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New Jersey
Court of Errors and Appeals

JOEL DICKINSON,
Plaintiff,
vs.
ERIE RAILROAD COMPANY,
Defendant.

Notice of Appeal

To Mess. Cortlandt & Wayne Parker, Attorneys of Defendant:

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The court erred in its decision directing the jury to find a verdict in favor of the defendant and against the plaintiff.

2. The judgment entered upon said verdict is contrary to law and the evidence because the defendant was guilty of negligence which resulted in the injury to the plaintiff, and the plaintiff was not guilty of contributory negligence.

3. The trial directed a verdict in favor of the defendant and against the plaintiff, and therein erred contrary to the law of the land and to the injury of the plaintiff.

Dated, June 27th, 1913.

HERBERT CLARK GILSON,
Attorney of Plaintiff.

Judgment Record

IN THE SUPREME COURT OF NEW JERSEY

JOEL DICKINSON,
Plaintiff,

vs.

ERIE RAILROAD COMPANY,
Defendant.

The Erie Railroad Company, the defendant in this cause, was summoned to answer unto Joel Dickinson, the plaintiff therein, in an action in tort upon the following amended declaration:

Judgment Record

Amended Declaration

NEW JERSEY SUPREME COURT

Of the tenth day of November, nineteen hundred and nine.

JOEL DICKINSON, Plaintiff, vs. ERIE RAILROAD COMPANY, Defendant.	In Tort. Amended Declaration.

Essex County, ss:

The Erie Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, the defendant in this suit, was summoned to answer unto Joel Dickinson, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by Herbert Clark Gilson, his attorney, complains:

For that whereas, heretofore, to wit, on the thirty-first day of July, nineteen hundred and nine, at Howells, in the County of Orange and State of New York, the said defendant was in possession, management and control of a certain railroad, which was then and there maintained and operated by the said defendant, in such manner and location as that the same then and there crossed a certain public road or highway, at grade and upon the same level with the said public road or highway, at and near the station of the said defendant, at Howells aforesaid, and so that persons approaching said railroad on said public

road or highway, in automobiles and other vehicles, were prevented by a certain bank of earth of great height, and by certain trees and bushes, and by a freight shed or station then and there at and near the said railroad, from seeing any locomotives which might be approaching said crossing on said railroad from an easterly direction, soon enough to avoid being struck thereby; and the said defendant then and there ran and operated certain locomotives by steam power with great rapidity on the said railroad and across the said public road and highway from the said direction in which the view from said public road and highway of such approaching locomotives was then and there obstructed as aforesaid.

And it then and there became and was the duty of the said defendant to use reasonable care in the maintenance, management and operation of its said railroad and its said property at and near the said public road and highway and the crossing aforesaid and to properly guard the said highway and crossing, and to give a warning or notice of the approach of its said locomotives, so that persons crossing said railroad would not be injured by the said locomotives.

Yet the said defendant disregarded its duty in that behalf, to wit, at the time and place aforesaid, and so negligently, carelessly and insufficiently maintained, managed and operated its said railroad, and guarded the said public road or highway crossing, and ran and operated its said locomotives over its said railroad and across said public road or highway without signals or warnings, that by reason of such neglect, careless and improper conduct of the said defendant, the said plaintiff while lawfully driving and passing

along the said public road or highway in a certain automobile or motor vehicle, then and there owned and operated by the said plaintiff, and while then and there attempting to cross the said railroad, without any negligence on his part, and while then and there unable to see by reason of the said obstructions, a certain locomotive operated and controlled by the said defendant approaching said crossing from an easterly direction with great rapidity and velocity, and not knowing of the approach of the same for want of warning and notification thereof, the said automobile or motor vehicle was then and there struck by said locomotive, and thereby not only the said automobile and property of the said plaintiff therein, of great value, to wit, of the value of one thousand dollars, were broken and wholly destroyed, but also the said plaintiff was thereby compelled to, and did jump out of the said automobile, in order to save his life, and he was thereby thrown and precipitated with great force and violence to the ground and railroad ties and rails, and was by means of the premises greatly bruised, wounded and hurt in and about his limbs and body; and thereby he suffered and underwent and still does suffer and undergo great pain, and was for a long space of time, to wit, from thence hitherto, hindered and prevented from attending to his business and affairs as he otherwise might and would have done; and also the said plaintiff was, in consequence thereof, compelled to and did, pay, lay out and expend divers large sums of money in and about endeavoring to be healed and cured of his said injuries, to wit, at the City of Newark, in the County of Essex and State of New Jersey.

Wherefore, the plaintiff says that he is injured and has sustained damage to the amount of ten thousand dollars; and, therefore, he brings his suit, etc.

HERBERT CLARK GILSON,
Attorney of Plaintiff.

The defendant answered as follows:

Plea

NEW JERSEY SUPREME COURT

JOEL DICKINSON,
Plaintiff,

vs.

ERIE RAILROAD COMPANY,
Defendant.

In Tort.

Plea.

And the said defendant, Erie Railroad Company by Cortlandt & Wayne Parker, its attorneys, comes and defends the wrong and injury when &c., and says that it is not guilty of the grievances in the plaintiff's declaration above laid to its charge, or of any or either or any part thereof, in manner and form as the said plaintiffs have above complained against it and of this it puts itself upon the country.

CORTLANDT & WAYNE PARKER,
Attorneys for Defendant.

Judgment Record

This action was tried before Judge Frederic Adams, with a jury, in the presence of counsel of the respective parties, at the Essex Circuit, on April 7th, 8th and 9th, 1913.

And the parties having submitted their evidence, and the court, being of the opinion that such evidence did not establish a cause of action against the defendant, ordered and directed that the jury bring in a verdict in favor of the defendant and against the plaintiff, and the said jury upon their oath say that the defendant is not guilty in manner and form whereof the plaintiff hath complained against it, the said defendant.

Entry of Judgment

Whereupon it is adjudged that the complaint of the plaintiff, Joel Dickinson, be dismissed and that the defendant, Erie Railroad Company, recover of the plaintiff its costs, which are taxed at $.

Judgment entered June 3rd, 1913.

Testimony

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Monday, April 7, 1913.

JOEL DICKINSON,
vs.
ERIE RAILROAD COMPANY
} In Tort.

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

For plaintiff appears Herbert Clark Gilson.
For defendant appear Cortlandt & Wayne Parker, by Cortlandt Parker and Fred G. Stickel, Jr.

It is stipulated between counsel that the plaintiff, Joel Dickinson, shall be called as a witness; that no other witness as to the circumstances of the accident shall be called on either side, but that the printed testimony at the former trial shall be read, and that the expert witnesses who testified as to the personal injuries of the plaintiff on the former trial shall be examined *de novo* on both sides orally, and that the defendant may call and examine expert witnesses as to the personal injuries of the plaintiff.

Mr. Gilson opens for plaintiff.

By consent of counsel, a map and blueprint produced by defendant are placed upon the wall.

It is admitted that the defendant operated the train in question.

Harry G. Healy—Direct

The testimony of Harry G. Healy given at the former trial, is read, plaintiff's counsel reading the direct-examination and defendant's counsel reading the cross-examination.

HARRY G. HEALY, sworn in behalf of plaintiff:

Photographs identified by witness at the former trial are offered in evidence and marked respectively, Exhibit P-2, Exhibit P-3, Exhibit P-4, Exhibit P-5, Exhibit P-6 and Exhibit P-7.

Paper produced by witness at former trial, and called sketch map, marked P-8 for identification.

Direct-examination by Mr. Gilson:

Q. Mr. Healy, what is your business? A. Photographer.

Q. How long have you been in that business? A. Six years.

Q. What is your address now? A. 12 Spruce Street, New York.

Q. On March 30, 1910, did you take some photographs and measurements at the Howells station of the Erie Railroad Company? A. I did.

Q. And have you your memoranda with you which you made at that time? A. I have the notes here, the original notes.

Mr. Gilson: First I offer in evidence the photograph of the machine, which was not taken by this witness, but by one of your witnesses.

Marked P-1 for identification.

Q. I show you a photograph, and ask you if you recognize that, and if so, where you saw it before (shown to witness)? A. That is one of the photographs I made on March 30, 1910.

Q. Where was that photograph taken, at what place? A. That was taken from the center of the highway, 103 feet from the south rail of the nearest track, or the east-bound track.

The Court: Please tell me again which way the road ran and which way the railroad ran.

Q. Which way did the highway run at that point, at Howells? A. The highway runs approximately north and south.

Q. And the railroad? A. The railroad east and west.

Q. Now, this photograph, as I understand it, was taken at a point 103 feet south of the first, or east-bound track? A. Yes.

Q. And your camera was about how high from the ground? A. The camera was about 5 feet from the ground.

Mr. Gilson: I offer that photograph in evidence.

Marked Exhibit P-2.

By Mr. Parker: Q. Looking which way? A. Looking north.

By Mr. Gilson: Q. Now, I show you another photograph, and ask you whether you took that, and if so, from what point (shown to witness)? A. This was made from the same viewpoint; in other words, 103 feet from the nearest rail of the east-bound track, looking in a direction about northeast.

By Mr. Parker: Q. You were looking towards the railroad? A. Towards the railroad.

Mr. Gilson: I offer that in evidence.

Marked Exhibit P-3.

By Mr. Gilson: Q. I show you another photograph, and ask you whether you took that, and if so, from what point (shown to witness)? A. This

photograph was made at a distance of 50 feet from the nearest rail of the east-bound track, looking in a direction northeast toward the railroad.

Mr. Gilson: I offer that in evidence.

Marked Exhibit P-4.

Q. I show you another photograph, and ask you if you took that, and if so, from what point (shown to witness)? A. This photograph was made at a distance of 14 1/2 feet from the nearest rail of the east-bound track, looking in a direction east, which direction is almost parallel to the railway.

Mr. Gilson: I offer that in evidence.

Marked Exhibit P-5.

Q. I show you another photograph, and ask you if you took that, and if so, from what point (shown to witness)? A. This photograph was made looking up the hill, or in a direction looking south, showing the three tracks of the railway at the highway crossing.

Q. From the north side of the tracks? A. From the north side of the track looking south.

Mr. Gilson: I offer that one.

Marked Exhibit P-6.

By the Court: Q. Can you tell us how near to the track? A. There was no dimensions taken at the time. It was probably about 10 feet from the siding, there being three tracks at that point.

Q. Ten feet from what? A. Ten feet from a siding. There are three tracks at that point.

Q. The siding is on the north side? A. The siding on the north side of the railroad.

Q. The siding is the one of the three tracks nearest to the camera? A. No, sir; furthest away.

Mr. Gilson: No, from that point nearest.

Witness: From the photograph just mentioned, yes.

Q. I mean from the place where the camera stood? A. Yes, sir.

Q. The camera was standing on the north? A. Yes.

Q. And then there came the siding? A. And then there came the siding.

Q. And then the two other tracks? A. Yes, sir.

By Mr. Gilson: Q. In other words, this photograph was taken from the opposite side of the tracks from all the other photographs spoken of up to this time? A. Yes, sir.

The Court: That looks up the hill in the direction from which the vehicle came?

Mr. Gilson: Yes.

Q. Now, I show you one more photograph, and ask you if you took that, and if so, from what point (shown to witness)? A. This photograph was made at a distance of 50 feet from the nearest rail from the automobile, looking in a direction northwest, toward the railway.

The Court: I do not quite understand that expression. Tell us again where that was taken from.

Mr. Parker: That is looking in the opposite direction from which the train came.

By the Court: Q. 50 feet from what? A. 50 feet from the south rail of the east-bound track.

By Mr. Gilson: Q. Looking west? A. Looking northwest.

Q. Showing the view in the opposite direction from the other photographs? A. Yes, sir.

The Court: This is at a point in the highway 50 feet south of the east-bound rail?

Mr. Gilson: Looking northwest.

Q. You had another from the same point in which you were looking northeast? A. Yes, sir.

Mr. Gilson: I offer that photograph.

Marked Exhibit P-7.

Q. Now, referring back to Exhibit P-5, which you said was taken from a point 14 1/2 feet from the first rail of the east-bound track, can you tell us from what point that was taken with respect to the shed shown there in the photograph? What part of the shed were you opposite when that photograph was taken (shown to witness)? A. I was on the center line of the shed shown in the photograph.

Q. And from that point, how far to the west could you see from the corner of that shed at that point? A. From that point looking toward the west there could be obtained an unobstructed view of the track.

Q. I made a mistake; I mean to the east, looking toward the east. A. Looking toward the east you could gain an unobstructed view of the track at a distance of 195 feet.

By the Court: Q. You mean that up to that point you had a view of the track, but was interrupted? A. It was interrupted by the shed.

Q. And after that it was continuous? A. After that it was continuous.

Q. How many feet? A. 195 feet.

(Photographs shown to witness.)

Q. For how long a distance was it unobstructed? A. With the camera standing at this point, 14 1/2 feet from the rail.

Q. No. For how long a distance was the view unobstructed? A. Well, from zero, 195 feet. After that it was obstructed.

Q. Perhaps I got your statement reversed. Let me see if I understand what you mean by that. I understood you before to mean that your unobstructed view to the east began at a point 195 feet. A. No, sir.

Q. That is not what you mean? A. It terminated at that point.

Q. To a point 195 feet? A. To a point.

The Court: I had it "from."

By Mr. Gilson: Q. Was there any point before you reached that point, which was 14 1/2 feet from the nearest rail of the east-bound track, where you could get a view to the east as you approached the railroad going in a northerly direction? A. You could get a partial view, not a clear, unobstructed view of the track.

Q. Where was that point that you could get a partial view? A. From a point 103 feet from the south rail of the east-bound track could be obtained quite a clear view of the railroad.

Q. How much of the railroad could you see from that point? A. You could see that portion of the railroad contained between the freight shed and a bank which was on the right side of the automobile as it approached the railroad.

Q. What was that distance between the freight shed and the bank? A. The distance between the freight shed and the bank, or the foot of the slope, was 7 1/2 feet.

Q. For how much of a distance at that point of 103 feet from the track could you see through that space? A. You mean on a straight line from the camera to the track?

Q. Just as you were going along, a person walking along or driving along that road, how long would it be possible for him to see through that space between the shed and the bank? A. I should say that the view would gradually become obstructed, a person in a carriage or automobile would soon lose—

Mr. Parker: Do not say what you should say.

Witness: The view would gradually become obstructed.

By the Court: Q. By the movement of the driver? A. By the movement of the driver.

By Mr. Gilson: Q. That bank of earth that you spoke of, did you measure the height of that? A. The bank is 16 feet high.

Q. And how far does that continue along the side of the road, from what point and to what point? A. The railroad or the highway?

Q. The highway. A. The point where the bank is 16 feet high is about opposite the freight shed.

Q. Does that bank extend along and parallel with the highway? A. It gradually turns and runs parallel with the highway.

Q. How far does that bank extend along and parallel with the highway, approximately? A. Well, I should say that the point where the camera was standing—that is, 103 feet from the railroad—the bank is about 10 feet high, gradually diminishing in height.

Q. How far along the side of the highway did it extend—not how high, but how far—100 feet or 200 feet or—

Mr. Parker: Do not lead the witness.

By the Court: Q. As you go toward the railroad track the bank is on your right hand? A. Yes, sir.

Q. Going down the hill. And you say that at the 103 feet point it is about 10 feet high, if I understood you correctly; is that right? A. Yes. sir.

Q. Now, as you go on does the bank continue? A. There is a small road branching off of the main road at the point where the camera was, or near that point—

Q. That is, the 103 feet point? A. Yes, sir—a road which turns off to right and goes on the far side of this freight shed from the railway.

Q. That is, from the 103 feet point? A. That is, from the 103 feet point is this small road branching off.

Q. Then where is the bank? A. The bank is south of this branch road.

Q. South of the 103 feet point? A. No, south of this road which runs alongside of the freight shed this road apparently being to haul freight up to the freight shed and unload it.

Q. How far does it extend south of that road—how far does the bank extend south of that road? A. Well, we took no measurements in regard to that, because there is a gradual hill approaching the railroad, and the bank extended away behind the camera, a distance which I didn't measure at all.

Q. And when you come to the road does the bank swing off parallel with the road and continue? A. The bank follows on a curve this road which leads up to the freight shed.

Q. It follows that road? A. Follows the road approximately.

Q. This is the question we started with. You can not say for how great a distance the bank continues along the side of the highway? (No response.)

Mr. Gilson: I think I can get it from the witness in another way.

By Mr. Gilson: Q. That is a gradual hill as you approach the railroad going in a northerly direction? A. Yes, sir.

Q. About how far from the railroad is the top of that hill, approximately? A. I should say the top of that hill was about 400 feet from the railroad.

Q. Now, where does that bank start on that hill, or with respect to that hill? A. The bank, I should say, would start about 400 feet from the railroad.

Q. Just about the top of the hill? A. Just about the top of the hill.

Q. So that the road is cut down through an embankment? A. The road is cut down through an embankment.

Q. Now, the point that you say you took some of those photographs from, 103 feet from the first rail of the east-bound track, is not opposite that highway that you say leads off to the freight shed is it? Isn't that point 50 feet, where you took the photographs, at a point 50 feet from the road? A. A point 50 feet would be nearer the place where the road branches off.

Q. So that from the point 103 feet the bank extended along the highway? A. Leaving a partial open space between that bank and the freight shed.

Q. Well, not until you pass some distance from the point where you say you took the photographs from, at 50 feet; the bank extended beyond that, did it not?

Objected to as leading.

The Court: The questions are quite leading.

(Question withdrawn.)

Q. I show you a paper drawing with some notes on, and ask you if you recognize that (shown to witness)? A. I do, yes.

Q. Who made it? A. I made it myself.

Q. From what did you make it? A. I made it from the original notes which we made at the time of the making of the photographs, March 30, 1910.

Q. And those are the original notes that you have in your hand now? A. These are the original notes.

Q. Now, referring to that sketch made from the original notes, can you tell me how far that bank extended down toward the railroad alongside of

the highway? A. About 40 feet from the railway.

By the Court: Q. Let me see. You are asked how far it extended toward the railroad. You say about 40 feet from the railroad. Do you mean a point about 40 feet from the railroad? A. The bank at its highest point is about 40 feet from the railroad, almost parallel with the railroad.

By Mr. Gilson: Q. No, Mr. Healy, I meant how far is the end of the bank from the first rail of the east-bound track? A. Meaning the foot of the slope?

Q. Yes, the foot of the slope? A. 26 1/4 feet.

Q. Now, in that space of 26 1/4 feet what is there, if anything? A. The freight shed is included in the space of 26 1/4 feet.

Q. And also that road that you spoke of, that leads off from the main highway to that freight shed, does it not? A. Yes, sir.

Q. Now, how wide is that freight shed? A. 9 1/2 feet.

Q. And how long is it? A. 36 1/2 feet.

Q. And how high? A. It is 14 feet high from the ground to the peak of the shed.

Q. And how far from the first rail of the east-bound track is it? A. 9 1/4 feet.

By the Court: Q. That is, the nearest part of the shed is— A. The shed is parallel to the track at a distance of 9 1/4 feet.

CROSS-EXAMINATION by Mr. Parker:

Q. You have there a memorandum and a map which you have been using. When was that made? A. March 30, 1910.

Q. And this was made from little notes that you had made? A. Yes, sir.

Q. Now, in Exhibit P-5—I believe you say that that was taken from 14 1/2 feet from the first rail? A. Yes, sir.

Q. In the middle of the road? A. Yes, sir.

Q. And you say it shows a clear view of 195 feet? A. Yes.

Q. By "a clear view" you mean a view of the track past the post of the—passing the post of the freight-shed on the left? A. Do you refer to this as the left (indicating on photograph)?

Q. Yes. A. Yes.

Q. So that a person standing there, 14 1/2 feet, could see 195 feet down the track from the center of the road, without considering the freight shed at all? A. Referring to the west-bound track?

Q. Yes, referring to the west-bound track. A. Yes, sir.

Q. Did you send somebody down there to measure the point that you could see? A. We did.

Q. And did you measure how far you could see through the posts of the freight shed, did you? A. No, sir.

Q. You could see a considerable distance through the posts of the freight shed, could you not? A. Not of the track, because the floor of the freight shed obscures the track.

Q. You could not see the track, but you could see a locomotive on the track easily enough? A. Any object above the track could be seen between the posts of the freight shed.

Q. And that view through the posts of the freight shed was 700 or 800 feet or more, was it not? A. Not more.

Q. Now, why did you select a point 14 1/2 feet from the railroad? A. I received instructions to that effect.

Q. You were told to take a place just 14 1/2 feet from the railroad? A. Yes.

Q. Was any reason given for that instruction? A. No, sir.

Q. Did the counsel or anybody tell you that by giving it 14 1/2 feet just exactly you would get the telegraph pole in the line of vision? A. No, he said to take the camera here; "Set your camera up here and make a picture looking in this direction, toward the freight-shed." We measured the distance there and found it was 14 1/2 feet.

Q. Was this direction made to you verbally on the spot? A. Yes, sir.

Q. And you were told to set the camera in such a place that when you took the view the telegraph pole was directly in your line? A. Yes, sir.

Q. If you had gone back a little further, could you not have seen a little more through the freight shed, say at 25 or 30 feet? A. Yes, because there was a little more elevation in the road.

Q. There was more elevation in the road and the posts of the freight shed further apart? A. The obstruction of the posts was less.

Q. Now, I want to get at the facts of this crossing, as you remember them. Going in the direction that Mr. Dickinson was going at the time of this accident—that is, north—if I understand you, you start going down a hill before you approach the track, do you not? A. Yes, sir.

Q. And the top of that hill is more than a hundred feet from the track? A. Very much more than a hundred feet.

Q. And then you go down the hill, and as you do so, at about 20 feet from the track the road becomes level with the track, does it not? A. I woudn't say that it was exactly level, but possibly—

Q. About practically level? A. About practically level, yes.

Q. Now, you are talking about the bank. This road, as it comes down the hill, at some parts has a bank on the right-hand side, has it not? A. Yes, sir.

Q. When you get 103 feet, as shown on Exhibit P-3, that bank is no longer close to the road, is it? I ask you, is the bank close to the road at that point?

The Court: At the 103 feet point?

Mr. Parker: Yes. Not the railroad, but close to the road.

A. Yes, it is.

Q. How close? A. Probably 12 feet.

Q. Twelve feet from the road there? A. Yes.

The Court: You mean just what by "the road?"

Mr. Parker: The highway.

The Court: I know, but what do you mean by "the highway?" What is in your mind as the road, the travelled way?

Witness: The road referred to is the travelled way, the highway.

The Court: Yes, the travelled way, that portion of the surface of the earth where the vehicles visibly go; is that it?

Witness: Yes, sir.

Q. How do you get the 12 feet measurement that you made? A. We made the measurement to that effect.

Q. But you show on your little map here that you made that very shortly after you leave the viewpoint of P-3, 103 feet from the railroad, a wagon road branches out and goes to the freight shed. A. I believe you are referring to the point 50 feet, aren't you?

Q. Is that 50 feet? A. This is the 103 feet (indicating).

Q. Then I am mistaken. You do not show any road branching out between the 50 feet and the 103 feet? A. No, sir.

Q. But immediately after you leave the 50 feet here shown in Exhibit P-4 there is a road; you testified that P-4 was 50 feet from the track, and your sketch map shows that immediately after leaving that point, 50 feet from the track, and going to the track, there is a wagon road that leads off and goes down to the freight shed? A. Yes, sir.

Q. Now, there is no bank between the south side of the railroad and the south side of this road that you have shown on the map, is there? A. There is a slight bank; yes, sir; probably 5 feet high.

Q. Well, where is that bank? A. Shown on the photograph.

Q. I am saying between the road, as you put it, that leads down to the freight shed and the railroad, is there any bank? A. No, sir.

Q. Then a person in the highway standing at a point where the road leading down the freight shed and the highway on which Mr. Dickinson was travelling a person standing at the junction is not obstructed from a view of the railroad by the bank, is he? A. Not the bank between the small road and the railroad.

By the Court: Q. You say there is not any bank between the small road and the railroad? A. Not between the small road and the railroad.

By Mr. Parker: Q. That is what I am talking about. A person standing at that junction, then, looks over the road and can look down over the railroad, can he not? A. For a short distance.

Q. Well, I am not asking for a short or a long distance? A. You can see the railroad from that point.

Q. And there is no obstruction of bank at all? A. There is a bank which would obstruct a long view of the railroad.

Q. But there is not any obstruction of the railroad which will obstruct a view of 600 or 800 feet of the railroad, is there? A. From that point you could probably see 400 feet of the railroad.

Q. I do not ask you what you can probably see. A. I can't swear to that, because we didn't make any measurement at that point.

Q. You put your camera arbitrarily at a point 50 feet from the track, when you could have put it forward 40 feet and gotten a great deal better view; is not that so? A. Very little better.

Q. Well, you could have gotten a better view? A. Yes, sir.

The Court: That is, to the east, of course?

Witness: Yes, sir.

Q. Did you make any observation of how far you could see down, down the track, standing in the road between 14 1/2 feet and 50 feet? A. No, sir.

Q. So you can not tell us whether you could see a thousand feet or not at points between the 14 1/2 and 50 feet? A. I have no photographs to show it.

Q. Nor have you made any observations or measurements, have you? A. No, sir.

Q. Well, why did you not? A. I was not instructed to do so.

Q. Now, what is the distance between the freight shed and the first rail? A. 9 1/4 feet.

Q. And what is the distance between the two rails of the first track? A. 4 feet 9 inches.

Q. And what is the distance between the first two tracks? A. Between the centers of the first two tracks is 13 feet.

The Court: Is that what you want, do you want the distance between the tracks?

Mr. Parker: Yes, I want the two tracks. This accident happened on the center track.

The Court: Well, you have the measurement from center to center. You wanted the distance between the tracks, did you not?

Mr. Parker: Yes.

Q. What have you given me in the 13 feet? A. You asked me the distance between the two tracks.

Q. Yes, I did, sir. A. That is, the centers of the two tracks are 13 feet apart.

Q. No, I wanted to know the distance between the north rail of the first track and the south rail of the middle track. A. That is 8 feet 3 inches.

Q. And how wide are the rails? A. The head of the rails are about 2 inches wide.

Q. Is the top of a rail only 2 inches? A. Yes, sir.

Q. Well, you have to add 4 inches on there to get the width of a track? A. No, because the dimension of 9 1/4 feet was measured from the freight shed to the gauge line of the railroad.

Q. What do you mean by the "gauge line?" A. The inside of the rail, the two rails; that is called the gauge line.

Q. Now, then, we have 9 1/4 feet and add to it that 4 3/4 feet? A. 4 feet 9 inches.

Q. And then we add to that the distance between the two rails, and we find the distance of the middle track from the freight shed? A. Yes, sir.

Q. And how much is that? A. 22 1/4 feet.

Q. Then a person standing on the highway at the line of the freight shed, if projected, 22 1/4 feet from the middle track, would have a clear view down the track for over eight or nine hundred feet, would he not? A. Yes, sir.

Q. And for a great portion of that distance, if he moves back, say 2 feet, will he not have a view of the middle track for a great portion of eight or nine hundred feet? A. No, sir; because that distance is readily obstructed by the freight shed, and a small movement back of 2 feet will decrease the distance seen from that point very greatly.

Q. Very well, it will reduce it very greatly. Will it reduce it a quarter? A. I should say about a quarter.

Q. Then moving back so that he gets back 24 1/2 feet, he could see a quarter how much is three-quarters of 900 feet? A. He will be able to see about 600 feet from that point.

Q. About 600 now, at 24 1/2 feet from the first rail? A. Yes, sir; moving back 2 feet from this projected line of the end of the freight station.

Q. And moving back 1 foot more, what effect would it have? A. That would greatly diminish the distances seen.

Q. How much? A. He could probably see 400 feet from that point.

Q. Well, that is 25 1/2 feet. How much can he see at 26 1/2 feet? A. Not much further than the distance given before, 197 feet—195 feet.

Q. Then at 26 1/2 feet, when you could see about 195 feet down the track, the view is 195 feet, and it increases very rapidly up to 22 1/2 feet, when there is a perfect view of the track? A. Yes, sir.

Q. Now, we are speaking entirely of the view that you have around the corner of the freight shed? A. Yes, sir.

Q. And we are not looking through the freight shed at all. A. Yes, sir.

Q. But at these points from 26 1/2 feet up to 50 feet you get a view of the track through the

freight shed, do you not, or of an engine on the track? A. Providing the freight shed is unobstructed by freight, as it was when I was there.

Mr. Parker: I am assuming that.

By the Court: Q. To which point on the railroad do you measure these distances, to the nearest rail, the first rail you come to? A. The dimensions have reference to the south rail of the eastbound track; that is, the first rail.

Q. That is, the first rail of the track nearest to you? A. The first rail to a person travelling on the road.

By Mr. Parker: Q. And your measurements, Mr. Healy, were made to the platform of the freight shed, were they not? A. From the rails to the platform.

Q. And the posts of the shed are not on the exact edge of the platform, are they? A. No, sir.

Q. How much distance are the posts from the edge of the platform? A. Probably 4 inches.

By the Court: Q. Back? A. Back.

By Mr. Parker: Q. Then to this 22 1/2 feet which you have testified to you ought to add 4 inches more to give the distance of the unobstructed view? A. Yes, sir.

Mr. Parker: I think we ought to have that map that this gentleman has referred to marked for identification and kept here. It may be valuable for us.

Q. Now, on that map you put down all the measurements accurately that you made there, have you not? A. Yes, sir.

Q. And is it drawn to scale? A. No, sir; I believe the title shows a sketch map.

Q. But all the measurements that you show on that thing are measurements that were made by you and are accurate? A. Yes, sir; they were made by a tape on the ground.

RE-DIRECT-EXAMINATION by Mr. Gilson:

Q. About what is the grade of that hill that you speak of? A. It is about a ten per cent grade.

Q. And you said that, assuming that this freight shed was clear of freight, you could see some 400 feet at a point 50 feet from the first rail; is that right? A. About that.

Q. And when you spoke of it being possible to see a greater distance down the track at some other points than the ones where you took these photographs, that was assuming that this shed was clear of freight, was it not? A. Yes, sir.

Q. If there had been freight on that platform, would it have made any difference with the view? A. It would.

Q. Now, this point that Mr. Parker refers to as being 26 1/4 feet from the first rail of the west-bound track is the same point that you speak of as being 14 1/2 feet from the first rail of the east-bound track, is it not? A. No, it is not, because 14 1/2 feet plus 13 feet, the distance between the rails, is 27 1/2.

Q. Oh, yes, 27 1/2 . So that his point of 26 1/4 feet is after you have passed the corner of that freight shed, going in a northerly direction; it is nearer to the first rail of the east-bound track than the place where you took the photograph? A. It is nearer the track than the place where my photograph was made.

RE-CROSS-EXAMINATION by Mr. Parker:

Q. Your photograph was made at 14 1/2 feet? A. Yes, sir.

Q. From the nearest rail? A. From the nearest rail.

Q. How far was it from the nearest rail of the middle track? A. That was 27 1/2 feet from the

south rail of the west-bound track, or nearest—

Q. 27 1/2 feet? A. Yes, sir.

Q. From the south rail of the west-bound track? A. Yes, sir.

Q. And your testimony was that at 27 1/2 feet from that south rail you could see practically past the freight shed unobstructed 195 feet? A. Yes, sir.

Q. And that view increased rapidly, did it not? A. As you approach the track.

Q. Then is it not a fact that at 26 1/2 feet from the track you could see more than 195 feet? A. Yes, sir.

Q. How many feet could you see? A. Would you like to have me give a guess? I made no dimensions to that effect.

Mr. Gilson: No, we do not want any guesses.

Witness: I can't state positively.

Q. But you could see more than 195 feet? A. Yes, sir.

FURTHER DIRECT-EXAMINATION by Mr. Gilson:

Q. Just one question. You said at some point you could see through this little road that you say leads off to the freight shed, a partially unobstructed view. Now, is that a view or is it just a glimpse? A. It is a glimpse of the track.

Q. At an angle? A. Obstructed on the right by a bank and obstructed on the left by the freight shed.

FURTHER CROSS-EXAMINATION by Mr. Parker:

Q. How big a glimpse do you mean? A. Well, a space through which you could drive a load of hay.

Q. You would have room enough, then, to drive a load of hay through, and you could look through the space, and see the track, could you? A. Yes, sir.

FURTHER DIRECT-EXAMINATION by Mr. Gilson:

Q. How much of the track, approximately? A. Approximately, measuring along the rails of the track, you could see—well, say 200 feet; but at the narrow angle at which the camera was placed, toward the track you could—

Q. No, I do not mean that. I mean how much of the track could you see in this glimpse—not how far down the track, but how much of the track? A. That part of the track embraced through an opening of about 8 feet.

Q. Well, what would that be, approximately? A. Measured lengthwise with the track?

Q. Yes. A. About 200 feet.

FURTHER CROSS-EXAMINATION by Mr. Parker:

Q. And how far would this 200 feet be away from the crossing, that you could see through, this glimpse, as you call it? A. I couldn't state.

Q. 400 or 500 feet from the crossing, would it not? A. It would be as much as that; yes, sir.

By the Court: Q. The railroad to the east is a double-track road? A. Yes, sir.

Q. And is it a flat grade or otherwise? A. I couldn't state. It is probably down grade to the west.

Q. An upgrade to the east? A. Upgrade to the east.

Q. But with regard to the down track, you could see a continuous line of double track for a long

distance? A. If you were on the center of the west-bound track, the view to the east would be obstructed at a point probably 1,000 feet away by a curve of the railway to the right.

Q. It is straight probably for a thousand feet? A. It is straight probably for a thousand feet.

Q. To the east. Have you measured the grade of that hill? You say it is ten per cent? A. Oh, we didn't measure that accurately. Probably a ten per cent grade.

Q. What do you mean by that? A. 10 feet to the hundred; every 100 feet of horizontal distance travelled, the road is on a hill of 10 feet.

Q. One foot in every ten. That makes a pretty steep hill, does it not? A. It does.

Q. For instance—A. One inch and ten inches.

Q. (Illustrating with ruler.) Something like that? A. That is 1 inch and that is 10 inches. A. Yes, sir.

Q. That is about the slope you have in mind? A. Yes, sir.

Q. And where is the bottom of that slope? I do not know whether you have testified about that. Where does it run out? As you go down toward the railroad, where does the hill stop? A. The hill stops probably 20 feet from the railroad.

Juror No. 3: I would like to ask, if your Honor please, after passing that glimpse, as you say, was the view of the rail obstructed, approaching the rail?

Witness: Approaching the railroad, it is obstructed by the freight shed.

By Juror No. 3: Q. Entirely obstructed? A. Not entirely obstructed; no, sir.

Juror No. 5: And, again, your Honor, with your kind permission, I would like to ask Mr. Healy from his point of vision, whether a motor or car

was approaching the track, how far away could he see the track, say about a thousand feet away?

Witness: From what point on the road?

Juror No. 5: Well, that I couldn't tell you, because I haven't seen it. But I would ask his Honor to ask the witness how far the point of vision do you see approaching the track before he could see that the accident was unavoidable?

The Court: You mean to see the crossing?

Juror No. 5: Yes, sir.

Witness: Well, you could see the railroad from the top of this hill, probably 400 feet from the railroad, when you go over the brow of this hill approaching the railroad.

Juror No. 5: We might not see Mr. Healy again, and I want to know how much of the track would you see from that point of vision?

Witness: 1,000 feet from the railroad?

Juror No. 5: Yes.

Witness: The railroad can not be seen.

Juror No. 5: It could not be seen?

Witness: No.

Juror No. 3: I would like to know how far from the track where this accident happened would a glimpse of the railroad be obtained?

Witness: There is a glimpse of the railroad obtained at a point 50 feet from the track, from the nearest track.

By Juror No. 3: Q. Between the track and the glimpse of the railroad there was 50 feet of space that was obstructed by the freight station? A. No, 50 feet was the point that the camera was sitting from the railroad; 50 feet was the distance from the camera to the nearest rail of the railroad.

Q. Well, at 50 feet, was that the glimpse of the railroad before approaching the tracks? A. As shown on that photograph; yes, sir.

The Court: I do not remember now what the fact was, the jury will not assume now on which rail the accident happened, or on which track it happened.

By Mr. Parker: Q. After you come to the track and when you are about 40 feet from the middle rail, you get a perfectly clear view of the track to the left, do you not, to the west? A. To the west; yes, sir.

Q. Which view is continuous until the crossing is reached? A. Yes, sir.

Q. Until the rails are reached? A. Yes, sir.

Paper called sketch map is marked P-8 for identification.

JOEL DICKINSON, plaintiff, sworn in his own behalf:

Direct-examination by Mr. Gilson:

Q. Mr. Dickinson, you are the plaintiff in this case? A. I am.

Q. Where do you live? A. No. 9 South Street, Newark.

Q. How long have you lived there? A. About fourteen years.

Q. You live there with your wife and family? A. Yes.

Q. What is your business? A. Contractor.

Q. With whom are you engaged as contractor? A. The Crucible Steel Company.

Q. How long have you been engaged in that business? A. Twenty-one years this next July.

Q. Does that business have anything to do with machinery? A. Oh, yes.

Q. What is that? A. With machinery, yes.

Q. How old are you? A. Fifty-seven.

Q. On July 31, 1909, were you at Howells, Orange County, New York? A. Yes.

Q. How did you go up there? A. Drove up with a small runabout car, a Maxwell car.

Q. Had you ever been up there to Howells before? A. Not before then, no.

Q. How long had you been there at Howells before July 31, 1909, how many days had you been there? A. Before the accident?

Q. Yes. A. Nearly a week.

Q. Had you ever gone up to Howells by train. by railroad, before that? A. I believe I had, yes; yes, I had. I don't think I was—I don't know whether I was there before or not; I don't think so, anyway.

Q. Do you remember ever having taken a train at that station, at Howells, before the accident, in either direction? A. If I had been there, I would have taken a train there.

Q. Well, had you or had you not? A. I don't think so, to the best of my knowledge, no.

Q. Now, on this day, July 31, 1909, where had you been? A. We had been down to Middletown.

Q. Middletown? A. Middletown.

Q. Who went down there with you? A. My wife and daughter.

Q. Which daughter? A. Mrs. Gardner.

Q. How did you go down to Middletown? A. We drove down in this little car.

Q. How far from Howells is Middletown? A. I should say about five miles, as near as I can say.

Q. In which direction from Howells? A. Towards New York.

Q. Where were you staying at Howells? A. Henry S. Reeve's, on a farm.

Q. That is a dwelling house, or farm house? A.

A sort of a farm, a boarding house, summer boarding house.

Q. How did you happen to go up there? A. Just to take a few days' rest.

Q. Had any of the members of your family been up there? A. Yes, my other daughter was staying there then.

Q. Which one was that? A. Mrs. Sloan.

Q. What time did you go to Middletown that day?

The Court: Q. What time did you start? A. Around 3 o'clock, I should say.

The Court: What time did you start, do you mean?

Mr. Gilson: Yes.

Q. What time did you start? A. About 3 o'clock in the afternoon.

Q. To go from Reeves', where you were staying, to Middletown did you have to cross any railroad? A. Had to cross this railroad at Howells.

Q. That is, the Erie Railroad? A. The Erie Railroad, yes.

Q. And coming back what time did you leave Middletown, about? A. I should say about quarter to five or twenty minutes to five, something like that; twenty minutes to five, as near as I can say; I don't know just when; near that.

Q. As you came back from Middletown was anyone with you? A. My wife and daughter.

Q. Where was your wife sitting? A. Right near me, on my left.

Q. Where was your daughter, Mrs. Gardner, sitting? A. She was sitting on the platform, with her feet on the running board.

Q. Who was running the automobile? A. I was.

By the Court: Q. When you say "on the platform," what do you mean? A. Where the other people put their feet.

Q. On the floor of the car? A. Yes, sir.

By Mr. Gilson: Q. And where were her feet? A. On the running board.

By the Court: Q. Which side? A. She was on the left-hand side.

Q. Her feet were on the left-hand running board? A. Yes, sir.

By Mr. Gilson: Q. Who was running the automobile? A. I was.

Q. Now, just tell the Court and jury what happened as you came back from Middletown and reached that crossing of the Erie Railroad, on your way to Reeves'? A. When I approached the top of the hill to get to the railroad, do you mean?

Q. Yes. A. We came up to this short, steep hill, and we looked west as far as we could, and then we got down, and we looked towards New York, east, as carefully as we possibly could. I was running not over four miles an hour, and as I got to the second post on this shed I saw the train; that was the first time I did see it. I turned my wheel to the left as quick as I could, and I jumped out of the car and grabbed my wife, and she dropped on my left knee, turning my leg the opposite way from what it should be. Of course, the car went up the track.

Q. Now, what happened to the car after you jumped out?

Mr. Parker: He said it went up the track.

Mr. Gilson: After it went up the track.

A. The train struck it and carried it up the track—

The Court: Describe what you saw only.

Q. Did you see the train hit the automobile? A. I saw it hit it, yes.

Q. Which track was the train on? A. The westbound track.

Q. Coming from—A. New York.

Q. Did you know at that time, at the time of the accident, which track the train was on? A. Well, after it happened.

Q. Yes, but before it happened, before the train hit the automobile, could you see and did you know which track the train was on? A. I knew it was coming from New York.

Q. But did you know which one of the three tracks the train was on? A. On the west-bound track.

Q. Well, did you know that?

Mr. Parker: He has answered your question.

Q. Did you know that before the accident, before the train hit the automobile? A. Well, I ought to know that. It should be on that track, anyway. It was coming from New York, and that is the track it would be on.

Q. Well, of course. A. Yes.

Q. You know now? A. Yes. I knew then.

Q. But did you before—

The Court: He said he knew then.

Mr. Parker: He has answered your question; he said he knew.

Q. Well, how did you know?

Objected to as cross-examining plaintiff's own witness.

The Court: No, I do not think that is improper. The witness says he knew a thing; before the accident happened he knew the train was on the west-bound track; and he is now asked how he knew it. I think he may answer the question.

By the Court: Q. How did you know it? A. Well, because I saw it coming up, sir.

By Mr. Gilson: Q. When did you first see that train? A When I passed the second post of the shed; that was the first time I saw it.

Q. Why did you not see it before that? A. Because I couldn't see it before.

Q. Why could you not? A. On account of the big shed being there and some obstruction on the shed, milk cans and barrels, and different things, and some poles standing up there, a telegraph pole right on the end of the shed, and just where they drive in with the wagons, the end there, there is a hill there, too. You can't see down the track at all, not at that time.

By the Court: Q. What do you mean by the second post of the shed? A. There is one here and another down here and another one here (indicating).

Q. That does not help us, because we can not transfer to paper your signs with your hands. Can you not describe in language what you mean by the second post of the shed? A. There is a shed with four posts; how many more I couldn't say, but there was two or three in front. When I got to the end of the shed, that was the first I saw the train approaching.

By Mr. Gilson: Q. Well, did you look for the train before you got to that shed? A. After I struck the hill I never stopped looking; I looked all the time.

Q. And what did you do, if anything, when you reached this little roadway that leads around that shed? A. I passed that before I saw the train.

Q. Well, why did you not see the train through that little roadway right alongside of the shed? A. Because as you drive in there there is a big embankment; that was grown up with trees and brush and everything else, and it was impossible at that time to see anything.

Q. You saw that, the brush and stuff growing there? A. We certainly did.

Q. What did you do with respect to the car when you reached the end of that shed? A. Well, I reached forward and looked forward, leaned forward and looked down to see if I could see anything.

Q. How far forward did you lean? A. Over the wheel, just a little bit over the wheel.

Q. Is that wheel that you speak of the steering wheel? A. That is the steering wheel.

Q. How is that situated in the automobile? A. The fifth wheel?

Q. The steering wheel, how is that located, where is that? A. Right in front of the driver.

By the Court: Q. You were on the right-hand side? A. The right-hand side of the driver; yes, sir.

By Mr. Gilson: Q. Did that steering wheel interfere with you in getting out or in that automobile on the right-hand side? A. Oh, you can't get out on the right-hand side.

Q. You can not? A. No.

Q. How many brakes were there on this automobile? A. Two.

Q. What kind were they? A. Well, the emergency brake, and then there is that acts as a foot brake, the clutch, too. When you put the clutch on it acts as a brake; it acts as a foot brake and a clutch.

Q. Well, how does the foot brake work? A. You throw the clutch out and it acts as a brake; after that you go on with the clutch and it acts as a brake.

Q. Did you have either of those brakes on as you came down the hill? A. I had the brake on all the time and part of the emergency brake, too.

Q. This automobile was run by gasolene, was it? A. Run by gasolene.

Q. Did you have the gasolene turned on or off as you came down that hill? A. None at all; I had it off.

Q. Where did you turn it off? A. Under the wheel.

Q. What part of the hill? A. As soon as I came over the hill I shut off the gas.

Q. Did you have the spark on or off? A. I didn't have anything on.

Q. Well, what made it come down the hill, then? A. Gravity.

Q. Was or was not the automobile making any noise? A. What?

Q. Was or was not the automobile making any noise? A. It would make no noise.

Q. Did you have a New Jersey license to run an automobile? A. Yes.

Q. Was the number displayed on your automobile? A. Yes.

Q. At the time of the accident? A. Yes, the back axle.

Q. What was the distance from the front of the front wheels of this automobile to the back of the seat? A. Seven feet one.

Q. One inch? A. Seven feet one.

Q. Inches? A. Seven feet one inch.

By the Court: Q. From the front of the front wheel to the back of your seat, is that it? A. From the front of the front wheel to the back of the seat was seven feet one.

By Mr. Gilson: Q. And about how high from the ground was the seat of the automobile? A. Four feet, I should say.

Q. About how much did this automobile weigh? A. 1,600 pounds.

Q. When did you buy this automobile? A. In 1899.

Q. 1909? A. 1909.

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Q. What month? A. I just had it between two and three months when the accident happened, as near as I can remember.

Q. Was it new when you bought it? A. Brand new, yes.

Q. From whom did you buy it? A. Mason's.

Q. In Newark here? A. Yes, Halsey Street.

Q. How much did you pay for it? A. $825.

Q. Did you have any extra shoe or tire? A. Yes, both; I had an extra shoe and extra tire.

Q. At the time of the accident? A. Yes.

Q. What became of that extra shoe and the extra tubes? A. Well, they was cut by the collision of the train, they was cut up, no good.

By the Court: Q. Both the shoe and the tires? A. Yes.

By Mr. Gilson: Q. Now, I show you photograph Exhibit P-1, and ask you if you recognize that (shown to witness)? A. Yes, I do.

Q. What does that show with respect to the automobile? A. The automobile broken up.

Q. Is that your automobile? A. It was; yes, sir.

Q. Did you see it immediately after the train hit it? A. After I got my wife fixed up.

Q. And this photograph shows it correctly after the train hit it? A. That is right.

Q. How many cylinders did this automobile have? A. Two.

Q. What was the condition of those cylinders after this accident? A. They were broken.

Q. What was the condition of the entire rear part of the car after the accident? A. Oh, it smashed it all to pieces; it was broken all to pieces.

Q. Was it a steel or a wooden frame car? A. Steel.

Q. What was the condition of the steel frame? A. It was all steel.

Q. What was the condition of the steel frame after the accident? A. All crushed together.

Q. Twisted and bent, was it? A. Twisted in all shapes.

Q. What was the condition of the rear wheels? A. Well, I didn't take particular notice of what was the matter with them.

Q. Now, when you jumped out of the automobile what part of the track or roadway did you alight on? A. As near as I can remember, it was the middle of the first track.

Q. And had Mrs. Gardner jumped before you or did she jump after you? A. No, she jumped before me.

Q. From which side of the automobile did you jump? A. From the left.

Q. About how much did Mrs. Dickinson weigh, do you know? A. 160 pounds.

Q. She weighed about that at the time of the accident? A. As near as I can say.

Q. What, if anything, did you hear as you came down the hill there? A. What did you say? I didn't hear what you said.

Q. What, if anything, did you hear as you came down the hill? A. I didn't hear anything.

Q. Why not? A. Well, I don't know why. There was nothing to hear, that I know. I didn't hear anything at all.

Q. Well, were you talking or were you not? A. I wasn't talking.

Q. Were any of the others in the automobile talking or making any noise? A. No, we wasn't talking at all.

Q. Was there any noise around in that vicinity as you came down the hill? A. I didn't hear any.

Q. Well, was there? A. No.

Q. You could hear it if there was. What were

the others doing as you came down the hill—Mrs. Dickinson and Mrs. Gardner? A. Sitting there perfectly quiet alongside of me.

Q. Were there any gates at that crossing? A. No.

Q. At the time of the accident? A. No.

Q. Was there any flagman there at the time of the accident? A. No.

Q. I show you a photograph marked Exhibit P-2, and call your attention to a signboard over here on the left-hand side (indicating)—

Objected to.

Mr. Gilson: I have not finished the question yet.

Mr. Parker: I know what your question is going to be. You are going to refer to something on that picture that was not there at the time of the accident.

Mr. Gilson: No, I am not; I am going to ask him if that signboard on that photograph was there at the time of the accident.

Mr. Parker: I do not object to that.

The Court: There does not seem to be any question yet.

Q. This signboard in photograph Exhibit P-2 (indicating), was that there at the time of the accident?

Objected to as irrelevant.

The Court: (After argument.) Why, in this point of view, may not the question be asked: For the purpose of informing the Court and jury whether one of the objects shown on the photograph was there at the time of the accident, or, in other words, whether the photograph correctly represents the situation as it then existed? It might be a shed or it might be a tree. It

might have very much to do with the case and perhaps nothing.

Mr. Parker: If it is only in that point of view, I have no objection to the question.

The Court: I can not determine for what ulterior purpose the question is asked. I conceive that, for the reason I have stated, the question is a proper one.

(Question read.)

A. It was there, but that bell wasn't there.

Q. What bell? A. That alarm bell.

Mr. Parker: I object to his saying the bell was not there.

Mr. Gilson: I will consent to that going out.

Q. Was or was not this thing inside of the sign-board which looks like an electric bell there or not there at the time of the accident (indicating)?

A. It was not there.

Mr. Parker: I object to that question and move that it be stricken out. It is not within the issue, whether there was a bell there or not.

The Court: For the reason already stated in respect to the last question, I will allow this question to be asked.

Defendant's objection noted as ground for appeal.

Q. Was or was there not any electric bell at any place at that crossing at the time of the accident?

Mr. Parker: I object to that. It is not within the issue.

The Court: This raises a board question.

Mr. Gilson: I ask that for two purposes, if your Honor please: in the first place, to show generally the character of that cross-

ing there, to inform the Court and jury as to whether there were any precautions at all taken to warn pedestrians or persons travelling on that highway, and, secondly, for the purpose of showing that the train in question was not operated with the due care required by law; in other words, if a train approaches a crossing without any automatic signal on it, or any gates or flagman, then, of course, I contend that the engineer is under a duty to give a different kind of warning than he would be if there were gates or electric bell or flagman. It seems to me the question is admissible on either theory.

The Court: It seems to raise the question whether the company was under any obligation to maintain at that point an audible signal.

(After further argument.) Of course, I would be glad to look at your cases, but is not this the law? That the company is bound by law to do certain things by way of giving signals. That is the measure of its obligation, and when it has fulfilled its obligation in giving signals, the engineer may run at the highest speed, without the slightest imputation of negligence. It is totally different from the case of a trolley car or a wagon. It is in order that railroad trains may keep up their schedules at headlong speed that the legislature says they must give particular signals. Now, if it is admitted that there was no legal obligation to maintain this particular signal, I do not see how any inference can be drawn by its absence as to the negligence of the

engineer, if he gave other signals required by law, which is another question.

(After further argument.) It being admitted that there was no legal obligation to maintain an audible signal at this point, I sustain the objection.

Plaintiff's objection noted as grounds for appeal.

Q. Now, I show you photograph Exhibit P-3, and ask you if that shows the situation at that crossing as it was at the time of the accident, with respect to the foliage and shrubbery, and so forth (shown to witness)? A. It doesn't look at all like it.

Q. Where is that any different? A. There is nothing growing here; it is all cleaned off here and back here, it is all (indicating)—

The Court: Tell us what you mean by "here."

Q. What part of the photograph do you say was grown up? A. On the end of the shed, back of it.

Q. On the right-hand corner of this photograph; is that where you are pointing? A. That is where I am pointing—the end of the shed.

By the Court: Q. What is the difference between the picture and the situation as you saw it, as it existed that day? A. Well, everything is cleared away, and when I was there everything was grown up with shrubbery and small trees.

By Mr. Gilson: Q. Now, I show you Exhibit P-4, and ask you if that shows the situation exactly as it was at the time of the accident (shown to witness)? A. No.

Q. Where is that different from the time of the accident? A. That has been cleared off, the same way as the other, only taken from a different view. That is all I can see.

Q. Now, I call your attention to this slope of the bank in the foreground of this picture, Exhibit P-4, and ask you whether that was grown up with shrubbery or not (indicating)? A. All back there was all grown up with shrubbery (indicating).

Q. How high was that shrubbery that you speak of? A. I didn't measure it.

Q. No, but approximately? Was it one foot or three or four feet? A. Oh, I should say all the way from three to seven feet.

Q. I show you Exhibit P-5, and ask you if that showed the condition of this freight shed at the time of the accident? A. No.

Q. Where is it different? A. Because it is all cleared back there.

By the Court: Q. What is that? A. It is all cleared away, the same as these other two.

By Mr. Gilson: Q. As far as the shrubbery is concerned? A. As far as the shrubbery is concerned.

Q. I am asking you about the condition of the platform, this freight shed? A. There is nothing on it now; there was a lot of stuff on it then.

Q. What do you mean by "a lot of stuff on it then"? A. There was some milk cans on it, some barrels, and different things of that kind; I couldn't just say what it was.

Q. When could you first see this railroad crossing as you approached it? A. Well, when you came over the top of the hill.

Q. Referring to this map, as you came down there was there anything toward the left to obstruct your view in that direction? A. I don't understand the map at all.

Q. Well, here is the hotel (indicating), on the left-hand side as you come down this road, and

here is the little freight shed by the railroad track (indicating). Now, you were coming down this road going in a northerly direction, and here is the railroad track (indicating). Now, as you came down from the top of this hill, was there anything to the left, this way, to obstruct your view of the tracks? A. No. That was looking west?

Q. Yes? A. No.

Q. Where did this hill stop as you came toward the railroad, wheer did it become level? A. It never becomes level while you get to the track.

Q. Until you get to the track, you mean? A. Until you get to the track.

Q. Now, your business is situated right on the Pennsylvania Railroad at Harrison, is it not? A. Right close to the railroad.

Q. Do you notice trains going by there? A. Yes, sir.

Q. About how many a day, would you say? A. I don't know; I couldn't say. There is a great many.

Q. Have you driven an automobile ever since this accident? A. Yes.

Q. And can you testify as to about how fast this train was going at the time of the accident, from your knowledge of running an automobile and your observation of railroad trains? A. The train that struck the car?

Q. Yes? A. Between forty-five and fifty miles.

The Court: Just answer this question yes or no.

Witness: Yes, sir.

Q. About how fast would you say it was going? A. To the best of my judgment, between forty-five and fifty miles, not less.

Q. An hour? A. Yes, an hour.

Q. Was there any whistle blown at the time you

approached the crossing? A. Well, I didn't hear one.

Q. Was there any bell, sounded? A. I didn't hear one.

Q. Was there any warning of any kind of the approach of this train? A. None at all, that I know of.

Q. Well, if there had been, would you have known it? A. I certainly would.

Mr. Parker: I object to that. I move to strike that out.

The Court: It seems to ask for an inference. Strike it out.

Q. Before the accident, Mr. Dickinson, what was the color of your hair? A. Sort of a dark.

Q. And when did it turn white?

Mr. Parker: Do you allege this as damages?

Mr. Gilson: No, just as to the character of the fright, and so forth.

Mr. Parker: I object to it as immaterial.

The Court: I will allow it.

Defendant's objection noted as grounds for appeal.

The Court: You were asked when it turned white?

A. I should say within a month after.

Q. After the accident? A. After the accident.

Q. What effect did the seeing of this train as you passed the second post, as you call it, of this shed have on you? A. Didn't have any.

Q. Well, were you perfectly cool and collected? A. Just the same as I am now.

Q. It did not frighten you at all? A. Not a bit.

Q. Well, why did you not stop the automobile immediately when you saw the train? A. Because I knew I was in danger and I tried to get away.

Q. Did you put the brake on? A. I had it on.

Q. Well, how far would it take you to stop the automobile? A. How far would it take me to stop it?

Q. Yes? A. Well, as soon as I saw the train I jumped out and left it.

Q. Well, how far would the automobile go after you attempted to stop it if everything worked all right? A. It must have gone three to four feet.

Q. Could you stop it in less than that, or is that about the distance it would take you to stop it? A. Well, I tried to stop it, and then jumped and left it. I don't know what it did after that.

Q. Why did you not know what you did? A. Because I was thinking about my wife and daughter.

Q. Well, were you or were you not excited and frightened?

Objected to as leading.

Objection sustained.

Q. What was the condition of your mental equilibrium?

Objected to as repetition.

The Court: He has answered the question as to how he was affected as he passed the second post. This question relates to a later period, not very far removed in time, to be sure.

Q. As you jumped out of the automobile what was your mental condition with respect— A. Everything was on taking care of my wife. My wife fainted away, and I was taking care of her, and I didn't think about anything else.

Q. Now, this injury to the knee you speak of, did that lay you up at all?

The Court: Well, the witness has hardly developed that. He said that his wife jumped against his knee.

(Question withdrawn.)

Q. When your wife dropped on your knee, as you expressed it, what effect did it have on you—what did it do? A. I didn't feel it very much then, but more next morning. The next morning I couldn't walk.

Q. Why? A. Well, the pain was so bad. It hurt me during the night, and next morning I couldn't walk.

The Court: Which knee was it?

Q. Which knee? A. The left knee.

Q. How long did you remain in Howells after that? A. A few days.

Q. Did you have a doctor while you were up there? A. Yes—I didn't have a doctor, but my wife did.

Q. Then when you came back to Newark did you have a doctor for your knee? A. Yes, sir.

Q. What doctor? A. I went to Dr. Seidler first and then I went to Dr. Hemsath.

Q. How many times did you go to Dr. Seidler? A. Twice.

Q. What did he do, if anything, for you? A. Well, he didn't know what to do.

By the Court: Q. The question is not what he knew, but what he did. What did he do? A. Well, that is a pretty hard question to answer. As my physician, my family doctor, I went to him all the time when I felt bad, and I told him about my knee, and then I didn't go again; I went to Dr. Hemsath.

By Mr. Gilson: Q. Did Dr. Seidler prescribe anything? A. The doctor told me to rub it—Dr. Seidler told me the best thing, to rub it, and this that and the other, and I tried everything, but it didn't do any good.

Q. Did he advise you to get an electric battery and use it on your knee?

Objected to as leading.

(Question withdrawn.)

Q. Did he advise you to get anything to use on your knee, except just rubbing it? A. He thought electricity would do it a good deal of good, and he did apply electricity on it down at his office, and then I got a battery afterwards of my own.

Q. How much did that battery that you bought cost you? A. $25.

Q. How long did you use that? A. Well, used it more or less all the time; it seemed to ease it a little.

Q. And then did you go to Dr. Hemsath? A. Yes, sir.

Q. How many times did you go to him about the knee? A. I didn't keep any account; I have been going to him ever since.

Q. When was the last time you went to Dr. Hemsath about your knee? A. Two weeks.

Q. About how many times on an average would you say you have gone to Dr. Hemsath within the last year? A. Twice a week, sometimes three times a week.

Q. And how many times within the last two years? A. Well, I say, ever since then.

Q. Ever since the accident? A. Ever since the accident.

Q. Now, just describe to the Court and jury what kind of pains you have in that knee. Are they dull pains or sharp pains? How long do you have it and when does it hurt you? A. It hurts me all the time.

Q. How does it affect you? A. Well, sometimes I can't bend it very well and sometimes I can.

Q. How does it affect you in your walking around? A. Well, I walk with a limp.

Q. Can you walk as far as you used to before the accident? A. No.

Q. Can you stay on your feet as long now as you could before the accident? A. Not nearly as long.

Q. Did you have any of these pains that you describe before the accident? A. Not that I know of, never.

Q. Well, you would know it if you had them? A. Well, I never had it.

Q. Do you have any walking to do in your business? A. Yes, quite a little.

Q. What for? A. Well, going from one place to the other to see what is going on.

Q. About how many men do you employ? A. One hundred and fifty.

Q. Over what area, or territory, of the plant are they distributed, working? A. Oh, I should say nearly—over quarter of a mile.

Q. Do you have to walk around to see them and talk to them during the day? A. As much as I can.

Q. And before the accident when you did that sort of work about how far would you have to walk during the day to oversee your men? A. Well, not quite as far as that.

Q. As what? A. As I do now.

Q. Well, what is that, how far? A. Oh, an eighth of a mile.

Q. About an eighth of a mile all day you walked; is that right? A. From one place to the other.

Q. All together, I mean?

By the Court (interposing): Q. When you speak of a quarter of a mile, do you mean that your men were spread over a quarter of a mile? A. Well, there is a new building now, sir, further away than there was then.

Q. That is what you mean; your work was spread over quarter of a mile? A. Yes, sir.

Q. And before the buildings were not so extensive? A. That is right.

Q. And it was about an eighth of a mile? A. Yes.

By Mr. Gilson: Q. Now I am speaking of before the accident, Mr. Dickinson. How much all together during the day would you walk before the accident in order to give your me nthe orders and watch them, as you have to do in your business? A. Well, I couldn't say because I never got tired.

Q. Well, about? A. Oh, I should say I would walk from eight to ten miles a day.

Q. Would that be every day? A. Every day.

Q. Now, since the accident how far do you have to walk to do that same kind of work? A. I walk what I can and I let the rest go and let somebody else do it.

Q. Well, about how much is that? A. I couldn't tell you. Very little sometimes.

Q. Well, is it one mile all day, would you say? A. Oh, more than that.

Q. Two miles? A. Two miles.

Q. And how do you get along in your business now, to take care of these men and keep track of them, since the accident? A. Well, I have other men to do it.

Q. What are the names of these other men? A. One is named Shaw and the other Baker.

Q. Did you ever have them before the accident? A. I had one part of the time.

Q. What for? A. Well, he did little things around for me, anything I asked him.

Q. Which one, Shaw or Baker? A. Shaw.

Q. And how much did you pay him? A. Now?

Q. Yes? A. Five dollars a day.

Q. Five dollars a day? A. Five dollars a day.

Q. And what does he do now? A. Well, he is practically taking my place.

By the Court: Q. Who is this? A. Shaw.

By Mr. Gilson: Q. He has taken your place with respect to everything in that business? A. Under my instructions.

Q. How long has he been in that position? A. How long have I been at it?

Q. No, how long has he—Shaw? A. Well, I should say he has been at it now for nearly two years.

Q. What was the reason for letting him take your place that way? A. Because I couldn't do it, that is all.

Q. Why could you not do it? A. I was so lame.

Q. And you would employ him every day in the year? A. Every day.

Q. Now, before he acted as sort of an assistant, or superintendent, or took your place, what did you pay him? A. I gave him a few dollars once in a while.

Q. Well, about how much a week? A. Well, say, I would give him about $5 a week, something like that.

Q. That was after the accident and up to about two years ago? A. That is right.

Q. Now, what kind of work does Baker do? A. He does the same kind of work, only in a different department, but not much of it.

