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IX

Notice of Appeal.

NEW JERSEY SUPREME COURT.

CHARLES R. CHRISTY, *et al.*, partners trading as Charles R. Christry & Son, *Plaintiff,* *vs.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Dtfendant.*	**In Tort.**

TAKE NOTICE:

That the defendant above named, appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause.

Yours Respectfully,

Dated November 24, 1916.

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

To:

EDMUND W. WAKELEE, Esq.,
Plaintiff's Attorney.

Filed November 1916.

X

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES R. CHRISTY, *et al.*, partners as C. R. Christy & Son,
Plaintiffs and Respondents,

vs.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant and Appellant.

The Appellant states the following grounds of appeal:

1. The trial Judge admitted, against the objection of the defendant, the communication of A. H. Smith, Vice-President and General Manager of the defendant Company, dated January 6, 1909, to the Public Service Commission, Second District, State of New York (page 300-302 inclusive of the printed case.)

2. The trial Judge admitted in evidence against the objection of the defendant, pages 2075 to 2083 inclusive, of the proceedings before the Public Service Commission for the Second Department of the State of New York, embodying the statement of Mr. Martin E. McClary before said Commission. (Pages 338 to 346 inclusive of the printed case.)

3. The Court refused to charge the following request of the defendant:

> "Plaintiff's right of action, if any, having accrued September 27, 1908, the law of this State presumes that plaintiff's demands were paid or released within one year thereafter. This presumption has not been rebutted and the verdict must be for defendant."

VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

Service acknowledged January 10, 1917.

WENDELL J. WRIGHT,
Plaintiff's Attorney,

Filed January 11, 1917.

Declaration.

NEW JERSEY SUPREME COURT.

Of the day of November, 1909.

BERGEN COUNTY, SS.:

New York Central and Hudson River Railroad Company, the defendant in this suit, was summoned to answer unto Charles R. Christy and Charles Roland Christy, Junior, partners trading as C. R. Christy & Son, the plaintiff's therein in an action of tort, and thereupon the said plaintiffs, by Edmund W. Wakelee, their attorney, complain for that whereas the said defendant heretofore, to wit, on the twenty-seventh day of September, 1908, as well as before that time and from thence hitherto was the lessor and operator of a certain line of railroad extending from Mohawk to Malone, in the State of New York; that said railroad as aforesaid, was leased, used, occupied, maintained, operated, possessed and controlled by the said defendant and the said defendant was at the time aforesaid and prior to that time and from thence hitherto continuously using, managing and operating said railroad as a common carrier for hire in the transportation of merchandise and passengers, and for that purpose put on said railroad and the tracks thereof one or more locomotive engines driven and used in the said business of the said defendant as a common carrier as aforesaid, and did cause said engine and engines on said days and times aforesaid to pass and repass a great number of times over the tracks of said railroad between the said Mohawk and Malone, in the State of New York, to wit, in the County of Bergen and State of New Jersey, and that on the twenty-seventh day of September, 1908, and prior thereto the said defendant had negligently, carelessly and wrongfully allowed the roadbed, track and lands comprising the right of way of the

said defendant company to become covered with a great quantity of grass, weeds and other vegetable and highly inflammable matter and to become foul and to become dangerous to adjacent properties and to the property of others adjacent to and in the vicinity of the said right of way and tracks of the said defendant by reason of the great inflammability of the material, grass, weeds and other vegetable matter which the said defendant had negligently and wrongfully allowed to accumulate along said roadbed, track and lands comprising the right of way in the possession and under the control of the said defendant; and for that the said locomotive engines of the said defendant on or about the twenty-seventh day of September, 1908, and while so passing and repassing were defectively and improperly and negligently made and constructed and were improperly and negligently managed and operated, and by reason of the negligent, defective and improper construction and operation of the said locomotive engines of the defendant and by reason of the negligence of the defendant in allowing the said roadbed, track and lands comprising the said right of way of the defendant to become foul and covered with dry grass, weeds and other vegetable and highly inflammable matter, fire was by the defendant negligently and carelessly allowed to be communicated and was by the defendant wrongfully and negligently communicated from said locomotive engines to said dry grass, weeds and other vegetable and highly inflammable matter on said tracks, roadbed and lands comprising the right of way in the possession of and under the control of the said defendant, and such fire was by the said defendant by reason of the defective and improper locomotive engines and the defective, improper and negligent manner in which the

same were operated and managed by means of sparks negligently and wrongfully emitted from the said locomotive engines caused by the improper and defective construction and the improper and negligent method of operating the said locomotive engines communicated to the said dry grass, weeds and other vegetable and highly inflammable matter which the defendant herein had negligently and carelessly and wrongfully allowed upon the roadbed, tracks and lands comprising the right of way and under its control and management thereby causing fire to be communicated to certain cut and piled boards, timber and lumber, the property of the said plaintiffs stored by the said plaintiffs at their yards on a certain siding connecting with the railroad of the said defendant near Long Lake West, Hamilton County, New York, to wit, in the County of Bergen and State of New Jersey, whereby and by means of the said several negligent and wrongful acts of the said defendant, the said cut and piled board, timbers and lumber of the plaintiffs on the day aforesaid, at the place aforesaid, to wit, at Hackensack, in the County of Bergen and State of New Jersey, then and there become ignited and burned and wholly and totally consumed and destroyed by fire and lost to the said plaintiffs to the great damage of the plaintiffs, to wit, to the amount of Fifty thousand dollars.

And also for that whereas the said defendant heretofore, to wit, on the twenty-seventh day of September, 1908, as well as before that time and from thence hitherto was the lessor and operator of a certain line of railroad extending from Herkimer to Malone in the State of New York, to wit, in the County of Bergen and State of New Jersey; that said railroad as aforesaid was leased, used, occupied, maintained, operated, possessed and

controlled by the said defendant, and the said defendant was at the time aforesaid and prior to that time and from thence hitherto continuously using, managing and operating the said railroad as a common carrier for hire in the transportation of merchandise and passengers, and for that purpose put upon said railroad and the tracks thereof one or more locomotive engines driven and used in the said business of the said defendant as aforesaid, and did cause said engine and engines on said day and times aforesaid to pass and repass a great number of times over the tracks of said railroad between said Herkimer and Malone, in the State of New York, to wit, in the County of Bergen and State of New Jersey, and that on the twenty-seventh day of September, 1908, the said defendant allowed and permitted said locomotive engines of the said defendant used as aforesaid to be improperly and negligently managed and operated, and did use improper and defective locomotive engines in the carrying on of its business aforesaid at the place aforesaid and by reason of the negligent, defective and improper construction and operation of the said locomotive engines of the said defendant, negligently caused and permitted fire to be communicated from said defective and improperly constructed locomotive engines of the said defendant to certain sawed and piled boards, timber and lumber, the property of said plaintiffs, lawfully stored by the said plaintiffs at their yards on a certain siding connecting with the said railroad of the said defendant at a point near Long Lake West, Hamilton County, New York, to wit, in the County of Bergen and State of New Jersey, whereby and by means of the said several negligent and wrongful acts of the said defendant the said cut, sawed and piled boards, timbers and lumber of the said plain-

tiffs on the day aforesaid at the place aforesaid, to wit, at Hackensack, in the County of Bergen and State of New Jersey, then and there became ignited and burned and wholly and totally consumed and destroyed by fire and lost to the said plaintiffs, to the great damage of the said plaintiffs, to wit, the sum of Fifty thousand dollars.

Wherefore, the said plaintiffs bring their suit, &c.

EDMUND W. WAKELEE,
Attorney for Plaintiff.

Pleas.

And the said defendant, by Vredenburgh, Wall & Carey, its attorneys, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the said plaintiffs have above thereof complained against it, the said defendant and of this it puts itself upon the country, &c.

And for a further plea in this behalf, the said defendant, by leave of the court for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against it, the sad defendant, because it says that the said causes of action arose in the State of New York and accrued to the said plaintiffs therein and not in the State of New Jersey, more than one year next before the commencement of this suit; and the defendant avers that the said plaintiffs released the said causes of action to the said defendant at the expiration of one year after the said causes

of action accrued, and this the said defendant is ready to verify; wherefore it prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against it.

And for further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against it, the said defendant, because it says that at the expiration of one year from the 27th day of September, 1908, and before the commencement of this suit, at to wit, Malone in the State of New York, in the County of Herkimer, the said defendant paid to the said plaintiffs the sum of Fifty Thousand Dollars ($50,000), and this the said defendant is ready to verify; wherefore it prays judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against it.

And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against it, the said defendant, because it says that the said several supposed causes of action accrued to the plaintiffs in the State of New York and did not arise from fire communicated directly from the premises of this defendant, but from fire which first spread over other and intervening lands not owned or controlled by this defendant, which lands were covered with inflammable material and without which fire could not have extended upon the premises of the plaintiffs; by reason whereof, under the laws of the State of New York, this defendant is not liable to the said

plaintiffs for any damages from fire arising upon the premises of the plaintiffs, and this the said defendant is ready to verify; wherefore it prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against it.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Replications.

And the said plaintiffs as to the said plea of the said defendant by it secondly above pleaded say that the said plaintiffs by reason of anything by the said defendant in said plea allaged ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that they, the said plaintiffs, did not release the said causes of action to the defendant at the expiration of one year after the said causes of action accrued, and that said causes of action have never been released by the said plaintiffs to the said defendant, in manner and form as in said plea alleged, and this the said plaintiffs pray may be inquired of by the country.

And the said plaintiffs as to the said plea of the said defendant thirdly above pleaded say that the said plaintiffs by reason of anything by the said defendant in said plea alleged ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that at the time and place aforesaid, to wit, at the expiration of one year from the twenty-seventh day of September, 1908, and before the commencement of this suit, to wit, at Malone, in the County of Herkimer and State of

New York, the said defendant did not pay to the said plaintiffs the sum of fifty thousand dollars or any other sum as the said defendant hath above in its said third plea in that behalf alleged, and this they, the said plaintiffs, pray may be inquired of by the country, &c.

And the said plaintiffs as to the said plea of the said defendant by its fourthly above pleaded say that the said plaintiffs by reason of anything by the said defendant in said plea alleged ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that the said several supposed causes of action accrued to the plaintiffs in the State of New York, but that it is not true that under the laws of the State of New York the said defendant is not liable to the said plaintiffs for damage from fire arising upon the premises of the said plaintiffs; that it is not the law of the State of New York that this defendant is not liable to the plaintiffs for damage from fire not communicated directly from the premises of the defendant, but from fire which first spread over other and intervening lands not owned and controlled by the defendant upon which lands were inflammable material and without which fire could not have extended upon the premises of the plaintiffs in manner and form as the said defendant hath above in its said second plea in that behalf alleged, and this, they, the said plaintiffs pray may be inquired of by the country.

EDMUND W. WAKELEE,
Attorney for Plaintiffs.

Judgment final was entered November 17,1916, as of December 29,1915.

Testimony.

NEW JERSEY SUPREME COURT.

C. R. CHRISTY et al., trading as C. R. CHRISTY & SON,

vs.

N. Y. C. & H. R. R. R. Co.

Tried December 16, 20, 21, 22 and 23, 1915, before Speer, *J.* and a jury.

EDMUND W. WAKELEE (Mr. Wright) for the plaintiff.

VREDENBURGH, WALL & CAREY for the defendant.

Counsel open to the jury.

Mr. Carey: (In his opening to the jury). There is another element in the case, which is partially a question of law and will to some extent perhaps be a question of fact, and that is the question of the law which is to govern the rights and liabilities of the parties in this case. This accident, or this destruction of property, as you observe from the opening of counsel, took place in the State of New York, up in the Adirondack section. The railroad of the defendant of course is located in that section. The defendant company is a New York corporation. The plaintiff was doing business in Hamilton County, New York, so that the rights and liabilities of the parties it will be the contention of the defendant—and the court will give you the law on that subject—are governed by the law of the state of New York, and our con-

tention is that the law of the state of New York—which of course is again for the construction of the court—is to this effect, that if a fire originates on property of the defendant and spreads from that property onto the property of a third party and from the property of the third party spreads to the property of the plaintiff and does damage on the lands and property of the plaintiff, the intervention of the property of a third party between the origin of the fire and the place where the damage is done discharges the defendant from liability to the plaintiff. * * * *

A further question will arise, as to whether or not this action was brought within the time that it should be brought. That will be largely a question of law, although perhaps a mixed question of law and fact, but that question I need not, I think, open to the jury. That will be primarily a question for the court to determine. The action was brought a little more than fourteen months after the origin of the fire, and the question is in the case whether or not the action should have been brought within a year in order to be maintained.

The Court: Well, there is no question I suppose about the fact that the law of New Jersey is applicable to that proposition.

Mr. Carey: That has been before the supreme court, and I will furnish the opinion of the supreme court, to your honor.

The Court: I will hear you on the other law point. We might as well get that disposed of once and for all so far as this court is concerned, as to whether or not the New York law applies or the New Jersey law applies with respect to the fire.

(Counsel argue and hand the court memoranda of cases.)

(Recess.)

Afternoon session:

Mr. Wright: I desire to offer in evidence a map showing the situation in and about Long Lake West village and the switch and lumber siding. The map is marked on the back, for the purpose of identification, "Exhibit P-1, Jan. 18, 1912."

Mr. Carey: I am willing that the map should go in evidence, subject to any corrections which we may develop in connection with the testimony.

(Map marked Exhibit P-1).

Mr. Wright: I also desire to offer in evidence a section of the U. S. Geological Survey, marked "Topography, State of New York," and known as Tupper Lake Quadrangle.

Mr. Carey: I am willing that that go in on the same basis, subject to any corrections that the testimony may develop.

(Marked P-2).

Mr. Wright: I wish to offer in evidence four photographs showing the territory in and around Long Lake West station.

Mr. Carey: I am willing that these should go in evidence subject to any corrections which may develop by the evidence and subject also to their being shown to be relevant and material by the evidence which will be put in later on.

(Marked P-3, 4, 5 and 6).

Mr. Wright: I also wish to offer in evidence enlargements of the photographs P-3, 4, 5 and 6.

Mr. Carey: I am willing that those should go in on the same basis as the others.

(Marked P-3-a, P-4-a, P-5-aand P-6-a.)

WATSON B. CLARK, sworn.

Direct Examination by Mr. Wright:

Q. Where do you live? A. Tenafly, New Jersey.

Q. What is your business or profession? A. I am a civil engineer and surveyor.

Q. How long have you been engaged in that profession? A. Since 1891.

Q. What experience have you had in surveying? A. Well, I have had a general engineering practise in construction work. I am a city surveyor of New York, licensed city surveyor, and have an office at 30 Church street. I have represented seven or eight boroughs, one city and two townships in the northeastern section of New Jersey.

Q. Are you familiar with the section of the Adirondacks near North Lake West station? A. I am.

Q. How long have you known that section? A. I went up there on November 9th and examined it. I have been through there. passed there frequently, but I went up there on November 9th this year.

Q. And for what purpose? A. To make a survey showing the topography of the land lying southeast and along the tracks south of the station, from Long Lake West south.

Q. And did you make a survey of that territory? A. I made a survey of that territory.

Q. Did you make a survey of the tracks of the New York Central from Long Lake West south for approximately three quarters of a mile? A. I surveyed for over a mile south.

Mr. Carey: What is that answer?

A. I surveyed for over a mile to the south.

Q. And did you do that yourself? A. I did.

Q. Did you make a map from that survey? A. The map was prepared.

Q. Under your supervision? A. Under my direction. It was compared with my notes and I checked the map up and it agrees with the notes taken by me.

Q. Does this map which I have in my hand correctly portray the surveys which you made? A. It does.

Mr. Wright: I desire to offer this map in evidence. Any objection?

Mr. Carey: Put it in subject to any corrections which we may find ought to be made. (Marked P-7).

Q. Now, Mr. Clark, that map as it stands, what point of the compass is toward the top, generally speaking? A. Generally speaking, north.

Q. And is the point of the compass shown on there by an arrow? A. Is is, in the upper left hand corner.

Q. Suppose you come over here where you can point. What do the black lines running from the top toward the bottom indicate? A. This line represents a single track road running from the station at the top of the map southerly a distance of 6,700 feet.

Q. What does the black line running off at an angle to the right indicate? A. A switch running into the lumber company's property—yard.

Q. What does the square on the south side of the track, about opposite the far point of the switch indicate? A. That is the foundation of an old section house.

Q. What does the black square still further to the left of that indicate? A. The Monahan residence.

Q. Now there is a black rectangle a little fur-

ther south and to the east of the track; what does that indicate? A. That is a sort of a coal shed or something at the present time—a building at the present time.

Q. A little south of that on the opposite side of the track there is another square in black. What does that indicate? A. That black square represents a dwelling.

Q. Then still further south there are two smaller black squares. A. Two small houses used by the railroad—section houses apparently—a tool house—car house.

Q. Now at the upper part of that map there apparently are two sets of tracks; is that true? A. There is a main track and a switch.

Q. And the switch commenced about where, from the southerly end? A. 2200 feet south of the north end of the station, about.

Q. Now I call your attention to a little mark in black farther down the track, and just around the first curve; what does that indicate? A. That is a mile post, or a sign post there—a mile post.

Q. Do you recall what number is on it? If you don't never mind. I thought may be you did. A. 940; 3,700 feet south of the station.

Q. In what direction does the track run from the station south? What direction on the compass? A. Southwesterly.

Q. Then there is a bend to the left, is there not? A. Yes.

Q. Then in what direction does the track run? A. About south.

Q. About north and south? A. Yes.

Q. Then there is another bend to the right, is that correct? A. Going south?

Q. Going south. A. Yes; to the right. That runs southwesterly at a tangent to that point.

Q. And the track after it gets around that bend runs in what direction? A. Southwesterly.

Q. Now the first bend going south from the station, what is the angle of that turn-curve? A. A little over 31 degrees.

Q. And what is the angle of the second bend going south from the station? A. 44 degrees.

Q. Now I notice that you have placed upon the map dotted red lines with figures at the end of each of the dotted lines. What does that indicate? A. The dotted line indicates the line of eight and the figures on the end represent the relative elevation of that point as compared with the point at the station.

Q. So you made a survey of the elevation of the land to the east of the track through this half mile, did you? A. A mile, yes.

Q. About a mile. And what was the elevation of the track at the station, or at least what distance did you take for the purpose of your survey? A. Took the elevation of the station steps, 1784 feet, I believe.

Q. Have you your original notes with you? A. (After referring to notes) 1785 feet at the station. We assumed that was the elevation.

Q. That is 1785 feet above what? A. High water. It compares practically with the government survey.

Q. And that was your base line, is that correct? A. That was the base of my plane that I used for comparison.

Q. So from that plane the other elevations were made by actual survey? A. They were.

Q. And therefore whether or not the figures which you have given as the elevation plane were correct or not, the difference between that figure and the other figures would indicate the different in elevation? A. It would.

Q. Will you please describe generally the character of the land on either side of the railroad

track from the station southerly as far as your survey shows? A. The land from a point about —well, a thousand feet south of the station toward the Monahan house, rises from the edge of the track toward the west. At approximately 2,500 feet from the station a little break runs in under the track to the east of the track. For a distance of approximately 2000 feet there is a swamp or low land extending east of the track variable distances, varying from that point to 600 to 650, 500 feet, to a point opposite the end of the switch of 800 feet. This was practically level, or based on my elevations there, approximately 1780 feet. West of that point there is a ridge rises; it rises very abruptly and very rapidly—

Mr. Carey: West of that point?

A. East of that point—excuse me. East of the easterly edge of the swamp. The hill terminates at the easterly edge of the swamp; and from that point the land rises rapidly toward the west to a summit height varying—

The Court: You do not mean toward the west?

A. Toward the east; to a summit height varying from 75 to 90 feet above the swamp. It then appears to flatten out. Behind that is another large mountain range running approximately northeast and southwest.

Q. Does that ridge you have just spoken of come near the railroad at any point? A. At about—at 3400 feet below the station the tracks cut through between the rock and the ridge, and it is about—starting at about eight feet above the track it rapidly rises up to the point of 90 feet above the swamp.

Q. What are the red figures which you show

alongside of each of the red dotted lines. A. The distances from the west rail of the track to the point where the elevation—

Q. East or west? A. West rail of the track, to the point where the elevations were taken.

Q. Say for instance taking this dotted line which reads 1100 feet; that means that taking the line of sight as shown by the dotted line— A. To the apex of that hill.

Q. To the point where the little X is—it means that in that eleven hundred feet there is a rise of from 1785 plus to 1875 plus? A. Yes, sir.

Q. And the other lines all mean the same; is that correct? A. Yes.

Q. Could you draw on there approximately the southerly and easterly line of what you call the swamp? A. Yes.

Q. Will you do so? (Witness does so).

Q. You have the line on there in blue pencil? A. Blue pencil.

Q. And that indicates approximately the southerly and easterly line of what you have called the swamp? Is that correct? A. Yes, sir.

Q. And it extends from that line all the way to the railroad tracks? A. From there to the fill of the railroad track.

Q. Now south of the first bend, what is the condition there at the point where you said there was a cut? Describe it from there on down. A. From station 34—that is 3400 feet from the station—a little over half a mile—the ground falls away quite rapidly in a southerly direction with a few spurs of rocks protruding, crossing the general line of the land, extending from 34 down to this point, 6200 feet, about a mile and an eighth from the station. There are several little streams going into these lowlands and the main mountain approaches the track at this point at the south end

of the map, running off in a northeasterly direction and rising very high above the track. At the southerly end of the map the mountain to the east is approximately a thousand feet away, at least the high portion of that mountain, and rises from two to three hundred feet bove the track.

Q. Within a thousand feet? A. The highest apex is over a thousand feet at this point.

Q. But I mean your map shows— A. At a thousand feet the elevation was then nearly three hundred feet above the track.

Q. Now this ridge that you have described where the cut was, what direction does that run? Just indicate about where it commences at the track and which direction it runs. A. The ridge starts at the station, at approximately 3400 feet south from the northerly end of the station, and curves around first in an easterly direction and then in a northeasterly direction, following the blue line of the swamp at a distance varying from 300 to 800 feet from the easterly edge of the swamp.

The Court: Following how far from the swamp?

A. Varying from 300 to 500 feet east of the blue line of the swamp I have indicated.

Q. What do you mean, "varies from 300 to 500 feet?"—the apex of the ridge? A. The apex of the ridge as seen from the track.

Q. The top of the hill in other words? A. The top of the hill.

Q. Will you describe the territory right around the station, particularly to the eastward of the track? A. There is a roadway leading off in a southeasterly and easterly direction, turning around into an easterly direction, starting from the station, and to the northeast of the station the

ground rises rapidly, the swamp extending southerly to a point approximately two or three hundred feet south of the sheds shown at the station.

Q. The swamp extends northerly? A. Yes.

Q. There is no swamp at the station? A. No; just flat land.

Q. But the swamp you have previously spoken of runs up to a point somewhere near the station but south of it; is that what you mean? A. Yes, sir.

Q. And that hill that is just east of the station, how does that run, what direction? A. It dies down as it approaches the northeasterly edge of the swamp, and rises, increases in height in a northeasterly direction.

Q. You may take the stand for a minute now. I forgot to ask you how far it was from the station to the point south of the Christy switch. I assume these little figures in here marked 10 plus double 0 will represent hundreds of feet? A. That represents hundreds.

Q. So where the figures appear "10 plus double 0" that means a thousand feet? A. A thousand feet from the north end of the station.

Q. And that is true all the way down the map, so that by looking at the map and referring to the figures you can tell just how many feet that point is away from the north end of the station? A. Yes, sir.

Q. I show you exhibit P-5-a and ask you if you recognize what that is. A. That is a photograph showing the foundation of the old section house, the building used for coal and dwelling on the east side of the track, and the hill east of the swamp, looking southeasterly from the north side of the Monahan home.

Q. North side? A. South side of the Monahan home.

Q. It is looking straight across the track, is it not? A. Yes—a little southeasterly.

Q. Does this picture show the ridge which you have testified to which was just at the south and east of the swamp as indicated by your blue line on the map, P-7? A. It does. It shows a dark line, with the trees—that is the top of the ridge as located by me; and the mountain range further back is shown; also the hill lying east of the station, running off in a northeasterly direction, and dying down as it comes down to the meadow.

Q. I show you P-4-a. Do you recognize that picture? If so, what is it? A. That shows the mile post south of the station and the straight track after getting around the first bend.

Q. Looking in what direction generally is that? A. Looking northerly.

Q. And does the picture show where the ridge that you have spoken about commences with reference to the railroad track? A. Yes; it starts right in here, in near the—above the mile post, and runs off here.

Q. Is the portion of the picture in the foreground showing rocks and a cut—is that the cut you testified to a few minutes ago? A. The cut I had reference to is the cut above the mile post. This is the second cut south.

Q. I show you P-3-a; do you recognize that? If so, what does that show? A. That is a view looking from the northeast—north of the station—looking southerly along the track.

Q. The building in the foreground is what? A. Is the station.

Q. And what are the buildings to the right of the station, and up on the hill at the east side of the track? A. The Monahan house and barns.

Q. And this picture in the foreground to the left shows the hill that you spoke of? A. The beginning of the hill.

Q. The beginning of the hill that is east of the station? A. Yes.

Mr. Wright: I think it would be a good time for the jury to see these pictures now that they have been explained. This P-3 is the one looking south that he has just spoken of. P-4 is the one looking north, the mile post at the first bend that he has testified to. P-6-a is the one from Monahan's house looking to the southeast. P-5 is identical with the one you have already looked at except that it shows a bit more of the stone—just a little bit different.

Cross Examination by Mr. Carey:

Q. Mr. Clark, you made this survey yourself? A. I directed it and made the major part of it; I acted as head of the party in making the survey and was there on the work all the way through.

Q. How many were there in the party? A. Two besides myself.

Q. And you took the notes yourself? A. I took the notes myself.

Q. And made the map from your notes? A. The map was made from my notes and I afterwards compared the map with my notes, and this is a correct representation of the notes.

Q. How long were you in making the survey? A. I got there in the morning at about four o'clock and we started as soon as it was light and worked till dark.

Q. Was the party with you all the time? A. They were.

Q. And you completed your survey of the ground at that time? A. I completed my notes that day.

Q. You spoke of the railroad in general terms as running north and south. The road from the

station down to the first curve is in what direction? A. Northeasterly direction.

Q. Running northeasterly and southwesterly, is it? A. Yes, sir.

Q. Can you tell me about how much the angle is? A. About 35 degrees or 36 degrees from true north.

Q. 36; that is the— A. The needle—

Q. —a little more than a third of a right angle? A. The needle correctly shows the distance.

Q. That is a little more than a third of a right angle, is it not? A. Yes.

Q. Do you know precisely what the direction of the track is between the two curves? A. Well, it is about 4 degrees from north and south.

Q. Four degrees which way? A. Northeast.

Q. Four degrees toward the east? A. Yes.

Q. And below the second curve do you know precisely what the direction is there? A. It would be about 48 degrees.

Q. 48 degrees? A. About 48 degrees in rough figures.

Q. 48 degrees toward the east as you are looking up and 48 degrees toward the west as you are looking down; that is a little more than half a right angle? A. Yes.

Q. Half of a right angle would be 45 degrees? A. That is correct.

Q. I notice in various places that you have run off lines from the railroad track to points easterly in a general direction from the railroad, and you testified to elevations at the termination of those lines. Did you make the survey for the elevations on that day that you were there? A. Yes.

Q. Or the measurements of the elevations? A. Yes, sir.

Q. And you did that yourself? A. I ran the instrument on that, yes.

Q. These points upon which you took observations as to elevations were high points lying off from the railroad track? A. They were the high points; in one instance it was the highest point; in others it was the general ridge line—a high point—where the ridge seemed to break away to the east or drop down as it appeared from the railroad track.

Q. And there was a great deal of variation of course in the elevations between these points that you took the measurements from, was there not? A. The rock was irregular; it varied up and down.

Q. The territory there is quite irregular? A. Yes; but there was the general sky line.

Q. Now you indicated here by a pencil line in blue the general southerly and easterly line of the swamp; that you are doing now without any reference to your notes which you took, are you not? A. With reference to the points as indicated on the map as to the edges of the swamps in some instances and in some by the elevation of the swamp.

Q. The swamp there is practically level from the southerly termination up to the northerly termination at the station, is it not, or near the station? A. Practically level, yes—approximately so.

Q. There is no very great difference in the elevation? A. No.

Q. Now can you come here and continue the line of that swamp around toward the station? A. I did not take levels beyond that point, beyond that 1100 feet south of the station.

Q. Does this upper termination of the swamp indicate— A. As far as I took the measurements to the easterly edge of the swamp.

Q. Why didn't you go around toward the station? A. I did not have time, and I did not intend

going up there to take that. I spoke from memory on the rest.

Q. What is that? A. I spoke from memory on the northerly end of the swamp.

Q. What do you mean by having spoken from memory on the northerly end? A. I testified to about where the swamp extended to the north of the station.

Q. And that was from memory and not from actual measurements or notes? A. That is correct.

Q. You spoke of a road which leaves the station and extends in a generally easterly direction. Do you know what that road is called? A. I do not.

Q. The road rises very soon after you leave the station going over in this direction, does it not? A. Well, it runs more southeasterly from the station around the edge of the hill.

Q. But it rises very soon after you leave the station; it strikes the hill very soon after? A. It crosses the southerly end of the hill that runs in a northeasterly direction.

Q. You did not take any elevation apparently so far as the map shows directly opposite from the easterly end of the Christy switch? A. No.

Q. All the elevations which you took were southerly from that point? A. That is right.

Q. Did you take any elevations northerly from the last line shown on your map? A. No.

Q. You spoke of a hill which is crossed by the road leading from Long Lake West. A. Yes.

Q. Over the hill here; does that hill follow round the edge of the swamp? A. It dies down.

Q. In a southerly direction? A. It dies down as it crosses the road, and then starts to rise again and follows out the ridge as shown there on the survey.

Q. It is higher up toward the Long Lake West

road and dies down gradually from that point as you go in a southerly direction? A. The hill is much higher farther to the north of Long Lake West road where it crosses. The road crosses very nearly the lowest portion of the swamp.

Q. Can you point out on the map about the point where this hill as it follows around the swamp begins to rise again? A. From memory I can. My notes do not show it.

Q. But not from measurement? A. No.

Q. Suppose you indicate as nearly as you can from your memory. A. About there.

Q. Suppose you mark that with an X. (witness does so).

Q. Now will you put there "Ridge begins to rise"? A. I will put there what you ask me.

Q. The lowest point. A. As near as I can remember. I could not come within a hundred feet of it by measurement—about two hundred feet.

Q. "Low point of ridge." A. Well, that is the way it appeared from the track. I did not take any measurements on that. I did not go that way. It appeared to be at that point.

Q. Will you put those words on there? From that point, as I understand you, south— A. Standing in the station and looking in an easterly direction at the point I have marked on this map the sky line appeared to be the lowest point of the ridge which traveled along the easterly edge of the swamp.

Q. And from that point did the ridge begin to rise again? A. It appeared to rise in that direction, and also very rapidly to the north.

Q. And by the north you mean the top of the map? A. Northeasterly.

Q. On territory not shown on your map? A. Yes.

Q. What was the character of the rise from this

low point as the ridge followed along the edge of the swamp, rapid or slow? A. Well, looking from the railroad track it appeared to be more or less general—not too rapid—not very rapid in either direction.

Q. But there was a very perceptible rise, was there not? A. There was a gradual drop and a rise again.

Q. Then as a matter of fact from near the station this ridge extended right along down to the edge of the swamp? A. No; not near the station.

Q. What was it? A. The ridge runs about as shown here away from the station in a northeasterly direction.

Q. Well, from the road up here which leads from Long Lake West station? A. From the station the ridge fell toward the west aways. The ridge followed the line approximately down to this point (indicating with a pencil); it was——

Mr. Wright: Don't mark that.

Q. By the way, what is the scale of this map? A. 100 feet to the inch.

Q. Do I understand that the ridge was approximately 1000 or 1100 feet away from the station along the road? A. Well, the sky line of the ridge was, yes.

Q. By the sky line of the ridge you mean the top of the ridge? A. Standing at the elevation of the track and looking easterly the high line appeared to be about that distance from the track.

Q. How far would you say? A. I should say about eight hundred to a thousand feet—that particular hill.

Q. Was there any hill between that point and the railroad track along the road? A. The mountain was more or less irregular right at the station, but that was the point that looked to be the highest.

Q. About how far from the station was the bottom of the hill? A. Why, the north end of the station was practically on the edge of the hill.

Q. So the hill began to rise immediately from the station did it? A. It rose in a northeasterly direction from the station, yes, but gradually.

Q. Did the bottom of the hill skirt this swamp all the way along? A. The bottom of the hill of course was fixed partially by the road, and after it got across the road it went off toward the swamp.

Q. You are speaking of the public road now? A. The road leading away from the station.

Q. How far southerly from the station was it before the bottom of the hill came right down to the swamp as you say? A. I could not say exactly. The road is curved all along. The distance would not be regular.

Q. The road did not skirt the swamp, did it? A. No; the road went along the east side of the hill.

Q. Can't you tell me about how far in a southerly direction from the station it was before the bottom of the hill met the swamp? A. No; for the swamp was very irregular. It went around in a curve. Roughly I said the swamp extended about two or three hundred feet from the station.

Q. Did the hill then meet the swamp at a line drawn two or three hundred feet southerly from the station? A. It went around; the ground rose; it started swamp and then rose more or less rapidly.

Q. Take the point which you have marked "Swamp, 800 feet wide." Did the hill come right down to the swamp at that point? A. It rose rapidly to the east at that point.

Q. Also, say 400 feet still farther in the northerly or northeasterly direction didn't the hill

come right down to the edge of the swamp? A. I cannot tell you.

Q. You could not say? A. I did not take any note of that.

Q. You haven't any recollection about that? A. I recollect that the swamp diverged from the track a little further north.

Q. Well, as a matter of fact, all along in front of this switch which we have here and at least about half the way from the end of the switch up to the station this hill skirted right along in the general direction of the swamp, didn't it? A. No; from this point, from a point marked edge of swamp 800 feet—where it says swamp 800 feet wide, the hill rose rapidly to the east to the sky line. Then it ran in a—not parallel with the track but ran in a northeasterly direction, the skyline diverging slightly from the track—materially from the track. The swamp, I don't know how, followed that hill; all I know is the northerly end of the swamp was as I said about two or three hundred feet south of the station.

Q. I am putting my pencil now about at the point seven or eight hundred feet easterly from the railroad track and about half way between the last line which you drew easterly from the railroad, and I ask you what was the character of the ground about at that point; did the hill begin to rise there and rise as you went back in an easterly direction? A. That I would say was still swamp.

Q. Still swamp at that point. Call that "Still swamp," marking it. A. Yes; I would say so.

Q. You think the hill began to rise still farther toward the east there? A. Yes; the hill began further east.

Q. If you go easterly from that point you come to the hill? A. Yes, sir.

Q. And the hill where it begins to rise rises

quite rapidly there, does it not, also? A. Yes; but not right here (indicating).

Q. Where did you locate 3400 feet southerly from the north end of the station? (Witness indicates).

Q. Was that the place where one of the mile posts on the road was located? A. No; the mile post is located down here at 37.

Q. 3400 feet is it, at the point of the curve? A. Approximately the point of the curve.

Q. The southerly point of the first curve? A. Well, there was a spiral there; I think that was at the point of the spiral.

Q. How far is it from that point to the summit of this ridge or elevation which you took? A. From 34 plus 14?

Q. Yes. A. Well, it was 1100 feet at the very highest peak. That is looking in a northeasterly direction. The high land reached down right close to the track.

Q. What was the elevation of the high land right close to the track, or close to the right of way at 3400 south? A. 17 feet above the track, forty feet away from the track.

Q. Forty feet; that would be about the right of way lone, would it not? A. Just about.

Q. Do you know the elevations of the camera at which any of these pictures were taken which have been shown to you? A. No, I do not, except I can give you the elevation at the corner of Monahan's house at its westerly point—1805 feet—about—25 feet above the meadow.

Q. You have located some buildings on your map? A. Yes, sir.

Q. Those are buildings which are there now? A. Yes, or were there at the time.

Q. Or were there at the time.

Mr. Wright: At the time he made his survey.

Q. Yes. We do not want to tie you up to the present time. And you have no knowledge, I suppose, of the buildings which were there at the time of the fire? A. No.

Q. Did you make any locations of the foundations which you found there? A. I located the foundations which were pointed out to me as being the foundation of one of the section houses.

Q. And that is on the westerly side of the track, is it? A. Yes.

Q. And between the track and the Monahan buildings on the westerly side of the track? A. Yes, sir.

Q. Right in that vicinity? A. Yes.

Q. Let me ask you a few questions about these pictures.

(Witness resumes his seat).

Q. Looking now at exhibit P-6-a, the enlargement of exhibit P-6, as I understand it, the foundation which you see shown in this picture is the foundation that was pointed out to you as the old section house foundation? A. It is, yes, sir.

Q. And the building which you see in the corner there is the porch of the Monahan residence which stood there at the time you made the survey? A. Yes.

Q. I notice on this picture, P-6-a the sky line of the hill near the left hand end rises to the highest point and then begins to dip down. A. That's right.

Q. The line of that hill is the first hill back of the swamp, is it not, which you testified about? A. Yes.

Q. Can you locate in here the Christy siding which you have shown in your survey? A. Approximately, yes, sir.

Q. Suppose you locate the northerly end of the

Christy siding on this picture if you can. I do not know if you can do it. A. It is near that lumber pile, that white mark down there, I think it is a little bit north of that lumber pile.

Q. By north you mean in a northerly direction?

Mr. Wright: That would be to the left of the picture.

Q. Isn't it about down here where you see this open space in that underbrush? A. If you will let me refer to the map I can tell you.

Q. Suppose you do that. A. (Referring to map) A little bit north as you say, just north of that dark part—north of that tree, about the line of the south side of that foundation—east.

Q. Suppose we put an X right there. A. About there, yes.

Q. Right about there is where you located. I will mark that N. S.—meaning northerly end of the switch as you located it. Now in the background we have another range of those hills? A. Yes, sir.

Q. There is a little valley between the hill in front and the hill in the back, is there not? A. Well, it is not much of a valley; it appears as a valley looking at it from the railroad track easterly because it rises so much more. That is practically a mountain to the east there.

Q. Quite high there? A. I think it is quite a mountain.

Q. And that range of hills in the background has in a general way the same direction as this range of hills in the foreground, has it not? A. No; that mountain range diverges to the east faster than the sky line of this range.

Q. Somewhat faster, but the divergence is not very large, is it? A. Well, I guess it diverges at least fifteen or twenty degrees more.

Q. Can you tell me about the height of the hill which skirts the swamp opposite the northerly end of Christy's switch? A. You mean directly in continuation of the south side of the switch?

Q. Well, at a line drawn at right angles from the end of the switch. A. No; I could not give you that.

Q. You did not take those elevations? A. No.

Q. Do you know the distance from the northerly end of the Christy switch to the end of the hill which skirts it? A. No.

Q. You did not take that? (No answer).

Q. This exhibit P-3-a, the enlargement of P-3, was taken northerly from the station, and do you know the location where that was taken? A. No; only approximately.

Q. You do not know anything about that. Did you go up there to look over the country? A. I did. I had a picture with me and I stood there and looked down over the land.

Q. Did you have this picture with you or one of the smaller ones? A. The smaller one.

CHARLES R. CHRISTY, sworn.

Direct Examination by Mr. Wright:

Q. You are one of the plaintiffs in this action? A. I am.

Q. And the other plaintiff, Charles R. Christy, Jr., is your son? A. Yes, sir.

Q. And in September, 1908, on September 27th, 1908, you and your son were in partnership, were you? A. We were.

Q. Under the name of Charles R. Christy and Son? A. Yes, sir.

Q. What business were you engaged in? A. The manufacturing of lumber.

Q. Where? A. At Long Lake West, or just four miles from Long Lake West station our mill was.

Q. That is in New York state? A. Yes, sir; in Hamilton County.

Q. By the way, where does your son live? A. He lives at Montclair, New Jersey.

Q. And you also lived there when the suit was started, did you not? A. I did.

Q. Were you in Long Lake West in September of 1908? A. I was.

Q. I believe you had a pile of cut and sawed lumber down near the station, is that correct? A. Yes, sir.

Q. I show you exhibit P-1. This P-1 shows the switch and the place where you had your lumber pile? A. Yes.

Q. That is the portion of the map which is colored pink, or a portion of it? A. Yes; running in on this side of the switch.

Q. Running into the sides of the switch? A. Yes.

Q. And that is where your lumber was piled? A. Yes; some piled on this side of the switch and —on both sides of it.

Q. And that was lumber which had been cut over at the mill at Bear Pond, was it? A. At Otter Pond.

Q. At Otter Pond, and carted over to the switch for shipping purposes? A. Yes; piled up there.

Q. Do you know how much lumber you had piled there at the time of the fire, September 27? A. Something over half a million feet. I do not remember the exact amount. I have not looked at it in some time. It was over five hundred thousand feet.

Q. Of what kind of lumber? A. Spruce and hemlock and some pine.

Q. Did you at the last trial of this case make up

a correct list of the lumber which was destroyed by the fire at that time? A. I did.

Q. And the value? A. Yes, sir.

Q. I show you three sheets of paper; is that the tabulation which you made up during the last trial of the lumber that was destroyed and the value of the lumber? A. It is.

Q. And that was correctly prepared? A. Correctly prepared, yes.

Q. And correctly states the amount of lumber destroyed and the value of it at that time? A. It does.

Q. The market value at that time? A. Yes.

Mr. Wright: I offer it in evidence.

Cross Examination by Mr. Carey:

Q. What did you make this up from? A. From the stock list of lumber that I had that was at the siding.

Q. How did you make up the stock list? A. The stock list I copied from a list taken by one of the men that was working for us there.

Q. Who was the man that made up the list? A. Gregory his name was.

Q. He was the one that made the inventory? A. He was the one who took the inventory.

Q. You did not take the inventory yourself? A. I did not.

Q. And your information as derived from the inventory which Gregory made? A. Yes, sir.

Q. Was anybody with Mr. Gregory when he made the inventory? A. I think not; not that I know of. He was in the habit of taking our inventories right along.

Q. Yes; and based on his inventory you made computations? A. Yes.

Q. And this is the result of the computations which you made from his inventory? A. Yes.

Mr. Wright: He deducted for all the stuff that had been sold.

A. There was some little stuff shipped, which was deducted.

Q. The inventory was made some little time before the fire? A. Yes; it was made in about the middle of July, I think.

Q. And this fire was on the 27th of September? A. Yes.

Q. In the meantime there had been sales, however, which you have deducted from the inventory made by Mr. Gregory? A. Yes; there was only a small amount shipped. It was a season that there were not a great many shipments.

Q. Mr. Gregory's inventory also included lumber back at the mill did it not? A. Yes, on separate sheets of paper. For instance, he took—the inventory at the mill was entirely different from that taken at the siding.

Q. And this inventory does not indicate I suppose any of the lumber which was back at the mill? A. No; it does not.

Q. The mill was three or four miles away, wasn't it? A. Four miles back by road.

Mr. Carey: I think under our stipulation we are to read the testimony of Mr. Gregory in regard to taking the inventory.

Mr. Wright: Yes, unless, as you intimated, we might possibly agree that the value of the lumber destroyed was this amount, and save all that time.

Mr. Carey: I think we'd better have Mr. Gregory's testimony. Mark that for identification.

Mr. Wright: All right, if you insist.

(Marked P-8 for identification).

By Mr. Wright:

Q. I show you a paper and ask what this is? A. This is a copy of the inventory given to me by this Mr. Gregory that took the inventory for us—a typewritten copy of that.

Q. This is a copy of it? A. Yes.

Q. Who made this copy? A. I did.

Q. What did you make this copy from? A. From the separate sheets that I received from Gregory.

Q. What did you do with those sheets that you received from Gregory? A. I destroyed them after I had made these copies.

Q. Did you check this copy up with the sheets before you destroyed the sheets? A. I did.

Q. That was your practise to do that in your business up there? A. Always. After making it I always destroyed the original taken by the man. We had no occasion to keep them, so we had always been in the habit of destroying them.

Q. On this inventory I notice that you have after each of the items showing the inventory the words, in some cases "Siding," and in some cases "Mill." What does that indicate? A. That the lumber marked "Siding" was piled at the siding, and the other was piled at the sawmill.

Q. And in making up the other paper, marked P-8 for identification, you did not include any of the items which are marked "Mill"? A. I did not.

Mr. Wright: I offer this paper in evidence.

Mr. Carey: I do not think it is competent in evidence as yet, until we have Mr. Gregory's testimony.

(Paper marked P-9 for identification).

Q. Can you fix the date when you received this inventory from Mr. Gregory from which you made up P-9 for identification? A. About the middle of July, 1908.

Q. Can you by looking at this P-9 state as of what date it was made up? A. It was made as of July 13th, 1908.

Q. Where did you keep a record of the lumber that was sold and shipped from the siding? A. In a shipping book, order- and shipping-book combined.

Q. I assume that no lumber was shipped from this siding without instructions from your New York office? A. None whatsoever.

Q. All your books were kept in New York, is that right? A. No; we kept the books up there.

Q. The instructions all went from New York? A. The orders came from New York but all the shipping instructions were given from our office there, over at the camp that I had.

Q. What is this book that I have in my hand? A. That is an order book.

Q. What does that show? A. That shows the orders received and when shipments were made, etc., the date when filled, the numbers of the orders.

Q. Does this show the lumber shipped from the siding at Long Lake West between July 13, 1909, and September 27, 1908? A. It does. There was very little lumber shipped. Most of it was sold locally that was sent out.

Mr. Wright: I desire to offer this book in evidence, that is the pages of this book from 119 to 126, which covers the period from July 11, 1908, to October 11, 1908. Any objection?

Cross Examination by Mr. Carey, as to the book.

Q. Did you keep those books, Mr. Christy? A. Partially. I did some of the writing, and then one of my sons did some, and a Mr. Sandford who was there also did some of the writing. It depended on who happened to be there.

Q. Who happened to be at the mill at the time of the sale? A. Yes.

Q. When were the entries made in this book with respect to the sale? A. They were made just as soon as the lumber was shipped, within a day, and the bills were made out and sent forward.

Q. And the entries were made either by your son or Mr. Sandford or yourself? A. Yes.

Q. And the records were made up I suppose from the actual shipment of the lumber? A. Yes, sir.

Q. Were all of the sales made from the siding entered in that book? A. They were.

Mr. Carey: I have no objection.

By Mr. Wright:

Q. Also the sales from the mill? A. Yes; from the mill as well—and they are so marked.

Q. And they are so marked in the book, are they not? A. Yes, sir.

(Book marked P-10).

Q. When were you there last prior to the destruction of the lumber? A. When did I leave there prior to that, do you mean?

Q. Yes. A. I left there on I think it was the 16th of September of that year, 1908.

Q. How long had you been up there? A. I should say about four or five days—about five days.

Q. And did you inspect the lumber down at the siding? A. Yes, I was down there several times.

Q. How long have you been in the lumber business? A. About sixteen years.

Q. And in this kind of business, of milling and selling lumber from the mill? A. Well, not altogether in the manufacturing as long as that, but in the greater part of that time in manufacturing —possibly a difference of three or four years, that is all.

Q. And from experience you have had are you able to determine with reasonable accuracy the number of feet of lumber in a pile of lumber? A. Yes.

Q. At the time you were at Long Lake West in September you had this inventory which has been marked for identification P-9, had you not? A. Yes.

Q. From your inspection of the lumber what would you say as to whether or not the amount of lumber mentioned in the inventory as being at the siding was there or not? A. I was well satisfied that there was fully that amount there.

Mr. Wright: There is another branch of the case I want to take up with Mr. Christy, and we could not possibly finish it tonight.

The Court: Why not have Mr. Carey cross examine on the part already in? He can do that, and then leave your other branch of the case until Monday.

Cross Examination by Mr. Carey:

Q. Mr. Christy, when you were at Long Lake West in September you looked at this lumber, did you? A. I did.

Q. Did you have any inventory with you at the time you looked it over? A. I did not have it, no. I did not have the inventory in my hand.

Q. In other words, you were not inspecting those piles of lumber with the inventory in hand to make up your mind whether or not about the quantity shown by the inventory was actually there? A. I did not. I did not when I looked at it have the inventory in my mind. The inventory was over at my office.

Q. When you looked at it did you look at it with the intention of satisfying yourself of how much lumber was there? A. Well, partially; and I also knew pretty well from prior inventories about how much there was there.

Q. Well just tell us what kind of inspection you made of the lumber on that occasion. Describe it in your own way. A. Well, I went over the lumber and looked over the piles to see whether there was about the amount there that was taken on that inventory, and I saw—

Q. Did you have the amount taken on the inventory in your mind then at the time? A. Yes, as to quantities, yes.

Q. But you did not bring the inventory with you? A. No, I did not; I did not go there with the especial purpose of looking it over.

Q. What was your purpose in going there? A. Coming down to the station, as I went almost every day down there some part of the day; I would drive down there to see what was coming in and see if there were any shipments, and so forth, and I looked over the lumber in that way.

Q. Well, the shipments were all made on orders from New York, weren't they? A. Yes, but it was shipped from the siding, you know.

Q. I understand. Were you in the New York office most of the time? A. Well, I was there the greater part of the time.

Q. And went up from time to time to Long Lake West? A. Yes; in the summer season I was up there more than at other seasons.

Q. When you were up there on this occasion in September you said you were there some four or five days? A. I think about four or five days at that time.

Q. And about how many piles of lumber were there along the siding at that time? A. Well, that I could not remember now; it is too long ago.

Q. Did you go around and examine each pile? A. Yes. There were two rows on piles on either side of the switch that was there, and there was a tramway alongside of this switch where the teams drove down there.

Q. Was your examination of it such that you had a mental process which said "that pile of lumber contains about so many feet, and this pile contains about so many feet"? A. I could tell approximately, yes.

Q. Did you do that; did you examine it with that purpose in mind, of fixing in your mind about how much lumber each pile contained? A. Well, I did not take each pile that way, no. But I went over it—I looked it over casually and I made up my mind there was about this amount of lumber there that was taken on that inventory.

Q. Did you know how much the inventory showed? A. I did at that time. I had made it up before.

Q. How long a time did you take to make this inspection? A. I could not say positively as to that; possibly I was over there for an hour or so.

Q. Well, were you doing this work that you speak of, making this inspection, during that whole hour? A. No; it would not take that long a time.

Q. About how long? A. I could not say just how long.

Q. There must have been quite a number of piles of lumber there, were there not? A. Well, they were piled up pretty high; there were quite a number of piles.

Q. Some ten or fifteen? A. Yes; more than that. I would say there were twenty or twenty-five—maybe thirty.

Q. Yes; so that if you were going to estimate on quantities with any degree of accuracy at all it would have been necessary for you to put down your estimate of each one of those piles, wouldn't it? A. Well, if I was going into it that way, yes; but I did not take the inventory myself. It would have necessitated my taking it myself if I had gone into it in such a way as that.

Q. But what I am getting at is this: assuming that you had in mind the amount of lumber which your inventory called for—in order to satisfy yourself with any degree of accuracy at all that that amount approximately was there it would have been necessary for you to make an estimate as you went along of approximately the amount in each pile, wouldn't it, and then foot them all up? A. Well, I could tell pretty well by taking it off casually, looking at it, whether they had this amount of lumber there. I had in a good many cases before gone over and checked up the inventories myself, and I found that those taken by Mr. Gregory were practically correct. Therefore I did not always do it.

Q. As a matter of fact you were relying upon Mr. Gregory's inventory and the state of the sales book to make up your mind how much lumber you had there, were you not? A. Yes.

Q. And not upon your inspection? A. Exactly.

Q. Yes. A. But I could not go into it every time and check up the inventories—

Q. No; precisely. And so you looked at Gregory's inventory and then you looked at your sales book, and you said, "Well, I ought to have so much lumber there." A. Well, I was well satisfied in my mind that there was that amount of lumber there when I received this inventory.

Q. When you were making this inspection did you have in mind the different kinds and varieties of lumber there at all? A. Did I have in mind?

Q. Yes. A. Oh, yes; and there were only three different kinds there.

Q. What were the three different kinds? A. Spruce, pine and hemlock.

Q. Well, they were different dimensions, were they not? A. What say?

Q. Different dimensions as to the lumber? A. Yes.

Q. Did you take that into account at all in your inspection? A. I did.

Q. And as you went along through the pile? A. Yes, sir.

Q. Different sizes and dimensions piled up separately? A. Different sizes were piled up separately, yes—only that is as to width and thickness.

Q. There were a number of different prices on this lumber, were there not? A. Yes, sir.

Q. And did you have that also in mind when you were going through there? A. I did not have it in mind then as to the price. There was not any necessity of having the price in mind when I was looking it over.

Q. You paid no attention to price? A. No; but I had my prices on my books of the different amounts—selling prices.

Q. And you trusted to your books and the inventory to show the different sizes, and to your books to show the difference in price as to the different sizes? A. The different prices, yes, sir.

Q. And you paid no attention to the quantities of any particular size or kind as you were going through, but just to the general question of approximately how much lumber you had there? A. Yes.

By the Court:

Q. Well, how could you tell approximately how much lumber you had there without paying any attention to the size? A. I did not understand your question.

(Question repeated).

A. Of course I had to take into account the different sizes of lumber.

Q. You must listen to what he says. He asked you if you paid any attention to size and you said "No." A. Well, I did not take that in.

By Mr. Carey:

Q. Did you as a matter of fact pay any attention to the sizes? A. Certainly I did.

Q. Weren't there a great many different sizes there? A. Yes; a number of them.

Q. And by this casual inspection which you made you could get a pretty clear idea of the quantity in these different sizes? A. I could. I could tell by looking at a pile approximately about how much there was in it.

Q. Tell me, Mr. Christy, if you can, about how long you were in making this inspection which you speak of. A. About how long?

Q. Yes. A. Well, I could not tell you, sir, it is so long ago—

Q. You say you were there about an hour you think? A. About that; I cannot say positively.

Q. Can't you give me any idea how long it took you to make this inspection of these twenty-five or thirty piles and reach the conclusion you have testified to? A. I could not.

Q. You cannot tell whether it was ten or fifteen minutes or how long? A. I cannot, because it was some time ago; I cannot tell you.

Q. How many different grades were there there, Mr. Christy? A. What do you mean; grades of stock?

Q. Grades upon which you based prices? A. Well, there were—let's see—there were three—about four—four to five different grades.

Q. About four or five different grades? A. Yes, sir.

Q. And only four or five different prices? A. Oh, no; there were more prices than that, according to the widths and thickness of the lumber.

Q. Then you simply made this casual examination and then figured up the amounts which you conceived ought to be there from this examination

and reached a conclusion as to what the value of the lumber was? A. I figured up the valuation from the inventory that was taken.

Q. So after all that was a reliance upon the inventory, wasn't it? A. It was.

Q. And not upon your inspection? A. Well, I was satisfied that the amount of lumber was there; otherwise I would have had it taken over again.

Q. But you did not answer the question. It was a reliance upon the inventory and upon prices shown by your books and not upon this casual inspection which you made? A. It was.

Redirect Examination by Mr. Wright:

Q. The prices were fixed how? A. The selling prices were made in New York.

Q. Did they fluctuate? A. Well, they fluctuated somewhat in different seasons.

Q. So that at the time you made up the inventory you did not make any note of the prices of that particular lumber there, did you? A. No; I took out selling prices—

Q. But at the time you made the inventory you did not figure out how much in value in dollars and cents you had there, did you? A. No, I did not.

Q. Because that was something you could not tell at that time? A. No.

Q. Because the price might change over night? A. They change somewhat.

Q. But when you made up your calculation of the amount which was destroyed you used what price? A. Used the selling price—used the delivery price at the railroad, the prices f. o. b. cars.

Q. As of what date? A. The day the lumber was burned, September 27, 1908.

Q. In other words, that was the price at which you could have sold it at that time if it had not been burned? A. Yes, sir.

By the Court:

Q. I understand you to say that if you had thought when you made your casual inspection that there was not the size and dimensions of lumber there that was found in Gregory's inventory, that you would have had another inventory taken there? A. That I would have had, yes, sir.

Q. Then you do mean it when you tell Mr. Carey that you relied entirely upon Gregory's inventory when you made up your list of loss? A. I relied on it because I had checked up his inventories before and found them practically correct.

Q. What effect did checking it up this time have on your reliance upon his inventory? A. I did not check it up; I simply looked it over.

Q. Well, what effect did your inspection have? A. I wanted simply to see whether the amount of lumber was there, just to look it over casually. That was the only way I did it.

Q. You looked it over. Now I want to know what effect did your inspection or overlooking have on your making up your mind the inventory was correct and you were going to rely upon it, if anything? A. It simply gave me an idea that the lumber was there.

Q. Then did you rely solely upon the inventory or did you rely in any degree upon your own looking over of the lumber? A. Well, both. I looked it over as I was down there, to make up my mind whether the amount was there.

Q. You see now you told Mr. Carey you did not rely on anything but the inventory. Now you say you relied upon both. Did you rely upon both? A. I did not mean to say it.

Q. That is why I ask you now, what you really do mean, so that when we come to the point of determining that question—when the jury does—what effect you gave in your estimation of the

value of that lumber to looking over it yourself to ascertain in your own mind whether the lumber was there or not that was represented by the inventory. A. I figured it up from the inventory given me by Gregory—copied it off and made up the prices on that inventory.

By Mr. Wright:

Q. That is not the question that the court asked you. He is not asking you about this final list you made up; but at the time you looked the property over you had the inventory and what did you rely upon in determining whether the lumber was there or not, upon the inventory alone or upon the inventory plus your inspection? A. I relied upon both.

The Court: That is what I wanted to find out.

Q. In other words, if you had gone up there and found that the lumber looked short, you would have had a new inventory made? A. Yes; as I had in some cases before at the final.

Q. Or if you found there was more lumber there than the inventory showed you would have had a new inventory made? A. I would have gone over it again.

Q. And that was your practice for years? A. Yes; where I found the inventory was not correct.

Q. And you had had new inventories made up? A. I had new inventories made up.

Q. May I ask how those resulted; did they compare with your judgment or with the previous inventory?

The Court: He has already testified that they did and showed that Gregory was right. That is what he has sworn to already.

Mr. Wrigth: That is all on this particular branch of the case.

By Mr. Carey:

Q. How often did you go there to satisfy yourself that Gregory's inventories were right? A. I went there once on this particular inventory.

Q. You say he had made inventories on numerous occasions? A. Prior, yes.

Q. Were you in the habit of going there from time to time to look over the lumber to see if you thought there was about the amount that Gregory had inventoried? A. No; I was not always in the habit of it. Sometimes my son went.

Q. Well, did you ever do that before? A. Did I ever look it over before?

Q. Did you ever look it over with the same object in view before this occasion? A. I had, yes.

Q. Frequently? A. Well, a number of times; but I did not do that as much as my son.

Q. You did not do it as much as your son? A. No; because I was not there as much as he.

Q. You say that your prices were f. o. b. the cars? A. Yes.

Q. And what allowance did you make for loading, if any, in the price which you figured up as the value of this lumber before it was loaded? A. Well, that varied somewhat according to where the pile of lumber was, and how much lumber there was. Putting the lumber into cars would run from fifteen to twenty-five cents.

Q. How much did you deduct in this case for loading the lumber? A. I do not remember exactly now. It is so long since I looked it up.

Q. About what was it? A. I think it was twenty-five cents.

(Adjourned to Monday, December 20, 1915).

The Court: Now, gentlemen, in this case one point came up which was argued before

me rather fully, and one of the counsel seemed to think it was only of academic interest; but in looking into the pleadings and in listening to what counsel have to say I think it is quite vital interest.

There are three theories on which this fire may have started or may have been communicated to the property that was alleged to have burned. Either it may have been communicated directly from the engine, or it may have been communicated directly from the right of way by combustible material on it to the adjacent land, or it may have been communicated across land that did not belong to the plaintiff and have set fire in that way. Now if it is the latter way—and counsel for the plaintiff says he is going to contend that it is; in part at least he is going to rely upon that; and counsel for the defendant says that is his defense—manifestly if counsel for the plaintiff contends it and counsel for the defendant says that is his defense, it is the most vital point in the case outside of the case made by the plaintiff on the other theory. So I have given it as much time as I have been able to give it during the adjournment from Friday until today, and I have absolutely no doubt on the question at all. I have looked it up with great care and I have reached a conclusion which I am ready to announce now and will announce now, and it will be the conclusion that will guide me in the trial of the case. I have no doubt at all that I am obliged to apply the common law of the State of New York as it is found and applied by the highest courts of New York in that state. The matter is so perfectly clear that I think I will just dictate a little memorandum on what my notion about it is.

The question for decision is whether in a cause of action sounding in tort and resting upon common law principles, which arises in one state and is sought to be enforced in another, the courts of the latter state will apply its own conception of the common law or that which has obtained in the former state under a line of repeated decisions, where those conceptions are variant. That the *lex loci delicti* will be applied and not the *lex fori* seems to me to be the settled and indubitable doctrine.

In the first place, the only cases that have been cited against this rule are cases from the United States courts. There are no cases that have been cited to me in the state courts, nor have I been able to find any, where a different rule has been applied. The rule in the United States courts bears upon a construction as to their jurisdiction within the state, sitting within the state, to say what the law is in that state, not entirely but in certain instances. For instance, it never attempts to say so where the rule has become one of property or of action, and it never attempts to say so where the rule has been settled in a state by a repeated series of decisions. All this matter is found laid down very clearly in the last case that I find on the subject, and which was cited to me by plaintiff's counsel, of *Kuhn v. Fairmount Coal Co.* in 215 U. S. And a most extraordinary fact about the jurisdiction of the United States courts on this point is that they seem to be trying to break away from it.

The Kuhn case is a case which was decided by six judges against three, the three dissenting judges being justice Oliver Wendell Holmes, who wrote the opinion, Justice White, who is now Chief Justice of the court, and

Justice McKenna,—a very strong dissenting body; and in the course of the dissenting opinion by Mr. Justice Holmes he makes use of this language, which seems to me to be quite unanswerable. He says, speaking of what the United States court must do:

"It is said we must exercise our independent judgment. But as to what? Surely as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing, from the state courts as well as from the state legislatures. When we know what the source of the law has said it shall be, our authority is at an end. The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else."

That is the dissenting opinion of Justice Holmes, concurred in by the other two judges. Now as I say there isn't any state court that I know of that has held anything to the contrary, and I have found cases in the states of New York, Iowa, New Hampshire, Texas, Indiana, Massachusetts, Connecticut, Michigan, Maryland, Alabama, Ohio, Tennessee, Kentucky and Kansas, absolutely holding the reverse in just so many words, where the point was squarely presented. And I have found something else. I have found that even if we apply the law of the United States courts, as it is urged we should apply it, that that law, where a repeated course of decisions has settled the course of the law in that state, recognizes that law and does not apply its own judgment; and in this case we find

that there is a repeated course of decisions. The only dispute over the law that has arisen in the State of New York—and I have read all the cases down to date on it—is that at one time, when *King v. Hoffman* was decided, reported in 160 N. Y., some discussion arose over the question as to whether or not this law was applicable only to urban communities or whether it could be applied to woodland and forest properties; and the case of *King v. Hoffman* settled that point and said it not only applied, as everyone admitted it did, to urban property, but that it applied as well to forest lands. And since that time that case has been twice affirmed by a unanimous court of appeals and has been twice cited and used as authority; once in the Appellate Division and once in the Supreme Court at the trial term, so far as I am able to find anything on it. So there is a repeated course of decision, and, even if we apply the United States rule, we are required to take the settled rule as we find it in the state. That we are obliged to do that, even if we were applying the United States rule, is perfectly manifest from the prevailing opinion (as well as the dissenting opinion) in *Kuhn v Fairmount Coal Company,* 215 U. S., where the court says:

"Where a local law or custom has been established by repeated decisions of the highest court of the state, it becomes also the law governing the courts of the United States sitting in that state."—citing any number of cases, but amongst them is *Bucher v. Cheshire R. R. Co.* 125 U. S. 555, and *Burgess v. Seligman,* 107 U. S. 20; and then the Kuhn case itself is authority for that. And not only do

we find this great majority of states saying what the law is, but we find every writer on conflict of laws that has written a book on the subject saying the same thing. We find it in Story on Conflict of Laws and we find it in Miner on Conflict of Laws, and we find it in Wharton on International Law, precisely the same law. We find it in Cyc dealt with and settled as the general rule on that subject.

I have found two cases that are not mentioned on anybody's brief. One of them is the case of *Hoxie v. N. Y. N. H. & Hartford R. R.* 73 Atl. 756, in which the opinion was written by no less a jurist than Simeon E. Baldwin, a recent Governor of Connecticut and then Chief Justice of the Connecticut Supreme Court, and he says, speaking for a unanimous court:

"If the plaintiff has a right of action it must be based upon the law affecting the relations of the parties at the time and place of the injury. As to the merits and rights involved in actions the law of the place where they originated is to govern. This is true of tort actions, at least when, a wrong having been done, actionable under the law of the place of its commission, there is nothing in the public policy obtaining at the forum to stand in the way of granting a remedy."

Whether anything can stand in the way of granting a remedy at the forum is settled in this state in the always-cited case of *Wright v. Remington,* that the only thing that can be said to stand in the way is where the decision of the other state is against some principle of morality or against the general public interest. Of course there is none of those.

Then we find this question set at rest so far as the states are concerned by a flat-footed decision in the United States Supreme Court, that nobody has cited to me yet in this case, and that is the case of the *Western Union Telegraph Co. v. Brown,* 234 U. S. 542, Lawyers' Ed. 58, 1457, where Chief Justice Holmes says what he means by the law of the state applying in the decision that I have read to you where he dissented in the Fairmount Coal Co. case. He says this—and it is the unanimous opinion of the court—

"Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery"—citing any number of cases—which is a flat-footed decision right upon the point; and the cases cited are all United States Supreme Court cases .

The distinction between *Kuhn v. Fairmount Coal Co.* 215 U. S. 370, and *Western Union Tel. Co. v. Brown,* 234 U. S. 542 would clearly seem to be this: in the former case the United States court is "sitting in the state," exercising an independent and co-ordinate jurisdiction therein; in the latter it is "not" "sitting in the state" exercising an independent and co-ordinate jurisdiction but is determining *ab extra* what the law of the jurisdiction where the tort was committed has been held by the courts of that state to be, a function identical in character with that in the

case now sub judice, and all cases arising in one state whose law as to liability is to be applied in another as a forum. A state court does not "sit in another state" and exercise "there" an independent and co-ordinate jurisdiction, but it determines *ab extra* the law of the sister state.

I might say that the latest case on this whole subject is one that is absolutely on all fours with this, and it is a fire case, originating in one state and tried in another state. It is the case of *Wallace v. N. Y. N. H. & H. R. R. Co.* 94 N. E. Rep 306. There the unanimous Massachusetts Supreme Court held that "Inasmuch as the fire occurred in the State of Rhode Island, our statute (they have a statute like ours) is not applicable, and it not appearing that there is any statute in that state affecting the question, the right of the parties must be determined by the common law of that state, which, in the absence of proof to the contrary, must be deemed to be the same as in this."

So far as the question has been dealt with in New Jersey it is in accordance with the rule which I have stated and will be found enunciated in the case of *Ferguson vs. C. R. R. Co.* 42 Vr. 651.

So it seems to me that there can be no ground for discussing the question any further, and I will decide that the rule as laid down in the case of *King v. Hoffman* in 160 N. Y. is the rule that will apply in this case.

The decision above rendered will be found to be supported by the principles enunciated in the following list of cases and text books:

W. U. Tel. Co v. Brown, 234 U. S. 542 and cases cited.

Dorr etc. Co. v. Des Moines Nat. Bank, 98 N. W. 918, Iowa Sup. Ct.
McDonald v. Grand Trunk R. Co. 71 N. H. 448.
Kimball v. Kimball, 73 Atl. Rep. 408 (N. H. Sup. Ct.)
Thompson v. W. U. Tel. Co. 61 S. W. (Tex.) 501.
Hamilton v. C. B. & Q. R. R. Co. 124 N. W. 363.
Ferguson v. C. R. R. Co., 74 N. J. L. 691.
B. & O. R. R. Co. v. Read, 56 L. R. A. 468 Ind. Sup. Ct.
Allen v. Pittsburgh, etc. 45 Md. 41.
Mount v. Tuttle, 183 N. Y. 358-365.
Alabama v. Carroll etc. 97 Ala. 126.
Alexander v. P . R. R. Co. 48 Ohio St. 623.
East Tenn. Co. v. Lewis, 89 Tenn. 235.
Debavoise v. N. Y. C. & H. R. R. R. Co. 98 N. Y. 377.
Louisville etc. v. Whittow, 19 Ky. L. Rep. 1931.
Hamilton v. Hannibal, 39 Kan. 56.
Turner v. St. Clair Tunnel Co. (Mich. Sup. Ct.) 36 L. R. A. 134.
Hoxie v. N. Y. N. H. & H. R. R. Co. 73 Atl. 756 (Conn.)
Wallace v. N. Y. N. H. & H. R. R. Co. 94 N. E. Rep. 306 (Mass.)
Miner Conf. Laws, Sec. 196.
38 *Cyc.* 549.
Story Conf. Laws, Par. 609.
2 *Wharton Prin. Int. Law* (3rd Ed.) par. 478 b.
Cooley, Torts, 552. *Cooley Const. Lim.* p. 443.

(Exception noted for plaintiff).

CHARLES R. CHRISTY resumes.

By Mr. Wright:

Q. Mr. Christy, in making up the tabulation of lumber burned and the value that was put in evidence last Thursday and marked P-8 for identification, what if anything did you allow for loading? A. Twenty-five cents.

Q. Twenty-five cents what? A. Twenty-five cents per thousand feet.

Q. How did you arrive at that figure of twenty-five cents? A. Well, taking a sort of average cost according to where the piles of lumber were placed in relation to the location of the cars.

Q. Is that a fair allowance for loading? A. Perfectly fair, yes, sir.

Q. Can you say what loading generally cost you? A. Well, it ran—fifteen cents was about the lowest—from that up to twenty-five.

Q. So twenty-five is really a maximum cost? A. Yes, sir.

Q. And you made up these figures on the basis of twenty-five cents? A. I did.

Q. What was the value of the lumber burned? I refer to P-8 for identification.

Mr. Carey: That is objected to at this time.

Q. What was the value of the lumber burned less a charge for loading of twenty-five cents per thousand, as you have stated?

Mr. Carey: I object to that at this time because the computation is made from figures which have not as yet been admitted in evidence.

The Court: That seems to be the fact, Mr. Wright.

Mr. Wright: Very well.

Q. Can you state at this time the amount of lumber which was destroyed? A. I could not say positively—

Mr. Carey: I object to that unless the witness states the sources from which he has obtained his knowledge.

The Court: The objection is overruled at this time, because he has only been asked if he can state it. The answer is yes, he can, or no, he can't.

A. I can state it approximately. I could not say it absolutely because I have not looked at the amount for several years.

Q. All right. You were in Long Lake West how many days before this fire of the 27th of September? A. Well, I left there on the 16th of September and the fire occurred on the 27th.

Q. And you had been there how long at that particular time when you left on the 16th? A. I had been there about five days.

Q. Did you go over the right of way of the defendant company from the Long Lake West station south during the time you were there from the 11th to the 16th? A. I did, one day prior to the day that I left there.

Q. How far down the track did you go? A. From three-quarters of a mile to a mile.

Q. Right there I might ask you; you owned the property on the east side of the track? A. Yes.

Q. From Long Lake West station how far south? A. About a mile and a half to a mile and three-quarters.

Q. Whose property adjoined you on the south? A. Doctor Seward Webb.

Q. Whose property was across on the other side of the right of way from yours? A. A portion of it belonged to Monahan and to the south of that was land that belonged to a Mr. Batchelar.

Q. Monahan's land extended about how far—just to get the extent of it. A. I do not know absolutely, but I should say in the neighborhood of a mile—three-quarters of a mile to a mile; I am not sure about that.

Q. From what? A. From opposite the Long Lake West station.

Q. On the west side of the track for from three quarters to a mile from yours? A. Yes.

Q. Who was south of Monahan? A. A man by the name of Batchelar.

Q. Can you say whether the corner between Batchelar and Monahan was north or south of the corner between you and Webb? A. It was to the north, I think.

Q. Now on this day you went down the track did you go down as far as your corner? A. I did not.

Q. How far south did you go? A. I went within possibly half a mile.

Q. Now just describe to the jury how the track runs when you are going south from Long Lake West station. A. It runs about—well, to the southwest.

Q. I do not mean that. Was it a straight track in front of the station and for a ways south? A. Yes.

Q. Just describe the track; tell us how much straight track there is and what the curves are. A. It runs straight I should think for half a mile, and then there is a curve to the south.

Q. A curve— A. A curve of the road to the left toward the south, or possibly a little to the southeast.

Mr. Carey: The map will show exactly.

Mr. Wright: I know, but I want him to tell it for other reasons.

A. And that extends I could not say how far, and it takes another curve to the right again towards the southwest.

Q. So there are two bends in the track where it fronts upon your property? A. Yes.

Q. And I believe one of those bends is locally known as the big bend, is that right? A. Yes, sir.

Q. Which of the two bends is the one that is known as the big bend? A. The first one from Long Lake West south.

Q. That is the one just below the lumber yard? A. Yes.

Q. That is the one that curves to the left when you are going south? A. Yes.

Q. Now this day you went down the track did you notice the condition of the right of way of the defendant company? A. I did.

Q. What was it? A. Well, the greater part of the way that I went over there was grass, some low brush, but principally grass, except where it was rocky, and there there were the rocks and a little grass between them, but the other grass was, well, somewhat high.

Q. Can you say about how high it was? A. It would be I should say a foot and a half to two feet high, some of it. It was a wild grass.

Q. And it was standing where it had grown? A. It was.

Q. It had not been cut? A. It had not been cut, to my knowledge, at all.

Q. Did you do any patrolling along the tracks that year? A. I did not.

Q. When did you go back to Long Lake West after the 27th of September? A. Back to Long Lake West?

Q. Yes. A. The morning of the 29th I reached there.

Q. And what was the condition of the town of Long Lake at that time? A. Everything was burned clean with the exception of a small shed that had been used for the storage of coal, holding coal, and one or two freight cars I think standing on a siding near this coal shed.

Q. What was the condition of your lumber? A. Nothing left whatsoever.

Q. Do you know where the buildings of the Brooklyn Cooperage Company were located in September of 1908? A. Yes, about where they were.

Q. About where were they? A. They were back to the south of Monahan's buildings some, oh, possibly half a mile.

Q. From what? A. To the south of Monahan's buildings.

Q. And how far from the railroad? A. I should say they were within several hundred yards, I do not know absolutely.

Q. Well, Monahan's buildings were located where with reference to the station? A. Almost opposite, some of them, and then they went a little bit to the—went to the south of that somewhat, back of the section houses.

Q. This building shown on this map, marked "Monahan", that is one of the Monahan buildings you refer to? A. I will have to go over there to look. (Witness goes to the map and indicates). Right up here.

Q. The buildings were located approximately where you have indicated on the map? A. Approximately, yes, sir.

Q. Can you then with reference to that indicate about where the Brooklyn Cooperage buildings were? A. I think they are down in here.

Q. The scale of the map is one hundred feet to the inch. A. Down here.

Q. How far west of the railroad? A. About half a mile—a quarter to a half a mile.

Q. West of the railroad? A. Yes.

Q. At a point you say about opposite the big bend? A. About that.

Q. The north end of the big bend? A. Yes.

Q. When you went back to Long Lake West on the 29th of September that year can you say whether or not these buildings of the Brooklyn Cooperage Company had been destroyed or not? A. They had not.

Q. Your lumber yard, the switch which ran into your lumber yard, about how far south of the station was that? A. Well, it is a short half mile.

Mr. Carey: Wouldn't it be better to make those distances definite from the map.

Q. I call your attention to exhibit P-1. Does that map show the location of your lumber yard, your switch and the other buildings at Long Lake West station as they were prior to the fire? A. It does.

Q. And the portion of this map marked in pink is the clear where your lumber was piled? A. Yes.

Q. And the road indicated in yellow running from the Long Lake West road southerly into that clearing was the road which ran in to your lumber piles on which you piled your lumber? A. It was.

Q. And the black line marked "Siding" running into the same place from the railroad track indicates what? A. That (indicating) is a wagon road; and that (indicating) is the switch.

Q. And your lumber was piled with reference to that wagon road and that switch about where? A. On both sides, and then some piles back on the right hand side.

Q. How far north does your land run? A. It ran up to the road, the middle of the road,—what is called the Long Lake Road.

Q. That is the road shown up here, running across the map? A. Yes.

Q. And marked "Long Lake Road"? A. Yes.

Q. Mr. Christy, after this fire what did you do with reference to making any claim on the defendant? A. What did I do?

Q. Yes. A. Well, I saw my attorney.

Q. Who was that? A. Mr. Edward V. Thornall.

Q. That is this gentleman sitting here at the table? A. Yes.

Q. Then what did you do? A. Then I had him come up there and go over the matter with me, look over—

Q. I do not mean that; but so far as the defendant is concerned, did you sign and file a claim? A. I did.

Mr. Wright: Have you got that claim, Mr. Carey? (Paper produced).

Q. Did you see this claim after it was made up, the one that was sent to the defendant company? A. I could not say positively.

Q. But you gave the information to Mr. Edward V. Thornall to make up the claim and file it; is that correct? A. I did, yes.

Q. After the claim was filed did you have any dealings whatsoever with the railroad company? A. I did not.

Q. Has your claim ever been paid? A. It never has.

Q. Anything been paid on it by the defendant? A. Never.

Q. Have you ever released the company? A. I never have.

Q. And Mr. Thornall has had entire charge of the matter for you ever since you first consulted him about it; is that right? A. He has.

Further Cross Examination by Mr. Carey:

Q. You say your land extends how far in a southerly direction along the railroad from Long Lake West? A. My remembrance is it was a mile and a half to a mile and three-quarters.

Q. Is it not a fact, Mr. Christy, that the Monahan property extended southerly beyond the line of your property? A. Well, I think Monahan bought some other property to the south that carried his line further down. It was not his original purchase.

Q. In 1908, however, the Monahan property did as a matter of fact extend southerly beyond your property? A. Well, that I could not say; I do not know.

Q. You do not know about that? A. I do not.

Q. But it was either the Monahan property or the Batchelar property which was opposite from your property across the railroad track all the way down from Long Lake West to the Webb line? A. Well, Batchelar owned below—that is he was below Monahan's. Monahan's of course started there by Long Lake West.

Q. On the westerly side of the railroad opposite Long Lake West it was Monahan's property? A. Yes.

Q. Down to a certain point? A. Yes.

Q. And below that, southerly or southwesterly from that, was the Batchelar property? A. Yes.

Q. On the easterly side of the railroad track from the Long Lake West road at Long Lake West station was first your property, extending in a southerly direction— A. Yes, sir.

Q. —and southerly from that was the property known as the Webb preserve? A. That is it.

Q. Doctor Webb had a very large tract of land in there, did he not? A. Very large, yes.

Q. And popularly known as the Webb preserve? A. Yes, sir.

Q. Now speaking of these curves, as you go southerly along the railroad track from Long Lake West there is a curve to the left and then quite a distance of straight track and then a curve to the right?

Mr. Wright: Speak out, Mr. Christy. The stenographer does not get your nods.

A. I did not know that you were asking me a question then.

Q. Well, that is a fact, is it? A. Yes.

Q. Now you spoke of one of the curves being called the big curve, or the big bend? A. Yes.

Q. And the other I suppose would be called the smaller bend? A. I never heard any designation except the big bend for the one.

Q. Now as a matter of fact wasn't the big bend the second one from Long Lake West? A. Well, my impression was that it was the first, but I have not been there in some time and I might be mistaken in that; but my idea was that the first one going south was the big bend.

Q. But you are not certain about that? A. I am not positive of it.

Q. As you looked on the map there did you notice those bends on the map? A. I did not look at them while I was there.

Q. Just step down and see if that doesn't refresh your recollection of the fact that the big bend was the second one. A. From the map I should call the first one the big bend. It is a longer one than this. This is a sharper bend I think.

Mr. Carey: We will be talking about the big bend and the smaller bend, and we do not want to have any confusion about it.

Mr. Wright: We will probably have to find out from each witness what he means by the big bend.

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Q. Then do we understand that when you speak of the big bend you mean the first bend? A. Yes.

Q. And if you speak of the smaller bend you will mean the second bend? A. Yes.

Q. Do you know the distance on the railroad track between the two bends? A. I do not, no.

Q. You went down the track, or southerly along the track, on one occasion? A. Yes, sir.

Q. And what date was that? A. That was on a Monday, the 14th, I think, of September.

Q. That was the first day that you arrived at Long Lake West? A. No; I had been there for a few days before, but I went down there.

Q. You left on the 16th, didn't you? A. I left on the 16th.

Q. So that it was two days before you went away? A. Yes.

Q. You were not back to Long Lake West after the 16th until after the fire? A. I was not.

Q. You spoke of grass along the right of way. A. Yes.

Q. Where was the grass located? A. It was located along the right of way at intervals on both sides of the track.

Q. It was only in low places where there was any grass at all high? A. In high places where it was rocky there was not any grass except some little low stuff.

Q. When you say little low stuff you mean about how high? A. Three or four inches or so, that would spring up between the rocks.

Q. And this little low grass which you speak of springing up between the rocks was very scattering, was it not? A. Yes, that was scattering.

Q. It did not amount to anything? A. No; but in other places there was this tall grass that I speak of.

Q. And that grew where there were no rocks? A. Yes; where there were no rocks.

Q. And that was in the wet places, was it not? A. Some of it was, and it was in other places where there were no rocks, where there was just the earth there. It was in fact all along on this place as far as I could see.

Q. And you say that was a foot or a foot and a half in height? A. Yes; it would run more than that. It would run from a foot up to two and a half or three feet. It is a wild grass and it grows pretty tall.

Q. This had been an exceedingly dry season in the Adirondacks, had it not? A. It had.

Q. And the grass was thin wherever there was grass, was it not? A. Well, it was not luxuriant at all, and it never was that kind of grass. It always was somewhat thin. It is a wild grass.

Q. And it was unusually thin this year, was it not? A. I could not say.

Q. You could not say as to that? A. No; it seemed to me about the same as an ordinary growth of that high grass.

Q. Had you been down the right of way previous years, previous years to that time? A. Oh, yes; a good many times.

Q. As a matter of fact wasn't the grass thinner this year and shorter than ordinarily? A. I did not see that it was, no, sir.

Q. You did not notice particularly? A. I did not.

Q. Except in the swampy places wasn't the grass as a matter of fact very short? A. No; I do not think it was. I think it was a fair height. Of course where the swampy places were and there had been moisture it would grow somewhat taller and thicker.

Q. You went down about three-quarters of a mile on the 14th of September? A. Well, up to I guess as much as a mile.

Q. And where with reference to the first curve? A. About between—half way down between the first and second curves, somewhere about that.

Q. About half way. There was quite a good deal of rock along the right of way in that interval over which you passed, was there not? A. There was more or less rock on the east side.

Q. On the easterly side; that is your side? A. Yes.

Q. More rock there than on the westerly side? A. Yes.

Q. And quite high rock a considerable part of the way, was there not? A. Well, in a few places where these ridges went up it was pretty high above the railroad there.

Q. And the growth along those rocks of either trees or grass or anything else was very sparse, was it not? A. The grass was, but there were bushes—small bushes.

Q. Those were small huckleberry bushes, weren't they? A. Huckleberry—I know there were huckleberry bushes, and there might have been some of these alders.

Q. There might have been, but you are not sure of that? A. I could not say positively as to that.

Q. You cannot recall now that you saw anything but huckleberry bushes? A. Well, low bushes; I cannot state just what they were. Of course the huckleberry bushes will grow in that kind of a place.

Q. Do you recall as a matter of fact that you saw huckleberry bushes? A. I do not—no.

Q. And you could not say what kind of bushes they were? A. I could not say positively.

Q. Do you know whether or not some huckleberry bushes did grow along the rocks there? A. I do not know for the reason that I did not take notice of that. I did not have it in mind. All I saw was bushes.

Q. Those bushes which grew there were also very low, were they not? A. None of them very high, no.

Q. And growing mostly along the rocky places? A. That is where the bushes were principally.

Q. And outside of the rocks and the rocky portions of this right of way, the remainder of the land was lower land, was it not? A. Lower, yes.

Q. Except in the low places the ground was pretty well covered with rocks? A. No; no; it wasn't. There would be other places where there would be no rocks at all, just the earth, where this grass grew.

Q. At the time you were down the right of way on the 14th of September, is it not a fact that there was not very much along the right of way to feed a fire? A. There was a great deal to feed the fire.

Q. Not enough to make a very large fire there, was there? A. There certainly was. The fire was raging the day I was down along the right of way in the grass there.

Q. Where? A. It extended for a long distance.

Q. Along the right of way? A. Along the right of way.

Q. On which side? A. It was principally on the west side of the right of way, but once in a while it would catch on the east side.

Q. When you say for a long distance you mean about how far? A. At intervals for about a mile or more it was burning.

Q. And which way was it moving? A. At that time there was very little wind when I first went there, and it was just running off as it naturally would without being blown by the wind. Then a breeze sprung up and carried it toward the southwest.

Q. Along the right of way? A. Along the right of way; and also onto the lands to the west.

Q. Can you give us an idea about how far back it was burned off and burned over on that occasion? A. Back to the west?

Q. I mean how far along the right of way. A. Oh! Up and down?

Q. Yes. A. Well, I was there all the afternoon and it burned from where I first started, where I first started fighting it there, it went down a mile and a half or so.

Q. And on the right of way all the way down? A. No; it went off from the right of way finally, it went off to the southwest.

Q. But did it burn along the right of way for that distance? I do not mean was all the fire confined on the right of way. A. Practically, yes, sir.

Q. And on both sides? A. No; it burned on the west side principally, and it would catch on the east side occasionally, but we put the fires out as fast as they caught there.

Q. Mr. Christy, did you testify that the grass had been cut along this right of way during the season? A. To my best knowledge it had not been cut at all.

Q. Upon what do you base your knowledge? A. By seeing the grass as I went along in the train on different trips that I made, I noticed the grass was growing there, particularly on that last trip that I took up there, not the last one but the one I mean before I am speaking of; I saw that the grass had not been cut.

Q. You would not say that it had not been cut, would you, at any time during the season? A. It had not been cut along that section in some time. In the spring it may have; I cannot say about that; but for some time it had not been cut.

Q. Do you know whether or not the railroad company had caused the right of way to be burned over earlier in the season? A. I do not.

Q. You do not know anything about that? A. I do not.

Q. On the 29th when you returned to Long Lake West you say the village was burned and your lumber was burned? A. Yes.

Q. And there were a number of buildings on the Monahan property pretty nearly opposite from your lumber pile, were there not? A. There were originally, yes, sir.

Q. And neither one of these maps shows those buildings? (No answer.)

Q. Were those pretty nearly opposite your lumber pile? A. Some were, yes; and some extended a little to the north—both ways—not very much to the north, however.

Mr. Carey: Are you willing that I should ask the witness some questions from this map, Mr. Wright (indicating a map not yet in evidence)?

Q. Can you step down here, Mr. Christy? Mr. Christy, this is a map which has been made by the railroad company, and we will show that it is correctly made when our witnesses get here. Judge Wright has permitted me to ask a few questions from this map. This you recognize I presume as the Long Lake West station and buildings located there? A. Yes.

Mr. Wright: When you say "this" you mean at the point where the words "Long Lake West are printed?

Mr. Carey: Printed in black, yes.

Q. Now these lines on the map running up and down on the map, Mr. Christy, we will show are north and south, and the ones running horizontally on the map are east and west. Now you will notice the course of the railroad is shown on this map. A. Yes.

Q. And I point to a little—what appears to be a spur extending on the easterly side of the railroad. That is what? A. A siding into our lumber yard.

Q. And you notice a mark on the northerly portion of the map, "Road to Long Lake"? A. I do.

Q. That is the same road which is shown on your exhibit P-1? A. Yes.

Q. And a sketch road from the schoolhouse southwesterly down to your siding? A. Yes.

Q. That is the road on which you drove in to your siding from the Long Lake road? A. It was.

Q. You will notice a number of buildings on the westerly side of the railroad track in black? A. I do.

Q. Those are located how with reference to your switch? A. They are to the northwest.

Q. A little to the northwest? A. Yes.

Q. The ones farther south being about opposite the northerly end of your switch? A. Yes, but according to this sketch it would seem to me as though the switch was longer than that; but it might not be.

Q. This is a small sketch, one inch to four hundred feet. A. All right.

Q. Now, calling your attention to these Monahan buildings on the westerly side of the railroad, in black, what was the condition of those buildings when you got back there? A. They were burnt up.

Q. These buildings which are shown here are buildings which have replaced the ones which were burned on the 27th? A. These?

Q. Yes. Do you know whether or not those buildings are in substantially the same location as the buildings that were burned? A. I do not, because I have not seen them.

Q. But you do know that a number of the Monahan buildings on the westerly side of the track

were found burned when you went back there on the 29th? A. Yes.

Q. Now you testified I think that all of the buildings in this little hamlet of Long Lake West were burned? A. All except that shed that I spoke of.

Q. On this map is drawn a line to the southeast of the railroad; do you know what that is? A. I do not know; I should say it was the line probably between the property that I owned and Doctor Webb's.

Q. That is true. That line extended farther back than is shown on this map? A. Yes.

Q. We have shown a point here called East Charlie Pond; was that on your land? A. Yes.

Q. We have also a pond shown on this map as Little Charlie Pond; was that on your land? A. That was on Doctor Webb's.

Q. We have also on the easterly part of this map quite a large pond marked Bear Pond; was that on your property? A. Entirely, yes.

Q. What did you find the conditions on your property easterly from the railroad on the 29th with reference to having been burned over since you were there on the 16th? A. It was all burned from here right through.

Q. Will you state whether or not you found the property from Bear Pond all the way through to the railroad burned over? A. I did not.

Q. Will you indicate on the map what part of the land between Bear Pond and East Charlie Pond you found to have been burned over? A. All this territory in here.

Mr. Wright: The territory to the west of Bear Pond?

A. Yes, to the west of Bear Pond, and along in here, and there was also some along here that was not burned.

Mr. Wright: When you say "along here" you mean—?

A. Well, it was before you get down to the swamp. I do not know just where that swamp is located on here. It does not show on this map. There was a swamp on this side of the wagon road and extended down through here.

Mr. Wright: When you say "this side" what do you mean?

A. On the north side of the wagon road, and also on the southerly side; it extended through; and before you got down to that swamp there was some land through there that was not burned.

Mr. Wright: You mean land between that swamp and Bear Pond?

A. Yes.

Q. We find on this map a point where the road extends considerably above the general line of the road toward the north. A. Yes.

Q. Do you know which side of that bend in the road toward the north the swamp which you speak of is located? A. The swamp is on that side and extends across.

Q. To the north? A. To the north, and extends across to the south road also.

Q. Does it extend right through that bend? A. Practically, yes. There is some higher ground about here, and then the swamp was off this way on the south side of the road.

Q. What part of your land between Bear Pond and the railroad track did you travel over that time when you went up there on the 29th? A. On the 29th?

Q. Yes. A. I did not travel through here at all.

Q. You did not travel through there at all? A. No; that was all burned through there, and there was no use going through there.

Q. Taking the land from the southerly part of Bear Pond through to the railroad, you say that was all burned through there? A. There was some land off here to the west that was not burned, coming in this direction, and all along here, there was some from there on that was burned.

Q. That is along the edge of Bear Pond? A. From there back quite a little ways. The fire came down here and went through that way.

Q. Let's get this straight on the record. On the westerly edge of Bear Pond there was a fringe of timber that was not burned? A. It extended back. It extended some distance here (indicating). The fringe was thin here and extended way back like that, and it was not burned at all.

Mr. Wright: When you say "in here" it does not mean anything at all on the record. Say where it was thin.

Q. This fringe which you speak of as being thin was on what portion of the edge of the pond? A. Well, it was the upper end as you call it—the upper end of Bear Pond.

Q. This is the upper end? A. Yes, sir; toward the southerly or southwesterly end.

Q. The fringe along there, this southerly portion of the pond, or the southwesterly portion of the pond, was comparatively thin, was it? A. It was here; this point here was burned; the fire had run through to about this point.

Mr. Wright: The witness indicates the point at the southwesterly corner of the pond.

A. There was a hill here that came down—quite a hill to this pond—and that was burned all through there.

Q. Burned all through to Bear Pond? A. Yes; but from here on—of course the green portion was in here and then it extended back in about that shape—back—followed up to the road; and that had not been burned at all in this portion.

Q. Suppose we just indicate that by a pencil mark. A. That is as near as I can tell from memory—starting in along about here somewhere.

Q. Starting in about here. Now will you take the pencil—

Mr. Wright: You mark it.

Q. Shall I mark it? A. Yes—running over to about here.

(Mr. Carey marks it.)

Q. Running over to about there? A. As near as I can tell.

Q. What shall we call that—"Unburned timber line"?

Mr. Wright: Green timber you mean?

Mr. Carey: Suppose we mark it "Green timber line".

A. I suppose there were intervals in here in this portion in here to the left.

Q. I have marked that line; is this line which I have drawn about right? A. Somewhere about right. I could not tell you positively because I do not know just where it was—right in about there.

Q. Now to the east of that line which I have marked "Green timber land—Mr. Christy," meaning that your testimony has located the line—down to Bear Pond, it had not been burned? A. No.

Q. Now from the station end of this line which I have drawn here down to the southwesterly cor-

ner of Bear Pond the fire had burned pretty close to the pond, had it? A. It had burned right down to the pond.

Q. Now westerly of this line which I have drawn here, right over to the railroad track, when you got there on the 29th was that territory substantially all burned over? A. Well, as far as I could tell. Of course I did not go through it, but as far as I could see from the road—I did not go through it, but I understood that it was burned. I never went over it.

Q. You did not go over it from that time at all? A. I never went over this portion of it; I went over through here.

Q. When you came up the railroad as far as you could see easterly from the railroad and southeasterly from the railroad was the territory all burned over? A. As far as I could see, yes.

Q. And you went through from Long Lake West over the Long Lake road over to Bear Pond, did you? A. Yes.

Q. And from the point of this line which I have drawn westerly along this road through to Long Lake West it was pretty nearly all burned over through this territory here so far as you could see from the road? A. Practically all of it so far as I could see.

