

The question turns upon the circumstances in which the ties were placed there, and whether the sectionmen in putting them there were acting in the course of their employment so as to render defendants liable for their negligent or unlawful act.

The evidence upon this point is in a narrow compass and to be found in the testimony of Torrance, which occupies three pages of the shorthand notes.

Torrance, as I have said, was a sectionman working under Dunlop. According to the testimony of Torrance, when ties that were worn out were removed from the track, the duty of the sectionmen, acting under the foreman, Dunlop, in this particular section, was to burn the ties beside the track. There is evidence from which the jury would probably be justified in inferring that defendants had permitted the sectionmen, or any of their employees who desired to have the ties for firewood, to take them instead of burning them beside the track.

Dunlop had, upon other occasions, according to the testimony, availed himself of that permission.

The ties in question were brought from where they had been collected upon the side of the track by the two men and Dunlop—the two men acting under the directions of Dunlop—not for the defendants' purposes (I think it is clear that no other inference could be drawn), but for the purpose of Dunlop appropriating them to his own use, according to the permission which had been given to him by his employers.

The ties were brought and placed upon the highway, so that they would be in a convenient position to be ultimately removed by Dunlop to his residence. The evidence does not shew, and perhaps it is not important to know, how far from the track Dunlop lived.

It seems to me that plaintiff is upon the horns of this dilemma: If there is no evidence that the sectionmen had authority to take and remove these ties for their own use, then what was done was an unlawful act, and it could not be said, if the act of removing them was a wrongful act and a misappropriation of the property of defendants, to be an act done by the sectionmen in the course of their employment. If, on the other hand, and that seems to be the more likely and probable view of the matter, there was the permission to Dunlop to take them, I think upon this evidence Dunlop must be taken to have availed himself of that permission, and that from the moment he made any disposition of the ties it must have been a disposition for his own purposes and not for those of his employers, and therefore that what was done