

May 17, 1928

~~Filed
1929~~

P.O.

SOUTHERN RAILWAY COMPANY, ET AL., 0

0

VS.

0

NO. _____

0

C. A. FISHBURN, ADMINISTRATOR. 0

0-0-0

0-0-0

APPEARANCES FOR PLAINTIFF IN ERROR:

Messrs. Brown & Johnson, Maryville, Tenn.,
Judge Hugh M. Tate, Knoxville, Tennessee.

APPEARANCES FOR DEFENDANT IN ERROR:

Messrs. James M. Cates, Dunn & Jackson,
and Gamble, Crawford & Goddard, Maryville,
Tennessee.

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Carpenter, Reba,	198	205	210	
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Fishburn, C. A.,	38	82	115	118
Hannah, Robert,	122	137		
Harris, C. C.,	149	155	158	
Murphy, John,	219	227		
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TRANSCRIPT FOR COURT OF APPEALS.

TRANSCRIPT OF THE RECORD IN THE CASE OF
C. A. FISHBURN, ADMINISTRATOR, VS. SOUTHERN RAILWAY COMPANY,
ET AL, IN THE CIRCUIT COURT FOR BLOUNT COUNTY, MARYVILLE,
TENNESSEE. BEING CASE NO. 2730, ON THE RULE DOCKET OF
SAID COURT.

February 21, 1911. GENERAL ORDER AS TO MOTION FOR NEW TRIALS
entered as follows:

MONDAY FEBRUARY 13, 1911.

STATE OF TENNESSEE.

Be it remembered that at a Circuit Court
began and held for the County of Blount at the Court House in
Maryville, Tennessee, on the second Monday it being the 13th
day of February, One Thousand Nine Hundred and Eleven, A. D.,
present and presiding the Honorable S. C. Brown, Judge, etc.
of the fourth judicial circuit, duly elected, commissioned,
and assigned to hold the Circuit Courts in the State of Tenn-
essee, when the following proceedings were had and entered
of record to-wit:

Thereupon Court adjourned to meet tomorrow
morning at eight o'clock.

Sam C. Brown, Judge.

T U E S D A Y F E B R U A R Y 2 1 . 1 9 1 1 .

Court met pursuant to adjournment, present and presiding the Honorable Sam C. Brown, Judge, as on yesterday, the minutes of yesterday were read and signed, when the following further proceedings were had and entered of record, to-wit:

GENERAL ORDER AS TO MOTIONS FOR NEW TRIAL.

All motions for new trials shall be made in writing and entered of record. The grounds for such motions shall be numbered separately and state the reasons assigned for setting aside the verdict and granting a new trial. It shall be unnecessary to set out in detail in such motions evidence objected to for incompetency or inadmissibility but such evidence shall be referred to in a general way that such objections may be understood by the Court.

No motion for new trial not in accord with this order will be considered by the Court.

The Clerk will copy this order into the transcript of all cases hereafter made out for the Supreme Court or Court of Civil Appeals, as the case may be, without further specific order of the Court.

All former orders or rules of this Court as to motions for new trial are hereby abrogated.

Thereupon Court adjourned until Court in Course.

O A T H.

STATE OF TENNESSEE.

BLOUNT COUNTY.

I, C. A. Fishburn, Administrator of the estate of Walter Fishburn, deceased, do solemnly swear that the estate of Walter Fishburn, deceased, is insolvent and that Emily Fishburn, Widow of Walter Fishburn, deceased is insolvent and that owing to the insolvency of the estate of the said Walter Fishburn, deceased, and the poverty and inability of the said Emily Fishburn, widow as aforesaid, for whose use and benefit this suit is brought, said estate and said Emily Fishburn is unable to give bond and security for the cost of a suit the said Administrator is about to commence in the Circuit Court of Blount County, Tennessee, against the Southern Railway Company, The Knoxville & Augusta Railway Company, and the Tennessee & Carolina Southern Railway Company for damages in the sum of Twenty Thousand Dollars for the wrongful killing of the said Walter Fishburn on their line of Railroad at Montvale Station in Blount County, Tennessee, on or about the 8th day of July, 1927, and that he, for the use and benefit of the said Emily Fishburn, sole beneficiary, is entitled to the relief sought to the best of my knowledge, information and belief.

C. A. FISHBURN
Administrator.

Subscribed and sworn to before me
this July 20th, 1927.

S. H. DUNN.
Notary Public.

(SEAL)

Filed July 20th, 1927.

Peter Rule, Clerk.

STATE OF TENNESSEE,

BLOUNT COUNTY.

TO THE SHERIFF OF BLOUNT COUNTY TENNESSEE; GREETING:

SUMMONS The Southern Railway Company a corporation, Knoxville & Augusta Railway Company, a corporation and Tennessee & Carolina Southern Railway Company, a corporation to appear before the Judge of the Circuit Court of Blount County, Tennessee, on the Second Monday in October 1927, to answer the complainant of C. A. Fishburn, an Administrator, in an action of damages for Twenty Thousand Dollars (\$20,000.00) for the wrongful killing of Walter Fishburn, for whose estate the said C. A. Fishburn is Administrator, said wrongful killing of the said Walter Fishburn being at Montvale Station on the 8th. day of July, 1927, on the line of the defendants railroad; This suit being brought by the said C. A. Fishburn, Administrator for the use and benefit of Emily Fishburn, widow of said Walter Fishburn, deceased for whose use and benefit this suit is brought, she being the sole beneficiary.

Given under my hand at office in Maryville, Tennessee, on this 20 day of July, 1927.

Peter Rule, Clerk.

Issued July 20th, 1927.

Peter Rule, Clerk.

James M. Cates,

Dunn & Jackson,

Attys. for Plaintiff.

RETURN.

Came to hand same day issued, and executed as commanded by reading this summons to Peter Hood, Superintendent of the Southern Railway Company, the Knoxville & Augusta Railway Co., and the Tennessee & Carolina Southern Railway Company, Corporations, he being the highest officer or agent of defendant companies to be found in my County, this July 25, 1927.

L. V. Turner, D. S.

for Blount County, Tenn.

C. A. FISHBURN, ADMINISTRATOR, 0

VS. 0

No. 2730.

0 IN THE CIRCUIT COURT
 AT MARYVILLE, TENNESSEE.

THE SOUTHERN RAILWAY COMPANY,
THE KNOXVILLE & AUGUSTA RAILWAY
COMPANY, THE TENNESSEE & CAROLINA
SOUTHERN RAILWAY COMPANY. 0

OCTOBER TERM, 1927.

DECLARATION.

The plaintiff, C. A. Fishburn, Administrator, of the estate of Walter Fishburn, deceased, duly appointed by the County Court of Blount County, Tennessee, and qualified as such, sues the defendant, the Southern Railway Company, a corporation, The Knoxville & Augusta Railway Company, a corporation, and the Tennessee & Carolina Southern Railway Company, a corporation, all which are duly in court by summons, for Twenty Thousand (\$20,000.00) Dollars as damages for this, to-wit:

That heretofore, to-wit: on or about the 8th day of July 1927, and prior thereto and since that date, the defendant railway companies were the owners and operators

of a line of railroad, running from Knoxville, Tennessee, to Calderwood, Tennessee, by way of Maryville, Tennessee, along which line of railroad the defendants had established, named, published and maintained many stations, one of which was Montvale Station, a few miles south of Maryville, on that part of said line of railroad running from Maryville to Calderwood, Tennessee, at which station a large number of people and patrons of the defendants were accustomed to go and board the trains of defendants to be carried to various points, and at which point trains on said line of railroad, operated by the defendants and prior thereto and since that date were accustomed to stop for the purpose of receiving and discharging passengers onto and from their trains and for the purpose of loading and unloading freight onto and from their trains, operated between Knoxville and Calderwood aforesaid and between the various stations along said line of railroad.

The plaintiff further avers that on the date aforesaid and prior thereto and since that date, a public road crosses said line of railroad at said Montvale Station at right angles to said railroad, over and along which public road a large number of people were accustomed to travel, as they had a right to do, on horses, wagons, buggies, and automobiles which was well known to the defendants, or should

have been known by the exercise of ordinary dilligence and observation.

The plaintiff further avers that along the east side of said line of railroad at said Montvale Station and within thirty feet thereof, is a large amount of trees, bushes and other shrubery, which obstructs the view of said railroad from one who is traveling along said public road, and on the east side of said railroad, on account of which it is impossible for one to see an approaching train on said line of railroad from the east side thereof, until within a few feet of said railroad crossing, and this condition existed on the date aforesaid, to-wit; July 8th, 1927, and was known to the defendant railray companies or should have been known by the exercise of ordinary diligence and observation.

The plaintiff further avers, that on the date aforesaid and prior thereto and since that date, there was and is now a store and grist mill located on the east side of said line of railroad and near thereto at said Montvale Station and near said public road crossing aforesaid, to which a large number of people were accustomed to go on

business, and was necessary for a large per-cent of the people going to said mill and store on business, to cross said line of railroad at said crossing, which fact was well known to the defendants, or should have been known by the exercise of ordinary diligence and observation.

The plaintiff further avers, that said public road on the east side of said railroad tract aforesaid at Montvale Station aforesaid, in approaching said railroad tract, and within ten feet thereof, is up grade, and he further avers that it was the duty of the defendant companies to keep said public road at said crossing and a distance of ten feet on each side thereof, on a grade level with said railroad, which it or they failed to do, said Montvale Station not being within the limits of a city, or taxing district or incorporated town.

The plaintiff further avers, that it was the duty of the defendant railway companies, through their vice-principals, agents and servants, in the maintenance and operation of said line of railroads and trains thereon and along and over said line of railroad and at said crossing aforesaid, and within a reasonable distance from said crossing

at said station and on approaching same, to sound the whistle and ring the bell on their trains, which they failed to do, at the time of the injury to plaintiff's intestate as herein-after set out, to warn the people traveling on said public road of the approach of trains.

The plaintiff further avers, that it was the duty of the defendant railway companies to operate their said trains through their vice-principals, agents, and servants across said public road, crossing at Montvale Station aforesaid, at a moderate, safe, and careful rate of speed, having said trains at all times under control, which they failed to do.

The plaintiff further avers, that on or about the date aforesaid, to-wit; July 8th, 1927, in Blount County, Tennessee, the plaintiff's intestate, Walter Fishburn, was driving his automobile along and over said public road at and near Montvale Station aforesaid, and that before he attempted to cross said line of railroad aforesaid, at Montvale Station, he, the said Walter Fishburn, brought his automobile to a full stop, looked and listened for approaching trains, and that after so stopping, looking, and listening, and hearing no trains he then proceeded toward said railroad with

intent to cross same, as he had a right to do, and just as he drove up the grade to said railroad and onto said railroad, without any fault or negligence or carelessness on his part, or without any negligence or carelessness upon the part of the plaintiff, or upon the part of the party for whose use and benefit this suit is brought, the defendant companies, through their vice-principals, agents and servants, without sounding the whistle or ringing the bell on said train, and without any warning whatever, ran one of their passenger trains, same being a special train, going south on said line of railroad, negligently, carelessly, recklessly, and without regard to the safety of human life, across said public road crossing at a high, dangerous, unsafe, reckless, negligent, and unlawful rate rate of speed, striking said Walter Fishburn's automobile, completely demolishing said automobile, bruising, wounding, maiming, said Walter Fishburn, and fracturing his skull, from the effects of said wounds, bruises and fracture the said Walter Fishburn died within a few hours thereafter, and that after said injury, the said Walter Fishburn suffered great pain and mental anguish, until he died as aforesaid. All of which injury, suffering, mental anguish, and death of the said Walter Fishburn, in the manner aforesaid, was caused by the negligence, carelessness,

recklessness, and unlawful acts, of the defendant railway companies, and not on account of any negligence, carelessness, or unlawful acts of said deceased, Walter Fishburn, nor on account of any concurring negligence on the part of the deceased Walter Fishburn, nor on account of any negligence or carelessness on the part of the plaintiff or the party for whose use and benefit this suit is brought.

The plaintiff avers, that the said Walter Fishburn, deceased, left a widow, Emila Fishburn, for whose use and benefit this suit is brought, but that he left no children, wherefore, the plaintiff, as administrator of the estate of the said Walter Fishburn, deceased, sues the defendant companies for Twenty Thousand (\$20,000.00) Dollars as damages aforesaid, and demands a jury to try the issue to be joined.

The negligence, carelessness, recklessness, and unlawful acts of the defendant companies, in causing the death of the said Walter Fishburn, deceased, aforesaid, are more specifically set out and charged as follows:

I.

The defendant companies, through their

Vice-principals, agents and servants were negligent and careless in causing the death of the said Walter Fishburn, deceased aforesaid, in that they failed to sound the whistle and ring the bell on said passenger train on nearing said railroad crossing at Montvale Station on the occasion, and at the time and place aforesaid, to warn the said Walter Fishburn, deceased, of the approach of said train as was their duty to do.

II.

That the defendant companies, through their Vice-principals, agents, and servants were negligent, careless, and reckless in causing the death of the said Walter Fishburn, deceased, in that they ran their train that struck the said Walter Fishburn at said railroad crossing at Montvale Station on the occasion, and at the time and place aforesaid, at an unlawful, rapid, careless, and reckless rate of speed in wholly and absolute disregard for human life.

III.

The defendant companies, through their Vice-principals, agents, and servants were negligent, careless,

and reckless in causing the death of the said Walter Fishburn, deceased, in that, at the time and place aforesaid, and on the occasion aforesaid, to-wit: July 8th, 1927, and prior thereto did unlawfully fail to maintain a grade of said public road on the east side of said railroad at said crossing at Montvale Station, on a level with the rails of said railroad, for a distance of ten feet on each side of said railroad tract, as was their duty to do, said crossing not being within the limits of a city, taxing district or incorporated town, so that when plaintiff's intestate, Walter Fishburn, deceased, attempted to cross said railroad on the occasion, and at the time and place aforesaid, said grade impeded the progress of his, the said Walter Fishburn's automobile, and caused it to slow down on said crossing, whereas, if said road had been on a grade with the rails of said railroad aforesaid, as required by law, said unlawful killing would not have happened. The defendants well knew that said crossing was a dangerous crossing.

Wherefore, the plaintiff, for the use and benefit of the said Emily Fishburn, widow of the said Walter Fishburn, deceased, sues the defendant companies for Twenty Thousand (\$20,000.00) Dollars as damages and demands a jury

to tey the issue to be joined.

J. M. CATES,

DUNN & JACKSON,

Attorneys for Plaintiff.

Filed October 10, 1927.

Peter Rule, Clerk.

C. A. FISHBURN, ADMINISTRATOR.

VS.

SOUTHERN RAILWAY COMPANY, KNOXVILLE
& AUGUSTA RAILWAY COMPANY, TENNESSEE
& CAROLINA SOUTHERN RAILWAY CO.

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No. 2730.

IN THE CIRCUIT

COURT AT MARYVILLE,

TENNESSEE.

P L E A

Come the defendants, Southern Railway Company, Knoxville & Augusta Railway Company and Tennessee & Carolina Southern Railway Company, by their attorney, and for plea to plaintiff's declaration filed against them in this cause, and to each and every count thereof, say that they are not guilty of the wrongs and injuries as plaintiff has alleged in his said declaration, and of this, their said plea, they put themselves upon the the country.

BROWN & JOHNSON,

and

Filed October 14, 1927.

Peter Rule, Clerk.

CHAS. H. SMITH,

Attorneys for the Defendants.

MONDAY, FEBRUARY 13, 1928.

STATE OF TENNESSEE,)
)
BLOUNT COUNTY.)

Be it remembered that at a Circuit Court began and held for the County of Blount, at the Courthouse in Maryville, Tennessee, on the Second Monday, it being the 13th day of February, One Thousand Nine Hundred and Twenty-eight (1928), it being the time fixed by law for holding said Court, present and presiding the Honorable Pat Quinn, Judge of the Fourth Judicial Circuit, duly elected, commissioned, and assigned to hold the Circuit Courts in the State of Tennessee, for Blount County, when the following proceedings were had and entered of record, to-wit:

Thereupon Court adjourned until tomorrow morning at 8:30 o'clock, a. m.

PAT QUINN, JUDGE.

W E D N E S D A Y F E B R U A R Y 2 9 , 1 9 2 8 .

Court met pursuant to adjournment, present and presiding the Honorable Pat Quinn, Judge, as on yesterday. The Minutes of yesterday were read and signed, when the following proceedings were had and entered of record, to-wit:

C. A. FISHBURN, ADMR.,

VS.

SOUTHERN RAILWAY CO., ET AL.

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No. 2730. Damage.

In this cause comes the plaintiff and moved the Court to be permitted to further amend its declaration filed in this cause, by treating the entire declaration originally filed in this cause, as Count No. 1, of said declaration, and that Count No. 2 be added to said declaration, consisting of all the original declaration so filed, down to paragraph No. 1, on fifth page of said declaration, with

the addition of the following after the word "follows" at the end of the twelveth line on page 5 of said declaration as a part of Count No. Two;

"The defendant companies were negligent, carelsss, and reckless in causing the death of the said Walter Fishburn, aforesaid, on the occasion aforesaid, in that it failed to keep a look-out ahead on its locomotive that ran against and over the said Walter Fishburn, deceased, and that when said Walter Fishburn's car in which he was riding appeared on the crossing aforesaid of said railroad at Montvale Station, they failed to sound its whistle and ring the bell on said locomotive, and failed to put down the brakes or do anything, or make any effort to stop said train."

Said motion being understood by the Court is in all things allowed and said amendments accordingly made.

And came the defendants and moved the Court that their plea heretofore filed in this cause, be now treated as filed to the declaration as now amended, which

motion is granted and the plea of the defendant is given
the same effect as if now filed to declaration as now amended.

C. A. FISHBURN, ADMR.,

VS.

SOUTHERN RAILWAY CO., ET AL.

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No. 2730. Damage.

In this cause came the parties and their
attorneys, also came a Jury of good and lawful men, citizens
of Blount County, Tennessee, to-wit: J. A. Coulter, John A.
Lowe, Pete Giffin, C. A. Jenkins, Fred Edmondson, M. T.
DeArmond, Jeff Whitehead, J. C. Hudgeons, T. S. McConnell,
Chas. McClurg, E. D. Brown, and Hartison Ingle, who were duly
elected, empaneled, and sworn to try the issues joined, and
a true verdict render, according to the law and the evidence,
and the trial of this cause not having been completed before
the hour of adjournment, said Jury was respited till tomorrow

morning at 8:30 o'clock.

Thereupon Court adjourned until tomorrow
morning at 8:30 o'clock.

PAT QUINN. JUDGE.

THURSDAY, FEBRUARY TERM.

MARCH 1, 1928.

Court met pursuant to adjournment, present and presiding the Honorable Pat Quinn, Judge, as on yesterday. The Minutes of Yesterday were read and signed, when the following proceedings were had and entered of record, to-wit:

C. A. FISHBURN, ADMR.,	0	
	0	
VS.	0	No. 2730. Damage.
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SOUTHERN RAILWAY CO., ET AL.	0	

In this cause came the same Jury, respited upon yesterday, and after hearing the arguments of counsel for both the plaintiff and the defendants, and after hearing the charge of the Court and retiring to consider of their verdict, upon their oaths do say, they find the issues in

favor of the plaintiff and against the Southern Railway Company and The Tennessee & Carolina Southern Railway Company on both Counts of the declaration, and fix the amount of damages at One Thousand Dollars.

It is therefore ordered and adjudged, by the Court, that in accordance with the verdict of the Jury, the plaintiff, C. A. Fishburn, Administrator, of the Estate of Walter Fishburn, for the use and benefit of Emily Fishburn, Widow of Walter Fishburn, deceased, have and recover of the defendants, The Southern Railway Company, and the Tennessee & Carolina Southern Railway Company, the sum of One Thousand Dollars (\$1000.00) and all the cost of this cause for which execution is awarded.

On motion of Jas. M. Cates, Dunn & Jackson, and Gamble, Crawford, & Goddard, Attorneys for the plaintiff, they are given a lien on the aforesaid recovery for their reasonable attorney fees.

Thereupon Court adjourned until tomorrow morning at 8:30 o'clock.

PAT QUINN, JUDGE.

SATURDAY, MARCH 17, 1928.

Court met pursuant to adjournment, present and presiding the Honorable Pat Quinn, Judge, as on Friday, March 2nd, 1928. The Minutes were read and signed, when the following proceedings were had and entered of record, to-wit:

C. A. FISHBURN, ADMR.,

VS.

SOUTHERN RAILWAY COMPANY, ET AL.

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No. 2730.
IN THE CIRCUIT COURT
FOR BLOUNT COUNTY,
TENNESSEE.

MOTION FOR NEW TRIAL.

In this case come the defendants, Southern Railway Company and Tennessee & Carolina Railway Company by attorneys and both and each separately move the Court to set aside the verdict of the jury heretofore rendered in this case at the present term of the Court in favor of plaintiff

and against these two defendants for \$1,000.00 and any judgment based thereon, and to grant these defendants both and each a new trial or rather to do that upon the sustaining of this motion which these defendants submit the Court should have originally done, to-wit: sustain ~~in~~ now a motion for peremptory instructions in favor of these defendants both and each and to dismiss the suit as to them, and as grounds of their said motion they both and each set down the following:-

-I-

The Court was in error in failing and declining to sustain and in overruling the motion made by both and each of these defendants at the close of the plaintiff's testimony, which was also the close of all the testimony in the case, that the Court peremptorily instruct the jury to return a verdict in favor of these defendants on the common law count of the plaintiff's declaration, among other reasons, there being no evidence submitted to the jury from which the jury would be justifiable in finding that these defendants had been guilty of any negligence under said count or about which the minds of reasonable men would be warranted in disagreeing in this respect. And furthermore, because, whatever

the negligence of these defendants, all the evidence submitted to the jury beyond contradiction that the plaintiff's intestate was guilty of such gross negligence, proximately contributing to his injury as that plaintiff's suit would be barred and as that plaintiff could not recover, and there being no conflict in the evidence in this respect as to which the minds of reasonable men would be justified in differing.

II.

The Court was in error in failing and declining to sustain and in overruling the motion made by both and each of these defendants as the close of the plaintiff's testimony, which was also the close of all the testimony in the case, that the Court peremptorily instruct the jury to return a verdict in favor of these defendants on the statutory count of the plaintiff's declaration, among other reasons, there being no evidence submitted to the jury making any Tennessee statute, and particularly that relied upon in the statutory count of plaintiff's declaration, applicable at all to this case, it being shown by all the testimony that plaintiff's intestate did not become an obstruction upon the track until the very instant of the collision between himself and the train which caused his death, and at a time

entirely too late to permit the compliance by these defendants with the precautions and requirements of the said statutes, and, further more, because there was a failure in the evidence to show a failure to comply with the statutory precautions and requirements and a failure to prove such a state of facts as would shift the burden to the defendants to show a compliance or an inability to comply, and there was no conflict in the evidence in these various respects and none as to which the minds of reasonable men would be justified in differing, and plaintiff's intestate being at the time of his injury engaged in the commission of a misdemeanor in that he was driving an automobile on a road across a railroad without coming to a full stop not less than ten feet or more than fifty feet from the nearest rail of the track as required by statute.

III.

The Court was in error in not sustaining and in overruling the motion of these defendants both and each that the Court peremptorily instruct the jury to return a verdict altogether in favor^{of} these defendants, made at the close of the plaintiff's testimony, which was also at the

close of all of the testimony in the case, among other reasons there being no evidence submitted to the jury to show negligence of either of these defendants under the common law count or under the statutory count of plaintiff's declaration, and the evidence being in accord and without conflict to the effect that plaintiff's intestate was guilty of such gross negligence, proximately contributing to his death, as to prevent plaintiff's recover under the common law count of the declaration and the evidence being in accord and without conflict to the effect that the Tennessee statutes relied upon in the statutory count of plaintiff's declaration never became applicable at all in this case, all of the evidence being to the effect that plaintiff's intestate only became an obstruction on the track at the very instant of his collision with the train that caused his death and at a time entirely too late to permit the compliance by the defendants with the precautions and requirements of the said statutes, and plaintiff's intestate being at the time of his injury engaged in the commission of a misdemeanor in that he was driving an automobile on a road across a railroad without coming to a full stop not less than ten feet nor more than fifty feet from the nearest rail of the track as required by statute.

IV.

There is no evidence to sustain the verdict of the jury in this case:-

- (a) On the common law count.
- (b) On the statutory count.
- (c) On both or either of said counts.

Whereas and for all of said reasons, these defendants move the Court to set aside the verdict of the jury heretofore rendered in this case at the present term of the Court and in the granting this motion, which is in the nature of a motion for a new trial, that the Court simply, instead of ordering a new trial, now sustain the motion for peremptory instructions, which these defendants both and each submit the Court should have sustained when the said motion above referred to was made.

BROWN & JOHNSON,

CATES, SMITH, TATE, & LONG,

Attorneys for Defendants.

This motion having been heard by the Court, it is taken under advisement of the Court to be passed upon Saturday morning, March 31st.

Thereupon Court adjourned until March 31st, at 8:30 o'clock.

PAT QUINN, JUDGE.

SATURDAY MARCH 31, 1928.

Court met pursuant to adjournment, present and presiding the Honorable Pat Quinn, Judge, ~~as on just~~ The Minutes were read and signed when the following proceedings were had and entered of record, to-wit:

C. A. FISHBURN, ADMR.,

VS.

SOUTHERN RY. COMPANY, ET AL.

No. 2730.

IN THE CIRCUIT COURT FOR
BLOUNT COUNTY AT MARY-
VILLE, TENNESSEE.

In this cause the motion which was heretofore made and taken under advisement of the Court to be passed upon on Saturday morning, March 31st., 1928, as stated above, came on to be finally determined by the Honorable ^{Court} Pat Quinn, Judge, and after reading over said grounds for motion of new trial and peremptory instructions and

having fully considered the matter, the Court overruled said motion for new trial and for peremptory instructions.

To which said action of the Court in overruling their motion for a new trial and peremptory instructions the defendants, Southern Ry. Company, and the Tennessee & Carolina Sou. Ry. Co., except and pray an appeal to the next term of the Court of Appeals, which meets at Knoxville, Tennessee. Said appeal is granted by the Court upon the defendants giving and filing with the Clerk an Appeal Bond, which has been done, and defendants are given thirty days time from this date, within which to perfect and file with the Clerk of the Court their Bill of Exceptions.

Thereupon Court adjourned until Saturday June 2nd at 8:30 o'clock.

PAT QUINN, JUDGE.

A P P E A L B O N D.

S T A T E O F T E N N E S S E E. B L O U N T C O U N T Y.

C I R C U I T C O U R T A T M A R Y V I L L E, T E N N.

We, Southern Railway Company, and Tennessee and Carolina Railway Company, and Cates, Smith, Tate, & Long, and Brown & Johnson, acknowledge ourselves indebted to C. A. Fishburn, Admr., in the penal sum of Two Hundred and Fifty Dollars, for the payment of which we bind ourselves, our heirs and personal representatives jointly and severally by these presents; but to be void, if the said Southern Railway and Tennessee Carolina Railway, shall effectively prosecute an appeal taken to the next term of the Court of Appeals to be held at the Court House in Knoxville, Tennessee, from a judgment rendered against them in the Circuit Court at Maryville, on the 17th day of March, 1928, in the case of C. A. Fishburn, Admr., Vs. Southern Railway Co. and Tennessee Carolina Railway in said Court, or failing therein, shall pay the amount adjudged against them with interest and damages, and also satisfy the judgment that may be rendered against

them by the Court of Appeals in the premises.

Witness our hands and seals the 31st,
day of March, 1928.

SOUTHERN RAILWAY COMPANY, (SEAL)
By Thos. N. Brown, Atty.

TENNESSEE & CAROLINA RAILWAY CO., (SEAL)
By Thos. N. Brown, Atty.

CATES, SMITH, TATE & LONG, (SEAL)
Surety

By Thos. N. Brown, by Authority.

BROWN & JOHNSON, (SEAL)
Surety.

Filed 31st., day of March, 1928.

Peter Rule, Clerk.

IN THE CIRCUIT COURT OF BLOUNT COUNTY, TENNESSEE.

AT MARYVILLE.

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C. A. FISHBURN, ADMINISTRATOR

OF WALTER FISHBURN,

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No. 2730.

Vs.

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DAMAGES.

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SOUTHERN RAILWAY COMPANY.

KNOXVILLE & AUGUSTA RAILROAD CO.

and TENNESSEE & CAROLINA SOUTHERN

RAILWAY COMPANY.

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BILL OF EXCEPTIONS.

APPEARANCES:

For the Plaintiff, Messrs. James Cates,
Dunn & Jackson, and Gamble, Crawford
& Goddard.

For the defendants, Messrs. Brown &
Johnson, and Hugh M. Tate.

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Maryville, Tennessee, February 29, 1928.

This case came on for trial before the Honorable
Pat Quinn, Judge, and a jury, on this February 29, 1928,
when the following were all of the proceedings had and
evidence adduced.

The witnesses were called, sworn and
excused under the rule.

The Jury was selected, impanelled and
sworn.

The pleadings were read.

The plaintiff then introduced the following evidence:

PLAINTIFF'S EVIDENCE:

C. A. FISHBURN, the plaintiff, of lawful age, being first duly sworn, testified as follows on:

DIRECT EXAMINATION

BY MR. JACKSON:

Q Your name is C. A. Fishburn ?

A Yes.

Q You are the duly appointed executor or administrator of the estate of Walter Fishburn, deceased ?

A Yes.

Q Is Walter Fishburn dead or alive ?

A He is dead.

Q When did he die ?

A On the 8th of July.

Q I show you a paper writing
and ask you if that is your letters of administration
issued by the County Court of Blount County ?

A Yes.

Q Will you file those as
Exhibit # 1 to your testimony in this case ?

A Well, how was that ?

Q Will you file this paper as
Exhibit # 1 to your testimony in this case ?

A Yes.

(The original will be sent up with the transcript)

Q How old was Walter Fishburn
at the time of his death ?

A About sixty-one years old.

Q In what state of health was
he ?

A He was in very good health.

Q Where was he living at the time
of his death ?

A Making his home with me.

Q How long had he been living with
you prior to his death ?

A About eight months I think -
I think it was eight months.

Q What kind of work was he doing
at the time of his death ?

A Well, he was just helping there
with me then. He had worked out some, out at other jobs,
carpenter work and the like.

Q You live on a farm, do you ?

A Yes.

Q What was Walter Fishburn's
trade or occupation, generally speaking ?

A Well, he was what you might
call an all-round mechanic, could do anything he wanted
to do.

Q What kind of mechanical work
did he do ?

A He was a pattern maker for
one thing, and a fine circular sawyer.

Q What wages did that class of
work pay ?

A Well, he always got, when he
sawed he got \$5.00 a day and his board for sawing, but
when he worked at the pattern maker's business he got more

than that, \$6.00 or \$8.00.

Q Immediately preceding his death did you know how much he was making a month or a year ?

A No, I did not exactly - he was - I could not say for sure just how much he was making.

Q Now you say you live on a farm. How far was that farm from Montvale Station ?

A Well, I guess it is about a mile and a half, maybe a little farther than that.

Q On which side of the railroad, the east or the west side ?

A We lived on the north side, on the north side of the railroad.

Q Are you acquainted, Mr. Fishburn, with that railroad crossing there at Montvale Station ?

A Yes.

A Yes.

Q How long have you known it ?

A Lived there for about twelve or thirteen years I guess.

Q How often have you been to that

station ?

A Well, pretty often, we generally go over to mill there every Saturday, you know.

Q State whether or not there is a mill at Montvale Station ?

A Yes, Mr. Hannah has a mill there, Bob Hannah.

Q (Drawing diagram on floor)
I am making a couple of tracks on the floor to represent two rails of the railroad company's line of railroad as it runs from Maryville -

JUDGE GAMBLE: (Interposing) Just show the directions and put the public road the way it runs there.

THE COURT: Yes, put it across the other way.

MR. JACKSON: All right (Drawing diagram on floor) I have drawn a rough diagram on the floor and I will mark this "public road", which is supposed to run nearly east and west. How does that road run there ?

THE WITNESS: What direction does the
railroad run ?

BY MR. JACKSON:

Q No. the public road.

A It runs nearly - I don't know
how to tell that - it runs rather north and south. It
is not exactly due either way.

Q I will make the crossing here
with four tracks here, these two tracks here (indicating)
represent the main line of the defendant Southern Railway
Company and the other railroad companies mentioned --

JUDGE TATE: (Interposing) I except to
the statement of counsel that they are the lines of the
defendant companies and ask that that be withdrawn
from the jury.

THE COURT: Yes.

MR. JACKSON: We withdraw it. That
railroad company's line, or the railroad that crosses
that public road at Montvale, what railroad is that ?

JUDGE TATE: If you know.

THE WITNESS: They call it the Tennessee & Carolina Southern, or Southern road.

BY MR. JACKSON:

Q Do you know who operates that road now ?

A Only what I hear. I understand the Southern runs it is all I know - I don't know who runs it.

JUDGE TATE: We except to the statement of the witness as to his understanding.

THE COURT: That is incompetent.

MR. JACKSON: We are not insisting on it.

JUDGE TATE: All right, you withdraw that ?

MR. JACKSON: Yes.

BY MR. JACKSON:

Q Had you seen trains recently before this accident pass along this railroad ?

A How was that ?

Q Had you seen passenger trains pass along there before that time ?

A Yes.

Q Had you noticed any printed names on the coaches ?

A Marked "Southern".

Q What ?

A Southern road, "Southern R. R."

Q Southern R. R. ?

A Yes.

Q Did you notice anything else printed on it ?

A Anything else ?

Q Yes.

A No. I didn't pay any particular attention.

Q Had you noticed what printing was on the equipment used on that line ?

A How was that ?

Q Had you noticed any other printing around on any equipment used on that line ?

A Generally the car boxes, like all of them, are marked that way, some of them and some of them are sometimes Southern car boxes and then again L. & N., and all kind of car boxes go down there.

Q Now, how many tracks at Montvale Station cross this road ?

A How was that ?

Q How many tracks at Montvale Station cross that public road, how many railroad tracks ?

A There is a side track and main line.

Q A main line ?

A Yes.

Q On which side of the main line is the side track ?

A On what we call the south side.

Q On what you call the south side ?

A Yes, this side over here
(indicating)

Q Is it to your left or right,
going from Maryville to Calderwood ?

A It is on the left going down.