Q. Did you get down to East Charlie Pond after the fire at all? A. Yes.

Q. You were down to East Charlie Pond? A. Yes.

Q. And when was that, on the 29th? A. No; at a later date.

Q. How much later? A. It was in the late fall, my remembrance is.

Q. How soon prior to the 27th of September had you been around Bear Pond? A. Been around Bear Pond?

Q. When I say around, I mean on the southerly and westerly edge of Bear Pond. A. The pond itself you mean, or walking through this land?

Q. Through this land. A. I had not been there for some time.

Q. A number of days? A. A longer time than that.

Q. Were you there at any time just a short time prior to September 27th when the fire was trenched along the southerly end of Bear Pond and on the westerly side of it? A. Yes; I was there.

Q. You were there? A. Yes.

Q. And found fire trenches there? A. Yes.

Q. What time was that? A. I could not say positively. I guess it was along in August, I think; the latter part of August.

Q. As far back as August, was it? A. Yes.

Q. Will you indicate as nearly as you can where fire was trenched along the shores of Bear Pond at this time that you speak of? A. I did not see any trenching along here.

Q. You didn't see any. I want you to tell me where you did see it. A. The only trenching I saw was back here to this side of the wagon road, that is back in here somewhere.

Q. That is to the west of the line which we have drawn here and called the green timber line? A. Yes.

Q. Did that trenching extend clear to the Long Lake road? A. Yes, it did.

Q. And about how far southerly from the road did it extend? A. I could not say.

Q. Can you give us an approximate idea? A. No.

Q. How far could you see that it had been trenched, possibly fifty or seventy-five feet? A. I did not go out over it—simply driving along in a wagon.

Q. When after September 27th were you in the vicinity of East Charlie Pond, down here? A. In November, I think, I would not say positively. I think it was about November—the hunting season.

Q. Did you know of fire being trenched around in the vicinity of East Charlie Pond and Little Charlie Pond in the month of September and a short time prior to September 27th? A. Well, my men said that it had been trenched there, but I never was over there.

Q. You did not go over there to see it? A. No.

Q. Now when you were down in the vicinity of East Charlie Pond will you state whether or not your land about East Charlie Pond, up to the southerly end of Bear Pond approximately, and thence through to the railroad, had been all burned over? A. I did not go through to the railroad, but what I saw through here had been burned all over with the exception of low places and swampy places where the timber was, in some patches of fairly good size, green timber.

Q. And those patches were comparatively small? A. Not very big.

Q. But the territory so far as you could see from where you were located at East Charlie Pond had been substantially all burned over through to the railroad? A. As far as I could see, yes.

Q. How far could you see from the point where you were? A. From the highest ground I was on possibly you could see for half a mile.

Q. Toward the railroad track? A. Yes.

Q. And do you know approximately how far it was from the point where you were to the railroad track, in a straight line? A. No.

Q. Do you know of your own knowledge where this fire came from that came in around East Char-

lie Pond and Bear Pond on your property? A. I do not.

Q. You haven't any personal knowledge? A. No, sir.

Q. You spoke of the Brooklyn Cooperage Company's buildings, and you say that they were located about south from the Monahan building. A. As near as I can tell, yes.

Q. Looking at these lines you see that south from those buildings would bring it down to the easterly side of the railroad? A. Yes. I guess it is southwest.

Q. So that it would be quite markedly to the southwest, would it not? A. Yes.

Q. You say that they were from a quarter of a mile to a half a mile back in from the railroad? A. That is my remembrance.

Q. While the Monahan buildings were not far back? A. No; pretty close.

Q. Two or three hundred feet away from the railroad tracks? A. Well, the first one I think was not as far as that. A dwelling house I think was the nearest at that time.

Q. Prior to the time of this fire had your property from Bear Pond and East Charlie Pond through to the railroad tracks been lumbered?

Mr. Wright: Objected to as immaterial.

Q. I think that is all on that map.

(Witness resumes his seat.)

Q. Mr. Christie, I am not sure that I understood you exactly with reference to how he lumber was piled around your siding. Won't you come down here? This (indicating) is a larger scale map. Now will you point out to the jury—

Mr. Carey (to the jury): Can you see the siding here, gentlemen?

A. This line is the siding.

Q. Yes. Point out where it was piled. A. It was piled both sides of the railroad.

Q. You mean both sides of your siding? A. Yes. And it was piled on that side of the wagon road, the west side, and also to the east side of the siding, and there was another road here.

Mr. Wright: Showing the dotted line.

A. Shown by the dotted line; and lumber was piled my remembrance is in double piles here, that is a pile right by the railroad and other piles back of that.

Q. How about the piling at the end of the siding? Do you remember that? A. At the end?

Q. Yes; at the northerly end. A. It was not piled very far beyond that.

Q. There were some piles just beyond the northerly end of the switch? A. There was a little shanty out there, and it was piled to the west of that; and it did not go back over here (indicating).

Q. Now I notice on the map, Exhibit P-1, what appears to be a building between your switch and the main line of the railroad. Was there a building there prior to the fire? A. There was.

Q. Do you know whether that building has been rebuilt in approximately the same position that it occupied before the fire? A. I do not know. I have not seen it.

Q. You do not know? A. No.

Q. What was that building known as which stood between your switch and the railroad track? A. That was a storehouse for Mr. Hosser, a lumber company there—Mr. Hosser had charge of it there.

Q. It was also sometimes called the Norwood Lumber Company's storehouse? A. Yes.

Q. And Mr. Hosser was connected with the Norwood Company? A. Yes.

Q. Where was your residence at the time of the fire? A. It was at Bear Pond. You mean the camp there?

Q. No; I mean your residence; where you voted from. A. Oh, I see. At Montclair, New Jersey. I thought you meant my residence up there.

Q. There were three or four kinds of lumber in these piles along the switch? A. Yes.

Q. Did your casual examination of these lumber piles which was made on the 16th of September take in the different kinds specifically— A. On the 16th of September?

Q. —so that you had an idea of approximately how much there was of each kind? A. I was not there on the 16th of September.

Q. Was it the 14th that you went down to look the lumber over? A. I went down the track on the 14th.

Q. When was it you looked the lumber over? A. That was in July when stock was taken.

Q. From your casual examination of the lumber piles on that occasion did you take into account the quantity of these different kinds? A. Yes.

Q. I mean when you observed the piles. A. I did.

Q. Did you have in mind then about how much there was of each kind? A. I did, as far as I could tell.

Q. Where did you get that idea, from your examination or from the Gregory inventory? A. The inventory is taken of the different kinds of lumber, and in looking over it I knew there was spruce and hemlock, etc.

Q. There were different grades also, were there not, of each kind? A. There were, yes, a few.

Q. How many different grades? A. Let's see;

well, there were three different kinds of lumber; spruce, pine and hemlock.

Q. Well, there were different grades then, different kinds? A. Well, there was rough lumber and dressed lumber, and some cull lumber.

Q. And some was of better quality than the other? A. Yes; some better quality.

Q. From your casual examination did you form an opinion as to the amount of rough lumber and dressed lumber that there was respectively? A. Well, of course I did not go into it accurately at all, but in looking it over I formed an idea of about what there was.

Q. And did you fix in your mind at that time about how many feet there were of dressed lumber and how much of rough lumber? A. No; I would just look over the piles casually to see if my estimation was that it would come up to the inventory, and that is all I did.

Q. That is whether the gross amount would come up to the inventory or not? A. The different kinds of lumber.

Q. And you did not at that time form any conception at all as to the different grades of lumber and the amount of each grade, did you? A. I did to a certain extent, yes.

Q. Well, a pretty limited extent, was it not, Mr. Christy? A. Well, in looking it over I could make up my mind—

Q. Wasn't it a pretty limited extent to which you formed any notion of that kind? A. I went through it casually to see whether it would come up to the inventory. I would look at a pile and could tell fairly well. Of course I could not tell accurately.

Q. But you did not know when you were there how much each pile was inventoried at? A. No; I would not.

Q. So that it was only the aggregate amount as to which you formed an opinion? A. Of the different kinds of lumber, yes.

Q. You did not have any idea of the amount of one quality of lumber as compared with another quality of lumber on that occasion, did you? A. I certainly did. I could not tell if the inventory was anywhere near correct otherwise.

Q. How could you tell the different qualities of lumber as contained in the pile? A. By looking at it.

Q. Could you tell the quality of lumber by looking at the outside of the pile? A. I could. It was piled separately, what few different qualities there were.

Q. Did you at that time know how much of each quality was in the inventory? A. Do I know?

Q. Yes. A. I presume I did.

Q. You did not have the inventory with you, did you? A. I did not; no.

Q. Then how could you form any idea as to whether the amount of different qualities would come up to the inventory? A. I had looked over the inventory before and made a copy of the inventory before—

Q. But you did not carry— A. —and I would have in mind what lumber there was there of the different kinds.

Q. But you did not carry those figures in your mind when you went there, did you? A. Not altogether, but to a certain extent I would.

Q. Wasn't that a pretty limited extent? A. I don't know.

Redirect Examination by Mr. Wright:

Q. You went there for the express purpose of checking up the inventory, did you not? A. I did.

Q. So that at that time you had in mind what the inventory was? A. I did.

Mr. Carey: Don't lead him.

Q. Will you please come down here and mark upon this map which Mr. Carey has produced and which he says he is going to put in evidence the approximate location of the Brooklyn Cooperage camps, bearing in mind that the map is on a scale of 400 feet to the inch? A. Well, right here somewhere.

Q. You are about two miles from the railroad according to the scale of the map. A. You said 400 feet to the inch?

Q. Yes. A. I said from quarter to half a mile.

Q. It would be about ten inches to the mile. A. Back here somewhere; about there.

Q. About where I make a circle? A. About there.

Mr. Wright: I will mark that "Cooperage Camp."

Mr. Carey: You'd better put Mr. Christy's name on there.

Q. You are not an engineer, are you? A. No.

Q. You are doing the best you can under the circumstances? A. Yes.

Q. I show you exhibit P-4-a, and ask you if you recognize that photograph? A. Yes.

Q. Can you say about what it represents? A. It represents a straight stretch of railroad to the south of the bend from the station.

Q. Looking north—the picture is looking north? A. Yes.

Q. The first bend is in the distance? A. In the distance, right there (indicating).

Q. You spoke in your cross examination about there being rock in a portion of the right of way? A. Yes.

Q. This shows the rock in the foreground? A. Yes.

Q. And also more of it up above? A. Up in the bend there.

Q. Does that show the character of the right of way as it existed in September of 1908 at the time you were down there, and which you have testified to? A. You mean as to the general character of it?

Q. General character of it. A. Yes.

Mr. Carey: What do you mean by the general character?

Q. By that I mean, and ask you if you mean the same, that it shows the railroad as it was at that time, it shows the rocks substantially as they were, of course different as to the amount of covering they had on them possibly; and also the amount of highland and lowland which abutted on the tracks? A. Yes.

Q. Do you recall the character of the land lying to the east of the railroad and south of where this picture commences, that is from these rocks shown in the foreground to the second bend? A. The character?

Q. Yes. A. The land is somewhat lower there and there is not so much rock.

Q. At the time you were over it what could you say with reference to whether there was any grass on that portion south of these rocks shown on this photograph? A. There was grass, yes.

Recross Examination by Mr. Carey:

Q. Do you know what point on the railroad this picture, P-4-a was taken? A. I do not.

Q. You do not know how far below the first bend? A. No, I do not.

Q. Do you know with reference to mile post 94?

A. I could not say. I know where mile post 94 was, but I could not say as to this picture.

Q. I see. Now, Mr. Christy, on your land right beside this first curve here do you recall whether in 1908 there was quite a growth of trees running down to the railroad that way? A. On the first curve?

Q. Yes. A. Yes, there was.

Q. And those trees were about how high? A. Well, it was a small sort of second growth.

Q. What kind of trees were they? Hardwood trees or— A. There was some hardwood and I think there was some—there was birch and poplar started there—birch and cherry, not poplar.

Q. Were there not also some evergreen trees? A. There were some.

Q. Quite a little clump of those just along the first bend there? A. I remember there was some there.

Q. And extending right down to the railroad right of way? A. Yes; practically to the right of way.

Q. And those trees were from 30 to 50 or 60 feet high, or more? A. The evergreen were not as high as that; the other trees were running up rather tall.

Q. How high would you say the highest was? A. Possibly 40 feet.

Q. Hgher than that, weren't they? A. I do not think they were, because they were second growth.

Mr. Wright: I desire to read, pursuant to agreement of counsel, a portion of the testimony of J. J. Gregory, a witness who was called at the previous trial of this case. It is stipulated that this testimony shall be read in so far as it relates to the lumber, but in so

far as it relates to other matters it is not to be read; so in reading it I will try to eliminate any other matters than the part agreed to. (Reads):

"Q. Mr. Gregory, where do you live? A. Millenocket, Maine.

Q. Where were you in September, 1908? A. In the town of Long Lake, at a place called Long Lake West.

Q. That is in New York State? A. Hamilton County, New York State.

Q. What were you doing up there? A. I was employed by Mr. Christy.

Q. Mr. Charles R. Christy? A. And Son.

Q. What were you doing? A. I was looking after the shipping of lumber.

Q. Did they have a mill there? A. They have a mill four miles from there.

Q. Had a place where the lumber was kept? A. Well, at the lumber yard; they have a lumber yard at the mill where this lumber is sawed; they also have one at the station, and they had several teams that were hauling lumber down there, sometimes putting it on the car as it is hauled, and then if they have no orders, piling it up in a pile; and it is located at the station a few yards south or southwest from the station at Long Lake West.

Q. On which side of the track? A. On the left hand side. I never was very clear as to the points of the compass, and since I have heard the lawyers talking, why, I am not clear yet.

Q. Show us on the map where it was, and then it will all be clear. A. (Indicating).

Q. This is the station up here (indicating), the building marked 1? A. Yes.

Q. Now where was the lumber yard? A. Well, the lumber yard was southwest.

Q. Down here (indicating)? A. Yes, down there.

Q. Where this 'X' is marked? A. That is right.

"Mr. Wright: There will be no dispute in marking this point as the lumber yard.

"Mr. McClary: Yes.

"Q. How far was the mill from this siding? A. Four miles, approximately; may be a little more than four miles.

Q. Did you have charge of the lumber that was kept in the lumber yard at the siding? A. I had charge of all the lumber that was kept at the siding.

Q. Charge of all the shipping? A. Yes, sir.

Q. Did you make inventories of that lumber? A. Yes, sir.

Q. When did you make the last inventory of the lumber that was on that siding, prior to September 27th? A. I think it was the 13th of July. July.

Q. Of the same year? A. Same year, 13th of July, 1908.

Q. What did you do with that inventory? A. I sent a copy of it to Mr. Christy and a copy I kept.

Q. Which Mr. Christy? A. Charles R. Christy & Son.

Q. What became of the copy that you kept? A. The copy I kept was destroyed in my room at the hotel, when everything else was destroyed there.

Q. On what date? A. On September 27, 1908.

Q. From the time you made that inventory down to September 27th, what lumber was shipped from that time? A. I haven't any way of telling positively now, but my impression is that there was hardly any lumber shipped.

Q. We will get that in another way. When lumber was shipped how did you report it? What

did you do? A. Well, when the lumber was all laid and all ready to ship, it was measured, billed, I got an order from the New York office, went down to the station and billed it and got a receipt, what is commonly called a waybill, and kept one of them—always kept two, duplicate ones, one for myself and sent one to Mr. Christy; sometimes sent it to the New York office; sometimes sent it to Mr. Christy when he lived at Long Lake, or some member of his family; it was sent up to the office, or up to his cottage at Bear Pond; or, we did that summer, what little was shipped, especially after the middle of the summer; I think the bills were sent up to Mr. Sanford at Bear Pond.

Q. Who is Mr. Sanford? A. Mr. Sanford was the man looking after Mr. Christy's business up at his cottage, a relative of Mr. Christy's.

Q. Did you report all lumber that was taken away from the lumber yard? A. Yes.

Q. Were you in Long Lake on the 27th of September when the town was burned? A. Yes, sir."

Cross Examination by Mr. McClary, read by Mr. Carey:

"Q. You spoke of taking an inventory in July, Mr. Gregory? A. Yes, sir.

Q. Will you tell the jury just how you took the inventory, and tell me? A. Yes, sir.

Q. Just how you took it; just briefly, please? A. I walked up to a pile of lumber—I piled all this lumber up myself that I took an inventory of; so that there was the same number of boards; we did not pile different widths together; every pile of lumber was all of the same dimensions—so I walked up to a pile of lumber and counted the number of tiers high and the number of boards that were in a tier—understand me?

Q. Yes, certainly; I know how it is done. A.

Then, of course, very easily count the number of pieces; multiply the number of pieces in width with the number in height.

Q. I understand that is the way you took the entire inventory on that day? A. You did not hardly wait until I finished. In taking an inventory and sending it to Mr. Christy, I made an allowance on every dimension, of about 15 per cent. for culls that might be in there, for the reason that while the culls would be in the material, they would have to come out and allowed for, and I wanted my inventory to clear that. If I sent in a report of 30,000 feet of a certain dimension—(interrupted).

Q. You need not go into that. A. What do you want I should tell you?

Q. Just what I asked; but I think you know that; as to how you personally took the inventory; I thought you had completed your answer. A. In that way I found the number of pieces.

Q. And you did that all yourself? A. Yes, sir.

Q. From that time on did you keep track personally of the amount of lumber that was shipped from that siding? A. Yes, sir.

Q. Personally? A. Yes, sir."

Testimony of the witness Gregory on being recalled, read by Mr. Wright:

"Q. Mr. Gregory, when did you return to Long Lake West after the fire that destroyed the town? A. I went back there at eleven o'clock that night for a short time, and went back again the next morning.

Q. When did you first go down to the lumber yard? A. I went down there that night, but I could not walk over it because it was still a mass of coals.

Q. Did you go back to the lumber yard on Mon-

day? A. I went back to the lumber yard on Monday morning.

Q. What was the condition of the lumber that had been there on Sunday morning? A Everything was burned."

Mr. Wright: I desire to offer in evidence the inventory and tabulation marked P-8 and P-9 for identification.

Mr. Carey: I object to receiving those in evidence. It appears that Mr. Gregory made an inventory. Then he made a copy of the inventory, and kept one copy himself and sent another copy to Mr. Christy and Mr. Christy destroyed his copy after having made a copy of the copy. It does not seem to me that it is evidence properly admissible.

The Court: What do you say about it, Mr. Wright?

Mr. Wright: The testimony shows that the original was destroyed by fire; that is Mr. Gregory took his original and sent a copy to Mr. Christy, and the original was burned up in his room; that was destroyed. Now he sent a copy to Mr. Christy, and Mr. Christy testified that in the usual course of business he made a copy from the rough copy that had been sent to him; and this is the record from which he did business; and in addition to that he testifies that having received this and knowing the contents of it he went there and verified it by his personal observation.

The Court: I think I will permit it. You may have your objection noted, Mr. Carey.

(P-8 for identification marked Exhibit P-8.)

Mr. Wright: Do you want to make any objection to the summary?

Mr. Carey: No; I have no objection to that.

The Court: That is a mere matter of mathematical calculation. I will permit that.

(P-9 for identification received in evidence as Exhibit P-9.)

EDWARD V. THORNALL, sworn.

Direct Examination by Mr. Wright:

Q. What is your business? A. I am an attorney and counsellor at law of the State of New York.

Q. And New York attorney of Mr. Christy—Charles R. Christy and Son? A. I am.

Q. Were you consulted by Mr. Christy shortly after September 27, 1908, with respect to this loss of lumber at Long Lake West? A. I was.

Q. What did you do with reference to that loss so far as this defendant is concerned? A. I first had a conversation with Mr. McClary, who represented the New York Central and had charge of the claims for fire losses. That was in November, 1908, at Saranac Lake; and subsequently I prepared, from data furnished me by Mr. Christy, a claim for the amount of lumber lost at Long Lake West by the fire of September 23, 1908, and forwarded that to Mr. McClary, or McClary and Allen, which was his firm, at Malone, New York.

Q. I show you a letter on your letterhead dated February 6, 1909, addressed to Martin E. McClary, to which is attached what purports to be a claim for lumber lost, which letter and attached paper were produced by the defendants. Is that the letter and claim which you forwarded to the company? A. It is.

Mr. Wright: I ask that that be marked in evidence.

Mr. Carey: The paper now offered is admissible, I think, to show that claim was filed, but for no other purpose than that—not to show value or to show quantity.

The Court There is no question about that. It simply shows the fact of the filing of the claim.

(Marked P-11.)

Q. Subsequent to the filing of that claim did you have any further communications with Mr. McClary or other persons representing the defendant company? A. I had considerable correspondence with Mr. McClary and also had personal interviews with him.

Q. I show you a letter dated Malone, New York, on the letterhead of McClary and Allen, addressed to you, dated February 8, 1909. Did you receive that letter from Mr. McClary? A. I did.

Mr. Wright: We offer this in evidence, for the same purpose.

(Marked P-12.)

(Letter dated March 17, written by Mr. Thornall to Mr. McClary, called for and produced.)

Q. I show you this letter, signed by yourself, addressed to Mr. McClary. Did you send that letter about the date mentioned? A. I did.

(Letter offered in evidence and marked P-13.)

Q. I show you a letter on your letterhead addressed to Martin E. McClary under date of May 18, 1909. Did you send that to Mr. McClary? A. I did.

(Letter offered in evidence and marked P-14.)

Q. Did you have a conference with Mr. McClary some time in April of 1909? A. I did.

Q. Where? A. At my office in New York City.

Q. And that was in response to your letter of March 17, that was put in evidence? A. Yes.

Q. And what was that conference about? A. It was about the proposed settlement of this claim.

Q. And incidentally the other claim, I suppose? A. And incidentally—both.

Q. I show you a letter of Mr. McClary under date of May 18. Did you receive that letter from Mr. McClary? A. I did.

(Letter marked in evidence P-15.)

Q. I show you another letter from Mr. McClary to yourself under date of May 26, 1909. Did you receive that letter? A. I did.

(Letter marked in evidence P-16.)

Mr. Wright: I call for the production of a letter under date of May 27th from Mr. Thornall to Mr. McClary.

Mr. Carey: That letter we have been unable to find.

Mr. Wright: By consent the copy is used.

(Copy of letter dated May 27th, 1909, marked P-17.)

Q. Did you write this letter to Mr. McClary under date of May 27th? A. This is a copy of a letter which I wrote to him on that date.

Q. Did you meet Mr. McClary at the Murray Hill Hotel on that day, June 30, 1909? A. I met him on the subway train on the way to the Murray Hill Hotel, and we both went to the Murray Hill Hotel and had lunch on that day.

Q. And you had discussion with regard to this question of Mr. Christy's claim against this company? A. We did.

Q. And what was the character of the discussion? A. There was a proposition of settlement made.

Q. It was made orally? A. It was, and he asked me to submit it to Mr. Christy.

Q. I show you a letter of June 22, 1909, written by you to Mr. McClary. Did you send that letter to him? A. I did.

Mr. Wright: I offer this letter in evidence.

Mr. Carey: I suppose these letters are put in for the purpose of showing negotiations between the parties looking to a settlement.

Mr. Wright: It is to meet your special plea.

Mr. Carey: Yes; and not as binding upon either party as admissions with respect to liability or anything of that kind?

Mr. Wright: Certainly not.

(Letter marked P-18 in evidence.)

Q. I show you a letter of July 7, 1909, from Mr. McClary to yourself. Did you receive that letter? A. I did.

(Letter offered in evidence and marked Exhibit P-19.)

Q. I show you a letter of August 13, 1909, written by you to Mr. McClary. Did you send that letter to him? A. I did.

(Letter offered in evidence and marked P-20.)

Q. I show you a letter dated September 22, 1909, written by Mr. McClary to you. Did you receive that letter? A. I received that letter after I saw him in Malone.

Q. You had seen him after August 13 and before September 22, at Malone? A. I did, in about the middle of September, 1909.

Q. And about what? A. About this claim. He requested me not to commence any action or take any steps until he had consulted with the railroad officials.

Q. And was this letter I show you the next word that you had from him at that time? A. It was.

(Letter offered in evidence and marked P-21.)

Q. I show you a letter of September 23, 1909, from yourself to Mr. McClary. Is that the letter you sent him? A. Yes.

(Letter offered in evidence and marked P-22.)

Q. Did you see Mr. McClary on the 27th? A. I did not.

Q. Did you hear from him again? A. I did, on September 27th.

Q. How did you hear from him? A. By telephone. He telephoned me that he was in the city and that he had consulted the railroad officials and there was no use in calling to see him as they would not increase their offer.

Q. Was that the last negotiation you had with Mr. McClary or the railroad company with respect to this claim? A. It was.

Q. How soon after that was this suit started? A. Within a very short time. I do not remember exactly; within a month or two.

Mr. Carey: We have the exact date of it.

A. Early in November, I think.

Q. Will you state why this action was not brought earlier?

Mr. Carey: I object to that. The facts will disclose why the action was not brought ear-

lier, and if there is to be any disclosure of the reason it must be by facts shown to have taken place between the parties.

The Court: The reason is a fact. The state of a man's mind is just as much a fact as the state of his appetite, and if he had a reason for not starting it prior to that time I will permit him to say it.

Mr. Carey: I may have my objection noted?

The Court: Yes. It is noted. Whenever you make it it is noted.

A. Because of the expectation that the company would settle for this loss the same as they had settled for prior losses.

Mr. Carey: I object to the last part.

The Court: That will be stricken out.

A. That negotiations were pending for a settlement of the claim.

The Court: I thought you told us that Mr. McClary had told you that there was no need of going any further with it, that the company would not increase its offer.

The Witness: Then suit was commenced shortly after that.

The Court: The question you have been asked is why suit was not commenced earlier after the negotiations with Mr. McClary had come to a conclusion, as you have stated.

Mr. Wright: That was not the question.

The Court: I so understood it, and I think everybody else so understood it.

Mr. Carey: It was commenced the first day of November, 1909.

Mr. Wright: It is admitted that the summons in this cause was dated November 1st, 1909.

The Court: If I had understood that your question was why it had not been started any sooner, going over that general period, I would have sustained Mr. Carey's objection. If that is the question, as you state it, I do sustain the objection and strike out the evidence that has been given in between.

Mr. Wright: Cross examine.

Cross Examination by Mr. Carey:

Q. These negotiations between you and Mr. McClary were on the basis of being without prejudice to the rights of either party to the negotiation, were they not? A. They were.

Q. And they covered not only the damage which Mr. Christy claimed had been caused by the destruction of lumber, but also the damage that he claimed to have resulted to his land and standing timber? A. The claim as presented by me was only as to the timber—as to the lumber—but Mr. McClary made his offer to include both the cut timber and the standing timber.

Q. Well, the negotiations between you were with respect to all the damage which Mr. Christy claimed he had sustained by reason of the fire, were they not? A. Well, only as Mr. McClary injected it. It was not so far as I was concerned. I was dealing simply with the lumber at that time.

Q. When he took up negotiations with you after the filing of this claim didn't the negotiations from that time cover the entire damage which Mr. Christy suffered? A. On the part of Mr. McClary, yes.

Q. Didn't you and Mr. McClary negotiate about the same thing? A. My negotiations were as shown by the letters. They are entirely as to the lumber—the cut lumber.

Q. Did you tell Mr. McClary that you did not

take into account the damage to the land at all? A. In our conversations I eliminated—

Q. You always said you were not negotiating with respect to the land damage at all? A. I told him we were only negotiating at that time with regard to the cut lumber; that I would take up the other matter later.

Q. Your letters would seem to indicate that you were negotiating about the damage to the land way back in April and May, isn't that so? A. No. I simply said I—the letters will speak for themselves.

Q. Well, back in May, 1909—May 18th—you write to the effect that green timber destroyed was about 955 acres, which he values at $20 an acre, making a total of $19,100? A. Yes.

Q. So you were evidently negotiating then for the whole damage. A. I think you will find one of those letters even later than that, saying that we had not made a survey, that the survey had not been completed.

Q. I guess that is in this one. You say in this letter of May 18th that the total damage to standing timber and land amounted to $29,420? A. Yes.

Q. Do you mean to say you were not negotiating then with Mr. McClary about damages to land? A. I think you will find a later letter there showing the survey. We could not take it up at that time because it was only approximate.

Q. Won't you answer the question?

(Question repeated.)

A. As I say, Mr. McClary made his offer based upon—

Q. Just a minute.

The Court: No; the question is whether or not you meant to say you were not negotiat-

ing then when that letter was written about damage to the land.

A. The letters will speak for themselves so far as that part is concerned.

The Court: That letter does speak for itself. Now he asks you to speak for yourself about that letter.

A. I told Mr. McClary when I saw him in the Murray Hill hotel in New York and later on—

The Court: That is not what he asks you. He is asking you whether you were not negotiating then, that is when that letter was written, about the damages to land. Now that is an easy question.

A. Well, not so far as his offer was concerned. I had not put put myself in the position at that time to know the exact amount of damage.

The Court: Well, if you were not negotiating about land what were you talking about in your letters for then?

A. In response to some of his inquiries.

The Court: Then if he was inquiring and you were responding to it, and the inquiry and response were in reference to the land, that is negotiation, isn't it, about land?

A. All I can say is that I in my conversations eliminated that entirely.

The Court: But in your letters you included it?

A. Included those statements.

Q. Now on June 22 you say that he has made a survey of the timber land from which it appears that the fire of 1908 burned over 2012.20 acres, of

which 1151.10 acres had been previously burned in 1903; the remaining 861.10 was green timber not touched by the 1903 fire. Now as a matter of fact from May right on through to September were you not carrying on negotiations with reference to all damages which Mr. Christy claimed? A. Only as shown by those letters.

Q. And in your conversation you did not have any dealings with each other in regard to the damage to the land at all? A. Mr. McClary made his statement—

Q. Answer the question. A. Mr. McClary did inject it, yes.

Q. What did you say then? A. I said we could not take up that question then.

Q. Did you say that after June 22nd? A. I only saw him once after June 22nd, and I do not remember anything that was said at that time.

Q. After the telephone message of September 27, 1909 you had no further conversation and no further correspondence with Mr. McClary in regard to the settlement of these claims, had you? A. I believe not. I do not recall any.

Mr. Wright: I desire to offer in evidence section 34 of Art. 5 of Chap. 130 of the laws of the State of New York, 131st session, being the year 1908, merely to show that Hamilton County is in the State Forest Preserve.

Mr. Carey: The entire county?

Mr. Wright: Yes.

Mr. Carey: If that is a fact I am willing to concede that.

(Designated Exhibit P-23).

Mr. Wright: I also desire to offer in evidence section 72 of the same act.

Mr. Carey: Section 72 is objected to on the ground that it is immaterial, irrelevant and incompetent. It is a statute which has a

penalty attached to it and is not a statute which is intended to define duties or liabilities with respect to private parties.

The Court: Have you read the case of Evers v. Davis in this state (90 Atl. Rep. 677.)

Mr. Carey: I do not recall it.

The Court: In that case the court of appeals says, (at page 680) that the ordinarily prudent man, which you are presumed to be in respect to fires, is presumed to be a law abiding man, and therefore even though a statute be enacted with only a penalty to it, and a statute which does not create in and of itself a cause of action, still in an action for negligence the statute takes its place in the general scheme and must be considered in passing upon the question of negligence.

Mr. Carey: The scope of this act it seems to me is entirely outside of the rights and obligations and duties as to private parties. The state is not a party to these proceedings.

The Court: In Evers vs. Davis the state was not a party to it, and the statute was the tenement house act. I haven't any doubt at all about the question. It is just as clear to me as the noon-day sun, and if you have any doubt about it that doubt may be embalmed on the record in the form of an objection and I will admit the statute. I haven't the slightest doubt about it. (Designated P-24).

ROBERT D. SANFORD, sworn.

Direct Examination by Mr. Wright:

Q. Mr. Sanford, where do you live? A. Litchfield, Connecticut.

Q. Are you related in any way to Mr. Christy? A. Son in law.

Q. In the summer and fall of 1908 where were you? A. Sabatas Park, Long Lake West, New York.

Q. Sabatas Park is the name of the post office? A. It is.

Q. Long Lake West is the railroad station? A. Yes.

Q. So both are really the same place? A. Same place.

Q. And where were you located? A. I was in Mr. Christy's park, or estate.

Q. The house, or camp, was where? A. Located on Bear Pond.

Q. That is about three or four miles east of the railroad? A. About four miles east of the railroad.

Q. How long had you been there that summer? A. From April up until after the fire.

Q. And you recall the day that the town of Long Lake West was burned? A. I do.

Q. Prior to that time had you had occasion to go down the line of the defendant's railroad south of Long Lake West station? A. I had.

Q. About when did you? A. September 9th.

Q. And between September 9th and September 27th, how often were you over the right of way south of Long Lake West station? A. Very often. I should say nearly daily.

Q. What were you doing? A. Looking for the fires that had been burning along the—well, had been burning along the railroad.

Q. When you left the Long Lake West Station you went down a piece of straight track for a while? A. Yes.

Q. Then you went around a curve? A. Yes.

Q. Which curved to the left as you were going down? A. Yes.

Q. Then there was some more straight track and a curve to the right? A. Yes.

Q. Then the track was substantially straight from that point down to the Christy-Webb corner? A. Yes.

Q. What was the character of the land upon which the railroad company's railroad was built and immediately east of it from Long Lake West station southerly? A. More or less swampy—lowland.

Q. With reference to the character of the land near where the lumber was piled, what can you say as to that? A. That was low land—swampy—bog.

Q. What can you say with respect to the character of the land going down the railroad farther down to the point of the switch, where the Christy switch went off? Come down and look at the map. Down around the point of the switch. A. That was low land.

Q. Then from there going on down how far did that low land continue? A. Down below the first curve.

Q. Then what was the general character of the land? A. Some ridge—small ridge and the low land between the ridges.

Q. After you had passed over the ridge—going down the track I mean—what was the character of the land below that? A. Still lower.

Q. Do you recall the land that lies to the north and east of the railroad track, down near the second bend? What was the character of that? A. There were two small ridges with low land between.

Q. On those days that you went down the track between September 9th and 27th, what have you to say as to the condition of the defendant's right of way? A. The right of way of the railroad from

a point about a half mile below the station—south of the station— was tall grass and brush.

Q. You mean from a point beginning about half a mile south of the station that condition existed? A. Between quarter and half a mile south of the station.

Q. In what way did that condition differ from the condition that existed up near the station? A. Up to that point, from a quarter to a half mile below the station, the grass and the natural growths of brush had not been cut in the right of way.

Q. Had it been cut up near the station? A. It had.

Q. I show you P-4-a. Do you recognize that photograph? A. Yes, sir.

Q. That is looking up the track toward Long Lake West station? A. Yes, sir.

Q. And shows the first bend south of the station; is that correct? A. Yes.

Q. Can you locate on that the mile post—I think it is known as mile post 94? A. Right here, right at the bend.

Q. It shows on this photograph just before you come to the bend? A. Yes.

Q. Can you tell us about where the Long Lake West station lies on this photograph? You cannot see it on account of the hill, can you? A. No; there is a ridge between.

Q. Can you tell us approximately where the station would be? A. I should say about in there.

Q. Make a little cross mark at the point where you thing the station would be.

(Witness marks it.)

Mr. Wright: I will mark "S" right near that "X" for identification.

Q. I show you P-6-a. Do you recognize that photograph? A. Yes.

Q. And what does that show? A. That shows the railroad track and the area to the east of the railroad track, and south of the former Long Lake West station.

Q. I call your attention to what is evidently a pile of lumber in the centre, just east of the railroad track, and ask you if that is approximately where the lumber of Mr. Christy was piled in September of 1908? A. Yes; I should say it was; very close to it.

Q. I call your attention also to a piece of road over on the left hand side of the picture. Is that the Long Lake road that has been spoken of this morning? A. That is the road running from the Long Lake station to the town of Long Lake West. It runs from the Long Lake Station to Long Lake West.

Q. Did you have to use that road to get from the Long Lake West station to Mr. Christy's camp at Bear Pond? A. We did.

Q. You know approximately where this picture was taken from, don't you, from the looks of it? A. Yes, approximately.

Q. Where did you say it was taken from? A. It was taken from a point west and south of the former Long Lake West station.

Q. With reference to the Monahan place can you locate it? A. I should say about the Monahan —I don't know whether you call it boarding place or cottage—close by.

Q. Near Monahan's place on the west side of the track? A. On the west side of the track.

Q. Can you on this photograph locate approximately the location of Bear Pond—having in mind the road and— A. I should say it was just about here.

Q. Just make a small oblong there.

(Witness marks it.)

Mr. Wright: I will mark it with the words "Bear Pond—Sanford."

Q. During the period from September 9th to 27th while you were patrolling the tracks south of Long Lake West station did you see any fires started? A. Yes, I did.

Q. How many times? A. I saw seven fires after the passage of one train.

Q. What train was that? A. It was the train passing Long Lake West 1:13 I believe.

Q. Going which direction? A. Going south.

Q. Where were you when you saw those seven fires started after that one train? A. I was along the track south of Long Lake station.

Q. Can you give us approximately the location where you were? A. Yes; I was on the second bend south of Long Lake station.

Q. Did you see any other fires started other than those seven?

Mr. Carey: Let us have the dates of these fires.

Mr. Wright: Between the 9th and the 27th.

Mr. Carey: I object unless the time fixed is closer than between the 9th and the 27th.

The Court: I think there ought to be some definite time fixed. They are required to answer these things if they have knowledge of them.

Q. Can you fix approximately the time when you saw these fires set?

The Court: As nearly as you can.

A. I think it was in the neighborhood of the 17th or 18th.

Q. At any other time during that period or be-

tween the 9th and the 27th did you see other fires set, and if so about when?

Mr. Carey: Fix the date first.

A. Yes. I can recall two on the 19th of September.

Q. What time of day were those started?

Mr. Carey: I object to his testimony in regard to fires started on the 19th.

The Court: Why?

Mr. Carey: As too remote in time.

The Court: I will overrule that objection. The case of Olcott vs. Public Service Railway Co. in this state has fixed the principles upon which that evidence is admitted. The first proposition of course is that it is within the discretion of the trial court to a large extent as to within what period the testimony shall range; but secondly the period here is so proximate and the facts which it tends to prove are of such a character that it seems to me it would be almost an abuse of discretion to say that it was not admissible, because one of the objects of course is to show the state of the right of way and the combustibility of the material on the right of way and so on. So for those reasons I think I shall have to admit it.

A. It was after the passage of the afternoon train; I do not recall exactly the time.

Q. About what time? A. About 4 or 4:30 I should think.

Q. And where were those fires started? A. Those fires were started on the first curve south of Long Lake West station.

Q. Where were the fires started, on the right of way? A. On the right of way, on the east side of the track.

Q. Do you know what started them? A. The fire—there was no smoke previous to the passage of the train. After the train was by there was smoke and these fires were buring.

Q. At any time did you find any evidences of what did start the fires? A. Yes; cinders.

Q. And when did you find them? A. On the day that the seven fires that I mentioned were started. One of those fires was burning on one of the ties of the railroad track from a cinder.

Q. How large a cinder? A. About the size of my little finger—the nail of my little finger.

Q. Can't you put it in inches or fraction of an inch? A. Well, say quarter of an inch in diameter.

Q. Those were the only fires you saw started at about that time, during that period? A. No; there were more fires, but I cannot recall them by an expression of dates now.

Q. Give us approximately the dates. A. There were more or less small fires started between the 9th and the 19th, during which time I was down along the track a great part of the time.

Q. What were you doing along the track?

Mr. Carey: I ask that that answer be stricken out as too indefinite—more or less fires during that time.

The Court: What does more or less mean? More or less than what? It is an expression that means absolutely nothing, so I think I will strike it out and you may inquire further on it.

Q. What were you doing along the track between the 9th and 19th? A. Patrolling the track after the passage of the trains.

Q. From where to where were you doing patrol duty? A. From the station at Long Lake West south to Mr. Christy's line.

Q. Just tell us what you mean by patrol duty. When you started out the first thing what would you do? A. Walk the entire length of the track from the station to Mr. Christy's line, or even a few hundred feet beyond.

Q. Did the time at which you walked the track have anything to do with the time that trains passed? A. Not necessarily, no; we always followed the trains as they passed us as close as we could.

Q. During that time while you were patrolling the tracks tell us how many fires you saw started along the right of way of the company? A. I remember seven fires being started—

Q. Those are the seven you told us about before? A. Yes—and two on the 19th. I cannot state positively as to the others. I remember indistinctly of putting out fires that had been started by the trains, but how many I could not state, it is too long to remember.

Q. During the time you were there did you fight fires some time every day? A. Yes; yes, we did.

Q. On the 27th of September where were you? A. I was on the Christy preserve fighting fire on the south and west side of Bear Pond.

Q. South and west side of Bear Pond? A. Yes; southwesterly side.

Q. And do you recall whether there was any wind that day or not? A. The wind sprung up between eleven and twelve o'clock.

Q. What direction was it blowing from? A. It was blowing from the south—or the north and west.

Q. Blowing from or to? Which do you mean now? In other words, what do you call it, a north, east, south, west wind, or whatever it may be? A. It was a northeast, northeasterly wind, blowing to the northwest.

Q. Now are you sure of that? How could it be a northeasterly wind blowing to the northwest? A. No; I am—

Q. Well, we will get at it another way. You were over there at Bear Pond. Did that fire which you were fighting go away from you or what? A. It did.

Q. What direction did that run in? A. It ran toward the swamp of Mr. Low.

Q. What direction was that? A. That was westerly—southwesterly from us I should say—south and west—a little south of west.

Q. I show you P-2. Here is Long Lake West station and Long Lake Road, and Bear Pond (indicating). These lines that run up and down are presumed to be true north and south. Now looking at that map and having in mind where the fire was, where you were, now can you say in what direction the wind was blowing? A. From the southwesterly to the northeasterly.

Q. From the southwest to the northeast? A. From the southwest to the northeast.

Q. And this map shows Bear Pond; it shows the road, and also shows to the north of the road a swamp; is that what you call Low swamp? A. That is what we call Low swamp.

Q. That swamp is just to the north of Long Lake road and half way between the railroad and Bear Pond? A. Yes.

Q. And that fire that you were interested in at that time you say ran up into the swamp? A. It ran to the swamp.

Q. Between that swamp and Long Lake there is a ridge, isn't there? A. A hardwood ridge.

Q. And did it run across that hardwood ridge that afternoon while you were there? A. I was not there; I could not state. I was there the next morning, but not there on that ridge that afternoon.

Q. But that is quite a good deal higher than the land down at the railroad, is it not? A. Much higher.

Q. About how much? Can you say? A. I should say seventy-five feet—possibly one hundred.

Q. That is the ridge you mean? A. Yes, sir.

Q. And how far is it from the west end of Low swamp over to Long Lake West—the railroad? A. A mile and a half.

Q. Did that fire which you were contending with over there at Bear Pond run toward Long Lake West station? A. No, sir.

Q. A different direction entirely? A. Different direction.

Q. With reference to the railroad what would you say, would it be parallel with the railroad?

Mr. Carey: I object to his leading the witness.

The Court: Objection sustained.

Q. I call your attention to the map P-2 which shows the railroad, and also shows the locations pointed out before. With reference to the railroad how did the fire run? A. Toward the railroad.

Q. But I am speaking now of the railroad at Long Lake West. A. No; away from that.

Q. When you say toward the railroad what do you mean? A. Toward the railroad at the point below here, a mile or so north of Long Lake West.

Q. After the track passes the Long Lake West station then what does it do then; it does not run straight very far? A. No.

Q. Which way does it curve? A. It curves to the west—to the east; to the east.

Q. Does it run quite a long distance to the east? A. I am not very familiar with that portion of the road.

Q. Well, looking at this map, this shows it? A. Yes, sir.

Q. It runs quite a ways to the east, doesn't it? A. Yes—a mile.

Q. So with respect to the railroad at Long Lake and from Long Lake southerly how was the wind blowing? A. The wind was blowing away.

Q. What do you mean by away? Having in mind the railroad from Long Lake West station south and the fire which you have just testified to, and the wind—how was the wind blowing?

Mr. Carey: I object to the question. He was not at Long Lake West. He cannot tell what direction the wind was blowing there.

Mr. Wright: I did not ask him that.

A. The wind was blowing from the southwest toward the northeast.

Q. How does the railroad run south of Long Lake West station? A. The railroad runs south of Long Lake West station—it runs south, southwest, and northeasterly, so that it would be blowing practically parallel with the railroad at that point you mention.

Q. Was there any wind in the morning of that day, do you recall, that Sunday? A. Not until between eleven and twelve we had wind to contend with.

Q. After the 27th did you follow the course of the fire which was burning at Bear Pond to see where it went to? A. Yes.

Q. Where did it go to? A. Through the Low swamp.

Q. Will you just mark the Low swamp here on P-2 so we will know where it is? A. Right here.

Mr. Wright: We will mark that "L."

Q. And how far to the west did that fire run?

A. Why, I do not know. It ran beyond the railroad.

Q. It ran beyond the railroad to the north, do you mean? A. Yes; here.

Q. I am speaking of westerly between Bear Pond and Long Lake West? A. It burned—the fire blast burned directly from a point where we were fighting the fire by Bear Pond to the Low swamp and went directly through there.

Q. What do you mean by the fire blast? A. A forest fire when it gets beyond control burns in varying widths according to the wind it creates as well as the wind that created the fire; and this fire burned about 200 or 250 feet in width, burning hot, and then slowly spread out from that.

Q. I think you had better mark on this map the place where you were fighting this fire that day, so we will have the two ends. A. I will just mark where the ends were when the fire jumped us?

Q. Yes.

(Witness marks it.)

Mr. Wright: From that we will carry a line out to the margin and mark it "Sanford; Sunday, Sept. 27."

(Recess.)

Mr. Wright: I would like to have this map marked. This is the map Mr. Carey used in his cross examination of Mr. Christy. He says he is going to prove it later. Looking at it casually, as near as I can tell, it is nothing we care to object to. I do not want to offer it myself. I ask that it be marked for identification by Mr. Carey, and then put in at the proper time.

Mr. Carey: No objection.

(Map marked D-1 for identification.)

By Mr. Wright:

Q. Mr. Sanford, will you please come down here where you can see this map. Mr. Sanford, the road running across that map, marked "Road to Long Lake," that is the road leading from Long Lake West station to Long Lake, over which you went to get to Bear Pond; is that right? A. It is.

Q. And am I correct in thinking that this location at the northwesterly end of Bear Pond is the place where you said that you were about the 27th, or about there? A. On the morning of the 27th.

Q. Will you please describe to the jury the character of the ground from the northwesterly end of Bear Pond over to Long Lake West, or to the railroad at Long Lake West, as to whether there was more than one ridge, and the character of them? A. Starting at Bear Pond there are two ridges running southwesterly and northeasterly—generally in that direction—and a third ridge running northeasterly and southwesterly—or more easterly than westerly—a part of the way.

Q. Well now, commencing at Bear Pond, you notice a little blue line which indicates a stream just west of Bear Pond? A. Yes.

Q. Is there a ridge between Bear Pond and that stream? A. Yes.

Q. I notice another little stream a little further west; is there another ridge between those two streams? A. Yes, sir.

Q. And the third ridge you speak of is still further west? A. It is.

Q. But it runs more easterly than westerly? A. Yes.

Q. In other words, it is more like the road runs? A. Parallel with the road.

Mr. Carey: What road do you mean?

A. Long Lake road.

Q. So that as a matter of fact the Long Lake road from the station easterly for some distance follows the line of the ridge? A. From a point 200 yards east of the station.

Q. Now this fire that got away from you down there at the corner of Bear Pond on Sunday, the 27th, which way did it run? Show on the map. A. I will point here. (Indicates.) This is northeasterly.

Q. These lines across the map are said to be north and south and east and west? A. Northeasterly and southwesterly (indicating).

Q. With reference to the first stream west of Bear Pond— A. Following that stream.

Q. Following that valley? A. It followed that valley.

Q. And just north of Long Lake West road there where the two streams cross, what is the character of the land there? A. Low swamp.

Q. Is that what is commonly known as the Low swamp? A. Yes.

Q. That is the name of the man who owns the property, a man named Low? A. Yes.

Q. Let me indicate that. Is that (indicating) what you mean—Low swamp? A. Yes.

Q. What is the character of the timber on the first ridge west of Bear Pond? A. Soft wood; spruce, hemlock and pine.

Q. On the second ridge what was the character of the timber? A. Similar.

Q. And the third ridge? A. Hardwood.

Q. What do you mean by hardwood? A. Maple or ash; birch; very little soft wood.

Q. Can you say whether there is a ridge which starts at the railroad somewhere a short distance south of Long Lake West station and runs northeasterly? A. Yes; there is; there is a ridge

starting at the mile post south of Long Lake West station.

Q. Mile post 94? A. 94.

Q. Is that the ridge which is shown in the photograph P-6-a? A. Yes; this is the ridge here (indicating on photograph).

Q. Beginning there? A. Yes.

Q. Now behind that ridge you have just described what is there there; is it low or is there another high ridge? A. It is low; low land.

Q. I call your attention to the blue lines shown just east of the railroad track from the second bend running northeasterly; would you say that was approximately the location of that stream running behind that ridge? A. Yes, sir.

Q. And can you point aprpoximately where the ridge would be on this map? A. The height of the ridge would be in right here, between this stream here and this stream here.

Q. About midway between the stream shown at station 9330 and station 9410; is that correct? A. Yes, sir.

Q. Mark that with a straight line in the direction you think the height of the ridge is.

(Witness does so.)

Q. Let's put on that line "Heighth of ridge; Sanford." How soon after the fire of the 27th of September was it that you went over to Long Lake West station? A. The following morning, the 28th, at about 9 o'clock.

Q. Did you go out on the road? A. I did.

Q. What can you say as to whether it was burned all the way through or not? A. Yes; it was burned all the way through.

Q. Did you notice any difference in the burning? A. The burn was very much harder in the soft wood timber region than in the hard wood.

Q. Is that a fact, that fire will run faster in soft wood than it will in hard wood? A. Always.

Q. Why is that so? A. It has more inflammable material to burn on.

Q. Has underbrush anything to do with the running of fire? A. Yes, a great deal.

Q. And in these hard wood ridges is there more or less underbrush than there is in soft wood ridges? A. There is less on a hard wood ridge than on a soft wood.

Q. On Monday morning on your way over to Long Lake West station did you see any living things? A. Yes; I saw four cows.

Q. Where? A. On the road at a point about between three and four hundred yards on the road to Long Lake West from the station.

Q. You mean three or four hundred yards from the station? A. From the station.

Q. That would be east from the station? A. Yes.

Q. What was the character of the timber at that place? A. Hard wood.

Q. That was one of those hardwood ridges you spoke of? A. That was the hard wood ridge.

Q. After the fire of the 27th did you look at the land around south of the old lumber piles along the railroad track? A. I did.

Q. What was the condition of that land? A. Burnt very heavily.

Q. What have you to say as to the right of way of the defendant's road south of Long Lake West; was that burned or not? A. Burned hard.

Q. What was the character of this ridge which you have mentioned and which you have marked on the map? A. A soft wood ridge.

Q. I think you told us that on the 18th, or about that time, you found that a fire was started from a cinder; is that the date? A. I think so; it was around that time, I think.

Q. Where did you find that fire, can you tell us, with reference to the second bend? A. Just on the second bend south of the station at Long Lake West.

Q. On which side of the railroad? A. On the east side.

Q. On the east side of the track? A. East side of the track.

Q. And was that below the ridge which you have indicated on the map? A. It was below the ridge.

Q. What was the character of the land right near there? A. Low ground—swampy.

Q. So that that was somewhere near where these two blue lines are shown? A. Yes.

Q. Just tell the jury again where you found that fire and where it went to. Where did you find it? A. Found it on the—about ten feet from the track on the east side of the track. It was burning in the grass, and spread from that out to, oh, somewhere say about twenty or twenty-five or thirty feet by the time I had reached this spot.

Q. Was it put out right away? A. No; it burnt into the ground; we ditched it; but it smouldered and kept on burning.

Q. Whose land did it burn on? A. Mr. Christy's.

Q. And that was about the 18th you say? A. About the 18th.

Q. This morning you said something about a fire blast. I ask you to tell the jury what you meant by that. I do not think you made it very clear. A. When a fire gets beyond control it runs in a greater or less width. The fire that got beyond our control at Bear Pond burned from 200 to 250 feet in width, it having a circular motion, more or less on the same order as a whirlwind, creating also a draught of its own and traveling very, very fast.

Q. Can you determine by looking at the burned material after a fire has passed which way the fire has traveled? A. Most assuredly.

Q. How do you determine that? A. The trees lie—the green trees that have fallen lie in the direction that the fire has travelled.

Q. After this fire of the 27th did you follow up the direction of the fire which got away from you? A. I did.

Q. Which way did that go? A. That burned from the point where we were fighting it to the Low swamp.

Q. That you have indicated on the map? A. I have indicated on the map.

Q. Did it go over the second and third ridges? A. Yes.

Q. Over toward Long Lake West station? A. Yes; there was a fire burning there; I did not follow that. I followed, as we term it, the fire blast.

Q. Did the fire blast go toward the station? A. No; it did not; it burned toward the Low swamp.

Q. What you mean is that after the direct line of the fire it spreads out? A. Yes, sir.

Q. But it does not spread as fast? A. No.

Q. Did you follow the fire blast of the fire which went along the railroad track toward the lumber piles? A. Parallel to the railroad track.

Q. Could you distinguish that after the fire? A. It was distinguishable, yes.

By the Court:

Q. What do you say the fire blast is? I do not know as I quite catch it yet. A. Well, a forest fire starting—jumping as this forest fire jumped us, depending upon the material—having a great deal of soft wood it created an immense amount

of heat and it has a circular motion very much on the same order as a whirlwind. It burns in a straight line, afterwards spreading out from that.

Q. I understand that. That is the way it does; but what is the blast, that blowing movement? A. Yes.

Q. That is the blast? A. Yes; what we term the fire blast.

By Mr. Wright:

Q. When you use the term "following the fire blast" you mean you followed the direction of the fire indicated in the way you have described, don't you? A. Yes.

By the Court:

Q. When you say that these green trees and things lie in the direction in which the fire has gone you mean to indicate that the blast or draught created by the fire blows them down in that way? A. Yes.

Q. You do? A. Yes.

Cross Examination by Mr. Carey:

Q. Mr. Sanford, you say that the character of the land along the railroad track south, or southerly, from Long Lake West is all low down to the second curve? A. A great portion of it was low; there were some small ridges.

Q. Which way did those ridges run? A. Generally southwesterly-northeasterly.

Q. That is the general trend of the ridges through that section? A. Yes.

Q. There is quite a great deal of rock along the railroad, is there not? A. There are one or two ledges, yes.

Q. After you pass the first curve it is rocky a

good share of the way? A. There are some ledges there, yes.

Q. And a good share of the way? A. No; I should not say so.

Q. Well, half of the way? A. No.

Q. What part? A. I should say a portion of the second bend south of Long Lake West—a portion of that was rocky, ledgy.

Q. Pretty thoroughly covered with rock, wasn't it? A. Yes, it was.

Q. And the straight track between the first and second curve, wasn't there a good deal of rock along there? A. There were one or two small ridges.

Q. Now from the end of the first curve from Long Lake West station going southerly there was not very much swamp land was there along the track? A. Yes; there was more swamp land, I should say, than ridge land.

Q. More swamp than ridge. Was it divided about half and half in your judgment? A. No; I should say there was more swamp. I should say there was three quarters swamp land to one quarter ridge.

Q. Now this season had been a very dry season in that section? A. It was.

Q. One of the driest ever known there? A. I believe so.

Q. You have had considerable experience in that section, have you? A. I have had some, yes.

Q. Did you ever know as dry a season before the 1908 season as that was? A. No; I did not.

Q. And the conditions were such that a fire would start very much more readily than at any other time in your experience in that section? A. Yes.

Q. And the throwing of a match in the grass would start a fire, wouldn't it? A. Why, certainly.

The Court: I suppose that would depend on whether the match was lighted.

Mr. Carey: Well, he says it would.

The Court: The throwing of a lighted match you mean?

Q. And through that section of the Adirondacks there are a good many summer tourists? A. I believe so.

Q. Camping parties? A. Yes.

Q. And a great many fires were started by the tourists and in camping parties through that section that summer? A. I don't know.

Q. You don't know anything about that? A. I don't know.

Q. Do you know as a matter of fact that fires were raging in a great many parts of the Adirondack mountains that summer? A. I heard there were.

Q. You knew there were? A. I heard there were.

Q. Didn't you know it? A. I presume so.

Q. And those fires were raging near railroad tracks and away from railroad tracks? A. I knew nothing about that.

Q. You know nothing about that? A. No.

Q. You spoke of the condition of the right of way and you said that from a quarter to a half a mile below the lumber pile the grass was to be observed along the right of way? A. I think I said below the station.

Q. I was not sure which you said, below the station or below the lumber pile. A. From below the station.

Q. Where with reference to the first curve? A. I should say about to the first curve.

Q. Down to that point as you go from the station the right of way was in good condition, was it? A. The grass had been cut.

Q. Do you know that it had not been cut below that point? A. Yes.

Q. How do you know that? A. I saw it; I saw the grass.

Q. I say do you know that it had not been cut below the first curve? A. Yes; I saw the standing grass, the brush.

Q. This was in September, was it not? A. This was in September.

Q. But you do not know but what it had been cut early in the season, do you? A. Yes. That growth could not have been made if it had been cut.

Q. The growth there was not a heavy growth, was it? A. It was in places two feet or two feet and a half.

Q. Not thick it all? A. Rank grass.

Q. Not thick? A. Yes; swamp grass, bunch grass.

Q. Any large spaces of that kind? A. There was in the low land on the second curve, especially, where the grass grew rank.

Q. That was the place where you found the grass two feet or so in height and bunched? A. Yes.

Q. And that is the location you were testifying about when you testified to the condition of the right of way with respect to grass? A. Yes.

Q. (By the Court) What do you mean by rank grass? A. Bog grass; the tussets of grass growing out of bogs.

Q. And I understood you to speak of brush along the right of way? A. Yes.

Q. What do you mean by that? A. Small alders.

Q. And where were they? A. They were along the track in with this heavy grass on the right of way.

Q. Down along the second curve? A. On the second curve.

Q. Anywhere else? A. Not that I recall just now.

Q. You testified in this case when it was tried before, did you not? A. I did.

Q. And with reference to the brush along the right of way were you asked this question: "What kind of brush did you testify to?" and did you answer, "Just the natural droppings of the bushes along the right of way, natural lumber droppings"? A. Yes; there was that, as well as small growth of alder and other brush, the name of which I do not know; it was small brush.

Q. You did not testify to that on the other trial, did you? A. I do not remember now just how I testified in the other trial.

Q. Were you also asked this: "What bushes are left on the right of way from this siding down to the Christy corner? A. Bushes along the edge of the right of way which overhang the right of way. Q. On the Christy side? A. On the Christy side." Did you testify to that? A. I believe I did.

Q. And these bushes that you speak of were bushes on the Christy land which overhung the right of way, were they? A. Yes.

Q. And were you asked this question: "And the brush that you refer to would be limbs that would drop off on the right of way from trees that were on Christy's side and overhang our fence? A. Yes?" A. Yes.

Q. You so testified, did you? A. Yes.

Q. Calling your attention to P-6-a, you were asked about the location of the lumber pile which is shown here on the Christy siding. A. Yes.

Q. And you stated, as I recall it, that that lumber pile was about the position where the lumber

was piled on the Christy siding. A. I should say that was about the spot.

Q. Do you recognize the northerly end of the Christy siding on this picture? A. I think I do; at a point about here (indicating).

Q. That is down toward the southerly end? A. Oh! The northerly end?

Q. The northerly end. A. I should say at a point about here (indicating).

Q. Shall I mark that right there? A. Yes.

Q. That is the main line track that you see there? A. Yes.

Q. Then it would be over a little distance from the main line track? A. Yes.

Q. Suppose we put an "O" there. Is that about right? A. Yes.

Q. And we will call that "End switch; S."—which means Sanford. A. Yes.

Q. You think it extended up as far as that, do you? A. I may possibly be a little north of where it was, but I should say that was about it.

Q. And you also located the direction of Bear Pond by the hill over which you thought Bear Pond lies on this map? A. Yes.

Q. What part of Bear Pond do you indicate by that mark which you have put on this picture? A. That was the east—no; let's see; the westerly end.

Q. That is perhaps not a very good descriptive term. A. Well, the upper end or westerly end.

Q. You mean the southwesterly end of the pond? A. Yes; southwesterly end.

Q. Suppose we put there "S. W. End." A. All right.

Q. And did you locate about where you think East Charlie Pond would come on this picture? A. No.

Q. Could you do that? A. Yes.

Q. Suppose you locate about what you consider would be a line through the middle of East Charlie Pond. A. Shall I mark it with a cross?

Q. Mark it with an oblong mark. A. East Charlie Pond you ask for?

Q. Yes. Suppose we mark that "E. C. Pond," and "S" for Sanford? A. Yes.

Q. How far apart are Bear Pond and East Charlie Pond? A. I should say about two miles or two miles and a half.

Q. Which; nearer two miles or two miles and a half? A. Well, two and a half by trail.

Q. When your attention was called to this lumber pile here you do not mean to say that was the only place along the switch where the lumber was piled? A. No.

Q. How was the lumber piled along the switch? A. On each side of the switch.

Q. And for what proportion of the length of the switch? A. Three quarters of the distance of the switch.

Q. How far did it extend with reference to the northerly end of the switch? A. Within one hundred feet of the switch.

Q. One hundred feet of the switch, or of the end of the switch? A. Of the switch where it meets the railroad.

Q. I want to know whether or not the lumber was piled at the northerly end of the switch or whether— A. Yes; it was.

Q. How far beyond the northerly end of the switch? A. About fifty feet.

Q. A good many piles of lumber there, were there not? A. A good many.

Q. How many would you say? A. I don't know. I haven't any idea.

Q. When you say the seven fires started after one train went down do you know what train that was? A. That was the 1:13 I believe at the time.

Q. And did that fire burn over very much of the right of way? A. No; we put them out.

Q. Right off, did you? A. Right off, as soon as we found them.

Q. Some of these othes fires that started, did they burn over much of the right of way? A. I don't know which fires you mean.

Q. You testified to some others besides these seven. You said you saw two other fires. A. On the 19th, two other fires.

Q. How do you fix the date as the 19th? A. On the 19th I sent my son and wife to New York.

Q. Did you make a memorandum of that? A. No; but it is very fresh in my memory, the finding of those fires on that date.

Q. How did you get the date fixed so firmly in your mind? A. Well, I was alone and I had hard work to get one fire under control.

Q. And that is why you say it was the 19th? A. The 19th.

Q. This fire that was burning from the cinder that you saw, that was on the westerly side of the track, was it? A. Yes.

Q. And which way from the second curve? A. To the north.

Q. North of the second curve? A. North of the second curve.

Q. How far? A. A very short distance; say possibly 100 feet.

Q. Then that burned along the right of way, did it? A. Yes.

Q. How far? A. For—we ditched it—it was perhaps twenty or twenty-five feet in diameter.

Q. Did you see it after that time? A. It smouldered over, yes.

Q. When did you see it after that? A. The following day it was burning there.

Q. Spread any? A. No, not at that time.

Q. Still burning on the right of way? A. Still burning on the right of way in the duff.

Q. How did you know that a cinder started the fire? A. There was no fire there previous to the train passing. I was within a hundred feet of this spot when the fire started.

Q. So you say it was started by a cinder? (No answer.)

Q. Was the cinder hot when you found it? A. There was a lot of hot cinders there, a number of them, naturally, being in the fire.

Q. From the burning? A. From the burning.

Q. Was the next day, the 20th, the last that you saw of that fire? A. I do not recall whether it was or not. I know it smouldered for some time, as all fires do, burning in the duff.

Mr. Wright: What do you mean by "duff"? It is a new term to me.

A. Duff is the accumulation of ages from the foliage in the trees. It burns just like punk. In the Adirondacks it was anywhere from six inches to three feet in depth.

The Court: What we would call mould, I suppose.

The Witness: Mould; up there it is called "duff."

Q. Was that duff all through the Christy property? A. Yes.

Q. Such as you have described it? A. Such as I have described.

Q. You say that trains set fire. How did you know that the trains set the fire? A. There were no fires previous to the trains passing. The fire sprang up after the passage of the trains.

Q. You were behind the trains, weren't you? A. I was behind the trains.

Q. How did you know they were not there ahead of the trains? A. There were no signs of them. The signs were there after the passage of the train.

Q. You followed the train down, didn't you? A. Yes; followed the train down. We had men st—

Q. You could not tell all the way down to the Christy corner whether there were fires until you got down the line? A. No; but the man could, the man stationed below me.

Q. You are testifying then from what he told you? A. Somewhat; not entirely.

Q. Then of your own knowledge you did not know that the fire sprung up immediately after the train passed there? A. I am certain of it.

Q. Why are you certain of it? A. Because before the train passed there were no fires.

Q. You were not there? A. I was down over the entire length of the line before the passage of the train.

Q. How long before? A. Fifteen or twenty minutes.

Q. Do you mean to say you went down the line fifteen or twenty minutes ahead of every train? A. Not ahead of every train, but ahead of this train in particular.

Q. You went down ahead of this train in particular? A. I went down to Mr. Christy's corner.

Q. And you were only fifteen or twenty minutes ahead of the train? A. Fifteen or twenty minutes ahead of the train.

Q. And you followed the train down? A. I followed the train back.

Q. Oh! You went back after the train went down? A. Yes.

Q. So you were in error when you said you fol-

lowed the train down, weren't you? A. Maybe that is so; yes.

Q. Now which was it? A. I followed the train —as the train passed me I immediately turned and followed it back from the direction that I had been going.

Q. You would not say you followed it back?

The Court: Is there any necessary inconsistency between "back" and "down"? Back may be down.

Mr. Carey: The inconsistency to my mind was the following of the train. When he was going away from the train he was not following it.

The Court: He has not said he was going away from it. He said he was going toward it and the train passed him and he turned around and followed it down. Isn't that what you said?

The Witness: Yes, sir.

Q. Won't you just describe that? I do not believe I have it right. You said you went ahead of this particular train that you found seven fires after? A. I started at the station and walked down the track southerly from the station to the end of Mr. Christy's line.

Q. When you did that had the train gone down? A. No.

Q. Very well. You were ahead of the train? A. Yes, on that stretch of road.

Q. Where did the train pass you? A. At Mr. Christy's corned.

Q. What did you do then? A. Followed it up to Long Lake West station.

Q. Followed the train up to Long Lake West station? A. Yes, sir.

Q. Well, the train was going toward Utica, wasn't it? A. No.

Q. It wasn't. A. No.

Q. Didn't you testify this was the down train that set these seven fires, 1:13 o'clock in the afternoon? A. Yes; at 1.13 o'clock.

Q. Well, that is a down train, isn't it—going toward Utica? A. Then that was not the train that I followed. I followed the train that came into Long Lake West station.

Q. You followed a train which came into Long Lake West station from where? A. From Utica, on the line from Utica up to Long Lake West station. It was about 1:13 as I recall it at the time.

Q. Then you went down to the Christy corner? A. Yes.

Q. And there the train passed you going up instead of down? A. Yes.

Q. And you followed it up? A. Yes.

Q. Now will you locate for me on this large map here the fire which was near Bear Pond on the 27th of September? Just indicate— A. We were working there (indicating) when the fire jumped us.

Q. How long was that line? A. That line was about 300 yards.

Q. That would be 900 feet? A. 900 feet, about that, more or less; it is hard to say.

Q. And that was about the course which the ditching took? A. That was about the course of our ditches at that time.

Q. And which direction had that fire come from? A. It had come from the west.

Q. From the west? A. From the west.

Q. On whose land was it before it came onto the Christy land? A. Doctor Webb's, I believe.

Q. So it came over from Doctor Webb's land to the Christy land? A. I think so.

Q. Now the "trench line, Sanford, Sept. 27," when had that trench been dug? A. About the 21st or 22nd, I am not sure.

Q. When did this fire come in from the Webb property? A. Some time previous. We fought it from a point—we commenced ditching here.

Q. Here is the line running right down between these two points? A. Yes. It was from a point here where we first commenced ditching this fire. We had ditches back about a quarter to half a mile in here.

Q. Then you did not begin to ditch it until after it had got over the Christy land some distance? A. No.

Q. I will call that "The first ditching." A. The first ditching.

Q. Wasn't that about the 19th? A. Probably it was about the 19th. I would not be certain as to the date.

Q. You would not say it was not? A. No; but it was some time previous to the 27th—a week or ten days.

Q. 19th to 21st. Will that be about right? A. That would be about right.

Q. How long a ditch did you have there? A. From quarter to half a mile.

Q. Was this the same fire which ultimately extended up here to the southerly end of Bear Pond? A. It was; it ran up here I think the 22nd from this point here.

Q. Will you indicate the course that it took?

(Witness indicates.)

Q. "Course of fire after 19th?" A. Yes.

Q. When did you dig this trench up here on the southerly end of Bear Pond? A. About the 22nd, I think—the 22nd.

Q. And from about the 19th to the time the fire got away from you were you holding it in here, in this vicinity? A. Yes.

Q. Held it in there all that time? A. Held it in there all that time.

Q. The 27th of September was on Sunday, wasn't it? A. It was.

Q. And on Saturday, the 26th, were you in there? A. I was.

Q. Did you stay there over night? A. No; I was up at the camp over night. It was just across the pond.

Q. On which side; about where? A. Right in here.

Q. Right in this bend here? A. Right in here.

Q. Mark that "Camp." A. Yes.

Q. From the 22nd to the 27th the fire had not spread very much from that point, had it? A. No; we had held it pretty well.

Q. And Thursday, Friday and Saturday were men going out from this section supposing that the fire was completely under control and beyond danger? A. No; I do not think so.

Q. When did the men begin to go out from the section here on Bear Pond where you were, under the supposition that the fire was completely under control? A. I could not say.

Q. They had gone out before Sunday, had they not? A. Some had, yes.

Q. Most of them had, had they not? A. No. My crew were still on.

Q. All of them? A. As I recall it, practically all. I should say all were there.

Q. Where were your crew on the morning of the 27th; where did you take them? A. They were fighting—they were digging these trenches deeper, digging them to rock and to hard pan.

Q. Was the fire practically out at that time as you supposed? A. No; it was still burning in the duff and burning in the swamps.

Q. You say that the wind rose on that day, on the 27th? A. It did.

Q. Previous to that time the general course of

the fire had been in an easterly direction, had it not? A. It had.

Q. Also moving from Doctor Webb's property in the southerly direction—that is moving from a southerly direction, northerly? A. No; that fire came, as I say, from a point here where I have designated and moved in here, southerly, and then from a point here to this point here burned hard owing to the nature of the ground—coming through a gulch to this point here where it was started.

Mr. Wright: By "this point here" you mean the extreme northwest corner of the pond? A. Yes; and it was stopped by the lake at that point.

Q. You mean the northwesterly corner of the southerly end? A. Yes.

Q. Now, on this 27th was there any other fire along Bear Pond than what you have indicated, anywhere? A. No.

Q. You are sure about that, are you? (No answer.)

Q. Prior to the 27th the wind had been moving in a generally easterly direction? A. Yes.

Q. The wind changed on that day? A. Yes.

Q. What time did the wind rise? A. About noon, between 11 and 12 o'clock.

Q. Wasn't it earlier than that? A. Possibly a little.

Q. Wasn't it 10 o'clock? A. It may have been; I cannot say.

Q. You testified as to the time when the wind rose when you testified before in this case? A. It may have been fresher in my memory than now.

Q. That was three and a half years ago? A. Yes.

Q. So that you were likely to have a fresher recollection at that time than now? A. Yes.

Q. We will see later on what you said in regard to it. I want to carry you over this territory. Now about how far from this trench line here is it to Long Lake West station? A. Oh, three miles I should say—three miles as the crow flies.

Q. Mr. Sanford, was there not another fire which extended along the shore of this pond which had been trenched prior to the 27th of September and which extended pretty nearly parallel with the westerly shore of the pond in a northeasterly direction from the fire which you have indicated by the trench line? A. I do not recall that one. I think that was after the 27th.

Q. After the 27th? A. I think that was after the 27th.

Q. There did not any other fire come over in there after the 27th, did there? A. After the 27th this fire apparently went in here and spread out here, way back to here.

Q. You are sure that prior to the 27th there was no fire in there? A. I cannot recall any fire prior to that.

Q. Was there a high wind on that day? A. Very.

Q. And it came up suddenly, did it not? A. Yes, it did.

Q. And that was the reason why the fire got away from you? A. It was.

Q. It took you by surprise? A. No; it simply blew too hard; we could not watch our trenches.

Q. You had not been expecting such a change in the wind and such a high wind as developed that day, had you? A. No.

Q. Mr. Sanford, was there any other fire located on the Christy property in the neighborhood of East Charlie Pond on the 27th? A. Yes, there was.

Q. Won't you indicate where that fire was located, if you know? A. I went down there. (Witness marks the map.) There were two small fires about where I have designated there. That is all I saw.

Q. When did those fires come in there? A. I do not know.

Q. Were they there prior to the 27th of September? A. Yes, sir.

Q. How long prior to that time? A. I do not know.

Q. Where did they come from? A. I do not know.

Q. Could you tell about the course of the fire? A. No.

Q. You did not investigate to find out? A. I did not investigate far enough. They were being trenched.

Q. When did you go over this land between this point which you have marked "First ditch," and "Course of fire after the 19th" and "Trench line, Sanford, 27th"—when did you go over the land lying between those lines and Long Lake West next after the 27th? A. I do not know the exact date.

Q. How soon after do you think? A. Three or four days.

Q. Three or four days afterwards? A. I should say yes.

Q. Won't you put a pointer on that map and indicate, showing the direction of the first and second ridge from Bear Pond? A. The first ridge ran about parallel to this little brook here; the second ridge ran parallel to the first; the third ridge ran about parallel to this road, Long Lake.

Q. What was in here? A. More or less low ground; and a ridge in here.

Q. A ridge in here southwest of the first stream?

A. A ridge in here, back of the first stream. This is low ground in here. This is a ridge here, running about so.

Q. Running also in a northeasterly and southwesterly direction? A. Yes—southeast and northwest.

Q. And wasn't there another high ridge over southeasterly from Long Lake West which ran in a northeasterly and southwesterly direction? A. Yes; there is.

Q. So that there were four ridges really? A. Yes; but that ridge is to the west and south of where we were trenching here on September 27th.

Q. And three of these ridges ran in a northeasterly and southwesterly direction and the fourth one is the one you have described as up along the road here? A. Yes.

Q. What time did this fire break away from you? A. Between twelve and half past.

Q. Not any earlier than that? A. No.

Q. Didn't you testify on the former trial that it broke away about twelve o'clock? A. I say between twelve and half past twelve.

Q. Well, would that be about twelve? A. I could not say now exactly what time. I did not take the watch out and look at it. I was too busy.

Q. How do you fix that time anyhow? A. Because the men at noon lay off for dinner.

Q. Were they laying off at that time? A. Part of them—for lunch.

Q. Was there anybody fighting these fires down here in the neighborhood of East Charlie Pond? A. Yes; Monahan.

Q. Monahan; and anybody else? A. I do not know who was there. I knew there were some of Monahan's men.

Q. Did you know a large number of men were down there? A. I saw quite a number, yes.

Q. Mr. Sanford, were there not fires to the west and northwest of East Charlie Pond? A. Yes.

Q. On the 27th? A. Yes.

Q. Won't you indicate where those fires were? A. This fire came in here.

Q. Just run that down. A. Somewhere in that general direction; and I followed it out to the line between Mr. Christy and Doctor Webb. It was in about that direction.

Q. All of these fires came in from Doctor Webb's property onto your— A. This fire came in from Doctor Webb's. These I cannot say; I did not follow them.

Mr. Wright: When you say "these" you mean the last ones?

Q. The two small fires? A. Yes. This was all burnt here the part that I marked.

Q. Just run that line down. (Witness marks it).

Q. These fires had been trenched in here, within this last line you drew as a continuation of what you call the first ditch? A. Yes.

Q. Who trenched those fires? A. Mr. Christy and his men.

Q. And did they trench pretty nearly down to his line? A. Pretty nearly down to his line.

Q. On which side of the fire did they trench, on the easterly side or on the westerly side? A. On the easterly side.

Q. That was because the fire was moving in an easterly direction? A. Yes; in an easterly direction.

Q. From the west it was moving in an easterly direction? A. Yes.

Q. Were you also over in this section where you have shown the course of this fire as a continuation of your first ditch within a few days after the

fire? A. No; I do not think I was; I do not recall being there.

Q. You did not go down in the East Charlie Pond section on the 27th at all? A. No.

Q. You were located up on the northerly side of this trenching which you had done here in the vicinity of Bear Pond? A. Yes, sir.

Q. And did you follow the fire on that day? A. No.

Q. You did not undertake it? A. No.

Q. It went very rapidly, did it not? A. Very.

Q. Large fire? A. A heavy fire.

Q. Now have you located the Low swamp here? A. Yes; right here.

Q. And what is the length of that swamp? What are its outlines on the easterly and westerly side? A. It is bounded by the railroad on the easterly side—on the westerly—

Q. The railroad swings around there, doesn't it? A. It is bounded by this high land here, this ridge here.

Q. Here is a line between Christy and Low, is it not? A. Yes; it is bounded by that line.

Q. It is entirely on Low's? A. All but a small portion in here.

Q. How far did it extend in a westerly direction? A. I should say to a point about here.

Q. That is at this "X" point near the north and south line? A. Yes; there is a swamp right in there.

Q. Will you indicate to us about what point the easterly line of the burnt area met that swamp? You say this fire spread through the swamp. A. Yes. The fire that got away from us burned right straight in this direction and afterwards spread out on both sides here. I do not know how far it went here. It was all burnt on the morning of the 28th, more or less all burned through here.

Q. It was burned all along Long Lake road with a very few exceptions along this road? A. Yes; except where it was hard wood.

Q. And where it had not burned along the Long Lake road there was hard wood and the ground was damp or moist? A. It was not moist, but there was no material for it to burn. That was a hard wood ridge; it burned slow.

Q. From the southerly end of Bear Pond through to Long Lake West was that land all burned over on Sunday, the 27th? A. I could not say; I did not go in there.

Q. You did not go in there at all? A. No; it was too hot.

Q. When did you go in there? A. Three or four days later.

Q. It had not been burned over from the southerly end of Bear Pond through to Long Lake West prior to the 27th? A. No.

Q. There had been no fire in there except what came up and had been trenched, as you have testified? A. Down in here.

Q. Prior to the 27th? A. Yes.

Q. But it did not move over in here? A. At the second bend.

Mr. Wright: North end of the second bend.

Q. Those fires burned in another direction, did they not? A. They were burning right in that section (indicating).

Q. They went down the track, didn't they? A. I could not say that; I do not know; they were in here (indicating) when I saw them burning.

Q. Don't you know this territory from the southerly end of Bear Pond over through to Long Lake West had been burned over prior to the 27th? A. No; it hadn't, the bulk of it.

Q. It had been burned over in another fire in

1903, had it not? A. I do not know the date, but years before.

Q. And when you got in there three or four days afterward what did you find in reference to land being burned over from this southerly end of Bear Pond over through to Long Lake West? A. Practically all burned.

Q. And it crossed all these ridges you have spoken of? A. They were all more or less burned.

Q. How far could you see when you were over there three or four days afterward down in the direction of East Charlie Pond? A. I could see to the East Charlie Mountain, which is on the north side of East Charlie pond.

Q. A big mountain there? A. Yes.

Q. And you could see down to that point? A. I could see to East Charlie Mountain.

Q. Could you see the pond from where you were? A. Oh, no.

Q. Could you also see this territory between Charlie Mountain, which is north of East Charlie Pond, over toward Long Lake West? A. Well, I could not see—yes, I could see East Charlie Mountain and I could see this territory in here. There is a high ridge in here that would not permit me to see this land in through here.

Q. That is lower land? A. Lower land; and this fire came in through this ridge here.

Q. You could not see beyond that, could you? A. Well, I could see up to the ridge, but not down through the ridge.

Q. Had that been burned over in the vicinity of East Charlie Pond toward Long Lake West? A. This had been burned here north of East Charlie Mountain.

Q. At the northeast of this line which you have drawn toward Long Lake West had that territory been burned over? A. No, not that year.

Q. Not any of it? A. Practically none of it—not in here, except as I have said before, this small fire that was down here by bend number two.

Q. Did you see where the fire went after it reached Long Lake West, the course it took?

Mr. Wright: What fire?

Q. The fire of the 27th? A. Yes; I saw where it went. It went across the railroad track and over onto Mr. Low's estate.

Q. In what direction was that? A. That would be westerly.

Q. Westerly? A. Well, it would be a northeasterly direction.

Q. A northeasterly direction? A. It would be in a northerly direction.

Q. Do you mean to say it went in the direction you have been pointing with your pointer? A. Yes, sir.

Q. Now, Mr. Sanford, did it ever go over onto Silver Mountain? A. No; I don't know any mountain of that name.

Q. Do you know where the Dean property is? A. No; I have heard of it, but I do not know where it is.

Q. You do not know the location of it? The Monahan buildings northwesterly of the railroad were all burned, were they not? A. Yes.

Q. Can you see quite a long distance from Long Lake West where the fire had burned over? A. Yes.

Q. And it had burned in that direction? A. Yes.

Q. And that whole territory was burned over? A. Yes.

Q. And as far as you could see it from Long Lake West? A. As far as you could see.

Q. And that was three or four miles, wasn't it?

A. Well, I would say we could see two miles anyhow.

Q. Fully two miles? A. Yes.

Q. Won't you lay your ruler on that map and indicate about the direction which the wind blew on the 27th?

(Witness places the pointer across the map and Mr. Carey draws along it a pencil line.)

Mr. Wright: Witness marks map with a straight line on which is marked "Direction of wind," and which indicates a northeast and southwest direction.

Q. Was the Low property burned over, over in this direction?

Mr. Wright: Which direction?

A. Yes.

Q. Are you sure about that? A. I wasn't there, so I did not see it.

Q. You were told that? A. I did not see it.

Q. About what point in the swamp did this fire strike, the middle, easterly or westerly portion? A. About this point here, where this stream is designated on this map.

Q. Do you mean the stream on the Christy land or the stream on the Low land? A. The stream that is on the Christy land.

Q. Right in that little corner of the swamp? A. Right in that little corner of the swamp. Let me see; that would be southwesterly, would it not? Southeasterly corner of the swamp.

Q. Was there any of this road burned over easterly from this point where you have indicated that the fire crossed? A. Yes; it was burning the next day. We trenched it.

Q. Where? A. We trenched it at a point about here—from here a little further, off here about in that way.

Q. I will mark that "Trenched, the 28th." A. It was either the 28th or 29th.

Q. Now wasn't that a trenching that was done for a fire that was about the middle of the westerly line of Bear Pond; a fire in there prior to the 27th? A. I am not sure about that. I do not recall. I cannot place it at that time.

Q. Don't you know that there were a large number of men working right about in the middle of the westerly shore of Bear Pond prior to the 27th? A. No, I do not.

Q. Do you remember of the railroad company sending some men over in there? A. Yes; but that was here.

Mr. Wright: The place you have indicated before?

A. The place I have indicated here.

Q. Are you sure they were not working up here on the middle westerly shore of the pond? A. Yes; I am sure.

Q. This land through from Bear Pond to Long Lake West had been lumbered over prior to 1908? You knew it had been? A. I had been told so.

Q. You saw the lumber slash there, didn't you? A. Yes.

Q. What do you mean by the lumber slash? A. The tops of trees that are left and the logs that are not taken away.

Q. Does that make splendid fuel for fire? A. Yes.

Q. And when fire gets up to it it runs very rapidly, does it not? A. Yes.

Q. Now you have told us about the northerly and the easterly end of this fire which got away from you on Sunday? A. Yes.

Q. You could not see the southerly line of that fire, could you? A. The southerly?

Q. It had two sides to it? A. Yes.

Q. And we will call this the northerly or northeasterly side and this the southerly or southwesterly side. A. Yes.

Q. Now you could not follow that, could you? A. No.

Q. You did not know where that was? A. No.

Q. Could you see the fire up on this first ridge westerly from Bear Pond? A. Yes.

Q. Up to that point you could follow it? A. Yes.

Q. And you say it crossed over there? A. It burned over that ridge.

Q. That was the ridge that ran northeasterly and southwesterly? A. Yes.

Q. After it crossed over that ridge you could not see it over the other ridges, could you? A. No.

Q. So that you would have no knowledge of the southerly line of this fire? A. No.

Q. Now you say that trees fall in the direction in which the fire moves? A. Yes.

Q. And you say that the wind in the fire blast is a sort of whirlwind? A. It is.

Q. So that the trees fall in a sort of a circular fashion? A. No; they fall in the way the fire travels fastest.

Q. Don't they fall the way the wind blows? A. They fall the way the wind blows.

Q. The wind is a whirlwind? A. The outside of the fire has that appearance of a whirlwind, but it is traveling—

Q. As a matter of fact it does do that very thing—have a whirlwind motion? A. A whirlwind motion, moving in a straight line.

Q. Yes; and the whirlwind moves forword in a straight line? A. Yes.

Q. Now the wind itself has a circular motion? A. Yes.

Q. Don't the trees follow that circular motion? A. No, not in a fire blast; they follow the direction the fire has taken.

Q. The fire moves off from the edges of the fire blast? A. Yes.

Q. And the fire that moves off from the fire blast will itself create a fire blast? A. It depends on the material.

Q. If it gets into a lot of old lumber slash it is very likely to create a fire blast of its own? A. I presume so.

Q. You know so, don't you? A. Yes.

Q. So that you might have, with fires spreading through here in a distance of a mile and a half or so, several what you call fire blasts? A. That might be.

Q. You say that two of the ridges amongst which fire happened were covered with soft wood? A. Yes.

Q. And this ridge up along the road here was a hard wood ridge? A. Yes.

Q. Now we have a third ridge over here between Bear Pond and Long Lake West, and that was covered with what kind of wood? A. That was soft wood predominating.

Q. Now in view of the fact that a large portion of the territory between the edge of Bear Pond and Long Lake West was covered with soft wood —and by the way that was second growth soft wood, wasn't it? A. Yes; well, there was more or less of a slash through here—old lumber slash through here.

Q. And whatever soft wood there was there was second growth? A. You see that was burnt territory; a great portion of it had been burned over in the fire of 1903 or—

Q. Not in 1903? A. Somewhere along there.

Q. But whatever timber there was along these

ridges was predominatingly soft wood and second growth soft wood? A. Yes; it had been left from previous cuttings.

Q. Now in view of the fact that there was this lumber slash over from Bear Pond to Long Lake West and also three soft wood ridges, what would be the rate of speed that fire would travel through that amount of territory? A. It would travel very fast through low land, slash. It would travel very fast up hill and very slowly down hill; three or four times as fast up hill as down hill.

Q. When it got to these evergreen trees the fire would shoot right up these evergreen trees like a breeze? A. Yes.

Q. And then fire would blow from that and dash way on beyond? A. Yes.

Q. And set fire even way beyond the farmost line that the fire had advanced? A. Yes.

Q. And sometimes those sparks from the boughs of the evergreen trees would blow a quarter or half a mile and set fire? A. Yes, fully that.

Q. So that the rate of speed at which it would travel would be very fast through that territory? A. Very fast.

Q. Did you go down onto the Webb property at all, southerly from the Christy property, to fight fire— A. No.

Q. —just previous to this— A. No. I might possibly get on Low's land; if I was it was unintentional. I do not know if I was or not.

Q. Your purpose was to keep on Mr. Christy's property? A. Yes, sir. There was also a fire here (indicating) on Doctor Webb's.

Q. That is down some distance below the Webb-Christy line? A. Yes.

Q. Do you know as a matter of fact that on Friday and Saturday a large number of men who had been in here fighting fire where you have

located fires on the Chirsty property went out in the belief that the fire was past the danger point? A. I could not state the time; I know that there were men there—railroad company's men there previous to the 27th, who had been withdrawn.

Q. They had been withdrawn and Monahan's men had been withdrawn? A. I do not know about Monahan's men, to tell the truth.

Q. And Whitneys men had been withdrawn? A. I do not know anything about that; I cannot say anything about Monahans or Whitney's because I do not know; but I know the railroad men had been withdrawn.

Q. Well, Whitney and Monahan and Christy and the railroad company were furnishing men to fight fire all through there? A. Yes.

Q. Trying to keep it under control? A. They were.

Q. Now, Mr. Sanford, I asked you about the time of the springing up of this wind which sprang up as you say suddenly on the 27th. Were you asked on the former trial of this case this question: "Do you recall whether there was any wind that morning? A. It was quite calm early"? Do you remember that? A. Yes.

Q. And that was the fact, was it? A. Yes.

Q. "Later in the day did the wind come up? A. The wind began to freshen from ten o'clock." And it freshened very rapidly from that time, did it not? A. It did. I can recall a strong wind before twelve o'clock.

Q. And the strong wind was before 11 o'clock too, wasn't it? A. Well, I could not say now.

Q. Your recollection of course was fresher when you testified previously? A. It was.

Q. Mr. Sanford, do you happen to recollect whether or not along the Christy property at the first bend, right down in here, at the first bend,

there was quite a grove of trees prior to the 27th? A. Yes, I do recall that.

Q. And they extended right up to the right of way line, did they not? A. Yes.

Q. And they were forty, fifty to sixty feet or more in height? A. No; I do not think they were as tall as that; they were smaller growth than that. I should say they were twenty to thirty feet in height and very thick.

Q. And were they killed by that fire? A. Yes.

Q. A good many of them were left standing there, were they not? A. Yes.

Q. And they have never grown any since that time, have they? A. I don't know. I have not been there to watch them.

Q. They were killed. They had the appearance of being pretty thoroughly killed when you saw them? A. Yes.

Q. In the case of a fire, and the wind is driving the fire against a tree, which side of the tree, if it remains standing after the fire passes, will show the greatest evidences of fire? A. The side on which the wind is blowing against it.

Q. That is the side that the fire strikes it? A. Yes.

Q. And the other side shows quite a different appearance? A. Yes.

Q. The side from which the fire came is blackened? A. Yes.

Q. And the other side is lighter color? A. Yes.

Q. With a wind blowing at the rate that it was on that Sunday and fire running through the kind of territory with this lumber slash and second growth, you said that the fire would run very rapidly? A. Yes.

Q. About how rapidly? A. That would depend on the strength of the wind.

Q. There was a high wind you recall? A. There was a high wind.

Q. About how rapidly would you expect it to run under such circumstances? A. I should say under circumstances existing the 27th it would run from four to six miles an hour.

Q. About how far from Long Lake West was the northwesterly line of the fire which you had trenched in the vicinity of Bear Pond? A. In a straight line?

Q. Yes; at the time it got away from you. A. Oh, I should say two and a half to three miles in a straight line.

Q. How far was the westerly edge of that fire from Bear Pond? A. The westerly edge was right practically at the pond.

Q. You mean at the very southwesterly corner of the pond? A. Yes.

Q. And as it moved farther north it receded from the pond, did it not? A. Yes.

Q. That is the burnt area? A. Yes.

Q. When you testified before, Mr. Sanford, with respect to the course of this fire did you testify that the fire crossed the Long Lake road between mile post 17 and 18? A. Yes.

Q. Will you locate for us as nearly as you can on that map where mile post 17 is and where mile post 18 is?

(Witness marks it.)

Q. You have put "17" where you think 17 mile post is? A. Yes.

Q. And you put "18" where you think 18 mile post is? A. Yes.

Redirect Examination by Mr. Wright:

Q. As the wind was blowing on September the 27th was it possible for the fire at Bear Pond to have gone to Long Lake West station? A. No; no.

Q. Mr. Sanford, just come down here a moment. I call your attention to exhibit P-1. Can you point out on there the Long Lake West station? A. Here is the station.

Q. The building marked "1" is the station?

Mr. Carey: These are the buildings as they stood prior to the fire?

Mr. Wright: Yes.

Q. Which building was the furthest north along the railroad track, the station or what building? A. Monahan's store.

Q. The store? A. This building here.

Q. The building marked "1" you indicate as the station? A. Yes.

Q. What is the building north of that? A. That would be the hotel.

Q. So the building marked "6" on this map is the hotel? A. Yes.

Q. The building marked "2" on the map, what is that? A. Monahan's store.

Q. The building marked "7"? A. Monahan's warehouse.

Q. Now I call your attention to the building marked "3" over here. Can you tell what that was? A. The stable, I think.

Q. Is that Monahan's stable? A. I don't know; I think it was a—yes; I think it was Monahan's stable.

Q. I call your attention to the building marked "5" on the map, P-1; what is that? A. I do not know.

Recross Examination by Mr. Carey:

Q. You have testified you could not see the southerly line of this fire? A. No.

Q. And you therefore cannot testify that that part of the fire could not go over to Long Lake West, could you? A. No.

Q. And you have also testified that there would be created, very likely created one or more other fire blasts from the outcropping of this fire? A. There might be.

Q. And you could not tell whether or not those would go over to Long Lake West, could you? A. No.

Mr. Wright: I would now like to read some testimony,—examination of Leroy Christy had at the previous trial, which is read by consent with the same effect as though Mr. Christy were here. It starts at page 141 of the printed book. (Reads:)

"*Direct Examination by Mr. Wright:*

Q. Mr. Christy, where do you live? A. I am living just at present in British Columbia.

Q. Are you a son of Mr. Charles R. Christy? A. I am.

Q. Where you at Long Lake on September 27—a part of September, 1908? A. I was.

Q. How long had you been there? A. I had been there since about the first of July of that year.

Q. Did you have occasion to go over the right of way between Long Lake and southerly to Mr. Webb's line or property? A. I did.

Q. What is the first time you recall going over that right of way? A. September 9th was the first time I recall.

Q. What was the condition of that right of way?"

Mr. Wright: Objection was made there.

Mr. Carey: Go on.

"A. It was grown up with grass and brush, and bushes.

Q. How high was the grass? A. Well, in some places it was not more than a foot, and in some places it went up to two feet; two feet and a half.

Q. Was it green or dry? A. It was dry.

Q. Will you state whether or not it had been cut that season, since the first of August? A. I didn't see any signs. No, it had not been cut since the first of August.

Q. Was it cut at any time? Was it cut and removed at any time?

(Question withdrawn.)

Q. Was it cut at any time up to September 27th? A. Since the first of August?

Q. Yes. A. No, it had not been.

Q. Did you have occasion to go over that part of the right of way after September 9th, and up to September 27th? A. I did.