Q. What do you pay him? A. From $5 to $7 a week.

Q. Five to seven dollars a week? A. From five to seven dollars.

Q. What kind of work does he do? A. Well, he goes and looks at the heat for me, and such things as that.

By the Court: Q. Looks at what? A. Looks at

the heat for me, down to the furnace, so that I don't have to walk down there.

By Mr. Gilson: Q. Who did that work before the accident to your knee? A. I did that myself.

Q. Why have you employed him? A. Because I can't do it; I can't walk down there; I get too tired.

Q. What makes you tired? A. Pains in my knee.

Q. And you did all of this work before the accident that both Shaw and Baker do now? A. Outside of these little errands that Shaw did for me, yes.

Q. Do you receive any more money benefit on account of employing Shaw and Baker than you did before? A. I don't get as much.

Q. What is the present condition of your knee? A. The present what?

Q. Condition? A. Of what?

Q. Of your knee? A. It is very painful all the time, more so at times than others.

Q. Did you have any other doctor? A. Only those two. Oh, the doctor that put the X-rays on.

Q. Who was he? A. Dr. Baker.

Q. Who advised the X-ray? A. Who what?

Q. Who advised you to have Dr. Baker put the X-ray on? A. Dr. Hemsath.

Q. Can you tell us about how much you paid Dr. Seidler? A. No. He is my family doctor.

Q. No, I mean just for your knee? A. No, there was no separate bill at all.

Q. You can not tell? A. There was no separate bill at all.

Q. What? A. No different bill; I got a regular family doctor bill.

Q. Can you tell us what you paid Dr. Hemsath for services on account of your knee? A. I can if I look at the bills.

Q. Well, have you looked at them? A. No.

By the Court: Q. You say Dr. Seidler was your family physician? A. Dr. Seidler was my family physician, yes, at that time.

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

After recess.

JOEL DICKINSON, plaintiff, resumes the stand in his own behalf:

Direct-examination (continued) by Mr. Gilson:

Q. How many times had you crossed over this railroad before the day of the accident, Mr. Dickinson? A. I should say between four and five times.

Q. After the accident did you examine the differential of the automobile? A. Did I examine it?

Q. Yes, did you see it? A. Yes, I saw the whole car.

Q. What was the condition of the differential? A. Well, I couldn't exactly say what the condtion was, it was in such a poor condition.

Q. All smashed up?

Objected to as leading.

Objection sustained.

Q. What do you say? A. I don't know what was smashed on it, the car was in such poor condition.

Q. Did you notice the transmission? A. Did I notice the condition of it?

Q. Yes? A. I say the whole thing was broken; I don't know exactly the differential, but the car entirely.

CROSS-EXAMINATION by Mr. Parker:

Q. Where were you born, Mr. Dickinson? A. In England.

Q. How long have you been in this country? A. 1880.

Q. And what business were you first employed at? A. The same kind of business I am in now, contracting.

Q. You have always been working in the iron business? A. No, the steel business.

Q. And in that business is the hammering and welding of steel, and so forth, going on a great deal? A. No.

Q. Have you ever been where that has been done? A. Yes, sir.

Q. How long? A. Well, all my life.

Q. That has an effect after a while on people's hearing, has it not? A. The effect of what?

Q. Of hammering iron, making a great noise. When people are around it it has an effect on their hearing, does it not? A. It has, more or less.

Q. And, as a matter of fact, as you testified before, you are a little deaf? A. Well, more so today, because I have got a cold.

Q. You had had this automobile for four or five months, you say, before—A. No, I didn't have it four or five months; between two and three months.

Q. What other automobiles did you have before that? A. Not any.

Q. You never owned an automobile? A. No.

Q. How did you get your experience of running an automobile? A. This man I bought it of learned me.

Q. Then only two or three months before this accident occurred you had received instructions in running an automobile? A. Yes.

Q. And how long were you instructed? A. Well, I couldn't exactly say. I was taking lessons oer a month before I bought this car.

Q. And you took these lessons and you were carrying on your business all the time? A. Different days and afternoons.

Q. Then what time do you go to business? A. Well, any time I have a mind.

Q. And what time do you come away? A. The same thing.

Q. And what time usually does your mind suggest to you going to busienss? A. Seven o'clock I get there.

Q. And what time does your mind suggest to you to come away? A. Well, it all depends what I have to do.

Q. Then if you are busy you get off later? A. I stay while it is done.

Q. How many times were you out in an automobile with an instructor? A. Oh, fifteen or twenty times, I should think. I couldn't just say; I wouldn't want to say; but, to the best of my knowledge, fifteen or sixteen times.

Q. You would not want to be accurate. Did you pay for this instruction? A. This man that worked for Mason.

Q. And that was the only instruction that you got in running an automobile? A. Why, I ran different cars before that.

Q. Then how many times had you been instructed on this car? A. Well, as I tell you, as near as I can remember, maybe a dozen or fifteen times.

Q. Did you run the car or did the man run the car and show you how to do it? A. He ran it first and showed me how to do it, told me all about it.

Q. How many times did you run it under his instructions? A. I couldn't say.

Q. You ran this car to Reeves', did you? A. Yes.

Q. That was what day? This accident happened on a Saturday. What day did you arrive at Reeves's? A. What day did I arrive?

Q. At Reeves's. A .A few days before that; I don't know just what day it was.

Q. Did you spend the previous Sunday there? A. I didn't hear what you said.

Q. Had you spent the previous Sunday at Reeves's? A. I suppose I had.

Q. Then you had been there a week? A. I must have been there nearly a week.

Q. Now, did you not come the Saturday before— A. I think it was on Monday I went there.

Q. Then you ran up on Sunday? A. No, it was one week day; it was not Sunday, I know that.

Q. As a matter of fact, you had been there the Sunday before the accident occurred? A. That I don't know, whether I was or not.

Q. Why, do you not go to church? A. Some times.

Q. Did you go to church from there? A. Sometimes—I didn't go to church there, no.

Q. And was that the first time you had ever been at Reeves's or in the vicinity of Howells' crossing? A. Across that crossing?

Q. When you went up there to Reeves's, was that the first time you had ever been there? A. I don't just remember whether I had been there before or not, but I had never been there with a car before.

Q. In going to Reeves's did you go out by this road on which the accident happened, when you originally went there? A. Yes.

Q. And Middletown is the chief town in that vicinity about Reeves's, is it not? A. I believe so.

Q. And people run in and back and forward from Middletown all the time? A. I don't think I went before that Saturday, because I went there to rest and I was resting; I don't think I went.

Q. But when you went up from there you crossed that crossing in the very same car in which you crossed at the time the accident occurred, did you not? A. I crossed there three to four times.

Q. What do you mean by three or four times, that you had made three or four trips across it or—A. No, I think I went twice each way.

Q. So, then, you had really been there six or eight times—you had crossed it one way or the other? A. No, twice each way, I think, if I remember right.

Q. I want to know what your memory is. Your testimony has been all along that you were there four or five times. A. Well, I say the same now.

Q. And I asked you whether you crossed it three or four times all together or whether you went back and forward across it three or four times? A. I crossed it all together about three or four times, as near as I can tell.

Q. How many times had you been to Middletown during the week you were at Reeves's? A. I don't know whether I was there at all or not; I don't think I was there at all.

Q. You do not think you were there? A. No.

Q. Then you have no recollection? A. Not that I remember now. Maybe I was and maybe I wasn't; I couldn't say.

Q. Well, the fact is, as you testified before, you were perfectly familiar with the fact that there was no flagman at that crossing? A. No, there wasn't.

Q. And you were familiar with the fact that there were no gates there. A. I didn't see it.

Q. Well, you knew it? A. I know it.

Q. You testified that when you were there there was no flagman kept there? A. I didn't see one.

Q. I ask you whether you remember testifying last time you were examined? A. I did testify. I testify the same thing now; there was no flagman there.

Q. Now, I want to know this. You knew at the time you crossed there that there was no flagman kept there? A. We asked the man at the station where the man was, and he said there was no man —the man in the ticket office.

Q. And so you knew perfectly well that there was no flagman there? A. By what he told us.

Q. And you had crossed there that morning, had you not? A. No.

Q. And you crossed there that afternoon? A. That afternoon.

Q. And how long were you in Middletown? A. To the best of my recollection, we left there at 3 o'clock; we got back around five.

Q. What were you doing there? A. Minding my business, attending to business, buying oil, buying gasolene, stuff like that.

Q. Now, you had three people in your automobile, yourself, Mrs. Dickinson and your daughter, Mrs. Gardner? A. That is right.

Q. And Mrs. Gardner was sitting on the floor of the car, with her feet on the running board, as you call it? A. Yes.

Q. Now, was it not the fact that she first saw the locomotive? A. She saw it?

Mr. Parker: Will you read that question?

The Witness: I didn't hear what you said.

Q. Was not the fact that she first saw the locomotive? A. I don't know.

Q. Was not your attention called to the locomotive by the fact that you saw her getting out of the car? A. No.

Q. When you saw the locomotive how far was it from you? A. A little farther than the length of this room.

Mr. Parker: That is about 80 feet.

Witness: About half as long again as this room.

Q. And you had your automobile going with no power on it? A. Yes, there was no power on it.

Q. And it had come down the hill with no power? A. That is right.

Q. And when you get about 20 feet from the first rail is it not more or less nearly level? A. Isn't it more or less what, double?

Q. The road, is it not level? A. There isn't a level part about it that I know of.

Q. You testified that the crossing was level on the railroad track itself, did you not? A. The tracks are level, yes.

Q. How far from the tracks did this level extend? A. Across the track, and then there is another hill.

Q. But in the direction in which you were coming, how near to the track did the hill commence? A. Why, as soon as I saw the train, I should say 7 or 8 feet away from the track.

Q. Then for 7 or 8 feet before you get to the first track it was level? A. No, it isn't level; it is a down-grade.

Q. When does the down-grade commence, how far from the first track? A. Well, I couldn't say; I have never measured it; but it is all on a grade.

Q. Can you not say whether it was 5 feet? A. If I didn't know?

Q. I ask you whether you knew. A. I don't know.

Q. You can not say whether it was 5 feet or 6 feet or 7 feet or 8 feet? A. There isn't a level piece about it.

Q. Then your witness, who testified in the testimony that was read here that for 15 or 20 feet before you get to the track the road was practically level, is mistaken, is he? A. I don't know anything about that.

Q. But you just told us that there was a hill extending right down to the tracks, and now you say you do not know about it. A. I say, to the best of my knowledge, it is all—

Q. But you say you have no knowledge. A. Well, I have told you what I know about it.

Q. Then the fact is practically that you do not know anything about it? A. I know all about it.

Q. Then I ask you to tell us all about it. A. I know that it is a down-grade right to the track. Now, what more do you want to know?

Q. Then you say that the down-grade extends practically till you get to the first track, do you? A. To the best of my knowledge.

Q. How good is your knowledge? A. What I saw there.

Q. Well, then, will you say that this man that testified, whose testimony was read today—will you say whether he was right or not in saying that 10 or 15 feet from the track the highway was level? A. I have nothing to do with anybody else's testimony but my own.

Q. I think you have. A. No, I have not.

Q. You can not say whether that is true or false? A. Nothing to do with it at all.

Q. I ask you to answer my question? A. I have answered it.

Q. No, you have not. You say you know all about the crossing. I ask you to answer whether or not the testimony of Healy is right or wrong, that for 15 or 20 feet from the track the highway is level? A. You asked me if that was level, and I said, to the best of my knowledge, it isn't level.

Q. Then how much is your knowledge of it, merely going down there once or twice? A. I have gone down there three or four times.

Q. Three or four times? A. Yes, sir.

Q. Then you had gone across that crossing more than three or four times before the accident? A. Three or four times.

Q. In the same way that you were crossing when the accident occurred? A. In the same way.

Q. Now, you were asked if you had ever taken a train at Howells, and you said not. A. To the best of my knowledge, I hadn't. It is four years ago. I don't remember everything four years ago.

Q. So you can remember so as to tell us about all these things that occurred when the accident happened, but you can not tell us whether or not you had ever taken a train at Howells? A. I don't remember whether I had or not.

Q. Did you ever get off a train at Howells? A. I don't know whether I had or not. If I got on, certainly I would get off.

Q. Then that is your recollection, four years ago? A. I don't remember whether it was before the accident or after the accident.

Q. What did you do when you first saw the train? A. Well, naturally, I was startled just for the second, and I jumped and grabbed my wife and got out of the way as much as I could, within a few feet.

Q. You were asked at the first trial of this case

in how short a distance you could stop your automobile, and you said you could stop your automobile in less than 1 or 2 feet. Isn't that right? A. At the speed I was going then.

Q. Yes. A. Yes.

Q. And that was a fact? A. That is a fact.

Q. You could have put on your brakes and stopped right there? A. The brakes was on then.

Q. When did you put the brake on? A. The brake was on all the time.

Q. Was there not an e mergency brake? A. The foot brake.

Q. Was there not an emergency brake? A. Yes.

Q. Why did you not put that on? A. Well. when I came down the worst part of that hill. It is a very bad hill.

Q. You had the emergency brake on? A. For a little while, yes.

Q. How far were you from the track when you took the emergency brake off? A. That I couldn't tell you.

Q. Can you not say whether it was a hundred feet? A. It wasn't a hundred feet.

Q. Where was it when it becomes not quite so steep, how far from the track? A. Oh, I should say as far as from here to that rail (indicating), maybe a little more.

By the Court: Q. How far is that? A. 20 or 30 feet.

By Mr. Parker: Q. Then at that point you took off the emergency brake? A. Yes, to the best of my knowledge, that is when I took it off.

Q. And what kind of a brake did you have on then? A. A foot brake.

Q. And that was not sufficient to stop the automobile, was it? A. I wasn't expecting to stop it.

Q. It was expected to make it go slow? A. It was going slow, slower than a man could walk.

Q. Going slow by gravity? A. Slower than a man could walk.

Q. And all you had to do then was to put the emergency on and you would stop it instantly? A. No, you have got to release your brake, just release it, and that is all there is to it; when you take up your foot the brake comes off.

Q. What brake are you speaking of? A. The foot brake.

Q. When you take your foot up that brake is loosened, is it? A. That comes back, yes.

Q. And when you press it down it goes on? A. Yes.

Q. How soon could you have stopped your automobile at the speed you were going by pressing on that brake? A. I should say a few feet.

Q. What do you mean "a few feet"? A. Oh, 2 or 3 feet.

Q. The emergency brake would stop it instantly, would it not? A. Yes.

Q. And you went down on this track, and you say you were leaning forward? A. I was what?.

Q. Leaning forward? A. Yes.

Q. How far were you leaning forward? A. Oh, just a little, not much, just a little over the wheel.

Q. Then how far were you from the front of your front wheels—how far were your eyes? A. Oh, I should say 6 or 7 feet.

Q. To the rear of your seat? A. 7 feet 1.

Q. Now, if you were leaning forward, how far was the front of your eyes from the rear of your seat? A. I didn't measure.

Q. Can you give us any estimate? A. I should say 6 or 7 feet; I should say about 6 feet.

Q. It is only 7 feet to the rear of your seat? A. 7 feet 1.

Q. 7 feet 1 inch? A. Yes.

Q. And if you were leaning forward, how far forward did you lean from the rear of your seat? A. You couldn't lean much more than 6 or 7 inches; you couldn't get over the wheel more than that.

Q. Then you were 6½ feet from the front? A. No, I was about 6 inches from the rear of the seat.

Q. How far is it from your back to the front of your eyes? A. You move your eyes more than you move your back.

Q. It is more than 6 inches, is it not? A. No.

Q. Then you do not think that, with all your leaning forward, you got more than about 6 feet 6 inches from the front of your automobile? A. No.

By the Court: Q. From the front? A. I don't think I gained more than 6 or 7 inches.

By Mr. Parker: Q. And yet it was 7 feet from the back of your seat, on which you were sitting? A. 7 feet 1 inch.

Q. Well, 1 inch? A. 1 inch. You are so particular.

Q. Yet by leaning forward you only got your eyes 6 inches nearer to the front of your automobile; is that right? A. To the best of my knowledge, yes.

Q. Is that the best of your knowledge? A. That is the best.

Q. You have been concerned all your life with this iron work, have you not? A. All my life.

Q. You have constantly to measure things, do you not? A. Measuring, yes.

Q. You know the difference between a foot and a yard, do you not? A. Yes.

Q. Yet you can not say that you got any nearer than 6 feet 7 inches of the front of your automobile by leaning forward on your seat? A. That is the best I know.

Q. That is your best judgment? A. Yes.

Q. After the accident you were looking after Mrs. Dickinson, were you not? A. I certainly was.

Q. You took her to a hotel there? A. Yes.

Q. And you went in there and attended to her? A. I did.

Q. And you were there all the time, were you not? A. Yes.

Q. And you did not go out again until you went out with her to go home? A. After I got her quieted down I went out.

Q. Where did you go? A. To the car.

Q. You went and looked at the car? A. Yes.

Q. And what did you do then? A. Couldn't do anything.

Q. How long did you stand by the car? A. Not many minutes.

Q. And then what did you do? A. I went back to my wife again.

Q. What did you do then? A. I expected the doctor every minute, and waited for him to come.

Q. In the hotel? A. In the hotel.

Q. How long did you stay there? A. All the time.

Q. Well, I want to know how long was that time? A. Oh, I should say about an hour.

Q. And then where did you go? A. We got a carriage and put my wife in a carriage and took her up to the place we were stopping.

By the Court: Q. Took her where? A. Up to the farm where we were stopping.

Q. Reeves's? A. Reeves's.

By Mr. Parker: Q. After that time did you go across that crossing? A. After that time?

Q. Yes. A. Yes, in a wagon.

Q. How many times? A. Oh, I don't know.

Q. Once or twice or three times? A. I don't know.

Q. Now, you said there were milk cans on that freight shed? A. I do, and I know there was, too, for I saw them.

Q. You are perfectly confident of that? A. I know there was. I saw the man put some more there, too.

Q. You saw the man put some more there? A. Yes, afterwards.

Q. At the time of the accident you saw milk cans there? A. Yes.

Q. Did you ever testify in both of the trials you have had here that there were ever any milk cans on that thing? A. I told you I saw some there. I couldn't tell what it was, milk cans or vegetable boxes, or what it was, I couldn't say, but I did see the milk cans after.

Q. I am asking you when you went past there that day did you see any milk cans; that is, just before the accident? A. I told you I saw barrels or milk cans, or something of that kind. When I looked again there was milk cans, after the accident.

Q. Did you ever mention having seen milk cans on that platform before the accident? A. I don't know just what I did tell you.

Q. Well, I will try to refresh your memory as to what you told me. Did you ever say that there was lettuce there before? A. I thought there was lettuce or cabbage, or something like that, but I told you I didn't know what it was.

Q. At the first trial of this case, which was in

May. 1910, you were asked: "I show you Exhibit P-5, showing that shed." You were shown that, P-5 (photograph shown to witness), and Mr. Gilson asked you: "I show you Exhibit P-5 showing the shed. Is that the condition in which it was at the time of the accident?" And you answered: "No, there was more grass, trees, and one thing and another, around here then. That was quite high, and it marred the view there, and there was something else on this place here (indicating)." Did you answer like that? A. To the best of my knowledge, there was baskets or barrels of either lettuce or cabbage, or milk; that is what I said.

Q. You did not testify then—A. I couldn't say exactly what it was; that is what I said.

Q. And what do you say now? A. I say the same thing now.

Q. Did you ever say there were baskets there? A. Baskets or barrels, or whatever you have a mind to call them.

Q. Now, you were asked: "On that shed?" and you answered: "On that shed. I don't know what it was, but there was something else on there." A. That is what I said.

Q. Then the Court asked you: "Can you give us an idea what you mean?" and you said: "I couldn't say whether it was boxes or barrels. Something obstructed the view of the line; just what it was I wouldn't want to say"? A. Well, isn't that fair?

Q. Why did you not mention the milk cans, if you saw them there? A. I saw the milk cans after the accident, about two or three minutes after.

Q. You saw milk cans after the accident, and therefore you think there were milk cans there at the time of the accident? A. I saw the things there before the accident, too.

Q. Well, you were asked that, and you said you could not tell whether they were boxes or barrels. A. That is true.

Q. Why could you not tell? A. Do you suppose I was examining boxes and barrels and running a car and watching a train?

Q. Did you answer the question this way: "I couldn't say whether it was boxes or barrels"? A. I couldn't.

Q. Now, you say there was a great deal of shrubbery growing around that place? A. Yes, there was a very great deal.

Q. And these photographs, taken in the winter by your own photographer after the accident, do not show the conditions of the things as to shrubbery? A. No.

Q. Did you examine as to shrubbery after the accident? A. No; I didn't have to; I could see plenty of it without examining it.

Q. Then you are testifying, and your remembrance now is your remembrance of the shrubbery as you went past there on that day? A. Hadn't I seen it before? Why should I examine it?

Q. You did not pay any attention to it, did you? A. Oh, sure, but not to fall in love with it.

Q. You paid no attention to it, and yet you can say that all this shrubbery was growing up there at that time when you passed there? A. I know it was.

Q. Why do you know it? Do you know it from your inner consciousness? A. I know it was; I saw it before and after.

Q. You saw it before and after? A. Yes, sir.

Q. Did you not say there were small trees growing there? A. Didn't I say what?

Q. Did you not say there were small trees growing? A. I did, yes, and there was, too.

Q. I show you Exhibit P-4, which I think, is about 40 or 50 feet from the track (shown to witness). Now, will you tell us and explain to the jury and show the jury where was all this shrubbery? A. (Indicating on photograph). Can you see here, gentlemen? You see to the right, around here? Another thing, there was a hill here; it leads down here. Here is the stuff; the stuff was on here, and there is where I was when I first saw the train, right in line with that post.

Mr. Parker: The witness speaks of the shrubbery back between a telegraph pole shown in the picture and the east end of the freight shed.

Witness: All down here, all around here (indicating).

Q. All down there and extending up towards a stone shown there? A. There is where the trees was, all down here.

Mr. Parker: And he says the trees were growing on a bank that is shown on the pitcure on the right-hand side.

Witness: Small trees.

Q. And the freight you are speaking of, where was it? A. As near as I can tell you, about here (indicating).

Mr. Parker: He shows between the first two pillars of the freight shed on the southwest side.

Q. Well, where is all this mass of underbrush growing up there? A. There is none there now.

Q. Well, that is your remembrance, that it was all covered up with trees and things? A. It was all growing in there, I remember it was.

Mr. Parker: He says there were trees all growing up there, and, as I understand,

around here; here is the telegraph pole, right at the foot; another one here. This road only goes in a little ways, and this is near to the best of my belief, where the milk was, right in between the two pillars, right in there.

Mr. Parker: He points to the freight shed, back between the first and second pillars from the road.

Q. That is the highway? A. Yes.

Q. And there was a pile of freight at that point? A. Yes, some there.

Q. And that was the stuff that you mentioned as being on the platform? A. That is the stuff.

Q. When you had turned the automobile, it ran up the track, did it not? A. When I turned it. I don't think it ran very far after that.

Q. How far did it run? A. A few feet.

Q. Well, how did it run, if there was no power on it? A. Gravity.

Q. What? A. Well, I suppose it was a little downhill; I don't know no other; and what was left on it after I let go of it.

Q. There was no power on, are you sure? A. When the car was coming there I saw the train, I started around, and I left it.

Q. Had you the power on at all at that time? A. You couldn't say whether there was or not. That is a foot brake. I couldn't say—I may have had my foot on the accelerator at the time. As soon as I released the accelerator the car would stop.

Q. You can not tell us whether or not you had your foot at that time on a mechanical device that would put the power on? A. There is no doubt where I had it, because I always had it—

Q. Then you had power on? A. No doubt I had.

Q. We do not want "no doubt;" we want to know the fact. A. Well, I did.

Q. And when you took your foot off this power thing, the power went off, did it? A. The power has got to go off then.

Q. It has got to go off? A. Yes.

Q. Well, did it go off? A. It had to go off.

Q. I ask you in this case did it go off? A. Sure it went off; there is nothing to stop it going off.

Q. Is it not a fact that the automobile did not work right and went on when you expected it to stop? A. No, I didn't expect it to stop; I turned it around to get out of it.

Q. You turned it around, not expecting it to stop? A. Trying to get out of it.

Q. And did it not run up with the track? A. A few feet.

Q. It ran 15 or 20 feet, did it not? A. Oh, no.

Q. Well, how much? A. I don't know.

Q. Well, 10 feet? A. 5 or 6 feet. I don't think it went any 10 feet.

Q. And then you threw the power off? A. I don't throw it off; it released itself.

Q. Then you released your foot, and it continued on by gravity? A. When I released my foot I jumped out of the car.

Q. Mrs. Gardner had then jumped, had she not? A. Yes.

Q. You would have had to jump right over her? A. No, she was gone.

Q. Well, she jumped before you attempted to jump? A. Well, she wasn't there.

Q. Well, then you went, and you went past your wife? A. I jumped past her.

Q. And you got on the ground? A. No, I didn't; I took her with me.

Q. Which arm did you seize her by? A. Well, I grabbed her by the right arm as I passed her; I took her with me.

Q. You grabbed her with your right hand? A. Well, I guess I grabbed her arm by my left arm. I couldn't say which arm I got hold of.

Q. You jumped over her? A. I passed her.

Q. Well, you passed her, did you not? A. I took her with me; I didn't pass her.

Q. And you grabbed her with your left arm? A. I think I did; to the best of my knowledge, I did.

Q. And then you got on the ground? A. Yes.

Q. You both came down together? A. Yes.

Q. You did not fall down? A. Yes, we both partly fell down.

Q. Did you fall? A. We both partly fell down, yes.

Q. I want to know whether you did fall down? A. Well, we partly went down. I don't think I went down altogether, but she went in my arms, this way (illustrating), and she fell on my leg.

Q. She came down there, and you say she struck your left leg? A. Yes, she dropped on it.

Q. You went around there, and you say the next morning you had some stiffness in your leg? A. It was very sore, very sore; I couldn't bend it.

Q. How long after that did you stop up there? A. A few days.

Q. How many? A. Oh, I don't know whether it was two or three or four.

Q. And then where did you go? A. Went home.

Q. Did you go to work then? A. I don't think I did for a few days.

Q. You were off on your vacation still? A. No.

Q. How long a vacation did you usually take? A. I never take any.

Q. Well, you took a vacation on this occasion, did you not? A. Just a few days.

Q. So that the fact is that you do take some vacation? A. Well, not only for a day or two at a time, say from Friday night—

Q. You take a week off, if you want to? A. Not a week, no.

Q. You take two or three days off, if you want to? A. Two or three days.

Q. And you wanted to take them then? A. Well, I stayed there longer than I would have stayed if it wasn't for that.

Q. Well, you stayed there for Mrs. Dickinson, did you not? A. Well, somewhat for that.

Q. Chiefly for her sake? A. Not strictly for her sake.

Q. Have you been away from work any days since the accident? A. Whenever I feel as if I couldn't go along I have to stay home.

Q. Well, how often have you had to stay home from work? A. I couldn't tell exactly; a good many times.

Q. Can you tell us one day you have been away from work? A. I can't tell you how many times I feel bad.

Q. You only know, you say, you have been some days away from work? A. Some days, yes.

Q. You get paid, all the same, whether you work or not, do you? A. No.

Q. Well, what is your business, Mr. Dickinson? A. I am a contractor.

Q. What is the business of a contractor? What do you do? A. Make all kinds of steel forgings, gun forgings, shells, projectiles.

Q. Do you contract to make them? A. Yes.

Q. Do you contract personally? A. Contract myself.

Q. Whom do you contract with? A. The company.

Q. What company? A. The Crucible Steel Company.

Q. You contract to make certain things for them? A. The contracts are made with them, yes.

Q. And you use their works? A. Do day work?

Q. No, do you use the manufactory and establishment of the Crucible Steel Works to do your work in? A. Yes, that is what I do.

Q. How many men did you employ at your work at the time of the accident? A. Well, I should say about one hundred and twenty-five, something like that.

Q. And how far—A. Sometimes more and sometimes less; I don't know.

Q. You say you employ one hundred and fifty or more now? A. Yes.

Q. You are doing a great deal more work for them now than you were then, are you not? A. Yes.

Q. And that requires you to go a good many more—oversee more people? A. Yes.

Q. And you have to use a bigger works? A. Yes.

Q. And before the works were all done in buildings an eighth of a mile apart? A. Yes.

Q. And now they are done in a quarter of a mile apart? A. Yes.

Q. Now, you had overseers for each one of these departments, did you not? A. Yes.

Q. And those overseers were the same as they are now? A. No.

Q. What differences does it make? A. Two more, one more steady and one part of the time.

Q. And you have those two to do your work for you? A. They work under my instructions.

Q. You do not have to give them the same attention you used to do, do you? A. Yes, the same as I always did, but I don't go around so many times as I did.

Q. Well, if you really had to go around, Mr. Dickinson—A. I should have to quit.

Q. Why so? A. Because I couldn't do it.

Q. Why, could you not be wheeled around? A. Well, you can have the job.

Q. Thank you. There are lots of colored men and others who would do the work for $10 a week, are there not? A. No, I wouldn't be wheeled around.

Q. It would be a matter of humiliation? A. Yes, I would quit first.

Q. You think it is better to pay somebody $5 a day? A. Yes.

Q. And get it out of the Erie Railroad? A. No, I get it out of my own earnings.

Q. Now, you were offered $23 for this auto, and never paid any attention to it, did you? A. What?

Q. You were offered $23 for the remains of this auto? A. For the car?

Q. Yes. A. Why, certainly, I wouldn't take it; I wouldn't take it, no.

Q. Why? A. Because I think it was worth more, more for scrap.

Q. Then you think it was worth more than $23? A. Yes, sir.

Q. How much more? A. I don't know; I haven't seen it in the last three years.

Q. $50? A. I don't know how much it was worth.

Q. Then you do not claim to recover the whole

of the automobile, do you? A. I don't know anything about it.

Q. Well, I want to know. A. It is to be seen whether I do or not.

Q. You say it cost $825? A. Yes, sir.

Q. What deductions ought to be made from the value of the automobile for salvage? A. It was worth nothing but for scrap then.

Q. Well, there was $50 worth of scrap? A. I don't know whether it was or not.

Q. Well, there was $23 that you were offered? A. I don't know whether I had that offer.

Q. Did you not testify last time that you were offered $23 for it? A. I remember what you mean, if you will allow me to tell you.

Q. Yes. A. There was a man came to the house, but I took no notice of him, because my wife was sick. That is what I told you before.

Q. He came to your house up there in Middletown? A. Yes.

Q. Took all the trouble going out to Reeves's, two and a half miles? A. I didn't think anything of it at all; I didn't give it any consideration.

Q. He offered you $23 and you did not pay any attention to it? A. I was thinking at the time of my wife.

Q. What is this differential? A. The rear running gear, where one wheel runs into the other.

Q. What was the matter with it? A. I don't know. It was all broken; that is all I know.

Q. When did you last see this automobile? A. The last time I was up there.

Q. When was that. A. Three or four years ago.

Q. After the accident? A. The same year after the accident; yes.

Q. Well, you went out of the house and looked at it, and then did you see it again during your visit that you made up at Reeves's? A. Not just immediately; I should say it was half an hour after I went out.

Q. Well, it is true that you saw it, whether it was half an hour or half a day? A. To the best of my knowledge, it was half an hour.

Q. Then you went in and took care of your wife? A. Yes, sir.

Q. And then you went out in about half an hour and looked at it? A. About that.

Q. About what time did the wagon come? A. I guess it was about an hour.

Q. An hour after when? A. After the accident.

Q. Then the wagon came about 6 o'clock? A. To the best of my knowledge, it was about an hour.

Q. Have you had any automobiles since then? A. Yes, sir; I have one now.

Q. How long after the accident did you get another one? A. I couldn't tell you; maybe six months, as near as I can say.

Q. It was only the next spring, was it? A. Well, I don't want to say, because I don't know just when I got it.

Q. What kind of an automobile was it that you got then? A. It was nearly a year afterwards.

Q. What did you get then? A. A thirty horsepower, the same kind of a car.

Q. A Maxwell runabout? A. No, sir; a Maxwell touring car.

Q. You got a touring car that time? A. Yes, sir.

Q. The one before was a runabout? A. Yes, sir.

Q. Did you get this new or second-hand? A. Brand new.

Q. These people that you speak of, that you are paying out money to, are also employed as hands by the Crucible Steel Company, are they not? A. Yes, sir.

Q. And what is their business? A. One is an inspector.

Q. Of the Crucible Steel Company? A. Yes, sir.

Q. What is he inspecting, work you are doing. your contract work, or not? A. If the work isn't done right I don't get anything for it.

Q. And you are paying him $5 a day? A. Yes, one of them.

Q. Does the Crucible Steel Company know that? A. I don't know whether they do or not.

Q. Here is a man that is inspecting your work and reporting to the Crucible Steel Company, that you are giving $5 a day to? A. Well, there are several of them five or six of them.

Q. There are several of them? A. Yes, sir.

Q. He is one of them? A. Yes, sir.

Q. Which one is that? A. Shaw.

Q. What does the other man do? A. He does the charging up.

Q. Charging up for whom? A. The Crucible Steel Company.

Q. What is he charging up ? A. Charging up the stuff we have worked.

Q. Charging up what you use every day? A. He works every day for the company.

Q. And you give him money too? A. Yes, for doing little errands for me, little things, when I want—

Q. Do I understand you to say that you pay Shaw $5 every day? A. Every day, yes.

Q. Sundays included? A. Every day when we work.

Q. How often do you work? A. Well, we work four and five days a week, sometimes every day.

Q. Where is Shaw, in what factory is he? A. He is the inspector.

Q. Does he go in each one of the factories? A. It is all one.

Q. Where is your department? A. In the forging department.

Q. And he inspects the forging department, does he? A. Yes, and other work, too.

Q. What other departments are you in? A. Well there is the mills and storehouse; that is about the extent where he has to go.

Q. What does he inspect? A. Well, he inspects everything that is done.

Q. Where does he work for you? A. Him and two or three more men.

Q. You have got two or three more men working there. Are they also employees of the company? A. I haven't got anything to do with that.

Q. Are these other men paid by you? A. No.

Q. Are they paid by the Crucible Steel Company? A. They are paid by the Crucible Steel Company.

Q. So that you do not pay those men anything? A. Which men.

Q. The other men there that— A. Nothing to do with them; they don't do nothing for me.

Q. Do they inspect your work? A. This man does my work and I pay him for it.

RE-DIRECT-EXAMINATION by Mr. Gilson:

Q. Mr. Dickinson, what is Mr. Illingworth in that Crucible Steel Company, is he an officer? A.

I don't see why a question like that should come up here.

Q. Well does he know that you pay either Shaw or Baker? A. I don't know anything about it. I do this as a favor to the boy, because he helps me out. It is a little on the side of his wages from the company.

Q. These other men that inspect your work, do you pay them anything? A. No, I don't pay anybody but this one.

Q. When did they enlarge this plant? A. It was built—just began here a little over a week ago.

Q. When was it that you took on more business, more contracts? A. Why, any time I want to take it; now if I want to take it; but I don't know how to take it.

Q. You answered in answer to Mr. Parker's question that you were doing more business now in the way of contracts than you were doing at the time of the accident? A. They are putting this thing through starting up. I don't know whether they will continue or not.

Q. When did you commence to take on these additional contracts? A. Two or three weeks ago,

Q. Where did you leave this automobile after it was hit by the train? A. At this here hotel.

Q. Where is it now? A. Up there, for all I know.

Q. Was it there the last time you went there? A. Not the last time; I didn't go there at all. The last time I saw it it was there.

Q. Now you said you took off the emergency brake when you got 20 or 30 feet from the track? A. To the best of my knowledge, yes.

Q. When you did that did the automobile go faster or slower? A. Not any faster, because I had control of it with the foot brake.

Q. Did it go slower? A. No. I did that so that when I got to the track I could go ahead.

Q. How far in distance had you driven this automobile during the time you had it that two or three months, about how many miles? A. How many miles had I driven it?

Q. About, yes. A. Oh it must be 1,500 or 2,000 miles, I guess.

Q. And the other members of your family— A. 2,500 miles; that is what I had driven it just before the accident.

Q. The other members of your family, Mrs. Dickinson and Mrs. Gardner, they are not hard of hearing, are they? A. Oh, no.

RE-CROSS-EXAMINATION by Mr. Parker:

Q. You say you took off the brake just before you got to the track so that when you got to the track you could go ahead, did you? A. If I need to go ahead, yes.

Q. Then you were expecting—you were coming down— A. I was naturally expecting to go ahead.

Q. You were coming down very slowly to this place, and you expected as soon as you got on the crossing to go on and increase your speed? A. To go down the other way, yes.

By Juror No. 12: Q. Mr. Dickinson, isn't it a fact that you are the head man in the Crucible Steel Company outside of the officers? A. No, sir; I am a contractor.

Q. Is it not a fact that that new plant has been running seven or eight months? A. No.

Q. The new plant towards the river there? A. No, this plant is down here by the Passaic River.

Q. I know, it is built over here, though. A.

It has been built nearly two years. It hasn't been started—in fact, we are not runinng yet.

Further DIRECT-EXAMINATION by Mr. Gilson:

Q. They have been experimenting with the new machinery; is that it? A. Yes, sir.

Q. How long have they been doing that? A. Two or three weeks, on and off, and something would happen, and we would have to stop, and then something else would happen, and we would have to stop again.

Q. So that it is not running right at the present time? A. No, sir; it isn't running right at the present time.

Further CROSS-EXAMINATION by Mr. Parker:

Q. How much is this man Shaw getting from the Crucible Steel Company? A. I don't know.

Q. A hundred dollars? A. I don't know anything about it. I give this on the side, Governor, just for helping me.

Q. You give him, you say, a hundred dollars a month on the side? A. I don't know what it is; I never asked him.

By Juror No. 10: Q. Would you have had an opportunity by putting on full power to get across that track, to avert that accident? A. No, sir; I couldn't have got across any of them.

Q. You could not? A. No, sir.

By the Court: Q. I understood you to say, Mr. Dickinson, that when you sprang from the auto you struck the ground, or reached the ground, about the midle of the east-bound track? A. As near as I can remember, that is where we stopped.

Q. And you got out on the— A. Left-hand side.

Q. And how at that moment was the car pointing—your car, the automobile? A. Towards the west.

Q. Pointing towards the west? A. Yes, sir.

Q. And was it standing on the east-bound track? A. It was standing on the east-bound track, as near as I can tell, crossing, astraddle of the further rail.

Q. Did you see the train strike the automobile? A. When I jumped back, as near as I can say, I was 6 or 7 feet from the car when the train struck the car; I was in this position, with my wife on my knee (illustrating). It was all done so quick, I couldn't say just what happened.

Q. Looking back at it now, do you say that you saw the train strike the auto? A. Well, when I jumped, I twisted this way (indicating) and jumped, and as quick as I did, the train struck the car.

Q. Did you hear it or see it? A. I saw it strike the car.

Q. Well, what part of the car? A. The off hind wheel.

Q. What part of the engine hit the off hind wheel? A. The cylinder, I think, or the cow-catcher; I think it was the cylinder.

Q. The right-hand side of the engine? A. The right-hand side of the engine and the left hind wheel.

Q. Where was the automobile when you first saw it after the accident? A. They took it off the track and rolled it over into the ditch, away up the track.

Q. How far up the track? A. Oh, 150 feet, I should say.

Q. Which ditch, the north or south? A. The west.

Q. I suppose there is a ditch on each side of the track. In fact, I do not know what you mean by "ditch" exactly? A. Yes, sir; they rolled it away down the embankment, into the ditch.

Q. On which side? A. On the south side, I think. I was going north; they were going west. Yes, it was the south side.

Q. You say you partly fell. Did you strike your knee on the ground? A. No, sir; I did not, not to my knowledge.

Q. Can you tell us what it was that hurt your knee? A. I fell backwards and took my wife with me, and my wife dropped on my knee.

Q. You think it was her weight? A. 160 pounds.

Q. You think it was her weight coming down on your knee that hurt you? A. Yes, it was. She was sitting in a chair—

Q. No. Your opinion is that it was your wife's weight coming down on your knee that hurt your knee? A. To the best of my knowledge and belief, it was; yes, sir.

CHARLES F. BAKER, sworn in behalf of plaintiff:

Direct-examination by Mr. Gilson:

Q. Doctor, you are a practicing physician and surgeon? A. I am.

Q. When and where were you graduated? A. Columbia College, 1902.

Q. Where is your office at present? A. 47 Walnut Street, Newark, New Jersey.

Q. Are you connected with any institutions here in Newark? A. Yes, sir.

Q. Which ones? A. City Hospital, St. Barnabas, St. James, Presbyterian and the Eye and Ear Infirmary.

Q. And in your private practice, as well as in these institutions, do you have occasion to make X-ray photographs? A. Yes, sir.

Q. Just explain to the jury what those photographs are. A. X-ray photographs are pictures made by shining the X-ray on the human frame, or body, making shadows as they do on photographic plates, which are laid under the leg, or the bone, or whatever is photographed, and then developed the same way as an ordinary picture; prints can be made from them in the same way.

Q. What is the advantage or purpose of making that kind of photographs? A. You can see very clearly the condition of the bones, whether they might be broken or diseased.

Q. Suppose you can not feel a broken bone on an examination of that kind, would that be ascertained by one of these X-ray photographs? A. Yes, sir.

Q. Did you make an examination of Mr. Joel Dickinson on or about November 30, 1911? A. On November 20, 1911, I examined him.

Q. Just tell us what that examination was and what you found. A. I made two pictures of his knee joint. They showed that a small, oval piece of bone had been torn from the upper end of the lower bone entering the joint, or the shin bone, as it enters the knee joint, and that piece of bone had been displaced backward and behind that bone—that little piece had been detached and was displaced behind the big bone, lying still within the joint.

By the Court: Behind the shin bone? A. Yes. The name of the bone is the tibia.

By Mr. Gilson: I show you a plate and ask you if you recognize that (shown to witness)? A. Yes. That is a lateral view.

Q. Is that one that you took? A. Yes, sir.

Q. At the time you speak of? A. I took two plates. This is the side view; the other is the front view.

Mr. Gilson: I offer this plate in evidence.

The Court: Do you wish to cross-examine on the offer?

Mr. Parker: No, sir.

Marked Exhibit P-9.

Q. Now I show you a print, and ask you if you recognize that (shown to witness)? A. I didn't make this print, but I recognize it as a print made from that plate.

Mr. Gilson: I offer this in evidence.

Marked Exhibit P-10.

Q. I show you another plate (shown to witness), and ask you if you recognize that? A. Yes, sir.

Q. Is that the other picture of the plaintiff's leg, that you speak of? A. Yes, sir; that is the front view.

Mr. Gilson: I offer this in evidence.

Marked Exhibit P-11.

Q. I show you another photograph (shown to witness), and ask you whether that was taken from the last plate? A. Yes, sir.

Mr. Gilson: I offer that in evidence.

Marked Exhibit P-12.

Q. Now, referring, Doctor, to Exhibit P-10, will you point out to us the chip of bone that you speak of shown in this photograph? A. There it is (indicating).

Q. You mean this little, round, black spot, about the size of a pea? A. Yes, sir. I hadn't seen this plate to refresh my memory, and that little, oval piece of bone lies higher than I thought it did, in my memory. It lies behind the other bone, at the knee joint.

Q. Now, referring to Exhibit P-12, will you show us where that little piece of bone came from? A. (Indicating.) There is a point on the top of this bone, and next to it there should be another point, and that point is missing. That is where it came from.

Q. Doctor, this little piece of bone that you refer to, is that inside or outside of the capsule of the knee? A. That is inside.

Mr. Parker: What is that, the capsule of the knee?

Q. That is the ligaments of the knee, is it not? A. Yes, sir.

Q. Do you know what a sesamoid bone is, Doctor? A. Yes, sir.

Q. What is that? A. It is a small piece of bone that develops in a tendon.

Q. Is there any question about whether this is a sesamoid bone or not? A. No, sir.

Q. Why not? A. It is not. There are no sesamoid bones within the knee joint ever.

Q. And this is within the knee joint? A. This is, yes, sir.

Q. Now, Doctor, assuming that a man, fifty odd years of age, jumped out of an automobile and dragged a woman with him weighing around 160 pounds, and that woman fell on his leg, and shortly afterwards, the next morning, he felt pains in his knee, and sometime afterward an X-ray photograph was taken, showing this piece

of bone about as large as a pea in this position shown in this photograph, what, in your opinion, caused that displacement of the bone? A. I think the injury received at the time that he jumped out of the machine did it.

Q. Such an injury would cause this condition? A. Yes, sir.

Q. Now, is that condition likely to be painful? A. Very.

Q. And what effect would it be likely to have on a man's capacity to stand on his feet and walk? A. Why, that piece of bone is continually causing an inflammation of the lining of the joint, and in the course of years it will greatly reduce the movement in that joint, making a chronically infiamed joint.

Q. Is there anything in either of these prints, Exhibits P-10 or P-12, that would show any inflammation? A. The prints are not perfect enough. I think in one of the plates it will be seen. (Counsel hands plates to witness.) The side view shows some spots which indicate chronic thickening of the joint; under the knee cap there are some spots which indicate a chronic thickening of the joint (indicating).

Q. What, in your opinion, caused that, assuming the same facts as contained in my other hypothetical question? A. I assume that that loose piece of bone in there has produced it.

Q. Is there any cure for that condition? A. Yes, sir.

Q. What is it? A. To remove the piece of bone.

Q. Is that a painful operation? A. The person would have to take ether; he couldn't stand the pain without.

Q. And about how long would it lay a man up?

A. You mean how long would the operation lay a man up?

Q. Yes. A. Why, it would be, I should say, a month or six weeks before he could walk around safely.

Q. Is there any other cures for it? A. There is no other cure for it.

Q. Would a sesamoid bone look like this shadow shown in this Exhibit P-10, that you spoke of? A. It would look somewhat like that.

Q. What is it, then, that makes you think that this is not a sesamoid bone? A. Because there are no tendons just at that point for it to grow in, in the first place; there is no reason for its being there, in the second place.

Q. Is that an unusual condition, to have a sesamoid bone? A. Within the knee joint?

Q. Yes? A. There never was one there.

Q. What was your bill, Doctor, for services in this case, taking the pictures, and so forth? A. I think it was $10.

CROSS-EXAMINATION by Mr. Parker:

Q. There is no perspective in these X-ray pictures, is there? A. No, sir.

Q. So that is a shadow that might be an inch nearer you or further from you—that little pea? A. Yes, sir.

Q. You could not tell exactly where it was? A. I could tell by the other—

Q. Just answer my question, Doctor. You are on your own ground. You can not from these pictures tell where it was? A. Yes, sir; I can.

Q. How? A. By taking a picture in two directions.

Q. Oh, you have another picture? A. Yes, sir.

Q. You have another picture? A. We have another picture here.

Q. Have you produced and shown any pictures but what we have had here?

Mr. Gilson: There are just two, are there not?

Witness: Yes.

Mr. Gilson: You have them both right there, Mr. Parker.

Q. Where is the little pea there? A. I don't see it in this print.

Q. In Exhibit P-12 you can not see it? A. No.

Q. So that in neither of these exhibits that have been put before the jury here—from neither of these or combining them can you tell exactly where that pea is? A. Yes, sir.

Q. Whether it is 1 inch nearer to you or 1 inch further from you? A. No, sir.

Q. Now, it is quite a usual thing for people to take ether, is it not? A. Yes, sir.

Q. If a person has a bad felon and you want to lance it, you give him ether, do you not? A. Yes, sir.

Q. And to a man in healthy and robust condition there is no danger? A. No, sir.

Q. So that, granting, for the sake of argument, that there is this broken off piece of bone, it could be removed from the leg and its usefulness practically entirely restored by an operation which would confine him for a month or six weeks in the hospital? A. I think so.

Q. That is the usual time that people go there for appendicitis, is it not? A. It is a great deal longer than the ordinary appendicitis.

Q. Well, they are there for a month for appendicitis, are they not? A. Sometimes.

Q. Now, is it not a symptom of some breaking away in the joint, a floating piece there, that a

person is taken with very severe pains and made absolutely lame at times? A. Yes, sir.

Q. And assuming that a man stepped off an automobile and brought his wife down on top of him, weighing 165 pounds, and broke a piece off as big as a pea in the knee joint, would he not immediately have great pain and suffering? A. I should think so.

Q. Now, you see some evidence of inflammation of the joint in these pictures? A. In the plates —in one plate.

Q. Which one is it? A. The side view (indicating). This is the side view. It lies right here underneath the knee cap; that is the knee cap shadow, and it lies under here.

Q. What do you see there (indicating)? A. In the plate, I said.

Q. What do you see in the plate? A. I see some little irregular shaped shadows. (Counsel hands plate to witness.) Do you see that little shadow down underneath the knee cap (indicating)?

Q. You think you can see a shadow there? What does it show? A. It indicates that there has been an inflammation of the lining of the knee joint which has persisted for some time.

Q. Well, an inflammation of the lining of the knee joint that has persisted for some time and that is connected with or caused by rheumatism would show the same thing, would it not? A. No, sir; there is no indication of rheumatism in the pictures.

Q. Is not that a chalky deposit that you say was there? A. I didn't say anything about chalky deposit.

Q. I thought you said something about a deposit there? A. No, sir.

Q. Did you not say a deposit was there? A. I said there was a thickening of the lining of the knee joint.

Q. And what kind of stuff is that thickening? A. It is fibrous.

Q. Then how would it show in your X-rays? A. Because it is denser than the surrounding substances.

Q. I thought in order to show on the X-rays it had to have some mineral substance in it? A. No, sir.

Q. You think not? A. I am sure of it.

Q. Why is it that bones show in the X-rays? A. Because they are very dense and they are partially opaque to the X-rays.

Q. They have got calcium, or lime, in them? A. Yes, sir.

Q. That is what makes it show, and anything else that had calcium, or lime, in it would show that? A. Yes, sir.

Q. And these deposits of rheumatism are of a chalky character, are they not? A. Yes, sir.

Q. Is not the knee cap itself a sesamoid bone? A. It is classified that way.

Q. Now, what is your business, Doctor, chiefly? A. X-ray, surgery.

Q. You just make X-ray photographs; is that the business you do? A. X-ray and surgery.

Q. Do you operate and treat people for— A. Yes, sir.

Q. What hospitals are you connected with? A. City Hospital, St. Barnasbas, St. James, Eye and Ear Infirmary, Presbyterian Hospital.

Q. Do you make their X-rays for them? A. Yes, sir; I do.

Q. Then your business is rather the making of these photographs than their interpretation? A. That and surgery, as I said before.

RE-DIRECT-EXAMINATION by Mr. Gilson:

Q. Doctor, you say it is not unusual to give ether to a patient. How about a patient who has a bad heart? A. You are very careful not to give it unless you think the case absolutely demands it, if the heart is bad.

Q. Only in emergency cases? A. Absolute necessities.

Q. This operation that you speak of, would that be an expensive operation? A. It is quite an expensive operation; yes, sir.

Q. How much would it cost all together, would you say, for the operation and the nursing and the room in the hospital and the surgeon's fee, and so forth? A. It depends on the surgeon who did the work.

Q. Well, a very good surgeon? A. Well, I should say from $300 to $500 would cover all expenses.

Q. Now, you say that a person would have immediate suffering in an accident like the one described in my question, where a woman weighing 160 pounds fell on his knee. Suppose that person who had the injury was under great excitement and fright, would that have anything to do with his noticing the pain? A. That is the natural explanation why he did not notice the pain.

Q. In these photographs that you took is there any evidence of a rheumatic condition? A. No, sir.

Q. Would it appear if it was a case of rheumatism? A. Yes, sir; they are very clear pictures.

Q. What would those evidences be? A. These deposits on the bones, deposits of lime.

Q. These chalky deposits that Mr. Parker

spoke about? A. Yes; these deposits of lime. They change the outlines of the bone. They are very easily recognized.

Q. And you say they do not appear in these photographs? A. No, sir.

RE-CROSS-EXAMINATION by Mr. Parker:

Q. You say a man under intense excitement would not feel that at once. Suppose a man was under excitement, and got sufficiently calmed down to go and examine the automobile, and walk for 50 feet or more to the track, and come back to the hotel, and then go on and stay there a moment, and then go in a carriage to his house, and not notice anything the matter with him until the next morning; do you think that would be likely to happen to a man who had a piece of bone broken off of his leg in the joint?

Mr. Gilson: I object to that on the ground that it does not correctly set forth the facts. The testimony shows that Mr. Dickinson noticed it during the night.

Mr. Parker: Well, I will amend that. During the night, for the first time.

A. I think he could easily go several hours without noticing it.

Q. Well, this accident occurred a little after five o'clock in the afternoon, and he did not notice it until some time in the night. A. It is perfectly possible.

Q. You think so? A. Yes.

JOHN HEMSATH, sworn in behalf of plaintiff:

Direct-examination by Mr. Gilson:

Q. Doctor, you are a practicing physician and surgeon? A. Yes, sir.

Q. When and where were you graduated? A. University of Pennsylvania, in 1894.

Q. And where is your office? A. 36 Spruce Street, Newark.

Q. You have been practicing your profession since you were graduated? A. Yes, sir.

Q. Are you connected with any institution here in the city? A. Newark Eye and Ear Infirmary assistant surgeon.

Q. Do you know Joel Dickinson, the plaintiff in this case? A. Yes, sir.

Q. Do you know Dr. Baker, the preceding witness? A. Yes, sir.

Q. Did you attend Mr. Dickinson before November 20, 1911, for an injury to the knee? A. Yes, sir.

Q. Do you remember how these X-ray photographs happened to be taken? A. Yes, sir.

Q. What were the circumstances of having them taken? A. I had previously treated members of Mr. Dickinson's family, and on several occasions while at his home he spoke to me about his knee, and I told him if he would come to my office I would examine his knee and see what I could do for it. He did, and I came to the conclusion that I had better have an examination with the X-ray, because the external—by looking at the knee and manipulating, outside of subjective symptoms, I could not find any particular trouble, and other physicians had applied all known remedies externally and local applications, without any benefit, and I came to the conclusion from the symptoms that he had that he must have something within the knee joint, so I advised this photograph to be taken.

Q. Then it was you who advised this photograph? A. Yes, sir.

Q. How long after that advice, do you know, were these photographs taken? A. Why, I think he first called at my office on November 5, 1911, and I don't remember the exact date that he went to Dr. Baker's. I called him up and made an engagement with him, and we went to Dr. Baker's office and had the pictures taken.

Q. Now, in the course of your practice do you have occasion to examine X-ray pictures and use them in your profession? A. Yes, sir.

Q. And all doctors do nowadays? A. Yes, sir.

Q. It is part of the science of medicine, is it not? A. Well, I think in all cases of fracture, any injury to the bone or any injury to the bony parts, it is absolutely necessary to have an X-ray picture taken, because by external feeling it is impossible to tell whether you have a fracture or not, in my opinion.

Q. Now, I show you two photographs, marked Exhibits P-10 and P-12, respectively, and ask you if you recognize them (shown to witness)? A. They look like pictures that were taken from the plates that Dr. Baker made.

Q. Now, will you point out to the jury what you see abnormal in that knee joint, if anything? A. This little body here (indicating).

Q. That little dark spot? A. Dark spot; yes, sir.

Q. About the size of a pea? A. Yes, sir.

Q. That is in Exhibit P-10. Now, in Exhibit P-12, is there anything in that that would indicate where that little piece of bone came from? A. There are two spines here; one seems to be longer than the other (indicating).

Q. What does that indicate? A. Why, this may have been torn off there.

Q. Now, referring to the plate, Exhibit P-9, is there anything in that that would indicate an inflammation? A. Why, I am not expert enough in examining plates to tell whether there is or not. It is very delicate there, and I wouldn't venture to say.

Q. Did you treat Mr. Dickinson at all for this trouble with his knee? A. Yes, sir.

Q. During what period did you treat him? A. I have treated him from April, 1911, until the present time.

Q. When did you treat him the last time? A. About two weeks ago he was over to my office.

Q. About how many times have you treated him on an average during the last three years? A. Well, I don't know the exact number of visits. Sometimes he would come to my office once or twice a week, sometimes oftener, and that would be probably according to how much trouble this leg was giving him, and he may stay away for two or three weeks and then come again.

Q. What did you do for him? A. Why, I applied bandages—that is, compression—and friction, electricity.

Q. Did you find during any of your examinations any evidence of rheumatism in that knee? A. No, sir; I never saw any external evidence of rheumatism or fluid in the knee joint, or anything of that kind.

Q. Do you see any evidences of rheumatism in these X-ray photographs? A. No, sir.

Q. Where is this spot that you pointed out as a piece of bone with respect to the capsule, inside or outside? A. It appears to be inside the capsule.

Q. Does that indicate anything to you as to whether it may be a sesamoid bone or not? A. Yes, sir.

Q. What? A. Most of the muscles pass over the capsule. If it was in the muscle, the sesamoid bone would have to be in the tenderest portion of the muscle. The sesamoid bone is usually produced by friction on a bone.

Q. Then, in your opinion, is it or is it not a sesamoid bone? A. Yes, sir.

By the Court: Q. What is your opinion as to whether it is or is not? A. It is not.

By Mr. Gilson: Q. Have you examined Mr. Dickinson's heart? A. Yes, sir. Not lately. Last winter he was ill in bed with his heart.

Q. Would you advise an operation where he would have to take ether? A. No, not unless it was absolutely a matter of life and death.

Q. Why? A. On account of his heart and his general build—general health.

By the Court: Q. What is the matter with his heart? A. He had a—his pulse was weak and irregular and intermittent. This was last winter that he had this attack. I have not examined his heart lately.

By Mr. Gilson: Q. Can you tell us, Doctor, about how much your bills have amounted to up to the present time for treatment to Mr. Dickinson's knee? A. If I can refer to my minutes, I can tell you.

The Court: You may do so.

Witness: (Referring to memoranda.) Up to the present time his bill is $126.

Q. He has paid part of that? A. He has paid part of that.

Q. The balance is for recent visits, I suppose? A. Yes, sir. He has paid $94.

By the Court: Q. Well, some of this covered the treatment for the heart? A. Yes, sir; that is—

By Mr. Gilson: Q. I mean just for the knee? A. Well, there was a few—only probably about six visits includes this other trouble.

Q. And how much would that be, how much would you deduct for that? A. Well, I charged him $2 at the house; these are house visits; that would be $12—less $12.

CROSS-EXAMINATION by Mr. Parker:

Q. How much is the bill for attendance on this knee, Doctor? A. Why, it is $12 less.

Q. $12 from that would be $114? A. Yes, sir.

Q. That includes your charges for attendance in Court and testifying? A. No, sir; I never charged him anything for that to today.

Q. Never charged him for that? A. No, sir.

Q. Do you not charge for your attendance here? A. I don't go to Court very often.

Q. But you went once before, because I recognize you; I had the pleasure of hearing you. A. But I never sent Mr. Dickinson a bill.

Q. Then that is not included? A. No, sir.

Q. And you charge at most $2 a visit for the house calls? A. Yes; that is my average fee.

Q. That is what you expect to charge Mr. Dickinson, as I understand? A. Yes, sir.

Q. You do not charge everybody alike? A. No, sir.

Q. And that would make at the most fifty-seven house visits, would it not? A. Yes, sir; but these were not all house visits.

Q. How many of them were house visits? A. I really don't know; I didn't bring any notes on that subject.

Q. Were any of them house visits? A. I think most of them were at my office.

Q. You have attended him from sometime in 1911. When was that? A. It was November 5th.

Q. Is that November 5, 1911? Was it not April 1911? A. November 5, 1911.

Q. I thought you said you attended him first in April, 1911? A. I made a mistake if I did; it was November 6th. That was the first time he consulted me about this leg.

Q. That was a year and a half ago. Have you ever given him any medicines for his leg? A. I did when I first treated his leg.

Q. What did you give him? A. I gave him medicine.

Q. What kind? A. Salicylates, medicine for rheumatism.

Q. Then your first diagnosis of this case was that it might be connected with rheumatism? A. I didn't make a diagnosis.

Q. Well, you always have to make a diagnosis when you are treating a case of disease, do you not? A. I was treating symptoms; I don't call it disease.

Q. And you gave him rheumatism medicines? A. I gave him medicines usually used in rheumatic cases.

Q. You gave him those things. How long did he keep on that? A. Until I found they were no use; then I stopped.

Q. And you have found them of no use to a good many rheumatic patients, have you not? A. It all depends on the form of rheumatics.

Q. Some people who have genuine rheumatism pile in those things, and it doesn't do any good; isn't that so? A. Well, I have failed in a good many other things, too.

Q. And you have never had him go around and be treated with baths, and see how he would do there? A. Sir?

Q. Do you not send rheumatic patients to Mt. Clemmons and other places where they bathe them? A. Yes, when we can't do anything else with them.

Q. And it is very successful sometimes, I understand. Now, Doctor, for instance, Exhibit P-10 (shown to witness); do you mean to say that that shows the leg looking at it sideways; is that right? A. Yes, sir; photographed this way, looking through here (indicating).

Q. I can not see that? A. I will stand up and show you. (Standing and indicating.) Here is your leg; that is the bone you see there.

Q. Show the jury. You can use my leg? A. The photographic plate is under here and the light goes through there (indicating).

Q. If the man stood up with his knees straight and you looked through both knees sideways— A. No, not both.

Q. Well, you are looking through one of them? A. Yes.

Q. And that bone turns around so that it goes at right angles to the lower one, does it not? A. What do you mean?

Q. This big bone here—what do you call it? A. That is the femur.

Q. You can bend that around? A. Yes, sir.

Q. When a man sits down it goes at right angles? A. Yes.

Q. And what becomes of that little piece of bone? A. Why, if it turns around far enough it would be pinched between the two bones.

Q. It would go into the bone, then? A. Into the cavity.

Q. If the man sat down here and went down like that, so as to turn that under, would not

that give him excruciating pain (indicating)? A. If it got between the joint completely.

Q. So that this is not really between the joint? A. It isn't there, but—

Q. And could it get between the joint unless he put his leg away up so that the knee made an acute angle? A. It is movable; it can get around the joint at the edge, on the outside.

Q. I do not see how that would affect anybody at all, that being there, just in walking and ordinary sitting down? A. It is a question whether it stays in that one spot all the time.

Q. Now, if there has been a movable thing wandering around in the joint, and if it is there yet, as you say, a photograph would show it, would it not, now? A. I should think it would.

Q. So that all you would have to have to show that this was a thing floating around here is to take another photograph, in the same position, and if that thing had changed its place, it is a floating thing? A. Yes.

Q. And if it had not changed its place, you would think it was a sesamoid bone or something of that sort? A. No, sir.

Q. What would you think? A. It might be permanently fixed in there by chronic inflammation.

Q. You would think it was a permanent pea there? A. Well, no, but by continuous inflammation it might become fixed there.

Q. Fixed where? A. Fixed on the capsule that surrounds that joint.

Q. Well, that is made up of cartilage or muscle, or something is it not? A. Made up of connective tissue or ligaments.

Q. If it was fixed on that, how would it affect the joint? A. In that location, when the knee is

bent sufficiently it would still come in contact with the cartilages, with the—

Q. But it would only come in contact if the man sat down like the Hindus do, right on their heels, would it not? A. Well, I don't know that, because I don't know by the picture just how near that is to the joint.

By Mr. Gilson: Q. Your charges for visits to the house are $2 and where they are to the office they are $1? A. Yes, sir; one to the office and two to the house.