Q Does this diagram on the floor
fairly represent the crossing there ?

Q Does it fairly represent it ?

A Yes.

(A copy of the diagram is attached and made a part of this
bill of exceptions and will be sent up with the transcript)

Q Is there a mill anywhere there,
Mr. Fishburn - but before we get to that, this road comes
across, this road coming from this way over to the east
side, this road turns after it crosses the road ?

A No, the way it is, directly out
there a piece from Hannah's Mill it makes a turn, but it
is straight out there for a right smart little piece.

Q How far is the road straight
before it makes a turn ?

A Well, I guess it is something
like 200 feet or more to where it makes the turn.

Q Where is Mr. Hannah's mill
with reference to the turn in that road ?

A Well, Mr. Hannah's mill - I
don't think it is over 150 to 200 feet away from the rail-

road.

Q I know, but where is it with
reference to --

A (Interposing) The bend in
the road ?

Q Yes.

A I expect it is 50 to 75 feet,
maybe a hundred feet.

Q I wish you would take this
pointer and point out here about the location of that
mill with reference to that turn there ?

A Well, Mr. Hannah's mill - this
is the side track, and Mr. Hannah's mill is right along
in there (indicating).

Q Now, is there a store there
anywhere ?

A A store ?

Q Yes.

A There is a store right along
there.

Q And whose store is that ?

A Mr. Huffstetler's.

Q Mr. Huffstetler's store ?

A Yes.

Q And Hannah's mill ?

A Yes.

Q Now, is there a little bridge there anywhere ? Any bridge across there ?

A Yes, there is a creek or a branch, whatever you call it, runs straight through there and runs up into the field.

Q State whether or not there is a bridge or culvert across there ?

A There is a culvert there and this creek goes through the culvert in here.

Q Where ?

A Right through under the road.

Q Does that culvert run right across the public road ?

A Yes.

Q Does the diagram I have drawn, on the floor fairly represent the location of the buildings and the creek and culvert ?

A Yes, pretty well, I think.

Q Now, Mr. Fishburn, I will ask you, in going across this line of railroad from the east

to the west or the southwest to the northwest, whichever it may be, if there is anything along the side of the railroad track obstructing the view going in that direction (indicating) ?

A Yes, it is growed up with underbrush all along there.

Q How far up does this underbrush go ?

A Away up there (indicating), for something like a quarter of a mile I guess -- up a good long ways.

Q How close does this underbrush come to this side track right there ?

A I don't know just how many feet, I expect it was up in -- I guess somewhere from 15 to 20 feet -- I am just guessing at it that way.

Q I believe you say they run up about a quarter of a mile - how high are those bushes ?

A There are plenty of them as high as a telephone pole.

Q About how high would that be in feet ?

A There were plenty of them
20 feet high.

Q 20 feet high ?

A Yes, but they were not all
that high.

Q About how many trees were
there along there, a few or many ?

A Oh, so thick you could not
see through them.

Q So thick you could not see
through them ?

A Yes.

Q That part of it ?

A Yes.

Q For what distance up this
way (indicating) ?

A Well, it would be anyway above
that toolhouse up there (indicating) , before you could
see it at all.

Q How far is the toolhouse up
the railroad towards Maryville ?

A I don't know that I could hardly
tell you, but up the road a right smart piece.

Q Give your best impression and estimate of how far it is ?

A How ?

Q Give your best impression as to how far it is.

A It is a quarter anyway I guess, something like that.

Q You mean a quarter of a mile ?

A Yes, maybe not quite so far - I would not want to be positive in that, I don't know.

Q What is right in there just east of this underbrush or this woodland up and down the road there - what is right in there where that creek goes down or the branch -- is that open or is it woodland ?

A I do not understand how you mean ?

Q Right where this creek goes down towards Calderwood where it crosses the railroad, just on north of that, is it woodland or in a field or open ?

A No, it is a field I expect right along the track there where it was growed up, they

had tended it there.

Q Now, just on the east side of this branch and nearly opposite Hannah's mill, what is the condition over there, is it woodland or a field or is it open ?

A Open field.

Q No woodland along there (indicating) at all ?

A No.

Q How close did this brush or woodland come to the public road ?

A It comes nearly right down to the crossing. I suppose it would lack possibly eight or ten feet coming to the crossing.

Q You mean to what ?

A To where the dirt road crosses.

Q To where the dirt road crosses ?

A Yes.

Q Is there any building over on the other side of the railroad ?

A Yes, there is a store over on that side.

Q I will ask you, Mr. Fishburn,
if a large number of people go to visit that mill and
store ?

A Yes, lots of people go there.

Q Now, people coming from that
store and the mill from the east or north side of the
railroad, state whether or not they have to cross the
railroad ?

A Yes, they have to cross it --
can't get across there any other way.

Q I believe you say you lived
on the east side ?

A Yes, on that side (indicating)

Q On the north side ?

A Yes, on the other side - we
live on that side over there (indicating).

Q What are the rails of this
railroad lying on ?

A How was that ?

Q What does the rails rest upon ?

A I don't understand exactly
what you mean.

Q What do the railroad rails rest

upon ?

A I don't know.

Q Does it rest upon wood or
what ?

A Oh, I understand now, on cross-
ties.

Q I will make some cross marks,
I have made some cross marks - do they fairly represent
the crossties ?

A Yes.

Q Do those cross ties reach across
this public road ?

A Yes, there are ties in there
but they are principally covered up with dirt.

Q Covered up ?

A Yes.

Q Now, Mr. Fishburn, there is, or
is there any grade on this road leading from this point
here at Hannah's mill going towards the railroad ? Is
it level or is it on a grade ?

A No sir, it is not exactly on
a grade, but it is a little up there - the railroad is
a little high but I don't know how much.

Q What distance is it between this main line of the railroad and then what you call the spur track ?

A How far it runs ?

Q No, how close do those two lines of railroad come together ?

A I don't know exactly.

Q Give us your best impression ?

A I guess about six feet - something like that.

Q Do you know how wide the railroad is between the two rails ?

A No, I do not.

Q Now, which is the main line railroad, Mr. Fishburn ?

A That one (indicating on diagram) over there where you have it laid off.

Q You mean the far line from you ?

A Yes, that is the main line on that side (indicating) .

Q This one (indicating) ?

A Yes.

Q That is the main line ?

A Yes.

Q Does this spur track here join the railroad up here anywhere (indicating) ?

A Yes, it goes in above.

Q Then does it run into the railroad down below ?

A Yes, it runs down below and - goes in - well, it used to go in - I don't know whether it goes in or not - they once cut it out down below.

Q Now, just below this railroad crossing going towards Calderwood, what is along this line or spur track right there (indicating) ?

A In below ?

Q Yes.

A On the north side there (indicating) ?

Q Yes.

A Well, some underbrush there but not a great deal.

Q I will ask you if there is a lot of wood or timber or lumber there anywhere ?

A Yes, there is stuff packed up

there but I can't say whether it was - yes, there is a lot of wood or something out that way.

Q Now, to get to these yards where this wood is stacked up, how do you get from there to the public road ?

A You go ~~down~~ in front of this store down between the tracks.

Q You mean between the spur track ?

A Yes.

Q Does that fairly represent the road as it goes down there (indicating) ?

A Yes, going around down there between the store and the railroad.

Q Now, on the morning of July 8th, did you and your brother come to Montvale Station ?

A Yes.

Q Where did you come from that morning ?

A From home.

Q How were you traveling ?

A How was that ?

Q How were you traveling ?

A Coming in a Ford Coupe.

Q Whose car was it ?

A It belonged to him.

Q To Walter ?

A Yes.

Q State whether or not you
crossed this railroad going towards Hannah's mill ?

A Yes, we come across on that
side.

Q Where were you going ? To
Mr. Hannah's mill ?

A Yes.

Q Did you go to the mill ?

A Yes, we went to the mill or
up pretty close to it, and stopped.

Q In crossing this railroad
going to Hannah's mill, how would you have to get
across there, tell us how you traveled ?

A What we stated ?

Q No, the way you went up
there ?

A I was aiming to come to the
mill and he said to take his car and drive it and I said
I could not do anything with his car, and I would just take
the horse and go to the mill and he said "If you can't

drive it I will go with you and drive it", and we loaded the corn on the car and we run on over to Montvale and when we got there on the far side he said "You help me watch out for the train."

Q On that side (indicating) ?

A Yes. He said "You help me watch out for the train." I looked both ways and you could see good on both sides.

Q Can you see the railroad for quite a distance from that side (indicating) ?

A Yes, you could see good from that side and I told him I didn't see anything, to run across, and when he got up close to Mr. Hannah's mill I looked up and I said "There is nobody here", and I said "We had as well go back and come some other time", and so I got out of the car - he stopped the car --

Q (Interposing) Now, Mr. Fishburn, you take this piece of chalk and mark upon that map just about where the car stopped ?

A Well, we came on over here (indicating), and there was a platform that runs out here in front of Mr. Hannah's mill, and of course this is so close here (indicating), it don't show up and I will have

to rub it out and make it like it was - w e came on here until we got to this platform here (indicating).

Q Will you stand over here so the jury can see you ?

A Yes. And before we got to this platform we stopped right there and I said to my brother, I said "You turn around and I will run to the store and we will go back home." I got out and the car was headed this way. (indicating).

Q You mean headed towards the east ?

A Yes, I got out of the car.

Q You mean from the railroad ?

A Yes, it was headed from the railroad and I got out of the car and went up to the store - I don't know how far it is, it didn't take me very long to walk it and about the time I got in the store the train ran past and it was running extra fast, faster than I ever seen a train run on this track, and I didn't hear any peculiar noise, and I said "It don't make a noise like I thought it ought to", and I walked to the door, and when I got back to the door his car was turned around with the front end of it back like that

(indicating), turned towards the railroad that way, hardly completely around.

Q Now, was the car lying on the railroad track there, one of the railroad tracks ?

A How was that ?

Q Was the car lying on either one of the railroad tracks ?

A The main part of the car had been knocked around onto the side track.

Q Was it off the public road or on the public road ?

A No, knocked him off the public road.

Q About how far off the public road ?

A I suppose about the width of it or maybe a little over.

Q Where was your brother Walter ?

A He was laying down in between, right along in between --

Q You mean between the two tracks ?

A Yes, he was laying right along there with his head down this way (indicating) and his feet up this way. That is, right along on the cross ties.

Q About how far from the road crossing ?

A Well, I don't know - I just don't know how to tell you how far that was. He was laying I suppose about 10 feet from the car.

Q From where ?

A From the car where it fell over.

Q Give your best impression how far he was down between those two tracks south of the line of the railroad ?

A How was that ?

Q I say, give your best impression how far he was lying south of the public road ?

A I could not tell you, unless I guessed at it.

Q Well, give your best impression ?

A Well, I suppose it was about

30 feet or maybe more.

Q Was he directly between
the tracks ?

A Yes.

Q I will make a mark here -
does that fairly represent where he was ?

A Yes.

Q Did you immediately go
to him ?

A Yes, I went to him as
quickly as I saw or as quick as I looked out the door -
the first thing I ran to him.

Q What was his condition
when you got down to him ?

A Well, I could not tell
much about it - he was laying there, is about all I
could tell, and didn't know anything.

Q Were there any wounds on
him ?

A No, he was just laying there
like he had been knocked in the head, is all I could
tell you.

Q You say laying like he

was knocked in the head ?

A Yes.

Q Why do you say that ?

A Well, he didn't move or anything.

Q Was he bleeding anywhere ?

A How was that ?

Q Was he bleeding ?

A Well, a little blood was running out of his mouth.

Q Did you speak to him ?

A Yes, I raised his head up.

Q Did he speak to you ?

A No.

Q Was he wounded anywhere except in his head ?

A I didn't catch that.

Q Was he wounded anywhere except in his head ?

A I could not see that he was.

Q Where did you carry him to then ?

A To the hospital, the
Riverside Hospital.

Q What time of day was that
when this accident took place ?

A Oh, I just don't know
exactly, I didn't look at any watch, but it was some-
where I judge between eight and nine o'clock.

Q You mean in the morning ?

A Yes, in the morning.

Q Then what time did you
get him to the hospital ?

A I guess something like
eleven o'clock. I didn't time it.

Q He later died ?

A Yes, he died after we got
there.

Q About what time did he
die ?

A I did not try to keep any
record of it, he only lived thirty or forty minutes
after he got over there.

Q After you got him to the
hospital in Knoxville ?

A Yes.

Q What hospital was that ?

A Riverside Hospital.

Q Now, after this train struck this car, you didn't see it strike the car ?

A No.

Q You only saw the condition after it struck it ?

A Yes, I was in the store then.

Q Did the train stop ?

A Yes, I think the train had gone or had stopped a good long ways below there.

Q What kind of a train was it ?

A It was a passenger train.

Q Do you remember how many coaches ?

A I didn't count them. It was a special hauling a Bible class from Knoxville up there.

Q Do you know where they were going ?

A How was that ?

Q Do you know where they were going ?

A They said they were going to Calderwood.

Q What condition did you find the car in ?

A Oh, it was tore - or something had struck the fender - it had been struck, the front brace of the car right where the fender brace runs up under the automobile and where the first motor hanger fastens the motor up and the radiator was twisted over that way and right back.

Q What kind of a car was it ?

A A Ford coupe.

Q What did you do with the car, did you move the car away?

A A gentlemen told me to take it after the accident was over and keep it.

Q Who told you that ?

A The railroad man - the man they sent down there - I have forgotten his name, they sent him down there to figure on the damages - he told me to go ahead and pick the car up --

A How was that ?

Q Do you know where they were going ?

A They said they were going to Calderwood.

Q What condition did you find the car in ?

A Oh, it was tore - or something had struck the fender - it had been struck, the front brace of the car right where the fender brace runs up under the automobile and where the first motor hanger fastens the motor up and the radiator was twisted over that way and right back.

Q What kind of a car was it ?

A A Ford coupe.

Q What did you do with the car, did you move the car away?

A A gentlemen told me to take it after the accident was over and keep it.

Q Who told you that ?

A The railroad man - the man they sent down there - I have forgotten his name, they sent him down there to figure on the damages - he told me to go ahead and pick the car up --

JUDGE TATE: I except, if your Honor please, unless they get that man identified.

THE COURT: Yes.

BY MR. JACKSON:

Q Do you see that gentleman sitting by Judge Tate, there, was that the man ?

A No.

Q That was not the man ?

A No.

Q Then what did you do with the car ?

A I taken it over home.

Q How did you carry it home ?

A We had put the front part up on the hind part of a wagon.

Q Did you have a photograph taken of the car ?

A Yes.

Q Have you got it over there ?

A Yes.

Q Was the car in the same condition so far as the picture is concerned, as it was

after you found it in the wreck ?

A Yes, taken the next morning.

Q Did you see the pictures taken yourself ?

A Yes.

Q I hand you a picture and ask you if that is a picture of the car and if the picture there shows the car in the same condition as it was that you found it immediately after the accident ?

A Yes.

Q Will you file that ?

A Well, I taken three of them.

Q Will you file that one as Exhibit # 2 to your testimony ?

A Yes.

(The original will be sent up with the transcript)

Q Did you see your brother after you got out of your car in front of Hannah's store, did you see him any more before he was killed ?

A No, I never saw him any more until I saw him on the pike down there.

Q About how far is it from

this main line of railroad over to where you got out of the car ?

A Oh, I never did measure it, but I suppose it is right around somewhere 150 feet over there.

Q A hundred and fifty feet ?

A Yes, around that.

Q Do you know where Walter turned his car ?

A How was that ?

Q Do you know where Walter turned his car ?

A No, I don't know.

Q I don't know whether I asked you how old Walter was, how old was he ?

A How old was Walter ?

THE COURT: You asked him and he said sixty-one years old.

THE WITNESS: Sixty-one years old.

JUDGE TATE: Sixty-one.

THE COURT: Anything else ?

MR. JACKSON: Yes.

BY MR. JACKSON:

Q Mr. Fishburn, when you got out, or how long was it after you stopped over here on the west or northwest side of the railroad and you and your brother had the conversation about the train, how long was it afterwards until you got out of the car ?

A Oh, it was just as quick as we could run over there. We were running slow but not a but a very few minutes.

Q How many minutes ?

A It could not have been over five minutes from the time we were on that side until we came to Bob Hamah's.

Q Did you hear, when you were over on this side, did you hear any trains whistle ?

A No.

Q How far could you see up the line towards Maryville ?

A From that side of the rail-

road ?

Q Yes.

A We could see a long ways.

Q About how far ?

A I guess you could see about
a half a mile, maybe more.

Q Now, after you crossed
this line of railroad and got out of the car over here
(indicating), and you came back to Huffstetler's store
did you hear any train whistle ?

A No.

Q Could you have heard it if
it had whistled ?

A Yes, I think I could if it
had blowed for the crossing, I could have heard it.

Q Were you in a position to
have heard it if it had whistled ?

A Yes.

Q As the train approached where
were you and when the train passed ?

A I was in the store.

Q Was it ringing any bell ?

A I never heard any.

Q Could you have heard it
if it had rung any bell ?

A Yes, I didn't know it came
until it had passed.

Q Were you in a position to
have heard the bell as it crossed that line of road if
it had rang ?

A Yes, I think so.

Q Who else was in the store
with you ?

A Two or three, Ross Huffstetler,
and I don't know, that is the man who runs the store.

Q When you came out of the store
was there anybody out there ?

A Mr. Giffin.

Q Which Giffin is that ?

A Dick Giffin and the boy
was down here loading some bark or some lumber or some-
thing down right in below there, they told me but I didn't
see them.

Q When you came up to Walter
had anybody come to him ?

A How was that ?

Q Had anybody come to Walter
before you got there ?

A No.

Q Now, you spoke about some
railroad man telling you to take care of the car --

JUDGE TATE: I except to what he said
about what the railroad man told him, because it has
not been proven who he was.

BY MR. JACKSON:

Q Would you know that man
if you saw him that talked to you about the car, is
that the man talking to Mr. Cooley over there ?

A That man there (in-
dicating).

Q Is that the gentlemen ?

A Yes, I think he is the man
(indicating) Mr. Gresham).

Q Now what did he tell you ?

A He told me to go ahead and

take the car up and take it home. I told him that I didn't know that I had any right to do it, and he said "Yes, go ahead and take it, if you leave it there the railroad, or nobody else, won't get any benefit out of it - they will steal everything off of it if it stays there one night," and I sort of hesitated and he said "It is perfectly all right", and he said "If the railroad has to pay for it you keep an account" ---

MR. JACKSON: Wait a moment - go ahead.

THE WITNESS: He said "If the railroad has to pay for it, you keep an account what you get out of it", and he said "That can be deducted from it", and if it don't have to pay for it then you will have just that much to trade."

BY MR. JACKSON:

Q While you were there where Walter was laying between the railroad track, did anybody come up there ?

A How was that ?

Q Did anybody come up where

you were there with Walter ?

A Yes, a half a dozen after the train passed - more than that, and four or five helped carry him off to the platform.

Q How far do you say it was after crossing this railroad and after it hit Walter's car before the train stopped ?

THE COURT: He said he didn't know, but if he can tell.

THE WITNESS: It was a pretty good ways. I can't tell you.

BY MR. JACKSON:

Q You can't tell ?

A No.

Q Were there any freight cars in that train or was it just passenger coaches ?

A No, I don't think there were.

Q You don't think there were ?

A No.

Q Can you say, Mr. Fishburn, how fast that train was running ?

A No, it was running - but I would not say, or would not be able to tell how fast it was running -- I don't want to tell how fast, but it was running faster than I had ever seen it pass there.

Q After the train stopped, as you have described, did it come back up there ?

A Yes, it finally backed up there after we had laid him on the porch.

Q It backed up ?

A Yes.

Q Did you know the schedule of the train along there at that time, did you know the schedule ?

A No, I did not. I was not positive that I knowed, but they told me this train was running forty minutes ahead as a special train.

Q You don't know about that yourself ?

A No.

Q State whether or not this was what they termed a "special train" ?

A Yes.

Q Now, Mr. Fishburn, did
Walter Fishburn have a wife ?

A Yes.

Q What was her name ?

A Emily Fishburn.

Q She is living ?

A Yes.

Q At the time of Walter's
death did he have any children ?

A No, he didn't have any
children.

Q None at all ?

A No.

Q Mr. Fishburn, do you know
how long Montvale Station on this line of railroad has
been a station there ?

A How was that now ?

Q Do you know how long Mont-
vale Station has been there ?

A No, I don't. It was a
station there when they first started the railroad,
but I don't know how long it has been.

Q You don't know how long ?
A No.
Q Are there quite a few
houses there ?

A Yes.

Q Could you say as to how
many ?

A Well, let me see there are
two, three, four, five - this house on this side of the
railroad - I can't remember right now.

Q You mean on the right hand
side going towards Calderwood ?

A Yes, and still a little far-
ther on Mr. Costner lives, on this side, Arthur Costner,
and Mrs. Gallagher has a house on this side of the rail-
road, they are tolerable close to the road.

Q Is there a church there
anywhere ?

A Yes, a church on top of
the hill.

Q A church on the hill ?

A Yes.

Q What is the name of that
church ?

A It is Carpenter's -- used
to be called Carpenter's Camping ground.

Q Is that on the left above
the railroad ?

A Yes.

Q Is there a school building
there anywhere ?

A The school building is on
the other side - it is nearly a half a mile out there
to the school building. It is on the other side of the
track.

Q On the road as you go towards
Calderwood ?

A Yes.

Q State whether or not that
is a central point in that section ?

A How was that ?

Q Is that a central point for
that entire section there ?

A Yes.

Q Do trains stop there to take
on and put off passengers ?

A Yes, it generally stops, the

regular train does.

Q Do they load and unload
freight at that station ?

A Yes.

Q On and off of trains of
this railroad company ?

A Yes.

Q And along this side track
what do they load, on this side track (indicating) ?

A Well, they load a little of
everything, cross ties and bark and lumber and acid wood.

Q Did they unload freight on
that spur track there on the main line ?

A On the main line.

Q Which line of railroad here
do they take on and put on freight that is in cars ?

A On this siding off on the
spur track.

Q Off on the spur track ?

A Yes.

CROSS EXAMINATION

BY JUDGE TATE:

Q How long, Mr. Fishburn,
had your brother been making his home with you ?

A How was that ?

Q How long had your brother
been making his home with you ?

A About eight months - he was
there practically all the time.

Q Where had he been before
that ?

A Where had he been before
that ?

Q Yes.

A They sent him to the peni-
tentiary.

Q And he got out of the peni-
tentiary about eight months before his death ?

A Yes.

Q He had not lived with that
lady you say was his wife in that eight months ?

A How was that ?

Q He had not made his home
with the woman that you call his wife ?

A No, not since he came
back.

JUDGE GAMBLE: I except to that unless
they show that contributed to this accident.

JUDGE TATE: The suit is brought for
her benefit, and we have a right to question whether she
was in fact his widow.

THE COURT: Find out about that.

JUDGE GAMBLE: If there is a question
made on that we now ask to amend the warrant to include
C. A. Fishburn, and for the benefit of C. A. Fishburn.

JUDGE TATE: We will see about that.
Is this Millie Fishburn here as a witness ?

THE WITNESS: Yes.

BY JUDGE TATE:

Q She is here as a witness ?

A Yes.

Q Where did she live at the

time ?

A She lived over at Lenoir
City.

Q Lenoir City ?

A Yes.

Q Over in Loudon County ?

A Yes.

Q Do you know who she was
living with ?

A She is living with some
of her kin folks -- I don't know.

Q Did he live there practically
with you for eight months ?

A Yes.

Q He had not had any actual
work within that eight months ?

A Well, I can explain to you
why he was there, if it is satisfactory.

Q He had not had any regular
work during that eight months ?

A How was that ?

Q Had he had any regular
work during that eight months ?

A He had worked some out there while he was there.

Q But at no regular work ?

A No.

Q Not on any salary or wages for any time at all ?

A No, he had not worked out regular.

Q How long had it been since he had been in this regular work which you said he was doing ?

A He had not worked at it any since he came back.

Q How long was it that he was at the penitentiary ?

A How was that ?

Q How long was he in the penitentiary ? How long was he confined in the penitentiary before he was pardoned ?

A About six years.

Q You say six ?

A Yes, or seven years. He had not served out his term.

Q He was in for life, was he not ?

A Yes.

Q And got pardoned after he
was there six or seven years ?

A Yes.

JUDGE GAMBLE: We object to that and
we might as well thresh it out now - we object to
that unless the fact that he was in the penitentiary
contributed towards his accident or --

THE COURT: I take it they are trying
to show what his earning capacity was -- that is your
idea about it, Judge Tate ?

JUDGE TATE: It is competent on the
question of the measure of damages.

THE COURT: That is on his earning of
wages ?

JUDGE GAMBLE: I would like for your
Honor just to let him go on now, I think we can bring
an authority on that.

THE COURT: All right.

JUDGE GAMBLE: But we wish to except to it.

JUDGE TATE: I offer it on the measure of damages, for it all gets to that.

JUDGE GAMBLE: We except to that.

THE COURT: That is one of the very questions in the lawsuit.

BY JUDGE TATE:

Q It had been then six or seven years and eight months intervening between the time when he had done any regular work or done any pattern work ?

A How was that ?

Q It had been six years at any rate, six or seven years since he went away ?

A Yes.

Q And eight months intervened since he had done any pattern work ?

A Yes.

Q Or any regular work ?

A Yes, six or seven years,
I don't know exactly how long.

Q Before he went to the peni-
tentiary he was confined a year or more waiting for his
trial ?

A Yes.

Q So it had been seven or
eight years since he had done any regular work, or done
any pattern work ?

A Somewhere along there - I
don't know exactly.

Q I take it when he went there
to live with you, that for helping around the farm he got
his board and keep, is that right ?

A No, I paid him - I was to
pay him \$25.00 a month and board him.

Q Did you pay him \$25.00
a month ?

A That was the contract.

JUDGE GAMBLE: It don't make any dif-
ference if he ever paid him.

BY JUDGE TATE:

Q You say that he was making
\$25.00 a month ?

A He was paroled out to me
with the understanding that I would pay him that much.

Q You had a contract ?

A Yes.

Q The trade was with the
State ?

A Yes.

JUDGE TATE: It is certainly competent.
That was the condition of your taking him ?

JUDGE GAMBLE: This is not brought for
the benefit of Walter Fishburn. It is brought for the
benefit of somebody else, and these things are merely to
crowd the lawsuit on the cause of the death of the man.

JUDGE TATE: Not at all.

JUDGE GAMBLE: It don't have anything
to do with it, what he had done six months before, to prove

that he was not doing certain work at the time of the accident - you could not measure the present value of a man that way because he had been somewhere else - he might have been on a sick bed.

JUDGE TATE: Then I ask your Honor to withdraw from the Jury the evidence brought out by the plaintiff as to what this man was making, that is, that he was making so and so, now that it develops that he was taken on a contract by this brother under parole for the amount of \$25.00 and I insist that it is thoroughly competent and that he was not worth any more than he could make, to his widow. This man shows that he had a contract with him for \$25.00 a month.

JUDGE GAMBLE: You can't measure the present and future by eight months or by when a man is confined in the penitentiary.

JUDGE TATE: This was the condition under which he was living there and the condition under which he was let out to live with him at \$25.00 per month.

THE COURT: He was loaned for a specific period of time ?

JUDGE GAMBLE: We will be able to show that.

JUDGE TATE: Yes, and that is what he was doing at the time of his death ?

THE WITNESS: Yes sir.

THE COURT: I will let it go to the jury for what it is worth to them in measuring the damages, if they come to that part of the case -- that is all it could go in for, that is, as to his earning capacity.

BY JUDGE TATE:

Q Mr. Fishburn, your home was a mile and a half out this way (indicating), that is to say west, if you call the railroad running north and south ?

A Yes.

Q Now, during the eight months that Walter Fishburn had lived there with you, how many times, in your best judgment, would you say that he had come there to that Maryville-Montvale crossing ?

A He had been to the crossing there several times, but I don't remember how many.

Q And that is where the stores were that you did your ordinary trading, were they not, is that right ?

A How was that ?

Q That was where the stores were where you did your ordinary trading - buying things, that is right ?

A Yes.

Q And you say he would go over there to do that for you lots of times ?

A Yes, there were two stores there, and sometimes he went to one and sometimes to the other.

Q A common thing for him to come over to the store ?

A Yes, he could if he wanted to.

Q And he did ?

A I don't know that he did - I didn't see him.

Q¹/₂ Didn't you go over there with him on other occasions ?

A Well, I came that morning.

Q You came with him on
other occasions ?

A No, I never crossed there
before with him.

Q Well, you know that Walter
Fishburn lived in that neighborhood with you and had
crossed at that place many times?

A I suppose I did, but I
never was with him.

Q The mill was over here
where he would come to the mill - that is where he would
come to the mill over there ?

A He hardly ever went to the
mill.

Q But he did sometimes ?

A No, he never had been to
the mill but one time.

Q He did go up and down that
road there on the east side of the railroad, in other
words, he was not kept at home - he went about that
section of country ?

A I suppose he did, I don't
know.

Q On this occasion what time of the day do you say it was ?

A Somewhere in the morning. I suppose somewhere about a little before nine o'clock.

Q A little before nine o'clock ?

A Yes.

Q When you first decided to come to the mill that day he said for you to take the car and you said no, that you didn't know anything about cars, and "Let's take the horse", - you suggested that you would take the horse ?

A Yes.

Q And he insisted on taking the car ?

A Yes.

Q And as you came on what we will call the main line, that is the western track, as you started across there he said for you to help him watch for the trains ?

A Yes, he told me to help him watch for the train.

Q And you did ?

A Yes.

Q And you got across safely ?

MAY 7 1929

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OF CERTIORARI

DeLoach

Clerk

*Filed
1929*

SOUTHERN RAILWAY COMPANY, ET AL., 0

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VS.

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NO.

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C. A. FISHBURN, ADMINISTRATOR. 0

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FILED

August 27th 1928

DeLoach

CLERK.

A Yes.

Q And came on down here to the mill, was that where you got out ?

A Yes.

Q And the last you saw of his car it was still headed east ?

A Yes.

Q He had to turn around after that ?

A Yes.

Q You went from there back to the store ?

A Yes.

Q And you had had time to do that and get back to the store ?

A Yes.

Q Even if it had only been five minutes, you think it was a short time, and if he had been turned and was running not more than ten miles an hour, he would run two and a half miles in that length of time ?

A Yes.

Q And if he was running faster,

then it would run more than that ?

A Yes.

Q From the time when you helped him look for the trains away back here at least five minutes before that, that is the last time you helped him look for the trains ?

A Yes, somewhere along there - I could not say exactly how long.

Q It might have been more than that ?

A Yes.

Q And you had been at the mill and gone down to the store ?

A Yes.

Q And the last time you saw his car it was still about here (indicating) ?

A Yes.

Q Until you saw it after it was struck ?

A Yes.

Q There is what distance between this man's lot or building here (indicating) and the side track or passing track of the railroad - what distance would you estimate it to be in there from the

fence of this next adjacent owner and the sidetrack -
there is a post and wire fence there ?

A Yes, a wire fence running
through this brush.

Q The fence went through
the brush ?

A Yes, up through that grove
up there.

Q You think that grove you
have testified about comes within 15 or 20 feet of that
passing track ?

A I don't know, to the best
of my knowledge, I didn't measure it.

Q Did you on that occasion
after the accident happened, or the next day or at any
time go there and measure the exact distance ?

A No, I did not.

Q But you estimated it at
15 or 20 feet ?

A Yes.

Q After you get within that
15 or 20 feet, that is after the brush stopped, your
estimate of 15 or 20 feet, and during that time that

a man is passing 15 or 20 feet on the side track even, you can see as you go from here (indicating) up above the tool house ?

A Yes, you could from that far side.

Q After you get by the undergrowth that keeps you from seeing it ?

A After you get on the railroad you can see up there.

Q After you get within 15 or 20 feet to which you estimated the underbrush came, and you have done that, estimated that it was 15 or 20 feet ?

A I suppose it was that far.

Q If it was 15 or 20 feet from the side track and a man could see up there a quarter or a half a mile after he got by the distance of 15 or 20 feet before he got to the side track, you could see plainly ?

A No, you could not see for 100 or 120 yards until you got to the track.

Q You say 15 or 20 feet ?

A Yes, back from that timber.

Q You said it was 15 or 20 feet, what you meant as you approached the side track,

is that correct ?

A Well, that is just an assumption, I didn't ever measure it.

Q That is your best estimate of it ?

A Yes, I thought so.

Q What is the width of the side track itself, what would you estimate that, if you don't know exactly ?

A I don't know how wide those railings are apart.

Q Well, would you say four feet eight inches or five feet, your best estimate, like you made your best estimate of the distance between the brush and the side track, you have made that in the best estimate, now give us your best estimate of the width of the side track.

A Well, whatever they are apart, I was just guessing it was 10 to 15 or 20 feet, I could not say for sure.

Q Then the width of the side track, if it is four feet eight inches - is it four feet eight inches ?

A I don't know.

Q After he had turned his car around and went back from the east headed west he had to cross the side track also before he got to the main track, didn't he ?

A Yes.

Q Well, let's put that five feet and fifteen or twenty, then it becomes twenty to twenty-five feet -- how far is it from the western rail of the side track to the eastern rail of the main track, how many feet is that ?

A You mean from this rail here (indicating) ?

Q Yes, from that rail there ?

A To the main line ?

Q Yes, just the space he had to pass to get on the main line ?

A I don't know, I never measured it. I suppose it is around six feet.

Q Well, take your estimate and put six feet then - that would figure twenty-six to thirty-one feet, does it not, and at that twenty-six to thirty-one feet how far up the track could a man see ?

A Well, if you got back there opposite this timber you could not see very --

Q (Interposing) I am talking about ~~twenty~~-six to thirty-one feet here, and past that obstruction, estimate it for us ?

A I don't know. I am not saying that I could say.

Q Do you know anything about the operation of Ford cars ?

A How was that ?

Q Do you know anything about the operation of a Ford car, did you ever operate one ?

A No, I never ran one.

Q There would be no trouble to stop a Ford car within 26 to 31 feet, with no more speed than you could get up coming from back there at the mill up there ?

A I would not think so.

Q If a man looked and saw an occasion to stop ?

A I would not think so.

Q I will hand you what purports to be a photograph and ask you to tell me about it --

JUDGE GAMBLE: (Interposing) Let us see it.

JUDGE TATE: All right. I hand you a picture and ask you if you recognize what it is the picture of ?

