# INDEX.

TESTIMONY FOR DEFENDANT.



EXHIBITS.

**Complaint.**

(Filed July 15, 1927.)

10

# Hudson County Circuit Court

| | |
|---|---|
| DONATO MARCONE, Administrator of the Estate of Joseph MARCONE, deceased, *Plaintiff*, *v.* NEW YORK CENTRAL RAILROAD COMPANY, a corporation, *Defendant*. | Action at Law. |

20

Plaintiff residing at No. 1450 New Durham Avenue, North Bergen, in the County of Hudson, and State of New Jersey, says that:

1. Defendant is now and was at all times hereinafter mentioned, a common carrier by railroad, engaged in interstate commerce.

2. Intestate of plaintiff, at all times mentioned in the within complaint, was the servant of the said defendant and engaged by it in the work of interstate commerce, in which he was working at the time of his death.

30

3. On the 27th day of July, 1926, the defendant by its agents and servants, negligently propelled against the intestate of the plaintiff a locomotive, while he was working as aforesaid for the defendant in interstate commerce, at the round house of the defendant, at New Durham, Hudson County, New Jersey.

40

4. The negligence of the defendant consisted in this:

That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc. so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; did not use reasonable care to equip said locomotive with suitable headlight or any light; and did not use reasonable care to propel same at safe rate of speed.

5. By reason of the said striking of the intestate of the plaintiff by said locomotive, through the negligence of the defendant, its servants and agents as aforesaid, the intestate of the plaintiff was killed.

6. Intestate of plaintiff was at all times in the exercise of due care for his safety.

7. Intestate of plaintiff left him surviving, his father, the plaintiff herein, age 55 years; Giancinta Morcone, his mother, age 54 years; Antonietta Morcone, his sister, age 13 years and Victoria Morcone, his sister, age 15 years, who have suffered pecuniary injury by reason of his death.

8. The within action is commenced within twenty-four calendar months after date of death of plaintiff's intestate.

Plaintiff demands $25,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

**Answer.**

(Filed August 1, 1927.)

HUDSON COUNTY CIRCUIT COURT.

| | |
|---|---|
| DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased, *Plaintiff.* *v.* NEW YORK CENTRAL RAILROAD COMPANY, a corporation. *Defendant.* | Action at Law. |

10

The defendant, New York Central Railroad Company, a corporation of the State of New York, having its office and principle place of business in the City and State of New York, answering the complaint herein says that:

20

1. It admits Paragraph 1.

2. It admits that plaintiff's intestate at the times mentioned in the complaint was employed by defendant as a machinist's helper. It denies all allegations of Paragraph 2.

30

3. It denies Paragraph 3.

4. It denies Paragraph 4.

5. It denies Paragraph 5.

6. It denies Paragraph 6.

7. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 7.

40

8. It admits Paragraph 8.

SECOND DEFENSE.

Any injuries sustained by plaintiff's intestate arose out of his negligence in going and standing upon a railroad track operated by defendant at a time when it was unnecessary, improper and obviously dangerous for him so to do.

THIRD DEFENSE.

At the time and place, when and where plaintiff's intestate received injuries set out in the complaint he was a mere licensee.

FOURTH DEFENSE.

At the time of the injuries complained of, plaintiff's intestate was not engaged in interstate commerce.

WALL, HAIGHT, CAREY & HARTPENCE,
Defendant's Attorneys.

HUDSON COUNTY CIRCUIT COURT.

Before—Hon. A. DAYTON OLIPHANT, J., and a Jury.

DONATO MARCONE, Administrator of the Estate of Joseph Marcone, deceased,
*Plaintiff,*

*v.*

NEW YORK CENTRAL RAILROAD COMPANY, a corporation,
*Defendant.*

10

Jersey City, N. J., May 4, 1928.

20

APPEARANCES:

ALEX. SIMPSON, Esq., for the Plaintiff.
WALL, HAIGHT, CAREY & HARTPENCE, Esqs. (by Mr. CAREY), for the Defendant.

Mr. Simpson: I would like to offer letters of general administration granted on the 25th day of April, 1927, to the plaintiff Donato Marcone, on the estate of Joseph Marcone.

The Court: Let it be marked. 30

(Marked Exhibit P-1 of this date.)

JEROME GORDON, sworn.

*Direct examination by Mr. Simpson:*

Q. Mr. Gordon, this is a map of the New Durham Railroad house, round house, of the New York Central Railroad as it appeared on July 27, 1926?
A. It is, sir.

Q. What is the distance from this point right 40

around to here? A. That was taken in short, so I couldn't tell you.

Q. What? A. I took those in short measurements.

Q. Can you tell us generally how large the round
10 house is from one point to the other? A. No, I couldn't, unless I scaled the distance.

Q. Well, come down and scale it. A. (Witness leaves stand and goes to the blue-print diagram.) 810 feet.

Q. Now, while you are here will you scale line on the inside? Does that indicate the end of the round house,—this? A. This is the end of the round house.

Q. What is the width of the enclosed building
20 —eight hundred feet from end to end, what is this? A. Ninety-two and one-half feet.

Q. What is the distance between the stall marks here—what is the distance between that stall and the stall on each side of it? A. I have got that in my notes.

Q. All right, tell us that please. A. (Witness resumes stand.) The width of the doorway is 13.35 feet at that stall.

30 Q. What is the clearance between the tracks of the stalls on each side of the stall measurement on this map which I understand to be the stall upon which the engine was? A. Approximately fourteen feet.

Q. And what is the width of the stall in which this engine was? A. That is the doorway, 13.35 feet.

Q. Have you got the measurements of this engine that was on this stall? A. It is right on
40 the map here.

Q. What is that? A. 17.2-15/16.

Q. In length? A. Yes.

Q. What is the width of the greatest overhang—the widest part of it? A. 10.2 feet.

Q. That is the widest part? A. Yes.

Q. What is that, the tank part? A. No, that is in front of the locomotive. 10

Q. What is the greatest width of the rear tank as the engine backed out? What is the greatest width of the rear? A. I haven't got that. I have just got the extreme measurements. It is less than ten feet.

---

OTTO BECHTOL, sworn.

*Direct examination by Mr. Simpson:*

Q. Where do you live, Mr. Bechtol? A. Seventeen Moffett Road, Little Ferry. 20

Q. On the 17th of July, 1926, where were you employed? A. New York Central roundhouse, at Grandon and New Bergen.

Q. Grandon? A. Grandon, North Bergen.

Q. What part of the roundhouse were you employed in? A. In the second section.

Q. What is that on this map? What does the second section mean? A. There is a house one and two and three. 30

Q. You mean the roundhouse is divided into—A. Yes, the walls divided.

Q. The walls divided this roundhouse into three different houses, is that it? A. Yes.

Q. You were in what section? A. I was in about the center, about in the center of the second section.

Q. The middle of the second section? A. Yes, sir. 40

Q. What time of day or night were you at work

there? A. Well, probably could have been a quarter after two in the morning.

Q. You went to work at a quarter after two in the morning? A. No, when I went to work?

Q. Yes. A. That was seven o'clock at night.

10 Q. About a quarter after two in the morning where were you working, in the same position? About the center of number two? A. When I went to work at seven o'clock I was working in that section.

Q. No, I didn't ask you that. You stated some time—a quarter after two, didn't you say—a quarter after two you were discussing—you referred to a quarter after two in the morning, didn't you? A. Yes, sir.

20 Q. What were you doing then? A. I was working on the locomotive.

Q. What locomotive? A. Well, I don't know just which one, I don't remember the number of it.

Q. Was your attention attracted to anything? A. No, sir.

Q. Did the foreman—not what the foreman said to you but did the foreman come in and say something to you that caused you to go out? A. I was working on this locomotive and it was kind of a

30 hot job and I came out from the locomotive to get cooled off, and as I was being cooled off this foreman comes along and he says—

The Court: Now what he said.

Q. He said something to you? A. Yes.

Q. Now as a result of what he said to you what did you do? A. I went out to see what happened.

Q. Where did you go? A. Out towards the turn-

40 table.

Q. How far was that from it from where the foreman spoke to you? A. (No answer.)

Q. Where were you when the foreman spoke to you, outside getting cooled off? A. No, in the house at the front of the engine.

Q. That is number 2? A. Yes. 10

Q. And was the front of the engine towards the turntable or away? A. Away.

Q. You were standing there getting cooled off and the foreman came in and said something to you and then you went out? A. Yes, sir.

Q. Where did you go with the foreman? A. I went out alone.

Q. What was the foreman's name? A. James Kelly.

Q. When you went out where did you go? A. 20 Went out towards the turntable.

Q. Did you go out towards the turntable? A. Yes, sir.

Q. What did you find there? A. (No answer.)

Q. What did you find when you got out there? What did you see? A. I seen there was something wrong.

Q. What did you see was wrong? A. I inquired and I was told— 30

Mr. Carey: I object to what he was told.

The Court: You are asked what you saw.

Q. What did you see? A. Well, I seen this Joseph Marcone.

Q. Where did you see him? A. Underneath the tank.

Q. Tank of what? A. The tender, the coal tender.

Q. Of the engine, was it? A. Yes. 40

Q. What engine was it? A. 3709.

Q. What time was it, you say, a quarter after two when you went out? A. It might have been around that; I don't just exactly remember.

Q. Was it around a quarter after two in the morning? A. It was after two.

10 Q. What was his position when you found him under the tank of this locomotive? A. He was just coming out from under the axle.

Q. Coming out or being brought out? A. Well, he was laying down on the turntable.

Q. What track was his body lying on? A. On the turntable.

Q. Is there more than one track on the turntable or only one? A. One track.

Q. One track? A. Yes.

20 Q. Where was the locomotive? A. The locomotive was off the table.

Q. Where? Had it backed completely off the table or had it gone in the roundhouse or where was it? A. She was coming out of the roundhouse and going onto the table.

Q. And when you found his body was the locomotive moving or not moving? A. Standing still.

Q. What position was it on the turntable? Which way was the head pointing? A. Towards

30 the roundhouse going in.

Q. Towards the roundhouse? A. Yes, sir.

Q. And the rear away from the roundhouse? A. Yes, sir, towards the turntable.

Q. Had it gone over the turntable or hadn't it yet gone on the table? A. It was probably three-quarters the way on the table.

Q. What was the condition of this man's body? A. Well, as I found the body I felt it and it felt

40 warm, so I thought there was life in the boy and I wanted to do what I could do for him.

Q. Well, what did you do? A. And I picked the boy up and as I picked him up—I lifted him clear of the track and laid him alongside.

Q. What was his condition? A. When I seen his condition I seen he had no head and had no arm. 10

Q. Which arm was cut off? A. Right.

Q. What position was his body when you got it out before you started to move, and what position was it on the track? A. It was laying on the right side.

Q. The body on the right side? A. Yes.

Q. Where was it, across the track? A. Yes, across.

Q. Was the head outside the track or was his head under the locomotive? A. Well, his head was under the tender. 20

Q. Of the locomotive? Did you look for any bloodstains? Did you try and trace any bloodstains to see where the locomotive had come from? A. No, I didn't trace any bloodstains, but after I found the body I thought it was the pumper. He had a blue shirt on and I knew he had a blue shirt on, and I was looking for his lantern.

Q. You found no lantern? A. I found no lamp, but I located a cap. 30

Q. How far was the cap from the body? A. It could be maybe fifty feet.

Q. Toward the roundhouse? A. Yes, toward the roundhouse.

Q. Was it in the roundhouse? A. No, sir.

Q. How close was it to the roundhouse? A. Well, probably twelve to fifteen feet.

Q. And where was it lying, this cap, between the tracks? A. Between the tracks. 40

Q. Well, which tracks? The tracks that lead to

the turntable? A. To the turntable, that the engine was on.

Q. So you saw the engine on the turntable? You saw the track it was on. If that engine had continued on head foremost was the cap on the same track that the engine would have gone into the roundhouse on? A. Yes, sir.

Q. Do you know of your own knowledge what track this engine that you have mentioned came out of the roundhouse on? Do you know what track she was on? A. Track eight.

Q. When did you see her on track eight? How long before the accident? A. Well, I passed her all night.

Q. On track eight? A. As I went to work, yes.

Q. What time was she first in there, do you know? Do you know when you first went to work was she in there? A. Yes.

Q. What kind of locomotive was she? A. Freight locomotive.

Q. Had you done anything to her that night? A. No, I don't remember.

Q. How long had Marcone worked in that roundhouse, to your own knowledge? A. I believe he had worked there a few times that I know of.

Q. How long a time? A. I couldn't say.

Q. Do you know what his work there was? A. Box packer.

Q. What does that mean? A. Lubricating.

Q. What does that mean? A. Lubricating the journals and the like of that.

Q. Putting grease in it? A. Putting grease in, yes.

Q. Anything else? A. That is all I know.

Q. Did you know him well or did you just see

him around the roundhouse? A. From working, associating with him.

Q. Associating in your work? A. Yes.

Q. Was he helper or was he the boss packer himself? Was there anybody over him? A. Well, yes, they have a foreman over them. 10

Q. Who was he, do you know? A. Mr. Siddell.

Q. Now, before you came out of number two, say for fifteen or twenty minutes before the foreman came in and spoke to you, which you say was about a quarter after two, had you noticed how many engines were in the roundhouse? A. No, that I couldn't tell you.

Q. Well, a number were there besides this one? A. Yes, there were more.

Q. There were more than this in the roundhouse? A. Yes. 20

Q. Were men working on the others? A. Yes, they work on different engines wherever they have work to do.

Q. Who was the foreman of the roundhouse that night of the accident? A. Mr. Kelly.

Q. Did you walk around this engine before you found the body or did you go around it after you found the body? A. No, I didn't go around the engine at all. 30

Q. You didn't notice that there was no light on the back of the engine?

Mr. Carey: I object to the form of the question.

The Court: Sustain the objection.

A. No.

Q. Did you make any examination of the back of the engine yourself? A. No, sir.

Q. What was the condition of the place where 40

you found the body? Could you see the body easily or did you have to take a lantern? A. I had no light; I felt my way.

Q. You felt your way? A. Yes, sir.

Q. It was dark? A. Yes, sir.

10 Q. And how far did you feel until you came in contact with this body? Did you walk along the locomotive? A. Well, it wasn't just so dark, you know, that throws a shadow, under a tender.

Q. Well, you felt your way, did you? Did you feel your way as you have sworn to a little while ago? A. Yes, I felt for the body.

Q. You felt your way, you say? A. The boy had a blue shirt on and that I located.

Q. You said you felt your way? It was dark?
20 You felt your way? A. No, not exactly all the way, what you would say all the way.

Q. If you said— A. When you get under a tender—

Q. Wait a minute. After you said it was dark and "I felt my way," did you get a signal from anybody in the back of the court room? A. No.

Q. Now will you go back there where you said it was dark and "I felt my way," just go back to that.

30 (Stenographer reads witness' previous testimony.)

Q. When you got the body did you take it out without a lantern? A. Yes, sir.

Q. What did you do after you took it out? A. When I seen what condition the body was in I went down and got a piece of canvas and covered it.

Q. Now before you went out how did you know
40 to go exactly where this body was, if you didn't know anything about the accident? A. Well, when

something happens like that, you know there is something wrong.

Q. Yes, but you didn't see this accident, you say? A. No, sir.

Q. You didn't know anything about it? A. No.

Q. And yet you went exactly to where the body was? A. No, sir. 10

Q. Well, you did get the body out, didn't you? A. Well, yes, when you walk along an engine and you are looking there.

Q. Don't make a lot of speeches. Did you get the body out? A. Yes, sir.

Q. You are still working for the Central, aren't you? A. Yes, sir.

Q. Now up to the time the foreman came in and told you, had you heard any whistle blown in the roundhouse? A. That I don't remember, for there is all kinds of whistles blown, all kinds. 20

Q. I asked you if you heard any whistle. You say you don't remember, is that right? A. I heard whistles.

Q. How long before the foreman came in did you hear the last whistle? A. Well, probably five minutes or so.

Q. Well, what do you mean, five minutes or so? Do you mean it was more than five minutes? A. There are whistles blowing there all times. You really don't know what they mean. You are working. The men may be testing out the whistle. 30

Q. In other words, whistling all the time, is that it, and you don't know what they mean, is that what you mean? A. Yes, off and on in different parts of the house.

Q. Now then, about the ringing of the bell, did you hear any bell rung within five or ten minutes before you went out? A. Yes. 40

Q. How many bells did you hear? A. Well, that I couldn't just say how many bells.

Q. A number of them? A. Yes, more than one.

Q. How many more than one? A. Well, that I couldn't just swear to here, how many more than one. For you hear them and you don't know who is ringing them. There is an air man and he tests it out the air and he is trying the bells.

Q. So if you hear a bell it may be a man testing it as far as you know? A. Yes.

Q. And the same is true of whistles? Now this roundhouse, this track that is marked here, is this the one you refer to, this track eight, the eighth track? That is the one you call track eight, is it? A. Yes, sir.

Q. When did you last see the man who was killed before you found his body? Had you seen him that night I am talking about? A. Yes, I seen him that night.

Q. How long before he was killed had you seen him for the last time? A. At dinner time.

Q. What time was that? A. At twelve o'clock.

Q. That is midnight? A. At midnight.

Q. Where did you see him? A. Seen him out behind the roundhouse.

Q. Outside of the roundhouse? A. Yes, sir.

Q. Was he employed outside as well as inside? A. Well, that—sometimes they are—it is all according to where the engine is at the time.

Q. He was sort of a laborer, wasn't he, around there? A. No, he was a box packer.

Q. He did nothing but pack the boxes, did he? A. Yes, sir.

*Cross examination by Mr. Carey:*

Q. You say you were in section two of the round-

house when the foreman spoke to you? A. Yes, sir.

Q. And section two is in the middle of the roundhouse? A. Yes, sir.

Q. There are three sections altogether? A. Three sections. 10

Q. Won't you come down here and show us about where you were when the foreman spoke to you. A. (Witness leaves the stand and goes to diagram.)

Q. Do you happen to remember what track you were on? A. Fourteen.

Q. Here is track fourteen (indicating)? A. Yes, sir.

Q. And that was about where you were? A. Yes, sir. 20

Q. And were you inside the roundhouse or outside? A. Inside.

Q. Inside? A. Yes, sir.

Q. And the foreman who spoke to you was Mr. Kelly? A. Yes, sir.

Q. And you went out after he spoke to you, and where did you go? A. Went out to the turntable.

Q. Did you go towards the turntable because of anything that Mr. Kelly said to you? A. Yes, sir. 30

Q. From what Mr. Kelly had said to you did you understand that an accident had happened? A. Yes, sir.

Q. And you spoke of feeling your way to find the body, as I understood you, is that right? A. Well, yes, of course I didn't just mean it the way you put it. When a man works nights, you see, it is a different thing altogether.

Q. Yes. Now, which side of track eight did you find this body on? A. It laid right across. 40

Q. Across one of the rails? A. In between the rails.

Q. In between the rails? A. Yes, sir.

Q. Was any part of the body outside of the rail? A. No, sir, not that I noticed.

Q. And on which side of the tracks did you take the body out? A. From the left side, going on to
10 the turntable from the house, facing the engine.

Q. On the left side facing which way, toward the turntable or toward the roundhouse? A. Toward the turntable.

Q. Then, this being track eight here, left hand side as you were facing toward the turntable would be the side farthest away from this end of the roundhouse, wouldn't it? A. (No answer.)

Q. Suppose you come down here and point out the side. Here is track eight. A. Yes.

20 Q. You were facing the turntable? A. Yes.

Q. And took it out on the left hand side. A. Of the turntable here.

Q. It was down on the turntable? A. Yes, sir.

Q. And when you spoke of the left-hand side you meant the left-hand side as you were facing the turntable? A. Yes, sir, coming toward the turntable.

Q. Was anyone there before you reached the place where you found the body? A. Yes, sir.

30 Q. Who was there? A. There was a turntable operator and hostler.

Q. What is his name? A. Maloy, I believe.

Q. Who else? A. I believe they called him McGee.

Q. Called him what? A. McGee.

Q. Yes. A. That is what I knew him by.

Q. Anybody else besides Maloy and McGee and yourself? A. I don't remember.

Q. Was Mr. Kelly there? A. No, sir.

40 Q. Now you felt for the body, did you? When

you got there you felt for the body? A. Well, I located the body first by seeing his shirt. He had a light shirt on.

Q. Could you see the color of his shirt before you began feeling for him? A. Yes, then I knew that there was something there. I didn't know it 10
was a body or what it was.

Q. You didn't know whether it was a body or something else? A. Yes, that is what I meant by feeling.

Q. Now you spoke of the tender, the tender of the engine casting a shadow. Is that true? Did it cast a shadow? A. Yes, underneath.

Q. And you had no lantern? A. No, sir.

Q. How did you see to get from the place where you work to the place where you found the body 20
in the night? A. Oh, you can see that much—you are working.

Q. Lights there? A. Day after day you are doing that.

Q. Lights around the roundhouse? A. Yes, sir.

Q. Were there? A. Yes, sir.

Q. What kind of lights? A. Electric lights.

Q. So that you had no trouble in going from the place you were to the turntable? A. Oh, no.

Q. Plenty of light? A. Yes. 30

Q. Now, what was the position of the body with respect to the tender? Was it near the end as the tender was being backed onto the turntable or was it at the front end of the tender? A. Toward the back end.

Q. Back end? A. Yes, just coming on the tracks.

Q. The rear trucks of the tender? A. Yes, sir.

Q. There are two trucks there together, aren't there, on the engine, on each side? A. One truck with three pair of wheels under it. 40

Q. On truck with three pairs of wheels, and the wheels where you found the body was the wheels narest the rear end of the tender? A. No, coming from under the truck towards the center of the tender.

10 Q. Towards the center of the tender? A. Yes, sir.

Q. Did anyone help you remove the body? A. No, sir.

Q. You say that you did hear a whistle about five minutes or so before you got to the place where the accident happened? A. Yes, sir.

Q. And you heard a bell ringing at the same time? A. I heard bells ringing, yes.

Q. At the same time or about the same time you
20 heard the whistle? A. Well, yes, there are whistles and bells blowing and ringing at all times.

Q. Now when you say that you felt your way you mean that you felt your way to a point where —that you felt your way to reach the body after you had found where the body was located? A. Yes, sir.

*Redirect examination by Mr. Simpson*:

Q. You said to Mr. Carey that you couldn't tell
30 what it was under the engine when you got there and yet there was plenty of light. Now if there was plenty of light how is it you couldn't tell what was under the engine? A. There is plenty of light in the surrounding—

Q. Will you tell this jury what you meant when you swore under oath that when you first got there you couldn't tell what it was under the engine and that there was plenty of light? How is it if there was plenty of light you could tell what
40 was under the engine, whether it was a dog or a

man or what it was? A. When I got there I felt the body.

Q. That don't answer my question, but I won't waste time on it. Now come down here and show us where the nearest electric light is. Show us where all the electric lights are; tell where you found the body. A. There is an electric light at each end of the table. 10

Q. How high is it? Is it an arc light or is it an incandescent light like one of these? Is it like a street light or like a room light? A. No, it had kind of a reflector.

Q. How high is it above the turntable? A. It may be ten or twelve feet.

Q. How far was it from where you found the body to the nearest light? A. Probably could have been seventeen feet. 20

Q. Now you say you didn't see this accident? A. No, sir.

Q. You didn't hear anything about it? You didn't know anything about it— is that right—of your own knowledge?

Mr. Carey: If the court please, he hasn't said that.

Q. I mean you didn't see it, the actual running over of the man, did you? A. No, sir. 30

Q. Didn't you tell this boy's father that he was run over because no warning was given? A. No, sir.

---

ARTHUR J. WEISS, sworn.

*Direct examination by Mr. Simpson*:

Q. What is your business? A. Chief Clerk to the Master Mechanic, New Durham, New Jersey. 40

Q. Is the Master mechanic the person in charge of the roundhouse? A. No, sir.

Q. Does he keep the records? A. No, sir.

Q. He was subpoenaed to produce the records, and I understand that you came in his stead, is
10 that right or not? A. I came with what I could obtain.