Q. How many times? A. Three or four times; maybe more; three or four that I can recall.

Q. Did you see any fire started burning on the right of way? A. I have.

Q. Can you tell us about where you saw fire started? A. It was on the second curve back from Long Lake West station.

Q. That is what we have been calling the big curve? A. Yes.

Q. Just tell us what you saw. Describe to the jury what you saw there. A. I was sitting there, eating my lunch; I had just about gotten through when the south train—this was on September 19th—the south train came through, and there was sparks and cinders flying all around me; as it went around the curve there and just got by, I looked up and there were two fires starting in the long grass; there had not been any previous to that time in that grass; and running up there—only about 200 feet—running up there, and by the

time I got there it had burned a place fifteen feet across, right on the right of way. That was one of them, the one I caught first; and the other did not burn quite so fast.

Q. Did you see any other fires started? A. Aside from those two I didn't see them started; but there were fires, numerous fires I put out or helped to put out along the right of way that had evidently started—

Q. Never mind about evidently. How large was the fires when you put them out? A. Well, sometimes just—not any bigger than that (indicating); sometimes four or five feet in diameter, and sometimes a little larger.

Q. Did you see any actual cinders on the ground or on the right of way or on the tracks? A. Yes, on that same day, the 19th; I was walking along the track at Long Lake West station in the afternoon; I got right at the lumber yard, and I found red hot ashes that had been dumped from the ashpan of the locomotive between the rails and burning the ties. I shoveled sand on it and tried to put it out.

Q. Where were you on the Sunday, the 27th? A. In the morning I was at Otter Pond; that is where the mill was located.

Q. Where the mill is located, that is shown on the map as further south even than Bear Pond? A. Yes, about a mile from Bear Pond.

Q. On the road from Long Lake West, about a mile— A. Just about a quarter of a mile off the road.

Q. What time did you leave there? A. I left there between twelve and one; I don't remember the exact time.

Q. Do you remember that morning? Was there any wind? A. No, it was still in the morning.

Q. Were there any fire right near where you

were, at Otter Pond? A. There was fire over towards East Charley Pond, and that is about two miles from there, I suppose.

Q. When you left Otter Pond, where did you go? A. I was going to try to go to the station. I knew they had a telehone message that there were fires around there, and I had been trying to get through to see if I could be of any assistance, and I saw when I got over as far as Bear Pond that I couldn't possibly get through; so I stayed at Bear Pond and watched the fire from there.

Q. When you got to Bear Pond—(interrupted) I did not get the time he left Bear Pond.

Witness: Between twelve o'clock and one.

Q. When you got over to Bear Pond, did you notice anything about the wind, whether there was any wind or not? A. Yes, the wind was blowing hard.

Q. In what direction was it blowing? A. It was blowing from the southwest; I should say a little south of southwest.

Q. Did you see the fire that had been burning near Bear Pond? A. Did I see it then?

Q. Yes. A. I could see smoke. I couldn't see fire then.

Q. Were you near the fire that got away from Mr. Sanford? A. Well, about between a quarter and a half mile, I should say; about a quarter of a mile.

Q. Did you see the direction that the fire took? A. I could.

Q. What direction did that take? A. That was going right towards northeast.

Q. What was located northeast? What can you designate as being a landmark? A. Well, the swamp; the swamp along the road that belonged to Mr. Low; a big swamp.

Q. Is that in the direction of Long Lake West? A. Not from the fire, no; not from where the fire was.

Q. Will you just come down and look at this map, Exhibit P-2, and point out the course of that fire as you saw it—the one that got away from Mr. Sanford? A. (referring) That direction.

Q. Just describe it. A. Right there (indicating).

Q. Almost a little west of north. You see this little spot on the map, marked little blue spots, what do you recognize that as? A. That is a swamp.

Q. What swamp? A. The Low swamp.

Q. And the line that you have marked from the southerly end of Bear Pond, strikes that swamp where? A. Strikes it just about in the middle.

Q. Did you go over the ground covered by that fire subsequently? A. No, I did not.

Q. Did you go down to Long Lake West that day? A. I went down the next day.

Q. Did you see where the fire had burned across the road? A. I did.

Q. Where was that? A. That fire was along the knoll of the hill, the ridge that Mr. Sanford spoke of, this side of Long Lake West.

Q. Can you see where it crossed the road about?

Mr. McClary: Where what crossed the road?

Mr. Wright: Where the fire crossed the road.

A. Which one, Mr. Wright?

Q. The fire that got away from Mr. Sanford, where did that cross the Long Lake West road? A. About in that swamp; in the middle of the swamp.

Q. Which swamp? A. The Low swamp.

Q. Did you hear any explosion that afternoon? A. I did.

Q. Where were you when you heard the explosion? A. I was on Bear Pond.

Q. Did you see the other fire, the fire that got away from Mr. Sanford, at the time you heard the explosion? A. I did.

Q. Where was that fire? In what direction was it going? Where was it? A. Well, that was going in the same direction I pointed out on the map there.

Q. Can you fix the time that you heard the explosion? A. No, I do not remember the time, except that it was after I got over to Bear Pond.

Cross Examination by Mr. McClary (read by Mr. Carey):

Q. Mr. Christy, you were over to Long Lake the next morning? A. Yes, sir.

Q. The next morning after the Sunday? A. Yes, sir.

Q. Was there any point on the south line of that Long Lake West road that wasn't burned from where you first struck the fire until you got clear through to the village—any point? A. Yes, there were points.

Q. How big a point? A. I don't recall the distance across, but I should say 100 feet or so.

Q. But in general, ninety-nine one-hundredths of the track on the south of the Long Lake West district was burned over where you first struck the burned district until you struck Long Lake West village? A. As I remember it, yes.

Q. You have been there since? A. Yes.

Q. And those other people have travelled back and forth, I suppose? A. I suppose.

Q. And there is no question that a fire burned through there, is there? A. It did.

Q. Where were you when the fire, or a fire, or the fire that Mr. Sanford says he lost control of, crossed the Long Lake West road? A. Where was I?

Q. Yes. A. At Bear Pond, I suppose; I don't know.

Q. And that was about how far from Bear Pond to where that fire crossed the road, that you are swearing about? A. Just about a mile, mile and a quarter along the road from Bear Pond.

Q. From that distance could you tell just where the fire crossed the road? A. The smoke came up in big masses, and I could see the edge of the fire on the southeast side of the fire, but all around the atmosphere was clear.

Q. You could see the other edge, too, could you? A. No, I could not see the other edge.

Q. Then you don't know where the other edge crossed the road? A. I do not know.

Q. Bear Pond is connected with the Tupper Lake water system, isn't it—by the outlet? A. The outlet on the—

Q. By Bogg River? A. Bogg River, yes.

Q. The outlet is to the north? A. The outlet is to the northeast.

Q. And the road from Long Lake crosses the outlet? A. Not the outlet; crosses across the pond, about a quarter of a mile from the outlet.

Q. A little neck of the pond there? A. Yes.

Q. From that point the Long Lake West road goes up very considerable of a hill before it goes down to Long Lake West, does it not? A. None to speak of, no.

Q. You have walked it, haven't you? A. I have walked it and ridden it.

Q. And do you tell me that the road from where it crosses at Bear Pond there doesn't go over considerable of a mountain before it goes down to

Long Lake West? A. It goes over a hill first; a very slight rise, and then goes down in the Low swamp, what we are talking about here, and then there is another rise, and that is what you are talking about; and then it finally goes down into Long Lake West village.

Q. I am trying to fix it from the level where the road crosses Bear Pond over to the level of where our railroad is; you go over a considerable elevation, do you not? A. You do.

Q. Of course, both ways. And this swamp of Low's that you speak of, is somewhat higher than either Long Lake West or the Bear Pond outlet, is it not? A. No.

Q. Where you stood when you were there, you knew the way the wind was blowing was down in the valley of the Bear Pond, was it not? A. There is no valley to speak of.

Q. Where the pond is? A. No, there is a hill on the south and southeast side, but you can look over practically any distance on the north.

Q. How does the water course happen to be down there if there is no valley? A. I said, to speak of. There is not much.

Q. Beyond, on the road to Long Lake West, you went up a hill, did you not—beyond where you cross your bridge there? A. Toward Long Lake?

Q. Yes. A. Yes.

Q. And you just said you went up a hill on the other side? A. I said there was a gradual elevation toward Long Lake West, and then went down into the swamp, and then finally went up on another hill.

Q. What I am asking you now, Mr. Christy, is this: if that Bear Lake, where you lived, was not down at the bottom of the valley between those two hills? A. Of course it is down a little bit, or the water wouldn't stay there.

Q. It is in a small valley, isn't it? A. It is in a small valley, yes.

Q. Now, do you know enough about forests to know that the wind is in the exact opposite direction in the valley; it goes up that valley or goes down that valley; that valley gives the direction of the wind—you know that? A. It does to a certain extent, yes.

Q. Doesn't it, in the valley, give the direction almost the whole extent? A. Not always, no.

Q. Well, you are over twenty-one years of age, Mr. Christy? A. I am.

Q. And don't you know that in a valley like your little valley there, that you will have in general two courses of the wind, one coming down the valley and the other going up the valley, isn't that true?"

Mr. Carey: You interposed an objection there.

Mr. Wright: That question was withdrawn.

"Q. Let the witness look at the map and state whether or not this map of the United States—which is called the Tupper Quadrangle—Exhibit P-2 in this case, shows on both sides of Bear Pond, and its outlet and elevation? A. (Referring) Of course there is elevation—yes.

Q. If there is an elevation, and the water flows between, there is something of a valley, is there not? A. Something of a valley, yes.

Q. Of course its size depends upon the size of the mountains on both sides; and this map shows that to be so, does it not? A. It does.

Q. Now, Mr. Christy, have you had experience, as one of the travelers of our forests up there—have you had the experience of finding this true, that in a depression where you have hills,—of

course more if they are higher, less if they are smaller—that the depression controls in quite a material way the course of the wind through there? A. Not around the Adirondack mountains, no.

Q. You never found it to be so? A. No.

Q. You think that the wind wouldn't be controlled at all by a valley between two mountains? A. If they were two big mountains, yes.

Q. Just answer that. A. I say, if they were two big mountains.

Q. Well, in a lesser degree if they were not quite as big, would that not be so? A. If the valley extends for any length.

Q. Yes, if they were not big mountains it would be true to a lesser degree? A. If the valley extends for any distance, yes.

Q. Looking at that map does it appear that the valley extends quite a little distance across? A. Well, I suppose it is half a mile; about half a mile across the pond at the widest place—across Bear Pond; almost half a mile.

Q. And starting with an outlet, with water running down hill? A. It must, yes.

Q. I did not ask you about 'must'. Doesn't it run down hill? A. Yes, it does.

Q. Does it strike Bogg Lake or Bogg River? A. I never followed it down. It isn't on father's property.

Q. It goes on the Low property, and from there to the— A. Below Whitney. I don't remember where.

Q. From your knowledge of water and streams and so forth, you have an idea that it followed along in something of a valley down through those hills to the Bogg River—I don't know that you know that? A. I don't know; I have never been down there.

Q. How much experience have you had in the Adirondacks, Mr. Christy? A. I have been up there every summer since 1896, until the year 1908.

Q. And have you been on the mountain tops? A. I have been on some of the mountain tops.

Q. And you have been on small tops? A. I have.

Q. Well, I will ask you straight this question: Haven't you often found that the course of the wind on the hill top varies a great deal from the course of the wind down in the valley? A. No, I have not; not there.

Redirect Examination by Mr. Wright:

Q. Why is it that in the Adirondacks the change of the wind is not affected by these depressions the same as it is in some other places you refer to? A. Because the hills are not great enough in that part of the Adirondacks to affect the direction of the wind.

Q. What is the nature generally of all that country through there? A. Well, hills and swamps to a certain extent; but as a general thing they are not long valleys that control the direction of the wind. There would be one hill rise up here (indicating) and another in a different direction, over in another spot.

Q. Are there in that vicinity any high mountains going to a very extended height? A. No, there are none.

Q. All plateau land? A. All hills.

Mr. Wright: He was called in rebuttal, page 578, but I will reserve that for rebuttal.

Interrogatories (read)

Mr. Wright: I now desire to read some interrogatories.

1st. Was the defendant during the entire year 1908 in the possession of and operating a certain railroad, known as the Mohawk and Malone Railroad, and extending from Herkimer or Remsen to Malone in the State of New York? A. Yes.

6th. How many and what trains and engines operated by the defendant passed the station of Long Lake West between six a. m. on September 27, 1908, and three p. m. on September 27, 1908, and give the direction each was proceeding, the number of each engine, and the time each passed Long Lake West station. A. Four trains as follows:

No. 7, North, Engine 2076 at 6:29 a. m.
Extra, North, Engine 1758 at 7:45 a. m.
No. 11, North, Engine 2071 at 12:43 p. m.
No. 6, South, Engine 2076 at 9:33 a. m.

7th. State which of the said trains mentioned in the answer to the foregoing interrogatory were passenger trains, and which freight trains. A. Nos. 7, 11 & 6 were passenger trains and the extra, engine No. 1758, was freight.

10th. In what section of the defendant's road is the station of Long Lake West. State where such section begins and ends. A. Section 19 of Subdivision 8. Section 19 begins at mile post 90 and ends at mile post 95.

13th. What was the name of the foreman in charge from September 1st, 1908, to September 28, 1908, of the section of defendant's road extending immediately south from Long Lake West Station? A. Joseph Lashaway.

34th. Was engine number 2076 one of the engines that was in use by the defendant over its said road near the station of Long Lake West, and if so, was it in use over said road near Long

Lake West on September 26th or September 27th, 1908? A. Yes and yes.

35th. If engine number 2076 was in use at the times and places mentioned in the Thirty-fourth Interrogatory was the grate of said engine broken and out of repair during any of said period? A. The records of the Company do not show any broken gate or lack of repair connected with said engine 2076 during the time stated, and the officer charged with the duty of attending to repairs on said engine has no recollection of any such condition during said time.

37th. Was engine number 2074 one of the engines that was in use by the defendant over its said road near the station of Long Lake West, and if so, was it in use over said road near Long Lake West on September 26th or September 27th, 1908? A. Yes and yes.

52nd. On January 6, 1909, was A. H. Smith, Vice President and General Manager of the defendant? A. Yes.

56th. In August and September, 1908, what were the duties of the Supervisor of Tracks of the defendant from Herkimer or Remsen to Malone on the Mohawk & Malone Division? A. In August and September, 1908, the duties of the Supervisor of Tracks of the defendant from Herkimer to Malone on the Mohawk & Malone Division were to have charge of and be responsible for the road-bed, tracks, tunnels and right of way on their respective sub-divisions, to employ assistance, to assign to each Foreman his respective duties and to see that such duties are promptly and properly performed, and to perform such other duties as the Division Engineer may from time to time direct.

58th. Where were the headquarters of such Supervisor of Tracks in August and September,

1908? A. The headquarters of the Supervisor of Track for Sub-division No. 8 was at Remsen, N. Y. in August and September, 1908.

62nd. In August and September, 1908, who had charge of the repairs of the engines of the defendant used on the Mohawk and Malone Division between Herkimer and Underwood? A. George H. Eck, General Foreman of Engines, Utica, N. Y.

68th. Was the said John V. Neubert the Division Engineer in charge of the Mohawk Division of the defendant in September, 1908? A. John V. Neubert was the Division Engineer in charge of the Mohawk Division of the defendant's railroad in September, 1908.

69th. State from what point to what point the Mohawk Division includes, and the number of miles between said points. A. The Mohawk Division of the defendant's railroad in the year 1908, included the following lines and mileage:

Ravenna to Syracuse, West Shore...	150 mi.
Albany to Syracuse, Main line.....	148 mi.
Troy to Schenectady, Branch.....	21 mi.
Troy to Albany, Branch.....	7 mi.
Herkimer to Adirondack Junction, M. & M.....	229 mi.
Clearwater to Racquette Lake.....	18 mi.
Lake Clear to Saranac Lake, Branch	6 mi.
Hinckley, Branch	3 mi.

91st. If Engine number 2076 was in use by the defendant at the times and places referred to in the Thirty-fourth interrogatory did it have a three inch opening between the top of the ash pan and the bottom of the foundation ring, and also large openings at the back corners on top and at the back end for grate connections between the false and main decks, if so, what was the size of such openings and what was there around such

openings to prevent the escape of cinders? A. There was a space of about three inches between top of ash pan and bottom of mud ring. This opening was protected by steel plates made of one-quarter inch plates fastened on to the side with set bolts and locked nuts, thus covering the opening between ash pan and mud ring. The openings in back of ash pan referred to, were slots, two or which were about one-half inch wide and two and one-half inches long; the other two were about three-fourths inches wide by three inches long. These slots were filled by the grate shaking rods which passed through them. These openings were also protected by a deflecting plate bolted on to the inside of the ash pan, which prevented cinders from falling through said opening and also the accumulation of cinders around these openings.

92nd. If said Engine number 2076 was in use at the times and places referred to in the Thirty-fourth interrogatory, was there an opening of about three inches between the top of the ash pan and the bottom of the foundation ring on said engine during said period? A. Yes, there was an opening protected by plates as described in the answer to the Ninety-first interrogatory.

93rd. Was engine number 2075 in use along the lines of the Mohawk and Malone Division of the defendant company at or near the Station of Long Lake West on the 26th or 27th days of September, 1908? If so, give the dates and time on each day it passed said Long Lake West Station. A. Engine No. 2075 was not in use along the line of the Mohawk & Malone Division of the defendant company at or near the station of Long Lake West, on the 26th and 27th days of September, 1908.

98th. Was Engine number 2071 in use along

the lines of the Mohawk & Malone Division of the defendant company at or near the station of Long Lake West on the 26th or 27th days of September, 1908, and if so, give the dates and time each day it passed along Long Lake West Station. A. Yes, as follows:

September 26, 1908, No. 11, North, 12:39 p. m. Pass.

September 26, 1908, No. 12, South, 10:28 p. m. Pass.

September 27, 1908, No. 11, North, 12:43 p. m. Pass.

99th. If said Engine number 2071 was in use at the times and places referred to in the ninety-eighth interrogatory did said engine during said period have a three inch opening between the top of the ash pan and the bottom of the foundation ring and also large openings at the back corners on top and at back for grate connections between the false and main decks? A. Same answer as in the answers to the ninety-first and ninety-second interrogatories.

100th. If the answer to the ninety-ninth interrogatory is in the affirmative with reference to openings what was the size of said openings? A. The same answers as to the ninety-first and ninety-second interrogatories.

101st. If the answer to the ninety-ninth interrogatory is in the affirmative with reference to openings, what was there around such openings to prevent the escape of cinders? A. The same as to interrogatories numbered ninety-first and ninety-second.

Mr. Wright: I will read some additional interrogatories which were served later:

First: Was the release referred to in the first special plea filed by you in writing and if so, what is its date? A. No.

Second: By whom was the release referred to by you in the aforesaid plea, executed? A. The release referred to was not in writing.

Third: What was the consideration for the release referred to by you in the aforesaid plea? A. The consideration of said release is the consideration raised by presumption and operation of law and is conclusively proved by the lapse of more

than one year between the date of the alleged fire in plaintiff's declaration set out and the bringing of this action.

FOURTH: What was the date of the alleged payment set forth by you in the second special plea above pleaded by you and to what person was such payment made? A. The defendant is unable to state the name of any person receiving said payment.

(Adjournment to Dec. 21, 1915).

Mr. Wright: I should like to have it appear upon the record that it is conceded that the act of the legislature of New York which I offered in evidence yesterday was in force at the time of the fire in question. It was an act of 1908, and I did not put in evidence the enacting section.

Mr. Carey: It is conceded that it was in force at that time.

The Court: All right.

ARTHUR YOUNG, sworn.

Direct Examination by Mr. Wright:

Q. Where do you live? A. South Canton, St. Lawrence County, New York.

Q. In September of 1908 by whom were you employed? A. Charles R. Christy and Son.

Q. You were at their mill at Long Lake West? A. Yes, sir.

Q. How long had you been employed by Mr. Christy? A. I think something like five or six years.

Q. You had been there all the season of 1908? A. I had.

Q. What was your particular duty? A. I was foreman.

Q. At the mill? A. At the mill—and woods work.

Q. During the month of September were you over the right of way of the defendant company from Long Lake West station southerly to the Webb line? A. I was.

Q. And prior to the fire of September 27, what was the condition of that right of way with respect to grass or anything of that kind? A. There was some grass.

Q. What do you mean by "some grass?" A.

Why, in some places there was wild grass in low ground.

Q. Had it been cut or was it standing? A. It had not been cut.

Q. Do you know whether it had been cut that season or not? A. It had not.

Q. How high was it? A. From a foot to two feet.

Q. It varied according to the soil I presume? A. According to the soil.

Q. Did you do any patrolling of the tracks, or that portion of the track at least, during the month of September? A. I did.

Q. Can you fix the date, or about the date, when you started doing patrol work? A. I could not positively. I should say it was about the 17th or 18th.

Q. How much time did you spend along the right of way? A. Why, I think I was there two or three days.

Q. Did you see any fires started on the right of way along the Christy property? A. I did.

Q. And what started them? A. Trains.

Q. How many fires did you see started during the three or four days you were there? A. Why, I recollect two or three fires particularly.

Q. How long after a train had passed would it be before the fires were shown—started to burn? A. Just as soon as the train would go by you would see smoke start—fire start.

Q. You were not at Long Lake West on the 27th when it burned up, were you? A. I wasn't.

Q. You were off down near East Charlie Pond? A. East Charlie Pond.

Cross Examination by Mr. Carey:

Q. You say this grass was only in spots along the right of way? A. Yes, in the swampy places.

Q. A good deal of rock was there not along the right of way? A. In some places, yes, sir.

Q. In some places the ground practically covered with rock? A. Yes; some places.

Q. Were you fighting fire back on the Christy land? A. I was.

Q. In what place? A. Well, I was in different places.

Q. Well, tell us the different places? A. Well, I went out East Charlie Pond; I was also—well, I don't know as I can describe it exactly—

Q. A little louder, please. A. I was at East Charley Pond and I was also back at a place called Waite's camp, where we did some trenching there.

Q. Where is that with reference to Bear Pond? A. It would be northerly I think of Bear Pond.

Q. And southerly from the Long Lake West road? A. Yes.

Q. Won't you come down to the map and point it out? Here is Long Lake West Station up here, and these are the Monahan buildings. This is the right of way toward Uitca and this is the Webb-Christy corner on the right of way, and this is the Webb-Christy line. Here we have East Charlie Pond down here that has been testified to as being on Mr. Christy's property, and here we have Bear Pond, and this is the road leading from Long Lake West. This is a stream which crosses the Webb-Christy line. Those are lines which were drawn by the witnesses yesterday showing the course of the fire and the place where the fire was trenched of which they had knowledge. Now will you please indicate where you were with reference to a fire in the vicinity of East Charlie Pond and tell us when you were there? A. It doesn't show the line there.

Q. No; that does not show the property line. A.

Well, if I remember rightly, we had a line right around about like this on both sides.

Q. I will draw that. See if I draw correctly. A. About like that. That is Charlie Mountain.

Q. That is Charlie Mountain there? A. That is Charlie Mountain.

Q. I will mark that "Trench—Young." Were you fighting fires anywhere else on the Christy property? A. I was also in here. It came down in here. It started in here somewhere. It was on this side of the mountain in here.

Q. Will you just take the pencil and draw a line in there, please? A. If I can do it.

Q. Get it as near as you can. A. This would be it, about in here; this line.

Q. Did you trench there where you indicated by this line? A. I did.

Q. Trenched all the way? A. All the way—principally all the way.

Q. I will mark that "Trench line—Young." In what direction had that fire come, Mr. Young, or those two fires you have spoken of? A. This fire (indicating) was running west right here, about, on the west, in here.

Q. Over in a westerly direction? A. Yes.

Q. And this fire around here, down at East Charlie Pond, came from what direction? A. That came from, I should say, in here some place (indicating)—about the point here some place.

Q. When you got to these fires were both of them on the Christy property? A. Yes, sir.

Q. You did not fight any fire over on the Webb property at all? A. Not at that time.

Q. Where were you on the 27th of September? A. Right back here.

Q. A line to the north of East Charlie Pond? And the 27th was the day that Long Lake West was burned up? A. Yes.

Q. You were not over at Long Lake West as I understand it on that day? A. No.

Q. What happened to either of these fires that you have mentioned on that day, if anything? A. Nothing happened; this one (indicating) we held.

Q. What happened to the other? A. The other one I could not say, because I wasn't there.

Q. Were you there a few days afterward? A. A few days afterward or the next day, if I remember rightly, after the fire, I came down the road somewhere about here (indicating).

Mr. Wright: Near mile post 18?

A. Yes, at mile post 18, over here; and I put a trench along the whole line up to here, practically all that way.

Q. That was—? A. A day or two days after the fire—about the 28th or 29th, I think.

Q. Did you come up across the Christy property at that time? A. I did not.

Q. You came in to Long Lake West? A. No; I stayed at Otter Pond, a mile further south.

Q. Were you through this Christy property from Bear Pond or East Charlie Pond through to Long Lake West or where you could see over the property between those points and Long Lake West within a few days after the fire? A. No; not within a few days.

Q. How long after the fire were you? A. When we made the survey.

Q. You made the survey for Mr. Christy? A. Yes.

Q. When was that? A. I could not tell you; it was quite late in the fall.

Q. Fall of the same year? A. Fall of the same year.

Q. What did you find wth reference to the land east of Bear Pond and Long Lake West with ref-

erence to having been burned over recently? A. Practically all burned through here (indicating).

Q. Clear through to the railroad? A. Yes.

Q. And what was the condition of the land from in the vicinity of East Charlie Pond, these lines you have drawn, through to the railroad at Long Lake West? A. There was a strip through here that did not burn, in this section.

Q. That was around the mountain, wasn't it? A. Yes; it came over in a northerly direction. It wasn't burned through here.

Q. Otherwise what do you say? A. Well, it was practically all burned with the exception of that place.

Q. Is it true that there are mountain ridges running northeasterly and southwesterly across the Christy property from Long Lake road southwesterly? A. There are some ridges in here (indicating).

Q. That is near Bear Pond? A. Running parallel, you might say, to the pond. Then when we get in here (indicating) there are the other ridges.

Q. How about farther down, say over about three quarters of a mile? A. There is a big ridge about in here that runs about parallel to the road too. In here there is a valley (indicating).

Q. You spoke of trenching from mile post 18— A. Yes, along that part here (indicating).

Q. That is westerly of it? A. That would be northerly.

Q. Well, northwesterly, down toward Bear Pond. Was the fire burning in there on that day? A. Yes.

Q. Did you go out that road to Long Lake West on that day? A. I didn't. I stayed right on the fire.

Q. How soon afterward were you at Long Lake West? A. I could not say; quite a few days.

Q. You were trenching when you were down in the vicinity of East Charlie Pond and along this other line which you have indicated here—you were trenching to keep the fire from going in what direction? A. Why, it would be going east—east and north.

Q. And did the wind change on Sunday, the 27th? A. We had not had any wind practically until Sunday.

Q. And did you have a high wind on Sunday? A. Quite high, yes.

Q. When you were trenching from the Long Lake West road you were trenching to keep the fire going in what direction? A. Why, it was spreading up the road on both sides of the Long Lake road southerly and southeasterly.

Q. And was the fire between where you were trenching and Long Lake West? A. Yes; we were right on the edge of the fire.

Q. And the fire laid between you and Long Lake West? A. Yes, sir.

Redirect Examination by Mr. Wright:

Q. You mean you were on the east side of the fire? A. Yes; on the east side of the fire, yes.

Q. Do you recall what direction the wind was blowing from on Sunday, the 27th? A. Southwest.

Recross Examination by Mr. Carey:

Q. When you went over to Long Lake West after the fire did you notice whether the fire had burned northwesterly on from Long Lake West? A. I could see a big burn across the track from Long Lake West.

Q. A long distance? A. Quite a long distance.

Q. And all the Monahan buildings on the west-

erly side of the road were burned? A. They were burned.

Q. Now you spoke of fighting some fires on the right of way. Did you put all those fires out? A. We did.

WILLIAM DAVIS, sworn.

Direct Examination by Mr. Wright:

Q. Where do you live? A. Long Lake West.

Q. How long have you lived there? A. Oh, eight or nine years.

Q. Were you there in September, 1908? A. Yes, sir.

Q. Were you there the day that the village of Long Lake West burned up? A. Yes, sir.

Q. What day of the week was that? A. Sunday.

Q. What time of day was it when the town burned up, approximately? A. About two o'clock.

Q. Were there any fires at or near Long Lake West in the morning that day? A. There was up the track, the railroad track.

Q. Up the track? A. Yes, sir.

Q. What do you mean— A. This way—south.

Q. When you say "up" you mean toward Utica? A. Yes.

Mr. Carey: What was his answer?

(Answer repeated as follows: "Answer: Yes.")

Q. And where were the fires up the track? A. Along the right of way.

Q. When did you see those? A. I saw them right along for a few days before the place burned up.

Q. And how far down? A. Oh, a mile and a half or a mile.

Q. That would be down near the Webb property? A. Yes; down that way, yes.

Q. Just come down here. This is a map showing the village of Long Lake West. These buildings are said to be the Monahan buildings. This is the railroad right of way running down here around the curves, and here is the Webb corner. Now where were you at about noon on that Sunday? A. I was right there.

Q. Right by the Monahan buildings? A. Right by the Monahan buildings.

Q. They are on the west side of the track? A. Yes, sir.

Q. And a little higher than the track, are they not? A. Yes, sir.

Q. Monahan, I believe, had a barn over on the east side of the track, did he not? A. Yes, sir.

Q. Can you locate that—tell us about where that was. Suppose you look at P-1 for that. Come over here. Look at this map. This is the Long Lake road; this is the railroad; this is the station. A. I was on this track probably there.

Q. This is toward Utica? A. Well, yes, just below the station, across the track, on the left hand side.

Q. Across the track he had a barn? A. Yes; on the left hand side.

Q. That is the west side; opposite the station you mean? A. No; just the other side of the track, the other side of the station across the track.

Q. I do not understand you. The station was on the east side of the track? A. Yes, sir.

Q. Now was the barn on the same side as the station? A. On the other side.

Q. You are speaking of the big barn now, aren't you? A. No; no.

Q. There was a barn across the track north of

the big barn, opposite the station—is that what you mean? A. Yes.

Q. Did Mr. Monahan have another barn or stable over here in the village? A. Yes, sir; he did.

Q. Where was that? A. Is this the station here?

Q. This is the station. A. His barn must set in about here some place.

Q. You are pointing now at the figure marked "7"; is that the barn or is that the warehouse? A. I should say it was the barn.

Q. Didn't he have another stable over further—over further west? (No answer).

Q. Do you know where the dynamite was stored? A. Yes, sir.

Q. Didn't he have a barn near there? A. He did. That was the barn I was trying to get at.

Q. It has been testified that the square marked "3" was the Monahan barn or stable. Now if that is the stable where was the dynamite stored? A. There is the stable there?

Q. Yes. A. (Indicating) There.

Q. A little building nearer the roalroad track than the stable? A. Right close to the barn.

Q. Right close to the barn but on which side of the barn was it, east or west of the barn? A. Well, I should say it was east of the barn.

Q. East of the barn? A. East of the barn.

Q. Then there is a little square shown on this P-1, marked "5". Is that about the location of it? A. Yes.

Q. I think that is all down here.

(Witness resumes the stand.)

Q. During that day did you see any fires down around the first bend? A. No; but I was not down that way.

Q. Did you see any smoke that way? A. Yes.

Q. When? A. Well, all of the day.

Q. And that is down toward the Webb line? A. Yes, sir.

Q. Now about noon did you see any change in the situation? A. Yes, sir.

Q. Can you fix that hour? A. Sir.

Q. Can you tell us about what time in the day it was that you saw the change in the situation? A. Well, along about twelve o'clock.

Q. Can you fix that with refererence to any trains going through, or did you notice any? A. There was one just going north.

Q. What time did the train go north? A. Well, it was between 12 and 1.

Q. What did you see about that time; what did you see that was different from what it had been in the morning? A. Well, the wind came up and there was more smoke arising.

Q. Where were you when you saw that? A. Right there by Mr. Monahan's place.

Q. That is in front of the barn at the west side of the track? A. Yes; I was up to his house I think.

Q. I show you P-6-a. Do you recognize that? A. I do.

Q. What is that a view of? A. That is a view of—this is Mr. Monahan's house here.

Q. That is his new house? A. That is his new house, yes. He had a house in the same place before the fire.

Q. Yes? A. This is a road that comes—this is the section house.

Q. Indicating a house on the left hand side of the picture? **A. Yes, sir.**

Q. What is this in front—a pump? A. That is a pump.

Q. Is that in the barn yard? A. Yes; that is right close to the house.

Q. What is this foundation a little bit to the left of the centre? A. That was the old section house at the time of the fire. That (indicating) is down further.

Q. So this picture is looking east from the place south of Mr. Monahan's house? A. That is correct.

Q. As a matter of fact you saw this picture taken, didn't you? A. I did.

Q. And is that a correct view of the country as it now is and as it was at that time except for what damage the fire has done? A. It is.

Q. Can you tell us about where you were standing at the time you first saw these fires down the road? A. I was standing here, along here.

Q. Do you mean near the barn? A. From the house to the barn and down toward the railroad track. I was right in that vicinity all the time.

Q. Now from that time on, tell us just what you saw. That was about half past twelve I understand you to say. From that time on just what did you see or do? A. Well, sir, I stood there and the wind come up and the fire come down both sides of the track.

Q. When you say came down you mean north? A. Yes.

Q. Tell us just what you saw and did. A. And I see the fire was going to burn up the buildings, so we went to work and let the horses out of the barn.

Q. You took the horses out of the barn? A. Yes; let them loose.

Q. You say "we". Who was there with you? A. Mr. Monahan.

Q. Which Mr. Monahan? A. Mr. Jack Monahan.

Q. And where did you go? A. Well, I went to—when I could not stay any longer I went to the station, down as far as there, and went down the railroad track.

Q. When you say down again you mean north? A. Yes, north.

Q. When you left Long Lake West where was the fire? A. Well, the fire was—the barn was afire —Mr. Monahan's barn was afire.

Q. That is the big barn on the westerly side? A. The big barn; and the fire was over in the lumber yards.

Q. Was the station on fire at that time? A. No, it was not, not at that time.

Q. Did you hear this dynamite explode that afternoon? A. No, sir; I did not mind it exploding.

Q. About what time did you leave? Can you fix the time that you left Long Lake? A. I should think it was three o'clock.

Q. It might have been a little later? A. Three anyway.

Q. And at that time you say the buildings up at the station were not on fire? They wasn't, no, but they was—

Q. What? A. Not at that time, no.

Cross Examination by Mr. Carey:

Q. Where was your place of work? A. Right there for Mr. Monahan.

Q. At which barn? A. Well, I was to the big barn.

Q. That was where you worked all the time? A. No, sir; not all the time.

Q. Were you there all that forenoon? A. I was there all that forenoon.

Q. And went down to dinner about what time? A. About twelve o'clock.

Q. When did you go back to the big barn? A. Right after dinner.

Q. When you went down to dinner did you see any fires or indications of fires around there? A. Yes, sir.

Q. Where? A. Up the line, up the railroad track.

Q. And toward what station? A. Nehasane.

Q. Did you say anything to anybody about it? A. We were talking about it before we went down, to whoever was around there.

Q. You testified in this suit before, didn't you? A. I did, sir.

Q. And that was three years and a half ago? A. I think so.

Q. At that time were you asked this question: "And at the time when you went down to dinner did you see any fire around? A. No, sir." Did you testify that way? A. I do not remember.

Q. What? A. I do not remember it.

Q. You do not remember that you did not testify that way, do you? A. No, sir.

Q. I am reading from the printed record of the case, page 60. A. Yes.

Q. You were telling the truth when you testified before, weren't you? A. I think I was.

Q. And you had a better recollection of the fact then than you have now, didn't you? A. No, sir; not any more, no, sir.

Q. Not any more, but at that time you appear to have said that you did not see any fires when you went down to dinner. A. I did not see any fires, not when I went down to dinner.

Q. Oh! And you did not see any fires before that during the morning, did you? A. Not any more than smoke.

Q. Not anything more than smoke. Well, there was some smoke hanging over that country there for days before this, was there not? A. Yes, sir.

Q. And you knew that there was a big fire over on the Christy property toward Bear Pond and East Charlie Pond? A. I heard there was.

Q. And you saw smoke coming from that direction? A. Yes.

Q. And the smoke which you testified to was the smoke which was hanging over that section of the country there from these fires around Bear Pond and East Charlie Pond for a number of days; is that right? A. I could not say.

Q. You do not know where the smoke came from then? A. Well, I—no, not exactly, no.

Q. No; there was smoke all around, wasn't there? A. Yes.

Q. And fires back in the woods for miles all around there, wasn't there? A. Well, now, I could not say; I wasn't in there.

Q. Well, you saw smoke coming from back in the woods for miles around, didn't you? A. I saw smoke; I do not know how far it came.

Q. Well, it came from some distance away, didn't it? A. Yes; it probably did.

Q. And when you testified to the smoke that you saw in the morning, you mean this general smoke which had been around there for days; is that right? A. Why, yes; that is right.

Q. What time did you get back to the barn? A. I was there about one o'clock.

Q. About one? A. Yes, sir.

Q. Tell me what you saw when you got back there and where you saw it. A. Well, I saw the fire come in—coming down toward Long Lake station—west.

Q. How far away? A. That was probably about a mile or a half a mile up the track.

Q. Half a mile or a mile? A. About a half a mile up the track.

Q. Was it below the first curve? A. Right about where the first curve was.

Q. Wasn't it below the first curve? A. Yes; it got below the first curve.

Q. I mean toward Nehasane, or toward Utica? A. Yes.

Q. It was beyond the first curve from where you were, wasn't it? A. Beyond the first.

Q. Yes. A. No; right there to the first curve—or right there by the first curve.

Q. Could you see the fire or only the smoke? A. I saw the fire.

Q. Where was the fire with reference to the right of way? A. Where was it?

Q. Yes; on or off the right of way? A. It was coming right down the right of way, and it came right across to Mr. Monahan's barn—right across his place.

Q. Rigth across toward the Monahan barn? A. Yes, sir.

Q. Across the track? A. It was on—yes; it was on one side of the track, yes, on the same side that his—

Q. Was it moving across the track? A. Why, there was fire on both sides of the track.

Q. Was it moving across the track, the course of the fire? A. No, sir; coming right straight down.

Q. When you testified before you were asked this question, and did you make the answer which I will read? "Do you know where the first bend is in the road? A. Yes. Q. With reference to that where was it? A. Pretty near there or the other side of it I should judge." Did you testify that way? A. I don't remember.

Q. You would not say that you did not, would you? A. No; I would not.

Q. Now you say that this fire which you saw was on the right of way? A. Yes; it was.

Q. Were you asked this question: "How near to the railroad was it? Don't think—tell us. A. Well, within eight or ten rods of the railroad." Did you testify that way on the former trial? A. I don't know.

Q. What? A. I don't remember.

Mr. Wright: Read the next question.

Q. And were you asked this question: "In what direction was it coming?" And did you answer, "Coming northwest"? Were you asked that question and did you answer it that way? A. Well, sir, I don't know if I was asked that or not; I don't remember.

Q. You cannot say whether you did or not? A. No.

Q. How long did you stay at the big barn after you saw this fire which you have spoken of? A. Oh, it was probably over an hour or probably a little over.

Q. Do you remember hearing any roaring in connection with the fire? A. Yes; yes, sir.

Q. When did you first hear that? A. Well, sir—pretty near—about one o'clock.

Q. About one? A. Somewhere along there.

Q. That was when you first saw the fire, wasn't it? A. Sir?

Q. That was when you first saw the fire, wasn't it? A. Well, pretty near, yes.

Q. Had the train gone north before you saw the fire? A. Yes.

Q. Sure about that? A. Yes, sir.

Q. Where were you when the train went north? A. I was eating my dinner.

Q. Eating your dinner where? A. At Mr. Monahan's boarding house.

Q. Where is that? A. Down at the station.

Q. When you left the big barn on the westerly side of the track was it on fire? A. Yes, sir.

Q. And how about the section house in front of the barn; was that on fire? A. I do not think it was, not at that time. I could not say, because I got right out as quick as I could.

Q. You got right out as quick as you could, you say? A. Yes; because I had to.

Q. Do you remember the fire service train com-

ing down and backing in on the Christy siding? A. I do.

Q. And did you see fire right opposite the Christy siding at that time? A. I did.

Q. And the fire train went in there and laid out some hose? A. Yes.

Q. At about right angles to the Christy siding, did they not? A. Right across.

Q. The men on the fire train? A. Yes, sir.

Q. Right up that swamp toward the hill? A. Yes, sir.

Q. And at about right angles to the siding, you say? A. Sir?

Q. About at right angles to the siding, you say? A. Yes. (Witness illustrates).

Q. And about how near the northerly end of the siding was the hose laid out? A. I should think about half way.

Q. About half way up the siding? A. I should think it was.

Q. You went away before the train came out there, didn't you? A. No, sir.

Q. Were you there when the fire train came out? A. Yes.

Q. At the time the fire train came out was there fire in the lumber piles up at the northerly end of the siding? A. No; no; there was fire coming right towards it though.

Q. Right toward the northerly end of the siding? A. Right over that knoll there.

Q. Right over the hill toward the northerly end of the siding? A. Yes, sir—no; the southerly end.

Q. Well, there was lumber up by the northerly end of the siding, wasn't there? A. Yes.

Q. What? A. There was lumber toward—well, the fire was coming from the southern end.

Q. Right over the hill? A. Yes.

Q. At about the place where the hose was laid out? A. Yes.

Q. And in that direction? A. Yes, sir.

Q. What was the first building so far as you know that took fire? A. Mr. Monahan's barn was the first one that I knew took fire.

Q. Around Monahan's barn the land was all cleared, wasn't it? A. With the exception of there was a piece of a swamp land there that runs up—

Q. I am speaking of Monahan's barn where you were working up on the hill. A. Yes, sir; it was cleared there.

Q. Well, cleared all around that barn, wasn't it? A. Why, yes; it was cleared from all brush and stuff.

Q. How far away from the barn was the land entirely clear? A. It wasn't clear at all; that is the brush picked up and burned up.

Q. The trees were all cut? A. The trees were pretty much all cut.

Q. Had they burned all over that brush around the barn before this fire? A. Pretty much all of it.

Q. They had been burning pretty much for some time? A. They burned some that spring, yes.

Q. And later in the summer also? A. I do not remember burning any later in the summer.

Q. They burned south and southwesterly from the barn for some distance, didn't they? A. They had burnt some.

Q. They had a permit for burning there from the fire board?

Mr. Wright: I object unless he knows.

The Court: Objection sustained.

Q. How far southerly and southwesterly from the barn had they been burning and clearing during that summer? A. Oh, I don't know; half a mile or a mile.

Q. Do you know where Gordon's house was located? A. Yes, sir.

Q. Where was it? A. Right across from Mr. Monahan's place.

Q. Right across from the lumber pile? A. Yes; it was between—the other side from the lumber pile—across the track.

Q. Was it directly across from the lumber pile? A. Yes; pretty near; yes.

Q. And was that house on fire at the time you were there? A. No.

Q. Nothing but Monahan's barn up on the hill? A. That was all that was afire that I see when I left. Of course other buildings might have been afire, but I did not take any notice.

Q. Was there any other building between Monahan's barn where you were and the railroad track down toward the first curve? A. I think there was a storehouse in there—the lumber company I think had a storehouse there.

Q. Did you notice whether that was on fire or not? A. No, sir; I didn't notice no more.

Q. Which caught first, the Monahan barn or the lumber pile? A. Well, sir, I could not say. I know the barn got afire and I did not stop to see what was on fire or anything about it. I got out.

Redirect Examination by Mr. Wright:

Q. There were quite a lot of horses in there? A. Yes, sir.

Q. Which way was the wind blowing at the time the fire was coming up the track? A. Blowing northwest as near as I get at it.

Q. Well, with reference to how the track ran, would you say it was blowing in the same direction the track ran or in a different direction?

Mr. Carey: I object to putting the answer in the witness' mouth. Let him tell.

The Court: I do not think he is putting the answer in the witness' mouth. I do not think

it suggests the answer. He asks him which way it was blowing. I overrule the objection.

A. It was blowing—the track was right there—the way I get to it, it ran south there a piece, and then it turned around; I should say the wind was in the northwest.

Q. You mean the wind was in the northwest? A. Yes; coming that way.

Q. Or blowing toward the northwest; which? A. Coming from the northwest.

Q. Coming from the northwest? A. Coming from the south.

Q. Suppose you look at this map. Show us down here along the railroad track. Put the ruler on it. There is Monahan's place. This is the first bend. This is the second bend. A. This is the Monahan place.

Q. Yes. A. Which is the east side of that?

Q. This is the west side. There is north up here. A. I should say the wind was blowing—the wind was blowing right down this way.

Q. That is about the same direction as the track in front of Monahan's place? A. Just about.

Mr. Wright: Witness indicates along the line of the track as shown in front of Monahan's property, southerly to the first bend.

Q. Now you said something about you saw the fire coming over the knoll. Can you point out on this picture (P-6-a) the knoll to which you refer that you saw the fire coming over? A. Here. This fire came right over this knoll here.

Q. Draw a pencil line. A. This knoll here.

Mr. Wright: The pencil line indicates direction of the fire coming over the knoll. (Marks it).

Mr. Carey: Is that the right direction?

Witness: Yes; right over here.

Q. Is that in the right place? A. Yes, sir; if this is the lumber yard here, right over here.

Mr. Carey: Suppose you point to the end of the switch there.

A. This is Monahan's house, isn't it? And this is across the track, isn't it? The lumber yard as I see it is there.

Mr. Carey: Well, can't you tell.

A. I can tell, yes.

Q. Well, you said this was the section house, and this was the new section house. That will give you an idea. A. Well, this is toward Tupper Lake, isn't it? This way?

Q. Yes. A. Well, that's the way—from the south.

Mr. Wright: Mark "Davis" over the line. The jury may be interested in that. (Shows it to the jury).

Mr. Wright: I now desire to read, under stipulation, the testimony of RICHARD F. STOCKTON. I might say to your Honor that I am through with my witnesses now. It is simply a question of reading testimony and interrogatories and depositions. (Reads:)

"*Direct Examination by Mr. Wright*:

Q. Mr. Stockton, where do you live? A. At Tupper Lake.

Q. That is in Hamilton County? A. Franklin County.

Q. In New York State? A. Yes, sir.

Q. Where were you living on September 27th, 1908? A. I was working in the town of Long Lake, at Sabattis, Hamilton County.

Q. In the town of Long Lake; is that the name of the railroad station? A. Long Lake West.

Q. Is the name of the railroad station? A. Yes, sir.

Q. What is the name of the post office? A. Sabattis.

Q. What were you doing there at that time? A. I was working for Mr. Monahan, in a blacksmith shop.

Q. How long had you been at Long Lake West prior to September 27th? A. I went there in the early part of April.

Q. The same year? A. Yes, sir.

Q. On the morning of September 27th—by the way, what day of the week was that? A. Sunday.

Q. On that morning where were you? What did you do? A. Well, I started hunting.

Q. Which way did you go? A. I went south of the railroad track; southwest.

Q. Southwest along the railroad track? A. Yes, sir; two miles.

Q. Then where did you go? A. I left the railroad track and swung off, on Monahan's property and through the woods.

Q. Mr. Monahan's property is which way from the railroad tracks? A. Near West.

Q. How far did you go in that direction? A. Well, I went as near as I can judge, about a mile and a half or so.

Q. And then which way did you go? A. I struck nearly west.

Q. Just describe to the jury your route, where you were? Tell us how you went. A. I went down the railroad track, the same as this (illustrating) is the railroad track; went down this way, struck off that way on the old lumber road; went to the end of it, and then struck that way over on my way home.

Q. Did you go back to Long Lake West? A. Yes, sir.

Q. About what time did you get back there? A. As near as I can judge it was eleven o'clock, a little later. I had no time with me.

Q. Do you know where the Monahan barn was located? A. Yes, sir.

Q. With reference to that barn where did you come into Long Lake West? A. Right near the barn; right close to his barn.

Q. Did you cross the track on your way home? A. Yes, sir.

Q. When you got near the Monahan barn did you notice anything? A. No, sir, I did not.

Q. Did you see a train go through there? A. Yes, sir.

Q. Where were you when the train went through? A. I was in Mr. Gordon's restaurant; he had a little restaurant there and I was in there getting a lunch.

Q. And then where did you go after that? A. I went up to Mr. Monahan's barn to take the road to go to Mr. Monahan's house.

Q. When you got up, to the barn, did you notice anything then? A. No, sir.

Q. Did you notice any fires anywhere around? A. Yes, I did; I noticed smoke over across on the railroad—on the other side of the railroad track.

Q. Just describe where that was. A. It was down the railroad track on the bend where Mr. Christy had a siding.

Q. Below the lumber pile? A. Yes, sir.

Q. About how far beyond the lumber piles? A. Oh, I should say half to three-quarters of a mile; might be less; might have been more.

Q. How much of a fire was that down there at that time? A. Not a very big one, just as I saw it; a small fire.

Q. Was it on railroad property or back in the woods? A. It was close to the railroad property.

Q. Now about how long was it that you noticed this fire after you had seen the train go through? A. It wasn't over fifteen or twenty minutes.

Q. Which way did the train go through? A. North.

Q. Do you know what time it went through? A. No, sir; I had no time with me; something between twelve and one o'clock, if I remember right.

Q. Did you see this fire afterwards? A. Yes, sir.

Q. Which direction did it burn in? A. Burned from Mr. Christy's siding right—the wind blew it right up the railroad track, right from the knoll towards Mr. Christy's lumber pile.

Q. Where were you when the lumber pile took fire? A. I am quite positive I was over by the depot helping, trying to save some goods that was there .

Q. You didn't see the lumber pile take fire? A. No, sir.

Q. After you saw the fire you went right up to the station? A. Yes, sir.

Q. How far was that station from where you were, to Monahan's barn? A. Oh, it might have been 200 feet. From Monahan's barn?

Q. Yes. A. About 500 feet, 600 feet, something like that.

Q. Do you recollect that morning when you were out hunting as to whether there was any wind or not? A. No, sir; there was not.

Q. How was the weather, so far as being hazy or not? A. Quiet.

Q. What? A. Very quiet, I called it.

Q. Very quiet? A. Yes, sir.

Q. Do you know whether or not during the day a wind did spring up? A. It sprung up along in the afternoon.

Q. With relation to the time you saw this fire, was it before or after or about that time? A. About that time the wind blew a little bit.

Richard F. Stockton, for Plaintiff—Cross (read)

Q. When the wind did come up, in what direction did it blow? A. It is pretty hard to tell what points of the compass it blew. I should say it was southwest.

Q. Tell us in what direction the wind was blowing with reference to the construction of the railroad track. A. At southwest.

Q. Blowing from the southwest? A. Yes, sir.

Q. Now, this fire, you say, travelled along in what direction? In what direction did the fire run? A. It ran southwest along the railroad track—it ran north, about northeast, I would say.

Q. On which side of the railroad track? A. On Mr. Christy's side at the time.

Q. Where you first saw it was below the lumber pile, further down the track? A. Yes, sir.

Q. Did it travel in the direction of the lumber pile? A. Yes, sir.

Q. But had not reached the lumber pile when you saw it? A. No, sir; it had not.

Q. Mr. Stockton, when you went down the track in the morning, that was about what time, you say? A. About seven o'clock.

Q. Did you see any fire along the right of way, or near the right of way? A. No, sir.

Q. On either side? A. No, sir; I did not.

Q. You had been there from April until September 27th? A. Yes, sir.

Cross Examination by Mr. McClary (Read by Mr. Carey:)

Q. Mr. Stockton, how long have you resided at Tupper Lake? A. About five years and a half.

Q. You are familiar with the topography of the country from Tupper Lake down to Horse Shoe and Long Lake West? A. Yes, sir; down as far as Robin Wood; Horse Shoe.

Q. You know where the county line between St.

Lawrence County and Franklin County is? A. Yes, sir.

Q. A short distance from where? A. Long Lake West station.

Q. I should have said St. Lawrence and Hamilton counties. About how far is that from Long Lake West station? A. It might be forty or fifty rods; might be more.

Q. Do you recollect on which side of the Long Lake West station is the line? A. It crosses.

Q. On which side of the station, north ,or south? A. North; I call it north.

Q. And is it on the north side of the station? A. Yes, sir.

Q. Does the railroad take a fairly sharp turn to the east there about where the county line is? A. Yes, sir; I believe it does.

Q. From where it comes around that small curve there, as it goes on to the south past Long Lake West station, is there a long distance of straight line? A. Yes, sir.

Q. And down perhaps a mile away is there another curve that comes around toward the Monahan tract, a mile or a mile and a half? A. I think it turns the other way.

Q. Well, there is a curve where it turns toward the west, down perhaps a mile and a half, is there not? A. There is a curve one way, and then it curves the other. As you are going along the railroad track, the curve to the left would come first.

Q. There is a short curve to the left and then a long curve and straight on toward the Monahan tract, is there not? A. Yes, sir.

Q. Do you know where the line between Mr. Christy's south line and Dr. Webb's preserve is? A. Yes, sir.

Q. That is indicated by a tall wire fence, so marked? A. Yes, sir.

Q. Do you now where Mr. Monahan's land extends on the westerly side of the track beyond the point where the line comes to the track on the east? A. No, sir; I do not.

Q. Do you know that Mr. Monahan's land does extend beyond the Christy line on the west side? A. Yes, sir.

Q. And it extends down to Bachelor's tract? A. I do not know how far down that way it goes; I didn't know where the line was.

Q. You had been working for the Monahans during that summer? A. Yes, sir.

Q. What was your work, please? A. Blacksmithing.

Q. Were you further than Monahans during the summer? A. Once in a while I was on Sunday; never through the week days.

Q. Were you ever south of the upper barns, immediately that way? A. Once before, I believe, during the summer.

Q. You were there after they were clearing the brush on the upper part? Were you there after that? A. No; I was not.

Q. They had, some years before, cleared quite a space near the barns, had they not? A. Yes, quite a ways away from the barns.

Q. Well, quite a space from the barns; cleared quite a space? A. Yes.

Q. Were they clearing a larger space that summer, so far as you know? A. No, sir.

Q. You don't know as to that? A. No, sir.

Q. You remember the day when Long Lake West burned up? A. I think I do; quite sure of it.

Q. Did you lose anything, personal property? A. Yes, sir.

Q. Do you know what time, about, you left? A. I do not. Everything was all hurly-burly.

Q. Was it after noon? A. Yes, sir.

Q. After one o'clock? A. Yes, sir.

Q. After two o'clock? A. Yes, I think it was after two o'clock.

Q. After three? A. I would not say.

Q. Some time in the afternoon? A. Yes, sir.

Q. Were the people all gathered into this freight train that was there and taken to the north? A. Yes, sir.

Q. You don't know whether any were left in the village or not, do you? A. I do not.

Q. Was the station burning at the time the train pulled out, do you know? A. No, it was not.

Q. The other buildings up beyond, to the southeast of the station were on fire when the train pulled out, were they not? A. One, I think.

Q. Did you, some time before the train pulled out and you took the train, hear this big fire coming from the southeast? Did you hear it? A. I saw—

Q. Did you hear it? A. Yes, sir, I did.

Q. Was it roaring so that it could be heard anywhere within five miles of Long Lake West? A. I should not say it roared as hard as that, to hear it five miles; that is quite a distance.

Q. Did you notice the smoke rolling up at the time you heard this roaring? A. No, sir; I did not.

Q. Did you see where the big fire was coming from? Did you see where it came from? A. I did not see any fire coming from the southeast.

Q. Did you hear it come, from a generally southeasterly direction? A. No, sir; I did not hear it.

Q. What portion of the little village was burned first? A. The Monahan property; the Monahan barn; Mr. Jennings' barn."

Mr. Carey: Do we agree where the Jennings' barn was?

Mr. Wright: Surely. The Jennings' barn was the one immediately across the track, as I understand it, right over here (indicating).

Mr. Carey: At any rate it was across the railroad track, either this building close to the road or up the road. Our direct evidence will show later on which was the barn and which was the house. Mr. Jennings had two buildings on the westerly side of the railroad; one was a barn and the other was the house.

Mr. Wright: Well, that (indicating) is probably it. The map was made up showing present conditions.

Mr. Carey: This shows the foundation. The barn was this little building up on the road that is sketched here.

Mr. Wright: Mark it "Jennings' Barn."

"Where were those explosions that were heard when the fire first struck the village, do you know? A. Mr. Monahan's barn, one of them.

Q. Upon the road to Long Lake West? A. Yes, sir.

Q. And that is practically southeast from the station, is it not? A. Southeast from the station?

Q. Southeast from the station—is it not? A. Nearer south.

Q. And that fire was coming over the hill, was it not—burned up those buildings? A. In my opinion the fire that burned up Mr.—

Q. No, just answer one thing—where the fire was coming that burned up those buildings. A. I was trying to tell you; the fire that burned up Mr. Monahan's house and barn is the same fire, if I remember right, that burned the lumber piles; it was going right that way.

Q. I think you are correct. You referred to the Monahan's house and buildings where the explo-

sions were heard on the road, coming down from Long Lake West? A. Yes, sir.

Q. Now you spoke some time ago of the fire coming from the southwest, the wind being in the southwest, with reference to the Christy corner and the Webb corner—you know where I mean, do you? A. Yes, sir.

Q. Where was it that you discovered the smoke that morning, about eleven o'clock, did you say? A. It was half a mile.

Q. Where were you standing with reference to the railroad track when you saw this smoke that you say you saw? A. You know where Mr. Monahan's barn was?

Q. Which barn? The large barn? A. Yes, sir.

Q. I do. A. I was right about in front of the door of that barn.

Q. That large barn was where, from the station, for instance? Q. Yes, sir.

Q. Where? Which direction from the station? A. That barn?

Q. Yes, the big barn we are talking about now. A. Southwest.

Q. And on the other side of the track? A. Yes, sir.

Q. On the westerly side of the railroad? A. On the west side of the railroad track.

Q. How far back from the railroad is the big Monahan barn? A. In a direct line I should say about 300 feet.

Q. How high is it above the railroad, do you think? A. I wouldn't say.

Q. No, you are not being asked that, Mr. Stockton; about how high? Does it stand upon a hill? A. It might have been 50 feet—I forget the level of the railroad track—and it might have been more.

Q. Not over 100? A. No, sir; I don't believe so.

Q. From that point you can see quite a long distance south, can you not? A. Yes, sir.

Q. But from that point the rails, except right in front, are hidden down below, are they not? A. Yes, sir.

Q. So that when you saw this smoke it would be an impossibility for you to say whether it was on the right of way or on either side, would it not, Mr. Stockton? A. At the point where I first saw the fire, there was a bluff of rock on the point of the railroad track, and near that bluff of rock the smoke burned.

Q. You don't answer my question. From where you stood it would be impossible for you to say as to whether it was on the right of way or off of the right of way, would it not that you saw that smoke? A. I did not say I saw it on the right of way.

Q. It would be impossible for you to say, wouldn't it? A. I should say it would be impossible.

Q. Don't you say so, Mr. Stockton, because you could not see the rails—could you? A. No, sir.

Q. And that was down beyond the first curve, was it not? A. Yes, sir.

Q. Do you recollect what happened in Long Lake West right after dinner, in regard to the movement of the fire service train that you went out on from the village? A. Yes, sir.

Q. You understand my question? A. That I went out on?

Q. Do you understand my question? A. No, sir, I do not.

Q. When did you first notice that the fire service train was there at Long Lake West? A. On that Sunday?

Q. Yes. A. It went from Long Lake West on its way to orse Shoe to get a tank full of water.

Q. You supposed they went for water? A. That is what they said.

Q. What time did they come back? A. Well, I don't know.

Q. Do you know about what time they came back? A. No, sir, I do not.

Q. Do you know where they went after they came back? A. They went on Mr. Christy's and stopped there; went on Mr. Christy's siding and tried to put the fire out.

Q. They went down to the Christy siding? A. Yes.

Q. Did they go in on this Christy siding? A. Yes, sir.

Q. And that is where the lumber piles were stacked? A. Yes, sir.

Q. Do you know whether they laid any hose down there or not? A. I would not say. I went away at that time. I saw the fire service.

O. You saw them going in? A. Yes, sir.

Q. You do not know what they did in there? A. No, sir.

Q. Did you see them come out? A. No, sir; I moved away.

Q. You don't know in what condition the fire was down at the siding when they drew out this fire service train, do you? You say you were not there—were you—at that time? A. I was in Mr. Monahan's barn.

Q. At the time they drew out? A. Yes, sir.

Q. What was the condition when they drew out ther train from that siding? A. The fire had got around them, got in behind them so that they had to leave it.

O. Then when they drew out the fire commenced to burn the lumber piles? A. Yes, sir.

O. Did you notice whether they left any of their apparatus in there—any hose—to get out? A. No, sir.

Q. Did they then move down to the station? A. I don't know.

Q. Where did you take the train? A. I went to the station, but I wouldn't say it was the fire service train I went out on. Didn't they have a freight train there?

Q. Possibly you wouldn't know. Did you know the conductor you went out with? A. No, sir.

Q. Do you know John Riando, the conductor? A. No, sir.

Q. Would you know him if you saw him in court?

Q. The man that took you out? A. I wouldn't know him; never knew any of the employees of the railroad company personally.

Q. Did the clerk, the agent, go out on that train? A. Yes, sir.

Q. There were one or two left in the village that did not take that first train—that could not be found—were there not? A. I was one that waited for the second train.

Q. And at the time you left was the station on fire? A. No, sir.

Q. Now, Mr. Stockton, what was the general condition of the land owned by Monahans south of their barns, their big barns, on the westerly side of the road, further down to the other end, as to whether it was practically denuded or whether it was— A. They used it for pasture.

Q. And had the lumber been removed? A. Yes, sir.

Q. A great many years before? A. I don't know how many.

Q. You can tell whether it had been— A. It had all been lumbered.

Q. Within a year or so, or years before? A. It could have been years before; but I couldn't say just how long.

Q. Could you tell whether it had been burned over some time before or not? A. No, sir.

Q. You could not tell that? A. No, sir.

Q. Didn't you notice the blackened space all through that section, down through Mr. Monahan's tract? A. No, sir.

Q. Standing all blackened? A. It might have been through it; I didn't notice that.

Q. Most of it was small brushes and— A. Yes, sir.

Q. Refuse that grows up after? A. After a fire; partly of wood.

Q. And that was true clear down to the railroad line—clear down to the right of way of the railroad? A. For a distance away from the barn it was; near the barn was all cleared, around to the railroad track.

Q. There was a little piece of green right near the barn, was there not? A. Yes, sir.

Q. And that was also true on the Christy siding; there was one little fringe of green down there, was there not? A. Well, now, I don't know myself.

Q. What was the character of the land and timber on the Christy siding, adjoining the railroad, prior to this Sunday fire? A. It had been lumbered.

Q. Did it look as though it had been burned over—looking at it? A. I think it had, partly.

Q. Don't you know it had? A. No, sir, I do not know it had.

Q. What was the earliest time in spring that you were over at Long Lake West? A. What is that?

Q. How early in the spring were you over? A. The early part of April; I don't know just what date.

Q. During May were you back and forth over the right of way? A. Which way?

Q. The right of way, either way? A. No, sir. I wouldn't say during the month of May. Pretty hard matter to remember such things; but I was back and forth from the station to Mr. Monahan's barn during that time.

Q. You had to cross the right of way? A. I had to cross the right of way, yes, sir.

Q. You were practically required to go back and forth two or three times at least? A. Yes, sir.

Q. Do you remember about the clearing of the right of way along that section in May? A. No, sir; I do not.

Q. Do you know the section foreman, who was the section foreman at that time? A. Yes, sir.

Q. What is his name? A. Mr. Lashaway.

Q. Do you know where our section house was? A. Yes, sir.

Q. How near was that to Monahan's big barn? A. Just about half-way from the station.

Q. With reference to the railroad track, where was it with reference to the barn? A. It was a little nearer, say, from Mr. Monahan's barn to the station.

Q. And the section house was right close to the right of way, wasn't it? A. Yes, sir.

Q. Do you recollect whether it was up somewhat on the Monahan's tract? A. No, sir; I think it was right on the right of way.

Q. You do not know about that, do you? A. I am quite positive it was on the right of way.

Q. Do you recollect whether the section house stood up also somewhat like the barn, away from the railroad track? A. It did, yes, sir.

Q. How many feet would you judge from the floor of the section house? A. High?

Q. Yes, how high up does the floor of the section house stand, at that distance from the track?

A. Might have been ten or twelve feet; might have been more.

Q. And it might have been twenty-five, might it not? A. Yes, sir.

Q. From the iron I mean—from the tracks? A. Yes, sir.

Q. And the section house faced the tracks, I suppose? A. The railroad track.

Q. Was the month of September and also the month of August of that year very dry? A. Yes, sir.

Q. So far as your knowledge goes, was there any rain in the month of September, until after this burning of Long Lake West? A. Now, I don't remember.

Q. As far as you can remember? A. I don't think there was.

Q. It was an exceedingly dry time? A. Yes, sir.

Q. Did you personally know of the fact that fires were raging at this time all through the Adirondacks? A. Yes, sir.

Q. And during that month of September, could you see smoke in almost any direction, back miles away from Long Lake West? A. I could not, because there was so much smoke there that you could not see very far away.

Q. A short time before this fire of Sunday, did you know of a large crowd of men fighting fire over in Mr. Christy's preserve? A. No, sir, I did not.

Q. Don't you know anything about that? A. Never.

Q. Do you know of any fire being over there? Over in Mr. Christy's preserve? A. No, I do not. My business did not call me away, so I could not pay any attention.

Q. You did not know that there were one hundred or two hundred people over there fighting fire for days? A. No, sir; I did not.

Q. Do you know now whether any fire occurred over in Mr. Christy's preserve? A. I do not.

Q. You know there was a large fire over there? A. Yes, I do.

Q. Do you know it was prior to the burning of Long Lake West? You know it now, do you? A. It was a few days, yes.

Q. You were there at the Monahan farm buildings for the week prior to that Sunday? A. No, sir.

Q. Where were you for the week prior to that Sunday? A. I was in Mr. Monahan's house down on the other side of the railroad track, on the road leading to Long Lake West.

Q. You didn't go over to the barns at all in that week? A. No, sir.

Q. You know the Monahan house, where you say you were; didn't you for a week previous to the Sunday, see large amount of smoke over in the direction of the Christy preserve? A. To the southwest.

Q. No, not to the southwest. Practically east. A. No, sir. May I ask a question? Which way do you call east from Long Lake West?

Q. I try to call that east, Mr. Stockton. Do you know where East Charley Pond is? A. Yes, sir.

Q. Do you know where Bear Pond is? A. Yes, sir.

Q. You know the country, for instance, between Bear Pond and East Charley Pond? A. No, sir. I do not. I never was there, from Bear Pond to East Charley Pond.

Q. You know where the two ponds are? A. Yes, sir.

Q. Did you know of the smoke coming from the land lying near those two ponds for a whole week before? A. No, sir.

Q. East Charley Pond would be about in what

direction, according to Long Lake West? A. Pretty near south, southwest.

Q. Do you know how far East Charley Pond is from Mr. Christy's line, the southerly line? A. No, sir.

Q. Do you know how far those lakes are from Long Lake West, about how far they are? A. No, sir; I do not. Bear Pond is about two miles and three-quarters, taking the Long Lake Road.

Q. Do you know whether Charley Pond is on the other side of the Bear Pond? A. On the right hand side.

Q. On the right hand side as you look from Long Lake West? A. Yes, sir.

Q. And near Christy's south line? A. I do not know where the line is.

Q. Were you over there after the fire? A. I was over there once.

Q. Did you then see where fires had burned? A. Yes, sir.

Q. It showed extensive fires around one end of the Bear Pond and also around East Charley, did it not? A. I saw where the fires burned around East Charley Pond.

Q. And the westerly section of Bear Pond away from the road? A. No, sir.

Q. You did not go there? A. No, sir.

Q. You have said that at the time you saw this smoke down at the corner there, that the fire was from the southwest? A. Yes, sir.

Q. The wind was from the southwest? A. Yes, sir.

Q. The wind being in that direction, would it carry the fire from the railroad or carry it on the railroad? To that I have your answer, it would? A. Along the line of the railroad.

Q. You didn't see that burning along the line of the railroad? A. I did not. I saw it burning

right over that hill from Mr. Christy's siding. It didn't take a straight line right across.

Q. You saw it come right over the hill into the Christy preserve? A. To the lumber pile.

Q. About how far as it crossed over the hill was it from the railroad? A. It followed it.

Q. About how far, as it came over the hill, was it from the railroad that you saw? A. It was all a sheet of fire, all across there.

Q. Just what time was that whole sheet of fire? A. Along in the afternoon.

Q. How many hours or minutes before you left Long Lake on that service train, was it that you saw that condition? A. It might have been an hour and it might have been more; might have been a half hour or less.

Q. Did it take the fire an hour to come from where you saw it down to the track? A. The fire was burning in the lumber piles before we left Long Lake West.

Q. Burning in the lumber piles when we took out our train out of that siding? A. Yes, sir.

Q. Have you seen the mile posts along the line of the road? A. Yes, sir.

Q. And they are marked mile posts so and so —whatever the number is? A. I don't know about the number; they are marked so many miles from a certain place—from the beginning of the road.

Q. So many miles from Herkimer, are they not? A. Yes, sir.

Q. Should you say about once a mile is one of those posts? A. I suppose so.

Q. Do you know what mile post it is that is right at the county line. Have you ever noticed? A. I think it is 98.

Q. Well, you have got it within three miles. A. I wouldn't swear to it; I wouldn't say for sure.

Q. Can you think of any other mile post? Can

you think of the mile post which is just beyond Christy's corner where the wire fence is that Dr. Webb built—the number of that mile post? A. There was a mile post there; I wouldn't say what number it was, for it has been some time since I travelled there.

Q. I understood you to say that you did not know just how far Christy's lands extend in point of miles? A. No, sir.

Q. But did know where his southerly line is by the fence? A. I know where they crossed the railroad track.

Q. You know where that big fence that Dr. Webb built, runs back? A. All I know is where it leaves the railroad track.

Q. That is what I mean; the point where it leaves the railroad track? A. Yes, sir.

Q. Did you ever follow it a little ways? A. No, sir.

Q. It is an unusual fence so that anyone would notice it that ever saw it? A. It is.

Q. Built to protect game? A. Well, I suppose so.

Q. One of the landmarks up in the Adirondacks, isn't it, that fence? A. Well, I should think so.

Q. Where you saw the fire, how near, if you can judge; where you saw the smoke—how near was that to that Christy corner? We will call it the Christy corner. A. I think as near as I can judge, about half a mile.

Q. Which way? A. Toward the railroad station.

Q. Toward the station? A. Yes, sir.

Q. Then that would be where, with reference to the curve, right about at that point or just below? A. Yes, sir.

Q. Just below? A. Right on that curve.

Q. It curves toward the west as you go toward Herkimer? A. Yes, sir.

Q. Did you report to anyone seeing that fire down there that morning? A. No, sir.

Q. Did you go and try to put it out? A. No, sir.

Q. Didn't do anything about it? A. No, sir.

Redirect Examination by Mr. Wright:

Q. Mr. Stockton, there seems to be some confusion about the two Monahan barns. A. Yes, sir.

Q. The barn which you referred to, which you were near when you saw this fire was located where, which side of the railroad? A. On the west side of the railroad track.

Q. That would be the upper side, as shown on this map? A. The larger barn.

Q. It is back of the section house? A. Back of the section house.

Q. And the building marked "4" on the map, above that, that is where you were when you saw the fire? A. Yes, sir.

Q. Is that the barn you said was burned first? A. No, sir; the other barn.

Q. The one marked "3"? A. That was the first building I know was burned.

Q. That was the first building you know was burned? A. Yes.

Q. And did you see the fire in the Gordon place? A. Did I?

Q. Yes? A. See the fire in Gordon's place? No, sir. I did not. I wasn't on that side of the railroad track at the time the place burned.

Q. But you saw the fire from the barn, the Monahan barn, down toward the station? A. Yes, sir.

Q. And you never went back on that side again? A. I never went back on that side again.

Q. That morning when you went down the track did you see any signs of any person coming along the track? A. No, sir.

Q. Did you see any one along the track on the way down? A. No, sir.

Q. Did you know of any one coming around that vicinity? A. No, sir."

Mr. Carey: On recross examination the witness identifies the building marked on this little map as number 5, where the dynamite was stored.

Mr. Wright: I will read the testimony of JAMES J. BARRY.

"*Direct Examination by Mr. Wright:*

Q. Mr. Barry, where do you live? A. At present I live in Detroit, Michigan.

Q. What is your business? A. Foreman of an automobile store, Ford Motor Company.

Q. How long have you been there? A. A little over two years.

Q. In September, 1908, where were you living? A. I was living in Long Lake West.

Q. How long had you been there prior to that time? A. I got in there the previous March of that year.

Q. Who were you working for? A. I was working for Mr. Long.

Q. Do you remember the Sunday the town of Long Lake West burned? A. Yes, sir.

Q. That was on that day, do you remember? A. On the 27th, Sunday.

Q. Where were you on that morning? A. I went in that morning for breakfast five or ten minutes after six o'clock.

Q. Which way did you go? A. North; north of the railroad track about ten or twelve rods.

Q. Went north of Long Lake West; is that right? A. Yes, from Long Lake West, north.

Q. That would be about in the direction— A. Towards Horse Shoe; up that way about ten or twelve rods, then turned off on the old road going about south, southwest.

Q. Where did you go then? A. That led on Mr. Low's land, in the swamp; after getting in the swamp, it led to the old siding; went down the railroad siding, and from that railroad siding I went into the swamp belonging to Low, across Monahan's land and continued on toward Bachelor's.

Q. After you left the swamp, what kind of land did you travel over? A. Clear land; went right to Monahan's clearing.

Q. High land or low land? A. High land.

Q. From that land could you look over some distance? A. Oh, yes, could see for some miles west, of a clear morning.

Q. How was the air that morning, the atmosphere? A. Perfectly still.

Q. Could you see for some distance off to the south? A. Yes.

Q. You know where Charley Mountain is? A. Yes, well.

Q. Could you see off that way? A. Yes, could see well over the country there.

Q. Did you see any fire burning that day in that section? A. No, there wasn't any sign of fire at all that morning.

Q. Was there any wind? A. No wind at all.

Q. You were on Monahan's land; where did you go after that? A. I entered in on Bachelor's.

Q. That is, you traveled generally in a westerly direction? A. Yes. Continued on probably until about ten o'clock, half past ten, when I started to go back. I got the deer and left it there and came back to Long Lake West.

Q. How did you come back? A. Came back the same way I went out.

Q. Went down into the siding, that way, and then came out? A. With the exception that I did not go up as far on the railroad track as I did when I went out. I crossed to Jennings' house, right straight across from the depot.

Q. Where is that? A. Right straight across from the depot.

Q. Right straight across from the building marked No. 1 on this map? A. What is No. 1?

Q. The station. A. Yes, straight across from there.

Q. What time did you get back to Long Lake? A. Somewhere about ten or fifteen minutes after twelve.

Q. Where were you living at that time? A. I was living in the hotel.

Q. Where was the hotel? A. The hotel was on the other side of the depot?

Q. Beg pardon? A. Right straight by the depot a little north.

Q. The building marked "6". When you got back did you see any signs of fire? A. No, there wasn't any signs of fire up to then.

Q. Then what did you do after you got back to the hotel? A. I went in to dinner; went upstairs and had to make a change of some clothes I had; had a little blood on them; wanted to get them off.

Q. Then where did you go? A. Came back to the hotel stoop.

Q. What time was that? A. I should judge five or ten minutes of one.

Q. How did you fix that time? A. Well, it was about ten minutes after twelve before I had dinner, and it took me at least half an hour, and that would make it ten minutes of one, in the neighborhood of one o'clock.

Q. Do you know whether any train went through? A. I believe one passed while I was upstairs.

James J. Barry, for Plaintiff—Direct (read)

Q. When you got on the stoop, what happened, if anything? A. Mr. John Monahan was there. He passed the remark about some smoke down the line.

Q. Never mind what he told you. What did you see? A. I saw two columns of smoke rising on both sides of the railroad track.

Q. You say down the line; by down the line you mean toward the southwest; past Mr. Christy's lumber piles? A. Yes.

Q. How far down the line? A. I should judge about three-quarters of a mile; a mile, may be.

Q. Do you recall that there was a bend in the railroad track down there? A. Yes.

Q. With reference to the bend you say about where the smoke was? A. The smoke was on that little knoll this side of the bend; there is a big ditch there, you have to cut right in close by it.

Q. In reference to the railroad, how close to the railroad? A. About fifteen or twenty feet from the railroad, I should say.

Q. From the tracks of the railroad? A. From the tracks of the railroad, yes.

Q. Which side— A. I mentioned the railroad track; I mean where the rails are laid on the ties.

Q. The physical railroad; which side of the railroad? A. That was on the east side.

Q. The east side was whose land? A. Right close by Mr. Christy's land.

Q. What did this smoke look like? Describe it. A. Like two smokestacks, one each side of the railroad, one on the other side as well.

Q. You mean smoke going up? A. Going right up straight. There wasn't a breath of air; everything was still.

Q. There was a volume of smoke? A. Well, the smoke was rising from the ground probably where it started from.

Q. You had seen fire burning up the mountains all that summer? A. Yes, sir.

Q. Was it a very great fire or a small fire? A. Oh, it was, when it started, a small fire.

Q. Where did you go after that? A. I came right down in that direction. I came down to go to bring in the deer I had shot that forenoon. I traveled up by Monahan's barn.

Q. How did you get to Monahan's barn? A. I went down the railroad, down towards the lumber yard, and turned in by the road, passed by the barn.

Q. There is a road that crosses the track there? A. Yes, there is a road that crosses the track there.

Q. And that road was located about where in reference to the station and the lumber piles? A. Beg pardon?

Q. About how far between those lumber piles and the station was that road? A. I should judge that road would be about a quarter or half mile from the depot.

Q. Between the lumber piles and the station? A. Yes, between the lumber pile and station; about midway, I should say.

Q. Monahan's barn that you referred to is located where? A. To the westerly of the track. That is where I was going. I passed by it.

Q. You know where the section house was? A. Yes.

Q. With reference to the section house where was it located? A. With reference to the section house it must have been five or ten rods from where I turned in.

Q. Monahan's barn was located in what direction from the section house? A. A couple of hundred feet to the back of the section house.

Q. You mean to the northwest? A. No southeast of it.

Q. To the south? A. Yes.

Q. Do you know what this building is that I point to, marked "4" on the map? Do you know what that was? Can you see well from there? A. I can see, but I don't know what it means from here.

Q. Do you know what this square of pink is? Do you know what that represents on the map? A. Must represent land around there. I don't know exactly what it does represent.

Q. That represents the lumber piles. Can you tell us what this building over here (indicating) represents—right across up on the hill to the lumber piles? A. That would be Gordon's house, or section house, wouldn't it? They are close together there.

Q. What I want to know is this: Where was Monahan's barn located with reference to those houses, in which direction? A. It was a little further from the section house, that way.

Q. By 'that way' you mean up on the map? A. Yes.

Q. Straight from the railroad? A. Yes.

Q. About how many feet from the railroad, you say? A. Oh, about 250 feet, I should think.

Q. Quite a little higher than the railroad, is it not? A. Yes, quite a height.

Q. As a matter of fact it is practically all high ground back of the railroad, is it not? A. Yes, all high ground.

Q. Where did you go from there? A. I walked over the same ground, crossed over Monahan's, right into Bachelor's, and I got that deer; coming back I came back on Mr. Low's land.

Q. And you went further back to the northeast? A. No, went back to the same place I went in the morning.

Q. You went where the deer was? A. I went

where the deer was, yes, and got the deer and started back with the deer, but I took the low land and came back; then the smoke was coming right across where I was at the time I was coming close by the Monahan barn.

Q. Then you took the low land over by the other side of the road? A. I took the low land because I could not get on to the railroad because the fire started on the railroad. The fire came over that mound, and come in on that land, so I took the lower end near the river.

Q. And that would be over the road, over the railroad? A. Yes. That is Monahan's land, right between there and the railroad.

Q. You came back in that direction? A. I came back through the swamp in the same direction I came at noon, right in on the old siding.

Q. On the siding? A. On the siding also of the Brooklyn Cooperage.

Q. That comes on the railroad track where? A. I didn't go to where it comes up on the railroad track.

Q. Which direction from Long Lake West Station? A. The northerly part of the station. I didn't go exactly so far as that. I came midway between the road to Monahan's barn and the depot. There is an old road came in there and I got on there and got into town.

Q. Did you go over as far as Monahan's barn? A. No, I could not get that far at that time; the place was all aflame.

Q. Which Monahan barn did you mean that you could not get to, the one on the hill? A. I couldn't get to either one.

Q. Which one did you refer to? A. I was referring to the one down by the lumber pile.

Q. Down by the lumber pile, the one marked "3" here? A. Yes; that is the big barn.

Q. The barn on the hill is the one that is known as the big barn, is that right? A. Yes, that is right.

Q. When you got there and it was burning, what was the first thing you saw burning? A. The lumber pile was all aflame at that time. Mr. Jennings' barn was completely gone.

Q. Mr. Jennings' barn was where? A. Right across from the depot.

Q. Mr. Jennings' barn was on the opposite side of the track? A. Yes; that was completly burned; on the west side.

Q. The northwesterly side? A. His house was practically gone.

Q. His house was gone? A. Practically gone. Monahan's small barn, the one where the dynamite was—the dynamite went up at that time.

Q. Did you notice the buildings down here where Gordon lived—the little building along the railroad track where Gordon lived? A. No, I didn't notice that. I couldn't see very well that distance for the heavy cloud of smoke at that time.

Q. You say Monahan's big barn was on fire at that time? A. No, I could not see that very much, for the heavy cloud of smoke there; but in the town those buildings were all ablaze; could see quite a lot there.

Q. You told us about seeing these fires down the track when you came out on the hotel porch? A. Yes.

Q. When you got down by Monahan's barn, did you notice them again? A. It was just the same thing; didn't seem to be anything different from what it was from the hotel; just the same.

Q. Did you get closer to them? A. Oh, yes, I got very close, a quarter of a mile closer at least, anyhow.

Q. Just describe the fires as you saw them, as far as you saw them. A. Oh, nothing just smoke, two columns of smoke; not a single thing else; just smoke rising in a column; nothing to disturb it; the air was perfectly still.

Q. Can you say about the wind after that, along later in the day? A. The wind came up awful strong as I started to come back; it blew half a gale.

Q. About the time you started getting back? A. About the time I started getting back.

Q. About what time would that be? A. I could not tell; I don't know what time it was.

Q. When you were over there by Monahan's big barn, did you still see over toward Charley Mountain? A. Oh, yes, that was perfectly clear that day.

Q. Did you see any fire in that direction? A. No sign of fire.

Q. Did you see over to Bear Pond? You know where Bear Pond is? A. Yes.

Q. Did you see any fires over that way? A. There wasn't any fire there at all at that time; but the fire was under control; the people had it under control.

Q. Just prior to September 27th did you do any patrol work along the tracks? A. Yes, I was called on by Mr. Jennings to fight fire; had to go.

Q. Where did you patrol the tracks? A. I patrolled the tracks north, towards Horse Shoe, or towards Big Tree.

Q. From where? A. From Long Lake West station.

Q. During that time did you see any engines drawing any trains, throw sparks and setting fire to grass and weeds? A. I saw ties on fire—(interrupted by objection). A. (Continuing) On Wednesday of that week I started up at two o'clock

fighting fire; after dinner we started out and put out several fires on the track; the ties were on fire.

Q. With reference to passing trains, what did you see? A. None; they were passing, however; before we left for dinner. We traveled the track down where we were fighting the fire; saw them passing down the track.

Q. During that same time, from Wednesday until Sunday, did you see any fires on the track which were burning on the ties between the rails? A. Not on Saturday or Sunday.

Q. During that week? A. Up to Wednesday and Thursday, and prior, yes, I saw fires on the track.

Q. What caused those fires? A. Passing trains.

Q. You have said that. You saw what, anything there? A. Saw the ashes right—cinders right on the ties.

Cross Examination by Mr. McClary (read by Mr. Carey):

Q. There were no fires that had not been extinguished on the line that you know about? A. Not that I know about.

Q. You spoke about that fire—referring to Bear Pond, I think—as being under control? A. Yes.

Q. What did you mean by that? A. I meant that they had it trenched; had the fire stopped. Of course there might be a small portion here and there—

Q. Were you over there during those fires? A. Yes, sir.

Q. Did you take part in fighting the fire? A. Not over there, no; no, sir, I did not take part in fighting the fire there.

Q. You knew of 200 men or more being there fighting fires? A. I don't know how many men there were, but I know there were a good many.

Q. Some of those fires were burning over a large extent? A. Quite a distance back, though, from the town.

Q. You understood that on Friday it was entirely under control, didn't you? A. On Wednesday.

Q. Early on Wednesday? A. On Wednesday.

Q. And that fire remained then under control up until after Sunday? A. That fire there?

Q. Over at Bear Pond, East Charley? A. That fire didn't start up Sunday that I know of.

Q. I didn't ask you that. That fire remained under control up to Sunday? A. I think it was extinguished altogether at that time.

Q. So far as you know? A. Yes.

Q. Where were you standing when you took this view that morning and observed that there was no sign of fire anywhere in the horizon? A. About twenty or thirty yards from Monahan's barn, right on the clearing.

Q. On the clearing? A. Yes.

Q. That would be south, a little to the west of the barn? A. Yes.

Q. And from that point you could see five miles down the track, couldn't you? A. Yes, I could see five across the country.

Q. You could see five miles to the north, toward Horse Shoe, that point, couldn't you? A. I could see quite a distance.

Q. Could you see up the lake country? A. I could see going toward Bachelors.

Q. Could you see the Bogg river tract which lies right north of Long Lake West and between there and Horse Shoe? Could you see that tract from that point where you were? A. I could see quite a distance north, yes. I couldn't see in a line right straight through.

Q. Right opposite from where you stood and

right back from the station there, there is a mountain extending back toward Bear Pond, isn't there? A. Yes.

Q. And this road that goes to Long Lake extends from the village up that mountain, doesn't it—winds around over Bear Pond? A. Yes.

Q. So that standing where you were, all of that mountain over across there, was directly southeast or practically south? A. Yes.

Q. Right across the track? A. Yes.

Q. Now, that was the condition of things so far as the air and the smoke and fires and wind until after twelve o'clock, when you came out after dinner, so far as you are concerned? A. It would be about one o'clock, I guess.

Q. When you came out from dinner, up to that time you had seen no sign of any smoke anywhere? A. No, sir, there wasn't practically a sign in any part of that country. There wasn't a sign of any description when I was coming in, around in any part of that country, that I could see.

Q. Please tell the jury and me how large were these two parallel columns of smoke. A. Well, I should say they would be about two feet in diameter.

Q. About how far were you from them? A. About three-quarters of a mile or a mile.

Q. With reference to the bend—do you know where the bend is, that bends around toward Monahan's tract? A. Yes, sir.

Q. Do you recollect the little mound where the Christy corner is, where the fence comes down? A. Where the Webb fence comes down?

Q. Where the Webb fence comes down to the railroad; do you recall that? A. No; it is quite a ways down; I don't know exactly where it is.

Q. I was going to call your attention to the mound or mountain this side and ask you if that

is where you saw the fire. The land on both sides of the road around that bend had been lumbered and burned over prior to this summer, had it not? A. Part of it, I guess.

Q. Substantially all? A. All the land across that was all practically burned over with a few exceptions.

Q. The Monahan farm tract down toward the Doctor's? A. Monahan's cleared? I don't know of any fires there.

Q. The ground is cleared? A. Yes.

Q. A mile back from the road there was standing timber that had black on it? A. I don't know of any fire being in that part of the country. I know it was close up to the depot, around the town there. Stumps there. Quite a lot of lumber burned in there some time before that.

Q. All of that tract called the Bogg River tract, that was a denuded tract right straight north of Long Lake West? A. I am not very well acquainted with that end of it.

Q. I did not quite understand where you went when you started on your hunting expedition; you said you went north on the railroad? A. Went north on the railroad towards the St. Lawrence line; I turned in on that siding.

Q. Which siding is that, the one to the right as you went north or the one to your left? A. There is only one to the left, the Brooklyn Cooperage there.

Q. I don't know which you mean. A. This is quite a ways north.

Q. You mean the first one to the left? A. Yes, sir.

Q. The one of I. Jennings there? A. Yes.

Q. Did you go over on the road toward Bogg River, or did you swing in toward the west? A. I went the full length of that siding.

Q. And from the end of the siding— A. Went up on Monahan's.

Q. Now, from the barn—what you call the big barn—to Monahan's south line, before you get to Bachelor's, is about how far? A. I don't know exactly. I just went by signs I saw posted on the trees.

Q. Should you say two and one-half or three miles? A. Not near so far as that, I don't think.

Q. Do you say that from the Monahan barn it isn't over two miles? A. About two miles, I should judge. I should judge about two miles and a half. I wouldn't swear to that. I don't know exactly.

Q. In going down there how far were you from the railroad in general as you went down on the Bachelor tract? A. I was quite a distance from the railroad.

Q. About how far? A. I must have been about a mile straight in from the railroad.

Q. During what time did you take notice of the general condition of the atmosphere? A. I didn't take notice of that at all.

Q. Do you recollect when they called help over into the Christy tract to fight this big fire over there—how many days it was before, do you recollect? A. I remember Mr. Gregory getting some men in Tupper Lake to work over there.

Q. About how long before the Long Lake West fire was it that help was called over into that section to fight fire? A. I know some men went in there early that week to fight fire there.

Q. Do you recollect when they first got a gang of extra men? A. No, I don't.

Q. Did you know of extra gangs being sent there—large gangs? A. All I know of fighting fire over there was to see the men coming out and then the men going back in their place. I didn't know they were called over.

Q. About how far from the little village of Long Lake West were they fighting this fire over there? A. I should say that would be about five or six miles—five miles.

Q. How far is it from the road to Bear Pond? A. About three miles from there.

Q. Would you say from the point where they were fighting the fire over the hill was over two miles, Mr. Barry? A. To Bear Pond?

Q. Measured right over the hill? A. I would say that would be at least two and one-half to three miles. I am not sure.

Q. You knew they were sending in gangs a long time prior to this fire, didn't you? A. I knew of one gang going in that week.

Q. Now, Mr. Barry, could you see the bottom of those parallel columns of smoke when you came out from dinner? A. No, I didn't look for that at all; just saw them.

Q. Up in the air? A. Saw them rising from the ground.

Q. From where you stood on the piazza of the hotel, you could not see the column—about how high from the ground? A. About three feet from the ground; saw a little brush there.

Q. There were obstructions in your line of vision, weren't there? A. No; there was nothing in the line of vision.

Q. Standing where you were on the veranda of that hotel, were those columns west of the station? A. They were on the—two columns on the east side and one on the west side.

Q. What I am trying to get at is your line of vision from where you stood; when you saw these parallel columns did your line of vision pass to the left of the station or to the right of the station? A. On the left of the station.

Q. How about the boarding house there, the

family boarding house? A. I could see right over the boarding house, and after I went down the track later on I should say they were fully a thousand feet over the ground.

Q. My question was, where you stood there looking over the boarding house, how high up—A. I understood you wanted to know what the height was of the column.

Q. How high were those columns? A. What I saw there would be looming up about five or six feet over the buildings.

Q. They were a mile away? A. About a mile.

Q. And that would bring them, as you say, a good many feet over the ground, of course? A. Yes.

Q. Now how far apart were those columns? About? A. Oh, I should say about forty or forty-five feet.

Q. Did you afterwards go down there so that you found where the bottoms of both columns were? A. Oh, no, sir; I did not.

Q. Did you ever go near enough to see the bottoms of the columns? A. Within three feet of the ground.

Q. Were both of them within the right of way line? A. I know the one on Mr. Christy's side was, because it was only about fifteen or twenty feet from the main line.

Q. You mean the rail? A. I mean the rail.

Q. When you came back with your deer, were you nearer the railroad or further away than when you went down? A. Nearer to that point. I was about—I should say I came out midways between the depot and the old road coming up to Monahan's barn; that is, the big barn; so I was about three-quarters of a mile from where I saw that smoke in the first instance.

Q. For instance, I desire this information: As

you came up over the Bachelor line, coming back, about how far were you from the railroad at that point? A. Where I started to go back there?

Q. Where you left the Bachelor property? A. I judge that would be about a mile back from the railroad track.

Q. Did you hear explosions that day? A. Yes, sir.

Q. Where were you when the dynamite exploded? A. I was right on the railroad track—you know, Monahan's store on the track.

Q. Got back to that point? A. I couldn't get any further.

Q. I understand at that time the lumber piles were— A. Already a mass of flame; all one blaze.

Q. And the buildings that contained the dynamite were also burning? A. Well, they were burning, yes.

Q. Do you know whether the concussion caps were removed? (That was objected to.)

Redirect Examination by Mr. Wright:

Q. You knew where the lumber piles were? A. Yes.

Q. Right below the lumber piles what is the nature of the ground? A. Low swamp.

Q. This smoke that you saw was in which direction from that swamp, further on down the road? A. Further down.

Mr. Wright: I will read the testimony of John Monahan. (Reads):

John Moynahan, for Plaintiff—Direct (read)

"JOHN MOYNAHAN, called as a witness in behalf of the plaintiff, being duly sworn, testified:

Direct Examination by Mr. Bell:

Q. Mr. Moynahan, where do you reside? A. Long Lake West.

Q. Were you there in the year 1908? A. I was.

Q. You have heard the testimony of the preceding witness as to the fire? A. I did.

Q. Coming up the right of way? A. Yes, sir.

Q. Did you see the fire at that time? A. I did.

Q. When, Mr. Moynahan? A. About, just a few minutes after the train went by.

Q. What train? A. The northbound train.

Q. Now, tell us where it was and how it was coming at that time? A. Well, it was up around the bend about three-quarters of a mile, from that to a mile, I was down to the office.

Q. So you could see down the track, could you? A. Yes, I could see there was a fire there.

Q. Could you see it as it came up nearer the station? A. Oh, no.

Q. Now, Mr. Moynahan, try and see if you cannot tell us just what you did see about this fire and smoke from the time your attention was first called to it toward the south there. You have said it was along the track three-quarters of a mile or so south of you? A. Yes, sir.

