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Notice of Appeal.

Filed March 13, 1931.

New Jersey Supreme Court.

Josephina De Rose, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* Delaware, Lackawanna & Western R. R. Company, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law.

To John O. Benson, Esq., Attorney of Plaintiff:

Sir:

You will please to take notice that the above defendant herewith appeals to the New Jersey Court of Errors and Appeals from the judgment and all and every part thereof, entered in the above entitled cause on the 2nd, day of February, 1931, and that it will, as prescribed by the rules in such cases made and provided, file and serve upon you its grounds of appeal within the time prescribed by said rules and the practice in such cases made and provided.

Yours, &c.,

Frederic B. Scott,
Attorney of Defendant.

Dated, March 12, 1931.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Filed March 21, 1931.

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose (also known as Nick Rose) deceased, Plaintiff-Respondent *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-Appellant.	Action at Law

The Delaware, Lackawanna and Western Railroad Company, appealing to the New Jersey Court of Errors and Appeals from the judgment, and all and every part thereof, entered in the above entitled cause in the New Jersey Supreme Court on the 2nd day of February, 1931, herewith sets forth and writes down its reasons and grounds of appeal, to-wit:

1. That the Trial Court refused to direct a nonsuit as against the plaintiff and in favor of the defendant on the trial of said cause, for the following reasons stated to the Trial Court:

1. The first reason is that the accident, if it occurred by the deceased coming in contact with Train 66, the accident was caused by the

sole negligence of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident.

2. That there has been no negligence shown on behalf of the railroad company.

3. That the plaintiff's decedent assumed the risk of the accident which happened to him.

2. Because the Trial Court refused to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent for the same reasons urged by the defendant-appellant on its motion for a nonsuit on the trial of said cause, which reasons are set forth in the preceding ground of appeal as they appear from the record on the trial of said cause.

FREDERIC B. SCOTT,
Attorney of Defendant-Appellant.

Summons.

THE STATE OF NEW JERSEY

TO

DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of
L. S. Pennsylvania, authorized to do business in the State of New Jersey.

YOU ARE SUMMONED to answer the annexed complaint of Josephina De Rose, Administratrix of the Estate of Alfonso De Rose (also known as Nick Rose) deceased, in an action at law in the Supreme Court. And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this eighth day of August, nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

JOHN O. BENSON,
Attorney.

Complaint.

Filed Aug. 18, 1929.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law

The complaint of Josephina De Rose, Administratrix of the Estate of Alfonso De Rose (also known as Nick Rose), deceased, of the City of Paterson, in the County of Passaic and State of New Jersey, respectfully shows:

FIRST COUNT.

1. That the defendant is a corporation of the State of Pennsylvania, authorized to transact business in the State of New Jersey, with its principal office at Hoboken, in the County of Hudson.

2. That Alfonso De Rose (also known as Nick Rose) on the 19th day of February, 1929, and for

a long time prior thereto was employed by said defendant corporation as a track worker and laborer, and that said Alfonso De Rose (also known as Nick Rose) was so employed as a track worker and laborer on the said 19th day of February, 1929, at a point about fifty feet east of the railroad station of the said defendant corporation at Paterson, in the County of Passaic, and State of New Jersey, and was then and there performing his services as a track laborer and worker for and on behalf of said defendant corporation.

3 That said tracks of the said defendant corporation on which the said plaintiff's intestate was employed as aforesaid, were regularly used by said defendant corporation as a common carrier between New Jersey, New York and elsewhere, and that at all times stated, said plaintiff's intestate was employed in and the said defendant corporation was engaged in interstate commerce.

4. That said defendant for its purposes and uses as a common carrier, operated over its said railroad and railroad tracks, from time to time, certain engines, cars and trains which passed over and along said track at a high and excessive rate of speed, and subjected plaintiff's intestate, while employed in his capacity as a track laborer and worker to great bodily peril and danger of life.

5. That on or about the said 19th day of February, 1929, at the place aforesaid, said plaintiff's intestate while employed by said defendant corporation in interstate commerce as aforesaid, was seriously injured at a point distant about fifty feet east of the Paterson station as aforesaid, by being run down by an engine of the defendant corpo-

ration, which engine is known as Engine No. 66, which was being operated in an easterly direction.

6. That as a result of the said injuries the said plaintiff's intestate on the 22nd day of February, 1929, died at the St. Joseph's Hospital in the City of Paterson aforesaid.

7. That said death of plaintiff's intestate resulted in whole or in part from the negligence of the officers, agents and employees of said defendant corporation by reason of defects in a certain engine, cars, brakes, signals, appliances, tracks and road-bed due to defendant's negligence.

8. That said defendant's negligence consisted in this, that at the time and place aforesaid, while plaintiff's intestate was then and there so employed by defendant corporation in interstate commerce as aforesaid, and was working on one of the said parallel tracks in such a position as to prevent his seeing the approaching train, while the said plaintiff's intestate was visible for a considerable distance to defendant's agents, servants and employees who were then and there operating defendant's engine on said track, that defendant by its agents, servants, and employees negligently caused one of its trains or engines to be operated at a high and excessive rate of speed toward said plaintiff's intestate without slackening its speed and without any signal or warning of any kind being given to the said plaintiff's intestate of the approach of said engine.

9. That on the 5th day of July, 1929, the Surrogate of the County of Passaic granted Letters of Administration upon the Estate of said Alfonso De Rose (also known as Nick Rose) deceased, to

said plaintiff who accepted same and duly qualified as such Administratrix of the goods and chattels, rights and credits which were of the said Alfonso De Rose (also known as Nick Rose) deceased.

10. That said plaintiff's intestate left him surviving, the plaintiff who is his widow and the following children, viz., James De Rose, Katie Tedeschi, William De Rose, Margaret De Rose, Annie De Rose and Anthony De Rose, and that they are his only next of kin, and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of said plaintiff's intestate by reason of the negligence of said defendant, by its agents, servants and employees as aforesaid.

11. That this suit is brought within twenty-four calendar months of the death of said plaintiff's intestate, and is also brought pursuant to the provisions of the Federal Employers' Liability Act in such cases made and provided.

Plaintiff demands as damages on the first count herein, the sum of $50,000, together with costs of suit.

SECOND COUNT.

1. Plaintiff repeats paragraphs one, two, three, four, five, six, seven, eight, nine and ten of the first count herein, and makes the same a part of this count.

2. That said plaintiff's intestate was so seriously injured on the said 19th day of February, 1929, that he was removed to the St. Joseph's Hospital in the City of Paterson, County of Passaic, and State of New Jersey.

3. That said plaintiff's intestate departed this life on the 22nd day of February, 1929, and that from the time he was injured to the date of his death, to wit, the 22nd of February, the said plaintiff's intestate did undergo great pain and suffering.

4. That by reason of the injuries and death of the said plaintiff's intestate as a result of the negligence of said defendant by its agents, servants and employees, the said plaintiff was obliged to incur hospital and medical expenses for the treatment of the injuries so sustained by plaintiff's intestate and to alleviate his pain and suffering.

Plaintiff on the second count claims as damages the sum of $10,000. together with costs of suit.

John O. Benson,
Attorney for plaintiff,
129 Market Street,
Paterson, New Jersey.

Answer.

Filed Aug. 30, 1929.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

JOSEPHINA DE ROSE, Administratrix, etc., of Alfonso De Rose (also known as Nick Rose), deceased,

Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant.

Action at Law

For answer to the complaint herein, defendants, The Delaware, Lackawanna and Western Railroad Company, says:

FIRST DEFENSE TO THE FIRST COUNT.

1. It admits the allegations of paragraphs 1, 2, and 11 of the first count.

2. It has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the first count, and in so far as they may be deemed material it demands due proof thereof.

3. All other allegations of the complaint are denied.

Answer.

SECOND DEFENSE TO THE FIRST COUNT.

4. Plaintiff's intestate was guilty of contributory negligence in the following particulars, viz:

(a) In failing and neglecting to take due and proper precautions for his own safety as required by defendant's rules.

(b) In failing and neglecting to look for the approach of the trains or train and engines or engine referred to in the complaint, in violation of defendant's rules.

(c) In taking a position so close to the track on which the train or engine which it is alleged ran plaintiff's intestate down was running as to endanger the safety of said intestate.

THIRD DEFENSE TO FIRST COUNT.

5. Plaintiff's intestate assumed the risk of the accident and injury complained of.

FIRST DEFENSE TO THE SECOND COUNT.

6. Defendant, for answer to paragraph 1 of the second count, repeats paragraphs 1, 2 and 3 of its first defense to the first count.

7. It denies the allegations of paragraphs 3 and 4 of the second count.

8. The allegations of paragraph 2 of the second count are admitted.

SECOND DEFENSE TO THE SECOND COUNT.

9. Defendant repeats and realleges the allegations contained in its second defense to the first count.

THIRD DEFENSE TO THE SECOND COUNT.

10. Defendant repeats and re-alleges the allegations contained in its third defense to the first count.

WHEREFORE, defendant demands that the complaint be dismissed, with costs.

FREDERIC B. SCOTT,
Defendant's Attorney.

Reply.

Filed Sept. 6, 1929.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

JOSEPHINE DE ROSE, Administratrix, etc., of Alfonso De Rose (also known as Nick Rose), deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.	Action at Law

Plaintiff by way of reply to the answer filed in the above cause, says:

1. That she denies that said plaintiff's intestate was guilty of contributory negligence as stated in paragraph 4, constituting the second defense to the First Count of said answer.

2. That she denies that plaintiff's intestate assumed the risk of the accident and the injury complained of as stated in paragraph 5, constituting the Third Defense to the First Count.

3. That she denies the allegations contained in paragraph 6, constituting the First Defense to the Second Count of said answer.

Reply.

4. That she denies the allegations contained in paragraph 9 constituting the Second Defense to the Second Count.

5. That she denies the allegations contained in paragraph 10 constituting the Third Defense to the Second Count of the answer.

Attorney for Plaintiff.
JOHN O. BENSON,

Postea.

Filed Feb. 1, 1930.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law

This cause was tried before Judge William B. Mackay with a jury at the Passaic Circuit, on January 30th, 1930.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Sixteen thousand ($16,000) dollars.

W. B. MACKAY,
Judge

Judgment.

Entered Feb. 1, 1930.

NEW JERSEY SUPREME COURT.

JOSEPHINE DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law

IT IS ORDERED that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of sixteen thousand dollars, besides costs to be taxed nisi.

Entered: February 1, 1930.

On motion of
JOHN O. BENSON, Atty.

$16,000.00	
77.09	
$16,077.09	

Testimony.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

JOSEPHINE DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law

Paterson, N. J., January 28, 1930.

Before HON. WILLIAM B. MACKAY, Judge, and a Jury.

Appearances:

For the Plaintiff: JOHN O. BENSON, Esq.

For the Defendant: FREDERIC B. SCOTT, Esq., and JAMES MURNER, Esq.

(A jury was called and sworn.)

(Mr. Benson opened the case to the jury on behalf of the plaintiff.)

Mr. Scott opened the case to the jury on behalf of the defendant.)

STIPULATION.

Mr. Scott: We have agreed upon certain fundamental questions here and I should like to put them on the record.

The Court: All right.

Mr. Scott: It is agreed by the defendant that both the deceased, Nick Rose, and the Delaware, Lackawanna and Western Railroad Company at the time of the alleged happening or the happening of the alleged accident in this case, were engaged in interstate commerce.

It is further agreed that Mr. DeRose was sixty-one years of age and that from the expectancy tables furnished by the Prudential Insurance Company he had an expectancy of 13.4 years; that is, from an insurance standpoint.

JOSEPHINE DEROSE, sworn.

Mr. Benson: I offer the letters of administration in evidence.

(Papers marked exhibits P-1 and P-2 in evidence.

Direct examination by Mr. Benson.

Q. Where do you live, Mrs. DeRose? A. 62 Murray Avenue.

Q. Where is that? In what city? A. Paterson.

Q. Are you the widow of Alfonse DeRose? A. Yes, sir.

Q. How long were you married? A. Twenty-four years.

Q. Where were you married, Mrs. DeRose? A. On Bridge Street, down there, you know.

Q. In what city? A. In Paterson.

Q. You have lived in Paterson since then? A. Yes, sir.

Q. How many children are there? A. I got four home and two married.

Q. Can you tell us the ages of your children? A. Yes, sir.

Q. Will you just tell us the names and the ages? A. One twenty-one.

Q. What is his name? A. Bill Rose.

Q. Yes? What is the next one? A. Margaret DeRose.

By the Court:

Q. How old is she? A. Is thirteen.

By Mr. Benson:

Q. What is the next one? A. Anna DeRose.

By the Court:

Q. How old is she? A. He was ten years old.

Q. Anna? A. Yes.

By Mr. Benson:

Q. All right. A. Anthony, he is seven.

By the Court:

Q. Anthony? A. Tony.

Q. Yes, how old? A. Seven.

By Mr. Benson:

Q. Any others? A. And James, twenty-nine.

Q. Do you have a daughter by the name of Catherine? A. Yes.

Q. How old is she? A. Twenty-six.

Q. That was in February, 1929? A. Yes.

Q. Do you know what your husband's work was? A. What my man worked at?

Q. Yes. What did he do? A. Everything, oiled the switches and walked the track, everything.

Q. And on the morning—do you recollect the morning of February 19, 1929? A. Yes, sir.

Q. What was the condition of his health at that time? A. He was happy, all the time happy.

Q. All the time happy or healthy? A. Happy.

Q. Happy? A. Yes.

Q. And what was the condition of his health? A. He was all right; he never was sick at all.

Q. Do you know how many years he worked for the company? A. Twenty-eight years.

Q. Do you know whether he lost any time of any kind? A. No, he never lost no time at all.

Q. What kind of a day was February 19, 1929? A. Sometime a little cloudy and sometime, you know, the sun come up.

Q. Was it clear or rainy? A. No, it was a nice day, clear; it wasn't raining. It was cold.

Q. Now, then, do you know—what did your husband do with his pay, Mrs. DeRose? A. He gave it to me.

Q. Do you know what was the average pay he received? A. Yes, he have a check. He bring to me.

Mr. Scott: Just a moment. I object to that.

The Court: Why?

Mr. Scott: A mere opinion—I perhaps ought to ask a preliminary question.

The Court: Yes.

By Mr. Scott:

Q. How did you receive this pay, Mrs. DeRose? A. A check.

Q. A check? A. Yes. I told you. Didn't you hear?

By the Court:

Q. What kind of a check? A. A check on the railroad.

Q. A railroad check? A. Yes.

The Court: All right.

By Mr. Benson:

Q. Do you know how much the average pay he received was? A. Well, sometime bring fifty dollars; sometime he worked over-time and bring more.

Q. How much more would he bring? A. Sometime he worked on Sunday, you know.

Q. How much more would he bring? A. Maybe sixty dollars every two weeks.

Q. For how many weeks would that be? A. Every two weeks.

The Court: How much?

Mr. Benson: Sixty dollars every two weeks.

The Court: Sixty dollars extra?

Mr. Benson: No, every two weeks. Sometimes he would get fifty dollars every two weeks, sometimes sixty.

Q. Is that what you said? A. Yes.

Q. Do you recollect just before he died, just before February 19, 1929, what his checks were? A. It was fifty dollars, the check.

Q. Fifty dollars? A. Yes.

Q. Would he get more in the winter than in the summer? A. Yes, in the summer he would get more; in the winter cut the pay.

Q. What did you do with the checks, with this money, Mrs. DeRose? A. Well, support the home.

Q. Support the family? A. Yes.

Q. Now, what time did he leave his house on February 19, 1929? A. Seven o'clock.

Q. And where was the next place you saw your husband? A. In the hospital.

Q. What hospital? A. St. Joseph's Hospital.

Q. Did you make any observation? Did he appear to be injured? Did you see any injury about him? A. Yes. He was all scratched up on the face and they had all bandaged up.

Q. Could he talk? A. No.

Q. What did he do? A. He was breathing like that (illustrating). I thought he was dying.

Q. How many days did he remain in the hospital? A. Three days.

Q. And then what happened to him, Mrs. De Rose? A. And he died.

Q. And then you were appointed administratrix? A. Yes.

Mr. Benson: That is all. Take the witness.

Cross-examination by Mr. Scott.

Q. Those pay checks, Mrs. DeRose, you say were sixty dollars every two weeks? A. No, it was sixty dollars every two weeks.

Q. You say Nick, your husband, gave you his pay checks? A. Yes, the pay checks.

Q. And you say that they were sixty dollars, a pay check for sixty dollars every two weeks?

A. Yes. Sometimes every two weeks sixty dollars.

Q. Was that every two weeks that he brought home a sixty dollar pay check? A. No, every week; sometimes when he worked over-time, when he worked on Sundays, too, times.

Q. When he worked over-time, then he brought home a pay check for every two weeks? A. Every two weeks.

Q. For sixty dollars? A. Yes.

Q. But when he didn't work over-time how much did he bring home? A. Fifty dollars a week.

Q. Fifty dollars a week? A. Every two weeks.

Q. Fifty dollars for every two weeks? A. Yes.

Q. When did you see the last pay check, Mrs. DeRose? A. When the company give me the last pay; they was give me the Monday after.

Q. When did you see the last pay check before Nick died? A. Oh, this month?

Q. The month before? A. Yes.

Q. How much was that check? A. Fifty dollars.

Q. That was for fifty dollars? A. Yes.

Q. For two weeks? A. For two weeks.

Q. Do you know how much the one before that was for? A. Huh?

Q. How much was the one before that? A. The one before that?

Q. Yes. A. The same, you know, when he worked more, some over-time and Sunday, he would get more. You know, he worked on Sunday, too.

Q. But you are sure the last two pay checks before he died were fifty dollars each? A. Yes, fifty dollars each.

Q. And when did he get the sixty dollar checks? A. Before he took the sixty dollars, because he

was working on the New Year's and Christmas; he had to work that day.

Q. On Christmas and New Year's he got fifty-dollar checks? A. He was working, you know, he got more.

Q. Sixty dollars? A. Because he was on track work, too.

Q. How many times during the year before he died did he bring home these sixty-dollar checks? A. Well,——

Q. Once or twice, or—— A. More than twice. In the summertime he would get more, you know.

Q. Well, how many times? A. What I know? Do you think I remember everything? I never remember everything.

Q. Well, just tell the Court and jury when you saw the last sixty-dollar check, the last before he died. A. Before he died he was working, you know. He was working Christmas and the New Year's. He took the pay, and the next he takes fifty dollars. He was working.

Q. When was the last you saw a sixty-dollar check before he died? He died in February? A. Yes, he died in February.

Q. Now, did you see—— A. Well, probably for Christmas—no, New Year's he take the pay, after New Year's.

Q. The pay check around New Year's, that was for sixty dollars? A. No, fifty dollars. I don't know the other one, no.

Q. Don't you remember? A. I never remember the other one. This is the fifty dollar I remember; I never remember the other one.

Q. Oh, you don't remember when he received a sixty-dollar check during the year before he died? A. No.

Q. Do you understand me, Mrs. DeRose? A. I don't much understand.

Q. The checks were not under fifty dollars, were they? A. Yes, one is fifty dollars.

Q. I say, none of them were less than fifty dollars? A. No, it ain't less than fifty dollars.

Q. Always fifty dollars? A. Yes.

Q. And sometimes sixty dollars? A. Yes, sixty.

Q. But never smaller than fifty dollars? A. No, never was smaller.

Mr. Scott: That is all.

JAMES DEROSE, sworn.

Direct examination by Mr. Benson.

Q. Are you one of the children of Alfonse and Josephine DeRose? A. Yes.

Q. Where do you live, Mr. DeRose? A. 95 Sherman Avenue.

Q. What city? A. Totowa.

Q. And what is your age? A. Twenty-eight.

Q. When did you leave your home, that is, the home of your father and mother? A. Two years and four months.

Q. Do you know how long your father was employed by the D. L. and W. Railroad? A. Twenty-eight years.

Q. Do you know anything about his regularity at work? A. Flagman, pick and shovel, track walker; he done everything in gang he could do on the job.

Q. Was he regular in his work? A. Yes, sir.

Q. What was his condition of health, so far as you observed? A. Good.

Q. What was his condition of health about February 19, 1929? A. All right, good, too.

Q. How many constituted the DeRose family? A. Six. There is four more home.

Q. Four at home? How many are married? A. Two.

Q. Are you familiar with the track and the location of the station, along the station at Paterson? A. Yes, sir.

Q. Did you ever work on the D. L. and W. Railroad? A. Seven months in 1919.

Q. What capacity did you work in? A. West Paterson.

Q. In what kind of work? A. Pick and shovel, flagman.

Q. Anything else? A. That is all.

Q. Did you do any track walking? A. No, I never done no track walking.

Q. While you were employed did you make any observation as to—did you ever observe any men working alone on the track?

Mr. Scott: I object. What happened in 1919 has no relevancy or bearing on what happened at this time.

Mr. Benson: It may have as to custom, it seems to me, if he knows whether that custom continued on down to the present time.

The Court: He only worked there seven months.

Mr. Benson: He may have made observations and know just what the custom was. Later, by virtue of the father working there, he would naturally be interested in the condition and the general operation of railroad work.

The Court: I hardly think that would prove a custom.

Mr. Benson: He knows what happened in 1919. That may be remote, but we may be able to connect it up to show that custom continued on down to 1929.

The Court: I suppose if you can connect it up. If you can't connect it I would have to strike it out.

Mr. Benson: I will ask him that subject to that ruling.

Q. Do you know what the custom was where a man was working alone on the approach of any engine or train or freight car?

Mr. Scott: May I at this time ask a preliminary question, sir?

The Court: Yes.

Cross-examination by Mr. Scott.

Q. Mr. DeRose, you worked for the railroad company when? In 1919? A. 1919.

Q. And you worked seven months? A. Seven months.

Q. After that where did you go to work? A. I didn't work; I loafed.

Q. You loafed? A. Yes.

Q. You loafed up to the present time? A. No, I didn't loaf up to the present time.

Q. When did you get a job after you left the railroad company? A. Oh, about five months after.

Q. And you have worked steadily ever since? A. Certainly.

Q. For the same concern? A. No, no.

Q. What concerns did you work for? A. I worked for the Dairy Maid now.

Q. What concern did you work for? What was the first concern you worked for after you left the railroad company and got a job? A. Washington Piece Dye Works on a truck. From there up to the Dairy Maid.

Q. On a truck? A. Yes.

Q. Would that job take you into Paterson? A. No, took me to New York.

Q. How long did you work for them? A. Eight months.

Q. Eight months? A. Yes.

Q. Did you go to New York every day you worked? A. Every day.

Q. And you worked every day in the week? A. Every day.

Q. After you left them where did you go? A. Dairy Maid Ice Cream Company.

Q. Driving a truck for them? A. No, sir, ice cream maker, inside.

Q. Oh, you were an ice cream maker? A. Yes.

Q. How long did you work for them? A. Five years and a half.

Q. During all that time you worked six days a week or seven? A. I work every day up there, Sunday and all.

Q. Sunday and all? A. Certainly.

Q. And your work is at the factory or the place where they make the cream? A. Where they make the cream, inside.

Q. And your hours are what? A. I haven't got any hours. I work from seven until I get done.

Q. And does that take you late at night? A. No, half past one, two o'clock, three o'clock, half past.

Q. Two or three o'clock is the latest? A. Yes.

Q. All your work is confined, done in the plant or factory? A. Right in the plant.

Q. Do you work for them at the present time? A. Five years and a half.

Q. You are working for them now? A. Yes.

Q. Yes, you still work for them? A. Still working there yet.

Mr. Scott: May it please the Court, I press my preliminary objection to the question for the purpose of making the objection to the question Mr. Benson has just asked, as to what the custom was.

The Court: I don't think he is qualified.

Mr. Benson: He may have made an observation. He doesn't of necessity—he is working steadily at the Dairy Maid Ice Cream Company, which would not preclude him from making observations on the D. L. and W. Railroad from time to time.

The Court: No, that wouldn't preclude him from making observations, but when you say to him, "What was the custom"——

Mr. Benson: He would know whether that custom was carried along the same as it was when he was working there.

The Court: He would hardly be in a position to know, if he is driving a truck, as to what would happen to a man walking the tracks or a man working on the tracks.

He might see them there, but I don't see what weight that could have. I don't see what evidential value it would have.

Mr. Benson: I don't know whether he has made the observation, but I was laying——

The Court: Of course, if you can connect it up all you have got to do is to ask him what may have occurred during the time that he was working for them. Of course, if you can connect it, why, you just continue from the point where he quit working for them and make your connection down to the time of the accident, so you might ask him as to what actually was done so far as that particular situation was concerned during the time that he was employed there.

Mr. Benson: All right, I will ask him that, then.

Mr. Scott: Will you put a question so I can object?

By Mr. Benson:

Q. What was the custom during your employment with the D. L. and W. Railroad with respect to warning any man engaged in working on the tracks?

Mr. Scott: I object.

A. Three blows.

Mr. Scott: First, on the ground that it is too remote; second, on the ground that there does not appear at the present time any similarity of situation with respect to the decedent. There is nothing to show what the decedent was doing, whether he was working on the track or whether he was walking on the track or what he was doing.

The Court: I will have to sustain the objection and strike out the answer.

Mr. Benson: I will ask permission, then, to withdraw this witness at this time so that I may lay the foundation by another witness.

The Court: Yes.

(The witness was temporarily withdrawn.)

THOMAS MURPHY, sworn.

Direct examination by Mr. Benson.

Q. Where do you live, Mr. Murphy? A. 153 Post Avenue.

Q. Where is that? In what city? A. Lyndhurst.

Q. What business are you engaged in? A. Section foreman.

Q. For what railroad? A. Delaware, Lackawanna and Western Railroad.

Q. How long have you been so employed? A. Since 1921.

Q. Did you know Alfonse DeRose? A. Yes, sir.

Q. Was he immediately under you? A. Yes, sir, he was.

Q. Do you remember the morning of February 19 Mr. DeRose reporting for work? A. Yes.

Q. He was rather regular, wasn't he, in his reporting for work? A. Yes, he was.

Q. And did you give him directions what he should do? A. Yes.

Q. What did you tell him to do, Mr. Murphy? A. I gave him instructions how to walk the track and oil the switches.

Q. Oil the switches? A. Yes.

Q. Now, did you tell him what switch to oil? A. Sure.

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Q. Are you familiar with the lay of the land at the railroad station at Paterson, the main station? A. Yes, sir.

Q. You have been working in that locality for how long? A. I have been working there since July, 1927.

Q. I show you a photograph. Does that truly depict the conditions that existed in February, 1929? A. That is the station up there, isn't it?

Q. Yes, that is the station up here? A. What is it?

Q. Is that a true picture of what conditions were in February, 1929? A. Yes, that looks like the track.

Mr. Benson: Now I offer that.

(Photograph marked exhibit P-3 in evidence.)

Q. I show you a photograph, Mr. Murphy, looking down, from the railroad station at Paterson, looking east. Does that truly depict the condition that existed in February, 1929? That is, looking east from the railroad station. Look at it, if you want to take it in your hand and examine it. A. Yes, that looks like it.

Mr. Benson: I offer it in evidence.

(Photogarph marked exhibit P-4 in evidence.)

Q. As shown on exhibit P-2, the connection of a track that extends from the railroad station to a switch, does that indicate the point where you directed Mr. DeRose to work on February 19?

Mr. Scott: I object, on the ground that the witness has said that he told him to oil switches.

Mr. Benson: That is one of the switches.

Mr. Scott: Mr. Benson wants to know if this is the particular point, as if that was the only thing he was supposed to do on this particular day. I have no objection if Mr. Benson will incorporate. Is that one of the places?

Mr. Benson: I haven't any objection to that.

Q. Does that indicate one of the switches that he was supposed to oil, Mr. Murphy? A. Well, I suppose that took in some of them; that is not the particular one I asked him to.

Q. Well, now, how far would you say that that switch is from the main station at Paterson? How many feet, about? A. It is about eight hundred feet.

Q. About eight hundred feet. Now, then, do you know whether he went to work there or not, Mr. Murphy? When did you give him the instructions? In the morning? A. In the morning, just as we left the tool house.

Q. Did you see him at the tool house? A. Yes.

Q. And in addition to oiling was he to do any other work, Mr. Murphy? A. He was supposed to look over the track and track-walk besides.

Q. And track-walk besides? A. On his journey.

Q. What? A. On his journey he was supposed to look after the tracks, see that it was safe, no broken rails or anything of the like, see.

Q. And did he carry with him any tools? A.

No, just he had a small pail and brush for to oil the switches.

Q. Did he have any wrenches with him? A. No.

Q. Did you give him any tools other than the pail and—— A. Pail and oil.

Q. And what? A. And a can of oil.

Q. Now, then, where did you go then, after that? A. We went down about our work, west.

Q. Did you accompany Mr. DeRose or did you leave him there to attend to his work? A. I left him there to attend to his work.

Q. Now, then, how long did you say you have been working for the railroad? Since 1921? A. Yes.

Q. And what is your position? A. Section foreman.

Q. Section foreman. Are you familiar with the custom in the protection of employes in the railroad? A. Yes.

Q. And when a man is on a track alone is it the custom of the oncoming train, whether freight or otherwise, to give any warning or signal? A. Well, yes.

Q. What signal must he give? A. He blows the whistle.

Q. He blows the whistle how many times? A. About three times.

Q. Three times. And that has been the continuous custom in the railroad, on the D. L. and W.? A. Yes.

Q. Now, then, do you recollect, Mr. Murphy—withdraw that.

Q. When was your attention first called to the injury of Mr. DeRose? A. The first time my attention was called to it is about ten minutes to one.

Q. And where were you at that time? A. At ten minutes to two, I should say.

Q. At ten minutes to two. Yes? A. I was at Little Falls.

Q. Did you immediately come back to Paterson? A. Yes, sir.

Q. Do you recollect where Mr. DeRose was picked up? A. Well, he was picked up already when I got down.

Q. Well, do you know the location?

Mr. Scott: I object. If he was picked up when he was not there.

Q. Was there anything on the ground indicating that he had been injured?

Mr. Scott: I object on the further ground that that doesn't indicate where he was picked up. If there was something on the ground that doesn't indicate where he was picked up; it doesn't indicate where he was hit.

Mr. Benson: All right, I will withdraw the question.

The Court: Sustain it.

Q. Did you see Mr. DeRose after that—withdraw that. Did you see him during the afternoon? A. No. I went to see him at the hospital but I wasn't able to see him.

Q. Did you see him at any time the following day? A. No, sir.

Q. Never saw him after that at all alive? A. Well, I saw him once.

Q. Where? A. In the hospital.

Q. Was he able to talk or not? A. No, he wasn't able to talk.

Mr. Benson: I think that is all. Take the witness.

Cross examination by Mr. Scott.

Q. As I understand it, DeRose worked under you as one of your gang? A. Yes, sir.

Q. You were the section foreman? A. Yes, sir.

Q. And on the morning of February 19, 1929, the gang all met where? At the tool house? A. At the tool house.

Q. Where is that? Near the Paterson station? A. Yes, that is just east of the Paterson station.

Q. Sir? A. Just east of the Paterson station.

Q. Just east of the Paterson station? A. Uh huh.

Q. And they opened up the tool house and each fellow would get the tools he was going to use that day? A. Yes, sir.

Q. Now, on this particular day you had designated or told Nick that he was to do track-walking work, did you not? A. Yes, sir, I did.

Q. And the rest of the gang were to go up to Little Falls to work? A. Yes, sir.

Q. And you went up to Little Falls with the rest of the gang? A. Yes, sir, I did.

Q. And as I think you told Mr. Benson, Nick took a pail and some oil? A. Yes, sir, he did.

Q. And no wrenches with him? A. No wrench that morning.

Q. And before Nick left, I think you told Mr. Benson, you instructed Nick— A. I did, sir.

Q. And you told Nick when he left or before he left that morning to look out for trains, did you not? A. I did, sir.

Mr. Benson: I object to that. Just a moment. I don't think he said that. He didn't say that on his direct examination.

Mr. Scott: You asked him if he gave him instructions and directions.

Mr. Benson: As to work, not as to any protection of safety at all.

The Court: Well, I hardly think you can limit the cross examination to that extent.

Mr. Benson: He was only asked—if he wants to make him his witness on that subject, why, he may, but I only asked him as to his work. I was very particualr about that, as to instructions as to work.

The Court: I think it is proper. I will permit it and allow you an exception.

Mr. Benson: All right, sir.

(The question and answer were read by the reporter.)

Q. The difference between a track-walker and the gang work, or the work of a track-walker and when the gang works, the gang works as a bunch or together, don't they, and a track-walker goes alone and by himself? A. Yes, sir.

Q. And Nick had done track-walking work before that day? A. Oh, yes, often.

Q. How often? A. Off and on ever since he was in my gang.

Q. And when you worked as a gang or when your gang was working together how would you warn your men of a train coming?

Mr. Benson: I object to it as not proper cross examination. We didn't go into any question of gang. This was a question of one man working alone, what the custom was.

Mr. Scott: Well, I will withdraw that, then.

Q. When a man was working alone as a track-walker, would he have to look out for himself with respect to trains? A. Yes, sir, he would have to look out for himself.

Q. And those had been your instructions from time to time to Nick? A. Yes, sir.

Mr. Benson: I object to that. That is too indefinite, from time to time.

Q. Wasn't it? A. Yes.

The Court: That is a little indefinite.