By Mr. Parker: Q. Did you consult with his former medical attendant before he came to you? A. No, sir. Up to that time he had never been a patient of mine, outside of the members of his family, and he spoke to me; he said he hadn't received any benefit, and I told him I would look him over.

Q. And this happened in November, 1911? A. Yes, sir.

Adjourned until tomorrow, Tuesday, April 8, 1913, at ten o'clock, a. m.

SECOND DAY

Tuesday, April 8, 1913.

Met pursuant to adjournment.
Present, counsel as before stated.

JOEL DICKINSON, plaintiff, re-called in his own behalf:

Direct-examination by Mr. Gilson:

Q. Mr. Dickinson, this man that you said you employed, and who was also employed by the

Crucible Steel Company to oversee your work, is he the only man that is employed by that company for that purpose? A. No, there is seven or eight more.

Q. Do they all oversee your work? A. Some of it.

Q. And if the work that you turn out is not satisfactory, what becomes of it? A. Well, I don't get nothing for it.

Q. What is this man's name? A. Shaw.

Q. How much time does he devote to your particular business—how much time during the day? A. Well, in the morning he will go around and see that the men is in; if not he will place other men there. I don't have to be there. At night the same way.

Q. How much time does he devote to the company's business? A. Well, he don't lose any time of the company's at all.

Q. He only works for you when he is not working for the company? A. When he has nothing else to do.

CROSS-EXAMINATION by Mr. Parker:

Q. I understand his time during the day is paid for by the company? A. Yes, sir.

Q. By the day? A. Yes, sir.

Q. How much does he get? A. I don't know.

Q. The time which he is not occupying for the company he may occupy for you if he wants to? A. In the morning; yes, sir.

Q. And he gets $5 a day for that? A. From me.

Q. What does he oversee? A. He don't oversee anything—when we do the work he looks if there is any defects in it, if it is done properly; if it isn't, he condemns it.

Q. Then it was done partly under his supervision, was it? A. What?

Q. He approves work that was done partly under his supervision? A. Not unless it is right.

Q. Not unless he thinks it is right? A. It has got to be right; it doesn't make any difference whether he thinks so or not, or it doesn't get paid for.

Q. If he reports that the thing is right, you get paid for it, do you not? A. No, sir; not if it isn't right.

Q. Why not? A. Because if it went away it would be worse for me; I would have to pay for the coal and the steel and everything else that it costs to do it. It would be very foolish for him to pass anything that isn't right.

Q. But if it passes him you get paid for it? A. Not unless it is right.

Q. If he says it is right, you get paid for it, do you not? A. Not if it isn't right, it doesn't make any difference who says so.

Q. Who ultimately tells whether it is right? A. There is another man, Patsy Martin, and two or three other men in the storehouse; they go over the same kind of work.

Q. Two or three men besides? A. Yes, sir, seven men.

Q. But this man inspects your work specially, does he not? A. Some of it, not all of it.

Q. What work does he inspect? A. Well, it depends what it is. If it is for forging, he inspects it; if it is the straight bar, he don't.

Q. Then he is inspector of forging? A. Yes, sir.

Q. Your things might go out and defects in the forgings might not be discovered for years, might they not? A. No, sir; it is discovered the day it is shipped, or it doesn't go out.

Q. Have you ever had anything returned to you? A. Lots of it.

Q. After it had gone out and been shipped? A. Lots of it.

Q. Then if he inspects it and says it is right, you are paid for it, and it goes out, and if it is returned, possibly you have to stand the loss, is that it? A. That is the way it goes. When he inspects it and says it is all right and it is shipped, it comes back on me, and I should have to pay the freight both ways and the coal and everything that it costs to make it.

Q. When are you paid for it? A. Every week end.

Q. So that when he inspects it at the end of the week and says it is right, you get paid, do you? A. Yes, sir.

Q. So that if it comes back a year or a month from now— A. There is no such thing as a year.

Q. How soon does it come back, then? A. Well, right away; we know it as soon as they receive it if it isn't right.

Q. If they accept it, it is all right? A. If they keep it, absolutely. They wouldn't keep it if it wasn't right.

Q. Well, there might be defects in it that a person might by skill discover? A. If it is discovered it doesn't go.

Q. But you say if it is to be discovered, this man Shaw discovers it? A. Yes, he will.

Q. Now, you say he spends what time he can spare, that is also paid by the Crucible Company, on your work. How much time does he give to your work? A. Well, in the morning he is there before I am, to see that the men are in their place, and if they are not in their place he puts other men in their place for me.

Q. Merely the beginning of the day? A. The beginning of the day.

Q. And therefore you are enabled to go there later in the day if you want to? A. What?

Q. If you want to, you can go to your manufactory later in the day than 7 o'clock, when the men go on duty? A. It only happens if I don't happen to be there.

Q. But you can, if you want to, stay away at your house and not go there at 7 o'clock in the morning, because you have this man there to take your place; isn't that so? A. I get my pay; I don't get it unless I earn it.

Mr. Parker: I do not think you understood what I said.

Q. (Question read.) A. It only happens once in awhile.

Q. Then you only pay him once in awhile? A. No, I pay him all the time.

Q. Whether you go there or not? A. Yes, I pay him all the time.

Q. If he does not do anything at all there for you, you pay him? A. He does something for me every day.

Q. What does he do other times? A. I can't tell you; that is out of reason; I can't tell you unless you go into details.

Q. You can not tell us what he does for you that you pay for? A. Well, supposing I ask him to take some orders or make some weights when I don't feel well. This is no secret, Mr. Parker; everybody knows why it is done, if that is what you are looking for. I don't care who knows it.

Q. I merely want to know the value of this man's work that you say the Erie Railroad should pay for. It is a legitimate inquiry, is it not? A. It is to help me out.

Q. And it relieves you of considerable work? A. Yes, he does quite a good deal for me.

Q. And you pay him $5 a day whether he does an hour's work or six hours' work or fifteen minutes' work? A. He does more than an hour.

Q. Well, how much does he do? A. Well, I couldn't tell you on an average, but he does more than an hour.

Q. Well, does he do two hours? A. I don't keep his time; he does anything I ask him to.

Q. Have you no idea what this man gets from the Crucible Steel Company? A. No, I don't know.

Q. You can not tell us whether he gets a dollar a day or ten dollars a day? A. No, I don't know; I never asked.

Q. You never heard? A. What?

Q. You never heard? A. Never heard.

Q. Never spoke about it at all? A. I never do speak about anybody's business.

Q. When you arranged this five dollars a day with him you had no talk such as, "You get so much from the Crucible Steel Company; you can afford to take so much"? A. No, sir; it wasn't that way at all; it was just from time to time.

Q. And from time to time you gave him $5? A. No, sir; it grew up. First I gave him $2, and then he got better and better, and now his is a good man, and I give it to him.

Q. Have you any memorandum at all of your payments to this man? A. No, sir; I have not.

Q. Do you keep any books or anything? A. I do, but not for him.

Q. He does not appear on your books, eh? A. No, sir; not on my books.

Q. Although he is a regular employee of yours? A. He is a regular employee of the company, not mine.

Q. And you do not keep any account of your books of what you pay him? A. No, I never did.

Q. When did you give him the last money you gave him? A. The raise, you mean?

Q. No. When did you pay him the last money? A. Last Friday night.

Q. How much did you give him then? A. $25.

Q. When did you pay him before? A. Every week.

Q. Every week? A. Every week.

Q. When did you raise him up to $5? A. Gradually from time to time in this last ten years.

Q. Oh, he has been raised for the last ten years, has he? A. No. Understand me, from time to time. I first gave him a few dollars a week; then he became a little better and he understood the business better.

Q. And that has been going on for ten years? A. Oh, yes.

Q. More? A. Yes, but not this raise.

Q. How much did you give him five years ago? A. Oh, I don't remember; I don't know what I gave him; very little.

Q. You can not tell whether you gave him $10 a week five years ago? A. No, I couldn't tell you what I gave him then; very little.

Q. What do you consider very little? A. Well, I consider $5 a week very little.

Q. And he has been gradually raised, until now you gave him $25 the last time? A. The better he got and the more I needed him, the more I gave him.

Q. Well, he knew more about your business? A. Yes.

Q. And right along he was getting better and better and you were paying him more, from the time you started in? A. As I say, the more I needed him and the more I felt the need of it.

Q. And the more that he knew, too? A. Yes.

Q. And the better he could serve you? A. Better than any man I can get.

Q. He attended to your business when you were down with heart trouble? A. Him and others. He can't do it alone.

Q. How long were you down with heart trouble? A. I couldn't tell you.

Q. Can you not say whether you were down two weeks? A. I don't know whether I was home one or two weeks; not over two weeks.

Q. You can not say? A. I don't know whether I was home one or two weeks.

Q. When was this heart trouble? A. About a year ago, as near as I can tell you.

Q. And yet you say that you never went to your business and you were sick with heart trouble, and you can not say whether you were in your house one or two weeks? A. No.

Q. And you can not say whether you were there three weeks, can you? A. I told you about between one and two weeks.

Q. I did not hear you say that. Between one and two weeks—you say you were there one or two weeks? A. To the best of my knowledge I was home one or two weeks.

Q. I want to know what your memory is. Here was your illness, and you were confined to your house, and you are a healthy man otherwise, and you were confined to your house for the first time in how many years? A. I don't know that; I can't tell you.

Q. You can not tell when you were before confined to your house? A. If I had any idea, I would have kept account of it.

Q. I want your recollection. A. I haven't got any.

Q. You have not got any recollection? A. No, sir. Whenever I am sick I stay home, and if I am not sick I don't stay home.

Q. You have no recollection of the time? A. No, I have not.

RE-DIRECT-EXAMINATION by Mr. Gilson:

Q. Do I understand that Shaw worked for you before this accident? A. He has worked around there for ten years.

Q. I mean for you? A. No. He would do maybe some little things, and I gave him something for it. He never worked for me like he does now.

Q. The same kind of work that he has done since the accident? A. That is what he is employed for.

Q. The work that he is doing for you now, is that the same kind of work that he did before the accident for you? A. The way I can explain that, if you have a little kindness done for you by somebody, you expect to give him something for it, don't you? That is the way he got his money starting in, and then I needed him more, and, of course I had to pay him more for it.

Q. And you started to pay him regularly? A. Yes, sir.

Q. When was that, that you needed him more and started to pay him regularly? A. Well, when I found I couldn't get around.

Q. When was that with respect to the date of the accident? A. That must be going on over two years.

Q. I mean how long before or after the accident was it that you started to give him more? A. It would be about two years now, between two and three years ago, since I started to give him more.

Q. And up to two or three years ago you just

gave him some little amount for doing a little favor for you now and then? A. That is as far as I went then.

Q. For the past ten years? A. Oh, yes.

Q. Now, this man Baker, do you keep his account on the books? A. Never.

Q. Do you keep any books of account of your business which would show the profits you made, or, any kind of books of that sort? A. Work, you mean?

Q. No, your business. A. I keep the time regular of every man that works there.

Q. I meant a regular set of books, to show each month or each year or half year how much profit you make in your buisenss. Do you keep that kind of books? A. No.

Q. Does anyone keep that kind of books for you? A. There is nobody knows.

Q. Well, do you keep any books of account of that kind? A. No.

RE-CROSS-EXAMINATION by Mr. Parker:

Q. As I understand you, you first began giving him tips; is that right? A. No, there is no tip about it.

Q. You say you gave him money from time to time, as you thought was proper, because he had done something for you? A. Well, I am a man of this kind; if anybody does a thing for me I pay him for it.

Q. You are a good, liberal man? A. Yes, I believe in that.

Q. And if a man does you a service you pay him for it? A. I do, whether there or anywhere else.

Q. They did not ask you for it; you gave it to them? A. They never asked me for a penny.

Q. You have been giving to them right along? A. Yes.

By the Court: Q. Mr. Dickinson, I understand you to say yesterday that there might be days or a day in a week when the work was not going on? A. Yes.

Q. For such a day you would not pay Mr. Shaw, would you? A. Well, now, I would. I don't imagine that he gets much money, and I do that because he is so good to me.

Q. Well, what on an average would you say that you had paid him each week for the last year? A. Well, it averaged $20 to $25.

Q. And the year before that? A. About the same thing as that.

By Juror No. 12: Q. Was Mr. Shaw getting $5 a day before the accident or after the accident? A. No, after the accident. Before the accident he got whatever—you know, a man does a little thing for you, you give him something for it, and then, of course, when he learned more about the business, and I showed him different things—I brought him up; he has really grown up under my instructions, and he has become a really valuable man. That is why he gets it.

By Mr. Parker: Q. What did you give him in the week you were away at Howells, New York? A. No more than—I wasn't away more than about—yes, I was away a week—the same as I gave him any other time.

Q. You gave him $25? A. The same as I gave him any other time.

Q. You gave him $25 then? A. I guess it would be $20 or $25 that week.

Further DIRECT-EXAMINATION by Mr. Gilson:

Q. At that time do I understand that you employed him regularly? A. Because he did extra work that week, you know.

Q. Well, what we are trying to get at, Mr. Dickinson, is how much time does this man Shaw devote to your business on account of your inability to get around on account of your knee? A. That is an impossible question for me to answer.

Q. Well, approximately? You can give us some idea? A. Well, when he hasn't done it, he stops overtime at night; he doesn't work in the company's time at all; it is nights and mornings that he attends to my business.

Q. Suppose you had not had this accident—A. I wouldn't want him.

Q. One moment. —would you have paid Shaw from $20 to $25 a week? A. I wouldn't be paying him that, no.

Q. Well, about how much would you be paying him now? A. Well, for doing little things for me, to assist me, I would give him maybe $5 or $6 a week.

Further CROSS-EXAMINATION by Mr. Parker:

Q. Where is Shaw? A. Down there.

Q. He is down there at the factory? A. I say he is in the factory.

Q. So is Baker, too, is he not? A. Baker is there, too, yes.

Mr. Gilson: I would like to call these men, Shaw and Baker, if I may. Under the stipulation, as I understand it, I am shut out from calling them, but I would like to do it. It has developed that it could not be anticipated.

Mr. Parker: We had it all in the other trial.

Mr. Gilson: Not under the same conditions that it is under now.

The stenographer reads the stipulation.

The Court: The case of another witness, who would not testify to the facts of the accident, seems to be a case of omission. I do not think there is anything in the stipulation that applies to that kind of a witness.

The testimony of Annie E. Dickinson given at the former trial is read, Plaintiff's Counsel reading the direct-examination and Defendant's Counsel reading the cross-examination.

ANNIE E. DICKINSON sworn in behalf of the plaintiff:

Direct-examination by Mr. Gilson:

Q. Mrs. Dickinson, you are the wife of the plaintiff in this case? A. Yes, sir.

Q. And you were in this automobile on July 31, 1909? A. Yes, sir.

Q. At the time of this accident? A. Yes, sir.

Q. Now, will you just tell the Court and jury how you came down the hill on your return from Middletown and what happened? A. When we got to the top of the hill, I said to my husband, "Here comes that bad crossing."

Objected to.

The Court: Not what you said.

Q. Not what you said; just what you saw and what took place. A. And we came down the hill very slow, because I wanted him to go slow; I was afraid, and we came down slow, and he said, "Is that all right?" and I said, "Yes, that is fine"—

The Court: Never mind the conversation, Madam; leave that out.

A. We came down very slow and we came down

so we could see the tracks; we could just see across them, and we looked up towards Port Jervis; there was a good view; you can see there very well; you couldn't see any trains that way; and you couldn't see down towards New York, on the west-bound, very well. We started; we thought everything was all right; we couldn't see anything and we couldn't hear anything.

By the Court: Q. You said "west-bound;" you meant east-bound did you not? A. We got down to the west-bound tracks.

By Mr. Gilson: Q. You said "west-bound tracks;" you mean you couldn't see anything to the west? A. To the west, yes, sir.

Q. That is towards New York? A. Yes, sir. We looked up the tracks. We didn't see anything or hear anything; we thought everything was all right and we started to go over and our wheels just got on the first track; that is, over the first track, that is, on the track coming toward Port Jervis.

Q. On the east-bound tracks? A. Yes, sir; that is, the first tracks. And then we was looking very cautiously down and we couldn't see anything, and as soon as we struck them we saw there was a train coming very fast on us, and immediately—of course, the car was going, although we were going slowly—and we saw we were in great danger, and my husband just turned the front of his car, thinking he could get away evidently, and we saw we couldn't and my daughter jumped out, and my husband jumped and pulled me with him. We got out on the east-bound tracks, the tracks that came from Port Jervis, that way. The train was coming very fast, and when I was getting out I didn't know we were going to be safe; I thought it was going to strike us before we could get away.

Q. Where did you alight from the automobile, what part of the roadway? A. On the left-hand side, west-bound tracks.

Q. West-bound or east-bound? A. On the left side—well, on the east—on the tracks where the train comes from Port Jervis. The train was coming from New York.

Q. So you alighted about the middle of the first track? A. Yes, sir; I should judge so.

By the Court: Q. Well, you said on one side of that track did you not? What do you mean by speaking of the side of that track as the place where you alighted? A. Well, I meant right on the tracks where the train comes down from Port Jervis, between there.

By Mr. Gilson: Q. Was it on the side or just where with respect to those rails? A. Well, I couldn't exactly say. We jumped out, of course, and we were right the other side of our car; that would bring us right near it.

By the Court: Q. The question is whether you alighted between the rails of that track or outside the rails of that track? A. Well, I should judge we were between the rails.

By Mr. Gilson: Q. Now, you said you came down the hill slowly and did not hear or see anything. Did you at that time hear any signal or bell or whistle?

Objected to.

A. No, sir.

Mr. Parker: I object to that on the same grounds.

The Court: As it seems to me to be within the general language of the declaration on that subject, I will receive the testimony.

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

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

Circuit Court Judge.

Q. Did you hear any bell or whistle? A. No, sir; nothing.

Q. Why was it you could not see to the west, toward New York? A. Well, there was a freight—a little shed there and also a very high bank. It is very high along there. It is cut out just a little ways back of the shed, but there is a big point that obstructs there. It is impossible for anybody to see until they get on those first tracks.

Q. Where was the automobile when you first saw the train? A. We were crossing over on the first—just crossed our wheels over on the first track, where the trains come from Port Jervis.

Q. The rear wheels or the front wheels? A. Our front wheels. As soon as our wheels got over we saw this train coming on us. Of course, we couldn't see the train—

The Court: That answers the question.

By the Court: Q. That was where the automobile was when you first saw the train? A. As near as I could judge.

Q. As soon as your front wheels got on the first track? A. As near as I could judge.

By Mr. Gilson: Q. I show you a photograph marked Exhibit P-5, and call your attention to a little roadway running along between that freight shed and bank (shown to witness). Do you recognize that? A. Yes, sir.

Q. Could or could not a person see, coming down the highway, through that roadway—see any part of the track? A. No, sir.

Q. Why not? A. Because this big embank-

ment stops it; there is a high bank; it is impossible.

Q. The bank you refer to is this one here, shown in the photograph (indicating)? A. There is one here (indicating); yes, sir.

Q. Back of the freight shed? A. Yes, sir.

Q. Is that little roadway that runs past the freight shed straight or crooked, or what? A. It slants there, and then, you know, there is a little roadway that goes past the freight shed, and then there was a lot of little bushes growing on the side when we were there.

Q. Did you notice whether there was anything on that freight shed at the time of the accident, on the platform? A. Well, I know we couldn't see anything until we got to the tracks.

The Court: That is hardly the question. You were asked this specific question: whether you noticed whether there was anything standing on the freight shed.

Witness: Well, I should judge there was. We couldn't see anything through there.

Q. Well, can you say whether there was? Do you remember seeing anything there?

Objected to as cross-examining plaintiff's own witness.

A. Well, I think there was; I couldn't swear.

The Court: The witness answered only inferentially. I do not think she is able to answer the question.

Q. Now, after you got down that hill when did you first start to look and listen? A. As soon as we started to come down the hill; we was coming down very steadily and we were looking and listening the whole time.

The Court: You have answered the question, Madam.

Q. When did you first start to look, at the top of the hill? A. The top of the hill, as soon as we started to come down.

Q. And how often did you look and listen as you came down that hill? A. We kept listening, we never stopped; we kept listening; but you can't see anything, only on one track, until you get right on the track.

The Court: You have answered the question, Madam.

Q. Do you know what happened to the automobile after Mr. Dickinson and you got out of it? Did you see? A. I couldn't see; I fell on Mr.. Dickinson; but we had no sooner got out than I heard the crash, the train hitting the machine; it sounded—a terrible crash; and of course I fainted away.

Q. Did you notice any difference in Mr. Dickinson's walk and his condition since that accident? A. Well, he has been very lame ever since.

Q. Was he before the accident? A. Never.

CROSS-EXAMINATION by Mr. Parker:

Q. As I understand you, Madam, you had been into Middletown that morning? A. Yes, sir.

Q. Have you ever been across that crossing since the accident? A. Yes; I have since.

Q. How many times? A. Oh, probably two or three times or four times, possibly.

Q. When was that—the last time? A. It must be over a year ago.

Q. The hill is quite steep at that point? A. Very steep.

Q. And there was danger of your automobile running away or getting out of control, was there not? A. Not the way we ran down; I don't think so.

Q. But what you said to be careful about, you meant to be careful about running the machine down the hill so that it would not get away from you? A. And the crossing.

Q. Well, what did you say to Mr. Dickinson? A. I said to be very careful, "Here comes a bad hill and that bad crossing."

Q. You said there was a bad hill and a bad crossing? A. Yes, sir.

Q. Then you meant to call his attention, among other things to the fact that it was dangerous to go down the hill too fast? A. Yes, and I wanted him to beware of the crossing.

Q. Just answer my question. A. I didn't mind the hill so much as the crossing.

Q. Then you started down the hill, and Mr. Dickinson said he was going about four or five miles an hour; is that according to your recollection? A. Yes, we was going very slowly.

Q. And you got to within 50 feet of the crossing, and you had a perfect view up towards Port Jervis, had you not? A. Well, you have a very good view to Port Jervis.

Q. And you say you could not see in the other direction, and you went on, till after the front wheels had crossed the first tracks; is that right? A. Yes, sir.

Q. So you had gotten across both the first rails that you entered before you saw the train? A. No, not both rails; we got over one rail.

Q. One rail? A. Yes, sir.

Q. I want to get definitely what you saw. A. Yes, one rail.

Q. Then, according to your recollection, the first wheels of your automobile were between the east and west-bound track? A. No, it was on the east track.

Q. I mean the east and west rails of the east-bound track? A. Yes.

By the Court: Q. You said madam, a few moments ago—I want to understand what you mean —"As soon as our front wheels had got over the first track." A. Well, I meant over the first track—I call it the track—those two tracks. That would explain it properly.

Q. Just distinguish between a rail and a track. A. Over the rail.

Q. You did not mean that it got over the first track, but over the first rail? A. Not over the track, the rail.

Q. Is that it? A. Yes, sir.

By Mr. Parker: Q. Then it was that you saw the train approaching on the other track? A. Yes, sir.

Q. Who saw it first? A. I couldn't say; I think we all saw it together.

Q. Then Mrs. Gardner was sitting a little ahead of you, was she not? A. She was sitting on the runboard at my feet.

Q. So that her head was nearer the tracks than yours was? A. Possibly it was.

Q. Did she not jump out before either of you attempted to move? A. Well, she jumped off first.

Q. And then, you say, Mr. Dickinson turned the automobile? A. Yes, sir; turned the front wheels, because he saw we couldn't cross it.

Q. He saw he couldn't cross it, so instead of stopping, he turned the front wheels? A. He thought we would get away from it.

Q. Then at the time he turned you had not crossed the second rail of the first track? A. Yes, sir.

Q. You had crossed it? A. We had then, at the

time we turned, because we weren't standing still, and from the time we saw the thing and to the time you can get your machine turned and look again—

Q. Then I understand from the time you first saw it to the time the automobile was turned, the automobile had gone, the front wheels being between the first tracks, to a point where it was in front of the approaching train; is that right? A. Well, we were pretty near the train. We couldn't see exactly how near it was coming; it was very near to us.

Q. It was very near to you? A. Very near to us.

Q. How far was the train off from you when you first saw it? A. Well, probably a little further than this—about as far again as this room, I should judge.

Q. About twice as long as this room? A. Yes. It may not be quite as much, but I should judge it was that.

Q. Were you not chatting and talking when you came down the hill? A. No, sir.

Q. Not saying anything at all? A. Never spoke.

Q. A very good view from there, is there not? A. Never noticed the view, only looking for the trains.

Q. Only looking for the trains? A. That is all.

Q. And you say that as you stepped out you fell against Mr. Dickinson? A. Mr. Dickinson pulled me out.

Q. Well, why did you not get out yourself? A. Because I was so—I didn't know what to do for a second. We had no time to hesitate; I don't think we had two seconds all together.

Q. And he pulled you out, and then you went to the hotel? A. Well, I don't know anything; I was carried to the hotel.

Q. Do you recollect being at the hotel afterwards? A. I recollect when I came to, after seven o'clock.

Q. You were shown Exhibit P-5. I did not see what bank you pointed out as obstructing your view. Will you show me again? A. Yes, sir. (Photograph shown to witness.) This is the point through here; it is very, very high there (indicating).

Witness: Right back of this place (indicating).

Mr. Parker: She points to the picture shown—

Witness: That is the embankment there (indicating).

Mr. Parker: Between the southerly side of the freight shed and the right hand edge of the picture.

Mr. Gilson: The easterly edge of the picture.

The Court: You did not use the word "bank."

Witness: And also the freight shed; of course, you couldn't see through that either.

Q. Well, you think you could not see through the freight shed? A. No, sir.

By the Court: Q. Now, Mrs. Dickinson, I want to get my mind clear as to what you mean to say. You say, bearing in mind the difference between the rail and the track, to which I called your attention—A. Yes, sir.

Q. That you saw the train coming as soon as the front wheels of the automobile had got over the first track—the first rail of the first track? A. The first rail; yes, sir; I should judge it was there—

Q. Now stop right there. Where the front

wheels were when Mr. Dickinson had turned the car to the left? A. On the west-bound track, the next tracks, the next one.

Q. At the time when the wheels—A. As near as I can tell.

Q. When the wheels were turning— A. Yes, sir.

Q. The front wheels were on the— A. West track.

Q. On the west-bound track? A. Yes, sir.

Q. Just what do you mean by the west-bound track? A. What do I mean.

Q. Which track do you mean? A. I mean the one coming from New York.

Q. You mean the track the train was on? A. Yes, the track the train was on.

Q. You think when your wheels were turned to the left they were on the track on which the train was running? A. I think so, as far as I can judge. It was done very quickly, you know.

The testimony of Eulalia D. Gardner given at the former trial is read, plaintiff's counsel reading the direct-examination and defendant's counsel reading the cross-examination.

EULALIA D. GARDNER, sworn in behalf of the plaintiff:

Direct-examination by Mr. Gilson:

Q. Mrs. Gardner, you are the daughter of Mr. Joel Dickinson? A. Yes, sir.

Q. And wife of Mr. George Gardner? A. Yes.

Q. You live here in Newark? A. Yes.

Q. You were in this automobile with your father and mother at the time of the accident at Howells? A. Yes.

Q. Where were you sitting? A. I was sitting at the bottom of my mother's feet, my feet on the running board.

Q. Just tell the Court and jury how you came down that hill and what happened? A. We came from Middletown and when we got to the top of the hill, we came down very slowly, and as we were nearing the foot where the track is, the machine was then going very slowly; we were very much afraid of that crossing. You can't see the track until your wheels are practically on the east-bound track. And as we did, we looked toward Port Jervis and saw nothing, and then turned and looked toward the west, and then we saw the train was coming on us, and I know I jumped from the machine, and I don't remember any more.

Q. Now, as you came down the hill did you hear any bell or whistle or any signal of any kind?

Objected to on the same ground.

Objection overruled.

Defendant's counsel pray an exception to this ruling of the Court.

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

Circuit Court Judge.

A. There was no signal of any kind.

Q. Any bell on the train or anything of that kind? A. No, there was not.

Q. Was there any noise of any kind? Was the automobile—A. No, it was very quiet.

Q. When did you first start to look and listen when you came down the hill? A. From the top of the hill, as we started.

Q. How often did you look and listen as you

came down? A. Continuously until we got to the tracks.

Q. In which direction were you looking? A. I looked first up the other end, and then I turned quick and looked the other way, and then I saw the train.

Q. Where was the automobile then, when you saw the train? A. We had just gone beyond that shed where they had vegetables piled up, just grazed that. The edge of that would cut off the train. We looked; I leaned out and looked up and saw the train.

Q. Where were the wheels of the automobile at that time? A. They were on the first rail, eastbound.

By the Court: Q. On the rail? A. There is two rails; I mean the first rail, as near as I could say.

By Mr. Gilson: Q. Of the first track? A. As near as I could say.

Q. Do you remember where you jumped to, where you landed? A. I jumped on the left, because I was sitting there.

Q. I mean on the highway, what part of the road with respect to the first rail of the eastbound track? A. I couldn't say what rail, because I fainted, and until I came to I can't remember.

Q. Since that time have you noticed any difference in your father's walk? A. He is lame, yes, he is.

Q. Was he lame before the accident? A. No. indeed.

Q. I show you Exhibit P-5, which is the freight shed photograph, showing the freight shed and the road alongside of it (shown to witness). Did you look through that road there? A. It is a little, narrow road, and you can't see until you

get down there; there is a little crooked road down there, that is all, where you can drive a carriage through.

By the Court: Q. The question was, did you look through the road—that is, along the road? A. You can only see the end of that shed.

Q. Did you look? A. Yes, you can only see the end of the shed, though.

Q. You say you did look? A. Yes, I looked.

The Court: That answers the question.

By Mr. Gilson: Q. Why was it you couldn't see the track, between the road and the embankment? A. You can't see through the shed, until you pass the shed.

Q. Why? A. On there they carry half barrels of lettuce; it is put there for the market.

Q. Why couldn't you see through the road? A. Because of the embankment, of course.

Q. Was that road straight or curving? A. The road curved—a little bit of a narrow road.

Q. Did you see anything on the freight shed, on the platform of the freight shed at that time? A. They had half barrels of lettuce.

Q. At the time of the accident? A. Yes.

CROSS-EXAMINATION by Mr. Parker:

Q. Did I understand you to say, Mrs. Gardner, that you saw half barrels of lettuce on this thing? A. Yes, sir.

Q. How did you know it was lettuce? A. Because after—I wouldn't say particularly it was lettuce, but I know they always had lettuce ever since.

Q. Then you did not see half barrels of lettuce there? A. I took it for granted it was lettuce. There has nothing else been piled on there since.

Mr. Parker: Will your Honor strike out

the answer about nothing else being piled on there.

The Court: Strike it out; it is immaterial.

Q. Kindly answer my questions. You say you saw a half barrel there? A. Not a half barrel; half barrels, I said.

Q. When did you see them? A. As we came right down by the shed.

Q. And you had seen them before? A. I saw them there the day before, yes.

Q. They were there twenty-four hours? A. They were there, I think, twelve hours, until the freight train comes and gathers them up.

Q. You say freight trains come and gather them up on Saturday afternoons? A. I don't know what day they do, but I know on week days they do it.

Q. Did you know this accident happened on Saturday afternoon? A. Yes.

Q. You say they were carrying in half barrels, and it was on Saturday afternoon? A. I didn't say they were carrying them in; I say they were there.

Q. Where were the half barrels on the shed? A. I say they were on the shed.

Q. On the top of the shed? A. No, inside, on the platform.

Q. Whereabouts on the platform? A. I didn't look so particular as all that; I can't tell.

Q. You can not tell whether the barrels were on the right-hand side of the platform or the left-hand side of the platform, in front or in back, when you looked, can you? A. I didn't look as close as that, no.

Q. And you testified that you did see barrels of lettuce there? A. I saw barrels.

Q. Didn't you see the barrels when you went up past there in the morning? A. I didn't go in the morning; I didn't go until afternoon.

Q. In the afternoon did you see them? A. Yes, that is the time I saw them.

Q. Early in the afternoon? A. Yes.

Q. When you were going to Middletown? A. When I was going to Middletown.

Q. But you did not see them when you came back again? A. I thought I did.

Q. But you can't swear positively they were there when you came back, can you? A. Well, I should say yes. I didn't have time to go and examine every thing on it.

Q. Didn't you testify a moment ago that you came down to the tracks, and then you looked toward Port Jervis and the view was clear? A. Yes.

Q. And then you looked toward New York and you saw the train? A. Yes.

Q. Now, that is what you did, is it not? A. Yes.

Q. Your face was away from this freight shed when you came down there in the afternoon, was it not? A. My face was straight ahead; I sat straight ahead.

Q. Then you had to turn your head away around over your right shoulder to see to your left, did you not? A. No, not a bit, any more than I would to do this (illustrating), not any more. My arms were on the front of the running board; I could look either way.

Q. Then your head was nearest to the track as the automobile approached? A. Yes, sir.

Q. How far ahead of you was your mother? A. Mamma sat right like this, in back of me (indicating).

Q. And your head was over the running board? A. No, toward the running board, in this position (illustrating).

Mr. Gilson: The dashboard, you mean.

The Witness: The dashboard.

By the Court: Q. With your feet on the running board? A. I had my feet on the running board.

By Mr. Parker: Q. Then you were the first person to get out of the automobile? A. Yes.

Q. Did you get out before or after Mr. Dickinson had turned the automobile? A. I don't remember; I just jumped quick, and I think he was turning; I am not sure.

Q. When you landed on the ground and when they landed, which side were they after they had gotten out of the automobile, were they toward Port Jervis or toward New York? A. They were carrying mamma away; I don't remember where she was.

Q. And the first thing you knew they were carrying her away? A. They were carrying mamma away.

Q. How far was the train from you when you first saw it? A. That would be had to say; it looked very near. Of course, I had no idea—

Q. Where did you get out on the track, between what rails? A. I say I couldn't say, because I fainted when I fell.

Q. You fainted immediately, did you? A. Immediately after.

Q. You did not see the train pass? A. After I came to the train was backing in the station, after I came to.

Q. The train was backing back? A. In the station.

The deposition of Frank A. Reevees is read, plaintiff's counsel reading the direct-examination and defendant's counsel reading the cross-examination.

"FRANK A. REEVE, being duly sworn according to his oath, says:

Examination by Mr. Gilson:

Q. What is your full name and where do you live? A. Frank A. Reeve. I live at New Vernon, Orange County, New York.

Q. How far is that from Howells station of the Erie Railroad? A. About two miles.

Q. How long have you lived there? A. Well, I was born there. I have lived away from there about twelve years, but outside of that time I have always resided there.

Q. How old are you? A. Thirty-five.

Q. Do you know the road which crosses the Erie Railroad right at the station at Howells? A. Yes, sir; I do.

Q. How long has that road been there, do you know? A. Ever since I can remember.

Q. And it is the road that is used by all the people around there, is it? A. Why, when they have occasion to go over; it is the main road leading to the state road.

Q. Now, I show you a photograph and ask you if you recognize the road on that photograph? (Photograph shown witness.) A. This photograph shows the road.

Photograph marked Exhibit P-1 for identification.

Q. Yes. On July 31st last, about 5:30, p. m., were you near that crossing? A. You mean the day that this automobile was struck?

Q. Yes. A. Yes, sir; I was; I could not tell

the date, but I was there at the time this automobile accident happened, I could not tell the date.

Q. Now, about how far from that crossing were you at the time of the accident? A. I should judge about 100 feet.

Q. On which side of the crossing? A. I was on the southwest side of the crossing.

Q. And that is on the same side as the hotel, the Mountain House, is it not? A. Yes, sir; I was on this side.

Q. This corner of the building on the right-hand side of this photograph which I have shown you, that corner of the building is the Mountain Hotel, is it not? A. Well, it stands right here, the Mountain House does, yes.

Q. Where the corner of the building shows on this photograph? A. Yes, sir.

Q. Now just tell us what you saw of this accident. A. Well, I happened to go out on the stoop and possibly I was there a minute and I was looking right towards New Vernon; it was north or northwest rather, and do not know what drew my attention; I looked around this way, to my right, and I saw the automobile and just at that I heard a scream—Mrs. Gardner, I think her name was—and at the same time I seen Mrs. Gardner jump, and Mr. Dickinson—I saw him take his wife right out of the automobile; he jumped on one side with his wife and Mrs. Gardner jumped from the other side.

Q. In which direction was the automobile going? A. Why, it was going right straight down the road; north, northwest.

Q. Referring to this photograph again, about how far from the nearest rail was it that you saw them jump out of the automobile? A. Right there (indicating).

Q. About how many feet is that from the first rail? A. (Witness marks with a cross on the photograph P-1 for identification the place where he says he saw them jump out of the automobile.)

Q. Do you know about—can you tell how fast the automobile was going at the time they jumped? A. It was not going very fast, it was going slow.

Q. And did you see a train approaching? A. I did not.

Q. Did you see a train hit the automobile? A. I see it, yes, sir.

Q. How long after they jumped out of the automobile did you see the train hit the automobile? A. A very short time.

Q. Did the automobile continue on over the crossing after they jumped? A. No, sir; the automobile went right on up the track alongside of the train; as soon as the automobile hit the train; as soon as the automobile hit the train there was a puff of smoke.

Q. Did the automobile hit the train or did the train hit the automobile? A. No, it struck right on the end; the cowcatcher; that is on the side towards where I stood at the time; they both got there at about the same time, I should judge.

Q. Which way was the train approaching? A. Coming from Jersey City, I should judge; it was going west.

Q. That was a Saturday afternoon, was it not? A. Yes; now, as I told you, all I know is—

Q. Do you not remember? A. No; it was on the day that the accident happened; that is all I know.

Q. You do not know whether it was a regular or special train? A. I do not, no, sir; I could not say.

Q. Do you know how fast the train was traveling when it hit the automobile? A. I should judge

it was going from thirty-five to forty miles an hour; of course, I am no judge of a thing like that.

Q. Referring to this photograph again, P-1 for identification, I call your attention to a wreck of an automobile alongside of the track; can you state whether that is the automobile and its condition immediately after it was struck by the train? A. It was smashed up just about like that, I should judge.

Q. Now, I show you another photograph and ask you if that shows accurately the road and the crossing as you approach going north?

Mr. Parker, of counsel for defendant: Objection to the question as leading.

Q. I show you another photograph and ask if you recognize the location of which that was taken? A. Yes, sir; I do.

Q. What is that a photograph of? A. Of Howells crossing, and what few houses you can see here in Howells depot.

Q. And is that the crossing about which you have been speaking? A. Yes, sir.

Q. In which direction is that photograph looking? A. About northwest.

Q. In the same direction in which this automobile was approaching the crossing, is that right? A. Yes, sir.

Q. I call your attention to a shed on the southerly side of the track, was that there at the time of the accident? A. Yes, sir.

Photograph marked P-2 for identification.

Q. I show you another photograph and ask you if you recognize that location? A. Yes, sir.

Q. Where is that L? A. At Howells.

Q. And I call your attention to a bank on the right-hand side of that picture. A. Yes, sir.

Q. Was that there at the time of the accident? A. Yes, sir.

Q. Dn which side of the road is that bank? A. The east side.

Q. The right-hand side as you approach the crossing going north? A. Yes, sir.

Photograph marked P-3 for identification.

Q. I show you another photograph and ask you if you recognize that location? A. Yes, sir; I do.

Q. Is this bank on the right-hand side of the photograph a continuation of the bank in that former photograph I showed you? A. No, it is not; it is the same, yes; there is the same bank there, but it is extended on down; you can't see these houses in that other picture, nor you could not coming down this way.

Marked for identification P-4.

Q. I show you another photograph, do you recognize that location? A. Yes, sir.

Q. Where is that? A. That is at Howells: this is the milk platform.

Q. That is looking in which direction? A. It is on your right-hand side as you go north or northwest.

Q. Looking east, this is? A. Well, this is east as you are coming down; it is on your right-hand side.

Photograph marked for identification P-5.

Q. I show you another photograph and ask you if you recognize that location? A. Yes, sir.

Q. Where is that? A. That is at Howells; this is the point to a building on the side, right-hand side of the photograph, and this is the Mountain House.

Q. And what road is that that shows in that photograph? A. It is the main road.

Q. That is the road upon which the automobile approached the track? A. Yes, sir.

Q. That is looking south? A. Yes, this is looking this way from the track, looking south.

Photograph marked for identification P-6.

Q. After the action do you know where Mrs. Dickinson and Mrs. Gardner were taken? A. Into the hotel.

Q. The Mountain House? A. Yes; I helped carry them in, one of them.

Q. Which one did you help carry in? A. I heelped carry in Mrs. Dickinson.

Q. Do you know whether any whistle was blown or bell rung or other warning given of the approach of this train?

That was objected to.

Mr. Parker: I make the same objection.

The Court: I make the same ruling.

Defendant's counsel pray an exception to this ruling of the Court.

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

Circuit Court Judge.

A. I did not hear any whatever, no whistle or bell.

Q. Or any other warning of any kind? A. No.

Q. Were you in a position to have heard any whistle or bell if one had been sounded? A. I was, yes, sir.

Q. Are you related in any way to Henry S. Reeve? A. No, sir; oh, third, fourth or fifth cousin."

Mr. Parker: (Reading.)

"CROSS-EXAMINATION by Mr. Parker:

"Q. Mr. Reeve, I understand that shortly before the accident occurred, you were in the Mountain House, were you? A. Yes, sir.

"Q. At what point of the Mountain House were you? A. I was in the hotel.

"Q. In the building itself, then? A. Yes, sir.

"Q. And whereabouts in the building called the Mountain House were you, in what room? A. In the bar room.

"Q. And how is the bar room situated as respects this road? A. The room leading to the bar room goes right out on the stoop.

"Q. And the stoop faces the railroad track? A. Yes, sir.

"Q. What room of the first floor of the Mountain House is nearest to the road on which the auto was traveling? A. What room did you say?

"Q. Yes. A. What they have for the parlor.

"Q. Then the bar room was the room of the house furthest way from the road on which the auto was traveling? A. Yes, sir.

"Q. And it was not the front room of the house was it, the bar room, it isn't the front room immediately adjoining the porch? A. You go right out from the bar room on the porch.

"Q. I understood you to say that there was a room in between the porch and the bar room, is that right? A. I didn't say so.

"Q. Now, were you in the bar room at the time that the auto approached this crossing, the railroad? A. No, I was not.

"Q. Where were you at the time that the auto

approached the railroad tracks? A. I was on the stoop.

"Q. Whereabouts on the stoop of the Mountain House? A. The first post.

"Q. The first post from where? A. The first post from the shed of the Mountain House.

"Q. Do you mean the post nearest to the wagan road on which the auto was traveling? A. No, sir.

"Q. Do you mean the post furthest from the wagon road on which the auto was taaveling? A. I mean the furthest post.

"Q. And now when did you first see the auto, how far about was it from the railroad tracks? A. It was about the same distance as I marked in that (marked P-1).

"Q. Referring to the mark on P-1 for identification? A. I think, as near as I could judge, I am not positive.

"Q. And at the time you first saw the auto the people were jumping from it, were they? A. When I heard the scream, I looked around and just as I looked around I heard somebody scream and at that time one jumped one way and I saw the other two go the other.

"Q. Then when you saw the automobile somebody had screamed and the people were jumping from the automobile, is that right? A. Now, I looked around, I don't know what drew my attention that way.

"Q. You said you heard a scream? A. Well, I looked around just as I heard a scream.

"Q. Were there doors on this automobile? A. No, sir.

"Q. And the people just could step down from it, is that right, without opening any doors? A. There was no doors on it.

"Q. And when you saw the people jump from the automobile you mean to say that they got down hastily from the automobile? A. I only saw one jump.

"Q. Who did you see jump? A. Mrs. Gardner and when Mr. Dickinson went out of the automobile he took his wife with him.

"Q. You think that you saw Mrs. Gardner get out herself? A. She jumped out.

"Q. And then I said I understood, then you saw Mr. Dickinson carry or lift Mrs. Dickinson out? A. He got her out that way (and takes hold of a person present at both shoulders, and dragged her out.

"Q. Then did either of the people fall down? A. I could not say, when the train hit the automobile there was a puff of smoke and the dust whirled around. I started to run right over there then.

"Q. Did I understand you to say in your direct-examination that the automobile turned and run up the track in the direction from which the train was coming? A. No, I said after the train hit the automobile it went right alongside of the train up the track, yes, sir, I did say that; after it was hit it went up the track.

"Q. Then the automobile did not go in front of the train but struck the train on the side, isn't that so? A. No, the automobile struck the cowcatcher, just ahead of the beam.

"Q. But the whole of the automobile did not go in front of the engine? A. No, sir, no, sir.

"Q. And was dragged alongside of the engine as the engine went along? A. Yes.

"Q. Now, Mr. Reeve, didn't you give a statement for the railroad company once? A. I give them a statement, yes, sir.

"Q. And that was almost immediately after the accident? A. Yes, sir; about three days.

"Q. And didn't you say before that you heard the train whistle for the lower crossing? A. I told him I did not hear it whistle for the lower crossing.

"Q. Aren't you mistaken, Mr. Reeve? A. No, sir.

"Q. Didn't you say 'I heard the train whistle for the lower crossing, but didn't hear it whistle for the crossing at the station'? A. I told him I did not hear it whistle, and if they put it down, I didn't say it so, that is all.

"Q. Wasn't the statement read over to you before you signed it?"

Mr. Gilson: I object to this line of examination, for Mr. Parker has written and signed statement; he should show it to the witness and allow him to read it and identify his signature. Mr. Parker shows witness the paper.

"A. No, sir.

"Q. You mean to say you signed the statement without reading or having read it over? A. No, sir; I read it over.

"Q. I show you a paper, is not that your statement? A. That is my signature.

"Q. And that is the statement that you read over at the time it was made, is it not? A. I do not think so. I did not say anything about hearing a train whistle at all.

"Q. Do you know that this is your signature to this statement? A. No, sir; that is my signature.

"Q. And this statement says among other things. 'I heard the train whistle for the lower crossing, but didn't hear it for the crossing at

the station,' does it not? A. That is what it says there.

"Q. Were you present when this photograph, Exhibit P-1, was taken? A. No; let me look at it, please.

"(Witness looke at photograph.)

"A. Not to my knowledge; no, sir.

"Q. Were you present there shortly after the accident when the photograph was taken? A. Not to my knowledge.

"Q. Was there anybody with you at the time that this accident occurred? A. Anybody with me?

"Q. Yes. A. Not with me at the time; no, sir."

Mr. Gilson: (Reading.)

"RE-DIRECT-EXAMINATION by Mr. Gilson:

"Q. Did you see Mr. Brola present at the time of the accident? A. Yes, sir.

"Q. When did you give this statement that Mr. Parker refers to, how long after the accident? A. I don't know, I guess it was two or three days; something like that; I could not tell, I did not take any note of it.

"Q. Where was the statement taken? A. In my blacksmith shop.

"Q. And who wrote it out? A. I couldn't tell you that.

"Q. Did the man who asked you the questions write it out in your presence? A. No, he wrote it out and I was busy.

"Q. And there after he wrote it out did he hand it to you to read? A. Yes, he handed it to me and I read it.

"Q. And you say that you didn't see that part of it where it says that you heard the whistle at the lower crossing, but not at the crossing at the station? A. No, I did not, or I would not have signed it, because I heard no whistle whatever.

"Q. The crossing at which this accident happened was the crossing at the station, was it not? A. Yes, sir."

Mr. Gilson: Now, if the Court please, I think it ought to appear on the record where this mark appears on this photograph, P-1. It seems to be almost on a line with the freight shed that is referred to.

Mr. Parker: Well, it is marked on the copy. It is in front and over the head of the man that is sitting on the railroad track.

Mr. Gilson: Well, that is near enough to identify it.

The Court: Yes, that is where it is.

The testimony of Ruloff Klein given at the former trial is read, plaintiff's counsel reading the direct-examination and defendant's counsel reading the cross-examination.

RUDOLF KLEIN, sworn in behalf of plaintiff:

Direct-examination by Mr. Gilson:

Q. Mr. Klein, you are a son-in-law of Mr. Joel Dickinson? A. Yes, sir; I am.

Q. And you reside at 9 South Street, Newark? A. At present

Q. Yes. A. Yes, sir.

Q. Were you at Howells the day after this accident, on August 1, 1909 A. Yes, sir; I was.

Q. Did you examine this automobile that was there at the crossing at Howells? A. I did, sir.

Q. I show you Exhibit P-1 (shown to witness), and ask you if that is the automobile you saw? A. That is the automobile.

Q. And that is where it was, in about that locality? A. No, when I saw it it was alongside of that shed.

Q. Oh, it was alongside of the shed? A. Yes.

Q. Did you examine the cylinders of that automobile that time? A. I did, sir.

Q. In what condition did you find them? A. They were cracked.

Q. Did you examine the transmission? A. Yes, sir.

Q. What was the condition of that at that time? A. The two shafts leading into it were bent.

Q. And did you examine the differential? A. Yes, sir.

Q. What was the condition of that? A. The axles leading into it were bent.

Q. Did you notice the frame of the automobile? A. Yes, sir.

Q. What was its condition? A. Twisted.

Q. And did you notice the steering gear or the steering wheel and rod? A. Yes, sir.

Q. What was its condition? A. It was not bent or twisted above the footboard; it was loose from the footboard, though.

Q. And you saw this automobile before the accident, did you not? A. Yes, sir.

Q. How was that steering wheel and rod, straight or on an angle, before the accident? A. On an angle, just like any other automobile.

Q. Was it any different from the way it is

shown in this Exhibit P-1? Is that about the angle that it was in before the accident? A. Well, that is hard to say.

Q. Well, about? A. It looks about the same.

Q. What is your business, Mr. Klein? A. Mechanical engineer.

Q. How long have you been in that business? A. Seventeen years.

Q. Are you familiar with the cost of making repairs to mechinery such as shown in an automobile of this kind? A. I am, sir.

Q. That is part of your business—in connection with your business? A. Yes, sir.

Q. Now, those cylinders, which you say were cracked, could they be repaired? A. Not commercially.

Q. What do you mean by that? A. It wouldn't pay to do it.

Q. Would it be safe, if they were repaired, to use them? A. No.

Q. With respect to this transmission, could that be repaired, or the rods that you say were bent? A. Not commercially.

Q. And the differential, could that be repaired? A. Not commercially.

Q. And the steel frame, could that be repaired? A. No, sir; under no circumstances.

Q. Now, suppose they were repaired, about how much would it cost to make the repairs, although it would not be worth repairing commercially?

Objected to on the ground that witness is not shown to be qualified to answer the question.

Objection withdrawn.

Q. How much, Mr. Klein?

The Court: Give us the different items.

A. First-class work would cost about as much as the—well, about $500.

Q. And then would it be in such condition that the automobile could be used safely?

Objected to as leading.

Objection sustained.

Q. What would be its condition then with respect to its former condition, before the accident? A. A second-class machine.

By the Court: Q. This perhaps is not very close to the question. Comparing the result that would be produced if you spent $500 on it with the machine as it stood on the day of the accident, before the accident, how would they compare? A. It would be second-class.

Q. Would one be as good as the other? A. No.

Q. Which would not be as good as the other? A. The repaired machine would not be as good as the present machine, which was used four months.

By Mr. Gilson: Q. Well, what would be the difference in money, the value, can you tell?

Mr. Parker: In the value of the machine?

Mr. Gilson: Yes.

Mr. Parker: He has not qualified as an expert on the value of machines.

Question withdrawn.

CROSS-EXAMINATION by Mr. Parker:

Q. What did you mean by "not commercially," when you answer that certain repairs could not be done commercially? A. Because it does not pay.

Q. That it would not make a salable article, do you not? A. No, I do not say that. The cost of repair would not increase the value of the repaired article as much as the cost was.

Q. Well, how do you know that? You do not

know what the cost of these various articles are, do you? A. I certainly do.

Q. Which ones do you know? What is the value of the cylinders? A. I know the cost of repairing; that is what I mean.

Q. You do not know the value of the cylinder, do you? A. I know the cost of repair.

Q. Well, you can buy these new cylinders and put them in, can you not? A. Yes, sir.

Q. And you do not know what you can buy them for? A. That would be a guess.

Q. And you do not know what you could buy these transmitters and steering wheels for? A Transmission and differential.

Q. You do not know what they could be bought for, do you? A. No, sir.

Q. And you can not judge whether or not it would be cheaper to repair them or buy them? A. I can judge that all the parts of the automobile which were bent were almost the entire value of the car.

Q. That is what you think? A. No, I know that.

Q. Well, how do you know it? A. Well, because I can see it; I know what the vital part—I know what the value of a vital part is and what the value is of a small part, like a sideboard.

Q. Did you ever have anything to do with automobiles? A. Yes, sir.

Q. In what way? A. I used to be assistant engineer for the Wellman-Seaver-Morgan Company, in Cleveland, Ohio.

Q. What do they make? A. They make a gasolene driven car.

Q. You do not know about these runabouts and automobiles for going about the country, do you? A. Oh, yes, I know.

Q. Well, what do you know about them? A.

They contain an engine, a gasolene engine. A. gasolene engine is a contrivance—

Q. Well, you do not know how much a gasolene engine is worth, do you? A. No. That is just about like asking, "How big is a house?"

Q. Well, this gasolene engine that was ruined, as you say? A. Well, that is part of the car.

Mr. Gilson: I will read the deposition of Frank A. Reeve, taken *de bene esse* at Howells, New York, on April 22, 1910. (Reading:)

Mr. Gilson: I offer in evidence the highway law of New York, 1904, chapter 538, Section 2, subdivision 9, contained in volume 2 of the Consolidated Laws of New York, 1909, at page 2335. Section 290 reads as follows: "The provisions of sections 282 to 289 inclusive of this article shall not apply to motor vehicles owned by nonresidents of this state, provided the owners thereof have complied with any law requiring the registration of owners of motor vehicles in force in the State, Territory or Federal District of their residence, and the registration number showing the initial of such State, Territory or Federal District shall be displayed on such vehicle substantially as in the preceding sections provided."

The Court: That was offered before and received, and I will receive it again. Counsel may object to it, if they like.

Mr. Parker: I make the same objection as I did last time.

Defendant's objection noted as ground for appeal.

Plaintiff rests.

Motion for Nonsuit

By direction of the Court, the jury withdraws.

Defendant's counsel move that plaintiff be nonsuited on the following grounds:

(1) That there is no evidence of negligence on the part of defendant.

(2) That there is clear evidence of contributory negligence on the part of plaintiff.

The Court (after argument): At the first trial of this case I thought there ought to be a nonsuit on the ground of contributory negligence, and granted a nonsuit. The case went up to the Court of Errors, and the nonsuit was set aside on the ground stated in the opinion reported in 81 Atlantic Reporter, page 104, that it was a question for the jury. I am bound by that decision in any case that exactly resembles this, still more in any case that is identical with it, and counsel for the defendant, no doubt thinking that I would look at the matter in that way, pointed out two differences which he conceives exist between the plaintiff's case as made on the first trial and the plaintiff's case as made on this trial. The differences which he mentions are differences which, in his view, make the plaintiff's case now much weaker than it was before, so much that the Court should grant a nonsuit.

Those differences which are thought to exist both relate to the subject of contributory negligence; that is, they fall under that head. One concerns the opportunity for observation which was afforded the plaintiff. It is said that the evidence on this trial locates the obstructions which are said to have been on the platform of the freight shed more exactly than at the first trial, so that a view through the shed to the

north of the telegraph pole was, under the evidence, available, and it appears on looking at the photograph that that view would give a glimpse, not of the track, but of such a large object as an engine on the track at a considerable distance. The evidence at the former trial did not indicate just where the alleged obstructions were upon the platform of the freight shed. It appears to me that this specification of the location of the alleged obstructions is not of enough importance of itself to justify the conclusion that the judges of the Court of Errors would have taken a different view of the merits of the case if the proof had been varied in that respect.

The other point of difference which is thought to exist is this. According to the opinion in the Court of Errors, it was conceived that Mr. Dickinson might have been confused as to which track the train was coming on. On this trial, as I understand the testimony, he said that he knew what track the train was coming on, and that he was, therefore, not confused in that particuar. Nevertheless, the remarks of the Court as to what the law expects of a man who finds himself, without any fault on his part, in a sudden and dangerous emergency are, I think, fairly applicable to the case. He certainly was in a tight place. As to that phase of the case, I think that the situation does not substantially differ from that presented on the first trial, and that the remarks of the Court of Errors as to the indulgence, you may say, which the law extends to a man who is suddenly confronted with a dilemma, with very little time to determine which horn he shall choose are applicable to the case, aside from the question whether he was in any uncertainty as to what track the train was coming on or not. It

was coming near enough to him to make his position at least dangerous.

So that, to sum it all up in a single word, I think that the case made by the plaintiff on this trial does not differ sufficiently from the case made by the plaintiff on the first trial to justify me in disregarding the binding authority of that decision. For that reason, I deny the motion to nonsuit.

Defendant's objection noted as ground for appeal.

Mr. Parker: There is a good deal of testimony here on the subject of law, your Honor. Will we be required to read that to the jury if we offer it? It is Mr. Oakes's testimony, pages 170 to 185. That was plainly for the instruction of the Court. I did not want to discuss it before the jury, and I took this opportunity.

To Plaintiff's Counsel: You do not require it to be read?

Mr. Gilson: No.

The Court: I should not think it was necessary, unless counsel desires it to be read.

Mr. Gilson: No, sir; I do not think it is necessary.

The Court: I will read it.

The jury returns into Court.

Mr. Parker opens for defendant.

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

Elbert N. Oaks—Direct

ELBERT N. OAKS, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. Oaks, what is your business? A. Lawyer.

Q. Of what state? A. New York State, Middletown, New York.

Q. When were you admitted? A. In 1902.

Q. Have you practiced in New York? A. Yes, continuously.

Q. How long? A. Ever since I was admitted.

Q. And what has been the nature of your practice? A. Well largely negligence law, railroad cases.

Q. Did you have cases for the Erie Railroad? A. Yes, sir.

Q. And have you tried many of those cases? A. Several, quite a good many.

Q. In the course of your business, have you been called upon to learn the law of the State of New York as respects the negligence at railroad crossings?

Mr. Gilson: I object, unless the purpose of this testimony be shown. I suppose that it is qualifying him to testify as to what the law of the State of New York is. If that is the purpose, it is not the proper way to prove the law of the State of New York. If he has the books here, they are evidence, under our Evidence act, and it can not be that a lawyer can come over here and construe those cases, which are evidence.

The Court: What have you in your mind, common law or statute law?

Mr. Gilson: The common law, or the decisions of the Courts construing the law. I suppose that is the purpose.

Mr. Parker: (After argument.) If your Honor please, I should think this testimony is entirely for the Court, and I should like to ask counsel on the other side if we could not take the testimony, and then your Honor could rule on it afterwards?

Mr. Gilson: That will be satisfactory.

(Question read.)

A. Yes.

Q. Do you consider yourself an expert on that law?

Objected to.

(Question withdrawn.)

Q. Will you tell us Mr. Oaks, what is the law of New York in relation to signals by bell or whistle made on a locomotive approaching a highway crossing in the country?

Objected to.

The Court: That question is broad enough to ask both for statute law and the common law.

Mr. Parker: I mean the common law.

The Court: State the ground of your objection.

Mr. Wilson: On the ground that the common law is enunciated in the decisions of the Courts of New York, and that they are the best evidence, and therefore this witness is not competent to testify to what those decisions hold.

The Court: It has been suggested, and I assented to the suggestion, that this testimony be taken subject to the objection, and the Court may rule on it afterwards. Under that stipulation, I will receive it.

You may answer the question.

A. There is no statute law in New York State either requiring the ringing of a bell or the blowing of a whistle of a locomotive approaching a highway crossing and the duty of the railroad corporation with respect to the operation of its trains towards a highway crossing is governed by the common law, which is that the defendant, the company, is required to exercise ordinary care and prudence with respect to giving notice of the approach of its trains, and that duty may be discharged by the ringing of a bell or the blowing of a whistle. Of course, in New York State it is for the jury to say whether the simple ringing of a bell discharges that duty or whether the simple blowing of a whistle discharges that duty. Where, however, the proof is that both the bell and the whistle were sounded, it then becomes a question of law for the Court, and the Court holds that there was no negligence on the part of the company.

By Mr. Gilson: Q. What was the last? A. Where the undisputed testimony is that both the bell and the whistle were blown, or were sounded, it then becomes a question of law for the Court, and the Court holds that there was no negligence on the part of the company.

By Mr. Parker: Q. There is a line of cases enunciating the law in the State of New Jersey which hold that where a railroad by the construction of its railroad in the vicinity of a highway has increased the dangers it may be required to give additional protection by way of flagmen, gates or other signals situated at the crossing. Can you inform us whether that law prevails in the State of New York?

Objected to on the same ground.

Same ruling.

A. That law does not exist in the State of New York, in this sense; that is, neither the Court nor the jury in a personal injury action would be permitted to say that, by reason of the physical characteristics of that crossing, that a crossing flagman, crossing the gates or an electric gong at the crossing should be established—should have been provided. For that reason, the failure or the omission to do any one of those three things, or provide any other means of safeguard at the crossing, is not negligence, because there is no violation of the duty, until that duty has been established in a separate proceeding, either before the Public Service Commission or before the Supreme Court, upon—

Mr. Gilson: One moment. Do I understand that this witness is testifying to the law as it is now or the law as it was in July, 1909? Because it makes some differences.

Witness: As it was then.

Q. Was the Public Service Commission then in existence? A. Yes, sir. (Latter part of former answer read.)—Upon notice to the railroad company, and after a hearing and after a determination of the question by either the Public Service Commission or by the Supreme Court.

Q. Do you know what is the common law of the State of New York as regards the duty of a traveller when he may be put in a situation of sudden peril or emergency by reason of an unexpected danger approaching?

Same objection.

Same ruling.

A. Yes, I know that rule.

Q. Will you kindly state that rule? A. It is in New York State the rule that where a person is

himself in the exercise of due care, and where by reason of the negligence of another person he is placed in a position of imminent peril or danger, he is not then required to exercise the same mature judgment that he would otherwise be required to exercise.

Q. Do you know the common law of the State of New York as regards what is such a position as you have described?

Same objection.

Same ruling.

A. I know the common law of the State of New York which describes or specifies what is not such a position.

Q. Could you describe that position which is not within the rule?

Objected to on the same ground.

Same ruling.

A. Yes. I refer to the case of Gettman v. Delaware, Lackawanna & Western Railroad, which is reported in 162 New York, at page 23—which, by the way is the highest Court in New York State—which was a case where a man in a wagon, driving a single horse, approaching the single-track railroad of the Delaware, Lackawanna & Western Railroad Company, and when the horse's head was six feet from the track the man looked in the direction of an approaching train, approaching at a high rate of speed, and when the train was in the neighborhood of 200 feet from the crossing, then the driver in the wagon hesitated as to what he would do, by changing the lines from one hand to another, and, I think, picked up his whip, gave the horse a cut, and started over the crossing and the wagon was struck and the man was either injured or killed; and the Trial Court charged the rule of imminent

peril as applicable to that case, and the Court of Appeals held that that was error and that the rule was not applicable to that situation, for the reason that the man was himself chargeable with blame in being in that situation, and on the further ground that when he was where he was when he first saw the train, with his horse six feet from the rail, that he was not then in a position of imminent peril within the meaning of the law. And that case has recently been cited by the Court of Appeals in another case.