Q. Now, what did you see after that? A. Well, I went in and ate my dinner and went from there up to the barn.

Q. What barn? A. We had a barn on the north side of the track, a place where the horses lay.

Q. And you stayed there? A. I stayed there until the last train went out.

Q. Tell us what you saw from that time on. A. Well, the fire was coming down both sides of the track and I went up to the barn there, and the

horses was there, and I went seeing about getting them out, and I stayed there until the last train went out.

Q. Now, tell more about it, Mr. Moynahan, what you saw of that fire; you say you saw it coming up both sides of the track? A. Yes.

Q. Now, tell all about it. A. Well, after I went, it took all my time then to see about getting them horses out, over 20 horses, and by that time you know they came up after me, said the train was going to go, and I looked around and went in the barn to see if there was any of them got back in, and they hadn't, and I went around the barn, and then started out.

Q. Where did you go? A. Went down to our house and couldn't find no one there but Stockton, and I went up to our other barn to see if I could find my men there. I see that was afire, and when I came back by the blacksmith shop I saw that was afire, and I went into the house again and then I started for the train.

Q. What train, the relief train? A. The relief train.

Q. Which train did you go up on, the first one or the last one? A. The last train.

Q. When you came down from the barn on the north side, was there any fire up there? A. Where?

Q. When you left the barns where the horses were on the north side of the track? A. Well, there was sparks flying around there but no fire that I could see.

Q. Now you speak about a house, this was Mr. Moynahan's house that you went through on the east side? A. On the east side.

Q. And the blacksmith's shop was Mr. Moynahan's? A. On the east side.

Q. How do those buildings run with reference

to the railroad? A. Well, they run about the same way the railroad runs.

Q. And they were on fire when you left? A. They were on fire when I left.

Q. That is, the barn and shop on the south side? A. On the south side of the track.

Q. Now, which end of those buildings were on fire? A. The south end.

Q. You say both sides of the track, do you mean on the right of way or off from it? A. No, on the right of way.

Cross Examination by Mr. McClary (read by Mr. Carey):

Q. Mr. Moynahan, you were there at Long Lake West the week before the Sunday when it burned? A. A week before.

Q. During the week before? A. Yes.

Q. Did you know of the big fire over on Christy's preserve? A. Why, I heard of a fire over there.

Q. You did not go over there at all? A. I wasn't over there at all.

Q. Do you know where Charley Pond is? A. No, I never was there, I know there is such a pond.

Q. And you have been over to Bear Pond, haven't you? A. Yes, been to Bear Pond.

Q. Did Mr. Moynahan, your brother, have men over there fighting that fire? A. Yes, on the other side of it.

Q. On which side? A. On the south side.

Q. And on the east side over to Bear Pond? A. Well, I don't know where they were; they were over in there somewheres on the Whitney—

Q. Over towards Bear Pond? A. No, they were over on the Whitney preserve, over on the further side of the fire.

Q. And do you know whether Mr. Whitney had men fighting the fire or not? A. I could not say.

Q. Did the railroad have gangs over there? A. Well, they had gangs, I don't know where they was fighting.

Q. Well, do you know of their going from Long Lake West over on the Long Lake road to fight this fire? A. Yes.

Q. Were you around the barn when the Christy piles burned? A. When what?

Q. When the piles of lumber in the Christy yard burned? A. I was to the barn then.

Q. Did you see the fire come to the Christy piles? A. I seen it coming along towards them you know, that is about the time we was getting our horses out and I was looking out for the horses then.

Q. Did you see the fire service train go in there to the Christy yard? A. No, I didn't see it go in there, but I seen it in there.

Q. Seen it in there? A. Yes, sir.

Q. And did you see them laying out hose? A. No.

Q. You did not see them doing any fighting on the fire in there? A. I didn't see nothing; I know they were in there because I happened to look down there and I seen the train in there.

Q. When you looked down that time, how far away was the front of the fire from Christy's piles? A. Well, I could not say; it was coming along down, I don't know just how far.

Q. When you say down, you mean coming down the slope of the hill? A. Yes, sir.

Q. When you first saw it was it within a quarter of a mile or within a hundred feet of the Christy piles? A. Oh, I saw the fire coming toward the Christy track; I didn't see it after it crossed the Christy track and the piles was right on the other side of the track.

Q. How far does the Christy track extend from

where these piles were in a southeasterly direction, do you know how far the Christy tract extends? A. Back in there?

Q. Yes, straight back in the— A. Well, I don't know, it ran in there two or three hundred feet, I should say—

The Court: The track or tract?

Mr. McClary: Tract.

Witness: Oh, the land, oh, I thought you meant the railroad track.

The Court: Tract.

Q. How far was the fire from the lumber yard when you first saw it? A. Oh, well, it must have been up there a quarter to a half a mile above that.

Q. Now, from the Christy piles does the land slope up to a height in a southeasterly direction from that; does it slope back up to a height? A. Yes, I think it does.

Q. And was the fire when you first saw it coming down that slope toward the piles? A. I didn't see it coming over that slope but I seen it coming over—it must have been coming over it but I didn't see it; it was down next to the track when I see it.

Q. It was down next to the track when you saw it? A. Yes.

Q. At what point, how far away from the piles when you first saw it? A. Well, it was right, oh, probably ten or twelve rod across the track.

Q. When you first saw it, was it? A. Oh, no.

Q. How far was it when you first saw the fire? A. Well, it was up around the bend, it must have been a quarter of a mile up there.

Q. I ask you with reference to this slope, how far from the Christy pile when you saw— A. I didn't see no fire on the slope. I was in the barn and when I come out I happened to see the fire near the track.

Q. Well, when you first saw fire near the Christie lumber piles, how near the lumber piles were they when you first saw them?

The Court: He cannot answer that, Mr. McClary.

Witness: You see we had some horses there and I was in and out of the barn, you know.

Q. Did you see the fire service train pull out of the Christy yard? A. No, I seen it in there but I didn't see it go in nor come out.

Q. Didn't see them when they came out? A. No, nor go in.

The Court asks Mr. McCleary to let him explain what he meant by saying the fire was above the Christy yard.

The Witness: South of the Christy yard.

The Court: Along the track?

A. Yes, along the track.

The Court: I will ask it in this way. Mr. Moynahan, will you look at this map? That arrow there points the north line. That is the magnetic north. Now, the railroad track then you can see runs from the southwest here up there to the northeast generally. Now, when you say it was south of you coming from the south, what do you mean?

The Witness: Well, I mean down along the track south of the lumber yard.

Q. Did you notice the fire after the lumber yard was quite fully ablaze? A. No.

Q. Did you notice any sparks going from the lumber piles burning across the track? A. Well, no, but when I was going down there the air was full of sparks when I was going down the road.

Q. Well, from the lumber tract? A. Well, I don't know where they came from.

Q. And how were they going, which way were the sparks going? A. Well, they were going right across the railroad.

Q. And across onto whose lands? A. Well, it would have to go onto the Low, you know.

Q. But from the lumber yards, opposite the lumber yards are whose lands? A. Opposite the lumber yards?

Q. Yes. A. That was Pat's land.

Q. Well, the Moynahan land? A. Yes, sir.

Q. And the Low line, separating the Low land and the Moynahan land on the westerly side of the track is northerly from where the Christy yards are? A. Yes.

Redirect Examination by Mr. Bell:

Q. Did you see any fires coming from the direction of Bear Pond or Charley Pond? A. No, I did not."

Testimony of MICHAEL MANNING, (read by Mr. Wright):

"*Direct Examination by Mr. Bell*:

Q. Mr. Manning, where do you reside? A. Long Lake West.

Q. How old are you? A. 41.

Q. Postmaster there? A. Yes, sir.

Q. The post office is Sabattis? A. Yes, sir.

Q. Were you there in the year 1908? A. I was.

Q. In September and August? A. Yes, sir.

Q. Did you travel up and down the right of way? A. Yes, sir.

Q. Traveled northerly from Long Lake West towards Horseshoe? A. Yes, sir.

Q. To where, how far up? A. Two miles.

Q. To a trail that leads into Hitchins Pond? A. Yes, sir.

Q. What was the condition of the right of way from Long Lake West for that two miles up, Mr. Manning? A. At what time?

Q. Oh, August and September before the fire? A. It was very dry, the grass had been cut and laid in swaths, in some places I couldn't say whether it was all left there or not, but in some places I can say it was left."

(Defendant's counsel interpose an objection that anything that has to do with the right of way to the north of Long Lake West is not involved in this action and is not material. Objection sustained.)

"Q. Did you see any fires on the right of way from Long Lake West northerly during the month of September before the 27th? A. Yes, sir."

(Defendant's counsel object to any fires to the north of Long Lake West, as immaterial.)

The Court: What is the point of the objection? What difference does it make whether it is north or south?

Defendant's Counsel: This man has simply been traveling to the north in a country that is not involved in this action at all, and on another section of the railroad, as it appears that this section only extended to mile post 95, that is immediately to the north of Long Lake West.

The Court: The same locomotives run over it, don't they?

Defendant's Counsel: Yes; but as to the condition of the right of way there might be a question.

Mr. Wright: I will waive that, as to the condition of the right of way.

The Court: The question as to whether locomotives were emitting sparks, etc. would be clearly relevant testimony.

Defendant's Counsel: If it were confined to that, that might be so.

The Court: As I understand you, you do not offer this for the purpose of showing anything with respect to the right of way?

Mr. Wright: No, sir; I have eliminated those questions.

The Court: All right; it will be admitted for the other purpose.

Q. And for how long a time? A. I should say from some time the latter part of August.

Q. Right down to what time? A. Down until the 27th, or down until the last time that I was down the track, and I would not say whether it was the 26th or 27th.

Q. Now, tell us where those fires were, Mr. Manning? A. They were at different places along the right of way on the west side.

Q. On the west side? A. And on the east side further down.

Q. Now, I will call your attention to an embankment just north of the county line on the west side of the track and ask you in particular with reference to this place, and whether you saw any fires there? A. Yes, sir.

Q. And is that one of the fires that you mention? A. Yes, sir.

Q. Do you remember the relief train or fire train leaving Long Lake West to go to Horseshoe that day? A. On which date?

Q. On Sunday? A. The 27th?

Q. The 27th. A. I remember of it pulling up there that day, coming in and going out.

Q. Did you go to Horseshoe on it? A. On the train that went out to the fire?

Q. Yes. A. Yes, on the first train.

Q. On the first train? A. Yes, sir.

Q. That was the first train? A. Yes, sir.

Q. Did you come back to Long Lake West on the second train? A. Yes, sir.

Q. And then went back on the last train? A. Yes, sir.

Q. Now, on either or any of those trips back and forth did you see any fire to the south from the vicinity of Bear Pond? A. No, sir.

Q. None whatever? A. No, sir.

Q. About what time did the last train go up? A. Well, I should think probably about 3 o'clock, I could not say as to the time.

Q. In the neighborhood of 3 o'clock? A. But this all happened between 1 and 3 I should imagine or 2, thereabout.

Q. Now, before leaving Long Lake West on either of these trips did you see any fire west opposite the station on Mr. Low's land? A. West, yes, sir, just before I left.

Q. Which train? A. The first train.

Q. And where was that fire? A. It was going up the knoll on which Mr. Jenning's barn stood on.

Q. And that barn is located on that map right by the county line, isn't it? A. Yes, sir, the county line just passes back of it.

Q. Just back of the barn? Did you hear an explosion of dynamite at any time, Mr. Manning? A. Yes, sir.

Q. Where were you when that came? A. I was about a mile from Horseshoe on my return on the last train back to Long Lake West.

Q. How much time had intervened between the time that you saw the fire over on Mr. Low's land

near Jennings' barn, your going to Horseshoe, and the time you heard the explosion of dynamite? A. I should say it would be an hour or more,—the trip to Horseshoe and we waited there about a half an hour before we came back; I think it was an hour.

Q. Were they troubled making steam? A. Yes, sir.

Q. Had to wait to make steam? A. That is what I understood was the reason we waited.

Q. Well, that is what the trainmen said? A. Yes, sir.

Q. Well, you spoke of 40 or 50 rods burned west, what did you mean, lengthwise of the track? A. Yes, sir, the width of it.

Q. The width of it? A. Yes, sir.

Q. Where was it at this time in the right of way? A. No, sir; it was off from the right of way.

Q. And when you saw it before where was it? A. It was on the right of way.

Q. Before the 27th? A. Yes, sir.

Q. Always in the right of way? A. Or stopped by a bank which was left smouldering all this time.

Q. Did you observe whether there was a track of black from where you saw it burning in the right of way?

(Defendant's counsel objected to the question as leading and incompetent. Objection sustained.)

Q. Were you at Long Lake West all during the day of Sunday, the 27th of September? A. I think so, I wouldn't say positively.

Q. Where were you about 1 o'clock, Mr. Manning? A. I was at Long Lake West.

Q. Where were you when you first saw a fire?

A. I was on the third floor, second or third floor of the hotel.

Q. And which end of the hotel? A. The end pointing south.

Q. Do you mean that directly south or how did the hotel stand? A. It stands directly in line with the railroad at that place.

Q. It was facing down the track then, this window, do you mean? A. Yes.

Q. And from where you looked out you could see both the south and the west and the east? A. No, sir; I could see south.

Q. Just south; could you see east? A. I wouldn't say, probably to a certain extent.

Q. When you looked out where was the smoke coming? A. The smoke was coming over this land that runs to the railroad at the bend point below.

Q. Did you hear any roaring at any time that time? A. I heard roaring, yes, sir, I won't say that I did at that time, I was inside of the hotel.

Q. Did you later? A. I did before I left the town, I heard roaring.

Q. Were you there when the Christie lumber yard caught? A. Not to my knowledge. They say it caught but that is only what I heard.

Q. You went out on the first relief train? A. Yes, sir.

Q. You do not know whether that lumber yard was substantially burned before that or not? A. I do not know.

Q. Did you see the fire as it approached the lumber yards, Mr. Manning? A. The fire I should say was—

Q. Did you see it, I asked you, as it approached the lumber yards? A. Well, not as it approached; I can't say that it was approaching the lumber yard.

Ernest H. Johnson, for Plaintiff—Direct (read)

Q. And as far as you know you do not know whether the lumber was burned or not? A. No, sir.

Q. What building did you first see on fire, if any? A. I saw no building on fire.

Q. You left before any of the buildings were burning? A. Yes, sir.

Q. Were you there the week before the fire? A. Yes, sir.

Q. Did you know of this big fire on the Christie preserve? A. I heard of it.

Q. Didn't you know anything personally about it? A. No, sir.

Q. Did you know about how far away it was, how many acres it covered? A. Which fire?

Q. The Christie fire? A. No, sir.

Q. You do not know how near it was to Long Lake? A. No, sir.

Q. Do you know whether it had burned up to the Long Lake West Road or not? A. I do not, no."

Testimony of Ernest H. Johnson, read by Mr. Wright:

"*Direct Examination by Mr. Bell*:

Q. Mr. Johnson, where do you reside? A. At Little Tupper Lake at Sabatti's Post Office.

Q. You are superintendent of the Whitney preserve? A. Whitney Realty Company.

Q. A track of how many ares? A. Well, there is about 97,000 acres of land and water.

Q. Were you formerly connected with the Forest, Fish & Game Commission of the State of New York? A. I was.

Q. In what position? A. I was Assistant Superintendent of State Forests.

Q. And are you pretty familiar with the Adirondacks? A. I am, I was born and brought up in the Adirondacks.

Q. Been in the lumber business? A. Well, some, not very much.

Q. Now, you are cutting? A. I am now, yes.

Q. And doing the lumber operations? A. I am.

Q. Were you Assistant Superintendent of Forests in the months of August and September, 1908? A. I was.

Q. Did you have occasion to go over this right of way of the New York Central Railroad from Long Lake West both south and north? A. I did.

Q. During the month of September did you upon any occasion see any fires on this right of way? A. I did on September 9.

Q. How far from the track did the fire start? A. From the rails? From the tracks?

Q. Yes, from the rails. A. Oh, probably 12 feet.

Q. In the grass? A. Yes, sir.

Q. You may locate that, whereabouts the fire was. A. Well, this fire I saw start was south of Long Lake West, the first one was but a mile and a half on Dr. Webb's land.

Q. Is that the one of September 9th? A. Yes, and the next one was the very same day but after a train passed I saw a fire start up about two miles, and that was on the north side of the track I think on either Mr. Monahan's or Mr. Batchellor's land.

Q. You were walking down the track before the train came along? A. I walked up from Long Lake West to Robinhood, that is four miles.

Q. Was there any fire there previous to the train passing? A. There was one about three quarters

of a mile from Long Lake West but that was a smouldering fire.

Q. A smouldering fire,—well, I mean the ones that you saw start, Mr. Johnson, those two that you say you saw start, were there any fires? A. I did not see any others, no.

Q. Well, before the train went up was the fire there? A. No.

Q. And how soon after the train passed did you see fire? A. Well, I saw probably, one fire I was nearly half a mile, and I saw it blaze up soon after the train passed, and when I got up to it it was quite a large fire, and the same on the other side.

Q. After this did you have occasion at any time to go north of Long Lake West during the month of September on the railroad? A. I did.

Q. And what date was this? A. I was there once on the day of September 23.

Q. Did you see any fires on the right of way at that time?"

Mr. Carey's Associate (Mr. Allen): It ought to be stipulated that that goes in only for the same purpose.

Mr. Wright: I won't read any questions about the condition of the right of way.

"A. I did.

Q. Where were they? A. The first fire going north from Long Lake West was about half a mile, it was about half way down to section 18 on the north side of the track. The next one was just below or just north of 18 siding on the north side of the track beyond section 18 about 100 yards. There was none of those large fires, just smouldering fire.

Q. State whether or not they were in or off the right of way? A. They were both on and off.

Q. Now, you know the location of Charley Pond? A. I do.

Q. Bear Pond? A. I do.

Q. Little Charley Pond and West Charley? You know the location of all of those on the ground? A. I do.

Q. Do you know the location of Little Tupper Lake and the direction from these ponds? A. I do.

Q. Where were you on this Sunday, September 27, after 12 o'clock? A. I could tell you better by explaining. I was at home.

Q. All right, explain. A. At just about the time the station burned I got a call on the telephone from one of the operators"—

Mr. Allen: We object to what this telephone message was as being immaterial and inadmissible and hearsay.

The Court: Well, it would seem to be, Mr. Wright.

Mr. Wright: Except so far as he got a call.

The Court: Yes; and if he did something in consequence of—

"A. I got a call on the telephone from one of the operators, the night operator.

By the Court: Q. How far were you from there then? A. I was seven miles.

Q: Did you go out on the lake, was you out on the lake that day? A. I went out on the Lake immediately after I got his telephone.

Q. What lake? A. Little Tupper.

Q. And how far from your house? A. I went up the lake probably a mile and a half.

Q. And to what they call Sand Island? A. Yes, sir.

Q. Could you see smoke over there? A. I could.

Q. Could you see more than one? A. I could.

Q. Tell us in what direction you saw smoke at this time, the two different—what direction is Tupper Lake from Long Lake West? A. Well, Little Tupper Lake is nearly southeast.

Q. About seven miles away? A. Yes, a little bit southeast from the station to my home.

Q. You may refer to that and state what direction from Bear Pond Little Tupper Lake is or where you were located. A. You want to locate Little Tupper Lake or Bear Pond?

Q. No, what direction Little Tupper Lake is from Bear Pond, that is, where you live, your house? A. Why, just about the same direction; it is right on the road; it is about southeast.

Q. And Charley Pond and the other ponds are about the same direction? A. Well, they are more to the west.

Q. How far is it from Little Tupper over to Charley Pond? A. Well, from where I was it was five miles but from the head of the lake it is not so far. You are referring, Little Tupper is seven miles long.

Q. From where you were where you saw the fire? A. About five miles.

Q. Now tell us in what direction you saw the two smokes, locating them with reference to these ponds or any natural object on the ground, such as a muntain, if you know? A. Well, I went on to an island, what we call Sand Island, and got up in a tree where I could look well and I could see, of course, as soon as I got out on the Lake, I could see this immense column of smoke coming up. It looked more like a very large thundercloud; and that went up thousands of feet in the air, and about this time the fire that we had left the night before, what was called the Bear Pond fire or the Charley Pond fire, began to smoke,

black smoke began to roll up from it. Then I could see the two fires distinctly, and the Charley Pond fire was about nearly three miles to the west in a straight line from where I was of the station fire, perhaps two miles, I won't say three, probably two miles.

Q. Where was the fire that you say looked like a thundercloud, what location was that? A. Well, that from where I was was just a little west of north.

Q. Well, in what location? A. Well, that is the station.

Q. Long Lake West? A. At Long Lake West.

Q. And could you see between them? A. Why, not exactly between them, but I could see the two smokes, see that the Charley Pond fire smoke was much nearer to me and plainer and the other was more glided in together.

Q. What would be the distance, Mr. Johnson, between the location where you saw the Charley Pond fire that you refer to and where you saw the thundercloud at Long Lake West? A. I should say it was three miles between the two fires, anyway.

Q. Now, did you go around Charley Pond fire on Saturday and Sunday, September 27th? A. I did.

Q. Give us the location of where these fires were at that time? A. On the map?

Q. Yes, well, with reference to those ponds. A. I could point on the map.

Q. All right, point on the map. A. Our fire line was, we had a fire line, I had 100 men in there and our fire line ran around like this; here is a large mountain right in here—

Q. I have got to get it on the record in some way, Mr. Johnson. A. Well, as I remember this mountain, or the mountain what we call Bear Pond

Mountain, would be on lots 66 and 65, about through here (indicating). We had a fire line that ran down around like this (indicating).

Q. That is, down across lots 90— A. Down across Lots 79 and 90 and up through to 89, and I think it ran up on to lot 76, and then when we got in here onto lots 67 or 66, the end of this large mountain, there was a big force of men from the railroad was fighting it there. That was on Saturday night. I was there about 5 o'clock when I left the end of the line between our two—we had a fire trench all the way around there. That was on Saturday night at 5 o'clock.

Q. That would be the 26th of September? A. The 27th.

Q. And that fire was all trenched? A. The fire was all trenched and we considered it safely out.

(The last part of that answer was stricken out.)

Q. When you say all trenched, Mr. Johnson, on what sides of it or do you mean on all sides? A. No, we trenched ahead of the fire and then set a back fire and burned back, and had the sand blown up by dynamite and then shoveled on on the green side. You see, this fire had been traveling from the west onto us or towards Mr. Whitney's property, and all this fighting was on the Christie land.

Q. And that would be on the north and east side of it? A. Yes, we was around on the northeast approach, we wasn't to the south of the fire.

Q. That you had this trench? A. My men was on the east and south and the railroad men and Mr. Christie's men were more on the south and towards the north. Their trench ran way around on the north side of the mountain ahead of the fire.

Q. Were the railroad men there when you got there that night? A. Well, I suppose they are, they was Italians, there was Italians there and they wasn't working because the fire was pretty well out.

Q. Do you know whether or not they withdrew them from there that night? A. Not personally, only by hearsay.

Cross Examination by Mr. McClary (read by Mr. Allen):

Q. Now, Mr. Johnson, how far east with reference to Bear Pond did this fire come at this time? A. On the other pond?

Q. Yes. A. At that time?

Q. During this week? A. Well, at this Saturday?

Q. No, during this week. A. That is what I say, that is the nearest that it got on Saturday night; I think a mile of Bear Pond.

Q. And do you know how far north it had got toward the Long Lake West Road personally? A. Yes, that is as far as it had come around on the end of this mountain that I spoke of; it hadn't got down towards the Long Lake West Road at that time at all.

Q. And there was no fire during the week? A. Not in there.

Q. Not within a half mile or so of the road? A. Not until later.

Q. Between Bear Pond and Long Lake West there was no fire? A. No, not then, later.

Q. Sunday night was that all burned over? A. I couldn't say as to Sunday night, but Monday morning.

A. It was burned Monday morning? A. I found it burned Monday morning at 5 o'clock.

Q. You were not over there Sunday? A. No, I was not there Sunday at all.

Q. And you do not know how far east from Long Lake Road it had burned? A. It had burned on Monday morning when I got over there, the fire had traveled within a mile and a half from Long Lake West.

Q. That is, Monday morning after the Long Lake West? A. Yes, about a mile and a half; after that it spread farther to the east.

Q. And do you of your own knowledge personally know as to the source where this big fire came from, whether it started here on Charley Pond or whether it came off of some other tract, do you know? A. Do you mean the first fire, what we call the—

Q. I mean the big fire that you say was trenched on the east side on Saturday night, the 26th? A. Well, that fire came from up on the railroad on Dr. Webb's land.

Q. Well, do you know whether it crossed from Dr. Webb's land on to the Christie land, of your own knowledge? A. Not of my own knowledge; I only know as we were ahead of the fire; I didn't see it on Dr. Webb's land after I saw the fire stopped there Saturday night.

Q. When you came to fight this on the Christie land the fire had crossed the Webb line? A. Oh, yes.

Q. And the Webb line is the line between— A. Yes, that is the one.

Q. And you were trenched to virtually on the Webb line? A. Yes, we joined with Mr. Ames' men; Mr. Ames had a large force of men in there.

Q. And you and they and the railroad were trenching on this side, on the east side? A. Yes.

Q. And the course of the fire in general had been what general direction? A. The course of the fire?

Q. During the week prior. A. All this time had been running nearly southeast.

Q. Running southeast? A. Running nearly southeast that week from the railroad way up towards Dr. Webb's.

Q. Why did you trench on the east side if the fire was running southeast? A. To keep it from going back down towards Bear Pond because the wind was forcing it gradually towards the southeast and we went around to the east and trenched clear around that side to get behind it.

Q. I think you did not answer my question, what was the course of the fire which you were fighting on this tract going towards the east or going towards the west? A. Why, it was going towards the east, as I said.

Q. That is what I asked you and you did not answer. A. Didn't I say that?

Q. And what was the course of the wind on that Sunday noon if you noticed? A. I have a record of it; it was south.

Q. That is, from the south? A. From the south, a very strong wind.

Q. Exactly south? A. A south wind I have marked it.

Q. South wind. How did you determine the south there? A. Why, at my place at Tupper, why I, of course, have lived there a long while and know exactly the points of compass.

Q. Have the points of compass as marked? A. Have the points of compass marked, yes, I have a record in my book of every day of that kind and I marked that high south wind.

Q. When you first saw the large thundercloud that you have described, was it right over the village of Long Lake West? A. Well, as near as we could tell. It was going from us because we could see it so plain; it didn't look like smoke, it looked more like an enormous cloud.

Q. And did you follow it with your eyes after that? A. It just went up and stayed there until dark. It stayed right in one place only it seemed to be mounting higher but kept the form.

Q. Could you see down to say whether it was right down on the ground, or not, or was it simply something that was sticking up in the air? A. Oh, I could see it was rising from the ground.

Q. And do you know whether it passed to the north or the west or the south? A. I know the way the wind was blowing and it passed to the north.

Q. The wind was blowing in a northwesterly direction? A. The wind was blowing in a northerly direction, right from the south.

Q. Do you know how it was blowing over at Long Lake West? A. I do not.

Q. Were you on the north side, yourself, Mr. Johnson, of that Christie fire within a day or two before Saturday, on the north side of it? A. No, not before Saturday, not the north side.

Q. And did you on Saturday go along on the north side of it? A. I went around on the northeast corner of that fire where it was running east."

Testimony of LEWIS L. JENNINGS, read by Mr. Wright:

"*Direct Examination by Mr. Bell*:

Q. Mr. Jennings, where do you reside? A. Long Lake.

Q. How old are you? A. 40 years old.

Q. Where did you live in the year 1908? A. Long Lake West.

Q. Lived there during the whole summer? A. Yes, sir.

Q. Were you there during the months of August and September? A. Yes, sir.

Q. Before and after? A. Yes, sir.

Q. Did you observe locomotives and trains passing up and down the right of way there? A. Yes, sir.

Q. During that summer? A. Yes, sir.

Q. Did you see fires set occasionally? A. Yes.

Q. Tell us just what you saw in that line, of fires starting on the right of way and when they started? A. During the months of September I saw—

The Court:

Q. Begin as nearly as you can with the first one and go through. A. Well, I couldn't give the dates.

Q. Where did you see your first fire? A. Just north of Long Lake West station.

Mr. Bell:

Q. North of the county line? A. Near the county line.

Q. And where was that? A. It was right on the right of way.

Q. How far from the railroad track? A. Why, about 15 or 20 feet.

Q. How long after a train had passed? A. Why, probably 10 or 15 minutes."

(Recess.)

Mr. Wright: I suggested to Mr. Carey this morning that I was willing to concede, in view of your ruling yesterday, that the fire that was on Christy's property back at Bear Pond and at East Charley Pond, which we all have talked about, was a fire which ran over the lands of Webb; so that would eliminate it from this case anyway; and I know from past history that they have a lot of testimony on

the origin of those fires and all that. That would save time.

The Court: Yes; that would be unnecessary.

Mr. Wright continues reading testimony of Lewis L. Jennings:

"Q. Now, go on and tell us others that you know of as well as you can remember generally, Mr. Jennings. A. Well, I saw, I think it is six fires north of Long Lake West.

Q. Now, describe the fires, tell where they started, and as near as you can when they were. A. Why, it was from the 15th of September until the 25th.

Q. And where were those? A. They was on the right of way.

Q. How far from the railroad track? First, where were they? How far north of Long Lake West? A. Why, near milepost 95, not over a quarter of a mile north of milepost 95.

Q. And all of these fires started between what points south and north? A. South and north of milepost 95. I see the fires start right after the trains had passed and I went and put them out. After the trains had passed about ten or fifteen minutes I went and put them out.

Q. What did you see, Mr. Jennings, anything drop from the engines? A. I saw sparks from the smokestacks; I see coals on the track. I never saw them drop from the engines.

Q. Did you see any live coals? A. Yes, sir.

Q. How large ones did you see? A. Why, an inch square.

Q. Were you at Long Lake West September 27? A. Yes, sir.

Q. And during that summer did you go down the right of way towards milepost 94; you know where that is, Lewis? A. Yes, sir.

New Jersey State Library

Q. And during August and September of that summer? A. I did in September; I don't remember—

Q. In September. How far down the track southerly toward Utica can you see from Long Lake West station, Mr. Jennings, approximately? A. Why, about a half a mile, I should think.

Q. Then there is a curve that bears to the south, isn't there? A. There is, yes, sir.

Q. You know where the Norwood Company's storehouse was? A. Yes, sir.

Q. How far was that from the station? A. About 50 or 60 rods.

Q. What was the condition of the right of way from that Norwood Company's storehouse south down the line for a mile and a half say? A. Well, I couldn't tell for a mile and a half.

Q. Well, how far down could you tell, Mr. Jennings? A. Down as far as milepost 94.

Q. What was the condition in September? A. Why, grass and brush that was cut in some places.

Q. Had it been removed? A. Some of it, I think, had been removed and some of it lay there.

Q. How, in piles or in grass? A. In swaths where it was mowed.

Q. Is there down about 94 a little bit of a cut that the road runs through, a knoll? A. Yes, sir.

Q. Can you tell us what the condition of that knoll was in September, 1908, the right of way? A. Why, I do not know as I could.

Q. You said you was in Long Lake West September 27? A. Yes, sir.

Q. Did you see a fire in the vicinity of Long Lake West anywhere on that day? A. Yes, sir.

Q. Where were you, Mr. Jennings? A. I was at the house across from the depot.

Q. Tell us where you saw that fire? A. It was

about three quarters of a mile south from Long Lake West station.

Q. Where with reference to the railroad? A. It looked to be right near the railroad.

Q. How far were you from it, Mr. Jennings? A. Why, I must have been three quarters of a mile away.

Q. Then you could not locate where the fire was, could you? A. No, sir.

Q. Did you go down to it at all, Mr. Jennings? A. No, sir.

Q. Where did you first see the fire, Mr. Jennings, where you could see it? A. Why, it was three quarters of a mile away south from Long Lake West station.

Q. Could you see it at any place on the right of way? A. After it burned toward Long Lake West.

Q. You say you did see it at one time burning on the right of way? A. Yes, sir.

Q. When was that? A. I saw it when it came in sight of Long Lake West where I could see it.

Q. Did you go down to the place where it was burning? A. No, sir.

Q. But you could see that it was on the right of way? A. Yes, sir.

Q. Was that on the 27th? A. Yes, sir.

Q. In what direction did you see it from Long Lake West on this map, Mr. Jennings, what direction was it? (No answer.)

Q. What direction from you was it when you first saw it? A. South.

Q. Where with reference to the railroad? A. South.

Q. Where with reference to the 94 milepost? A. Well, if the railroad, I call the railroad north and south, I call it south from the milepost 94.

Q. Did you know where the Christie lumber yards were there? A. Yes, sir.

Q. How near that end of the lumber yard did you see that fire? A. I saw the lumber yards burning.

Q. Was it in the right of way then? A. Yes, sir.

Q. Was it on one side or both sides? A. On both sides.

Q. Now, was there anything in the right of way between the Norwood Company's building and the Moynahan's building, Mr. Jennings, piled up there? A. There was wood, hard wood piled up there.

Q. Did you see that on fire? A. Yes, sir.

Q. Now, any time during that day did you see a fire on the north, north of the railroad?

Mr. McClary: You mean north of Long Lake West?

Mr. Bell: Yes, northerly of Long Lake West, north of the railroad.

A. Yes, sir.

Q. And what was the first fire you saw there? A. It was around Mr. Low's barn, north.

Q. Can you locate that for us on this map, Mr. Jennings, tell us where it is? A. I don't know, right up there (indicating).

Q. Right near the county line and north of the depot? Now, at that time did you observe smoke in any other direction, Mr. Jennings? A. Only from the fire that was coming from the south.

Q. Well, at the time you saw this. Did you go back to Long Lake West after the 27th? A. Yes, sir.

Q. About how soon after? A. I went the next day.

Q. Where was the fire then burning, to the

north? A. It had burned out of sight at Long Lake West.

Q. How far can you see from Long Lake West to the north over Mr. Low's land? A. Two miles, two miles and a half.

Q. Did you have some buildings on the northwest side of the track at Long Lake West? A. I had some that I rented from Mr. Low.

Q. Had a livery business there? A. Yes, sir.

Q. And do you remember the way the wind was blowing for three or four or five days prior to the burning of Long Lake West? A. I don't remember of any wind blowing until that day.

Q. Do you remember where, which side of the fire, they were fighting over on Christy's for the five days, six or seven days preceding the burning of Long Lake West? A. I do not know where they were.

Q. Did you have any occasion to take men over there? A. No, sir.

Q. Were you over on that Long Lake West road during those days at all, the seven days preceding the Long Lake burning up? A. I could not say, I might have been, I don't remember.

Q. Did you know of men being sent over, large bodies of men, 75 and more, being sent over to fight that fire? A. I know there was lots of men in there.

Q. Did you know of Moynahan's people having a large crowd of men in there? A. Yes, sir.

Q. Did you know of the Whitney people having men in there? A. Yes, sir.

Q. Did you know of Dr. Webb having men in there? A. I did not.

Q. Was it over in front of Bear Pond or near Bear Pond where they were fighting? A. Where the railroad ran there, yes, sir.

Q. Where were the Whitney men fighting, down near Charley? A. I don't know.

Q. Well, do you know whether or not that from the westerly end of Bear Pond they had a large number of men, over 150 or thereabouts, fighting this fire on the easterly side down at Charley Pond? A. I don't know that they did.

Q. Didn't you carry Starks and his gang over there, didn't the company hire you to carry them over there, Mr. Jennings? A. No, sir.

Q. Well, you knew of their being over there. Now, was there a large area burning on Christie's preserve for some five days, four or five, I will call it, before the burning of Long Lake West, immediately before? A. Why, yes.

Q. Do you know of your own knowledge whether these men were fighting on the easterly edge of that fire or on the westerly edge? A. I do not.

Q. What time in the afternoon on Sunday did Long Lake West burn up, about? A. Between 1 and 2 o'clock.

Q. Were you there, Mr. Jennings, when the fire service train came back from the north? A. Yes, sir.

Q. And were you there when they went down to Christie's yard and went in there to fight the fire? A. I was there.

Q. Did you know of their going down? A. Yes, sir.

Q. Did you go down with them? A. No, sir.

Q. But you know of their going down there? A. Yes, sir.

Q. Do you know where that schoolhouse is? A. Yes, sir.

Q. Do you know where the building was that the dynamite was stored in? A. Yes,

Q. Do you know where all the buildings that were burned there were? A. Yes.

Q. What one of the buildings burned first in this burning up of Long Lake West? A. Moyna-

han's barn on the easterly side was the first building I saw afire.

Q. I ask you if you knew of the houses around Long Lake West, which one burned first? A. Of the houses?

Q. Yes; that includes the schoolhouse; do you know, on the east side do you happen to know which one of the buildings burned first? A. The Norwood Company's storehouse burned first.

Q. Do you know when the schoolhouse burned? A. No, sir; I do not.

Q. You know it did burn up during the day some time? A. Yes.

Q. It was burned after the fire? A. Yes.

Q. Where were you at the time that the fire service train and the men were fighting the fire down at Christie's yard? A. I was up at the house and station.

Q. Had the fire reached the Christie yard, the mill yard, when the fire service train went down there? A. No, sir.

Q. Did they back into the yard and lay hose off in the direction the fire was coming? A. Why, I couldn't say that they did.

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

Q. Do you know whether they had to leave the hose there, do you know about that? A. I do not.

Q. When that train came back was the mill yard afire, when the service train left the mill yard were the mill piles afire? A. Why, I couldn't say.

Q. Did you see the mill yard while it was burning at all? A. Yes, sir.

Q. What did you see in regard to brands of boards in the air or pieces of boards, did you see them, burning pieces of board? A. Yes, sir.

Q. And were they being carried over the track? A. No, I don't remember.

Q. Didn't you see pieces of burning boards carried clear over the track when that mill yard was burning? A. I did not.

Q. You saw them dropping down on the track? A. I saw them dropping down where I was there at the station, the hotel.

Q. Dropping down on the right of way? A. On the ground.

Q. On the ground? A. Yes, sir.

Q. Where were you when you saw that? A. I was right near the station.

Q. And at that time was the air full of cinders? A. The air was full of smoke.

Q. Wasn't there more or less cinders, burning cinders in the air? A. Yes.

Q. Do you recollect when the train pulled out for the north, what we call the relief train? A. I knew when they pulled out the first time.

Q. Do you know when they pulled out the first time? A. I saw them when they pulled out the first time.

Q. Did you go with them? A. No, sir.

Q. Did you go out with the first train? A. I did not.

Q. At the time when the train left were the cinders dropping on the other side of the track beyond the station? A. I didn't see any.

Q. Had the schoolhouse burned at that time? A. I don't know, I don't know when it did burn.

Q. Which way were the smoke and cinders drifting? A. It was coming from the south.

Q. From the south over the village? A. Yes, sir.

Q. How long had that been true? A. Why, that must have been about an hour.

Q. How long had you seen the smoke coming from the south before the fire got up to Long Lake West? A. Well, it was about half an hour, half or three quarters.

Lewis L. Jennings, for Plaintiff—Redirect (read)
Byron P. Ames, for Plaintiff—Direct (read)

Q. Well, this fire over beyond Christie's, could you see the smoke there from Long Lake West? A. I did not.

Q. You did not see it? A. No.

Q. Mr. Jennings, for an hour before the fire didn't you see the smoke rolling over the hill beside the schoolhouse? A. I did not.

Q. Did you look up that way at all? A. Why, I don't know.

Redirect Examination by Mr. Bell:

Q. Where is the storehouse, Mr. Jennings; can you locate it on this map; where is the Norwood Company's storehouse located? A. Right in here (indicating).

Q. Well, that is at the end of the Christie's lumber yard. He points to the word "Christie" in lot 33 south of the railroad.

Q. Does that storehouse adjoin the railroad? A. Yes.

Q. The Norwood storehouse was on the right of way? A. Yes, sir.

Mr. Wright: I will now read some depositions which were taken. I will read first the deposition of Byron P. Ames—it was not read before—it is on page 15 of the depositions.

Direct Examination by Mr. Wright:

Q. Where do you live? A. Nehasane, New York.

Q. And you have lived there for how long? A. Twenty years.

Q. Were you there in September, 1908? A. Yes, sir.

Q. And your occupation is what? A. Superintendent of Nehasane Park.

Q. That is Dr. Webb's property? A. Yes.

Q. And that adjoins this Christy property on the west? A. On the northeast.

Mr. Carey: That is, the Christy property is northeast?

Witness: Yes. The Webb property is on the southwest of Christy's.

Q. Were you at Long Lake West on September 27th, 1908? A. I was not.

Q. When were you there last prior to that date? A. Why, I should judge, it might have been some days before that that I might have been up there.

Q. During the ten days prior to the fire you were somewheres away from that locality? A. Yes, I was on Dr. Webb's property.

Q. You were on Dr. Webb's property all that time? A. All the while.

Q. I believe you had some fire on Dr. Webb's property at that time? A. Yes, sir.

Q. Did you have occasion on September 27th, 1908, to be at the northeast corner of Dr. Webb's property, along the right of way? A. I wasn't that day.

Q. When were you there last? A. I suppose a day or two before. I used to be up along the line there every day, as far as our corner.

Q. Patrolling back and forth the right of way? A. Yes, sir.

Q. Was there any fire at that point when you were there the last time? A. Yes, sir.

Q. Where was that fire? A. That was burning on our property. It started on the 16th, I think. That is, part of it was burning up in through there.

Q. That fire that started there on the 16th, do you know where that started? A. Yes.

Q. Where did it start? A. Just about a mile from our corner, adjoining Christy's.

Q. That is a mile southwest of your corner? A. Yes, sir.

Mr. Carey: Towards Nehasane?

Witness: Yes, sir.

Q. Where did that start, on the right of way, or elsewhere? A. That blowed over that day from on the Monahan side."

Mr. Wright: There is a lot of this we can admit.

The Court: If there is a lot you can omit I think you ought to do it.

Mr. Wright: I stated to Mr. Carey this morning that in view of your Honor's ruling as to the law, that we are willing to concede for the purpose of this trial that the fire which was burning on the Christy property back at Bear Pond and at Charlie and East Charlie which has been described by the witnesses, was a fire that burned over intervening lands before it came on Mr. Christy's property.

The Court: All right.

Mr. Carey: And that intervening land was Doctor Webb's.

Mr. Wright: Yes.

Mr. Wright: The next question is on page 17:

"Q. Did you see any fires start from the right of way of the railroad, running along Mr. Christy's and your northwest line, within a week prior to September 27th, and if so what dates, if you can fix them?"

Mr. Carey: Objected to as being too remote in time and also too remote and indefinite in place.

The Court: I don't think that so far as time is concerned is too remote.

Mr. Wright: And the place is along Mr. Christy's line.

The Court: I do not think either the time or place is too remote.

"A. No, I didn't see the fire start. I saw the fire, but I saw it after it got a-burning.

Q. During the month of September, 1908, did you see a fire start upon this same right of way of this railroad? A. Yes, sir.

Q. At what time of day? A. Mid-day, one o'clock.

Q. How do you fix the time? A. Well, that is in the middle of the day when we generally have fires start, it being dry and hot at that time, in the morning there would be heavy dew, and there wouldn't be any fire started.

Q. Do you know what started those fires referred to? A. Some of them would be after a train went along.

Q. Do you know whether this train that passed there mid-day, along this railroad's right of way, northwest of Mr. Christy's, and Mr. Webb's property, threw out sparks and cinders?"

Mr. Carey: That is objected to, as too remote in time and place and too indefinite—the month of September.

The Court: I think I will permit it.

Mr. Carey: Your Honor will permit an objection?

The Court: Oh, yes.

"A. I could swear that the fire came up after the train went by; whether it was caused by sparks or cinders, or a cigar thrown out of the smoker, I couldn't say.

Byron P. Ames, for Plaintiff—Direct (read)

Q. You understand that my question was, did you see them throwing out sparks and cinders? A. You can't see the sparks in the daytime.

Q. In the night time did you see them throwing out sparks, during the month of September, 1908—did you see the engines passing along this right of way, or the northwest side of Mr. Christy's said land, and Mr. Webb's land, throwing out sparks and cinders at any time? A. I couldn't swear that I saw it during that month.

Q. During the month of September, 1909, prior to September 27th, 1908, did you see engines passing along the right of way of this railroad running along the northwest side of Mr. Christy's and Mr. Webb's land, drop coals, or live coals, from the fire box, and did you see live coals lying on the tracks immediately after a train passed?"

Mr. Carey: Objected to for the same reason —indefinite as to time and place.

The Court: Of course the other objection was a matter of utter inconsequence, because the answer that came nullified it.

Mr. Wright: This limits it to the month of September, prior to September 27th.

The Court: I think I will permit that.

Mr. Carey: I would like my objection noted.

"A. Yes, sir, I have seen the fire on the ties.

Q. Many times? A. Several times, yes, sir.

Q. After what trains—can you fix any special trains? A. I don't know as I have any record of any particular train.

Q. Have you any recollection? A. I don't know.

Q. These fires upon the railroad ties, which you have just spoken of, was that during the day, or during the night? A. During the day.

Q. Along what time in the day? A. Mid-day.

Q. And trains passed there at mid-day? A. Yes, a little after one.

Q. During that month did you have occasion to follow that train? A. We followed all the trains.

Q. And did you find fires starting up immediately after that train had passed?"

Mr. Carey: That is objected to.

Mr. Wright: It was subsequently amended by the question: "I amend the question by adding that the question relates to September, 1908, prior to the 27th of September, 1908.

Mr. Carey: Well, that then I suppose would be under the same objection.

The Court: Yes, I suppose the rule must be settled that an inquiry limited to the day in question is absolutely too narrow. I do not know of any case that says the inquiry is limited to that time, and it is largely in the discretion of the court as to the extent of the time over which the inquiry shall extend. I will admit the question and you may have your objection entered on the record.

Mr. Carey: I would like my objection noted.

"A. Yes, sir.

Q. Which one of these trains that you followed up during that time caused the most fires, if there was any difference? A. Train No. 2.

Q. Train No. 2 passed Long Lake West Station at what time? A. About 1:20.

Q. Going in which direction? A. South.

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

Q. What other trains passed Long Lake West station during the middle of the day? I will amend the question by adding, during the month of September, 1908? A. Train 43, went north, I think that was the number of the train at that time, I think about 12:40.

Q. Did you follow that train? My questions all relate to the month of September, 1908, and the location the same as described before? A. Yes, sir.

Q. Did you follow that train? A. Yes, sir.

Q. Did you find fires after that train had passed? A. I don't remember finding any fires behind that train. It is a light train.

Q. Was number 2, the other train you testified to, a heavier train than Number 43? A. Yes, sir.

Q. Were there any other heavy trains that passed through there during the day? A. Train No. 1, going north.

Q. What time did train number 1 pass Long Lake West Station? A. I think about five o'clock in the afternoon.

Q. And did you follow that train? A. Yes.

Q. Did that cause fires? A. I couldn't swear that it did at that particular time that we are speaking of.

Q. Did you keep any record of fires put out by you during the month of September, 1908? A. I couldn't tell without looking up my records. I have kept records of fires at different times; but whether I have at that particular time or not I don't remember now.

Q. Where are your records, at home, or did you bring them with you? A. They are home. I don't remember at that particular time of keeping any records of fires.

Q. What is your best recollection as to the number of fires you put out each day during the month of September, 1908, on the same piece of right of way that I have referred to before? A. I couldn't tell.

Q. Was it one or a dozen? A. You mean personally, or my men?

Q. That you saw? A. That I saw myself?

Q. Yes? A. I couldn't swear to that.

Q. I don't ask you to swear positively, I ask you for your best recollection? A. Just that date I couldn't tell you. It is three years ago.

Q. Was it one or a dozen? A. I couldn't tell you.

Q. More than one? A. I couldn't tell just what date. I know I put out lots of fires during the drought, but just between those dates I couldn't swear, whether I put out any or not.

Q. During the month of September, 1908? A. Just that date.

Q. Do you recollect the day that the Town of Long Lake West was destroyed? A. Yes, sir.

Q. During the three weeks prior to that time have you any recollection of putting out fires, and, if so, what is your best recollection as to the number you put out each day on the piece of right of way I have described? A. I should say four or five during that time—personally.

Q. How many did you see put out? A. No, I helped to put out fires—more than that.

Q. About how many, how many fires to your knowledge were put out along this right of way which I have described during that time? A. How many miles have you reference to?

Q. How many fires were put out to the best of your recollection each day during the month of September, 1908, and prior to September 27th, on this right of way? A. I couldn't answer it for each day.

Q. Can you say approximately? A. Some days —no, sir, I couldn't tell.

Q. You started to say something about some days? A. Some days we didn't have any fires.

Q. During the month of September, 1908, were you Fire Warden of that section? A. Yes, sir.

Q. What district, what was the number? A. Nehasane.

Q. It was called Nehasane district? A. Yes, that section.

Q. By whom were you appointed? A. By Mr. Jennings, from Long Lake; I was his assistant.

Q. Who paid you for your services, in whose employ were you? A. I was in the employ of Dr. Webb.

Q. But as Fire Warden, I mean, were you employed by the State or any municipality of the State? A. No, I was an assistant; he gave me authority to order out men in case of fire.

Q. Then you were not a regular fire warden, but, an assistant? A. Yes, sir.

Q. Were you paid for your time as Fire Warden? A. No, sir. Do you mean was I paid during the time I was fighting fire?

Q. Yes? A. Yes, sir.

Q. By whom? A. The Town—the State.

Q. The Town or the State? A. They each paid half.

Q. Did you keep a record of the fires, as Fire Warden, or Deputy Fire Warden? A. Yes, I kept the record of all fires of any account. These little fires didn't amount to anything.

Q. The little railroad fires you didn't keep a record of? A. A little fire that you put out in five minutes, I didn't make any report to the Fire Warden of any damage. You have to make a report of any damage when you make your report.

Q. These fires that you put out on the right of way, you didn't make a record of those? A. No, sir, that is according to the rule of the Fire Warden. The rule calls for a report and the damage done.

Q. Did you make any reports in writing to anyone? A. I gave it to Mr. Jennings of Long Lake, and he turned it in here to Albany, I suppose.

Q. What is Mr. Jennings' first name? A. W. D. Jennings, I was appointed under him, and then a man named Helms went in, and I turned the report of this last 1908 fire over to Mr. Helms, Mr. John Helms.

Q. Where does he live? A. Long Lake.

Q. When did the dry season commence? A. Along about the ninth of September, and it was along about that time that I got notice from Mr. Helms that he was appointed Fire Warden, and he appointed me the same as Mr. Jennings did before.

Q. You say Mr. Jennings is in Long Lake West? A. Long Lake Village, but this report I turned in to Mr. Helms, who was the Fire Warden then.

Q. As I understand you, you didn't report to him the small fires which you found on the right of way and put out immediately? A. Not every one, unless there was some damage done.

Q. Did you report any of those fires? A. I don't think so.

Q. You spoke a few minutes ago of having some records at home. Is that record in writing? A. Just a memorandum book.

Q. Does that show these fires put out on the right of way, small fires put out on the railroad right of way? A. As I remember it, I know I have had each man give me a record of how many fires he put out at night time, I know on our property, that I kept a record, kept track of it.

Q. You were subpoenaed to produce any report, memoranda, or notes which you had concerning these fires? A. Yes, sir.

Q. Did you produce such memoranda? A. I have got a little note book in my pocket here, a memorandum that I made, that is all I had during that time.

Q. This is the book that you make it in from

time to time? A. That is what I carry in my pocket from day to day. I will look in September, but I don't think Ie kept account of every little fire. Yes, I have a record of some of them. I have just a little record here of some of the fires.

Q. Just let me see. A. It is a sketch—here is one here.

Q. September 24th? A. "Southwest wind, clear, had fourteen new fires start on the park. Put them all out."

Q. Will you please turn in your memorandum book to the date of September 27th, 1908, and tell us what you find there with reference to the fires on the railroad right of way, on the location which I have previously described? A. "Heavy south wind, clear, fire burned very hard today, Long Lake West all burned up."

Q. Does that referesh your recollection as to whether or not there was a southwest wind or not? A. Yes, I remember it perfectly, it was a south wind.

Q. Will you turn to the 26th, and see what it shows there with reference to fires on this right of way? A. "Southwest wind, clear, fire broke out two miles south of Nehasane, and could not stop it. Set by No. 81."

Q. What does No. 81 mean? A. A train.

Q. Passing Long Lake West Station at what time? A. I don't remember.

Q. A day or night train? A. Day, in the afternoon.

Q. About what time? A. I guess about two or three.

Q. Did you follow that train on or about the 26th, of September? A. Yes, I followed it, but not in this particular place where the fire was set.

Q. Where did you follow it from, where to where? A. From Nehasane to Robinhood; that is, towards Long Lake West.

Q. Did you see any fire started by that train? A. No, sir.

Q. Turn to September 25th, what fire was started that day on the right of way? A. Not any.

Q. September 24th? A. I have given that date.

Q. On the 24th, referring to the 24th, referring to your book, I now ask you to testify what fire was started that day on the right of way, where, and what time? A. I can't tell where they started. I have only got a note of it, that there were so many fires started, but I can't testify where.

Q. Can you say what point? A. Yes, sir.

Q. Between what points? A. On the grounds of Nehasane Park.

Q. That is Dr. Webb's property? A. That is Dr. Webb's property. I can't tell where they started. I have no note of it.

Q. Were they along the right of way of the railroad? A. Near the railroad.

Q. Do you know what started those fires? A. No, sir.

Q. Did you see any of them started? A. No, sir, I couldn't swear that I saw them that day.

Q. What kind of fires were they, do you recollect that? A. They were fires—this is a record brought in by my men, and possible I saw some fires started myself; I couldn't say; I made this note of it; so many fires started during the day."

Mr. Carey: It appears from the testimony which the witness has given that the record which he made in his book was a hearsay record. He says these were reports which were brought in by his men and very largely he had no personal knowledge of it. He testified in a few cases as to his personal knowledge. I therefore move to strike out the testimony with respect to these fires which the witness has read from this book.

The Court: As I understand it these depositions are being read by consent, are they not?

Mr. Carey: Read by consent but subject to our legal objections as to admissibility or pertinency or materiality.

The Court: What do you say about it, Mr. Wright? If it appears that he is simply testifying from hearsay—

Mr. Wright: It does not so appear. He simply says as to some of those entries they are hearsay.

The Court: How can you tell which the "some" are unless he specifies?

Mr. Wright: He testifies here that certain fires—he puts down in his book all the fires.

The Court: How can you say which one of those is the hearsay fire?

Mr. Wright: I can't.

The Court: Then how can the jury? You see, if you were to have that of any value you should have had him specify which ones were not hearsay.

Mr. Wright: But the testimony as far as it relates to his own observation is perfectly competent.

The Court: But you have to show which is his own observation. All that does not appear to be that, that he has indicated is gathered from the reports of others to him I think should be stricken out.

Mr. Wright: If it can be picked out, yes.

The Court: If it cannot be picked out it all ought to be stricken out.

Mr. Wright: I can pick it out by going back, but counsel should have made his motion some time ago. If your Honor will strike out all his testimony so far as it relates to any

hearsay testimony, I have no objection, but if you are going to strike out all his testimony that would not be proper either.

The Court: I am not going to strike out all his testimony. I will strike out all his testimony with respect to the fire that rests upon hearsay.

Mr. Wright: If that is the understanding I don't make any objection at all.

Mr. Carey: From the time he begins to consult his book he is testifying entirely from reports made up by his men and given to him.

Mr. Wright: Not entirely; partly. Partly from his own observation and partly from reports from his men.

Mr. Carey: It is almost completely made up of reports from his men.

The Court: I am striking out from the testimony, without objection, all that appears to be hearsay or appears to be based upon hearsay. Now when you come to argue before the jury or when you come to present this case on either one side or the other in any other light, if you should go to any other court, the advantage of the ruling that I have made will be absolutely conclusive and complete, because you yourself will put your finger on any particular piece and say "This was hearsay and should not have gone in." Now if you want me to rule in any other way on it I want to hear what that way is and I will take it under consideration.

Mr. Carey: The witness produces this book on page 27, and the question with which the book is introduced is, "Have you produced such a memorandum?"

The Court: Yes.

Mr. Carey: And according to the testimony

which Mr. Wright just read it appears that this memorandum was made up from reports by his men.

The Court: Largely.

Mr. Carey: And I ask that from that point on, page 27, of the original deposition, be stricken out.

The Court: If there is anything between those pages, Mr. Wright, that you say is not rested on that book and is differentiated in the testimony as being based on knowledge I will hear what that is and permit it to stand, from page 27 where he produces the book.

Mr. Carey: About a third of the way down: "Did you produce such a memorandum? A. I have got a little note-book in my pocket."

Mr. Wright: Well, the rest of the book is competent: "A little note book in my pocket here, a little memorandum that I made. That is all I had during that time. Q. This is the book that you make it in from time to time? A. That is what I carry in my pocket from day to day. I will look in September, but I don't think I kept account of every little fire. Yes, I have a record of some of them. I have just a little record here of some of the fires. Q. Just let me see. A. It is a sketch—here is one here. Q. September 24th? A. Southwest wind, clear, had fourteen new fires start on the park—put them all out.' "

Mr. Carey: The 14 new fires in the park does not appear to have been from his own personal knowledge.

The Court: Does he say he put them all out?

Mr. Wright: No. "Put them all out." Now over later in the deposition he explains a little more clearly what he means by that, that he

did not see them all, that some of them were based on the reports of his men. He did put some of them out himself; and your Honor's previous ruling striking out a portion of his testimony I think is perfectly proper.

The Court: There is no question about the fact that those he put out he must have seen, and I will permit that part to stand.

Mr. Carey: On page 27 he does not say that he put them out. He has simply read an entry from his note—"Put them all out."

The Court: I thought you said that he put them out.

Mr. Wright: I say subsequently in his deposition he did say that he did. On page 27 he is simply refreshing his memory from a note book.

The Court: It is perfectly manifest as a matter of law that he cannot refresh his memory from a note book that is made up of reports given to him by others of the fires. Now if it appears further in the testimony that he put some fires out on a certain day, what do you need the note book for anyway?

Mr. Wright: Simply to refresh his recollection.

The Court: Well, when you come to that part—I do not understand that he says further on that he used the note book to refresh his recollection as to those he put out on a certain day.

Mr. Wright: Yes; it is apparent all the way through, because before his recollection was not very good until he produced the note book. When I asked him to turn to the memorandum on September 27th and he read it, I said "Does that refresh your recollection as to whether or not there was a southwest wind

or not? A. Yes; I remember it perfectly, there was a south wind."

The Court: I will permit that part to stand.

Mr. Wright: That was included in Mr. Carey's motion to strike out.

The Court: I will permit that part to stand, that he recollected there was a south wind and his recollection was refreshed by the book.

Mr. Wright: Now the next is on page 29, in which he read this memorandum, "Southwest wind, clear, fire broke out two miles south of Nehasane, and could not stop it. Set by No. 81."

Mr. Carey: That is reading from that note book. It is a quotation.

The Court: I will strike that out. It does not appear that he did not get that from reports, as he says he got many of them.

Mr. Wright: Now on the 30th page he is asked to refer to the 24th: "Q. On the 24th, referring to the 24th, referring to your book. I now ask you to testify what fire was started that day on the right of way, where, and what time? A. I can't tell where they started. I have only got a note of it, that there were so many fires started, but I can't testify where." That does not appear to be hearsay.

The Court: It does not appear that it is not hearsay either.

Mr. Wright: "Q. Can you say what point? A. Yes, sir. Q. Between what points? A. On the grounds of Nehasane Park. That is Dr. Webb's property. I can't tell where they started. I have no note of it. Q. Were they along the right of way of the railroad? A. They were near the railroad. Q. Do you know what started those fires? A. No, sir.

Q. Did you see any of them started? A.

No, sir, I couldn't swear that I saw them that day."

The Court: See?

Mr. Wright: Now so far as that particular statement I suppose goes, I—

The Court: It goes out.

Mr. Wright: Just that particular answer should go out possible.

The Court: Which answer?

Mr. Wright: "I can't tell where they started. I have no note of it." That there were so many fires started he cannot say where.

The Court: I think it has all got to go out, because he says he did not see them that day.

Mr. Wright: He didn't say that he didn't see them.

The Court: You just read it.

Mr. Wright: That is testimony given later on; that is not in the note book.

The Court: But that is testimony characterizing the note book; he says "I didn't make a note of them; I didn't see them."

Mr. Wright: He says "I couldn't swear that I saw them that day."

The Court: All right; and he doesn't swear he saw them any other day.

Mr. Wright: "Q. What kind of fires were they? Do you recollect that? A. They were fires—this is a record brought in by my men, and possibly I saw some fires started myself; I couldn't say; I made this note of it; so many fires started during the day." Now where he says "I saw some fires started myself," that certainly is competent.

The Court: I will permit that piece of testimony to stand, "I saw some fires started myself."

Mr. Wright: That has reference to that particular day, the 24th.

Mr. Carey: It may, or may not, have reference to that day.

The Court: We will let the jury say whether it has or not. I will let it stand in.

Mr. Wright: "Q. The ones that you saw yourself, where were they started? A. I can't tell you now; I don't remember."

Mr. Carey: Where are you reading?

Mr. Wright: Page 31. It follows up that same question.

Mr. Carey: And his answer?

Mr. Wright: "Q. The ones that you saw yourself, where were they started? A. I can't tell you now; I don't remember. Q. Were these fires along the right of way? A. Yes, sir, along the railroad."

Mr. Carey: "These fires." That refers to all the fires that have been mentioned.

The Court: Oh, what is the use of talking that way? That just wastes two minutes of time. He specifies certain fires he saw himself. Then he says "These fires." Why should we bother about that? It seems so perfectly clear.

Mr. Wright: "Q. Either on, or some of them may have been adjoining the right of way?" That was not answered. "Q. Are you sure whether they were on or adjoining the right of way? A. I couldn't swear to that."

Mr. Carey: Read the rest of it.

Mr. Wright: "The account was brought in by men. The men that were working under me brought in the report." That of course is improper. The next question is incompetent because he is testifying entirely from the

book. The next question is another where he was testifying only from the book so I won't read it. "Q. That book which you have, was a memorandum made up by you at the time? A. Yes, sir. Q. Entries made from day to day as these things happened? A. Yes, sir.

Q. Does it show all the fires that you saw and put out or had anything to do with during the month of September, 1908? A. It shows what I made a record of here, yes, sir.

Q. Did you make a record of all fires which you saw put out? A. I think so.

Q. Can you recollect during that time the location of any particular fire which you saw start immediately after a train passing along this same right of way—during the month of September? A. No, sir, not at that particular time.

Q. Do I understand by that, that there were so many of those occasions that you can't recollect any specific one? A. I can't recollect the date, the particular date—at that time.

Q. During that time, the month of September, was there any difference in what had taken place between that time and the month previous, or time afterwards, either by fewer fires, or more fires? A. The month before we didn't have any fires.

Q. That is August? A. Yes, as I remember it.

Q. But you do remember having some in September? A. Yes, sir.

Q. It is the month of September that I call your attention to, and ask if you can tell where some of those took place, along this particular right of way. A. Two miles south of Nehasane we had quite a fire there.

Q. Well, do you recollect during the month any fires which occurred to your personal knowledge along this right of way, in front of the Christy property or the Webb property, anywhere near the Christy property? A. Yes, sir.

Q. Can you tell us where that was, give us the location of it? A. About one mile southwest of the Christy corner.

Q. Is that the only one that you recollect within that vicinity—by fires I don't mean fires that have run to any extent, but fires which start after a train passed? A. No, sir, I didn't see a train setting fire there. I thought it was with reference to fires after you saw them burning.

Q. Mr. Ames, you have stated that you kept a ledger showing these fires, in addition to this book? A. That is all shown in this book.

Q. Everything in that ledger is shown in this book? A. Yes, sir.

Q. Nothing more is shown in that ledger than in this book? A. No.

Q. Is that the book which you kept, to make up your reports for the Fire Warden? A. It is a diary that I kept. Of course, if we had a fire which done any damage, I made a report to the Fire Warden.

Q. Your ledger is a book which you keep in the course of your employment with Mr. Webb? A. Yes, sir.

Q. Did you have any other memoranda besides this book and the ledger? A. No, this is all that I have got about the fires.

Q. This is the memorandum which you referred to when you said something about a memorandum? A. Yes, sir.

Q. Have you got any other memoranda, at

home, besides this and the ledger? A. Not with regard to fires, no—not at home.

Q. Or anywhere else? A. No, sir.

Q. With regard to these fires? A. No, sir.

Q. These reports that these men gave to you, which you used in making up your reports, were they in writing?"

Mr. Carey: Go on.

Mr. Wright: "A. They used to have a piece of paper, generally, which they would carry in their pocket, and send it down or hand it to me, and I made a memorandum in this book, wherever I met them, either on the railroad, or wherever I met them.

Q. Where are those copies? A. They are destroyed.

Q. How many men did you have at this work, patrolling? A. I think I had six on the railroad; and then, of course, I hired during the fire, quite a number of men.

Q. Who were the six on the railroad? A. One is Frank Peltier.

Q. Where does he live? A. He has a camp near Long Lake West. I haven't seen him in some time.

Q. And the next one? A. L. W. Brown, but he was away down on the south.

Q. Did he live at Long Lake? A. No, down near Brandreth.

Q. Who else? A. I had a man named Walter Remington; he was on the railroad two days; he was there only a few days and he went back to his camp.

Q. He was there at this time? A. Yes, sir.

Q. Who else? A. A man named Albert Hayes.

Q. Where does he live? A. Bloomingdale, New York.

Byron P. Ames, for Plaintiff—Cross (read)

Q. Who else? A. Arthur Peterson.

Q. He lives where? A. I couldn't tell you. I wrote him last summer and the letter came back; they didn't know where he was.

Q. Did you say you had a fire train at your place, at Nehasane? A. Yes, sir.

Q. Kept there all the time? A. Yes, sir.

Q. Was it in use during September, 1908? A. Yes, kept there all the time.

Q. That was, in addition to the railroad's? A. Yes, sir.

Q. Who maintained it, who kept it up? A. Dr. Webb.

Q. Did anybody keep any records of the operation of that train as to what fires they put out? A. No. The New York Central handled it with their engines subject to my orders.

Q. Do you remember testifying before the Public Service Commission of the Second District in regard to the fires? A. Yes, I remember being there.

Q. Do you remember at that time testifying on September 24th, that there were a number of fires on the right of way? A. I don't remember what I testified to at that time—three years ago.

Q. Do you remember now whether or not it was a windy day on September 25th, 1908? A. I couldn't swear to it, without looking at my memorandum; that is all the evidence I have. I read it from my book a few minutes ago.

Cross Examination by Mr. Carey (Read by Mr. Carey).

Q. You spoke of patrolling the railroad right of way—what distance did you cover? A. Twelve and a half miles, that is myself and men.

Q. And that was from what point to what point? A. Down there near Little Rapids, a place called Little Rapids, to within about a mile and a quarter of Long Lake West.

Q. And Little Rapids is the southerly terminus? A. Yes, sir.

Q. You say the northerly terminus was about a mile and a half southwest of Long Lake West? A. Yes, sir.

Q. And what was that terminus? A. The corner of Mr. Christy's property and Dr. Webb's.

Q. And that is the boundary line between the two properties, Christy and Webb? A. Yes.

Q. It was about a mile and a quarter or so, or rather a mile and a quarter was the nearest point to which you came to Long Lake West? A. Exactly.

Q. Do you know where this lumber was located which was burned? A. I do.

Q. That was right at Long Lake West station? A. Down this side.

Q. By this side you mean southerly? A. Yes, sir.

Q. And about how far southerly? A. I should think six or seven hundred feet.

Q. You did not patrol the right of way at all northerly from the dividing line between the Webb and Christy tracts, as I understand it? A. No.

Q. These fires concerning which you have testified were all south of the dividing line between those two tracts? A. They were.

Q. And the reports which you made to the Fire Warden, and which the men made to you, were of fires also south of the dividing line between those two tracts? A. They were.

Q. When you speak of the south wind, I suppose you mean a wind blowing from the south? A. From the south, and blowing north.

Q. And when you speak of a southwest wind, you mean a wind blowing from the southwest toward the northeast? A. Yes, sir.

Q. You spoke of a south wind in connection with this fire which destroyed Long Lake West; do you mean absolutely south or a southerly wind? A. I mean a south wind, blowing out of the south.

Q. Absolutely from the south? A. Yes.

Q. What were the conditions as to drought and dryness of the forest during the month of September, 1908? A. It was very dry all through the Adirondacks.

Q. Was it unusually dry? A. Yes.

Q. Was it dry to such an extent that fire would catch, where it ordinarily would not catch? A. Yes.

Q. You spoke of a number of fires which originated along the right of way and outside of the right of way—some of those fires which are recorded in your memorandum book were outside of the right of way, were they not? A. They were when I saw them.

Q. Those fires, a good many of them, were reported to you by your men, were they not? A. The biggest share of them.

Q. And you have no way now of distinguishing between those fires which you saw yourself, with one or two exceptions, and those which were reported to you by your men, and which you did not see? A. Only just the ones I recollect seeing.

Q. So that you would be unable to take your memorandum book and say as to certain fires which are noted there, which one of those fires you saw yourself, and which ones were reported to you by your men? A. The fires are not numbered.

Q. And that is true of all the fires concerning which counsel questioned you and regarding which

you referred to your memorandum book, is it not? A. Yes, sir.

Q. You spoke of a fire which occurred one mile southwest of the Christy corner—that would be about how far from Long Lake West? A. About two miles and a quarter.

Q. You also spoke of a fire which was mentioned in your memorandum book and which was located two miles south or southwest of Nehasane. How far would that be from the place where this lumber was burned? A. Nine miles.

Q. You also spoke of a number of fires which were on the Nehasane Park property. How far were those away from the place where the lumber was burned—in their inception—so far as you know? A. Do you mean the farthest one?

Q. How far would the farthest one be away and how far would the nearest one be from this place —at its beginning? A. The nearest one would be two miles and a quarter, and the other one would be about thirteen miles—the farthest away.

Q. You saw very few of these fires at their very beginning, yourself? A. I saw quite a number. I have no record of just how many I saw personally. I saw some.

Q. I mean at the time they began. Usually you saw them after they had been burning some little time? A. The majority of them. Some of them I saw when they started.

Q. And you would be unable to tell just what the cause of the fire was, in most of those cases? A. A good many of them. I didn't see them when they started.

Q. And the conditions were such that a cigar thrown on the ground would start a fire—a lighted cigar? A. Yes, sir.

Q. Or a lighted match? A. Yes, sir.

Q. And a fire made by a camping party would

be very likely to spread, would it not? A. Yes,

Q. Fires do frequently spread from such causes? A. Sometimes.

Q. And particularly during a season when the ground is dry and all the vegetation is dry? A. Yes, sir.

Q. You read from your memorandum book a memorandum of a fire started by number 81. Do you recollect that? A. I remember reading it.

Q. You did not see that fire when it started? A. I did not.

Q. That was one of the fires which were reported to you? A. Reported to me.

Q. And it was reported to you also that it was started by number 81? A. Yes, sir.

Q. So you were not undertaking to swear to that fact, but simply reading from an entry which you made in your memorandum book, the facts being reported to you by somebody else? A. Yes, sir.

Q. And whether it was started by number 81 or not, you do not know? A. I do not.

Q. Was W. D. Jennings a State Official? A. He was a Town Fire Warden.

Q. He was a public officer? A. Yes, sir; he was appointed by the State Fire Warden, Mr. Emmons.

Q. And Mr. Helms occupied the same position? A. Yes, he took Mr. Jennings' place when he resigned.

Q. And both of them were public officers? A. Yes, sir.

Q. Your memorandum book shows a number of fires put out, some of them were put out by your men and reported to you, I suppose? A. Exactly.

Q. And you would be unable to tell now which ones you assisted in putting out and which ones were reported to you as having been put out by

your men? A. My memorandum don't give any particular fires. It gives so many fires.

Q. When you were testifying as to train time, or the time of trains passing Long Lake West, you were testifying as to the schedule? A. Exactly.

Q. And not as to the fact of a train having, at certain times, on certain days, passed? A. Just the schedule time.

Q. You have no personal recollection of any particular time that any particular train passed on any particular day? A. They might have been late that day. I have no record of it.

Q. You spoke of a fire which was burning on the Monahan property; do you recollect that? A. Yes, sir.

Q. You have personal recollection, I think, of that fire? A. Yes, sir.

Q. Will you locate the place where this fire was burning on the Monahan property on the 16th, I think you said, of September; is that right? A. Yes, sir.

Q. Will you locate it, its location, on the Monahan property, relative to the Webb property and the Christy property? A. About a mile and a quarter southwest of the Christy corner, between Dr.Webb and Mr. Christy, and opposite of Dr. Webb's property.

Q. Will you describe the character of the location where this fire was burning at that time on the Monahan property, as to vegetation and general conditions? A. It was burning where the fire had burned in 1903, in dry timber there and lots of down brush, and on a knoll—quite a knoll there.

Q. Is it higher or lower than the Webb property on the opposite side of the right of way? A. Quite a good many feet higher.

Q. As I understand the situation, the Monahan

property was on the northwesterly side of the railroad and the Webb property on the southeast side? A. Yes, sir.

Q. And you say the fire spread or passed from the Monahan property to the Webb property? A. Yes, sir.

Q. Do you know what direction the wind was the day when it passed over? A. Northwest.

Q. That is, a wind from the northwest? A. Yes, sir.

Q. And blowing southeast? A. Yes, sir."

Mr. Carey: That is all of the cross examination I care to read.

Deposition of ALEXANDER S. LYMAN, (read by Mr. Wright).

"*Direct Examination by Mr. Wright:*

Q. You are connected with the defendant company? A. Yes, sir.

Q. In what capacity? A. I am the general attorney.

Q. In September, 1908, what was your position with the defendant company? A. I was general attorney.

Q. And you were also Vice-President? A. No, sir.

Q. Were you at that time? A. No, sir.

Q. Are you Vice-President at the present time? A. No, sir.

Q. Do you know Mr. Martin E. McCleary? A. I do.

Q. Is he connected with the defendant railroad company? A. He is one of the counsel for the defendant railroad.

Q. During the months from September, 1908, until April, 1909, what was his connection with the company? A. He was one of our counsel.

Q. What were his duties? A. His duty was to appear and represent the railroad company in such legal matters as were sent to him for attention.

Q. Particularly with reference to the northern section of the railroads—the Adirondack Division? A. Yes, sir; that fell within his territory. Our local counsel, as a rule, are assigned to cases which arise within certain territorial limits.

Q. And within that territory he negotiated settlements of claims and received claims, did he not? A. Well, he received claims that were forwarded from the Home Office, and followed such instructions as were given to him, with reference to testing the validity of claims.

Q. And also with reference to negotiating for settlement? A. Yes, if he was called upon.

Q. During the month of October, 1908, did the defendant company appear before the Public Service Commission of the Second District of the State of New York, in a proceeding instituted by the State Forest, Fish & Game Commissioner?"

Mr. Wright: That was objected to and witness declined to answer on the advice of counsel.

"Q. May I ask, Mr. Lyman, who is your counsel? A. Counsel for the defendant in this action.

Q. He is not your personal counsel? A. No, I don't understand that he is.

Q. Did you, representing the defendant company appear before the Public Service Commission of the Second District of the State of New York, in a matter instituted by the State Forest,

Fish & Game Commissioner, to compel a change of fuel or motive power on the railroads operating in the Adirondack Districts, and which matter was entitled, 'In the matter of fire prevention along the lines of the railroads in the Adirondack Forest preserves.' The date of such appearance being on or about October 12, 1908?"

Mr. Wright: That was objected to; on the advice of counsel the witness refused to answer.

"Q. Are you familiar with the line of the Mohawk & Malone Branch of the New York Central Railroad System? A. To an extent."

Mr. Wright: Now this is about location. With your permission, Mr. Carey, I will cut that out.

Mr. Carey: Yes; we have it located now.

"Q. (At the top of the 5th page) Are you familiar with the rules of the company, relating to the reports to be made of Forest Fires by your employees—your track foremen and employees? A. Reports to whom?

Q. Reports, if any, which are made. Are you familiar with any rule of the company, requiring track foremen, or any employees of the company who are engaged in the work along the line of the Mohawk & Malone Division, to make reports to a superior officer of the number of fires and the cause of such fires? A. I am not familiar with the rules. I think there is such a rule.

Q. Who is the superior of the Section Foreman in that division? A. Why, the supervisor, I think.

Q. Do you know, Mr. Lyman, whether or not Mr. A. H. Smith, Vice-President and General Man-

ager of the defendant company, made a statement as follows."—

Mr. Wright: I won't read that now, because that was refused, and I will bring it up in the second deposition, to save time. On page 12.

"Q. During September and October, 1908, and from thence on until July, 1909, did Mr. A. H. Smith hold any position with the defendant company? A. He was Vice-President and General Manager."

Mr. Wright: The rest of the deposition I do not think is necessary or competent.

Mr. Wright: Now, for the purpose of keeping the record straight I think I will read Mr. Lyman's deposition given later on.

Alexander S. Lyman's Examination Continued:

"Q. During the month of October, 1908, did the defendant company appear before the Public Service Commission of the Second District of the State of New York in a proceeding instituted by the State Forest, Fish & Game Commissioners? A. Yes, sir.

Q. Did you, representing the defendant company, appear before the Public Service Commission of the Second District of the State of New York, in a matter instituted by the State Forest, Fish & Game Commissioner, to compel a change of fuel or motive power on the railroad operating in the Adirondack Districts, and which matter was entitled 'In the matter of fire prevention along the lines of the railroads in the Adirondack Forest preserves.' The date of such appearance

being on or about October 12th, 1908? A. I, representing the company''—

Mr. Carey: That was objected to as incompetent, irrelevant and immaterial and not bearing upon the issue raised by the pleadings in the case, and incorporating an unwarranted assumption of facts. The question incorporates in it this phrase: ''To compel a change of fuel or motive power on the railroads operating in the Adirondack Districts, and which matter was entitled''—from that point on of course the title is all right—''In the matter of fire prevention along the lines of the railroads in the Adirondack Forest preserves.'' What was done in that proceeding has no bearing upon the question of the liability or negligence of the defendant in this case.

Mr. Wright: I suppose we might as well settle this question now rather than at some other time. The object of this testimony was this: There was a proceeding which it has been conceded was a regular proceeding under the laws of the State of New York, held before the Public Service Commission of the Second District, at the instigation of the Forest Fish and Game Commissioner, which investigated these various fires which destroyed Long Lake West and other properties during that period. Now one point is this: Mr. McClary, appearing for the company, made certain statements, which are clearly admissions, and this is to lay the foundation for putting in a portion of the statements made by Mr. McClary which are in the nature of admissions of liability. The second branch of this testimony is this, that Mr. A. H. Smith,

representing the company, filed with the Commission in the course of this proceeding a signed statement, signed by him on behalf of the company, which is certainly I think material, because it contains admissions and statements, and that is the reason for this testimony being offered now.

The Court: What is the objection to the admission of admissions made by duly authorized agents?

Mr. Carey: In the first place this proceeding was a proceeding of investigation, informal in character, instituted by the State of New York, for the purpose of devising means for the prevention of fires.

The Court: I will assume that it was entirely without authority of anybody—except that the company at this proceeding authorized these people to appear for it, and that while they appeared for it, whatever the object may have been, they made these statements. Now what difference does the regularity of the proceedings make?

Mr. Carey: I am not speaking of the regularity of the proceedings.

The Court: What difference does it make what jurisdiction they had? They are not trying to offer in this case the jurisdiction of that Board or body or whatever it may be; so the proposition that the issues are different is a matter of utter indifference here. The question is whether the statements made by the authorized agents or servants contained admissions. If they did, the character of the proceedings is of utter inconsequence.

Mr. Carey: But those statements that were made were made for the purposes of that investigation and were limited in character.

The Court: What difference does that make? Suppose that I am pugnacious enough this afternoon and I go out of the court house and hit some fellow in the nose on Newark avenue, and I am arrested for that, and the proceeding comes on to determine whether I am guilty of assault and battery or not, before the criminal court on Oakland avenue, and suppose in that proceeding I say, "Yes; I came out of there and he called me a vile name and I smashed him in the nose;" now the object of that proceeding is to ascertain whether I am guilty under the law of the laws of the state, and under a different rule with respect to the kind of evidence required, and all that sort of thing. And then suppose this man that I hit brings action against me for damages growing out of the assault and battery; manifestly my conviction over there is not evidence here, but what I said there, no matter what the object of that proceeding was, is evidence here. Suppose that instead of there being a proceeding, after hitting the man on the nose I go away and next morning I meet a friend of mine, or a friend of yours, and I say "I just had an altercation down the street and hit some one in the nose, and I hit him because he called me a name." What difference does it make that there was no proceeding pending, or what difference does it make what the extent of the proceeding is? The question is, if the man is authorized to speak for the company and talks for it in accordance with that authority, that is an admission on the part of the company. Whether the proceeding is regular or irregular, whether its object is formal or informal, or

whatever it may be, the question is, is it an admission? That is the way the thing strikes me.

Mr. Carey: The representatives of the railroad company come before the commission and say, "Now, so far as this investigation is concerned we are willing to assume certain facts. We want to cooperate with this commission, and if there is any better means"—

The Court: Now wait a minute. Don't let us argue way off in some corner lot. Let's ascertain what occurred. Do you mean to say that is what occurred, at this proceeding, that they said, "Now for the sake of this proceeding we will assume certain things, without admitting anything"? If that is so I will strike it out.

Mr. Carey: I was not present at this proceeding, but when this matter came up Mr. McClary, who was present, and who is now dead, and who cannot appear here to state what took place, said in substance just what I have said to the court now, that he stated to the commission "For the purposes of this investigation I make these statements and we make these offers."

Mr. Wright: That is not the true situation.

Mr. Carey: How do you know it is not?

The Court: The point about it is this: This was a proceeding, I understand. Whether it was regular or irregular I do not care anything about.

Mr. Carey: I do not either.

The Court: I am not going to investigate the jurisdiction of that commission. I do not

care anything about it. Now you offer to produce something here as being an admission made by the railroad company. Now it seems to me that the rules of law require me to admit that thing, and if you have any excuse or if you have any evidence to show that this was not an admission at all, but that it was simply a concession made for the purposes of that proceeding you can put that in; and if the other side, for instance, does not countervail that or if it appears so clear that it can admit of no doubt that it was a mere concession for special purposes with the distinct understanding that it should not be taken as an admission but merely to expedite an inquiry, I will strike it out and not let it stand at all; but until that does appear it seems to me I should be obliged to admit it. Now the fact that Mr. McClary is dead does not at all militate against your proving what occurred there. Of course you are deprived of one witness, but you are not deprived of other witnesses, because there must have been plenty of people there, and a stenographer there.

Mr. Carey: This is Mr. McClary's statement, which was not questioned at the previous trial of this case. After outlining what the investigation was for, for the purpose of determining whether some other fuel ought to be used rather than coal, and whether some special design of engines oughtn't to be made to operate through the Adirondack district, something entirely new and different from what the law required or what any of the railroad companies were using,—"So when we reached that I stated to the commission

that to avoid that, they might assume'' certain things. (On page 210).

Mr. Wright: You will find the statement at page 225—

Mr. Carey: They were discussing electricity, they were discussing oil fuel, they were discussing types of engines and all those things, and the railroad company was endeavoring to cooperate with the commission.

The Court: I will agree to all that, but I do not see that that changes the nature of the situation at all. You do not take the admission and wipe it out simply because of the nature of the inquiry. If a man makes a statement of a fact, no matter what the nature of the inquiry is, and without indicating that it is not the truth, he makes it indicating that it is the truth, whether that is an admission or not I think I have got to let the jury determine. The mere fact that he says ''For the purposes of the inquiry you may assume,'' may very well be an admission on his part that that was the fact. They might assume it because it was true.

Mr. Carey: But he certainly evidenced an intention that it should be limited to that and nothing else and used only to facilitate the purposes they had in view.

The Court: How can he limit that as against people who were not parties to the proceeding and preclude them from using it? They are not bound by what he chose to say when he made admissions.

Mr. Carey: He was not authorized to go there and make admissions to bind the company generally. All he was authorized to do was to appear before the commission.

The Court: And he did appear and made these admissions.

Mr. Carey: And that was all.

The Court: And that was all.

Mr. Carey: And that was the extent of his authority.

The Court: Yes; and that was enough, I think. That is what an attorney is permitted to do when he goes into court.

Mr. Carey: Yes; but what I might say with reference to the liability of this company would not bind the company in another proceeding.

The Court: Why wouldn't it?

Mr. Carey: Because it wouldn't.

The Court: You seem to think so, but you may be wrong. I think if you make an admission in court here of a fact, that that fact can be used elsewhere, if you were the authorized agent of the company at the time you made the admission; and I do not think—with all the vigor that you state it here—that you can find anything to the contrary in the books.

Mr. Carey: I had always supposed, and I am not convinced to the contrary now, that even if an admission is made or a statement made, and when it is limited specifically to a certain purpose, that it cannot be used to the detriment of the person or the person who is represented by the party making the statement, outside of that proceeding.

The Court: Well, in order to either have you confirmed in this lifelong impression or to have this lifelong impression destroyed, I will rule that you are wrong about it and I will permit this admission to go in, and you

may have your objection entered on the record; that is, I will rule that you are wrong about it in the aspect of it as presented by the facts in this case.

Mr. Carey: I want it to appear that the question does not relate to any issues raised in this case, and it is wholly incompetent and immaterial.

The Court: You may state your objection just as fully as you want it and it may go on the record.

(Mr. Wright resumes reading:)

"A. I, representing the company, appeared before the Public Service Commission, Second District, of the State of New York, in a matter instituted by the State Forest, Fish & Game Commissioners, which matter was entitled 'In the matter of fire prevention along the lines of the railroads in the Adirondack Forest preserves.' I can't recall the date of the appearance, but, subject to correction, I should say it was October 12th, 1908.

Q. Do you know whether or not on or about January 6th, 1909, Mr. A. H. Smith, the vice-president and general manager of the defendant company, ever made a statement to the Public Service Commission of the Second District of the State of New York, in writing, in which he stated as follows:"—

Mr. Carey: I of course renew my objection.

The Court: It will go to all this line.

Mr. Carey: Objection.

"We respectfully submit for your consideration and approval the following plan as a remedy for that portion of the forest fires due to railroad operation, the same to apply to that portion of the Mohawk & Malone Division, between Remsen and Malone. We will be able, if allowed to make use of this plan, practically, to prevent the spread of any fire from our right of way. The details of

this plan will be offered in evidence at the hearing in Albany.

(1) We will change the present steam locomotives as follows: Close with netting the opening between the ash pan side and the fire box foundation ring of some of the locomotives; extend backward those pans which now are of such length that there is a possibility of coal dropping from the grate through the openings in the pans for the grate shaking connection. Put finer nettings in the smoke boxes with the idea of breaking into smaller pieces those cinders which may be emitted from the stack. In addition, we will make such other changes in the front end, with the idea of breaking up the cinders, which may be emitted from the stack, as may be developed in any of the several tests which are now in progress of preparation.

(2) A clean right of way, and the maintenance of the same in that condition. A clean right of way to consist of one from which all dead grass, weeds, stumps and other dead and combustible material have been removed; this not to include the removal of turf or soil which in times of extreme dryness might be considered as combustible. The maintenance to include the burning of the right of way once or twice a year, the latter preferably; also the cutting and removal of the grass twice a year.

(3) The organization of a fire patrol on the following lines, viz.: The territory to be patrolled to be from Forest Port to Whippleville, including the Saranac Branch, in all 140 miles; the same to be divided into patrol sections, averaging substantially five miles in length, as per schedule to be hereafter submitted; each patrol to consist of a patrolman and assistant, who will cover their

patrol on a quadracycle, carrying two persons, and equipped with two shovels, two collapsible buckets, one mattock, and some portable fire extinguisher; the assistant to be taken from the section force and returned to the same when not needed; this patrol service to be under the direct supervision of the Supervisor of Tracks, who shall be responsible for same, with full power to increase or decrease this force to meet whatever conditions may arise, the said Supervisor of Tracks to report to the Division Engineer.

(4) Telephones are to be installed at all necessary places in order that our patrolmen may give prompt notice to the supervisor of any fires on the line of their patrol, and to the District Fire Warden of any outside fires, and also for assistance, if needed.

(5) A service consisting of three fire equipments, stationed at convenient points, to take care of emergency calls for fires that are beyond the control of the patrolmen, if any; the details of this equipment and the handling of the same to be submitted hereafter. A. Mr. A. H. Smith, the vice-president and general manager of the defendant company, made a statement in writing to the Public Service Commission which has already been, in substance, read to him upon his examination here this morning—subject to correction."

Mr. Carey: I would like to have the objection which I entered at the time entered on the record here. I won't stop to read each objection.

"Q. Was Mr. Martin E. McCleary authorized to appear for the defendant company in a proceeding had before the Public Service Commission of the Second District of the State of New York,

At the taking of Mr. Lyman's deposition, immediately following the question put to him, which embraced the statement of Mr. Smith, the Vice-President and General Manager, and before the answer of the witness was given, the following objection was stated:

> "Mr. Carey: Objected to as incompetent, irregular and immaterial, and not bearing upon the issues raised by the pleadings in this case, and that there is nothing in the record to show that the person alleged to have made the statement was authorized to make the statement for the company, or could bind the company by a statement of that kind; that the statement itself, if made, would not be evidence in this case; it is hearsay, not the best evidence; it is privilege, if made; it is too remote in time, circumstance and substance.

At the taking of Mr. Eyman's deposition, imme-
diately following the question put to him, which
embraced the statement of Mr. Smith, the Vice-
President [illegible], and before the
answer was given, the following
objection

entitled 'In the matter of fire prevention along the railroads in the Adirondack Forest Preserves, instituted by the Forest, Fish & Game Commissioner of the State of New York, in which matter hearings were commenced at Albany on October 12th, 1908, and continued, from time to time, for several months thereafter? A. Yes, sir."

Mr. Carey: With regard to this statement of the Vice-President which has just been read—it is evident from a reading of the statement that the offer that was made was an offer to go entirely beyond the legal requirements under which the railroad was operating, that it was a scheme devised for the purpose of absolutely preventing fires spreading along the right of way, and the whole scope of it shows that it was not a promise to come within legal requirements or simply to do what the law required them to do, but it went way beyond that, to make changes in the equipment which were not in use and were not standardized, not required, but for the purpose of preventing fires they were willing to go way beyond any of the legal requirements that could be made upon the company. I therefore move to have it stricken out.

The Court: Why should that be stricken out under those circumstances? Suppose that is true?

Mr. Carey: We are here upon the basis of negligence.

The Court: Yes.

Mr. Carey: And there is nothing in this statement which goes to that issue.

The Court: Unless I am stricken with something or other before I charge the jury, the jury is not going to be instructed that

the liability of this defendant company is going to depend upon any scheme other than that that existed in the law at the time of the happening of the fire. They surely are not going to be held—if this statement, as you say, goes beyond the legal requirement—they certainly are not going to be held, if they are to be held liable, because they did not comply with a scheme that the law did not compel them to comply with.

Mr. Carey: This statement was made by an officer of the company, and was under such circumstances that it was privileged in character.

The Court: Privileged?

Mr. Carey: Working with the public authority to accomplish an end which both the railroad company and the commission had in view.

The Court: Privileged against what?

Mr. Carey: Against being used.

The Court: Where do you find any authority for that proposition?

Mr. Carey: Why, the very situation of the parties themselves, the railroad company and the state authorities working in unison to get up a scheme, and this is a proposal on the part of the railroad company to do certain things.

The Court: All right.

Mr. Carey: And it ought not to be used as an admission against them.

The Court: It is not used as an admission against them unless it is an admission. Privilege arises from occasion, and this occasion does not present any feature of privilege as I see it.

Mr. Carey: I do not see how we can get a

broader basis of privilege than parties, the state and the railroad company, negotiating together to get up a scheme to do more than the law requires the railroad company to do.

The Court: Suppose they are; what gives it the privilege? For the life of me I cannot see it, and I never heard any such thing.

Mr. Carey: Just the situation of the parties themselves.

The Court: I understand the situation.

Mr. Carey: And what they offer to accomplish and the end they have in view.

The Court: In this state a man calls in his physician and he has talks with him about his ailments. Now anyone would say that that surely would give privilege if there were any occasion of privilege at all, but it doesn't. And here you have got a situation that requires diagnosis and treatment of another character, to fix up a physical condition of land rather than a physical condition of a person, and you say they were trying to diagnose a way out of this thing, and that gives them a privilege. I do not think there is any such doctrine.

Mr. Carey: The statement of a physician in New York is privileged.

The Court: Ah! In New York, yes; but the *locus fori* governs the admission of testimony, not the *locus loci delicti.* We do not admit evidence in accordance with the rules of New York; we admit it in accordance with the rules of New Jersey.

Mr. Carey: The motion was that the statement be stricken out.

The Court: And the answer is that it will not be. You may have your objection noted on the record.

Deposition A. H. Smith, for Plaintiff—Direct (read)

(Mr. Carey reads cross examination:)

"Q. At the time these conferences were taking place between the railroad company and the Public Service Commission, the company was cooperating, to the fullest extent of its power, with the Public Service Commission, to insure against forest fires, was it not? A. The primary action of the Public Service Commission was that of inquiry. With reference to that inquiry the railroad company did endeavor to the fullest extent to get the facts before the Public Service Commission. It was not until we had an order from the Public Service Commission that we found out what they thought ought to be done. When we got that order we obeyed it absolutely."

Deposition of ALFRED H. SMITH, read by Mr. Wright.

"*Direct Examination by Mr. Wright*:

Q. You hold an official position with the defendant company? A. Yes, sir.

Q. What is that position? A. Vice-President and General Manager.

Q. And you held that position in September, 1908? A. Yes, sir.

Q. Were you familiar with the location of the station of Long Lake West, Hamilton County, New York? A. Yes, sir.

Q. And on what branch of the defendant company's line was that? A. The Adirondack Division.

Q. The part of that division known as the Mohawk & Malone Road? A. The Mohawk & Ma-

lone Road is north—yes; yes, it is the old Mohawk & Malone—it is the old Adirondack Division of the New York Central Railroad; we don't speak of it as the Mohawk & Malone, we call it the Adirondack Division.

Q. Mr. Lyman, I believe, is also in the employ of the defendant company? A. Yes, sir, as general attorney.

Q. And a Mr. McClary is also in the employ of the defendant Company, is he not? A. Yes, sir.

Q. In what capacity? A. Local attorney.

Q. Are you familiar with his duties and powers? A. Only in a general way. Mr. McClary reports in to the Legal Department, and my only knowledge of Mr. McClary and of Mr. Lyman, for that matter, is as counsel; what their duties are, that can best be testified to by Vice-President of Law, who is the head of that department.