Q. Those were Nick's instructions on this particular morning, were they not? A. They were, sir.

Mr. Scott: That is all.

Redirect examination by Mr. Benson.

Q. Just a minute, Mr. Murphy, please, Did Mr. De Rose ever work in the gang? A. Yes sir. he did.

Q. And when he worked in the gang, of course, the foreman had to look out for the trains, didn't he? A. Yes, sir.

Q. How long did you say Nick worked for the railroad? A. I don't know how long he worked for the railroad.

Q. He worked a good deal longer than you, didn't he? A. He worked longer than I did, yes, so therefore I couldn't tell you.

Q. And he had far more experience than you had? A. I guess so.

Q. On track work hadn't he had more experience than you did? A. In track work?

Q. Yes. A. I think so.

Q. How many years have you had experience in track work? A. How many?

Q. How many? A. I have been doing track work since 1905.

Q. 1905? A. Uh huh.

Q. And Nick was always a very careful employe, wasn't he? A. Yes, he was.

Q. You are still employed by the D. L. and W. Railroad? A. Yes, sir.

By Mr. Benson:

Q. When did Nick arrive on that morning of February 19? A. He arrived about half past seven.

Q. And you say you sent him out to inspect the tracks? A. Yes, sir.

Q. And did you send any other person out besides Nick—alone? A. Any other person?

Q. Yes. A. Sure.

Q. How many others? A. Not that morning.

Q. That particular morning? A. That particular morning I only sent himself; one man.

Q. Now, then, Nick prior to that time had been a flagman, hadn't he? A. Occasionally, yes.

Q. Did he do any other work other than flagman and track-walker? A. Yes, sir, sure. He worked with the men in the gang.

Q. Worked with the men in the gang? A. Yes.

Q. You said, Mr. Murphy, I understood, on your direct examination, that when a train approached a man working alone on the track, that the engineer would give three blasts of the whistle; is that true? A. Yes, that is true.

Q. And that would be— would that be the warning that would warn a man to look out for

himself, to get off the track after that whistle was given? Isn't that the fact? A. Yes, that is what it meant.

Mr. Benson: That is all.

Recross examination by Mr. Scott.

Q. That is if the engineer saw him? A. Oh, yes.

Q. He would give a whistle? A. If he saw him, yes.

Q. If he saw him? A. If he didn't see him, of course he wouldn't blow the whistle. He couldn't.

Q. And on this particular occasion and prior, on the different occasions when Nick was working as flagman, as Mr. Benson brought out, Nick was obliged to look out for himself, was he not? A. Yes, sir.

Q. And those were the instructions when he was flagman, that he look out for himself? A. Oh, yes.

Q. And look out for the coming of trains? A. Yes, sir.

Q. And that had been going on for a number of years while Nick was working for you, had it not? A. Yes.

Q. And when a man is a flagman he works alone, too, doesn't he? A. Yes.

Q. Away from the gang? A. Yes, he does.

Q. And at those times he looks out for himself? A. Yes.

Mr. Scott: That is all.

Redirect examination by Mr. Benson.

Q. There is a curve just above the station, is there not? A. Yes.

Q. Now, then, when he reached the point about eight hundred feet from the place where the tracks connect again, as indicated on P-4, does the engineer have a clear vision down the track?

Mr. Scott: I object to that on the ground it calls for——

Mr. Benson: Well, I will withdraw it and put it in this form.

Q. At a point eight hundred feet to the west of where the track shown on exhibit P-4 is, are there any obstructions to obstruct the view of the engineer?

Mr. Scott: I object, on the ground that the witness has testified that on that particular day he was up at Little Falls.

The Court: Oh, yes, but he may know the condition of the tracks, he is so familiar with it.

Mr. Scott: He is talking about obstructions, sir.

The Court: Well, I suppose what you want to find out is what ordinarily is the situation——

Mr. Benson: Yes.

The Court (continuing): —with respect to whether the tracks are straight or crooked; is that it?

Mr. Benson: Yes.

Mr. Scott: Fixed objects? Nobody is complaining about the fixed objects.

The Court: Well, then, I suppose that is what he wants to find out, as to what kind of a view he could get and how far you can see from that point.

Mr. Scott: I am objecting if Mr. Benson is trying to tell what the engineer could see.

Mr. Benson: Then I will ask him if he had fair sight.

The Court: I suppose there is no question about an engineer being able to see, or he would not be an engineer.

Mr. Benson: At least on the D. L. and W. they do see.

The Court: But I suppose the point of counsel for the defendant is that there may have been some obstruction there, such as cars or something else, and if this man wasn't there at this particular time he couldn't tell what obstructions may have been there. But on the assumption that there were no cars or obstructions, to what extent he could get a view from one point to another would be permissible. I will allow that.

Mr. Scott: May I have that put in the question?

The Court: Yes.

By Mr. Benson:

Q. From the point as indicated on exhibit P-4, which is approximately, you said, I think, eight hundred feet from the intersection of the tracks as shown on the photograph, is that a straight line?

Mr. Scott: I object. I think the picture speaks for itself.

Mr. Benson: I want to lead up to it.

The Court: He can ask the witness outside of the picture, I suppose, and the use of the picture is only to indicate a point and make it certain. What is the answer?

A. It is not a straight line.

Q. What kind of a line is it? A. It has a little curve going into a straight line.

Q. Well, from a point eight hundred feet to the west of where the tracks join, as indicated on P-4, is that such a line that if there was no obstruction a person could see an object from the point eight hundred feet to the point where the intersection of the tracks was?

Mr. Scott: I object—could you see an object?

Q. An object the size of a human being.

Mr. Scott: I object to that. It contains an unwarranted assumption of fact. There is no evidence in this case, if this man—I will put it that way—if this man was struck on the track.

Mr. Benson: We have to connect it up. We have to start somewhere.

Mr. Scott: In the second place, there is nothing to indicate where this object is that Mr. Benson is trying to have the witness designate.

The Court: Well, let him mark the point on the photograph so that we will get it definitely.

Q. Can you mark the point?

The Court: Where the tracks come together.

Q. Where the tracks come together? Can you mark that, Mr. Murphy?

By the Court:

Q. Can you see the point where the tracks come together on that photograph? A. Yes, sir.

Q. Will you just make an X-mark where they came together? A. Where the tracks come together?

Q. Yes. A. They come together here. They come together right at the frog.

Q. Just make an X on there. A. Right here.

Mr. Scott: Mark it at the frog.

By Mr. Benson:

Q. Now, then, from the point that you have indicated and marked on exhibit P-3, how far is the visibility to the west from that point, how many feet? A. Oh, you could see about six hundred feet.

Q. Six hundred feet. In your experience as a foreman, Mr. Murphy, if you see a section man walking and if his back was to the engine, would the engineer give a signal?

Mr. Scott: I object to it as immaterial, incompetent, and irrelevant.

The Court: What would that prove, Mr. Benson?

Mr. Benson: Just to see whether under any circumstance——

The Court: You have proven it is the cus-

tom of the trainman to blow the whistle three times and that it has been a continuous custom of the D. L. and W.

Mr. Benson: All right, that is all.

WILLIAM GUSTA, sworn.

Direct examination by Mr. Benson.

Q. Where do you live, Mr. Gusta? A. 40 Peach.

Q. In what city? A. Paterson.

Q. How long have you lived in Paterson, Mr. Gusta? A. Twenty years.

Q. Twenty years? A. Yes.

Q. What kind of work do you do? A. Laborer.

Q. For whom do you work? A. All over.

Q. What is the name of the people that you work for? A. Now?

Q. Yes. A. Lackawanna Coal Company.

Q. Where is that? A. Over there (indicating).

Q. How far is it from the station at Paterson? A. I don't know. I can't figure it up.

Q. Is it anywheres near the—I show you exhibit P-3. Do you recognize that picture? A. Yes.

Q. Now, can you say about where the Lackawanna Coal Company is there? Can you find it there? A. Here is the coal pocket, I know; here is the coal pocket.

Q. Will you mark that with pen and ink? Just mark there with a cross, right there on the flat surface. A. (The witness complied.)

Q. Now, looking at exhibit P-3, can you tell where you were on February 19, 1929, just before Mr. Alfonso DeRose was injured, was hurt? A.

I can't speak English, you know. On the tool house.

Q. Just mark it on the photograph. A. On the tool house.

Q. What were you doing, William, at the time just right after dinner? A. After dinner I got on the job——

(A five-minute recess was taken.)

After Recess.

(Thomas Vigorito was sworn as Italian interpreter.)

By Mr. Benson:

Q. I will withdraw the last question. How long did you know Alfonso DeRose? A. Fifteen years —eleven.

Q. Did you see him on the 19th day of February, 1929? A. Yes.

Q. And where did you see him? A. On the track where we were working.

Q. Did you see him in the morning of the 19th? A. Yes, sir.

Q. Do you recollect seeing him right after dinner? A. Yes, sir.

Q. You have marked a cross. Is that the place where you were right after lunch? A. This is the place where I was, and he was here.

Q. Where the cross—point to it. Right near the frog of the railroad track; is that right? A. He was right here, working.

Q. Now, which way—withdraw that. Do you recollect seeing any freight train, the first freight train go through? A. Yes.

Q. Now, then, did you see Alfonso after that

first train went through, working on the track? A. He was working.

Q. Now, which way was he facing? Toward the mountain or toward the City of Paterson? A. Facing the mountain.

Q. And what kind of a day was it, William? A. A bad day. It was cloudy. The sun would shine and then would not shine.

Q. Was it clear, though? Was there any rain or anything? A. No rain.

Q. And was there anyone sitting—withdraw that. At the point you have indicated on this exhibit P-3, what was there there about that place? A. Nothing.

Q. What were you doing? Standing up or sitting down after lunch? A. Sitting down.

Q. Was anyone with you at the time? A. A friend of mine, a companion.

Q. Where does he work? A. In a coal yard.

Q. Was he working in the same place? A. Same place. He works downstairs and I work upstairs.

Q. And after this first train went by do you remember how soon after that the second freight train went by? A. Seven or eight minutes.

Q. Now, then, when did you first see that second freight train? A. Seven or eight minutes after the first train passed.

Q. Well, now, then, where did you first see it, Mr. Gusta? A. I heard the noise and I turned and saw the train coming.

Q. Was there any whistle or bell blown at any time? A. No bell and no whistle.

Q. And then what happened, after that? A. A couple of minutes after my companion and partner turned and he saw the man lying on the track.

Q. What can you say of the speed of the train? A. It was traveling fast, because it was a passenger train.

Q. Because it was a what?

Mr. Murner: "A passenger train," he said.

Q. What kind of a train was it that you saw right after the freight, right after the first freight?

Mr. Murner: Wait a minute. How many questions is that? I think the interpreter asked him two, didn't he?

The Interpreter: No.

A. The first freight passed and the second freight passed.

Q. And then what happened after the second freight passed? A. We saw Nick lying on the ground.

Q. How far from the point that you have marked with a cross at the frog? Just indicate here, will you? A. He was right here.

Q. Mark that. A. (The witness complied.)

Mr. Benson: I would like to ask the Court if it had better be marked by some designation, because there are several marks on here. Will I mark an *A* to designate that?

The Court: Yes, all right.

Mr. Scott: What does the *A* indicate?

Mr. Benson: The location where he saw Nick after the freight train had left or had gone by.

Q. Now, what did you do when you saw Nick lying in the position as indicated *A* in exhibit P-

3? A. We went after him, and one of the partners said, "What is he doing; he is lying"——

Mr. Scott: We don't want to hear what he said, of course.

The Court: No.

Q. What was he doing? A. He was lying— he was lying on the ground, and my partner observed that he was lying on the ground.

Q. And then what did he do? A. We went after him.

Q. And then what happened after that? Just tell us what happened after that? A. We brought him into the freight house on the pushcart.

Q. And from there what happened? A. The flagmen came and he called the boss. The boss came and he put his handkerchief over the head.

Q. How many feet would you say it was from the place where you stood or went down to the point where Alfonse was struck? A. I cannot tell but it may have been fifty feet; it may have been a thousand feet.

Q. You are not sure, then? A. Three hundred feet.

Q. Could you see him there just before he was hurt? A. Yes.

Q. Do you know, Mr. Gusta, whether or not Alfonse was conscious at the time you got there? A. He wasn't; he heard nothing.

Q. Did he have anything in his hand at all? A. He had a brush, a bucket, and a wrench.

Mr. Benson: Take the witness.

Cross-examination by Mr. Scott.

Q. You had been working over at the coal pockets all the morning of the day that Nick was hurt? A. I wasn't working. I was waiting for coal and the engine didn't come with the coal.

Q. What were you doing? Just sitting around all morning? A. Swept the floor and waiting for orders from the boss.

Q. And you saw Nick working around the tracks that morning? A. Yes.

Q. Then you had your lunch? A. I went home to lunch.

Q. You went home to lunch and when you came back from lunch what time was it? A. One o'clock.

Q. When you got back from lunch did you see Nick working around the tracks then? A. Yes.

Q. And while Nick was working around the tracks after lunch you say a freight train went by? A. Yes.

Q. How do you know that freight train was coming down toward the coal pockets? Did you hear it making a noise? A. I was on the bridge.

Q. On what bridge? The coal trestle? A. Yes.

Q. I asked you how you knew that this freight train was coming down from Boonton toward the coal pockets. Did you hear it coming down?

Mr. Benson: I object to that unless he fixes the place where he heard it. It is rather indefinite. He says from Boonton. Does that indicate he heard it when it was at Boonton?

Mr. Scott: From Boonton direction.

The Court: He is referring to the direction.

Mr. Scott: I will withdraw that, Mr. Benson.

Q. What directions were those trains coming from and where were they going to, that you saw, these freight trains? A. They were going to New York.

Q. Coming from Paterson and going down toward New York? A. Yes, to New York.

Q. About how soon after one o'clock was it that you saw the first freight train go by? A. About one-thirty.

Q. About one-thirty? A. Yes, sir.

Q. And how do you know that this train that passed by at one-thirty was coming down from Paterson? Did you hear it? A. Certainly. I was on the bridge and I saw it.

Q. You saw it coming down? A. I saw the train coming.

Q. What was Nick doing at the time you saw this train coming? A. He saw the train and he walked from the track.

Q. Now, then, about ten or twenty minutes after that did you see another freight train coming by? A. No, sir, seven or eight minutes after.

Q. Now, this first train, did that have— how many cars did that have attached to it? A. Maybe twenty or thirty cars; I don't know how many cars were on it.

Q. Was it a big train? A. Yes.

Q. Where was it when you first saw it? Up near the Paterson station? A. No, it was near me.

Q. How far away from you? A. About seventy or eighty feet. I couldn't figure out the exact distance.

Q. Which way were you looking? At the train or up toward Paterson? A. I look up on the mountain, looked out at the mountain.

Q. Could you see about eight hundred feet up the track towards the Paterson station from where you were? A. When the line is direct, yes.

Q. Was it direct where you were? A. Yes, sir, just a small curve.

Q. You were looking up that way and you couldn't see the train coming?

Mr. Benson: I object to that. He has already testified that he was standing——

The Interpreter: I didn't hear that, your Honor.

Mr. Benson: I object to it, because he has already testified he was stanidng on the bridge and saw it coming. I think that is his testimony.

Mr. Murner: We have a right to ask how far away it was. your Honor, when he first saw it.

The Court: I will permit it. I think it is proper.

(The question was read by the reporter.)

Mr. Benson: I object to that. The question is, "You were looking up that way"; there is no foundation for that. He didn't say that. He said he was on the bridge and saw the train. That indicates that he might have been looking, but it doesn't say he looked continuously.

The Court: Well, ask him if he was looking up that way.

The Interpreter: He says, "Certainly, I was standing in this position on the bridge and I saw it."

By Mr. Scott:

Q. How far away was that train when you first saw it? A. Is that the first or second?

Q. When you first saw it.

Mr. Benson: No, the first or second train.

The Court: He means the first freight or the second.

Q. How far away was the first freight train when you first saw it? A. From the wall in back to the other wall.

Q. Now, what attracted your attention to this train?

Mr. Benson: Which one?

Q. The first freight train. A. I was just leaning over the bridge and I saw that Nick was working.

Q. What attracted your attention first to this first freight train, not what Nick was doing? A. Nothing except that I was just standing and looking and I saw the train.

Q. Now, you—that train was a long freight train, the first train? A. Certainly, freight trains are long. They maybe had forty or fifty cars.

Q. Was this a long freight train or not? A. Long.

Q. Now, after that freight train passed what did you see Nick doing? A. He was greasing the tracks.

The Court: Greasing the what?

The Witness: The tracks.

Q. Now, from the time you first saw the first freight train go down toward New York did any trains go up the other way? A. No, sir.

Q. Now, after the first freight train passed him, what track was Nick on? A. Side track.

Q. Which side track? Can you show us on this picture? A. Right there (indicating).

Q. He just indicated, your Honor, right here.

The Court: Which one would that be? East, west, or north, or south-bound?

Mr. Scott: That would be what they call the middle track.

The Court: The middle track?

Mr. Scott: Yes, sir.

The Court: I see.

Q. This track here is what we call the middle track? A. Yes.

Q. This is the track that comes from Paterson down to New York? A. Yes.

Q. This is the middle track and this is the track that they go up to Paterson from New York? A. You come into Paterson.

Q. Coming into Paterson from New York? A. Yes.

Q. And Nick was on the middle track? A. The middle track, this track.

Q. Right where I have my finger, about? A. Yes, over there; perhaps there could be a difference of two or three inches.

Q. Now, will you point where Nick was after the first train, the first freight train, went by? Point out on this picture?

Mr. Benson: I would like to know how soon after.

Q. How soon after the first freight train went by did you see Nick near the tracks? A. Two or three minutes.

Q. And then where did you see him? Point out on the picture. A. Where? Here is where we saw ihm.

Mr. Scott: May we just mark that with this fellow's name, William? W? May we mark that with a W?

Q. Is that the point where you saw Nick right after, two or three minutes after the train passed? A. Yes.

Mr. Benson: That is the first train?
Mr. Scott: The first train, yes.

A. Yes, the first train.

Q. Now, the freight train came right down this track here, did it not, on the track to the left of the picture, the track nearest the left of the picture? A. This is the track on which the train came, and Nick was here working.

Mr. Benson: Wait a minute. He ought to point that out.

Mr. Scott: If the interpreter will ask this question.

The Interpreter: Yes?

Q. The train came down on the track that I have indicated here, that being the track to the left side of the picture? Tell him to answer the question and not fiddle around so much. A. The train was coming on this track.

Mr. Benson: Indicating the left track on the picture; is that right?
Mr. Scott: Yes.

Q. Where was the first train—the second freight train when you saw it? Where was it?

The Interpreter: He made the same answer, seven or eight minutes.

Mr. Scott: Repeat the question to him.

(The interpreter repeated the question.)

A. The train was on the track. I couldn't tell you where it was. The first I noticed was just before my eyes.

By the Court:

Q. Did you see it coming, the second train? A. Sure, I saw it.

Q. And when you saw it coming how far away was it from where you were? A. About thirty feet—from this wall to that wall.

By Mr. Scott:

Q. Where were you standing at that time? A. I was there doing nothing, waiting for the engine to bring the coal.

Q. Can you show us where you were sitting doing nothing? Where were you sitting doing nothing? A. Right there.

Mr. Benson: I think it is marked there.

A. At the place marked with an X, yes, sir.

Q. Now, which way were you looking or facing when you saw this train?

Mr. Benson: I object to that, which way were you looking or facing? It is kind of——

Q. Which way were you looking? A. In this direction (indicating).

Q. Was that looking at the mountain or looking at the train? A. Looking at the mountain, in the direction of the mountain.

Q. Then you heard the train coming?

Mr. Benson: He didn't say that. I object to that.

Mr. Murner: This is cross examination.

Q. You heard the train coming, didn't you? A. Yes.

Q. And then you turned your head away?

Mr. Benson: I object to that. He didn't say that.

A. Certainly, I turned; I turned in the direction of the train.

Q. You turned your head away from the train, too, didn't you? A. The train is coming in this direction and my head was standing firm.

Q. Was Nick standing in the same place you showed us on this picture at the time you saw the train, the second train?

Mr. Benson: What train do you refer to?

Mr. Scott: This train I am questioning him about.

Q. Was Nick standing here? A. The first or second train.

Q. The second train? A. Right there.

Q. Right there, and there means that point? A. Before the train he was standing there on the inside, working.

Q. And when you first saw the train where was Nick? A. Right there.

Q. Right where you—— A. Put the mark.

Q. Near the W on the track? Near this W? A. Yes, yes.

Q. Then, when you saw the second train you turned your head away, didn't you?

Mr. Benson: I object to that. He didn't say that.

Mr. Scott: I am asking him what he did.

Mr. Benson: He has already said he didn't turn his head away, he kept looking firm.

The Court: It is cross-examination.

A. And I was sitting and my head remained firm.

Q. When you saw the train at the time you told us Nick was standing on the track, where you have indicated, the train was thirty feet away from you, wasn't it? A. It may have been thirty feet from the main line from where I was standing, but from where Nick was standing it could have been sixty or seventy feet; it could have been a thousand feet, also. I don't know. I didn't figure it out.

Q. Do you know what a foot is? A. I don't know it, because I didn't attend school.

Q. Do you know what a pace is? A. A pace may be two feet.

Q. Well, how may paces was it?

Mr. Benson: From where? Wait a minute. I object until he tells him where, from what point to what point.

Q. How many paces was it from the point where you were to the second train when you first saw it? A. I have told you from this wall to the other wall, the second train, from this wall to the other wall.

Q. And how far was the train at that time from Nick? A. It could have been forty or fifty, seventy, or two hundred; I don't know. I can't figure how long the track is.

Q. Well, how far were you from where Nick was at that time? A. I have told you it could have been fifty or sixty, a hundred, or two hundred. I don't know.

Q. Could you see his face where you were? A. I could see him, but not his face. He was by the mountain.

Q. As you were watching toward Nick you saw the train coming, didn't you?

Mr. Benson: I object to that. He has already answered that he saw the second train as he was looking. He expresses himself by standing up and looking in the direction of the track, and it is a limitation of the same question a number of times.

The Court: Yes, it seems to be, but I don't know.

Mr. Scott: I have a particular reason for asking in that particular phraseology, sir.

Q. As you were watching toward Nick you saw the train coming, meaning the second train, did you not? A. The first passed and the second came.

Q. Just answer this question yes or no. As you were watching towards Nick you saw the second train coming? Yes or no.

Mr. Benson: Now, I object to that. That question cannot be answered by yes or no.

The Court: Why?

Mr. Benson: For the simple reason that there is the premise as you were looking towards Nick, and he already said his head was firm in a certain position and he was looking and he saw the train.

The Court: All right.

Mr. Benson: Now, then, it doesn't say he was looking towards Nick. At what time? At what specific time. The question isn't fair to the man.

The Court: He said he was looking towards Nick and he saw his back, but could he see his face?

Mr. Benson: I think he ought to premise that question, did he continue to look in one direction, yes or no? If he did, then he is laying the foundation for it, but this way it is not fair to the witness.

The Court: Oh, I will permit it.

(The question was read by the reporter.)

A. Yes.

Q. After you saw the train coming you paid no more attention to the train, did you? A. No, sir.

Q. About ten minutes after—— A. Seven or eight or ten minutes.

Q. But ten minutes after the train went by you looked over toward Nick and then you saw Nick lying on the ground?

Mr. Benson: I object to that. There is no testimony indicating that. He said he saw the train go by and then he saw the man right after.

The Court: Well, he is asking now if that is so, I suppose, to attempt to contradict.

A. Yes.

Q. You didn't see any train hit Nick, did you? I say, you didn't see any train hit Nick? A. No, sir, I saw him after the train passed.

Q. And you didn't look back toward where Nick was for ten minutes after the train passed?

Mr. Benson: I object to that, unless it is determined whether the witness knows the length of a minute. I object to it unless it is determined——

The Court: No, I didn't stop you when you asked him.

Mr. Benson: But on direct examination I didn't ask him a question about minutes.

The Court: Well, you asked him how long and he told you.

Mr. Benson: And he told that the train had gone on right after.

The Court: He told you about the minutes and he said the second freight train passed seven or eight minutes, so he must know what minutes are, I assume.

Mr. Benson: All right, all right.

(The question was read by the reporter.)

Mr. Benson: I object to the question in that form. It says, "didn't look back." Does that indicate looking back towards the City of Paterson or up the track or down the track? It confuses the witness.

The Court: I think that question in that form is not sufficient. It is not a question.

Mr. Scott: Your Honor will see just a few questions before he says in answering he turned his head away.

The Court: I know, but you just simply said to the witness, "You didn't look back until

ten minutes after the train passed." That is merely a statement of fact.

Q. Did you look back—how long was it after you turned your head away after the train passed that you looked back toward where Nick was? A. A couple of minutes.

Q. Do you remember being up here at the Courthouse on July 8 of last year before Mr. Kelly, the court stenographer? A. Yes—I don't know who he was, but I remember I was here.

Mr. Benson: I object to that. Was he under oath or what was the situation?

Mr. Scott: Let me develop it. I will develop it.

Q. Do you remember that this gentleman sitting here, the stenographer, was present? A. Not in here; I was in another room.

Q. In another room. Do you remember that this gentleman here was present? A. I don't remember if he was here.

Q. And do you remember at that time giving a statement to me? A. Yes, I remember.

Q. After you were sworn by Mr. Kelley? A. I saw him first, indicating the attorney, and then the other.

By the Court:

Q. Were you sworn under oath? A. Yes, sir.

By Mr. Scott:

Q. And do you remember at that time being asked this question——

Mr. Benson: Now, I object to that, unless it is indicated that there was an interpreter there and who he was.

Mr. Scott: I will get that, too.

Q. And do you remember at that time there was an Italian interpreter there by the name of Nicholas Scalzetti? A. Yes, yes.

Q. And do you remember at that time being asked this question and did you answer in this way or in this language——

Mr. Benson: Now, I object to that, unless the witness understood at that time that Mr. Scalzetti was the representative of the D. L. and W. Railroad Company.

Mr. Scott: No, he was an interpreter.

Mr. Benson: He was an interpreter and was there in their employ.

The Court: The question was put under oath and counsel said he was an interpreter—Mr. Scalzetti—and I assume he put the question.

Mr. Benson: I think the foundation ought to be laid as to the character of the proceedings of the examination of this witness.

The Court: Oh, I don't know, it may have been some informal proceeding.

Mr. Benson: I know, but what was the reason for it all. If it is a written statement, that is one thing, but here is testimony taken of a witness before a trial.

The Court: What is the difference between a written statement under oath and testimony under oath?

Mr. Benson: I think it has quite a differ-

ence. In the written statement under oath the witness has an opportunity to re-read and read it back and all those conditions are surrounding, but here is a case where an illiterate person is brought to the Court-house with the attorney for the railroad, with the employe as an interpreter——

The Court: You brought him here today, didn't you?

Mr. Benson: Who?

The Court: You. Did you bring him here?

Mr. Benson: I brought him here under subpoena.

The Court: Yes, but whether you brought him under subpoena or not—what difference does it make?

Mr. Benson: I think it makes quite a difference.

The Court: You bring him here.

Mr. Benson: In the usual course. This was an unusual situation.

The Court: You don't mean to say that you think that he is not telling the truth, do you?

Mr. Benson: I don't say that he isn't but I say under the confusing circumstances and the surrounding circumstances——

The Court: What would be confusing, any more than this?

Mr. Benson: Or where there could be a chance of being misunderstood.

The Court: The larger the audience, the more he would be apt to be confused. He would be more apt to be confused today than he was then.

Mr. Benson: I say this wasn't a regular

proceeding where he was under any obligation to speak.

The Court: No, and he probably voluntarily spoke. The question is, Did you say so-and-so, putting the direct question and answer, and did you answer it so-and-so?

Mr. Benson: Then I think it is also improper cross-examination.

The Court: Do you want to show that there was something improper about the proceeding?

Mr. Benson: I don't know. It may develop. I don't know, but I object to the question.

The Court: I will permit it.

Mr. Scott: There is no question before the Court yet.

Mr. Benson: I object to it as a preliminary question, as to whether or not you have the right to.

The Court: Put your question.

By Mr. Scott:

Q. Do you remember on July 8, 1929, giving to me a statement under oath before Mr. Kelley, the official court stenographer, in the presence of Nicholas Scalzetti, an interpreter? A. Yes, I remember.

Q. Did you say at that time—was this question asked you and did you say or answer as follows: "Well, how far was the train from Nick when you last looked over that way" and did you answer, "About thirty feet?" Just answer yes or no.

(The witness made a lengthy reply in Italian which was not translated.)

Mr. Scott: I don't understand that, but may it be stricken out.

Mr. Benson: I object to it, until I hear what it is.

The Court: I didn't understand it either. How can you strike it out if you don't understand it?

Mr. Scott: It is not either yes or no, I know that much of Italian.

The Court: We don't know that yet.

Mr. Scott: Was it? Was that yes or no?

The Interpreter: He said, "How do I know? The tracks are running here and there and I don't know anything about the distance."

The Court: No, that is not the question. He asked you a question. Now, this interpreter will give you the question again and you say whether or not on that day you answered that question the way they say you answered it.

(The last question was read by the reporter as follows:)

"Q. Did you say at that time—was this question asked you and did you say or answer as follows: 'Well, how far was the train from Nick when you last looked over that way,' and did you answer, 'About thirty feet'? Just answer yes or no."

A. The distance of the track this way, thirty feet, but the distance in the other direction could be sixty or seventy or I don't know.

Mr. Scott: I ask to have it stricken out, sir.

The Court: Strike out the part that is not responsive.

Mr. Scott: Yes, I mean the irresponsive part.

Q. I will repeat the question to the witness and ask him whether he was asked this question: "Q. Well, how from Nick"——

The Court: Is this the same question?

Mr. Scott: Yes, sir.

The Court: The same one? What was the answer before?

Mr. Scott: He didn't answer it.

The Court: He answered it partly. What did he say?

(The last answer was read by the reporter.)

Mr. Scott: I asked him whether that question was put and whether he made that answer.

The Court: Yes.

Mr. Scott: Now, he either did or he didn't.

The Court: Yes, all right, just ask the question again.

Q. Do you remember being asked this question: "Well, how far was the train from Nick when you last looked over that way," and did you answer, "About thirty feet?" A. I have told you fifty or sixty feet. I can't figure whether it is two hundred or one hundred feet. The distance in this direction could be two hundred or one hundred, and the other way thirty feet.

The Court: Well, that is probably all right.

Mr. Scott: He has already testified today he first saw the second train thirty feet away.

Mr. Scott: I won't press that question if

that is the only answer he will give and your Honor rules that that is an answer to my question. It is not an answer.

The Court: You can try it again if you think you can succeed.

Mr. Scott: I think between the Court and the counsel we ought to succeed, because that is the purpose of a court of justice.

The Court: If he can understand it and grasp the situation and answer it, why, certainly.

Mr. Scott: In other words, I don't know—

The Court: But I won't grab any witness by the neck, even if I am a judge, and I won't hang him up and make him answer because he can't.

Mr. Scott: No.

The Court: Now, try it again and see how you make out.

Mr. Scott: Very well, sir. May I ask that the interpreter ask that the witness answer yes or no to my question.

The Court: Just answer yes or no.

A. Yes. Fifty or sixty feet in that direction; my calculation was about thirty feet in this direction.

The Court: Now, tell him that is not the question. Tell him he doesn't understand. He must listen carefully to the question. Tell him that. Tell him, now, to listen carefully. On July 8, 1929, did you say——

Q. In answer to the following question, "Q. Well, how far was the train from Nick when you

last looked over that way," did you answer, "About thirty feet?" A. How many times must I tell you I can't remember whether I said thirty feet.

Mr. Benson: That is the answer.
The Court: He can't remember, he says.

Q. Now, do you remember at that time being asked this question: "Q. Why did you turn your head away," and did you answer it, "Why, the reason I wasn't looking and didn't see what happened at that moment, my eyes were not direct all the time, my eyes wasn't directed to where Nick was. Naturally, when the train was approaching I happened to turn the other way." A. Yes.

Mr. Scott: His answer is "Yes?"
The Interpreter: Yes.

Redirect examination by Mr. Benson.

Q. I would like to ask him just one or two questions. When you first saw train number two pass you, did you see the locomotive? A. Yes, I saw the engine.

Q. Did you see anyone in the cab of the engine?

Mr. Scott: I object to it as leading.

Q. What did you see in the cab of the engine? A. Nobody.

Q. Did you look? A. Sure I looked, because the train was traveling this way, and I saw nobody.

Q. Where? A. On this side. On my side.

The Court: We will take a recess until tomorrow morning at ten o'clock.

(Adjourned to Wednesday, January 29, 1930, at ten o'clock in the forenoon.)

Paterson, N. J., January 29, 1930.

(Trial of the Cause Continued.)

WILLIAM GUSTA, resumed.

Redirect examination (continued) by Mr. Benson.

Q. Mr. Gusta, showing you exhibit P-3, will you point on there to the exact location where Mr. DeRose was working just before train number two came by?

Mr. Scott: I object. The witness has already answered that question, and it is not redirect examination.

The Court: I thought he had.

Mr. Scott: He brought it out.

The Court: He marked it, didn't he?

Mr. Benson: As I understood, it was over here but I wanted to be sure so I can mark it with some other designation.