By the Court: Q. Give me the reference to the case again. I did not get it? A. Gettman v. Delaware, Lackawanna & Western Railroad Company, 162 New York, page 23.

Q. Cited where? A. It was cited recently; I haven't that—it was cited recently by the Court of Appeals; I haven't the citation.

The Court: It occurs to me that we have here another question. Admitting, for the sake of the argument, that counsel may be called to state what, of his own knowledge, derived from a thousand sources, as Mr. Parker says, is the common law on a given point, does the rule that such a witness can testify without a book apply to his evidence respecting a certain reported case? Does it not so narrow the evidence down to that case as to call for the book itself? The witness may unintentionally make some mistake in undertaking to state from memory what the case is.

Mr. Parker: I would like to offer the book, 162 New York, page 23, in evidence.

Mr. Gilson: I object to that: It is one thing or another. If he is depending on the

book, he does not need the witness, and if he is depending on the witness, he does not need the book.

The Court: (After argument.) When it comes down to a reference to a particular case we must go to the book. That is not inconsistent. I have not had time to look at the books. It is not inconsistent that a witness should go on the stand and make a general statement as to what the law is.

Mr. Gilson: But not construe a particular case.

The Court: The book is offered in evidence and received.

Mr. Gilson: Well, if your Honor please, to relieve the situation, I will withdraw all my objections, because I can see from the testimony of the witness that my understanding of the New York law is virtually the same as the law in this State. So that I will withdraw my objection.

The Court: I will receive it.

By Mr. Parker: Q. Do you know the law of the State of New York in regard to what inference must and should be drawn from the fact that a party approached a railroad crossing, and at a distance from the crossing where a reasonable man would have a view of the train approaching for a long distance, say 500 or 1,000 feet or more; that though this reasonable distance for which this good view existed appeared clearly by the evidence, the plaintiff testifies that he did not see the approaching train? I do not know whether I have got my question clear? A. Yes, I know the law with respect to that.

Q. What is the law? A. It is this: That, as you have stated in your facts, where a witness under

those circumstances states that he looked in the direction of the approaching train, when, by the conceded facts, the train must have been in sight, that his statement is incredible, as a matter of law, and does not raise an issue for the consideration of the jury upon the question as to his contributory negligence; and that doctrine is stated in the case of Dolfini against the Erie Railroad Company. That is reported in 178 New York, page 1, and is the law of the State of New York today and was at the time the case was—

Mr. Parker: I offer that book in evidence, if your Honor please.

Q. Could you refer us to any other cases that state the law in that respect? A. You mean as bearing on the question as to the negligence of the plaintiff?

Q. Yes? A. Well, I think the case of Swart against New York Central, reported in 81 Appellate Division, 402, and affirmed, without opinion, in 177 New York page 529, is unquestionably the general law of the State of New York with respect to the contributory negligence of the plaintiff in a highway crossing case. I can give you the facts of that case, if you desire.

Mr. Gilson: No, do not volunteer anything.

Mr. Parker: We will not trouble you, Mr. Oakes.

Witness: I have some other cases here, if you care to have them.

Mr. Parker: I should like them, for the information of the Court. Perhaps the Court would like the cases.

The Court: All right.

Witness: There is the case of Wahler against Long Island Railroad Company, reported in 137 Appellate Division, page 17.

Mr. Parker: That is also reported in 121 New York Supplement, page 755.

Mr. Gilson: Are these all before 1909? We do not want any law, of course, you understand, since that.

Mr. Parker: I think we are entitled to everything.

Mr. Gilson: There was a statute passed after that time. That would not be right.

By the Court: State the cases that you have in your mind. I will see what the dates are and what they say about the form of the law. Have you any others, Mr. Oakes? A. There is the case of Rodrian against New York, New Haven and Hartford, 125 New York, page 528; May against New York Central, 137 Appellate Division, page 7.

Mr. Parker: That is also reported in 121 New York Supplement, page 791.

Q. Now, what is the gist of these cases, without going into the detailed facts? What is the legal principle? A. They are not all upon the same principle, but, generally speaking, they hold that is the duty of the highway traveller to look and to listen, both attentively, with the purpose in mind of seeing what the physical characteristics of the crossing will permit; and where he has a reasonable opportunity to see, and does not look and does not listen, he is chargeable with contributory negligence, as a matter of law.

The Court: That is the common law everywhere, I suppose.

Witness: Yes. And also where he says that he did look at a point where the undisputed testimony shows that he could see, and he was then in a position of safety, where he could have stopped, and he goes on, he is chargeable with contributory

negligence, as a matter of law. There is also the case of McSweeney against Erie Railroad Company reported in 93 Appellate Division, 496.

Mr. Parker: Also 87 New York Supplement, 837.

Witness: There is Waddell against New York Central, 98 Appellate Division, 343.

Mr. Parker: I wish to formally offer these cases in evidence.

Witness: Wieland against the Delaware & Hudson Canal Company, 167 New York, page 19. That is the last case I have.

Mr. Parker: The Waddell case is in 90 New York Supplement, 239.

CROSS-EXAMINATION by Mr. Gilson:

Q. Mr. Oakes, you are generally familiar with the law of New Jersey, as well as New York, with respect to this kind of cases, are you not? A. I wouldn't like to say so.

Q. Well, I know, but you have to use New Jersey cases and look up New Jersey cases in trying your actions in New York, do you not? A. Well, some kinds of actions, yes. From time to time I have consulted the New Jersey reports.

Q. And besides that, you have talked with Mr. Parker and other New Jersey lawyers with respect to the law of New Jersey, have you not? A. Upon different subjects. I don't know that I ever talked to Mr. Parker about it except—

Q. Well, you have talked about it in this case, have you not? A. Only with respect to one decision, the name of which I do not now recall but it has reference to the gates here in New Jersey.

Mr. Parker: May I suggest to the witness the Matthews case?

Witness: Yes, he told me about the Matthews case.

Q. Now, from what information you have, do I understand that you want the Court and jury to believe that the law of New York is any different to the law of New Jersey on all these questions; namely, the question of the negligence of a railroad company, the contributory negligence of a person on a highway or the law with respect to his actions in a case of sudden peril? A. I am not qualified to speak, because I do not know the law of New Jersey.

Q. Do you know, Mr. Oakes, that this is the law of the State of New York, generally speaking; that since the repeal of the statute requiring the ringing of a bell or giving some other signal by a locomotive crossing a highway, the question in a case where negligence of a railroad company at such a crossing is charged is whether the engineer exercised adequate precaution under the circumstances; that it is proper to submit to the jury the question whether, if the speed was not excessive, if the lights were lit, the bell rung, the whistle sounded, there was any other precaution which could reasonably have been expected, and to instruct them that if there was not, the railroad company was not charged with negligence? A. No; that is not the law of New York State at the present time with respect to speed in a country district or in the small villages.

Q. No, but that is substantially the law of the State of New York today, is it not—that although the company may have given signals by whistle or by bell, that even then they might be required to give some other warning of the approach of the train under some circumstances? A. When you say "some other warning," if you mean by a crossing flagman or crossing gates—

Q. Of an electric bell or something of that kind? A. No, that is not the law as to the crossings.

Q. Are you familiar with the case of Bailey against Jourdan, reported in 18 New York, Appellate Division, 387, and also in 46 New York Supplement, 399? A. I do not recall having read the case.

Q. You will not say that that case does not hold just what I have read, will you? A. No, I don't say that; I won't say that.

Q. Are you familiar with the case of Vanderwater against the New York & New England Railroad Company, 135 New York, 583? A. Yes, sir.

Q. What does that hold? A. That holds in substance that since the repeal of a statute in New York State a good many years ago which required the ringing of a bell and the blowing of a whistle by a locomotive engine upon its approach to a highway crossing, that the common law duty of exercising a reasonable degree of care was placed upon the railroad corporation.

Q. Irrespective of any statute? A. That is with respect to the giving of a notice by the railroad locomotive.

Q. That is the leading case in the State of New York and is cited right along, is it not? A. That is the leading case upon that subject, I think.

Q. Are you familiar with the case of Petrie against New York Central, &c., Railroad Company, 63 New York, Appellate Division, 467, also 71 New York Supplement, 866, holding this, or in substance this: That the rule is well settled that if a steam railroad creates extraordinary dangers at a highway crossing it must use extra precautions to give notice of the approach of a train? A. Extra precautions in the way of blowing the whistle or ringing the bell on the locomotive, but not anything additional at the crossing.

Q. Is not that a question for the jury to say? A. No.

Q. And you say that is not the law at the present time and was not the law in July, 1909, as enunciated in the case of Petrie against New York Central Railroad Company? A. I say that was not the law with respect to anything additional at the highway crossing. The additional precaution refers to some additional notice by the locomotive engine; that is what that means, and that is the way that is construed in New York State.

Q. Are you familiar with the case of Coulter against American Merchants' Express Company, 56 New York, 585? That seems to be the leading case on this proposition. This is the quotation from that case: "There can be no rule of law which imposes it as a duty upon one over whom danger impends by the negligence of another to incure greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort on the part of the plaintiff to avoid the danger did not relieve the defendant from responsibility." That is the law of New York, is it not? A. Why, that does not, to my mind, give any legal principle; it sounds to me more like an argument in some particular case, the facts of which I do not know; I do not recall them.

Q. Does not that sound to you like the law on the question of a man in sudden peril? A. It may be an argument, but that is not the legal rule, nor it is not a legal principle.

Q. You do not mean to say that I am not quoting properly from that case, do you? A. I mean to say that what you have quoted is not, to my mind, a legal principle of law in New York State; it may have been used as part of the argument with respect to a legal principle.

Q. Well, how about the case of Twombley against Central Park, &c., Railway Company, 69 New York, 169, where the plaintiff jumped from a horse-car, in fear of a collision with a train, and it afterwards appeared that he would have been safe if he had remained on the car, and it was held that the question of contributory negligence was for the jury? A. That is true. In that case that doctrine of imminent peril applied, if I recollect correctly. I remember reading the case.

Q. And that is the law and was the law in July, 1909, in New York? A. With respect to an accident of that kind, yes.

Q. Now, Mr. Oakes, you said that if a witness testified that he looked at a certain point, and it later developed that if he had looked at that certain point, that his evidence would be held, as a matter of law, incredible and thrown out—

The Court: Not if he looked, but if he looked and saw nothing.

Mr. Gilson: Yes, if he testified that he looked and saw nothing.

The Court: When there was something to be seen.

Mr. Gilson: Yes, when the other evidence showed that there was something to be seen, then the Court, as a matter of law, would throw that testimony out, as being incredible.

Q. Is that right? Do I understand you to say that? A. I do not think that you have gotten all of the elements. It is where the undisputed evidence discloses that at the place where he says he looked the train must as a physical fact, have been within his line of vision, where he says he looked at that place and saw nothing, the Court

says, as a matter of law, that that witness is incredible of belief, it is not a question of fact for the jury.

Q. Then, as I understand, when the Court says that the overwhelming weight of the evidence shows that he could have seen that train, that then his testimony would be thrown out as incredible? A. I think it is where the undisputed proof is.

Q. Undisputed? A. Undisputed.

Q. Well, I suppose that is the same as the mere weight of the evidence, is it not? A. I do not recognize it as such.

Q. Or the overwhelming weight of the evidence? A. Where there is a conflict of proof.

Q. Where there is any conflict at all—A. as to whether he could or could not see, that rule is not applicable.

Mr. Gilson: No, then it is a question for the jury.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. Is there any rule in New York State as to whether or not a railroad crossing is a place where a person approaching would be considered to be subject to the emergency rule?

Mr. Gilson: This is hardly re-direct.

The Court: I will allow it. It may be an omitted question.

A. Why, whether or not that rule of imminent peril would be applied in a crossing case depends altogether on the character of the case. Where there are multiplicity of tracks or multiplicity of engines it might be applied; but I have never known it in any case in New York to be applied to the simple crossing in an ordinary small village or in the open country.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. Well, you do not know of any case of that kind that has come up in Court, do you? A. Yes, I once tried one case myself where that rule was applied.

Q. In what Court? A. In the Supreme Court in New York State at Newburgh.

Q. Was it an automobile case? A. It was a pedestrian who was crossing the New York, Ontario & Western Railroad tracks.

After recess.

The testimony of Luster H. Robinson given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

LUSTER H. ROBINSON, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. Robinson, where do you live? A. In Middletown, New York.

Q. And what is your business? A. Civil Engineer and surveyor.

Q. How long have you conducted that business? A. About eight years.

Q. At the request of the Erie Railroad Company, did you prepare a map showing the situation of the crossing of the highway and the railroad at or near Howells Station, New York? A. Yes, sir.

Q. How far is that from Middletown? A. Four miles.

Q. I show you a blueprint here (shown to witness). What is this? A. It is a blueprint of the map that I made.

Q. Were the figures set there according to your measurement? A. Yes, sir.

Q. And does it correctly show the buildings and tracks, the poles and other erections at and around Howells Station? A. It does.

Q. What is the scale of the map? A. Twenty feet to the inch.

Mr. Parker: I would like to offer the map in evidence. May I have it put up?

Said map is shown to plaintiff's counsel.

By Mr. Gilson: Q. Mr. Robinson, does this map show anything there? Did you put in this map everything that you found at that station? A. In reference to what?

Q. With respect to the conditions and the surroundings coming down the hill towards the railroad track at that highway in a northerly direction. A. The ground. There is a bank there that does not show.

Q. Does this map show correctly the road? A. Yes, sir.

Q. The direction of each road? A. Yes, sir.

Q. And the direction of that little road leading past the milk platform? A. Yes, sir; the outline is there.

Q. Well, you have not extended the line of that road over the tracks, as appears at that place, have you? A. That doesn't extend over the track.

Q. Does not that road go around the easterly side of that platform and then continue on over the tracks to the passenger station on the other side? A. A foot passage; it isn't a highway.

Q. But it is a continuation of that road? A. Well, they can walk across there, and I imagine they could drive across there, but it isn't a driveway.

Q. But that road does continue around on the easterly end of that platform, does it, so that it is not straight, or has a curve in it? A. As far as it goes.

Q. Well, why did you not continue it all the way? A. There is nothing to show there is a turn there.

Q. You did not put that on, did you? A. No. There is no particular reason for it.

Mr. Parker: Are you not cross-examining now?

Witness: It is just a turning place there, that isn't shown, but—

Q. Well, it is a curve, almost a curve, almost at right angles, is it not? A. Just around the end of the building.

Q. Are you sure that this little road that we are speaking about, that leads past this milk platform, joins this main highway on just the angle you have here on the map? A. Yes, sir.

Q. Is it not more on an angle, starting up further away from the track? A. This is the outlines of the foot of the bank as you come around there (indicating on map). The wheel tracks may turn, but that is the outlines of the edge of the road. There may be a wheel track in there. It doesn't show any wheel tracks in there. This is what you would take as the edge of the road.

Q. Well, have you got anything on this map to show the distance of this milk platform from the first rail of the east-bound track? A. I can't tell you.

Q. Well, is there anything on the map? A. The scale is correct; it scales correctly.

Q. Is that true of the distance from the rail of the east-bound track to the middle of this road leading past the platform? A. Yes, sir.

Q. That is scaled correctly, is it? A. Yes.

Q. Now, as I understand you, then, with that one exception, the continuation of this little road everything is shown on this map just as it is there? A. According to scale; yes, sir.

Q. When did you make your measurements? A. In December of this year.

Q. Do you know whether any changes were made between July, 1909, and December, 1911? A. I have been over that road a number of times. I have never seen any changes. I couldn't swear

whether the wheel tracks have been changed or not, but no material changes.

Q. No change in the location of the milk platform or any of those buildings? A. No, sir; there is not.

Q. No change in the telegraph poles? A. No, sir.

Mr. Gilson: No objection.

Said map is marked Exhibit D-2, and is placed upon the wall.

By Mr. Parker: Q. Which is north and which is south on that map? A. This is north and this is south (indicating).

Q. The top of the map is north? A. Yes, sir.

Q. And the railroad, then, runs practically east and west? A. Yes, sir.

Q. Now, I see a building marked on the top of the map (indicating). What is that? A. The station; the passenger station.

Q. That is the passenger station? A. Yes, sir.

Q. What is that shaded line around it (indicating)? A. This is the platform, part of it here; the shaded line is the station proper, the building proper (indicating).

Q. Now, just show us the road running across the railroad—the highway? A. That is it (indicating).

Q. At the bottom of the map? A. At the bottom of the map. It runs practically northeast, across that way (indicating).

Q. And I see a building apparently on the left-hand side of the map. What is that? A. A hotel.

Q. Do you know what the name of that hotel is? A. I can't just recall it.

Mr. Gilson: Well, that is the Mountain House.

Witness: The Mountain House.

Q. And I see another building put down at the foot of the map, at the bottom of the map. A. That is a dwelling (indicating).

Q. That is a dwelling house? A. Yes.

Q. Do you know who lives there? A. No.

Q. But it is the dwelling house that stands up on the side of the hill, does it not? A. Yes, sir.

By the Court: Q. On the east side of the road? A. Yes, sir.

By Mr. Parker: Q. Now, we have a good deal of talk about the freight platform. Where is that? A. There (indicating).

Q. Does that show by scale the size of it? A. It does.

Q. And its distance from the road? A. Yes, sir.

Q. At the crossing across the road there, the railroad, I see some heavy marks (indicating). What do those represent? A. This is the crossing proper, the woodwork of the crossing of the highway (indicating).

Q. And how wide is that? A. Twenty-eight feet. It varies a little.

Q. What is the most southerly track represented on that map? A. The east-bound main.

Q. And what is the middle track? A. The west-bound main.

Q. And what is the third track? A. It is a siding.

Q. I understood the testimony in this case that the train which approached the crossing, into which Mr. Dickinson's automobile ran or was run into by, came on that track, the middle track. A. The middle track; yes, sir.

Q. Did you make any observations in the centre of the highway, looking towards the east, to show how far people could see? A. Yes, sir.

Q. Start in the middle of the railroad track and in the middle of the highway. How far a view would a person have there?

The Court: Which way?

Mr. Parker: The middle track.

Mr. Gilson: I object, if the Court please, unless it is shown that everything was exactly in the same condition in December, when it appears that he made those observations, as they were on July 31, 1909

The Court: The evidence is that there has been no material change as to the situation depicted by the map. Do you wish to cross-examine the witness as to whether the line of the road has been changed?

Mr. Gilson: No, sir; I just wanted to find out when he made the observations—when he made this particular observation.

The Court: If you wish to ask the witness whether between the time of the accident and the time when he made the observation the line of the road has been changed, the line of the railroad to the east has been altered, you may do so.

By Mr. Gilson: Q. When did you make these observations with respect to the view? A. In December.

By the Court: Q. In December of this year? A. In December of this year.

By Mr. Gilson: Q. At the same time you made the measurements? A. Yes, sir.

Q. Do you know whether there was any change in the line of the railroad to the east? A. There has not.

Mr. Gilson: All right.

By Mr. Parker: Q. Then just answer my question. What was the view that you observed from

the middle of the highway and the middle of the track? Did you make an observation there? A. Yes, sir.

The Court: December of this year means last December, I suppose?

Witness: Yes, sir; 1911.

A. It is 2100 feet straight sight that you can see in the middle of the west-bound track; and 5 feet from the middle, from the south rail of the west-bound track, it is—

By the Court: Five feet south of the south rail? A. Five feet; yes sir. Five feet south of the south rail of the west-bound track you can also see 2,100 feet; in centre of the east-bound track you can see 2,100 feet.

By Mr. Parker: Q. How far is that from the centre of the main track? A. Well, it is 13-foot centre.

Q. That is 10 feet south of the south rail of the west-bound track, is it not? A. Yes, sir.

Q. Well, 10 feet south of the south rail of the west-bound track how far can you see? A. 2,100 feet.

Q. At 15 feet how far can you see? A. At 15 feet, 2,080 feet.

Q. At 20 feet how far can you see? A. The same distance, 2,080 feet.

By Mr. Gilson: Q. Twenty feet from where? A. From the south rail of the west-bound track.

By the Court: Q. Give me your distance again at 50 feet. A. Fifteen feet, 2,080, and at 20 feet, 2,080. It does change there.

By Mr. Parker: Q. Now, in between 25 and 20 feet the line of the freight-shed begins to interfere, does it not? A. Between 20 and 25; yes, sir.

Q. At what point does it interfere with a view of over 1,500 feet?

The Court: That 20 and 25 feet are measured from where?

Mr. Parker: From the south rail of the west-bound track.

The Court: I will ask the witness.

By the Court: Q. From what point do you measure your 20 and 25 feet? A. All these measurements are from the south rail of the west-bound track.

Q. Then the freight shed begins to interfere between the 20 and 25 feet points? A. Yes, sir; at about 23 feet.

By Mr. Parker: Q. Did you make any observation at 24 feet? A. No, at 25 feet is the next observation.

Q. The next observation was taken at 25 feet. What was the result of that observation? How far could you see without looking through the shed? A. You could see 441 feet clear of the shed.

By the Court: Q. What do you mean by "clear of the shed"? A. There is an upright post in the corner, and looking this side of it you could see 441 feet.

Q. Which side is "this side"? A. Well, on the left side, or down the track, on the clear side of the shed, toward the track, on the north side of the shed.

Q. That is all I want to know. At a point 25 feet south of the south rail of the west-bound track you can look north of the shed and see 441 feet? A. Yes, sir.

By Mr. Parker: Q. And at 26 feet how far can you see in the same way? A. 303 feet.

Q. And at 27 feet how far can you see? A. 241 feet.

Q. And at 28 feet how far can you see? A. 190 feet.

By the Court: Q. Looking all the time north of the shed? A. Yes, sir.

Q. Along the side of the shed? A. Yes, sir; on the north side.

Q. Not through the shed? A. Not through the shed at all.

By Mr. Parker: Q. Now, take up your views from 25 feet by looking through the shed. A. Looking through the shed, at 25 feet you could see 1,957 feet; at 26 feet, looking through the shed you could see 1,840 feet.

By the Court: Q. Let me ask you what was your position when you took these observations? A. Standing on the ground.

Q. How tall are you? A. Six feet.

By Mr. Parker: Q. Well at 27 feet? A. 27 feet, 1,335 feet.

Q. Twenty-eight feet? A. 765 feet.

Q. Twenty-nine feet? A. 1,041 feet.

By the Court: Q. Let me ask you: You can see further from the 29-foot point that you can from the 28-foot point? A. Yes, sir; there is a space in there between the poles and obstructions at that one point.

By Mr. Parker: Q. Is there any obstruction to the view except the shed between the 29-foot point and the next time you took it? A. Going which way, out?

Q. Going backwards, yes. A. The bank begins. At 35 feet you can still look through the shed.

Q. And how far can you see? A. 550 feet.

Q. And at 40 feet? A. 445 feet.

Q. What is your next observation? A. Forty-five feet. You could see 307 feet.

By the Court: Q. Still looking through the shed? A. Yes, sir.

By Mr. Parker: Q. What is your next observa-

tion? A. At 50 feet, 277 feet, through the shed.

Q. Can you give us your next observation? At 60 feet, how far? A. At 60 feet you could see 247 feet. That is on the south side of the shed that you are looking then.

By the Court: Q. That is your first view south of the shed, is it? A. Yes, sir.

By Mr. Glison: Q. Do you mean south or east? A. South, looking south of the shed.

The Court: We have got by the shed now.

Witness: We have got by.

Mr. Parker: Well, give us your other views, whatever they are. A. At 75 feet, 207 feet; and at 100 feet, 170 feet; at 150 feet, 140 feet; at 200 feet, 108 ft. That is the last.

Q. Then you say your map is made on the scale of 20 feet to the inch? A. Yes, sir.

Q. And that by use of a ruler we can find the distances of these erections you have shown on the map? A. Yes, sir.

Q. Just give us the distance between the hotel and the first railroad track? A. Along this way (indicating)?

Q. No, straight across.

The Court: From the nearest point of the hotel.

A. It is 70 feet.

Q. Now, is there any obstruction to the view after you get past the hotel, to a view to the left? A. No, sir; up the track.

Q. How is the track, straight? A. Yes, both ways.

Q. And is the track level, or is there a grade there? A. There is a grade to the west; going west there is a grade.

Q. That is, going in the direction in which this

train was coming, the train was going up a grade; is that right? A. Yes, sir.

Q. And do you know what the grade is? A. I couldn't tell what the grade is.

By the Court: Q. Let me ask you: Was this measurement from the hotel from the solid structure of the hotel or from a porch? A. From the solid structure. There is about a five or six-foot as I remember, or a seven-foot porch on it.

Q. That would take five feet off? A. Yes, from the edge of the porch. I wouldn't swear just to the width of it. I have got the solid part of the hotel.

Q. About a five-foot porch? A. Yes, sir.

By Mr. Parker: Q. What is the little road as it runs across the milk platform, or freight shed? A. Well, it varies from six to seven feet.

Q. And it is just a driveway? A. What I term as the beaten part of the driveway, the edge of it.

Q. You have not put down there the line of the bank, have you? A. No, sir.

Q. Do you know what is the height of the freight platform, from the ground to the platform? A. Why, I didn't measure it; I could approximate very close.

Q. How much? A. About three feet.

Q. How far is the first telegraph pole from the highway? A. The centre?

Q. Yes. A. (Measuring on map) 120 feet. Well, there is one right by the milk platform. Is that the one you mean?

Q. Well, what is that one? A. The first one is at the west end of the milk platform, 35 feet. The next one is 120 feet from the centre of the road.

By the Court: Q. In the centre of the road—A. Parallel with the tracks.

Q. Measuring parallel with the tracks, 35 feet to the telegraph pole which is at the westerly end of the milk platform? A. Yes, sir.

Q. You said something about another pole? A. The next one down.

Q. To the east? A. To the east.

Q. Along the track? A. Along the track, 120 feet from the centre of the highway. The next one is 220 feet from the center of the highway.

By Mr. Parker: Q. Is there any usual distance of telegraph poles from one to another? A. They run from 100 to 120 feet.

Q. Please tell us the distance of that little house on the south of the map from the railroad track? A. Along the highway?

Q. No, a straight line. A. (Measuring on map) the nearest part of the house, about 150 feet.

Q. And how far is it from the nearest part of the house to the centre of the highway? A. Twenty-five feet.

Q. And what is the width of the highway at that point, opposite the house? A. It is 16 feet—the edge of the bank.

By the Court: Q. Your measurement was from the nearest part of the house to the centre of the highway? A. Yes, sir.

Q. The highway is how wide? A. From the edge of the—16 feet; it varies a little one way or the other; 14, 16, 15 feet, along there.

CROSS-EXAMINATION by Mr. Gilson:

Q. Mr. Robinson, do I understand that that is the only house on that side of the highway? A. This house here (indicating)?

Q. Yes. Is there not another one nearer the railroad, right up on top of the bank? A. Not close to the highway not up in here (indicating).

Q. I show you Exhibit P-1 (shown to witness), and call your attention to a house up on top of that bank. Is that the house that you are talking about and the one that is shown on this map? A. No.

Q. That is nearer the railroad than the one shown on your map, is it not? A. Nearer the railroad, but over here, yes (indicating).

Q. Well, it is right up on top of this bank, is it not? A. Yes, it is further over here (indicating).

By the Court: Q. When you say "over here," you mean further towards the east? A. Further towards the east. I couldn't tell you —

Q. Well, approximately, can you give us an idea compared with the house that you are talking about? A. No; it isn't closer to the highway.

Q. About the same, is it not? A. No, I would say it was further from the centre of the highway than the one further up the hill.

Q. Well, how much further, about? A. Well, I can't tell you from a photograph. I would say about 35 or 40 feet further from the centre of the highway.

Q. You said the other house was 120 feet. You do not mean to say— A. Oh, no.

The Court: Twenty-five feet?

Witness: Twenty-five feet.

The Court: From the road. You are speaking about the road, are you not?

Mr. Gilson: Yes, the highway.

The Court: Yes.

Mr. Gilson: Oh, yes. The hotel was 120 feet from the highway.

Q. You say this house is 25 feet from the centre of the highway? A. Yes, sir.

Q. And about how much do you judge this

house to be from the centre of the highway (indicating). A. Well, perhaps 50 or 75 feet, or maybe a little more.

Q. Why did you not put this house on that map, when I asked you a few moments ago if it showed everything, and you said yes? A. It shows everything in connection with any view that you could get there.

Q. Does that house that you have on your map have anything to do with your view? A. No; somebody lives there, that is about all I know, perhaps a witness.

Q. Who told you what to put on that map? A. Nobody; I went there alone. I was told to go there and make a map of it. They had a map made before.

Q. So that you used your own judgment? A. So that I used my own judgment. I didn't know anything about it.

Q. You said that looking to the left, to the west, that there were no obstructions except that hotel shown on your map. A. Did I say that?

Q. I understood you to say that. A. (Indicating) there was a shed over here. As you come down here you can see up the track (indicating).

Q. But there is a shed right in front of the hotel and almost on the railroad, is there not? A. Right to the left edge of the map the shed begins.

Q. Why did you not put that on this map? A. No reason at all.

Q. There are also, looking to the left, not only one line of telephone poles or telegraph poles, but two lines, are there not? I show you Exhibit P-7 (shown to witness).

Mr. Parker: That is looking towards the west.

A. Yes, there is poles there.

Q. You did not put those poles there? A. Not at all. They don't obstruct the view.

Q. They do obstruct it, do they not? A. No, sir.

Q. Do you mean to say that that shed and those telegraph poles had nothing to do with the view?

A. The shed has something to do with it, maybe but it is some way up the track, where it doesn't obstruct, and the poles don't amount to anything.

Q. Now I show you Exhibit P-6, showing two houses on the right-hand side of the road coming down the hill (shown to witness). The second house is the one that is shown on your map, is it? A. This one, yes (indicating).

Q. That is the one, up towards the top of the hill? A. Yes, towards the top of the hill.

Q. The other house is the one that we have just been talking about, on this other photograph? A. Yes, sir.

Q. Now, all your observations of the distances given by you, of course, were given from the post advantageous points that you could see the track, were they not? A. Well, walking along and take them.

Q. Well, you picked out, naturally, the places where you could get the longest view to the east? A. Where you could see, certainly.

Q. Could you see looking through the shed, the way you said you did—could you see the tracks, the rails? A. I could see a man. I usually use a man, let him go down there and stand.

Q. Not usually; what did you do this time? A. I did this time.

Q. Who was he? A. A friend of mine in Middletown—

Q. What is his name? A. —in the garage. McBrier is the man that was with me.

Q. Is he the man on the track? A. He is the man that went with me.

Q. And you sent him down at each of these points? A. Yes, sir.

Q. Each time you looked? A. Yes, sir.

Q. Is he in Court? A. No, sir.

Q. Did you ask him to be here? A. No, sir.

Q. Did you tell Mr. Parker that he helped you? A. No, sir.

Q. You could see what part of his body at each of these points? A. I could get a good view of him. I couldn't see his feet; I could see different parts of him, sometimes half of him and sometimes more.

Q. Of course you do not mean to lead the jury to believe that if there were shrubbery, weeds and stuff growing up there alongside of the bank, or stuff on the platform, that you could get any of these great views that you have testified to, do you? A. I hardly think I could get a view of a man down there, but I am quite positive I could get a view of an engine. I don't think I could look through there and get anything as small as a man.

Q. That platform is how high from the ground, Mr. Robinson? A. I should imagine about three feet.

Q. Did you measure it? A. No.

Q. About three feet? A. I say about three feet.

Q. Suppose there were barrels piled up on that platform—barrels or boxes? A. Well, I am not talking about the barrels.

Q. Well, I am talking about them. A. Well, before I answer it I want to know where they were and how many there were.

Q. If there were boxes or barrels piled up on that platform, which is three feet above the

ground, you do not mean to say that you could see a locomotive or anything else on that track for the distances testified to by you, do you? A. It depends on how they are placed.

Q. How could they be placed so that you could see? A. One on top of the other. If they were spread apart a little, you could see between them; if they were set on one side, you could see different than you could in another place.

Q. You could get a glimpse—you mean if you stood right there and got in the right position, you could see either one side or the other or between them, if they were arranged just right? A. Exactly.

Q. But you do not mean to say that a person coming down there in either an automobile or a wagon could see, do you? A. With the barrels there?

Q. Yes. A. I don't know; I would testify to that.

Q. Referring to photograph P-3 (shown to witness.) If this part of the embankment between the high part of the bank and the freight-shed had been grown up with weeds of course you could not get the views that you testified to, either, could you? A. Oh, no, if it was solid—

Q. Well, not solid, but— A. Well, good, heavy weeds. You couldn't see a man down there.

Q. You could not see a man down there? A. No.

Q. There were not any weeds or anything like that grown up when you made your observations? A. No.

Q. This man that you said was standing, was he on the east-bound or west-bound track? A. On the west-bound track.

Q. You said there was a grade there on the railroad? A. Yes.

Q. Is that what you call a heavy grade or just a slight grade? A. Not at that point.

Q. But it is a grade so that the trains have to get a pretty good start from Middletown to make it? A. Yes, they come over the hogback there, what we call the hogback, pretty good.

Q. A pretty good clip, do they not? A. Yes, sir.

Q. In order to make that hill? A. Oh, yes.

By the Court: Q. Does your map show the position of the telegraph pole that you say was at the west end of the freight shed? A. Yes, sir; it says "Pole."

Q. Can you tell the dimensions of that pole. Never mind the height, but the thickness of it, the diameter? A. I didn't measure it, sir, but I could tell you—

Q. Well, aproximately. A. Not over 13 inches, 14 inches at the outside.

By Mr. Gilson: Q. Is not that an extremely large pole there, Mr. Robinson? A. Not as I remember it.

Q. Well, I call your attention to P-5 (shown to witness), and ask you if it is not almost half as large as the barrel standing alongside of it, or quite as large as that? A. Oh, no.

Q. Does it not look that way? A. No, it don't.

Q. What is the diameter of an ordinary barrel —that barrel? A. I don't know what the diameter of a barrel is.

Q. Does not that pole look a little larger than the ordinary telegraph pole? I will show you the same pole in P-4 (shown to witness). A. No, I wouldn't say so. You know a 13 or 14-inch butt on a pole, it is a pretty fair pole.

Q. It is a pretty large pole? A. Yes, sir.

Q. As poles go? A. Yes, sir; 13 or 14 inches is a pretty large pole as poles go.

By the Court: Q. Show us 13 or 14 inches (handing ruler to witness). A. (Witness indicating on ruler.)

By Mr. Gilson: Is that 13 or 14? A. 13.

Q. Did you measure those posts of the freight shed? A. The size of them?

Q. Yes. A. No.

Q. About what are they, do you know? A. No; I couldn't say.

By Mr. Parker: Q. Do you know the height of a barrel? A. No.

The testimony of Hector Tuthill given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examniation.

HECTOR TUTHILL, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Tuthill, where do you live? A. Howells, New York.

Q. Where did you live on July 31, 1909? A. About half a mile west of Howells.

Q. What is your business? A. Farmer.

Q. Do you send milk to market? A. I did at that time.

Q. What time of day do you usually deliver milk? A. About 5:30 in the afternoon.

Q. Where? A. Howells Station.

Q. The freight platform? A. The milk platform; yes, sir.

Q. Do you keep a record of the milk delivered? A. I do.

Q. Have you that record with you? A. I have.

Q. Will you produce it? A. (Witness produces memorandum book.)

Q. Will you turn to your record of July 31, 1909? A. Yes, sir.

Q. And tell us what that record shows as to milk delivered at the freight platform at Howells?

Objected to as irrelevant and on the ground that no foundation has been laid for the question.

The Court: The suggestions that you make do not exclude this evidence. It is probably only a link in the chain. I can see how it may tend to throw light on this case.

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

(Question read.)

A. Three forty-quart cans; each held forty quarts.

Q. What time of day were they delivered at the freight platform? A. About 5:30 in the afternoon.

Q. They were to go down on a certain train, were they? A. Yes, sir.

Q. What time did that train go down? A. Why, it was due to leave at 6:05, I think.

Q. At the time you delivered those three cans of milk at the freight platform was there anything on the platform? A. I believe the platform was empty, to the best of my knowledge, entirely empty.

Q. Was there anything to obstruct the view through the platform? A. Nothing.

Q. When you arrived at the crossing did you

learn anything about an accident that had happened at that point? A. I heard it just before I reached the crossing.

Q. Who told you?

Objected to.

The Court: This is not to prove what the circumstances were, of course, but merely to prove the fact that the witness heard any report of an accident. I think it is competent.

A. Mr. John Rowland.

By the Court: Q. You heard it from someone before you reached the station? A. Yes, sir.

By Mr. Stickel: Q. Did you know in any other way that there had been an accident? Did you see a damaged automobile? A. I did.

Q. Where was it? A. Lying along the track, the east-bound track.

Q. Was it east or west of the crossing? A. It was west of the crossing.

Q. At that time, Mr. Tuthill, who were the shippers of milk from the Howells freight or milk platform? A. Mr. Asa Mapes, Mr. Emmett Mapes and myself.

Q. Are Mr. Asa Mapes and Mr. Emmett Mapes presnt in Court this morning? A. They are.

Q. Will you just tell us what you saw of the automobile when you came down to the crossing? A. After I unloaded the milk I heard of the accident, and I drove around and saw the automobile, the wrecked automobile, lying there.

Q. Will you tell us what part of the platform you placed the milk? A. About the center, the usual place.

Q. On the side nearest to the track, or the other way? A. No, near the little driveway; just lift it out of the wagon and set it on the edge of the platform.

Q. As I understand, you drove in in the rear of the shed? A. Yes, sir.

Q. And placed it on the side nearest the road? A. Yes, sir. There is just a driveway around the platform.

Q. Did you place them out in a row or on top of one another? A. Just set them out.

Q. Just set them out straight? A. Yes, sir.

Q. How high is a milk can? A. A milk can is about 30 inches high, I should judge.

CROSS-EXAMINATION by Mr. Gilson:

Q. How did you happen to come here this morning, Mr. Tuthill? A. I come at the request of the railroad company.

Q. Of course your expenses were paid? A. Why, certainly.

Q. And a little more? A. No.

Q. How much? A. Well, they pay me for my time.

Q. What is that? A. They pay my expenses here.

Q. Well, how much do they give you? A. I don't know.

Q. You don't know how much they gave you? A. No. They pay my expenses here.

Q. But you do not know how much your expenses were or how much they give you? A. They haven't paid me yet; they have paid my expenses so far.

Q. Well, how much have they paid so far? A. They paid my railroad fare.

Q. Anything else? A. And board.

Q. Anything else? A. No, sir.

Q. How much did that amount to all together? A. Probably less than $5 so far.

Q. Of course your record does not show whether there was anything on that platform when you say you put—(let me see that record) (witness hands book to counsel)—when you say you put the cans there, does it? A. No, sir.

Q. What is it that calls it to your mind now after two and a half years that that platform was clear? A. Well, it isn't two and half years since I had occasion to think about it.

Q. And that is what makes you think now that that platform was clear, is it? (No response.)

Q. Is there anything else that makes you think now that that platform was clear when you put those milk cans on? A. Well, my own observation.

Q. Well, I know, but you can not remember now, after two and a half years, just the condition of that platform on that particular day, can you? A. No, sir.

Q. So that you will not swear positively that there was not something on that platform when you put those cans on that day? A. I can swear that you were not there.

Q. I understand that, but you can not swear that there were not any boxes or barrels there when you put the cans on, can you? A. Boxes of what?

Q. Anything, lettuce or anything else? A. Yes, I will swear there was no lettuce there, positively.

Q. But you will not swear that there were not some boxes and barrels there on the platform? A. Well, I have a very distinct recollection of it, and it was empty—the platform.

Q. Well, what is it that makes you so distinct now in your mind? A. I knew something of the parties that—

Q. You knew there had been an accident? A. I knew there had been an accident, yes.

Q. Now, you did not know at that time that that accident would have anything to do with the condition of that platform, did you? A. No, sir.

Q. So that that did not call the condition of this platform to your mind, that this accident had occurred, did it? A. No.

Q. Now, tell the jury what it is that calls it so vividly to your mind now that that platform was clear, if it was not this accident? A. Well, I have been used to delivering milk there a good many years, and I usually notice the condition of the platform, and I—

Q. And you picked this day out of all the others? A. No.

Q. And say that at that time there was nothing on that platform? A. I know this was on a Saturday, and I know on other days there was apt to be celery and lettuce there, but Saturdays never.

Q. Do they not ship other things besides celery and lettuce from that platform? A. Not usually no, sir.

Q. Well, sometimes? A. Oh, I have seen things there.

Q. And there were freight trains and other trains coming along all times of the day and picking up stuff from that platform, were there not? A. No, not usually.

Q. Sometimes? A. There is a produce train just ahead of the milk train that picks up things.

Q. Just ahead of the milk train? A. Yes.

Q. How long before the milk train? A. Yes.

Q. How long before the milk train? A. It is often there when I am taking milk, half-past five.

Q. The produce train comes along and takes

up the stuff on the platform? A. Usually through the summer season.

Q. What becomes of it on Saturdays? A. Don't send it Saturdays; there is no market Sunday mornings.

Q. Are there not other cars on that train besides produce cars? A. You mean passenger coaches?

Q. Any kind of coaches? A. It is just called a produce train.

Q. Well, it is a regular train that goes through there, is it not? A. I think it does through the summer season.

Q. And it picks up other freight besides produce, does it not? A. I couldn't say. It is called the produce train.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. Mr. Tuthill, was not your attention directed to the condition of this platform by people wondering why the man did not see the train through the platform?

Objected to.

The Court: No. In the first place it is leading, ond, in the next place, it is founded on hearsay observations. It is not part of the *res gestae*.

Q. When was your attention first directed to this freight platform after the accident? A. About being empty?

Q. Yes? A. Why, it was common talk there, talked among the people.

Q. When did someone from the railroad first see you after the accident with respect to the condition of the platform? A. I think it was a year ago last June.

Q. Did you recall at that time that there was nothing on the platform? A. Yes.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. You say it was common talk around there? A. Yes, sir.

Q. I suppose the station agent or somebody from the railroad went up to see you about it? A. No, sir.

Q. Now, all your testimony is founded largely on the fact that other people said that that platform was clear, is it not? That was the common talk? A. No, sir.

Q. Don't you think that is the reason you think so now, that the platform was clear, because it was talked about there? A. I think if it had been full of celery, as it was sometimes, I would have noticed it and known it.

By the Court: Q. Where was your milk going? A. Jersey City.

Q. How did you get your empties back? A. Why, they have a train that brings the empties back.

Q. When do you take back the empties? A. The same time I deliver the milk. The empties are on the opposite side of the track.

Q. On the station side? A. Yes, sir.

Q. Did you take back any empties on this trip? A. Yes, sir.

Q. Where did you take them from? A. The opposite side of the track.

Q. What is the diameter of a forty-quart can? A. Why, I should think about 15 inches. I never measured one especially.

The testimony of Asa Mapes given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

ASA MAPES, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Mapes, where do you live? A. I live at Highland Lake.

Q. Where did you live on July 21, 1909? A. At Highland Lake.

Q. What is your business? A. Farming.

Q. And was it that on July 31, 1909? A. Well, milk; that is my business, a milk farm.

Q. When do you usually deliver milk at the milk platform at Howells, at what time of day? A. Well, between half-past five and six.

Q. Do you keep a record of the milk delivered at that point? A. I do.

Q. Have you that record with you? A. I have.

Q. Refreshing your memory from that record, will you tell us what it shows you delivered at the freight platform on July 31, 1909? A. (Referring to memorandum book.) Two cans.

Q. Two cans? A. Two cans; yes, sir.

Q. What time of day was that delivered at the milk platform? A. Well, sometime—about quarter of six probably, between half-past five and that.

Q. And when you delivered those two cans at that point was there anything else on the milk platform?

Objected to as leading.

A. Well, nothing but three cans.

Q. When you delivered those two cans on the platform what else was on it? A. Nothing but three cans of other milk.

Q. What part of the platform were they on? A. Well, we set them in the center, generally, about the middle.

Q. About the middle of the platform? A. Of the platform; yes, sir.

Q. Which side of the platform, the north or the south side? A. The south side.

Q. Where did you place your cans? A. I set them on the platform, as I generally do, right about the center of the platform.

Q. The north or the south side? A. The south side.

Q. When you arrived at that point did you learn of an accident that had occurred at that crossing? A. I did sir.

Q. How did you learn it? A. Well, I saw it.

Q. Saw what? A. I saw the automobile.

Q. Where was it? A. It was laying up the track nearly opposite the hotel.

Q. What track? A. The Erie track.

Q. East or west-bound track? A. It was on the east-bound track, I think.

Q. Was there anybody around there at that time? A. Well, there was a few looking around the machine, that was all.

Q. Who were the shippers of milk in that community from that point at that time? A. Well, Mr. Tuthill and myself and S. E. Mapes.

CROSS-EXAMINATION by Mr. Gilson:

Q. Of course, you have talked this thing over a great many times with different people since July, 1909, have you not? A. Well, not very much.

Q. About how many times would you say? A. Well, that I couldn't say.

Q. Well, more than two or three? A. Why, it has been general talk.

Q. And you remember now because you have talked it over lately with somebody? A. No, not only on account of that.

Q. When was the last time you talked to anybody about this accident? A. Well, I couldn't tell you. Lately, likely, yes.

Q. Within the last week, was it not? A. Yes, likely.

Q. Who was that you talked to? A. Well, people around Howells.

Q. Anybody from the railroad company? A. No, sir.

Q. And have you not seen anybody from the railroad company within the last week? A. Why, I have.

Q. Whom? A. I don't know as I could call their names.

Q. Did he not talk to you about this case? A. Nothing, any further than what I have told you.

Q. You did not tell me anything yet? A. Well, I told you all I know about it, that is all.

Q. Well, somebody did, of course, come to you and pay your expenses to come down here? A. I paid my own expenses.

Q. Have they not paid you anything at all? A. I haven't had anything yet.

Q. Have you had any promises? A. No, not particularly.

Q. You just came down and paid your own expenses? A. I don't expect to come down here for nothing.

Q. Well, you did not come down because you were particularly fond of the Erie Railroad Company, did you? A. I came down because—

Q. Because somebody asked you? A. Because it was necessary.

Q. Now, that person that asked you to come down told you the case was coming up for trial, did they not? A. Yes, sir.

Q. And they asked you what you were going to testify to? A. No.

Q. Did they not ask you whether you were going to say that that platform was clear of everything when you put your milk on, except those other three cans? A. There was nothing else on there.

Q. But this man that asked you to come down today, did he not ask you if you were going to testify that way? A. No, I don't think he did.

Q. Well, you will not swear positively that he did not? A. Well, I don't think he did.

Q. Now, he did talk it over with you and ask you what you were going to testify to? A. No, he didn't ask me what I was going to testify.

Q. He did not ask you what you were going to testify; he just asked you to come down and come to Court? A. Well, I knew what it was for.

Q. When you saw this auto alongside of the track did you see any of the people that were injured there? A. How is that?

Q. Did you see any of the people that were in the automobile? A. No, sir; I did not.

Q. It was quite a long while after the accident that you were there? A. Well, not a great while.

Q. Well, half an hour or more? A. Well, I don't know what time the accident happened exactly; I don't remember that.

Q. Did you not hear it was some time before you got there? A. Yes.

Q. It was half an hour or more, was it not? A. Probably it was.

Q. Now, there is a train that goes down there just before the milk train, is there not? A. That I couldn't say.

Q. How long have you lived there? A. I have lived there for thirty-nine years. I know there is trains running all the time.

Q. When you get down there at half-past five or quarter-past five sometimes, have you not heard of another train which comes down just before the milk train? A. I have seen it.

Q. So that you will not say that there were not some boxes or barrels on that platform, will you? A. I will.

Q. You say they were not there? A. They were not there; no, sir.

Q. What is it that calls so distinctly to your mind that there were no boxes or barrels there? A. Because when I put my milk on I know that there wasn't any.

Q. How do you know? A. Well, can't I see?

Q. Well, you can not remember on that particular night, after two and a half years or so, can you? A. Well, I don't know but what I can.

Q. Tell me what was on that platform on the 25th day of July, 1909, when you put your milk on? A. The 25th?

Q. Yes? A. Well, that I don't know; I don't know as there was anything.

Q. And what was there on the 3d day of August, 1909? A. That I couldn't tell you.

Q. Why is it that you remember now what was on there on July 31st? A. Because I remember this accident happened.

Q. And you did not know at that time that it was necessary for you to look at that platform and notice the condition of that, just because there was an accident? A. I noticed it when I drove up there.

Q. Well, the accident did not make it necessary for you to remember that. Now, is it not a fact that the reason that you remember it is because you have been talking and you have heard the common talk around there about this case? Isn't that the reason? A. I don't know; it might have some bearing on it.

Q. You will not say to the jury, of course, that you can remember what was on that platform every day, two and a half years ago? A. No, not every day.

Q. No, nor that day, you do not remember it

distinctly? A. I know that sometimes there is things on the platform, but I know there wasn't that day, because it was Saturday, and they never ship that day.

Q. That is the reason you know? A. That is one thing, yes.

Q. Which side of the track did you get your empty cans from? A. I get them on the west side—the north side.

Q. Always? A. Yes, sir—the empty cans.

Q. Once in a while you get them on the other side, do you not? A. No, sir.

Q. Did you take any empties back that day? A. I think I did.

Q. Which side you get them on that day? A. On the other side.

Q. On the other side? A. Yes.

Q. Sometimes they get over on the other side? A. Well, it is very rarely, if they do.

By Mr. Stickel: Q. Mr. Mapes, did that produce train that you speak of go down on a Saturday? A. I think not.

By Mr. Gilson: Q. Well, you do not know that positively, do you? A. They don't run any produce train on a Saturday.

Q. But you think they do— A. Well, some other days, yes.

Q. But they do have other cars besides produce cars in that train, do they not? A. Well, they have passenger cars.

Q. Suppose you want to ship a box of freight of any kind, or something else, not perishable, on Saturday afternoon, do you mean to say that you can not get anything out of there on Saturday afternoon from Howells? A. By express.

Q. Suppose you want to send it by freight? A. You can't.

Q. Where would you put your express packages? A. Over in the depot.

Q. And then the station master, just before the express train came along to pick them up, going east, would bring them over and put them on that platform? A. He would bring them over and put them on a truck. He don't use that platform in any way for that purpose, I think.

Q. He used to, though? A. Not for quite a while.

Q. Well, how about two and a half years ago? A. Well—

Q. You do not know anything about that? A. No, but I don't think they did much about that time.

The testimony of S. Emmett Mapes given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

S. EMMETT MAPES, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Mapes, where do you live? A. I live one mile south of Howells.

Q. Where did you live on July 31, 1909? A. I lived one mile south of Howells.

Q. What was your business at that time? A. Farming.

Q. Did you ship any milk to the market? A. I did.

Q. From what point would you ship it? A. Howells.

Q. And when would you deliver it there for

shipment, what time of day? A. Probably some time between half-past five and six.

Q. And on making such a shipment would you make a record of it in any book? A. I do.

Q. Now refresh your memory from that book. Can you tell us what milk you shipped from the milk platform on July 31, 1909? A. (Referring to memorandum book.) I didn't ship but one forty-quart can.

Q. And when did you place the can on the platform on that day? A. Well, I think before 6 o'clock.

Q. When you placed it there was there anything else on that platform? A. I think there were five cans of milk.

Q. Where were they on the platform? A. About in the middle of it.

Q. On the north or on the south side of the platform? A. On the south side.

Q. How were they placed there? A. Just set in a bunch, rolled right up together, I think.

Q. Was one on top of another? A. No, sir; they set right on the platform.

Q. And where did you place your can? A. Right with the others.

Q. On the same side? A. On the same side.

Q. Did you know of the accident at this time? A. I did not.

Q. When did you first learn of it? A. I think I didn't know of it until Sunday morning, sir.

Q. Was there anything on the platform other than the five cans of milk? A. I don't think there was.

Q. How long did you stay at this crossing, at the milk platform? A. I didn't stay, only just to get out and put in my empty cans—I think there were two—and over to the postoffice I got my mail, and went right home.

Q. Where did you get your empty cans from? A. From the other side of the track, in the station, from the platform.

Q. Was there anybody around the crossing at that time? A. I didn't see anybody in particular of any note; there might be a few people standing around, but I didn't notice anybody in particular, because I was anxious to get home.

CROSS-EXAMINATION by Mr. Gilson:

Q. You are not very busy in your business at this time of the year, are you Mr. Mapes? A. Oh, yes, we have plenty to do every day; yes, sir; we have plenty to do every day.

Q. But you like to take a trip to New York, do you not, sometimes? A. I haven't been to New York since last March.

Q. So that you were anxious to come down on this trip? A. No, sir.

Q. Did you not want to come down to look over the automobiles? A. No, sir.

Q. You knew there was an automobile show, did you not, down here? A. No, sir.

Q. How did you happen to come down, then? A. Because the railroad or the official of the railroad, requested; they sent there.

Q. You do not do everything they requested you, do you? A. Well.

Q. Well you would not do anything I requested you to do? A. I might; yes, sir.

Q. Would you not expect me to pay your expenses, and so forth, if I asked you to take a trip? A. Well, that might all be.

Q. Did they do that? A. They said they would.

Q. Have they paid you anything? A. They gave us a free pass to here and home again.

Q. And did they pay your board? A. I think they paid thirty-five cents of my board since I have been here.

Q. How long have you been here? A. I came day before yesterday.

Q. Well, have they given you any promises? A. Not anything, only what they done when a gentleman was there; he said he would see that my expenses was paid.

Q. Now, Mr. Mapes, how many cans did you see on that platform on July 25, 1909? A. When do you mean, after I put my own or before.

Q. Yes? A. Which one?

Q. Before? A. I think there were five there.

By the Court: Q. Did you notice the date you were asked about?

Mr. Gilson: This is a different date from the accident.

The Court: You were asked about July 25th? A. Oh, I thought you meant the day I took it down there.

By Mr. Gilson: Q. No, not the day of the accident; July 25, 1909? A. No, I couldn't say now; I don't know, because sometimes we send two cans; sometimes three, and so on. I don't remember without looking.

Q. Do you remember whether on that date, July 25th, there were any boxes or barrels or anything else on that platform? A. Well, at that time of year they were shipping celery and lettuce every day, only Saturdays.

Q. Not Saturdays? A. Not Saturdays.

Q. But you often on Saturdays and other days saw other things besides lettuce and celery and things like that, did you not? A. I think not.

Q. Do they not ever put anything there but celery and lettuce and milk cans? A. Not at that time; no, sir.

Q. Isn't there anything that people deal in and ship out of Howells? A. No, but what express they have, and one thing and another, comes over on a truck on this side of the track.

Q. Suppose you have trunks and boxes, and things like that, that they can not leave on the truck, that they have to go back and forth, they put them up on this platform, do they not? A. No, sir.

Q. What do they do with them? A. They put them over in the depot, and then they fetch them over in the truck.

Q. Suppose they have more than one truck load, they have to go over and unload the first truck, and go back and get another truck load and bring that back, do they not? A. Well, I don't think they ever bothered coming only once.

Q. Well, you have seen other things on the platform besides celery, lettuce and milk, haven't you? A. Well, there might have been a few boxes sometimes.

Q. And you will not say on this particular day that there was not some of these other boxes? A. Well, I don't think there was anything.

Q. But you will swear positively— A. Because it was Saturday, and the produce train don't run Saturdays.

Q. And because it was Saturday and because you have talked this matter over with people lately? A. No, sir; I haven't talked it over. I didn't know anything about it; I thought this thing was settled long ago.

Q. So that you have not talked it over since when? A. I don't know that I ever talked it over.

Q. How did they know that you knew anything about it? A. Because they came to the depot and got the names of those that got milk; I suppose that is the case.

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Q. When was it they asked you to come down here? A. This time?

Q. Yes? A. It was Friday or Saturday; I don't remember.

Q. Did they not ask you then what you were going to testify to? A. No, sir.

Q. Just brought you down here and took a chance on what you were going to say? A. Only that they wanted me as a witness, that is all.

The testimony of Jesse Edward McMunn given at the former trial is read, defendants counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

JESSE EDWARD McMUNN, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. McMunn, where do you live? A. Graycourt, Orange County, New York.

Q. What is your business? A. Railroad clerk.

Q. Where? A. Graycourt.

Q. What was your business on July 31, 1909? A. Agent for the Erie Railroad at Howells.

Q. Do you recall an accident that happened at that point on July 31, 1909? A. I do; yes, sir.

Q. Did you see it? A. I did not.

Q. Did you see the parties after the accident? A. I did; yes, sir.

Q. Can you tell us what you saw of them? A. Why, I saw Mr. Dickinson, and also his wife and his daughter, after the accident happened. Mr. Dickinson seemed to be uninjured, as far as I could see—

Mr. Gilson: I object, and ask that it be

stricken out. How can he tell whether he was injured or not?

Witness: I did not say he wasn't; I said—

Mr. Gilson: Do not volunteer, now.

The Court: I do not exactly see the force of the objection. He might describe his appearance, I suppose.

Mr. Gilson: Yes, but not the conclusion that he did not appear to be injured.

The Court: That does not require expert knowledge. I will let it stand.

Q. Have you anything to add to that? A. Well, with the exception that the lady folks were hysterical. I mean by that that they were making noises, crying and going on.

Q. What first called your attention to the accident? A. Well, someone in the waiting room. I was in the rear of the station, in the office.

Q. What did you do then, when they spoke to you about it? A. As soon as the rear of the train had passed I ran out over the track.

Q. And what did you see? A. I saw, as I described before, Mr. Dickinson and the two ladies and the wrecked automobile.

Q. Where were Mr. Dickinson and the two ladies? A. In the highway.

Q. How near the track? A. I couldn't say as to that; I don't recall.

Q. What highway were they in, the one leading north and south or the one leading parallel to the tracks and in front of the Mountain House? A. The one leading north and south, as I recall it, the one that goes directly across the track.

Q. Now, what are your duties as agent at that point? Were Mr. Dickinson and his wife and daughter on the railroad track? A. No, they were not.

Q. Were they close to the track? A. Not as I recall it, no.

Q. How long after the crash did you come out and see the accident? A. As soon as the rear o the train passed.

Q. What are your duties as agent at this point? A. Handle all the business of the Erie Railroad, also the Wells, Fargo Express.

Q. Did you handle the freight business there? A. Yes, sir; all the Erie Railroad business, and also the express business, the Wells, Fargo business.

Q. Do you keep records of freight delivered there for shipment and received there for shipment? A. Yes, sir.

Q. Have you that record with you there? A. I have the express record.

Q. Does that show the goods received and shipped from Howells on July 31, 1909? A. This express record shows the goods forwarded, not received.

Q. Goods shipped from Howells on that day? A. Shipped; yes, sir.

Q. Turning to that record, can you tell us what was shipped from Howells on that day, July 31, 1909? A. Yes, sir; I can. (Witness refers to book). There were seven shipments made on that date.

By the Court: Q. Seven? A. Seven; yes, sir.

By Mr. Stickel: Q. What were they? A. There was three trunks, a package, two boxes and a crate.

Q. From what point were they shipped, from the north or the south side of the track? A. Why, there was a west-bound—let me see—all but one was made—as I understand the south side, you mean the west-bound side?

Q. I mean were they shipped from the station or from the milk platform?

The Court: The south side would be the west-bound.

A. There was not anything shipped from the milk platform.

Q. They were all shipped from the station? A. Yes, sir.

By the Court: Q. You said something about all but one? A. There was one west-bound.

Q. All but one were shipped from the station?

Mr. Stickel: No, they were all shipped from the station.

Mr. Parker: One was west-bound; the others were east-bound.

Q. All shipped from the station? A. Yes, sir.

By Mr. Stickel: Q. What is ordinarily shipped from the milk platform? A. Well, the milk and some freight and all of the express and produce; that includes celery and lettuce.

Q. Is there a train that goes through Howells in the afternoon that takes the produce to market? A. About 5 p. m., yes, sir.

Q. Does that train go through every day in the week, or did it on July 31, 1909? A. It did on July 31st, yes, sir.

Q. Including Saturdays? A. It did on that Saturday.

Q. On that Saturday did it stop at that station and load produce? A. It did not; it stopped, but not to load produce.

Q. Was there any produce to load? A. There was not.

Q. When was the first shipment of produce from the freight platform after July 31, 1909? A. August 1st.

Q. And when were the goods that were shipped

at that time received at the freight platform? A. Well, sometime during the morning of that date, sometimes after 10 o'clock.

Q. Sometime during the morning of August 1st? A. August 1st, after 10 o'clock.

Q. What time of day did the milk train go through Howells or stop at Howells? A. 6:12, I think, was her time at that time.

Q. Do you know whether it loaded any milk on that day? A. It did; yes, sir.

Q. Do you know whether the milk platform was free at the time of the accident?

Objected to.

A. I can't say just that.

The Court: It is objectionable as being leading.

Objection withdrawn.

Q. The produce train you say stopped at the crossing after the accident, was that the train you speak of that usually does not stop at Howells to load freight? A. On a Saturday.

Q. On Saturday. Do you know who at that time had charge of that train? A. I do; yes, sir.

Q. Who? A. The conductor, Chris McMahon the engineer, Mat Curtis.

Q. Do you know who shipped the milk that was taken away by the 6:12 milk train? A. I do; yes, sir.

Q. Who? A. Hector Tuthill, S. E. Mapes and A. Mapes.

Q. Where did the produce train stop on the day of the accident? A. They made both stops; they stopped west of the station on account of the wrecked automobile being on the west-bound track, and they stopped again at the station to load three trunks.

Q. Those three trucks were loaded from the sta-

tion platform? A. Not from the milk platform, no; they were loaded from the ground.

Q. Where is produce discharged from trains coming into Howells? A. I don't understand what you mean.

Q. Where is freight discharged, or unloaded, coming into Howells? A. On the station side.

CROSS-EXAMINATION by Mr. Gilson:

Q. Well, coming from the other direction, coming from Port Jervis, where is it unloaded? A. On the station side; always was while I was there.

Q. What do you mean, put it right down on the west-bound track? A. Carry it across; yes, sir.

Q. What do they do when the west-bound train is coming? What do they do then? A. They wait until the west-bound train clears.

Q. Always do that? A. I never knew of any circumstance where they did do that.

Q. Well, isn't that shed there for other purposes as well as loading freight? A. Not to my understanding, no.

Q. It is not, eh? A. It was built there, to my understanding, for the purpose of milk.

Q. Only milk? A. Milk particularly, yes.

Q. And it was used for other purposes, such as produce? A. Produce express shipments; yes, sir.

Q. And boxes and barrels and other stuff at other times? A. Well, produce express shipments was all that I ever remember; that was all that was ever loaded, to my knowledge, while I was there.

Q. How long were you there? A. I went there the 1st of June.

Q. What year? A. 1909. And I think I left there the 1st of March, 1910. I am not positive about leaving date. The date I went there, I know, was the 1st of June, 1909.

Q. And you are still engaged with the Erie Railroad Company? A. Yes, sir.

Q. Now, did you bring your freight record? A. I did not; no, sir.

Q. Why not? A. Well, I didn't know that it was necessary.

Q. Did you bring your milk record? A. I did not; no, sir.

Q. Why not? A. Well, I didn't know that was necessary.

Q. What express record is this that you have? A. Wells, Fargo & Company.

Q. Now, besides those seven packages which you say were loaded that day, or shipped that day, were there not some trunks? A. Yes, sir. I didn't say seven packages; I said seven pieces.