Q. And your duties generally, what are they? A. To maintain, construct and operate the railroad.

Q. That includes maintenance of roadbed and right of way and engines? A. Yes, sir, everything to do with the maintenance and operation.

Q. In September, 1908, who was the person in charge of maintenance of roadbed and right of way on the Adirondack Division? A. The Engineer of Maintenance of Way; the Chief Engineer of Maintenance of Way would be the officer in charge of the maintenance, Mr. George Vaughan. He is the officer in charge.

Q. He was the officer in charge in September, 1908? A. Yes, he has charge of the maintenance of the entire New York Central Railroad.

Q. His office is located where? A. In New York.

Q. Who was the officer located somewheres in

that division who had charge under him of the maintenance of way? A. I can't tell you.

Q. Were you acquainted with Mr. John V. Neubert? A. I know him.

Q. What position did he hold in September, 1908? A. I can't tell you in 1908. This organization is pretty big. There are about fifty thousand men, and for me to go back to 1908 and you ask me where these boys were, that is impossible for me to tell. I can go back, on my records; but I cannot recollect from memory.

Q. Was he the division engineer? A. He might have been at that time. I think he is the engineer of tracks; but where he was in 1908, I can't tell you.

Q. What are the duties of Division Engineer on that division? A. To maintain the tracks; do all the engineering work necessary in the maintenance of the property; do such construction work as may be detailed to him, and if the construction work is too heavy for their organization, we put in a special construction force made up of special engineers, all depending on the judgment of myself and others on my staff, as to whether we will do it one way or the other. For instance, the division engineer on the Hudson Division is not constructing the Forty-second street terminal.

Q. Did he have anything to do with the operation of the road, oversee the running of the rolling stock or engines?"

Mr. Wright: That was interrupted and withdrawn.

"Q. Will you ascertain what position Mr. Neubert held in September, 1908, and also the duties of Division Engineer in 1908 on that division? A. It wouldn't make any difference whether it was

Neubert or who it was—some man was up there to do certain duties; now, if you want to know what he had to do, I will tell you that. It don't make any difference whether the man's name is Neubert or Smith.

Q. What the duties were, and, secondly, what the position was that Mr. Neubert held at that time? A. I can't tell you about Neubert for the moment. I can tell you what a division engineer has to do.

Q. If he was not division engineer I would like to know what his position was, and what his duties were at that time? A. I can't tell you. He might have been a superintendent of tracks; he might have been an assistant; or he might have been on special duty.

Q. Were you over the Adirondack Division, particularly at Long Lake West, in September, and prior to September 27th, 1908? A. I can't tell you without looking up the records. It is a long while ago and I have made a great many trips since then.

Q. You are familiar with the rules made by the railroad for the guidance of their subordinates in the operating and maintenance department? A. Yes, in a general way.

Q. Had the defendant company, during the month of September, 1908, any rule to the effect, that immediately after a fire on or adjoining a right of way, occurs, that the section foreman, on whose section it occurs, should make a report of the fire, and of the cause of the fire, to some other officer?"

Mr. Wright: That question was amended to read "During the month of September, 1908".

Deposition A. H. Smith, for Plaintiff—Direct (read)

"I am not familiar enough with the details to know what they exact of the section foreman, because I am considerably removed from him. I have no doubt that they have some form of report, just what they require in the report, and just what they do, I don't know."

Mr. Wright: Omit the rest of it; it is all presumption on his part, the rest of that page. Page 37—

"Q. You are familiar with the hearing had before the Public Service Commssion and which resulted in that order? A. I know the Public Service Commission had a hearing, but they have so many hearings, and we have so much business with them, that just when that order was issued, and the details of it, I haven't charged my mind with. When this order goes through it is over with, there are many coming up every day.

Q. The change to oil locomotives on that division, a portion of that division, was a result of that order made by that commission, wasn't it? A. Yes, we put the oil burners on upon the order of the commission.

Q. Is it not a fact that there was a very long and extended hearing before that commission with reference to these fires in the month of September, 1908?"

Mr. Carey: Objected to as immaterial, irrelevant and incompetent—the objection is not material, because I see it is answered "I don't know."

"A. I don't know. I did not attend the hearings myself. From my personal knowledge I don't know.

Q. Do you remember submitting a written state-

ment signed by yourself, to the Public Service Commission, with reference to the proposed change from coal to oil burning locomotives, which subject was under investigation by the Public Service Commission, in a proceeding to investigate the cause of the fires which occurred in September, 1908?"

Mr. Carey: Objected to as immaterial, irrelevant and incompetent and calling for matter which is not under any circumstances evidence under the issues in this case; secondly, that no such investigation was ever ordered or undertaken or had before the Public Service Commission.

Mr. Wright: In looking at the matter I find that it is not very material.

"Q. Did you, on or about January 6th, 1909, submit to the Public Service Commission, Second Department, State of New York, a communication which reads as follows:"

Mr. Wright: —which is exactly the same as I read in Mr. Lyman's deposition.

Mr. Carey: That is objected to on the same grounds.

The Court: Objection overruled.

Mr. Carey: Objection noted.

"A. I did.

Mr. Wright: I think that is all of Mr. Smith's deposition.

Mr. Carey: I will read the cross examination.

"Q. You say you were not present at any of these hearings?"

Mr. Wright: No; that is not cross examination.

Mr. Carey: That is right.

Deposition A. H. Smith, for Plaintiff—Redirect Recross (read)

"Q. Was this communication which you made to the Public Service Commission of the Second District made at the request or the suggestion of the commission? A. Yes, sir."

(Mr. Wright reads redirect examination).

"Q. You say you were not present at any of these hearings—in what way did you receive the request to make the communication? A. Our people that were in attendance upon the hearing came to me and stated that these matters had been discussed.

Q. I don't want you to say what they said to you, but what you did as a result. It was as a result of statements made to you by representatives at the hearing? A. Yes.

Q. And those representatives were who—Mr Lyman and Mr. McClary? A. Mr. Lyman was there—but our maintenance of way people—our locomotive people—we had quite a good many witnesses there. Mr. Crowley, my assistant, was there.

Q. And it was at the suggestion, not of the persons who are represented of record there, but of other employees? A. My staff officers. They wanted us to do something, and we said we will do anthing we can, not that we believe it will do any good, but, we will just do it."

Recross Examination Read by Mr. Carey:

Q. You were endeavoring to co-operate, to the fullest extent, with the plans and purposes of the Public Service Commission? A. And the State of New York generally, yes, sir. I had some conversations at different times with officers of the State of New York. Take that section of track in there, where we say we will clear our right of way.

That is a joke, for the reason, that you go through the forest preserves of the State of New York, and it is piled right up to our fence, with refuse. They can't clear the way under the law. So it is a joke for us to clear our right of way. When we clear our right of way, and then with all that rubbish in there piled right up against our fence it is like a tinder box. Well, they said something had to be done, and, of course, we were the goat, that's all."

Mr. Wright: I now desire to put in the statement of Mr. McClary, being the same statement which was used previously, the statement made by Mr. McClary to the Public Service Commission in the same proceedings.

Mr. Carey: That is objected to.

Mr. Wright: I think they will waive all the formalities of proving it except as to the materiality and so forth.

Mr. Carey: Where is it?

Mr. Wright: Page 225.

Mr. Carey: I think Mr. McClary's statement that preceded it ought to go in, explanatory of this statement.

Mr. Wright: That is the only statement offered.

Mr. Carey: His explanation of the circumstances under which the statement was made.

Mr. Wright: The argument of counsel? You have made the same argument.

Mr. Carey: I think that the statement that Mr. McClary made at the former trial of this case with reference to this proceeding and what the purpose of the proceeding was—

Mr. Wright: Call my attention to it.

Mr. Carey: Page 209 and 210.

Mr. Wright: If you want to go ahead and make the statement, go ahead. I did not concede

a thing. Mr. McClary talked for ten or fifteen minutes and it went into the record. You see, I did not concede a thing.

The Court: Well, what is the part there, Mr. Carey where you say that Mr. McClary made this statement only for this occasion? Where is that? Is that in evidence yet?

(Mr. Carey hands the Court the printed book and indicates.)

(The Court called the counsel to the bench and, out of the hearing of the jury, the following discussion ensued:)

The Court: This is not in evidence yet. Is this testimony?

Mr. Wright: That is talk.

Mr. Carey: This is the statement which Mr. McClary made when this discussion was up at the other trial.

The Court: Oh, well, that is not in this case at all.

Mr. Carey: It is in this case at the former trial, not at the present trial.

The Court: There is nothing in this case to show that this statement was limited by counsel when he made it to the proceeding then under investigation? That is what I wanted to get at.

Mr. Wright: No.

The Court: The reason I ask is this: I have been looking up this question a bit, and I find out that the rule is that "Relevant judicial statements made or adopted by a party, although made without the consent or knowledge of his attorney, are, when received by the court, admissible not only in the case in which they are made but in any subsequent trial or proceedings connected with it, and in other cases in which the facts covered thereby are relevant. The statements may be made not only in the course of a trial as usually

conducted but in bankruptcy, probate, or other special proceedings, and are competent, although made in a representative capacity, provided they are offered against the party when acting in the same capacity in which he made them. When a party, however, is sued individually it is not material that the admissions were made by him in a different capacity." Then under the title "Counsel or Attorneys" it says: "Judicial admissions are frequently those of counsel or attorneys of record. When these are made in good faith, in the counsel's professional capacity, for the purpose of dispensing with evidence, and to that end are distinct and formal, they bind the client, whether made before, on, or after the trial, and in the exercise of a wide discretion with which the client has as a rule so little personal connection as to establish in many cases no real relation of agency. It is within the appropriate function of counsel to make admissions dispensing with strict rules of law or practice"—and so on. Then we come down to this situation:

"The anomalous relations of agency existing between counsel and client impose an important limitation upon the use of judicial admissions made by counsel when these are offered in subsquent cases. It is considered that the original concession may well have been made for other reasons than because it states the fact truly, for example to save time or to avoid a continuance or that the truth of facts may have been admitted only provisionally to raise an issue of law, as on an agreed statement of facts, a bill of exceptions, demurrer or special verdict, or in order to formulate a request to charge to the jury. The judicial admission as originally made is not therefore so necessarily connected with the party himself as to be deemed competent in another action as an

extra-judicial admission; unless it was formally made, without limitation to the purposes of any purposes of any particular action, or was ratified by the client or his immediate agents; the general rule being that under other circumstances an admission of this nature is to be strictly construed and not extended by implication."

Then follows a section with respect to the form of judicial admissions, and the writer says: "A judicial admission may be oral, as a verbal waiver of proof made in open court, or a plea of guilty in a criminal case, or it may be in writing, as in pleadings, stipulations, confessions of judgment, or in a letter."

Then we have down here any number of cases where the party, for instance, attempted to withdraw the agency, and the court, in *Perry* v. *The Simpson Water Proof Manufacturing Co.,* 40 Conn. 313, held that "Even where the admission is withdrawn it may still retain its force as an extra judicial admission."

Now in this case, as the proof now stands before me, it simply amounts to this: So far as Mr. Smith, the Vice-president, is concerned, whenever you speak about him, he is the agent, the general manager of the company, and his admission, made without any limitation upon it, would be admissible in this case without any question. So far as it stands now it is admissible and has been admitted, but whether or not the proof will show that it was hedged about with limitations to the particular inquiry that was then being conducted depends upon what those facts are when they are produced.

Mr. Wright: I think if your Honor will glance over this statement you will see it is not that kind of an admission. He says "I apologize; I am ashamed," etc. I now offer it.

Mr. Carey: I am not going to stand on formality of proof. The court will recall, however, that the authority of Mr. McClary is that of a local attorney, and he handled such matters as were referred to him, and this matter of attending an investigation of this commission with respect to what means could be adopted to lessen forest fires was referred to him and he appeared before the commission.

The Court: Indubitably with instructions.

Mr. Wright: The deposition shows that he did.

Mr. Carey: I admit that he was there under instructions or that he was authorized to use his discretion.

The Court: You see, if they sent him there and gave him no instructions, then he had omnibus instructions, in effect. If they sent him there and gave him limited instructions, let them prove it. That will show the nature and limitations of his employment. My impression is that where an admission is solemnly made in a proceeding, even though it be as the writer calls it here a special proceeding—and there is some other evidence in the case you know with respect to whether this admission was authorized and warranted, because we have now the statement made by the general manager of the company himself practically to the same effect—clearly indicating that it must have been the policy of the company as well as the result of the instructions given to Mr. McClary.

Mr. Carey: I would like to call the attention of the Court still further to the fact that it is apparent that Mr. McClary was making statements with regard to matters which he had no personal knowledge of at all.

The Court: Why is that apparent? Why should I assume that an attorney is violating his duty or is doing something that is calculated to mislead or impose upon the party?

Mr. Carey: He made statements which came to his knowledge as an attorney of the company and he does not pretend to have personal knowledge of these things that he is talking about. For instance, he was talking about a right of way 200 miles long. We are investigating only a very small part of that right of way. His statements were general statements covering a very large territory and taking in altogether more than we are investigating here.

The Court: Still, it takes in what we are investigating here.

Mr. Carey: And also having in view an entirely different object from what we have here.

The Court: Well, doesn't that rather bear upon interpretation of the alleged admission? You look at the object which the party who was pursuing the investigation had in view and read the alleged admission in the light of that object and say then, in the light of that object, to what extent it goes as an admission. That would seem to me to be the logic of the situation.

Mr. Carey: It has appeared in the case already that the Mohawk and Malone Division comprised several hundred miles of track. Now he speaks of the right of way.

The Court: I understand; but won't the jury assume, as common sense men who are not picking a nut out of a nut shell—won't they infer as plain, ordinary men of experience and logic, that this company made preparation of some kind when it sent this vice-president and general manager and attorney there, and that the attorney and vice-president and general manager were operating in pursuance of a plan?

Mr. Carey: The vice-president didn't go.

The Court: He was there in spirit. He sent this statement, clearly indicating that the com-

pany—the jury might infer—that the company, or at least its executive officers, had this matter under discussion and that this move that they were making was a move of deliberation on their part and not a mere flash in the pan that some local attorney had dreamed about.

Mr. Carey: Undoubtedly.

The Court: Now, if that is so, why can't they say if they had given it deliberation and thought that they have not made slipshod announcements of facts of which they are ignorant and so on, but that it represents their clear notion of the situation? Now when a man makes a statement, even though he does not have knowledge of it—a party to a suit makes a statement even though he hasn't knowledge of it, it is his admission, even though it appears he got his knowledge from hearsay. It is his admission. If you are fond of the law of the State of New York I can refer you to a case right on it now—160 New York, 330. The point is that a man does not state anything against his interest unless it is against him. That is the theory of admissions, stated in plain, ordinary, everyday language. Nobody gets out and tells things against himself unless they are true, or at least unless he thinks they are true. Now if a man whose automobile has been in an accident comes out and says, "True, I wasn't there; I didn't see the accident and I don't know who drove the car, but I am perfectly satisfied that my chauffeur was at fault;" that is an admission, even though he didn't know anything about it from personal knowledge. Now you say Mr. McClary has made statements of facts about things of which he is ignorant.

Mr. Carey: He could not have personal knowledge.

The Court: Even so, I say he has made the

statements as of the knowledge of the company. Of course the company could not know, because it is an artificial being, and when the admission is made it must be the admission of an agent or attorney.

Mr. Carey: The court I think concedes that if this were made—

The Court: I concede this—and I asked you at the start if there was anything in the proof to show that this was distinctly hedged about at the time it was made with a limitation as to the extent to which it was to be used. If it was I would be perfectly willing to go the length of holding that such a statement was merely a statement for that purpose, the purpose of that proceeding, and that it was not to be used by third parties in any other proceeding. If it were simply said, "Now, for the purposes of this suit and for this suit only, we make the admission"—as I always say to the jury when a man comes here in an accident suit where he admits liability for the purpose of settlement—I would be willing to hold there that the attorney being employed only for that case and not to get rid of that case, and making the statement under those circumstances—I think I would be inclined to hold that it ought not to be admitted; but with respect to the admission of Mr. Smith that does not appear to be hedged about with anything.

Mr. Wright: So far as Mr. McClary is concerned, doesn't an examination of the whole transcript does not show any limitation. What he may have had in his mind is another thing, but so far as the record goes, or the admission goes, there is nothing to indicate.

The Court: Now here is a case which indicates what I indicated, with respect to the jury saying: "In doubtful cases the question of the intention with which the statement was originally made is

one of fact for the determination of the jury''—in doubtful cases. If it was simply a concession which was not intended to act as an admission at all I would not let it in. If on the other hand it is doubtful whether it was an admission or not, I would let it in and say to the jury, ''You determine what it was. If it was an admission you apply it in this case as an admission. If it was not an admission you dismiss it from your consideration.''

Mr. Carey: Has the court reached the conclusion that it makes no difference what the object of this investigation was, what the object of the parties was in the result to be obtained?

The Court: Of course I can readily see an object which would utterly destroy the value of the admission. I can readily conceive such a case; but this is not that case.

Mr. Wright: It is just the other way.

The Court: It seems to me the object which they had in view in this case was an object which rendered the statement of conditions peculiarly appropriate.

Mr. Wright: The very subject of discussion.

Mr. Carey: The object they had in view was not to find out if the railroad company had performed its legal obligation but to devise a plan—

The Court: I understand that thoroughly. It was a public service commission and the object was to better conditions if they could.

Mr. Wright: But remember this—called at the instance of the Fish and Game Commissioner.

The Court: I do not care who called it. The point in my mind is simply this, that the fact that the object was to determine something other than guilt is a matter of utter inconsequence. What difference does it make what the object was, except as the evidence tends to show that the man

who made the admission did not mean it, that it was a joke or something of that sort? If that were the object I can readily see that the object would destroy its value as an admission; but the Public Service Commission wanted to act on facts as to conditions and they wanted to know what the truth was, and then these men came along and made statements with respect to facts.

Mr. Carey: But you see if the railroad companies are to be held in actions for negligence in connection with statements they may make to public service commissions in order to devise a plan which shall result to the benefit of the public, they are not going to make those statements. They will let the public service commission find out for themselves; and in this case they were working along hand in hand.

The Court: The same thing would be true of a coroner's inquest. They would let the coroner go hang if they were going to be held for it; and they uniformly are held for it. The officers are brought up and interrogated, and when the matter comes before the court the officers are examined again and again and again about what they said before the coroner; and I do not see any reason why a railroad company should not be held for what it says just at much as an individual.

Mr. Allen: Under these circumstances—do you appreciate that a great many claims arose out of this fire? At the time of this investigation we were not prepared to meet the question of negligence at all, and we simply waived the proposition and said, "for the purposes of this investigation we say this fire"—

The Court: Why weren't you prepared to meet the question of negligence?

Mr. Allen: This was immediately after the fire.

The Court: You knew from your own reports what your men had done with respect to roadbeds, engines and all the other things that are required to exculpate yourselves. You knew that just as well then as you would today.

Mr. Allen: From my investigation of the matter we didn't. It came on us—this, with a great many other fires—a great number of them.

The Court: I have tried twenty-five or more of these cases. When you come to prove the condition of your spark arrester how do you prove it? You prove it by your books or by the men in charge of the inspection of the engines. They say, "Jim Smith inspected it on so and so" and so on. Everything with respect to the spark arrester and the circumjacent apparatus all is proved by books.

Mr. Allen: True, as to a railroad fire. But suppose the fire were not a railroad fire? It takes a lot of investigation to find that out.

The Court: If it was not, why then the railroad company is not responsible.

Mr. Allen: But you see that is the situation here. We haven't had time to investigate the origin of all these fires.

The Court: But don't you see, your argument doesn't get anywhere, as a matter of logic? You are saying, "True, we did know about the railroad, but we did not know about the other things alongside of the railroad." The admission they are asking to put in now is with respect to the railroad matters, and not with respect to anything along the railroad.

Mr. Allen: No; this admission contains many things we are not inquiring about at all.

The Court: The only thing the admission can be of any value as, is an admission with respect to the conduct of the railroad company. That is

the only thing they could admit or that they know about.

Mr. Allen: But they are seeking to apply it to fires which possibly have no railroad origin. That is the very object of the thing. They apply that admission to all these fires. At the time we didn't know—we hadn't had time to investigate—

The Court: Well, I should think it would be very unwise to talk about a thing that you had not investigated—on the part of your officials.

Mr. Allen: But that admission was simply made for the purposes of that investigation and without any idea—

The Court: If it were I would rule it out for you.

Mr. Allen: I can only speak from hearsay. I was not present.

The Court: If it were I would rule it out for you; but it does not show it. If you are in the position that you say you are in I am ready to rule it out—if you can prove that—but if you are not I have to leave it in.

Mr. Allen: That is the fact as I believe it. I cannot testify to it except from hearsay evidence.

Mr. Carey: All we have on that subject is the statement made by Mr. McClary at the former trial of this case as to what he said to the commission. Of course he was not under oath, but at the same time his statement was not disputed.

The Court: You do not think, do you, that the railroad company in this whole proceeding was entirely altruistic before this Public Service Commission?

Mr. Allen: I wouldn't say that.

The Court: They had a distinctly worked-out plan, as they ought to have. But that is not the question before me. The question is whether I have got to admit this thing as an admission or not.

Mr. Allen: That admission of Mr. McClary wasn't part of that plan that was worked out.

The Court: If they had foreseen that, it would not have been in there. Well, that is the way the law strikes me as being settled.

Mr. Wright: I would suggest that your Honor glance over this proposed admission, and if there is any doubt in your Honor's mind, have that before you when you make your final ruling. The parts I have marked are such clean-cut admissions that there cannot be any dispute about it. Here, and here, (indicating pages 226 and 227 of the printed book)—it seems to me that shows clearly—

The Court: You see, he was not obliged to say that to that commission. He simply told them a fact. He said "This was wrong; I'll just tell you so now."

Mr. Carey: Where?

The Court: This right of way where the fires occurred.

Mr. Carey: That is three hundred miles long.

The Court: Very well. If the counsel does not limit it the jury will have a right to infer that he meant all along the right of way.

Mr. Carey: It appears in the testimony that the railroad company and the commission were working together.

Mr. Wright: I don't think they were working together.

Mr. Carey: That is what the testimony shows.

Mr. Wright: The railroad was endeavoring its best to prevent oil burning locomotives from being ordered, and the commission was working to have them ordered, so they were not working together.

Mr. Carey: The commission says, "Submit a plan to us if you say these results can be accomplished."

The Court: Let us assume that is a fact, that they said "Submit a plan to us."

Mr. Carey: I think that ought to be considered a privileged communication.

The Court: If they had stopped at that point, whether it was privileged or not, it would not have hurt them, because the Public Service Commission did not say, "Come up here and we will act as a confessor; you confess your sins and we will listen to them." What the railroad company was doing was this: it was soothing and mollifying the Public Service Commission by saying, "Sure; the right of way was bad, and it was covered with all this sort of stuff, and we can stop these fires by proper fire boxes and do all these things, and if you gentlemen will join in with us it will make this whole thing delightful. We will admit all these facts." Why did they admit them? It was simply to put them in the position of being willing to concede something, and the Public Service Commission concede something—"Let's go and clean this thing up for the future." That was his attitude.

Mr. Carey: To go way beyond any legal requirement.

The Court: Now this does not at all mean that the railroad company were under any obligation whatever to get, for instance, a screen which was not standardized and not in regular approved railroad use at the time. It does not mean that they were, and they don't have to; and if this fire happened despite the employment of such a screen, and your roadway was clean, there would not be any responsibility, even if there was a fire; and it would not make any difference what this man said. The only thing that this bears upon is as tending to show that what you prove with respect to the right of way by certain witnesses who say

that it was cleaned and hadn't any grass on it, was not a fact; that is all that tends to show. And it does not seem to me that if a man sees fit to get up in a public meeting and announce his faults and so on—suppose, for instance, just to make it a little grotesque, but still illuminating, suppose I had gone out to Paterson during the time that Billy Sunday was out there, and suppose I had hit the sawdust trail and had wandered up to the platform and said, "Yes, I am a crook; I received money for the dispensation of justice in Hudson County, and I did it in the case of Tom Jones against Robert Smith on the 14th of June;" would the fact that I was hitting the sawdust trail militate against the force of that admission? I can see what you have got in your mind. I think—at least some of what you have in your mind—you have in your mind that if a railroad company, for instance, or any other defendant, after an accident happens makes repairs, the fact of making repairs is not to be urged as an admission on the part of the railroad company that the thing was wrong before—or if they make improvements—and the reason for that is perfectly plain, as laid down in all the cases, and the reason is if you did have such a rule you would stop all improvement. Now you reason by analogy and say, "If, when we go before a public service commission and try to do our duty, we are to be held up for it, we will never go before them." But I think that is a false analogy. In the first place, the railroad company is under no obligation to help in a proceeding of that sort, and if it is called upon to give testimony it must give it, and if this man had not handed in this statement they could have produced him as a witness there under subpoena and they could have asked him certain questions and he could not have shielded himself

behind the fact that the corporation might be found guilty of a crime and subjected to a penalty, because he is not the corporation, and under various cases he would have been obliged to testify and he could have been compelled to tell on the stand, under oath, everything that he gave here on the part of the railroad company in writing. So that he was not coerced; he was not under any duress; he was not performing any public duty in the sense that he was under any obligation to do this thing which he did. He made a statement in which there appears an admission, and I am asked to admit that admission, and it seems to me under the authorities I am obliged to do it.

Mr. Carey: I think I have said all I can.

The Court: I would think, in the light of the way the case has gone, that you would want this exception, because I do not think that there is anything else that would seriously advantage you in the way of an exception, and if I am wrong about this I am dead wrong about this case and you reverse me head over heels. There is no doubt about that. The reason I am arguing with you now so fully and carefully about it is that if I am wrong about this I am so wrong they cannot say my error won't affect the result. There is no doubt about it, when that thing goes in in which the agent of the railroad company says the roadbed of the company was wrong—there is no question about that.

Mr. Carey: He was not employed to make any such statement as that.

The Court: I think the jury have a right to infer he was. That is the very point. Now we have got it all threshed out and put right down in its bones here on the record, and to that I give you an exception, or an objection in the nature of an exception, so if I am wrong about it that

ends it so far as I am concerned and you will reverse me. (Counsel for defendant notes an objection in the nature of an exception).

(Adjourned to December 22, 1915).

The Court: Did you gentlemen find anything over night? I have found enough that will cause me to adhere to the ruling I made without going into the matter further.

Mr. Allen: I would like to call your Honor's attention to—

The Court: This record is not before me now, is it?

Mr. Allen: It is not before you. It is part of the same record.

The Court: I will only rule on what is before me now, and what comes afterward you may handle in your own way; but I am only called upon to rule on what is before me now. I am simply going to put on the record the cases that seem to me to govern. Now in our own state we have a very interesting case that seems, so far as a case can be said to settle a thing like this, to settle it—Jones vs. Mount Holly Water Co., 93 Atl. at page 860. In that case the president of a corporation which was furnishing water to Mount Holly saw fit to send a communication to the board of health with respect to the character of the water and how it was infected with coli and other bacilli, and that statement of his was offered in a suit brought in a court of law—which is a pretty close analogue to the case now on trial—and the supreme court said that "A letter of the president of the defendant company, sent to the town clerk, relating to the water supply, and making statements relating to the condition of the water before the outbreak of the fever epidemic, and his statements before the

board of health as to what the company had done to ascertain the condition of the water supply prior to or at the time of the epidemic, were competent evidence." That is practically right on the point. Then you will find any number of decisions that bear upon it. If you will read 2 Wigmore on Evidence, sections 1066 and 1067, and again at 2593, you will find the rule elaborated. You will find also the rule laid down in Rowan v. Yarnell, 90 Atl. 730, where a letter was written to a township committee and the letter was used in an action of ejectment as an admission; and you will find the rule laid down in Simon v. Etgen, 110 N. E. Rep. 1069, a court of appeals case in New York, where the principle is gone into very thoroughly. You will find the rule laid down in Ansell v. Cleveland, 79 Atlantic, 19. You will find it in Connecticut, in a case on 64 Atlantic, 912, and in another case in the same volume at page 666. You will find it laid down in Nicholson v. Sneider, 59 Atl., 486, and in 54 Atlantic 700; 59 Atl. 926; 59 Atl. 577; and you will find a very leading case in Templar v. See, 103 N. E. 1091, and that lays down the rule as to what the defendant may do with respect to those admissions in order to characterize them and the circumstances surrounding their outgiving and the weight which may be attached to them by the jury.

Now in the discussion last night something was said about these coming in the category of judicial admissions. Of course in the suddenness of the question that came before me I applied the language that was found in the 16th volume of Cyc to the case and considered these in the light of judicial admissions and that even if they were considered as that that they were admissible. It is perfectly manifest that these are not judicial admissions. Wigmore makes it perfectly plain

that a judicial admission ceases to be a judicial admission when it is used in a case other than the one in which it was first announced. What these are is what Wigmore calls quasi admissions—which I think is a bad term—What they are really is admissions in pais. There is a wealth of authority on the subject, and I looked through the question of so-called privilege; I looked through the various matters that were suggested, and I looked also at the question of the authority of the attorney of a company to make such a statement; and I think there is a case on that subject which I might as well put in the record—James vs. Boston Electric Railroad Company—the facts are not at all similar, but the principles are the same—87 N. E. Rep. 476, where the Massachusetts Supreme Court makes use of this language: "The attorney was her agent and represented her, acting in her business. What he said or did, acting within the scope of his employment, must be presumed to have been done under her instructions, and it is evidence that may be used against her, differing only in weight but not in competency from her personal words and acts."

Mr. Carey: That was one of the strong points which I thought existed in favor of the exclusion of Mr. McClary's statement. He was only employed to represent the company in this investigation, and not sent there to make admissions, and if admissions are to be taken from him the burden is upon the plaintiff to show the authority of this agent to make admissions which should go beyond that investigation and be held as admissions in another proceeding entirely. As to that it seemed to me those statements were without authority and entirely hearsay.

The Court: There are innumerable cases on the subject. You will find them laid down in Burr

Jones' Book on Evidence, 260 or 261. You will find it laid down there that where a man employs an attorney to represent him in a certain transaction and gives him authority to appear for him in that transaction, if the attorney appearing for him makes stipulations that those stipulations are as binding as admissions in pais upon the party himself as they would be had they been made by the party himself, the distinction of course being between the weight to be attached to them if they had actually proceeded from the mouth of the party himself, or from his pen, and the weight to be attached to them, proceeding as they did from the mouth or pen of his attorney.

Mr. Carey: I would concede that in the proceeding in which they were made we were bound, but to take them bodily and use them in another proceeding—

The Court: Suppose this were a pleading, filed by an attorney. You can take a pleading and put it in evidence in another case between the party who pleaded it and another party altogether. The authorities are almost uniform on that subject. I have found one case growing out of the nature of the pleading in Massachusetts that militates against the rule I cite, but in this state, whose rule we are applying, there is no divergence on that.

Mr. Carey: I recall a trial in which I was interested in New York, where Judge Beach ruled against that very proposition and said that is merely the conception of the attorney and does not bind the party in this case.

The Court: If you will look at the rule as it is laid down in the text books—and Beach is a text book writer himself—you will find that that thought that you now enunciate is embalmed in

their discussion by showing that in England they adopted that rule, and they show how we have departed from it absolutely here as a matter of history and of law. Originally the pleading was not a thing that bound a man, but here it is every day's practice for a man, to take a pleading that has been withdrawn—a man files a pleading, gets leave to withdraw it and it is out of the case altogether, and some other man comes in and drags the pleadings out of the record and says "You filed this thing." He says, "That is not conclusive on me." "Oh, no, it is not conclusive against you, but it is evidence against you and must be considered by the jury, as most of the cases say, for what it is worth; and what it is worth depends on the circumstances under which it was made."

Mr. Carey: In the record in this case there are some limitations which were placed upon the admissions which were used. Mr. Allen has references to those limitations. Our stipulation was if any part of this record before the Public Service Commission was put in by the plaintiff, the defendant could put in any part he chose.

The Court: The cases are uniform in this state that if the thing can be considered as an admission in pais then every circumstance which in any way can be held legitimate to affect the weight of the testimony is admissible. You can show what was said at the time the thing was put in evidence; if it be a stipulation you can show what arrangements were made between the parties, and all those things, as affecting its weight. There is no doubt about that. So what you are talking about now is clearly, in my judgment, admissible, if it is as you say—and I do not doubt it at all—that the stipulation is that if part of the record goes in the rest of it may—

Mr. Carey: Yes; that was the stipulation.

The Court: I have no doubt about that.

Mr. Wright: We waive formal proof of all this record, and simply reserve the right to object to the materiality and admissibility.

The Court: All right.

(The above discussion all took place out of the hearing of the jury. What follows occurred in open court).

Mr. Wright: I started this discussion yesterday by offering the statement made by Mr. McClary before the Commission, which is known as pages 2075 to 2083 of the record of the Public Service Commission, and it was marked at Albany as Exhibit A, by Theodore Rurode, Master.

The Court: I want to ask this, gentlemen, so that there will be no misunderstanding about it: You do not object to the pages offered because they contain some matters that are not admissions, do you?

Mr. Carey: No.

The Court: Because if you did I would strike those things out. I thought it very much better to let it all go in and then it would be in its proper setting.

Mr. Carey: Yes; the introductory matter we do not object to.

Mr. Wright: I offer it for that reason, that it throws a light on the entire transaction.

Mr. Carey: Our objections all go to the admissibility of the statement itself in this proceeding.

The Court: Your objection I suppose is based upon the ground that it was offered in a proceeding and under circumstances which prevent it from being legal testimony in this case.

Mr. Carey: Yes; that it cannot have any relevancy to the issues raised in this case. It was mere hearsay. So far as characterizing it as evi-

dence, it would be mere hearsay and it was without authority.

The Court: By hearsay you mean it was not authorized by the defendant?

Mr. Carey: Yes; it was without authority, and about matters of which the party making the statement had no personal knowledge.

The Court: As against that objection I admit those pages of the statement for the reasons which I have stated out of the hearing of the jury to counsel when they were before the bench.

Mr. Carey: There were other reasons which I gave in the discussion.

The Court: Whatever reasons you have stated anywhere on the record may be considered as being urged now, because if I am wrong about it I want to be reversed just as bad as you want to reserve me.

(Statement marked in evidence P-25).

Mr. Wright: Before reading it I desire to also place upon the record the same stipulation we had before, page 219, the first two paragraphs.

Mr. Carey: I think that is our stipulation. I haven't any doubt about it.

The Court: All right.

Mr. Wright: It is stipulated between the parties as follows: The Public Service Commission shall produce the original statement sent by Mr. Smith to them and which is set forth in Mr. Smith's testimony heretofore taken in this cause, and it is agreed that the copy set forth in Mr. Smith's testimony is a correct copy of the statement filed with the Public Service Commission, and as printed in their report, it being understood that this admission is no waiver of the objections made to the admissibility and relevancy of that paper, or of this paper, or a waiver of any other legal objection that may be raised to the paper as evidence.

Subject to the same objections, and to any other objections that may be raised, it is agreed, that upon the proceeding before the Public Service Commission, Second District, entitled, "In the matter of fire prevention along the lines of the railroads in the Adirondack Forest Preserve," in which proceeding the statement of Mr. Smith was filed, the defendant company in this action did cross examine witnesses produced by others and also produced and examined witnesses on their own behalf, this stipulation being entered into subject to objections to the relevancy and materiality of this testimony.

Mr. Carey: In that connection there was also read into the testimony at the previous trial, and I think should go in here, the order under which the Commission was proceeding at the time these statements were made.

The Court: I think that ought to go in because it tends to characterize the nature of the evidence and the reason for which it was given and so on.

Mr. Wright: It is agreed that the order under which the proceedings were had is entitled as follows: "In the matter of the New York Central & Hudson River Railroad Company and other railroad companies whose lines run through forest lands in counties containing parts of the Forest Preserve:- Ordered to show what devices and precautions are now being used by them against setting fires upon their respective lines in such forest lands; and also to show cause why they and each of them should not use some fuel upon their locomotive engines which will not give out sparks: and why the motive power should not be changed to some other than steam."

Mr. Carey: This is a copy of the printed report?

Mr. Wright: Yes.

Mr. Carey: All right. I have no objection to having those words "and set fires" inserted.

Mr. Wright: I would like to put in the statement made by Mr. McClary at the bottom of page 220.

Mr. Carey: The second paragraph from the top, on page 221, beginning, in parentheses, "Referring"; is there any objection to that going in?

Mr. Wright: Only in connection with the entire statement, beginning at the bottom of page 220, because one leads to the other.

The Court: I haven't any doubt at all that the rule is perfectly settled that when any alleged admission of this kind is offered it may be rebutted, and that all the circumstances of it may be explained; the statement made at the time it was asserted may be given; and that it is admissible also to give the circumstances under which it was signed, if it was signed, and under which it was filed, if it was filed. In other words, anything that tends to characterize the statement in any way that will elucidate or explain its object or its contents is admissible.

Mr. Carey: This is not a statement made before the Commission.

The Court: I am simply stating the general rule so that there will be no misunderstanding that I intend to keep anything out which would color, tinge, characterize or elucidate any statement made by anybody in any other hearing than the one now on trial.

Mr. Carey: The statement I refer to is the one made by Mr. McClary at the former trial in which he explained how he came to make that statement.

Mr. Wright: I think we can simplify that by putting in the statement of Mr. McClary at page 226.

Mr. Carey: I do not care to put that in.

Mr. Wright: Well, I will offer the statement made by Mr. McClary at the former trial, pages 206, 207 and 208, in which Mr. McClary stated in detail the circumstances which surrounded the making of this statement.

Mr. Carey: How far?

Mr. Wright: The full statement: down to 209. It is a two page statement. It is his own words as to what happened.

Mr. Carey: Down to the bottom of the last paragraph on page 209? All right.

The Court: All right; it will go in.

Mr. Wright: Statement by Mr. McClary: (Reads): "And it was also agreed that if any part of these notes went in (that is referring to the notes of the stenographer taken before the Public Service Commission) the other party must put in the other parts.

"We object to any evidence of any part of the proceedings taken before the New York Public Service Commission in the fall of 1908, for several reasons. I will state first what the proceeding was.

"On all lines of railroad running through the Adirondacks and also in St. Lawrence, in New York, the same drouth existed in 1908. In all of the lumbering sections the same drouth existed. At that time forest fires were raging, and ten thousand acres in one particular fire had been burned over. Of course on the lines of traffic where people lived up through the wilderness, there had been more fires. We were at that time, in common with all other railroads in St. Lawrence, and in the Adirondacks over to Canada, burning hard coal. We were burning soft coal and part hard coal, but mainly soft coal. Some were burning wood and hard coal.

Statement by Mr. McClary (Read)

"The fish, forest and game law of our state provided at that time, this—taking section 72 of the forest, fish and game laws: 'That the Public Service Commission must, upon request of the forest, fish and game commissioner, and on notice to the railroad company or companies, affected, require any railroad company having a railroad running through the forest lands in counties containing parts of the forest preserve, to adopt such devices and precautions against setting fire upon its line in such forest lands as the public interest requires.'

"Under that law the Forest, Fish and Game Commissioner began an investigation into forest fires to ascertain what the causes were; to what extent railroad operations were responsible for those fires, and to ascertain if some other device, some other fuel, the electrification of the roads, oil burning should be used. The New York Central happened to have the principal railroad through the Adirondacks, known as the M. & M. Division; and after we met at Albany the Catskill was dropped out and the burden of the proposition fell to this company, the defendant. The Delaware & Hudson stayed in, but the burden was with us; and the matter was proceeded with under the rules of that commission, which isn't a court. They did not pretend to be a court, and evidence was taken by anybody who had anything to offer —any suggestion to offer as to a better method of operating railroads through the Adirondacks and of stopping fires elsewhere., There were no issues joined at all. I represented the New York Central and its allied roads, and I think perhaps took the burden on myself, in a way, of helping the Public Service Commission. We started at the outset to find out what faults could be found with the present system of operating the rail-

roads, and what method might be used. Those proceedings ran over quite a long time. We had hearings up through the Adirondacks, at different points, and we had hearings at Albany. Evidence was brought in their record of the use of oil in other parts of the United States; and the Commission finally, as a result, decided that for the summer months the railroads running through a part of the forest preserve of the State of New York, from eight o'clock in the morning until eight o'clock in the evening, and from, I think, May 15th, or somewhere about the middle of May, until—it don't matter now— until some time in the fall, in October, we should burn oil as a fuel. And since that time we have, in the day time, been burning oil as a fuel in the Adirondacks; and that means on the main line; on the M. & M. Division of the New York Central, and also on its allied lines. There was the track which they called the forest regulated track, but in practice it ran from Utica, on the main line, through to Malone.

"Now that commission did not conduct its proceedings at all after the fashion of courts; and it so provides in the public service commission law that they need not. I have section 20 of the Public Service Commission law; it says this: 'All hearings before the commission or a commissioner, shall be governed by the rules adopted and prescribed by the commission; and in all investigations, inquiries and hearings of the commission, the commssion or commissioner shall not be bound by technical rules of evidence.'

"There wasn't any attempt to bind us. The purpose of the commission was to find some method that would decrease the fires. That was the purpose of the railroads; and we joined with them in every way in bringing out the evidence to find what was the best method within limits. Of course it appeared very early in the proceedings

that electrification was impossible; it would take so many millions. It appeared that oil burning, perhaps, was simply a matter of cost; perhaps $100,000 a year more; and that was finally ordered.

"Now, if evidence had been taken in a court of record, it is possile that that evidence could be used in another State in a court of record. I am not saying anything about that; but evidence taken before one of our public service commissioners, taken in that way, under their rules, cannot possibly be evidence in the trial of an issue in another state, or in the State of New York."

Is there anything else you would like to put in before we close this?

Mr. Carey: No.

Mr. Wright: I will now read the statement of Mr. McClary that was offered in evidence. The first part is not material, is it?

Mr. Carey: You might read it; it won't do any harm—to show the objections that were being raised to the plans of the commission for oil burning.

Mr. Wright: (Reading):

"Mr. McClary: No, sir; Mr. Osborne, it is not practicable and I do not know now that they would allow us to burn oil in Canada. They are very particular about that."

Mr. Carey: "Not practicable" we understand meant that it was not practicable to change to oil burning.

Mr. Wright: I presume that is what they meant. (Continues reading:)

"Commissioner Olmsted: Do you run clear through from Remsen to Montreal?

Mr. McClary: They run now from Utica by our Black River Road to Remsen, over the Utica and Black River division to Tupper Lake. That

is a division; and then an engine is all ready, takes the train to Montreal, back to Tupper Lake, and so on. That is, Tupper Lake is our central point.

Com. Olmsted: Wherein lies the trouble then of making the change at Malone instead of making it at Tupper Lake? You have got to make a change of engines. You simply change engines, put on a coal burner and take off an oil burner.

Mr. McClary: We would have to change engines; we wouldn't proably run 168 miles with any proposed oil burning proposition that I have heard of.

Mr. Staley: Mr. Henderson says that you can.

Mr. McClary: He says lots of things that I don't believe.

"I also want to say this, gentlemen, in regard to the Adirondacks up there that our road crosses. The evidence shows that the lands burned over, that a large part of it was land that was worth from 50 cents to $2.00 an acre. That is in the evidence. There are certain sections where, I recall one man, but it don't matter about that; but that is in the evidence from 50 cents to $2.00. The bulk of the other part of it was land and is land that is not worth over ten or fifteen dollars an acre. Occasionally you strike some state land that is worth its weight in gold of course, because the state owns it; and we have got 22 miles and a fraction of that, 22 miles and a fraction that we cross through state lands. But that was all lumbered.

"Our proposition is this: We say to this Commission that with all the brains that are back of the New York Central people, and with the brains that they are able to command, that we are able to furnish a locomotive that will absolutely cut out the question of coals dropping from the firebox; and the evidence shows by I don't know how many

men that practically one half of the fires came from the lower part, from the firebox, fire grate, ash pan, whatever you call it, the lower part of the engine. We can do that. We will take an engine and have an engine ready that will cut that out, 50 per cent there.

"Then we are experimenting now in Schenectady and at West Albany, and I think that our men will be able to demonstrate that we can so change that engine with regard to the spark arrester, and with regard to another proposition which Mr. White will later on explain to the Commission, that will take care of 75 percent of the other half. So much for the engine construction. I think we can make that plain, that we can take care of 75 percent of the causes of the fires. Then we propose to do this: to clean our right of way. We apoligize; I have apoligized to Mr. Osborne and Mr. Sague, and to Mr. Olmsted because they were there, with regard to the condition of our right of way. I was ashamed; it was bad, and it was one of the causes of the fires this summer on the right of way. We say we will take care of that. We ask and will ask and we shall say that the proper way to take care of that is to burn in the opening of the spring, and we shall say it can be done with perfect safety; and we shall go further than that. We shall show that any man of ordinary ability, mental ability, must know that it can be done. It is only a question of how many men. Of course, two men could not go out and burn that right of way over with safety, and the wind blowing, and everybody knows that. We say that we will clean our right of way down to grass; and the initial expense of that for the first year is something like thirty or forty thousand dollars. We will clean that thoroughly; we will take out

the stumps and the trees, get it down clean, and we will keep it clean. We will keep it clean if the Commission will make an order that we can burn it, and then the Legislature can be let alone and allowed to amend that little section to allow us, with that order, to burn it. We will take care of 90 percent of the rest of our fires, and that is not all.

"We offer to put on a patrol, that, if we did not keep it clean, could take care of the fires. We will put on a quadracycle patrol for every five miles of two men that shall patrol that road from the beginning of the spring until the snow comes in the fall; and that is going to cost us a good many thousand dollars. We will do that, and that is not all we will do.

"We will so arrange it, and our plan calls for that, that the person in charge, not somebody down in New York City or out West, but that the man on the spot, the supervisor of tracks, has full power to increase that patrol as the needs come. If it grows drier, he can put them on, and there isn't any official higher that will say nay to him, not with this in view.

"And we will do this: In case they cannot stop that fire with the patrol, they will have this extinguisher, and the shovels, and so forth, he can drop off one of his men, go along, and take up another man from the section. We will keep the two men on that patrol while there is any danger whatever, and we will keep the one man on the patrol all the time regardless of danger.

"Not only that, but we will establish telephones once in every five miles, and we will make it possible to protect our right of way and protect ourselves against other fires. We will keep track of those; we will report them to the district fire wardens, and so forth, we will take care of it that way.

Statement by Mr. McClary (Read)

"That is not all we will do. We will make three of the best equipments that is possible, large tanks that are capable of holding a large amount of water, and have them placed at three different points to take care of any cataclysm that comes up.

"Now, we say that with this scheme—I wouldn't ask you to take my word for it, but I do ask you to take the general manager's statement, the general manager of the New York system. Certainly, if he says to you, 'We will carry out this plan and it is good, and I will see it is carried out,' he certainly is entitled to at least the thought that he intends to do as he says. That he is entitled to, and I know it can be done; I know it can be done, I know it will do the business, and it will do the business with a quarter of the expense that this oil burning proposition involves, and I haven't any doubt about it.

"Now, with all of those, that is what we can show. When we get through with that, we do not say that any system is absolutely perfect. You take what turns out about your oil business, the changing those engines, keeping the maximum number, it is going to knock our business all to pieces at times. We have to do that. Change the whole system of doing business; idle engines are all over the line certain times of the year, and we cannot help that; it will be terribly expensive, but we say that we can take care of 99 percent, and if you know of any law on God's earth that will do more than that I do not. Take the law against murder. Any law you please, it does not begin to make it perfect. We do not claim that never under any possibility could there a fire happen; but will take care of 99 percent of our fires, and I think that is all you ought to ask.

"That is for the New York Central; I haven't a word to say for any other road, but I say that for the New York Central."

Statement by Mr. McClary (Read)

Then follows a statement on behalf of another road, which was read in before. I will omit the next paragraph, which relates to the New York & Ottowa road.

(Continues reading):

"I want to say one thing more, and then I will stop bothering your patience, and that is this:

"This scheme introduces full power to increase that to any limit. We will say that, I will assume for the moment that you say to us, 'That is fair; you have been accused of burning the woods, a good deal of it, and you acknowledge you did. Now, you propose this: this is your property, your funeral, you are going to pay the bills, it is your boy.' I am so tired sometimes of hearing what other people would do with other people's children. It is not their child; it is not their boy. It is just so with these lumbermen. They say, 'Burn oil; we don't pay it.' The Society for the Protection of the Adirondacks, they say, 'Burn oil; we never had a child, it is not our boy.' Now, this is our boy, and if our scheme of taking care of that boy is good, I think we are entitled to try it. Then, if it does not work, if it does not work, you could say, do anything, take up the tracks or electrify or burn oil. But give us a chance to work out our own salvation in our own way at an expense of sixty or seventy thousand dollars initially, and twenty-five thousand dollars a year. That is what we ask and that is what we expect."

The Court: Is it admitted that this Public Service Commission was a body created by the Legislature of the State of New York with power to deal with matters of this kind?

Mr. Wright: I think it probably would be better to put in evidence the act.

I offer chapter 429 of the laws of 1907, being the 130 session of the legislature of New York,

which act took effect on July 1st, 1907; and I understand it is conceded that in pursuance of that act the Commission had the power to conduct this investigation.

Mr. Allen: They did.

The Court: I suppose it is admitted that in pursance of that act commissioners were appointed and that the body actually existed with the powers conferred upon it by that statute.

Mr. Allen: Yes.

Mr. Wright: And then there is one thing more that I am not sure was put in; that is that part of the forest preserve is in Hamilton County.

The Court: You already have that in.

Mr. Wright: I desire to read a part of the deposition of Mr. Hall. This deposition was taken, and as to a part of it there are some questions raised as to the legality of which I am in some doubt, and I won't even press them.

The Court: All right.

(Mr. Wright reads):

"Edward Hall, a witness on behalf of the plaintiff, being duly sworn, on his oath, says:

Direct Examination by Mr. Wright:

Q. You reside in New York City? A. I do.

Q. In December and October, 1908, were you connected with any association, and if so, what?

A. Yes, I was secretary of the Association for the Protection of the Adirondacks.

Q. Do you recall a forest fire in 1908 in the Adirondacks in September? A. I do.

Q. Do you know the location of the Town of Long Lake West? A. I do.

Q. On or about the 15th of October, 1908, did you visit that section, on the lines of the New York Central Railroad Company running through and on each side of Long Lake West? A. I did.

Q. How did you come to make that trip and who were with you?''

Mr. Carey: That was objected to as not in any way relating to the issues raised in this case, and also because it was something which took place subsequent to the fire.

Mr. Wright: I will withdraw the question.

''Q. Who accompanied you besides Mr. Osborne? A. Do you mean who accompanied you or who were in the party?

Q. Who were in the party? A. Will you allow me to refresh my memory by looking at my records. I can give some names without my records. The party consisted of Commissioner Thomas M. Osborne, J. K. Ward, attorney for the Forest, Fish and Game Commission; Ernest Johnson, Assistant Superintendent of Forests; L. S. Emmons, Chief Fire Warden; A. D. Shepard, Jr., a trustee of the association for the protection of the Adirondacks; Mr. M. E. McClary, attorney for the New York Central Railroad; Mr. McClary's son, A. E. McClary; D. B. Flemming, Train Master''—

Mr. Carey: I object to the further reading of the answer because it is apparent that the witness is testifying to the official connections of certain persons whom he names with the defendant company, which he has no knowedge of, and it appears later on that he has no knowledge of their official relations.

Mr. Wright: I am willing to read it, leaving out the designations of what they are.

The Court: Any objection to that?

Mr. Carey: No.

Mr. Wright: All right. From ''Mr. McClary,'' leave out the words, ''Attorney for the defendant railroad company''—although I think that is competent, from the subsequent testimony.

The Court: Oh, I would not have any hesitation in admitting that, and I should not think you would mind it. It is in several times that he was.

(Mr. Wright continues reading):

"Mr. M. R. McClary; Mr. McClary's son, A. E. McClary; D. B. Flemming; W. N. Skelton; J. F. Welsch; C. E. Lindsey; J. V. Neubert; E. A. Walton; D. R. Macbain; George A. McCoy; and later we were joined by Mr. Ames, who was Dr. Webb's Superintendent.

Q. Did you inspect the territory in and around the hamlet of Long Lake West, or what still remained of it?"

Mr. Carey: The same question is asked again on page 271. There was quite a long discussion there and the question was asked him in a little different form on page 271. That question was not answered.

Mr. Wright: The next question is identically the same, on page 271. The question is the same as the one I read; and the answer is "Yes, sir."

Mr. Carey: That was objected to at the time the depositions were taken on the ground that it was immaterial, irrelevant and incompetent and outside of the issues raised by the pleadings in this case, and too remote in time, being six or seven weeks after the alleged fire; also calling for a conclusion of the witness and not a statement of fact.

The Court: I do not think it is open to any of those objections. The question simply calls for an answer of yes or no—"Did you inspect the territory?" If he says "Yes, I did," it does not call for any conclusion, it does not call for anything that is too remote or for anything that is open to the objection you state; and I overrule the objection.

"A. Yes, sir."

The Court: If it comes to a question of having him tell what he discovered, that is a different proposition.

Mr. Wright: I will omit the next question. That is the Neubert matter.

"Q. Did you have any conversation with Mr. McClary, who you said was on that trip at that time, when you were at Long Lake West on October 15th, 1908?"

Mr. Carey: Objected to as immaterial, irrelevant and incompetent.

The Court: With whom was the conversation supposed to have been held?

Mr. Wright: With Mr. McClary.

The Court: I won't admit that at all. It is clearly inadmissible. You see the statement of Mr. McClary when he was before the Public Service Commission was a statement which was made while he was actually engaged in and about the company's business and in the prosecution of a work which he had apparently been engaged to perform; but a mere casual conversation while tramping over the land, even if indulged in by one of the company's agents, is not an admission against the company.

Mr. Wright: I do not offer it as an admission at all. All I wish to show is that Mr. McClary was there in connection with these matters—not what he said at all.

The Court: You have already shown he was there by showing that he was one of the party.

Mr. Wright: That is all of that. Do you want to read the cross examination?

Mr. Carey: There is none of the cross examination that I care to read.

Mr. Wright: Will you admit that one of the matters investigated by the Public Service Com-

mission at that time was the fire which destroyed Long Lake West?—It is on page 209; I don't think you want me to read what he said there. If you will admit that, that is all I care about, that it was one of the matters which was investigated by the commissioners.

Mr. Allen: It was included in the affairs that were investigated by the commissioners at that time.

Mr. Wright: And witnesses were called with regard to the origin of the fire that destroyed Long Lake West?

Mr. Allen: I believe so.

Mr. Wright: Well, do you say that is a fact?

Mr. Allen: I think it is.

PLAINTIFF RESTS.

Defendant's Testimony.

GEORGE F. CHISM, sworn.

Direct Examination by Mr. Carey:

Q. What is your occupation? A. Engineer and surveyor.

Q. And you are in the employ of the defendant company? A. I am.

Q. And have been for how long? A. About six years.

Q. And how long has been your experience as a civil engineer and surveyor? A. Between 24 and 25 years.

Q. And have you had experience in surveying and in plotting the survey on maps during that time? A. Yes, sir.

Q. How extensive? A. Quite considerable.

Q. Have you had experience in making topographical maps? A. I have.

Q. Covering a period of how long? A. Over twenty years.

Q. Do you do that work frequently in connection with the railroad work you do? A. Quite frequently.

Q. Did you make some maps in connection with the Long Lake West fire, showing the territory around Long Lake West village? A. I did.

Q. And the Christy property? A. Yes, sir.

Q. Were those maps made from actual surveys? A. They are.

Q. All of them? A. Yes, sir.

Q. And were you in charge of the surveying party? A. I was.

Q. And did you actually attend the survey in the field and take notes of the survey as you went along? A. Yes, sir.

Q. And from those notes were these maps which you made prepared? A. They were.

Q. And have you checked up the maps to see whether or not they are correct, with your notes made on the field? A. I have.

Q. And are the maps correct? A. They are.

Q. Will you step down to the easel? I call your attention to the map which is on the front of the easel and ask you if that is one of the maps which you made? A. It is.

(Map offered in evidence and marked D-2.)

Q. This map is drawn on what scale? A. One inch equals one hundred feet.

Q. It shows the land and buildings where? A. In the vicinity of Long Lake West in Hamilton County.

Q. And you have located various buildings on the map? A. Yes.

Q. And by agreement we have named various of those buildings? A. Yes, sir.

Q. Some of these buildings are shown in solid lines and some in sketch lines. What do the buildings in solid lines indicate? A. Buildings which I found there at the time I made the survey.

Q. And those in sketch lines show what? A. They are either foundations or evidence on the ground of having been occupied by buildings.

Q. And the station we have marked "Building No. 1" on this map. A. Yes, sir.

Q. And off from that is a road which is marked "Road to Long Lake." Is that road from an actual survey? A. Yes, sir.

Q. Everything shown on the map made from an actual survey? A. Yes, sir.

Q. How are swamps indicated on these maps which you have drawn? A. By small characters with straight lines representing bogs.

Q. Point to a swamp shown on this map. A. (Indicating) Quite an area to the south of the station.

Q. You have drawn on this map, D-2, contour lines; do those contour lines correctly show the elevations? A. They do.

Q. What is the elevation shown for the railroad track in the vicinity of Long Lake West and the Christy siding which is the subject of testimony in this case? A. Approximately 1780 feet above the United States Geodetic Survey datum.

Q. I notice a switch extending in an easterly direction below the station at Long Lake West. What switch is that? A. It is known as the Christy switch—Christy spur.

Q. Now these contour lines are drawn at what interval of elevation? A. Interval of 10 feet.

Q. Is it a ten foot interval on all of the contour maps that you drew? A. It is.

Q. Just explain to the jury the meaning of these contour lines. A. The contour line describes the point in the surface of the earth where a horizontal slice was cut through; each slice being 10 feet thick.

Q. I notice certain figures in these contour lines; what do those figures indicate? A. The elevation of that slice or cut.

Q. I notice for example in one of these lines "1780", following around in an irregular direction. That means that every point on that line is at what elevation? A. 1780 feet above the datum point.

Q. I notice that another line at an interval of practically an inch is marked "1790"; that means what? A. That every point on that line marked "1790" is 10 feet higher than any point on the 1780 line.

Q. And the elevation between the lines marked 1780 and 1790 is always the same interval, is it, of 10 feet? A. Always the same interval.

Q. I notice on the map various arrows with numbers on them. What do those indicate? A. The circle at the end of a line following the arrow represents the position of a camera when a photograph was taken from that point. The line and the arrow indicate the direct centre line of the focal position. A number on the line represents the number that was given the photograph at the time for identification.

Q. And the number appears on the photographs that were taken? A. It does.

Q. Then in order to find the view on the map shown by the photograph you would turn to the arrow indicated by the same number as the picture and the direction of the arrow would be the direction that the camera was pointing when the picture was taken? A. Yes, sir.

Q. Now will you fold this map which we have been examining over? This (indicating) is another contour map? A. It is.

Q. Drawn on what scale? A. 1 inch equals 400 feet.

Q. And this shows Bear Pond, East Charlie Pond and Little Charlie Pond and also contour lines extending back easterly for a long distance from the railroad, and also westerly a shorter distance from the railroad. The interval between the contour lines on this map is what? A. Ten feet.

Mr. Wright: This map so far as outline goes is a duplicate of the one you used on cross examination of the plaintiff's witnesses.

Mr. Carey: The same thing without the contour lines.

(Map offered in evidence and marked D-3.)

Mr. Carey: I offer also the map which was marked D-1 for identification.

Q. Now the first map, D-2, to which you have testified; it covers about what area on this map, Mr. Chism? Just indicate approximately what the large scale map covers on this map. A. How shall I describe it on this map?

Q. Just draw your pointer about it approximately. A. It covers an area of approximately 1500 feet south of Long Lake West station to a point about 1000 or 1200 or 1500 feet north of Long Lake West station, and the area of approximately 1500 feet west of Long Lake West station, to about 2,000 feet east of Long Lake West station.

Q. Will you just draw roughly your pointer around the area so as to indicate to the jury what is covered on this map? (Witness does so.)

Q. Will you point to what has been testified to

as the Low swamp on this map? A. An area on the north side of the road to Long Lake West, about 6500 feet due east of Long Lake West station.

Q. And it is the swamp to which you are pointing now? A. Yes, sir.

Mr. Carey: Mark that up here "Low swamp"—"Low" because Mr. Low owned the property there.

Q. Will you indicate the Christy siding on this map? A. (Indicating) Southwest of the Long Lake West station, about 1200 or 1400 feet.

Q. And these represent the buildings of Long Lake West station, where the word "Long Lake West" is located? A. Yes, sir.

Q. And on the westerly side of the track are a group of buildings, and those are what buildings? A. Known as the Monahan Camp buildings.

Q. Mr. Chism, during the testimony produced by the plaintiff the Brooklyn Cooperage buildings were mentioned. Can you indicate where those buildings are located on this map? A. I can.

Q. Do you indicate them from the surveys which you made through that section? A. Yes.

Q. Indicate where those Brooklyn Cooperage buildings are located. A. The most easterly of the group of buildings found there is approximately at that point (indicating).

Q. That is the most easterly? A. Yes.

Q. Write there—"Brooklyn Cooperage Camp."

(Witness does so.)

Q. Now will you indicate the other extremity of the land approximately? A. Approximately in a southwesterly direction and on level ground between elevation 1550 and 1560.

Q. Put a circle at the other end. (Witness does so.)

Q. Then between these two circles, where you have written "Brooklyn Cooperage Camp" is in general the line of those Brooklyn Cooperage buildings? A. It is in general that line.

Q. I notice here a line drawn at apparently right angles from the railroad and extending some distance to the southeast. What is that line? A. That is the line of the wire fence said to be between Christy and Webb.

Mr. Wright: It is shown on the other map.

Q. And that line is continued still farther on, is it, on the ground, beyond the limits of your survey? A. It is.

Q. I notice on this map are lines running from the top to the bottom and also horizontal lines. What do those indicate? A. The lines running from top to bottom that are about five inches apart indicate due north and south through the territory I surveyed. The lines which run from the right to the left, or vice versa, and about five inches apart and parallel, represent east and west lines.

Q. In order to tell the height of any of these hills you would do what, reading it from the map? A. I would read the elevation of the contour as marked on the map.

Q. And the distance between the contour lines on any of the hills representing the upgrade or the downgrade depending on whether you were going up or down hill? A. Yes, sir.

Q. Change in elevation? (No answer.)

Q. Were you all over through this section which is shown on your map here, personally? A. I was.

Q. And over through this section including the

two Charley Ponds and Bear Pond? A. I was personally along the west side of Bear Pond and the territory between Bear Pond and East Charley Pond and on top of the mountain between Bear Pond and East Charley Pond known as Charley Mountain. In the neighborhood of Little Charley Pond I did not make a personal survey.

Q. Did you find any evidences of trenches through that territory?

Mr. Wright: I object unless the time is fixed when he was there.

Q. When were you there? A. I was there from the 14th of May, 1914, to the 26th of August, 1914.

Q. Did you at that time find evidences of trenching on this ground at any point?

Mr. Wright: Objected to as immaterial, irrelevant and incompetent. This is six years after the fire took place.

The Court: Unless you have shown first as a foundation for the question that the land has not changed in the meantime, I will sustain the objection.

Mr. Carey: I will withdraw the question.

Q. What was the general trend or course of these ridges which you found between Bear Pond and Long Lake West? A. Trending from northeast to southwest.

Q. Will you indicate the number of ridges between Bear Pond and East Charley Pond and Long Lake West and carry your pointer along the summit of those ridges?

Mr. Wright: I object to that unless you call attention to some particular line. I do not want to leave it open to pick out any ridges from the top of the map to the bottom.

Mr. Carey: I want him to point out the trend of the different ridges between Bear Pond and Long Lake West and East Charley Pond and Long Lake West.

Q. How many general ridges are there, Mr. Chism? A. Three.

Q. Will you point to the first one and show its direction, lying westerly from Bear Pond? A. I lay my pointer from about the middle of Bear Pond in a direction southwesterly—north of westerly.

Q. Where is the second ridge located between Bear Pond and Long Lake West? A. I lay my pointer with its end on the intersection of the Christy line with the railroad, running northeasterly—in a direction north of east.

Q. Where is the third ridge located? A. I lay my pointer where it crosses the railroad just north of the first curve south of Long Lake West, the line of direction of the ridge being north and east —a little north of east.

Q. And meeting the Low swamp at what part of the Low swamp? A. Near its northerly line adjacent to the Long Lake West road.

Q. What is the character of this ridge nearest to Long Lake West and the railroad, as to height? A. Its highest point on the southerly end of the ridge is about 70 feet above the swamp adjoining on the northwest.

Q. And running down to what on the northeasterly end? A. On the northeasterly end the highest point is about 30 feet above the level of the swamp which adjoins it on the northwest. The northerly end of this ridge which is south of the road to Long Lake reaches its highest point about three thousand feet from Long Lake West at an elevation of about 150 feet above this same swamp referred to previously.

Q. Now between this ridge fronting on the railroad and the next ridge to the southeasterly what kind of land is there? A. A valley, interspersed with swampy sections and one or two small streams running through it.

Q. And that valley through there is known as what? A. The little swamp.

Q. And how does the height of the middle ridge compare with the height of the ridge along the railroad? A. A difference of about 260 feet or 270 feet in elevation, the middle ridge being that much higher than the general level.

Q. And the ridge over next to Bear Pond and its continuation in a southwesterly line? A. The highest point is about 310—I would like to correct my testimony as to the height of this ridge (indicating)—the elevation of the middle ridge at the highest point is about 310 rather than 260 or 270 feet.

Mr. Wright: Higher than what?

A. Higher than the general level of the railroad.

Q. And how about the ridge over at Bear Pond? A. The highest point on the ridge at Bear Pond is about 210 or 220.

Q. So that the middle ridge is the highest of the three? A. The middle ridge is the highest of the three, yes, sir.

Q. Now, will you take the witness chair? You were present when certain photographs were taken of this section? A. I was.

Q. I think you testified you located on the map the position of the camera? A. I did.

Mr. Carey: I would like to say to counsel, and to the court and jury, that owing to concessions which have been made, quite a large number of photographs which were taken will

not be needed in evidence, and I shall eliminate those; so that, while you will find on the maps a large number of arrows indicating where photographs were taken, it will not be necessary to introduce those, because of the arrangement made between counsel as to the fact that the fire which got onto the Christy property in the neighborhood of Bear Pond, East Charlie Pond and Little Charley Pond came onto that property from the Webb property, and also in order to shorten the case I shall eliminate some of the pictures which were taken.

Q. Can you tell us where picture number 9 was taken from? Or do you have to go to the map? A. Either by the map or by refreshing my memory from the notes taken by me.

Q. Perhaps you would better take it from the map. A. Picture No. 9 was taken right opposite the Christy-Webb corner and is looking up the track. It shows the general character of the right of way as to rocks, etc., looking up the track in the northeasterly direction.

Q. No. 12 is the next one, which is taken up at this point, which is just at the southerly end of the big bend.

Mr. Wright: To the north.

Mr. Carey: And is looking—when you come to examine the map—is looking right over in that direction, from the arrow.

Mr. Wright: Looking northerly.

Mr. Carey: No. 14 is taken at the upper end of the big bend and is looking directly up the track.

Mr. Wright: Toward the first bend.

Mr. Carey: The next one, No. 16, is taken right opposite mile post No. 94, which is about

half way between the two bends, and is looking up the track.

Mr. Wright: Northerly, toward the first bend.

Mr. Carey: No. 17 is taken right at the southerly end of the first bend, and is looking northerly in the direction of the arrow. I would like to have these photographs marked.

(Photographs marked in evidence D-4, D-5, D-6, D-7 and D-8.)

Mr. Carey: Now, gentlemen, beginning with picture No. 9, this shows the right of way from the Webb-Christy corner, looking northerly up the track toward the big bend, and the next one, No. 12, is looking right up this way (indicating).

Mr. Wright: Still looking northerly.

Mr. Carey: Still looking northerly. No. 13, directly up the track toward the first bend, and No. 16 and 17 looking still up the track but closer to the first bend. That will show you the character of the right of way all the way up to the—

Mr. Wright: In other words, taking the pictures as offered, just as you would see it if you started walking at that point, north.

Mr. Carey: Yes.

Mr. Carey: I offer another photograph.

(Marked D-9.)

Q. The next picture which I show you is looking in the other direction and is taken from a point about two or three hundred feet below the point of the Christy switch—or southerly from the point of the Christy switch, and looks right toward the first bend. Now what is the distance where this picture was taken below the point of the switch? A. I have the exact measurement of that in my notes.

Q. Will you give that, please—number 18? A. 200 feet.

Q. 200 feet from the point of the Christy switch looking southerly. The next picture which we have is a picture taken from the Christy siding at the point shown by the arrow there, and bearing off in that direction.

Mr. Wright: Bearing off to the southeast.

Q. Southeasterly direction.

Mr. Carey: When you come to examine these maps in the jury room you will take the larger map, and you will be able to see the location more distinctly.

(Picture last referred to offered and marked D-10.)

A Juror: When were these taken? A. They were taken in July, 1914.

The Witness: They were taken on the 14th and 15th of May, 1914.

Mr. Carey: I think the date is on the picture: "5/14/14." These, of course, are shown for the purpose of showing the rocks and the hills and where swamps are, and things of that kind. We cannot show the condition of the right of way at that time.

Q. The next one is No. 30. This picture, No. 30, is taken from the cab of the locomotive, facing down the track, from the same position as No. 18, 200 feet southerly of the Christy switch. There will be evidence to show why we took the photograph from the cab of the engine in that position. I am not at liberty to tell you (addressing the jury) just what that is now.

(Photograph marked D-11.)

Mr. Carey: This is a series of three pictures, numbered 23, 24 and 25. All of those pictures—

Mr. Wright: Let me see about that. They did not make a very good job of it here.

Mr. Carey: They did not join them very well.

Mr. Wright: Subject to noting upon the record that this is not as a whole a correct picture, I do not object to it going in for what it shows, but it shows clearly that it is three separate photographs, and then tried to be put together and not getting the focus correct; but as to showing the hills, buildings, etc., it is, to a certain degree, accurate. Ask him what that shows. I don't object to it.

Mr. Carey: This photograph was taken on the foundation of the section house. If the jury will give me their attention for a moment I will locate this for them. Here is the section house right opposite the Christy siding, and right opposite the lumber yard. These pictures were taken from the foundation of that old section house. That burned down, and some other witnesses will testify about that. So we have these three pictures taken showing this ridge of hills along here and the schoolhouse at Long Lake West station and the relation of this territory right around here to the Long Lake West station. That, like the others, will show more clearly when you get the larger map.

(Picture marked D-12.)

(A smaller copy of the same picture offered and marked D-12-a.)

Mr. Wright: I make the same objection to that one.

Q. Will you please turn to this larger scale map now? Here (indicating) is where the camera was when this picture, No. 38, was taken.

Mr. Carey: Have you any objection to this picture?

Mr. Wright: I object to this picture, No. 38, which is now offered, for the reason that it shows conditions as they now exist particularly with reference to buildings, and the buildings take up a very large portion of the picture, and therefore it may be misleading.

Mr. Carey: So far as the storehouse is concerned, or warehouse, that was shown by the testimony to have been rebuilt on practically the same site.

Mr. Wright: I do not know whether that is the same type of building or anything of that kind.

Mr. Carey: Well, perhaps we will have some testimony on that.

Mr. Wright: With the understanding that that is a new building and that all the buildings there are new, I haven't any objection to it going in to show the general character of the land.

Mr. Carey: Isn't this the same general character of building in here?

Mr. Wright: I understand it is the same general character of building.

Mr. Carey: This picture, this enlargement, No. 38—we now have the larger scale map —this building shown in outline was the old hotel—

Mr. Wright: With reference to that I wish you would have the witness show where it was taken because there are some questions I want to bring out from him.

Q. Mr. Chism, will you step this side and state to the jury where the camera was located when that photograph was taken? A. I can give you a more exact answer by referring to my notes.

Q. Refer to your notes. A. This camera was set up on a line along the front of the foundation, said to be of the old hotel, six feet toward the track.

Q. At the place indicated by the circle at the end of the arrow? A. Exactly.

Q. And looking in what direction? A. Looking south 32 degrees west as the needle bore at that date.

Q. And that is the same as the arrow shown on the map? A. It is.

Q. What was the elevation of the camera? A. The elevation of the camera was approximately five feet above the ground.

By Mr. Wright:

Q. Was the picture taken with the lens of the camera horizontal with the base of the camera? A. The focal plane of the picture is with a horizontal lens, yes, sir.

Q. It wasn't tipped up or tipped down? A. No.

Q. And this point where this camera stood, is that higher or lower than the ground down near the warehouse, the building marked "7"? A. I should say there was a difference of not to exceed 18 inches in the two places, the point near the hotel being approximately a foot and a half higher.

Q. You do not recall the old hotel, do you? A. I never saw it.

Mr. Carey: I offer it in evidence.

(Marked D-13.)

Mr. Carey: No. 39. Taken in front of the station.

Mr. Wright: Yes; there is no question about that. That is a correct representation as it now is.

(Marked D-14.)

Mr. Carey: No. 39 is taken in front of the station with the camera pointing over toward the Monahan buildings and taken in the track down to the first curve. No. 27 is taken in front of one of the Monahan barns, up from this point, with the camera pointing in this direction, and there is a man in the picture and a number, and those two are right in a direct north and south line. That was taken for the purpose of showing you north and south as you look from that point. I will have Mr. Chism testify to that.

Mr. Wright: I do not doubt that is a fact. At the same time, the picture does not show the exact points of the compass very well. That was taken from substantially the same place as P-6.

Mr. Carey: Nearer to the railroad station. (Picture marked D-15.)

Cross Examination by Mr. Wright:

Q. I show you now P-6-a. That is a correct representation, is it not, of the station around Long Lake West? A. As I remember it, yes, sir.

Q. Will you tell us what the elevation of the land lying southeast of the switch was between the two ridges, as shown on your map D-3? A. The elevation of what was known as the saddle, between the two hummocks on this ridge, was between 1790 and 1800 feet—not reaching 1800 at any place.

Q. But the elevation of that point through the low part was 1790; is that correct? Maximum elevation? A. No. It was above 1790 but not up to 1800.

Q. And what was your base line? A. The U. S. Government survey.

Q. And what is that? A. That is approximately 1780.

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Q. 1780 at the station? A. Yes.

Q. Does the elevation increase or decrease as you go south along the track? A. There is a slight rise southwesterly from the station toward the first curve; not sufficient to make the change of contour of a 10 foot interval.

Q. And below the first curve, what is the condition of the grade? A. Between the first curve and the second curve the condition of the grade is approximately level.

Q. But the general grade from Long Lake West station southerly for several miles is more or less upgrade, is it not? A. I could not answer for that beyond the third curve south of Long Lake West except as an opinion.

Q. Well, to the third curve? A. Just south of the mile post which is about 400 feet southerly from the Webb-Christy corner, the elevation of 1770 crosses the track. Near the northerly end of the second curve south of Long Lake West, the elevation of 1780 crosses the track. In that distance of approximately a half a mile there is a ten foot drop to the south.

Q. Of course the track would not drop that much, but that is the contour of the land? A. That is the general contour along the right of way.

Q. The track is substantially level, is it not, through that entire distance shown by the map? A. Well, there are changes, rolling slightly.

Q. I mean the variation is very small, less than a foot? A. No; it is more than a foot.

Q. You have not shown the elevation of these various swamps, have you? A. Each swamp is within the zone described by the contour line surrounding it as being indefinitely below that point.

Q. Indefinitely below that means what? A. Well, there may be little pools of water which—

Q. With a depth of ten feet? A. Possible, but not probable.

Q. At the first curve going south of Long Lake West, where your first contour line intersects the right of way from the east, that is 1780 feet; is that correct—above sea level? A. That is correct.

Q. And the next contour line a short distance south of that where it intersects the right of way indicated at that point, it is 1790 feet; is that correct? A. That is correct.

Q. Then going down south of the first bend south of Long Lake West station to where you strike the swamp what is the elevation of the swamp there at its most northerly point alongside of the right of way? A. Its greatest elevation at the border line of the swamp is 1780 feet.

Q. You have shown on the map here a dotted green line which is marked "Line of standing timber." Is that as you found it in 1914? A. That is the line of standing timber as shown on the date of the map, July 17, 1914.

Q. And that I presume means the westerly line? A. Yes; it is intended to indicate that west of that line the appearance is of having been burned over, and to the east of that line the appearance is of a forest or standing timber.

Q. I call your attention to a blue line leading from the Low swamp southerly to another swamp just west of Bear Pond. What does that indicate? A. It indicates a valley running in a northerly direction below the Low swamp.

Q. Is it not a fact that the blue line indicates a stream? A. Yes.

Q. A stream which drains into the Low swamp? A. Yes.

Q. What is the difference in elevation between the swamp at the southerly end of that stream and the Low swamp? A. 150 feet.

Q. The Low swamp is 150 feet lower than the

small swamp at the southerly end of that stream? A. It is.

Q. Now the land lying immediately east of that stream that I have just spoken of ascends and forms a ridge, does it not, running in a generally northeast and southwest direction—approximately parallel with the stream? A. Yes, sir.

Q. And then immediately to the east of that stream the land again rises and forms a ridge to the east, running approximately parallel with that stream; isn't that so? A. I assume you mean to the west?

Q. To the west. A. Yes; the northerly continuation of what has been testified to as the middle ridge runs out along that line.

Q. And then going over that ridge in a direction approximately due east you come to what we term the little swamp, is that correct? A. I assume again you mean westerly.

Q. Westerly. A. Yes; that is correct.

Q. And that little swamp is bounded on the north and somewhat to the west by the third ridge you spoke of? A. Yes.

Q. And that swamp runs in a direction of northeast and southwest? A. It does.

Q. Pretty nearly true northeast and southwest? A. Its general direction is very close to a southwest drainage.

Q. I call your attention to the tracks which go from Long Lake West north. Now after you pass the Long Lake West station in a northerly direction for a short distance to about the county line, the road makes a very sharp turn to the east, does it not? A. I would not call it a sharp turn; it does turn to the east a considerable degree.

Q. So that after the road passes the county line it is running a very few degrees north of east? A. That is true.

Q. How far does it continue running in that direction? Your survey stops at approximately 1200 feet from the county line. A. There is quite a long piece of straight track in there; I should say approximately two to three thousand feet anyway.

Q. You mean from the county line or in addition to what you have shown? A. From the county line, or from the end of the curve, I should say there was between two and three thousand feet of straight track.

Q. And this Low swamp runs up to the railroad, up to the north, doesn't it? A. It does.

Q. What is the width of the right of way all the way from Long Lake West station south to the Webb line? A. 100 feet.

Q. You have shown it 100 feet all the way? A. Yes, sir.

Q. And there is not any fence shown— A. There is a fence part of the way along the west side.

Q. And you have shown it there by— A. A row of dots.

Q. And as far as that row of dots goes, that shows the right of way, along the westerly side of the right of way? A. It does.

Q. All the buildings which are located on this map are as you found them in the spring and summer of 1914? A. All the buildings which I found in the spring and summer of 1914 are indicated on this map by a small black mark.

Q. You have also indicated some buildings by open-drawing marks; those are what? A. Those are where I either found foundations of previously existing buildings or evidences on the ground that that had been occupied by a building.

WILLIAM N. SKELTON, sworn.

Direct Examination by Mr. Carey:

Q. You are in the employ of the defendant company? A. Yes, sir.

Q. In what capacity? A. Supervisor of tracks.

Q. Were you in the employ of the company in the summer of 1908? A. Yes, sir.

Q. In what capacity? A. Supervisor of tracks.

Q. What part of the line of the defendant company were you supervisor of? A. I was between Herkimer and Tupper Lake—or about a mile south of Tupper Lake.

Q. Does that take in the Long Lake West section? A. Yes, sir.

Q. Long Lake West is southerly from Tupper Lake, is it not? A. Yes, sir.

Q. About how far? A. About 20 miles.

Q. And the part of the track over which you were supervisor is divided into sections? A. Yes, sir.

Q. How long is each section? A. Five miles.

Q. And did you have a foreman for each section? A. Yes.

Q. And what was the width of the right of way along the Long Lake West section? A. 100 feet.

Q. Was that the width of the right of way all the way through? A. Practically, yes.

Q. What were your duties in connection with the position which you held? A. I had charge of the tracks, maintaining the tracks.

Q. And also of the right of way? A. Yes.

Q. Where was your headquarters during August and September, 1908? A. My headquarters were at Remsen.

Q. Remsen is about how far from Utica? A. That is about 20 miles.

Q. And it is a considerable distance south from Long Lake West station? A. It is.

Q. Do you know whether anything was done in connection with cleaning the right of way in the season of 1908? A. Yes, sir.

Q. State what was done? A. The right of way was burnt over in the first part of May, 1908.

Q. All of it? A. All of the right of way, yes, sir.

Q. That is, all that you had under your supervision? A. Yes, practically all of it.

Q. Did the part which was burned over include the section in front of the Christy line? A. It did.

Q. How far north and south of that? A. Clear to the north end of my subdivision and as far as Forestport south.

Q. Everything between Forestport and the northerly end of your subdivision was burned over in that way? A. Yes, sir.

Q. And that was a distance of about how far? A. That was about fifty miles.

Q. When this was being done were you along the track yourself? A. I was.

Q. And did you see it when it was done? A. I did.

Q. And did you see what the condition was after it had been completed? A. Yes.

Q. State what those conditions were? A. The conditions were that the right of way was clean.

Q. During the months of August and September, 1908, what were the weather conditions in the Adirondacks? A. The weather conditions were very dry.

Q. Did they continue to be very dry up to September 27, 1908? A. Yes.

Q. What did you do in the months of August and September, September particularly, with reference to preventing fires along the right of way and adjacent to the right of way? A. We had two fire trains—

Q. Well, go on; tell what you did, briefly. A.—and patrolled the tracks with those fire trains.

Q. Well, go on; what did you do? A. If we found any fires we turned the hose on—that is, we adjusted the hose and laid them out.

Q. How much hose did you carry? A. We carried from 1000 to 1200 feet on each fire train.

Q. Did you have any men employed by the company for the purpose of putting out fires? A. Yes.

Q. Do you recall about how many men you had? A. About 75 or 80 men in addition to the men that were on the sections.

Q. And did you fight fires away from the railroad track as well as adjacent to the railroad track? A. I did, yes.

Q. What was done with reference to patrolling the track, and extra precautions taken with reference to patrolling the track? A. Yes.

Q. During the months of August and September? A. Yes, sir.

Q. State what those precautions were. A. There was a man stationed on each mile of the track.

Q. And you did that because of what? A. As a precaution against fires.

Q. On account of the weather conditions? A. On account of the weather, yes.

Q. Do you know whether or not during the months of August and September there were a great many fires in the Adirondack region away from the railroad track? A. Yes, sir.

Mr. Wright: Objected to as immaterial.

Q. Will you step down to the map, please?

Q. I take it that this whole track which is shown on this map was within your division? A. Yes.

Q. During the months of August and September did you have any knowledge of the brush piles

over on the Monahan property some little distance back from the railroad tracks? A. Yes, sir.

Q. And piles of refuse? A. Yes, sir.

Q. About how far back from the railroad track were those brush piles and refuse piles? A. They were about from ten to fifteen hundred feet.

Q. Do you know what was done by Mr. Monahan with those brush and rubish piles? A. They were burnt up.

Q. About what time, as nearly as you can judge? A. Somewhere near the end of August.

Q. Did you see the fire when those were set fire, when they were burning? A. I did not see them when they were set; I saw them afterward when they were burning.

Q. And did you have any occasion to fight fire originating from those fires? A. I did.

Q. Do you know what direction that fire took? A. It took a southwesterly direction.

Q. Indicate on the map as nearly as you can about the direction the fire took so far as you followed it. A. (Indicating) It came right down in here and then went in this direction.

Q. Did it at any time come down through this section here? A. Yes; it came down in here. It covered this whole territory here and went off in this way; and here.

Q. Did you have men from the railroad company fighting that fire? A. Yes, sir.

Q. Now, Mr. Skelton, did you at any time send your men over onto the Christy property to fight fire? A. Yes.

Q. Will you state the location where you sent your men and the location of the fires and what was done so far as your personal observation went? A. My men were stationed at Long Lake West and they used to go out in here (indicat-

ing) and sometimes—in here and here—and they were fighting fire in this vicinity, down in through here.

Q. Won't you indicate about the northerly portion of the fire so far as you saw it?

Mr. Wright: I object unless he tells when he saw this fire.

Q. Very well. Tell when you saw this fire which you have indicated back in here, westerly from Bear Pond and extending down toward East Charley Pond. A. I was called in here on the 24th or 25th.

Q. Of what? A. Of September—before the fire —either the Thursday or Friday before the fire of September 27th.

Q. Did you have men over there fighting fire at that time? A. Yes; I had about 35 in here, and I had about 40 down in here, down around Charley Pond.

Q. Down around East Charley Pond? A. Northerly from East Charley Pond.

Mr. Carey: That is where the witness points.

A. In this direction (indicating).

Q. On that occasion did you visit both of those gangs of men? A. Yes.

Q. Who had charge of the gang of men up here in the Charley Pond section? A. His name was Martin Starks.

Q. Who had charge of the men down in the neighborhood of Charley Pond? A. William Duquette.

Q. Won't you indicate the northerly part of the fire which was westerly from Bear Pond as you found it when you went over in there on the 24th or 25th? A. That was about in there (indicating) or about right in this neighborhood, right in there.

Q. Indicate as near as you can the northerly position of the fire. A. I should judge it was about there (indicating).

Q. Right about there (indicating)? A. Yes, sir.

Q. That seems to be in a sort of a little swamp there with a little elevation. A. There was a little ridge came up in here where I landed; it was right about in there.

Q. Right about in there was the northerly part? A. Yes; near there.

Q. I put right beside these figures 1880, a cross, and will mark that "North end, fire, 24th or 25th Sept.—Sk." Now from that point you say the fire extended in what direction? (Witness indicates.)

Q. Running along the first ridge from Bear Pond—

Mr. Wright: Don't testify for him.

Mr. Carey: That was where he pointed. The witness pointed.

Mr. Wright: He pointed in a southwest direction.

A. Right out from here, and then it covered this in here.

Mr. Wright: It went down toward the Webb line?

Mr. Carey: The witness pointed along the ridge, the third ridge from Long Lake West, and southerly from that ridge in the direction of East Charley Pond and of Little Charley Pond.

Mr. Wright: He didn't do it; but let it go at that.

The Witness: Yes. (Again indicates.)

Q. When you went over in there what were your

men doing? A. They were trenching along on the edge of the fire—practically—well, that is trenching to keep the fires from going any further. There was not any fires—the fire wasn't running when I was over in there; it was under control, and they were simply scraping the leaves back so that if it started up again it could not run along.

Q. Which side of the fire were they trenching, on the easterly side or the westerly side? A. They were on the northeasterly side.

Q. Northeasterly side of the fire? A. Yes.

Q. You are speaking of the men in the Bear Pond section? A. Speaking of these men in here (indicating).

Q. After visiting these men in the Bear Pond section where did you go? A. I came down in this direction. I came down here, and I was going up toward the Webbs', but I could not get out in there. About in this line here there was a thick growth of timber, and then I proceeded down in here to about—well, in this direction here, and came down in here where the rest of my men were working.

Q. The men under the direction of Duquette? A. Yes.

Q. And were they trenching down there? A. They were trenching.

Q. Which way were they trenching? A. They were on the easterly side.

Q. And the general direction of the fire had been what up to that time?

Mr. Wright: If he knows.

Mr. Carey: I will withdraw the question.

Q. After seeing Duquette where did you go? A. I saw Duquette along here. Then I started and came along in here and struck the Christy-Webb line.

Q. As you passed from this point by Bear Pond over to where Duquette was and from there on to the Christy line, will you state whether or not that ground had been burned over at that time? A. Yes; all the ground that I walked over from this point here down here to the Christy line was burnt over.

Q. Recent burn? A. Yes, sir.

Q. What was the condition of the ground there? A. The ground was pretty high in some places.

Q. As to these fires; you could see over these ridges and to Long Lake West; had that been burned over at that time? A. No, sir.

Q. When you got down to the Webb-Christy line you say you went out to the railroad track along that line? A. Yes; I followed that out to the railroad track.

Q. When you were following that out did you come to a place where the burn indicated that the fire had crossed the Webb-Christy line? A. Yes, sir.

Q. About how far from the railroad was that point? A. It was about half a mile.

Q. Now you may take the chair again. Where were you on the Saturday preceding the fire? A. I was at Beaver River and Horseshoe.

Q. Did you get up to Long Lake West on Saturday? A. Yes, sir.

Q. What time in the day? A. In the forenoon, and also in the afternoon.

Q. What were you doing; how did you move from place to place? A. On the trains; and also on my motor car.

Q. That is on the regular tains? A. Yes.

Q. And what were you doing; what were you passing over the road for? A. Well, I had men there, and of course I had charge of the tracks, to see that everything was all right.

Q. Were you up to Long Lake West on Friday? A. Yes, sir.

Q. How many times on the Friday did you pass over the road between Long Lake West and say the Christy corner southerly from Long Lake West, if you recall? A. I could not say.

Q. More than once? A. I could not say.

Q. You were once? A. I was once there, yes.

Q. Now on that day did you find any fires along the right of way from the Webb-Christy corner northerly to Long Lake West? A. No, sir; there was not.

Q. And how was it on Saturday between those two points? A. There wasn't any fires on Saturday.

Q. And were you over that line on Sunday, the day of the fire? A. Yes, sir.

Q. And where did you stay on Saturday night? A. I stayed at Beaver River.

Q. And when and how did you get up to Long Lake West Sunday morning? A. I went part of the way on the fire train and the other part by motor car.

Q. Were there any fires along the right of way from the Christy corner on Sunday morning up to Long Lake West? A. No, sir.

Q. And did you go back over that right of way, Sunday, from Long Lake West southerly? A. Yes, sir.

Q. What time did you go up in the morning? A. I went up about eight o'clock.

Q. And what time did you get back? A. I got back about ten.

Q. Leaving Long Lake West about ten? A. Getting back towards Nehasane about ten o'clock.

Q. Leaving Long Lake West about what time? A. About 9:30.

Q. When you went down the line did you look for fires along the right of way? A. Yes, sir.

Q. Were there any fires along the right of way there? A. No, sir; there was not.

Q. You were not at Long Lake West at the time the fire took place? A. No, sir.

Q. When did you go to Long Lake West next following the time of the fire? A. Following the time of the fire, or the day of the fire?

Q. Well, following the time when Long Lake West burned. A. I got there in the afternoon.

Q. Did you go up to Long Lake West? A. I went as far as the southerly switch.

Q. As far as the southerly switch? A. Yes, at Long Lake West.

Q. That is where, with reference to the Christy switch? A. That was the switch I referred to. There is one a little more southerly than that on the other side.

Q. You went up to the point of the Christy switch? A. Yes.

Q. At about what time in the day? A. It was about five o'clock in the afternoon.

Q. When you went down in the morning between nine and ten will you state whether or not this Christy property adjoining the railroad property and easterly from it had been burned over? A. No, sir; it had not.

Q. And when you went up that night will you state whether or not this frontage of the Christy property on the railroad property had been burned over? A. It had been, yes, sir.

Q. How far southerly did this burn on the Christy property extend with reference to his line? A. East of the Christy line?

Q. No. You say that this line of Christy bordering on the railroad track was burned over when you went up at night? A. Yes.

Q. Now, how far down along the track did that burned section extend with reference to his line,

whether it extended to the line or not? A. It extended to the line.

Q. And any below the line burned? A. Yes; some.

Q. Were you able to get up to Long Lake West that night along the track? A. Yes; we got up at Long Lake West along the track.

Q. At what time? A. At Long Lake West at five o'clock.

Q. I mean up to where the station had been. A. No; I said we got at the southerly switch at five o'clock Sunday evening.

Q. Had the lumber been burned then? A. Yes, sir.

Q. And the adjoining buildings there had been burned? A. Yes, sir.

Q. Were you there the day following? A. Yes, sir.

Q. Up to Long Lake West? A. I got out. I couldn't go any further that night; it was so hot there; and there was smoke.

Q. The following morning did you go up to Long Lake West station? A. Yes, sir.

Q. How soon after the Long Lake West fire did you go up beyond Long Lake West? A. Within a day or so afterwards; I don't think I went north of Long Lake West that day, the 28th.

Q. On the 28th when you got up there what was the condition of the country to the north of Long Lake West? A. That was all burned over as far as I could see.

Q. How far could you see? A. There is places there you can see from Long Lake West to the northwest from two to three miles.

Q. Later on did you go up the road toward Tupper Lake? A. Yes.

Q. And what did you find the condition to the northwest and west of the railroad track for eight

or nine miles, or for five or six miles, above Long Lake West? A. For about a mile north of Long Lake West it was burnt on each side of the railroad, and to the left, that is to the northwest, why, that was burned clear over Mr. Low's over to the mountain as far as you could see.

Q. How far back from the railroad? A. Two or three miles you could see, northwest.

Q. What was used for ballast on the railroad track in the vicinity of Long Lake West? A. Cinder and gravel.

Cross Examination by Mr. Wright:

Q. You say the morning of the 27th you were up to Long Lake about eight or nine o'clock? A. Yes, sir.

Q. And then went back down to Beaver River? A. I went as far as Horseshoe, and then came back as far as Nehasane.

Q. Did you stay in Nehasane all day? A. No, sir.

Q. Where were you about the middle of the day? A. About noon time, or one o'clock, I was around Nehasane station.

Q. I say, did you go any further south than Nehasane after you came back from Long Lake West? A. Yes, sir; I went some south.

Q. How far—Robin Hood? A. Robin Hood is north of Nehasane.

Q. Did you go on down the track? A. I went south of Nehasane.

Q. And how far is Nehasane from Long Lake? A. It is about five or six miles—Oh, more than that—seven miles.

Q. Now, when you went down the track about half past eight or nine o'clock, you did not see any fire? A. No, sir.

Q. Do you recall later in the day a heavy wind came up that day? A. I do, yes.

Q. Then you went back up the track about five o'clock; did you—up towards Long Lake? A. Yes.

Q. And you went up past the first bend south of the station? A. Yes, sir.

Q. And about to the point of that switch; is that right? A. Up to the point of that switch.

Q. That is one of your main line switches?—It is not a spur switch? A. No; it is a team track; and then leading off of the team track it leads in to Christy's siding.