Mr. Scott: The record will show that he marked it with a W.

Mr. Benson: I beg your pardon, he did not. In the first instance, when you asked him, he marked it with a W over here, but when I asked him it was over where the frog on the track was.

The Court: If there is any doubt about it, get it straight.

Mr. Scott: As Mr. Murner well calls my attention, he put that when Mr. Benson had him first marking.

The Court: I will permit the question. There is no use discussing it.

Mr. Scott: May I have an exception, sir?

The Court: If you like.

(The question was read by the reporter.)

Mr. Scott: I object to the question as to train number two, because their complaint specifically charges train number 66. Now, if this is some other designation, I object to it as not within the specific language of the pleadings.

The Court: Well, they came by within a few minutes of each other. I think you went into the question of which train passed first and which train passed second and so forth, didn't you? That is my recollection, that you went into it.

Mr. Scott: But now Mr. Benson wants to know where he was when train number two—

The Court: Well, he had better designate it by some other method.

Mr. Scott: Yes, that is what I had in mind.

Mr. Benson: I will withdraw that for the present.

By Mr. Benson:

Q. Do you know what number this freight train was that came after the first freight train? A. 66.

Q. And will you show us on the photograph, exhibit P-3, the position that Mr. DeRose was in just before train 66 passed, on the photograph?

Tell him to mark where he was in reference to the tracks.

The Court: Mark where DeRose was.

Mr. Benson: Yes.

Mr. Murner: May we know what he asked the interpreter?

The Interpreter: He said, "When we are working," and I said, "Before the second train came down."

Q. All right. A. (The witness complied.)

Q. Will we mark that Y so it has some designation on the record?

The Court: Yes, whatever is convenient.

Mr. Benson: That is all; take the witness.

Recross examination by Mr. Scott.

Q. Where did you go last night after court adjourned? Home? A. Where could I go elsewhere? I went home.

Q. Well, did you go home? A. Yes, I went home, because I had to eat.

Q. After the court adjourned last night did the lawyers, Mr. Benson or his associate, show you this photograph? A. No, sir.

Q. Didn't you look at it at all? A. (In English) No, sir.

Q. Do you understand English? A. I understand English, that part.

Q. Did you see this photograph after you went off the witness stand last night? A. (Through the interpreter) No, sir.

Q. Did anybody talk to you about—— A. (In English) No, sir.

Q. Didn't talk to you about anything? Did anybody talk to you this morning? A. Nobody talks.

Q. Nobody talked to you? A. No, sir.

Q. Did—why did you change the position of Nick from where you designated it yesterday afternoon to a different place this morning?

Mr. Benson: I object to that, because he didn't change—in his direct testimony, and then under cross-examination under pressure he did change it a little bit, but he didn't change it on direct examination.

The Court: Well, he is asking—I don't think he asked why he changed it.

A. I haven't changed it.

Mr. Scott: Have you got that photograph?

Q. Yesterday afternoon you put this W on the photograph?

Mr. Benson: I beg your pardon. Mr. Scott put the W on there.

Mr. Scott: I guess that is quite correct.

Q. Yesterday afternoon you indicated a place on the track where I put the W. Do you remember that?

Mr. Benson: I object to that, because the place where he indicated the W was the place where he was after the train had passed.

Mr. Scott: I am just asking him for his recollection.

The Court: He has a right to ask him did he answer the question.

A. He was here working.

A. And he was lying on the ground at this.

The Court: At the W.

Mr. Benson: Where the W was.

Q. Mr. Gusta, what was that mark in here for? Is that an R?

Mr. Benson: I put an A there.

Mr. Scott: That is an X?

Mr. Benson: Yes. That X is just to be designated, I suppose, as A.

Q. Yesterday you designated a point right here on the photograph. What was that point?

The Court: Ask him, Mr. Interpreter.

A. That is where I picked him while he was lying on the ground.

Mr. Benson: That is, indicating the A mark, isn't it, Mr. Scott?

Mr. Scott: That is the A.

Q. And there is a mark here, X, near the A. What was that place?

Mr. Benson: Excuse me, I think that is what it was. Isn't A——

Mr. Scott: No, A isn't X.

The Court: Didn't somebody else mark the photograph besides this man? I mean, some other witness marked it?

Mr. Benson: Maybe Mr. Murphy did. I don't think he did though. I am not sure.

The Court: Maybe he did. I don't know.

Mr. Scott: May I have that question?

(The last question was read by the reporter.)

A. That is one inch either way, my mark is, here. I couldn't make an exact mark.

The Court: I have here in my notes that the witness stood there just before the accident. He made an X-mark.

Mr. Scott: That was this present witness?

The Court: Yes.

Mr. Scott: That is all.

GIATANO TASHA, sworn.

Direct examination by Mr. Benson.

Q. Where do you live, Mr. Tasha? A. 14 Peach.

Q. Peach Street? A. Peach.

Q. Where is that? A. Paterson.

Q. How long have you lived in Paterson? A. I be fifteen years.

Q. Fifteen years?

The Court: Do you need the interpreter for him?

Mr. Benson: On these simple questions he may be all right, but I think later on I will need him.

Q. Who did you work for, Mr. Tasha, on February 19, 1929? A. McNab.

Q. What kind of business is it? A. Foundry.

Q. And who did you work for? A. I don't know the boss. I don't remember him. I work over there after I work in the coal company.

Q. In the coal company? A. Yes.

Q. Did you work in the coal pockets in February, 1929? A. Yes, sir.

Q. Did you know Alfonse DeRose? A. Yes, sir.

Q. How long had you known him? A. Seven years.

Q. Seven years? A. Yes, sir.

Q. Did you see him working on February 19, 1929? A. (No audible response.)

By Mr. Scott:

Q. What is the answer? A. No.

By Mr. Benson:

Q. Do you remember—withdraw that. Did you, right after—withdraw that. Were you busy right after lunch? A. Yes, sir, I going upstairs.

Q. Now, where did you go upstairs? A. I go upstairs because I ain't got any job downstairs, see.

Q. Where did you go after you got upstairs (handing an exhibit to the witness)? A. Right here (indicating).

Q. Indicating a cross near the tool house? A. Yes.

Q. And what did you do while you were there? A. Sit down.

Q. Who was with you? A. The other fellow.

Q. Mr. Gusta? A. Yes, sir.

Q. How long did you stay there? A. Until one o'clock.

Q. About one hour? A. About one hour, yes, sir.

Q. Did you see a freight train go by? A. After I saw the Paterson train passed.

Q. The Paterson train pass? Was that the first or the second train? A. No, the second train.

Q. How far from the—withdraw that. When was the first time you saw the Paterson train pass? A. When it passed, because I sit down behind the box over there.

Q. Behind the tool box, you mean? A. Yes.

Q. What can you say of the speed of that train? A. Well, they going fast; they got quarter to two train behind him.

Q. Do you know whether or not as the train passed you or before that time it had blown any whistle or bell? A. No, sir. No, sir.

Q. Then what did you do after that, Mr. Tasha? A. I seen Nick DeRose on the side of the track.

Q. How soon after the train passed? A. Maybe three minutes.

Q. What did you do? A. I go over there. I told my friend, you know, that guy over there, to see that is Nick DeRose; he don't work. I go and pick it up.

Q. Now, will you put a mark, an O? Do you know what an O is? A. No.

Q. Make a cross, then, just where you found Mr. DeRose. A. Here.

Q. Just make some kind of a mark with the pen. A. That is where I find him.

Mr. Benson: He marks a cross right over the A that was indicated on the photograph; is that right?

Mr. Murner: That is right.

Q. And what did you do then—withdraw that. What was Mr. DeRose doing? A. Well, I go down the track and picked him up.

Q. You picked him up? What did he appear

like? A. The head bust, all the blood in the face and in the mouth.

Q. And did he talk? A. No, sir.

Q. Now, where was the train when you got there? Down where Mr. DeRose was? A. The train pass.

Q. Do you know whether or not it stopped? A. No, sir, no stop to it.

Q. And then what did you do with Mr. DeRose? A. Well, I bring in the tool house.

Q. And then what happened, after that? A. The big fellow came in and said they will go to the hospital.

Q. Which hospital? A. St. Joseph's Hospital.

Q. St. Joseph's Hospital? A. Yes.

Q. Do you recollect what happened to Mr. De Rose where they took him? A. I don't know.

Q. You don't know. Do you know from the position where you were sitting up by the tool house, could you see clearly down to the point where you found Mr. DeRose? A. Oh, yes.

Q. What kind of a day was it? A. Well, that is just like today.

Q. Like today. When you reached where Nick was did you see any tools of any kind? A. No, I didn't think for tools. I look for the guy and picked it up.

Q. Did you see any blood anywhere? A. No, I see on the face, that is all.

Q. Now, when the train passed did you look up? A. No.

Q. When it passed by you where were you sitting? A. Oh, yes.

Q. Did you see anyone in the engine? A. No, sir.

Mr. Benson: That is all; take the witness.

Cross examination by Mr. Scott.

Q. The first time you saw Nick that day was after he was hurt, wasn't it? A. Yes.

Q. And you didn't see him hit by any train? A. No sir. After the Paterson train pass I see him.

Q. Did you say you saw him after the passenger train passed? A. The freight Paterson train passed.

Mr. Benson: The Paterson train.

Q. After the freight passed? A. Yes.

Q. And then that was the first time you saw him? A. That is the first time, when the Paterson train pass.

Q. That was the first time you saw Nick, after the train passed? A. Yes, yes.

Q. What do you do in the coal pockets? A. No work that day.

Q. You didn't work that day? A. I ain't got no work.

Q. You were just sitting around? A. Yes.

Q. What were you doing downstairs before you came up? A. Well, put the coal in the boiler room for the boiler.

Q. That is all? A. That is all.

Mr. Benson: Yes, that is all.

ALBERT ROSE, sworn.

Direct examination by Mr. Benson.

Q. Where do you live, Mr. Rose? A. 79 Pacific Street, Clifton.

Q. What business are you engaged in? A. Police officer.

Q. Where? A. Clifton.

Q. And prior to your employment as police officer in Clifton what work did you do? A. I was in the police department of the D. L. and W. Railroad.

Q. For how long did you serve in that capacity? A. Three and a half years.

Q. What were your duties? A. Well, different kinds of work.

Q. I mean, did it call you out on the road itself? A. On the road, in the yards, riding trains.

Q. Do you know or did you make any observations as to the custom, whether or not when a man was working on the tracks alone, whether it was the usual custom to give a warning of the approach of a train?

Mr. Scott: Just a moment. May I ask a preliminary question, sir?

The Court: Yes.

Cross examination by Mr. Scott.

Q. When did you leave the police department and became connected with the Clifton Police Department? A. Nearly six years ago.

Q. Six years ago?

Mr. Scott: There is no question?

Mr. Benson: Yes, I asked him a question.

A. I shook my head, but I will say yes.

Redirect examination by Mr. Benson.

Q. What was that custom?

Mr. Scott: May I object as being too remote in time with respect to the accident in question, six years before?

Mr. Benson: He was an employe six years ago.

The Court: What makes a custom?

Mr. Scott: Well, custom presupposes a length of time of usage, but it doesn't—merely because the custom six years ago, when Rose was there, there is no presumption that that situation continued, sir.

The Court: Well, isn't there other testimony of a similar custom at a later date? Thomas Murphy testified to it.

Mr. Scott: Sir?

The Court: Thomas Murphy testified to it.

Mr. Scott: Well, but irrespective of what some other witnesses testify, this witness here, I say again—assuming your Honor might say that there is such testimony in the case—(Discussion.)

The Court: I will permit it for the purpose of showing that there was a custom between those parties.

Mr. Scott: May I respectfully ask an exception?

The Court: Yes.

A. Yes.

Q. Just describe, will you, Mr. Rose, what that was? A. Well, if an engineer sees anything or anyone on the track it is customary to give several short blasts of the whistle.

Q. Are you familiar with the location at the Paterson station, Mr. Rose? A. Not since the new station has been built.

Q. Have the tracks been changed at all since the building of the—— A. I think they have.

Q. Do you know from the Paterson station down to the point indicated on P-3 as A about how many feet it would be?

Mr. Scott: I object. He says he is not familiar with it, change in the layout.

By the Court:

Q. Are you familiar with it? A. Well, the only thing on this photograph that is familiar is the coal pockets. You see, the station wasn't there when I worked for the company.

By Mr. Benson:

Q. Well, that is all right. Will you describe, Mr. Rose, just the signals that an engineer would customarily give if he saw someone was on the track ahead of you? A. Why, he would toot-toot-toot, three blasts.

Q. Of what? A. Of the whistle.

Q. Of the whistle. And suppose the object didn't move, what was the custom?

Mr. Scott: Now, if your Honor please,——
The Court: If he knows.

Q. If you know. A. Well, naturally, he would try to stop.

Q. Would he add any more blasts to the whistle? A. Yes, he would continue to blow.

Mr. Scott: I object to what might have, and leading the witness.

The Court: Yes, don't lead the witness.

Mr. Benson: That is all.

Recross examination by Mr. Scott.

Q. If the man was not on the track on which the engine was running there was no custom to blow a signal for a man on another track, was there? A. The first part of your question, Mr. Scott, I didn't get.

(The question was read by the reporter.)

A. Not necessarily, no.

Q. Well, your answer to that is "No," then, isn't it? A. No.

Mr. Benson: I object to that. He said, "Not necessarily no."

Mr. Murner: Then he said no.

Mr. Scott: He said, "No," Mr. Benson.

By Mr. Scott:

Q. Well, as I asked you before, Mr. Rose, if the employe that you have observed was on another track, not on the track on which the engine or train was being operated, there was no custom that you ever observed for the engineer to blow for a man on another track? A. No.

Mr. Scott: That is all.

Albert Rose, for Plaintiff, Re-Redirect—Re-Recross.

Redirect examination by Mr. Benson.

Q. Mr. Rose, if a man was working near the proximity of a track, such as is indicated on P-3, near the frog, would the warning be given?

Mr. Scott: I object on the ground that this witness has shown no familiarity or knowledge of special and particular situations.

Mr. Benson: He has a general knowledge.

The Court: Yes, I think he answered your question satisfactorily.

A. Well, Mr. Benson, if a man is working here where this frog or where this guard rail is, it would be impossible for an engine to pass without striking him, and the engineer would give warning if he saw him; but if he had been over here it would be different.

Q. You are referring to the westbound track. But if he was within range of where this mark A and Y would a warning be given? A. Yes, sir.

Recross examination by Mr. Scott.

Q. Do you recollect any particular occasion or any specific occasion where a man was working at that particular point in that track when the whistle was blown for him? A. At that particular point?

Q. Yes. A. No, I can't say that I remember.

Mr. Scott: That is all.

Redirect examination by Mr. Benson.

Q. At any other point? A. Well, Mr. Benson, I couldn't specify any particular point where I seen the warning given. It was so regular you don't notice anything of that kind.

Q. It what? A. It happened so regular you wouldn't notice anything of that kind.

JAMES DEROSE, recalled.

Direct examination by Mr. Benson.

Q. Mr. DeRose, you were on the stand yesterday and I think you testified you were a pick and shovel man? A. Yes.

Q. For about how long? A. Seven months I worked on the railroad.

Q. On what railroad? A. D. L. and W.

Q. And were you ever sent out alone at any work? A. Yes, sir.

Q. What, if anything, would occur when a train would be coming on the track upon which you were working? A. Why, they give you a blow.

Q. Just describe what—— A. Three blows.

Q. Do you know whether or not that was the custom? A. That was the custom of the railroad.

Q. Do you know whether that continued down to February, 1919?

Mr. Scott: I object to that. He showed yesterday his unfamiliarity.

The Court: What does he know?

Mr. Benson: I don't know whether he visited his father at any time.

The Court: He visited his father? Unless he went on the tracks to visit him.

A. Yes, I visited my father, too.

Q. I beg your pardon? A. I used to go up and visit my father.

The Court: He means at his home.

By the Court:

Q. You visited at the home? A. Well, sometimes I used to bring up his lunch and all when he used to work in around the new tunnels they built.

By Mr. Benson:

Q. Did you make any observations then? A. No.

Q. Well, all right, if you didn't. Are you familiar with the station up at Paterson? A. Yes, but not the new station; the old station.

Q. The new station? A. No, the old station.

Q. Have you been there recently? A. Oh, I have been up there about three weeks ago.

Q. Yes. Did you make any measurement of the distance from in front of the present station down to the point where on P-3 it is marked Y? A. About eight hundred feet.

Q. Do you know whether or not there is a curve in the railroad at the Paterson station? A. Yes, away up past the station.

Q. Well, how far past the station? A. Oh, about three hundred feet.

Q. Is it a clear—can you see from a point on exhibit P-3 marked A, could you see three hundred feet above the railroad station?

Mr. Scott: I object. It is immaterial what this witness can see. The charge, the specific charge is with respect to an engineer, an engineer. There is nothing to show, although I think the Court will take judicial knowledge that locomotives are run from the right-hand side. This witness is not competent to give an opinion as to what an engineer would do.

Mr. Benson: I didn't ask that.

Mr. Scott: What view a person would have. His view wouldn't be an engineer's view, necessarily.

Mr. Benson: I am speaking of a person standing down at Y as designated on P-3, looking westerly three hundred feet beyond the Paterson station.

Mr. Scott: You mean a person down at the point Y?

Mr. Benson: At the point where Mr. De Rose was killed.

A. Yes, you can see.

Q. Three hundred feet beyond the station? A. Three hundred or about 370 feet.

Q. Are there any obstructions shown on P-3 that in any way would affect the visibility of a person standing here looking up the track beyond the station?

Mr. Scott: I object. Will you make it more definite? You say "from here."

Q. From the point marked Y on P-3, are there any obstructions respecting the oncoming, or a train above the station? A. Sure.

Q. What is the answer? A. Yes.

James DeRose, Recalled, for Plaintiff, Cross.

Q. What obstructions? A. You can see a train coming.

Q. What obstructions? What are they? A. I don't get that word.

Q. What things are in the way of your view? A. There ain't nothing in the way.

Q. There is nothing in the way of the view? A. No, sir.

Q. And from a point eight hundred feet to the west of the point marked Y on the photograph, is that a clear view? A. Yes.

Q. Do you know of your own knowledge, Mr. DeRose, what your father was earning at the time of his death? A. Well,——

Q. Do you know? Yes or no. A. I know that.

Q. How do you know? A. I used to see the pay, his checks.

Q. Do you know what he was receiving? A. In the winter-time he was getting $3.20 a day, and in the summertime he was getting about $4.40, or $4.80 a day, something like that.

Q. You don't know what the average was? A. Well, he got paid twice a month.

Q. What was the general health of your father before February 19, 1929? A. Good health.

Q. Do you know whether he worked each day, every day? A. While I was there he worked every day.

Mr. Benson: Take your witness.

Cross examination by Mr. Scott.

Q. How far from that point X on the photograph was the station? The X is this point here. How far is the station? About a thousand feet? A. The station? No, about 375 feet.

James DeRose, Recalled, for Plaintiff, Redirect.

Q. About 375? A. Yes, yes.

Q. And then the station proper, that is, the platform and the building, about how long is that? A. Well, I couldn't tell you how long exactly.

Q. Well, about how long? You were up there three weeks ago, weren't you? A. About 125 feet, about a hundred feet, something like that.

Q. That is a hundred feet? A. Maybe about two hundred feet, for all I know.

Q. Well, what the jury wants to know is what you do know, now. A. Well, between 100 and 200 feet.

Q. The station is about two hundred feet? A. Yes.

Q. And from that point Y on the photograph up to the station you say was how many feet? A. About 375 feet.

Q. From the point Y up to the station is 375 feet, and one of the measurements of the station was as much as two hundred feet, one hundred to two hundred. That is all.

Redirect examination by Mr. Benson.

Q. I understood you to say, Mr. DeRose, that the point from Y up to the curve was eight hundred feet; is that right? A. Yes, but the curve is away past the station, you want to figure that.

A. The curve, I said, was away up past the station. You figure it up.

Q. Is there any curve in the track up in front of the station? A. No, no curve at all.

Q. Did you pace it off at all from the point marked Y up to the railroad station? A. I didn't think about that, but I paced it from the point all

the ways up around the curve. It is about eight hundred feet.

Q. Eight hundred feet.

Recross examination by Mr. Scott.

Q. From the station to the curve? A. No, from the point all the ways up to the curve.

Q. From the point Y all the way around the curve or up to the curve? A. Up to the curve.

By Mr. Benson:

Q. Up to the curve? Up to the curve? A. Yes, yes, about eight hundred feet.

By Mr. Scott:

Q. From the point Y up to the point where it starts to curve is eight hundred feet? A. It is about eight hundred feet.

Mr. Benson: There is one error in Mrs. DeRose's testimony. I think she said she was married twenty-four years.

A voice: Thitry-four years.

Mr. Benson: Thirty-four instead of twenty-four.

Mr. Scott: We will admit that.

THE PLAINTIFF RESTED.

Motion for a Non-Suit.
Frank Pascrell, for Defendant, Direct.

MOTION FOR A NON-SUIT.

Mr. Scott: At this time, may it please the Court, I will ask the Court to grant a non-suit for three reasons. The first reason is that the accident, if it occurred by the deceased coming in contact with train 66, the accident was caused by the sole negligence of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident.

Second, that there has been no negligence shown on behalf of the railroad company.

Third, that the plaintiff's decedent assumed the risk of the accident which happened to him.

(Mr. Scott argues.)

The Court: I will deny the motion and allow you an exception.

DEFENDANT'S TESTIMONY.

FRANK PASCRELL, sworn.

Direct examination by Mr. Scott.

Q. Mr. Pascrell, you live in Paterson? A. Yes, sir.

Q. And you knew Nick DeRose? A. Yes, sir.

Q. And you know Mr. Murphy, the section foreman? A. Yes, sir.

Q. On the morning of February 17, 1929, did you see Mr. DeRose? A. Yes, sir.

Q. Whereabouts? A. At the tool house.

Q. At the tool house? A. Yes, sir.

Q. Where was that? A. Where we report to work in the morning.

Q. At Paterson? A. Yes, sir.

Q. What is your position? A. Assistant foreman.

Q. Assistant foreman? A. Yes, sir.

Q. Murphy's assistant foreman? A. Murphy's assistant foreman.

Q. And on that morning did you see—you say you saw Nick DeRose? A. Yes, sir.

Q. About what time? A Well, about seven-thirty, when we started to work.

Q. Were you present when Mr. Murphy told Nick what he was to do that day? A. Yes, sir.

Q. And were you present when Mr. Murphy instructed Nick how to go about his work? A. Yes, sir.

Q. Did you say anything to Nick, as assistant foreman, before he left to go about his work? A. Well, I told him to watch for himself for trains or motor cars of any kinds, as he was going to oil switches.

Q. He was going to oil switches? A. Yes, sir. Right after Mr. Murphy told him in American I explained it to him in Italian, which I always do with any men of my own nationality.

Q. After Mr. Murphy explained that he look out for trains? A. Yes, sir.

Q. You explained it to him in Italian? A. Yes, sir.

Q. You did on this particular day? A. Every morning——

The Court: No, just this particular day.

Q. Not every morning, but on this particular day.

Frank Pascrell, for Defendant, Cross.

The Court: Just this particular time we are talking about.

A. Yes, sir. Yes, sir.

Q. You didn't see DeRose again that day, did you? A. We left.

Q. Sir? A. We left Paterson right after that with the gang.

Q. You went where? A. Little Falls.

Q. To Little Falls? A. Yes, sir.

Q. And which way did Nick go? A. He went east.

Q. He went east? A. On the westbound track.

Mr. Scott: That is all.

Cross examination by Mr. Benson.

Q. Where do you live, Mr. Pascrell? A. What is that?

Q. Where do you live? A. 85—101 Newark Avenue.

Q. Do you remember you stated on your direct examination this was on the 17th of February? Was that right, when you gave him these instructions? A. Yes, sir.

Q. You are sure of that, aren't you? A. Yes, sir.

Q. Did you give any instructions the next day? A. The next day to the gang, the man who goes on the walking of the track.

Q. Well, Mr. Pascrell, did Mr. DeRose go with the gang the next day? A. Well, the next day he was killed.

Q. He was killed? Are you sure it was the 17th when you gave him instructions? A. I don't remember special date, whether it was——

Q. You don't remember that, do you; isn't that true? You are not sure about it, are you? A. The 17th?

Q. You aren't sure about the time, are you? A. I don't, to tell you the truth.

Q. We want you to tell the truth. A. Yes, not anything but the truth. I don't remember the date when he got killed.

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

Q. You don't remember specifically any instructions that you gave him on that particular day, do you? A. I don't?

Q. You don't remember that, just every word that was spoken on that day? A. Well, the only thing, I told him——

Q. Do you remember every word that was spoken to Nick that day? A. Yes, sir.

Q. What makes you remember? There was nothing extraordinary about it, was there? A. What is it?

Q. It was just the ordinary work of the railroad, wasn't it? A. Well, because he was an Italian and I explained it to him.

Q. Well, I know, but how long had he worked there, do you know? A. Yes, he had worked there a good many years.

Q. How many? A. Quite a few many years.

Q. A good deal longer than you had worked there, hadn't he? A. Yes, sir.

Q. Yes, and he was usually a very careful man, wasn't he? A. Yes, sir.

Q. And it was known not only to you but to Mr. Murphy that he was a careful man? A. Yes, sir.

Q. And in spite of knowing that he was a careful man you spoke to him about looking out? A. I do with everybody in the gang.

Q. It was a nice, clear day, wasn't it? A. Yes, sir.

Q. No fog on the track? A. No, sir.

Q. And there was nothing especially dangerous that day, was there? A. No, sir, the same as any other day.

Q. And you said you don't remember the day he was killed and you can't tell us definitely just what you said to him, can you? A. Well, I remember what I said to him.

Q. But what is there to make you so sure? A. No, I know I said, "Look out."

Q. What makes you so sure? A. Well, because I remember it.

Q. You remember what? A. I remember that.

Q. What did you say to him on the 18th? A. The 18th day of what?

Q. Of February, 1929. A. When the accident happened?

Q. No, the day before. A. Oh, well, I said to him to look out in Italian.

Q. Where did he work on the 18th? A. On the 18th?

Q. Yes. A. He worked in the gang.

Q. Yes. Why did you tell him to look out when he went to work in the gang? A. Well, he was along there with us, just the same as——

Q. The foreman gives the warning, doesn't he, when the train is approaching? A. Yes, sir.

Q. You don't tell the gang when they are going out, the whole crowd, to look out; you look after them yourself, don't you? A. Yes.

Q. So you didn't tell him the morning of the 18th to look out, did you? A. Yes, I certainly did.

Q You did tell him that in spite of that? A. In Italian.

Q. Why did you pick out Mr. DeRose to tell him to look on the 18th? A. I didn't pick him out, but I told him just the same as Mr. Murphy told me. I explained it to him in Italian.

Q. Wasn't it your duty to look out after him on the 18th? A. Well, I generally do that with any of the Italian men.

Q. Wasn't it your duty on the 18th to look after him when he was in the gang and give warning of the approach of any train? A. It was.

Q. It was not? A. Sure, it was.

Q. So it wasn't necessary to tell him in the morning to look out, was it? A. Well, I always do.

Q. How many were there in the gang on the 18th? A. Why, we have a full gang.

Q. How many? A. Six or seven.

Q. You aren't sure of that, are you? A. I don't keep the time.

Q. No, you don't keep track of the time; you tell the men to look out, do you? A. Yes, sir.

Q. Why do you take care of that? A. Well, because the railroad giving me the safety first book.

Q. The safety first? A. Yes.

Q. And you told each man in that gang on the 18th to look out? A. Well, any ones we had working under us were right there.

Q. And Nick DeRose was right under you on the 18th, wasn't he? A. Yes.

Q. So you didn't give him any warning on the 18th, then? A. Well, I did.

Q. Why? You said that those that were work-

ing under you, it wasn't necessary. A. Well, he was on a different job.

Q. On the 18th? A. No, the day that he got killed.

Q. I am speaking of the 18th. A. He got killed on the 19th?

Q. Yes. The day before he was killed he was working in the gang with you? A. I see.

Q. You didn't tell him to look out, then, did you? A. I told him anyway.

Q. Why, you just stated—— A. Not when the gang is all together, I never told him to look out, but if a train is, I am watching.

Q. You are watching for trains? A. Yes.

Q. And if the men had to look out for trains when would they work? A. If the men is what?

Q. If the men had to look out, when did you expect them to work?

By the Court:

Q. If they had to look out for trains—— A. Yes, Judge?

Q. (Continuing)——how could they work? A. Well, I watch myself.

Q. That is what he means.

By Mr. Benson:

Q. That was your duty, wasnt it? A. Yes.

Q. Why would you tell them to look out when it was your work to look out? A. Well, we don't allow only one man when he walks the track; we don't allow anybody to watch for him.

Q. I am speaking of the gang, now, on the 18th. A. Yes.

Q. Why were you telling these men to look out

when it was your duty to be on the look-out and inform them when a train came? A. It is a habit; I generally tell anybody.

Q. Why are you so sure? A. Because I got the gang to prove it, and our book of rules.

Q. Never mind the book of rules. You say that you know that on the 19th you gave him instructions? A. Yes.

Q. Why are you so sure of that? A. Well, I am sure.

Q. Isn't it because you generally gave him instructions? A. Well——

Q. Isn't that the reason? A. That is our rule.

Q. Isn't that the reason? A. What do you mean?

Q. That you gave them instructions, whether they were working in a gang or whether they were working alone, to look out; isn't that what you do? A. Sure, to look out.

Q. And because you usually gave them that instruction, isn't that the reason you think you gave him instructions on the 19th? A. I generally give them.

Q. Don't you know that Mr. DeRose could understand English? A. Well, he could understand a little.

Q. Do you know how long he had been in this country? A. Well, he could understand some.

Q. Do you know how long he had been in this country? A. Yes, sir.

Q. How long? A. I pretty near know it.

Q. How many years? A. About thirty years.

Q. And he was working on the D. L. and W. when you came there? A. Well, I only started—

Q. Didn't he break you in as an employe?

Mr. Scott: Let the witness answer the question.

Q. What was the answer? A. He was there when I was—when I went there as assistant.

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

Q. How long have you worked there? A. About six, seven, eight years, something like that, on and off.

Q. And at the time you first went there Nick DeRose could understand English pretty well, couldn't he? A. Well——

Q. Talk as well as you do now? A. No, he couldn't speak as well as I could.

Q. He couldn't speak as well as you? A. No.

Q. But you could understand him pretty well, couldn't you? A. Oh, I could understand him, some of it.

Q. You could understand him generally, whatever he said? A. Well, pretty near, because——

Mr. Benson: Yes, that is all.

Redirect examination by Mr. Scott.

Q. Mr. Pascrell, when was the last time you saw Nick DeRose? A. The last time?

Q. Yes. A. Why, in——

Q. I mean, when you heard about him being hurt? A. Why, in the morning at the tool house. The date I don't remember. The 18th, I think, or 19th.

Q. The day he was hurt, that was the last time you saw him? A. Yes, sir, but I was in the hospital, too.

Q. Well, the last time you saw him before you

were in the hospital was where? A. At the tool house.

Q. Will you tell the Court and jury what the last words you had with Nick DeRose were? A. Well, that I instructed him to look out for the trains.

Mr. Benson: Does he say he heard anything?

Mr. Scott: He said the last words he had with Nick DeRose.

Mr. Benson: Yes.

Mr. Scott: Were when he instructed him, and then you interrupted.

Mr. Benson: When he instructed him at the station, you mean?

Mr. Scott: At the tool house.

Mr. Benson: Oh, yes.

A. Seven-thirty in the morning.

Q. At what time? A. About seven-thirty, seven-twenty, something like that.

Recross examination by Mr. Benson.

Q. Murphy didn't say anything; you just told him that? A. Well——

Q. Well, you told him? A. Yes.

Q. Murphy didn't say anything? A. Well, yes, he told me to tell him and explain in Italian to make sure they get them.

Q. Which one told him? Did Murphy tell him or did you tell him? A. Mr. Murphy, he told him first, and then I told him second.

John C. Carroll, for Defendant, Direct.

JOHN C. CARROLL, sworn.

Direct examination by Mr. Scott.

Q. Mr. Carroll, you live where? A. In East Orange.

Q. You are employed by the Lackawanna Railroad in what position? A. As a train despatcher.

Q. And have been for how long? A. Twenty years.

Q. Paterson is on what is known as the Boonton branch of the Lackawanna Railroad? A. It is.

Q. And your duties as despatcher have reference to—in February—to Boonton branch? A. On certain days they did, yes, sir.

Q. And as despatcher what were your duties with respect to movements of trains and recording of those movements? A. Well, in general, I would say the duties of a despatcher consist of supervising the movement of trains over a certain district and keeping a record of the movements.

Q. And those train movements are recorded by whom? A. They are recorded by the despatcher.

Q. The despatcher on duty at the time? A. Yes, sir.

Q. And they are recorded just as soon as they are received, in what manner? A. They are entered on what is known as a train sheet.

Q. Now, without looking at a train sheet I imagine you couldn't tell us with respect to the movement of the trains on any of the divisions at any particular time that had passed? A. Not accurately, no sir.

Q. You would have to refresh your recollection? A. I would.

Q. I show you a paper here and ask you if this

is—what this paper is and whether you had anything to do with making it. A. This is the train sheet of Tuesday, February 19, 1929, embracing the twenty-four hours between midnight and midnight.