Q. That includes how many trunks? A. Three trunks. They were loaded on this produce train.

Q. Where do you see any record of which direction they were shipped to? A. (Indicating in book.) There, three trunks to Jersey City; that is the address there.

Q. It shows they were all shipped to Jersey City? A. Yes, sir.

Q. Is that what you say? A. Yes, sir.

Q. And the boxes were shipped to Passaic? A. Yes, sir.

Q. And Hornell? A. New York; yes, sir; Hornell, Passaic and New York. Didn't go with the produce train.

Q. In that produce train there were other cars besides produce cars? A. As a rule they had a coach; I think they had more than one passenger coach.

Q. And then they had— A. A baggage—a combined car; seldom freight cars.

Q. So that they took on that train other classes of freight besides produce? A. No freight, only express.

Q. Only express? A. Only express.

Q. Is it not a fact that people come along and put on that platform stuff that they want to go out on the express trains? A. Nothing only those kinds of shipments, produce shipments; that includes celery.

Q. And milk? A. And milk.

Q. Suppose somebody wants to ship some other stuff, they would put boxes and barrels there, would they not, and then go over and tell you about them, tell you that they wanted them to get on a certain train? A. Express shipments, you mean?

Q. Yes? A. Well, this stuff would have to be weighed, if it was anything outside of produce shipments, and for that reason it would be left on the station side, where the scales were.

Q. And produce boxes and barrels would be left there sometimes, and they would go over and tell you about it, and you would make a note of it would you not? A. Your question isn't clear to me.

Q. (Question read.) A. What do you mean by that?

Q. I mean that people would come along, if they had some boxes or barrels of celery or lettuce or some other produce, and they would put them on that platform and drive over to your side, the passenger station side, and report it to you? A. that is where that stuff had been loaded from, yes, that is where it was left.

Q. So that there might be times when people

would put stuff on that platform, and you would not know anything about it until they reported it, an hour or so afterwards? A. That wouldn't hardly be rulable.

Q. But it did happen sometimes, did it not? A. Not that I recall.

Q. Never? A. Not that I recall.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. Did the produce have to be weighed? A. It did not; no, sir.

Q. How about the ordinary freight, did that have to be weighed? A. Yes, sir.

Q. And where are the scales for that purpose? A. In the freight house, on the station side.

Q. I ask you this question, but will you tell us when the milk train goes down? A. About 6:12, I think, was her time.

Q. And when did the produce train go down? A. Generally along about 5:50 p. m.

Q. How many records have you at this station? A. I have the express received and forwarded and the freight received and forwarded and the milk forwarded.

Q. Did you look for the book containing the milk records? A. I think; yes, sir.

Q. Were you able to find it? A. I wasn't able to find it, no.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. Well, you said in answer to me that the reason you did not bring it here was because you did not think it was necessary. Now, why was it?

Mr. Parker: He said the freight record.

Q. Did you say the reason you did not bring the milk record was because it was not necessary?

A. No, sir. I understood it was the freight record you were looking for.

Q. And I asked you if you did not keep a milk record, and you said, "Yes," and I asked, "Did you bring that?" and you said, "No," and I said, "Why not?" and you said, "It was not necessary." A. I didn't understand it that way.

Q. And you say that milk record was lost? A. As far as I know; I couldn't locate it.

Q. But the freight record is not lost? A. Not that I know of.

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

After recess.

JESSE EDWARD McMUNN, re-called in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. McMunn, you were on the stand the other day and were asked if you had your freight record of that station at Howells for July 31, 1909, and you said you had not? A. Yes, sir.

Q. Have you found that freight record? A. Yes, sir; I have it here (producing book).

Q. Is this the book that you have? A. Yes, sir. Right here.

Q. What does that freight record show? A. It shows the freight shipped on that date.

Q. I know, but when you ship freight what do you do with regard to that book? A. It shows an exact copy of the waybill.

Q. Does any freight go without waybill? A. No, sir.

Q. If you had sent freight off from Howells on July 31st would a waybill then be made out for it? A. Yes, sir.

Q. And where would that waybill have been copied? A. Copied in this book.

Q. And you say, refreshing your memory from that book, there was no freight sent out from Howells on July 31st; is that so? A. Yes, sir.

Q. Now, you were at Howells station as station agent there, I think you testified, from June, 1909, to March, 1910? A. Yes, sir.

Q. And where did you live at that time? A. Why, I lived at Howells part of the time. I don't just recall the date I went there; I think it was in October.

Q. You lived there part of the time? A. Yes.

Q. You think after October? A. Yes, sir.

Q. But before that time how long were you employed at that station? A. I went there to work on June 1, 1909.

Q. And what were your hours? A. I generally got around—I had to get around about 6:30 and it was generally 8 o'clock in the evening before I could get away.

Q. Now, can you tell us during the time that you were there whether or not the railroad and the milk platform, the bank and the herbage remained in the same condition at the time you left as they were on July 31, 1909? A. No change that I know of.

Q. Would you have known if there had been any change? A. Why, yes, sir.

CROSS-EXAMINATION by Mr. Gilson:

Q. Well, you do not mean to say that the shrubbery did not change, of course? A. No, that changes with different seasons of the year, of course.

Q. But outside of that there were not any changes, that you know of? A. Not that I know of.

By Mr. Parker: Q. Any shrubbery on the other side of the track, any weeds and grass? A. Well, with regard to shrubbery, I don't know that there was shrubbery, no, weeds and grass, as you say.

By Mr. Gilson: Q. And there were also these— what do you call these bushes with a sort of a purple flower that grow in the country? Sumach. You know what that is. Sumach bushes, that grow with all kinds of rank weeds and that stuff? A. I don't know that I recall any.

Q. Well, there were weeds enough there to be cut down by the railroad every so often? A. Yes, there were weeds there.

Q. And on P-4, that ordinary ground grows up with weeds and bushes and stuff, does it not (photograph shown to witness)? A. Yes, sir.

The testimony of Christopher McMahon given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

CHRISTOPHER McMAHON, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. McMahon, where do you live? A. 445 Baldwin Avenue, Jersey City, New Jersey.

Q. What is your business? A. Passenger conductor.

Q. What railroad? A. Erie Railroad.

Q. What was your business on July 31, 1909? A. Passenger conductor.

Q. What was your run at that time? A. Well, I started out of Port Jervis with a baggage car and four coaches to run a section of train No. 2, commencing at Middletown.

Q. What was the office of that train? What did it do on the way down? A. Well, we didn't do anything until we got to Middletown, New York,

Q. And from Middletown, New York, what did you do? A. We made the time and stops of train No. 2, passenger, baggage, express.

Q. On July 31, 1909, were you conductor of this train? A. Yes, sir.

Q. Did you stop at Howells, New York? A. Yes, sir.

Q. Where did you stop with reference to the crossing west of Howells station? A. Well, we stopped probably 500 feet, or a little bit more, west of the crossing at Howells.

Q. Why did you stop there? A. Well, the engineer, I believe saw an accident, or saw that there was something on the track ahead of him, and stopped.

Q. Was this a regular stopping place of that train? A. No, sir.

Q. Did you pick up any freight or express matter at Howells station that day? A. We did that day; yes, sir.

Q. Where did you obtain the express from, or the freight from? A. From the truck, on the station side.

Q. From the truck, on the station side? A. Yes, sir.

Q. And what was it that you loaded on your train? A. Well, it was two or three pieces of baggage, I believe, baggage—trunks, anyhow; I couldn't say what they were; two or three pieces there—New York stuff.

Q. Did you see an automobile that was said to

have been struck in this accident? A. I did; yes, sir.

Q. Where was it? A. Why, it laid on the east-bound track partly, just west of where we stopped. We stopped to clear it nicely.

Q. Did you see the persons who were said to have been in the automobile? A. I did; yes, sir.

Q. Where were they? A. There was a lady sitting in a chair and a gentleman alongside of her.

Q. Where was the chair with respect to the east-bound track? A. Well, that was quite a ways; it was over towards the hotel.

Q. Towards the hotel? A. Yes, sir.

Q. Did you have any conversation with them? A. I did.

Q. You did? A. I did.

Q. With whom did you have the conversation? A. With the gentleman that was in charge of the automobile, as I understood at the time.

Q. What was the substance of that conversation, if you remember? A. Well, after I saw what had happened I ran right down there from my train—I had coaches on the train— and I said to him if there was anybody hurt I would go right down and put them on the train and bring them to the hospital, and he said there wasn't anybody hurt, so of course—

By the Court: Q. Who said this? A. The gentleman that had charge of the automobile—that I supposed had charge of it; he was there with the lady.

By Mr. Stickel: Q. Do you know whether there was anything on the freight platform at this point? A. No, there was nothing on the freight platform.

Q. The freight platform or the milk platform? A. That is where they usually load the freight. There wasn't anything there.

CROSS-EXAMINATION by Mr. Gilson:

Q. What time did you leave Port Jervis, Mr. McMahon? A. Somewheres about 3 o'clock.

Q. And how far is that from Howells? A. Oh, probably eighteen—let me see— twenty miles.

Q. About how long did it take you to make that run? A. Well, that usually depends. Of course, we didn't have any specified time on that train; we just merely run extra from Port Jervis to Middletown.

Q. You did not make any stops? A. No.

Q. About how long did it take you to go down that day? A. Oh, it would probably take thirty minutes.

Q. So that you think you arrived at this crossing about half-past three? A. Well, we arrived there about the time of the accident; I don't know the time.

Q. Well, you know exactly what time you left Port Jervis, do you not? A. Well, from the records, I suppose.

Q. Well, when you say about three, you know it was within half an hour of that time, do you not? A. Well, it might have been three-thirty.

Q. Now, do I understand that you did not even see any milk cans on this platform? A. I did not.

Q. And you say you saw a lady, probably Mrs. Dickinson, sitting in a chair? A. I did.

Q. Was she unconscious? A. She didn't seem to be.

Q. Did she seem to be talking?

Mr. Parker: Is that relevant?

Mr. Gilson: Well, I want to test his recollection.

(Question read.)

A. I couldn't say as she was talking, but she seemed to be excited and nervous.

Q. Were her eyes open? A. Well, I didn't take any particular notice of her eyes.

Q. Did you personally pick up these trunks or other express matter? A. No, sir; I didn't personally, but I helped to, though.

Q. You helped to? A. Yes, sir.

Q. And you are sure that you took them off the truck? A. Yes, sir.

Q. Well, you often took them off that platform, did you not? A. No, sir; never load baggage from that platform. We come down there with a passenger train; our head car is always the baggage car, and it is always two or three car lengths east of this platform. We couldn't positively load passengers and baggage at the same time; it would be out of the question.

Q. But I understood you to say this train did not stop there? A. No, sir; it didn't.

Q. This was unusual for it to stop this day. Why did you stop there and pick up baggage this day? A. I had stopped there. The agent asked me if I would take this baggage. It was New York baggage, probably something left over. The agent asked me to take it, and I did.

Q. And that is customary with your train and other trains along there, to sometimes stop and pick up baggage and stuff along the line? A. Not if they are not scheduled to stop, they don't stop there.

Q. But under circumstances like this your train stops and other trains stop? A. Not unless they are flagged.

Q. But if they are flagged they do? A. When they are flagged they stop.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. Which way was your train going? A. East.

Q. To New York? A. To New York.

Q. When you arrived there with your train was there any other train there? A. Yes, sir; there was.

Q. What train? A. I think it was a section of train 3, or a section of one of our through trains; I couldn't say positively now.

Q. Which way were they going? A. They were going west.

Q. Where did your train stop with relation to that train? A. Stopped with the engine—that is, he stopped his engine just before he came to this other engine, about that point.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. And that was about 500 feet, did I understand, west of the crossing? A. Well, just about the length of their train. After they hit the automobile they ran about the length of their train. They had probably five or six cars; I don't know just how many they had; but we stopped before we blocked off their train; that is, they had run past the crossing, see, just about the length of their train, probably a little more maybe 10 feet more, and then we stopped at their engine.

Q. Do you not remember that that train went along further than that, and then backed up to the crossing? A. It didn't back an inch.

Q. It didn't back at all? A. It did not.

Q. What time does that No. 3, or whatever that train is, get to Howells, do you know? A. I do not.

Q. Did you not pass it every day? A. No, sir; didn't run every day.

Q. The regular; I don't mean that section? A.

Oh, the regular train? They left Middletown somewheres about 5:02, somewhere along there, but this was a second section of the train, and that was on account of the regular train not being able to accommodate the passengers, they put on an extra train every Saturday, and this train, of course, run in sections. I don't know; they had no regular time. After the first one went they run any time.

Q. The second section of that train ran after the main part of that train, did it not? A. Well, I don't know.

Q. They never send out a section before the regular train do they? A. The regular train always ran ahead of the section.

Q. What I want to know is this, Mr. McMahon: How is it that you left Port Jervis around 3 o'clock and this train left Middletown around 5 o'clock—how they both arrived at Howells at the same time? A. Well, there was no particular time for the train I was on, any more than I had to leave Middletown to carry a relief to No. 2, to help No. 2; that is as soon as they cared me to get there. I couldn't go to Middletown and hold the main track until No. 2 came along, or until the time for her. For that reason there was no hurry for me to get there. They simply started me to get out of Port Jervis, and I could wait on the way to wait until my time was up for the first section of train 2.

Q. Can you tell us the time that this accident happened? Can you tell us any nearer than half-past three or around five? A. Well, I haven't studied that part up, any more than I know I was there at the time of the accident. I knew at the time it was, but since then I haven't paid much attention to it.

Further DIRECT-EXAMINATION by Mr. Stickel:

Q. When were you due to leave Middletown, Mr. McMahon? A. Well, about five minutes ahead of train 2's time, whatever that was; I don't remember just what her time was then. We were supposed to leave there five minutes ahead of train 2, or ten minutes, something like that, whatever her time was there.

The testimony of Alfred H. Still given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

ALFRED H. STILL, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. Still, what is your business? A. Photographer.

Q. And where do you practice your business? A. In Middletown, New York.

Q. How long have you been there? A. I have been in my present place two years.

Q. That is, working in your profession? A. Oh, I have been working in my profession for seven or eight years.

Q. Did you take any views of the crossing at Howells, New York? A. I did.

Q. When was the first time you took views? A. I am not positive. I have the note on the back of the photographs. I think it was September 2d.

Q. I show you a photograph marked D-3 for identification (shown to witness). There is a memorandum on the back of it. Is that your memorandum? A. Yes, sir.

Photograph marked D-3 for identification.

Q. Refreshing your memory from that memorandum, can you tell us when you took those pictures? A. This was taken September 2, 1909.

Q. And what does it show? A. It shows a view of the tracks, the camera being placed 37 3/4 feet from the center of the west-bound track; the extent of the view up the track, 405 feet.

By Mr. Gilson: Q. Which way? A. East.

By Mr. Parker: Q. You were looking towards New York, or east? A. Yes.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-3.

Q. How long a view does that show of the west-bound track, for what distance? A. 405 feet; not a continuous view, but—

Q. What do you mean by "not a continuous view?" A. Continuous from the crossing. The furthest point east is 405 feet.

Q. But it shows the track at the furthest point, 405 feet? A. That is right.

Q. There is a little white mark at the end of the track. What is that? A. That is a man holding a piece of paper.

Another photograph produced by defendant's counsel is marked D-4 for identification.

Q. I show you another marked D-4 for identification (shown to witness). Where was that picture taken from and what does it show? A. That was taken from a point 41 feet 3 inches from the center of the west-bound track; the extent of the view, 345 feet. That is east.

By the Court: Q. Forty-one feet south, 345 feet? A. Forty-one feet and three inches.

Mr. Parker I offer that in evidence.

Marked Exhibit D-4.

Another photograph produced by defendant's counsel is marked D-5 for identification.

By Mr. Parker: Q. I show you a photograph marked D-5 for identification (shown to witness). Tell us what that shows? A. That shows a view, with the camera placed at 50 feet and 9 inches from the center of the west-bound track; the extent of the view, 278 feet. That is looking east also.

Marked Exhibit D-5.

Q. Now, coming back nearer to the track than any of the photographs you have shown, I show you another photograph, marked D-6 for identification (shown to witness). Will you tell us wner that photograph is taken from?

Marked D-6 for identification.

A. The camera was placed 32 3/4 feet from the center of the west-bound-track; the extent of view, 540 feet east.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-6.

Q. Now, these were all taken on September 2, 1909? A. I think these were all, so far.

Q. Your memorandum says so on the back. You put those memorandums on? A. Yes.

Q. I show you a picture which was heretofore marked "D-1 for identification, H. W. K.," which I have just scratched out by mistake, and is now marked in this case D-7 for identification, and ask you what that is?

Marked D-7 for identification.

A. This is a general view of the crossing from the depot platform, showing the hotel and roadway, the highway.

Q. That is looking from the depot platform south—A. About south.

Q.—southerly along the highway? A. Yes, sir.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-7.

Q. Now, how high was your lens from the ground when you had those pictures taken? A. Why, I have it marked on the back of the photograph. I think it was 5 feet and 2 inches, something like that.

Q. Was your tripod, or whatever it was, put on the ground? A. I couldn't say until I saw my notes, because I have taken so many pictures that I can't remember that particular time. (Photographs shown to witness.) The height of the lens from the automobile seat, 30 inches. That was taken from the automobile.

Q. Which one was that? (No response.)

Q. Look and see if any others were not taken from the automobile? A. All of these were taken from the automobile (indicating).

Q. All the photographs that have been testified to by you were taken from the automobile seat? A. No, all of those (indicating). I don't know about this one. That was the one that was taken from the depot platform (indicating).

Q. Then the one showing the road, and marked Exhibit D-7, was taken from the depot platform? A. Yes, sir.

Q. You say the camera was put on the auto-seat? A. No, the tripod was placed on the floor of the car, but I measured the distance from the automobile seat to the lens, 30 inches.

Q. And what kind of an automobile was it? A. A Maxwell.

Q. And how high was the seat above the ground? A. That I couldn't say.

By the Court: Q. This was a Maxwell auto? A. Yes, sir.

Q. Do you know anything about the model of the auto used by Mr. Dickinson? A. No, sir; I do not.

Q. You can not say whether it was the same as yours? A. Well, I know it wasn't the same model; it was a two-seated car.

By Mr. Parker: Q. Now, did you go there at any other time? A. Yes, sir.

Q. To take photographs? A. Yes, sir.

Q. Now, I show you some othere photographs, marked D-8 to D-14 for identification, also one marked D-1 for identification (shown to witness). Look at those and tell us when you took those.

Photographs marked respectively D-8 to D-14 for identification.

A. This one view was taken April 27, 1910 (indicating).

Q. What is that? A. April 27, 1910.

The Court: D-8.

Witness: This is December 9, 1909 (indicating).

Mr. Parker: D-9, December 9th.

Witness: This is also December 9th.

Mr. Parker: D-10.

Witness: This is December 9th (indicating).

Mr. Parker: D-11.

Witness: December 9th (indicating).

Mr. Parker: D-1.

Witness: December 9, 1909.

Mr. Parker: D-12.

Witness: December 9, 1909 (indicating).

Mr. Parker: D-13 and D-14.

Witness: December 9, 1909 (indicating).

Q. They are all December 9, 1909, except D-8: is that right? A. Yes, sir.

Q. Now just tell us what these photographs show. Take first D-9 for identification? A. The

camera was placed 25 feet from the near rail of the west-bound track; the extent of view, 1,957 feet; height of the lens from the ground 5 feet.

By the Court: Q. Is that an uninterrupted view? A. No, it isn't.

Q. What interrupted it? A. That is the furthest point of view.

Q. What interrupts it? A. Why, the upright beams of the platform, the shed.

Q. On the north side of the milk shed? A. Yes, sir.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-9.

By Mr. Parker: Q. I show you Exhibit D-10 (shown to witness). What does that show? A. It shows a view with the camera placed 30 feet from the near rail of the west-bound track; the extent of view, 1,057 feet east; the height of the lens is also 5 feet from the ground.

By the Court: Q. Is that a continuous view? A. No.

Q. That also is not a continuous view? A. No.

Mr. Gilson: I do not know whether this witness testified that he made these measurements himself, if the Court please.

By Mr. Gilson: Q. Did you do that yourself—did you make the measurements? A. No, sir.

By the Court: Q. What is that? A. I didn't make the measurements, not myself; with help I made them.

By Mr. Parker: Q. You sent a man down the track? A. Yes, sir.

Q. And he measured? A. He and I together measured; I held one end of the tape and he the other.

Mr. Parker: I offer D-10 in evidence.

Marked Exhibit D-10.

Q. I show you D-11 (shown to witness). What view does that show? A. With the camera placed 35 feet from the near rail of the west-bound track, the extent of view 557 feet; the height of the lens, 5 feet.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-11.

Q. I show you another, marked D-1 for identification (shown to witness). A. The camera is placed 40 feet from the near rail of the west-bound track, showing the extent of view, 447 feet, and the height of the lens, 5 feet.

Mr. Parker: I offer D-1 for identification in evidence.

Marked Exhibit D-1.

Q. Take Exhibit D-12 (shown to witness). What does that show? A. The camera was placed 45 feet from the near rail of the west-bound track; the extent of view, 307 feet; the height of the lens, 5 feet from the ground.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-12.

Q. I show you one marked D-13 (shown to witness). What does that show? A. The camera was placed 50 feet from the near rail of the west-bound track; the extent of the view is 277 feet, and the height of the lens from the ground, 5 feet.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-13.

Q. I show you another, D-14 (shown to witness). What does that show? A. The camera is placed 60 feet from the near rail of the west-bound track; the extent of the view, 247 feet; the height of the lens from the ground, 5 feet.

Marked Exhibit D-14.

Q. Did you go there a third time? A. Yes, sir.

Q. When did you go there again? A. April 27th.

Q. I show you an exhibit marked D-8 for identification (shown to witness). Where is that taken from? A. That is taken—the camera was placed 23 feet from the near rail of the west-bound track. The view looking east is not marked on this photograph.

By the Court: Q. The distance? A. The distance looking east is not marked here, but the distance is more that 2,000 feet.

Mr. Parker: I offer that in evidence.

Marked Exhibit D-8.

By Mr. Parker: Q. Now, Mr. Still, was there any change in the situation there at Howells as respects the matters shown in your photographs between when you first went there, September 2, 1909, and your last photograph, of April 27, 1910? A. Not that I know of.

Q. Did you observe any difference A. No, sir.

Q. When you went there in September, 1909, was the foliage out on the trees? A. Yes, sir.

Q. And the grass and shrubbery? A. Yes, sir.

Q. Do you know of any change in the situation there between when you first took those photographs—between July 31st and the day when you took these photographs? A. No, sir.

Q. Where do you live, in respect to that crossing? A. I live at Middletown; that is about four miles.

Q. And how often do you go to this crossing? A. Oh, I have been there dozens of times, perhaps more.

Q. Since July 31, 1909? A. Yes, sir.

CROSS-EXAMINATION by Mr. Gilson:

Q. Well, of course, you do not know whether that shrubbery had been cut between July 31, 1909, and September 2d? A. No, sir.

Q. Now, as I understand you, this camera when you took the pictures of September 2d was standing on a tripod and the tripod was in the automobile? A. Yes, sir.

Q. On the floor of the automobile? A. Yes, sir.

Q. And how high was that floor of the automobile from the ground? A. I didn't measure it.

Q. Well, it was a touring car, was it? A. Yes, sir.

Q. Did you compare any of these figures with Mr. Robinson? A. No, sir.

Q. Did you talk with Mr. Robinson about it? A. I didn't compare any figures with him.

Q. How do you account for the fact that your figures usually correspond to the foot with his figures? A. I couldn't say as to that.

Q. Where did you measure from? A. Measured from the center of the road.

Q. The center of the highway? A. Yes.

Q. In the middle of the tracks? A. Yes, sir.

Q. And what kind of a tape measure did you have, a steel tape measure? A. No, a cloth tape measure.

Q. Is this the tape measure shown in D-10, lying on the ground (indicating)? A. Yes, sir; that is one of them.

Q. That is steel, is it not? A. That is steel.

Q. Did you use that? A. I didn't use it; that was used by Mr. Lockborough, an engineer. This was taken at a time when he was with me, and the other was the time that the automobile was there. This was taken from the ground. The ones taken from the automobile were the ones that we

used, and that that measure, the cloth measure, was used at the time we measured from the automobile seat.

Q. And that was on September 2d? A. Well, I can't say now; I would have to refer to the notes on the back.

Q. That was the first time you were there? A. Yes, I believe it was.

Q. Referring to Exhibit D-4. That shows it was taken September 2d? A. From the auto seat.

Q. From the auto seat, which was 30 inches? A. Thirty inches.

Q. Well, you did not take any picture from the auto seat, did you? A. Well, I don't mean from the auto seat; I mean a distance of 30 inches above the auto seat.

Q. This says, "Height of lens from auto seat 30 inches." And at that time you used the cloth tape? A. Yes, sir.

Q. And the other time, the next time, in December, you used the steel tape? A. That was Mr. Lockborough's tape.

Q. At that time did you take the measurements yourself, or did this Mr. Lockborough? A. Well, I helped him that time; the other fellow helped me before, and I helped him that time.

Q. Did the other fellow or did you put the figures down the first time? A. I put them down.

Q. Now, all these photographs and measurements that you have given are views either through the freight shed or clear of the freight shed, are they not? A. No, not all of them.

Q. Did you not place your camera in such a position so that it would get a clear view through the platform or right along the edge of the platform? A. Yes, sir. The reason I made that answer was on account of taking one from the depot platform, showing the roadway.

Q. Well, I mean with the exception of that one. A. Yes, it was.

Q. Who told you just where to stand with your camera, anybody? A. Well, no, I don't think that anybody directed me on any particular point.

Q. Did you use your own judgment as to where you would take those photographs? A. Well, not entirely, no.

Q. Well, who made any suggestion to you? A. Well, now, I don't know as I could say whether—what the name of the person was; I don't believe I can.

Q. Somebody from the railroad company? A. I don't know that. He came from Port Jervis with the automobile.

Q. The man who engaged you to take the photographs? A. No, Mr. Early was the man that engaged me.

Q. Then he would suggest these different places to take the photographs from? A. Not entirely, no.

Q. Well, partly? A. Partly, yes.

Q. Now, referring to Exhibit D-9, which you said was taken at a point 25 feet south from the near rail of the west-bound track when you could get a view of 1,957 feet, is that looking along the edge of the platform? A. No, sir.

Q. Where is it? A. It must be looking through here (indicating).

Q. Pointing to a spot between the posts of the shed and the telegraph poles at the westerly end.

The Court: There was one on one side of the shed and one through it, the extreme point being seen through it.

Q. What is the other distance without looking through the shed that you could see the racks? A. I don't know as I could say that.

Q. Can you give us any idea?

The Court: It is mere guess work.

(Question withdrawn.)

A. It would have to be guess work.

Q. Now, that is true of all the photographs and the distances that you took on September 2d and December 9th, is it not? A. Yes.

Q. The distances given by you are the greatest distances looking through the shed? A. I think not; I think there is one that is a clear view.

Q. Oh, yes, there is one. A. I am not positive.

Q. Yes, there is one, the one you said that you could see 2,000 feet.

The Court: That is taken on the east-bound track.

Mr. Gilson: That is D-8.

Q. That is the one (shown to witness)? A. That is the one.

The Court: They speak for themselves pretty well.

Q. Well, how is it, Mr. Still, that you took some of these photographs from a distance from the center of the west-bound track and others from the south rail of the west-bound track? Didn't I understand the first distances that you gave, on Exhibits D-3, 4, 5 and 6, were taken from the center of the west-bound tracks—those distances? A. I think the only ones that I have marked from the center are when I didn't have these slips, these slips printed wtih the regular form on, and I think that perhaps the other ones I used from the center of the—

By the Court: Q. The other ones were from the south rail? A. Yes, sir.

Q. A measurement from the south rail? A. Yes, sir.

Mr. Parker: The ones of September 2d were from the center of the track and the others are from the south rail.

By Mr. Gilson: Q. How wide are those rails there, do you know? A. I do not.

Q. Do you know the gauges of that railroad, the Erie Railroad? That is the standard gauge, is it not? A. Yes.

Q. Do you know what that is? A. I do not.

The Court: It is in evidence.

Q. Now referring to Exhibit D-9, can you tell me what the distance is from the posts of this shed to this telegraph pole, the line of the embankment, through which you said you could see that 1,957 feet (shown to witness)? A. No, sir.

Q. Well, it is about the distance of two boards there on the platform, is it not? A. It is at the end of the shed.

Q. Well, that is what I mean. A. Of course, beyond that it would increase.

Q. I mean the view you could get? A. That would be a very hard matter to get, I think.

Q. You can not tell? A. I don't believe you could tell without measuring it.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. Were any direction given you as to from what points you should measure when you first went up there, in September? A. No, sir.

Q. And you measured from the middle of the track? A. I think on the first time I did measure from the middle of the track.

Q. And afterward, when you went up there again, on December 9th, were there any directions given you? A. Not on all of them. I placed my camera in a position that I thought was a good position, and sometimes—

Q. I am not going to that point; I want to know why you changed from taking your measurements from the center of the track to taking them from

the south rail? A. Simply because I had the printed form furnished me on the second time, and it says that the camera is placed so many feet from—well, the first one was from the center.

Q. The printed form was from the center? A. Yes.

Q. And on these other photographs of December 9th that seems to be altered? A. It is.

Q. How did you come to alter it? A. I don't remember; it must have been from instructions, though, from the parties that were there with me.

Q. From instructions? A. Yes, sir.

The testimony of John H. Helt given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

JOHN H. HELT, sworn in behalf of defendant:

Direct-examination by Mr. Stickels:

Q. Mr. Helt, where do you live? A. Howells.

Q. Where did you live on July 31, 1909? A. Howells.

Q. Where with respect to the crossing west of the station at Howells is your home? A. At that time I was on the south side about 500 feet.

Q. On the south side about 500 feet below, or east, of this crossing? A. Yes, sir.

By Mr. Parker: Q. The south side of the railroad? A. The south side of the railroad.

By Mr. Stickel: Q. Do you recall the accident that occurred at the crossing west of the station at Howells? A. The accident; yes, sir.

By the Court: Q. Do you remember it? A. Yes, sir.

By Mr. Stickel: Q. Where were you when you first heard of the accident? A. I was standing in the door of the house, just after washing for supper.

Q. Just tell us how you came to hear of the accident? A. Why, after going to the house—I was section foreman there—after going to the house —we quit 5 o'clock; I went over to the house to get ready for supper; I just washed and had the towel drying my face and stood in the door when this train went by.

By the Court: Q. You were standing in the door? A. Yes, sir.

Q. Go on. A. And when the train went by, one of the Italians that was working for me, he started to run up the railroad, and hollered to me at the same time that there was an automobile struck, and I went right over there to the accident right away; I was there within possibly three minutes after the accident happened.

By Mr. Stickel: Q. Did you know prior to Italian calling to you that this train was coming?

Objected to as leading.

A. I knew this train was coming—

Q. Why? A. —before the Italian hollered, because I heard it whistle below there at the curve, for the lower crossing.

Q. What sort of a whistle was it? A. Two long and two short.

Q. When you went up to the crossing what did you find? A. Why, the automobile was laying right at the east-bound rail, on the inside rail of the east-bound track.

Q. How far above the crossing? A. Why, about 90 feet, I should say, betweeen that and 95.

Q. Did you do anything further at this point? A. Nothing any more than to take the automobile off the track.

Q. Did you help to take it off the track? A. No; I was there and instructed the men what to do.

Q. Did you take a picture of the scene of the accident? A. Yes, sir.

Q. How soon after the accident did you take that picture? A. Probably twenty or twenty-five minutes.

Q. Do you know what time of day it was that you took the picture what hour? A. Possibly between twenty and fifteen minutes of six.

Q. Where did you stand when you took the picture? A. I stood between the east and westbound track, west of where the automobile lay.

Q. West of the crossing? A. Yes, sir.

Q. Which way was the camera focused? A. East, or southeast.

The Court: Which picture is that?

Mr. Gilson: That is P-1, I suppose.

Mr. Parker: Yes, Plaintiff's P-1.

Q. Is this a print of the plate that you took at that time (shown to witness)? A. Yes, sir.

The Court: That is the one that shows the little cross in the road over a man's head.

Mr. Parker: One of the witnesses said in the deposition that that was where the automobile was when the parties jumped.

The Court: I was looking at the view of the situation. I could not make that out clearly. There is some object there that I can not myself clearly see.

Q. Why did you take that picture, Mr. Helt? A. Why merely for my own benefit. It was a rare accident, that probably wouldn't occur again,

and I often take views that I like to have for my own self, and make postcards of them, and when I saw this accident, I took the camera out there and took a view of it, merely to get a picture of the machine that was smashed.

Q. Did you have your camera with you when you first came to the crossing? A. No, sir.

Q. Where was it? A. At the house.

Q. And you went back and obtained it? A. Yes, sir.

Q. How far below the crossing west of the station at Howells is the crossing at the curve about which you have spoken a few moments ago? A. Well, I should judge it is about 1,200 feet, about 1,200 feet, one crossing from the other.

Q. Do you know the speed of the train as it passed your house? A. Not exactly, no, but it wasn't going at full speed, I don't think.

Q. Have you any idea how many miles an hour? A. Why, I should judge it was going probably twenty or twenty-five miles an hour; not more than that, I don't think.

Q. Was it making any noises? A. Oh, yes, yes, it was making a noise.

Q. What noises? A. It was pulling heavy; the exhaust was quite heavy coming up the grade there.

Q. What do you mean by pulling heavy, the exhaust? A. Well, the puffing of the engine.

Q. Issuing steam? A. Yes, sir.

Q. Do you know whether there was anything on the freight platform at that time? A. Nothing that I recollect. I didn't take any notice of that.

CROSS-EXAMINATION by Mr. Gilson:

Q. I thought you said that you were washing your hands and did not see this train until the

Italian yelled? A. I stood in the door of the house, and the railroad passes right in front of the house, when the train went by.

Q. But you were not watching that train were you? A. Looking right out at the railroad.

Q. And you did not see this accident? A. No, because there is an embankment in there between that and the house.

Q. There is a bank between your house and this crossing? A. Yes, sir.

Q. Then where did you see the train going twenty-five or thirty miles an hour? A. When it went by the house, the front of the house.

Q. Then it was after it had gone over the crossing? A. No, sir.

Q. The brakes had been applied then? A. No, sir.

Q. Well, your home is east of the crossing? A. Yes, sir.

Q. Oh, yes, 500 feet east of the crossing? A. Yes, sir.

Q. And then this lower crossing that you speak of is 1,200 feet below your house? A. No, sir.

Q. 1,200 feet from Howells crossing? A. One crossing to the other.

Q. I thought you started to say it was 2,000? A. Well, I was thinking where the train whistled.

Q. You think that was about 2,000 feet below Howells crossing? A. Yes, or more than that; it may be probably more where they whistle.

Q. Where they whistle? A. Yes, sir.

Q. It may be 2,500 feet? A. It may be that. The whistle board is—

Q. One moment.

Mr. Parker: He is answering your question.

Q. I did not ask you where the whistling board

was, but where the train whistled? A. Well, about that distance, I should judge. Of course, I was not down there to see it.

Q. Where they usually whistle? A. Yes, sir.

Q. Well, I am not talking about that; I am talking about where this train whistled? A. That is where this train whistled; that is as near as I could tell by the sound of the whistle.

Q. Why was that called to your attention, that that train whistled? A. Well, because No. 3 went up just ahead of it, a little while ago, just as I came in from the railroad, about fifteen minutes, and I stood in the door, and this was a special; that is the reason I knew the whistle. When it whistled I looked back, because I didn't expect another train before 29 came up.

Q. But that special runs every Saturday afternoon during the summer, does it not? A. Well, probably it does.

Q. It was another section of a regular train, was it not? A. Not regularly.

Q. There was not anything to call to your mind this particular train until after this accident happened, was there? A. Nothing until I heard the train whistle when it came up there, because it was so close behind the other one.

Q. Did that train whistle the Saturday before? A. Well, I wouldn't say; no doubt that it did.

Q. You were around there every Saturday about that time? A. Yes, sir.

Q. And quit about that time? A. Yes, sir.

Q. Well, can you tell us whether that train, or that section of the train, whistled every Saturday during the summer at that particular point? A. Well, not exactly. Most every train that comes up there does whistle.

Q. Almost always, but sometimes they do with-

out whistling, do they not? A. It is a point to whistle there.

Q. And that is the reason you say you heard this train whistle? A. No, I heard that train whistle.

Q. But you have known trains to come up there without whistling, have you not? A. Yes, sir.

Q. And the reason you thought this train whistled was because it is usual for trains to whistle at that whistling board? A. No, sir.

Q. Well, what I want to know is what impresses it upon your mind that this train whistled now, anything particular? A. Nothing particular only the accident happened and I was out there and I recalled it right away, don't you see?

Q. You did not hear that train whistle for the crossing, did you? A. Yes, sir.

Q. Why didn't you say so then? A. Which crossing.

Q. The Howells crossing. A. The lower crossing?

Q. This crossing. A. No, sir. It is very seldom the trains whistle for that crossing.

Q. What? A. For this crossing.

Q. At the station? A. At the station.

Q. It is very seldom they whistle? A. It isn't customary to whistle; they ring the bell for that.

Q. That is an extraordinary dangerous crossing, is it not, Mr. Helt? A. Yes, sir.

Q. It is the most—

Objected to as a matter of opinion.

The Court: Objection sustained. Strike it out.

Q. Now, this other crossing that they whistle for is not travelled as much as this crossing, is it? A. About the same.

Q. There is no station there? A. No, sir.

Q. And there is no hill coming down to it, is there? A. No, sir.

Q. And there is no bank or other obstruction? A. Yes there—is no bank, but there is a house and trees, and so forth.

Mr. Parker: I object to this as immaterial and irrelevant, what the situation is at another crossing.

The Court: I think it is irrelevant.

Mr. Gilson: Well, I will not press that.

Q. But you say that you did not hear it whistle for the crossing at the station where you say this accident took place? A. No, it whistled down below there.

Q. Now, you took this photograph after this train coming from Port Jervis had passed, did you not? A. Yes, sir.

Q. How long after that train had passed did you take the photograph? A. Well, I couldn't say just exactly; it might have been five or ten minutes.

Q. You are a section foreman? A. Yes, sir.

Q. Of the Erie Railroad? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. You are in the employ of the Erie Railroad. Mr. Helt? A. At present?

Q. Yes. A. No, sir.

Q. Will you tell us what whistle you heard of this train, given by this train?

Objected to as not re-direct-examination.

Q. Did you hear the station whistle given by the train? A. The whistle for the crossing, four blasts, two long and two short.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. That is quite a grade there coming from Middletown coming toward Port Jervis, is it not? A. Yes, sir.

Q. About how much of a grade, would you say? A. Well, I couldn't say, because it is different; there isn't a grade to the mile there at the same grade.

Q. Well, how much is it along from that lower crossing up to Howells station about? A. Why, I should say that is about 6 or 10 feet to the mile.

Q. And it is necessary for a train to get pretty good momentum and, as a matter of fact, they go pretty fast up that grade, do they not? A. Well, they don't go pretty fast, but they have to use steam going up there. It is quite a heavy grade.

Q. And they go at a pretty good clip, do they not? A. Not as fast as they do other places.

Q. Well, not as fast as they do downhill, perhaps, but they go pretty fast, do they not? A. Usually.

The testimony of John N. Brola given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross examination.

JOHN N. BROLA, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Brola, where do you live? A. I live between Howells and Winterton, in the Town of Wallkill, Orange County, New York.

Q. Where did you live on July 31, 1909? A.

In the Town of Wallkill, between Howells and Winterton.

Q. What is your business? A. Farmer.

Q. On July 31, 1909, on the day of this accident, just before the accident occurred where were you? A. Well, I came to Howells that day with a load of furniture and it was a hot day; we unloaded the furniture; and the young gentleman that I was moving he said—well, he says, "Let us have a"—

The Court: Never mind that.

Q. Where did you go? A. We went to the Mountain House.

Q. Where was the Mountain House with respect to the crossing at which the accident happened? A. Well, just a little on the south side of the crossing.

Q. About how far from the crossing? A. Oh, I should judge about 75 or 100 feet; I don't know; I didn't measure it.

Q. And where were you in the Mountain House? A. I was on the west corner, on the further corner of the building, in the barroom.

Q. What side of the house the side nearest the railroad track or the other side? A. Near the railroad track.

Q. Was the door open? A. Part ways.

Q. Where were your horses? A. My horses were outside of the door, facing towards the station, at the corner of the shed.

Q. Where is the shed with respect to the Mountain House? A. Why, it is just on the west corner of the Mountain House.

Q. Did you hear this train coming that caused the accident? A. Yes, sir; I heard it whistle.

Q. Just tell us about that. A. Well, I came in the Mountain House, and I bought a pair of

horses, and the gentleman I bought them off of—one of the horses was afraid of steam cars, and he told me to be careful of it, because he had him in trouble and—

The Court: Never mind that.

Witness: For that reason, I heard the train whistle and I went out to watch my horses; and in the meantime I was standing beside my horses and I was looking—

Q. When you were standing beside your horses did you see the train? A. Yes, sir.

Q. Where was it? A. It was just coming up over the lower crossing.

Q. Just coming over the lower crossing? A. Yes, sir.

Q. At that time did you see the automobile? A. No.

Q. Of Mr. Dickinson's? A. No.

Q. Where did you first see the automobile of Mr. Dickinson? A. Why, in just a moment later I turned around and I seen Mr. Dickinson coming downhill, and before he got to the track he slackened the speed a little but I don't think he stopped; at least I didn't notice it.

Q. How far away from the track was the automobile when you first saw it? A. The automobile was from the south rail of the east-bound track about—oh, anywheres from about 5 to 10 feet.

Q. When you first saw it? A. Just about 15 or 20 feet when I saw him slack the speed.

Q. When you first saw it it was about 15 or 20 feet from the south rail of the east-bound track? A. Yes, sir.

Q. At that time where was the train? A. The train was just coming over—just passed that coal shed that—I don't know who runs it; anyway, on this side of the lower crossing.

Q. How far from the crossing on which the accident happened was this coal shed that you speak of? A. Oh, I should judge—I never measured, but about 600 or 700 feet or more. I am not a carpenter; I never measured it.

Q. Was the train making any noise? A. Oh, yes, a lot of noise.

Q. What kind of noise? A. Why, puffing and steaming.

Q. Did you see the people in the automobile? A. Yes.

Q. What were they doing? A. Why just simply going on, I guess.

Q. Were they looking down the track? A. I didn't notice that.

Q. Then what happened?

The Court: What did you see happen?

A. I seen happen, as I seen them proceed to the track, and later I heard a scream. I looked over there. There was Mrs. Gardner, I think it was—I didn't know the lady before—what they said was Mrs. Gardner jumped on one side and Mr. Dickinson jumped on the other and took his wife out, turned the car off the track and jumped out, and they was just about going over the south—the first rail of the east-bound track when the train struck the automobile.

Q. Of the east-bound track? A. Yes, sir.

Q. Which is that, the first of the middle track? A. That was the first track, going to New York.

Q. On which track was the train coming that struck the automobile? A. Why, on the west-bound track, the second track from the side I was on.

Q. Where did Mr. Dickinson turn the car off the track? A. Just as he went over on the east-bound track.

By the Court: Q. That is the track the train was on? A. No, sir.

Q. How could the train hit him if he was not on the track the train was on? A. He turned the automobile on the other—the automobile was going that way and the train was coming up from the other way, and as he turned it this way the train it—just hit him right on this wheel as he turned it up the track (indicating).

By Mr. Stickel: Q. Did the automobile keep moving after they jumped out? A. It seemed to be moving, but very slow. I didn't take particular notice, but it must have been running. If it wasn't, it would—

The Court: No, just what you saw. What was your own observation.

Q. Did you call out to the people in the automobile? A. No, sir.

Q. Where was the automobile when they jumped out? A. Why, I think it was on the eastbound track.

Q. What did you do after the accident occurred? A. I stood just where I was. When the locomotive struck the automobile it made such a smoke and noise. I looked what became of the car, and the car was in front of it.

Q. Did you see the people after the accident? A. Yes, sir; I went over and I helped to hold Mrs. Dickinson.

Q. Where was she? A. She was in the highway, from the crossing.

Q. What highway, the one going north and south over the crossing, or the one— A. Going south in the road going to Middletown.

Q. Did you see Mr. Dickinson? A. Yes, sir.

Q. Where was he? A. Why, he was right there.

Q. Right where? A. Well, trying to hold his wife.

CROSS-EXAMINATION by Mr. Gilson:

Q. I show you Exhibit D-8, and ask you if that coal shed that you speak of is on that photograph (shown to witness)? Do you see it there? A. Yes, sir.

Q. Which one is it? A. Right down here (indicating).

Q. That building away down below that car (indicating)? A. Yes, sir.

Q. Standing on the track down there? A. Yes, right here (indicating).

Q. Is that a car? There seems to be a car standing on the track. A. Well, there is cars standing down there on the crossing.

Q. Of this photograph? A. On the crossing.

Q. And that coal shed, you say, is down below that car? A. No, sir; that is on this side, next to the station, between the station and the car. (Witness examines photograph through a magnifying glass.) The car is on the other side, between the coal shed and the station.

Q. That building with the slanting roof? A. Yes, sir.

The Court: Is there any objection to writing the words "coal shed" over this building?

Mr. Parker: I have no objection.

By the Court: Q. Which is it, that building (indicating on photograph)? A. Yes, sir.

(The Court writes the word "Coal shed" on photograph.)

By Mr. Gilson: Q. And you say when the train was about there, about where was the automobile? A. The automobile was about 5 or 10 feet, almost going on the first rail on the east-bound track.

Q. And that train was going pretty fast then,

was it not? A. Well, I don't know. It was going pretty fast, but I have seen them go faster.

Q. You did not hear this train whistle for the Howells crossing, did you? A. No, sir.

Q. It did not whistle, did it? A. Not that I know of, not for the upper crossing; it did whistle for the lower crossing.

Q. But not for this upper crossing, where this accident happened, it did not whistle, did it? A. Well, I didn't hear it.

Q. And did you hear any other signal of any kind given? A. Well, not particularly, I didn't hear it, but when the train stopped the bell was ringing; I could hear it then.

Q. But I mean before it came to the crossing you did not hear it? A. I didn't hear it.

Q. Was there not any electric bell at that crossing, was there? A. No, sir.

Q. At that time? A. No, sir.

DIRECT-EXAMINATION by Mr. Stickel:

Q. Mr. Brola, do I understand you to say that when the train that caused this accident stopped the bell on it was ringing? A. When the train stopped the bell was ringing; I heard it all right.

Q. How long did it continue ringing? A. It rang all the while it stood there, until after it started.

The testimony of Edward J. Sallee given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

EDWARD J. SALLEE, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Sallee, where do you live? A. Jersey City, 503 Grove Street.

Q. What is your business? A. Engineer on the Erie Railroad.

Q. What was your business on July 31, 1909? A. Engineer.

Q. What was your run? A. We was relief train to train 29.

Q. From where to where? A. Jersey City to Port Jervis.

Q. Did you on July 31, 1909, have an accident at the crossing west of Howells? A. I did.

Q. Just tell us about it. A. Well, going into Howells I whistled for the lower crossing, a crossing whistle, two long and two short. When I got to this crossing I whistled one long whistle for a station whistle.

Q. To what crossing? A. When I got to this crossing that I whistled below—

Q. The lower crossing? A. Yes, sir—I whistled a station whistle, one long blast of a whistle; and the bell was ringing from the time I left Middletown. I stopped at Middletown, and, of course, when I started from there I started the bell ringing, and it was ringing after I came to this crossing where I hit the automobile.

Q. When did you first get sight of the automobile? A. Between 5 and 10 feet from the crossing.

Q. What condition was it in at that time? Was there anybody in it? A. Well, I couldn't see. I could see the front wheels of the car going up the track.

Q. What track? A. On the left side, the westbound track, that I was on.

Q. Was it moving? A. Yes, sir.

Q. How far did your train go after striking it? A. About the length of the train, eight cars.

Q. How are the tracks east of this crossing, are they straight or curved? A. Well, it is straight for a distance.

Q. How far? A. I couldn't tell exactly.

Q. About how far? A. I should judge very near half a mile.

Q. What kind of a day was it? A. Clear.

Q. Warm? A. Yes.

Q. Any wind? A. I couldn't tell you that.

Q. How fast was your train going? A. Between 30 and 35 miles an hour.

Q. Were you scheduled to stop at Howells station? A. No.

Q. What kind of a bell is that that you have on your train A. Automatic.

Q. Was there anything on the freight platform at Howells that day? A. I don't know.

Q. Just tell us what an automatic bell is and how it works? A. Worked by air.

Q. How did you start it? A. By a little wheel; you start the wheel, and, of course, the air goes to this piston, like, that is on the bell, and, of course, that starts the bell going.

Q. When does it stop? A. When you shut it off.

Q. Not until then? A. Not until then.

Q. Did you go back to the place where the automobile was struck? A. No, I started to go back, and the conductor told me everything was all right, to go on.

Q. Did you see any of the people after the accident? A. No.

Q. How long did you stay there? A. Oh, between five or ten minutes, I guess.

Q. Was anybody in the automobile when you first saw it? A. Well, I didn't see the automobile at all, only part of it, you know, going on the left side. Of course, if the fireman was there he could have seen it, but I only saw it on the outside rail.

By the Court: Q. Were you on the right-hand side of the engine? A. Yes, sir.

Q. What fireman do you speak of? A. The fireman of the engine.

By Mr. Stickel: Q. Where is your position in the cab, on what side? A. On the right side.

Q. Looking ahead? A. Well, looking ahead or—

Q. And where is the fireman stationed? A. Well, he was firing the engine then.

Q. What side of the cab? A. Down at the firebox.

Q. The right or left side? A. Well, between.

Q. What did you do when you first saw the automobile? A. Throwed the brake handle in emergency to stop.

Q. Stopped the train? A. Yes.

CROSS-EXAMINATION by Mr. Gilson:

Q. This fireman could not see, of course, from his position, firing the engine? A. No.

Q. Are you sure you whistled for that second crossing? A. Yes, sir.

Q. And that was when you were right on the lower crossing? A. Yes, sir.

Q. And that was how many feet from Howells station? A. I couldn't say.

Q. Well, approximately. A. Well, it must be about 800 or 900 feet.

Q. Is it not 2,000 feet? A. Not as far as that.

Q. Well, you are not positive about that? A. No, but it isn't as far as that, though.

Q. Well, it is more than 1,200, is it not? A. I shouldn't think so.

Q. Can you see it on this Exhibit D-8, which shows a view of over 2,000 feet (shown to witness)?

The Court: The lower crossing?

Mr. Gilson: The lower crossing.

A. Yes, there it is (indicating).

Q. Away below that car that is shown on that photograph, is it not? A. Yes—Well, it isn't way by it; it is just about the end of it.

Q. It is just about as far as you can see on that photograph, is it not? A. Yes, sir.

Q. The extreme point of that view? A. Yes.

By the Court: Q. That is where you blew the one blast for the station whistle? A. Yes, sir.

By Mr. Gilson: Q. Now, you did not blow any whistle after that point, did you? A. No.

Q. And you had made this run lots of times before, had you not? A. Yes.

Q. And you say the bell was ringing constantly from the time you left Middletown? A. Yes.

Q. Isn't that unusual? A. Well, our through line trains that way, they don't make any station stops, they usually leave the bell ringing.

Q. Well, it is usual for your trains, is it not? A. Yes.

Q. And you stopped at Middletown? A. Yes, sir.

Q. Your train was just a section of a regular train, was it not? A. Yes.

Q. And it was because you did sometimes ring the bell continuously that you think the bell was ringing on this day? A. Yes.

Q. You do not remember this day, of course, in particular before the accident, do you? You do not remember everything you did or what

was being done before the accident, did you? A. No.

Q. Now, you say the first time you saw this automobile it was 5 or 10 feet from the crossing, or you were 5 or 10 feet from the crossing? A. I was 5 or 10 feet from the crossing.

Q. Then how did you see it from your position on the right-hand side of the engine? A. Well, I could see the front wheel going up the left side of the—

Q. On the track in front of you? A. On the same track I was on, but on the left rail, going up the track ahead of me.

Q. And you think you were going about thirty or thirty-five miles an hour? A. Yes, sir.

Q. Now it is a very steep grade from Howells to Port Jervis, is it not? A. Well, some places it isn't.

Q. Well, from Howells station, from that crossing on, it is quite a steep grade, is it not? A. Yes.

Q. And from Middletown to Howells you have got to get a pretty good start to take that grade, have you not? A. You can't get the start.

Q. Four miles? A. No. It is upgrade from Middletown until you get to a place they call the hogback; there is a little bit of a sag there, but it doesn't amount to much.

Q. Well, you try to get a start, do you not? A. Well, you try, but you couldn't.

Q. Well, you put on all the power you have to make the grade? A. Yes, sir.

Q. And you did this day? A. Yes.

Q. And the fastest you could go was thirty or thirty-five miles an hour? A. That is all.

Q. Did you have your lever out all the way? A. Yes.

Q. What of an engine was this? A. A small type of an engine.

Q. Well, what is the type, do you know? A. They call it a class G type there on the Erie.

Q. That is one of the best engines, is it not? A. Well, for a certain train to pull. Of course, this day we had a heavy train.

Q. But there is not a faster train between Port Jervis and Jersey City than your train, is there? A. Why, certainly.

Q. I mean the stops that you make—that you made that day? A. Certainly.

Q. Isn't that one of the star trains of the Erie Railroad? A. This train that I was on?

Q. Yes. A. No.

Q. I thought that was one of the commuting trains for the summer. A. It only runs every Saturday.

Q. And it only makes how many stops between Jersey City and Port Jervis? A. Well, it makes the stops of train 29.

Q. What is that? A. Paterson, Monroe, Graycourt, Goshen, Middletown, and then Port Jervis is next.

Q. That is how many stops, four or five stops? A. Yes.

Q. And what is the distance from Jersey City to Port Jervis? A. Eighty-eight miles.

Q. And yet you say that is not one of the best trains on the Erie Railroad between Jersey City and Port Jervis? A. It is a good train, but it is not the best train.

Q. I did not ask you that. It is one of the best engines, too, is it not? A. No.

Q. One of the fastest engines? A. No.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. What is the running time of this train from Jersey City to Port Jervis? A. There isn't any time on it.

Q. There is not any time on it? A. No.

Q. Why? A. It was a section of this train ahead, supposed to be ten minutes in advance of this train behind us.

Q. What was the time of the train ahead? A. The train ahead left Jersey City at 3 o'clock and got to Port Jervis at 5:27, two hours and twenty-seven minutes.

Q. Two hours and twenty-seven minutes for eighty-eight miles? A. Yes.

Q. That was the time you were running on? A. Yes.

By Mr. Gilson: Q. That is, including stops? A. Yes.

By Mr. Stickel: Q. You said in answer to a question by Mr. Gilson that you remember the bell rang on this day because it always rang. Have you any other reason for remembering that the bell rang on this day? A. No. We always start the bell at Middletown; there is three or four crossings from Middletown to Howells; instead of shutting the bell off we leave the bell ringing.

Q. Did you make any statement about the incidents in this case before today? A. Yes.

Q. When? A. This happened on a Saturday and I made the statement out on Monday to the claim agent.

Q. Did you remember whether your bell was ringing on the day of the accident at the time you made that statement? A. Yes.

Q. And did you say so in your statement?

Mr. Gilson: A written statement?

Mr. Stickel: Yes.

Mr. Gilson: Well, I object to what he said in a written statement. Anyway, this is cross-examination of their own witness.

The Court: I think it is re-direct. It can only be used as a memorandum.

Q. Is that your signature (paper shown to witness)? A. No.

Q. Is that your signature (another paper shown to witness)? A. Yes, sir.

Q. What is the date on there? A. The 3d day of August.

Q. What year? A. 1909.

Q. Refreshing your memory from this paper—

The Court: Let us see what the paper is.

Mr. Gilson: I would like to cross-examine on it.

The Court: Yes.

By Mr. Gilson: Q. You did not write this paper yourself, did you, Mr. Sallee? A. No.

Q. Where did you give this statement? A. Jersey City, at the claim agent's office.

Q. Did you go in and just dictate this to the stenographer? A. Yes, I told them the way it happened and—

Q. And then he wrote it on the typewriter? A. Yes.

Q. While you were there? A. Yes.

Q. And then after he finished it you signed it? A. I read it and then signed it.

Q. He did not take down your exact words, though, did he? A. Yes.

Q. He took it right down on the typewriter as you dictated it? A. Yes.

By Mr. Stickel: Q. Will you read, Mr. Sallee—

Mr. Gilson: I object to his reading the statement. I do not object to his using it as a memorandum.

The Court: Our law is that a witness who has a memorandum made at or about the time may use the memorandum; he may

read it and may even testify from it. (After discussion.) It is not evidential. The question is whether he can refer to it.

Mr. Gilson: I have no objection to his referring to it, but I do object to putting this paper in evidence or reading it verbatim.

The Court: It can not be put in evidence. If it is a memorandum, he can testify from it.

Q. Referring to this paper, which you signed, on August 3, 1909, will you tell us what you say in that statement about the blowing of the whistle and the ringing of the bell?

Objected to.

Question withdrawn.

Q. Refreshing your memory from this statement, will you tell us whether you remember on the day of the accident the bell was ringing and the whistle was blowing for this crossing? A. Well, I didn't until I read this.

Q. I say refreshing your memory from that, will you tell us whether the bell was ringing and the whistle was blowing on that day? A. Certainly the bell was ringing and the whistle was blowing.

Q. Then you remembered on August 3d, 1909—

Mr. Gilson: I object to this on the further ground that it is leading.

Mr. Parker: The witness does not seem to be able to comprehend the thing, and I think we are entitled to lead to a certain degree.

The Court: I think this present question may be asked.

Q. Then you remembered on August 3, 1909, three days after the accident, that the bell

was ringing on that train and that the whistle was blown for that crossing? A. Yes.

Q. And after having refreshed your memory from this paper, is that your recollection now? A. Yes.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. Why did you not tell us that in the first place, Mr. Sallee? A. Well, I didn't think of it until I see the paper.

Q. Well, you were telling us just what you remembered of the accident. Now, is not this the fact, Mr. Sallee, that it is the rule of the company to whistle for this crossing? A. It is a rule, yes.

Q. And you knew you had to make a report that you whistled on this crossing? A. Yes.

Q. And you knew if you did not make such a report that you would lose your job? A. Not that alone.

Q. Well, what else? A. Well, if I didn't whistle just in this case here and somebody got hurt, why—

Q. You might be liable yourself? A. Yes.

By the Court: Q. I would like to get a little clearer idea of just the position you say you saw that automobile. You say you saw the front wheel going up the track that you were on? A. Yes.

Q. Which front wheel? A. The front wheel of the automobile.

Q. Which one? There are two front wheels. A. The wheel was going like that (indicating); I could see the front wheel, and that is all I could see of them from the front part of the engine.

Q. Going like that? A. Going up the track.

Q. Going up the track ahead of you, the same direction that you were going? A. Yes, sir.

Q. You say it was between the rails of your track? A. Yes, on the left-hand side, the left rail.

Q. On what line was that wheel that you saw running, parallel with the left rail or crosswise? A. With the left rail; yes, sir; kind of zigzag.

Q. That is not the only part of the car that you saw, is it? A. That is all I could see.

Q. How is it you could see one wheel and not see the rest? A. Well, I suppose the other part of the car was like sideways.

Q. Well, that is all you saw, anyway. Did you get an edge view of the wheel or a side view of the wheel? A. A side view.

Q. Do you know whether your engine hit it? A. Well, I know it hit it, because part of it was on the pilot.

Q. What part was on the pilot? A. The seat and the top, the top part of it.

Q. How far did you carry them? A. Until I stopped.

Q. You carried them until you stopped? A. Yes, sir.

By Mr. Gilson: Q. Where is the pilot on the engine? A. The front part of the engine.

Q. Just above the cowcatcher? A. The pilot is the cowcatcher. That is what a farmer says—a cowcatcher. It is a pilot.

The testimony of Cornelius Donohue given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

CORNELIUS DONOHUE, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Donohue, where do you live? A. Paterson, New Jersey.

Q. And what is your business? A. Locomotive fireman.

Q. How long have you been a locomotive fireman? A. Eight years.

Q. And have you always worked on the Erie? A. Yes, sir; as a fireman.

Q. And you fired freight engines and passenger engines? A. Freight and passenger, both.

Q. Well, now on July 31, 1909, when this automobile was struck at Howells crossing, were you anywhere about the crossing at that time? A. I didn't comprehend what you said.

Q. When this automobile was struck where were you? A. I was firing the engine, had been putting coal on the boiler—not at the time it was struck; I was standing after covering the fire over, but I hadn't time to get up on the left side yet.

Q. But as you came to Howells station you were firing the engine, were you? A. Yes, sir.

Q. Where did the train stop last before coming to Howells? A. At Middletown.

Q. At Middletown you started off to go to Port Jervis, didn't you? A. Yes, sir.

Q. Can you tell us whether there were any signals given by bell or whistle after you started out from Middletown? A. After the engineer got the signal to go—that is two air whistles to go—he started the bell ringing.

Q. Did you see him start the bell ringing? A. Yes, sir.

Q. How did you see that? A. Turn on a little wheel right in front of him.

Q. The bell started ringing? A. Yes, sir.

Q. How long did the bell keep ringing? A. The bell was ringing continuously, as it generally done, all the time.

Q. Ringing continuously until when? A. Until we got to Howells. I shut the bell off after we stopped, after hitting this automobile. The bell was ringing after we stopped, after the engineer got off, and I shut the bell off and stopped it.

Q. After you got in the vicinity of Howells did the train give any signal by way of whistle? A. Yes, it gave the usual whistles.

Q. What were the whistles it gave that day? A. The usual highway whistles.

Q. What are they? A. Two long and two short.

Q. Where was the train with respect to Howells crossing, how far was it when he gave the two long and two short whistles? A. I should say about quarter of a mile east of Howells crossing.

Q. Did he give any other whistles before it struck the automobile? A. It made a station whistle after it got over the highway crossing.

Q. What do you call the highway crossing? A. The road crossing we call a highway crossing.

Q. Is there a road crossing between the curve in the road and this road where this automobile was struck? A. Yes, sir.

Q. Is that what you mean by the highway crossing? A. Yes, sir.

Q. Then at the crossing east of Howells, as I understand you, you gave a station whistle? A. Yes, sir.

Q. Now, what did you first know of any trouble occurring between an engine and an automobile? A. Why, when the engineer put the brake on on emergency; he stopped; he threw the brake.

Q. He threw the brake for emergency? A. Yes, sir.

Q. What happened then? A. I got up; I looked out of my side, and I see it hit something.

Q. Which side is your side? A. The left side is the fireman's side.

Q. And did you see what had been hit? A. Yes, I could see. A lot of dust was flying around there. I see the automobile we had hit.

Q. And the train went on with the emergency brakes on, did it? A. Well, I should say about a train length.

Q. And what happened then? A. I didn't see any more; I didn't go back.

Q. You did not go back? A. No, sir; I stayed with the engine.

Q. Can you give us an idea how fast the train was going on that occasion just before it came over the crossing at Howells? A. Well, I should say we were going thirty-five miles an hour, maybe more.

By Mr. Gilson: Q. It may have been going more, too, you say? A. Yes.

