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New Jersey
Court of Errors and Appeals

WALTER R. HODLER,	} Plaintiff,	} In Tort.
vs.		
PUBLIC SERVICE RAILWAY Co.	} Defendant.	}
and HUDSON RIVER TRACTION		
Co.,		

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Notice of Appeal

Notice is hereby given that the plaintiff in the above entitled cause appeals from the judgment rendered therein, to the New Jersey Court of Errors and Appeals.

Dated, November 18th, 1912.

LOUIS HOOD,
Attorney for Walter R. Hodler, 30
Plaintiff.

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

	WALTER R. HODLER, Plaintiff and Appellant, vs. 10 PUBLIC SERVICE RAILWAY CO. and HUDSON RIVER TRACTION Co., Defendants and Appellees.
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To L. S. Hoffman,
 Attorney of Appellees.

TAKE NOTICE that the following are the grounds of appeal under the notice of appeal heretofore filed and served in the above entitled cause, to wit,

The following questions were admitted:

1. To the plaintiff, Walter R. Hodler: Q. Then it is a fact that the night you were hurt, before you received your injuries, you were standing alone on the back platform of a trolley car, the car going on a down-grade, on a curve, and going at the rate of from thirty-five to forty miles an hour, which, as you think, made that car cover the distance of about sixty feet in a second, and that you stood with your back against the controller of the car, with your hands at your side or crossed in front of you, with the door closed to your left and with the door open to your right, about two to three feet away, with a seat available inside the car, and with space to stand inside of the car, if you did not care to take a seat, and yet you remained on that back platform until you were

Grounds of Appeal

thrown out of the door by the movement of the car as it passed along the tracks and went on to a greater curve?

2. To the witness Florence R. Hodman: Q. And what brought it about, do you know? Q. Who taught you, if anybody? Q. What is his address? Q. What street in New York? Q. What does he teach? Q. And when did you begin your studies for lip-reading? Q. And how long did it take you? Q. In talking to people does it make any difference as to their articulation? Q. Does it make any difference in the person talking to you as to whether they have a clean shaven face or a mustache, do you think? Q. Is this school of lip-reading a public school or private school? Q. Do you meet few or many people there every day? Q. Are you obliged to carry on conversation with them or not? Q. About how much in money did it cost you to acquire lip-reading? Q. Did this Mr. Nitchie, who was your tutor in lip-reading, as you say, have few or many pupils? Q. If you know what is his regular charge for a course of thirty-five lessons? Q. While you are taking lessons do you or do you not practice in any way? Q. How? Q. Does or does not the ability to acquire this lip-reading depend on the intelligence of the pupil? Q. What time do you go to your duties at the school in the morning? Q. And how long do you remain?

3. To the witness, Rudolph F. Bodecker: Q. Well can you?

4. To the witness, Joseph McCabe: Q. What do you mean by "they are not telling the truth"?

5. To the witness, Clarence H. Coe: Q. In your judgment, what kind of a curve was that? Q. How were the cars of this 34 type equipped?

The following question was overruled.

6. To the witness, William Breen: Q. That it was tough and rough?

Record of Pleadings

7. The map of the alleged scene of the accident made by Walter R. Barthelemew was admitted in evidence.

8. The paper marked D-4 for identification and Ex. D-4 was admitted in evidence.

9. The paper marked D-5 for identification and Ex. D-5 was admitted in evidence.

10 10. The Court directed a verdict for the defendant.

11. The Court charged the jury "The clerk will therefore call your names and you will render a verdict for the defendant in this case."

LOUIS HOOD,
Attorney of Appellant.

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Record of Pleadings

Pleas before the Justices of the Supreme Court of the State of New Jersey of the Tenth day of December, A. D., Nineteen Hundred and Nine.

Witness, William S. Gummere, Esquire, Chief Justice.

30 William Riker Jr., Clerk.
Harry V. Osborne, Attorney for Plaintiff.
Edmund W. Wakelee, Attorney for Defendant

Essex County, ss:

Public Service Railway Company, a corporation organized under the laws of this state, and Hudson River Traction Company, a corporation organized under the laws of this state, the defendants in this suit, were summoned to answer unto
40 Walter R. Hodler, the plaintiff, in an action of

Record of Pleadings

tort, and thereupon the plaintiff by Harry V. Osborne, his attorney, complains: For that, whereas, the said defendants, on the twenty-eighth day of December, nineteen hundred and seven, were the owners and possessors and had the use, management and control of a certain passenger car, which car was operated, propelled and run along by electric power in and upon certain railway tracks in the possession and under the control and management of the said defendants, said tracks being situated upon and extending along Kearny Avenue, a public street or highway, in the town of Arlington, County of Hudson and State of New Jersey, to wit, in the County of Essex and State of New Jersey; and it thereby became and was the duty of the said defendants to use due and proper care in the use, management and control of the said passenger car while said car was being operated, propelled and run along said public street or highway, and upon the tracks as aforesaid, so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car so operated, propelled and run as aforesaid, and to operate, propel and run said car at such a rate of speed as to keep the same within safe and proper control; yet the said defendants not regarding their duty in that behalf did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, and upon the tracks as aforesaid, so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car while the said car was being operated, propelled and run along as aforesaid, and did not operate, propel and run said passenger car at such a rate of speed so as to keep the same within safe and proper

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Record of Pleadings

control, while operating, propelling and running said passenger car along said public street or highway, and upon the tracks as aforesaid, so as to avoid injury or hurt to persons lawfully riding therein, but wholly failed and neglected so to do; and the said defendants on the day and year aforesaid, at the town of Arlington, in the County of Hudson and State of New Jersey, to wit, in the

10 County of Essex aforesaid, by its servants, so carelessly, negligently and improperly operated, propelled and run said passenger car, in, upon and along said public street or highway, and upon said tracks as aforesaid at such a high rate of speed as to lose the safe control of the same, and to cause the said car to lurch and sway in an extraordinary and unusual manner and in utter disregard of the safety of this plaintiff and other

20 passengers upon said car, and to strike a curve in said tracks, which curve was wholly unknown to this plaintiff, in so violent a manner as to then and there in going around said curve, cast, hurl and throw the said plaintiff from said passenger car, while the plaintiff was lawfully riding thereon, as aforesaid, to the ground with such force and violence that he was seriously, painfully and permanently bruised, wounded and injured, and thereby the said plaintiff was permanently and

30 internally injured in his head, face, limbs, body and feet so that his life was despaired of and was made permanently deaf and unable to hear.

And for that whereas the said defendant Public Service Railway, was, on the day and year aforesaid, in the management and control, by its servants of a certain passenger car, which was operated, propelled and run along by electric power in and upon certain railway tracks in the possession and under the control and management of

40 the said defendant, said tracks being situated

Record of Pleadings

upon and extending along Kearny Avenue, a public street or highway in the town of Arlington, County of Hudson and State of New Jersey, to wit, in the County of Essex and State of New Jersey; and it thereby became and was the duty of the said defendant to use due and proper care in the use, management and control of the said passenger car while said car was being operated, propelled and run along said public street or highway, and upon the tracks, as aforesaid so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car so operated, propelled and run as aforesaid, and to operate, propel and run said car at such a rate of speed so as to keep the same within safe and proper control; yet the said defendant Public Service Railway, not regarding its duty in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, and upon the tracks as aforesaid so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car while the said car was being operated, propelled and run along as aforesaid, and did not operate, propel and run said passenger car at such a rate of speed so as to keep the same within safe and proper control, while operating, propelling and running said passenger car along said public street or highway, and upon the tracks as aforesaid, so as to avoid injury or hurt to persons lawfully riding thereon. but wholly failed and neglected so to do. And the said defendant Public Service Railway on the day and year aforesaid, at the town of Arlington, in the County of Hudson and State of New Jersey, to wit, in the County of Essex

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Record of Pleadings

aforesaid, by its servants so carelessly, negligently and improperly operated, propelled and run said passenger car, in, upon and along said public street or highway, and upon said tracks as aforesaid at such a high rate of speed as to lose the safe control of the same and to cause the said car to lurch and sway in an extraordinary and
10 unusual manner and in utter disregard of the safety of this plaintiff and other passengers upon said car, and to go around a curve in said tracks, which curve was wholly unknown to this plaintiff, in so violent a manner as to then and there cast, hurl and throw the said plaintiff from said passenger car, while the plaintiff was lawfully riding therein, as aforesaid, to the ground, with such force and violence that he was seriously, painfully and permanently bruised, wounded and in-
20 jured, and thereby the said plaintiff was permanently and internally injured in his head, face, limbs, body and feet so that his life was despaired of and he was made permanently deaf and unable to hear.

And for that whereas the said defendant Hudson River Traction Company, was on the day and year aforesaid the owner and possessor of a certain passenger car, which was operated, propelled and run along by electric power in and
30 upon certain railway tracks in the possession and under the control, and management of the said defendant, said tracks being situated upon and extending along Kearny Avenue, a public street or highway, in the town of Arlington, County of Hudson and State of New Jersey, to wit, in the County of Essex and State of New Jersey; and it thereby became and was the duty of the said defendant to use due and proper care in the use, management and control, of the said passenger car while said car was being operated, propelled
40 and run along said public street or highway, and

Record of Pleadings.

upon the tracks, as aforesaid so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car so operated, propelled and run as aforesaid, and to operate, propel and run said car at such a rate of speed so as to keep the same within safe and proper control; yet the said defendant Hudson River Traction Company not regarding its duty 10 in that behalf, did not use due and proper care in the use, management and control of said passenger car, while said car was being operated, propelled and run along said public street or highway, and upon the tracks as aforesaid so as to avoid injury or hurt to persons or passengers lawfully riding in and upon said passenger car while the said car was being operated, propelled and run along as aforesaid, and did not operate, 20 propel and run said passenger car at such a rate of speed so as to keep the same within safe and proper control, while operating, propelling and running said passenger car along said public street or highway, and upon the tracks as aforesaid, so as to avoid injury or hurt to persons lawfully riding therein, but wholly failed and neglected so to do. And the said defendant Hudson River Traction Company on the day and year aforesaid, at the town of Arlington, in the County 30 of Hudson and State of New Jersey, to wit, in the County of Essex aforesaid, by its servants so carelessly, negligently and improperly operated, propelled and run said passenger car, in, upon and along said public street or highway, and upon said tracks as aforesaid at such a high rate of speed as to lose the safe control of the same and to cause the said car to lurch and sway in an extraordinary and unusual manner and in utter disregard of the safety of this plaintiff and other passengers upon said car, and to go around a 40 curve in said tracks, which curve was wholly un-

Record of Pleadings

known to this plaintiff, in so violent a manner as to then and there cast, hurl and throw the said plaintiff from said passenger car, while the plaintiff was lawfully riding therein, as aforesaid, to the ground, with such force and violence that he was seriously, painfully and permanently bruised, wounded and injured, and thereby the said plaintiff was permanently and internally injured in his head, face, limbs, body and feet so that his life was despaired of and was made permanently deaf and unable to hear.

Whereby and by means of the premises the said plaintiff became and was sick, sore, deaf, lame and otherwise disordered, and so remained for a long space of time, to wit, hitherto, during all which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of, and in the future will lose and be deprived of divers great gains, profits and advantages which he might and would have otherwise derived and acquired, and thereby also the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers large sums of money, amounting in the whole to the sum of one thousand dollars in and about endeavoring to be cured of the wounds, bruises and injuries so received as aforesaid; wherefore, the said plaintiff says that he is injured and has sustained damages in the sum of twenty-five thousand dollars, and therefore he brings his suit etc.

And the said defendant, Hudson River Traction Company, by Edmund W. Wakelee, its attorney

Record of Pleadings

ney, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them as the said plaintiff hath above thereof complained against, it and of this it puts itself upon the country, etc.

And for further plea in this behalf the said defendant by leave of the Court here for this purpose first had and obtained says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it because it says that at the time and place of the committing of the grievances complained of in the above declaration, to wit, on the twenty-eighth day of December, 1907, in the town of Arlington, County of Hudson and State of New Jersey, to wit, in the County of Essex and State of New Jersey, the said plaintiff was guilty of carelessness and negligence which directly contributed to the injuries complained of in the said declaration in that the said plaintiff at the time and place aforesaid, without reasonable care for his own safety, stood upon the rear platform of the said car as aforesaid, notwithstanding that there was at the time and place aforesaid plenty of room and space on the inside of said car as aforesaid which had been provided by the said defendant for the occupancy of passengers riding upon said cars, and that it was by reason of the said plaintiff standing upon the said platform as aforesaid that he was thrown from said car as complained of.

WHEREFORE the said plaintiff was injured in the manner complained of without any fault or negligence on the part of the said defendant but by reason of his own negligent and careless acts and conduct as aforesaid, and this the said defendant is ready to verify.

WHEREFORE it prays judgment if the said plaintiff ought further to have and maintain his aforesaid action against it.

Transcript of Evidence

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Monday, September 23, 1912

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WALTER R. HODLER,

VS.

PUBLIC SERVICE RAILWAY COM-
PANY and HUDSON RIVER
TRACTION COMPANY.

In Tort.

Before HON. FREDERIC ADAMS, J., and a jury.

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For plaintiff appears Louis Hood.

For defendant appears Howard MacSherry.

Mr. Hood opens for plaintiff.

WALTER R. HODLER, plaintiff, sworn in his
own behalf:

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(By direction of the Court, with the consent of counsel, the examination of this witness is conducted as follows: Questions asked by the Court and by counsel are taken down by the stenographer, who dictates them to an operator upon the typewriter, and the typewritten questions are placed before the witness, and the witness answers orally.)

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Mr. Hood: Mr. MacSherry suggests, if your Honor please, that we ought to agree upon some code of signals, in case we want the witness to stop. I think Mr. Mac-

Walter R. Hodler—Direct

Sherry says that the way to do is to raise the hand. I think that fact ought to be communicated to the witness.

The Court: We had better let the witness know that.

(The suggestion made by plaintiff's counsel is typewritten and handed to the witness.

10

Witness: I understand.

Direct-examination by Mr. Hood:

Q. Where do you live? A. Irvington, New Jersey, 437 Stuyvesant Avenue.

Q. What is your business, if any? Are you married or single, and if married, have you any family, and if so, of what does it consist? A. At present I am working at a branch of the piano trade, or have been. Married? Yes. Children? No.

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Q. On the 28th of December, 1907, did you have an accident? A. Yes.

Q. How did it happen? A. That question links cause and effect. How am I to treat it? It links cause and effect. How am I to treat it?

Q. State the circumstances under which the accident took place? A. I boarded the car at Hackensack, New Jersey, about 11:30 p. m. Going in from Hackensack, on the way to Newark from Hackensack, I was unfortunate enough to become involved in a little controversy. We reached the point of the junction. I was the first one to step from the car. We were delayed there for a few moments. I stepped back on the rear platform, and I was thrown from that point a very brief period after leaving the junction. There is a downgrade from the junction to the point of accident. There is a curve a short distance from the junction. As the car passed onto the curve I ex-

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Walter R. Hodler—Direct

perienced a severe jolt; I experienced a second very shortly afterwards, very greatly intensified. The second jolt I refer to was so great that it took my feet from under me and threw me from the rear platform. In my efforts to save myself I grasped for the handle on the side of the car. Missing it and being in space, it turned me. I
 10 was conscious of a blow below the knees. Turning in space, I fell in a peculiar position; I struck on the side of my head first; the vestibule end of the car striking my limbs threw me over on the right side. I guess that is all.

Q. Describe more particularly the character of the jolts that you experienced? A. I was standing on the rear platform, my back resting against the controller; I was a little nearer the right-hand
 20 side of the car than the left. In the first jolt, or jar—I was firmly set at that time, but the first jolt, or jar, had a tendency to throw me off of my balance, to lose my equilibrium; the second, the greater of the two—of course my losing my balance intensified the second jolt; it threw me completely from the platform. The jolts, or jars, can be attributed to the curve; it is of a peculiar nature.

Q. I would like you to describe, if you can, the degree of intensity of the jolts that you ex-
 30 perienced. A. They were far greater than I have ever experienced in all the many trips I have taken on trolley cars.

Q. What experience did you have prior to the 28th of December, 1907, in riding on trolley cars? A. In the year 1904 and 1905 I was employed by the St. Louis & Suburban Railway, St. Louis, Missouri. While there I obtained considerable inside knowledge treating with the construction of cars and what they were capable of, pertaining to speed, and I also incidentally learned to op-
 40 erate a car.

Walter R. Hodler—Direct

Mr. Hood: Show him the question again, please. He does not seem to have caught it. I asked him what experience he had in riding.

Q. (The last typewritten question is again handed to witness.) A. I have ridden very frequently.

Q. When did you first take your position on the back platform of the car? A. Just previous to leaving the junction. 10

Q. Before that time in what part of the car were you riding? A. Before that I was riding on the inside of the car, seated.

Q. Will you describe the interior arrangements of the car? A. The car in question, the only difference from the general type of cars, the fact that they had a smoking compartment for men; there was a partition between the two compartments, one for ladies and the other for men. 20

Q. Did the seats run lengthwise or crosswise? A. Well, the majority of the seats in the car were crosswise; on the extreme ends they were on the side.

Q. Taking into consideration the direction in which the car was going, was this smoking compartment at the front end or at the rear end of the car? A. The front.

Q. And were you riding in the smoking compartment? A. Previous? I do not quite understand the question. 30

Q. Before leaving the junction? A. Well, I occupied seats in both compartments. For awhile I was in the smoking compartment, and then I stepped in the other part of the car. The car was pretty well crowded on our leaving Hackensack. As passengers alighted, I stepped from the smoking compartment to the other.

Q. You said that you had some controversy on 40

Walter R. Hodler—Direct

the car that induced you to change your position. Will you describe in a general way what it was, where it occurred and what changes you made in your position before the happening of this accident? A. Just previous to our reaching the junction there were a number of people boarded the car, and I lay particular stress upon three men
10 who were among the party. One was exceedingly rough in being seated, in endeavoring to occupy part of the seat I was occupying. I resented it. He did not think the position I assumed was merited; he took a point of view just the opposite. It developed into a controversy. He wanted to know if I assumed that I owned the road or was a director of the road, and then he suggested that I travel in a private car. The conversation, or the controversy, drifted on in that line. Finally
20 he got a little more severe in his remarks; it looked for a moment that it would lead to violence. That was only suggested from his attitude. I assumed that was really the object he was endeavoring to achieve. We both got up from the seats we were occupying, and others who were near heard the argument, and they intervened, or prevailed upon my adversary to be a little more discreet. It quieted down for the moment, and not desiring a repetition of it after
30 leaving the junction, just previous to our reaching the junction I stepped upon the rear platform from the car. We stopped there. There were a number of other people alighted. I stepped over to the sidewalk. There is an electric pole and a standpipe stands there right close together. I stepped over there so as to remain in obscurity, so that these three men wouldn't see me on the road, because I thought it would lead to a fight if they should see me on the road, which I was en-
40 deavoring to avoid. A number of them got off

Walter R. Hodler—Direct

and ran over to the lunch room, which was on the corner. We were there quite a few moments. As to the cause, I do not know. After they had all got back on the car, or those that were going on, I stepped to the rear platform. Then there was a slight delay there before we left. As to the time I remained on the rear platform before starting, I can't say with any degree of certainty, but I assume it was in the neighborhood of five minutes or probably less. 10

Q. At the time when the quarrel started were you riding in the smoking compartment or in the other inside compartment? A. Inside, not in the smoking compartment.

Q. Did you get out to the rear platform before the car got to the junction, and if so, how long were you on the rear platform before the car reached the junction? A. Almost prior to the car reaching the junction, why, I stepped to the rear platform, in order to be in a position to alight first. 20

Q. And at that time were there any other people on the back platform? A. Previous to our reaching the junction? Yes, there were one or two previous to our reaching the junction, but neither of the parties present on the rear platform were involved in this controversy that I refer to. 30

Mr. MacSherry: I would like the last part of that to go out, if your Honor please.

Mr. Hood: I would have asked him that next.

The Court: It is relevant, although not responsive. Therefore, if Mr. Hood had asked me to strike it out, I would have done so. I can not strike it out on your motion. 40

Walter R. Hodler—Direct

Q. When the car started from the junction were there any other people on the back platform excepting yourself? A. No, there was no other party present.

Q. From the time that the car started from the junction until the time that you were thrown off the rear platform was there any other person on
10 the rear platform? A. No, there was not.

Q. Describe fully the rear platform of this car that you were travelling on. A. The type of the car in question—it is a vestibule car. Looking forward, on the left-hand side, it is closed; the vestibule is closed; there is a door. On the right-hand side the door is open; it is folded—the door is folded flat against the front of the car. There is a controller a little to the right of the center of the rear platform. There is one step from the
20 platform to the street.

Q. Was the platform inclosed on the rear, or was it open? A. The platform—on the left-hand side the door was closed, on the right-hand side the door was open.

Mr. Hood: I will underscore the word “rear.” Perhaps that will bring his attention to it.

Q. (Plaintiff’s counsel marks on the last typewritten question, which is again handed to the
30 witness.) A. Closed.

Q. About what was the size of the rear platform? A. Well, I regret to say I am a little at a loss to reply to the question. Across, I would assume, it is three and a half, probably four feet, something in that neighborhood; from the door that leads to the interior of the car to the rear of the platform it is about three and a half feet, I would assume. I can’t say with any degree of
40 certainty.

Walter R. Hodler—Direct

Q. To what point were you travelling that night? A. Why, I boarded the car at Hackensack, New Jersey; I was returning to Newark.

Q. And had you or had you not paid your transportation—your fare? A. I had paid my fare.

Q. Describe the speed of the car after leaving the junction. A. The speed of the car varied from the starting point to the point that I was thrown. In order to fully understand, you will have to— 10

Mr. MacSherry: I object to that, not as not being responsive, but as highly improper; it is argumentative. I let the witness go on, but the question is susceptible of an answer without telling us now how he got at it.

Mr. Hood: I will caution him on that point, because I can get at it later on. 20

Q. Describe the speed of the car, without telling us your reason for saying that the car travelled at a given speed. A. The speed of the car varied from the starting point to the point that I was thrown, but it picked up very rapidly from the point we started from to the curve, and I would assume it was travelling at the rate of 35 miles an hour at the time we reached the curve.

Q. Have you had any experience in the speed of trolley cars from which you state the speed of this car at that time to have been 35 miles per hour, and if so, what was it? A. The experience is founded upon the fact that I have operated a car a little, and, at the same time, from riding upon trolley cars formerly, or previous to this particular circumstance. 30

Q. Have you any knowledge as to the type of construction of the car that you were travelling 40

Walter R. Hodler—Direct

on and as to the speed at which that type of car can be propelled?

Objected to as immaterial and irrelevant, and on the further ground that the witness is not qualified to answer the question.

(Question withdrawn.)

10 Q. What knowledge, if any, did you have of the location of the curve in the rail at or near the point where you were thrown off? A. I possessed no knowledge at all previous to the accident in question, laying particular stress upon the curve.

Q. Did you receive any warning as to riding upon the rear platform or as to the car approaching a curve?

20 Mr. MacSherry: I object to that as incompetent, immaterial and irrelevant. I do not know of any duty on the company to warn people not to ride on the back platform or of the existence of a curve ahead.

30 The Court: The question might point, not to any negligence or alleged negligence of the company, but to the degree of care exercised by the witness for his own safety, which would be affected by his knowledge of danger. On that ground I think it is admissible. The question does not necessarily indicate the source of the notice as being the company; it might have been a warning from a fellow passenger. The question is whether the question is competent. I think it is, for the reason that I stated.

Defendant's counsel prays an exception and the same is allowed.

40 A. I did not, no.

Walter R. Hodler—Direct

Q. Can you say where the conductor of the car was during the time that the car passed from the junction to the place where you were thrown off? A. The conductor boarded the car and gave the motorman the signal to proceed, and he stepped immediately forward to collect fares, I assume. I handed him my fare as he passed through.

Q. What is the very last thing that you remember in being thrown off the car? A. The most vivid thing I recall is a pitiful effort to recover my equilibrium and save myself from the injury.

10

Mr. Hood: I will underscore the word "last," and return the question to him.

(Plaintiff's counsel marks on the last typewritten question, which is again handed to the witness.)

Witness: I was conscious of the blow I referred to below the knees, the effort to regain my balance.

20

Q. Do you recall anything after the blow below your knees? A. No, I do not.

Q. What is the very next thing that you recall after that happening? A. Of recognizing my mother at the hospital.

Q. And do you know when that was? A. As to date, I do not. It was only a flash.

Q. Do you know what hospital? A. St. Michael's Hospital, on Central Avenue and High Street, I believe.

30

Q. Can you state at all when it was that you first came back to consciousness? A. No, I can not with any degree of certainty.

Q. Well, when you did come back to consciousness did you realize that there was anything the matter with you? A. When I regained consciousness I couldn't recall anything; I was endeavor-

40

Walter R. Hodler—Direct

ing to see clearly through a deadly blur, both material and mental. I couldn't fully grasp the situation in any respect.

Q. Was there any time while you were at the hospital at which you can specify any particular injury that you felt? A. Only severe suffering in the brain, I would refer to—headache. It was
10 far greater in potency than headache.

Q. After regaining consciousness at the hospital were you able to hear? A. Absolutely no.

Q. When was it that you were last able to hear? A. Just previous to my injury.

Q. And how had your hearing been up to that time? A. Exceedingly accurate in every respect.

Q. Now, since the injury that you speak of have you been able to hear anything at all? A. No.

20 Q. How long were you kept in St. Michael's Hospital? A. I entered St. Michael's Hospital December 28th, at 1 a. m.; I was released January 19, 1908.

Q. When you were discharged from St. Michael's Hospital in January, 1908, did you suffer from anything else except the want of hearing? A. I was released from St. Michael's Hospital. I had no control over the limbs at all; I couldn't walk; I was subject to severe dizzy
30 spells and pounding, turmoil, interior noises. That is something that I have never been free from since the injury; it will be five years in December, I have experienced no surcease from that turmoil, pounding noises. It is something that baffles description. At times I would liken it to the pounding of hot and cold air in the steam pipes; then again it will assume proportions equivalent to a steam riveter in operation. I am
40 absolutely stone deaf, and I am the victim of

Walter R. Hodler—Direct

severe headaches, and I have a tendency to lose my equilibrium in a dark place.

Q. Now, have you suffered from those things that you have mentioned, ever since, or has there been a modification of them in the course of time?

A. The turmoil, the interior noises, they haven't modified in the slightest; even at times they are intensified. The question as to my equilibrium, 10
losing my balance in a dark place, I have overcome that slightly, but very little. I still remain absolutely stone deaf.

Q. After leaving the hospital, what, if anything, did you do to be cured of the things you were suffering from? A. Well, I consulted ear specialists; I have endeavored to overcome the affliction by osteopathy, and I have also taken considerable treatment with galvanic electricity; 20
but I regret to say that none of them have achieved the purpose; and I also have endeavored to overcome the difficulty by the different electric ear devices that they have on the market for deafness, but for me they are out of the question—like the acousticon; it is like a blow on my chin; it would throw my head.

Q. Name the various persons with whom you have consulted. A. Dr. Fewsmith, St. Michael's Hospital; Dr. Eagleton, Newark, New Jersey; 30
Dr. Proctor, Chicago, Illinois; Dr. Felker, Chicago, Illinois; Dr. Rogers, Chicago, Illinois; Dr. Hubbard, New York. That is all.

Q. Now, will you specify what services these various gentlemen rendered you and what amount of expense you incurred in consulting them? A. Dr. Eagleton, the expenditure equivalent to \$50—my indebtedness, I mean; my indebtedness to Dr. Proctor amounts to—

Q. Will you specify what services these various gentlemen rendered and what the expense 40

Walter R. Hodler—Direct

was? A. Dr. Eagleton, examinations relative to the possibilities for an operation, in order to ascertain if, in his opinion, I would ever regain the lost sense. Then I also obtained services in being examined by a physician representing the Public Service Street Railway. My indebtedness to him as a result amounts to \$50. Dr. Proctor—
 10 took the general course of treatment of osteopathy. In such a treatment you are not subject to medicines or drugs of any kind; it is similar to massage. With Dr. Felker, galvanic electricity. That is something I can not define—that is, the ingredients—but with that treatment, too, necessitated my also using an oil for each ear and taking medicine internally. Dr. Rogers—merely examinations to determine whether or not an operation would be advisable or not. He is a surgeon.
 20

Q. How much in all have you spent in an effort to be cured? A. That I can't reply to accurately, but I will say that my expenditure in my effort to overcome this affliction, or my efforts to be cured of this affliction are equivalent to \$1,500, but my expenditures or indebtedness, resulting from the effort to be cured of this affliction are equivalent to \$1,800.

Q. Specify as much of this as you can. A.
 30 There are \$250 to Dr. Proctor, a very little of it paid. Dr. Felker's bill amounts to \$900, a very little paid. Dr. Rogers' bill is equivalent to \$30. Then the expenditures for medicines as a result of Dr. Fewsmith's prescriptions in the three years are equivalent to \$85; from Dr. Felker's prescriptions, they amount to \$50 or \$60, and miscellaneous expenditures, for ear syringes and
 40 from these severe headaches, that will amount

Walter R. Hodler—Direct

to \$20 or \$25. Of course, we are considering the four years—the five years.

Q. Have you any bills from any of the gentlemen that you have named showing the services and the payments on account of them? A. I have statements from Dr. Felker and Dr. Proctor.

Q. Are these papers that I am showing you the statements to which you refer (papers shown to witness)? A. Yes. 10

The papers said to be the bills of Dr. Proctor and Dr. Felker are marked respectively Exhibit P-1 and Exhibit P-2.

Plaintiff's counsel reads Exhibit P-1 and Exhibit P-2.

Q. Mr. Hodler, has there been any change in the conditions that you have described as to hearing the noises in the head since the time you got hurt?

A. Not that I can detect, not in the slightest, no. 20

Q. Did you suffer any bruises or bodily injury except that which you have already described? A. The bruises—no other bruises except what I have already described, below the knees, but there has been an injury to the brain that I neglected to speak of; its nature I can not say.

Q. What do you know about this injury that you now mention? A. Absolutely nothing; it is merely an observation of Dr. Hubbard, in New York. 30

Q. Have you still the clothing that you wore on the night that you got hurt? A. I regret I have not; they were destroyed in the fire at Rutherford, New Jersey, last summer.

Q. Since leaving the hospital have you seen the clothing that you wore on the night that you got hurt? A. I have, yes.

Q. Do you say they are now destroyed by fire? A. They were destroyed by the fire that destroyed the storage house at Rutherford a year 40

Walter R. Hodler—Direct

ago last summer. All our household effects were stored there.

Q. Was the clothing that you wore on the night when you were injured damaged or torn?

Mr. MacSherry: Is that as to the value of the clothing?

10 Mr. Hood: No, it is only to show whether there were probably any bruises and the manner of the injury.

A. It was damaged, yes, covered with mud and considerable blood, but the knees to the trousers were very badly torn, for some reason; as to the cause, I do not know.

Q. Now, Mr. Hodler, for three or four or five years before you were hurt what were you doing for a living and how much did you earn. Give us the details of that without my asking you any
 20 further questions. A. My field of endeavor varied during that period, five years previous to the injury. In 1901 I just graduated from Rockland Military Academy, at Nyack on the Hudson. I was planning to go on with educational work, but through adverse circumstances I couldn't think of it. While here in this city, I worked during that period at two places, for a short while with the New York Telephone Company; from there I
 30 went to work for the Cooper Manufacturing Company, sanitary supplies, in New York. Shortly after that I went west, and I spent considerable time in St. Louis. While there I was employed at the National Lead Company, also the St. Louis Post-Despatch, also the St. Louis & Suburban Railway; but just previous to that I was employed by the Fox River Heat, Light & Power Company, at Aurora, Illinois, in construction work. I returned from the West in August,
 40 the 22d or 27th, I don't remember, near that time,

Walter R. Hodler—Direct

in 1907. In the early part of September I went to work for Miles Brothers, moving picture distributors; they were located at Sixth Avenue between Sixteenth and Seventeenth Street, New York. I remained with them until the middle of November. From that time on to the time I was injured I was not employed; I was not employed during that period. I believe I have covered the 10 years in question.

Q. You have not told us how much you were earning during that period. Kindly state that?

A. My earnings averaged \$15 to \$18 a week.

Q. Since the injury have you earned any money at all? If so, how much and at what time, and what efforts have you made to earn money? A. My income since my injury has been very inconsistent; I have earned very little. I can not say with any degree of certainty as to the amount I have earned up to the present time. Since my injury it is equivalent to \$150 or \$175 up to the present time. 20

The Court: I will direct the witness's attention to the word "efforts" (indicating on last typewritten question.)

Witness: The first employment I obtained since my injury, with the C. B. & Q. Railway, at Galesburg, Illinois, in the tie treating plant, general work; but in my weakened condition I couldn't endure the strain. I returned East. My stepfather is a piano contractor, and through him—I have been working for him during the periods that he needed me; but outside of that I have endeavored earnestly and conscientiously to obtain some kind of employment, but, I regret to say, I have met with no success. 30

Q. How long were you working at the Aurora concern and at what compensation? A. Only a 40

Walter R. Hodler—Direct

brief period that I was employed. You are referring to the Fox River Heat, Light & Power Company, at Aurora? That was construction work. I was employed there only a brief period.

Q. For how long? A. A little over three months. It was summer work that they would offer. As soon as the cool weather set in they

10 would discontinue the work.

Q. How much did you earn there? A. I started in at 10; I finished earning 15. There was a slight change in my work; I was given charge of what they refer to as a trenching gang.

Q. When you say that you started at 10 and finished at 15, do you mean per week? A. Precisely, yes.

Q. How long were you helping your stepfather in the piano line and how much did he pay you per week? A. I started in in January, 1910, and I worked until the early part of April of that year; then work ceased as far as I was concerned until the next September. It was very inconsistent. There would be a week that I would be employed and a week that I wouldn't be employed; it would vary. Such has been true ever since that time up to the present time.

Q. Do you still occasionally work for your stepfather? A. I do, yes.

30 Q. Now, how much pay do you get, or how much pay have you gotten during all this time from him? A. There is no specific way of treating with the pay at all; only what he feels he can give me after the expenditures are met in the household; it will vary: three, four, five, during the weeks that I am occupied. If you consider my board, too, in that—he considers that first—that and my board.

40 Q. Where have you been living since you got

Walter R. Hodler—Direct

hurt? A. We lived at Roseville, New Jersey; after that we were in New York City for a brief period. This is since I got hurt, in 1907. From that, then we removed to Rutherford, New Jersey; from Rutherford we moved back into New York, and remained in New York until we moved to Irvington, here recently.

Q. Have you been maintaining a separate household or have you been a member of your stepfather's household during all this time? A. I am boarding with my stepfather and mother. 10

Q. How old are you? A. Thirty-two years of age.

Q. Since the 28th of December, 1907, did you ever go to inspect the locality about where you were hurt? A. Yes, I have been there on several occasions.

Q. What was the first occasion? A. The first occasion, I believe, I went to the point in question alone, and the second occasion— 20

Q. When was the first occasion? A. In April, the early part of April.

Q. Of what year? A. 1908. I desire to retract that statement. I am inclined to believe that the first time I went up to the place in question I was accompanied by my mother; I went with her.

Q. Well, I do not care so much with whom you went; I want to get the time when you first saw it after the accident. A. It was in April, in the month of April, the early part of April. 30

Q. 1908? A. 1908, yes.

At 1 o'clock p. m. the Court takes a recess of one hour.

Joseph L. Fewsmith—Direct

After recess.

JOSEPH L. FEWSMITH, sworn in behalf of plaintiff:

Direct-examination by Mr. Hood:

Q. Dr. Fewsmith, you are a practicing physician in this city? A. Yes, sir.

10 Q. And have been such how long? A. Since 1902.

Q. You are a graduate of what institution? A. College of Physicians and Surgeons, New York—Columbia.

Q. Are you connected with any of the hospitals in this city? A. St. Michael's.

Q. How long have you been connected with that? A. Practically from the time I graduated.

Q. In what capacity? A. Assistant surgeon.

20 Q. Now, Doctor, have you ever seen at the hospital Mr. Hodler, the gentleman who sits at my side (indicating)? A. I have, sir.

Q. Do you recall when it was? A. I had to renew my memory on that. It was in December, 1907.

Q. Do you recall where you saw him in the hospital? A. I saw him in one of the beds in the ward.

30 Q. He was then a patient in the hospital? A. Yes, sir.

Q. Did you give him your personal attention, Doctor, while he was in the hospital? A. I was one of the men who took care of him, yes.

Q. Did you examine his case for the purpose of ascertaining what he was suffering from? A. Yes, sir.

40 Q. What examination did you make of him? A. Why, simply as he lay there in bed, we examined him all over. He was a pretty hard person to examine at the time.

Joseph L. Fewsmith—Direct

Q. What was the matter? A. He was extremely restless, irritable, pulling himself around from side to side. Tried hard to keep him quiet. Examined his ears. There was bloody fluid coming from his ears, and I think from his mouth; I am not sure about that. He was unconscious, sometimes moaning, sometimes groaning a little bit, as he pitched and tossed from side to side. We made a diagnosis of fracture of the base of the skull. 10

Q. Were there any injuries on his body and limbs? A. That I don't recall.

Q. Do you recall whether you examined him for such or not? A. I presume we did, but it is so long ago that I have forgotten.

Q. So that your diagnosis is that he had a fracture at the base of the skull? A. Yes.

Q. That is an injury that may or may not result from force? A. It may result from force. 20

Q. Do you recall how long he was in the hospital? A. About a month.

Q. Can you say in a general way how he progressed? A. Why, for two weeks he was so restless and so irritable that we practically had to keep him in a strait jacket to keep him from throwing himself out of bed. At the end of that time he began to clear up mentally, and cleared up rather rapidly, as I remember it, for a few days, up to a certain point, and then after that the progress was rather gradual. 30

Q. How long did he continue unconscious? A. I think, as I say, that was about two weeks.

Q. Well, when he got back to consciousness could you talk to him? A. Tried to talk to him; couldn't seem to make him hear.

Q. Well, did you examine to ascertain whether there was any trouble with his ears? A. Finally 40

Joseph L. Fewsmith—Re-direct

we had to do all our talking by writing all our questions on paper.

Q. So that for the balance of the time he was in the hospital you could not make him hear? A. No, sir.

Q. Did you make any examination of your own to ascertain whether or not he was deaf? A. 10 Made no special tests of any sort; we left that to the specialist to make.

Q. Is a fracture of the skull connected with pain for the patient? A. With pain?

Q. Yes. A. It may or may not be.

Q. Well when you discharged him was the fracture healed? A. I think, as I recall it, he went home in the care of his parents before we would really have discharged him; I think we would have probably kept him a little longer, but 20 they wanted to take him home and take care of him home.

CROSS-EXAMINATION by Mr. MacSherry:

Q. Can you not tell us, Doctor, whether there were any abrasions or contusions on his body aside from his head? A. I don't remember, Mr. MacSherry; I would have to look it up in the records.

Q. Well, are you prepared to express any 30 opinion today, Doctor, whether his case is an incurable one or not? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Hood:

Q. Let me ask you one other question, Doctor. Were there any bruises or marks on his head?

A. As I recall it, there was simply the blood coming from the ears, and whether there were any 40 bruises there or not, I don't remember; there

Walter R. Hodler—Direct

probably were. I would have to look the records up to see about that.

Q. Will you be good enough to examine the records and if you find anything come here in the morning? A. I doubt very much whether there are any marks in the records; I think the interne that was there at that time made no special record.

10

Q. Well, Doctor, a skull ordinarily fractures where the force is applied, does it? A. It may or may not.

Q. Well, whether it fractures where the force is applied or not, if force is applied there are evidences of it, are there not? A. Not necessarily in a fracture of the base. You may get a bruise somewheres; yet we see cases every now and then that apparently give very little signs externally.

20

Q. So that you may have a fracture at the base of the skull without any external sign of it? A. Nothing that shows much.

WALTER R. HODLER, plaintiff, resumes the stand in his own behalf:

Direct-examination continued by Mr. Hood:

Q. Will you describe the locality as you saw it in April, 1908? 30

Objected to, unless it can be shown that the conditions in April, 1908, were the same as at the time of the accident.

Objection sustained.

Q. Now, Mr. Hodler, was there any change in the rate of speed of the car as it went around the curve? A. Not that I could detect, no.

Q. And how fast do you say the car was trav- 40

Walter R. Hodler—Cross

elling rounding this curve? A. About 35 miles an hour.

Plaintiff's counsel asks the Court to permit the jury to view the place of the alleged accident.

Defendant's counsel states that he will have no objection to a jury view if he finds that there has been no change in the place of the accident between the time of the accident and the present time.

10

The Court: I will not make any order until I know about that.

CROSS-EXAMINATION by Mr. MacSherry:

Q. At the time of this accident where were you living? A. 148 Plane Street, Newark, New Jersey.

20 Q. Living with your parents, boarding or keeping house? A. Boarding with my parents.

Q. How many people were in your household at the time of the accident? A. Three; at the time of the accident, three.

Q. Who were they? A. Mother, stepfather and self.

Q. At the time of the accident how long had you been out of work? A. About one month.

30 Q. Before that you were working for a moving picture concern on Sixth Avenue between Sixteenth and Seventeenth Streets, New York City, were you not? A. And if so, for how long did you work for them? A. I was employed by Miles Brothers, in New York City, between Sixteenth and Seventeenth Streets, on Sixth Avenue; I went to work for them about September 5th or 6th, the early part of September, anyway, and I remained with them until the 10th or 12th of No-

40 vember.

Walter R. Hodler—Cross

Q. For a period of two years prior to this accident in about how many places did you work? A. The National Lead Company, St. Louis, Missouri; the Post Despatch, St. Louis, Missouri; St. Louis & Suburban Railway, St. Louis, Missouri.

Q. For how long did you work for the St. Louis Suburban Railway, and in what capacity? A. I was employed in the treasurer's department, counted money, and checking up the conductors' receipts; with them about a year. 10

Q. What, if anything, did that have to do with running a trolley car? A. I had nothing to do with the operating of the cars.

Q. What time would you go to work in the morning and about what time would you leave at night? A. Go to work about 8:30 in the morning. The evening was uncertain, so far as leaving was concerned; it was governed entirely by the work. Sometimes I would get through at five; in other instances I would remain till 8, 8:30, or 9. 20

Q. Were you employed by a telephone company in New York, and if so, when? A. Yes, in 1902, for a brief period.

Q. Your memory is very good, is it not? A. Yes, under ordinary conditions I would not hesitate to say that it is the average. 30

Q. Is your stepfather's name Dalbey? A. Mr. E. M. Dalbey.

Q. Do you derive your support for yourself and wife from your stepfather now? A. I derive my own support from my stepfather; my wife is with her people, in Chicago.

Q. Have you any receipts for any moneys you have paid out for medical services as the result of this accident?

(Question withdrawn.)

Walter R. Hodler—Cross

Q. Will you tell us again how you make up an expenditure of \$1,800 for medical services as the result of this accident?

The Court: I understood the witness to say that was his indebtedness, not his expenditure.

10 Mr. MacSherry: Well, I will say indebtedness; that is what I mean.

A. Do you desire me to itemize it again?

The Court: Yes.

Witness: Dr. Proctor, \$250; Dr. Felker's bill amounts to \$900; Dr. Rogers' amounts to \$30; Dr. Eagleston's amounts to \$50; for Dr. Fewsmith's prescriptions will amount to \$85; Dr. Felker's prescriptions will amount to \$50; miscellaneous, equivalent to \$30 or \$40; Dr. Roger's, \$30.

20 Q. What period does Dr. Felker's bill of \$900 cover? A. It begins about June, 1908, the early part of June, and runs through until September, 1909. There are two months that can be taken out of that period that I spent at Galesburg, Illinois.

Q. What was the nature of his treatment? A. Galvanic electricity.

Q. How often? A. Twice a day, morning and late in the afternoon.

30 Q. Every day? A. Every day, and invariably once on Sunday. There are exceptions where he doubled up on Sunday.

Q. Did you ever try to learn lip reading? A. I have not, no.

Q. Do you know what that is? A. I know what you refer to, by speaking, lip reading; I assume I know what it is, yes.

40 Q. Do you not know that when your hearing is gone it is possible to acquire the knowledge of what people are saying to you by studying the

Walter R. Hodler—Cross

movements of their mouths or lips? A. I do not agree with you, Mr. MacSherry.

Q. What do you say? A. I do not know that, no.

Q. You remember the last trial of this case, do you not? A. Certainly.

Q. Do you not remember a Miss Hodman here, who was connected with the public schools in Newark and who was a teacher of lip reading? Do you not remember her? A. I do remember her. 10

Q. Do you remember testifying as follows at the last trial: "Q. You have stated that you have not had an opportunity to acquire some knowledge of lip reading, because you had not the opportunity. What did you mean by that? A. I dread to attempt it. Anyone that—I am stone deaf. To any stranger I rather hesitate; I never acknowledge it unless I positively have to in that respect. Q. You have stated that you did not take up lip reading because you had not the opportunity. Now, have you not had the opportunity or have you not desired to do it because you did not want people to know that you could not hear? A. No, I haven't had the opportunity. If I had had the opportunity I would have taken advantage of it, but I have never thought seriously of doing so until you spoke of it; I never considered it seriously—lip reading." Did you not testify that way at the last trial? A. Precisely; of course I remember it. 20

Q. Have you read the printed testimony of the former trial, or any part of it, before you came on the stand today? A. I have, yes. 30

Q. Were you in any way familiar with this locality where you were hurt before the night of the accident? A. No, I can't say that I was fa- 40

Walter R. Hodler—Cross

miliar with the locality. Do you mean the topography? No, I was not familiar with it.

Q. Had you ever been there before? A. I have gone over that way, yes, previous to the accident, but I have never returned by that road; on the other occasion I went back in to New York and around back in that way.

10 Q. Then it is a fact that prior to this accident you had ridden over the trolley tracks over the place where the curve is? A. On one occasion, yes.

Q. Day or night? A. At night.

Q. How long before this accident? A. Three nights previous to the accident.

Q. Did you ever study law, and if so, where? A. I have endeavored to study law, yes; I have attended no institution.

20 Q. How did you study, at home, and if so, for how long? A. Studied at home, yes. 1902 and 1903 and a little of 1904 will cover that period.

Q. Were you ever employed in the sheriff's office in New York? A. I desire to retract that former assertion as to the years. 1901, 1902 and 1903.

Q. All right. Now what about the sheriff's office? A. Decidedly no.

30 Q. Did you at any time on the night of the accident before you were hurt represent to anyone at any time that you were employed in the sheriff's office in New York, or in any sheriff's office, and that you were out on secret service work? A. Indeed, no.

Q. How many times since this accident have you visited the locality, do you think, about? A. You are treating not with the number of times I have passed there—the number of times I have visited the locality in question?

40 Q. No, passed and visited.

Walter R. Hodler—Cross

(The last typewritten question is not handed to the witness.)

A. Three or four.

Q. I refer to passing it or visiting it, too.

Mr. Hood: I think there may be a misapprehension. The question was not submitted to the witness; he answered before it was written.

Q. So that there will be no misunderstanding, will you tell us, please, how many times you have inspected this locality since the accident and how many times you have passed it? A. I will repeat, there are three or four occasions that I have inspected the locality in question, but I have passed there very frequently while living at Rutherford, New Jersey; as to number, I can not state. 10

Q. Do you recollect when the former trial in this case took place? A. Certainly. Do you mean what date? 20

Q. About. A. The date of the former trial? Certainly. The early part of February; I believe it was over about the 7th; I don't know.

Q. Did you not testify at that trial that since the accident, while you could not remember the definite dates, you have visited this curve about five times since the accident? A. I have no recollection of specifying definitely five times; I believe I stated about five, four or five. 30

Mr. MacSherry: I am showing the witness page 27 of the printed book (shown to witness).

Q. Having shown you page 27 of the printed testimony of the last trial, now what have you to say as to the number of times you visited the place of the accident between the night of the accident and the time of the last trial? A. You will notice. Mr. MacSherry, I specified that five times would cover that, which is precise; it does 40

Walter R. Hodler—Cross

cover it, whether it is three or four or under it; I stated that it covered it.

Q. Now, how many times have you visited that locality since the last trial? A. Once since the last trial.

10 Q. How did you come to go there the first time after the accident, in April, 1908? A. I believe I accompanied my mother to visit Mr. Kavanaugh and his wife the first time.

Q. Then your mother told you where to go, did she? A. She told me where Mr. Kavanaugh lived.

20 Q. Did not your mother tell you where you were hurt, and did you not, according to her instructions, visit that place stated by her? A. I knew from my own faculties and due to inspection that I was thrown a very brief period after leaving the junction, but as to the precise location where I lay and as to where Mr. Kavanaugh may have lived, I did not know, due to the fact that I was found in an unconscious state.

Mr. MacSherry: I ask that the latter part of the answer go out, if your Honor please, as not responsive, and I would like to have the question repeated.

30 Mr. Hood: I do not know what counsel means by the latter part, but it seems to me that it is responsive.

Mr. MacSherry: About his being unconscious is not responsive.

Mr. Hood: He is giving his reason why he does not know.

(Question read.)

Mr. Hood: I suppose, strictly speaking, it is not accurately responsive to that particular form of question, although it is in a sort of a way involved.

40 Q. (The last typewritten question is again

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handed to witness.) A. My mother instructed me as to the precise location where I lay; she also instructed me as to where Mr. Kavanaugh lived—that I laid directly in front of the house.

Mr. MacSherry: I ask that the last part, as to what Mr. Kavanaugh said, go out as not responsive.

The Court: Strike it out.

Q. Did you not testify as follows at the last trial: "Q. Was anyone with you on the first visit to the scene? A. No. Q. How did you know where to go? A. Directly through my mother. Q. Then your mother told you where you got hurt, did she, and you went to that place, according to her instructions? A. Yes." Did you so testify? A. She told me, yes, the precise location where I was injured. 10

Q. (The last typewritten question is again handed to the witness.) A. Yes. 20

Q. These statements made by you in Court today, as to where you were hurt, the locality, are statements based on what other people told you, are they not? A. I will repeat, Mr. MacSherry, my own faculties, due to my inspection, I know that I was thrown a very brief period after leaving the junction, but as to the precise location, the curve, the spot where I was found, in front of Mr. Kavanaugh's house. I don't know from my own absolute knowledge. 30

Q. Did you not testify as follows at the last trial: "Q. Then the statements as to where you got hurt made in Court today are statements based on what other people told you? A. Yes."? A. As to the precise location, I repeat, yes.

Q. When did you last visit the scene of this accident? A. Friday last, Friday of last week.

Q. Alone or with anyone? A. I was accompanied by Mr. Hood. 40

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Q. Did you make an examination of the curve while you were there? A. I endeavored to, yes.

Q. Your mother was not on the car with you the night you were hurt, was she? A. Indeed, she was not.

Q. Do you remember the last trial making a little sketch, or diagram, of that curve as it appeared to you? A. I do, yes.

Q. Will you draw one now? A. I will endeavor to, Mr. MacSherry.

Mr. MacSherry: I ask the witness to draw a sketch of that curve as it appears to him now.

(Witness sketches on paper.)

Q. Now, will you look at that sketch? I show the witness Exhibit D-5 on the part of the defendant at the last trial—

20 Mr. Hood: Don't you think that you ought to have him identify this paper?

Mr. MacSherry: I will; that is what I am going to do.

Q. I am showing you a paper, and ask you if you remember drawing that sketch at the last trial (paper shown to witness)? A. May I inquire which is my work?

Q. (Counsel indicates on paper.) A. I do, yes. It is a little uncertain to determine which is mine, Mr. MacSherry.

Q. Is there any doubt in your mind as to which sketch on that paper I have shown you is yours? A. I will have to repeat, I am a little uncertain as to which I might have sketched. I am inclined to believe that the first one shown here might possibly have been mine. That is incomplete.

Mr. MacSherry: I would like to have both of those papers marked for identification.

40

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Mr. Hood: One is a paper that has a mark on it, "Exhibit D-5."

Marked D-1 for identification.

Mr. Hood: The other one is the sketch he draws today.

Marked D-2 for identification.

Q. Now, Mr. Hodler, prior to this accident were you in the habit of drinking alcoholic liquors? A. Hardly in the habit, Mr. MacSherry; I drink from a social point of view. 10

Q. Prior to your being hurt, on the night of December 28, 1907, had you been drinking anything? A. I had, yes.

Q. How much? A. Two ginger ale highballs in the course of the evening.

Q. What is a ginger ale highball made of? A. It consists of ginger ale and whiskey.

Q. Had you ever taken them before this night? A. Yes, I had drank them before that. 20

Q. How large a glass, about, were they served in? Show us with your hands. A. Well, as to the size of glasses, that will vary in the different places that you were served, but invariably it would run that high (indicating); it is narrow, not very wide; that high (indicating); it is a very narrow glass. Of course, it is governed entirely by the place you frequent.

Mr. Hood: About four by one. 30

Mr. MacSherry: Yes, about.

Q. Did they affect you any that night? A. They did not affect me in any way that I was conscious of.

Q. Did they encourage in you a desire to sing, or did they make you quarrelsome? A. Indeed, no.

Q. Do you remember expressing a desire to whip somebody in the car just before you were hurt? A. I do not, Mr. MacSherry; I have no recollection of it. 40

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Q. Why did you want to go to Hackensack that night?

Objected to as too remote.

The Court: It is difficult to draw a line as to just what surrounding circumstances may be inquired into. I am inclined to think that the whole round trip is the proper subject of inquiry.

10

A. On the night in question I went to Hackensack in an effort to locate a room mate of mine, a man I had roomed with at Delaware Institute and the Rockland Military Academy.

Q. What time did you leave Newark to go to Hackensack and what car did you take? A. About 7:15 or 7:30; I took what was commonly known then as a Hackensack river car. I boarded it at Bridge and Broad.

20

Q. Did you have anything to drink before you took the car at Bridge and Broad Streets, or anything to drink on your way up to Hackensack?

A. Indeed, no.

Q. Did you stop in a lunch room at the Belleville turnpike on the night you were hurt on your way to Hackensack from Newark? A. I did not.

30 Q. Did you not stop in a place called the Mountain House, at Belleville turnpike, on the way to Hackensack, at a place commonly called and known as the junction, and ask for whiskey, and when the people in the place did not give it to you, did you not say that they ought to keep whiskey, and did you not finally take a glass of cider and treat the man behind the counter to a glass of cider?

Objected to.

Mr. MacSherry: It combines half a dozen questions.

40

Mr. Hood: I do not object to it on that ground. I have no objection to your prov-

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ing that he got whiskey or got cider; if he got it; but it seems to me that the conversations at the Mountain House, when he could not get whiskey after he asked for it, are irrelevant. They prove nothing; they can not possibly prove anything.

The Court: It would seem to me to belong to that class of questions which are used to excite the witness' memory as to a transaction, not in themselves important otherwise, but for the purpose of refreshing recollection as to the point of the question. I think the question is competent. 10

A. Indeed, I did not, Mr. MacSherry.

Q. Did you not on the night you were hurt, on your way to Hackensack, stop at a little place called the Mountain House, at the Belleville turnpike, and meet there a man by the name of Quick and talk with him? A. I will repeat, Mr. MacSherry, with all the emphasis in the world, that I stopped at no place on the way to Hackensack. 20

Q. And were you not on your way to Hackensack that night at a place known as the Mountain House, at Belleville turnpike, under the influence of liquor, stragginger? A. Indeed, I was not, Mr. MacSherry.

Q. Did you have a watch with you that night?

A. No, I did not. 30

Q. What time did you get to Hackensack that night? A. About 8:45, between 8:45, and 9 o'clock.

Q. How do you know? A. The clock that is located right there at the New York & Susquehanna depot.

Q. Did you meet on the way to Hackensack a man by the name of Kavanaugh, and did you as soon as you reached Hackensack go with him to Ryan's cafe and have a drink? A. I met Mr. 40

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Kavanaugh on the way over. After we reached Hackensack we both crossed to Ryan's cafe and had a drink.

Q. Is that the first drink that you had that night? A. That was the first one I had, yes.

Q. What did you drink, and how long did you stay in Ryan's cafe? A. I had a ginger ale high-
10 ball. I remained in there for a period about—well, I would assume 15 or 20 minutes.

Q. What were you doing in that saloon for 15 minutes besides taking one drink? A. Talking to Mr. Kavanaugh.

Q. Did you meet a man there by the name of John Mackay, a lawyer in Hackensack? A. That was later in the evening; Mr. MacSherry; not at that time, no.

Q. Where did you go from Ryan's cafe? A.
20 In Ryan's cafe I had instructions as to where I might possibly find the party in question I was looking for; it followed that he was visiting on Green Street, near the Erie Railroad. I stopped there. There was a house on each side. I went up to the one where there was a light burning; I rang the door bell, and I inquired as to whether this man was visiting there; I was instructed to the contrary. A gentleman answered the door bell. I returned to Ryan's cafe from that point.

30 Q. Why did you go back to Ryan's cafe? You did not expect to find your friend, your old schoolmate, there, did you? A. It was possible that I would find him present, and I returned to Ryan's cafe to see if he happened to be one who was present.

Q. Did you look any other place except Ryan's cafe for your friend? A. No, except the trip to Green Street.

40 Q. Did you meet Mr. Mackay at Ryan's cafe

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when you went back there? A. After I had returned I met Mr. Mackay, yes.

Q. How long did you stay in Ryan's cafe the second time, and how many drinks, if any, did you take then? A. I had one drink with Mr. Mackay and his friends, and I remained in there—probably stayed about 15 minutes the second time.

Q. Did you try to sing in Ryan's cafe? A. Indeed, I did not. 10

Q. Then you left Ryan's cafe and went over to take the midnight trolley to Newark, did you not? A. No, I left Ryan's cafe to go over and take the next car in. That was in the neighborhood of 10:30, or 10:15—10:45—between 10:30 and 10:45; I don't recall absolutely as to time. While waiting for the car to come there was a party accosted me, inquired as to whether my name was Hodler or not; I said yes. He said he met me at Nyack, while staying there, and gave his name as S. T. Brooks, and the subsequent conversation would corroborate his assertion; he stated he had met me up there. I did not recall his features at the time. We stood there for a little while, and then crossed over to a poolroom, and played a game of pool, in time to catch the last car in. 20

Q. You left Newark at about 7:15 or 7:30 to go to Hackensack to find an old school friend, and from the time that you left Hackensack until you left for Newark, at midnight, with the exception of the trip to Green Street, you spent the entire time in saloons and pool rooms, did you not? A. That is a wrong interpretation, Mr. MacSherry; I did not spend all that time in saloons. Probably half an hour will cover all the time I devoted to Ryan's cafe. It takes an hour and a half to make the trip to Newark; you will have to deduct that—to make the trip from here to Hackensack 40 30

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it will take an hour and a half; deduct that from your total, you will find that I spent very little time in the saloon.

Q. I ask you from the time that you reached Hackensack—I meant to. Is it not a fact that from the time you reached Hackensack that night until you left it, with the exception of the trip to
 10 Green Street, you spent the rest of the time in saloons and pool rooms? A. I spent about half an hour in the saloon, Mr. MacSherry; the rest of the time in the pool room and outside.

Q. Did you meet Mr. Kavanaugh at the depot as you were about to start to come back? A. At the depot? I did not meet Mr. Kavanaugh at the depot coming back.

Q. Were you under the influence of liquor when you took the car from Hackensack to come home?
 20 A. Indeed, I was not, Mr. MacSherry.

Q. You rode down part of the way from Hackensack with Mr. Kavanaugh, did you not? A. Yes.

Q. What part of the car did you go in as soon as you boarded it, and did you stand up or sit down? A. I went to the forward part of the car at first, to watch the headlight on the way in, to allay the monotony of the ride; but the seats were nearly all occupied. I found a place to sit down
 30 by sharing a part of a seat with another.

Q. Was it an open or a closed car? A. It was a closed car.

Q. So the first seat you took, you shared the seat with another person who got on the car at Hackensack; isn't that so? A. I assume he boarded the car at Hackensack, Mr. MacSherry; I shared the seat with him.

Q. He did not give you any trouble, did he?
 40 A. Indeed, no.

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Q. And you two occupied the whole cross seat?

A. We occupied a cross seat, yes.

Q. And do you remember a crowd getting on as the car approached Arlington—do you remember a crowd getting on from a dance hall, or from the direction of a dance hall? A. I recall the incident, yes.

Q. And they were laughing and talking, apparently in good humor, were they not? A. I was impressed that way. It is not for me to judge, Mr. MacSherry. 10

Q. There was nothing disorderly about their movements when they boarded the car, so far as you know, was there? A. Indeed, no. I believe—you will pardon me, Mr. MacSherry, but I believe there is an explanation due at this point. We have already commented on the fact that I was sharing the seat with another in leaving Hackensack. 20
Now, desiring to complete that assertion, the party in question alighted from the car as we came through Rutherford; I stepped through the other part of the car. We were in the smoking compartment. I stepped back to the other. I was occupying the seat alone to the point you have reached now.

Q. Did you notice any of this party after entering the car near Arlington throwing sneeze-reen, as they call it, a powder to make people sneeze? Did you notice them throwing that around the car? A. I did not notice it, Mr. MacSherry. 30

Adjourned until tomorrow, Tuesday,
September 24, 1912, at 10 o'clock, a. m.

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Second day.

Tuesday, September 24, 1912.

Met pursuant to adjournment.

Present, counsel as before stated.

- 10 WALTER R. HODLER, plaintiff, resumes the stand in his own behalf:

Cross-examination continued by Mr. MacSherry:

Q. Did you notice anyone in that crowd shut one of the doors in the car so the conductor could not reach them, or did you see anything like fooling with the conductor on the part of these people?

- 20 Witness: (Before I reply to this question, I desire to call your attention to the fact that I am under the impression I was guilty of a slight discrepancy in my testimony yesterday pertaining to expenditures and indebtedness resulting from this injury. I desire to overcome the error, if I made an error. Miscellaneous—I put the items at \$30 or \$40, which is wrong; I believe it should be between \$25 and \$30; and I also believe I neglected to specify attendant fees at the hospital, amounting to \$10.)

- 30 A. Not that I recall, no.

Q. When this party, these young men and women, got in the car at Arlington, or near Arlington—Lyndhurst—were there seats for all of them? A. No, there were not seats for all.

- Q. Will you explain the construction of that car inside? A. Well, the majority of the seats run crosswise, and there is a partition between, partitioned off; one is a smoking compartment
40 and the other for ladies. Both ends of the car

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are vestibuled. The front end, both vestibules are closed; the rear, one side is open; that is, the right-hand side facing forward, the door is folded flat against the forward part of the car.

Q. Then the car was divided by a partition very near the center, one part being for smokers and the other part being for ladies and men who did not care to smoke, as you understood it? A. 10
Yes, sir.

Q. Do you remember meeting Mr. Kavanaugh before you got on the car at Hackensack? A. After I left Mr. Kavanaugh at Ryan's cafe I did not see him again until we were both aboard the car.

Q. When you saw Mr. Kavanaugh on board of the car on the return trip did you say anything to him about having some trouble with men at Hackensack? A. Not that I recall. 20

Q. Now, will you tell us what trouble you had with any of the men in that car on the return trip? A. The seat I was occupying alone. Another party endeavored to share it, and he was too rough in doing so. I took it as a deliberate affront, which it was meant in that spirit, and prudence forced me to pay due recognition to the affront offered. He apparently took a different point of view of the situation, and it led to quite an argument. He desired to know if I assumed I owned or was a director of the road, and then he followed up that remark by suggesting I travel in a private car. He was very antagonistic in his attitude towards me. The argument became quite heated. Other passengers sitting near there prevailed upon us not to resort to violence, but to be a little discreet. That was just previous to our reaching the junction, and almost immediately after this argument had closed I stepped to the rear platform. 30 40

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Q. What, if anything, did you say to him? A. I had very little to say.

Q. Were you angry? A. Indeed, I was not.

Q. How many people interfered to keep you two men from fighting? A. I presume there were three or four indirectly involved in the controversy.

10 Q. Well, did they finally induce you two men to become quiet and peaceful? A. That was the ultimate result, yes.

Q. Then the trouble between you and these other men had all passed away before you left your seat to go on the back platform? A. No, we both got up from the seat just previous to the argument closing. If I neglected to mention that, I regret it. We were standing, when the argument closed, in the aisle. Two men that were appar-
20 ently friends of his were standing in back of him, and they had a few words to say directly in the controversy.

Witness: If your Honor, please, I believe that an explanation is due at this point, in order that I do not fall into a false interpretation. May I proceed?

Mr. MacSherry: I ask that the last go out.

30 Mr. Hood: I think he ought to be permitted to explain.

The Court: I do not know what the witness wishes to explain. I think he ought to be allowed to make an explanation, if it is necessary. Make your explanation.

Witness: I am forced to draw a comparison. I do not want to impress the Court that I am dilatory in replying to interrogatories, and in order to make my point thoroughly understood, I am forced to draw a comparison. When a person is with the hearing in a perfect state, if a
40 question is put to them, they can be—

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Mr. MacSherry: One minute. I object to that. I do not think that is an explanation.

The Court: No charge has been made that the witness has been dilatory. I think he is under a misapprehension. We will drop the matter there. But I think you had better put your question again. The witness went off on the idea that he was seated. The point of your question was whether the trouble was over between the two men. Put a question on that point again, without reference to whether they were standing or seated. 10

Q. Had the trouble passed away between you and the two men when you went to the back platform? A. It apparently closed, yes, when I stepped to the rear platform; they did not follow. 20

Mr. MacSherry: I ask that the last go out, as not responsive.

Mr. Hood: I submit that it is responsive. The question is whether it had passed away.

The Court: I will let it stand.

Q. Did any of these men in the car go to the back platform with you? A. None accompanied me, no. That was previous to reaching the junction. 30

Q. Did you have any trouble on the back platform of that car with any of the men in the car? A. I did not. The controversy was closed within the car.

Q. Now, did you remain on the back platform of the car until it reached the Belleville junction? A. I stepped back there immediately prior to reaching the junction. Only a very little time intervened from the time I remained on the platform and I stepped from the car. 40

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Q. (Question repeated.) A. Yes.

Q. Alone? A. When I stepped to the rear platform the first time there were several of the people on the rear platform; that is, previous to reaching the junction.

10 Q. Do you mean to say that when you left the car after the altercation inside, before you reached Belleville junction, when you went on the back platform there was several people there? A. After the controversy had apparently closed in the car I stepped to the rear platform. There was several people standing there. That is, previous to our reaching that point.

20 Q. Do you remember testifying as follows at the last trial: "Q. After this trouble in the car with one of the men that got on at the dance hall did you go on the back platform? A. I remained within the car until we reached the junction, Belleville junction; from that point on I remained on the back platform to evade any more trouble. Q. Was there anyone on the back platform when you went out there? A. No. Q. Did any one come out on the back platform while you were there? A. No." Did you not so testify? A. I assumed that that question was pertaining to immediately after leaving the junction. "Previous to that," I state here. I do not understand.

30 Mr. MacSherry: I ask that that go out, as not responsive.

Mr. Hood: I submit that it is responsive.

Q. (Question repeated.) A. Yes.

40 Q. When you reached Belleville junction, what, if anything, did you do? A. I stepped from the rear platform, practically the first one; I crossed over to the walk, or the curb. There is an electric pole that stands there, and there is a pipe, or water main, I believe it is, stands right alongside

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of the pole. I stepped behind the two, to remain in obscurity, so that I would not meet the three men in question on the road, assuming it would lead to a repetition of the controversy.

Q. Did you change cars at the junction? A. I most earnestly believe that we did.

Q. Do you remember testifying as follows at the last trial: "Q. How far do you think you rode on the back platform? A. We changed at the junction, and I would say it is about quarter of a mile from Belleville Junction to the curve in question, probably less. Q. Now, when you changed cars at the junction what part of the car did you get on? A. The rear platform"? Did you so testify? A. That question is pertaining to after leaving the junction. The former question pertains to previous to our leaving the junction, or while at the junction. This is after leaving. Certainly, I testified to that effect. 10 20

Q. Do you not remember that you did not change cars at the Belleville Junction at all, but simply the crews were changed there? A. I do not, Mr. MacSherry.

Q. Did you have the same conductor going from Belleville Junction to the curve that you had coming from Hackensack to Belleville Junction? A. Indeed, we did not. 30

Q. When the car left Belleville Junction, on the home trip, I am talking about, about how many people were in the car? A. I am at a loss to reply in a figurative sense to that.

Q. Did you not testify at the last trial that you did not think there were forty (book of testimony at former trial shown to witness)? A. I did. yes; I didn't think there were forty. I repeat it.

Q. Were all the people in the inside of the car seated when you left Belleville Junction? A. All that continued from that point on were inside of 40

Walter R. Hodler—Cross

the car leaving the junction. The majority that I saw were seated.

Q. When you left Belleville Junction, as your car was moving towards the curve, was there a seat inside of the car for you? A. Not that I could see; there was a seat that I might have shared with another.

10 Q. Then when the car left Belleville Junction there was a seat for you to occupy inside of the car, if you had chosen to do it, was there not? A. By sharing it with another.

Q. Were there other people on the back platform with you, or were you alone, when the car left Belleville Junction? A. When the car left the junction I was alone on the rear platform.

20 Q. Now, tell us, please, what part of the platform you were standing on, and how you were standing? A. I stood directly in front of the controller, which construction is inclined to be a little to the right from the center of the car, one portion in the center of the platform, and then it verges to the right; I stood directly in front of that; my back was resting against the controller, facing forward.

30 Q. Where were your hands? A. That I can't recall; it is very probably I had them clasped in front of me or very probably they hung loose at the side.

Q. Were the doors of the vestibule at the back platform, upon which you were standing, open or closed when the car left Belleville Junction? A. When the car left Belleville Junction the door on the left-hand side, facing forward, was closed, but the door on the right-hand side was folded flat against the forward part of the car.

40 Q. Why did you not take a position on the back platform near the door that was closed?

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Mr. Hood: I object. The question involved is what he did, where he was, not why he did not do something else.

Mr. MacSherry: Well, it is cross-examination.

Mr. Hood: I know it is; but has his reason for not taking another position on the back platform than that which he says he did take anything to do with the controversy before us? For my part, I do not see that it has. 10

The Court: That depends on the judgment that may be formed on the propriety of the attitude that he did take. If it was obviously improper, then the question might suggest itself as to why he did not take some other attitude. The question seems to me to be unobjectionable. 20

Objection withdrawn.

A. I assumed that position unconsciously; I can't advance a cause for standing at the particular point I did.

Q. Now, will you tell us, please, how the car travelled as to speed after leaving Belleville Junction before you were thrown off, as you say? A. From the starting point it varied. It picked up very, very rapidly, and far more rapidly than it would on a straight-away track, due to the incline. 30

Q. Did it have a swaying and a lurching motion?

Mr. Hood: At what time?

Mr. MacSherry: After it left Belleville Junction.

Mr. Hood: And before it struck the curve?

Mr. MacSherry: And before it struck the curve. 40

Walter R. Hodler—Cross

(The question as amended is handed to the witness.)

A. It was inclined to sway a little after we had gone some distance, and as the car reached the first break in the straight-away track—that is what I refer to as the take-on of the curve—it intensified the swaying.

10 Q. Did you not think that was very dangerous?

A. On a straight-away track it would not be at all dangerous.

Q. No, on the track upon which you were travelling, I mean? A. I did not assume it was dangerous; it couldn't be on a straight-away track.

Q. Have you not stated that between the junction and the curve, and immediately preceding the taking of the curve, that that car was going from
20 thirty-five to forty miles an hour? A. I have, yes.

Q. Do you not consider that it is a dangerous thing to stand on the back platform of a trolley car with one of the doors open and with your hands down at your side or crossed in front of you, leaning against the controller, when the car is going at the rate of thirty-five or forty miles an hour and swaying and lurching?

30 Plaintiff's counsel objects to the use of the word "lurching," on the ground that it is not justified by the evidence.

The stenographer reads from the record as follows: "Did it have a swaying and lurching motion after it left Belleville Junction and before it struck the curve?"

40 A. It was inclined to sway a little after we had gone some distance, and as the car reached the first break in the straight-away track—that is what I refer to as the take-

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on of the curve—it intensified the swaying.”

Mr. MacSherry: I will cut out the word “lurching” and use the word “swaying.”

The question as amended is handed to the witness.

A. I do not consider it dangerous if the track is a straight-away, and I assume those who are in control of the car, that they will use a little discretion if they are going to meet a curve. 10

Mr. MacSherry: I ask that the last part go out.

The Court: Strike it out.

Mr. Hood: You mean “I assume”?

Mr. MacSherry: Yes.

Mr. Hood: All right.

Q. Did you not testify at the last trial that there was a swaying of the car before it reached the curve? A. It was slight, a slight swaying before we reached it, certainly, yes. 20

Q. You so testified at the last trial, that there was a swaying, did you not? A. I did, yes.

Q. Have you any idea, when a car is moving at the rate of forty miles an hour, how many feet it is moving in a second? A. That formula will be governed entirely by the conditions, Mr. MacSherry; it will depend entirely on the condition of your rail as to the number of feet it will travel. 30
Candidly, I have not the remostest idea.

Q. Would you be surprised to know that a car moving at the rate of forty miles an hour is moving sixty feet a second? A. I would assume that was probably correct, if the conditions in the formula were all right.

Q. What have conditions got to do with it if the car is moving forty miles an hour? A. On a wet rail the wheel will revolve a larger number of rev- 40

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olutions than it will on a dry rail; it slips—it doesn't bind.

Q. But suppose the car is actually moving forty miles an hour, what has the wet rail or dry rail to do with it? A. Your former question, Mr. Mac-Sherry, pertained to the number of feet; you were specifying a formula. This merely pertains
 10 to forty miles an hour; you are not specifying any number of feet, or as to the number of times the wheel will revolve to cover a certain space. If the car is moving forty miles an hour on a wet rail or dry rail, there is really nothing that would govern it, but if you are referring to the miles an hour, whether it be on a dry rail or a wet number of feet or revolutions the car will travel, the wet rail will govern it to a certain extent.