Q. From what midnight to what midnight? A. That would be from Monday midnight until the following midnight, Tuesday midnight.

Q. The 18th and 19th? A. Well, from 12:01 a.m. on the 19th until 12:01 a. m. on the 20th.

Q. And as a despatcher your trick of duty was what on that day? A. On that day it was from the——

Q. On the 19th? A. From eight in the morning until four in the afternoon.

Q. You say from eight in the morning until what time? A. Four in the afternoon.

Q. And as a despatcher can you tell us whether or not during your tour of duty there was any train engine known as 66 moving over the Boonton branch? A. I Can, yes, sir.

Q. Was there any engine of that number moving over the Boonton branch? A. There was no engine of that number, no, sir.

Q. Was there any train by that number known as 66? A. There is no train that would be properly number 66, but there is an extra train that was commonly known as 66.

Q. And what was that kind of a train, Mr. Carroll? A. That was a local freight train.

Q. And that traveled up and down the Boonton branch? A. It traveled between Port Morris and Hoboken.

Q. What engine hauled that particular train, Mr. Carroll? A. Engine 1250.

Q. That train left Port Morris at what time? A. At 11.38 a. m.

Q. And it was made up of—what was the consist of the train? A. The total consist of the train was forty-six cars leaving Port Morris, and they were cars for—beginning with Little Falls. practically all the stops east of Little Falls.

Q. At Little Falls they set out one of the cars? A. They set out one car, yes, sir.

Q. And then from Little Falls where did they set out any other cars or the next stop?

Mr. Benson: I object to this unless he has a record in his own handwriting, because it is purely heresay unless he was there and can tell whether they left a car off at Little Falls.

The Court: What difference does it make?

Mr. Benson: It is purely heresay, it seems to me.

The Court: Well, it is probably just routine to connect up something.

Mr. Scott: Have I a question?

(The last question was read by the reporter.)

A. The next stop east of Little Falls was Paterson Junction.

Q. Can you tell us, as train despatcher, when that train reported to you west of Paterson?

Mr. Benson: I object to that unless it is actually—pure heresay, what someone told him.

The Court: The man in charge of the train might call him and tell him. "My train is at

such and such a place;'' that wouldn't be heresay.

Mr. Benson: If he was told it was there. He wouldn't know definitely unless somebody told him.

The Court: I don't know what the object of the testimony is, but I don't think that it means anything so far. I suppose technically you are correct.

Mr. Benson: I don't see what relevancy it has, anyway.

The Court: It is heresay, isn't it, Mr. Scott?

Mr. Scott: Sir? These sheets have been universally recognized by the Courts as a proper method of proving train operations, sir, and I have never had them—I have never heard in any of our cases or anybody else's railroad cases that anybody seriously questioned that it wasn't the proper method of proving train movements. Here is the man that has direct charge of the movement of the trains over a division, the responsibility of both lives and freight——

The Court: What difference does it make if they let off a freight car at Little Falls or Boonton or some other place?

Mr. Scott: I can't develop my whole case at once, sir, but it has a material bearing.

The Court: On the question of time?

Mr. Scott: The time and the character of this train as it passed the place where this accident is supposed to have happened.

The Court: Well, I don't suppose you object to that.

(Discussion.)

The Court: If the man was struck by a train, there is no question but that it would be an inter-state train, is there?

Mr. Scott: Yes, it was engaged in inter-state commerce.

By the Court:

Q. Then, what did it do at Little Falls, Mr. Carroll? A. May I have the question again?

(The last question was read by the reporter as follows:)

"Q. Can you tell us, as a train despatcher, when that train reported to you west of Paterson?"

A. The last report west of Paterson?

By Mr. Scott:

Q. Yes. A. Was Lincoln Park.

The Court: "Lincoln Park," he said.

Q. And at what time? A. At 12:32 p. m.

Q. When did it next report? A. The next report is its arrival at Paterson Junction at 1:06 p. m.

Q. Now, Paterson Junction is about how far west—east of the Paterson station, approximately? A. Approximately one mile.

Q. And how far is it from Lincoln Park, where it reported, to Paterson Junction, approximately? A. Roughly it is nine miles from Lincoln Park.

Q. Now, I will just ask you if your records show the engineer of the train in question? A. They do, yes, sir.

Q. And what was his name? A. R. Schroeder.

Q. And what was the number or what was the proper railroad designation number of that particular train? What was it known by? What did you know it by? A. Well, the proper designation was extra 1250.

Q. Extra 1250? A. Yes, sir.

Q. That is taken from the engine number? A. That is it, yes, sir.

Q. You say they set a car out at Little Falls and then the next set of cars were set out at Paterson Junction? A. Yes, sir.

Mr. Scott: That is all.

Cross examination by Mr. Benson.

Q. This information that you have on that sheet, it is all the information given you by someone over the telephone, is that right? A. It is, yes, sir.

Q. You don't know, as a matter of fact, the information that was on the sheet respecting the time of leaving Port Morris other than someone transmitting it to you? A. As it is given to me, yes, sir.

Q. Who gives you the information at Port Morris? A. On that train it would be the towerman at Port Morris Junction.

Q. Do you know who he was in 1929? A. I couldn't say for sure, no, sir.

Q. Don't you make a record of it? A. Of the towerman?

Q. Of the man who gives you the information. A. No.

Q. Do you know, as a matter of fact, whether there was any passenger train immediately following number 66?

John C. Carroll, for Defendant, Cross.

Mr. Scott: May I hear that question?

(The question was read by the reporter.)

A. There was no passenger train immediately following. There was one within an hour, less than an hour.

Q. How much less than an hour? A. Why, forty-five minutes, forty-six minutes.

Q. After this train left—I am speaking now of Port Morris—— A. Oh, at Port Morris?

Q. Yes. A. The next train that followed this train through Paterson was a train which started from Dover.

Q. Well, how far behind—withdraw that. What is the lapse of time between the schedule of starting of this train at Dover and this passenger train? A. It is one hour and one minute.

Q. Now, then, do you know whether or not this train leaving Dover left—switched at any place to permit any other traffic to go through? A. I will take back that last answer, if you please. It is fifty-two minutes.

Q. Fifty-two minutes? A. Fifty-two minutes.

Q. Do you know whether it switched at any time after it left Dover for the purpose of letting any through traffic go by? A. The passenger train?

Q. This freight that we are speaking of. A. No, sir, they continued their way; they had a clear road all the way to Paterson.

Q. Until they reached Little Falls? A. Yes, sir.

Q. What did they do there? Did they stop? A. They stopped to leave one car.

Q. And that consumes a considerable time, does it not? A. No, possibly ten minutes.

Q. Possibly more? A. Not as a rule, no, sir.

Q. Well, it is possible to be more? A. It is possible under certain conditions.

Q. Yes. Now, then, what time did you have the train at Little Falls? A. We have no report from Little Falls. We have no time shown there at all.

Q. You don't know, then, as a matter of fact, whether or not when the train left Little Falls, the—withdraw that. What is the average speed of a freight such as 66 that has been referred to? A. Thirty miles an hour.

Q. With forty-six cars on it? A. Forty-six cars, yes.

Q. And that was continuing at that time a continuous speed of thirty miles an hour, you say? A. Well, allowing for time lost in starting and stopping, it——

Q. How fast would that regular passenger train which immediately followed this go? A. Well, it made about the same speed average.

Q. I didn't say the average. I say from Dover down to Little Falls. A. The speed would vary between stations; I imagine the highest speed would be possibly fifty miles an hour between stations.

Q. Now, was there any through train from Buffalo that passed about this time? A. There was not, no, sir.

Q. When does that train go by? A. Do I understand passenger train?

Q. Yes, passenger train. A. No passenger train, no, sir.

Q. No passenger train at that time? A. No, sir.

Q. From any distance farther than Port Mor-

ris? A. Not until three hours afterwards.
Q. Three hours afterwards.

The Court: We will take a recess at this time.

(A recess was taken until two o'clock p. m.)

Afternoon Session, 2 P. M.

JOHN C. CARROLL, resumed.

Mr. Scott: I would like at this time to offer in evidence a certified copy of the death certificate in this case.

Mr. Benson: I want to enter an objection to its being offered, because a portion of the death certificate, it seems to me, has got an unwarranted assumption as to the cause of death, purely based on heresay. The purpose of the certificate is the question of the death.

Mr. Scott: That is my very purpose.

Mr. Benson: Not the cause of it, but the fact of the death. In this particular instance it refers to the cause.

(Discussion.)

The Court: I don't think there is anything out of the way in that, Mr. Benson.

(Paper marked exhibit D-1 in evidence.)

Cross examination (continued) by Mr. Benson.

Q. Do you say, Mr. Carroll, that there was no passenger train scheduled to pass between—pass the station at Paterson between twelve and one o'clock that day? A. I couldn't answer that with-

out referring to the time-table that was current on that date.

Q. Don't you know, as a train despatched—wouldn't you know that? A. Yes, but schedules vary from one part of the year to another.

Q. You will not say whether or not a train did pass sometime—I will change that—sometime between twelve-thirty and one-twenty? A. I couldn't tell you now, without referring to the train sheet.

Mr. Scott: Do you want the sheet, Mr. Benson?

Mr. Benson: If it can assist us.

Q. Thanks. Is that twelve-thirty and one-twenty, sir? In that neighborhood? A. No, no passenger train.

Q. No passenger train at all? A. No.

Q. You are sure of that, aren't you? A. I am positive, yes, sir.

Q. And on any day—I am not speaking now of February 19, 1929—was there any passenger train that would pass the Paterson station between twelve-thirty and one-twenty? A. No passenger train in that time, no, sir.

Q. When this train made up at Port Morris were they loaded freight cars? A. They were—well, I couldn't tell about that. They were practically all loaded.

Q. Isn't your record precise in respect to that? A. It is not, no,—well, yes, I will take that back. It is.

Q. How many cars were loaded and how many empty? A. Forty-six loaded.

Q. How many empties? A. And one caboose.

Q. What was the number of that caboose? A. I don't know. We have no record.

Q. You have no record of it? A. Not on the sheet, no.

Q. Was there a number of the caboose? A. There is, yes, sir.

Q. Don't you keep a record of where that particular caboose would be? A. No, we do not.

Q. Do all trains—I think you called this a local freight? A. A local freight, yes, sir.

Q. Did the other through train, freight, stop at Port Morris? A. Not all. Practically all, but not every train.

Q. When did you say this freight left Port Morris? A. At 11:38 a. m.

Q. Did any other freight leave that locality about that time? A. A freight train left at 12.20 p. m. and one at 12:37 p. m.

Q. What kind of a freight was the one that left at 12:20? A. It was a train consisting of seventy cars of coal and three frieght.

Q. That was 12:20, wasn't it? A. Yes, sir.

Q. And did that train stop at any station on the way down from Port Morris? A. It stopped at Lincoln Park.

Q. For what purpose? A. For the purpose of letting a high-class freight train pass.

Q. What high-class freight train was that?

Mr. Scott: I object to any further inquiry with respect to any other train, except for the purpose, perhaps, of testing the witness's credibility, because the complaint alleges train 66. The witness that the plaintiff produced referred to train 66. Now, that is the only train that is involved here, and Mr. Carroll has identified the train as 66.

The Court: Well, if it is admissible for the purpose of testing his credibility I will admit it for that purpose.

Mr. Benson: In addition to that, your Honor, in the complaint it refers to his working on said parallel tracks in such a position as to prevent him seeing the approaching train; then it refers to the defendant's engine and train there, without specifically stating train 66.

Mr. Scott: You would have to read your complaint as a whole, and it designates 66 as the offending train.

(Discussion.)

The Court: I will overrule the objection and allow you an exception, Mr. Scott.

Q. Will you answer that question?

Mr. Scott: I can't do any more than try to follow the rule.

The Court: No, that is right.

A. May I have the question, please?

(The question was read by the reporter.)

A. That was extra 1405.

Q. Now did that 1405—what time was that at Lincoln Park?

Mr. Scott: May I have it noted that out of respect for the Court I am not going to continually interrupt, that I am following the Court's directions, and I object generally, although I understand that doesn't mean anything? I do object generally.

The Court: Yes, you object to the particular line of evidence.

Mr. Scott: Yes.

The Court: For the same reason that you have made in your previous objection.

Mr. Scott: I don't want to have the Court think I am sitting quietly by——

The Court: I will consider that your objection stands to this also, so as to give you the benefit of it, and allow you an exception.

Q. What time was it at Lincoln Park, Mr. Carroll? A. It was at Lincoln Park at 1:20 p. m.

Q. How far is Lincoln Park from Paterson? A. From Paterson Junction tower that is approximately nine miles.

Q. Have you any report as to when it reached Paterson, that train? A. I have.

Q. What time? A. 1:37, the time it passed Paterson Junction.

Q. Has that train any specific name other than extra 1405? A. It was also known as 454.

Q. 454? A. 454, fourth section of number 54.

Q. Was that an extra train? A. It was, yes, sir.

Q. Not on the regular schedule, was it? A. It was not scheduled, no, sir.

Mr. Benson: That is all .

Redirect examination by Mr. Scott.

Q. Mr. Carroll, when you call a train a scheduled train you mean a train that runs on a regular schedule from one point to another and has a particular designation?

Mr. Benson: The question is rather leading.

Mr. Scott: Oh, I will withdraw it.
The Court: Well, I will permit it.

Q. Just explain to the Court and jury what a scheduled train is. A. A scheduled train is one that is shown in the working time-table; it has a definite time at each station.

Q. And with respect to the freight service are there—what proportion of the trains in the freight service going over the Boonton branch are known as scheduled trains? A. We have none at all.

Q. You have none at all? A. No, sir

Q. But they are known as extra trains? A. They are properly known as extra trains, yes, sir.

Q. And every designation of extra, their number is taken from the engine? A. That is it.

Q. If it is extra 1000 that would be train pulled by engine 1000? A. Yes, sir.

Q. And like that? A. Yes.

Mr. Scott: That is all, Mr. Carroll.

Recross examination by Mr. Benson.

Q. Just one question, Mr. Carroll: When you speak of not on schedule, there is a distinction between what you call regular freight trains, isn't there? A. There is, inasmuch as we have certain through runs and also certain local runs that are regular trains, that is, they are represented by some extra train every day, but they are not shown on the time-table, they have no definite time at any particular station.

Q. Was number 66 a regular train? A. It wasn't.

Q. Was that an extra? A. That was an extra.

Q. And the men working on the track, having a time-table, would not know of the existence of that train, would they? A. They would have no notice of that, unless they secured it themselves.

Q. On that particular day? A. Yes, sir.

Q. Now, then, when you refer to this train known as 54, that didn't run the day before, did it? A. It did, yes.

Q. Did it pass on that particular track? A. It would be on the same track, yes, sir.

Q. 54 from Port Morris to New York? A. Well, 54 is from Buffalo to Hoboken.

Q. Are there more trains designated than one 54? A. As a rule there are two or three, possibly four, sections. Sometimes more.

Q. Well, how many sections were there to 54 on this particular day? A. On this date we have three sections east of Port Morris.

Mr. Benson: That is all.

FRANK SCHWARTZ, sworn.

Direct examination by Mr. Scott.

Q. Mr. Schwartz, you were the conductor? A. Yes.

Q. Of what is known as extra freight train 1250? A. Yes, sir.

Q. On February 18, 1929? A. February 19.

Q. Do you keep a record of the cars on your train? A. Yes, sir.

Q. And that is what is known as your train book? A. Yes, sir.

Q. Without looking at that book could you tell the Court and jury just what particular cars you had on that particular day? A. No, sir.

Q. I show you two books and ask you if those were your train books and whether they were made by you at the time you made up your train and whether the books are in your handwriting? A. Yes, sir, they are.

Q. Now, will you tell us if your record shows what engine you had on extra 1250 going east on the day in question? A. The engine?

Q. Yes. A. 1250.

Q. 1250. And you picked up or took charge of the train where? A. In Secaucus, or Hoboken, New Jersey. We went westbound first and then returned east from Port Morris; it is a round trip.

Q. And when you were going east how many cars did you have leaving Port Morris? A. How many did we have leaving Port Morris?

Q. Yes, yes. A. My record shows forty-six, without the caboose. The caboose would be forty-seven.

Q. Did you set any cars out before you got to Paterson Junction? A. It shows setting a car up at Little Falls.

Q. Can you tell us what time you set that car out there? A. It shows here 12:45 and 12:50 p. m.

Q. What is the 12:50, the time you left? A. Yes, the 12:45 is arriving and 12:50 is leaving.

Q. So that you were five minutes setting that car out? A. Yes, sir.

Q. You got down to Paterson Junction at what time, if you have a record? A. Why, this record shows 1:05 p. m.

Q. 1:05 p. m. And there you set out some more cars? A. Yes, sir.

Mr. Scott: That is all.

Frank Schwartz, for Defendant, Cross.

Cross examination by Mr. Benson.

Q. Mr. Schwartz, are you sure that it was 1:05? A. Why, I have got my own handwriting as a record.

Q. When did you make that record, Mr. Schwartz? A. On the—at the particular time that it is marked.

Q. In your own handwriting? A. Yes, sir.

Q. Did you report that to Mr. Carroll? A. Report what?

Q. And time of arrival in Paterson? A. No, I don't report no time to Mr. Carroll. This is a personal record of my own.

Q. Well, is any report made to Mr. Carroll? A. Yes, sir. Not of mine. I don't make any report to him with respect to my times.

Q. You don't? A. No, this is for my personal record.

Q. Well, it is your personal record; it is not for Mr. Carroll? A. No, sir.

Q. Does that record show how many cars were loaded of the forty-six? A. Yes, sir.

Q. How many? A. All of them.

Q. All loaded? A. Yes, sir.

Q. Do you have any record of the number of the caboose? A. Yes, sir.

Q. What was it? A. 768.

Q. 768. Do doubt about that, is there? A. Why, I don't think so.

Q. Well, then, when you reached Port Morris what time was it? A. When I arrived there on the westbound trip?

Q. Yes. A. Why, my record shows 10:45 a. m.

Q. And when did you start to return from Port Morris? A. The leaving time is marked 11:35 a. m.

Q. 11:35. Now, then, did you stop at any place on the way down? A. Well, that I wouldn't be able to tell you. I wouldn't be able to remember that. It is possible we might have stopped somewhere, but if there was any stop to take on or let off cars, why, that record would have shown; otherwise it would not. Not on this record. I have a detention report which covers the time, and the detention report would show that, if we made any other stops, but with respect to setting out cars this is the only one that would show it.

Q. Now, Mr. Schwartz, do you recollect a fast freight passing you? A. Well, no.

Q. Did it pass you? A. I can't—I can't recall any particular freight passing me.

Q. Well, did you give way to any freight? A. Well, I can't tell you that, because we have a four-track section from East Dover to this side of Lincoln Park, and they give us a track and give the other train a track and, of course, I wouldn't pay any particular attention. I might at the time, but I wouldn't recollect that now.

Q. When you reached any point from the road down from Dover you don't recollect stopping to let any freight go through? A. No, I couldn't say.

Q. How fast was the speed of your train, the average speed, when you reached Paterson? A. Well, for instance, the average speed between Little Falls and Paterson, is that what you mean?

Q. Well, I would say from West Paterson into Paterson. A. Well, I couldn't tell you exactly what it is on this date, but about what it ought to be, it ought to be twenty-five miles an hour.

Q. And is there a grade from the—just this side of West Paterson on into Paterson? A. Yes.

Q. A down-grade, I should say. A. This side of west Paterson?

Q. East of West Paterson, yes. A. Is there a grade?

Q. Yes. A. It starts to descend, I should say, just east of the station, but west of the station I should say it was practically flat.

Q. And is that a marked decline or is it what percentage, do you know? A. Well, it is what we call a light grade.

Q. A light grade. Did you have any schedule on that date to be in Paterson at any particular time? A. No, sir.

Q. No fixed time at all, had you ? A. No, sir.

Q. Did that mean that you could run her out an hour later and it would be all right? A. That would depend on your work. They expect you to make the best time possible consistent with safety and delays, and you can never tell—you never can foresee.

Q. But there was no fixed schedule for you to arrive in Paterson at any particular time, was there? A. No, sir.

Q. You don't know and have no recollection of any train passing you at all? A. No, I wouldn't say that I had, because I don't recollect.

Q. Is there any other freight train, do you know, as a railroad operator, that followed closely behind you in the regular schedule? A. Why, I wouldn't swear to it, but it seems to me that a couple of trains passed us after we got on the fourth track east of Paterson; there is another four-track section from Paterson Junction.

Q. Oh. Do you know whether they were fast freights or local freights? A. Well, there wouldn't be any locals because I really don't know

where they would come from. If a freight passed it would be what we call a fast freight.

Q. What is the speed, usually, of a fast freight? A. Well, it depends on the place where it is operating.

Q. I mean as it passed you down at the Paterson Junction, how fast would it go? A. Oh, Paterson Junction, if it had clear signals it would probably make forty or fifty miles an hour.

Q. Do you know, other than seeing these two trains pass, as you say, do you know whether there was any other freight right behind you on the same track that you were operating on? A. No, I don't remember. There could have been, but I don't remember the circumstances, because it is too long ago for me to remember that.

Q. It is possible, though, that there was a train? A. Yes.

Mr. Benson: That is all.

Richard H. Schroeder, sworn.

Direct examination by Mr. Scott.

Q. Mr. Schroeder, you live where, sir? A. Jersey City.

Q. How old are you, sir? A. How old?

Q. Yes. A. Sixty-one.

Q. And you are an engineer of the Lackawanna Railroad? A. Yes, sir.

Q. And you have been employed by them how long? A. Twenty-five years.

Q. How long have you been in the train service as an engineer? A. About thirty-five years.

Q. As an engineer? A. Yes, sir.

Q. And in February, 1929, what service were you in? The freight or passenger? A. Local freight service.

Q. And you were running on the Boonton branch? A. Yes, sir.

Q. Between what points? A. Port Morris and Hoboken.

Q. And in February did you have any particular train to haul? A. Nothing more than our regular extras, extra pick-up between Port Morris and Hoboken.

Q. Did you have any regular engine? A. My regular engine is 1250.

Q. 1250? A. Yes, sir.

Q. And you would get that train at Secaucus, New Jersey? A. Hoboken at that time.

Q. Hoboken, and go out to Port Morris? A. To Port Morris.

Q. By way of the Boonton branch? A. Boonton branch.

Q. And then you would get another train and haul it back? A. And return, yes.

Q. Now, on February 19, 1929, were you operating that extra 1250? A. Yes, sir.

Q. From Port Morris east to Hoboken? A. Port Morris to Hoboken.

Q. And how frequently have you traveled over the Boonton branch? A. How frequently? Well, I have been on that job a little over two years.

Q. Over two years? A. Yes.

Q. That particular job? A. That particular job.

Q. And prior to that how frequently had you been over it? A. Well, I been on work extras three years before that; that would be five years altogether.

Q. On the Boonton Branch? A. Yes.

Q. You are familiar with the vicinity of the Paterson station? A. Yes, sir.

Q. And the Paterson junction? A. Yes, sir.

Q. And you know where the express or milk platform is? A. Yes, sir.

Q. East of the Paterson station? A. Yes, sir.

Q. That is on which side of the train going east, the right or left-hand side? A. On the south side of the east-bound track.

Q. And that is on your right-hand side? A. On the right-hand side, yes.

Q. Now, I guess we all know about where it is, but I would like to have it noted on the record. In operating a locomotive like 1520—— A. Yes.

Q. (Continuing)—which side of the locomotive do you operate it from? A. The right-hand side.

Q. The right-hand side? A. Yes, sir.

Q. And as you approached Paterson station, coming east, and coming down toward Paterson Junction, will you tell the Court, aside from your duties of running locomotives, what other signs or places you are under an obligation to observe in running your train? A. Yes, sir.

Q. Take it just as you are approaching Paterson station. A. Well, just west of Paterson station there is an automatic signal which we look for——

Mr. Benson: I ask to have it stricken out, "what we look for."

A. Well, it is there for us; we must know it is there.

Mr. Benson: If he looked that is one thing. He says "We looked for it."

The Court: Well, he means that that is the custom,——

A. It is there for us to look for.

The Court: (Continuing)—that there was a regular, stationary signal there, and I suppose he means he looked for it that day and that they always do look for it, I suppose.

Q. That is just west of the—— A. Just west of the station.

Q. Now, is that down on the ground or where is it? A. No, sir, it is on a high pole.

Q. On a high pole? A. Yes, sir.

Q. To the right or left? A. To the right side of the track.

Q. Sir? A. To the right-hand side of the track.

Q. Then, after you—— A. Then comes the station, the platform to be taken care of, looked after, to see whether there is any traffic going back and forth. It means that I have to watch out for the gates, baggage men and expressmen and the likes of that. Then when we get down below about near the express office, why, then we begin to get looking down towards your depot, down near the cross-over where they claim this trouble was. There was nothing down in there for me to draw any of my attention to anything.

Mr. Benson: He has not been asked——

Mr. Scott: All right, I will consent to strike it out.

The Court: I suppose he is just going on with his story. You had better put it in question form.

By the Court:

Q. You say "where this trouble was"; was it pointed out to you? A. Why, it was said to me, when they told me that there was trouble, that the man got hit there. They told me that the day it happened, but I didn't know just where it was, but now I know.

Q. Was it pointed out to you later? A. No, it wasn't exactly pointed out. It has been spoke about enough so that I should know.

Q. About how far could you see? A. About 350 or 400 feet.

Q. How fast were you traveling that day? A. About eighteen or twenty miles an hour.

Q. Within what distanec could you stop your train? A. Oh, I don't know whether I going stop it to clear that man if I saw him there in that time. I might.

Q. Well, have you ever tried to stop your train going eighteen or twenty an hour? A. Yes.

Q. Within what distance do you stop? A. According to what kind of grade I am on or what kind of a train I have got.

Q. A grade such as this and a train such as you had that day? A. It is level ground; I wouldn't be hardly able to stop it to clear that man.

Mr. Scott: May I interrupt the Court to hear that last answer?

The Court: I think he said he wouldn't quite be able to stop to clear the man.

By Mr. Scott:

Q. Now, you learned—was your Honor through?

The Court: I thought he was going to give me the distance. I didn't know.

By the Court:

Q. You say you have tried to stop? A. Well, we had occasions where we tried to stop, of course.

Q. Under similar conditions? A. Where we saw something in the way and tried to stop, of course. I have sometimes stopped and sometimes I don't.

The Court: I see.

By Mr. Scott:

Q. That question of stopping depends—— A. On the——

Q. (Continuing)—on the condition of the train?

Mr. Benson: Don't lead him.

Mr. Scott: All right.

Q. Just what are the conditions that you have to figure on in stopping a train? A. The weight of the train and the grade.

Q. The what? A. The weight of the train and the grade.

Q. And does the condition of the rail—— A. Oh, yes.

Q. And your speed have something to do with it? A. And the speed.

Q. They enter into your calculation? A. Yes, it has something to do with it.

Q. Now, you learned, I think, subsequent to the time Mr. DeRose was found down near the coal pockets, you learned that there had been an accident down there? A. Yes, sir.

Q. How soon after was it you learned? A. On my arrival in Hoboken.

Q. On your arrival at Hoboken? A. Yes.

Q. Having that in mind—— A. In what?

Q. Having that fact in mind, that when you got to Hoboken—— A. Yes.

Q. (Continuing)—you learned that somebody had been hurt up near the coal pockets east of the Paterson station—— A. Yes.

Q. (Continuing)—can you tell us whether, when you were coming down there that day and passing the station, whether or not there were any obstructions of any character on your east-bound track? A. No, sir.

Q. Sir? A. Nothing in view at all; nothing in the way whatever. There wasn't a man to be seen, nothing to stop me.

Q. On your east-bound track? A. On the east-bound track, nothing.

Q. Do you recollect whether your bell was ringing or not? A. My bell was ringing, yes, sir.

Q. As you came down that day? A. Yes, sir, my bell was ringing.

Q. How does that bell ring? A. By air.

Q. By air? A. Yes, sir.

Q. Just one other question, Mr. Schroeder: A train of forty-six loaded cars, do you use steam coming down? A. Oh, yes, yes, sir, both ways.

Q. Toward the Paterson station? A. Both ways.

Q. Both ways? A. Yes, sure.

Q. In other words, you don't drift down? A. Don't drift, no.

Q. From West Paterson down? A. Oh, no. No, sir, not at all.

Q. Into East Paterson? A. No.

Richard H. Schroeder, for Defendant, Cross.

Q. Now, you say that there was nothing on your track? A. Nothing on my track to be seen nowheres all the way down.

Q. Until where? A. Until I arrived the Paterson Junction.

Q. And then what did you see? A. There was a gang of men working down there.

Q. There was a gang of men working there? A. Yes.

Q. At Paterson Junction? A. Yes.

Mr. Scott: That is all.

Cross examination by Mr. Benson.

Q. You do drift sometimes, don't you, Mr. Schroeder? A. Not unless we are coming down with a signal to stop. That is the only time to put the brake on and stop in a short distance; don't go far.

Q. Drifting is going without any great force of steam? A. No, sir, not any.

Q. There is grade there, isn't there? A. Yes, a level grade, level ground.

Q. Absolutely level from Paterson station east? A. Just level enough so they wouldn't run there.

Q. In other words, you would have to be on full steam? A. Full steam all the time.

Q. And from the Paterson station down to Barclay Street is on a dead level? A. After you get down a little ways below the cross-over, down into Barclay Street, it begins to go down.

Q. I mean, between the new station and Barclay Street, would you say it was on a dead level? A. Well, up to Barclay Street is level.

Q. Absolutely level? A. About level. It may be a little bit up instead of down. After Barclay

Street it is a little bit down, and the further down you go the heavier it gets.

Q. Isn't there a slight grade from Paterson station down? A. I shouldn't think so.

Q. You have been on the railroad for twenty-five or thirty years? A. On different train runs.

Q. Can't you tell by looking at a track whether or not there is a drop? A. Well, you might tell, but we know where we got to pull them and where we don't.

Q. I show you exhibit P-4. A. Yes, sir.

Q. Would that indicate that there was a grade? A. It might indicate it on the picture, but not on the ground.

Q. The picture, then, you say, does not depict— A. The picture of the grounds makes it appear as if it was going down-grade.

Q. Well, would you say, then, the picture isn't accurate? A. The picture is all right, yes.

Q. Well, if it is all right, tell me—— A. But it looks to some people, if they looked at it, they would think there was a grade, but there is no grade there until after you go by Barclay Street.

Q. On the day in question when you left Lincoln Park how fast did your train run up there? A. How fast did we make up there?

Q. Yes. A. About the same speed we did here.

Q. How fast, fifteen or twenty miles an hour? A. Eighteen to twenty miles an hour.

Q. Eighteen to twenty? A. Eighteen to twenty.

Q. Do you keep any record of that? A. No.

Q. Do you keep any records of anything? A. No, sir, not of that kind.

Q. When you were up, you say, at Little Falls or Lincoln Park you ran eighteen to twenty miles an hour? A. Yes.

Q. When you got down to Little Falls you were going about the same; is that right? A. Yes.

Q. When you reached Paterson you were going exactly the same? A. We stopped at Little Falls.

Q. After you got going again? A. After we got going again, about the same gait.

Q. When you approach a large city don't you slacken up a little bit? A. You have got to watch and see what is going on, and if there is anything particular, do the next best we can.

Q. Just answer my question, please. A. Yes.

Q. When you reach any large city don't you have to slacken speed? A. I never heard of it at all.

Q. You go just as fast through the station as anywhere else? A. Unless the yard limit restriction is there.

Q. Approaching the station you would go just as fast? A. Yes, sir.

Q. So when you reached Paterson station you just proceeded right on; is that right? A. What is that?

Q. When you reached the Paterson station you proceeded at the same speed? A. I come in and go out the same as I come in if I have got to stop there.

Q. And you are familiar—you have been working on this particular division for some time, haven't you? A. Yes.

Q. There were trains going down that particular track quite frequently during the day, weren't there? A. Sure, every day.

Q. The D. L. and W. is a heavy freight railroad, isn't it? A. Yes.

Q. There was a great deal of freight being

hauled during the month of February over the division south or east of Port Morris? A. Yes, sir.

Q. And the trains ran how far apart, the freight trains? A. That is not for me to tell.

Q. Would they be about fifteen or twenty minutes apart? A. Maybe that far, maybe farther, maybe closer. It is hard for me—I wouldn't know where they were behind me.

Q. There was a freight ahead of you, wasn't there? A. Not as I know of.

Q. You had no signal for any freight ahead of you? A. No.

Q. Did you know whether there was any ahead of you? A. I didn't know that.

Q. You never made any inquiry, did you? A. I had no reason to.

Q. There is a bend in the railroad at the Paterson station, isn't there? A. Yes, sir.

Q. Quite a considerable bend, isn't there? A. Yes, sir.

Q. And when you go around curves don't you slacken? A. No.

Q. Disregard the curves entirely and continue on the same speed? A. Keep on going the same.

Q. Now, when you got five hundred feet to the west of the Paterson station you have no vision down the track from the Paterson station, have you? A. No, not five hundred feet, I wouldn't have.

Q. And when you were really right in front of the Paterson station you couldn't see down to the point where this Y-mark is on exhibit P-3? A. No, hardly.