Q. Where did you get these records? A. From the master mechanic's office.

Q. If he don't keep them how could you get them from his office? A. We keep them in his office.

Q. Who keeps them? A. The master mechanic's office force.

Q. Are you in his office force? A. Yes, sir.

Q. What is your position in his office force?
20 A. Chief Clerk.

Q. Have you got the record covering engine 3709 which killed this man on the 27th of July, 1926? A. What record?

Q. The record of when she came in and when she was to go out? A. (No answer.)

Q. What makes you hesitate so long? A. I have a record that shows the time she arrived.

Q. What time did she get to the roundhouse? A. 7:50 P. M. July 26th.

30 Q. What was done to her? A. That I don't know.

Q. What time was she to go out? A. She was scheduled to go out—that depends from where.

Q. From the yard, to go to work, to pull a train out. A. Four o'clock is the schedule time to leave Weehawken—four A. M. standard time.

Q. Four A. M. standard time? A. Yes, sir.

Q. Have you any record, anything on your
40 records indicating what time this man was killed,

daylight or standard time? A. No, sir, I haven't those records.

Q. Who would have those? A. Why the Claim Department, I imagine.

Q. Who would keep the record at the roundhouse? Who would be responsible for this happening, to report it? A. The foreman. 10

Q. That would be Mr. Kelly? A. I believe Mr. Kelly.

Q. And you say this locomotive came in at what time? A. 7:50 P. M.

Q. And she did take a train out in the morning? A. Four o'clock on the 27th, from Weehawken.

Q. Is there any record at all there as to what time she would leave the roundhouse, anything on your record? A. What do you mean, the time she would leave? 20

Q. Oh no, the time she ordinarily would take a train out at four o'clock—at what time she would leave the roundhouse. A. (No answer.)

Q. Is there any schedule of time when she was to be taken out of the roundhouse on your records? A. Three o'clock in the morning.

The Court: Standard or daylight?
The Witness: Standard time. 30

Q. You are talking of standard time now? A. Yes, sir, that is railroad time.

Q. Now, have you any record of what was done to her in the roundhouse? A. No, I have no record of that.

Q. Your record is simply of the time she came in? Now have you got a record of the time she left? A. The time she actually left the engine house, 3:18 A. M., July 27th.

Q. That is the roundhouse? A. Yes. 40

Q. 3:18 Standard time? A. A. M.

Q. And she was to go out at three o'clock? A. Yes, sir.

Q. Didn't go out for eighteen minutes after? A. Right.

10 *Cross examination by Mr. Carey*:

Q. She was scheduled to go out from the roundhouse you say at three, standard time? A. Yes, sir.

Q. Three A. M.? A. Three A. M.

Q. Do you know what train she was scheduled to take out? A. According to my records W. D.-1.

Q. She coupled onto that train at Weehawken? A. I don't know whether she did or not.

Q. You don't know where the train was located?
20 A. No, sir.

*Redirect examination by Mr. Simpson*:

Q. Who would know that, the train dispatcher at Weehawken, the time she actually coupled on? A. I don't know.

Q. Have you got any record of the time the men reported to take the engine away from the vicinity of the roundhouse? A. I have got the time that they are supposed to report.

30 Q. What time are they supposed to report? A. Three A. M.

Q. But the time they did report you haven't any record of? A. No, sir, I haven't that.

*Recross examination by Mr. Carey*:

Q. How many men in the crew that reported to take the engine out from the roundhouse? A. I couldn't tell you, sir.

Q. Does the train crew or the engine crew take

40

the engine out from the roundhouse? A. Not usually, no, sir.

Q. Who takes it out of the roundhouse? A. It is the duty, from my recollection, of the hostler to take the engine out of the roundhouse.

Q. And the time you have got here as the time when the engine was scheduled to leave the roundhouse is the time when the engine crew takes the engine, takes charge of the engine? A. The time that I have here is the time the crew is ordered to depart with the engine from the engine house.

Q. Not the time the hostler is supposed to remove the engine from the engine house to the turntable? A. No, I haven't that record.

Q. But the time you have given us is the time when the engine crew is supposed to take charge of the engine to leave with it for the purpose of coupling onto the train. A. To leave the engine house, yes, sir.

*Redirect examination by Mr. Simpson:*

Q. The time you have given is the time the crew would take it out of the yard, whatever you call it? The hostler is the man who backed it out for the crew, wasn't he? A. I don't know whether he did or not.

Q. Was that the custom? A. It is the custom.

Q. The hostler takes it out there where he leaves it and the crew gets it? A. Yes.

Q. And your record shows the time the crew was to take it there at three o'clock; they really took it at 3:18, but the time it was backed out of the roundhouse you have no record of? A. No, sir.

Q. And the record of the time you are giving us has nothing to do with the movement of the engine out of the roundhouse onto the turntable? A. No, sir, it is not.

CORNELIUS McGEE, sworn.

*Direct examination by Mr. Simpson:*

Q. Where do you live, Mr. McGee? A. 962 Tonnele Avenue, North Bergen.

10 Q. What is your occupation now? A. Fireman.

Q. On what railroad? A. New York Central.

Q. New York Central? A. Yes, sir.

Q. On the 27th of July, the morning of the 27th of July, 1926, were you a hostler? You were a hostler, weren't you? A. Yes, sir.

Q. And how long had you been a hostler? A. I should imagine about three months, but I had been a hostler off and on.

Q. What do you do as a hostler? A. I bring the
20 engines out in order for the crews to take them away.

Q. Where do you put the engines for the crew to take them? A. Out by the water plug, right by the master mechanic's office.

Q. How far from the turntable there? A. I should imagine about three hundred feet.

Q. Would you leave it there or wait? A. I would leave it there; put it in condition.

Q. Before the time of the accident who was in
30 charge of the roundhouse or who was your superior? A. Mr. Kelly.

Q. Had you made any complaint to him as to conditions around the roundhouse in reference to the men before the accident? A. I have told him and I have told Mr. Strauss both.

Q. Who? A. Mr. Strauss, the master mechanic.

Q. What complaint had you made? A. About men being around by live engines, and if they hap-
40 pen to sit down or take a rest by a live engine

when I am taking it out they are liable to get either blinded or deaf from steam.

Q. When did you tell him that? A. About two weeks previous to the accident.

Q. Any changes made after you told him that? A. Yes, sir. 10

Q. What changes were made? A. The men didn't come out and sit down there any more.

Q. Back of you? A. In back of the dead engines.

Q. I am talking about inside the roundhouse. You didn't see any men there? A. No, sir.

Q. Did you make any complaint about the throttle on this engine that was in this accident? A. Not that I remember.

Q. You never made any? A. I have with some engines but not with this one. 20

Q. I am talking about this one. Your recollection is that about 3709 you didn't make any question about the condition of the throttle to anybody? A. No, sir.

Q. What time did you get on this engine this night? A. I figure I got on the engine about 2:20.

Q. You said you got on— A. About 2:20.

Q. Who sent you to get on? A. My business is—

Q. Who sent you, if anybody? A. Mr. Kelly.

Q. Did you or would you move it without his direction? A. No, sir, not unless he O. K.'s this. 30

Q. Did he tell you to get it O. K.'d? A. Yes, sir.

Q. Then you went in there in the roundhouse before 2:20, did you? A. About 2:20.

Q. What track was this engine on? A. Track eight.

Q. Were there any engines on either side? A. Yes, sir, on both sides.

Q. Both sides there were engines? A. Yes, sir. 40

Q. Were there any men working on them? A. No, sir, not that I remember.

Q. Did you see any men? A. I seen no men at all.

Q. Did you get up on the engines to make any
10 examination? A. No, only on my own engine.

Q. From your own engine you didn't see anybody on either engine? A. No, sir.

Q. On either of these engines on either side of you was there steam up? A. One was a dead one and one was steam up.

Q. Did it take the one with steam up—the engine that had steam up, did you have anything to do with it that night? A. No, sir.

Q. Did you take it up afterwards? A. No.

20 Q. Do you know what engine it was? A. No.

Q. So as I understand it you simply walked in and got on your engine, is that right? A. No, sir.

Q. What did you do? A. I walked in on the left hand side of my engine.

Q. That would bring you between your engine and what other engine? A. I don't know the number of it.

Q. Was it the dead one or the live one? A. Supposed to be the dead one.

30 Q. Do you know whether there was anybody working on it? A. No, sir, there was nobody working on it.

Q. You didn't go to see? A. I went around my own engine.

Q. I am talking about the other engine. You never—you have already described that you got in on the left hand side of your engine between your engine and a dead engine, and got up on your
40 engine, is that true? A. No, I came in on the left hand side of my engine.

Q. Yes. A. And in regard to the other engine it don't bother me.

Q. I am not talking about the other engine. I am asking you if you can describe what you did. A. That is what I am saying.

Q. Come in and walked along the left hand side of your engine, that is 3709, and then you got up on it? A. No, sir, there is pet cocks generally open on top of the cylinders. 10

Q. What? A. If an engine moves, she can't move very far with the pet cocks open. The steam will go out of the pet cocks when they are open, and if there are pet cocks open it is my business—

Q. Will you please be good enough to tell us what you did? You got up on your engine and what did you do? A. I got up on the engine and I started my air compressor and then I turned on the lights. 20

Q. Which lights? A. The lights for the whole engine; the one dynamo controls the whole engine.

Q. What does it control, headlights? A. Headlights, cab lights and back light.

Q. Then what did you do? A. Then after I got my air up some five to seven pounds I put on my bell to hear the air on the bell.

Q. Were other bells ringing at the time you put on your bell? A. I don't remember. 30

Q. Other whistles blowing? A. Whistles blowing all the time.

Q. Then you did what? Did you start your engine in motion? A. No, I waited until I got fifty pounds of air on my engine.

Q. How long did that take? A. Five to seven minutes.

Q. How long were you on your engine before 40

you put the steam on and moved it? A. Ten minutes.

Q. And that would bring you to 2:30? A. Yes.

Q. So when you started your engine in motion it was about half past two, is that right? A. About
10 half past two, yes, sir.

Q. Where did you go when you started your engine? How did she go, back out or go out front? A. Backed out.

Q. Did you know Marcone? A. No, sir.

Q. Didn't know him? A. No.

Q. Never seen him? A. No, sir.

Q. You knew men were working around there, though, didn't you? In the roundhouse? A. I knew lots of men were working in there.

20 Q. What did they do, work there all night? A. They worked on shifts.

Q. What did they do? Were some of the men there all night? A. Yes, sir, somebody there all the time.

Q. Working, is that right? A. Yes, sir.

Q. On the engines. Now what was the first you knew that your engine had killed a man? A. When I got notice from the turntable man he swung me up and I put her in emergency.

30

The Court: What do you mean, he swung you out?

The Witness: With the lamp, across the track.

Q. Did you look to see what was behind you? A. Yes, sir.

Q. Behind your engine? A. Yes, sir.

Q. And he was swinging for you to stop? A.
40 Yes, sir, and he hollered at the same time.

Q. How far out of the roundhouse were you when he stopped? A. I would say thirty-five feet.

Q. You mean the rear of the engine or the front? A. Back of the engine.

Q. Where was the front of the engine, still partly in the roundhouse? A. Partly in the roundhouse. 10

Q. How much was partly in the roundhouse? A. I don't know how much, say about sixty feet.

Q. Of your engine was still in the roundhouse? A. Yes, sir.

Q. And how far do you think you were with the engine before you were stopped by this signal? A. I went about almost sixty feet.

Q. Before you were stopped? A. Yes, sir.

Q. You never saw this man that was killed, did you? A. Not that I recollect. 20

Q. I mean you never saw him the night of the accident around your engine? A. No, sir.

Q. The first you knew was when you were stopped? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now with your engine in the position it was when you looked back or after you had gone back of your engine there was nothing to prevent seeing anybody there? It was all fully lighted up, wasn't it? A. It is lit up from the table. 30

Q. In other words, there is nothing to prevent you from seeing a man if he was working on an engine next to you? Nothing to prevent you from seeing him, was there? A. No, sir, not on the right-hand side.

Q. Or on the left-hand side, was there anything on the left-hand side? A. No, sir, there is lights, it is lit all through the roundhouse.

Q. On which side of the engine were you on? 40
A. Left-hand side.

Q. So that you got on the left-hand side and stayed on the left-hand side, is that right? A. No, sir, I came over on the right-hand side to run the engine.

Q. You got on the left-hand side and then you
10 went over to the right-hand side and then you were on both sides? A. Yes, sir.

Q. And there was nothing whatever to prevent you looking back and seeing if anybody was working on the live engine on your right-hand side, was there? A. No, sir.

Q. And you didn't see anybody, did you? A. No, sir.

Q. You didn't give any warning to anybody? I am not talking of your whistle or bell now. You
20 didn't do anything to warn anybody who might be working behind your engine, did you? A. No, sir, but I came in from behind and I seen nobody working in behind.

Q. You came in from behind and you got on the front but you didn't, before you moved your engine, you didn't take any precaution to see whether anybody was working on the live engine and if so to give them a warning that you were going to move the engine, did you? A. Well, I did when I
30 went in; if anybody was working on either side I would have told them about the steam.

Q. Now, but you— A. If anybody was on either engine.

Q. Yes, but you never saw this dead man before? A. No.

Q. And he was hit by your engine? A. Yes.

Q. And he was taken out dead from under your engine. Now what I ask you is, when you got on
40 the engine—you knew that bells were ringing and whistles blowing all the time—and knowing there

was a live engine right along your right-hand side did you give anybody any warning that you were going to move that engine? A. No, sir.

Q. You didn't know you had hit this man, did you? A. No, sir, I didn't know it.

Q. What was the over-hang of your tank? How close was it to the engine on your right-hand side that was alive? A. The over-hang of the tank, you mean? 10

The Court: How close.

Q. You have described an engine on your right-hand side that had steam up. You don't know what the number of it was; you can't identify it; but I am trying to find out what clearance was there between your rear tank and that engine with steam up. A. Must have been about ten feet. 20

Q. Ten feet clearance? A. Yes, sir.

Q. What was the over-hang of your tank over the track? A. About four feet.

Q. You were over the track? A. Yes.

Q. So there must have been then the distance between the tracks according to you, if the other engine had four feet, would have been about fourteen feet between the rails, is that right, or between the tanks? 30

The Court: Eighteen, wouldn't it be, Senator?

A. When they are in the house side by side there is a four inch clearance between the engine and the door and with the same engine on the inside there is a four inch clearance with the door. This would give it about three foot from tank to tank.

Q. When you were stopped, then what did you do? A. Then I put it in emergency just as soon as I stopped and jumped down off the engine. 40

Q. Then what did you see? A. I seen a man laying on the right-hand side of my engine with his legs out on this side of the rail outside of the rail.

Q. That is, his legs were on the right-hand side of the right-hand rail, is that right? A. Yes, sir.

Q. When you say right-hand you mean looking toward the back? A. No, looking toward the head of the engine.

Q. Looking toward the headlight? A. Yes, sir.

Q. When you say right-hand all the time you mean looking toward the headlights? A. Yes, sir.

Q. Then as I understand you you walked in between your engine and the dead engine on the left-hand side? A. Yes, sir.

Q. And got up in your cab? A. No, sir.

Q. What did you do? A. Walked all the way around my engine, back to the tank again.

Q. You walked up the left-hand side, crossed in front and walked back on the right? A. Yes, sir.

Q. And then went behind? A. No, I didn't go clear behind, I went right to the door and I seen there was no obstruction there so I came back to the right and got up on my engine.

Q. You walked up on the left and around in front around down to the rear on the right-hand side, is that right? A. Yes.

Q. And then you went back again? A. I went back up on the right-hand side.

Q. You described a little while ago how you come up on the left-hand side of your engine. A. No, sir.

Q. You did not? A. I always get up on the right.

Q. You didn't get up on the left-hand side? A. No, sir.

Q. As I remember you swore distinctly that you

walked up on the left-hand side and got up on your engine. You say that is not so? A. No.

Q. Now your movement is, up along the left-hand side, around the front, down to the end on the right, and then in around to the back and up back—back up again on the right, and back up on the engine, is that right? A. Yes, sir.

Q. And then you stayed always on the right-hand side, did you? A. Yes, sir.

Q. You never got up on the left-hand side of your engine? A. No, sir.

Q. You always stayed on the right-hand side of the engine? A. Always on the right-hand side, yes.

Q. And this man's feet extended over the rails, is that right? A. All but his shoulders.

Q. How far was he on the turntable? A. He was about—well, he was about between the turntable and the rails. He was half on the turntable and half on the roundhouse rail.

Q. How far out on the edge of the turntable was he? How far on the turntable, do you know? How far was his body lying? A. Three feet.

Q. He only got three feet on the turntable? A. Yes, sir.

Q. Did you trace the bloodstains back to see where he first got hit? A. No, sir.

Q. You didn't go back at all in the roundhouse? A. No, I left the engine stand and beat it to the master mechanic's office.

Q. You did what? A. Left the engine stand there with the air off.

Q. What did you do? A. And went to the master mechanic's office.

Q. And made a report to him? A. Yes, sir.

Q. You didn't go back and find out where your

engine had been, where he had first been hit by your engine? A. I did an hour later, but we couldn't locate it.

Q. You went back an hour later? A. Yes, sir.

Q. What did you try to do an hour later? A.
10 Tried to locate where the man was hit, where he was when he was hit.

Q. Did you see any bloodstains? A. Only in between the rails.

Q. How far towards the roundhouse did the bloodstains go? A. About thirty feet.

Q. Thirty feet in the roundhouse? A. Outside of the roundhouse.

Q. What? A. Outside.

Q. When you say the roundhouse do you mean
20 the— A. The stall.

Q. You mean the stall? A. Yes, sir.

Q. Well, how far was the blood from the position that he was found? You say he was three feet in on the turntable? A. Yes, sir.

Q. And the blood was about thirty feet in from where the body was found, so the bloodstains went twenty-seven feet up the tracks, did they? A. No, there wasn't that much blood spilt.

Q. You have already described—if we can get
30 you to be definite, that the body was in three feet on the turntable? A. Yes.

Q. And that the blood went thirty feet from where the body was found? A. Yes.

Q. Now if it was only three feet in on the turntable it must have been twenty-seven feet—there must have been twenty-seven feet of blood on the tracks, wasn't there? A. Yes, sir.

Q. How near would that bring you to the edge of that stall? A. About thirty-two feet.

40 Q. So there would be about sixty feet from the

end of the stall to where the body was found? A. Sixty-eight feet from the stall to the turntable.

Q. To the end of the stall—from the end of the stall to the table? A. Yes, sir.

Q. You are still working for the New York Central? A. Yes, sir. 10

Q. As what? A. Fireman.

Q. Did you find this cap that one witness described as fifty feet from the place where the body was found? A. No, sir.

Q. You didn't find that? A. No, sir.

Q. After you backed out of the lights—you didn't have any headlights on your rear, did you, to throw light? A. Yes, sir.

Q. Had a headlight? A. Had a tail light.

Q. Was it a big light or little? A. Big light. 20

Q. Give you all the light you wanted? A. Well—

Q. Did it give you enough light to see a man behind your engine? A. Yes, sir.

Q. And you kept looking all the time? A. Yes, sir.

Q. And you never saw a man? A. No, sir.

Q. You looked before you moved your engine? A. Yes, sir.

Q. And you looked while you were in motion? A. Yes, sir. 30

Q. And the man's body was on the right-hand side and you never saw him until the man stopped you, is that right? A. Yes, sir.

Q. How long had you been a hostler? A. I was three months previous to that time, as near as I can recollect it.

Q. Had you done anything else? A. Yes, I had been firing off and on.

Q. Did you make a written report of the accident to the master mechanic? A. Yes, sir. 40

Q. Who was the man you made it to? A. I made it to—well, to what we call our dispatchers.

Q. You wrote down what happened? A. I made the report out to Patrick Ross.

Q. Who is Patrick Ross? A. Engine dispatcher.

10 Q. And he has got your written report, has he? A. No, sir, he turned it over to the claim agent.

Q. Who is the claim agent? A. The man is dead now; I don't recollect his name.

Q. Do you know who has that report now? A. No, sir.

Q. Did you see it down in Mr. Carey's office? Was your memory refreshed from it in Mr. Carey's office? A. I didn't refresh my memory from it.

Q. You saw it down there, didn't you? A. He

20 had something there, but I didn't read it.

Q. You don't know whether it was your report or not? A. No, sir.

Q. You say you started to move this engine at 2:30, did you? A. Yes, sir.

Q. Was anybody working on this engine you moved at the time you moved it? A. No, sir.

Q. Who did you say sent you to move it? A. Mr. Kelly; he gives me a list of our engines supposed to come out of the house.

30 Q. What did he tell you about this engine? A. I asked him if it was O. K. to move it and he said yes.

Q. And then you moved it? A. Yes, sir, moved it on schedule time.

Q. Did Kelly ask you what you backed out so early for? A. No, sir.

Q. Did you have any conversation with Kelly about backing out early? A. No, the only conver-

40 sation I had with Mr. Kelly was, "Don't wake the

dead blowing that whistle, because they will come down and have us arrested."

Q. What? A. They have an ordinance in Grandon—

Q. What did Kelly say to you and what did you say to Kelly about your backing out early? A. He never said nothing to me. 10

Q. He never said nothing to you? A. No, sir.

Q. And when was it he told you not to blow the whistle too loud? A. He was walking through the roundhouse; that was about 2:30; he had already moved the engine.

Q. Had you known at that time that a man had been killed? A. No, sir.

Q. Kelly didn't know it? A. No, sir.

Q. And Kelly never said to you that you backed out too early? A. No, sir. 20

Q. Was there any system or custom of warning men in the roundhouse of the movement of these engines, keeping in mind the fact that a whistle, that whistles are blowing all the time and bells sounding all the time and give no warning—was there any system or custom of warning these men concerning some of whom who had been so employed had been killed—was there any custom of warning them of the intended movement of an engine by the hostler? 30

Mr. Carey: I object to that question.
The Court: Objection sustained.

Q. You have already testified that you complained because there was danger of people being hurt? A. Yes, sir.

Q. In view of that was there any custom, after your complaint, about warning men working in the vicinity of engines about the intended movement 40

of engines? A. The engine was put on a blackboard; the engine was posted to go out at a certain time.

Q. That was the only warning? A. Them men were governed accordingly.

10 Q. Is that the only warning that was given? A. I don't know whether that was given or not, but that is what I surmised.

Q. You say there was a custom of writing up on a blackboard the time an engine would move? A. Yes, sir.

Q. Whether it was done in this case or not you do not know? A. No, sir.

Mr. Simpson: That is all.

The Court: Recess.

20

(Recess until two P. M.)

---

After Recess.

JAMES H. KELLY, sworn.

*Direct examination by Mr. Simpson*:

Q. Where do you live? A. 30 Cornish Street, North Bergen.

30 Q. What is your business? What was your business on July 26th, 1926? A. Assistant terminal foreman, nights, at the Grandon Roundhouse.

Q. Were you in charge this night? A. I was.

Q. And this man Marcone, what was his work? A. Box packer.

Q. What time did he go on duty this night? A. Seven P. M.

Q. Until what time did he work? A. Until three

40 P. M. in the morning.

Q. What was his work during that time, what did he do? A. Box packer, on inspection work.

Q. What does that mean? A. Well, packing journals, drive boxes—

Q. How long had he been employed in the roundhouse? A. That I don't know.

Q. Had he been there for some time? A. He was there as long as I was foreman—first of July. 10

Q. In doing this work, in packing boxes, did he have to go to the different engines on the tracks in the roundhouse? A. Yes, sir.

Q. And put grease and oil— A. Yes, he did.

Q. Who was his superior? A. Robert Siddell.

Q. What was he? A. Gang leader.

Q. And this man would do whatever he told him to? A. Yes, sir.

Q. Now this engine that killed him, do you know what time he left the roundhouse, of your own knowledge? A. No, not the exact time I don't. 20

Q. Did you send McGee for it? A. I did earlier in the evening. An hour before that I told him O. K. to take it out whenever he got it ready.