MR. JACKSON: We object.

THE COURT: On what ground ?

MR. JACKSON: We except to the introduction unless it is shown it represents the condition which existed at the time of the accident.

JUDGE TATE: We propose to show what differences there are.

MR. JACKSON: We except to the picture unless you can show it is the same as at the time.

JUDGE TATE: We will show what the condition was at the time of the photograph and what if any difference there was between that time and when the accident happened ?

MR. JACKSON: That would not make the photograph competent - it must represent the true conditions at that time.

JUDGE TATE: The witness has not answered it.

THE COURT: Yes, the photograph would have to show the conditions at the time of the accident, and then he could show anything that had been changed or done around there.

MR. JACKSON: It is not competent to introduce a photograph and then show what changes have been made - the photograph must be an exact picture of it as it existed at the time of the accident.

JUDGE TATE: We shall finally put on the witness stand the photographer who took this photograph and then show exactly the conditions that prevailed and the only change that has been made between that and the time of the accident - as to the thing that I am going to ask the witness about, the condition is precisely the same.

MR. JACKSON: I object to him using the photograph for any purpose, I do not care what it is, unless it represents the true conditions at the time of the accident.

BY JUDGE TATE:

Q I will ask you this,
does this represent the true condition as to the road
there --

THE COURT: All right.

BY JUDGE TATE:

Q Just confine yourself to
the road there - that does show the condition of the
road - that shows the way the road runs ?

A Yes, but that is all out
out (indicating on photograph), and don't look like the
same place.

Q Now just confine yourself
to the condition of the road ?

A Yes. This is the bend out
there.

Q I will ask you to file this
photograph as Exhibit #1 to your cross examination.

MR. JACKSON: We object to it.

THE COURT: It is sustained unless the

picture shows it as it was at the time.

JUDGE TATE: I will make it a little different. Now, let's take that much of the picture of the road at that crossing there --

JUDGE GAMBLE: I object to that being filed - he has cut this picture in two.

THE COURT: Let me look at it.

JUDGE TATE: I am willing to file it as it was. I only offer this --

JUDGE GAMBLE: I object to this as it don't show the true conditions. The picture itself is an entirely different picture and I object to it being filed here before the jury.

JUDGE TATE: I am offering to file the picture.

THE COURT: What do you say about the condition of the road ?

BY JUDGE TATE:

Q Is that the condition of the

road as you saw this, or do you identify that as the road crossing there ?

A Yes, it looks like the crossing, but you can't tell back this way - I can't say.

Q That shows the road crossing there towards the mill, that shows the dirt road, looking towards the mill?

A It don't show up to the store at all - this much of it there looks like the crossing (indicating).

Q This is the mill out there (indicating), where I put my finger ?

A Yes.

Q I will ask you to file this as Exhibit #1 to your cross examination ?

A Yes.

JUDGE GAMBLE: We object to that being filed because it is a mutilated picture.

THE COURT: It is offered and filed just for the purpose of showing the road and that is still left on there.

JUDGE TATE: Yes.

(The original will be sent up with the transcript)

JUDGE GAMBLE: We note an exception.

BY JUDGE TATE:

Q You came to this side ?

A Yes.

Q And went on out there to
that mill ?

A Yes. We went to the end of
this (indicating), you see this platform here that runs
there - we stopped there.

Q And that is the dirt road
or automobile road straight down to the mill ?

A Yes.

Q There is no curves in it ?

A No.

Q Straight down to the mill ?

A Yes.

Q When you found your brother
and the car in which he was riding after the accident --

MR. JACKSON: We further object to the
introduction of this picture as illustrating the road

crossing there, because it does not show that road crossing --

THE COURT: You can't make a picture that shows all of it - I hold that he may file it for the purpose of showing the road there and that is all.

BY JUDGE TATE:

Q The dirt road is straight down to the mill ?

A Yes, from the railroad.

Q From the railroad ?

A Yes.

Q And the railroad is straight for, you think, between a quarter to a half a mile going up in a northerly direction ?

A You mean up this way (indicating) ?

Q Towards Maryville ?

A Yes, the railroad is straight up there.

Q It is straight ?

A- Yes.

Q And the dirt road is
straight ?

A Yes, the dirt road running
across there is straight.

Q Down to the mill ?

A Yes.

Q Now, there where you found
this Ford car after the accident, the radiator, that is
the front part of the car, the very front part of the car ?

A Yes.

Q Had been turned back towards
the left -- that is, if the pilot beam of the engine
had hit the front right hand corner of the automobile ?

A Well, I could not say what
hit it, but something hit it.

Q Well, whatever hit it, hit
it right on the end of the corner?

A Yes, where the brace comes
down under the fender, and it fastens to the frame right
at the end.

Q Right at the front end ?

A Yes.

Q And it twisted that rod

that goes through there, and twisted it that way and twisted the radiator around and right back ?

A And the fender - this does not look like the car was when it was hit there.

Q That is like it was when it was put on the wagon ?

A Yes.

Q When you got back home with it ?

A Yes, but it never had been changed any.

Q You had to separate it to carry it home ?

A No, raised it right up and set it on the wagon.

Q Now, this right hand front fender was pushed right straight back ?

A Yes, like it is there exactly.

Q Like it is there ?

A Yes.

Q And there was not any of the middle of the car apparently struck, was there -

it was at that right front end ?

A No, the right hand door on the side of the car was tore plumb off.

Q But the radiator was pushed back ?

A Yes, and it was hit on the right side and tore that door, the right hand door on the side of the car, it was tore plumb off and a part of it was laying down the bank, I suppose 50 feet or more.

Q The train went on out towards Calderwood ?

A Yes.

Q And stopped ?

A Yes.

Q Now, what station there is there at Montvale Station, it is on the western side of the track, isn't it ? I should say on the southern side of the track on the side towards Calderwood ?

A The station is on the lower side.

Q And a train coming in the direction from which this was coming, if it had made a stop at Montvale, would have crossed the road to stop at the station ?

A Yes, it would have crossed the crossing.

Q If it had made a stop it would have stopped after it had crossed the dirt road ?

A Yes.

Q Even if it had stopped there ?

A Yes.

Q How many years ago, Mr. Fishburn, was it that that railroad, whatever line it is, was completed ?

A I could not tell you - it has been a good bit but I could not tell you.

Q It was a good while ago your brother went to the penitentiary ?

A Yes.

Q And he lived there at that time in that neighborhood ?

A Yes, he lived on the railroad.

Q Even back then he knew all about this railroad ?

A Well, he lived at Allegheny

though then. He didn't live at Montvale. He lived at Allegheny in below there.

Q But he crossed that road coming into town ?

A How was that ?

Q When he came into Maryville he crossed that road ?

A No, didn't cross it any over there.

Q Well, where did he have to cross that crossing ?

A He would cross it on the train, and any other way he would not cross it.

Q He crossed it on the train ?

A Yes.

Q Before he went away ?

A Yes.

Q And during the past eight months that he lived there, after he came back from the penitentiary he crossed that track when he went to Montvale ?

A Yes.

Q Now, Mr. Dick Giffin was

standing down near this store over here, was he ?

A No, I didn't see him, but
he told me he was standing down, farther down the track
near some lumber or bark.

Q You didn't see him ?

A No, I didn't see him down
there ?

Q You saw a boy who had some
horses or mules down there ?

A Yes, they were both together,
is what they told me.

Q They were together there ?

A Yes.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q How many years ago was it
that Walter Fishburn lived there where he did live ?

A When he went away ?

Q Yes.

A He lived at Allegheny Station.

Q In coming towards Maryville state whether or not that road leads by Montvale Station or some other way ?

A The railroad ?

Q No, the public road ?

A No, the public road don't come that way.

Q State where he crossed and went over this railroad coming from Allegheny up to Maryville ?

A How was that ?

Q Where did he cross the road ?

A He crossed it right there, at Allegheny Station.

Q Was that an overpass or on the track or an underpass ?

A It was under the track, came under a trestle.

Q Came under a trestle ?

A Yes.

Q How far is that from Montvale Station ?

A Well, that is a good long

ways. I don't know, it must be four miles maybe or better, I don't know.

Q Mr. Fishburn, I will ask you if the picture introduced by the defendant represents all the conditions as they existed there at the time of this accident ?

A I didn't understand you just exactly.

Q Does this picture introduced by the defendant represent all the conditions that existed there at the time of this accident ?

A No, it don't.

Q Mr. Fishburn, you say you were to pay Walter Fishburn \$25.00 a month ?

A Yes.

Q During his parole term ?

A Yes.

Q How long a term was that ?

A For twelve months.

Q Now, outside of that \$25.00 a month did he work any other place and earn any money?

A Yes, he worked over at Montvale Station building a house over there.

Q Do you know how much he re-

ceived for building that house ?

A No, I think they gave him \$3.00 a day and his board, is all I know.

Q \$3.00 a day and his board ?

A Yes.

Q Do you know of him procuring a job or of him being offered a job anywhere else ?

A They promised him a job at Knoxville in a stove works as a pattern maker.

Q At how much a day ?

A He didn't tell me just what he was to get. He said he could not get that until the twelve months was over.

Q How much of that had gone up to the time of his death ?

A Eight months had gone.

RE CROSS EXAMINATION

BY JUDGE TATE:

Q You say he built a house at Montvale Station ?

A Yes, for McSpadden, a

little house.

Q At the station ?

A Yes.

Q He drove to that place
down there and came back at night ?

A Yes. When he was at work there
a part of the time he stayed principally with me.

Q- How long had Walter Fishburn
had the Ford car and been driving it ?

A I don't know just how long
he had had it. He had had it some **two** or three months
I suppose.

Q Did he drive before that time
or did he learn on this car ?

A I don't know.

Q You don't know of his
driving any before that ?

A I don't know whether he
had driven any before or not, no sir.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q This house you say he built there, which side of the railroad running from Maryville to Calderwood ?

A Over there (indicating).

Q Over on the west side ?

A Yes.

Q Do you know how far from the crossing ?

A No, I don't know exactly, but it was a right smart distance.

Q A right smart distance?

A Yes.

Q In regard to working and building that house would he have to cross that crossing ?

A No, he never crossed the railroad at all.

Q Did he come to the crossing ?

A No.

Q Now, on that side (indicating) , I believe you say he could see away up along here (indicating) ?

A Yes, and when he came up to work there he never did cross the railroad.

Q Never went across the rail-

road ?

A No.

Q Do you know how long he was building that house ?

A No, I don't know, but I think he worked there some three or four weeks, or three - I didn't keep any account of it.

RE CROSS EXAMINATION

BY JUDGE TATE:

Q You mean by that when you say he didn't cross the track, you mean he didn't have to cross the track in coming from your house to the place of his work ?

A No.

Q He didn't have to cross it ?

A No.

Q Of course what he did down there you don't know ?

A No, I don't know that.

ROBERT HANNAH, the next witness, of
lawful age, being first duly sworn, testified as follows
on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Your name is Robert
Hannah ?

A Yes.

Q You hold an official position
in Blount County now ?

A Yes.

Q What ?

A Constable.

Q Have you held any other
position in Blount County ?

A Yes.

Q State what it is or was ?

A Justice of the Peace and

Deputy Sheriff.

Q How long were you Justice
of the Peace ?

A Fourteen years.

Q How long Deputy Sheriff ?

A Two years.

Q And how long have you been
constable ?

A This makes four years, when
I get this term in.

Q Where do you live ?

A At Montvale Station.

Q How close to the station ?

A In about 300 or 400 yards.

Q What direction from the
crossing ?

A West.

Q West ?

A Yes.

Q That is over on the right
as you go from Maryville to Calderwood ?

A Yes.

Q On which side of the public

road ?

A I live on the west side
of the public road, southwest side.

Q Southwest side?

A Yes.

Q Were you at home or at
Montvale Station the day that Walter Fishburn was killed ?

A I was not there at the time
he was killed. I was home that evening after it happened
awhile.

Q Do you know anything about
the accident ?

A No.

Q Mr. Hamah, suppose this
represents the main line of the railroad crossing going
from Maryville to Calderwood, and this is the side track
and this is the public road and this is over at your place -
you have a mill there ?

A Yes.

Q Does that fairly represent
your mill near this bend in the road ?

A My mill is on the east side.

Q Well, suppose, Mr. Hannah,
this is looking across the track (indicating) toward your

mill and this is Maryville up there ?

A Yes.

Q And that is the railroad there (indicating) ?

A Yes.

Q Does this fairly represent it ?

A Yes.

Q And what would this (indicating) represent right here ?

A That is the store.

Q There is the store ?

A Yes.

Q Is this store between your mill and the railroad?

A Yes, but it is back farther away from the public road than my mill is.

Q Back farther - about how far is your mill from the public road ?

A My mill is on the public road and the store is back.

Q How far is the store from the public road ?

A Forty feet.

Q How far is the store from
the railroad side track ?

A Well, it is 20 or 30 feet
from the side track, 30 feet I would say.

Q Were you acquainted, Mr.
Hannah, with the condition of that crossing there at
the time Mr. Fishburn was killed ?

A Yes sir.

Q How long have you lived
there ?

A I have lived there for
something near twenty years.

Q In coming from your mill,
Mr. Hannah, across the railroad track going west, is
there anything that would obstruct your view of the rail-
road crossing and this road along there ?

A Yes, there was at that time.

Q There was at that time ?

A Yes.

Q Just tell the Court and
jury what it was ?

A There was undergrowth and
timber that had growed up along the edge of the railroad.

Q What effect did that timber have upon a person's view of this railroad coming across the track ?

A You could not see the train coming.

Q And how far up the track did that condition exist ?

A I would say at least 300 feet.

Q At least 300 feet ?

A Yes.

Q Describe that timber, how high was it ?

A Well, it ran from just shrubbery up to 25 or 30 feet high.

Q From 25 to 30 feet high ?

A Yes.

Q Were there many or few of those trees that high ?

A Quite a good many, yes sir.

Q Could you tell how thick they were in diameter down near the ground ?

A Well, very good stuff -- the fellow had it cleaned off and cut it into wagon

lengths and hauled it out for firewood.

Q It was how tall ?

A 25 or 30 feet.

Q How close did those woods
come up to the public road ?

A Right up to the edge of
the road.

Q How close to the railroad ?

A A part of it was on the
railroad right-of-way.

Q Do you know what kind of
timber it was right there, whether bushes or taller
timber ?

A On the road it was not as
tall as it was over in the field.

Q In coming from your mill
to the railroad crossing is the road on the level or
does it rise ?

A The railroad crossing is a
little higher than the big road.

Q Is there any road leading
from the main road between this store and the line of
the railroad ?

A There is a turn off down

into the store, in front of the store house building.

Q Do they load any kind of freight down there ?

A Yes.

Q What kind ?

A Lumber and acid wood and anything that needs to be loaded there.

Q Is that a station that they discharge and take on passengers from the train ?

A Yes.

Q Is that a station where they take on and unload freight ?

A Yes.

Q Is that done every day ?

A Well, not every day.

Q Do passenger trains stop there every day ?

A It is a flag station.

Q In stopping there state whether or not this train stops across this public road ?

A Yes, it does.

Q Is there any station building there ?

A No, just a couple of box cars.

Q That is on the side track.
or where is it ?

A It is on the main line.

Q You do not mean on the main
line, but off to one side ?

A Off to one side.

Q On which side ?

A The west side.

Q Below the road crossing or
above it ?

A Below.

Q Down this way (indicating) ?

A Yes.

Q Towards Calderwood ?

A Yes.

Q How close does it come up
to the track ?

A Well, when the train is
passing there is about between the car and the box car
there is I would say a space of about three feet.

Q How long are those cars used
for that ?

A About 36 feet long.

Q I will draw an oblong
mark along there, does that fairly represent the cars ?

A They are not joined to-
gether.

Q Not joined together ?

A No.

Q An opening something like
that between them ?

A Yes.

Q Does that fairly represent
the condition ?

A Yes.

Q Is there a porch on that
store or mill ?

A Yes, there is.

Q In looking across this way
can anyone see the train coming down that way ?

A They could not at the time
of this accident.

Q Yes, I am talking about
the time of the accident ?

A That is right.

Q Are there any buildings up

this railroad here anywhere (indicating) ?

A There is a tool house and
there is a box car.

Q How far is that from the
public road crossing up towards Maryville ?

A Well, I would think it is
something near about 400 feet from the corner of the tool
house and a box car up the track some distance above that.

Q How far from the railroad
to this little tool house and box car, how close does
that timber come up to it ?

A Right up close to the tool
house.

Q Mr. Hannah, how long have
you noticed trains passing that station ?

A Ever since they have been
running on that road.

Q Did you notice anything
printed on the coaches, any words ?

A I believe the word
"Southern".

Q Anything else ?

A I do not recall anything
else just now.

Q Do they use hand cars there
in their section equipment ?

A They have a hand car.

Q Did you notice any printing
on it ?

A No. I didn't pay any attention
to it.

Q Have they got any signs
there about the depot any way indicating what road it is ?

A I don't think so.

Q Have you ever had any ship-
ments made over that road ?

A Yes.

Q Do you receipts for them ?

A Yes.

Q Have you got any of those
receipts with you ?

A No. I have not.

Q Could you get some of them ?

A I think I could.

Q Have you bought tickets
over this road ?

A Yes.

Q What do you do with those

tickets ?

A Well, there may be some
of them down at home.

Q Passenger tickets ?

A Receipts for fares.

Q Receipts for fares ?

A Yes, you just get on and
pay your fares and they give you a receipt.

Q Give you a receipt ?

A Yes.

Q Did you keep that receipt ?

A I usually put it in my
pocket.

Q Have you any of them now ?

A I have not got any with me.

Q Will you bring those receipts
with you when you go back down home, bring them back ?

A Yes, if I can find them.

Q Or any other paper indicating
any dealings you have had with the railroad company ?

A Yes.

Q Have you some bills of
lading ?

A I ought to have a lot of

them if I can find them.

Q Will you search and see if you can and introduce them when you are recalled ?

A Yes.

Q I believe you say that the condition is not now like it was at that time ?

A No.

Q What changes have been made there ?

A The under brush has all been cleared away.

MR. BROWN: What did you say ?

THE WITNESS: I say this undergrowth has all been cleared away.

BY MR. JACKSON:

Q Do you know who cleared it away ?

A The man who owns the farm adjoining the railroad, Otto Best, cut off what was on his land and then after he did that the section foreman took

the men and cut off what was on the road.

Q The section foreman of
what railroad company ?

A Tennessee & Carolina
Southern.

JUDGE TATE: Do you know - you mean
the railroad out there - you mean the railroad that is
out there ?

THE WITNESS: Yes sir.

JUDGE TATE: You don't know what rail-
road it is, except just by hearsay ?

THE WITNESS: That is what is on the
bulletin.

JUDGE TATE: What some of them call it ?

THE WITNESS: What is on the bulletin.

JUDGE TATE: If he will bring that in
that will be the best evidence.

JUDGE GAMBLE: All right.

CROSS EXAMINATION

BY JUDGE TATE:

Q You say the tall growth
was back on this land adjoining the railroad ?

A Yes, the tallest timber.

Q And who was the man who
owned it ?

A Ott Best.

Q And some of the shrubbery
was over on the right-of-way of the Southern ?

A Yes.

Q The right-of-way there is
100 feet wide ?

A That is what the railroad
men say.

Q There was not any of the
timber at all up close to the track itself there at the
crossing, was there ?

A No, not right up near the
track.

Q How many feet would you say
there was between the side track and any of this growth ?

A I would think about
20 feet.

Q Back how far from the track
is this store down here, what do you call it - Huffstetler's
store ?

A Yes - from the main line ?

Q No, we will say from the side
track ?

A That is about 10 feet off
the right-of-way.

Q Ten feet off of the right-
of-way ?

A Yes.

Q In other words, that would
be some 60 feet from the main line ?

A Yes, from the center of
the main line.

Q And that would be some 30
to 40 feet from the side track ?

A Yes.

Q That store is lower than
the dirt road ?

A Yes.

A Yes.

Q Lower than a man would
be sitting in a car on the road ?

A Yes.

Q And some 30 or 40 feet from
the track, or from the side track ?

A Yes.

Q Lower than a man would be
riding in a car on the road ?

A Yes, it is lower there at
the store than the public road is.

Q Beg your pardon ?

A It is lower in front of
the store than the public road. The public road is on
a fill.

Q Of course lower than a
man sitting in a car on the public road ?

A Yes.

Q Do you know how wide a
distance it is from the rail of the passing track or the
side track which you think is 20 feet from the edge of the
timber and the main track ?

A No.

Q How wide is the track itself,

what is your guess, your best estimate I mean ?

A I would think it is about five feet between the rails.

Q Then 20 feet within which there is no growth, you say, and you put 5 to that and it makes 25 ?

A Yes.

Q How many feet is it from that rail of the side track to that rail of the main track (indicating) ?

A I could not give you that accurate.

Q Could you give us your best estimate on that, Mr. Hannah ?

A I think it would be 5 or 6 feet, there, but I am not positive on it.

Q That would be some 30 or 31 feet from the undergrowth -- now, if that undergrowth - now, if that undergrowth - you say a small part of it was down there about 24 feet from the passing track - now, when one gets by it and has that 30 or 31 feet to travel until he gets on the main track where the train runs, how far up towards Maryville can one see ?

A Well, in coming from this point out here (indicating) ?

Q After he gets by the underbrush ?

A After he gets by the undergrowth ?

Q Yes, how far can he see ?

A He can see up to that cut above the station up there.

Q How far, a quarter or a half a mile ?

A About a quarter of a mile.

Q Did you know Walter Fishburn in his life time ?

A- Yes.

Q Was he a frequent visitor at your mill ?

A No, he was not often at my place.

Q You have seen him there several times ?

A I have seen him there around the station and knew of him getting hurt.

Q And in coming there the

last few months during his life I believe he drove a Ford Coupe ?

A Yes, a Ford Coupe.

Q You noticed him using this on several occasions before he was killed ?

A Yes, I think I have, but I did not see him at the time he was killed.

Q Did you ever drive a Ford ?

A Yes, I have driven a Ford.

Q A Ford is driven with foot pedals ?

A Yes.

Q A man sometimes trying to put on the brake will hit the gas, will he not, and if he hits the gas,-- if he hits the gas --

MR. JACKSON: (Interposing) I object to that.

BY JUDGE TATE:

Q Is it possible for one to hit the wrong pedal on the Ford and instead of stopping the Ford propel it forward, and will that be the effect

if he steps on the gas instead of stepping on the
brake ?

MR. JACKSON: I object to that because
it is incompetent.

THE COURT: He can tell about it if
he knows.

THE WITNESS: If the Ford had a foot
feed on it it would be impossible to do that. I don't
know whether that Ford had that.

BY JUDGE TATE:

Q There are three pedals on
a Ford car ?

A Yes sir.

MR. JACKSON: I object to his going
into that.

BY JUDGE TATE:

Q And on a Ford Coupe there

are three pedals, one of which is the brake ?

A Yes.

Q And one to put it in high ?

A Yes.

Q And the other in reverse ?

A Yes.

Q And then a foot feed for the gas and one is a brake and the other is a foot feed ?

A I never drove a Ford with a foot feed.

JUDGE GAMBLE: I ask that that be withdrawn from the jury.

THE COURT: Well, don't pay any attention to that, he don't know about the Ford.

JUDGE TATE: Any part that he don't know about I don't insist on. Mr. Hannah, there had been no change in the condition of the road across there at all since the time of that accident, has there ?

A No.

Q There had been no change in the condition of the road ?

A No. I think not.

Q Now, did you ever go there with a level or transit and make an actual calculation for ten feet back from the side of the track ?

A No.

Q You are not in position to state to the jury that for ten feet back it is not on a level, although it drops off some towards your mill after that ?

A It drops off some towards the mill, but I could not say whether it starts at ten feet or not.

Q The conditions are now as they were then, as far as the road is concerned ?

A Yes.

Q The only change that has been made has been the cutting of what underbrush there ?

A Yes, on the right of way and I have seen the section men working on this crossing taking out some ties and putting in new ones.

Q That crossing itself ?

A Yes, and putting in new ties.

Q There has been no public road work done there, no change in the road ?

A No.

Q Do you know what they were doing at that crossing, the section men ?

A Putting in some ties and taking out some old ties and putting in some others I think.

Q How long was that after this accident ?

A I don't know how long, but not very long since I noticed them working there - but I don't know how long.

Q I show you a picture introduced by the defendant and ask you if that picture shows the conditions along that side track there ?

A Now this is the side track over there (indicating).

Q Do you recognize that picture, Mr. Hannah ?

A Yes.

Q Does that recognize the true conditions existing around there at the time of

this accident ?

A I don't know.

MR. JACKSON: I will ask you if this black mark along this rail, do you know what that indicates there ?

THE WITNESS: No. I do not.

BY JUDGE TATE:

Q How long is a Ford Coupe, your best judgment on that ?

MR. JACKSON: We want to present this feature of the matter -

THE WITNESS: (Interposing) A Ford Coupe ?

JUDGE TATE: Yes.

THE WITNESS: Ten or eleven feet.

BY JUDGE TATE:

Q It certainly is not 20 feet ?

A No.

Q In length ?

A Yes, I mean in length.

Q Ten or eleven feet ?

A Yes.

Q¹/₂ They don't use this side track for their passenger trains, whatever road that was out there, they do not use it for passenger trains, but the passenger trains all run on the main track ?

A I have seen passenger trains go over on the side track when a heavy freight train would pass there.

Q Only when the main track was being used ?

A Yes.

Q I mean when the main track was being used ?

A Yes.

Q And when it was not they used it for their passenger trains ?

A Yes.

Q Have you ever seen any pictures or photographs of any kind that the plaintiff's side of this litigation has offered to show the condition that existed there at that time ?

A This is the only photograph I have ever seen.

MR. JACKSON: The photograph we passed to the jury is Exhibit #2 to the direct examination of C. A. Fishburn.

C. C. HARRIS, the next witness, of lawful age, being first duly sworn, testified as follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q What is your name ?

A C. C. Harris.

Q Have you been sworn ?

A Yes.

Q What is your business ?

A Mail carrier.

Q Out of what postoffice ?

A Maryville.

Q How long have you been

such ?

A Seven years.

Q Did you at one time carry

mail by Montvale Station ?

A Yes.

Q What route is it on ?

A Route 7.

Q How often would you pass

Montvale Station ?

A Well, I went down there to

the station every day. I would turn when I got to the
railroad.

Q What side of the railroad ?

A Down there on the east
side.

Q On the east side ?

A Yes.

Q That is the left side going
from Maryville to Calderwood ?

A Yes.

Q Was that the end of your
route ?

A Yes, that was the end of
it there.

Q Do you know where Bob
Hannah's mill is ?

A Yes.

Q Would you pass that mill ?

A Yes.

Q Then go on, or did you
cross the railroad ?

A No.

Q You just went to the rail-
road ?

A Yes.

Q Mr. Harris, in coming in this direction from Mr. Hannah's mill is there anything along here (indicating) that would obstruct your view of a train on the main line track ?

A Yes, at that time quite a bit of timber there.

Q At the time he was hurt ?

A Yes.

Q Just describe that timber ?

A Well, I don't know, I never thought of it in the way of a description of it before any more than the bulk of it, and I don't know what kind of timber it was, for that matter. It was a great bunch of timber, it might have been 25 or 30 feet high.

Q Could you tell about what size this timber was in diameter, some of it ?

A No, I could not.

Q You say 25 or 30 feet high ?

A Yes.

Q State whether or not when you came along here until you got past this timber you could see a train over on the railroad ?

A No. I would not think so.
Q How long did you travel
that road ?

A Six years.

Q Six years ?

A Yes.

Q And that is the condition
that existed on the 8th of July of last year ?

A Yes.

Q Were you there the day
Walter Fishburn was run against and killed ?

A I made a trip that day.

Q You made a trip ?

A Yes.

Q Did that condition exist
at that time ?

A Yes.

Q Were you there about the
time of the accident ?

A Well, some little time after,
probably an hour after - I usually got there about ten
o'clock.

Q Had they moved Fishburn away

from there at that time ?

A Yes.

Q Had they moved the car ?

A No, it was still there.

Q In coming from Mr. Hannah's mill up here to the railroad, state whether or not it is on a level or rises to some extent ?

A To the best of my opinion practically level.

Q For how far back here ?

A Oh, I would say 50 or 60 yards.

Q Do you know what the condition of this crossing was at that time, more especially on this side of the track there ?

A I do not understand your question ?

Q Was it smooth, or level or how ?

A Well, it was in fairly good shape.

Q In fairly good shape ?

A Yes.

Q I show you a picture of this crossing and I will ask you if that picture fairly represents the condition of that crossing at that time ?

A Yes, I would think so.

CROSS EXAMINATION

BY JUDGE TATE:

Q Mr. Harris, the timber growth you spoke of, the high timber was back here on the land of the owner that joined the right-of-way of the railroad ?

A I could not say about that.

Q Then there was no high timber after you got on the right-of-way of this road out here ?

A I didn't hear you.

Q How was that ?

A I didn't understand you.

Q There was no high timber after you got onto the right-of-way of the railroad ?

A Well, I just could not say

about that.

Q You could~~not~~ say about that ?

A No.

Q As a matter of fact you never noticed it with the idea or for the purpose of making any estimate, did you ?

A No, I never thought of it in any shape except that the timber was just there and I couldn't see it.

Q There was a clear space after you got by, by all of that, and after you got up near the track 25 or 30 feet back, a minimum of that distance after you passed all of that grove, don't you know about that ?

A I don't understand exactly.

Q After you passed whatever underbrush there was there when you got by that man's land where his timber was and after you got by whatever underbrush there was, there was a clear space in there ?

A Yes.

Q This if Huffstetler's store (indicating) along there ?

A Yes.

Q And it is some thirty feet from the nearest rail of the side track ?

A Well, it is some distance - I could not say.

Q Thirty or 40 feet - you say 30 or 40 feet to the passing track ?

A I judge it was something like 20 or 30 feet anyway.

Q Anyway ?

A Yes.

Q And it is lower than the pike road ?

A Yes.

Q Did you know Walter Fishburn ?

A Well, I had a passing acquaintance with him - I knew who he was.

Q When you came there to the place where you carried the mail, did you ever see him at Montvale Station ?

A No, I don't remember of seeing him.

A No.

Q Where was the postoffice ?

A At Maryville.

Q You didn't have a sus-
station out there ?

A No.

Q Where they would get their
mail ?

A No.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q Do you know who operated
that line of railroad there ?

A No, I do not.

Q Now, Judge Tate asked you
the question about whether or not you knew what railroad
it was ?

JUDGE TATE: I beg your pardon.

BY MR. JACKSON:

Q All right. Have you
seen passenger trains pass that station ?

A Yes.

Q Did you notice any printed
matter on the passenger coaches ?

A No. I don't know that I
did.

Q You didn't give that close
notice to it ?

A No.

Q

FURMAN BEST, the next witness, of
lawful age, being first duly sworn, testified as follows
on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Mr. Best, how old are
you ?

A Twenty-four years old.

Q Did you know Walter Fish-
burn during his lifetime ?

A Well, not long after he
came back - I didn't know him before he left there.

Q How often have you seen
him there at Montvale Station ?

A Well, about every Saturday
I think.

Q Well, were you there the
day he was killed ?

A Yes.

Q Did you see the train hit
the car ?

A No, not exactly.

Q Just tell what you know
about it, tell what you saw and know about it ?

A I was hauling lumber and
I heard the train blow - it must have been up the track

a right smart piece and we throwed off two or three other planks and I jumped down to cut my mules loose from the wagon and just as I got my mules loose and drove them out from the wagon I looked around and saw Fishburn coming from the mill and I just kept driving my mules on and presently I heard a racket and I looked around and I said "Great heavens, the train has hit him and killed him."

Q About what rate of speed was Walter traveling ?

A Well, he was going slow.

Q Slow ?

A Yes.

Q You could not tell about how slow ?

A No.

Q Or how fast ?

A No, I didn't pay close attention.

Q You heard the train whistle ?

A Yes.

Q Could you tell how far it was above the station up towards Maryville ?

A No, I could not.

Q Well, what did you do
now after the train whistled until you heard the crash ?

A I was taking the mules
loose from the wagon.

Q I believe you say you took
some lumber off the wagon ?

A Yes, threw off about
three plank.

Q How long did it take you
to do that, to throw the three planks off ?

A I don't know.

Q Give your best impression ?

A- Well, it would not take over
a minute I would not think anyway.

Q Then you took your mules
out ?

A Yes.

Q And then what did you do ?

A I drove them out and started
to get them out of there -- I knew they would run off.

Q And then you took the planks
off the wagon, three of them ?

A Yes.

Q Unhooked your mules
from the wagon ?

A Yes.

Q What did you have to do
to unhook your mules from the wagon ?

A Had to drop the breast
chains.

Q I know, but I wanted to
get it into the record ?

A Yes.

Q They were hooked to the
wagon by means of chains, breast chains ?

A Yes.

Q And you had to unloosen
how many chains ?

A Four.

Q Two to each mule ?

A Yes, breast chains.

Q And then what did you do
after you done that ?

A Drove them around the end --

Q (Interposing) Did you have

to go back to where your lines were ?

A Yes.

Q Then after you unloosened the breast chains you had to go back to your lines ?

A Yes.

Q Which did you unloosen first, the breast chains or trace chains ?

A Trace.

Q Where were your lines lying ?

A I think they were lying kind of off to the side of the mules.

Q Off to the side ?

A Yes.

Q You unloosened the breast chains and then went to the lines ?

A Yes.

Q And then drove your mules off ?

A Yes.

Q How far had you driven your mules before the train came ?

A Well, it was not but a

little piece.

Q Was there any bell ringing as the train came along ?

A I didn't hear it.

Q Were you in a position to hear it if it had rung ?

A Yes, I guess I would have heard it.

Q Was there anybody handling lumber at the time you unloosened the mules ?

A No.

Q Nothing to keep you from hearing the bell ringing if it had rung ?

A No, not a thing.

Q After you heard the whistle up there before you began to put off the three pieces and unloosen your chains and drive the mules off, did the train whistle any more ?

A I didn't hear it.

Q You could have heard it if it had ?

A Yes.

Q State whether if it whistled it would have been closer to you then than when you first heard the train ?

A Yes, if it had whistled it would have been closer to me.

Q Are you acquainted with the speed of trains, Mr. Best ?

A No.

Q State whether or not that train was running fast or slow ?

A Well, it was running fast. I can tell you that.