Q. But when you reached the—— A. Express office?

Q. Now, then, as you approached the Paterson station you continued at the same speed? A. Yes, sir.

Q. Where was your fireman at that time? A. Well, now, that is something I couldn't tell you, unless he was over on the left side or back in the tank.

Q. Isn't it part of his duty to be on the left side? A. Not particular.

Q. Isn't it part of his duty? A. No, only when he has got nothing else in his own line of work to do.

Q. Do you know at that particular time whether he was working? A. Well, not, I told you I don't know. I couldn't say that, whether he was working or sitting in the cab or in the tank.

Q. When it was called to your attention that there had been an injury there, didn't you make any inquiry to find out where he was? A. Well, at that time it was too late to find out where he was.

Q. He was on the train with you, wasn't he? A. He was on the train, sure he was.

Q. Yes, and didn't you inquire of him whether he had seen a man on the track? A. Well, he didn't see him.

Q. He didn't see him? A. No.

Q. What did he say he was doing at the time? A. He wouldn't have been able to see him if he was there because he was on left side of engine.

Mr. Scott: I think this is not proper cross examination, and I object.

Mr. Benson: All right.

Q. Did you speak to him about it? A. I don't think we did that day.

Q. Did you speak to him at any time about it? A. I didn't really know anything about it that day.

Mr. Scott: I object. I can't see how—does this test his credibility?

The Court: No.

Mr. Scott: I don't think it is directed to anything I asked him on my examination.

The Court: No.

Mr. Benson: All right, I won't go any further with it.

Q. Now, how many feet would you judge it was from where you can see right down to the point *Y*? A. About 350 feet.

Q. Only about 350 feet? A. That is about all.

Q. Are you sure of that? A. Well, 350 or 300 or 400. About 350 feet, I should judge.

Q. How are you positive? A. Well, I won't say anything different. I can't.

Q. You never measured it, did you? A. No, sir.

Q. It is just a guess, isn't it? A. That is all.

Q. Now, then, at the point marked *Y* on this photograph, if a man was working at the frog indicated as *Y* on exhibit P-3,—— A. Yes.

Q. You could easily see him as you passed the station, couldn't you?

Mr. Scott: May I hear that question?

A. Not 350 feet passing the station I couldn't see him.

(The question was read by the reporter.)

Q. At what point could you see this man? A. About down by the express office.

Q. How far is that below the Paterson station? A. Oh, that might be a hundred feet.

Q. I show you exhibit P-4. At what point there would you be able to see? A. That has got the express platform out of it, hasn't it?

Q. Yes. A. The express platform ought to be in about here.

Q. Yes. A. A little more around the curve—at the express platform where I should begin to see down there, and I should judge it was nearly 350 feet or 400 feet.

Q. 400 feet? A. 350 or 400 feet, not any more.

Q. This was a clear day, wasn't it? A. Yes, sir.

Q. You said something about a bell? A Yes.

Q. When did you start to ring the bell? A. The bell is started when I go by the automatic signal, before you come to the depot.

Q. Where is the automatic signal? A. Sir?

Q. Where is the automatic signal? A. Just before you come to the depot.

Q. Just how far is it from the depot? A. Until you get down to Barclay Street. I don't know, maybe about a hundred feet.

Q. I show you a post—— A. Yes.

Q. —Marked on exhibit P-4. What does that indicate? A. Oh, that is a flanger.

Q. That is not a signal post, is it? A. No, this is for a man to stand by the track and raise and lower the flanger.

Q. How long did that bell continue to ring after that? A. Until you get down to about Barclay Street.

Q. Did the engine make any noise? A. I guess she would, pulling forty-six cars.

Q. Was it pulling hard or easy? A. It was pulling hard.

Q. Is forty-six cars a long train? A. Well, forty-six cars is pretty nearly a half a mile.

Q. What was your reason for ringing the bell if there wasn't anything on the track? A. We always do that going by a station like that.

Q. That was the only reason? When you passed the station you stop? A. It is a rule in the time-table, in the book of rules.

Q. After you pass the station, then you stop? A. Sure.

Q. Sure. This was an extra train, wasn't it? A. Yes, sir.

Q. No schedule? A. No, sir.

Q. Liable to get in Paterson at one o'clock or two o'clock, depending on the circumstances? A. One o'clock or two o'clock or four o'clock.

Q. You mentioned something about your rules, your rules, you mentioned something about the rules. A. I don't remember what it was.

Q. The book of rules. A. Well, what was it?

Q. Didn't you mention something about your book of rules? A. Well, the rules what we got to work by.

Q. Doesn't your book of rules specifically provide that you must sound a whistle at particular intervals where the view is obstructed? Will you say there is no such rule? A. Never, not on the whistle.

Q. What is it on for? A. Why, in case we see something or come to a grade crossing or something like that, I blow my whistle, but where is nothing to be seen——

Q. You mean to say when you are going around this sharp curve you don't blow a whistle? A. No.

Mr. Benson: That is all.

Richard H. Schroeder, Recalled, for Defendant, Cross.

Frank Henderson, sworn.

(The witness was temporarily withdrawn.)

Richard H. Schroeder, recalled.

Cross examination (continued) by Mr. Benson.

Q. When you reached Hoboken that day—— A. Yes.

Q. —you received a report that a man was injured, didn't you? A. Yes.

Q. What officer of the company gave you that report? A. I think, if I am right, they were waiting for the engine to come in for inspection.

Q. Who gave you the report? A. I couldn't tell you who gave it to me now, it is so long ago I forget who gave me the notice.

Q. Even with an important matter like that? A. We got more things than that—we got more things on our minds since that than that. You don't stand still when you get through with anything like that, for one thing.

Q. How do you remember, than—— A. I remember.

Q. You remember, don't you? A. Yes, siree.

Q. And you don't remember anything about a report other than a man was injured and killed? A. He wasn't killed; he was injured.

Q. As a result of the injury? A. Yes, sir.

Q. And you don't know the name of the person who reported that to you? A. No, sir.

Q. You haven't the slightest idea? A. I didn't know the man that was injured.

Q. Not the slightest idea? A. No.

Richard H. Schroeder, Recalled, for Defendant, Cross.

Q. You didn't make any report after you had received this information? A. I had no report to make.

Q. Didn't you make a report that you didn't make any observation of any man on the track? A. What I don't see I don't report.

Q. What you don't see you don't report? A. Yes, sir, I don't report.

Q. Was it a cold day that day? A. Well, I wouldn't say whether it was very cold that day or not. I don't remember that.

Q. Did they state to you that it was your train that struck the man? A. Well, they thought it was my train.

Q. Didn't they state it was your train? A. No, sir.

Q. Only that they thought? Who said that they thought it was your train? A. The same party that I got the information from. Now I don't know who the party was.

Q. Was it a man or a woman that you received that information from? A. I wouldn't hardly think it would be a woman in the railroad line of business, not in the round-house or around in the yard.

Q. You say it was a man? A. Why, it must be.

Q. You don't know anything about it? You can't describe him? A. No, sir, any more than I got the word that they were waiting for me.

Q. That day wasn't your window closed? A. I don't know now. I don't think so.

Q. You weren't hanging out of your cab looking forward? A. No, sir, I don't hang out of the cab.

Richard H. Schroeder, Recalled, for Defendant, Redirect.
Frank Henderson, for Defendant, Direct.

Q. You don't lean out at all? A. I do my work all inside.

Q. All inside? A. Yes.

Q. Was your window—— A. It may have been open; it may have been closed. If it was closed I could have seen that man if he was down there.

Q. You could have seen him? A. Yes.

Mr. Benson: That is all.

Redirect examination by Mr. Scott.

Q. And the first knowledge you had, Mr. Schroeder, was when you got to the round-house, as I understand it, on this day? A. When I arrived at the round-house.

Q. They wanted to make an inspection of the engine? A. Make an inspection of the engine; that was the first word I got.

Q. That was at Hoboken A. Hoboken—Jersey City.

FRANK HENDERSON, recalled.

Direct examination by Mr. Scott.

Q. Mr. Henderson, you are employed by the Lackawanna Railroad, and you worked at Hoboken, didn't you? A. I worked at Jersey City.

Q. Jersey City? A. Yes, sir.

Q. On February 19, 1929, whereabouts in Jersey City did you work? A. Jersey City round-house.

Q. What was your position there? A. Round-house foreman.

Q. Round-house foreman? A. Yes, sir.

Q. And on the afternoon of February 19, 1929, did you have occasion to do anything with respect to engine 1250? A. Yes, I inspected 1250.

Q. For what purpose? A. Why, the train despatcher told me to inspect 1250, that there was a man found lying alongside of the tracks at Paterson, to see if I could find any marks on that engine.

Q. And as a result of that information that a man was found alongside of the tracks—did you say at Paterson or where? A. Yes, Paterson.

Q. As a result of that request to examine that engine on account of a man being found lying alongside of the tracks did you examine engine 1250? A. Yes, I did. I examined it, yes.

Q. And where did your examination—how soon after the engine got to the round-house, would you say? A. Well, I would say about ten minutes, fifteen minutes.

Q. Before the engine was cleaned or not? A. Yes, before the engine was cleaned.

Q. And what kind of an examination did you make of the engine? A. Well, I went all over the engine, both sides, engine and tank.

Q. And as a result of that examination did you come to any conclusion as to whether that engine had struck anything or person? A. No, I seen no marks.

Q. I asked you, Did you come to any conclusion? A. No, I didn't come to any.

Q. Or did you make a conclusion? A. Yes, I did.

Frank Henderson, for Defendant, Cross.

Q. Now, it may be objected to, so don't answer it. What conclusion did you come to?

Mr. Benson: I object to that. He can tell us what he saw, if he found anything.

Mr. Scott: All right, all right, put it that way, then.

Q. What did you find in the course of your examination to indicate whether the engine had struck any person or any obstruction? A. Well, I found no marks of any kind.

Q. You found no marks of any kind? A. No marks of no kind.

Q. And you examined the engine entirely? A. Yes, I did.

Q. And by the entire engine just tell the jury what part of the engine you mean by that. A. Why, that is the steps, upright, cylinders, tank, everything included; that is the whole engine.

Q. You found no marks? A. No, I didn't.

Q. On the engine? A. No.

Cross examination by Mr. Benson.

Q. You didn't visit the place to find out just the location where the man was injured, did you? A. No, not at that time.

Q. Well, at the time of the inspection that you referred to? A. No.

Q. And you just made the inspection from information you received from others? A. Yes.

Q. Now, when did you first get the information that a man was injured at the Paterson—at Paterson? A. Well, I don't know. I might have received it around half-past two, somewhere around there. I couldn't just exactly say the time.

Q. Don't you keep any record of those things? A. No, I don't keep no record.

Q. You made no notes at the time? A. No.

Q. And that train was a local freight, wasn't it? A. As far as I know, it was.

Q. Yes. It stopped at the Paterson Junction, didn't it? A. I couldn't say.

Q. You don't know how long it had been at the Paterson Junction, do you? A. No, I don't.

Q. You don't know how long it took from the time it left Paterson before it reached your yard, do you? A. No, I don't.

Q. It is possible that any marks that were on the engine could have been removed? A. Well,—

Q. It is possible, I say. A. I don't know what way.

Q. Well, it is possible that they could have been removed? A. I suppose it could have been removed.

Q. Yes. And it is possible that when the engine struck the man there wouldn't have been any marks on the engine? A. Possible.

Mr. Benson: Yes, that is all.

Mr. Scott: Would you mind reading that last question?

(The last question and answer were read by the reporter.)

Richard H. Schroeder, Recalled, for Defendant, Direct, Cross.

RICHARD H. SCHROEDER, recalled.

Direct examination by Mr. Scott.

Q. Will you tell the Court and jury who had charge of the engine from the time you passed the Paterson station on the 19th of February, 1929, until you got to the round-house in Hoboken? A. Well, I had charge of the engine and run the engine myself from Hoboken to Port Morris and returned to Hoboken.

Q. Who took it to the round-house? A. Well, when I got to Jersey City the round-house authorities took it over, of course.

Q. Well, now, from the time you got into Hoboken or Jersey City, whichever it was, on the east-bound trip, during that time did anybody—did you see anybody removing any marks? A. No, sir, never removed nothing, because nobody knew anything until we got to Hoboken till the man in charge there for inspection took charge of her; nobody knew anything until that man took charge of her in Jersey City.

Cross examination by Mr. Benson.

Q. Just a minute, Mr. Schroeder. Now, you were in the round-house a little while? A. Who? I was?

Q. Your engine, I am speaking of. A. When we arrived there?

Q. Yes. A. Yes, the engine was.

Q. After you left the point indicated as Y on this exhibit, P-3, you went to the Paterson Junction, didn't you? A. Yes, sir.

Q. And what did you do there? A. Set out cars.

Richard H. Schroeder, Recalled, for Defendant, Cross.

Q. How long were you there? A. We might have been there ten or fifteen minutes.

Q. And what do you mean, drilling cars back and forth or at a standstill? A. Setting out cars and getting on again.

Q. Was there anybody around the front of the locomotive at the time? A. I don't know. I didn't see any of the crew. The fireman had been in the cab with me all the time.

Q. You aren't sure, though, are you? A. Well, I dont know that anybody might be out in front; I can't see them over on the left side, out of my view.

Q. You can't say there wasn't anyone there? A. I wouldn't say there wasn't anybody there.

Q. No. And when you came into the station or the round-house at Jersey City you didn't see Mr. Henderson—— A. When I arrived there?

Q. —ten minutes after, did you? A. When I arrived there they were ready to take charge.

Q. Are you sure of that? A. Well, I know they were waiting for me.

Q. Why are you sure that Mr. Henderson took charge immediately upon your arrival? A. Well, that is the way he spoke.

Q. What do you mean? A. They told me they were waiting for the engine.

Q. You are sure that the minute you landed in that round-house that Mr. Henderson was there to examine your engine? A. I don't know whether it was Mr. Henderson, but somebody spoke to me on my arrival, before I was off the engine.

Q. Now, you know Mr. Henderson, don't you? A. I do.

Richard H. Schroeder, Recalled, for Defendant, Cross.

Q. How long have you known him? A. Oh, about ten years.

Q. And surely you can remember—— A. There is other men there just as he is that might have spoke to me. He said they were going to inspect the engine.

Q. Now, isn't it a matter of fact that Mr. Henderson didn't come there for ten minutes? A. He was there when I got off the engine.

Q. Mr. Henderson was? A. Somebody was there and said they were going to inspect the engine and wanted to know what I knew about it.

Q. I am asking you whether you saw Mr. Henderson there? A. I wouldn't say whether I did or not.

Q. You don't know? A. I don't know.

Mr. Scott: We rest.

THE DEFENDANT RESTED.

William Gusta, for Plaintiff, in Rebuttal, Direct, Cross.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

WILLIAM GUSTA, recalled.

(The testimony of this witness in rebuttal was given without an interpreter.)

Direct examination by Mr. Benson.

Q. I want to ask one question. I think you can tell us. Do you know, Mr. Gusta, the number of the caboose on the train? A. Yes.

Q. That struck Mr. DeRose? A. Yes.

Q. What was it? A. 768.

Cross examination by Mr. Scott.

Q. Mr. Gusta, you know this number 66 train, don't you? A. I said the number of the caboose.

Q. What is that? A. The number of the caboose, the caboose.

Q. This second freight train that you saw go by was what you call number 66, wasn't it? A. Yes.

Q. And you knew that it was 66 because that was the train which would sometimes bring coal down to you? A. Yes.

Q. And it would come down most every afternoon, down the track? A. Two times a day, three time a day.

Q. How did you know that they called this train 66? A. Everybody, the big boss, too.

Q. The big boss told you to call it 66? A. Yes, yes, call it.

Q. You are sure? A. Yes.

Q. That the second freight train was 66? A. Yes.

William Gusta, for Plaintiff in Rebuttal, Redirect.

Q. How do you remember the number of the caboose? A. Is that number I see every day.

Q. What is that? A. I see every day.

Q. The same caboose every day? A. Yes.

Q. Is that the only caboose you ever saw going up and down past your place? A. I see that morning, and I see at night, too.

Q. What is that? A. Sometimes I see in the morning, sometimes at night.

Q. Yes, but I say, is that the only caboose you ever saw going up and down at that place? A. Yes.

Q. That is the only train has a caboose on? A. A lot of cabooses got on the trains.

Q. A lot of trains have cabooses on? A. Sure, the freight trains.

Q. What are the numbers of those cabooses? A. I don't know. Sometime they got 175.

Q. 175? A. A lot of number they got that I don't know.

Q. What are the other numbers of the cabooses?

Mr. Benson: Of what trains?

A. You go ahead and ask him. I said I just see this got number 66, the caboose is number 768, Paterson train.

Redirect examination by Mr. Benson.

Q. Just one question: Did you see Mr. Murphy there? A. Yes.

Q. Which Mr. Murphy was that? A. Down at the station.

Q. At the station? A. Yes.

Q. Which one? A. Paterson station.

Q. Which Mr. Murphy? There are two Mr. Murphys, aren't there? A. No, the big boss.

Q. The big boss? A. Yes.

Q. Is that the man that helped you—helped Mr. DeRose? A. After the engine—the flagman was, too, you know.

Q. Was there anything said about train number 66 at that time? A. That is all, there was a passenger train after.

Q. But was anything said then about train 66? A. The engine?

Q. When Mr. Murphy was there? A. Mr. Murphy was there you know, down at the station.

Q. Was anything said about train 66? A. I don't understand good.

Q. Don't you understand? What did Mr. Murphy say about train 66? A. Well, because when Mr. Murphy——

Q. No, what did he say about train 66? A. He says that train is 66.

Mr. Scott: May it please the Court, I don't like to interrupt this witness and counsel, but I don't see what Mr. Murphy said had anything to do with the case, in the first place; in the second place, I don't think it is proper rebuttal.

The Court: I don't think he could be permitted to tell what Mr. Murphy told him or said.

Mr. Benson: All right, withdraw the question. That is all.

Recross examination by Mr. Scott.

Q. What was the number of the engine on that freight train? A. 66.

Q. The number of the engine? A. How many times do you want to call now? Didn't you call before?

By the Court:

Q. What number? 66.
Q. The engine? A. Yes.
Q. Or the caboose? The caboose, 768.
Q. The caboose was 768? A. Yes.
Q. And the engine 66? A. Yes.
Q. 768. 768, and the engine was number 66? A. Yes.

Both sides rested.

MOTION FOR DIRECTED VERDICT.

Mr. Scott: At this time I would like to renew my motion for a direction of a verdict without the argument, and I would like to reassign as my reasons the three reasons that I gave on my motion to non-suit.

The Court: Yes: I will deny the motion and allow you an exception.

(A recess was taken until Thursday, January 30, 1930, at ten o'clock in the forenoon.)

Court's Charge to the Jury.

Paterson, N. J., January 30, 1930.

MACKAY, J.:

Members of the Jury:

This is an action brought by Josephine DeRose, administratrix of the estate of Alphone DeRose, also known as Nick Rose, deceased, against the Delaware, Lackawanna and Western Railroad Company, under the first section of the Federal Employers' Liability Act. The Federal Act is an Act of Congress, an act passed by the House of Representatives and the United States Senate, so it is a Federal law and not a State law.

That section reads as follows:

> "That every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia, and any of the States or territories, or any of the States or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce; or in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then to such employee's parents, and if none then to the next of kin dependent upon said employee for such injury or death resulting in whole or in part from the negligence of any of the officers agents, or employees of said carrier, or by reason of defect or insufficiency due to its neg-

ligence in its cars, engines, appliances, machinery, tracks, road-bed, works, boats, wharves or other equipment."

It is admitted by counsel for the defendant that the defendant corporation is engaged in interstate commerce and was so engaged on February 19, 1929, and that the deceased, Nick Rose, was in the employment of the defendant company.

On February 19, 1929, the deceased was employed by the defendant as a track walker and laborer. As I recall it, it is claimed that he was at a point about eight hundred feet from the beginning of the curve beyond the railroad station of the defendant at Paterson, and that while so employed he was injured by being run down by the engine of the defendant's train known as number 66, which was being operated in an easterly direction, and that as a result of the injuries Nick Rose, as he was called, died on the 22nd day of February, 1929, at St. Joseph's Hospital in the City of Paterson.

Now, the object and purpose of this federal law was and is that first it modifies the old law of negligence of co-employees. The old law took root in the United States about two generations ago and was to the effect that an employee injured by the negligence of a fellow workman could not recover. The proposition was that an employee injured by the negligence of a fellow servant could not recover. This statute abolishes that doctrine and gives the employee a right to recover for injuries arising from the negligence of the fellow workman. Secondly, it modifies the law whereby in other times workmen were held by the Court to assume the risks arising from defective ma-

chinery. Thirdly, this statute modifies radically the law of contributory negligence as administered by our Court, it having been universally held that an employee suffering an injury to which his own negligence contributed cannot recover, that is, by reason of his participation in the injury.

This statute, however, liberalizes that law. It is a statute based upon the theory that where an injury occurs partly by reason of the negligence of an employee the jury ought to determine what proportion of the injury arises from the negligence of the deceased, as in this case, and take away from the sum total of the damages allowed that part which can properly be apportioned to his own negligence.

Now, I want you to give this case your very careful and thorough attention. The evidence, to give it to you briefly, is that the plaintiff has produced evidence attempting to show that it was a custom of the defendant company for a number of years past that when an employee was working on the track the blasts of the whistle of the engine were blown—I think the evidence was that three blasts were to be blown—that the engineer had a clear view of about eight hundred feet from where the accident is alleged to have occurred when he first had an opportunity to view that particular place. Of course, I am speaking now about the plaintiff's side. That is not so so far as the defendant's evidence is concerned, as I will tell you later.

The plaintiff says that no whistle was blown or signal given to the deceased and that it was the duty of the engineer to do so; that the train was traveling at a high rate of speed—the witness did not say how fast;—that there was no one on the

left side of the engine or the cab of the engine to make observations; and the plaintiff claims, that is, the administratrix, that she relies on the custom for notice and warning.

Evidence has been adduced as to the train known as number 66. The plaintiff claims that the deceased was seen working at a frog marked Y on exhibit P-3, which is the photograph that is in evidence in this case and which you will have with you in the jury-room, and that that was just before the train passed which they claim caused the accident, and that after it had passed the deceased was lying at a place marked W on exhibit P-3. I think there is also an X mark or some other mark to show where the witness William Gusto, or whatever his name was, was sitting at the time he said he saw the man working there and the train go by.

Now, the plaintiff claims that the next of kin suffered pecuniary loss; that the deceased endured pain and suffering from the time of the accident until the time of his death.

The defendant claims that there was no negligence on its part and that the sole and proximate cause of the accident and injuries was the negligence of the deceased, Nick Rose. The defendant produced witnesses who testified as to the movement of the trains, and that train number 66 did not cause the accident in question, and also that Mr. Murphy, the section foreman, gave instructions to the deceased on the day of the accident and prior to the accident to walk the track, oil the switches, and look out for broken rails; that the deceased had often walked the track before but he gave special instructions also to look out for himself for trains. The assistant foreman heard Murphy give these orders and he says that he, too,

told the deceased in Italian to watch out for trains and motor cars. I presume by motor cars he meant those little cars that we see that are worked by the men, the workmen themselves. They used to be called hand-cars on the railroad. I presume that is what he meant. I don't know, but that would be for you to say, anyway.

The engineer said he was only going eighteen to twenty miles an hour; that his bell was ringing just before the accident. I am not sure whether he said just prior to the accident, but I think he said at or near the station, either just before he rached the Paterson station or while he was at it or as he was just passing it. That is for you to say, too, and you must remember what the evidence is and disregard anything I may say that you think is incorrect.

The engineer said that he could see a distance of from three hundred to three hundred and fifty feet, and then he finally said perhaps four hundred feet, from the time he could get a view of the place where the deceased was alleged to have been injured. He didn't know where the place was until after it had been called to his attention at a later date, as I understand it. He said that sometimes he could and sometimes he could not stop his train in that distance; that he looked ahead and was looking ahead and saw no one on the track.

Now, the first thing for you to do is to determine from the evidence that is before you just what you believe the facts to be. You have the right to draw an inference from the testimony that the train which the plaintiff claims struck the deceased did strike the deceased and caused the injuries complained of, or you may draw an

inference that it did not. That is for you to say. If you infer from the circumstantial evidence, and it is circumstantial evidence because no one saw him struck, that the train did not strike him, then that is the end of the plaintiff's case and your verdict must be for the defendant, no cause of action. If you infer that it did strike him, then you would come to the question of custom and determine that question from the weight of the evidence before you.

The burden of proof is upon the plaintiff to prove custom by the fair preponderance of the testimony, and if the testimony on that point is evenly balanced or preponderates in favor of the defendant, then your verdict must be for the defendant, no cause of action.

If you find from the evidence before you that instructions were given to the deceased to look out for trains, or words to that effect, that would show contributory negligence on the part of the deceased, contributing to the injury which would bar a recovery by the plaintiff, unless you find a negligent act on the part of the defendant, in which event the contributory negligence would mitigate the plaintiff's damages, as I shall hereafter mention.

You must determine from the evidence what view the engineer had, how far away he could see the place where the deceased was working, whether it was three hundred feet or eight hundred or more than three hundred feet or less than eight hundred feet. In other words, from the conflicting testimony just how far he could see. You must determine whether the train was going at a reasonable rate of speed or a high rate of speed and within what distance the engineer could stop

this heavy train which, as was testified to, was about half a mile long, and whether under all the circumstances he used such care as a reasonably prudent person would exercise under the circumstances at the time and just prior to the accident.

Now, the first rule of law, one with which you are no doubt by this time familiar, is that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that the defendant was negligent in one or more of the particulars alleged in the complaint in this action, with consequent injuries, and that such negligence was the proximate cause of the accident and injuries. That means by the greater and weightier evidence; it means by the more convincing testimony. If you find that the testimony on this score is equally balanced or that it preponderates in favor of the defendant, then your verdict must be in favor of the defendant and against the plaintiff, no cause of action.

On the question of contributory negligence let me say that if the deceased was guilty of an act of negligence which directly contributed to the injury or was guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances, and such lack of care, act, or omission contributed to the accident, that is a factor to be taken into consideration under the third section of the Federal Employers' Liability Act, in determining the amount of compensation to be awarded in case you find for the plaintiff.

Now, I charge you, also, on the question of contributory negligence that if you find that the deceased was negligent and that his negligence was

the sole and proximate cause of the injury, then your verdict must be for the defendant and against the plaintiff, no cause of action.

The Federal law or statute provides that contributory negligence shall not bar a recovery, but shall be considered in abatement of a recovery in accordance with the degree. No degree of contributory negligence, however great, will bar a recovery of any damages. It is only when the plaintiff's, or as in this case the deceased's act is the sole cause, where the defendant's act is no part of the causation, as it is called, that the defendant is free from liability under the Act.

Now, as to the degree of care required by the deceased and the defendant, I charge you that they were both bound to use such care as an ordinarily prudent person would exercise under the conditions existing at the time they are called upon to act.

If you find that the plaintiff has sustained the burden of proof by a fair preponderance of the testimony and the negligence of the deceased, if any, was not the sole and proximate cause of the accident and injuries, you would come to the question of damages. Under this Federal statute this is simply an action to recover in dollars and cents a compensation for the loss and damages, which have been sustained. What those services might reasonably have been expected to have been worth the plaintiff would be entitled to recover for the benefit of the surviving widow and children.

Nothing can be allowed for mental anguish which the next of kin or the widow and children are supposed to have suffered; nothing for the loss of the satisfaction and comfort of having the

father; nothing for the loss of society or association or funeral expenses. In other words, the administratrix, the plaintiff who brings this action for the benefit of the widow and children, is entitled to nothing more than a deprivation of a reasonable expectation of the pecuniary advantage which would have resulted by a continuance of the life of the deceased, and it is upon this principle that the statute is to be applied.

You must weigh the probabilities and, to a large extent, form your estimate of the damages upon conjectures and uncertainties.

By the word "pecuniary" is meant pertaining to money. Therefore, a pecuniary loss is a money loss. What do the widow and children lose in money?

There was evidence that the deceased was earning fifty dollars, and occasionally sixty dollars, every two weeks; that he was sixty-one years of age; that he had an expectancy of life, according to tables of authority, and I don't know whether it was admitted that they were some insurance tables or mortality——

Mr. Benson: May I interrupt the Court? The data was obtained from the Prudential Insurance Company.

The Court: Which, of course, was as authentic as you can get it. According to the plaintiff's own claim, which the defendant did not dispute, but agreed to, this man had an expectancy of 13.4, and I think that means four one-hundredths, although I am not sure whether it means four-tenths or four months or four hundredths, but in any event it is a little over thirteen years, and, of course, less than fourteen years; in fact, less than thirteen and one-half years.

There was testimony, also, that he was in good health prior to the accident and just before the accident.

Now, remember this: that if you should find for the plaintiff and should also find that the deceased was guilty of negligence which contributed to the injury, the defendant is entitled to a deduction in such sum as would be just and reasonable under the circumstances, depending on what you believe the extent of his contributory negligence was. I may be able to give it to you a little more exactly, but it is, as counsel have said, somewhat of a ratio proposition that you take into consideration.

Where the plaintiff, in this case, of course, it would be the deceased—is guilty of contributory negligence, the damages should be diminished in proportion to the amount of the negligence attributable to the plaintiff. Now, that is about as near as I can give it to you.

The plaintiff, if you find the plaintiff is entitled to a verdict under the rules which I have already given you, would be entitled, also, to such sum as you believe to be fair and reasonable and just for the pain and suffering that the deceased actually endured, if any, from the time of the accident to the time of his death. On that score, of course, you would take into consideration the evidence of the physician as to whether he was or was not conscious of pain or if he did feel pain during any part of the time. There was evidence to the effect, I think, that he was unconscious a good part of the time, and then there was evidence by Dr. Morrill to the effect that the deceased was semi-conscious and in his opinion, the doctor's, it was probable that he suffered. That you would take into consideration, but that, of course, is only, as

I recall it, a period of four or five days in all. That is another claim the plaintiff has in this case, if you find for the plaintiff.

Now, the plaintiff has requested me to charge,

First, "Where there is a system or custom of warning employees under certain circumstances, the employee when such circumstances arise, has the right to rely upon such warning being given and the negligent failure to give such warning resulting in injury to the employee is actionable."

I so charge you.

"If you find from the evidence that there was a a system or custom of warning a trackwalker, or trackworker of the approach of a train, and the engineer was negligent and did not give such warning, and DeRose did not assume the risk of the negligence of the engineer, and if the death of DeRose was due to the negligence of the engineer in failing to give such warning, the plaintiff should recover."

I so charge you.

Number three I refuse.

Four, "There is no presumption that DeRose's death was the result of his own negligence, for the rule is that negligence is never presumed but must be proved by the evidence, equally applies to the deceased as well as to the defendant."

I so charge you.

Number five I refuse to charge.

Number six, "If the plaintiff is entitled to recover anything she is entitled to recover a sum which will satisfy the pecuniary injury resulting from Mr. DeRose's death to his widow and children. This means the deprivation of a reasonable expectation of the pecuniary advantages that would have resulted by the continuation of Mr.

DeRose's life. You should take into consideration the wages he was earning at the time of his death; his age; and the condition of his health; his probable expectation of life; the probability of his becoming injured or incapacitated by disease; the certainty of approaching old age; and the question of whether his earning power will decrease or diminish as he grows older."

I so charge you.

The defendant has requested me to charge:

First, "The mere happening of an accident to DeRose proves nothing. The statute under which this suit has been brought obliges the plaintiff to prove that the defendant has been negligent in some one or more of the particulars enumerated by the statute and in this particular case in the particular manner alleged in her complaint."

I so charge you.

Number two I refuse to charge.

Number three, "There is no evidence that the engineer of number 66 actually saw DeRose at any time prior to DeRose having been found injured."

I so charge you.

Number four I refuse to charge.

Number five, "If you find that DeRose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

I so charge you.

Now, take the case and give it your very thorough and careful consideration and use good, reasonable common sense in determining this situation, taking into consideration in determining the damages these things that I have mentioned as to his age, how long an expectancy of life he had, the probability, or the possibility, rather, that he might have died sooner. All those things you take into consideration. You also take into consideration on the question of contributory negligence whether or not he was instructed to watch out for trains and whether or not that may have contributed to the injury.

Now, use good, sound, common-sense judgment in determining the facts in this case. You have a right to believe who is telling the truth, if there is any doubt in your mind, and you have a right to take into consideration the demeanor of the witnesses on the witness-stand, what interest they may have in the outcome of the case. All of those things you may take into consideration in coming to a decision in this matter.

Give the case your careful and thorough attention and render a verdict that will do justice to the parties.

Let the jury retire.

(The jury retired to consider of their verdict.)

PLAINTIFF'S EXCEPTIONS.

Mr. Benson: I want to take exception to the last request of the defendant; I didn't get the wording of it.

The Court: Yes, number five.

Mr. Benson: And then the refusal to charge the third request of the plaintiff.

Plaintiff's Requests to Charge.

DEFENDANT'S EXCEPTIONS.

Mr. Scottt: May I take an exception to your Honor's refusal to charge the two requests specifically requested?

The Court: Yes.

PLAINTIFF'S REQUESTS TO CHARGE.

"(1) Where there is a system or custom of warning employees under certain circumstances, the employee when such circumstances arise, has the right to rely upon such warning being given and the negligent failure to give such warning resulting in injury to the employee is actionable.