Q. Told him what? A. I told him an hour before she was O. K. to take out of the house.

Q. Where was she to go to? A. To Weehawken.

Q. What for? A. To take a train out.

Q. To where? A. Freight. 30

Q. Freight to where? A. I don't know the number. It is called the Morning Glory, but it has a number.

Q. Morning Glory? A. Yes, sir.

Q. A freight train? A. Yes, sir, freight train.

Q. Do you remember having a talk with McGee in which he complained to you before the accident of the conditions around the roundhouse were such that some of these laborers would be injured or killed? A. Yes, sir, he complained about it. 40

Q. What did he tell you about it? A. He told

me the men had a habit of going out to cool off and sitting around back of the engines in the back of the roundhouse and he would come in back, see, and he said he wanted it stopped.

Q. Came in what? A. He always come in the back way.

Q. He came in the back way? A. Yes, before that. I mean he crossed over the turntable and come through the back end of the roundhouse.

Q. You mean the men would come right in the roundhouse? A. McGee did.

Q. He would do what? A. To come in to take an engine out, he would, and that is how he discovered the men there.

Q. What system was there in the roundhouse of warning the men that an engine was going to move? How would the hostler warn them? A. Start the bell and give three blasts of the whistles.

Q. If the whistles and bells were going all the time what kind of warning was that?

Mr. Carey: Objected to.

The Court: Objection sustained.

Q. Was that the only system you had in that roundhouse of warning the men? A. The whistle was the warning to the men.

Q. That was the only system you had? A. Yes, sir.

Q. Did you say— A. I did tell McGee in the course of a conversation not to blow the whistle too hard.

Q. And did you tell him after the accident was all over, "Why did you take this engine out so early?" A. No, sir, I did not after the accident; before the accident I spoke to him.

Q. What did you tell him before the accident?

A. I had been in the roundhouse and I heard the whistle blow so loud, and I came down to the roundhouse and said to him, "Don't blow that whistle so loud or you will have us locked up."

Q. What did you do then? A. Said not to take them out too early when it wasn't necessary. 10

Q. And then you came away? A. Yes, sir.

Q. How soon after that did he take it out? What time was it when you told him that? A. That is as I can recall sometime after two. I don't know the exact minute.

Q. You told him not to take it out too early if it wasn't necessary? A. Yes, sir.

Q. Did you know sometimes they took them out early so they could go to sleep afterwards? 20

Mr. Carey: I object to that.

Mr. Simpson: Withdraw that question.

Q. You did tell him—you left him in the cab and told him not to take it out too early if it wasn't necessary? A. Yes, sir.

Q. What was the next you knew that there had been any trouble? A. I proceeded down the roundhouse and got to the assistant foreman, and the next I heard was this whistle blown again, three short blasts, the whistle to go on out on the turntable, and I seen it was him with the cab all lit up and actually he started to move out; and two or three minutes after that we heard the turntable man holler, and we went down, thinking the engine had gone off the track. 30

Q. What did you do? A. Went back to the roundhouse and to the turntable and I saw Marcone lying there with his head off.

Q. How many men worked there at night, la- 40

borers, what was the number of employees working around the roundhouse? A. Around forty.

Q. Forty? A. Yes.

Q. They all work from seven at night until three in the morning? A. On that shift.

10 Q. There was something said about a custom of putting the time up on a blackboard that the engine was to go out. What do you know about that? A. Yes, sir, we have a board down there telling the time the engine is to leave.

Q. What was on the board that night? A. The time schedule for it to leave.

Q. Three o'clock? A. The time on this board?

Q. Yes, what was on this board with reference to this engine? What time was she to leave, on

20 the board, three o'clock? A. I don't remember just what time.

Q. Would it be the same time she was scheduled to be out in the yard for the crew? A. Well, yes.

Q. Who put this up on the board? Who was supposed to? A. General foreman, days.

Q. The day foreman? A. Yes, sir.

Q. Did you go to the place of the accident? A. Almost to the place of the accident; I didn't go right to it.

30 Q. Did you see the bloodstains or anything of that kind? A. No, I didn't.

Q. You didn't trace any bloodstains then? A. No, sir, I didn't.

Q. What time did the train called the Morning Glory leave? A. I don't recall that.

Q. Four o'clock? A. Yes.

Q. And this train—referring to the train the witness has referred to as leaving Weehawken at four

40 o'clock in the morning called the Morning Glory,—

do you know who the crew were that took the engine out? A. No, sir; I don't recall.

Q. Where would be the record of that? A. In the dispatcher's office.

Q. Train dispatcher's office? A. In the roundhouse. 10

Q. Would that Mr. Weiss be the man to have those records? A. No, sir, he would not.

Q. Who would have those records? A. The engine dispatcher.

Q. The engine dispatcher? A. Yes, sir.

Q. You don't know anything about the accident yourself, you didn't see how it happened? A. No, sir, I didn't.

Q. Now these forty men working in and around the roundhouse, what would be their general duties? A. Several machinists, there were several machinists' helpers, boiler makers, boiler makers' helper; chief metal worker and helper; and then we have laborers working on the inspection wagon; gang leader and machinists' helpers. 20

Q. And the immediate superior of this man killed, what was his name? A. Robert Siddell.

*Cross examination by Mr. Carey*:

30

Q. Where were you when you heard this loud blasts of the whistle that you mentioned? A. I first heard it down in number one stall in the roundhouse.

Q. That is the stall down on this end (indicating)? A. That is number one.

Q. And what track did this engine 3709 go out on? A. I believe track seven or nine; I don't remember which one it was now.

Q. You don't remember? A. No. 40

Q. Where did you go after you heard that blast

of the whistle? A. I came down from the roundhouse to caution the hostler not to blow the whistle too loud.

Q. How many blasts did he blow? A. Three, the customary.

10 Q. How long was it after you heard blasts on the whistle that you told him not to blow so loud? A. Five minutes.

Q. What reason had you for directing him not to blow too loud? A. Because I told him the North Bergen Police Department had been down there two or three times and told me if I continued he would lock me up.

Q. You say that this blackboard had the time when the engine was to leave the yard? A. Yes,
20 sir.

Q. But that did not refer to the time when it was to be taken out of the roundhouse? A. No, sir.

Q. Did you get the time that this engine was scheduled to leave the yard? A. The hostler got it in the early part of the evening when he started to work.

Q. Where was this blackboard posted? A. In the center of the roundhouse.

Q. Center? A. Yes, sir.

30 Q. At the front end? A. Stall twelve.

Q. Stall twelve? A. Yes, sir.

Q. That is there (indicating). And where in stall twelve was it posted, at this end here? A. It was posted on the main wall of stall twelve, the partition wall.

Q. That was inside the roundhouse? A. Yes, sir, inside the roundhouse.

Q. How far from the doors through which the
40 engine passed out? A. That was at the front end

of the roundhouse, the board was, in front of the engine.

Q. In front of these tracks? A. Yes, sir.

Q. And at what time was the time posted on that board? A. Three o'clock, I believe.

Q. No, I mean what time was the board hung up with the leaving time on it? A. The leaving time of the engine? 10

Q. Yes. A. I don't recall whether it was on the board that night or not; it was customary to; but I gave the hostler the leaving time anyhow.

The Court: The question was, what time was that board hung up?

The Witness: The board is permanent.

The Court: What time were the notations put on the board? 20

The Witness: Probably put on before the general foreman, days, went home. He went home at five or six o'clock and he would put it on before he went home. In other words, the line-up for the night's work.

Q. Were all of the times that engines were to leave put on the board at one time or at different times? A. At different times. 30

Q. Now about how long before the engine was to leave the roundhouse would this time be posted up on the board? A. This particular engine was put on there before I got to work that night.

Q. Before you got to work? A. Yes, sir.

Q. And was its leaving time posted also? A. Yes, sir.

Q. Before you got to work? A. Yes, sir.

Q. Who gives out the engines upon which work is to be done? A. Well, that is determined; when an engine comes in the house the engineer makes 40

a report on a sheet and it is put on the board in front of us by the foreman.

Q. There is a gang of men who go around examining the engines and doing what is necessary fixing it to go out? A. That is the inspection gang.

10 Q. The inspection gang? A. Yes, sir.

Q. What gang was this man Marcone in? A. In the inspection gang.

Q. In the inspection gang? A. Yes, sir.

Q. Now who gives to the inspection gang the engine numbers that they are to work on? A. The foreman, me.

Q. That would be in this case who? A. Me or my assistant.

Q. So that this inspection gang has a list of the

20 engines they are to work on? A. Yes, sir.

Q. And given by you? A. Yes, sir.

Q. Does that list give any notations as to the time the engines are to leave? A. The inspector goes down to the board and gets it off the board.

Q. I am asking you this question: Does this list of engines which you give to the foreman of the inspection gang have on it the times that the engines named thereon are to leave? A. No, sir.

30 Q. Does not? A. No, sir.

Q. How many blasts of the whistle did you hear? A. I heard six.

Q. All at one time? A. No, sir.

Q. Where were you when you heard the first blast? A. At number one stall.

Q. At number one stall? A. Yes, sir.

Q. And then you went up to number eight? A. Twelve.

Q. Up to number eight stall and spoke to McGee,

40 did you? A. Yes, that is it.

Q. And was it before or after you had spoken to

McGee that you heard three other blasts? A. After I spoke to McGee.

Q. About how long was that? A. That was about five to eight minutes afterwards.

Q. Did McGee blow those blasts? A. Yes, sir.

Q. Now at the time you passed this stall number eight where McGee's engine was located, which end of the engine did you pass, the front end? A. The front end.

Q. The front end? A. Yes, sir.

Q. Will you state whether or not the headlight was lighted at the time you passed? A. Yes, sir, the front end, yes, sir.

Q. Do you know whether the bell was ringing on the engine? A. Yes, sir, I do. The bell was ringing.

Q. And where was McGee? A. In the cab on the right side.

Q. Did you notice what was on the tracks adjacent to track eight, on either side? A. Yes, there was a locomotive on each side of it.

Q. A live or dead locomotive? A. One was alive and one was dead.

Q. Which one was the live one? A. That I don't remember which was alive and which dead.

*Redirect examination by Mr. Simpson:*

Q. Why did you tell the hostler not to take this engine out too early unless it was necessary? A. At times they take them out to the plug and we have a mid track there, and sometimes we have to cross over and use it to clear the engines out when the other track is plugged out, and sometimes they get them out there on the mid track and we have got to move them over again; and at other times we have got—

Q. That is why you told him not to take it out too early, unless it was necessary? A. Yes, sir.

Q. And five minutes after that he did take it out? A. Yes, sir.

Q. Five minutes after you told him not to take
10 it out too early unless it was necessary and went away? A. Five minutes after that I saw it backed out.

Q. What is the name of this day foreman? A. Mr. Hesson.

Q. How long has that system been in vogue there, of writing the time of leaving on the board so the men can see the time of leaving? A. Ever since I have been there.

Q. How long have you been there? A. Since the
20 first of July two years ago.

Q. This first of July it is two years? A. Yes, sir.

Q. So during all the time you have been there that has been the system? A. Yes, sir.

*Recross examination by Mr. Carey*:

Q. About what time was it, Mr. Kelly, when you first spoke to Mr. McGree? A. I don't recall; I didn't look at my watch; I can't just tell you the exact time.

30 Q. Do you know about what time it was when you learned this accident had happened? A. No, I couldn't tell you that either. I was too excited to look at the time.

*Redirect examination by Mr. Simpson*:

Q. There was a written record made by you or McGee in July of the exact time of the accident, wasn't there? A. Yes, sir.

Q. That is in the possession of the company?
40 A. Yes, sir.

CORNELIUS McGEE, recalled.

*Cross examination by Mr. Carey:*

Q. Mr. McGee, you say it was about 2:20 when you first went to the engine number 3709? A. Yes, sir. 10

Q. And is that standard or daylight time? A. Standard.

Q. How long after you went there was it before you got in the cab of the engine? A. How long before I got in the engine?

Q. After you reached the engine how long was it before you got in the cab? A. I should imagine about five minutes.

Q. You came, as I understand it, on the left side of the engine? A. Yes, sir. 20

Q. That is, you came in by track number one? A. Yes, sir.

Q. And what track was it that you engine was on? A. Track eight.

Q. You walked to track eight on the rear of the engine? A. Yes, sir, on the left-hand side.

Q. And you turned into stall eight on the left-hand side? A. Yes, sir.

Q. Facing the front? A. Yes, sir.

Q. And walked up the side of the engine? A. Yes, sir. 30

Q. Now as you came into stall eight what was the position of the rear end of the engine tender? A. The engine tender was sticking out about four foot.

Q. About four foot outside the door? A. Yes, sir.

Q. And as you came up there could you see along the rear of the tender? A. Yes, sir.

40

Q. Was anybody at the rear of the tender when you came there? A. No, sir.

Q. Now you walked up the left-hand side again. A. Yes, sir.

Q. When you got to the cylinder you said you
10 did something to the cylinder cock. A. To see if the pet cocks were open. They generally screw them off a little bit.

Q. And you attended to that, did you? A. Yes, sir.

Q. Was it necessary to close that before you took your engine out? A. Yes, sir, it is unless you don't move very fast, the steam escapes out through the porthole.

Q. What did you do, pass around in front of
20 your engine? A. Yes, sir.

Q. To the right-hand side? A. Yes, sir.

Q. And after you got around to the front what did you do then? A. I went all the way to the back. There are chains underneath the wheels on both sides.

Q. Chains? A. Yes, sir.

Q. Underneath what wheels? A. Underneath the main drive. A couple of chains there, and in order for me to walk around the whole engine it
30 is necessary for me to walk around—

Q. And you did that that night? A. Yes, sir.

Q. And walked back to the rear of the engine? A. Yes, sir.

Q. Now, at the time you walked around this engine, from the time you came to it on the left hand side until you came to the rear of the engine on the right hand side, was anybody working on that engine? A. No, sir.

Q. When you pulled out those chains from the
40 drivers, you could see under the engine, couldn't

you? A. Yes, sir, I looked under the engine for all obstructions,—probably they leave a board under there or something.

Q. Who leaves something under there? A. A box packer or men working underneath the engines. If they do I go find that man and make him take that board out, or whatever he put in there. 10

Q. It is a part of your duty to look under your engine to see if anything is underneath? A. Yes, sir.

Q. And you did that that night? A. Yes, sir.

Q. And you saw nobody underneath or around the engine? A. Nobody.

Q. On which side of your engine was this, was the live one? A. On the right hand side.

Q. That would be on what track? A. On track number seven. 20

Q. On track number seven? A. Yes, sir.

Q. So the live engine was on track number seven? A. Pardon me. Track number nine—it starts from this way (indicating).

Q. Track number nine? A. Yes, sir.

Q. Was anybody working on that engine when you were around there? A. No, sir.

Q. And the engine on track number seven was dead or alive? A. Dead. 30

Q. What do you mean by a live engine? A. An engine that is fired up, and a dead engine is an engine put in for a wash-out and the fire taken out of it.

Q. After going around to the rear of the engine, after passing in front of it and removing the chains, and looking underneath for anything that might be underneath the engine, what did you do? A. After I seen everything was clear I got up in my engine and started my air compressor. 40

Q. Was there anybody around the rear of the tender of your engine? A. No, sir.

Q. At any time after you arrived there that night and before you got onto the engine? A. No, sir.

Q. You started your air compressor? A. Yes, sir.

10

Q. What is that? A. That is in order to pump up air to apply brakes on your engine.

Q. It is an engine, is it? A. It is an air pump.

Q. And how is that pump operated? A. That pump is operated by steam pressure.

Q. Steam from the boiler? A. Yes, sir, boiler head.

Q. And does that make any noise? A. Yes, sir, makes considerably noise.

20

Q. How far can it be heard? A. You can hear it at least thirty or forty feet.

Q. How long did you operate that pump? A. I operated that pump until—

The Court: No, how long did you operate it?

The Witness: When I went on the engine I put it on and it was on when I left the engine outside, sir.

30

Q. When you left the engine outside it was still going? A. Yes, sir.

Q. How long had it been operating before you moved the engine out of the engine house? A. From five to seven minutes.

Q. Now, did you turn on the lights on the engine? A. Yes, sir.

Q. How many? A. You turn on one dynamo and that puts on all the lights.

Q. How many lights are there? A. There is a

40

head light and a back light and cab lights—I should imagine about twelve lights altogether.

Q. And you turned all those on? A. Yes, sir.

Q. Where an engine is standing—where a live engine is standing in the house and there is no hostler on it are the lights turned on that engine? A. No, sir, they are turned off unless a pumper gets on.

Q. And the hostler turns the lights on, does he? A. Yes, sir.

Q. After turning the lights on, you did what? A. After I turned the lights on I put on my bell.

Q. You put on your bell? A. Yes, sir.

Q. How is the bell put on? A. The bell is rung by air from the air compressor, and then I gave three blasts of the whistle.

Q. And where was your engine standing at the time you gave these three blasts? A. Standing in the center of the stack in the roundhouse—that is the smokestack.

Q. The smokestack was in position where it ventilated properly overhead? A. Yes, sir.

Q. And how near to the front of the track was the front of your engine? A. About six inches from the block.

Q. After giving the three blasts of the whistle—by the way, what does three blasts of the whistle mean? A. That means to back up to give a warning to the men on the table that you want to come out.

Q. And the man at the table sets the table for the particular engine that blows the whistle for him, is that right? A. Yes, sir.

Q. Did the turntable man respond to your signal? A. No, sir, he was down in the pit, and he was cleaning the pit and when I blew the whistle

and then Mr. Kelly came along and asked me why I blew the whistle so long and I said, "That man down there must be deaf; he won't give me the table."

Q. When you were sitting in the engine and
10 backing it out of the place where were you looking? A. I was looking back.

Q. And as you were looking back from your position in the cab—the tender of the engine cut off your view of the track for a little distance? A. For a little distance, but I can always see the table.

Q. You can always see the table? A. Yes, sir.

Q. About how far does the tender on the engine cut off your view of the track? A. I should judge
20 —I imagine about twelve feet.

Q. About twelve feet? A. Yes, sir.

Q. And about how long was it from the time you took your place in the cab before you started to back out? A. Ten minutes.

Q. And about how far from the engine house doors was the rear of your tender when you stopped? A. When I stopped, about thirty-five feet. I stopped just to clear the door so we can look out of the cab and look all around.

30 Q. Why did you stop there? A. I didn't have the table; and I moved out slow so that the man could come around and give me the table or else I could holler to him.

Q. Did you give any other warning that you were going to back out? A. When he gave me the table I blew three blasts again.

Q. About how fast did you move when you moved back the first time? A. About four miles an hour.

40 Q. And about how fast when you moved back

the second time? A. About four miles an hour the second time again. You can't go very fast on account of the table.

Q. Do you know the distance from the round-house doors, or rather from the stall doors to the turntable? A. About sixty-eight feet. 10

Q. Then, as I understand you, it was about 2:30 when you started to back the engine out? A. Yes, the engine was registered for 3:15.

Q. What is that? A. The engine was registered to go to work at 3:15.

Q. Registered for what? A. To go to work at 3:15.

Q. Where did you get that information? A. Well, I have been on the Morning Glory and all the men that I have been with all drive it out of there at the same time, 3:15 standard time. 20

Q. 3:15 from what point? A. Grandon round-house; that is the time a man registered to go on his work, fireman and engineer.

Q. The man with the records, as I recall it, said it was registered to leave there about three o'clock? A. Well, he might have left there at three o'clock, but the way we generally time we registered at 3:15. 30

Q. How long had you been acting as hostler? A. About three months to the time that happened.

Q. And had you had charge of this engine on track eight which was to go out to take the Morning Glory out before that time? A. Yes, sir.

Q. And what was your usual time of taking the engine out? A. I always deliver an engine out half an hour before leaving time.

Q. Do you know what the custom was with the other hostlers? A. Yes, sir. 40

Mr. Simpson: I object to that.
The Court: Objection sustained.

Q. Did you take out this engine on the night of the accident at about the usual time? A. Yes, sir.

10 Mr. Simpson: I object to that, if your Honor please. That is a matter of opinion. Testimony is already in the case, and that is the important part of this case, that the time the engine was to leave was up on a board; and that is a matter of fact and not an opinion. He asks him his opinion as to his usual time.

Mr. Carey: I withdraw the question.

20 Q. Did you take this engine out this night at about the usual time you are accustomed to take the engine out for this particular train?

Mr. Simpson: I object to that. That is a conclusion. The testimony in this case is that men in the roundhouse got warning of the movement not by bells or whistles but by something on the board.

The Court: The jury will remember what was testified to. This witness has already

30 said that he took the engine out at twenty minutes to three, I think it was—the testimony as I remember it— As I say, the jury will take its own recollection as to what the testimony is; that he got on the engine about half past two and took it out about twenty minutes of three. He has further testified that he did the same thing every day for the Morning Glory. I will sustain the objection.

40

Mr. Carey: May I have my objection noted?

The Court: Certainly.

Q. Do you know about what time it was, Mr. McGee, when you were stopped by Mr. Maloy, the turntable man? A. It must have been about 2:40.

Q. And how long a time was it between the time when you first stopped and the time when you made the second stop? A. About 2:30 is when I started the engine moving and then when he give me the signal I had to wait from five to seven minutes at the most for him to give me the table and signal, which took up almost ten minutes more.

Q. At the time you were backing out—from the time you first started until you were notified of the accident was there anybody working on the engine on track nine?

Mr. Simpson: I object to that, if the Court please. I don't object to his saying he didn't see anybody.

The Court: Objection sustained.

Q. Did you see anybody? A. No, sir.

Q. Did you look to see? A. Yes, sir.

Q. Did you see anybody working on the engine on track seven during that period? A. No, sir.

Q. Did you look to see as you passed along? A. Yes, sir, I warned the men about the steam if they are working there.

Q. What about the steam? A. Steam—for instance, an employee—if an engine full of water—if you open the throttle on an engine full of water she will either blow out a cylinder head or else she won't move; and if you want her to move you have got to give her a lot of throttle; and that is

the reason we have cylinder throttles upon there, to prevent water and steam from being in the engine in order to make the engine move.

Q. What was the condition of this engine when you started out with it? A. In what way, Mr. Carey?

Q. General condition,—was there anything the matter with her? A. No, sir, she was O. K.

Q. Everything in good condition? A. Yes, sir.

*Redirect examination by Mr. Simpson*:

Q. Did you testify this morning that you had no conversation with Kelly about moving out earlier? Did Kelly come to you and tell you not to move that engine out too early? A. I don't remember.

Q. You say he didn't tell you not to move it too early? A. I couldn't say.

Q. Were you through when you moved this engine? A. No, sir.

Q. You weren't through? A. No, sir.

Q. You did look for men in the vicinity of your engine? A. Yes, sir.

Q. And you looked for them for the purpose of warning them? A. Yes, sir.

Q. And you didn't see anybody? A. No, sir.

---

JOHN MALOY, sworn.

*Direct examination by Mr. Simpson*:

Q. Were you the turntable man the morning of this accident? A. Yes, sir.

Q. Did you move the turntable for this engine? A. Turntable for 3709?

Q. Yes. A. Yes, sir.

Q. Why didn't you move it the first time he gave you the signal? A. I was cleaning out the

pit. I was going over the pit to let the engine out and I said, "By the time you get over her I will be ready."

Q. Why didn't you move it out at the time you got the first signal? Did you hear the first signal? A. Yes, but I was down in the pit oiling the rail. 10

Q. You were down in the pit because you didn't expect that engine out so soon? A. Yes. Then I got up—

Q. Wait a minute. Listen to the question. You were down in the pit? A. Yes.

Q. To do some work because you didn't expect that engine out so soon, did you? A. No, I didn't expect it out.

Q. You didn't expect her out? A. He told me he was going to get the engine out and I said, "All right, where you going?" and he said, "On track eight"; and I swung the table around. 20

Q. Why didn't you expect her out? A. She was going out; I didn't know what engine is going out.

Q. You said you didn't expect her out, as I understand your testimony, and that is the reason you were down in the pit. Now why didn't you expect her out? Was it too early for her to come out or what? 30

Mr. Carey: I object.

The Court: What is the objection?

Mr. Carey: The objection is that counsel is leading his witness.

Mr. Simpson: Working for the defendant?

The Court: He is your witness.

Mr. Carey: I object to that remark, if the court please. 40

The Court: It will be stricken out.