By Mr. Parker: Q. Was there any noise besides the bell and the whistle made by the train as it came up towards Howells crossing? A. Well, she was working hard; he had a heavy train; a heavy exhaust:

Q. You railroad men know what you mean by "working hard," but we do not. A. Well, using as much power as she could.

Q. Does it make any noise? A. Yes, sir; a heavy exhaust.

Q. Is that a choo-choo? A. Yes, sir; a choo-choo.

Q. Was it using that exhaust, making that sound, up through the— A. Yes, the smokestack.

CROSS-EXAMINATION by Mr. Gilson:

Q. You can not hear that very far, can you? A. Well, you certainly can hear it quite a ways. You know that, too.

Q. Well, how far would you say you could hear that? A. Well, you can hear an engine exhaust quite a ways; I couldn't say how far.

Q. Well, you can hear it because you are in the firebox, but a person outside can not hear it very far, can he? A. Well, yes, a man can hear a freight train—

Q. What is the use of having any bell or whistle then, if it makes such a noise? A. Oh—

Q. That exhaust that you speak of, is that so loud as a bell or whistle? A. Yes, it is just as loud as the bell will ring.

Q. But it is not so loud as a whistle? A. Well, you can hear the whistle further away.

Q. Now, you think you were going thirty-five or more miles an hour up there? A. I should say about thirty-five miles an hour or a little more.

Q. A little more? A. I couldn't say; a little more, but it couldn't be going much faster.

Q. And there was no whistle blown between the lower crossing and the crossing—A. A station whistle was blown; after we got over the first crossing he blew the station whistle.

Q. How far over the crossing had you gotten before he blew the station whistle? A. Well, maybe a train length; I couldn't say exactly how far.

Q. Now, are you not testifying from what is usually done? A. What do you say?

Q. You are testifying now from what was usually done, and not from what you remember happened on that day? A. I certainly do remember what happened that day.

Q. And you were firing the engine at that time? A. Yes.

Q. There was nothing to call this thing to your attention until after the accident happened, was there? A. Why, it isn't necessary to do so. I can hear the crossing whistle and the station whistle.

Q. But can you tell us whether that whistle was blown the Saturday before? A. Yes, sir.

Q. And the Saturday before that? A. Yes, sir.

Q. And the Saturday after that? A. Yes, sir; every time we go over the crossing.

Q. And you mean to tell this jury you remember the incident of the blowing of that particular whistle on each of those Saturdays? A. No, I don't say that, but I say we wouldn't go over a crossing without blowing the whistle.

Q. And that is the reason it was blown that day? A. Well, you can't go over a highway crossing without blowing a whistle, or any crossing.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. Was there anything that specially called your attention to the blowing of the whistle on that day? A. Nothing more than to hear it blow, that is all.

Q. When did you have occasion to remember it? A. I had to make out a statement.

Q. When? A. A couple of days afterwards.

Q. And your memory was then asked? A. Yes, sir.

Q. Was that your memory when you were asked? A. Yes, sir.

Q. And it is your memory now? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. When did you see that statement last? A.

After I made the statement and after I had been to the lawyer's office.

Q. When was that, the last time you saw that statement? A. A couple of days ago, the first day I came down here, yesterday, I think.

Adjourned until Monday, January 15, 1912, at 10 o'clock, a. m.

Mr. Stickel: I am going to read a deposition taken at Howells on the 9th of May, under stipulation by which it was taken stenographically:

(Reading:)

"It is hereby stipulated between the plaintiffs and the defendant in the above entitled actions that the evidence of Mrs. Melissa A. Coleman, of Howells, N. Y., a witness on behalf of the defendant, and resident out of the State of New Jersey, may be taken *de bene esse,* without order of the Court, on the 9th day of May, inst., at 12 o'clock noon, at Mrs. Coleman's residence, in Howells, in the County of Orange, and State of New York, and may be adjourned from day to day until finished, before and by Herbert W. Knight, Esq., a Master in Chancery of New Jersey, at the home of Mrs. Coleman, in Howells, Orange County, New York.

That said testimony may be taken stenographically by said Herbert W. Knight, Master in Chancery, and oath of said master and stenographer is waived.

It is further stipulated that said testimony so taken shall be written out by said

stenographer and need not be signed by said witness.

It is further stipulated that the said transcript shall be transmitted by the said Master in Chancery to the Clerk of the Circuit Court of Essex County in the State of New Jersey, to be filed by him, and after so filing either party may read the testimony so taken on the trial of either or any of the said actions in the same manner and with the same force and effect as if said testimony had been taken under a commission duly issued by the Court on application therefor, or upon notice, as provided to take testimony of a witness out of the State, by virtue of the Laws of the State of New Jersey.

Dated, May 6th, 1910.

HERBERT CLARK GILSON,
Plaintiff's Attorney.
CORTLANDT & WAYNE PARKER,
Defendant's Attorneys.

Deposition of Melissa A. Coleman, taken pursuant to the foregoing stipulation.

Deposition of Melissa A. Coleman is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

"MELISSA A. COLEMAN, being duly sworn according to law, testifies as follows:

Direct-examination by Mr. Stickel:

Q. Where do you live? A. I live in the Town of Wallkill.

Q. Is this Wallkill here? A. Yes, near the City of Middletown, Middletown is the nearest city; the Village of Howells, this is.

Q. How long have you lived there? A. I have lived here thirty-one years in this house.

Q. You were living here on July 31st last? A. Yes.

Q. Where is your house with respect to the crossing west of Howell Station this crossing right here? A. Well, it is rather southwest of the station, is it not? You could tell by looking as well as I could.

Q. Southwest of the station? A. I think it is southwest.

Q. About how far from the crossing? A. Well, I couldn't tell, I think it is about a hundred and forty or a hundred and fifty feet from the crossing.

Q. Is it on that road which crosses west of Howells? A. Yes, on this road.

Q. I show you a photograph looking south on the road, west of Howells Station, and ask you whether you recognize it? A. That is the Mountain House and that is our church (indicating on the map).

Q. Does this photograph show the crossing west of Howells at Howells station? A. Yes.

Q. Does that show your house? A. That is my house (indicating on photograph, and pointing to place marked 'X').

Photograph referred to by witness marked for identification D-1, H. W. K.

Q. On July 31st last do you recall a train hitting an automobile just west of Howells Station? A. I do not remember the date, but I think it was in July, warm weather.

Q. In July? A. Yes, I could not just tell the date.

Q. That is the only accident you have seen within the last year? A. Yes, and I hope I won't see any more.

Q. Where were you at that time when you saw the accident? A. I was sitting right down where I be now, just in the same chair by the window.

Q. Will you point out on the photograph D-1 the window at which you were seated at that time? A. Perhaps it is now shown in the picture.

Q. Well, if it is shown. A. I don't think it is; that is the upper part of the house.

Q. There (indicating on photograph D-1) is the door. A. Well, now the window don't show here that I was sitting by.

Q. (Indicating on photograph.) There is the road and there is the door, is not that the window? A. It don't really look to me like it, I don't know.

Q. You were seated by the window in the front of the house? A. By the door.

Q. By the door? A. Yes.

Q. And that window overlooked the crossing at Howells, did it not? A. Yes, sir.

Q. Did you see the automobile approach the track that day? A. Yes, I saw it going down.

Q. Which way was it going? A. Going down.

Q. Towards the station? A. Towards the station, yes, sir.

Q. It then had to pass your house to get to the station? A. Yes, it passed this house, I did not see it until it got down by the crossing, you know, I told you the other day.

Q. Tell us where you first saw that automobile on that day? A. I saw it right here through the fence at first, and when it got down so I could see it plainly it was just below the steps that go up to the brick house.

Q. Was it going fast or slow when you saw it going? A. Going rather slow.

Q. How many people were in it? A. Three, three people.

Q. Two women and a man? A. Yes.

Q. Tell us what you saw of the accident. A. I saw the automobile going down and I heard the train coming.

Q. When did you hear the train coming, where was the automobile when you heard the train coming? A. Just before it got to the track; well I heard the train coming when the automobile was going right down here, I heard the sound of the engine, you know, coming.

Q. Where was the automobile when you first heard the train? A. That was below the steps, below those steps.

Q. How far had the automobile still to go before it would reach the track? A. I could not tell the number of feet.

Q. About. A. Well it is not far you know to the track certainly, you can see that yourself; I don't know just how many feet it is I am sure.

Q. Did you make any observations?

Objected to as leading.

Q. Tell us what you saw of this accident. A. I saw them go down, as I thought, on the track, I think they were on the first track.

Q. Which track? A. The first track, the one going to Middletown, and then they were so near the other track and the engine was so near them that they turned there—they seemed to have presence of mind to turn the automobile a little, and then is the time they jumped out; they had just time to jump out and that is all.

Q. Where did they jump? A. Right out on that track.

Q. Which track? A. This first track going down, and they walked in the road. The man had to carry his—well helped his wife in.

Q. They went down to the crossing and turned the automobile up the track? A. Yes, rather, turned it up on this other—so that it would be out of the way; I think if he had had a little more time he would have got off, and then the engine came and took the automobile out of my sight, and I didn't see any more of it at all.

Q. They jumped out to the left, did they? A. Yes, sir; out this way, up to the left.

Q. How soon after they turned their automobile up the track did a train come? A. Very soon; I could not tell; very soon indeed; they just had time to escape and that was all.

Q. When you were seated at this window immediately alongside of your door was the window opened? A. Yes, just as it is now.

Q. Could you tell which way the train was coming when you first heard it? A. Yes, I heard the train coming up.

Q. From Jersey City? A. Yes, coming from Jersey City.

Q. Did the automobile make any noise in going down the hill? A. Well, not very much, it didn't make very much noise because it was going rather slow; sometimes they make a big noise, they don't always.

Q. Will you look at the photograph D-1 and tell us where you first saw the automobile and heard the train? A. Perhaps I can't, I don't know.

Q. Was it then at the end of your fence? A. Yes, when it was down past those steps is when I saw it plainly.

Q. It was that spot where you first saw the automobile and heard the rumble of the train? A.

Well, I heard the train as soon as I saw the automobile go down past those steps.

Q. You said it was just below the steps? A. Just below the steps is where I saw it and then I heard the train."

The Court: Is there anything in the testimony to show what the witness means by "the steps"?

Mr. Gilson: It is the lower steps, the steps leading up to the second house, the brick house.

The Court: She is not asked to explain what she means by "the steps"?

Mr. Stickel: Later on, I think she is.

(Reading:)

"Q. Were you especially attracted by the automobile? A. Yes, on account of the train coming, yes.

Q. Why were you especially attracted? A. Because I thought there would be a terrible accident, that is why.

Q. Did the automobile stop before it reached the first track? A. No, it did not stop.

Q. When did it first stop? A. When it got up to that track, on the first track, and then I suppose they heard the train coming, but I had heard it before that; I don't know whether they heard it or not I could not tell.

Q. Did they seem to hear it? A. I don't know, they didn't seem to—the first thing they thought of, of course, was to get out, they heard it after they got on the track right in the way of the engine of course.

Q. When the train hit the automobile it took it out of your sight, did it not? A. Yes, took it away, I could not see it, took it right up above the hotel.

Q. What did the people do after they jumped out of the automobile? A. Well, the girl she jumped out first and she stood there and the man took his wife—she was so frightened she could not get out of course, and he helped her out and had hold of her and someone came and helped him; they carried her to the hotel.

Q. How did the daughter get to the hotel? A. She walked, she was all right. She was not hurt at all; there was not any of them hurt very much, I guess.

Mr. Gilson: I object to that, and move to strike it out

Witness: Well, I don't know. I have not been asked that.

Q. How did the young lady get out of the automobile, did she step out or did she jump out? A. I think she jumped out.

Q. How did the elderly lady and the man get out? A. I think they jumped out as quick as they could, it seemed to me that they jumped out, I think they did, he had hold of his wife, and they jumped out together, the two.

Q. Did the automobile slow up as it approached the track? A. I don't think it slowed up very much; it was going slow all the way down, when I first saw it it was going slow, below the steps there."

Mr. Gilson (reading):

"CROSS-EXAMINATION by Mr. Gilson:

Q. How old are you? A. Eighty-two on my last birthday.

Q. When was that? A. In November.

Q. The Village of Howells is in the Town of Wallkill, is it not? A. Yes, sir.

Q. Are you related to anyone in the employ of the Erie Railroad? A. No, sir.

Q. Do you ever have any business dealings with the Erie Railroad? A. No more than I have had freight fetched up on the cars, that is all.

Q. Then they do not own this property you live on? A. No, I own it myself.

Q. Do you own the property adjoining you on the railroad? A. No.

Q. You said you thought the distance from the railroad to your house was about a hundred and forty or a hundred and fifty feet? A. Well, I don't know.

Q. That is just a guess on your part, is it not? A. Well what makes me know that, they used to lay the papers up here one hundred feet from this hotel, when they had an election here, they used to lap the paper right by my steps here, that's all I know about it, so it must be—

Q. When you say one hundred feet you mean one hundred feet from where? A. From the hotel where they were having the election.

Q. That was one hundred feet? A. From the hotel.

Q. From the hotel to your house? A. Yes, sir; the hotel that was burned.

Q. About how far was it from the hotel which was burned to the rails to the track? A. Very short, it was not very far, just the main road went through right between the house and the track, very little room besides that.

Q. You say that when you first saw the automobile you thought there was going to be an accident? A. I did if they didn't stop.

Q. At that time you did not warn them in any way? A. No, I could not, you know.

Q. They were too near the railroad for you to warn them in any way, were they not? A. Yes, I did not have any chance to warn them of course.

Q. Can you tell us about how far they were from the railroad track at that time when you thought there was going to be a terrible accident? A. Just below these steps down there, just as I saw the automobile; I heard it going by and I looked up and saw it just below the steps that go up to the brick house, and then I heard the engine and I thought there surely would be an accident, that is the way I thought about it.

Q. You did not know at that time whether they were going to cross the tracks or turn into the hotel at the left? A. They were going right straight on.

Q. But they had not reached this lane which goes into the hotel? A. Hardly, I think not; they seemed to be going straight on.

Q. But they were too near the track for you to call out and warn them? A. Oh, yes; I didn't have anything to do with that.

Q. I suppose the door was open and the windows in your house? A. The door was not open, this window was open and I think that one was open too.

Q. It was a warm day? A. Yes, sir.

Q. You don't remember how the wind was that day, do you? A. No, I don't remember, I don't think there was very much; it was a warm day.

Q. This house you live in is some distance above the road on a bank is it not? A. Rather on a hill, yes, sir.

Q. About how many feet above the road would you say it is? A. I could not tell.

Q. Approximately. A. I could not tell.

Q. It is more than six feet right here? A. You mean from the road?

Q. Above the road? A. I don't know, I don't think it is six feet, I don't know.

Q. About? A. The steps—I don't know—I might tell by them.

Q. And there is quite a grade from your house down to the track, is there not? A. Yes, all the way down.

Q. So that as a person approaches the track on the road the bank grows higher as they go toward the track? A. Goes higher up this way.

Q. But the bank on the road? A. Oh, yes, that bank, yes.

Q. And of course, that bank would interfere with the sound of the train somewhat, would it not?

Objected to.

Mr. Gilson: Do you want to press that?

Mr. Parker: No.

Mr. Gilson (reading):

"A. Yes, I think it did some, still I could hear it plain enough.

Q. You could hear the train as you were sitting in this window? A. Yes.

Q. Whereas a person down on the road behind a bank would not hear it?

Mr. Stickel: I object to that as incompetent, there is nothing to show she knows that"

The Court: Does it appear from the testimony on what floor she was?

Mr. Gilson: Well, she pointed out in this picture that she was on the ground floor.

(Reading:)

"Q. Do you think that is the fact?

Objected to.

A. What do you mean, I don't understand what you mean.

Q. (Question read to the witness as follows: 'Q. You could hear the train as you were sitting in

this window? A. Yes. Q. Whereas a person down on the road, behind a bank, would not hear it?') A. Well, I could not tell, I was not down there and I could not tell; I could tell when I heard it coming, sitting up here.

Q. You knew that that train usually came up at that time every Saturday afternoon, did you not? A. Yes.

Q. You were sort of watching for it, I suppose? A. Well, I don't know as I was watching for it, still I heard it.

Q. You heard the rumble of the train as it came along? A. Yes, sir.

Q. Can not you give us some idea as to how far they were from the first rail when you saw them? A. I can not tell the number of feet.

Q. Can not you tell looking out of the window now? A. You can see for yourself; can't you tell yourself how far it is?

Q. You say you think it is about one hundred and fifty feet? A. I don't know, I don't really know.

Q. —about one hundred and fifty feet from where you sat in the window to the track. Now can you tell us about how far, whether half way or more than half way from the window to the track it was when you first saw the automobile?

Mr. Stickel: In other words, how far is it about from the steps to the track, is not that what you mean?

Mr. Gilson: No, I want to know how far it was below the steps.

A. It was more than the length of the automobile below the steps, I think.

Q. Can you tell us approximately how many feet that would be from the track? A. I can not, I am not used to measuring by the feet at all, I can not tell.

Q. If you think it is, one hundred and fifty feet from here to the rail, can not you tell us whether it was half way or more than half way from the window to the automobile when you saw the automobile? A. Well, I think it was perhaps half way between the first rail and the steps, I do not know for certain, I could not say positively.

Q. And it was not at that time that you expected this accident, was it? A. I expected it as soon as I heard the train coming and saw the automobile, I thought then of course there would be an accident.

Q. When did you hear the train coming, before you saw the automobile or afterward? A. Afterward I heard the train.

Q. About how long afterward? A. Well I saw the automobile going down and I heard the train almost at the same time coming.

Q. It may have been a little after? A. I could not tell just the moment.

Q. And the automobile may have gone down toward the tracks further before you heard the engine, is not that right? A. Well, it was going slow all the time, it didn't stop, the automobile did not stop at all.

Q. It was going very slowly, was it not? A. Quite slowly.

Q. Do many automobiles pass here? A. Quite a good many.

Q. Did you ever see one going slower than that going down this hill? A. Yes, they often go slow when they get near the tracks.

Q. Any slower than this one was going? A. I don't know as they go any slower, they slow up a little and some of them stop.

Q. And this was going about as slowly as any of them? A. As any I noticed, yes, I think it was.

Q. You made a statement about this accident for the company, did you not? A. Well, there was a gentleman came here I gave my statement to and he wrote it down, he was interested with the company, I think. That man was with you Mr.— (indicating Mr. Stickel).

Mr. Stickel: Yes, she did.

Q. About how long after the accident was that? A. I don't know, I can't remember. Well it was not the one either that came first, I don't think he was.

Q. How many men have called to see you about this case, more than two? A. This same gentleman that was with you (indicating Mr. Stickel) called twice, that is all I think.

Q. Two interviews? A. Yes, two, I think so.

Q. When you say 'you' you mean Mr. Stickel, do you not? A. Yes, sir. It was another gentleman took the statement.

Q. Did you sign the statement after it was written out? A. I did, yes, sir, he read it, over to me and I signed it; I told him all I knew about it and I can not tell you any more I am sure, I have told you all I know.

Q. How did they know you saw the accident? A. I don't know, I couldn't tell you, someone I suppose had told them, I didn't tell them I am sure.

Q. Did you say that Mrs. Gardner, the younger lady, walked over to the house? A. Oh, yes.

Q. Didn't any one assist her? A. I didn't see anyone, she jumped up and walked around, she was crying.

Q. They all fell when they jumped out of the automobile, didn't they? A. I don't think they fell, I don't know whether they did or not, she didn't fall, she got up and ran.

Q. Was there a great cloud of dust down there? A. I don't remember.

Q. Steam and— A. Well, steam of course when the automobile was struck, that made a great report; I don't think there was much dust, I don't remember about that.

Q. They carried Mrs. Dickenson over, did they not? A. What?

Q. They carried the older lady to the hotel? A. Yes, sir; the lady they carried to the hotel."

Mr. Stickel (reading):

"RE-DIRECT-EXAMINATION:

Q. You read without glasses, do you not? A. Yes, sir.

Q. Your hearing is also good, is it not? A. Yes, I can hear and see just as good as I could when I was your age, even if I am old.

Q. They came down the road and did not stop you say until they got to the nearest track, is that so? A. Yes, I don't think they stopped until they got right on the track, it might have been a little over the first rail of the first track, I don't know but they were right in the way of the engine.

Q. Which track was the train coming on? A. The second track from here.

Q. When did you first see the automobile as it approached the track? A. I saw the automobile when it was going right along here by that tree, just had a glimpse of it.

Q. Where was that, through your fence? A. Yes, right through the fence, and when it got further down I could see it plainer; the fence hindered my sight.

Q. Did you hear the train at that time? A. I do not think I heard the train until it got below, just below where I told you I saw it so plain.

Q. Do you know whether these people fell when they got out of the automobile? A. I do not think they did.

Q. You did not see them fall, did you? A. No, I think they jumped up and ran, this girl did I am sure—jumped out and ran, she was frightened of course.

Q. You do not know about how far it is from the place where you first saw the automobile and first heard the train, to the track? A. No, I could not tell you that.

Q. Could you tell approximately? A. I could not, I do not know the number of feet at all.

Q. About how many feet? A. I could not tell; you could guess that yourself.

Q. I would rather you did the guessing. A. I don't want to guess, I want to tell what's right about it, and as far as I can I will of course.

Q. How long is this lot of yours? A. How many feet?

Q. Yes. A. I could not tell that really, it reaches away up on the road and I don't know how many feet it is."

Mr. Gilson (reading):

"RE-CROSS-EXAMINATION:

Q. Of course when you expected the accident you were quite excited? A. I was frightened.

Q. Naturally. A. Yes.

Q. And you can not remember now all of the details of just how many got out or where that automobile was in all that excitement, naturally. A. I saw them jump out, I remember that, I do.

Q. But I mean the details of just where the automobile was, and— A. I could not just tell exactly within an inch or two, I could not from here.

Q. The train was that Saturday afternoon spe-

cial was it not? A. I don't know whether it was or not; there does a train go up Saturday afternoon a special train.

Q. This train did not stop at Howells? A. No, sir, it don't never stop here, the express trains never stop here, none of them.

Q. And that was an express train? A. Yes, sir, going quite fast.

Q. About how fast? A. Oh, mercy, I could not tell you.

Q. Was it not about as fast as any of the trains go? A. Yes, as fast as any that go up here.

Q. Did you ever see a train go by any faster? A. Well, I don't know, I don't mark those things.

Q. Well, for thirty-one years— A. Well, I didn't sit in this window all the time for thirty-one years, I would grow fast.

Q. Did you notice whether they came to almost a stop just before they reached the track? A. I do not think they stopped at all; they were going slow but I do not think they stopped at all until they were obliged to.

Q. And you think they did stop when the automobile reached the first rail? A. Oh, they stopped and jumped out.

By Mr. Stickel: Q. He asked you whether you think the automobile stopped when it got to the first rail? A. No, I don't think it did, I think it went on.

Further RE-CROSS-EXAMINATION:

Q. You think it stopped then after the front wheel passed over the first rail? A. I think it stopped when they saw the engine, I know he turned it up a little and he jumped out and I could not tell just how many feet it was I could

not tell you anything about that, I saw them jump out, I am sure of that.

Q. This has been a public crossing here in Howells for the thirty-one years you have lived here, has it not? A. Yes, sir.

Q. It is a public road connecting with the State road? A. Yes, it goes to the State road just above the hill there.

Q. The electric bell which is there at that crossing was not there last summer, was it? A. No, it has been put there since this accident happened.

Q. They have put it there this spring, have they not? A. This summer, yes, this spring.

Q. You can hear it up here at your house, can you not? A. Oh, yes, very plain.

Q. This bank on the right as you approach the crossing from your house is all grown up with bushes and shrubbery in the summer, is it not? A. Well, quite a good deal, they cut them down generally in the spring, but they have not cut them all down yet.

Q. How was it in July last, had it grown up pretty well? A. I think they cut them down last spring, and I don't think they have since; the railroad company cuts them down.

Q. Do you mean the spring of 1909? A. Yes, sir.

Q. They have not cut them down since? A. I have not seen them cut them down this spring?

Q. About how high do they get in the summer above the level of the ground?

Mr. Stickel: Of course you mean last summer, 1909? A. I don't know, just like other weeds they grow up in the summer; they cut them down; they trim up around the track and always trim weeds down, and bushes along by the bank.

Q. They grow up so that they get to be several feet high in the middle of the summer—last summer, 1909? A. No, I don't think they get very high, I can't see them on account of the corner of my woodhouse.

Mr. Stickel: Q. Do you know whether this was a regular train? A. I do not know whether it was the train that goes every day, I could not tell.

Q. Where were they when they turned their auto up the track? A. Well, they were—I think they were on the first track and partly on the other track.

Q. When you heard the rumble of the train and the auto was at your steps, or just below, why didn't you call out to them? A. What good would that do, you couldn't make them hear if you called ever so loud; I never advise people going along the road, never; if I could do them any good I would, but I never did that.

By Mr. Gilson: Q. When you say your steps you do not mean the steps right by your door, but the steps further down toward the brick house? A. The steps that go up to the next house, the brick house.

Q. Those are the steps nearer to the railroad? A. Yes, sir.

By Mr. Stickel: Q. What time of day was it when this accident happened? A. I think it was about 4 o'clock, or between three and four, I could not say.

Q. It was late in the afternoon? A. It was late in the afternoon.

Q. It was a bright, clear day, was it not? A. Yes, it was a nice, pleasant day, warm, very warm."

Mr. Parker: I offer this testimony in evidence, if your Honor please.

FORREST C. STOWERS, sworn in behalf of defendant:

Direct-examination by Mr. Stickel:

Q. Mr. Stowers, what is your business? A. Automobile business.

Q. Where? A. 273 Halsey Street.

Q. What concern? A. R. M. Owen & Company.

Q. In what capacity are you in business with that firm? A. Managing the wholesale department.

Q. How long have you been in the automobile business? A. Seven or eight years.

Q. In what lines of the business? A. All the way from the manufacturing to the selling line.

Q. In connection with the selling end, what kind of cars have you sold? A. Well, almost every make. I say almost every make; that is, of the standard makes.

Q. Have you sold new cars? A. Yes, new cars, second-hand cars, various kinds of cars.

Q. In your work in this business have you had occasion to learn the depreciation of a new automobile? A. Very much so, because very often we trade in—in fact, a lot of our business we trade in second-hand cars on a new car, and, naturally, we have to be conversant with the second-hand value of a car in order to make the trade.

Q. What is the depreciation of a new car? Can you give us any idea? A. The depreciation of a car after it has been running any length of time at all is practically about fifty per cent.

Q. A new car, run three or four months, can you give us any idea as to its depreciation? A. It depends largely on the value of the car and somewhat on the mileage that it has been run, but the average depreciation on any car after it has

been run, after it has been used, is about fifty per cent.

Q. A runabout Maxwell auto, valued at $825 and run about three or four months and about a thousand miles in that time, can you give us any idea of the depreciation of such a car? A. About $400 to $450.

Q. $400 or $450? A. Yes.

CROSS-EXAMINATION by Mr. Gilson:

Q. Then do I understand that that is what you would allow on that in your business? A. Well, it is very much a question. We might allow that on a new car, a car selling somewhere around $1,100 or $1,200.

Q. You would not allow $400 on a car that cost $1,600 or $1,700, would you—a Maxwell touring car? A. On a car that cost about $1,600 or $1,700, about a year old or under that time, if it was a last year's car, a 1911 car, it would be worth about half what the car sold at originally.

Q. And when you say "worth" what do you mean? A. That is, it would be worth in trade, the second-hand market today. For instance, a car that sold in 1911 at $1,000 or $1,100 is worth $500 in the second-hand market, and you can't get that much for it. I have got half a dozen cars down here in Newark that I will sell for $500.

Q. You would sell them for less, wouldn't you? Let me ask you this: Suppose a man should bring in a Maxwell runabout today to you that has been run three or four months, a thousand miles or more, how much would you allow him in trade on it? A. Not over $350 or $400.

Q. And you certainly would not give him that much in cash, would you? A. No.

Q. How much in cash would you give him? A.

We are not in the second-hand business. It is worth that much in cash.

Q. Well, you would not buy it. How much would it bring in cash? A. It all depends on the buyer you can get for it; it would all depend on whether you got a buyer that wants that kind of car. The chances are it wouldn't bring over $400.

Q. And the chances are it would bring much less than $400? A. Well, I don't know. I should imagine a Maxwell selling at around $800 would be worth about $400 today.

RE-DIRECT-EXAMINATION by Mr. Stickel:

Q. Does the care or condition in which a car is kept make any difference in its value? A. It makes quite some difference in its value whether it has been taken good care of, it has been kept greased and oiled, a car that has been properly taken care of. You can ruin a car in three or four hours by driving it when it isn't properly greased and lubricated.

Q. What is the life of a car ordinarily—a runabout? A. It all depends on the user of the car. Some cars in the hands of one man will last five or six years, and other cars won't last two years in the hands of certain people.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. Well, the life of a Maxwell runabout is the greatest of any automobile in this country; isn't that the record of it? A. Why, I wouldn't exactly care to dispute that; I am not disputing the merits of a Maxwell car with any other car. I am in the line of a competitive car.

Q. Is it not a fact that it is advertised generally that ninety per cent of the Maxwell runabouts are running now that were sold in 1905 and

1906? A. They advertise that in New York State; I wouldn't say that that applies universally.

Q. In New York State, yes? A. They advertise that. They are about the only people that build a car of the runabout type, that type.

Q. Oh, no. How about the Auto-car? A. The Auto-car haven't built a runabout in the last two years.

Q. They did build them in 1905 and 1906. You do not know of any Auto-cars running now, do you? A. Yes, I do; several.

Q. You do not know of any that were running in 1905 and 1906? A. No, sir.

Further DIRECT-EXAMINATION by Mr. Stickel:

Q. Mr. Stowers, you say you have seen the Maxwell automobile advertised as being one of the longest lived automobiles. Have you any personal knowledge of that fact? A. I don't consider them any longer lived than any other car. They are not built any better; I don't see any reason why they should. Of course, a good many features are resorted to in advertising a product, but isn't necessarily true because it is in print.

Mr. Stickel: That is all.

Witness: There is one thing I would like to say, and that is with reference to being about 1905 and 1906 Maxwells—

Mr. Gilson: No, we don't want any statement.

Witness: I would like to answer your question about that.

Mr. Parker: I think he has got a right to answer the question.

Mr. Gilson: He is not answering a question; he is making a voluntary statement.

Further CROSS-EXAMINATION by Mr. Gilson:

Q. I am talking about Maxwell runabouts, not the touring cars. It is the fact that the life of a Maxwell runabout is greater than any other runabout, is it not? A. No.

Q. It is so accepted in the trade, is it not? A. Not in any trade that I ever knew, only by the Maxwell people themselves.

Q. What particular machine do you sell? A. Reo and Premier.

Further DIRECT-EXAMINATION by Mr. Parker:

Q. Mr. Stowers, you said that you had not answered one of Mr. Gilson's questions fully and wished to answer it more fully. What was it? A. He asked me the question about whether there were very many 1905 and 1906 Maxwell cars in Newark; I said I didn't think that there were many. I was in business when we sold out to J. B. Mason in 1908, and prior to that time the Maxwell people had very little representation, if any, in Newark.

The testimony of Harry Price given at the former trial is read, defendant's counsel reading the direct-examination and plaintiff's counsel reading the cross-examination.

HARRY PRICE, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. Price you are employed by the Erie Railroad? A. Yes, sir.

Q. Were you so employed on July 31, 1901? A. Yes, sir.

Q. Were you on this train that met with an accident at Howells? A. Yes, sir.

Q. This train came from Jersey City, I understand? A. From Jersey City.

Q. And what time did it reach Middletown? A. About 5:05.

Q. And how long did it stop there? A. About three minutes.

Q. And about when did you leave there? A. About 5:07 or 5:08.

Q. And when were you due at Howells, do you know? A. We haven't any time at Howells; the train hasn't any time.

Q. The train did not stop there? A. Didn't stop there.

Q. How many miles is it by the railroad from Middletown to Howells? A. Four miles.

Q. And about what rate of speed were you going after you left Middletown? A. Oh, from Middletown, about thirty-five miles per hour, I should think.

Q. What is the condition of the tracks, as to whether it is level or— A. There is quite a heavy grade all the way from Middletown to Howells.

Q. How many cars did you have? A. Seven cars.

Q. And when did you first know of any trouble at the crossing at Howells? A. When we was passing Howells the train came to a very sudden stop.

Q. And where were you in the train at that time? A. I was in the third car from the engine.

Q. And what did you do? A. I immediately got off on the ground on the north side of the train.

Q. That is, toward the station? A. Toward the station, yes.

Q. Did you see anything there? A. No, sir.

Q. What did you do then? A. I ran back around the rear end of the train.

Q. And when you got there what did you see? A. I saw this automobile lying on the east-bound track.

Q. That was lying on the east-bound track? A. Yes, sir.

Q. About how far was it from the crossing? A. It was nearly three car lengths.

Q. And how long is a car length? A. About sixty feet.

Q. And where did the train stop with relation to the crossing? A. The rear end passed the crossing; when I stopped it was about two car lengths west of the crossing.

Q. And you say the automobile was three car lengths. Then the automobile was alongside of the cars when they stopped, was it? A. Yes, sir.

By the Court: Q. I think you said there were seven cars? A. Seven cars; yes, sir.

By Mr. Parker: Q. What were Mr. Dickinson and the ladies doing when you saw them? A. Well, when I ran around the rear end of the train and saw this automobile lying on the east-bound track, my first duty was to get a flag out to protect east-bound trains, get trains stopped; I saw to this, and saw that the train coming east had been stopped, and then I came back to the crossing.

Q. You wanted to stop the train that was going east? A. That is it.

Q. And when you came back to the crossing, what did you find there then? A. Well, there was a large crowd around this lady and gentleman.

Q. Did you see the ladies and gentleman there? A. Yes, sir.

Q. What were they doing? A. There was one gentleman holding a lady.

Q. Was she standing or sitting? A. He was holding her; she was standing.

Q. And was there another lady there? A. Well, there was a number of them, but I—

Q. But you saw a gentleman holding a lady? A. Yes, sir.

Q. And did you have any talk with them? A. I did not.

Q. What did you do? A. I couldn't get near them on account of the crowd coming out of the train after we had stopped. Before I could get back there they had congregated around them, before you could get close to them; so I left them in charge of the agent, to get what information he could and do what he could for them. There was another train due close behind us and we had to get away from there.

By the Court: Q. You were the conductor? A. Yes, sir.

By Mr. Parker: Q. Did you notice the other train, the east-bound train come up? A. Yes, sir, it came there and stopped before we—right away.

CROSS-EXAMINATION by Mr. Gilson:

Q. Did I understand that you were the conductor of this train? A. Yes, sir.

Q. Now, it is a fact, Mr. Price, is it not, that that heavy grade that you speak of begins about at Howells and continues on up to Port Jervis? A. Oh, no; it begins right at Middletown.

Q. Well, I show you Exhibit D-8 (shown to witness). Do you think that shows a grade on that railroad? A. This is at Howells.

Q. Yes, looking toward Middletown? A. Howells station.

Q. Looking toward Middletown, east, is it not? A. Yes, sir.

Q. Does that show any grade there? A. The grade right at Howells station isn't very heavy.

Q. And that shows a distance down to the east of over 2,000 feet, does it not? A. Yes, sir.

Q. Half a mile, does it not? A. Well, I don't think it is half a mile.

Q. More than two thousand feet, is it not? A. I don't know.

Q. Well, is there any grade there? A. There is a grade right at Howells station, for a short distance there.

Q. Well, is there any grade from Howells station the distance you can see on that photograph? A. Yes, sir.

Q. And you think that photograph shows it, do you? A. Yes, sir; there is quite a heavy grade back in here (indicating).

Q. Well, you are pointing back of the hill, further than you can see on that photograph, are you not? (No response.)

Q. Did you ever see a more level track than you can see on that photograph? A. Yes.

Q. It is perfectly level, is it not? A. No.

Q. You think it shows a hill there? A. Yes.

Q. Down hill? A. Yes, sir.

Q. Now, this train left Jersey City at 3 o'clock did it? A. I couldn't say.

Q. Well, I show you a time-table of that division, and ask you if that does not show No. 3, and that was the train that you were conductor of, or part of it— A. No, I was running a section of it.

Q. That is scheduled, according to this time-table, to leave Jersey City at 3 o'clock? A. Yes, sir.

Q. And it is scheduled to arrive at Port Jervis at 5:43? A. Yes, sir.

Q. And it shows on this time-table that that is a distance of eighty-nine miles, does it not? A. Yes, sir.

Q. And that is correct, is it not? A. Yes, sir.

Q. And can you tell us how many stops that train made that day between Jersey City and Port Jervis? A. Paterson, Graycourt, Goshen, Middletown, Otisville and Port Jervis.

Q. Otisville is beyond Howells? A. Yes, sir.

Q. And I suppose those stops will average about three minutes? A. About; some less.

Q. And some more? A. Very, very few more. Three minutes is a long stop.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. Let us get the facts. What stops was the train making? A. Paterson, Graycourt, Goshen, Middletown, Otisville, and then Port Jervis.

Q. The distance from Middletown up to Howells, how does that compare with other places on the road for making time? A. It is a very heavy grade; it is almost impossible to attain speed with the train that way at over thirty-five or forty miles an hour.

Q. And there are other places on the road where you can make faster time than that? A. Oh, yes. Take it from Ramseys to Sterlington.

Q. And how about across the meadows? A. We can do it there.

Q. And after you leave Paterson? A. We make fast time from there until—well, from there to Ridgewood Junction.

Q. Where do you get the other favorable place for time after you leave Ridgewood Junction? A. Southfield to Graycourt.

Q. How far is that? A. About thirteen miles.

Q. How far is it from Jersey City to Paterson? A. Sixteen miles.

Q. That is a favorable grade, is it not? A. It is favorable grade, but it is running through cities and over drawbridges, that you can't attain a very high rate of speed.

Q. Is this train 3 that the gentleman showed you the time-table of? A. What is that?

Q. Were you running train 3? A. I was running as a section of train 3, but I wasn't representing train 3; I was running as a relief for train 29, making the schedule and stops of train 29.

Q. Then you had a heavy train, you say? A. Yes, sir.

EMMETT WALT, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. What is your business, Mr. Walt? A. Brakeman.

Q. On what road? A. Erie Railroad.

Q. And were you a brakeman on July 31, 1909? A. I was.

Q. On what train? A. On section No. 2.

Q. Of what, what train? A. Section No. 2, from Port Jervis to Jersey City.

Q. Then you were coming from Port Jervis to Jersey City? A. I was.

Q. And who was your conductor? A. Chris McMahon.

Q. What were your duties on the train? A. Brakeman.

Q. Any other duty? A. No, sir.

Q. When you got there at the station—before you came to Howells, what happened? A. Nothing happened before we came to Howells.

Q. Well, what happened at Howells? A. Well,

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we stopped there, and I supposed there was express or something to load and looked out, and there was nothing there to load.

Q. Were you expecting to load anything at Howells? A. I was, in a way.

Q. How? A. Well, on week days we always load it; on Saturdays we never had nothing to load there, not unless we got orders.

Q. This was Saturday? A. Yes, sir.

Q. And you did not expect to load unless you got orders? A. Unless we got orders.

Q. And had you got any orders to load at Howells? A. We had not orders.

Q. What did you do there when you had stopped? A. I seen an automobile laying over alongside of the east-bound track, in the gutter.

Q. When you saw it was alongside of the east-bound track? A. In the gutter.

Q. How were you dressed? A. In uniform.

Q. Did you have any other duties with respect to the baggage? A. Help load anything, if there was anything to be loaded.

Q. Did you load anything that day from the freight and milk shed? A. I did not.

Q. Was anything loaded at Howells? A. Not to my knowledge, there wasn't.

CROSS-EXAMINATION by Mr. Gilson:

Q. Well, now, the conductor says, and so does the station agent, that they put some trunks on your train at Howells? A. If they did, I didn't have anything to do with it.

Q. So that you do not know anything about that? A. I just said I didn't.

Q. And you do not know whether there was anything taken from the platform, either? A. There was nothing taken from the platform.

Q. Why do you say there was nothing taken from the platform, and you do not know about the trunks? A. Well, I know there wasn't.

Q. How do you know? A. There wasn't anything on the platform taken.

Q. You know it, eh? A. Yes, sir.

Q. Was there anything on the platform the Saturday before that? A. No.

Q. You looked? A. Yes, sir.

Q. Why did you look? A. Because we come there to see if there was anything.

Q. You did not stop, did you? A. No, because the agent come out and gave us the signal to go ahead, there was nothing to load.

Q. Was there anything on the platform the Saturday after this day? A. I couldn't swear to that.

Q. You could not swear to any particular Saturday or any day, whether there was any stuff on that platform or not could you? A. I can.

Q. And you do not know whether there was anything taken from the truck that day? A. There wasn't from the platform side.

Q. But you do not know about the other side? A. I don't know whether there was or not, but I know we come down there and stopped in front of the station.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. What did you do with reference to flagging the rear of your train when it stopped? A. I go back. You can't tell what is coming back of us; there might be a freight train or something come along.

Q. Then you went back with a flag, did you? A. Yes, sir.

Q. And before they started what did they do? A. Called me in.

Q. You were called in; and when you got aboard the train where did you get aboard the train? A. The rear end.

Q. And then what happened? A. We proceeded on down.

Q. How many cars was this? A. Five cars, I believe.

Q. And where was the baggage car? A. The head end, right back of the engine.

Q. So that the baggage car was four cars ahead of you? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. You said there was not anything on this platform? A. There wasn't.

Q. What became of the six cans of milk, do you know? A. They were probably put there after we went. We don't handle no milk on there, anyway; we don't carry milk.

Q. No, but you could see them? A. They were probably there after we were there.

By Mr. Parker: Q. Is the baggage master alive? A. No, he is dead.

MATT CURTIS, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Mr. Curtis, what is your business? A. Engineer.

Q. Were you running an engine on the Erie Railroad on July 31st, last? A. Yes, sir.

Q. Where were you coming from on that day about a little after 5 o'clock? A. Port Jervis.

Q. And what was the train that you were running? A. We were going to run a section of No. 2 from Middletown.

Q. And what were your stops that you made as

you were coming down from Port Jervis? A. The first stop we was supposed to make was Middletown.

Q. And were you under any time? A. Not specified time, no.

Q. When were you expected to leave Middletown? A. 5:31.

Q. And after you left Port Jervis, was there any other place between there and Middletown where you expected to be at a certain time? A. No, sir.

Q. When you approached Howells, did you notice anything unusual there that day? A. Yes, sir.

Q. What did you see? A. An automobile on the track.

Q. On whose track? A. My track.

Q. Where was it lying as respects the track, was it on one side or the other, or was it in the middle? A. It was pretty near in the middle of the tracks. The trackmen were there about the same time, and they were taking it off the track.

Q. Did you see the other train, the train from New York, there? A. Yes, sir.

Q. Where did that stand with relation to your train? A. Well, when I stopped my engine was about at his.

Q. Did you see anybody on the ground near the automobile at the time you stopped—standing there, I mean? A. Yes, sir.

Q. Did you see the people that you saw here in Court testifying? A. Yes, sir.

Q. Now, did you stop that day at that station, at Howells? A. Yes, sir.

Q. Was that a usual stop of your train on Saturdays? A. Not on Saturdays.

Q. Why did you stop on that day at the station?

A. The station agent found out what we were going to do, and he had some trunks, I guess, he wanted us to load, and I had orders to pull down to the station.

Q. Who gave you those orders? A. I think the station agent; either him or the conductor told me.

Q. And so you stopped at the station? A. Yes, sir.

Q. What was loaded in the train that day, do you remember? A. I couldn't say; it was loaded from the other side; I was on the right side; it was loaded on the left side.

Q. You were on the right side of the engine, and the stuff was loaded on your left-hand side, eh? A. Yes, sir.

Q. Where was it loaded in as respects the milk shed and the station, on the station side or the milk shed side? A. Do what, did you say?

Q. Well, I will make it a little more definite. Were those things loaded into your train from the station side; that is, where the— A. Loaded from the station side.

CROSS-EXAMINATION by Mr. Gilson:

Q. Which section of No. 2 were you running that day, Mr. Curtis? A. The first section.

Q. Did you notice any cans or anything on the freight platform there? A. No, sir.

Q. You did not notice that? A. No, sir.

Q. There might have been some things there and you would not notice them? A. I don't think there would be.

Q. You think you would have noticed them if they had been there? A. I think so.

Q. Did you notice any cans? A. I think I should see them if they were there, yes. The station is all open, you know.

Q. Did you see them? A. I didn't see them, no.

Q. Did you see any boxes or barrels or anything else? A. No, sir.

Q. Of course, it is a long while ago, and you will not swear positively that there was nothing on the platform? A. Well, I kept it in my mind so well on account of this accident, that I would remember it, I think.

Q. Well, I know, but that did not have anything to do with the accident then, did it, at that time? A. It did, because we went down there after the accident.

Q. And you looked at it? A. Yes, sir.

Q. And you think it was clear? A. Yes, sir.

Q. Who told you that it was important that the platform should be clear? A. Nobody at all.

Q. How did you happen to look on there? A. We go down there so many times in the week, on week days, that I notice it.

Q. And you thought that had something to do with the accident, and therefore that impressed it on your mind, didn't it? A. No, I didn't notice that had anything to do with the accident at all.

Further DIRECT-EXAMINATION by Mr. Parker:

Q. On week days you stop for stuff on that platform? A. Yes, sir; we load on the first car.

Q. And how about on Saturday? A. Don't load at all there.

Further CROSS-EXAMINATION by Mr. Gilson:

Q. About how long did you wait there at Howells? A. I should judge we must have been there ten minutes.

Q. And do you remember what time you arrived at Middletown? A. Why, I think we arrived there about twenty-five, or around there somewheres.

Q. Five twenty-five? A. Five twenty-five.

GEORGE J. HOLMES, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Dr. Holmes, you are a physician and surgeon? A. Yes, sir.

Q. Practicing in this city? A. Yes, sir.

Q. How long have you been practicing? A. Since 1901.

Q. And what college were you educated at? A. College of Physicians and Surgeons, New York City.

Q. Have you had any experience in hospital practice? A. Yes, sir.

Q. What hospitals? A. Roosevelt Hospital, New York; St. John's Hospital, Yonkers; St. Michael's Hospital, Newark; St. Barnabas and the Eye and Ear Infirmary.

Q. Do these hospitals treat surgical cases? A. Yes, sir.

Q. And have you had any experience in surgical cases? A. Yes, sir.

Q. Were you in the surgical wards in those hospitals at any time? A. Yes, sir.

Q. How about your general practice afterwards, have you had surgical cases? A. The usual amount, yes, sir.

Q. Did you, at our request, examine Mr. Dickinson? A. I did, sir.

Q. Can you give us the date of those examinations? A. I believe the first examination was on

April 1, 1910, and the second one was on January 10, 1912, I think.

Q. Have you examined him just lately? A. I examined him yesterday.

Q. Just describe the condition of the left knee that you found. Did you examine the left or right knee? A. I examined both knees.

Q. Can you tell us the result of this examination, as to what it disclosed in relation to any abnormal characteristics? A. Well, at all these examinations I was unable to find anything abnormal—that is, anything that you could see—at any of the examinations.

Q. Were there any signs of injury to be detected by the eye or hand? A. No, sir; not that I saw.

Q. Were there any objective signs? A. None at all.

Q. How was the movement in the joint? A. There was no abnormal movement in the joint. The only thing noticable was the slight limitation due to the pain caused by movement.

Q. Did he complain of pain caused by the movement? A. He did at the first examination, and yesterday likewise, and I think at all these examinations he complained of pain on manipulation, or moving the joint.

Q. How far? A. Why, when you would move it to its full extent in any direction he complained.

Q. When did he complain of pain, at what time of the movement of the joint? A. At the end of the excursion of the movement, either flexion or extension, chiefly flexion.

Q. Was there anything, except from what he said, that would lead you to believe there was anything wrong with the joint? A. No, sir.

Q. Was there any restriction of movement? A. No, I passed the limb through the normal extent of movement and motion in all directions.

By the Court: Q. How is that? A. I moved his leg and flexed his knee, the extent of his knee, through the normal arc, or extent, of motion.

Q. The reason I asked you was this. You used the expression: "limitation due to pain." Was there a limitation? A. Well, I should have said a resentment. On extending or flexing his limb to the full extent of normal extension or flexion he would resent it and there would be resistance at the end. That is what I meant to say in reply.

By Mr. Parker: Q. Have you seen these photographs that have been put in evidence here? A. That is, the X-ray photographs? Yes.

Q. Yes? A. I have.

Q. I show you P-10 and P-12, and ask you whether you understand those photographs (shown to witness)? A. I do; yes, sir.

Q. How does that show a photograph of a leg, or joint? A. This one here in my right hand, P-12, in my judgment, is taken, this being the upper bone, and these the two lower bones here—this is the larger bone of the thigh and these are the two smaller bones of the leg (indicating)—

Q. One of them is the shin bone? A. Yes, sir.

Q. Is it taken from the front or rear, would you say? A. I would say from the front.

The Court: That is P-12.

Q. And what does P-10 show? A. P-10 shows the picture of a knee joint taken from the side, and, in my judgment, from the inner side, viewing it from the inner side.

Q. Now, calling your attention to P-10, you will observe a small thing which looks like a pea there near the rounded part of the bone (indicating).

Do you see that? A. Yes, sir; right here (indicating).

Q. Is there any way of telling where that is? A. Well, it is located behind the outer expanse, or tuberosity, of the lower end of the femur, or thigh bone, behind.

Q. Is it attached to the bone? A. Well, I don't see how anybody could say whether it is attached to the bone or not. It appears to be lying against it.

By the Court: Q. What does "behind" mean? A. Well, I don't know just how I can explain myself. If I could have that bone I could show you what I mean.

Q. The end of the femur is in the joint—that tuberosity that you speak of? A. A portion of it is in the joint only.

Q. When you say this is behind the tuberosity, do you mean that is in the joint? A. Not necessarily. In my judgment, it is not in the joint, but is posterior to the portion of the tuberosity which does not enter into the joint. There is only a portion of the tuberosity which takes part in the joint.

By Mr. Parker: Q. Now, Doctor, have you got a human knee joint that you could show us? A. Yes, sir (produced).

By Mr. Gilson: Q. Is that the woman's leg or the man's leg this time? A. This is the woman's leg, the same one that was here before.

Mr. Gilson: I understood there was some difference between a woman's leg and a man's leg with respect to this particular bone. If that is so, I object to this. I would like to cross-examine for that purpose.

The Court: You may do so.

By Mr. Gilson: Q. Is there any difference between the bones of a woman's leg and a man's leg, Doctor? A. Yes, sir.

Q. Do you know what a sesamoid bone is? A. Yes, sir.

Q. Does that appear in a woman's leg? A. They appear in a woman's leg.

Q. And does it appear in a man's leg, too? A. It may appear in a man's leg. It always appears in both legs.

Q. What is the difference between the bones of a man's leg and a woman's leg, Doctor? A. The difference is chiefly in size and—well, build; that is, in a man, in a male, the bones are heavier; the bony marks, tuberosities, or projections, and grooves and curves are more pronounced; the bone is heavier and the tuberosities are larger; in every sense the bone is more massive; whereas in a woman the entire bone is more slender and its irregularities are less pronounced.

Q. That is about the only difference? A. That is about the only difference; yes, sir; in this bone here that we are speaking of.

Mr. Gilson: I have no objection to the use of that.

Witness: (Producing bone.) This is the left knee.

Q. Let me ask you one more question, Doctor. Are the bones of a woman's leg the same with respect to these bones and these little points that are shown here in Exhibit P-12 (indicating)? A. The same, and the same thing applies there. In a man they are more pronounced. The same thing applies there as it does in any other part of a woman.

Q. That bone that you have there does not show any of those points. Are they broken off, or is

that— A. It does show them, Mr. Gilson; it does show them. There is, no doubt, a change brought about by the boiling of this bone and the use I have put it to.

Q. Worn off? A. That is worn down, but it used to show them, undoubtedly. Now, the question put to me was with reference to the tuberosity (indicating on bone)—

The Court: The questions that Mr. Gilson asked you are at an end, because he finished his cross-examination on the offer.

By Mr. Parker: Q. The claim is made that there were certain little elevations, as I understand, it upon the front of the shin bone, the top, or the rear, and that these tuberosities are broken off in this picture here, P-12—that one of them has broken off and is floating around, and appears as the little pea with the X-ray photograph. I want to know what you have to say about that? A. Why, in my judgment, this object that is seen here (indicating) is what is commonly spoken of, in medical language, as a sesamoid bone, resembling a seed—

By the Court: Q. A letter C? A. No. It went in the record as "C," but I meant to say, and did say, "seed"; it says "C" there, but it is seed, s-e-e-d.

By Mr. Gilson: Q. S-e-ed? A. Yes, sir; because of its shape. And it is my opinion that that is a sesamoid bone, which is common in adult life, and whose place is taken in young people by a cartilage, which turns to bone in adult life and forms a sesamoid bone.

By Mr. Parker: Q. Are those sesamoid bones, as you call them, more frequent in man or woman? A. Why, I think they are more frequent in a male, because of the fact that the male more often does hard labor; for no other reason.

Q. Are they more frequent in a man who has done hard labor during his life or a person who has lived a sedentary life? A. More frequently in a man who has done hard labor.

Q. Is there anything abnormal in a sesamoid bone in the way of giving difficulty or incapacitating? A. None at all.

Q. Does a sesamoid bone arise from any injury? A. No, sir.

Q. Now, just describe the structure of the knee, as to what it is surrounded by, if anything? A. (illustrating with bones.) Well, the knee joint is made up of these bones here. This bone here, of course, does not enter into the knee joint, but portions of the two long bones enter into the joint. The portions that you see here, that are smooth, are those that articulate and rub against the smooth surface on the lower bone. Now, these bones going to make up the knee joint and the knee cap, which is a sesamoid bone, are surrounded, first of all, by what is spoken of as the capsule, which is a thin membrane going up to a point, like this, and coming down along on all sides, and inclosing the joint, and containing within its cavity the small amount of normal fluid which keeps the joint greased and moving freely.

Q. Oils them up? A. Oils them up. And on top of that you see the numerous ligaments, and within it as well are ligaments attached to the spine of the tibia, and running up here and forming ligaments here, called crucial ligaments, because they cross.

Q. There are numerous ligaments, and are these ligaments outside of the capsule or does the capsule overlap the ligaments? A. Most of the ligaments are outside of the capsule; there are some inside.

Q. And within the capsule, you say, there is a mass of watery substance? A. Within the capsule there is a space in which there is a normal amount of the serous fluid which belongs there, as well as some ligaments.

Q. Now, take this little pea-shaped thing which appears in the X-ray photograph, and assuming that that was within the capsule of the knee, can you explain how it would stay up on the upper side of the knee when the person was standing up? A. No, sir.

Q. What would that little pea naturally do? A. Why, it would naturally fall; gravity would cause it to fall; it would fall from its position there and work into the joint, and lodge either in between the bones or in the groove between the attachment of capsule and the ending of the bone here.

Q. If a piece was broken off of the point of the shin bone, where would that piece be with relation to this capsule that surrounds the pea, inside or outside of it? A. Inside of it.

Q. Can you imagine or explain how it could get outside of the cavity? A. The capsule?

Q. Yes, or the capsule? A. Well, the only way it could get outside of the capsule would be by the capsule being torn, and the opening existing there permitting this piece of bone to work out.

Q. What effect would that have upon the watery substance inside? A. Why, it would be followed by very active inflammation in the joint, with marked synovitis, redness and swelling, because the damage would be very great. There would not only be the tearing of the capsule, but the attached ligaments, the attached ends of the cartilages, coming at the end to the bone here, would fall with it and be dragged with it in

through this rent of the capsule, and everything would be disarranged in the joint.

Q. Is there any ligament that runs from that top there? A. This whole surface, with the exception of one spot, right there and here (indicating)—there is only one spot there and here in the center that is not covered by ligaments and cartilage, and there it is covered by the synovial membrane, or capsule. This is the point, as I understand, the piece is supposed to come from (indicating on bone).

Q. The center of the bone—the top of the shin bone? A. Yes. This is what they call a spine, this whole center, and it has two eminences, or points, on top of the spine, one here and here, to which are attached the ends of the semilunar cartilages, or the cartilages padding this surface here—they are heavy cartilages—and in front of this whole spine here, front and back, are attached the crucial ligaments, or cross ligaments, that run from here to here—short ligaments. If that were torn from here, it would be sure to carry with it its attachments, or a portion of it, at least, because in order for a piece to be torn off the pull must come through the ligament.

Q. And how much of a pull would there have to be to tear off the ligament in that way? A. Very great.

Q. Would it have any immediate effect to have this little elevation, with its attaching ligaments, torn off? A. I have just described the resulting effect.

Q. I want to know whether there would be any immediate effect? A. There would be immediate pain and great suffering.

Q. What do you mean by "great suffering"? A. Well, the pain would be very great, very severe.

Q. Would the person be able to move his leg, his knee, without pain? A. No.

Q. Do you think that any such accident could happen and that the person should not notice it for three or four hours after the accident? A. I do not see how it could, unless there are other injuries to mask this one.

Q. Now, you say that this is a sesamoid bone. To what muscle or muscles do you think these photographs show it to be attached? A. It is not attached to any muscle; it lies beneath the head, or one head, of the gastrocnemius muscle, or one of the largest muscles of the calf, the muscle that goes to form the major portion of the calf. It comes up from the calf and is inserted at this point, above that object in question, inserted above that. Now, underneath that there exists a cartilage, which becomes bone in adult life and forms a sesamoid bone, which acts as a fulcrum, rolling underneath that muscle, gives it greater leverage.

Q. How does it compare with the knee cap? A. In the same way—the knee cap is there for the same purpose; it relieves the cartilage there.

Q. And you say that is a bone that often occurs in people that have done heavy work? A. Yes, sir.

Q. Now, assuming that this was a broken off piece of bone that was wandering around in that way within this capsule of the knee, what effect would it have on the man's locomotion?

The Court: You mean on the outside of the capsule?

Mr. Parker: No, the inside of the capsule. The claim is made, as I understand it, that this thing is inside the capsule.

A. Why, a foreign substance like that, of that

size, or any size, for that matter—the larger it was, the worse would be the suffering—would be bound to move about, and at some time or other get in between the opposing surface of the bone and cause excruciating pain, and even throw a man down on the ground, if it came there suddenly, and throw him down, and it would act as an irritant, and cause constant suffering, and greater suffering at the time it got in between the joint.

Q. Do you think such a bone could be broken off in July, 1909, and a man be able to walk around from two to three miles a day, and not have any severe attacks of great pain or excruciating agony from it, for three or four years? In your opinion, could any such foreign substance be in the joint?

Objected to as misstating the evidence.

The Court: (After argument.) It may be a question whether the evidence indicates that the plaintiff suffered acutely. The safest way would be to use the language of the witnesses, which is not at my command, of course. There is, no doubt, evidence of pain and pretty continuous pain.

(Question withdrawn.)

Q. You say you were not able to find any objective trouble with this knee? A. Yes, sir.

Q. Are there any natural ailments that might account for the pain that this man had in his knee, if he had it?

Mr. Gilson: I object to that. A man might have pain in his knee from a number of causes; he might fall and injure a muscle or ligament, or something like that. That is not quite a fair question.

The Court: That is the question that the doctor is asked, I suppose.

Mr. Parker: I was asking if there were any natural ailments that would account for this thing.

The Court: You may ask the question.

A. There are.

Mr. Gilson: Your Honor will note my objection. The point of it is this. If Mr. Parker means by that to get an answer from the doctor, it may be rheumatism or something else, that is one thing. It might be. It is possible for a person to have a pain in the knee from a number of causes; but it is not quite fair to ask that question unless he sets forth the history of the case.

The Court: I do not know that it is asked as a hypothetical question. The doctor has examined the knee, and he has had a statement from the patient of some kind, I suppose, and now he is asked whether there are causes other than that which is mentioned to which that result can be ascribed. I think the question may be asked.

Plaintiff's objection noted as ground for appeal.

Witness: Yes, there are—there could be other causes for his pain.

Q. Will you mention some of them, Doctor?

Mr. Gilson: I object to the question on the ground that a physician can not testify as to possible causes of complaint. If he testified as to what probably causes the pain to this man, that is legitimate evidence, but to say it is possible for a man

to have a pain in his knee from ten different causes is not evidence. I object to it on that ground.

Mr. Parker: I think it is for the jury to say.

The Court: The objection is overruled.

Plaintiff's objection noted as ground for appeal.

(Question read.)

A. One of the most common would be rheumatism.

Q. Is there anything else not so common? A. Well, any inflammation of the structures making up the joint due to disease of any kind would give pain, such as tuberculosis or other forms of disease.

By the Court: Q. Making up what? A. Making up the joint, the structures making up the joint.

By Mr. Parker: Q. He might have tuberculosis in this knee; is that so? A. Not in my judgment; no, sir.

Q. But that is a possibility? A. That might cause pain in the bone.

Q. Coming back to the rheumatism. Is there any way of discovering the presence of rheumatic tendency in a person by an examination of the excreta from the human body? A. Yes, sir.

Q. In what way? A. Why, the examination of the urine frequently discloses a high percentage of acid and a great many uric acid crystals, which commonly go with rheumatic conditions or gout.

Q. Could it be ascertained whether Mr. Dickinson has this rheumatic condition by the examination of his urine? A. Well, I think the only thing you could ascertain would be whether his urine had the look of an individual suffering

with rheumatism; that is the only thing you could ascertain by examining his urine.

Q. Now Doctor, will you tell us, supposing this man had a broken off piece of bone wandering around in his knee joint, within the capsule, and that it had been going on for three or four years, what natural effects would you expect to find from it, resulting from it? A. My experience is that people suffering with a foreign body in a joint, this joint or any other joint, but particularly this joint, because of the weight of the body on it, suffer continuously with pain, but have occasionally and quite frequently attacks of excruciating pain when the foreign body works its way into the joint between the two opposing surfaces of the bone, so severe that it will throw them right to the ground, because there is no warning of its getting there, and that occurs frequently—comparatively frequently—as long as the foreign body exists in the joint. They look forward with great fear to a recurring attack of such a thing.

Q. Well, what are the symptoms of rheumatism as respects this pain? A. Why, a rheumatic--

Mr. Gilson: I object to that, if the Court please, unless the Doctor says that he thinks this is a case of rheumatism. What difference does it make what the symptoms of rheumatism are unless Dr. Holmes thinks this was a case of rheumatism? It might be rheumatism or any other disease; it wouldn't make any difference in this case.

The Court: The decision of the question would not be for the witness, but for the jury, and one of the aids towards a conclusion would be whether the symptoms

which the plaintiff has had correspond with the symptoms which may naturally be attributed to any particular dicease, as in this case, to rheumatism. I therefore overrule the objection.

Plaintiff's objection noted as ground for appeal.

Q. What are the symptoms of rheumatism as occurring in attacks of pain? I want to know the general symptoms of rheumatism, and what the pain of the patient is and his general way of behavior, when there is rheumatism in the joint? A. Why, that depends a little bit on what form of rheumatism you are dealing with. There is not any form of rheumatism without pain some time or other. In an acute attack of rheumatism, whether it is the first attack or whether ti ts subsequent attacks in the course of a chronic rheumatism in a joint, are acute the pain is severe. They may be accompanied by redness, swelling, increased fluid in the joint and disability as a result of the pain, and stiffness. In chronic rheumatism the patient may be free from pain and recover from the attacks that he has had and have a useful joint, or there are cases in which there are the ear-marks of rheumatism existing even where the pain disappears, such as chalky deposits and limited motion, and even swelling.