"(2) If you find from the evidence that there was a system or custom of warning a track-walker or trackworker of the approach of a train and the engineer was negligent and did not give such warning, and De Rose did not assume the risk of the negligence of the engineer, and if the death of De Rose was due to the negligence of the engineer in failing to give such warning the plaintiff should recover.

"(3) If you find that De Rose's death was not the result of the risks assumed by him, but was caued by the negligence of the defendant's officers, agents, or employees or by reason of the defect or insufficiency of the defendant's equipment due to defendant's negligence then your verdict should be a verdict for the planitiff.

"(4) There is no presumption that DeRose's death was the result of his own negligence, for the rule is that negligence is never presumed but must be proved by the evidence, equally applies to the deceased as well as to the defendant.

"(5) Even if you find that the plaintiff's deceased was guilty of contributory negligence that would not prevent the plaintiff from recovering in this case, for, under the Federal Employers' Liability Act, contributory negligence is not a bar to a suit as is the case in accident cases in this State. It merely goes to diminish the damages in proportion to the amount of such contributory negligence, and so, members of the jury, if you find after considering all the evidence in the case that the deceased was guilty of contributory negligence, you should take that into consideration and reduce the amount of the verdict if you find for the plaintiff, by an amount which would represent a proportional share of his contributory negligence to the amount that the plaintiff would otherwise recover.

"(6) If the plaintiff is entitled to recover anything she is entitled to recover a sum which will satisfy the pecuniary injury resulting from Mr. DeRose's death to his widow and children. This means the deprivation of a reasonable expectation of the pecuniary advantages that would have resulted by the continuation of Mr. DeRose's life. You should take into consideration the wages he was earning at the time of his death; his age; and the condition of his health his probable expectation of life, the probability of his becoming injured or incapacitated by disease; the certainty of approaching old age; and the question of whether his earning power will decrease or diminish as he grows older."

DEFENDANT'S REQUESTS TO CHARGE.

"(1) The mere happening of an accident to De Rose proves nothing. The statute under which this suit has been brought obliges the plaintiff to prove that the defendant has been negligent in some one or more of the particulars enumerated by the statute and in this particular case in the particular manner alleged in her complaint.

"(2) There is no evidence that the engineer of number 66 should have anticipated the presence of De Rose in the particular vicinity and in such close proximity to the east-bound track on which number 66 was running as to have obliged him to give a warning signal or signals on account of De Rose's anticipated presence.

"(3) There is no evidence that the engineer of number 66 actually saw De Rose at any time prior to De Rose having been found injured.

"(4) Even should the jury determine the place at which the engineer of number 66, if he was on the look-out, should have seen DeRose, there is no evidence whatever from which the jury can determine whether under all the existing circumstances the engineer of number 66 could have stopped his train in time to have avoided coming in contact with De Rose.

"(5) If you find that De Rose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

Rule to Show Cause.

Filed Feb. 4, 1930.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law

Application having been made to this Court by the defendant within six days from the rendition of the verdict in the above entitled cause, for a Rule to Show Cause why the verdict in the above entitled cause and the judgment entered thereon should not be set aside and for nothing holden and a new trial granted;

It is on this 4th day of February, 1930,

ORDERED that the above plaintiff do show cause before the Supreme Court, at the State House in Trenton, New Jersey, at the next or May 1930

Rule to Show Cause.

Term of said Court, why the verdict in the above entitled cause and the judgment entered thereon should not be set aside and for nothing holden, and a new trial granted the defendant in the premises; and it is further

ORDERED that the above defendant have leave of this Court to reserve its exceptions taken upon the trial of the above cause; and it is further

ORDERED that all proceedings in the above entitled cause be and the same hereby are stayed until further order of the Court in the premises.

W. B. MACKAY,
Circuit Court Judge.

Reasons.

Filed February 28, 1930.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant.	Action at Law On Rule to Show Cause.

The Delaware, Lackawanna and Western Railroad Company herewith sets out and files its Reasons why the verdict and the judgment entered thereon in the above entitled cause should be set aside and for nothing holden and a new trial granted:

1. Because the verdict of the jury in said cause upon which judgment was entered thereon was contrary to the charge of the Court, wherein it charged the jury as follows:

> "If you find that DeRose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his in-

juries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

2. Because the verdict of the jury in said cause upon which judgment was entered thereon was against the evidence and the weight thereof of the charge of the Court wherein it charged the jury as follows:

"If you find that DeRose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

3. Because the Trial Court erred in its charge to the jury with respect to the application of the doctrine of contributory negligence in the matter of the reduction of damages, wherein it said:

"This statute, however, liberalizes that law. It is a statute based upon the theory that where an injury occurs partly by reason of the neglignece of an employee the jury ought to determine what proportion of the injury arises from the negligence of the deceased, as in this case, and take away from the sum total of the damages allowed that part which can properly be apportioned to his own negligence."

* * *

Reasons.

"Now, remember this: that if you should find for the plaintiff and should also find that the deceased was guilty of negligence which contributed to the injury, the defendant is entitled to a deduction in such sum as would be just and reasonable under the circumstances, depending on what you believe the extent of his contributory negligence was. I may be able to give it to you a little more exactly, but it is, as counsel have said, somewhat of a ratio proposition that you take into consideration.

"Where the plaintiff—in this case, of course, it would be the deceased—is guilty of contributory negligence, the damages should be diminished in proportion to the amount of the negligence attributable to the plaintiff. Now, that is about as near as I can give it to you."

FREDERIC B. SCOTT,
Attorney of Defendant.

Opinion on Discharging Rule.

Filed Jan. 27, 1931.

NEW JERSEY SUPREME COURT,

No. 45, MAY TERM, 1930.

JOSEPHINA DE ROSE, Administratrix of Estate of Alphonsa De Rose, deceased,
Plaintiff,
v.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.,
Defendant.

Submitted , 1930; Decided , 1931.

On Defendant's rule to show cause.

For plaintiff, JOHN O. BENSON.
For defendant, FREDERIC B. SCOTT.

Before Justices PARKER, CAMPBELL and BODINE.

Per Curiam: The plaintiff brought suit under the Federal Employers' Liability Act, and had judgment at the Passaic Circuit for $16,000.

The defendant procured the rule and reserved exceptions in particular to the court's refusal to non-suit and to direct a verdict for the defendant.

The grounds for the motion for a non-suit and a directed verdict were as follows:

> "First, if the accident occurred by the deceased coming in contact with train 66, the accident was caused by the sole negligence

of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident.

"Second, that there has been no negligence shown on behalf of the railroad company.

"Third, that the plaintiff's decedent assumed the risk of the accident which happened to him."

The non-suit and direction having been denied, the court was requested to charge, and did charge, "If you find that DeRose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

It is now argued under reasons I and II, that the verdict was contrary to the charge as above quoted, and against the evidence and the weight thereof and the above quoted portion of the court's charge. In other words, it is sought now to review the case on the theory that the verdict was contrary to the charge of the trial court, in that the evidence demonstrated as a matter of law that decedent had assumed the risks incident to his employment. The question so presented was reserved by the exception taken when the motion for a non-suit and a directed verdict on this ground was made. However, it is argued here and it may as well be decided. The case was submitted to the jury on the theory of a custom to give warnings to track workers which was not

followed. Although the deceased's superiors testified to warning him to look out for trains and cars, there was no way in which the plaintiff could negative this testimony. The burden of proving such warning as a foundation for assumption of risk was on the defendant; and although the testimony was in the nature of things not negatived, the jury were entitled to pass on it and were not required to believe it. Schmidt v. Marconi Wireless Telegraph Co., 86 N. J. L. 183. It may well be that the point is not material here, since the theory on which the case was submitted was whether the engineman failed to give a usual and customary warning. We cannot say that the case was barren of evidence to support the verdict on the theory on which it was submitted to the jury.

The second point argued is that the trial judge was in error in that portion of his charge in which he discussed the rule of diminution of damages because of contributory negligence. It is not apparent to us that he was, but we do not consider the point because no exception was taken.

The rule will be discharged.

Order Discharging Rule.

Entered Feb. 2, 1931.

NEW JERSEY SUPREME COURT

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose, (also known as Nick Rose) deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	On Rule to Show Cause.

The verdict having been rendered in the above entitled cause in favor of the plaintiff and against the defendant for the sum of $16,000 and a rule to show cause having been obtained by the said defendant, requiring the plaintiff to show cause why the said verdict of $16,000 should not be set aside and a new trial had, and the said cause coming on to be heard, and the Court having considered the arguments of counsel and the evidence;

It is on this 2nd day of February 1931, ORDERED that the rule to show cause why the verdict should not be set aside and a new trial had, obtained by

the said defendant, shall be and the same is hereby discharged with costs;

Entered.

On motion of
JOHN O. BENSON,
Attorney for Plaintiff.

Judgment.

Entered February 2, 1931.

NEW JERSEY SUPREME COURT

JOSEPHINA DE ROSE, Administratrix of the Estate of Alfonso De Rose (also known as Nick Rose), deceased, Plaintiff, *vs.* THE DELAWARE, LACKAWANNA & WESTERN R. R. COMPANY, a corporation of the State of Pennsylvania, authorized to do business in the State of New Jersey, Defendant.	Action at Law. On Postea R. to S. C. Judgment Final.

JOHN O. BENSON, Attorney.

	$16,000.00
	77.09
	$16,077.09

Judgment entered this 2nd day of February, A. D. 1931, as of February 1, 1930, in favor of plaintiff and against the defendant for the sum of $16,000.00 damages and $77.09 costs.

WILLIAM S. GUMMERE,
C. J.


EXHIBIT P-3
1-6-30
H.B.


EXHIBIT P-4
1-6-30
H.B.

New Jersey Court of Errors and Appeals

JOSEPHINA DE ROSE, Administratrix of Estate of Alphonsa De Rose, deceased,
Plaintiff-Respondent,

vs.

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

BRIEF OF APPELLANT

Statement

This is an appeal from a judgment entered in the New Jersey Supreme Court on February 2, 1931, as of February 1, 1930, in a death claim brought by the respondent, hereinafter called the plaintiff, against the appellant, hereinafter called the defendant, under the Federal Employers' Liability Act.

On January 30, 1930, a jury in the Passaic Circuit of the Supreme Court returned a verdict against the defendant for Sixteen thousand dollars ($16,000.00), but a Rule to Show Cause being allowed the defendant because said verdict was contrary to the charge of the court in certain particulars, and against the weight of evidence in the same particulars, and that the court erred in its charge to the jury with respect to certain other particulars, the court reserved to the defendant its exceptions taken upon the trial of the above cause. Subsequently said rule was dis-

New Jersey State Library

charged by the Supreme Court, and judgment final entered.

Abstract of Pleadings

The plaintiff in her complaint set forth the grounds upon which she predicated the defendant's negligence for the death of her decedent, employed by the defendant as a track walker, to wit:

> "That said defendant's negligence consisted in this, that at the time and place aforesaid, while plaintiff's intestate was then and there so employed by defendant corporation in intertsate commerce as aforesaid, and was working on one of the said parallel tracks in such a position as to prevent his seeing the approaching train, while the said plaintiff's intestate was visible for a considerable distance to defendant's agents, servants and employees who were then and there operating defendant's engine on said track, that defendant by its agents, servants, and employees negligently caused one of its trains or engines to be operated at a high and excessive rate of speed toward said plaintiff's intestate without slackening its speed and without any signal or warning of any kind being given to the said plaintiff's intestate of the approach of said engine."

Besides the general denial of the allegations of negligence charged against it, the defendant set up as special, separate defenses, that the plaintiff's intestate was guilty of contributory negligence in the following particulars:

> "(a) In failing and neglecting to take due and proper precautions for his own safety as required by defendant's rules.
>
> "(b) In failing and neglecting to look for

the approach of the trains or train and engines or engine referred to in the complaint, in violation of defendant's rules.

"(c) In taking a position so close to the track on which the train or engine which it is alleged ran plaintiff's intestate down was running as to endanger the safety of said intestate."

"Plaintiff's intestate assumed the risk of the accident and injury complained of."

Appellant's Grounds of Appeal

1. That the Trial Court refused to direct a nonsuit as against the plaintiff and in favor of the defendant on the trial of said case, for the following reasons stated to the Trial Court:

"1. The first reason is that the accident, if it occurred by the deceased coming in contact with Train 66, the accident was caused by the sole negligence of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident.

"2. That there has been no negilgence shown on behalf of the railroad company.

"3. That the plaintiff's decedent assumed the risk of the accident which happened to him."

2. Because the Trial Court refused to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent for the same reasons urged by the defendant-appellant on its motion for a non-suit on the trial of said cause, which reasons are set forth in the preceding ground of appeal as they appear from the record on the trial of said cause.

ARGUMENT

POINT I

The appellant is not precluded from pressing its appeal irrespective of the discharge of its Rule to Show Cause.

Three reasons were urged by the defendant-appellant on its Rule to Show Cause, only two of which need be considered, they being as follows:

1. Because the verdict of the jury in said cause upon which judgment was entered thereon was contrary to the charge of the Court, wherein it charged the jury as follows:

> "If you find that De Rose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

2. Because the verdict of the jury in said cause upon which judgment was entered thereon was against the evidence and the weight thereof of the charge of the Court wherein it charged the jury as follows:

> "If you find that De Rose was an experienced trackman and that when he was working alone he had been instructed to 'look out' or 'watch out' for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

In disposing of the defendant-appellant's Rule to Show Cause, the Supreme Court said:

> "Per Curiam: The plaintiff brought suit under the Federal Employers' Liability Act, and had judgment at the Passaic Circuit for $16,000.
>
> "The defendant procured the rule and reserved exceptions in particular to the court's refusal to non-suit and to direct a verdict for the defendant.
>
> "The grounds for the motion for a non-suit and a directed verdict were as follows:
>
> " 'First, if the accident occurred by the deceased coming in contact with train 66, the accident was caused by the sole negligence of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident.
>
> " 'Second, that there has been no negligence shown on behalf of the railroad company.
>
> " 'Third, that the plaintiff's decedent assumed the risk of the accident which happened to him.'
>
> "The non-suit and direction having been denied, the court was requested to charge, and did charge, 'If you find that De Rose was an experienced trackman and that when he was working alone he had been instructed to "look out" or "watch out" for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed.'
>
> "It is now argued under reasons I and II, that the verdict was contrary to the charge as above quoted, and against the evidence and

the weight thereof and the above quoted portion of the court's charge. In other words, it is sought now to review the case on the theory that the verdict was contrary to the charge of the trial court, in that the evidence demonstrated as a matter of law that decedent had assumed the risks incident to his employment. The question so presented was reserved by the exception taken when the motion for a non-suit and a directed verdict on this ground was made. However, it is argued here and it may as well be decided. The case was submitted to the jury on the theory of a custom to give warnings to track workers which was not followed. Although the deceased's superiors testified to warning him to look out for trains and cars, there was no way in which the plaintiff could negative this testimony. The burden of proving such warning as a foundation for assumption of risk was on the defendant and although the testimony was in the nature of things not negatived, the jury was entitled to pass on it and were not required to believe it. Schmidt v. Marconi Wireless Telegraph Co., 86 N. J. L. 183. It may well be that the point is not material here, since the theory on which the case was submitted was whether the engineman failed to give a usual and customary warning. We cannot say that the case was barren of evidence to support the verdict on the theory on which it was submitted to the jury."

Nevertheless this appellant contends that due to either an erroneous conception or failure of the Supreme Court to recognize the obvious distinction as laid down by both the United States Supreme Court and your honorable court, the Supreme Court erred in endeavoring to foreclose this appellant's present appeal because the authorities do not sustain it in such action.

While it is true that this is not an appeal from the decision of the Supreme Court in discharging this defendant-appellant's Rule to Show Cause but an appeal from the judgment of the Supreme Court inasmuch as an examination of the entire record is necessary to determine the right of appellant to appeal, the decision of the Supreme Court of this defendant-appellant's Rule to Show Cause is helpful in determining the point here under argument.

An examination of the authorities will show that this appellant is not precluded from pressing the instant appeal.

In *Lewis v. Schlicting,* 6 N. J. Misc. R. 340 (at page 341) one of the reasons assigned and argued on their Rule to Show Cause was that the verdict was against the weight of the evidence. On appeal to the Supreme Court, that court held that the appeal would not lie on the ground that there was no evidence to support the jury's finding. But in the instant case your court has said in *Cleaves v. Yeskel,* 104 N. J. L. (at page 503) that it is still an open question whether where an appellant has specified in his reasons on a Rule to Show Cause that a verdict was against only certain portions of the charge.

> "That he may thereafter argue on appeal * * * the denial of matters not so specified, were erroneous."

And your court has again only recently in the case of *Steinert v. Penn. R. R. Co.,* 9 N. J. A. Rep. 178 (at page 181) reiterated that expression of your opinion where it calls attention to the fact that the Rule to Show Cause obtained by the railroad company "asserted as one of its reasons for a new trial that the verdict was contrary to the charge of the court (not a specified portion or

portions but the whole charge), and in view of this there is authority that the appellant is bound by what the court said."

Likewise, the instant case is appealable because it does not come within the broad doctrine of the *Cleaves v. Yeskel* case (*supra*) but rather its exception, as the urging by this appellant that the plaintiff's decedent's own negligence was the sole and proximate cause of his fatal injury was not included or comprehended in the two reasons hereinbefore specifically set out with respect to assumption of risk as reasons for its Rule to Show Cause. Neither is the appellant taking an inconsistent position between the Supreme Court and this Appellate Court on appeal so as to preclude it pressing this present appeal for an employee may well assume a risk which in itself is not at all predicated on any negligent act of his employer, such as voluntarily working in a place inherent with dangers or hazards due to either the construction or the operation of the place of employment.

> *Allen vs. Toledo, St. L. & W. R. R.*, 276 U. S. 165-171.
> *C. & O. R. R. Co. vs. Latch*, 276 U. S. 429.
> *Koske vs. D. L. & W. R. R. Co.*, 279 U. S. 1.

So when the Supreme Court on discharging this defendant-appellant's Rule to Show Cause said:

> "The question so presented was reserved by the exception taken when the motion for a non-suit and a directed verdict on this ground was made" (P. 170, L. 33, etc.),

that court failed to recognize the obvious distinctions that, while the verdict with respect to the charge of the defendant requested number (5), P.

163, L. 31, etc.; P. 2, L. 33, etc.; P. 3, L. 13, etc., may not have been against the weight of the evidence but that it did not at all follow because the defendant did not assume the risk as covered by the requested charge that whether the plaintiff's decedent's actions were the sole and proximate cause of his fatal injury were in no way involved in a proper determination of the defendant-appellant's Rule to Show Cause and hence it is urged it in no way precluded this appellant from pressing its present appeal on the ground that the evidence on the trial of the case entitled the defendant-appellant to a direction of a verdict on the ground that "the accident, if it occurred by the deceased coming in contact with train 66, the accident was caused by the sole negligence of the plaintiff's decedent, and therefore his sole negligence was the proximate cause of this accident" (P. 91, L. 8, etc.; P. 147, L. 20, etc.; P. 2, L. 38, etc.) and now argued as Point II as this appellant's second ground of appeal.

POINT II

The trial court erred in failing to direct the verdict because the plaintiff's decedent's acts were the sole and proximate cause of his fatal injuries.

The argument with respect to this point naturally resolves itself into the examination of certain portions of the evidence on the trial of the above case and that said evidence may in its proper place be presented to this court and it would seem appropriate to inquire of the record how it stands with respect to the following questions, whether the evidence in response to said questions is un-

contradicted or not, because if uncontradicted they naturally present the necessary law question for the determination as to whether the Trial Court erred in refusing to direct a verdict. These questions may be appropriately put as follows:

A. Did the plaintiff's decedent receive any instructions with respect to his actions the violation of which instructions had proximate relation to his death?

B. What was the defendant's alleged duty to the plaintiff's decedent and was that alleged duty violated?

C. Whether irrespective of the violation of the defendant's alleged duty was not the plaintiff's decedent's violation of his positive instructions the sole and proximate cause of his injuries under a proper interpretation of the Federal Employers' Liability Act?

Evidence as to Question A

It is immaterial as to whether the plaintiff's decedent was instructed by written rule or specific oral instructions and as no claim is made that the plaintiff's decedent violated any written rule the record only discloses his verbal or oral instructions. From the plaintiff's decedent's boss, Murphy, the section foreman, we learn that the decedent was specifically instructed on the very morning of the accident to look out for trains (P. 36, L. 36, etc.), that when an employe was working alone, as was the plaintiff's decedent, he had been instructed to "look out for himself" (P. 38, L. 1, etc.) and that those instructions were the very instructions given him on the morning of the fatal

accident (P. 36, L. 18, etc.; P. 40, L. 18, etc.). Similar instructions were given to the decedent by the Assistant or Student Section Foreman (P. 92, L. 22, etc.; P. 93, L. 1, etc.; P. 97, L. 33, etc.; P. 100, L. 3, etc.).

Evidence as to Question B

In the plaintiff's complaint (P. 7, L. 18, etc.), the plaintiff charged the defendant with negligently operating one of its engines at a high, excessive rate of speed to approach and run down her decedent without any signal or warning being given him.

On the trial of the case it was endeavored to establish the character of the signal or warning which the plaintiff claimed her decedent was entitled to and was the appellant's duty to give and this evidence was brought into the case by calling the defendant-appellant's section foreman who was questioned as follows:

> "Q. And when a man is on a track alone is it the custom of the oncoming train, whether freight or otherwise, to give any warning or signal? A. Well, yes.
>
> "Q. What signal must he give? A. He blows the whistle.
>
> "Q. He blows the whistle how many times? A. About three times.
>
> "Q. Three times. And that has been the continuous custom in the railroad, on the D. L. and W.? A. Yes."

However, that custom the same witness said only applied—if the engineer of the oncoming locomotive saw the person (P. 40, L. 11, etc.) and that the custom was so qualified is borne out by additional testimony of the plaintiff's witness Rose, who said:

> "A. Well, if an engineer sees anything or anyone on the track it is customary to give several short blasts of the whistle" (P. 81, L. 36, etc.).

This very witness further testified that if an employe was seen on another track or not a track on which the engine or train was being operated, there was no custom for the engineer to blow (P. 83, L. 28, etc.; P. 84, L. 17, etc.).

An examination of the record will show that the Trial Court sensed the situation of the dual nature of the custom to blow under certain circumstances when an employe was seen on the track or when he could not be seen. (See Court's observation P. 42, L. 18, etc.)

That the engineer of the locomotive apparently involved in the accident neither did, could or should have seen the plaintiff's decedent for the purpose of giving him a whistle warning is apparent from an examination of his testimony in the record at P. 122, L. 2, etc.; P. 123, L. 1, etc.; P. 126, L. 14, etc.; P. 127, L. 1, etc.; P. 130, L. 30, etc.; P. 131, L. 31, etc.

Evidence as to Question C

Under our analysis of the evidence with respect to Question A regarding the fact that the plaintiff's decedent had received positive instructions with respect to the care he was obliged to take of himself while doing the work he was engaged in on the day of his accident, it is undeniable that but for his violation of his instructions he would not have received his fatal injuries; that he violated his instructions is clear from the record. Being even a more experienced railroad hand than his boss, the section foreman, Murphy (P.

38, L. 30, etc.), very vividly answers the question propounded as C, but the record further uncontradictorily shows that the plaintiff's decedent violated his instructions to his harm. It appears from the record that but a short while before the plaintiff's decedent was struck, i.e., some seven or eight minutes, another freight train had passed down and by the deceased (P. 47, L. 27, etc.), but that the decedent observing this train walked away from the track (P. 51, L. 20, etc.) and returned to work after it passed (P. 46, L. 40, etc.; P. 47, L. 1, etc.).

The slightest attention or carrying out of the instructions to the decedent to look out for trains would have averted the accident, for it appears that the engine bell was ringing and the train of forty-six cars was pulling hard as it approached the place near where the decedent was struck (P. 133, L. 33, etc.; P. 134, L. 1, etc.) and the witness Gusta heard it approach (P. 57, L. 13, etc.).

Law

Ordinarily, as Circuit Judge Hand in *Paster v. Penn. R. R. Co.*, 43 Fed. R. (2d) 908, has said, we should have been disposed to call such inattention on the part of the plaintiff's decedent contributory negligence which could only go in mitigation of damages had it not been for those decisions in the Supreme Court of the United States to which we shall refer.

In the *Paster v. Penn. R. R. Co.* case, *supra,* at 910, the learned judge said:

> "In a series of late cases, however, under the Federal Employers' Liability Act, the

> Supreme Court has modified this rule as we understand it (Frese v. C. B. & Q. Ry. Co., 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla, etc., Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224); and the lower courts have followed (Southern Ry. Co. v. Hylton, 37 F. (2d) 843 (C. C. A. 6); Unadilla, etc., Ry. v. Dibble, 31 F. (2d) 239 (C. C. A. 2). In these cases it was held that the disregard by a servant of specific orders or standing rules, promulgated for his own safety, will bar his recovery though the injury was due as well to the fault of other servants."

Continuing, the same judge said:

> "We cannot see what difference it makes whether the fault relied upon for liability, consists in general inattention, or, as here, in the breach of a promise to protect the injured servant. True, it might be argued that such a promise was an excuse for compliance with the rule, but that is clearly untenable. Nobody supposes that two servants can dispense with a valid rule of the master, made exactly for the purpose of avoiding the possibility of lapses in the discharge of their duty" (P. 910).

Reference was made by the court in the above case to *Southern Ry. Co. v. Hylton,* 37 Fed. (2d) 843, wherein the negligence charged against the railroad company was the violation of a custom of the defendant for the safety of trackmen and the company trains. The court in that case, speaking as to the custom, said:

> "Whether there was such a custom, applicable to these events, and of such extent that Hylton might be presumed to have relied upon its observance, are questions as to which it may be doubtful whether the evi-

> dence in support reaches the character of substantial proof as distinguished from a scintilla. However, for the purpose of this opinion, we assume that there was substantial proof of it, and that there was room for the jury to find that what was done by Majors in the way of sending a second flag did not satisfy the custom. These assumptions leave open only the question whether such negligence by defendants as is thus assumed in this respect substantially contributed to the derailing, or whether Hylton's own conduct was the sole efficient cause" (Pp. 843-4).

It appears that Hylton was the engineer of a train and that he relied upon a custom referred to by the court, but that he in turn had violated a certain order of the company and substituted his judgment in running the train forward in reliance upon the custom assumed. With respect to this, the court said:

> "In this situation we think it clear that Hylton's general disobedience of the 19 order and his specific and voluntary release of control because he had misjudged the distance of the danger constituted the sole efficient cause of the disaster, and the absence of any further second flag cannot be treated as a substantially contributing cause. The recent decisions of the Supreme Court require this conclusion.
>
> "The controlling principle, though arising under different facts, is stated in Great Northern Railway Co. v. Wiles, 240 U. S. 444-448."

In the *Wiles* case a freight train broke in two, due, as the court assumes, to the company's negligence. Wiles was the rear brakeman. It was his duty to go back and flag the following train. He did not do so, and he was killed in the ensuing rear-end collision. His representatives brought

the suit. In reversing the judgment for plaintiff, the U. S. Supreme Court said:

> "There is no justification for a comparison of negligences or the apportioning of their effect. * * * In the present case there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy" (240 U. S. 444 at page 448).

In an examination of the cases in the U. S. Supreme Court cited, and we must bear in mind that that court is the final arbiter in determining the true rules under the Federal Employers' Liability Act, we find that in *Frese v. Chicago, etc., R. Co.,* 263 U. S. 1, there was a collision at a grade crossing of two railroads. One of the engineers was killed and an action was brought against his employer. His contributory negligence was not involved. It was his duty under the rules, as well as under a state statute, to bring his train to a full stop and ascertain that the way was clear before proceeding. He brought his train to a stop, and proceeded, and was in collision. The other train was approaching from the fireman's side and it was plainly the fireman's duty to keep watch for such approach and give notice to the engineer. The fireman neglected this duty without which neglect the accident would not have occurred. The court, disposing of the case, said:

> "Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty and it would be a perversion of the Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required,

> on the ground that possibly the injury might have been prevented if his subordinate had done more."

In *Davis v. Kennedy,* 266 U. S. 147, an action was brought by Kennedy's representatives under the Federal Employers' Liability Act. Kennedy was the engineer of a certain train which collided with another train. Under train schedules, the train into which Kennedy's train ran had the right of way and the crew of Kennedy's train, including Kennedy, had standing positive orders not to pass on to the single track unless they knew that the train coming from the opposite direction had finished its use and had entered upon a double track. It appeared that Kennedy thought he saw the oncoming train on the double track, as well as did the other members of his crew. But they were all mistaken. Using almost the identical language in the *Frese* case, the Supreme Court again said:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more" (P. 148).

There remains but to discuss the case of *Unadilla Valley Ry. Co. v. Caldine,* 278 U. S. 139, from which case it appears that a collision occurred killing one, Caldine, the conductor of a certain train who had distinct orders that his train was to pass a certain other train in the Bridgewater yard and that other train was to take a siding there and al-

low Caldine's train to pass. That on the occasion of the accident, for some unknown reason, Caldine directed his train to go on beyond Bridgewater, and the collision occured. It further appeared that there was a custom to send Caldine a special notice with respect to train movements but that this customary special notice did not reach Caldine and he proceeded in violation of his definite order to pass the oncoming train in the Bridgewater yard. In disposing of this case, the U. S. Supreme Court held:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the Railroad Company that employed him to say that the collision was due to any one but himself. He was in command. * * * He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was * * * brought about by his own acts. * * * A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey" (P. 141).

And the judgment of the lower court was affirmed.

CONCLUSION

The appellant having a right to prosecute its present appeal, the action of the Supreme Court on discharging its Rule to Show Cause not being *res adjudicata,* the judgment of the Trial Court should be set aside for the reason that it erred in refusing to direct a verdict in favor of the appellant on the ground that the accident to the plaintiff's decedent was caused by his sole negligence and was therefore proximate cause of his fatal injuries.

Respectfully submitted,

Frederic B. Scott,
Attorney of Appellant.

New Jersey Court of Errors and Appeals

JOSEPHINA DE ROSE, administratrix of Estate of ALPHONSA DE ROSE, Deceased,

Plaintiff-Respondent,

vs.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,

Defendent-Appellant.

Action at Law on Appeal from New Jersey Supreme Court

BRIEF OF PLAINTIFF—RESPONDENT

Statement of the Case

The plaintiff, Josephina De Rose, administratrix of the estate of Alphonsa De Rose, deceased, instituted an action at law in the New Jersey Supreme Court, Passaic County Circuit, under the Federal Employers' Liability Act against the defendant, the Delaware Lackawanna & Western Railroad Co., to recover damages sustained by reason of wrongful death of the plaintiff's intestate as a result of the negligence in whole or in part of the officers, agents and employers of the defendant railroad company, or by reason of defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbeds, works, boats, wharves or other equipment.

The defendant by way of answer to the complainant filed by the plaintiff, after denying the

allegations of negligence, interposed the defense of contributory negligence in the following particulars:

(a) In failing and neglecting to take due and proper precautions for his own safety as required by defendant's rules.

(b) In failing and neglecting to look for the approach of the trains or train and engines or engine referred to in the complaint, in violation of defendant's rules.

(c) In taking a position so close to the track on which the train or engine, which it is alleged ran plaintiff's intestate down, was running as to endanger the safety of said intestate.

The defendant in addition to the defense of contributory negligence, interposed the defense that the plaintiff's intestate assumed the risk of the accident and injuries complained of. The plaintiff jointed issue on answer of the defendant and the matter proceeded to trial.

On the 30th day of January, 1930, a verdict was rendered in favor of the said plaintiff against the said defendant for the sum of $16,000. The said defendant subsequently obtained a rule to show cause why the verdict should not be set aside and a new trial granted (having reserved its exceptions in said rule to show cause) on the following grounds, viz:

1. Because the verdict of the jury in said cause upon which judgment was entered thereon was contrary to the charge of the Court, wherein it charged the jury as follows:

> "If you find that De Rose was an experienced trackman and that when he was work-

ing alone he had been instructed to "look out," or "watch out" for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

2. Because the verdict of the jury in said cause upon which judgment was entered thereon was against the evidence and the weight thereof of the charge of the Court wherein it charged the jury as follows:

"If you find that De Rose was an experienced trackman and that when he was working alone he had been instructed to "look out," or "watch out" for trains, then your verdict must be for the railroad company, for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed."

3. Because the trial court erred in its charge to the jury with respect to the application of the doctrine of contributory negligence in the matter of the reduction of damages, wherein it said:

"This statute, however, liberalizes that law. It is a statute based upon the theory that where an injury occurs partly by reason of the negligence of an employee, the jury ought to determine what proportion o fthe injuries arises from the negligence of the deceased, as in this case, and take away from the sum total of the damages allowed that part which can properly be apportioned to his own negligence."

Subsequently the New Jersey Supreme Court discharged the said rule to show cause and judgment final was entered in favor of the plaintiff.

The said defendant thereupon filed a notice of appeal to this Honorable Court and filed the following grounds of appeal:

1. That the trial court refused to direct a nonsuit as against the plaintiff and in favor of the defendant on the trial of said cause, for the following reasons stated to the trial court; (a) the first reason is that the accident, if it occurred by the deceased coming in contact with train 66, the accident was caused by the sole negligence of the plaintiff's decedent and therefore his sole negligence was the proximate cause of this action.