Q. You said that you didn't expect her out. Were you down in the pit when the first signal was given? A. Yes, sir.

Q. Did you hear the first signal? A. Not the first time, no.

10 Q. You didn't hear the signal? A. I heard it the second time.

Q. You heard the signal the second time? A. Yes, three blasts.

Q. Where were you when you heard it the second time? A. Up turning the table around.

Q. To operate the table? A. Yes, sir.

Q. How did you operate it? A. Was turning her around to track eight.

Q. What was the first you knew there was any 20 accident? A. I gave him the table and the lights were lit; and I gave the signal to back up and he took my signal. The table was all right because he couldn't get off the table, you know. I got to stay there and watch it. So I stayed there and I seen him coming out and I said, "There is something dragging on that engine"; and I swung him up and stopped.

Q. What did it look like that was dragging? A. I didn't know until I got down with the lamp and 30 found it. I said, "There is a man under there"; and I went up in the air.

Q. How far was the engine away when you first saw something dragging? A. I was out on the table.

Q. Were you or the engine? A. No, the engine wasn't.

Q. How far away, when you first saw something dragging, how far away was the engine from the table? A. I couldn't say. I heard it.

40 Q. You heard it dragging? A. Yes, I took my

lamp along there to look to see if she was off the track.

Q. You couldn't see this engine? A. The engine was backing out.

Q. What was it you couldn't see? A. I couldn't see under the engine until I got up there and looked under. 10

Q. You heard something dragging? A. Yes, and I swung him up right away.

Q. When you stopped him you found there was a body underneath? A. Yes, I said, "There is a man under there."

Q. How is this turntable operated? A. By electric.

*Cross examination by Mr. Carey*: 20

Q. Did you see McGee when he came in to go into the engine stall number eight? A. Sir?

Q. Did you see McGee when he came in by the turntable to go into the stall number eight? A. Going across the table?

Q. He crossed the table, didn't he? A. Yes, sir.

Q. And you were in the pit? A. Yes, sir.

Q. And he said to you that he was going to take an engine out on track eight? A. Yes. I said, "By the time you get it there I'll be ready." 30

Q. You heard a signal, did you? A. Yes, sir.

Q. What was the first signal you heard? A. I heard three long blasts of the whistle.

Q. What does that mean? A. And the bell ringing. I heard the bell ringing too.

Q. At the same time? A. Yes, sir.

Q. Where was the engine tender?

Mr. Simpson: He hasn't told us yet what the three blasts mean. 40

Q. What do the three blasts of the whistle mean? A. Back up.

Q. Back up? And to you it meant what? A. To give the signal with a lamp.

Q. It meant to you that he was ready to come out? A. Yes, I gave him the signal then to back out.

Q. Did you notice whether or not there was any light on the rear of the engine? A. There was a tail light on the tank, yes, sir.

Q. There was? A. Yes, sir.

Q. When you got out to set the turntable— A. Yes, sir.

Q. Where was the tender of the engine with respect to the doors of the roundhouse? A. Out by the door—about three feet.

Q. What? A. About three or four feet outside of the door.

Q. And you were standing on the turntable? A. Yes, sir. I can't leave there, you know.

Q. And you had set the turntable for the engine to come out on track eight? A. Yes.

Q. Now you heard something that caused you to give him the signal to stop? A. Yes, sir.

Q. And to stop right off? A. Stop right away.

Q. And then you looked for something underneath the engine? A. I ran over with a lamp to see if he was off the track or something, or if there was something dragging there, and there was a man under there.

Q. I wish you would come down to this diagram and show us on this diagram of the engine about where the body was when you found it—before you do that will you tell us on which side of the track eight this body was found? A. On the right-hand side.

Q. On the right-hand side looking toward what? A. Backing out.

Q. When you say it was on the right-hand side, on the right-hand rail, which direction were you looking? A. I was looking at the table, watching the table. I was on the table. 10

Q. You were on the table, and what direction were you looking? A. Toward the engine.

Q. Towards the engine? A. Yes, sir.

Q. Now the body was found on the right-hand side? A. Yes, sir.

Q. On the right-hand rail? A. Yes.

Q. Of that track eight? A. Yes.

Q. Now will you point out on this diagram on the engine about where? A. Backing on to track eight. I stood right here (indicating). 20

Q. You stood right on the turntable? A. Yes, right here.

Q. Were you— A. I heard something dragging and I swung him up, then—

Q. Then you later found the body? A. Yes.

Q. You see this diagram of the engine here? A. Yes.

Q. Can you see that? A. Yes.

Q. This is the front end? A. Yes.

Q. And this is the back end? A. This is the tender. 30

Q. Now will you show us about where on this tender you found that body? A. Right up in here; right between the first pair of wheels coming out.

Q. Now will you make a mark there where you found the body? Make a cross there. A. Right here (making mark on diagram).

Q. Right there between those two wheels? A. Yes.

40

Q. All right. Go back to the chair now. A. (Witness resumes the stand.)

Q. How long had you been working in that roundhouse, and at the turntable? A. Going on five years, about five years next August.

10 Q. When you set the turntable did you see anybody around the rear of engine 3709? A. No, sir.

Q. Did you look at the rear of the engine? A. Yes, sir; I couldn't see into the roundhouse, you know, at all, backing out—I couldn't see in there from the table.

Q. You couldn't see in the roundhouse? A. No, it was too far.

Q. I wasn't asking you about the roundhouse. Now about how fast did that engine come out?

20 A. Well, she was going very slow, just about as fast as a duck could trot. You can't come very fast out of that house, you know. You have got to go very, very slow in and out.

The Court: How fast does a duck trot?

The Witness: About a nice walk is all. They never go fast out of the house.

Q. How is this roundhouse lighted? A. With electric lights, like this here (indicating lights in

30 the court room) all around the front part of the engine. It was all light around there, and then there is a couple of flash lights from the wall to the back, which you can't see very well; they blind you. I don't go in there very much.

Q. Are there any lights in the rear of the engine? A. Yes.

Q. Electric lights? A. Yes.

Q. Any lights on the turntable? A. Yes.

Q. How many? A. There is one on the wheel,

40 and there is one on the left-hand side of the table and there is one on the right-hand side on the

other end. There are about three lights on the table, three or four.

Q. Did you notice whether the bell was ringing or not? A. Yes, the bell was ringing.

*Redirect examination by Mr. Simpson*: 10

Q. You said it almost blinded you, what did you mean by that, in the roundhouse? A. When you are looking from behind the tank your eyes—you can't see.

Q. What lights? A. Big bulls eyes.

Q. What lights blinded you? A. Back end of the engine, the lights on the back end of the engine.

Q. Dazzled you so you couldn't see, is that what you mean? You said blinded—don't get impatient 20 —I am using your own language—you said it was so light in the roundhouse it blinded you. What did you mean by that? A. When you go in there —you can work in front but when you walked in you can't see nothing.

Q. Can't see anything? A. You walk right against it.

---

ROBERT H. SIDDELL, sworn.

30

*Direct examination by Mr. Simpson*:

Q. What was your position on the 27th of July, 1926? Where did you work? A. New York Central, Grandon.

Q. What was your position? A. Gang leader.

Q. Of what, the roundhouse? A. Of the little inspection gang.

Q. In the roundhouse? A. Yes.

Q. What did you do in the roundhouse, take care of all the engines from Weehawken? 40

Mr. Carey: Objected to as leading.
The Court: Objection sustained.

Q. What did you do in the roundhouse? What was your work there? A. Inspecting the engines.

Q. What engines? A. Any engine I was ordered to inspect.

10

Q. How many engines were in the roundhouse? A. At times a dozen; sometimes there were thirty-two.

Q. All freight or all passenger or all kinds? A. Mixture, freight, passenger and switch.

Q. Were you boss of this man? Were you over this man who was killed? A. I wasn't boss; only gang leader.

Q. What is gang leader? A. To show them what to do and how to do it.

20

Q. What did you show him what to do that night that he was killed? A. I didn't have to.

Q. What was his work? A. Packing boxes—grease for the drivers.

Q. He knew his work and that is what he did? A. He did know his work.

Q. Did he do it to all the engines or only to the engines you selected? A. Engines I selected for him.

30

Q. What? A. Engines that I selected for him —fourteen up to 3835—we had done fourteen engines.

Q. Do you know how many he had done when he was killed? A. He had done the last one I had ordered him to do.

Q. That would be the fourteenth for him? A. Yes.

Q. Do you know which one that was? A. 3835.

40

Q. Is that the one that killed him? A. No, sir.

Q. Then he worked on fourteen engines, did he? A. Yes.

Q. And he finished the last one? A. Yes, sir.

Q. And he could then go home? A. He could not.

Q. What did he have to do? A. He had to first wait until three o'clock and wait until I come in from the farm. 10

Q. He had to wait there until you told him he could go home? A. Yes, sir.

Q. But he had done all the work it was necessary for him to do? A. When I came in and looked then the work was all done.

Q. When you came in and looked it over? A. We went out on the farm about 2:15. We had about twenty minutes work. I came in about 2:35. 20

Q. You got in about 2:35? A. Yes.

Q. Did you see him there then? A. No, he wasn't there.

Q. Were you present at the time of the accident? A. I was out on this what we call the farm, the spur.

Q. There is no cover over that in summer time. In summer time we have a couple of engines like that that don't require to go into the pit maybe once a week. 30

Q. How far was this farm from the roundhouse? A. Just suppose the circle of the roundhouse, just double that and that is where I was out on that circle.

Q. What was the first you knew of the accident? A. When I came in I started to write out my reports.

Q. What did you find? A. I didn't find anything. 40

Q. Did you see the condition there? A. No.

Q. You had no personal knowledge of the accident? A. I had none, no.

Q. When was the last time you saw him alive? A. When I was going out to the farm I gave him his instructions.

10 Q. What instructions? A. What to do.

Q. What time did you go to the farm? A. About 2:15.

Q. He was through then, wasn't he? A. He was not. He had not done 3835. He was through, but he only begun when I was done.

Q. Did you see him after he was finished with all his work? A. No, sir, I didn't see him until he was dead.

Q. What time he really finished you don't know, 20 what time he finished all his work? A. I came in and looked at the work at about twenty minutes of three o'clock, after I had been notified that there was an accident.

Q. And it was all finished then? A. Yes, then the one I gave him, 3835 was done.

Q. How long had he been under you in your gang? A. He came off the day gang onto me; I couldn't say exactly; I guess I must have had him about a year.

30 Q. Did he only do this box packing or did he do other work besides box packing? A. Yes, sir, all his work was just packing—if I asked him to do other work, of course.

Q. What was the other work? A. To fill grease cups.

Q. On engines? A. Yes.

Q. Anything else? A. That was all.

Q. Box packing and filling grease cups? A. Box packing.

40 Q. And filling grease cups? A. Only on request.

Q. But on request he did it? A. Yes, any man will do that.

Q. His particular line of work was box packing? A. Yes.

Q. But he would do whatever you told him besides box packing? A. Any man has to do that. 10

Q. And his work was confined entirely to this roundhouse, was it? A. Yes, sir.

Q. And how many engines were in the roundhouse this night? A. I couldn't tell you.

Q. You don't know that? A. No, sir.

The Court: What stall was 3835 in, do you know?

The Witness: Stall seven.

*Cross examination by Mr. Carey*: 20

Q. Had Marcone worked on 3709 that night? A. Yes, sir.

Q. What had he done on that engine? A. He packed the boxes, re-doped the engine's trucks, oiled the trailers and oiled the tank boxes.

Q. What time that night did he work on 3709? A. Before he went to supper.

Q. What time did he go to supper? A. Eleven o'clock P. M. 30

Q. You are speaking all the time of standard time? A. Standard time.

Q. So he had completed all the work on 3709 about eleven o'clock? A. About four hours before, yes, sir; about eleven o'clock, before we went to supper.

Q. Before you went to supper? A. Yes, sir.

Q. And you say he had completed the work on 3709 about four hours before quitting time? A. Yes, sir. 40

Q. And quitting time was what? A. Three A. M.

Q. You gave him directions with reference to working on 3835? A. Yes, sir.

Q. Which was in stall seven? A. Yes, sir.

Q. And you spoke about going out on the farm? A. Yes, sir.

10 Q. Was that before you went on the farm? A. Yes, sir, before I went on the farm I gave him his instructions.

Q. And what instructions did you give him? A. He had joined us just when I was finishing 3835. I looked over the engine truck wheel and called to him. I said, "I am going on the farm, Joe; finish this engine and then wait for me."

Q. Wait for you. A. He would have to wait until I come back—"Then wait for me."

20 Q. He was not to leave that place then where he was working on 3835 until you returned?

Mr. Simpson: I object to that as a conclusion.

The Witness: Exactly.

The Court: Strike it out.

Q. Then your direction to him was not to leave that place where he was working until you returned?

30 Mr. Simpson: I object to that as a conclusion. I don't object to what he told him, the actual words he used to him. I don't object to that—I withdraw the objection.

Q. (Question repeated by stenographer.) "Then your direction to him was not to leave that place where he was working until you returned?" Was that your direction to him? A. Yes, I said "I am going on the farm; finish 3835 and wait for me."

40 Q. Did you have anything to carry tools on? A. Yes, we have an inspection wagon.

Q. And what tools were carried on that? Were Joe's tools carried on the inspection wagon? A. Yes, at that time we had place on the end for his buckets. He had one end of it to himself.

Q. And what tools did he have? A. He had two buckets, one for used dope and one for new dope. Then we had a box that we carried the grease in for his cellars, and he also had a receptacle for his cellar keys, and such things as he used in his business.

Q. That cart was moved around through this roundhouse? A. Yes, sir.

Q. And where was it used; in front of the engines or in the rear of the engines? A. In front of the engines.

Q. That is around this place here? A. Yes.

Q. What is the flooring there on this space in front of the engines? A. Concrete.

Q. You spoke about going out on the farm and that, I understand it, is out in the open space? A. That is it exactly. We call it a farm for a nickname.

Q. And you told him to finish the work on 3835? A. Yes, sir.

Q. And did you see him from the time you left to go out on the farm until after the accident? A. No, sir.

Q. When you came back to look at the engine did you look to see whether his work on that engine was completed or not? A. No, not right away I didn't.

Q. When did you look? A. When the assistant foreman came and notified me that a man had been killed on the turntable.

Q. Then you looked at 3835? A. I was writing in the book and—

Q. I am asking you if after he made that inquiry you looked to see whether Marcone's work on 3835 had been completed? A. Yes.

Q. What did you find? A. I found it had been done.

10 Q. Had you assigned any other work to him than the work on 3835? A. No, sir.

Q. Was there any further work for him to do after he had completed 3835? A. Not until he got two orders, no, sir.

Q. Not until what? A. He would have to get two orders when I come in.

Q. Did you have any further work for him to do that night before quitting? A. No, not that I knew of then.

20 Q. Now, how is this roundhouse lighted at night? A. Well, she has lights in the top; she has two for each stall, one over the pit; she has two lights; and she has lights along the top.

Q. What do you mean by lights along the top? A. In front.

Q. In front of the engines? A. Yes.

Q. Around there? A. Yes. At that time there used to be lights at the head of the stalls, but I think those lights are gone now; they have heavier

30 ones up above.

Q. And what other lights are there around there? A. In the house?

Q. Yes. A. There is a flood light over the tanks in the center; the stalls all have their two lights.

Q. How near the rear of the stall is the rear light? A. Inside of the house? I would say it is about from here to that little sideboard, maybe fifteen feet from the wall—maybe ten feet—twelve feet—something like that.

40 Q. From the doors of the roundhouse? A. Yes.

Q. Is about fifteen feet inside? A. Inside.

Q. Inside the doors? Now what lights are there around the turntable inside? A. There is lights on the turntable; I don't know whether there is two—there is lights on the turntable shanty—only one on the turntable. There is a shanty. There is lights over that turntable on the shanty, over the tip, or the flooding out light that as he swings around it floods right on the rails.

Q. And what are these lights that you have spoken about? A. What lights do you mean, in the house?

Q. The lights that you have been telling us about? A. They are electric lights.

Q. How large? A. Well, I just couldn't tell you what power they are; they have a reflecting thing above them that throws the lights down over the workmen or over that walk-way in between; but the power of them I couldn't tell you that because I don't have nothing to do with the electric part of it.

Q. Are there any large lights out in the yard, around the section you spoke of as the farm? A. Not the farm proper, but at the head of the farm there is a tall pole with flood lights on that, a couple of them. They shine down on the farm and in coming over the turntable they are over a pole about seventy-five feet high—seventy feet anyway.

Q. How many of those poles are there? A. Only one I know of. There are some down in the ash pit, but they are not for the roundhouse.

Q. How far is that from the roundhouse? A. Oh, that is two hundred yards.

Q. What? A. About two hundred yards, I guess.

Q. Is there a second large light out in the open?

A. There was one at that time, at the head of the turntable, but I think they have taken that pole down. I am not so positive. That is what I am talking about—at the time that the accident happened there was a large light near the turntable
10 besides the two at the end. There is one right at the entrance to the turntable.

Q. How high is that light? A. Only about half as high as the big flood one, we will say maybe thirty-five feet.

Q. How many lights on that pole? A. I believe there was only one. I didn't pay so much attention to it. It was a heavy one.

Q. Did Marcone make out any report of the work he had done that night? A. He didn't have
20 time to make out any report. I took care of that.

Q. You took care of that? A. Yes, sir; I told him what to do.

Q. Did you inspect his work? A. Yes.

Q. You knew what he had done? A. Oh, yes.

*Redirect examination by Mr. Simpson*:

Q. Did you tell those men to finish the work on this engine and come over to you at the farm? A. No, sir.

30 Q. Didn't the men at the farm when you were writing in the book say to you all you men were—A. What is that?

Q. Did you have any of your men at the farm with you? A. I certainly did.

Q. How many did you have? A. The machinist's helper, the cab man and Dick, the laborer.

Q. And where were the rest of your men? A. One was working on the cylinder cock on the—

Q. This engine you left him working on was
40 right next to track eight, was it? A. Yes, sir.

DONATO MARCONE, sworn.

*Direct examination by Mr. Simpson*:

Q. Your son is Joseph Marcone, or was, was he? A. Yes, sir.

Q. What is your name? A. Donato Marcone. 10

Q. How old are you? A. Fifty-six.

Q. Is your wife alive, the boy's mother? A. Yes, sir.

Q. How old was the boy that was killed? A. Twenty-four.

Q. How much money did he make a week? A. Twenty-eight dollars a week.

Q. Did he bring it home? A. Yes, sir.

Q. And you gave him his food and clothes, is that right? 20

Mr. Carey: Objected to.

*Cross examination by Mr. Carey*:

Q. You say he made twenty-eight dollars a week, your son? A. Yes.

Q. And where did he live? Did he live with you? A. Yes, he lived with me, I lived with him.

Q. How much did he pay for his board? A. No, no, no board. 30

Q. What? A. Don't pay board, he give it to me, the money.

Q. You gave him his board? A. He didn't board at my house.

Q. He didn't board at your house? A. No.

Q. Did your son live at your house? A. (No answer.)

The Court: I think we had better have an interpreter.

(Examination continued through an Italian interpreter.) 40

(Question repeated.)

A. Yes, always.

Q. Always lived at your house? A. Yes.

Q. Did he pay you fifteen dollars a week? A. No, sir; he gave me twenty-three dollars per week and then he take five dollars for himself. That
10 is all.

Q. You were working also? A. Yes, I worked there fifteen years.

Q. How much were your wages? A. Same, twenty-eight dollars, same pay as my son.

Q. You were not dependent on your son, were you? A. Well, he helped me. Now I am not doing much; I am—

Q. You are still working, aren't you? A. Yes.

Q. Getting the same wages? A. A dollar less.

20 Q. Twenty-seven dollars a week? A. Yes.

---

JAMES H. KELLY, recalled.

*Cross examination by Mr. Carey*:

Q. Mr. Kelly, are you familiar with the lighting of the roundhouse at the time this accident happened? A. Yes, sir.

Q. Won't you tell the jury how it was lighted? A. Well, from the center over each stall outside
30 the track is a one hundred bulb light, and at the end of each stall there are two flood lights that flood it this way, at the back end of the house, and in the front of the house there are two flood lights that go that way at each stall; the entire roundhouse is equipped that way.

Q. Those lights give good light in the roundhouse? A. Yes, sir; and when they are out it is my duty to see that new ones are put in.

Q. How is the space around the turntable there
40 outside of the roundhouse lighted? A. There are

three lights on the turntable, a flood light on each end, one in the center of the turntable cabin; there is a small bulb on the outside and then at the pole with three flood lights at the outgoing track of the turntable.

Q. Will you come down and point to the position of the flood lights on the diagram? A. The flood light is right out here (indicating) and here is the front light here. 10

Q. And where are the lights on the turntable? A. This is the turntable cabin here, and there is a light on this side of the turntable cabin, and the light on this end of the table—on both ends of the table—and a light here and a light there and a light in the center.

Q. Now you have stated the position of that large flood light? A. Yes, sir. 20

Q. Is there any large flood light down in this section here (indicating)?

The Court: The witness is pointing out places on the map which mean nothing to the stenographer.

Q. I will have him mark on the map when he locates them. Won't you mark on the map the lights—at the turntable? A. Yes, sir. 30

Q. Mark with an L so we know it stands for lights? A. Yes, sir.

Q. Make a good big letter. A. There is one here and there is one here and this is where the flood light is right here and this is where the pole is right here and there were flood lights at the top.

Q. That is about, I suppose, the center of the roundhouse? A. Yes, sir, about the center of the roundhouse.

Q. There was at the time a pole right here? A. Yes. 40

Q. Near track thirty-two? A. Yes, sir, the pole was right here, see, and the pole stood out here in the center of the farm; and these stood right here in the center of the farm, but during a recent storm we had last summer we discontinued the lights.

10 Q. That was after the accident? A. And they changed the pull from Weehawken.

Q. That was after the accident? A. Yes, sir.

Q. That the change was made? A. Yes, sir.

*Cross examination by Mr. Carey*:

Q. What would you say about the turntable main shed, that it was so lighted that it blinded you? A. What I meant by that, when you come in front, you see the light was so strong that not 20 being used to the lights it would kind of blind you for a second, going into the back end.

Plaintiff Rests.

Mr. Carey: If the Court please, I move for a nonsuit on the following grounds:

First. That at the time of receiving the injuries which resulted in his death plaintiff's intestate was not engaged in interstate commerce;

30 Second. No negligence has been established against the defendant;

Third. The negligence alleged in the complaint has not been established against the defendant. The negligence alleged in the complaint is that the engine was not in proper order; that no signal was given; that the brakes were out of order. None of those elements of negligence have been proven. On the contrary they have been disproven.

40 Fourth. At the time of receiving the in-

juries resulting in the death of plaintiff's intestate he was not acting in the scope of his employment.

Fifth. The injuries which resulted in the death of plaintiff's intestate arose out of his negligence. 10

Sixth. The proximate cause of the death of plaintiff's intestate was his negligence.

Seventh. The injuries which resulted in the death of plaintiff's intestate were received at the place where his duties to defendant did not require him to go.

The Court: I will rule on your motion Monday morning.

(Recess until Monday morning, May 7, 1928.) 20

---

Monday Morning, May 7, 1928.

(The above entitled cause continued pursuant to adjournment.)

The Court: (After hearing argument.) The motion for nonsuit will be denied and an exception allowed.

Mr. Carey: The exception is noted?

The Court: Yes. 30

---

DEFENSE.

CORNELIUS McGEE, recalled.

*Direct examination by Mr. Carey*:

Q. Mr. McGee, did you see the body of this man after the accident happened? A. Yes, sir.

Q. How soon after the accident happened did you see the body? A. Why I should imagine about three minutes; just as soon as the man notified me. 40

Q. You got off the engine, did you? A. Yes, sir, just as soon as I put her in a safe position.

Q. And where did you go? A. Right to the accident.

Q. Did you see the body? A. Yes, sir.

10 Q. Where did you see the body? A. I seen the body on the track number eight with the body on the outside of the rail toward number nine.

Q. Toward what? A. The body toward number nine.

Q. On the right hand side? A. Yes, sir.

Q. When you say the right hand side, in which direction were you looking? A. Looking toward the back of the tank, toward the tank.