Q What kind of a train was it ?

A A passenger train.

Q Do you remember how many coaches it had ?

A No, I do not.

Q Was there any letter or writing or sign printed on the coaches, if you remember ?

A I con't remember, I didn't look.

Q Do you know who operated

that line of railroad there ?

A No.

Q Do you ship any freight ?

A No.

Q Do you have bills of lading
in any way ?

A No.

Q How long do you say it was
from the time you first heard the train whistle, that
is, from the time you heard the train whistle I mean
until you heard the crash ?

A Well, I could not say how
long it was - it didn't take me very long to get my
team unhitched.

Q Was that train working
steam coming down there or was it exhausting ?

A I didn't pay any attention.

Q Is it down grade or up
grade there or level ?

A I believe it is down grade.

Q Down grade ?

A Yes, but I won't say for
sure.

Q Mr. Best, how long have

you lived in that section ?

A All my life.

Q How old are you ?

A Twenty-four years old.

Q About how often have you gone along this road crossing of the railroad at Montvale Station ?

A Well, I have crossed it several times, but not so often.

Q Every week ?

A No, I don't cross it every week.

Q But you have crossed it enough, or state whether or not you have crossed it enough to be acquainted with its condition there ?

A Yes sir, sure.

Q Do you remember where Bob Hannah's mill is ?

A Yes.

Q Now, suppose this (indicating) represents Bob Hannah's mill here ?

A Yes.

Q Now, coming out this road, is there anything to prevent anyone from coming along

this way, going towards the railroad track, is there anything to prevent you from seeing the train either way there ?

A Yes sir.

Q What is it ?

A A lot of bushes along there at that time.

Q Is that the condition of it now ?

A No, they are trimmed up.

Q How high was that timber ?

A It was 10 to 15 feet high.

Q Do you remember what size it was in diameter ?

A No, I do not.

Q For the purpose of showing how big it was, have you seen the timber after it was out ?

A No.

Q You have not ?

A No.

Q How far was that condition that the view of the train would be obstructed by this

timber here, from one over on this side here (indicating) ?

A I don't know.

Q Give your best estimate of how many feet ?

A You mean how far up north ?

Q Yes, how far would the train's view be obstructed by this timber here (indicating) ?

A Well, it must have been -- you mean from --

Q (Interposing) From the public road on up there ?

A Well, it must have been 15 or 20 feet I suppose.

Q You mean going up the side of the railroad ?

A You mean the timber up on the side of the railroad ?

QA Yes.

A It would obstruct the view of the railroad -- I don't know whether I paid any attention to it.

Q A long or short distance ?

A Well. I could not tell you, for I didn't pay close attention to it.

Q Did that condition exist at the time Mr. Fishburn was killed ?

A Yes.

Q Did you see Mr. Fishburn after he was killed ?

A Yes.

Q Where was he ?

A He was laying down the track about ten feet.

Q From where ?

A From where the crossing was.

Q From the crossing ?

A Yes.

Q From the public road crossing ?

A Yes.

Q Do you remember how he was injured, what bruises he had on him ?

A I believe he had a knot

above his eye here (indicating), and a scratch or two on his head there.

Q Did you see any blood ?

A Yes, I seen a little blood, but very little.

Q Where was the blood coming from ?

A I believe it was coming out of his nose.

Q Out of his nose ?

A Yes.

Q Did he talk any ?

A No.

Q Did you hear anybody speak to him ?

A I don't think I did.

Q You helped put him in a car or some conveyance ?

A No.

Q Do you know who did that ?

A Yes.

Q Who did that ?

A The undertaker.

Q Do you know where the undertaker was from ?

A No sir.

Q Do you know his name ?

A No.

CROSS EXAMINATION

BY JUDGE TATE:

Q Mr. Best, the underbrush or under growth that you spoke of I believe you say is 15 or 20 feet from the rails ?

A Yes.

Q Fifteen or 20 feet from the rails ?

A Yes.

Q Do you know how wide that side track is ?

A No, I do not.

Q Could you estimate that for us - it is the usual width side track at any rate ?

A Well, it is the same width

as the main line.

Q Do you know what that width is ?

A It must be about eight feet I think.

Q Do you know how far it is between the side track and the main line ?

A No, I do not.

Q Now, after you get by that underbrush you could see up that track between a quarter and a half a mile, could you ?

A Well, after you get by the brush you could see something like a quarter of a mile.

Q After you get by the brush ?

A Yes.

Q The underbrush ?

A Yes.

Q A quarter of a mile ?

A Yes.

Q When you were 15 or 20 feet from that rail ?

A Yes.

Q Now, you were down near
Huffstetler's store ?

A Yes.

Q- What were you doing when
you saw Walter Fishburn going up ?

A I was driving my team,
getting them out of the way.

Q When you saw him going
up ?

A Yes, I didn't see the
train hit him.

Q Now, I understand, but
did you see him drive on the track ?

A Yes.

Q Where was he then ?

A In the car.

Q Then when you heard the
train blow you got your mules to a safe place ?

A Yes.

Q And he was then in the
car ?

A Yes.

Q Going up towards the
track ?

A Yes.

Q When you heard that train
blow ?

A No.

Q Well, you just heard it
blow ?

A I had just heard it blow.

Q He had come from down there
at the mill ?

A Yes, from over there some-
where.

Q At the time you heard the
train blow - when did you look up and see the train
coming down the track ?

A I never looked at all.

Q You never saw the train
coming down the track ?

A No.

Q Where was Mr. Dick Giffin,
was he there at the time ?

A Yes, on the side track.

Q Just about where were you
when you heard that train blow ?

A I was on the wagon -
you mean from the road crossing ?

Q Yes, where was the
wagon ?

A It was sitting along the
side track and I was unloading lumber.

Q Well, opposite Huffstetler's
store ?

A Yes.

Q Right down by the side of
the track by Huffstetler 's store ?

A Yes.

Q And you had pitched out
three planks ?

A Yes.

Q Was it while you were on
your way back to the store that Walter came up, Walter
Fishburn ?

A As I drove my mules out
I looked back over my shoulder and saw him coming along.

Q Going slowly ?

A Yes, I was letting my mules
go along and before I passed the corner of the store I

heard something and looked around.

Q That quick ?

A Yes.

Q If I understand I believe you say you did examine the marks made there, didn't you, where the automobile had gotten ?

A No.

Q You didn't do that ?

A No.

Q You didn't do that ?

A No.

Q You didn't see the marks made in the road there by the wheels of the automobile ?

A There was a little bit of a scratch on the ground is all I paid any attention to.

Q And that was from eight to ten inches I believe, or from six to ten inches before the wheels reached the first rail of the main track ?

A I believe it was.

Q Eight or ten inches ?

A Yes.

Q Before the wheels reached the main track, the first rail ?

A Yes.

Q Did you speak to Walter Fishburn ?

A No.

Q Wave to him or speak to him or anything ?

A No.

Q- How was he hit at the time, how was he laying, straight across the track ?

A I won't say - I did not look to, see.

Q At any rate when you heard that warning whistle, when you heard that whistle you hurried to get your three planks off and the mules to a place of safety ?

MR. JACKSON: He didn't say that.

BY JUDGE TATE:

Q Is that correct, did you say that ?

A Explain that again.

Q When you heard the train

whistle did you hurry then to get your planks off and get your mules to a place of safety ?

A Yes, I did.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q State whether or not there was any particular reason for you to hurry and get your planks off ?

A Well, I knowed if the train happened to come through why my mules would run off. One of them had run off from the train already.

Q You took the plank off before you began to unloosen the mules ?

A Yes.

Q Now, Mr. Best, you say that was a passenger train ?

A Yes.

Q Do you remember how many coaches to it ?

A No.

Q Did the train stop ?
A Which do you mean, after the
accident ?

Q Yes.

A Yes.

Q Did the train stop ?

A Yes.

Q Where did it stop ?

A¹/₂ Well, it stopped on the
railing.

Q How far from the crossing ?

A I don't know. I didn't pay
close attention to it.

Q Give your best impression
how far it was before it stopped or at the point where
it stopped ?

A Well, I just can't say.

Q Was it as far as to Main
Street in town, was it that far ?

MR. BROWN: I object to that.

THE COURT: He says he don't know.

RE CROSS EXAMINATION

BY JUDGE TATE:

Q Did you ever drive a
Ford ?

A Yes.

Q You say that Walter Fish-
burn was driving slowly when you saw him ?

A Yes.

Q Driving as slowly as he
drove could he have stopped the Ford car instantly if
he had applied the proper brakes ?

A It is according to your
brakes.

Q If your brakes are in good
condition ?

A Yes, if they are in good
condition.

Q The length of a Ford car is
11 feet, a Ford Coupe ?

A Well, I won't say, for I

don't know.

Whereupon, at 12 o'clock on this February 29, 1928, Court adjourned until 1 o'clock p. m. of February 29, 1928.

Maryville, Tennessee, February 29, 1928.

Court met pursuant to adjournment at 1 o'clock p. m. on this February 29, 1928, when the following proceedings were had and evidence adduced.

PLAINTIFF'S EVIDENCE (Continued) :

ELSIE TUCK, the next witness, bring first duly sworn, testified as follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Were you sworn this morning ?

A Yes, I was.

Q Were you ever a witness
before ?

A Yes.

Q Look straight at these
men there, the jury, Elise.

A Yes.

Q How old are you ?

A Fourteen.

Q Who is your father ?

A Charlie Tuck.

Q Do you remember the occasion
of Walter Fishburn getting killed ?

A Yes, I do.

Q Did you know Walter ?

A Well, I knew him when I
saw him.

Q How close did you live to
Montvale Station ?

A About a mile and a half I
suppose.

Q Which side, over towards
the Montvale Pike ?

A No.

Q Over towards Niles Ferry
Pike ?

A Yes.

Q Between there and Niles
Ferry Pike ?

A Yes.

Q Now this is an illustration
here- (indicating) and this is the main line (indicating)
and this is the switch at Montvale station and this is
Maryville this way (indicating) and this is Calderwood
this way (indicating). Do you understand that ?

A Yes.

Q Did you see the accident ?

A Well, I saw a part of it.

Q Where were you ?

A I was standing up at Dick
Giffin's store. Which side of the railroad, towards
Maryville or going towards Calderwood, were you ?

A I was on the north side.

Q That would be on the right
side of the railroad going down ?

A Yes, going down.

Q This represents Dick's
house over there ?

A Yes.

Q Was was Dick Giffin's store with reference to that ?

A He was right out there (indicating).

Q Up this way ?

A Yes.

Q Now, when I put the pointer about the right place, let me put it down.

A All right.

Q About that way ?

A Yes, right there (indicating).

Q Were you between the public road and Dick Giffin's store ?

A Between where ?

Q Between the public road and Dick Giffin's store - is it a store ?

A I was between his house you know and the porch, the bridge.

Q Where is the house from the bridge ?

A Just out a little above.

Q Farther back from the road ?

A Yes. Back here (indicating) .

Q You were between the house and the store ?

A Yes.

Q Did you see the train ?

A Yes, I saw the train.

Q What attracted your attention to the train, Elsie ?

A Well, it was not train time you know and I seen the train coming.

Q A little louder.

A I heard it coming and we began to look at it.

Q How far up the line was this train from the public road crossing when you first saw it ?

A I just don't know.

Q You don't know ?

A No.

Q Could you tell from the telephone poles -- by the telephones poles, how many telephone poles it was ?

A About two.

Q You mean up from the crossing here ?

A Yes.

Q At the same time, approximately the same time, did you see somebody trying to cross the track or come up to the track ?

A I saw him coming - he was not up to the track yet.

Q Who did that prove to be ?

A Walter.

Q Walter Fishburn ?

A Yes.

Q Now, when you saw the train coming and this car was approaching the track, what did you do ?

A Well, I was scared to death almost - I thought the train was going to hit him.

Q How close was he to the track, or could you tell ?

A I could not tell you.

Q Was he driving slow or fast ?

A Driving slow.

Q Did you see the train
hit him ?

A No, I did not.

Q Why ?

A I heard it.

Q Why ?

A I don't know, I was
scared and turned my back to the train.

Q Elsie, did that train
whistle there ?

A I didn't hear it, if it
did.

Q Were you close enough to
have heard it if it had whistled ?

A Yes.

Q Were you in a position to
have heard it if it had whistled ?

A Yes.

Q Did it ring the bell ?

A I didn't hear it.

Q Were you in a position
to have heard the bell if it had rung ?

A Yes.

Q Now Elsie, from the time you looked and saw the train and your attention was attracted to this train about two telephone poles away and Mr. Fishburn was coming up on the track there, how long was it after that until the train hit him ?

A I don't know how long it was.

Q Just sitting there and measuring the time in your memory, could you tell about how long it was ?

A I guess about a half a minute.

Q Take my watch here, Elsie, and look at this second hand and begin at a given point and when you think the time is up I wish you would say so and say how many minutes or half minutes it goes.

A All right - it is about a half a minute.

Q That is from the time you saw the train and Walter Fishburn ?

A Yes.

Q Before you heard the crash ?

A Yes.

Q The crash that you speak of, is that the one in which the train hit the car ?

A Yes.

Q Did you go down after that, did you go down to the track where the track was ?

A I went down a part of the way down to the road - I didn't go all the way down.

Q Did you see him ?

A No, I didn't go to where he was until they picked him up and laid him on the porch.

Q How close were you to him after that ?

A When they laid him on the porch ?

Q Yes.

A I was right up close to him.

Q Was he bloody, was he bleeding any ?

A Yes, I seen his nose was bleeding.

Q Now, Elsie, standing up here

as you say you were, could you see the train - was there anything to keep you from seeing the train on this side of the road (indicating) ?

A No.

Q Now, you are acquainted with that place are you ?

A Yes.

Q Now, suppose you came from the other side, is there anything to obstruct your view from the train ?

A Yes.

Q What was it ?

A A lot of bushes and things grown up.

Q Do you know where Mr. Hannah's mill is ?

A Yes.

Q Could you see the train over here where you saw it, from here could you see it ?

A No.

Q If you had been over there- (indicating) ?

A No.

Q Why not ?

A You could not see it for
the bushes.

Q Just after you heard the
crash did you pay any attention to the train after
that ?

A Well, it went on down a
piece and then backed up.

Q Do you know how far it
went ?

A No, I don't know.

Q In coming to that crossing
there did it slow up any ?

A No, I don't think so.

Q State whether or not the
train was running fast or slow ?

A It was running fast.

Q When you were standing over
here looking at this train and Mr. Fishburn, who was
with you ?

A Reba Carpenter, and Etta
Blevins and Martha Blevins.

Q Are those girls here ?

A Reba Carpenter is.

Q And Martha Snyder ?

A Martha Blevins.

Q You say you don't know
how far the train went below the crossing before it
stopped ?

A No.

CROSS EXAMINATION

BY JUDGE TATE:

Q Miss Elsie, where was
Walter Fishburn in the car when you first saw the train
coming and saw him coming up on the track ?

A Where was he at ?

Q Where was he ?

A Down a little piece from
the mill, Bob Hannah's mill.

Q Past Bob Hannah's mill ?

A Yes, a little bit towards
the track from the mill.

Q You mean towards the
track from the mill ?

A Yes.

Q About how far ?

A I don't know how far it
would be.

Q Well, would you say he was
half way to the track; half way to the first track ?

A About half way.

Q To the first track ?

A Yes.

Q And you think the train was
about two telegraph poles up the track ?

A Yes.

Q Do you know how far apart
those telegraph poles are ?

A No, I know about in my
mind but I could not tell it.

Q Could you look out yonder
and tell us about how far it would be, some object ?

A I don't know.

Q You think the train was
running what you would call fast running ?

A Yes.

Q Now, the telegraph poles average seventy-five feet apart, don't they, Miss Elsie ?

A I don't know.

Q This train was running about 30 miles an hour and that would ^{be} a half a mile a minute - 40 feet a second, 44 feet a second - you think the train was as much as say 30 seconds - would it be as much as 1300 feet, that is about a quarter of a mile up the track, was it that far away ?

A How ?

Q As far away as a half a mile up the track when you saw it ?

A No, not that far.

Q As soon as you saw it you turned your head to keep from seeing the accident ?

A I seen him coming on up that way, you know, and I seen the train coming right on and I turned my head.

Q To keep from seeing the accident ?

A Yes.

Q He still was not on the first of the side tracks at that time ?

A No, he had not got that far.

Q When you turned your head to keep from seeing the accident ?

A Yes, I did.

Q He had not got on the side track ?

A No.

Q That is right ?

A Yes.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q Do you remember, Elsie, on up the track towards Maryville, do you remember a tool house up there by the side of the railroad ?

A Do you mean up from the station ?

Q Yes.

A Yes.

Q State whether or not the train was between that and this station when you first saw it ?

A Why I don't remember whether it was or not.

REBA CARPENTER, the next witness, being first duly sworn, testified as follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Your name is Reba Carpenter ?

A Yes.

Q How old are you ?

A Fourteen years old.

Q Where do you live ?

A Montvale Station.

Q Have you lived there all
your life ?

A No. I was not born there.

Q How long have you lived
at Montvale Station ?

THE COURT: About how long ?

THE WITNESS: I guess it has been about
two or three years since I moved to Montvale.

BY MR. JACKSON:

Q A little louder, Reba.
Where do you live at Montvael Station with reference
to the station where the road crosses there ?

A- You know where Dick Giffin's
store is ?

Q Yes. Do you live close
to that ?

A Down below.

Q On the same side of the
railroad ?

A Yes.

Q That is Dick Giffin's store

(indicating) , you live down there ?

A Yes.

Q Now, this represents the public road crossing (indicating), and here is Mr. Giffin's store and here is Mr. Hammah's store and this is Mr. Huffstetler's store, and these two tracks is the railroad running along there, and that is the road (indicating), you understand that ?

A Yes.

Q You remember the occasion of Walter Fishburn getting killed down there, you remember the occasion ?

A Yes.

Q You remember the occasion you say ?

A Yes.

Q Now, I don't mean the date, but you remember when, or the occasion, do you ?

A Yes. I could not remember the exact date.

Q Well, you remember it, do you ?

THE COURT: You remember the time it was.

don't you, when the man was hit in a car down there
by the train ?

THE WITNESS: You mean what month ?

MR. JACKSON: I mean do you remember
when it happened ?

THE WITNESS: Yes sir.

BY MR. JACKSON:

Q Where were you when it
happened ?

A We started - right there
is Dick Giffin's porch.

Q Where were you with refer-
ence to his store ?

A Well, we were nearly to
the store.

Q You were between the
house and the store ?

A Yes.

Q Who was with you ?

A Well, there was Elsie Tuck
and Martha Blevins.

Q Anybody else ?

A And Nannie Snyder.

Q Now, did you see the crash
when the train hit the car ?

A No, I heard it.

Q Why didn't you see it ?

A I turned around a second
and heard it - I didn't see it.

Q What did you do then ?

A Well, I heard it.

Q Did you see the train any-
where ?

A Yes, I saw it coming.

Q How far was it up above
the station here when you first saw the train - do
you remember the tool house up there ?

A Yes!

Q Had the train passed that
tool house ?

A I don't remember whether it
had passed it or not.

Q Anyway you saw the train coming. Was there anything particularly that attracted your attention to the train ?

A I don't know - I noticed the coaches, they were taking them down to Calderwood.

Q Was it an unusual train there that was run on that road ?

A Yes.

Q Was it a freight or passenger train ?

A A passenger.

Q Do you remember how many coaches ?

A No. I do not.

Q When you saw the train coming, state whether you saw Walter Fishburn coming there ?

A Yes, he was just coming this way (indicating).

Q About how close was he to the railroad when you first saw him ?

A I don't exactly know.

Q Had he got onto the railroad ?

A No, when I seen him he
had not.

Q Then you say you turned
your face ?

A Yes.

Q Why did you turn your
face ?

A Well, I commenced to
scream and holler.

Q Did the whistle blow ?

A I don't remember.

Q Could you have heard the
whistle if it had blown ?

A Yes, I guess I could have
heard it if they blowed.

Q Was the bell ringing ?

A I don't remember.

Q If the bell had rung would
you have noticed it ?

A I guess so.

Q Was the train running fast or
slow ?

A Well, I didn't pay much
attention to whether it was running fast or slow.

Q You were scared, were
you ?

A Yes.

Q Do you remember how far
the train went down below the station before it stopped ?

A No.

CROSS EXAMINATION

BY JUDGE TATE:

Q You don't mean to say that
the whistle did not blow or the bell did not ring, but
that you just don't remember ?

A I just don't remember.

Q Now you were over here at
Giffin's store ?

A No, I was over next to the
house.

Q Where is the house with
reference to the store ?

A It is a step or two.

Q Part of the store, or
one building ?

A No.

Q Where is the house, Miss
Reba ? The house where you were when you saw it coming,-
I mean is it closer than the store or farther away than
the store from the track ?

A It might be a little fraction
closer.

Q You were down somewhere there
in the neighborhood of the store ?

A Yes.

Q Is the house on the same
side of the public road as the store ?

A Yes.

Q You saw the train coming and
saw Walter Fishburn in his car ?

A Yes, but I didn't know who
he was.

Q You saw this man in the car
who was afterwards killed ?

A Yes.

Q You saw him in the car ?

A Yes.

Q He had not yet got on the side track ?

A He had not quite got to the side track.

Q Was he coming from the mill, in the direction from this mill of Mr. Hannah's ?

A He was coming from that.

Q From that direction ?

A Yes.

Q And was he approaching the track, getting fairly close to the side track, was he ?

A Well, he was just coming on -

Q You don't know how far from the side track he was ?

A No.

Q But he had not got to the side track yet when you saw the train coming and saw him coming, is that right ?

A Well, when I seen him he had not got to the track.

Q He had not got there ?

A No.

Q And then you turned
your head ?

A Yes.

Q When you saw him he had
not got to the side track yet, but you turned your head
to keep from seeing the accident - you didn't want to see
it and you turned your head ?

A Well, I was scared.

Q You were scared ?

A Yes, and I turned my head.

Q And you say he had not
gotten to the side track yet, - now, after anybody gets
on that side track they can see on all the way up past
the school house on the track, can't they ?

A Yes, on the track they
can.

Q After they get to the side track
they can see all the way up the track past the tool house -
that is right - when they are on the track ?

A I don't know about that.

Q After they get up on the
side track they can see plumb up to the tool house, either
a quarter or a half a mile away, can't they ?

A Well,

Q There are no trees or brush growing between the rails where the train runs, is that right ?

A Yes.

Q Now, he had not gotten to the side track when you saw the train there, away over here at Giffin's house, and you turned your head to keep from seeing the accident - is that what you told the jury ?

MR. JACKSON: I object to that. She said she didn't remember.

JUDGE TATE: The jury will remember. Young lady, I believe you said that he had not gotten to the side track when you saw him ?

THE WITNESS: Yes, he was just coming on it.

BY JUDGE TATE:

Q And then you turned your head to keep from seeing the accident after you had already seen the train ?

A Yes, I had seen the train.

RE DIRECT EXAMINATION

- BY MR. JACKSON:

Q Reba, you know where Hannah's mill is over there ?

A Yes.

Q Now, if one is in the road along there near that little bridge at Hannah's mill, could you see the train over there ?

A Could I see the train over on the railroad ?

Q Yes, could you see the railroad and train now, from over there ?

A Well, I don't know.

Q You have not tested that ?

A No.

H. F. FERRIS, the next witness, of lawful age, being first duly sworn, testified as follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Mr. What is your business ?

A Railroad agent.

Q For what railroad ?

A Southern Railway and T.

& C. S. Railway.

Q What is the T. & C. S. ?

A Tennessee & Carolina Southern

Railway.

Q Is that the line of railroad that operates between Maryville and Calderwood ?

A Yes.

Q Which one of those corporations, are they corporations ?

A Yes.

Q Which one of those corpora-

tions operates this railroad ?

A The Tennessee & Carolina
Southern.

Q Tennessee & Carolina
Southern ?

A Yes.

Q What connection does the
Southern Railway have with it ?

A What connection it has
with it ?

Q Yes.

A None that I know of.

Q Does the Southern Railway
Company operate their cars and trains over it, over
this line of railroad ?

A Yes.

Q Do you remember the date
Walter Fishburn was killed ?

A I don't remember the date
I remember it all right, but I could not say what date
it was he was killed. I don't remember the exact date.

Q Do you remember the special
train run on that occasion ?

A Yes.

Q Was that a Southern Railway Company train ?

A I don't know.

Q Where does the jurisdiction of this Tennessee & Carolina Southern Railway Company begin and where does it end ?

A From Maryville to Calderwood.

Q Was this train on this occasion made up at Maryville ?

A No.

Q Where was it made up at ?

A In Knoxville I suppose.

Q And came over what road ?

A It came over the Southern from Knoxville to Maryville and the Tennessee & Carolina Southern on up.

Q Does trains belonging to that road running from Maryville to Calderwood operate between Knoxville and Maryville ?

A I beg your pardon ?

Q Do you have trains belonging to the Tennessee & Carolina Southern Railway Co. operating between Knoxville and Maryville ?

A No, not that I know of.

Q This train was made up at Knoxville and came in over the Southern ?

A Yes.

Q Was it a through train from Knoxville to Calderwood ?

A It was a special train.

Q A special train ?

A Yes, for that occasion.

Q What did you say the name of this railroad company was ?

A Tennessee & Carolina Southern Railway Company.

Q What connection did the Knoxville & Augusta Railroad have - does it have any in the operation of that line of railroad ?

A No, not that I know of.

Q Does the Southern Railway have any connection in the operation of this road in conjunction with the Tennessee & Carolina Southern Rail-

way Company over here from Maryville to Calderwood ?

A Not that I know of.

Q When you sell a ticket to Calderwood what kind of a ticket do you sell ?

A You mean on ~~what~~ road ?

Q Yes.

A Tennessee & Carolina Southern.

Q When you sell a ticket to Knoxville what kind of a ticket is that ?

A Southern.

Q But Southern trains do operate over this line of railway of the Tennessee & Carolina Southern Railway Company ?

A Yes.

Q They do you say ?

A Yes.

Q Is that daily ?

A Yes.

Q Do you know by what right they operate over that line ?

A No.

Q Did you see this special train on that occasion ?

A No.

Q You didn't see it ?

A No.

Q Have you got any record showing what kind of train it was ?

A No.

Q Did it stop at Maryville ?

A I don't know. I was not on duty at the time it went by.

Q What did you say the name of that railroad company was ?

A Tennessee & Carolina Southern Railway.

CROSS EXAMINATION

BY JUDGE TATE:

Q Mr. Ferris, you say you are a railroad agent here at Maryville ?

A Yes.

Q Are you familiar with the distance between telephone poles or telegraph poles along the railroad ?

A No.

Q Do you know what the distance is up near the Montvale Station ?

A No, I do not.

Q Are you familiar with the situation up there at Montvale Station ?

A No, I am not. I have never been up there but a few times and I am not familiar with the situation there.

Q Do you know the distance the rails of the standard track such as they operate between between / here and Calderwood on that line of railroad, that is, how wide are the tracks between the rails ?

A Eight and a half feet, I believe. It is a standard gauge road.

Q You mean $8\frac{1}{2}$ feet from the end of a cross tie to the end of a cross tie or the rails themselves ?

A Between the rails I think it is.

Q Do you know the distance between the main line track and the passing track or side track, would that be the 8 feet you speak of ?

A Well, the 8 feet I was speaking of is between the rails.

Q Of a single track ?

A Yes.

Q Do you know how wide or how much distance there is between the inside rail of the side track and the inside rail of the main track where there are two tracks together ?

A I think that is 13 feet.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q Do you mean to tell the jury that it is $8\frac{1}{2}$ feet between the rails on a single line railroad ?

A I think it is, I am not sure - I am not a track man and I don't pay very much

attention to that department - I don't know. I believe it is but I am not sure.

Q Isn't that about the width of a coach - to refresh your memory, isn't it, between the track, about four feet and a few inches. How long is a cross tie ?

A Different lengths.

Q How much is a standard cross tie ?

A I don't know.

JOHN MURPHY, the next witness, of lawful age, being first duly sworn, testified as follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Your name is John Murphy ?

A Yes.

Q Where do you live ?

A I still live down at Niles Ferry, on Niles Ferry Road, eight miles.

Q You are the man who raises water melons ?

A Yes.

Q How far do you live from Montvale Station ?

A Four and a half miles.

Q Do you remember the occasion of Walter Fishburn being killed ?

A Yes.

Q Where were you ?

A Right above the church, right over from the station.

Q What church is that ?

A Carpenter's Camp Ground.

Q Is that an old established church there ?

A Yes.

Q Been there how long do you reckon ?

A I can't tell you, it was an old church when I was a little boy, fifty years ago.

Q I will explain to you this diagram on the floor - here is (indicating) Bob Hannah's mill, and the public road crosses the railroad there (indicating), and this is Dick Giffin's store, and this is the main line of the railroad (indicating), and this is the spur track there (indicating). Do you understand the map now ?

A Yes.

Q And for instance, here is is the main track here (indicating) ?

A Yes.

Q Where is Carpenter's Camp Ground church ?

A Away down there.

Q Just point on the diagram, is it on the left or right ?

A It is over there.

Q Here is a patch of woods (indicating).

A It is over here (indicating).

Q Over this way (indicating) ?

A Yes.

Q How far from the railroad ?

A Well, it is just oh,

it is ---

Q (Interposing) How many feet would you say ?

A I would say about an eighth of a mile.

Q On what kind of land is that church built, low land or high ?

A High land.

Q How far, state whether or not it is above the railroad ?

A It is.

Q Is the railroad in plain view there ?

A Yes.

Q How far can you see the railroad from Carpenter's Camp Ground church there ?

A You can see it - there is a cut right up from the station and you can see it from a little above that cut and then it goes around some pines and comes this way (indicating).

Q Do you remember the day
Walter Fishburn was killed ?

A Yes.

Q You were up there at the
church ?

A No, I was up above it.

Q On the hill ?

A Yes, up on the upper road
that comes the same way that the railroad runs, but it
is over on this side (indicating) .

Q And you saw the train going
down that way ?

A I saw the smoke. There
was some timber there and I could not see the train.

Q But you could see the smoke ?

A Yes.

Q Did that train whistle ?

A If it did I didn't hear it.

Q Were you in a position
elevated that you would have heard the train if it had
whistled ?

A Yes, I think so.

Q Did the bell ring before it

got to the station ?

A I didn't hear it if it did.

Q Were you in a position to hear the bell if it had rung ?

A Yes, I could for I could not have been over a quarter of a mile up above the church there.

Q Did that train make any noise except the actual running of the train ?

A It didn't make any noise hardly at all because it was down grade and it was not pulling.

Q It was not pulling ?

A No.

Q Did you hear the train stop down there ?

A No.

Q You did not ?

A No, I was coming up the ridge.

Q You were coming up the railroad ?

A Yes.

Q And the train was going one way and you were going the other ?

A Yes.

Q Are you acquainted with the situation at Carpenter Camping Ground and at the station ?

A Yes. I ought to be. I was raised right there.

Q Do you know where Bob Hannah's store (mill) is ?

A Yes, I know.

Q Coming up this road towards the crossing from Bob Hannah's store --

THE COURT: The mill you mean.

MR. JACKSON: Yes. Can you see a train on this line of road ?

THE WITNESS: No, not at that time you could not see but a little piece up the line if you were out here in the road, because there was timber or brush there, right along there (indicating).

BY MR. JACKSON:

Q Right along there ?

A Yes.

Q How high was that timber ?

A Oh, it varied, some of it
I guess 25 feet high or 30 anyway.

Q And that timber obstructed
the view of the train approaching this crossing here ?

A Yes.

Q It did ?

A Yes.

Q And that was the situation
existing at that time ?

A Yes.

Q You don't know how far
the train ran on down ?

A No, I didn't see it - I
didn't go back.

Q You did not go back
down there ?

A No.

Q You were coming by Mont-

vale ?

A Well, I was coming up
this way (indicating).

BY JUDGE TATE:

Q Were you walking at the
time ?

A No, I was horse back.

Q Were you coming away
from the track and had your back to it ?

A I had come from the track
coming up a piece, and then the road leads up this
way and runs the same way the railroad does.

Q You were headed northeast ?

A I was coming up this
way (indicating).

Q Of course you were not
expecting any accident on that occasion and you were
not listening to see what the train did or anything
like that at all ?

A No.

Q Your testimony is simply that
if it whistled you didn't hear it ?

Q And if the bell rang you didn't hear it ? A Yes.
Q The church was something
like a quarter of a mile and you were above the church
farther away than the church ?

A The road comes right by
the church leading up this way and I had done passed
up and got along up here and there is more timber after
you get along the ridge there and I was along in that
timber there.

Q Anyone who comes up here
from the mill would have that growth between him and the
tracks up north, but when he got by the growth, when he
got up approaching the side track then you can look up
the track and see anything that is there about an eighth
to a quarter of a mile ?

A I would not count it over
an eighth of a mile.

Q You could certainly see it
an eighth of a mile away ?

A Yes, but you would have to
get nearer the track before you could do it.

Q After you got by the growth
and before you got on the tracks ?

A Yes, sir. I don't know how wide that right-of-way is there, but you would have to get past the line of fence that runs up through the field before you could see.

Q That fence is 50 feet from the center of the track ?

A I don't know.

Q After you got up on a line of that fence you say you could see ?

A Yes, after you got up on the line of the fence.

Q Between the right-of-way and the owner of that land ?

A Yes.

Q You say you can see after you get up to the line of the fence ?

A Yes.

Q When you get where you can see up the track at all then you can see at least an eighth of a mile up the track ?

A Yes, that would be my judgment.

Q Whenever you get by the

line of that fence you can see at least an eighth
of a mile ?

A Yes.

W. E. PARHAM, the next witness, of
lawful age, being first duly sworn, testified as follows
on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Your name is W. E.
Parham ?

A Yes.

Q How old are you ?

A Sixty-eight.

Q Have you held any official
position in Blount County ?

A Yes.

Q What, if any ?

A Justice of the Peace, and School Commissioner and Chairman of the Court, and representative of the Senate, and Deputy Sheriff and Constable.

Q Anything else ?

A Assistant Tax Assessor.

Q Were you raised in this county, Mr. Parham ?

A From the age of five.

Q Are you acquainted with what is known as Montvale Station in this County?

A Yes.

Q How long have you known that station ?

A Since 1867.

Q 1867 ?

A Yes.

Q Since Walter Fishburn's death have you gone out and viewed that situation ?