Q. If a trolley car is moving at the rate of forty
 20 rail, or a high rail or a low rail, or a thin rail or a thick rail, or on an upgrade or downgrade, would it not be moving at the rate of sixty feet a second? A. Certainly, but that does not pertain to the number of revolutions.

Q. What do you think the length of this court room is? A. With all deference to you, Mr. Mac-Sherry, I will have to be excused from replying to that question. I do not know with any degree of certainly, nor can I determine.

30 Q. Well, if you can not tell us about the length of this court room, how is it that you are so proficient in being able to tell us the rate of speed that a trolley car is moving along the tracks, upon which you are a passenger? A. The speed of a trolley car is not governed by distance Mr. Mac-Sherry; it is governed by the velocity, or the rate you are passing through space. It is of a very different quality. It is more by a sense of
 40 intuition that you determine.

Walter R. Hodler—Cross

Q. How far do you think you were standing on the back platform of that car just before you reached the curve—how far from the open door?

A. I would assume a little over two feet, between two and three feet.

Q. Was there anything between you and the open door? A. You are referring to the door that was folded flat against the front of the car? 10
There was nothing, no.

Q. What kind of a night was it as to weather?

A. Dark and cloudy, inclined to be misty.

Q. After leaving Belleville Junction and approaching the curve, is the country an open country or are there houses along there? A. From Belleville Junction for the first block or so there is one house on the right-hand side going towards Newark; from Bennett Avenue on there are a few houses on both sides of the street, more 20
closely congested from Bennett Avenue on.

Q. From Belleville Junction to the take-on of the curve was the grade on the level or up or down and was there any curve to the track? A. There is a downgrade from Belleville Junction to about Bennett Avenue, and from Bennett Avenue on it is inclined slightly on an upgrade, but very little. A curve to the track? Certainly.

Q. Then it is a fact that the night you were hurt, before you received your injuries, you were 30
standing alone on the back platform of a trolley car, the car going on a downgrade, on a curve, and going at the rate of from thirty-five to forty miles an hour, which, as you think, made that car cover the distance of about sixty feet in a second, and that you stood with your back against the controller of the car, with your hands at your side or crossed in front of you, with the door closed to your left and with the door open to 40

Walter R. Hodler—Cross

your right, about two to three feet away, with a seat available inside of the car, and with space to stand inside of the car, if you did not care to take a seat, and yet you remained on that back platform until you were thrown out of the door by the movement of the car as it passed along the tracks and went on to a greater curve?

10 Mr. Hood: I object, if your Honor please, to that question. It is pretty lengthy and there are a good many points in it, but the thing in the question to which my objection is specially directed is the matter of a curve. The witness has testified in answer to a question as to whether or not there was a curve in the track; he said yes, that there was a curve in the track.

20 The witness has also testified in this case, certainly in answer to my question, if not in answer to Mr. MacSherry's question, that on the night of the occurrence he had no knowledge of the existence of that curve in the track. Now, the question implies that at the time when he took this position and knew this fact the car was travelling in expectation of reaching a curve that he had knowledge of. I think that in that respect it is an unfair question to put to the

30 witness, and for that reason I object.

The Court: I think you may ask your question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

Walter R. Hodler—Cross

A. There are a number of misinterpretations here, Mr. MacSherry on your part; that is, from the meaning I intended to convey to the Court and to you. I assume I have a right to refer to them to overcome any misapprehension you may be laboring under.

Q. Yes. A. I do not think—it is not a question in treating with your formula as to the number of feet a car will travel a second. I will assume that is probably correct; but it is subject to proof; it is a formula. I don't think I assumed it. it is probably correct; I can offer nothing in refutation to that. You say "with a seat two or three feet away available." The seat was further than two or three feet; it was further forward in the car. If I had stepped in the car it would have brought me in close proximity with the three men I was endeavoring to evade. And, furthermore, I didn't know that the curve was in existence at all. I was standing on the rear platform alone, yes. With the car going at a rate of thirty-five or forty miles an hour? Yes. "That the car covered a distance of sixty feet in a second, and that you stood with your back against the controller"? That is subject to proof, Mr. MacSherry—about sixty feet a second. Conditions will govern that to a certain extent. The door was closed on the left? A. Yes. The seat was more than two or three feet from me; it was inside of the car, pretty well forward, the one I am referring to.

Q. Where in that question have I said anything about the seat inside of the car being two or three feet away? Have I not stated that you were standing on the back platform, two or three feet away from the open door? A. Well, I apologize to you if I have made a misinterpretation; I did not mean to.

Walter R. Hodler—Cross

Q. Have you not stated that after you leave Belleville Junction and before you reach the beginning of the curve which threw you off your balance, as you say—that before you reach that there was some curve to the track and some downgrade? A. I don't recall testifying to the effect that there was a curve previous to our reaching—
 10 this is what I don't understand: "That before you reach that there was some curve to the track and some downgrade." Let me specify. There is a downgrade; after that, a short distance from the base of the grade, you reach your curve. There is really only one curve that I am treating with—only one curve in existence. I possess no knowledge of referring to two curves.

Q. Is the track straight, as you remember it, from Belleville Junction to the take-on of the
 20 curve? A. The track is straight from the Belleville Junction to the curve I refer to.

Q. You were not thrown off the car when the car reached this curve, but when it left the curve. were you not? A. I refer you to two jolts, or shocks; the first I attribute to the take-on of the curve; the second I attribute to the take-off.

Q. How far did you ride from Belleville Junction before you were thrown off the car? A. It
 30 was a very short distance; I would assume probably it is equivalent to a quarter of a mile; it was a very brief distance—short.

Q. How long were you on that car after the car left Belleville Junction until you were thrown off, about how long? A. After the car left the junction it was less than a minute, I will assume—a very brief period.

Q. Then, according to that, your car travelled
 40 about quarter of a mile in less than a minute, while you were standing on the back platform, as

Walter R. Hodler—Cross

you have stated? A. I would assume that was correct. I couldn't say accurately as to the period. I was on the back platform from the junction to the point of the curve.

Q. Well, after leaving Belleville Junction, if it took nearly a minute to run quarter of a mile, how do you figure that your car was going at the rate of thirty-five or forty miles an hour? 10

Objected to as assuming a fact not proven.

(Question withdrawn.)

Q. Did it take a full minute or a little less than a minute to run that quarter of a mile after you left Belleville Junction?

Objected to as not based upon any fact testified to.

The Court: Well, the question is based on nothing except an appeal to the witness' personal recollection; it is not founded on anything. 20

(Question withdrawn.)

Q. Do you think it took three-quarters of a minute to run the quarter of a mile from Belleville Junction to the curve? A. I am thoroughly at a loss to reply to that, Mr. MacSherry; I hold no opinion worthy of comment at all.

Q. How long were you on the back platform before the car started for Belleville Junction? A. 30 Well, I would assume in the neighborhood of five minutes.

Q. Do you know of your own knowledge where you were thrown off the car, at what point in the road? A. I do from my own knowledge. I was thrown at the first curve from the junction; but where I lay I do not know.

Q. Did your mother ever tell you where you were picked up? A. Yes. 40

Walter R. Hodler—Cross

Q. Is your eyesight good? A. Why, I regret to say, Mr. MacSherry, it is not as good as it has been, but I would assume it is equivalent to the average.

Q. Aside from Mr. Kavanaugh, do you recognize in the court room today any of the persons who were in that car the night you were injured?

10 A. We will have to consider, Mr. MacSherry. This interrogatory pertains entirely to those that I would have recognized to the former contest; we have got to consider that I have seen these people since.

Q. Is it not a fact that at the last trial you could not recognize in the court room any who were present in that car, nor could you describe the man with whom you had the altercation in the car?

20 A. That adheres strictly to fact, Mr. MacSherry, yes.

Defendant's counsel asks if Mr. Moore is present and a man steps forward.

Q. Did you meet a man by the name of Joseph Moore while you were in the hospital? A. I recognize him as the inquisitive attendant at the hospital.

30 Q. Do you recognize Mr. Moore, standing here at my right, next to the rail, as being the Mr. Moore that you met in the hospital? A. Whether it is Mr. Moore or not I can not say, but I recognize his features.

Q. Did your mother visit you in the hospital while this man standing here was there? A. Yes.

40 Q. Did you say to your mother upon the occasion of one of her visits to you in the hospital, and in the presence of Mr. Moore, about seven or eight days after you were in the hospital, that you got hurt on a trolley car; that you got in a fight and that two men tried to get your money; that

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you did not let them get it, and that all you had on your person was twenty-five cents and a check for \$4? Did you make that statement to your mother at the time and place I have mentioned or any part of it, while Mr. Moore was there? A. I have no recollection of the occasion at all.

Q. Did you at any time in the hospital say to your mother, when she was visiting you, "Do not tell anyone how I got hurt"? A. Not to my knowledge, Mr. MacSherry. 10

Q. I am showing you a paper which contains the answers to the interrogatories in this case (shown to witness). Do you remember having this paper in your possession, and is that your signature to the affidavit attached thereto, and was it not signed in the office of your counsel?

A. Yes, that is my signature and I recall the paper. It was signed in the office of counsel, yes. 20
Marked D-3 for identification.

Defendant's counsel asks if Mr. Bodecker is present, and a man comes forward.

Q. Do you remember seeing this gentleman standing at my left before? A. I do not recall his features very distinctly, Mr. MacSherry, but I am inclined to believe that he is the gentleman who called while we were living at 148 Plane Street, representing the Public Service Street Railway Company. 30

Q. Did you on the 19th day of February, 1908, at 148 Plane Street, Newark, New Jersey, make a statement to him of your movements on the day and on the night that you were hurt? A. Made a statement to a gentleman that called there, but as to date I don't recall.

Q. And did he reduce it to writing in your presence, and did you read it over and write on the back of the statement these words: "This state- 40

Walter R. Hodler—Cross

ment contains the truth as far as I can recall the facts, but I must refuse to sign any paper, on advice of counsel"? A. It was composed in my presence, but I have no recollection of writing the statement referred to in this interrogatory.

Q. I am showing you one paper, and ask you if this is not your handwriting and signature on the
10 back (shown to witness)? A. That is my signature below, but the writing is not mine above.

Q. I am showing you another paper, and ask you if that is your writing and signature on the back (shown to witness)?

The Court: What does your question refer to, the whole of the paper that you show him?

Mr. MacSherry: No, the back.

(Defendant's counsel indicates on paper
20 to witness.)

The Court: The question is broad.

A. That is my signature, yes.

Q. I meant on the back. A. I do not think that that is my writing above there, Mr. MacSherry.

(The two papers shown to witness are marked respectively D-4 and D-5 for identification.)

Q. Will you please read what is on the back of
30 D-4 for identification and also what is on the back of D-5 for identification? A. "This statement contains the truth as far as I can remember the facts, but I must refuse to sign any paper, on advice of counsel." "This statement contains the truth as far as I can recall the facts, but I must refuse to sign any paper, on advice of counsel."

Q. Did you sign your name on the back of those two papers. D-4 for identification and D-5 for identification, voluntarily? A. I did, yes, in a sense of
40 equity. I think, Mr. MacSherry, that an explana-

Walter R. Hodler—Cross

tion is due at this point, pertaining to the conditions under which those papers were signed. May I have the opportunity of explaining it now?

Q. As far as I am concerned. A. The gentleman called, Mr. Bodecker, stating that he represented the Public Service Street Railway Company, and he desired for me to make some kind of statement pertaining to facts that occurred during the day of December 27, 1907, and facts pertaining to all circumstances on the night in question up to the time I was injured. I told him that I was very greatly at loss to recall details accurately, but I volunteered to do the best I possibly could. Then he suggested that detectives of the Public Service Street Railway Company had learned that I was sandbagged, and they had carried me a number of feet and had left me lying on the car tracks. He desired to know if I recalled anything like that, and I didn't, because it didn't happen. Then he followed that up with another assertion; he gave me to definitely understand that the detectives had learned that there was a fight on the car, and several of the passengers on the car had locked the door in the forward part, and I interfered in the conductor's behalf; there was a fight; I was struck with a billy and thrown from the car. He desired to know if I recalled anything like that. Naturally, I didn't, because it didn't occur; but I did the best I possibly could. It is a construction, the paper in question; I protest, which is wrong. I did not tell him a number of us went to Ryan's cafe; I told him that Mr. Kavanaugh and I went over there. He has got that I and a number of friends; that is wrong. In a number of particulars it is in error; but I was endeavoring to clearly—

Mr. MacSherry: I ask that the latter part

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of the witness' statement, with reference to the paper itself, go out. It is not in evidence yet. I do not think that what Mr. Mr. Bodecker said ought to go in.

The Court: I think his criticism of the contents is not fairly raised by your question.

10 Q. Did he read these two papers, D-4 and D-5 for identification, to you before you put your signature on the back of them? A. Did he read them to me? That would be impossible, Mr. MacSherry; I can not hear. How do I know?

Q. Did you read them over yourself before you placed your name on the back of them? A. I believe I did; yes.

Q. Did he write these papers, D-4 and D-5 for identification, in your presence? A. Yes, they
20 were written in my presence.

Q. Do you remember testifying as follows in the last trial: "Q. In order that there can be no question about it, I am going to ask you to read the papers again. Will you please read these two sheets marked 'D-2 for identification' and 'D-2a for identification,' and state if these papers are in the same condition today as they were when you wrote your name on the back of them? I mean, has there been any change or alteration in
30 them since you put your name on the back of them? A. (After examining paper.) As I recall the circumstance, there are some slight alterations. Q. Point out wherein the papers have been changed, if you say they are changed. A. I don't say they have been changed; I am impressed that way." Did you so testify? A. I do recall it, yes, Mr. MacSherry, very clearly.

Q. I ask you now to read both of these papers,
40 D-4 and D-5 for identification, and te'l the Court

Walter R. Hodler—Cross

and jury, if you can, wherein they have been changed since they were in your possession, read by you, and since you placed your signature on the back of them (papers handed to witness). A. “States to R. F. Bodecker, at 148 Plane Street, as follows: On December 27, 1907, I went to the Central railroad station on Broad Street, Newark, at about 10 a. m., with my mother, Mrs. Carrie Dalbey, and we proceeded to Jersey City. I left her at Jersey City and went to New York City. Called to see a friend, Mr. C. K. Purdy, who works for the New York Sun. Stayed at Sun office about half an hour, then went to Mr. Purdy’s home, 83 Hamilton Place, to get three books. About 3 p. m., I started back to Newark. I came home, stopping on the way to buy some groceries. I then got supper, and, leaving the house at 5:30 p. m., I went down to the Alderney Dairy Company’s office to order milk. I then came up to Broad and Central Avenue and boarded a car for Hackensack, I arrived at Hackensack at about 8 or 8:30 p. m. Met Mr. Mackey and Mr. Brooks there, in addition to one or two others, whose names I don’t know.” It is a construction that is open to criticism, Mr. MacSherry; I did not state that at all. I have no recollection of reading it over to that effect. And also there is an error as to the time specified in here; I have no recollection of its being 5:30. “Got to Hackensack about 8 or 8:30 p. m. Met Mr. Mackey and Mr. Brooks there, in addition to one or two others, whose names I don’t know. We went to Ryan’s cafe, and remained there until about 10 or 10:30, when I left to take car back to Newark.” Shall I read this again?

Q. Yes. A. “My friends were insisting upon me taking some kind of liquor, and when I tried

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to refuse they would jolly me about it. They fooled me about not drinking, and finally I consented to try one." I have no recollection, Mr. MacSherry, of such a construction at all or reading anything like it. "They called it a ginger ale highball. When I got on the car it was about 11 p. m. My friends remained at Ryan's cafe. On
10 the way back on the car I sat in the smoking compartment and got into conversation with a Mr. Kavanaugh. I have learned this man's name since my arrival." That is destroyed. I can't detect what it is. "That is all I can recollect." That is destroyed. "After drifting into conversation with this man Kavanaugh, my mind is a blank just now as to what occurred after that, owing to the condition of my brain, due to the accident. I am gradually commencing to recall things, and
20 eventually I will be able to recollect just what happened."

Q. So far as you can tell from examination, have there been any changes or alterations made in these papers since you last saw them in Court at the previous trial? A. Since I last saw them in Court? No, not that I can detect.

Q. Will you tell me, please, the name of your superintendent or the head of your department at the place in the treasurer's office of the St. Louis
30 & Suburban Railroad, where you were employed some years ago? A. Mr. Sommers was the treasurer of the company; he is the man that I worked under. The St. Louis & Suburban Railway, Mr. MacSherry, is no longer in existence. There was a company formed, and they have absorbed the two roads that were competitors at that time. The two companies were the Transit Street Railway and the St. Louis & Suburban. There has
40 been a pool formed and they have been consoli-

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dated, and they are known as the United Street Railways of St. Louis.

Q. What is the first name of Mr. Sommers, and what year were you working there? A. I don't know his first name, but I was with the St. Louis & Suburban Railway in 1904 and 1905.

RE-DIRECT-EXAMINATION by Mr. Hood: 10

Q. Mr. Hodler, did Mr. Fewsmith attend you after you left St. Michael's Hospital, and if so, for what length of time? A. He attended me from the time I was taken in there—that is, the 28th day of December, 1907—until I was released—I wasn't discharged; I was released—on January 19, 1908, and I have been to see him occasionally—

Q. No. After you were released from the hospital did he render you any medical services, either at your house or at his office? A. Yes, I went in to consult him on two occasions; one was in an effort to get something to experience some surcease from this pounding and turmoil and headache; both occasions were pertaining to that one thing; and he was the one who suggested that I go and consult Dr. Eagleton. 20

Q. Can you specify the time when Mr. Bodecker came to see you? A. No, I can not specify the date. 30

Q. Well, can you specify it with reference to the time that you were released from the hospital, how soon after that it was? A. Definitely I can not specify.

Q. Well, can you approximately? A. Well, I would say it was within a period of two weeks or ten days after leaving the hospital; I don't know.

Q. Can you say what your physical and mental condition was at the time when Mr. Brodecker called upon you? A. I can only say that I was 40

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in a pitiful condition; weak mentally and physically; I couldn't think.

Q. You said on your cross-examination that the date of the last trial was in February. Do you mean by that February of this year or February of last year? A. Meaning February, 1911.

10 Q. Can you state, either definitely or approximately, how far the car was from the Belleville junction at the time when you first stepped on the back platform, and if you can not state it in distance, can you measure it by time? A. It was a very brief distance. By looking forward I could detect the lights of what they refer to as the Mountain House, that little lunch room, on the left-hand side; we were very near there when I stepped to the rear platform.

20 Q. At the time you stepped on the rear platform, you say there were two or three or three or four persons on the back platform. Were either of those persons people with whom you had been in controversy that night? A. The two persons that I refer to on the rear platform, in no way were they involved, directly or, to my knowledge, indirectly, with the controversy.

30 Q. Did you have any controversy with those two persons between the time that you stepped on the rear platform and the time that the car stopped at the junction, at the turnpike? A. Indeed, no.

Q. Do you know what became of those two persons when the car got to the junction? A. I do not know absolutely, but I assume that they were one of the number that crossed to the little lunch room, or the Mountain House.

40 Q. You said that when the car got to the junction you stepped off and took a position behind an electric light pole. Now, when you stepped on

Walter R. Hodler—Re-cross

the car again, can you tell whether you stepped on the same or on a different car? A. I can not for certain say whether I stepped on the same car or not. They were identically the same type.

Q. At the time when you stepped on the car at the junction was there one or more cars at the junction? A. There were two cars at the point.

Q. Both of the same type or of different types? 10
A. Identically the same type.

Q. What I want to know is whether the two cars that were at the junction were both the same type of car or whether they were different types? A. They were identically the same type, in color and all, and after considering—I do not know—I am inclined to believe that there were three at that point. I can not recall absolutely, but I am impressed with the fact that a car came in at right angles, that runs in to Jersey City; what line it 20
was I do not know. But if there were three there on the night in question, I can not say absolutely; there were two, anyway.

Q. Now, from the time you stepped on the back platform of the car at Belleville junction until the time that you were thrown off the car were there any other passengers on the back platform? A. Indeed, there were not.

RE-CROSS-EXAMINATION by Mr. Mac- 30
Sherry:

Q. If there were two cars at Belleville junction when you reached it on your home trip, one car was on the way to Newark and the other coming from Newark; isn't that so? A. That is true, yes.

Q. There is not any car from Jersey City that comes up there, is there? Do you not mean a car from the Erie Railroad? A. I do not know from 40

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my own knowledge as to what point the can runs to; I know it comes in at that point at a right angle with the Hudson River line.

At 1 o'clock, p. m., the Court takes a recess of one hour.

10

After recess.

CHARLES T. KAVANAUGH, sworn in behalf of plaintiff:

Direct-examination by Mr. Hood:

Q. Mr. Kavanaugh, where do you live? A. Bayonne, New Jersey.

20 Q. What is your business? A. Superintendent of the New York & New Jersey Water Company.

Q. How long have you held that position? A. I think three years the 1st of July last.

Q. And before that time what were you doing? A. Assistant superintendent of the same company.

Q. How long did you fill the position of assistant superintendent? A. About four years.

Q. Before that time? A. Before that time.

30 Q. So that you have been in the employ of the Water Company for about seven years, then? A. About seven years.

Q. Did you at any time live in Arlington or Kearny? A. Yes; 763 Kearny Avenue.

Q. What do you call that, Arlington or Kearny? A. The Arlington section of Kearny.

Q. Does Kearny Avenue run north and south? A. Yes, sir; generally speaking, north and south.

Q. And does it meet at any point the Belleville turnpike? A. I am not sure that it ends there; 40 the road continues—

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Q. No, but— A. Yes, if the name continues, then the road crosses the Belleville turnpike.

Q. At any rate, it runs up to the Belleville turnpike? A. Oh, yes.

Q. When did you live in Arlington? A. I moved up there about five years ago, I think, last April—No, about five years ago this coming month.

Q. How long did you live at the place you have named? A. I think from October of 1907 to about April of 1909; I won't be sure that that is so; it was about that time. 10

Q. October, 1907, till April, 1909? A. Yes, sir.

Q. Always in the same house? A. Always in the same house.

Q. Now on the evening of the 28th day of December, 1907, did you come out from Hackensack on the 11:34 car? A. Well, if that is the date. I came from Hackensack quite frequently. If that is the date in question here. 20

Q. Do you know what the last car that leaves Hackensack is? A. About half-past eleven.

Q. And do you remember coming out on that car on the 28th day of December, 1907? A. Well, as I say, if that is the date in question, the date that this accident happened on. I don't remember the exact date.

Q. If that was the date of the accident, that was the date? A. Yes. 30

Q. Where did you leave the car? A. Coming from Hackensack?

Q. Coming from Hackensack. A. At the corner of Stuyvesant and Kearny Avenue, which was my corner.

Q. Do you recall about what time of night it was when you left the car? A. Well, it would be about half-past twelve or quarter of one.

Q. Do you remember whether the car that you 40

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came on stopped at the junction there, at Belleville turnpike and Kearny Avenue? A. I remember that it did.

Q. And after stopping at the junction on the night of the accident, as you call it, have you in mind the speed at which the car ran from there down to Stuyvesant Avenue? A. Why, I recall it
10 was going at what I would call a good speed, yes.

Q. What do you call good speed? A. Well, as to miles per hour, I wouldn't want to judge that. It is down hill there from the starting point, and the cars always run fast there.

Q. On that day was there a curve anywheres near your house? A. There was and, I believe, still is, about—Oh, I would say, roughly, maybe 150, 100 feet north of my house towards the Belleville turnpike; it might not be as much as that.

20 Q. Can you tell me whether or not there was any variation in the speed of the car after it got going, after leaving the junction, and the time when it struck the curve that you have mentioned. A. You mean after it rightly got started?

Q. After you got rightly started. A. I do not think so, no.

Q. And can you say anything as to the speed of the car when it struck that curve? A. Well, I can recall the fact that it hit the curve hard.

30 Q. You do recall that fact? A. I can recall it by other things, yes.

Q. How far from the curve is the point where you left the car? A. Well, the curve is about the third house from the corner, 100 or 150 feet, maybe 200 feet.

The Court: North or south.

Q. North or south? A. Well, you said from the corner, as I understood the question, how far
40 from the corner of Stuyvesant Avenue.

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Q. Oh, yes, that is right. Stuyvesant Avenue is south of your house, is it? A. Yes, sir.

Q. Now, how far from that corner is the curve?
A. I think it is about 200 feet, roughly—150 feet.

Q. Do you recall where the car stopped to let you off? A. Stopped at the corner of Stuyvesant Avenue and Kearny.

Q. Which corner, the one nearest your house or the one furthest away from it? A. I don't recall the actual fact. Under the rules at that time, it would be the south corner, but whether they stopped—

Q. The south corner? A. Yes, sir.

Q. That is the corner furthest away from your house? A. Yes, sir.

Q. Do you recall that night who gave the signal for the car to stop? A. I did.

Q. And do you recall when it was that you gave that signal? A. Yes, sir.

Q. When was it? A. When the car hit the curve.

Q. Did the car come to an actual standstill for you to get off? A. I presume so, yes.

Q. When you left the car did you leave by the back platform? A. Yes.

Q. When you left the car were there any persons on the back platform? A. No, sir.

Q. After leaving the car what did you do? A. Went directly home.

Q. And did you go into your house? A. Yes, sir.

Q. Was there anything that induced you to go out of your house again that evening? A. Directly after, within a few minutes, before I became fully undressed, the noise in the street, the noise made by a whistle and the scuffling of feet, attracted my attention to the window, or my wife heard it and called my attention to it, but that was what attracted me in the street.

Charles T. Kavanaugh—Direct

Q. And did you go out? A. I did; yes, sir.

Q. And when you left your house did you see anything unusual on the street? A. Well, I first looked out of the window, and saw a trolley-car almost directly in front of the door, and two police officers, one of which was coming towards my house at the time, and knowing there was something wrong, I went out.

10 Q. When you went down what did you see? A. I first met Officer Vreeland, of the Kearny police force, and made a hurried inquiry as to what was the matter—I think he was the officer who came running—and he said there was a man hit by the car.

Q. You need not say what he said, just what you did. You asked Officer Vreeland what was the matter? A. Yes, sir.

20 Q. And what did you do then? A. I went to where the man lay.

Q. Was there a man lying anywhere? A. Yes, sir.

Q. Where was the man lying? A. He was lying between the car track and the westerly curb of Kearny Avenue, between Bennett and Stuyvesant.

Q. Can you say how far away from the car track? A. No; within a very few feet of it.

30 Q. Can you say in which direction the man was lying? A. I wouldn't be sure of that, but I think his head was toward the curb.

Q. Well, what was towards the curb, his head or his feet? A. His head.

Q. His head was towards the curb. Can you say whether he laid diagonally across the roadway, or whether his body was in a slanting position?

40 Objected to as leading and suggestive.

Charles T. Kavanaugh—Direct

The Court: Tell us what you remember about the way in which he lay.

Mr. Hood: As to the position in which the body was lying.

Witness: Generally speaking, if you mean as to the direction of his body, his body was surely more across the street than it was lengthwise. I thought you meant which way was his head. His head, I think, was towards the curb. 10

Q. Can you say where he was lying in the road with reference to your house? A. Yes, sir; I think that he was about 50 feet, or maybe 75 feet, the width of that property—well, between 50 and 75 feet north of my house on Kearny Avenue.

Q. Now, from what point do you measure the distance from your house; that is, from what point of your house do you measure it? A. From the northeasterly corner of it. 20

Q. From the northeasterly corner? A. Yes, sir.

Q. Is your house out on the street or does it sit back? A. It sets back.

Q. And in the measurement you have given us do you cover the actual distance from the house as it is actually located? A. No, I mean that much further up the street.

Q. Then you mean if you extend the northerly line of your house to the street? A. Yes, sir.

Q. He was, then, lying how many feet north of it? A. I would say 50 or 75 feet north of that, on the street. 30

Q. Can you tell me whether or not the man that you saw lying in the street was this gentleman by my side (indicating plaintiff)? A. It was he.

Q. What condition was he in? A. Lying there, covered with blood and dirt.

Q. Was he conscious or unconscious? A. Unconscious. 40

Charles T. Kavanaugh—Direct

Q. Did you notice whether or not he had his hat on? A. I noticed that he had his hat off.

Q. Did you see anything of his hat? A. Not at that time; later on, when they looked for his hat.

Q. And did you see his hat being found in that vicinity? A. Yes, sir.

10 Q. Where was his hat found? A. Under the car.

Q. What? A. Under the car, or under the fender of the car.

Q. In what direction was that car that you speak of going? A. North, towards Belleville turnpike.

By the Court: Q. Which car have you in mind when you say his hat was found under the fender of the car? A. The car the noise from which attracted my attention after I had gotten into the house, a Kearny car.

20 By Mr. Hood: Q. Now, the car that you found in front of your house, practically, when you came out was on the track going toward Belleville junction— A. Yes, sir.

Q.—or on the track coming from Belleville junction? A. I think that I am mistaken about that hat being found under that car. A few minutes later another car came, and I think that the car that first found the man—no, the car that found the man was coming south; it had just come down.

30 Q. That was a car running from the Belleville turnpike towards Newark? A. Yes, sir. A very few minutes after I got out there another car came, so that there was a car looking in both directions at the one place.

Q. And that car was going towards the Belleville turnpike? A. The car under which his hat was found?

Q. The car that came up a few minutes afterwards was going towards the junction? A. Yes,
40 sir.

Charles T. Kavanaugh—Direct

Q. Under which of those two cars was the hat that you spoke of? A. Under the one going towards Newark.

By the Court: Q. Will you tell me, so that I can get the topography of this locality a little better, in which direction is the junction from your house, north or south? A. In a northerly direction, your Honor.

10

By Mr. Hood: Q. Can you say approximately how far away from the body of the man the hat was? A. I don't remember, but I remember the car was very close to him, and it was when the car either backed up or went forward to take him to the hospital that the hat was found.

Q. Can you say whether that hat when it was found lay north or south of the body? A. No, I don't remember that.

Q. Now, will you say generally what you saw done after you got out to the highway with the man? A. Why, as I recall it, the first thing was that Officer Vreeland was seeking a telephone, and I told him to go ahead and use mine, and I think his first act was to call Dr. Squires, who lived within a block of the neighborhood, and then to call the Kearny police station for the ambulance; and Dr. Squires came there, and I don't remember just what he did say, but it was found necessary to take him to the hospital, and they turned the seats of the car over on the floor and made a sort of a bed, or cot, of the bottom, the spring part, of the seats, and he was taken away.

20
30

Q. From October, 1907, when you first moved into the house on Kearny Avenue, until the spring of 1909— Did you say you moved away then? A. I think it was 1909; yes, sir.

Q. —was there any change in the roadway or the street of Kearny Avenue as it ran in front of your house? A. No, sir.

40

Charles T. Kavanaugh—Direct

Q. That is, either from your house up to the curve— A. No, sir.

Q. —or from the curve beyond, up to the Belleville junction? A. No, sir; nor it isn't yet.

Q. Does that street remain in the same condition as it was on the night of the accident? A. You mean as to the curve in the street?

10 Q. In any respect. A. The street may have been paved, but the curve of the street line, the street is the same now as it was then.

Q. Do you remember whether or not during the time you were living there, between the time of the accident and the time you moved away, there was any change in the paving of the street? A. No, sir; there was not, not the time I was living there.

20 Q. I am talking simply of the time you were living there. A. No, sir; there was not.

Q. Was there any change in the rails, the tracks lying on the street?

Objected to as irrelevant and immaterial.

The Court: It has been suggested that the jury might go and look at the locality. We want to know whether it is the same today as it was at the time of the accident.

30 Mr. Hood: Yes, sir; and there is another point. You remember that I proposed to interrogate Mr. Hodler on the question, and wanted to ask him whether he looked at the place when he got out, and the objection was that it was not proved that the place was the same.

The Court: You reserved the right to inquire on that point.

40 Q. Was there any change while you were living there, from the time of the accident until you moved away, in the tracks? A. Not that I know of; no, sir.

Charles T. Kavanaugh—Direct

Q. Well, living there, you would have known of it if there was any, would you not? A. Well, they were working along the tracks all the time tearing up and rebuilding, and so on, but whether there was any actual change made in them, I don't know.

Q. Do you know of any change that was made in the track? A. No, sir; I can't say that there was. 10

Q. At any time until you moved away from there? A. No, sir.

Q. Now, you have told us, Mr. Kavanaugh, that the first street to the south of your house is Stuyvesant Avenue? A. Yes, sir.

Q. What is the first street north of your house? A. Bennett Avenue.

By the Court: Q. Which side of the street is your house on? A. On the westerly side.

Q. Stuyvesant Avenue is the first street south 20 of it and Bennett Avenue the first street north? A. Bennett Avenue north.

By Mr. Hood: Q. Does Stuyvesant Avenue cross Kearny Avenue? A. At right angles; yes, sir.

Q. And Bennett Avenue crosses it, too? A. The same thing.

Q. What is the next street beyond that? A. You mean north?

Q. North, towards the junction? A. I think Seeley Avenue is the name of the street. 30

Q. And does that cross Kearny Avenue, too? A. Yes, sir.

Q. And what is the next street to that? A. I think the next one is Elizabeth Avenue.

Q. And does that cross Kearny Avenue, too? A. I believe it does.

Q. And what is the next street to that? A. Rutherford place is the next one to that.

Q. And then what next to that? A. Then comes the Belleville turnpike. 40

Charles T. Kavanaugh—Direct

Q. Do you know whether or not those several blocks between the streets that you have mentioned are of the same or of different lengths on Kearny Avenue? A. I don't know.

Q. Can you tell me approximately the distance from Belleville junction to Bennett Avenue or Stuyvesant Avenue? A. Why, I think they are
10 longer than the average city block; I should say probably—I wouldn't be at all sure, but I think they were about 400 or 450 feet long; a little longer than an ordinary city block.

Q. You have said that your house is the third house south from Stuyvesant Avenue? A. No.

The Court: Bennett Avenue.

Q. Your house is the third house north of Stuyvesant Avenue? A. The second house.

Q. The second house north of Stuyvesant Avenue? A. Next to the corner.
20

Q. How many houses are there between your house and Bennett Avenue? A. I think there are only three houses there—a good deal of property.

Q. Lots? A. Yes, sir.

Q. Now, can you tell me, Mr. Kavanaugh, how far distant from the northerly side of the house extended to the street is the curve in the track?

A. Well I think it was about—as I recollect the
30 neighborhood, I would say it was about 150 feet, roughly.

By the Court. Q. What, from the house to the track? A. To the curve in the track; that is how I answered the question.

By Mr. Hood: Q. From the northerly side of your house as extended to the street— A. Yes.

Q. —to the curve. A. No, about a hundred feet, I should think.

40 Q. About a hundred feet? A. Yes, sir.

Charles T. Kavanaugh—Cross

CROSS-EXAMINATION by Mr. MacSherry:

Q. Well, you saw Mr. Hodler's body picked up about a hundred feet from the curve? A. No, his body was not as far as that; his body was about 50 or 70—well, say 25 or 30 feet south of the actual curve in the track.

Q. Well, now, you have a pretty good idea of distance, have you not? A. I have, but it is a place—while I go by there every day almost, I haven't carried the thing in my mind for five years. I am telling you the best I can. 10

Q. I know you are. A. I am basing it on the neighborhood. His body was found almost directly opposite the property line between a man named Anthus and Hunter.

Q. Had his body been moved before you saw it? A. Not to my knowledge, no.

Q. It was picked up opposite the house next door, was it not? A. Just about. 20

Q. And that is how far, do you say, from the curve? A. Why, I think it was about 25 or 30 feet south of the curve, that would be.

Q. Was it as far as the length of this room? A. I don't think it is; about as far as the width of the room possibly.

Q. Mr. Kavanaugh, you were a witness at the last trial? A. Yes, sir.

Q. Called on the stand by the defendant company? A. Yes, sir. 30

Q. With whom have you talked about this case since? A. Mr. Hood yesterday was the first time; he asked me to—

Q. Not what he asked you. How many houses are there between your house and the end of the curve? A. Why, as I recall it, the curve is between the house that would be nearest the corner 40

Charles T. Kavanaugh—Cross

of Bennett Avenue and the next one south; in other words, I think the curve is nearly opposite the property of a man named Hunter.

Q. Well, as you leave Belleville junction and strike the curve, the bend is there, is it not?

Mr. Hood: What do you mean by that?

Q. I mean the taking-on of the curve, from the
10 Belleville junction side. That is the sharpest part of the curve, is it not? A. Why, I don't know that.

Q. You know that, do you not?

Mr. Hood: I do not think you can dispute with the witness on that.

Q. Have you not used the expression here "when you struck the curve"? What do you mean by that? A. When you get to the bend in the track.

Q. What is that? A. When we hit the bend in
20 the track.

Q. And after you pass that bend there is not another bend? A. There isn't any in that immediate vicinity, no; there are other bends in the street.

Q. I know that. A. Not there, no.

Q. I mean before you get to your house? A. No.

Q. There is only one bend in the track? A. Between Stuyvesant and Belleville Avenue, yes,
30 there is only one.

Q. And that is how far away from your house? A. Why, it is the same curve. I would say about 75 feet, maybe 100 feet, something like that—75.

Q. It may be 150? A. It may be, but I don't think it is.

Q. It is certainly longer than the width of this room, is it not?

The Court: Which way from your house?

40 Witness: North.

Charles T. Kavanaugh—Cross

Q. It is longer than the width of this room? A. Yes, sir; the property next door is longer than that.

Q. You have used the expression that you know the car struck the curve hard, without saying how fast it went? A. Yes, sir.

Q. How far do you think it was from your house that it struck the curve hard? A. I would say that it was about 75 feet north of my house—about 150 feet north of the corner of Stuyvesant Avenue. 10

Q. I am just asking you from your house. Did you know Mr. Hodler before that night, Mr. Kavanaugh? A. Never.

Q. You first met him on the way to Hackensack? A. Yes, sir.

Q. How did you get acquainted with him on that car? 20

Objected to as not cross-examination.

The Court: The witness has identified the plaintiff as the man who was hurt, and that opens up, to a certain extent, the question of his previous knowledge of the man, but only to an extent sufficient to cover the question of reasonable identification.

(Question read.)

The Court: I think that is hardly cross-examination. 30

Q. Had you seen the man before—the man that you saw on the road? A. I saw him earlier that night; yes, sir.

Q. Where did you first see him? A. On a Hackensack car.

Q. Going to or coming from Hackensack? A. Going to Hackensack.

Q. What time in the evening? A. About seven or half-past seven o'clock in the evening. 40

Charles T. Kavanaugh—Cross

Q. Did you see him before you got on the car or afterwards? A. After I got on the car.

Q. Did you talk to him? A. Why, we talked. My recollection is he opened up the conversation.

Q. Had you known him before? A. No, sir.

Q. Were you seated together?

Objected to as not cross-examination.

10

The Court: I will sustain the examination up to this point, as being fairly developed by the identification which he made.

Mr. MacSherry: I am now about to ask him if he rode all the way with him.

The Court: You may ask that.

Q. Did you ride all the way to Hackensack with him? A. Yes, sir; that is to say, we were on the same car all the way.

Q. Did you talk to him? A. Off and on; yes, 20 sir.

Q. Did you go to Ryan's cafe, in Hackensack, with him?

Objected to as not cross-examination.

The Court: I have tried to indicate the distinction in my mind between a general inquiry as to the circumstances of the previous acquaintance and a limited inquiry as to previous acquaintance sufficient to support an identification of the individual. I think you have gone as far as you can in the way of cross-examination. 30

Defendant's counsel prays an exception, and the same is allowed.

Q. Now, did you see him on the return trip of the car? A. Did I see him on the return trip of the car?

Q. Yes. A. Yes, sir.

Q. Did you see him before you got on the trol- 40 ley car at Hackensack or did you see him after

Charles T. Kavanaugh—Cross

you got on the car? A. I saw him at Hackensack just previous to taking the car home.

Q. Did you talk with him at Hackensack just before taking the car home?

Objected to.

The Court: That question may be answered.

A. I don't remember whether I talked to him 10 before we got on the car or not.

Q. Was anyone with him when you saw him just before he took the car at Hackensack?

Objected to.

Objection sustained.

Defendant's counsel prays an exception, and the same is allowed.

Q. What kind of a car was this on the way back, an open car or a closed car? A. Oh, a closed car.

Q. Was it a pay-as-you-enter car? A. I don't 20 think there was such a thing at that time; no, sir; it was one of those compartment cars.

Q. What do you mean? Will you explain, please, how the compartments were inside? A. Why, one part of the car was—I think about a third of the car was partitioned off for smoking purposes, and the balance of the car was for general use; that is, ladies as well as gentlemen; a vestibule at both ends. I don't think it was a pay-as-you-enter car. 30

Q. Where did the car stop for you to get off?

A. It stopped there at Stuyvesant Avenue, on Kearny.

Q. And how far do you say that is from the end of the curve? A. You mean where the car actually stopped?

Q. Yes. A. Why, I don't know where the car actually stopped; I presume it stopped at the south side of Stuyvesant Avenue, on Kearny. 40

Charles T. Kavanaugh—Cross

Q. How long had you been in the house before your attention was called to the fact that there was some trouble outside? A. Oh, a very few minutes.

Q. Well, about. A. Oh, I would say three or four or five minutes, something like that.

Q. Had you taken off any of your clothes? A. 10 I had partly removed my clothing; yes, sir.

Q. It was late then, was it? A. Oh, yes, about one.

Q. And that was the time that your attention was directed to the fact that someone had been hurt? A. Yes, sir.

Q. And who called your attention to that? A. Well, I either heard the whistle myself or my wife called my attention to it, but whatever it was I went to the window and looked out and saw the 20 commotion.

Q. Was there a light in your house? A. There would be a light upstairs; yes, sir.

Q. Did it shine out on the street? A. You mean when I went in or while I was undressing?

Q. Yes. A. No, I don't think so.

Q. Did it not shine out on the man in the street? A. No. There may have been a gleam from one of the side windows that would lead that way; I don't know; I don't think so, though.

30 Q. Well now, you remember testifying in the last trial, Mr. Kavanaugh, do you not? A. I do; yes, sir.

Q. Well, now, do you remember testifying as follows: "Q. Was there a light in your house, Mr. Kavanaugh? A. After I came downstairs—there was a light in the house, but upstairs. Q. Did that light show on the man in the street? A. It would be possible—not from the door, though. Q. No, but from the window. A. Yes." A. You are 40 talking about the hall now.

Charles T. Kavanaugh—Re-direct

Q. No, any light. A. That was not the question, as I understood it; the question, I understood, was the light upstairs.

Q. No, any light in the house. A. The light in the hall; when I lit the light downstairs in the hall to permit Officer Vreeland to use the telephone; that light would shine on the man from that window, or about in that direction.

10

Q. Do you remember making a statement to a representative of the company, Mr. Ingalls, this gentleman here (indicating)? A. I remember making a statement, yes; I think that is the gentleman.

Q. And did he take it down in writing in your presence? A. I believe he did; yes, sir.

Q. Did you read it or did he read it to you? A. I can't recall that; one or the other.

Q. Did you sign it? A. I believe I did; yes, sir. 20

Q. Just look at it (paper shown to witness). A. At the signatures or the whole statement?

Q. No, just the signatures. A. I would say they were my signatures; yes, sir.

The paper shown to witness is marked D-6 for identification.

Q. Do you think your recollection of what happened that night was better when you made that statement than it is today, or worse, or about the same? A. I should think it was better at that time than it is today. 30

RE-DIRECT-EXAMINATION by Mr. Hood:

Q. Can you say when you made that statement, Mr. Kavanaugh? A. Not exactly, Mr. Hood; it was a short time after the accident, I think, though.

Q. Mr. Kavanaugh, I wanted to ask you whether there was any grade in Kearny Avenue between 40

Peter Vreeland—Direct

the Belleville junction, or the Belleville turnpike, and Stuyvesant Avenue? A. Yes, sir; there is a downgrade.

Q. From where does the downgrade run, from where to where? A. Why, the downgrade begins about at Belleville turnpike and keeps on running all the way down until you get to Harrison; 10 It is all a continual downgrade.

Q. Is it downgrade all the way to Stuyvesant Avenue? A. Oh, yes; there may be a little level spot here and there, but, generally speaking, it is downgrade.

PETER VREELAND, sworn in behalf of plaintiff:

20 Direct-examination by Mr. Hood:

Q. Officer, you are connected with the Arlington police? A. Kearny.

Q. The Kearny police. And has Kearny jurisdiction over Arlington? A. Yes, sir.

Q. Do you recall the night of December 28, 1907? A. Yes, sir.

Q. Were you on duty on that night? A. Yes, sir.

30 Q. Do you recall what day of the week it was? A. No, sir.

Q. Now, on that night did you see anything of Mr. Hodler, the gentleman who can not hear, who was on the stand? A. Yes, sir.

Q. Where did you see him? A. Laying in the street.

Q. When? A. About 12:40 a. m.

Q. Where? A. Kearny Avenue.

40 Q. Whereabouts on Kearny Avenue? A. Between Bennett Avenue and Stuyvesant.

Peter Vreeland—Direct

Q. Can you describe particularly the manner in which he was on the street? A. Well, he laid—his feet was towards the curb—no, his head was towards the curb, his feet was to the rail.

Q. How far away from the rail were his feet?
A. About 2 feet.

Q. Was this on the west roadway or on the east roadway? A. West. 10

Q. Kearny Avenue has two tracks, has it not?
A. Yes, sir.

Q. And they lie generally in the middle of the street? A. Yes, sir.

Q. Now, how was your attention attracted? How did you first come to know that a man was on the street there? A. Somebody whistled.

Q. And where were you when you first heard the whistle? A. I don't know; in the neighborhood somewheres. 20

Q. And you went up to the place? A. Yes, sir.

Q. And when you got up there you saw Mr. Hodler on the street? A. Yes, sir.

Q. Was he conscious or unconscious? A. Unconscious.

Q. Did he show any evidences of having been hurt? A. Well, there was blood from his ear.

Q. In what condition was his clothing? A. Oh, I don't know; he had his clothes on.

Q. What? A. His clothes was onto him. 30

Q. You do not know whether they were mussed or torn, or anything of that kind? A. They wasn't torn.

Q. Can you tell whether or not he had a hat on? A. He didn't have a hat on.

Q. Now, when you got there was there anybody else there ahead of you? A. Yes, sir.

Q. Who? A. Conductor and motorman.

Q. A conductor and a motorman were there?
A. Yes, sir. 40

Peter Vreeland—Direct

Q. And a car was there, too? A. Yes, sir.

Q. What kind of a car? A. A trolley car.

Q. And where was that standing? A. Right where the man lay.

Q. On which track? A. On the down track, going south.

Q. By that you mean the track going to Newark?

10 A. Yes, sir.

Q. Now, excepting the conductor and the motor-man and the trolley car and the man lying on the street, was there anybody else there when you came? A. There was some young fellow there.

Q. Do you know who it was? A. No, sir; not at the time.

Q. Well, what did you do when you found that situation? A. Well, I looked at him, and I seen the blood, and tried to shake him; he couldn't
20 move, and so I went towards Mr. Kavanaugh's house to get a telephone. In the meantime, when I was going there, he came out. He says, "That fellow came up from Hackensack with me on the car." I said, "Let me use your telephone?" and he said, "Yes." So I telephoned for Dr. Squires. Dr. Squires came, and he said the man should go to the hospital.

Q. Before Dr. Squires came did anybody else come up to the place? A. Not as I know of; no,
30 sir.

Q. Do you know Officer— A. Officer Shepard; yes, sir; we both got there together.

Q. You and Shepard went there together? A. Yes, sir.

Q. Anybody else, so far as you recall? A. No, sir.

Q. Up to that time? A. No, sir.

Q. Did anybody come while Dr. Squires was there? A. Not to my knowledge. Well, Mr. Kava-
40 naugh came out.

Peter Vreeland—Cross

Q. Well, you mentioned Mr. Kavanaugh. Except those that you have mentioned, I am talking about. A. No, sir.

Q. What did you do with the man then, when Dr. Squires said he ought to go to the hospital? A. I asked Mr. Kavanaugh if I could go back and telephone again, and he said, yes and he went and opened the door. The conductor said he would 10
take him down in the car, and I said "All right," and I telephoned to the station house to have the ambulance ready, and we took him and laid him on the seats, and took him in the ambulance down there and took him to St. Michael's Hospital.

Q. Did anybody arrive after the time you have mentioned before; that is, when Dr. Squires said he should be taken to a hospital, between that time and the time when the man actually left did any other persons come there? A. I don't remember 20
anybody.

Q. Did you find his hat that night? A. Somebody found his hat; I don't know who it was.

Q. You did not find it? A. No, sir.

Q. They found it that night? A. Yes, sir.

Q. Before he was taken away? A. Yes, sir.

CROSS-EXAMINATION by Mr. MacSherry:

Q. Officer, what kind of a night was it? A. It 30
was a hazy night.

Q. Any fog? A. I believe there was, sir.

Q. How far from the track rail was this man?

A. How far was he laying from the rail?

Q. Yes? A. Two feet, his feet, about two feet.

Q. And how near to a point about opposite the center of Kavanaugh's house? A. About fifteen feet.

By the Court: Q. Fifteen feet? A. Yes, sir. 40

Peter Vreeland—Cross.

By Mr. MacSherry: Q. Is there a garden in front of Kavanaugh's house? A. Well, no, sir; the house sets back a little from the sidewalk.

Q. How many houses from the corner of Stuyvesant avenue does Kavanaugh live? A. The second house.

10 Q. From the position of the body on the street, could you form any opinion or judgment as to whether he had rolled any or not, or was where he dropped?

Objected to.

A. He couldn't have been thrown off the car—
Objected to.

The Court: The objection is that it is asking for an inference?

Mr. Hood: Yes, sir.

20 The Court: Let the witness confine himself to the facts.

Q. Was there anything in the street or on the clothing of the man to indicate that he had rolled or moved from where he fell? A. No, sir.

Mr. Hood: One moment. It seems to me that is of the same character.

The Court: That again is an inference.

Defendant's counsel prays an exception, and the same is allowed.

30 Q. What was the condition of his clothing? A. I don't know what condition it was in; it didn't seem to be in bad condition.

Q. His clothing, you mean? A. Yes. It might have been dusty.

Mr. Hood: Then his answer is that it was not in bad condition? Is that what you said? Did you say it was not in bad condition?

Witness: No, not as I seen it; no, sir.

40 Q. Was there dust or mud on the ground? A. Oh, there ain't much dust there.

Peter Vreeland—Cross

Q. Had it been raining, do you know? A. No, sir.

Q. What was the position of his body? A. His feet lay towards the rail and his head towards the curb—not the curve, the curb.

Q. How much space is there between the rail and the curb on the side where the man lay? A. I don't know how much it is; about five feet or six. 10

Q. I want the space in the roadway between the trolley track and the curb. How much is there in that driveway between the railroad track and the curbstone? A. I don't know.

Q. You don't know, eh? A. No, sir.

Q. Do you know where the curve is? A. Yes, sir.

Q. Towards Belleville junction? A. Yes, sir.

Q. Looking north from where the man lay, how far do you think that was from the beginning of the curve, from where the man lay to the beginning of the curve? A. 125 feet. 20

Q. How much? A. 125 feet or more.

Q. Did you ever measure it? A. No, sir.

Q. When did you notice it—how many times have you noticed it? A. Ever since it has been there.

Q. How was the track from the point where the man lay to the end of the curve, straight or otherwise? A. Straight, where he was found. 30

Q. And for how long a distance looking north was it straight? A. Going north?

Q. Yes? A. 125 feet.

Q. Now, how far is it, do you think, from where Hodler was lying in the street to the round, or sharp, part of the curve, if you know what I mean? A. North or south?

Q. North? A. 125 feet or more.

Q. You know that little Erie car that comes there, do you not? A. Yes, sir. 40

Peter Vreeland—Re-direct

Q. Did you see any such car as that around there at that time? A. No, sir.

Q. Did you see any cars around there at the time you saw Hodler's body in the street? A. No, sir; only the one.

RE-DIRECT-EXAMINATION by Mr. Hood:

10 Q. Mr. Vreeland, did you on the night when you picked up Mr. Hodler make any special observations to see how far the point that he was lying was distant from the curve in the track? A. At that time?

Q. Yes? A. No, sir.

Q. Or how far distant from Mr. Kavanaugh's house it was? A. No, sir.

Q. Have you since that time made any observations concerning it? A. Yes, sir.

20 Q. And is the testimony that you have given now based upon that inspection since that time? A. Yes.

Q. When did you make that? A. Oh, at different times when I walked past.

Q. At whose request? A. At my own.

Q. Your own request? A. Nobody's request.

Q. When did you say that you first made that inspection? When did you first try to find out with regard to the spot where Hodler was found,
30 how far it was away from the curve in the track and how far it was away from Kavanaugh's house? A. Oh, when I come back that night.

Q. That night you did? A. Yes, sir. That was my post.

Q. That was the first one? A. Yes, sir.

Q. Did you make any since that time? A. I was up and down there right along.

Q. No, but what I meant is, did you especially look at it for the purpose of settling it in your own
40 mind? A. Yes, sir.

Peter Vreeland—Re-direct

Q. Since that time? A. Since that time; yes, sir.

Q. Do you remember when, approximately? A. No; just before I got a subpoena, before the last trial, I went up there to look it over.

Q. When you made your inspection on the night that you found Hodler, was there anything around to indicate where he was lying? A. Yes, 10
by the line of Kavanaugh's house I could tell.

Q. You could tell from the line of Kavanaugh's house? A. Yes, sir.

Q. But there was not anything on the ground otherwise— A. No, sir.

Q. —by which you could identify the exact spot? A. No.

Q. Now, when you said, officer, that he was lying fifteen feet from the line of Kavanaugh's house— 20

The Court: I thought he said from the center line.

Q. What did you say about that? A. Fifteen feet north of Kavanaugh's house he laid, about.

Q. Fifteen feet north? A. Yes, sir.

Q. Now, what I want to know is, when you fix that point, do you take Kavanaugh's house as it stands on its plot? A. Yes, sir.

Q. Which part of Kavanaugh's house do you take? A. On the north side. 30

Q. The corner? A. Yes, sir.

Q. The northeast corner? A. The northwest corner, on the west side of the street.

Q. That is the front of the house, is it not? A. Yes, sir.

Q. That would be the northeast corner, would it not? A. All right.

Q. Well, would it not?

The Court: Yes.

A. Yes. 40

Charles P. Shepard—Direct

Q. The back is the west corner? A. Yes, sir.

Q. Then you are measuring the fifteen feet on a straight line into the roadway where Hodler was lying? A. No, north of the house, I am telling you, north of the edge of his house.

Q. Well, I do not quite understand how you measure it, that is all; I want you to tell me. Do
10 you carry this northerly house line out into the street and then measure north from that? A. Yes, sir.

Q. That is your notion of it? A. Yes, sir.

Q. That is, you carry the northerly house line practically out to the railroad track? A. Yes, sir.

Q. And then, you say, carrying it out that way, Hodler's body was about fifteen feet north of that? A. Yes, sir.

Q. And then, carrying the line out there still,
20 you say the curve began 125 feet beyond that? A. Yes, sir; or more.

Q. Or more? A. Yes, sir.

CHARLES P. SHEPARD, sworn in behalf of plaintiff:

Direct-examination by Mr. Hood:

Q. Mr. Shepard, you are connected with the
30 Kearny police? A. Yes, sir.

Q. And patrol Arlington? A. Yes, sir.

Q. Do you recall the night of the 28th of December, 1907? A. Yes, sir.

Q. Do you recall that night? A. Yes, sir.

Q. Were you on duty that night? A. Yes, sir.

Q. Do you remember seeing Mr. Hodler, this gentleman here (indicating the plaintiff)—A. Yes, sir.

Q. —in the roadway on Kearny Avenue that
40 night? A. Yes, sir.

Charles P. Shepard—Direct

Q. About what time do you remember seeing him there? A. Oh, it was somewheres around about quarter to one, I think.

Q. How did you come to go to the point where you saw him? A. I heard a whistle.

Q. Where were you at the time you heard the whistle? A. Where was I?

Q. Yes? A. I was on Elizabeth Avenue.

Q. How far is that away from the junction? A. From where he laid?

Q. No, how far is Elizabeth Avenue away from the junction? A. About two blocks.

Q. About two blocks? A. A little over.

Q. When you heard the whistle which way did you go? A. Went south.

Q. Then you were on Kearny Avenue at Elizabeth Avenue at the time you heard the whistle? A. Yes, sir.

Q. How far did you have to go to find this man?

A. I had to go about—well, one block and a half, a block and three-quarters, to where I found him.

Q. Where did you find him? A. On Kearny Avenue, between Stuyvesant Avenue and Bennett.

Q. Can you say with reference to any of the houses on the west side of the street where he was? A. Well, he was laying about, I think it was the third house from the corner.

Q. From the corner of what street? A. The second house from the corner of Stuyvesant Avenue.

Q. The second house north or south of Stuyvesant Avenue? A. South.

Q. Are you referring to Kavanaugh's house? A. Yes, sir.

Q. Whereabouts in the roadway was he lying? A. Between the track and the curb.

Q. West or east? A. West.

Charles P. Shepard—Direct

Q. How was he lying on the roadway? A. Well, he was laying kind of diagonally, not exactly straight, a little bit varying to the south, his head was laying.

Q. What was nearer to the rail, his head or feet? A. His feet.

Q. And his head pointing in the direction of
10 the gutter? A. The curb; yes, sir.

Q. The curbstone? A. Yes, sir.

Q. Was he conscious? A. No, sir.

Q. Did you see any bruises or marks of violence on him? A. No, no more than he was bleeding from the nose and ears.

Q. Did you observe his clothing? A. Well, they were—well, no, not in particular; they weren't soiled, more than from the dust from the road, of course.

20 Q. Was his clothing torn? A. No, sir; not as I noticed.

Q. Can you tell in what position his body was lying, whether it was on the back or side, or what? A. He laid on his right side, with his face towards the south.

Q. On the right side? A. On the right side, with his face towards the south.

Q. Did he have a hat on? A. No, sir.

30 Q. When you first came there who was already at the spot? A. Well, when the other officer and I come there—

Q. Did you come together? A. We come together; yes, sir.

Q. Did you start together? A. No, sir; we didn't start together.

Q. You overtook him on the way? A. Yes, sir. There was the conductor and the motorman of the car—the car stood there—and a young man
40 that lived on the corner was there.

Charles P. Shepard—Direct

Q. Do you know what his name is? A. I know the man well, too, but I can't think of it now. He is dead, anyhow.

Q. Oh, he is dead? A. Yes, sir.

Q. Those were the only people there? A. Yes, sir; and the officer and myself.

Q. The other officer? A. Yes, sir.

Q. And yourself and this man who lived at the corner, who has since died? A. Yes, sir. 10

Q. And the motorman and conductor of the trolley car? A. Yes, sir.

Q. And Mr. Kavanaugh? A. And then come Mr. Kavanaugh.

Q. And where did he come from? A. From his house.

Q. And what then? A. Well, we examined him, and the other officer, he went to Kavanaugh's home and telegraphed to the physician— 20

Q. Telegraphed or telephoned? A. Telephoned to the physician—and then after he telephoned to the physician, the physician come and said the best thing was to take him to the hospital; so we took him to the hospital.

Q. How long did it take for the physician to come? A. Oh, I don't think it was over six or seven minutes; he lives right near there.

Q. Did anybody else come there? A. Not that I remember. 30

Q. The physician directed his removal to the hospital? A. Yes, sir.

Q. And what then? A. We took the seats out in the car and put them in the aisle, and laid him down there, and telephoned down to the station to have the ambulance there, and when we got down there we took him out of the car and put him in the ambulance and took him to St. Michael's Hospital. 40

Charles P. Shepard—Cross

Q. Up to the time of his leaving the place where he was found did any other person arrive?

A. Not as I know of; I couldn't say.

Q. So that up to the time you left with the car you did not see any people except the ones you have named? A. No, sir; not that I know of.

10 Q. Did you see his hat there that night? A. Somebody said there was a hat found; I didn't see it.

CROSS-EXAMINATION by Mr. MacSherry:

Q. What kind of a night was it? A. I should judge about quarter of one.

Q. What kind of a night? A. Oh, it was kind of a damp night.

Q. Foggy or not? A. Kind of a foggy night, yes.

20 Q. For what distance could you see there well? A. Oh, quite a ways.

Q. Well, how far about? A. Oh, you could see a block.

Q. And you were busy, naturally, with this man? A. Yes, sir.

Q. There might have been other people nearby without your noticing them? A. There might possibly be; yes, sir.

30 Q. I mean coming from some other direction? A. I didn't see none; there might have.

Q. How far was his body from the track rail? A. Well, his feet was, I should judge, about two feet; no more than that, anyhow; two feet or two and a half feet, something like that.

Q. And how was the track opposite the spot where the man was lying on the ground? I mean was it curved or straight? A. Where he laid?

40 Q. Yes? A. Well, it was partly straight where he laid; yes sir.

Wells P. Eagleton—Direct

Q. Do you know where the curve is there? A. Yes, sir.

Q. How far is the curve away from where he lay? A. Well, I should think it was about 125 feet.

By the Court: Q. Which way? A. South from the curve.

Q. What? A. He laid south from the curve. 10

Q. The curve was north of him? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Hood:

Q. Well, Officer Shepard, do you state that distance after an inspection of the place or just from a general recollection? A. Just a general recollection.

Q. Of the situation that night? A. Yes, sir.

Q. Would you say that you are right within twenty-five or fifty feet? A. No, I wouldn't. 20

Mr. Hood: Now, by stipulation, if your Honor please, we will read the testimony of Dr. Wells P. Eagleton, who is out of the city. This is the testimony of Dr. Eagleton taken at the former trial.

(Reading:)

“WELLS P. EAGLETON, sworn in behalf of plaintiff:

“Direct-examination by Mr. Osborne: 30

“Q. Doctor, you are a practicing physician in this city? A. Yes, sir.

“Q. And do you make a specialty of any particular line? A. The eye and ear, sir.

“Q. How long have you been an eye and ear specialist? A. Well, I have done nothing but that since about 1900.

“Q. Before you practiced alone were you with Dr. Kip? A. Yes, sir.

Wells P. Eagleton—Direct

“Q. And he was also a specialist in that line?
A. Yes, sir.

“Q. Do you know this man, Mr. Hodler? A.
Yes, sir.

“Q. Did you make an examination of his ears
for the purpose of ascertaining whether or not he
could hear? A. Yes, sir.

10 “Q. Please give the jury the result of that ex-
amination? A. The man is totally deaf.

“By the Court: Q. When was it, Doctor? A.
I examined him on the 22d day of February, 1908,
again two days later, and again for some time last
year, I think in May of 1910.

“By Mr. Osborne: Q. And you say he is
totally deaf? A. He is totally deaf.

“Q. Is there any possibility of his ever regain-
ing his hearing? A. Absolutely none, sir.

20 “Q. Could the condition which you found his
hearing in have been caused by a fall, for instance,
from the platform of a rapidly moving trolley car,
and receiving a fracture of the skull? A. Yes,
sir.

“Cross-examination waived.

30 “By the Court: Q. Dr. Eagleton, was there
anything progressive about this? You made
three examinations? A. Why, I made three ex-
aminations for the reason of my interest in the
case, because of the rarity of a fracture going
through both ears at the same time—the rarity
of a fracture going through the hearing part of
both ears at the same time. There was nothing
progressive about it; the man was totally deaf
the first time I examined him.

40 “Q. When you speak of a fracture going
through the hearing part, just what do you mean?
A. The line of fracture must have passed through
the base and going through both labyrinths, or he
must have had a fracture of one and at the same

Carrie Dalbey—Direct

time a severe hemorrhage through the other. That is the only possible condition that would cause it.

“Q. What was it that was fractured? A. The base of the man’s skull.

“Q. And beyond that, when the fracture reached the ear what did it fracture? A. Why, it tore through and probably caused hemorrhages into the labyrinth; that is a very small— 10

“Q. The labyrinth? A. Yes. It was because of the course of the fracture through the man’s labyrinth that I examined him afterwards.

“Q. Is there any way of examining the labyrinth? A. Yes, sir; by the man’s equilibrium.

“Q. I mean is there any way of seeing it, getting at it? A. No, but you can examine the function of it.

“Q. Yes, but I want to be instructed as to whether your conclusion was an inference or whether it was derived from ocular proof. It was inferential? A. Inferential entirely, from tuning-fork examinations and from tests of the man’s coordination, the way the man swung.” 20

CARRIE DALBEY, sworn in behalf of plaintiff:

30

Direct-examination by Mr. Hood:

Q. Mrs. Dalbey, are you the mother of Walter R. Hodler? A. I am.

Q. In 1907, in December, did Walter live at your house? A. He did, yes.

Q. How long before that had he been living at your house? A. Why, since September, the September before.

Q. Of that year? A. Yes, sir.

40

Carrie Dalbey—Direct

Q. From September of that year until the end of December of that year did you see him every day? A. Yes, sir.

Q. And talked with him? A. Yes, sir; he lived with me.

Q. He lived with you? A. Yes.

Q. What was his condition of health generally?

10 A. Why, he was in perfect health.

Q. What was the condition of his hearing? A. Always good.

Q. It seems that he got hurt on the night of the 28th of December, 1907? A. Yes, sir.

Q. When did you first hear of it? A. Well, I left in the morning for Lakewood, and left Walter perfectly well, and after they found him they telephoned for us to Lakewood, but they failed to reach us—

20 Q. No, I asked you when you first heard of it?
A. Monday.

Q. On Monday? A. No, Sunday.

Q. What day of the month was Sunday, do you know? A. I don't know.

Q. Was that the next day or two days after, or what? A. Well, it would be two days after Friday night.

Q. Was he hurt Friday night? A. He was hurt Friday night.

30 Q. And you heard of it on Sunday? A. Yes.
They tried to telephone us, but couldn't reach us.

Q. Where did you first see him after you got the news? A. We took the first train on Monday morning, took the first train and went up to the hospital.

Q. Did you see him in the hospital? A. Yes, sir.

Q. What was his condition, generally? A. He was lying on the cot, perfectly unconscious.

40 Q. Did you see him right along after that? A.
Yes, sir; every day.

Carrie Dalbey—Direct

Q. Do you recollect when it was that he first came back to consciousness? A. Yes, sir; Thursday afternoon at 4 o'clock.

Q. Of the first week that you visited him there? A. Yes.

Q. Was he able to speak with you then? A. Why, I stood by his cot, and his eyes were closed, and it was quite a few moments, and he opened his eyes, and he looked at me, and then he said, "Mother! Mother!" That is just the way he did (illustrating with his hands). And then he closed his eyes. He didn't know much after that for several days.

Q. When were you first able to talk with him? A. Why, it was several days after that.

Q. When did you first notice any difference in his hearing condition? A. Well, they told me at the hospital—

Q. No, when did you first notice it? A. Why, I didn't know—I couldn't talk with him, because he couldn't answer me, on the cot, and they told me that he was deaf.

Q. Do you recall when he left the hospital? A. Why, I don't remember the day, no, but we went after him, I know, in a carriage.

Q. Where did you take him to? A. To our flat, down in Newark.

Q. Here in Newark? A. Yes, sir.

Q. Did he continue to stay until then? A. Yes, sir.

Q. Well, during the time that he stayed with you was he able to hear? A. Oh, no, not at all.

Q. Has he been able to hear, so far as you know, since that time? A. No, I always talk with my fingers and write.

Cross-examination waived.

Samuel Connor—Direct

SAMUEL CONNOR, sworn in behalf of plaintiff:

Direct-examination by Mr. Hood:

Q. Mr. Connor, you were the conductor of the last car that came from Hackensack on the night of December 28, 1907? A. Yes, sir.

10 Q. Who was the motorman on that car? A. William Ryan.

Q. When did you and Ryan take charge of the car, at what point in the run? A. Which car do you mean, the one coming down? We took a car up to the junction.

Q. No, I mean the car from which the man was hurt? A. Oh, at the junction, or this side of the junction.

Q. Well, by "this side" you mean where? A. Well, probably twenty or thirty feet.

20 Q. Well, practically at the junction? A. Practically at the junction.

Q. And from that point on, you were the conductor of the car? A. Yes, sir.

Q. And Mr. Ryan was the motorman of the car? A. Yes, sir.

Q. For whom were you working at that time? A. The Public Service.

Q. And was Mr. Ryan an employee of the Public Service Railway Company at that time also?

30 A. Yes, sir.

Cross-examination waived.

Plaintiff rests.

(By order of the Court, the jury withdraws from the court room.)

40 Mr. MacSherry: May it please your Honor, I move for a nonsuit in this case

Walter L. Bartholomew—Direct

on two grounds: First, that on the plaintiff's own statement of the case, there is proof of his negligent acts—in other words, that he is guilty of contributory negligence—and therefore can not recover; secondly, that the case as presented by the plaintiff does not show negligence on the part of the defendant. 10

The Court: (After argument.) I will deny the motion to nonsuit.

Defendant's counsel prays an exception, and the same is allowed.

Adjourned until tomorrow, Wednesday, September 25, 1912, at 10 o'clock, a. m.

Third day. 20

Wednesday, September 25, 1912.

Met pursuant to adjournment.

Present: Counsel as before stated.

(A map is placed on the wall by defendant.)

Mr. MacSherry opens for the defendant. 30

WALTER L. BARTHOLOMEW, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Bartholomew, where do you live? A. Newark, New Jersey.

Q. And what is your business? A. Engineer and surveyor.

Q. How long have you been that? A. Why, for two years. 40

Walter L. Bartholomew—Direct

Q. Are you employed by the Public Service now? A. I am.

Q. How long have you been in their employ? A. A little over two years.

Q. Have you made a survey of the premises at Kearny Avenue and Bennett Avenue and Stuyvesant Avenue? A. I did.

10 Q. When did you make that survey? A. I made that survey on January 30, 1911.

Q. How long have you been acquainted with that neighborhood? A. Well, since I have been in Newark, about two years.

Q. Can you tell us whether for several years before you made the map there had been any change in the grade there? A. From all our records, an investigation I made at the office, there have been no changes.

20 Mr. Hood: I object to his investigation of the records they have in the office. I do not think that is a foundation for him to state a conclusion on.

The Court: (After argument) I think it is incompetent.

Q. Did you from your survey make a map? A. I did.

Q. And is that the map behind you? A. This is the map.

30 Q. What is the scale of it? A. One inch equals ten feet.

Q. Will you take the pointer, please—

Mr. Hood: No, I do not think you have any right to use that map until you offer it.

40 The Court: (After argument.) For all that the Court now knows, this may be a map of Pall Mall, in the City of London. in which case it would not be competent. It is therefore proper that the witness show

John F. Ryan—Direct

say what this document is, in a general way, in order to establish its connection with the case.

Mr. Hood: That I am willing to concede.

The Court: But I agree with you that the details of the map can not be put in evidence until the map is shown to have an evidential character.

10

(The witness is withdrawn for the present.)

JOHN F. RYAN, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Ryan, where do you live? A. 617 Jersey Street, Harrison.

Q. What is your business? A. Police officer. 20

Q. Are you acquainted with that locality there at Kearny Avenue and Stuyvesant and Bennett Avenues, Arlington? A. Yes, sir.

Q. How long have you been acquainted with it? A. About fifteen years.

Q. Are you a witness in this case? A. Yes, sir.

Q. Were you a witness at the last trial? A. Yes, sir.

Q. Do you know where that curve is where this plaintiff claims to have been hurt? A. Yes, sir. 30

Q. Are you pretty well acquainted with that neighborhood? A. Yes, sir.

Q. Has there been any change at all in the tracks—I mean with respect to the curve—in the last ten or twelve years? A. There hasn't been any in seven or eight years, I know positively.

Q. Has there been any change in the width of the street? A. No, sir.

Q. Or in the location of the tracks? A. No, sir. 40

Plaintiff's: John F. Ryan—Cross

Q. Or in the grades? A. Well, at this point I would like to explain.

Q. Very well? A. A previous witness in this case has testified that that is a downgrade—

Q. Never mind about that. Has there been any change in the grade? A. No, sir.

10 CROSS-EXAMINATION by Mr. Hood:

Q. Well, Mr. Ryan, has not this track at the curve been relaid? A. The track probably might have been relaid.

Q. Well, do you not know that the track at the curve was relaid shortly after December 28, 1907? A. Don't I know that?

Q. Yes? A. I have seen it since. I don't think so.

20 Q. Well, why did you say before that it probably may have been relaid? A. The track?

Q. Yes? A. I was asked about the curve, wasn't I—the grade?

Q. What track had you in mind? A. The track on Kearny Avenue between Stuyvesant and Bennett avenue.

Q. You think that has been relaid? A. The track probably might have been relaid, but it looks the same now as it was before.

30 Q. Then by speaking of the curve do you mean the curve in the street or do you mean the railroad track curve? A. Both.

Q. You speak of both of these? A. Yes.

Q. Well, have you, either before December, 1907, or after December, 1907, made such a close inspection that you can say that the track after 1907, presented all the details of the track before December, 1907? A. The general view of it did.

40 Q. But as to particulars, could you say any thing about it?

Plaintiff's: John F. Ryan—Cross

Mr. MacSherry: What do you mean by "particulars"?

Mr. Hood: Whether it was the same curve or not, whether the curve was built on the same radius or not.

A. I have no measurements of it; I can't say that way exactly, not to the measurements. It looks to be the same.

Q. Well, your observation of this locality is merely casual, is it not? A. I don't understand that.

Q. You do not know what "casual" is. Well, do your duties as police officer take you up there?

A. No, sir.

Q. What takes you up there? A. Why different things; go to Hackensack, go to Rutherford, go to Arlington.

Q. You mean you generally go through on the cars? A. Well, we have walked as far as the Belleville turnpike, we have walked as far as North Arlington.

Q. How many times between December, 1907, and February, 1911, did you go along there as far as the junction? A. Say about fifteen.

Q. About fifteen times? A. Maybe more.

Q. And how many times did you pass along there by trolley car? A. Maybe half a dozen times.

Q. In the same period of time? A. Since that.

Q. Since December, 1907? A. Yes.

Q. I am talking of between December, 1907, and February, 1911; that is a year and a half ago? A. You didn't say February, 1911, at first.

Q. I think I did? A. If you mean between 1907 and this time, I will say I passed over there between twenty-five and thirty times.