Q. What is it? A. Toward the tank, outside.

20 Q. Which way were you facing? A. I was facing outside the roundhouse.

Q. Which way was the engine facing? A. Towards the front of the house.

Q. Won't you come down to the diagram here and show us what you mean by the right hand track or right hand rail of the track you were on? A. Yes, sir.

Q. Do you see track eight (indicating diagram)? A. Yes, sir.

30 Q. Which rail do you refer to when you say the right hand rail? A. This rail right here.

Q. Will you put an X mark on that rail which you refer to? A. Yes, sir (marking diagram with an X).

Q. Is that rail adjacent to track seven or track nine? A. Track nine.

Q. Referring to this diagram of the engine on this map, where did you find the body? A. Right there beside that. He has got two trucks on this,

40

but that has three trucks, laying right in here (indicating on diagram).

Q. Your mark, you just put in front of the second of the rear wheels on the tender? A. Yes.

(Witness resumes the stand.)

Q. Were there any tools along the track there? A. No, sir.

Q. Do you know what tools this man used? A. Yes, sir.

Q. What did he use? A. I seen them—I didn't see him, but I seen them carrying a pail and a box-packing outfit.

Q. Were there any tools of any kind along the track there at that time when you first saw the body? A. No, sir.

Q. Did you see any blood marks? A. I seen blood marks after the accident.

Q. After the accident? A. Yes, sir.

Q. Where were the blood marks which you saw? A. About thirty feet going into the house from the turntable.

Q. About thirty feet from the turntable? A. Yes, sir.

Q. And the distance from the turntable to the door of the roundhouse being sixty-eight feet that would be about half way? A. Yes, sir.

Q. Now where were those blood marks with reference to the right-hand rail which you have marked? A. On the right-hand rail.

Q. And from that point did you trace the blood marks to a point which you have referred to? A. Yes, sir.

Q. And how far did that extend? A. To the turntable where the accident happened.

Q. At the place where you found the body? A. Yes, sir.

Q. What part of the body—was any part of the body outside of the right-hand rail? A. Yes, sir, his shoulders were the only thing laying on the rail and all the rest of the body was outside towards track number nine.

10 Q. Did you see any marks along the outside of the right-hand rail of track eight? A. Yes, sir, from where the accident started.

Mr. Simpson: I object to that and ask to have it stricken out.

The Court: Strike it out.

Q. Where, with reference to the blood spots that you saw? A. About thirty feet.

Q. About thirty feet from the blood spots? A.
20 No, about thirty feet from the turntable.

Q. Now where did the dragging marks start with reference to where you saw the first of the blood marks?

Mr. Simpson: If the Court please I object to the form of the question—"dragging marks." There is no proof whatever that this witness knows what dragging marks are, and it is purely a conclusion. I don't object to him describing the marks so that
30 the jury can say what the dragging marks are.

The Court: Reframe the question so as to use instead of the words "dragging marks" have it refer to the marks he previously testified to.

Q. Referring to the marks which you have previously testified to, where did those marks begin with reference to the first of the blood spots which
40 you saw? A. Right opposite.

*Cross examination by Mr. Simpson*:

Q. Do you now recall that the foreman told you not to take this engine out too early? A. No, sir.

Mr. Carey: If the Court please, I object to that question; and I also move to strike out all the testimony with respect to the alleged conversation between the assistant foreman Kelly and Mr. McGee with reference to the early taking out of the engine, on the ground that there is nothing in the complaint which calls upon us or which alleges negligence of that character, and counsel has already said that he relies upon negligence in failing to give warning. 10 20

Mr. Simpson: I submit it is too late to move to strike it out.

The Court: Motion denied.

Mr. Carey: Exception noted.

The Court: Certainly.

Q. You did have a conversation with the foreman about this one engine, didn't you? A. Only about the whistle.

Q. Did you have a conversation about any other engine that you moved that night? A. No, sir. 30

Q. Had you moved any other engine that night? A. Yes.

Q. How many had you moved? A. I won't say just how many, maybe four or five.

Q. Do you know the numbers of them? A. No, sir.

Q. What time did you move the first engine? A. I couldn't recall that.

Q. Did you go to the board to look what time this engine was supposed to leave before you 40

moved this engine that was in the accident? A. No, sir.

Mr. Carey: Object to the question. It relates to no negligence which is alleged in the complaint, and it is immaterial.

10 The Court: Objection overruled.

Q. Did you go to this board?

Mr. Carey: I object to that, and ask that my objection be noted.

The Court: Yes.

Q. Did you go to this board in the roundhouse where it stated engine so and so is scheduled to leave at such and such a time? Did you go to

20 that board in question?

Mr. Carey: I object to that question. That represents the time the engine crew was to take the engine out away from the roundhouse and not the time when the engine was to be moved out of the roundhouse by the hostler.

The Court: Objection overruled.

Mr. Carey: Objection noted.

The Court: Yes.

30

Q. Did you go to this board before you went to this engine that was in the accident? A. No, sir.

Q. Then you didn't know what time was up on the board for that engine to leave? A. I knew.

Q. How did you know it? A. I have my orders before I go to work.

Q. Who do you get your orders from? A. Mr. Kelly, right on a slip.

Q. Have you got that slip? A. No, sir.

40 Q. Who has got the slip? A. That slip is tore up.

Q. What did that slip say as to time? A. Give me the time it was due out, three o'clock.

Q. 3:18? A. The crew was supposed to get on the engine at three o'clock.

Q. And the time you had on your slip was three o'clock? A. The time I had was the time to be moved out of the roundhouse. 10

Q. Who gave you those slips? A. Mr. Kelly.

Q. Who gave you that slip? A. Mr. Kelly.

Q. What did it say? A. The time the engine was to be moved.

Q. What did it say on your slip, 3, 4? A. I suppose it said 2:30.

Q. What? A. About 2:30 I suppose.

Q. You know perfectly well it said 3 o'clock because you have already sworn that the time the engine was due to leave was three o'clock. 20

The Court: He said the time the crew was to leave.

Q. If you don't know say so. A. (No answer.)

Q. You are guessing now about the time, aren't you? A. No, sir.

Q. Did you go to the board to look if it was 2:30 on the board? A. No, sir.

Q. Where is this board? A. In the middle of the roundhouse. 30

Q. Who has got that slip that was given to you? A. Nobody.

Q. What did you do with it? A. When I do my work I throw the slip away.

Q. You threw it away? A. Yes, sir.

Q. And you didn't say anything about when you were called here about having a slip the last time the case was on, about having a slip with 2:30 on it. A. Not that I know of; I wasn't asked. 40

Q. Who have you talked to since you were here last? A. All the men that have been there.

Q. The foreman? A. Yes, sir.

Q. The claim agent? A. No, sir.

Q. You got on this engine at what time? A. I
10 got on the engine about 2:20.

Q. Were you a green hostler or experienced? A. Experienced hostler.

Q. How long have you been a hostler? A. Off and on.

Q. Off and on? A. Yes, sir.

Q. What time did you give the time to the turntable man, the three blows of the whistle for the turntable? A. 2:30.

Q. 2:30, just as soon as you got on the engine
20 you gave him the three blows. Did you get the turntable then? A. No, sir.

Q. How long did you have to wait before you got the turntable? A. Ten minutes.

Q. Did you say to the foreman that the turntable man must have been asleep? A. Yes, sir, something like that.

Q. Something like that? A. Because he had to give the whistle—when they give a whistle they generally have a table—

30 Q. But you gave the whistle then just as soon as you got on the engine? A. I didn't give it as soon as I got on the engine.

Q. You have already sworn that you got on the engine at 2:20 and you gave the two blows at 2:30. So you gave the blows as soon as you got on the engine.

Mr. Carey: I object to that.

The Court: Objection sustained.

40 Q. You gave the three blows at 2:30? A. Yes, sir.

Q. And you didn't get the turntable? A. No, sir.

Q. And you said to the foreman, "He must have been asleep." Where was the foreman? A. The foreman I mean on the floor.

Q. What? A. The foreman on the floor. He was saying something. I couldn't understand what he was saying—arguing to me. 10

Q. What was he arguing to you about? A. "Don't blow the whistle so loud."

Q. Did he say anything about not moving too early? A. I don't remember that.

Q. Was that when you gave the first three blows? A. That was when I gave the first three blows, just before he came in.

Q. And that is when he said, "Don't blow so loud"? A. Yes, sir. 20

Q. And that is when you said, "The turntable man must have been asleep. A. Yes, sir.

Q. When you gave the first three blows you had to wait ten minutes? A. Yes, sir.

Q. When you got the turntable the second time what did you do? A. Moved out.

Q. How did you know you had the turntable? A. I could see out there and I seen his signal.

Q. Whose signal could you see? A. The turntable man's. 30

Q. How do you know you didn't get the turntable's signal? Did you get any signal? A. Not the first time.

Q. What was the overhang of your engine towards the tank? A. The overhang you mean—

Q. What was the furthest point of the truck—the overhang of your tank on the track toward the engine on the next track?

Mr. Carey: I object to that, if the Court please. It is evident that this injury was 40

caused by the striking of the tank, not the engine—or the tender rather.

Mr. Simpson: This is cross examination, and the purpose of the objection is evidently to hamper the cross examination. I have a perfect right to know what was the overhang of the engine.

The Court: Objection overruled.

Mr. Carey: Objection noted.

The Court: Yes.

Q. What was the overhang of your tank, how much did you go over your track? A. I don't know that.

Q. You don't know what clearance there was between your tank and the tank of the engine on track seven? A. About two foot.

Q. Now then, a man oiling the boxes, the axles, the axle boxes nearest to your engine on track seven would have to stand in that two feet, wouldn't he? A. Yes, sir.

Q. To do his work oiling and packing those boxes there where these boxes were down on the wheels. A. Yes, sir.

Q. So that to properly oil them he might of necessity have to stoop? A. No, sir.

Q. How could he do it? A. Just bend over the least little bit.

Q. Just come down and show us how the men that packed the axle boxes without as you said stooping. Show us how he would do it. A. The box was about that high (witness leaves stand and illustrates).

Q. As high as the wheel? A. Yes.

Q. Now just show us. A. So he would have to pull up the box there and jab in there (witness illustrates).

Q. Just stand like you would. A. Yes.

Q. And that would bring you how? Just stoop as much as you would have to. A. The way I am now (illustrating).

Q. That would bring you that much toward the engine? A. Yes, sir. 10

(Witness resumes stand.)

Q. Did you know whether anybody was working on this engine on track seven the last engine that this man worked on before he was killed? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Had you been instructed by the foreman of the roundhouse or by the assistant, the superior of this dead man that there was anybody working 20 on the engine on track seven? A. No, sir.

Q. And you didn't know whether there was or was not? A. I looked.

Q. Where did you look? A. I looked on the left-hand side of 3709 towards track seven.

Q. From your engine? A. Yes, sir.

Q. And if he had been behind the engine on track seven or on the other side you could not have seen him? A. I could have seen him when I come in. 30

Q. You couldn't have seen him from where you are describing the observation you are making now? A. No, sir.

Q. So the observation you made of the engine alongside of it wouldn't reveal this dead man if he was behind there or on the other side of it? A. No, sir.

Q. When you first knew you killed a man what did you do? A. I jumped right down and seen what happened to him. 40

Q. Where were you when you first knew it? A. When I first knew it I was up in the cab.

Q. How much of your engine was out of the roundhouse? A. All my engine.

Q. It had gotten clean out? A. Yes, sir.

10 Q. How much of it was on the turntable? A. About three foot.

Q. And all the rest was pointing towards the roundhouse? A. Yes, sir.

Q. Had the body been taken out when you saw it? A. No, sir.

Q. It was still under the engine? A. Yes, sir.

Q. Did you see Bechtol there? A. No, sir, Bechtol—Otto?

Q. Yes. A. No, I didn't see him there at that

20 time.

Q. Who told you there was an accident? A. Mr. Maloy, the turntable man.

Q. You didn't see the man who has described that he saw a blue shirt and pulled the body out? A. No.

Q. You didn't see him there at all? A. No, sir.

Q. Who took the body out from under the engine? A. Mr. Bechtol.

Q. That is the man I am talking about. A. I

30 seen him after the accident happened.

Q. You didn't see him when he took the body out? A. Yes, sir.

Q. You have said no and you have said yes. Did you see him? A. I seen him when he rolled out from underneath the tank.

Q. You saw him when he rolled out from underneath the tank? A. Yes.

Q. Is that right? A. Yes.

Q. Was the body still under the tank when you

40 first saw it? A. Yes, sir.

Q. Where was the head? A. I don't know where the head was. His shoulders was only on the rail when I seen him.

Q. Did you see the head? A. No, sir.

Q. What part of the body did you see? A. The back and hind quarters and legs. 10

Q. Where were they? A. Outside of track number eight.

Q. That is on the right hand rail? A. Right hand side.

Q. And you didn't see the head? A. No, sir.

Q. What did Bechtol roll if the body was already out when he saw it? What did he roll out? A. The shoulders were laying on the rail just like that, and the head, if he had one, was towards the back of the tank. 20

Q. And you spoke of blood stains. When did you look for blood stains? A. After the accident happened.

Q. How long after the accident happened? A. Oh, just as soon as the hospital authorities were notified.

Q. What did you do to look for bloodstains? A. I just wanted to see where the man was hit.

Q. What did you do? A. I didn't do nothing. 30

Q. What? A. I just stood there.

Q. Didn't you look for the blood stains? A. Yes.

Q. If you just stood there how could you look for blood stains? A. They were right on the rail where the accident happened.

Q. What you call where the accident happened is where the body was taken out? A. No, sir, where the body was first hit.

Q. How can you say where it was first hit? A. I can't say only relying on the blood stains. 40

Q. You don't know where the man was hit, where he was when he was first hit?

The Court: He said he can't tell.

Q. All you know— A. I saw blood stains.

10 Q. Did you go in the roundhouse and look for blood stains? A. No, sir.

Q. You never made an examination there? A. No, sir.

Q. Did you see his hat? A. No, sir.

Q. You don't know where his hat was knocked off? A. No, sir.

Q. Where is this board kept where they mark up the time of the engines? A. In the middle of the roundhouse.

20 Q. What kind of a board is it? A. Blackboard.

Q. Who does the marking? A. The foremen of the roundhouse.

Q. Night foremen or day foremen? A. I couldn't tell you which one.

Q. After the accident happened what did you do with this engine? A. I let it stand there.

Q. When did the crew take it? A. The crew took it after three o'clock.

Q. Did they take it from the position you left it

30 in? A. No, sir, the other hostler moved it.

Q. What is his name? A. Klink.

Q. If you were not in the accident would you have moved it to where the crew would have taken it? A. Yes, sir.

Q. Where was that? A. Outside the master mechanic's office.

Q. About how far from where the body was found? A. Three hundred yards.

40 Q. Take you how long to do it? A. I should imagine about five or seven minutes.

Q. Five or seven minutes to go three hundred yards? A. From the turntable.

Q. Five to seven minutes? A. Yes, sir.

Q. Did you take any other engine out after this one? A. No, sir.

Q. This was the last one you took out, was it? A. Yes, sir. 10

Q. You never made any examination then of the point where you first started to move this engine immediately after the accident, did you? A. No, sir.

*Redirect examination by Mr. Carey*:

Q. Did you ever measure the clearance between the engine tanks or engines on these tracks? A. No, sir. 20

Q. You don't know from having measured them? A. No, sir, I never measured them.

Q. Why do you say two feet, then? A. Well, I figure two feet because I can squeeze through myself between the door and the engine.

Q. You mean the door post? A. The door post and the engine.

Q. The door post and the engine? A. Yes, sir.

Q. How wide is the door post? A. There are two posts with a door on each post. 30

Q. Then at the rear of each track there are two posts? A. Yes, sir.

Q. And the doors swing on hinges attached to these posts? A. Yes, sir.

Q. And a door for track eight would be hung to a post on this side and the door to track nine would be on the other side? A. Yes, sir.

Q. When you came in you walked all along the left side of the engine, did you not? A. Yes, sir. 40

Q. And whom did you see working on 3835? A. Nobody.

Q. Didn't you look for anybody there? A. Yes, sir.

Q. Did you look for anybody working on track nine? A. Yes, sir.

Q. Did you see anybody working there? A. No, sir.

Q. Did you see anybody from the time you boarded the engine until after the accident working on any engine or on track nine? A. No, sir.

*Recross examination by Mr. Simpson:*

Q. You made a written statement about this accident, didn't you? A. Only to the claim agent.

Q. You made it and signed it, didn't you? A. Yes, sir.

Q. Have you seen it since you made it? A. No, sir.

Q. Have you read it since you made it? A. No, sir.

Mr. Simpson: Have you got that, Mr. Carey?

Mr. Carey: Yes, sir.

Mr. Simpson: Will you produce it?

Mr. Carey (looking through papers): Do you want to put it in evidence?

Mr. Simpson: If you want to put it in evidence you can, but I want to use it in my examination of this man.

(Mr. Carey produces the paper called for.)

Q. Have you signed this paper? A. Yes, sir.

Q. You say in this statement that you got there at two o'clock in the morning. Is that right? Instead of 2:30? A. No, sir.

Q. You didn't get there at 2 o'clock in the morning? A. (No answer.)

Q. You made this statement right after the accident, did you not? A. No, sir.

Q. When did you make it? A. The next night at twelve o'clock—eleven o'clock rather—twelve o'clock—sometime. 10

Q. Which was it, the west side of your engine that you walked along? Is that the left-hand or right-hand side? A. Left-hand side.

Q. Left-hand side. Did you say here—you don't say here anything in this statement, do you, about looking for people working around the engines?

Mr. Carey: I object to that question.
The Court: Objection sustained. 20

Q. You don't say anything in this statement about blood stains, do you? A. I don't know.

Mr. Carey: I object.
The Court: Objection sustained.

---

ROBERT H. SIDDELL, recalled for the defendant.

*Direct examination by Mr. Carey:* 30

Q. Mr. Siddell, when you came back from the farm, as you called it, to what point did you go? A. Went to the inspection wagon.

Q. And the inspection wagon was standing where? A. Between stalls seven and eight.

Q. Front or rear? A. Front always.

Q. And where were you at the time you learned that this accident had happened? A. Just opened my desk and started to write my reports.

Q. The what? A. At the inspection wagon. 40

Q. At the inspection wagon. And you were writing what? A. Making out my night's reports.

Q. What did you do after you learned that this accident had happened? A. Closed my books, took my torch and went to see if his work was done.

Q. On what engine? A. 3835.

Q. That is the engine where you left him working? A. Yes, sir.

Q. What did you find with respect to his work? A. It was all done, complete.

Q. Did you look for his tools? A. Yes, sir.

Q. Where were his tools carried? A. In their place on the inspection wagon.

Q. And when did you find those tools there? A. Immediately I got out of the pit after examining his work.

Q. Were all of his tools there? A. Yes, sir.

Q. Did you go to the place where his body was? A. Yes, I walked out to the turntable.

Q. What was the position of the body when you arrived there? A. They had it covered with a bag. It was covered.

Q. It had been taken out from under the tank? A. Oh, yes.

Q. When you arrived there did you find any tools belonging to Marcone along the track there anywhere? A. No, sir.

Q. Did you look? A. I had to look; I had to walk up and down that track.

Q. Did you look for any bloodstains? A. When daylight came.

Q. This was about three o'clock in the morning in July? A. July.

Q. When you looked for bloodstains what did you find? A. The first stains that I saw were on

the right-hand rail and as near as I can remember they seemed to be about around 15 or 18 feet from the end of the roundhouse, as near as I can remember.

Q. And where else did you see bloodstains? A. I didn't follow it up. It was in the morning when I went there and looked—it was with the general foreman. We walked together and looked, and near as I can remember it was about 18 feet where I saw the first part.

Q. And were there bloodstains along the rails anywhere else? A. I didn't follow it back.

Q. You didn't follow it back? A. No.

Q. Did you notice any marks along the rail? A. There was marks on the outside of the ties, like dragging your foot or something like that.

Mr. Simpson: I object to that and ask to have it stricken out.

The Court: Strike out after there were marks on the outside of the ties.

Q. You saw marks there? A. Yes, there were marks there.

Q. How far did those marks extend? A. Only a short—about three feet.

Q. And where were the marks with reference to the turntable? A. Up towards the roundhouse.

Q. Where were they with reference to the place where you saw the bloodstains? A. Three or four feet, maybe five feet from them towards the turntable.

Q. Had this man anything to do on track nine at this time? A. No, sir.

Q. Had he anything to do on track nine between the time you left to go out on the farm and the

time when you came back and saw the blood-stains? A. No, sir.

Q. Did you see anything of a cap along the track there? A. Yes, sir.

Q. Where was that? A. The cap was towards
10 the turntable, maybe six feet—five or six feet from where I saw the mark.

Q. And where was that lying? A. On the inside of the right hand rail between the rails.

Q. About what time was it, as near as you can recollect, when you came back from the farm? A. I should imagine it was about 2:35 or 2:40.

Q. That is as near as you can state it? A. Yes, sir.

Q. How long after that was it before you saw the
20 body? A. Maybe five minutes. I had just got started to write when they notified me.

Q. How long had this man been working for you? A. I can't recall exactly, but I think it was about a year or maybe more.

Q. This same kind of work? A. Yes, sir.

Q. Same place, throughout the roundhouse? A. Yes, sir.

Q. You get your orders for working on engines from whom? A. Mr. Kelly and Mr. Shusler, the
30 other foreman. There are two of them.

Q. In what form does it come? A. Mostly in verbal, although when we come to work at night we make out a little slip for each one of the engines.

Q. Who makes out the slips? A. I make my own out of all engines that have not been done.

Q. Does anyone else give directions to your gang except yourself? A. No, not after we start to work. I handle that.

40 Q. You handle it entirely? A. Yes, sir.

Q. Do you give them directions which engines to work on? A. Yes, sir.

Q. If I recall your testimony correctly you say he had worked on fourteen engines at that time? A. Yes.

Q. Beginning at seven o'clock? A. Seven o'clock in the evening. 10

Q. And the eight hours end at what time? A. 3 A. M.

Q. And in that time you have an intermission for supper? A. Twenty minutes—11 to 11:20.

Q. Had you given this decedent Marcone any instructions as to work when you were leaving for the farm with the exception that he was to wait there at engine 3835? 20

Mr. Simpson: I object to that, first because it is leading and second there isn't any such testimony. His testimony is that he gave him instructions to wait there, not at engine 3835.

Q. What were your instructions? A. To finish 3835 and wait for me. The inspection wagon was there. That is his place.

Q. The place for waiting is where? A. At the inspection wagon. 30

Mr. Simpson: I object as calling for a conclusion, the place of waiting.

The Court: Objection overruled.

Mr. Simpson: I ask for an exception.

The Court : You may have it.

Q. And at that time the inspection wagon was where? A. Between stalls seven and eight.

Q. And at what position? A. Out in the big wide concrete runway. 40

Q. How wide is that concrete runway? A. Ten feet.

Q. Front or rear? A. Front, up against the wall.

*Cross examination by Mr. Simpson*:

10 Q. You saw the body at half past two? A. No, sir, it was later than that when I saw it.

Q. Didn't you testify that you came back there at 2:35 or 2:40 and five minutes before you saw the body? A. No, sir, I did not.

