

Q. And were there any cabooses on the caboose track at the time Mr. Willever left you and Billy Fort? A. Yes.

Q. And after Mr. Willever left you did he walk down the caboose track or on which side of the caboose track? A. He left and he went towards Easton.

Q. That does not answer my question. I asked when he left you and Billy Fort whether he walked down the caboose track west or between the caboose track, and if he walked down the caboose

track which side of the caboose track did he walk on? A. He was walking down the caboose track and the other track.

Q. And what do you mean by the other track? A. On the other track there used to be a main line.

Q. And he walked between the main line track and the caboose track? A. Yes, sir.

Q. And how far could you see him after he left you? A. I cannot see him any more.

Q. Why? A. I could not see him.

Q. Why? A. He told me to clean the switch there and I was doing the work and I couldn't look at him.

Q. The reason you could not see him was because you were doing something else, is that a fact? A. I didn't look where he went.

Q. Was there anything obstructed your view from seeing Mr. Willever after Mr. Willever left you. A. The cabooses interfered.

HORACIO D. FERGUSON, sworn in behalf of plaintiff:

*Direct examination by Mr. Gebhardt.*

Q. Where do you live, Mr. Ferguson? A. Hackettstown, New Jersey.

Q. By whom were you employed in December last? A. D., L. & W. Railroad.

Q. At what station? A. Port Morris.

Q. Do you remember the accident to Mr. Willever? A. Remember hearing about it.

Q. Did you see any part of it? A. No, sir.

Q. Did you see Mr. Willever before the accident? A. I did.

Q. Where was he? A. On the hill switch.

Q. Is that along track No. 5? A. That's up on the hill.

Q. Did you see him working on track No. 5? A. No, sir.

Q. Did you see the accident to him? A. No, sir.

Q. Where were you? A. I was on the highway to the middle there.

Q. What is your business there? A. Interchange clerk.

Q. When did you first hear of the accident? A. When I went up in No. 4 office, which is in the middle, the freight office.

Q. How far away is that? A. That must be pretty near quarter of a mile or more.

Q. And you didn't see Mr. Willever at the time he was injured? A. No, sir.

Q. And didn't see the accident? A. No, sir.

*Cross-examination by Mr. Scott.*

Q, What time did you see Mr. Willever? A. It was in the morning.

Q. Before the accident? A. It might have been five or ten minutes.

*By the Court.*

Q. Before the accident? A. Yes.

*By Mr. Scott.*

Q. And at that time where was he? A. On the hill switch.

Q. At the hill switch? A. Yes.

*By the Court.*

Q. You are still in the employ of the defendant? A. Yes, sir.

Q. What do you mean by an interchange clerk? A. Taking numbers, seals, and writing up records of the Lehigh & Hudson trains that pull in at the Morris yard.

Q. And you are in the employ of the company? A. Yes, sir.

Q. And you keep track of the business of the Lehigh & Hudson in connection with the D., L. & W.? A. Yes, sir.

DAVID BIRD, sworn in behalf of plaintiff.

*Direct examination by Mr. Gebhardt.*

Q. Where do you live? A. Netcong, New Jersey.

Q. By whom are you employed? A. D., L. & W. Railroad Company.

Q. Were you employed by that company on the 11th of last December? A. Yes, sir.

Q. Are you the Mr. Bird that was conductor of the train that had a car derailed? A. Yes.

Q. On that morning? A. Yes, sir.

Q. When did you first see Mr. Willever that morning? A. On the hill, by the track known to us as the mud track, about quarter to nine, I should judge.

Q. What time did this accident occur? A. Nine-twenty-five.

Q. What part of this train that was taking up freight that morning and the car derailed were you on? A. The leading car, or which I would term the head car; that was the first car coming east, we were shoving the train east.

Q. You mean running backwards? A. Yes; we came against the opposite end of the cars to where I was and pushed them on through.

Q. What part of that car were you on? A. The westward end.

Q. That would not be the front end, would it? A. No, sir; that would be the end nearest the engine, the end connected to the car following it.

Q. And did you see Mr. Willever around there? A. No, sir.

Q. You didn't see him around there? A. No, sir.

Q. When did you see him after he was run over? A. When he laid between the tracks.

Q. When did you first give the stop signal? A. Just as soon as the car that I was on jumped up; I heard somebody holler, I looked down and I saw Mr. Willever laying between the tracks; that's the first I saw him. I gave the stop signal to stop at once, which was received at the other end, and we did stop, because we didn't go no distance.

Q. How far do you think you went? A. We went just two-thirds the length of a car; the first pair of wheels of the following truck was on the switch when we stopped. It was back one—we went back to put the car on the track.

Q. When you heard this man holler and the car began to rise up? A. Just gave a bump, dropped off on the ties.

Q. And you immediately gave the stop signal? A. Yes.

Q. Then what did you do? A. I jumped from there on another car and an engine working in the transfer there a signal to stop, and started immediately for to get help to pick the man up.

Q. Did you go down where he was? A. Not until we came back.

Q. How soon did you come back? A. I should judge about ten minutes, possibly; maybe not that long.

Q. How far away did you have to go? A. Oh, I should say about thirty car lengths, possibly, to the round house.

Q. To get the stretcher? A. Yes.

Q. And you came right back? A. Yes.

Q. Did you see Mr. Willever's tools around

there? A. Not at that time; no, sir.

Q. When did you see them? A. When we went back to put the car on the track there was a hammer laid there at the switch.

*Cross-examination by Mr. Scott.*

Q. What was the number of this car that was derailed? A. 28191.

Q. What time did you go back to put the car on the track—you are positive that you went back to put the car on the track? What time did you get back? A. I couldn't tell you what the time was; it was before our dinner time some time.

Q. Would you say it was half an hour? A. No, sir; I think it was longer than that.

Q. Half an hour before dinner. Was it about half past eleven or what time? A. I couldn't say as to the time; it was before we went to our dinner, I know.

Q. And after you had done any other work? From the time the car was derailed to the time you went back to put the car on the track, had you done any other work? A. Yes, sir.

Q. And about how long did that other work take? A. Well, I couldn't answer. We have many jobs and I couldn't tell you just how long.

Q. The best of your recollection is that it was some time in the forenoon before twelve o'clock? A. Yes.

Q. And it was after ten o'clock, was it not? A. Yes, I think it was. I wouldn't say positively, it was some time before we went to dinner.

*Re direct examination by Mr. Gebhardt.*

Q. What did you do with Mr. Willever that day after the accident? A. We got a stretcher out of the round house to take him up, went down with the engine and fetched him up to the Yard Master's

office, took him in the office and left him there in charge of the doctor; there was a doctor there when we got him there. Then we returned on to our work.

Q. You don't know what was done with him? A. I saw that they got another engine and caboose and I saw it leave and they told me that they had taken him to the hospital. I didn't see him after that, of course; I suppose they took him there.

MRS. LILLIAN WILLEVER, resumed the stand.

*Direct examination by Mr. Gebhardt.*

Q. Mrs. Willever, after the accident that day, when did you first see your husband? A. About one o'clock.

Q. When did you leave him that day? A. About twenty minutes to five.

Q. When did he die? A. About five o'clock.

Mr. SCOTT—We admit that.

PLAINTIFF RESTS.

Adjourned to Wednesday, June 3rd, 1914, at 10.30 o'clock in the forenoon.

MOTION FOR NON-SUIT

SECOND DAY. Wednesday, June 3rd, 1914.

HUNTERDON COUNTY COMMON PLEAS COURT.

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LILLIAN WILLEVER, Administratrix, etc., of William Willever, deceased,

*Plaintiff*,

*vs.*

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

*Defendant.*

*Action at Law.*

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APPEARANCES AS BEFORE NOTED.

Mr. SCOTT—I desire at this time to make a motion for a non-suit and I have written out my reasons, so I will confine myself to my reasons as I read them.

The first is, because there is no proof that the cars being pushed by Engineman Lake on the morning of December 11th, 1913, of which the head car was east end car Number 28191 was derailed was either the whole or part of the train brought from Maybrook, New York, to Port Morris on December 10th, 1913, by Conductor Daly, and even assuming that Conductor Daly brought a train of cars into Port Morris on track number 5 on December 10th, 1913, there is no proof that the same remained there from the evening of December 10th, 1913, to nine o'clock, or somewhere thereabouts, on the morning of December 11th, 1913.

As regards the evidence on that point, the Court will remember that Engineman Bossett testified that when he brought this train in from Maybrook, New York, he detached his engine after he got to Port Morris and took it to the ash pit and finished his work for the night. Conductor Daly could not testify and explained to the Court why he could not state what track he brought this Lehigh & Hudson train in on, and in going through my notes last night I failed to find any evidence in this case to show that the train that Daly brought in was composed of or a part of this car which was derailed.

My second reason is because even if the Court should find and decide there was some evidence from which the jury could infer that this derailed car, which was the east end of a string of cars which Daly brought into Port Morris, the proof is that the destination of Daly's car was Port Morris, New Jersey; that the train came from Maybrook, New York, and arrived at Port Morris, its destination, on December 10th, 1913, in the evening, and the further fact that the evidence shows that after Daly's train arrived at Port Morris perhaps a repetition of Engineman Bossett's testimony—that he cut off his engine and ended his trip; that the interstate character of that train has ceased, and that on the next morning, about nine o'clock, there is evidence that a freight engine which never left the Port Morris yard, moved these trains up into a light yard; and there is further no evidence that any of these cars which went up into the light yard, which were ordered there, contained at the time of the movement any interstate freight. If I recollect—and perhaps

I am wrong in my recollection—I believe that Mr. Ike said something about them being empty cars, but aside from that I will state that there is no proof that any of these cars had any interstate freight in and that they had arrived at the destination on the day before and on the day of the accident they were being moved in an intrastate movement in the yard.