Q. No, I am not talking about December, 1907, 40

Plaintiff's: John F. Ryan—Cross

and this time; I am talking about December, 1907, and February, 1911? A. Half a dozen times.

Q. In walking over there the fifteen times you were in company. I suppose? A. Sometimes I was and sometimes I wasn't.

Q. Did you, as you walked along, make any special observation of the situation there? A. Well, I have taken notice of the curve on account
10 of being connected with the accident.

Q. What notice did you take of the curve on account of its being connected with the accident? A. Why, I made it my business to judge about the distance from the curve to the Belleville turnpike, and the grades of it, what I would think was the grade.

Q. And what else? A. And took notes of it.

Q. Took notes of it? A. Yes.

Q. What else? A. How do you mean, what
20 else?

Q. Did you make any other observation? Did you make any measurement of the curve? A. No, no measurement, only taking a step and judging it as a yard.

Q. You are not a surveyor yourself? A. No.

Q. And you did not undertake to measure as to what the bend of it is? A. No.

Q. Now, in going over it on the cars did you make any special observation? A. Well, yes, I
30 have taken particular notice to a car going around it, and I have stood on the back of the car and I have been in the car, to see how it would act.

Q. So that you have experimented on different cars for the purpose of ascertaining just what sort of motion there is in the car in going around the curve; is that it? A. For my own benefit yes.

Q. And, I suppose, as a witness in this case? A. No, I didn't want to come up here and not be
40 able to tell you nothing at all.

Winthrop B. Ingalls—Direct

Q. Now, that is the only source of information that you had, is it? A. Well, I don't understand what you mean now.

Q. What you have told us is the only information that you have with regard to the actual situation of the tracks and of the road at that point, between Bennett Avenue and Stuyvesant Avenues?

A. Yes.

Mr. Hood: I do not think the witness has qualified your Honor.

10

WINTHROP B. INGALLS, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Ingalls? A. 87 Montclair Avenue, Newark.

20

Q. How long have you lived in Newark? A. Well, the last thirty years.

Q. Are you acquainted with this locality that we are talking about, on Kearny Avenue between Stuyvesant and Bennett Avenues, Arlington? A. I have been there from time to time for the last twelve years, since I have been with the company.

Q. Do you know where the curve that we are talking about in this case is? A. I do.

Q. Do you know what kind of a curve it was at the time of this accident? A. I do.

30

Q. Have you seen it since? A. I have.

Q. How often? A. Why, I couldn't say to the exact number of times, but frequently. I frequently do work over in Kearny and Arlington.

Q. Have you noticed any change in that curve? A. There has been no change that I have ever noticed.

40

Winthrop B. Ingalls—Cross

Q. Any change in the width of the street? A. Not that I have noticed.

Q. Or in the grade of the car tracks? A. No, sir.

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Ingalls, what is your business, did you
10 say? A. I am investigator for the claim department.

Q. And is it that that takes you over there? A. Yes.

Q. You have not made any measurements of this curve? A. No, I never made a measurement of it.

Q. And your observation of it is merely casual? A. It is merely to observe that there has been no change.

20 Q. Do you mean to say that during the period between December, 1907, and February, 1911, there has been no change at that curve? A. There has been no moving of the tracks.

Q. Has there not been work done on the tracks? A. Possibly, but that doesn't change it.

Q. Was there not work done upon those tracks at that curve in the spring of 1908? A. Not that I ever observed.

Q. Not that you observed? A. No.

30 Q. Well, have you heard of it? A. Never heard of such a thing.

Q. Do you know that it was not done? A. Well, I don't follow up all those things; a great many of them I do.

Q. Well, you could not swear, Mr. Ingalls, that it was or was not? A. Not in 1908, possibly.

40 Q. Well, was there any work done on that track at the curve from December, 1907, to February,

Winthrop B. Ingalls—Cross

1911? A. They may have replaced a rail or a joint, or something of that kind.

Q. They may have replaced that curve? A. I don't think that they did.

Q. Do you know that they did not? A. As I said before, I couldn't say that they did not.

Q. Do you know whether they did not do anything to raise it or lower it? A. I don't think they 10
could do that.

Q. I am asking you whether they did anything? A. I think I am perfectly safe in saying that they did not.

Q. That is a conclusion, but not a matter of knowledge as to the fact, is it not? A. I know one thing about track work; they can't change the grade of the track without changing the grade of the road.

Q. But there is such a thing as rails wearing 20
out? A. Yes, sir; rails wear out, certainly.

Q. And curves wearing out? A. Yes, sir.

Q. And the replacing of an old rail by a new? A. Yes, sir.

Q. Or the replacing of an old curve by a new? That would change the situation, would it not?

Objected to.

A. Not at all.

Objected to as not cross-examination.

Objection overruled.

Mr. MacSherry: Now, I submit that I 30
have shown sufficiently by three witnesses that there has been no change.

Mr. Hood: I am perfectly willing that the map shall go in, without opposition, if the Court will direct the jury to go and view the place. I will withdraw all objections to the map if counsel will agree that there may be a jury view. 40

Walter L. Bartholomew—Direct

WALTER L. BARTHOLOMEW, re-called in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Now, Mr. Bartholomew, what is the scale of that map?

10 Mr. MacSherry: Wait until the Court rules as whether I can go on.

The Court: I will repeat what I said a few moments ago: that in view of the objection made by the learned counsel for the defendant, that the details of the map can not be gone into until the map itself was passed on as an instrument of evidence, I think the thing to do now is to show that this map delineates the locality. We have assumed that without proof thus far.

20 Mr. MacSherry: Now I offer the map.

The Court: I do not think you have shown that this is a map of the place where the accident occurred. As I said before, it may be, for all the Court judicially knows, a map of some other place.

Q. Did you make a survey of the premises embracing the curve between Stuyvesant Avenue and Bennett Avenue on Kearny Avenue. A. I did.

30 Q. You have stated when you made the survey? A. I have.

Q. And did you make a map of that locality? A. I did.

Q. Embracing that curve? A. I did.

Q. And is that the map (on the wall)? A. This is the map.

By the Court: Q. What are the north and the south limits of that map? A. The north is towards the right and the south toward the left.

40 Q. And what is the street on the north? A. The

Walter L. Bartholomew—Direct

street on the north is Bennett Avenue, the street on the south is Stuyvesant Avenue and the street running from left to right is Kearny Avenue (indicating).

Q. And on what street, if any street, are there trolley tracks? A. The trolley tracks are on Kearny Avenue, the north-bound track represented by the lower curved lines and the south-bound represented by the upper curved lines; the curb is represented by the outer lines (indicating on map). 10

The Court: Do you think there is sufficient ground for your objection now?

Mr. Hood: I think so. It has been established that the map shows the condition of affairs in February, 1911, but it has not been established that the conditions between the time of the accident and the time this survey was made were identical with the conditions at the time of the accident. 20

The Court: Perhaps I am assuming too much about the agreement of counsel. I thought it was understood that there was to be a view. Is that the understanding?

Mr. MacSherry: I do not know of any such understanding at present.

The Court: Then I will rule on your objection. I think there is some evidence that the map correctly represents the situation at the time of the accident. I therefore overrule that objection. 30

Plaintiff's Counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge. 40

Walter L. Bartholomew—Direct

The Court: Now you may go into the details of the map. You now offer it, do you?

Mr. MacSherry: I now offer it; yes, sir.

The Court: I will not rule on the offer until the witness has been asked as to the particulars of the map.

10 Mr. Hood: I understood your Honor to have ruled on the offer. The offer was of the map, and I objected to the introduction of it.

The Court: The offer has only just been made.

Mr. Hood: It is merely that I may understand the matter. Your Honor overruled the objection I made and gave me the benefit of an exception. May I inquire just
20 what it was? I thought my objection was to the offer of the map.

The Court: Mr. MacSherry had now formally offered the map, which he had not done before. I think your objection assumed that there had been a formal offer, which I did not understand had been made. It has been made now, at any rate.

Mr. Hood: Then my objection and your Honor's ruling and my exception may apply to the formal offer of the map?
30

The Court: The formal offer, yes.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

Q. What is the scale of your map? A. The scale of the map is one inch equals ten feet.

40 Q. Where is Bennett Avenue? A. Bennett Ave-

Walter L. Bartholomew—Direct

nue is shown at the right of the map (indicating on map).

Q. Where is Kearny Avenue? A. Kearny Avenue is shown running from left to right in the center (indicating).

Q. Where is Stuyvesant Avenue? A. Stuyvesant Avenue is shown at the left (indicating).

Q. A car going towards Newark, on what track 10 does it run? A. A car running towards Newark takes the south-bound track, or on the upper track as indicated (indicating).

Q. Where are the tracks? A. The tracks are in the center of Kearny Avenue (indicating).

Q. Where is the curve? A. The curve is—

Q. Coming from the junction towards Newark, where does it begin and where does it end? A. I will have to scale that to get the exact starting point. (Witness measures on map.) It begins 20 about eighty feet south of the south curb of Bennett Avenue, measured along the westerly rail (indicating).

Q. And where does it end? A. I will measure this. (Witness measures on map.) At a point about sixty-seven feet south from where it begins (indicating).

Q. Then how long is that curve? A. It is about sixty-seven feet.

Q. What is the radius of the curve? A. The 30 radius of the curve is 400 feet.

Q. Well, that is, if you carry the curve all around, it would make a circle, and the radius of that circle is 400 feet? A. It is.

Q. From your experience as a surveyor and engineer, how would you designate that curve?

A. It is a very easy curve.

Q. Do you know where Mr. Kavanaugh lived?

A. I do not.

Walter L. Bartholomew—Direct

Q. Well, where is the second house from the corner of Stuyvesant Avenue? A. The second house from the corner is here (indicating).

Q. Well, bring it down to the track, will you not? A. (Witness indicates on map.)

Q. What is the length of that block? A. From Stuyvesant Avenue to Bennett Avenue?

10 Q. Yes. A. Measured on which side?

Q. Well, measured on the north side, the south-bound track? A. That would be the west side. (Witness measures on map.) 438 feet.

By Mr. Hood: Q. What is that distance? A. 438 feet.

Q. Between what points? A. From the north curb of Stuyvesant Avenue to the south curb of Bennett Avenue, measured on the west side of Kearny Avenue.

20 By Mr. MacSherry: Q. Can you mark on that map to indicate in some way the end of the curve going south? A. (Witness marks on map.)

By the Court: Q. What kind of a mark do you make? A. I will mark a circle.

Mr. Hood: I guess you had better designate by letter.

Mr. MacSherry: Make it "E."

(Witness marks on map.)

30 The Court: You have written "E" for the end of the curve at the south. Now put "B" at the north end.

(Witness marks on map.)

By Mr. MacSherry: Q. How much roadway is there on the north side there? A. It is practically 17 feet, 16.8 feet, from the curb to the rail, the nearer rail.

Mr. MacSherry: I offer the map.

40 By the Court: Q. Your scale is how much? A. One inch equals ten feet.

Walter F. Bartholomew—Cross

CROSS-EXAMINATION by Mr. Hood:

Q. Can you locate the center of that curve? A. I have it located, yes. That is what we call the point of intersection; it would be a point where this rail produced and this rail produced, they would come together (indicating).

Q. That, I suppose, is the center? A. Yes, 10
sir.

Q. That would not be the center in distance, would it? A. Yes.

Q. It may or may not be? A. Yes; that is, a line drawn from there to where the center of the curve would be would leave an equal distance of the curve on each side of that line (indicating).

Q. Is that curve so built? A. It is symmetrical.

Q. It is symmetrical from the center point running towards the curve? A. Yes, sir; it is not a 20
compound curve.

Q. There are curves that are not symmetrical? A. Yes.

Q. But this, you say, is symmetrical? A. Yes, sir; there is one radius.

Q. And, therefore, the center of that curve would be practically the middle of the distance you have given? A. Yes, sir.

Q. Half of sixty-seven; is that right? A. It 30
is.

Q. Now, will you be good enough to tell me what the distance is from the middle of that curve to the southerly side of Stuyvesant Avenue? A. My last measurement that I gave was taken along the rail; this is measured on a straight line.

Q. That would not make very much difference in this case, would it? A. No. (Witness measures and marks on map.) From the center of the curve, marked "C," to a line drawn from the 40

Walter F. Bartholomew—Cross

southerly curb of Bennett Avenue across Kearny Avenue would be 115 feet.

Q. That is not what I asked you; I asked you for that distance to Stuyvesant Avenue? A. Oh, pardon me.

Q. However, the measurement you gave us may be useful. How much do you say it is? A. 115
10 feet from Bennett Avenue.

By the Court: Q. From the southerly side of Bennett Avenue? A. Yes, sir; to the center.

Q. Now, you are asked to measure to the southerly side of Stuyvesant Avenue.

Mr. Hood: From the southerly side of Stuyvesant Avenue.

A. (Witness measures on the map.) That is 360 feet from the centre of the curve to the southerly side of Stuyvesant Avenue.

20 By Mr. Hood: Q. Now, what is the angle in the street on the west side of the road there? A. Do you mean the departing angle?

Q. As it is indicated on the curb line? A. This angle in here (indicating)?

Q. Yes. A. 169.52.

The Court: That is apparently an obtuse angle.

Witness: It is.

Q. What is the angle on the opposite side of the street, on the east side? A. That angle is
30 the same.

Q. Now, you said that from your experience as a surveyor you would call this an easy curve? A. I would.

Q. Your experience as a surveyor is limited to your service with the Public Service Railway Company? A. No, I worked two years before that, previous to that, part of the time—I was out of school. A year I worked with the city engineer
40 in the town where I came from, and then I spent

Walter F. Bartholomew—Cross

my summers doing railroad service, working for an electric line.

Q. Well, where did you get this other experience? A. Do you want to know the place?

Q. Yes. A. Why, I used to live in a place called Cortlandt, New York.

Q. That is not a very large town, is it? A. Oh, no. It is still on the map. 10

Q. What about the other place that you say you worked at? A. Well, that was the locality where I did all the work in the summers.

Q. And that was in Cortlandt? A. Yes.

Q. And except for your experience there, your experience is limited here with the Public Service? A. Yes.

Q. And with them you have been for two years? A. I have.

Q. How long have you been a civil engineer? 20
A. I graduated in June, 1910.

Q. That is a little more than two years, is it not? A. Yes.

Q. What kind of work have you been doing for the Public Service? A. Railway work.

Q. What particular time? A. The first seven months, I should say, I was with the track department—that is, the maintenance of way—and we staked out the new lines and figured the curves. 30

Q. In the new lines? A. Yes.

Q. And after that? A. After that I did this work for the claim department.

Q. What do you mean by “this work for the claim department,” making surveys for the claim department? A. Making surveys and maps for the claim department.

Q. So that your construction work is limited—that is, your connection with construction work 40

Walter F. Bartholomew—Cross

is limited to Cortlandt, New York, and the seven months of your service with the Public Service?

A. It is.

Q. The rest is merely a matter of surveying and mapping? A. The claim department work?

Q. Yes. A. Yes.

By Mr. MacSherry: Q. Well, are there or are
10 there not many curves in the trolley tracks of the Public Service? A. Why, a great many curves, yes.

By Mr. Hood: Q. Of all kinds? A. All kinds.

Q. Well, the cars do go around corners, do they? A. At right angle turns, yes.

Q. And they go around slanting streets, like, for instance, the junction of Broad Street and Clinton Avenue, do they not? A. Yes, sir.

Q. That is a different sort of a curve again? A.
20 It is an easier curve.

The Court: The map may be marked.
Marked Exhibit D-7.

Mr. Hood: I presume my objection is good to this point?

The Court: Yes.

Mr. Hood: My exception covers this additional ruling?

The Court: Yes.

Exception allowed; let it be sealed, and
30 it is sealed accordingly.

FREDERIC ADAMS, (Seal)
Circuit Court Judge.

Florence E. Hodman—Direct

FLORENCE E. HODMAN, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live? A. 46 Halstead Street, Newark.

Q. Can you hear my voice from the distance I am standing away from you, about three feet, if I hold my head away from you like that (turning face away from witness)? A. You turn away; I don't know what you were saying. 10

Q. Can you hear my voice as I am speaking to you now, standing about three feet away from you, unless I look directly at you and you have an opportunity to watch my mouth? A. I hear your voice, yes, but if you were turned away I wouldn't know what you were saying.

Q. I will turn away my head now, and tell us if you can hear my voice, standing about three feet from you. (Counsel turns his face away from witness.) How long have you been living at your present home? A. I don't know whether you were speaking or not. 20

Q. How do you understand what I say now? A. I understand by lip-reading.

Q. How long have you been troubled with your hearing? A. How long?

Q. Yes. A. About twelve years, almost twelve years now. 30

Q. And what brought it about, do you know?

Mr. Hood: I object. I do not understand that this lady's individual case can play any part in this case. If this lady is an expert, if she is a physician, if she has had a long experience in instruction, so that she can give us the result of her special knowledge, I can appreciate that it might 40

Florence E. Hodman—Direct

10 get to be competent evidence in showing whether the defect that the plaintiff suffered from can in any way be relieved or improved upon; but I can not understand for a moment, sir, that because this lady, who has defective hearing—she is not stone deaf apparently; she has a defect in hearing; it is not perfect—that because she helped that out in her individual case by acquiring what she calls lip-reading, that it has any relevancy or competency, so far as her own capability or experience may be concerned, in establishing anything with regard to the damages that the plaintiff suffers from. I think the testimony is incompetent, and for that reason I object to it.

20 The Court: Let me understand what you object to. The question which was asked, and which, I supposed, was objected to, was, "What brought it on"? Is that it?

Mr. Hood: Yes.

The Court: "What brought on your deafness?"

Mr. Hood: Yes.

30 The Court: Just what is your objection to that?

Mr. Hood: I say it is incompetent; it does not make any difference as to what her own experience may be.

40 The Court: (After further discussion.) The question that you asked, "What brought it on?" it seems to me, is open to the objection that it may require a technical and scientific answer, which the witness so far as appears, would not be able to

Florence E. Hodman—Direct

give. For that reason I sustain the objection.

Q. When did you acquire the capacity for understanding people by watching their lips, known as lip-reading?

Mr. Hood: I object to that as incompetent and irrelevant.

The Court: This raises a broader question. The object of the proof I understand to be to show that there is such a thing as lip-reading, which enables persons who are without the sense of hearing to understand by the eye what is said to them. I do not see that proof to that extent would be objectionable. 10

Mr. Hood: Proof of the character that your Honor mentions, I think, would not be objectionable; but apparently that is not the purpose of this proof, as my friend has explained it to the Court. He proposed to show by this lady that she acquired the art of lip-reading and that it has been useful to her, and he proposes on that basis to inferentially draw the conclusion that, because it has been useful to her, it may be of service to the plaintiff in this case. Now, I say her own individual experience in the matter is incompetent. I say it is competent to prove that there is such a thing as lip-reading, to what sort of cases it is applicable, and whether or not it is applicable to the case of the plaintiff, such as it may be, and to what extent it would be of service. I admit that, in my judgment, all that is competent proof; but I do say that I do not think it is competent proof to put on 20 30 40

Florence E. Hodman—Direct

the witness stand an example and let her tell her own experience, in order that the jury or counsel may draw conclusions as to whether it is applicable to the plaintiff's case, and if so, to what extent.

10 The Court: (After further discussion.) I think the evidence is competent to the extent I have indicated; namely, the fact that there is such a thing as lip-reading which is available to a person who is without hearing and who has the use of the organs of vision.

(Question read.)

Mr. Hood: I object to that question for the reasons I have urged.

The Court: I overrule the objection.

20 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

Q. When did you acquire the capacity for understanding people by watching their lips, known as lip-reading? A. When?

30 Q. When? A. I think I started to study in about 1905.

Q. Who taught you, if anybody?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

Florence E. Hodman—Direct

Q. Who taught you? A. Mr. Nitchie.

Q. What is his address?

Objected to on the same grounds.

A. His place of business is in New York.

The Court: I think it would be proper to save time, to give you a general exception.

Mr. Hood: If your Honor will make it applicable to all of it, all right. There may be questions that will intervene that your Honor may take a different view of.

The Court: I will make the same ruling and give you the same exception, if you think it is better.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly. 20

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

Q. What street in New York?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly. 30

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

A. 156 Fifth Avenue.

Q. What does he teach?

Objected to on the same grounds.

Objection overruled. 40

Florence E. Hodman—Direct

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)
Circuit Court Judge.

10 A. He teaches lip-reading; other subjects, too; principally lip-reading.

Q. And when did you begin your studies for lip-reading?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is sealed accordingly.

20 FREDERIC ADAMS, (Seal.)
Circuit Court Judge.

A. Where?

Q. When did you begin that, at what time, how long ago was it that you commenced to study? A. About how long was it that I lost my hearing?

Q. No, how long ago was it that you commenced to study? A. Why, I think it was in 1905 when I started to study.

30 Q. And how long did it take you?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

40

Circuit Court Judge.

Florence E. Hodman—Direct

A. I took two terms, thirty-five lessons each term.

Q. Do you mean by that that by the end of two terms, or thirty-five lessons, you were able to understand by watching the lips of a person speaking to you? A. Yes.

Mr. Hood: I object to that on the same grounds, and for the additional reason that it is leading. 10

Q. In talking to people, does it make any difference as to their articulation?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.) 20

Circuit Court Judge.

A. Make any difference in what?

Q. As to whether they articulate well or not?

A. Whether they articulate well?

Q. Yes? A. Well, sometimes it doesn't depend exactly on the articulation, but it depends upon the formation of the sounds.

Q. As a rule, can you understand a person talking to you who has a mustache as well as one having a clean face? 30

Objected to.

Q. Does it make any difference in the person talking to you as to whether they have a clean-shaven face or a mustache, do you think?

Objected to on the same grounds.

Objection overruled. 40

Florence E. Hodman—Direct

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)
Circuit Court Judge.

10 A. Well, sometimes I can understand sideways, some people.

Q. Is it necessary for them to keep their heads erect and look straight at you, as a rule?

Objected to on the same grounds.

A. Not always. If I can't see the mouth, of course I can't—

Mr. Hood: I want to add an additional objection, that I think the examination is very leading.

20 The Court: I will let the question stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed: let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)
Circuit Court Judge.

Q. Is this school of lip-reading a public school or private school?

30 Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)
Circuit Court Judge.

40

Florence E. Hodman—Direct

A. The one in New York, where I studied?

Q. Yes. A. Well, it is private.

Q. At the present time, what business, if any, are you engaged in? A. I am down at the Lawrence Street school, office work; I have charge of the office.

Q. Do you meet few or many people there every day?

10

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

A. A great many people come in during the day sometimes. 20

Q. Are you or are you not obliged to carry on conversation with them?

Objected to.

Q. Are you obliged to carry on conversation with them or not?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court. 30

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

A. Oh, yes.

Q. Where is that school? A. On Lawrence Street, at the foot of Clinton.

Q. How long have you been there? A. I started there in September, 1905. 40

Florence E. Hodman—Direct

Q. About how much in money did it cost you to acquire lip-reading?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

10 Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

A. I can't remember the exact figure, but it cost quite a sum.

Q. About what? A. Well, about fifty. The reason of that is because I got a scholarship.

Q. Did this Mr. Nitchie, who was your tutor in lip-reading, as you say, have few or many pupils?

Objected to on the same grounds.

20 Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

A. He has a great many now.

30 Q. If you know, what is his regular charge for a course of thirty-five lessons?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

Circuit Court Judge.

40 A. He charges, I think, now—when he gives the lessons personally, I think, he charges \$75.

Florence E. Hodman—Direct

Q. While you are taking lessons do you or do you not practice in any way?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed: let it be sealed, and it is sealed accordingly.

10

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

A. What is that?

Q. While you were taking lessons did you practice in any way at home? A. Oh, yes.

Q. How?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

A. Well, you practice with people, conversation, practice with what they call mirror practice. You would not understand that.

Q. What is that? A. Well, you watch the formation of the sounds that you make yourself. 30

Q. Does or does not the ability to acquire this lip-reading depend on the intelligence of the pupil?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court. 40

Florence Hodman—Cross

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)
Circuit Court Judge.

A. Of course it does, to a certain extent, yes.

Q. What time do you go to your duties at the
10 school in the morning?

Objected to on the same grounds?

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is sealed accordingly.

FREDERIC ADAMS, (Seal)
Circuit Court Judge.

20 A. Quarter of nine.

Q. And how long do you remain?

Objected to on the same grounds.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)
Circuit Court Judge.

30

A. How long do I remain?

Q. Yes. A. Why, I stay until three or after three, whenever my work is finished.

CROSS-EXAMINATION by Mr. Hood:

Q. Miss Hodman, can you hear me at this distance? A. What?

Q. Can you hear me at this distance? A. I just
40 hear your voice, yes.

Florence Hodman—Cross

Q. Then you have the capacity to hear? A. I have a little capacity to hear, yes.

Mr. MacSherry: I think the distance ought to appear on the record, to indicate the distance you are standing away from the witness, and the fact that she does not hear your words, but just your voice.

Mr. Hood: We will measure it, to be exact. I should guess about 6 feet. 10

(The distance between plaintiff's counsel and witness is measured and announced to be 5 feet 3 inches.)

Q. I will take one step further back (stepping back), and ask you whether you can hear me now?

A. I can hear you just a little.

Q. What you get when I speak to you is sound, is it? A. I didn't get that.

Q. As you say that you did not get it, I will step forward to the same point where I was standing before, when the measurement was taken (stepping forward). What you get when I speak to you is the sound of my voice? A. Yes, I get the sound of your voice. 20

Q. The motion of my lips in speaking helps you to get the sound of my voice? A. Well, of course, sometimes when I was practicing I used to say I heard, when it seemed as though I heard, and they said I couldn't hear, because there was not anything to hear. 30

Q. That is not the question I am asking you; I am asking you whether the sound of my voice is helped along by the motion of my lips? A. Helped?

Q. Helps along, whether you get the sound of my voice? A. Well, I don't know; I should think that it might help. 40

Florence Hodman—Cross

Q. I will turn my back to you now (turning back towards witness). You say you are employed in the Lawrence Street school? A. And I now turn back to you (turning face towards witness). Did you hear what I asked you? A. I heard your voice, but I couldn't tell what you said.

10 Q. The question that I put to you I will now repeat. Do you say that you are employed in the Lawrence Street school? A. I didn't get one word there—something about the Lawrence Street school.

Q. Whether you are employed at the Lawrence Street school—employed? A. Oh, employed. Yes.

Q. Working? A. Yes.

Q. You get it now; is that right? A. Yes.

20 Q. In other words, in your own experience, Miss Hodman, in speaking with other people, you do hear the sound of their voice? A. I hear the sound of their voice?

Q. Yes. A. Well, some people I do, yes.

Q. Can you make out what is said without getting the sound of the voice? A. Yes.

Q. (Counsel forms words with his lips without sound.) A. I am working in the Lawrence Street school.

30 Mr. Hood: The question I put without any sound was, "Where are you working now?" and she answered, "I work at the Lawrence Street school."

Q. Now, Miss Hodman, do you know anything about lip-reading except in your own experience, your own individual case? A. I teach it myself.

Q. Oh, you teach lip-reading? A. Yes.

40 Q. How long have you been teaching lip-reading? A. Well, I think I started in 1906; about six years now.

Charles T. Kavanaugh—Direct

CHARLES T. KAVANAUGH, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Kavanaugh, you were called as a witness on the part of the defendant in the last trial, were you not? A. I was subpoenaed by both; I don't recall now; I think it was, though.

Q. You are living in Bayonne now? A. Yes, sir. 10

Q. But you used to live in Kearny, in the Arlington section? A. Yes, sir.

Q. Have you been up there lately? A. In that neighborhood?

Q. Yes. A. Oh, yes, I get up there every day.

Q. How long have you been going up there every day? A. For more than seven years.

Q. Well, now, Mr. Kavanaugh, have you noticed any change in the tracks up there and in the curve since this accident? A. I never noticed any change in the tracks at any time; no, sir. 20

Q. Do you remember meeting Mr. Hodler, the plaintiff in this case, the night he was hurt? A. Yes, sir.

Q. And where did you first meet him? A. On a car bound to Hackensack.

Q. And you were going to Hackensack, too? A. Yes, sir.

Q. And after you reached Hackensack, where, if any place, did you go with him? A. We went into a cafe there at the Susquehanna depot. 30

Q. And how long did you stay there? A. Long enough to have one drink.

Q. And what did he drink, please? A. Really, I don't recall now; it was liquor of some sort.

Q. What do you mean? A. That is to say, I say liquor; I mean it was an intoxicating drink of some sort. 40

Charles T. Kavanaugh—Direct

Q. When you left did he go with you? A. No.

Q. Or did you leave him there? A. I left him there.

Q. And how long were you there? A. I don't think more than four or five minutes; long enough to get a drink and go on.

Q. Were there other people in the place or no?

10 A. I think there were.

Q. Now, when did you next see him? A. My recollection is that I next saw him on the platform of the depot, waiting for the return car, the last car down.

Q. Did you notice anything about his condition then? A. Yes.

Q. What was his condition? A. In my opinion, he was intoxicated.

Q. That was before he got on the car? A. Yes,
20 sir.

Q. What, if anything, did you see him do there which made you form that opinion? A. He seemed to be having a—either having an altercation with one or more people on the platform or talking of an altercation, or really having one. I didn't enter into the discussion.

Q. Talking of having an altercation where? A. In Hackensack.

Q. Now, did you see him get on the car at Hack-
30 ensack? A. I don't remember actually seeing him getting on the car, but I saw him after he got on the car.

Q. And did you notice his condition while he was on the car? A. Yes, sir.

Q. What was it? A. The same condition: intoxicated, in my opinion.

Q. What part of the car were you in, Mr. Kava-
40 naugh? A. The smoking compartment.

Charles T. Kavanaugh—Direct

Q. And what part of the car did he ride in? A. Why, I think he rode in both parts, as well as the back platform; I know he did.

Q. Do you remember a crowd getting on at Ell's Hall? Do you know where that is? A. Yes, sir.

Q. About how many in that crowd? A. I don't remember exactly, but there was quite a crowd; I suppose a couple of dozen.

10

Q. Was there anything about them to attract your attention—was there anything they were doing? A. They were a lot of young folks having fun, coming from a dance, I believe.

Q. And what, if anything, did you see them do?

The Court: Please tell me again the name of the place where they got on?

Witness: Why, Ell's Hall, I believe, is in Kingsland, your Honor.

Q. And how far is that from Belleville Junction? A. As to miles or time?

20

Q. As to distance? A. I should say a ten-minute ride, maybe two or three miles. I am not sure about that, though.

Q. Now, what, if anything, did you see this crowd do in the car? A. Well, they cut up among themselves. Is this prior to the Belleville Junction, now?

Q. Yes. A. Cut up among themselves, and Mr. Hodler got into a controversy with one at least. something about a seat.

30

By the Court: Q. In which compartment was that? A. I am inclined to think it was in the forward compartment, the compartment for ladies and gentlemen.

By Mr. MacSherry: Q. Did you notice whether the conductor had any trouble with them or not? A. Not prior to the arrival at Belleville Junction, as I call it.

40

Charles T. Kavanaugh—Cross

Q. Did he have any trouble there? A. From there down.

Q. What kind of trouble? A. Why, somebody dropped the hasp—there was sort of a hasp, or lock, on the door between the two compartments, and the conductor, as I remember it, starting the car, they all went into the forward compartment, or most of them, and somebody dropped this hasp down, so that he couldn't get in to collect the fares.

By the Court: Q. Dropped the hasp of the lock? A. Yes, sir.

By Mr. MacSherry: Q. What, if anything, do you remember seeing Hodler do? A. A general talkative condition, talked to everybody, and beyond getting into the altercation with this young man about a seat, nothing in particular.

20 Q. Did you or did you not change cars at Belleville Junction? A. I don't remember that we changed cars, but we did stop there and change crews, either one or the other; changed crews, I think, but not cars.

Q. When this trouble was going on, that you noticed, between Hodler and the passenger, did anyone interfere? A. I don't think so; no, sir.

Q. Did you? A. No.

30 Q. Did any of these young men bother you? A. No.

Q. Or tell you to keep out of the trouble? A. No.

Q. Or threaten you in any way? A. Not that I recall; no, sir.

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Kavanaugh, where did you take the car going to Hackensack? A. The corner of Stuyvesant and Kearny Avenue.

40

Charles T. Kavanaugh—Cross

Q. That is near your house? A. Yes, sir; the very corner.

Q. And do you recollect about what time it was when you took that car? A. My recollection is that it was directly after dinner, about seven or half-past seven o'clock car. The cars run on the half hour and hour.

Q. Can you recollect when it was that you first noticed Mr. Hodler on that car? A. Not exactly, Mr. Hood, but early in the ride. 10

Q. When you boarded the car did you take a seat in the car? A. I believe so, although I don't remember.

Q. And did you at that time notice Mr. Hodler in the car? A. I don't remember whether I noticed him immediately that I got on the car or not.

Q. Can you tell me whether you noticed him before you got to the junction? 20

The Court: This is on the way to Hackensack?

Witness: On the way to Hackensack.

Mr. Hood: On the way to Hackensack; yes, sir.

A. I wouldn't be sure of that, Mr. Hood. It was only a three blocks' ride—four blocks.

Q. Can you tell me whether or not that car going to Hackensack stopped at the junction? A. Yes, sir; it did.

Q. And can you tell me how long it stopped there? A. No. That was a matter according to the time that the other car arrived there. Sometimes it will be but a minute or two, and more times it would be more time. That particular night I don't recall. 30

Q. You do not recall? A. No.

Q. You ride over that road very often? A. Yes, sir; I do. 40

Charles T. Kavanaugh—Cross

Q. I suppose between the night of the 27th or 28th of December, 1907, and the present time you have been on that car going over the road two or three times each week? A. Well, at least once or twice a week.

Q. And it is a little difficult for you to keep apart what occurred on that night from other occasions?

10 A. General occurrences; yes, sir.

Q. So that you would not trust yourself to say whether that car stood at the junction on that occasion a considerable period of time or whether it went on almost immediately? A. No, sir.

Q. When you spoke to Mr. Hodler first on the car do you recall about where the car was? A. Not exactly; no, sir; I don't, but I think probably it was about at the junction. That would be the natural time for people to enter into a conversation, when the car stops.

Q. Was he seated with you, in the same seat?

A. He was during the ride, but whether it was just at that time or not I don't recall.

Q. Well, do you recall that he changed seats at all on the way going to Hackensack? A. Yes, I do; he did change seats.

Q. That he did change seats? A. Yes, sir.

Q. Do you mean after he got into conversation with or before that? A. I think it was after.

30 Q. So that when he started the conversation with you he was sitting by your side? A. Well, I am not sure of that; he may have been sitting just before me or just behind me. That is a pretty hard thing to remember.

Q. Well, sitting right near you, at any rate? A. Yes.

Q. Well, can you tell me from your memory at this time whether he had been sitting in the place from which he started the conversation with you

40

Charles T. Kavanaugh—Cross

for some little time before that? A. No, I couldn't.

Q. You haven't any recollection that you can give us now, have you, Mr. Kavanaugh, as to whether or not he started talking with you as soon as he happened to get into his place, or whether he had been in the place a little while before he started to speak? A. He was on the car when I got on, Mr. Hood. 10

Q. He was on the car? A. He was on the car.

Q. How do you know that? A. Because I saw him and I remember that he was on the car.

Q. So that when you got on at Stuyvesant Avenue Mr. Hodler was on the car? A. Yes, sir; he was a passenger on the car when I got on.

Q. And you know that he went with you on that same car to Hackensack? A. Yes, I do.

Q. And you know that you both got to Hackensack at the same time? A. Yes, I know that. 20

Q. Can you tell me about what time it was that he got to Hackensack? A. Well, the running time would be about an hour later.

Q. It took about an hour from Stuyvesant Avenue, or the junction? A. Well, from Belleville turnpike. Stuyvesant Avenue is only two or three blocks away. About an hour and five minutes, I should say.

Q. An hour and five minutes? A. I should say that was about the time. 30

Q. Now, going out to Hackensack was he sober? A. I think he was.

Q. You think he was a sober man going out to Hackensack? A. Yes, sir.

Q. And when you got out to Hackensack he asked you to go into a cafe there? A. Yes, sir either he asked me or I asked him. 40

Charles T. Kavanaugh—Cross

Q. And you stayed in that place only a little time? A. Only long enough for one drink.

Q. You do not know how long he stayed? A. No, sir.

Q. You do not recollect particularly what he drank at that cafe? A. Not exactly what he drank.

10 Q. Nor do you recall whether you paid for the drink, or whether he paid for it? A. No, I don't remember that.

Q. In other words, you do not recall whether you treated him, or he treated you? A. No, sir; I do not.

By the Court: Q. Did you know him? A. Never saw him before I got on the car.

Q. He was a stranger? A. Absolutely.

20 Further CROSS:

Q. Was it a ginger highball he had there? A. Well, I could not remember, Mr. Hood.

Q. I thought, perhaps, by suggesting it to you it would bring it back to your mind. A. It may have been.

Q. Now, you must have left him, then, before 9 o'clock that evening? A. 7:30, 8:30, yes.

30 Q. And the next thing you saw of him was on the platform of the Susquehanna, or of the Erie Railroad, which is it? A. Well, it is both, I guess.

Q. The same thing? A. Yes, sir.

Q. That is a sort of waiting place for people who take the Hackensack car to Newark? A. Yes, sir.

40 Q. And was he there ahead of you, or did he come there after you got there, do you recall that? A. No, not exactly; I don't remember

Charles T. Kavanaugh—Cross

whether he was there before I got there, or not, but I am inclined to think he was there when I got to the depot.

Q. Do you remember how long you observed him on the platform there? A. Only a few minutes elapsed between the time I got there and the time the car arrived.

Q. It was just a short time? A. Just a short 10 time.

Q. Now, you say your impression was when you saw him on the platform that he was under the influence of drink? A. Yes, sir.

Q. Will you kindly tell me what it is that makes you think so? A. Why, his general actions; talkative.

Q. What were his actions? A. Talkative; saying things you would not expect a sober man to say; his general actions. 20

Q. Was he steady on his legs? A. Well, I don't remember that exactly.

Q. Did you notice anything in his bearing that made you think he was under the influence of drink? A. Yes; general wild, excitable condition.

Q. Yes; that is in his talk and manner; but I mean in his bearing, as he carried himself? A. Well, I don't remember exactly whether he was staggering around, or not, now, but I know I was firmly impressed with the thought at the time that he was under the influence of liquor. 30

Q. Yes, I understand that, but I am trying to have you tell us, if you can, what gave you that impression? A. I say it was his general excitable condition, and added to that, his conversation on the car down.

Q. Was he able to take care of himself? A. As far as taking care of himself was concerned, 40

Charles T. Kavanaugh—Cross

yes, I would say yes; walked all right, and got onto the car all right.

Q. Then your idea that he was under the influence of drink is not based altogether on what you saw of him on the platform in Hackensack, but also as the result of your conversation with him on the way down on the Hackensack car? A.

10 More particularly that.

Q. More particularly on account of that; in other words, you did not reach the conclusion that he was under the influence of drink as you saw him on the platform, but reached that later in the evening? A. Well, I suppose I did both times. I noticed the young man as a man I had met on the car and had a drink with.

20 Q. Well, now, what was there in his talk on the car that made you think he was under the influence of drink? A. He had a card, a business card of a lawyer, and he told of a conspiracy that he believed had been entered into to do him harm by this lawyer; a thing I would not expect a sober man to say.

Q. You think lawyers are beyond that? A. Well, I think that one was.

Q. Did you say you did, or you did not? A. I did.

30 Q. Well, now, what else was there? A. Well, his actions towards the girls on the car.

Q. What were those? A. Why, attempting to flirt, and things of that sort; talked about business. Just a general impression that he was under the influence of liquor; I believed he was; honestly believed he was.

Q. As you saw him on the car there was he able to take care of himself? A. Oh, yes.

40 Q. There isn't any question about that? A. No, sir.

Charles T. Kavanaugh—Cross

Q. Now, you say there was a little trouble on the car; in fact, I think you said there were two occurrences on the car; one shortly after you left the dance hall in Kingsland, did you say it was?

A. Yes, sir.

Q. And another after you left the Belleville Junction? A. Yes, sir; I believe that is the way it was; yes, sir. The one trouble, the little hitch 10 between he and the young man about the seat, I am quite certain occurred before we got to the Belleville turnpike.

Q. Who participated in whatever trouble there was after you left the Belleville turnpike? A. There wasn't any trouble after we left the Belleville turnpike as far as he was concerned.

Q. There wasn't? A. No, sir; the trouble then was between the young men on the car and the conductor; dropping the hasp over the door so 20 the conductor couldn't get in or collect the fares.

Q. After leaving the junction the conductor collects another fare? A. Yes, sir.

Q. And after leaving the junction the young men that got on at Kingsland, a lot of boys, dropped the hasp over the door into the compartment so the conductor could not get in? A. Yes, sir.

Q. The young men were in the front compartment, and the conductor in the rear? A. The 30 parties who dropped the hasp were, yes, sir.

Q. Did Mr. Hodler have any participation in that at all? A. After we left the turnpike?

Q. Yes. A. No, sir.

Q. What was the trouble before you got to the Belleville turnpike? A. General fooling. The conductor collecting the fare would go to one, and that one would pass him over to another one, and that one to someone else.

Charles T. Kavanaugh—Cross

Q. What part did Hodler have in that? A. The only thing I saw Hodler in was the controversy about the seat.

Q. What do you recall about that? A. As I remember it, the young man sat down in the seat in a rough way alongside of Hodler, the seat across the car seats two people, and Hodler objected
10 to the way he took the seat.

Q. And that led to a verbal quarrel? A. That is it.

Q. Were there any blows exchanged at all? A. Not that I remember; no, sir.

Q. Did that last for any period of time? A. No.

Q. Was there any movement toward the rear platform of that car in that controversy? A. Of him?

Q. Yes. A. Not that I recall, no, sir.
20 Q. Did you see any people move to the rear platform before you got to the Belleville junction? A. I don't remember that; there was, probably, people got off the car; I think, probably, there was some people riding on the back platform.

Q. Of those who were in the body of the car, as though there was going to be a rumpus. Did you see a crowd push out for a fight, or rumpus, at any time before you got to the Belleville Junction? A. No, sir; nor at any other time.
30

Q. You saw none of that after you left the Belleville Junction? A. There wasn't any.

Q. Then I understand you to say, Mr. Kavanaugh, that there was at no time, either before you got to the Belleville Junction or after you got to the Belleville Junction, a movement of a crowd towards the rear platform—a crowd of the passengers inside—in connection with a quarrel?

40 A. No, sir; not to my recollection.

Charles T. Kavanaugh—Re-direct

Q. Did you see him move about the car on the way home—did you see Mr. Hodler move about the car on the way home from Hackensack? A. Yes, sir.

Q. And was he able to stand up? A. Oh, yes.

Q. And move about the car? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Mac- 10
Sherry:

Q. Mr. Kavanaugh, when the car left Belleville junction for your street, what part of the car did you go in? A. I was still in the smoking compartment; I don't think I ever went from the smoking compartment.

Q. Was that the front or back part? A. The rear part of the car on the southerly trip.

Q. And where did Hodler go? A. I don't recall seeing Hodler after we left the Belleville turn- 20
pike at all.

Q. So that you do not know what Hodler did after you left the junction? A. No, sir; I do not.

Q. You did not see him on the car at all? A. No, sir.

Q. You did not see Hodler from the time you left Belleville junction until you saw him lying in the street, after you had reached home? A. No, sir; I did not. 30

Q. Do you remember the name of the lawyer he had on that card? A. I do.

Q. What was his name? A. Mackay.

Q. What is his first name? A. I don't recall his first name. He was at that time Assistant Prosecutor of Bergen County.

Q. He died since then, did he not? A. Yes.

Charles T. Kavanaugh—Re-cross

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Well, on the way from the junction down to Stuyvesant Avenue, Mr. Kavanaugh, on the way home, do you recall whether or not you looked out on the rear platform to see whether anybody was there? A. I don't recall having looked out to see if there was anybody there.

10 Q. You know that you did not see him in the body of the car? A. I know that he was not in the body of the car; at least, if he was, I didn't see him.

By the Court: Q. When you left the car did you leave it by the rear platform? A. I did; yes, sir.

Q. And do you now remember whether anyone was on that platform when you passed through it? A. I am quite certain there was nobody on
20 it.

Further DIRECT-EXAMINATION by Mr. MacSherry:

Q. Where did you get out of the car? A. At the corner of Stuyvesant Avenue and Kearny.

Q. Which corner? A. Whichever corner the car stopped on. Under the rule, it would be the south corner.

Q. That is, the second corner? A. Yes, sir.

30 Q. As the car was going to Newark? A. Yes, sir.

Further CROSS-EXAMINATION by Mr. Hood:

Q. Now, Mr. Kavanaugh, can you tell me whether you got out on the rear platform before the car took the curve or after the car took the curve in the track? A. I wouldn't be sure of
40 that, Mr. Hood. It is only a very short distance.

William F. Weincamp—Direct

I remember pulling the bell, under the instructions of the conductor, when the car hit the curve, and then I turned to alight.

Q. What is that? A. I remember pulling the bell-cord when we hit the curve and prepared to alight.

Q. You pulled the bell-cord, as I understand you to say, when you hit the curve in the track? A. Yes, sir. 10

Q. Now, when you pulled the bell, at that time where were you? A. Just inside of the rear door.

Q. Just inside of the rear door of the car? A. Yes, sir; between the vestibule and the compartment—really in the car.

Q. In the smoking compartment of the car? A. Yes, sir.

Q. After you pulled the bell, what did you do then? A. Prepared to alight. It was only a matter of minutes, or half a minute. 20

Q. Did you go out immediately to the rear platform, or did you wait until further down the road? A. I really don't remember that.

Q. You don't remember? A. No.

Q. Do you remember whether you went out on the rear platform while the car was still in motion, or did you wait until the car stopped at your corner? A. I don't really remember it, but following my usual custom—

Q. No, I want to know what you remember. 30

A. I don't remember.

WILLIAM F. WEINCAMP, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Weincamp? A. 40 Taylor Street, Orange.

William F. Weincamp—Direct

Q. What is your business? A. Salesman.

Q. For whom? A. David Abrams, of Orange.

Q. What is their business? A. Liquor business.

Q. Were you ever in the employ of the Public Service? A. Yes, sir.

Q. In what capacity? A. Motorman.

10 Q. Were you operating along Kearny Avenue the night of this accident? A. Yes, sir.

Q. Who was your conductor? A. Carroll. I don't remember his first name. Carroll, I believe, was his last name.

Q. Do you remember seeing Mr. Hodler, this gentleman here (indicating plaintiff), that night? A. Not until I picked him up; I found him.

20 Q. Well, that is what I want to know. In what direction was your car coming when you picked him up? A. We were coming towards Newark.

Q. About what time of night was it that you reached Stuyvesant Avenue? A. Well, it was quite late when we reached Stuyvesant Avenue, because we had stopped there on the north side of Stuyvesant Avenue before we put him in the car. I couldn't tell you what time we reached Stuyvesant Avenue.

30 Q. Now, when you approached between the blocks there, between Bennett Avenue and Stuyvesant Avenue, what occurred, if anything? A. Well, I was coming up there rather slowly—plenty of time at that time of night—and I saw what I thought to be a bundle, and I stopped.

Q. Where was that? A. That was, I should say, about 125 or 150 feet south of the curve there on Kearny Avenue.

40 Q. Do you or do you not mean the curve between Bennett Avenue and Stuyvesant Avenue? A. Bennett Avenue and Stuyvesant Avenue.

William F. Weincamp—Direct

Q. Where was this bundle, as you thought then, lying, how far from the rail? A. Well, between 2 and 3 feet.

Q. And what, if anything, did you do? A. I stopped the car and called the conductor, called his attention to it being a man. At that time a gentleman came along; I don't know who he was; he started to whistle, and I run towards the junction, having seen Officer Vreeland standing there before I had left, and called him, and we come back and waited for the officers to come down. In the meantime Mr. Kavanaugh came out of the house there; I don't know whether it was his house, but he came out of the house there. 10

Q. Did you know Mr. Kavanaugh at that time? A. No, sir.

Q. How far away from or how near to Kavanaugh's house was this man lying? A. Well, I couldn't just judge the distance, but it was a very few feet north of his house there; I couldn't say exactly. 20

Q. Where was the man taken? A. Why, we put him on the seats in the car and took him down to the Kearny station.

Q. What kind of a night was it? A. Well, I should judge around 12:30 or 12:40.

Q. No, what kind of a night, what kind of weather? A. Well, it was misty. 30

Defendant's counsel calls for Mr. Quick, and a man in the audience comes forward.

Q. Do you know a man by the name of Henry Quick? A. No, sir; I don't know him.

Q. Do you remember seeing this man standing at my left there that night? A. If I am not mistaken, that is the gentleman from the lunch room at the top of the mountain, at the Mountain House there. 40

William F. Weincamp—Cross

Q. Did you see him? A. That night?

Q. Yes. A. Yes, sir.

Q. Where? A. Down at the car; he helped to put the man on the car; he was one of the ones that helped to put the man on the car.

Q. When did he come there? A. Directly after the officers.

10

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Weincamp, on what line of cars were you motorman? A. Kearny.

Q. Do you recall when it was that you left the junction there at Belleville turnpike? A. As to the minute I couldn't say, but it was between 12:30 and 12:40.

Q. Were you at that junction when what was then known as a Hudson River car passed south?

20 A. Well, that I don't remember.

Q. That you do not remember? A. No, sir. As a general rule, on that trip I wait this side of the switch there for them to come through, but I don't remember whether it was there that night or not.

Q. Do you remember a car starting south shortly ahead of you? A. No, sir.

30 Q. When was it your attention was first directed to this case after the night of 28th of December, 1907? A. I beg your pardon?

Q. When was your attention directed to this case after the night of the 28th of December, 1907? A. Well, I think at the time of the last trial.

Q. You had not been spoken to about it— A. No, sir.

Q.—between the night when you found the man and the last trial? A. No, sir.

40 Q. Did you testify at the last trial? A. No, sir.

William F. Weincamp—Cross

Q. Were you here at the last trial? A. I wasn't in the state.

Q. Oh, you were not in the state? A. No, sir.

Q. Then how do you know it was the last trial?

A. Well, I have heard since.

Q. Oh, you have heard since? A. Yes, sir; through my father, at home, that they came there to find me to testify in the case here.

Q. But that was in February, 1911? A. That I heard of it? 10

Q. That your attention was next attracted to the occurrences on the night of the 28th of December, 1907? A. No, sir, it wasn't in February; it was around in March or April.

Q. You think it was around in March or April, 1911? A. Yes, sir.

Q. Well, in between the 28th day of December, 1907, and the spring of 1911, no one had spoken to you about this occurrence on the night of the 28th of December? A. I don't know what you mean by "no one." I had mentioned it to my wife a couple of times, but outside of that, no, sir. 20

Q. Did you give the matter any thought? A. Well, I had often wondered what had become of the man.

Q. Did you know that a suit was pending in Court about it? A. No, sir.

Q. When did you first know about that? A. Well, in March of 1911. 30

Q. Of last year? A. Yes, sir.

Q. Now, I understand you to say that you were the motorman on the Kearny car that was running south some time between half-past twelve and quarter of one on this night of the 28th of December, 1907? A. Yes, sir.

Q. That you started from the Belleville turnpike? A. Belleville turnpike. 40

William F. Weincamp—Cross

Q. That when you got to Bennett Avenue, or thereabouts, you noticed a bundle in the road?

A. What I thought to be a bundle.

Q. That as you got nearer to the place, you found out that it was not a bundle, but a man?

A. Yes, sir.

10 Q. And you stopped your car where this prostrate form of the man was on the ground? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And called the attention of your conductor to that thing? A. Yes, sir.

20 Q. Will you describe to me as nearly as you can what the position of the man was on the ground? A. Well, as near as I can recall, he was lying on the right side, with his knees sort of doubled up, with his face towards Bennett Avenue; his feet, I wouldn't say positively, but as close as I can remember, wasn't no more than two or three feet from the track.

Q. Was he lying directly across the road or in a slanting position? A. Well, that I don't remember, but it seems to me that his head was direct towards the curb, straight.

Q. Well, then, you think that practically his body was lying at right angles to the track? A. Well, yes, sir.

30 Q. And he was lying on his right side? A. On his right side; yes, sir.

Q. And you say that his face was in the direction of Bennett Avenue? A. No, sir; in the direction of Stuyvesant Avenue.

Q. Oh, I thought you said Bennett Avenue before. A. Stuyvesant Avenue.

40 Q. Then his face was looking south? A. Looking south; yes, sir.

William F. Weincamp—Cross

By the Court: Q. You mean Stuyvesant Avenue? A. Stuyvesant Avenue.

Q. I think you did say Bennett Avenue. A. Well, the street south.

Mr. Hood: Well, that is Stuyvesant Avenue.

By Mr. Hood: Q. Did he have a hat on? A. No, sir.

Q. Did you discover any hat around there? 10

A. I don't remember who discovered the hat, but it seems to me I did pick his hat up.

Q. Do you know where you picked the hat up?

A. Towards the curb, toward Mr. Kavanaugh's house, if it was Mr. Kavanaugh's house. I didn't know at the time whose house it was.

Q. On the same side of the road where the body was lying? A. Yes, sir.

Q. Nearer his house? A. Yes, sir.

Q. Can you say how many feet away from the body? A. No, I couldn't. 20

Q. At what point with reference to the curve in the track do you say this body was lying? A. I don't understand you.

Q. I understood you to say before to counsel for the defendant that the body was lying at a certain distance from the curve in the track. A. Well, I would judge 125 or 150 feet.

Q. Did you make any special observation for the purpose of determining that? A. No, sir. 30

By the Court: Q. South of the curve in the track? A. Towards Stuyvesant Avenue.

By Mr. Hood: Q. Did you make any special observation on the night when this happened?

A. Did I make any special observation?

Q. As to where this body lay on the track? A. Well, I can't say I made any special observation, but I made the remark that if it wasn't for coming up there slow I might have hit the man; I 40

William F. Weincamp—Cross

thought it was closer to the track than it was; that is all.

Q. No, that is a different proposition. I mean from the curve, not from the track. A. Well, that is what I say: I had a reason to notice how far it was from the curve.

10 Q. Why? A. On account of the position the man was lying.

Q. Why? A. Because if the man was lying closer on the track it is probable I would have struck him.

Q. You mean the place that you discovered him, if he had been nearer to the track, that you might not have been able to stop your car; is that your notion? A. Yes, sir.

20 Q. Where were you on the track when you first discovered him? A. Well, I should say, a little the other side of the curve.

Q. You had not struck the curve yet? A. No, sir.

Q. Were you running fast? A. No, sir.

Q. Could you not stop your car in 125 or 150 feet?

Objected to.

A. Yes, sir.

Objected to as not cross-examination.

Objection overruled.

30 Defendant's counsel prays an exception, and the same is allowed.

Q. Could you not have stopped your car that night, at the rate you were going, within twenty-five or fifty feet?

Objected to on the same ground.

Objection overruled.

Defendant's counsel prays an exception, and the same is allowed.

40 A. Yes, sir.

William F. Weincamp—Cross

Q. So that it could not have been the distance within which you could have stopped your car that could have fixed this point? A. I don't understand you. You will have to make it plainer to me.

Q. I will try to, because I want to get your best judgment on it. You say that you noticed this man just slightly before you hit the curve in the track? A. Yes, sir. 101

Q. And that your notion is that he was lying 125 feet south of this curve in the road, because if he had not been lying that far away you might have run over him? A. No, sir; I didn't say that.

Q. If I misunderstood you, kindly set me right. A. Yes, sir. I said if his body had been laying—that I had reason to notice that he was away from the curve that night, because if he had not been laying away from the curve my fender might have hit the man. 201

Q. But I understood you to say that that was your reason for noticing that that was 125 feet from the curve. A. No.

Q. Now, I want you to tell me why you say that the body was lying 125 feet away from the curve? A. By just judging the distance.

Q. Just general observation? A. Just general observation. 301

Q. No particular observation about it at all? A. No, sir.

Q. What would you say the length of this room is? A. I would say about fifty feet or so.

Q. What would you say the width of this room is? A. I would say thirty-five feet.

Q. When you discovered the man he was unconscious, I suppose? A. Yes, sir.

Q. Did you move him any? A. No, sir. 401

William F. Weincamp—Cross

Q. So that he was in the same position in which you found him at the time when the officers came up? A. Yes, sir.

Q. Who do you say blew a whistle? A. There wasn't no one blew a whistle; there was a gentleman came through there and whistled through his fingers.

10 Q. And you left your car and went to the junction to get a policeman? A. I didn't go all the way to the junction.

Q. How far did you get? A. I went back about as far as Bennett Avenue, when I saw the policeman coming down.

Q. Was there one or more policemen? A. There were two.

Q. Can you say whether the body was in the same position in which you found it at the time
20 when the police got there? A. Yes, sir.

Q. And at the time when Mr. Kavanaugh got there? A. Yes, sir.

Q. Can you say who was there up to the time that the body was removed, excepting yourself and the motorman? A. Well, there was Mr. Kavanaugh, Dr. Squires, this gentleman that whistled, and two gentlemen that came running down in the rear of the policemen from the Mountain House.

30 Q. Two gentlemen that came running down? A. From the Mountain House; they came running down, closely following the policemen.

Q. And the policemen? A. And the policemen.

Q. Yourself and the motorman? A. And the conductor.

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

Rudolph F. Bodecker—Direct

RUDOLPH F. BODECKER, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Bodecker? A. Hackensack, New Jersey.

Q. How long have you lived there? A. Two years.

Q. What is your business? A. Investigator 10
for the Public Service.

Q. In the month of December, 1907, what business were you engaged in? A. I was engaged at the Newark office—the same line.

Q. And in the course of your work did you make any investigation about this claim of Mr. Hodler's? A. I did.

Q. Did you or did you not have an interview with him in the month of December, 1907? A. No, when I interviewed Mr. Hodler, I believe, it 20
was the latter part of February, 1908.

Q. And where? A. At his home, at the corner of Plane and Central Avenue.

Q. In whose presence? A. In the presence of his mother.

Q. And how did you have an interview with him, in what manner? A. I asked him for his version of the accident by writing on slips of pad paper, which he had there, and then he answered me verbally. 30

Q. And what did you do when he answered you? A. I put the substance of his answer in writing on the statement which you have there.

Q. And what did you do after writing the statement out? A. I asked him if he would sign it—that is, by writing the question to him—and his mother objected; she said that he shouldn't sign any paper, because his counsel had told him not to do so. 40

Rudolph F. Bodecker—Direct

Q. I am showing you a paper marked "D-4 for identification," and ask you if you have seen that paper before (shown to witness)? A. Yes, sir; that is my writing.

Q. Where did you write it? A. In the presence of Mr. Hodler and his mother, at his home.

10 Q. Is that the writing that you have been testifying about? A. Yes, sir.

Q. Did you or did you not take down what Mr. Hodler said to you? A. I did.

Q. Has there been any change in that paper in any way since you made it out that night, so far as you can see, except the wear and tear on it? A. No, sir.

Q. Is or is not that the same paper that was in evidence in the last trial?

20 Objected to.

A. Yes, sir.

Mr. Hood: I do not know whether he can testify that this paper was in evidence at the last trial.

The Court: I do not know whether he can either.

Q. Well, can you? A. I was here—

30 Mr. Hood: I object to that question, because it is a matter of no consequence whether or not it was in evidence. I think it is irrelevant.

The Court: I think it might be a relevant fact. I will let the answer stand.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

Rudolph F. Bodecker—Direct

Q. Will you turn the paper over and tell me if there is anything written on the back? Do not tell me what it is yet. A. Yes, sir.

Q. Who wrote that? A. Mr. Hodler.

Q. When? A. After he had read the paper.

Q. Did you write any of it on the back? A. No, sir.

Mr. MacSherry: I offer this paper in 10
evidence.

Mr. Hood: I object. I do not understand upon what theory this paper is offered in evidence. The gentleman goes to interview someone, and takes his memorandum of the interview. It does not appear that Mr. Hodler said anything in contradiction of the interview. I concede that this gentleman can identify the paper, so that he can testify from it, but I can not see that 20
any paper that he prepared at that time because of an interview, even if it has a memorandum on there by Mr. Hodler, is an instrument that becomes evidence or is to be submitted as evidence in itself—the document itself. I therefore say that it is incompetent, and I object to it.

Mr. MacSherry: Mr. Hodler has been examined on it; he contradicted the paper, and how it was made out, and explained it. 30

The Court: I will receive that paper.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal),
Circuit Court Judge.

Marked Exhibit D-4.

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Rudolph F. Bodecker—Direct

Q. I call your attention to D-5 for identification, and ask you if you have seen that paper before (shown to witness)? A. Yes, sir; that is my writing.

Q. Where was that written? A. At Mr. Hodler's home, in the presence of himself and his mother.

10 Q. At the same time as the other paper or some other time? A. At the same time; this is a continuation of that one.

Q. What did you do with that after you had written it? A. When he refused to sign any paper, I wrote this on the back of it (indicating).

Q. I want to know whether you read it to him or whether he read it or not? A. He read the statement over.

Q. And after reading it what did he do? A.
20 He signed this.

Q. Well, he signed his name there? A. He signed his name there.

Q. And the other writing on the back? A.
That is my writing.

Mr. MacSherry: I offer this other paper, D-5 for identification.

Mr. Hood: I object to it for the same reason that I urged before.

30 The Court: It appears to relate to the occurrences that are the subject of inquiry? I will receive it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal),
Circuit Court Judge.

Rudolph D. Bodecker—Cross

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Bodecker, which of these indorsements on the back of the two sheets do you say is in your writing and which do you say is not in your handwriting? A. The indorsement on the first sheet, marked "Exhibit D-4," is in Mr. Hodler's handwriting; the indorsement on the second sheet, the continuation of his story, marked "Exhibit D-5," is in my handwriting, but signed by Mr. Hodler. 10

Q. So that you say that the indorsement on the back of sheet No. 1—both the indorsement and the name are in Mr. Hodler's writing, and you say that on sheet No. 2 the indorsement is in your handwriting and the name is in his? A. Yes, sir.

Q. There is a wonderful similarity between the two handwritings, is there not? A. No.

Q. You think not? A. No, Mr. Hodler's handwriting is considerably different from mine. 20

Q. You think it is? A. I think so. Of course, it is written very distinctly, in plain English, but the curves and the formation of his letters are different.

Q. The language is practically the same, is it not? A. Yes, sir. I will tell you how that came.

Q. Did you draft the form of the indorsement? A. That was put as a question to him, if he would have any objections to sign that form on the back of the statement, as long as he refused to sign the body of it. 30

Q. Did you draft the form of the indorsement? A. I wrote that on the back of the second sheet as I finished his statement, asking him if he would sign it that way.

Q. Then it is your composition? A. Yes, sir.

Q. And the second sheet was signed before the first? A. No. I put that indorsement on the 40

Rudolph F. Bodecker—Cross

back, and asked him if he had any objection to signing that, and he said no, and then he signed that and copied my indorsement on the other sheet in his own handwriting.

Q. How did he come to copy your indorsement on the other sheet? A. Because he had the two papers in front of him.

10 Q. Did you ask him to do it? A. I asked him to indorse both sheets because they were single sheets.

Q. Mr. Bodecker, you say that you wrote the indorsement on the back of the second sheet of this paper and asked him to sign it? A. Yes, sir.

Q. And you say further that he then copied your indorsement on the first sheet and signed it? A. And signed it; yes, sir.

20 Q. I ask you whether you requested him to copy the form of that indorsement? A. I did.

Q. You asked him to copy it? A. To copy the indorsement on the first sheet.

Q. And that is how it got there? A. Yes, sir.

Q. Now, I understand you to say that this thing occurred on the 19th of February, 1908? A. Yes, sir.

Q. I understand you to say that it occurred in his house? A. Yes, sir.

30 Q. And that you got whatever you wrote down there as the result of questions that you directed to him in writing? A. Yes, sir.

Q. He answered them by word of mouth? A. Yes, sir.

Q. You wrote down, not the words that he used, but you used your own language in writing out the substance as to what he said? A. Practically so.

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Rudolph F. Bodecker—Re-direct

RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. This is one statement, is it not? A. Yes, sir.

Q. Written on— A. Written on two sheets.

Defendant's counsel reads Exhibits D-4 and D-5 to the jury.

Mr. MacSherry: I want to offer in evidence now, if your Honor please, a paper consisting of four sheets, marked "D-6 for identification," admitted by Mr. Kavanaugh when he was on the stand for the plaintiff yesterday as having been made out in his presence and having been read by him and signed by him. 10

Objected to as incompetent and irrelevant.

Counsel argue. 20

Mr. Hood: I have made my application before, and I renew my application, for a jury view.

The Court: If the jury think a view of the locality would be useful, I always feel inclined under those circumstances to grant a view, unless it is going to be inconvenient, not worth the trouble, or for some other reason objectionable. I will not say anything more about it now. I 30 will hear anything you have to say in the absence of the jury.

At 1 o'clock p. m., the Court takes a recess of one hour.

Rudolph F. Bodecker—Re-direct

After recess.

Mr. MacSherry: Your Honor will bear in mind that I have offered in evidence a paper writing purporting to be a statement alleged to have been made by Mr. Kavanaugh, he having been shown it while on the stand and having examined it.

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The Court: (After argument.) The enduring thought appears to me to be, when we are dealing with the case of witnesses who are not parties, that the witness's attention should be directed to those portions of the statement which are claimed to be contradictory of his evidence. That would not apply to the case of a party. A party's admissions require no foundation to be laid for introducing them. They may be offered as part of the case of the party who relies upon them, although the party may not be on the stand and may not be asked about them. They stand on their own merits. If they are contradictory of his testimony, they speak for themselves. He may also be asked about them, and, if they are not contradictory, they go for nothing. But it seems to me that in the case of witnesses who are not parties, it is only justice to the witness, and I had always supposed it to be the practice, that a foundation should be laid for the use of the instrument by calling the attention of the witness to the features of his written statement which are claimed to contradict his evidence, and thus give him the opportunity to be heard as to that question. Otherwise the matter would be considerably at large. Half a dozen long documents might

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William H. Carroll—Direct

be introduced, all made by a witness who is not a party to the case and bearing more or less on the subject-matter of the suit. If he admits that he wrote them, or his signature is proved by the testimony of some other witness, they go in without any scrutiny as to whether they are contradictory or otherwise, and so lumber up the case, whereas if the matter were sifted in the process of cross-examination, some progress would be made. 10

I will adhere to my first impression, Mr. MacSherry, and sustain the objection to this offer.

Defendant's counsel prays an exception, and the same is allowed.

Mr. MacSherry: By consent, if your Honor please, I will read the testimony of William H. Carroll, a witness, at the last trial, who is down in Cuba. 20

(Reading.)

“WILLIAM H. CARROLL, sworn in behalf of defendant:

“Direct-examination by Mr. MacSherry:

“Q. Where do you live, Mr. Carroll? A. At present in Detroit, Michigan.

“Q. What are you engaged in? A. United States Marine Corps, the military arm of the Government. 30

“Q. How long have you been in the United States army? A. Since May 27, the last time, and 12 years previous to that.

“Q. Where are you stationed now? A. Special service, quartermaster's service, it is called, recruiting service, in Detroit, Michigan. 40

William H. Carroll—Direct

“Q. Were you ever in the employ of the Public Service? A. I was in their employ on two occasions while I was in Newark.

“Q. Were you in the employ of the Public Service in the month of December, 1907? A. I was at that time working out of the Miller Street barn.

10 “Q. Have you done any work for the Government abroad? A. Why, yes, I have been on foreign service.

“Mr. Osborne: What has that got to do with running this trolley car?

“Mr. MacSherry: I have got a right to show the intelligence of this man and his record.

“The Court: There is no objection.

20 “Q. What kind of service have you done for the United States Government abroad? A. I have generally worked in the quarter-master's department, and I was in a little insurrection in the islands.

“Q. What do you say? A. A little insurrection, I was out in the islands.

“Q. Have you been awarded any medals by the United States Government? A. I got a medal; yes, sir.

30 “Q. Were you a conductor on the car at the time of this accident? A. The night of the accident, or the night I found the gentleman, I left the end between 12:30—

“By the Court: Q. Were you conductor? A. Yes, sir.

“By Mr. MacSherry: Q. What line of cars were you conductor on? A. On the Kearny line.

“Q. Who was your motorman? A. Weincamp.

40 “Q. Just tell us what you saw there that night. Did you see anything? A. Well, I left the end between 12:30 and 12:45—

William H. Carroll—Direct

“By the Court: Q. Left what? A. The end of the line, Belleville turnpike, the intersection, between 12:30 and 12:45.

“By Mr. MacSherry: Q. Do the Hackensack cars go over the same road? A. Yes, sir. The Hackensack is supposed to leave there at 12:30. I came down. Just before—well, just after we passed Bennett Avenue the motorman said, 10
‘There is somebody laying alongside of the track.’ I said, ‘Stop the car, and we will see what it is.’ So I got out where we stopped, and the front platform had just passed the man about seven or eight feet, and I got out to see him, and we struck a match and noticed the man laid there.

“Q. Where did he lie—about how near to the track, I mean? A. Two or three feet from the track. He laid on his right side; his feet was— 20
his head was towards the junction, his face was towards Newark, in that position, with his head towards the curb.

“Q. Now, at what point in the road did he lie, I mean opposite what point, if you know? A. Well, if Mr. Cavanaugh’s door was opened, he was laid right at an angle with his door.

“By Mr. MacSherry: Q. The man laid? A. Yes, sir. Because the light was right on an angle, almost, with this man.

“By Mr. MacSherry: Q. Was there a light in 30
the door of Cavanaugh’s house? A. Yes, sir—not at that time; that was after I had whistled and some other young man there—I don’t know his name just now—he whistled, and Officer Vreeland and Shepard answered to the call.

“Q. Did or not the light from the hall in Cavanaugh’s house strike on the spot where this man lay? A. Yes, sir; it shined pretty near directly on the man himself. 40

William H. Carroll—Cross

10 "Q. And what, if anything, did you do? A. Why, we called for a doctor, and one of the officers got a doctor. The doctor says that he was hurt pretty bad, the best thing we could do was to get him to a hospital; and so I suggested to take him in the car and meet the ambulance at the City Hall there in Kearny. So we put him on the car and went down and met the ambulance at the City Hall.

"Q. How long did you operate on that line as conductor? A. Why, almost a year.

"Q. Have you seen that map? A. That is the first time, sir.

"Q. Well, does or does not that, in your opinion, correctly show the condition of that curve at that time? A. Yes, sir.

20 "Q. You went over there for a year. Was or was not that an easy curve for your cars to go around? A. Well, that was classed as an easy curve compared with some of them on the same line, sir."

Mr. Hood (reading):

"CROSS-EXAMINATION by Mr. Osborne:

30 "Q. You mean an easy curve for your car? A. Yes, sir.

"Q. What type of car did you run? A. A 700 and 400, open cars, both cars.

"Q. Small cars? A. And 1600, long ones.

"Q. Single truck or double truck? A. Double truck?

"Q. Both double truck cars? A. Yes, sir.

"Q. Had they abandoned those small cars on that line at that time? A. Why, the smallest car they had on there was the 700.

40 "Q. Well, they used to run some little, single

William H. Carroll—Cross

trucks there? A. I never worked a single truck.

“Q. They run them on that line, did they? A. Not to my knowledge, sir.

“Q. How long a car was it? A. Well, that is something I couldn't say, sir.

“Q. As long as the Hudson River cars? A. Well, no, not quite as long.

“Q. They were still longer? A. The Hudson River is a bigger type of car. 10

“Q. A different type of car? A. Yes, sir.

“Q. Swung differently? A. Well, I don't know about the swing of a car. All I ever done was a conductor.

“Q. You say the light shown from Mr. Cavanaugh's house pretty nearly directly on Hodler. What do you mean by that? A. When the door was opened of Mr. Cavanaugh's house the light shone across the feet of the man. 20

“Q. Shone across his feet? A. Yes, sir.

“Q. His feet were towards the track and his head was towards the sidewalk? A. Yes, sir.

“Q. If it shone across his foot, why didn't it shine across the rest of him? A. Because the light—the corner of the house prevented it from doing it.

“Q. Have you got a pencil in your pocket? A. Yes, sir.

“Q. Take your pencil and indicate the position in which Hodler lay on the street there, please. 30

“The Court: I do not like to have witnesses put marks on the map.

“Mr. Osborne: No, I do not want him to put a mark on—just lay his pencil on the map.

“A. He laid on an angle, like that (indicating).

“Mr. Osborne: He was not away up on the sidewalk. 40

William H. Carroll—Cross

“Mr. MacSherry: He did not say he was. I submit that if it goes on the record, it is improper. I think the witness ought not to be interrogated on the map until the map is explained to him, inasmuch as he has already said that he has not seen the map before.

10

“Question read.

“Mr. MacSherry: Now, I ask permission to tell the witness about the map, the number of feet to the inch and where the track is and where the houses are.

“By the Court: Q. Do you understand the map? A. No, sir; not directly, sir.

“By Mr. Osborne: Q. Then you do not know whether that is a fair representation of the condition? A. Yes, sir; but I don't know about the distances here.

20

“Q. I do not ask you anything about distances. A. The map is, yes, sir.

“The Court: The witness was asked a question that involved something more than a knowledge of the character of the curve; he was asked to locate an object on the street, and the question is whether he has sufficient acquaintance with the map to locate it correctly.

30

“Mr. MacSherry: May I tell him what the map is about?

“The Court: Yes, you may tell him.

“Mr. MacSherry: (Indicating on map.) This is the curblin, there are the trolley tracks, there is Cavanaugh's house, there is Bennett Avenue, and your car is coming in that direction and every inch on the map is 10 feet.

40

“Witness: Yes, sir.

William H. Carroll—Cross

“Q. Now, you understand the map? A. Yes, sir.

“Q. Will you indicate on the map by laying your pencil on it the position in the road in which Mr. Hodler lay when you got off the car and found him there? A. Roughly speaking, around in here (indicating on map with pencil).

“Q. I did not mean the point where he lay; I mean the angle. You say his head was in one direction and his feet in another? A. Well, his feet was towards the rails and his head was towards the curb; he laid on his right shoulder—

“Mr. MacSherry: One moment.