Q. What time did you see the body? A. Five minutes after I arrived at the wagon.

Q. What time did you arrive at the wagon? A. I presume about 2:35.

Q. Where was the wagon? A. In between tracks
20 seven and eight.

Q. And did you go to the wagon before you saw the body? A. Certainly.

Q. Not certainly. Did you go? A. Yes, sir.

Q. Before you saw the body? A. Yes, sir.

Q. Did you look at your watch to see what time it was? A. I did not, no.

Q. Did you know there had been an accident? A. No.

Q. You didn't know anything when you got to
30 the wagon about an accident? A. No, sir.

Q. Why did you go to the wagon? A. That is where we congregate to do our work, to finish it.

Q. To do what? A. To finish our work.

Q. When you got to the wagon was this engine out of the roundhouse or in the roundhouse? A. Which one do you mean?

Q. The one that killed the man? A. She was out.

Q. And you got to the wagon about 2:35? A.
40 2:35 or 2:40, I couldn't swear on it.

Q. Do you know how long she had been out when you got to the wagon? A. She was in when I left.

Q. When you left to go out to the farm—when did you leave to go out to the farm? A. About 2:15. 10

Q. And the engine was there? A. Yes, sir.

Q. When you came back at 2:35 or 2:40 she was out? A. Yes, sir.

Q. Did you see her? A. Seen her headlights shining.

Q. Was she in motion or stopped? A. Standing still.

Q. And this engine you speak of as 3835,—

Mr. Simpson: It is admitted, your Honor, that this engine 3835 pulls a train into New York State. 20

Q. What time did you put this man to work on 3835? A. About 2:15.

Q. What did he have to do? A. Packed the engine, re-doped the engine trucks, re-oil the trailers.

Q. How many? A. One on each side.

Q. How many tank boxes? A. Six on each side.

Q. What else did he have to do? A. Re-dope the engine trucks. 30

Q. What does that mean? A. The engine trucks on those engines,—is a pony truck, only two wheels—not a double truck. He has to take the cellars out, re-dope them, put new dope in composed of wool waste and oil—change the dope on those.

Q. Then he had to do oiling, re-dope these things and pack the grease box, you say? A. No. The driving wheel—

Q. I want to know what he had to do at 2:15? 40
A. He started to re-dope the engine truck cellars.

Q. Now what was the doping operation? A. Take the cellars out.

Q. What is a cellar? A. The cellar is a kind of vessel, as you might call it, that holds the dope.

Q. Then what did he have to do? A. Take out
10 the old dope, put it in one bucket and replace it with new oily dope.

Q. And then put that back in? A. Yes.

Q. Where was that with reference to the engine, down in front or up near the tank? A. Down in front at the first pair of wheels.

Q. What did he have to do at the rear where the tank was? A. He didn't have nothing to do there.

Q. I mean, did he have to put in these boxes on
20 the wheels—did he have to put packing in them? A. Just only when they are burned out.

Q. What did he have to do to oil these at the end? Just come down here.

(Witness leaves stand and goes to the diagram.)

Q. He was in front of the two wheels, of these two wheels, and behind these two wheels on this tank. What did he have to do on these four
30 wheels? A. That isn't correct.

Q. That is the picture they gave us. A. The tank boxes are here. These journals have got to have oil, and he has got to open that little tank box and open the journal and put in oil.

Q. How can he tell it needs oil? Does he have to feel with his fingers? A. No, sees with a light.

Q. With a light? A. With a light.

Q. Then when you came back at 2:35 that was all finished? A. All, yes.

40 Q. And you didn't see him around at all? A. No.

Q. He was then of course killed under the engine? A. Yes.

Q. Now, speaking of tools here, what tools do you mean? A. The box packer has his own kit of tools.

Q. What does it consist of? A. It consists of a packing iron. I would have to draw it. It is a bell iron like this, see? It has a hook on that so he can easily open the cellars. 10

The Court: They are the same things you see men at stations going along opening the top of boxes over the wheels with?

The Witness: Yes.

Q. You don't go around looking over the engine to tell them what to do? He was supposed to know what to do. A. I go with him when I have got a new man, but that man was an experienced man. 20

Q. How long had he been working for you? A. Over a year.

Q. A good workman? A. Yes, sir.

Q. And he had been there for a year? A. I couldn't tell you just how long, but I had had him a long while, quite a while.

Q. You say this work was all done on 3835 when you examined her? A. When I noticed I immediately took my light and looked. 30

Q. That is immediately after the accident? A. No, after they notified me.

Q. About what time was that? A. I got back at 2:35 or 2:40. It was probably three or four minutes. I had just got back when I seen the other foreman looking toward me up at the turntable.

Q. This truck you went to, was that in the same position at the head of the engine? You spoke of 40

going to a truck or wagon. Where was that located? A. The inspection wagon?

Q. Yes, where you went after the accident. A. Between stall seven and eight.

Q. What part between stalls seven and eight?
10 A. Out to the front, past the end of the rails there is a wide concrete space there.

Q. And at 2:15 you told him to fix this engine and wait for you, is that right? A. Yes.

Q. In their work these men pass all over the roundhouse, don't they, these packers have to walk all over the roundhouse? A. The gang stays together. We move from engine to engine.

Q. How many would there be in a gang? A. He was working with me.

20 Q. You were away. A. I left him behind to finish that engine. He was late arriving at that engine. I had finished the inspection of the engine. We had finished the grease cups, the lubricating, the sand, and was just completing making out my report; and when he arrived I said, "Go ahead, Joe."

Q. So Joe arrived late at 3835? A. Yes.

Q. And it was then you gave him his instructions to go on 3835 and you went on with your work?
30 A. Yes, sir.

Q. And if this accident hadn't happened he was through, wasn't he? Did he have anything else to do, or did he have to wait for you to tell him? A. He had nothing else to do.

Q. And if you had come back there and you had found him at the truck at 2:35 what would you have done with him? I mean if this accident hadn't happened he had finished 3835? A. We
40 would have gotten our tools all together and moved our wagon to its standard place at number 2 and we would have made out our cards and gone home.

JAMES H. KELLY, recalled for the defendant.

*Direct examination by Mr. Carey:*

Q. Mr. Kelly, you were at track one when you heard the whistle, as I recall your testimony? A. Yes, sir. 10

Q. And you went from there to track eight? A. Yes, sir.

Q. How did you go there? A. Around this concrete walk in the roundhouse.

Q. In front of the engines? A. Yes, sir.

Q. The hostler has testified that he moved the engine out of the roundhouse about 2:30. Could you say whether that was too early or otherwise?

Mr. Simpson: I object to that, if the Court please, his opinion as to whether it was too early. 20

The Court: Objection sustained.

Mr. Carey: If the Court please, he is the assistant foreman of the roundhouse.

The Court: Yes.

Mr. Carey: And he is the one from whom these hostlers take their instructions.

The Court: Objection sustained.

Mr. Carey: Objection noted? 30

The Court: Yes.

Q. If an engine was to be taken, or if the time schedule for the train crew to take an engine was three o'clock will you state whether or not moving the engine out of the roundhouse at 2:30 would be too early? A. No, sir.

Mr. Simpson: I object to that—same objection. That calls for this man's opinion.

The Court: Yes. I think what is custo- 40

mary governs, Mr. Carey, rather than this man's opinion. Objection sustained.

Mr. Carey: Objection noted?

The Court: Yes.

10 Q. Are you familiar with the custom as to the time of moving engines out of the roundhouse with reference to the time when the engine crew takes them? A. Yes, sir, that is my business.

Q. Now will you tell whether in accordance with that custom the moving of the engine from the roundhouse—backing the engine from the roundhouse a half hour before the time it was scheduled to move would be proper, or not proper, but in accordance with the custom? A. There is no such

20 time as long as the engine is there by three o'clock. If she is there after three o'clock she is late leaving the roundhouse and against my records.

Q. What was the customary time between the time of backing the engine out of the roundhouse and the taking of the engine by the engine crew? A. No set time.

Q. I understand there is no set time, but what was the customary time? A. Well, I gave them a chart, a paper, and I make the charts half

30 an hour, so they can take it out fifteen minutes or so before. Before the crew reached the engine it had to be at the water plug at that time.

Q. A half hour would or would not accord with the custom? A. Half an hour would be all right; an hour would be all right.

*Cross examination by Mr. Simpson:*

Q. So that if a man was working on the engine and the board in the roundhouse said three o'clock

40 was the leaving time, it would be perfectly all

right, without warning, to move the engine right over him half an hour before the time.

Mr. Carey: Objection.
The Court: Objection sustained.
Mr. Simpson: I ask for an exception.
The Court: Yes.

Q. You said to this man, "Don't move this engine too early." What time did you say that to him? A. What I meant by that was—

Q. I don't care what you meant. What time did you say it to him? A. At the time he was in the cab of 3709.

Q. What time? A. That I don't know; I left the office a quarter to two to go through the roundhouse.

Q. How far is your office from the roundhouse? A. I don't know; I never measured it.

Q. How long did it take you to walk from your office to the roundhouse? A. Sometimes half an hour; maybe I stop fifteen or twenty times.

Q. I am not asking you for a history of your life. I am asking you how long it took you that night to walk from the office to the roundhouse? A. From what point?

Q. From your office? A. To the roundhouse?

Q. Yes. A. About a minute from the office to the roundhouse.

Q. So you left your office at what time? A. About a quarter to two.

Q. Quarter of two? A. Yes, sir.

Q. You were in the roundhouse then fourteen minutes of two? A. I was.

Q. And how long were you in the roundhouse before you said to this man, "Don't move this engine too early?" A. Well, I had walked down the

entire length of the roundhouse; I don't just know how long I was in there. I walked from 32 stall to number 1 stall around the concrete walk.

Q. Have you any objection to telling me how long you were in the roundhouse, it being now es-
10 tablished that you got there fourteen minutes of two,—how long you were in the roundhouse before you went to this man and said, "Don't move your engine too early?" A. I didn't time myself; I don't know.

Q. How long had you been in the roundhouse before you went to him and said, "Don't move your engine too early?" A. Well, I may have been in the roundhouse twenty or twenty-five minutes.

Q. All right. Let's give you twenty-five minutes.
20 That would have been ten minutes after two. A. Yes.

Q. So ten minutes after two you said to him, "Don't move the engine too early?" And you found him on the engine, although he said he didn't get on the engine until 2:30.

Mr. Carey: I object to that.

The Court: Objection sustained. He said 2:20.

30 Q. What time— A. I went down and asked him why he was blowing his whistle so loud. I said, "Do you want to get us locked up for blowing that too loud?" I said, "Don't take the engines out too early unnecessarily"; and McGee said, "I am blowing for the turntable"; and he said, "He knows I want the turntable; I told him."

Q. And that was all you said to him? A. That was all I said to him.

Q. And then you went away? A. Yes.

40 Q. Why did you say, "Don't take the engine out

too early"? A. Because sometimes they have; they take the engines outside to a plug.

Q. You have described how you told him, "Don't move the engine too early." A. I didn't say that engine,—"Don't take the engines out too early."

Q. Well, he was on this engine that killed the man? A. Yes, sir. 10

Q. And you said to him, "Don't take the engines out too early?" A. Yes.

Q. What did you do then? A. I left, I walked away from him.

Q. Did you still stay in the roundhouse? A. Stay in the roundhouse?

Q. Did you then stay in the roudhouse? A. Yes.

Q. Did you hear the second three blasts? A. I heard the second three blasts. 20

Q. How long after you had told him, "Don't take the engines out too early" did you hear the second three blasts? A. It might have been five, eight, or ten minutes; I don't remember.

Q. Either five, eight or ten. Then what did you do, anything? A. I seen the engine move out; I turned around; the whistle blew; the foreman said to me, "He didn't pay much attention to you about blowing that whistle." And I said, "I'll see him later." And the next I heard was the turntable man— 30

Q. Where was this board on which the time of leaving was posted? In what part of the roundhouse? A. I didn't write them. I said the general foreman, day. Sometimes I might have.

Q. The day foreman wrote them on? A. Before he went home.

Q. What time did he go home? A. Six or seven.

Q. This Mr. McGee says something about getting a slip on which the time was stated that he was 40

called to take the engine out. Did he get any slip from you? A. Yes, sir, he did; that is my testimony; every night the starting time.

Q. Have you got a copy of that starting slip? A. No, sir, I have not.

10 Q. He don't give it back to you? A. No, he can do what he likes with it.

*Redirect examination by Mr. Carey*:

Q. For whose information are these numbers put on the blackboard? A. Put on there for the roundhouse employees in general, so they can all go up to the board and see what time the engine is due out and they know what they have got to do. That gives them a line-up for their work for

20 the evening.

Q. These men are given directions with respect to the engine they are to work on by their foreman? A. Yes, sir.

Q. And the time they are to work on them? A. No, they know themselves by following this board, and then when the engine is O. K. the hostler is told, "O. K., take her out."

Q. None of these men go to work on an engine until the foreman tells them to do that, do they?

30 A. The foreman may hand them a slip on two or three engines and say, "I want you to work on such and such an engine first."

*Recross examination by Mr. Simpson*:

Q. The hostlers have a certain amount of work to do and as soon as they do that they are through, isn't that so? A. Sir?

Q. The hostler has a certain amount of work to do and as soon as he gets through his work

40

he is through, isn't he? A. He can't leave the roundhouse until leaving time.

Q. If he finishes all of his work before leaving time can he sleep in the roundhouse? A. No, he is not supposed to sleep in the roundhouse.

Q. What does he do after he finishes everything he has got to do before he gets out? A. He generally comes in the office where I am or where the engine dispatcher is.

---

JEROME GORDON, recalled for the defendant.

*Direct examination by Mr. Carey*:

Q. Mr. Gordon, can you tell us what the clearance is between tanks standing on track eight and track nine in this engine house? A. About three feet nine and a half inches.

Q. About three feet nine and a half inches? A. Yes, sir.

Q. And between tracks seven and eight? A. It is the same.

Q. Same thing, same distance all around the tracks? A. No, it depends upon the width of the tender.

Q. Tenders of engines 3709 and 3835, are the distances which you have given us of clearance? A. Yes, sir.

Q. And you say that is three feet nine and one-half inches? A. Yes, sir.

*By the Court*:

Q. Where is that? A. That is within the door.

Q. That is at the door? A. Fourteen foot clearance.

Q. Is this three feet nine and one-half inches you have spoken about as being the clearance between

these two tanks— A. That would be inside the door.

Q. Just inside the door? A. Yes, sir.

Q. The tracks narrow from the turntable—no, widen from the turntable to the center of the roundhouse? A. Yes, sir; this is immediately inside the door.

*Cross examination by Mr. Simpson*:

Q. Do you know the distance of clearance between engine 3835, being on track seven, and the other engine that killed the man on track eight? Can you tell what was the nearest distance between the tanks as they stood on the tracks? A. At the time of the accident?

Q. These two engines stood one on track eight and one on track seven. I am trying to find out what was the clearance supposing this man was working between these two tanks? A. Three feet nine and one-half inches.

Q. And that would be at the point where the engines were standing? A. Not at the time of the accident.

The Court: That is at the door.

Q. That would be more or less at the place of the accident? A. It would be more, probably.

Q. The farther inside the roundhouse you go the distance increases, is that it? A. Yes, sir.

Defendant Rests.

Mr. Carey: I move for a direction of a verdict on all the grounds stated in my motion for a nonsuit.

(Motion denied.)

Mr. Carey: Exception.

The Court: That map has not been put in evidence. I presume it should be marked in evidence.

(The diagram was marked Exhibit D-1 in evidence.) 10

(Both sides sum up to the jury.)

---

**The Court's Charge.**

The Court thereupon charged the jury as follows:

The Court: Gentlemen of the Jury: This is an action brought by Donoto Marcone, as administrator of the Estate of Joseph Marcone, deceased, 20 against the New York Central Railroad Company. It is brought for the purpose of recovering damages under what we know as the Death Act, for the death of Joseph Marcone, which it is alleged was caused by the negligence of the defendant company. The action is brought under what we commonly in law speak of as the Federal Employers' Liability Act.

Now, gentlemen, the plaintiff claims that on the 27th day of July, 1926, the deceased was working 30 at the roundhouse of the defendant company at New Durham, in this county; that he was there engaged in interstate commerce; that the defendant was then and there engaged in interstate commerce and that through the negligence of the defendant he was killed and the administrator brings this suit to recover damages for his death. The defendant company says that it is true that it was engaged in interstate commerce but that the deceased at the time in question was not engaged in 40

interstate commerce and that his death resulted from his own negligence.

Now, gentlemen, it is important that I read to you a section of the Federal Employers' Liability Act under which this case is brought. That act provides that every common carrier by railroad while engaging 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, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. And the act further provides that in all actions hereafter brought against such common carrier railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, 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.

You will notice that a prerequisite to a suit under this statute is that both the defendant and the deceased in this case were engaged in interstate commerce at the time of the accident. The defendant admits that it was engaged in such commerce but denies that the deceased was. Therefore the first question for you to determine is whether or not Joseph Marcone at the time in question was engaged in interstate commerce; and you must determine from all the facts and all the

circumstances in the case at the time of the happening in question. Was the intestate engaged in and about a duty which he owed to his master, the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relationship that had existed as between himself and the defendant company so that he was not at the time of the happening in question engaged in any act which he was called upon as the servant of the defendant company to perform in relation to and with respect to the interstate commerce of the defendant company? You will ask yourselves: Where was this man killed, in the roundhouse, or outside of the roundhouse? What was he doing at the place he was when killed? Did his work call for him to be there? Was he doing something disassociated from his work in connection with the engines at the time he was killed? Did he go from a place of safety to a place of danger, not being ordered there by his superior and not in furtherance of his duties?

It is only when you find from the evidence and under the rules I have given you that at the time of the happening the defendant company was engaged in interstate commerce, which, as I have said, they have admitted, and that the intestate of this plaintiff was likewise engaged in interstate commerce, that he has a right of action under this statute. If that has not been shown to you by a preponderance of the evidence on the part of the plaintiff, then you need not go any further with your deliberations, because then the case must end and your verdict must be for the defendant

Now, if you should pass that point you will have observed from what I have read from the statute

that the basis of an action of this kind is founded upon negligence, and that logically brings us to consider what the negligence is which the plaintiff in this case claims this defendant was guilty of, and that is the charge as contained in the written complaint. The plaintiff in his complaint says that the negligence of the defendant consisted in this: "That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; that it did not use reasonable care to equip said locomotive with suitable headlights or any headlights or any lights and did not use reasonable care to propel same at a safe rate of speed." Now the plaintiff relies on that part of the complaint which charges that the defendant did not give warning of the movement of this locomotive. It is a fundamental principle in the law that the plaintiff is bound to satisfy the jury by a fair preponderance of the evidence that the defendant was guilty of negligence and that that negligence of which he was guilty, if he was guilty, proximately caused the accident of which he complains and for which in this suit the plaintiff seeks a recovery.

Now, gentlemen, let me say to you, that the mere happening of an accident, unfortunate though it is, standing alone, of itself does not entitle the plaintiff to a recovery against a defendant. The law is, as I have said, that the plaintiff must prove his case by a fair preponderance of the evidence. Now by use of the word preponderance is not meant necessarily a greater number of

witnesses on one side than on the other, but it is the quality of the testimony produced, rather than the quantity, and to determine that measure of preponderance it is necessary that all the evidence which has been produced be considered by you.

Now as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive and that that negligence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you assess his damages. If he does not make that out, manifestly he ought not to have a verdict and the verdict should be, under such circumstances, for the defendant. That, you will observe, is practically all that is necessary to be said upon the question of the negligence of the defendant. Has the defendant been shown by the preponderance, by the greater weight of the evidence, to have been guilty of the charge of negligence made against it by the plaintiff, and has the plaintiff further shown that that negligence was the proximate cause of the plaintiff's intestate's injuries? If those things are made out by a greater weight of the evidence, as I said before, the plaintiff is entitled to a verdict and to have you assess his damages,—unless the defendant has made out a defense.

That brings us to consider what defenses are interposed by the defendant. Of course, one defense is that no negligence has been shown. That amounts to this, that the plaintiff has not made out his case; but that defense is not one of the

defenses concerning which I wish particularly to speak, because it follows that if the plaintiff has not made out his case, there is no case to defend against and the defendant is entitled to a verdict.

The defendant says that the plaintiff's intestate was guilty of contributory negligence. Now you will remember that I read to you a few moments ago from the statute that in this kind of action, under the Federal Employers' Liability Act, contributory negligence does not bar the plaintiff's right of action, but it is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself. It is to be taken into consideration by the jury and so much must be deducted from the entire damage suffered by the plaintiff as is represented by his proportion of the joint negligence of himself and the defendant. Now what is meant by that? Suppose that the entire amount of the damage—and I use figures only to illustrate and I do not indicate by them that I have a notion that the plaintiff is entitled to a thousand dollars or not; I just use figures to illustrate—suppose that the entire damage was a thousand dollars and suppose that the evidence showed that the plaintiff by his negligence had contributed one-half to the production of the result of which he complains and the other half was due to the negligence of the defendant. You see how it is easy to figure it out under the statute. If the plaintiff is one-half guilty you must determine the entire damage; you must diminish the entire damage by one-half of it. If the plaintiff's negligence contributed one-quarter and the defendant's negligence three-quarters, manifestly you would deduct the one-quarter. Now, that illustrates to you the manner in which that rule is applied, and that is

all there is to that phase of it; but the defendant is entitled to have the advantage, and claims the advantage and is entitled to have an allowance for whatever contributory negligence is shown in the case to be chargeable to the plaintiff's intestate and to have you subtract that amount of negligence from the entire amount of negligence in the case and reflect the result of that subtraction from your verdict in the manner in which I have indicated.

Now, that brings us to inquire: What is the contributory negligence of which we have been talking? The law says that the duty of this plaintiff in the employment in which he was engaged—and when I speak of the plaintiff I mean the plaintiff's intestate, the man who was killed—was to use reasonable care for his own safety, and by reasonable care is meant such care as a reasonably prudent person would use under the circumstances. Now, if this man Marcone did not use reasonable care for his own safety, then you say whether or not his neglect to use that care contributed to the accident, and if it did then you say how much, a quarter, a third, a half, three-quarters, or what? And to whatever extent it did contribute, if the defendant is liable, you subtract that proportion which its negligence bears to the joint negligence of the two and that would be your verdict, if you find for the plaintiff.

Now, gentlemen, a servant assumes the usual and obvious risks of his employment and those which he could discover with ordinary care, but of course not the negligence of his employer. An employee assumes the risk not only of dangers arising from facts known to him but also of such dangers attending his work as he might discover by the exercise of reasonable care for his own

safety. The doctrine of assumption of obvious risks by the servant applies as well to those which arise or become known to the servant during his services as to those in contemplation at the original hiring.

10 Now, gentlemen, so much for the question of law as to whether or not the plaintiff is entitled to a verdict.

If the plaintiff is entitled to a verdict then you come to the question of the assessment of damages, and to determine that point you must consider what is the loss that a person sustains by the death of someone because of the negligence of a defendant; and that is a question that depends largely upon conjecture, depends largely upon

20 speculation. The intestate in this case might have been killed the next day in another accident. The next of kin here might themselves have died shortly after the accident. The intestate might have become disabled from performing productive services and instead of having been a bread-winner he might merely have become a bread-consumer. He might have gotten married and supported his wife instead of giving anything to his parents. Let me say to you that the only damage that can be al-

30 lowed is the pecuniary damage suffered. You cannot allow anything to solace the persons because they have lost someone that is dear to them. You cannot allow anything for funeral expenses or doctors' bills because that is not what is permitted by the statute. The statute known as the Death Act, which I have before referred to, only permits the allowance of so much, if they are entitled to anything, as the persons would have gotten in a money

40 sense if it had not been for the untimely cutting off of life by the accident upon which the action

is predicated. All other considerations of suffering or anything of that sort are entirely eliminated from a case of this kind and no allowance can be made on that account. You must further consider, if you consider the question of damages, that the only thing you can allow in a case of this kind is the present value of a sum, not a sum that would be the amount that the next of kin would have gotten, because under those circumstances you would give too much; they would get not only the interest on the money; they would have the money itself at the end of the whole time; and therefore you find the present value of the money, and that would be the sum only that you would be entitled to allow in a case of this kind, if you allow any amount.

Now, gentlemen, you are not to allow prejudice, bias or sympathy to guide you in any particular in determining your verdict in this case. You are simply to be guided by the facts and by the law that the Court has given you. Let me say to you that you are the sole judges of the facts. You are not to be guided by what counsel has said in regard thereto or by what the Court has said, but you are to take your own recollections of what the facts have been as related to you by the witnesses and be guided by those recollections that you have of those facts and the law that the Court has given you.

The Court has dealt with several motions during the course of the trial. You are not to be guided in any particular by the finding of the Court in regard to those motions. Those were legal duties which the Court had to determine and should not be a guide to you in any particular.

I have had several requests to charge by the defendant.

(Addressing Mr. Carey.) I think I have charged the first two, Mr. Carey.

Number three. If the proximate cause of the injuries which resulted in the death of plaintiff's intestate was his negligence, plaintiff cannot recover.

I so charge you.