Adjourned until tomorrow, Wednesday, April 9, 1913, at ten o'clock, a. m.

THIRD DAY

Wednesday, April 8, 1913.

Met pursuant to adjournment.
Present, counsel as before stated.

GEORGE J. HOLMES, resumes the stand in behalf of defendant:

Direct-examination continued by Mr. Parker:

Q. Taking the symptoms in this case, the symptoms that you can see and observe, is there any reason why it should be distinguished from rheumatism—that is, from the objective symptoms? A. I could not be positive of that.

Q. You mean that you could not be positive that it was rheumatism or— A. That it was not rheumatism.

Q. Taking the statement of Dickinson that the night after the accident he found his leg stiff and painful in the joint, and that it has continued at times to be painful and troublesome for locomotion, and that it is a fact that, as he stated to you, in moving the leg, I believe, to its full extent the knee was painful, what do you think is the matter with the knee joint, if anything? A. Well, I could not make a positive statement as to that.

Q. If there had been a strain in the knee at the time that the accident occurred, causing pain the next day, and the man had continued to live an active life, walking from two to eight miles a day, and he at times suffered some pain, and has this difficulty and pain when the knee is flexed to its full extent, would that be evidence of a strain occurring to the knee?

Objected to on the ground that there is no evidence that the plaintiff walks from two to eight miles a day.

The Court: My recollection is as you state it. I am subject to correction by the record, of course.

Mr. Parker: Well, take out "eight miles a day" and make it walking over two miles a day in the performance of his duty and business.

Mr. Gilson: I am not sure that the testimony shows that he walked two miles a day since the accident. Let me ask the doctor a question.

By Mr. Gilson: Q. Would that make any difference in regard to your opinion, whether he could walk two miles a day?

The Court: Mr. Parker is examining the witness.

Mr. Gilson: May I examine him on his qualification as an expert?

The Court: No, I do not think you can break in on Mr. Parker's examination at this point.

Mr. Gilson: Well, I object to the question, then, on the ground that there is no evidence to show that this man walked two miles a day every day since this accident.

The Court: Shall I have the matter looked up, Mr. Parker?

Mr. Parker: I do not know. It seems to me it is practically an introductory question. My recollection is quite positive that it was two miles—that he said he walked over two miles a day. I do not want to take up the time.

The Court: The objection is sustained.

(Question withdrawn.)

Q. Walking around in his business, in an iron manufactory, where he has to go at various times during the day to different parts of the business, thereby exercising the knee?

(Question read as amended.)

A. Yes, sir.

Q. What would be the proper treatment for a strain to the knee? A. Immobilizing the joint, or fixing it so that it could not be moved.

Q. How would that be done? A. By splints, either wooden or plaster.

Q. Just immobilizing the limb to prevent him moving around? A. Well, it would prevent him moving the joint. He would walk stiff-legged if he had a plaster cast on; he could stump around on his stiff limb.

Q. And how long would that have to be continued? A. As long as the acute symptoms lasted, and possibly longer. It would probably be taken off at intervals to inspect the joint, and the physician would use his judgment as to how long it would continue.

Q. What is the ordinary time for curing a strain of the knee by immobilization? A. I would say in the average case it would be kept up in plaster for, say, six weeks or two months.

Q. Being taken out at times and the joint moved? A. I don't believe it would be taken out, unless the swelling demands it, the first three weeks at all.

Q. Would that require any etherization or any surgical treatment at all? A. No, sir.

Q. What, in your opinion, would be the result of such treatment in this case? A. A case treated in that manner?

Q. Yes. A. That depends a good deal on the extent of the injury to the joint but in a large percentage of the cases you would get a useful knee as the result. It is possible, if the injury is great enough, that there would be permanent damage.

Q. Has this man shown any evidence of severe injury to the joint? A. Objectively there is nothing; there is nothing except the claim of pain; there is nothing to be seen or felt.

Q. What would be the symptoms of a severe strain to a joint? A. Well, a severe strain is followed immediately by pains and the other symptoms of inflammation, such as swelling, increased fluid in the joint and redness and active inflammation.

Q. There is no evidence in this case, Doctor, as I understand you, of the swelling or the redness? A. There has been none any time I have seen him.

Q. Nor in the history of the case, as I understand it? A. I have not received any such history.

Q. Do you consider this strain, if any, as a severe strain in this case? A. Not from anything I can find myself.

Q. From anything that you have heard? A. If you want to take the man's statement as to the amount of pain he has had and the length of time it has lasted.

Q. Did you hear his testimony on that subject? A. I am not positive of that; I think I did, but I am not sure of it.

CROSS-EXAMINATION by Mr. Gilson:

Q. Of course, in all cases, Doctor, you have to take the man's statement with regard to the his-

tory of the case, and so forth? You take that into consideration? A. That is taken into consideration.

Q. Always? A. Yes, sir.

Q. Now, will you tell us what the distinction is between objective symptoms and subjective symptoms? A. Why, objective symptoms are those that you can either see or feel. That subjective are those complained of by the patient, that you can not see or feel.

Q. Well, now, when you get a case where there are only subjective symptoms, the X-ray examination is very helpful, is it not? A. Yes, sir.

Q. And, of course, in stout people you can not feel symptoms as well as with thin people? A. It depends on where you are feeling.

Q. For instance, in the back of the knee joint? A. You find very little fat around the knee joint in anybody.

Q. You find heavy muscles, however, do you not—ligaments? A. We find heavy muscles; yes, sir.

Q. Particularly with a man who has used his legs considerably in walking and standing on them? A. That makes a difference in the size of the muscles, although there are very few muscles right in that joint. The ligaments and the insertion of the muscles are there.

Q. As I understand you, you are not in a position to give any opinion as to what the trouble with Mr. Dickinson's knee is at the present time?

Mr. Parker: You mean from all the things that he—

Mr. Gilson: From all your examinations and all the history of the case that you have heard? A. I have a very decided opinion as to what it is not, but—

Q. You can not tell us what it is? A. But as to what is the cause of his pain I am not in a position to make a positive statement.

Q. Well, can you tell us what the probable trouble is? A. I can tell you what it might be.

Q. No, what you think it is, what your opinion is from your examination? A. Assuming that he had an accident and received an injury to his knee?

Q. Yes. A. Well, after these three examinations I have made, I am inclined to believe that there has been a wrench and strain of the muscles, if anything at all, or ligaments, rather, in that knee; but I am unable to find any tear or dislocation of any ligaments or cartilages or pieces of bone broken off.

Q. Of course you could not feel any bone that was broken off in the position that is shown in this Exhibit P-10—you could not feel that, could you? A. You are speaking now of the piece—

Q. This piece that is alleged to have been broken off and shown here and described as a shadow about the size of a pea. A. While it remains in that position it might not be possible to feel it.

Q. And in a case of that kind you would resort to an X-ray? A. Yes.

Q. Now, of course, the purpose of your three examinations was to ascertain what the trouble was with Mr. Dickinson's knee? A. Yes, sir.

Q. You did not suggest to have an X-ray taken, did you? A. It was not done at my suggestion.

Q. And you did not examine his urine, did you? A. No, sir.

Q. So that, in your opinion, is this a case of rheumatism or is it not, or can you not tell because you have not examined his urine? A. I can't say.

Q. Well, now, why did you not examine his urine, if your examinations were to ascertain what the trouble was? A. Why, the reason that I went there to examine Mr. Dickinson for an injury to his knee—an alleged injury to his knee—and not for rheumatism; that is the only reason.

Q. Now, you say a sesamoid bone is not an abnormal condition? A. No, sir.

Q. And therefore it would not inconvenience a man to have one of those bones? A. Not at all.

Q. And, as I understand it, that is sort of a callous formation of a ligament? A. No, it is a bony formation taking place in a normal cartilage. It exists in everyone.

Q. Do you think that such a bony formation would be shown in that shape, as shown in this Exhibit P-10, and described as about the size of a pea? A. Yes, sir.

Q. You think it would be about that size and shape? A. Yes, sir.

Q. Now, do I understand that that is a normal condition in that particular joint? A. That is my opinion.

Q. And a good many people have it, then? A. A good many people have them?

Q. Yes. A. Yes.

Q. It is not usual for people to have them in that particular joint? A. Well, it is not as common as they are in other parts of the body, but—

Q. Is it not very, very uncommon? A. No, I wouldn't say that.

Q. Well, have you any pictures of any description of such a bone in that joint? A. Yes, sir.

Q. Have you them here? A. Yes, sir.

Q. Will you let me see one, please? A. You said "description" this time?

Q. Yes, description of this particular joint, not on the feet or— A. Yes, sir (producing book).

Mr. Parker: Tell us what you are referring to, Doctor.

Witness: I am referring to a copy of Gray's Anatomy, Descriptive and Surgical.

By the Court: Q. What is the edition? A. New American edition.

Q. And the date? A. This is dated 1896.

By Mr. Gilson: Q. Well, that is a very old book, is it not? A. Well, it is the one that I had at college, and I have not purchased another. They do not change very much; that is, they may add other things to it, but they do not change the descriptions of the bones; they do not change. The human race is not changing as fast as that.

Q. I know, but the science of medicine is, is it not? A. This is not medicine; this is a descripton of exact facts.

Q. Surgery? A. Well, that is not surgery, either; it is descriptions of bones.

Q. At that time did they use X-rays—in 1896? A. Yes, sir.

Q. It was in its infancy then, was it not? A. Well, I do not say that it was in its infancy, no

Q. Was it used pretty generally ? A. It was used in the hospitals; it was not used as generally as it is now.

Q. Now, just let me see that, please. A. (Witness hands book to counsel.)

The Court: What is the page?

Mr. Gilson: Page 312.

Witness: I will pick it out for you, to save time, if you want me to.

Mr. Gilson: Yes, if you will.

(Witness indicates in book.)

By the Court: Q. You point out a description

of a sesamoid bone, as I understand it? A. Yes, sir.

By Mr. Gilson: Q. Will you just read the part that you pointed out to me, which you say describes this particular sesamoid bone in this joint? A. I don't think the jury will understand it unless I say what it refers to.

Q. Well, that is what I want. A. It is the description of sesamoid bones, as to what they are and where they occur. It refers to various parts of the body in which they may occur. The one here asked for, and the one that fits and describes the one in the picture, it says here, "One"—referring to the sesamoid bone—"One in the outer head of the gastrocnemius"—the gastrocnemius is the name of the muscle that I spoke of yesterday, running down the back of the calt and being inserted—

Q. Just the description, Doctor, from the book. A. Well, I would like to make it intelligent, that is all.

Q. Well, I just wanted to see what was in the book, and not your comments on it. A. "One in the outer head of the gastrocnemius behind the outer condyle of the femur."

By Mr. Parker: Q. That is the femur in your hand, is it not? A. Yes, sir. Is that all you wish?

By Mr. Gilson: Q. Does that describe this bone and the looks of it? A. There is another reference here, if you would like to have it.

Q. No. Does that describe this particular sesamoid bone and the looks of it in this knee joint? A. Yes, sir.

Q. Does it give any description of its size and its shape? A. This particular one?

Q. Yes. A. No.

Q. Its shape? A. Only in a general description of sesamoid bones, I will read that, if you would like it, as to the sesamoid bones.

Q. No, I do not want that. I understand that sesamoid bones are usually found in the feet and hands; isn't that so? A. They may be found there, too.

Q. But they are usually there? A. They are always found in the knee.

Q. Always? A. Always.

Q. Do I understand, then, that everybody has those sesamoid bones in the knee? A. Everybody has one sesamoid bone in the knee.

Q. Well, that is the knee cap, is it not? A. Yes.

Q. That is on the opposite side to this, is it not? A. Yes.

O. And that is this dark shadow shown in Exhibit P-10, on the opposite side from this small shadow (indicating)? A. Yes, sir.

Q. Now, if everybody has one of those sesamoid bones, why did you not have an X-ray taken of any leg, or have a picture or plate or something of that kind to show us? A. I haven't any money to spend that way; I am not interested in the case. It is up to Mr. Parker.

Q. Nobody suggested that you do that? A. Nobody suggested that to me; no, sir.

Q. Where do you say this sesamoid bone is, inside or outside the capsule? A. Outside of the capsule, beneath the tendon.

Q. Outside of the capsule? A. Outside of the capsule, beneath the tendon of the muscle—the insertion of the muscle.

By the Court: Q. You are speaking now of the sesamoid bone shown in the picture which

counsel holds in his hand? A. Speaking of the one back of the knee.

Q. Shown in the picture which counsel holds in his hand? A. Yes, sir.

Mr. Gilson: P-10.

Q. You say that is outside of the capsule? A. Outside of the capsule.

By Mr. Gilson: Q. Now, you say that, in your opinion, if that were a piece of bone, you think it would fall down, not stay in the same position? A. Yes, sir.

Q. Is it not probable that that might become lodged in some part of the ligaments or muscles or fat and stay there? A. No, sir.

Q. You think it would be likely to wander all around in the knee joint? A. What are you speaking of now, the sesamoid bone?

Q. No, I am assuming that this is a piece of bone, and you think that that piece of bone might wander all around in that knee joint? A. Yes, sir; I think it would wander all around.

Q. You think it would? A. Yes, from time to time change its place.

Q. If it fell down how could it get up between the two bones (indicating)? A. You have got it upside down there.

Q. Then you think if it were a piece of bone chipped off it might fall down and gradually work itself between the two bones of the leg? A. It would do that.

Q. Is there not anything there to stop that, any ligaments or muscles? A. No, sir; because if that is, as you assume, a piece of bone broken off inside of the capsule, there is nothing there to prevent the falling. The only ligaments that exist inside of that capsule are—

Q. But you said it was outside. A. You are saying now a piece of bone broken off inside of the capsule, as I understand the testimony.

Q. No, I understood you to say it was outside of the capsule. A. I say that it is a sesamoid bone outside of the capsule. That would not fall down.

Q. But then, you say, if it is a chip of the bone it is inside of the capsule. It could not get outside, could it? A. It could not get outside without a tear existing in the capsule itself, and thus getting outside.

Q. Does not this picture show whether it is inside or outside? A. Why, in my judgment, it is— Let me have that picture just a minute. (Plaintiff's counsel hands picture to witness.) In my judgment, this picture shows that this body spoken of is in opposition, or against the end of the femur.

Q. The end of what? A. Of the long bone, the femur. It lies against it like this (illustrating). Now, it is absolutely impossible for anyone looking at that picture to say what fraction of an inch or a millimeter there exists between that body and the femur itself.

Q. It looks as if it was right up against it, does it not? A. It may be against it or it may be behind it, as the picture is taken. This is a lateral view.

By the Court: Q. Would that put it inside or outside the capsule? A. It wouldn't do either, your Honor, because it is absolutely impossible for the eye to appreciate whether that is inside or outside of the capsule from the fact as to where it lies against the bone. My conclusion that it is outside is due to the position that it holds above the joint.

Q. What makes you think it is a natural growth? A. That, and also the fact that it holds a position is against the law of gravity.

Q. The picture itself does not inform you whether it is inside or outside the capsule? A. It does only in this way: that it stays at a point above where the attachment of the capsule would be and—

Q. I understand that by a line of reasoning you reach a conclusion? A. Yes.

Q. But regarding the picture merely as something to look at, you could not tell whether it was inside or outside the capsule? A. It may lie against the capsule in this picture or it may lie under the capsule, as far as the picture is concerned, if you just put out of your mind the elevation it has.

By Mr. Gilson: Q. Is there anything in the picture to show the capsule? A. You could not take a picture of the capsule.

Q. What is the capsule? A. Nothing but a thin, serous membrane, with the ligaments lying on top of it.

Q. Would that not support and hold a chip of bone? A. Permanently in that place?

Q. Yes. A. No, sir.

Q. Why not? A. Because the inner surface of the capsule is extremely smooth and bathed in an oily fluid, and a free piece of bone chipped off of any part of the joint would move as the joint moves, and change its position, no matter where it was; it would change from that position to another.

Q. Then, as I understand you— A. And I do not see how it could possibly stay up there, when it is up at the highest point possible in the joint, if it is in the joint. I don't think it is.

Q. Then, as I understand you, this pea-shaped shadow in this picture has nothing at all to do with Mr. Dickinson's knee—the condition of his knee? A. That is my opinion.

Q. And it is your opinion, from the history of the case and your examinations, that there was probably a sprain of the muscles and ligaments at the time of the accident, and that that causes the present condition? A. Of course, that is a good deal of assumption on my part, but that is the only way I could possibly explain Mr. Dickinson's symptoms.

Q. Would it not be very unusual, Doctor for such a sprain to last this length of time? A. I don't think so, particularly as Mr. Dickinson has been about on his knee.

Q. Been what? A. About on his feet, and has not had the knee immobilized and kept quiet.

Q. You understand that this accident happened on July 21, 1909? A. I believe it did; yes, sir.

Q. Almost four years ago? A. Yes, sir.

Q. And you think that a sprain would last as long as that and that his knee would be in the condition that he describes at the present time? A. It might be.

Q. Now, in rheumatism, Doctor, that does not come on all of a sudden, does it? A. Oh, yes.

Q. Does it come on in one night the first time? A. An attack can come on over night, yes; it can come on very suddenly.

Q. Ordinarily does it not come on gradually? A. There are cases where there are rheumatic twinges of pain preceding severe attacks.

Q. And with rheumatism there is more or less swelling as a rule? A. In chronic rheumatism, or where there is only a slight affection, there might not be any appreciable swelling; there frequently is not.

Q. A case of four years standing would be—
A. How long?

Q. Almost four years standing. It would be what you would call a case of chronic rheumatism, would it not? A. I would call it that, yes.

Q. And in that kind of a case you would expect to find more or less swelling in the joint? A. I don't think I would make a positive statement to that effect.

Q. But you would expect to find it? A. You frequently do, yes.

Q. Did you find at any of these examinations any swelling in Mr. Dickinson's knee? A. I did not.

Q. Now, I understand you to say that this same kind of pains and the stiffness of the joint might also come from tuberculosis of the knee. Is that correct? A. I was asked what might produce pain in the knee joint, and that was one of the things I mentioned.

Q. Well, you did not mean that you thought that there was tuberculosis in that particular joint? A. I am very positive there is not.

Q. There is not? A. So far as I can make out from my own examination.

Q. It would be the same situation as a person with a headache; it might come from a great many causes? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. If I understand you, Doctor, one of your reasons why you think this is not a broken off piece of bone is that in such a case it would be within the capsule and it could not stay at the top of the cavity which the capsule incloses, because the force of gravity would bring it down to the bottom; is that right? A. Yes, and the motion of the joint would also dislodge it.

Q. Do you see any evidence in looking at P-12 of any part of the bone being broken off—that is, of the upper or lower bone of the knee—which would account for this alleged broken off bone that is shown in the other photograph, P-10? A. No, sir; this picture, to my mind, is an absolutely normal picture of a knee joint.

Q. Those little spikes shown in the picture appear to be in the front. Where are they in fact? A. About midway between the front and back of the bone, possibly a little bit more to the back at this point (indicating on bone).

Q. There are two spikes shown in that bone that you have there, are there not? A. Yes, sir.

Q. And they are different sizes? A. Yes, sir.

Q. As a matter of fact, in examining bones of that character do you find any variation in the size and height of those spikes among different persons? A. Yes, sir.

Q. How much of a variation? A. Oh, fractions very small fractions of an inch or a millimeter; it is only slight. They vary, of course, as bones vary in different people.

Q. No two bones, then, of different persons are exactly similar? A. They may not be; no, sir. As I said before, these do not show as high as they do in that joint, because this is stripped of its ligaments and capsule and it has been boiled.

Q. Has the science of anatomy been at all affected by the X-ray—the anatomy of dead persons? A. No, sir.

Q. These researches, and so forth, that are shown in standard books of anatomy, where are the facts acquired from? A. From the dissecting room, on dissecting the dead body, and examining minutely the bones and putting the description down on paper as they are found.

Q. Would the X-ray throw any light on that subject any more than has been thrown already? A. None at all.

Q. A dead body? A. No, sir.

Q. Now, you were going to read something about a sesamoid bone there that you were stopped from reading. Will you kindly give us that information? A. Well, I have two references—

Mr. Gilson: I object to that on the ground that you can not get the book in evidence that way. On cross-examination I asked him to read one sentence that he pointed out. Now, if he is going to read generally what this author says about sesamoid bones, it seems to me it is incompetent.

The Court: I do not understand that to be the question. The book was brought in upon cross-examination. The witness was asked to point out a description. I have not got the precise question on my notes.

(The stenographer reads from the record.)

The Court: The question that introduces this matter was the question, "Have you a description or picture of a sesamoid bone in this particular joint?" That is, the knee joint. And then, having in mind a description rather than a picture, the witness consulted the book and read a statement mentioning, as one of the places in which a sesamoid bone was found, the knee joint. That was not the expression, but it was located with reference to a muscle that was within the immediate vicinity of the knee joint. I think that is a fair statement of the testimony. Now, what is the question you want to ask, Mr. Parker?

Mr. Parker: I wanted to ask what he was about to read when counsel asked him to give a description of the sesamoid bone. As I understood, that was the question.

The Court: Not a description of the sesamoid bone, but a discription of the sesamoid bone in this joint. That is the question.

Q. Is there anything in that book there of a description of the sesamoid bone in the knee joint? A. Yes, sir.

Q. Will you read it? A. I am to confine myself to this particular location, as I understand it?

Q. Yes, sir. A. Unless I am permitted to read what goes before, I will have to simply say, "One in the outer head of the gastrocnemius muscle, behind the outer condyle of the femur."

By the Court: Q. That is what you read before? A. Yes, sir. Now, there is another description of the same thing.

Q. Where is that? A. This is on page 521, under the heading of a description of the gastrocnemius muscle, which goes into detail, of course, as to where it arises. Now, if you want me to read that I will. Then below, under the same heading, speaking of the relations of this muscle to the surrounding tissues, there is a description here which fits this particular case.

By Mr. Parker: Q. Let us have that description.

The Court: What page is that on?

Witness: Page 523.

A. "The tendon of the inner head"—speaking of the inner head of this gastrocnemius muscle—"corresponds with the back part of the inner condyle"—referring to this bony point here (indicating)—"from which it is separated by a

synovial bursa," which is a sac of membrane containing some fluid, "which in some cases conflicts with the cavity of the joint and tendon of the outer head, a sesamoid fibrocartilage, where it plays over the corresponding outer condyle. One is occasionally found in the tendon of the inner head."

Q. Can you translate that for us? A. Well, in substance it means that there is a cartilage, a fibrous cartilage, existing in the tendon of the gastrocnemius muscle, as it plays over the bony surface, which becomes in some cases bony. And it is not only found there, but it is also found on the back of the opposite condyle, on the opposite side, lying against it and underneath the tendon of the muscle.

Q. Would any fibro sesamoid bone, as is described in that book, appear on the X-rays in this case in the position where this pea-shaped shadow is? A. It would, yes.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. I thought you said that everybody had these sesamoid bones in these locations? A. Oh, no; I said everybody has a sesamoid bone in the knee, meaning the knee cap.

Q. In the knee cap? A. Yes.

Q. But it is very unusual to have this kind of sesamoid bone in the back of the knee cap, is it not? A. It is not a common thing as compared with the number of human beings.

Q. Is it not very unusual? A. I don't know that I can state that.

Q. Does not Dr. Gray say that it is only occasionally found? A. Yes, he does.

Q. You agree with him about that? A. Yes.

Q. So that occasionally found there would mean

that it is seldom found? A. I am speaking now of the bone. The cartilage is always there, but it only in some cases is bony. I think I have said that right along.

Q. I misunderstood you; I thought you said it was usually found there—these sesamoid bones; not the cartilage, but the sesamoid bone? A. I may have mixed you by saying it was a usual place for sesamoid bones to be found.

Q. But you agree with Dr. Gray that it is only occasionally found there? A. Yes.

By the Court: Q. Usually there in cases where it exists? A. Yes, sir; always there.

By Mr. Gilson: Q. Well, you say, Doctor, that all this information comes from dissecting bodies in the hospitals? A. Yes, these men that write a book like that do so with the subject in front of them.

Q. Well, why did you not bring one of those bones to show us instead of all these bones? A. Which bone?

Q. Sesamoid bones. A. I have sesamoid bones here.

Q. No, one of these found back of the knee joint. A. Well, this particular skeleton, or bone, that I have does not happen to have one in that location; as it comes to me it didn't happen to have any sesamoid bone in that location.

Q. I suppose you have them and see them in the different institutions? A. Well, you can see them, yes.

Q. You could have gotten one, of course—borrowed one? A. Why, yes, I suppose so. I didn't try to.

Q. Did it not occur to you that we would rather see that one that you knew there was a controversy about than a lot of other bones you knew

there was no controversy about? A. No, I don't think it did occur to me.

Q. Referring to this Exhibit P-12 which is the print from the plate Exhibit P-11. In using these X-rays you usually take the plate and not the print, because the plate shows better than the print always, does it not? A. If you understand reading a plate, yes.

Q. Now, I show you Exhibit P-11, and ask you to tell me whether you see anything in that plate with respect to those points that looks to you abnormal? A. No, sir; nothing here.

Q. Does not one of those points show very much smaller than the other one? A. You mean as to its elevation?

Q. Yes. A. It does appear to be lower as shown in the picture.

Q. And it shows more prominently in the plate than it does in the photograph? A. Well, I don't know as there is any difference; I don't think there is any difference.

Q. You think it is about the same? A. About the same. This is a little blacker (indicating).

Q. And you do not think that that difference is because the top of it has been chipped or broken off? A. I do not.

Q. Is that the normal condition or is that on account of the position of the X-ray? A. Well, it is the normal condition, but the position in which the joint was and the perspective from which it was taken might make it appear higher. For instance, if you are looking down on it or if the joint were bent in taking it, it would possibly make it more exaggerated. But there does not seem to me to be anything abnormal about the condition here.

By the Court: Q. Doctor, which do you think is more difficult, to take an X-ray picture or to interpret it? A. Why, your Honor, I think that if one understands photography that it is not difficult to take an X-ray picture. The interpretation of an X-ray picture is one that is set with a number of pitfalls. You find many people who interpret a picture different; one will see one thing and another another thing, and one will magnify one thing more than another; in other words, the interpretation of an X-ray picture is fraught with danger.

Q. It is subjective? A. Yes, sir.

WALTER S. WASHINGTON, sworn in behalf of defendant:

Direct-examination by Mr. Parker:

Q. Dr. Washington, are you a practicing physician in this city? A. I am.

Q. Where did you have your education? A. I am a graduate of Trinity, Toronto.

Q. How long have you practiced in this city? A. I have practiced twenty-five years in Newark and thirty-seven years all together.

Q. Have you had any practice in surgery? A. I have.

Q. Are you connected with any hospital? A. Yes, I am on the consulting staff of St. James Hospital now.

Q. And you have been in other hospitals? A. Not in a surgical capacity. I have been connected with St. Michael's a great many years ago.

Q. Do you treat surgical cases? A. I do.

Q. The claim is made in this case that there was an injury to the knee joint of Mr. Dickinson—his

left knee. Will you describe the knee joint and how it is protected and arranged? A. The knee joint connects the two longest and largest bones in the body, and is a hinged joint, and without the surrounding coverings would not be well protected; but it has very strong ligaments, which appear on the outside and connect the thigh bone with the shin bone—very strong ligaments on the inner side and very strong ligaments in front, and an especially strong and wide one in the back, and two of what are spoken of as crucial ligaments, which are two short, broad ligaments, one beginning just here and going up here and the other one beginning posterior and coming to the inside (indicating on bones)—those are short, flat ligaments, which unite the two bones together—and other ligaments and tendons, which are on the outside and inside, form a very strong protection to the joint, and while they admit of extending the leg and flexing it, there is very little side motion. The result is, with that, and the knee pan in front, the joint is especially well protected from injury, and although it is a very complicated joint, when it is injured the injury is very likely to be in the tendons or the ligaments surrounding the joint.

Q. A capsule is spoken about surrounding the joint. Will you describe that? A. The capsule ligament is not of as much protection to the joint as the other ligaments of which I have spoken. The capsule ligament does not entirely surround the joint, as has been said, but it falls in between these other ligaments and unites with them and in the rear it reenforces them posterior, but at the front and on the sides it falls in between the other ligaments.

Q. What is the effect of this capsule falling in and the ligaments themselves as containing anything within the cavity so formed? A. Well, it protects the inside of the joint, the synovial membrane which lines the joint, and which, if the injury is at all severe, is followed by inflammation.

Q. That is called synovitis? A. Synovitis, yes.

Q. What is there in this capsule and within these ligaments in the way of substance there? A. The only things that are contained on the inside are the crucial ligaments—the others a- the outside—and some small ligaments, like the transverse, which is a matter of no moment; but those two ligaments which are in between here, as I have stated, they are surrounded by the synovial membrane; that covers them entirely. They are on the inside of the joint; they are not on the outside.

Q. Is there any water or oil in them? A. Yes; that is, the normal secretion of the ligament, which acts as a lubricant for the smooth moving of the joint.

Q. It keeps it greased? A. Yes.

Q. Do you know what would be the symptoms and effect on the knee joint of a loose body in the joint? A. Yes, I have seen many cases of loose cartilage in the joint, and one symptom that is always present, and there is never any exception to it, is when there is a loose piece floating in the synovial membrane of the joint on the inside. and in walking the piece gets in between here, and there is a catch. A man will be walking along and with that in there probably he can walk as well as anybody else, but as soon as it gets in between the end of the bones it locks them, it catches, the joint is absolutely stiff, and there

is excrusiating pain. The man may fall down or may not; but there is a locking of the joint; it is impossible to move it; you can not bend it or do anything at all, until after a time the piece floats out from there into the rest of the membrane, and one can walk. Now, then, that attack, or that catch, is accompanied by inflammation, pain and fluid; that is, that sets up a synovitis, which makes the knee larger, and it is accompanied by tenderness and pain and inflammation. That will subside after a little time, and one may go about again, until a similar thing occurs again. Each time that that occurs there is more inflammation, more fluid in the joint, until finally the attacks will become so that the man will become peramently disabled. There will be such a condition of inflammation and fluid in the joint that it would be utterly impossible to use it at all.

Q. Now, Doctor, did you examine Mr. Dickinson? A. Yes, sir; I did.

Q. When did you examine him? A. Day before yesterday.

Q. Have you heard his testimony in Court A. Most of it.

Q. Did he make any statements to you of the trouble or difficulty in the examination you made? A. He did.

Q. What did he tell you? A. He told me that he always had pain in the joint; that he has now; that the pain was in front, on both sides of the knee cap, and considerable on the inner side, behind, and also on the outside, but there is never any time that he does not suffer pain of some degree; that he had never had a catch; that he had fallen down from the severity of the pain, but he had never had a catch, and at the time he fell down he could bend the leg just as well as he

ever did, so far as that particular thing is concerned, so that he has never had any symptoms of a foreign body in the joint. It would be impossible for Mr. Dickinson to go around for four years with a bone loose in the joint without its catching him some time. He also complains of the pain on motion. He has full extension and he has the normal amount of flexion of the joint, but when you flex it back beyond a right angle, then, I think, it causes him considerably more pain.

Q. When you put it away up like that (illustrating)? A. Yes. That would cause Mr. Dickinson a good deal of pain. He has none of the symptoms, according to his statement—I have no reason to disbelieve what he says—but the full extension and complete flexion would cause him considerable pain.

Q. Can you give us an opinion of what is the cause of the plaintiff's present condition in regard to his knee? A. Well, there are no objective symptoms of any injury of any kind whatever. He has motion, as I have spoken of; the size of the limb is precisely the same as the other one—the measurements; there is no fluid in the joint; there is no synovitis, and there are no objective symptoms of any trouble whatever with the joint; that is, if you look at it and examine it and manipulate it, there is nothing that can be determined. Judging from the history and from the statements and the subjective symptoms as given by Mr. Dickinson, I think he had an injury to the tendons, the ligaments, or the soft parts on the outside of the knee joint; that that injury would be, as we speak of it, a strain or a sprain, which means some laceration, as a rule. Aside from that, Mr. Dickinson has had no treatment—what I mean is,

no proper treatment—in my judgment, for the trouble that he had at that time. He has been going about on the limb, and the most important thing in an injury to the knee joint, as it is anywhere else, is rest. That is the first principle of surgery; it is rest. If Mr. Dickinson had been taken and put to bed and insisted on staying there, and had his limb, or his knee joint, kept absolutely still by some apparatus, either a splint or plaster, or something of that character, until the pain had disappeared, I haven't any doubt that he would have been perfectly well; but Mr. Dickinson did precisely the thing that he ought not to have done and precisely the thing that would keep up the pain in his knee joint. It never had rest; it never had a chance to properly get well.

Q. Is it practicable to treat him now and cure the knee? A. I don't know. Mr. Dickinson has been four years going about on this knee joint, and while I think undoubtedly rest would do it good, I am unable to say whether even rest, at this late date, would be a complete cure for it. I think it could be helped a good deal, it could be made a good deal better; if he would submit to the proper kind of treatment and care; but it will never get well if he continues to go about on it, as he does now and as he has done for the last four years.

Q. What would be the treatment for it now? A. It would have to be absolutely at rest, and a number of other things, like electricity and massage and bathing, and things of that character, which are usually and commonly used for treatments of that kind.

Q. Suppose it was put in a plaster cast, would not that give it rest? A. Yes, but I would not put it in a plaster cast now, because he should

have massage and electricity, and that could not be done within a plaster cast. He should have a posterior splint fitted to his knee, which could be taken off for the application of these things that I have spoken of.

Q. And he would not have to have a plaster cast put on, but only a splint? A. Yes, a posterior splint would answer.

Q. Now, Doctor, are you familiar with X-ray photographs? A. I am.

Q. Have you looked at these (shown to witness)? A. I have.

Q. I call your attention to a shadow on P-10 looking like a little pea. Can you tell us what that is? A. Yes, I think so.

Q. Interpreting that thing, what do you think that pea-like shadow is? A. That is a sesamoid bone in the outer head of the large muscle of the calf of the leg. The large muscle in the calf of the leg with the one beneath it form the big tendon at the heel. The outer one is attached, or, at least, it begins with the two heads, one called the outer head, which is attached here, and the inner head, attached here (indicating on bones). Those two heads come down and unite in the large muscle, which with the one below are attached to the heel, form that large tendon at the heel.

Q. What we call the calf of the leg? A. The muscle is the calf of the leg, but the tendon is up here (indicating)—these two tendons, one on each side—and when it goes down it unites with the tendon of the big muscle beneath it, and forms this large tendon at the heel. This is a sesamoid bone (indicating), this little—it is present in all cases, but not developed in the bone. It is called a fibrocartilage. It is somewhat different to bone, but it plays in a tendon and develops where it

passes over some hard, smooth surface, so that you would have it—you may have the sesamoid bone in this head here, or you may have one on the other side, and you may have a large number of people in which the fibrocartilage is there, but there is no bone there. In working people, or men that walk a good deal, this little bone will develop from the fibrocartilage. It then becomes bony substance, but not precisely of the same character as the other bones. That is what this is. It is precisely in that location, where the tendon comes down over the outer condyle of the thigh bone, right here. Here is where the tendon begins, up here; that is where it starts, up there; that is where it is attached (indicating).

Q. At the beginning of the curve on the right-hand side? A. Yes. (Indicating). Here it is on the bone, and here, where the tendon begins, above the round, smooth surface, the little bone develops in the tendon as it passes over this smooth surface here.

Q. Is that within or without the cartilages, ligaments and capsules containing the fluid which oils or greases the joint? A. It is outside, entirely outside. It shows distinctly. There is absolutely nothing outside of that except soft parts. The synovial membrane, of which you speak, and the capsule, which is immediately outside of it—the inner lining of the knee joint, as with other joints, is the synovial membrane—immediately outside of that is the capsular ligament, or other ligaments, and they are close to the bone. As shown here, they are close to the bone. This is entirely outside of it.

Q. Did you examine those X-ray photographs, and can you tell us whether there is any evidence of anything being broken off from the lower or

upper bone of the leg? A. No, nothing whatever. (Indicating.) The spine of the shin bone is here. The height of these two surfaces here—there is always a little surface in between, but the height of these varies; sometimes one is higher and sometimes it is lower; they are not always precisely alike, and in this case the one on the inner side is lower than the one on the right. It would be impossible to break that off; there is no possible injury, except a crushing force, something which destroys the knee joint entirely, which crushes this whole head, that can break that off. That is on the inside of the joint and it is the most protected part of the joint. There is no strain on it, because these two crucial ligaments, which are very short, strong and powerful, are behind, attached here. They are not attached to these little tubercles; they are attached to the periosteum and then the synovial membrane comes up to them and surrounds them. There is no possible way to get at those. Before those would be injured by a strain or an ordinary injury, you would have to destroy all this on the outside. Naturally, this would be unprotected here, but to get inside of the joint, it is impossible. I have seen a great many cases of fracture that went through here and broke them off, but never here; I never heard of it. I suppose if, by any possibility, it was broken, in order to get into the joint, it has to go through the synovial membrane to get to the joint. It is outside of the membrane; it is not in it. You would have to make a hole through, break through it, break that little piece, right in here between these two. That would disable a man immediately. That is the first place it would be.

Q. The books say that these sesamoid bones are occasionally found in the knee joint. Are they more frequently in hardworking, full developed, stalwart people than they are in the ordinary man and woman? A. They are, and they are more frequent in men than they are in women.

Q. What is Mr. Dickinson's physical development? A. Very good indeed.

Q. Does it show evidence of his having worked hard? A. Mr. Dickinson is a well preserved man, a strong, well man physically aside from this injury to his knee joint that he complains of, and I suppose he has been a hard working man all his life. He said he walked an average of eight miles a day, which is pretty good going.

CROSS-EXAMINATION by Mr. Gilson:

Q. Do I understand you, Doctor, to say that it is absolutely impossible to break those two little bones? A. Absolutely impossible from a crushing injury. A severe injury would either crush that bone or would break off the whole of the tuberosity, not that little particular point, but the whole of it. I have seen that; I have seen both of them broken in a railroad accident, here (indicating), a fracture through this; it would take in this.

Q. Take off the whole of the top of the bone? A. Yes. I have seen both broken in a patient I had a few years ago. The fracture went through this way, or it went through this way (indicating). And the injuries as given in surgical text books are injuries of that character, but there is no known case of a simple fracture of either one of these little tubercles.

Q. That you have come across? A. I never heard of such a case and never read of one, and it

is impossible, from the protection they have in the joint in every way for it to be done, unless there is a very severe injury to the whole of the head of that bone.

Q. Suppose those two bones are forced down together and bent back so that the upper bone crunches on the lower bone, would not that be likely to break off the top of those points? A. You mean the thigh bone forced down?

Q. Yes, forced down onto the shin bone with tremendous force. A. Well, you see, that would be all right.

Q. That would do it? A. Yes, but that would injure the other; you couldn't—

Q. I understand that, but it would break off the top of those two points? A. It would break the whole top. It would have to do more than that. What I mean is that there is no form of ordinary injury that would break off these two little parts themselves. You would have to have a severe injury to the rest of the joint in order to do that; you could not confine it to those two particular parts.

Q. Well, there was not anything to show whether the rest of that bone or the top was injured or not in this case, was there? A. Oh, no.

Q. It does not show in that photograph? A. Well, the fact that Mr. Dickinson could go there and walk on it, and all that sort of thing, is good enough evidence without anything else. There is no indication here or in the history—there is no evidence that the rest of the bone was hurt, or any part of it, because he went about on it all the time. He could not have done that if he had been injured that way.

Q. Do you think that is a more severe injury than the breaking of the knee cap? A. Which?

Q. The one you have just described, the injury to the top of that bone? A. Well, if it were possible to break the little top of that bone, I would not consider that at all to be compared to a fracture of the knee cap.

Q. A fracture of the knee cap is a very serious and delicate thing, is it not? A. Well, it is not a serious matter; I never saw anything serious about it. It is a fracture that lays one up for some length of time; sometimes you do not get good union, and all that sort of thing; but I never saw anything serious about it.

Q. Would you not call it serious to permanently disable a person? A. Yes, certainly.

Q. Does it not often happen that a fracture of the knee cap permanently disables a person? A. I do not think it often does, not properly taken care of, nowadays, under modern antiseptic surgery. I think that under modern antiseptic surgery fractures of the knee cap are very amenable to successful treatment.

Q. In that kind of injury people do walk around on the leg right after the accident, do they not? A. You mean after it is broken?

Q. Yes. A. They do not walk very well; they can not extend the leg.

Q. It is impossible? A. Well, it might be, if it were a longitudinal fracture, but not a transverse fracture with separation; they can not do that.

Q. Well, some kind of a fracture? A. There is a possibility of there being a very small piece broken off, a fracture in that direction, longitudinally (indicating), in which one could walk, but if you fracture it across here, you can not walk then.

By the Court: Q. You are speaking about the knee cap? A. Yes. That is the knee cap here

(indicating). But it is possible a small piece might be chipped off on either side here, but if you have a fracture which involves the bones transversely or the ligaments transversely, then your patient is disabled immediately.

By Mr. Gilson: Q. But, you see, you and I are arguing at cross purposes. You are confining your answer to a particular kind of fracture, and I am not doing that with my question. My question was whether a fracture of the knee cap, which, as I understand, is a serious injury—whether it is possible for a person to use the leg and walk around? A. Well, you are asking me to give a specific answer to a general question, which I can not do.

Q. Well, with some kind of fractures it is possible to walk around? A. Oh, yes, it might be a trival matter; it might be a little one, as I say, any of the kinds I speak of; but any fractures which involve the knee cap transversely—

Q. It would not be possible? A. It would not be possible to walk; they could drag the leg; they could not walk.

Q. And you think it would not be possible to walk if either of these two little points on the top of the shin bone were broken off, either one of them? A. I do, from the fact that they could not be broken off without severe injury to the rest of the joint.

Q. You say that this photograph, Exhibit P-10 shows distinctly that the sesamoid bone, as you call it, is outside of the capsule? A. Yes.

Q. What is it that shows in that picture so distinctly? A. Why, the shadow shows completely back of the bones, completely back of the bone. If you can see there, you can see that it is in apposition

with the rounded surface of the condyle of the thigh bone, that it is not inside. If it were broken off and floating, then it would be in closer, hidden; but here you can see where the normal membrane—that is, the synovial membrane—and the capsule ligament should come. They do not come away out around there (indicating).

Q. Why is it that the entire cartilage did not harden instead of just that round spot? A. I could not tell you that. You will have to go back a few thousand years. These cartilages have been in the human body as long as we know that there has been a human body. We did not know anything about them four or five thousand years ago, but since anatomy has been developed, as it has in the last few hundred years, and dissections have taken place and descriptions given, they have been found. We did not know anything about them before that.

Q. Does it not strike you as peculiar that just a little spot on that cartilage should harden and form into bone without some reason? A. Well, now, "without some reason." You are getting into a physiological subject. The facts are anatomical; they are historical; they have been so always. Now, why is your nose in that shape? I do not know. You will have to go back to someone else to find that out, or to find out why my nose is a different shape to yours.

Q. Well, that is not the case here at all. A. Oh, yes, it is anatomical. We know by dissection that these sesamoid bones form; we know that they do no form in some people and that they do in others. Now, in a general way, we do not know why that is so. We know that in some people, rugged people, people who work hard, they are more apt to form than in delicate people; but

we do not know why. I may have a sesamoid bone; I do not know; and you may have one. I do not know why I do not have it or why you have it, except that these things come, and they are not present in all cases.

Q. Then you can not tell, from your own experience or any authorities you have read, why it is that a cartilage forms a bony part instead of the entire cartilage? A. Oh, no, that is a mere matter of development, a detail of development, in each individual case. I do not know, nobody does. All we know is that they are there in some people and in some people not; but the cartilage is there; the fibrocartilage is there in every person, from which they are developed.

Q. Do you not think that, if it is possible that that is a piece of bone that is chipped off, it should be held by that cartilage instead of floating all around? A. It would not be loose cartilage then at all. As far as Mr. Dickinson is concerned, if he had a piece that was fastened and located in that particular way, that would never cause him any particular trouble; but he is suffering from something, he is having pain. It can not be from a little piece stuck on, no; that could not be; it must be something more than that.

Q. But assume, for the purpose of the question, that it is a little piece of bone lodged in between the end of that thigh bone and the cartilage that you say runs down from that to the other bone; would it not be possible to have it held there by that cartilage instead of dropping down, falling down or floating around? A. No.

Q. Why? A. Well, the natural tendency by gravity would be for it to drop to the bottom of the joint. In the second place, there is no evi-

dence of a synovitis—that is, an inflammation of the joint on the inside, that is accompanied by fluid, and all that sort of thing—in this case. So that this floats around on the perfectly smooth, soft surface on the inside. There is nothing t attach itself to; it simply slips around, or slide around, and slips on that, but on the inside.

Q. You are familiar with X-ray pictures, I suppose? A. Well, I have seen a great many.

Q. You would not say you are an expert, I presume? A. No.

Q. Do you see any evidence of inflammation in that Exhibit P-11 (shown to witness)? A. I wouldn't say that I am expert enough to say that, Mr. Gilson. My statement is predicated on the examination I have made of it.

Q. Did I understand you to say, Doctor, tha Mr. Dickinson told you he had always had pain in that knee? A. Only since he was injured.

Q. Not before that? A. Oh, no.

Q. He told you, in fact, that he never had any pains before the accident? A. Oh, yes, his knee had been perfectly well until the time of the accident.

RE-DIRECT-EXAMINATION by Mr. Parker:

Q. These were his statements to you? A. Yes, they were his statements to me.

Q. And they were not given to you for the purpose of prescribing for him? A. No.

RE-CROSS-EXAMINATION by Mr. Gilson:

Q. Your examination was not for the purpose of treating him of course? A. Oh, no.

Q. It was merely for the purpose of testifying in the case? A. Yes. The conversation was a perfectly free one; Mr. Dickinson was perfectly

open in telling me just what he felt and where it hurt him, and all that sort of thing. It was for no purpose except to inform me how the knee joint was.

Q. The history of the case? A. Yes, that was all.

Q. And, of course, you testify a great deal in these cases, Doctor? A. Yes, I have testified quite a number of times.

Q. Well, you testify regularly for the trolley company, do you not? A. Yes, quite often.

Defendant rests.

Mr. Gilson: I desire to offer in evidence the following New York reports containing cases on the question of the duty of a railroad company in crossing a public highway. The first case is Vanderwater v. New York & New England Railroad Company, 135 New York, 583. Shall I cite what the cases hold?

Mr. Parker: No, I object to that.

Mr. Gilson: The next case is Bailey vs. Jourdan, 18 New York, Appellate Division, 390, also 46 New York Supplement 399; Richardson v. New York Central, &c., Railroad Company, 45 New York, 846; Petrie v. New York Central, &c., Railroad Company (decided in 1901), reported in 63 New York, Appellate Division, 467, also in 71 New York Supplement 866; Nelson vs. Long Island Railroad Company (decided in 1905), reported in 109 New York, Appellate Division, 627, also in 96 New York Supplement 246; Coyle vs. Long Island Railroad Company, 33 Hun, 37, at page 41; McGrath v. New York Central, &c., Railroad Company, 63 New York, 528; Friess vs. New York Central, &c., Railroad Company, 67 Hun, 205 also

Citation from N. Y. Law Report in evidence

reported in 22 New York Supplement 104, and affirmed in 140 New York 639; Brown v. Rome, &c., Railroad Company, 1 New York Supplement 286, affirmed in 121 New York 669; Stewart v. Long Island Railroad Company, 54 New York, Appellate Division, 623, also 66 New York Supplement 436, and affirmed in 166 New York 604; Bleyle v. New York Central, &c., Railroad Company, 11 New York State Reports 585, affirmed 113 New York 626; Henavie vs. New York Central, &c., Railroad Company, 66 New York 280; Cordell vs. New York Central, &c., Railroad Company, 64 New York 535; Hermans vs. New York Central, &c., Railroad Company, 14 New York Supplement 319, affirmed in 137 New York 558; all holding virtually the same as our cases with respect to the duties of a railroad company, especially where they create or maintain extraordinary dangers or obstructions which substantially or materially interfere with the view, and virtually the same as our line of cases on that same subject.

And on the question of contributory negligence, first with respect to the duty of a traveller on the highway—

The Court: Is there any difference between the New Jersey and New York law as to contributory negligence?

Mr. Gilson: I do not think so; but I understood Mr. Oakes to make some sort of a distinction.

With respect to the duty of a traveller to stop, in addition to looking and listening, I cite Neudoeffer v. Brooklyn Heights Railroad Company, 9 New York, Appellate Division, 66, 41 New York Supplement 50; Lewis v. Long Island Railroad Company, 162 New York 52; Judson v. Central Vermont Railroad Company, 158 New

Citation from N. Y. Law Report in evidence

York 597; Ernst vs. Hudson River Railroad Company; 35 New York 9.

On the question of sudden fright and emergency, I cite Coulter v. American Merchants' Express Company, 56 New York 585; Salter v. Utica, &c., Railroad Company, 88 New York 34; Heath v. Glen Falls, &c., Railroad Company, 90 Hun, 560, 36 New York Supplement 22; Hoyt v. New York &c., Railroad Company, 6 New York State Reporter 7; Remer v. Long Island Railroad Company, 48 Hun, 352, 1 New York Supplement 124 affirmed 113 New York 669; Nickelsberg v. Second Avenue Railroad Company, 11 New York Miscellaneous, 432, 32 New York Supplement 130; Twombly v. Central Park, &c., Railroad Company 69 New York, 169; Hefferman v. Barber, 36 New York, Appellate Division, 163, 55 New York Supplement 418; Wright v. Boller, 3 New York Supplement 742, affirmed 123 New York 630; Thiess v. Thomas, 77 New York Supplement 276.

Then on the question of damages, the right to recover for fright, and so forth, Lofink v. Interborough Rapid Transit Company, 102 New York, Appellate Division, 278, 92 New York Supplement 386.

Mr. Gilson: If your Honor please, I offer in rebuttal these reports of New York cases, on pages 323 to 326 inclusive. I do not suppose it is necessary to read them.

The Court: That is a legal matter. I will consider them.

Plaintiff rests.

Motion for direction of verdict

Mr. Parker: If your Honor please, I desire to make a motion to direct a verdict for the defendant in this case on these grounds: That negligence of the plaintiff contributed to the injury, and it so clearly appears; because no negligence of the defendant appears, and because the defendant is entitled to a verdict on the clear weight of evidence.

The Court (after argument): On this motion to direct a verdict for the defendant what we have to consider is the evidence as to the circumstances of the accident. The medical and surgical testimony, which has occupied us for so long a time, need not be considered on this motion because it throws no light on the question.

This book which I hold in my hand contains all the evidence in the case at the last trial this is the testimony that went up to Trenton, and this is the evidence which the Supreme Court con sidered. This book has served at this trial the purpose of convenience. All the testimony on be half of the defendant, the railroad company, has been read from this book, and nothing else has been introduced, except some medical testimony, perhaps. I do not know that even that has been changed; but that would not affect the question of the testimony which the defndant relies on now as to the circumstances of the accident. All the testimony whih bears now on the negligence of the defendant company and on the contributory negligence of the plaintiff has been read from this book in the hearing of the jury, and is just the same evidence which, on behalf of the de-

fendant, was considered by the Supreme Court and that is true of the plaintiff's evidence, with the single exception of the testimony of Mr. Dickinson, who has testified here on the stand. All of the evidence on behalf of the plaintiff except his has been read from this book, and if Mr. Dickinson's testimony had been read from this book, instead of being delivered from the stand, this Court would have had before it exactly the same testimony on both sides which the Supreme Court had before it.

What conclusion did the Supreme Court reach? They say: "At the present trial"—that is, at what is now the last trial—"the question of contributory negligence was properly left to the jury; but, in view of the additional testimony introduced by the defendant, the verdict upon this question was against the weight of the evidence." And the verdict, which was in favor of the plaintiff, was therefore set aside, on the ground that the weight of the evidence favored the defendant.

If the testimony before this Court now was exactly the same as it was before the Supreme Court, it would be my duty, I conceive, to follow that opinion and to reach the same conclusion; for, if I did not, the inevitable result would be a mistrial. The case would go up on a rule to show cause and when it came before the Court they would say, "How does this case differ from the case when we last considered it?" The answer would be, "It does not differ at all." "Well, then, how is it that the Circuit Court did not follow the decision of the Supreme Court on precisely the same testimony?" And the verdict would be set aside.

So that the question is—and that is the question on which I wanted to hear counsel and on which counsel have favored me—whether the testimony of Mr. Dickinson, delivered orally on the stand, differs in any essential respect from the testimony that is printed in this book, and which was before the Supreme Court, and whether it differs, not in mere phraseology, but whether it differs so essentially as to make a new case. If it does, then this decision has no binding force; but if it is the same case, if there is no essential difference between what he testified to before and what he testifies to now, why, then it is impossible to avoid the conclusion that it is the duty of this Court to allow that decision. I have considered everything that counsel have said for the purpose of showing that the oral testimony of Mr. Dickinson puts a new phase on the case, but I am not convinced that it does. It seems to me to be substantially the very same testimony as it was before, and I can not conceive that there would be the slightest probability that the Supreme Court, if it were called on to review this case again, would not find that it was substantially and essentially identical with the case on the last trial.

Taking that view of the case, I take it to be my duty to grant this motion and direct a verdict for the defendant.

Plaintiff's counsel objects to this decision of the Court, and his objection is noted as ground for appeal.

The jury accordingly renders a verdict in favor of the defendant.



Exhibit P-1

Exhibit P-2

Exhibit P-2



Exhibit P-2

Exhibit P-3



Exhibit P-3

Exhibit P-4



Exhibit P-4

Exhibit P-5



Exhibit P-5

Exhibit P-6



Exhibit P-6

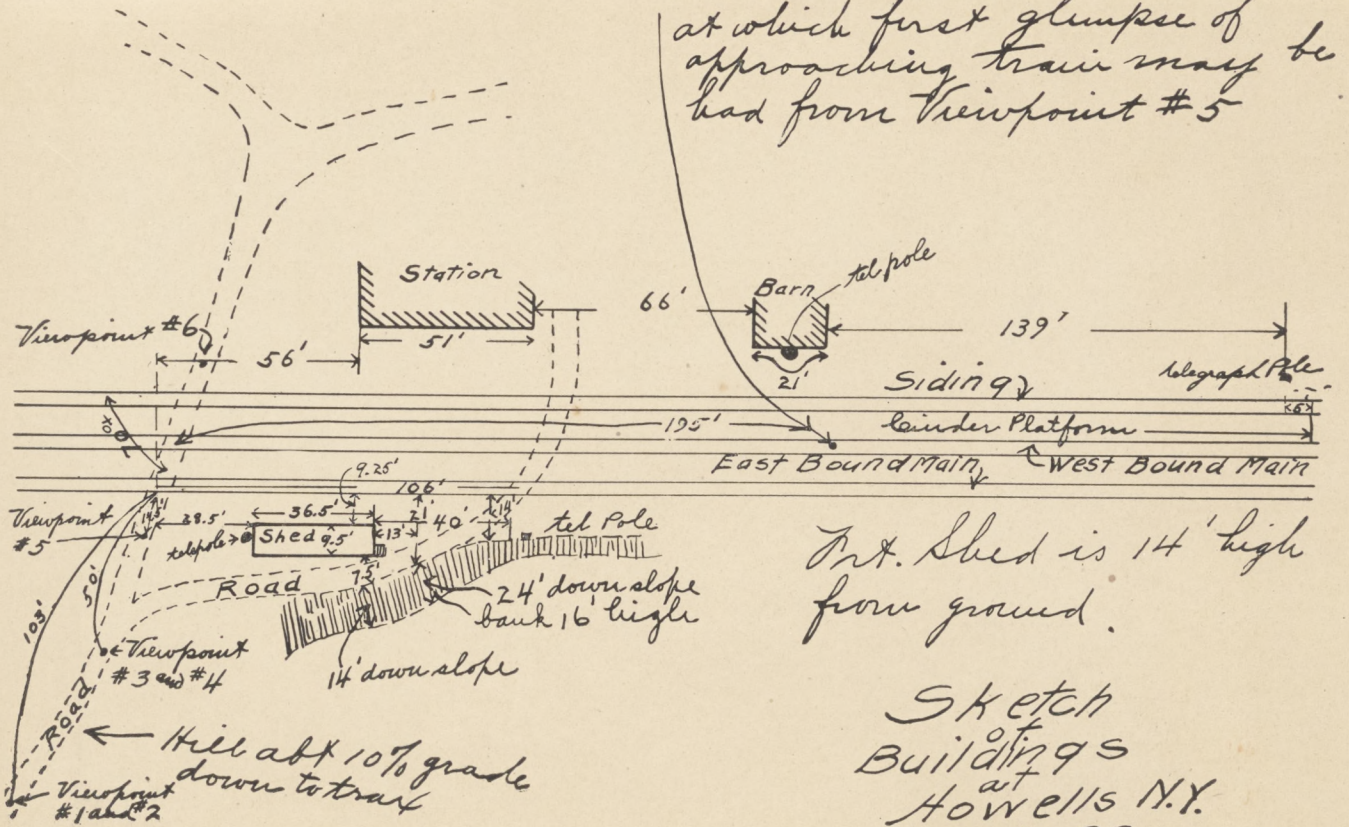
Exhibit P-7



Exhibit P-7

EXHIBIT P8

EXHIBIT P8


Point on West Bound Main track at which first glimpse of approaching train may be had from Viewpoint #5
Station
Viewpoint #6
56'
51'
66'
Barn
tel pole
139'
21'
Siding
telegraph Pole
195'
Cinder Platform
East Bound Main
West Bound Main
9.25'
106'
Viewpoint #5
28.5'
36.5'
Shed 9.5'
telephone
13'
21'
40'
tel Pole
Road
75'
24' down slope
bank 16' high
14' down slope
103'
50'
Viewpoint #3 and #4
Road
Hill abt 10% grade down to track
Viewpoint #1 and #2
Frt. Shed is 14' high from ground.
Sketch of Buildings at Howells N.Y. Erie R.R.

Exhibits P-10 and P-12



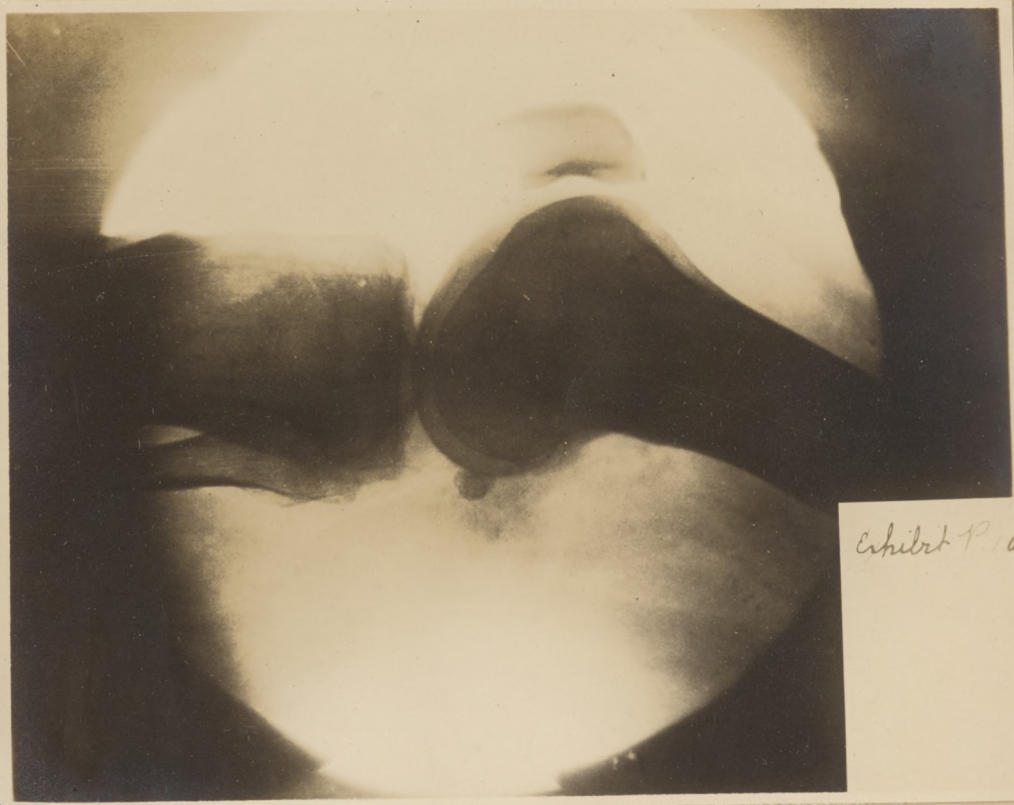


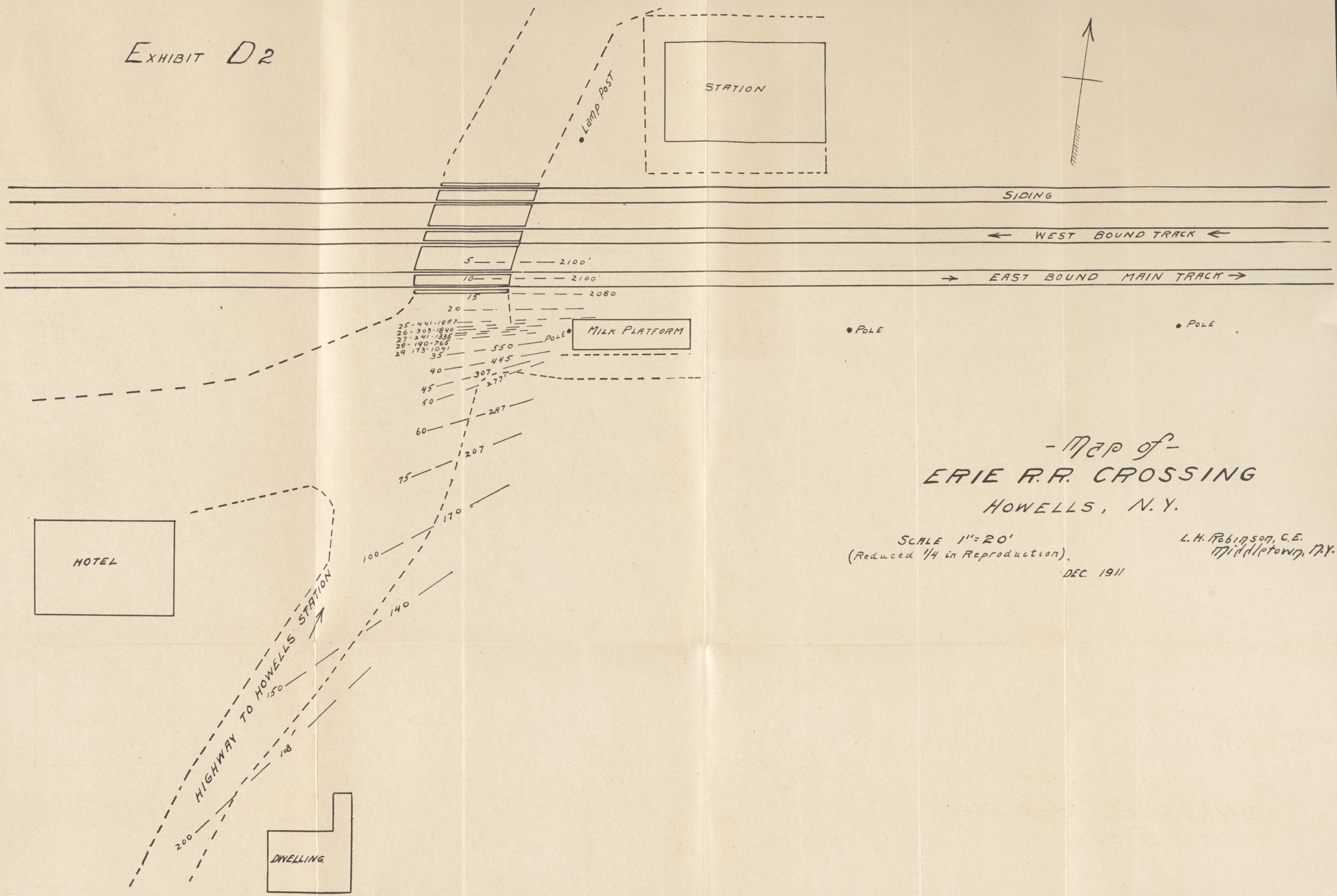


Exhibit D-1

Plate No. 4.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 40 feet from near rail of West-bound track.
Extent of view up the track, 447 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.