“The Court: I think it is proper for Senator Osborne to have his question answered in the way he asks it. (To witness.) Take a shorter pencil. Imagine this metallic end to be the head. Just locate the man on the street. 20

“By Mr. MacSherry: Q. This is Cavanaugh’s house (indicating) and every inch on that map is 10 feet, do you understand? A. Yes, sir. About this way (indicating with pencil).

“By Mr. Osborne: Q. Is that right? A. (Indicating.) About that way, only his head—I can’t very well represent the way he laid with the pencil; you can’t bend it like the man. His body was more on a curve. 30

“Q. Didn’t I understand you to say that his head was towards the curbstone and his feet towards the track? A. Yes, sir; his head towards the curbstone and his feet towards the track.

“Q. Well, that does not correspond with the position that you indicate. A. I just explained that you can’t bend a pencil the way the man was bent.

“Q. Then the man was not lying straight? A. No, sir; not directly. 40

William H. Carroll—Cross

“Q. There were some repairs made to that track soon after this accident, were there not? A. That is something I couldn't say, sir.

“Q. Were you not still running on it after the accident? A. No, sir.

“Q. Were you taken off immediately after the accident? A. No, I went on night work in the
10 Miller Street barn.

“Q. What were you before the accident? A. I was conductor.

“Q. Were you on the night work before the accident? A. Yes, sir; I was; I was generally extra; I was both.

“Q. Then this was not a regular run? A. It was at that time; yes, sir.

“Q. How long had you been on it? A. About two weeks.

20 “Q. Had you been taken off night work at the Miller Street barn? A. I went on after.

“Q. Well, you had been on night work at the Miller Street barn before, I understood you? A. No; afterwards. All cars was night work.

“Q. Hadn't you been on night work at the barn and not on a run immediately preceding the accident? A. No, afterwards.

“By the Court: Q. Answer the question. Had you been on before? A. Night work?

30 “Q. Yes. A. Yes.

“By Mr. Osborne: Q. At the Miller Street barn? A. Yes, sir.

“Q. Running extra? A. No.

“Q. What was this night work at the Miller Street barn that you were doing? A. Night starter.

“Q. Well, you were not starter at the Miller Street barn before the accident, were you? A.
40 Yes, sir.

William H. Carroll—Cross

“Q. How long before? A. While the regular night starter was sick.

“Q. How long had you been on as night starter at the Miller Street barn before the accident? A. That is something I couldn't say; maybe a month.

“Q. And how long had you been making this particular run before the accident? A. I think I was on there about two weeks.

10

“Q. About two weeks? A. Yes, sir.

“Q. Then you were not running extra then? A. Not at that time; no, sir.

“By Mr. MacSherry: Q. How many feet away do you think his body lay from the corner of Cavanaugh's house? A. Why, 25 to 30, sir.”

Mr. MacSherry: Now, I would like to introduce in evidence a diagram of the curve, made by Mr. Hodler—admitted by him to have been made by him on the other trial.

20

The Court: I think he identified it.

Mr. MacSherry: Yes, sir.

The Court: You may do so.

Mr. Hood: I think he did say something about it, but there was a controversy about it, arising from the fact that there were a number of pencil marks on this paper, and the proposition I am not clear about is the pencil mark on this paper that he said was his.

30

Mr. MacSherry: This one (indicating on paper)?

Mr. Hood: If Mr. MacSherry says that was the one, with proper explanation to the jury, I have not any objection. If your Honor thinks there is no objection to it, we could divide this paper on this line (indicating), so that we should have in the

40

John S. Mackay—Direct

case only what he identifies. Of course, it mutilates the paper.

The Court: I see here three curves.

Mr. Hood: Does your Honor think there is any serious objection to tearing off that paper on that line, so as to prevent in this case the thing that he identifies?

10 The Court: There is no objection to presenting what the witness said he drew, and nothing else.

(The paper referred to, after being torn as suggested, is marked Exhibit P-1.)

Mr. MacSherry: A witness in the last trial, Mr. Mackay, a lawyer in Hackensack, gave his testimony, and since that trial he has committed suicide, and, by consent, I am going to read his testimony.

20 Mr. Hood: No, not by consent; you have a right to offer it; it is not by consent, because I think it is your right.

Mr. MacSherry (reading):

“JOHN S. MACKAY, sworn in behalf of defendant:

“Direct-examination by Mr. MacSherry:

“Q. Mr. Mackay, where do you live? A. Hackensack, New Jersey.

30 “Q. What is your business or profession? A. I am a lawyer.

“Q. How long have you been practicing law? A. Fourteen years this November.

“Q. Where is your office? A. In the postoffice building, on the main street, in Hackensack.

40 “Q. Have you held any public office in Hackensack lately? A. I was the assistant prosecutor for six years and appointed prosecutor for one

John S. Mackay—Direct

month at the expiration of the term or the death of Mr. Koester.

“Q. But your office just expired, I believe? A. I am not holding office at the present time.

“Q. Have you a case in Paterson? A. Yes, I have a hearing on a rule to show cause at 2 o'clock at Mr. O'Bryne's office, 16 Clark Street.

“Q. And that is the reason that you are being called out of order? A. I so understand. 10

“Q. Do you remember seeing this gentleman before indicating the plaintiff)? A. I saw him in—

“Q. Where? A. In Mr. Ryan's cafe, in Hackensack, one evening.

“Q. How long ago is that, do you recollect? A. It was in the latter part of 1907. I remember the date now, because I have refreshed my memory since. 20

“Q. Where is Ryan's cafe? A. It is directly north of the Susquehanna station abutment, on the main street, on the east side of Main Street, adjoining the Susquehanna railroad tracks and opposite the station.

“Q. Is it or is it not a general and popular resort for men, a first-class place, there? A. It is; you can consider it a first-class place.

“Q. And at that time were you interested in politics? A. At that time of the year I probably was discussing it, no doubt. I have occasion to go there frequently with friends. 30

“Q. What time was it, do you think, Mr. Mackay, that you went there? A. I had been to Paterson that day in connection with a book that I was getting up, and it seems to me it was between half-past nine and ten o'clock, in that neighborhood, when I stopped in.

“Q. What book were you getting out?

“Objected to as immaterial. 40

John S. Mackay—Direct

“The Court: You may ask it as a circumstance.

“Q. I merely wanted to know if at that time you were going to the cafe to see people interested in a book that you were about to produce? A. I had a meeting there with one of the agents.

10 “Q. What time did you get to the cafe? A. I should judge between half-past nine and ten o’clock, in that neighborhood; I couldn’t say exactly.

“Q. The Senator wants to know the kind of book you were getting out? A. It was a digest of the New Jersey decisions.

“Q. Do you remember seeing Mr. Hodler there? A. I do.

“Q. Had you met him before? A. I had not; he introduced himself.

20 “Q. What time of the evening did he come in the cafe? A. He was there when I entered.

“Q. Was he standing or sitting? A. I didn’t see him until I was in the place, and I was conscious of his presence when he came up and met the group that I was with.

“Q. Who were with you? A. Mr. Brooks was there and Mr. White was there and Mr. Ryan himself.

30 “Q. Was Mr. Brooks there when Mr. Hodler came in? A. He was there before he came in, to my knowledge; he was in company with me before Hodler approached.

“Q. What time did Mr. Hodler come in? A. Well, I was conscious of Mr. Hodler’s presence probably after I had been in there about ten minutes. I can’t say, of course, that I saw him coming in.

40 “Q. How did you become conscious of his presence? A. He was talking quite loudly and he

John S. Mackay—Direct

introduced himself, and some one in the company asked him to have a drink. Anyway, he joined the group.

“Q. What did he drink? A. I couldn't say exactly whether it was whiskey or a cocktail that he was drinking; it was a colored drink in a whiskey glass.

“Q. What was his condition then? A. Well, I stayed there some little time, and his condition seemed to be getting worse. 10

“Q. Well, now, just tell us frankly what was his condition? A. Well, I should say he was intoxicated.

“Q. Did he or not talk much? A. He talked much and wanted to sing, and I think he did sing.

“Q. What did he sing? A. That I couldn't tell you.

“Q. How many drinks did he take in there? A. I didn't count the number, considerable. He was there until he left for his car. 20

“Q. How long did he stay in there? A. Well, he left before I left; I should judge he left somewhere between 11 and 12 o'clock.

“Q. Did he at any time go out and stay out for half an hour or an hour or so and come back? A. Not to my knowledge.

Q. Did you miss him there at all? A. No, I did not. Of course, I was talking also. I didn't miss him. 30

“Q. And what time do you think he left? A. Well, between eleven and twelve.

“Q. How did he act as he went out? A. Intoxicated.

“Q. Did he go out alone or was any one with him? A. He went alone.

“Q. Which direction did he take? A. He went toward the Main Street door of the cafe. 4

John S. Mackay—Cross

“Q. What did you see him drink during the evening? A. I don't know whether it was whiskey; it was some dark colored liquor in a small glass, like a whiskey glass; it may have been sherry or some other—

“Q. Did he sit down at any time? A. No, he was standing there at the bar and moving around.

10 “Q. Without desiring to lead you, I want to know whether he was quiet or boisterous? A. He was inclined to be talkative and press himself forward, and inclined to be boisterous.

“Q. Was he able to walk without staggering when he went out? A. You could notice that he was under the influence of liquor when he walked.

“Q. Did you give him your card? A. He asked me for my card after talking to him, and I laughingly gave it to him.

20 “Q. I am showing you a card, marked Exhibit P-2, and ask you is that your card, the card that you gave him (showing to witness)? A. That is the card I gave him.

“Q. Was there anything on the back of it when you gave it to him? A. No.

“Q. Did you see him after that? A. I never saw him after that.”

Mr. Hood (reading):

30 “CROSS-EXAMINATION by Mr. Osborne:

“Q. You never saw him after that? A. I did not.

“Q. Until here? A. I say I never saw him. I saw him once until this morning. I saw him the last time I was here, about a week or so ago, the day that this case was expected to come on for trial.

“Q. So that the first time you saw him was in 40 1907? A. Yes.

John S. Mackay—Cross

“Q. And the last time you saw him was about a week or so ago? A. Yes.

“Q. And those were the only two times that you saw him? A. And this morning was the third time, or this afternoon.

“Q. Who pointed him out to you about a week ago? A. Who pointed him out?

“Q. Yes? A. He wasn't pointed out to me at all. I came in there and I described to the man I was with, Mr. Bodecker—I described to Mr. Bodecker, as I recalled, how—as I recalled the face of the man, his talk and his manner, and so forth; and the fact that I corresponded on the subject refreshed my memory. 10

“Q. Corresponded with him? A. Corresponded in the matter.

“Q. With whom? A. With his mother, I suppose, some lady. 20

“Q. You had some correspondence with his mother regarding the case? A. She wrote me and I answered her letter.

“Q. And your recollection all this time was perfectly clear what happened on that night? A. I refreshed it two months after the case, when the claim agent of the Public Service Corporation, or Railway Company, called upon me and asked me about the case.

“Q. About what case? A. If I knew the man, and so forth and so on. 30

“Q. Knew what man? A. Mr. Hodler.

“Q. How did you know it was Mr. Hodler that he called to see you about? A. He told me the circumstances and I recalled the case.

“Q. Told you the circumstances of what? A. About Hodler.

“Q. He told you you had met a man by the name of Hodler, did he? A. He asked me if I had met a man named Hodler, and described him. 40

John S. Mackay—Cross

“Q. You did not know his name? A. No, but I confirmed it afterwards by Mrs. Hodler’s letter.

“Q. He described a man that you believed to be the man that you saw in the saloon that night? A. Yes, he described him then.

10 “Q. How many times did you have an interview with a representative of the company about the case? A. Three times. Three times; once then, once a considerable time ago, probably a year or so ago, I guess it must be, and once when I came down here the last time, expecting to testify as a witness.

“Q. And your recollection has been refreshed each time by them, has it? A. It has not been refreshed; it has been brought more to my attention.

20 “Q. Well, the circumstances have been brought more clearly— A. I don’t know what process the mind goes through to reach that conclusion, but it has probably helped it.

“Q. Did the agent of the company when he saw you first tell you just what had happened in the saloon? A. What is that?

“Q. Did the agent— A. No, he did not.

30 “Q. If he did not tell you what had happened, how could you determine whether it was the man you were talking about or not? A. I wasn’t sure at that time; it was the subsequent evidence, the subsequent writing and correspondence, that convinced me.

“Q. Just now did you not say that from your conversation with the agent of the company you determined that this was the man? A. I believed him to be the man at that time; I wasn’t sure.

40 “Q. And it was from a description of the agent of the company, a Mr. Bodecker—from his description of what took place there, that led you to believe that this was the man?

John S. Mackay—Cross

“Mr. MacSherry: He did not say Bodecker.

“Q. Who was the agent? A. That I formed my belief in my mind, which I now say is a positive belief.

“Q. So that your first impression of what took place there was gained from what an agent of the company told you? A. Yes. 19

“Q. You did not have prior to that a very clear recollection of what had taken place that night, did you? A. I did have, but nothing—what took place and actually occurred; and after Mrs. Hodler wrote to me I didn't want to disclose my knowledge on the subject, because I would rather not have been called as a witness; I would rather now not have been called as a witness; and I wrote Mrs. Hodler in a vein so that she probably wouldn't call me. 20

“Q. You would rather be called by your friends on the other side than by Mr. Hodler, would you not? A. No, I would rather not be called at all.

“Q. I suppose you do not do business up in your county with the traction company, do you? A. No, I am constantly opposed to the traction company in every way, and they are not indebted to me—

“Q. You never represented them up there? A. No, sir. I am positively opposed to them and ask no favors. 30

“Q. Then until the agent of the company, whatever his name was, refreshed your memory you did not have a very clear idea of what took place there that night, did you? A. Nobody attempted to recall it to my memory, and so I didn't attempt to remember it.

“Q. You didn't have a clear idea, did you? A. I had a clear idea— 40

John S. Mackay—Cross

“Q. You did not have a very good recollection of the details, did you? A. Just as I told you the details as they occurred.

“Q. Well, that is the reason I say that you did not have a very good recollection. Then you think you did? A. I think so.

10 “Q. How long had you been drinking before Hodler came in? A. I had been there probably about ten minutes—not drinking.

“Q. Not drinking? A. No.

“Q. Where were you, standing up or sitting? A. I was standing at the east corner of the bar.

“Q. And you got there about half-past nine? A. Between that and 10 o'clock.

“Q. And you stood there about ten minutes before Mr. Hodler came in? A. Before I was conscious of his presence, yes.

20 “Q. Then you became conscious of his presence. How long were you conscious of his presence before you spoke to each other? A. He came up and spoke to me, or those that were with me.

“Q. When, how long after you became conscious of his presence? A. Shortly after that.

“Q. Well, about how many minutes? A. I wouldn't guess on that.

30 “Q. Well, you have guessed on the first point. Now give us some more guesses? A. Well, that wasn't a guess. Maybe six minutes or eight minutes.

“Q. Well, that is a guess, is it not? A. I only guessed the ten minutes. It was a very short time.

“Q. Suppose we compromise, and say five minutes you were conscious of his presence? A. Well, it isn't a question of compromise. I will say a short while. I don't say it is a guess.

40 “Q. And during the time that you were con-

John S. Mackay—Cross

scious of his presence had you been having anything to drink with your friends? A. Yes.

“Q. What did you have to drink? A. Well, I should say possibly during the entire evening five or six small shells of beer; that is my customary drink.

“Q. You drank five or six— A. Small shells of beer, a small whiskey glass; and I generally leave about half an inch in the bottom of the glass. 10

“Q. You call a shell a whiskey glass? A. A whiskey glass is called a shell.

“Q. You say you had five or six of those and you left half of them? A. I leave a little in the bottom of the glass. I am very careful in drinking.

“Q. Had your friends been drinking small whiskey glasses full of beer and leaving half of it in the glass? A. More or less, whatever they pleased. I didn't pay close attention to them. 20

“Q. Are you quite sure that your condition was such as you could observe with certainty what was going on about you? A. I am perfectly sure I was perfectly sober. I just had occasion to go through a campaign this year, 1910, in the past four months, and I had occasion to visit a great many places, and had occasion to be very careful; I was very particular to be.

“Q. I am speaking about this occasion? A. Yes. That is my custom. 30

“Q. I am only interested in what happened at this time. What time did you leave there that night? A. I should say before 12 o'clock, about quarter to twelve.

“Q. What time did Mr. Hodler leave? A. Before I did.

“Q. What time did the last car leave Hackensack? A. That I couldn't tell you. 40

John S. Mackay—Cross

“Q. You are not familiar with it? A. No. There are several cars leaving there.

“Q. So that you were there probably over two hours, were you not? A. Between half-past nine and ten and quarter to twelve.

“Q. And in that time you only drank five or six shells, eh? A. Yes. I took some cigars.

10 “Q. Talking about this book all the time? A. Different subjects, different topics.

“Q. Politics? A. Politics.

“Q. Standing up at the bar all this time? A. Standing at the bar.

“Q. Two hours? A. Moving around and standing there in the corner and talking. This man wasn't always in my company; he was drifting from one crowd to another that came in.

20 “Q. Didn't you ask him to take a drink? A. I think I did.

“Q. What? A. Possibly I did; I would say yes.

“Q. Then he did not shove himself in the crowd, then? A. Not at that time. I asked him to take a drink after he made himself acquainted; I didn't ask him to have a drink when he introduced himself; not until after that.

30 “Q. You did not make any objection to the forming of this acquaintance, did you? A. I don't believe in doing that anytime. I did not, no.

“Q. He was behaving himself, was he not? A. He was doing what I told you.

“Q. You told us your conclusion; you did not tell us what he did? A. He wasn't calling anyone any names.

40 “Q. He was so obnoxious that you did not desire him to have a drink, did you? A. I was polite to him; I didn't want to hurt his feelings; but I wasn't in company with him.

John S. Mackay—Cross

“Q. Well, you thought enough of his condition for him to have another drink, didn’t you? A. Not another one.

“Q. Hadn’t he had any drinks before that? A. He evidently had, from his talk.

“Q. Then the one that you offered him was another one? A. Well, if you put it in that way, yes, another one, but not another one from me. 10

“Q. But his condition was not such as that you saw any objection to him having another drink, was it? A. I don’t think I asked him personally to have a drink. He was in the company there; I said, ‘Have a drink,’ and he was asked generally with the others, and he partook.

“Q. Were you assistant prosecutor then? A. I was, yes.

“Q. As assistant prosecutor, you would not have a man whom you thought was under the influence of liquor take any more, would you? A. I wasn’t acting as his guardian. It was the duty of the hotel proprietor, probably, to reprimand him if he was boisterous. 20

“Q. You did not think there was any legal or moral responsibility on you whatever, did you? A. Not unless he committed a breach of the peace.

“Q. And if you asked a man that you thought intoxicated to have more and he committed a breach of the peace, then you would be responsible, wouldn’t you? A. Well, he would be taken care of, probably so that he wouldn’t do any damage, of course. 30

“Q. You are not sure that he sang a song, are you? A. I am sure he was singing.

“Q. Well, did I understand you to say on your direct-examination that you thought he did sing you thought he sang? A. No, he was singing, I said.

“Q. Now, you think your memory has been still further sufficiently refreshed to make you sure 40

John S. Mackay—Cross

that he was singing? A. I don't put it that way, that my memory is still further refreshed; I say I am positive he was singing.

“Q. Well, why were you not positive on your direct-examination as to whether he sang or not? A. You asked me if I could remember any particular song, and I said no.

10 “Q. I didn't ask you anything; Mr. MacSherry asked you? A. Possibly. He was singing, anyway.

“Q. And you said in answer that you thought he sang? A. Well, I am now conscious of the fact that he was singing at that time and talking.

“The Court: His testimony is that he wanted to sing, and that the witness thought he did sing.

“Q. This was rather a jolly party, was it not? 20 A. It was not a jolly party, no; it was one of those occasions where a man would come in and you tolerate him a while and he drifts around, and it has tendency to break up a party.

“Q. Everybody was good natured, was he not? A. Well, it was just as you find in a saloon; you find a group of men talking earnestly, another group talking and another singing. It depends on the group you are with. The man drifted from group to group.

30 “Q. There was nothing particularly disorderly about it, was there? A. Nothing disorderly, no, not disorderly.

“Q. Nothing in the fact that he wanted to sing? A. No.

“Q. And nobody told him to stop? A. No.

“Q. And your recollection of the matter is not sufficiently clear to enable you to say what it was 40 that he was singing? A. No, I can't say.

John S. Mackay—Cross

“Q. You had your own friends to talk to? A. You couldn't help but observe his presence; anyone could observe it; it was natural to observe it.

“Q. How many were in your group? A. Three or four.

“Q. There was Brooks? A. Yes.

“Q. And Wright? A. White, I said.

“Q. And Ryan? A. Mr. Ryan.

“Q. Who else? A. I believe Mr. Beyer came in there awhile and went out. 10

“Q. Do you know a Mr. Foley? A. Two or three others came in and went out.

“Q. Mr. Foley? A. No.

“Q. Did he have a drink every time you had a drink? A. I couldn't say that.

“Q. You had five or six during the whole evening? A. Yes, and several cigars.

“Q. How many drinks did you have while Hodler was with you? A. With Hodler? 20

“Q. Yes? A. I mean while Hodler was drinking, how many did I have?

“Q. While Hodler was with your party, so that he could be said to be under your observation, not while he was on the other side of the room and while you were attending to something else, but while he was with your party how many drinks did you have? A. I should say I had two.

“Q. And did he drink every time you drank? A. Yes, and oftener. 30

“Q. He drank more than you did, did he? A. I could see him and hear him with other groups. I could see him there; he was a noticeable character; he drank with other groups.

“Q. You were not following him around, were you? A. No.

“Q. There was no reason why you should watch him especially, was there? A. No. 40

John S. Mackay—Cross

“Q. So that you think he had several drinks, but you do not know what they were? A. Some dark colored liquid, as I said before, but whether it was sherry or whiskey or cocktail, I don't know.

“Q. Your recollection is not sufficiently clear to enable you to recall what he ordered each time, is it? A. No, I couldn't tell what he ordered each time.

10 “Q. What makes you say he went out intoxicated? A. I can always tell when a man is intoxicated.

“Q. You are a good judge, are you? A. I am a pretty good judge of that, yes.

“Q. What was there about him to indicate that to you? A. His walk and his talk; he was voluble, boisterous, he wanted to sing.

20 “Q. You had never seen him before? A. No, but he impressed himself upon me that night, because he was a man that wanted to put himself forward.

“Q. I thought you said you had invited him to take a drink? A. Not until he had made himself acquainted. There was something—he said something about his being a singer and talked about his music, and so forth.

30 “Q. Well, was he a pretty good singer? A. I am not a good judge of a good singer; I couldn't tell you that. He didn't give any evidence of it.

“Q. You are a better judge of a man who goes out intoxicated than you are of singing? A. If you are going to compare matters, I don't think that is right.

“Q. How did you like his singing? A. I wasn't impressed with it, if you want my opinion.

40 “Q. Probably your case was not up to par that night? A. It may not have been and it may have been below par. No standard was set that evening for singing.

John S. Mackay—Cross

“Q. When was it that he asked for your card?

A. After he began talking about himself, and some others were talking about some case that I had been trying recently, and he spoke up and asked me for my card.

“Q. Were you campaigning about this time?

A. No, this was in December.

“Q. You gave him your card? A. I did.

10

“Q. You were not ashamed to let him walk away with your card, were you? A. He asked me for it, so I gave it to him laughingly.

“Q. Why do you say ‘laughingly’? A. Well, I remember that. As a matter of fact, I am not in the habit of handing out my card, anyway, and I don’t carry them; I haven’t carried them for some time.

“Q. You are a little modest about it and you think it is perhaps not according to ethics to hand them out; is that it? A. Yes.

20

“Q. Well, why do you say ‘laughingly’? Why shouldn’t you give an acquaintance your card if he asked for it? A. Because he wasn’t an acquaintance, and I knew so little about him; it was a little strange for a man to ask for my card on such a short acquaintance.

“Q. How did he come to leave the group that you and he were with? A. I don’t know what operated on his mind; he just kept drifting.

30

“Q. Was there any particular incident that caused him to leave? A. No, he was just drifting around aimlessly in the hotel, or the cafe.

“Q. When you asked him to join your group did he not refuse in the first place? A. No. I never asked him to join our group.

“Q. What was the general subject of your conversation, outside of the book, during that two hours? A. Why, there were many, many topics; I couldn’t remember them all; but I remember his topic was music.

40

John S. Mackay—Cross

“Q. And yours? A. Well, I was discussing matters privately with friends there.

“Q. You were discussing matters privately? A. Sometimes, talking low.

“Q. I mean when you were not discussing privately? A. I had no particular theme or topic with this gentleman, except to hear him about his
10 music and his musical ability and singing. I believe there was a gentleman there talking about printing that night; I remember that. We were talking about the book at the time.

“Q. Do you remember how he was dressed that night? A. Dark clothes. I paid no particular attention to his clothing.

“Q. When he was described to you by the agent of the company, what description did he give you that made you recall it so particularly? A. I
20 don't remember the description he gave me particularly, except that he gave me the man's build.

“Q. And you could remember him out of all the men in the place as being this particular man? A. After conversing with his mother and corresponding with her, and after talking to the agent, and after recalling the occasion and seeing him here in Court, those circumstances operated on my mind to bring the man back to my memory.

“Q. How many conversations did you have with the claim agent in this refreshing process?
30

“Objected to as repetition.

“The Court: He said three, I think.

“A. Three, yes.”

Mr. Hood: I will read Exhibit P-2 in the former case. (Reading:) “John S. Mackay, Counsellor-at-law, Assistant Prosecutor of the Pleas of Bergen county. Hackensack, N. J.” On the back of this card appears the following: “S. D. Brooks,
40 Fairmount Avenue, Hackensack, N. J.”

Henry T. Quick—Direct

HENRY T. QUICK, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Quick, where do you live? A. Milford, Pike County, Pennsylvania.

Q. How long have you lived there? A. It will be four years, I think now, the 1st of November, or about the 1st of November. 10

Q. What is your business there? A. Farmer at the present time.

Q. And when did you come to Newark recently? A. Recently? Day before yesterday, or yesterday, rather, yesterday morning.

Q. Do you remember being a witness in the last trial of this cause? A. Yes, sir.

Q. Did you ever live in Newark? A. Never just exactly in Newark; in Arlington, in Belleville. 20

Q. When was that? A. In 1907, and part of 1908, I think.

Q. And what were you doing there? A. Part of the time I worked for the Hudson River Traction Company, when I first came here, at Rutherford, and then I came up and was in the lunch room at the Belleville turnpike, and afterwards I went over to Belleville, when I quit that, and the last position I had was working in the celluloid factory in Arlington. 30

Q. Do you know what is known as the Mountain House there at Belleville Junction? A. Yes, sir.

Q. Did you have anything to do with that in the month of December, 1907? A. I did up to the 22d or 23d of the month.

Q. Do you remember when Mr. Hodler was hurt up there? A. Yes, sir.

Q. Did you at that time have anything to do with the Mountain House? A. Nothing at all.

Henry T. Quick—Direct

Q. Well, what kind of a place was the Mountain House? Just describe it, will you? A. It is an abandoned car, or was at that time, with a little addition built to it, sort of a leanto, or shanty, that the cooking was done in, lunches prepared in, and the body of the car was used as a sort of waiting room for people that came from Newark
 10 down there, where they changed cars, where the Public Service changed cars, or changed crews, with the Hudson River Traction Company.

Q. And that is what you call the Mountain House? A. Yes, sir.

Q. Why did you call it the Mountain House? A. Well, I don't know. The man that was there before I was there gave it that name. That is the only name I ever heard for it.

Q. How far was it from Bennett Avenue? A.
 20 Well, probably two or three blocks, something like that, two or three.

Q. Was any liquor sold there? A. No, sir.

Q. What did you sell there? A. Sandwiches of all kinds, sweet cider, when it was in season, and soda, a few different brands of soda, small bottles, coffee and tea.

Q. Where did the patronage come from there? A. Principally the people that travelled on the cars.

Q. Did you ever see Mr. Hodler before—I mean
 30 previous to the last trial? A. Before the last trial?

Q. Yes? A. Yes, sir; on the night he was hurt I am sure I seen him.

Q. How many times did you see him that night? A. Twice.

Q. Where did you see him the first time? A. When he came in the Mountain House.

40 Q. About what time in the evening or night?

Henry T. Quick—Direct

A. Well, I think that was between eight and nine o'clock; I am not positive as to just the exact time, but I think about half-past eight.

Q. You think it was about half-past eight? A. Yes, sir; or a little previous to that, perhaps a little earlier than half-past eight. I think the car he went down on left at half-past eight.

Q. Do you know which way he was going? A. I didn't know until after he was in there. 10

Q. How did you know then? A. Well, he came in there—

Q. I just want to know what he said? A. Well, he didn't say anything until we got in conversation; he asked some questions.

Q. How long did he stay in there? A. I couldn't say as to the time; it might have been a little longer than I think; it might have been three or four minutes, or even ten minutes. 20

Q. Did he talk to you? A. I talked with him, a few words.

Q. What, if anything, did he say to you? A. I spoke to him through the other man, that really was in charge of the lunch room. He insisted on have something to drink and—

Q. I want to know just what he said, Mr. Quick? A. Well, he said it was a funny thing you couldn't get anything to drink there; I told him there wasn't anything. 30

Q. Did he ask for any kind of drink? A. He asked for liquor.

Q. What kind of liquor? A. I think he mentioned it as booze the first time. He mentioned it in a couple of different phrases.

Q. Go on and give us the entire conversation, will you? A. Well, it was quite a while ago; I don't know as I can exactly.

Q. Well, you have refreshed your recollection 40

Henry T. Quick—Direct

after reading your testimony at the last trial, have you not? A. To a certain extent, but, then, time makes some difference. He came in and asked for something to drink. I didn't know who the man was. There was two or three in there at the time. I was waiting to take a car down the road at the time, and the man in charge, Cliff Riker, or
 10 Ricker, asked him what he wanted, tea or coffee or a soft drink, and he said he didn't want that, he wanted booze, and he laughed, made a little joke of it. We told him we didn't keep anything of that kind, and Cliff spoke to me; he said, "That fellow insists on having a drink," he said—

Objected to.

Q. Only what Hodler said? A. I can't explain that without giving the reason.

Q. No, not the reason; what Hodler said to you
 20 or what you heard him say? A. That is an expression he used. I turned around and told him, "You can get a drink further down according to which way you are going; you can get a drink down here at Schuler's, down at the Arlington station"; and he said he was going this way.

By the Court: Q. In what way did you say this to him? A. I said, "If you are looking for a drink of liquor or beer you can get it"—

Q. How did you communicate it to him? A.
 30 He stood right there, and I just spoke to him, the same as I would to anyone, as a matter of accommodation.

By Mr. MacSherry: Q. Did he say where he was going? A. He said he was going down the line; I won't say now whether he said Rutherford or Hackensack, but I think he said Hackensack; at any rate, he said he was going down the line. and I told him he could stop at different places on the way to Hackensack and get what he
 40 wanted.

Henry T. Quick—Direct

Q. Did he drink anything in your place? A. I think he did; he drank some cider, and treated the man behind the bar and offered to treat me. I didn't take anything.

Q. How long did he stay there? A. I couldn't say. The car stopped there for different periods, sometimes two or three minutes, sometimes three or four, according to whether they make connections. 10

Q. Now, Mr. Quick, let me call your attention, to refresh your memory, whether you testified as follows—

Objected to.

The Court: I think you are outside of the rule. That would be leading.

Q. Now, when did you next see him? A. Well, I see him after that on the car, because I rode on the same car with him in the direction of Hackensack; I went down to a place called the Half-way House and got off there. I went there to meet a friend of mine by the name of Dr. Cottwell, from New York. 20

Q. Where did you next see him, if you saw him? A. That was after the accident, laying in the road.

Q. Where did you see him lying in the road? A. Down nearly in front of what they call Kavanaugh's house, between Bennett and Stuyvesant Avenue. 30

Q. You know where Kavanaugh's house is, do you? A. I do know; yes, sir.

Q. Whom, if anybody, did you see down there that you knew? A. I saw the motorman and conductor, Mr. Carroll—I don't just recall the motorman's name. I wasn't well acquainted with him; I knew him by sight, though, well—Officer Shepard, Officer Vreeland, and I heard them call 40

Henry T. Quick—Direct

Mr. Kavanaugh by name. I didn't know who he was.

Q. What kind of a night was it as to weather?

A. Well, it wasn't moonlight; I don't just remember about the night exactly; it wasn't moonlight; it wasn't a bright night.

Q. Where did you see him on the road, how
10 near to or how far away from the trolley track?

A. Why, where he laid in the road, do you mean?

Q. Yes? A. His feet was, I should judge, between two and three feet, or two feet away from the rail.

Q. Did you or did you not recognize that as the man who had been in your place earlier in the evening? A. I did after they scratched some matches and looked at him. I spoke about it to Mr. Evans.

Q. How did you come to go down there? A. I
20 don't know how it was we brought up there, but our attention was attracted in some way, and I heard someone speak about an accident, and I turned around to Evans and I asked him what was the trouble, and he said there was a man injured—

Objected to.

Q. Well, by reason of what you heard, you went down there? A. Yes, sir; but I can't say who
30 just brought the news up to our attention—

Q. Did you walk or run? A. Well, walked pretty fast, or you might say kind of a slow run part of the way, perhaps.

Q. What, if anything, did you do after you got down there? A. Nothing more than stand around until they got ready to load him in the car.

Q. Was he bare-headed or did he have a hat on? A. His hat was off.

Q. Did you see his hat at any time? A. Yes,
40 sir.

Henry T. Quick—Cross

Q. Where? A. After he was placed on the car the hat hadn't been found yet, and when the car started ahead, I am pretty sure that Mr. Evans was the one that picked the hat up; he picked the hat up, and I ran after the car and handed it to Conductor Carroll.

CROSS-EXAMINATION by Mr. Hood: 10

Q. Mr. Quick, do you know where the hat was picked up? A. The hat was picked up either—it was on the opposite side of the car. The car that stood there, that we loaded him on, shaded the hat; that is the reason it wasn't found. It was a little further—I wasn't right by the hat when it was picked up; it was may be twenty or thirty feet away. I picked it up, and I said, "That must be the hat"—

Q. What I want to know is where the hat was picked up? A. The hat was picked up either on the east side of the outside of the two tracks. 20

Q. When you came to where Hodler was lying on the street was the doctor there? A. I am not sure about that; I think I was there a little before he got there.

Q. Did you see a doctor there that night? A. I seen a man they called a doctor, the man that examined him and said he should be taken to the hospital. 30

Q. Can you tell me whether the hat was picked up north or south of where the body was lying? A. Well, I should say it was a little south of where the body lay.

Q. Can you say how far south? A. No, I could not.

Q. Can you give us any idea about it at all?

A. Well, perhaps five or six feet, or maybe a dozen feet, something like that. 40

Henry T. Quick—Cross

Q. It seems you had been working for the Hudson River Traction Company? A. I did at one time; yes, sir.

Q. That was the company that was operating the cars between Hackensack and Newark? A. No, sir; between Hackensack and the Belleville turnpike.

10 Q. Hackensack and the Belleville Junction? A. Yes, sir.

Q. At the Belleville junction, you say, there was a place called the Mountain House, which consisted of an old abandoned car and a leanto which was built attached to it? A. Yes, sir.

Q. Where did that Mountain House stand? A. It stood on the corner between the Belleville turnpike, on what I should call the southeast corner of the four corners.

20 Q. Is it on the southeast corner? A. I should say it was. I am not positive just about how a compass would show that square, whether the Belleville turnpike runs directly square or not.

Q. You do know the locality? A. Yes, sir.

Q. And you know there is a street there that they call Kearny Avenue? A. Yes, sir.

Q. And you know there is a street that crosses that up there that they call the Belleville turnpike? A. Yes, sir.

30 Q. And you know there are four well defined corners there? A. Yes, sir.

Q. Now, Hackensack is in the northerly direction from there? A. Yes, sir.

Q. And Harrison is in the southerly direction from there? A. Yes, sir.

Q. And I suppose you know what direction east is up there? A. Yes, sir. Well, it was on the east side of the tracks where the Mountain House
40 was.

Henry T. Quick—Cross

Q. And on the corner nearest to Harrison? A. No, sir; on the opposite corner.

Q. On the corner nearest Hackensack? A. Yes sir; on the northeast corner.

Q. The northeast corner? A. It may not be exactly northeast, but nearly northeast.

Q. How long before this evening had you left the employ of the Hudson River Traction Com- 10
pany? A. It was some time in the last of June or first of July.

Q. What had you been doing for them? A. I was conductor.

Q. Conductor on that line of cars? A. Yes, sir.

Q. After that you had a number of occupations? A. Well, I went up and was nightman in that lunchroom there.

Q. How long had you been nightman in the 20
lunchroom? A. From the day after I quit the Hudson River Traction Company until the 23d of December, this previous December.

Q. The patronage of that place was largely the crews of the cars, was it not? A. Yes, sir; and people that happened to change cars there for some purpose. There is quite a number of them that come from the celluloid and button works down in Arlington that comes up to Belleville there, that stops off there. 30

Q. You were not working in the Mountain House then, on the 28th of December, at that time? A. No, sir.

Q. What time did you get to the Mountain House? A. I couldn't say exactly. I had an appointment to meet a man there at eight o'clock, and I was there about eight or a little before eight, probably before eight, about quarter to eight, or something. 40

Henry T. Quick—Cross

Q. Did the man meet you there? A. No, sir.

Q. How long did you wait for him? A. Probably half an hour or something like that. And then I went down. I expected to meet him at another place, a place known as the Half-way House.

10 Q. So that you are certain that you got to the Mountain House a little before eight? A. Yes, sir; I am sure.

Q. And you are certain you left the Mountain House about half past eight? A. I wouldn't say exactly; that is as near as I can place the time; yes, sir.

Q. And you are sure that you went on the same car that this man took to Hackensack? A. I am positively sure of that.

20 Q. And in view of the fact that you had an appointment with a man at that place at eight o'clock— A. Yes, sir.

Q. —I suppose you are very well satisfied in your mind that it was not very much before half-past eight that you left the Mountain House? A. Well, I don't think it was any earlier; no, sir, I don't.

Q. Do you know how long a run it is from the Belleville junction to Hackensack? A. Usually it takes about an hour.

30 Q. About an hour? A. Barring accidents.

Q. How long do you say that Holder was in this place of yours? A. Well, it might have been two or three minutes, or even a little bit longer. Sometimes time passes a little quicker than others. Possibly it might have been seven minutes. The cars doesn't stop there much over that, as a rule. Once in a while there is a chance to stop there longer than others. Once in a while
40 they would meet there; they would leave immedi-

Henry T. Quick—Cross

ately. They are different now; they run on a different system.

Q. Have you any recollection as to how long he was in there? A. No, sir.

Q. You were examined as a witness on a former trial? A. Yes, sir; I believe so.

Q. Did you say in your former testimony then that he stayed there in the neighborhood of ten to fifteen minutes? A. Well, he possibly might have; but I don't think it was as long as that. 10

Q. Did you say in answer to this question, "How long did he stay there?" "In the neighborhood of ten or fifteen minutes; I am not positive about the length of time"? A. Well, I am not positive about it.

Q. Do you remember saying that at the last trial? A. I really don't remember whether I said it or not; no, sir. 20

Q. So that you will not say that you said it and you will not say that you did not say it? A. Well, I am not positive about it. If I was, I would answer you immediately.

Q. When were you first spoken to about the events of the night of December 28, 1907, after that date? A. By who, or when, or what?

Q. By anybody. A. Well, it was talked of—I went home that night; where I boarded I talked about it. 30

Q. No, I do not mean what you talked, but what other people said to you. A. Well, there was different ones that asked me questions about it the next day.

Q. Were you ever asked about it by anybody connected with the Public Service Railway Company? A. I think so; yes, sir.

Q. Did any investigator or inspector of theirs call upon you? A. Well, there was a man that 40

Henry T. Quick—Cross

represented himself to be one; I believe he was; yes, sir.

Q. Can you tell me when it was that he called upon you? A. No, sir; but it was some time after that.

Q. How long after that? A. I couldn't say.

10 Q. Within a month? A. Well, probably it was; it might not have been as long as that and may perhaps been a little longer.

Q. Certainly within two months? A. Well, I am not positive about it; I never charged my memory with it.

Q. When did you leave Arlington or Belleville, where you were living at that time? A. On the 1st of November after, the next year, about eleven months later, perhaps.

20 Q. Was it before you left Belleville— A. Yes, sir.

Q. —on the 1st of November that this inspector called to see you about it? A. I believe there was one that I had a talk with.

Q. Is your memory pretty good? A. No, sir.

Q. Have you any distinct recollection today of these events of that night of the 28th of December, 1907? A. Why, yes, certainly.

30 Q. Have you those after reading your testimony today, or did you have them before you read your testimony? A. I had them before. Of course, there is certain things that I might have forgot, that partly slipped my memory. I had partly forgot all about it until the other day, when I was called to come as a witness.

40 Q. In what respect were you refreshed as to your testimony? A. Well, I can't say as to that. There was some little things that practically got out of my mind for a minute or two.

Henry T. Quick—Cross

Q. What were the things that got out of your mind? A. I can't tell you to the letter. It is any easy matter to forget a little thing sometimes.

Q. Well, I want you to tell me, if you can, what they were—now, having read your testimony, what the little things were that you had forgotten. A. Well, I couldn't say. I noticed that there was some little things that occurred different to me when I came to read it over, that I had practically forgot. 10

Q. Can you mention any of them? A. No, sir; I can't mention any of them.

Q. When you say that you read your testimony, do you mean the printed book was given to you of what you had testified to before? A. Yes, sir.

Q. That is what you mean? A. Yes, sir. 20

Q. When the inspector came to see you did he take a written statement from you? A. He asked me a few questions and wrote it down and asked me to sign it.

Q. And you did so? A. I think I did, if I remember right.

Q. Was that shown to you since you have been back here in Newark? A. No, sir; I haven't seen it.

Q. Was it shown to you in connection with your testimony at the former trial? A. Not that I remember of. 30

Q. You do not remember that? A. No.

Q. Do you remember having seen it at all since the time that you gave it? A. No, I think not; I am not positive about that.

Q. Now, I gathered from what you said in answer to Mr. MacSherry's question that Mr. Hodler, when he stepped into your place, called 40

Henry T. Quick—Cross

for booze in a joke? A. Well, in a joke or any other way. He came in and says, "Let's have something to drink," the same as anyone would step in; and the fellow named over what he had, and he said, "I don't want that; I want booze."

Q. And when he said he wanted booze, what was there about that that made you think he
10 was joking? A. Well, nothing particular, only there is lots of men that way that meet in a bar-room, or like that, that make a peculiar remark, and I was sitting there and I noticed the remark.

Q. It was not a new word to you? A. No, it wasn't a new word to me; I had heard it lots of times and used it myself.

Q. Did he ask for it by another name first?
A. Sir?

20 Q. Did he ask for something to drink by any other name before that? A. Well, he first said, "Give us a drink," or "Give me a drink," or "What have you got to drink?" some such expression as that; I don't recall just the exact word; and he said, "What will you have?" and he said, "Booze." I think, if my memory serves me right, he named over what there was, in the way of sweet cider and milk and different things.

Q. And he did not get any, did he? A. He
30 didn't get any, not then, no.

Q. What he got then was some sweet cider?
A. A glass of sweet cider.

Q. And he asked you to drink with him? A. Yes, sir.

Q. And you took a glass of sweet cider? A. No, sir; I didn't, but the other man did.

Q. Who else was in the place at the time this thing happened? A. I think Mr. George Taft, if
40 I remember right, was the conductor's name that

Henry T. Quick—Re-direct

was on the car, and Mr. Mohn was in the car.

Q. No, I am talking about the Mountain House. Who was in there while Mr. Hodler was in? A. I think they were in and a crew off of the Kearny cars. There was two or three in there; I don't just recall the names.

Q. How many people in all were there in this Mountain House during the time that Mr. Hodler 10 stayed there? A. There might perhaps been five or six; I can't say exactly.

Q. Can you call any of those by name? A. I know that Cliff Riker was in there.

Q. Cliff who? A. Cliff Riker, or Ricker.

Q. Who is he? A. The man that owned the lunchroom at that time.

Q. And who else? A. Some of the railroad men; I wasn't acquainted with them, only by their features; I wasn't personally acquainted 20 with them. There was a crew off a Kearny car came in and got a sandwich, or something like that, and Mr. Taft and Mr. Mohn, I think, came in a little while, but whether they stayed or not, I couldn't say.

Q. Mr. Mohn and Mr. Taft? A. I think so; I ain't sure.

RE-DIRECT-EXAMINATION by Mr. Mac- 30
Sherry:

Q. Where is that man Riker, or Ricker, who owned the place, do you know? A. I have never seen him since; I haven't seen him since a few days later than that, some time perhaps in January, the next month.

Q. Did you notice Mr. Hodler's condition when he came in there? A. Well, I took it from his remarks that he had been drinking some; he was 40 a little under the influence of drink; yes, sir.

Henry T. Quick—Re-cross

Q. How did he show that? A. Well, the same as 'most any man would.

Q. Well, how is that? A. Well, if a man acts a little bit peculiar or steps a little peculiar or speaks a little peculiar, you would naturally have that impression.

10 Q. Well, what did this man do or say that night that led you to believe that he had been drinking? A. Well, he spoke in a peculiar way, in a little boisterous way.

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Well, do I understand you to say, Mr. Quick, that because he was a little boisterous and because he asked for booze, for that reason you thought he was under the influence of drink? A. I did; I had no other reason to think so.

20 Q. That is the only reason? A. Yes, sir. I didn't see him drink nothing and don't know that he ever had a drink in his life; only from his actions.

Q. Only that and the fact that he asked for booze and the fact that he was boisterous? A. Yes, sir.

30 Q. He was boisterous? A. Well, just as if I stepped up to you and asked you to loan me a book, or something, for you to say, "Why haven't you got that?" or "Why don't you keep that?"

Q. Then it was not so much the noise he made as the roughness of his speech? A. Yes, sir.

Q. He did not say what he did say in an unusual tone of voice? A. Well, a little louder than the ordinary.

Q. A little louder than usual? A. Yes, sir.

40 Q. But the manner of his speech was rough? A. Yes, sir.

Joseph H. McCabe—Direct

Q. It was not polite? A. Yes, sir.

Q. And it is that, coupled with the fact that he asked for booze, that led you to your conclusion?

A. Yes, sir.

Q. Is that true? A. Yes, sir.

10

JOSEPH H. McCABE, sworn in behalf of defendant:

Direct examination by Mr. MacSherry:

Q. Where do you live, Mr. McCabe? A. 607 North Fourth Street, Harrison.

Q. Did you ever live in Kearny? A. Yes.

Q. What business are you in now? A. Nothing.

Q. Has your health been very good lately? A. No, sir. 20

Q. How long have you been sick? A. Well, ever since I have been operated upon, about—over a year, I guess.

Q. Do you know where Kearny Avenue and Bennett Avenue and Stuyvesant Avenue, those streets, are? A. I do.

Q. Were you up in that vicinity in the month of December, 1907? A. I was.

Q. What were you doing there? A. Went up there to a dance. 30

Q. Where was this dance? A. At Ell's hall.

Q. Where is that? A. Up apast the Belleville turnpike.

Q. How far is that away from Belleville junction? A. Oh, about ten minutes' ride on the trolley.

Q. Now, this Ell's hall—was the dance hall upstairs or downstairs, or how? A. Downstairs— 40
one floor.

Joseph H. McCabe—Direct

- Q. Under whose auspices was this dance held?
 A. Whose what?
 Q. Who was running the dance? A. Why, some Italians were running it.
 Q. Was it the dance of some association or—
 A. That is all I know, that Italians was running it.
- 10 Q. What time did you get there? A. Oh, it was some time after nine, around nine.
 Q. You see, you dropped your voice, Mr. McCabe. A. Some time after nine.
 Q. And how many attended the dance? A. Oh, there was about twenty or thirty of our crowd up there.
 Q. And how many at the dance all together?
 A. That was in the dance?
 Q. Yes. A. Well, there was a couple of hundred up there.
- 20 Q. Did you drink anything up there? A. No, sir.
 Q. Beer or whiskey? A. No, sir.
 Q. Are you a drinking man? A. Never touch it.
 Q. You did not touch any that night? A. No, sir.
 Q. Did you notice anyone drinking up there?
 A. I did not. Couldn't get no drink up there.
- 30 Q. Why not, do you know? A. Well, they didn't have no license and they couldn't sell it.
 Q. What time did you leave? A. I don't know; we caught the last car down, the last Hackensack car.
 Q. Can't you tell us about what time it was?
 A. Well, it was after twelve o'clock.
 Q. Did you know either the conductor or the motorman on the car? A. I did not.
- 40 Q. About how many in your party took the car

Joseph H. McCabe—Direct

there at this dance hall? A. The whole lot of us about twenty.

Q. Any girls in the party? A. One.

Q. When you got on board of the car, were there other people in the car? A. There was.

Q. Did or did not your party fill all the seats of the car, or were there seats vacant? A. There was a few seats vacant. 10

Q. And how did you distribute yourselves on that car—I mean as to where your crowd went? A. All over, inside and outside.

Q. Any on the back platform? A. Yes.

Q. Did you see Mr. Hodler, the plaintiff, on that car? A. I did.

Q. Where was he when you first saw him? A. He was about the third seat from the front.

Q. Standing up or sitting down? A. Sitting down. 20

Q. Did you notice his condition? A. Yes, as soon as we got in there.

Q. What was it? A. Well, he was singing—trying to sing.

Q. Well, was he or was he not sober, in your judgment? A. I think he was drunk.

Q. What, if anything, did he say or do to lead you to that belief? A. Well, when he was singing someone says, "Put him out." Well, they kept arguing about it, and he kept on arguing and talking until we got down to the turnpike. Then they were all hollering, "Put him out." 30

Q. What did he say, if anything, when the crowd said, "Put him out"? A. I don't know. He got up and wanted to lick somebody.

Q. Had you reached the junction yet? A. No, we didn't just reach the junction then—yes, we did reach the junction by then.

Q. Do you remember any particular word he 40

Joseph H. McCabe—Direct

used when he said he wanted to lick anybody?
A. Well, not at that time.

Q. What happened when you got to the junction? A. Well, there was a few of them got off the car and went off for lunch. We changed crews.

Q. Did you change cars? A. We did not. I
10 didn't get off the car.

Q. And what happened after that? A. Well, when the car started up again they kept arguing again.

Q. Now you are down at the junction and you are starting up from the junction going towards Harrison. Now, how did your crowd distribute itself then in the car? A. Well, there was three or four Ginneys on the outside of the platform, and a few of our fellows was out there; I didn't
20 just know who they were.

Q. Where was Hodler? A. He was still in the car.

Q. What, if anything, did he say then, or what did he do? A. I remember him getting up and saying he could lick any son-of-a-bitch in the car.

Q. That is, after you left the junction? A. After we left the junction.

Q. Go from that and tell us what you saw him do. A. Well, you see, the whole bunch come out
30 to go for him then.

Q. What do you say? A. Quite a few of the fellows got up; they were going to lick him. Well, I think he went out—he walked towards the back, then to the platform, I think to get out of the trouble, and I think when he got out there he got into the trouble.

Mr. Hood: Now, if your Honor please, I think that I will have to object to that
40 part of that answer, and ask that it be

Joseph H. McCabe—Direct

stricken from the record, unless the witness means to testify to a fact. He said, "I think." Now, if that is merely a form of expression, I have no objection, but if it is an inference that he draws from something that happened, I do object to it.

The Court: We will treat it as a matter of some uncertainty as to just what he did 10 mean.

Q. What do you mean by the expression, "I think he got into trouble"? A. I got told he did.

Mr. Hood: Then I move that it be stricken from the record.

The Court: Strike it out.

To the Witness: Mr. McCabe, let me caution you to confine yourself to your own personal knowledge, what you actually saw and heard.

Q. Before he went to the back platform was 20 there any attempt on the part of anybody to stop the trouble? A. Yes, they tried to stop it; this man Cavanaugh tried to stop it, for one.

Q. How did he try to stop it? A. He didn't want to see him hit, that is all.

The Court: Never mind about that, just what he did.

Q. What did he do or say? A. He says. "don't hit him."

Q. To whom did he say that? A. He said, 30 "Don't hit him; he is drunk. Can't you see he is drunk?"

Q. Did anybody reply to that? A. Well, they kind of slackened off then, and then they went to the back of the car.

Q. Who went to the back platform? A. This Hodler and three or four after him.

Q. When Hodler got to the back platform of 40

Joseph H. McCabe—Direct

the car was there or was there not anybody on that back platform? A. There was.

Mr. Hood: If you know.

The Court: The witness has already been cautioned by the Court in testifying to confine himself to his own actual knowledge. It is not what anybody told you, but what you yourself know.

10

Q. Where were you when he went on the back platform? A. Where was I when he went?

Q. Yes. A. I was still sitting in the front. Well, I kind of stood up then and watched them going back.

Q. Did he go back alone, or someone with him?

A. Three or four went after him.

Q. So that when he got back on the back platform how many were there back there? A. I don't
20 know how many, but there were three or four back there talking and hollering; they hollered, "Send him back here."

Q. And when he went on the back platform, how was the car going then, do you know? A. Oh, going at a fair rate of speed. I ain't a very good judge of speed.

Q. And what became of him after he got on the back platform, do you know? A. That I don't know.

30 Q. Do you know how he got off the car, of your own knowledge? A. Only what I got told.

Q. What do you say? A. Only what I was told.

Q. Well, you must not tell that. Did you see him again after he went on the back platform, when you saw him there with the other people? Did you see him after that? A. No, I didn't see him. There was people in back of him; I didn't

40 see him.

Joseph H. McCabe—Cross

Q. Were there any Italians on the back platform? A. There was.

Q. Did they belong to your party? A. They did not.

Q. Had they been up to the hall, to the ball? A. That is where they were.

Q. Who were those men, do you know? A. I I don't know them at all. 10

Q. Do you know where they came from? A. No. I believe some of them come from New York, from what I heard them say.

Q. What you heard them say? A. Yes, sir.

The Court: No. Strike it out.

Q. Do you know what sneezereen is? A. I do.

Q. What is it? A. Well, it is a powder they blow around, and if you get any of it you have to sneeze.

Q. Was there any of that thrown around that car before-- A. There was. 20

Q. Before or after Hodler went to the back? A. That was before he went to the back.

Q. Were any of the members of your party on that car that got on at the dance hall in an intoxicated condition, so far as you know? A. There was not, not as far as I know.

Q. Did this trouble with Mr. Hodler in the car make any excitement there? A. Well, it made a little. 30

Q. Did you notice whether people stood up or not? A. They did; quite a few of them stood up.

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. McCabe, how old are you? A. Thirty-one, I guess, or thirty-two, I don't know which.

Q. Are you married? A. I am.

Q. How long have you been married? A. A couple of years. 40

Joseph H. McCabe—Cross

Q. You were not married in December, 1907, then? A. When is that?

Q. On the night when this occurrence took place. A. No, I wasn't.

Q. What was your occupation at that time? A. A confectionery store and pool-room.

Q. Where? A. Kearny.

10 Q. What time did you go down to this dance hall? A. Oh, around nine o'clock.

Q. Did you go alone or with others? A. I went with a young lady and a few fellows; we all got on the same car, near, going up.

Q. You went down there as a party? A. What?

Q. You went down there as a party? A. Yes, we generally all go.

20 Q. These people that went down to the dance hall that night assembled in your place in Kearny? A. They did not.

Q. In some place in Kearny? A. Met them on the car, lots of them.

Q. You met lots of them on the car? A. Yes.

Q. Did you all go down to the dance together, all that came away together? A. No, not all.

Q. How many of you went down together? A. Oh, I should judge there was about twelve, thirteen or fourteen, something like that.

30 Q. And did these twelve, thirteen or fourteen that went down there together early in the evening come back together on this car? A. Every one of them.

Q. Were there any in addition to that that had joined the party coming back? A. There was.

Q. How many all together? A. Oh, I couldn't say how many there was; about twenty-five, twenty or twenty-five.

40 Q. In this party that went down to the dance

Joseph H. McCabe—Cross

was there only just one lady? A. That is all.

Q. And in the party that came back from the dance there was only just one lady? A. That was all.

Q. What do you call the name of this place where the dance was carried on? A. Ell's hall.

Q. And where is that located? A. I don't know; in Kingsland, I guess. 10

Q. That is quite a few miles away from the Belleville turnpike, is it not? A. I should judge about two and a half miles or three miles.

Q. And it would take the car ten minutes to run it, would it not? A. I don't know; I don't know how fast the cars run; I don't know.

Q. Well, do you know about how long it took that car that night to come from the dance hall to Belleville junction? A. I never thought of thinking about the time. 20

Q. Do you know how long it took you to get down to the dance hall on the car? A. No, we never think about that.

Q. Time is of no importance to you? A. No.

Q. That was a pretty rough place, that dance hall, was it not? A. Pretty rough?

Q. Yes. A. Not as I know of.

Q. Was it not full of fight that night? A. Not as I know of; I didn't see a fight in it.

Q. You did not see a fight there all night? A. 30
No.

Q. Well, you were in the dance hall all night?
A. I was.

Q. If things had been going on that way you would have seen them? A. I think so.

Q. When you got out to take the trolley car, you say, there were twenty or twenty-five of you?

A. I think that was about it.

Q. Do you add in that the Italians, or do you 40

Joseph H. McCabe—Cross

omit the Italians in the count? A. I don't count no Italians at all; just our own crowd, what we knew.

Q. How many Italians were there that got on the car? A. That I can't tell.

Q. Was there a crowd about as big as yours? A. I should say not.

10 Q. Were there five or six? A. I don't know how many, I tell you.

Q. Well, you saw some Italians get in the car? A. Yes, some.

Q. They were waiting for the car at the same place where you were? A. I guess they were. I wasn't looking for them though.

Q. They were not mingling with your party? A. Not as I know of.

20 Q. They were standing by themselves? A. They might have mingled with a few of our bunch, for all I know.

Q. You did not notice that? A. No, I didn't notice. I was with a girl.

Q. She had monopolized your attention? A. Right.

Q. And had done so all evening? A. Right.

Q. And did so all the way home, did she not? A. Right.

30 Q. You say that some Italians took a position on the back platform? A. I did.

Q. Do you know how many of them? A. I do not.

Q. Do you know that any of them did? A. I just told you I did.

Q. Well, how do you get at it? Why do you tell me that? A. What.

40 Q. Why do you tell me that some Italians took a position on the back platform? A. Because they were on there ahead of us.

Joseph H. McCabe—Cross

Q. Do you mean that they got on ahead of you?

A. Yes, sir.

Q. You passed them on the way in? A. Yes, sir.

Q. How many of them? A. I don't know.

Q. Will you say there were two? A. Well, I might be telling a lie if I said it.

The Court: Give us your general recollection. 10

The Witness: Well, I seen a couple of them.

Q. Do you mean two? A. Well, how many is a couple?

Q. Well, give us your idea of that. A. Well, I seen a couple.

Q. Were there two or three? A. I can't say positive.

Q. When you went in the car with this young lady where did you go? A. Right up in the front seat. 20

Q. The farthest end of the car? A. Right up in the front seat.

Q. The farthest end of the car? A. Don't you understand what I mean?

Q. Don't you understand what I mean? A. I am saying the front seat.

Mr. MacSherry: I think that is an answer to the question.

The Court: Well, it already appears that the car was in two compartments. 30

Mr. Hood wants to understand distinctly what part of the car you were in.

The Witness: Well, why don't he say that? Right up in the front of the car, yes.

Q. Well, the car had two compartments? A. Yes.

Q. It had a smoking compartment and a place for ladies and men? A. I don't know whether it 40

Joseph H. McCabe—Cross

is for ladies and men or not.

Q. Well, another compartment outside of the smoking compartment; did it not have that? A. Yes.

Q. And as the car was moving that night, the general compartment was in front? A. Yes.

Q. And the smoking compartment was in the
10 rear? A. Yes.

Q. And there was a partition between the two parts of the car? A. There was.

Q. And there was a door that moved up and down to go from one to the other? A. Yes.

Q. Is that right? A. Right.

Q. And this was a large car, was it not? A. I don't know how large it was.

Q. Can you give me any idea how long it was? A. A pretty good size car.

20 Q. The size of a regular Hackensack car, now? A. I guess it was.

Q. That would be how much, forty feet long?

A. I don't know about that.

Q. Would it be as long as the width of this room? A. I guess it would, pretty near.

By the Court: Q. How do you say that door moved? A. A sliding door.

Q. From side to side? A. Yes, sir.

30 Q. Not up and down, as counsel said? A. No.

Adjoined until tomorrow, Thursday,
September 26, 1912, at ten o'clock, a. m.

Joseph H. McCabe—Cross

Fourth Day.

Thursday, September 26, 1912.

Met pursuant to adjournment.

Present, counsel as before stated.

JOSEPH H. McCABE, resumes the stand in 10
behalf of defendant:

Cross-examination (continued) by Mr. Hood:

Q. Now, McCabe, your crowd was a rather jolly crowd that night, was it not? A. Well, they were.

Q. They started fooling and carrying on pretty much as soon as they got on the car, did they not? A. Yes.

Q. When they got on the car most of them got 20
into the front compartment of the car; isn't that so? A. Well, they must have; the largest part, that was, of the car.

Q. And they started fooling in the front compartment? A. Yes, sir.

Q. Was it at that time that the sneezereen was thrown around? A. The sneezereen was thrown around all through around the time we were on the car.

Q. Well, was the sneezereen thrown out after 30
you left the junction? A. Oh, yes.

Q. How long did you remain on the car after leaving the junction? A. How long did I remain on the car?

Q. Yes. A. Until I got home.

Q. Where did you get off? A. Kearny Avenue.

Q. Well, where on Kearny Avenue? A. Afton Street.

Joseph H. McCabe—Cross

Q. How far away is that from Stuyvesant Avenue? A. Oh, that is about ten minutes' ride.

Q. Ten minutes' ride from there? A. Yes.

Q. Well, do you know whether any sneezereen was thrown around between the junction and Stuyvesant Avenue? A. There was, yes.

Q. Sneezereen was thrown around then, too?

10 A. Yes.

Q. Was there any frolicsome attempt to keep the conductor from collecting the fares? A. Well, I can't say to that; I think there was.

Q. Didn't somebody drop the hasp of the lock? A. I don't know.

Q. Well, don't you know that the conductor tried to get in the front compartment and couldn't? A. I don't know nothing about that. The conductor was up in the front.

20 Q. Don't you know that that happened after you left the junction? A. What happened?

Q. That somebody dropped the hasp on the door? A. I don't know whether anybody dropped it or not, I told you.

Q. You do not know anything about that? A. Know nothing about that.

Q. What do you know about the conductor not being able to get the fares? A. All I know, they were fooling with him when he was up in front of the car.

30

Q. Do you know whether that happened after the car arrived at the junction? A. About the fares?

Q. Yes. A. Yes.

Q. You had to pay another fare after you left the junction? A. I did.

Q. And the conductor started the collection of the fares at the head of the car, the front of the

40 car, did he not? A. Yes.

Joseph H. McCabe—Cross

Q. Do you remember the car stopping at Stuyvesant Avenue? A. I don't remember that at all.

Q. You know the location of Stuyvesant Avenue, do you not? A. I do.

Q. Do you remember whether the conductor was in the front part of the car collecting the fares when the car got about that place? A. I believe he was in the front; he only had collected a few 10 fares.

Q. How long did the car stop at the junction? A. Stopped at the junction?

Q. Yes, the turnpike? A. A couple of minutes.

Q. There was not any row at the junction, was there? A. Not as I know of.

Q. How long after the car left the junction do you say the row started? A. Oh, it was all the way down.

Q. How soon after the junction did it start? A. 20 Right after we left it, no more than we left it.

Q. The moment you left it? A. Yes, sir.

The Court: I think he said, "No more than we left it."

Q. How long did you keep it up? A. Till Hoder went back.

Q. How long is that? A. I don't know; about a couple of minutes, I guess, or a minute.

Q. What do you mean by a minute or a couple of minutes? A. Well, a minute, I will say; I don't 30 know; I ain't sure of it.

Q. Sure of a minute. Did you look back? A. Yes, I looked back.

Q. And did you see the people on the platform in back? A. I don't know whether you could see; I believe you could see a few back there, where I was; not when he was going back, though; there was too many in the aisle. 40

Joseph H. McCabe—Cross

Q. When did you see them in back, after he had gone back? A. After he was gone back I looked back and seen them. The door was open.

Q. How long after that did you see people on the back platform? A. After that, I don't know; I didn't look back any more, only when he just got out.

10 Q. Do you know where the car was when you saw people on the back platform? A. No.

Q. You said on your direct-examination that the people on the back platform shouted, "Send him back here"? A. Yes, I heard that.

Q. That you heard? A. Yes.

Q. Did you testify to that when you were examined formerly, in the former trial? A. I don't know whether I did or not.

20 Q. Did you look at your testimony before you went on the stand? A. I looked at it, yes.

Q. Did you find anything to that effect in your former testimony? A. I don't know.

Q. I will hand it to you and ask you to examine it and see whether there is anything to that effect in your former testimony (handing book to witness)?

Mr. MacSherry: I object to that. The mere fact that the man did not testify to that can not affect the question in any way.

30 The Court: We are not considering the effect of it, but what the fact was. He said he did not know whether he said it.

Mr. MacSherry: Well, doesn't that close it?

The Court: No, he does not say that he did not say it; he does not know whether he said it. Now Mr. Hood shows him a document, I do not know what it is, and asks him to look his testimony over.

40

Joseph H. McCabe—Cross

It is admitted that this is the record of the testimony?

Mr. MacSherry: Yes.

The Court: (To the witness.) Then you may look at your testimony on the former trial and see whether you find that expression.

A. (After examining book.) I don't see nothing here, no. 10

Q. Well, now, having refreshed your mind by reading this testimony of yours at the former trial, and not finding anything there, will you say now as to whether you testified to that effect at the former trial? (No response.)

The Court: Do you understand the question?

Witness: I don't understand.

Q. I say, now that you have looked over this testimony, I ask you again whether you said anything at the former trial about the expression of anybody toward the rear of the car, "Send him back here"? A. No. 20

Q. Now, you say, then, that you did not say anything about that in your former testimony? A. No, I did not.

Q. In your testimony at the former trial you undertook to give an account as to what happened on that car, did you not?

Mr. MacSherry: I object to that, because his attention ought to be directed to what he said, and not a general statement as to what he attempted to do. 30

The Court: The question is a general one, and, I think, is susceptible of a general answer. You may answer.

A. Well, at that other trial I was pretty nervous.

The Court: That was not the question.

Q. (Question read.) I did, yes. 40

Joseph H. McCabe—Cross

Q. What did you say was your business at the time of this occurrence, in 1907?

The Court: What do you now say it was, or what did you then say?

Q. Now, I say, what do you now say was your business at the time of the trial? A. Confectionery and pool-room.

10 Q. Were you the proprietor of it? A. I was.

Q. Are you still the proprietor of it? A. No.

Q. You said that you noticed Hodler in the front compartment when you got on the car? A. I did.

Q. Can you tell us about where he was sitting? A. I should say about the third seat.

Q. From the front? A. Yes.

Q. Can you tell us whether he changed his seat at that time? A. I don't know whether he did or
20 not.

Q. Can you tell me whether he went from the front compartment to any other part of the car before the car came to Belleville Junction? A. I don't know whether he did or not.

Q. Did you see him while the car was at Belleville Junction? A. I believe he was in the car then, yes.

Q. Whereabouts in the car was he then? A. In
30 the same place; I don't think he got—

Q. Then you do not think he changed his seat any from the time you got on the car until the car got to the Belleville Junction? A. Well, that I don't know; I don't know whether he did or not. I didn't watch him all the time.

Q. But you say you think he was in the front compartment after the car started from the junction? A. After it started again; yes, sir; I believe
40 he was.

Joseph H. McCabe—Re-cross

Q. He was still in that seat after the car started up again? A. I believe he was.

Q. And the row that you are talking about is a row that started from that seat on? A. Yes, that is where the row come.

Q. Were you paying any particular attention to the speed that the car was travelling? A. I was not. 10

RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. Mr. McCabe, will you look at your testimony and tell us whether your attention was called, either by question or in any other way, at the last trial to the action of people in the back of the car, as to what they said, if they said anything (book shown to witness)? 20

The Court: You mean in the back of the car?

Mr. MacSherry: On the back platform—as to what was said by them, if anything, to Hodler while he was in the car.

A. (After examining book.) The only thing I can see here, "Someone says. 'Put him out.' "

Q. Was there any other reference made to that?

A. That is all.

Q. What was the condition of your health during the last trial while you were on the stand? A. Well, I was just after coming out of the hospital, and I was very nervous. 30

RE-CROSS-EXAMINATION by Mr. Hood:

Q. You are better now? A. What?

Q. You are better now? A. Not all better.

Q. You have been sick all this time? A. I have, yes. 40

Joseph H. McCabe—Re-cross

Q. Were you asked in your examination at this trial to state what people in the back of the car or on the back platform said? A. Was I asked that?

Q. Yes, at this trial, yesterday? A. I don't know whether I was or not.

10 Q. Did you answer, "They hollered, 'Send him back here,' " in answer to a question as to what the people on the back platform said? A. Yes, I answered that.

Q. Is not this the question that was put to you: "So that when he got back on the back platform how many were back there?" and did you not answer to that, "I don't know how many, but there were three or four back there talking and hollering; they hollered, 'Send him back here' " ? Isn't that the situation? A. I said that.

20 Q. Were you not asked on the former trial, "When they went towards the back of the car, what happened there?" Were you asked that question? A. I was.

Mr. MacSherry: He can not tell without looking at it.

30 Q. Well, I will show you the record, to refresh your memory (book shown to witness) "When they went towards the back of the car, what happened there? Answer: That I can't say; I was sitting in the front seat"?

Objected to as irrelevant.

The Court: All I am considering now is whether the witness's attention may be called to this feature of his testimony. I think it may.

Mr. MacSherry: Is it a feature of his testimony, your Honor?

The Court: I think it is.

Joseph H. McCabe—Direct

Mr. MacSherry: It does not contradict anything.

The Court: That is a matter of argument.

Defendant's counsel prays an exception, and the same is allowed.

The Court: Did you give that answer? Let the witness say whether he said that 10 which you read.

Q. Did you give that answer to that question?

A. I believe I did, yes.

Q. And were you then asked, "Where did they go, do you know?" and did you then answer, "Well, they went on the back platform, I guess; that is all I know"?

Mr. MacSherry: I want to enter a formal objection to both these questions on the ground that they are not cross-examina- 20 tion and take an exception.

Exception allowed.

Q. Did you say that? A. I believe I did.

Q. Were you then asked, "Did you see them on the back platform?" and did you answer to that, "No"? A. Yes.

Q. And did you further answer to that question, "Well, I know that they did go on the back platform?" A. Yes, sir.

Q. Were you then asked, "What did you hear 30 back there, if anything?" and did you answer to that, "Well, I couldn't hear very much from where I was; I was up in the front"? A. I did.

Further DIRECT-EXAMINATION by Mr. MacSherry:

Q. Now, will you tell us why you said in this trial that the men on the back platform used such 40

Joseph H. McCabe—Direct

words as these: "Send him back here," and did not make that statement at the previous trial?

A. Well, I was nervous at the other trial and I couldn't—I was kind of afraid.

Q. Afraid of what? A. Well, I don't know what it was.

10 Q. Is it not a fact, now, Mr. McCabe, that you had an idea at the last trial that in some way you and your associates would be criticised for what happened to Hodler on that platform?

Objected to as leading and suggestive of the answer.

Objection sustained.

Q. Will you tell us what you mean by saying you were afraid to tell?

Objected to.

20 (By direction of the Court, the stenographer reads from the record as follows: "Well I was nervous at the other trial and I couldn't—I was kind of afraid.")

The Court: Cut out "to tell."

Q. What do you mean by saying you were afraid? A. Well, if they all told the truth at that trial, he wouldn't be here today.

Q. What do you mean by that—"if they all told the truth"? A. Why, half of them witnesses.

30 Q. What do you mean by telling the truth? A. Because they seen him.

Mr. Hood: I object to that. That seems to be very plain language.

The Court: The witness is now making a statement of a fact which is proper enough, if it is relevant and founded on his own knowledge, but not otherwise.

40 Mr. Hood: I move that it be stricken from the record, sir, as being inference

Joseph H. McCabe—Direct

that "if they were telling the truth, he would not be here today."

The Court: Before the witness goes any further, it should appear that he has personal knowledge of what he said.

By Mr. MacSherry: Q. Whom do you mean by "he"? A. Some of the witnesses.

By the Court: Q. What? A. Some of the witnesses. 10

By Mr. MacSherry: Q. Whom do you mean by "he wouldn't be here today"? A. Hodler wouldn't.

Q. I want to get you right on the record. Do not answer this until the Court rules on it. Do you mean to say that the witnesses on the last trial did not tell the truth, or did not tell all they knew?

Objected to as leading. 20

Mr. MacSherry: All you think they knew?

The Court: The witness's opinion as to what other people knew is not evidential.

Q. Do you mean to say that the witnesses at the last trial that you refer to, on that car, did not tell the truth, or that you know of your own personal knowledge that they could tell more than they told?

Objected to. 30

The Court: I sustain the objection on the ground that it is a leading question.

Q. What do you mean by "they are not telling the truth?" A. They told the truth—

Mr. Hood: I object to that question because that is plain English language and it is not open to interpretation.

The Court: I want to be fair to the wit. 40

Joseph H. McCabe—Cross

ness I will allow him to answer your question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

10

Circuit Court Judge.

A. Why, I meant by that, they didn't tell all they knew; they were afraid.

Mr. Hood: I object to that, if your Honor please, and I ask that it be stricken from the record—"they were afraid."

20 The Court: I will strike it out. It is his own notion as to the state of mind of other persons; it is his own hypothesis as to the state of mind of somebody else.