A Yes.

Q How soon after he was killed ?

A He was killed on the 8th
and I was there on the 12th.

Q Of what month, anyway the
samw month he was killed ?

A Yes, July I believe.

Q Now, let this indicate,
this line here between these lines represent the road,
the public road crossing there at the railroad, which
comes by Bob Hannah's Store, and then makes a turn and
then these two lines represent the main line of the rail-
road (indicating), and this Montvale and this Calderwood,
and this represents the switch or house track (indicat-
ing), and this represents Huffstetler's store, did you
take measurements as to how far it was from this main
line there at Bob Hannah's store ?

A No.

Q Or to the mill I mean ?

A No.

Q How far is it if you meas-
ured from this little bridge here to the track ?

A To the main line east rail
135 feet, that is by steps - I didn't measure correctly

FILED

SEP 11 1928

S. E. CLERGE, Clerk

By _____



Filed Feb 29 1928

Patent Book Clerk

C. G. Fushum admn
as

~~Substitution Ry. et al.~~

LETTERS OF ADMINISTRATION

State of Tennessee, Blount County.

FILED

SEP 11 1928

S. B. CLARKE

To Walter Ashburn, a Citizen of

Blount County:

Walter Ashburn

Whereas, It appears to the Court, now in session, that

has died, leaving no will, and the Court being satisfied as to your claim to the administration, and you having given bond and qualified as directed by law, and the Court having ordered that Letters of Administration be issued to you: These are, therefore, to authorize and empower you, the said W. A. Ashburn to take into your possession and control, all the goods, chattels, claims, and papers of the said intestate, and return a true and perfect inventory thereof to our next County Court, or within ninety days from the date hereof; to collect and pay all debts, and to do and transact all the duties in relation to said estate which lawfully devolve on you as Administrator; and, after having settled up said estate, to deliver the residue thereof to those who have a right thereto by law. Herein fail not

Witness, Geo D Roberts, Clerk of said Court, at office, this

the 15th day of July, 1927.

Geo D Roberts
Clerk County Court.

W. A. Ashburn

Letters of Administration

Ed Ashburn

Adminstrat. of

Walter Ashburn

Issued

July 15, 1927

J. D. R. Clarke

Clerk.

Free Paid 300

Filed Feb 29 1928

Peter Paul Clark

SOUTHERN RY. CO. ET AL

VS.

C. A. FISHBURN, ADMR.

NO. _____

FILED

Sept 11th 1928

W. C. Clegg

SUPREME COURT CLERK.

STATE OF TENNESSEE

BLOUNT COUNTY.

I, Peter Rule, Clerk of the Circuit Court, in and for the aforesaid County and State, do hereby certify that the attached Exhibits were filed in the case of C. A. Fishburn, Administrator of Walter Fishburn vs. Southern Ry. Co. et al. No. 2730, on the Rule Docket of said Court, and through oversight, the same were not filed in Supreme Court with the Transcript.

Witness my hand and official seal,
at office, Maryville, Tennessee, this the 10th day
of September, 1928.


Circuit Court Clerk

Blount County,

Tenn.

Return in 10 days to
SUPREME COURT
S. E. CLEAGE, Clerk
JAS. T. JOY, D. Clerk
KNOXVILLE, TENNESSEE

< 2 Exhibits >

Lenthbury & Co. et al
vs
C. A. Fishburn Adm'r

FILED
SEP 11 1928
S. E. CLEAGE, Clerk

except by steps.

Q Have you had occasion
to test your steps to see how far you step ?

A Yes.

Q Is that on a level there
from this bridge up to the railroad there ?

A No.

Q Did you put a level on
it or a transit on it to see what percentage it was ?

A No.

Q About what percent would
you estimate it ?

A About 4 per cent.

Q Now, speaking of Mr.
Hannah's mill here, is there anything between the rail-
road and Mr. Hannah's mill to prevent anyone from seeing
the train as it comes from towards Maryville going towards
Calderwood ?

A Yes, there was a growth
of timber at that time.

Q How high was that timber ?

A 15 or 20 feet.

Q Could you say about how
big it was in diameter at the ground ?

A No.

Q How near does this timber
come down to the public road ?

A Within 30 feet.

Q Of the public road ?

A Yes.

Q How close to the railroad ?

A Within thirty feet of this
switch.

Q Of this switch ?

A Yes.

Q Do you know how far it is
between the switch and main line ?

A No, but I would say six
feet.

Q Do you know how far it
is between the rails or between a line of standard
gauge rails ?

A Four and nine tenth
inches.

Q How wide is this patch
of timber or growth of timber here ?

A About four feet.

Q How far does it - or how far would it obstruct your view of the train from here, how far up the road does that condition exist ?

A 300 feet.

Q Of course you know nothing about the fact of or how this accident took place ?

A No.

Q You were not there ?

A No.

Q Did you see this automobile, Mr. Parham, after it was torn up ?

A Yes.

Q Could you tell where it had been hit, just describe the condition of the car ?

A It was hit on the left hand side and tore out the entire side from the rear back to the front-- the top was broke loose, the windshield was broke and the fender was dented to the left and forward and the radiator was bent over to the side and broken. There were no wheels under the front.

Q Do you know whether there were any wheels under the front at the time or just

immediately after the wreck or not ?

A No.

Q Did you say the right side of the automobile or the left side ?

A The left side as you sit in it.

Q Would that be the side up towards Maryville if the car was coming from Mr. Hannah's mill ?

A Yes.

Q Would that be on the same side of the train in case the train was coming down this way as it came across there ?

A The train would be coming from the same side.

Q Did you notice the head lights on the car ?

A Yes.

Q Were they broken ?

A The one on the right was broken, and the one on the left was whole.

Q Whole but dented ?

A Yes, the glass was whole

and the frame was bent there.

Q The glass was whole ?

A Yes.

Q Were you any farther over
towards Hannah's mill than this bridge ?

A I may have been.

Q I mean when you were making
these tests ?

A Yes, I was over farther.

Q Could you stand on this
bridge and see a train as it came along here ?

A I could not see beyond
fifty feet from the center of the road east, to the
northeast.

Q You mean 50 feet north of
the center of the road up towards Maryville ?

A Yes.

Q Fifty feet ?

A Yes.

Q How wide is that road ?

A I would say ten feet.

Q The right-of-way or what ?

A Which road are you talking about ?

Q The public road.

A Ten feet.

Q You say you could stand there and only see 50 feet up the road here from the center of the pike ?

A Yes.

GROSS EXAMINATION

BY JUDGE TATE:

Q Now, if I understand you correctly, a man within 30 feet of the side track--

A (Interposing) The growth ?

Q Yes, the timber or whatever you call it.

A Yes.

Q After you got within that 30 feet of the side track then you could look up the rail-

road and see whatever was on the track ?

A You could Judge, except there was some small growth, I would say five or six trees in between this thick growth as I have called it and the side track, but it stopped before it got to the side track itself.

Q You are speaking now of the smaller growth ?

A Yes, it stopped before it got there - the small growth, that would not be closer than ten feet.

Q Not closer than ten feet ?

A No.

Q Within that ten feet at any rate there was not anything to obstruct the view of a man looking up the track a quarter to a half a mile away ?

A No.

Q And still he would not be on the track ?

A No.

Q You say you could see 50 feet from back at the culvert ?

A Yes.

Q As you approached the track that angle would widen and that distance would extend ?

A Yes.

Q And the culvert is 120 feet away ?

A Yes.

Q And every foot you got closer to the track would lengthen that distance that you could see up the track ?

A Yes.

Q The dirt road and the railroad were practically at right angles ?

A No.

Q Well, you tell me.

A No, they are not at right angles. The road comes at an angle- I mean the railroad comes at an angle I would say from the north to the south, while the road would approach it from the southeast.

Q Would that make the larger part of the angle, the obtuse part, on this side or that side of the dirt road ?

A On the right of the
dirt road.

Q It would be wider in
here (indicating) ?

A Yes.

Q Therefore one approaching
from this side (indicating), would get a longer view up
the track and more clearly as he approached than he would
if it were a right angle or an acute angle ?

A Yes.

Q But it was obtuse like
that (indicating) ?

A Yes.

Q You say 50 feet - you say
you could see 50 feet up the track at 150 feet away,
every foot he got closer to the track on that obtuse
angle lengthened his vision up the track ?

A If it was 30 feet of the
track he could only see 150 feet.

Q Thirty feet south of the
side track ?

A No, sir, of the main line.

Q South of the main line ?

A Yes, the east rail of the main line 30 feet.

Q When you were still thirty feet from the main line --

A (Interposing) Hold on now.

Q All right.

A Sixty feet.

Q When you were 60 feet from the main line ?

A Yes, from the first rail of the main line you could see 150 feet up the track.

Q And every foot that you got closer would lengthen the distance that you could see up the track ?

A Yes.

Sixty feet from the closest or eastern rail of the main track you could see 150 feet and every foot you got closer you could see farther.

Q You spoke about a four per cent grade. Did you observe it right on the crossing or for just ten feet on the other side ?

A It is steeper - that is

practically the whole of the jump, is within 20 feet of the side track.

Q I believe you say you didn't put an instrument on it?

A No.

Q Does this picture that has been filed in evidence here as exhibit to the testimony of Mr. Fishburn and the second one by the defendant fairly represent the condition of the road as it is there?

A Yes. This ^{is} however, looking south instead of north.

Q That is looking towards the mill?

A Yes, towards the mill and I was standing and taking all my observations from the other side.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q You say as you approach

the road it gets steeper ?

A Yes, I would say very
nearly all the rise is in 20 feet of the side track.

FRED CARPENTER, the next witness,
of lawful age, being first duly sworn, testified as
follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q How old are you ?

A Twenty-five.

Q Where do you live ?

A I live near Montvale

Station.

Q On which side of the rail-
road going towards Calderwood ?

A Going towards Calderwood
on the east side.

Q How long have you lived there ?

A All my life.

Q Do you remember the occasion of Walter Fishburn being killed down there ?

A Yes.

Q Where were you at that time ?

A I was on the west side of the railroad.

Q Where with reference to Dick Giffin's store ?

A I was on the same side of the railroad.

Q How close to the store ?

A I don't know how close to the store.

Q Were you near that store ?

A Well, something like half way I guess between the store and the railroad.

Q Half way ?

A Yes, maybe a little closer than that.

Q Well, let this be the public road coming west and going east, and this is Bob Hannah's mill over here and this the main line, and this the spur track, and this Giffin's store, you say you were half way between there and the railroad ?

A Yes, maybe a little nearer to the railroad.

Q A little closer you say ?

A Yes.

Q You say you saw the crash ?

A Yes, but the train was between me and the man though.

Q Where did you first see the train ?

A I guess it had just come out of the cut up there.

Q How far above the railroad crossing ?

A I don't know, a good little ways up there.

Q Give your best estimate as to how it was ?

A Well. I don't know. I
am not much on distances.

Q About that time did you
see Walter Fishburn ?

A Yes.

Q Where was he ?

A Along about the culvert.

Q About the culvert ?

A Yes.

Q Near Hannah's mill ?

A Yes.

Q Did you keep your eye on
the train or Fishburn ?

A Well, when I saw him coming
at the Culvert I looked back at the train and a little
bit before it hit him I looked back towards Fishburn.

Q Did that train whistle ?

A Not close there.

Q How far was it away when
it whistled ?

A I don't know - I didn't
see the train when it whistled - I imagine it was around

the curve.

Q How far is that from
Montvale Station ?

A I don't know.

Q About how far ?

A I don't know, but about
a quarter of a mile I guess.

Q Had the train come in
sight when it whistled ?

A No.

Q Did the train whistle after
it came in sight of the station down there ?

A No.

Q Did it ring the bell ?

A I didn't notice it.

Q If it had rung the bell
were you in position to have heard it ?

A Yes.

Q You say you didn't hear it ?

A No, I didn't listen.

Q Was the train running
fast or slow ?

A Pretty fast.

Q Do you know where the
train stopped after it hit the car, where it stopped ?

A Yes.

Q Where ?

A Down about the trestle
down there.

Q How far is that below the
station on towards Calderwood ?

A Between ~~400~~ and 500 feet,
something like that.

Q Did you go down to the sta-
tion after the train passed on ?

A Yes.

Q Did you see Fishburn ?

A Yes.

Q Did you see him before they
moved him ?

A Yes.

Q Was he bleeding ?

A Yes.

Q Where ?

A In the nose I noticed.

Q Did he speak any ?

A No.

Q Was that a passenger train
or a freight train, Mr. Carpenter ?

A A passenger train.

Q You say it was running
pretty fast ?

A Yes.

Q Did it slow up when it
approached the crossing there ?

A I didn't notice it.

Q You mean you didn't notice
it slowing up or or didn't notice to see whether it did
or not ?

A I didn't notice it slowing
up.

Q Did that train make any
noise whatever except the natural noise made by the run-
ning of the train ?

A I don't know that it did.

Q You were in position to
hear it, were you ?

A Yes.

Q Were you looking directly
at the car when the crash came ?

A Yes, I was.

Q Do you know whether the train
hit the car ?

A Well, it hit it right in
the radiator.

CROSS EXAMINATION

BY JUDGE TATE:

Q Now, Mr. Carpenter, you
and your sister, Miss Maude, aged about forty years,
were in your auto coming down from your home that
morning, were you not ?

A No.

Q Was Miss Maude with you ?

A Yes.

Q Where were you coming
from ?

A We were coming from the

store.

Q I beg your pardon,
from the store ?

A Yes.

Q You were not at home ?

A No.

Q You were traveling towards
your home from Montvale - you were approaching the
crossing ?

A Yes.

Q You were approaching the
railroad from the west and near the crossing you heard
the train blow, as you were near the crossing, didn't
you ?

A I had not left the store
when I heard the train blow.

Q And you heard it back
there ?

A Yes.

Q How many feet back of the
crossing is that ?

A I don't know, about four
hundred or five hundred feet I guess, something like
that.

Q And when you got up to the crossing the train was close enough for you to stop ?

A Yes.

Q To let it get by ?

A Yes.

Q And then Mr. Walter Fishburn was in his Ford coming down at the culvert ?

A Yes.

Q Now, when you got up to the crossing you could see the train up there between the crossing and the cut ?

A When I stopped ?

Q Yes.

A Yes sir, when I stopped I could.

Q When you stopped you recall that you could see the train up at the cut ?

A Yes.

Q And Mr. Fishburn was at that time still down near the culvert or 135 feet away, or do you know -- I believe that is what you said on direct examination ?

A What is the question ?

Q When you stopped up there
at the question you could see the train between the
crossing and the cut, and Walter Fishburn was, as you
have told the jury awhile ago, down at the culvert in
his car coming towards the crossing, and that was 135
feet away from the main line ?

A I don't think 135 feet.

Q Well, whatever it was, he
was down at the culvert, whatever it was, and you stopped
there and waited for the train to pass, and he was coming
on, and he kept coming right on without any change in
his speed right on until the crash came ?

A Yes.

Q He never slowed up ?

A No.

Q Never stopped or slowed
up ?

A No.

Q He came right straight
onto that track until the crash came ?

A Yes.

Q Never slowed up ?

A I never noticed him slowing up any.

Q Now, I believe you saw the marks made in the crossing - that is the public road crossing, by the wheels of the auto, did you not ?

A Yes.

Q They showed that the front wheels didn't get up on the front rail of the track ?

A No.

Q All right. How were those marks ?

A Well, it looked like it was about a foot over the track, something like that.

Q Now, this gentleman over here, Mr. Gresham, you know him ?

A Yes.

Q Did he come out that afternoon or the night after the accident and ask you to make a statement for him ?

A Yes.

Q Did you then sign that statement in your hand writing ?

A Yes.

Q Look at it there and see if that is your hand writing ?

A It looks like it.

Q This statement was made by you immediately after the accident, that very afternoon ?

A Yes, that afternoon.

Q I will read the statement to you and ask you if it is one that you made.

MR. GAMBLE: I object to his reading that statement before the jury.

THE COURT: On what ground ?

MR. GAMBLE: On the ground that we don't know what he has there -- that is a copy of the statement - I asked him if he made that statement.

JUDGE TATE: I asked him that.

MR. GAMBLE: That would not make it competent.

JUDGE TATE: That is the usual^{way}/of

asking the witness. This statement was made in your home on the afternoon of the accident, was it not ?

THE WITNESS: Made at the barn, hardly in my home.

Q At the barn there at your home ?

A Yes.

Q Did you say on that occasion to Mr. Gresham, and after wards sign the statement: "I am twenty-five years old and live near Montvale Station Maryville route No. 7, occupation farmer. This morning at about nine o'clock my ~~sister~~ Maude, aged about forty years, and I were in our auto and were driving towards our home from Montvale. We were approaching Montvale crossing ~~at Montvale Station from the west~~ at Montvale Station from the west and when near this crossing I heard the train blow. This train was then some little distance north of the crossing. I stopped my auto on the west side of the crossing and this Ford coupe approached the cross-

ing from the east but this coupe was just about the culvert or about 50 or 75 feet east of the crossing, and I kept watching the train and saw that this Ford auto didn't stop, but kept coming right on towards the crossing and when it came over the side track it seemed to be just moving as though it was going to stop before it got to the main line track. As the auto crossed the side track the front end of the engine or train looked to be almost on the north edge of the crossing and the train was running pretty fast and an accident seemed eminent-- the engine or train came between me and the auto so that I could not see the actual collision. I saw the marks made in the crossing by the wheels of the auto which showed the front wheels did not get up on the first rail of the track and I would judge it ran into the side of the engine"---

MR. GAMBLE : I object to that.

THE COURT: Yes.

JUDGE TATE: I am asking the witness whether he said it.

MR. GAMBLE: He can't say what his judgement was, was.

THE COURT: I will take care of that in a moment.

JUDGE TATE: And you further said: "And I didn't notice and could not say whether the bell on the engine was ringing or not - I heard no whistle except the one above mentioned."

Did you say to Mr. Gresham that which I have read here and then sign it in person ?

THE WITNESS: Yes sir.

BY JUDGE TATE:

Q Was that a correct statement and do you now say it is a fact, Mr. Carpenter, that as the auto got on the side track the engine had approximately reached the north part of the crossing ?

A I didn't say approximately

on the north side of the public crossing down this way
when the auto got on the side track --

Q That is what you said here,
is that correct ?

A Yes, that is correct.

MR. JACKSON: Are you going to file
that, Judge Tate ?

JUDGE TATE: Will you file this state-
ment as Exhibit 1 to your testimony ?

THE WITNESS: Yes.

THE COURT: What the witness said in
the signed statement about his opinion that the auto
ran into the side of the engine, gentlemen of the jury,
you need not pay any attention to that - but that is a
matter you must determine from the proof in the case
and not take the opinion of the witness on it.

JUDGE TATE: Will your Honor say to
the jury that that is only that part, and that you do
not mean to exclude from them that the engine was nearly

to the road crossing when the auto had come up ?

THE COURT: I just exclude that opinion that he gave about the car running into the side of the engine, the rest of it goes to the jury for what it is worth.

BY JUDGE TATE:

Q I understand you run a Ford, Mr. Carpenter ?

A Just a little bit.

Q Do you know the operation of a Ford ?

A Yes.

Q I will ask you what is the effect if one pushed the pedal that is supposed to bring the Ford to neutral a little too far and gets it past the neutral point --

MR. GAMBLE: (Interposing) I object to that.

THE COURT: You say you run a
Ford ?

THE WITNESS: I own a Ford. I don't
run one.

BY JUDGE TATE:

Q Did you ever run one ?

A Yes a little bit.

MR. JACKSON:: That is a hypothetical
question.

THE COURT: No, it is not.

MR. JACKSON: There must be something
to base it on, there is no proof in the record.

JUDGE GAMBLE: That would make the
witness assume that a certain state of facts were true
and say that was the cause of the accident.

THE COURT: I don't know what he is going to show about it -

JUDGE TATE: The witness stated he saw this Ford slow up after it got up on the side track and he thought it was going to stop.

JUDGE GAMBLE: What he thought is out of the record.

THE COURT: That is in the record.

JUDGE TATE: The only opinion is as to the side swiping of the train - this is a statement of facts as he saw it, that it slowed as if it was going to stop and slowed down, and I want to submit to the jury now off of the proof -- I don't know whether this man is qualified to give it, but by a witness who can, that when you put a Ford into neutral to come to a stop you might go a trifle too far and then it would go on as this car did -- do you know about that ?

JUDGE GAMBLE: First, Judge Tate says it is competent for this witness to say what he thought this car was going to do, and that is a matter for jury. When he tells what the car did it would be for the jury to say whether he was going to stop or not - that is a conclusion of the witness and we insist that he could only tell what that car was going and how it was traveling, and it would be for the jury to say what they thought it was doing.

JUDGE TATE: There is no argument between us about that.

JUDGE GAMBLE: That is what I am objecting to and the other is that he says he has not operated a Ford enough to know those things.

THE COURT: He says he knows about it.

JUDGE TATE: If he don't know I don't want to try to prove it by him .

BY JUDGE TATE:

Q Do you know the effect of the different pedals on a Ford car ?

A Yes.

Q Now, is there a pedal that when you press it half way in that puts the car in neutral because it is where none of the machinery will make it move on ?

A Yes.

Q And will that same pedal if pressed a trifle on beyond that point put the car in low speed that will start it and make it go ?

A Yes.

Q Pressed on beyond neutral ?

A Yes.

JUDGE GAMBLE: We wish to except to that on the ground that there is no evidence whatever that such a condition existed at this particular time and place with this car and it would be assuming a con-

dition to exist --

THE COURT: The objection is over-
ruled.

JUDGE GAMBLE: We note an exception.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q Now, Mr. Carpenter, I
believe I asked you about your seeing this train coming
up there - I believe you say that the train did whistle
after it came in sight?

A I didn't see it.

Q You didn't see it ?

A No.

Q You mean you didn't hear
it ?

A No, I didn't see it or

hear it. I didn't see it when it whistled.

Q You state now that it was not in sight when it whistled ?

A Yes.

Q Did that train whistle after it did come in sight ?

A No sir.

Q You say no ?

A No sir.

Q Now, in coming from over on this side, assuming it is 133 feet there, could you look up the track and see the train over there (indicating) ?

A I don't think so.

Q Who wrote this statement, Mr. Carpenter ?

A Who wrote that ?

Q Yes.

A That gentlemen over there.

Q Who was that ?

A The gentlemen over there.

Q Mr. Gresham ?

A Yes.

Q That gentlemen stand-
ing up there ?

A Yes.

Q He is the law agent of
the railroad company, this railroad company ?

A I suppose so.

Q How long was it after this
accident happened until he came to see you ?

A It was the afternoon of
that day.

Q The same identical day ?

A Yes.

Q About how many hours after
Walter Fishburn was struck there ?

A Well, something like eight
hours I guess.

Q Do you know whether Walter
Fishburn was dead at that time or whether or not he died
before Mr. Gresham came down there ?

A Yes.

Q You had heard that he was
dead ?

A Yes.

RE CROSS EXAMINATION

BY JUDGE TATE:

Q In other words, as soon as he could get to you after the death of the man and while it was fresh on your memory, is that correct ?

MR. JACKSON: He don't know what Mr. Gresham did.

BY JUDGE TATE:

Q While it was fresh on your memory and as soon as he could get to you after Fishburn's death, you made a correct statement of it, didn't you ?

MR. GAMBLE: I object to that as
argumentative.

BY JUDGE TATE:

Q You told him or made him
a correct statement of the matter at that time when
it was fresh on your mind as you have stated here today,
you told him correctly ?

A Yes.

MISS MAUDE CARPENTER, the next witness,
of lawful age, being first duly sworn, testified as
follows on

DIRECT EXAMINATION

BY MR. JACKSON:

Q Have you been sworn ?

A I was in here this morning, yes.

Q Now, talk loud, Miss Carpenter, so the jury and these gentlemen over yonder can hear you - are you a school teacher ?

A Yes.

Q Do you remember the occasion of Walter Fishburn being killed at Montvale Station ?

A Yes.

Q Where were you at that time ?

A I was on the side of the road by Mr. Giffin's store, on the same side of the road there.

Q This (indicating) represents the road coming from Montvale Pike and crossing the railroad and going over to Bob Hannah's Mill on there, and this represents the main line of the railroad from Knoxville to Calderwood, and this represents (indicating), the store. You were over here (indicating) ?

A Yes.

Q At Mr. Giffin's store ?

A Yes, I was between the store and the railroad.

Q Did you see the train ?

A Yes.

Q How far up the road was it when you saw the train ?

A Well, I don't know how far it is, but as soon as it came in sight.

Q Did you see the train come in sight ?

A Yes.

Q Did you hear the train whistle ?

A I heard it up the pike a good ways.

Q Was that before the train came in sight that you heard its whistle ?

A Yes.

Q Do you know how far that was up the line ?

A I don't know just how far.

Q Quite a distance ?

A Yes, quite a distance.

Q After the train came in sight I will ask you, Miss Maude, if the train whistled ?

A No, it didn't.

Q I will ask you if after it came in sight the bell was ringing ?

A No.

Q State whether or not it made any noise, the natural noise of the running of the train ?

A I didn't notice any noise at all.

Q You didn't notice any at all ?

A No, I didn't notice it.

Q Is it up or down grade ?

A It is down grade .

Q Going down grade ?

A Yes.

Q Was the train running fast or slow ?

A Fast.

Q Was it a passenger train

or a freight ?

A A passenger.

Q Now, as it approached this crossing, did the train slow up any ?

A No.

Q It did not ?

A No.

Q Did it stop after it ran over the crossing and struck Mr. Fishburn's car ?

A It stopped down the track a good ways.

Q Do you know about how far it stopped down the track ?

A It went down about that trestle, I don't know how far.

Q Now, were you looking directly at the car when the train hit it ?

A No.

Q You were not ?

A No.

Q Which way were you looking ?

A I was looking at the coaches, up at the windows.

Q What attracted your attention about the coaches ?

A Well, I was just looking as you will when a train passes - I was not attracted especially.

Q You don't know what part of the train hit the car ?

A No.

Q Did you see the car after it was struck ?

A Yes.

Q Do you know what part of the car was injured ?

A Well, I can't tell you exactly.

Q Did you see Mr. Fishburn after he was struck ?

A Yes.

Q Where was he when you saw him ?

A He was just laying down there on the track.

Q Down below the railroad

crossing ?

A Yes.

Q Was he between the two
tracks ?

A I don't remember.

Q Did you hear him speak ?

A No.

Q Could you tell whether he
was wounded ?

A No, I was not near him.

Q Now, Miss Carpenter, looking
up this way from where you were state whether or not
you could see the train when it came in sight up here ?

A I didn't understand the
question.

Q From where you were down
here, could you see the train coming and could you see
the train as it came in sight up here ?

A I could see all the way to
the curve.

Q Up the road ?

A Yes.

Q It was up the road ?

A Yes, I could not say how far the distance was.

Q Have you ever notice whether you could on the other side of the road, whether you could see the train up that way ?

A No, you could not at that time.

Q Why ?

A Because of the trees.

Q And the undergrowth ?

A Yes.

Q Did that obstruct the view of the train from near the crossing ^{on} /up the track ?

A Yes.

Q How far up ?

A You mean how far up on the railroad ?

Q Yes.

A Well, you could not see it except until you were about on the track.

Q You could not see the train until you were almost on the track ?

A No.

Q You remember the tool house up the line of railroad ?

A Yes.

Q How close did that woodland or this obstruction come to that tool house up there ?

A I don't remember, I didn't notice.

CROSS EXAMINATION

BY JUDGE TATE:

Q Miss Maude, did you ever make any experiment over here to see how close you would have to get to the track before you could see up it at all, did you ever measure it ?

A No, I never measured it.

Q That is your guess as to about how far you could see up the track, by looking up it ?

A Yes, that morning I
looked up.

Q You could see before you
got on the track, there was a space in there before you
got on the track where you could see a ways up the
track ?

A Well, I could not see very
far up.

Q Before you got up on the
track there was a space though when you could see up
on it - there was a space before you got on the track
where there was not anything to keep you from seeing
up the track, there were no trees in between the rails
of the track ?

A No.

Q I say there was a space
before you got on the track where you could see up
the track ?

A A little ways, yes sir,
but not far.

Q You stopped after having
heard the whistle blow over here ?

A Yes.

Q Your car stopped after you heard the whistle blow ?

A Yes sir - well we were out there at the store when the whistle blew.

Q Had you left the store yet ?

A We were still at the store then.

Q You knew that the whistle had blowed and you stopped before you got to the track ?

A Yes.

Q And the train was then coming in sight ?

A Yes.

Q It had come in sight before you got to the track ?

A Well, it was just coming in sight as we stopped.

Q Before you stopped your car it was coming in sight ?

A Yes.

Q Where was Mr. Fishburn in the Ford at that time ?

A Well, he was just a little ways on that other side.

Q Do you know how far ?

A No.

Q After that, Mr. Carpenter, did he come right on, just right on with his car ?

A Yes, he just came on after I got there.

Q Did you ever see him turn his head one way or the other or just drive on ?

A Well, I was not paying any attention to him.

Q The car was coming right on ?

A Yes, it was moving.

Q He had not yet got on the side track ?

A No.

Q Were you over on your side of the train ?

A Yes.

Q When you were over on that

side was the train in sight ?

A Yes.

Q Even before you stopped
your car ?

A Yes.

Q Mr. Fishburn at any rate
had not at that time reached the side track of the rail-
road ?

A No.

RE DIRECT EXAMINATION

BY MR. JACKSON:

Q Miss Maude, you say you
were over there at the store when you heard the train
whistle ?

A Yes.

Q Were you in the car when
you heard the train whistle ?

A Yes.

Q Were you in the car when
you heard the train whistle ?

A Yes.

Q Then when you heard the train whistle you drove on down to about half way the distance I believe you say to the road ?

A Yes.

Q Was it then you saw the train come in sight ?

A No. I saw the train before we drove that.

Q You heard the train whistle before you started ?

A Yes.

Q That was the last time it did whistle ?

A Yes.

Q When the train came in sight over here could you have been over here on the other side and seen the train ?

A No.

MR. JACKSON: Plaintiff rests.

A Yes.

Q Then when you heard the train whistle you drove on down to about half way the distance I believe you say to the road ?

A Yes.

Q Was it then you saw the train come in sight ?

A No, I saw the train before we drove that.

Q You heard the train whistle before you started ?

A Yes.

Q That was the last time it did whistle ?

A Yes.

Q When the train came in sight over here could you have been over here on the other side and seen the train ?

A No.

MR. JACKSON: Plaintiff rests.

PLAINTIFF RESTS.

JUDGE TATE: I will ask that your Honor excuse the jury for a few moments.

THE COURT: Gentlemen of the jury, you will please retire from the court room.

(THEREUPON THE JURY RETIRED FROM THE COURT ROOM).

JUDGE TATE: Now, if your Honor please, we move your Honor to instruct peremptorily the jury to return a verdict in favor of these various defendants and the motion is made separately as to each defendant and separately as to each count of the declaration.

Now, your Honor, I will address myself to that motion - if your Honor pleases, with the amendment added this morning, we have here a possible common law count and a statutory count. Now, as I view the facts

in this case as they are brought out here, there are enough undisputed facts as that your Honor should not require us to introduce proof in this case. There are enough undisputed facts to show conclusively that reasonable minds cannot differ about the fact that this man was the author of his own injury, that he drove upon the railroad track at a time when he could have seen the train away up the track in time to have protected himself, and that he just simply came right on to his death. Therefore we ask your Honor upon the facts of this case to direct the jury to return a verdict peremptorily in favor of the defendants in this case.

THE COURT: Gentlemen, these railroad statutes are just like the multiplication tables - if you don't see them every day you get lost in them.

On the common law count the Court said in the Hinds case, 144 Tennessee, that the question of contributory negligence is a question to be submitted to the jury, and in this case taking the proof as it shows the conditions of the crossing and what was done and what the defendant did and what the plaintiff did

both, what the deceased, rather, did, - is, the Court thinks, a question for the jury to say whether it was negligence on the part of the defendant and also whether there was any contributory negligence on the part of the deceased, Walter Fishburn.

Now, on the statutory count; of course this statute of the State does not apply to the common law count. It specifically sets that out - and while it is sometimes insisted as was in Tennessee Central, 153 Tennessee, page 695, that this did apply to the common law, yet when you read that case correctly and find out just what it is about, it is a case under the statute solely, and the Court held that that might apply to a certain extent in statutory actions and sets that out in that case just how far it goes and we will leave that to the jury to say whether or not plaintiff was guilty of contributory negligence, even in the face of that statutory

Under all the circumstances, gentlemen, I overrule the motion as to the Southern Railway Company and the Tennessee Carolina Southern Railway Company, and I direct a verdict for the Knoxville & Augusta Railroad

Company on all the counts. Let the jury come.

JUDGE TATE: Does your Honor overrule the motion on both counts ?

THE COURT: On both counts as to the Southern Railway and Tennessee & Carolina Southern Railway.

JUDGE TATE: On behalf of those defendants, Southern Railway Company and Tennessee & Carolina Southern Railway Company we now note exception to your Honor's ruling as to each of them as to each of the counts.

THE COURT: Let the jury return.

(Thereupon the jury returned into open Court).

THE COURT: Gentlemen of the jury, I direct you to return a verdict in favor of the de-

fendant Knoxville & Augusta Railway Company, that is one of the defendants in this case.

JUDGE TATE: If we could have a few minutes conference, your Honor, I think that we might save some time.

THE COURT: All right.

(After conference) :

JUDGE TATE:

The defendants are content to except to your Honor's ruling in overruling their motion, and will stand on the record as made and introduce no proof.

DEFENDANTS CLOSED.

PLAINTIFF CLOSED.

The foregoing was all of the evidence introduced and proceedings had on the trial of this case.

Whereupon, at 4:30 o'clock p m. on this February 29, 1928, Court adjourned until 8:30 o'clock a. m. of March 1, 1928.

Maryville, Tennessee, March 1, 1928.

Court met pursuant to adjournment at 8:30 o'clock a. m. on this March 1, 1928, when the following proceedings were had:

Thereupon counsel for the parties argued the case to the jury, and after argument of counsel the Court charged the jury as follows:

C H A R G E.

THE COURT: Gentlemen of the Jury:

The plaintiff, C. A. Fishburn, administrator, sues Southern Railway Company, Knoxville & Augusta Railway Company, and Tennessee & Carolina Southern Railway Company for \$20,000.00 as damages for the death of his intestate, Walter Fishburn, and in the declaration which he files as a basis for his lawsuit he has two counts.