Number four. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

I so charge you.

Number five. Decedent, being of full age, he would not be obligated to contribute to the support of his parents, or either of them, unless or until they or one of them shall have been adjudged to be a poor person and unable to maintain himself or herself, or those dependent upon him or her, and unless and until decedent should have been found of sufficient financial ability to contribute to their support. In such event, the other children of decedent's parents, being of equal financial ability, would be equally obligated to contribute pro rata toward the support of said parents.

I so charge you.

Number six. Whether the intestate was engaged in interstate commerce or not depends upon what he was doing at the time of the accident.

I so charge you.

You may take the case.

(Thereupon the jury retired.)

Mr. Carey: I wish to note an objection to the submission to the jury of the question whether

the intestate was at the time of the accident engaged in interstate commerce and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the submission by the Court to the jury of the question of defendant's negligence and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the charge of the Court with respect to contributory negligence and the language which the Court used in submitting that question to the jury. My contention is that the negligence of the plaintiff's intestate alone produced the accident, and not in conjunction with negligence on the part of the defendant.

Mr. Simpson: May I have an objection in the nature of an exception to that part of your Honor's charge which refers to the question of interstate commerce and everything your Honor said on that subject?

The Court: Yes.

Mr. Simpson: And also an objection in the nature of an exception to your Honor's charge that if the negligence of the plaintiff's intestate was the proximate cause of the injury the plaintiff could not recover.

The Court: I said if that alone was the proximate cause. But you may have an objection.

Mr. Simpson: And also may I have an objection in the nature of an exception to your Honor's charging the defendant's requests to charge, to each and all of them?

The Court: Yes.

I have had several requests to charge by the defendant.

(Addressing Mr. Carey.) I think I have charged the first two, Mr. Carey.

Number three. If the proximate cause of the
10 injuries which resulted in the death of plaintiff's intestate was his negligence, plaintiff cannot recover.

I so charge you.

Number four. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

I so charge you.

Number five. Decedent, being of full age, he
20 would not be obligated to contribute to the support of his parents, or either of them, unless or until

the intestate was at the time of the accident engaged in interstate commerce and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the submission by the Court to the jury of the question of defendant's negligence and to the language which the Court used in submitting that question to the jury.

I wish to note an objection also to the charge of the Court with respect to contributory negligence and the language which the Court used in submitting that question to the jury. My contention is that the negligence of the plaintiff's intestate alone produced the accident, and not in conjunction with negligence on the part of the defendant.

DEFENDANT'S REQUESTS TO CHARGE.

1. If at the time of receiving the injuries resulting in the death of plaintiff's intestate, he was not engaged in interstate commerce, plaintiff cannot recover.

2. Unless some act of negligence alleged in the complaint has been established against the defendant, plaintiff cannot recover.

3. If the proximate cause of the injuries which resulted in the death of plaintiff's intestate was his negligence, plaintiff cannot recover.

4. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

5. Decedent being of full age, he would not be

obligated to contribute to the support of his parents, or either of them, unless or until they or one of them shall have been adjudged to be a poor person and unable to maintain himself or herself, or those dependent upon him or her, and unless and until decedent should have been found to be of sufficient financial ability to contribute to their support. In such event, the other children of decedent's parents, being of equal financial ability, would be equally obligated to contribute pro rata toward the support of said parents.

6. Whether the intestate was engaged in interstate commerce or not depends upon what he was doing at the time of the accident.

---

**Rule for Final Judgment.**

HUDSON COUNTY CIRCUIT COURT.

| | |
|---|---|
| DONATO MORCONE, Administrator of the Estate of Joseph Morcone, deceased, *Plaintiff*, *v.* NEW YORK CENTRAL RAILROAD COMPANY, a corporation, *Defendant*. | Action at Law. |

This case was tried at the Hudson County Circuit Court before Honorable A. Dayton Oliphant, Judge, and a jury, on May 4th and 7th, 1928.

Evidence having been adduced by both parties, hereto, the jury considered same and returned a verdict in favor of the plaintiff herein and against

the defendant herein, and assessed the damages in the sum of seven thousand ($7,000.00) dollars.

It Is Therefore Ordered and Adjudged that the plaintiff Donato Morcone, administrator of the Estate of Joseph Marcone, deceased, have and recover of the defendant, New York Central Railroad Company, a corporation, the sum of Seven thousand ($7,000.00) dollars together with costs, and it is further Ordered and Adjudged, that judgment final be, and it is hereby, entered, in favor of the Plaintiff Donato Morcone, administrator of the Estate of Joseph Morcone, deceased, and against the defendant New York Central Railroad Company, a corporation.

A. Dayton Oliphant.
Judge.

Rule actually entered this 7th day of May, 1928.

On Motion of
Alex. Simpson,
Attorney for Plaintiff.

---

**Judgment.**

[Same Title]

Judgment on Verdict in the above entitled cause was entered in this Court on the 7th day of May in the year of our Lord One Thousand Nine Hundred and Twenty-eight in favor of the Plaintiff, Donato Morcone, Administrator of the Estate of Joseph Morcone, deceased, and against the defendant New York Central Railroad Company, a corporation in a plea of Action at Law for the sum of Seven Thousand Dollars damages and costs of suit to be taxed.

Judgment signed this 7th day of May A. D. 1928.

John J. McGovern.
Clerk.

**Notice of Appeal.**

(Filed May 15, 1928.)

HUDSON COUNTY CIRCUIT COURT.

| | |
|---|---|
| DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased, *Plaintiff*, *v.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant*. | Action at Law. |

10

To

20

ALEXANDER SIMPSON, Esq.,
Attorney for Plaintiff.

TAKE NOTICE, That the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the Circuit Court of Hudson County in the above stated cause. May 7th, 1928.

Dated May 15, 1928.

30

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Sevice of a copy of the within Notice of Appeal is hereby acknowledged this 15th day of May, 1928.

ALEX. SIMPSON,
Attorney for Plaintiff.

40

## Recognizance.

(Filed May 19, 1928.)

Recognizance on appeal in this action in the sum of $14,200, duly entered into before George G. Tennant, Supreme Court Commissioner, by the defendant-appellant, New York Central Railroad Company, as Principal, and National Surety Company, as Surety, in favor of the plaintiff-respondent, was filed herein May 19, 1928.

10

---

## Grounds of Appeal.

(Filed, June 1, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

20

| | |
|---|---|
| DONATO MARCONE, Administrator of the Estate of Joseph Marcone, deceased, *Plaintiff-Respondent,* *v.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appellant.* | Action at Law |

30

The appellant states the following grounds of appeal:

1. The Court overruled defendant's motion for judgment of nonsuit.

2. The Court overruled defendant's motion to direct a verdict in its favor.

40

The Court overruled the following question:

3. To the witness, Cornelius McGee:

"Q. Did you take this engine out this night at about the usual time you are accustomed to take the engine out for this particular train?"

10

4. To the witness, James H. Kelly:

"Q. The hostler has testified that he moved the engine out of the roundhouse about 2:30. Could you say whether that was too early or otherwise?"

5. To the witness, James H. Kelly:

"Q. If an engine was to be taken, or if the time scheduled for the train crew to take an engine was 3 o'clock, will you state whether or not moving the engine out of the roundhouse at 2:30 would be too early?"

20

The following questions were admitted against defendant's objections:

6. To the witness, Cornelius McGee:

"Q. Did you go to the board to look what time this engine was supposed to leave before you moved this engine that was in the accident?

30

"Q. Did you go to this board?"

7. To the witness, Cornelius McGee:

"Q. Did you go to this board in the roundhouse where it stated engine so and so is scheduled to leave at such and such a time? Did you go to that board in question?"

8. The Court overruled defendant's motion to strike out all the testimony with respect to the alleged conversation between the Assistant Foreman Kelly and Mr. McGee with reference to the early taking out of the engine.

40

9. The Court charged the jury as follows:

"You will notice that a prerequisite to a suit under this statute is that both the defendant and the deceased in this case were engaged in interstate commerce at the time of the accident. The defendant admits that it was engaged in such commerce but denies that the deceased was. Therefore the first question for you to determine is whether or not Joseph Marcone at the time in question was engaged in interstate commerce; and you must determine from all the facts and all the circumstances in the case at the time of the happening in question, was the intestate engaged in and about a duty which he owed to his master, the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relationship that had existed as between himself and the defendant company so that he was not at the time of the happening in question engaged in any act which he was called upon as the servant of the defendant company to perform in relation to and with respect to the interstate commerce of the defendant company?"

10. The Court charged the jury as follows:

"Now, if you should pass that point you will have observed from what I have read from the statute that the basis of an action of this kind is founded upon negligence, and that logically brings us to consider what the negligence is which the plaintiff in this case claims this defendant was guilty of, and that

is the charge as contained in the written complaint. The plaintiff in his complaint says that the negligence of the defendant consisted in this: 'That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; that it did not use reasonable care to equip said locomotive with suitable headlights or any headlights or any lights and did not use reasonable care to propel same at a safe rate of speed.' Now, the plaintiff relies on that part of the complaint which charges that the defendant did not give warning of the movement of this locomotive."

* * * * * * *

"Now, as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive and that that negligence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you assess his damages."

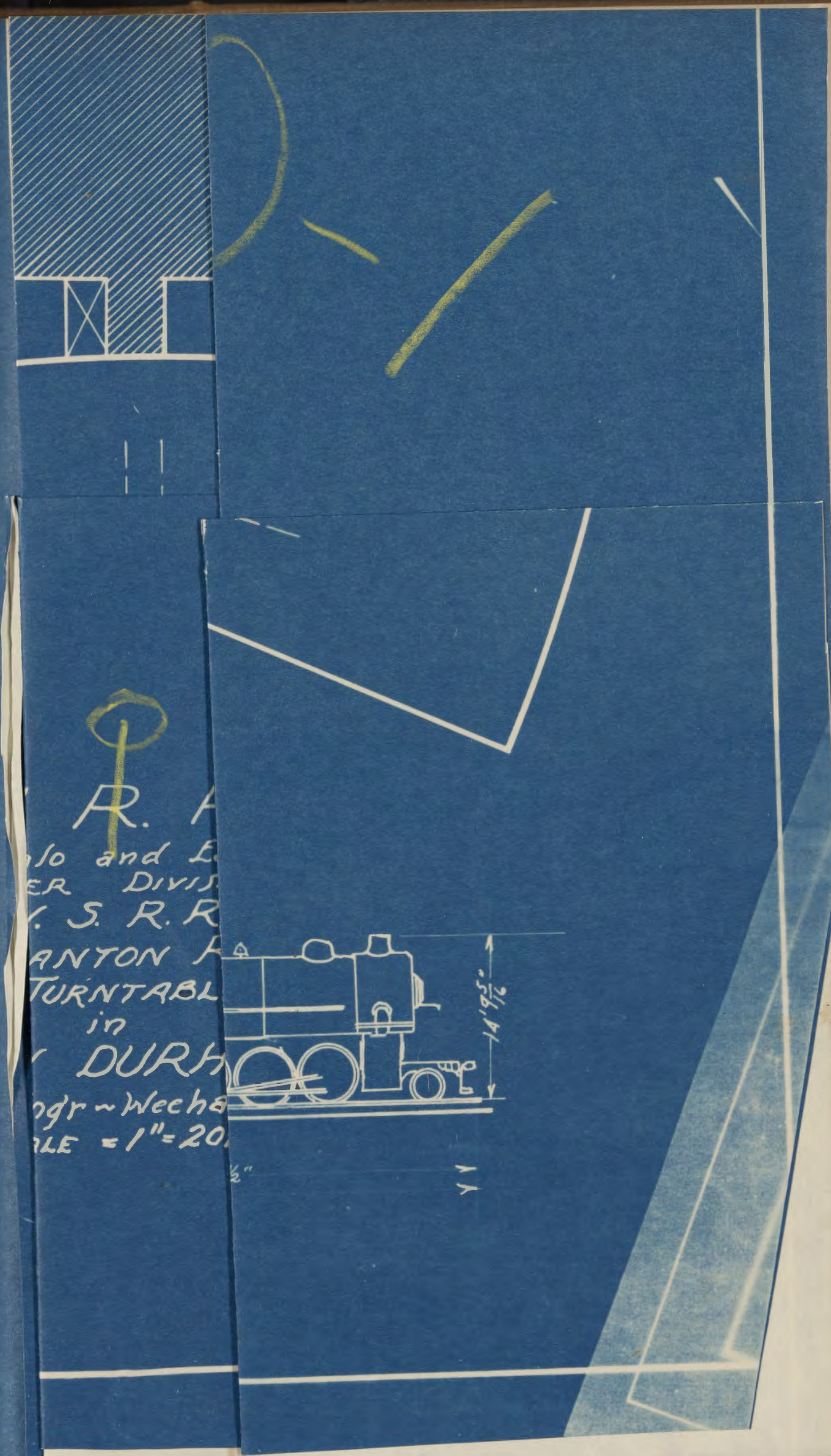
11. The Court charged the jury as follows:

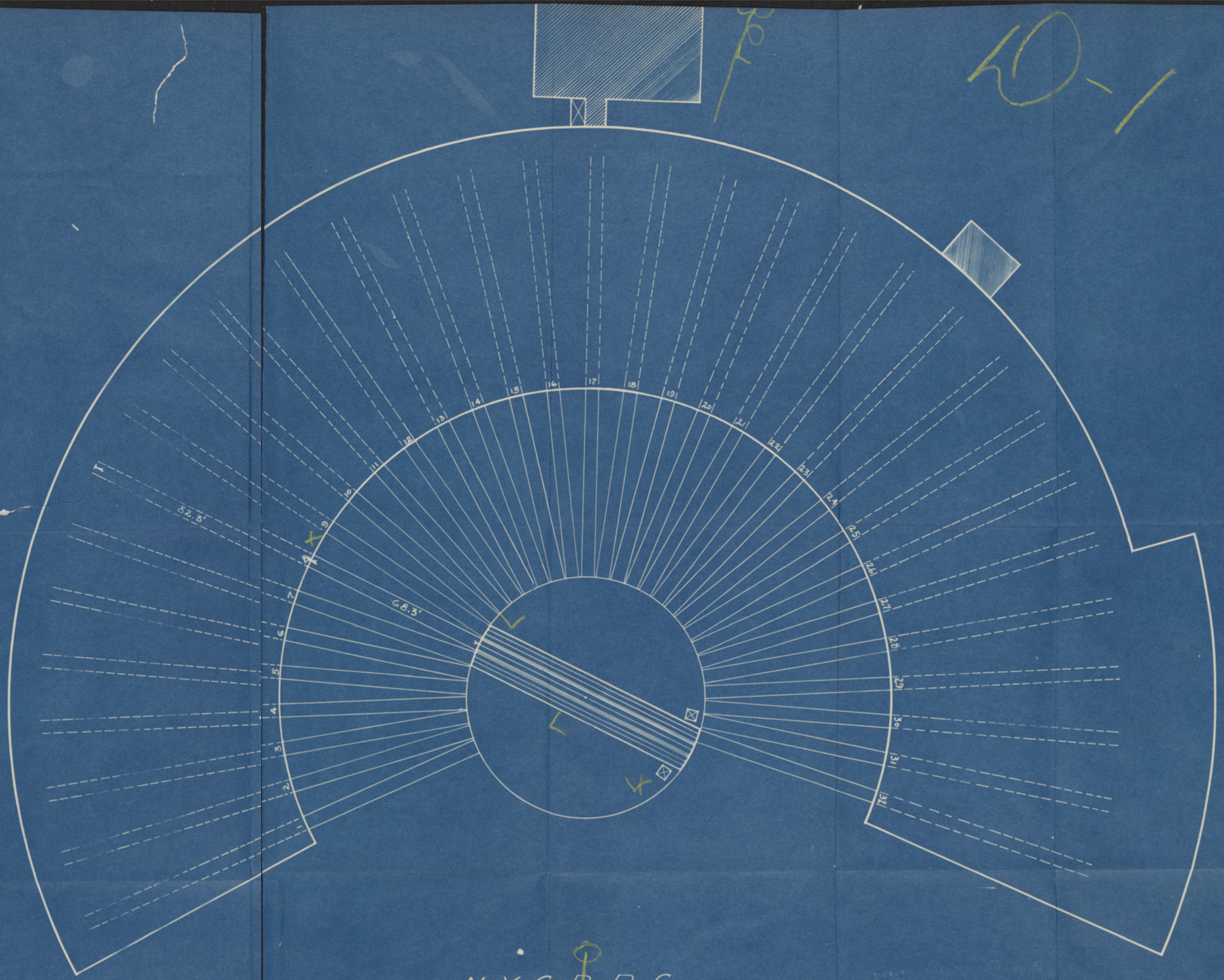
"The defendant says that the plaintiff's intestate was guilty of contributory negli-

gence. Now, you will remember that I read to you a few moments ago from the statute that in this kind of action, under the Federal Employers Liability Act, contributory negligence does not bar the plaintiff's right of action, but it is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself.

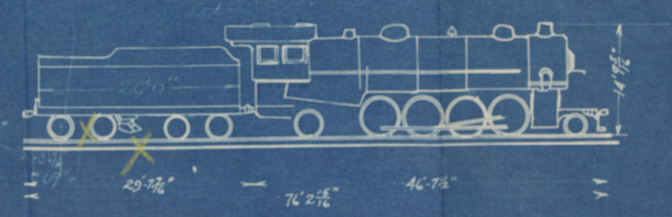
Served May 31, 1928.
Filed June 1, 1928.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.


R. R
lo and E
ER DIVIS
. S. R. R
ANTON
TURNTABL
in
DURH
ogr ~ Weeha
ALE = 1" = 20
14' 9 5/16"
1/2"




N. Y. C. R. R. Co.
Buffalo and East River Division
W. S. R. R.
Map of Granton Roundhouse and Turntable in New Durham
Office of Div. Engr. ~ Weehawken, 4-18-28
Scale = 1" = 20 ft.



# New Jersey Court of Errors and Appeals

| | |
|---|---|
| DONATO MARCONE, Administrator, etc., of Joseph Marcone, deceased, *Plaintiff-Respondent,* *v.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appellant.* | Action at Law. On Appeal. |

## BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

This appeal brings up for review a judgment entered in the above entitled action in the Hudson County Circuit Court. The action is brought under the Federal Employers' Liability Act.

The decedent, an employee of defendant, met his death at the roundhouse of the defendant, at Granton, New Jersey, on July 27, 1926, probably between 2:30 and 2:45 o'clock A. M., Eastern Standard Time. He was run over by defendant's locomotive No. 3709, which had been standing on track 8 in the roundhouse and was being slowly backed therefrom to the turntable, which was located at a distance of 68.3 feet from the entrance to the roundhouse (see Exhibit D-1).

The complaint alleges (p. 2, line 1), that both the intestate and defendant were engaged in interstate commerce at the time of the accident, and that defendant was negligent in failing "to use rea-

sonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff, did not use reasonable care to equip said locomotive with suitable head light or any light; and did not use reasonable care to propel same at a safe rate of speed."

The answer (pp. 3 and 4) admits that at the times mentioned in the complaint defendant was a common carrier by railroad, engaged in interstate commerce. It denies that at the time of the accident intestate was engaged in interstate commerce, and denies all allegations of negligence.

As separate defenses, defendant alleges that the injuries sustained by the intestate arose out of his negligence in going to and standing upon a railroad track operated by defendant at a time when it was unnecessary, improper and obviously dangerous so to do; that at the time and place of receiving said injuries, plaintiff's intestate was a mere licensee.

The questions presented by this appeal are that the Court erred:

(1) In overruling defendant's motion for a nonsuit;

(2) In overruling defendant's motion to direct a verdict in its favor;

(3) In refusing to admit certain evidence offered on behalf of defendant;

(4) In admitting certain evidence against defendant's objections;

(5) In denying defendant's motion to strike out all testimony with respect to the alleged conversation between the assistant foreman Kelly and the

witness McGee with reference to the early taking out of defendant's engine from the roundhouse;

(6) The Court erred in its charge to the jury as specifically set forth in the Grounds of Appeal, and on pages 20 to 23 of this brief.

## Statement of Facts.

Plaintiff's intestate had been in the employ of the defendant for more than a year (Siddell, p. 70, line 26; p. 100, line 22). He was a member of the inspection gang under leader Siddell. This gang made minor repairs and adjustments on engines, and fitted them for road service (Siddell, p. 68, line 5). Decedent packed boxes on engines with lubricants, and when directed so to do he also filled grease cups on the engines. He was thoroughly familiar with his work and with conditions and the manner in which operations were carried on in the roundhouse where he did all his work (Siddell, p. 68, line 20; p. 70, line 30).

On the night of the accident decedent began work at 7 P. M. and his hours of service ended the following morning at 3 A. M. (Kelly, p. 40, line 35; Siddell, p. 101, line 10). On the night prior to the accident he had done work on fourteen different engines, the last one being engine 3835 located on track 7 (Siddell, p. 68, line 30; p. 71, line 15; see Exhibit D-1).

He had lubricated engine No. 3709 and had completed his work on that engine about four hours before the accident. Thereafter he had nothing further to do on that engine and had no occasion to go to or on the track where it was located (Siddell, p. 71, line 20).

Decedent was last seen alive at about 2:15 A. M. when his foreman Siddell told him to finish his work on engine 3835 and remain there at the in-

spection wagon for further orders (Siddell, p. 69, line 10; p. 72, line 1; p. 101, line 25).

After these directions, Siddell took a part of his gang and went outside the roundhouse to a place called "the farm" to do some work on an engine there located.

When Siddell left for "the farm" at about 2:15 A. M., engine 3709 was in the roundhouse. When he returned from "the farm" about 2:35 to 2:40 A. M., it had been backed out of the roundhouse (Siddell, pp. 102, line 35 to 103, line 18).

When Siddell returned from "the farm" decedent was not at engine 3835, nor at the inspection wagon. Siddell went to the wagon which was then located where he left it when he went to "the farm." This location was on the concrete floor which extends all around the engine house in front of the engine stalls. It was at a place in line with the space between tracks 7 and 8. He then began making out his reports. Just as he began this, he was informed that a man had been killed at the turntable. Upon hearing this he immediately examined engine 3835 and found that decedent's work on that engine had all been completed. No other work had been assigned to him. Siddell then went to the turntable and found that the dead man was Marcone (Siddell, p. 69, line 15; p. 70, line 20; pp. 73, line 30 to 74, line 20; pp. 97, line 30 to 98, line 15).

The inspection wagon was used for carrying the tools and supplies of the inspection gang. It was moved from place to place in the roundhouse along the concrete floor above mentioned, which was about 10 feet wide, and extended in front of all the engine stalls.

Decedent's tools were carried on this wagon. They consisted of two buckets, one containing material saturated with lubricant, and in the other

was placed the used lubricants removed from the engine boxes; also a grease box; a receptable for his keys for opening the boxes, and an iron rod used in removing the used lubricants and applying the new. All decedent's tools were found in place on this wagon ready to be removed when the gang quit work at 3 o'clock. They were found there at about 2:45, only about 15 minutes before quitting time (Siddell, pp. 72, line 40 to 73, line 22; pp. 97, line 30 to 98, line 22; pp. 101, line 25 to 102, line 25).

No one saw decedent from the time Siddell left him at engine 3835 until his body was found lying partly on the turntable and partly on track 8, adjacent to the turntable. When found, his body was lying either between the two right-hand trucks at the rear end of the tender of engine 3709 or just in front of the second of these wheels from the rear of the truck. Maloy, the turntable operator, places the body between the two trucks, and the witness McGee places the body in front of the second of these trucks from the rear of the tender. The place of the body with respect to these trucks, as testified to by these two witnesses, is shown by the two crosses on the diagram of the engine on Exhibit D-1, one cross being between the two trucks, and the other in front of the second truck (Maloy, p. 65, line 32; McGee, p. 34, line 1; p. 82, line 10).

The body was taken out on the right side of track 8, adjacent to track 9. The witness Bechtol testifies that he found the body between the rails of track 8. MeGee and Maloy testified that the body was lying across the right-hand rail of track 8, the shoulders being on the rail and the rest of the body being outside that rail, and on the side toward track 9 (Bechtol, p. 17, line 40; McGee, p. 34, line 1; p. 82, line 10; p. 84, line 1; Maloy, p. 64, line 35).