Defendant's counsel prays an exception, and the same is allowed.

Further CROSS-EXAMINATION by Mr. Hood:

Q. Do you include yourself amongst those who did not tell the truth at the last trial?

Objected to.

30 A. I include the people that was in the back.

Mr. MacSherry: I object to that question because on the record that would seem to imply that the witness had stated that the other people did not tell the truth. Now, he did not say that, in the common acceptance of the term; he did not say that they lied; he said they did not tell all they knew. I do not think that question is proper, for that reason.

40

The Court: I will allow it.

Joseph H. McCabe—Cross

Defendant's counsel prays an exception, and the same is allowed.

Q. (Question read.) A. I do not.

Q. Did you remember at the last trial that the people in the back halloaed, "Send him back here"? A. Well, they said something like that.

Q. Did you remember that at the last trial? A. I believe I said it there—"Put him out." 10

Q. I said, did you remember that fact at the last trial? A. I think the answer is in the book there.

Q. Won't you answer my question?

The Court: You may answer the question. It is not as to what you said, but as to what you then remembered.

A. Well, I remember them saying, "Put him out."

Q. When you testified at the former trial did you remember that the fellows in back halloaed, "Send him back here"? A. Did I remember that at the first trial? 20

Q. Yes. A. No, I didn't remember it.

Q. You did not remember it at the last trial? A. No, I did not.

Q. Is your memory now any better than it was at the last trial? A. I don't know; it might be a little better.

Q. What you remembered at the last trial was that somebody shouted, "Put him out"? A. I believe that is what it was. 30

Q. And you did not remember at the last trial that someone shouted, "Send him back here"? A. Well, that is pretty near the same.

Q. Did you not say that they shouted, "Put him out," when he tried to sing? A. Yes, they were saying it all the time, too, all different kinds—

Q. Did you not testify at the former trial that 40

Charles T. Kavanaugh—Cross

when they shouted, "Put him out," it was when he was trying to sing in the car? A. Yes.

Q. And did you not testify in this trial that the row started because he called somebody a son-of-a-bitch? A. That is what the row started over.

Q. Isn't that what you said in this trial? A. I believe I did, yes.

10 Q. And did you not say it was on that account that the fellows pushed him back and said, "Send him back here"? A. I believe I did, yes.

Defendant's counsel proposes to recall the former witness Charles T. Kavanaugh for further cross-examination.

Plaintiff's counsel objects.

20 The Court: (After argument.) I suppose it is discretionary with the Court, so that if my discretion is not wisely exercised you would not have any remedy, but I think I will grant the request, Mr. Hood, to get all the light we can on the case.

CHARLES T. KAVANAUGH, re-called for further cross-examination by Mr. MacSherry:

30 Q. Mr. Kavanaugh, I have not had a chance to look at the minutes, but did you say that you were on your feet before you reached the curve that night? A. Between the Belleville turnpike and the curve?

Q. Yes. A. Yes.

Q. Who pulled the bell for the car to stop at Stuyvesant Avenue? A. I did.

40 Q. And where were you on your feet, what part of the car were you in, when the car reached the curve? A. At the rear door.

Charles T. Kavanaugh—Cross

Q. Did the movement of the car throw you off your feet? A. No, sir.

Q. Or throw you off of your balance? A. Well, off my balance would be off my feet. No, it didn't knock me down.

Q. Now, you have already said that you met Mr. Ingalls, I believe? A. Yes, sir.

Q. To assist you, I will show you this statement, 10 which you say was your own. (Shown to witness.) You had a conversation with him on January 27, 1908? A. Yes, sir; whatever the date was, yes.

Q. That conversation was at your residence in Arlington, was it not? A. Yes, sir.

Q. Did you tell Mr. Ingalls that you first met Mr. Hodler on the way up? A. Yes, sir.

Q. And did you tell him you met him at the depot on the way down? A. I don't remember 20 whether I told him that or not.

Q. And did you tell him that you talked to Mr. Hodler on the way down? A. I presume so, yes. I did do it.

Q. And did you tell him that the man appeared to be somewhat under the influence of liquor? A. I believe I did; yes.

Q. And did you tell him that about a mile or half a mile from the junction, or at Arlington, a crowd got on at the dance hall? A. Well, if that 30 means Ell's hall, yes.

Q. And that they were jollyng the conductor? A. Yes. When I say, "Yes," all that happened, yes.

Q. And did you tell him that they latched the door so that the conductor could not get in? A. Yes.

Q. And did you tell him that they were on the rear platform? A. I don't think so, no. 40

Charles T. Kavanaugh—Cross

Q. Just look at it, will you please, (paper shown to witness)? A. I saw that. That is one of the things I do not think is correct.

Q. Did you tell him that the conductor took it good-naturedly? A. Yes.

Q. But this man Hodler acted fussy about it? A. Well, he was—

10 Q. Well, I just want to know whether you told that to Mr. Ingalls, that is all. A. Well, I don't remember exactly.

Q. And did you tell him that Hodler went out on the platform? A. I don't remember whether I said that or not. He may have gone out on the platform; he was back and forth on the car.

20 Q. I just want to know whether you told that to Mr. Ingalls, that is all. Did you tell him that you did not hear any arguments after he got out there? A. No, I didn't.

By the Court: Q. You mean you did not tell him that? A. After he got out on the back platform?

The Court: Yes.

Mr. MacSherry: Yes, that you did not hear any arguments. Did you tell Mr. Ingalls that?

Witness: I don't remember specifying the back platform.

30 By Mr. MacSherry: Q. Did you tell him these words: "As I recall it, we made close connection at the end of the Kearny line, after we changed crews. I was near my home, and my attention was given to having the car stop at Stuyvesant Avenue for me to get off, and I did not notice him again"? Did you tell him that? A. I believe so; that was about the truth of it, yes.

Q. I just want to know whether you told him that? A. Yes.

40 Q. Did you tell him that you told the conductor you wanted to get off, and he said not to mind it,

Charles T. Kavanaugh—Cross

because it was only three blocks? A. Relative to the fare?

Q. Yes. A. Yes.

Q. And did you tell him that you were not familiar with the neighborhood? A. Not as it applies to that statement.

Q. Did you tell him that at all? A. I will have to explain it. 10

Q. Yes. A. Mr. Ingalls, if that is the gentleman's name, in talking, in making that statement up, mentioned the fact that he and a friend of his were about to open a sanitarium, or had opened a sanitarium—about to open one, I think—and inquired as to that location, or that neighborhood. At that time I told him that I was not familiar enough with the neighborhood to suggest where a sanitarium would be a good thing, not that I wasn't familiar with the road. 20

Q. No, I do not mean that; the locality. A. The locality I was familiar with for years.

Q. Did you tell him that the conductor told you to pull the bell "right after we struck the curve"? A. The conductor did say that, yes.

Q. Did you tell him this: "We struck the curve, and he rushed up and pulled the bell himself"? A. No.

Q. Did you say you went out on the rear end, and that when the car stopped at Stuyvesant Avenue you got off and came right into the house? A. Yes, sir. 30

Q. Did you tell him that you were on your feet in the rear of the car "when we struck the bend," and did not feel any hard jerk to throw you off your balance? A. Not hard enough to throw me off my balance; no, sir; I didn't

Q. And did you tell him that you came into the house and was partly undressed when you heard 40

Charles T. Kavanaugh—Cross

somebody whistling in the street? A. Yes, sir.

Q. And did you tell him that you went to the window, looked out and saw a south-bound car standing in front of the house? A. Yes.

Q. Did you tell him that while you were looking out you saw a north-bound car come by and stop, and then go right on— A. Yes, sir; I think so.

10 Q. —up near the end of the line, and come right back? A. Went up to the end of the line.

Q. Did you tell him that you did not know what the trouble was and did not think of running out until two men went around the end of the house, and then you went out? A. I believe that is it, yes.

Q. Did you tell him that you found this man lying on his right side, facing the south, lying at right angles with the track on the west road-
20 way? A. Lying on his right side, facing the south, at right angles with the track?

Q. Yes. A. On what side of the road?

Q. On the west roadway? A. Yes.

Q. Did you tell him that “the rear end of the car, I noticed, was about 5 or 6 feet past where he lay”? A. That is about where it was, yes.

Q. Did you tell him that? A. Well, I think so.

Q. Did you tell him, “After calling for the ambulance, the man was put on the first south-bound car, which took him down the line”? A. Yes, sir.
3

Q. Did you tell him that Dr. Squires saw him while he was on the road? A. Yes, sir.

Q. And did you tell him that you did not think that he fell from the car that he came down on? A. I don't think I did say it in that way; no, sir.

Q. Did you tell him “He may have been struck by the south-bound car that I just saw out there, as it was a very foggy night”? A. I believe I did,
40 yes.

Charles T. Kavanaugh—Direct

Q. And did you tell him "or he may have been assaulted and laid there"? A. Well, with the qualifications, yes.

Q. Did you tell him, "He told me a story on the way down that may have been true or may have been a maudlin imagination"? A. Yes, sir.

Q. "But if it were true, someone at Hackensack would have possibly had reason to assault him"? A. Yes, sir. 10

Q. Did you tell him that there were no passengers who came from Hackensack to Arlington except you two? A. Yes, sir.

Further DIRECT-EXAMINATION by Mr. Hood:

Q. Mr. Kavanaugh, what is the fact, as you now recall it, with regard to what you felt when the car struck the curve of the track? A. Why, I don't quite get your meaning, Mr. Hood. 20

Q. I say, what happened to you or what did you notice, as you now recall it, as the car struck the curve in that road? A. Why, it struck the curve, and I knew that we struck the curve by the motion sufficiently to pull the bell.

Q. Were you at that time seated or were you standing? A. Standing.

Q. What effect did it have upon you as you were standing? A. Why, a jolt, a jerk. 30

Q. In what part of the car were you standing at the time? A. The rear door, the right-hand side of the car.

Q. Inside of the compartment or outside of the compartment? A. Inside.

Q. Do you remember in what direction you were looking? A. Towards the front of the car.

By the Court: Q. Was this inside of the first 40

Martin B. Shields—Direct

compartment or the smoking compartment? A. Inside the rear door of the car; that would be the smoking compartment, I think, on that trip.

Q. The rear door? A. Yes, sir.

By Mr. Hood: Q. At the time when you received the instructions from the conductor to ring the bell when the car struck the curve whereabouts
10 was the car? A. Well, just about starting.

Q. Were you seated or were you standing? A. When I spoke to the conductor?

Q. When you spoke to the conductor? A. I don't recall that.

Q. Well, do you recall whether or not you were seated all the way from Hackensack down until you got ready to leave the car? A. I believe I was; yes, sir; I don't recall getting up.

Q. Can you say definitely whether you got up
20 before the car struck the curve or after it struck the curve? A. Oh, I got up before it struck the curve.

Q. What is it that you say that the conductor told you about ringing the bell? A. He told me to pull the bell, or ring the bell, when we struck the curve.

By Mr. MacSherry: Q. While you were standing up, as the bell was rung, when you reached the curve, did you have a hold of anything or not? A.
30 I don't think so, unless probably the bell cord.

MARTIN B. SHIELDS, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Shields, where do you live? A. Kearny.

40 Q. What is your business? A. Plumber

Martin B. Shields—Direct

Q. Do you know where Kearny Avenue is? A. Yes, sir.

Q. And Bennett Avenue and Stuyvesant Avenue, crossing it there? A. Yes, sir.

Q. Were you in that vicinity in the month of December, 1907, when this man, Mr. Holder, was hurt? A. Yes, sir.

Q. Where were you that night? A. Up to a 10 dance.

Q. Where? A. Up in Ell's hall, Kingsland.

Q. Do you know under whose auspices this dance was given? A. No, sir; I do not.

Q. A public dance, was it, or private? A. A public dance.

Q. Did you have to pay admission or was it free? A. I paid admission.

Q. Could you get in without paying? A. I guess if you got by them at the door you could. 20

Q. Where was this located, how far from the junction? A. I don't know; about a mile and a quarter or a mile and a half.

Q. Was there anything to drink there, that you saw? A. I didn't see any.

Q. Did you drink anything? A. No, sir.

Q. Did you see anybody drink anything? A. Just soda.

Q. And what time did you get there? A. I should judge around 9 o'clock. 30

Q. And what time did you leave? A. I don't know. We stopped dancing about half-past eleven. There was a fight and the dance stopped.

By Mr. Hood: Q. What? A. We stopped dancing about half-past eleven, I guess.

By Mr. MacSherry: Q. What stopped the dance? A. There was a fight there and we stopped dancing at half-past eleven. 40

Martin B. Shields—Direct

Q. What kind of a fight? A. Oh, an all-around fight.

Q. That was a public affair, too? A. Kind of.

Q. Well, what time did you leave there? A. Well, we waited for a car there. I don't know what time the car did get there; it must have been around 12 o'clock.

10 Q. About how many of you people took the car, if you took the car? A. About twenty-five or thirty of us.

Q. Any girls? A. Well, there was some girls, yes; I didn't know how many; I didn't know any of them.

Q. Did you or did you not take the car with the rest? A. Certainly.

20 Q. And when your party of dancers got on the car, what part of the car did they go in, or what part of the car did they occupy? A. They kind of scattered; some stood on the back, and I guess some went inside.

Q. Were there any on the back platform? A. Yes, sir.

Q. Do you remember seeing Mr. Hodler, the plaintiff, in that car? A. Well, after we were on the car, I did.

30 Q. That is what I mean. Where was he when you first saw him? A. He was up towards the front; he stood up.

Q. And where were you? A. In the smoking compartment, right near the rear door at the time, I believe.

Q. And how long after this fight was it that you left the dance hall? A. Why, no more than we got on, there was some sneezereen blew around.

40 Q. No, I am not in the car yet. I mean how long after this fight in the dance hall was it that you boys and girls got on the car, or left the hall? A.

Martin B. Shields—Direct

That I couldn't say. The first car that come we got on. They run every half hour, and I guess we must have made the half-past eleven car.

Q. How long did this fight last in the hall? A. Oh, it was brewing all night.

Q. When you left the dance hall was any bad blood engendered, if you know what I mean by that? Was there a feeling of fight still in the party, or had everything quieted down? A. I believe there was a feeling of fight in the party. That is what we went up for, I guess. 10

Q. What did you go up there for, a fight or a dance? A. Well, we didn't care which.

Q. Now, when you got on the car, tell us first what happened, if anything out of the ordinary, if anything did happen? A. Oh, we were riding a ways, and then I heard a lot of argument up in the front, and I seen this man here stand up and issue a challenge. 20

Q. What man? A. Mr. Hodler there issued a challenge.

Q. Well, what did he do and what did he say. A. I couldn't hear him say anything.

Q. What do you mean by issuing a challenge? A. Well, he stood up in the car, and I could hear the wrangling, and three or four went up towards him. 30

Q. Do you know what sneezereen is? A. Yes, sir.

Q. Was any of that thrown around the car? A. Yes, sir.

Q. Before this wrangling or not? A. No more than we got in the car, it was thrown around.

Q. What effect, if any, did that have on the passengers in the car? A. Why, it makes them sneeze.

Q. Well, did it make them sneeze? A. Yes, sir. 40

Martin B. Shields—Direct

Q. Go on and tell us what you saw Mr. Hodler do and how anybody acted towards him? A. I seen him get up towards the other compartment of the car, and they kind of gathered around him, and they were arguing up there for a little while.

Q. And then what happened? A. Then we all tried to get near him, I guess.

10 Q. Tried what? A. To get near him.

Q. What for?

The Court: Speak for yourself.

A. Kind of spoke out of his turn, I guess.

Q. What did you want to get near him for? A. To have a crack at him, I guess.

Q. What had he done to make you have a desire to have a crack at him, as you say? A. Well, he was mixed up with the boys.

20 Q. Tell us what he did after that, where he went, if anywhere, or whether he stood there, and what happened to him? A. Well, by that time we were down to the Belleville crossing, and we stood there a minute or so, I guess.

Q. Did you get off the car or not? A. No, I don't think I got off.

Q. What happened after the car left the crossing? The junction, you mean, I suppose? A. Well, the whole gang come towards the back platform. I don't know what happened after that.

30 By the Court: Q. You mean after the car left the junction? A. Yes, sir.

By Mr. MacSherry: Q. Where were you when the car left the junction? A. Standing right at the back door, just inside, right at the back door.

Q. Where was Hodler when you left the junction? A. Out on the back platform then, I guess.

The Court: Do not guess. Do you know?

40 Q. Do you know where he was? A. No, I couldn't say then just exactly where he was.

Martin B. Shields—Direct

The Court: Confine yourself to your actual knowledge.

Q. Did you see him at all after the car left the junction? A. Yes, I did.

Q. Where? A. Coming through the aisle, just as the car left the junction.

Q. What do you mean by "coming through the aisle"? A. Coming from the front down through the aisle. 10

Q. Which way was he going? A. Towards the back platform.

Q. And at that time was or was there not anybody on the back platform? A. Oh, yes, because I was talking to them on the back platform.

Q. Can you tell us what happened on that back platform? A. Well, it looked to me as if there was a fight.

Mr. Hood: No, only what you saw and heard. 20

Q. No, what you saw and heard only? A. What I saw, there was a fight on the back platform.

Q. Was that before or after Hodler went through the aisle back there? A. After he went through the aisle.

Q. And how long did that fight last? A. It didn't last long.

Q. Did you see Hodler after that? A. No, sir; I did not.

Q. Do you know what became of him? A. No, sir. 30

Q. You did not see him at all? A. No, sir.

Q. Did you hit him while he was on that back platform? A. No, sir.

Q. Did you try to? A. Yes, sir; I tried to, but I couldn't get near enough to him.

Q. Why not? A. The crowd was all there.

Q. Was the car standing still or moving then? 40
A. The car was going.

Martin B. Shields—Cross

CROSS-EXAMINATION by Mr. Hood:

- Q. How old are you, Shields? A. Twenty-eight.
- Q. Married? A. No, sir.
- Q. Where do you work? A. I don't work no place now.
- 10 Q. How long have you been without work? A. About eight days.
- Q. Where did you work before that? A. Tommy Branch, in Kearny.
- Q. How long did you work for him? A. Six months.
- Q. Were you working in December, 1907? A. I can't tell. Plumbers' life is like a circus life, you know; you never know when you are working.
- 20 Q. Have you ever been convicted of crime? A. No, sir.
- Q. You went to the dance with the gang, did you not? A. I didn't go with the gang, no.
- Q. Well, you went up to the dance on an appointment with the gang, did you not? A. Not exactly an appointment, no; I knew they would be all up there.
- Q. Well, how did you know they were all going up there? A. Because it was talk for a week
- 30 around the corners that they was going up there.
- Q. And while you were at the dance there was fight all evening? A. Kind of fighting, yes.
- Q. Fisticuffs, blows? A. Oh, yes, every once in a while you would see it.
- Q. Gang against gang? A. Yes, sir.
- Q. Your crowd against some other crowd? A. Well, kind of that way.
- Q. And when anyone of any particular crowd started a rumbus, all those that belonged to the
- 40 crowd joined in? A. Yes, sir.

Martin B. Shields—Cross

Q. You say you do not know under whose auspices that dance was given that night? A. That is what I said.

Q. Was it not a well known New York club? A. That I don't know.

Q. I mean a club well known as being made up of roughs and toughs? A. I didn't know that.

Q. When you got ready to take the car you were still in fighting humor, were you not? A. Yes, sir.

Q. Did you have any fights there while you were waiting for the car among yourselves? A. No, sir; not among ourselves, no.

Q. Did you have any fights with anybody else? A. No, not then.

Q. Well, when the car came along you all piled on, did you? A. Yes, sir.

Q. Just your gang, or your gang and some other gang? A. Oh, there was more there besides our gang.

Q. Well, were they people that you were associating with or were they people that were in opposition to you? A. No, I don't say they were in opposition to us nor they wasn't associated with us; probably they were up to the dance, too.

Q. Well, I do not care anything about your private speculations; I want to know what you know. Were they friends of yours or were they strangers or were they opponents? A. They might have been friends just for that evening.

Q. You do not know anything about it? A. No. They didn't chum around with us.

Q. When you got on the car, that was at Ell's hall, down in Kingsland? A. Yes, sir.

Q. How far do you say that is away from Belleville junction? A. Oh, about a mile and a half. I may be wrong.

Martin B. Shields—Cross

Q. How long did it take the car to come from where you got on to Belleville junction? A. I don't know.

Q. Can you give me any idea of the time? A. No, sir; I can't because we were all kind of excited, and time didn't seem to bother me that night.

10 Q. Time did not seem to bother? A. Not at that stage, no.

Q. Well, what were you excited about? A. I wasn't excited.

Q. Did you not say you were all excited? A. A little bit up in the air, with the fight going on.

Q. What were you up in the air for? A. Fighting.

Q. Fighting where? A. Up in Ell's hall.

20 Q. That had not quite cooled down yet, had it? A. No, sir.

Q. Did it cool down by the time you got to the junction? A. Well, there was a new one started by then.

Q. Well, had the old fight cooled down by the time you got to the junction? A. I didn't hear any more about the old fight then.

30 Q. Well, as a matter of fact, there was not any fight on the car between the time you got on and the junction, was there? A. Between what time? I didn't understand.

Q. Between the time you got on the car and the time you got to the junction there was not any fight, was there? A. Oh, they may have been arguing, yes.

Q. When you talk of fight, do you mean argument? A. Well, that generally starts a fight.

Q. When you speak of fight do you mean argument? A. Yes, in the sense of the word, yes.

40 Q. When you spoke of the fight in Ell's dance

Martin B. Shields—Cross

hall did you mean argument? A. Well, some of them, yes.

Q. Did you not speak of blows? A. Well, there were blows, too.

Q. Did you not speak of a real fight, not talk? A. Yes.

Q. Well, now, was there any real fight on the car from the time you got onto it until Belleville junction? A. None that I seen. 10

Q. If there had been you would have seen it, would you not? A. I may and I may not have.

Q. And you would have had a hand in it? A. I may and I may not have.

Q. Well, you had a hand in everything that went on that night in the dance hall, did you not? A. Not everything; no, sir.

Q. Pretty much everything? A. No, sir.

Q. All that happened on that car between the hall and Belleville Junction was talk, was it not? 20

A. That I don't know.

Q. All that happened that you know anything about on that car between Ell's hall and the junction was talk, was it not? A. That I know anything about; yes, sir.

Q. It was talk, was it not? A. Yes, sir.

Q. Where was Hodler at the time when you got on? A. I didn't see him when I got on.

Q. Where was Hodler at the time when you first saw him? A. Standing up in the front of the car—towards the front of the car. 30

Q. You mean in the first compartment of the car as the car was going? A. Up towards the front door.

Q. Well, there were two compartments in that car, were there not? A. Yes, sir.

Q. It was one of the big Hudson River cars? A. Yes, sir. 40

Martin B. Shields—Cross

Q. And inside were two compartments? A. Yes, sir.

Q. And the back compartment was the smaller of the two? A. Yes, sir.

Q. And that was the smoking compartment; is that right? A. Well, I guess it was.

Q. Well, don't you know? A. Well, lots of
10 times you couldn't smoke in them compartments.

Q. Were you not standing by the back door in the smoking compartment that night? A. I was standing there, yes.

Q. And was not that the smoking compartment that night? A. Why, the whole car was a smoking compartment that night.

Q. The whole car was. All right. Well, at any rate, Hodler was at the head of the car, in front? A. Towards the front, yes.

20 Q. And he stood there during all the time until you got to the junction, did he not? A. No, he rose, I think, as we were coming down to the junction; he got up in the aisle.

Q. Well, how far down the aisle did he get before you got to the junction? A. That I don't know.

Q. Did he leave the front compartment at all before you got to the junction? A. I don't think so.

30 Q. Did he leave the car at the junction? A. I can't say that he did or did not.

Q. Do you remember seeing him at all while the car was standing at the junction? A. No, I do not.

Q. You remained on the car at the junction, did you not? A. I think I did, yes.

Q. You did not go over to the Mountain House for refreshments? A. I may have and may not;
40 I hardly think I did.

Martin B. Shields—Cross

Q. Well, do you remember whether you did or not? A. That is what I say; I don't remember whether I did or not.

Q. So that you will not say either that you were on the car or that you were off the car while the car was at the junction? A. That is what I will say.

Q. You said on your direct-examination that you were on the car, did you not? A. I may have. 10

Q. Well, don't you know? A. I am saying now I don't know.

Q. Don't you know that you said in answer to Mr. MacSherry's questions this morning that you remained on the car and that you did not get off while the car was at the junction? A. I don't know if I did or not.

Q. What? A. I believe I did.

Q. And did you not say on your direct-examination that some of the fellows got off and went to the Mountain House, but you did not, you stayed on the car? A. Well, I don't say now that I did get off. 20

Q. I am asking you whether you did not say that to Mr. MacSherry on the direct-examination? A. I believe I did.

Q. And did you not tell me just a few minutes ago that you do not know whether you got off or not? A. I did. 30

Q. Was there a conductor on that car? A. Yes, sir.

Q. Did you see the conductor get on the car after the car left Belleville junction? A. No, sir.

Q. You changed crews, did you not, at the Belleville junction? A. I seen them change crews there.

Q. Did you see the new conductor come on? A. Yes, sir. 40

Martin B. Shields—Cross

Q. Where were you at the time? A. Standing near the back door.

Q. In the door or on the back platform? A. Just off the raise of the step there.

Q. Were there any people standing in the car? A. Yes, sir.

Q. Were there seats enough for everybody in
10 that car? A. I didn't notice.

Q. Well, why did you stand? A. Just to talk there with the lads on the back platform.

Q. Talk with fellows on the back platform? A. For a while.

Q. This is after the car left the junction, is it? A. Yes, sir.

Q. I am not talking of before you got to the junction; I am talking about the time after you left the junction? A. I was standing about—just
20 at the back door there.

Q. You were standing in the car, at the back door? A. Just about a foot in from the back door.

Q. And which way were you looking? A. Looking all ways.

Q. Got eyes all around? A. No, but I was turning all around.

Q. In your turns did you see anything of the conductor? A. Yes, seen him up in the front of the car, yes.

30 Q. Did you see him go up in front? A. No, I seen him up in the front.

Q. Saw him up in front. What was he doing there? A. Trying to collect the fares, I guess.

Q. While you saw the conductor up in the front trying to collect fares, was there any fussing or fooling with him at that time about the fares? A. I believe there was.

40 Q. Did anybody close the door between the two compartments? A. Not just then, no.

Martin B. Shields—Cross

Q. When? A. Well, I don't know; we had got down quite a ways.

Q. How far down had you gotten when that happened? A. Well, that I don't know.

Q. Had you gotten beyond Stuyvesant Avenue? A. That I don't know.

Q. Do you know Kavanaugh? A. Yes, sir; I know him when I see him. 10

Q. Did you know him at that time? A. I knew him to see at that time.

Q. Did you see him that night? A. Yes, sir.

Q. Did you see him in the car? A. Yes, sir.

Q. Did you see him get off? A. Yes, sir.

Q. Do you know where he got off? A. No, sir.

Q. Do you know whether the conductor was having his trouble with the fellows in the front compartment before or after Kavanaugh got off? 20
A. I don't know.

Q. You do not know that. Did you continue to stand in the aisle of the car, in the smoking compartment, all the way down until you left the car?
A. I believe I did; yes, sir.

Q. Pretty much at the place that you have specified? A. Pretty much there.

Q. And where did you get off the car? A. Bergen Avenue.

Q. How far is that away from Stuyvesant Avenue? 30
A. Oh, about a mile and a quarter or a mile and a half.

Q. Further south? A. Yes, sir.

Q. Do you remember the car stopping at any point between the Belleville turnpike and the place where you got off? A. It may have stopped. I don't remember.

Q. You do not remember it at all? A. No, sir. 40

Martin B. Shields—Cross

Q. Do you remember anything about the speed of the car? A. No, sir.

Q. How many people were there on the back platform when the car left the junction? A. Oh, I suppose eight or nine.

Q. What? A. Eight or nine probably.

Q. Eight or nine were on the back platform?

10 A. A lot of them run out from the lunchroom.

Q. I am talking now about when you started from the Belleville junction, how many people were there on the back platform? A. That is what I say; they run out with pie in their hand and they stood on the back there, three or four of them.

Q. I do not care whether they had pie in their hands or not, but I want to know how many there were? A. About eight or nine.

20 Q. That filled up that platform pretty well, did it not? A. Practically, yes.

Q. It is not a very large platform, is it? A. Oh, yes, it is large enough for eight or nine.

Q. Yes, but eight or nine would fill it up, would it not? A. Kind of.

Q. Well, would not eight or nine fill it up, pretty chuck full?

Objected to as not cross-examination.

30 The Court: I think an inquiry as to the situation on the car is competent on cross-examination.

(Question read.)

Mr. MacSherry: I object to that. It is not what it would do. Did it do it?

Mr. Hood: Yes, did it?

A. I don't know whether it did or not.

Q. Was there room for you to get on? A. To get on where?

40 Q. On the back platform? A. I was on.

Martin B. Shields—Cross

Q. Did you not say that you were standing in the door? A. Well, wasn't I on the car?

Q. I am not talking about the car; the back platform? A. I didn't try to get on the back platform.

Q. Did you try to get on the back platform any time after the car left Belleville Junction? A. Just to get off the car, that is all. 10

Q. Otherwise you made no try to get there? A. Well, once I did.

Q. When was that? A. When Hodler and the boys came rushing towards me.

Q. Well, did you get on? A. No, sir.

Q. It was too full, was it not? A. It was at that time, yes.

Q. How far had the car travelled from the Belleville junction when there was trouble on the car? A. That I don't know. 20

Q. How long in time had it been going? A. I don't know.

Q. Can you say whether it was a short time or a long time? A. A short time.

Q. Can you say whether it was a couple of minutes or longer? A. I can't say.

Q. Can you say whether it was a couple of minutes or less? A. No, sir.

Q. Can you say about where the car was on the road at the time when it occurred? A. No, sir. 30

Q. Where was Hodler at the time when the rumpus started after the car left Belleville Junction? A. Kind of walking towards the back.

Q. Where was he when you first saw him after leaving the Belleville Junction—where was Hodler in the car? A. Kind of towards the front, walking to the back of it.

Q. He was in the front compartment, was he? A. Yes. 40

Martin B. Shields—Cross

Q. You could not hear what he said? A. No, I couldn't hear.

Q. You could not hear what anybody else said to him? A. Oh, yes, I could.

Q. You could hear what others said to him, but you could not hear what he said? A. Not at that time.

10 Q. How many fellows were around him? A. Why, I don't know; as many as could get around him.

Q. Well, how many, according to the best of your judgment, were around him?

The Court: Now you are speaking of something that occurred in the front of the car, you understand. Go on.

(Question read.)

A. That I couldn't say.

20 Q. Were they in the aisle? A. Yes, sir; in the aisle and standing on the seats.

Q. How many were there in the aisle according to the best of your judgment? A. I don't know.

Q. Was there any between you and him in the aisle? A. There might have been a few.

Q. Do not tell me there might have been; I want you to tell me whether they were or not. A. There were a few.

30 Q. What do you mean by "a few"? A. Two or three.

Q. Were there any in back of him in the aisle, between him and the front door of the car? A. That I don't know.

Q. Was it a narrow aisle or was it a broad aisle in that car? A. Kind of a narrow aisle.

Q. Seats running crossways? A. Yes, sir.

Q. There was not any room except for just about one person to stand in the aisle, was there? A. Oh, yes, two can stand.

40 Q. Abreast? A. Yes.

Martin B. Shields—Cross

Q. Two can stand abreast? A. Yes.

Q. How long did the argument continue with Hodler in the front part of the car? A. I don't know.

Q. What is the best of your recollection as to the length of time that the argument lasted? A. I couldn't very well recollect at all.

Q. Did it last a couple of minutes? A. I don't know. 10

Q. Did it last more than that? A. That I don't know.

Q. Did it last less than that? A. I don't know.

Q. Did Hodler move towards the back platform of the car, or was he pushed towards the back platform of the car? A. That I don't know; the whole crowd come back in a body, like, in a mass.

Q. What? A. The whole crowd came back in a body, a mass like. 20

Q. How did they get by you? A. I was standing up by one of them seats that run lengthways of the car, see?

Q. You got out of the way for them, did you? A. Kind of; I kind of stepped in the seat.

Q. And yet you were anxious to get out to have a crack at Hodler? A. When I seen what it was, yes.

Q. And yet you let him go by, did you? A. I did at the time, yes. 30

Q. Did they get out on the platform? A. Kind of crushed out on there, yes.

Q. Well, did they get out? A. Well, Hodler did; I don't know if they did.

Q. Did you see him get out on the back platform? A. Well, he must have.

Q. No, not "must have." Did you see him get out on the back platform? A. Well, he went apast me. 40

Martin B. Shields—Cross

Q. Then you can not say that he was out on the back platform? A. Well, he had to go out there.

Q. I am asking you not to draw conclusions or arguments; I am asking you to tell what you saw. A. I saw him go by me, and then he—

Q. And you were in the rear compartment? A. Yes, right near the door.

10 Q. How many people were there on the back platform at the time when he was going by you? A. That I don't know.

Q. All those that were there when you started? A. That I don't know.

Q. What became of the people that were on the back platform at the junction while you were travelling down? A. I don't know.

Q. Were any of them standing in the aisle? A. They may have.

20 Q. I am asking what you know about it. Were they or were they not? A. I don't know.

Q. Was there any quarrel or argument on the back platform after Hodler got there? A. Yes, sir.

Q. How long did the argument last out there? A. That I don't know.

30 Q. Did the people that were out on the back platform at the time when Hodler passed you remain out there until you got off? A. I don't know if them people did; there was a crowd out there when I got off.

Q. Well, did the crowd continue to stay out there all the way down from the Belleville Junction until you got off? A. No, they were going up and down the car all the while—the lads fooling amongst themselves.

Q. Did any of the people continue on the platform during that time? A. I am telling you they were there when I got off, quite a few.

40 Q. And they were there at the time when Hod-

Martin B. Shields—Cross

ler passed you in the car? A. Well, I don't know how many was there then; no, sir.

Q. But you know they were there then, do you not? A. Yes, some were there then; I was talking to them.

Q. You were talking to them? A. Yes.

Q. There were quite a few there? A. I don't know what you mean by "quite a few." 10

Q. There was the same crowd there that was there at the time you started from the junction, was there not? A. That I can't say.

Q. There were the same number of people there on the back platform that were there at the time you started from the junction? A. I don't know.

Q. Were you not talking to them? A. I was talking to some.

Q. Was it not your crowd? A. Yes, but I don't watch when one goes away from the crowd. 20

Q. But you watched it long enough until this affair with Hodler took place, did you not? A. Watched what?

Q. Your back platform? A. Oh, no.

Q. You were standing right there at the door, you say? A. I was.

Q. Well, you know about that back platform at that time, do you not? A. I know the party I was talking to, yes; I was watching him; I wasn't watching all the others. 30

Q. But the party that you were talking to was not the only one on the back platform? A. No, not at that time.

Q. There were a lot of others there? A. There was some.

Q. Eight or nine of them? A. I don't know; not necessarily eight or nine.

Q. How many? A. I don't know.

Q. How many, to the best of your judgment? A. That I don't know. 40

Martin B. Shields—Re-direct

Q. Was the back platform at that time pretty well crowded? A. I don't know.

Q. Do you mean to say that you were there, talking to some fellows on the back platform, and you can not tell us as to the back platform being crowded or not? Is that what you mean to say? A. That is what I mean to say.

10 Q. You said to me a little while ago that you could not now tell me how long the argument was going on in the car, in the front part of the car, after leaving the junction? A. That is what I said.

Q. Did you read your testimony that you gave at a former trial before you got on the stand in this case? A. I looked over it, yes.

Q. Do you remember that you testified at that former trial with regard to the length of time?

20 A. I may have.

Q. Do you remember in reading your testimony that you did testify about it? A. I don't remember about it; I may have.

Q. Now, you say that you took a crack at him? A. I took a crack at him?

Mr. MacSherry: He did not say that.

Q. Did you not say you tried to strike him? A. If I had got near enough to him, I guess I would.

30 Q. Well, you do not mean that you actually made the trial? A. Well, I couldn't.

Q. You only mean that you had it in your mind that if you had a chance you would do so? A. Yes, sir.

Q. That is what you had in mind, is it? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. MacSherry:

40 Q. Mr. Shields, how near the back door, the door leading to the back platform, were you

Martin B. Shields—Re-cross

standing when Hodler passed you? A. Oh, it varied from one foot to about four. You know, there is a long seat there, and I kept walking up and down by that seat lengthwise.

Q. And which way was he going when he passed you? A. Towards the back platform.

Q. What, if anything, did you see Mr. Kavanaugh do there on the car? A. Well, he was near the back, and he says, "Why, don't hit that man; he is drunk." 10

Q. To whom did he say it? A. To the boys. And somebody said, "You had better get out of here, or you will get yours."

Q. And then what was said? A. And then they kind of said not to hit this man, that he was crippled, he only had one hand.

Q. What? A. Not to hit that man, that he only had one hand. 20

Q. Who said that? A. Someone there; I don't recollect who it was.

Q. Somebody outside said not to hit Kavanaugh? A. Yes.

Q. Because he only has one hand? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Where in the journey did that thing happen to Kavanaugh? A. Coming down from the pike. 30

By the Court: Q. From the what? A. From the Belleville turnpike.

By Mr. Hood: Q. Was that before or after Hodler went toward the rear platform? A. Just as he went there.

Q. Just as he went to the rear platform? A. Yes, sir.

Q. You knew Kavanaugh? A. I knew him to see from being on the water board, that is all. 40

Joseph H. Moore—Direct

Q. And you knew that he said that? A. Well, something similar to that.

Q. Do you know of your own knowledge that Kavanaugh said that, or are you telling us something that somebody told you? A. No, what I heard.

10 Q. What? A. No, just what I heard. Probably the words are not the same, but I heard it.

Q. You heard it that night, did you? A. In that way, yes, sir.

Q. Did you say anything about that in the former trial? A. I don't think I did. Probably I wasn't asked that.

By Mr. MacSherry: Q. What is that? A. I may not have been asked that.

By Mr. Hood: Q. Well, you undertook to tell all you knew then, did you not? A. No, sir.

20 Q. Oh, didn't you? A. Only the questions that was asked me.

Q. Did you not undertake to tell all you knew about this occurrence? A. The questions that was asked me I undertook to answer.

Q. Just the questions that were asked you? A. Yes.

Defendant's counsel offers in evidence and reads the interrogatories propounded to the plaintiff and the answers thereto.

30 Marked Exhibit D-3.

JOSEPH H. MOORE, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

40 Q. Where do you live, Mr. Moode? A. 386 Sanford Avenue.

Joseph H. Moore—Direct

Q. What is your business? A. Public Service inspector.

Q. In the month of December, 1907, what was your business? A. I was a track foreman for the Hudson Tunnel Company.

Q. And in December, 1907, what was your health? A. It was poor at that time; I was in the hospital. 10

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

Q. What was the matter with you? A. An operation for appendicitis.

Q. For how long were you there? A. About a month.

Q. And while you were in the hospital did you see Mr. Hodler, the plaintiff in this case? A. Yes, sir.

Q. Were you in the hospital when he was brought there? A. Yes, sir. 20

Q. And he was in bad condition, was he not? A. He was in bad condition.

Q. So far as you could see? A. Yes, sir; unconscious.

Q. Do you remember while he was there his mother calling to see him? A. Yes, sir.

Q. How near were you to him in the hospital there, how far apart were your rooms? A. We were in the same room, in the same ward, about twenty feet apart, or less; about fifteen feet apart, I should say. 30

Q. And how many sick people were in that room, if you recollect? A. About eight.

Q. While he was there did you ever hear him tell in your presence how he got hurt? A. Yes.

Q. Yes or no? A. Yes.

Q. Well, do you remember his telling while his mother was present how he got hurt? A. His mother was in the room, close by. 40

Joseph H. Moore—Direct

Q. When was that? A. In January, the second week, I should say, about—

Q. Did you or did you not carry on any conversation with him? A. Yes, sir.

Q. How? A. In the room we were anxious to know how—

Mr. Hood: You were asked how you carried on
10 the conversation; you were not asked about your anxiety about anything?

Witness: By writing questions on paper, and he answered verbally.

Q. Why did you do that? A. Because we were anxious to know—

The Court: No, you.

Witness: I was anxious to know how he got in that condition.

Mr. Hood: You want to know the reason for
20 having to do it that way—what his condition was?

Mr. MacSherry: No, I want to know why he wanted to know, the motive; I want to show that he was not representing anybody or was representing somebody.

Mr. Hood: I object to it.

The Court: I don't think it is important as to what his motive was.

Q. Did anybody ask you to communicate with
him? A. No.

30 Mr. MacSherry: Now can I ask him why he did communicate with him? It seems to me that I ought to be permitted to show the disinterestedness of the witness.

The Court: What question do you want to ask?

Q. Why did you carry on a conversation with this man as to how he got hurt—why did you want to do it?

Objected to.

40 Objection sustained.

Joseph H. Moore—Direct

Defendant's counsel prays an exception, and the same is allowed.

Q. How did you become acquainted with Hodler? A. By being in the same ward in the hospital with him, talking to his mother in the hospital, seeing his wife there, and the natural desire that all patients in the ward had of getting acquainted with each other.

10

Q. Why did you carry on a conversation with him by slips of paper, writing down on a paper?

A. I asked him how he got hurt, and he couldn't hear me, and I wrote the question down.

Q. Did he tell you how he was injured? A. Yes, sir.

Q. In the manner you have stated? A. Yes, sir; he answered verbally, he spoke.

Q. In what way did he tell you— A. Verbally.

Q. How did you carry on the conversation? A. He answered my questions verbally.

20

Q. And how did you put your questions to him? A. In writing.

Q. And in whose presence? A. There was two or three other patients around at the time; his mother was a short distance away.

Q. Now you have stated the time and the people present. Now will you tell us what he said as to how he got hurt? A. On that day that he got hurt, he said, he made a trip to New York to get some books, and that he got those books, and that he was a singer by profession, and he wanted to go to Hackensack to get some money—to make some money; he said he went in to Hackensack, and coming home from Hackensack there was a fight; he said some men tried to get his money, but they didn't get it, and after the fight he didn't remember anything. Then he said, with a wave of his hands (illustrating), that everything seemed blurred after the fight.

30

40

Joseph H. Moore—Cross

Q. Do you know who was the first one that he recognized after he reached the hospital? A. His mother.

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Moore, you are an employee of the Public Service? A. Yes, sir.

10 Q. How long have you been in their employ?

A. Since May, 1908, this last time; I was previously employed by them.

Q. You were employed by them before that? A. Before that; yes, sir.

Q. When was that? A. Why, it is probably twelve years since I started in the service with them. I broke the service to go to work for the Hudson Tunnel people.

20 Q. So that you have been connected with the railroad company for twelve years, have you? A. I have.

Q. What did you do for the Public Service twelve years ago? A. Conductor.

Q. On a trolley car? A. Yes, sir.

Q. What line? A. Springfield, Plank Road.

Q. How long did you serve them in that capacity? A. About five years.

30 Q. And then did you leave them to go to the Hudson Tunnel Company? A. I was also track foreman for the Public Service.

Q. How long were you track foreman for them? A. About two years.

Q. After you stopped being conductor? A. Yes, sir.

Q. So that you had seven years' continuous service with them did you? A. Yes, sir.

40 Q. So that you went over with the tunnel company? A. I got leave of absence with the Public

Joseph H. Moore—Cross

Service and overstayed my leave of absence, and when I came back I had to start in over again, and I resigned and accepted a position with the Hudson Tunnel Company—Mr. Greenway.

Q. How long did you work for the Hudson Tunnel Company? A. A very short time; I took sick with appendicitis.

Q. What do you mean by "a very short time"? 10
A. The very first night I went to work for them.

Q. Then you were working for them only one night? A. I was working only one night when I took sick.

Q. Do you remember when that was? A. Yes, it was in December.

Q. What time in December? A. When I took sick?

Q. Yes. A. I should judge about the 10th or 11th. 20

Q. And you left the Public Service how long before that? A. When I got leave of absence or when I resigned?

Q. No, you have been through that. Then you came back, and they made you begin back at the bottom of the line again? A. A week previous.

Q. A week previous? A. Yes.

Q. So that for a week you were out of employment? A. Yes.

Q. How long did you stay in the hospital? A. 30
One month.

Q. When did you get to the hospital? A. About the 18th of December.

Q. When you say that you were there a month, you mean that you left on the 18th of January?
A. About the 18th of January.

Q. Don't you remember when you left? A. As close as I can remember, it is about the 18th of January.

Q. How many beds were there in the ward in 40

Joseph H. Moore—Cross

which you and Hodler were? A. I should judge about eight.

Q. Were they all occupied? A. To the best of my recollection they were.

Q. Now, do you remember Hodler's coming in? A. I do.

Q. That was at the end of the month? A. Yes,
10 sir.

Q. By that time you were progressing fairly well, were you not? A. Well, quite well at the time; I was able to look around me and see what took place.

Q. On the 28th of January you were still low yourself? A. The 28th of January?

Q. Or of December? A. I wasn't sitting up.

Q. You were not sitting up yet? A. No.

Q. How long was Hodler unconscious after he
20 came to the ward? A. Well, I should judge a week—a semi-conscious condition; he was raving part of the time.

Q. During the week? A. Yes.

Q. Do you mean that this recognition of his mother happened about a week after he was brought in? A. Oh, it was more than that.

Q. How much? A. Well, it might be a week or eight or ten days after he was brought in.

Q. When was it that you had your conversation
30 with him? A. About the 14th of January.

Q. Was he then in bed? A. No.

Q. He was sitting up? A. Walking.

Q. Walking around? A. Yes.

Q. And you were, too? A. Yes, sir.

Q. Were all the other inmates of that ward about? A. Not all, no.

Q. Did you save these slips of paper on which you wrote to him? A. No.

Q. Did you make any memorandum of his an-
40 swers at the time? A. No.

James H. Moore—Cross

Q. When was it that you communicated the information that you got from him to the Public Service? A. In speaking of the case with one of their agents.

Q. When was it? A. About a week or two weeks later.

Q. Was it before or after you got employed by them? A. Before. 10

Q. How long after you imparted that information did you get employment? A. About three months or four.

Q. Three months or four? A. Yes.

Q. When do you say that you were employed by them? A. About May.

Q. About May, 1908? A. Yes, sir.

Q. Who was the man to whom you imparted the information? A. Mr. Healey, the secretary of the benevolent association, when he was paying me the money due me on account of being sick. 20

Q. Who is Mr. Healey, an employee of the Public Service? A. Yes, sir.

Q. What position does he hold with them? A. He is instructor.

Q. How did you come to tell him? A. In speaking of the case, I was telling about this man, Mr. Hodler, being in the hospital, how sick he was.

Q. Was there any case at that time? A. Mr. Healey told me then that there probably would be a case, and he asked me if I knew anything about it; I said, "Only what Mr. Hodler told me in the hospital;" and he said he would like to have a statement from me. 30

Q. Healey is an instructor? A. At present.

Q. What was he at that time? A. At that time an investigator.

Q. Healey was an investigator at that time? A. Yes. 40

James H. Moore—Cross

Q. And Healey told you at that time that he thought there was going to be a suit? A. Yes, sir; probably.

Q. He did not tell you that there was a suit, did he? A. No.

Q. As a matter of fact, you know that there was not a suit for a year after that time, do you not? A. I don't know anything about that, until I was asked to come up here.

Q. Now, your experience with the Public Service and with railroads before May, 1908, was as conductor and as track foreman? A. Yes.

Q. Your occupation with the Hudson Tunnel Company was as what? A. Track foreman.

Q. When you re-entered the employ of the Public Service Company you went in it as investigator? A. No, sir.

20 Q. As what? A. Conductor.

Q. As conductor? A. Yes, sir.

Q. How long were you conductor? A. About four months.

Q. And on what line? A. Plank road line.

Q. And what position were you then advanced to? A. Inspector.

Q. And you have been inspector ever since? A. I have.

Q. Now, you made no memorandum of what this man said at the time, did you? A. No.

Q. The whole thing rests with you in a matter of memory? A. Yes.

Q. Did you speak of this thing to anyone before you spoke to Healey about it? A. Yes.

Q. To whom? A. Some of the other patients in the room; we were talking about it and holding a conversation with regard to it.

Q. Well, were not the other patients in the room there hearing what Hodler had to say? A. Yes.

40

James H. Moore—Cross

Q. So they heard it? A. Yes.

Q. After leaving the hospital did you speak of this to anybody before you spoke of it to Healey?

A. That I don't remember.

Q. That you do not remember? A. It is too long ago.

Q. Do you say that he told you he went to Hackensack to make some money? A. Yes. 10

Q. Or told you that he did make some money in Hackensack? A. He didn't say that.

Q. Is not that what you told us before? A. No, sir; he said he was a singer by profession and he wanted to make some money in Hackensack.

Q. And did you not tell us that he said he had made some money in Hackensack? A. I don't remember making that statement.

Q. What do you say about that, did he say anything as to whether he made any money in Hackensack? A. Not that I remember; that he went with the object to make some money. 20

Q. Did you not say that he made some money in Hackensack, and that on the cars—

The Court: Do you mean today?

Mr. Hood: Yes.

Q. — and that on the cars there were some people that were trying to take away the money that he made there? A. I didn't make such a statement. 30

Mr. MacSherry: I would like the record read, your Honor.

The Court: I will not interrupt Mr. Hood's examination. You may refer to the record later.

Q. Now, will you tell me, Mr. Moore, just what your recollection is that he did say? A. That he went to Hackensack to make some money, and on the way back from Hackensack there was a fight; 40

James H. Moore—Cross

that two men tried to get his money, but they didn't get it.

Q. Are those the words that he used? A. As close as I can remember.

Q. And is that all that he said on the subject?
A. No, he said he had an engagement, if I remember, at St. Mark's Church in New York, to sing
10 that Sunday, and it seemed to be worrying him, to be on his mind, to get over there to sing—at St. Mark's Church, if I am not mistaken.

Q. Anything else that he said? A. Well, there might have been and I haven't remembered all of it.

Q. Now, won't you begin at the beginning, and tell me, in so far as you remember, everything that he said to you in answer to the written questions that you put to him? But before I ask you
20 that, let me ask you another question. Did you speak to him about this matter on one occasion or on more occasions? A. On one occasion.

Q. So that all that you learned from him happened at one time? A. At one time. There was others in the room trying to obtain the same information.

Q. What? A. There was others in the room also interrogating him.

Q. I am not talking about others; I am talking
30 about you. All that you got from him happened at one time? A. At one time.

Q. You did not get any information from him excepting at one time; is that right? A. That is right, yes.

Q. Now, will you tell me, as fully as you can remember, all that he said to you at that one time concerning the happenings of that day?

Objected to as repetition.

Objection overruled.

(Question read.)

Joseph H. Moore—Re-direct

A. There was more than one question written on paper.

Q. Yes, I understand that you asked several questions, but I want to know all that he said in answer to all the questions that you put to him?

A. Reviving his memory, he said that he went to New York—

Q. What do you mean by “reviving his memory”? A. He was thinking over what happened on the day of the accident. 10

The Court: I do not understand whose memory it was that was revived, whether it was the memory of Mr. Hodler or the witness.

By the Court: Q. What do you mean by “reviving his memory”? A. I asked Mr. Hodler if he remembered that day, the day of the accident, and he said he went to New York to get some books; that he got those books, and came back to Newark; that he went to Hackensack then to make some money—he was a singer by profession—and coming back from Hackensack there was a fight; he said two men tried to get his money, and they didn’t get it, and after the fight, he didn’t remember anything then, with a wave of his hands (illustrating), that everything seemed blurred. 20

By Mr. Hood: Q. What he said. You interpret his motion to me, but I want what he said? A. He said everything was blurred after the fight; he didn’t remember anything at that time. 30

Q. He said that two men tried to get his money?
A. Yes.

RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. Mr. Moore, did anyone connected with the Public Service ask you to have a conversation 40

Joseph H. Moore—Re-direct

with Hodler with a view to getting from him the story as to how he got hurt? A. No, sir.

Q. What position, if any, did Mr. Healey hold at that time besides being investigator? A. He was connected with the benevolent association, and his duty was to pay the sick members, and he visited the hospital to pay me some money.

10 Q. What is that association? A. It is an association formed by the members to take care of their sick.

Q. The members of what? A. The members of the railroad company that belong to it. Anybody working for the railroad can be a member.

Q. And were you at that time, while you were in the hospital, receiving money from that association? A. I was.

20 Q. And was it or was it not necessary for someone of the association to call upon you to pay you? A. It was.

Q. Did you or did you not at that time, at the time of having this conversation with Hodler, have any application on file with the Public Service for a position? A. Absolutely none.

Q. How did you come to speak to Mr. Healey about it? A. Why, the general topic in the room, the condition of this man—

Objected to.

30 The Court: I think the witness may say, for example, which of them spoke first, how the matter came up.

Mr. Hood: The circumstances, yes, but not the motive. He did not ask him that.

(Question read.)

The Court: That might be understood either way.

40 Mr. Hood: I have no objection to the circumstances.

Joseph H. Moore—Re-cross

Q. How did you come to speak to Mr. Healey about it when he called? A. The general conversation amongst the patients there. We got scared a couple of times by Mr. Hodler nearly getting out of the straight-jacket. He was in a straight-jacket, in his condition, and, naturally, everyone was speaking about the condition he was in.

10

Q. Who spoke first about it when Mr. Healey called, did you or Mr. Healey speak first? A. I spoke to Mr. Healey.

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Do I understand, Mr. Moore, that you spoke about it to Mr. Healey at the hospital? A. He visited me there and paid me some money there.

Q. Did you speak to Mr. Healey about what Mr. Hodler said to you at the hospital? A. No, 20
sir.

Q. You spoke to him about that two weeks after you got out of the hospital, did you not? A. Yes, sir; about the condition Mr. Hodler was in then.

Q. About Mr. Hodler's condition. When was he in the straight-jacket? A. About two or three days—three days, I should say, after they took him in the hospital.

Q. How long did he continue in the straight-jacket? A. I should think seven or eight days. 30

Q. Did he go back to it again? A. No.

Q. He was not in it at the time you asked him about how this thing happened? A. No.

Q. I suppose he was put in the straight-jacket because he got violent? A. Got violent, yes.

Q. Did you make any suggestions to him at all as to how this thing happened? A. No. 40

William Breen—Direct

WILLIAM BREEN, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Breen? A. 4 Duke Street, Kearny.

Q. What is your business? A. Painter and decorator.

10 Q. How long have you been in that business?
A. About six years.

Q. Are you in business for yourself or do you work for somebody? A. Work for a man.

Q. Whom do you work for now? A. A man by the name of Cathcart.

Q. Where is his place of business? A. 4 Duke Street, Kearny.

Q. Do you know where Kearny Avenue is? A. Yes, sir.

20 Q. And Bennett Avenue and Stuyvesant Avenue, crossing? A. Yes, sir.

Q. Were you in that vicinity in the month of December, 1907? A. Yes, sir; coming from a—

Q. And were you one of the party that went to this dance? A. Yes, sir.

Q. Where did you get on board of the car? A. At Ell's dance hall, Kingsland.

Q. What time did you go to the dance? A. I arrived there about ten o'clock, I should judge.

30 Q. Did you go alone or was anyone with you?
A. A couple of fellows with me.

Q. Who were they? A. Well, there was a fellow by the name of Spillane, was with me; I don't just remember who the other fellow was.

Q. Well, was there a dance there that night?
A. Yes, sir.

Q. Did you attend it? A. Yes, sir.

Q. Can you tell us who was running the dance, who had charge of it? A. Well, I believe, from
40 what I seen, there was a lot of ginneys running it.

William Breen—Direct

Q. What do you mean by that? A. Italians.

Q. Where from? A. Well, I heard they were from New York.

Q. Do you know a crowd called the Paul Kelly crowd, in New York? A. Yes, sir; I have met some of them already.

Q. What are they? A. Italians.

Q. Did they have anything to do with this dance? A. That I don't know. 10

Q. Were any of them there? A. There were a few of them there, yes.

Q. Was there any trouble at the dance? A. Well, I believe there was a few fights there, from what I seen myself. The thing broke up in a kind of a fight.

Q. The thing broke up in a fight, eh? A. Yes.

Q. About what time? A. I should judge about half-past ten. I wasn't very long in— 20

Q. Was there anything to drink for sale there; that is, hard liquor? A. Well, I don't know. I was looking for a drink myself. I understood there was drink there, but you couldn't get it, on account of having no license there; but I got no drink there.

Q. Now, when you left the hall where did you go? A. Went direct for a trolley car.

Q. About how many left the hall about the time that you did? A. I should judge it would be about twenty, or maybe more. 30

Q. The trolley car was going in what direction? A. Going towards Newark.

Q. When you got on the car how did the crowd distribute itself, if you know, what part of the car? A. Well, they were distributed all over the car, as far as I could see.

Q. Any on the back platform? A. A few.

Q. Do you remember whether you changed at 40

William Breen—Direct

the junction or not? A. I don't remember changing, not cars.

Q. Did you get off the car? A. I did.

Q. Did any of the people get off the car? A. Not to my knowledge, as I seen it.

Q. What part of the car were you in? A. Well, I was all over the car, in fact; in the front of the car and in the rear of the car.

10 Q. Well, could any of them get off the car without your knowing of it? A. Well, I believe they could.

Q. Now, what, if anything happened on that car on the way down to the junction? A. Well, there was quite some fight and argument went on; no blows struck, to my knowledge.

Q. Did you see Mr. Hodler there? A. Yes, sir.

Q. What, if anything, was he doing? A. Well, he acted real nasty.

20 By Mr. Hood: Q. What? A. Acted kind of nasty, mad.

By Mr. MacSherry: Q. How? A. Arguing and moving people around, shoving them around.

Q. Did you hear him say anything? A. Well, I heard him in an agrument with his mouth, called some names.

Q. Well, we want to know just what occurred on that car from you boys, just what Hodler said; we want to know, if you know. If you know, say so? A. Well, I heard him myself using the word "son-of-a-bitch" in the car.

30 Q. Did you hear him say anything else? A. Well, he threatened to clean up a few.

Q. What did he say? A. He said he could lick any son-of-a-bitch on that car.

Q. Did you notice his condition? A. Intoxicated.

40 Q. And where was he when he said that, when

William Breen—Direct

he used the word you have stated? A. Why, in the front part of the car.

Q. Were there any girls in the party? A. Yes, sir.

Q. Was he paying any attention to them, do you know? A. Well, I don't really believe he was paying any attention to the girls that was with us.

10.

Q. Or any of the girls? A. Not to my knowledge.

Q. Do you know what sneezereen is? A. Yes, sir.

Q. What is it? A. It is kind of a powder that you blow around, and it makes people sneeze.

Q. Was any of that blown around that car? A. Yes, sir.

Q. By whom, do you know? A. I guess every-one of us was kind of loaded up with it.

20

Q. What effect did that have? A. Why, it made the people sneeze.

Q. Did your car leave the junction? A. Did the car leave the junction?

Q. Yes. You got on at the dance hall, and then you went to the junction, did you not? A. I went from the dance hall to the car and rode to the junction, and they changed cars at the junction, to my knowledge.

Q. After they left the junction what part of the car were you in? A. Well, I believe I was in the smoker, in the smoking part of the car, the rear end.

30

Q. When the car left the junction were there or were there not people on the back platform? A. There were a few, to my knowledge.

Q. Where was Mr. Hodler? A. At that time?

Q. Yes? A. After the car had left the junction?

Q. Yes? A. I believe he was at the front of the car.

40

William Breen—Direct

Q. Just tell us what, if anything, you saw him do after leaving the junction? A. Well, the argument continued with the crowd around, and I was at the rear of the car, and I couldn't see just what went on, but I could see the crowd.

By the Court: Q. Did you see him? A. Mr. Hodler?

10 Q. Yes? A. Yes, sir; I could see him.

By Mr. MacSherry: Q. What was he doing? A. Standing up in the front of the car.

Q. What happened after that, if anything? A. Well, I can't just remember now what happened afterwards. I know there was quite some trouble going on in the car.

Q. What part of the car? A. The front part of the car.

20 Q. Did you see any trouble on the back platform? A. No, sir.

Q. Did you see any scuffling on the back platform? A. Well, there was a few fellows on the back platform was half drunk, I know that.

Q. Well, did you see what became of Hodler? A. No, sir; I did not.

30 Q. Were you seated or standing up? A. Well, I have been seated at parts of the time and standing up other parts of the time; I was with a girl; occasionally I walked away from her and walked around the car.

Q. Did you see the plaintiff go on the back platform or not? A. I believe he did go to the back platform.

The Court: No.

Mr. Hood: Not what you believe; what you saw?

40 Witness: Well, I can't say when I saw him, but I saw him move around the car; he come towards me, and I was in the back of the car.

William Breen—Direct

The Court: What we want to know, Mr. Breen, is what you actually saw and heard, and not what you may think or suppose.

Q. Was there anybody with him when he was coming that way? A. Not to my knowledge.

Q. Was there any crowd in front of him or behind him? A. Well, there was people in the front of the car and people in the rear of the car, I know that. 10

Q. Well, won't you let me call your attention to your testimony? Do you remember testifying in the last trial? A. Yes, sir.

Mr. Hood: I do not know about that.

The Court: That is open to the objection of being extremely leading.

Mr. MacSherry: Well, if a witness seems unwilling, or perhaps antagonistic, haven't I a right to call his attention to what he said before? 20

The Court: When that question arises I will deal with it. I do not see any signs of it yet.

Q. Did you read your testimony taken at the last trial? A. I did; I looked it over.

Q. Well, would you like to read it over again to refresh your recollection? A. I may memorize if I saw it again.

Q. What? A. I may. 20

Q. What do you say? A. I may.

Mr. MacSherry: I ask permission to show the witness his testimony again, then. He requests it.

Objected to.

Objection sustained.

Q. Mr. Breen, will you tell us whether you remember or not of Hodler going out on the back platform at all after— A. That I can't remember. 40

William Breen—Direct

Q. Will you tell us, then, what happened on that car after the car left the junction? A. After the car had left the pike junction?

Q. Yes? A. Well, the argument continued on the inside of the car.

Q. What do you mean by "the argument"? A. Why, the same argument that happened coming
10 down.

Q. Who were in it? A. Why, our own fellows was mixed up in it part of the time; to my own knowledge, they were.

Q. Was Mr. Hodler in it? A. I believe he was.

Mr. Hood: No, not what you believe; what you saw and what you heard.

The Court: Just consult your recollection. You are not bound to remember anything that you do not remember, but consult your recollection.

20 Witness: Yes, he was in the argument, Mr. Hodler was.

Q. What did you hear said, if anything was said, by the parties near Hodler or by him after the car left the junction? A. I can't remember anything that was said much.

Q. Where was Hodler when you last saw him? A. When I last saw Hodler he was coming towards the car with me, to where I was at.

Q. At that time was there any one on the back platform? A. Yes, sir.
30

Q. About how many? A. Well, I should judge there was eight or nine, maybe, about eight or nine; I couldn't say.

Q. What were they doing there? A. They were standing there.

Q. Did you hear anything said to Hodler by anybody as he was coming back? A. No; only I
40 heard somebody say they wanted to get Kavanaugh.

William Breen—Direct

Q. Did you see Mr. Kavanaugh on the car? A. Yes, sir.

Q. What, if anything, did you see him do? A. Why, he tried to be a peacifier for Mr. Hodler.

Q. And what, if anything, did he say? A. Well, he tried to defend him. I don't know just what he said, but he tried to keep us fellows from him.

10

Q. What did he say or do? A. He told us not to bother with him, he was intoxicated, he was drunk.

Q. And what, if anything, did anybody say in reply to that? A. Why, they let him alone; that is all I know.

Q. Did you try to hit Hodler? A. Well, I believe if he had called me—if he had used the words to me—

Mr. Hood: No, not what you believe.

20

Witness: Well, I would have.

The Court: No, just what you did.

Witness: No, I didn't make no attempt to get at him.

Q. How far were you from the back platform when he passed you in that direction? A. When he passed me coming—

Mr. Hood: He has not said that he passed him; he said that he saw him coming towards him.

30

Witness: Coming towards me.

Q. Did he pass you or not? A. That I couldn't say whether he passed me.

Q. Were there people standing up in the car or not? A. There was a few standing up.

Q. Was the car crowded or not? A. Well, there was sitting room.

Q. What became of him after you saw him coming towards you? A. I don't know.

Q. Did you see him after that? A. No, sir.

40

William Breen—Direct

Q. Where was the conductor at this time? A. Collecting fares.

Q. Did he have any trouble in collecting fares?

A. Yes, sir.

Q. Why?

Mr. Hood: You do not mean "Why," do you?

10 The Court: What were the circumstances?

Mr. Hood: All right.

A. Half of the fellows didn't have no fare.

Q. Did not have any fare? A. Didn't have no fare to pay their fare.

Q. Do you mean to say—did they refuse to pay their fare or— A. They didn't refuse to pay it; they got on the car without it.

Q. Did you see anyone close the doors? A. No, 20 sir.

Q. What was said or done by anybody when the conductor demanded the fare and they would not pay? A. By the conductor?

Q. Yes? A. He didn't say anything.

Q. He did not try to put you off? A. No, sir.

By the Court: Q. Did you pay your fare? A. Yes, sir; I believe I paid my fare; I don't know now.

30 By Mr. MacSherry: Q. What do you say? A. I believe I paid my fare; I don't know now.

Q. Why, don't you recollect? A. I don't know; I can't recollect as far back as that whether I paid my fare or not. I was with the boys.

Q. Don't you know what became of Hodler, now, after he came towards you? A. Became of who?

Q. Hodler? A. After he came past me?

Q. Yes? A. I didn't see him pass me.

40 Q. I mean came towards you? A. I didn't see him pass me.

William Breen—Direct

Q. What occurred after that? A. I heard a few of them say he was a pretty lucky fellow, getting away—

Mr. Hood: One moment. Heard whom say?

Witness: Well, I don't know the fellow's name; I don't remember.

Mr. Hood: What he heard the fellows say at some other time is not competent, if your Honor please. 10

The Court: No, not some other time, but what was said at this time in the car or on the car might be part of the *res gestae*.

Mr. MacSherry: That is the idea.

Mr. Hood: That might depend. Up to what point? Up to some point it is certainly *res gestae*. The question is where the point ends. I do not know what he is talking about, and I think we ought to be definite on it. 20

(Last question and answer read.)

The Court: The witness, being asked what occurred after that—that is, after he saw Mr. Hodler coming toward him—begins his answer by saying that he heard a few of them say something. Assuming that that refers to this immediate occasion, something that was said on the car, I should think it comes within the *res gestae* rule. It would not necessarily be so, but it depends on what it was. 30

Mr. Hood: Then I think the witness ought to specify just about when it was.

The Court: Undoubtedly it ought to be definite.

Q. I want to know this from you. You stated that the last time you saw Hodler was when he was coming towards you. I want to know what 40

William Breen—Direct

you heard in that car or what you saw in that car after that?

Objected to.

The Court: That is rather broad. Within what period of time?

Mr. MacSherry: Immediately after.

The Court: Next after that?

10

Mr. MacSherry: Next after that.

A. Immediately after this man got towards me?

Q. Yes. A. I didn't hear anything.

Q. Did you see anything? A. No, sir.

Q. Was there any quarreling after that? A. Well, there was a quarrel in the rear end of the car, but I don't know what it was; I wasn't out there.

Q. I did not ask you that. Just answer my question. What do you mean by "the rear end of the car"? A. On the back platform.

20

Q. Back of you or in front of you?

The Court: He says on the back platform.

Witness: On the back platform.

Q. What do you mean by quarreling? A. Just a mouth quarrel.

Q. Did you see Hodler after that? A. No, sir.

Q. Do you know how he got off the car? A. No, sir; I do not.

30

Q. Of your own knowledge? A. No, sir.

Q. Did you see him fall off? A. No, sir.

Mr. Hood: One moment.

Q. Did you see him go off?

Mr. Hood: I object, if your Honor please. These are leading questions. He was asked specifically what he knows, and he says that he does not know. I submit that these questions are suggestive and leading.

40

Q. What did you hear—what words did you

William Breen—Direct

hear on the back platform immediately after you saw Hodler coming towards you—what words did you hear? A. That I can't remember.

Mr. Hood: He has not said that he heard anything immediately after.

Witness: I can't remember.

Mr. MacSherry: He said he heard quarreling.

10

Mr. Hood: He said he heard a quarrel on the back platform.

Q. What do you mean by that? A. I heard a mouth quarrel on the back platform, but what was said I don't know.

Q. What do you mean by a "mouth quarrel"?

Mr. Hood: I object. I think the language is perfectly clear and is not open to interpretation by the witness any more than the word "yes" or "no" is.

20

The Court: Without being asked to interpret it, he may be asked, perhaps, to explain what he means by it. It is not a literary question; it is a question of his own use of language—what he meant to signify by it. I think you may answer the question.

(Question read.)

A. By a mouth quarrel, I always thought myself it was two fellows fighting with their mouths.

Q. Was it a soft mouth quarrel or a loud one? 30

A. Quite loud.

Q. Could you hear it? A. I could hear it, but I couldn't tell what they were saying.

Q. I have not asked you that. Just answer my questions. I just want to know what you know about it, if I can get it.

The Court: Strike it out.

Q. Could you or could you not hear the move- 40

William Breen—Cross

ment of the people on the back platform—any movement? A. Yes, sir.

Q. How much?

The Court: How much did you hear.

Q. How much did you hear? A. Oh Quite a lot.

Q. Do you know what the word "scuffle" means?

A. Yes, sir.

10 Q. Did you or did you not hear anything like that at that time? A. I did.

CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Breen, do you know Mr. Shields? A. Yes, sir:

Q. Did you know him on the night of the 28th of December, 1907? A. Yes, sir.

20 Q. And had you known him for some time before that? A. Yes, sir.

Q. He was a friend and associate of yours? A. Yes, sir.

Q. Did you know Mr. McCabe? A. Yes, sir.

Q. On that night? A. Yes, sir.

Q. You had known him for a considerable period of time before that? A. Yes, sir.

Q. And he was a friend and associate of yours? A. Yes, sir.

30 Q. Did you know a man by the name of Breen—William Breen? A. Yes, sir.

Q. That is yourself? A. Yes, sir.

Q. Did you know a man by the name of James J. Crowley? A. Yes, sir.

Q. And you knew him at that time? A. Yes, sir.

Q. And he stood in the same position to you as the other gentleman I have named? A. Yes, sir.

Q. Did you know John Watson? A. Yes, sir.

40 Q. And is the same thing true of him as is true of Shields? A. What is that you say?

William Breen—Cross

Q. In his relations to you, did John Watson stand to you in the same relation on that night—

A. Yes, sir.

Q. —as Martin Shields did? A. Yes, sir.

Q. And is the same thing true of John H. Polding? A. Yes, sir.

Q. And of Thomas V. Hopkins? A. Yes, sir.

Q. These gentlemen had all been to the dance with you that night, had they not? A. Yes, sir. 10

Q. Together with a good many more— A. Yes, sir.

Q. —that I have not named? A. At the dance; yes, sir.

Q. At the dance? A. Yes, sir.

Q. They constituted the Kearny gang? A. What do you say?

Q. Did they constitute the Kearny gang? A. Yes, sir. 20

Q. Known as the Kearny gang? A. Known as the Kearny gang.

Q. And they went up to a dance that was held at Ell's hall by the Paul Kelly gang? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And the Paul Kelly gang is a New York gang? A. Yes, sir.

Q. That figures in the newspapers? A. Sometimes.

Q. And has a reputation for roughness and toughness? A. I believe sometimes. 30

Q. Now, when you went to that dance that night you knew that the Paul Kelly gang was going to be there? A. No, I didn't.

Q. Didn't you go to meet them there? A. No, sir.

Q. Did not the Kearny gang go up to meet the Paul Kelly gang? A. I didn't go up with the gang. 40

William Breen—Cross

Q. But you went up? A. I went up.

Q. Was not that the scheme that night, that the Kearny gang was to go up to the dance to meet the Paul Kelly gang? A. Not to my knowledge.

Q. Now, you have told us about the reputation of the Paul Kelly gang. Was that, too, the reputation of the Kearny gang? A. I don't know what
10 you mean.

Q. That it was tough and rough?

Mr. MacSherry: I will object to that now as irrelevant and unimportant.

The Court: I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal.)

20

Circuit Court Judge.

Q. What time did you get to the dance hall? A. About 10 o'clock or a little after, I should judge.

Q. And how long did you stay? A. Till about half-past eleven.

Q. And during that time you danced and fought? A. Yes, a little.

Q. A little of each? A. A little of each.

30 Q. And you fought, not with the mouth, but you fought with the fists? A. Not me.

Q. Well, I mean the fight; I am not talking about you personally, but I mean what occurred in the hall was dancing and fighting? A. Yes, sir.

Q. And that the fighting was not what you call a mouth quarrel? A. No, sir.

Q. But was a real fight? A. A knuckle fight.

Q. A knuckle fight? A. Yes, sir.

40 Q. How many of you boarded the car at Ell's hall? A. Coming from the dance?

William Breen—Cross

Q. How many of you boarded the car at Ell's hall? A. Coming from the dance?

Q. Coming from the dance? A. Twenty or twenty-five or more; I couldn't just say.

Q. Were they all of your crowd, the Kearny crowd? A. All our own crowd?

Q. Yes? A. Oh, there may be a few strangers; I don't know that. 10

Q. Well, so far as you recall, were there any strangers in the crowd at all that got on board of that car? A. That I don't know.

Q. You do not remember any strangers, do you? A. I don't remember.

Q. Do you recall after you got on the car that there were people on the car that you did not know? A. No, sir; I believe I knew all of them.

