

way. If, on the other hand, he was walking along No. 5 track when he was struck, the case falls to the ground, as there is no evidence of negligence in the condition of the track or the management of the engine. If deceased had reached the space between tracks 4 and 5, he must have done so by crossing in front of the cars, which had just been or were just being shunted into the latter after he had set the switch; in other words, he must have passed to that place from the switch on the other side of that track. He is found just behind the front wheels of the truck of the second car, the first car having been entirely derailed. No other cause for this circumstance is suggested, except that the car had passed over the deceased, and it appears to me equally consistent with all the facts in evidence that he was struck while just crossing the track in front of that car, as that he was walking along the space between the tracks and slipped into the track and under the first or second car. If the first car had not been derailed, there would be little or no room for doubt that deceased was walking between the tracks, but that fact removes the vital question, whether he was walking along the track or between the tracks, into the region of conjecture. The position in which deceased's body was found cannot assist us, as the learned trial Judge observed, for the sudden collision with the car might have thrown it into any imaginable position. The Court below has assumed that the place where he slipped was between the tracks. This, however, assumes the very question in issue. Upon that theory a new trial would be right, because, as I have said, there was evidence that the place was in a slippery and dangerous condition. It would in that case be quite unnecessary to lay stress on the deceased's answer to the question as to how the accident happened. That was an answer to a question put some minutes after the happening of the accident, and, even if it was properly admitted as being part of the *res gestæ*, I do not see how it aids the plaintiff in proving where deceased was when he was struck. It is quite as consistent with one theory as with the other. He may have slipped on the track or between the tracks, but unless it points to the latter it carries the case no further.

The learned trial Judge's opinion evidently was that there was no case for the jury. And as that, after a careful examination of the evidence, is my own view, I think that the appeal should be allowed.