In the first count of the declaration the plaintiff alleges, among other things, in substance as follows: That the plaintiff, C. A. Fishburn, administrator of the estate of Walter Fishburn, deceased, duly appointed by the County Court of Blount County, Tennessee, and qualified as such administrator, sues defendants Southern Railway Company, Knoxville & Augusta Railway Company, and Tennessee & Carolina Southern Railway Company for \$20,000.00 and alleges that on or about the 8th day of July, 1927, and prior thereto and since that date the defendant Railway Companies were the owners and operators of a line of railroad running from Knoxville to Calderwood, Tennessee, by way of Maryville, Tennessee, along which line of railway the defendants had established

and maintained many stations, one of which was Montvale Station, a few miles south of Maryville, on that part of said line of railroad running from Maryville to Calderwood, Tennessee, and at this station a large number of people and patrons of the defendants were accustomed to go and board the trains of defendants to be carried to various points, and at which point trains on said lines of railroad operated by the defendants and prior thereto and since that date were accustomed to stop for the purpose of receiving and discharging passengers on and from their trains and for the purpose of loading and unloading freight onto and from their trains.

The plaintiff further avers that on the date aforesaid and prior thereto and since that date a public road crossed said line of railroad at said Montvale Station at right angle to said railroad, over and along which public road a number of people were accustomed to travel, as they had a right to do, in buggies and automobiles, which was well known to the defendants, or should have been known by the exer-

cise of ordinary diligence and observation, and that along the east side of said line of railroad at said Montvale Station, and within thirty feet thereof is a large amount of trees, bushes and other shrubbery, which obstructs the view of said railroad from one who is traveling along said public road, and on the east side of said railroad, on account of which it is impossible for one to see an approaching train on said line of railroad from the east side thereof, until within a few feet of said railroad crossing, and this condition existed on the date aforesaid, to-wit, July 8, 1927, and was known to the defendant railroad companies, or ought to have been known in the exercise of ordinary diligence and observation.

Plaintiff further avers that on the date aforesaid and since that time there was and is a store and grist mill located on the east side of said line of railroad and near thereto at said Montvale Station and near said public road crossing aforesaid, to which a large number of people were accustomed to go on business, and it was necessary for a large per cent of the people going to said mill

and store on business to cross said line of railroad at said crossing, which fact was well known to defendants, or should have been known by the exercise of ordinary diligence and observation. That said public road on the east side of said railroad track aforesaid at Montvale Station in approaching said railroad track, and within ten feet thereof, is up grade, and he further avers that it was the duty of the defendant companies to keep said public road at said crossing for a distance of ten feet on each side thereof on a grade level with said railroad which it or they failed to do, said Montvale Station not being within the limits of a city or taxing district or incorporated town.

Plaintiff further avers that it was the duty of the railway companies, through their vice-principals, agents, and servants, in the maintenance and operation of said line of railroads and trains thereon and along and over said line of railroads and at said crossing aforesaid and within a reasonable distance from said crossing at said station and on approaching same to

sound the whistle and ring the bell on their trains, which they failed to do at the time of the injury to plaintiff's intestate as hereinafter set out, to warn the people traveling on said public road of the approach of trains.

Plaintiff further avers that it was the duty of the defendant railway companies to operate their said trains through their vice-principals, agents and servants across said public road crossing at Montvale Station aforesaid at a moderate, safe, and careful rate of speed, having said trains at all time under control, which they failed to do, and that on or about July 8, 1927, Walter Fishburn, was driving his automobile along and over said public road at and near Montvale Station aforesaid, and that before he attempted to cross said line of railroad aforesaid at Montvale Station he, the said Walter Fishburn brought his automobile to a full stop, looked and listened for approaching trains, and that after so stopping, looking, listening, and hearing no train he then proceeded toward said railroad with the in-

tent to cross same, which he had a right to do, and just as he drove up the grade to said railroad and onto said railroad, without any fault or negligence or carelessness on his part, or without any negligence and carelessness on the part of the plaintiff or upon the part of the party for whose use and benefit this suit is brought, the defendant companies, through their vice-principals, agents, and servants, without sounding the whistle or ringing the bell on said train, and without any warning whatever, ran one of their passenger trains, same being a special train going south on said line of railroad, negligently, carelessly, recklessly, and without regard to the safety of human life across said public road crossing at a high, dangerous, unsafe, reckless, negligent, unlawful rate of speed, striking said Walter Fishburn's automobile, completely demolishing said automobile, bruising, wounding, and maiming said Walter Fishburn, and fracturing his skull, from the effects of said wounds, bruises, and fracture the said Walter Fishburn died within a few hours thereafter, and that after said injury the said Walter Fishburn, suffered great pain and mental anguish until he died, as aforesaid. All

of which injury, suffering, mental anguish and death of the said Walter Fishburn in the manner aforesaid, was caused by the negligence, carelessness, recklessness and unlawful acts of the defendant railway companies and not on account of any negligence, carelessness or unlawful acts of said deceased, Walter Fishburn, nor on account of any concurring negligence on the part of the deceased, Walter Fishburn, nor on account of any negligence or carelessness on the part of the plaintiff or the party for whose use and benefit this case is brought.

The plaintiff avers that the said Walter Fishburn, deceased, left a widow, Emily Fishburn, for whose use and benefit this suit is brought, but that he left no children.

The negligence, carelessness, recklessness, and unlawful act of the defendant companies in causing the death of said Walter Fishburn, deceased, aforesaid, are more specifically set out and charged as follows:

1. The defendant companies, through their vice-principals, agents, and servants were negligent and careless in causing the death of the said Walter Fishburn, deceased, aforesaid, in that they failed to sound the whistle and ring the bell on said passenger train on nearing said railroad crossing at Montvale Station on the occasion and at the time and place aforesaid, to warn the said Walter Fishburn, deceased, of the approach of said train as was their duty to do.

2. The defendant companies, through their vice-principals, agents, and servants were negligent, careless, and reckless in causing the death of said Walter Fishburn, deceased, in that they ran their train that struck the said Walter Fishburn at said railroad crossing at Montvale Station on the occasion and at the time and place aforesaid at an unlawful, rapid, and careless rate of speed in absolute disregard for human life.

3. On July 8, 1927, and prior

thereto, that the railroad companies, through their servants and agents did unlawfully fail to maintain the grade of said public road on the east side of said railroad at said crossing at Montvale Station on a level with the rails of said railroad for a distance of ten feet on each side of the track as was their duty to do, said crossing not being within the limits of a city taxing district or incorporate town, so that when plaintiff's intestate, Walter Fishburn, deceased, attempted to cross said railroad on the occasion and at the time and place aforesaid, said grade impeded the progress of his, the said Walter Fishburn's automobile and caused it to slow down on said crossing.

I instruct you, gentlemen of the jury, that the plaintiff is not insisting on this act of negligence set out in the third act of negligence in this count, and you need not pay any further attention to any proof in the case on that, as they are not insisting on it.

In the second count of the declaration

plaintiff alleges the same as he does in the first count, down to this act of negligence, with this additional allegation that the defendant companies were negligent and reckless in causing the death of the said Walter Fishburn, aforesaid, in that it failed to keep a lookout ahead on its locomotive that ran against and upon said Walter Fishburn, deceased, and that when said Walter Fishburn's car in which he was riding appeared on the crossing aforesaid of said railroad at Montvale Station, it failed to sound its whistle and ring the bell on said locomotive, and failed to put down the brakes or do anything or make any effort to stop the train.

We are not further concerned, gentlemen of the jury, with the defendant Knoxville & Augusta Railroad Company, as I have heretofore instructed you to return a verdict in its favor.

Southern Railway Company and Tennessee & Carolina Southern Railway Company for plea say that the Southern Railway Company and Tennessee & Carolina

Southern Railway Company, by their attorneys, for plea to plaintiff's declaration filed against them in this case and to each and ever count thereof, say that they are not guilty of the wrongs and injuries as plaintiff has alleged in his declaration, and of all this in their said plea they put themselves upon the country.

Plaintiff joins issue on this plea of not guilty and in this way are formed the issues that you have been selected, impanelled and sworn to try and determine, and you should determine those issues, gentlemen of the jury, according to the law and evidence in the case.

Before the plaintiff can recover he must make out his case by a preponderance of the evidence, that is the greater weight of the evidence must be in support of plaintiff's contention and of every material averment, but a mere preponderance of the evidence, however slight, is sufficient.

If the evidence preponderates in favor of the defendants' contention, or is evenly balanced,

the plaintiff's action must fail.

By a preponderance of the evidence, gentlemen of the jury, is meant the greater weight and value of all the testimony, which is not necessarily determined by the greater number of witnesses, but by their character, their intelligence, and their means of knowledge, touching the subject matters about which they testify. In ascertaining where the preponderance of the evidence is, you will not be guided alone by the number of witnesses who have testified in favor of or against either party, because the evidence must be considered, and weighed with reference to its value and not merely with reference to the number of witnesses.

You, gentlemen of the jury, are the sole and exclusive judges of the evidence and the weight to be given to the swearing of each and every witness in the case, but the law you will take as given you by the Court.

If the evidence is conflicting, you must reconcile it, if it can be done, and if not wholly at least as far as you can, without hastily or rashly concluding that any witness has sworn falsely, for the law presumes that every witness has sworn the truth. In reconciling the evidence or in determining its weight, you should look to the interest and feeling of the witnesses, if any are manifested, look to their relationship to any of the parties, if such is the fact, look to their intelligence, their respectability, the reasonableness or unreasonableness of the stories they tell. You look to their manner of testifying, look to their means of knowledge of the facts about which they testify and you will look to their readiness and willingness to answer questions on the one side and their reluctance or tardiness in answering on the other side, if such be shown. You look to his or her motive to speak the truth or otherwise, and you will look to see if they have made contradictory statements out of court about matters which they profess to know and understand, if such should be shown. You will finally, gentlemen of the jury,

give greater weight to that witness or those witnesses believed by you to have correctly and truthfully detailed the facts in the lawsuit.

There are several modes of impeaching a witness. One mode is by a rigid **cross** examination to involve the witness in contradictions and discrepancies as to material facts stated by him. Another mode of impeaching a witness is by showing that he has made conflicting statement as to material facts in the case about which he testifies, that is, that he has made statements different out of court from what he makes in Court.

I charge you, however, gentlemen of the jury, that when a witness is impeached by any method known to the law, that he remains an impeached witness through out the trial, but even an impeached witness may, of course, swear the truth, and in determining how this is the jury will look to all the proof in the case in order to see whether he had been corroborated or sustained by the testimony of other witnesses or other facts or other circumstances in the case.

and also to the reasonableness or unreasonableness of the story he tells, and his means of knowledge. In other words, it becomes a question of fact, like any other facts, for the jury to determine just what weight, if any, is to be given to the testimony of any witness thus assailed.

On the subject of positive and negative testimony gentlemen of the jury -- positive testimony is where a witness swears that he was present and saw or heard a certain thing. Negative testimony is where a witness swears that he was also present and that if a certain thing happened or was said or done he did not see it or hear it. I charge you that the positive swearing of one credible witness will outweigh the negative testimony of any number of negative witnesses, but if a witness swears that he was present and that a certain thing was not said or was not done, then that becomes positive testimony and you will weigh it as such.

It is the insistence, gentlemen of the jury, on the part of the plaintiff in this case,

and it is the theory of plaintiff that the defendants Southern Railway Company and Tennessee & Carolina Southern Railway Company operated its certain passenger train in a careless and reckless and negligent manner, and that the servants and representatives of the defendant companies in charge of said train were not in the exercise of reasonable care and caution, that is, not in the exercise of such care as reasonably prudent, cautious servants, agents, and representatives of said company would have or should have exercised under all the facts and circumstances in proof in the case.

It is insisted further that these defendants maintained a railroad crossing near Montvale Station and that they allowed trees and brush to grow up along the sides of their railroad and grow so closely to the public road that crossed the railroad at this place that it was impossible for one traveling from towards the east to see an approaching train and that the plaintiff on this occasion driving down to Montvale Station, drove across the tracks towards the west in a careful manner, and that his brother got out of the car and that the deceased, Walter

Fishburn, turned his car around and started back across the railroad crossing at this crossing going towards the west, and that the train of the defendant companies came along without giving any warning, and without blowing any whistle or ringing any bell, and that because of their negligence in allowing the trees, bushes, and brush to grow up along their railroad tracks, it was impossible for the plaintiff's intestate, Walter Fishburn, to see the train coming, and that the train ran into him when he was crossing and killed him.

It is further insisted by the plaintiff that the deceased, Walter Fishburn, in his automobile appeared as an obstruction on the railroad track ahead of the train and that the defendant companies violated the statute of the State of Tennessee with reference to keeping a lookout ahead on their train, and when an object appeared close enough to the track to be struck it was their duty to blow the whistle, ring the bell, and put down the brakes and do all in their power to prevent an accident. Plaintiff insists that this was not done on this occasion and that this was negligence on the part of the de-

fendant companies and that it was the prime and proximate cause of the accident and that there was no negligence on the part of the plaintiff's intestate.

I instruct you, gentlemen of the jury, that if you find this to be true from the proof, that is, by a preponderance of the evidence of the evidence then the defendant railway companies would be guilty of negligence and your verdict would be in favor of the plaintiff and against the defendant, provided you find further that the plaintiff's intestate, Walter Fishburn, was not guilty of any negligence on his part and that he was at the time in the exercise of due care and caution for his own protection. That would have to appear, gentlemen of the jury, by a preponderance of the evidence, before you could return a verdict in favor of the plaintiff in this case. The plaintiff's intestate, Walter Fishburn, is required to use that degree of care and caution that an ordinarily prudent person would be required to use to protect himself from sudden danger which he sees or might have seen by the exercise of ordinary

care. He would not be allowed to see the danger and go right into without exercising any care to protect himself from being injured. He must use that ordinary degree of care and caution that an ordinarily prudent person would use to protect himself if he sees there is danger or if he might have seen there was danger, and exercise ordinary care.

On the other hand, gentlemen of the jury, it is the insistence on the part of the defendants and it is the theory of the defendants that they were in the exercise of due care and caution in the management and running of their trains and that the train was not run at a negligent and reckless rate of speed, and that at this railroad crossing, that while there were some trees along the sides of the track, that those trees were not on the right-of-way of the defendant companies, but that they were over on some other land owner, and that after coming to the railroad right-of-way somewhere from fifteen to thirty feet from the side track, that if the plaintiff's intestate had looked and listened when

he came to the railroad right-of-way and after he came onto the side track, which is on the west side of the main line, he could have seen the train coming some quarter of a mile and would have had ample time to have stopped and prevented the injury, and that he failed to do that, and that his contributory negligence was the cause of his death, free from any negligence on the part of these defendant companies.

Defendants insist further that their train blew and that other people who were expecting to cross the track heard the train blow and saw it coming and stopped, and that there was no reason why the plaintiff's intestate should not have heard the same whistle blow and seen that the train was coming. They insist further that the plaintiff's intestate, when he drove onto the railroad right-of-way and onto the side track on the west side, which he came to first, that he was driving his car very slowly and in such a way as to indicate that he intended to stop and not cross the track and that if he was struck by defendants' train that he ran into the side of the train, or some part of the side of the train, by defective machinery

about his car, and that that was not the fault of the defendant companies. They insist further that the plaintiff's intestate was perfectly familiar with the crossing at that place, having been there on numerous occasions and that he knew just how close to the railroad he must be to see up the railroad track and that he knew that he could not see from back towards the mill, but that it was his duty to look when he came near or could see and that he failed to do that. They insist further that the train was running faster than Walter Fishburn was driving and that the train appeared on the crossing before the deceased got there, and that he ran into the side of the train.

They insist further that if he did see the train coming he was guilty of gross contributory negligence that would bar a recovery and after he did see the train that his defective machinery in some way carried him into the side of the train. They insist further that at the time of the accident the defendants were in the exercise of due care and caution in the operation and management of their train, that is,

such care and caution as an ordinarily prudent and cautious person would have exercised at that place under all the facts and circumstances in proof, and they insist further that it was not their negligence that caused the accident and injuries, but that it was the contributory negligence of the plaintiff's intestate himself.

I instruct you, gentlemen of the jury, that if you believe this to be true from the evidence, or if the evidence on that question is evenly divided on that question, that is, evenly balanced, your verdict would be in favor of the defendants in this case.

There are two counts in the declaration and I have explained to you and I shall instruct you further on the common law count and then I will instruct you on the statutory count.

Now, on the common law count, gentlemen of the jury, a railroad company ordinarily speak-

ing has the exclusive use of its tracks and road bed on which to run its trains and engines and conduct the business of the company, except at crossings of the railroad tracks by streets or public roads and at such crossings the company and the public have rights to pass. The plaintiff had the same right to travel along the road which the defendant had to operate its trains upon the railroad. Their rights at the crossing were equal at common law.

A railroad company is held to reasonable and ordinary care, considering all the circumstances and surroundings, to not injure any person who is on their tracks or comes upon their tracks or so close thereto as to be struck by the running engine or train.

In running its engine or train in a congested section or at a place where more people travel than travel at other places, where the place is more thickly settled, if the proof shows that is true in this case, and where people are accustomed to be or to cross the railroad track, it is the duty of the defendant railroad company to have a person

on the engine on a careful lookout for the persons thus on the track, and in case the person or persons in charge of the engine sees or should have seen and known that a person was about to go onto the railroad track and be struck or injured by the engine, it would be the duty of the railroad company, through its agents, servants, and employees to do all it can to prevent it, and the greater the danger there is of any injury to pedestrians or people coming onto the track, the greater the care required by the company to prevent it and reasonable and ordinary care under all circumstances is required. It is the duty also of all persons, when they enter upon the track of the railroad or are about to go upon the same, to use reasonable and ordinary care for their safety and protection, and the greater the danger the greater the degree of care that is required on their part to protect themselves.

All persons are held to the knowledge that going upon or walking on or crossing a railroad track where engines and trains run is dangerous, and that they are under a duty to use ordinary care and

caution to protect themselves, and the greater the danger the greater the care required by the law for the person to observe that goes upon or attempts to go upon a railroad track or cross a railroad track at a crossing. They should not enter upon the track until after such train or engine passes, if they see one passing or if they could have seen one coming by the exercise of ordinary care.

I charge you further, gentlemen of the jury, that the engineer or person operating the engine, ordinarily speaking, is not required to stop any train or engine or attempt to do so upon seeing a person or an automobile approaching the track, if that person seen approaching the track by the engineer is apparently, or the driver of a car is apparently in condition to see and hear the approaching engine or train, and the engineer or other person in charge of the train or engine has the right to presume that the person approaching a track in an automobile will stop and not enter upon the track in front of an approaching engine. But if the engineer or fireman

or person on the lookout or person in charge of the running of the train should believe from the nature of the movements that the person approaching or the automobile approaching the track, that such person did not realize, or the occupants of an approaching automobile did not realize the danger of their entrance upon the track, and that they were about to do so and be injured, then it would be the duty of the engineer or person in charge of the train to do all in his power to try to stop the engine or otherwise to prevent an accident, and if they complied with these requirements they would not be guilty of negligence, otherwise they would be guilty of negligence.

So, gentlemen of the jury, in this case, if you believe by a preponderance of the evidence that the plaintiff's intestate, Walter Fishburn, was in the exercise of reasonable and ordinary care for his own safety, considering his condition and surroundings and the apparent danger of the surroundings, and all the facts and circumstances of the case, and that

while in the exercise of that care the car was driven on the track and Walter Fishburn was injured, and if you further find from the proof that the person in charge of the engine at the time was in the exercise of reasonable and ordinary care, and that such person in charge of the engine saw that Walter Fishburn, or the automobile was about to enter upon the track where the automobile would likely be struck or injured by the engine, or could have seen such to be the fact in time to have stopped the engine and to have prevented the accident, and that he failed to do so, then ~~such~~ failure would be the proximate cause of the injury and the defendants would be liable.

If you find, gentlemen of the jury, that the person in charge of the engine did not realize and the facts were such that he was warranted in not realizing that it was the purpose of the driver of the automobile to go upon the tracks until he did go upon the track on the part of the defendants, and that the fireman or other person on the engine thought or would have thought from the conduct of the plain-

tiff's intestate, and from all of his actions, that he intended to stop his automobile and not go on the track or across the track, and they did not see him until it was too late for the engineer or fireman in charge to take steps to prevent the accident and prevent striking the automobile, plaintiff could not recover.

The law does not require impossibilities of railroad companies, gentlemen of the jury, nor does the law hold them liable for accidents in such cases where they or their agents have exercised reasonable and ordinary care under all the circumstances to prevent an accident, but what is reasonable and ordinary care under all of the circumstances, gentlemen of the jury, is a matter for you to determine from all the proof in the case.

The degree of care required of the defendant railroad companies while approaching the crossing where the plaintiff's intestate was injured was commensurate with the known dangers of the particular situation. A railroad company running and operating

its trains upon and across a crossing such as the one at Montvale Station must use greater care and diligence to prevent accidents to persons who may be upon the crossing of such railroad company than is required of it in less frequented and populated localities, if the proof shows that the place of the accident was more thickly populated and used to a greater extent than the ordinary railroad crossing. If the proof does not show that, then they would not be held to any greater degree than they would at any other railroad crossing. If a train is running upon or across a highway at a place where by reason of the existence of special conditions and particular surroundings there is greater danger of accidents to persons upon or crossing the street than at places where such special conditions and particular surroundings do not exist, it is the duty of the railroad company and its employees in charge of the train to exercise greater precautions to be on the lookout and to give warning of the approach of the train of a character depending upon the particular locality and the circumstances to avoid accidents, than would be required in other localities where such conditions and particular sur-

roundings do not exist, and any neglect of such precautions, that is to be on the lookout and to give such warning of the approach of the train as are proper unto the peculiar surroundings and circumstances of the locality constitute negligence for which the railroad company is liable in damages, if the jury believes that such negligence was the proximate cause of the accident, unless the injured person by the exercise of such care on his part as would be used by an ordinarily prudent person under the same circumstances could have avoided the accident.

It is the duty of the plaintiff, gentlemen of the jury, as I have already said to you, to use that degree of care and caution which an ordinarily prudent person would use to protect himself from the danger that he sees or which he might exercise of ordinary care.

I instruct you further, gentlemen of the jury, on the question of the negligence of the defendants that you should take into consideration the

place at which the accident occurred, the nature of the surrounding country, the condition of the road bed and the manner that the train was being propelled, the rate of speed it was running, the character of the railroad track, the probability of pedestrians or people in automobiles being on the track at the time and place, if any, and from all these facts and circumstances determine whether or not the servants of the defendants in charge of the train exercised ordinary care and prudence in the management and operation of the train at the time and place of the accident. To run a train, gentlemen of the jury, at a high rate of speed when approaching a point where the train men have reasons to believe there are persons in exposed conditions on the track or that they were in a place where people crossed the railroad track frequently and where the public are expected to pass tracks or cross tracks and those facts and circumstances are known to the ones in charge of the train, or where they would be held to know the probable consequence of maintaining great speed without warning, this would be recklessness and negligence, and the defendant company would

be liable for their actions.

Gentlemen of the jury, this case is based on the alleged negligence of the defendants, as I have heretofore explained to you. The plaintiff insists and says that the injury was caused by the defendant companies, and the defendant companies insist that the plaintiff's intestate was guilty of negligence which proximately caused or contributed to his own injury, which if true under the common law count of this declaration would bar any recovery, and I have been talking to you about the common law count.

I instruct you, gentlemen of the jury, that negligence as applied to either the injured person, plaintiff's intestate, in this case, or to the defendants in cases like this, means a wrong doing of an act or wrongful omission to act which resulted in damages to another, but which was done with no intent to cause injury or damage. That means the doing of something that an ordinarily prudent person would not do, or in failing to do something that an ordinarily prudent

person would do under the same or similar circumstances.

The term "negligence" has been defined by our Supreme Court to be the want of ordinary care and caution in the doing of an act or in the failure or omission to do that which a person of ordinary prudence and caution would do under similar circumstances, and what would be ordinary caution in one instance, gentlemen of the jury, might be gross negligence in another. In other words, the dangers and risks incident to the business or undertaking, and the circumstances under which the parties are engaged or that which they are doing, should be considered by the jury in determining what ordinary care and caution is or whether the same is negligence.

The proximate cause of an injury is that act or omission which immediately causes or fails to prevent an injury. It is the act or omission accruing or concurring with another which had it not happened the injury would not have been inflicted. Proximate cause, as above defined, does not necessarily

mean that which is last in point of time, but it means that which is the procuring and efficient cause of the accident.

If the consequent result of such act or omission could, by the exercise of ordinary care have been anticipated or foreseen that an injury or such injury which did occur, if one did occur, would probably result from such act or omission, then that party would be guilty of negligence proximately causing or contributing to the injury.

I instruct you further, gentlemen of the jury, that when parties operate through agents and employees, the employees and agents act within their apparent scope of authority, and that the parties are bound by the acts of their employees. In other words, gentlemen of the jury, the railroad companies, defendants in this lawsuit, are bound by the acts of their agents and servants and representatives in operating the engine on that occasion.

As I have already stated to you there is no proof in the case about the condition of the crossing, the grade being for ten feet level with the top of the rails, for ten feet on either side of the railroad, and the plaintiff is not insisting on that, and you need not pay any further attention to it.

Further, under the common law count, gentlemen of the jury, which I have been talking to you about, if both plaintiff's intestate, Walter Fishburn, and the defendants were guilty of negligence, that is, if both were guilty of negligence that contributed directly and proximately to cause plaintiff's injury, that is, the death of Walter Fishburn, then plaintiff cannot recover in this case. In other words, gentlemen of the jury, if you believe the negligence of the plaintiff's intestate, Walter Fishburn, combined with the negligence of the defendant railroad companies to produce the accident, so that both acts together constituted the proximate cause of the injury, then the negligence of the plaintiff's intestate, Walter Fishburn, however slight, would bar a recovery, and

you would find for the defendants.

If you find that the plaintiff's intestate, Walter Fishburn, was guilty of contributory negligence, and that his contributory negligence contributed directly and proximately to the injury, then the plaintiff could not recover in this case.

Contributory negligence, gentlemen of the jury, is the negligence of a person which would be the negligence of Walter Fishburn in this case, in failing to exercise ordinary care and caution in the doing of an act or in a failure or omission to do that which a person of ordinary prudence and caution would do under the same or similar circumstances.

If you find that the defendant is liable in this case and that the plaintiff's intestate, Walter Fishburn, was guilty of some negligence, but that such negligence on the part of Walter Fishburn, was not the direct and proximate cause of the injury complained of

and did not directly and proximately contribute thereto, but contributed indirectly or remotely thereto, then plaintiff's intestate's negligence, that is Walter Fishburn's negligence, would not defeat a recovery, but such contributory negligence on the part of Walter Fishburn must be taken into consideration by you and you must reduce the amount of damages which you would otherwise give commensurate with the contributory negligence of the plaintiff's intestate, Walter Fishburn, and say then what damages plaintiff suffered by reason of the accident, if any.

The burden is on the defendant to prove contributory negligence, gentlemen of the jury, but when the proof raises a presumption of contributory negligence, then the burden is on the plaintiff to show that there was no contributory negligence. What I have had to say to you, gentlemen of the jury, in regard to negligence and the weight of the proof and all has been on the common law feature of the lawsuit. I shall now instruct you on the statutory count or feature of the lawsuit.

The method of weighing the evidence on both counts will be the same, but the degrees of contributory negligence and the manner in which the degrees of contributory negligence are applied will be different under the statutory count from the common law count.

The statutory count in the declaration, which is the second count, gentlemen of the jury, is based on Section 1574, subsection 4 of the Code of Tennessee.

Section 4 reads as follows:

"Every railroad company shall keep the engineer, fireman or some other person upon the lookout always on the locomotive ahead and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an injury" or "prevent an accident."

Section 1575, gentlemen of the jury,
reads as follows:

"Every railroad company that fails to observe these precautions or causes them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned to or resulting from any accident and collision that may occur."

Section 1576 reads as follows:

"No railroad company that observes and causes to be observed these precautions shall be responsible for injuries done to persons or property on its road bed. Proof that it has observed such precautions shall be upon the defendant company."

The above section of the statute, subsection 4 of Section 1574 that I have just read to you, gentlemen of the jury, that is the one requiring the railroad company to keep the engineer, fireman, or some other person upon the locomotive upon the lookout ahead, before this section can apply it is necessary, gentlemen of the jury, for the plaintiff to show by the greater weight of the proof that the plaintiff's intestate, Walter Fishburn, came onto the railroad track ahead of the engine, or came so near to the track as to be an obstruction, and that the said Walter Fishburn was killed by a collision with the train, that is, that the defendant companies' moving train struck Walter Fishburn, or struck the automobile in which Walter Fishburn was riding. That is the question now that under your oaths it is your duty to determine, and you will have to settle it from the evidence in the case and this evidence you will weigh under the rules that I have given you heretofore under the common law count. I am now talking to you about the statutory count, but you weigh the evidence the same and under the same rules that I

have given you under the common law count.

If you believe from the greater weight of the proof, and as I have stated, the burden is upon the plaintiff to show it by the greater weight of the proof under the statutory feature of the lawsuit that I am talking to you about now, for this is the one I am talking to you about now, the burden is upon the plaintiff to show by the greater weight of the proof that Walter Fishburn, the deceased, appeared upon the track and in front of the train, or so near thereto as to amount to an obstruction in front of the train, and if you believe this has been shown by the greater weight of the proof, and that there was a collision, that is that the engine struck the deceased, Walter Fishburn, and that as a result of that striking he was killed or injured, and later died, then this section of the statute would apply and plaintiff would be entitled to recover damages from the defendants, unless it appears from the proof that the plaintiff's intestate, Walter Fishburn, appeared in front of the train at the instance of the collision and so near to the time of the collision that it was impossible for the de-

fendant companies and those in charge of the train to have carried out the provisions of the statute or some of the provisions required by the statute that I have read to you. In this respect, gentlemen of the jury, the statute does not require impossibilities, and if the car or automobile appeared on the track in front of the automobile so suddenly and so near to the rapidly moving engine that it was impossible for the engineer or those on the lookout ahead to comply with the requirements of the statute or comply with these sections, or some of them, before the collision, then there could be no liability on that theory of the lawsuit, that is the statutory feature of the lawsuit.

As I have said to you, it is for you, the jury, to say, if you find there was a collision by the engine, if the engine struck Walter Fishburn, it is for you to say whether the automobile appeared in front of the train so suddenly and so near the moving engine that it was impossible to comply with these sections of the law or with some of them. As I have stated to you, if the automobile did appear

so suddenly and if you so find from the proof, there can be no liability. But, if you find, gentlemen of the jury, that the automobile did appear on the track or was so near thereto as to be an obstruction and that it did not appear so suddenly in front of the engine as to make it impossible to comply with the statute, then there would be liability unless the defendant railway companies have shown by the greater weight of the proof that they did comply with all these requirements.

In other words, gentlemen of the jury, after the plaintiff has shown by the greater weight of the proof that the plaintiff's intestate, Walter Fishburn, appeared as an obstruction upon the track or so near to the track that he would be hit, if the plaintiff has carried this burden of the proof, that is, the burden of the proof on this point, then the burden shifts on the defendant railway companies to show by a preponderance of evidence that they have complied with the statute that I have read to you, or that the object appeared on the track in front of the train so suddenly that it was impossible to comply

with the statute or some part of it, and on this feature of the case the jury should believe by the greater weight of proof that the automobile appeared as an obstruction on the track ahead of the engine or so near to the track that it would be hit or struck by the engine, and if the plaintiff does not show that by a preponderance of the testimony, it would not be necessary for the defendant railway companies to show anything. In other words, gentlemen of the jury, you must believe by a preponderance of the testimony on this feature of the lawsuit that that automobile in which Walter Fishburn was riding appeared on the track in front of the train, or so near the train that it could be struck by an engine, before there could be any liability in this case, but if that were to be shown by a preponderance of evidence, then the burden would shift to the defendant railroad companies to show that they had complied with the statutes that I have read to you. If the plaintiff has not shown that by a preponderance of the evidence, then it would not be necessary for the defendant railway companies to show anything.

It is the duty of the railway companies, the defendants in this case, to use the greatest care and utmost vigilance in order to prevent injuries to persons upon their railroad tracks, in front of moving engines or within striking distance of a running engine.

The statute requires that the lookout be in such a position on the locomotive that he can see what is to be seen and that he must be vigilant and watchful. A lookout, even though he be upon the locomotive, who fails to see with due care and caution what he ought to have seen, would not be in the discharge of his duty, and that is not what the statute requires, but it requires that he should be placed where he can see and that he be vigilant. That he must see what he could see by the exercise of care. It is not necessary or required, gentlemen of the jury, that there be more than one lookout on the engine, but either the engineer, fireman or some other person shall be on the lookout for obstructions on the track in front of the moving train.

But as I have said to you, gentlemen

of the jury, unless the plaintiff has shown by a preponderance of the proof that the automobile did appear there, it would not be necessary for the defendants to show that they had a lookout on the engine, or a lookout on the engine ahead. If there is a proper lookout on the engine and the object is visible and yet is not seen, the jury will be well warranted in finding that the person so on the lookout was not vigilant and doing his duty. A lookout who does not see or who could have seen by the exercise of due care would not be in the discharge of his duty and would not be the lookout prescribed by the statute.

You take into consideration all the facts and circumstances in this case, gentlemen of the jury, and say whether or not the defendant companies had a lookout ahead, and if they did have one whether or not the automobile appeared as an object on the track, and if it did whether or not the engineer or fireman or some other person on the engine saw it when it appeared, and whether the engineer could have

seen him if he had been looking and had been watching for an object on the track. Those are matters for you to determine, gentlemen of the jury, from all the proof in the case, under this statutory phase of the lawsuit that I have been talking to you about.

The defendants insist further, gentlemen of the jury, that the plaintiff was guilty of contributory negligence in failing to comply with chapter 36 of the Acts of 1917, which requires the driver of an automobile, when traveling upon a public road or street to come to a full stop before crossing the railroad tracks. The violation of a penal statute intended for public safety is deemed negligence per se and generally speaking if such violation causes the injury on which the action is ground the plaintiff would be denied a recovery, but the naked violation of such statute by the plaintiff in negligent cases, though controlled by principles of the common law would not in every case defeat a recovery. The casual connection between the violation of the penal statute and the accident and generally the conduct of both

parties is looked to to determine liability, and if the negligence of plaintiff is imputed solely from the violation of a statute and he in fact exercises intelligence and sense and acts as a reasonably prudent man to avoid injury, which violation of the statute without more would not bar a recovery for an injury flowing from the wrongful act of the defendants.