Q. You knew them all with the exception of Hodler, did you not? A. I didn't know Mr. Hodler; no, sir. 20

Q. But every other person on the car you knew? A. Well, I don't say that I knew all of everybody that was on the car.

Q. I thought you said you did? A. I knew all that was in our own crowd that night.

Q. What I am trying to find out is whether there was anybody on the car except your own crowd besides Hodler and Kavanaugh? A. That I don't remember. 30

Q. Do you recall anybody being there? A. No, sir.

Q. Kavanaugh you knew? A. Yes, sir.

Q. You had known him for some time before that? A. No, sir.

Q. Was this the first time that you saw him? A. Yes, sir.

Q. When you got on the car you were not with a girl, were you? A. Yes, sir.

Q. Oh, were you with a girl? A. Yes, sir. 40

William Breen—Cross

Q. Was there more than one girl? A. I guess there was a few.

Q. I mean that seriously. Was there more than one girl on the car coming back? A. With us there was.

Q. How many were there? A. I couldn't just judge now.

10 Q. Well, were there a number of girls? A. I told you there were about twenty-five in your party.

Q. But how many of those were men and how many women? A. Well, I guess they was all supplied with girls, very near.

Q. They were all supplied with girls? A. Yes, sir.

Q. So that of the men there were only about a dozen, and about a dozen girls; is that right? A.
20 That I don't know; I can't say they was all supplied with girls.

Mr. MacSherry: Do you mean getting in the car now or—

Mr. Hood: Yes, I mean getting in the car at Ell's dance hall.

Witness: I know I was with a girl and everybody around me, near, had a girl.

Q. Well, whether they were even up or not, there were quite a number of girls in the car? A.
30 I should judge there was about seven girls with us.

Q. You got on with a girl, did you? A. Yes, sir.

Q. Did you notice Hodler as soon as you got on?
A. Yes, sir.

Q. Where was he? A. Mr. Hodler?

Q. Yes. A. I believe he was standing up in the front of the car, demanding a seat.

Q. He was standing up in the front of the car, doing what? A. Demanding a seat.
40

William Breen—Cross

Q. Demanding a seat? A. Yes.

Q. Weren't there any seats there? A. Yes, there was a few there, but he didn't want the seats that was empty.

Q. That is the first you saw him? A. That is the first I saw him.

Q. Was the car then travelling? A. Well, we were on it. 10

Q. Well, was it moving? A. Yes.

Q. And that was the front part of the car? A. That was the front.

Q. This was a big car? A. Yes, sir.

Q. With a compartment inside? A. Yes, sir.

Q. Was there any trouble on the car between the dance hall and the Belleville Junction? A. Just as I said, a mouth argument.

Q. Was there any controversy on the car between the dance hall and the Belleville turnpike in which Hodler participated? A. Not to my knowledge. 20

Q. He played no part in any controversy before the junction? A. Before coming to the junction?

Q. Yes. A. The same argument was going on before and afterwards.

Q. Well, was he in the argument before getting to the junction? That is what I want to know. A. Yes, sir. 30

Q. And that was the argument about the seat, did you say? A. Yes, sir; as far as I understand, that is what it started on.

Q. Then it started about a seat? A. I believe it did; I don't know that.

Q. Well, didn't you hear it? A. Did I hear it?

Q. Yes. A. No, sir.

Q. Where were you with the girl? A. Well, I 40

William Breen—Cross

left my girl sitting down, and went to the rear of the car.

Q. When did you do that? A. When I went into the car, as soon as I went into the car.

Q. You took her to a seat in front? A. Inside of the smoker.

Q. You mean in the smoking compartment? A.
10 On the outside of the smoker; we went through the smoker.

Q. In front of the smoking compartment? A. Yes, sir.

Q. And then you came back to the smoker? A. Yes, sir.

Q. And you smoked? A. Yes.

Q. Did you sit down or stand up? A. I walked all around that car, blowing sneezereen around.

Q. You are the fellow that blew the sneezereen
20 around? A. I am one of them.

Q. Did you do that in the front compartment or the back one, or both? A. In the back, both.

Q. Then you did not interest yourself in what was going on in the front compartment? A. Yes, I noticed pretty much everything.

Q. You had an eye on everything? A. Yes, sir.

Q. And you know everything that was going on between the junction and Ell's dance hall? A.
30 Pretty near.

Q. Now, you are sure that the argument started about a seat? A. I ain't positive; I said I wasn't positive.

Q. How did you come to talk about an argument about a seat? A. I said I believe an argument started there.

Q. Did you hear any argument about a seat? A. He demanded a seat—Mr. Hodler.

Q. Of whom did he demand a seat? A. He de-
40 manded a seat off of myself one time.

William Breen—Cross

Q. Off of you? A. Off me.

Q. From anybody else? A. Not to my knowledge, he didn't.

Q. Was that the start of any argument? A. That was the start; yes, sir.

Q. Asking you for a seat? A. Yes, sir.

Q. Had you said anything to him before that?
A. No, sir. 10

Q. Had you been sitting in the same place? A. No, sir.

Q. You had not been sitting down where he had been sitting? A. No, sir.

Q. Did he complain about your roughness in sitting down there? A. Well, he was going to clean me up, I guess.

Q. He was going to clean you up? A. Yes, sir.

Q. He would have had his hands full, would he not? A. I guess yes. 20

Q. And all that happened in the front compartment? A. All that happened in the front compartment, yes.

Q. Well, did you have a quarrel with him at that time? A. Only over the seat.

Q. Only over the seat? A. Only over the seat.

Q. Will you tell us what that quarrel was that you had with him? A. I wouldn't give him a seat.

Q. You would not give him a seat? A. No. 30

Q. Was the disposition of seats in your control? A. Yes, sir; at the time it was.

Q. At the time it was in your control? A. Yes, sir.

Q. You assumed the control of the seats? A. Yes, sir.

Q. And that started the argument on the part of Hodler? A. I believe so.

Q. Is that right? A. I believe it did. 40

William Breen—Cross

Q. Now, at the start of that argument everybody was in the front compartment; that is, everybody in the argument—you and Hodler—is that right? A. Yes, sir.

Q. Was Kavanaugh there at that time? A. Kavanaugh where?

10 Q. In that front compartment? A. In the front compartment of the car? I believe he was.

Q. At the time when this argument started? Or was he in the smoking compartment? A. I believe he was in the front compartment of the car.

Q. Was he sitting anywhere near where this man was? A. He was with him.

Q. He was with this man? A. I think he was.

20 Q. So that he was in a position so that he could hear and see what was going on? A. Yes, sir.

Q. Kavanaugh was? A. At that time he was.

Q. Well, how long did that argument last? A. Oh, about a few minutes.

Q. And what happened then? A. Nothing.

Q. Well, how did it stop?

The Court: What was the outcome of the argument about the seat? Did Mr. Hodler get the seat?

30 Witness: No, sir.

Q. Well, how did the argument stop? A. I don't know.

Q. Who kept Hodler from getting the seat? A. I wouldn't give it to him.

Q. Well, I do not quite understand how that was worked out, Mr. Breen. Can you tell me? A. Well, I don't know; I didn't do anything.

Q. Did you stand in front of the seat so that he could not sit down? A. Well, I sat on the seat.

40 Q. How did you sit on the seat that he was

William Breen—Cross

going to sit on? A. He didn't get no chance to sit on it.

Q. Do you mean as he tried to sit down on a seat you moved and took the seat? A. No, sir.

Q. Do you mean that there was only one seat in the car that he could have taken? A. No, sir.

Mr. MacSherry: Why don't you answer Mr. Hood's question, then? 10

Q. I would be thankful to you, Mr. Breen, if you would not require me to use all my ingenuity in finding out how the thing happened. Now, tell us how that proposition of his wanting a seat and your keeping him out of the seat came about? A. Just because I knew he wanted a seat, I wouldn't give it to him.

Q. How did you keep him out of the seat? A. He didn't try to force me out of it in anyway; he wanted this one particular seat that I had. 20

Q. Oh, it was that particular seat that he wanted? A. Yes, sir.

Q. There were other seats? A. Yes, sir.

Q. Did he have that seat before? A. Not to my knowledge.

Q. He wanted that particular seat? A. Yes, sir.

Q. And you would not give it to him? A. Yes, sir.

Q. And you occupied it yourself? A. Yes, sir.

Q. And what was how that came about? A. Yes, sir. 30

Q. Do you know where the car was at the time the argument about that seat stopped? A. About the seat?

Q. Yes. A. Well, I believe it was at the junction then.

Q. Then that carried you up to the junction? A. Yes. 40

William Breen—Cross

Q. Well, at the junction the car stopped for a few minutes? A. Yes, sir.

Q. You did not leave the car? A. No, sir.

Q. Did you stay in the front compartment? A. In the front compartment of the car?

Q. While the car was at the junction? A. No, sir.

10 Q. Did you go in the smoking compartment? A. Yes, sir.

Q. What became of Hodler? A. I don't know what happened to him.

Q. No. At the junction what became of Hodler? A. At the junction?

Q. Yes. A. I don't know where he went to.

Q. Well, do you know that he was in the car? A. Coming down.

20 Q. At the junction, while you were laying at the junction, do you know that he was in the car? A. No, sir.

Q. When you got to the junction there were people on the car that went off; isn't that so? A. Went off the car at the junction?

Q. Yes, at the junction? A. Yes, there was people went off.

Q. There is a refreshment place there? A. I know it.

30 Q. You did not get out— A. No, sir.

Q. —for refreshments; you had your own; but there were people that left the car while it was lying there? A. Yes, sir.

Q. Can you say whether Hodler was one of the people that left the car while it was lying there? A. Yes, sir.

Q. What do you say about that? A. I say he left the car, he went off the car.

40 Q. At the junction? A. At the junction.

William Breen—Cross

Q. The car laid at the junction only a few minutes, did it not? A. Yes, sir.

Q. When the car got started again, what was the first you saw of Hodler? A. He came back on the car again.

Q. What? A. He came back on the car again.

Q. Well, where in the car did you see him when he came back? A. When he came back on the car? 10
To the front of the car.

Q. What is the first thing that you saw of Hodler after the car got started from the junction?

A. I seen him in the front compartment of the car.

Q. He was then in the front compartment of the car; is that right? A. Yes, sir.

Q. Pretty much the same place where he had been before? A. Pretty much the same.

Q. Occupying a seat or standing up? A. I believe he was sitting down. 20

Q. Kavanaugh by the side of him? A. Yes, sir.

Q. The same situation that existed before the argument concerning the seat started? A. Yes, sir.

Q. Well, how far had the car gone along after leaving the junction when you noticed him in that position in the front compartment? A. How far had it went?

Q. Yes. A. Oh, it just started off. 30

Q. It was just going? A. Just after changing the crew.

Q. And when the crew was changed, that meant a new fare? A. That meant a new fare, yes, sir.

Q. And that meant a new conductor? A. A new conductor.

At one o'clock, p. m., the Court takes a recess of one hour. 40

William Breen—Cross

After recess.

10 The Court: I propose, gentlemen, to leave it to you whether you think it would pay for you to have a view of the locality where the accident occurred. When I say “whether you think it would pay,” I mean whether you feel that a view would be likely to assist you to understand the evidence in the case, and assist you sufficiently to make it worth whatever time and trouble would necessarily be involved in viewing the premises. Arrangements would, of course, be made, if you feel that you would like to see the ground, so that you would be taken there without any expense or trouble to yourselves, so far as possible. What do
20 you think of it? Or would you like to consider it and let me know a little later in the day.

 The Fifth Juror: Your Honor, I think counsel on both sides might settle that matter.

 The Court: Counsel do not altogether agree; therefore I leave it to the jury.

30 The Foreman: Your Honor, is that map admitted to be correct?

 The Court: You have heard the evidence as to the map; you have heard the testimony of the engineer who made it; you have heard evidence of the fact of there having been no change, so far as the witnesses knew, in the locality since the accident. There is no witness who says so far that there has been any change, and, I think, the accuracy of the map has not so
40 far been criticised. As the case

William Breen—Cross

stands, the map seems to be supported by sufficient evidence of its accuracy.

(The jury retires, and, after some time, returns into Court.)

The Foreman: Your Honor, the jury does not think it necessary to go down and view the curve. 10

The Court: That is a question for you, gentlemen.

WILLIAM BREEN resumes the stand in behalf of defendant:

Cross-examination continued by Mr. Hood:

Q. Mr. Breen, I think we got to the time when there was a change of crews at the Belleville junction. I want to ask you how soon after the car left the Belleville junction the conductor began to collect fares? A. How soon after? 20

Q. Yes. A. Right away, I guess.

Q. And do you recall where he began the collection of fares, the rear end of the car or the front end of it? A. The front end.

Q. Can you tell me where Mr. Hodler was at the time when the conductor began to collect fares? A. I believe he was in the smoking compartment. 30

Q. Can you tell me where Mr. Kavanaugh was at that time? A. I don't remember.

Q. And where were you at that time? A. In the smoking compartment.

Q. Seated? A. No, sir; standing up.

Q. Standing up? A. Yes, sir.

Q. Was Hodler seated? A. No, sir; I don't believe he was.

Q. How soon after that was this occurrence with 40

William Breen—Cross

the conductor in the collection of fares? A. Which occurrence?

Q. That the boys would not pay? A. Right away.

Q. Was that in the front compartment? A. At the front compartment; yes, sir.

Q. And was the door closed between the two
10 compartments at that time? A. No, sir; I don't think it was.

Q. Was the door of the front compartment closed at any time while this occurrence with the conductor was going on? A. The front end of the trolley car?

Q. The door between the two compartments of the trolley car. A. Was it closed?

Q. Yes. A. No, sir; I don't think it was.

Q. You say it was not closed at any time dur-
20 ing the occurrence? A. I don't think so; I don't know that.

Q. You do not recall that. At that time were there people on the back platform? A. Yes, sir.

Q. Can you say about how many? A. Well, I should judge, about eight or nine.

Q. And did the people that were then on the back platform continue— A. Just the same.

Q. —on the back platform? A. Just the same.

Q. Until you got off the car? A. Until I got
30 off the car?

Q. Yes. A. Yes, the same crowd was on the back, I guess.

Q. And they stayed on the back platform all the way? A. All the way down.

Q. Where did you get off the car? A. I believe I got off at Central Avenue and Fourth Street.

Q. Where is that with reference to Stuyvesant Avenue? A. In Harrison.

Q. In Harrison. That is a couple of miles
40 further south? A. Yes, sir.

William Breen—Cross

Q. Did Hodler continue in the smoking compartment all the time? A. All the way down?

Q. Yes. A. After we left the junction?

Q. Yes. A. I believe Hodler went in the rear.

Q. Well, was not the rear the smoking compartment? A. I mean outside of the smoking compartment, out onto the platform.

Q. I did not ask you what you believe; I asked you whether Hodler continued in the smoking compartment all the time down from the junction? 10

A. No, sir.

Q. Did you see where he went from the smoking compartment? A. Well, he went out; he passed me.

Q. He went past you? A. I believe he did go past me.

Q. Did you not say in your direct-examination that you did not remember his passing you? A. 20
Yes. Well, after he came to me, I know where he went after that.

Q. Did you not say in your direct-examination that he was coming towards you, but that you did not know that he actually passed you? A. I may have.

Q. Well, don't you recall what you said on that subject this morning? A. I recall. I just begin to remember now that he went past me.

Q. You now remember that he went past you? 30
A. Yes, sir.

Q. Have you been speaking about this matter during the recess? A. No, sir.

Q. Has anybody been trying to refresh your memory about it during the recess? A. No, sir.

Q. Have you been trying to refresh your recollection yourself during the recess, thinking it over? A. Yes, sir.

Q. And now he went past you, you say? A. I think he did. 40

William Breen—Cross

Q. You believe he did? A. Yes, sir.

Q. Where were you when he went past you?

A. Inside the door of the smoker.

Q. How far from the door leading to the back platform? A. Almost up against the door.

Q. Had anybody passed onto the back platform up to that time in addition to the people who were on it at the time when the car left the junction?

A. Not that I seen.

Q. Did anybody follow Hodler in passing you?

A. There was a crowd said they was going to get him.

Mr. Hood: I did not ask you that. I ask you to strike that out, as not responsive.

The Court: Strike it out.

Q. I ask you if anybody followed him? A. Yes.

20 Q. How many? A. One or two, I guess.

Q. One or two. Now, before going out on the back platform, or passing you, rather—before passing you, up to that point had there been any discussion in the car—any quarrel? A. Inside of the car?

Q. Yes. A. Not as I know of.

Q. Any words at all? A. The same argument continued.

30 Q. That is what I am asking you. A. Well, it continued all the way along.

Q. How long did the argument continue before Hodler came in your direction? A. About three or four minutes, I guess.

Q. Was it no longer than that? A. I don't think so.

Q. You say that you read your testimony at the former trial? A. I looked it over.

40 Q. Did you say at the former trial that it was about five or seven minutes that the argument

William Breen—Cross

lasted after you left the junction? A. I may have; yes, sir.

Q. What? A. Yes, sir, I guess I have.

Q. Was your memory of the occurrence then as good as it is now? A. No, sir.

Q. Is it better now? A. No, sir.

Q. What? A. It may have been better then.

Q. It was better then. I call your attention 10 specifically to the question and answer at the former trial: "Q. How long did they continue this argument after they left the junction? A. I should judge about five or seven minutes; I couldn't tell." Does that refresh your memory any about the subject? A. It does.

Q. And do you now think that it was that? A. Well, it may have been five or seven minutes.

Q. When Hodler was coming towards you in the car, after leaving the Belleville junction, did 20 you notice where Kavanaugh was? A. No, sir.

Q. Did you say that it was after the Belleville junction that Kavanaugh asked you people to let him alone, that he was drunk? A. After leaving the Belleville junction; yes, sir.

Q. Where was Kavanaugh at the time he said that? A. In the smoking compartment of the car.

Q. Where was Hodler at the time when Kavanaugh said that? A. The same place.

Q. And did the argument continue after that? 30 A. It continued; yes, sir.

Q. For several minutes? A. Yes, sir.

Q. Can you say whereabouts the tralley car was about the time that Hodler was coming towards you? A. I couldn't give you the least idea about it.

Q. You do not know whether you had gotten up as far as Bennett Avenue or not? A. Midland Avenue? 40

William Breen—Re-direct

Q. Bennett Avenue? A. No, sir.

Q. Or Stuyvesant Avenue? A. No, sir.

Q. You could not tell anything about it? A. No, sir.

Q. How long was it after Hodler was coming towards you that you heard scuffling out on the back platform? A. How long?

10 Q. Yes. A. I heard a scuffling right along, all the time.

Q. At all times? A. Yes, sir.

Q. Both before and after? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. So that you can not distinguish between the scuffling on the back platform after Hodler came towards you from the scuffling before he came towards you? A. No, sir.

20 RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. Now, after you left the junction and until you left the car did you notice anyone in the car being affected in any way—I mean as to swaying or jolting by going around a curve? A. No, sir.

Q. Were you? A. No, sir.

Q. Or anyone near you? A. No, sir.

30 Q. When you say he demanded his seat of you, what did he say to you? A. Oh, he just wanted me to get up; he asked me would I move out of the seat.

Q. Well, when you entered the car did you take a seat with Hodler or not? A. No, sir; I took no seat with him.

Q. Then it was not you who was crowding him out of a seat or crowding into a seat with him? A. No, sir; I didn't crowd in the seat with him.

40 Q. Why did he ask you for a seat. do you know?
A. I don't know.

William Breen—Re-direct

By the Court: Q. Well, these seats were cross-wise seats and each held two persons? A. Yes, sir.

Q. Were you occupying the whole of one of those seats? A. There was another fellow in the seat.

Q. What? A. There was another man in the seat. 10

Q. In the seat with you? A. Yes, sir.

Q. The two of you, then, filled the seat? A. Yes, sir.

By Mr. MacSherry: Q. Did he ask you for a seat when the two of you were occupying that seat? A. Yes, sir; he wanted me to get up.

Q. He wanted you to get up? A. Yes, sir.

Q. What did he say to you? A. He wanted me to get up and give him the seat.

Q. What did he say to you? A. He told me this 20 was his friend.

Q. What? A. This fellow was his friend; he wanted to sit with him; that is all I know.

Q. What the jury and both counsel want to know is what the exact language he used to you was? A. He told me if I didn't get up out of the seat he would make me get up.

Q. When one or two persons were following him, as you say, as he went towards you, towards the back platform, what was said by anybody? 30
A. On the back platform?

Q. No. You have used the expression. What they said. What was said? A. He said he would lick—

Mr. Hood: Used the expression in what connection, if you please?

Mr. MacSherry: As they followed him out.

William Breen—Re-cross

The stenographer reads from the record as follows: Q. Had anybody passed onto the back platform up to that time in addition to the people who were on it at the time when the car left the junction? A. not that I seen. Q. Did anybody follow him in passing you? A. There was a crowd
10 said they was going to get him.”

The Court: Is that what you mean?

Mr. MacSherry: Yes, sir.

The Court: I do not think the question is sufficiently explicit to explain itself. Ask another question that will bring the mind of the witness to the subject.

Q. When Hodler was nearing you, and one or two persons behind him, what, if anything, was said by any person or by the crowd? A. They
20 said they were going to get him; that is all I know.

Q. Who said that? A. These few fellows that was after him, that followed him up.

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Breen, did you pay any attention to the movement of the car that night? A. Yes, sir; I
guess I did.

30 Q. What? A. I guess I did.

Q. As to speed? A. Yes, sir.

Q. As to swaying? A. The swinging?

Q. As to swaying, jolting? A. Jolting?

Q. Swaying or jolting—did you pay any attention to it at all? A. No, sir.

Q. You did not pay any attention to it? A. No, sir.

Q. That was a pretty hard track, anyway, was
40 it not, running down from Kingsland?

William Breen—Re-cross

Mr. MacSherry: I object to that as not re-cross-examination. How could he possibly know that?

The Court: I think you may answer the question.

Defendant's counsel prays an exception, and the same is allowed.

(Question read.) 10

Mr. Hood: What is your answer?

A. Coming from Kingsland to the pike?

Q. Yes.

Mr. MacSherry: I object to it again. The condition of the track prior to coming to Bennett Avenue has nothing to do with this case. The speed of the car half a mile before would not be permissible, I think.

The Court: I will allow it.

Defendant's counsel prays an exception, 20
and the same is allowed.

A. I didn't notice it, any hard road.

Q. Have you travelled it often? A. Yes, sir; travelled it mostly every day.

Q. Is it a good roadbed?

Objected to as too remote.

Objection overruled.

Defendant's counsel prays an exception, and the same is allowed.

Mr. Hood: Answer, please. 30

A. What, the road?

Q. Yes. A. From Kingsland to the pike?

Q. Yes. A. Well, I don't know. It ain't such a bad road.

Q. Is it a good roadbed?

Objected to.

A. A good roadbed?

Q. Yes. A. I don't know what you mean. 40

William Breen—Re-cross

Mr. MacSherry: This man is no judge of a good roadbed. I object to it on that ground.

Objection overruled.

Defendant's counsel prays an exception, and the same is allowed.

Witness: I don't know what he means about a
10 good roadbed.

Q. Don't you know that the preparation of the ground upon which the rails are laid constitute the roadbed of the line? A. I paid no particular attention to it.

Q. Don't you know at that time that the road from Kingsland on towards Newark was uneven?

Mr. MacSherry: One minute.

A. I don't know.

Objected to as immaterial and irrelevant.

20 Objection overruled.

Defendant's counsel prays an exception, and the same is allowed.

Q. Do you remember the question? A. Yes, sir; I remember the question. I took no particular attention to the road.

Q. As a matter of fact, you did not pay any attention to the movement of the car at all that night, did you? A. No, sir; I did not.

30 Q. You do not know whether it swayed or did not sway? A. No, sir.

Q. You do not know whether it jolted or did not jolt? A. No, sir.

Q. You do not know whether it ran fast or slow? A. No, sir.

40 Q. You do not know anything about the speed of the car or the motion of the car from Ell's hall, down to Kingsland, to the point where you got off, do you? A. No, sir; I do not.

William Breen—Direct

Further DIRECT-EXAMINATION by Mr. MacSherry:

Q. But you do know whether after you left the junction people in that car were jostled or thrown around by the movement of the car, do you not?

A. Yes, sir.

Q. Did you see any? A. Well, swinging a little; that is all I seen. 10

Q. Did you see any jostled, I mean? A. We were all swinging at times.

Q. What do you mean by "swinging"? A. Hopping around the car a little.

Q. By reason of what? A. Fooling, that is all.

Q. What do you say? A. Fooling.

Q. But not by reason of the movement of the car? A. No, sir.

Q. When you say "fooling," you people were all mixed up in a fight there, were you not? A. No, sir. 20

Q. Well, did or did not this trouble with Hodler make a commotion in the car? Do you know what I mean by "commotion"? A. Yes, sir.

Q. Was there anything in the movement of the car that swayed the people against each other? That is what I want to know. A. Yes, sir.

Q. When? A. When the jolt of the car swayed them together. 30

Q. Where? A. Where?

Q. Where, yes? A. Inside of the car.

Q. When? A. When?

Q. Yes, when? A. Why, after we left the turnpike road, the only time I took any particular attention to anything like that.

Q. How long after you left the turnpike road? A. Within a few minutes.

Q. At the time Hodler went past you, did you 40

Margaret M. Fearon—Direct

notice any swaying of the car then? A. No, sir.

Q. Did you notice any when he was on the—
when you heard the noise on the back platform?

A. No, sir.

Further CROSS-EXAMINATION by Mr.
Hood:

10 Q. Well, then, I understand you to say that
there was swaying and jolting of the car after it
left Belleville junction? A. Inside of the car
there was.

Q. What? A. Inside of the car there was.

Q. Yes, inside of the car. What do you mean
by "inside of the car," the people in it? A. The
people inside of the car, yes.

20

MARGARET M. FEARON, sworn in behalf of
defendant:

Direct-examination by Mr. MacSherry:

Q. Miss Fearon, where do you live? A. 37 Mul-
berry Street.

Q. Are you in business anywhere? A. Clark
Thread Works.

Q. How long have you been there? A. About
30 nine years.

Q. In the month of December, 1907, where did
you live? A. 3 Clark Avenue, Kearny.

Q. Were you working in the Clark Thread
Works then? A. Yes, sir.

Q. Were you one of a party that went to a ball
at Ell's hall in the month of December, 1907? A.
Yes, sir.

Q. What time did you get there? A. A little af-
40 ter 9 o'clock.

Margaret M. Fearon—Direct

Q. Whom did you go with? A. Mr. McCabe.

Q. Are you a single lady? A. Yes, sir.

Q. How long did you stay at the ball? A. We caught the last car down; after 12 o'clock this was.

Q. Did you notice any liquor being sold there?

A. No, sir; none at all.

Q. Where did you start from? A. Coming home? 10

Q. Yes. A. From Ell's hall; we got on right at the corner, at Ell's hall.

Q. How many of you went there? A. About twenty or twenty-five or thirty.

Q. When you left the hall, what time did you leave? A. In time to catch the last car down.

Q. Why did you leave, do you know? A. Well, there was an argument in the hall when we left; there had been some trouble.

Mr. Hood: There was what? 20

Mr. MacSherry: An argument.

Witness: There had been some trouble in the early part of the evening there.

Q. Fighting or not? A. Yes, sir.

Q. And when you took the car did you get a seat? A. Yes, sir.

Q. Was there room in the car for you to sit down or not? A. Yes, sir.

Q. For people to sit down? A. Yes, sir.

Q. Do you remember seeing Mr. Hodler, the 30 plaintiff, in the car? A. Yes, sir.

Q. Where was he? A. Well, I was right in the front seat in the car, right up near the motor-man, and he stood about two or three seats in back of me.

Q. After you got in the car, what, if anything, did you see him do or hear him say? A. Mr. Hodler started to sing, and someone hollered, "Put him out"; and right then there was sneezereen 40

Margaret M. Fearon—Cross

blowed around the car, and Mr. Hodler said he would lick the one that done it, and out he went towards the back of the car, and there was a couple of others followed him.

Q. And is or is not that the last you saw of him? A. Then I stood up in the seat, and I seen there was a fight on the back of the car.

10 Q. Now, do you know where the junction is? A. Not exactly. I know where they change cars. I don't know just where it lays.

Q. Did you change cars? A. No, sir.

Q. Now, was it after you left that place where you change cars sometimes or before that this trouble took place? A. There was an argument in the car before that and after it.

Q. When was it that you saw him go to the back of the car with the others following him? A.
20 Right after we left the junction, just about when we left the junction.

Q. What do you say? A. Just about when we left the junction.

Q. And where were you seated then? A. Right in the front seat of the car.

CROSS-EXAMINATION by Mr. Hood:

Q. You stayed at Ell's hall during the fight?

30 A. Yes, sir.

Q. And left with the crowd of boys about half-past eleven? A. Yes.

Q. Were there any other girls in the party excepting yourself? A. Yes, sir.

Q. How many? A. Well, there was a couple of other girls there, but they weren't in my company.

Q. What? A. There was a couple of other girls
40 in the crowd, but I wasn't with them. I was with

Margaret M. Fearon—Cross

one girl; she is dead now; her name was Miss Katlis.

Q. Did you know any other girls? A. Well, I don't know who they were; they weren't with me.

Q. Did you ever see Hodler before that night? A. No, sir.

Q. How soon after that night did you see him again? A. Not till the last trial. 10

Q. Not till the last trial? A. No, sir.

Q. Do you know when that took place? A. About two years ago.

Q. What? A. About two years ago.

Q. Three years ago? A. About two years ago.

Mr. Hood: The last trial was in February, 1911, was it not, Mr. MacSherry?

Mr. MacSherry: Yes, sir.

Q. So that there were more than three years between the time that you saw him on the car that night and the time that you saw him next? A. Yes, sir. 20

Q. Did you have any trouble in identifying him? A. Sir?

Q. Did you have any trouble in identifying him? A. No, sir; I knew the gentleman as soon as I seen him.

Q. When you see a gentleman once, you know him whenever you see him, eh? A. Yes, sir.

Q. Do you lay stress on the word "gentleman"? 30
(No response.)

Q. You say you took seats right in the front of the car? A. Yes, sir.

Q. As you came in with McCabe? A. Yes, sir.

Q. Was Hodler at that time standing up or sitting down? A. No, sir; he was sitting about the third seat back of me and then he stood up in the aisle of the car.

Q. Looking out forward? A. Well, he was standing with his two hands on the seats. 40

Margaret M. Fearon—Cross

Q. Up to that time had there been any quarrel in the car? A. No, sir; not until the sneezereen was thrown around.

Q. Was that before or after he stood up that the sneezereen was thrown? A. Well, the sneezereen was thrown around before that, and then he stood up and said he would lick the one that done it,
10 and out he went to the back of the car.

Q. That is the time when he said that? A. Yes, sir.

Q. And did he at once go to the back of the car then? A. Yes, sir.

Q. So that he went toward the back of the car immediately after the sneezereen was first thrown? A. Yes, sir.

Q. He took offense at that? A. Yes, sir.

Q. And he went in the back of the car? A. Yes,
20 sir; and there was a couple followed him.

Q. And said he would lick the man that did it? A. Yes, sir.

Q. And there was a fight then on the back platform? A. There was a couple of other fellows followed him.

Q. But that was the time that the fight was on the back platform? A. Yes, sir.

Q. Did you see Mr. Breen there? A. I just can't say that I seen him there.

30 Q. Do you know Mr. Breen? A. Yes, sir.

Q. How long have you known Mr. Breen? A. About eight years, nine years.

Q. Eight or nine years? A. Yes, sir.

Q. So that you knew him before the night of the 27th day of December, 1908? A. Yes, sir.

Q. I mean the 28th day of December, 1907? A. Yes, sir.

Q. He was of your party at that time, was he not? A. Well, I didn't go up with him; I went
40 up with a couple—

Margaret M. Fearon—Cross

Q. No; but he was one of your party? A. Yes, sir.

Q. Do you recall his being in the car that night? A. Yes, sir.

Q. In the front part, where you were? A. I think I seen him all around the car.

Q. Do you recall his having an argument with Mr. Hodler about a seat? A. I just won't say 10 that; I don't remember.

Q. What? A. I don't just recall that.

Q. You don't recall that? A. No, sir.

Q. Do you know a man by the name of Kavanaugh? A. Well, just to see him, that is all.

Q. Do you know who he is? A. Yes, sir.

Q. Did you see him around the car that night? A. Yes, sir.

Q. Was he in the front compartment? A. Well, I won't just say he was in the front; he was more 20 to the rear end of the car.

Q. Well, that was a car with two compartments, was it not? A. Yes, sir.

Q. A smoking compartment in the back? A. Yes, sir.

Q. Was Kavanaugh anywhere near Hodler at any time?

Objected to as not cross-examination.

The Court: I have an impression, Mr. MacSherry, that the whole subject is open 30 for cross-examination and inquiry, and it has been opened to the extent to which you opened it on the direct.

Mr. MacSherry: I have not gone into the conduct of the people in the car with this witness at all.

The Court: Well, the witness, unless I am mistaken, on your examination spoke 40 of the conduct of other persons. She said

Margaret M. Fearon—Cross

10 that she saw Mr. Holder go to the back of the car, with others following him, as I understood, and, unless I am wrong, she said she stood on the seat and saw a fight, I understood her to say, in the back part of the car. Mr. Hood in cross-examining has spoken of a fight on the rear platform. The witness seems to have adopted that as her meaning, so that I think the whole situation is open to inquiry.

Mr. MacSherry: All right, your Honor.
(Question read.)

A. He was more to the rear end of the car.

Q. How soon after the car started from Ell's dance hall was it that this fight that you speak of occurred on the rear platform of the car? A. I don't know; it wasn't very long.

20 Q. A few minutes? A. Well, that I don't know.

Q. Before you got to the junction? A. Well, there was a fight on the car before we got to the junction, and the fight with Mr. Hodler was after we left the junction.

Q. Oh, you had two fights on the car? A. It wasn't exactly a fight the first time; the first was an argument.

Q. The first was an argument? A. Yes, sir.

30 Q. Well, what was the first fight that you have been talking about? A. Oh, I couldn't tell you that.

Q. What was the argument about? A. I don't know.

Q. What was the fight that you called an argument about? A. I don't know.

Q. Where did it occur? A. On the back of the car.

40 Q. On the back platform? A. Yes, sir.

Margaret M. Fearon—Cross

Q. And where did the fight with Hodler occur?

A. When he went out there.

Q. Out where? A. To the rear end of the car.

Q. Now, you stood up on the seat and you saw it, did you? A. Yes, sir.

Q. And are you sure it was after you left the junction? A. Yes, sir.

Q. Do you know what I mean by "the junction"? A. Yes, sir.

Q. You know that as you came along from the dance hall that night the car stopped at a certain place for a few moments? A. Yes, sir.

Q. And that there was a change of crew? A. Yes, sir.

Q. And from that point on, you say, the fight occurred? A. Yes, sir.

Q. How soon after the car started up again? A. I just couldn't say; it was pretty soon. 20

Q. Well, was it almost immediately or was it after five or ten minutes? A. Almost immediately.

Q. Almost immediately. And you stood up on the seat and saw the fight? A. Yes, sir.

Q. Now, tell us about it. A. Well, when Mr. Hodler went outside—when the sneezereen was blown around, he said he would lick the one that done it, and he went out on the back platform, and the other gentlemen followed, and then the fight started out there. 20

Q. Well, tell us about the fight on the back platform. You say you saw it? A. I said I saw the fight.

Q. Well, tell us about it. A. It seemed as if they was all one on top of one another, trying to get a crack.

Q. How many were on? A. I couldn't say; about half a dozen or so. 40

Margaret M. Fearon—Cross

Q. Were there any out on the back platform before Hodler got out there? A. I don't know.

Q. Didn't you get up on the seat to look? A. I got up after the gentleman went out.

Q. Didn't you see out on the back platform? A. I couldn't see all the way out there.

Q. You could not see all the way out on the
10 back platform? A. No, sir.

Q. How could you tell there was a fight, then? A. I got out in the aisle.

Q. Did you see Hodler out there? A. He went out there; I saw him going out.

Q. You saw him going out? A. Yes, sir.

Q. When you got in the middle of the aisle? A. Yes, sir.

Q. Then he had not reached the platform yet? A. He hadn't yet; he got out there; the others
20 were in back of him.

Q. Was there anybody in front of him? A. That I don't know.

Q. Were there any people out on the back platform before he got out? A. I don't know.

Q. You did not see that from where you were standing, did you? A. I see Mr. Hodler and the other boys going out.

Q. You did not see that from where you were
30 standing?

Mr. MacSherry: You are interrupting her.

By Mr. MacSherry: Q. What were you going to say?

Mr. Hood: I object to the interruption on the part of counsel, except by way of objection.

By the Court: Q. Do you understand the question? A. I said I seen Mr. Hodler going out and
40 the other gentlemen in back of him.

Margaret M. Fearon—Cross

Q. The question now is, did you see that from your position in the car? I understand the word "that" to refer to the presence of persons on the back platform before Mr. Hodler went out. Am I right about that? A. Yes, sir.

Q. Did you from your position see persons on the back platform or see what the situation was on the back platform before Mr. Hodler went out? A. Well, there was someone there, but who it was I don't know, nor how many was there I don't know. 10

By Mr. Hood: Q. How long did the fight last? A. I don't know.

Q. Well, you have some idea of the time? A. Well, it wasn't very long.

Q. Did you watch for the end of it? A. No, sir; I wasn't interested in it.

Q. When you saw they were fighting you went back to your seat? A. I still stayed in my seat, only I stood up. 20

Q. I thought you said you went in the aisle? A. Well, the seat is here and the aisle is here (indicating).

Q. So that you stepped to the side of your seat? A. Yes, sir.

Q. So that when the fight was on you went back to your seat and sat down? A. Yes, sir.

Q. You are the Miss Fearon who gave testimony on the former trial of this case? A. Yes, sir. 30

Q. Did you read your testimony that was given in that case? A. I looked over it.

Q. You read? A. Yes, sir.

Q. And you looked it over? A. Yes, sir.

Q. Have you any recollection of what you said at the last trial? A. I don't just remember all of it.

Q. Have you any recollection of what you read 40

Margaret M. Fearon—Cross

when you read over your testimony? A. Yes, sir.

Q. When did you read over your testimony?

A. Monday.

Q. Do you remember these questions and answers that were put to you during the last trial, on cross-examination? Perhaps I ought to go further back. I will call your attention to questions on the direct-examination: "Q. Well, did you make any change of cars, you or any of your friends— A. No, sir." Do you remember that? A. Yes, sir.

Q. "Q. After you left the dance hall? A. No, sir." Do you remember that? A. Yes, sir.

Q. Now, the cross-examination. "Q. You know that is where they do change sometimes, do you not? A. Yes, sir. Q. Did all this occur before you left that point? A. There was a fight before we come there." Do you remember that question and answer? A. Yes, sir.

Q. "Q. All this matter that you have been testifying to occurred before you reached the junction? A. Yes, sir." Do you remember testifying to that? A. I said there was a—

Q. Do you remember testifying to that? A. Yes, sir.

Q. And you remember that you testified to that at the former trial, do you not? A. Yes, sir.

Q. Now, I call your attention to your testimony on the direct-examination in that case. "Q. Do you remember seeing Mr. Hodler, the plaintiff, there? A. Yes, sir. Q. Where was he? A. Right in the center of the car. Q. What, if anything, did you see him do? A. Well, he wanted to sing, and somebody hollered, 'Put him out' and then there was sneezereen blown around, and he got up, and he said, 'Well, I will lick the one that done that,' and out to the back of the car him

Margaret M. Fearon—Cross

and a few others went; and that is all I remember." Do you remember saying that? A. Yes, sir.

Q. "Q. Where was he when you last saw him? A. When he was going out to the back of the car." Do you remember that? A. Yes, sir.

Q. The next question: "Q. Who was with him? A. There was a couple of others following him." 10 Do you remember saying that? A. Yes, sir.

Q. The next question: "Q. Did you see him after that? A. No, sir." Do you remember saying that? A. I didn't see him in the car after that; I seen—

Q. Do you remember saying that? A. Yes, sir.

Q. The next question: "Q. Do you know where the junction is there? A. No, sir; not exactly." Do you remember saying that? A. Yes, sir.

Q. The next question: "Q. Where did you 20 want to go? A. Coming home?" Do you remember saying that? A. Yes, sir.

Q. "Q. Yes. A. Woodland Avenue." Do you remember that? A. Yes, sir.

Q. "Q. Where is that? A. In Kearny." Do you remember saying that? A. Yes, sir.

Q. "Q. Well, did you make any change of cars, you or any of your friends— A. No, sir."

Q. Do you remember that? A. Yes, sir.

Mr. MacSherry: I object, because she 30 said all that now. I mean the last two or three questions and answers. You can not read the whole testimony.

The Court: Testimony is often linked together so that it is necessary to read the context.

Mr. MacSherry: All right.

Q. "Q. After you left the dance hall? A. No, sir." Do you remember that? A. Yes, sir. 40

Margaret M. Fearon—Re-cross

Q. The next question: "Q. You know that is where they do change sometimes? A. Yes, sir." Do you remember that? A. Yes, sir.

Q. The next question: "Q. Did all this occur before you reached that point? A. There was a fight before we come there." Do you remember that? A. Yes, sir.

10 Q. "Q. All this matter that you have been testifying to occurred before you reached the junction? A. Yes, sir." Do you remember that? A. Yes, sir.

Q. And do you remember that what I have read to you is all of the testimony that you gave as to the occurrence on that car that night? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Mac-
20 Sherry:

Q. Were you asked any more than that, do you know? A. Not that I really remember.

Q. Was there any fight there after you left the junction? A. After we left the junction?

Q. Yes. A. The fight started.

Objected to as not re-direct-examination.

Objection overruled.

30 Q. When you stated here in your examination at the last trial that all this fight occurred before you got the junction, why did you say that? A. Why, there was a fight before we got to the junction, and then a fight started again when we started from the junction.

RE-CROSS-EXAMINATION by Mr. Hood:

Q. Well, Miss Fearon, did you know that fact when you testified before in the case? A. Yes,
40 sir.

William A. Mohn—Direct

Q. But you did not speak of that fact when you testified before in the case? A. I wasn't asked it.

Q. You did not speak of that fact? A. I wasn't asked it.

Q. You did not speak of that fact? Will you answer my question? You did not speak of that fact? A. No, sir. 10

WILLIAM A. MOHN, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Mohn, where do you live? A. West Orange.

Q. What is your business? A. I am an instructor in the Edison phonograph works. 20

Q. Where is that? A. In West Orange.

Q. Were you ever employed by the Public Service Company? A. No, sir.

Q. Were you ever employed by the Hudson River Traction Company? A. Yes, sir.

Q. Were you employed by the Hudson River Traction Company in the month of December, 1907? A. Yes, sir.

Q. Do you remember the night that Mr. Hodler was hurt? A. Well, I heard about it. 30

Q. When? A. As I stated before—

Mr. Hood: Never mind what you stated before. We have not heard it before.

The Court: No, just when?

Witness: I heard it the night that it happened after about ten or fifteen minutes.

Q. What car were you operating that night, if any? A. A 34 car. 40

William A. Mohn—Direct

Mr. MacSherry: We do not know what that means.

By the Court: Q. A car of what line? A. Hudson River line, running from Hackensack to Arlington.

By Mr. MacSherry: Q. What were you, the motorman or conductor? A. The motorman.

10 Q. What line of cars, what division? A. Hackensack division.

Q. What time did you leave Hackensack that night? A. 11:34.

Q. And what time were you due at the junction? A. 12:34.

Q. Before you got to the junction, do you recollect a crowd of young men and women getting on opposite a dance hall? A. Yes, sir.

20 Q. Did you or did you not stop your car for them? A. I stopped for them.

Q. Did you on the way down smell sneezereen? Do you know what that is? A. Yes, sir.

Q. What, if anything, did you do when you smelt it? A. Well, I had the back draft, in the back of the door, and it drove the smell right in the vestibule, and I had to drop the front window in order to drive it out.

30 Q. How was the car inside as you were going, where was the smoker? A. In the rear.

Q. Was there or was there not a partition between the smoker and the other side? A. There was a partition dividing the two parts of the car.

Q. And back of the smoker was the back platform, I suppose? A. Yes, sir.

Q. How was that back platform protected? A. With vestibule doors all the way around, with one side open.

40 Q. About how far is it from Hackensack to the junction?

William A. Mohn—Direct

Mr. Hood: If he knows.

A. I should judge about twelve miles.

The Court: He is asked for his knowledge, and knowledge on a matter of distance may be somewhat a matter of estimate.

(Question withdrawn.)

Q. You did not take the car beyond the junction, did you? A. I don't understand what you say. 10

Q. Did you take the car beyond the junction?

A. On the other side the junction? Yes.

By the Court: Q. Toward Newark from the junction? A. Sir?

Q. Did you go toward Newark from the junction, this side of the junction? A. Yes.

Mr. MacSherry: You do not understand the question, do you? 20

Q. Or was the crew changed there? A. No, we change there, we change crews.

By Mr. MacSherry: Q. Well, did you change? A. Yes, sir.

Q. Where did you change? A. On the Arlington side; it is called the Hudson countyside, where the two cars meets there, and you walk from one platform to the other.

By Mr. Hood: Q. You do what? A. As the two cars comes together, you walk from one platform to the other. 30

By Mr. MacSherry: Q. Well, you left the car there? A. Yes, sir.

Q. Who took it? A. The Public Service Company.

By the Court: Q. You went back to Hackensack? A. Yes, sir.

By Mr. MacSherry: Q. Who took your place? 40

William A. Mohn—Cross

A. Mr. Ryan; he is a motorman of the Public Service.

Q. About how long was that car? A. Well, I believe about 40 feet over all, from the bumper to bumper.

CROSS-EXAMINATION by Mr. Hood:

10 Q. Mr. Mohn, you were then working for the Hudson River Traction Company? A. Yes, sir.

Q. And operated this car between Hackensack and the Belleville turnpike? A. Yes, sir.

Q. The Belleville turnpike was known in those days as the junction, was it not? A. Yes, sir.

Q. At the junction the motorman of the Public Service Railway took control of that car? A. Yes, sir.

20 Q. What is this thing that you say about the cars pulling up together and stepping from platform to platform? A. In order to get alongside of each other, so that you needn't to walk around; they are platform to platform, together, so that we can walk right across and change crews.

Q. You mean by that that the motorman of the Public Service Company brings a car of the Hackensack Road up to there? A. Yes, sir.

30 Q. And the cars are brought side by side? A. Yes, sir.

Q. And the motorman of the Public Service Company steps on the Hudson River car that goes to Newark? A. Yes, sir.

Q. And the motorman of the Hudson River Company steps on the car that goes back to Hackensack; is that what you mean? A. Yes, sir.

Q. And you made that change that night? A. Sir?

40 Q. You made such a change that night? A.

William A. Mohn—Cross

Yes, sir; always did, since the cars run through.

Q. Do you know when that car on the night of the 28th of December, 1907, left Hackensack? A.

Yes, sir; 11:34.

Q. Do you know when that car arrived at the junction? A. 12:34.

Q. You remember that to be a fact? A. Yes, sir. 10

Q. Was that your schedule time? A. That was the regular schedule time.

Q. And you ran on your schedule that night? A. Yes, sir.

Q. You say the car was 40 feet over all? A. I think they were 40 feet over all.

Q. Vestibules at both ends? A. Yes, sir.

Q. And having two compartments within? A. Yes, sir.

Q. Do you recall how many people it seats? A. 20 I believe it will seat forty people, twenty on a side.

Q. Do you recall how large the vestibules are? A. Well, they can stand about ten people in the vestibule.

Q. No, I asked you how large they are; I did not ask you how many you can stand in them; I asked you how large they are? A. The vestibules?

Q. Yes. A. Well, enough to hold about twelve people. 30

Q. Well, can't you tell me in dimensions about what it is. Of course it is as wide as the car? A. It is the width of the car.

Q. And about how deep? A. Well, I should say in to the part of the car it is about five feet.

Q. Five feet. Now, the vestibule on the car consists of a stationary back and on the sides of doors that open? A. Well, what do you mean by "stationary back"? 40

William A. Mohn—Cross

Q. Well, the whole of the back platform is inclosed, is it not? A. Yes, sir.

Q. And on each side of the back platform are doors that you can open? A. Yes, sir.

Q. And when you open them they fold back against the body of the car, do they not? A. Yes, sir.

10 Q. Now, what is on the back of the platform?

A. Well, there is a controller there and the air, the air block and the hand brake, the wheel.

Q. What is there on the back? A. The switch.

Q. And what is there there to keep the air out, the storm out? A. Oh, glass.

Q. Open? A. Yes, sir.

Q. That is, you can open the windows? A. Yes, sir.

20 Q. But it is a firm part of the car, is it not? A. Yes, sir.

By the Court: Q. It is fixed in a frame? A. Yes, sir.

By Mr. Hood: Q. Whereabouts is the controller-box on the platform? A. Well, on the rear; as you are facing in the direction the car is going why, it is to your right side.

Q. A little to the right from the center of the car? A. A little more on the side, yes.

30 Q. And you say the platform will hold nine people? A. About nine or ten people.

Q. In those days were the cars equipped with electric headlights? A. Yes, sir; with arc lights.

Q. You mean these great, big, powerful lights? A. Yes, sir; you can see about 1,700 feet in front of you.

Q. That car was equipped with one of such? A. Yes, sir.

40 Q. Do you know whether it was in use that night? A. Yes, sir.

John F. Ryan—Direct

JOHN F. RYAN, re-called in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Ryan, where do you live? A. 617 Jersey Street, Harrison.

Q. What is your business? A. Police officer.

Q. Where? A. Harrison.

Q. How long have you been a police officer? A. 10
Four years and four months, I think; it is a little over four years.

Q. In the month of December, 1907, what were you doing? A. Running a Hackensack car on this end, the Public Service end.

Q. Who was your conductor? A. Connors; I forget his first name.

Q. Do you recollect the night that Mr. Holder was hurt? A. Yes, sir. 20

Q. You were the motorman of that car, were you? A. Yes, sir.

Q. Where did you take charge of the car? A. At the switch, about 125 feet south of the Belleville turnpike, that has been mentioned here as the junction. I didn't know that until this trial.

Q. Was there any change of cars at that point? A. No, sir.

Q. What was changed, if anything? A. The cash boxes were changed and crews; the motormen and conductors exchanged with each other, and they exchanged—not the cash box; they call them the registers; they take them out of one car and put them in the other; the Hudson River had their own and the Public Service had their own. 30

Q. You had how many points on your controller that night? A. Eleven.

Q. And when you started up, on how many points did you start? A. Well, you have got to catch one at a time; you move it, and it snaps 40

John F. Ryan—Direct

into one; you give another jerk, and it will snap into two.

Q. Well, is there any speed that you get to? A. Well, one, two, three, four, five, and six is what pulls the car, and then when you go past six you pass a space until you come to No. 7, and then that starts to give you the speed.

10 Q. Now, tell us what you did this particular night in that regard, about starting the car. A. Well Mr. Mohn pulled down over the switch I was there ahead of him; I was due there ahead of him; I was due there at 12:29, and he was due there at 12:31 He said 12:34, but 12:31 is the correct time; and I was there at '29 or '28; and when we got the cars even, why, I stepped off and got down on the ground, and he set the brakes on his car and I set mine, and I went in through
20 the back of the car and walked through to the front. As I passed through I saw a lot of these fellows, that I knew. I didn't know the girl at that time; I know her well now; I didn't know her then.

Q. How is the grade there, if you know, after you leave the junction? A. Well, from the switch to Seeley Avenue is downgrade for a short distance, I should say about 325 to 350 feet, and right at Seeley Avenue, in the center of Seeley
30 Avenue on Kearny Avenue, it commences to go up again. until you strike the south side of the curve, and then it goes down again until you come to the Erie Railroad, and then it is straight all the way down Kearny Avenue until about Bergen Avenue, and then you go up a little again, and down.

Q. How long had you been running that car previous to that time? A. For two years, about two

John F. Ryan—Direct

years; it might not have been quite so long or it may be a little longer; I can't say now.

Q. Do you know where the curve is there at Bennett Avenue and Stuyvesant Avenue? A. Yes, sir.

Q. Now, as you approached the curve that night on this trip at about what speed were you sending your car? A. Well, I came to Stuyvesant Avenue—I don't know whether it is Bennett— 10

Q. It is Bennett first. A. Darst I look at that map for a second first, and I will tell you.

Q. Yes. A. (Witness examines map.) Stuyvesant—no, Bennett Avenue. When I came to Bennett Avenue I was running full speed, as fast as the car would go.

Q. And that would be about what? A. About fifteen or seventeen miles an hour, something like that. 20

Q. And what did you do at Bennett Avenue? A. I shut off and prepared for the curve.

Q. Now, when you reached the curve at about what speed were you going? A. I guess the car would be rolling between—around ten miles an hour, anyhow, maybe twelve, something like that—just giving it a little bit of air and slackening up the least bit.

Q. What kind of a curve is that as compared with other curves, is it an easy curve or a bad curve, or what? A. No, it isn't a bad curve. 30

Q. How does it compare with the other curves in the tracks you have been over? A. Well, it compares about with the curve at the corner of Clinton Avenue and Broad Street; it is something on the same style as that, I should judge. I mention that because Mr. Hood did the other day.

Q. Well, is that a bad curve or an easy one, or what? A. Why, that would be an easy curve to go around. 40

John F. Ryan—Cross

Q. Was this curve at Bennett Avenue and Stuyvesant Avenue an easy curve to go around or not?

A. An easy curve, yes.

Q. Do you remember whether your car stopped at Stuyvesant Avenue that night or not? A. Well, I knew Mr. Kavanaugh was on the car.

Q. Well, did you stop there? A. Yes, sir.

10 Q. Which corner did you stop at? A. The head of the car was about on the south side of Stuyvesant Avenue, just about spread in the center of Stuyvesant Avenue, taking in from curb to curb, something like that.

Q. As you approach Stuyvesant Avenue is your grade up or down? A. It starts to go down. You are past the curve then, and you start to go down again.

20 Q. Until you reach the curve is your grade up or down? A. Up, it is an upgrade.

Q. Did you notice as you went around that curve any unusual jolt or swaying of the car? A. No, sir.

Q. There is always, is there not— A. Yes, sir.

Q. Is or is not there always some swaying or jolting to a car going around curves? A. Yes, always making a curve you take some kind of a little jolt; you will notice it.

30 CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Ryan, you had experience as a motor-man for how many years? A. On that line, do you mean?

Q. Well, on that line or any other line. A. I guess around two and a half years.

Q. And, I suppose, on all the lines that you ran on there were curves? A. Yes, sir.

40 Q. And on all the lines that you ran on there were jolts and swaying of the car? A. Yes, sir.

John F. Ryan—Cross

Q. And you got pretty well used to jolts and swaying while you were motorman, did you not?

A. No, sir.

Q. You did not get used to them? A. No, sir; I was used to them before that; I was a fast freight brakeman.

Q. So that you got pretty well enured to them, did you not? A. Yes, sir.

10

Q. And it would have to be one of great intensity to have any effect upon you? A. Well, I would know it was there, but before it would have any effect it would have to be some curve.

Q. How long did you continue to run the line after December 28, 1907? A. Oh, I couldn't tell you that.

Q. Did you for four or five months after that? A. Yes, longer than that.

Q. Was anything the matter with the track around the curve or in the neighborhood of the curve? A. What curve? 20

Q. That curve on Kearny Avenue, the only one we are talking of. A. That I saw?

Q. The one you were running the car over. A. You said that I saw?

Q. Yes. A. I didn't see any.

Q. Or that you noticed, running your car over? A. No, sir.

Q. Were there any repairs made to that curve shortly after that night in December? 30

Objected to as immaterial and irrelevant, and on the ground that repairs after an accident can not be proved.

The Court: This has been held—it is not exactly analogous—that where a man is hurt at an unguarded railroad crossing the Court will not receive evidence of the fact that a flagman was put there pretty soon 40

John F. Ryan—Cross

after, because that might be regarded as an admission that it was a dangerous place, *ex post facto*.

Mr. MacSherry: Does not this involve the same principal?

The Court: The fact that there was a physical change soon after would not necessarily prove that it was a needed change.

10 Mr. MacSherry: I also say that it is not cross-examination.

The Court: I think it is competent. I do not think it is analagous to the other case that stated.

Defendant's counsel prays an exception, and the same is allowed.

(Question read.)

A. I don't know.

20 Q. Now, where is Seeley Avenue, Mr. Ryan? A. Seeley Avenue is the second street north of the curve on Kearny Avenue.

Q. That is the street nearest to Bennett Avenue? A. Yes, sir.

Q. Next to Bennett Avenue? A. Yes, north of Bennett Avenue.

30 Q. The street north of Bennett Avenue. And is the block between Bennett Avenue and Seeley Avenue about the same length as the block between Stuyvesant Avenue and Bennett Avenue?

A. I am pretty sure all those blocks up there are about 400 feet.

Q. The grade from the junction to Seeley Avenue, you say, is down? A. Yes.

Q. A considerable downgrade? A. Oh, I wouldn't call it much of a grade.

40 Q. Enough of a grade to add to the speed of your car as it comes down? A. Well, I will say about five per cent, in my judgment, five feet in a hundred.

John F. Ryan—Cross

Q. That is, that would be the grade, in your judgment? A. It would look about that.

Q. Enough to add to the speed of your car as it comes down? A. It will help a little, yes.

Q. You came down full speed, you say? A. Yes, I fed the car on the way down the hill, yes.

Q. What is the grade after you strike Seeley Avenue? A. About a little—about the same as 10 coming down.

Q. You think there is about the same rise? A. I do, yes; say five per cent, about five feet in a hundred.

Q. Is it not level there from Seeley Avenue on? A. From Seeley Avenue on to where?

Q. From Seeley Avenue on to Stuyvesant Avenue? A. Isn't it level?

Q. Yes. A. I don't think it is; I am sure it ain't; no, sir; it is not. 20

Q. After coming down from the junction under full power, you did not undertake to regulate the speed of your car until you got to Bennett Avenue; is that right? A. No, sir; I didn't say that at all.

Q. What did you say? A. I told you after I left the switch, not the junction. You are quite a ways from the junction where the car starts from.

Q. How far is that? A. I should say about 125 30 or 130 feet.

Q. Now, after you left the switch, you ran full speed down to Bennett Avenue, did you not? A. Yes.

Q. And you did not undertake to regulate your speed until you got to Bennett Avenue? A. I was regulating it until I got on what they call the loop full speed, and left it there until I arrived at Bennett Avenue. 40

John F. Ryan—Cross

Q. When did you begin to regulate your speed after you got to Bennett Avenue? A. I told you, from the time I left the switch, coming down that grade.

Q. I understand that you did not start off at full speed; it took you some time before you reached full speed, did it not? A. Yes.

10 Q. And then after you got up to full speed, after you gave her all the power you could give her, she went under that power until you got to Bennett Avenue? A. Yes, sir.

Q. Before you did anything else to the speed? A. Yes, sir.

Q. Now, what did you do then, at Bennett Avenue, to the speed? A. Why, I shoved her off the loop.

20 Q. How far did you shove her off? A. You can't shove her no part; you have got to shove her all the way. I shoved her all the way.

Q. You do that only for a minute? A. You can do it less than a minute.

Q. How long do you keep it off? A. How long do I?

Q. How long did you? A. You said do I?

Q. Well, I stand corrected. How long did you?

A. Until I went around the curve, I thought—

30 Q. No, simply what you did. A. I couldn't tell you that unless I tell you what I thought.

Q. Do I understand, then, that you have not any distinct recollection of what you did that night? A. Well, if you had waited a minute I would have told you that I thought my car around the curve. You didn't wait until I put that in. I know what I done.

40 Q. Do I understand that you have no distinct recollection of what you did that night? A. I didn't hear anybody say that.

John F. Ryan—Cross

Q. I want to know whether that is so or not. Are you speaking from an accurate recollection of what you did that night or from the ordinary practice? A. I am speaking from the ordinary practice and recollection, both.

Q. When did you hear of the trouble? A. What trouble?

Q. The trouble on the night of the 28th of December, 1907? A. When did I hear of that? The next morning, about half-past ten.

Q. Do you recall getting a bell to stop at Stuyvesant Avenue? A. Yes, sir.

Q. Do you recall where you were at the time you got the bell? A. Yes, sir.

Q. Where were you? A. Right about the center of the curve.

Q. Now, you say, Mr. Ryan, that full speed for your car is fifteen to seventeen miles an hour? A. In my estimation.

Q. Then you do not know? A. I am not an expert, no.

Q. Did you ever try it out? A. How do you mean, by a speedometer?

Q. No, any way that you can tell? A. Yes, I did.

Q. That car that you were operating that night? A. Yes.

Q. How did you try it out? A. By taking the miles of track from Fourth Street and Harrison Avenue to the Belleville turnpike, and seeing the time it took to run the car there.

Q. At full speed? A. Not full speed all the way.

Q. Did you ever try it at full speed for any distance? A. Well, I have tried the car at full speed for a distance, but I don't know what she was running.

Q. You do not know what she was running? A. No.

John F. Ryan—Re-cross

Q. So that when you say she could make fifteen to seventeen miles an hour, that is merely your judgment, without having tested her at all? A. Certainly, certainly.

Q. And when you say that she was reduced down to ten to twelve miles an hour after you shut off the power at Bennett Avenue, that is only
10 your judgment again? A. Certainly.

RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. Well, that is the only way you could tell at night, is it not? A. That is the only way I could tell in the daytime, either.

RE-CROSS-EXAMINATION by Mr. Hood:

20 Q. Let me ask you about this curve at Clinton Avenue. That is a little different curve from this one, is it not? A. Well, a little different. The reason I took that Clinton Avenue curve, I didn't know whether you knew any curve that I knew just like that one.

Q. Clinton Avenue is not quite like that, is it? A. No, Clinton Avenue isn't quite as sharp as that.

30 Q. It is an easier curve? A. No, I wouldn't call it an easier curve.

Q. What would you call it? A. I think Clinton Avenue would put you off easier going around it.

Q. You think this is an easier curve? A. Yes, sir.

40 Mr. Hood: I thought you said the other way.

Harry Evans—Direct

Further DIRECT-EXAMINATION by Mr. MacSherry:

Q. Why do you think the Clinton Avenue curve would be an easier one to put you off, as you say, than this curve? A. Well, I can't tell you that in words; I would have to show you that—that you are running on a straight track on Broad Street, and when you are going to go, as I would say, southwest on Clinton Avenue, you leave all of a sudden, like that (illustrating), you see, right off that straight track; while this track here, you approach it something like that, and you go around it like that (illustrating); and on Clinton Avenue you get a switch to make the curve point on. That is why I would call it worse. 10

Further CROSS-EXAMINATION by Mr. Hood: 20

Q. You could not take the Clinton Avenue curve at ten or twelve miles an hour, could you?

A. Sure you could; take it fifty miles an hour.

Q. You could take it at fifty miles an hour?

A. Sure, but I wouldn't want to be on it, though.

HARRY EVANS, sworn in behalf of defendant: 30

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Evans? A. Fremstad Avenue, North Arlington.

Q. What is your business? A. Wood worker.

Q. What is your business? A. Why, working on automobiles, body work.

Q. Are you in business for yourself? A. No, sir. 40

Harry Evans—Direct

Q. For whom? A. The Atlantic Vehicle Company, Woodside, Newark.

Q. You used to be a carpenter, did you not? A. Yes, sir.

Q. You were a witness in the last trial? A. Yes, sir.

Q. And you were a carpenter then, I believe?
10 A. Yes, sir.

Q. Do you know where Kearny Avenue and Bennett Avenue and Stuyvesant Avenue are? A. I do.

Q. Do you know where this junction is nearby there, the Belleville Junction? A. Yes.

Q. Were you in that vicinity in the month of December, 1907, when Mr. Hodler, the plaintiff here, was hurt? A. I was.

Q. Where were you? A. When he was hurt?
20 Q. Yes. A. Belleville turnpike, in the lunch-room.

Q. What is the name of that lunch-room? A. The Mountain House.

Q. Is there any mountain there? A. Well, it is upgrade all around it, so they call it the mountain.

Q. How many stories has that Mountain House? A. An old car.

Q. Where was it situated at that time? A. On
30 the left-hand side coming from Kingsland.

Q. What time of the night were you there? A. I was there from—as near as I can remember, from ten till nine o'clock the next morning.

Q. Who was the proprietor of that place? A. Cliff Ricker.

Q. What were you doing there at that place then? A. I was working nights for him at that time.

Q. Did you know a man working there by the
40 name of Quick? A. Yes, sir.

Harry Evans—Direct

Q. Have you seen him in Court at this term?

A. I have.

Q. Did you see him last term? A. I did.

Q. He is not in Court now, is he? A. No.

Q. What sort of a looking man is he? A. Kind of a thin man, with a heavy mustache, dark complexion.

Q. Did you see him this night that Mr. Hodler 10
was hurt? A. I did.

Q. Where did you see him? A. At the Mountain House.

Q. How did you hear that Mr. Hodler was hurt?
A. I don't quite remember how I got the word that some man was hurt, but there was someone hollered there when I was by the door, or by the window. I don't know which, and as they did I pulled the door to and ran down there.

Q. Did you go alone or with someone? A. I 20
don't know whether this Mr. Quick was with me, or somebody else; somebody started the same time as me.

Q. When you got down there did you see Mr. Quick? A. I don't remember whether I did or not.

Q. Whom did you see down there? A. Well, I didn't go close up to where the car was; I was pretty near on the sidewalk. I know there was four or five around there. 30

Q. What kind of a night was it? A. It wasn't a very clear night, kind of misty.

Q. Well, now, just recollect whether you saw Mr. Quick down there, will you? A. Well, I have been thinking over it these last few days, and I can't remember whether I seen him down there or not.

Q. Where did you last see him that night? A. 40
At the Mountain House.

Harry Evans—Direct

Q. Have you read your testimony at the previous trial? A. Why, I have looked it over.

Q. When? A. Why, Monday, when we came down.

Q. Did you see any policemen down there? A. I couldn't exactly say whether they were policemen or not, where I was standing, but it looked to
10 me as if they was policemen, but I couldn't swear on it.

Q. Do you think it would refresh your recollection if you read your testimony at the last trial? A. Well, I don't know; it might.

Mr. MacSherry: Well, I ask permission to show this witness his testimony, if your Honor, please. It is not of vital importance, perhaps. He did not see Mr. Hodler hurt. I think it is in the discretion of the
20 Court.

The Court: I think it is objectionable.

Q. Did you see this man, Hodler, picked up? A. No, sir.

Q. Did anybody go down with you at all? A. I know there was somebody started from the turnpike with me, but I couldn't exactly swear who it was.

Q. Was he in front of you or behind you? A. Oh, when I started to run I passed who I was running with; that is all I know. I know Mr. Quick
30 was round there.

By the Court: Q. Around where? A. Around the turnpike.

By Mr. MacSherry: Q. Was he around there when you got word— A. I am pretty sure he was.

Q. —that there was a man hurt? A. Yes.

40 Q. How did you get word? A. Somebody come

Samuel Connor—Direct

up and hollered it out; that is all I know how I got the word.

Q. That is what I want to know. A. I went off as soon as I closed the door.

Cross-examination waived.

10

SAMUEL CONNOR, re-called in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Where do you live, Mr. Connor? A. 151 Hoyt Street, Kearny.

Q. And what is your business? A. Iron molder.

Q. How long have you been an iron molder? A. About nine years—eight years. 20

Q. Were you ever in the employ of the Public Service? A. I was.

Q. In what capacity? A. Conductor.

Q. Running on what line? A. The Hackensack line.

Q. This was the Hudson River line then, was it not? A. Yes, sir.

Q. How long were you conductor? A. About six months, I should judge. 30

Q. Do you remember the time that Mr. Hodler was hurt? A. I remember the accident.

Q. Were you the conductor at the time? A. I was.

Q. And where did you take charge of the car? A. At the junction.

Q. And who was your motorman? A. Ryan.

Q. Now, was there any change of cars at the junction. or did you just change the crew? A. The crew was changed. 40

Samuel Connor—Direct

Q. What car were you on prior to that? A. Why, we took a car from Bank Street up to the junction.

Q. Bank Street, Newark? A. Yes, sir. And changed from that car to the car that was at the junction, coming from Hackensack.

Q. You run right alongside of each other? A. 10 Yes, sir; north and south.

Q. When you took charge of the car at the junction, about how many passengers were in the car? A. Well, I should judge there was about twenty-eight or twenty-nine.

Q. Did you know Mr. Kavanaugh at that time? A. No, sir.

Q. How did the car proceed as to speed after leaving the junction? A. After leaving the junction?

20 Q. Yes. A. Oh, nothing unusual, that I should remember.

Q. Well, I want to know whether it went fast or slow or moderately, or how? A. Just a moderate rate of speed.

Q. Do you know where the curve is beyond Bennet Avenue? A. Yes, sir.

Q. How was your car going as it approached or reached that bend? A. The rate of speed, you mean?

30 Q. I don't want to know how many miles per hour, but whether it was going fast or slow, or how? A. No, just a moderate rate of speed, I should judge.

Q. As your car went around that curve did you see anybody being jolted or pushed or thrown— A. No, sir.

Q. —off of their balance by the movement of the car? A. No, sir.

40 Q. Do you remember anyone asking you to stop

Samuel Connor—Direct

at Stuyvesant Avenue? A. There was a gentleman asked me to stop.

Q. Did you know who it was at the time? A. No, sir.

Q. Do you know who it was now? A. I have heard since; yes, sir.

Q. Was there any bell for the car to stop at Stuyvesant Avenue? A. There was a bell. I believe I told him to pull the bell, but I don't know whether I pulled it or whether he pulled it. I think I pulled it; I am not positive, though. 10

Q. Did you have any trouble in collecting the fares on that car? A. Well, I don't know whether you would call it trouble or not. There was a few didn't have any money. I knew them all, and merely asked them for it, and when they didn't have it, that was all. I knew I couldn't get it.

Q. Why did you know you could not get it? A. 20 Because they told me they didn't have it.

Q. Did you see Mr. Holder on the car? A. He may have been on, but I couldn't identify him.

Q. You were pretty busy on that car, were you not? A. Yes, I was for about five or ten minutes.

Q. From the time you left the junction until you reached Stuyvesant Avenue where were you most of the time? A. In the forward part of the car, the front compartment. 30

Q. Do you know what was going on in the back part of the car? A. There was an argument going on down there of some kind.

Q. Did you have much time to attend to that? A. I didn't bother with it much, to tell the truth.

Q. Why not? A. I knew most of them; I knew they could take care of themselves pretty well. 40

Samuel Connor—Cross

Q. You do not know what Mr. Hodler was doing? A. No, sir.

Q. And you do not know anything about the trouble between Mr. Hodler and the other people, of your own knowledge? A. Not between Mr. Hodler and the other people, I do not.

10 CROSS-EXAMINATION by Mr. Hood:

Q. Mr. Connor, you took charge of the car at the junction? A. Yes, sir.

Q. And as the car moved away from the junction, you proceeded immediately to the front of the car to collect fares? A. After putting up the register, yes.

Q. Is it much of a job to put up the register? A. Merely a minute or so—not that.

20 Q. When you say a minute, do you mean a full minute? A. Well, you can put it in less if you hit the hook the first time.

Q. You have to hit the hook? A. Yes, sir. It is a little hook.

Q. And it takes a little expert knowledge to hit the hook the first time? A. Not particularly. It is very small. You have to stand on a seat.

Q. Did you put it up before or after your car was in motion? A. Before.

30 Q. So that your register was in place at the time when you left the junction? A. Yes, sir.

Q. And you therefore proceeded to the front of the car immediately after leaving the junction to collect your fares? A. I believe I did.

Q. That car had two compartments inside? A. It did.

Q. And the smoking compartment was in the rear? A. The rear of the car.

40 Q. When you got in the car you found a lot of boys that you knew? A. Yes, sir.

Samuel Connor—Cross

Q. And they began to fool you a little about the fares? A. Yes, there was a few of them that didn't have the fare.

Q. No, they fooled you? A. What do you mean by that?

Q. When you went to one, didn't they say that another fellow would pay, pointed to him, and then he pointed out another? A. I didn't go 10
around looking for it; when they said they didn't have it, I knew they didn't have it.

Q. And then you carried them free? A. Yes, sir.

Q. Do you rememebr anybody closing the front compartment? A. Closing the front compartment?

Q. The door between the two compartments in the car? A. The smoking compartment—I believe somebody pushed the door over and put the 20
clasp in for a second or so.

Q. You remember that? A. Yes. sir. I believe it was down the line a bit when that happened.

Q. That was down the line a bit when that happened? A. I believe it was, as far as I can remember.

Q. When did you have the talk with the gentleman who wanted to get off at Stuyvesant Avenue? A. When did I have the talk? 30

Q. Yes. A. Why, right as soon as the car started, I believe.

Q. He told you he wanted to get off at Stuyvesant Avenue? A. Yes, sir.

Q. And you told him to ring the bell? A. Yes, sir.

Q. Did you tell him where to ring the bell? A. No.

Q. Did you not tell him that he should ring the 40

Samuel Connor—Cross

bell when the car struck the curve? A. I did not.

Q. Did you give him any information as to at what point he was to ring the bell? A. He told me he wanted to get off at Stuyvesant Avenue.

Q. Well, why did you ask him to ring the bell? A. Because I have been busy collecting fares. I
10 didn't collect his fare, because I told him it was only a block or so to where he wanted to get off.

Q. You carried him free? A. Yes, sir.

Q. And you expected to be busy? A. Yes, sir.

Q. And for that reason you told him that he should ring the bell? A. I told him to ring the bell. I believe a little explanation is due at this
20 point about that. From the junction to Midland Avenue is only three or four minutes, and I wanted to get as many fares as possible before I got to Midland Avenue, because there would be another passenger getting off here, as there was one got off there.

Q. Well, I have no doubt you did your full duty to the Public Service Company. A. Not full duty, no.

Q. You did not pay any attention to the movement of the car that night, did you? A. Nothing unusual, no.

Q. Did you pay any attention? A. Nothing
30 any more than I always do.

Q. Did you pay any attention? A. Yes, sir.

Q. You were so busy collecting fares that you told a passenger to ring the bell himself, and yet you had time to consider the speed of the car? A. It is only a matter of a second to consider the speed of the car.

Q. And how much times does it take to ring the bell? A. Only a second or so.

Q. There is not much difference in that, then,
40 is there? A. None.

James J. Crowley—Direct

Q. Will you say, as a matter of recollection, that you remember anything definite with regard to the speed or motion of the car that night? A. Anything definite?