My third point is because there is no proof that the injury to Willever occurred by reason of the violation by the defendant of any statute enacted for the safety of employees, and it is not contended or claimed in the declaration or complaint that that was so. As to that point, we claim there is no proof as to how Willever was injured, neither is there any proof that at the time he was injured Willever was working on the mud or any other track.

The next point I desire to call your Honor's attention to is that there is no proof in this case that the defendant company negligently operated its locomotive or train.

And the last is, because there is no evidence whatsoever that defendant failed to give the plaintiff any notice or warning of the approach of the locomotive or train, and inasmuch as that is one of the specific charges of negligence, the plaintiff has failed to make out a case on that point.

Those being my reasons, if the Court desires, I would be pleased to address the Court further on the different propositions more at length.

Motion argued.

THE COURT—It seems to me that there are several questions of fact in the matter which should be submitted to the jury,

and I, therefore, refuse the motion to non-suit.

Mr. SCOTT—I ask that my opinion be noted on the record.

Exception to defendant.

JAMES H. CLARKE, sworn in behalf of defendant.

*Direct examination by Mr. Scott.*

Q. Mr. Clarke, what is your business? A. Civil Engineer.

Q. And for the D., L. & W. Railroad Company? A. Yes.

Q. And for how long have you been employed by them? A. About thirty years.

Q. Are you familiar with the road as it runs into Port Morris, and yard at Port Morris? A. I am.

Q. Are you familiar with what is known as the Port Morris yard? A. I am.

Q. And at my request have you prepared a map showing the lay-out of the Port Morris yard? A. I have, a portion of it.

Q. And the map the officer is attaching to the wall is the map in question? A. It is.

Q. Does that map show the entire yard? A. It does not.

Q. What portion of the yard does it show? A. It shows the greater portion of the westerly end of the yard.

Q. Were you familiar with the lay-out of the yard on December 10th and 11th, 1913? A. Yes.

Q. And does that map correctly represent the lay-out of the yard at that time? A. It does.

Q. You were familiar with the tracks in that yard? A. I am.

Q. You are familiar with what is known as the caboose track? A. Yes.

Q. Will you kindly indicate that track on the

map. A. The caboose track is that which is known as the northerly side of the yard between the drill tracks and what is known as the hill track. I can mark it if you desire.

Q. The caboose track is this straight piece of track that runs around from— A. On the northerly side of what is known as track 5.

Q. Mr. Clark, from where the caboose tracks enter track 5 on that map, how far east of that point are the yard limits or where does the Port Morris yard run? A. About a little over a mile, I should say; a mile and an eighth.

Q. From the same point, how far does it run west? A. Between three-quarters and seven-eighths of a mile, approximately.

Q. In what direction, taking this same point where the caboose tracks run into track 5 at its westerly point, how far and in what direction from that point is the round house in the Port Morris yard? A. It is east.

Q. And is that indicated on the map? A. The round house is not, no, sir; it does not appear on the map. It is east of the east end of the map.

Q. Do you know, of your knowledge, what the grade of track 5 is from the time it enters the Port Morris yard at its westerly point up to the caboose track? A. Yes, it is about one per cent. grade; Port Morris is the summit; it is an ascending grade coming east and descending grade after you leave Port Morris. Port Morris is the summit of the division.

Q. Can you indicate and show on the map where the main line, the main lines, through lines, run through the yard? A. The main lines of the railroad are shown on the south side of the yard, the most extreme two southerly tracks.

Q These are the tracks you have reference to (indicating)? A. Yes.

Q. Is this the platform colored in yellow? A. That is correct, the transfer platform.

Q. At my request, Mr. Clarke, you took some photographs of the Port Morris yard? A. I did.

Q. And when did you take those? A. On May 28th.

Q. And were you familiar with—you have already stated you were familiar with the condition of the Port Morris yard in December last? A. Yes.

Q. And do those photographs represent the track lay-out as they appeared in December 10th and 11th, 1913? A. They do. No change there.

Q. I show you a set of photographs numbered from 1 to 6 and ask you if these are the photographs that you took? A. They are.

Q. And will you explain, taking each one in their numerical order, what they represent and from what points they were taken? A. Number 1 is taken from what we call the "reloader." It is a frame structure and it is about seventy-five or eighty feet high.

Q. And where is that reloader on that map? A. It is shown west of the boiler house, about five hundred feet. It is indicated here as "holder."

Q. That is where the first photograph was taken? A. Yes, that is where No. 1 was taken, looking in an easterly direction.

Q. And does that show track No. 5? A. It does; also shows the caboose track and also the hill tracks.

Q. And the other tracks in the yard? A. It shows a portion of some other tracks. Photograph No. 2 is a general view looking east from the same location, but showing all the tracks in the yard.

Q. Does photograph No. 2 show the mud track? A. It does.

Q. Or what is known as No. 5? A. Yes.

Q. What does photograph No. 3 show? A. Photograph 3 is taken in the same location only looking in a westerly direction. It shows the entire tracks and a portion of the land to the north of the tracks. Also shows the reloaders west.

Q. Does it show track No. 5? A. It does.

Q. Will you continue with the balance of the photographs? A. No. 4 is a general view looking west, showing the beginning of what is termed the hill tracks, and it also shows the easterly end of the caboose track; also it shows what is called No. 5, or the mud track; No. 5 shows the westerly end of the caboose track looking in an easterly direction; it also shows the easterly end of track No. 5, and No. 6 is looking on the westerly direction, showing the westerly end of the caboose track; also showing track No. 5, and a portion of what is known as the hill track.

Q. Before you leave the stand, Mr. Clarke, will you indicate with a cross at the bottom of the photograph the track No. 5 as shown? A. In all cases?

Q. Yes; well, in photographs 1 and 2 (witness marks photographs as requested)? A. I have indicated on photographs No. 1 and 2 in the center of the track the figure 5.

*Cross examination by Mr. Gebhardt.*

Q. Just two questions, Mr. Clarke: From your measurements there, as a civil engineer, a train pushing east on track No. 5, in the locality where this accident occurred, would be pushing up a little upgrade? A. It would be an ascending grade coming east; about eight-tenths to one per cent.

Q. Then assuming that the train in question, which is alleged to have run over Mr. Willever, was moving in an easterly direction, it was going slowly upgrade, wasn't it?

Mr. SCOTT—I object as not proper cross-examination.

Mr. GEBHARDT—It was a hypothetical question. I said: "Assuming that the train—"

THE COURT—Repeat the question. (Former question repeated as follows: "Assuming that the train in question, which is alleged to have run over Mr. Willever, was moving in an easterly direction, it was going upgrade, wasn't it)?

Mr. SCOTT—I will withdraw my objection, but I don't think it is proper cross-examination.

A. I have stated it was an ascending grade—it was pushed about one per cent. grade, yes.

Q. How far from what is known as the mud track, or track No. 5? A. Just how do you mean, right angles across?

Q. Yes; first give us the photograph to show us the mud track, track No. 5. A. Well, the mud track shows in No. 4, 5 and 6.

Q. Is there any photograph that shows the mud track and track No. 5? A. Yes, a portion of it, as far as you can see, No. 4.

Q. This is the hill track (indicating)? A. There are two tracks; they are both hill tracks.

Q. Where is track No. 5? A. Track 5 is the track which is the first track shown.

Q. Won't you please mark on the top or back of this: "This photograph shows both track No. 5 and the two hill tracks." Have you done that? A. No, I

haven't; I have marked on there: "General view of mud track looking west."

Q. Will you mark on there, that shows the hill tracks and track No. 5, and that will be all I have to ask? A. I have marked on there: "General view of mud track No. 5; that is looking west."

*Re-direct examination by Mr. Scott.*

Q. Will you give me the distance from the point of the switch on the hill track, from the point—do you know where the store had been mentioned, near the hill track? A. Yes.

Q. Can you indicate that with a cross on your map? A. I cannot, because in my opinion the store is further east than the map is.

Q. And then can you indicate on the map the first switch on the hill track? A. I can, yes; I can mark it with an arrow (witness marks the map as indicated).

Q. Will you mark the other point of the switch, of the same switch? A. There isn't any switch beyond that, outside of the caboose.

Q. From the point that you have indicated by an arrow, will you tell me how far it is down to the point of the switch where the caboose track enters at its westerly end to track No. 5? A. 670 feet.

Q. And what is the distance from the east end of the transfer platform down to the point of the caboose track where it enters the mud track at the westerly end? A. 706 feet.

*Re-cross examination by Mr. Gebhardt.*

Q. Have you told, Mr. Clarke, the distance at right angles across from track No. 5 to the mud track? A. I have not, sir.

Q. Will you do that, please, and can you mark on that map track No. 5?

Mr. SCOTT—Yes, Mr. Clarke can mark it with a 5 or some number.

A. Do you want that center to center, or how?

Q. Side to side from the nearest rail to the nearest rail? A. Twenty-seven feet; shall I mark that No. 5?

Q. Yes.

JOHN H. SEXTON, sworn in behalf of defendant.

*Direct examination by Mr. Scott.*

Q. Mr. Sexton, you are a road master in the D., L. & W. Company? A. Yes.

Q. Will you explain to the jury what your duties as road master were? A. I have charge of the division on the D., L. & W.; 300 miles of track; my duties are to employ men to take care and maintain that portion of the track.

Q. And does that section take in Hackettstown? A. Yes.

Q. And Netcong? A. Yes.

Q. And Port Morris yard? A. Yes.

Q. Did you know Mr. Willever? A. Yes.

Q. Also includes the Washington yard at Washington? A. Yes.

Q. When did he come to work for you? A. He came to work for me in 1901.

Q. What position did he have at that time? A. Laborer.

Q. Track laborer? A. Yes.

Q. And subsequently what position did he have? A. Section foreman.

Q. At what place? A. I think he had about one year at Hackettstown and five years at Port Morris.

Q. When Mr. Willever came to you, did you instruct him in his duties? A. Yes.

Q. And will you explain to the Court and jury what his duties were, and what your instructions were? A. His instructions and all other foremen always to protect themselves from danger, also their men, and keep up the portion of track assigned to them in good repair.