Q. It is the switch where the trains pass? A. No; it is an unloading track. The passing track was on the westerly side.

Q. Well, it was some distance south of where the Norwood storehouse was? A. Yes.

Q. I show you D-9, which is a photograph looking south from down toward the first bend. That shows the switch that you went up to—about? A. This is looking south, isn't it?

Q. Yes—but you came up to that switch, about? A. Yes, sir.

Q. And there has been no substantial change in that switch since before the fire? A. Not as I know of.

Q. I mean it is about the same location as it always has been? A. It was when I left there.

Q. It was in 1914, a year ago? A. It was, yes.

Q. So you came up around this bend, up to the point about the end of that switch? A. Yes, sir.

Q. And that is as far as you could go? A. That is as far as I went Sunday night.

Q. And you said that was as far as you could go, didn't you? A. That was as far as I could go, for heat and smoke, yes.

Q. Now you say that the grass was all cut on this right of way along this part of the railroad? A. No, sir.

Q. Wasn't it cut at all? A. No, sir.

Q. You saw grass cut along this right of way? A. No, sir.

Q. I have reference to the portion from Long Lake West south to the Webb line. A. It wasn't cut.

Q. And isn't it a fact that in September there were some berry bushes along the right of way? A. There were a few that had grown up during the summer.

(Recess.)

Q. Just step down to this map. You put a mark on here which indicated the course of the fire, didn't you, running off here? A. Yes, sir.

Q. That fire did not go up to the Brooklyn Cooperage camps? A. I do not know; I never was back in there. What we used to call the Brooklyn Cooperage sidings were back in here, south of the second curve.

Q. But you never were in to the camps? A. I never was back in there very far. I was in there —but not where I saw any camps.

Q. But where you put this mark on here, you put it on generally; you did not put it on with any particular reference to measurements, did you? A. No.

Q. It was just more or less relative as you put it on? A. Yes.

Q. And that is also true of the mark you put over here near Bear Pond; that was relative, to the best of your recollection as you see it on the map? A. Yes, sir.

Q. You are not particularly familiar with these maps, are you? A. Oh, yes.

Q. You use maps of this kind all the time? A. Yes.

Q. Contour maps of the country up through

the Adirondacks? A. Not contour maps, but maps.

Q. When you were over to Bear Pond you first went down to Mr. Christy's camp, didn't you? A. Yes, sir.

Q. And then some one took you across in a boat? A. Yes.

Q. Did you go straight across the pond or did you go to the upper end of the pond? A. We landed at the centre of the pond—came down in this direction, down in here, and somewhere along over in there.

Q. Don't you know Mr. Christy's camp is right in this bend, that his camp on the lake—right in this little bay? A. It was a boat house I started from; I don't know whether it is a camp or not. There was a boat house there; I don't know if the camp was in there or not; I couldn't say.

Q. And you say you had a gang of men in there? A. Yes, sir; under Starch.

Q. And another gang down near East Charley Pond? A. Yes, sir.

Q. Take the stand.

Q. You are quite sure of that? A. Sure of what?

Q. That you had two gangs of men in there? A. Yes, sir.

Q. One down near East Charley Pond? A. Yes, sir.

Q. Do you remember testifying in this same matter in the case of Low against this same company at Canton, about three years ago? A. Yes, sir.

Q. Do you remember testifying as follows: "State what was being done so far as your knowledge goes as to the work upon this fire down in the region of Charley Pond and East Charley Pond and that country if you went there. A. Well, I didn't have any men down there, but I

saw some men there; I believe they were working for Dr. Webb and also for Mr. Christy. That fire then was working to the east a good deal." Do you remember testifying that way? A. Well, I don't remember testifying, but I suppose I did testify that I had men there.

Q. Then this is wrong that I have read you? A. I had men there working at that time.

Q. Do you remember testifying as follows on the trial of the Low case: "What foreman did you have under you working on that fire? A. I had William Duquette and Martin Starch. Q. And can you say where Duquette and his gang were? A. They were right in there by that pond. Q. Which pond? A. Bear Pond." Did you so testify? A. I could not remember that I did testify to that.

Q. Well, if you did testify to that that was probably true, wasn't it? A. Yes, sir.

Q. August, 1913, was much nearer to the time of the fire than this? A. Yes, sir.

Q. And did you testify as follows: "Q. And where was Starch? A. Starch was right along there near the same place." Can you remember testifying to that? A. No; I don't.

Q. But if you did so testify it was undoubtedly correct? A. To the best of my recollection, yes.

Redirect Examination by Mr. Carey:

Q. Was Duquette at one time up on the shore of Bear Pond? A. Yes, sir; he was there.

Q. From there where did he go? A. He worked further east towards Charley Pond.

Q. You testified that the grass was not cut; but what was done with it? A. It was burned in the spring, but it was not cut in the regular time that we generally do, because the Fire Warden wouldn't allow it.

Mr. Wright: I object to the answer.

Q. When it was burned it was burned without being cut, was it? A. Yes, sir.

Recross Examination by Mr. Wright:

Q. When was it burned? A. It was burnt in the first half of May.

Q. That was just right after the snow went off the ground, wasn't it? A. Yes, sir; and snow was in the woods yet—some.

Redirect Examination by Mr. Carey:

Q. You started to say "because the Fire Warden gave you some direction."

Mr. Wright: I object to that. He did not say that; he said "Because"—and then stopped there.

(Testimony repeated.)

Q. Did you desist from cutting later in the season because of something that the Fire Warden said to you?

Mr. Wright: I object to that.

Mr. Carey: We will settle it later on. I will recall him when the judge comes in, to have a ruling on the question.

WILLIAM DUQUETTE, sworn.

Direct Examination by Mr. Carey:

(The Court having returned to the room, the last question asked of the preceding witness and the objection to it were repeated to the court, and after discussion, the question was withdrawn).

Q. Mr. Duquette you were in the employ of the

railroad company in the month of September, 1908? A. Yes, sir.

Q. And doing what? A. In charge of an extra gang.

Q. Extra gang, doing what? A. Track labor or any other work that they had me do.

Q. Did you do anything in the way of fighting fire? A. I did.

Q. And under whose supervision were you working? A. Mr. Skelton.

Q. Do you remember fires in the vicinity of Long Lake West in the month of September, 1908? A. Yes, sir.

Q. Will you step down to the map? Do you remember of any fires on the Monahan tract westerly from the railroad in the latter part of August or early in September, 1908? A. Yes, sir.

Q. Will you indicate where they were with reference to the first bend below Long Lake West? A. Well, this first fire that I remember was not far from the barn.

Q. Do you know what that fire started in? A. Clearing up the land.

Q. Do you know what course that fire took? A. Well, it was working southwest.

Q. Point along here where it was working.

(Witness indicates).

Q. And how far down, so far as you know? A. Well, I only worked one day there with the hose; that is at the train over here on the track; we had the hose; that was on a Sunday, I think, and we got this fire out as far as I know, and Monahan's men worked there; they had pails and water and tearing up the dirt.

Q. Did you observe any smoke over through this section later on? A. Later on I was called to fight fire about in here.

Q. And any farther down than that? A. Yes; I fought fire right along through here.

Q. Were you on the Christy property near Bear Pond at any time fighting fire? A. Yes, sir.

Q. When was that? A. Well, that was in September.

Q. How long before the fire that burned Long Lake West? A. Well, I was there between—well, it was a week before, on Christy's; and I was there the day before.

Q. Did you go in there every day from a week before down to a day before the 27th? A. Yes, sir.

Q. Will you indicate where you went on Bear Pond? A. On Bear Pond?

Q. Yes. A. I worked around in here (indicating), and I worked some of the time in here (indicating).

Q. When you say "in here" you are pointing to the southwesterly end of Bear Pond? A. The southwesterly end of Bear Pond.

Mr. Wright: I object to that. It is the northwesterly corner of Bear Pond I should say that he indicates.

Mr. Carey: I should say that the southwesterly corner is about here, and the northeasterly corner over there. Well, at any rate he points westerly from the head of Bear Pond. How is that, Mr. Wright?

Q. This you call the head of the pond, opposite from the outlet—westerly from the head of the pond—and you worked in there how long? A. One day.

Q. Then you pointed northerly from East Charley Pond? A. That was in here.

Q. Which way was the fire moving when you went in there to work? A. When I was working in here?

Q. Yes. A. It was moving this way; that is east.

Q. Easterly direction? A. Easterly direction when I worked there.

Q. And what did you do? A. Trenched it and knocked down with a shovel when it was running; when it wasn't running we trenched it and cut down the stumps.

Q. You went out of there what day? A. We were taken out of there I do not remember what day, but we were taken in over the Long Lake West road; a team came after us and took us down to a hill on Long Lake West road; we went by this pond here, bore around a hill to another little pond there, and they took us in through the woods there.

Q. Do you know where that was? A. No, sir; I cant locate that.

Q. How long were you working at East Charley Pond? A. We were working in this way from Christys line and went off in through here.

Q. When you went out from there the last time you say that was Saturday? A. Saturday night.

Q. Before the fire on Sunday? A. The day before.

Q. Can you indicate about how much territory had been burned over through that section north of East Charley Pond at that time? A. North of East Charley Pond?

Q. Yes. Here is East Charley Pond, and you pointed in here. A. Well, in here. I had come in from the road two or three days and worked in through here—whether I was back in the same place I couldn't say.

Q. Can you tell how much territory you saw burned over north of East Charley Pond at any time? A. There was lots of it there.

Q. Where did you stay nights? A. Stayed at Long Lake West.

Q. Were you there on Sunday? A. At Long Lake West?

Q. Yes. A. No, sir.

Q. Did you stay Saturday night at Long Lake West? A. Yes.

Q. Where did you go Sunday morning? A. To Nehasane.

Q. And that is seven or eight miles, according to the testimony, southerly on the track; and you were not back at Long Lake West until that Sunday night? A. No, sir.

Q. Did you go back there Sunday night? A. Pretty near to Long Lake West. We didn't get to the station.

Q. Who went with you? A. Mr. Skelton and the crew.

Q. When you went down in the morning was this Christy property along the railroad track back as far as you could see—had it been burned over on Sunday morning? A. No, not then. The Christy property, no, none of this had been burnt.

Q. That is, you could not see any burned from the railroad when you went down? A. Not in here.

Q. And when you went up Sunday night what time did you get up there, about, if you recall? A. I think it was along about seven o'clock. I don't know just what time it was.

Q. How near did you get to Long Lake West? A. We got down to the switch that leads into the yard.

Q. You could not get any farther than that? A. No, sir.

Q. Were you up there the next day? A. Yes.

Q. What was the condition of the territory over northwest of Long Lake West, if you observed? A. Burnt.

Q. How far? A. As far as I could see.

Q. Do you know whether the land around these Monahan buildings here had been cleared off before this fire? A. Some of it had been cleared off, yes.

Q. Do you know where the Brooklyn Cooperage buildings were? A. No, not by name. I might know where they are, but not by name.

Q. Were you, soon after the fire, back in the vicinity of Bear Pond or East Charley Pond at any time? A. I wasn't there until some time later.

Cross Examination by Mr. Wright:

Q. When you say you and Mr. Skelton went north after the town burned and you got to near the switch, what switch is that? A. A switch leading to the siding here. There was a switch leading to a side track where they stored cars, next the passenger track. There was a passenger station on one side and on the easterly side a freight station.

Q. That was just a little ways around the first bend? A. Yes; a little ways north of it.

Q. A little ways north of the first bend? A. Northeast of the first bend.

Q. You did not mean the Christy switch when you said you got to the switch? A. The Christy switch and the other switch weren't far apart.

Q. How far apart? A. I can't say, but only a little ways apart.

Q. What do you mean by a little ways? A. There was the switch that led into this side track, and the Christy switch was off from that, and the other switch was off from the main line.

Q. That is further south? A. Yes; further south than the Christy switch is.

Q. As a matter of fact, the switch that ran off the main line was just a little ways north of the bend, wasn't it? A. Yes; we got below that switch.

Q. You got below that switch? A. North of that switch, yes, sir.

Q. How far north of that switch? A. I could not say just how far it was. There was a car standing there, partly burned, and we got as far as there.

Q. You went as far as you could? A. Yes, sir.

Q. And you went through, I suppose, quite a little burned territory before you actually had to stop? A. There was burned territory, but not—

Q. The fire went ahead of you, and you went as far as you could until it got too hot to go further? A. There was no track to go further; the rails were burnt.

Q. That was up near the Christy siding? A. That was up to the other side of the Christy siding.

Redirect Examination by Mr. Casey:

Q. Were the Monahan buildings on the westerly side burned that night? A. They were burnt when we got there that night.

Q. Did you know Martin Starch? A. Yes, sir.

Q. Do you know whether or not he was working over here in the vicinity of Bear Pond? A. Yes; I know that he was working there.

Q. Which worked there first, you or he? A. I put in the first day there.

Q. And then he came in afterward? A. Yes, sir.

SEEBER BRADISH, sworn.

Direct Examination by Mr. Carey:

Q. By whom were you employed in the month of September, 1908? A. Doctor Webb.

Q. During that month did you work on his property fighting fire? A. I did.

Q. And later on did you fight fire between East

Charley Pond and Little Charley Pond? A. I did.

Q. Will you come down here to the map and indicate where you were? A. I was right along down to the swamp, the outlet of that pond, and I was this side of the swamp, fighting fire from Dr. Webb's to where this line comes down (indicating). From here (indicating) down toward Bear Pond there was other men on the line; I don't know what was down there (indicating) because I was held right here (indicating) all the time.

Q. Were you up in the vicinity of East Charley Pond on Sunday the 27th day of September, 1908? A. I was.

Q. Will you indicate what direction and about where you were with reference to East Charley Pond? A. Well, I came right along up through here and along up to about here, where this comes over this hill here.

Q. What time were you there? A. Well, that was about three o'clock in the afternoon, I should say; I don't know.

Q. Had anything happened to the fire that was located around East Charley Pond at that time? A. Yes; it had all burnt all through there.

Q. Burned in what direction? A. Burned off here to Long Lake West.

Q. You are not pointing to Long Lake West there. A. Long Lake West here.

Q. What could you see? A. All I could see was smoke and fire.

Q. Were you over through that section a day or two after that? A. The next day, the 28th.

Q. Where did you go at that time? A. I came right up through here, and went right over this burning, around here, through Mr. Webb's, and came over through around onto Mr. Christy's, and on this side, where I could look over here. I

didn't go down in that country (indicating) at that time.

Q. From where you were could you look over Long Lake West? A. Yes, all over.

Q. What had happened to this territory between East Charley Pond and Bear Pond and Long Lake West at the time? A. It was all burned over.

Q. Did you go up to Long Lake West soon after that time? A. I think it was two days after that that I went by there, home—north.

Q. You were going home, you say? A. Yes, sir.

Q. Where is that? A. Malone.

Q. At that time did you observe what the condition of the land was northwest from Long Lake West? A. I did.

Q. What was the condition? A. It was all burnt; those hills back through Silver Mountain and all through that country.

Q. How far? A. I should think six or seven miles over there, probably, onto that mountain.

Q. Do you know whether or not around the Monahan buildings here the property had been cleared? A. Why, it was burnt down there; and here at Long Lake West there was a big pile of lumber afire when I got there, and the buildings all burnt down; they hadn't commenced to clean them up yet.

Q. Do you know the Brooklyn Cooperage buildings; where they were located? A. No; I don't know just exactly where they were located there.

Q. Have you been up there? A. Yes; several times around there at Long Lake West, but I don't just exactly know where the Brooklyn Cooperage buildings were.

Q. Have you had any experience in fighting forest fires? A. Yes, sir.

Q. What position have you held with respect to forest fires? A. State Fire Warden; I have been

State Fire Warden.

Q. Will you state, if you can, in case of a forest fire which side of trees shows the most burn, if there is any difference between them? I mean the trees that are left standing? A. The side that the fire comes from is burnt the hardest always.

Cross Examination by Mr. Wright:

Q. And where a forest fire is being driven along by a heavy wind the trees fall with the wind, don't they? A. Apt to.

Q. Now on this Sunday do you remember which way the wind was blowing? A. I do.

Q. Which way? A. Coming from the southeast.

Q. Coming from the southeast? A. Yes.

Q. And blowing parallel with the railroad? A. No; not exactly; blowing northwest.

Q. By the way, are you employed by the railroad now? A. I am.

Q. Did you testify in the Low case at Canton about three years ago? A. I did, sir.

Q. At that time didn't you testify that the smoke was going parallel practically with the railroad? A. I don't think I did. I might "practically."

Q. Didn't you testify that they called the railroad north and south there? A. Yes.

Q. "And when I say the smoke was going north I mean it was going in the same direction as the railroad, nearly?" A. Yes, nearly. I swear now that they call that north and south. I get all my instructions on the road that way. Even if the road is running east and west they say "north side" and "south side".

Q. I am asking you now if you didn't testify—didn't you testify as follows? "Q. Right up the railroad do you mean? A. Well, I don't know

what you call by up the railroad—north? Q. Yes; Northerly. A. Northerly, yes. Q. Well the smoke was going parallel practically with the railroad, was it? A. Sure.

Q. You call the railroad there north and south? A. That is what they call it—north and south. Q. And when you say that the smoke was going north you mean that it was going in the same direction as the railroad? A. Yes." Did you so testify? A. I probably did.

Redirect Examination by Mr. Carey:

Q. Then were you asked the following question: "Is that right"?

Mr. Wright: I object to that.

Q. And did you answer: "Yes, nearly. I couldn't say exactly"?

Mr. Wright: I object; he is trying to impeach his own testimony, is he not, when he reads his former testimony?

The Court: You produce the record of the former trial for the purpose of impeaching the witness, and you say "Did you testify such a thing?" and he, in order to show that he qualified that in some way at the very time that testimony was given and therefore did not contradict himself, asks him "Didn't you at the same time say so and so?" It does not contradict his own witness, but it tends to qualify what he did say.

Mr. Wright: It is not material.

The Court: I will permit it.

Q. Were you asked that question and did you answer it in that way? A. I think so, probably; I don't remember now.

Mr. Carey: I want to read a few extracts from the testimony of Walter D. Jennings—page 306. (Reads):

"Q. Now will you state to the jury what the weather conditions were in the summer of 1908, with special reference to the latter part of August and all of September—state it quite fully? A. It was very dry; very dry; the time of the year when, if there is a forest fire from any cause, it will run, and it is almost impossible to stop it, unless you get a heavy rain, or the fire goes into green timber. If it goes into green timber that has not been lumbered, or hasn't been burnt, why, it will check itself to a certain extent. Of course it won't go out until you get a heavy rain. If the fire gets into where it has been lumbered, it is almost impossible to put it out until you get a heavy rain. You can dig down until you come to the sand—the soil is very sandy there—if you have got a good big trench, why it will check, unless the wind blows; and if the wind blows, it will blow it over. I think I have seen it catch nearly half a mile on the other side of the trench, and the first thing you know, you have got a big fire there.

Q. On the 27th day of September, had it been a number of weeks since there had been any rain in the Adirondacks? A. Yes, sir.

Q. And was that condition—I mean as to the weather—as to dryness, true of the entire Adirondac region? A. Yes, sir, all through.

Q. During the month of August and part of September, was there smoke hovering over the wilderness a good deal of the time? A. Yes, sir, all of it.

Q. And that was true of Long Lake village? A. Yes, sir, over all the village."

Mr. Carey: Long Lake village I might say

is a village 12 or 14 miles east of Long Lake West—

Mr. Wright: 19 miles.

Mr. Carey: 19 miles—and the two are distinguished by being called Long Lake and the westerly one Long Lake West.

"Q. All sections of the Adirondacks? A. Yes, sir. Q. Do you know of your personal knowledge whether there were fires in very many sections of the Adirondack forests at this time, September, 1908? A. There were. Fires were reported all over the forests."

Mr. Wright: The latter part was stricken out before and it should be again.

Mr. Carey: He was the Warden, to whom fires were reported.

The Court: Is there an objection to that?

Mr. Carey: It was objected to; the last part, as to whether fires were reported all over the forests.

The Court: I suppose that comes under precisely the same ruling that I sustained you in yesterday when you objected to the man who made the entries in this little book giving hearsay.

Mr. Carey: I am willing to have it stricken out.

The Court: It will be stricken out.

"Q. Of your own knowledge, first, do you know of many fires? A. Yes, sir.

Q. And as fire warden you had reports made to you of all fires, had you? A. Yes, sir.

Q. And they were made very frequently in the month of September, were they not? A. They were.

Q. As to your personal knowledge of fires, does it cover fires away from the railroad or railroads? A. Yes, sir, away from the railroads."

Mr. Wright: Read the next question while you are about it.

"Q. Or fires near the railroads? A. Both; near the railroad and away from the railroad."

Mr. Carey: And on page 297, line 25:

"Q. Now, Mr. Jennings, as fire warden of the town of Long Lake, had you power to give permits to burn lands? A. Yes, sir.

Q. Did you give them? A. I did.

Q. Did you give in the summer of 1908, to the Monahans a permit to burn their lands?"

Mr. Wright: I object. The permit would be the best evidence, it appearing that the permit must be in writing.

(Objection overruled.)

"Q. Did you give them a permit? A. I did.

Q. Was it oral or in writing? A. Oral.

Q. About what time did you give them a permit to burn? A. I think it was about the middle of August; I wouldn't be positive about the date.

Q. And that permit was for them to burn what portion, what section, what part? A. On the north side of the railroad, on the farm, burning stumps.

Q. What you say the north side, do you mean the northwesterly side? A. The northwesterly side, yes, sir.

Q. South of their big barn? A. South of their big barn.

Q. Were you at Long Lake West from time to time after that? A. Yes, sir.

Q. Did you see or observe what they were doing on that land? A. Yes, sir.

Q. Did you observe them from time to time as to whether they were burning that land? A. I did.

Q. How late, prior to September 27th, 1908, were you at Long Lake West and observed anything with regard to the burning of the Monahan lands, if anything? A. I was there every week and sometimes twice a week.

Q. Up to September 27th? A. Up to September 20th, as late as that. I am not sure about later; at least the 20th.

Q. When you were there did you each time observe that there were fires on the Monahan tract? A. I did."

Mr. Carey: I will read the testimony of Martin Starch. (Reads):

"MARTIN STARCH—*Examined by Mr. McClary*:

Q. Mr. Starch, where do you reside? A. Utica, New York.

Q. What is your present occupation? A. Section foreman.

Q. Where? A. At Utica on the Ontario & Western.

Q. That is the line that runs from Utica? A. Runs out from Utica.

Q. In the summer of 1908, in the month of September, what was your employment? A. I was employed by the New York Central Railroad as extra foreman.

Q. Extra foreman? A. Yes, sir.

Q. During the month of September? A. Yes, sir.

Q. Were you up in the Adirondacks? A. I was

Q. Were you up to Long Lake West a portion of that time? A. Yes, sir; I was.

Q. Getting right down to the latter part of September were you up at Long Lake West? A. I come to Long Lake West on the 21st day of September.

Q. How many men did you have in your gang? A. I had about thirty five men.

Q. Mr. Starch, where were your headquarters while you were at Long Lake West, you and your men? A. Right at Long Lake West.

Q. They boarded at what? A. Boarding cars.

Q. And the men were taken from place to place during that season? A. Yes, sir.

Q. You say you got there about what day of the month? A. The 21st of September, about noon.

Q. Where did you and your men go to fight fire at that time? A. In the afternoon we fought the fire to the northeasterly side from Long Lake West; I should guess about a mile.

Q. Were you around any lakes at that time, do you know? A. I was on the 22nd, 23rd and 24th.

Q. Where were you then with your men? A. I was down on that time in the morning of the 22nd, I guess about two miles in a southeasterly direction, and a party told me it was Mr. Christy's property.

Q. Did you go out on Long Lake Road? A. Yes, sir; I presume so.

Q. Went out on the highway? A. Yes, sir.

Q. Is that the only highway that you ever saw there, at Long Lake West? A. This was, yes, sir; the only one.

Q. When you got there, about two miles, or thereabouts, did you find where the highway crossed the neck of a pond? A. I didn't go far; we took to the woods.

Q. Went through the woods? A. Yes, sir.

Q. From there when you left the highway, what was the general course that you took, you and your men? A. We went a little towards the railroad track, or south.

Q. What did you find when you and your men got in there? A. Found fires there.

Q. How extensive were the fires that you found, and what did you do in regard to them? A. We started to dig trenches all around it.

Q. How extensive fires did you find in those three days that you were in there? A. All around I should judge, about pretty nearly two miles, taking it around a circle.

Q. Two miles around it or two miles across? A. Yes.

Q. Not across? A. About a mile across.

Q. How far from Bear Pond, if you know? A. Right on the side of it, the edge of it.

Q. One edge was on the side of Bear Pond and the other edge was toward— A. The other edge was towards the highway.

Q. What is it? A. Toward that highway there.

Q. You did not take your men over toward the high, wire fence? A. I don't remember as I was around that wire fence.

Q. Your work was confined to that section right near that pond? A. Yes, sir.

Q. You and your men and others trenched it clear around? A. During these days; that is all there was for my gang of thirty five men.

Q. Weren't there other men coming over before you left? A. I don't know; I couldn't say.

Q. You didn't see any? A. I didn't see any.

Q. Did you see Mr. Christy during the time that you were there? A. I couldn't say for sure that I did see him. I saw a man come there; I wouldn't swear it was Mr. Christy.

Q. Can you see any men here that came over to you? A. I couldn't say.

Q. After you fought the fire during the day, where did you go that night? A. Went back to Long Lake West.

Q. To your boarding house? A. Yes, sir.

Q. What day was that that you and your men left the fire? A. It was on the 24th at night.

Q. The 24th at night? A. Yes, sir.

Q. At the time you left that section of the fire, you had trenched around it? A. Yes, sir.

Q. By trenching do you mean water trenchin or dry trenching? A. Digging a ditch around there; that is what I mean.

Q. There was no water where you were digging your trenches? A. No.

Q. Simply dirt thrown over? A. Dirt.

Q. Where did you come from the next day? In other words, did you come from there, from Long Lake West? A. I went north on the next day; that is the 25th; I went north.

Q. From where? A. From Long Lake West.

Q. Were you back at Long Lake West at all after that, until after the fire, until after Long Lake West burned? A. I was in Long Lake West up to that Sunday morning.

Q. That is, your boarding cars were there? A. At Long Lake West, yes.

Q. They were there? A. Yes, sir.

Q. Were you there that Sunday morning? A. I was there, yes, sir.

Q. Were you there during Sunday? A. Trenching.

Q. From where you left this fire trenched, on toward Long Lake West, was there a section through there that was not burned over? A. There was.

Q. Were you back to Long Lake West that night, or had they taken your cars away? A. The cars were all burned down.

Q. The cars were all burned down? A. Yes, sir.

Q. What time did you go back to Long Lake West? A. I went back to Long Lake West Sunday, along about ten o'clock at night.

Q. Where were you during the conflagration of Long Lake West? A. I was at Nahasane.

Q. That is at the south of— A. Southwesterly.

Q. Did you observe anything—I don't know that you could from that point—did you observe any amount of fire from where you were? A. No.

Q. In regard to smoke or anything? A. No, could not.

Q. When you came back to Long Lake West, did you see where the fire had burned? A. I did, yes.

Q. Did you go up on the road at all? A. We couldn't tell where—

Q. Did you go up on the highway at all? A. No, I think not.

Q. As far as you could see, in that direction, had it burned over? A. I could not make a statement to that effect. It was all hot and we didn't stay very long. I cannot make no statement to that effect.

JOSEPH LASHAWAY, sworn.

Direct Examination by Mr. Carey:

Q. Were you employed by the defendant railroad company in September, 1908? A. Yes, sir.

Q. In what capacity? A. Section foreman.

Q. Where was your section? A. From 95 to 90.

Q. Between 95 and 90. 90 is southerly? A. Yes, sir.

Q. And where is mile post 95? A. 95 is north of the station, the Long Lake West station.

Q. Just a short distance north, isn't it? A. Yes.

Q. Were you the section foreman in the month of May, 1908? A. I was.

Q. How long had you been the section foreman on that section? A. Three years and a half.

Q. Where did you live at that time; where was your house located? A. Right opposite Mr. Christy's lumber yard on the west side.

Mr. Carey: That is the house which we have marked on the map, "Old section house." It shows the foundation.

Q. That house was burned in the Long Lake West fire? A. Yes.

Q. And has not been rebuilt? A. No.

Q. Is the foundation wall standing there? A. Yes, sir.

Q. What, if anything, did you do in connection with clearing the right of way in May, 1908? A. Well, in the first part of May I burned all what there was to be burned—dry grass and a few small bushes that were there, the first part of May.

Q. And over what part of your section? A. All over.

Q. During the month of September, 1908, did you do any extra work or have any extra help in connection with the keeping of fires from spreading? A. I had one man extra.

Q. What is that? A. They gave me one man extra.

Q. What did you have to get over your line there, over your section? A. I had orders to leave a man to every mile, to divide a man to every mile.

Q. Did you have a man for every mile? A. Yes; to patrol the track for fires.

Q. What did you use to travel over your track? A. I sometimes used the car, and sometimes I would go afoot.

Q. When you say "a car" what do you mean? A. A hand car.

Q. On Saturday, the day before the fire, were you over your section? A. Yes, I was.

Q. Starting from where in the morning? A. I started from mile post 95 there every morning.

Q. And went in what direction? A. Went towards mile post 90.

Q. And did you go all the way down to mile post 90? A. Yes, I did, myself.

Q. And when you were going down the right of

way were there any fires that Saturday morning along the right of way? A. No; there was no fires Saturday morning.

Q. How many times did you go over that section on Saturday? A. Every day—I never used to go back as far as the section house, but my section —I mean from mile post 93 to mile post 90, I used to travel up and down there all day myself.

Q. Between what mile posts? A. Mile post 93 to 90.

Q. That was where you patrolled, was it? A. Yes, sir.

Q. And the men that you spoke of patrolled on the other— A. I had two men on the other mile.

Q. How many men did you have altogether? A. Five.

Q. Did you have five on this Saturday? A. I had five also.

Q. And what did you do Sunday morning, and what time did you start out? A. Seven o'clock.

Q. At the regular hour for starting out? A. Regular hour for starting out.

Q. Tell us what you did. A. I left the men the same as usual, starting from mile post 95 to 90, and I took my hand car and went on my hand car as far as mile post 93, and I left the hand car there and I walked the rest of the way to mile post 93— or 90; then I left the other man over there, and I kept on walking the same as usual from mile post 90 to 93.

Q. And what time did you get back to Long Lake West that day? A. I couldn't say.

Q. Before the fire or after the fire? A. During the fire.

Q. During the fire? A. Yes.

Q. Did you receive any information in regard to a fire up along the line at Long Lake West? A. Yes.

Q. About what time in the day did you receive information as to a fire? A. It was some time after twelve, but I could not say exactly what time it was.

Q. What did you do then? A. I walked down to get my other man at mile post 90; then I got that man and picked up the other man, and walked over and we walked over and picked up the car and put on the car.

Q. Where was the car? A. At mile post 93; and we went almost to mile post 94.

Q. Almost to mile post 94? A. Yes.

Q. Mile post 94 is on the straight between the two curves? A. Yes.

Q. Here is mile post 94, right there (indicating on map).

Mr. Wright: Is 93 shown there?

Mr. Carey: Here is 93 and here is mile post 94. Here is mile post 94 right there. I made a mistake; and mile post 93 is there.

Q. So that the big bend is between mile post 93 and mile post 94? A. Yes, sir.

Q. You came with this man up to mile post 94, did you? A. Yes, sir.

Q. What did you see when you got up in the neighborhood of mile post 94? A. Well, I couldn't see no fire at all, but it was all smoke and we could not go any further with the car.

Q. Can you show me about where you saw the smoke? A. Well, I was right in smoke when I went to take out the car.

Q. What did you do then? A. Well, I took out the car and we started and tried to get to Long Lake West.

Q. You started to walk up? A. To walk up to Long Lake West, yes.

Q. Just come down here to the map. Where

were you when you first saw smoke? A. First saw smoke, right to the side, this side—the north side of mile post 93 (indicating).

Q. You were at mile post 93? A. Yes, sir.

Q. That is down below the Webb-Christy corner? A. Yes, sir.

Q. In what direction were you looking when you saw smoke? A. Looking towards Long Lake West.

Q. Then you continued on up the track? A. Yes, sir.

Q. And when you were going up the track, near the big bend, did you look off toward your right? A. Yes, sir.

Mr. Wright: Don't lead him.

Q. What, if anything, did you see when you were looking in that direction? A. I seen a lot of smoke.

Q. Can you indicate on the map about where you saw the smoke? A. Well, it was all over the place.

Q. Can you show it on the map? A. No; I don't know anything about the map.

Q. Then you went on up to Mile Post 94, and left the car there? A. Yes—north of mile post 94—I should say south of mile post 94.

Q. South? A. Yes, sir.

Q. From the time you left the big bend what was the condition, if you remember, of the smoke off toward your right? A. It was heavy smoke and almost down to the ground.

Q. And after you left the car what did you do? A. Well, we started down the track, me and my man.

Q. When you say "down the track" you mean what? A. North—toward Long Lake West station.

Q. You may go back to the chair. How far did

you go northerly after you left the car? A. As far as that switch there south of Long Lake West station.

Q. Down to the switch? A. Yes.

Q. Did you go beyond there? A. No.

Q. When you got there what was the condition of the lumber pile? A. I could not see the lumber pile; there was so much smoke.

Q. Could you see your section house? A. No.

Q. Do you know whether it was burned or not at that time? A. No.

Q. You do not know? A. No; I do not know.

Q. What did you do then? A. Then I had to go back.

Q. Go back where? A. I came south—this side of mile post 94.

Q. How far this side of mile post 94? You mean southerly? A. Yes.

Q. How far did you go down below mile post 94? A. It down a little over half a mile, I should judge.

Q. And what happened during that time? A. When I got back there the fire got caught in the grass there and I had to go back to the culvert pipe there as they call it.

Q. When you went up the track had any fire crossed over on the right of way in the neighborhood of mile post 94? A. When I went up towards Long Lake?

Q. Yes. A. No; not the first time.

Q. When you went back— A. When I got back there was fire on both sides.

Q. Which direction was the fire moving? A. Working towards the west.

Q. Towards the west? A. Yes.

Q. What happened to you when you were down southerly from mile post 94? A. Well, I had to get in there to save my life.

Q. Where? A. In the culvert pipe.

Q. And that was about half a mile below mile post 94? A. I should judge half a mile.

Q. You had to get in there to save your life? To save your life from what? A. From the fire.

Q. Where was the fire coming from? A. I suppose there was a fire from both sides of the track; I could not tell very much which way it was traveling.

Q. You could not tell? A. No.

Q. How long did you stay in there? A. I should judge fifteen or thirty minutes.

Q. When you got out what was the condition of that fire? A. It was all burned there.

Q. And was the fire burning on both sides of the track then? A. Yes.

Q. Which side was it burning the most on? A. On the east side.

Q. When did you get up to Long Lake West after the fire? A. The second time?

Q. Yes. A. Well, there was one pile of lumber that was standing up yet; all the other piles—

Q. I mean when did you get up there after you went down the track and crawled into this culvert? A. When did I go up there?

Q. Did you go up there that night again? A. Yes; I went up there that night again.

Q. What time did you get up there? A. I do not know what time it was.

Q. When you got up there had your section house burned? A. Yes.

Q. Had the people left Long Lake West? A. Yes, sir.

Q. Were the Monahan buildings, on the same side of the road as your section house, also burned? A. Yes, sir.

Q. When you went up the track the first time and got up to the switch, did you hear any noise from the fire? A. Yes, sir.

Q. What kind of a noise was it? A. It was a cracking. When the fire is in the woods it generally cracks and roars.

Q. Where was that roaring sound that you heard; where did it come from? A. The east side of the track.

Q. The easterly side of the track? A. Yes, sir.

Q. And where were you when you first heard that roaring sound? A. Between mile post 94 and the southerly switch there, this side of Long Lake.

Cross Examination by Mr. Wright:

Q. Now on this Sunday morning you left your house at about seven o'clock in the morning, did you? A. Yes, sir.

Q. You had five men with you? A. Yes, sir.

Q. And you dropped those five men off on the way down? A. One man each mile.

Q. Where did you drop the first man? A. Between mile post 95 and 94.

Q. That is somewhere near the first bend? A. Yes.

Q. As a matter of fact you did not take him on your car at all, did you? You just started him out? A. Well, started him out, yes.

Q. The next man; where did you drop him? A. Between mile post 93 and 92.

Q. How about the mile between 94 and 93? A. I dropped a man there, as I said a while ago.

Q. Between 94 and 93. The big bend is in between? A. Yes.

Q. Where, with reference to the big bend, did you drop the men? A. Right on the south side of Christy's line there.

Q. Right about Mr. Christy's south line? A. Yes.

Q. Then you dropped another man between 92 and 93? A. Yes.

Q. And another between 92 and 91? A. Yes.

Q. And another between 90 and 91? A. Yes.

Q. Then you turned around and came back? A. Yes.

Q. With your car? A. No; I didn't have no car.

Q. You had left your car at 90? A. No; at 93.

Q. But we are at 90 now. A. But I have said I left the car at 93 and walked back to 90 with the men.

Q. All right; now we are down at 90; and you had dropped a man at each mile? A. Yes, sir.

Q. When you got to 90 how long did you stay there? A. I did not stay there very long. I then started back.

Q. Did you come right straight back? A. Right straight back to 93.

Q. All the way back to 93? A. Yes, sir.

Q. Then what did you do? A. Then I walked back again.

Q. You walked back again? A. Yes, sir.

Q. What time was it when you got back the second time? A. I could not say.

Q. Was that the time you got your lunch? A. No.

Q. Did you make another trip before lunch? A. I made another trip before I got my lunch.

Q. So you walked back once more to 93? A. Yes, sir.

Q. And down to 90 again? A. Yes, sir.

Q. Then you had your lunch? A. Yes.

Q. Do you know what time you had your lunch? A. No.

Q. Where did you have your lunch? At what they called Robin Hood then.

Q. That is a railroad station? A. A flag station.

Q. Did you see the 12 o'clock train go through? A. Yes, sir.

Q. Where were you when that went through? A. I was right between 90 and 91.

Q. That was before you had your lunch then? A. Yes.

Q. So you had your lunch after that? A. Yes, sir.

Q. Now you said you got some word about a fire up at Long Lake? A. Yes, sir.

Q. Where were you when you got that word? A. I was at that little station at Robin Hood there.

Q. Had you finished your lunch yet? A. I was just eating my lunch.

Q. Then what did you do? You started to walk up the track again? A. I had to go back and get my man at mile post 90, and kept on and walked along toward the station, and every man as I came along we picked him up with me.

Q. Where is Robin Hood station with reference to mile post 90? A. It is just a little south of mile post 90, just a little bit this side.

Q. And you went back to 93 and got your car? A. Yes.

Q. Then you went up on your car? A. I went up on my car as far as I could.

Q. How far did you go with your car? A. I left it a little—it wasn't quite a mile.

Q. Well, did you go up as far as 94? A. Not quite.

Q. Did you go around the big bend? A. Yes.

Q. Did you go to the north end of the big bend? A. I went right to the north end of the big bend.

Q. That was right where the cut is? A. Right at the end of the cut there when you come out of the bend.

Q. And that is as far as you could go? A. That is as far as I could go with my car.

Q. Why couldn't you go any further with your car? A. Too much smoke.

Q. Fire? A. Must be. Where there's smoke there must be fire. I could not see any flame at the time.

Q. How far did you walk? A. I walked almost to the switch.

Q. By that you mean which switch? A. By that I mean the switch south of Long Lake station.

Q. You mean the switch of the main line? A. Yes.

Q. That is just north of the first bend, isn't it? A. Just north of the first bend.

Q. And you went up to that point, did you? A. Yes.

Q. What time did you get there? A. I could not tell you.

Q. How long did it take you to go from Robin Hood up to that place, four miles; how long would it take you? A. Well, we had to walk.

Q. You walked three miles and rode one? A. Yes.

Q. How long would that take you? A. Well, it would take three quarters of an hour.

Q. And that would be what time, can you say? Would it be about two o'clock? A. I could not say, because I can't say what time I started away from there.

Q. Well, you remember the 12 o'clock train passing you? A. Yes.

Q. And you had your lunch after you got down to Robin Hood station? A. Yes.

Q. That was about an hour later, wasn't it, or more? A. It was more than that because I had to walk back to mile post 90 and get my other man and walk back again.

Q. So that it was at least two o'clock, wasn't it? A. Yes.

Q. And probably later? A. Probably later.

Q. When you got up to the end of the switch you say you could not see anything, what was burned and what was not burned? A. No.

Q. So much smoke you could not see the lumber

piles or your house or Monahan's house? A. No; I could not see nothing that way.

Q. And there was fire along the right of way, wasn't there? A. There was no fire when I come.

Q. What? A. I didn't see no fire when I come there; I saw lots of smoke though.

Q. You did not see any flames? A. No.

Q. Did you see where the fire had been, where it had burned along? A. No.

Q. You did not see that? A. No.

Q. It had not burned at that time? A. No.

Q. The grass and trees had not been burned then down around the bend? A. No.

Q. Then you went back; how far did you go back? A. I came back I should say about half a mile this side—south of mile post 94.

Q. Well, half a mile south of that would be by the big bend, wouldn't it? A. Yes.

Q. Did you go around the big bend? A. I don't think I went clear around; I could not say.

Q. But you were somewhere near the big bend? A. Yes.

Q. Then what did you do? A. I went in the pipe there, the culvert pipe.

Q. And stayed there for a while? A. Yes.

Q. And that was about what time? A. I could not say.

Q. You testified in this case at Hackensack, back in 1912, didn't you? A. Yes, sir.

Q. And didn't you testify on the direct examination, by Mr. McClary, as follows:—you had previously testified to having come up the track toward Long Lake West; and you were asked this question: "Was there any fire on the right of way there where you were, as far as you could see the right of way? A. I could not see on the right of way. Q. What? A. I couldn't see no right of way; it was all fire. Q. Where you stood when you

first saw the right of way, was there any fire on the right of way at that point? A. I could see some fire on the right of way, on both sides. Q. That is at the time you were talking about? Was it on the right of way? A. On the right of way, both sides. Q. Where was that? A. The second curve from the station." Did you testify to that effect? A. I do not remember.

Q. But if you did, that was true, wasn't it? A. It must have been true at that time—because it is a long time since then.

Q. Yes; it is now eight years nearly. A. Yes.

Q. Your recollection was much fresher in 1912 than it is now? A. I think so, yes.

Q. Then didn't you testify—going on from that point—"Off on the Christy tract, was that all afire? A. All fire. Q. As far as you could see on the tract? A. Yes, sir. Q. Had it already crossed on both sides at the time you got there? A. On both sides." Did you so testify? A. I do not remember.

Q. But if you did, that was correct? A. It must have been.

Q. And you answer to the same effect there, that your memory then was better than it is now? A. Yes.

Q. Now, isn't it a fact that you only went as far as mile post 93 with your car? A. Yes, sir.

Q. You did not take the car beyond 93, did you? A. What do you mean—south?

Q. No; when you were going up? A. No.

Q. When you heard about the fire and started up the track you only went as far as 93, did you not, with your car? A. Yes—I went as far as 94 —north—south of 94.

Q. South of 94? A. Yes, sir.

Q. That was about 93, wasn't it? A. Well, between 93 and 94.

Q. Did you get the car around the big bend? A. Yes, sir.

Q. You brought the car up around the big bend? A. Yes; if I remember rightly, yes.

Q. Now you are quite sure about that? A. Yes; I am quite sure.

Q. Do you remember testifying at Canton in 1913 in the Low case? A. Yes, sir.

Q. And there you were asked about coming back up the track? A. Yes, sir.

Q. And then you were asked this question: "Q. Went back where? A. I came back as far as mile post 93; then I took off my car and I tried to walk in there, and I couldn't walk in there because it was too much fire, mile post 93." Now did you so testify? A. I don't remember now, but—

Q. You do not remember? A. No.

Q. But if you did so testify that was more apt to be true than what you have testified now, was it not, by reason of the lapse of time? A. Certainly.

Q. Did you testify in that Low case as follows, in answer to this question: "Q. You went up after you got your man, somebody told you there was a fire somewhere, you went up you say about mile post 93? A. Yes.

Q. Did you go beyond that mile post any? A. Not that—I had to go back.

Q. You did not go beyond the mile post that time? A. No." Did you so testify? A. No—I don't remember it.

Q. You do not remember. Did you testify in the Low case as follows: "How near was the fire to where you were when you went back this second time? A. Maybe 50 rods.

Q. 50 rods; and you were where? A. I was near the mile post 93.

Q. So that the fire was down on the right of way to a point within about 50 rods of mile post 93? A. Yes.

Q. And what time was that? A. About half past two." Did you so testify? A. I don't remember it.

Q. Well, is that the truth, or isn't it? A. Well, it must be, at that time.

Q. So you are not quite clear at the present time? A. No.

Q. And you were testifying about the fire that you saw; and you were asked this question: "Q. Was it the entire width of the right of way? A. Well, as I say, when I got in there it was both sides of the road. Q. On both sides of the track? A. Yes.

Q. And did it fill up the whole 100 feet of the right of way? A. It certainly did.

Q. And how far did it extend toward Long Lake West as far as you could see? A. As far as you could see, as far as I went.

Q. Now, how near was that where you just saw that fire to the curve at 94? A. 93.

Q. There is a curve up between 93 and Long Lake West, isn't there? A. There is two curves.

Q. Is there a curve between 93 and 94? A. Yes.

Q. How near was the point where you saw that fire to that curve between 93 and 94? A. About a quarter of a mile.

Q. Which way? A. South.

Q. Towards you? A. No, the other way." Did you so testify? A. No; I don't think I did. I don't remember that now at all. I remember the last time I went back there, last time up, but not the first time.

Q. Do you remember testifying to this effect? A. Yes; I remember testifying that.

Q. Do you remember saying this at the Low case at Canton? A. I don't remember it, but it must be I said it or it wouldn't be there.

Q. If you said it it was true? A. It must have been true.

Q. And if you say anything different now you are mistaken now? A. Because I don't remember it.

Q. Because it has been so many years since it happened? A. Yes.

Redirect Examination by Mr. Allen:

Q. Which trip was it on which you first saw the fire itself? A. The second trip.

Q. Now when you testified that the fire was burning on the right of way on both sides, which way was the fire traveling? A. It was traveling towards the west.

Q. And which way was the wind blowing, if any? A. Well, the wind blows from the east.

Q. Just describe that wind; what kind of wind was it? A. Well, it came right across the track.

Q. How much of a wind was it? A. It was quite a high wind we had that day during the fire.

Q. Do you remember when this wind came up that day? A. It was after—something after 12, after I had my lunch.

Q. What was the wind in the morning when you first came on? A. There weren't no wind in the morning, to notice it.

Q. Do you know what the wind had been previous to that morning, previous days? A. No; not until after 12.

Recross Examination by Mr. Wright:

Q. Are you still working for the railroad company? A. I am working on the Racquette Lake Branch now.

Mr. Carey: Mary Lashaway, a witness who testified on the previous trial, has since died, and we will read her testimony. (Reads):

"*Direct Examination by Mr. McClary:*

Q. Mrs. Lashaway, are you the wife of Joseph Lashaway? A. Yes, sir.

Q. He was the section foreman that has already testified here? A. Yes, sir.

Q. Where did you reside in the summer of 1908? A. In the section house.

Q. Where was the section house with reference to the lumber piling? A. Yes, sir.

Q. Where was the section house? A. By the front of the lumber pile.

Q. Do you remember the day that Long Lake West burned up? A. Yes, sir.

Q. Were you at the section house that day? A. Yes, sir.

Q. Tell these gentlemen what you saw with regard to fires that day before Long Lake West was burned up. Tell them where you were. A. I was on the piazza there, about noon; I saw smoke on the top of the mountain.

Q. Which direction from where you were? A. Just in front of the house, over on the top of Mr. Christy's wood yard.

Q. Looking right over his wood? A. Yes, sir; and then I saw the fire go down toward that hollow from the mountain.

Q. How far did you see it come before you left? A. Before I left home?

Q. Before you left the house? A. When I left home, the house, the fire was in the lumber pile.

Q. Did you see the fire service train go into the siding? A. Yes, sir.

Q. Did you see them come out? A. No, sir.

Q. Did you see the lumber piles after there was

no train there? A. Yes, sir, I saw it—a couple of them.

Q. When you came to go to the train, to the station, did you find a train down there? A. No, sir.

Q. Where was it? A. Well, the train was gone to Horse Shoe after some water.

Q. You did not go away on the first train? A. No, not on the first train; on the first train after —in the afternoon the first train that went down; that is the one I took.

Q. That is the one you went down on, the first one in the afternoon? A. Yes, sir.

Q. Do you remember seeing the train when it came back from the lumber piles and went down to the station? A. No, sir.

Q. What was the condition when you finally left Long Lake West? What about the smoke and fire around the village? A. It was all on Mr. Christy's wood pile, the fire.

Q. Wasn't it elsewhere? A. What?

Q. Wasn't there something else up in the village? A. I didn't see any, except the school house.

Q. Except the school house? A. Yes, sir.

Q. Was that burning before you left? A. Yes, sir.

Q. You know where the school house was? A. Yes.

Q. At the time you saw this smoke rolling over the Christy ridge, was there any fire in the siding on the right of way? A. No, sir, I didn't see any."

Mr. Carey: The school house is shown on this map right up at this point; it is marked on the map, "School house." It is shown on the larger map at this point—this being the station over here and this being the school house where the witness was located at the time she testified to.

Mr. Wright: I beg your pardon; that is not the testimony—what you have just stated.

Mr. Carey: I say that is where she was located at the time she was testifying about.

Mr. Wright: "What was the condition when you finally left Long Lake West?" That was what led up to it.

Mr. Carey: (After re-reading the testimony): Well, perhaps that is so. (Continues reading):

"Q. At the time you saw this smoke rolling over the Christy ridge was there any fire in the siding on the right of way? A. No, sir; I didn't see any.

Q. Was there any fire anywhere else? A. No, not that I know of.

Q. With reference to the railroad, which way was the wind blowing? A. I don't know.

Q. Which way was the wind blowing? A. The wind was blowing—

Q. From where? From what section? A. Just in front of the house, of home.

Q. Where was it blowing from? A. From over the hill.

Q. From over the hill? A. Yes, sir.

Q. You mean by the hill, the hill over in front of you? A. A. Yes, sir.

Cross Examination by Mr. Wright (read by Mr. Wright):

Q. You say that when you went down to the train, the station had not burned yet? A. No, sir.

Q. And then you got on the train and was taken away? A. Yes, sir.

Q. When you left the house the lumber pile was on fire? A. Yes, sir.

Q. You know where Gordon lived? A. Yes, sir.

Q. Right south of you, wasn't it? A. Yes, sir.

Q. Was that on fire when you left your house? A. Yes, sir.

Q. Was your house on fire when you left? A. I don't know; I think it was at that time.

Q. It was getting pretty hot there about that time? A. Yes, sir; it was kind of hot there.

Q. You didn't go right away as soon as you saw the fire; you waited for your husband to come? A. No, I went away before he came.

Q. You went away before he came? A. Yes, sir; I went away on Sunday; I didn't see him until Monday.

Q. Didn't see him until Monday? A. No, sir."

Mr. Wright: Can we mark this Gordon house?

GEORGE LASHAWAY, sworn.

Direct Examination by Mr. Carey:

Q. George, you are a son of Joseph Lashaway? A. Yes, sir.

Q. And Mary Lashaway was your mother? A. Yes, sir.

Q. Where did you live in 1908? A. At Long Lake West.

Q. In what house did you live? A. In the section house.

Q. And the section house is on which side of the railroad track? A. On the west side.

Q. That is the section house that was burned in the 1908 fire? A. Yes, sir.

Q. And has that section house been rebuilt? A. No.

Q. The foundation is there yet, is it? A. Yes.

Q. George, how many were there in your family in 1908, in September? A. Three.

Q. Your father, your mother and yourself? A. Yes.

Q. And you are how old now? A. 15.

Q. And when was your birthday? A. April 23.

Q. You were 15 April 23rd, were you? A. Yes.

Q. And in 1908 you were a little past eight years of age in September? A. Yes, sir.

Q. Do you remember the school house up on the hill? A. Yes.

Q. At Long Lake West? A. Yes.

Q. You are not living there now, are you? A. No.

Q. When did you move away from there? A. We did not go back after the fire.

Q. You did not go back after the fire? A. No.

Q. Have you been back to Long Lake West since that time at any time? A. Yes.

Q. Did you use to go to school at the school house? A. Yes.

Q. Up on the road back of the station? A. Yes.

Q. George, do you remember anything about this fire that happened in September, 1908? A. Yes.

Q. Where were you at the time of the fire? A. In the section house.

Q. In the section house? A. Part of the time in the section house and part of the time outside.

Q. And who was with you that day? A. My mother.

Q. Anybody else but your mother? A. No.

Q. Tell the jury what you remember about seeing either fire or smoke or sparks or anything of that kind. A. Why, my attention was called to the fire—

Mr. Wright: Just talk over this way so I can hear you.

A. My attention was called to the fire by a man

who came by the window; I was sitting by the open window and he said—

Mr. Wright: Never mind what he said to you. Somebody called your attention to it?

A. Yes.

Q. And then you looked? A. Yes.

Q. Go on and tell what direction you looked. A. We looked out in front of the house, and there was a hill right directly in front, and we looked there, and it was coming south, a little southeast, coming down towards the house.

Q. Toward what? A. Toward the section house.

Q. How many ridges or hills could you see in front of your house? A. Two.

Q. Will you tell how they were with reference to height? A. Why, the second—the first one from the house was lots lower than the last one.

Q. The one nearer to the house was lower than the last one? A. Yes, sir.

Q. By the last one you mean the one farther away? A. Yes, sir.

Q. And where was it that you saw smoke, over which of the hills? A. Both of them. I saw it over the highest hill first.

Q. You saw it over the highest hill first? A. Yes, sir.

Q. Do you know whether that was before or after dinner that you saw it? A. After dinner.

Q. Do you remember where the Christy switch was? A. Yes.

Q. Where was that with reference to your section house? A. On the south of it—of the track.

Q. Was it on the same side of the railroad track or the opposite side of the railroad track? A. The opposite side of the railroad.

Q. Do you remember whether the main track of the railroad was between you and the switch or

whether the switch was between you and the main track of the railroad? A. I believe the main track was between me and the switch.

Q. What? A. I believe the main track was between me and the switch.

Q. The main track was between you and the switch? A. Yes.

Q. Do you remember about the lumber being piled there? A. Yes, sir.

Q. Tell the jury what you remember about the lumber being piled there. A. The lumber was all piled in rows on both sides of the road; there was a wagon road; there was a—

Q. And where was it piled with reference to the switch? A. Below the switch.

Q. What do you mean by below? A. North of it.

Q. Do you remember whether it was on but one side or on both sides of the switch? A. I could not say as to that.

Q. You would not remember that? A. No.

Q. Do you remember the end of the switch towards the railway station? A. There was no switch there.

Q. What? A. There was no switch towards the station.

Q. Well, you remember the end of this switch, do you? A. Yes.

Q. I mean the farthest end from the railroad track. When I say "the switch" I mean the sidetrack. Can you come down here to the map and point out that switch? A. Yes.

Q. Come down here and point it out. (Witness indicates.)

Q. That was the switch, was it? A. Yes, sir.

Q. Now where was the siding? A. Over here.

Q. You are more accurate than I am when you speak of the switch; it was the switch that was

turned to open up the siding, at the end of the siding? A. Yes.

Q. Do you remember whether or not there was any lumber up around the upper end of this switch—the northerly end of it? A. No.

Q. You do not remember that? A. No.

Q. Can you point out where the section house was that you were in? A. There. (Indicating.)

Q. Right there was it? (No answer.)

Q. Now from the hills where did the fire go? A. It came down towards the lumber and was spreading on both sides—more towards the station.

Q. And did you see the lumber piles when they took fire? A. I could not say as to that; I don't remember it.

Q. You do not remember as to that. Did you see any sparks coming from the fire? A. Yes, sir.

Q. Will you tell which way the sparks came with reference to your house? A. They came right toward the house—across the track.

Q. Across the track towards the house? A. Yes.

Q. Did any of the sparks come to the house? A. Yes; some came into the house; the door was open.

Q. Do you remember whether there was a high wind or not at that time? A. Yes.

Q. Did you do anything with the sparks that came into the house? A. I swept them out.

Q. You swept them out? A. Yes.

Q. Do you remember anything about bends in the railroad track? A. You could see one from the house.

Q. And which way from the house was it? A. South, towards Utica.

Q. As you got out on the porch and stood facing the lumber pile on which side was this bend that you speak of, your right or your left hand side? A. Left.

Q. When you were facing the lumber pile? A. Right.

Q. Raise the hand that would be toward the bend. A. This one (raising his right hand).

Q. Now from your house could you see down to that bend? A. Yes, sir.

Q. Your father was Joseph Lashaway, the section man? A. Yes.

Q. Do you remember looking down toward the bend after you saw the smoke and fire coming over the hill? A. Yes, sir.

Q. What were you looking down that way for? A. I was expecting father to come along.

Q. And after the fire got down the hill—did you see the fire coming over the hill? A. Yes.

Q. Which of the hills did you see the fire coming over? A. The furthest one off.

Q. Did you see, at any time, fire coming over the lower hill, in front? A. Yes.

Q. Where did the fire go to after it went over that lower hill? A. It kept coming straight down and it kept spreading on both sides.

Q. And what was down there at the bottom of the hill? A. Old brush and swamp.

Q. You say that it spread in both directions? A. Yes, sir.

Q. Did you see any train go in on the Christy siding? A. Yes, sir.

Q. What was the train that you saw go in on the Christy siding? A. The fire service train.

Q. Had you seen the fire service train before that day? A. Yes.

Q. Where did you see it? A. It passed the house quite often.

Q. I can't hear you. A. It passed quite often.

Q. Which way did the fire service train come from when it went into the switch, from the station or from the bend? A. From the station.

Q. Do you remember how it went into the Christy siding? A. Backed in.

Q. Did you see it after it got in there? A. Yes.

Q. Did you see anything that was done by the men on the fire train after they got in there? A. No; they were working—they were working on the opposite side from where I was.

Q. Oh! You could not see them? A. No.

Q. Were you there when the fire service train came out? A. Yes.

Q. Where did the fire service train go, if you remember? A. Back to the station and stopped, and then started on towards Tupper Lake.

Q. And did you and your mother go out on the fire train? A. Not the first one.

Mr. Wright: Not the first, you say?

A. No.

Q. Do you remember anything about the school house on the day of this fire? A. I—no—yes.

Q. What is it? A. Yes.

Q. Could you see the school house from your house? A. You could see the top of it, where the bell was.

Q. Do you recall whether or not you at any time while you were up at the house saw any fire over around the school house? A. Yes, sir.

Q. Just describe what you saw. A. The fire was all around the school house and we thought the school house was on fire.

Q. You did not see anything but the— A. Just the top of it, the cupola.

Q. How about the smoke, as to quantity of smoke? A. There was a lot of smoke.

Q. Did you at any time that afternoon see any fire coming up near the first bend in the railroad track or off in that direction? A. No.

Q. Where did you see the fire first—down in the swamp or around the school house? A. I saw it up on top of the hill first.

Q. On the top of the hill first? A. Yes.

Q. I show you these photographs, three of them together, marked D-12-a, and ask you if you can see the Christy switch in that photograph. A. No. There is the end of the track.

Q. Can you see the Christy siding? A. No.

Q. Will you point out where the Christy siding is? A. Right there (indicating).

Q. You can't see quite down to the switch; the photograph does not show it down to the switch? A. No.

Q. Can you show about where the end of the siding toward the station is? A. Right there (indicating).

Mr. Wright: Right at the end of the first picture.

Mr. Carey: Yes; about the end of picture 23.

Q. Now, George, does this picture look natural to you? A. Yes.

Q. Can you point out on the picture about where you saw the fire coming over the highest hill? A. Right over here (indicating).

Q. I will mark the two points. Is that about right for the upper point? A. Yes.

Q. And how far down? A. Just about to there.

Q. About to there? A. Yes.

Q. Now I will connect those with a line; and we will make that "Where George saw fire." Is that right? A. Yes.

Q. Now in front of that high hill what is there? A. A ridge.

Q. Lower or higher than the other? A. Lower.

Q. Will you indicate where you saw the fire coming over that lower ridge? A. Right along in here. It had spread somewhat coming down.

Mr. Wright: Make another mark.

Q. Is that about right for the lower part? A. Yes.

Q. And how far up? A. About here.

Q. For the lower one. And we will connect those two.

Cross Examination by Mr. Wright:

Q. Well, then, the fire was in the lumber piles before it was up at the school house? A. No.

Q. It was up by the school house first? A. Yes.

Q. Then you must have made a mistake in marking this picture, haven't you? You say you first saw it over here? A. Yes, sir.

Q. Then you saw it coming down in here—the lumber piles were nearer to it than the school house, weren't they? Quite a little? A. No.

Q. So you still think this is right, do you? A. Yes.

Q. You have marked this right? A. Yes.

Q. And you want it to stay marked the way it has been marked, do you? You saw the fire coming in between those two lines over the front ridge? A. Yes, sir.

Q. And this was the upper line, the most northerly line? A. Yes.

Q. But yet, notwithstanding that, the fire got up to the school house before it got to the lumber piles? A. Yes; it kept spreading on both sides.

Mr. Wright: I will show that to the jury. This is the southerly line where he saw it

coming over the ridge, he says, and this is the northerly line he says, coming over this way. This is the school house up here.

Q. Did you hear the dynamite explode? A. Yes.

Q. Where were you then; you were on the train going up to Horseshoe, weren't you? A. No; we hadn't got on the train yet; we were below the station.

Q. And that was how long after you saw the fire going into the lumber piles? A. Not very long, because we had just had time to walk from the house.

Q. Was Gordon's house on fire before you left? A. I could not say as to that, but the fire was right around there; the fire was across.

Q. Was your house on fire when you left? A. I do not know.

Q. You stayed in the house until the fire got into the lumber piles, didn't you, or did you leave your house before that? A. The fire was right up to the lumber piles and was amongst it.

Q. Do you remember testifying at Hackensack in this case about three years ago? A. Yes.

Q. And at that time do you remember testifying that the Gordon's house was on fire before you left your house? A. Yes.

Q. Well, now, was it on fire or wasn't it? A. It was.

Q. Just a minute ago you said it wasn't, or you didn't know. A. I made a mistake. It might have been on fire or it might not. The fire was all around it, and I didn't happen to look that way.

Q. You were eight years old when this fire took place, weren't you? A. Yes.

Q. A pretty bad fire, wasn't it? A. Yes.

Q. You were pretty badly frightened that day, weren't you? A. What?

Q. You were quite badly frightened that day, weren't you? A. Yes.

Q. And you and your mother were trying to get out of town as fast as you could? A. Yes.

Q. And you were worried about your father too, weren't you? A. Yes.

Q. Did you see any of the other buildings burn or get on fire? A. No.

Q. Did you see the Monahan barn on fire, the one over on the east side of the railroad? A. No.

Q. Do you remember testifying in the Low case at Canton? A. Yes.

Q. Do you remember testifying there that Mr. Gordon's house was burning when you left your house? A. No.

(Adjourned to December 23, 1915.)

(The following colloquy too place out of the hearing of the jury):

Mr. Wright: There is one thing in connection with the first ruling you made on Monday; I think to make the record straight in case I should want to use it, I ought to make an offer of proof and have your Honor overrule it. I would like to make an offer to prove that the fires which ran over the Christy property—across from the Webb property onto the Christy property, and which were found at Bear Pond and East Charley Pond, were railroad fires, started on the right of way of the railroad by the railroad's negligence.

The Court: And that they traversed the land of other people.

Mr. Wright: Yes.

The Court: And eventually landed on the Christie property?

Mr. Wright: Yes.

The Court: And you make the offer for the purpose of laying the foundation for the right of recovery on that ground?

Mr. Wright: On that ground.

The Court: Yes; and I overrule that upon the ground that the common law as construed in New York governs, and you take an objection to that ruling.

Mr. Wright: Yes; and that ought to be put right after the ruling in the record, I think, to keep it straight. My idea is this: in case I should want to raise that question, instead of taking up the entire record, I could take up that part of the record, to save that expense of printing.

The Court: You can put it anywhere you want in the record and I will agree that it is there.

Mr. Carey: Another matter which perhaps might be decided now, and may shorten the case: My contention is that we are charged with three elements of negligence: 1. The improper construction of our engines. 2. The improper operation of the engines. 3. The improper care of our right of way; and that there is no question raised in the pleadings as to our neglect to repair or maintain engines in proper condition. Mr. Wright's contention is that the pleadings do raise the question of proper repair and maintenance of the engines. Now the gist of the declaration is on page 2. There are two counts; one is the communication negligently of fire from our engines to our right of way and thence to the plaintiff's property, and over the plaintiff's property to the lumber piles. The other count is a count charging the throwing of fire from the engines onto the lumber pile.

The Court: What do you find here (referring to the pleadings), Mr. Wright, that has any bearing upon the right to recover because of improper repair or maintenance?

Mr. Wright: By reason of "negligent, defective and improper construction and operation."

The Court: Let's take them just in their ordinary meaning, as we must, and most strongly against the pleader, as we must. Construction is a recognized thing; it means the original manufacture and manner of building them; and operation means the manner in which they are operated. You turn to the second volume of Thompson on Negligence, section 2230, and you will find there drawn the distinction between the negligent construction of an engine as a basis of action and the negligent repair of the engine. You see the operation of the engine means the actual propelling of it along the rails; it does not mean the operation on it to repair it. It is not the operation *on* the engine; it is the operation *of* the engine.

Mr. Wright: Yes.

The Court: And it would seem to me as that stands now that the neglect to repair is not charged.

(Argument.)

The Court: I am perfectly satisfied that you cannot, on an allegation of negligent construction, recover on a proof of negligent repair.

You may have an objection entered to that ruling on my part now. I rule it now so that Mr. Carey will mold his proof to that point.

EUGENE C. RIENDEAU, sworn.

Direct Examination by Mr. Carey:

Q. You are in the employ of the defendant railroad company? A. Yes, sir.

Q. And how long have you been in the employ of the company? A. 24 years.

Q. Continuously? A. Continuously.

Q. You are employed in what capacity? A. Conductor.

Q. During part of the month of September, 1908, you were conductor of what train? A. Fire service train.

Q. That train was known as what number, do you recall? A. We had no number, being extra. We were patrol service.

Q. You were extra? A. We were extra.

Q. How long did you have charge of that fire service train in the month of September, 1908? A. I was practically on fire service all the month of September, but I was located around Long Lake West from the 9th to the 28th, with the exception of a couple of days.

Q. State very briefly what your fire train was made up of and what crew you had and what appliances you had on the train, giving the cars and the length of the train. A. We had a locomotive and a fire tank, that held 6700 gallons of water; it could be connected with the engine tank provided we wanted to equalize the water. Next came a fire car with two pumps, containing a boiler to make its own steam, and a caboose. We carried about 1250 feet of hose and a gang of men to handle the hose, besides an engineer and a mechanic.

Q. You said it consisted of an engine; I suppose it had the engine and usual tender for the coal and the water? A. Yes.

Q. Now, what was the approximate length of the train? A. About 200 feet.

Q. Was that the train that you had on the 27th day of September, 1908? A. Yes.

Q. State very briefly what you did in connection with patrolling the tracks and putting out fire adjacent to the tracks. A. Well, our duties at that time—we were laying at Long Lake West nights and in the morning we would go south, that is to Nehasane—a matter of about eight miles—looking for fire, and return from Nehasane to Horseshoe, which is about five miles north of Long Lake West. We continuously kept that patrol up, keeping clear of regular trains, all day long, if we weren't notified of any trouble anywhere else.

Q. What were the weather conditions during the months of August and September in the Adirondacks? A. Very dry.

Q. Have you operated an engine or train through the Adirondack section for a good many years? A. Yes, sir.

Q. How did the weather conditions in August and September, 1908, compare with the ordinary year? A. Drier than I have ever seen it.

Q. Drier than you ever saw it? A. Yes, sir.

Q. And this fire train service I presume was an extra precaution on the part of the railroad company? A. Something we had never run up there since that road was built.

Q. Now, Mr. Riendeau, coming down to the 27th day of September, 1908, will you begin with your movement in the morning, where you started from, and state the track which you patrolled and what you saw and what you did, down to the time when this fire occurred? A. On the morning of the 27th we left Long Lake West about 6:30 and we patrolled the track to Nehasane, a distance of

about eight miles, with the train, looking for fire. From Nehasane we returned to Long Lake West over the same track.

Q. Give the time, if you can. A. We left Long Lake at 6:30; arrived at Nehasane at 6:55; left Nehasane at 7:10, and I cannot say what time we returned to Long Lake West, but anyway we had no work of any fire description on the way there or back. At Long Lake West I received a telegram that there was a fire on Dr. Webb's preserve about a mile and a half south of Nehasane, so we went back to that point and worked there until about 11 o'clock.

Q. Where was that fire with reference to the railroad? A. It was on the west side of the railroad.

Q. And how far from the railroad? A. Possibly 400 feet when I arrived there.

Q. Go on. A. We worked there until 11 o'clock. We were pretty near out of water, so we returned to Horseshoe.

Q. Horseshoe is which way from Long Lake West? A. Horseshoe is north about thirteen miles; and we got our tank of water at Horseshoe, and laid in a sidetrack there for the regular train to go by—number 11.

Q. Do you know what the number of the regular train was, and in which direction it went? A. No. 11; northbound; we returned to Long Lake West—left our fire train standing on the main track,and went into the hotel to dinner.

Q. Just at that point—number 11 did pass you at Horseshoe? A. No. 11 passed us at Horseshoe.

Q. And we have the time already fixed when No. 11 passed Long Lake West.

Mr. Wright: Not by number.

Mr. Carey: Well, the number of the train

—it is fixed in the interrogatories, I think, by number. It was late that day. The answers to the interrogatories show that it passed Long Lake West at 12:43 on that day.

Q. About what time was the schedule time of No. 11 from Long Lake West north to Horseshoe? A. Twelve minutes.

Q. And did you pull out of Horseshoe immediately after No. 11 passed? A. We did.

Q. And about how long did it take you to run from Horseshoe down to Long Lake West, southerly? A. About 12 minutes.

Q. So that you arrived at Long Lake West then about what time? A. About 1:05 or 1:10.

Q. Now you said you left your fire service train on the main track? A. Yes, sir.

Q. And what did you do then? A. Went to the hotel to have dinner.

Q. And the hotel was located where? A. About 75 feet on the east side of the track from the main line—about 75 feet. Right in here on the easterly side of the track (indicating on map).

Q. It is marked on these maps. That was the hotel where you went for dinner, was it? A. Yes, sir.

Q. Now you had then passed over the right of way in front of Christy's property on that day up to the time you stopped for dinner, how many times? A. Three times.

Q. You went down in the morning— A. South —north—four times.

Q. —and then back to Long Lake West? A. Yes.

Q. Then down again? A. Yes.

Q. Then back to Horseshoe? A. Four times.

Q. And had returned to Long Lake West. Now on all of those occasions were you looking for fires along the right of way? A. Yes, sir.

Q. Were there any fires between Long Lake West station and the Christy line or near the Christy line on any of those occasions when you passed along the line? A. No, sir.

Q. Now describe your actions and what you did after stopping your train on the main line. A. We went to the hotel to have dinner; had only been in the hotel a few minutes when I heard an awful roaring and ran out the front door of the hotel onto the piazza, thinking at the time the roaring was coming from a train that was coming into the station.

Mr. Wright: I object to what you thought. What did you see?

A. I looked to the south, or southeast, from the hotel piazza, and I seen a fire coming over the hill. We got together and took the fire train and went down the main line track and backed in on the Christy siding—stretched out a thousand feet of hose and started the pumps, and remained there applying water as far as the hose would reach in front of us until the trainmen came down from the station and said that the agent wanted us to get out of town or we would get burned up, as the fire was swinging both to the right and left. We cut off our hose and left it there, pulled up the siding and backed up to the station, nosed in on the team track with the engine and took hold of some cars. We pulled those cars up to the station, and we rode the women and children in the caboose and the men got onto the cars we had picked up in the station and onto the fire tanks, and we loaded whatever we could into the fire train and then we backed out, taking everybody that wanted to come with us.

Q. Will you step down to the map and point out to the jury? Point to the hotel where you went for dinner. (Witness indicates).

Q. You say you came out on to the piazza of the hotel? A. Yes, sir.

Q. On which side or end of the hotel? A. On the front side facing the railroad track (indicating).

Q. And where did you go then? A. Came right to this corner here.

Mr. Wright: He indicates the southwest corner.

Mr. Carey: Southwest corner of the hotel.

Q. You say that you saw what when you got around on this corner of the hotel? A. I came around here; I looked off over the hill and seen a big volume of smoke—and an awful roar.

Q. In what direction did you look? A. I looked straight up from that corner, practically straight up this road until you get to the top of this hill; it is in a direction practically like that (indicating).

Mr. Wright: Like the arrow there, you mean?

A. Not quite as much to the south; a little more to the east than the arrow is. I remember looking straight up this road, up to the hill where the big rock is, and I looked right over that rock. That is the first volume of smoke that I seen.

Q. And the smoke was where? A. Just coming over the top of this big hill.

Q. The big hill is not shown on that small scale map, is it? This hill that is shown here is just the little hill where the rock is located? A. Yes.

Q. You then got your men together, and heading down the track which way was the engine heading? A. The engine was heading south, as the railroad runs north and south.

Q. Then in backing in on this switch about how far below the end of the switch did you go? A. Just the length of the train.

Q. And that was, you say, about 200 feet? A. Yes; or a little less than 200 feet.

Q. So that the head end of your train was about 200 feet south of the switch? A. Yes.

Q. Then, backing in on the switch, what did you see with respect to the smoke or fire when you got in there? A. Well, it had come over the top of the big hill at that time and was practically coming down towards the smaller hill (indicating).

Q. And you notice the siding here, do you? A. Yes, sir.

Q. Now suppose we turn this back to the larger map, which shows the hill. Will you point out the siding there? (Witness indicates).

Q. That is right; that is the Christy siding.

Q. Now, with reference to these hills, will you indicate where the smoke was coming, about? (Witness indicates). A. I should say it was right in there when I first seen it, off this hill, coming down this way.

Q. And what direction with reference to the railroad track? A. Southeast.

Mr. Wright: Suppose you put a mark where you indicated, so there will be no question. Put an "X" there.

The Witness: All right.

Mr. Wright: He puts an "X" near the figure 1790, with the mark "R".

Q. Can you indicate about how wide a front there was to that fire or smoke—did you see fire or smoke at that time? A. At first I seen the smoke—I should say three to four hundred feet.

Q. Three to four hundred feet in width across

here (indicating). And that would be about an inch on this map. A. Well, that (indicating) was what I call the point of the hill, there, this way.

Q. And it was down toward this second little hill here, going this way? A. Yes, sir.

Q. Now which way did you run out your hose after you got in on the siding? A. I ran the hose at right angles to the main line, right in there (indicating).

Q. In what direction? A. About in that direction (indicating).

Q. Did your hose reach all the way across the swamp to the foot of the hill? A. Yes; they got it to the foot of the hill.

Q. When you got your hose in there were you able to reach the fire? A. No, sir.

Q. In what direction was the fire advancing at that time? A. Straight where I pointed the hose to.

Q. And with reference to the railroad track? A. It was advancing at right angles to the railroad track.

Q. What did you do after you got your hose strung? A. As soon as we got our hose strung we turned on our water and we used it just as fast as we could in wetting down this territory we could reach with it, until the fire came up to the water, and then it started to spread.

Q. Spreading in the direction you have indicated? A. Spreading in the direction I have indicated.

Q. That is southwest and northeast? A. Northeast.

Q. And about how long did you stay in there? A. I could not say. It seemed a matter of a half an hour.

Q. Then you received warning as to danger, did you? A. Yes, sir.

Q. And what was the situation with respect to between the end of the Christy switch and the road to Long Lake West along the lumber road there? A. After we came out of here?

Q. No; when you started to come out. A. Well, the fire was coming over this hill when we started down here. It hadn't got down to this lower hill. I could see it on the big hill, but when we got back in here and got our hose out it was coming down the slant of the hill.

Q. You say it spread? A. Yes.

Q. About where was it in the northeasterly direction when you pulled out of the siding, if you could tell? How far had it got along there? A. When I got up here to the station that was the first time I took notice that I remember; it was up around the school house here.

Q. Did you notice while you were on the siding where it was? A. No, sir.

Q. You say you cut your hose off. Why did you do that? A. Because we were practically buried down in here so we could not see which way the fire was. We thought we were stopping the fire because we were holding it almost in a straight, direct line. At the same time the fire was switching both ways; so then we got word to come back to the station as the fire was spreading around here (indicating).

Q. You then pulled out of the switch and backed down? A. Yes.

Q. While you were in there was there any other fire in this vicinity except the fire which you have spoken of coming over the hill? A. Not that I seen.

Q. Did you look down in this direction? A. From down the track I did.

Q. Was there any fire down in this direction, down southerly along the right of way, at the

time when you came down the track? A. Not as far as I could see.

Q. And were you in a position where you could have seen it if it had been there? A. I could see to the end of the tangent.

Q. By that you mean to the end of this curve? A. Yes.

Q. Then between the place where you were and the beginning of this curve was there any fire along the right of way or adjacent to the right of way southerly from you? A. No, sir.

Q. How was it when you came out with respect to fire down toward the curve, either along the right of way or adjacent to the right of way? A. There was no fire down at the curve. This fire was swinging around here. It hadn't got out to the right of way.

Q. You may return to the stand. You notice on this side track here an arrow pointing off in the direction of these hills? A. Yes, sir.

Q. Do you recall whether that arrow was about the direction that the hose was laid out? A. No, it wasn't; the hose was laid a little more to the east, at a right angle to the main line, and not a right angle to the siding.

Q. Do you know how the fire spread, or whether it crossed the track, and if so, in what direction it spread after crossing the track? A. Well, it crossed the track while we were still in Long Lake West, but I only seen it in one place—only noticed it in the one place.

Q. Where was that? A. That was in the boarding cars which were almost opposite the siding.

Q. By boarding cars you refer to the cars that the railroad company's men used, the men who were fighting the fire? A. Yes.

Q. What about the wind at the time you went down into the station? A. There was quite a hard wind blowing.

Q. In what direction was it blowing? A. Coming from the southeast to the railroad track.

Q. About how with reference to the railroad track? A. At right angles.

Q. Did you notice any sparks from the fire? A. Yes, sir.

Q. And what direction were the sparks going? A. Across the track.

Q. How about the noise of this fire? A. The noise was quite loud—a very hard, roaring noise.

Cross Examination by Mr. Wright:

Q. About what time was it when you left Long Lake West with the first relief train after you had pulled out from the siding? A. I think about 2:30; I could not say exactly; about 2:30 somewhere.

Q. And then you went to Horseshoe? A. Yes, sir.

Q. And came back a second time? A. Came back from Horseshoe.

Q. And took on some more people? A. Yes, sir.

Q. And went back again to Horseshoe? A. To Tupper Lake.

Q. And that was your last trip? A. No.

Q. Did you go back again? A. Yes.

Q. What time did you get back again the third time? A. It must have been about half past eight.

Q. At night? A. Yes.

Q. But that was after the fire had gone entirely away from Long Lake West station? A. Of course there was smouldering there yet.

Q. But the fire had gone out? A. Yes; everything had burned.

Q. About what time was it when you went up on the second trip? A. The second trip?

Q. Yes; you took the people up on one trip, and

then you came back and took some more up again? A. Yes.

Q. About what time did you leave Long Lake West station on the second trip up? A. About 4:30 I think.

Q. You said you left on the first relief trip at 2:30? A. Yes.

Q. Were you two hours going to Horseshoe then and coming back for the rest of the people? A. I think so; of course we done some work in between there.

Q. You did some work in between? A. Yes, sir.

Q. But you knew there were some more people at Long Lake West to come out? A. I did.

Q. Now you say that you laid this hose at right angles to the main line? A. Yes.

Q. Are you sure it was the main line, or the switch? A. No; the main line.

Q. Didn't you testify before that it was at right angles to the switch? A. I don't know.

Q. When you came out of the hotel right after dinner you saw the fire or smoke—A. It wasn't after dinner.

Q. —Just as soon as you got out doors, out on the porch? A. I seen the smoke; not the fire.

Q. When you came out on the west side of the building? A. West side of the building.

Q. You could see smoke then? A. Yes.

Q. And from that point you walked down to the southwest corner? A. No; I could not see the smoke until I got to the road.

Q. And then you looked down the railroad track? A. No, sir; I looked off over the top of the first hill or straight up the Long Lake West highway.

Q. You looked up along that Long Lake West highway, you say? A. Yes.

Q. Did you look past the Monahan barn, which

was just south of the Long Lake West highway? A. I am not sure about those buildings.

Q. Just come down here and see if you can locate it. Do you remember these buildings being located here south of the Long Lake West road? A. I remember some buildings being in there, but to know one from the other, I don't.

Q. Well, did you look to the east or the west of the buildings which were located south of the Long Lake West road? A. I looked to the east.

Q. You looked to the east? A. Yes.

Q. As a matter of fact, Mr. Reindeau, you can only see a very short distance up that road from the corner of the hotel? A. That is all.

Q. You can hardly see the most easterly building, can you? A. You can see right on top of the hill where the big rock was.

Q. There is quite a hill starts right behind the post office, isn't there? A. No; it is quite a ways back from the post office, back in here.

Q. Well, about two or three hundred feet? A. Yes; just about that.

Q. And then you could see this way? A. Yes; that is just the way.

Q. Right down that way? A. Yes, sir.

Q. Down here? A. Well, when I looked over the top of this, it was in line—wherever this hill was that was in back of that, it was right in line with that.

Q. This place where you indicated on the other map that the fire came across, right in there?

Mr. Carey: No.

Mr. Wright: Yes, this is the place, where this brook is.

Mr. Carey: It is farther over; farther away than that. This is quite a different scale.

Mr. Wright: It is a different scale. At the same time the map is the same.

Q. Well, you looked right down toward the place where you say the fire came into the swamp, is that right? A. No; when I looked over here, right over the top of this hill, I looked back to the top of that hill, and the smoke was just coming over it at that time, just coming over the top of that. After we got down in here and got on the siding that had widened out quite a bit at that time. When I first saw it it was only a matter of I should judge three to four hundred feet. By the time we got back in there it had widened and was coming down.

Q. That was about quarter after or twenty after one? A. Yes; twenty to thirty after one.

Q. Take the seat. And the wind you say was southeast? A. Southeast and east.

Q. And was blowing at right angles to the railroad track? A. Yes; at right angles—so that the fire was coming directly to the track.

Q. And it was coming right in this direction, was it? A. Yes.

Q. Did you see the Monahan buildings to the west of the railroad on fire? A. No, sir; I didn't.

Q. When you left the town on the second relief trip—you know what I mean by relief trip? A. Yes.

Q. —was the station burned at that time? A. No, sir; I don't believe it was. I won't say as to that positively; I don't think it was.

Q. But the cars across from the station on the other track opposite the station were on fire? A. They were on fire when I left the first time.

Q. And did you see Jennings' barn on fire? A. No; I won't say that I did.

Q. You know where Jennings' barn is? A. That was back of the cars.

Q. The one to the west of the track, two or three hundred feet from the railroad. (No answer).

Q. Do you remember hearing the dynamite explosion? A. Yes, sir.

Q. Where were you when you heard that? A. At section 18; that is one mile north of Long Lake West.

Q. On which trip was that? A. On the first trip. Then there was another explosion later.

Q. Was the school house on fire when you left on your first trip? A. I cannot say.

Q. I show you exhibit D-13. Do you recognize that picture? A. Yes.

Q. That picture was taken at the point you indicated on the map at the southwest corner of the hotel? A. Yes, sir.

Q. And that is the view you saw when you say you saw the fire? A. It is exactly, yes, sir.

Q. This is the rock shown here to the extreme left of the picture? A. Yes, sir.

Q. And the fire was coming in that direction, was it? A. From where I stood at the hotel steps, the corner of the piazza there, I looked over the big rock.

Q. And fire was coming in that direction? A. The fire was coming from that direction.

Q. You have been traveling on this road a long time, I suppose? A. Ever since it was built.

Q. I call your attention to the first range of hills in the centre of the picture. A. Yes.

Q. And beyond that a large, high range of hills which runs down further in the picture. The railroad when you go south for a distance—after you go south for a distance—takes a turn to the left, doesn't it? A. Yes, sir; the first curve is to the left.

Q. It turns that way toward this high range of hills? A. Well, it turns in that direction.

Q. Over behind this first ridge? A. I don't think that ridge goes across the track.

Q. But it starts at the track; isn't there a cut there where it is 8 or 10 feet high? A. There is a ridge down there, but it is before the first curve.

Q. Well, between the first and second curve. It commences at the first curve, doesn't it? A. Not the first curve, not as I remember the country there; it is down below further.

Q. But the railroad runs behind that ridge and over toward the big ridge where it takes the bend to the right? A. The big bend swings the other way. When you go down the track and have swung as far south or east as that you turn the other way and go away from it.

Q. That is what I mean. You turn and go behind this first ridge to some extent and toward the big ridge, and then at the second curve you swing away from the big ridge and follow the line of that creek down, don't you? A. I think that ridge is run out by the time it reaches the railroad track.

Q. You mean the first ridge? A. Yes. I don't think there is any ridge goes across the track.

Q. Yes. The cut through that ridge is only about eight or ten feet high at the most, isn't it? That is where it runs out? A. It runs off to the west of the railroad track.

Q. Into a swamp on the Monahan property; that is correct, isn't it? A. I won't say what ridge it is. I know there is a ridge, but it is down below the first curve, the one I have reference to; whether it runs through there or not I don't know, or whether it is connected with either one of these or not I can't say.

Q. I show you P-4-a, which is a picture taken from the upper end of the second curve below Long Lake West looking north, and shows the second curve, curving to the right toward the Long Lake West station. Does that look natural

to you? And this ridge shown in the foreground is the ridge you refer to that is down below the first curve? A. It is down practically at the second curve.

Q. Also a spur of that ridge runs out just near mile post 94, doesn't it, and not as high as in the foreground, but a spur runs down there near mile post 94? A. That I do not remember.

Q. Well, it shows in the picture; shows rocks near mile post 94? A. Yes; but they may have been blasted from any of these cuts.

Q. But at any rate this picture you recognize as the picture of the track running north? A. Yes; towards Long Lake West station.

Q. And Long Lake West station lies over here to the right of the curve. Would you say it lies about where that "X" is made? A. I would say it lies about there.

Q. An "X" with the letter "S" above it? A. Yes; I should say about that direction.

Q. The same place Mr. Sanford identified. And then after the track comes down here a little way it curves around the other way? A. Yes.

Q. Now it is a fact that that curve is very near this big ridge? I mean it runs pretty close to the big ridge before it curves? A. Yes.

Q. I show you the defendant's exhibit D-6. That is looking up the track towards mile post 94, is it not? A. Well, that is before you get to the second curve, is it not?

Q. Before you get to the first curve. Do you know where mile post 94 is? A. No; I can't say I do exactly.

Redirect Examination by Mr. Carey:

Q. When you came down to get the people for the second trip at Long Lake West, were you able to get clear down to the railroad station? A. No, sir.

Q. How far from the station did you have to stop? A. Half a mile.

Q. Half a mile northerly? A. Yes, sir.

Q. When you went out from the hotel to go down to the Christy siding had you eaten dinner? A. No, sir.

Q. Begun dinner? A. Yes, sir.

Q. How far had you gotten along? A. As far as a plate of soup.

Q. You say there were two dynamite explosions? A. Yes, sir.

Q. How far apart in point of time, about? A. We were back to the same point from Horseshoe as we heard the first one; that is, a mile from Long Lake West, and had gone to Horseshoe and were back there; possibly an hour's time, or very nearly.

Owen R. Mench, sworn.

Direct Examination by Mr. Carey:

Q. You are in the employ of the defendant railroad company? A. I am.

Q. In what capacity now? A. Assistant track supervisor.

Q. Where? A. At Utica, New York.

Q. In the month of September, 1908, were you in the employ of the company? A. I was.

Q. What were you doing during that month? A. I was acting as assistant track supervisor.

Q. During that month did you work on the fire train with Mr. Riendeau, the conductor, at any time? A. I did.

Q. You heard Mr. Riendeau's description of the fire train, did you? A. Yes, sir.

Q. That was the train you were working on? A. Yes.

Q. Were you working on that fire train some days preceding September 27, 1908? A. I was.

Q. About how long? A. I had been working on the fire train since the fore part of August.

Q. Coming down to the few days just preceding the Long Lake West fire, where did the fire train stop over night? A. Long Lake West.

Q. And it had been stopping there for about how long over night? A. We laid there for about, well, ever since I had been there in the fore part of August.

Q. You had continuously been at Long Lake West? A. That was our headquarters, yes, sir.

Q. Were you on the fire train on the Saturday preceding the Sunday of the fire? A. Yes, sir.

Q. Do you know whether or not you passed up or down the line from Long Lake West in front of the Christy property on Saturday? A. Yes; we did.

Q. When you were passing up and down the line were you keeping a lookout for fires? A. Yes.

Q. On the Saturday preceding the fire were there any fires along the right of way between Long Lake West and the Christy corner on the south? A. No, sir.

Q. Coming down to the Sunday of the fire, will you describe the movements of the train, of your fire service train, up to the time you stopped at the hotel for dinner? A. We left Long Lake West at the usual time, 6:30 in the morning, went south to Nehasane, returned to Long Lake West, and received orders to return to a point south of Nehasane at mile post 86, I believe, and assist in fighting fire at that point.

Q. That was the fire that Mr. Riendeau spoke of? A. Yes, sir.

Q. Then did you go north again? A. We went north at about 11 o'clock—ran out of water.

Q. You had then passed in front of the Christy property four times? A. Yes.

Q. Up to about eleven o'clock. Did you keep a lookout for fire on those trips up and down? A. I did.

Q. Were there any fires along the right of way, adjacent to the right of way, in front of the Christy property? A. No, sir.

Q. And on any of those occasions was there any fire off to the east from this first curve here, on the Christy property?

Mr. Wright: Which way?

Q. Toward the east, up to the point of this hill here? A. No, sir.

Q. Now you went in to dinner in the same hotel that Mr. Riendeau did? A. I did.

Q. How long after you went in to dinner was it before you were called out? A. A few minutes, probably ten or fifteen minutes.

Q. Where were you when you were called out? A. I was in the dining room.

Q. In the same dining room with Mr. Riendeau or another dining room? A. Another dining room.

Q. What was the call that came to you, and who made the call? A. One of the dining room girls notified us—called our attention to the fire coming over the hill.

Q. Where did you go after the dining room girl called attention to the fire? A. We went to the side, to a door.

Q. Won't you come down here and point out on the map just where you went and state what you saw? This is the hotel. A. The fire was right in there.

Q. In that easterly extension? A. Yes.

Mr. Wright: Southerly side of the easterly extension?

A. Yes, sir.

Q. And what direction did you look? A. Looked practically over this way.

Q. Do you notice the school house up here on the hill? A. I do now, yes, sir.

Q. Do you know where these other buildings are down here? A. Yes.

Q. Did you know the Monahan boarding house? A. Yes, sir.

Q. And that is building No. 10 right down in here; and you were up here? A. Yes, sir.

Q. Indicate generally the direction in which you looked. A. We looked over towards a rock that was on Long Lake West road.

Q. That rock that Mr. Riendeau spoke of? A. Yes.

Q. What did you see when you looked? A. Saw a vast volume of smoke going over the hill.

Q. Was there any noise at that time? A. Yes; there was a loud roaring.

Q. And after you saw that smoke in the direction in which you have indicated, what did you do then? A. We went out of the hotel and got on the fire train.

Q. And where did the fire train go? A. Went down and backed in on Mr. Christy's siding.

Q. And you heard Mr. Riendeau's description of that? A. I did.

Q. Was that according to your recollection of the way the train was put in there? A. Yes, sir.

Q. And after you got in onto the Christy siding what did you do? A. Strung out our hose and threw water.

Q. About where on the Christy siding with reference to the two ends of it was the tank car to which the hose was attached? A. That was near the rear end of the siding, that is it was nearer the rear end than it was to the switch.

Q. Nearer the rear end than it was to the switch? A. Yes, sir.

Q. You will notice this arrow pointing up from the siding; was it northerly or southerly from that, according to your recollection? A. To my recollection, it was northerly.

Q. Northerly from that. Now about how far would you say northerly from that? A. Perhaps a couple of car lengths, eighty feet—eighty or ninety feet.

Mr. Wright: Three quarters of an inch.

Q. Three quarters of an inch, about, in there? A. Yes.

Q. We will mark it with an "M", for your name.

Mr. Wright: Mark it a straight line running at right angles from the switch, with an "M" at the end of it.

Mr. Carey: Not quite at right angles.

Q. About what direction with reference to this switch, or this siding, did you run the hose? A. We ran it practically at right angles—probably a little northerly.

Q. A little northerly from right angles? A. But practically at right angles.

Q. How far did you run the hose out? A. A thousand feet.

Q. What did you do then? A. Threw water.

Q. Were you able to reach the fire at that time? A. No.

Q. Will you indicate as nearly as you can on this large map the place where you saw smoke when you got down into the siding, if you saw any? A. The smoke was coming from over this way, directly toward the siding.

Q. This ridge of hills here is the ridge next the swamp? A. Yes, sir.

Q. Had it come over that ridge when you got down there? A. Yes, sir.

Q. Were you able to reach the fire at that time with your hose? A. No, sir.

Q. Go on and tell what you did, and what happened? A. We threw water until one of the men from the station notified us to—

Q. Came down and warned you, did he? A. Came down and warned us that we had better—

Mr. Wright: Never mind what he warned you. He warned you and you got out?

A. Yes; we got out of there and picked up the box cars and loaded the people and their effects into them.

Q. What did you do with the hose? A. Left it.

Q. Why did you leave it? A. Didn't have time to take it out.

Q. Was the fire down where you could see it when you pulled out from the siding? A. Just working over the hill, or the top of that lower range.

Q. Do you know what direction it was coming in? A. Straight towards us.

Q. As to the edges, what direction were they taking? A. I did not pay much attention to the edge of the fire. I know it was swinging around, especially towards the north, because when the station man came down and notified us my attention was called to it.

Q. What effect had your throwing water had on the progress of the fire, where the water was thrown? A. Well, it would check it where it was thrown.