Q. That you have a definite recollection as to the speed or motion of the car that night? A. As to the speed, yes.

Q. From the junction down to Stuyvesant Avenue? A. Yes. 10

Q. What do you say about it? A. I say it was travelling a moderate rate.

Q. You say you have a definite recollection about that? A. I have.

Q. Wasn't your motorman running at full speed? A. No.

By the Court: Q. When did you first learn of the accident to Mr. Hodler—not how, not who told you, but when? A. Why, the next day. 20

Adjourned until tomorrow, Friday, September 27, 1912, at 10 o'clock, a. m.

Fifth Day.

Friday, September 27, 1912.

Met pursuant to adjournment.

Present, counsel as before stated. 30

JAMES J. CROWLEY, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Crowley, where do you live? A. Kearny.

Q. How long have you lived there? A. Five years.

Q. And what is your business? A. Spinner in the Clark Thread Company. 40

James J. Crowley—Direct

Q. How long have you been with the Clark Thread Company? A. Ten years.

Q. Are you acquainted with that locality there, Kearny Avenue, Bennett Avenue and Stuyvesant Avenue? A. No, I ain't acquainted with it.

Q. Well, you know where it is? A. Yes, sir.

10 Q. Were you in that vicinity on the night in December, 1907, when Mr. Hodler was hurt? A. Yes, sir.

Q. Do you know there is a dance hall up near the junction there? A. Up in Kingsland—Ell's hall.

Q. A mile away. Were you there that night? A. Yes, sir.

Q. Did you attend that dance that we have been talking about in this case? A. Yes, sir.

20 Q. What time did you get there? A. Between nine and quarter after.

Q. Was anyone with you when you went, or were you alone? A. A young lady.

Q. Did you stay at the dance? A. Yes, sir.

Q. Was there any liquor for sale there? A. No, sir; you couldn't get no drink, only soda.

Q. Did you drink anything there? A. Soda I drank there.

30 Q. I mean any strong liquor? A. No, sir; you couldn't get it; he had no license to sell it.

Q. Whose ball was this? A. Some Italians ran it, as far as I understood.

Q. New York people, or New Jersey? A. I couldn't say whether it was New York or Jersey people.

Q. Did you dance there? A. Yes, sir.

Q. Was there any disorder in the hall there? A. There was a little trouble in the hall—fights.

40 Q. What do you mean by "a little trouble"? A. A couple of fights.

James J. Crowley—Direct

Q. What time did you leave there? A. Between half-past eleven and twelve; caught the last car down.

Q. Were you alone or were others with you? A. I was with a young lady.

Q. And when you took the car, what part of the car did you go in—I mean what part of the car did you sit in? A. I sat in the rear of the car, 10 in the smoking compartment.

Q. Where was your young lady? A. Right there. I was about pretty near the last on the car; there was about twenty-five went on before me.

Q. Did you get a seat? A. Yes, sir.

Q. With your young lady? A. Yes, sir.

Q. Where? A. Right near the back door, on the side seat that runs down.

Q. When you went in were there any people on 20 the back platform? A. Yes, sir.

Q. And after you entered the car, do you remember seeing Mr. Hodler there? A. I didn't see him right away; I seen him later on, down the road.

Q. Where did you see him? A. Somebody started to blow sneezereen around, and that fellow there was going to sing, and some fellow said, "Put him out." He says he would like to see the 30 guy could put him out.

Q. What else, if anything, happened after that? A. Well, they started talking, arguing like, but I wasn't close enough to hear what they were saying, and then we come to the junction then.

Q. What did you do at the junction, if anything? A. Stayed on the car.

Q. Did you make any change of cars? A. Not 40 change of cars.

James J. Crowley—Direct

Q. What was changed, if anything? A. The conductor and motorman changed.

Q. Did you change your seat? A. No, sir; I didn't.

Q. Did your young lady? A. No, sir.

Q. Well, now, after the car started up from the junction were there any people on the back platform, if you remember? A. Yes, sir.

Q. And were there any people standing up in the car? A. Kind of in the front of the car there was some people standing up.

Q. Now, just tell us, if you remember, what took place, if anything, after you left the junction?

A. We wasn't going any length of time, I don't think it was two minutes from the time we left the junction, till I seen this gentleman get up out of his seat and come through, with three other fellows following him.

By the Court: Q. You mean Mr. Hodler? A. Yes, sir.

By Mr. MacSherry: Q. Which way was he going? A. He was going to the back platform.

Q. Where did he go? A. He did go on the back platform.

Q. Did you see him there? A. Yes, sir.

Q. And when you saw him on the back platform of that car after the car had left the junction, were there or were there not other people on the back platform? A. There was other people on it.

Q. How far from the back platform were you? A. I was sitting right on the right-hand side of the car coming towards Harrison.

Q. And what did you see, if anything, happen on that back platform? A. Well, there was a fight there on the back platform.

Q. How could you tell there was a fight? A.

James J. Crowley—Cross

Well, the people in front of me—I see fellows swinging.

Q. How do you mean, “swinging”? A. Swinging their arms.

Q. Just show the jury. A. They were swinging, punching.

Q. Just stand up and show us. A. (Standing and illustrating.) They were going over each other’s—the fellows’ shoulders, like that. 10

Q. Was or was not Hodler there at that time? A. Yes, sir; he was there.

Q. You saw him, did you? A. I didn’t see him there; the crowd comes to me and blocks him off. And I heard after a little while, “There he goes off the car.”

Q. You heard that, did you? A. I did hear that.

The Court: Just say exactly what you heard.

Witness: “There he goes.” 20

Q. Do you know how he got off the car, of your own knowledge? A. I heard them say, “There he goes.”

Q. I went to know just what you saw. Did you see Mr. Hodler again after that? A. No, sir.

CROSS-EXAMINATION by Mr. Hood:

Q. Are you a member of the Kearny gang? A. Sir? 30

Q. Are you a member of the Kearny gang? A. The Kearny gang?

Q. The Kearny gang? A. No, sir.

Q. Do you know Breen? A. He ain’t no Kearny gang. When I knew Breen he lived in East Newark, New Jersey.

Q. Do you know William Breen? A. Yes, sir.

Q. He is the man who was on the stand? A. Yes, sir. 40

James J. Crowley—Cross

Q. And do you know Martin Shields? A. Yes, sir; I was talking to Martin Shields on the car.

Q. And do you know Joseph H. McCabe? A. Yes, sir.

Q. And did you know Miss Fearon? A. Yes, sir.

Q. All of those people were with you that night? A. Yes, sir.

10 Q. And you were with them? A. I was in their company part of the night.

Q. And you were part of the crowd of twenty-five that attended the dance at Ell's hall? A. I don't know about twenty-five; I know—

Q. Well, did you not say there were twenty-five of you that took the car coming back? A. Yes, there was twenty-five got on the car, I said.

Q. Were they not all of your crowd? A. No, not that I know they were all my crowd.

20 Q. You went to this dance by arrangement with these people whose names I have mentioned? A. I went to the dance with them people?

Q. By an arrangement with them? A. No, sir.

Q. You knew they were going? A. I didn't know they were coming at all; I went alone, with a young lady, I said.

Q. You went alone, with a lady, and did not know they were going? A. No.

30 Q. You spent the evening there with them at the dance, did you not? A. When I met them there.

Q. Where was it that Hodler was when you first noticed him on the car? A. In the center of the car, about.

Q. That car had two compartments, did it not? A. Yes, sir.

Q. And was it in the rear compartment or the front compartment? A. In front of the smoker.

40 Q. That is, in the front compartment? A. Yes, sir.

James J. Crowley—Cross

Q. That is where the trouble arose about the sneezereen and the singing? A. Yes, sir.

Q. That trouble settled itself before you got to the junction? A. Yes, sir.

Q. How long did you lay at the junction? A. How long did we stop at the junction?

Q. Yes. A. I couldn't just say; I think about five minutes, five or ten. 10

Q. Where was Hodler while the car was at the junction? A. Sitting down.

Q. What? A. Sitting in his seat with somebody in an argument.

Q. In what part of the car? A. In the same seat as he took when I seen him.

Q. Then he was sitting all the way down? A. As far as I seen him, until he got up and made that speech about he would like to see the guy put him out. 20

Q. Well, that was the first speech he made, was it not, so far as you heard? A. As far as I heard.

Q. And he was then, up to that time, sitting? A. Yes, sir.

Q. And he was sitting in the front compartment? A. Yes, sir.

Q. And when he made the speech that he would like to see the guy that would put him out, then he rose in his seat? A. He did rise; yes, sir.

Q. And after he made his speech he sat down again in his seat? A. Yes, sir. 30

Q. The same seat that he had been occupying before? A. The same seat.

Q. And he continued to occupy that seat until the car had gotten away from the Belleville Junction? A. Well, he got up as soon as he left the junction, I said about two minutes, I should say.

Q. I said he continued to occupy the seat until 40

James J. Crowley—Cross

the occurrence that you say took place after the car left the junction? A. Yes, sir.

Q. Now, the beginning of that trouble after the car left the junction, you say, was about two minutes? A. Yes, sir.

Q. Can you locate where the car was at that time? A. Not any more than a block, I don't
10 think, or a block and a half from the junction.

Q. You think only a block or a block and a half? A. Yes, sir.

Q. And it took the car two minutes to travel that block or the block and a half? A. It did what?

Q. It took the car two minutes to travel that block or the block and a half? A. I don't know. I say it was about two minutes since we left the junction when I seen Mr. Hodler get up out of
20 his seat and come to the rear.

Q. I asked you where that locality was, if you could fix it on the road? A. Oh, I don't know that.

Q. You do not know that? A. No, sir.

Q. But you are pretty firm in your mind that it was about two minutes after the car left the junction that Hodler got out of his seat? A. I should say about that; the car only just started off.

Q. Was there any quarrel at the time when he got out of his seat? A. That is when the quarrel
30 was, when he got out of his seat.

Q. With whom did he have a quarrel? A. Those three fellows after him.

Q. Who were the fellows? A. I don't know who they were. There was a lot of strangers on the car; I don't know who they were.

Q. Did he have the quarrel with strangers? A. With the strange people? I don't know none
40 of the people that he had the quarrel with at all.

James J. Crowley—Cross

Q. Did you see him have any quarrel with Breen? A. No, sir; I did not.

Q. The quarrel he had was with strangers? A. Yes, sir.

Q. Were they the Italians that you are speaking of that he had the quarrel with? A. Well, one looked to be an Italian to me.

Q. One looked like an Italian to you? A. Yes, 10
sir.

Q. And the fellows that he had a quarrel with were not people that you knew? A. The three fellows that followed him out I never seen before.

Q. The people that he had a quarrel with in the front of the car were not people that you knew? A. No, sir.

Mr. MacSherry: When?

Mr. Hood: After the car left the junction.

Q. You understand that I am talking of the occurrences after the car left the junction? A. Yes, 20
sir.

Q. And you say that the people that he had a quarrel with were not people that you knew? A. Yes, sir.

Q. They were not the people of the crowd that you had been with that night at the dance? A. No, sir.

Q. They were strangers to you? A. To me 30
they were; yes, sir.

Q. How many of the people that were at the dance that night, that boarded the car, did you know? A. How many people did I know?

Q. Of those that boarded the car? A. About eight.

Q. About eight of them. Well, how long was the quarrel in the front of the car? A. Leaving the 40
junction?

James J. Crowley—Cross

Q. After you left the junction. Just keep your mind on the fact that I am talking about the trouble that you say Hodler participated in after the car left the junction. How long did they wrangle? A. As soon as the car started, it seemed to me; I said about two minutes, I should say.

10 Q. After Hodler got out of his seat, how long did the people quarrel before Hodler moved away from his seat? A. How long did they quarrel before they moved away from his seat?

Q. Yes, that is the question. A. As soon as they started to argue with him he got up out of the seat and walked out to the back; that is all I know.

Q. What was the argument about? A. About the sneezereen, I think it was.

20 Q. Well, didn't you hear? A. No, sir; I did not hear; I was too far away from him, I said.

Q. Too far away from him? A. I was sitting in the back of the car.

Q. Did they talk pretty loud? A. Well, they were hollering.

Q. And yet you could not hear? A. I didn't hear them when they were away in the middle of the car; no, sir.

30 Q. You could not. Now, how do you say you were sitting? A. At the back, right near the door, on the side seat.

Q. What do you mean by the side seat, a seat that runs with the length of the car or a seat that runs crosswise? A. The length of the car.

Q. With the length of the car? A. Yes, sir.

Q. And on which side of the car were you? A. The right-hand side, I said.

Q. As the car was going? A. Coming down.

40 Q. And how long a seat was that, room for two? A. There was room for four.

James J. Crowlev—Cross

Q. Room for four in that seat. Now, you say that there were people on the back platform from the time that the car left the junction? A. Yes, sir.

Q. How many? A. Five, I should say.

Q. Can you call them by name? A. No, sir.

Q. Were they people that you knew? A. No, sir.

Q. Were they people of the crowd— A. There 10
were four Italians on the back of the platform when we left the junction; they were on there all the way from Ell's hall in.

Q. Were any of the people on the back platform when the car left the junction— A. Yes, sir.

Q. Wait a moment until I get through. Were any of those part of your crowd? A. No, sir; I didn't see none of them.

Mr. MacSherry: What do you mean by part of his crowd, the crowd at the dance 20
hall?

Q. What did you understand me to mean when I said "part of your crowd"? A. The fellows that you mentioned there in the book to me before.

Q. Fellows that you had been with at the dance? A. Yes, sir.

Q. Up to the time that Hodler arose from his seat to go toward the back platform, were there any people on the back platform that were of your crowd? A. No, sir; not on the back plat- 30
form.

Q. That belonged to your crowd? A. Not on the back platform.

Q. So that when Hodler started for the back platform there was not a single man on the back platform that belonged to your crowd? A. No, sir.

Q. The people that followed him after he started 40

James J. Crowlev—Cross

from his seat did not belong to your crowd? A. No, sir; I didn't know them.

Q. And after the car left Belleville Junction he had no quarrel with anybody that belonged to your crowd? A. Not that I know of.

Q. How many people were on the back platform after Hodler got out there with those who followed him? A. How many people was on the back platform?

Q. Then, yes. A. When he came on the back platform?

Q. Yes. A. There was them four Italians, that I said before; that was four; and when them other three fellows and he got out there, there must have been eight.

Q. That is all that went out? A. No, other people rose from their seat and went to the back.

20 Q. All that went out to the back platform, the eight that you mention? A. Eight was on, about, when he went, and the other three got on, sure.

Q. Were there any more on when you say that you saw the fellows reach over each others shoulders to punch at someone? A. They were crowding in the door then.

Q. Was there anybody else on the back platform? A. I couldn't see.

30 Q. You were pretty close to it? A. The crowd from the front of the car blocked me off there.

Q. Do you remember which seat you had from the back of the car? A. Yes, sir.

Q. Which one? A. Right at the back of the door, on the right-hand side coming down.

Q. And there was glass there in the door? A. Yes, sir.

40 Q. You could see through the glass, could you not? A. Not when the crowd was all there, taking

James J. Crowley—Cross

off my view, no; the only time I seen was when I stood up to keep the crowd from falling on the young lady I was with. That is when I seen them shooting over each other's shoulders at him.

Q. How long did the fight on the platform last?

A. It didn't last no time, up to the time someone said, "There he goes."

Q. Well, how long did it last? A. I couldn't 10
say; a minute or a minute and a half.

Q. How much time do you think was consumed from the time that the car left the Belleville junction until the time that somebody shouted, "There he goes"? A. Oh, in my mind, I should say, about three minutes or three and a half minutes. I ain't no judge of speed—

Q. Now, when somebody shouted, "There he goes," did anybody shout to the conductor to stop the car? A. No, sir. 20

Q. Did anybody ring the bell to stop the car?
A. No, sir.

Q. Where was the conductor at the time? A.
The front of the car.

Q. What? A. The front compartment of the car, collecting his fares, or trying to collect his fares.

Q. Was there any trouble there with him? A.
Any trouble with him?

Q. Yes. A. Well, what I seen, one would say: 30
"Go over to him," and "Go over to him;" that is all I know; they didn't seem to pay their fare.

Q. Well, he did have some little trouble in collecting his fares? A. In collecting his fare, he did, yes.

Q. At the time you say this thing happened?

A. Yes, he was in the front of the car. He couldn't get out, anyway. Somebody shut them 40

James J. Crowley—Cross

doors in the smoking compartment and put a latch on them; it was locked.

Q. When did that happen? A. Right after we left the junction. When the fight was started somebody shut them doors.

Q. How long did the door continue to be shut?
A. I don't know.

10 Q. Well, you were there? A. I certainly was.

Q. You saw the trouble with the conductor? A. Yes, sir.

Q. The conductor went into the front part of the car to collect the fares just as soon as the car started? A. Yes, sir.

Q. And just as soon as he began to collect the fares the trouble started, did it not? A. Yes, sir.

20 Q. In the front of the car? A. He couldn't collect his fares.

Q. And the door was shut? A. The back door shut.

Q. How long did that situation continue? A. Till somebody said "There he goes," and then—

Q. I mean how long was the door shut in front?
A. In the front compartment of the smoker?

Q. Yes. A. I don't know how long.

30 Q. Well, when did you see the conductor come through the door next? A. When we hit Midland Avenue.

Q. Do you know whether that door was shut all the way down up to that point? A. It was shut as far as I seen it, yes.

Q. All the time? A. Yes.

Q. Do you know who shut the door? A. No, sir.

40 Q. Was it shut by some fellow in the smoking compartment or by some fellow in the other compartment? A. The inside.

James J. Crowley—Re-direct

Q. What do you mean by "the inside"? A. Inside of the smoking compartment.

RE-DIRECT-EXAMINATION by Mr. MacSherry:

Q. After Hodler and the people moved from the front and went to the back platform, did they have to go through this door to get to the back? 10
A. Yes, sir.

Q. Was it open or closed then? A. It was open when he got up from his seat and the fellows followed him out, and after that the door was shut.

By Mr. Hood: Q. Did you not tell me a moment ago that that door was shut just as soon as the conductor got in the front compartment? A. I don't think I did.

By Mr. MacSherry: Q. When you stated that the door was shut as soon as the conductor went in front, what did you mean by that? 20

Objected to.

Mr. MacSherry: He has a right to make an explanation of an answer, has he not?

Mr. Hood: I think his testimony is before the jury, and the jury are the ones to pass upon it.

Mr. MacSherry: I think it is in the discretion of the Court. 30

The Court: The testimony seems to be unambiguous. I will let it stand.

Q. What was going on, if you know, when the door was first closed?

Objected to.

Q. When the door was closed?

Objected to as not re-direct-examination.

Objection overruled.

A. I didn't understand what you said just then.

By the Court: Q. What was going on when the 40

James J. Crowley—Re-cross

door was closed? A. What was going on when the door was closed?

Mr. MacSherry: Yes.

Witness: After he got up and he walked out and the other three men followed him out, somebody pulled the door shut. There was other people sitting in the smoking compartment—a man
10 with one arm.

By Mr. MacSherry: Q. Had the door been closed before that? A. Before he got up?

Q. Yes. A. No, sir.

Q. Do you know a man by the name of Kavanaugh? A. I didn't know him; I just knew him from—

Q. Do you know who he is? A. Yes, sir.

Q. Do you remember Mr. Kavanaugh being there that night? A. Yes, sir.

20 Q. Where was he? A. He was sitting in the smoking compartment.

Q. Did you hear him say anything during this trouble, after the car left the junction? A. He said, "Don't hit that fellow; you can see that he is drunk."

Q. To whom did he say that? A. Well, to the fellows that was following him out.

30 Q. Did you hear anybody say anything to Mr. Kavanaugh? A. Well, they kind of said, "If you don't shut up, you might get it yourself."

RE-CROSS-EXAMINATION by Mr. Hood:

Q. That is the man with the one arm? A. Yes, sir.

Q. Have you seen him on the stand here? A. Yes, sir.

Q. That is the man, is it? A. Yes, sir.

40 Q. Did you know him that night? A. No, sir; I didn't know him.

Thomas V. Hopkins—Direct

THOMAS V. HOPKINS, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Hopkins, where do you live? A. 155 Midland Avenue, Arlington.

Q. And where did you live in December, 1907? A. 408 Elm Street, Arlington.

Q. What is your business? A. I run a pool parlor and cigar store. 10

Q. Where? A. 155 Midland Avenue, Arlington.

Q. And what was your business in February, 1911? A. Comb maker.

Q. You were a witness at the last trial? A. Yes, sir.

Q. Do you know where Belleville Junction is? A. Yes, sir.

Q. And Kearny Avenue and Bennett Avenue? A. Yes, sir. 20

Q. And Stuyvesant Avenue? A. Yes, sir.

Q. Were you in that locality in the month of December, 1907? A. Yes, sir.

Q. Were you one of the party at that dance that we have been talking about in this case? A. I wasn't one of the party, but I was up there.

Q. Well, did you go to the dance? A. Yes, sir.

Q. Where was it? A. Up in Ell's hall, Kingsland. 20

Q. Did you go alone or with someone? A. Went alone.

Q. Were you with any party, the Kearny gang, or any other gang? A. I wasn't with no Kearny gang, but I used to live up in Kingsland; I used to hang out with the gang up there.

Q. What time did you get there? A. About half-past eight.

Q. What kind of a night was it? A. Oh, it was a foggy night, a damp night. 40

Thomas V. Hopkins—Direct

Q. How long did you stay there? A. I stayed there until about half-past eleven or twelve o'clock.

Q. Did you drink up there? A. No, sir.

Q. Any hard stuff? A. No, sir; I never drank in my life.

Q. Did you see anybody drink anything up there? A. No, sir; there was no drink up there; they didn't have no license.

Q. What time did you leave there? A. Around half-past eleven or twelve o'clock.

Q. How many do you think took the car at that point, if you know? A. About twenty-five or thirty.

Q. Did you? A. Yes, sir.

Q. Did you get a seat in the car? A. Yes, sir.

Q. What part of the car? A. Up near the front.

20 Q. Can you tell us how that car was inside, how the seats were? A. The seats run crossways, and down near the end of the car there was seats running with the car, lengthways.

Q. Do you remember any partition in the car? A. Yes, sir.

Q. Did you see Mr. Hodler, the plaintiff, there? A. I did.

30 Q. Where was he when you took your seat in the car? A. He was sitting about three seats behind me, just about the center of the car, I guess.

Q. Did you notice when you got on the car near the hall whether there were any people on the back platform? A. Yes, sir. Well, I was about one of the first ones to get on; I run right on the car first.

40 Q. Did you notice whether the conductor had any trouble there in collecting fares? A. I think he did.

Thomas V. Hopkins—Direct

Q. Do you remember anything about sneezereen being sent around that car? A. Yes, sir.

Q. Did people sneeze or not? A. Of course, I was asleep when the sneezereen was blown around. It woke me up; I had to sneeze.

Q. What, if anything, first attracted your attention to Mr. Hodler, who was seated, you say, three seats back of you? A. When the sneezereen was blown around I was laying there asleep; I was tired; and I had to sneeze, and I woke up, and I heard Mr. Hodler and a couple of fellows talking. I looked around and I see them. I knew who this gang were, and I didn't want to butt in; I knew they were a bad gang, known as the Forty Strong of Harrison; I didn't want to butt in: I thought I might get a beating myself; and so I sat right there in my seat. 10

Q. What did you see Mr. Hodler do, if anything, and what did you hear him say, if anything? A. I didn't bother with them. They were talking all the way down to the junction. I kept my seat all the time. 20

Q. Did you get out of the car or stay in at the junction? A. No, sir; stayed in the car.

Q. After you left the junction did you see Mr. Hodler? A. Yes, sir.

Q. Where was he then? A. He was in his seat. 30

Q. Now, tell us what happened then, if anything? A. Well, after we left the junction they started arguing again, and I see Mr. Hodler get up and three or four fellows following him towards the back.

Q. Did Mr. Hodler sing there or not? A. He was singing before we got to the junction, or trying to sing.

Q. Now, did you notice his condition after you 40

Thomas V. Hopkins—Direct

left the junction and before? A. Yes, sir; he was intoxicated.

Q. What do you say? A. Intoxicated.

Q. Now, as he went toward the rear, how many people, do you say, followed him? A. About three or four.

Q. And what were they saying? Can't you tell
10 us something they said? A. Well, I think I heard them saying among themselves, "I will get him."

Mr. Hood: Not what you thought, what you heard.

Witness: Well, I heard it. I don't know how many was saying, but I heard them say, "I will get him," I heard it.

Q. What happened after that? A. I see them
20 all go towards the back of the car, and I just looked around out of my seat, and I heard a lot of arguing back there, loud talking, and I didn't bother with it, because I didn't want to get mixed in with it myself.

Q. Did you see Mr. Hodler after that? A. No, sir.

Q. Do you know what became of him? A. No, sir.

Q. Where was he when you last saw him? A. Going towards the back of the car.

Q. What do you mean by "the back of the car"?
30 A. The rear of the car, the back platform.

Q. How far was he from the back platform when you last saw him? A. He was going in the smoking compartment.

By the Court: Q. That hardly answers the question. How far was he from the back platform when you last saw him? A. How many feet?

Q. Yes. A. Well he was about ten feet.

40 By Mr. MacSherry: Q. And what was he doing

Thomas V. Hopkins—Cross

when you last saw him? A. Well, I think these fellows were shoving him along, like, if I ain't mistaken.

Q. Where did you get off? A. Midland Avenue.

CROSS-EXAMINATION by Mr. Hood:

Q. You were examined at the last trial? A. 10
Yes, sir.

Q. By Mr. MacSherry? A. I guess so.

Q. You were not asked any questions by the opposing counsel in the last trial, were you? A. I think I was; I ain't sure.

Q. Have you looked at your testimony? A. I have.

Q. Before you got on the stand? A. Yes, sir.

Q. And will you say that you were asked questions by the— A. Well, I don't know whether I was or not. 20

Q. Even after reading the testimony, you do not know whether you were or not? A. No, sir.

Q. And how long ago did you read the testimony? A. About five days ago.

Q. Now, do you recall being asked by Mr. MacSherry at the last trial this question: "Well, now, did he go out on the back platform before you got to the junction or after?" and do you remember answering it, "Before we got to the junction"? 30
Do you recall that? A. I think I do.

Q. Do you recall making that answer? A. Yes, sir.

Q. That is not what you say now, is it?

Mr. MacSherry: One moment.

A. He didn't ask me, I don't think.

Q. That is not what you say now, is it?

Mr. MacSherry: I object to that because 40

Thomas V. Hopkins—Cross

I think it implies something that is not correct.

The Court: I think it is a fair question. (Question read.) A. I don't know whether he went to the back or not before we got to the junction.

Q. Will you be good enough to answer my question? That is not what you say now, is it? A. I don't know whether it is what I said now.

Q. You do not know what you said now? A. I don't know what you are talking about.

Q. Well, now, let me see whether I can not make you understand what I am talking about. You were asked at the last trial by the same lawyer, "Well, now, did he go out on the back platform before you got to the junction or after?" That is on page 203. I ask you whether you remember that now? Your name is John Watson, is it not? A. No.

Mr. MacSherry: His name is Thomas V. Hopkins.

Mr. Hood: That is my error, then, gentlemen. I take back all that I may have said and implied about this witness, and I will start my examination now.

Mr. MacSherry: I think that the examination should be stricken from the record.

Mr. Hood: No, I do not think you can do that. But I say to you, gentlemen, that I was referring to other testimony.

Mr. MacSherry: But if this record should be made up again it would not show it.

The Court: Yes, it would show that the cross-examination was based on a misapprehension.

Thomas V. Hopkins—Cross

Q. Mr. Hopkins, you were pretty well tired that night? A. Yes, sir.

Q. And pretty sleepy? A. Yes, sir.

Q. And you nodded off before you got to the junction, or fell asleep before you got to the junction? A. Yes, sir.

Q. Then you say that you were awakened by the sneezereen and a controversy that was going on between Mr. Hodler and somebody in the car? A. Well, the sneezereen woke me up and after I woke up I heard it. 10

Q. Did you go to sleep after that? A. No, sir; I laid in my seat; I couldn't go to sleep after that.

Q. With your eyes shut? A. No.

Q. You laid in your seat? A. Well, laid in my seat, like this (illustrating).

Q. Did you keep that position all the way through? A. No, not when the argument started, I didn't. 20

Q. What did you do when the argument started? A. I turned around in my seat to look at it.

Q. Did you ever get out of your seat at all? A. No, sir.

Q. Was there any argument while the car was laying at the junction? A. I don't remember it.

Q. You do not remember any argument there? A. No, sir.

Q. Do you remember where Mr. Hodler was while the car was at the junction? A. I didn't look; I laid in my seat; I wasn't looking around. I didn't want to get caught looking around; I thought they might think I was with him or something. I didn't want to get mixed up. 30

Q. You did not want to get mixed up in it? A. No, sir.

Q. Did you know the Forty Strong of Harrison? A. I knew them by sight; I seen them. 40

Thomas V. Hopkins—Cross

Q. You knew them when you saw them? A. Yes, sir.

Q. How far was the car from the junction when your attention was attracted to Mr. Hodler? A. Just about when the car started up; the argument started again as soon as the car started.

Q. Just as soon as the car started? A. Yes, sir.

10 Q. And how long did the argument continue? A. Well, I seen them go to the back and heard them arguing back there about two minutes.

Q. Did you see them go to the back before the conductor came to the front compartment or not?

A. I don't remember seeing the conductor.

Q. Did not the conductor come there to collect fare? A. He did before he come to the junction.

Q. And did he not after you came to the junction? A. I don't remember.

20 Q. You do not remember the conductor being in the front compartment collecting fares? A. He might have been there, but I don't remember seeing him.

Q. Don't you remember seeing him have trouble with the boys about collecting fares? A. He had trouble before we got to the junction. I know I paid him my fare.

Q. You changed conductors at the junction? A. Yes, sir.

30 Q. And the conductor came around to get another fare, did he not? A. I guess he did.

Q. He got yours, did he not? A. I don't think he did.

Q. He tried to get yours? A. He didn't have to try; if he asked for it he would have got it. I only had to go five or six blocks from the junction.

40 Q. Did you go beyond Stuyvesant Avenue? A. Yes, sir; I went beyond Stuyvesant Avenue.

Thomas V. Hopkins—Cross

Q. How many blocks beyond that? A. Well, about four blocks, four or five blocks.

Q. Now you say after the car leaving the junction and until you got off the car you do not remember the conductor being in the front compartment to collect fares or trying to collect fares? A. No, sir.

Q. Or that he had any trouble in the front compartment about collecting fares? A. He might 10
have been in the front of the car while I was looking back at the argument.

Q. But you do not know of any trouble that he had about collecting fares in the front compartment? A. No, sir.

Q. From the junction up to the time you got off? A. No, sir.

Q. Where did you say you saw Hodler after the car left the junction? A. Sitting in his seat. 20

Q. The same seat that he had before? A. No, sir.

Q. Did you see a man named Kavanaugh there—a one-armed man? A. I don't remember.

Q. Do you know who the people were who followed Hodler out? A. I do not.

Q. Do you know whether they were of the Forty Strong of Harrison? A. I don't know whether they were or not. I think they were, because they were all together. 30

Q. You knew the Forty Strong of Harrison? A. I knew some of them; I knew them by sight.

Q. You saw some of them that night? A. Yes, sir.

Q. Can you tell me whether they were of the Forty Strong of Harrison? A. I couldn't say that.

Q. Won't you be good enough to tell me, in your 40

Thomas V. Hopkins—Cross

own way, what it was that first attracted you to Hodler after the car left the junction? A. Well, they started arguing again.

Q. About what? A. Well, I don't know; I guess about the sneezereen, the sneezereen—

Q. No, do not guess. I want to know what happened. A. Well, the sneezereen. The sneezereen
10 was in the car yet; it wasn't blown out.

Q. Was anybody blowing it? A. I don't know. You can't tell who is throwing it.

Q. Was there any new sneezereen thrown in the car at that time? A. I don't know.

Q. What occasioned the argument about sneezereen at that time? A. I don't say there was an argument about sneezereen.

Q. What do you say, then? A. I said I heard an argument; I don't know what it was about.

20 Q. You do not know what it was about? A. No.

Q. And the man was three seats in back of you? A. Yes.

Q. You do not know whether it was about sneezereen? A. I didn't want to know anything about it.

Q. Or about any other subject? A. I didn't want to know anything about it.

30 Q. I did not ask you whether you wanted to know; I want to know what the fact was, whether you do or not? A. I don't know.

Q. How long did that argument last? A. About two minutes.

Q. How long was the argument before Hodler got up? A. I don't know. They were arguing all over; there was all noises all over the car.

40 Q. How much time elapsed between the time that the car left the junction and the time that Hodler got up? A. About a minute, I guess.

John H. Polding—Direct

Q. I thought you said the argument was two minutes? A. When I seen him going towards the back it was two minutes.

Q. It was two minutes when you saw him going towards the back? A. Yes.

Q. Did you get up out of your seat to see how far he was going? A. No, I just turned around in my seat. 10

Q. And all that you saw was that he was going towards the rear of the car? A. That is all.

Q. And that is all that you know about it? Do you know anything beyond that, after that? A. All I know, that when I got off the car at Midland Avenue—

Q. No, what happened on the car? A. Well, I heard an argument back there, that is all.

Q. You heard an argument back there? A. A lot of loud talking. 20

Q. After Hodler went back? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. How long was that argument? A. It didn't last long.

Q. How long would you say it lasted? A. About a minute.

Q. What did you say your business was? A. Pool parlor and cigar store.

Q. Just where in the front compartment were you sitting? A. Why, I don't know whether it was the first or second seat—the second seat. 30

JOHN H. POLDING, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Polding, where do you live? A. 501 John Street, East Newark. 40

John H. Polding—Direct

Q. What is your business? A. Cotton spinner.

Q. Where do you work? A. Clark's.

Q. How long have you worked there? A. About twenty years.

Q. Do you know where Kearny Avenue is? A. Yes, sir.

10 Q. Do you know where the Belleville Junction is? A. Yes, sir.

Q. Were you up there in the month of December, 1907? A. Yes, sir.

Q. Did you go to this dance at Ell's hall, or not? A. Yes, sir.

Q. And where did you live at that time? A. In Central Avenue, East Newark.

Q. Whom did you go with? Were you alone or with other people? A. I went with a girl.

20 Q. What time did you get to the dance hall? A. About half-past eight or nine o'clock.

Q. Was it a public dance? Could anybody who paid go in? A. You could go in if you paid.

Q. Did you drink anything there? A. No, sir; I couldn't get anything.

Q. Did you see anybody drink any hard liquor there? A. No, sir.

Q. Did you see anybody intoxicated there? A. No, sir; I did not.

30 Q. When did you leave, what time? A. About half-past eleven or twelve o'clock.

Q. How far is that dance hall from Belleville Junction, about? A. I think it is about a mile or a mile and a half.

Q. About how many left the hall when you did, if you remember? A. It looked to be about thirty or more.

Q. And did you take this car down? A. Yes, sir.

40 Q. Did you get a seat? A. Yes, sir.

John H. Polding—Direct

Q. Do you know whether there were people standing up on the way down to the junction or not? A. That I don't know; I was sitting up in front; I didn't notice.

Q. Do you remember whether there were people on the back platform? A. I didn't notice that.

Q. On the way down to the junction did you see Mr. Hodler? A. No, sir. 10

Q. Where were you seated in the car? A. Right up in the front, on the right-hand side.

Q. Now, on the way down to the junction did you see Mr. Hodler or hear him do or say anything? A. Not on the way down to the junction; no, sir.

Q. After you left the junction? A. I seen him then.

Q. What if anything, did you see him do? A. The only thing I seen him, he stood up to sing. 20

Q. Where? A. In the car.

Q. What part of the car? A. He was about in the center of it when I seen him.

Q. Did you hear him say anything? A. No, only he got up to sing, and they all started to holler, "Shut up," and I turned around to see who it was, and that is the only time I seen him.

Q. What became of him, do you know? A. Why, he walks out of his seat and goes to the back platform. 30

Q. Was there anybody near him at that time? A. Near him?

Q. Yes. A. Only what was out on the platform.

Q. Were there any people on the back platform when he went out? A. Yes, sir.

Q. Did you notice anybody in front of him or behind him when he went out? A. Not till he got out there. 40

John H. Polding—Cross

Q. And what did you do while this thing was going on? A. I just sat there in my seat.

Q. Could you see what was going on on that back platform after he went out? A. Not after these fellows followed him.

Q. Did you hear anything? A. No, sir.

Q. Why not? A. That was too far away from
10 me, I guess, to hear them.

Objected to.

Objection withdrawn.

Q. Could you see what was going on on the back platform then? A. The only thing I could see was them roughing and swinging at one another.

Q. Well, that is all I want to know; I want to get from you people what you know, that is all. Just show us what you saw. A. Well, I could see people was swinging at one another.

20 Q. What do you mean by "swinging"? A. Why, swinging their hands like that (illustrating).

By Mr. Hood: Q. Like what? A. Over their heads.

By Mr. MacSherry: Q. That is not swinging their hands; that is swinging their fists, is it not? (No response.)

Q. Do you mean punching by "swinging"? A. Yes, sir.

30 Q. Do you remember whether the conductor had any trouble in collecting fares in that car? A. No, sir; I didn't notice that.

Q. Do you rememebr any sneezereen being distributed? A. No, sir.

Q. Do you know whether the back door was locked or not? A. No, that I didn't notice.

CROSS-EXAMINATION by Mr. Hood:

40 Q. Just where in the car do you say that you were sitting? A. Right up in the front.

John H. Polding—Cross

Q. The very front seat? A. Well, I don't say the very front; it was one of the front seats; I don't know whether it was the first or second.

Q. In the first compartment of the car? A. Yes, sir.

Q. Mr. MacSherry wants me to ask you whether your girl was seated with you? A. Yes, sir.

10

Q. Right by your side? A. Yes, sir.

Q. You took that seat just as soon as you left Ell's hall? A. Yes, sir.

Q. By the way, did you know Breen and Shields and those people? A. Yes, sir.

Q. Did you belong to the Forty Strong? A. No, sir.

Q. You are not one of the Forty Strong of Harrison? A. No, sir.

Q. You kept your seat right through? A. Yes, 20
sir.

Q. When did you first notice Holder? A. Just as we left the junction.

Q. Just as you left the junction? A. Yes, sir.

Q. You had not noticed anything of him before? A. No, sir.

Q. Was he then in your compartment? A. Yes, sir.

Q. There had not been any trouble, so far as you know, before you left the junction? A. Not as I 30
know of.

Q. There was not anybody that started to sing before you left the junction? A. That I couldn't say.

Q. Well, there was not anybody who started to sing that there was any trouble about before you got to the junction? A. No, sir.

Q. There was not any trouble with Hodler about his singing before you got to the junction? A. 40
Not as I know of.

John H. Polding—Cross

Q. There was not any trouble with anybody on account of sneezereen before you got to the junction? A. Not as I know.

Q. There was not any trouble with Hodler about sneezereen before you got to the junction? A. Not as I know of.

10 Q. In fact, you did not know that Hodler was in existence until after you got to the junction; is that true? A. No, sir.

Q. When did you first realize that Hodler did exist? A. Just after we started from the junction.

Q. How far had you gotten away, do you know? A. I don't know; I couldn't say; it couldn't be very far, because the car had just started.

Q. Was the conductor on the car? A. Yes, sir.

20 Q. Where was he? A. He was collecting the fares.

Q. Did you see him collect the fares? A. Yes, sir.

Q. Did he start off to collect the fares just as soon as the car started? A. Yes, sir.

Q. Up in the front compartment? A. Yes, sir; he walked right through to the front.

30 Q. Any trouble about it? A. Well, all I could see was that some of them was paying, and he was asking for it and couldn't get it; that is all I could see.

Q. Did anybody lock the compartment door? A. I never noticed it.

Q. You did not notice it? A. No, sir.

Q. You do not mean to say that it is not so, do you? A. No, sir.

Q. You simply say that you did not notice it? A. Yes.

40 Q. Well, then, the first thing that you knew about Hodler was when he got up in the aisle to sing? A. Yes, sir.

John H. Polding—Cross

Q. How far away was he from you then? A. Well, I should say about four or five seats away from me.

Q. But still in the same compartment? A. Yes, sir.

Q. Well, how many verses did he sing? A. He didn't get time to sing any verses at all until he was told to shut up; he only had said a couple of 10 words, I guess.

Q. Did he mind instructions? A. Well, he stopped and then went to walk out.

Q. Well, after he stopped was there any quarrel? A. Quarrel?

Q. Yes. A. Well, I don't know whether it was with him or not, until he went to the back.

Q. Well, was there anything else said except, "Shut up"? A. That is all I heard them say.

Q. And he did shut up? A. Yes, sir. 20

Q. And then he went toward the back? A. He went out on the platform; yes, sir.

Q. And a couple of fellows followed him? A. Yes, sir.

Q. And that is all there was about the trouble in the front compartment about his singing? A. That is all I know of.

Q. That is all that you know of? A. Yes, sir.

Q. Who were the fellows that followed him? A. That I couldn't say. 20

Q. Strangers to you? A. Well, I didn't know whether they were strangers or not.

Q. Fellows of the Forty Strong? A. No. I know pretty near all them fellows that was there.

Q. Those you know. They were not of that crowd at all? A. No, sir.

Q. And did you see how far he went? A. I could see him until he got to the platform. 40

Q. Did you see him go out on the platform? A. Yes, I did.

John H. Polding—Cross

Q. You saw him go out on the platform? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. Did you see what the fellows that followed him did? A. No, sir; not to him.

Q. Did you see what they did? A. That followed him?

10 Q. Yes. A. Well, I said the only thing I could see was them swinging at one another, punching at one another.

Q. Did you see that they went out on the back platform? A. Well, some of them went out and the others were standing in the door.

Q. Not all got out? A. No, sir.

Q. Do you know how many fellows were on the back platform? A. I should judge about four.

Q. Only four? A. Before he went out.

20 Q. Well, how many were there after he went out? A. Well, I should judge about eight or nine.

Q. Why do you say there were four before he went out? A. Because I judged there was that many out there when I looked out.

Q. Did you look out before he went out? A. No, sir.

Q. Did you look out before he went out? A. No, sir.

30 Q. Did you look out just as he was going out? A. Yes, sir.

Q. And that is all you could see? A. Yes, sir.

Q. Could you see who they were? A. No, sir.

Q. Could you tell enough about them to tell whether they were of the Forty Strong or whether they were strangers? A. Well, they looked to be strangers to me.

Q. Well, with the fellows standing around the back door, how could you see what was going on on the back platform? A. I didn't say that I seen
40 what was going on on the back platform.

John Watson—Direct

Q. Did you not say that you saw people reaching over one another? A. That was in the doorway.

Q. Oh, that was in the door? A. Yes, sir.

Q. In the car? A. Yes, sir.

Q. But what happened actually on the back platform you do not know? A. No, sir; I couldn't see.

10

Q. How long did this rumpus last? A. Well, I only noticed a second or so, and then I didn't bother with it, because I was pretty sick.

Q. What do you mean by that, that you were pretty sick? A. I was just after coming out of an operation, and I didn't want to get in any trouble.

Q. You were not feeling very strong? A. No.

20

JOHN WATSON, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Watson, where do you live? A. Harrison.

Q. What is your business? A. Stamper in Osborne's.

Q. What do you mean by a stamper? A. Stamper—novelty works.

30

Q. Where is Osborne's? A. In Harrison.

Q. What is their business? A. Novelty business.

Q. How long have you worked there? A. Oh, I worked there about ten years or more, I guess.

Q. Were you one of the party that went to this hall in December, 1907, that night—up at Ell's hall? A. Yes, sir.

Q. Near Belleville Junction? A. Yes, sir.

Q. Did you go alone or not? A. I went with a friend.

40

John Watson—Direct

Q. Have you been in Court during this trial? Have you been in Court during this last week?

A. Yes, sir.

Q. Were you a witness in the last trial? A. Yes, sir.

Q. Do you remember seeing these various young men who say they were up there at that place?

10 A. Yes, sir.

Q. Up at the ball, I mean? A. Yes, sir.

Q. Did you go alone or was anyone with you at the ball? A. With a friend of mine.

Q. A man or a woman? A. A man.

Q. Did you drink anything, hard drink, up there? A. No, sir.

Q. Did you see anybody drink anything? A. No, sir.

20 Q. What time did you leave the ball? A. About half-past eleven, I guess, between half-past eleven and twelve.

Q. Was there any trouble up there? A. I don't remember any trouble.

Q. How many do you think left the hall at that time? A. How many?

Q. Yes? A. I guess there were about twenty or twenty-five.

Q. Did you get a seat in the car, or did you stand up? A. I had a seat.

30 Q. In what part? A. The front part.

Q. Now, on the way down to the junction do you remember seeing Mr. Hodler in the car? A. Yes, sir.

Q. What part of the car was he in? A. About the middle of the car, I think.

Q. Do you remember any sneezereen being distributed around that car on the way down to the junction? A. Yes, sir.

40 Q. What effect, if any, did that have on the people in the car? A. Make you sneeze.

John Watson—Direct

Q. And what then did you see Mr. Hodler do or what did you hear him say, if anything? A. I don't remember hearing him say anything; I remember him getting up, that is all.

Q. And where did he go? A. I just looked around to see; I heard them all sneeze; and I seen him getting up and walking towards the back.

Q. Now, did you change cars at the junction? 10
A. No, sir.

Q. Well, now, when you got to the junction—after the car had left the junction, were you on the car then or not? A. I was on the car.

Q. Did you see Mr. Hodler in the car after you left the junction? A. I don't remember now whether I seen him.

Q. Do you know what became of Mr. Hodler?
A. No, sir.

Q. Where did you have your seat in the car 20
after you left the junction? A. The second seat from the door.

By the Court: Q. In which compartment? A. The front part.

Q. The front part? A. Yes, sir.

Q. Not in the smoking compartment? A. No, sir.

By Mr. MacSherry: Q. Did you hear any argument, any loud talk, or anything at all in the car after you left the junction? A. Oh, I heard talk 30
about the sneezereen; that is all I remember; they were all kicking about the sneezereen.

Q. Well, you did not see Mr. Hodler after you left the junction—you did not? A. No, sir.

Q. And you do not know what became of him?
A. No, sir.

Q. Nor do you remember anything that happened in the back part of the car? A. No, sir; I wasn't down that way. 40

John Watson—Re-direct

CROSS-EXAMINATION by Mr. Hood:

Q. There was not any fight, that you remember, after the car left the junction? A. No, sir; not as I remember.

Q. And there was not any trouble in the car after the car left the junction, that you recall, except people complaining about the sneezereen?
10 A. Yes, sir.

Q. That is the only thing that you know of? A. Yes, sir.

Q. And that is the only thing that there was any talk about after you left the junction? A. That is all I know.

RE-DIRECT-EXAMINATION by Mr. MacSherry:

20 Q. Were you asleep or awake after you left the junction? A. I was awake.

Q. What were you doing after the car left the junction? A. Just sitting there, that is all.

Q. How far from the front? A. Two seats.

Q. Two seats from the front? A. Yes, sir.

By the Court: Q. What was the name of the man you were with, Mr. Watson? A. Mr. Quinn.

Q. Is he a gentleman who has been called here as a witness? A. No, sir.

30 Q. Mr. Henry C. Quick—he is not the man? A. No, sir.

Q. What is your friend's first name? A. William.

Q. William Quinn? A. Yes, sir.

Clarence H. Coe—Direct

CLARENCE H. COE, sworn in behalf of defendant:

Direct-examination by Mr. MacSherry:

Q. Mr. Coe, where do you live? A. 106 South Tenth Street, Newark.

Q. And what is your business? A. Superintendent of instruction of the Public Service Railway Company. 10

Q. How long have you held that position? A. Since December, 1907.

Q. Do you know where Kearny Avenue is? A. I do.

Q. Stuyvesant Avenue? A. I do.

Q. Bennett Avenue? A. I do.

Q. Do you remember about the time that Mr. Hodler was hurt up there, in December, 1907? A. Well, I remember about the time; I don't know that I can exactly recall the date. 20

Q. As superintendent of instruction, what, if anything, briefly, are your duties? A. Why, I have charge of the school of instruction, the men connected with it, instructing the conductors and motormen, inspectors, everybody in the service.

Q. In what? A. In their duties and equipment.

The Court: I probably misunderstood you. You said you were the superintendent of instruction?

Witness: Instruction. 30

Q. Instructing the conductors and motormen how to run a car? A. How to run a car, as to the equipment.

Q. How long have you been in the street railway business? A. Since 1878.

Q. Were you ever with the Brooklyn Rapid Transit? A. About seventeen years.

Q. And are you or are you not well acquainted with curves in trolley tracks? A. Pretty well. 40

Clarence H. Coe—Direct

Q. Do you know where that bend, or curve, is in the track of the trolley line on Kearny Avenue between Bennett Avenue and Stuyvesant Avenue?

A. I do.

Q. In your judgment, what kind of a curve is that?

10 Mr. Hood: I object, if your Honor please. I do not see that this gentleman has laid any special foundation for passing on that. It is merely a matter of observation, and the jury itself has heard the testimony and has got the map, and, I suppose, is amply able to decide that.

20 The Court: (After argument.) I think the witness must have sufficient knowledge of curves to institute a comparison between curves of different kinds and characters. I will overrule the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)

Circuit Court Judge.

A. A very easy curve, what I would call an easy curve, of long radius.

30 Q. What experience have you had in noticing curves in different trolley tracks? A. I have been train master of the lines in Brooklyn for a number of years; I was superintendent of the Kearny line for some time before going in the instruction department.

Q. This particular line? A. This particular line; yes, sir.

40 Q. Do you know the car that Mr. Hodler claims to have been a passenger on that night? A. I believe it was car 34; I am positive of that.

Clarence H. Coe—Direct

Q. What is that? A. Car 34.

Mr. Hood: How does he know that?

The Court: Mr. Mohn described it as a 34 car. Does that mean anything to you?

Witness: It doesn't mean anything to me rather than—

By direction of the Court, the stenographer reads from the testimony of the witness, William A. Mohn, as follows: "Q. What car were you operating that night, if any? A. A 34 car." 10

By the Court: Q. "34 car" what does that mean, do you know? A. It means to me that there is a certain type of motor on that car, although some of those cars are equipped with different types of motors; that is, the ratio of the gear to the pinion is different, which might cause a difference in the speed of the car. I made a test of this particular car at the request— 20

Mr. Hood: One moment.

Mr. MacSherry: I ask that that go out. I do not ask that.

The Court: Now, I presume that the witness will tell us what leads him to think that the car he examined was the car in which the plaintiff was injured.

Witness: I was informed of the fact by somebody in the department; I don't recollect just who it was now. That is all I know. 30

By Mr. MacSherry: Q. When were you informed? A. I think, if my memory serves me right, it was—well, it was a few days before I testified here at the last trial; I can't just exactly recall the date; it was some time before I testified; I can't just exactly say the date.

Q. Well, these cars, the property of the Hudson River line, had been taken over by the Public Service.

Clarence H. Coe—Direct

Objected to as incompetent and irrelevant.

(Question withdrawn.)

Q. Now, have you any other means of ascertaining that this car that you examined was the car that Mr. Hodler was on the night that he claims to have been hurt? A. No, sir.

10 Q. Do you know how many of the type of what is known as the 34 car were on the road the night Mr. Hodler was hurt? A. I do not.

Q. Do you know how many of that type were in use by the company?

Mr. Hood: At that time, you mean?

Mr. MacSherry: Yes, about.

A. I do not.

Q. How were the cars of this 34 type equipped?

20 Mr. Hood: I object. I think we are dealing with a specific car here, and if this gentleman has any knowledge about the specific car, I think he may testify about it, but I do not think any general description as to any particular type of car is competent evidence for the purpose of establishing anything respecting the particular car that we are interested in in this issue.

30 The Court: Well, I can conceive that cars of a certain class might have certain physical characteristics about them, about which a witness who is acquainted with that class might testify, and that the testimony might be sufficiently important to be received. Of course, I can not anticipate what the witness is going to say.

40 Mr. Hood: Well, the question, after all, would be whether the characteristics of type 34 were, in fact, in existence on this car, it seems to me. A mere general de-

Clarence H. Coe—Direct

description as to a general type of car, while it may lead to some inferences, does not establish, as a matter of fact, that the conditions were in existence at that time on this car. Besides that, this gentleman says that his attention was directed to this proposition a short time before the last trial, which was in February, 1911. The 10 occurrences which we are speaking of relate to 1907, four years before that.

The Court: As we are dealing with a class up to this point, and not with specific conditions on that day on one of that class, the answer to the question must necessarily be somewhat general and relate to the general facts as to the class as a whole. Now, I supposed that this question was a somewhat general question— 20

Mr. MacSherry: That is all.

The Court: —and, in that point of view might be answered.

(Question read.)

The Court: That is a general inquiry, and I think an answer to it would be competent.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and 30 it is sealed accordingly.

FREDERIC ADAMS, (Seal.

Circuit Court Judge.

A. With four General Electric 67 motors, air brake, geared for 22.65; that is, to turn the wheel 22.65 or 23 miles an hour.

Q. What is that? A. Four General Electric 67 machines—that is, motors—with air brake, geared 40

Clarence H. Coe—Cross

for about 22.65 or twenty-three miles an hour.

By the Court: Q. 22.65? A. Yes, sir.

By Mr. MacSherry: Q. Are all cars of that type, 34, geared in that way? A. To the best of my knowledge and belief.

Q. When you say geared for a speed of 22.65 miles an hour, what do you mean by that, is that
10 the extreme limit of speed? A. That means the ratio of the pinion to the gear, which would allow the car, with sufficient voltage, or amperage, to run at that rate of speed per hour; that is, miles per hour.

CROSS-EXAMINATION by Mr. Hood:

Q. Is your statement as to the equipment of this car the result of your personal investigation of these cars of that type? A. I examined the type
20 of motor. The ratio of the gear to the pinion is a matter of record. To the best of my knowledge and belief, I would have to separate the gear from the pinion and find out the number of teeth in each, in order to give you the ratio, except as a matter of record.

Q. Then I understand you to say that you yourself inspected the motors and find that there are four motors on the car of the 67— A. 67 type.

Q. The general type that the General Electric Company makes? A. Yes, sir.
30

Q. That, so far as the gears are concerned, you did not personally inspect those, but that you take that from some information that you received; am I right about that? A. From our records.

Q. Do you know whether your records are the result of actual examination or whether they are the reports of the manufacturer concerning them? A. Actual examination.
40

Charles T. Kavanaugh—Direct

RE-DIRECT-EXAMINATION by Mr. Mac-Sherry:

Q. I meant to ask you, what is the length of these cars? A. The 34 car, I think, is 44.8 or 45.8, I am not quite—in the neighborhood of 46 feet over all, bumper to bumper.

RE-CROSS-EXAMINATION by Mr. Hood: 10

Q. Do you know what they weigh? A. I do not.

Q. You did not post yourself as to the weight of the car? A. No, sir; I did not.

Q. And you have not any idea as to the weight of them approximately? A. Well, to the best of my knowledge and belief, that type of car, that length, a four-motor car, would weigh, with that body, in the neighborhood of twenty-two tons, I should say. 20

Q. You are now speaking of the car that was in existence in December, 1907? A. Yes.

Q. And you knew them then? A. I did.

Defendant rests.

CHARLES T. KAVANAUGH, re-called in behalf of plaintiff in rebuttal: 30

Direct-examination by Mr. Hood:

Q. Mr. Kavanaugh, were you in the rear compartment of the trolley car on the night of the accident to Mr. Holder all the way from the junction down to the place where you left the car, at Stuyvesant Avenue?

Objected to as not rebuttal.

The Court: (after argument): I think the question may be answered. 40

Charles T. Kavanaugh—Direct

Defendant's counsel prays an exception,
and the same is allowed.

(Question read.)

A. I was.

Q. Will you say at what particular point in the
rear compartment you were during that time?

Objected to on the same ground.

10

Objection overruled.

Defendant's counsel prays an exception
and the same is allowed.

A. The extreme rear part, at the door.

Q. How near to the door? A. As close as you
could get to it.

Q. How were the seats arranged in which you
were sitting?

Objected to on the same ground.

Objection overruled.

20

Defendant's counsel prays an exception,
and the same is allowed.

A. Why, on one side of each end of the car—I
will say the rear end—there is a short side seat.
Now, whether that short side seat was on the side
that I sat on, which was the right-hand side of the
car, towards the front, I mean—I don't recall
whether that was a long seat or one of the cross
seats. It seems to me in those cars there are two
of those seats, two seats running lengthwise with

30

the car.
Q. And you say you were sitting on one of
those? A. Yes, sir.

By the Court: Q. On which side was the door
which led onto the back platform, was it on the
right-hand side of the car? A. It is a double door.
your Honor; in the center of the car.

Q. Oh, in the center? A. Yes, sir.

By Mr. Hood: Q. In the center of the car? A.
40 In the center of the end.

Charles T. Kavanaugh—Direct

Q. And you sat, you say, on the right-hand side of the car? A. Yes, sir.

Q. In one of those seats? A. Yes, sir.

Q. How far away from the rear, did you say?

A. As close as you could get to the door.

Q. During the time that the car ran from the junction, at the Belleville turnpike, until you got off at Stuyvesant Avenue, was there any fight in 10 part of the car?

Objected to as not rebuttal.

The Court: (After argument) In your formula, "any part of the car," do you include the back platform?

Mr. Hood: Yes, sir; I consider the back platform part of the car.

The Court: Understanding the question in its broad acceptation as referring to the back platform, all parts of the structure of 20 the car, I think it may be answered.

Defendant's counsel prays an exception, and the same is allowed.

(Question read.)

A. There was not.

Q. During the time that the car passed from the Belleville Junction down to the point where you got off the car, did Mr. Hodler proceed down the aisle of the car from the front portion of the car to the rear platform, followed by two or three 30 or by three or four other persons?

Objected to as not rebuttal.

The Court: (After argument) It is often that a specific question is asked in Court when a more general question might be asked. Nevertheless, it is calling the witness's attention to a particular phase of the matter that a general question would not indicate. You may answer it. 40

Charles T. Kavanaugh—Cross

Defendant's counsel prays an exception,
and the same is allowed.

Q. What is your answer? A. Did I see him? I
did not.

Q. (Question read.) A. I didn't see it.

Q. During the time that the car passed from
the Belleville Junction until the time that you got
10 off the car, did you say to any person on the car,
"Don't hit him; he is drunk"?

Objected to as not rebuttal.

The Court: (After argument) I think
the testimony is entirely proper.

Defendant's counsel prays an exception,
and the same is allowed.

(Question read.)

A. I did not.

20 CROSS-EXAMINATION by Mr. MacSherry:

Q. Mr. Kavanaugh, you did not see Mr. Hodler
on that car at all after it left Belleville Junction,
did you? A. I don't think so; no, sir.

Q. You so testified in this trial, did you not? A.
I believe so.

Q. And also at the last trial? A. I believe so.

Plaintiff rests.

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The jury withdraws.

Mr. MacSherry: If your Honor please, I ask
the Court to direct the jury to render a verdict in
favor of the defendant company. Irrespective of
any previous decision in this case, I think there
should be a direction of a verdict, because the
overwhelming testimony is that the plaintiff was
40 guilty of contributory negligence. I think he

Charge

shows it on his own statement, and I think it is proved by the testimony of other witnesses in the case. I think that the testimony in the case shows that the defendant company was not guilty of any negligence.

Counsel argue.

At half-past twelve o'clock, p. m., the Court takes a recess until 2 o'clock.

10

After recess.

Charge

The Court: The testimony on both sides being 20 concluded, the learned counsel for the defendant has moved that the Court direct the jury to render a verdict in favor of the defendant. The ground assigned for this motion is that the evidence as a whole is so strongly in favor of the defendant that it will not support a verdict for the plaintiff. In other words, the counsel for the defendant insists that there must be a verdict for the defendant because the proof in the whole case is such that, if a verdict were rendered for the 30 plaintiff, it would be set aside by the Supreme Court as against the weight of evidence.

The Court has the undoubted power in such a case to direct a verdict for the defendant, and it is, of course, in such a case the duty of the jury to render such a verdict, the Court taking the responsibility.

Is it true that, if a verdict were rendered in this case for the plaintiff, the Supreme Court would 40

Charge

set it aside? If that is true, such a verdict would, of course, be of no value to the plaintiff, for it would not stand. In order to answer this question, it is necessary to consider the history of this litigation. This case has been once tried in this Court with a jury, and the plaintiff had a verdict. The verdict and judgment were taken up to the

- 10 Supreme Court for review. All of the testimony was printed and laid before the judges of the Supreme Court, and the question was duly argued at Trenton whether there should be a new trial. In due time that question was decided, and the following brief decision was rendered: "We think the verdict for the plaintiff in this case was against the weight of the evidence. On his own showing, he unnecessarily left the inside of a car that was running very fast, stood on the rear
- 20 platform without holding onto anything and was thrown off at a curve. This of itself indicates contributory negligence on his part. The weight of the evidence is that he was intoxicated and got in an altercation with other passengers and that he either went to the rear platform to escape them or to engage in a personal conflict with some of them. The rule should be made absolute"—that is, that there should be a new trial. Pursuant to that direction, the case came on for trial
- 30 again in this Court, and the evidence is now all in.

The learned counsel for the defendant now makes the motion to which I have referred; he insists that the proof which has now been presented to the Court and jury does not differ essentially from the proof which was presented at the first trial in this Court and was afterwards reviewed by the Supreme Court and pronounced insufficient to sustain the verdict for the plaintiff

40 that was rendered and came up for that review.

Charge

The question, therefore, as to what the Supreme Court would do if there should be, on this proof that has now been presented to our minds, a verdict for the plaintiff depends on the identity of the two cases, whether it is the fact that the proof with which the Supreme Court dealt and on which they founded their decision and the proof that has now been presented to us on this second trial is essentially the same. If the case made at this trial is essentially the same as the case made at the first trial, then it is to be assumed that the judges of the Supreme Court would entertain the same opinion as to a verdict for the plaintiff rendered on this trial that they entertained as to the verdict rendered on the first trial. That question of identity is a question of fact. The evidence, as appears from the records of the Court and from my own recollection and the statement of counsel, comes from almost exactly the same witnesses throughout. The attention of the Court has not been called to any variations in the proof which, to my mind, at least—I am speaking of myself—indicate that any stronger case has been for the plaintiff now or that any weaker case has been for the defendant now than was made before. Matters of detail, to a certain extent, may be different, but I think I can not be wrong in saying that substantially the two trials, not merely in their general outline and in their controlling features, but in their important details, are so nearly the same that, for legal purposes, it can hardly be thought that the Supreme Court would regard the question, if it were again presented to them, as having any different aspect from that which was first presented to them. I entertain no doubt that, if there were to be a ver-

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30

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Verdict

dict for the plaintiff and if it were to go up again, the same result would follow.

Under those circumstances, it appears to me that, in the interest of justice, for the prevention of unnecessary litigation, and in view of what may fairly be called the rights of the defendant, I ought to grant the motion which has been made
10 and direct the jury to render a verdict for the defendant—the reason for my direction of a verdict being that the weight of the evidence in the cause would not sustain any other verdict.

The clerk will, therefore, call your names, and you will render a verdict for the defendant in this case.

The jury accordingly renders a verdict for the defendant.

20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, (Seal)
Circuit Court Judge.

30

LOUIS HOOD,
Attorney of Appellant.

New Jersey Court of Errors and Appeals

WALTER R. HODLER,

Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY CO., AND

HUDSON RIVER TRACTION CO.,

Defendants-Appellees.

In Tort.

On Appeal

from

New Jersey

Supreme

Court.

Brief of Appellant.

ABSTRACT OF THE CASE.

This action was instituted in the New Jersey Supreme Court to recover damages for personal injuries sustained by the appellant while a passenger upon one of the appellees' trolley cars. While the car was rounding a curve at high speed, he was hurled from the back platform to the ground, thereby sustaining serious and permanent injuries. The trial resulted in the direction of a verdict for the defendants below and this appeal is prosecuted to review the judgment consequent thereon.

Grounds of Appeal.

The Grounds of Appeal relied upon for the reversal of the judgment are:

1. The court directed a verdict for the defendant (Case, p. 4, l. 10).
2. The court charged the jury, "The clerk will therefore call your names and you will render a verdict for the defendant in this case" (Case, p. 4, l. 14).

Brief of the Argument.

On the 28th day of December, 1907, about eleven-thirty P. M., the appellant boarded at Hackensack one of the appellees' cars. The car was divided into compartments by a partition near the centre, one compartment being reserved for smoking and the other for the accommodation of passengers generally (p. 15, l. 16; p. 50, l. 36; p. 51, l. 5). There was a vestibule at either end; the one at the front was entirely closed, that at the rear was open on the right side facing forward (p. 51, ll. 1-4). Upon leaving Hackensack, the car was pretty well crowded and the appellant took a seat in the smoking compartment, where he remained for some time. After some of the passengers had alighted, he quitted the smoking compartment and went into the other one (p. 15, ll. 32-40). Sometime before the car reached the junction of Belleville Turnpike and Kearny avenue, in the Town of Kearny, a crowd of twenty-five or thirty rowdies boarded it. These were members of the so-called "Kearny gang" who had attended a dance held at Ell's Hall, Kingsland, by the notorious "Paul Kelly Gang" of New York City. Hodler became involved in a controversy with one of the members of this party, and in order to avoid any disturbance, he left his seat and walked to the rear platform where he remained until the car stopped at the junction (p. 16, ll. 7-30; p. 51, ll. 20-40). Here the car's crew was changed (p. 337, l. 21; p. 355, l. 38). During the interval required for this purpose the appellant alighted from the rear platform in order to avoid the men who were involved in the controversy above mentioned, and who left the standing car to visit a lunch room directly opposite (p. 16, ll. 32-40; p. 54, ll. 32-40; p. 55, ll. 1-4). After all the passengers had returned to the car, Hodler stationed himself on the rear platform and the car proceeded along Kearny

avenue (p. 17, ll. 3-12). What happened next is best described by the appellant himself:

"* * * There is a downgrade from the junction to the point of the accident. There is a curve a short distance from the junction. As the car passed onto the curve I experienced a severe jolt; I experienced a second very shortly afterwards, very greatly intensified. The second jolt I refer to was so great that it took my feet from under me and threw me from the rear platform. In my efforts to save myself, I grasped for the handle on the side of the car. Missing it and being in space, it turned me, I was conscious of a blow below the knees. Turning in space I fell in a peculiar position; I struck on the side of my head first; the vestibule end of the car striking my limbs threw me over on the right side * * *; it threw me completely from the platform" (p. 13, ll. 37-40; p. 14, ll. 1-14, 24).

The fall from the car rendered him unconscious and his body lay in the roadway, near the tracks where it was discovered later by the motorman of another Newark-bound car. He was removed to the hospital, and the physicians there discovered that he had sustained a fracture at the base of the skull which caused total and permanent deafness. Hodler testified further that when the car struck the curve it was traveling at a speed of about thirty-five miles per hour (p. 19, ll. 21-29). This estimate was based upon the witness's own experience in the operation of trolley cars and upon observations made while riding as a passenger upon them (p. 14, ll. 33-40; p. 19, ll. 30-38). That the car was being operated at a high rate of speed was corroborated by other witnesses:

Charles T. Kavanaugh, who was called by both parties, testified that from the junction to the curve is downgrade; that the car was running at a "good speed" and "hit the curve hard" (p. 78, ll. 4-10; 27-30).

John F. Ryan, the motorman of the car in question was produced by the appellees. He testified on his direct examination that for a distance of some 325 to 350 feet from the junction there is a down grade (p. 342, l. 25); that when he reached Bennett avenue he "*was running full speed as fast as the car would go*" (p. 343, ll. 15-17); that at Bennett avenue, he shut off the power and prepared for the curve (p. 343, l. 21); he guessed that the car as it struck the curve was "rolling between—around ten miles an hour, anyhow, maybe twelve, something like that—just giving it a little bit of air and slackening up the least bit" (p. 343, ll. 23-28). He testified further that he did not notice any unusual jolt as the car swung around the curve (p. 344, l. 21).

On his cross examination, however, he admitted that before he became a motorman he had been a fast freight brakeman, and because of that employment had become enured to such jolts (p. 345, ll. 5-10); that before a jolt would have any effect upon him, it would have to be produced by "some curve" (p. 345, ll. 11-14). He reiterated that the car came down the hill at full speed (p. 347, l. 5); that he applied all the power at his command until he arrived at Bennett avenue (p. 348, l. 10); that the grade was sufficient to accelerate the speed of the car (p. 347, l. 3). The witness estimated that the car would travel at from fifteen to seventeen miles per hour at full speed (p. 349, l. 19); but he admitted that this was merely his judgment and was not based upon any test (p. 350, ll. 1-4).

Clarence H. Coe, Superintendent of Instruction of the Public Service Railway Company was called by the appellees. He explained the equipment of the car and testified that it was geared to travel twenty-three miles per hour (p. 404, ll. 8-14).

The defense principally relied upon, was that Hodler was intoxicated and left the inside of the car

to engage in personal conflict with some of the characters who boarded the car at Ell's Hall, and that in the melee which ensued, he fell or was thrown from the platform. It was also claimed that upon the former trial and prior thereto, Hodler had made statements inconsistent with his present testimony.

At the close of the case, the trial judge directed a verdict for the appellees upon the ground that the weight of the evidence would not sustain any other verdict. We submit that the course pursued was erroneous for the following reasons:

I.

IT IS NOT NEGLIGENCE PER SE TO STAND UPON THE PLATFORM OF A MOVING TROLLEY CAR.

In *Brackney vs. Public Service Corporation*, 48 Vr., 1, the plaintiff, while riding on the front platform was injured in a collision between the car and a wagon ahead of it which was partly upon the track. It appeared that the accident occurred upon a down grade; that as the car approached the wagon, the motorman shut off his power and allowed the car to drift; that he rang his bell as a notice to the driver of the approach of the car; that the driver turned his wagon off the tracks but the rear wheels skidded and the collision ensued. Application for a non-suit and the direction of a verdict for the defendant were made and refused, which refusals were assigned for error. In affirming the judgment below the Chief Justice said:

"It is further contended that the plaintiff's act in riding on the front platform of the car was such negligence as will bar him from recovery, and that a non-suit should have been ordered, or a verdict directed, for this reason. No authority

for this proposition is cited by counsel, and it is opposed to the doctrine of our earlier decisions. *North Hudson County Railway Co. vs. May*, 19 Vr., 401; *City Railway Co. vs. Lee*, 21, *Id.*, 435. *Whalen vs. Consolidated Traction Co.*, 31 *Id.*, 606. Viewed in the most favorable light for the defendant, the question whether such conduct on the part of the plaintiff constituted negligence was for the jury."

See also *Nirk vs. Jersey City, etc., Street Railway Co.*, 46 Vr., 642.

Moreover, it is not disputed that the conductor collected the appellant's fare while he was standing upon the platform (p. 21, l. 9). Hodler had no knowledge of the existence of the curve nor had he been warned of that fact or forbidden to remain upon the platform (p. 20, ll. 10-40). Under such circumstances he was not conclusively guilty of contributory negligence. *Hoppock vs. Easton Transit Co.*, 48 Vr., 342.

No doubt, when he assumed his position on the back platform Hodler took upon himself the duty of looking out for and protecting himself against the usual perils of his position, such as the danger of being thrown therefrom by the ordinary jolting and swinging of the car. His injuries, however, did not result from such causes, but were due to the extraordinary lurching caused by the car as it rounded the curve. His testimony was that the car picked up speed very rapidly from the junction to the curve; that after it struck the curve, it was proceeding at a rate of about thirty-five miles per hour (p. 19, l. 22; p. 57, l. 25); that the jolt which hurled him from the car was the greatest he had ever experienced; that "it took my feet from under me and threw me from the platform" (p. 14, ll. 3, 30-32). Kavanaugh who was seated inside felt the car strike the curve "hard" (p. 78, l. 27). Even Breen, the gangster, testified that within a few minutes after the car left the junction, the jolt swayed

them together inside (p. 321, ll. 29-39). Ryan, the motorman, admitted that when he reached Bennett avenue he "was running full speed, as fast as the car would go." And Bennett avenue is but eighty feet from the curve (p. 125, l. 20). Coe, the Public Service superintendent, testified that the car was geared to travel twenty-three miles per hour (p. 404, ll. 8-14). It was also admitted by the motorman that the down grade was sufficient to accelerate the speed of the car. From the lips of the appellees' own witnesses, therefore, came ample corroboration of the charge that the car was running at an excessive rate of speed and in consequence struck the curve with extraordinary violence.

It is well settled that evidence of extraordinary lurching or violence in the movement of a car is sufficient upon which to predicate negligence in its management.

Burr vs. Pennsylvania Railroad Co., 35 Vr., 30;

Faul vs. North Jersey Street Railway Co., 41 Vr., 795;

Scott vs. Bergen County Traction Co., 34 Vr., 407.

It may be claimed that the decisions above cited are not applicable to the case at bar because of Hodler's alleged intoxication. Assuming (but not conceding) that he was intoxicated, that fact would not necessarily defeat a recovery. It was so held in *Bageard vs. Consolidated Traction Co.*, 35 Vr., 316, where this court said (at p. 322):

"* * * Drunkenness alone, though voluntary, is not negligence. A drunken man *may* be careful. The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and if his drunkenness renders him incapable of exercising such care, then it contributes to any injury thereby sustained and bars recovery for another's negligence. * * *"

This rule was adopted and applied by the Supreme Court in the case of *Hoppock vs. Easton Transit Co., supra.*

The evidence upon this branch of the case was, however, in conflict. Hodler positively denied that he was under the influence of liquor (p. 48, l. 18). Of the witnesses called by the appellees to prove this fact, Kavanaugh had ridden on the same car as did the appellant on the way from Newark to Hackensack earlier in the evening. He testified that on the way to Hackensack, Hodler was sober (p. 151, ll. 34-37); that on the return trip he formed the impression that Hodler was intoxicated more particularly from what he said than did (p. 154, l. 3); but that he was perfectly able to take care of himself; that he walked all right and boarded the car all right (p. 153, l. 39; p. 154, ll. 1, 38); that he was able to move about the car (p. 157, ll. 1-6). Quick testified that he saw Hodler earlier in the evening at the Mountain House which was located at the junction (p. 203, l. 32; p. 204, l. 38). The witness described this as an abandoned car, with a small leanto or shanty built as an addition, where lunches were served (p. 204, l. 1). He further testified that Hodler came into the place between eight and nine o'clock in the evening, and "I took it from his remarks that he had been drinking some; he was a little under the influence of drink; yes, sir" (p. 217, l. 38). It will be perceived that this testimony does not accord with Kavanaugh's, who says that the appellant was sober on the way to Hackensack. Hodler emphatically denied he had stopped anywhere on the way to Hackensack (p. 44, ll. 24, 27; p. 45, ll. 16-23).