Q. How many men did Mr. Willever have in his gang? A. Four, I think.

Q. You have stated to the jury relative to instructing them as to their protection. Will you explain that, if you can, more fully?

Mr. GEBHARDT—I want him to tell them what he told this man.

Q. Will you state what you told Mr. Willever? A. Well, I told him to always protect himself and his gang of men against all chances of accident or destruction of property. Them instructions are given to other foremen on the division.

NO CROSS-EXAMINATION.

CHARLES J. YOUST, sworn in behalf of defendant.

*Direct examination by Mr. Scott.*

Q. What was your business in December? A. General Yard Master.

Q. At what place? A. Port Morris, New Jersey.

Q. And prior to that time where were you employed? A. One year in Scranton.

Q. In what position there? A. Yard Master.

Q. And prior to that time? A. B. & O. Railroad Company.

Q. At what place? A. Menwood, West Virginia.

Q. On December 13th, you have stated you were general yard master at the Port Morris yard? A. Yes.

Q. Will you describe to the jury in a general way what work was carried on in the Port Morris yard? A. On that day?

Q. No, what work at that time and in general? A. The general yard master's duties are general supervision over the entire works within the yard limits.

Q. And will you explain to the jury what the nature of the work in the yard consists of and the way it is handled? A. Well, making up trains, receiving trains, calling of power, calling of crews.

Q. And what was the extent of the business carried on in December, 1913? A. I don't understand the question.

Q. What was the extent of the yard business carried on in 1913? A. You mean the number of cars handled?

Q. No, not number of cars; whether there was much or little work. I mean to get before the jury in a general way the nature of the work that was done in Port Morris yard? A. I don't quite get what you mean.

Q. You have told us that the work in the Port Morris yard consisted of making up trains and doing other things. Now, what I want you to explain to the jury is more in detail the nature of that work. A. I think in December, 1913, we handled 94,000 cars in and out of the yard.

*By the Court.*

Q. In what time? A. In December, 1913.

*By Mr. Scott,*

Q. And will you state to the jury just when you say you handled those cars, will you state to the jury just how you handled them, in what manner? A. They are received in different trains and switched

up and classified and discharged to the several destinations.

Q. In other words, the work there is the making up of trains and re-billing and re-lading and switching of trains? A. Yes.

Q. How large is that yard, Mr. Youst? A. Well, that is pretty hard to determine, but I should say about fifteen or eighteen hundred cars for the entire yard; that's including the east and west bound car and transfer.

Q. And the work is done there both day and night? A. Yes.

Q. With different shifts of men? A. Yes, sir.

Q. And the cars are moved about by what kind of engines? A. Switching engines.

Q. Can you state to the jury whether the switch engines have any particular place to operate in that yard? A. Anywhere within their limits.

Q. And what consists of a switch crew? A. Engineer, foreman, one foreman and two helpers.

Q. Will you state just how trains are made up in that yard? A. They are classified according to their destination; that is, we make up so many trains; cars for Hoboken are classified in Hoboken classification; cars for Sussex in that section; west-bound, such as Scranton and points beyond are classified accordingly. Loaded cars run on ahead of a train, with empties in the rear.

Q. Do you know David Bird? A. Yes, sir.

Q. And do you remember giving any orders to David Bird on December 11th, 1913, relating to certain cars in the yard? A. Yes.

Q. And what were those orders? A. Well, the first order I gave him in the morning was to make up a local train that runs between Newton and Port Morris and vice versa, and after that train was completed we made up our next train, that is the

train that handles part freight and part passengers between Newton and Franklin Furnace; and after that went I struck into track No. 1, the west tower, and pulled twenty-seven empties which was standing on track 5 in the west-bound yard.

Q. And do you know what time you gave him that order? A. About nine—between nine and nine-ten. I don't exactly know the time.

*Cross-examination by Mr. Gebhardt.*

Q. I just wanted to ask you, Mr. Youst. You say the crew of a switching gang or whatever you call them, is composed of the engineer, foreman and what? A. One foreman and two helpers.

JOHN E. CHURCH, sworn in behalf of defendant

*Direct examination by Mr. Scott.*

Q. Mr. Church, what is your business at the present time? A. Freight train master.

Q. And you are located where? A. Port Morris.

Q. And will you explain to the jury what the nature of that employment is? A. The freight train master has charge of all crews operating on his division; movement of the traffic and employees in connection with it.

Q. And prior to that position—did you occupy that position in December of last year? A. I did.

Q. And prior to that time and your employment with this company were you employed by any other railroad company? A. Yes.

Q. In what capacity? A. Train Master.

Q. By what railroad? A. The Pierre Marquette Company, in Michigan.

Q. You are familiar with the operations of trains in the Port Morris yard? A. Yes.

Q. And were in December of last year? A. Yes.

Q. With reference to that kind of work, in the making up of trains and sending of the trains down into the light yard, is there any rule or practise or custom with respect to warning men engaged in the repair of tracks in that yard? A. No, sir.

Q. How long were you with the Pierre Marquette? A Twenty-four years.

Q. And with the D., L. & W.? A. Eleven months.

Q. With the Pierre Marquette how long were you as train master? A. About four years.

Q. In your opinion, is it practical in the operation of the making up of a train or shoving of a train down in the light yard to have any rule providing for the warning of men repairing the tracks.

Mr. GEBHARDT—Objected to because he cannot give an opinion. The object is to give an opinion. If he wants to show facts surrounding—that would be a question for the jury.

Mr. SCOTT—Here is a man that is an expert in his line, in business twenty-two years and eleven months. He has been with the company and has been with another company operating in there in a similar position, a man whose general knowledge of such a situation is gained by having charge of crews of this character. I respectfully insist—

THE COURT—Did this man have charge?

Mr. SCOTT—He asserts he had charge.

THE COURT—Of this car?

Mr. SCOTT—Of the crews and the trains. One of his first answers were that he had.

THE COURT—Yes, entire charge and supervision?

Q. Did you have entire charge and supervision of the crews in the yard? A. Yes, as well as on the road, the entire division.

Mr. GEBHARDT—I want to cross-examine a little on that before he qualifies as an expert.

*By Mr. Gebhardt.*

Q. What did you do, sit in the office? A. No, sir, my business is outside as well as in the office. I am on the road among the cars the greater part of the time.

Q. Everywhere on the division in New Jersey, all over the State? All over the State where the D., L. & W. runs? A. Yes.

Q. What you really do is to tell the men what to do? A. To see they carry out instructions.

Q. Your instructions? A. The company's instructions.

Q. And that is all you have got to do with it? You don't tell the men when to move trains, do you. A. Some trains, I do.

Q. But not one case out of a thousand, do you? A. May I ask in what way you mean? Do you mean I give the signal for particular trains?

Q. Yes; do you have anything to do with directly instructing them when to move from Hoboken? A. When I am present with them.

Q. But you aren't present with them in one case out of a thousand, are you? A. I can't say.

Q. How many crews are there operating in New Jersey? There's more than one hundred? A. Considerably.

Q. More than two hundred? A. I think there are.

Q. More than five hundred? A. You are getting nearer the number.

*By the Court.*

Q. Why don't you say? A. I don't know.

Q. You say five hundred is near the number? A. A. I should say, in my opinion.

*By Mr. Gebhardt.*

Q. You couldn't look after the whole five hundred a day, could you? A. Not every day.

Q. You are the train master, the man who gives the general instructions how trains should be operated? A. Yes.

Q. See that the instructions are carried out, as far as you can? A. Yes, certainly.

Mr. SCOTT—About this day, December 11th, when this accident occurred? May I ask the Court to assist the witness with a little more definite information?

THE COURT—Yes, what as to having charge of the cars and what your directions were on that particular day.

Q. Were you in the Port Morris yards on the 11th of December last? A. I cannot state positively.

Mr. SCOTT—Senator; have you finished his preliminary.

I repeat my question for the Court's ruling.

Mr. GEBHARDT—I will withdraw my objection. That will save time of the Court and jury.

Q. (Former question repeated. In your opinion, is it practical in the operation of the making up of a train or shoving of a train down in the light yard to have any rule providing for the warn-

ing of men repairing the tracks?) A. There is none.

Q. Do you know, in your experience, of any rule or regulation which is written or otherwise to prevent in the Lackawanna yard or any other railroad yard with respect to any warning being given to employees engaged in repairing tracks within the limits of the yard? A. None.

Q. You are familiar with what is known as the light yard? A. Yes.

Q. And that is located down east toward the round house? A. Just east of the round house.

Q. And what is that yard used for? A. For the assembling of cars to be inspected and pulled out later and moved on trains.

Q And when they are moved out by trains what engines take them? A. Road engines always.

Q. Will you kindly tell the jury the distinction between yard and road engine? A. The road engine is an engine which is used between certain towns and cities; yard engine is one that operates exclusively within certain yard limits.

Q. Are loaded or empty cars sent down to the light yard? A. Usually empty cars.

Q. And they are taken, the cars that are assembled down there are taken out by virtue of what orders or instructions? A. Usually the orders of the Chief Dispatcher at Hoboken directing where certain cars are to be sent, depending on their condition.

Q. And until such orders are received, what are done with the cars in the light yard? A. They are held.

Q. How many engines did you have in Port Morris yard in December, last year? A. I think they were working what is known—three engines day and night, and one half day and half night.

Q. And that makes how many engines continuously in operation at one time? A. That would be four engines; they would not be continuously; three continuously, one twelve hours.