The failure of an automobile driver to stop before crossing a track would not bar a recovery unless a failure to do so was the proximate cause of the accident. Driving an automobile upon a railroad track contrary to the provisions of chapter 36 of the Acts of 1917 is gross negligence, and if the violation of the statute which forbids such conduct is the proximate cause of the collision, this conduct should always be charged to the plaintiff in mitigation of damages and in extreme cases might reduce recovery to nominal damages. But the violation of Chapter 36 of the Acts of 1917 cannot be set up as altogether excusing the railroad

of the imperative duty imposed upon it to observe statutes intended to protect life and property.

This Chapter 36 of the Acts of 1917, gentlemen of the jury, does not apply to the common law feature of this lawsuit, but applies only to the statutory feature of the lawsuit, the statutory count which I have just been talking to you about. If you find that the plaintiff's intestate failed to stop, look, and listen as required by this statute, and was the proximate cause of the injury, it would not bar the recovery, but it would mitigate the damages and you take that into consideration.

As to the statutory count, gentlemen of the jury, under the sections of the Act that I have read you, if you find liability under the instructions I have heretofore given you and if you find plaintiff's intestate, Walter Fishburn, was guilty of contributory negligence, you weigh that under the rules I have heretofore given you, even though that contributory negligence be the proximate cause of the injury it will not defeat the recovery.

However, if under these circumstances referred to, plaintiff's intestate, Walter Fishburn, was guilty of contributory negligence, you must take that contributory negligence into consideration if you find there is liability and you reduce the amount of damages commensurate with the contributory negligence of the plaintiff's intestate, Walter Fishburn, and say then what amount the plaintiff has been damaged, if any. But no amount of contributory negligence on the part of Walter Fishburn, deceased, under the statutory feature of the lawsuit that I have been talking to you about, under the sections of the Code I have read you, would not bar a recovery, but any contributory negligence on his part must be taken into consideration by you and you must reduce the amount of damages you would otherwise give commensurate with the contributory negligence of the plaintiff's intestate, as I have heretofore explained to you, as I have said to you any contributory negligence would not be a bar under the second count of the declaration.

If you find in favor of the defendants in this case, the railroad companies, gentlemen of the jury, you will simply say "We find in favor of the defendants", and that is the end of the lawsuit.

If you find, gentlemen, that the accident was caused by the defendants' negligence under the common law count, the first count in the declaration, and that it was the direct and proximate cause of the accident, free from any negligence on the part of the plaintiff's intestate, Walter Fishburn, then under this count of the declaration you would go further and assess and fix the amount of damages.

If you should find under the second count of the declaration, the statutory count, that the defendants are liable, then it would be your duty to go further and fix the amount of damages.

You can find liability, gentlemen of the jury, under either count of this declaration

if the proof warrants it, or you can find liability under both counts, but you only assess one amount of damages. You can find liability under both counts or on either count if the proof warrants it.

If you find there is liability in this case, assess the damages, gentlemen of the jury, at just compensation in dollars and cents for the death of Walter Fishburn, and in assessing the plaintiff's damages you will look to the mental and physical suffering, the loss of time, if any, the necessary expenses resulting to the deceased from personal injuries, if any, and you will also take into consideration the pecuniary value of the life of the deceased to be determined upon a consideration of his expectancy of life, his age, the condition of his health, and his strength and his capacity, if any, for labor and for earning money through skill in any art, profession, occupation, or business, and his personal habits of sobriety and industry, - all of these to be modified, however, by the fact that the expectancy of life is at most only a probability, based upon experience, and also by the fact that the earnings of the same

individual are not always uniform.

You take into consideration the facts and circumstances and proof before you and give such amount, if you find there is liability, as in your sound judgment would be just compensation in dollars and cents for the injuries the plaintiff has sustained by reason of the accident, if any.

Gentlemen of the jury, in passing upon this case, if any of you should know any fact or circumstance in any way connected with the case, however remote, you will not consider the same in arriving at your verdict, nor neither will you communicate such fact or circumstance to your fellow jurors, - nor will you attempt to get outside information with reference to this case, nor consider any information that may come to you, but you will try this case and be governed alone by the evidence introduced before you on the trial of this case. You will also try this case, gentlemen of the jury, just as you would a case between two citizens of this

County. You will not take into consideration the fact that one party is a citizen and the other parties corporations or railroad companies, but you will try it like you would try a case between any two citizens. You can have no sympathy in the lawsuit and you can have no prejudice in the lawsuit against either side. You just try the lawsuit on the cold facts, the testimony, and under the instructions of the Court and give it your full, fair, and impartial consideration seeking to find the truth, and when you have found the truth let that be the basis of your verdict and make and return into Court such verdict as you think the truth and justice dictate under the oaths you have taken.

Further along with what I have said to you, gentlemen of the jury, I charge you that you must not undertake to compare or weigh the negligence of plaintiff's intestate with that of the railroad companies if you find any on the part of either the plaintiff's intestate, Walter Fishburn, or on the side of the railroad companies, and then cast blame for the injury upon that person whom you may consider

to have been guilty of the greater degree of negligence, for the doctrine of comparative negligence does not exist under the laws of the State of Tennessee. If plaintiff's intestate was guilty of any negligence proximately contributing to his injury, the plaintiff's recovery would be barred under the common law count of the declaration as I have already explained to you, and should you find as to the statutory count that his injuries were caused by the violation of such statute by the defendants, then his negligence would go in mitigation or reduction of the damages.

An obstruction on the track, gentlemen of the jury, under our statute, means an object on the track upon which the train is approaching, or so near it as probably to be struck by the train, and it must be on the track on which the train is coming, and not on some other track.

If you find for the plaintiff in this case, gentlemen of the jury, you will state against

which one of the defendant railroad companies, or whether against both companies.

Take the case gentlemen.

At the conclusion of the charge, counsel for the defendants Southern Railway Company, and Tennessee Carolina Southern Railway Company, submitted the following requests to the Court, which requests were refused.

"SPECIAL REQUEST NO. 2.

"I charge you, gentlemen of the jury, that if plaintiff's intestate or the vehicle in which he was riding did not appear upon the track in a position probably to be struck or if it only came into such position at the instant of the contact with the train, then the statute relied on by plaintiff would have no application at all, that is the

statute relied upon by plaintiff to the effect that the railway must keep a look-out ahead and when an obstruction appears upon the track ring the bell and sound the whistle and do everything possible to prevent an accident, etc., would have no application whatever.

"SPECIAL REQUEST NO. 4.

"I charge you gentlemen further that the burden of the proof, that is the obligation to make out his case, rests upon plaintiff and you are not justified in drawing inferences unfavorable to the defendants from the mere fact that they introduced no witnesses unless you should find that the plaintiff through his own witnesses carried such burden of proof.

"SPECIAL REQUEST NO. 5.

"SPECIAL REQUEST NO. 5.

"I charge you gentlemen that it is the duty of one entering upon a railroad track to take due and reasonable precaution for his own safety which includes the duty of stopping, looking, and listening, for approaching trains, and this duty continues so long as the person crossing the railroad track is upon such track.

"SPECIAL REQUEST NO. 6.

"By statute of the State of Tennessee it is made the duty of any person driving an automobile across a railroad track to bring such automobile to a full stop not less than ten nor more than fifty feet from the nearest rail of such railway track or tracks.

"SPECIAL REQUEST NO. 7

"By statute of the State of Tennessee it is made the duty of any person driving an automobile across a railroad track to bring such automobile to a full stop not less than ten nor more than fifty feet from the nearest rail of such railway track or tracks, and failure so to do is made a misdemeanor, and if you find that the plaintiff's intestate, Walter Fishburn was about to cross the railroad track and while driving his automobile that he did not so stop, this would bar his recovery under the statutory count of the declaration.

"SPECIAL REQUEST NO. 8.

"Gentlemen of the jury, what you are to endeavor to do is to ascertain the proximate cause of the injury to

Walter Fishburn. If you should find that there was timber or brush wholly or partially obstructing or obscuring the view of one approaching the track from a certain distance but if you should also find that there was a reasonable distance after one in the position of plaintiff's intestate passed by such obstruction within which he could have seen an approaching train had he looked, that he failed to look and see such approaching train, under circumstances where there was nothing to prevent him from looking and seeing, then a mere obstruction would not necessarily be the proximate cause of the injury, and you might find that his failure to look after passing the obstruction was the proximate cause.

"SPECIAL REQUEST NO. 9.

"I charge you, gentlemen of the jury, that the duty of one going upon

or crossing the railroad tracks to look and listen for approaching trains is a continuing one and that the duty of looking means that he look when he can see and the duty to listen, to listen when he can hear, and if you find that there was reasonable space within which plaintiff's intestate could have looked and seen and could have listened and have heard, and that there was no reasonable excuse for his not doing so, then it would be such negligence on his part as would bar plaintiff's recovery on his common law count or ground of action, and such as would cause you to reduce his damages on the statutory count, even if you should find that the statute applied and the violation thereof caused the injury to plaintiff's intestate.

" SPECIAL REQUEST NO. 10.

"I charge you, gentlemen

of the jury, that when a man goes upon a railroad track he knows or should know that he goes to a place where he will be injured if a train comes upon him before he is clear of the track. In such circumstances if a driver cannot be reasonably sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although that is an extreme precaution not often likely to be necessary to use. If a person goes upon a railroad track relying upon not hearing the train or any signal and takes no further precaution, he does so at his own risk and he would be guilty of negligence, and if such negligence proximately contributed to the cause of his injury, his recovery would be absolutely barred, if you find plaintiff's intestate was guilty of such negligence.

"SPECIAL REQUEST NO. 11.

"I charge you, gentlemen

of the jury, that when a man goes upon a railroad track he knows or should know that he goes to a place where he will be injured if a train comes upon him before he is clear of the track. In such circumstances if a driver cannot be reasonably sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although that is an extreme precaution not often likely to be necessary to use. If a person goes upon a railroad track relying upon not hearing the train or any signal and takes no further precaution, he does so at his own risk and he would be guilty of negligence, and if such negligence proximately contributed to the cause of his injury, his recovery would be absolutely barred, if you find plaintiff's intestate was guilty of such negligence, as to the common law count of the declaration in this case, and such negligence would reduce plaintiff's damages, if any, even if you should find that the

statutory count of plaintiff's declaration applied and that a violation of such statute caused the injuries to plaintiff's intestate.

"SPECIAL REQUEST NO. 12.

"Gentlemen of the jury, in order to make the statute relied upon by the plaintiff as to the keeping of a lookout ahead and when an obstruction appears on the track sound the whistle and ring the bell, apply the brakes and do everything possible to prevent an injury at all, it is incumbent upon plaintiff to prove by the preponderance of the evidence that there was an object, in this case the plaintiff's intestate or vehicle in which he was riding, and appearing on the track or so near it as probably to be struck, and that this appearance was not simply at the instant of being struck, until and unless plaintiff has carried this burden it is not a burden on the part of the railway companies

to show compliance with the statute.

"SPECIAL REQUEST NO. 13.

"I charge you, gentlemen of the jury, that the statute does not require a railroad to sound the whistle, ring the bell, apply the brakes, and do everything possible to prevent an accident or injury merely because a person or object is in sight, even though such person or object be on the right of way or other tracks of the railroad.

The statute only applies and only requires such precautions when the person or object is an obstruction on the track on which the train is running or so near thereto as probably to be struck.

"SPECIAL REQUEST NO. 14.

"I further charge you, gentlemen, that it is the duty of defendants to keep this right of way at and near the crossing in question clear of weeds, brush and other obstruction, so that a traveler on the public road may see an approaching train, and also that the operators of the train may see an approaching traveler to the crossing, and if this condition obstruction existed and was the approximate cause of the injury, it would be negligence on the part of the defendants."

Thereupon the jury retired to consider of its verdict and after consideration of the case returned a verdict in favor of the plaintiff and against the defendants, in the sum of \$1000.00.

MOTION FOR NEW TRIAL.

In this case come the defendants, Southern Railway Company and Tennessee & Carolina Railway Company by attorneys, and both and each separately move the Court to set aside the verdict of the jury heretofore rendered in this case at the present term of the Court in favor of plaintiff and against these two defendants for \$1,000.00 and any judgment based thereon and to grant these defendants both and each a new trial or rather to do that upon the sustaining of this motion which these defendants submit the Court should have originally done, to wit, sustain now a motion for peremptory instructions in favor of these defendants both and each and to dismiss the suit as to them, and as grounds of their said motion they both and each set down the following:-

-I-

The Court was in error in failing

and declining to sustain and in overruling the motion made by both and each of these defendants at the close of the plaintiff's testimony, which was also the close of all the testimony in the case, that the Court peremptorily instruct the jury to return a verdict in favor of these defendants on the common law count of the plaintiff's declaration, among other reasons there being no evidence submitted to the jury from which the jury would be justifiable in finding that these defendants had been guilty of any negligence under said count or about which the minds of reasonable men would be warranted in disagreeing in this respect. And furthermore, because, whatever the negligence of these defendants, all the evidence submitted to the jury beyond contradiction that the plaintiff's intestate was guilty of such gross negligence, proximately contributing to his injury as that plaintiff's suit would be barred and as that plaintiff could not recover, and there being no conflict in the evidence in this respect as to which the mind of reasonable men would be justified in differing.

-II-

The Court was in error in failing and declining to sustain and in overruling the motion made by both and each of these defendants as the close of the plaintiff's testimony, which was also the close of all the testimony in the case, that the Court peremptorily instruct the jury to return a verdict in favor of these defendants on the statutory count of the plaintiff's declaration, among other reasons there being no evidence submitted to the jury making any Tennessee statute, and particularly that relied upon in the statutory count of plaintiff's declaration, applicable at all to this case, it being shown by all the testimony that plaintiff's intestate did not become an obstruction upon the track until the very instant of the collision between himself and the train which caused his death, and at a time entirely too late to permit the compliance by these defendants with the precautions and requirements of the said statutes, and, furthermore, because there was a failure in the evidence to show a failure to comply

with the statutory precautions and requirements and a failure to prove such a state of facts as would shift the burden to the defendants to show a compliance or an inability to comply, and there was no conflict in the evidence in these various respects and none as to which the minds of reasonable men would be justified in differing, and plaintiff's intestate being at the time of his injury engaged in the commission of a misdemeanor in that he was driving an automobile on a road across a railroad without coming to a full stop not less than ten feet nor more than fifty feet from the nearest rail of the track as required by statute.

-III-

The Court was in error in not sustaining and in overruling the motion of these defendants both and each that the Court peremptorily instruct the jury to return a verdict altogether in favor of

these defendants, made at the ~~close~~ of the plaintiff's testimony, which was also at the close of all of the testimony in the case, among other reasons there being no evidence submitted to the jury to show negligence of either of these defendants under the common law count or under the statutory count of plaintiff's declaration, and the evidence being in accord and without conflict to the effect that plaintiff's intestate was guilty of such gross negligence, proximately contributing to his death, as to prevent plaintiff's recovery under the common law count of the declaration and the evidence being in accord and without conflict to the effect that the Tennessee statutes relied upon in the statutory count of plaintiff's declaration never became applicable at all in this case, all of the evidence being to the effect that plaintiff's intestate only became an obstruction on the track at the very instant of his collision with the train that caused his death and at a time entirely too late to permit the compliance by the defendants with the precautions and requirements of the said statutes, and plaintiff's intestate ^{being} at the time of his injury engaged in the commission of a misdemeanor in

that he was driving an automobile on a road across a railroad without coming to a full stop not less than ten feet nor more than fifty feet from the nearest rail of the track as required by statute.

-IV-

There is no evidence to sustain the verdict of the jury in this case:-

- (a) On the common law count.
- (b) On the statutory count.
- (c) On both or either of said counts.

Whereas and for all of said reasons, these defendants move the Court to set aside the verdict of the jury heretofore rendered in this case at the present term of the Court and in the granting this motion, which is in the nature of a motion for a new trial, that the Court simply, instead of ordering a new trial, now sustain the motion for peremptory instructions, which these

defendants both and each submit the Court should have sustained when the said motion above referred to was made.

BROWN & JOHNSON,

CATES, SMITH, TATE, & LONG.

Attorneys for defendants.

This motion having been heard by the Court, it is taken under advisement of the Court to be passed upon, Saturday Morning, March 31, next.

Thereupon the motion for a new trial on behalf of the defendants in this case came on for hearing before the Honorable Pat Quinn, Judge, at Maryville, Tennessee, on this 31st. day of March.

1928. and after argument of counsel on said motion, the Court is pleased to and doth disallow and overrule said motion and pronounce judgment upon the verdict of the jury herein in the sum of \$1000.00 against the defendants Southern Railway Company and Tennessee & Carolina Southern Railway Company, to which action of the Court the defendants then and there excepted and now except and pray an appeal to the next term of the Court of Appeals, at Knoxville, Tennessee, which is granted, and the defendants are allowed thirty days within which to prepare and file proper bill of exceptions in this cause.

Thereupon came the defendants Southern Railway Company and Tennessee & Carolina Southern Railway Company by attorney and tendered the foregoing as their bill of exceptions to the action of the Court in overruling their motion for a new trial in this cause, which bill of exceptions is signed and ordered by the Court to be made a part of the record in this cause.

This the 30th day of April, 1928.

PAT QUINN,

CIRCUIT
JUDGE.

Filed April 30th, 1928.

Peter Rule, Clerk.

C. A. FISHBURN, ADMINISTRATOR, 0

0

VS.

0 No. 2730.

SOUTHERN RAILWAY COMPANY, ET AL. 0

BILL OF COSTS.

State Tax \$ 2.50 ✓

County Tax 2.50 ✓

Clerk, Peter Rule, file Pauper Oath 50, 3
dock. 30, Iss. sums. 75,
file dec. 25, file plea 25,
Iss 25 Pltff. subs. \$2.50,
Iss. 2 deft. subs. 20, Judg-
ment 75, Mot. for new trial
25, Order overruling same 25,
File Bill of Exceptions 25,
Bill of Costs 50, 7.00 ✓

D. S., J. L. Gamble, ex. 2 deft. subs. 1.00

" J. C. Gillespie, ex. 1 pltff. sub .50

D. S., L. V. Turner, Ex. Summons	2.00
" Joe Adams, ex. 2 pltff. subs.	1.00
" W. H. Coulter, ex. 13 pltff. subs-50¢	6.50
" Wm. Brooks, ex. 2 pltff. subs	1.00
" W. D. Best, ex. 2 pltff. subs	1.00

WITNESSES:

W. E. Parham, 2 days (Pltff)	2.00
J. C. Murphy, 2 days (Pltff)	2.00
C. C. Harris, 2 days (Pltff)	2.00
J. R. Hamah, 1 day (Pltff)	1.00
Fernon Best, 2 days (Pltff)	2.00
Fred Carpenter, 1 day (Pltff)	1.00
Elsie Tuck, 1 day (Pltff)	1.00
Maude Carpenter, 1 day (Pltff)	1.00
Reba Carpenter, 1 day (Pltff)	1.00
Chet McGhee, 2 days (Pltff)	2.00
J. A. Costner, 1 day (Deft)	1.00

Total--

\$ 41.00

BILL FOR MAKING TRANSCRIPT.

To making transcript from the Circuit Court, at Maryville, Tennessee, to making transcript to Court of Appeals, at Knoxville, Tennessee:

Three Hundred sixty-eight (368) pages at three hundred fifty (350) words per page, total number of words, 128,800; at ten (10) cents per hundred (100) words, - \$128.80; Certificate fifty (50) cents; Seal fifty (50) cents; Order of Appeal and Bond seventy-five (75) cents. Postage fifty (50) cents, making a total of \$131.05.

Corrected

Order of appeal & Bond	- 75
Transcript	= 128.80
Seal	= .50
Postage	= .50
	<hr/>
	\$130.55

STATE OF TENNESSEE,)
) ss
BLOUNT COUNTY.)

I, PETER RULE, Clerk of Circuit Court in and for the aforesaid County and State do hereby certify that the foregoing is a true, perfect, and complete transcript of the record and proceedings had in the case C. A. FISHBURN, ADMINISTRATOR, VS. SOUTHERN RAILWAY COMPANY, ET AL, as will be found on file and on record, in my office at Maryville, Tennessee.

WITNESS, my hand and the seal of this Court, this the 14th day of May, 1928.

Peter Rule
Circuit Court Clerk.

Southern Railway Company, et al

vs.

C.A. Fishburn, Administrator,

Entered 10/9/24
Writ Denied.

This case came on to be heard on the transcript of the record from the Circuit Court of Blount County, opinion and judgment of the Court of Appeals, petition for certiorari, assignments of error and briefs of counsel; after full consideration by the Court, the Court is of opinion that the petition for certiorari is not well taken, and said petition is accordingly denied.

The costs incident to filing petition for certiorari will be paid by the defendant in error, C.A. Fishburn, Administrator, for which let execution issue.

BOND
USA

BASIC
MADE IN

Southern Railway Company, et al

vs.

C.A. Fishburn, Administrator,

Entered March 23-29

Reversed and dismissed.

This case came on to be heard on the transcript of the record from the Circuit Court of Blount County, assignments of error, briefs and argument of counsel; from all of which the Court is of opinion and orders and adjudges that there is error in the judgment of the trial court as set forth in the opinion of the Court filed and made a part of the record in this case, and for the reasons stated in ^{said} ~~the~~ opinion, the judgment of the court below is reversed and set aside.

It is, therefore, ordered and adjudged by the Court that the judgment of the court below be, and the same is reversed, set aside, and for nothing held, and the suit of the defendant in error is dismissed at his cost, for which let execution issue.

FILED

MAY 7 - 1929

S. E. CLEAGE, Clerk

C.A. FISHBURN, ADMINISTRATOR,
PLAINTIFF IN ERROR

BLOUNT COUNTY

VS.

LAW CAUSE.

SOUTHERN RAILWAY COMPANY, ET AL.
DEFENDANT IN ERROR.

TO SOUTHERN RAILWAY COMPANY AND TENNESSEE & CAROLINA
SOUTHERN RAILWAY COMPANY AND THEIR ATTORNEYS, J.A. SUSONG,
BROWN & JOHNSON, CATES, SMITH, TATE & LONG.

Take notice that on the 7th day of MAY
1929, we will file in the office of Honorable S.E. Cleage,
Clerk in the Supreme Court of Tennessee, at Knoxville, petition
for Certiorari asking thereby to have reviewed and reversed by
the Supreme Court, the judgment of the Court of Appeals entered
in the above styled cause on March 23, 1928.

This 1st day of May 1929.

Gas. M. Coles
Dunn & Jackson
Gamble Crump & Goddard
ATTYS. FOR PLAINTIFF IN ERROR

We acknowledge service of the foregoing notice and
receipt of a copy of petition for Certiorari, Assignments of
Error and Brief in support thereof on this the 1st day of May
1929.

Brown & Johnson
ATTYS. FOR DEFENDANTS IN
ERROR.

FILED

MAY 7 - 1929

S. E. CLEAGE, Clerk

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE,
TENNESSEE.

C.A. FISHBURN, ADMINISTRATOR,
PLAINTIFF IN ERROR,

VS.

BLOUNT COUNTY
LAW CAUSE.

SOUTHERN RAILWAY COMPANY, ET AL.,
DEFENDANT IN ERROR.

PETITION OF C.A. FISHBURN, ADMINISTRATOR, FOR
WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE
COURT OF APPEALS.

Comps the petitioner, C.A. Fishburn, administrator,
and most respectfully shows unto this Honorable Court that he
is much aggrieved by the action of the Court of Appeals entered
at Knoxville on March 23, 1929, in the above styled cause, wherein
the Court of Appeals held that there was error in the action of
the Circuit Court of Blount County, and reversed the judgment
of the Lower Court against the defendant in error and in favor
of the plaintiff in error for the sum of \$1000.00, with costs
etc.

On or about July 8, 1927, while traveling in an
automobile Walter Fishburn at a station on the Tennessee &
Carolina Southern Railway called Montvale and while crossing
said railway was killed. The plaintiff in error, C.A. Fishburn,

was duly appointed and qualified as administrator of the estate of Walter Fishburn, deceased, and shortly thereafter this suit was brought in the Circuit Court of Blount County to recover damages on account of his death against the Southern Railway Company and the Tennessee and Carolina Southern Railway Company and the Knoxville & Augusta Railway Company.

The declaration contained two counts:

The first count of the declaration is based upon the common law and alleges that the railway company was operating its passenger train down a sharp grade when there was no exhaust from the engine and at a rapid rate of speed, without a lookout ahead when it was approaching a station at a small community and a grade crossing frequently used by the public, and that said railroad failed to give warning of its approach by ringing a bell and blowing the whistle, and that the deceased was guilty of no negligence in approaching the crossing. And further that the said defendant in error had permitted shrubbery and young growth to grow up along and near said crossing so as to cut off the view of travelers from an approaching train.

The second count of the declaration is a statutory count based upon the negligence of the defendant in causing the death of Walter Fishburn on said occasion by its failure to keep a lookout ahead on its locomotive, sounding the bell and blowing the whistle and taking all necessary precautions in bringing the locomotive to a stop and prevent the accident.

To the declaration as originally filed and as amended the defendants filed their plea in which they averred they were not guilty of the wrongs and injuries alleged in the plaintiff's declaration.

At the close of the proof on the trial of the case the defendants in error moved the Court to peremptorily instruct the jury to return a verdict in favor of the defendants on the ground there are enough undisputed facts in the proof to show that reasonable minds cannot differ about the facts that the deceased Walter Fishburn was the author of his own injury, that he drove ^{upon} up the railroad track at a time when he could have seen the train up the track in time to have protected himself.

The defendants in error offered no proof whatever in the case but relied upon their motion at the conclusion of the testimony of the plaintiff in error for peremptory instructions.

The Court overruled the motion for peremptory instructions made by the defendants in error, except as to the Knoxville and Augusta Railroad Company which was sustained. The case then went to the jury on the facts against the Southern Railway Company and the Tennessee & Carolina Southern Railway Company. The jury returned a verdict against both Companies in favor of the plaintiff in error for the sum of \$1000.00, and costs.

After the jury had returned its verdict the defendants in error moved the Court to set aside the verdict of the jury and in effect to grant their original motion for peremptory instructions in their favor. This motion was overruled by the Circuit Judge. An appeal was prayed and granted to the Court of Appeals. The Honorable Court of Appeals reversed the lower Court and dismissed plaintiff in error's suit.

It is the contention of the plaintiff in error that the train that killed Walter Fishburn was being run from Knoxville Tennessee through Maryville to Calderwood, Tennessee.

That it was a special train not running on schedule time. That Montvale station the place where Fishburn was killed is a central point in the rural sections of the county. That the public highway crosses the railroad tracks at this station at almost right angles. That at the time Fishburn was killed there was on the south or rather south east side of the railroad track on the right of way and off the right of way and extending up to within eight or ten feet thereof, just before entering upon the railroad crossing, shrubbery, young trees and brush which obstructed the view of those traveling upon the highway from the south east and the south west. That Fishburn came to the railroad crossing from this direction; and that these obstructions prevented him from seeing the approaching train until he had gotten so near its track that it was impossible for him to protect himself, and that the proximate cause of this was the condition surrounding the crossing at the time. That it was the duty of the defendants to keep their premises cleared of obstructions, and that their failure to do so was gross negligence. It was also contended by the plaintiff in error that the automobile in which the deceased was riding was on the track or was near to the track it was in striking distance when the train approached and that no whistle was blown, no bell was rung and no warning of any kind given; and that therefore the defendants in error were guilty of negligence in failing to observe these precautions required of them by statute.

Petitioner is much aggrieved by the action of the Court of Appeals in sustaining the assignments of error by the defendants in error and reversing the Lower Court and dismissing his suit and taxing him with the costs of this case, and he therefore comes and files this petition for certiorari to bring this case and the record therein into this Honorable

Court for review and correction.

Petitioner respectfully insists that the Honorable Court of Appeals was in error in reversing the Lower Court and dismissing petitioners suit, and that said error highly prejudicial to him.

Petitioner files herewith his assignments of error and Brief in support thereof, which are offered and asked to be treated as a part hereof.

Petitioner has given written notice to the defendants in error through his counsel that he would present this petition and a copy of said notice is hereto attached and made a part e hereof.

THE PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a writ of certiorari issue by this Honorable Court to the Court of Appeals sitting at Knoxville, Tennessee directing the said Court of Appeals and the Clerk thereof to certify and transmit to this Honorable Court the entire record and proceedings in this cause including the Opinion and judgment of said Court of Appeals.

2. That the judgment of the Court of Appeals be reviewed, and that the error complained of be cured and that the judgment rendered therein be reversed and that the judgment of the Court below be affirmed.

3. That petitioner have all such other, further and general relief as he may be entitled to.

This is the first application for a writ of certiorari in this case.

CA Fishburn Adm.
By M.H. Gamble atty.

STATE OF TENNESSEE,
BLOUNT COUNTY.

Personally appeared before me the undersigned authority, M.H. Gamble, who being duly sworn, says that he is one of the attorneys for the petitioner in this case, and that he has assisted in the preparation of the foregoing petition, and the statements therein contained are true to the best of his information, knowledge and belief.

M.H. Gamble

Sworn to and subscribed before me this the 1st
day of May 1929.

A. D. ...
NOTARY PUBLIC.

FILED

MAY 7 - 1929

S. E. CLEAGE, Clerk

TO THE SUPREME COURT AT KNOXVILLE, TENNESSEE.

C.A. FISHBURN, ADMINISTRATOR,

PLAINTIFF IN ERROR.

VS.

SOUTHERN RAILWAY COMPANY, ET AL.

DEFENDANTS IN ERROR.

BLOUNT COUNTY

LAW CAUSE.

ASSIGNMENTS OF ERROR AND BRIEF IN SUPPORT
THEREOF.

I.

ASSIGNMENTS OF ERROR.

FIRST: The Honorable Court of Appeals erred in holding that the deceased Walter Fishburn appeared so sudden upon the railroad tracks as to excuse the Railroad Company from observing the Statutory requirements alleged under the Statutory account of the declaration.

SECOND: The Honorable Court of Appeals erred in holding that the deceased Walter Fishburn was guilty of such contributory negligence as to bar his estate from recovering for his death under the common law count of the declaration.

THIRD: The Honorable Court of Appeals erred in dismissing plaintiff's suit and taxing him with the costs of the case.

II.

STATEMENT OF THE CASE.

On or about July 8, 1928, while traveling in an automobile Walter Fishburn at a station on the Tennessee and Carolina Southern Railway called Montvale, and while crossing said railroad line on a public highway was killed.

On the 16th day of July 1927 the plaintiff, C.A. Fishburn, was duly appointed and qualified as administrator of the estate of Walter Fishburn, deceased.

On July 20, 1927, the plaintiff, C.A. Fishburn, brought this suit against the defendants, Southern Railway Company, Tennessee & Carolina Southern Railway Company, and the Knoxville & Augusta Railway Company.

1. DECLARATION.

On October 10, 1927 after the issuance and service of Subpoena, C.A. Fishburn, Administrator, and for the use and benefit of Emala Fishburn, widow of Walter Fishburn, deceased, filed his declaration, which alleged in substance the following:

The plaintiff sues the defendants for TWENTY THOUSAND (\$20,000.00) DOLLARS, as damages, and avers that on or about the 8th day of July 1927, and prior, and since said date, the defendants were the owners and operators of a line of railroad

running from Knoxville, Tennessee, to Calderwood, Tennessee, by way of Maryville, and along which line of railroad the defendants had established and maintained many stations, one of which was named Montvale Station, a few miles south of Maryville. At which said station a large number of people were accustomed to go and board the trains of defendants, and at which station the trains of the defendants were accustomed to stop for the purpose of receiving and discharging passengers, and for the purpose of loading and unloading freight.

The plaintiff further avers that on the date aforesaid, and prior and since said date, a public road crosses said line of railroad at said Montvale station at right angles to said road, over which public road a large number of people were accustomed to travel on horses, wagons, buggies and automobiles, all of which was well known to the defendants, or should have been well known to them by the exercise of ordinary diligence.

It is further averred by the plaintiff that along the east side of said railroad at said Montvale Station is a large number of trees, bushes and shrubbery, which obstructs the view of said railroad from one who is traveling along said public highway, and on the east side of said railroad, on account of which it is impossible for one to see an approaching train on said line of railroad from the east side thereof until within a few feet of said railroad crossing, and that this condition existed on July 8, 1927, and was known to the defendants, or should have been known to them by exercising ordinary diligence.

It was further averred by the plaintiff that on the date aforesaid and prior and since said date, there was and

still is a store and grist mill located on the east side of said line of railroad and near thereto at said Montvale Station and near said public road crossing, to which a large number of people were accustomed to go on business, and that those living on the north west side of said railroad line were accustomed to go on business, and had to cross said railroad line to get to said store and mill, which fact was well known to the defendants, or should have been by the exercise of ordinary diligence.

It is further averred that said public road on the East side of said railroad track at said station in approaching said railroad and within ten feet thereof, is up grade and that it was the duty of the defendants to keep said public road at said crossing on a grade level with said railroad, which they failed to do.

It was further averred that it was the duty of said defendants in the maintenance and operation of said line of railroad and trains thereon at said crossing and within a reasonable distance from said crossing on approaching same, to sound the whistle and ring the bell on their train, which they failed to do at the time of the injury to plaintiff's intestate, and to warn the people traveling on said public highway of the approaching of trains, and that it was the duty of the defendants to operate their said trains across said public road at said station at a moderate, safe and careful rate of speed, and to have said trains at all times under control, which they failed to do.

It was further averred that the plaintiff's intestate Walter Fishburn, on the date aforesaid was driving his automobile along and over said public road, and that before he attempted to cross said line of railroad at Montvale Station he

brought his automobile to a full stop, looked and listened for trains, and after stopping, looking and listening, and heard no trains, he proceeded towards said railroad with the intent to cross the same, and just as he drove up the grade to said railroad and on to said railroad, without any negligence or carelessness on his part, the defendants without sounding a whistle or ringing the bell and without any warning whatever, ran one of their passenger trains, it being a special train, going south, negligently, carelessly and recklessly and without regard to the safety of human life across the public road at a high, dangerous and reckless rate of speed, struck said Walter Fishburn's automobile and completely demolished the same, bruised, wounded and maimed the said Walter Fishburn, from the effects of which the said Walter Fishburn died within a few hours, and that said Walter Fishburn suffered great pain and mental anguish until he died, all of which was caused by the negligence, carelessness and recklessness and unlawful acts of the defendants, Railway Companies, and not on account of any negligence, carelessness or unlawful acts of the deceased, Walter Fishburn, or the plaintiff, or the party for whose use and benefit this suit is brought.