Of the four other witnesses who testified on this point, three of them—Breen, McCabe and Hopkins—were gangsters. The character of these men certainly does not inspire confidence and the credit to be given their stories was, at best, a question for the jury. They were all very careful to convey the impression that no member of the gang was intoxicated that evening, the

alleged reason being that the proprietor of Ell's Hall did not have a license to sell liquor (p. 220, ll. 28-32; p. 287, ll. 21-26; p. 378, l. 9). It was surely to Breen's interest to so testify because, as will appear later, he was the man with whom Hodler became involved concerning the seat; and McCabe is the individual who testified that upon the former trial he and other members of the gang did not tell the whole truth. It is also significant that although eight members of the dance party were sworn as witnesses for the appellees, only three of them attempted to testify upon this subject.

Certain so-called lapses of memory on the part of Hodler were also relied upon to substantiate this theory. For instance, he was asked by the appellees' counsel whether he *remembered* expressing a desire to whip somebody in the car just before he was hurt, and answered: "A I do not, Mr. MacSherry; I have no recollection of it" (p. 43, ll. 37-40). Again witness Mackay testified that the appellant, while in a cafe in Hackensack that evening, "* * * wanted to sing, and I *think* he did sing" (p. 189, l. 17). When asked on his cross examination about the matter, Hodler testified, "Indeed, I did not" (p. 47, l. 10). Such denials can scarcely be termed lapses of memory. Hodler's failure to *remember* whether sneezereen was thrown around the car, was also commented upon. As a matter of fact the question propounded to him on his cross examination was: "Q Did you *notice* any of this party after entering the car near Arlington throwing sneezereen, as they call it, a powder to make people sneeze? Did you *notice* them throwing that around the car?" And he answered: "A I did not *notice* it, Mr. MacSherry" (p. 49, l. 27). The appellees' witness, Polding, was admittedly sober, yet he did not remember whether or not sneezereen had been distributed (p. 390, l. 33). And, although, there was testimony that it had been thrown around both before and after reaching the junction (p. 231, l. 30), that fact

apparently did not impress itself upon the mind of Connor, the conductor, nor of Kavanaugh, witnesses called by the appellees, for neither of them testified about it; yet no doubt was expressed regarding the sobriety of these gentlemen.

Like effect was claimed for the statement made by Hodler on his cross examination that he changed cars at the junction; whereas it appeared that only the crew was changed. He testified on his cross examination, however, that they had a different conductor after leaving the junction (p. 55, l. 26). And on his re-direct, he said that he was not certain about the change of cars, but that the car which he boarded at the junction was identically the same type as that from which he had alighted shortly before (p. 74, ll. 38-40; p. 75, ll. 1-4); that there were two cars of the same type and color at the junction at this time (p. 75, ll. 7-11)—and this latter statement was proven to be so (p. 338, ll. 19-30). On the other hand, Breen, upon whom the appellees relied, testified (p. 289, l. 28) that: “* * * *they changed cars at the junction to my knowledge.*” Yet no claim is made that he was intoxicated.

There being a substantial conflict in the testimony regarding the appellant's intoxication, that question could not be withdrawn from the jury.

II.

THE QUESTION AS TO THE CAUSE OF HODLER'S FALL FROM THE CAR WAS FOR THE JURY.

Of the eight gangsters called by the appellees to prove that the appellant fell or was thrown from the car during the alleged fight not one of them testified positively that the accident occurred in that manner. Only five of them testified that there was a fight on the car and one of them swore that there was no fight on the car after leaving the junction.

William Breen testified that he was a member of the Kearny gang and had attended the dance at Ell's Hall held by the Paul Kelly gang of New York City (p. 299, ll. 10-27); that during the evening the gangs danced and fought (p. 300, l. 26); that the dance ended in a fight, after which he and his gang boarded the car (p. 287, ll. 18, 26-30); that the members of the gang were "loaded up" with sneezereen, which they proceeded to blow around the car, the effect of which was to make the passengers sneeze (p. 289, ll. 15-22); that on the way down to the junction, he noticed that Hodler was arguing with some members of the gang (p. 288, ll. 14-20); that after the car left the junction, he noticed the appellant standing up in the front compartment (p. 289, ll. 38-40; p. 290, l. 11). The witness was at that time at the rear of the car and could not see just what went on in front (p. 289, l. 3). He did not know what became of Hodler after that, but saw him walk toward the back platform (p. 290, ll. 24, 38-40; p. 292, ll. 26-28); *that as Hodler walked toward the back platform, there was no one with him* (p. 291, l. 4); that as Hodler passed by, no one said anything to him but that somebody said he "wanted to get Kavanaugh," who had interceded in behalf of Hodler during the argument (p. 292, ll. 38-40; p. 293, ll. 1-9); that after the car left the junction, the conductor had a great deal of trouble attempting to collect fares from the members of the gang (p. 294, l. 3); that after Hodler passed him on his way toward the back platform, he heard a "mouth" quarrel in the rear end of the car but did not know what it was (p. 297, l. 13).

On his cross examination, he testified that soon after he and his gang boarded the car at Ell's Hall, he became engaged in an altercation with Hodler regarding a seat (p. 302, ll. 36-40); that the disposition of seats was at that time in his control (p. 305, ll. 30-36); that just because he knew that Hodler wanted a seat, he would not give it to him (p. 307, l. 16); that the argument lasted but a few minutes and was over when the

car arrived at the junction (p. 307, ll. 33-40). The witness then testified that he did not alight from the car when it arrived at the junction although upon his direct examination, he said that he did (p. 308, l. 3; p. 288, l. 3); that a number of people left the car at the junction and among them was Hodler (p. 308, ll. 34-40); *that after the car left the junction, he saw Hodler in the front compartment occupying a seat alongside Kavanaugh* (p. 309, ll. 19-21).

At this point, the noon recess was taken and when the court reconvened, Breen's cross examination was resumed.

He then testified that as soon as the car left the junction, the conductor began collecting another fare, and at that time *Hodler was in the smoking compartment standing up and he did not know where Kavanaugh was* (p. 311, ll. 18, 27-33); he guessed that there were some people on the back platform after the car left the junction (p. 312, ll. 26-33); he then said that as Hodler passed him on the way to the back platform, one or two people followed him (p. 314, ll. 18-20); although on his direct examination, he testified positively that no one accompanied Hodler on the way out (p. 291, l. 4); he paid no particular attention to the speed at which the car was traveling, but testified that within a few minutes after he left the junction the jolt of the car "swayed them together inside" (p. 320, ll. 26-40; p. 321, ll. 29-39).

Margaret Fearon testified that after she and the gangsters had boarded the car, Hodler tried to sing and someone hollowed "Put him out;" that immediately sneezereen was thrown around, whereupon the appellant said he would whip the man that did it and started toward the back platform followed by a couple of others (p. 323, ll. 37-40). Then came the following question and answer:

"Q And is or is not that the last that you saw of him?"

A Then I stood up in the seat and I seen there was a fight on the back of the car."

She said further that the fight occurred after leaving the junction (p. 324, l. 28).

Upon her cross examination, she testified that Hodler went toward the back of the car immediately after the sneezereen was first thrown around (p. 326, l. 15). According to the other members of the gang, the sneezereen was first thrown around as soon as they boarded the car at the hall (p. 253, l. 35). It would appear, therefore, that the witness was mistaken as to whether the fight occurred before or after leaving the junction. Upon the former trial she did not testify to having seen the fight at all. Her recollection then was that Hodler and the others went to the back of the car *before* it had arrived at the junction (p. 332, ll. 22-27); that she saw them go down the aisle and that was all she remembered (p. 332, ll. 36-40; p. 333, l. 1).

James J. Crowley also attended the dance and boarded the car with the gang. He testified that there had been fighting at the dance (p. 362, ll. 37-40); that he took a seat in the smoking compartment near the door leading to the back platform (p. 363, ll. 7, 18); that before reaching the junction, Hodler attempted to sing (p. 363, l. 26); that shortly after leaving the junction Hodler came toward the platform followed by three others (p. 364, ll. 14-20); that a fight ensued and he heard some one say "There he goes" (p. 364, l. 37; p. 365, ll. 14-22). He also testified that as Hodler and his followers came down the aisle, witness Kavanaugh said to them: "Don't hit that fellow; you can see that he is drunk" (p. 376, l. 22). Kavanaugh flatly contradicted the remark attributed to him (p. 408, ll. 11-19).

John H. Polding, another of the characters that attended the dance, testified that on the way to the junction, he did not notice whether any of the passen-

gers were standing, nor whether there were any upon the platform nor did he see Hodler (p. 389, ll. 1-15); he did not notice whether the conductor had any trouble in collecting fares nor whether sneezecreen was thrown around (p. 390, ll. 30-34). Apparently the only thing that made any impression upon his mind was that after the car left the junction, Hodler attempted to sing; that they all hollowed, whereupon he left his seat and went to the back platform (p. 389, ll. 19-30); that he did not notice anyone in front of or behind Hodler until he got out upon the platform (p. 389, ll. 38-40); that he could not see or hear what transpired upon the platform after Hodler went out because it was too far from him (p. 390, ll. 3-8); in answer to the very next question, he said that he did see what was going on upon the platform, that the people out there were "swinging at one another" (p. 390, ll. 13-19).

Upon his cross examination, he admitted that the conductor had difficulty in his attempt to collect fares from the gang (p. 392, l. 27); that after Hodler's attempt at singing was howled down, there was no quarrel of any kind; he simply left his seat and walked to the rear platform (p. 393, ll. 14-22); he then denied his previous testimony and said that he could not see what transpired upon the back platform; that the persons, who were "swinging" at one another stood in the doorway (p. 394, ll. 37-40; p. 395, ll. 1-10).

Thomas V. Hopkins also attended the dance with the gang. He testified that *before reaching the junction* Hodler tried to sing (p. 379, ll. 37-40; p. 380, ll. 1-3); that after leaving the junction, Hodler became involved in an argument and left his seat (p. 379, l. 30); after which time, the witness did not see him again (p. 380, ll. 23-28); he didn't remember whether the conductor attempted to collect fares after starting from the junction (p. 385, ll. 3-18); that there were arguments and noises "all over the car" (p. 386, l. 35).

Joseph H. McCabe was another member of the dance-fight party. He testified that *before the car reached the junction*, Hodler tried to sing (p. 221, ll. 27-40); that after leaving the junction, Hodler was still in the car (p. 222, l. 21); that he then offered to fight and went toward the back platform accompanied by three or four of the gang (p. 222, l. 22; p. 223, l. 38); that he did not see what happened there, but was told what occurred (p. 224, ll. 27-40).

Upon his cross examination, he testified that there had been no fighting at the hall during the evening (p. 227, ll. 28-35). His testimony on this point is in direct conflict with that of every member of the gang who was interrogated upon the subject. When confronted with his testimony at the previous trial, the witness became very much embarrassed and admitted that he and some other members of the gang who testified upon that occasion had not told all they knew (p. 240, 241, 242).

Martin B. Shields, who attended the dance with the gang, testified that the dance wound up in a fight (p. 251, ll. 38-40; p. 252, l. 1); that the gangs went to the hall to fight or dance—they did not care which (p. 253, l. 14); that as soon as they boarded the car, the sneezereen was thrown around (p. 253, l. 35); that *when the car left the junction, Hodler was out on the back platform* (p. 254, l. 36).

Upon his cross examination, however, he testified that after leaving the junction, Hodler was in the front of the car and that this was the first time he noticed him (p. 265, ll. 36-40); that the fight party was "the talk around the corners for a week" (p. 256, l. 28); that at the hall the fighting was continuous—gang against gang (p. 256, ll. 31, 35); the witness had no idea of the time consumed in making the run from the hall to the junction, for they were all excited because of the fighting at the dance (p. 353,

ll. 1-18); he did not remember whether he left the car at the junction, although he testified on his direct examination a few minutes before that he remained in the car at this time (p. 261, ll. 1-20); that shortly after an argument ensued and that Hodler came toward the back platform followed by the whole crowd (p. 267, ll. 17-20); that he didn't know what happened after that (p. 254, ll. 26-29); he later testified that it looked to him as though there was a fight on the back platform (p. 255, l. 18); that there had been eight or nine people on the back platform prior to this time (p. 264, l. 3); he later said that he did not know how many were there (p. 269, ll. 38-40); although from the time he entered the car he was standing in the smoking compartment talking to one of the gang on the back platform (p. 262, ll. 11-20; p. 263, l. 22).

In direct conflict with this testimony is that of *John Watson*, who was one of the companions of the gangsters. He had attended the dance, and boarded the car at Ell's Hall. He testified that he saw Hodler in the car before it arrived at the junction (p. 396, l. 31); that after the sneezereen was thrown around, Hodler left his seat but *said nothing* and walked toward the back of the car (p. 397, ll. 1-9); that he did not see Hodler after the car left the junction (p. 397, l. 33); *that there was no fight on the car after it left the junction* (p. 398, ll. 1-16).

Charles T. Kavanaugh, who had theretofore been called by both parties, testified in rebuttal that after the car left the junction, he sat in the smoking compartment on the seat nearest the door leading to the back platform (p. 405, l. 30; p. 406, ll. 6-15); *that during the time that the car ran from the junction to Stuyvesant avenue, which is below the curve, no fight occurred on the back platform* (p. 407, ll. 7-26). Hodler testified positively that he was alone on the back platform after leaving the junction, and paid

his fare to the conductor there (p. 18, ll. 1-10; p. 21, l. 9; p. 56, ll. 14-17; p. 75, l. 29). Although Connor, the conductor, was called as a witness on behalf of the appellees, he made no attempt to deny this latter assertion. And Kavanaugh, who left the car immediately south of the curve, testified that there was nobody on the back platform as he alighted (p. 158, l. 16).

It cannot be seriously claimed that the testimony of the five gangsters so far outweighed that of the appellant and the two other witnesses (Kavanaugh and Watson) as to justify the trial court in directing the verdict. The mere number of witnesses does not establish the weight of the evidence. Such is the declaration of this court in *Baumann vs. Hamburg-Amer. Pack. Co.*, 38 Vr., 250, and of the Supreme Court in the recent case of *Floersch vs. Donnell*, 82 Atl., 733, where Kalisch, J., said:

“* * * The fact that the witnesses for the defense outnumbered those of the plaintiff does not in itself establish the weight of the evidence. *Baumann vs. Hamburg Am. Pack. Co.*, 67 N. J. Law, 250, 51 Atl. 461; *Goldman vs. Central R. R. Co. of N. J.*, 79 N. J. Law, 205, 74 Atl., 261. The credibility of a witness and the weight to be given to his testimony involve the consideration of many other matters, such as his personal interest in the subject-matter in controversy, his opportunity of observation or knowledge of the subject about which he is testifying, the influences under which he may be testifying, his demeanor on the witness stand, etc., all of which are circumstances for a jury, who see the witness to consider in determining what credit and weight should be given to the witness and his testimony.”

These remarks seem peculiarly apposite to the case in hand. According to their own admissions the appellees' witnesses were members of a notorious gang

of ruffians. So many contradictions and inconsistencies appear in their testimony as to demonstrate its unreliability and the jury would have been justified in disregarding it entirely.

The respective province of the court and the jury under the circumstances here presented were indicated by this court in the case of *Crosby vs. Wells*, 44 Vr., 790-800. It is there said:

“* * * *Firstly*, the trial court should direct a verdict, when any number of verdicts, if found otherwise than as ordered, would be set aside as without sufficient evidence to support them. (*Hartman vs. Alden, Executrix* (1870), 5 Vroom, 518, 522; *Baldwin vs. Shannon* (1881), 14 Id., 596, 602, 603; *Crue vs. Caldwell* (1889), 23 Id., 215, 218; *McCormack vs. Standard Oil Co.* (1897), 31 Id., 243, 245); or when the testimony in the case will not support any other verdict as in *Loper vs. Somers*, 42 Id., 657, 661. *Secondly*, the trial court cannot direct a verdict when any material facts which the parties have been permitted to introduce are in dispute. See *Deleware, Lackawanna and Western Railroad Co. vs. Shelton* (1893), 26 Id. 342, 345; *Baumann vs. H. A. Packet Co.* (1901), 38 Id., 250, 254.”

Referring to the cases above cited in support of the doctrines enunciated, it will be found that the power of the trial court to direct a verdict has been vindicated only in cases where the facts material to the verdict in favor of one party or the other have been conceded or are not in substantial dispute; thus in *Hartman vs. Alden*, the point in dispute was as to whether a judgment had been paid in the lifetime of Alden's testator. The trial court conceiving that the proof offered to establish the defense of payment was insufficient to go to the jury, directed a verdict for the plaintiff. The judgment below was reversed by this court which held that the material facts were in

dispute and should have been passed upon by a jury, and the opinion points out that the court is not to be understood as expressing any opinion as to what verdict the jury ought to have rendered on the evidence if they had been permitted to pass upon it.

Baldwin, et als, vs. Shannon was an action of ejectment. A verdict was returned for the plaintiffs by direction of the trial judge, whereupon a rule to show cause was allowed why the verdict should not be set aside and a new trial granted. The Supreme Court discharged the rule, holding that the plaintiffs' claim to the *locus in quo* was rendered impregnable by the description contained in their deed, and that the defenses of practical location and estoppel were not good as matters of law.

Again in *Crue vs. Caldwell*, the point in controversy was as to whether a mortgage was a gift *causa mortis* or a gift *inter vivos*. The facts were controverted and the proofs concerning them were submitted to the jury. After the jury reported that it could not agree, the trial judge directed a verdict for the plaintiff. This court in reversing the judgment below, held that the testimony was clearly of such a character as to produce different results in different minds and should therefore have been submitted to the jury.

In *McCormack vs. Standard Oil Co.*, the plaintiff brought his action to recover damages for injuries sustained on November 8th, 1895. At that time, he was driving through a public highway when one of the wheels of his truck suddenly dropped into an excavation in the highway and threw him from the seat. In order to establish that the excavation was made by the defendant, the plaintiff produced one witness, a former employee of the defendant, who testified that he had been employed by the defendant from June, 1895, to January, 1896, as a civil engineer, in laying out an extension of the defendant's plant, which extension included the excavation of the highway for

the laying of pipes thereunder. The witness was not clear as to any particular time, but testified that trenches had been made in the highway by the defendant; whether they were there on November 8th, he was unable to state. A motion to non-suit was made and refused. The refusal being based upon the theory that the evidence would justify an inference that the excavation was made by the defendant. The defendant then produced those of its employees who had actual charge of the excavating. All of these witnesses united in testifying that the first excavation was made on November 14th, 1895, and their recollection was fortified by time-slips and work-reports made by them at the time. There was no contradiction of their testimony and they stood unimpeached. The trial judge directed a verdict for the defendant and allowed a rule to show cause, which was discharged.

The court said :

“The case before the court then stood thus: The inference that defendant had opened the excavation into which plaintiff said he fell on November 8th, 1895, which was possibly justifiable from the fact that between June, 1895, and January, 1896, defendant was executing a plan which contemplated such excavations, was not merely rendered doubtful, but was made impossible from the further fact proved that the excavations under that place were not commenced until November 14th, 1895.”

Loper vs. Somers was an action upon a sealed bill whereby the plaintiff promised to pay to the defendant, or her order, the sum of \$2,000. The defendant admitted that he signed and delivered the bill; that he received full consideration therefor; that a novation had been effected whereby there had been a change of creditor with the assent of the debtor. The material facts were therefore conceded and this court held that as no verdict in favor of the defend-

and could have been supported, if rendered, it was the duty of the trial court to direct a verdict for the plaintiff.

Delaware, Lackawanna and Western Railroad Co. vs. Shelton was an action to recover damages for the injury done to a horse and buggy of the plaintiff through a collision with a locomotive at a crossing. There was testimony showing that no whistle was blown, that no bell or signal was heard, and that the gates on both sides were open. Motions to non-suit and direct a verdict for the defendant were refused. In sustaining the action of the trial judge, this court again re-stated the general rule that “* * * all the authorities concur in the principle that the court cannot direct a verdict when any fact the parties have been permitted to introduce, material to the verdict, one way or the other, is in dispute” * * *.

In *Baumann vs. Hamburg Am. Pack. Co.*, damages were sought for the personal injuries sustained by the plaintiff by being thrown down a stairway which was alleged to be in an unsafe and insecure condition. The testimony of the plaintiff and three other witnesses was that the stairs were in bad condition and the defendant produced eight witnesses who testified substantially that the stairway was securely built and was in proper condition at the time of the accident. At the close of the case, the court directed a verdict for the defendant and the judgment consequent thereon was reversed by this court. In the course of the opinion read by Mr. Justice Van Syckle, it is said:

“The duty of the court is to settle the law of the case; the province of the jury is to settle disputed facts.”

“In *Central Railroad Co. vs. Moore*, 4 Zab., 824, 830, this court formulated the true rule as follows: ‘But if the facts be controverted, or not manifest, it is the duty of the judge to submit these to the jury, under proper instructions,

thus leaving to that branch of the court the exercise of its peculiar functions, and affording to the parties the right of trial by jury, which the constitution has declared shall remain inviolate.’ ”

“In *New Jersey Express Co. vs. Nichols*, 3 Vroom, 166, the Supreme Court adhered to the rule that where the evidence is doubtful and the inferences to be drawn from the facts uncertain, it is the province of the jury to decide.”

“In *New Jersey Railroad Co. vs. West*, 4 Vr., 430, this court reaffirmed the rule laid down in *Central Railroad Co. vs. Moore*, *supra*.”

“Again this court, in *Delaware, Lackawanna and Western Railroad Co. vs. Toffey*, 9 Vroom, 525, declared: ‘If the evidence is open to fair debate and leaves the mind in a state of some doubt on this subject, the case should not be withdrawn from the jury.’ ”

“The court further said that there were ‘no conceded or undisputed facts that showed the plaintiff’s testimony could not be true, and therefore the non-suit was properly denied.’ ”

“In my judgment this case recognizes the true distinction, and will serve as a correct guide in determining whether a non-suit should be granted or a verdict directed.”

“As an illustration: If it is conceded or manifest that, when standing in a safe place near a railroad track, there is nothing to prevent seeing an approaching locomotive for a long distance, the evidence of a plaintiff, with unimpaired eyesight, that under such circumstances, on a clear day, he looked toward the locomotive and could not see it, would be rejected as incredible under the conceded facts.”

“Even the testimony of two or more witnesses to the like effect would be disregarded, and the

court would say that they could not have looked without seeing the danger, and a non-suit would be properly ordered."

"But if the alleged negligence was in providing an unsafe stairway, and five witnesses should testify that, at the time of the accident, it was securely fastened, and one witness should testify that he had examined it and found it loose and shaky, a question of credibility would be presented. The five witnesses might be mistaken as to the time when their inspection was made, or they might be under improper influences. Witnesses are not counted; credibility is not necessarily on the side of numbers. Under such circumstances the province of the jury intervenes to settle the question of credibility. If the evidence of the one witness is accepted, negligence may properly be found by the jury."

* * * * *

"The evidence in the case *sub judice*, hereinbefore set forth, was contradictory in respect to the facts upon which the question of negligence of the defendant hinged. There was no conceded or manifest fact which rendered the testimony of the plaintiff incredible. If the evidence of plaintiff's witnesses was credited by the jury, a verdict for the plaintiff would have been justified."

"To deprive a plaintiff, under such circumstances, of the right to go to a jury, is a denial of the right of trial by jury, guaranteed by the fundamental law."

"The direction of a verdict for defendant was error in law, and the judgment should therefore be reversed."

To the same effect see:

Myers vs. Birch, 30 Vr., 238;

Lippincott vs. Royal Arcanum, 35 Vr., 309;

Friedman vs. North Hudson County Ry. Co.,
36 Vr., 298.

Our review of the decisions has failed to disclose one where a trial court has been held to be justified in withdrawing from the jury the settlement of controverted facts material to the issues presented. In the present case the material inquiry was whether or not a fight had occurred after the car left the junction. The five gangsters swore that it had, while the testimony of Hodler, Kavanaugh and Watson was in direct opposition and negated such an occurrence. The testimony offered by the plaintiff and his witnesses being material, its force could be escaped only by denying its truth. These witnesses were not impeached and their story was not intrinsically incredible. It was therefore the jury's province to pass upon its credibility.

It may also be claimed that the point in the roadway where Hodler was found on the night of the accident renders incredible his version of the accident. Kavanaugh testified that the body was found 25 or 30 feet south of the curve (p. 87, ll. 1-4, 22). The appellees' witnesses estimated the distance at 100 feet.

The observations which enabled these witnesses to estimate the distance were made on a dark, foggy night (p. 97, ll. 30-32; p. 377, l. 39), and under such conditions, it cannot be pretended that this measurement should be accorded the weight of mechanical accuracy. But assuming that the latter estimate is the more accurate, this is not dispositive of the issue; particularly when it is borne in mind that the car was traveling in the neighborhood of 35 miles per hour when it struck the curve, and could have traversed the hundred feet in less than two seconds. This, again,

was simply another circumstance to be considered by the jury.

Regarding the alleged inconsistent statement made by Hodler to the claim agent of the appellees shortly after the accident, it is only necessary to say that the statement itself shows that Hodler was not then in a fit condition to remember the occurrence and did not purport to do so. At the end of the statement appears the following:

“* * * After drifting into conversation with this man Kavanaugh my mind is a blank just now as to what occurred after that, owing to the condition of my brain, due to the accident. I am gradually commencing to recall things, and eventually I will be able to recollect just what happened” (p. 72, ll. 15-21).

Much was made of the fact that Hodler testified at one point in his examination that he took his position on the back platform “just previous to leaving the junction” (p. 15, l. 10), and that this corroborated the appellees’ theory that he went to the platform to engage in a fight. A perusal of his testimony will demonstrate that he went to the platform immediately prior to reaching the junction and was standing there when the car stopped for the change of crews (p. 16, ll. 28-40; p. 17, ll. 1-11; p. 53, l. 35; p. 54, l. 8; p. 74, ll. 9-18); nor was his testimony upon the previous trial inconsistent with that now under review (p. 54, l. 16).

Importance may also be claimed from the fact that Hodler did not produce upon the trial the trousers which he wore on the night of the accident, and which were alleged to have been torn below the knees by the blow which he received as he was hurled from the back platform. It appears, however, that all of his personal effects, including the trousers, were lost in a fire which destroyed the warehouse in Rutherford, N. J., wherein they were stored (p. 25, l. 38).

FOR THE REASONS ABOVE URGED, IT IS
RESPECTFULLY SUBMITTED THAT THE
JUDGMENT BELOW SHOULD BE REVERSED
WITH COSTS.

June Term, 1913.

LOUIS HOOD,
WILLIAM K. FLANAGAN,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

WALTER R. HODLER, <i>Appellant,</i>	} <i>On Appeal</i>
<i>vs.</i>	
PUBLIC SERVICE RAILWAY COM- PANY AND HUDSON RIVER TRACTION COMPANY, <i>Appellees.</i>	

Brief for Public Service Railway Company and Hudson River Traction Company, Appellees.

The occurrence upon which this action is based happened on December 28, 1907, between 12 o'clock midnight, and 1 o'clock in the morning, on Kearny Avenue, between Bennett Avenue and Stuyvesant Avenue, Arlington, Hudson County.

The plaintiff claimed that he was a passenger on the car from Hackensack bound south for Newark; that he had a seat in the car but that when the car started from a point which is known as Belleville Junction, where the tracks of the Hudson River Traction Company joined the tracks of the Public Service Railway Company, and where the employes of the Public Service Railway Company took charge of the car, he took a position on the rear platform for the purpose of avoiding some trouble which he had gotten into with other passengers on the car; that as the car proceeded in a southerly direction from the junction, although he could have had a seat in the car he stood on its rear

platform with his back against the controller and his hands either hanging at his side or clasped in front of him, but without taking hold of any part of the car; that the distance from the junction to the place of the accident is about a quarter of a mile; that the car increased its speed rapidly, so that when it rounded a curve about a quarter of a mile from the junction the plaintiff claims he was thrown to the ground, striking on his head so that his skull was fractured which injury resulted in total deafness.

The plaintiff brought his action on December 10, 1909, nearly two years after the accident. It was first tried February 8th, 1911, and resulted in a verdict for the plaintiff in the sum of \$10,000, which verdict was set aside by the Supreme Court on a rule to show cause, and the following decision on such rule was rendered by that Court: "We think the verdict for the plaintiff in this case was against the weight of the evidence. On his own showing, he unnecessarily left the inside of a car that was running very fast, stood on the rear platform without holding on to anything and was thrown off at a curve. This of itself indicates contributory negligence on his part. The weight of the evidence is that he was intoxicated and got in an altercation with other passengers and that he either went to the rear platform to escape them or to engage in a personal conflict with some of them. The rule should be made absolute." The case was retried in September, 1912, before Honorable Frederic Adams and a jury, and resulted in a direction of verdict in favor of the defendant on the ground "that the weight of the evidence in the cause would not sustain any other verdict." (P. 412.)

The appellees claim that this direction of a verdict in their favor should be sustained on the following grounds:

1. Because it appears in the plaintiff's case that he was guilty of negligence, which was either the sole or a contributing cause of the accident.

2. Because on the whole evidence it appears that the accident was not caused by the defendant's negligence as charged by the plaintiff.

I

Because it appears in the plaintiff's case that he was guilty of negligence, which was either the sole or a contributing cause of the accident.

The plaintiff testified (p. 13) that at Hackensack he boarded a car bound for Newark; that on the journey he became involved in a little controversy; that at the junction he got off the car and then got on its rear platform, where he stood, although (p. 56, l. 3) there were seats inside the car which he could have occupied; that (p. 18) the lefthand vestibule door on the platform was closed while the righthand door was open; that the controller is a little to the right of the center of the rear platform. He describes his position on the platform as follows: (P. 14, l. 16) "I was standing on the rear platform; my back resting against the controller. I was a little nearer the righthand side of the car than the left"; his hands (p. 56, l. 27) were clasped in front of him or hanging loose at his side; that (p. 19, l. 25) the car picked up speed very rapidly so that when it reached a curve south of the junction it was travelling at the rate of 35 miles an hour, at which speed it continued around the curve (p. 33, l. 36); that prior to reaching the curve (p. 58, l. 20) the car was running from 35 to 40 miles an hour, and (p. 58, l. 3) swaying, and (p. 59, l. 20) that while he was on the platform in the position described the car entered the curve, which he says is about a quarter of a mile from the junction, and what happened to him when the car went around the curve he describes in the following language: (P. 13, l. 35) "There is a down grade from the junction to the point of the accident; there is a curve a short distance from the junction.

As the car passed on the curve I experienced a severe jolt. I experienced a second very shortly afterwards, very greatly intensified. The second jolt I refer to was so great that it took my feet from under me and threw me from the rear platform. In my efforts to save myself I grasped for the handle on the side of the car. Missing it and being in space it turned me. I was conscious of a blow below the knees," and continuing he says (p. 14, l. 20) "in the second jolt or jar I was firmly set at that time, but the first jolt or jar had a tendency to throw me off of my balance to lose my equilibrium; the second the greater of the two—of course my losing my balance intensified the second jolt; it threw me completely from the platform." This second jolt occurred as car was leaving curve (p. 64, l. 25).

The only injury he received were bruises below the knees and the injury to the head (p. 25, l. 22).

As hereinafter shown, he was found at a point at least 100 feet to the south of the curve, the curve being 67 feet long (p. 125, l. 25).

We submit that the plaintiff, who could have had a seat in the car, in standing on the platform of the car when it was running on a downgrade at a rate of speed from 35 to 40 miles an hour, and swaying, was clearly guilty of contributory negligence in not taking hold of anything or taking any other precautions for his own safety, but on the contrary was standing near the open side of the platform merely leaning against the controller with his hands clasped in front of him or hanging on his side.

It also appears that from the time of feeling the first jolt when the car entered the curve, he made no efforts to save himself until he was in space when he tried to grasp the handle on the side of the car. As he knew of the presence of the curve at the first jolt when the front trucks of the car entered it, and as the car is 46 feet long (p. 405) it follows that the car at least ran 67 feet, the length of the curve, plus about 46 feet,

or 113 feet after he knew of the presence of the curve and before he made an effort to protect himself. This calculation assumes that he was thrown off as the car was at the south end of the curve, while really judging from where the plaintiff was found he was thrown off in the neighborhood of 100 feet south of the curve, in which event he rode on the car 213 feet, instead of 113 feet, after knowing of the curve without making any effort whatever to protect himself. This was gross negligence on the part of the plaintiff.

If we add to the plaintiff's conduct the fact that he had imbibed so much intoxicating liquor that he was drunk, (as hereinafter conclusively demonstrated) and thus less able than when sober to preserve his equilibrium, can there be any question but that the plaintiff was himself responsible for the injuries he received?

The only answer the plaintiff suggests as to why he did not take hold of any part of the car before it entered the curve is that he did not anticipate that the motorman would run onto a curve at a high rate of speed, but certainly the plaintiff knew that curves in street railways are of very common occurrence. He claims to be experienced in street railway operation (p. 14, l. 34) and he had been over this same road in the opposite direction three days prior to the accident (p. 38, l. 15). For all that appears in the testimony, the plaintiff could have been thrown off the car when it rounded the curve in the position in which he was standing had the car been going at a very reasonable rate of speed. In this connection, we call special attention to the fact that plaintiff's witness Kavanaugh, who was standing up in the car (p. 249, l. 25 and p. 250, l. 30) without having hold of anything except possibly the bellrope, noticed when the car entered the curve and was not thrown from his balance (p. 245, l. 3). Neither were any of the other passengers in the car disturbed by the car going around the curve, although a number of them were standing up.

In the case of *Pascell vs. North Jersey Street Rail-*

way Company, 69 Atl., 170, decided by this court in 1908, it appeared that a girl left her seat in the car and went to the rear platform and stood with her hand lightly resting on some part of the car; that the car entered a switch and she was thrown. The court held that there was no liability, turnouts being a usual feature of street railroads. In this Pascell case the evidence was that the car was going slowly at the time it took the switch, but so far as appears in our present case very likely the plaintiff would have been thrown off the car however reasonable the speed may have been when it entered the curve, as he was taking no precaution whatever to avoid being thrown off.

In the case of Faul vs. North Jersey Street Railway Company, 70 N. J. L., 795, decided by this court in 1904, where it appeared that a passenger was thrown from the rear platform, and there was evidence that he had hold of nothing, the court said the wonder is that he retained his position for any length of time.

II

Because on the whole evidence it appears that the accident was not caused by the defendants' negligence as charged by the plaintiff.

The trial court directed a verdict because "the weight of the evidence in the case would not sustain any other verdict" (p. 412). We submit that the only evidence purporting to show that the plaintiff was thrown off the car by reason of the car rounding a curve at an excessive rate of speed is that of the plaintiff himself, who, at the time of the accident, was drunk.

That the plaintiff was drunk there can be no question. To be sure he testified that the ginger ale and whiskey highballs which he admits having taken during the course of the evening (p. 43) did not have any effect upon him that he was conscious of. His testi-

mony on this point is as follows: (P. 43, l. 32.) "Q. Did they affect you any that night? A. They didn't affect me in any way *that I was conscious of.*" Admitting for the moment the truth of his statement on page 43, that during the course of the evening he had only two drinks of whiskey, then those two drinks of whiskey produced a decided state of drunkenness when he was on the car bound for Newark, although he says (p. 48, l. 18) that he was not drunk on leaving Hackensack. It may be that the motion of the car helped along the effect of the whiskey.

His testimony that he was not conscious of any effect from drinking whiskey is of no consequence, in view of the fact that a drunken man never admits that he is drunk, and not only never admits that he is drunk but is not even conscious of that fact. At the best his testimony in relation to the effect upon him of whatever whiskey he drank during the course of the evening, leaves undecided the question of his drunkenness shortly before and at the time of the accident. His statement that the whiskey he drank had no effect upon him that he "was conscious of" has no force whatever. As opposed to this equivocal statement we have the testimony of six witnesses who testify unequivocally that he was drunk previous to and at the time of his fall from the car, so it appears conclusively that he was then drunk irrespective of the amount of whiskey he drank and where he may have obtained it.

These witnesses are as follows:

CHARLES T. KAVANAUGH, who was called by the plaintiff and afterwards called by the defendant, testified, (p. 145, l. 38) that the plaintiff took an intoxicating drink on his arrival at Hackensack somewhere about half-past eight in the evening, and that (p. 146, l. 11) he next saw the plaintiff on the platform of the depot waiting for the return car from Hackensack to New-

ark, at which time (p. 146, l. 117) the plaintiff was drunk, and that (p. 146, l. 34-35) he was still drunk when he got on the car to go to Newark. Again, this same witness testifies (p. 153, l. 11) on cross-examination by plaintiff's counsel as follows: "Q. Now, you say your impression was when you saw him on the platform that he was under the influence of drink? A. Yes, sir. Q. Will you kindly tell me what it is that makes you think so. A. Why, his general actions; talkative. Q. What were his actions? A. Talkative; saying things you would not expect a sober man to say; his general actions. Q. Was he steady on his legs? A. Well, I don't remember that exactly. Q. Did you notice anything in his bearing that made you think he was under the influence of drink? A. Yes; general wild; excitable condition. Q. Yes; that is in his talk and manner but; I mean his bearing, as he carried himself? A. *Well, I don't remember exactly whether he was staggering around, or not, now, but I know I was firmly impressed with the thought at the time that he was under the influence of liquor.* Q. Yes, I understand that, but I am trying to have you tell us, if you can, what gave you that impression? A. I say it was his general excitable condition, and added to that, his conversation on the car down. Q. Was he able to take care of himself? A. As far as taking care of himself was concerned, yes, I would say yes; walked all right, and got onto the car all right."

It will be noticed that this witness, who was originally called by the plaintiff, while he says (p. 153, l. 40) that the plaintiff was able to take care of himself and walked all right, he also said (p. 153, l. 30) in relation to the plaintiff's drunken condition on the station platform at Hackensack (p. 153, l. 12.) "Well, I don't remember exactly whether he was staggering around or not now, but I know that I was firmly impressed with the thought at the time that he was under the influence of liquor." Other than that the plaintiff was drunk, there is not much value to Kavanaugh's

testimony as to the degree of the drunkenness, in view of the fact that he says in one breath that he does not remember whether the plaintiff was staggering but that he was firmly impressed at the time that he was under the influence of liquor, and in the next breath he says he thinks the plaintiff was able to take care of himself. All this testimony refers to the condition of the plaintiff at Hackensack. After leaving there he no doubt became drunker, because this witness says he became *more* impressed that plaintiff was drunk by his talk and actions on the way down in the car from Hackensack (p. 154).

Witnesses other than Kavanaugh who testify to the plaintiff's drunkenness are the following:

JOHN S. MACKEY, Assistant Prosecutor of Bergen County, deceased since the first trial, and whose testimony was read, who testified that (p. 189) he saw the plaintiff in Ryan's Cafe between 9.30 and 10 o'clock in the evening; (p. 188, l. 10) that the plaintiff left there between 11 and 12 o'clock; that (p. 189, l. 13 and 33) the plaintiff was drunk, and (p. 200, l. 15) that his condition was noticeable "in his walk and talk."

HENRY T. QUICK, who saw the plaintiff at Belleville Junction when the plaintiff was on his way from Newark to Hackensack in the early part of the evening, testifies that even at that time (p. 217, l. 40) the plaintiff "was a little under the influence of drink."

JOSEPH H. McCABE, a passenger on the car, testified (p. 221, l. 21) in relation to the plaintiff: "Q. Did you notice his condition? A. Yes, as soon as we got in there. Q. What was it? A. Well, he was

singing—trying to sing. Q. Well, was he or was he not sober, in your judgment? A. I think he was drunk.”

WILLIAM BREEN, a passenger on the car, testified (p. 288, l. 38) in relation to the plaintiff's condition, when on the car as follows: “Q. Did you notice his condition? A. Intoxicated.”

THOMAS B. HOPKINS, a passenger on the car, testified: (P. 379, l. 40) “Q. Now, did you notice his condition after you left the junction and before? A. Yes, sir, he was intoxicated. Q. What do you say? A. Intoxicated.”

Beside the direct evidence of drunkenness given by the above witnesses, there are certain acts testified to by the other witnesses and certain lapses of memory on the part of the plaintiff himself which strongly indicate that the plaintiff was in an abnormal mental condition, evidently due to his intoxication. For instance, Hodler testifies (p. 43, l. 38) that he had no recollection of desiring to whip somebody in the car just before the accident, while, as a matter of fact, it will be shown hereafter that there was a violent quarrel on the car in which he was implicated.

Again, (p. 47, l. 10) he does not remember of trying to sing in Ryan's Cafe at Hackensack, while, as a matter of fact, he did try to sing there, according to the testimony of Mr. Mackey (p. 189, l. 17).

Again, (p. 47, l. 20) he thinks he met one S. T. Brooks at the station at Hackensack while waiting for the car for Newark, while, as a matter of fact, according to the testimony of Mr. Mackey (p. 188, l. 30) he met Brooks in Ryan's Cafe; that (p. 49, l. 31) he did not notice sneezereen (a disagreeable powder which produces sneezing) being thrown around in the car,

while, as a matter of fact, a great deal of sneezereen was thrown around as shown by the testimony of McCabe, p. 225, l. 20 and p. 231, l. 26 and p. 232, l. 5; Shields, p. 252, l. 36; Breen, p. 289, l. 17; Margaret Fearon, p. 323, l. 40 (who testifies p. 326, l. 9 that the blowing of the sneezereen was partly the cause of the fight hereinafter referred to); Crowley, p. 363, l. 26; Hopkins, p. 379, l. 1, who testified that although he was asleep so much sneezereen was blown around that it woke him up.

Again, (p. 51, l. 16) he does not remember about telling Mr. Kavanaugh about some trouble he had in Hackensack, while his own witness Kavanaugh (p. 154, l. 20) testifies that he talked to him about such trouble.

Again, (p. 55, l. 5) he says that he changed cars *at the junction*, and also testified to the same effect on the previous trial, while, as a matter of fact, there is no question but that only the crews changed and he did not change cars. See testimony of Kavanaugh, p. 148, l. 20; McCabe, p. 222, l. 3; Shields, p. 261, l. 36; Breen, p. 288, l. 1; Mohn, (who was motorman on the car upon which the plaintiff was a passenger, and operated the car from Hackensack to the junction) p. 337, l. 21; Ryan (motorman of the car when the plaintiff fell from it) p. 341, l. 27; Connor (conductor on the car upon which Hodler was a passenger) p. 35, l. 40; and Crowley, p. 363, l. 40.

We submit, under the foregoing evidence and circumstances, that Hodler was drunk at the time of the accident, and that the possible inference which might be drawn from his testimony that the amount of liquor he drank had no affect upon him of which he is conscious, or his own assertion that he was not drunk, is not sufficient to warrant the submission of the question of the plaintiff's drunkenness to the jury.

In *Timlan vs. Dilworth*, 76 N. J. L., 568, decided by this court in 1908, it was held that a mere scintilla of evidence is not enough to submit the question to the

jury, and it is for the court to decide even though it is a question of fact which are sometimes inaccurately called questions of law.

The plaintiff being drunk entitled his testimony relation to the manner of his being thrown off the car to little if any credit. See *Anderson vs. Public Service Corporation*, 73 Atl., 840, in which our Supreme Court said "it must be nevertheless judicially noticed that intoxication is productive of the existence of a mental condition which renders testimony unreliable and impairs credibility."

We submit, therefore, that the unsupported testimony of a drunken man as to how an accident occurs amounts to that mere scintilla of evidence under the rule laid down in the case of *Timlan vs. Dilworth*, supra, and warranted the trial court in directing a verdict for the defendant in this case on the evidence, which we will now proceed to discuss, as to how the plaintiff really received his injuries.

The plaintiff was thrown off the car in consequence of a fight which he had with several passengers.

While it is true that the plaintiff testifies that from the time of leaving Belleville Junction until the time he was thrown off he was alone on the rear platform of the car, and that he didn't have any fight with anybody at that time, we submit that that evidence from a man who was drunk during the time of the happenings about which he is attempting to testify is worth such little credence in the face of the overwhelming evidence against him, that it was the duty of the trial court to direct a verdict for the defendant.

It is the contention of the plaintiff that whatever trouble there was on the car in which he was involved, this trouble had ceased before the car reached Belleville Junction, and he states that immediately after the quarrel, and before the car reached the junction, he

went to the rear platform (p. 53) in order to avoid a reopening of the quarrel. On the other hand, the defendant claims that while it is true there was trouble on the car, in which the plaintiff was involved, before reaching the junction, a fight ensued after the car left the junction, in the course of which plaintiff was knocked from the platform.

While it is true that Hodler testified that he went to the rear platform after the quarrel and before the car reached Belleville Junction (pp. 16 and 53) his testimony on p. 15, l. 10 indicates that he took a position on the platform as the car was standing at the junction, before which time he had been riding inside the car. He testifies— "Q. When did you first take your position on the back platform of the car? A. Just previous to leaving the junction. Q. Before that time in what part of the car were you riding? A. Before that I was riding on the inside of the car seated." To say the least, this is not consistent with his testimony given on p. 53, to the effect that immediately after a quarrel he went to the rear platform.

Besides these inconsistent statements given at the last trial, we have his testimony given at the first trial, which is in direct contradiction to the testimony given at the last trial. In relation to his testimony at the first trial (p. 54) he testified as follows: "Q. Do you remember testifying as follows at the last trial: 'Q. After this trouble in the car with one of the men that got on at the dance hall did you go on the back platform? A. I remained within the car until we reached the junction, Belleville Junction; from that point on I remained on the back platform to evade any more trouble. Q. Was there anyone on the back platform when you went out there? A. No. Q. Did anyone come out on the back platform while you were there? A. No.' Did you not so testify? A. I assumed that that question was pertaining to immediately after leaving the junction. "Previous to that," I state here. I do not understand. Mr. MacSherry—I ask that that

go out as not responsive. *Mr. Hood*—I submit that it is responsive. Q. (Question repeated) A. Yes.”

In view of the fact that the plaintiff has testified differently at the two different trials on a very important point, and his apparently inconsistent testimony given at the last trial, his statement that he went to the rear platform before reaching the junction is of little, if any, value in the face of all the testimony that he went to the rear platform after the car left the junction.

In this connection, I beg to call the Court's attention to the case of *Baier vs. Camden & Suburban Ry. Co.*, 68 N. J., 42, decided by our Supreme Court in 1902, where it appeared that at the second trial of the case the evidence of the same witnesses was substantially different from that given at the first trial and Mr. Justice Van Syckel, speaking for the Court said: “Such testimony is not entitled to any favorable consideration; the witnesses have either forgotten the circumstances or have intentionally perverted the facts. There would have been no error in granting the motion to nonsuit.”

In any event, whenever it was the plaintiff went to the rear platform of the car, the fact still remains that after the car left the junction there was a fight on the rear platform in which the plaintiff was involved, and during the course of which the plaintiff was knocked from the car. As to the fight which took place after the car left the junction, and as to plaintiff going to the back platform during the course of that fight, the testimony is as follows:

JOSEPH McCABE testified that (p. 219) he got on the car with others at what is known as Ell's Dance Hall, about ten minutes ride before reaching Belleville Junction; that (p. 221) when he got on, Hodler was sitting about three seats from the front (l. 18) trying to sing. Somebody hollered “put him out,” when Hod-

ler (l. 36) "got up and wanted to lick somebody"; that (p. 222) as the car started from the junction the quarrel continued and the plaintiff got up from his seat and said (l. 25) "he could lick any son-of-a-bitch in the car," whereupon (l. 31) several passengers got up from their seats and the plaintiff walked toward the rear of the car; that (p. 223, l. 39) "Q. He went to the back platform? A. This Hodler and three or four after him." (P. 244) "Q. Did he go back alone or someone with him? A. Three or four went after him. Q. So that when he got back to the back platform, how many were there back there? A. I don't know how many but there were three or four back there talking and hollering; they hollered "send him back here." (P. 233, l. 17) "Q. How long after the car left the junction do you say the two started? A. Oh, it was all the way down. Q. How soon after the junction did it start. A. Right after we left it, nor more than we left it. Q. The moment you left it? A. Yes, sir."

MARTIN SHIELDS testified (p. 254) that there was a quarrel in the car in which Hodler was involved, both before and after reaching the junction. (P. 254, l. 30). "By the Court.—Q. You mean after the car left the junction? A. Yes, sir. By Mr. MacSherry—Q. Where were you when the car left the junction? A. Standing right at the back door, just inside, right at the back door." (P. 255, l. 3) "Q. Did you see him at all after the car left the junction? A. Yes, I did. Q. Where? A. Coming through the aisle, just as the car left the junction. * * * Q. Which way was he going? A. Toward the back platform. Q. And at that time was or was there not anybody on the back platform? A. Oh, yes, because I was talking to them on the back platform. * * * Q. No, what you saw and heard only? A. What I saw, there was a fight on the back platform. Q. Was that before or after Hod-

ler went through the aisle back there? A. After he went through the aisle. * * * Q. Did you hit him while he was on the back platform? A. No, sir. Q. Did you try to? A. Yes, sir, I tried to, but I couldn't get near enough to him. Q. Why not? A. The crowd was all there." Again referring to this fight, Shields testified (p. 264, l. 3) on cross-examination: "Q. How many people were there on the back platform when the car left the junction? A. Oh, I suppose eight or nine. Q. What? A. Eight or nine probably." P. 267, l. 15) "Q. Did Hodler move toward the back platform, or was he pushed toward the back platform of the car? A. That I don't know, the whole crowd came back in a body, like, in a mass. Q. The whole crowd came back in a body, a mass like"; that (p. 268, l. 36) Hodler went past the witness to the rear and the witness was standing right at the rear door; that (p. 268, l. 22) there was a quarrel on the back platform.

WILLIAM BREEN, a passenger, testified (p. 287, l. 11) that there were some of the members of the famous Paul Kelly gang on the car; that the dance at Ell's Hall that they had all been attending broke up in a fight; that (p. 288) when he got on the car he saw Hodler. "Q. Did you see Hodler there? A. Yes, sir. Q. What, if anything, was he doing? A. Well, he got real nasty. *By Mr. Hood*—What? A. Got kind of nasty, mad. *By Mr. MacSherry*—Q. How? A. Arguing and moving people around, shoving them around. Q. Did you hear him say anything? A. Well, I heard him in an argument with his mouth, called some names. Q. Well, we want to know just what occurred on that car from you boys, just what Hodler said; we want to know, if you know. If you know, say so. A. Well, I heard him myself using the word 'son-of-a-bitch' on that car. Q. Did you hear

him say anything else? A. Well, he threatened to clean up a few. Q. What did he say? A. He said he could lick any son-of-a-bitch on the car"; that (p. 289, l. 34) there were people on the back platform when the car left the junction; and that the plaintiff was in the forward part of the car; that (p. 290) the witness was in the rear of the car; that (p. 292) the argument in which Hodler was involved continued after leaving the junction and that (l. 26) he saw Hodler going toward the rear of the car, at which time there were (l. 23) eight or nine people on the back platform; that (p. 296, l. 18) there was a quarrel on the back platform and that (p. 298, l. 10) there was a scuffle there; that it seems Hodler wanted a particular seat and was not willing to take one of the other seats that was empty (p. 303, l. 3); (p. 304, l. 39) plaintiff demanded the seat of the witness; that (p. 309) after the car left the junction (l. 15) he saw Hodler in the front part of the car; that (p. 313) after leaving the junction Hodler went to the rear platform and (p. 314) some passengers followed him. (P. 318, l. 17) "Q. When Hodler was nearing you, and one or two persons behind him, what, if anything, was said by any person or by the crowd? A. They said they were going to get him; that is all I know. Q. Who said that? A. These few that was after him, that followed him up."

MARGARET FEARON, a passenger on the car, testified (p. 323, l. 32) that she sat near the front of the car; that after the car left the junction (p. 324, l. 20) Hodler went toward the back of the car and there were a couple of others followed him, and there was a fight on the back platform (p. 324, l. 5).

In reference to a fight on the platform after leaving the junction, this witness testifies (p. 328, l. 24): "Q. Before you got to the junction? A. Well, there

was a fight on the car before we got to the junction and the fight with Mr. Hodler was after we left the junction. Q. Oh, you had two fights on the car? A. It was not exactly a fight the first time, the first was an argument." (P. 329, l. 8) "Q. Are you sure it was after you left the junction? A. Yes, sir. Q. Do you know what I mean by "the junction"? A. Yes, sir. Q. You know that as you came along from the dance hall that night the car stopped at a certain place for a few moments? A. Yes, sir. Q. And that there was a change of crew? A. Yes, sir. Q. And from that point on, you say, the fight occurred? A. Yes, sir." (P. 330, l. 10) This witness saw there was a fight on the back platform, saw Hodler going out, and (l. 20) that there were others in back of him.

JAMES J. CROWLEY testified (p. 364, l. 8) that when the car started from the junction there were people on the back platform; that (p. 363, l. 18) the witness sat right near the rear door of the car; (p. 364) and shortly after leaving the junction the plaintiff got up from seat and went to the back platform followed by three others: (L. 37) "Q. And what did you see, if anything, happen on that back platform? A. Well, there was a fight there on the back platform. Q. How could you tell there was a fight? A. (P. 365) Well, the people in front of me—I see fellows swinging. Q. How do you mean, 'swinging'? A. Swinging their arms. Q. Just show the jury. A. They were swinging, punching. Q. Just stand up and show us. A. (Standing and illustrating.) They were going over each other's—the fellows' shoulders, like that. Q. Was or was not Hodler there at that time? A. Yes, sir; he was there. Q. You saw him, did you? A. I didn't see him there; the crowd comes to me and blocks him off. And I heard after a little while, 'There he goes off the car.' Q. You heard that, did you? A. I

did hear that. *The Court.*—Just say exactly what you heard. *Witness.*—‘There he goes.’ Q. Do you know how he got off the car, of your own knowledge? A. I heard them say, ‘There he goes?’ Q. I want to know just what you saw. Did you see Mr. Hodler again after that? A. No, sir.” That (p. 367) sometime before the fight there was trouble but that this trouble had been settled prior to reaching the junction; that (p. 368, l. 30) witness testified about a quarrel on leaving the junction and (p. 369, l. 12) says that three men followed the plaintiff to the rear platform; that (p. 371, l. 10) there were four Italians on the back platform when the car left the junction; that (p. 372, l. 39) “Q. You could see through the glass, could you not? A. Not when the crowd was on there, taking off my view, no; the only time I seen was when I stood up to keep the crowd from falling on the young lady I was with. That is when I seen them shooting over each other’s shoulders at him. Q. How long did the fight on the platform last? A. It didn’t last no time, up to the time someone said, ‘There he goes.’”

THOMAS V. HOPKINS testified (p. 378, l. 19) that he got a seat in the front of the car. Hodler was sitting behind him; that (p. 379, l. 27) “Q. After you left the junction did you see Mr. Hodler? A. Yes, sir. Q. Where was he then? A. He was in his seat. Q. Now, tell us what happened then, if anything? A. Well, after we left the junction they started arguing again, and I see Mr. Hodler get up and three or four fellows following him towards the back.” (P. 380, l. 4) “Q. Now, as he went toward the rear, how many people, do you say, followed him? A. About three or four. Q. And what were they saying? A. Well, I think I heard them saying among themselves, ‘I will get him.’” (P. 380, l. 40) “Q. And what was he doing (p. 381) when you last saw him? A. Well, I

think these fellows were shoving him along, like, if I ain't mistaken."

JOHN H. POLDING, a passenger on the car, testified (p. 389) that he was sitting at the front of the car that (l. 28) after the car left the junction he saw the plaintiff. "Q. What became of him, do you know? A. Why, he walks out of his seat and goes to the back platform. * * * Q. Were there any people on the back platform when he went out? A. Yes, sir." (P. 390, l. 13) "Q. Could you see what was going on on the back platform then? A. The only thing I could see was them roughing and swinging at one another. Q. Well, that is all I want to know; I want to get from you people what you know, that is all. Just show us what you saw. A. Well, I could see people was swinging at one another. Q. What do you mean by 'Swinging'? A. Why, swinging their hands like that (illustrating). *By Mr. Hood.*—Q. Like what? A. Over their heads. *By Mr. MacSherry.*—Q. That is not swinging their hands; that is swinging their fists, is it not? (No response.) Q. Do you mean punching by 'Swinging'? A. Yes, sir." To the same effect see page 394.

Besides this evidence of all those who were present and saw the fight with Hodler on the car, we have the evidence of Joseph H. Moore, who, (p. 273) at the time Hodler was brought in St. Michael's Hospital in December, 1907, was recovering from an operation for appendicitis; that (p. 273, l. 28) witness and Hodler "were in the same room, in the same ward about twenty feet apart or less; about fifteen feet apart, I should say," and that in the presence of the plaintiff's mother (p. 273, l. 40) about the second week of January (p. 274) the witness testifies that Hodler told him that he had a fight on the car, after which he did not remember anything. His testimony on this point is as follows:

(P. 275, l. 26) "Q. Now you have stated the time and the people present. Now will you tell us what he said as to how he got hurt? A. On that day that he got hurt, he said, he made a trip to New York to get some books, and that he got those books, and that he was a singer by profession, and he wanted to go to Hackensack to get some money—to make some money; he said he went in to Hackensack, and coming home from Hackensack there was a fight; he said some men tried to get his money, but they didn't get it, and after the fight he didn't remember anything. Then he said, with a wave of his hands (illustrating), that everything seemed blurred after the fight (p. 283). This witness testifies again as to what Hodler told him in the hospital, (p. 283, l. 16). *By the Court*—Q. What do you mean by "reviving his memory?" A. I asked Mr. Hodler if he remembered that day, the day of the accident, and he said he went to New York to get some books; that he got those books, and came back to Newark; that he went to Hackensack then to make some money—he was a singer by profession—and coming back from Hackensack there was a fight; he said two men tried to get his money, and they didn't get it, and after the fight, he didn't remember anything then, with a wave of his hands (illustrating) that everything seemed blurred. *By Mr. Hood*—Q. What he said. You interpret his motion to me, but I want what he said? A. He said everything was blurred after the fight; he didn't remember anything at that time. Q. He said that two men tried to get his money? A. Yes."

At the time of the trial (p. 237) this witness was in the employ of the Public Service Railway Company as an inspector. In December, 1907, at the time of the accident to Hodler, the witness was a track foreman for the Hudson Tunnel Company, and (p. 279) he was evidently receiving some sick benefits from the Public Service Corporation.

In relation to this evidence of Moore, we would call

attention to the fact that although Moore said that Hodler's mother was present she makes no denial that this conversation took place, although she was present in court during the trial, and, in fact, was called as a witness on behalf of the plaintiff (p. 109, l. 30). Her name at the time of the trial was Carrie Dalbey; she evidently having remarried.

The plaintiff himself merely says he has no recollection of making such a statement to his mother in the presence of Moore (p. 67, l. 5) but at no time does he testify denying that he made such a statement to Moore.

RUDOLPH E. BOEDICKER, testified (p. 169) that he was an investigator in the service of the defendant and that he interviewed the plaintiff in February, 1908; that he wrote out what the plaintiff told him in relation to the accident, and these papers were marked respectively (p. 68) D-4 and D-5, and both were introduced in evidence (pp. 171-172). The papers are not printed as exhibits in the book, but the contents of them are set forth on pages 71 and 72, when the plaintiff reads them in open court. By a perusal of these exhibits it will be seen that the plaintiff at that time pretended not to know how the accident happened; he refers to his return trip from Hackensack as follows: "On the way back on the car I sat in the smoking compartment and got into conversation with Mr. Kavanaugh. I have learned this man's name since my arrival home. This is all I can recollect definitely. After drifting into conversation with this man Kavanaugh my mind is a blank just now as to what occurred after that owing to the condition of my brain due to the accident."

It is curious to note that in February, 1908, his mind is a blank as to the fight when he told Moore in the hospital the month previous that he had been in a fight after which he could remember nothing.

While he attempts to attribute to some injury to the brain his loss of memory at the time he made his statement to Mr. Boedicker, he not only does not call his mother to deny the conversation in the hospital with Moore, but he calls no physician from the hospital or anywhere to show his mental condition either at the time of the conversation with Moore or at the time of giving the statement to Boedicker. The fact that he distinctly remembers (p. 66) Moore as being in the hospital negatives any suggestion of such a mental condition as would make his statement to Moore unreliable.

Referring to this statement as regards his drinking, the statement reads: "Met Mr. Mackey and Mr. Brooks there in addition to one or two others whose names I do not know. We went to Ryan's Cafe and remained there until about 10 or 10.30, when I left to take car back to Newark. * * * My friends were insisting upon me taking some kind of liquor, and when I tried to refuse they would jolly me about it. They fooled me about not drinking, and finally I consented to try one. They called it a ginger ale highball." According to this statement the plaintiff no doubt attempted to convey the impression that he did not ordinarily take intoxicating liquor and that he was ignorant of the drinks he had and altogether he was an innocent unsophisticated young man. Judging, however, from the fact that as soon as he arrived at Hackensack he went with Kavanaugh to Ryan's Cafe where Kavanaugh said he stayed only five minutes, during which time Hodler had a ginger ale highball, it would seem as though he was not quite so innocent as he attempted to make the defendant believe in February, 1908.

The plaintiff admits (p. 68, l. 30) that on the back of the papers D-4 and D-5 he signed a statement to the effect that the statement on the face of the papers was the truth so far as he could recollect the facts. He further testifies in relation to these papers (p. 70) "Q. Did you read them over yourself before you placed

your name on the back of them? A. I believe I did.
 Q. Did he write these papers D-4 and D-5 for identification, in your presence? A. Yes, they were written in my presence. Q. Do you remember testifying as follows at the last trial: 'Q. In order that there can be no question about it, I am going to ask you to read the papers again. Will you please read these two sheets marked "D-2 for identification" and "D-2a for identification", and state if these papers are in the same condition today as they were when you wrote your name on the back of them? I mean, has there been any change or alteration in them since you put your name on the back of them? A. (After examining paper.) As I recall the circumstances, there are some slight alterations. Q. Point out wherein the papers have been changed, if you say they are changed. A. I don't say they have been changed; I am impressed that way.' Did you so testify? A. I do recall it, yes, Mr. MacSherry, very clearly."

The metamorphosis of the plaintiff's claim showing the various stages of its transformation from December 28, 1907, the date of the accident, to the commencement of this action, may be stated as follows:

1. Injured during a fight: (statement made in hospital January, 1908.)
2. Don't know how injury received: (statement made to defendant February, 1908.)
3. Injured by being thrown from car by reason of its rounding curve at excessive speed: (statement in declaration of law suit commenced December, 1909, about two years after receiving injury.)

Plaintiff's testimony as to being thrown off at curve should be rejected as incredible.

Another important matter for consideration as showing that the plaintiff was not thrown from the car by its action in going round a curve is the undisputed fact that he was picked up at a point some little distance

south or beyond the end of the curve. By reference to the map which was introduced in evidence (p. 123) marked Exhibit D-7 (p. 130) it will be seen that the beginning or northerly end of the curve (it will be remembered the car was running in a southerly direction) is indicated on the map by the point marked "B". The southerly end is similarly indicated by a point marked "E", (p. 126, l. 130) and the center of the curve is indicated by the letter "C" (p. 127, l. 40).

The engineer describes the curve (p. 125, l. 31) as a very easy curve with a radius of 400 feet, and that the curve is 67 feet long (p. 125, l. 25).

Hodler testified (p. 13, l. 40) that "as the car passed into the curve I experienced a severe jolt. (P. 14) I experienced a second very shortly after, very greatly intensified. The second jolt I refer to was so great that it took my feet from under me and threw me from the rear platform." By this testimony we understand his claim is that as the car entered the curve there was a jolt, and as it left the curve (p. 64) the second jolt occurred. The car upon the rear platform of which the plaintiff was riding was 46 feet long (p. 405) so that if the plaintiff was thrown as the car left the southerly end of the curve he must have been standing on the car after losing his balance (p. 14, l. 23) a distance of 67 feet, the length of the curve, plus about 46 feet, the length of the car, or 113 feet from the time he felt the first jolt when the front trucks of the car entered the curve, until the time he claims to have been thrown when the car was leaving the curve. Notwithstanding the car was running from 35 to 40 miles an hour (p. 58, l. 20) and swaying to a greater degree than it did on the straight track (p. 58, l. 3).

Now, as a matter of fact, the plaintiff was found shortly after the accident at a point at least 100 feet south of the southerly end of the curve. There is not the slightest evidence that his position had been changed from the place where he fell from the car.

Plaintiff's witness Kavanaugh is the one who places

the point where the plaintiff lay after the accident nearest to the curve. Kavanaugh (p. 86) lived in the second house north of Stuyvesant Avenue on the westerly side (p. 85) of Kearny Avenue. This house is indicated on the map by the number "763". This was the number of the house on the avenue (p. 76, l. 33). Kavanaugh is very indefinite as to distance. He says (p. 78, l. 17) that the curve is, "roughly, maybe 150—100 feet north of my house." See also page 86. He testified further that the plaintiff lay (p. 80, l. 28) within a very few feet of the car track, and (p. 81, l. 13) about "50 feet, or maybe 75 feet, the width of that property—well, between 50 and 75 feet north of my house on Kearny Avenue." Again, Kavanaugh testified (p. 87) "Q. Well you saw Mr. Hodler's body picked up about a hundred feet from the curve? A. No, his body was not as far as that; his body was about 50 or 75—well, say 25 or 30 feet south of the actual curve in the track." (P. 87, l. 20) "Q. It was picked up opposite the house next door, was it not? A. Just about. Q. And that is how far, do you say, from the curve? A. Why, *I think* it was about 25 or 30 feet south of the curve, that would be." And again he testifies as to distance between his house and the curve page 88, line 32, "Q. And that is how far away from your house? A. Why, it is the same curve. I would say about 75 feet, may be 100 feet, something like that—75. Q. It may be 150? A. It may be, but *I don't think* it is." Now, it was a dark hazy or foggy night (p. 97) and it would naturally be very difficult for a man to estimate the distance, and Kavanaugh's evidence that the plaintiff was picked up about opposite the house next his would be more reliable than his estimate of his house from the curve, and where Hodler lay from the curve. By referring to the map, which is drawn on a scale of ten feet to the inch, it will be seen that the distance from the point "E" to a point about opposite to the house next north of Kavanaugh's it is 110 feet, so that as, according to Kavanaugh's

testimony, the plaintiff was picked up about opposite the house next his, that point must be 110 feet south of the southerly end of the curve. Again, Kavanaugh says that plaintiff was lying between 50 and 75 feet north of his house. Now, by actual measurement, the distance from Kavanaugh's house to the southerly end of the curve is 165 feet, so that according to this testimony of Kavanaugh's Hodler lay about 100 feet south of the curve.

Police Officer Vreeland testified (p. 94) that he found the plaintiff lying in the street about 12.40 a. m.; that (p. 95) he lay about two feet from the rail; that (l. 31) his clothes were not torn, that he lay (p. 97, l. 38) about 15 feet from a point opposite the center of Kavanaugh's house; that (p. 98, l. 20) there was nothing to indicate that he had rolled or moved from where he had fallen; that, (p. 99, l. 30) the track was straight for a distance of 125 feet. According to the evidence of this witness for the plaintiff the plaintiff lay at least 150 feet south of the curve.

Police Officer Sheppard testified (p. 103, l. 30) that the plaintiff lay about opposite Kavanaugh's house; that (p. 104) his clothing was not torn or soiled; that (p. 106, l. 31) the plaintiff lay about two feet from the track. According to this witness called by the plaintiff the plaintiff lay at least 150-feet south of the curve.

WILLIAM F. WEINCAMP, on behalf of the defendant, testified (p. 160) that at the time of the accident he was a motorman in the employ of the defendant and that he picked up the plaintiff and that the plaintiff lay (p. 160, l. 35) about 125 or 150 feet south of the curve on Kearny avenue, and (p. 161) two or three feet from the rail.

William H. Carroll, in behalf of the defendant, testified (p. 177) that he was not in the employ of the defendant at the time of trial, but (p. 188) that he was

employed by it at the time of the accident; that he was the conductor who picked up the plaintiff; that (p. 179, l. 18) plaintiff lay two or three feet from the track, and (p. 185, l. 14) 25 to 30 feet from the corner of Kavanaugh's house, and as we said before, the corner of Kavanaugh's house is shown to be 165 feet south of the southerly end of the curve.

While, no doubt, the plaintiff lay at least 140 or 150 feet south of the curve, we submit that there is no dispute but that he lay about 100 feet south of the curve. This being so, we contend that it is one of those kind of facts which show that the plaintiff's story of being thrown off by the action of the car as it rounded the curve cannot be so. This conclusion is only confirmed and made stronger by the fact that other than a fracture of the skull sustained by the plaintiff there is no evidence of a single scratch, cut or bruise on the plaintiff's body. He says (p. 14, l. 10) that as he was being thrown from the car he struck the car with some part of his legs below the knees, which he is evidently referring to (p. 25, l. 23) when he speaks of bruises below the knees, but these bruises, if they were there, are accounted for by striking the car as he went off it, and we submit that it is incredible for him to have been thrown off that car on any part of the curve and finally landed where he did without showing some bruises or cuts or injury of some kind as a result of such a long throw or dragging or rolling along the ground.

I believe Hodler says somewhere in the testimony about the knees of his trousers being cut, which is a new statement for him, and, by the way, he does not produce the trousers and never even attempted to do so. Plaintiff's own witnesses, Police Officers Vreeland and Sheppard, say plaintiff's clothes were not torn (pp. 95 and 104).

That the plaintiff lay only two or three feet from the car track is more consistent with his being knocked from the car in a fight, when the car was on the straight track, than it is with his claim that he was thrown from

the car by centrifugal force when it was traveling around a curve at 35 to 40 miles an hour.

Again, the curve is a very easy one with a radius of 400 feet (p. 125, l. 30) and is symmetrical (p. 127, l. 25) or uniform. A curve with a radius of 400 feet is part of a circle of the diameter of 800 feet or a circumference of 2,512 feet, or nearly half a mile. There does not appear to be anything peculiar about this curve which would cause the plaintiff to be thrown so violently from the car as it either entered or left it.

Under the evidence and the facts established thereby in this case, we submit that the direction of a verdict in favor of the defendant was the only proper course open to the trial judge. It must be remembered that this case having been referred to the Circuit by the Supreme Court, and a verdict returned in favor of the plaintiff, such verdict was set aside after full argument and mature deliberation of three judges of the Supreme Court.

We do not claim that it was the duty of the trial court to direct the verdict hereby because the evidence was the same upon which the Supreme Court based its opinion setting aside the first verdict, but because on the evidence the plaintiff was not entitled to recover, irrespective of the opinion of the Supreme Court.

In the case of *Hartman vs. Alder*, Excr., 35 N. J. L., 518, decided by this court in 1870, there was a verdict directed for plaintiff in an action to revive a judgment, the defendant having pleaded payment, of which there was evidence. In setting aside the verdict the court in referring to the question as to whether or not the facts should have been submitted to the jury, says: "If they had been submitted and a verdict rendered for the defendant could that verdict have been set aside as being unsupported by the evidence or as *against the weight of evidence*? The answer to this question furnishes the true text of the correctness of the ruling in the court below."

The case of *Baldwin vs. Shannon*, 43 N. J. L., 596, decided by the Supreme Court in 1881, was an action of ejection in which a verdict was directed in favor of the plaintiff. The court says (p. 602) "The power of a court to order a nonsuit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry the case to the jury is completely exploded in the English Courts." The court then quotes with approval from Lord Chelmsford's opinion in the case of *Giblin vs. McMullin*, as follows: "The course of recent decisions, however, * * * * has established a more reasonable rule, viz., that in every case before the evidence is left to the jury there is a preliminary question for the judge, not literally, whether there is no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it *upon whom the onus of proof is imposed.*"

In the case of *D., L. & W. R. R. Co. vs. Shelton*, 55 N. J. L., 342, decided by this court in 1893, the court uses the following language in refusing to set aside a verdict for the plaintiff: "It has been held in this court to be error for a judge to direct a verdict where the evidence is such that a contrary verdict would not be set aside on the ground that there was not enough evidence to sustain it or that it was *clearly against the weight of the evidence.*"

In the case of *Brunjes vs. Metropolitan Life Insurance Co.*, 84 Atl., 1062, decided by our Supreme Court in 1912, there was a verdict for the plaintiff on a life insurance policy and a rule to enter judgment for defendant non obstante was made absolute. The reason the verdict was entered for the defendant was because, that according to the warranty in the insurance policy, the plaintiff had been treated during the two years previous to making such warranty only for grippe, by a certain physician, which physician was called by the insurance company, who testified that during that

period he had treated the plaintiff for tuberculosis of the lungs. There was no denial of this testimony of the physician, or attempt to impeach him. On this case, however, it would appear as though at another trial the plaintiff might have produced evidence in denial of the doctor's statement, and also have been able to impeach the doctor, notwithstanding which a verdict was entered for the defendant.

If this procedure is proper, we submit that our present case is one in which it was also proper to direct a verdict. We are well aware that our courts have said that a trial court should direct a verdict only in cases where any number of verdicts contrary to the one so directed would be set aside, but we respectfully submit that this rule has been a source of prolific perjury, for it is a well-known fact that were plaintiffs obtain verdicts which are merely set aside, the evidence of some of the witnesses produced at the first trial is so molded at a subsequent trial as to conform to the opinion of the court setting aside the first verdict, and often false witnesses are produced, and to direct a verdict in favor of the party entitled thereto is the only proper course to pursue to prevent such frauds upon our courts of justice and to avoid placing a premium on perjury.

Respectfully submitted,

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