Q. And where are those engines operated, in the yard or on the road? A. Those engines are operated in the yard.

Q. Will you explain to the jury why no rule has been provided for the giving of any warning or signal relative to the movement of cars and the making up of cars, sending of cars down to the light yard, to men on the tracks or working on the tracks?

Mr. GEBHARDT—Well, now, it seems to me that is going too far. He is asked to give a reason that the railroad company itself had, I suppose.

THE COURT—I think the question may be answered.

Mr. GEBHARDT—I object, and ask for an exception.

Exception to plaintiff.

A. On account of the frequent moves of engines and the large number of signals and so forth, if warning of any kind were given it would be confusing. If warning were given it might attract the attention of some one on the opposite track, which would cause a greater confusion than to have every man looking out for himself, knowing that frequent moves are to be made, expected at any moment.

*Cross-examination by Mr. Gebhardt.*

Q. You say, Mr. Church, that there were located in this yard about three engines, all told, for the twenty-four hours? A. For the twenty-four hours.

Q. That would be how many in the daytime? A.

Three days, three nights, one-half day and half night. They have between three and four.

Q. How big are these yards? A. The yard extends about two and a quarter miles east and west, holds approximately about fifteen hundred cars.

Q. How many tracks are there? A. All told, about forty, counting them up entirely.

Q. And about how long is this track No. 5? A. Track No. 5 holds somewhere between sixty and eighty cars, I cannot tell exactly—I never measured it.

Q. Sixty or eighty. If it holds eighty that would be about three thousand feet long, wouldn't it? A. Twenty-four hundred feet.

Q. Eighty cars? A. Thirty-two hundred feet.

Q. Do you know how many feet there are in a mile? A. 5,280.

Q. Now, isn't it the custom in that yard when the locomotive engineer is going to start up to ring the bell? A. No, sir.

Q. Does he ever ring the bell? A. Sometimes, I suppose.

Q. Up there? A. The law states he must not cross over a crossing without—

Q. I mean in the yards, does he ever ring the bell? A. I cannot say that he ever does.

Q. Can you say that he don't? A. I wouldn't say that he didn't. I haven't any particular recollection of his doing it.

Q. Suppose that he saw a man on the track with his back to him, twenty—or thirty or fifty feet ahead, doing something on the track, wouldn't he then ring the bell if he was going toward the man? A. Any man would warn any other man of anything if it was dangerous, if he saw him.

Q. I thought you said it couldn't be done? A. I said it wasn't done as far as I know.

Q. You said it wasn't practical. A. The practical part, if they always gave a warning before they moved—

Q. You said it wouldn't be practical to give any warning. Now, you said if a man was twenty or thirty feet ahead, seen by the engineer, he would give warning by bell. You say now the man would give the man warning on the track. A. If he saw him in front of him.

Q. And if he was looking out he would see him, wouldn't he? A. Not always.

Q. Unless something was to interfere? A. Yes, unless he was looking out some other way.

Q. He is supposed to look out, isn't he? A. Not in that direction. He is looking out for signals.

Q. But he is supposed to look out so as not to run over anybody? A. Not in there.

Q. Doesn't pay any attention? A. That isn't his duty.

Q. That isn't a rule of the company? A. It always is not a rule of the company.

Q. You say that it isn't his duty; what do you mean? A. I mean his duty is the operation of the engine and taking signals, the company paid him for.

Q. You mean he isn't required by the company to give a signal, don't you? A. Yes, put it that way.

Q. Would he be required by the company to give a signal if he saw men on the track? A. Yes, we are told we must not take any chances.

Q. What do you mean by that? A. Injuring or colliding with anything.

Q. You are told to do that? A. That is one of the general rules.

Q. How is he going to avoid chances if he does not keep an outlook for that very thing on the

track in front of him? A. He hasn't any reason to expect anyone there.

Q. Weren't men repairing the tracks? A. They are not supposed to be on the track.

Q. Suppose they don't get off the tracks; can he obey the rule of the company and run over him or not? A. If he sees him?

Q. You know that he couldn't, don't you? A. No, we would not violate the rules of the company.

Q. He would be obeying the rules of the company if he saw a man on the track, was going to run him down and didn't give him any warning? A. There is no rule covering that. We are talking about rule, not custom.

Q. Yes; there is no rule of the company that requires him to warn a man if he sees him on the track and is going toward him? A. No rule that covers it in that way.

Q. In that way, but if he saw him on the track and did run him down without giving him any warning he would not be violating his duty to the company? A. Yes, he would violate his duty to the company as well as to the State. That's murder.

Q. It would be pretty near murder? A. Yes.

Q. So that under the circumstances it is practical to give warning? A. That isn't the statement I made.

Q. I want you to be perfectly fair, Mr. Church. Now, as a matter of fact, was it the duty, not only from the standpoint of a decent man, but also from the standpoint of the rules of the company and the practise of the company for the engineer and anybody else on the end of a train that is approaching, that is going in any direction to keep a look-out?

Mr. SCOTT—I object. I don't see how a question of a decent man—

Mr. GEBHARDT—Well, strike out the decent man.

THE COURT—We are trying to try the case on a lawful standpoint.

Q. As a matter of fact, was it the duty, from the standpoint of the rules of the company and the practise of the company for the engineer and anybody else on the end of a train that is approaching, that is going in any direction, to keep a look-out? Isn't that the practise? A. Not within yard limits.

Q. Now, Mr. Church, you mean that, do you? A. I mean just what I said.

Q. Isn't it, for instance, the duty of an engineer or man stationed on the car that is being pushed backward to look out as he goes ahead that the switches are right? A. It is his duty to be up in a conspicuous place and signal the engineer.

Q. And see that things are all right ahead of him? A. He would be crazy if he didn't do that.

Q. And the engineer does something when he happens to be playing inside of the engine? A. He is looking in all directions that he can.

Q And whenever he does that and sees any danger ahead of him, whether an open switch, broken tracks or any of the employees on the tracks, it is practical for him to warn the person he sees on the tracks, isn't it? A Not consistent with the moves that were made, the entire moves.

Q. What do you mean? A. I mean if various moves you would be liable to attract the wrong man's attention and get him in more danger.

Q. There's always one thing he can do, he can stop if he has time, can't he? A. Yes, anybody can stop.

Q. And what else? He can try to stop? A. He can make an effort to stop.

Q. And it is his duty, as a trainman, if he sees

somebody on the track and can stop to stop, isn't it? A. That is everybody's duty.

Q. And if he cannot stop then he ought to do his best to warn him? A. If he sees anybody.

*Re-direct examination by Mr. Scott.*

Q. One line of questions, very short, that I neglected. Up at the Port Morris yard there is also a freight yard, a freight transfer platform, is there not? A. Yes.

Q. And that is indicated on the map there? A. Yes.

Q. And they have employes working up there? A. Yes, a large number.

Q. And there is a freight agent stationed there on the north side of the yard, is there not? A. Freight office, yes.

Q. And men were employed there? A. Yes.

Q. How do those men get to the transfer—how do they get there? A. They walk through the yard.

Q. And the men at the freight office, how do they get to the freight office? A. Those that come from Port Morris or Netcong walk through the yards.

*Re-cross examination by Mr. Gebhardt.*

Q. You frequently couple and uncouple cars in there? A. Freight office?

Q. These trainmen? A. Very often.

Q. And does the trainmen start, when that has been done or is about to be done without giving any warning at all? A. He does not give any warning but takes their signal.

Q. He doesn't move until he gets the signal? A. No

Q And when he does it, doesn't he ring the bell? A. No, sir.

Q. You are sure about that? A. I never heard a

switch engineman ring his bell when he was given the signal to move.

MR. SCOTT—May I ask the Senator when he propounded the last question what he meant by his "they?"

Mr. GEBHARDT—I meant when they were uncoupling or coupling up trains.

Mr. SCOTT—We were talking about these men at the transfer platform and freight stations.

THE COURT—He meant those in charge of the engine.

Mr. SCOTT—I inferred that.

Q That is what you had reference to? A. Yes, same thing.

*Re-direct examination by Mr. Scott.*

Q. They don't start the engine until they get the signal and why? A. Because they don't know what the next move is to be.

Q. Is that the only reason? A. That is the reason.

Q. Isn't there danger in starting up the trains when the men are over from between the cars? A. Yes, if there are cars in front of the engine, possibly.

Q. And that is one particular reason he doesn't move until he gets the signal; he knows they are cutting away? A. No; he does not know any more than he would move on when he has the signal.

Q. But he wouldn't move without the signal? A. He would get the signal and if he did move before we got that signal he would be in danger of injuring the man? A. He might be.

DEFENDANT RESTS.

At this point the Court took a recess until one o'clock.

AFTER RECESS.

Mr. SCOTT—I inadvertently overlooked the fact that I had not offered my map and photographs in evidence.

Mr. GEBHARDT—We consent to their admission.

Photographs marked D 1 to D 6, inclusive.

Map marked D 7.

Plaintiff opened in rebuttal.

RAYMOND WALTERS, sworn in behalf of the plaintiff in rebuttal.

*Direct examination by Mr. Gebhardt.*

Q. Mr. Walter, what is your business? A. Engineer.

Q. For what railroad? A. D., L. & W.

Q. Where? A. At Port Morris.

Q. How long have you been employed there? A. Since 1901.

Q. I show you a book and ask you if you know what that book is? A. Yes.

Q. Look at it, please? What is it? A. Book of rules.

Q. Are those books or not furnished to all the employes of the railroad? A. I can't answer that; I don't know.

Q. I will change it. I mean furnished to the men in the Port Morris Yard? A. I don't know.

Q. The trainmen? A. I don't know; I know it was furnished to me.

*Cross-examination by Mr. Scott.*

Q. You say you know this was furnished to you? A. No, one like it.

*By the Court.*

Q. Do you know of their being furnished to any other people? A. Yes, I have sometimes seen people have them.

Q. Who were they? A. Trainmen, sometimes.

Q. In the employ of the D., L. & W. Railroad? A. Yes.

CHARLES IKE, sworn in behalf of plaintiff in rebuttal.