EXHIBIT D2



- Map of -

ERIE R.R. CROSSING

HOWELLS, N.Y.

SCALE 1" = 20'
(Reduced 1/4 in Reproduction).

DEC. 1911

L. H. Robinson, C.E.
Middletown, N.Y.

NOTES



Exhibit D-3

Plate No. 8.

Date of taking, Sept. 2, 1909.
Time, 4:55 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 37-3/4 feet from center of West-bound track, or 35 ft. 3 in. from near rail of West-bound track.
Extent of view up the track, 405 feet.
Height of lens from auto seat, 30 in.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-4

Plate No. 9.

Date of taking, Sept. 2, 1909.
Time, 4.50 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 41 ft., 3 in. from center of West-bound track, or 38 ft., 9 in. from near rail of West-bound track.
Extent of view up the track, 345 feet.
Height of lens from auto seat, 30 in.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-5

Plate No. 10.

Date of taking, Sept. 2.
Time, 4:45 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 50 ft., 9 in. from center of West-bound track, or 48 ft., 3 in. from near rail of West-bound track.
Extent of view up the track, 278 feet.
Height of lens from auto seat, 30 in.
Views taken by A. H. Still. Address, Middletown, N. Y.



Exhibit D-6

Plate No. 7.

Date of taking, Sept. 2, 1909.
Time, 5 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 32-3/4 feet from center of West-bound track, or 30 ft., 3 in. from near rail of West-bound track.
Extent of view up the track, 540 feet.
Height of lens from auto seat. 30 in.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-7

Plate No. 12.

Date of taking, Sept. 2.
Time, 4 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed on depot platform.
General view of crossing, looking South.
Views taken by A. H. Still,
Address, Middletown, N. Y.



Exhibit D-8

Howells, N. Y.
April 27, 1910.
Camera placed 23 feet from near rail of West-bound track.
View looking East.
A. H. Still.

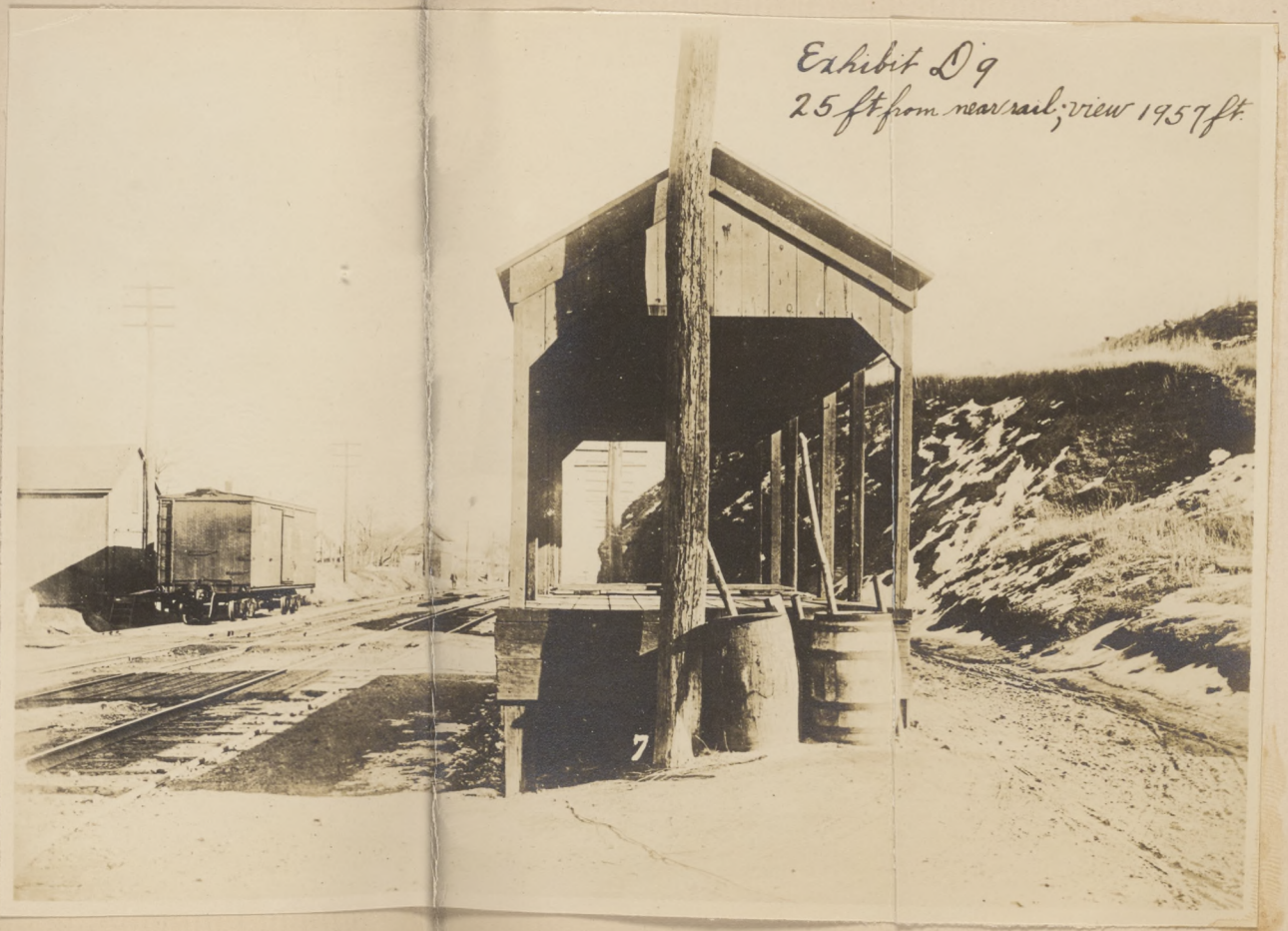


Exhibit D-9

Plate No. 7.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 25 feet from near rail of West-bound track.
Extent of view up the track, 1957 feet.
Height of lens from ground, 5 feet.
View taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-10

Plate No. 6.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 30 feet from near rail of West-bound track.
Extent of view up the track, 1057 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-11

Plate No. 5.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 35 feet from near rail of West-bound track.
Extent of view up the track, 557 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-12

Plate No. 3.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 45 feet from near rail of West-bound track.
Extent of view up the track, 307 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-13

Plate No. 2.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 50 feet from near rail of West-bound track.
Extent of view up the track, 277 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.



Exhibit D-14

Plate No. 1.

Case of Dickinson vs. Erie.
Date of taking, Dec. 9, '09.
Time, 12:15 p. m.
Place, Howells, N. Y.
Weather, Fair.
Camera placed 60 feet from near rail of West-bound track.
Extent of view up the track, 247 feet.
Height of lens from ground, 5 feet.
Views taken by A. H. Still, Address, Middletown, N. Y.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

JOEL DICKINSON, *Plaintiff below & Appellant.* *vs.* ERIE RAILROAD COMPANY, *Defendant below & Respondent.*	*On Appeal from Supreme Court.*

Brief for Erie Railroad Company, Respondent.

This was a crossing accident at Howells, New York, July thirty-first, nineteen hundred and nine. It has been before the Circuit Court for trial three times.

At the first trial there was a non-suit which was reversed by this court, *Dickinson* vs. *Erie R. R.,* 81 N. J. L., 464.

At the second trial there was a verdict which was set aside by the Supreme Court.

At the third trial the court below directed a verdict for defendant.

The plaintiff now alleges error and seeks a new trial.

The plaintiff, driving a small runabout automobile, attempted to cross the Erie tracks at Howells, New York. The railroad tracks run generally east and west, the road on which plaintiff was traveling, north and south. Plaintiff was traveling northwardly. The

first track to which he would come was the eastbound track. The track beyond that was the westbound track, and still further north was the third or switch track. The train which caused the accident was going west, came from the east on the middle track, and from the plaintiff's right hand side, as he faced the track.

About 150 feet from the first track the plaintiff began to descend a hill, but at about twenty feet from said track the roadway became practically level. He had a perfect view of the track to the left or west, from a point 150 feet from the first track, which view was continuous up to the track and beyond, and so he could see any train coming east.

To the right the view was obstructed by a bank of earth running parallel with the highway. The character of this bank and its obstruction is seen in plaintiff's Exhibit P. 3 at 103 feet; P. 4, 50 feet; Ex. P. 5, 14½ feet from nearest rail. At the foot of the bank was a wagon road used by vehicles to reach the freight shed on the north side of said road. In the space from the bottom of the bank slope to the tracks, defendant had erected an open milk shed used only for shipment of milk and produce, chiefly lettuce.

It is claimed that the milk shed obstructed the view by itself and because there were barrels or milk cans on the shed platform which prevented a view through the shed.

Plaintiff's surveyor testified that without looking through the shed the views at the following distances from the westbound track were (page 25)

at 22¼ feet	800 or 900 feet
" 24½ "	600 feet
" 25½ "	400 feet

accurate surveys testified to by defendant's surveyor is that up to 23 feet there is a view of about 2,000 feet (P. 165), see Ex. D. 8; at 25 feet there is a view of 441 feet (P. 166), see Photo D. 9.

Through the shed there was a view

at	26	feet	1840 feet
"	27	"	1335 "
"	28	"	765 "
"	29	"	1041 "
"	35	"	550 "
"	40	"	445 "

Plaintiff testified (P. 25/20) that when he got to the second post of the shed, or the post nearest the railroad, he saw the train (P. 66/23). He could stop his car instantly (P. 62/10). The locomotive was then about 120 feet away.

Mrs. Dickinson says that they first saw the train when the front wheels of the car were over the first rail (P. 128-9) (P. 125/15). It was then very near. About 120 feet away (P. 130/10).

Mrs. Gardner says (P. 134/10) they had gone beyond the shed where she saw the train.

The following distances are important:

Between the north rail of the eastbound track and the south rail of the westbound track is (P. 24, line 5)	8 feet 3 inches
The two rails of which are 2 inches wide (P. 24/16) or in all	4 inches
The eastbound track is in width (P. 24/30)	4 feet 9 inches
From the south rail of the eastbound track to the platform of the milk shed is (Map Ex. p. 8)	9 feet 3 inches
The post set back from the line of the milk platform	4 inches
Distance from south rail of westbound track to posts of milk shed	22 feet 11 inches

It is only after a traveler is more than 23 feet from the westbound track that the milk shed begins to obstruct a perfect view (Ex. D. 8). It is plain from Ex. D. 8 which shows a view at 23 feet of 2000 feet

one foot back, would certainly have 1000 feet view for at 25 feet there is substantially a perfect view (Ex. D. 9).

Plaintiff's surveyor admits that at 24½ feet a traveller could probably see 600 feet. The proof, on all hands, shows that at 25 feet there is substantially a perfect view.

Our argument is in brief

That it is the law of this state that a driver of horses, if he has a clear view of the track at 27 to 30 feet, is guilty of contributory negligence if he doesn't observe a train.

When a driver is 30 feet from the rail his horses' heads are 10 feet in front of the driver's eyes, or 20 feet from the track.

Dickinson's eyes were less than 6 feet from the front of his automobile, and he could certainly lean forward to within 5 feet of the front of his automobile and was bound to do so.

When therefore Dickinson sitting in his automobile was 25 feet from the track, with only 5 feet of automobile before him, he was in that respect exactly in the same position as the driver of horses, who is sitting 10 feet behind his horses' heads, at the distance of 30 feet from the track.

But an automobile is in perfect control. To hold horses with their heads 20 feet from a fast moving train is difficult and dangerous. Some allowance ought to be made for that.

We think that to have the front of an automobile 10 feet from a moving train is far less dangerous than to hold horses with their heads 20 feet from such train; that at least 10 feet allowance should be made for that fact; and that a view of 25 feet for automobiles is practically the same as a view at 35 feet for horses.

We contend that Dickinson should have observed the train when his eyes were 25 feet from the west-

bound track; when he had a full view and when the front of his automobile was 7 feet away from the first track.

We distinguish this case from that formerly before this court, and in which it was held that an "emergency" existed on the grounds that it now appears that Dickinson first got a sufficient view, unobstructed before his front wheels came on the south rail, of the east-bound track; that it now appears that his view, not looking through the shed, was sufficient, and that the court now has the alleged obstructions on the shed placed so that it is apparent that there was also a good and sufficient view through the shed, and further that there was no "emergency."

This case differs from the former case in that when he saw the train he was perfectly cool and collected.

His direct testimony was as follows (P. 48, line 30):

> Q What effect did the seeing of this train as you passed the second post, as you call it, of this shed have on you? A Didn't have any.
>
> Q Well, you were perfectly cool and collected? A Just the same as I am now.
>
> Q It did not frighten you at all? A Not a bit.

On page 49, line 5, he says

> "As soon as I saw the train I jumped out and left it."

and line 14

> "I tried to stop it and then jumped out and left it."

He knew perfectly well what track the train was coming on (see page 36) where counsel tries to get him to say he was confused about what track it was on and he positively declines to say he didn't know. He had passed the crossing three or four times before the day of the accident. He worked near a railroad and of course knew trains ran to the right of one another.

Why then didn't he stop in a place of safety? He says "I tried to stop it" and then jumped. We think he did not have the machine under control and failed in some attempt he made to stop it. So failing and as the machine was carrying him into a place of danger he jumped.

We do not have to argue that Dickinson was negligent after he saw the train, to convict him of contributory negligence. According to Mrs. Dickinson when plaintiff saw the train his front wheels were half way on the first track. The front of his automobile had progressed about sixteen feet from the thirty-foot view, eleven feet from the twenty-five foot view.

We charge that he was negligent in getting into this place of "sudden peril." His dilemma, if it existed, was the result of his own negligence.

The rule (Sudden Peril Rule), however, cannot obtain where the danger is one incident to the place, its use or surroundings, for such danger is not a sudden peril within the meaning of the law, but a danger to be anticipated and guarded against by proper care and precaution. Ell. Rail S. 1173:

> "The peril which will exonerate the traveler from the exercise of that care which the law requires of travelers at railroad crossings must be, in its nature, an extraordinary one, in the sense that it is not such as ordinarily pertains to railroad crossings, for, as matter of fact and of law, such crossings are places of great danger, exacting from the traveler care and caution." Ell. Rail, *supra.*
>
> "Where the sudden peril is attributable to the negligence of the plaintiff he cannot successfully assert that he is absolved from the duty to exercise due care. If the plaintiff voluntarily goes into a place of danger without exercising the care required by law, he is guilty of negligence, although after so getting into the place of danger

he exercised his judgment to the best of his ability to escape from the danger." 3 Ell. Rail, 1174, and cases cited.

Our cases of "sudden peril" are cases where the plaintiff was no way in fault. In *Buchanan* vs. *West Jersey and Seashore Railroad,* 52 N. J. Law, 265, the plaintiff, standing on a railroad platform, was threatened by a beam projecting from a freight car. In *Tuttle* vs. *Atlantic City Railroad Co.,* 66 *Id.,* 327, plaintiff walking on a public street, was suddenly confronted by a freight car that had been derailed and was thrown across the street. In *Davis* vs. *Central Railroad,* 38 Vroom, 660, the plaintiff was penned in between crossing gates.

As to the case cited by plaintiff *Weston* vs. *Pennsylvania Railroad,* 45 Vroom, 485. The facts in this case are not clear. It appears that there were obstructions to the view at less than thirty feet, for the plaintiff had to crouch in the wagon to get a better view (page 486). The roadway and the track came together at an acute angle (page 485), so that though the distance of the driver from the track was thirty feet, the distance to the point of danger was shortened by reason of the angle at which the highway and railroad crossed.

Dobbs vs. *West Jersey and Seashore Railroad,* 75 Atl. Rep., 905:

In this case the plaintiff was driving a horse and buggy and the clear view was only after the driver got within twenty-two feet of the track. This is too little distance for a horse but ample for an automobile.

Danskin vs. *Pennsylvania Railroad,* 76 Atl. Rep., 975.

In this case the clear view was only when the horse was within twelve feet of this track on which the train approached.

The cases cited as to the driver not being always compelled to stop have no application.

The reason underlying these cases is that to stop a horse close to the track may increase the danger. But if there is smoke or transient noise, the driver must stop. *Keeley* vs. *Central Railroad,* 64 N. J. Law, 355; *Merkle* vs. *Erie Railroad.*

This court in reversing the non-suit granted at the first trial of this case did so apparently on the theory that plaintiff could not obtain an unobstructed view of the train until the front wheels of his auto were upon the south rail of the eastbound track and that at that time the train was seen by plaintiff rapidly approaching a short distance away. If such were the facts as proven in this case, the emergency rule might be applicable had plaintiff been driving a horse. But he was not and the facts have not so been proven.

Plaintiff knew the situation at this crossing, knew the number of tracks, knew which was the eastbound, which the westbound, had been over the crossing three or four times in the prior week, and had driven over it a few hours previous to the accident, regarded it as a dangerous crossing. To him the possibility of a train rapidly approaching from the east was not a possibility, it was a probability. To him it was not a sudden peril, it was a highly probable one.

Verdict was rightly directed for Defendant.

The court below may have too loyally endeavored to follow the decision of the higher court.

The decision of the Supreme Court which the court below followed reads:

Per Curiam—A non-suit ordered at the first trial of this cause was set aside upon error (81 Atl. Rep., p. 104).

At the present trial the question of contributory negligence was properly left to the jury but in view of the additional testimony introduced by the defendant, the verdict upon this question was against the weight of the evidence.

The Judge presiding at the trial below refused to non-suit also because he wished to follow the higher court (pp. 156-7-8) although he had once non-suited on the same evidence. The plaintiff's case was in no ways improved after defendant's testimony went in. Whatever case he had made up was absolutely overthrown. The court below ought to have directed a verdict and would have done so, irrespective of the decision of the Supreme Court. His decision was right. The reasons he gives may be disregarded. And to set aside his decision and to forbid the Judges of the Circuit Court, setting as Supreme Court Judges, to control the administration of justice before them in a plain and proper case is to take away trial by judge and jury and to prevent Circuit Judges and Supreme Court Justices, trying cases at circuit, from seeing that justice is done. In a plain and proper case the court should direct justice to be done and direct a verdict. A Supreme Court Justice, sitting at circuit, is no Justice of the Peace forbidden to non-suit or direct a verdict. If the law contended for in this case is established a Justice of the Supreme Court

would hardly be more important, in the trial of a case than a Country Squire.

The law in this State is that "if evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled." *Crue* vs. *Caldwell*, 52 N. J. L., 215-218.

In *Horandt* vs. *Central R. R. Co.*, 83 Atl., 511, this court set aside a verdict directed under similar circumstances because "a substantial conflict of testimony was presented." In *Uvalde Co.* vs. *Central Union Co.*, 86 Atl., 424-6—this court went, we submit, outside the question necessarily involved in the case, and said, "To warrant a non-suit or the direction of a verdict, something more than the mere weight of evidence must be involved. A verdict that is against the weight of evidence is sufficiently controlled by the subsequent power of the court over its own verdicts: if concurring verdicts on the same evidence will not be permitted to stand, it is because *something more* is involved."

What is the "something more"? Turning to *Brown* vs. *Paterson Paper Co.*, 69 N. J. L., 474, cited in the Uvalde case, we find this "something more" defined, as follows:

1. Disregarding the force of the whole range of the unimpeached testimony.

2. Palpable failure to give proper force to the unimpeached evidence in the cause offered by the party against whom the verdict is found.

3. Giving to the testimony of the prevailing party a force to which, under the law and facts, it was not entitled.

4. The verdict controlled by prejudice, partially or passion and not based upon weighing of the conflicting testimony.

To hold that in such cases the trial court should not direct a verdict but should allow the case to be carried back and forth for hearing on rules to show

cause and re-trial, is for the Supreme Court to refuse to allow its associate justices to guide and enforce the administration of justice. The court should at once end the litigation even when there is "testimony" which may be claimed to support a verdict.

For instance in a crossing accident case, a witness swore that on the day of the accident the view of the track was obstructed by a thicket of bushes so close to the track that they must have scraped the cars as they passed. The witness further swore that this thicket was cleared away immediately after the accident.

The defence produced a photograph taken a few months before the accident showing that there was nothing growing within thirty feet of the track. The Judge, now a Judge of this court, directed a verdict because of contributory negligence having been clearly demonstrated by the photograph in opposition to the weight of the lying witness's testimony. And he did right.

II.

The Plaintifi should have been nonsuited or a verdict directed because contributory negligence clearly appeared.

The present case differs from the case before this court in *Dickinson* vs. *Erie R. R. Co.*, 81 N. J. L., 465, in that this court then held that "it was open to the jury to find that the view to the east was so obstructed that plaintiff could not see the approaching train until the front wheels of his automobile were on the first or eastbound tracks."

The Court of Errors further held that under these circumstances it was a jury question as to whether "an emergency existed and whether the traveler used due care."

Dickinson testified that when he first saw the locomotive it was about 120 feet away (p. 62). The map shows that there is a view around the corner of the freight shed when twenty-five feet from the track, of 441 feet.

Plaintiff's surveyor swears to the same thing (p. 25, ll. 1 to 30).

From the front of the front wheels to the back of the front seat was seven feet, one inch (p. 39, l. 30). Dickinson's head was at least one foot or eighteen inches from the rear of the seat. He could easily have brought his eyes within five feet of the front of his automobile. There was a distance of thirteen feet four inches from the south rail of the second track, on which the train came, to the south rail of the first track.

Dickinson could have got the view of at least 441 feet, when twenty-five feet from the track and the front of his automobile was over six one-half feet south of the first rail.

So in the present case the evidence is not that Dickinson's first view was when his front wheels got on the first track, but his front wheels were at least six feet from the first track. Look at the view at twenty-five feet (Ex. D. 8).

In the former case the alleged obstructions by barrels, &c., on the shed were not placed. In this case they are definitely placed. Dickinson pointed out the alleged obstructions as between the first and second posts on the south side of the shed (p. 77, top 72, l. 30). The testimony is plain that this stuff was on the side of the freight shed away from the railroad and at a distance of at least eight feet from the nearest end of this shed.

Now look at plaintiff (Exhibit P. 5) taken at the distance of fourteen one-half feet from nearest rail, or twenty-eight one-half feet from the westbound track.

How could freight placed as Dickinson says have obstructed that view?

How could it have obstructed view at thirty feet of over 1,000 feet (Photo. Ex. D. 10)? How much would it obstruct view at thirty-five feet (Photo. Ex. D. 11)? or the other photo exhibits.

The only way in which freight could obstruct the view at less than thirty feet from the track was for the freight to be piled close to the near end of the freight shed and toward the railroad. Dickinson places it away from the railroad track and away from the near end of the shed.

As to corroboratory evidence of obstructions Mrs. Dickinson says, "Well, I think there was—I couldn't swear."

Mrs. Gardner cannot place the obstruction (p. 136, l. 30) she testifies positively (p. 137, l. 9) that she saw the obstructions when she went into Middletown early in the afternoon. She is then asked, "But you did not see them when you came back again"? and answers, "I thought I did" (p. 137, l. 13); she is asked "But you can't swear positively that they were there when you came back, can you? A Well, I should say yes—I did not have time to go and examine everything on it."

The evidence for the plaintiff as to obstruction on the freight shed, is that there was something there, definitely placed by Dickinson in such a manner that it did not interfere with the view when Dickinson's eyes were thirty feet from the track. At that point the front of Dickinson's motor was twenty-five feet from the first rail of the westbound track or eleven feet from the first track.

The views looking through the shed were (p. 169):

at 25 feet	1957 feet
" 26 "	1840 "
" 27 "	1335 "

at 28 feet	765 feet
" 29 "	1041 "

None of these views would be interfered with by the stuff piled on the freight shed as placed by Dickinson, and his is the only evidence. His evidence was that the stuff was away from the railroad track and away from the end of the shed.

There was thus this clear and undisputed evidence of contributory negligence appearing at the last trial that was not in the evidence at the first trial.

III.

The proof of Defendants demonstrated that there were no obstructions on the freight shed.

The proof is that twenty-five minutes after the accident the shed was clear of freight. This is shown by a photograph produced by plaintiff (Ex. P. 5) and taken certainly within twenty-five minutes of the time of the accident.

The photograph is blurred by a person walking between the lens and the milk shed. There is a curious reduplication of this man's person, but otherwise the photograph is a perfect representation of the milk shed at that time, and shows nothing upon the milk shed platform. Alongside of the telegraph pole standing at the west end of the shed there is a cloudy white place upon the photograph. This might be mistaken for something on the milk platform, but careful observation will disclose that it is entirely behind the milk shed and that it is foliage under bright sunlight, similar to foliage shown on the bank, and having the appearance of snow. Counsel for plaintiff at the argument of this case before the jury admitted that this was foliage behind the milk shed and that the milk shed at the time the photograph was taken was clear of all articles or materials standing upon the platform.

The proof further shows that the only use made of this milk shed was for shipping milk and the country produce raised in that vicinity. This produce at this time of the year was lettuce, and shipments were made on every day of the week except Saturday. The accident occurred on Saturday afternoon. It was midsummer. No train stopped at this milk shed to take up produce on Saturday afternoon. It is absurd to think that lettuce should be shipped on a hot Saturday afternoon to New York, remaining there over Sunday, when it could picked and shipped on Sunday and be ready for Monday's market.

The only article shipped from this milk shed on Saturday afternoon was milk in cans. The proof shows that six cans were brought there after the accident and were the only cans of milk shipped. We produced the three farmers, Tuthill A. Mapes and S. E. Mapes, who shipped this milk, and who all testified that they arrived with their milk after the accident; that they did not receive empty cans from this milk shed, but from the station on the other side of the track. The proof shows that the accident occurred about 5.15 P. M. No trains passed east after that time to receive milk or produce except the milk train arriving after 6 o'clock, and the regular produce train which did not stop to take up produce at Howell's Station on Saturdays. However, this produce train met the train which had the accident a little west of Howell's Station and stopped, and then the agent at Howell's, McMunn, sent word to the employees of this train that he had certain pieces of baggage, *not at the milk shed, but at the station itself,* and desired the produce train to stop at the station and receive this baggage. This was accordingly done and baggage was received from the station and put aboard that train, but nothing else was put aboard it except these three pieces of baggage, and nothing was put aboard it from the milk shed. The stop made by the produce train was

unusual on this (Saturday) afternoon and arose from the fact that it had been compelled to stop anyhow because of the accident of the other train, and that thereupon the station agent requested that it should stop again at the station.

The proof of these facts was as follows:

First the farmers: Tuthill (page 177) delivered milk about 5.30; pages 178-9, had record of milk delivered; pages 178/23, consisted of 3 forty-quart cans; pages 178/31; they were to go on the milk train leaving at 6.05; page 179/20, saw the wrecked automobile when he arrived. Asa Mapes and Emmett Mapes were the only other milk shippers, page 179-34, placed his cans on the milk shed nearest the little road; page 178/30, platform was empty when he delivered milk; page 182, he says this again; page 182/34 the produce train precedes the milk train; page 183/3, the produce train does not run Saturdays; no market Sunday morning.

Asa Mapes: Page 185/20, has his record of two cans delivered; arrived about quarter of six; page 185/30 there were three cans on the platform when he arrived; page 186/1, he placed his cans on the south side of the milk shed about the centre; page 186/10, accident happened before he arrived; page 186/21, Tuthill himself and S. E. Mapes were the only shippers of milk; page 190/1, they never shipped produce from Howells on Saturday afternoon; page 190/25, they ran no produce train on Saturday; page 190 bottom, you could only send produce by express; you can't send it by freight but might do so by express, and 191 the express matter was received only at the station on the other side.

S. E. Mapes, page 191/20 has his record; page 192/20, he placed one can upon the platform; page 192/16, there were then 5 cans there. Page 200 bottom, 193 top, he got his empty cans from the other side of the track. 194/30, at this time of year they

shipped only celery and lettuce and did not ship Saturdays; 195/1, express matter, boxes as are received at the station and trucked over to the train; 195/27, the produce train does not run Saturdays.

McMunn, (196) the agent at Howells, page 204, corroborates these witnesses and the photographs, and says that there was no shipments made from the milk platform on July 31st. 198/30, he produced his records of all shipments showing that there were 7 pieces, viz., 3 trunks, 1 package, 2 boxes and 1 crate shipped from Howells on July 31st, and one of these pieces was westbound—the other were for Passaic and New York.

199 top, there was not anything shipped from the milk platform that day; all from the station side. P. 199, l. 2, the produce train goes through about 5 P. M. It did not stop at Howells usually on Saturdays, but stopped that day, but not to load produce. P. 199/30, the produce train stopped July 31, but not to load produce; there was none to ship. 199/37 the first shipment was on August 1, of produce received that day. Page 200, line 30, Tuthill, S. E. Mapes and Asa Mapes were the only persons who shipped milk on the 31st of July; page 200, line 30, the produce train stopped west of the station on account of the accident, and again stopped at the station to load three trunks and these were not loaded from the milk platform. Page 201, all freight at Howells is discharged on the station side. Page 201, line 18, milk shed was built for milk but was also used for produce. Page 202/20, seven pieces were loaded at Howells July 31st. Page 203, line 10, the produce train only took express and produce and there was no freight, only express, on that day. Page 203, only lettuce, celery and milk were loaded at the milk shed. Page 203, line 20, all express matter sent by produce train would have to be weighed at the station; 204/10, produce did not have to be weighed but ordinarily freight did.

Page 199, witness produced express records of shipment but not milk records which were lost and the freight record which was (page 205) subsequently produced, and he testifies (page 206/10) that no freight whatever was sent out from Howells on July 31st. P. 212, the produce train went over about 5.50 and the milk train about 6.12.

The force of McMunn's evidence is that, exclusive of milk only seven pieces were shipped from Howells July 31st; all were express matter and all were shipped from the station and not from the milk shed.

Christopher McMahon (207), conductor of the eastbound produce train (pages 208/18), stopped west of the crossing because of the accident. Pages 208/30, he picked up two or three pieces at Howells from the station side (page 209), Dickinson said, after the accident; no one was hurt. Page 209, line 30, he testifies there was nothing on the milk platform. Pages 211/13, they never loaded baggage from the milk platform. His train was a passenger train with a baggage car as head car, which stopped two or three car lengths east of the milk platform. They could not load baggage (from the milk platform) and passengers from the station. P. 211, line 25, the stop by this train was unusual, and because the agent asked them to stop. Page 213, they were in no hurry to make time as they went out as a second section from Middletown and had to wait until the first section had gone.

Emmett Walt (page 287), a brakeman on the produce train running east, says (page 288) that they never loaded anything at Howells on Saturday unless they got special orders, and they had no such orders that day. Page 288, line 27, line 40, there was nothing taken from the milk shed that day. Page 289, I know there was nothing on the platform taken. He reiterates this again, pages 290, line 16. Page 290, he was on the rear of the five car train and would be opposite the milk shed when the train stopped at the station.

The train consisted of five cars and the baggage car was at the head end of the train, right back of the engine. Page 290, line 25, the baggage master is dead.

Matt Curtis (page 290), engineer of the produce train, says (page 318) they *were going to run* a section to No. 2 from Middletown and to leave there at about 5.31. Page 291, line 10, etc., approaching Howells he saw the wrecked automobile on the track at about the middle of his track—men were removing it. Pages 291/35, the train did not usually stop at Howells on Saturdays, but it stopped at this time, and (292, l.1) at the request of the agent they pulled into the station. (292, l. 20) There was no stuff loaded except from the station side; on the left side of the train. Page 292, he saw no barrels or boxes on the milk shed platform. Page 293, line 30, he testifies that on week days they stop for stuff to be loaded from the platform and it is loaded on the first car and that they load nothing on Saturday. Page 294, they were there about ten minutes, arriving about 5.25.

It seems impossible to prove more convincingly the fact most probable in itself, that on this milk platform or shed there was nothing on this hot mid-summer Saturday afternoon—the only articles loaded from that platform was produce and there was nothing ever unloaded on to the platform. That any fool farmer should be sending perishable produce away on Saturday afternoon is impossible to believe, and we have shown the fact to be, that nothing was on that platform when Dickinson drove past in his automobile.

Counsel for plaintiff suggests that some other train stopped and took things off this platform before the produce train passed it.

The produce train arrived there immediately after the accident. It did stop at the station to load three pieces of baggage and there is no evidence of any other train being in that vicinity between the time when the accident occurred and when this photograph,

Exhibit P. 1, was taken. We have demonstrated that the platform was clear.

In an attempt to avoid the force of our evidence showing that the produce train was the only train which would have taken produce from the milk shed, had it not been Saturday, counsel attempts to argue that the produce train was a section of No. 2 and that No. 2 might have taken produce and milk cans from the milk shed.

The produce train was the only train that ever took produce and it did not take milk. It ran as a section of No. 2 only *from Middletown*. Curtis, its engineer, says (page 290, line 38), "we *were going to run* a section of No. 2 from Middletown." McMahon, its conductor, says, *from Middletown* (P. 208-40) " we made the time and stops of train No. 2 passenger, baggage and express." (P. 213-22.) "There was no particular time for the train I was on, any more than I had to leave Middletown to carry a relief to help No. 2; that is as soon as they cared for me to get there. I couldn't go to Middletown and hold the main track until No. 2 came along, or until the time for her."

There was not the least suggestion that any other train except that which stopped that day at Howells because of the accident, ever stopped or took produce at Howells. The scheme of the trains evidently was that the produce train did the local business in produce, &c., from Port Jervis to Middletown and then ran express as a first section to No. 2. There is no suggestion that No. 2 ever took produce. All the witnesses refer to the train on which Curtis and McMahon were as the *produce train*.

Counsel admits (his brief P. 9) that milk cans were deposited on the milk shed about 5.30, and that no milk cans appear in Photo Ex. P. 1 taken about 5.40 and argues that milk cans and produce were taken away by No. 2. But there is no pretence that No. 2 or the produce train carried milk. Everyone says that

milk was taken by the milk train leaving at 6.05 (P. 178, line 30). Milk is a special business and carried on milk trains.

The natural inference of the absence of milk cans on the milk platform is that the photo was taken earlier than 5.40, and before milk cans were deposited on the platform at 5.30.

Photo Ex. P. 1 was offered by plaintiff. Helt (P. 234/20) took the photo five or ten minutes after the produce train passed (P. 230/10). He lived about 1,000 or 1,200 feet from the station (P. 228/20.) He knew of the accident at once (P. 230/10).; he went back to his house, came back to the station and took the picture.

This would only occupy about 10 or 15 minutes.

There had been no change in the condition of the platform between the time of the accident and the time the photograph was taken.

The law in this state is that if a traveler driving horses has a good view at 27 feet from the track, he is guilty of contributory negligence.

Dotty vs. *Atlantic City Railroad,* 35 Vroom, 710 (Court of Errors):

Plaintiff, driving in buggy "if the deceased, approaching the crossing without stopping, and while so near as twenty-seven feet from it, had looked up and down the tracks, he must have seen the coming train wherever it then was before his horse's head had come within about seventeen feet of the western track and in time to stop his horse and avoid being struck by the train." The view was two-fifths of a mile.

> "The conclusion is irresistible that had the deceased exercised the reasonable degree or prudence which the law requires on his approach to this place of known danger—in looking along the track as he drove across the crossing, he would have seen the train before it became too late to avoid being struck." Judgment below reversed.

The court cites *Pennsylvania Railroad* vs. *Righter*, 13 Vroom, 605, and says, that it appeared that in that case the driver's field of observation of the tracks was confined by obstruction to a point within thirty feet of the track. The decision of the court was unanimous.

In *Righter* vs. *Penna. R. R.*, 13 Vroom, 605, the 30 foot view was across an intervening track as in this case. The decisions in the Supreme Court are to like effect.

In the case of *Willoughby* vs. *Erie R. R.*, 77 N. J. L., 149, plaintiff at 20 feet from the track, and when his horse must therefore have been about 10 feet therefrom, had a view of 700 feet. He was struck by an eastbound train. Held guilty of contributory negligence. And in that case a westbound train was passing, a trolley track hemmed plaintiff in on the rear, a line of telegraph poles and a privet hedge stretched westbound along the line of his view. It was in a busy city with trains passing at short intervals. And the gateman raised the gates which had been lowered at the approach of the westbound train. Surely, if a man in that situation in charge of two horses whose heads were but 10 feet from the track on which the train was approaching, and who had seen the gates raised on the passage of the westbound train is guilty of contributory negligence with a view of 700 feet, this plaintiff must be similarly guilty, when at 23 feet from the track on which the train came, and when his vehicle completely within his control and non-frightenable was 16 feet from the said track and 3 feet from any track, he had a view of *800 or 700 feet.*

Plaintiff in the Willoughby case testified definitely, specifically and distinctly to careful and continuous looking, but the court said that with the view, he had that *"if it be true that he looked before starting, he must have looked ineffectually."*

Van Riper vs. *N. Y. S. & W. R. R. Co.*, 42 Vroom, 345. Plaintiff when 32 feet from nearest rail had a view for half a mile which remained unobstructed except by gates. The gateman did not lower gates. Plaintiff held guilty of contributory negligence, 32 feet means horses' heads were 23 feet from the track.

Leithead vs. *W. Jersey & Seashore R. R.*, 72 Atl. Rep., 452.

Plaintiff, driving a "farmer's carriage" at 38 feet from the track on which he was struck; with a track intervening, view unobstructed for a mile. The driver drove across the first track, observed train and turned his horse away. Held contributory negligence.

And the New York rule, which should be applied to this case, is of the same import—a clear view of 750 feet at 25 feet from the track is sufficient to show contributory negligence. *Swart* vs. *New York Central & Hudson River Railroad*, 80 N. Y. Supp., 906.

See *Dolfini* vs. *Erie R. R. Co.*, 178 N. Y., 1-70 N. E., 68.

McSweeney vs. *Erie Railroad*, 87 N. Y. Supp., 837:

Deceased driving a horse and buggy—apparently little or no view before twenty-three feet of the track.

> "A momentary halt within twenty-three feet of the track, or a glance, when the buggy reached that spot, in the direction from which the train was approaching, would have averted the accident. To my mind, the evidence indicates that the occupants of the buggy drove onto the crossing confident in their safety because of the silence of the stationary signal bell, and without the observance of that care which the law imposed upon them notwithstanding the omission of the signal."

Bomboy vs. *New York Central and Hudson River Railroad Co.*, 47 Hun., 425:

Action by milkman. Evidence to show that plaintiff could not have seen train until within twenty-six

feet from crossing, at which point he could see three hundred and twenty feet and such view continued.

But the plaintiff in the case in hand, was driving a machine of which he had perfect control. It was not like a driver of a horse, who, by placing the horse very near an approaching train, is liable to cause the horse to be frightened and have it rush into the very danger which was to be avoided. The plaintiff was driving a machine which could not be frightened. A horse cannot be stopped in an instant—an automobile can, and this one could be so stopped. It could stand in perfect safety within a few inches of a fast going train. An automobile is entirely under the personal control of the driver and the same rules are applicable to it as to bicycles. As regards the latter this court said in *Passmen* vs. *West Jersey and Seashore Railroad*, 39 Vroom, 719-722:

> "The plaintiff's intestate was riding a bicycle, a vehicle propelled by his own power, of which he had personal control. The general rule to be applied requires a bicyclist, on approaching a railroad crossing where the view of the track is in any way obscured, to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross, and while his acts may vary in certain details, the law requires of him practically the reasonable care of a pedestrian."

The law has been determined to be more strict as to automobiles. *New York Central Railroad* vs. *Maidment* (U. S. Court of Appeals, 1909), 168 Fed. Rep., 21. This was an appeal from the District Court of New Jersey.

Automobile stopped before crossing double tracks. A train passed on near track. He started ahead and was struck by a train on the further track. From where he stopped he could see one hundred and seventy-five feet in the direction from which the train

that hit him came. "If he had stopped again on the first track he could have seen the approaching train when seven hundred and fifty feet away, but he did not stop. Held, that he took chances rather than precaution and was chargeable with contributory negligence which precluded recovery from his injury." With the coming into use of automobiles new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossings. When the passing vehicle is a ponderous machine it threatens the safety of the train. "And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there without risk of his horse frightening, shying or overturning his vehicle. 'He cannot leave horse and walk forward.' These precautions the automobile driver can take carefully and deliberately and without the nervousness communicated by a frightened horse. It will thus be seen that an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the one side of safety and with less inconvenience, no danger and more surely than the driver of a horse. Such being the case the law, both from a standpoint of his own safety and the menace his machine is to the safety of others, should, on meeting these new conditions, rigidly hold the automobile driv-

er to such reasonable care and precaution as to go to his own safety of the traveling public."

In this case plaintiff went down a steep grade to the tracks, and stopped about twenty feet from the nearest track. "When the plaintiff made his only stop he had no sufficient view of tracks on which westbound trains came, and he made no stop on the eastbound track, from which he could have seen a train coming on the westbound one. This was negilgence; a lack of precaution and reasonable care, which would have prevented the accident."

> "The duty of an automobile driver approaching tracks where there is a restricted vision, to stop, look and listen, and to do so at a time and place where stopping and where looking and listening will be effective, is a positive duty, and these safeguarding steps the plaintiff failed to take. He stopped when stopping served no purpose, and failed to stop where stopping would have disclosed danger. He made chance and not sight the guarantee of his safety."

Plaintiff is clearly guilty of contributory negligence and the non-suit applied for should have been granted.

IV.

The law of New York is alone applicable to this case.

The accident occurred in New York State and the duty of giving audible signals is different from that in our State. The fact, that a penal statute directs the engineer to give signals, does not affect the questions whether reasonable signals were given. The law was proved by Mr. Oakes, 158 c, &c. Our law as given in the Matthews case, that if the railroad by its construction causes special danger, it must give special protection by flagmen, &c., does not apply p. 157 c-158 d.

The rule in New York as to imminent peril is very strict. See *Getman* vs. *D. L. & W. R. R.*, 162 N. Y., 23, cited by Mr. Oakes, p. 158 e. The law as to contributory negligence being found because a person could see had he looked in time is similar to our law, p. 157 g., and pp. 158, &c.

The bell was rung from Middletown and whistle was blown. Sallee, engineer, p. 242-10, says, "I whistled for the lower crossing 2 long and 2 short. I blew at station whistle. The bell was started automatically to ring at Middletown and it was ringing when we hit the automobile. The crossing he whistled for was about 1,000 feet from the station, p. 244, the place at which he whistled is shown by the car in Photo D. 8, p. 248. He made a statement just after the accident that the bell was ringing automatically from Middletown. Donohue the fireman, p. 253/30 says the engineer started the bell ringing at Middletown and p. 254 he shut off the bell after the accident, p. 244-15, they whistled when about ¼ mile from Howells, and then again after it crossed a highway, p. 256/30, after they passed the crossing they blew the station whistle. He also had made a statement of these facts two days after the accident.

Brola, p. 235—a farmer— was in the Mountain House, just east of the crossing (marked Hotel on Map D. 2.). He was nervous about his horses standing outside, p. 237, he heard the whistle 257/8, he went out to look after his horses. A moment later he saw Dickinson's automobile about five or ten feet from the track. The train had then just passed coal shed (see Ex. D. 8) 238. The train was "puffing and steaming." There was a scream and the party began to jump, p. 238. They jumped off on the eastbound track. Reeve, p. 148, plaintiff's witness, made a statement and signed it saying he heard the train whistle for the lower crossing.

Melissa Coleman (p. 259), who lived in the house on the side of the road (Ex. P. 6), p. 262, line 10, and 263/20, heard the sound of the train coming as the auto passed her house, 262-263; she describes the accident, her house is about 100 feet from the hotel—(It is about 100 feet from the track see Ex. D. 2). She anticipated the accident, they stopped a little over the first rail, Dickinson turned the automobile a little and they all jumped out.

John Helt, p. 227, was in his house about 500 feet east of the crossing, p. 228, he heard the whistle blow at the lower crossing, p. 230/15, this crossing is about 1,200 feet from the Howells' crossing. Page 238, he went to the crossing, saw the wrecked automobile and took a photo of it at about 5.40 or 5.45. (This is Photo P. 1), p. 230, line 30. The locomotive was "pulling heavy" the exhaust was heavy, puffing and emitting steam.

The evidence clearly shows bell and whistle, proper signals that should have attracted Dickinson's attention. So also should the noise of the train on that hot, summer afternoon.

The evidence of the three interested parties who say they heard nothing was clearly overcome by the preponderance of the evidence and the Jury were rightly instructed to find for defendant.

V.

The Appeal should be dismissed.

CORLANDT PARKER.
Of Counsel with Erie R. R. Co.

NEW JERSEY

Court of Errors and Appeals.

JOEL DICKINSON,
Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY,
Defendant-Respondent.

On Appeal from Supreme Court.

Brief of Plaintiff-Appellant.

The plaintiff sued to recover damages on account of personal injuries and loss of his automobile while attempting to avoid a collision with defendant's train at Howells, New York, on July 31, 1909. The first trial resulted in a non-suit which was reversed by this Court. (*81 Atl. Rep., 464*). At the second trial a verdict in favor of the plaintiff was rendered which was set aside by the Supreme Court on rule to show cause on the ground that the weight of evidence showed that the plaintiff was guilty of contributory negligence. *Per curiam; not reported*). The third trial resulted in a direction of a verdict in favor of the defendant on the ground that the evidence was substantially the same as the testimony on the second trial. (*Statement of Case, page 350*). This appeal was taken from the judgment entered on that verdict.

The crossing at which the accident happened was at grade. The highway ran north and south, and the railroad east and west. The plaintiff was operating a small runabout automobile, travelling in a northerly direction with his wife and married daughter. The first track was the east bound; the

second the west bound, on which the train was approaching; and the third was a siding. The view to the west was not substantially interfered with, but the view to the east was obstructed by a bank of earth 16 feet high (*p. 15, line 3*); and by the defendant's freight station with freight on the platform (*p. 46, line, 28; p. 135, line 25*), and by telegraph poles and shrubbery (*p. 37, line 9; p. 45, line 31; p. 126, line 13*). The bank of earth ran paralled with the highway for a distance of about 400 feet (*p. 16, line 37*) to a point 26¼ feet from the tracks (*p. 18 line 16*), and in that space the defendant maintained its freight station, (*Photograph, P 5, p. 357*). The highway ran slightly down grade, and the obstructions interfered with the view until the front wheels of the automobile reached the first or east bound track (*p. 37, line 23; p. 125, line 30; p. 134, line 16; p. 141, line 3*). The plaintiff approached the crossing very slowly, at a speed of about 4 miles an hour (*p. 35, line 21*). The power had been turned off; the brake was partly on, and the automobile was proceeding, noiselessly, by gravity (*p. 38, line 37; p. 39, lines 1 10*). The plaintiff and his family were looking and listening constantly from the time the crossing could first be seen from the top of the hill (*pp. 37, 125, 133*). When the last obstruction (the freight shed) was cleared, the train was suddenly seen approaching at a speed of 45 to 50 miles an hour (*p. 47, line 31*). The front wheels of the automobile had then reached the first track, and the plaintiff did not know which track the train was on (*p. 36, line 3*). He turned the steering wheel away from the train and jumped from the automobile dragging his wife with him on the east bound track (*p. 41, line 14; p. 124, line 10*). His daughter had jumped a second before him, and the automobile continued by force of gravity and was struck by the locomotive on the west bound track. The plaintiff's

wife fell against his leg, injuring the knee-joint, and the automobile was practically wrecked (*p. 40; and see Photograph, P 1, p. 353*).

No bell, whistle or other warning was given of the approaching train, and there was no flagman, gate or electric bell at the crossing. (*p. 42, lines 5-10; p 43, line 12; p. 47, line 40; page 124, line 32; p. 133; line 30; p. 144, line 30*).

FIRST.

The decision of the Supreme Court, setting aside the verdict of the former trial, did not justify the direction of a verdict at the last trial.

The direction of the verdict was based solely upon the ground that the evidence was substantially the same as the evidence on the second trial, and, therefore, the inevitable result would be that the Supreme Court would again set aside a verdict if the jury returned one in favor of the plaintiff (*pages 350 and 351*).

The fact that the evidence was virtually the same on both trials did not justify the Court in taking the case from the jury.

> "The rule that a verdict should be directed
> "where any number of opposite verdicts
> "would be set aside has no application
> "where the sole question is the weight
> "of the evidence."

"In *Horandt v. Central R. R. Co., 81 N.J. Law,*
"*488, 83 Atl., 511,* it is categorically
"stated in the headnote of the opinion of
"this Court that: 'The mere fact that
" 'the Supreme Court, on rule to show

> " 'cause, has seen proper, in the exer-
> " 'cise of its discretion, to award a new
> " 'trial to defendant because of the ver-
> " 'dict being against the weight of the
> " 'evidence will not justify the direction
> " 'of a verdict for defendant at a sec-
> " 'ond trial on the same or similar evi-
> " 'dence, where a substantial conflict is
> " 'presented.' "

Uvalde Asphalt Paving Co. v. Central Union S. Co., 86 Atl. Rep., (N. J.), 425.

See, also, *Spargo v. Central R. R. Co. 86 Atl., 385.*

It was erroneous for the trial court to direct a verdict on any theory. The weight of evidence was not in favor of the defendant on any question in the case.

SECOND.

Negligence of Defendant.

The crossing was rendered extremely dangerous by the defendant. The railroad and highway were both in a cut, and the freight station was maintained in the only place where a view could have been obtained. The freight on the platform and the telegraph poles and shrubbery also interfered with the view. The station was 9½ feet wide, 36½ feet long and fourteen feet high, and it was 9¼ feet from the tracks and 7½ feet from the end of the bank of earth (*p. 18, lines 23-30*). The shrubbery had not been cut since the spring before the accident (*p. 275, line 26*).

All of the witnesses on behalf of the plaintiff swore that no warning was given of the approach

of the train (*p. 47, line 40; p. 124, line 32; p. 133, line 30; p. 144, line 30*). The only witness in the case who said a whistle was blown for the *crossing in question* was Sallee, the engineer. And it was not until re-direct examination that he made that statement. On direct examination he said that the usual crossing whistle, two long and two short blasts, were blown for the *lower crossing* (*p. 242, line 19*); and when he reached the lower crossing he blew one blast for the station (*p. 242, line 21*). The lower crossing was 2,000 feet below the crossing in question and the station (*p. 244, line 32; p. 245, lines 3-20*). But he said nothing about any whistle for the *crossing in question* until he was shown his report on re-direct (*p. 250, line 24*). On re-cross examination he admitted that he knew if his report did not show he blew the usual whistles for that crossing as well as all crossings he would be discharged, and also that he would be personally liable (*p. 251, lines 10-25*). There were two witnesses for the defendant who said they heard a whistle, Helt, a section foreman, who was 500 feet below the crossing at which the accident happened, and Brola, who was standing in front of the hotel where the bank of earth did not interfere with the sound. Mrs. Coleman, another witness for defendant, did not say she heard a whistle. She was on top of the bank and she only heard the "rumble" of the train. It is fair to assume that if she had heard any whistle she would have spoken of it.

If the bell on the locomotive was rung it was entirely inadequate as a warning to travelers on the highway behind the bank of earth. And the question whether or not the whistle blown at the lower crossing, if it was blown, was a timely and adequate warning for the crossing in question, was for the determination of the jury.

"On the first point, the rule established in
"this State is that if a steam railroad
"company creates extraordinary dan-
"gers at a high way crossing it must use
"extra precautions to give notice of ap-
"proaching trains."

Hires v. Atl. City Railroad Co., 66 N. J. L., 30, 31.

"Where the defendant's railroad is carried
"across a public highway in such man-
"ner and place that those travelling the
"highway can neither see nor distinctly
"hear approaching trains until too late to
"avoid collision with them, the company
"is liable for such collision in the absence
"of negligence of those injured. The
"defendant again, by its own act, caused
"the injury, in its erection of a watch
"house, now not used, but preventing
"the traveller from seeing the train,
"which he otherwise might."

Richardson v. N. Y. Central R. R. Co., 45 N. Y. 846. And see New York cases cited on page 346 of Statement of Case.

"A railroad is not bound and owes no duty
"to station a flagman at a crossing, and
"negligence cannot be predicated of the
"omission; but the fact may be proven
"as one of the circumstances under
"which the train was moved and by
"which the degree of care requisite to its
"handling and running may be affected;
"so that the question is never whether
"there should have been a flagman or
"one ought to have been stationed at
"the crossing, but whether, in view of
"the presence or absence, the train was

" moved with prudence or negligence.' "

Coyle v. L. I. R. R. Co., 33 Hun. (N. Y. 37.

THIRD.

Contributory Negligence.

The plaintiff was a man of mature years, with the safety of his wife and daughter to think of. He approached the crossing very slowly, "not over four miles an hour" (*p. 35, line 21; p. 122, line 34; p. 133, line 9; p. 141, line 9*). The automobile was running down grade by gravity, with the foot-brake on "all the time, and part of the emergency brake too" (*p. 38, line 37*). The gasoline and spark had been turned off and the car was running noiselessly (*p. 39, lines 1-13*). No one was talking, and there was no noise in the vicinity (*p. 41, lines 33-40*). When the freight station was reached the plaintiff leaned forward over the steering wheel to obtain a better view (*p. 38, line 3*). They were all looking and listening constantly from the time the crossing could first be seen and at every point where even a glimpse of the track was possible under the most favorable circumstances (*p. 37, lines 25, 29, 33; p. 125, line 37; p. 135, line 5*).

The first unobstructed view to the east was obtained when the plaintiff, in the seat of the automobile, reached a point about in a line with the middle of the freight station. That point was 14½ feet from the first track, and there was a view of 195 feet to the east (*p. 13, line 20; p. 37, lines 1-25; Photograph, P. 5, p. 357*). The train was not then in sight. It was at least 297 feet from the crossing when the plaintiff reached the point about in a line with the middle of the freight station. It was

running 45 or 50 miles an hour (*p. 47, line 31*), or at least 66 feet a second. It required 4½ seconds for the automobile, at a speed of 4 or 4½ miles an hour, to travel 14½ feet to the first track, 13 feet to the west bound track, and about 2 feet in turning before it was struck in the rear by the locomotive. The train traveled 297 feet in 4½ seconds, and it was not, therefore, in sight when the plaintiff had the view of 195 feet. The wheels of the automobile were 7 feet and 1 inch nearer the track than the plaintiff in the seat of the automobile (*p. 39, line 26*). The view increased as he proceeded from that point until it suddenly became unobstructed when the freight station was cleared. But the wheels of the automobile were then in such close proximity to the track that a train on the first track, projecting over the rails, as it does, would strike the automobile.

The plaintiff and Mrs. Gardner were positive there were milk cans or barrels on the platform which also interfered with the view. (*p. 46, line 28; p. 135, line 25.*) Mrs. Dickinson knew there was some obstruction on the platform because she could not obtain a view between the posts (*p. 126, line 24*) The exact character of the freight and its precise location, obviously, could not be described. It would be strange if those details had been remembered under the circumstances. Mrs. Dickinson and Mrs. Gardner fainted immediately after they jumped from the automobile, and the fright and excitement rendered it impossible for Mr. Dickinson to swear positively whether they were milk cans or barrels or both.

The defendant produced some records of freight shipped that day which tended to show that nothing was shipped from the freight station until after the accident. But the milk record was lost (*p. 204, line 30; page 205, line 10*). Three farmers were also pro-

duced by defendant who said they deposited milk cans on the platform shortly after the accident, and that there was nothing else at the station at that time. But they based their statements largely upon the fact that it was not customary to ship produce on Saturdays (*p. 182, line 20; p. 190, line 5; p. 195, line 26*). Furthermore, two sections of a very irregnlar and accommodating train passed Howells about that time, and one section evidently picked up the freight. The first section (*p. 208, line 3*) stopped at Howells on account of the accident, and although it was unusual it took on several trunks at the request of the agent (*p. 208, l. 29; p. 211, l. 25; p. 288, l. 10; p. 292, l. 8*). The other section was not accounted for. The conductor of the first section declared that there was no "particular" running time for the train; he left Port Jervis "somewheres around 3 o'clock" or "three-thirty" (*p. 210, lines 2 and 26*). Yet that train reached Howells, a distance of 18 or 20 miles (*p. 210, l. 5*), at the time of the accident, which was admittedly about 5.15 or 5.20 P. M. (*p. 282, lines 5-22*). These trains were in no "hurry;" they could "wait" along the run from Port Jervis to Middletown (*p. 113, lines 28 to 31*). The photograph *P. 1, 353*, which was taken by one of defendant's employees about 5.40 or 5.45 P. M. (*p. 229, l. 15*), does not show the milk cans which were deposited on the platform by one of the farmers about 5.30 P. M. (*p. 178, l. 26*). One section of the irregular train waited at Howells about ten minutes after the accident (*p. 293, l. 40*), or until about the time the first farmer delivered his milk cans. The other section probably followed within a few minutes. The photograph does not show either train, but it does show that the milk cans which were deposited on the platform at 5.30 were not there at 5.40 P. M. It is also a significant fact that the railroad records of milk shipments were lost.

The irresistible inference from all the facts is, that the other milk cans or freight which obstructed the plaintiff's view were removed shortly after the accident, as well as the milk cans which were delivered about 5.30 P. M.

The photographs taken for the defendant were taken from points measured from the west bound track which was 13 feet farther away than the first or east bound track. They are views during the fall and winter, and when there was no freight on the platform. It may be possible to catch glimpses of the track between the end of the bank of earth and the station, and between the posts of the station under those conditions, but not under the conditions that existed at the time of the accident (*page 27*). And even those glimpses would be of very little practical use unless a train was then passing those narrow points. It is apparent from all the photographs that the view is substantially interfered with by the bank of earth, freight station and telegraph poles, until a traveller is almost on the tracks; and when the shrubbery is grown up and there is freight on the platform of the shed, the view is almost totally obstructed.

The Court was not justified in deciding that the weight of evidence on these questions was in favor of the defendant. Where the view is substantially interfered with by buildings, or telegraph poles, or banks of earth, or shrubbery, or other permanent obstructions until the driver is almost on the tracks, or in the act of crossing, the question of contributory negligence is for the determination of the jury.

Dobbs v. West Jersey &c. R. R. Co., 78 N. J. L., 679.

Danskin v. Pennsylvania R. R. Co., 79 Id., 526.

Weston v. Pennsylvania R. R. Co., 74 Id., 484.

Wolcott v. N. Y. & L. B. R. R. Co., 68 Id., 421.

Petrie v. N. Y. Central &c. R. R. Co., 63 N. Y. App. Div., 476; 71 N. Y. Supp., 866.

And see New York cases cited on pages 347 of Statement of Case.

FOURTH.

Emergency.

The plaintiff had only a second or two in which to act when the train suddenly appeared. He was in a place of danger if the train had been on the first track, or if the brakes had failed to work. He was "startled" (*p. 64, line 36*), and he must have been terribly frightened, for his hair turned white within a month afterward (*p. 48, line 29*). Even when a person is looking for a train its sudden appearance is alarming. The plaintiff had several courses of action open to him. He might have applied the brakes hard and stopped on the first rail with the danger of the train being on that very track and the risk that the brakes would not work. He might have stopped, reversed and backed away. He might have put on full power and dashed across the tracks. And he might have jumped from the automobile, as he did. The result of the jump shows it was not a reckless thing to do, and even now it is not clear which course was the least dangerous. If he had chosen any other course and had been struck, there would have been great force to an argument that he should have jumped when he had the opportunity. The gross negligence of the

defendant in creating extraordinary dangers at the crossing and failing to give even the ordinary warning, placed the plaintiff in imminent peril and caused the emergency. And as Mr. Justice Trenchard said, when the case was before this Court on writ of error:

> "All that is required of a person in such an "emergency is, that he act with ordi- "nary care under the circnmstances, it "being for the jury to determine "whether such an emergency existed, "and whether the traveller acted with "due care."

Again, in a case somewhat similar to the present case, this Court said:

> "How a reasonably prudent man would act "in the face of concurrent and distract- "ing dangers must, in the nature of "things, be a question of fact to be "passed upon by the jury, and not a "question of law upon which the Court "may order a non-suit or direct a "verdict."

Weston v. Pennsylvania R. R. Co., *supra*, quoting from *Connolly v. Trenton Pass. Ry. Co.*, 56 *N. J. L.*, 704, and citing *Davis v. Central R. R. Co.*, 67 *Id.*, 660.

See, also, *Tuttle v. Atlantic City R. R. Co.*, 66 *N. J. L*, 327; *Buchanan v. West Jersey R. R. Co.*, 52 *Id.*, 265; *Goodenough v. Pennsylvania R. R. Co.*, 55 *Id.*, 596; *Hires v. Atlantic City R. R. Co.*, *supra*; *Ellis v. Erie R. R. Co.*, 66 *Id.*, 451; *McLean v. Erie R. R. Co.*, 69 *Id.*,

57, *aff.* 70 *Id.*, 337; *Schramm v. Parker*, 72 *Id.*, 243.

And the law is the same in New York, where this accident happened.

> "Although a person jumps from a vehicle in "which he is riding, in case of imminent "danger of collision with an approach- "ing train at a crossing, this does not "prevent his recovery against the rail- "road corporation, although he would "have escaped injury had he remained "in the vehicle."
>
> *Dyer v. Erie R. R. Co.*, 71 *N. Y.*, 288.
>
> "There can be no rule of law which imposes "upon one over whom danger impends "by the negligence of another to incur "greater dangers by directing his efforts "to avoid it until its exact nature and "measure are ascertained. The instinc- "tive effort on the part of the plaintiff "to avoid the danger did not relieve the "defendant of responsibility."
>
> *Coulter v. Am. Merchants Union Ex. Co.*, 56 *N. Y.*, 585. *And see New York cases cited on page* 348 *of Statement of Case.*

There was no place to obtain a view until the automobile was in a place of danger. Our Courts have not made any distinction between the driver of a horse and the driver of an automobile. The case of *Maidment v. Pennsylvania R. R. Co.*, 168 *Fed. Rep.*, 21, 21 *L. R. A.* (*N. S.*), 794, was entirely different from the present case. The plaintiff "dashed" across the tracks as soon as a freight train had passed, and it was not a case of sudden peril or of acting in an emergency. Furthermore,

the automobile, in the present case, was not a "ponderous structure;" it weighed only about 1,600 pounds (*p.* 39, *line* 37), which is less than a team of horses.

It is respectfully insisted that the questions were all for the determination of the jury, and the judgment in favor of the defendant should be reversed.

Respectfully submitted,

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