(b) That there has been no negligence shown on behalf of the railroad company.

(c) That the plaintiff's decedent assumed the risk of the accident which happened to him.

2. Because the trial court refused to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent for the same reasons urged by the defendant-appellant on its motion for a non-suit on the trial of said cause, which reasons are set forth in the preceding ground of appeal as they appear from the record on the trial of the said cause.

POINT ONE

The discharge of the Appellant's Rule to Show Cause is res judicata respecting the Appellant's appeal, and, therefore, precludes the Appellant from pressing its appeal.

The appellant, as heretofore stated, obtained a rule to show cause why a new trial should not be had for the reasons that the verdict of the jury was contrary to the charge of the court, was against the evidence and the weight thereof of the charge of the court, and the trial court was in error respecting the application of the doctrine of contributory negligence. At this time by way of appeal, it attempts to review the same questions presented to the Supreme Court on its rule to show cause, or, in other words, attempts to appeal from the decision of the New Jersey Supreme Court in discharging the defendant's rule to show cause, and does so by alleging that the trial court was in error when it denied the motions to nonsuit and to direct a verdict in its favor for the reason that the accident in question was caused by the sole negligence of the plaintiff's intestate. At this time the appellant is occupying two inconsistent positions. On its rule to show cause, the present appellant urged that the verdict was contrary to the weight of the evidence and contrary to the charge of the court, and now urges that Supreme Court did not take into consideration the question of the negligence of the plaintiff's intestate for the reason that the present appellant had reserved the question of the negligence of the plaintiff's intestate in its reservation of the exceptions as recited in its order to show cause.

It is the respondent's contention that the appellant, having argued the question of the verdict being contrary to the weight of the evidence and charge of the court, that this necessarily included the point now raised on appeal by the appellant that the accident in question was due to the sole negligence of the plaintiff's intestate, for the reason that in reason number one as submitted on the appellant's rule to show cause, the appellant urged that the judgment was contrary to the charge of the court wherein the court stated that if the plaintiff were an experienced trackman and had been instructed to "look out" or "watch out" for trains, that the verdict must be for the railroad company for his injuries, if he received them by coming in contact with a train of the defendant, was a risk which under the law he assumed. In addition to this it is contended by the respondent that under reason number two the appellant advanced the argument that the judgment was contrary to the evidence and the weight thereof the charge of the court, in that the court charged that if De Rose was an experienced trackman, and that when he was working alone, he had been instructed to "look out" or "watch out" that that was a risk which under the law he assumed. It would therefore seem that what the appellant is apparently trying to do is to have this Honorable Court consider the refusal of the trial court to grant a nonsuit or motion for a direction of a verdict in the defendant's favor as a separate and distinct argument from that submitted in the Supreme Court on its rule to show cause. A careful analysis of its present reason shows that it is part of the reasons submitted on its rule to show cause.

It is the respondent's contention that the doctrine of assumption of risk embodied the question whether the accident was caused by the sole negligence of the plaintiff's intestate. If we assume for the purpose of argument that the plaintiff's intestate had received instructions to "look out" or "watch out" for trains of the defendant company, and had disobeyed these instructions, would that not go to the question of assumption of risk, and if so, was not that question disposed of by the Supreme Court on the appellant's rule to show cause?

LAW

It has been held that where the reservation of the exception is argued on a rule to show cause, that that would preclude the appellant from arguing the reservation on appeal. Holler vs. Ross, 67 N. J. L. 60; Gregutis vs. Steinberg, 97 N. J. L. 1; Bennett vs. Henrichsen, 9 N. J. Advanced Reports 154; Bennett vs. Eagleke, 9 N. J. Advanced Reports, 91; Catterall vs. Otis Elevator Company, 103 N. J. L., 381; El Mora Realty Company vs. Griffin, 2 N. J. Misc. Reports, 1187; Steinert vs. Pennslyvania Railroad Co., 9 N. J. Advanced Reports, 178; Cleaves vs. Yeskel, 104 N. J. L., 503. In the case of Holler vs. Ross, supra, page 60, it appeared:

> That the plaintiff recovered a verdict for personal injuries and a rule to show cause why the verdict should not be set aside and a new trial granted was entered, reserving the defendant's exceptions, among which were an exception to refusal to nonsuit and an exception to refusal to direct a verdict for the defendant, which included all the evidence in the cause.
>
> It appeared that amongst other reasons, the defendant contended that (1) the verdict was contrary to the charge of the court. (2) The verdict was contrary to the weight of the evidence. (3) That the verdict was contrary to law.

The court on page 62 said:

> "Under the Ashhurst case, the third questions is also embraced in the exceptions. Why this view was taken is not expressly stated in the report of the case, but the reason is

> plain, namely, that where all the evidence in a cause is involved in a motion to take the case from the jury it would be impossible to determine that the verdict was not contrary to the weight of evidence, without necessarily determining that the refusal of the motion was right; for evidence that is not sufficient to warrant submission of a plaintiff's case has no weight in law."

In the case of Gregutis vs. Steinberg, supra, the court on page 2 said:

> "Assuming that the reservation contained in the rule was a proper one (a matter which we do not now decide), it left two courses open to the defendant, viz: either to abandon his rule to show cause and take an appeal, or abandon his reserved right to appeal and prosecute the rule to a final decision. The case shows that he saw fit to attempt the latter course—that is, that the rule to show cause was brought to a hearing upon the return day, and that after a consideration of the matters urged by him in support of the rule the trial court urged the conclusion that the verdict ought not to be disturbed and discharged the rule."

On page 3 the court said:

> "Assuming that the conditional reservation contained in the rule to show cause allowed in the present case was such as it permitted by our standing rule 129, the effect of the action of the defendant in prosecuting that rule to show cause to a final hearing and determination was to completely nullify the

> reservation and to bar him from thereafter taking or prosecuting an appeal to this court."

In the case of Bennett vs. Henrichsen, supra, it appeared:

> That the plaintiff recovered damages by reason of the defendant's negligence and a rule for new trial was allowed, argued and disposed of in the Supreme Court. One of the reasons set forth in the rule was that the verdicts were against the weight of the evidence.

The court on page 155 said:

> "A reason assigned for a new trial, that the verdict is contrary to the weight of the evidence, which reason was argued, considered and decided on the return of the rule, is necessarily embraced within the exceptions to the refusal to nonsuit and to direct a verdict on the ground that there was no evidence of defendant's negligence, and that contributory negligence of the plaintiff conclusively appeared, which were reserved in the rule, and, therefore, such exceptions cannot be considered on appeal."
>
> "See, also, Geokel, v. Erie Railroad Co., 100 N. J. L. 281, and Margolies v. Goldberg, 101, Id. 77, in which cases this court declared that 'it is to be presumed that each and every reason (for new trial) was argued, but whether so or not, all the reasons in support of the rule, as an effect of the order (discharging it) are res adjudicata.'
>
> The present appeal comes squarely within the rule thus enunciated. Under the reason as-

> signed in the rule that the verdicts were against the greater weight of the evidence the appellants were at liberty to, and presumably did, urge that the verdicts were against the weight of the evidence on the contributory negligence of Mrs. Bennett, and thereby waived the right to a review by appeal based on the ground that there should have been a nonsuit because of such contributory negligence."

In the case of Bennett v. Eagleke, supra, it appeared:

> That the defendant had the benefit of a rule to show cause why the verdict should not be set aside and claims upon appeal that the trial court erred in refusing to direct a verdict in favor of the appellants."

The court said on page 92:

> "All of the matters argued thereunder were presented to and argued before the Supreme Court on such rule for new trial and decided adversely to the appellants. Bennett v. Eagleke, 8 N. J. Mis. R. 61."
> This precludes the raising of these questions here upon appeal. Catterall v. Otis Elevator Co., 103 N. J. L. 381, and cases therein cited and cases following it."

In the case of Catterall vs. Otis Elevator Co., supra, which case was decided by your Honorable Court, it appeared:

> That the plaintiff recovered damages by reason of the defendant's negligence and thereafter a rule to show cause was applied

for and allowed to the defendant but with the reservation of the exception taken by the defendant at the trial.

On page 382 the court said:

"Notwithstanding this reservation, the prosecutor of the rule specified, as a ground for making it absolute, that the verdict was contrary to the weight of the evidence. After hearing the argument the Supreme Court decided that the verdict was not contrary to the weight of the evidence and discharged the rule to show cause.

The defendant thereupon appealed to this court and now seeks a reversal of the judgment entered upon the verdict, relying only upon exceptions reserved, namely, to the refusal of the court to grant motions to nonsuit the plaintiff and to direct a verdict for the defendant, which motions were based upon the ground that there was no evidence of defendant's negligence and that contributory negligence of the plaintiff conclusively appeared.

But here there remains for determination the question whether the reason specified by the defendant for making the rule absolute, and which was argued, considered and decided on the return of the rule, was embraced within the exceptions reserved and now sought to be argued on this appeal. We think that it was."

That a reason assigned for a new trial that the verdict is contrary to the weight of the evidence is necessarily embraced within exceptions to the refusal to nonsuit and to

> direct a verdict on the ground that there was no evidence of defendant's negligence and that contributory negligence of the plaintiff conclusively appeared, which were the exceptions reserved in the rule to show cause in the present case and now assigned as grounds of appeal in this court. That case was followed by the Supreme Court in Holler v. Ross, 67 Id. 60, where the last mentioned principle was restated, and where it was said that the reason therefor is plain, namely, that where all the evidence in a cause is involved in a motion to take the case from the jury it would be impossible to determine that the verdict was not contrary to the weight of the evidence, without necessarily determining that the refusal of the motion was right. Both of the last mentioned cases were cited with approval in Brown v. Public Service Railway Co., 98 Id. 747, in this court."

In the case of Steinert v. Pennsylvania Railroad Co., 9 N. J. Advanced Reports, 178, supra, it appeared:

> That a suit was brought by the plaintiff under the Federal Employers Liability Act and a judgment was recovered thereon in the Hudson Circuit. Subsequently the defendant company obtained a rule to show cause why the verdict should not be set aside and a new trial granted on the grounds that the verdict was excessive contrary to the charge of the court and the risk of the bias prejudice and passion of the jury, the rule reserving to the defendant all exceptions taken and objections noted at the trial. The rule to show cause was subsequently discharged and an appeal was duly filed by the defendant.

On page 180 the court said:

> "1. Should not the trial court have directed a verdict in favor of defendant, because (a) no negligence of defendant was shown as the proximate cause of the injuries complained of; (b) the proximate cause of said injuries was plaintiff's own voluntary act in placing himself in a dangerous position without apprising the enginman of his position; (c) the release is a bar to plaintiff's alleged cause of action? We hold from the proofs in this case the trial judge was justified in presenting all these questions to the jury. As to the weight and sufficiency of the evidence, this was disposed of by the allowance and determination of the rule to show cause which alleged therein the reason that the verdict was the result of 'bias, prejudice and passion of the jury,' this being equivalent to saying it was against the weight of the evidence. Where the rule is allowed and a reason assigned, whether argued or not, the appellant cannot urge that ground on appeal. Goekel v. Erie Railroad Co., 100 N. J. L. 279; Margolies v. Goldberg, 101 Id. 75."
>
> "The rule to show cause obtained by the defendant asserted as one of its reasons for a new trial that the verdict was contrary to the charge of the court (not a specified portion or portions, but the whole charge), and, in view of this, there is authority that the appellant is bound by what the court said. On appeal from a judgment entered after defendant's rule to show cause has been discharged, the appellate court will not consider and decide any question which was assigned as ground for setting aside the verdict on the

> rule, such question being res adjudicata, whether argued or not, and although not decided in terms on the rule to show cause. Cleaves v. Yeskel, 104 N. J. L. 497. But considering the two points raised, we find from all the evidence in the case and from all that the trial judge said in his charge there was no error prejudicial to the defendant."

In the leading case of Cleaves vs. Yeskel, supra, it appeared that the plaintiff instituted suit at the Supreme Court, Essex County, to recover damages from the defendants for the death of the plaintiff's intestate, and upon the second trial, there was a verdict for the plaintiff. The defendant then obtained an order to show cause why the verdict should not be set aside and a new trial granted on the sole ground that the verdict was against the weight of the evidence and that the granting of the rule should not operate as a waiver of any objection or exceptions granted to defendants, but each of them was thereby expressly reserved for the purpose of an appeal. It appeared that the first four of the five reasons were that the verdict of the jury was contrary to the weight of the evidence as granted in the rule, and the fifth was that the verdict was contrary to the charge of the court.
The court on page 499 said:

> "The defendants could have relied upon the limitations contained in the rule and refrained from finding the last cause for refusal, but chose to write it down and argue it, and are bound by it."
> The Supreme Court in its per curiam opin-

ion on the rule to show cause, after reciting all the reasons alleged for a new trial, including the one that the verdict was against the charge, said that they were unwilling to disturb the verdict for any of the reasons alleged for a new trial, and that the rule to show cause was therefore discharged, and an appropriate order and judgment were thereupon entered.

It next appears that the defendant appealed to this Honorable Court and alleged as grounds of appeal that the trial court was in error in refusing to nonsuit the plaintiff on the ground that she had failed to disclose any negligence on the part of the defendant, and that plaintiff's decedent was guilty of contributory negligence and that the court was in error in refusing to direct a verdict for the defendants on the ground that the plaintiff had failed to prove the issues raised in the pleadings.

On pages 500, 501, 502, 503, 504, and 505, the court said:

"The defendants on the rule to show cause have set down reasons that the verdict was contrary to the weight of the evidence in varying phrases, and also contrary to the charge of the court, all of which was decided; but, whether so or not, they were precluded from making those matters the subject of appeal, as will hereafter appear."

"This court in Goekel v. Erie Railroad Co. 100 N. J. L. 279, held, that where a party obtains a rule to show cause why a verdict should not be set aside and a new trial granted, reserving exceptions, and afterwards files reasons upon which the

motion for a new trial is rested, included in which are the reserved exceptions (and errors in the record, not pertinent here), and after hearing, the trial court discharges the rule, error could not thereafter be made a ground for review in an appellate court, as all reasons in support of the rule are, as an effect of the order discharging it, res judicata. And also held in Margolies v. Goldberg, 101 Id. 75, on appeal from judgments entered after defendant's rule to show cause had been discharged, the appellate court will not consider and decide any question which was assigned as ground for setting the verdict aside on the rule to show cause, such questions being res judicata, whether argued or not, and although not decided in terms on the rule to show cause. This is but a statement of a familiar rule with reference to judgment res judicata, and that is, that parties and those in privity with them are precluded, not only as to every matter offered to sustain or defeat a demand, but as to any other admissible matter which might have been offered for that purpose. Paterson v. Baker, 51 N. J. Eq. 49. This case has been repeatedly cited approvingly by the courts of this state, and is a leading authority. See the cases in this court of In re Walsh's Estate, 80 Id. 565; McMichael v. Horay, 90 N. J. L., 142, 144; Margolies v. Goldberg, 101, Id. 75, 77."

"That a reason assigned for a new trial, the verdict is contrary to the weight of the evidence, which reason was argued, considered and decided on the return of the rule, is necessarily embraced within the exceptions to the refusal to nonsuit and to direct a verdict on the ground that there

was no evidence of defendant's negligence, and that contributory negligence of the plaintiff conclusively appeared, which were reserved in the rule, and, therefore, such exceptions CANNOT BE CONSIDERED ON APPEAL."

There was, however, left open to the defendant-appellant the argument in this court of his ground of appeal concerning questions of evidence; but these were not argued, and, consequently are considered to have been abandoned.

The plaintiff-respondent answers this by saying that the ground was assigned for setting aside the verdict as being against the weight of evidence on the rule to show cause, and, consequently, cannot be reviewed by an appellate court under reserved exceptions, citing the cases above referred to, and several others. And also says that each and every reason was argued, and, whether so or not, all the reasons in support of the rule are res judicata. See McMichael v. Horay, 90 N. J. L. 142.

It must be perfectly obvious that when the defendants urged upon the Supreme Court on the rule to show cause that the jury's verdict was against the charge of the court, they presupposed, and doubtless urged upon that tribunal that the charge was without legal error, and, therefore, should have been followed by the jury, and had it been, the verdict would have been different. This being so, it certainly cannot now be available to the defendants to say to this court on appeal that, although they represented to the trial court that the charge was faultless, nevertheless, a certain charge should not have been made, and the charge as made contained errors, and that had the charge been different in those respects, the

verdict should have been, and probably would have been, different.

Here we have a change of position on appeal, and that is not permitted. *A defendant on rule to show cause cannot say that the verdict was against the charge of the court, without affirming that the court was right and the jury wrong. Being defeated on the rule to show cause, he cannot afterwards say the court was wrong, and if, in the respects pointed out, the court had made a proper charge, or refrained from making an improper one, the verdict should and might have been different. In other words, defendant cannot take an inconsistent position between the trial court on rule to show cause and the appellate court on error or appeal.*

The contention of the respondent that the appellant has argued the question it now raises respecting the sole negligence of the plaintiff's intestate as having caused the accident in question, is borne out by the fact that the appellant, on its rule to show cause, cited the same cases as it now cites on its present appeal. The cases of Allen vs. Toledo Railway Co., 276 New York and C & O vs. Latch, 276 U. S. 429 and Koske vs. D L & W Railroad Co. 279 U. S. 7 were all cited in the argument on the appellant's rule to show cause before the Supreme Court as tending to show that the plaintiff's intestate, by reason of his experience as a track-walker, was such that he thereby assumed the risk of the accident. This conclusively indicates that the appellant was agreeable to have the Supreme Court pass upon that question and not reserve this question for this Honorable Court to determine.

The conclusion is therefore reached that the appellant is attempting to have this Honorable Court consider the question as to whether the sole negligence of the plaintiff's intestate caused the accident in question, notwithstanding that the appellant had urged on its rule to show cause before the Supreme Court that the verdict was contrary to the weight of the evidence and to the charge of the court, in that the plaintiff's intestate had assumed the risk of his employment.

It is the respondent's contention that the appellant once having argued the reservation on its rule to show cause, cannot at this time take an inconsistent position and ask this Honorable Court to consider the question as to whether the accident was caused by the sole negligence of the plaintiff's intestate, and attempt to have this Court review those matters passed upon and decided by the Supreme Court on the appellant's rule to show cause.

In order to properly ascertain the negligence of the defendant as causing the accident in question, it is necessary that we analyze the testimony respecting the following particulars which go to make up the defendant's negligence, viz: *(1) The speed of the engine or train which caused the accident in question. (2) The visability of the engineer of the train which ran down the plaintiff's intestate. (3) The existence of a custom to warn and the violation thereof by the defendant's agent, servant and employee. (4) Other acts of the defendant's employee, viz: (a) Failure to warn when approaching curves. (b) Failure to provide safe and suitable place of employment (c) Failure of engineer to be on the look-out when operating train, which ran down plaintiff's intestate.*

Evidence As To Speed

The respondent, at the time of the trial, submitted evidence showing that the train or the engine which ran down the plaintiff's intestate, was being operated at a high and excessive rate of speed. We have the testimony of William Gusta, who on page 48 L. 6-8 said:

Q. What can you say of the speed of the train?

A. It was travelling fast, because it was a passenger train.

To the same effect is the testimony of Giatano Tasha, who on page 77 L. 11-13 said:

Q. What can you say of the speed of the train?

A. Well, they going fast; they got quarter to two train behind him.

Evidence As To No Warning Given By Engineer

The plaintiff's witnesses on the trial of the cause testified that the train, which ran down the plaintiff's decedent, at no time blew any whistle or gave any warning of its approach to the plaintiff's intestate, who was working on the track of the defendant railroad company. We have the testimony of William Gusta on page 47 L. 36-40 to the following effect:

Q. Was there any whistle or bell blown at any time?

A. No bell and no whistle.

Q. And then what happened after that?

A. A couple of minutes after my companion and partner turned and I saw the man lying on the track.

On the question of no warning being given there is the testimony of Giatana Tasha on page 77 L. 15-17, who said:

Q. Do you know whether or not if the train passed you or before that time it had blown any whistle or bell?

A. No, sir. No, sir.

Q. What did you do after that, Mr. Tasha.

A. I seen Nick De Rose on the side of the track.

Q. How soon after the train passed?

A. Maybe three minutes.

Under the cases hereinafter cited the defendant's servants, agents and employees were under a duty of giving warning to all men working on the track. This duty was one based on custom, and it will be subsequently shown that there was a violation of the custom to warn employees of the defendant railroad company, who at the time were working on the track.

Evidence As To Engine Being Operated Without Engineer In Cab

The proof adduced by the plaintiff showed that the engineer of the train, which ran down the plaintiff's intestate, was not operating his engine at the time that it ran down the plaintiff's intestate; in fact the testimony showed that no-one was in the cab of the engine at the time in question.

The testimony of William Gusta on page 69 L. 33-37 shows, viz:

Q. What did you see in the cab of the engine?

A. Nobody.

Q. Did you look?

A. Sure I looked because the train was travelling this way and I saw nobody.

Q. Where?

A. On this side. On my side.

To the same effect is the testimony of Giatano Koske, who on page 78 L. 39-40 testified as follows:

Q. Did you see anyone in the engine?

A. No, sir.

Evidence As To Visibility Of The Engineer

The point where the plaintiff's intestate was run down was about eight hundred (800) feet from the commencement of the curve at or near the station of the defendant railroad company, and the testimony showed that the engineer had a clear and unobstructed view from the commencement of the curve to at or near the frog where the plaintiff's intestate was working. On page 88 L. 13-15 James De Rose testified as follows:

Q. Well, all right, if you didn't. Are you familiar with the station up at Paterson?

A. Yes but not the new station, the old station.

Q. The new station?

A. No, the old station.

Q. Have you been there recently?

A. Oh, I have been up there about three weeks ago.

Q. Yes. Did you make any measurement of the distance from in front of the present station down to the point where on P—3 it is marked "Y"?

A. About eight hundred (800) feet.

Q. Do you know whether or not there is a curve in the railroad at the Paterson station?

A. Yes, a way up past the station.

Notwithstanding his clear and unobstructed view, the engineer of the train, without slackening his speed while making this curve of the track and without giving any signal or warning of his approach, ran down the plaintiff's intestate, who was performing his labors on behalf of the defendant railroad company.

Evidence as to the Existence of a Custom to Warn and the Violation Thereof by the Defendant

The testimony in the plaintiff's case showed that there was a custom of the railroad company on the part of the engineer to give warning of his approach to anyone working on the track. To prove the existence of such custom at the time of the accident in question, the plaintiff produced Thomas Murphy, a foreman employed by the railroad company. On page 34 L. 21 - 34 Mr. Murphy testified as follows:

Q. And what is your position?

A. Section foreman.

Q. Section foreman. Are you familiar with the custom in the protection of employees in the railroad?

A. Yes.

Q. And when a man is on a track alone, is it the custom of the on-coming train, whether freight or otherwise, to give warning or signal?

A. Well, yes.

Q. What signal must he give?

A. He blows the whistle.

Q. He blows the whistle how many times?

A. About three times.

Q. Three times, and that has been the continuous custom in the railroad on the D L & W?

A. Yes.

On page 39 L. 33-40 Mr. Murphy further testified:

Q. You said, Mr. Murphy, I understood on your direct examination, that when a train approached a man working alone on the track, that the engineer would give three blasts of the whistle, is that true?

A. Yes.

Q. Would that be the warning that would warn a man to look out for himself to get off the track after that whistle was given, isn't that the fact?

A. Yes, that is what it meant.

Lastly we have the testimony of Albert Rose, who was formerly employed by the defendant railroad company, who also testified as to the existence of a custom to warn. On page 81 L. 37-40, Mr. Rose testified as follows:

Q. What was that custom?

A. Yes.

Q. Just describe, will you, Mr. Rose, what that was?

A. Well if an engineer sees anything or anyone on the track, it is customary to give several short blasts of the whistle.

On page 82 L. 24-39 it is stated:

Q. Well, that is all right. Will you describe, Mr. Rose, just the signals that an engineer would customarily give if he saw someone was on the track ahead of you.

A. Why he would toot — toot — toot three blasts.

Q. Of what?

A. Of the whistle.

Q. And suppose the object did not move, what was the custom, if you know?

A. Well naturally he would try to stop.

Q. Would he add any more blasts to the whistle?

A. Yes, he would continue to blow.

On page 84 L. 7-26 Mr. Rose further testified:

Q. Mr. Rose, if a man was working near the proximity of a track, such as is indicated on P—3 near the frog, would the warning be given?

A. Well, Mr. Benson, if a man is working here where this frog or where this guard rail is, it would be impossible for an engine to pass without striking him and the engineer would give warning if he saw him, but if he had been over here it would be different.

Q. You are referring to the westbound track. But if he was within range of where this Mark "A" and " Y," would a warning be given?

A. Yes, sir.

Respecting the regularity of giving warning by the engineer, Mr. Rose testified on page 85 L. 7-12 as follows:

Q. At any other point?

A. Well, Mr. Benson, I could specify any particular point where he seen the warning given. It was so regular, you don't notice anything of that kind.

Q. It what?

A. It happened so regular you wouldn't notice anything of that kind.

The plaintiff also offered as a witness James De Rose, who was a son of the plaintiff's intestate, who on page 85 l. 25--32 testified as follows:

Q. And were you ever sent out alone at any work?

A. Yes, sir.

Q. What if anything did occur when a train would be coming on the track upon which you were working?

A. Why they give you a blow.

Q. Just describe what.

A. Three blows.

Q. Do you know whether or not that was the custom?

A. That was the custom of the railroad.

Evidence as to Other Acts of Negligence of Defendant

The proofs in the case show that the engineer while approaching a curve in the track would not give any warning to anyone who might be on the track and sometimes would stop his train and other times would not. We have the testimony of Richard H. Schroeder, the engineer of the train, which ran down the plaintiff's intestate, who testified on page 124 L. 19-32 as follows:

Q. How fast were you travelling that day?

A. About 18 or 20 miles an hour.

Q. Within what distance could you stop your train?

A. *Oh, I do not know whether I could stop it to clear that man, if I saw him and in that time, I might.*

Q. Well, have you ever tried to stop your train going 18 or 20 miles an hour?

A. Yes.

Q. Within what distance do you stop?

A. According to what kind of grade I am on or what kind of a train I have got.

Q. A grade such as this and a train such as you had that day?

A. It is level ground. I won't be hardly able to stop it to clear that man.

On page 125 L. 9-14 the engineer of the train testified as follows:

Q. You say you have tried to stop.

A. Well, we had occasions where we tried to stop, of course, under similar conditions where we saw something in the way and tried to stop, of course. I have sometimes stopped and sometimes I don't.

The testimony of Schroeder further showed that when he approached a curve, he would not slacken his speed. On page 130 L. 22-29 he testified as follows:

Q. There is a bell in the railroad Paterson station, isn't there?

A. Yes, sir.

Q. Quite a considerable bell, isn't there?

A. Yes, sir.

Q. And when you go around curves, don't you slacken?

A. No.

Q. Disregard the curves entirely and continue on the same speed?

A. Keep on going the same.

On page 134 L. 38-40 the engineer of the engine in question testified respecting the sounding of a whistle while going around the curve.

Q. You mean to say when you are going around two sharp curves, you don't blow a whistle?

A. No.

The appellant contends that the reason why it did not sound any whistle or gave any warning of the approach of the engine, was because the

plaintiff's intestate was not on the track when the train passed at that particular point. This contention is overthrown by the testimony of the two eye-witnesses respecting the speed of the train, the visability of the engineer and the failure to give warning. Under the circumstances it was a question for the jury as to which contention was true and the jury found in favor of the respondent, and by its verdict gave rise to an inference that the plaintiff's intestate was working on the track and that there was a custom to warn and that there was a violation of said custom by the engineer of the defendant railroad company in failing to give the customary warning.

The appellant attempts to show that the accident in question was caused by the plaintiff's intestate disregarding instructions which were alleged to have been given to him on the morning of the accident by the foreman and assistant foreman of the defendant railroad company. *At this point it can be said that the same question was presented to the Supreme Court on the rule to show cause of the appellant, but in view of the appellant's argument raising this question, it is necessary that the respondent make reply to it.* The testimony showed that the plaintiff's intestate had been employed by the railroad company for a long period of time, in fact much longer than either Murphy or Pascrell. *On this question of instructions alleged to have been given by Murphy and Pascrell, we have the contradictory testimony of Murphy and Pascrell. The latter testifies that Murphy gave him instructions, but later changed this testimony and testified that he had explained it in Italian to plaintiff's intestate*

respecting the watching out of trains. (see page 92 L. 26-36). The testimony of Pascrell further showed that he did not know the exact day when the alleged instructions had been given and did not remember specifically respecting any of the instructions. (see page 93 L. 38-40; page 94 L. 5-16). It is inconceivable that Pascrell should give instructions to the plaintiff's intestate who was a careful man and who was much longer in the service than Pascrell himself. (see page 94 L. 28-40). *The testimony of Pascrell further showed that he had instructed the plaintiff's intestate to look out for trains while working in a gang, notwithstanding that it was the duty or custom of the foreman to give warning under the defendant's rules. (see page 96 L. 11-17).*

LAW

When the appellant contends that the accident in question was caused by the sole negligence of the plaintiff's intestate this would necessarily mean that the defendant assumed the risk of the accident.

The plaintiff's intestate, in view of the existing custom on the part of the railroad company, did not assume the risk of the accident. Hardy vs. D L & W Railroad Co. 97 N. J. L. page 358, affirmed in 98 N. J. L. page 564; Grybowski vs. Erie Railroad Co. 88 N. J. L. page 1—affirmed in 89 N. J. L. 361; Swank vs. Pennsylvania Railroad—94 N. J. L. 550; Santomassimo vs. New York Susquehanna & Western Railroad 92 N. J. L. 10; Nestico vs. D L & W Railroad Co. 4 N. J. Misc. Reports, 418; Gila Valley vs. Hall 232 U. S. 94; Mappin vs. Atchison, Topeka & Santa Fe Railroad 49 A. L. R. 1331; Hannon vs. D L & W Railroad 89 N. J. L. 697.

In the case of Hardy v. D L & W R. R. reported supra, it appeared that the plaintiff's intestate was a member of a gang of bridge repairers, employed by the defendant company on its main line tracks, and on the day of the accident, he and the other members of the gang had gone to Wharton, N. J. where they were engaged in making repairs to a bridge located at that place, and that in preparing for the work to be done Hardy had carried some tools to a point between the eastbound and westbound tracks where they were to be used, and it further appeared that he observed a train about to cross the bridge on the westbound track and stepped over onto the eastbound track in order to permit it to pass; and that while standing on this

track, and apparently watching the westbound train passing, he was struck and killed by an eastbound freight. There was also testimony which justified the jury in finding that it was the duty of the foreman of the gang to keep a lookout for trains from either direction, and to give timely warning to the men at work under him when a train was approaching; that he failed in the performance of that duty, with relation to the train running on the eastbound track; and that this failure was the producing cause of the accident which result in the death of Hardy. There was a verdict in favor of the plaintiff. The court on page 359 said: "*In the case of Reed, Administratrix, v. Director General of Railroads, U. S. Sup., Ct. Adv. Sheets No. 78, October term, 1921 it was held that in actions under the federal statute the doctrine of assumption of risk has no application in cases where the negligence of a fellow servant, which the injured party could not have foreseen or expected, is the direct and immediate cause of the injury. And the court in so holding, expresses the opinion that a contrary view would nullify the declaration of congress that every carrier by railroad, while engaging in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein when death results from the negligence of any of the officers, angents or employees of such carrier.* On page 361 the court continuing says, "In the first place, it cannot be said, as a matter of law, that an employee

of a railroad company engaged in the work of bridge repairing while the tracks are in use is required to be constantly on the lookout for danger from approaching trains, where, to his knowledge, the duty of giving of warning thereof rests upon the foreman.

Common knowledge teaches us that is is for the very purpose of enabling repair gangs to devote themselves more exclusively to the work in which they are engaged that a watchman is furnished for their protection; and, in the second place, even if it be true that the decedent was equally negligent with his foreman in failing to observe the approach of the train which struck him, and that his negligence contributed to the accident, that fact is not a bad to the right of recovery against the railroad company but, under the third section of the federal statute, is merely to be taken into consideration in determining the amount of the compensation to be awarded.

(The above case affirmed by the Court of Errors and Appeals which affirmance is reported in 98 N. J. L. 564.)

In the case of Grybowski v. Erie Railroad, 88 N. J. L. 1, it appeared that the plaintiff's intestate while in the employ of the railroad company was run over and killed by a locomotive engine while coming out of the pit constructed between and underneath certain of the yard tracks. The plaintiff's decedent was engaged in cleaning out the ashes therefrom, and was just coming out of the pit when the accident occurred which caused his

death. The trial resulted in a verdict for the plaintiff, and from the judgment entered thereon the defendant company appeals. On page 5 the court said, "The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because here decedent had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. THE DOCTRINE OR ASSUMPTION OF RISK HAS NO APPLICATION TO SUCH RISKS AS ARISE SOLELY AND DIRECTLY OUT OF THE NEGLIGENT ACTS OF FELLOW-SERVANTS. AND IF IT DID SO APPLY, AS A GENERAL RULE, IT WOULD HAVE NO PERTINENCE IN THE CASE OF ACCIDENTS THE RIGHT OF RECOVERY FOR INJURIES ARISING OUT OF WHICH IS REGULATED BY THE FEDERAL STATUTE; FOR TO SO HOLD WOULD BE TO NULLIFY THE DECLARATION OF CONGRESS THAT EVERY COMMON CARRIER BY RAILROAD ENGAGED IN INTERSTATE COMMERCE SHALL BE LIABLE IN DAMAGES TO THE PERSONAL REPRESENTATIVE OF ANY EMPLOYE WHO SHALL LOSE HIS LIFE WHILE EMPLOYED IN SUCH COMMERCE, WHEN HIS DEATH RESULTS "FROM THE NEGLIGENCE OF ANY OF THE OFFICERS, AGENTS OR EMPLOYES OF SUCH CARRIER." (Case affirmed in 98 N. J. L. 564.)