*Direct examination by Mr. Gebhardt.*

Q. I show you a book, Mr. Ike, and ask you what it is? A. Book of rules.

Q. Of the D., L. & W. Railroad Company? A Yes.

Mr. SCOTT—I have changed my mind. I will admit that is the book of rules furnished to the trainmen.

Mr. GEBHARDT—Book of rules of the D., L. & W. Railroad?

Mr. SCOTT—I don't know about the brakemen.

Mr. GEBHARDT—Then I will have to go on.

Q. You were a brakeman on this train? A. Yes.

Q. That injured Mr. Willever that day? A. Yes.

Q. And did you have a copy of that book of rules furnished you by the company? A. Yes.

Q. Did Mr. Bird have one? A. I don't know.

NO CROSS EXAMINATION.

DAVID BIRD, called by the plaintiff in rebuttal.

*Direct examination by Mr. Gebhardt.*

Q. Will you tell us what that book is, if you

know? (handing witness book.) A. That's a book of rules.

Q. Did you have one of those books, or not, furnished you by the company on the day of the accident to Mr. Willever? A. Yes, I had one of those books.

*Cross-examination by Mr. Scott.*

Mr. SCOTT—Has that book been offered, Senator?

Mr. GEBHARDT—No, I propose to offer it after your cross-examination.

Q. Does that book apply to your work? A. No, sir; I don't think it does.

*Re-direct examination by Mr. Gebhardt.*

Q. What was it given to you for, Mr. Bird? A. For the government, I would consider—for the government to me—for the use of our government if out on the main lines.

Q. You didn't work on the main line, did you? A. Well, no, sir; my work was in the yard.

Q. And still the company gave you one of these books for your instruction? A. Yes, I had a book given to me over before I went in the yard.

Mr. GEBHARDT—I offer the book in evidence.

Mr. SCOTT—I object to it as immaterial and incompetent, and having no bearing.

Objection overruled. Exception to defendant.

Book referred to marked Exhibit P 1.

WATSON AYRES, recalled by the plaintiff in rebuttal.

*Direct examination by Mr. Gebhardt.*

Mr. GEBHARDT—I withdraw my offer before

putting him on the stand until I get through with Mr. Ayres.

Mr. SCOTT—I made my objection and the book is therefore in.

Mr. GEBHARDT—It is not in, because I withdraw it.

Mr. SCOTT—I don't take it to be a practice that has any basis in law that a person can offer something in evidence and get it in and have the Court rule that it is in—

Mr. GEBHARDT—I offer to withdraw it.

Mr. SCOTT—I object to the offer to withdraw the book.

THE COURT—The jury has not seen the book. As I understand it we have perfect control of the situation, and for the purpose the Senator says, has not really been offered and not gone before the jury, he may withdraw it if he desires.

Mr. SCOTT—I don't want to be misunderstood. My understanding is that the book was offered—made my—made objection in proper form; you ruled against me and the book is now in and the Senator wants to take it out.

THE COURT—He may take it out, sir.

Exception to defendant.

*By Mr. Gebhardt.*

Q. I show you this book, Mr. Ayres, and ask you if you know what it is? A. I know what it is, yes, sir; I know what it is by reading here on the cover.

Q. Look inside, please, Mr. Ayres? Are you now

able to tell what it is? A. Rules of the transportation department.

Q. Of what? A. D., L. & W. Railroad.

Q. Was a copy of this furnished you by the company? A. No, sir. I am not in that department.

No Cross-examination.

James O'Neill, recalled by the plaintiff in rebuttal.

*Direct examination by Mr. Gebhardt.*

Q. Mr. O'Neill, I show you a book and ask you if you know what it is? A. That's a book of rules of the company.

Q. Was a book of that kind furnished you or not by the company? A. Yes, I have one of these.

Q. When was it furnished to you? A. I don't know what date, I couldn't tell.

Q. Since you have been occupying the position that you now occupy with the company? A. Yes, sir.

Q. Was it given to you for your guidance in your position? A. I suppose so; it was handed to me and told it was a book of rules.

*Cross-examination by Mr. Scott.*

Q. You are familiar with that book of rules? A. Partly so.

Q. Your business was in the Port Morris yard? A. My business, yes.

Q. And has been for how long? A. About twenty-seven years.

Q. Do you know of any rule in that book that has reference to the yard service? A. No, sir.

*By the Court.*

Q. Was one of these books given to you after you were in the Port Morris yard? A. Yes, sir.

Q. From whom did you receive it? A. I couldn't say; one of the yard masters from the yard master's office.

Mr. GEBHARDT—I again offer the book in evidence, and would state for the benefit of both Court and counsel that my purpose of offering the book in evidence is to get in evidence Rule 102 contained in this book and for no other purpose.

Mr. SCOTT—I object, on the ground that all the witnesses who identified the book have testified that the book has no reference to Port Morris yard service; that the book has reference to road service, as we distinguish it; and the further evidence that the book has been shown not to include any rule relative to yard service and there is no proof that Rule 102 has any reference to yard service and that the offer, therefore, is incompetent and immaterial.

Objection overruled. Exception to defendant.

PLAINTIFF RESTS IN REBUTTAL.

JOHN E. CHURCH, recalled in rebuttal by defendant.

*Direct examination by Mr. Scott*

Q. What is a train? A. A train is one or more cars coupled to engine, with or without cars displaying markers.

Q. Do engines and cars being made up in the yard, pushed down into the light yard, display markers? A. No, sir.

Q. I show you plaintiff's Exhibit P 1 and call your attention to Rule 102, and ask you whether

that has reference to the movement of cars as distinguished from trains in the Port Morris yard? A. I don't know that I understand that question.

Q. I show you that Rule 102 and ask you if that rule has reference to cars—movement of cars as distinguished from trains in the railroad parlance or terminology that you have described in the Port Morris Yard? A. This has reference to trains.

Q. And under what section or sub-division of the rules is that Rule 102? A. Page 21 it shows to be under the heading of "Movement of Trains?"

Q. And do you know where that rule was derived from? A. It is one of the rules formulated by the American Railroad Association, which is the standard practice for railroad operation as regards rules.

Q. Is Rule 102 the same as the rule adopted by the Standard Railroad Association? A. Yes, with one exception. The Railroad Associations go further than this rule.

Mr. Gebhardt—If the Court please, why take up time with what other railroads do? The only question is whether it was a book of rules of this company. I don't want to waste time.

The Court—I think the objection is timely.

Mr. Scott—May I have an exception?

Exception to defendant.

Q. Does that apply to other movements, that Rule 102? A. No.

*Cross-examination by Mr. Gebhardt.*

Q. What is there in there that says it does not? A. It says the movement of trains.

Q. Is there anything in there that says to the movements of trains in yards? A. Except yard movement—not movement of trains.

Q. How do you know? A. Because it displays markers.

Q. You mean to tell me a train with cars and engine to it is not a train? A. Not in the rules.

Q. Can those rules make or unmake a train? Suppose those rules said now that a train made up, running out of the yards to go to Scranton was not a train; would that make it not a train? A. We are mixed on—

MR. GEBHARDT—Will the stenographer repeat the question?

Q. (Former question repeated). A. I don't know what a train is from your angle?

Q. Oh, you don't. What was you furnished with it for, if it wasn't to guide men? What was it furnished, Mr. O'Neill, for? What was it furnished to you for, Mr. O'Neill? A. So that any employee that needed the information in the book could have it.

Q. But if he was a yard man he didn't need it, did he? A. There are certain things in there that do apply.

*By Mr. Scott.*

Q. I call your attention to a division on page 9 of this book, which reads as follows: "Trains. An engine or more than one engine coupled with or without cars displaying markers"—that is what you have been endeavoring to state is a train? I mean in the railroad parlance? A. Yes, sir.

*By the Court.*

Q. Suppose you have an engine and nine cars; what would you say it was? A. We would say that was switch cars.

Q. I am speaking of an engine connected with nine cars—twenty seven in this case—what would you call it? A. A string of cars.

Q. In railroad parlance, what is the difference between "string" and "train?" A. As far as we know, the rules as laid down in that book apply to certain conditions. When it speaks there of a train it has reference to a train that is identified and identified by these markers—then it is a train, and those apply to that and don't apply to cars running in the yard.

Q. Whose book is that? A. Reads "D., L. & W."

Q. To whom does it belong? A. Under the writing—Belongs to the D., L. & W. Railroad Company.

Q. And is passed out to men for their guidance and instruction? A. Yes.

Q. So far as it pertains to other particular employees? A. I find also on page 1 that this book is No. 5904, and says it must be presented to the head of the department once a year for inspection.

Q. Is that a rule that is carried out, to your knowledge? A. I haven't been there a year; it hasn't to my knowledge.

Q. When you say Mr. Bird and these other men working in the yard had these books for some other particular purposes than Rule 102? A. It is: if they are called on for any other service they will know how to do it safely; that's the reason it is furnished to men in any department, so they will have the information at hand to know how to do a thing safely.

Mr. SCOTT—Perhaps we can agree. I was going to ask Mrs. Willever if that is Mr. Willever's book?

Mr. GEBHARDT—We will admit that it is.

THE COURT—It is admitted on the record that Plaintiff's Exhibit P 1 is Mr. Will-

ever's—the book held by Mr. Willever, in his lifetime.

DEFENDANT RESTS IN REBUTTAL.

Mr. SCOTT—I desire at this time to ask the Court for a direction of a verdict, and as I have already stated to your Honor, I do not desire to take up the time to recite those preliminary reasons which I alleged for a non-suit, but I ask that those be considered as if I had been fully heard.