When the engine was stopped, the body was located partly on the turntable and partly on track 8 adjacent to the turntable (Bechtol, p. 10, line 10; McGee, p. 35, line 20).

Decedent's cap was found between the rails of track 8, about 30 feet from the position of the body on the turntable, and 12 feet to 15 feet from the door of the roundhouse (Bechtol, p. 11, line 30; Siddell, p. 100, line 10).

Blood stains were found on the right-hand rail, and between the rails of track 8, and about 30 feet from the place where the body was found (McGee, p. 36, line 30; p. 83, line 20; Siddell, p. 98, line 40).

McGee and Siddell found marks as if something had dragged along track 8, beginning at or near the place where the blood stains began (McGee, p. 84, line 18; Siddell, p. 99, line 30).

None of decedent's tools which he used in his work were found near the place of the accident, nor along tracks 7, 8 or 9. On the contrary, they were all found in place on the inspection wagon ready for removal at quitting time (McGee, p. 83, line 10; Siddell, p. 98, line 15 to line 35). It is evident, therefore, that decedent was not doing or attempting to do any work at the time and place of the accident. He knew his work for the day was done, and undoubtedly he placed his tools in the inspection wagon.

McGee testifies on behalf of plaintiff that the clearance between the rear of the tank of engine 3709 on track 8, and that of 3835 on track 7 was about three feet (p. 33, line 35). Again (p. 90, line 20) he testifies that the clearance between the tanks of these engines was about 2 feet. This witness never measured the clearance between the engine tanks, and he was simply giving an off-hand estimate of the clearance (p. 95, line 18).

By actual measurement of Gordon, the engineer, the clearance between the tanks of engines standing on tracks 7 and 8 is three feet nine and a half inches. The clearance is the same between engines standing on tracks 8 and 9 (Gordon, p. 113, line 18).

## POINTS.

### I.

**Plaintiff failed to prove any negligence on the part of the defendant.**

The negligence alleged in the complaint (p. 2, line 1) is that defendant failed to use reasonable care to keep the locomotive under control; to give warning of the movement thereof; to keep the same in proper condition so it could be stopped by the use of reasonable care in time to avoid injury to plaintiff's intestate; that it failed to use reasonable care to equip the locomotive with suitable head light or any head light, and did not use reasonable care to propel same at a safe rate of speed.

After reciting the negligence alleged in the complaint, the Court, in charging the jury, said (p. 118, line 22):

> "Now the plaintiff relies on that part of the complaint which charges that the defendant *did not give warning of the movement of this locomotive.*"

Again at page 119, line 10, the Court said:

> "Now as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence *the charge of negligence which he relies upon,* that is, that the defendant *did not give warning* of the movement of this locomotive and that that negli-

> gence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you assess his damages. *If he does not make that out,* manifestly he ought not to have a verdict and the verdict should be, under such circumstances, for the defendant. That, you will observe, is practically all that is necessary to be said upon the question of the negligence of the defendant."

Plaintiff's counsel, although making objections to other parts of the charge, made no objection to this part (see plaintiff's objections to charge, p. ~~105~~./25).

Not only has the plaintiff failed to prove lack of warning prior to and during the movement of this engine, but the evidence affirmatively shows without contradiction, that the whistle was sounded before the movement began, and that the bell was ringing during the entire movement.

McGee, the hostler in charge of the engine, testifies that he blew three blasts of the whistle on two occasions—one before he started the movement, and one after stopping his engine and before the second movement. The first of the three blasts was unusually loud. Three blasts were distinctly a warning that the engine was about to *back up.* In this respect it was entirely different from the other whistles blown in that vicinity which might be mere testings of whistles, or signifying other and different movements of the engines (McGee, p. 38, line 35; p. 55, line 18; Maloy, p. 63, line 32).

Thus, the undisputed evidence establishes that warning of the engine movement was given both by bell and whistle, and thereby the one ground of negligence relied on by the plaintiff, and the only negligence submitted to the jury by the Court's charge, was wholly negatived.

If it be urged on behalf of plaintiff that warning by bell and whistle was insufficient, in view of the circumstances of this case, the answer is fourfold:

(1) Three blasts of the whistle have a distinct significance. It is a "back-up" signal which must have been well known to all employees about the roundhouse—especially those who had worked there for over a year as decedent had.

(2) Other warnings of the impending movement were given which, in themselves, were sufficient notice thereof.

(3) All the customary warnings of this location were given.

(4) Careful observations were made by the hostler before the movement, and no one was in the vicinity of this engine to whom a warning was due or could be given.

The other warnings in addition to the bell and the well-known "back-up" signal of the whistle were:

(1) All the lights on the engine—twelve in number; head light, cab lights and tail light—were lighted several minutes before the movement. Lights were not lighted on an engine until the engine was being prepared for movement from the roundhouse (McGee, p. 37, line 18; pp. 54, line 35 to 55, line 15; Kelly, p. 49, line 15; Maloy, p. 64, line 10).

(2) The air pump was started at the same time the lights were turned on, and it was continued in operation until after the accident. It could be heard a distance of at least 30 to 40 feet. This alone was ample notice that the engine was about to be moved (McGee, p. 53, line 40 to p. 54, line 35).

(3) No other warnings of movements of engines from the roundhouse stalls to the turntable are shown to have been customary at this place. Surely these were ample for the protection of all employees.

(4) In addition to these warnings, the hostler, before moving the engine, made careful observations not only as to the engine he was about to move, but also as to engines on the two adjacent tracks. No one was working on engine 3709 which he was about to move. All work on that engine as above shown had been completed four hours before the movement. The hostler also made careful observations to see whether workmen were employed on engines standing on tracks 7 and 9 and he saw no one.

McGee testifies that he arrived at the roundhouse about 2:20 and entered stall No. 8 from the rear; that the tender of engine 3709 extended outside the door about 4 feet; that as he approached it he had a view along the rear of the tender and no one was there; then he walked along the left-hand side of engine No. 3709 to the front; at the front of the engine he closed the cylinder cocks, passed in front of the engine and down the right side to the rear. There were chains underneath the two main drive wheels on both sides which he removed. As he removed these chains, he could see underneath the engine and was looking for all obstructions. No one was around or underneath the engine at that time. As he was passing around his engine he could see the engines on track 7 and track 9, and no one was working on those engines at that time (McGee, p. 51, line 5 to p. 54, line 10).

While backing out of the roundhouse, he was looking to the rear. His view to the rear was cut off by the tender for a distance of about 12 feet.

He started to back out about ten minutes after he took his place in the engine cab, or about 2:30 A. M. The speed was about 4 miles per hour (McGee, p. 56, line 8 to p. 57, line 15).

Thus, every precaution was taken to ascertain whether, by the movement of this engine, anybody would be in danger either on track 8 or the adjacent tracks 7 and 9.

Were it necessary to discuss grounds of negligence alleged in the complaint other than the one relied upon by the plaintiff and submitted by the Court to the jury, *i. e.*, the failure to give warning of the movement of the engine, it could be easily shown that there is no evidence to support them, and on the contrary, that they have been proved not to exist. These grounds are: Failure to equip the engine with proper brakes and appliances; failure to equip it with a suitable headlight or any light, and failure to propel the engine at a safe rate of speed.

We have already cited evidence showing that the locomotive was properly equipped with lights and that these lights were properly lighted.

The engine was in good condition throughout (McGee, p. 60, line 8).

The speed was about four miles per hour (McGee, p. 56, line 38).

Of course, it goes without saying that in backing an engine from the roundhouse on to the turntable a distance of but 68 feet from the door of the roundhouse, it would be impossible to operate the engine at any but an exceedingly slow rate of speed.

There were no eye-witnesses to this accident. How or why deceased came upon track 8 is not shown. It was not to do any work, for his work on engine No. 3709 had been completed four hours before that time. He was not near track 8 be-

cause of doing any work on engine No. 3835, for his work on that engine was all completed, and he had placed his tools on the inspection wagon. Nor is it shown when he arrived there. It must have been after the hostler, McGee, walked around his engine in the course of his investigation, and the time when he moved the engine. This was about ten minutes. Whether he deliberately walked upon the track, or whether for some unknown reason he fell across it, is unknown. It is clear, however, that whenever he came near or upon this track, there was abaundant evidence, which he must have observed, that the engine was about to be moved. Under these circumstances, there was no evidence of negligence to be submitted to the jury.

In *McCombe* v. *Public Service Railway Company,* 95 N. J. L. 187, an action was brought to recover for the death of one Saunders, plaintiff's intestate. His body was found lying on the defendant's track near midnight. He had suffered injuries from which he died. The motorman on the car following the one supposed to have injured the decedent, discovered the body lying on the rail of defendant's track. One leg and one arm had been cut off, and the body was otherwise mangled. "There were no eye-witnesses to the accident. No one saw how it happened." This Court held that the facts proved did not warrant a presumption of negligence on the part of the defendant, and said (p. 189):

> "But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price* v. *New York Central R. R. Co.,* 92 *Id.* 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven.

> Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

In *Adriance* v. *Palisades Realty and Amusement Company, et als.*, 95 N. J. L. 185, the plaintiff was riding in a "racer" operated by the Amusement Company within the boundaries of its park. With him in the car were two companions. An iron bar was placed in front of them and fastened to the car. Toward the end of the second ride something happened, and plaintiff ceased to remember anything. One of his companions spoke to him a few minutes before the accident. The next he saw was that "the plaintiff was doubled up, bleeding." Not one of the party saw the plaintiff struck or saw how he was injured. This Court said (p. 186):

> "The facts disclose an injury which is admitted, but do not disclose *how it happened* and no one gave any testimony on the point."

The Court also held that the maxim *res ipsa loquitur* was not applicable. On page 187 the Court used the following language:

> "If there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon. *Bahr* v. *Lombard, Ayres & Co., supra.*
>
> "The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price* v. *New York Central R. R. Co.*, 92 N. J. L. 429."

If, in the first paragraph of the above quotation, before the word "conduct" we insert the word "negligent," the language will be perfectly applicable to the present case. All the evidence with respect to the conduct of the defendant establishes the absence of negligence.

In *Alvino* v. *Public Service Railway Company*, 97 N. J. L., 526, suit was brought to recover for the

death of plaintiff's intestate arising out of a collision between a motorcycle and defendant's trolley car. No one testified to having seen or heard any collision. Decedent's wife testified that she saw him riding in the side car of the motorcycle. About a half hour later she heard of his injury. There was testimony to the effect that a motorcycle was found badly broken down and two men were found unconscious on the road side. This Court said (p. 529):

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

*Patton* v. *Public Service Railway Company*, 227 Fed. 810 (C. C. A., 3rd Circuit), is a case almost on all fours with the present case. Plaintiff's husband was found dead under the rear truck of one of defendant's cars. This car had backed from a position north of the trolley station toward a switch south of the station. Decedent's head lay in the direction of the front of the car. Just prior to the accident, the conductor of defendant's car, standing upon the platform, gave the signal by bell to move the car back to the switch. The conductor remained upon the rear platform and according to the testimony was able to see a certain distance down the track, but he saw no one. The car was lighted within and carried the customary forward and rear lights. The conductor felt a jolt, ordered the car stopped, and discovered the body of plaintiff's husband beneath it.

The negligence charged was that the defendant, by its servant, backed the car at a reckless speed, without giving sufficient warning, and failed to

exercise the care which the law requires of a carrier toward a passenger. The Court assumed for the purpose of the argument that there was evidence sufficient to warrant a presumption that decedent had been a passenger on one of defendant's cars, from which he had recently alighted, but decided the case upon the broad question of defendant's negligence, and said (p. 812):

> "No one saw the accident and no one knows, as a matter of fact, how it happened. The plaintiff contends that from the circumstances of the accident, negligence of the defendant must be inferred, that is, had the defendant not been negligent, the accident would not have occurred. When or how the plaintiff's husband got upon the track between the two rails is not disclosed. Whether he heard the bell ordering the car to back or whether he saw the lighted car in time to avoid his peril, is not shown. Whether the car knocked him down, or whether he fell down and while in the forward position in which his body was found, was run over by the car, is a mystery. Whether the conductor upon the rear platform of the car could have seen the decedent or by the exercise of care should have seen him, is not proved, nor is it proven that in backing the car, under the circumstances, the conductor was engaged otherwise than in directing the car's movements and in the proper exercise of care for the safety of those upon the track. *In fact it is not shown how the accident occurred.* While it is certain that the plaintiff's husband was killed by the car, there is no evidence that his death was caused by negligence, or that the proximate cause of his death was the negligence of the defendant. The learned Trial Judge was entirely without error in withdrawing from the jury a case in which a verdict for the plaintiff could not have been sustained by the evidence."

At page 813, the Court held that the doctrine of *res ipsa loquitur* did not apply, and said:

> "Recognizing the lack of testimony upon the element of negligence, the plaintiff urged that the case is one in which the maxim of *res ipsa loquitur* applies. *This maxim does not relate to a situation susceptible of proof yet not capable of proof merely because of the absence of witnesses.*"

To the same effect is *Adriance* v. *Palisades Realty and Amusement Company, et als.*, 95 N. J. L. (bottom of p. 186).

See also *Olsen* v. *Erie R. R. Co.*, 99 N. J. L., page 485.

There is no evidence in the case justifying a finding of negligence on the part of defendant.

## II.

**At the time of the accident the decedent was not engaged in interstate commerce.**

It is clear that decedent was not doing or attempting to do any work at the time he was injured. Prior to the accident, his work on engines 3709 and 3835 had all been completed. No tools were found near the scene of the accident. All his tools were on the inspection wagon, where he undoubtedly placed them.

If he were leaving the place of his employment contrary to the orders of the foreman, and before quitting time, and walked behind engine 3709, he was disobeying those orders in prematurely leaving the place of work, and he chose a way of danger, when the defendant had provided for him a perfectly safe way of egress along the concrete floor which extended throughout the roundhouse

in front of the engine stalls. His conduct, therefore, constituted a withdrawal from his previous service, whether in interstate commerce or otherwise, and the case is governed by the rule laid down in *Krysiak* v. *Pennsylvania Railroad Co.*, 270 Fed., page 758 (C. C. A., 3rd Circuit, 1921). In that case the Court said (p. 760):

> "We are particular to note just here that we are not passing on a case where an employee, leaving employment in interstate commerce, selects one of several more or less dangerous means of exit from his place of employment because his employer had provided him no safe means; but we are passing on a case where the employer had provided a safe way out and the employe, ignoring it, selected a dangerous way. At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns.
>
> "We are therefore of opinion that the learned trial judge committed no error in holding that the decedent when killed was a mere volunteer on the defendant's tracks."

To the same effect is *Haber* v. *Jenkins Rubber Company*, 72 N. J. L. page 71.

*Harris* v. *U. S. S. Co.*, 75 N. J. L. page 861; *Mehl* v. *Glucose Co.*, 83 N. J. L. page 630; *P. & R. Ry. Co.* v. *Allen*, 9 Fed. 2nd, 854 (C. C. A. 3, 1925).

## III.

**The Court erred in overruling defendant's motions for judgment of nonsuit and for a directed verdict.**

The grounds on which the motion for judgment of nonsuit was based are as follows (p. 80):

"First. That at the time of receiving the injuries which resulted in his death plaintiff's intestate was not engaged in interstate commerce;

"Second. No negligence has been established against the defendant;

"Third. The negligence alleged in the complaint has not been established against the defendant. The negligence alleged in the complaint is that the engine was not in proper order; that no signal was given; that the brakes were out of order. None of those elements of negligence have been proven. On the contrary they have been disproven.

"Fourth. At the time of receiving the injuries resulting in the death of plaintiff's intestate he was not acting in the scope of his employment.

"Fifth. The injuries which resulted in the death of plaintiff's intestate arose out of his negligence.

"Sixth. The proximate cause of the death of plaintiff's intestate was his negligence.

"Seventh. The injuries which resulted in the death of plaintiff's intestate were received at the place where his duties to defendant did not require him to go."

(See objection to Court's ruling, p. 81, line 25.)

The motion for a directed verdict was based on the same grounds (p. 114, line 35; objection noted p. 115, line 1).

(Grounds of Appeal 1 and 2, p. 129.)

It will be observed that these motions were based partly on the failure of plaintiff to prove the negligence set out in the complaint or any negligence on the part of defendant; partly on the failure of plaintiff to prove that at the time of the accident decedent was acting in the scope of his employment, or was engaged in interstate commerce, and partly on the ground that the injuries suffered by

plaintiff's intestate arose out of his negligence and that such negligence was the proximate cause of his death.

We have shown in the statement of facts and under Point I of this brief that there was a total failure to establish negligence against the defendant, but that on the contrary the evidence established the entire absence of such negligence.

We have further shown under Points I and II a total lack of evidence that at the time of the accident deceased was doing any work whatever; that he was doing no work, and had no work to do, at the time and place where the accident occurred; that in going to that place at that time, whether with intent to leave the premises, or to go to some other part thereof, he was not acting within the scope of his employment, or engaged in interstate commerce, and that if he was leaving the premises, or going from one part of the roundhouse to another, he deliberately chose a dangerous way instead of a perfectly safe way provided by the defendant along the concrete floor in front of the engine stalls. Furthermore, the evidence is far more persuasive that his death was due to his own negligence or to a pure accident without negligence of either party, than that there was any negligence on the part of defendant.

For the reasons shown under Points I and II, the motions for judgment of nonsuit and for a directed verdict should have been granted.

## IV.

**The Court erred in submitting to the jury the question of decedent's employment in interstate commerce and the question of defendant's negligence at the time and place of the accident.**

In submitting these two questions to the jury, the Court used the following language:

### As to Interstate Commerce.

> "You will notice that a prerequisite to a suit under this statute is that both the defendant and the deceased in this case were engaged in interstate commerce at the time of the accident. The defendant admits that it was engaged in such commerce but denies that the deceased was. Therefore the first question for you to determine is whether or not Joseph Marcone at the time in question was engaged in interstate commerce; and you must determine from all the facts and all the circumstances in the case at the time of the happening in question. Was the intestate engaged in and about a duty which he owed to his master, the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relationship that had existed as between himself and the defendant company so that he was not at the time of the happening in question engaged in any act which he was called upon as the servant of the defendant company to perform in relation to and with respect to the interstate commerce of the defendant company?"

(Pages 116, line 30 to 117, line 18.)
(See objection, page 124, line 40.)
(Ground of Appeal No. 9, page 131.)

AS TO DEFENDANT'S NEGLIGENCE.

"Now, if you should pass that point you will have observed from what I have read from the statute that the basis of an action of this kind is founded upon negligence, and that logically brings us to consider what the negligence is which the plaintiff in this case claims this defendant was guilty of, and that is the charge as contained in the written complaint. The plaintiff in his complaint says that the negligence of the defendant consisted in this: 'That it failed to use reasonable care to keep said locomotive under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by the use of reasonable care in time to avoid injury to intestate of plaintiff; that it did not use reasonable care to equip said locomotive with suitable headlights or any headlights or any lights and did not use reasonable care to propel same at a safe rate of speed.' Now the plaintiff relies on that part of the complaint which charges that the defendant did not give warning of the movement of this locomotive."

(Page 117, line 40, to 118, line 25.)

"Now as I have said, if the plaintiff recovers or is entitled to recover he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive and that that negligence was the proximate cause of this accident. If he makes that out, unless, of course, the defendant makes out some defense, he is entitled to a verdict and to have you assess his damages."

(Page 119, line 10 to line 20.)
(See objection, page 125, line 10.)
(Ground of Appeal No. 10, page 131.)

As abstract legal propositions these portions of the charge are doubtless correct. They are erroneous and harmful to defendant because there is no evidence in the case to which they are legally or properly applicable.

*Brooks* v. *Pennsylvania Railroad Company,* 92 N. J. L., middle of page 396.

This Point raises the same questions and objections as we raised on the motions for a judgment of nonsuit and for a directed verdict. It is sustained by the evidence cited in the Statement of Facts and under Points I, II and III, and the argument presented under those Points to which reference is hereby made.

## V.

**The Court erred in charging that defendant claimed that decedent was guilty of contributory negligence.**

On this subject, the Court used the following language (p. 120, line 9 to p. 120, line 18):

> "The defendant says that the plaintiff's intestate was guilty of *contributory negligence.* Now you will remember that I read to you a few moments ago from the statute that in this kind of action, under the Federal Employers' Liability Act, contributory negligence does not bar the plaintiff's right of action, but it is to be taken into consideration unless it is the sole cause, so far as the evidence shows, of the accident itself."

(See objection, page 125, line 14.)
(Grounds of Appeal, No. 11, page 132.)

The defendant made no claim that the decedent was guilty of *contributory negligence.* Contribu-

tory negligence presupposes and is based upon primary negligence of the opposing party. No such negligence exists on the part of this defendant and it claimed throughout the case that it was guilty of no negligence, and that any negligence in the case was that of plaintiff's intestate. This part of the charge was, therefore, erroneous and prejudicial to defendant.

## VI.

**The Court erred in the admission and rejection of evidence, and in overruling defendant's motion to strike out evidence improperly admitted.**

An attempt was made to show that engine 3709 was moved earlier than it should have been, and that such early movement was negligence which contributed to decedent's death.

No such negligence is alleged in the complaint. Furthermore, the plaintiff at the trial relied upon the failure to give warning as the sole ground of negligence (p. 85, line 10; Court's Charge, p. 118, line 22; p. 119, line 10).

To meet any implication that the engine had been moved too early, McGee, the hostler, who had frequently taken engines out for the "Morning Glory" (the train for which engine 3709 was designated on the day of the accident), was asked:

> "Q. Did you take this engine out this night at about the usual time you are accustomed to take the engine out for this particular train?"

This question was overruled and objection noted (p. 58, line 19; Ground of Appeal No. 3, p. 130, line 1).

For the same purpose, Kelly, the assistant foreman of the roundhouse, and who was familiar with

the time of moving engines therefrom (p. 47, line 10), was asked the following questions:

> "Q. The hostler has testified that he moved the engine out of the roundhouse about 2:30. Could you say whether that was too early or otherwise?"

This question was overruled and objection noted (p. 107, line 15; Ground of Appeal No. 4, p. 130, line 10).

This witness was also asked the following question:

> "Q. If an engine was to be taken out, or if the time scheduled for the train crew to take an engine was 3 o'clock, will you state whether or not moving the engine out of the roundhouse at 2:30 would be too early?"

This question was overruled and objection noted (p. ~~103~~ 107, line 32; Ground of Appeal No. 5, p. 130).

The following questions to witness McGee were admitted against defendant's objections:

> "Q. Did you go to the board to look what time this engine was supposed to leave before you moved this engine that was in the accident?
>
> "Q. Did you go to this board?"

This question was admitted and objection noted (p. 85, line 40; Ground of Appeal No. 6, p. 130).

> "Q. Did you go to this board in the roundhouse where it stated engine so and so is scheduled to leave at such and such a time? Did you go to that board in question?"

This question was admitted and objection noted (p. 85, line 18; Ground of Appeal No. 7, p. 130, line 32).

The Court overruled defendant's motion to strike out all the testimony with respect to the alleged

conversation between Assistant Foreman Kelly and the witness McGee with reference to the early taking out of the engine, the ground of the motion being that no such negligence was alleged in the complaint, and that counsel had stated that he relied upon negligence in failing to give warning.

This motion was overruled and objection noted (p. 85, line 10; Ground of Appeal No. 8, p. 130, line 35).

There is no evidence that decedent had any knowledge as to the time when engine 3709, or any other engine for that matter, would be moved from the roundhouse. There is no evidence that he consulted the board on which the time was posted at which the train crew would take the engine after it had been backed out of the roundhouse. There is no evidence that any of the employees in the roundhouse relied upon the time thus posted to protect them from danger from moving engines.

Any instructions given with respect to the early moving of the engines were to avoid congestion of engines in the vicinity of the turntable (Kelly, p. 49, line 30).

The several rulings of the Court with respect to this evidence were erroneous.

For all the foregoing reasons we respectfully submit that the judgment appealed from is erroneous and should be reversed.

WALL, HAIGHT, CAREY & HARTPENCE,
Of Counsel with Defendant-Appellant.