It was also averred that Walter Fishburn left a widow, Emila Fishburn, but he left no children; that this suit was brought for the use and benefit of said widow.

The negligence, carelessness, recklessness and unlawful acts of the defendants in causing the death of Walter Fishburn were specifically set out as follows:

1. That the defendants were negligent and careless in failing to sound the whistle and ring the bell on

said passenger train on approaching the railroad crossing at Montvale Station on the occasion, time and place to warn the said Walter Fishburn of the approach of said train, and that this was their duty.

2. That the defendants were negligent, careless and reckless in running their train at a high rate of speed in disregard for human life in approaching said crossing and passing over said crossing at the time, place and occasion that Walter Fishburn was killed.

3. That the defendants were negligent, careless and reckless in failing to maintain a grade of said public road on the east side of said railroad at said crossing at Montvale Station on the level of the rails of said railroad for a distance of ten feet on each side of said road as was their duty to do.

For all of which the plaintiff sues the defendants for the use and benefit of Emila Fishburn, widow of the said Walter Fishburn for TWENTY THOUSAND (\$20,000.00) DOLLARS.

See record pages 7 to 15.

2. PLEA.

On October 14, 1927 the defendants filed their plea, in which they averred that they were not guilty of the wrongs, and injuries as alleged in plaintiff's declaration.

See record page 17.

3. AMENDMENT TO THE DECLARATION:

On February 29, 1928 the plaintiff, C.A. Fishburn,

moved the Court to be permitted to further amend his declaration, by adding County No. 2 and consisting of all of the original declaration, which was to be treated as Count No. 2, down to paragraph No. 1 on the fifth (5th) page of said declaration, with the following additional averments; That the defendants were negligent, careless and reckless in causing the death of Walter Fishburn on the occasion aforesaid in that they failed to keep a lookout ahead on its locomotive that ran against and over the said Walter Fishburn, deceased, and that when said Walter Fishburn's car in which he was driving appeared on the crossing of said railroad at Montvale Station the defendants failed to sound their whistle and ring their bell on said locomotive, and failed to put down the brakes or do anything or make any effort to stop said train.

The Court sustained said motion and permitted plaintiff to so amend his declaration.

SEE RECORD PAGES 19 and 20

4. PLEA.

To this Count of the declaration the defendants moved the Court that their plea heretofore filed be treated as filed to the declaration as amended, which motion was granted.

SEE RECORD PAGES 20 and 21.

5. MOTION.

At the close of the plaintiff's proof the defendant moved the Court to peremptory instruct the jury to return a verdict in favor of the defendants on the ground (as stated by defendants) that there are enough undisputed facts to show con-

clusively that reasonable minds cannot differ about the facts that the deceased, Walter Fishburn, was the author of his own injury, that he drove upon the railroad track at a time when he could have seen the train away up the track in time to have protected himself, and that he just came right on to his death.

SEE RECORDS PAGES 284 and 285

6. VERDICT OF JURY:

The jury returned a verdict in favor of the plaintiff and awarded him ONE THOUSAND (\$1000.00) DOLLARS.

SEE RECORD PAGE 355.

7. MOTION FOR A NEW TRIAL.

The defendants motion for a new trial, when analyzed narrows itself down to the proposition that the court erred in not sustaining their motion for peremptory instructions to the jury to return a verdict in defendants favor upon the common law count, and the statutory count, and on both, or either of said counts, on the theory that there is no evidence to support the verdict of the jury on either, or both of said counts,

See record Pages 25 to 31.

8. ORDER OF COURTS:

The Lower Court overruled the motion for a new trial, and gave the plaintiff judgment for \$1,000.00 in accordance with the finding of the jury.

See record pages 32 and 33.

But the Honorable Court of Appeals reversed the Court below and sustained the contention of the defendants in error and dismissed the case and taxed the plaintiff's in error with the cost.

SEE OPINION OF COURT OF APPEALS.

III.

STATEMENT OF FACTS.

The train that killed Walter Fishburn was being run from Knoxville, through Maryville, to Calderwood, It was a special train not running on schedule time.

See record C.A. Fishburn pg. 67-68-78
See record Elsie Tuck pgs. 187 and 188
See record Reba Carpenter page 303.

The defendant in error Southern Railway Company owns the road from Knoxville to Maryville; and the defendant, Tennessee & Carolina Southern Railway owns the road from Maryville to Calderwood. The Southern Railway Company operates trains over both roads, which are connected and continuous.

We therefore insist that both of these defendants are liable for the injury done to plaintiff in error in this suit.

See record H.F. Farris pages 211 to 218

Montvale Station, the place where Fishburn was killed, is a few miles south of Maryville, on the Tennessee & Carolina Southern Railway, it is a central point in this entire section. There is located in and around this station a mill, two stores, church, school and some four or five dwellings. The

public highway crosses the railroad tracks at this station at almost right angles. This is a well known station and has been since the road was first built.

See record C.A. Fishburn Pages 42 and 43.

C.A. Fishburn testified on this point as follows:

Q. Do you know how long Montvale Station has been there?

A. No I don't, it was a station though when they first started the railroad, but I don't know how long it has been.

Q. Are there quite a few houses there?

A. Yes sir.

Q. Could you say as to how many.

A. Well, let me see, there are two, three, four five, I can't remember right now.

Q. Is there a church there?

A. Yes sir, a church on top of the hill.

Q. Is there a school building there?

A. The school building on the other side, it is nearly one-half mile out there to the school building, it is on the other side of the track.

Q. State whether or not that is a central point in that section?

A. How was that.

Q. Is that a central point for that entire section there?

A. Yes sir.

See record C.A. Fishburn pages 80 and 81.

On the date that Fishburn was killed by the train of the defendants there was on the south or rather south east side of the railroad track on the right of way and off the right of way and extending up to near the public highway, and within eight or ten feet thereof, just before entering upon the railroad crossing, shrubbery, young trees and brush, which obstructed the view of those traveling upon the highway from the south east to the north west. Fishburn came on to the railroad crossing from this direction and these obstructions prevented him from seeing up the line of railroad of the defendants.

See record C.A. Fishburn Pgs. 50-51-52-55 & 63
See record Bob Hannah pgs. 126-132.
See record C.C. Harris pg. 158
See record Herman Best pgs. 169 to 174
See record Elsie Tuck page 192.
See record John Murphy pgs. 225 & 226
See record W.E. Parham page 239
See record Maud Carpenter pages 277 to 279

On approaching the crossing where Fishburn was killed, from toward Maryville and Knoxville, the way the train was going on the day in question, it was down grade, the engine of the train was not pulling, but the train was moving rapidly by the power of its own weight, and, was therefore making very little, if any, noise. The road discloses that the train in question was running silently and very rapidly, although approaching a prominent station where a much traveled highway crossed the railroad tracks, without even slacking or stopping the train.

See record C.A. Fishburn pages 61 to 78
See record Herman Best pages 166 to 167
See record Elsie Tuck pages 198 to 199
See record John Murphy pages 224
See Fred Carpenter record page 248 to 250
See record Maud Carpenter page 273.

May we at this point suggest our contention. That the defendants in error knew or ought to have known by ordinary care that they were approaching a much frequented station where a much traveled highway crossed their railroad tracks, and that brush, shrubbery and trees permitted by the defendants to grow up along their line of railroad and extended down to the highway formed such a condition that their train should have been slowed down and the brakes applied, and the whistle blown and the bell rang, and the failure of the defendants to do this, under the conditions that existed at the crossing, was gross negligence. Immediately after Fishburn was killed the defendants cleared away this brush, shrubbery and bushes along their tracks and off their right-of-way.

See record Bob Hannah, pages 135 & 145.

The defendants in error operated their train on the day that Fishburn was killed not only down grade rapidly without noise from the engine to a crossing where the approach of trains was obstructed from the traveling public by brush, shrubbery, etc. , but they failed and neglected to ring the bell, blow the whistle, or do either, to warn the travelers on the highway of the approaching train to the crossing.

See record C.A. Fishburn pg. 72-73-& 74
See record Herman Best pgs. 165 & 166

This witness Herman Best says he heard the train blow away off, after he heard the whistle blow he threw off some lumber from his wagon, unhitched his mules and drove them away before the train came up, and that it did not blow or ring the

bell for this station or this crossing.

See Herman Best record page 160 to 161
See also record Elsie Tuck page 189-198.
See John Murphy page 223 to 224.
See Fred Carpenter page 247 & 248
See record Maud Carpenter page 272 & 273.

The facts in this case are that the deceased drove his automobile from the south or south east side of the railroad on the highway to this much used crossing, at this prominent rural station, that his view of the railroad was completely obstructed by shrubbery, etc. along the railroad and the public road where it intersects the railroad. That the defendants in error train came rapidly and without noise, that they did not blow the whistle or ring the bell or give any warning of any kind that they were coming on to this crossing,

We insist that anyone of these negligent omissions of the duty on the part of defendants, or commission of a wrong, above quoted, is sufficient, under the law, to impose liability on the defendants for the death of Fishburn, and when all are taken together they constitute gross negligence, and that under the first or common law count of the declaration, the decree of the Court of Appeals should be reversed and that of the trial Court affirmed. The acts of negligence on the part of defendants in error were the prime and proximate cause of the death of Fishburn, The only answer the defendants offer is that Fishburn was guilty of contributory negligence in driving on to this crossing. If so then the defendants in error should have observed the statutory precautions.

The defendants in error say when the deceased got on at the railroad tracks he could see away up the tracks, if

that reasoning is sound, then it is just as sound for the plaintiff in error to say that when Fishburn got on at the tracks and the train was coming away up the tracks, the defendants in error could see him and should have given him warning by blowing their whistle or ringing their bells. But this question of contributory negligence was submitted to the jury by the Court, and it was a question for the jury to determine, and the jury from all of these facts, found liability, and therefore had passed upon the question of contributory negligence. And if there is sufficient evidence in the record, which we insist there is to show negligence of the defendants in error and the lack of contributory negligence on the part of the deceased, then the Court below was correct when it declined to sustain the motion of the defendants in error for peremptory instructions, and the Court below was correct in submitting these questions to the jury, and the jury passed upon them, and found liability, and we insist that the Court of Appeals was in error when it reversed this holding and dismissed this case.

On the day of this tragedy, the deceased and the plaintiff, C.A. Fishburn, administrator, came to the mill at Montvale Station on an automobile. They lived on the north west side of the railroad and station, the mill was on the south or south east side of the station, at the side of the public road, and only a very short distance from the crossing, they both looked and listened for the train, and saw and heard none, and crossed over to the south east side where the mill was located, they found no one at the mill and decided to go back. C.A. Fishburn, the now plaintiff in error, got out of the car and went to the store which was very near by. The deceased Fishburn turned his car and just as C.A. Fishburn got up to the store he

heard the crash. He heard no train, he heard no bell and heard no whistle. The deceased Fishburn was traveling back toward the north and was on the side which was obscured by the brush etc. He could not see the train because of the condition in which defendants permitted their right-of-way to grow up in brush, which brush extended down and within eight or ten feet of the highway as it led on to the crossing.

Under the conditions as existed there, we insist, that the presumption would be that CA. Fishburn, who could not see because the defendants negligent acts in not clearing the brush from around this crossing, which prevented him from seeing, entered the crossing without any intimation that danger was ahead.

Under these facts, all taken together, we respectfully insist that the Lower Court was eminently correct when he refused to peremptorily instruct the jury to find for the defendants; and that the Court of Appeals was in error in its holding.

Under the Statute, and the second count of the declaration, we insist, that the deceased had become an obstruction upon the railroad tracks under the law, and that the defendants failed to observe and comply with the requirements of the statute, and are therefore guilty of negligence and liable under the second count or statutory count.

Physical facts do not mislead. What was the condition of the automobile after it was hit. W.E. Parham testified, (see record page 235 and 236)

Q. Did you see the automobile Mr. Parham after it was torn up?

A. Yes sir.

Q. Could you tell where it had been hit, just describe the conditions of the car.

A. It was hit at the left hand side and torn out the entire side from the rear back to the front- the top was broke loose, the wind-shield was broke, and the fender was dented to the left and forward, and the radiator was bent over to the side and broken. There were no wheels under the front.

See record W.E. Parham pgs 235 to 236
See also record C.A. Fishburn pages 68 & 112.

The marks of the wheels looked like they were about a foot over the tracks.

See record Fred Carpenter pg. 255.

The condition of this car as fully shown by the record indicates that the train hit this car in the side after it was on the track.

Under the record the deceased was an obstruction upon the tracks or was near enough to the tracks to be struck by the train. The defendants did not apply their brakes at all, blow their whistle or ring their bells, they did not even check. It is not necessary to argue that the burden shifted to the defendants in error to prove that they complied with the statutes because the plaintiff in error has fully carried the burden, and shown beyond question that the defendants did not comply with the statutes. The train crew did not testify in the Court below. They were present, they are employees of the defendants. They knew whether the deceased was on the tracks or not, and yet in so

far as this record is concerned they are silent.

We therefore insist that under the Statutory count that the deceased had become an obstruction on the tracks or was near enough to the tracks, that under the law it was an obstruction, and that it was the duty of the railroad company to have a lookout ahead, apply their brakes, blow their whistles, ring their bells, and do everything in their power to avoid hitting the deceased.

We insist further that this record fully justifies the conclusion that Fishburn was an obstruction on the track or was near that he was likely to be struck, and that when the plaintiff in error has shown this fact, this burden shifts to the defendants in error to prove that they had a lookout ahead, that they rung their bell, and that they blew their whistle and applied their brakes, and did all that was in their power to prevent this tragedy.

IV.

BRIEF OF LAW AND ARGUMENT.

Under the first count of the declaration of the common law count, we present and insist that the defendants were negligent in not blowing the whistle, in not ringing the bell, in not applying the brakes, in not keeping the brush and shrubbery etc. cleared from around the crossing, in running at a high rate of speed with the engine cut off, and therefore almost noiselessly on to the public highway crossing. In any event these acts of the defendants are questions for the jury to determine on an issue of negligence and are not questions of law for the Court.

And the insistence of the defendants in error on the question of contributory negligence under the common law count, under all these circumstances and conditions as they existed at the time of the accident, are questions of fact for the jury and not questions of law for the Court. The jury passed upon these questions and found that the defendants were liable. We submit that if there were any questions of controverted facts to go to the jury, then it was the duty of the Court Below to submit those to the jury, under proper charges, which we insist he did. We therefore insist further that there is proof to sustain the verdict of the jury; and if this be true, under the uniform holding of the Court, the verdict of the jury should not have been disturbed by the Court of Appeals.

"In an action for wrongful death there is a presumption arising out of the instinct of self preservation that the decedent was in the exercise of ordinary care when fatally injured, prevailing until overcome by competent evidence, and which may prevail where there are no eye witnesses of any direct testimony as to his conduct."

See Tenn Central R.R. Co. vs. Herb, 134 Tenn Page 397.

The question of negligence and contributory negligence was held to be for the jury under the following circumstances:

"Where the traveler approached the crossing very slowly, but the view was obstructed and it was difficult to tell by means of the sense of hearing whether or not that road or another and neither the bell was rung or the whistle sounded."

See Thompson on Negligence Sec. 1583.

Again it has been held:

"With regard to the nature of the warning, which are to be given by an approaching train, the principal should be kept in mind that, although the statute law or a valid municipal ordinance may prescribe a particular warning at a particular distance, yet, if this proves insufficient for the

protection of the traveling public, the railroad company is bound, within practical limits, of course, to give such warning as may be sufficient----The sufficiency of the warning which is given is here, as in other cases generally a question for the jury."

See Thompson on Negligence Sec. 1574.

Where the view is obstructed, so that the train cannot be seen by the traveler as it approaches the crossing, the most obvious suggestion of social duty is that those in charge of it should give warning by means of the bell and steam whistle; and their failure to do so is evidence of negligence to go to the jury.

In the case at bar the failure of the defendants in error to ring the bell, or blow the whistle and warn the public of the approaching to this station and crossing is, we insist, evidence of negligence to go to the jury, and that these questions were properly submitted to the jury by the Court Below.

In the case of Strong vs. Sacramento & C. Railroad Company, 61 Cal. 326, the Court said:

"The plaintiff drove up to a railroad crossing. He could not see the track in either direction, because of piles of lumber; the defendants train came along ringing no bell as it should have done and struck the plaintiff's team as he was crossing. It was held that plaintiff was not guilty of contributory negligence sufficient to justify a nonsuit."

"If, therefore the evidence is in such a state as to warrant the jury in drawing the conclusion that the traveler would not have ventured upon the crossing if the proper signals had been given, they may find a verdict for the plaintiff."

Thompson on Negligence Sec. 1582.

Our own Supreme Court has passed upon these question in the case of Hurt vs. Y.M.V.R. Co. 140 Tenn.

"The Rule that it is negligence per se to enter upon a railroad track without looking and listening has been applied to the ordinary case in which the plaintiff, or the deceased, was not prevented from seeing or hearing from any other circumstances and had the use of his faculties.

See Hurt vs. Y. & M.V.R. Co. vs. 140 Tenn. Pg. 642.

The facts of this case are as follows:

"Drs. Nelson and Lewis had gone out of Memphis on what is known as the "Horn Lake Road" to operate on a patient. They were partners. The track of the defendant crosses the road at practically a right angle, though not entirely so. A train of the defendant's was proceeding South over its tracks from Memphis to Vicksburg, Miss. The crossing of the railroad and the dirt road is commonly known as a "blind Crossing: the train in proceeding South over the tracks of the company, passes through a deep cut which emerges a short distance north of the road crossing. The walls of this cut are stated to be about twenty-five high except at the south where the walls gradually decline to a level with the railroad tracks. On the east side of the cut are a great many trees, vines and the like which obstruct the view of one traveling the dirt road as it enters on the railroad track. There is substantially an agreement in the testimony that a traveler on the dirt road cannot see the train emerging from this cut until he is within twenty feet of the crossing and that the engineer and fireman on the train cannot see the traveler sooner.

Dr. Lewis was giving his attention to the car because the dirt road at and near the crossing was bad. He and Dr. Nelson saw the approaching train at the same instance. Dr. Nelson cried "Look out" and Dr. Lewis saw the train out of the "corner of his eye."

The automobile was moving at from twelve to fifteen miles per hour. Dr. Lewis thinks he first tried to stop the car but instantly concluded that it was too close to the railroad track and then tried to rush across the track. The engine struck the car about the rear wheel and turned it over an embankment about 30 feet and the automobile was carried about 300 feet on the pilot.

Dr. Nelson received injuries from which he died but Dr. Lewis recovered.

The plaintiff's proof is that that the train was seen by them as soon as it could have been seen. It also shows or tends to show that the whistle was not sounded and the bell was not rung. The engineer says he did not see the automobile until he was in the act of striking it. The fireman did not see them as he was at that time engaged about his duties. The engineer says he put on the emergency brakes but did not sound the alarm as he did not have time to do so.

Same case pages 628 and 629.

Not guilty of contributory negligence such as
would bar a recovery.

In this cause our Supreme Court through Justice
Landsen said:

"It is said for the defendant that Drs. Lewis and
Nelson were guilty of such contributory negligence as would
bar their right of recovery as a matter of law. We think this
contention is not well taken.

See Hurt vs. Y. & M.R. Co. 140 Tenn. 638

In the case at bar the proof is in favor of the
proposition that at the time the train approached the cross-
ing at Montvale Station, the whistle was not sounded or the
bell rung and no other warning given as to the approach of the
train.

The Court further said in this case:

"The plaintiff's proof tends to show that the
train entered upon the crossing without sounding the
whistle or the bell or taking any other steps to give
warning of the approach. This of course, nothing else
appearing made a question for the jury against the defendant
under the common law."

Same case page 639.

The Court further said:

"Some Courts have laid down the dogmatic formula
that the driver of an automobile cannot enter upon a
railroad track without first stopping, looking and listening
at a point where stopping looking and listening will avail
to discover the presence of a train on the track if such be
the case. The Learned Trial Judge seemed to think that the
plaintiffs should have flagged themselves across the track.
However, it must be admitted that the plaintiff's had the same
right to travel along the county road which defendants had
to operate their trains upon the railroad. Their rights at
the crossing were equal at the common law.

It is reasonably clear that if the defendants had given warning of the approach of the train to the crossing in sufficient time before it entered upon the crossing, the accident would have been avoided.

Same case pages 639 and 640.

The doctrine of the whole case is to the effect that there was liability in the case as found by the Jury however this case was reversed on account of a statement that was in the record made by the trial judge to the effect that he was dissatisfied with the verdict of the jury and the case was reversed upon that point, however a reversal of the case does not change the fundamental rules and doctrines laid down by the Court.

We again submit that the only question in this Court is whether there was sufficient evidence to carry this case to the Jury. If so, then we must insist that the holding of the Court of Appeals is erroneous and the action of the lower Court should be affirmed on the common law count by the Court.

Passing from the common law count to the statutory count or second count, we insist, that the defendants are liable under this count, and that the Hon. Court of Appeals erred in not holding that they were not. The automobile had reached the track. The manner of the damage shown on the automobile, as testified to by W.E. Parham and others, shows that the train hit the automobile. It was battered all along the side, the door was knocked off. It was testified that prints of the wheels were at least one foot over the track. When this machine in which the deceased was riding became an obstruction, it was the duty of the railroad company, under the statute, to apply the brakes, ring the bell, blow the whistle, and do anything else in their power to prevent the accident. The railroad crew did not do this.

The statutory count is based upon the following

Statute:

"Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead, and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent the accident.

Code Sec. 1574 sub sec. 4.

"Every railroad company that fails to observe these precautions, or cause the same to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by or resulting from, any accident or collision that may occur.

Code Sec. 1575 Sub. Sec.

"No railroad company that observed or causes to be observed, these precautions shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions, shall be upon the company.

Code Sec. 1576.

Our Supreme Court has said, through Justice

Wilkes:

"As to the burden of proof being upon the railroad the statute is very plain and emphatic. The proof that it has observed said precautions, shall be upon the company; and this means all the precautions enumerated in the Statute.

See Chattanooga Rapid Transit Co. vs. Walton 21 Pickle page 422.

The Supreme Court said further in this cause as follows:

"There is no new rule. It has been uniformly held that when either stock or persons are killed or injured on the track of a railroad, there the Statutory precautions must be observed, the burden of proof is up on the company to show that they were observed, and that it was guilty of no negligence and that the accident was unavoidable and this is not a new rule but the announcement of a common law principal."

In the case at bar, the defendants have offered no proof either to show that they complied with the statutory precautions or to show that the accident was unavoidable.

In the above case the court further said:

"It is only incumbent upon the plaintiff to prove the injury by collision in the first instance, and when this is done, the statute throws upon the company, the burden of excusing itself, which it can show by showing a compliance with the statutory precautions, and when this is attempted, the plaintiff may show otherwise and also rebut the testimony of the defendant company as to the accident itself."

The defendant companies are not only required to show that they complied with the Statute, but they must go further as was held in the foregoing case as follows:

"When the killing or injury is proved, in order that the company may show a compliance with the statute and remove the presumption of negligence, the onus and necessity is upon it to show that it had the means to be thus employed; in other words, that it not only did what the statutes requires as to sounding the bell or whistle and having some person on the lookout ahead, but that its road, its machinery and equipmenys are according to the present state of art or in reasonable conformity thereto.

Citing L. & N. R.R. Co. vs. Conner 9 Heisk. 22
Summers vs. Railroad 7 Lea 204
Railroad vs. Stewart 13 Lea 426.

Our Supreme Court in the case of Louisville & Nashville Railroad Company vs. O.P. Parker recognized the burden of proof being on the defendant to show a compliance with the Statute in that it casts the burden of proof to show a compliance upon the defendants in error; then as provided by statute, the plaintiff in error had a right to rebut the testimony of the defendant:

"After the plaintiff in an action against a railroad company for killing stock, had established his prima facie case, the railroad company had closed its explanatory evidence, it was not error to permit the plaintiff to introduce witnesses again, to show the nature of the accident and that the necessary precautions had not been observed."

See 12 Heiskell 49

In the case of Memphis & Charleston Railroad Co. Vs. Guy Smith after quoting the statute casting the burden upon the railroad company to show that it complied with the Statute, said:

"It follows that when the Legislature declares that 'where the railroad company is sued for killing stock, the burden of proof that the accident was unavoidable shall be upon the company.

It meant that if the company prove that at the time of the accident, it was in observance of the several statutory precautions, then the accident would be unavoidable and the company would not be responsible; But if this proof is not made, the law makes the company responsible for all the damages resulting from the accident. The company, to exonerate itself, must show that, not only, the specific precautions were observed; but, in addition, that every possible means was employed to stop the train and prevent the accident.

While this case above cited is for damages for killing stock, yet the same rule applies for killing or injuring persons.

In this casuse the court further said:

"As the law is plainly written, the responsibility for the damages occasioned by or resulting from the accident, attaches to the company upon its failure to prove that all the statutory precautions had been observed.

9 Heisk. 863-4

In the case of C.C.N. & T.P.R.R. Co. vs. Brook reported by our Supreme Court, this question was directly at issue as to the burden of proof as to the observance of the Statutory precautions. The Court said:

"One of the questions to be herein dealt with is as to the correctness of the charge of the trial Judge on the point of where lies the burden of proof to show that the deceased appeared on the track or within striking distance of the track as an obstruction."

The Trial Judge gave the jury instructions as follows:

"If you find that the deceased was killed (and the defendant admits that) then you will inquire whether or not the defendant, the railroad company did what the law required it to do. If it shows you by the greater weight of the evidence that it did, that it had some one on the lookout on the engine and this man at the time he appeared in the vision of the engineer was not in striking distance of the train, there was no duty that devolved upon the engineer to sound an alarm or put down the brakes."

See 132 Tenn. Page 477.

The Supreme Court held this to be error, affirming the Court of Civil Appeals.

There can be no doubt but that the deceased Walter Fishburn appeared on the track or so near to it that a passing train would strike him.

The Supreme Court said further in this case:

"By the charge both the parties concede the burden was placed on the defendant railroad company in that regard; Whereas, the burden of proof was on the plaintiff to show that the deceased appeared upon the track or was near to it as to be an obstruction. Until this was done there was not made the prima facie case that would place, in turn, upon the defendant the burden of showing that its employees had observed the prescribed statutory precautions of sounding the whistle, etc."

See 132 Tenn. p. 477

In the case of Railroad vs. Walker, Our Supreme Court said:

"It will be observed that the statute does not make the liability of the company depend upon whether or not the accident or collision was the consequence of the failure of the employees to observe these precautions, but, on the contrary, the company shall be liable to all damages resulting from any accident or collision in all cases where the company fail to prove that the precautions were observed. Therefore ~~all~~ if the precautions have not been observed, the company is liable, although it may appear that the observation of the precautions would not have prevented the accident."

Railroad vs. Walker 11 Heisk. 385.

This doctrine was re-affirmed in the case of Railroad Companies vs. Foster 4 Pickle 478.

In commenting upon that case the Supreme Court further said:

"We fully recognize the justice of the law as laid down in some of the authorities, that persons going upon railroad tracks ought to be required to act as rational and sensible creatures and to exercise their sense in looking out for trains and thus avoid unnecessary danger to themselves and others; and in very many cases the injured parties contributed in a great degree to the accident by their culpable failure to observe the most common degree of prudence and attention; But under the statute before quoted as construed by this Court, the more negligence of the injured party, contributing to the accident, will not all together defeat the action, provided the precautions of the statute have been observed. This negligence may and should be looked to by the jury in mitigation of damages."

Railroad vs. Walker 11 Heisk. 386

In the case of E.T.V. & C. R.R. Co. vs. Platt The Court through Justice Snodgrass said:

"It follows therefore, that if an injury to a person occur while he is on the the road of the Company through any negligence of its officers and servants, it is now statutory negligence or negligence against which the statute as well as the common law provides; and a declaration as in the present case, that the servants of the company wrongfully and negligently ran its train over such person, gives notice that it was contrary to the statute and imposes no hardship on defendant in requiring that it come and defend by showing in accordance with the same statute that it observed these precautions and is therefore not liable.

E.T.V. & G.R.R. Co. vs. Platt 1 Pickle 15

The Court in commenting on Sections 1167 and 1168 of the Code which is Sections 1575 and 1578 of Shannon's Code said:

"The proper construction of Sects. 1167 and 1168 etc. of the Code is: The railroad company is responsible for the damages occasioned by or resulting from the accident or collision, unless it shows that the precautions prescribed by these sections were performed. And although it may appear that the accident or collision would have occurred had the precautions been performed. Cases of hardship and absurdity may occur upon such construction of the clauses of the Code. But the language is explicit and certain and the construction is inevitable.

L. & N.R.R. Co. vs. Burke, Admr. et al
6 Cold. 50.

In the same cause the court further said:

"The statute is founded on a policy of double aspect; One to guard and protect the safety of the general public and the other, to compensate the injured person which has sanction in what is called the police power of the government.

In the case of N.C. R.R. Co. vs. C.C. Smith, Admr. it appears that the party was killed by the defendants cars running over him and that the train was running at night without a head light. The Court said:

" The Court correctly held that if it was shown that the party was killed by the defendants' running cars running over him, liability would be incurred and the jury must find for the plaintiff, unless the defendant show by proof that the precautions laid down in Code Sec. 1106 sub. S 5 (evidentially meaning 1574 Sub. Sec. 4 Shannon's Code)

In other words when the killing by the cars of the company is shown, then the burden of proof is thrown on the defendant that all the care imposed by law had been exercised.

By said section it is provided that 'every railroad company shall keep the engineer, foreman or some other person upon the locomotive always upon the lookout ahead and when any animal or other obstruction appears upon the

road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent the accident.

N. & C.R.R. Co. vs. Smith, Admr.
6 Hesik. 177.

The same doctrine is laid down in the case of Railroad vs. Dies, except this case goes further and holds:

"That he (the injured party) cannot be held liable for negligence in failing to look when his view is absolutely cut off or so obstructed as that he cannot see nothing until he is entering or has entered on the track.

Railroad vs. Dies 14th Pickle 663

GREATER DUTY TO GIVE SIGNALS WHERE VIEW IS
OBSTRUCTED.

"Where the view is obstructed, so that the train cannot be seen by the traveler as it approached the crossing the most obvious suggestion of social duty is that these in charge of it should give warning by means of the bell and steam whistle; and their failure to do so, is evidence of negligence to go to the jury, sufficient to justify a finding of negligence and sufficient to warrant the court in giving instructions to the jury to the effect that if they find such to be the fact and find that the plaintiff was injured without fault or negligence on his part they will return a verdict in his favor and one court has characterized such an omission under such circumstances to be negligence per se".
Thompson on Negligence Sec. 1573.

"We concur in the conclusion of the court of Appeals that the testimony of witnesses that they did not hear the whistle or bell as the train approached the station is not negative evidence. After stating that they were in a position to hear and observe and that they could have heard the whistle and bell had either been sounded, the witnesses testified that they heard neither whistle nor bell. They gave the reason which lies at the basis of their direct negative assertion of fact, that is, that they would have done so had they sounded as the train approached the station; their evidence was competent and probative of the fact that sub section 3 Dec. 1574 Shannon's Code was not observed."

Tenn. Cent. Ry. Co. vs. Page 26 Thompson Page 89
Railroad vs. Ray 124 Tenn. p. 16

In the case of Hines vs. Patridge this court said:

"We do not think that Chapter 36 of the Acts of 1917 has any bearing on the plaintiff's right to recover. The act expressly provides that none of its provisions 'shall be construed as abridging or in any way affecting the common law right of recovery of litigants in damage suits that may be pending or hereafter brought against any railroad company or common carrier."

17th Thompson 237.

In the above opinion, the exact language of the statute is quoted.

In conclusion we say from all the facts and circumstances in the case that we fail to see how the Court can come to the conclusion as a matter of law that there was no negligence, and if the Court cannot correctly so conclude then it was a question for the jury, and if there is evidence to sustain and support the verdict of the jury, then the Court of Appeals was in error in reversing the trial court. On the Statutory Count we say in conclusion that the deceased appeared upon the track or so near that he was an obstruction, and that if the defendants in error had looked out ahead, they either failed to look or failed to observe the precautions laid down by the Statute, and having failed to do so, the defendants in error are liable per se, and that under either or both of the counts, the judgment of the Court of Appeals should be reversed and the lower Court affirmed.

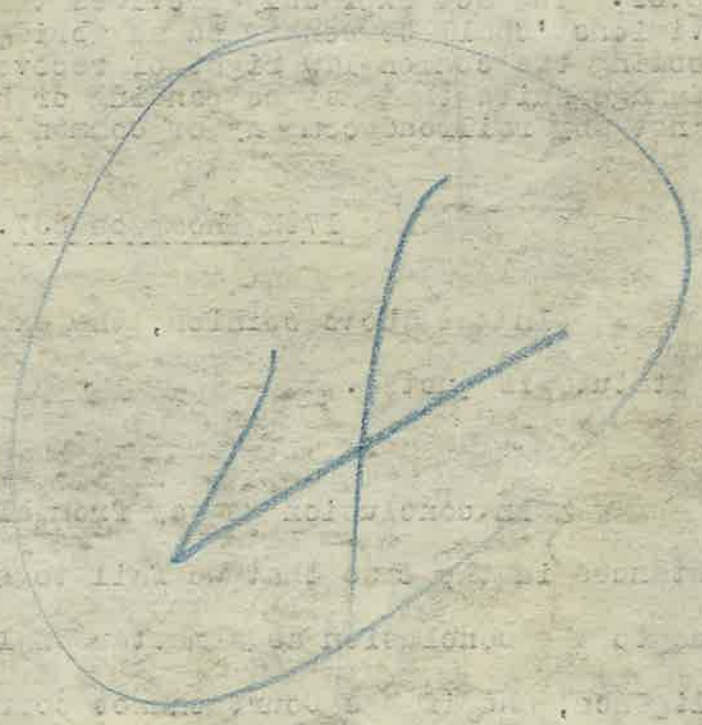
Respectfully submitted,

James J. Jackson
James M. Cole
Gamble Crawford & Goddard



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