Q. At that point? A. Yes, sir.

Q. How about the wind at the time you went down to the Christy siding? A. There was a heavy wind from the southeast.

Q. Any sparks coming from the fire while you were down at the siding there? A. Yes, sir.

Q. What direction were the sparks going? A. They were going northwest.

Q. And what direction with reference to the railroad? A. Across.

Q. While you were down in the siding was there any line of fire in this neighborhood here except the fire that was coming in a northwesterly direction over those hills? A. There was none there when we went in, no, sir.

Q. And when you went in did you notice the conditions down here, down to the point of this first curve? A. Yes, sir.

Q. Was there a fire down in that direction? A. No, sir.

Q. When you came out what were the conditions with respect to fire around there? A. I could not say southerly with respect to fire when we came out; I didn't notice.

Q. When you came out you didn't look down toward the first bend? A. No, sir.

Q. After you got out from there you went back to the station, did you? A. Yes.

Q. And took the people out? A. Yes, sir.

Q. And hooked onto the other cars, as Mr. Riendeau testified? A. Yes, sir.

Q. Do you know one of the buildings where dynamite was kept? A. I did, yes.

Q. Did you do anything in connection with the dynamite or anything connected with it? A. I removed the exploders from the building.

Q. When did you do that? A. Just prior to the time the fire train left Long Lake West on the first trip north.

Cross Examination by Mr. Wright:

Q. When you say you removed the exploders, you mean you removed the caps? A. Yes, the fulminate of mercury.

Q. What did you do with those? A. Put them in a water barrel just north of the station, a barrel of water.

Q. And that building you removed them from is the building that has been marked "5" on the map, and was over here south of Long Lake West? A. It was south of the road. I do not remember the marks.

Q. You remember identifying it at the last trial? A. I remember identifying it. I do not remember how it was marked.

Q. Can you see from where you are whether that (indicating) is the building? A. No; I cannot.

Q. Come down and look at it. A. That was the building.

Q. That is the building marked "5" which it has been agreed was the dynamite building. And you did that after the train had come out of the switch and gone up to the station and you went over there? A. Yes, sir.

Q. And that was just before the train left for Horseshoe the first time? A. Yes, sir.

Q. How long was it after the train came out of the Christy siding before you left for Horseshoe? A. I believe it was about 25 or 30 minutes.

Q. When you left for Horseshoe the first time the box cars on the west side of the track were on fire, were they not? A. I did not notice.

Q. You did not notice that? A. No, sir.

Q. Now, at the time you came out of the hotel —you came out of the back door, I believe? A. I came out of the front door. I looked out of the back door but I came out of the front part of the hotel.

Q. You looked out of the back door; that was when you first looked? A. Yes.

Q. When you looked out of the back door that door was facing south, wasn't it, down the track? A. Yes.

Q. And at that time you did not see any fire coming over the hill back of the hotel, did you? A. Not directly back of the hotel; it was on the left.

Q. The hill back of the hotel was the hill where the school house was, wasn't it? A. Yes, sir.

Q. And you did not see any fire in that direction, at that time? A. No, sir.

Q. And it was more around to your right where you saw this smoke, wasn't it? A. It was towards the big rock.

Q. Well, you know where the school house was? A. Yes.

Q. The school house was to your left from the big rock? A. Yes, sir. The fire was to the left, not quite as far as where the school house was located.

Q. And you could not see anything behind the big rock, could you? A. I could see the smoke.

Q. You could not see the ground behind because it drops off, doesn't it? A. I believe it does, yes.

Q. That big rock is a point of the ridge and you were on one side of the slope? A. Yes, sir.

Q. Now when you backed into the switch the fire was about how far away from you? A. Probably two or three thousand feet.

Q. And then you ran out a hose; how many lines of hose? A. One line.

Q. You laid that out at right angles to the switch? A. Yes, sir.

Q. The full length of it? A. Yes, sir.

Q. And the fire was coming right towards you, was it? A. Yes, sir.

Q. Did you come back on the second relief train? A. Yes, sir.

Q. When you came back was the station on fire—was the station burned? A. It was not burned, no, sir.

Q. Did you hear the dynamite explosion? A. I did.

Q. Where were you at that time? A. Section 18.

Q. That is how far from Long Lake West? A. About a mile.

Q. Was that on your first trip up? A. Yes, sir.

Q. That was after you had left the station with the people, going north the first time? A. Yes, sir.

Q. Was there a great deal of smoke at the time you started to go down with the train to go in on the switch? A. Yes, sir; a great volume of smoke coming from the southeast.

Q. And what—dark, black smoke? A. Yes, sir.

Q. Do you know where the ridge is that starts at the railroad just below the first bend and runs in a northerly direction? A. Yes, sir.

Q. And that was the ridge the fire came over, wasn't it, onto the lumber piles? A. Yes; the north end of the ridge.

Q. Yes; it come over the ridge into the lumber piles? A. Yes, sir.

Redirect Examination by Mr. Carey:

Q. Do you know whether the dynamite building set partially back onto the bank there? A. I believe it did, yes.

Q. Do you know whether any buildings were on fire before you went out or not? A. No, I don't.

Q. You do not know about that? A. No, sir.

Recross Examination by Mr. Wright:

Q. The dynamite building was not on fire when you were there was it? A. No, sir.

Q. And you had to pass the Monahan barn and two or three others, and they were not on fire? A. No, sir.

Q. When I said the Monahan barn I meant the Monahan Barn on the side of Long Lake road. That's all.

CHARLES D. O'CONNOR, sworn.

Q. You are also in the employ of the defendant company? A. Yes, sir.

Q. And have been for how long? A. About fifteen or sixteen years.

Q. Continuously? A. Yes, sir.

Q. On what division of the road have you been employed? A. Adirondack division.

Q. That is the division of the road on which Long Lake West is located? A. Yes, sir.

Q. What are you? A. Locomotive engineer.

Q. How long have you been a locomotive engineer? A. About eight years.

Q. Operating over that line all of the time? A. Yes, sir.

Q. In the month of September, 1908, what duties were you performing? A. Why, I was—on about the 17th, I think—the 17th, I went on to the fire service train.

Q. You went on the fire service train on the 17th? A. Yes.

Q. That was the fire service train of which Mr. Riendeau was conductor? A. Yes, sir.

Q. And Mr. Mench was one of the men on the train? A. Yes.

Q. You heard Mr. Riendeau's description of the train, what it was composed of? A. I did.

Q. Was that correct, according to your recollection? A. Correct, as I remember it.

Q. You operated the engine from the 17th on, on that train? A. From the 17th to the 27th—including the 27th.

Q. Do you remember on the Saturday before the fire you went over this line southerly from Long Lake West past the Christy property? A. Yes, sir.

Q. While you were on this train were you keeping a lookout for fires? A. Yes; that was our duty. We were a fire patrol—fire service train.

Q. And your position on the engine was on the engineer's side, and that is which side of the engine? A. On the right side.

Q. Who was your fireman? A. Frank Lowe.

Q. On the Saturday preceding the fire were there any fires on the right of way in front of the Christy property or nearby? A. None that I have any recollection of.

Q. Beginning with the Sunday morning of September 27th, you have heard the testimony of Mr. Riendeau and Mr. Mench as to your movements on that day, have you? A. Yes, sir.

Mr. Carey: I do not think it is necessary to go over that with this witness.

Q. Did they testify in accordance with your recollection of the movements of the train? A. They did.

Q. Coming down to the point where you came from Horseshoe after No. 11 passed, where did No. 11 pass you? A. No. 11 passed us at Horseshoe.

Q. And this is a single track road up there, is it not? A. Yes, sir; it is.

Q. And how long did it take you to run down

from Horseshoe to Long Lake West? A. It would take us about twelve minutes there running time and allow about three minutes for leaving and closing the switch—about fifteen minutes.

Q. You were on the siding when they came in? A. Yes.

Q. So it would be about fifteen minutes according to your judgment? A. Yes.

Q. Did you go in to dinner when the train reached Long Lake West? A. Yes.

Q. The same hotel? A. Yes.

Q. Were you in the dining room with Riendeau or with Mench? A. With Mench.

Q. What first called your attention to fire or smoke? A. My attention was called to fire by one of the dining room girls coming in the dining room and saying there was an awful fire coming over back of the hotel.

Q. What did you do? A. Got up and went into the kitchen, and there was a door at the side of the kitchen.

Q. Were you with Mench at that time? A. Yes; we went out together, I believe. We looked out over the hill and saw the fire, and went back—

Q. Did you see a fire at that time? A. Well, there was a lot of smoke. I call it fire—a great volume of smoke. We then went out and manned the fire train and went down the main track to the Christy siding, and the fire was coming in such direction that it would strike Mr. Christy's lumber yards. We backed the train in on to the Christy lumber track and ran out our hose, a thousand feet of it, I believe, and stayed there until—I presume we were in there probably thirty minutes.

Q. I can't hear you. A. I say I presume we were in there about thirty minutes. Somebody came down from the station; the fire was then

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blowing over us and all around us; somebody came down from the station and wanted us to get out as the village was going to burn.

Mr. Wright: Never mind what they told you.

Q. Well, you received warning? A. We received warning to get out of there. So we pulled the train on the main track, backed down the main to the north switch, went in on the north switch and got hold of some box cars, loaded the people and their effects what they could into those cars and then we took them to Horseshoe.

Q. Now, Mr. O'Connor, when you went down the line you went beyond the point of the Christy switch? A. Just the length of it.

Q. Did you have a view down the track as you were going down the line? A. I did, down to the first curve.

Q. Down to the first curve, was there any fire on the right of way when you went down? A. No, sir.

Q. Was the fire adjacent to the right of way on the easterly side of the track? A. The only fire was the one which was coming from over the hill.

Q. The one which you saw from the hotel? A. Yes.

Q. While you were in the siding did you remain on the engine or get off? A. I was on and off the engine.

Q. And when you pulled out of the station was there any fire down on the right of way in the vicinity of those cars? A. Not with the exception of the fire that was coming—the one that we were fighting that had spread down from each end.

Q. Exactly. Now what was the condition of the wind at that time? A. The wind was a very high wind.

Q. Which way was the wind blowing with reference to the railway track? A. It was blowing across the track.

Q. How about the sparks, if you noticed? A. Well, the air was full of sparks and pieces of burning branches. The wind was carrying them over.

Q. Over what? A. Over across the tracks, over the lumber piles.

Q. In what direction with reference to the Monahan buildings on the westerly side of the railroad track? A. Why, it would be towards the Monahan buildings.

Q. Now won't you come down here and point out the direction in which you looked from the hotel for the fire? Which map do you prefer; the one with the large scale or this one? A. This one. Here is the hotel; that is right; here is the hotel.

Q. Perhaps we would better have the larger map. Here is the hotel right up here. A. Do you wish me to describe the dining room and the hotel? We were dining in about the centre of the building. The door would be located right about there in the wing.

Q. In that extension? A. Yes, sir.

Mr. Wright: The south side of the wing?

A. Yes, sir; the south side of the wing.

Q. Will you indicate in what direction you looked to see the smoke? A. Why, coming to this door, you look across like that.

Q. Notice the school house here? A. Yes, sir.

Q. Which side of the school house did you look, to the left or the right of the school house, as you were facing toward the school house? A. Well, looking right at that angle you would be looking about up towards the school house, or perhaps—it would be about that direction you would look up (indicating).

Q. Pretty near toward the school house? A. Yes.

Q. That was the direction you looked? A. That was the direction I looked.

Q. Describe the volume of smoke which you saw. A. Why, it wasn't of such great breadth at that time; it was perhaps, I should think, three or four hundred feet in breadth but traveling very high.

Q. After you got down on the Christy siding will you indicate what direction you looked and saw smoke, if you saw it? Here is the Christy siding up here, and here is the station. A. This is the Christy siding here?

Q. Yes. A. Well, there was smoke and fire coming across like that, and towards these hills.

Mr. Wright: He indicates at right angles to the main track.

Q. About right angles to the main track, and over the point of that southerly hill? A. Yes, sir.

Q. And when you got in there had the fire come down to the swamp? A. The fire had not got down to the swamp yet; it was about at the top of the first rise from this low point here.

Q. About where was it when you pulled out, according to your recollection? A. It had got down nearly to the low ground when we pulled out of there.

Q. What direction was the hose run out? A. The hose was run crossways from the track, at right angles to the track, towards the hills.

Q. And how with reference to the fire or smoke that was coming over? A. Right directly towards the fire.

Mr. Wright: Towards the fire?

A. Yes.

Q. Did you see them throwing water? A. I did not get out to the end of the hose. I wasn't out to the end of the hose; I was there when they started to pump.

Q. When you pulled out with the fire train was there any fire on this point of the hill here near the first curve? A. Not that I saw. As I say, the fire was spreading both ways and there was more in both directions, north and south, than when we got in there, but it had not got up to the tracks yet.

Q. At any time did you see any fire coming up the right of way? A. No, sir.

Q. Was there any fire coming up the right of way at any time? A. The only fire was the one that was coming from over the hill.

Q. Now will you take the stand again? You said the fire was coming over a point of the southerly hill; which point of the southerly hill? A. At what time?

Q. When you backed in onto the siding. A. It was coming over the hill; it would be about—

Q. Which point of this southerly hill was it coming over? Here is the southerly point, and here is the northerly point. Here is the switch in here. A. It would be coming centrally as to where we were located.

Q. Centrally as to where you were located. You were on the engine when it went down into the siding, and you remember being at Long Lake West when some of these photographs were taken? A. I do.

Q. And do you remember a photograph taken about 200 feet southerly from the Christy switch? A. I do.

Q. Do you recall how far with reference to the position of your engine? A. That would be about opposite the position of the engine—the same po-

sition that the engine would occupy on the main track.

Q. At what time? A. At the time that we pulled down to back in or to leave the switch.

Q. I show you exhibit D-9, and it is picture No. 18. What curve is this that you see in the photograph? A. That is the first curve south of Long Lake West.

Q. And is this the view which you had? A. That is the view you would have facing south.

Q. Do you remember a picture which was taken from the engine cab? A. I do.

Q. That is picture No. 30, and it is D-11. Do you recall whether this was the same engine that you were on on the fire train? A. No; it was not the engine. An engine of the same type, but a different number.

Q. And where was the camera located when this picture No. 30 was taken? A. The camera was located in the cab in the same position that I would occupy.

Q. And does that show your view down the track at that time? A. Yes.

Q. When you were going down the track, and before you got down to this point, how would your view be off toward your left, greater or less than this, after you got down to this point? A. Well, if you take in the length after you had passed around the engine and two cars, or sixty feet, then you had a view to both sides.

Mr. Wright: You mean the cab and the engine would cut off the view to the left?

A. Cut off the view to the left.

Q. Picture No. 30 shows a protograph taken from the engine cab. (Shows it to the jury).

Mr. Wright: And the curve in the photograph is the first curve south of Long Lake West station.

Charles D. O'Connor, for Defendant—Cross
Frank S. Lowe, for Defendant—Direct

Cross Examination by Mr. Wright:

Q. This fire was coming right directly toward the lumber pile, wasn't it, when you went in on the switch? A. Yes.

Q. And from the same direction that you laid out the hose? A. Yes, sir.

Q. That hill that is just about southerly of the lumber piles? A. Southeasterly.

Q. Well, southeasterly. The same hill that you pointed out on this map? A. Yes, sir.

Q. When you came out of that switch the fire was pretty close to you, wasn't it? A. The fire was very close then.

Q. There were a lot of sparks and smoke and cinders all around you? A. Blowing over us; the wind was blowing very strong, yes, sir.

Q. And you say it was blowing branches and cinders of all kinds? A. I don't mean to say large branches, but you get small pieces of fire that will blow from tree to tree and carry along with a high wind.

Redirect Examination by Mr. Carey:

Q. Before you came out from the siding had you begun to feel the heat of the fire? A. Yes; the heat was intense then. The wind was blowing it towards us of course.

Frank S. Lowe, sworn.

Direct Examination by Mr. Allen:

Q. What is your occupation at the present time? A. I am locomotive fireman, working for the Ontario and Western.

Q. In September, 1908, were you in the employ

of the defendant company? A. I was, sir, for the New York Central.

Q. Do you recall the 27th of September, 1908? A. Yes, sir.

Q. Are you familiar in a general way with Long Lake West as it was then, and its surroundings? A. Not exactly, no, sir.

Q. Well, immediately around the station and the Christy switch? A. Yes, right around the station.

Q. Were you on the train, the fire service train, that day? A. Yes, sir.

Q. And have you heard the description that has been given by the preceding witnesses of that train? A. Yes, sir.

Q. Does that coincide with your recollection of that train that day? A. Yes, sir.

Q. And with the course taken that morning back and forth between Nehasane and Horseshoe; is that correct? A. Yes, sir.

Q. Coming down to when you arrived back from Horseshoe the last time just before dinner time, will you tell us what happened and what you saw with reference to any fire? A. Well, as we entered Long Lake West station the engineer shut off the engine. I didn't have much water and a great deal of steam; so then I started to get up steam and I put in more water in the boiler. When we stopped the engineer left the engine and went to dinner. I stayed by the engine, trying to get water in the boiler so I could go and get my own dinner. I was for about twenty minutes trying to get water in the boiler; and I heard a roar above the noise of the blower. I rushed out to the left hand side of the engine and looked over—

Q. Which way was your engine facing? A. Towards Utica. I looked over—I can't say ex-

actly the direction of the building; I thought it was the post office—right over the building, and I saw a big fire; the nearest I could explain it would be like a big, high surf rolling, throwing sparks ahead of it.

Q. What was it you saw, fire or smoke? A. Fire and smoke both.

Q. Where was your engine at that time? A. On the main track.

Q. Where with reference to the station, northerly or southerly? A. North of the station, almost directly opposite the hotel; and I shut off the injector, and ran to the hotel to warn the boys; but it seems as though they had been warned ahead of me; so I went back to the engine and I knew I would have to move, so I went back to the engine and got what water I could and steam and we moved back onto the Christy siding.

Q. As you went down could you see the track ahead of you? A. Yes; you could see the first curve.

Q. And whether or not there was any fire on or near the right of way at that time? A. There was not a bit of flame or anything on the right of way.

Q. As you went down did you see this smoke and flame you had seen from the station? A. Yes; I was watching ahead in the direction in which the engine was going, and I could see it.

Q. Just describe where you saw that smoke on your way down. A. The smoke seemed to come directly over the train from the left hand side of the fore part of the engine.

Q. And where with reference to any hill or ridge, if any? A. It is—well, it is the lowest ridge, the ridge nearest the village, that the fire was when I first seen it, when I seen it just before dinner; at dinner time.

Q. Was it on the ridge that you could see the

flame or smoke first? A. It was flame when I first saw it, I believe; there was flame and sparks going with the smoke.

Q. Just tell what you did with reference to going in on the switch and what you saw. A. We pulled down by the switch; I didn't know which side I was going in; then we stopped and run back to the switch and then I told the engineer "All right,' and we backed in the switch, what we call Christy siding.

Q. And what was done? A. When we got in there we stopped and the boys put out the hose, out through the door of the car, out into the swamp, and I had to supply the steam for the pump; so they started the pump, started the water, and started fighting the fire, and the fire came down by the ridge right down into the swamp.

Q. You mean the swamp surrounding the Christy siding? A. I mean the swamp where they had the hose in.

Q. Where was this fire coming with reference to the direction of the track? A. As I turned around to the back of the engine it came, not directly to the side, more the back than the side.

Q. You mean from your back a little? A. Well, I was turned; I turned the back direction of the engine—backed in; the fire was coming directly like that (indicating), not to the side, a little off of the side, back of the side, down the high ridge.

Q. How was this hose strung out with reference to the track? A. From the side of the car it seemed to go right almost straight out.

Q. Through this swamp? A. Yes.

Q. And towards this ridge? A. The direction of the fire seemed to be more towards another little ridge in there. They were out fighting there. The fire seemed to be coming this way and up towards the village, more up that way.

Q. Will you tell us what you observed from then on with reference to the spread of the fire, if anything? A. While they were fighting I could see everything. They kind of checked this southerly end of the fire toward Nehasane. They kind of checked that; and the fire seemed to swing in between there and the village and worked in there and set the rear end of the lumber pile afire.

Q. When you say the rear end which end do you mean? A. The furthest end I could see on the left hand side.

Q. That is toward the village or away from it? A. Towards the village.

Q. Then what further did you see with reference to the fire and the hose, and so forth? A. As that fire started it seemed pretty warm, and the engineer had been off there for five or six minutes, and he ran back and said "We will have to pull out;" so they started to pull out, and we left the hose there; so as we pulled out I stood facing with the engine. We pulled out on the main track, and when he cleared the siding I motioned to back and we backed up to the station again.

Q. All this time where were you, in the engine cab or out of it? A. On the left of the engine.

Q. When you came out from the switch you were faced which way? A. Towards Nehasane—towards Utica.

Q. Did you at that time look down the track toward the first curve? A. Yes, sir.

Q. Did you see any fire on the right of way? A. Not a bit of fire on the right of way, not to the first curve.

Q. What have you to say with reference to the wind during all this time? A. All the sparks seemed to come against the side of the train and over the train.

Q. And did you see sparks blowing? A. Yes; I even got a spark down my neck.

Cross Examination by Mr. Wright:

Q. When you came down with the train you stopped right by the station, you say? A. You mean from Nehasane? No; we stopped a little to the north of the station.

Q. Your engine was a little to the north of the station? A. Yes.

Q. That would be just about where the hotel was? A. Almost directly in front of the hotel.

Q. Just come down here, will you please? This is the station; this is where the old hotel was. Now tell us where you stopped. A. We stopped just about there.

Q. Your engine was just a little bit south of the yard? A. Yes, sir.

Mr. Wright: I will make a little cross there at the south end of the yard.

Q. You were getting up steam, you say? A. Yes; putting water on.

Q. Now when you looked over you looked right out at right angles to the track? A. No, sir; I looked this side of the hotel, right over the post office; I looked a little to the left of the highway.

Q. A little to the left of the highway? A. Yes, sir.

Q. The post office was there then at the same place it is now, wasn't it? A. I looked directly over at the post office building.

Q. I say the post office was then the same place it is now? A. I don't know if it is or not. I have not been there in the last six years.

Q. Aren't you working on this line any more? A. No, sir; I have not been working there for six years.

Q. You are still working for this company? A. No, sir; I am with the Ontario & Western.

Q. You looked right over the top of the post

office, is that right? A. Almost; the fire was over the post office—it was to the left of the highway.

Q. The fire was to the left of the highway? A. Yes, sir.

Q. Do you know where the school house is? This is the school house. It was further north than the school house—like this? A. I could not see through the hotel.

Q. But you were looking across this way? A. Just about like that.

Q. You think it would be a little to the north of the school house? A. It might be almost in the direction of the school house, but the post office—you could see over the post office to this ridge.

Q. You are sure you looked to the north of the post office? A. No, I wouldn't say I looked—I looked over the post office and I could see over the post office.

Q. You did not look this side of the post office, that is to the west of the post office? A. No, sir, I didn't.

Q. And you didn't look down the track? A. Not at that time; not till we moved. When we moved the engine I looked ahead of the engine.

Q. And the fire after you got in to the siding down here came over from the direction of the road? A. I don't know anything about the road.

Q. It came from over here in the direction of this road shown on the map down toward the siding? A. Yes—well, I couldn't see; I was facing this way; see? And the fire was almost in that direction from me.

Q. You have indicated on there a direction generally toward the Long Lake West Road? A. Yes, sir.

Q. And a little bit east of the school house? A. I don't know about the school house. I ain't much on directions, but I could say as to how it was.

Q. It wasn't coming at right angles to the road? A. No; it wasn't coming at right angles.

Q. It was just coming over the ridge then, was it? A. No; it had been down the ridge. It was burning down in the swamp.

Q. I see. You could see the fire coming over that hill right there? A. Yes, sir.

Q. That was not very far from you? A. Not when we were in the swamp; it was close to us.

Q. When you first saw it, when you were on your engine? A. When I first saw it it wasn't such an awful distance.

Q. It was such a distance you could see the flames rolling toward you? A. See the flames and sparks.

Q. When it got to the ridge it continued rolling right down into the swamp? A. It seemed to roll into the swamp and then pick up again.

Q. It was burning very fiercely, was it not, when it got into the swamp? The swamp was full of cattails and weeds, was it not? A. I didn't notice it very much; I didn't notice what was in the swamp. I just know it was burning. I know there were trees.

Q. I want to show you a picture that has been marked in evidence, D-12. Can you see the Christy siding on that picture? A. This is it here.

Q. And you see where the station is? A. Yes, sir.

Q. And the track; and you see—here, where the school house is? A. Yes, sir.

Q. Do you see this swamp around in here, and the siding? A. Yes, sir.

Q. Which way was the fire coming in? A. It seemed to be coming down here. When I first saw it it was on this ridge; then it came and burned down here, where the hot fire was.

Mr. Carey: Will the witness mark where the fire was when he first saw it.

A. When I first saw it it was up on that hill there; it was rolling.

Q. Behind the school house? A. Yes, sir; right along there. I could see it from this direction.

Mr. Carey: Just run a line wherever you saw the fire.

A. That picture is kind of confusing to me, but the fire seemed to be coming down from this ridge in here and there, off in here somewhere.

Mr. Carey: Wherever that was, let the witness mark.

Mr. Wright: He says it is confusing; he can do as he pleases about marking it.

A. That is where I see the—you see the hotel—the fire was right there when I first saw it.

Q. We will mark a circle where you first saw it. We will mark a circle with a "I" inside of it. Now you say when you got down on the Christy spur it came right down in from the north? A. It would not be north.

Q. It is as a matter of fact, isn't it, from that point? A. It came right down in through that hollow there, right there.

Q. And when they had their hose out they had it out here at right angles to the siding? A. No, more straighter, like that.

Q. You said before they had it right out of the door. A. Straight out of the door, like that.

Q. And of course the car stood straight on the siding, didn't it? A. Yes.

Redirect Examination by Mr. Allen:

Q. Will you mark the line of the fire as you saw it after you had gotten down onto the siding and after the hose had been strung out—the line of the fire? A. You see, there was quite a line of flame

and the flame was this way, and they were fighting this end, and they kind of deadened that end.

Q. You mean the end toward Nehasane? A. Yes; they kind of deadened that; and the fire seemed to swing away and to sweep in this way, in toward the village; and I was on that side of the engine (indicating) and the furthest part I could see on that lumber pile was burning before we left there. I saw it burning myself before we left there.

Mr. Wright: The most northerly pile you saw burning?

A. Yes; it was burning before we pulled out of the siding.

Q. Will you mark wherever you wish the line of the fire as it appeared to you after it had gotten down to the station? A. It was all smoke; I could not tell the direction the fire came, but it seemed to get in somehow. You see it was kind of long and they deadened this end and it swept in this side.

Mr. Wright: When you say they deadened this end you mean the southerly end?

A. The end toward Nehasane, yes.

Q. And when you say it swept around you mean north? A. Around the end of this switch toward the village.

WILLIAM E. KUNEY, sworn.

Direct Examination by Mr. Allen:

Q. Where do you live? A. Lockport, New York.

Q. What is your occupation? A. Locomotive engineer.

Q. In September, 1908, what was your occupation and for whom did you work? A. Locomotive engineer, Adirondack division, New York Central.

Q. Were you the engineer on No. 11, northbound, that day? A. I was.

Q. What time did you reach Long Lake West? A. About 12:40 I should think.

Q. You were a little late that day? A. A little late, yes.

Q. Will you tell us what you saw with reference to indications of the fire at or near the Webb-Christy corner on your way north? A. Well, I was approaching the long straight, south of Long Lake West; running a little off to the right of my cab—

Q. Where do you mean by the "long straight"? A. Near the Christy line. The Christy line is located on this long straight, the first long straight south of Long Lake West. I noticed big volumes of smoke rolling toward Long Lake West a little to the right of my cab.

Q. You were on which side of your cab? A. The right hand side.

Q. That would bring you to the southeasterly side? A. Yes.

Q. How near did that appear to be; was it near or a considerable distance away? A. It looked to me as if it might be within half a mile or a mile of Long Lake West from where I was at that time.

Q. What did you observe as you went toward Long Lake West about this fire? A. Approaching Long Lake West and striking that switch near the Christy switch I glanced over to the right side and still saw this smoke.

Q. In which direction was it from the railroad track as it appeared there? A. Off to the right, a little to the right from the cab.

Q. And with reference to whether or not it was nearer the railroad than it was when you first

saw it? A. Well, I think it was perhaps within about half a mile at that time, the way it appeared to me.

Q. Then what did you observe from then on? A. I simply made the station stop.

Q. Where did your engine stop? A. Just this side of the coal crane.

Q. Where was that located with reference to the hotel, if you know? A. Just a little trifle—well, about west—about west from the hotel.

Q. Well, toward Horseshoe or the other way? A. Yes, toward Horseshoe, but in a westerly direction.

Q. And is it a little toward Horseshoe from the hotel, if you remember where it was? A. Yes, sir.

Q. What did you observe there with reference to this smoke? A. I looked around to get a signal from my conductor and I still saw this smoke in between the hotel and the back of the depot.

Q. How near to the tracks of the right of way, if you know? A. What—the smoke?

Q. Well, the signs of this smoke rolling up that you saw. A. I should judge about a mile at that time.

Q. On your way up from the Christy corner up to Long Lake West did you observe whether or not there were any fires burning on the right of way? A. No fires whatever on the right of way.

Q. There were not on either side? A. Not either side.

Q. Any right near the right of way on either side? A. I don't think there was.

Cross Examination by Mr. Wright:

Q. Did I understand you to say that you saw the fire coming from northerly over the hill? A. No, sir.

Q. What did you say? A. From the right of my cab, approaching Long Lake; I don't know what the direction is.

Q. When you were near the Christy switch you looked out to the right? A. Yes, sir.

Q. Did you look behind you? A. No, sir.

Q. Did you look right straight out? A. A little off to the right.

Q. What do you mean by off to the right? A. Off to the right.

Q. Well, you were on the right hand side of the cab, weren't you? A. Yes, sir.

Q. And did you look out of the front window of the cab? A. No, sir; side window.

Q. The side window? A. Yes, sir.

Q. So you looked at right angles to the window, is that right? A. Yes, sir.

Q. Right out sideways? A. Right a little to a right angle.

Q. Right a little to the right of a right angle? A. Yes.

Q. That is a little behind you then? A. No; I couldn't look behind me and make my station stop.

Q. I asked you how you looked when you observed this fire. A. Off to the right.

Q. Off to the right could mean anything. A. In a southeasterly direction I should say.

Q. In a southeasterly direction? A. Yes.

Q. How does the track run there at the Christy switch? A. North and south.

Q. North and south; and so when you say you looked in a southeasterly direction you are basing it on the same idea of the points of the compass, namely, that the track ran north and south? A. Yes.

Q. So that, that being so, if you had looked at right angles you would have been looking east,

wouldn't you? A. That was southeast, I should think.

Q. I am asking you another question.

Mr. Allen: He didn't say he looked at right angles.

Q. If you had looked at right angles— A. Directly out of the side of the cab.

Q. If you had been looking at right angles you would have been looking directly east? A. I think so.

Q. But you were looking south? A. Yes.

Q. And that is where the fire was coming from, from the southeast? A. Yes.

CHARLES E. FANCHER, sworn.

Direct Examination by Mr. Allen:

Q. Where do you reside? A. Long Lake West.

Q. And did you in 1908, in September? A. Yes, sir.

Q. What was your occupation, and what is it still? A. Guiding.

Q. Were you there on the 27th of September, 1908? A. Yes, sir.

Q. And did you arrive there along toward noon, or 11 o'clock that morning? A. About between 11 and 12.

Q. Will you tell us from that time on what you observed with reference to any fires near Long Lake West? A. About 12 o'clock I went in and had my dinner, and after dinner we came out on the veranda and sat down and smoked, and was walking over toward the station from the hotel, and some one called my attention to smoke arising off in toward East Charley Pond. He asked me what direction it was in, and I told him; I told

him it was off toward East Charley Pond as near as I could tell from where we were.

Q. Where was this that you observed from? A. Between the hotel and the station.

Q. That is the Monahan hotel you are speaking of? A. The Low hotel.

Q. It is the hotel near the station? A. Yes.

Mr. Wright: The building No. 6.

Mr. Allen: Yes.

Q. How far away did that fire appear to be at that time? A. At that time I should think it was about two miles.

Q. What was it that you saw, fire or smoke? A. Smoke.

Q. Describe the volume of it. A. Why, quite a high volume of smoke.

Q. Do you remember the wind that day? A. Yes, sir.

Q. What was the wind at this time? A. Southeast.

Q. And how much of a wind? A. A high wind.

Q. What had the wind been previous to this time during the day? A. Why, in the early part of the morning there was no wind to speak of—practically in the west.

Q. And when did the change in the wind come? A. I should think about nine o'clock.

Q. Well, from that time on what did you observe with reference to the fire? A. I stayed around over by the station there a while and watched it.

Q. Did you see the fire service train? A. Yes, sir.

Q. Did you see them go down to the switch? A. I did.

Q. And the men go down with it? A. The men that was on the train.

Q. Did you go down to the Christy switch? A. Yes.

Q. When? A. Right after the fire service train went down.

Q. Did you go over where the men were fighting the fire? A. Yes, sir.

Q. Did you do anything yourself with reference to the hose? A. Yes.

Q. Did you see them string out the hose? A. I saw them string out the hose.

Q. When you got down to the Christy siding what did you see then with reference to this fire? A. I seen the fire to the left of the main track there, coming toward the lumber pile.

Q. How far away from the right of way was it at that time? A. From the main track you mean?

Q. Yes; from the main track. A. I think two thousand feet.

Q. Could you see smoke, or smoke and flame? A. I could not see much flame; I could see smoke and sparks.

Q. That was when you first got down there? A. Yes.

Q. What was the progress of that fire from that time on while you were there? A. It burned down that ridge right back of the lumber piles and they had hose strung out through the swamp almost at right angles I should think to this Christy siding; whether they had water on or not I did not know, because I didn't go any further than to the car.

Q. You did not go out where the men were who were handling the hose, at the end of it? A. No, sir.

Q. Did you remain there as long as the men did, or did you go away? A. No, sir; I came up just before the train left.

Q. When you went down just after the fire service train went down did you observe the right of way down toward the curve? A. I did, as far as the first curve, yes.

Q. Was there any fire on the right of way at that time? A. None that I could see.

Q. On either side? A. On neither side.

Q. Was there any fire over on the northwesterly side of the track at all at that time? A. No, sir.

Q. Did you go back after you left the switch northerly to the station? A. Yes, sir.

Q. Now tell us what you saw after that with reference to this fire. A. Coming back toward the station?

Q. Yes. A. I didn't turn around and look back.

Q. But I mean after that what did you see; what happened to the fire after that time? A. Why, it burned down to the lumber piles there and the train came back to the station, and I went down there and helped some ladies get their trunks onto the fire service train and we went to Horseshoe.

Q. And you saw the fire service train come back, did you? A. Yes, sir.

Q. Did you see the lumber piles burning? A. No. sir.

Q. Did you see any sparks? A. Yes, sir.

Q. Which way were they going? A. Towards the northwest.

Q. That was how with reference to the tracks? A. Well, almost—it wasn't straight across—it was a little corner to it (illustrating).

Q. Will you come down to the map, please? Now is this the hotel that you refer to where you got your dinner? A. Yes, sir.

Q. And that is the switch? A. This is the siding—the switch.

Q. The Christy siding, I should say. Now will you indicate the direction from which the fire was coming when you were down at the switch? A. I should say in about here.

Q. You are familiar with the ridges and mountains on this tract, are you? A. Yes, sir.

Q. And you know where East Charley Pond is? (Witness indicates).

Q. Will you just draw a line in the direction of the centre of that fire as you saw it approaching the switch? A. The centre would be about here.

Q. Then if I draw this line is that about it? Is that as you want it? A. That's near it.

Mr. Wright: Line drawn marked "Fancher".

Q. Now as you saw the men when they were fighting the fire with the hose, what would you say with reference to the spread of the fire in any direction? A. Why, when they were out here with the hose it seemed they must have had it wet or something; it was in a half circle out there, burning this way and that way.

Q. That is, spreading on each side of the men as they were fighting with the hose? A. Yes.

Mr. Wright: Indicating the southwest and northwest.

Mr. Allen: Yes.

Q. Did you see any of the buildings burning? A. Why, the Jennings barn was the only building I saw on fire.

Q. Did you happen to observe the school house at any time? A. The school house, you couldn't only just see the roof of it from the track.

Q. You know where the section house was? A. Yes.

Q. And how was the section house with reference to the track, as to height? A. Quite an elevation; I should think 20 or 25 feet.

Q. And whether or not you could see the school house any better from the section house than you could from the level of the track? A. Yes, sir.

Q. And you have been up there and know what

you can see from that point, do you? You are familiar with it? A. Yes, sir.

Q. Now you are familiar with the land on both sides of the right of way between Long Lake West station and the first curve toward Nehasane? A. Yes, sir.

Q. What if anything was there in the line of timber between Long Lake West and that curve at the time of this fire? A. Why, a small swamp —timber—small spruce—

Q. Where? A. Practically from Long Lake West down to the curve, on the Christy side, and a little strip on the Monahan side.

Q. That was soft or hard wood? A. Soft wood.

Q. How far did that extend with reference to the curve? A. It extended pretty well to the curve. On the Monahan side a little beyond the curve; on the Christy side about over to the curve.

Q. Now whether or not at a point up near the Monahan barns a person could look down this curve and see beyond the first bend, that is could see the track—I mean the rails. A. I hardly think so, not before the fire.

Q. Are you familiar with the country immediately south of Long Lake West road, and between Bear Pond and the village of Long Lake West as it was at that time? A. Yes.

Q. Whether or not that had been lumbered? A. Yes, sir; it had—except the land around the pond, a short line.

Q. And in the manner of lumbering at that time what was left there after the lumbering? A. Hardwood; no soft wood.

Q. I mean as to what was left from the lumbering operation. Well, we always called the lumbering job the fire slash after it was lumbered.

Q. What would you say with reference to the territory lying beyond the county line and to the

north and northwest, as to whether it was burnt over during September 27th and the day following? A. It was.

Q. How far north, if you know-northwesterly?

Mr. Wright: I think that is immaterial, how far.

Mr. Allen: Simply showing the progress of the fire.

A. Northwest—I should say at least three miles in that direction.

Q. Are you familiar with the location of what was called the Brooklyn Cooperage camps? A. Yes.

Q. And whether or not that had been cleared at the time of these fires? A. It had been cleared.

Q. And what would you say with reference to the same as to the country around the Monahan buildings and between there and the Brooklyn Cooperage camps? A. That is a pasture between those two, and some of it was cleared and some of it wasn't.

Q. Had they been clearing any that year around those buildings? A. I think around Monahan's buildings, but not the cooperage.

Q. Had that all been cleared before that time? A. Yes.

Cross Examination by Mr. Wright:

Q. You are familiar with this ridge that runs from just below the first curve south of Long Lake West up in the northeasterly direction? A. Yes.

Q. And that was the ridge that was south of this swamp? A. A little to the south, yes.

Q. Was that ridge burned over on the 27th of September? A. Yes, sir.

Q. Burned over all the way to the railroad, wasn't it? A. Yes; it was burned to the railroad.

Q. And Monahan's buildings up here were burned, up west of the railroad? A. Yes.

Q. And the town of Long Lake West was burned? A. Yes.

Q. From where you were standing, down near this Christy siding, you cannot see as far as East Charley Pond, can you? A. You can't see the pond, no.

Q. There are two or three ridges between you and the pond, are there not? A. Yes.

Q. When you are standing down here the first thing that is in your way is this first ridge running northeast and southwest? A. No, sir. Beyond the switch you can see there is a valley that runs right up through here; this ridge does not connect.

Q. You say there is a valley between the two ridges? A. Yes.

Q. That is, it is not actually swamp, but it is low land comparatively? A. It is a valley there; it is a swamp.

Q. This map shows that it is 10 to 15 feet higher than the swamp. Is that the part that you mean? A. I think so.

Q. Then it is quite a distance over to the next ridge, isn't it? A. Quite a distance.

Q. And the next ridge is quite a high ridge, quite high mountans, aren't they? A. They are not mountains; they are hills.

Q. They call almost everything up there hills; but it is quite high, isn't it? A. Very high.

Q. And then there is again a third ridge before you get to East Charley Pond, isn't there? A. Yes, sir.

Q. So when you said that the fire was coming from toward East Charley Pond you were just speaking generally? A. You can follow the course to the pond if you know the country.

Q. The line you have drawn is not anywhere near East Charley Pond, is it? A. I said from that country; I didn't say exactly at East Charley.

Q. You said "from the direction;" this is not the direction of East Charley, is it? The line you have drawn here lands you out two miles from East Charley. A. The line there?

Q. The line you drew in there (indicating). A. There it is, southeast.

Mr. Allen: Perhaps I drew the line a little crooked.

Mr. Wright: He drew it and said it was all right.

A. I didn't draw it.

Q. You said it was all right, to Mr. Allen. A. I said the fire came out this way.

Q. You said that was the direction of the fire. A. It came both ways here.

Q. As a matter of fact you don't know where it came except you saw it coming through there; that was the first you saw it, wasn't it? A. I saw it in the vicinity of Charley Pond when I came out of the hotel.

Q. You saw it in the vicinity of Charley Pond? A. That is the direction of Charley Pond.

Q. But you saw it off in here, didn't you? A. That is where it come later.

Q. You saw it on the first ridge, didn't you? A. Why, over that point.

Q. Are you working for the railroad now? A. No, sir.

Q. You have been, haven't you, since the fire? A. I have worked since the fire.

Q. Up until when? A. Three years ago.

Q. That is the last you worked for them? A. Yes, sir.

Q. You did not testify at the last trial of this case at Hackensack? A. No, sir.

Q. From the point where you first saw this fire you would get a different angle, would you not, from— A. Yes, sir; quite a bit.

Q. And whether or not from where you first saw it it would appear to be in the direction of East Charley Pond? A. Yes, sir.

By Mr. Wright:

Q. In what direction does the railroad track run in front of Long Lake West station? A. Almost north and south.

JOHN A. OLIVER, sworn.

Direct Examination by Mr. Allen:

Q. You reside at Long Lake West? A. Yes.

Q. What is your business? A. Telegraph operator.

Q. What was it in September, 1908? A. Telegraph operator.

Q. Were you at Long Lake West a portion of the day September 27th, 1908? A. Yes, sir.

Q. Will you tell us just what you did and what you saw with reference to any fire that day? A. I lived down below there about two miles and three-quarters.

Q. You mean below in which direction? A. I mean north of Long Lake West, down the track, toward Tupper Lake. I went to work at one o'clock. I started from there and walked toward the station in time to get there at one o'clock, and as I was going up the right of way I didn't observe any fires—

Mr. Wright: Speak a little louder. I can't hear you.

A. I noticed a cloud of smoke over back of the school house, looking—as I was coming from the main line looking over to the school house.

Q. And the main line is located where with reference to Long Lake West station? A. It is north of Long Lake West station, just below the curve.

Q. As you approached there, what did you observe? A. As I got to the station the people were getting ready to get out of there, and the fire at that time was over back of that ridge back of the school house.

Q. Which ridge do you mean, the first or second ridge? A. The second ridge. There was no fire on the first ridge at all, that is near the school house. The ridge where the school house was located, there was no fire there that I could see; and this smoke seemed to be about a mile back of the station.

Q. Could you see flame at that time? A. I could not at that time, no, sir.

Q. Just describe this smoke. A. Well, there was a lot of smoke.

Q. As you came down to the station could you see southerly on the right of way? A. Yes, sir.

Q. How far down? A. Well, I could see down as far as the Norwood storehouse.

Q. Was there any fire on the right of way at that time? A. Well, I could not say; I don't know as I—I did not notice any, but I could not say that I looked down there.

Q. What further did you observe as to this fire you had seen approaching? A. Well, I went up to the station at that time and relieved Mr. Clark and went to work and got the orders for Mr. Riendeau to get out of there, and the train went out about that time, went north with the people who were ready to go at that time.

Q. You mean the fire service train, the first re-

lief train? A. Yes. And I went up with another man to look for Mr. Monahan, whom they thought was in the barn.

Q. Where did you go, what building? A. That was the building on the right hand side of the track, Mr. Monahan's side.

Q. That is the northwesterly side? A. Yes, sir.

Q. Up to the Monahon buildings there? A. Yes, sir.

Q. Well, what did you see from there? A. Well, the land back of the ridge, back of Mr. Cristy's lumber yard, and over the ridge where the school house stands, was on fire at that time.

Q. How about the lumber yard? A. The lumber yard was on fire.

Q. And how about sparks? A. Sparks were flying almost directly across the track, almost straight across the track.

Q. What would you say with reference to wind? A. There was a high wind at that time—high enough so that it blew portions of boards afire from Mr. Christy's lumber yard over the buildings on the opposite side of the track.

Q. Now what was the extent of this fire; did the fire burn to the northwest during this afternoon, if you know? A. To the northwest of the station?

Q. Did you afterwards observe what effect the fire had across to the northwest, onto Mr. Low's property. A. Yes; there was a fire down as far as the station across the track before I left there that afternoon.

Q. And after that did you observe anything with reference to it? A. No, sir.

Q. Whether or not the schoolhouse is built on substantially the same place that it formerly was? A. I should say so, yes, sir.

Q. You say you saw that fire back of the school house. Indicate the direction you mean on this map. (Witness indicates).

Mr. Wright: First, where was he when he saw it?

Q. Tell us where you were. A. County line.

Mr. Carey: The jury cannot hear you.

A. I was right here, just below this curve, about at the county line as it is—near the county line.

Q. Now indicate what you mean by the back of the school house that you saw the fire. A. The school house was up here and I was looking in a southerly direction.

Mr. Wright: This is the school house here.

A. This building here.

Mr. Wright: Looking in a southerly direction?

A. Yes; from the county line.

Q. Will you just mark that, just whatever you want? Get that in the direction that you want it, Mr. Oliver.

(Witness marks it.)

Mr. Allen: I will mark that "Oliver."

Q. Now whether or not that fire was north or south of Long Lake West road. A. I should imagine it was north.

Q. Now what you imagine. Tell whether or not it was on the northerly or southerly side of Long Lake Road, that is the fire which you saw.

Mr. Wright: He didn't say he saw any fire; he said he saw smoke.

A. I saw fire on the southerly side of the road; I saw that later.

Mr. Wright: Later?

A. Yes, sir; on the southerly side of the road. I did not see any fire on the north side of the road; I saw smoke there.

Q. And when you were over at Monahan's buildings where was the fire with reference to the railroad track? A. On this side. The fire was in here, and down to about, I should say, about 700 feet this side of the Long Lake West station.

Q. That is 700 feet toward the Christy switch from Long Lake West station? A. Yes, sir.

Q. And pointing to a point in the swamp about the Christy switch? A. Yes, sir.

Q. Directly opposite the Monahan buildings had the fire gotten beyond the ridge into the swamp? A. It was into the swamp when I was up here.

Q. And how close at any point to the railroad tracks was it at that time? A. It was right down to the right of way, this little building, just this side of the little building that stood there, a watch house or something on the right of way.

Q. Which direction was that fire traveling at that time? A. Straight across the track.

Q. And this was after the first relief train had left the station? A. Yes, about that time.

Q. I think you used the term, "back of the siding." Now what do you mean by back of the siding, which direction with reference to the railroad track? A. On this side.

Mr. Wright: He indicates the southeasterly side.

Mr. Allen: Almost directly east, I would say.

Q. That is what you mean when you say back of the siding? A. Yes, sir.

Cross Examination by Mr. Wright:

Q. How far up the track had you been? A. A mile and three quarters.

Q. And had walked down the track down toward Long Lake West station? A. Yes, sir.

Q. And where had you first noticed fire? A. I noticed fire at 18 siding—I noticed smoke; I did not notice fire; I noticed smoke.

Q. When you were at 18 siding you noticed smoke south of the railroad? A. I noticed it—I could not say as to the direction from 18.

Q. Well, it was to your left hand as you were walking down toward Long Lake West? A. No, at that point it was—well, I could not say.

Q. The 18 siding is about a mile north of Long Lake West, isn't it? A. Yes, sir.

Q. Now, can you say which direction you were looking when you saw smoke first at 18 siding? A. No, sir.

Q. And you cannot say whether it was to the right or the left of the track? A. Not at that point, no, sir.

Q. Now, the track from 18 siding down to the county line runs to a certain extent through a swamp, doesn't it? A. Yes, sir.

Q. And did you see any fire in that swamp? A. No, sir.

Q. Did you see any smoke coming in that swamp? A. No, sir.

Q. Hanging over or going through there? A. No, sir; not at that time.

Q. You did not see any smoke then? A. Not in that swamp, no, sir.

Q. Now can you say where you saw this smoke when you were at 18 siding? A. In the direction of Long Lake, but I could not say positively where it was.

Q. How does the railroad track run at 18 siding—what direction? A. I could not say exactly.

Q. Well, about 18 siding, does it run in pretty nearly a straight line until it comes to the county line? A. Just north of the county line, yes, sir.

Q. In other words, from the point of the curve shown on the map, which is at or near the county line, it runs straight up to 18 siding? A. Yes, sir.

Q. And from the county line it takes a bend to the left as you are going down the track toward Utica? A. Yes.

Q. When you were at the county line and looked south along the line you indicated you say you looked south and saw smoke; no fire? A. No, sir.

Q. Just smoke? A. Yes, sir.

Q. The smoke was coming up toward you? A. The smoke was very high in the air and it seemed to be traveling in toward me, yes.

Q. And then you went on down to the station, and when you got to the station you found the train in, loading up, to take people away? A. I could not say what the train was there for when I got to the station.

Q. People were loading their things on, were they not? A. There were people there in the station and I went in and reported conditions to Utica and got a message to get the people out of town.

Q. You relieved Mr. Clark, the day agent? A. Yes, sir.

Q. Did you stay there until the second train went out. A. I was down at the crossing, across the road over toward Long Pond, at the time the second train came out; I did not see them; I don't know that I saw them; I could not say.

Q. You did not go out on the train? A. No, sir.

Q. What time did you leave the station? A. I could not say exactly.

Q. About? How long after the first train went out? A. I should say it must have been an hour.

Q. After the first relief train went out? A. About three quarters of an hour.

Q. When you left the station was it on fire? A. No, sir.

Q. The Jennings barn got on fire what time, do you know? A. I could not say as to that; I did not see it on fire at all.

Q. I thought you said so. I beg your pardon. What buildings did you see on fire? A. Mr. Monahan's barn—I did not see the fire; I knew it was on fire.

Q. That was the big barn on the west side of the track? A. Yes, sir.

MARGARET RIENDEAU, sworn.

Direct Examination by Mr. Carey:

Q. You are the wife of Mr. Riendeau, the conductor of that fire train? A. Yes, sir.

Q. Were you at Long Lake West on the 27th of September, 1908? A. I went there on that day.

Q. What? A. I went to Long Lake West on that day.

Q. On what train did you go? A. The train leaving Utica at 9 o'clock in the morning.

Q. Do you know what number that is? A. Number 11.

Q. And that is the train which reached Long Lake West at 12:43 that day? A. That I do not know, when it reached there.

Q. Well, it was due there about that time, wasn't it? A. We were a little late.

Q. You left the train where? A. At Long Lake West station.

Q. As you got off of the train was your attention called to anything with reference to smoke? A. Yes, the conductor of the train that I came up on called my—

Q. Will you speak louder, please? A. The conductor of the train that I came up on called my attention to a column of smoke coming up off in the woods.

Q. Where were you with reference to the northerly end of the station at that time? A. Well, I walked up towards the hotel and stood between the station and the hotel.

Q. And did you look? A. Yes, sir.

Q. In what direction did you look? A. Back of the station.

Q. And what is the character of the ground over toward where you looked; high or low? A. The smoke that I saw was coming from behind the hill.

(Recess.)

Q. Where did you go after you left the train? A. To the hotel.

Q. That is the hotel which has been talked about here and marked No. 6 on the map? A. Yes, sir.

Q. Whom did you meet there? A. Miss Meade, the teacher.

Q. An acquaintance of yours? A. Yes. I had met her that summer when I had been up there before.

Q. And did you meet Mr. Riendeau there? A. Not then.

Q. Did he come later? A. About twenty minutes later.

Q. And were you with Mr. Riendeau at the time he was in the dining room? A. Yes, sir.

Q. And did you hear any noise while you were in the dining room with him? A. Not when we first went in—while we were eating our dinner.

Q. How far along had the dinner got? A. We were eating our soup.

Q. Describe the noise you heard. A. Well, it was a sort of a roaring noise.

Q. Where did you go after hearing that noise? A. I ran out of the dining room with Mr. Riendeau onto the porch.

Q. And did you look for anything? A. Well, I ran to the end of the porch to look in the same direction where I had seen the smoke when I first arrived there, and it had come considerably nearer than it was at the time that I first saw it.

Q. Did you see the fire train pull out from the station? A. Yes, sir.

Q. And what did you do after the fire train left the station? A. Mr. Riendeau told me to follow them, and I did; I walked down the railroad track to where the fire train was on a siding.

Q. When you got down there the fire train was in on the siding? A. Yes, sir.

Q. And what did you do then? A. I walked over to the train and got in the caboose and up in the cupola and sat there.

Q. When you were going down the track how far down could you see? A. There was a turn in the road. I could see down as far as there.

Q. Will you state whether or not at the time you were going down the track there was any fire down in the vicinity of that bend? A. I did not see any.

Q. Or any smoke? (No answer.)

Q. When you got down to the train and got on into the caboose did you notice any smoke or fire? A. There was a fire burning over the hill, and coming down the side of it. It was quite red and smoky there.

Q. And what direction was the fire coming? A. Well, it was coming right towards me where I sat in the train.

Q. And what direction with reference to the railroad track, slanting toward it or straight toward it or how? A. Towards the side of it; towards the side the station was on.

Q. Did you stay there in the caboose until the train pulled out of the station? A. Yes, sir.

Q. And did you notice anything about the wind? A. Well, I could see all around there, sitting up so high, and I did not know then what way the wind was blowing, but I know the sparks and smoke were coming directly over the caboose where I sat, over towards the track.

Q. And how about the smoke? A. It was coming in that direction.

Q. Was there very much smoke? A. A great deal of red flame.

Q. Where was this red flame that you saw? A. The smoke and flame, as well as the fire, was spreading out considerable towards the last.

Q. Where was it, on the hill or in the swamp? A. It came down the hill and sparks were flying beyond where the real fire was burning, and different directions to the right and left of where the big fire was burning.

Q. Did you feel any heat from the fire before you left there? A. Yes.

Q. How much? A. Not as much as I did later when we stood so long at the station.

Q. Not as much as when you were back at the station? A. Yes.

Q. Did you ride out on the fire train when it pulled out? A. I did.

Q. And back to the station on it? A. You mean when it pulled into the siding?

Q. Yes. A. I sat right in the caboose.

Q. And remained there until it got back to the station? A. Yes.

Q. And went out on the fire train? A. I went out on it and came back the second time.

Q. When the train pulled out from the station did you notice whether there was any fire down in the vicinity of the bend or not; did you look down in that direction? A. There wasn't then.

Q. There was none? (No answer.)

Q. Will you come here and point out the direction in which you saw the fire when you were in the caboose? Up here is the Christy siding; here is the station. You came down here and backed in on the siding. Can you locate yourself on the map? A. We were down here—here was the caboose.

Q. Will you indicate in what direction you saw fire and smoke from the place where you were in the caboose? A. Straight across, coming up the lower end of this—over the upper end of this hill.

Q. At the lower end of the northerly hill? That is the southerly end of the northerly hill opposite from the siding and the northerly end of the southly hill opposite the siding? A. The smoke was flying on both sides.

Q. The jury did not hear that. State that again, will you? Turn around so the jury can hear what you say. A. It was coming in a direction over the lower part of the upper hill, right straight there like this, and the upper part of this hill.

Mr. Wright: The upper part of the lower hill. She indicates in the same place that her husband made the crosses.

Mr. Carey: Yes.

Q. What did you state about smoke and sparks and fire down in the swamp there? A. They were working in here with the hose. The sparks were up through here, and this way. It had been burning near me when I left there.

Q. You say the sparks were flying northerly and southerly? A. Flying over the caboose.

Q. Now in a general direction which way were the sparks flying, with reference to the railroad? Just point out on the map. (Witness indicates.)

Mr. Wright: Straight across, she points, at right angles to the railroad.

Q. You spoke of seeing some fire in the northerly part of the swamp later on. When was that? A. It was catching while I was there. It was spreading out, and sometimes the large fire would be burning here and little fires catching in here.

Q. The large fires you indicate up there, and smaller fires catching over here and down here?

Mr. Wright: That does not mean anything for the record.

A. Catching to the right and left of the large fire, nearer to the railroad.

Q. Catching to the right and left of the large fire nearer to the railroad. Did you at any time see any fire down in the vicinity of this first bend? A. No, sir.

Cross Examination by Mr. Wright:

Q. You were in the caboose from the time the engine backed in on the siding? A. I went back to the caboose after the train backed in.

Q. The engine was on the northerly end of the train, wasn't it? That is, the caboose was on the upper end of the siding? A. Well, the engine was facing what I call south and the caboose was on the—

Q. Extreme other end of the train? A. Yes.

Q. So that you were on the extreme northerly end of the train when it stood on the siding? A. Yes.

Q. And did any fire start right near the caboose while you were in there? A. No, not right near it.

Q. It was very smoky there and the flame was coming toward you then? A. Sparks and smoke were blowing over the caboose.

Q. Blowing over it; which way, toward the railroad. A. Toward the railroad.

Q. Do you mean the way you indicated on the map, right straight toward the railroad, or partly toward the station? A. Well, I would call it spreading out toward the station and to the south too.

Q. Which was the main direction? A. The fire didn't come in one straight path down.

Q. But the wind was blowing in what way? A. I thought it came toward me because it came the side I was sitting on the caboose.

Q. Isn't it a fact that the wind blew toward the caboose and up toward Mr. Jennings' barn? You know where Mr. Jennings' house was, the house across the railroad track from the station? Do you know the house across the railroad track from the station? A. I know there were houses there, but I don't know whose they were.

Q. Did the wind blow toward those? A. Yes.

Q. The lumber piles were not on fire when you left the siding? A. Not when we left, or at least I didn't see them when we left.

Q. But you did see them on fire before you left Long Lake West? A. When I was at the station.

Q. When you were at the station you saw the lumber piles on fire, and you saw a building burning before you left the station? A. Yes, something—some sort of a building down near there, I don't know what it was.

Q. Down near the point of the switch that went into Mr. Christy's lumber yard? A. Somewhere near the lumber piles.

Q. A building right near the railroad track? A. Yes.

Q. The Norwood storehouse property, quite a large building? A. It did not look so big to me from where I was at the station.

Q. Now, when you left the station to go up to Horseshoe on the relief train, did you notice any fire in the cars which were right up from the station? A. Yes; there were some cars burning there; box cars.

Q. Box cars, weren't they? A. I don't know what they were; they looked like box cars.

Q. They were not passenger cars? A. No.

Q. Or not flat cars? A. No.

Alice Meade, sworn.

Direct Examination by Mr. Carey:

Q. Were you at Long Lake West in the fall of 1908? A. I was.

Q. What were you doing there, Miss Meade? A. I was teaching school.

Q. In the little school house up on the hill there? A. Yes.

Q. And you are now teaching where? A. In West Hoboken, New Jersey.

Q. Miss Meade, do you remember the 27th of September, 1908, when the fire occurred at Long Lake West? A. I do.

Q. Where were you boarding, Miss Meade? A. At the hotel, across from the station.

Q. And did you on that day meet Mrs. Riendeau at the hotel? A. I did.

Q. Do you remember where she came from as she came to the hotel? A. She came from the noon train.

Q. There were piazzas on this hotel, were there not? A. Yes; on three sides.

Q. Which sides were they on? A. On the side facing the post office and toward the railroad track and on the right hand side.

Q. That is on the northerly side? A. Yes.

Q. And how many piazzas were there; that is in height? A. There were two.

Q. On the ground floor and the second floor? A. Yes.

Q. And your room was on what floor? A. On the second floor.

Q. Do you remember when the alarm of fire came? A. Yes.

Q. Where were you at that time? A. I was eating my dinner.

Q. At the hotel? A. Yes; in the dining room.

Q. Were you in the same dining room with Mrs. Riendeau? A. Yes.

Q. You had met Mrs. Riendeau before that time, had you not? A. Yes.

Q. What did you do when you heard the alarm of fire? A. I got up and went over and looked out of the dining room window, looking toward the post office.

Q. Yes; did you see anything from there? A. I saw smoke up in the northwest.

Q. In what direction was the smoke? A. I should say it was over near Monahan's boarding house—between Monahan's boarding house and the post office.

Q. You know where Monahan's boarding house was? A. Yes, I do.

Q. Was that the line of your sight, between the post office and where Monahan's boarding house was? A. Yes.

Q. What did you do then? A. Then I hurried upstairs and finished packing my trunk—I did not have very much to do because I already had it partly packed, and then I helped Jay Smith pack his trunk.

Q. We won't stop to go into those details; but did you look for the fire at any time after you went upstairs? A. Yes; several times.

Q. And where did you go to look for the fire? A. I went to the veranda, looking toward the post office.

Q. And what did you see? A. I saw smoke.

Q. And will you state whether there was a large or small volume of smoke? A. Very large volume.

Q. What direction did you see the smoke in from the upper veranda? A. In the same direction that I had seen it at first, only it kept increasing in volume.

Q. Did it seem to be moving, and if so in what direction? A. Moving from the southeast toward us.

Q. Did you later on go out on the train that took a number of people out? A. Yes.

Q. And from the hotel did you go over to the station? A. Yes.

Q. And do you recall looking down the track at any time after you left the hotel? A. Yes, I do.

Q. What were you looking for? A. I was looking to see if the train was coming back to get us.

Q. That was before the fire train returned? A. Yes.

Q. And in looking down the track how far could you see? A. Well, I could see to the first curve. I don't know just how far down it was.

Q. You could see to that curve? A. Yes.

Q. And do you recall whether you looked more than once down the track for the return of the fire train? A. Yes; I think I looked several times.

Q. What was the condition of the people around the station? A. Everybody was very excited.

Q. Were they looking also for the fire train? A. Yes.

Mr. Wright: How does she know.

Q. Well, were they looking in that direction? A. Yes.

Q. Talking about the fire train? A. Yes.

Mr. Wright: I object to that as hearsay.

The Court: I think I will permit that. I suppose that is part of the *res gestae* of looking.

Mr. Carey: I think so.

Q. Do you recall any buildings being on fire before you left? A. I know that when I was getting off the train that some one said—

Mr. Wright: I object to what some one said.

A. I did not see any buildings on fire.

Mr. Carey: I think perhaps that is part of the *res gestae* of the situation.

The Court: I do not think the *res gestae* of getting on the train is at all illuminated by the fact that somebody talked about a fire.

Mr. Carey: All right.

Q. At any time that you looked down toward the curve did you see any fire in that direction, in that vicinity? A. No; I didn't.

Cross Examination by Mr. Wright:

Q. Will you step down here? This building marked "6" was the hotel at that time? A. Yes, sir.

Q. And this building marked "10" was the Monahan boarding house, wasn't it? A. Yes.

Q. And your line of vision was down between the post office and the— A. And the Monahan boarding house.

Q. Right down there, wasn't it, the same way that arrow is pointing? A. No; I should say it was a little bit to the right of that.

Q. A little bit to the right of that? A. You see, I was out on that veranda, looking over toward the post office.

Q. This is the post office? A. Yes.

Q. This building marked "P. O."; and you were looking right toward the post office? A. Right over the post office.

Q. This was your line of vision then, this way? A. Yes.

Q. Can you remember which side of the Monahan boarding house you looked? A. Yes; I looked to the left of it.

Q. That is to the left as you were facing it; that would be to the east of it? A. Above it and to the left of it.

Q. That would be to the east of it? A. Yes; I think—I am not sure about that direction.

Q. Well, the railroad track is generally north and south, and you looked the side away from the railroad track? A. Yes.

Q. So that would be to the east of the Monahan boarding house? A. Yes, sir.

Q. Over the top and a little to the east of it; so that was your line of vision, like that; isn't that about right? A. Yes; I should say that is about right.

Q. And at the same time you were looking right near the Monahan barn, were you not? A. Yes.

Q. The Monahan barn was located approximately where this long rectangle is, wasn't it? A. Yes.

Q. So that you were looking between the boarding house and the barn and over the top of the post office; is that about right? A. Yes; over in that direction generally; that is about right.

Q. And that was the direction the fire was coming from? A. Yes.

Q. You were looking right straight at it? A. Yes.

Q. Any buildings on fire when you left? A. Not that I saw.

Q. Did you see the cars across the railroad track from the station on fire? A. No, I didn't.

Q. Do you know whether the lumber piles were on fire when you left? A. No; I don't remember —I did not see them on fire.

Q. Did you notice when you were standing by the station looking down the track whether or not the lumber piles were on fire? A. No, I do not remember that.

Q. But you do remember that there was no fire on the right of way? A. Yes, sir.

Redirect Examination by Mr. Carey:

Q. Do you know what these contour lines represent on this map? A. Yes; I do.

Q. A ridge of hills here, and further back another ridge of hills? A. Yes.

Q. And your line of vision was from the hotel over between the boarding house and the post office? A. Yes, sir.

Q. That would be something in that direction, wouldn't it? A. Yes.

Q. And the fire was also in that direction? A. Yes.

Eva Perry, sworn.

Direct Examination by Mr. Allen:

Q. In September, 1908, did you live at Long Lake West? A. I was working there; my home was at Tupper Lake.

Q. Do you remember the 27th of September, when the village burned? A. I do.

Q. Will you tell just what you saw with reference to the fire on that day? Tell us when you first saw it and where you were and in what direction you saw it. A. I was at Monahan's boarding house. Between 10 and 11 o'clock I see a large volume of smoke back of the Monahan boarding house. I could not tell just how far.

Q. Where, in the boarding house, were you then? A. I was back of the house, Monahan's boarding house.

Q. Was that before dinner? A. Before dinner, yes.

Q. When did you next see it? A. Between 12 and half past.

Q. Where were you then? A. Back of the house. I happened to go out and I noticed the fire—the smoke rather.

Q. And what could you say with reference to whether or not it had moved any since you had seen it— A. Yes; it was coming nearer towards the railroad track, towards the Monahan boarding house.

Q. Did you see any fire at that time? A. No; not at that time.

Q. How much of a volume of smoke? A. Why, quite a large volume of smoke.

Q. Where was this with reference to where you were—what direction, can you tell us? A. I don't believe I could say just what direction.

Q. Could you from the map? A. Perhaps I could from the map.

Q. Come to the map. Are you acquainted with the two ridges, one of which is a lower ridge, and then back of it a high ridge? A. Not very.

Q. Do you recall that there are? A. Yes; I know that there are.

Mr. Carey: Can't you turn around a little so that the jury can hear you?

Q. Now you were at the boarding house, you say? A. Yes; in there (indicating.)

Q. Can you show us the general direction from which you saw that fire coming the first time you saw it? A. I can't tell you just the direction, but I should think it would be in here, coming from this direction.

Q. That was when you saw it in the forenoon? A. In the forenoon.

Mr. Wright: "In this direction" does not mean very much.

Q. Can you mark with a pencil just the direction in which you saw it—putting your pencil here and running off in whatever direction you saw it—the first time? A. There is the building.

Q. Remembering that this is the first ridge? A. That is the first ridge.

Q. And here is the Christy switch; you know where that is? A. Yes.

Q. Then that is about the direction you want it? A. Just about the direction.

Q. Is that right? A. Yes, just about.

Q. And that is the direction in which you saw it at first? A. Yes.

Q. Then you say that about half past twelve—did you say—or after twelve—you again saw it? A. Yes; it was nearer to the railroad, nearer to Christy's.

Q. What would you say with reference to its general direction from you at that time, as compared to what it was before?

Mr. Wright: She said it was nearer the railroad.

Mr. Allen: Yes.

A. It was coming nearer to the railroad.

Q. Then when did you next see it? A. I saw it after I got to the station, about 1:30—between 1:30 and 2.

Mr. Wright: The jury do not hear this, I am sure.

A. Between 1:30 and 2 I seen the flames coming towards Christy's lumber yard.

Q. Where were you then? A. I was then at the station.

Q. Did you go from the boarding house to the station? A. Yes.

Q. What did you see on your way over? A. I did not see anything, but I heard the roaring.

Q. Was that the first time you heard the roaring? A. That was the first time, yes.

Q. What could you see with reference to any flame? A. I seen flame and I seen sparks flying in all directions.

Q. That was this last time you are speaking about? A. The last time, going to the station.

Q. Had you seen any flame up to that time? A. No, sir.

Q. Just tell us where that fire was if you can, that you saw when you were going from the boarding house over to the station. A. I did not see the fire till I got to the station. I heard the roaring but I did not notice the fire until I got to the station.

Q. Where did you notice it then? A. There is the lumber yard there; I see the fire about in here, the Christy lumber yard.

Q. Here is a switch. (Witness indicates.)

Q. Mark the direction of it from the lumber yard. (Witness indicates.)

Q. Now that is the direction that you point, is it? A. Yes.

(Mr. Allen marks it.)

Q. Is that right? A. Yes.

Q. That is about the direction that you saw it coming at that time? Can you tell us how far from the switch or siding this fire was when you saw it while you were at the station? A. I cannot tell you just how far it was, because I just saw—

Q. Had it reached the railroad? A. No; it had not reached the railroad.

Q. On which side, the easterly or the westerly side of the railroad was it at that time? A. The easterly side of the railroad.

Q. Was there any fire on the westerly side of the railroad at that time? A. I did not notice any.

Q. While you were at the station did you look down the track in the direction of Nehasane? A. Yes; I did.

Q. Was there any fire— A. I did not see any at all.

Q. —on the right of way? A. I didn't see any.

Q. Was there any other fire that you saw, other than this fire you have told us about? A. No; only that one I have told you about.

Q. Do you remember the sparks at that time? A. The sparks were flying, yes.

Q. How were they flying? A. The wind was blowing quite hard and they were flying all directions—blowing right across the track—blowing towards the track.

Q. And you remember that there was quite a hard wind as you say at that time? A. Yes.

Q. Had there been a wind blowing during that day, had you noticed, previous to that time? A. I did not notice any. This was after dinner. After I got to the station I noticed that the wind was blowing real hard,—going to the station.

Q. Did you see any of the buildings burning? A. No; I didn't.

Q. You left on the first relief train? A. On the first relief train.

Q. Did you hear the explosion of dynamite? A. Yes, I did.

Q. Were you in town when you heard that? A. I do not just remember where I was at that time.

Q. Was it before you had left or after? A. It was after I had left the station.

Q. And you were on the train at that time? A. I was on the train, yes.

Cross Examination by Mr. Wright:

Q. The wind was blowing the same direction the fire was blowing? A. Yes, across the track.

Q. In the same direction you have drawn that line? A. Yes, sir.

CHARLES D. VAN SCHAICK, sworn.

Direct Examination by Mr. Allen:

Q. You reside in New York City, Mr. Van Schaick? A. Yes, sir.

Q. And what is your position? A. Combustion expert, New York Central Railroad.

Q. What has been your experience in the past with locomotive engines? A. Rogers Locomotive and Machine Works, Paterson, New Jersey; fireman, engineer, machinist, foreman, master mechanic.

Q. Extending over a period of how many years? A. 38 years.

Q. Were you in September, 1908, connected with the New York Central Railroad? A. Yes.

Q. And are you familiar with the engines of the type of No. 2071? A. Yes, sir.

Q. Are you familiar with that particular engine? A. Yes.

Q. Are you familiar with the engines in common use upon other railroads throughout the country? A. Yes.

Q. And were in 1908? A. Yes.

Q. And for some years previous to that time? A. Yes.

Q. Did you hear the interrogatories read describing in certain particulars the construction of engine 2071? A. Yes.

Q. Will you state whether or not that description and that engine was standard construction? A. Yes.

Q. Do you know whether or not engines of a similar type were in use on other railroads throughout the country at that time? A. Yes, sir.

Q. And whether or not that engine was equipped with the best practicable apparatus for preventing the emission of sparks in common use at that time? A. Yes.

Q. And whether the construction of the fire box and ash pans was the best practicable construction in common use at that time? A. Yes.

Q. To prevent the dropping of fire from the fire box or the ashpan? A. Yes.

Q. Was engine 2076 of the same general type of engine as 2071? A. Yes, sir.

Q. Both known as what? A. F-2-a.

Q. Wide fire box type? A. Wide fire boxes.

Cross Examination by Mr. Wright:

Q. When did you see those engines, 2071 and 2076? A. During the spring of 1908—I could not tell you the date, the time.

Q. Did those engines have a screen or guard around the opening between the fire box and the foundation ring? A. They had a projection on the outside of the pan about ¾ of an inch wide to prevent anything that might drop off from rolling out. That was a construction somewhat out of the ordinary.

Q. I asked you if they had a screen there around those openings? A. On the side, no.

Q. You had had engines with screens at that point, hadn't you? A. Not at that time.

Q. You had had prior to that time? A. No.

Q. Have had since that time? A. Yes.

Q. Isn't it a fact that for some years prior to that time you had had a screen around those openings? A. Prior to that time, no.

Q. Who drew the plans of these engines? A. The New York Central Railroad.

Q. Who made the engines? A. The Schenectady Locomotive Company.

Q. From plans furnished by the railroad company? A. Yes.

Q. How long had those engines been in service? A. 2071 was built in 1906.

Q. And the other one I suppose about the same time or a little later? A. I assume—I think, if my memory serves me, yes.

Q. The number would indicate it was a later engine? A. Yes.

Q. It would be five engines later of that type? A. Something like that.

MR. CHISM, recalled.

By Mr. Carey:

Q. I show you P-6-a, and call your attention to a line put on this picture by Mr. Davis, indicating the course of the fire according to his recollection. Can you place that line from the horizon down to the bottom of the hill on the map? A. I can.

Q. Will you do that, please?

Mr. Wright: I object to that for the reason that the witness put it on the photograph to the best of his recollection, having in mind what the photograph shows, and there is a great difference between a photograph and a

map, due to the fact that a photograph has a perspective whereas there is no perspective to a map.

The Court: I will permit it. I think your objection goes rather to the weight than to the admissibility of it.

Q. Will you do it, please? A. I see a line already on the map, marked "Miss Perry"—which is substantially the same as indicated on the photograph.

Q. Then it will not be necessary to draw another? A. No, sir.

Q. Now on Plaintiff's exhibit D-12-a is the mark of George Lashaway where he saw the fire coming over the second ridge, in connection with some rocks. Can you locate those rocks on your survey? A. I can.

Q. Will you locate them on the survey and mark your location "Rocks," and put your initial on? A. Between those two lines which I have marked.

Mr. Wright: Two lines on the second ridge—there are so many lines on this map.

Q. Will you put your initials on there? A. I have put my name on.

Q. This exhibit P-6-a shows the front ridge of hills, does it not? A. Yes.

Q. And the higher hills back of them? A. Several higher ridges back of them.

Q. Will you state on which side of the higher ridges at the right of this picture, exhibit P-6-a, the railroad track runs? A. The side nearest the viewer—toward the viewer, toward the camera.

Q. Now when you were making your survey for this contour map will you tell us if you found any difference in the color of the sides of the trees that were standing there? And if so, describe the condition?

Mr. Wright: I object to that. The survey of Mr. Chism was six years after this fire.

The Court: Objection sustained until you show the condition was practically the same at that time of the observation as it was at the time in question.

Q. Did you notice any burns on the trees?

Mr. Wright: I object to that for the same reason.

The Court: Objection sustained.

Cross Examination by Mr. Wright:

Q. I call your attention to the range of hills shown at the right of the picture in the distance, not the first, lower range but the higher range. A. About level with the top of the roof of that building.

Q. About level with the top of the new school house. Will you indicate those on your map? (Witness marks it.) A. The point I mark with an "X" and my name.

Q. Your initial. Mark it "C". A. That is the high point shown on the photograph just to the left of the peak of the roof.

Q. And this low ridge in the foreground in front, that is the ridge which we have been talking about, extending up from just below the first bend south of Long Lake West station northeasterly, is it not? A. It is.

CHARLES D. VAN SCHAICK, recalled.

By Mr. Allen:

Q. In September, 1908, were engines 2071 and 2076 equipped with the best practicable apparatus

for preventing the emission of sparks from the front ends?

Mr. Wright: Objected to as calling for a conclusion.

The Court: This man is an expert. Of course it calls for a conclusion. All expert testimony is a conclusion. I will permit it.

A. Yes.

The Court: You might ask him still further, if they were equipped that way throughout the month of September. You ask him if they were equipped that way in the month of September. It would be equally true, what he says, if they were equipped that way on the 28th.

Mr. Allen: May I insert in that question the word "throughout" ?

The Court: You may. Otherwise it does not cover what you want.

Q. And will you answer the question? A. Yes, sir.

Mr. Carey: I now offer in evidence the summons in this case to show the beginning of the suit.

Mr. Wright: We will concede that the summons was issued on the first day of November, 1909.

Mr. Allen: We offer the following cases as to proximate cause: Ryan v. New York Central & Hudson River Railroad, 35 N. Y. 210; Hoffman v. King, 160 N. Y. 618; Dougherty v. King, 165 N. Y. five-seven; Van Ingwersen v. Port Jervis Realty Co. 165 N. Y. 625; McDonald v. N. Y. C. & H. R. R. R. Co. 124 Ap. Div. 38.

The Court: I suppose what you are offering is the printed volumes

Mr. Allen: Containing the reports of the cases.

Mr. Wright: We have no objection to the form of the offer, but we object on the ground that the cases are not controlling in this matter.

The Court: As against that objection I will admit it.

Mr. Wright: I would like an objection entered in the nature of an exception.

The Court: Yes; it will be noted.

Mr. Carey: During the entire years of 1908 and 1909 this defendant was subject to service of process within the State of New Jersey.

The Court: That is admitted, is it?

Mr. Wright: It is admitted it was a foreign corporation authorized to do business in the State of New Jersey, and that process could be served upon it in the State of New Jersey.

DEFENDANT RESTS.

Mr. Wright: In rebuttal I desire to offer in evidence portions of testimony of certain witnesses which I have examined them on in their cross examination. I do not want to take up any further time on it.

The Court: What you want to do is to offer in evidence those portions of the testimony which were read to them and which they denied having testified to or did not admit having testified to.

Mr. Wright: To save time reading it over again.

Mr. Carey: I have no objection to that.

Mr. Carey: And I would like to make the

same offer with respect to the evidence that I read, for the same purpose.

Mr. Wright: No objection to that.

TESTIMONY CLOSED.

Mr. Carey: I move for a direction of a verdict in favor of the defendant on the ground that none of the allegations of negligence set out in the declaration have been sustained by the proof in the case; and I also move for a direction of a verdict in favor of the defendant because the action was brought too late, after the expiration of a year from the date of the fire, and on the theory that the presumption has not been overcome by the proof which the plaintiff has put in the case.

The Court: What presumption? You are speaking now of your second ground—the presumption of release or payment?

Mr. Carey: Yes. The evidence shows a standard construction of engine. If the fire escaped notwithstanding standard construction of the engine, then there would be no actionable negligence upon the part of the defendant in that particular.

The Court: What do you say about that, Mr. Wright? They have offered a standard construction of engine, and the only proof in the case shows that it was standard construction, and the only allegation is that it was improperly constructed, and if there is no proof on that subject it is equally consistent with standard and proper construction that the fire escaped because of lack of repair, probably more consistent; and Plummer v. Lehigh Valley Railroad is authority for the proposition that where two hypotheses are indulgible, for one of which the defendant is responsible and the other not, and the one is equally proper with the other, you have no right to go to the jury on

it, because they would not be entitled to say that the burden of proof rested on either side.

Mr. Wright: I dispute the statement that the undisputed evidence is that the engines were properly constructed, following the statement made by Mr. McClary and the statement made by Mr. Smith; it clearly appears that they have these places where fire escapes and they say "We can remedy that."

The Court: You mean in the fire pan?

Mr. Wright: Yes. And we have evidence that the fire pan dropped cinders on the track and set fires.

The Court: Where is there any evidence that that was not standard construction at the time of the happening of the fire? You see there is no evidence to show that it was not. You must take the state of the art at that time. If at that time the fire box was constructed with a deflecting plate such as this witness testified it was, this company would not be to blame for not putting on something that later wisdom demonstrates the propriety of using. You see the burden is on you to show that the construction—that is in an action originating in New York—that the construction was faulty, and that more fire dropped from this engine on account of the faulty construction than should have dropped in the exercise of reasonable care by them in the adoption of those things which were then practical devices for the prevention of such results.

Mr. Wright: That is only shown, of course, by circumstantial evidence, that they did drop these coals.

The Court: All the cases that deal with the subject say that engines will drop some coals; in fact they reversed a case in our state in 60 N. J. Law, 150, a very interesting case where a judge

said that they had to just shut off these sparks altogether where it was very dry. This is the case, West Jersey R. R. v. Abbott. It says here: "Railroad companies have authority to use the dangerous element of fire in the propulsion of their trains. The danger is in the escape of the fire they are permitted to use, upon adjoining lands, to the destruction of property thereon. In the absence of statutory regulations in respect to the precautions to be taken by railroads against such danger, doubtless, the companies using, though by authority, the dangerous machines would, upon the principles of the common law, be under a positive obligation to employ all reasonable precautions against doing harm thereby to others. But in that case a requirement that a railroad company, should in times of excessive drought, absolutely prevent all escape of fire from its engines or be liable for the consequences, would be not a reasonable, but an unreasonable, rule of precaution, for it seems that no device has yet been invented that will absolutely and at all times control the escape of sparks capable of igniting inflammable matter. Such a rule, therefore, would compel the companies either to abandon their duty to the public in running their trains or be answerable for every fire communicated, no matter how cautious they had been in using the best practicable means to prevent its escape." That is the court of errors of our own state; and it would seem that there has got to be some evidence that the construction—I assume that your allegation that the engine was not properly constructed is broad enough to cover every part of the engine; and if there be any evidence tending to show that the fire pan was improperly secured, or that the screens were improperly adjusted to the engine or were improper in their method of construction, I agree that I must

let it go to the jury. I haven't any doubt about that. That is the law.

Mr. Wright: There is evidence that tends to show that certain trains threw more sparks than others, and Mr. Ames testifies to that.

The Court: That is the case of flying sparks. You are not talking about flying sparks but of the dropping of them. You are talking about sparks from the fire pan, whereas Ames and the other witnesses testified to the sparks from the smoke-stacks.

Mr. Wright: Ames also testified to the dropping, but I do not know that he said any particular train dropped more than others.

The Court: As far as any of us know, all trains will drop some, and for the purpose of your case I do not think there are any witnesses in your case who have said that the sparks were communicated directly—or have given evidence which would warrant such an inference—that the sparks were communicated directly from the engine to the property.

Mr. Wright: That the right of way was foul.

The Court: That they were dropped to the right of way. What difference does it make then whether it was good or bad?

Mr. Wright: I don't think it makes any difference if the right of way was in a negligent condition and the spark drops on that right of way—that is the real negligence we are relying upon.

The Court: And why should we attempt to stretch it out? Suppose I charge the jury that they might find—in the light of this evidence—that they may find negligence on the ground that the engine was not properly constructed, and suppose what I am saying to you now is the way the court would look at it?

Mr. Wright: I am afraid if you charged them that way I would be in very bad.

The Court: I think if you have a right of action here you have a right of action because the right of way was foul. There is evidence in this case, in spite of the request of my dearly beloved friend here to find to the contrary, that the right of way was foul, and it does not make the slightest difference in the world if the company communicated that fire to a foul right of way whether their engine was absolutely airtight in its construction; if they communicated that fire to that foul right of way that ends this case, if that was the proximate cause of this fire.

Mr. Wright: That is the way the thing has appeared to me.

The Court: I think then that I will charge the jury—I will eliminate from the consideration of the jury the question as to whether or not the engine was properly constructed, and I will submit the case to the jury on the question as to whether there was not negligence on the part of this company in allowing its right of way to become encumbered with accumulated igneous or combustible matter, and whether that matter took fire and the fire was communicated from there to the immediately adjacent property of the plaintiff here and destroyed the stuff that he claims damages for. That is the theory upon which I will submit the case to the jury. To that extent I will grant your motion.

Now the other portion of your motion was as to this question of payment or release. I am going to submit that to the jury, for these reasons: I may say, first of all, that I agree that the law of this state is that this fire having occurred in New York and the New York law being applicable to the case, that our statute of limitations does not directly apply to it, and that therefore what does apply is what you have pleaded, if anything is

applicable. I understand the law to be perfectly settled that if the defendant offers evidence of the lapse of time, or if it appears in the plaintiff's own case that that length of time has elapsed, and that is unexcused, unexplained, that then there is a conclusive presumption of fact, which some cases call a presumption of law, which arises and ousts the plaintiff of his remedy. In this case excuse has been attempted, or explanation, or we will call it, if you please, justification, that takes at least a two-fold aspect. The first aspect is, Mr. Thornall has given evidence here that on a date prior to the 27th of September, 1909, Mr. McClary, who admittedly represented the defendant company, sent to him a communication, that is to Mr. Thornall, a communication asking him to delay bringing suit or any proceedings until Mr. McClary should have seen Mr. Thornall on that day. Now that day is one day outside of the year, the fire having happened on the 27th of September, 1908, and that communication was given inside of the year, and therefore Mr. Thornall was justified in being carried over the period of limitation by the request made of him by Mr. McClary; and that brings up a doctrine which you will find very interestingly discussed—interestingly because briefly—in Martin v. State Ins. Co. in 15 Vroom. That case deals with a limitation which grew out of a contract of insurance, and the court held that where the defendant fiddles the plaintiff, in the legitimate hope of settlement, past the time of limitation, that that is explanation of the delay in bringing the action. And the court went on to say—it is of great importance here—that if after the time of limitation had expired, under those circumstances the defendant treated with respect to that contract, that he therefore recognized its vitality, and therefore his right to insist upon his limitation—in other

words, to state it in still fewer words than the Martin case stated it, the doctrine of estoppel is applicable; and I think in this case there is evidence from which the jury may conclude, and I may say frankly, that they ought to conclude, that the defendant's attorney smoothed our guileless brother here past the year.

Mr. Carey: He did not have that in mind, because he did not know our limitation.

The Court: Oh, no; it is not necessary at all to say that Mr. McClary had in mind anything at all about the limitation. I don't suppose he did. It was a most extraordinary coincidence he asked him to hold it up until the 28th; but that is the ground upon which I must place this. I did say a moment ago that if the mere efflux of time is unexplained it is conclusive against the defendant, but if there be reasonable explanation offered it is unquestionably for the jury; and probably the best discussion of that is that of Vice-Chancellor Emery in Plugh v. Everett, 15 Dick.

So I will deny the motion, on that ground.

Judge's Charge.

(Counsel sum up).

The court charged the jury as follows:

Gentlemen of the Jury:

This suit is brought by Charles R. Christy and Charles R. Christy, Jr., partners, trading as C. R. Christy & Son, against the New York Central & Hudson River Railroad Company, and the object of the suit is to recover damages for property, lumber, which the plaintiffs say was destroyed on the 27th of September, 1908, by a fire which they say was negligently kindled on the property of the defendant company and immediately communi-

cated to the property of the plaintiff, destroying that property; and for this destruction of property they seek in this suit to recover the damages which according to the testimony produced on the part of the plaintiff amount to $10,070.53. Something was said in the summing up by counsel for the plaintiff with respect to the allowance of interest on that sum. I charge you that in this case, indeed in this kind of a case, interest cannot be allowed upon such a sum. The reason for that seems to be, as I gather it, this: that interest, by that name, is simply a payment which is made because of an absolute default to make the payment of a certain sum at a definite time. That is what interest is; and in this case there isn't any such thing as that. There was no absolute default to make the payment of a definite sum at any certain time, and I have the permission of the counsel for the plaintiff in this case of saying to you that in this case no interest is sought, and therefore if you are satisfied that the plaintiff, if he is entitled to recover, has made out by the greater weight of the evidence that the value of his property was $10,070,53 and you find in favor of the plaintiff, that will be the amount of the verdict that you will render.

That brings us to consider the case which is made by the plaintiff, or sought to be made by the plaintiff. The defendant company is a railroad company, and it has a right to run cars propelled, or pulled, drawn, by locomotives, and they have a right to use fire in drawing those locomotives, and they are not under an obligation to prevent fire from escaping from those locomotives at all events, because so far as modern contrivances have demonstrated the fact it is impossible to run a locomotive without some fire being expelled from it, either from its fire pan or from its chimney. That

seems to be the indubitable present fact, and the legislature having given a railroad company the right to run its trains has thereby impliedly permitted the railroad company to expel so much fire from its chimney and its fire pan as is reasonably necessary, and no more; but that proposition is a matter of inconsequence in this case, because I charge you that there can be no recovery in this case because of any negligence either in the construction of the locomotive engine or in its operation, because there is not any evidence in this case that tends to show either that the railroad engine which kindled this fire, if any engine did kindle the fire, was defectively or improperly or insufficiently constructed, nor is there any evidence to show that it was negligently operated, and if there is to be a recovery in this case it must rest upon the other ground of negligence which is set out in the complaint of the plaintiff here and upon which the plaintiff relies for the recovery of damages, and that ground as it is stated in our books is that the railroad company was negligent in not keeping its right of way free from combustible materials. That is the sole ground upon which a recovery can be had, if there is to be a recovery in this case. As bearing upon that question the law seems to have been laid down clearly in these words: that,

"A duty lies upon a railroad company under the common law to exercise reasonable care in keeping its track free from combustible matter whereby fire from its locomotives may be carried to adjacent lands, and that an action will lie for negligence in that respect although there be no suggestion that the engine from which the fire was thrown was improperly constructed or driven."

I want to get the real sense of that firmly and clearly in your minds, that even though the engine were a perfect engine, still the railroad com-

pany might be held responsible by you for their negligence if they were negligent in permitting their right of way to become encumbered with an accumulation of combustible material. That is the point I want you to gather because that is the sole point upon which the right of action in this case is rested by the plaintiff and upon which the plaintiff seeks to have a recovery. The judges say with respect to that:

"All the authorities agree that the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there by the company without cause and negligently, is a fact from which a jury might find negligence against the company."

Now to elaborate that rule a little bit more and to state it to you from different angles so that you may the more clearly see precisely what the rule is, I am going to read you what some other authorities say about it:

"All that is required is that the railroad company should exercise ordinary or reasonable care in this particular, and what is reasonable or ordinary care will, as in other cases, be generally a question for the jury under all the circumstances of the case. This measure of care has been well defined by saying in substance that a railroad company is bound only to use the same diligence in removing combustibles from its right of way that a prudent and cautious man would use in reference to combustible materials on his own premises if exposed to the same hazard from fire. The true rule is that although it is not negligence in and of itself for a railroad company to allow combustible materials to accumulate upon its right of way, yet to allow such accumulation may become actionable negligence where it is reasonably probable that damage will result to adjacent property therefrom in case

of such material being fired by passing locomotives."

Now, that is the rule. Another matter to which your attention must be directed is this: that this fire, whoever kindled it, took place in the State of New York, and this suit is taking place in the State of New Jersey, and the law is perfectly settled, so far as I have been able to find it, that the law which shall govern in determining whether a railroad company shall be responsible and to what extent a railroad company shall be responsible under such circumstances is the law of the State of New York where the accident happened. That is the law that the parties themselves must be understood to have known would govern in case an occurrence of this kind took place. Therefore it becomes necessary for me to state to you what the law of the State of New York is with respect to the extent to which such a recovery will be permitted; and that is a very important circumstance in this case, because upon it really depends the decision of this case. In the State of New Jersey one law applies, a different one from the State of New York; and therefore I must tell you what the law of New York is with respect to the extent to which this recovery may go. When I am speaking of the extent I am speaking of the geographical extent. That law has been laid down by the courts of the State of New York in these words:

"As even properly constructed locomotives, with the most approved spark arresters, will of necessity emit sparks, it is the duty of a railroad company in periods of drought to use reasonable care to keep its right of way free from combustible material which is liable to be ignited from sparks so emitted, and failure so to do constitutes negligence. The rule of law as to fires negligently set, viz: that the damage must be the proximate, that

is the immediate, result of the negligent act, applies to fires on woodland with the same force as to fires in cities or villages. If a person lights a fire upon his own premises upon which he has maintained inflammable material extending to his neighbor's lands and the fire fed by this material spreads upon the abutting lands, the damage is the proximate result of the act and a liability exists, but the damage to the abutting lands is the limit of liability, and if the fire runs across the abutting owner's lands upon the lands of other proprietors, causing damage, such damage is not the proximate result of the original fire and imposes no liability upon its starter."

You see, the point about that is this, that that casts upon the plaintiff in this suit the burden of showing you that the fire that originated, if the fire did orginate upon the property of the defendant company, was communicated directly and immediately to the property of the plaintiff and destroyed the property which he seeks to recover the damages for the destruction of in this case. If that fire was started, even by the negligence of the defendant company, upon its right of way and went across some other person's lands than those of the plaintiff and across those lands eventually got upon the property of the plaintiff, the plaintiff could not recover. That is the law in New York. That is perfectly settled there, and that is the law that must be applied here. So you see it is necessary for you to settle in this case that the plaintiff has made out by the greater weight of the evidence that the fire was kindled proximately and immediately from the right of way of the railroad company to the property of the plaintiff. If the plaintiff has made that out and has shown that negligence originated that fire—negligence on the part of the defendant company—and that that fire was

the proximate cause of the destruction of his property, then the plaintiff is entitled to your verdict and to have you assess the damages; but if he has not made that out, if it is equally likely that the fire originated either on some other person's land or upon the property of the defendant and was brought to the property of the plaintiff across the land of some other person, then the plaintiff cannot recover and the verdict would have to be for the defendant. You see that is the importance of laying down the rule with respect to the law of the State of New York. Our State, the State of New Jersey, lays down a different rule; but that is the law of the State of New York and you must apply that law in your determination of this case.

Another phase of the same doctrine in the same case which I have been reading to you from the court of errors and appeals says: that,

"A railroad company which has negligently set a fire in inflammable material on its right of way is not liable to the owner of lands not abutting on its premises for damgaes because of fire communicated through the abutting and intervening lands of a third person, over which the railroad company had no control and without which the fire could not have been extended."

Now if there is any question in any juror's mind about that rule which I have been endeavoring to make plain to you, I want you to ask that question and let me answer it for you, because that is the crucial point in this case with respect to that New York law; and in order that there may be no doubt about it I will state it again to you in brief: That the plaintiff's burden in this case is that of making out by the greater weight of the evidence, if he is to recover damages here, that the fire was communicated immediately and directly from the right of way of the defendant company because of the

negligence of the defendant, to the property of the plaintiff and proximately destroyed the property which he complains of the destruction of and for which he seeks to recover damages in this case. If the fire was communicated circuitously over the property of some third party he cannot recover against the defendant in this suit. That is the rule of law that will govern in this case.