I now further desire to ask for a direction of a verdict on the ground that the evidence is conclusive and undisputed; that the movement of the train at the time of the accident was an intrastate movement; that there is no evidence that the plaintiff, or decedent, was employed in interstate commerce at the time, and therefore there is no proof to show the Court or allow the jury to determine that the action has been properly brought under the Federal Liability Act.

My second reason, which is a new reason, is that under the fourth section of this Federal Employer's Liability Act it states that unless the defendant company has violated some rule for the protection of their employes that then and in those cases injuries outside of such a violation, the decedent or the party injured assumes a risk, and the assumption of the risk not being covered by the statute, we fall back upon the law of the State where the case is being tried, and in this case I think there are abundant

authorities to show that the injury to Mr. Willever, assuming it occurred as the plaintiff contends, assumed the risk of this very injury, and that therefore the evidence being undisputed that he assumed this risk, there should be a direction of a verdict. And on that point I desire to call the Court's attention briefly to five cases which deal with a situation quite similar to this.

Citing cases.

Mr. GEBHARDT replied for plaintiff.

THE COURT—As I remember, the conductor was on the rear car on the end next to the engine; the other end ran over the man, or his assumed surroundings show. Was there any negligence—was it his duty to be upon that car for the purpose of signalling to the engineman in the case of emergency? Would there be any question of negligence that he was not up to the other end, the rear end of the cars so that he could see what he was coming in contact with? There is some question of negligence there which does not take the case away from the jury.

Mr. GEBHARDT—Your Honor is correct in the statement of facts that he was between the east end and the middle of the car. I think those are the facts.

THE COURT—If there are three cars the engine is ahead at the other end. The conductor was on the front end of the rear car next to the engine, the length of

which I have forgotten, and if that car injured the man—it was presumed he was injured at the front end. Now, with that question in my mind, I think there is sufficient in the evidence to let the whole case go to the jury and deny the motion for a direction of a verdict.

Mr. SCOTT—Your Honor will allow me an exception?

Exception to defendant.

Senator Large then summed up for the defendant.

Senator Gebhardt summed up for the plaintiff.

## CHARGE.

(QUEEN, C. P. J.) Gentlemen of the jury: This case is brought by the plaintiff, Lillian Willever, as administratrix of William Willever, deceased, for damages for the death of her husband, which she alleges was caused by the negligence of the defendant, in whose employ he was.

It is claimed the deceased was injured on the property of the defendant at Port Morris, in this State, it being uncontradicted that he died on the same day, December eleventh, 1913, having been run over by a car owned by the defendant, while he was in its employ. The deceased, at the time of the accident, was employed on the repair of tracks, and on the day of the accident was doing some work upon a track of the defendant company at Port Morris, designated as track number five, or mud track. The legs of the deceased were cut nearly off and he received other injuries, and he died during the day from the injuries. The deceased was thirty-six years of age, he having been in the

employ of the company for a number of years, and it appears from the testimony that his monthly wage for some time previous to the time of his death was sixty-five dollars a month. He left a widow, thirty-three years of age, but no children. The widow is administratrix and is here, prosecuting this suit.

This action is brought by the plaintiff by virtue of a United States Statute called "An Act relating to the liability of common carriers by railroad to their employes in certain cases." Under this statute, it is directed that those suits can be brought in the State Court, and this suit has been brought in the Common Pleas of this County, and the facts have been presented to you. The deceased, we gather, was an employe of the defendant, and the defendant is a common carrier under the law. This action is brought in this Court under the provisions, as I stated, of the statute referred to, and is before you, the facts having been presented for your determination.

The statute referred to—and I will only quote a part of it briefly—which refers to the commerce between the several States of the United States, says and provides, that "Every common carrier by railroad, while engaged in commerce between any of the several States of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier, in such commerce; or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then for such employe's parents; and if none, then to the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes

of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." The act also provides: "That all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in death, the fact that the employe might 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 said employe; also providing, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

Section 4 directs: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where violation of such common carrier of any statute enacted for the safety of such employes contributed to the injury or death of such employee."

One of the first things for you to determine is whether or not this defendant was employed in interstate commerce. By interstate commerce, gentlemen, is meant where a railroad company does business from one State into another, as has been explained, between States. The Lehigh & Hudson Company runs over into some town in New York and the same trains continue over into the State of

New Jersey up to Port Morris. Take the Pennsylvania Railroad Company, the Lehigh, where they run from one State to another and do business, it is what is termed interstate commerce. A company running within the State and not running out of the State on its own line could not be said to be engaged in interstate commerce—but where one end is in one State and the other end is in another—putting it in a crude manner, would be interstate commerce.

So in this action, one of the questions for you to take into consideration is whether or not this company was engaged at the time of the accident in interstate commerce. Counsel has stated in his argument, and admitted in the answer, that it is true as to the main line, but there has been some contradiction in the records and the evidence as to whether or not those particular tracks were so used, and that matter will be for you to determine. That the man is dead is one certain fact; that he was killed on the tracks of the company is another, but in the pleadings in the case the fact that the deceased was at that time of the accident engaged in interstate commerce is denied.

Mr. GEBHARDT—It is admitted.

Mr. SCOTT—We have denied in the answer that at the time of the accident the plaintiff was engaged in interstate commerce. The first paragraph.

Mr. GEBHARDT—But you deny the deceased person was engaged in interstate commerce.

THE COURT—It is alleged in the declaration filed by the plaintiff that "On the eleventh day of December, 1912, the said defendant owned and operated a certain

railroad extending from the city of Hoboken, in the County of Hudson and State of New Jersey, to the city of Scranton, in the State of Pennsylvania, and was then and there engaged in interstate commerce between the State of New Jersey and the State of Pennsylvania."

"2. On the said 11th day of December, 1913, the said deceased was employed by the said defendant in the capacity of section foreman, or foreman of track repairers, and was then and there engaged in interstate commerce in repairing a track used by the said defendant in interstate commerce between the State of New Jersey and the State of Pennsylvania.

"3. On the above-mentioned day, the said deceased was engaged in repairing a track of the defendant in the village of Port Morris, in the County of Morris, and State of New Jersey, which said track was then and there being used by the said defendant in interstate commerce as aforesaid, when the said defendant by its servants and agents, then and there propelled and operated a locomotive engine and cars on the said tracks in a negligent and careless manner; and without giving the said deceased any notice or warning of the approach of said locomotive engine and cars on the track where the said deceased was working as aforesaid, so that by means of the premises the said cars ran into and over the said deceased with great force

and violence, by reason whereof the said deceased was so crushed and injured that on the said 11th day of December, 1913, the said deceased died, leaving him surviving the said Lillian Willever."

Now, that is the charge made by the plaintiff. Then comes the defendant and says that:

"It admits that it operated a railroad between Hoboken and Scranton, on Deber 11th, 1913, and that on said day it was engaged in interstate commerce between said points.

"3. It admits that plaintiff's intestate was employed by defendant on said date as a section foreman, and on said date was engaged in repairing a track, but denies that said track was used in interstate commerce."

Now, in that second reply, one of the questions will be for you to decide whether or not they were using that track in interstate commerce. The defendant says they were not. The evidence is before you, and it is for you to consider and determine.

"Defendant admits that deceased was engaged in repairing a track of defendant in Port Morris on the day aforesaid, but denies that said track was used in interstate comerce, as alleged in paragraph 3 of the complaint. It admits that deceased died on or about December 11th, 1913."

The same question for you to remember and consider and make your determination. It admits that the deceased died on or about the 11th day of December, 1913.

For the defense, now, to this action, the defendant company says:

> "1. That the injury complained of arose without any fault or negligence on the part of defendant.
>
> "2. That deceased was guilty of contributory negligence in that, while engaged in a dangerous occupation and in a dangerous place, he did not take proper precautions to see and hear passing and approaching engines and cars, and did not exercise proper care to guard himself from injury."

Now, you see from the pleadings, the complaint and answer, the issues you have to determine. Under the statute, if the deceased came to his death because of the negligence of the defendant company or of some of its agents or servants, and the deceased himself was not guilty of any negligence contributing to the accident, then you must find a verdict for the plaintiff. And even if the deceased himself was guilty of contributory negligence, your verdict should still be for the plaintiff, providing the violations of any statutes enacted for the safety of employes, by such carrier, contributed to the injury or death of the deceased. You will remember the statute says that "If any such employe was injured or killed through the negligence of the common carrier, by violating the statute enacted for the safety of employes, and the employe himself was guilty of contributory negligence, that did not bar a recovery, but the damages should be diminished by the jury in proportion to the amount of negligence attributable to said employe." If the injured person had been negligent in part and the company negligent to a greater extent, in finding the amount of damages you should deduct out of

the amount the damage occasioned by the negligence contributed by the plaintiff. Your verdict should be reduced in proportion to the negligence of the deceased as compared with the negligence of the defendant. Before you can find a verdict for the plaintiff, you must be satisfied by a fair preponderence of the evidence that the defendant was guilty of some negligence which was the cause of the death of the deceased. Negligence is want of ordinary care, and ordinary care is such care as an ordinarily prudent man would use under the circumstances, and this explanation of negligence applies to the deceased as well as to the defendant. The deceased might have been negligent and contributed to his death; the defendant might have been negligent; the same rule applies to each, and whether the deceased was guilty of such ordinary care such as an ordinarily prudent man would use under the circumstances; if not, he was guilty of contributory negligence. If the defendant company or any of its servants or agents were guilty of using the lack of such care as an ordinarily prudent man would use under the circumstances, then the defendant company was guilty of negligence.