In the case of Swank v. Pennsylvania Railroad, reported supra, it appeared that plaintiff's intestate was engaged in removing stone ballast from between the ties of main-line railroad tracks used in interstate commerce preparatory to running a pipe line under them to operate the switch point of a new switch, the rails of which had just been laid between such main-line tracks and a siding, and while thus engaged was killed by a train which had been shifted from one of the main-line tracks to the one on which he was working. There was a verdict for the plaintiff, which was upheld by the Court of Errors and Appeals. On page 548 the court said, "Suit was brought by the general administratrix of the deceased, under the Federal Employers' Liability Act (U. S. Comp. Stat. 1916, sect. 8657, 8665), and was ground upon the proposition that both the deceased employe and the railroad company were engaged in interstate commerce at the time of the accident, and the act of negligence complained of was that the boss or foreman of the section gang, in which plaintiff's intestate was working, failed to discharge his duty, established by custom, to blow a whistle to notify deceased and his co-employes of the approaching train. On page 550 the court said, "It is further contended as a ground for reversal that the plaintiff's intestate assumed the risk of the negligence of his fellow-servants in failing to give a warning of the approaching train, notwithstanding the provisions of the Federal Employers' Liability Act. THERE WAS EVIDENCE IN THE CASE FROM WHICH

THE JURY MIGHT PROBABLY FIND THAT A CUSTOM EXISTED REQUIRING THE FOREMAN OF THE GANG OF WORKMEN TO GIVE WARNING OF THE APPROACHING TRAIN BY BLOWING A WHISTLE, AND THAT NO SUCH WARNING WAS GIVEN, AND THAT THE FOREMAN WAS NEGLIGENT IN THIS RESPECT. AND THERE WAS ALSO EVIDENCE FROM WHICH THE JURY MIGHT INFER THAT THE DECEDENT RELIED UPON THIS WARNING BEING GIVEN, SO, THAT THE QUESTION FOR SOLUTION RESOLVES ITSELF IN DETERMINING WHETHER THE NEGLIGENCE OF THE FOREMAN OF THE SECTION GANG IN NOT BLOWING THE WHISTLE ACCORDING TO CUSTOM TO WARN OF THE APPROACHING TRAIN, WAS A RISK ASSUMED BY THE PLAINTIFF'S INTESTATE AS AN INCIDENT OF HIS EMPLOYMENT, UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT. * * * On page 551, the court continuing says, "We, therefore, conclude that decedent did not assume the risk of the negligence, of his foreman in failing to give warning of the approaching train, and therefore, THERE WAS NO ERROR IN THE REFUSAL TO CHARGE AS REQUESTED AND TO NONSUIT OR DIRECT A VERDICT ON THE PROPOSITION CON-

TENDED FOR BY DEFENDANT, AND SINCE THE TRIAL COURT CHARGED ON THE SUBJECT IN ACCORDANCE WITH THE VIEWS WE HAVE JUST EXPRESSED, WE FIND NO ERROR THEREIN.

In the case of Santomassimo v. N. Y. S. & Western Railroad, reported supra, it appeared that plaintiff's intestate was employed by railroad company as a trackwalker, and while at work upon the tracks, in endeavoring to get out of the way of a passenger train stepped in front of a freight train upon an adjacent track and was killed. On page 11 the court said, "We think that the jury was justified from the proofs submitted in finding the following facts: (1.) That it was the custom in the operation of the defendant company's trains to give a warning signal, consisting of several short blasts of the whistle, whenever anybody, whether employe or stranger, was seen walking on the track in apparent unconsciousness of the approach of the train. * * * If the jury found these facts it was then for them to determine whether the engineer of the passenger train was not guilty of negligence in failing to give the warning signal to Di Pierro soon enough to enable him to discover whether it would be dangerous to step over on to the freight track. THE PRESUMPTION IS THAT THE JURY RESOLVED ALL OF THESE FACTS AGAINST THE DEFENDANT COMPANY, AND WE CANNOT SAY THAT THEY WERE NOT JUSTIFIED IN DOING SO UNDER THE

EVIDENCE SUBMITTED TO THEM. It is next argued that the rule should be made absolute for the reason that Di Pierro assumed the risk of just such an accident as that which brought about his death, and it is said that all the authorities hold this view. WE DO NOT UNDERSTAND THE TREND OF THE DECISIONS. UNDER THE FEDERAL STATUTE AN EMPLOYE DOES NOT ASSUME A RISK WHICH ARISES OUT OF THE NEGLIGENCE OF A FELLOW EMPLOYE. IF IN THE PRESENT CASE DI PIERRO HAD RECEIVED TIMELY NOTICE OF THE APPROACH OF THE PASSENGER TRAIN BY THE BLOWING OF THE WARNING SIGNAL, AND HAD, NEVERTHELESS, BEEN KILLED, HIS DEATH WOULD HAVE BEEN THE RESULT OF A RISK ASSUMED BY HIM, AND GROWING OUT OF HIS EMPLOYMENT. *But, as we have already said, the jury has declared that the negligence of the engineer of the passenger train was the producing cause of the death, and consequently the doctrine of assumption of risk has no application to the situation exhibited by the facts in the present case.*

In the case of Willever v. D. L. & W. Railroad reported supra, the court on page 705 said, "Turning now to the second point relied upon by the Supreme Court, it is said that Willever, having received instructions

and knowledge, as section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of Precodnich v. Lehigh Valley Railroad Co. supra, was as to him, under no duty to give warning. We do not think the negligence of defendant's employes in failing to comply with a rule established for Willever's safety, was one of the dangers he undertook to look out for, and, therefore, one of the risks he assumed. Obviously, Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and, therefore, prescribed by the limit of dangers incident to his employment under the system established for the operation of the business. This is necessarily so. Suppose, for instance, it had been Willever's duty to go under the standing freight cars in question and to do his work there in a position where he could not possibly see the new danger and escape in time when the engine backed up to and started to push the train without warning to him, and that under a system provided by the employer with his knowledge a man was stationed alongside to watch and warn, and that the man so on watch had negligently failed to see and warn, and Willever had been run over in consequence, NO ONE WOULD CONTEND THAT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, MAKING THE EMPLOYER LIABLE FOR THE NEGLIGENCE OF FELLOW-EMPLOYES, WILLEVER'S ASSUMPTION OF RISK HAD INCLUDED THIS ACT OF NEGLI-

GENCE. AND SO, IN THE CASE HERE PRESENTED, FEELING, AS WE DO, THAT THE JURY WERE JUSTIFIED BY THE EVIDENCE IN FINDING A CONDITION OR STATE OF FACTS WHICH MADE RULE NO. 102 APPLICABLE, WE THINK WILLEVER HAD THE RIGHT, UNDER THE SYSTEM OF WHICH THAT RULE BEING TAKEN BY HIS FELLOW-EMPLOYES FOR HIS PROTECTION, AND THAT HE CONSEQUENTLY, DID NOT ASSUME THE RISK OF ITS NEGLIGENT OMISSION.

In Nestico v. D. L. & W. R. R. reported supra, the court stated, "The case of the case of the plaintiff was that decedent was engaged in his work along the defendant company's tracks, and while so engaged he was run down by an engine, to which no cars were attached, and that no warning of any kind was given to him of its approach, and that defendant company did nothing to protect him against danger from it, although, apparently, it was not running on any schedule. The first contention is that the verdict is against the weight of the evidence. We think this contention is without merit. The jury was entirely justified in finding THAT IT WAS THE DUTY OF THE DEFENDANT COMPANY TO USE REASONABLE CARE TO PROTECT ITS TRACK LABORERS WHILE AT WORK ON THE TRACKS, AND THAT IT HAD FAILED IN THE PERFORMANCE OF ITS DUTY.

> There is no suggestion that the engineer who was driving the engine which the plaintiff claimed ran the decedent down blew a whistle or did anything else to give warning of its approach. It is said that the alinement of the track at this point was such as to prevent the engineer from seeing the decedent. BUT, IF THAT IS SO, THEN IT WAS FOR THE JURY TO SAY WHETHER THE COMPANY OUGHT NOT TO HAVE PROVIDED SOME OTHER METHOD OF PROTECTING HIM. It is further argued on this point that, because the engineer testified that he did not see the decedent on the track, and did not know that he had been killed until some time after the accident happened, the jury was not justified in finding that the decedent was run down by the engine. We think there was plenty of testimony to support that conclusion. * * * IF THE ENGINEER, BECAUSE OF HIS INABILITY TO SEE, COULD NOT OPERATE HIS ENGINE IN SUCH A WAS AS TO AVOID RUNNING DOWN LABORERS UPON THE TRACK, THAT CERTAINLY DID NOT EXCUSE THE DEFENDANT FROM ITS OBLIGATION.

It was the duty of the defendant railroad company to provide a safe place of employment as far as the plaintiff's intestate was concerned. Chesapeake & Ohio R. R. vs. Proffitt, 241 U. S. 462; Union Pacific R. R. vs. O'Brien, 161 U. S. 451; Chicago vs. Ward, 252 U. S. 18; Meyers vs. Pittsburgh Coal, 233 U. S. 191; Wyatt vs. N. Y. Ontario & Western Railway, 45 Federal Reporter (2 D) page 705.

In the case of Union Pacific R. R. vs. O'Brien reported supra, the court on page 457 said, "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, BUT HE DOES NOT TAKE THE RISKS OF THE NEGLIGENCE OF THE MASTER ITSELF. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, BUT IT IS BOUND TO EXERCISE THE CARE WHICH THE EXIGENCY REASONABLY DEMANDS—FURNISHING PROPER ROADBED, TRACK AND OTHER STRUCTURES, INCLUDING SUFFICIENT CULVERTS FOR THE ESCAPE OF WATER COLLECTING AND ACCUMULATING BY ITS EMBANKMENTS AND EXCAVATIONS.

In the case of Chicago vs. Ward reported supra, the court on page 22, said, "The testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the records shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the

proper time by the engine foreman so that he mightly safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly preciptated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. THIS SITUATION DID NOT MAKE THE DOCTRINE OF ASSUMED RISK A DEFENSE TO AN ACTION FOR DAMAGES BECAUSE OF THE MANNER OF OPERATION WHICH RESULTED IN WARD'S INJURY, AND THE PART OF THE CHARGE COMPLAINED OF THOUGH INACCURATE COULD HAVE WORKED NO HARM TO THE PETITIONER. THERE WAS A SUDDEN EMERGENCY, BROUGHT ABOUT BY THE NEGLIGENT OPERATION OF THAT PARTICULAR CUT OF CARS, AND NOT A CONDITION OF DANGER, RESULTING FROM THE MASTER'S OR HIS REPRESENTATIVE'S NEGLIGENCE, SO OBVIOUS THAT AN ORDINARY PRUDENT PERSON IN THE SITUATION IN WHICH WARD WAS PLACED HAD OPPORTUNITY TO KNOW AND APPRECIATE IT, AND THEREBY ASSUME THE RISK.

In the case of Meyers vs. Pittsburgh Coal Co. reported supra, it was held (1) that the duty of the master to use reasonable diligence to provide a safe place for the employes to work is a continuing one which is discharged only when he provides and maintains a place of that character. WHERE WORKMEN ARE ENGAGED IN A HAZARDOUS OCCUPATION, SUCH UNDERGROUND MINING, IT IS THE DUTY OF THE MASTER TO EXERCISE REASONABLE CARE FOR THEIR SAFETY, AND NOT TO EXPOSE THEM TO INJURY BY USE OF DANGEROUS APPLIANCES OR UNSAFE PLACES TO WORK, WHEN SUCH APPLIANCES AND PLACES CAN, BY EXERCISE OF DUE CARE, BE MADE REASONABLY SAFE.

In the case of Wyatt vs. N. Y. O. & W. Ry. reported supra, the court on page 707 said, "It is another question whether the defendant owed plaintiff any duty in regard to warning him of the approach of the engine. At the moment he was not doing anything in his employment, but something which concerned his own comfort and that of his fellow-employes. However, the practice of gathering fallen coal for the dugout fire was of long duration—certainly long enough to charge the defendant with notice of it. The conductor told Wyatt to get coal for the fire. There was implied, if not express, permission given him to go upon the tracks for this purpose. We hold that employes who are rightfully upon the tracks are entitled to the

benefit of this rule, even though not at the moment engaged in work for the company. Hence, defendant owed plaintiff the same duty of care as though he were directly engaged in moving its cars; and a failure to sound the cautionary signal required by the railroad was a violation of that duty. It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to keep out of its way. Aerkfetz v. Humphreys, 145 U. S. 418; Chesapeake & Ohio Ry. v. Nixon, 271 U. S. 218; Toledo &c. v. Allen, 276 U. S. 165. But this court is committed to the doctrine that those decisions are inapplicable when the railroad violates its own rule requiring the ringing of the engine bell when the engine is about to move. Pacheco v. N. Y., N. H. & H. R. R. 15 Fed. Rep. (2D) 567.

POINT THREE

It was for the jury to say as to whose negligence the accident in question was caused.

The appellant claimed that the plaintiff's intestate sustained injuries by reason of his sole negligence. On the other hand the respondent claimed that the accident in question was caused by the defendant's sole negligence. *Under the circumstances, the trial court properly held that it presented a question of fact for the jury to determine. The following authorities substantiate the trial Judge in refusing to grant a nonsuit or a motion for a direction of a verdict for the reason that the question was one of fact to be decided by the jury.* D. L. & W. vs. Hughes 200 Federal Reporter 941; Albanese vs. Central Railroad, 70 N. J. L. 241; D'Agostino vs. Pennslyvania Railroad 72 N. J. L. 358; Stiedler vs. Pennslyvania Railroad 94 N. J. L. 199; Toohey vs. Webster—98 N. J. L. 545; Germanus vs. Lehigh Valley Railroad 74 N. J. L. 662; Tonsellito vs. New York Central Railroad 87 N. J. L. 653; Schultz vs. New York, Susquehanna & Western Railroad 87 N. J. L. 659; Kopenhefer vs. Pennsylvania Railroad 8 N. J. Advanced Reports 69; New York Central Railroad vs. Marcone 281 U. S. 345; Grand Trunk Railway vs. Ives, 144 U. S. 408; Norfolk & Western Railway vs. Earnest 229 U. S. 114; Cross vs. Spokane, 71 A. L. R. 451; Cowell vs. Pennslyvania R .R. 101 N. J. L. 507; Baer vs. Lehigh & Hudson Railway, 93 N. J. L. 85.

In the case of D. L. & W. R. R. v. Hughes, reported supra, it appeared that the deceased was employed by the railroad company as a

switchman, and he was killed by being run down by a freight train. It further appeared that he was a man of experience and long service in the defendant's employ and was thoroughly acquainted with the premises in question. The court found that he was killed by a freight train which the plaintiff insists was improperly managed in that there was no watchman at or near its end with a signal lantern to warn those who had a right to be on the track of an approaching car. The court on page 942 said, "We are convinced that it was a question of fact for the jury, and their verdict is sufficiently supported by the testimony. Thomas Hughes was employed as a switchman by the defendant in its Syracuse yard for 26 years. He must have been thoroughly acquainted with the situation and familiar with the location of the tracks, the movement of the trains and all the customs of the yard. THAT SUCH A MAN SHOULD BE RUN DOWN AND KILLED AT A PLACE WHERE HE KNEW EVERY DETAIL OF THE PREMISES AND OF THE METHODS EMPLOYED RAISES A PRESUMPTION THAT SOME ABNORMAL CONDITION PREVAILED WHICH WAS NOT TO BE EXPECTED, WHICH HE COULD NOT HAVE FORESEEN AND WHICH HE WAS NOT REQUIRED TO GUARD AGAINST BY TAKING EXTRAORDINARY PRECAUTIONS. THAT SUCH A MAN WOULD HAVE REMAINED ON THE TRACK IF ADEQUATE WARNING

HAD BEEN GIVEN IS CONTRARY TO ALL THE IMPULSES WHICH GOVERN THE CONDUCT OF MEN OF ORDINARY INTELLIGENCE. IT WAS THE DUTY OF THE DEFENDANT TO GIVE ADEQUATE WARNING OF THE APPROACH OF THE CAR. IF THIS COULD HAVE BEEN DONE ONLY BY HAVING A MAN WITH A LANTERN ON THE LADDER AT THE END OF THE CAR, THAT PRECAUTION SHOULD HAVE BEEN ADOPTED.

In the case of Albanese v. Central Railroad of N. J. reported supra, it appeared that the deceased met his death while at work between the rails shoveling away some of the said which had slipped down upon the track, by being struck by a train, coming from the Broad Street station, without warning by bell or whistle. On page 242 the court said, "That it was the duty of the defendant, having undertaken to elevate its tracks while using them for the passage of trains, to take reasonable care for the safety of workmen who, in the prosecution of the work, might be on or near the tracks, was settled in Delaware, Lackawanna and Western Railroad Co. v. Hardy, 30 Vroom 35, 562. In the present case the fact that there was no custom to give signals and that no instructions were issued to workmen about the approach of trains may have resulted from a belief that, ordinarily, the workmen were exposed to no danger which, with reasonable care they could not avoid, that, ordinarily. they could

"look out for themselves," *but it surely would not induce a workman to expect that, if he were actually working on the track in such a position as prevented his seeing an approaching train, the engineer of the train, having the workman in sight, would fail to sound a warning and so run him down. Such exceptional conditions required and therefore justified the expectation of an audible signal, whether signals were customarily given or not. It thus becomes evident that, when Agostino, in the discharge of his duty, placed himself in a position of danger which would be apparent to the engineers of approaching trains, he had a right to expect a warning from those engineers. If there be a right to expect a warning, it makes no difference in principle whether the right springs from custom, as in Harmer's case, or from usual conditions as Hardy's case, and under such circumstances questions concerning the assumption of risk and contributory negligence cannot be decided by the court against the party injured. They are for the jury.*

In the case of D'Agostino v. Pennslyvania R. R. reported supra, it appeared that the plaintoff's intestate was employed by the defendant as a track laborer, and that he was engaged in sorting loose stones from the earth on track No. 5, which was the drill track, and throwing the stones, when sorted, on track No. 4, which is the westbound passenger track. WHILE AT WORK THE DECEAS-

ED WAS NECESSARILY BENT OVER. HE COULD NOT, OF COURSE, DEVOTE HIS ATTENTION TO HIS WORK AND THE APPROACHING TRAINS AT THE SAME TIME. The court on page 359 said, "The proof in the cause shows that there was a foreman and an assistant foreman present, who did not actually engage in the work, but only acted as superintendents. The proof was that the foreman of gangs of men at work, as the deceased and his fellow-laborers were at the time he was killed, were accustomed, upon the approach of a train, to call out to the men, 'Look out on Track No. 3.' 'Look out on Track No. 4,' or whatever track it happened to be upon which the train was approaching. IT IS CLEAR THAT THE MEN RELIED UPON THIS WARNING, AND IT IS EQUALLY CLEAR THAT IT WAS THE CUSTOM OF THE COMPANY TO GIVE. IT IS CONCEDED THAT WHEN THE DECEASED WAS KILLED BY THE BACKING UPON HIM OF A FREIGHT ENGINE ON TRACK NO. 5 NO SUCH WARNING WAS GIVEN. BOTH THE FOREMAN AND HIS ASSISTANT were absent at the time. They were at the "shanty," some distance away. It was testified by the foreman that it was the custom, when he left the men unprotected, owing to his going on some temporary duty, for him to warn them of his leaving and to caution them to look out for themselves; to call out to them, 'Now, boys, look out.' He says he did this on this day, but it appears

by the proof that if he called at all he did not call so that all heard, and that the deceased was too far away to hear if he did so call. *On this state of facts we think that the deceased had a right to rely upon the fact that, if there was any danger from an approaching train the customary warning would be given. There was no error in the refusal to nonsuit or to direct a verdict for the defendants. Where a workman in the discharge of his duty has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning was given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court. Albanese v. Central Railroad Co., 41 Vroom 241; Hamer v. Reed Apartment Co. 39 Id. 332.* Under the proof this case cannot be distinguished on principle from that of the Belleville Stone Co. v. Mooney, 32 Vroom 253. In that case it was held, WHERE THE GIVING OF A WARNING WAS EMBRACED IN THE DUTY OWED BY THE EMPLOYER TO THE EMPLOYE IN ORDER THAT THE PLACE WHERE THE EMPLOYER SETS THE EMPLOYE TO WORK MAY BE KEPT SAFE, THAT THE FAILURE OF THE FOREMAN TO DISCHARGE THIS DUTY CAREFULLY WAS IMPUTABLE TO THE EMPLOYER, AND THAT SUCH

FAILURE WAS NOT ONE OF THE OBVIOUS DANGERS OF WHICH THE EMPLOYE ASSUMED THE RISK. It was strongly contended in this case that the danger to the deceased of being run over was clearly an obvious one. On this point, in Belleville Stone Co. v. Mooney, Mr. Justice Dixon says: "Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case, for that doctrine is not applicable to risks arising from negligence in the discharge of the master's duty to his servant. No doubt the plaintiff took the risks of the system under which he knew the quarry was worked. He could not be heard to complain that places of refuge close at hand were not provided, or that other possible precautions which he saw were not in use were omitted. BUT HE HAD A RIGHT TO EXPECT THAT THE PRECAUTIONS WHICH THE DEFENDANT HAD PROVIDED FOR THE SECURITY OF THE QUARRYMEN SHOULD BE CAREFULLY OBSERVED, AND HE DID NOT ASSUME THE RISK OF A NEGLIGENT OBSERVANCE."

In the case of Stiedler v. Pennslyvania R. R. reported supra, the court on page 199 says, It is also contended that no or not sufficient negligence was proven, and that plaintiff assumed the risks incident to his work. We think there was ample proof in the case from which a jury might infer negligence upon the part of the co-employe. Such negligence

is contemplated as the basis under the federal act; and the common law doctrine of assumption of risk from the negligence of fellow-servants is thereby abolished, and the plaintiff's contributory negligence presents merely a basis for the reduction of damages, based upon the rule heretofore peculiar to admiralty. (Section 3 of the act). Santomassimo v. N. Y. S. & Western R. R. N. J. L. 10; Grybowski v. Erie Railroad Co. 88 Id. 1; affirmed in this court, 89 Id. 361. *These adjudications are also declarative of the proposition that upon a state of facts no more cogent or persuasive than that submitted in the case at bar, the determination of the question of negligence was properly submitted to the jury.*

In the leading case of Germanus v. Lehigh Valley Railroad Co. reported supra, it appeared that the plaintiff's intestate was one of a gang of laborers in the employ of the defendant company, who on the day of the accident was working on the eastbound track, with his back toward the direction from which trains would come, and he was killed by being run down by a special engine running on the eastbound track, and when he was struck he was bending forward, working with his pick. It was claimed by the engineer that the bell was rung and the whistle blown from Roselle until the deceased was struck. *The testimony on the part of the plaintiff, was that no signals were given of the approach of the engine.* The court on page 664 said, "According to the evidence of the plaintiff's

witnesses it was the custom of the foreman to call out to the men to look out on the approach of trains, and even to push them away if they didn't move in time, but that on this occasion no warning at all was given by the foreman. The foreman, Kutora, testified that he had given two warnings, and was corroborated by one of the gang of men. * * * I think the motion to nonsuit was properly denied. As the case stood when the case for the plaintiff was closed there was proof uncontradicted that it was the custom of the company, by its foreman, to warn men working on the tracks, as this gang were, of the approach of trains, and that in this particular instance the warning was not given. THE DECEASED HAD THE RIGHT TO RELY upon such a warning being given in case there was any danger from approaching trains. D'Agostino v. Pennslyvania Railroad Co. 43 Vroom 358. *IT WAS CORRECTLY HELD IN THAT CASE THAT WHERE A WORKMAN, in the discharge of his duty, has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because of no warning is given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decideed by the court. Albanese v. Central Railroad Co. 41 Id. 241; Herman v. Reed Apartment Co. 39 Id. 332.*

In the case of Tonsellito v. N. Y. C. & H. R. R. reported supra, it was stated on page 654 "We are not concerned on this appeal with the question of the relative weight of the testimony as to the negligence of the defendant in the operation of its engine or the alleged defect of its roadbed. THERE IS TESTIMONY IN THE CASE FROM WHICH BOTH MAY BE LEGITIMATELY INFERRED AS WELL AS THE QUESTION WHETHER THE RISK WAS SO OBVIOUS THAT THE PLAINTIFF ASSUMED IT. Burns v. Telegraph Co. 70 N. J. L. 745. THE WEIGHT AND CREDIBILITY OF THIS TESTIMONY, CONTRASTED WITH THE FACTS ABDUCTED IN BEHALF OF THE DEFENDANT'S CONTENTIONS WERE QUESTIONS FOR THE CONSIDERATION OF THE JURY. THE MOTIONS FOR A NONSUIT AND TO DIRECT A VERDICT FOR DEFENDANT WERE THEREFORE PROPERLY REFUSED. Dickinson v. Erie Railroad, 85 N. J. L. 586; Clark v. Public Service, 86 Id. 144.

It is urged by the respondent that the present case is practically in accord with the case of Albanese v. Central Railroad, supra, wherein a recovery as above set forth was upheld in favor of the plaintiff.

In the case of Cross vs. Spokane, reported supra the court on page 455 said:

"But there is here an added element. It was shown by the evidence which the triers of the fact were entitled to believe, that the train which ran down and killed him was operated in violation of the rules of the appellant, that it was being run in excess of the prescribed speed limit, and that no whistle was sounded either at the whistling post placed just preceding the point of entry into the rock cut in which Cross was killed, or at the time of the entry of the train therein, and the question is whether this omission of duty was but a part of the usual and ordinary risk assumed by him, or did it create an unusual or extraordinary risk which he did not assume. That the excessive speed of the train and the failure to sound the alarm added to the hazard of the employee is hardly to be doubted. Being compelled to rely wholly on his senses of sight and hearing for his protection, it was of vital importance to him that the operators of trains over the road obeyed the rules as to speeds and signals. The difference between a train going twenty-five miles an hour and one going between thirty and forty miles an hour when discovered by him could easily mean the difference between life and death, and, clearly, the sounding of the alarm signals by an approaching train was even of more importance to him.

POINT FOUR

The question as to whether any instructions were given to the plaintiff's intestate by his superior was a question for the jury to decide.

The appellant contends that the trial court was in error in failing to grant a non-suit and in failing to grant a motion for a direction of a verdict in its favor. The Supreme Court on the rule to show cause of the appellant, which decision is reported in 9 N. J. Miscel. Rep. *on page 183 held that the question as to whether instructions were alleged to have been given by the foreman of the defendant railroad company to the plaintiff's intestate was one for the jury. In view of the fact that the plaintiff was in no position to negative the testimony so adduced, it refers us to the cause of Schmidt vs. Marconi Wireless Telegraph Company, 86 N. J. L. 182 and remarked that the case was submitted properly to the jury on the question as to whether the engineman had failed to give the usual and customary warning.* If this Honorable court is to consider the question as to whether any alleged instructions were given the respondent contends that it was a question for the jury as to whether any instructions were given to the plaintiff's intestate in view of the contradictory testimony given by Murphy and Pascrell. In the case of Schmidt vs. Marconi Wireless Telegraph Co., supra, which case was decided by your Honorable court on page 186 it was said:

"It cannot, therefore, be said that by his failure to controvert it he impliedly admitted its truth. Of course the testimony of a man whose character for truth and integrity is so universally known as that of Governor Griggs would always be accepted as a correct recital of the facts spoken to as he remembered them. But it will hardly do to say that the character of a witness is the determining factor upon the question whether the facts testified to by him shall be determined by the court or by the jury. It cannot be that where the character of the witness for truth and veracity is known by the court to be unimpeachable, the facts sought to be established by his testimony are to be determined by the court, but that where, in the judgment of the court, the witness is not entitled to full faith and credit, the facts sought to be proved by him must be determined by the jury. No such rule of evidence exists. In every case where the issue depends upon the determination of facts the existence of which is not admitted, the jury, and not the court, must determine them."

The above cited case of Schmidt vs. Marconi Wireless Telegraph Co. has been cited with approval in the cases of McCormack vs. Williams 88 N. J. L. 173; Klitch vs. Betts, 89 N. J. L. 356; Second National Bank vs. Smith, 91 N. J. L. 537; Cronecker vs. Hall, 92 N. J. L. 458; State vs. Lanto 98 N. J. L. 412; State vs. Kaspowitz 98 N. J. L. 550; Mohawk Dres Co. vs. Michlaeis 1 N. J. Misc. R. 24.

POINT FIVE

Respondent contends that if the plaintiff's intestate was partly responsible for the accident that that would only go to the question of contributory negligence.

There might be some merit in the argument that if the accident in question was partly caused by reason of the acts of the plaintiff's intestate that that would amount to contributory negligence on the part of the plaintiff's intestate. In that event, the respondent would still be entitled to a recovery and under the Federal Employers' Liability Act, the question of contributory negligence only goes to the mitigation of damages and does not preclude a recovery on the part of the plaintiff. Furthermore, the question of contributory negligence was determined by the Supreme Court on the appellant's rule to show cause wherein it alleged that the trial court was in error when it charged the jury respecting the question of contributory negligence. The Supreme Court decided that in view of the appellant's failure to take an exception to the charge that it was precluded from raising any question respecting contributory negligence.

The contention of the appellant that the acts of the defendant amounted to negligence on his part and therefore, precludes a recovery by his administratrix is inconsistent with the allegations contained in the answer heretofore filed by the appellant in that under the second defense to the first court, it is recited as follows:

"Plaintiff's intestate was guilty of contributory negligence in the following particulars, viz:

(a) In failing and neglecting to take due and proper precautions for his own safety as required by defendant's rules.

(b) In failing and neglecting to look for the approach of the trains or train and engines or engine referred to in the complaint, in violation of defendant's rules.

(c) In taking a position so close to the track on which the train or engine which it is alleged ran plaintiff's intestate down was running as to endanger the safety of said intestate.

Under present circumstances, the appellant is in no position at this time to contend that the accident was due to the sole negligence of the plaintiff's intestate, having once alleged and contended in the trial court that plaintiff's intestate was guilty of contributory negligence.

POINT SIX

The authorities cited by the appellant under point 2 are not applicable to the present case.

The appellant cites the cases of Pastor vs. Pennslyvania Railroad Co. 43 Federal Reporter (2D) 908; Southern Railway Co. vs. Hylton 37 Federal Reporter (2D) 843; and Northern Railroad vs. Nyles 24 U. S. 244; Davis vs. Kennedy 266 U. S. 147 and Unadilla Valley Railway Co. vs. Caldine 278 U. S. 139; and it is the contention of the respondent that these cases do not apply to the present case in that the facts are different that the cited cases. The persons involved in the cited cases were either engineers or brakemen, and did not take into consideration a trackwalker. The cited authorities seem to hold that the injured party could still operate his train and

at the same time obey any instructions given to him. This is not true of the present case for the reason that the plaintiff's intestate was working just prior to the accident on a track of the defendant railroad company. *How can we then say that he was in a position to obey any alleged instructions to look out for or watch out for trains while thus employed? This would be contrary to the case of D'Agostino vs. Pennslyvania Railroad supra, and Nestico vs. D. L. & W. Railroad, supra. The gist of those cases is that the worker could not look out for trains and at the same time perform his work on behalf of the railroad company.*

The appellant in its brief stated that the disobedience of the plaintiff's intestate of the instructions given to him was the cause of the accident and that, if he had obeyed these instructions, the accident would have been averted. *As before stated, it would have been impossible for the plaintiff's intestate to "look out" or "watch out" for trains and at same time perform his labors for the defendant company. It was his duty to grease the track, and that was what he was doing at the time of the accident. It is the respondent's contention that there was a custom to warn and that the plaintiff's intestate relied upon this custom and that the accident in question was caused by the negligence in whole or in part of the defendant railroad company in failing to make the proper observation and to give the usual and customary warning to him. If the warning were given, the accident in question would never have happened.*

The respondent, therefore, respectfully urges that the judgment of the Supreme Court should be affirmed, for the following reasons:

1. That the points now raised by the appellant were disposed of by the Sumpeme Court in De Rose vs. D L & W Railroad reported supra and is res judicata as far as this Honorable Court is concerned.

2. That if this honorable court decides that it is not res judicata, then it is contended by respondent that the accident was caused by the sole negligence of the defendant railroad company.

3. That the questions respecting the negligence of the railroad company were for the jury to be determined.

4. That if there was any disobedience of instructions, that that would possibly go to the question of contributory negligence, which question was disposed of by the Supreme Court on the appellant's rule to show cause.

Respectfully submitted.

JOHN O. BENSON,

Attorney and of counsel for

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