Now another question was raised here to which I desire for a moment to direct your attention. The defendant contended that our statute concerning railroads has laid down the rule that an action of this kind must be started within one year from the time the right of action accrued. This fire took place in New York and therefore our statute of one year is not applicable to it; but our law is this, that although our statute will not be applied to this action, that we will act by analogy to our statute and we will say that if the one year from the time of the accrual of the action has elapsed and the delay is unexplained by the plaintiff, the plaintiff's right of action is gone, but if the plaintiff has made out by the greater weight of the evidence that that one year's delay is explained, why then manifestly if it is explained to your satisfaction his right of action is not gone. Now in this case the plaintiff has sought to explain that delay and has said that during that year negotiations were depending between Mr. Thornall, representing the plaintiff, and Mr. McClary, representing the railroad company, and Mr. Thornall as a witness has said that an arrangement was made some time prior to the 27th of September, 1909, one year after the fire, whereby Mr. McClary asked him not to begin any suit until he should see him on the 27th day of September, 1909, which would be after the year was up. Now if you think that that is a reasonable explanation and that the plaintiff has explained by the greater weight of the evidence

this delay, why then you would say that this delay does not deprive the plaintiff of his right of action. If he has not properly explained it, or has not properly made out by the greater weight of the evidence an explanation, then you would say that the delay defeats the right of action and the verdict on that phase of it would have to be for the defendant.

I am requested to charge you certain things by the defendant in this case. I am requested to charge you that

"The law of the State of New York in force at the time of this fire governs the rights of plaintiffs and the liabilities of the defendant and the defenses which it may interpose."

That is the law, and I have charged you that, and I have read to you what that law is and have told you that that law must apply in this case.

I am next requested to charge you that

"It is admitted that the fires burning on the Christy property in the vicinity of Bear Pond and East Charley and Little Charley Ponds a few days prior to September 27, 1908, crossed from the Webb property to the Christy property. If either or any of these fires spread to the lumber piles and destroyed them, the plaintiffs cannot recover, and the verdict must be for the defendant."

I charge you that because that would come deliberately and directly within the ruling of this New York case of fire communicated not immediately and directly but mediately and circuitously over the property of other persons, and the plaintiff under such circumstances would not be entitled to recover.

I am next requested to charge you that

"The only negligence complained of in this case is faulty construction of engines; careless operation of engines; negligence with respect to keeping the right of way clear."

That is true, and I have gone even farther than the defendant wanted and have said to you that you are not to consider in this case either faulty construction of engines or careless operation of engines but merely negligence with respect to keeping the right of way clear.

Next, I am requested to charge you that

"Unless the jury find from a preponderance of the evidence that defendant was guilty of some act of negligence with respect to keeping its right of way properly cleared, and that such negligence was the proximate cause of the burning of the lumber, the verdict must be for the defendant."

I charge you that. (You will notice, Mr. Carey, that I have left out something which I presume you wanted left out).

I am next requested to charge you, that

"There is no charge that defendant failed to properly keep its engines in repair, or to properly maintain them. Hence, the question of repairs or maintenance of the engines is not in this case."

That is true. I have already charged you that.

Next I am requested to charge you that

"Unless the plaintiff establishes by a fair preponderance of the evidence that the fire which destroyed their lumber originated in some specific act or acts of negligence of the defendant, plaintiff cannot recover."

I charge you that.

I am requested to charge that

"If it appears from the evidence that it is equally probable that the fire which destroyed the property of the plaintiff may have originated from one of two causes, for one of which the defendant is not responsible, and for the other of which the defendant is responsible, the plaintiff has failed to establish his cause of action, and cannot recover."

Of course that is perfectly plain. I have told you already that the burden of proof rests upon the plaintiff to make out that it is more probable that it originated from negligence of the defendant than from any other cause, and unless he has made that out he cannot recover, and therefore if the probabilities are merely balanced so that you cannot say on which side they weigh the heavier, of course the verdict would have to be for the defendant.

I am next requested to charge you that

"In order that plaintiff may recover in this action, it must appear affirmatively from the evidence that the company or some officer, agent or employee of the defendant company has been guilty of some specific act of negligence which was the proximate cause of the injury complained of."

I do charge you that.

The other one has nothing to do with the case now. I am next requested to charge that the use of locomotive engines in the business of railroad companies being lawful, no presumption of negligence arises from the mere fact that fire has been communicated from them. That becomes irrelevant now because they are not charged with negligence with respect to the engines. The negligence charged is only with respect to the right of way and cumbering of it with material.

That, gentlemen, is all, I think, that you need to know to safely and satisfactorily decide this case, and you will take it and decide it.

Mr. Carey: I do not believe I can find any reasonable fault with the charge of the court. I note an objection to the failure to charge the first request—outside of the record.

The Court: Put it right on the record. Note an objection to the refusal to charge the first request, that "Plaintiff's right of action, if any, having accrued September 27, 1908, the law of this State presumes that plaintiff's demands were paid or released within one year thereafter. This presumption has not been rebutted, and the verdict must be for defendant."

That is equivalent to my directing a verdict, which of course I refuse to do, and you have that objection anyway.

Rule to Show Cause.

NEW JERSEY SUPREME COURT.

CHARLES R. CHRISTY, *et al.*, *Plaintiffs,*	In Tort.
vs.	Rule to Show Cause.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendant.*	

The issues joined in the above entitled action having been referred for trial to Honorable William H. Speer, Judge of the Circuit Court of Hudson County, pursuant to the statute in such case made and provided, and application for this rule having been made by the above-named defendant, within six days after the verdict rendered at said trial,

IT IS, on this thirty-first day of December, Nineteen hundred and Fifteen, on motion of Vredenburgh, Wall & Carey, attorneys for said defendant,

ORDERED, that the plaintiffs show cause before the Justices of the Supreme Court, at the State House in the City of Trenton, on the third Tuesday of February, 1916, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the verdict rendered in this cause should not be set aside and a new trial granted.

AND IT IS FURTHER ORDERED that the following objections noted by the defendant at the trial be and the same are hereby expressly reserved as grounds for appeal, to wit:

(1) Objections to the admission in evidence of pages 2075 to 2083, inclusive, of the

proceedings before the Public Service Commission for the Second Department of the State of New York, embodying the statement of Mr. Martin E. McClary, before said Commission.

(2) The objections to the admission in evidence of the communication of A. H. Smith, Vice-President and General Manager of the New York Central & Hudson River Railroad Company, dated January 6, 1909, to the Public Service Commission, Second District, State of New York.

(3) The objections to the refusal of the court to charge defendant's first request.

WILLIAM H. SPEER,
Judge.

Entered Jan'y 3, 1916.
On motion of
VREDENBURGH, WALL & CAREY.

New Jersey State Library

Reasons.

NEW JERSEY SUPREME COURT.

CHARLES R. CHRISTY, *et al.*, *Plaintiffs*, *vs.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendant.*	In Tort. On Rule to Show Cause Reasons.

The defendant assigns the following reasons on the rule to show cause entered herein January 3, 1916, why the verdict in this cause should be set aside and a new trial granted:—

I. Said verdict is against the evidence and against the clear weight of the evidence—

(1) With respect to the cause of the fire which destroyed plaintiff's property.

(2) With respect to the origin of said fire.

(3) With respect to the course of said fire.

(4) With respect to the liability of the defendant for the damages caused by said fire.

(5) With respect to the negligence charged in the plaintiff's declaration.

(6) With respect to the damages alleged to have been sustained by the plaintiffs.

II. That the trial court admitted the following illegal evidence against the objection of defendant—

(1) Exhibit P-8.

(2) Exhibit P-9.

(3) Section 72, of Chapter 130 of the Laws of the State of New York, for the year 1908.

(4) Evidence as to fires alleged to have been started September 19th, 1908.

Reasons

(5) In connection with the fire alleged to have started on the railroad right of way in the month of September, 1908, the court permitted the following question to be answered:

"Q. Do you know whether this train that passed there mid-day, along this railroad's right of way northwest of Mr. Christy's and Mr. Webb's property, threw out sparks and cinders?"

(6) The court permitted the following question to be answered:

"Q. During the month of September, 1909, prior to September 27th, 1908, did you see engines passing along the right of way of this railroad, running along the northwest side of Mr. Christy's and Mr. Webb's land, drop coals, or live coals, from the fire box, and did you see live coals lying in the tracks immediately after a train passed?"

(7) That the court permitted the following question to be answered:

"Q. And did you find fires starting up immediately after that train had passed I amend the question by adding that the question relates to September 1908, prior to the 27th of September, 1908?"

III. The court refused defendant's motion to direct a verdict in its favor on the ground that none of the allegations of negligence set out in the declaration were sustained by the proofs.

IV. There is not in the case sufficient legal evidence of the amount of the damages sustained by the plaintiffs.

V. The verdict is excessive.

Reasons

VI. The verdict was contrary to the charge of the court, in that it appears from a clear preponderance of the evidence that the fire which burned plaintiff's property crossed from the Webb property to the Christy property and thence spread to and burned the lumber mentioned in the declaration.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Rule to Show Cause discharged November Term 1916.

Exhibit P-8.

						Feet	
1 x 2″	—	10/16 Ft.	Spruce Dressed & Bdld.		21.50	6600	$141.90
1 x 4″	—	"	" "	Rough	20.	8000	160.
1 x 3″	—	"	" "	"	20.	2000	40.
1 x 5″	—	"	" "	"	20.	12500	250.
1 x 6″	—	"	" "	"	20.	4200	84.
1 x 8″	—	"	" "	"	21.	3000	63.
1 x 10″	—	"	" "	"	21.	9500	199.50
5/4 x 4″	—	"	" "	"	20.	7300	146.
5/4 x 5″	—	"	" "	"	20.	23200	464.
5/4 x 7″	—	"	" "	"	20.50	15200	311.60
5/4 x 8″	—	"	" "	"	21.	15400	323.40
5/4 x 10″	—	"	" "	"	21.	6500	136.50
2 x 4″	—	"	" "	"	20.	6000	120.
2 x 5″	—	"	" "	"	20.	36000	720.
2 x 5″	—	16 ft	" "	"	20.50	6360	130.38
2 x 6″	—	16 "	" "	"	20.50	13000	266.50
2 x 6″	—	10/13 ft	" "	"	20.	1200	24.
2 x 7″	—	12/16 ft	" "	"	21.	9100	191.10
2 x 8″	—	"	" "	"	21.	27400	575.40
2 x 9″	—	"	" "	"	22.	9000	198.
2 x 10″	—	"	" "	"	21.50	4000	86.
2 x 12″	—	"	" "	"	21.50	1000	21.50
						226,460	4652.78
5/4 x 3″	—	10/16	Spruce D 1 S. & M.		21.50	1000	21.50
5/4 x 7″	—	"	" D 1 S. & M.		22.	16400	360.80
3 x 4″	—	"	" D 4 S.		21.50	2000	43.
5/4″	—	"	Clear Spruce—Rough		28.	23700	663.60
1″	—	"	Cull Spruce—Rough		15.	68300	1024.50
						337,860	6766.18
1 x 7″	—	12/16 ft	Hemlock Rough at		$18.	9600	172.80
1 x 9″	—	"	" " "		18.	30500	549.
1 x 10″	—	"	" " "		18.	70800	1274.40
2 x 4″	—	"	" " "		18.	7800	140.40
2 x 6″	—	"	" " "		18.	1680	30.24
2 x 8″	—	"	" " "		18.	5200	93.60
2″	—	Hemlock Mixed Widths			18.	32700	588.60
						158280	$2849.04
1″ Cull Hemlock Rough					12.	36870	442.44
1″ Cull Pine Rough					17.	7250	123.25
						202400	
Cedar Shingle					4.	30000	120.
							3534.73
Spruce Lumber (Sheet #1)						337.860	6766.18
						540.260	10300.91
Less for local sales of lumber from siding from July 13, 1908 to Sept. 15, 1908					4784 Ft.		95.38
							10,205.53
Sheet #2 Cost of loading 25¢ per 1000 ft.							135.
							10,070.53

Exhibit P-8

Spruce S 2 S. & M.				$22.	135	ft	2.97
9" & 10"	Spruce Rough			22.	50		1.10
1 x 7"	" "			20.50	20		.41
	Hemlock "			18.	40		.72
1 x 12" —	13 ft. Spruce Rough			21.	39		.82
1 x 10" —	" " "			21.	22		.46
1 x 4" —	" " "			20.	4		.08
1 x 7" —	" " "			20.50	8		.16
5/4 x 5" —	" " "			20.	27		.54
3 x 4" —	" D. 4 S. Spruce			21.50	26		.56
2 x 8" —	16 ft Spruce Rough			21.	85		1.79
2 x 9" —	13 ft. Hemlock "			18.	765		13.77
2 x 6" —	16 ft Spruce "			20.50	288		5.90
2 x 4"	Odd Lengths Hemlock Rough			18.	94		1.69
2 x 5" —	13 ft. Spruce Rough			20.	173		3.46
Different Width	" "			21.	93		1.95
1 x 10" —	13 ft. " "			21.	43		.90
2 x 6" —	16 ft. " "			20.50	320		6.56
3 x 4" —	16 ft. " "	D. 4 S.		21.50	213		4.58
2 x 8" —	16 ft. " "			21.	42		.88
5/4 x 8" —	" " "	Spruce Rough		21.	40		.84
5/4 x 9" —	" " "			22.	30		.66
1 x 8" —	" " "			21.	84		1.76
1 x 7" —	13 ft. " "			20.50	59		1.21
1 x 12" —	" " "			21.	26		.55
2 x 6" —	" " "			20.	26		.52
2 x 4" —	14 ft. Hemlock Rough			18.	19		.34
2 x 9" —	12/14 ft. " "			18.	747		13.45
2 x 10" —	12/14 ft. " "			18.	1070		19.26
2 x 8" —	13 ft. " "			18.	17		.31
1 x 10" —	13 ft Spruce			21.	11		.23
2 x 6" —	13 ft, "			20.	39		.78
	Cull Spruce			15.	78		1.17
1 x 10" —	16 ft. Spruce Rough			21.	27		.57
2 x 4" —	12 ft. Hemlock "			18.	24		.43
					4784		91.38
	1000 shingles						4.
							$95.38

Exhibit P-9.

			Spruce			Stock		July 13th, 1908	
1	x	2″	—	10/16 ft.	Spruce,	S. I. S. & Bdld.	Old	6,600 ft.	Siding
1	x	4″	—	“	“	Rough	Old	500	“
1	x	4″	—	“	“	“	New	7,500	“
1	x	3″	—	“	“	“	New	2,000	“
1	x	5″	—	“	“	“	New	12,500	“
1	x	6″	—	“	“	“	New	4,200	“
1	x	7″	—	“	“	“	New	10,500	Mill
1	x	8″	—	“	“	“	New	3,000	Siding
1	x	10″	—	“	“	“	Old	2,500	“
1	x	10″	—	“	“	“	New	7,000	“
5/4	x	3″	—	“	“	“	New	600	Mill
5/4	x	4″	—	“	“	“	Old	300	Siding
5/4	x	4″	—	“	“	“	New	7,000	“
5/4	x	5″	—	“	“	“	New	7,500	“
5/4	x	5″	—	“	“	“	Old	15,700	“
5/4	x	7″	—	“	“	“	Old	5,000	“
5/4	x	7″	—	“	“	“	New	10,200	“
5/4	x	8″	—	“	“	“	Old	4,500	“
5/4	x	8″	—	“	“	“	New	10,900	“
5/4	x	10″	—	“	“	“	New	6,500	“
5/4	x	3″	—	“	“	S. I S. & M.	Old	1,000	“
5/4	x	9″	—	“	“	S. I S. & M.	Old	1,900	Mill
5/4	x	7″	—	“	“	S. I S. & M.	Old	16,400	Siding
5/4″			Clear	“	“		Old	23,700	“
3	x	4″	—	10/16 ft.	“	S. 4 S.	Old	2,000	“
2	x	4″	—	“	“	Rough	New	6,000	“
2	x	5″	—	“	“	“	Old	31,000	“
2	x	5″	—	“	“	“	New	5,000	“
2	x	5″	—	16 ft.	“	“	Old	6,360	“
2	x	6″	—	16 ft.	“	“	New	13,000	“
2	x	6″	—	10/13 ft.	“	“	New	1,200	“
2	x	7″	—	12/16 ft.	“	“	Old	9,100	“
2	x	8″	—	“	“	“	Old	27,400	“
2	x	9″	—	“	“	“	Old	9,000	“
2	x	10″	—	“	“	“	Old	4,000	“
2	x	12″	—	“	“	“	Old	1,000	“
2″ x all mixed widths						“	New	10,800	Mill
1″ Cull Spruce							Old	68,300	Siding
1″ “ “							New	20,800	Mill
1″ shorts “ Old 2,500 ft. New 3,500 ft.								6,000	“

Siding 540,200 ft. lumber
30,000 shingles

Exhibit P-9

				Hemlock	Stock		July 13, 1908.	
1	x	4″	—	10/16 ft. Hemlock Rough		Old	2,000 ft.	Mill
1	x	4″	—	" " "		New	6,500	"
1	x	5″	—	" " "		Old	2,200	"
1	x	5″	—	" " "		New	7,000	"
1	x	6″	—	" " "		Old	6,800	"
1	x	6″	—	" "		New	12,000	"
1	x	7″	—	" " "		Old	9,600	Siding
1	x	7″	—	" " "		New	14,400	Mill
1	x	8″	—	" " "		Old	11,000	"
1	x	8″	—	" " "		New	24,000	"
1	x	9″	—	" " "		Old	8,600	Siding
1	x	9″	—	" " "		New	21,900	"
1	x	9″	—	" " "		New	350	Mill
1	x	10″	—	" " "		Old	19,000	Siding
1	x	10″	—	" " "		New	51,800	"
2	x	4″	—	" " "		Old	5,500	"
2	x	4″	—	" " "		New	2,300	"
2	x	6″	—	" " "		Old	1,680	"
2	x	8″	—	" " "		Old	5,200	"
2″				mixed widths " "		New	32,700	"
2″				mixed widths " "		New	13,600	Mill
1″				Cull Hemlock " "		Old	36,870	Siding
1″				Cull Hemlock Rough		New	21,000	Mill
Pine								
1	″			Pine Rough		Old	14,000	Mill
1	″			" "		New	87,400	"
5/4″				" "		Old	4,500	"
5/4″				" "		New	27,700	"
6/4″				" "		Old	2,550	"
2	″			" "		New	14,400	"
1	″	Cull	Pine	"		Old	8,000	"
1	″	"	"	"		New	41,800	"
1	″	"	"	"		Old	7,250	Siding
Cedar Shingles							30,000	Siding

Exhibit P-11.

New York, February 6th, 1909.

MARTIN E. MCCLARY, Esq.,
65 East Maine St.,
Malone, N. Y.

Dear Sir:—

On behalf of my clients, C. R. CHRISTY & SON, I herewith send you their claim against the New York Central & Hudson River Railroad Co. for damages sustained by them through the loss of their lumber at the siding near Long Lake West, Hamilton County, N. Y. which was destroyed by fire on September 27th, 1908 through the fault of the New York Central & Hudson River Railroad Co.

The claim of Mr. Charles R. Christy for damages to his individual property, I will prepare and present when I obtain further data.

Trusting to receive a prompt settlement of this claim, I remain,

Yours very truly,

ENC. EDWARD V. THORNALL.

Exhibit P-12.

Malone, N. Y., February 8th, 1909.

Mr. EDWARD V. THORNALL,
Counsellor at Law,
50 Church St.,
New York City.

Dear Sir:—

We are in receipt of your letter of February 6th, enclosing statement of lumber owned by C. R. Christie & Son, lost at Long Lake West, amounting to $10,169.13. We will file the claim and give it consideration. The enclosed letter to McFarland, Taylor & Costello was enclosed to us by error.

Very truly yours,

McCLARY & ALLEN.

Enclosure.
M/H

Exhibit P-13.

New York, March 17th, 1909.

MARTIN E. MCCLARY, Esq.,
65 East Maine St.,
Malone, N. Y.

Dear Sir:—

May I trouble you to call in and see me the next time you are in this City as there are some things in the matter of the claim of Charles R. Christy & Son that I would like to talk over with you before I take any further steps in the matter.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-14.

New York, May 18th, 1909.

MARTIN E. MCCLARY, Esq.,
Malone, N. Y.

Dear Sir:—

I have been waiting to hear from you regarding the proposition I laid before you when you called on me last April. I have had an estimate made by Mr. Christy of the damage done by the fire to his land and standing timber. This is only approximate and may be a little greater or less, the survey having not yet been fully completed. The green timber destroyed was about 955 acres which he values at $20. an acre making a total of $19,100. The land reburned amounted to about 1290 acres acres which he values at $8. an acre makes a total of $10,320.00, thus making the total damages to the standing timber and land $29,420. This of course, has nothing to do with the lumber that was stored at the station.

I should be pleased to hear from you at an early date.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-15.

Malone, N. Y., May 19th, 1909.

Mr. Edward V. Thornall,
50 Church St.,
New York City.

Dear Sir:—

I have your letter of May 18th, matter of Mr. Christy's claims. I note what you say about his damage. I have the matter up with the company and hope before long to name some proposition.

Very truly yours,
M. E. McCLARY.

M/H

Exhibit P-16.

Malone, N. Y., May 26th, 1909.

Mr. Edward V. Thornall,
50 Church St.,
New York City.

Dear Sir:—

I shall be in New York on Thursday, June 3rd, and shall be very glad if you will take lunch with me at the Murray Hill Hotel at 12.30 and we will talk over the Christy matter. I would be glad if Mr. Christy would join us. Please ask him to do so. If one O'clock is a better hour, please send a note to me there.

Very truly yours,
M. E. McCLARY.

M/H

Exhibit P-17.

New York, May 27th, 1909.

MARTIN E. MCCLARY, Esq.,
Malone, N. Y.

Dear Sir:—

Replying to your letter of the 26th inst. I would say that I shall be pleased to meet you at the Murray Hill Hotel on next Thursday June 3rd at 12.30 P. M. Mr. Christy is out of the City and it is doubtful if he will return by that date. If he does return, I will give him your message.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-18.

New York, June 22nd, 1909.

MARTIN E. MCCLARY, Esq.,
Malone, N. Y.

Dear Sir:—

As requested by you I submitted your offer of $6500.00 on behalf of the railroad to Mr. Christy in settlement of the damages both to his standing timber and to the lumber belonging to C. R. Christy & Son at Long Lake West, which offer Mr. Christy has unqualifiedly refused to accept as the damage was greatly in excess of that amount.

He has had made a survey of the timberlands from which it appears that the fire of 1908 burned over 2012 20/100 acres of which 1151 10/100 acres had been previously burned in 1903. The remaining 861 10/100 acres was green timber not touched by the 1903 fire.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-19.

Malone, N. Y., July 7th, 1909.

Mr. Edward V. Thornall,
50 Church St.,
New York City.

Dear Sir:—

Referring to your letter of June 22nd, matter of Mr. Christy's claim against the New York Central, would say: I am going to make one more offer before letting the matter drop. Will an offer of $7500. take care of the matter? If not, there is no further use in our looking to a settlement, I think.

Very truly yours,
M. E. McCLARY.

M/H

Exhibit P-20.

New York, August 13th, 1909.

Martin E. McClary, Esq.,
Peoples Bank Building,
Malone, N. Y.

Dear Sir:—

On my return to the City a few days ago I found awaiting me your letter submitting an offer of $7500. in settlement of Mr. Christy's claim against the New York Central. I submitted your proposition to Mr. Christy and am instructed to say that the same will not be entertained as the amount of it is far below the actual loss he will be able to prove.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-21.

Malone, N. Y., Sept. 22, 1909.

Mr. Edward V. Thornall,
50 Church St.,
New York City.

Dear Sir:—

I find that I am able to be in New York next Monday, the 27th, and if you are in town will call you up and arrange for an interview. If, on receipt of this letter, you find it impossible to make an appointment for that day, write us by return mail.

Very truly yours,
M. E. McCLARY.

M/H

Exhibit P-22.

New York, September 23rd, 1909.

Martin E. McClary, Esq.,
Malone, N. Y.

Dear Sir:—

I am in receipt of your favor of the 22nd inst. and in reply thereto would say that I shall be at my office next Monday the 27th, and will be pleased to meet you at that time. Can you not arrange to come about one o'clock and take lunch with me.

Yours very truly,
EDWARD V. THORNALL.

Exhibit P-23.

Laws of the State of New York, Chapter 130 131st Session 1908 entitled "An Act for the Protection of the Forests, Fish and Game of the State" constituting Chapter 31 of the General Laws. Became a law April 14th, 1908.

SECTION 34. FOREST PRESERVE.— The forest preserve shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

1. Lands within the limits of any village or city, and
2. Lands not wild lands acquired by the state on foreclosure of mortagages made to loan commissioners.

Exhibit P-24.

SECTION 72. RAILROADS IN FOREST LANDS.—Every railroad company shall, on such part of its road as passes through forest lands or lands subject to fires from any cause, cut and remove from its right of way along such lands, at least twice a year, all grass, brush and other inflammable materials. Where the railroad runs through forest lands in counties containing part of the forest preserve, it shall so cut and remove the same from its right of way whenever required by the commissioner; employ in seasons of drought and before vegetation has revived in the spring, sufficient trackmen to promptly put out fires on its right of way; provide locomotives thereon with netting of steel or iron wire so constructed as to give the best practicable protection against the escape of fire and sparks from the smoke stacks thereof and adequate devices to prevent the escape of fire from ash pans and furnaces which shall be used on such locomotives. The public service commission must upon the request of the forest, fish and game commissioner, and on notice to the railroad company or companies affected, require any railroad company having a railroad running through forest lands in counties containing parts of the forest preserve, to adopt such devices and precautions against setting fire upon its line in such forest lands as the public interest requires. No railroad company or employee thereof shall deposit fire coals or ashes on its track or right of way near such lands. In case of fire on its own or neighboring lands, the railroad company shall use all practicable means to put it out. Engineers, conductors or trainmen discovering or knowing of fires in fences or other material along or near the right of way of the railroad in such lands, shall report the same at the first station to the station agent, and such station agent shall forthwith

notify the nearest fire warden or game protector thereof, and use all necessary means to extinguish the same. Any railroad company failing or neglecting to comply with any of the provisions of this section, or any order of the public service commission made pursuant to the provisions of this section, shall be liable to a penalty of one hundred dollars for each day that it continues a violation thereof, and any officer or employee of a railroad company violating any provisions of this section or neglecting to comply with any requirement of the public service commission duly ordered, shall be liable to a penalty of one hundred dollars for every such violation. The supreme court may on notice to the persons or corporations affected enforce compliance with any such order of the public service commission.

New Jersey Court of Errors and Appeals.

CHARLES R. CHRISTY *et al.*, Plaintiffs-Respondents, *against* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.	On Appeal.

BRIEF OF PLAINTIFFS-RESPONDENTS.

Statement.

This appeal brings up for review a judgment entered in the Supreme Court.

The verdict upon which the judgment was entered was rendered on December 24, 1915, and thereafter the plaintiff obtained a rule to show cause why a new trial should not be granted, reserving three exceptions (Printed Case, page 544).

The rule was argued at the June Term, 1916, and dismissed at the November Term, 1916.

The exceptions reserved and which are the grounds of this appeal are as follows:

1. Admission of a communication by A. H. Smith, Vice-President and General Manager of the defendant company, dated January 6, 1909, addressed to the Public Service Commission, Second District, State of New York.

2. The admission in evidence of a statement made to the same Commission by Mr. McClary.

3. The refusal of the Court to charge,

> "Plaintiff's right of action, if any, having accrued, September 27, 1908, the law of this State presumes that plaintiff's demands were paid or released within one year thereafter. This presumption has not been rebutted, and the verdict must be for the defendant."

This action was brought by plaintiffs, residents of the State of New Jersey, against the defendant to recover the value of certain cut and piled timber situated at Long Lake West, Hamilton County, New York, which was destroyed by fire on Sunday, September 27, 1908. The action was commenced by the issuance of a summons dated November 1, 1909.

The defendant filed several pleas, one of which was a plea of the Statute of Limitations.

The plaintiff demurred to this plea and the demurrer was argued in the Supreme Court at the February, 1910 Term and was sustained at the June Term, 1910.

Thereafter the defendant pleaded over and the matter was brought on for trial in the Bergen Circuit in May, 1912. This trial resulted in a verdict for the plaintiffs for the same amount as the judgment now under review.

Defendants obtained a rule to show cause which was made absolute at the November Term, 1914, and the matter was then by stipulation, transferred to the Hudson County Circuit and brought on for trial in December, 1915, and resulted in another verdict for the plaintiff upon which the present judgment was entered.

Thereupon the defendant obtained a second rule to show cause, reserving the three exceptions above set forth, which was brought on for argument at the June Term, 1916, and was dismissed at the November Term, 1916.

Thereupon the present appeal was taken.

At the last trial, which resulted in the judgment under review, the issue was whether or not the defendant company was negligent in the maintenance of its right of way by reason of which negligence the plaintiff sustained the damage sued for. (See Judge's Charge, page 534.)

The plaintiff introduced considerable testimony showing that the right of way of the defendant at and near the place where the lumber was piled was filled with combustible material. The plaintiffs also put in evidence, Section 72 of the General Railroad Law of the State of New York, which will be found at page 560, Printed Case. This Statute provides as follows:

> "Every railroad company shall, on such part of its road as passes through forest lands or lands subject to fires from any cause, cut and remove from its right of way along such lands, at least twice a year, all grass, brush and other inflammable materials. * * * Employ in seasons of drought and before vegetation * * * sufficient trackmen to promptly put out fires on its right of way; * * *. In case of fire on its own or neighboring lands, the railroad company shall use all practicable means to put it out. Engineers, conductors or trainmen discovering or knowing of fires in fences or other material along or near the right of way of the railroad in such lands, shall report the same at the first station to the station agent, and such station agent shall forthwith notify the nearest fire warden or game protector thereof, and use all necessary means to extinguish the same."

The same section also contained the following provision:

> "The Public Service Commission must upon the request of the forest, fish and game commissioner, and on notice to the railroad company or companies affected, require any rail-

road company having a railroad running through forest lands in counties containing parts of the forest preserve, to adopt such devices and precautions against setting fire upon its line in such forest lines as the public interest requires."

It was proven and also admitted that part of the forest preserve was in Hamilton County (p. 347, lines 10, &c.).

It appears that after the fire of September 27, 1908, the Public Service Commission of the Second District of the State of New York, upon the request of the forest, fish and game commissioner, began an investigation into the forest fires to ascertain what the causes were, and to what extent railroad operations were responsible for the fires. (Printed Case, p. 339, lines 1 to 20, &c., p. 346, lines 33 to 40, and p. 347, lines 1 to 15, also p. 350, lines 39 and 40, p. 351, lines 1 to 16.)

That the Public Service Commission, Second District of New York, made an order directing the defendant company and others to show what devices and precautions were being used by them against setting fires upon their respective lines in forest lands, &c. (See Order, page 336, lines 25, etc.)

That on October 12, 1908, the defendant appeared in response to such order, by its general attorney, Mr. A. S. Lyman. (Page 300, lines 15, etc. Also page 292, lines 25, etc.)

That the defendant company also appeared by Martin E. McClary (page 302, lines 36, etc., and page 303, lines 1 to 10, etc., and page 307, lines 9 to 21).

Mr. A. H. Smith Vice-President and General Manager testified as follows:

"Q. Mr. Lyman, I believe, is also in the em-

ploy of the defendant company? A. Yes, sir; as general attorney.

Q. And a Mr. McClary is also employed by the defendant company, is he not? A. Yes, sir.

Q. In what capacity? A. Local attorney.

Q. Are you familiar with his duties and powers? A. Only in a general way. Mr. McClary reports in to the Legal Department, and my only knowledge of Mr. McClary and of Mr. Lyman, for that matter is as counsel; what their duties are, that can best be testified to by Vice-President of Law, who is the head of that department" (page 307, lines 9, &c.).

Mr. Lyman testified as follows:

"Q. Was Mr. Martin E. McClary authorized to appear for the defendant company in a proceeding had before the Public Service Commission of the Second District of the State of New York, entitled 'In the matter of fire prevention along the lines of the railroads in the Adirondack Forest preserves' instituted by the State Forest, Fish and Game Commissioners, on October 12, 1908, and continued from time to time for several months thereafter? A. Yes, sir."

It further appears that on January 6, 1909, Mr. A. H. Smith, the Vice-President and General Manager, made a statement in writing to the Public Service Commission of the Second District in connection with the said proceedings (page 300, lines 23, etc.; also pages 301 and 302).

The written statement is incorporated in the question asked of Mr. Lyman beginning at line 24, page 300, and is also incorporated in a question asked of Mr. Smith at line 20, page 311.

Counsel for the defendant has inaccurately stated the ground of his objection to this statement for the reason that the statement itself was not admit-

ted, excepting as it was incorporated in these two questions.

There was also placed in evidence, by consent of counsel for the defendant, except as to materiality, competency, and/or relevancy, a statement made by Mr. McClary to the Public Service Commission during the same proceedings. The record does not definitely fix the date when this statement was made. It was known as pages 2075 to 2083 of the records of the Public Service Commission (page 334, lines 10, etc.). Its admission was preceded by the introduction, by consent, of a statement made by Mr. McClary at the former trial which will be found at pages 338, 339 and 340, Printed Case.

Mr. McClary's statement will be found beginning at page 341, lines 25, &c. From this statement it is clearly apparent that it was made subsequent to the communication of Mr. Smith above referred to. It will be noted that Mr. Smith in his written statement says:

> "The details of this plan will be offered in evidence at the hearing in Albany" (page 300, lines 40, etc.).

And Mr. McClary's statement is clearly a statement of some of the details of the plan outlined by Mr. Smith.

The only parts of either Mr. Smith's statement or Mr. McClary's statement which it was contended were immaterial were the parts relating to the condition of defendant's right of way and its complying with the provisions of the law to supply sufficient trackmen to promptly put out fires and using all other practical means to put out fires, also in so far as such statements would indicate that the defendant company had not strictly complied with the provisions of Section 72 of the Railroad Law above quoted, to wit:

"Shall report the same at the first station to the station agent, &c."

The context of the statement so far as it related to the engines, or improvements to be made in engines, are admittedly not material in view of the Court's charge. See statement by Trial Court, page 303, lines 38, etc., also page 334, lines 20, etc., page 530, lines 18, etc.; Court's charge, page 534, lines 10, etc.

There was also offered in evidence Chapter 429, Laws of 1907, which Act took effect June 6, 1907, and is known as the *Public Service Commissions Law,* and it was conceded that in accordance with the provisions of that Act the Public Service Commission had the power to conduct the hearing in question.

Section 16 of this Act provides that all proceedings of each commission shall be public records.

Counsel for the appellant has overlooked the fact that the plaintiff did not introduce the statement made by Mr. Smith in the same manner in which they introduced the statement made by Mr. McClary.

Mr. Smith's written statement came before the Court and jury in response to the following questions addressed to Mr. Lyman, the general attorney of the railroad company, which was:

"Q. Do you know whether or not on or about January 6, 1909, Mr. A. H. Smith, the Vice-President and General Manager of the defendant company, ever made a statement to the Public Service Commission of the Second District of the State of New York in writing, in which he stated as follows: (Here follows the alleged contents of the written communication.) A. Mr. A. H. Smith, the Vice-President and General Manager of the defendant company, made a statement to the Public Service

> Commission in writing which has already been read in substance to him upon his examination here this morning—subject to correction."

And also in response to the following question addressed to Mr. Smith:

> "Q. Did you, on or about January 6, 1909, submit to the Public Service Commission, Second Department, State of New York, a communication which reads as follows: Mr. Wright—which is exactly the same as I read in Mr. Lyman's deposition? A. I did."

The statement as a separate instrument or document was not introduced or offered in evidence.

The only possible objection which could be made to these questions or either of them would have been lack of materiality or relevancy.

Nevertheless, at the trial both counsel and the Court discussed the admissibility of these questions in the light of their being admissions and the written statement of Mr. Smith and the oral statement of Mr. McClary were dealt with, more or less, as one question by the Court.

POINT I.

The communication of Mr. Smith and the statement of Mr. McClary were clearly admissible in evidence.

The defendant in his brief under Point I has stated that this communication of Mr. Smith and the statement of Mr. McClary were not legal evidence constituting an admission of negligence in either the construction or operation of defendant's local agents. See defendant's brief, Point I.

The plaintiff, in view of the charge of the Court and the theory upon which the case was submitted

to the jury, does not attempt to argue this question, but insists that the said communication and statement were both legal evidence tending to prove negligence of the defendant in the care and maintenance of its right of way;

And also, negligence in complying with its legal duty to supply sufficient trackmen to promptly put out fires on its right of way;

And the failure to use practical means to put out such fires;

And failure to report this fire in the manner directed by Section 72 of the Railroad Law of the State of New York, above quoted in full.

Turning to Mr. Smith's communication, page 300, etc., I would refer to Paragraph 2, Page 301 in which Mr. Smith says as a part of his plan to prevent the spread of fire from the defendant's right of way,

> "A clean right of way, and the maintenance of the same in that condition, a clean right of way to consist of one from which all dead grass, weeds, stumps and other dead and combustible material have been removed; this not to include the removal of turf or soil which in times of extreme dryness might be considered as combustible. The maintenance to include the burning of the right of way once or twice a year, the latter preferably; Also the cutting and removal of the grass twice a year."

It is submitted that this statement particularly taken in connection with Mr. Smith's testimony found on page 313, lines 1, &c., which is as follows:

> "Take that section of track in there, where we say we will clear our right of way. That is a joke, for the reason, that you go through the forest preserves of the State of New York, and it is piled right up to our fence, with refuse. They can't clear the way under the

law. So it is a joke for us to clear our right of way."

Attention is again called not only to the common law duty of the defendant to exercise reasonable care in keeping its track clear of combustible matter, (Judge's Charge, page 534, line 30, &c.), but to the special duty imposed by Section 72 of the Railroad Law of the State of New York, Exhibit P-4, page 560, which requires the railroad company to "cut and remove from its right of way along such lands at least twice a year, all grass, brush and other inflammable materials."

Mr. Smith in his statement says that further details of his plan would be offered to the Commission, and Mr. McClary in accordance therewith said among other things,

> "Our proposition is this * * * then we propose to do this, to clean our right of way; we apologize; I have apologized to Mr. Osborn and Mr. Sague and Mr. Olmstead because they were there with reference to the condition of our right of way. I was ashamed; it was bad, and it was one of the causes of the fire this summer in the right of way. We say we will take care of that. We ask and will ask and we shall say that the proper way to take care of that is to burn it in the opening of the Spring and we shall say it can be done with perfect safety; and we shall go further than that; we shall show that any man of ordinary ability, mental ability, must know that it can be done," &c. Page 343, lines 18, &c.

Mr. McClary further stated to the Commission, See Page 343, lines 32, &c.,

> "Of course, two men could not go out and burn that right of way over with safety, and the wind blowing, and everybody knows that. We say that we will clean our right of way

> down to grass; and the initial expense for that for the first year is something like thirty or forty thousand dollars, &c., and we will clean that thoroughly; we will take out the stumps and the trees, get it down clean, and we will keep it clean."

There can be no question whatever that if this communication and Mr. McClary's statement are competent, as will be hereafter demonstrated, that they were relevant and material in the above respects, irrespective of their relevancy or materiality with respect to the condition of the engines.

Mr. Smith's statement in Paragraphs 3, 4 and 5 relates to what he proposes to do to prevent fires from spreading from the right of way to other property.

(1) The organization of a fire patrol along certain lines;

(2) To place the patrol service under the direct supervision of the supervisor of tracks, a local official who can easily be reached;

(3) The establishment of a fire service; Page 301 and 302.

And Mr. McClary elaborating on these various points mentioned above, stated page 344, lines 10, &c.:

> "We offer to put on a patrol, that, if we did not keep it clean, could take care of the fires. * * * We will so arrange it that our plan calls for that, that the person in charge, not somebody down in New York City, or out West, but that the man on the spot, the supervisor of tracks, has full power to increase that patrol as the needs come. Not only that, but we will establish telephones once in every five miles * * *. Now we say that with this scheme—I wouldn't ask you to take my word

> for it, but I do ask you to take the General Manager's statement, the General Manager of the New York system."

From the foregoing it will appear that Mr. McClary's statement was clearly an amplification of the written statement made by Mr. Smith. Taking the two together, it is apparent that Mr. McClary took up each point made by Mr. Smith in the order made by Mr. Smith and amplified it.

The plaintiff contends that both the communication of Mr. Smith and the statement of Mr. McClary were statements made by them while acting as agents of the defendant and were within the scope of their respective employments at the time they were made.

Mr. Lyman was general attorney for the defendant (page 307, line 10). Mr. Lyman was representing the defendant before the Public Service Commission (page 292, page 300 and page 312), which Commission was at that time examining into the cause of the fire in question among other fires, and on such investigation examined witnesses in regard to the fire in question. (See Admission of Counsel, pages 350 and 351.) It also appears that Mr. McClary was in the employ of the defendant company as local attorney and appeared before the said Commission in the said matter as counsel for said defendant (pages 289 and 290, page 307, also see Admission of Counsel, pages 338, 339 and 340).

It further appears that the said investigation resulted in an order, with which the defendant subsequently complied (page 306, lines 18, &c., page 310, lines 25, &c.).

There can be no doubt but that Mr. Smith and Mr. McClary were the duly authorized agents of the defendant and that communication of Mr. Smith to the Pulic Service Commission was within

the scope of his authority and that the statement made by Mr. McClary was within the scope of his employment.

A statement made by a general agent of a corporation in the course of his employment as to facts within his official knowledge touching the status of a matter entrusted to him is admissible in evidence against a corporation.

Agricultural Ins. Co. v. Potts, 55 N. J. L., 158;
Jones v. Mt. Holly Water Co., 93 Atl. Rep., 860;
Sussex County Mutual Ins. Co. v. Woodruff, 26 N. J. L., 541;
Runk v. Ten Eyck, 24 N. J. L., 756;
Huebner v. Erie, 69 N. J. L., 327;
Blackman v. West Jersey R. R. Co., 68 N. J. L., 1;
Carey v. Wolff & Co., 72 N. J. L., 510;
Smith v. Delaware & Atlantic Telegraph & Telephone Co., 64 N. J. Eq., 770;
Rowan v. Yarnell, 90 Atl. Rep., 730, N. J.
Cook v. Barr, 44 N. Y., 157;
Morse v. Conn. River Ry. Co., 6 Grey (Mass.), 450;
16 Cyc., 1019;
16 Cyc., 967 and cases cited;
Binewicz v. Haglin, 103 Minn., 97, 115 N. E., 271;
Simon v. Etgen, 213 N. Y., 598;
Ansell v. Cleveland, 79 Atl. Rep., 19;
Templar v. See, 103 N. E., 1091;
James v. Boston Elec. R. R. Co., 87 N. E., 476;
Kitchen v. Robbins, 29 Georgia, 713.

It is not necessary that the facts should be within his knowledge.

Chapman v. Wisconsin, 26 Wis., 295;
Kitchen v. Robbins, 29 Georgia, 713;
Potts v. Agricultural Ins. Co., 55 N. J. L., 158.

None of the cases cited by the defendant in his brief under Point II are in point, but all or nearly all adopt and state the rule contended for by the plaintiff, but only reject it in the particular cases because either the admission was not within the scope of the agent's authority, or, as in the case of *Binewicz* v. *Haglin*, 103 Minn., 297, upon the ground that liability for negligence may not be based on an admission alone. In that case the only evidence of negligence was the alleged admission, and the case turned upon that point. The general rules laid down are those urged by the plaintiff, and plaintiff has cited this case as a precedent for its contention. Another class of cases is cited by the defendant, namely, those in which the admission was by its terms, either expressed or which could not be misunderstood, limited to the particular action in which it was made.

POINT II.

The defendant was not co-operating with the Public Service Commission of the State of New York.

Defendant devotes a large part of his brief and all of Point IV in an effort to demonstrate that the statements made by Mr. Smith and Mr. McClary were made in a proceeding and investigation in which the defendant was fully *co-operating* with the Public Service Commission.

A mere statement of the order and of the proceedings in question, and particularly of the state-

ments made by Mr. McClary to the Public Service Commission and the statement made on the previous trial which was offered in evidence and is found on page 338, Printed Case, clearly shows that there was anything but *co-operation* between the Public Service Commission and the railroad. The Public Service Commission was contemplating and subsequently did take radical measures, which imposed a great expense upon the defendant company, in an effort to prevent future fires. On the other hand, the Railroad Company was contesting every effort of the Public Service Commission and was endeavoring to pursuade the Commission to depart from the plans which it evidently had in view to prevent fires and adopt the railroad's suggestions. It appears from the testimony that the Commission did not co-operate with the railroad and did not adopt the railroad's suggestions, but against the railroad's strong opposition made an order requiring the burning of oil over a certain portion of the lines during the months when the danger from fires existed.

It would be just as logical to say that the Public Service Gas Company was co-operating with the Public Utility Commission of the State of New Jersey and with the Supreme Court and the Court of Errors during the pendency of the so-called gas rate case which resulted in a very substantial reduction of the rates charged by the Public Service Gas Company for gas. The fallacy of this contention is so apparent that it does not seem worthy of further comment, except to say that Mr. Smith's communication was *not* made in response to a request of the Public Service Commission. The evidence of Mr. Smith is that his communication was made at the suggestion of his staff officers:

"Q. And it was at the suggestion, not of the

> persons who are represented of record there, but of other employees? A. My staff officers. They wanted us to do something, and we said we will do anything we can, not that we believe it will do any good, but, we will just do it."

Page 312, lines 25, &c., also see subsequent answer on page 313.

POINT III.

The Trial Court's refusal to charge in accordance with defendant's request was correct.

This request was in the following language:

> "Plaintiff's right of action, if any, having accrued September 27, 1908, the law of this State presumes that plaintiff's demands were paid or released within one year thereafter. This presumption has not been rebutted, and the verdict must be for the defendant" (page 543).

It appears that the defendant in the first instance pleaded the Statute of Limitations as one of its defenses. Plaintiff demurred to this plea and the Supreme Court sustained the demurrer. The opinion is not reported, but was filed June 16, 1910. The substance of the opinion is printed in full at page 33 of defendant's brief, with the exception that the Court cited at the end of the opinion the case of *Gulick* v. *Loder*, 1 Green, 71.

After the demurrer was sustained defendant pleaded over in accordance with the opinion of the Supreme Court and filed two special pleas, one of *payment* and one of *release*.

To meet these pleas the plaintiff proved that the defendant had not paid the plaintiff or released it,

but that immediately after the fire he consulted his attorney, Mr. Edward V. Thornall, and turned the matter over to him; that the claim has never been paid, and that the plaintiff had never released the company (page 63).

Mr. Edward V. Thornall, the New York attorney for the plaintiff, was called and examined and there was placed in evidence Exhibits P-11 to P-22, both inclusive, the first being a letter written by Mr. Thornall to Mr. Martin E. McClary under date of February 6, 1909, to which was attached an itemized claim for the damages sustained by reason of the burning of the lumber in question.

P-12 is a letter from Messrs. McClary & Allen addressed to Mr. Thornall dated February 8, 1909, acknowledging receipt of the claim; P-13 is a letter from Mr. Thornall to Mr. McClary, dated March 17, 1909; P-14 is a letter from Mr. McClary to Mr. Thornall, dated May 18, 1909; P-15 is a letter from Mr. McClary to Mr. Thornall, dated May 19, 1909; P-16 is a letter from Mr. McClary to Mr. Thornall, dated May 26, 1909; P-17 is a letter from Mr. Thornall to Mr. McClary, dated May 27, 1909; P-18 is a letter from Mr. Thornall to Mr. McClary, dated June 22, 1909; P-19 is a letter, dated July 7, 1909, to Mr. Thornall from Mr. McClary; P-20 is a letter from Mr. Thornall to Mr. McClary, dated August 13, 1909; P-21 is a letter, dated September 22, 1909, from Mr. McClary to Mr. Thornall, asking Mr. Thornall to make an appointment to meet Mr. McClary on September 27, 1909; P-22 is a letter, dated September 23, 1909, from Mr. Thornall to Mr. McClary confirming the appointment requested by Mr. McClary in the preceding exhibit.

Mr. Thornall testified that, in addition to the correspondence, he had a conference with Mr. McClary in his office in New York City sometime in April,

1909 (page 95, lines 1, &c.), also a conference with Mr. McClary at the Murray Hill Hotel in New York City on June 30, 1909 (page 95, lines 33, etc.); that in the middle of September, 1909, he had seen Mr. McClary at Malone (page 95, lines 35, etc.); that at that time they talked about this claim and Mr. McClary requested Mr. Thornall not to commence any action or take any steps until he, Mr. McClary, had consulted with the railroad officials (page 97, lines 1, etc.); that he again heard from Mr. McClary in New York on the 27th of September, 1909, at which time Mr. McClary informed him by telephone that there was no use in continuing the negotiations any further (page 97, lines 20, etc.); that very soon thereafter this suit was started (page 97, lines 30, etc.).

The defendant at the close of the testimony moved for a direction of a verdict in its favor upon a number of grounds among which was the following:

> "And I also move for a direction of a verdict in favor of the defendant because the action was brought too late, after the expiration of a year from the date of the fire, and on the theory that the presumption has not been overcome by the proof which the plaintiff has put in the case" (p. 526, lines 5, etc., and p. 530, lines 32, etc.).

The Court, passing upon this motion, says:

> "Now, the other portion of your motion was as to this question of payment or release. I am going to submit that to the jury, for these reasons: * * * I understand the law to be perfectly settled that if the defendant offers evidence of the lapse of time, or if it appears in the plaintiff's own case that that length of time has elapsed, and that is unexcused, unexplained, that then there is a conclusive presumption of fact, which some cases call a presumption of law, which arises and ousts the

plaintiff of his remedy. In this case excuse has been attempted, or explanation, or we will call it, if you please, justification, that takes at least a two-fold aspect. The first aspect is, Mr. Thornall has given evidence here that on a date prior to the 27th of September, 1909, Mr. McClary, who admittedly represented the defendant company, sent to him a communication, that is, to Mr. Thornall, a communication asking him to delay bringing suit or any proceedings until Mr. McClary should have seen Mr. Thornall on that day. Now that day is one day outside of the year, the fire having happened on the 27th of September, 1908, and that communication was given inside the year, and therefore Mr. Thornall was justified in being carried over the period of limitation by the request made of him by Mr. McClary; and that brings up a doctrine which you will find very interestingly discussed—interestingly because briefly—in Martin v. State Ins. Co., in 15 Vroom. That case deals with a limitation which grew out of a contract of insurance, and the court held that where the defendant fiddles the plaintiff, in the legitimate hope of settlement, past the time of limitation, that that is explanation of the delay in bringing the action. And the court went on to say—it is of great importance here—that if after the time of limitation had expired, under those circumstances the defendant treated with respect to that contract, that he therefore recognized its vitality, and therefore his right to insist upon his limitation—in other words, to state it in still fewer words than the Martin case stated it, the doctrine of estoppel is applicable; and I think in this case there is evidence from which the jury may conclude, and I may say frankly, that they ought to conclude, that the defendant's attorney smoothed our guileless brother here past the year.

Mr. Carey: He did not have that in mind, because he did not know our limitation.

> The Court: Oh, no; it is not necessary at all to say that Mr. McClary had in mind anything at all about the limitation. I don't suppose he did. It was a most extraordinary coincidence; he asked him to hold it up until the 28th; but that is the ground upon which I must place this. I did say a moment ago that if the mere efflux of time is unexplained it is conclusive against the defendant, but if there be reasonable explanation offered it is unquestionably for the jury; and probably the best discussion of that is that of Vice-Chancellor Emery in Blue v. Everett, 10 Dick., 329 at 337, etc.
>
> So I will deny the motion on that ground."

The Trial Judge in the above statement very clearly stated the law. It would seem to be settled that the rule is, that the presumption of payment or release arising from lapse of time if unaccounted for or unexplained becomes a conclusive presumption, but if the lapse of time is satisfactorily accounted for and explained, then the presumption does not apply as a conclusive or absolute presumption, but that the lapse of time still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined in connection with the other evidence Gulick v. Loder, 13 N. J. L., 71; Blue v. Everett, 55 N. J. Equity, 329 at 337, etc.

In the case last cited, Vice-Chancellor Emery discusses this question very elaborately and analyzes numerous cases in which it has been followed, citing among others Buchanan v. Rowland, 2 South., 721; Gulick v. Loder, 13 N. J. L., 71; Wanamaker v. Van Buskirk, Sax, 685.

POINT IV.

The judgment below should be affirmed, with costs.

Respectfully submitted,
EDMUND W. WAKELEE,
Attorney for Plaintiffs-Respondents.

WENDELL J. WRIGHT and
EDWARD V. THORNALL
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Of Counsel.

New Jersey Court of Errors and Appeals

CHARLES R. CHRISTY, *et al.*, *Plaintiffs-Respondents,* *vs.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendant-Appellant.*	On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-APPELANT

This matter comes before this Court on appeal from a judgment entered in the Supreme Court on the day of , 1916.

Plaintiff recovered judgment for $10,070.53 besides costs for the value of certain lumber destroyed by fire at Long Lake West, Hamilton County, New York, on Sunday, September 27, 1908.

In their declaration plaintiffs charged defendant with negligence as follows:

(1) In negligently permitting combustible matter on its right of way.

(2) In operating over its railroad in the vicinity of Long Lake West locomotive engines which were negligently constructed and operated.

(3) In communicating fire from its locomotives thus negligently constructed and operated to the combustible matter on its right of way, and thence to plaintiffs' lumber.

(4) In communicating fire from such defectively constructed and negligently operated engines directly to plaintiffs' lumber.

At the trial the Court took from the jury the question of negligence in the construction and operation of defendant's engines, and charged the jury that the sole ground upon which a recovery could be had, if at all, was the negligence of the defendant in keeping its right of way free from combustible materials (Judge's Charge, p. 534, line 10).

The questions involved in this appeal are:

(1) The legality of the admission in evidence of a certain written communication dated January 6, 1909, made by Mr. A. H. Smith, Vice-President and General Manager of the defendant to the Public Service Commission of the Second District of the State of New York in a proceeding before that body entitled "In the matter of fire prevention along the lines of the railroads in the Adirondack Forest Preserves".

(2) The legality of the admission in evidence against defendant's objections of the oral statement made by Mr. Martin E. McClary, one of the local attorneys of defendant before said Commission at one of said hearings.

(3) The refusal of the Court to charge that the plaintiffs' right of action, if any, having accrued September 27, 1908, the law of this state presumes the plaintiffs' demands were paid or released within one year thereafter; that the presumption had not been rebutted and that the verdict must be for the defendant.

The appellant relies upon and will urge the foregoing as grounds of appeal.

The testimony shows that the summer of 1908 was one of the driest ever known in the Adirondack Forests; that fires were burning all through the forest preserve adjacent to the several rail-

roads that run through them and also away from the railroads. This condition had prevailed several weeks before the fire of September 27 which destroyed plaintiffs' lumber.

On the 12th day of October, 1908, the Public Service Commission of the Second District of the State of New York, began an investigation in a proceeding entitled as above and in the course of this investigation hearings were held from time to time for several months. Mr. Martin E. McClary appeared for the defendant company at these hearing (p. 302, line 35).

Mr. McClary was one of the local counsel of the defendant, and it was his duty to appear and represent the railroad company in such legal matters as were sent to him for attention. The Adirondack Division of the defendant company fell within Mr. McClary's territory. In handling claims against the railroad company which were from time to time referred to him, he followed such instructions as were given him with reference to testing the validity thereof, and to negotiations for settlement if that were referred to him (p. 289, line 35).

It was at one of the hearings before the Public Service Commission that Mr. McClary's oral statement above referred to was made. The exact date when the statement was made does not appear, but it was subsequent to October 12, 1908.

The primary action of the Public Service Commission was that of inquiry, and the defendant company endeavored to the fullest extent to get the facts before the Commission (p. 306, line 1).

The above mentioned communication of Mr. Smith to the Commission was made at the request of the Commission (p. 312, line 1).

The Commission wished the railroad company to co-operate with them and wanted them to do something and Mr. Smith said they would do anything they could. Not because he believed it would

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do any good, but because the Commission wanted something done (p. 312, line 25).

The order served upon the defendant company and other railroad companies operating lines through the forest lands shows the scope and nature of the inquiry. These companies were required

> "To show what devices and precautions are now being used by them against the setting of fire upon their respective lines in such forest lands; and also to show cause why they and each of them should not use some other fuel upon their locomotive engines which will not give out sparks and why the motive power should not be changed to some other than steam" (p. 336, line 15).

The Commission was not investigating or passing upon the question of negligence on the part of the railroad companies. There is no evidence in the case that they found negligence on the part of any of the companies.

The object was to ascertain what precautions were then in use against setting forest fires and to ascertain what additional precautions and appliances might be necessary, in such times of extreme drouth to attain the object in view although such precautions and appliances might go far beyond the then legal requirements and even embrace a change in fuel and a change in motive power. It was in aid of this inquiry that the defendant was co-operating with the Commission (p. 306, line 1; p. 312, line 1 and line 35).

As a result of the investigation the defendant with other railroad companies was required to use oil burning engines during a certain portion of the year, a requirement not theretofore imposed upon them by law (p. 310, line 25).

The investigation was in furtherance of the general public good, with the State as an interested

party, on account of its ownership of forest lands. In this investigation the State through its Commission invited and received the co-operation and assistance of the defendants herein.

Made in a proceeding of this character and under the circumstances above stated, the communication of Mr. Smith to the Commission and the oral statement of Mr. McClary were offered and received in evidence as admissions by defendant material to the issues in this action, *and as evidence against defendant on the question of negligence* (p. 293, line 20, etc.).

The communication of Mr. Smith dated January 6, 1909, admitted in evidence against defendant's objections, is as follows:

> "We respectfully submit for your consideration and approval the following plan as a remedy for that portion of the forest fires due to railroad operation, the same to apply to that portion of the Mohawk & Malone Division, between Remsen and Malone. We will be able, if allowed to make use of this plan, practically, to prevent the spread of *any fire* from our right of way. The details of this plan will be offered in evidence at the hearing in Albany.
>
> "(1) We will change the present steam locomotives as follows: Close with netting the opening between the ash pan side and the fire box foundation ring of some of the locomotives; extend backward those pans which now are of such length that *there is a possibility* of coal dropping from the grate through the openings in the pans for the grate shaking connection. Put finer nettings in the smoke boxes with the idea of breaking into smaller pieces those cinders which may be emitted from the stack. In addition, we will make such other changes in the front end, with the idea of breaking up the cinders, which may

be emitted from the stack, as may be developed in any of the several tests which are now in progress of preparation.

"(2) A clean right of way, and the maintenance of the same in that condition. A clean right of way to consist of one from which all dead grass, weeds, stumps and other dead and combustible material have been removed; this not to include the removal of turf or soil which in times of extreme dryness might be considered as combustible. The maintenance to include the burning of the right of way once or twice a year, the latter preferably; also the cutting and removal of the grass twice a year."

"(3) The organization of a fire patrol on the following lines, viz.: The territory to be patrolled to be from Forest Port to Whippleville, including the Saranac Branch, in all 140 miles; the same to be divided into patrol sections, averaging substantially five miles in length, as per schedule to be hereafter submitted; each patrol to consist of a patrolman and assistant, who will cover their patrol on a quadracycle, carrying two persons, and equipped with two shovels, two collapsible buckets, one mattock, and some portable fire extinguisher; the assistant to be taken from the section force and returned to the same when not needed; this patrol service to be under the direct supervision of the Supervisor of Tracks, who shall be responsible for the same, with full power to increase or decrease this force to meet whatever conditions may arise, the said Supervisor of Tracks to report to the Division Engineer."

"(4) Telephones are to be installed at all necessary places in order that our patrolmen may give prompt notice to the supervisor of any fires on the line of their patrol, and to the

District Fire Warden of any outside fires, and also for assistance, if needed."

"(5) A service consisting of three fire equipments, stationed at convenient points, to take care of emergency calls for fires that are beyond the control of the patrolmen, if any; the details of this equipment and the handling of the same to be submitted herewith."

(Pp. 300-302.)

The oral statement of Mr. McClary, admitted in evidence against defendant's objections, is as follows:

"Mr. Wright: (reading):

"'Mr. McClary: No, sir; Mr. Osborne, it is not practicable and I do not know now that they would allow us to burn oil in Canada. They are very particular about that.'

"Mr. Carey: 'Not practicable' we understand meant that it was not practicable to change to oil burning.

"Mr. Wright: I presume that is what they meant. (Continues reading):

"Commissioner Olmsted: Do you run clear through from Remsen to Montreal?

"Mr. McClary: They run now from Utica by our Black River Road to Remsen, over the Utica and Black River division to Tupper Lake. That is a division; and then an engine is all ready, takes the train to Montreal, back to Tupper Lake, and so on. That is, Tupper Lake is our Central point.

"Com. Olmsted: Wherein lies the trouble then of making the change at Malone instead of making it at Tupper Lake? You have got to make a change of engines. You simply change engines, put on a coal burner and take off an oil burner.

"Mr. McClary: We would have to change

engines; we wouldn't probably run 168 miles with any proposed oil burning proposition that I have heard of.

"Mr. Staley: Mr. Henderson says that you can.

"Mr. McClary: He says lots of things that I don't believe.

"I also want to say this, gentlemen, in regard to the Adirondacks up there that our road crosses. The evidence shows that the lands burned over, that a large part of it was land that was worth from fifty cents to two dollars an acre. That is the evidence. There are certain sections where I recall one man, but it don't matter about that; but that is in the evidence from fifty cents to two dollars. The bulk of the other part of it was land and is land that is not worth over ten or fifteen dollars an acre. Occasionally you strike some State land that is worth its weight in gold, of course, because the State owns it; and we have got 22 miles and a fraction of that, 22 miles and a fraction that we crossed through State land. But that was all lumbered.

"Our proposition is this: 'We say to this Commission that with all the brains that are back of the New York Central people, and with the brains that they are able to command, that we are able to furnish a locomotive that will absolutely cut out the question of coals dropping from the fire box; and the evidence shows by I don't know how many men that practically one-half of the fires come from the lower part, from the fire box, fire grate, ash pan, whatever you call it, the lower part of the engine. We can do that. We will take an engine and have an engine ready that will cut that out, 50 per cent. there.

"Then we are experimenting now in Schenectady and at West Albany, and I think that

our men will be able to demonstrate that we can so change that engine with regard to the spark arrester, and with regard to another proposition which Mr. White will later on explain to the Commission, that will take care of 75 per cent. of the other half. So much for the engine construction. I think we can make that plain that we can take care of 75 per cent. of the causes of the fires. Then we propose to do this: To clean our right of way. We apologize; I have apologized to Mr. Osborne and Mr. Sague, and to Mr. Olmsted because they were there, with regard to the condition of our right of way. I was ashamed; it was bad and it was one of the causes of the fires this summer on the right of way. We say we will take care of that. We ask and will ask and we shall say that the proper way to take care of that is to burn in the opening of the spring, and we shall say it can be done with perfect safety; and we shall go further than that we shall show that any man of ordinary ability, mental ability, must know that it can be done. It is only a question of how many men. Of course, two men could not go out and burn that rigth of way over with safety, and the wind blowing, and everybody knows that. We say that we will clean our right of way down to grass; and the initial expense of that for the first year is something like thirty or forty thousand dollars. We will clean that thoroughly; we will take out the stumps and the trees, and get it down clean and we will keep it clean. We will keep it clean if the Commission will make an order that we can burn it, and then the Legislature can be let alone and allowed to amend that little section to allow us, with that order to burn it. We will take care of 90 per cent. of the rest of our fires, and that is not all.

"We offered to put on a patrol, that, if we did not keep it clean, could take care of the fires. We will put on a quadracycle patrol for every five miles of two men that shall patrol that road from the beginning of the Spring until the snow comes in the fall, and that is going to cost us a good many thousand dollars. We will do that, and that is not all we will do.

"We will so arrange it, and our plan calls for that, that the person in charge, not somebody down in New York City or out West, but that the man on the spot, the supervisor of tracks, has full power to increase that patrol as the needs come. If it grows drier, he can put them on, and there isn't any official higher that will say nay to him, not with this in view.

"And we will do this; in case they cannot stop that fire with the patrol, they will have this extinguisher, and the shovels and so forth, he can drop off one of his men, go along, and take up another man from the section. We will keep the two men on the patrol while there is any danger whatever and we will keep the one man on the patrol all the time regardless of danger.

"Not only that, but we will establish telephones once in every five miles, and we will make it possible to protect our right of way and protect ourselves against other fires. We will keep track of those; we will report them to the District Fire Warden and so forth, we will take care of it that way.

"That is not all we will do. We will make three of the best equipments that is possible, large tanks that are capable of holding a large amount of water and have them placed at three different points to take care of any cataclysm that comes up.

"Now we say that with this scheme—I

wouldn't ask you to take my word for it, but I do ask you to take the general manager's statement, the general manager of the New York system. Certainly, if he says to you, 'we will carry out this plan and it is good, and I will see it is carried out, he certainly is entitled to at least the thought that he intends to do as he says. That he is entitled to, and I know it can be done; I know it can be done, I know it will do the business, and it will do the business with a quarter of the expense that this oil burning proposition involves, and I haven't any doubt about it.

"Now, with all of those, that is what we can show. When we get through with that we do not say that any system is absolutely perfect. You take what turns out about your oil business, the changing those engines, keeping the maximum number, it is going to knock our business all to pieces at times. We have to do that. Change the whole system of doing business; idle engines are all over the line certain times of the year, and we cannot help that; it will be terribly expensive, but we say that we can take care of 99 per cent., and if you know of any law on God's earth that will do more than that I do not. Take the law against murder. Any law you please, it does not begin to make it perfect. We do not claim that never under any possibility could there a fire happen; but will take care of 99 per cent. of our fires, and I think that is all you ought to ask.

"That is for the New York Central; I haven't a word to say for any other road, but I say that for the New York Central."

"I want to say one thing more, and then I will stop bothering your patience, and that is this:

"This scheme introduces full power to in-

crease that to any limit. We will say that, I will assume for the moment that you say to us, "that is fair; you have been accused of burning the woods, a good deal of it, and you acknowledge you did. Now, you propose this: This is your property, your funeral, you are going to pay the bills, it is your boy.' I am so tired sometimes of hearing what other people would do with other people's children. It is not their child; it is not their boy. It is just so with these lumber men. They say, 'Burn oil; we don't pay it'. The society for the protection of the Adirondacks, they say, 'Burn oil; we never had a child, it is not our boy.' Now, this is our boy, and if our scheme of taking care of that boy is good, I think we are entitled to try it. Then, if it does not work, if it does not work you could say, do anything, take up the tracks or electrify or burn oil. But give us a chance to work out our own salvation in our own way, at an expense of sixty or seventy thousand dollars initially, and twenty-five thousand dollars a year. That is what we ask and that is what we expect." (pp. 341-346).

Note: The introductory discussion between Mr. McClary and members of the Commission, although not containing admissions was not objected to, but was admitted to show the proper setting of what followed. The statement which was objected to begins with words, "I also want to say this, gentlemen, &c." (See page 341, line 18; p. 334).

Plaintiff's attorney opened the discussion as to the admissibility of this evidence by explaining the character of both the written communication of Mr. Smith and the statement of Mr. McClary and claimed that both were admissible as admissions binding upon defendant in this action (p.

293, line 20). The discussion and objections following were in general applicable to and applied to both, except where one or the other was specifically mentioned.

In the discussion and argument (pp. 293-305 inclusive, and pp. 311-338 inclusive), the admission of the communication and statement was objected to for the following reasons:

They were made for the purpose of the investigation then being conducted and were limited in character (p. 294, line 40).

That the defendant was cooperating with the Public Service Commission for the public good (p. 296, line 5).

That Mr. McClary was not authorized to make admissions before the Commission binding upon the company generally, but his authority was limited to his appearance before the Commission (p. 298, line 38).

That what was said before the Commission could not bind the defendant in another proceeding (p. 299, line 12).

That the communication and statement did not relate to any issues in the case and are wholly incompetent and immaterial (p. 300, line 5).

These objections were renewed to the specific question addressed to Mr. Lyman, which embodied the communication of Mr. Smith, and the Court stated that the objections would go to all that line of testimony (p. 300, line 30.)

Defendant's attorney also asked to have noted on the record the objections stated to the question at the time the deposition of Mr. Lyman was taken (p. 302, line 30 and insert). The objections noted at that time were as follows:

> "Objected to as incompetent, irrelevant and immaterial, and not bearing upon the issues raised by the pleadings in this case, and that there is nothing in the record to show that

the person alleged to have made the statement was authorized to make the statement for the Company or could bind the Company by a statement of that kind, and that the statement itself, if made, would not be evidence in this case; it is hearsay and not the best evidence; it is privileged, if made; it is too remote in time, circumstance and substance. The *gravamen* of the action in question is based upon negligence, and the statement, if made, has no relation to that matter or to any other similar or relevant matter."

After the communication of Mr. Smith had been read in evidence, motion was made to strike it out on the grounds stated on page 303, line 10, through p. 305. These grounds were in substance as follows:

That the communication embodied a scheme devised for the purpose of absolutely preventing forest fires spreading along the right of way, and embraced an offer to go beyond legal requirements; to make changes in equipment which were not in use and not standardized nor required; that the basis of the action is negligence and there was nothing in the statement going to that issue, and that the communication was privileged.

The same objections were renewed to the question put to Mr. Smith embodying his communication of January 6, 1908 to the Public Service Commission (p. 311, line 20).

The admission of the statement of Mr. McClary when offered, was formally objected to, the reasons having been given in the preceding discussion (p. 113, line 10).

In the discussion which followed the formal offer of the statement, these reasons were amplified and added to as follows:

That Mr. McClary was a local attorney handling such matters as were referred to him, and that

the matter of attending the investigation of the Public Service Commission with respect to what means could be adopted to lessen forest fires was the matter which was referred to him, and for which he appeared before the Commission (p. 317, line 1).

That in his statement to the Commission he made declarations with regard to matters concerning which he had no personal knowledge (p. 317, line 32).

That in his statement to the Commission he was talking about a right of way 200 miles long, while in this action the investigation related only to a very small part of the right of way. His statements were general, covering large territory, taking in altogether more than was under investigation in this action (p. 318, line 1).

That the making by Mr. McClary of the statement he did with respect to the condition of the right of way was not within the scope of his employment (p. 328, line 18-35).

That the statements made in the proceeding before the Commission could not be used in another proceeding (p. 332, line 18).

That the statement itself made to the Commission beginning with the words "I also want to say this, gentlemen," (p. 342, line 18) was inadmissible because offered in a proceeding and under circumstances which prevent it from being legal testimony in this case; that it has no relevancy to the issues raised in this case; it was mere hearsay and without authority (p. 334, line 30 to 335, line 20).

The objections to the rulings of the Court with respect to the admissibility of this communication and statement were noted on pp. 299, line 35, etc.; p. 300, line 30; p. 311, line 28; p. 328, line 35.

The objections to the refusal of the Court to strike out the communication of Mr. Smith was noted on page 305, line 38.

I.

Neither the communication of Mr. Smith, nor the statement of Mr. McClary contains legal evidence constituting an admission of negligence in either the construction or the operation of Defendant's locomotive engines.

Mr. Smith's communication embodied a comprehensive plan, not to bring the operations of the railroad within legal requirements, but "*practically to prevent the spreading of any fire from our right of way.*" This plan had no relation to the past but was a promise for the future. It confessed no breach of the law in the past, but looked to the employment of methods and appliances for the future which would be sufficient to meet the unusual conditions attending the operation of a railroad through the Adirondack Forests, and to carry on such operations in such manner as to prevent the spread of fire from the right of way.

It is recognized in all the cases bearing upon that subject that coal burning locomotives will scatter some fire, and that they may do so without necessarily rendering the railroad company liable to a charge of negligence. The changes which Mr. Smith's plan proposed in the construction of the engines were of such a nature as to eliminate the "*possibility* of coal dropping from the grate through the openings in the pans for the grate shaking connections" (p. 301, line 10).

The plan also provides for further precautions against the discharge of sparks from the smokestack. There is not the slightest implication that the engines in use at the time of the fire which destroyed plaintiff's property were not of standard construction and did not conform to all legal requirements. The plain implication is that these changes would be beyond legal requirement.

From an examination of Mr. McClary's statement, it is evident that it is only his argument, based on the communication of Mr. Smith, and not an independent proposition or plan offered by Mr. McClary. He follows point by point the plan of Mr. Smith, and says:

> "I won't ask you to take my word for it, but I do ask you to take the General Manager's statement, the General Manager of the New York (Central) System. Certainly, if he says to you 'we will carry out this plan and it is good, and I will see it is carried out', he is certainly entitled at least to the thought that he intends to do as he says."

Mr. McClary's statement was to the effect that defendant would be able to produce a locomotive "*that will absolutely cut out the question of coals dropping from the fire box.*" This likewise was a proposition to go beyond the legal requirements. He goes on to state that the evidence (taken before the Commission), shows that practically half of the fires came from the lower part of the engine, the fire box, fire grate and ash pan. That, however, is merely his conclusion as to what the evidence showed. *It is not evidence of the facts stated, and cannot be used as such.*

Even if coals dropped from the fire box or the lower part of the engine, that in itself is not evidence of negligence, for it is conceded that some fire will drop from that part of engines which in every way conform to standard construction and meet all legal requirements.

Moreover, these engines were of standard construction in all the particulars mentioned by Mr. Smith and Mr. McClary, and they met all the requirements imposed by law upon the defendant. (See testimony of Van Schaick, p. 519-521 and 523-524).

The Court ruled at the trial that "there can be

no recovery in this case because of any negligence either in the construction of the locomotive engine or in its operation, because there is not any evidence in this case which tends to show either that the railroad engine which kindled this fire, if an engine did kindle the fire, was defectively or improperly or insufficiently constructed, nor is there any evidence to show that it was negligently operated'' (p. 534, line 9).

It is plain that neither this communication nor the statement contained any admission of negligent construction or operation of the engines and the Court in effect so ruled in the charge above quoted.

II.

Neither the communication of Mr. Smith, nor the statement of Mr. McClary contains legal evidence constituting an admission of negligence with respect to the condition of the right of way.

Mr. Smith's communication refers to a clean right of way and the maintenance of the same in that condition. Here again, there is no statement with respect to what the condition of the right of way was at the time of the fire in question, nor is there any admission that any fire originated on the right of way through the fault of the railroad Company. His plan in this respect looks solely to the future and the promise is to go beyond legal requirements to meet the unusual conditions existing through the forest sections, especially during such seasons of unusual drouth as prevailed in 1908. He says—

> ''A clean right of way to consist of one *from which all dead grass, weeds, stumps and other dead and combustible materials have been removed.''*

The plan also includes the "burning of the right of way once or twice a year, the latter preferably; also the cutting and removal of the grass twice a year."

That a part of what is promised may have been within the duties imposed on defendant by law does not imply that such duties had been neglected. Clearly the removal of all dead grass, weeds, stumps and other dead and combustible materials from the right of way was beyond the legal requirement and it was the joining of these things with the legal requirements which Mr. Smith believed would accomplish their purpose of preventing the spreading of any fire from the right of way.

It was not permissible for the jury to draw from this statement any inference that the defendant had failed to discharge the duties imposed upon it by law with respect to keeping its right of way reasonably clean.

The proposal also included the burning of the right of way. This could not be done without legislation and the suggestion contained in Mr. McClary's statement was that the legislature should authorize the Public Service Commission to permit the burning of the right of way (p. 344, line 2).

Mr. McClary's statement with respect to the right of way is that the railroad company will clean it. He was speaking of a right of way about 200 miles in length and this in itself would not warrant an inference on the part of the jury that the right of way in the vicinity of these lumber piles was not clean at the time of the fire, or that a foul right of way in any manner contributed to the destruction of plaintiff's property. Furthermore, he also is speaking of the absolute prevention of the spread of fire and not concerning the meeting of legal requirements. He is also in that statement looking to the future and not considering the past.

But he continues— "I have apologized to Mr. Osborne and Mr. Sague, and to Mr. Olmstead because they were there, with regard to the condition of our right of way. I was ashamed; it was bad and it was one of the causes of the fires this summer on the right of way."

That statement was clearly outside of the scope of Mr. McClary's authority and expressed merely his personal views. They did not send him there to apologize to the commissioners, nor to express his personal emotions or his personal views with respect to the condition of the right of way, or the results flowing therefrom. When he made this statement he did not purport to speak for the company, but for himself. *He* apologized; *he* was ashamed; *he* thought the right of way was bad.

Before defendant can be charged with this language as an admission it must be shown that Mr. McClary had authority to express his personal views in this matter and that burden is upon the plaintiffs. They have not undertaken to bear it. This statement of Mr. McClary was inadmissible to bind the defendant.

Plaintiffs do not attempt to show that Mr. Smith's communication or Mr. McClary's statement had reference to the particular part of the right of way which was adjacent to their lumber piles. They fail to show the application of either to the part of the right of way which is material in this action and they fail to show that either had reference thereto. Hence the statements have no probative force with respect to the negligence which plaintiffs must prove in order to maintain their action.

Both Mr. Smith and Mr. McClary speak of a fire patrol and say that the defendant will provide it; also the installation of a telephone system and the establishment of fire service stations but defendant is not charged in the pleadings with negligence with respect to the failure to provide any of these

things. *Consequently these statements do not relate to any issues in the case and were therefore inadmissible.*

They were also inadmissible because they were promises to go beyond any legal requirement. That they had not been provided prior to and at the time of the fire in question is of course, no evidence of negligence.

Neither the communication of Mr. Smith nor the statement of Mr. McClary with respect to defendant's engines or to the condition of the right-of-way, were a part of the *res gestae* in this case. The *res gestae* in this case related to conditions as they existed and acts that were done at the time of the fire. Neither of these men were present on that occasion. Neither had any knowledge of the facts. Neither of them attempted to state anything with respect thereto. This is certainly true with respect to Mr. Smith, and if it may be said that Mr. McClary attempted to describe conditions at the time and place of the fire, he was describing an event which took place weeks and probably months before his statement was made. He was thus describing past conditions with which he had no connection at the time. His statement, therefore, was inadmissible as evidence.

In *Runk* v. *Ten Eyck*, 24 N. J. L. 756, a surveyor employed to make measurements in connection with a matter in dispute, certified in writing to his employer the results of these measurements. Discussing the admissibility of the certificate in evidence, as binding upon the employer of the surveyor, this Court said (p. 761):

> "The certificate is nothing more than the assertion in writing of a fact, and 'the mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making the assertion was employed as agent.

"'If any fact material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his assertions.' Payley on Agency 269."

To the same effect, see:

Potts v. *Agricultural Ins. Co.*, 55 N. J. L. 158;
Blackman v. *West Jersey*, &c., *Ry. Co.*, 68 N. J. L. 1;
Huebner v. *Erie R. R. Co.*, 69 N. J. L. 327.

In *Evans* v. *Montgomery*, 55 N. W. Rep. 362, the Supreme Court of Michigan, in discussing the effect of statements made by counsel in his opening to the jury in a former trial of the case, said:

"On cross-examination, defendant sought to show statements made by plaintiff's counsel in the opening before the jury upon a former trial, as tending to show that plaintiff there contended for a different state of facts. We know of no case going to the extent of holding that such statements amount to admissions. The witness said he did not know what he said, and thereupon was asked the following question: 'Q. If Mr. Cross so stated, wasn't it by reason of something which you had told him in regard to the case?' We think the answer was properly excluded. Had counsel asked *if the plaintiff* did not make a particular statement, it might, perhaps, have been admissible, if not a privileged communication."

In *Cadigan* v. *Crabtree*, 78 N. E. Rep. 412, the Supreme Court of Massachusetts held it was inadmissible to ask the plaintiff if his counsel, in his presence, at an argument in the cause before the

Supreme Court, was asked by the presiding Judge "if he contended that Miss Crabtree was acting in bad faith when she said what she testified to in January, 1899". The question was excluded on the ground that it related to the contention of plaintiff's counsel for the purpose of that hearing, and that if plaintiff's counsel answered in the negative, it did not preclude the plaintiff from contending at the trial in question that there was in fact bad faith on defendant's part in revoking the plaintiff's authority.

In *Binewicz, by guardian,* v *Haglin,* 103 Minn 297; 115 N. W. 271, the plaintiff's wife testified that following the accident to her husband defendant had paid to her considerable sums weekly, and promised further assistance. She also testified that defendant had said to her "Don't cry. I know it was my fault not your man's. I know your man was hurt bad. That was not your man's fault."

Defendant did not deny this testimony, although he was in Court at the trial. A verdict for defendant was directed by the Court. On appeal, the Supreme Court sustained the ruling of the trial court and said:

> "In the case at bar defendant's admission may not have been a mere sympathetic assurance, but it was not an admission of negligence or of liability. It bore no resemblance to a declaration admissible as a part of the *res gestae.* Giving it the most favorable consideration—to which plaintiff without doubt is here entitled—it was in itself indistinct. It was given a long time after the conversation had taken place and it concerned a subject matter easily subject to misapprehension * * * * * * In so far as the admission concerned facts they were not within defendant's personal knowledge. In so far as the admission concerned law, it cannot be determined

> whether the opinion was or was not erroneous. * * * * * Taking the testimony as to the condition of the accident and as to the admissions of fault as a whole, we do not think that the record shows reversible error in the rulings of the trial court."

In *O. & M. R. R. Co.* v. *Stein,* 19 L. R. A. 733, an engineer after stopping his engine walked about a car's length to the place where the injured man was, and said to him

> "If that man last night would have fixed that cylinder cock as I told him, you would never have been hurt."

The Supreme Court of Indiana in discussing this evidence, said:

> "This declaration related to the past and was a narrative of what had been done at an entirely different time and place. It was in, deed, a combination of an opinion and a narrative of the things that had passed, for it was a statement of the engineer's opinion that if, on the night before, something had been done which he had then directed the collision would not have taken place. *It is too well settled to excuse the reference to authorities that neither narratives of past occurrences nor matter of opinion can be placed before a jury by proving the declarations of an agent or servant.*

III.

The communication of Mr. Smith and the statement of Mr. McClary were made in another proceeding, entirely different in character, to which Plaintiffs' were not parties. They are not admissible in this action.

The proceedings before the Public Service Commission had for its object to determine what measures beyond the then legal requirements were necessary to protect the forests within a certain section from fires caused by railroad operations. In this action it must be determined whether the defendant conformed to the requirements of the law as it existed at the time of the fire.

In *Hamilton Brown Shoe Co.* v. *Milliken,* 88 N. W. Rep. 913, plaintiff brought an action against defendant which was discontinued. Another action was brought against the same defendant in another Court. On the trial of the second action, the petition in the first suit was admitted in evidence. The Supreme Court of Nebraska said:

> "Prior to the commencement of this action, the plaintiff filed a petition in the county court of Dodge County against the defendant, seeking to recover the same goods, on the same state of facts as in this case. Subsequently, and before the commencement of this action, plaintiff dismissed its case in the County Court. On the trial of this action the petition filed in the County Court was received in evidence on behalf of the defendant over plaintiff's objection. We are unable to see how the introduction of that petition in evidence served any legitimate purpose. The tendency of such evidence is to give rise to speculation and conjecture as to the result of the former action and the effect thereof on the present,

and to divert the minds of the jury from the real issues. While its admission might not be sufficient, in itself, to justify a reversal, in our opinion the evidence should have been excluded."

In *Thallhimer* v. *Brinkerhoff,* 4 Wend. 394, plaintiff and one Teller had entered into an agreement that suits should be brought in the name of Teller to recover some property to which the latter claimed title; that plaintiff should defray one-half of the expenses of prosecuting the suits and should receive one-quarter of the proceeds thereof. Defendant was employed as an attorney to bring the actions. By authority of Teller he settled the actions and received a large sum of money. Defendant knew of the agreement between plaintiff and Teller, but claimed to have paid all the money over to Teller.

The Court found that under the circumstances disclosed by the evidence Teller was the agent and representative of the plaintiff, and that payment to him of plaintiff's share was proper.

At the trial plaintiff proved the amount recovered in the suits and claimed one-quarter thereof.

Defendant proved that in an action brought against defendant by a creditor of Teller, the defendant had put in an answer showing that he had paid to Teller all moneys to which plaintiff and Teller were entitled. That an account had been stated between him and Teller and that a balance was due to defendant; that Teller had made an affidavit in that suit in which he swore that the allegations of the answer were true, and that the account was correct.

The question before the Supreme Court was the admissibility of the affidavit of Teller and the answer of defendant and the account therein mentioned, as binding upon the plaintiff by reason of

the fact that Teller was plaintiff's agent, and had sworn to the truth of the bill and the correctness of the account. The Court said:

> "Was the affidavit admissible evidence? The plaintiff was an entire stranger to the chancery suit in which it was used; he could not, therefore, be concluded or affected by the proceedings or proof in that suit. If upon any principle, the affidavit could be received, it must be as the admission of an agent. The general rule on this subject is that what an agent does or says within the scope of his authority is binding upon the principal. Not only the agreement that he makes, but all his declarations affecting or qualifying such agreement, are binding on the principal; but what an agent says at another time, or of his own authority, is not evidence against the principal." * * * * *
>
> "Where a party is bound by the act of his agent, and the declarations of the agent qualify or affect that act, these declarations may be proved against the principal; but they are not proved as admissions or declarations merely, but as a part of the *res gestae*. The act and the words together make the whole thing to be proved." * * * * *
>
> "The defendant's answer to a bill in chancery, in a suit to which the plaintiff was not a party, could not have been admitted on any other principle than that it was referred to and its accuracy established by Teller's affidavit. The affidavit being decided to be improper evidence, the answer which was admitted on the strength of it must be rejected as improper also."

In *Andrews* v. *Tamarack Mining Co.*, 72 N. W. 242, an "underground captain" of the mine, who had charge of a gang of men of which decedent

was one, testified as a witness at the coroner's inquest. His testimony at that time tended to prove that he knew the mine was in a dangerous condition when he ordered the man in. The testimony given by him at the inquest was admitted at the trial of an action to recover damages against the defendant company. On appeal the Supreme Court of Michigan said:

> "The Court was in error in permitting this deposition to be read. It was not offered for the purpose of impeaching Captain Maslin, but for the purpose of proving *a substantive fact;* that is that Maslin knew that the mine was in a dangerous condition when he ordered the men in there. It is conceded that it was no part of the *res gestae.* It has many times been held by this Court that the declarations of an agent as to past transactions are inadmissible to bind the principal."

In *State* v. *Butler, et al.,* 151 N. C. 672; 65 S. E. 993, the Court held that an admission by attorneys of accused at a preliminary hearing made to prevent a continuance to enable the State to secure certain evidence and to secure a hearing without delay, was not admissible against the accused at the trial where the State had secured the evidence which it sought.

In *Ryer* v. *Beard,* 74 Ala. 306, in order to prevent a continuance, the attorney admitted that an absent witness, if present, would testify to facts set forth in an affidavit submitted on an application for the continuance. This admission was held to be inadmissible for any purpose in a subsequent trial without the consent of the counsel who made the admission. The Court said:

> "The whole power and efficacy expired with the term at which it is given, with the trial it is intended to accelerate."

In New York, the pleadings in a civil action are admitted against the party fiilng them for the reason that under the practice of that state, the parties are required in their pleadings to state the facts truly. The pleadings are sworn to by the parties and are therefore presumed to be within their knowledge and the facts are presumed to be inserted in the pleadings under the direction of the parties and with their sanction. (*Cook* v. *Barr*, 44 N. Y. 156).

IV.

The communication of Mr. Smith and statement of Mr. McClary are inadmissible because of the relations existing between the Company and the Public Service Commission in the proceeding in which they were made, and also because of their nature and the object in view when they were made.

As already pointed out, the object of the investigation was to determine what additional precautions beyond the then legal requirements were necessary to protect the forests from all fires arising from railroad operations in those counties in which the state had forest preserves (p. 347, line 10; order of Public Service Commission, p. 336, line 25).

In this proceeding and investigation the Company was fully co-operating with the Public Service Commission (p. 306, line 1; 312, line 34).

Mr. Smith's communication was made at the request of the Public Service Commission (p. 312, line 1).

The Commission was contending that oil should be used as fuel on the locomotive engines, or that

electricity should be used as a motive power. The railroad company contended that this was unnecessary, and the communication of Mr. Smith and the statement of Mr. McClary were in their nature an offer of compromise in which the only thing admitted was the desirability of further precaution against forest fires than those then required by law. The defendant made no legal admission, either through Mr. Smith or Mr. McClary, that it had been guilty of negligence in the past, nor did it admit any fact from which negligence or a breach of the law as it existed on September 27, 1908, might properly be inferred.

Under these circumstances, Mr. Smith merely outlined a plan for future operations. Mr. McClary merely urged this plan by way of argument, with the exception of his statement with respect to the condition of the right of way, and as to that, as already noted, he merely voiced his own views and the opinion formed by him on the evidence taken before the Commission. Hence, in that particular, he does not speak for the company, nor is there any evidence in the case to show his authority to speak with respect thereto.

Under the circumstances, the communication and statement were privileged in character and inadmissible upon the question of defendant's negligence in the two matters in which negligence is charged, namely negligent construction and operation of engines and negligence with respect to the condition of the right of way. (Wigmore on Evidence, Vol. 2, Sections 1061 and 1062; *Tenant* vs. *Dudley,* 144 N. Y. 504.

The fact that Mr. Smith's communication was made in response to the request of the Public Service Commission brings it within the principle of the rule laid down in *Richardson* vs. *Int. Pottery Co.,* 63 N. J. L. 248.

The admission of the communication and state-

ment under the circumstances disclosed by the record is against public policy, and would tend directly and powerfully to prevent free communication between the railroad companies and the public authorities in matters pertaining to the general welfare of the public.

The authorities cited by the trial judge are not applicable to the case at bar, and do not support his rulings.

In *Jones* v. *Water Company,* 93 Atl. 860, the President of the defendant company in a statement to the Board of Health which was investigating the condition of the water, showed what had *actually been done* by the Company to ascertain the condition of the water and what had *actually been found by such investigation.* It therefore contained a statement of facts as to matters pertinent to the issue on trial, and the statement was admitted as evidence tending to show the condition of the water. It was not a promise with respect to future operations, nor was it merely the opinion of the President of the Company. Thus, it differed radically from the present case.

In *Rowan* v. *Yarnall,* 90 Atl. 730, the question related to the title to lands and the plaintiff had written a letter to the taxing authorities advising them that the land should be assessed to a person other than himself. This was properly held to be an admission by him with respect to the title.

In *Simon* v. *Etgen,* 110 N. E. Rep. 1069; 213 N. Y. at p. 598, it was held that an affidavit made by an executor with respect to the value of property in a proceeding under the transfer tax law of the State of New York, was admissible against the same executor in a civil action to which he was a party as executor. This was a sworn statement made by the party against whom it was admitted with respect to the very question at issue in the civil action.

In *Currie* v. *Cleveland,* 79 Atl. 19, counsel for one of the parties had admitted certain specific facts with respect to the issues. These admissions were used on two trials of the action. Before the third trial, notice of the withdrawal of the admission was given, and the court held that under those circumstances the admissions were not conclusive on the last trial.

In *Commonwealth* v. *Bridge Company,* 64 Atl. 908, it was held that the pleadings in one action are admissible in another action between the same parties, but that the admission therein are not conclusive.

In *Profile etc.* v. *Hotel Company,* 54 Atl. 700, the court held that although a deposition of a party taken on notice and signed by him might not be read in evidence because of irregularities or because the party was in court, yet if it contained admissions, the admissions were admissible either upon proof of the signature of the party or by the testimony of any one who heard him testify.

In *O'Connell* v. *King & Sons,* 59 Atl. 926, it was held that although a pleading might have been withdrawn, yet it might be admitted in evidence as proof of an admission by the party. This, however, was in the same case in which the pleading was originally filed.

V.

Defendant's request to charge should have been complied with.

This request was in the following language:

> "Plaintiff's right of action, if any, having accrued September 27th, 1908, the law of this State presumes that plaintiff's demands were

paid or released within one year thereafter. This presumption has not been rebutted and the verdict must be for defendant'' (p. X, line 35).

The fire occurred September 27th, 1908. The summons was issued November 1st, 1909 (p. 524 line 30).

During the entire years of 1908 and 1909, defendant was subject to the service of process within the State of New Jersey (p. 525 line 12).

Defendant originally pleaded that the plaintiffs should not maintain their action because the causes of action in the declaration mentioned did not accrue to the plaintiffs at any time within one year next before the commencement of the suit.

A demurrer to this plea was sustained.

In a memorandum filed June 16th, 1910, but not reported, the Court said:

''The purpose of this plea is to take advantage of the 58th section of the Railroad Act of 1903, which prescribes that 'All actions for injury done to any property by fire communicated by an engine of any railroad company on any railroad within this state, shall be commenced and sued within one year after the cause of action accrued and not after.' The section in terms applies only to fires communicated by an engine on a railroad within this state. The contention of the defendant is that the plaintiffs, when they invoke the jurisdiction of a court of this state over such a cause of action, must accept the limitations which would exist against a resident of the state prosecuting a cause of action which arose in the state; and that the Courts of New Jersey will conclusively presume that such a cause of action has been released or settled at the expiration of the period named in the statute. Assuming the contention to be sound,

it does not support the plea. The lapse of time is only a positive, or legal, bar, when it is made so by statute; in other cases it is merely a presumptive bar. When it is made a bar by statute it is proper to plead its efflux; but when it is merely a presumptive bar then it is the matter of fact of which the lapse of time is evidence which must be pleaded, and the lapse of time proved at the trial in support of the plea."

It is to be observed that the Supreme Court did not hold that the presumption arising from the lapse of time was not a conclusive presumption. The decision was that the question had not been raised by a proper plea.

The policy of the law of this State is expressed by the Act of the legislature. The statute in force at the time of the fire limited the time within which to bring an action to one year in all cases of fire arising from railroad operations within this state. Certainly a more favorable rule ought not to be applied when the action arose out side of the state and the presumption arising from the efflux of time should be held to be a conclusive presumption.

See on this point *Gulick* v. *Loder,* 13 NJL. 71, and cases therein cited.

Beardsley v. *Southmayd,* 3 Green, 171.

For the reasons stated, we respectfully submit that the judgment should be reversed.

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