In order to find for the plaintiff you must first find that the defendant company or some of its servants or agents did not use ordinary care or such care as an ordinarily prudent man would have used under the circumstances, and that the want of this care caused the accident which resulted in the death of the deceased. You will remember that under the Statute, in the first place, the defendant company must have been engaged in interstate commerce. As I said before, that is commerce between two or more States of the United States, and it must also appear that the deceased was also engaged at

the time of the accident in performing services which the law says is interstate commerce. Now you have the facts before you, as to how those yards were operated, what they were used for; they were used for the storage of engines that came in from not only in the State but from out of the State; they came there, they were shunted about, changed, turned, and went to different parts of the State and out of the State, some going to Maybrook, over into New York State. You have a right to take into consideration these tracks of the company, whether or not they were used in connection with the tracks of the company in interstate commerce. That is for your consideration, but counsel of defendant correctly says the plaintiff must show, in order to recover, that Mr. Willever was himself engaged that day in interstate work and at the very time. Plaintiff says he was engaged in interstate work. You have heard the evidence as to his being there, as to what he was doing. You have a right to take that all into consideration. He was there, a foreman, had his men there—you heard what the Italian said as to his directions and have heard detailed to you the manner in which he was found dead, and his hammer lying near him. Now, was he engaged in interstate commerce, in work connected with it? His duty was that of repairing tracks and work about the yards, and those tracks, so it is for you to consider and conclude whether or not those tracks were used in interstate commerce, I care not whether the train went out that day direct to New York State or whether it went the week before, but whether or not they were used in their business in interstate commerce and were part of the tracks used in that business off and on, although they say frequently trains were shunted in.

Tracks and bridges are indispensible to interstate commerce by railroads, as are engines and cars, and sound economic reasons require that all these instrumentalities be kept in repair. The secure operation depends, in a large measure, upon this being done. Indeed, the statute under which this suit was brought proceeds upon the theory that the carrier is obliged to keep its equipment in good repair, "in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment," used in interstate commerce; but independently of the statute, I direct you that the work of keeping such instrumentalities in a proper state of repair, is so closely related to such commerce as to be in practice and legal contemplation a part of it. So if you find that there was negligence upon the part of the defendant and you find that through the negligence of the company or some of its agents and servants this man was killed—injured so that he died—and that this railroad company was employed in interstate commerce, the deceased being at work upon the tracks—if you find being engaged upon work for the company in and upon those tracks at the time of the accident and they were used in interstate commerce that he was engaged in interstate commerce, and if the defendant was negligent it would be your duty to find a verdict for the plaintiff, unless for some reason you are prohibited under the act and evidence before you.

It has been stated that these cars were standing in and about or being shunted or pushed from one point to another, preparatory, perhaps, to sending them on to other points of the work, so it is not necessary that the train and crew of the defendant company should have been at the time engaged in interstate commerce. This may have been entirely intrastate

work so far as the engine and crew of that train was concerned, but it must appear that the track—was used in interstate commerce. There is evidence which shows that this track is what is known as number five or "the mud track," and that it was customary for trains to come in from the Lehigh & Hudson Railroad from points in the State of New York and run in this yard over this track, with other tracks of that yard.

So if you find this to be a track used in interstate commerce and at the time the deceased was injured he was engaged in repairing this track, even if the deceased contributed to his injury, and through the negligence of the defendant company or its agents or servants the deceased came to this death, then your verdict should be for the plaintiff for such sum as will, under the law, fairly compensate the plaintiff in a monetary manner for the loss of her husband, under the rules I have given you.

The law with respect to the regulation of damages in our State provides that whenever the death of a person shall he caused by a wrongful act, neglect or default, and the act, neglect or fault is such that would, if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case the person whom or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and in the case of death every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in proportion provided by law in relation to the

distribution of personal property left by persons dying intestate, and in every such action you may give such damages as you shall deem fair and just in reference to the pecuniary injury resulting from such death to the wife and next of kin of the deceased, but where the deceased has left him surviving a widow but no children or descendants of any children, the widow shall be entitled to the whole damages which she shall sustain, and the same shall be paid to her.

Your verdict, if for the plaintiff, must be in accordance therewith as to the pecuniary loss and pecuniary loss only, in fixing the damages. You are not to allow the plaintiff anything for the sorrow caused her by the death of her husband nor are you to allow anything for the suffering of the deceased after the accident, but only for such sum as will reasonably compensate, from a money standpoint, the plaintiff for the loss of her husband, subject to such deduction for any contributory negligence of the deceased, if you find he was negligent under the law as I have stated. In making up this sum you should take into consideration the earnings of the deceased, which appeared to be $65.00 a month. You should also take into consideration the age of the deceased and the age of the widow, there being no children and no others dependent upon him,—under the law, the widow being entitled to the whole of the damages, if any you find. You should also take into consideration the fact that part of these earnings went for his own support—paid some money for his own insurance, and also the fact that life is uncertain; he might have been out of work, but based upon such reasonable earnings as he would be entitled to expect under his age and condition of health. If you render a verdict for the plaintiff all you are to

find will be such sum as will compensate her in money for the loss of her husband, having made any deduction that you may conclude the defendant is entitled to, if any, because of any contributory negligence upon the part of the deceased, or any other cause.

There has been considerable said about this man taking the assumption of the risk when he took this work. The statute says that in any case brought against a common carrier under or by virtue of any provisions of this act to recover damages for injuries to, or death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Now, I don't understand, gentlemen, that there has been any charge that any statute in this case has been violated — that of the violation by a common carrier — by defendant — of any statute which was enacted for the safety of the employees.

The statute provides that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." So I want to say to you, gentlemen, that though this deceased was a co-employee—that he was a co-servant there with the men in charge, the engineer and others in charge of those tracks, that when he went there he did assume certain risks, the risks of the employment, but not all risks of employment, not the negligence, the risk of negligence upon the part of the officers and agents, for that is what this very act is for,—to protect the working men, to protect

the employees. I say negligence, because that is the very foundation of this act, in order to recover. After you find all these facts, if you so find, in order to find a verdict for the plaintiff you must find that this company was negligent by its agents, officers or servants whereby and through whom this man Willever lost his life.

Then again, as to contributory negligence on the part of the deceased, as I find the law and I so charge you, the fact that this man was found in the condition that he was, both legs nearly cut off, having died from the results, being found by the side of or under the car, or in whatever the situation was, his mouth being closed and no one seeing the accident, how it happened, does not raise a legal presumption, that he had been guilty of contributory negligence, such contributory negligence as would bar a recovery in this section, it cannot be said that being found in that condition, as I have herebefore stated, that contributory negligence upon his part, is implied; that is, you cannot comply contributory negligence just for the reason that he was found in that condition and no one to explain and show how it happened.

There must be proof or something to show; being merely found in that condition does not warrant you in implying there was contributory negligence upon his part which should be deducted from whatever verdict, if any verdict you should find against the defendant, but if from the facts established, negligence may reasonably and legitimately be inferred it is for you to say whether or not, from the facts, negligence ought to be inferred.

I have been requested to charge you in reference to the derailment of the cars. You heard the evidence, there was no proof and you cannot infer that the tracks were out of order, that the damage was

done by the fact that the tracks were out of order. You have the evidence whether the derailment was caused by riding over this man's body or what it was—that is for you to conjecture, gentlemen, under the evidence, but you have no right to consider that the tracks were out of order and that the company, the defendant, in that had been negligent by what was the result afterward.

Now, on the subject of the employe assuming risk, there has been considerable said about the dangerous task and risk, the risk of the employment the deceased assumed, but whether such dangers should have been observed by one ordinarily skilled in employment is for you to say. In other words, an employee cannot shut his eyes to danger but is bound to use all of his senses to observe. You have a right to take all the facts and circumstances surrounding this action. You heard the testimony of Mr. Bird, the conductor, a man whose very evidence and appearance seems to impress one; he told you what he heard, what he felt; that he was on the end of the car nearest the engine, the train moving backward, and what he observed. If that man, gentlemen, was negligent in not being where he should have been, his duty to be, as the rules and regulations of this company say—you have heard the evidence on that—but leaving the book out of the evidence in the case other than that, whether or not if he had been at the other end of the car on the lookout, with the signal back to the engineer, there to see what was in front of him, whether it would have been possible for the man to be killed, and if killed, whether or not that man couldn't have told you, gentlemen, how the accident happened.

The burden, gentlemen, is on the plaintiff. It is their duty to show you by a preponderance of proof

all these matters, proof fully beyond conjecture. Take the evidence, review it, reconcile it as best you can, and come to your determination. The facts are always yours. It makes no difference what the Court may say as to facts; he is liable to be mistaken; it is for you to take all the facts into consideration and make your determination therefrom. You should take in consideration the interests of the parties and witnesses. It is true here that only railroad men, only men of this car company have been before you—not a witness, as I understand, on the part of the plaintiff—who was not in the employ of defendant. You have a right to take the testimony, take their methods and manner. I must say some very fair men—some certainly pleased the Court and jury—but take into consideration their interest in the matter and take up your conclusions finally from all the facts. The facts which were proven before you are all that you can take into consideration. As I have stated, the burden of proof is on the plaintiff, the facts being wholly for your consideration under the instructions of the law as I have given you, that among other things, in order for the plaintiff to recover you must find that the deceased came to his death through the negligence of the defendant company or its agents or servants; that the deceased was not guilty of negligence, although, as I have stated before, if you find deceased was guilty of some negligence and if you find that the negligence of the defendant company was greater than the negligence of the deceased, making any such deductions as I have heretofore stated and instructed. If the plaintiff has failed to satisfy you of the negligence alleged by her under these instructions, then your verdict should be for the defendant. All questions of fact are for you to determine under the rules as I have given you.

CHARGE

I have had several requests to charge. I have endeavored to charge every one of them, and if there has been any omitted, and counsel will call my attention to it, I will be glad to take it up. I have intended to charge every one, and if there are any I have not covered I would like to know it.

Mr. SCOTT—I don't remember the exact wording of my requests, but as I understand it, the Court refuses to charge except as charged?

THE COURT—Except there is any part I have omitted to charge, if counsel will call my attention, I will so charge.

Mr. SCOTT—The only thing I can say at this moment is that I presume my requests to charge—The Court, to my recollection, in my hearing, in his charge, has covered some of the points requested, but whether they embrace both the verbiage and the full intent I am not prepared to state.

THE COURT—I have intended to charge every one of them. If I have omitted any—

Mr. SCOTT—I do expressly remember my last request, which the Court did not cover, and has refused, and that is on the question of the evidence of pecuniary loss which the plaintiff is alleged to have suffered, which was in words following; that, "while the law presumes that the widow of the deceased suffered a pecuniary loss by reason of his death, you cannot base your verdict merely upon such a presumption; you must go further and decide the case upon the evidence before you."

THE COURT—That I refuse to charge other than I have charged. I think I covered that fully.

TO THE JURY:

I intended to charge the requests of the plaintiff

and defendant, requests which I thought I had covered, but counsel of the defendant requests to further charge, so I charge you as requested, to the following requests, that is, "Section 4 of the Federal Statute under which this action has been brought, without quoting the exact words, says that such employees should not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee."

REQUEST OF DEFENDANT TO CHARGE:

"In this case I charge you there was no violation of any such statute which contributed in any way to the injury of the deceased of which the plaintiff complains, and, therefore, the old doctrine that existed before the enactment of this statute with respect to the assumption of risk by an employe still exists (and if you find that the defendant has made out by the greater weight of evidence that the deceased assumed the risk of injury, the plaintiff cannot recover at all), because such assumption of risk would be one of the things that by his contract of employment he took upon himself and absolved the defendant company from liability for."

THE COURT—That I fully covered.

REQUEST OF DEFENDANT TO CHARGE:

"If you should find for the plaintiff and against the defendant in the matter of determining to what extent the deceased contributed to his injury, I will state that in a case where a party was working in a yard used for making up trains, where a switch-engine was employed therein, constantly moving backwards and forwards, changing cars and making up trains, where the plaintiff had only been

employed 18 months and was familiar with the work done in the yard, where there was nothing to obstruct the view of the plaintiff, where he placed himself with his face away from the direction from which the cars were to be expected and continued to work without ever turning to look, the Supreme Court of the United States said: 'If by any means negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury.'"

THE COURT—That I intended to virtually charge you, but fearing that I may not have covered it fully, I so charge you at this time.

As to the sixth request, that was charged along with the other points in reference to it, to that statute as to the assumption of the risk and undertaking of the work.

THE JURY THEN RETIRED.

Mr. SCOTT—I desire to ask your Honor to allow me an exception to your Honor's refusal to charge the requests to charge except as your Honor has them, with the exception of the fourth charge, which your Honor read.

(Exception to defendant.)

I also desire to except to as much of your Honor's charge as I will specify.

I desire to except to that part of your Honor's charge where you stated that Willever, the deceased, was working on the "mud track" on the day in question.

(Exception to defendant.)

Mr. SCOTT—I desire to except to that part of your Honor's charge in which you made the statement that whether he was employed in interstate commerce, which was without any qualification by the Court, at the time of the accident.

(Exception by defendant.)

Mr. SCOTT—I desire to except to the statement of the Court that Willever was killed on the tracks of the railroad company.

(Exception to defendant.)

Mr. SCOTT—I desire to except to the statement of the Court beginning: "If you consider that these tracks were used in interstate commerce, I care not,"—that is the expression—without being qualified as to the time when the accident happened.

(Exception of defendant.)

Mr. SCOTT—I desire to except to that part of your Honor's charge which dealt with the question of "shutting of the cars," allowed there as being interstate commerce.

(Exception to defendant.)

MR. SCOTT—I desire to accept to that part of your Honor's charge in which you read the law of the State of New Jersey as fixing the measure of damages to the plaintiff instead of the Federal Statute in question.

(Exception to defendant.)

THE COURT—Where is the measure of damages fixed? I took it from the interpretation of the statute itself, the pecuniary loss.

Mr. SCOTT—I desire to accept to that part of your Honor's charge which stated that the finding of the body in the condition it was found does not warrant the jury in finding contributory negligence.

THE COURT—Didn't imply, that there must be some proof, some facts.

Mr. GEBHARDT—I suggest that the Court call the jury back.

(The jury was recalled.)

THE COURT—Some question has arisen, gentlemen, as to what I meant to state to you in reference

to the matter of work by the deceased up at Port Morris in the yard on the day of the accident. I want to say to you, gentlemen, that it is for you to say whether or not this man Willever was working there upon No. five track, called the "mud track," and for you to say whether he was there or not and what he was doing at the time of the accident and what the situation was. The law requires where we talk about facts that it is for the jury to say what the facts are and not for the Court.

You may retire.

(The jury then retired.)

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## EXHIBIT P 1.

"Rule 102. When cars are pushed by an engine a man must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

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NEW JERSEY, SUPREME COURT.

November Term, 1914.

LILLIAN WILLEVER, Admx.,

*vs.*

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

Appeal from Hunterdon Common Pleas Court.

Argued before Gummere, Chief Justice and Justices Garrison and Minturn.

For the appellant, Frederic B. Scott.

For the respondent, Elinor R. Gebhardt.

The opinion of the Court was delivered by Gummere, C. J.

This is an action brought by the administratrix

of a deceased employee of the defendant company to recover compensation for his death, which occurred while engaged in the performance of the duties of his employment at the company's Port Morris yard in Morris County on the 11th of December, 1913. The appeal is taken by the defendant from a judgment entered on a verdict in favor of the plaintiff.

The plaintiff's right of action is based upon the Federal Employer's Liability Act of 1903 (35 Stat. 65, Chap. 149), which provides that every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative, for such injury, or death, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

The decedent was a section foreman of the defendant company, and he and the men under him were required to keep in order the tracks and switches in the Port Morris yard. This yard was used for the breaking up, temporary storage and making up of trains which were devoted to interstate, as well as to intrastate commerce. Decedent had held the position of foreman for five years preceding the date of his death. Shortly before the accident occurred he was at work with his gang repairing certain switches in the yard. He left these switches to go to some other point in the yard—where, or for what purpose, the evidence does not show. As he was crossing track No. 5 he was run down at the switch connecting that track with another by a freight train which was being backed down the track by a yard engine, and which was

moving about as fast as a man walks. The testimony showed that no warning was given to the deceased by those in charge of the movement of this train, or by any other employee of the company, of its approach.

The appellant seeks to reverse the judgment under review upon two grounds; first that the facts do not show that the decedent was employed in interstate commerce at the time of his death; and second, that they will not support the conclusion that such death resulted to any extent from the negligence of any of the officers, agents or employees of the appellant.

We do not think the first contention of the appellant can be sustained. In the case of *Pedersen vs. Del., Lack. & West. R. R. Co., 229, U. S., 146,* the plaintiff was employed by the defendant company in the repair of a bridge near Hoboken, in this State, over which the tracks of the defendant company were laid. The bridge, and the tracks upon it, were being regularly used in both interstate and intrastate commerce. While engaged in this work, the plaintiff was run down and injured by an *intrastate* passenger train. It was held that the accident occurred while the defendant company was engaged in commerce between the States, and while the plaintiff was employed by the defendant in such commerce. The present case cannot be distinguished from the cited one in its legal essence, so far as this phase of it is concerned.

The second ground of appeal, however, namely, that the proofs fail to disclose negligence on the part of the company, its agents or employees, which produced the death of plaintiff's decedent, is, we think, well taken. The yard in which the accident occurred was a very extensive one, containing many tracks, and requiring the use of three switch

engines constantly, and of a fourth one for more than half the time. During the month of December, in which the accident happened, an average of more than three thousand cars were moved in and out of the yard, and shifted about therein, daily. As has already been stated, the train which ran down the decedent was moving at a very slow rate of speed.

The facts recited are so similar to those which were present in the case of *Aerkfetz vs. Humphreys, Receiver, 145 U. S. P., 418*, that we cannot do better than cite the language of the Court in that case in dealing with the question of the negligence of the defendant, as expressive of our own view in the present case, viz.: "The plaintiff was an employee, therefore the measure of duty to him was not such as to a passenger, or a stranger. As an employee of long experience in that yard he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineer, or of any other employee, that he would pay no attention to his own safety. Under such circumstances what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and

coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movements of the cars, would take reasonable precaution against their approach. The engine was moving slowly; so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard, would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant."

In addition to the factors which were present in the cited case, and which led the Federal Court to the conclusion that no negligence chargeable to the defendant had been exhibited, it was shown in that now before us, and was uncontroverted, that it was a part of the duty of every section foreman in the defendant company's employ on that division of its road, to protect not only himself, but also the men under him, from danger arising out of the movement of engines, cars and trains, and that the decedent was so instructed when he was appointed to that position. In the case of *Precodnick vs. Lehigh Valley R. R. Co.*, 74 *N. J. L.*, 566, where a similar obligation of self-protection was shown to have been imposed, it was held by the Court of Errors and Appeals that the defendant company owed no duty to the plaintiff's decedent (who was run down and killed while at work repairing tracks),

of giving him warning of the approach of the train. That decision is, of course, controlling upon us.

It is argued on behalf of the appellant that this case is distinguishable from those which have been cited because of the existence of a rule of the company which was put in evidence, and which reads as follows: "When cars are pushed by an engine a man must take a conspicuous position on the front of the leading car, and signal the engine man in case of need." But there is nothing in the wording of this rule to suggest that it was promulgated for the protection of employees engaged at work in the defendant company's yards; and proof is uncontradicted that it has no application to the movement of engines and cars therein, but is only for the guidance of employees upon trains moving upon the road itself.

The judgment under review will be reversed.